UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

IN RE: EVENFLO CO., INC. MARKETING, SALES PRACTICES AND PRODUCTS LIABILITY LITIGATION This Document Relates To: ALL ACTIONS	MDL No. 20-md-02938-DJC Hon. Denise J. Casper

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT AND CONDITIONAL CERTIFICATION OF SETTLEMENT CLASS

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I. INTRODUCTION

Plaintiffs,[1] all purchasers of the "Big Kid" Evenflo belt-positioning booster seat ("Booster Seat"), negotiated a nationwide class action settlement with defendant Evenflo Co., Inc. that provides substantial monetary and non-monetary benefits to all individuals who purchased a Big Kid Booster Seat between January 1, 2008, and December 31, 2022 (the "Class Period"). Plaintiffs alleged that Evenflo falsely marketed its Booster Seats as being safe for children weighing less than 40 pounds and as having been side-impact tested—while they were neither. While Evenflo denies making any misrepresentations, it has agreed to resolve this litigation, which has now been proceeding for almost five years, to obtain finality.

Plaintiffs in turn, through this settlement, achieve a positive result for all purchasers within the proposed settlement class (the "Settlement Class") without the uncertainty of further litigation at the trial level and potentially on appeal. Plaintiffs and Evenflo have reached a proposed class action Settlement[2] that provides for a $3,500,000.00 non-reversionary cash common fund, plus $25 credits for each Settlement Class Member (based on the number of Big Kid booster seats purchased, with a limit of 2 per claimant) towards future purchases of Evenflo products through the Evenflo website. The settlement also provides to the Class substantial non-monetary benefits,

[1] The named Plaintiffs ("Class Representatives") in this action include Mona-Alicia Sanchez, Heather Hampton, Karyn Aly, Debora de Souza Correa Talutto, Sakina Taylor, Jessica Greenshner, Becky Brown, Anna Gathings, Joseph Wilder, Talise Alexie, Jeffrey Lindsey, Theresa Holliday, Amy Sapeika, Emily Naughton, Karen Sanchez, Danielle Sarratori, David Schnitzer, Carla Matthews, Cassandra Honaker, Lauren Mahler, Tarnisha Alston, Ashley Miller, Lindsay Reed, and Kristin Atwell.

All Plaintiffs have agreed to the proposed settlement except for one, Ashley Miller, whom, despite counsel's best efforts, counsel has not been able to reach to obtain express assent. Plaintiffs will update the Court shortly with additional information, but request that the Court proceed with its Preliminary Approval analysis notwithstanding.

[2] All capitalized terms used and not otherwise defined herein have the same meaning as defined in the Settlement Agreement.

including informational notices for all Settlement Class Members, agreement regarding future marketing disclosures, and the dissemination of an educational video regarding booster seat safety.

After nearly five years of litigation, Plaintiffs have a full understanding of the strengths and weaknesses of their claims. Although Plaintiffs believe they would ultimately prevail, Plaintiffs recognize that they would face hurdles and risks—and additional delay—in litigating their claims to a successful adversarial resolution. Given the immediate and significant benefits the Settlement will provide to the Settlement Class, Plaintiffs respectfully request that this Court (1) grant preliminary approval of the Settlement, (2) conditionally certify the Settlement Class, (3) designate Plaintiffs as Class Representatives, (4) designate Steve W. Berman of Hagens Berman Sobol Shapiro LLP, Mark P. Chalos of Lieff Cabraser Heimann & Bernstein LLP, and Martha A. Geer of Milberg Coleman Bryson Phillips Grossman, PLLC as Class Counsel; (5) direct notice be provided to the Settlement Class and approve the form and manner of the notice; (6) authorize retention of Epiq Class Action and Claims Solutions, Inc. ("Epiq") as Settlement Administrator; and (7) set a schedule for final approval of the Settlement and Plaintiffs' request for service awards for Plaintiffs and for attorneys' fees and expenses.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. The litigation and mediation

