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Ottawa

**ONTARIO
SUPERIOR COURT OF JUSTICE**

C. BENNETT

Plaintiff

- and -

EVENFLO COMPANY, INC. AND GOODBABY CANADA INC.

Defendants

Proceeding under the *Class Proceedings Act, 1992*

STATEMENT OF CLAIM

TO THE DEFENDANTS

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the plaintiff's lawyer or, where the plaintiff does not have a lawyer, serve it on the plaintiff, and file it, with proof of service, in this court office, **WITHIN TWENTY DAYS** after this statement of claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your statement of defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

TAKE NOTICE: THIS ACTION WILL AUTOMATICALLY BE DISMISSED if it has not been set down for trial or terminated by any means within five years after the action was commenced unless otherwise ordered by the court.

Date: June 5, 2020

Issued by

(S) Signature

Local Registrar

Address of
court office:

161 Elgin Street
2nd Floor
Ottawa, ON K2P 2K1

TO: Evenflo Company, Inc.
225 Byers Road
Miamisburg, Ohio
45342, U.S.A.

Tel: (937) 415-3300
Fax: (937) 415-3112

AND TO: Goodbaby Canada Inc.
181 Bay Street, Suite 4400
BCE Place, Bay Wellington Tower
Toronto, Ontario, M5J 2T3

Tel: (905) 361-9808

DEFINED TERMS

1. In this Statement of Claim, in addition to the terms that are defined elsewhere herein, the following terms have the following meanings:

- (a) “**Booster Seat**” means a removable device designed to be used in a vehicle for seating a person whose mass is at least 18 kg, to ensure that the seat belt assembly fits properly (as defined at s. 100 (1) of the *Motor Vehicle Restraint Systems and Booster Seats Safety Regulations*;
- (b) “**Evenflo Big Kid Booster Seat(s)**” or “**Big Kid Booster Seat(s)**” means the Evenflo-branded **Booster Seat** that was designed, researched and developed, tested, manufactured, imported/exported, distributed, supplied, marketed, advertised, promoted, packaged, labelled, and/or sold by the **Defendants**;
- (c) “**Class**” or “**Class Members**” means all persons residing in Canada, excluding Quebec, who have purchased an **Evenflo Big Kid Booster Seat**;
- (d) “*Class Proceedings Act*” means the *Class Proceedings Act, 1992*, SO 1992, c 6, as amended;
- (e) “*Sale of Goods Act*” means the *Sale of Goods Act*, RSO 1990, c S.1, as amended, including ss. 15 & 51;
- (f) “**Sale of Goods Legislation**” means:
 - (i) The *Sale of Goods Act*, RSBC 1996, c 410, as amended (British Columbia);

- (ii) The *Sale of Goods Act*, RSA 2000, c S-2, as amended (Alberta);
 - (iii) The *Sale of Goods Act*, RSS 1978, c S-1, as amended (Saskatchewan);
 - (iv) The *Sale of Goods Act*, CCSM c S10, as amended (Manitoba);
 - (v) The *Sale of Goods Act*, RSNL 1990, c S-6, as amended (Newfoundland);
 - (vi) The *Sale of Goods Act*, RSNB 2016, c 110, as amended (New Brunswick);
 - (vii) The *Sale of Goods Act*, RSNS 1989, c 408, as amended (Nova Scotia);
 - (viii) The *Sale of Goods Act*, RSPEI I 988, c S-1, as amended (Prince Edward Island);
 - (ix) The *Sale of Goods Act*, RSY 2002, c 198, as amended (Yukon);
 - (x) The *Sale of Goods Act*, RSNWT 1988, c S-2, as amended (Northwest Territories and Nunavut);
- (g) “**Consumer Protection Act**” means the *Consumer Protection Act, 2002*, SO 2002, c. 30, Sched. A, as amended, including ss. 8, 11, 14 & 15;
- (h) “**Consumer Protection Legislation**” means:
- (i) The *Business Practices and Consumer Protection Act*, SBC 2004, c.2, as amended, including ss. 4, 5 & 8-10 (British Columbia);
 - (ii) The *Consumer Protection Act*, RSA 2000, c C-26.3, as amended, including ss. 5-9 & 13 (Alberta);
 - (iii) The *Consumer Protection and Business Practices Act*, SS 2014, c. C-30.2, as amended, including ss. 5-9, 16, 18-23, 26, & 36 (Saskatchewan);
 - (iv) The *Business Practices Act*, CCSM, c B120, as amended, including ss. 2-9 & 23 (Manitoba);

- (v) The *Consumer Protection and Business Practices Act*, SNL 2009, c C-31.1, as amended, including ss. 7-10, and the *Trade Practices Act*, RSNL 1990, c T-7, as amended, including ss. 5-7 & 14 (Newfoundland and Labrador);
 - (vi) The *Consumer Product Warranty and Liability Act*, SNB 1978, c 18.1 at ss. 4, 13, 15, & 23 (New Brunswick);
 - (vii) The *Consumer Protection Act*, RSNS 1989, c 92, including ss. 26-29 (Nova Scotia);
 - (viii) The *Business Practices Act*, RSPEI 1988, c B-7, as amended, including ss. 2-4 (Prince Edward Island);
 - (ix) The *Consumers Protection Act*, RSY 2002, c 40, as amended, including ss. 58 & 86 (Yukon);
 - (x) The *Consumer Protection Act*, RSNWT 1988, c C-17, as amended, including ss. 70 & 71 (Northwest Territories); and
 - (xi) The *Consumer Protection Act*, RSNWT (Nu) 1988, c C-17, as amended, including ss. 70 & 71 (Nunavut);
- (i) “**Motor Vehicle Safety Act**” means the *Motor Vehicle Safety Act*, SC 1993, c 16, as amended;
- (j) “**Motor Vehicle Safety Regulations**” means the *Motor Vehicle Safety Regulations*, C.R.C., c. 1038, as amended;
- (k) “**Motor Vehicle Restraint Systems and Booster Seats Safety Regulations**” means the *Motor Vehicle Restraint Systems and Booster Seats Safety Regulations*, SOR/2010-90, as amended, including Part 4;

- (l) “**Highway Traffic Act**” means the *Highway Traffic Act*, R.S.O. 1990, c. H.8, as amended;
- (m) “**Seat Belt Assemblies Regulation**” means *Seat Belt Assemblies*, RRO 1990, Reg 613 under the *Highway Traffic Act*;
- (n) “**Canadian Seat Belt Regulations**” means:
- (i) The *Motor Vehicle Act Regulations*, BC Reg 26/58, as amended, including Division 36 (British Columbia);
 - (ii) The *Vehicle Equipment Regulation*, Alta Reg 122/2009, as amended, including Part 5 (Alberta);
 - (iii) *The Vehicle Equipment Regulations*, 1987, RRS c V-2.1 Reg 10, as amended, including ss. 60-63.1 & 248 (Saskatchewan);
 - (iv) *The Highway Traffic Act*, CCSM c H60, as amended (Manitoba);
 - (v) The *Seat Belt Regulation*, NB Reg 83-163, as amended (New Brunswick);
 - (vi) The *Seat Belt and Child Restraint System Regulations*, N.S. Reg. 366/2008, as amended (Nova Scotia);
 - (vii) The *Highway Traffic Act*, RSPEI 1988, c H-5, as amended, including Part V, s. 92 (Prince Edward Island);
 - (viii) The *Highway Traffic Act*, RSNL 1990 Chapter H-3, as amended, including ss.178 & 178.1 (Newfoundland and Labrador);
 - (ix) The *Seat Belt Assembly and Child Restraint System Regulations*, RRNWT (Nu) 1990 c M-35, as amended (Nunavut);

- (x) The *Seat Belt Assembly and Child Restraint System Regulations*, RRNWT 1990 c M-35, as amended (Northwest Territories);
- (xi) The *Motor Vehicles Act*, SY 2019, c.6, as amended, including s. 194 and Part VII, ss. 86-88 (Yukon);
- (o) “**Test Method 213.2**” means Test Method 213.2 — Booster Seats (May 2012), published by Transport Canada;
- (p) “**Competition Act**” means the *Competition Act*, RSC 1985, c C-34, as amended, including ss. 36 & 52;
- (q) “**Negligence Act**” means the *Negligence Act*, R.S.O. 1990, c. N-1, as amended;
- (r) “**Courts of Justice Act**” means the *Courts of Justice Act*, RSO 1990, c C.43, as amended, including ss. 128, 129, & 130;
- (s) “**Canada Consumer Product Safety Act**” means the *Canada Consumer Product Safety Act*, SC 2010, c 21, as amended, including ss. 6-11, 14, & 41;
- (t) “**Restraint Systems and Booster Seats for Motor Vehicles Regulations**” means the *Restraint Systems and Booster Seats for Motor Vehicles Regulations*, SOR/2016-191, as amended, including s. 1;
- (u) “**Consumer Packaging and Labelling Act**” means the *Consumer Packaging and Labelling Act*, R.S.C. 1985, c C-38, as amended, including ss. 7, 9 & 20;

(v) “**Defendants**” or “**Evenflo**” means Evenflo Company, Inc. and Goodbaby Canada Inc.;
and

(w) “**Plaintiff**” means C. Bennett; and

(x) “**Representation(s)**” or “**Safety Misrepresentations**” means the **Defendants’** false, misleading or deceptive representations that their **Big Kid Booster Seats** were rigorously “side impact tested” at 2X the Federal Crash Test Standard and safe for children as small as 40 pounds, when these “tests” were self-created, virtually impossible to fail, and entirely unrelated to the actual forces involved in side-impact collisions;

THE CLAIM

2. The proposed Representative Plaintiff, C. Bennett, claims on her own behalf and on behalf of the members of the Class of persons as defined in paragraph 5 below (the “Class”) as against Evenflo Company, Inc. and Goodbaby Canada Inc. (the “Defendants”):

(a) An order pursuant to the *Class Proceedings Act* certifying this action as a class proceeding and appointing the Plaintiff as Representative Plaintiff for the Class Members;

(b) A declaration that in marketing, advertising, promoting, packaging, labelling, selling, and/or representing the Evenflo Big Kid Booster Seats as rigorously “side impact tested” at 2X the Federal Crash Test Standard and safe for children as small as 40 pounds, in failing to disclose the risks associated with using the Big Kid

Booster Seats, and/or in not performing scientifically-appropriate testing on the Evenflo Big Kid Booster Seats, the Defendants committed the following:

