

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

KEITH EPPERSON, ELIZABETH
GRANILLO, and CASEY HASH, *individually
and on behalf of all others similarly situated,*

Plaintiffs,

v.

EVENFLO COMPANY, INC.,

Defendant.

Case No.

CLASS ACTION COMPLAINT

JURY TRIAL DEMANDED

CLASS ACTION COMPLAINT

Plaintiffs Keith Epperson, Elizabeth Granillo, and Casey Hash (“Plaintiffs”), individually and on behalf of all other persons similarly situated, based upon personal knowledge as to themselves and their own actions, as well as based upon information and belief and investigation of their counsel, allege as follows against Defendant Evenflo Company, Inc. (“Evenflo” or “Defendant”).

NATURE OF THE ACTION

1. This case seeks to put an end to Evenflo’s improper marketing and sales tactics of putting profits over the safety of American children.

2. In the early 2000s and in order to address the need for a vehicular safety device for young children too big for an infant car seat, but still too small or too young to properly fit or to stay in a seat belt, companies began selling booster seats which elevated children so that the automobile seat belts fit more securely.

3. In the highly competitive market for booster seats, Evenflo sells the Big Kid Booster Seat (“Big Kid Booster”), a seat cushion used to elevate children sitting in automobiles.

4. Evenflo labels and markets the Big Kid Booster in the United States as “safe” for children as light as 30 pounds and as young as three years old. Evenflo boasts that the Big Kid Booster is the “the best way to minimize injuries to your child” and claimed that it would “greatly reduce the risk of serious injury to your child in a crash.”¹

5. But according to recently published reports, Evenflo has known since at least 2008 if not earlier that its Big Kid Booster is *not* safe for children under forty pounds and four years of age nor does it appreciably reduce the risk of serious injury or death from side-impact accidents.

6. Evenflo sews a tag onto its Big Kid Boosters prominently labeling them as “SIDE IMPACT TESTED,” and claimed that its “rigorous test simulates the government side-impact tests conducted for automobiles.” These labels and marketing claims misled customers to believe that the Big Kid Boosters provided side-impact protection without revealing that those representations were virtually meaningless.

7. Evenflo designed its own side-impact tests and yet failed even those lax standards. Recently released video from 2008 testing shows that Evenflo’s tests unmistakably demonstrated that a child seated in its booster could be in grave danger in such a crash. And Evenflo’s tests were not comparable to federal government tests, which simulate accidents at higher speeds and involving impacts into external objects; Evenflo’s tests merely simulated rapid deceleration.

¹ <https://www.evenflo.com/on/demandware.static/-/Sites-evenflo-Library/default/dw37971093/Instruction%20Manuals/BK%20Advanced%20Right%20Fit-1210.pdf>

8. While Evenflo aggressively marketed the Big Kid Boosters to U.S. consumers as safe for children who weigh as little as 30 pounds, Evenflo told consumers in Canada that a child that weighed less than 40 pounds risked “SERIOUS INJURY or DEATH” using the same Big Kid Booster. Evenflo failed to disclose this material safety information to consumers in the United States.

9. The Canadian government has not allowed the sale of any make or model of booster seats for children under 40 pounds since 1987. Evenflo’s Big Kid Boosters have been recalled three times in Canada, most recently in 2012, for misrepresenting that the booster seats were safe for children weighing 30 pounds or less.

10. According to the recently published ProPublica report, in 2012, Evenflo’s now-former safety engineer told executives at the company to stop selling booster seats for children who weigh less than 40 pounds:

Citing government research, the engineer, Eric Dahle, emailed high-ranking executives to tell them that children lighter than 40 pounds *would be safer in car seats that use harnesses to hold their small bodies in place*. Making the change would match Canadian regulations and better align with recommendations from the American Academy of Pediatrics.

A marketing executive ‘vetoed’ Dahle’s safety recommendation, an internal Evenflo record shows. Later that year, the subject came up again. The same executive, who had been promoted to vice president of marketing and product development, expressed his exasperation. ‘Why are we even talking about this?’ he wrote in an email, adding, ‘I have looked at 40 lbs for the US numerous times and will not approve this.’²

² <https://www.propublica.org/article/evenflo-maker-of-the-big-kid-booster-seat-put-profits-over-child-safety>

11. Evenflo has settled multiple lawsuits with the families of children severely injured in accidents while using the Big Kid Booster going back to at least 2009. One young girl, then three years old and weighing just under 37 pounds, was paralyzed from the neck down while seated in a Big Kid Booster Seat during a side-impact collision.

12. Two other children of similar weight have also sued Evenflo alleging their Big Kid Booster failed to protect them in side-impact accidents. One suffered a traumatic brain injury and the other suffered internal decapitation, which is the separation of the spinal column from the skull base. While it is possible to survive such an injury, only 30% of cases do not result in immediate death.

13. Yet, despite knowing that its representations regarding the safety of its Big Kid Booster are deceptive, misleading, omit material safety information, and constitute a fraud on consumers, Evenflo continues to manufacture, label, sell, distribute, advertise, and market Big Kid Boosters in a false, misleading, unfair, and/or deceptive manner.

14. Plaintiffs each purchased Evenflo Big Kid Booster seats for their children's use.

15. If Plaintiffs and those similarly situated had known the truth of Evenflo's representations, they would not have purchased or used Big Kid Boosters.

16. But Evenflo chose to market the Big Kid Booster in a way that concealed all of this information from consumers; in fact, Evenflo actively and aggressively marketed the Big Kid Booster as a side-impacted tested, side-impact protected booster for children in the U.S. who weighed as little as 30 pounds, which would "greatly reduce the risk of serious injury to your child in a crash."³

³ <https://www.evenflo.com/on/demandware.static/-/Sites-evenflo-Library/default/dw37971093/Instruction%20Manuals/BK%20Advanced%20Right%20Fit-1210.pdf>

17. Evenflo made these misrepresentations in an effort to increase its share of the booster seat market and its revenues and profits.

18. Because Evenflo actively concealed material safety information from consumers, and made affirmative misrepresentations, parents bought the Big Kid Booster under the numerous express and implied promises, representations, assurances, and/or affirmations from Evenflo.

19. Evenflo has breached the trust of consumers who purchased Big Kid Boosters. Plaintiffs and those similarly situated can no longer trust any of Evenflo's representations regarding the safety of the Big Kid Booster.

20. More importantly, Big Kid Booster seats Plaintiffs and similarly situated consumers have purchased do not provide side-impact protection, leaving young children vulnerable to catastrophic injury or even death. As such, the Big Kid Boosters purchased by Plaintiffs and the purported class have no value.

21. Evenflo continues to sell Big Kid Booster seats as of the date of this filing, and according to reports continued to label them as safe for children weighing as little as 30 pounds as of February 6, 2020.

22. Plaintiffs, on behalf of themselves and those similarly situated, bring claims for consumer fraud, breach of warranty, common law fraud, and unjust enrichment. Plaintiffs seek damages, injunctive and declaratory relief, interest, costs, and reasonable attorneys' fees.

PARTIES

23. Plaintiff Keith Epperson is a citizen of the State of California residing in the City of San Luis Obispo, and is a member of the Classes defined herein.

24. Plaintiff Elizabeth Granillo is a citizen of the State of California residing in the City of Hesperia, and is a member of the Classes defined herein.

25. Plaintiff Casey Hash is a citizen of the State of Colorado residing in the City of Pagosa Springs and is a member of the Classes defined herein.

26. Defendant Evenflo Company, Inc. is a Delaware corporation with its principal place of business in Canton, Massachusetts.

JURISDICTION & VENUE

27. This Court has subject matter jurisdiction pursuant to the Class Action Fairness Act of 2005 (hereinafter referred to as “CAFA”), codified as 28 U.S.C. § 1332(d)(2), because the claims of the proposed Class Members exceed \$5,000,000 and because Defendant is a citizen of a different state than most Class Members.

28. The Court has personal jurisdiction over Evenflo because Defendant regularly conducts business in this District and/or under the stream of commerce doctrine by causing products to be sold in this District, including the Big Kid Booster purchased by Plaintiffs.

29. Venue is proper because a substantial portion of the events complained of occurred in this District and this Court has jurisdiction over the Defendant.

FACTUAL ALLEGATIONS

I. Background

30. Evenflo was first formed in the 1920’s as a manufacturer of products related to baby feeding. For many years Evenflo produced baby bottles, nipples, and other related accessories.

31. In 1995, Evenflo Company, Inc. was created through the merger of Evenflo Juvenile Products and Evenflo Juvenile Furniture Company (formerly known as Questor Juvenile Furniture Company).

32. Evenflo Company, Inc., under the ownership of various private equity firms, began manufacturing, among other things, car seats, strollers, and other home goods and selling those products through the nation's leading retailers.

33. In the early 2000s, many states began passing regulations requiring toddlers that were too small to fit regular seat belts to use child safety seats. To address the market of young children who were too large for or preferred something larger than an infant harness car seat, but still too small to properly fit in a seat belt, Graco, Evenflo's rival, came out with the TurboBooster, a booster seat that elevated children so that the automobile seat belts fit more securely.

34. Evenflo--late to the game in this booming new category of child safety seats--responded by designing the Big Kid Booster seat to compete for a share of the market with Graco.

35. The Big Kid Booster Seat became a top-seller for Evenflo and was marketed and sold at retailers nationwide, including Walmart, Target, and Amazon.com.