On February 6, 2020, the online journal ProPublica published an article entitled "Evenflo, Maker of the 'Big Kid' Booster Seat, Put Profits Over Child Safety,"[3] discussing both Evenflo's claims that its Big Kid Booster Seats were safe for children weighing as little as 30 pounds and that its Booster Seats were side-impact tested. Numerous lawsuits were filed following the article,

[3] *See* Daniela Porat & Patricia Callahan, *Evenflo, Maker of the "Big Kid" Booster Seat, Put Profits Over Child Safety*, PROPUBLICA (Feb. 6, 2020), https://www.propublica.org/article/evenflo-maker-of-the-big-kid-booster-seat-put-profits-over-child-safety.

and on June 2, 2020, the Judicial Panel on Multidistrict Litigation ordered that the pending actions be transferred to this Court. (MDL No. 2938, ECF No. 90).

On August 27, 2020, this Court appointed as co-lead counsel for the proposed class Steve W. Berman of Hagens Berman, Mark P. Chalos of Lieff Cabraser, and Martha A. Geer of Whitfield Bryson (now Milberg) together with Liaison Counsel and an Executive Committee for Plaintiffs. (ECF No. 50). Co-lead counsel filed a Consolidated Amended Class Action Complaint on October 20, 2020, alleging that Evenflo had falsely advertised its Booster Seats as (1) being safe for children weighing less than 40 pounds and (2) having been side-impact tested without disclosing the true nature and results of its testing. (ECF No. 67). Evenflo responded by filing a Motion to Dismiss on November 20, 2020. (ECF No. 80). This Court granted the Motion to Dismiss on the grounds that Plaintiffs lacked Article III standing. (ECF No. 119). The First Circuit affirmed in part (as to injunctive relief), reversed in part, and remanded for further proceedings. *In re Evenflo Co.*, 54 F.4th 28 (1st Cir. 2022), *cert. denied*, 144 S. Ct. 93 (2023).

Following issuance of the mandate and remand to this Court, the parties agreed to engage in mediation. (ECF No. 131). On April 5, 2023, the parties participated in an in-person mediation with retired Judge Louis M. Meisinger. (*See* Mark P. Chalos Declaration (hereinafter "Chalos Decl.") at ¶ 9). Although the parties were unable to reach agreement, they continued to negotiate through August 2023.

While engaging in attempted settlement negotiations, on March 15, 2023, Plaintiffs also filed a Motion for Leave to File a Second Consolidated Amended Class Action Complaint to focus and clarify allegations and causes of action in light of the arguments made during previous briefing and orders. (ECF Nos. 144 and 145). After Evenflo opposed the Motion on June 5, 2023 (ECF No. 151), the Court heard oral argument on August 29, 2023. (ECF No. 161). On December 20, 2023,

the Court allowed the Motion to Amend in part and denied it in part. (ECF No. 164). Twenty-five named Plaintiffs from 19 states filed the Second Consolidated Amended Class Action Complaint ("SAC") on January 4, 2024. (ECF No. 167). Plaintiffs' SAC sought certification of a Nationwide Class and Subclasses for all persons who purchased an Evenflo Big Kid Booster Seat between 2008 and May 31, 2022.

While the Motion for Leave to Amend was pending, Plaintiffs commenced discovery on August 29, 2023, by serving their First Set of Requests for Production of Documents. (Chalos Decl. ¶ 11). After receiving Evenflo's written responses and an initial document production, the parties engaged in multiple meetings by Zoom and exchanged numerous letters and emails in efforts to resolve disputes over the scope of Evenflo's production. (Chalos Decl. ¶ 13). Evenflo ultimately produced more than 450,000 pages of documents in April 2024. (*Id.*). Following that production, the parties continued to negotiate remaining issues in meet-and-confer sessions and through correspondence. (*Id.*). By October 2024, Evenflo produced a total of 465,361 pages of documents. (*Id.*).

Evenflo in turn sought and received both documents and interrogatory responses from each of the Class Representatives. After negotiations regarding the scope of Evenflo's requests, the Class Representatives supplemented their responses. (Chalos Decl. ¶ 14). Ultimately, however, Evenflo moved to compel and the parties fully briefed Evenflo's request for disclosure of medical information about the Class Representatives' children and social media posts related to the Booster Seat. (ECF Nos. 184, 185, 195, 203).