- (i) Fraudulent or negligent misrepresentation;
 - (ii) Fraudulent concealment;
 - (iii) Negligence;
 - (iv) Breach of express contractual warranty;
 - (v) Breach of implied warranties;
 - (vi) Breach of the implied covenant of good faith and fair dealing;
 - (vii) Unfair practices in violation of the *Sale of Goods Act* and the parallel provisions of the Sale of Goods Legislation, the *Consumer Protection Act* and the parallel provisions of the Consumer Protection Legislation as well as the *Competition Act*;
 - (viii) Breach of the *Canada Consumer Product Safety Act*;
 - (ix) Breach of the *Consumer Packaging and Labelling Act*;
- (c) A declaration that this Statement of Claim is considered as notice given by the Plaintiff on her own behalf and on behalf of “person similarly situated” and is sufficient to give notice to the Defendants on behalf of all Class Members;
- (d) In the alternative, a declaration, if necessary, that it is in the interests of justice to waive the notice requirement under Part III and s. 101 of the *Consumer Protection Act* and the parallel provisions of the Consumer Protection Legislation;

- (e) General damages in an amount to be determined in the aggregate for the Class Members;
- (f) Special damages in an amount that this Honourable Court deems appropriate to compensate Class Members for, *inter alia*, the purchase price of the Evenflo Big Kid Booster Seats or, in the alternate, the cost of its replacement;
- (g) Punitive (exemplary) and aggravated damages in the aggregate in an amount that this Honourable Court deems appropriate;
- (h) An order that Class Members are entitled to a refund of the purchase price of their Evenflo Big Kid Booster Seats, including, but not limited to sales taxes, based *inter alia* on revocation of acceptance and rescission;
- (i) In the alternative, an order for an accounting of revenues received by the Defendants resulting from the sale of the Evenflo Big Kid Booster Seats;
- (j) A declaration that any funds received by the Defendants through the sale of their Evenflo Big Kid Booster Seats are held in trust for the benefit of the Plaintiff and Class Members;
- (k) Restitution and/or a refund of all monies paid to or received by the Defendants from the sale of their Evenflo Big Kid Booster Seats to members of the Class on the basis of unjust enrichment;

- (l) In addition, or in the alternative, restitution and/or a refund of all monies paid to or received by the Defendants from the sale of their Evenflo Big Kid Booster Seat to members of the Class on the basis of *quantum valebant*;
- (m) An interim interlocutory and permanent order restraining the Defendants from continuing to sell the Evenflo Big Kid Booster Seat until the false, misleading, and deceptive representations are removed from their packaging and labelling and from any other form of misleading marketing, advertisement, or promotion, including on the Defendants' websites;
- (n) An order requiring the Defendants to engage in a corrective marketing campaign and to engage in any further necessary affirmative injunctive relief, such as recalling existing products;
- (o) An order directing a reference or such other directions as may be necessary to determine issues not determined at the trial of the common issues;
- (p) An order compelling the creation of a plan of distribution pursuant to ss. 23, 24, 25 and 26 of the *Class Proceedings Act*;
- (q) Pre-judgment and post-judgment interest on the foregoing sums in the amount of 2% per month, compounded monthly, or alternatively, pursuant to ss. 128, 129, and 130 of the *Courts of Justice Act*;
- (r) Costs of notice and administration of the plan of distribution of recovery in this action plus applicable taxes pursuant to s. 26 (9) of the *Class Proceedings Act*;

- (s) Costs of this action on a substantial indemnity basis including any and all applicable taxes payable thereon; and
- (t) Such further and other relief as counsel may advise and/or this Honourable Court may deem just and appropriate in the circumstances.

THE PARTIES

The Representative Plaintiff

3. The Plaintiff, C. Bennett, is an individual residing in the city of Coldwater, in the province of Ontario.

4. On November 16, 2018, the Plaintiff purchased 2 Evenflo Big Kid Amp High Back Belt-Positioning Booster Car Seats in static black from the Toys “R” Us website for \$49.97 each plus sales taxes, for a total cost of \$104.94.

The Class

5. The Plaintiff seeks to represent the following class of which she is a member (the “Proposed Class”):

All persons, entities or organizations resident in Canada, excluding Quebec, who have purchased an Evenflo “Big Kid” booster seat.

The Defendants

6. Defendant Evenflo Company, Inc. is an American corporation headquartered in Miamisburg, Ohio. It is a wholly-owned subsidiary of China-based Goodbaby International Holdings Limited that designed, researched and developed, tested, manufactured,

imported/exported, distributed, supplied, marketed, advertised, promoted, packaged, labelled, and/or sold car seats and other baby and child-related products. It conducts business throughout Canada, including within the province of Ontario.

7. Evenflo Company, Inc. is the current owner and registrant of the Canadian trade-mark “EVENFLO” (TMA363284), which was filed on May 19, 1988 and registered on November 10, 1989.

8. Defendant Goodbaby Canada Inc. (“Goodbaby”) is a Canadian corporation headquartered in Toronto, Ontario, which, prior to January 23, 2018, was known as Evenflo Canada Inc. It is a wholly-owned subsidiary of Goodbaby International Holdings Limited that designs, researches and develops, tests, manufactures, distributes, markets, advertises, promotes, packages, labels, and sells car seats and other baby and child-related products. Its corporate directors include John Ball, located in the Goodbaby Toronto office and Michael Qu, located in the Evenflo Company, Inc. office in Miamisburg, Ohio. It conducts business throughout Canada, including within the province of Ontario.

9. Defendant Goodbaby is registered with Transport Canada to affix the National Safety Mark (NSM) onto the Evenflo Big Kid booster seats (J80) under s. 213.2 of the *Motor Vehicle Restraint Systems and Booster Seats Safety Regulations*, which establishes the Canadian Motor Vehicle Safety Standard (CMVSS) for booster seats.

10. Defendants are and have been at all relevant times, either directly or indirectly, engaged in the business of designing, researching and developing, testing, manufacturing, importing/exporting, distributing, supplying, marketing, advertising, promoting, packaging,

labelling, and/or selling the Evenflo Big Kid Booster Seats that are the subject of the present Statement of Claim, throughout Canada.

11. Given the close ties between the Defendants and considering the preceding, they are jointly and severally liable for the acts and omissions of each other.

12. Unless the situation indicates otherwise, both Defendants will be referred to as “Evenflo” throughout this proceeding.

NATURE OF THE CLAIM

13. These class proceedings concern booster seats that were falsely marketed, advertised, promoted, packaged, labelled, sold, and/or represented by the Defendants to be rigorously “side impact tested” at 2X the “Federal Crash Test Standard” and safe for children as small as 40 pounds, when these “tests” were self-created, virtually impossible to fail, and entirely unrelated to the actual forces involved in side-impact collisions (the “Safety Misrepresentations”).

14. A booster seat is a child safety car seat designed specifically to protect children from injury or death during vehicle collisions by raising the child to ensure that the seatbelt can be correctly adjusted so that it crosses over the middle of the shoulder (collarbone) and over the hips (pelvis).

15. In Canada, under the *Motor Vehicle Restraint Systems and Booster Seats Safety Regulations* (s. 100 (1)), a child must weigh at least 18 kgs (40 pounds) before they can be placed into a booster seat.

16. The Defendants’ Evenflo Big Kid Booster Seat was falsely and prominently marketed, advertised, promoted, packaged, labelled, sold, and/or represented as “side impact tested” and safe

for children as small as 40 pounds; however, the Defendants' so-called "tests" were self-created and entirely unrelated to the actual forces involved in side-impact collisions.

17. Contrary to the Defendants' representations, legitimate science and appropriate testing reveals that the Big Kid Booster Seats provide dubious benefit to children involved in side-impact collisions.

I. Side-Impact Collisions

18. Side-impact collisions are vehicle crashes where the side of one or more vehicles is impacted. These crashes often occur at intersections, in parking lots, and when two vehicles pass on a multi-lane roadway.

19. In 2017, there were 1,841 motor vehicle fatalities in Canada and 9,960 serious injuries, of these statistics, 32 vehicle fatalities and 131 serious injuries were of children 4 and under, and 43 vehicle fatalities and 303 serious injuries were of children aged 5 to 14 years old. The total number of injuries for all ages was 154,886 and, from this, 2,744 were of the age group 0-4, and 6,514 were between 5 and 14.

20. Side-impact collisions are a serious automotive injury problem and have been shown to have higher rates of death and serious injury. An occupant on the struck side of a vehicle may sustain far more severe injuries than an otherwise similar front or rear collision crash.

21. Side-impact collisions pose a great risk to children and injury patterns vary across the pediatric age range. In a study conducted by the TraumaLink and the Department of Pediatrics of the Children's Hospital of Philadelphia whereby 93 children in 55 side-impact crashes were

studied, 23% of them had received a clinically-significant injury and, of these, head (39%), extremity (22%), and abdominal injuries (17%) were the most common. The cases revealed that serious injuries occur even in minor crashes.

22. Though less common than head-on crashes, side-impact collisions are more likely to result in serious harm, including traumatic brain injuries, spinal injuries, and atlanto-occipital dislocation (“AOD”), which occurs when the ligaments attached to the spine are severed. According to a 2015 study, AOD (sometimes referred to as “internal decapitation”) is “3 times more common in children than in adults” because, compared to adults, children have proportionally larger heads and laxer ligaments”.

II. Child Restraints

23. Although models may vary, there are three established styles, or stages, of car seats or child restraints for kids: rear-facing, forward-facing, and booster:

- (i) Stage 1: A rear-facing seat in which the child is placed with its back to the driver – this is considered the safest position for young kids and it’s legally required across Canada for all children from birth until reaching a weight of at least 20 pounds, with most jurisdictions having even more stringent requirements,
- (ii) Stage 2: A forward-facing seat orients the child in the same direction as the rest of the passengers. This type, as with a Stage 1 seat, is equipped with its own five-point harness,
- (iii) Stage 3: A booster seat, which is used in conjunction with the vehicle’s built-in seat belt. The purpose of the booster is to ensure that the seat belt follows the correct path

— the shoulder strap needs to sit squarely on the child’s shoulder, not climbing up onto the neck, and the lap belt should fall low across the hips, not higher onto the torso.

24. These thresholds are important because, according to scientific consensus, booster seats (stage 3) do not adequately protect toddlers. To deliver its full safety benefit in a crash, an adult seat belt must remain on the strong parts of a child’s body, i.e. across the middle of the shoulder and the upper thighs. Even if young children are tall enough for a belt to reach their shoulders, they rarely sit upright for long and often wriggle out of position.

25. By contrast, a tightly adjusted five-point harness (stage 2) secures a child’s shoulders and hips, and goes between the legs. Harnesses secure children’s bodies so that they are less likely to be ejected, and they disperse crash forces over a wider area. This difference is illustrated by the following video stills, which are taken from comparison tests of the Evenflo “SecureKid,” a seat that can accommodate a child up to 65 pounds with an internal harness, and the Evenflo Big Kid:



26. As can be seen above, in the test of the SecureKid, the dummy's head and torso remained entirely within the seat's confines. By contrast, in the test of the Big Kid, the seat belt slipped off the dummy's shoulder, and the dummy's head and torso flailed far outside the seat.

27. Although this latter test "passed" Evenflo's side-impact testing, as will be discussed in more detail hereinbelow, Evenflo's director of manufacturing engineering has previously admitted that it placed the dummy's neck in severe extension, and thus more at risk for injurious head contact.