36. Evenflo marketed its Big Kid Booster as "the best way to minimize injuries to your child" and claimed that it would "greatly reduce the risk of serious injury to your child in a crash."⁴

⁴ <https://www.evenflo.com/on/demandware.static/-/Sites-evenflo-Library/default/dw37971093/Instruction%20Manuals/BK%20Advanced%20Right%20Fit-1210.pdf>

37. Evenflo's aggressive marketing has helped make the Big Kid Booster a top-selling booster seat in the United States. The company has sold more than 18 million Big Kid boosters.⁵

II. Evenflo Misrepresents the Safe Minimum Weight for Children in Big Kid Booster

38. Minimizing injuries to children is the primary purpose of a booster seat.

39. There is a wealth of data, recommendations, and "best practice" guidelines regarding the appropriate weight range of children who should use a booster seat.

40. These materials make very clear that the best practice for booster seat use, one that would truly "minimize injuries to your child" in an accident, sets the minimum weight for a child to use the Big Kid at "above 40 pounds."

41. In Canada, where Evenflo also sells its Big Kid Booster seats, the sale of booster seats to children under 40 pounds has been prohibited since 1987.

42. Evenflo is aware of this restriction as it has had its booster seats recalled three times in Canada, most recently in 2012, for misrepresenting that a child weighing as little as 30 pounds could safely use its Big Kid Booster.

43. Evenflo acknowledges that it is dangerous for children who weigh less than 40 pounds to use the Big Kid Booster—in Canada, at least.

44. Evenflo informs Canadian consumers that the Big Kid Booster—a seat identical in every respect to the one sold in the United States—was specifically designed for use ONLY by children who weigh between 40 and 100 pounds and that a 30 pound child would be at risk of "DEATH OR SERIOUS INJURY."⁶

⁵ <https://www.propublica.org/article/evenflo-maker-of-the-big-kid-booster-seat-put-profits-over-child-safety>

⁶ <https://www.propublica.org/article/evenflo-maker-of-the-big-kid-booster-seat-put-profits-over-child-safety>

45. But Evenflo made no such warning to American consumers. Instead, Evenflo originally marketed its booster seat with no age or weight recommendation at all.

46. It was several years before Evenflo changed the marketing materials to inform consumers that its boosters seats were unsafe for babies and toddlers.

47. And, then, it was not until 2007 that Evenflo increased the minimum age on the Big Kid Booster to 3 years old and added any minimum height recommendation at all.

48. Evenflo was also fully aware that various safety organizations with expertise in child transportation safety had consistently recommended against using booster seats for children who weighed less than 40 pounds and, further, had identified the dangers and risks of using these products, especially for side-impact collisions.

49. For example, in 1989, the American Academy of Pediatrics (the “AAP”) issued “1989 AAP Car Safety Guidelines.” The guidelines recommend keeping a child in a convertible seat “for as long as possible” and that booster seats should only be used for children 40 pounds and over.⁷

50. In 2011, the AAP revised its 1989 Policy Statement regarding booster seat use. In the revised Policy Statement, the AAP issued a “best practice recommendation” that, for children 2 to 8 years of age, children should remain in “convertible” or “combination” child safety seats (using integrated harnesses) so long as their weight was less than the limit for the seats.

51. Despite the AAP’s “best practice recommendation,” Evenflo continued to urge parents to move their children from convertible harness seats into Big Kid Booster seats—seats that had no side wings of substance and that did not utilize any type of lower anchors or harnesses—as soon as children reached as little as 3 years of age and 30 pounds.

⁷ These guidelines were but one of dozens of publications and articles which confirmed that children are better protected in harnessed seats for as long as possible, especially in side impacts.

52. Ignoring these safety guidelines and best practices allowed Evenflo to increase its share of the booming booster seat market.

53. In May of 2012, Evenflo revised the instruction manual for the Big Kid Booster.

54. However, despite the overwhelming evidence that booster seats were not safe for children under 40 pounds, Evenflo did not change the minimum weight of 30 pounds to 40 pounds for its booster seats.

55. Not only did Evenflo leave the Big Kid Booster Seat minimum weight at 30 pounds, it stated that “even children who have not outgrown their toddler seat can benefit from the use of a booster seat, if it is used properly.”⁸

56. This statement, coupled with the 30 pound minimum weight, was specifically intended by Evenflo to convince parents to move their small children out of full, safety harness restrained child car seats and into the Big Kid Booster, generating profits for Evenflo but endangering children.

57. According to the ProPublica report, in February 2012, a safety engineer at Evenflo urged the company to increase the minimum weight for the Big Kid Booster to 40 pounds in the United States and to increase the minimum age to 4.

⁸ <https://www.propublica.org/article/evenflo-maker-of-the-big-kid-booster-seat-put-profits-over-child-safety>

58. That safety engineer reported internally that there is an “increased risk of injury” for children between 3 and 4 riding in boosters instead of seats with harnesses because they are immature and may not sit properly; “[k]eeping the seat at 30 lbs encourages parents to transition them earlier because they can, and the booster is a less expensive option,” he wrote. A harnessed seat, he said, “is the better option. We should encourage that behavior by modifying the weight rating to 40 lbs.” He added, “[t]o overcome the misuse, we should follow the NHTSA Guidelines and increase the age rating to 4 yrs old also.”⁹

59. The engineer also sent Evenflo a 2010 federal report on booster seat effectiveness which showed that 3- and 4-year-old children had a reduced risk of injury in crashes when they were using harnessed seats rather than boosters and that early graduation to boosters may “present safety risks.” The report stated that children should remain in harnessed seats until they are 4 or weigh 40 pounds and because they offer more side support and “better containment” for smaller children in crashes.¹⁰

⁹ *Id.*

¹⁰ *Id.*

60. Evenflo refused the warnings of its own safety engineer and instead chose to risk the lives of the children riding in its booster seats so that it could maximize profits. When the issue of raising the minimum weight to 40 pounds arose again a year later, an Evenflo executive

FROM: Featherstone, McKay
SUBJECT: RE: amp fixtures
Date: Wednesday, July 25, 2012 9:33 AM

Gregg, why are we even talking about this? It has always been this way in Canada so I don't understand why it is now a big problem that requires a \$30k investment or us to change product. I have looked at 40 lbs for the US numerous times and will not approve this.

wrote:¹¹

¹¹ *Id.*

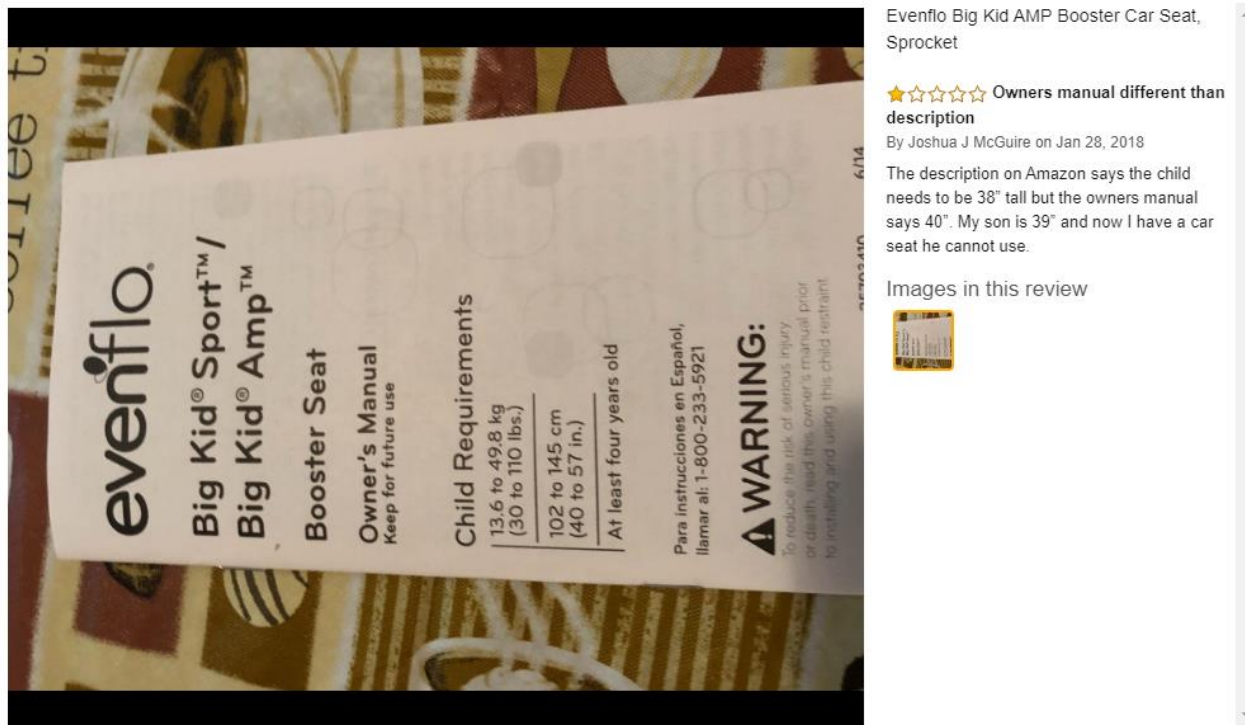
61. Evenflo ignored the safety dangers its Big Kid Boosters posed to children and continued to label a minimum weight limit of 30 pounds as the images below attest:



62. Evenflo continues to sell its Big Kid Booster to parents with the recommendation that children who weigh as little as 30 pounds can safely ride in their booster seats.