On October 30, 2024, the parties participated in a second mediation, this time overseen by Robert Meyer with JAMS. (Chalos Decl. ¶ 15). While no settlement was reached during the actual mediation, the parties continued, with Mr. Meyer's assistance, to negotiate. Mr. Meyer made a

mediator's proposal, which the parties accepted with some modifications. (Declaration of Robert Meyer (hereinafter "Meyer Decl.") at ¶ 11). The parties memorialized their agreement in a Term Sheet dated December 5, 2024. (Chalos Decl. ¶ 16). The parties then negotiated and finalized the formal Settlement Agreement. (Chalos Decl. ¶ 16 and Ex. 1).

B. The Settlement Agreement and its terms

1. The Class Definition

The proposed Settlement Class consists of "all Persons in the United States, including the District of Columbia and any U.S. territories (including without limitation Puerto Rico, Guam, and the U.S. Virgin Islands), who purchased an Evenflo "Big Kid" booster seat in the United States during the Class Period."[4] (Settlement § II.EE).[5] "Class Period" means "purchases between January 1, 2008 and December 31, 2022." *Id.*

2. The Settlement Fund

Evenflo will establish a settlement fund that will provide for payment of cash benefits to the Settlement Class, as well as the costs of notice and administration, Plaintiffs' Service Awards, and attorneys' fees and costs. (Settlement § II.DD). Evenflo will pay the amount of $3,500,000 cash into a common fund which will be non-reversionary to Evenflo. (Settlement § XII.A).

3. Monetary settlement benefits

Settlement Class Members will be entitled to submit one claim (for a maximum of two (2) seats). (Settlement § IX.A). Each claim will entitle the Settlement Class Member to receive (1) a

[4] The proposed class definition here is slightly broader than the class definition proposed in the Second Amended Complaint (ECF No. 167), as it includes Class members in Guam and the U.S. Virgin Islands. It also includes purchases through December 31, 2022, extending the prior-pleaded Class Period by 7 months from May 31, 2022. This is intended to offer relief to all purchasers of Big Kid Booster seats through the end of production. All the proposed Class members included in the proposed Class definition will receive notice pursuant to the proposed Notice Plan.

[5] The Settlement Agreement is attached to the Chalos Declaration as Exhibit 1.

pro rata cash payment from the Settlement Fund and also (2) a $25 credit towards the purchase of Evenflo products directly from Evenflo at www.evenflo.com. (Settlement §§ IX.A, XII.D-F).[6] There is no aggregate or per household cap on the number of credits being made available to the Class.

The cash amount that each claim will receive from the Settlement Fund is set forth in the Settlement Agreement's Distribution Plan. (Settlement § XIII.B). For each valid claim[7] the Class Member will receive a *pro rata* amount of the common fund after the deduction of settlement-related costs (including the expenses of the settlement administrator and the costs of notice to the Settlement Class) and any Court-awarded attorneys' fees, expense reimbursements, and service awards. (*Id.*).

4. Non-monetary settlement benefits

In addition, Evenflo has agreed to substantial non-monetary benefits that will educate parents and other consumers about safe use of Booster Seats. Evenflo will make two informational notices available to Settlement Class Members, including (1) a notice regarding the minimum weight for safe use of the Big Kid Booster Seat, and (2) a notice about Evenflo's side-impact testing of the Big Kid Booster Seat. (Settlement § XI.B). The precise language of those notices is set forth in the Settlement Agreement. (*Id.*). Evenflo will also create and post an educational video discussing transitioning a child from a front-facing harnessed car seat with a tether to a booster seat. (Settlement § XID). The video will include specified language regarding NHTSA and the

[6] Only one $25 credit may be used per transaction and the credit is not combinable with other offers online. (Settlement § XII.F.3, 4). The credit is freely transferrable by a Settlement Class Member to another individual. (Settlement § XII.F.6).

[7] The criteria for a "valid claim" are set forth in Section II.II of the Settlement Agreement.