28. As compared with seat belts, child restraints, when not misused, are associated with a 28% reduction in risk of death adjusting for seating position, vehicle type, model year, driver and passenger ages, and driver survival status.

III. Canadian Laws and Regulations concerning Booster Seats and Testing Procedures

29. In Canada, car seat regulations vary for each of the provinces and territories.

30. Ontario's *Highway Traffic Act* requires children weighing 18 kg to 36 kg (40 to 80 lbs), standing less than 145 cm (4 ft. 9 in.) tall and who are under the age of 8 to use a booster seat or allows the continued use of a forward-facing seat as long as the car seat manufacturer recommends its use. Section 8 of the *Seat Belt Assemblies Regulation* provides as follows:

8. (1) Passengers under eight years old are classified as follows for the purposes of this section:

...

3. Children weighing 18 kilograms or more but less than 36 kilograms and who are less than 145 centimetres tall are classified as pre-school to primary grade children. O. Reg. 195/05, s. 1.

...

(4) The driver of a motor vehicle on a highway is required to ensure that a pre-school to primary grade child passenger is secured as set out in subsection (7) or (7.1) and subsection (8). O. Reg. 195/05, s. 1; O. Reg. 236/09, s. 2 (3).

...

(7) A pre-school to primary grade child shall be secured,

(a) if there is a seating position in the motor vehicle that has a seat belt assembly consisting of a pelvic restraint and a torso restraint, in that position,

(i) on a child booster seat that is used in the manner recommended by its manufacturer and that conforms to,

(A) Standard 213.2 (Booster Cushions) made under the *Motor Vehicle Safety Act* (Canada),

...

(ii) by the motor vehicle's complete seat belt assembly, worn as described in subsection (9);

31. Most of the other Canadian provinces and territories provide similar legislation – the Canadian Seat Belt Regulations – although most other province provide that a child must remain in a booster seat until they reach the same age and height restrictions or be 9 years old (Alberta, the Northwest Territories, and Nunavut do not regulate the use of booster seats).

32. While the laws do vary from province to province, they do share a singular purpose: to prevent injury by ensuring that children are properly, and safely, restrained.

33. Federally, a child may not be placed into a booster seat until s/he is at least 18 kgs (40 pounds).

34. With regard to the safety testing of booster seats, the Canadian *Motor Vehicle Restraint Systems and Booster Seats Safety Regulations* provides the following Canadian Motor Vehicle Safety Standard (CMVSS) as follows:

Prescribed Standards

103 ...

CVMSS 213.2

(3) Every booster seat must conform to the applicable standards set out in Part 4, CMVSS 213.2 — Booster Seats.

...

PART 4

CMVSS 213.2 — Booster Seats

General

Interpretation

400 In this Part, *Test Method 213.2* means *Test Method 213.2 — Booster Seats* (May 2012), published by the Department of Transport.

...

Testing

Dynamic testing

407 A booster seat that is subjected to a dynamic test in accordance with section 3 of Test Method 213.2 must, when in any adjustment position,

(a) exhibit no complete separation of any load-bearing structural element, and no partial separation exposing a surface with

(i) a protrusion of more than 9.5 mm, or

(ii) a radius of less than 6.4 mm;

(b) remain in the same adjustment position during the test as it was in immediately before the test began, except a component of the booster seat used to ensure that the vehicle seat belt is adjusted as recommended by the manufacturer;

(c) except in the case of a booster seat tested with the anthropomorphic test device specified in subpart S, part 572, chapter V, title 49 of the Code of Federal Regulations of the United States (revised as of October 1, 2012), limit the resultant acceleration at the location of the accelerometer mounted in the upper thorax of the anthropomorphic test device to not more than 60 g, except for intervals of not more than 3 ms;

(d) except in the case of a booster seat tested with the anthropomorphic test device specified in subpart S, part 572, chapter V, title 49 of the Code of Federal Regulations of the United States (revised as of October 1, 2012), limit the resultant acceleration of the centre of gravity of the head of the anthropomorphic test device during the movement of the head towards the front of the vehicle to not more than 80 g, except for intervals of not more than 3 ms, unless it is established that any resultant acceleration above 80 g is caused by another part of the anthropomorphic test device striking its head;

(e) except in the case of a booster seat tested with the anthropomorphic test device specified in subpart S, part 572, chapter V, title 49 of the Code of Federal Regulations of the United States (revised as of October 1, 2012), not allow any portion of the head of the anthropomorphic test device to pass through the vertical transverse plane — shown as the forward excursion limit in Figures 5 and 6 of Schedule 7 — that is 813 mm forward of the Z point on the standard seat assembly, measured along the SORL; and

(f) except in the case of a booster seat tested with the anthropomorphic test device specified in subpart S, part 572, chapter V, title 49 of the Code of Federal Regulations of the United States (revised as of October 1, 2012), not allow either knee pivot point to pass through the vertical transverse plane — shown as the forward excursion limit in Figures 5 and 6 of Schedule 7 — that is 915 mm forward of the Z point on the standard seat assembly, measured along the SORL.

35. The anthropomorphic test devices referred to above, commonly referred to as dummies, are mechanical surrogates of the human that are used by the automotive industry to evaluate the occupant protection potential of various types of restraint systems in simulated collisions of new vehicle designs.

36. Test Method 213.2 – Booster Seats referenced in Part 4 of the *Motor Vehicle Restraint Systems and Booster Seats Safety Regulations*, which were issued by Transport Canada on January 1, 2010 and revised in May 2012, provide *inter alia* the following federal standards for the testing of booster seats and the dummies for a frontal impact (Canadian Motor Vehicle Safety Standard 213.2 (CMVSS 213.2)):

- That the seat assembly must be mounted on a dynamic test platform that has an accelerometer that is linked to a data processing system;
- That for the dynamic testing, the mass and height range of the anthropomorphic test device (dummy) must match that of the persons for whom the manufacturer recommends the booster seat (under s. 409(1)(e) of the *Motor Vehicle Restraint Systems and Booster Seats Safety Regulations*, SOR/2010-90;
- Regulations on the dummy's clothing in terms of temperature for washing and drying, that it be light-weight cotton, size 12½ sneakers with rubber toe caps, uppers of Dacron and cotton, or nylon and a total mass of 0.453 kg;
- That in terms of testing for a frontal barrier impact, the change in velocity must be 48 km/hr, that the temperature must be between 20.6°C and 22.2°C with humidity of at 10% and not more than 70%;
- Regulations regarding the placement of the booster seat and the dummy;

37. Unfortunately, Test Method 213.2 only references testing for frontal barrier impact and not side-impact collisions, although it is quite clear that certain of these standards would apply to testing any type of collision, including side-impact.

38. There are no federal regulations for booster seats in side-impact crashes. So Evenflo made up its own test and then passed itself.

39. As a result of this absence, parents and guardians are left to rely on the claims of car seat manufacturers regarding side-impact crashworthiness who are in competition with each other for

sales and market share. Among the major players in the child safety seat industry is Evenflo, who designs, researches and develops, tests, manufactures, imports/exports, distributes, supplies, markets, advertises, promotes, packages, labels, and sells a range of juvenile products including car seats, strollers, high chairs, and infant carriers.

IV. The Evenflo Big Kid Booster Seat

40. Evenflo launched its Big Kid booster seat in the early 2000s, with the goal of “regaining control in the market” for booster seats from its main competitor, Graco, which had recently released a popular model called the “TurboBooster”.

41. At the time of the Big Kid Booster Seat’s development, Evenflo’s team proposed creating a booster seat with similar features to Graco’s TurboBooster, but priced to sell for about \$10 less. Evenflo sought to develop a product that would sell briskly at large retailers (e.g., Walmart, Canadian Tire, Costco, Babies “R” Us/ Toys “R” Us, Amazon). Evenflo succeeded and within a few years, an internal design review deemed the Big Kid “the reliable workhorse in the Evenflo platform stable”.

42. Despite the Big Kid Booster Seat’s success, by 2008, Graco was still outselling Evenflo. The marketing department wanted to make the Big Kid look more like the TurboBooster on the shelves of big box retailers. The company felt the Big Kid’s “on-shelf perception” was poor compared with the TurboBooster because Graco’s seat looked like it had more side support.

43. To make its seat look more like Graco’s, Evenflo added side wings – curved extensions that protrude from the backrest of the Big Kid booster seat (pictured below). One Evenflo

document describing the strategy behind the product launch said the consumer benefits of these new side wings included “increased perceived side protection”:

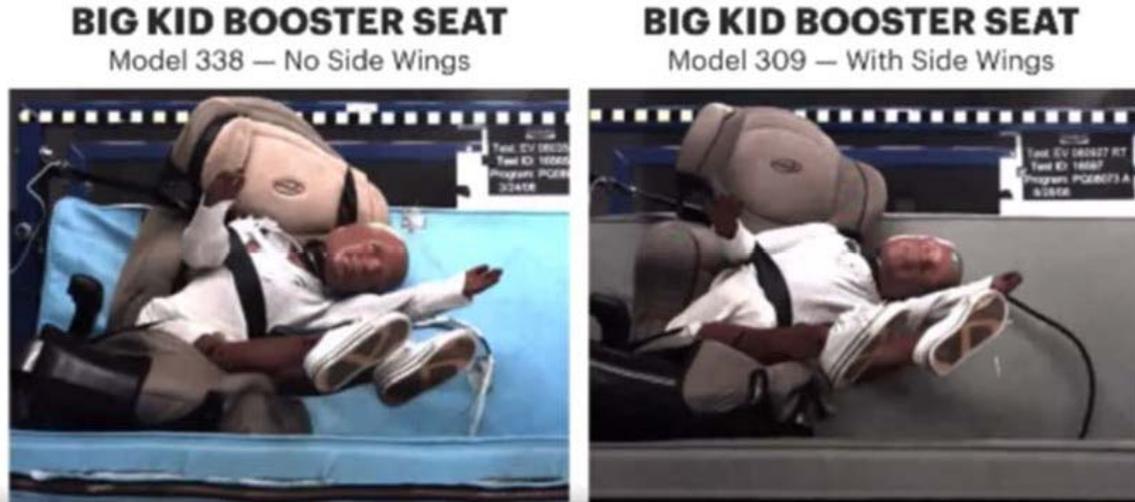


Big Kid



TurboBooster

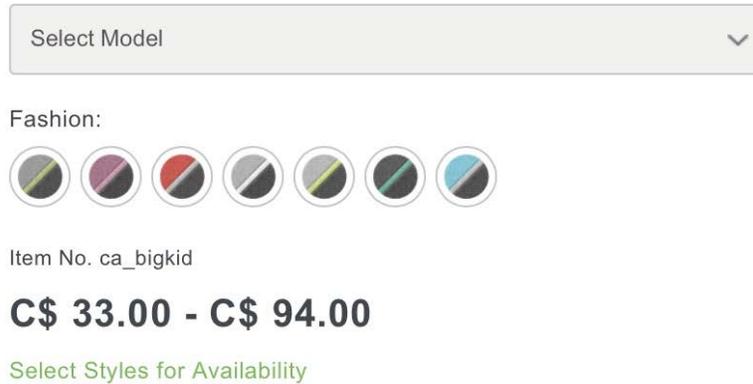
44. Consistent with these side wings having no material benefit other than consumer perception and increased profits for the Defendants, Evenflo’s own side-impact testing showed no difference in safety between the two models:



45. Evenflo offers the Big Kid booster seat in 7 different colour combinations and in 5 different models; Sport, Amp 2-in-1, DLX 2-in-1, LX 2-in-1, and 2-in-1 at a price point of between \$33.00 and \$94.00 as pictured below:

[Car Seats](#) / [Booster](#) / Big Kid Booster Car Seat





46. At Canadian Tire, the Big Kid booster seat is sold for \$79.99, at Best Buy for \$74.99, at Walmart for \$74.97, and at Babies “R” Us for \$63.67.