63. A 2017 YouTube video showing the outside of the Big Kid booster box lists the weight limit as 30 to 110 pounds with the backrest and 40 to 110 pounds without the backrest.¹²

64. On Amazon.com, a review from 2018 shows an Evenflo Big Kid Booster owner's manual that has the 30 pound minimum weight requirement:¹³



65. Even now, on its website, Evenflo is encouraging parents to move their children from the safety of harnessed car seats to what they know are less safe booster all for the sake of sales.

¹² <https://www.youtube.com/watch?v=gNUxII01D7Q>

¹³ <https://www.amazon.com/Evenflo-Big-Booster-Seat-Sprocket/dp/B00AJSIVWW?th=1>

66. On its website, Evenflo states that: “[w]hen your child reaches about 40 pounds, it’s time to move her out of a convertible car seat and into a booster seat.” Evenflo continues to represent that “[m]ost **boosters are designed to accommodate children from 30 to 100 pounds.**”¹⁴

67. Again and again, Evenflo advises unsuspecting consumers that boosters are designed for and appropriate for children who weigh as little as 30 pounds, as in this example from its website (highlighting added by Plaintiffs’ counsel):¹⁵

Types of Booster Seats

Booster Child Restraints are specifically designed for children who have outgrown their convertible child restraints. **Booster child restraints are designed for forward facing use only with children from 30 to 100 lbs.** (or 4-8 years of age.) Please note that some seats are designed for use outside of this weight range and can accept children who weigh up to 100 lbs. Please refer to your child restraint system instructions for the weight limit of your child restraint.

Carefully read the manufacturer's instructions prior to installing and using your booster child restraint. NEVER use a booster child restraint in a seating position with an active air bag.

There are several types of booster child restraints: With and without a back, and with a 5-point harness. **A belt positioning booster is a child restraint designed for use by children between 30 and 100 pounds,** and up to 8 years of age. It is designed to improve the fit of the vehicle's safety belt system across the child's body. Booster seats provide a transition from restraints with full internal harness to adult vehicle belts. A belt positioning booster should only be used with a lap and shoulder belt combination.

Backless Belt Positioning Booster

The weight limits on belt-positioning boosters range from 30-100 lbs. (Seat weight limits vary, please refer to your instructions for your booster's weight specifications). Note: Belt-positioning boosters are available with and without a seat back. High Back Belt Positioning Booster

¹⁴ <https://www.evenflo.com/car-seats/booster/car-seat-guide/buying-guide-booster.html> (last visited February 11, 2020).

¹⁵ *Id.*

68. In fact, it is still possible to purchase Big Kid Booster with Evenflo's unsafe weight representations. According to ProPublica, in or around January 2020 reporters for the publication were able to order two Big Kid Booster seats directly from Evenflo's website that did not specify an age for use on the box and whose labels said booster seats were safe for children weighing as little as 30 pounds.¹⁶

III. Evenflo's Misrepresentations and Omissions About the Side-Impact Protection of its Booster Seats

69. Not only did it misrepresent to consumers that its Big Kid Booster was safe for children under 40 pounds, Evenflo also represented to consumers that its booster seats were "SIDE IMPACT TESTED."

70. However, Evenflo concealed the fact that its own tests showed that a child seated in a Big Kid Booster could be severely injured or killed by a side-impact collision.

71. In 2008, in an effort to make its seat look more like Graco's better selling TurboBooster, Evenflo added "side wings" to the Big Kid Booster—small pieces of material that extend forward from the backrest.

72. One Evenflo document, describing the strategy behind adding the side wings, said the consumer benefits of these new side wings included "increased *perceived* side protection."¹⁷ But Evenflo knew from testing—and did not disclose—that its added side wings provided no actual extra side protection.

73. When Evenflo launched the newly modified Big Kid Booster with side wings, Evenflo marketed the booster seat by emphasizing in large bold letters that the top feature of the new Big Kid Booster seat was that it was "Side Impact Tested."

¹⁶ <https://www.propublica.org/article/evenflo-maker-of-the-big-kid-booster-seat-put-profits-over-child-safety>

¹⁷ *Id.* (emphasis added).

74. Evenflo even added tags to the seat itself, touting that it was “Side Impact Tested”:



75. “Knowing that one in four automobile accidents are side-impact collisions, we believe it’s important to go beyond the current government standards when designing the next generation of Evenflo car seats, including the Big Kid LX,” one marketing pitch read.

76. Evenflo presents its tests as tough, going above and beyond what the government required.

77. Evenflo once boasted on a corporate blog called “The Safety Net” that its “rigorous test simulates the government side-impact tests conducted for automobiles.”

78. *But the federal government has no side-impact testing rules or standards for child safety seats*, making Evenflo’s representations that it surpasses a non-existent standard wholly misleading.

79. And the relevant testing done by the federal government, even if not required, is far more extensive than that done by Evenflo, making Evenflo’s claim that its “rigorous test

simulates the government side-impact tests” false or misleading. For example, one of the federal government’s tests simulates a side-impact crash by smashing a 3,015-pound barrier at 38.5 miles per hour into a vehicle. Another federal test pulls a car sideways at 20 miles per hour into a stationary pole. The Evenflo side-impact tests use a bench resembling a vehicle’s seat that moves at 20 miles per hour and is suddenly decelerated. Unlike the federal government’s tests, Evenflo’s testing involves no barrier smashing into the bench and no pole.

80. And, in truth, Evenflo’s side-impact tests were insufficient, with no reasonable standard whatsoever.

81. As ProPublica wrote: “[t]he company’s tests show that when child-sized crash dummies seated in Big Kid boosters were subjected to the forces of a T-bone collision, they were thrown far out of their shoulder belts. Evenflo’s top booster seat engineer would later admit in a deposition if real children moved that way, they could suffer catastrophic head, neck and spinal injuries — or die.”¹⁸

82. Videos from the company’s tests show child-sized dummies being flung far outside the booster seat, where a child’s head, neck, and spine would be in terrible danger. The Evenflo test showed the belt slipping off the shoulder of the child-sized dummy and was instead wrapped tight around the soft abdomen and ribs where the belt could cause internal organ damage.

¹⁸ <https://www.propublica.org/article/evenflo-maker-of-the-big-kid-booster-seat-put-profits-over-child-safety>

83. Evenflo's testing records showed the new Big Kid Booster Seat with side wings did no better than the old version without the purported additional side protection, despite Evenflo's representations of additional side protection:

BIG KID BOOSTER SEAT
Model 338 — No Side Wings



BIG KID BOOSTER SEAT
Model 309 — With Side Wings



84. When Dr. Ben Hoffman, an Oregon pediatrician and a lead author of the American Academy of Pediatrics' policy statement on car seats, was shown the video of Evenflo's side-impact test, he said such violent movement at high speed of the dummy in the booster could lead to abdominal, brain, and spinal injuries in a real child, including paralysis or death.

85. Dr. Hoffman said "I think the word that I used to describe them initially was horrific. Human beings just aren't built to survive that amount of movement."¹⁹

¹⁹ <https://www.cbsnews.com/news/evenflo-car-booster-seat-propublica-investigation-raises-concerns-over-some-of-the-companys-safety-claims/>

86. Asked if he would want his child in a seat that performed that way, Hoffman said, “No, and there’s no way I would want a child who I know or knew or loved to be put into a scenario like that.”²⁰

87. The Big Kid Boosters had slight differences in fabric, base, or model number, but no matter which Big Kid Booster Evenflo “tested,” Evenflo’s safety engineer said in a 2019 deposition that the dummies’ bodies all moved in the same way.²¹

88. Yet Evenflo gave *all* of its booster seats passing grades. Indeed, the company’s test bar was so low, the only way to fail was if the child-sized dummy ended up on the floor or the booster itself broke into pieces.²²

²⁰ *Id.*

²¹ <https://www.propublica.org/article/evenflo-maker-of-the-big-kid-booster-seat-put-profits-over-child-safety>

²² *Id.*

89. After each test, a technician filled out a form that asked whether the test showed “dummy retention,” which reflected the dangerously low standard of whether the dummy stayed in the seat or fell out of the seat and end up on the floor.²³

Rowe: And Plaintiff's Exhibit 138A, what would you answer for dummy retention?



Belzyt: Yes.

90. An engineer who filled out the form who worked at Evenflo for 13 years said in an interview with ProPublica that he never performed a side-impact test on a booster that was deemed a failure.²⁴

²³ *Id.*

²⁴ *Id.*

91. And yet, on its website, Evenflo continues to make false representations concerning its purported side impact testing:

Evenflo tests all of our car seats to energy levels approximately twice that of the federal crash test standard. Additionally, our engineers developed the Evenflo Side Impact test protocol, which simulates the energy in severe 5-star government side impact tests conducted for automobiles.²⁵

92. Also, Evenflo continues to misrepresent side-impact testing:

Evenflo Side impact testing simulates a crash in which the vehicle carrying the car seat is struck on the side by another vehicle. An example of a real life side impact collision is when a car crossing an intersection is struck on the side by another car that ran a stop sign.²⁶

93. The truth of Evenflo's misrepresentations regarding its side impact testing and the supposed side impact protections provided by the Big Kid Booster Seat was made clear by an Evenflo engineer, who said in a 2016 deposition: "We side-impact test our seats, but I don't think we say that we offer any type of side-impact protection."²⁷

94. Evenflo knew, after the 2008 side impact tests on the Big Kid Booster Seat, that the seat's side structure—while giving the perception to consumers of providing side impact protection—actually provided no side impact protection whatsoever and, in fact, actually allowed the head, upper torso and even the abdomen of the child-sized test dummy to be ejected from the confines of the seat.