American Academy of Pediatrics' recommendations and will appear on Evenflo's Facebook page and on the blog page of Evenflo's website. (*Id.*).

In addition, Evenflo is agreeing to "conform its marketing of belt-positioning booster seats as it concerns child weight recommendations to comply with federal regulations established by NHTSA" and "not to market its booster seats as being tested in any other manner not regulated by NHTSA without identifying the testing standard as having been developed by Evenflo and not NHTSA or another governmental body." (Settlement § XI.C).

5. Release of claims

Plaintiffs and Settlement Class Members will release Evenflo from all claims that have or could have been asserted against Evenflo in this action and all putative class actions and individual actions composing this consolidated case, as specified in the Settlement Agreement. (Settlement §§ II.A, XVI.A). The release does not, however, encompass claims arising from personal injuries or wrongful death. (Settlement § XVI.A).

6. Notice, claims process, and settlement administration

Epiq will serve as the third-party settlement administrator for this Settlement. (Settlement § II.C). Epiq will be responsible for implementing the notice program to Settlement Class Members. (*Id.*). In addition, Epiq will receive and process claim forms, provide information needed by this Court related to Epiq's administration, and distribute awards to Settlement Class Members, as well as any other needed administrative tasks. (Settlement § V.A-C).

7. Attorneys' fees and costs and service awards

The parties did not discuss attorneys' fees and reimbursement of costs prior to agreement on the material terms of the Settlement Agreement. (Settlement § XIV.A). Settlement Class Counsel may petition this Court for a fee award to be payable from the Settlement Fund. (Settlement § XIV.B, C). There is no agreement with Defendant on attorney fees. Settlement Class

Counsel will seek Service Awards for each Class Representative to be paid from the Settlement Fund. (Settlement § XV). Evenflo will not oppose any request for Service Awards that does not exceed $1,000 per Class Representative. (Settlement § XV.C).

ARGUMENT

In determining whether a proposed class action settlement should be approved, Federal Rule of Civil Procedure 23(e) sets out a two-stage process. First, "[t]he parties must provide the court with information sufficient to enable it to determine whether to give notice" of the proposed settlement to the class. Fed. R. Civ. P. 23(e)(1)(A). If the Court concludes, based on that showing, that it "will likely be able to" approve the settlement under Rule 23(e)(2) and also to certify the class for purposes of judgment on the settlement, then the Court should grant preliminary approval and direct notice in a reasonable manner to all class members who would be bound by the settlement. Fed. R. Civ. P. 23(e)(1)(B).

III. PRELIMINARILY APPROVAL IS APPROPRIATE.

The request for preliminary approval "only requires an 'initial evaluation' of the fairness of the proposed settlement." *New England Biolabs, Inc. v. Miller*, No. 1:20-cv-112234, 2022 WL 20583575, at *2 (D. Mass. Oct. 26, 2022) (quoting *Manual for Complex Litigation* § 21.632 (4th ed. 2004)). Preliminary approval is "a less rigorous standard" assessing if the settlement "appears to fall within the range of possible final approval." *Del Sesto v. Prospect Chartercare, LLC*, No. 18-cv-0328, 2019 WL 2162083, at *1 (D.R.I. May 17, 2019).

Federal Rule of Civil Procedure 23(e)(2) sets out the following factors that the Court must ultimately consider in determining if the class action settlement is "fair, reasonable, and adequate":

> [T]he class representatives and class counsel have adequately represented the class; (B) the proposal was negotiated at arm's length; (C) the relief provided for the class is adequate, taking into account: (i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method of distributing relief to the

> class, including the method of processing class-member claims; (iii) the terms of any proposed award of attorney's fees, including timing of payment; and (iv) any agreement required to be identified under Rule 23(e)(3); and (D) the proposal treats class members equitably relative to each other.

See also Jean-Pierre v. J&L Cable TV Servs., Inc., 538 F. Supp. 3d 208, 212-13 (D. Mass. 2021) (considering on a motion for preliminary approval whether it would "likely approve the settlement under Rule 23(e)(2)" and granting preliminary approval because "the proposed settlement is likely to be found to be a fair, adequate, and reasonable resolution of this case").[8]

Here, the proposed Settlement, negotiated by competent, experienced counsel who vigorously represented the interests of the Settlement Class, satisfies Rule 23(e).