V. Evenflo’s development of a supposed “test” to bolster its marketing and sales

47. As part of its quest to gain an upper hand on Graco and to enhance the perceived safety of the Big Kid Booster Seat, Evenflo also began to “test” the side-impact crashworthiness of its new Big Kid booster seat prior to its 2008 release – absent a federal standard, Evenflo made up its own rules.

48. Evenflo developed its own test, then used supposed passing of that test as a means by which to distinguish its new product from the competition in the minds of consumers.

49. Evenflo has represented publicly that its side-impact testing is “rigorous” and analogous to “government” tests. For example, according to a blog post authored by Sarah Haverstick, a “Safety Advocate” and “Child Passenger Safety Technician” at Evenflo, “the engineers at Evenflo have designed the Evenflo Side Impact Test protocol” as a “rigorous test [that] simulates the government side impact tests conducted for automobiles:

Side Impact Testing

Currently, there is no federal standard for side impact testing of car seats and booster seats. However, the engineers at Evenflo have designed the Evenflo Side Impact Test protocol. This rigorous test simulates the government side impact tests conducted for automobiles.

50. This claim is misleading at best. Evenflo’s side-impact test is performed by placing a product on a bench (resembling a car seat), moving that bench at 32 kms per hour (20 miles per hour), then suddenly decelerating it – by contrast the actual federal regulations in Canada for testing frontal barrier impact require a velocity of 48 km per hour under Test Method 213.2.

51. This difference is not explained in Evenflo’s marketing materials, nor is it explained on Evenflo’s website. To the contrary, a section of Evenflo Company, Inc.’s website entitled “Safety Technology” states the following:

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.

Some of those technologies include:

...

Side Impact Tested: Meets or exceeds all applicable federal safety standards and Evenflo's Side impact standards.

52. The same webpage includes the following descriptions of Evenflo's side-impact testing:

Evenflo 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.

Why is it important to car seat safety?

Approximately one out of four vehicle crashes have a side impact component. According to the National Highway Traffic Safety Administration (NHTSA), impacts to the side of the vehicle rank almost equal to frontal crashes as a source of fatalities and serious injuries to children ages 0 to 12.

How are car seats tested now?

Federal car seat safety standards require a frontal impact test with a 30 mph velocity change. This approximates the crash forces generated in a collision between a vehicle traveling 60 mph and a parked car of similar mass, or the energy produced in a fall from a three story building. There are currently no provisions in the U.S. and Canadian standards for side impact testing. NHTSA is in the process of developing a child side impact test standard.

What is the Evenflo Side Impact Testing?

At Evenflo, car seat safety is a top priority. That's why we have created the Evenflo Side Impact test protocol. The Evenflo Side Impact test protocol was developed by Evenflo engineers using state-of-the-art facilities. The rigorous test simulates the energy in the severe 5-star government side impact tests conducted for automobiles.

All Evenflo car seats meet or exceed all applicable federal safety standards and Evenflo's side impact standards.

For car seat safety that you can depend on, trust Evenflo. Shop our collection of side impact tested car seats today.

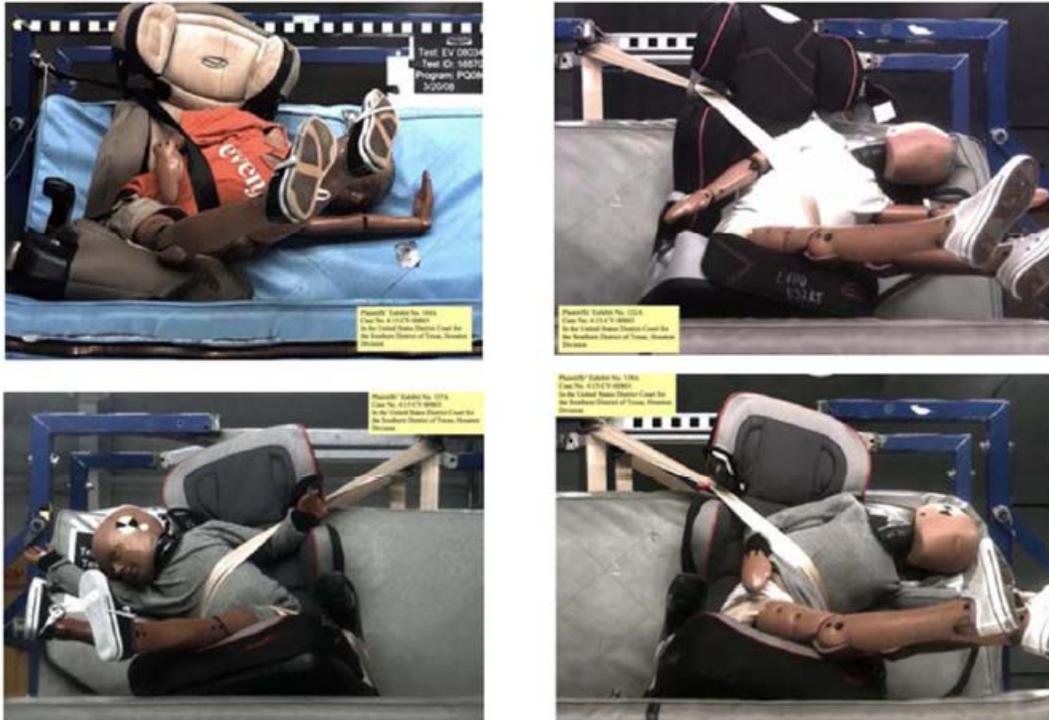
53. Not only is Evenflo's side-impact test less rigorous than the federal government testing protocol for front crashes. It is, for all intents and purposes, impossible to fail and therefore, completely and utterly meaningless.

54. Records of Evenflo's internal side-impact tests of various models indicate that, following each test, an Evenflo technician answers whether the test showed "dummy retention", meaning, did it stay in the seat or fall on the floor, which is indicated by checking either "yes" or "no" on a form, then sends the report to an engineer who decides whether the Big Kid model passes or fails.

55. In other words, there are only two ways to fail Evenflo's "rigorous" side-impact test: (1) if a child-sized dummy escapes its restraint entirely, and thus ends up on the floor; or (2) the booster seat itself breaks into pieces. The following video still is from a side-impact test "passed" by Evenflo's Big Kid Booster Seat:



56. The same technician has stated that, in 13 years, he did not once perform a "failed" side-impact test on a booster seat. He also testified that the following images—all of which are from "passed" Evenflo side-impact tests, and use a dummy based on a three-year-old child would have been ticked as "yes":



57. The above images show the seat belt slipping off the dummy's shoulders and instead tightening around its abdomen and ribs. This kind of violent movement at high speed can cause serious damage to a child's internal organs, head, neck and spine, including paralysis and even death.

58. Evenflo was aware of these risks. A safety engineer at Evenflo has admitted under oath that, when real children move in this way, they could suffer catastrophic head, neck and spinal injuries — or die.

59. In other words, the same proprietary side-impact tests deemed successful by Evenflo's engineers plainly demonstrate that Big Kid Booster Seats place many children at risk of serious injury or death.

VI. Evenflo's Representations Regarding its Big Kid Booster Seat

60. In 2008, Evenflo began intentionally misrepresenting the safety of its products to consumers and retailers in order to drive up sales. Evenflo prominently markets the Big Kid booster seat (one of its most popular products) as “side impact tested” and, as safe for children as light as 40 pounds. But these claims are false: Evenflo’s own testing demonstrates that the Big Kid booster seat leaves children vulnerable to serious head, neck, and spine injuries in a side-impact crash.

61. On its website, Evenflo Company, Inc. represents the following:

Perfect for your growing child, this seat belt booster combines the peace of mind parents require, with colorful options your child will love.

...

Safety Testing

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.

- Side Impact Tested: Meets or exceeds all applicable federal safety standards and Evenflo’s side impact standards.
- Designed and tested for structural integrity at energy levels approximately 2X the federal crash test standard.
- FMVSS 213: Federal Motor Vehicle Safety Standards for Child Restraint Systems
- FMVSS 302: Federal Motor Vehicle Safety Standards for Flammability of Interior Materials
- CMVSS 302: Canada Motor Vehicle Safety Standard
- CMVSS 213: Canada Motor Vehicle Safety Standard
- Evenflo Temperature Testing: All current Evenflo car seats are tested for product integrity at both high and low temperatures.

62. There are no federal standards for side-impact testing of car seats and booster seats making any claims of doubling that standard nonsensical.

63. On its website and in its marketing, Evenflo tells parents and guardians that its in-house side-impact testing, which it calls the Evenflo Side Impact Test protocol, is “rigorous,” simulates realistic conditions, and is equivalent to federal testing.

64. In reality, Evenflo’s tests are anything but: videos reveal that when child-sized crash dummies seated in Big Kid Booster Seats are subjected to the forces of a T-bone collision, they are thrown far out of their shoulder belts.

65. To date, Evenflo continues to prominently advertise its products as “side impact tested,” going so far as to stitch a “side impact tested” label into many of its Big Kid Booster Seats themselves:



66. In other words, by creating a test that has no basis in science or safety and then concluding that its products “pass” this “test”, Evenflo is able to aggressively market its Big Kid booster seats as “side-impact tested”.

67. In the owner’s manual for the Big Kid booster seat, Evenflo represents that “By properly using this child restraint and following these instructions (and the instructions that accompany

your vehicle), you will greatly reduce the risk of serious injury or death to your child from a crash” and that it was safe for children between 40 to 110 pounds (18 to 49.8 kgs).

68. Evenflo’s misleading and deceptive marketing strategy has been phenomenally successful: since its launch, Evenflo has sold more than 18 million Big Kid booster seats, making the product one of the best-selling models in Canada. It has likely earned hundreds of millions of dollars of profits on these dubious safety products that are, in reality, a mere shadow of what Evenflo claims.

69. Evenflo has now subjected millions of children to the risk of grave injury and death. Meanwhile, it continues to hold itself out to the public as keenly concerned with children’s safety. According to Sarah Haverstick, a “Safety Advocate” and “Child Passenger Safety Technician” at Evenflo, “safety is a word that is embedded into [Evenflo’s] DNA and will always be our number one priority for our customers”.