²⁵ <https://www.evenflo.com/safety-learning/promise-on-safety.html>

²⁶ <https://www.evenflo.com/safety-learning/safety-tech.html>

²⁷ <https://www.propublica.org/article/evenflo-maker-of-the-big-kid-booster-seat-put-profits-over-child-safety>

95. Evenflo also knew from its 2008 side-impact “tests” on the Big Kid Booster that side-impact forces could cause the shoulder belt to fall completely out of position and off the shoulder, thus subjecting children to catastrophic injuries.

IV. Evenflo’s Misrepresentations and Omissions Regarding the Safety of its Booster Seats

96. Despite all of the evidence cited and discussed above, Evenflo continues to make misrepresentations and omissions to consumers about its commitment to safety and the safety of its products, including the Big Kid Booster seat.

97. On its website, Evenflo uses language designed to engender trust in parents so that they will rely on Defendant’s misrepresentations about its testing:

To us, it just doesn't get much more important than delivering products that help keep your little ones safe. We're parents just like you are so we build products that we would trust and use for our own children. That's why we rigorously test all of our products again and again. Every bounce, twist, turn and latch is tested to make sure our products are safe, durable and comfortable.²⁸

98. Evenflo makes these representations despite knowing that its booster seats are unsafe, that it falsely represents to consumers that children less than 40 pounds would be safe riding in its booster seats, and that it falsely represented that its booster seats provided side-impact protection and were proven safe by its side-impact testing.

99. Evenflo makes these representations regarding the safety of its products, including the Big Kid Booster Seat, despite knowing that young children have been paralyzed and brain damaged from a side impact collision while riding in its booster seats.

²⁸

<https://www.evenflo.com/safety-learning/promise-on-safety.html>

100. For example, in November of 2009, the *Robinson v. Evenflo* case was filed in North Carolina. The Robinsons alleged that their son, Ethan, suffered severe brain damage when his Big Kid Booster Seat failed to restrain him in a side impact crash because of its defective design and labeling.

101. In April 2010, the *Romph v. Evenflo* case was filed in Missouri. The Romph family alleged that their daughter Margaret was rendered a ventilator-dependent quadriplegic when her Big Kid Booster Seat failed to provide protection to her in a side-impact collision.

102. In April 2015, the *Arias v. Evenflo* case was filed in the Southern District of Texas. The Arias family alleged that their child suffered catastrophic injuries that have rendered the child a ventilator-dependent quadriplegic because of deficiencies in the Big Kid Booster Seat.

103. Despite knowing of these injuries and allegations, Evenflo continues to make misrepresentations and material omissions concerning the safety of its products, including the Big Kid Booster Seat, elsewhere on its website:

Safety isn't just a word to us, it's in our DNA. For nearly 100 years Evenflo has been a leader in baby and juvenile products. We rigorously test all of our products, repeatedly. Every bounce, twist, turn and latch is tested to make sure our products are safe, durable, convenient and comfortable.

Our approach to safety testing has been to not just meet the requirement, but to go above and beyond. An example of this is the fact that Evenflo tests all car seats to energy levels approximately twice that of the federal crash test standard.

Additionally, our engineers developed the Evenflo Side Impact test protocol, which simulates the energy in severe 5-star government side impact tests conducted for automobiles. Now we are leading the industry by incorporating a dynamic rollover test.²⁹

²⁹

<https://www.evenflo.com/safety-learning/safety-learning.html>

104. Elsewhere, Evenflo again touts its commitment to safety, testing, and deceived consumers by making misleading representations concerning federal government testing.³⁰

Safety Technology

Evenflo is committed to providing child safety through research, testing, design, and community.

At Evenflo, we continue to go above and beyond government standards to provide car seats that are tested at 2X the Federal Crash Test Standard. We also continually enhance our products with new technologies that distribute crash forces away from your child during a crash.

105. Evenflo's foregoing representations regarding safety, testing, and its surpassing federal government standards in testing and safety are false and misleading for all of the reasons discussed above, including its failure to acknowledge that the federal government has no side-impact testing rules or standards for child safety seats. Evenflo's concealment and omission of the inherent dangers in using the Big Kid Booster Seat with children under 40 pounds, its lack of stability, its lack of containment in side impacts and/or its complete lack of side-impact protection, are also dangerously misleading.

V. Factual Allegations of Plaintiffs

Plaintiff Keith Epperson

106. In 2013, Plaintiff Epperson purchased an Evenflo Big Kid Booster Seat for his child at a large nationwide retail store in San Luis Obispo County, California.

107. Prior to purchase, Plaintiff Epperson researched various seats online, and ultimately purchased the Big Kid model because he believed Evenflo was a trusted brand and would provide side-impact protection.

108. Had Plaintiff Epperson known about the unsafe nature of Evenflo's Big Kid Booster seats, he would not have purchased his seat and instead would have purchased one of many safer available alternatives.

Plaintiff Elizabeth Granillo

³⁰

<https://www.evenflo.com/safety-learning/safety-tech.html>

109. In 2018, Plaintiff Granillo purchased an Evenflo Big Kid Booster Seat for her child through an online retailer.

110. Prior to purchase, Plaintiff Granillo researched various seats online, and ultimately purchased the Big Kid model because she believed Evenflo was a trusted brand and would provide side-impact protection.

111. Had Plaintiff Granillo known about the unsafe nature of Evenflo's Big Kid Booster seats, she would not have purchased her seat and instead would have purchased one of many safer available alternatives.

Plaintiff Casey Hash

112. In 2010, Plaintiff Hash purchased an Evenflo Big Kid Booster Seat for her child at a large nationwide retail store in Pagosa Springs, Colorado.

113. Prior to purchase, Plaintiff Hash researched various seats online, and ultimately purchased the Big Kid model because she believed it was a trusted brand and would provide side-impact protection.

114. Had Plaintiff Hash known about the defective nature of Evenflo's Big Kid Booster seats, she would not have purchased her seat and instead would have purchased one of many safer available alternatives.

CLASS ACTION ALLEGATIONS

115. Plaintiffs incorporate by reference all other paragraphs of this Complaint as if fully set forth herein.

116. Plaintiffs bring this action individually and on behalf of all other persons similarly situated pursuant to Federal Rule of Civil Procedure 23. The class definition(s) may need to be amended based on the information obtained throughout discovery. Notwithstanding, at this time, Plaintiffs bring this action and seeks certification of the following Classes:

National Damages Class under Fed. R. Civ. P. 23(b)(3): All persons within the United States who purchased Evenflo’s Big Kid Booster seat from the beginning of any applicable limitations period through the date of class certification (the “National Damages Class,” or together with the National Injunctive Class, the “National Classes”).

National Injunctive Class under Fed. R. Civ. P. 23(b)(2): All persons within the United States who purchased Evenflo’s Big Kid Booster seat from the beginning of any applicable limitations period through the date of class certification (the “National Injunctive Class”, or together with the National Injunctive Class, the “National Classes”).

Consumer Fraud Multi-State Class under Fed. R. Civ. P. 23(b)(2) and 23(b)(3): All persons in the states of Alaska, Arizona, Arkansas, California, Connecticut, Delaware, Florida, Idaho, Illinois, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, New Hampshire, New Jersey, Nevada, New Mexico, New York, North Dakota, Oklahoma, Rhode Island, South Dakota, Utah, Washington, West Virginia, and Wisconsin who purchased Evenflo’s Big Kid Booster seats in those states from the beginning of any applicable limitations period through the date of class certification (the “Consumer Protection Multi-State Class”).³¹

³¹ California Business & Professions Code section 17200, prohibits any “unlawful, unfair or fraudulent business act or practice” and generally prohibit all deceptive and unfair conduct. California’s Consumer Legal Remedies Act, California Civil Code section 1750 similarly protects consumers from unfair business practices. These states in the Consumer Protection Multi-State Class have consumer protection laws that similarly prohibit all deceptive and unfair conduct: Alaska (Alaska Stat. Ann. § 45.50.471); Arizona (Ariz. Rev. Stat. § 44-1521); Colorado (Colo. Rev. Stat. § 6-1-101); Connecticut (Conn. Gen. Stat. § 42-110a); Florida (Fla. Stat. § 501.201); Hawaii (Haw. Rev. Stat. §§ 480, 481); Illinois (815 ILCS 505/1); Iowa (Iowa Code § 714H.1); Kentucky (Ky. Rev. Stat. Ann. § 367.110); Maine (Me. Rev. Stat. Ann. tit. 5 § 205-a; tit. 10 § 1211); Massachusetts (Mass. Gen. Laws Ch. 93A); Missouri (Mo. Rev. Stat. § 407.010); Montana (Mont. Code Ann. § 30-14-101); Nebraska (Neb. Rev. Stat. § 59-1601; § 87-301); New Hampshire (N.H. Rev. Stat. § 358-A:1); Oklahoma (Okla. Stat. tit. 15, § 751; tit. 78, § 51); Oregon (Or. Rev. Stat. § 646.605); Rhode Island (R.I. Gen. L. § 6-13.1); Vermont (Vt. Stat. Ann. tit. 9, § 2451); Washington (Wash. Rev. Code § 19.86.010); West Virginia W. Va. Code § 46A-6-101). The following additional states in the Consumer Protection Multi-State Class have consumer protection statutes that prohibit deceptive, false, or misleading conduct (and thus for purposes of this case are comparable to California’s statutes), but do not necessarily prohibit unfair conduct: Arkansas (Ark. Code Ann. § 4-88-101); Delaware (Del. Code Ann. tit. 6, § 2511); Idaho (Idaho Code § 48-601); Kansas (Kan. Stat. Ann. § 50-623); Maryland (Md. Code. Ann. Com. Law § 13-101); Michigan (Mich. Comp. Laws § 445.901);

California Sub-Class under Fed. R. Civ. P. 23(b)(2) and 23(b)(3): All persons who purchased Evenflo's Big Kid Booster seats in California from the beginning of any applicable limitations period through the date of class certification ("the California Sub-Class").