A. The Settlement Class has been well represented.

Plaintiffs have pursued the objective they share with the Settlement Class of showing that Evenflo engaged in false and misleading advertising by working with Class Counsel in the preparation of the complaints and also responding to document requests and interrogatories, including supplementing those responses after discovery negotiations. (Chalos Decl. ¶ 14).

[8] In 2018, Rule 23(e) was amended "mainly to address issues related to settlement . . . ." Fed R. Civ. P. 23(e) advisory committee's note to 2018 amendment. With respect to Rule 23(e)(2), the Committee explained:

> The central concern in reviewing a proposed class-action settlement is that it be fair, reasonable, and adequate. Courts have generated lists of factors to shed light on this concern. Overall, these factors focus on comparable considerations, but each circuit has developed its own vocabulary for expressing these concerns. In some circuits, these lists have remained essentially unchanged for thirty or forty years. The goal of this amendment is not to displace any factor, but rather to focus the court and the lawyers on the core concerns of procedure and substance that should guide the decision whether to approve the proposal.

Id. Courts in this Circuit still "must presume the settlement is reasonable" when "'the parties negotiated at arm's length and conducted sufficient discovery . . . .'" *Robinson v. Nat'l Student Clearinghouse*, 14 F.4th 56, 59 (1st Cir. 2021) (citation omitted).

Plaintiffs' counsel have vigorously represented the proposed Settlement Class. Counsel's representation has included (1) investigation of initial complaints and the First and Second Consolidated Amended Complaints; (2) extensive research and analysis to address Evenflo's comprehensive motion to dismiss; (3) successful appellate litigation including briefing and oral argument; (4) investigation and preparation of the proposed SAC; (5) briefing and argument of the motion for leave to amend and Evenflo's comprehensive opposition to that motion; (6) substantial document discovery and discovery negotiations; (7) gathering of Plaintiffs' documents and relevant information to respond to Evenflo's discovery requests; (8) motion to compel briefing; (9) participation in two mediations and extensive subsequent settlement discussions; and (10) achievement of a favorable Settlement on behalf of the Settlement Class. (Chalos Decl. ¶¶ 7-16).

Additionally, neither Plaintiffs nor Class Counsel have any conflicts of interest with the Class. This factor weighs in favor of preliminary approval. *Jean-Pierre*, 538 F. Supp. 3d at 212 (requiring that (1) class representatives have ability and incentive to represent the class vigorously, (2) they obtain adequate counsel, and (3) no conflicts exist between a class representative's claims and those asserted on behalf of the class).

B. The proposal was negotiated at arm's length.

"A settlement is presumed to be reasonable when it is achieved by arm's length negotiations conducted by experienced counsel." *Nat'l Ass'n. of the Deaf v. Mass. Inst. of Tech.*, No. 3:15-cv-30024, 2020 WL 1495903, at *4 (D. Mass. Mar. 27, 2020). In addition, the negotiations in this case occurred with the assistance of two neutral mediators, which "reinforces that the Settlement Agreement is non-collusive." *New England Biolab*, 2022 WL 20583575, at *3.

Here, following the first mediation with retired Judge Meisinger, Class Counsel, who are experienced consumer class action litigators, continued to engage in settlement negotiations with

Evenflo. When no further progress could be made, Class Counsel aggressively pursued document discovery, which resulted in the production of 465,361 pages of documents. (Chalos Decl. ¶ 13).

Although even with the assistance of the second mediator, Robert Meyer, the parties were unable to reach a settlement during the actual mediation, Mr. Meyer continued to work with the parties until a resolution in principle was finally achieved. (Chalos Decl. ¶ 15; Meyer Decl. ¶ 11). Class Counsel continued to work over the next several weeks to obtain more favorable settlement provisions for the Settlement Class. (Chalos Decl. ¶¶ 15-16).