70. Had Evenflo disclosed the results of its side-impact testing to the public, no parent or guardian would have purchased a Big Kid booster seat, which does not fulfill its main function – to keep children safe in a vehicle in the event of a collision. Instead, Evenflo kept these tests secret, and embarked on a disinformation campaign aimed at convincing millions that its Big Kid Booster Seats are safe.

VII. The ProPublica Report and the U.S. Congress Investigation into Evenflo’s Conduct

71. On February 6, 2020, ProPublica published a report detailing its investigation into Evenflo’s product marketing and testing practices in relation to the Big Kid Booster Seat.

72. ProPublica's investigation showed how the company put marketing over safety in pushing its booster seats as "side impact tested," even though its own tests showed a child using that seat could be paralyzed or killed in such a crash.

73. In the course of its investigation, ProPublica had obtained internal videos of Evenflo's side-impact tests that had been performed on the Big Kid booster seat, internal corporate documents, and depositions that had not previously been made public. As detailed hereinabove, Evenflo's "tests" showed child-sized dummies thrown violently out of their seat belts with their heads and torsos being thrown far outside the confines of the booster seats. Evenflo's top car seat engineer admitted in a 2019 deposition that if real children's bodies moved that way, they could suffer catastrophic injuries and even die; however, Evenflo gave each of its tests passes.

74. The ProPublica video report on its investigation, describes the 2016 deposition of an Evenflo project engineer who at the time said that parents should not misinterpret the side-impact test labels. David Sandler, then-Associate Director of Project Engineering at Evenflo, attested to the following: "we side-impact test our seats, but I don't think we say that we offer any type of side-impact protection".

75. The ProPublica video news report describes a lawsuit that involved a 5-year old girl who had been properly strapped into an Evenflo Big Kid booster seat during a side-impact crash, where she had been sitting opposite the side of impact. She suffered "internal decapitation"; her spinal cord was damaged in the accident leaving her paralyzed from the neck down.

76. In response to ProPublica's reporting, on February 12, 2020, the United States House of Representatives' Subcommittee on Economic and Consumer Policy sent a letter to Evenflo

Company, Inc.'s CEO requesting documents and information on Evenflo's Big Kid model booster seats.

77. The letter from the U.S. Congress states the following:

Evenflo has marketed the "Big Kid" seat as safe and "Side Impact Tested." That safety representation appears to be inconsistent with the video evidence of side impact testing. In fact, your company's internal tests appear to show that side impacts could put children sitting in the "Big Kid" seat in grave danger.

In order to assist the Subcommittee in its review of this matter, please provide the following information by February 24, 2020, regarding "Big Kid" and other belt-positioning booster seats marketed or sold by Evenflo:

1. All impact test videos, including side-impact test videos; and
2. All documents referring or relating to the following:
 - a. Labeling concerning the age, weight, and height of children for whom the seat is intended, including on marketing materials, packaging, instructional materials, or the seat itself;
 - b. Labeling of safety-related terms, including "Side Impact Tested," on marketing materials, packaging, instructional materials, or the seat itself;
 - c. Labeling of potential risks, including "Serious Injury or Death," on marketing materials, packaging, instructional materials, or the seat itself;
 - d. Safety and risk standards used by Evenflo in connection with side-impact testing, including what constituted a "passing" result; and
 - e. Actual results and records of impact and other safety testing; and
3. All communications with the U.S. federal agencies referring or relating to safety standards; and

All communications with Canadian regulators relating to any recall.

78. On February 14, 2020, two U.S. Senate members sent a letter to the U.S. National Highway Traffic Safety Administration (NHTSA) – the equivalent to Transport Canada, but in the U.S. – "demanding answers about reported negligence by a booster seat manufacturer [named] Evenflo".

79. The letter requested that NHTSA “act swiftly to finalize a long overdue rule establishing effective side impact performance requirements for all child restraint systems” and stated the following:

There are real world consequences to [NHTSA’s] inaction. For example, ProPublica reported the details of potential negligence of a booster seat manufacturer, Evenflo, in developing and marketing its “Big Kid” booster car seat product that may fail to protect children in side impact crashes, which accounted for an estimated 25 percent of vehicle collision fatalities for children under the age of 15 in 2018.

Evenflo suggests that their car seat products meet or exceed all applicable Federal safety standards for side impact testing, a claim that appears misleading. Evenflo also asserts that their products meet the company’s own side impact standards. However, alleged videos of side impact testing calls into question the level of protection these standards provide.

80. In addition, the letter requested responses to the following questions by March 4, 2020:

1. On what date and in what manner did NHTSA first learn about concerns related to the safety performance of Evenflo booster seats in side impact collisions?
2. Evenflo’s website states that it provides car seats that are “Side Impact Tested: Meets or exceeds all applicable federal safety standards and Evenflo’s Side impact standards.” Please identify which applicable Federal Motor Vehicle Safety Standard (FMVSS) addressing side impact performance requirements Evenflo is citing, and confirm whether Evenflo consulted with NHTSA in establishing the company’s side impact standards.
3. Has Evenflo’s “Big Kid” booster car seat ever failed NHTSA compliance testing under FMVSS 213?
4. What actions has, or will, NHTSA take in coordination with the Federal Trade Commission and the Consumer Product Safety Commission to crack down on false and deceptive advertising by makers of child safety seats and booster seats?
5. When will NHTSA publish a final rule creating a Federal Motor Vehicle Safety Standard that establishes effective side impact performance requirements for all child restraint systems?

VIII. Summative Remarks

81. The Defendants have spent over a decade maximizing their profits by waging a disinformation campaign against parents and guardians, relentlessly telling them that Big Kid Booster Seats are “side-impact tested” and safe for children as small as 40 pounds.

82. The Defendants have apparently done no scientific testing to determine at what height or weigh, if any, it is actually safe to use a Big Kid Booster Seat. Though the Defendants could have treated their testing as an opportunity to answer this question regarding the safety of their product, consistent with their stated commitment to making safety a “number one priority for our customers”, they have yet to actually do so.

83. The Defendants’ ongoing practice of designing, researching and developing, testing, manufacturing, importing/exporting, distributing, supplying, marketing, advertising, promoting, packaging, labelling, and/or selling the Big Kid booster seat as “side impact tested” and safe for children as small as 40 pounds – when in fact, the Big Kid Booster Seat was not subjected to any meaningful tests, nor is safe by any stretch of the word for a child in the event of a collision – is likely to deceive ordinary consumers who reasonably understood that the Big Kid Booster Seats will protect their children in the event of a side-impact crash. In reliance upon the Defendants’ claims, Class Members sought out and purchased Big Kid Booster Seat(s).

84. The advertisements and representations made by the Defendants as set forth above were and are false and/or misleading. The acts and practices of the Defendants, as alleged herein, constitute unfair or deceptive acts or practices and the making of false statements.

85. As a result of the Defendants' deceptive claims, consumers have purchased products that are substantially different than represented and have unknowingly and unwittingly subjected their children or guardians to a serious risk of injury and death.

86. Had Evenflo disclosed the methods and results of its side-impact testing to the public, no responsible parent or guardian would have purchased a Big Kid Booster Seat. As noted above, these tests demonstrate, unequivocally, that Big Kid Booster Seats place many children at risk of serious injury or death. Evenflo's engineers have admitted that they knew this.

87. Through their deceptive practice of designing, researching and developing, testing, manufacturing, importing/exporting, distributing, supplying, marketing, advertising, promoting, packaging, labelling, and/or selling the Big Kid Booster Seat as "side impact tested" and safe for children as small as 40 pounds despite the lack of any foundation of truth to this, the Defendants have been able to gain significant market share for their Big Kid Booster Seat by deceiving consumers about the attributes of the Big Kid Booster Seats and differentiating them from other traditional, comparable booster seats that are actually safe. The Defendants were motivated to mislead consumers for no other reason than to take away market share from competing products, thereby increasing their own profits.

88. The Plaintiff and the other Class Members were among the intended recipients of the Defendants' deceptive representations and omissions described herein. The Defendants' deceptive representations and omissions, as described herein, are material in that a reasonable person would attach importance to such information and would be induced to act upon such information in making purchase decisions.

89. As a result of Evenflo's failure to disclose the risks associated with using Big Kid Booster Seat models, as well as its false and misleading claims that these models were "side-impact tested," the Plaintiff and Class Members were misled into purchasing these car seats, which they otherwise would not have purchased.

90. The Defendants placed their Evenflo Big Kid Booster Seats into the stream of commerce in Canada with the intention and expectation that customers, such as the Plaintiff and Class Members, would purchase the Evenflo Big Kid Booster Seats based on their representations.

91. The Defendants knew or ought to have known that purchasers of their Evenflo Big Kid Booster Seats would not be reasonably able to protect their interests, that such purchasers would be unable to receive a substantial benefit from the Evenflo Big Kid Booster Seats and that customers would be relying on the Defendants' safety representations to their detriment.

92. The Plaintiff and the Class Members that she seeks to represent suffered economic damages by purchasing the Evenflo Big Kid Booster Seats; they did not receive the benefit of the bargain and are therefore entitled to damages.

93. The Defendants must be brought to task for their inexcusable behaviour. Though it will never be able to make amends for untold number of children who have been injured or killed in its misleadingly marketed Big Kid booster seats, Evenflo should, at the very least, be forced to recall each and every Big Kid Booster Seat still in use and refund their purchase price.

THE REPRESENTATIVE PLAINTIFF

94. On November 16, 2018, the Plaintiff purchased 2 Evenflo Big Kid Amp High Back Belt-Positioning Booster Car Seats in static black from the Toys “R” Us website for \$49.97 each plus sales taxes, for a total cost of \$104.94.

95. The Plaintiff purchased the Evenflo Big Kid Booster Seats based on the Defendants’ marketing and after having read the product labelling. Specifically, she believed that the Evenflo Big Kid Booster Seats were side-impact tested and that they were safe for her 4-year old child, who weighed 40 pounds at the time.

96. The Evenflo Big Kid Booster Seats were shipped to the Plaintiff on November 20, 2018 and in December 2018, they were installed in both the Plaintiff’s vehicle and her spouse’s vehicle.

97. The Plaintiff was unaware that the Evenflo Big Kid Booster Seats had not been subjected to any meaningful side-impact tests and that they were not actually safe to transport her daughter.

98. In consequence, Plaintiff now realizes that she has been misled by the Defendants; had she known the true facts, the Plaintiff would not have purchased and used the Evenflo Big Kid Booster Seats.

99. The Plaintiff has suffered damages as a result of purchasing the Evenflo Big Kid Booster Seats, including the costs of purchase, i.e. \$104.94. In addition to the monetary damages, she has also endured pain, suffering, stress/distress, anxiety/anguish, and trouble and inconvenience.