Colorado Sub-Class under Fed. R. Civ. P. 23(b)(2) and 23(b)(3): All persons who purchased Evenflo's Big Kid Booster seats in Colorado from the beginning of any applicable statute of limitations period through the date of class certification ("the Colorado Sub-Class").

117. Excluded from the Classes are the Defendant, any entities in which the Defendant has a controlling interest, the Defendant's agents, employees, and their legal representatives, any Judge to whom this action is assigned and any member of such Judge's staff and immediate family, and Plaintiffs' counsel, their staff members, and their immediate family.

118. Plaintiffs reserve the right to amend the Class definitions or add a Class if further information or discovery indicates that the Class definitions should be narrowed, expanded, or otherwise modified.

119. Certification of Plaintiffs' claims for class-wide treatment is appropriate because Plaintiffs can prove the elements of their claims on a class-wide basis using the same evidence as would be used to prove those elements in individual actions alleging the same claims, and because Plaintiffs otherwise meet the requirements of Federal Rule of Civil Procedure 23, as alleged below.

Minnesota (Minn. Stat. § 325F.67; § 325D.43); New Jersey (N.J. Stat. § 56:8-1); Nevada (Nev. Rev. Stat. § 598.0903); New Mexico (N.M. Stat. Ann. § 57-12-1); New York (N.Y. Gen. Bus. Law § 349); North Dakota (N.D. Cent. Code § 51-15-01); South Dakota (S.D. Codified Laws § 37-24-21); Utah (Utah Code Ann. §§ 13-11-1, 13-11a-1); and Wisconsin (Wis. Stat. § 100.18).

120. **Numerosity – Federal Rule of Civil Procedure 23(a)(1).** The members of the Classes are so numerous that their individual joinder herein is impracticable. On information and belief, members of the Classes number in the thousands to hundreds of thousands. The number of members of the Classes is presently unknown to Plaintiffs, but may be ascertained from Defendant's books and records. Members of the Classes may be notified of the pendency of this action by mail, email, Internet postings, and/or publication.

121. **Commonality and Predominance – Federal Rules of Civil Procedure 23(a)(2) and 23(b)(3).** Common questions of law and fact exist as to all members of the Classes and predominate over questions affecting only individual members of the Classes. Such common questions of law or fact include, but are not limited to, the following:

- a. Whether the marketing, advertising, packaging, labeling, and other promotional materials for the Big Kid Booster are deceptive;
- b. Whether Defendant made material omissions in its marketing, advertising, packaging, labeling, promotion, and sale of the Big Kid Booster;
- c. Whether Defendant's actions violate the state consumer fraud statutes invoked below;
- d. Whether Defendant's actions constitute common law fraud;
- e. Whether Plaintiffs and the members of the Classes were damaged by Defendant's conduct;
- f. Whether Defendant was unjustly enriched at the expense of Plaintiffs and Class Members;
- g. Whether Defendant breached express warranties to Plaintiffs and Class Members;
- h. Whether Defendant breached implied warranties to Plaintiffs and Class Members; and
- i. Whether Plaintiffs and Class Members are entitled to injunctive relief.

122. Defendant engaged in a common course of conduct giving rise to the legal rights Plaintiffs seek to enforce on behalf of themselves and the other Members of the Classes. Similar or identical statutory and common law violations, business practices, and injuries are involved. These common questions, and the common answers they will generate, predominate in both quality and quantity over any individual issues that may exist.

123. **Typicality – Federal Rule of Civil Procedure 23(a)(3).** Plaintiffs' claims are typical of the claims of the other Members of the Classes because, among other things, all Members of the Classes were injured in the same way through Defendant's uniform misconduct described above.

124. **Adequacy of Representation – Federal Rule of Civil Procedure 23(a)(4).** Plaintiffs are adequate Class representatives because their interests do not conflict with the interests of the other Members of the Classes they seek to represent; they have retained counsel competent and experienced in complex class action litigation; and they will prosecute this action vigorously. The Classes' interests will be fairly and adequately protected by Plaintiffs and the undersigned counsel.

125. **Declaratory and Injunctive Relief – Federal Rule of Civil Procedure 23(b)(2).** Defendant has acted or refused to act on grounds generally applicable to Plaintiffs and the other Members of the Classes, thereby making appropriate final injunctive relief and declaratory relief, as requested in the Prayer for Relief below, with respect to the members of the Classes as a whole.

126. **Superiority – Federal Rule of Civil Procedure 23(b)(3).** A class action is superior to any other available means for the fair and efficient adjudication of this controversy, and no unusual difficulties are likely to be encountered in the management of this class action.

The damages or other financial detriment suffered by Plaintiffs and the other Members of the Classes are relatively small compared to the burden and expense that would be required to individually litigate their claims against Defendant, so it would be impracticable for Members of the Classes to individually seek redress for Defendant's wrongful conduct. Even if Members of the Classes could afford individual litigation, the court system could not. Individualized litigation would create a potential for inconsistent or contradictory judgments, and increase the delay and expense to all parties and the court system. By contrast, the class action device presents far fewer management difficulties, and provides the benefits of single adjudication, economy of scale, and comprehensive supervision by a single court.

CAUSES OF ACTION

Count I

Violation of State Consumer Fraud Acts

(On Behalf of the Consumer Fraud Multi-State Class)

127. Plaintiffs incorporate by reference all of the foregoing paragraphs of this Complaint as if fully set forth herein.

128. The Consumer Fraud Acts of the States in the Consumer Fraud Multi-State Class prohibit the use of unfair or deceptive acts or practices in the conduct of trade or commerce.

129. Plaintiffs and the other Members of the Consumer Fraud Multi-State Class have standing to pursue a cause of action for violation of the Consumer Fraud Acts of the states in the Consumer Fraud Multi-State Class because Plaintiffs and Members of the Consumer Fraud Multi-State Class have suffered an injury in fact and lost money as a result of Evenflo's actions set forth herein.

130. Evenflo engaged in unfair and/or deceptive conduct, including, but not limited to the following:

- a. Misrepresenting that Big Kid Booster seats were safe for children who weigh as little as 30 pounds even while, in Canada, Evenflo told consumers that a child less than 40 pounds risked “SERIOUS INJURY or DEATH” using the same Big Kid Booster, and even while Evenflo otherwise knew that the Big Kid Booster was unsafe for children weighing less than 40 pounds;
- b. Misrepresenting that Big Kid Booster seats were “SIDE IMPACT TESTED” and provided side-impact protection without revealing that its own tests showed a child seated in its Big Kid Booster could be in grave danger in such a crash;
- c. Misrepresenting that Evenflo’s “rigorous test simulates the government side-impact tests conducted for automobiles” or that its tests even “go beyond the current government standards,” when in fact Evenflo’s tests were less rigorous than and not comparable to federal government side-impact tests, and they went beyond government standards only because the government does not require particular side-impact testing at all;
- d. Misrepresenting that the Big Kid Booster was safe and that using the Big Kid Booster was “the best way to minimize injuries to your child”;

- e. Omitting and failing to disclose its knowledge that the Big Kid Booster was unsafe for children less than 40 pounds; and
- f. Omitting and failing to disclose its knowledge that the Big Kid Booster did not protect children from side-impact accidents, which Evenflo knew from its internal testing and otherwise.

131. Evenflo intended that Plaintiffs and each of the other Members of the Consumer Fraud Multi-State Class would rely upon its unfair and deceptive conduct and a reasonable person would in fact be misled by this deceptive conduct described above.

132. As a result of Evenflo's use or employment of unfair or deceptive acts or business practices, Plaintiffs and each of the other Members of the Consumer Fraud Multi-State Class have sustained damages in an amount to be proven at trial.

133. Evenflo's conduct was willful and knowing, and thus the damages recovered in this action should be multiplied as permissible and appropriate under the Consumer Fraud Acts of the states in the Consumer Fraud Multi-State Class.

134. In addition, Evenflo's conduct showed malice, motive, and the reckless disregard of the truth such that an award of punitive damages is appropriate.

135. Because Evenflo's deceptive and unfair conduct is ongoing, injunctive relief is necessary and proper.

Count II
Fraudulent Concealment
(On Behalf of the National Classes
and, in the Alternative, the California and Colorado Sub-Classes)

136. Plaintiffs incorporate by reference all of the foregoing paragraphs of this Complaint as if fully stated herein.

137. Plaintiffs bring this claim against Evenflo on behalf of themselves, the National Classes and the California and Colorado Sub-Classes (for purposes of this Count, the “Classes”).