In addition, the Settlement itself includes no indicia of collusion. Attorneys' fees were *not* negotiated—the Court will decide them. There is *no* "clear sailing" provision—a provision that the defendant will not object to a fee request—and under no circumstance will any amount of the Settlement revert to Evenflo. *See Bezdek v. Vibram USA, Inc.*, 809 F.3d 78, 84 (1st Cir. 2015) (holding that although a clear-sailing agreement is not per se unreasonable, "courts are directed to give extra scrutiny to such agreements").

That the Settlement was negotiated at arms' length supports the finding that the Settlement is likely fair, reasonable and adequate. *See Roberts v. TJX Cos.*, No. 13-cv-13142, 2016 WL 8677312, at *6 (D. Mass. Sept. 30, 2016) ("[T]he participation of an experienced mediator[] also supports the Court's finding that the Settlement is fair, reasonable, and adequate").

C. The relief provided the Class is adequate considering Rule 23(e)(2)(C) factors.

The $3.5 million cash Settlement Fund is substantial, especially given that Class Members will also receive a $25 credit (and a second $25 credit if they have a valid claim for two booster seats). As the SAC shows, Plaintiffs purchased their Big Kid Booster Seats for as little as $29.88 and a maximum of around $50.00. (ECF No. 167 ¶¶ 23, 34, 56, 76, 87, 107, 116, 174, 182). Damages in this case would be calculated based on the amount that Class Members overpaid for their Booster Seats as a result of Evenflo's fraudulent claims about its Booster Seats, which would

be a percentage of the market price as determined through expert testimony. *See In re Dial Complete Mktg. & Sales Pracs. Litig.*, 320 F.R.D. 326, 334 (D.N.H. 2017). Depending on the final number of claimants,[9] Settlement Class Members will likely recover a significant percentage of what they could recover at trial. The exact amount each Class Member will receive cannot be determined at this point because each is entitled to a *pro rata* share of the Settlement Fund.

In addition to the monetary relief, the Settlement includes meaningful non-monetary benefits, including corrective notices to Class Members, educational materials, and commitments to specified business practices. *Compare Bezdek v. Vibram USA Inc.*, 79 F. Supp. 3d 324, 346-47 (D. Mass. 2015) ("Injunctive relief has been recognized as a meaningful component of a settlement agreement, particularly where it mimics the injunctive relief that the plaintiffs could achieve following trial."), *aff'd*, 809 F.3d 78 (1st Cir. 2015).

In addition, the Rule 23(e)(2)(C) factors each support preliminary approval of the Settlement:

Risks of Further Litigation. The benefits provided through the proposed Settlement are significant given the costs and risks of further litigation. Absent a settlement, Evenflo will aggressively litigate this case, as they have, and although Plaintiffs' SAC has survived, Plaintiffs face summary judgment and class certification. If this Court certified a class, Evenflo would likely seek an interlocutory appeal under Fed. R. Civ. P. 23(f). This litigation has been pending since 2020. Continued litigation—including completion of merits discovery, expert discovery, class

[9] *See* Fed. Trade Comm'n, *Consumers and Class Actions: A Retrospective and Analysis of Settlement Campaigns* at 21-22 (Sept. 2019), https://www.ftc.gov/system/files/documents/reports/consumers-class-actions-retrospective-analysis-settlement-campaigns/class_action_fairness_report_0.pdf (describing the FTC's analysis of 149 consumer class actions and its finding of a median claims rate of 9% and weighted mean (cases weighted by the number of notice recipients) of 4%).

certification litigation, summary judgment, trial, and any appeals—would likely take several more years. Settlement is preferable because of its guarantee of recovery to the Settlement Class without substantial additional delay as compared to continued litigation, which could prove to be lengthy and could result in a lower or no recovery.