CAUSES OF ACTION

A. Fraudulent and/or Negligent Misrepresentation

100. The tort of negligent misrepresentation can be made out as:

- (a) There was a relationship of proximity in which failure to take reasonable care might foreseeably cause loss or harm to the Plaintiff and to the Class;
- (b) The Defendants made Representation(s) that were untrue, inaccurate and/or misleading;
- (c) The Defendants acted negligently in making the Representations;
- (d) The Representations were relied upon by the Plaintiff and by the Class reasonably;
and
- (e) The Plaintiff and the Class sustained damages as a result of their reliance.

101. Fraudulent misrepresentation can equally be made out as the Defendants made the representation that the Evenflo Big Kid Booster Seats were “side impact tested” and safe for children as small as 40 pounds, knowing that this was false as the “tests” were completely and utterly meaningless and the Defendants intended that the Plaintiff and Class Members would rely upon these representations in purchasing the Evenflo Big Kid Booster Seats.

102. The Defendants represented to the Plaintiff and the Class Members, by means of their marketing, advertising, promotion, packaging, labelling, and other representations that the Evenflo

Big Kid Booster Seats were “side impact tested” and safe for children as small as 40 pounds – these Representations were untrue as set forth herein.

103. At the time that the Defendants made the misrepresentations herein alleged, they had no reasonable grounds for believing the Representations to be true, as there was ample evidence to the contrary set forth in detail above.

104. The Defendants made the Representations herein alleged with the intention of inducing the Plaintiff and the Class Members to unknowingly purchase their Evenflo Big Kid Booster Seats.

105. The Plaintiff and the Class Members relied upon the Representations and, in reliance upon them, purchased the Evenflo Big Kid Booster Seats. Said reliance was reasonable.

106. Plaintiff and the Class Members were without the ability to determine the truth of these statements on their own and could only rely on the Defendants in this regard.

107. Had the Plaintiff and the Class Members known the true facts, they would either not have purchased the Evenflo Big Kid Booster Seats or would not have paid such a high price.

108. As a direct and proximate result of the foregoing acts and/or omissions, Class Members have suffered damages entitling them to compensatory damages, special damages, punitive damages and, in the alternative, equitable and declaratory relief as elaborated further below.

B. Fraudulent Concealment

109. The Defendants made material omissions as well as affirmative misrepresentations regarding the Evenflo Big Kid Booster Seat in claiming them to have been tested using its

“rigorous” in -house side-impact testing, the Evenflo Side Impact Test protocol, and that they have been proven to be safe for their intended use. In reality, Evenflo’s own testing demonstrates that the Big Kid Booster Seat leaves children vulnerable to serious head, neck, and spine injuries in a side-impact crash.

110. The Defendants failed to disclose: (i) that the Evenflo Big Kid Booster Seats had not been subject to any meaningful scientific testing to ensure their safety for children as small as 40 pounds and (ii) that the testing that they had performed demonstrated that the Big Kid Booster Seats were actually unsafe.

111. Recall that there are only two ways to fail the “test”; if the dummy completely escapes the restraint or if the booster seat breaks into pieces – the passing grades of the tests where the dummies were placed at risk of injury or death, were entirely misleading and meaningless.

112. Evenflo kept the actual results of its tests secret, choosing instead to pass everything and to run a disinformation campaign aimed at convincing millions that its Big Kid Booster Seats are safe for their children thereby creating a false sense of security.

113. Evenflo had an independent duty to disclose the truth about the safety risks posed by its Big Kid Booster Seats because these seats put children’s health and well-being at serious risk in side-impact car crashes.

114. The Defendants knew that the representations were false at the time that they were made.

115. The Defendants were under a duty to disclose that the Evenflo Big Kid Booster Seat were unsafe because it was known and/or accessible only to the Defendants, who had superior

knowledge and access to the facts, and the Defendants knew it was not known to or reasonably discoverable by the Class until it was too late. The Class Members could not, in the exercise of reasonable diligence, have discovered independently that the Evenflo Big Kid Booster Seats had not actually been subjected to any meaningful tests and that the tests that they had been subjected to indicated that they were unsafe.

116. The Defendants' misrepresentations and false claims that the Evenflo Big Kid Booster Seats are safe for their intended use are material because any reasonable consumer would have considered that this was true – why else would someone purchase a booster seat?

117. Whether or not the Evenflo Big Kid Booster Seats have been tested and proven to be safe in the event of a side-impact crash is certainly a material safety concern. The facts concealed and/or not disclosed by the Defendants to the Plaintiff and Class Members are material facts in that a reasonable person would have considered them important in deciding whether to purchase an Evenflo Big Kid Booster Seat.

118. In addition, the Defendants intentionally made the false statements and omissions in order to sell their Evenflo Big Kid Booster Seats and to avoid the expense and public relations consequences of a refund and recall.

119. The Defendants actively concealed and/or suppressed these material facts, in whole or in part, with the intent to induce Class Members to purchase the Evenflo Big Kid Booster Seats and to protect its profits and it did so at the expense of the Class.

120. Class Members were unaware of these omitted material facts and would not have acted as they did if they had known of the concealed and/or suppressed facts. Class Members' actions

were reasonable and justified. The Defendants were in exclusive control of the material facts concerning the manner of testing (and lack thereof) of the Evenflo Big Kid Booster Seats and such facts were not known to the public or to the Class Members.

121. Class Members relied on the Defendants' representations in relation to the Evenflo Big Kid Booster Seats that they were purchasing and they purchased such Evenflo Big Kid Booster Seats. Said reliance was reasonable. Class Members were without the ability to determine the truth on their own and could only rely on the Defendants' statements and representations.

122. As a result of the concealment and/or suppression of facts, Class Members have sustained and will continue to sustain damages.

123. As a direct and proximate result of the foregoing acts and/or omissions, Class Members have suffered damages entitling them to compensatory damages, special damages, punitive damages and, in the alternative, equitable and declaratory relief as elaborated further below.

C. Negligence

124. The Defendants had a positive legal duty to use reasonable care to perform their legal obligations to the Plaintiff and to Class Members, including, but not limited to designing, researching and developing, testing, manufacturing, importing/exporting, distributing, supplying, marketing, advertising, promoting, packaging, labelling, and/or selling the Evenflo Big Kid Booster Seats in a reasonably acceptable manner and without misrepresentation.

125. The Defendants knew and it was reasonably foreseeable that in purchasing the Evenflo Big Kid Booster Seats, the Plaintiff and Class Members would trust and rely on the Defendants' skill

and integrity. The Defendants also knew and it was reasonably foreseeable that, if the Evenflo Big Kid Booster Seats were not subjected to proper testing procedures and that if they misrepresented this testing out its outcomes, that Class Members would suffer damages as detailed herein.

126. The standard of care reasonably expected in the circumstances required the Defendants to act fairly, reasonably, honestly, candidly and with due care in the course of designing, researching and developing, testing, manufacturing, importing/exporting, distributing, supplying, marketing, advertising, promoting, packaging, labelling, and/or selling the Evenflo Big Kid Booster Seats. The Defendants, through their employees, officers, directors, and agents, failed to meet the reasonable standard of care. The aforesaid loss suffered by the Class Members was caused by this negligence.

127. The Defendants failed to properly market, advertise, promote, package, label, and/or sell the Evenflo Big Kid Booster Seats such that it failed to reveal the deficiencies with its testing of the Evenflo Big Kid Booster Seats using its “Evenflo Side Impact Test protocol” and instead promoted its testing as being rigorous and as 2X the supposed federal standard.

128. The Defendants failed to adequately and scientifically test the Evenflo Big Kid Booster Seats to ensure a proper design and to ensure proper and timely modifications to the Evenflo Big Kid Booster Seats to eliminate the foreseeable safety risks and else, change its false representations and represent the truth.

129. By virtue of the acts and omissions described above, the Defendants were negligent and caused damage and posed a real and substantial risk to the health of the Class Members.

130. The loss, damages and injuries were foreseeable.

131. As a direct and proximate result of the foregoing acts and/or omissions, Class Members have suffered damages entitling them to compensatory damages, special damages, punitive damages and, in the alternative, equitable and declaratory relief as elaborated further below.

D. Breach of Express Contractual Warranty

132. The Defendants are “merchants” in the business of selling Evenflo Big Kid Booster Seats to foreseeable consumers such as the Plaintiff and the members of the Class.

133. The Plaintiff and the members of the Class purchased the Defendants’ Evenflo Big Kid Booster Seats either directly from the Defendants or through retailers, such as Walmart, Canadian Tire, Costco, Babies “R” Us/ Toys “R” Us, and Amazon, among others.

134. The Defendants expressly represented on their websites, packaging and labelling as well as in their marketing, advertising, and promotion of the Evenflo Big Kid Booster Seats that they were rigorously “side impact tested” at 2X the Federal Crash Test Standard and safe for children as small as 40 pounds. These express representations become a basis of the bargain between the Defendants and Class Members, implicating the Defendants’ liability for breach thereof.

135. Each model of the Big Kid Booster Seat has an identical or substantially identical warranty.

136. In fact, the Defendants’ Booster Seat is not safe in the event of a side-impact collision because each of the express warranties is a false and misleading misrepresentation.

137. The Evenflo Big Kid Booster Seats do not conform to these express representations because they are not rigorously side-impact tested, there is no “Federal Crash Test Standard” for

side-impact testing and their testing protocol is a complete farce – thus, the Defendants breached their express warranties.

138. The Defendants made the Representations in order to induce the Plaintiff and Class Members to purchase their Evenflo Big Kid Booster Seats.

139. The Defendants breached these warranties and/or contract obligations by placing the Evenflo Big Kid Booster Seats into the stream of commerce and selling them to consumers, when they are unsafe and pose a significant safety risk to children in the event of a side-impact crash. The lack of safety inherent in the Evenflo Big Kid Booster Seat renders it unfit for its intended use and purpose and substantially and/or completely impairs its use and value.

140. The Defendants breached their express warranties by selling the Evenflo Big Kid Booster Seats, which are in actuality not free of defects, are unsafe for use, and cannot be used for their ordinary purpose of protecting children in the event of a side-impact collision. The Defendants breached their express written warranties to Plaintiff and Class Members in that the Evenflo Big Kid Booster Seats were not safe for their intended purpose at the time that they left the Defendants' possession or control and were sold to Plaintiff and Class Members, creating a serious safety risk to Plaintiff, Class Members, and their children.

141. The Evenflo Big Kid Booster Seats that Plaintiff and Class Members purchased were uniformly deficient with respect to their ability to protect children in the event of a side-impact collision, which caused each of them damages including loss of the benefit of their bargain.

142. The Plaintiff and the Class Members did rely on the express warranties and promises of the Defendants.

143. The Defendants knew or should have known that, in fact, said Representations and warranties were false, misleading, and untrue.

144. As a direct and proximate result of the foregoing acts and/or omissions, Class Members have suffered damages entitling them to compensatory damages, special damages, punitive damages and, in the alternative, equitable and declaratory relief as elaborated further below.