138. Evenflo made false statements and omissions of material facts, including:

- a. Misrepresenting that Big Kid Booster seats were safe for children who weigh as little as 30 pounds even while, in Canada, Evenflo told consumers that a child less than 40 pounds risked “SERIOUS INJURY or DEATH” using the same Big Kid Booster, and even while Evenflo otherwise knew that the Big Kid Booster was unsafe for children weighing less than 40 pounds;
- b. Misrepresenting that Big Kid Booster seats were “SIDE IMPACT TESTED” and provided side-impact protection without revealing that its own tests showed a child seated in its Big Kid Booster could be in grave danger in such a crash;

- c. Misrepresenting that Evenflo's "rigorous test simulates the government side-impact tests conducted for automobiles" or that its tests even "go beyond the current government standards," when in fact Evenflo's tests were less rigorous than and not comparable to federal government side-impact tests, and they went beyond government standards only because the government does not require particular side-impact testing at all;
- d. Misrepresenting that the Big Kid Booster was safe and that using the Big Kid Booster was "the best way to minimize injuries to your child";
- e. Omitting and failing to disclose its knowledge that the Big Kid Booster was unsafe for children less than 40 pounds; and
- f. Omitting and failing to disclose its knowledge that the Big Kid Booster did not protect children from side-impact accidents, which Evenflo knew from its internal testing and otherwise.

139. Evenflo's false statements and omissions of material facts were made to Plaintiffs and the Members of the Classes at least each time that Plaintiffs and the Members of the Classes purchased Big Kid Booster seats.

140. Evenflo knew or should have known that these statements were false and that the omissions were material. Alternatively, Evenflo recklessly made these false statements and/or omissions without having any reasonable basis to believe they were true.

141. Evenflo intended that its false statements and omissions of material facts would induce Plaintiffs and each of the Members of the Classes to purchase a Big Kid Booster Seat.

142. Plaintiffs and the Members of the Classes reasonably relied on the false statements and omissions of material facts regarding Big Kid Booster seats as described above.

143. Plaintiffs and Members of the Classes would not have purchased a Big Kid Booster Seat had it been accurately marketed, advertised, packaged, and/or sold.

144. Evenflo's false statements and omissions of material facts directly and proximately caused the damages suffered by Plaintiffs and Members of the Classes.

145. As a result of Evenflo's false statements and omissions of material facts, Plaintiffs and each of the other Members of the Classes have sustained damages in an amount to be proven at trial.

146. In addition, Evenflo's conduct showed malice, motive, and a reckless disregard of the truth such that an award of punitive damages is appropriate.

147. Because Evenflo's deceptive and unfair conduct is ongoing, injunctive relief is necessary and proper.

Count III
Breach of Express Warranties
(On behalf of the National Classes
and, in the Alternative, the California and Colorado Sub-Classes)

148. Plaintiffs incorporate by reference all of the foregoing paragraphs of this Complaint as if fully stated herein.

149. Plaintiffs bring this claim against Evenflo on behalf of themselves, the National Classes and, in the alternative, the California and Colorado Sub-Classes.

150. Evenflo made express warranties and representations regarding Big Kid Booster seats when it represented:

- a. that Big Kid Booster seats were safe for children who weigh as little as 30 pounds;
- b. that Big Kid Booster seats were “SIDE IMPACT TESTED” and provided side-impact protection;
- c. that Evenflo’s “rigorous test simulates the government side-impact tests conducted for automobiles” or that its tests even “go beyond the current government standards”; and
- d. that Evenflo products, including The Big Kid Booster, were generally safe and that using the Big Kid Booster was “the best way to minimize injuries to your child.”

151. These (mis)representations were made directly to consumers and end purchasers of Evenflo’s Big Kid Booster seats, constitute express warranties, and became part of the basis of the bargain between the parties and created a collective “express warranty” that the Big Kid Booster seat would conform to Evenflo’s affirmations and promises.

152. Evenflo breached express warranties about Big Kid Booster seat and its qualities because Evenflo’s statements about Big Kid Booster seats were false and the product does not conform to Evenflo’s affirmations and promises described above.

153. Plaintiffs and the Members of the Classes would not have purchased Big Kid Booster seats had they known about the misrepresentations described above.

154. Evenflo's conduct described in this Complaint constitutes a breach of express warranties under UCC § 2-313, as adopted in whole or in substance by statutes in all 50 states and the District of Columbia:

Ala. Code § 7-2-313, *et seq.*; Alaska Stat. § 45.02.313, *et seq.*; Ariz. Rev. Stat. § 47-2313, *et seq.*; Ark. Code § 4-2-313, *et seq.*; Cal. Com. Code § 2313, *et seq.*; Colo. Rev. Stat. § 4-2-313, *et seq.*; Conn. Gen. Stat. § 42a-2-313, *et seq.*; 6 Del. C. § 2-313, *et seq.*; D.C. Code § 28:2-313, *et seq.*; Fla. Code § 672.313, *et seq.*; O.C.G.A. § 11-2-313, *et seq.*; Haw. Rev. Stat. § 490:2-313, *et seq.*; Idaho Code § 28-2-313, *et seq.*; 810 Ill. Comp. Stat. 5/2-313, *et seq.*; Ind. Code § 26-1-2-313, *et seq.*; Iowa Code § 554.2313, *et seq.*; Kan. Stat. § 84-2-313, *et seq.*; Ky. Rev. Stat. § 355.2-313, *et seq.*; La. Rev. Stat § 9:2800.53(6) , *et seq.*; 11 M.R.S.A. § 2-313, *et seq.*; Md. Code Ann., Com. Law § 2-313, *et seq.*; Mass. Code 106, § 2-313, *et seq.*; Mich. Comp. Laws 440.2313, *et seq.*; Minn. Stat. § 336.2-313, *et seq.*; Miss. Code § 75-2-313, *et seq.*; Mo. Rev. Stat. § 400.2-313, *et seq.*; Mont. Code § 30-2-313, *et seq.*; Neb. U.C.C. § 2-313, *et seq.*; Nev. Rev. Stat. § 104.2313, *et seq.*; N.H. Rev. Stat. § 382-A:2-313, *et seq.*; N.J. Stat. § 12A:2-313, *et seq.*; N.M. Stat. § 55-2-313, *et seq.*; N.Y. U.C.C. § 2-313, *et seq.*; N.C. Gen. Stat. § 25-2-313, *et seq.*; N.D. Cent. Code § 41-02-30, *et seq.*; Ohio Rev. Code § 1302.26, *et seq.*; Okla. Stat. Tit. 12A, § 2-313, *et seq.*; Or. Rev. Stat. § 72.3130, *et seq.*; 13 Pa. Cons. Stat. § 2313, *et seq.*; R.I. Gen. Laws § 6A-2-313, *et seq.*; S.C. Code § 36-2-313, *et seq.*; S.D. Codified Laws § 57A-2-313, *et seq.*; Tenn. Code § 47-2-313, *et seq.*; V.T.C.A., Bus. & C. § 2.313, *et seq.*; Utah Code § 70A-2-313, *et seq.*; Vt. Stat. Tit. 9A, § 2-313, *et seq.*; Va. Code § 8.2-313, *et seq.*; Wash. Rev. Code § 62A.2-313, *et seq.*; W. Va. Code § 46-2-313, *et seq.*; Wis. Stat. § 402.313, *et seq.*; and Wyo. Stat. § 34.1-2-313, *et seq.*

155. As a result of Evenflo's breach of warranty, Plaintiffs and each Member of the Classes have been damaged in an amount equal to the value of the Big Kid Booster seat and/or in an amount to be determined at trial plus any consequential damages resulting from their purchases.

156. Plaintiffs and the Class did not need to send notice to Evenflo of its breaches of warranty because Evenflo was already on notice of the defects alleged herein. Indeed, Evenflo is already facing similar lawsuits for the conduct alleged herein.

Count IV
Breach of Implied Warranties
(On behalf of the National Classes
and, in the Alternative, the California and Colorado Sub-Classes)

157. Plaintiffs incorporate by reference all of the foregoing paragraphs of this Complaint as if fully stated herein.

158. Plaintiffs bring this claim against Evenflo on behalf of themselves, the National Classes and, in the alternative, the California and Colorado Sub-Classes.

159. Evenflo is in the business of manufacturing, supplying, marketing, advertising, warranting, and selling Big Kid Booster seats. Evenflo impliedly warranted to Plaintiffs and Members of the Classes that the Big Kid Booster seat was of a certain quality and was fit for its ordinary and particular purpose.

160. Evenflo's implied warranties included but are not limited to the warranties that: Big Kid Booster seats were safe for children who weigh as little as 30 pounds; were "SIDE IMPACT TESTED" and provided side-impact protection; and were generally safe and that using the Big Kid Booster was "the best way to minimize injuries to your child."

161. Evenflo's Big Kid Booster was unfit for its ordinary use and was not of merchantable quality and/or did not conform to the promises or affirmations of fact for the reasons described above. Prior to purchase, Plaintiffs and the Members of the Classes could not have discovered that the product was not fit for its ordinary purpose and did not conform to the quality previously represented.

162. Similarly, Evenflo's Big Kid Booster was unfit for its particular purpose. At the time Plaintiffs and Members of the Classes purchased Big Kid Booster, Evenflo knew or should have known that Plaintiffs and the Members of the Classes would purchase and consume the Big Kid Booster because it is labeled and advertised as safe, side-impact tested and protected, and appropriate for children who weigh as little as 30 pounds. However, Evenflo's product was not suitable for this purpose at the point of sale for all of the reasons stated above.

163. Evenflo's Big Kid Booster was unfit for its ordinary use and was not of merchantable quality and/or did not conform to the promises or affirmations of fact made on the label and was unfit for its particular purpose when it left Evenflo's control.

164. Plaintiffs and Members of the Classes would not have purchased Evenflo's Big Kid Booster if they knew about the misrepresentation described above.

165. Accordingly, Plaintiffs and the Members of the Classes did not receive the benefit of their bargain in purchasing Evenflo's Big Kid Booster.

166. Evenflo's conduct described in this Complaint constitutes a breach of implied warranties under UCC §§ 2-314 and 2-315, as adopted in whole or in substance by statutes in all 50 states and the District of Columbia:

Ala. Code § 7-2-314, *et seq.*; Alaska Stat. § 45.02.314, *et seq.*; Ariz. Rev. Stat. § 47-2314, *et seq.*; Ark. Code § 4-2-314, *et seq.*; Cal. Com. Code § 2314, *et seq.*; Colo. Rev. Stat. § 4-2-314, *et seq.*; Conn. Gen. Stat. § 42a-2-314, *et seq.*; 6 Del. C. § 2-314, *et seq.*; D.C. Code § 28:2-314, *et seq.*; Fla. Code § 672.314, *et seq.*; O.C.G.A. § 11-2-314, *et seq.*; Haw. Rev. Stat. § 490:2-314, *et seq.*; Idaho Code § 28-2-314, *et seq.*; 810 Ill. Comp. Stat. 5/2-314, *et seq.*; Ind. Code § 26-1-2-314, *et seq.*; Iowa Code § 554.2314, *et seq.*; Kan. Stat. § 84-2-314, *et seq.*; Ky. Rev. Stat. § 355.2-314, *et seq.*; La. Rev. Stat § 9:2800.53(6), *et seq.*; 11 M.R.S.A. § 2-314, *et seq.*; Md. Code Ann., Com. Law § 2-314, *et seq.*; Mass. Code 106, § 2-314, *et seq.*; Mich. Comp. Laws 440.2314, *et seq.*; Minn. Stat. § 336.2-314, *et seq.*; Miss. Code § 75-2-314, *et seq.*; Mo. Rev. Stat. § 400.2-314, *et seq.*; Mont. Code § 30-2-314, *et seq.*; Neb. U.C.C. § 2-314, *et seq.*; Nev. Rev. Stat. § 104.2314, *et seq.*; N.H. Rev. Stat. § 382-A:2-314, *et seq.*; N.J. Stat. § 12A:2-314, *et seq.*; N.M. Stat. § 55-2-314, *et seq.*; N.Y. U.C.C. § 2-314, *et seq.*; N.C. Gen. Stat. § 25-2-314, *et seq.*; N.D. Cent. Code § 41-02-30, *et seq.*; Ohio Rev. Code § 1302.26, *et seq.*; Okla. Stat. Tit. 12A, § 2-314, *et seq.*; Or. Rev. Stat. § 72.3130, *et seq.*; 13 Pa. Cons. Stat. § 2314, *et seq.*; R.I. Gen. Laws § 6A-2-314, *et seq.*; S.C. Code § 36-2-313, *et seq.*; S.D. Codified Laws § 57A-2-313, *et seq.*; Tenn. Code § 47-2-314, *et seq.*; V.T.C.A., Bus. & C. § 2.314, *et seq.*; Utah Code § 70A-2-314, *et seq.*; Vt. Stat. Tit. 9A, § 2-314, *et seq.*; Va. Code § 8.2-314, *et seq.*; Wash. Rev. Code § 62A.2-314, *et seq.*; W. Va. Code § 46-2-314, *et seq.*; Wis. Stat. § 402.314, *et seq.*; and Wyo. Stat. § 34.1-2-314, *et seq.*

167. As a result of Evenflo's breach of warranty, Plaintiffs and each Member of the Classes have been damaged in an amount equal to value of the Big Kid Booster and/or in an amount to be determined at trial plus any consequential damages resulting from their purchases.

168. Plaintiffs and the Class did not need to send notice to Evenflo of its breaches of warranty because Evenflo was already on notice of the defects alleged herein. Indeed, Evenflo is already facing similar lawsuits for the conduct alleged herein.

Count V
Violation of the California False Advertising Act –
Business & Professions Code §§ 17500, *et seq.*)
(On behalf of the California Sub-Class)

169. Plaintiffs incorporate by reference all of the foregoing paragraphs of this Complaint as if fully stated herein.

170. Evenflo engaged in unfair and deceptive advertising, in violation of California Business and Professions Code § 17500, *et seq.*, as alleged herein.

171. These acts and practices, as described above, have deceived Plaintiffs and Class Members, causing them to lose money by purchasing Evenflo's product or paying more for it than they otherwise would, as herein alleged, and have deceived and are likely to deceive the consuming public. Accordingly, Evenflo's business acts and practices, as alleged herein, have caused injury to Plaintiffs and Class Members.

172. In the absence of Evenflo's misrepresentations, Plaintiffs and Class Members would not have purchased Evenflo's product or would not have paid a price premium for it.

173. Plaintiffs and Class Members are entitled to relief, including full restitution and/or disgorgement of all revenues, earnings, profits, compensation, and benefits which may have been obtained by Evenflo as a result of such business acts or practices, and enjoining Evenflo from engaging in the practices described herein.

Count VI
Violation of the California Unfair Competition Law –
Business & Professions Code §§ 17200, *et seq.*
(On behalf of the California Sub-Class)

174. Plaintiffs incorporate by reference all of the foregoing paragraphs of this Complaint as if fully stated herein.

175. California Business and Professions Code section 17200 prohibits any "unfair deceptive, untrue or misleading advertising." For the reasons discussed above, Evenflo has engaged in unfair, deceptive, untrue and misleading advertising in violation of California Business & Professions Code sections 17200, *et seq.*

176. California Business & Professions Code section 17200 also prohibits any "unlawful, unfair or fraudulent business act or practice."

177. Evenflo has violated Sections 17200, *et seq.*'s prohibition against engaging in unlawful, unfair or fraudulent acts and practices by, among other things: making the misrepresentations and omissions of material fact as alleged herein; violating California False Advertising Act – Business & Professions Code §§ 17500, *et seq.*, by making the misrepresentations about Evenflo's product; and violating section 1770 of the Consumers Legal Remedies Act. Evenflo violated Section 1770. Evenflo violated these California statutes by at least the following conduct:

- a. Misrepresenting that Big Kid Booster seats were safe for children who weigh as little as 30 pounds even while, in Canada, Evenflo told consumers that a child less than 40 pounds risked "SERIOUS INJURY or DEATH" using the same Big Kid Booster, and even while Evenflo otherwise knew that the Big Kid Booster was unsafe for children weighing less than 40 pounds;
- b. Misrepresenting that Big Kid Booster seats were "SIDE IMPACT TESTED" and provided side-impact protection without revealing that its own tests showed a child seated in its Big Kid Booster could be in grave danger in such a crash;

- c. Misrepresenting that Evenflo's "rigorous test simulates the government side-impact tests conducted for automobiles" or that its tests even "go beyond the current government standards," when in fact Evenflo's tests were less rigorous than and not comparable to federal government side-impact tests, and they went beyond government standards only because the government does not require particular side-impact testing at all;
- d. Misrepresenting that the Big Kid Booster was safe and that using the Big Kid Booster was "the best way to minimize injuries to your child";
- e. Omitting and failing to disclose its knowledge that the Big Kid Booster was unsafe for children less than 40 pounds; and
- f. Omitting and failing to disclose its knowledge that the Big Kid Booster did not protect children from side-impact accidents, which Evenflo knew from its internal testing and otherwise.

178. Plaintiffs and Class Members reserve the right to allege other violations of law that constitute other unlawful business acts or practices. Such conduct is ongoing and continues to this date.

179. Evenflo's acts, omissions, misrepresentations, practices, and non-disclosures as alleged herein also constitute deceit under Cal. Civ. Code § 1710: "[t]he suppression of a fact, by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact."

180. Evenflo's acts, omissions, misrepresentations, practices, and non-disclosures as alleged herein also constitute violations of Sections 17200, *et seq.*'s prohibition against fraudulent acts and practices.

181. Evenflo's acts, omissions, misrepresentations, practices, and non-disclosures as alleged herein also constitute "unfair" business acts and practices within the meaning of Business & Professions Code sections 17200, *et seq.* in that Evenflo's conduct is substantially injurious to consumers, offends public policy, and is immoral, unethical, oppressive, and unscrupulous as the gravity of the conduct outweighs any alleged benefits attributable to such conduct. Plaintiffs assert violations of the public policy of engaging in false and misleading advertising, unfair competition, and deceptive conduct towards consumers. There were reasonable alternatives available to further Evenflo's legitimate business interests other than the conduct described herein. This conduct constitutes violations of the unfair prong of California Business & Professions Code sections 17200, *et seq.*

182. Evenflo's conduct is also a breach of warranty as previously alleged herein. Because Evenflo breached express warranties to Plaintiffs and Class Members, they have violated California Commercial Code §2313.