E. Breach of Implied Warranties

145. By designing, researching and developing, testing, manufacturing, importing/exporting, distributing, supplying, marketing, advertising, promoting, packaging, labelling, and/or selling the Evenflo Big Kid Booster Seats, in addition to misrepresenting their safety in the event of a side-impact crash, the Defendants also created and breached implied warranties.

146. At all times relevant hereto, applicable law imposed a duty that requires that the Evenflo Big Kid Booster Seats be of merchantable quality and fit for the ordinary purposes for which they are used.

147. The Defendants knew of the specific use, i.e. protecting children in the event of a collision, for which the Evenflo Big Kid Booster Seats were purchased, and they impliedly warranted that the products were fit for such use, especially so as the Defendants marketed them for this particular purpose. The fact that they are not actually safe in the event of a side-impact crash wholly impairs the use, value, and safety of the Evenflo Big Kid Booster Seats.

148. The Evenflo Big Kid Booster Seats were unsafe at the time they left the Defendants' possession. At all times relevant hereto, the Defendants were aware of the lack of safety as well

as their safety misrepresentation at the time that these transactions occurred. Thus, the Evenflo Big Kid Booster Seats, when sold to consumers at all times thereafter, were not in merchantable condition or quality and were not fit for their ordinary intended purpose.

149. The Evenflo Big Kid Booster Seats are unfit, unsafe, and inherently unsound for use, and the Defendants knew that they would not pass without objection in the trade; that they were not fit for the ordinary purpose for which they were used, and that they were unsafe and were unmerchantable.

150. Thus, the Defendants breached the implied warranty of merchantability as well as the implied warranty of fitness for a particular purpose in selling the Evenflo Big Kid Booster Seats without proper testing and with the Safety Misrepresentations.

151. As a direct and proximate result of the foregoing acts and/or omissions, Class Members have suffered damages entitling them to compensatory damages, special damages, punitive damages and, in the alternative, equitable and declaratory relief as elaborated further below.

F. Breach of Implied Covenant of Good Faith and Fair Dealing

152. It is a well-established tenet of contract law that there is an implied covenant of good faith and fair dealing in every contract.

153. The Class Members entered into agreements to purchase the Evenflo Big Kid Booster Seats, and/or were in contractual privity with Defendants as a result of the express warranties described herein.

154. The contracts and warranties were subject to the implied covenant that the Defendants would conduct business with the Plaintiff and the Class Members in good faith and would deal fairly with them.

155. The Defendants breached those implied covenants by selling to the Class Members, unsafe Evenflo Big Kid Booster Seats with its Safety Misrepresentations, when they knew, or should have known, that the contracts and/or warranties were unconscionable and by abusing their discretion in the performance of the contract or by intentionally subjecting the Plaintiff and the Class Members to a risk beyond that which they would have contemplated at the time of purchase.

156. The Defendants also breached the implied covenants by not placing terms in the contracts and/or warranties that conspicuously disclosed to the Plaintiff and the Class Members that the Evenflo Big Kid Booster Seats had not been subjected to any meaningful tests for side-impact crashes.

157. As a direct and proximate result of Defendants' breach of its implied covenants, the Plaintiff and the Class Members have been damaged in an amount to be determined at trial.

158. As a direct and proximate result of the foregoing acts and/or omissions, Class Members have suffered damages entitling them to compensatory damages, special damages, punitive damages and, in the alternative, equitable and declaratory relief as elaborated further below.

STATUTORY REMEDIES

159. The Defendants are in breach of the *Sale of Goods Act*, the *Consumer Protection Act*, the *Competition Act*, the *Canada Consumer Product Safety Act*, *Consumer Packaging and Labelling Act*, and/or other similar/equivalent legislation.

160. The Plaintiff pleads and relies upon trade legislation and common law, as it exists in this jurisdiction and equivalent/similar legislation and common law in the other Canadian provinces and territories. Class Members have suffered injury, economic loss and damages caused by or materially-contributed to by the Defendants' inappropriate and unfair business practices, which includes the Defendants being in breach of applicable consumer protection laws.

A. Breach of the *Sale of Goods Act* and the Sale of Goods Legislation

161. At all times relevant to this Claim, Class Members were “buyer[s]”, the Defendants were “seller[s]”, the Evenflo Big Kid Booster Seats were “goods”, and the transactions by which Class Members purchased the Evenflo Big Kid Booster Seats from the Defendants were “sale[s]” within the meaning of those terms as defined in s.1 of the *Sale of Goods Act*.

162. Class Members resident in British Columbia, Alberta, Saskatchewan, Manitoba, Newfoundland, New Brunswick, Prince Edward Island, Yukon, the Northwest Territories, and Nunavut, who purchased the Evenflo Big Kid Booster Seats, are buyers located in those provinces for the purposes of the Sale of Goods Legislation. The Defendants carried on business in those provinces and territories and were, among other things, sellers for the purposes of the Consumer Protection Legislation.

163. The Defendants were aware that consumers purchased the Evenflo Big Kid Booster Seats for the particular purpose of protecting children in the event of a collision and there is therefore an implied warranty or condition that the goods will be reasonably fit for such purpose and/or would be in merchantable condition.

164. Pursuant to s. 15 of the *Sale of Goods Act*, there were implied conditions as to merchantable quality or fitness of the Evenflo Big Kid Booster Seats whose purpose was obviously and primarily for the particular purpose of protecting children in the event of a collision, whose true nature could not have been revealed upon examination. The Evenflo Big Kid Booster Seats, when sold and at all times thereafter, were not merchantable and were not fit for the ordinary purpose for which they are used.

165. The Evenflo Big Kid Booster Seats were sold by the Defendants in the ordinary course of their business.

166. The Plaintiff and Class Members reasonably relied on the Defendants' skill and judgment in making the Representations.

167. The Defendants committed a fault or wrongful act by breaching the implied conditions as to fitness for a particular purpose and to merchantability. By placing into the stream of commerce a product that was unfit for the purpose for which it was marketed, the Defendants are liable for damages relating thereto. The Class is entitled to maintain an action for breach of warranty under s. 51 of the *Sale of Goods Act*.

B. Breach of the *Consumer Protection Act* and Consumer Protection Legislation

168. The Defendants are resident in Ontario for the purpose of s.2 of the *Consumer Protection Act*.

169. At all times relevant to this action, Class Members were “consumer[s]”, the Defendants were “supplier[s]”, the Evenflo Big Kid Booster Seats were “goods”, and the transactions by which the Class Members purchased the Evenflo Big Kid Booster Seats were “consumer transaction[s]” within the meaning of that term as defined in s. 1 of the *Consumer Protection Act*.

170. Class Members resident in British Columbia, Alberta, Saskatchewan, Manitoba, Newfoundland, New Brunswick, Prince Edward Island, Yukon, the Northwest Territories, and Nunavut, who purchased the Evenflo Big Kid Booster Seats for personal, family or household purposes and/or not for resale or for the purpose of carrying on business (as those concepts apply in the various provinces and territories), are consumers located in those provinces for the purposes of the Consumer Protection Legislation. The Defendants carried on business in those provinces and territories and were, among other things, suppliers for the purposes of the Consumer Protection Legislation.

171. The Defendants have engaged in unfair practices by making a representation to Class members, which were and are “false, misleading or deceptive” and/or “unconscionable” within the meaning of ss. 14, 15 and 17 of the *Consumer Protection Act* as follows:

- (a) Representing that the Evenflo Big Kid Booster Seats have performance characteristics, uses, benefits, and/or qualities, which they do not have;

- (b) Representing that the Evenflo Big Kid Booster Seats are of a particular standard, quality, or grade, which they are not;
- (c) Representing that the Evenflo Big Kid Booster Seats are available for a reason that does not exist; and
- (d) Using exaggeration, innuendo and ambiguity as to a material fact or failing to state a material fact as such use or failure deceives or tends to deceive.

172. The Safety Misrepresentations were and are unconscionable because *inter alia* the Defendants knew or ought to have known that consumers are not reasonably able to protect their interests and are unable to receive a substantial benefit from the Evenflo Big Kid Booster Seats.

173. The Safety Misrepresentations were and are false, misleading, deceptive and/or unconscionable such that they constituted an unfair practice which induced Class Members to purchase the Evenflo Big Kid Booster Seats as a result of which they are entitled to damages.

174. The Plaintiff and the Class Members relied on the Defendants Safety Misrepresentations. Said reliance is established by the purchase of the Evenflo Big Kid Booster Seats. Had Class Members known that the Representations were false and misleading they would either not have purchased the Evenflo Big Kid Booster Seats or would not have paid such a high price.

C. Breach of the *Competition Act*

175. At all times relevant to this action, the Defendants' sale of the Evenflo Big Kid Booster Seats was a "business" and the Evenflo Big Kid Booster Seats were "product[s]" within the meaning of those terms as defined in s. 2 of the *Competition Act*.

176. The Defendants' acts are in breach of s. 52 of Part VI of the *Competition Act*, were and are unlawful and render the Defendants liable to pay damages and costs of investigation pursuant to s. 36 of the *Competition Act* because the Representations.

- (a) Were made for the purpose of promoting, directly or indirectly, the use of a product or for the purpose of promoting, directly or indirectly, the business interests of the Defendants;
- (b) Were made knowingly or recklessly;
- (c) Were made to the public; and
- (d) Were false and misleading in a material respect.

177. Class Members relied upon the representations by purchasing the Evenflo Big Kid Booster Seats and suffered damages and loss.

178. Pursuant to s. 36 of the *Competition Act*, the Defendants are liable to pay the damages which resulted from the breach of s. 52.

179. Pursuant to s. 36 of the *Competition Act*, the Plaintiff and Class Members are entitled to recover their full costs of investigation and substantial indemnity costs paid in accordance with the *Competition Act*.

180. The Plaintiff and Class Members are also entitled to recover as damages or costs, in accordance with the *Competition Act*, the costs of administering the plan to distribute the recovery in this action and the costs to determine the damages of each Class Member.

D. Breach of the *Canada Consumer Product Safety Act*

181. At all times relevant to this action, the Defendants was “sell[ing]” the Evenflo Big Kid Booster Seats, which were “article[s]” and “consumer product[s]”, that were a “danger to human health and safety” within the meaning of those terms as defined in s. 2 of the *Canada Consumer Product Safety Act*.

182. The Defendants’ Representations regarding the Evenflo Big Kid Booster Seats were “advertise[ments]” within the meaning of that term as defined in s. 2 of the *Consumer Packaging and Labelling Act*.

183. The Defendants knowingly manufactured, imported, advertised and/or sold the Evenflo Big Kid Booster Seats, which are a “danger to human health and safety” and in so doing, breached ss. 7 (a) and 8 (a) of the *Canada Consumer Product Safety Act*.

184. In addition, the Defendants packaged and labelled the Evenflo Big Kid Booster Seats in a false, misleading or deceptive manner (i) that may reasonably be expected to create an erroneous impression regarding the fact that it is not a danger to human health or safety and (ii) regarding its

certification related to its safety or its compliance with a safety standard”, which is in breach of ss. 9 and 10 of the *Canada Consumer Product Safety Act*.