183. Evenflo's unfair business practices and conduct described herein were the immediate and proximate cause of damages suffered by Plaintiffs and Class Members.

184. Evenflo's unfair business practices and conduct described herein caused Plaintiffs and Class Members to buy or pay more for Evenflo's product.

185. Furthermore, Evenflo's misrepresentations and omissions caused Plaintiffs and Class Members actual damages because had they known the truth about Evenflo's product, they would not have purchased it or paid as much for it.

186. Evenflo's conduct caused and continues to cause substantial injury to Plaintiffs. Plaintiffs and the other Class Members have suffered injury in fact and have lost money as a result of Evenflo's wrongful conduct.

187. Pursuant to Business & Professions Code section 17203, Plaintiffs and the other Class Members seek an order requiring Evenflo to immediately cease such acts of unlawful, unfair, and fraudulent business practices and requiring Evenflo to engage in a corrective advertising campaign and other corrective conduct as necessary and proper.

188. Unless Evenflo is enjoined from continuing to engage in these unfair, unlawful, and fraudulent business practices, Plaintiffs, and the public, will continue to be injured by Evenflo's actions and conduct.

189. Evenflo has thus engaged in unlawful, unfair, and fraudulent business acts and practices, entitling Plaintiffs and the other Class Members to judgment and equitable relief against Evenflo, as set forth in the Prayer for Relief, including full restitution and/or disgorgement of all revenues, earnings, profits, compensation, and benefits which may have been obtained by Evenflo as a result of such business acts or practices, and enjoining Evenflo from engaging in the practices described herein.

Count VII
Violation of California's Consumer Legal Remedies Act,
California Civil Code section 1750 *et seq.*,
(On behalf of the California Sub-Class)

190. Plaintiffs incorporate by reference all of the foregoing paragraphs of this Complaint as if fully stated herein.

191. Evenflo violated section 1770 of the Consumers Legal Remedies Act. Evenflo violated Section 1770 by at least the following:

- a. Misrepresenting that Big Kid Booster seats were safe for children who weigh as little as 30 pounds even while, in Canada, Evenflo told consumers that a child less than 40 pounds risked “SERIOUS INJURY or DEATH” using the same Big Kid Booster, and even while Evenflo otherwise knew that the Big Kid Booster was unsafe for children weighing less than 40 pounds;
- b. Misrepresenting that Big Kid Booster seats were “SIDE IMPACT TESTED” and provided side-impact protection without revealing that its own tests showed a child seated in its Big Kid Booster could be in grave danger in such a crash;
- c. Misrepresenting that Evenflo’s “rigorous test simulates the government side-impact tests conducted for automobiles” or that its tests even “go beyond the current government standards,” when in fact Evenflo’s tests were less rigorous than and not comparable to

federal government side-impact tests, and they went beyond government standards only because the government does not require particular side-impact testing at all;

- d. Misrepresenting that the Big Kid Booster was safe and that using the Big Kid Booster was “the best way to minimize injuries to your child”;
- e. Omitting and failing to disclose its knowledge that the Big Kid Booster was unsafe for children less than 40 pounds; and
- f. Omitting and failing to disclose its knowledge that the Big Kid Booster did not protect children from side-impact accidents, which Evenflo knew from its internal testing and otherwise.

192. Plaintiffs and the Class Members are entitled to, pursuant to California Civil Code §1780(1)(2), an order enjoining the above-described wrongful acts and practices of Evenflo, and ordering the payment of costs and attorneys’ fees and any other relief deemed appropriate and proper by the Court under California Civil Code §1780.

193. Plaintiffs are sending Evenflo a letter demanding corrective actions pursuant to the CLRA. Plaintiffs will amend their complaint to add claims for monetary damages if Evenflo fails to take the corrective actions.

Count VIII
Violations of the Colorado Consumer Protection Act –
Colo. Rev. Stat. § 6-1-101, *et seq.*
(On behalf of the Colorado Sub-Class)

194. Plaintiffs incorporate by reference all of the foregoing paragraphs of this Complaint as if fully stated herein.

195. Evenflo is a “person” as defined by Colo. Rev. Stat. § 6-1-102(6).

196. Evenflo engaged in “sales” as defined by Colo. Rev. Stat. § 6-1-102(10).

197. Plaintiffs and Colorado Sub-Class Members, as well as the general public, are actual or potential consumers of the products offered by Evenflo or successors in interest to actual consumers.

198. As alleged herein, Evenflo engaged in deceptive trade practices in the course of its business, in violation of, inter alia, Colo. Rev. Stat. §§ 6-1-105(1)(e), (g), (i),(u).

199. Evenflo’s deceptive and misleading representations and omissions were made knowingly and/or recklessly.

200. Evenflo’s representations and omissions were material because they were likely to deceive reasonable consumers.

201. In the absence of Evenflo’s misrepresentations and omissions, Plaintiffs and Class Members would not have purchased Evenflo’s product or would not have paid a price premium for it.

202. As a direct and proximate result of Evenflo’s deceptive trade practices, Colorado Sub-Class Members suffered injuries to their legally protected interests.

203. Evenflo’s deceptive trade practices significantly impact the public.

204. Evenflo’s conduct showed bad faith.

205. Because Evenflo's deceptive and unfair conduct is ongoing, injunctive relief is necessary and proper.

Count IX
Unjust Enrichment
(On Behalf of the National Classes
and in the Alternative to Counts IV and V)

206. Plaintiffs incorporate by reference all of the foregoing paragraphs of this Complaint, except those in the other Causes of Action, as if fully stated herein.

207. Plaintiffs bring this claim against Evenflo on behalf of themselves and the National Classes.

208. Plaintiffs and the other Members of the National Classes conferred benefits on Evenflo by purchasing Evenflo's Big Kid Booster.

209. Evenflo received the benefits to the detriment of Plaintiffs and the other Members of the National Classes because Plaintiffs and the other Members of the National Classes purchased a mislabeled and deceptively advertised product that is not what they bargained for and that would unnecessarily put the safety of their children in jeopardy.

210. Evenflo has been unjustly enriched in retaining the revenues derived from the purchases of the Big Kid Booster by Plaintiffs and the other Members of the National Classes. Retention of those monies under these circumstances is unjust and inequitable because Evenflo's labeling of the Big Kid Booster was misleading to consumers, which caused injuries to Plaintiffs and the other Members of the National Classes, because they would have not purchased the product had they known the true facts.

211. Because Evenflo's retention of the non-gratuitous benefits conferred on it by Plaintiffs and the other Members of the National Classes is unjust and inequitable, Evenflo must pay restitution to Plaintiffs and the other Members of the National Classes for its unjust enrichment, as ordered by the Court.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs, individually and on behalf of the other Members of the Classes proposed in this Count, respectfully requests that the Court enter judgment as follows:

- A. Declaring that this action is a proper class action, certifying the Classes as requested herein, designating Plaintiffs as Class Representatives, and appointing the undersigned counsel as Class Counsel for the Classes;
- B. Declaring that Evenflo's failure to disclose the dangers of the Big Kid Booster seats and misrepresentations to the contrary were unfair, deceptive, fraudulent, wrongful, and unlawful;
- C. Permanently enjoining Defendant from engaging in the unlawful conduct set forth herein;
- D. Issuing a permanent injunction requiring Evenflo to (i) recall all Big Kid Booster seats still in use; (ii) cease selling Big Kid Booster seats as currently designed or stop labeling, marketing, and advertising them as safe for children less than 40 pounds or otherwise engaging in the deceptive misrepresentations and omissions alleged herein; and (iii) add labeling to all future Big Kid model booster seats warning consumers of the dangers associated with their use;
- E. Issuing an injunction ordering Evenflo to engage an independent person, group, or organization to conduct an internal assessment to (1) identify the root causes of the decisions that led Evenflo to knowingly disregard and conceal the results of its internal testing, to provide different disclosures and warnings to U.S. and Canadian consumers, and to fail to disclose the risks associated with the Big Kid Booster; (2) identify corrective actions and institutional culture changes to address those root causes; and (3) help Evenflo implement and track those corrective actions to ensure these failures do not happen again;

- F. Ordering Evenflo to disgorge any and all ill-gotten gains derived from its unlawful conduct;
- G. Ordering Evenflo to pay compensatory damages and/or actual damages and/or consequential or incidental damages and/or exemplary damages and/or restitution and/or statutory damages, as provided by applicable law, to Plaintiffs and the other Members of the Classes, multiplied as appropriate pursuant to applicable law;
- H. Ordering Evenflo to pay punitive damages, as allowable by law, to Plaintiffs and other Members of the Classes;
- I. Ordering Evenflo to pay both pre- and post-judgment interest, as allowable by law, on any amounts awarded;
- J. Ordering Evenflo to pay reasonable attorneys' fees and litigation costs to Plaintiffs and other Members of the Classes; and
- K. Ordering such other and further relief as may be just and proper.

DEMAND FOR JURY TRIAL

Plaintiffs demand a trial by jury, pursuant to Rule 38(b) of the Federal Rules of Civil Procedure, of all issues in this Complaint so triable. Plaintiffs also respectfully request leave to amend this Complaint to conform to the evidence, if such amendment is needed for trial.

Dated: February 21, 2020

Respectfully submitted,

/s/ Kimberly A. Dougherty
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