185. As such of these breaches, the Defendants are liable to pay damages under s. 41 of the *Canada Consumer Product Safety Act*.

E. Breach of the *Consumer Packaging and Labelling Act*

186. At all times relevant to this action, the Defendants were “dealer[s]”, the Evenflo Big Kid Booster Seats were “prepackaged product[s]”, the Evenflo Big Kid Booster Seat packaging were “labels”, and the Defendants’ representations thereon were “advertise[ments]” within the meaning of those terms as defined in s. 2 of the *Consumer Packaging and Labelling Act*.

187. The Defendants labelled, marketed, packaged, promoted, advertised, and sold the Evenflo Big Kid Booster Seats with “false or misleading representation[s]” under s. 7 of the *Consumer Packaging and Labelling Act* in that they used expressions, words, figures, depictions and/or symbols descriptions and/or illustrations of the type, quality, performance, function, and/or method of manufacture or production that may reasonably be regarded as likely to deceive the Plaintiff and Class Members.

188. In addition, the Defendants sold and/or advertised the Evenflo Big Kid Booster Seats, which were packaged and/or labelled in such a manner that the Plaintiff and Class Members might, and were, reasonably be misled with respect to the quality of the product.

189. As such, the Defendants breached ss. 7 and 9 of the *Consumer Packaging and Labelling Act* and are liable to pay damages as a result under s. 20.

CAUSATION

190. The acts, omissions, wrongdoings, and breaches of legal duties and obligations of the Defendants are the direct and proximate cause of Class Members' injuries.

191. The Plaintiff pleads that by virtue of the acts, omissions and breaches of legal obligations as described above, they are entitled to legal and/or equitable relief against the Defendants, including damages, consequential damages, specific performance, rescission, attorneys' fees, costs of suit and other relief as appropriate in the circumstances.

DAMAGES

192. By reason of the acts, omissions and breaches of legal obligations of the Defendants, Class Members have suffered injury, economic loss and damages, the particulars of which include, but are not limited to, the following general, special, and punitive damages:

A. General Damages (Non-Pecuniary Damages)

193. The general damages being claimed herein include:

- a) Pain;
- b) Suffering;
- c) Stress/distress;
- d) Anxiety/anguish;
- e) Trouble; and
- f) Inconvenience.

B. Special Damages

194. The special damages being claimed herein include the purchase price of the Evenflo Big Kid Booster Seats or, in the alternative, the cost of its replacement as well as any other damages as described herein.

C. Punitive (Exemplary) and Aggravated Damages

195. The Defendants has taken a cavalier and arbitrary attitude to their legal and moral duties to the Class Members.

196. At all material times, the conduct of the Defendants as set forth was malicious, deliberate, and oppressive towards their customers and the Defendants conducted themselves in a willful, wanton and reckless manner with regard to Class Members, such as to warrant punitive damages.

197. By engaging in such deplorable conduct and tactics, the Defendants committed a separate actionable wrong for which this Honourable Court should voice its disapproval and displeasure with an award of punitive damages.

198. In addition, it should be noted that it is imperative to avoid any perception of evading the law without impunity. Should the Defendants only be required to disgorge monies which should not have been retained and/or withheld, such a finding would be tantamount to an encouragement to other businesses to deceive their customers as well. Punitive and aggravated damages are necessary in the case at hand to be material in order to have a deterrent effect on other corporations in Canada.

199. At all material times, the conduct of the Defendants as set forth was malicious, deliberate and oppressive towards their customers and the Defendants conducted themselves in a wilful, wanton and reckless manner.

WAIVER OF TORT, UNJUST ENRICHMENT AND CONSTRUCTIVE TRUST

200. The Plaintiff pleads and relies on the doctrine of waiver of tort and states that the Defendants' conduct including tortious, statutory and otherwise, constitutes wrongful conduct which can be waived in favour of an election to receive restitutionary or other equitable remedies.

201. The Plaintiff reserves the right to elect at the Trial of the Common Issues to waive the legal wrongs and to have damages assessed in an amount equal to the gross revenues earned by the Defendants or the net income received by the Defendants or a percent of the sale of the Evenflo Big Kid Booster Seats as a result of the Defendants' unfair practices and false representations which resulted in revenues and profit for the Defendants.

202. Further, the Defendants have been unjustly enriched as a result of the revenues generated from the sale of the Evenflo Big Kid Booster Seats and as such, *inter alia*, that:

- (a) The Defendants has obtained an enrichment through revenues and profits from the sale of the Evenflo Big Kid Booster Seats;
- (b) Class Members have suffered a corresponding deprivation in having paid the cost of the Evenflo Big Kid Booster Seats; and

(c) The benefit obtained by the Defendants and the corresponding detriment experienced by Class Members has occurred without juristic reason. Since the monies that were received by the Defendants resulted from the Defendants' wrongful acts, there is and can be no juridical reason justifying the Defendants' retaining any portion of such money paid.

203. Further, or in the alternative, the Defendants are constituted as constructive trustees in favour of Class Members for all of the monies received because, among other reasons:

(a) The Defendants were unjustly enriched by receipt of the monies paid for the Evenflo Big Kid Booster Seats;

(b) Class Members suffered a corresponding deprivation by purchasing the Evenflo Big Kid Booster Seats;

(c) The monies were acquired in such circumstances that the Defendants may not in good conscience retain them;

(d) Equity, justice and good conscience require the imposition of a constructive trust;

(e) The integrity of the market would be undermined if the court did not impose a constructive trust; and

(f) There are no factors that would render the imposition of a constructive trust unjust.

204. Further, or in the alternative, the Plaintiff claims an accounting and disgorgement of the benefits which accrued to the Defendants.

EFFICACY OF CLASS PROCEEDINGS

205. The members of the proposed Class potentially number in the thousands and are geographically dispersed. Because of this, joinder into one action is impractical and unmanageable. Class members are readily identifiable from information and records in the possession of the Defendants and third-party merchants like Walmart, Canadian Tire, Costco, Babies “R” Us/ Toys “R” Us, and Amazon.

206. Continuing with the Class Members’ claim by way of a class proceeding is both practical and manageable and will therefore provide substantial benefits to both the parties and to the Court.

207. Members of the proposed Class have no material interest in commencing separate actions. In addition, given the costs and risks inherent in an action before the courts, many people will hesitate to institute an individual action against the Defendants. Even if the Class Members themselves could afford such individual litigation, the court system could not as it would be overloaded and, at the very least, it is not in the interests of judicial economy. Further, individual litigation of the factual and legal issues raised by the conduct of the Defendants would increase delay and expense to all parties and to the court system.

208. This class proceeding overcomes the dilemma inherent in an individual action whereby the legal fees alone would deter recovery and thereby in empowering the consumer, it realizes both individual and social justice as well as rectifies the imbalance and restore the parties to parity.

209. Also, a multitude of actions instituted in different jurisdictions, both territorial (different provinces) and judicial districts (same province), risks having contradictory and inconsistent judgments on questions of fact and law that are similar or related to all members of the class.

210. In these circumstances, a class action is the only appropriate procedure and the only viable means for all of the members of the class to effectively pursue their respective rights and have access to justice.

211. The Plaintiff has the capacity and interest to fairly and fully protect and represent the interests of the proposed Class and has given the mandate to her counsel to obtain all relevant information with respect to the present action and intends to keep informed of all developments. In addition, class counsel is qualified to prosecute complex class actions.

LEGISLATION

212. The Plaintiff pleads and relies on the *Class Proceedings Act*, the *Sale of Goods Act*, the *Consumer Protection Act*, the *Competition Act*, the *Canada Consumer Product Safety Act*, the *Consumer Packaging and Labelling Act*, and other Sale of Goods Legislation and Consumer Protection Legislation.

JURISDICTION AND FORUM

Real and Substantial Connection with Ontario

213. There is a real and substantial connection between the subject matter of this action and the province of Ontario because:

- (a) Defendant Goodbaby Canada Inc. has its head office in Ontario;
- (b) The Defendants engages in business with residents of Ontario;

- (c) The Defendants derives substantial revenue from carrying on business in Ontario;
and
- (d) The damages of many Class Members were sustained in Ontario.

214. The Plaintiff proposes that this action be tried in the city of Ottawa, in the province of Ontario as a proceeding under the *Class Proceedings Act*.

DEFENDANTS' JOINT AND SEVERAL LIABILITY

215. The Plaintiff pleads that by virtue of the acts and omissions described above, the Defendants are liable in damages to herself and to the Class Members and that each Defendant is responsible for the acts and omissions of the other for the following reasons:

- (a) Each was the agent of the other;
- (b) Each companies' business was operated so that it was inextricably interwoven with the business of the other as set out above;
- (c) Each company entered into a common advertising and business plan to design, research and develop, test, manufacture, import/export, distribute, supply, market, advertise, promote, package, label, and/or sell the Evenflo Big Kid Booster Seats;
- (d) Each owed a duty of care to the other and to each Class Member by virtue of the common business plan to design, research and develop, test, manufacture, import/export, distribute, supply, market, advertise, promote, package, label, and/or sell the Evenflo Big Kid Booster Seats; and

(e) The Defendants intended that their businesses be run as one global business organization.

216. The Plaintiff and the other Class Members are entitled to legal and equitable relief against the Defendants, including damages, consequential damages, specific performance, rescission, attorneys' fees, costs of suit and other relief as appropriate.

217. The Plaintiff and Class Members are entitled to recover damages and costs of administering the plan to distribute the recovery of the action in accordance with the *Consumer Protection Act*.

SERVICE OUTSIDE ONTARIO

218. The originating process herein may be served outside Ontario, without court order, pursuant to subparagraphs (a), (c), (g), (h) and (p) of Rule 17.02 of the *Rules of Civil Procedure*. Specifically, the originating process herein may be served without court order outside Ontario, in that the claim is:

- (a) In respect of personal property situated in Ontario (rule 17.02(a));
- (b) For the interpretation and enforcement of a contract or other instrument in respect of personal property in Ontario (rule 17.02 (c));
- (c) In respect of a tort committed in Ontario (rule 17.02(g));
- (d) In respect of damages sustained in Ontario arising from a tort or breach of contract wherever committed (rule 17.02(h));

- (e) The claim is authorized by statute, the *Sale of Goods Act*, the *Competition Act* and the *Consumer Protection Act* (rule 17.02(n)); and
- (f) Against a person carrying on business in Ontario (rule 17.02(p)).

Date: June 5, 2020

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Plaintiff

COURT FILE NO.

**EVENFLO COMPANY, INC. AND
GOODBABY CANADA INC.**
Defendants

**ONTARIO
SUPERIOR COURT OF JUSTICE**

PROCEEDING COMMENCED IN OTTAWA
Proceeding under the *Class Proceedings Act, 1992*

STATEMENT OF CLAIM

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