Effectiveness of the Proposed Method of Distributing Relief. Rule 23(e)(2)(C)(ii) requires the Court to consider the effectiveness of the parties' "proposed method of distributing relief to the class, including the method of processing class member claims." As detailed in the accompanying Declaration of Cameron R. Azari, Esq. Regarding Notice Plan (Settlement Exhibit E) (hereinafter "Epiq Decl."), Epiq has designed a detailed and comprehensive Notice Plan that provides the best notice to Class Members that is practicable under the circumstances. (Epiq Decl. ¶¶ 17-41). The Settlement contemplates direct individual notice to Class Members who registered for the warranty or recall or who purchased their Big Kid Booster Seat on www.evenflo.com if Evenflo has an email or physical street address for the individual. (*Id.* ¶¶ 24-26). Those Class Members will be able to submit a claim online with "one click." (Settlement § IX.C). In addition, Epiq will conduct a 42-day internet digital notice campaign, a form of notice that has become a standard component of legal notice plans. (Epiq Decl. ¶¶ 30-37). Other Class Members will be able to submit Claim Forms electronically or by mail. (Settlement § IX.B).

Attorneys' Fees. In accordance with Fed. R. Civ. P. 23(e)(2)(C)(iii) and the Settlement, Plaintiffs' Counsel will request that this Court award a total Fee Award composed of both attorneys' fees and reimbursement of expenses to be paid from the Settlement Fund. (Settlement §§ II.P, XIV). *See In re Neurontin Mktg. & Sales Pracs. Litig.*, 58 F. Supp. 3d 167, 172 (D. Mass. 2014) (citing 2010 study of federal class action fee awards finding that "nearly two-thirds of class

action fee awards based on the percentage method were between 25% and 35% of the common fund").

Agreements Required to be Identified under Rule 23(e)(3). Rule 23(e)(2)(C)(iv) requires that the court consider whether there are any other agreements "required to be identified under Rule 23(e)(3) . . . ." There are no additional agreements.

D. Class members are treated equitably under Rule 23(e)(2)(D).

The final Rule 23(e)(2) inquiry is whether the Settlement Agreement "treats class members equitably relative to each other." Fed. R. Civ. P. 23(e)(2)(D). The proposed Settlement is a common fund settlement, without any preferential treatment of the Class Representatives or any segments of the Class. Class Counsel do intend to apply for Service Awards (also called "incentive payments") for the Class Representatives. (Settlement § XV). However, "[c]ourts have blessed incentive payments for named plaintiffs in class actions for nearly a half century . . . ." *Murray v. Grocery Delivery E-Services USA Inc.*, 55 F.4th 340, 352 (1st Cir. 2022). The First Circuit has confirmed that it "choose[s] to follow the collective wisdom of courts over the past several decades that have permitted these sorts of incentive payments, rather than create a categorical rule that refuses to consider the facts of each case." *Id.* at 353.

E. The proposed Notice Plan should be approved.

Before a proposed class settlement may be finally approved, the Court "must direct notice in a reasonable manner to all class members who would be bound by the proposal." Fed. R. Civ. P. 23(e)(1)(B). When, as here, seeking certification of a Rule 23(b)(3) settlement class, the notice must also comply with Rule 23(c)(2)(B), which requires "[a]t a minimum" that the notice

> inform class members of "(i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through an attorney if the member so desires; (v) that the court will exclude from the class any member who requests exclusion; (vi) the time and

> manner for requesting exclusion; and (vii) the binding effect of a class judgment on members under Rule 23(c)(3)."

Meaden v. HarberOne Bank, No. 23-cv-10467, 2023 WL 3529762, at *4 (D. Mass. May 18, 2023).

The proposed Notice Plan here meets all applicable standards. (Epiq Decl. ¶¶ 17-44). The Plan includes direct notice through email or postcards to Settlement Class Members for whom Evenflo has contact information, including warranty and recall registrants and consumers who purchased Big Kid Booster Seats directly from Evenflo. (*Id.* ¶¶ 24-29). The direct notice will provide the information specified in *Meaden*. (Settlement Exs. B, C). Epiq will also establish a Settlement Website where Class Members can view the long-form Class Notice, and other key case documents. (Settlement §§ II.C, II.HH, VI.A; Epiq Decl. ¶ 41). They will establish a Toll-Free Number where Class Members can obtain additional information (Epiq Decl. ¶ 42).

In addition, Epiq will also provide additional notice through an internet digital notice campaign, which, when combined with the individual notice, Epiq anticipates will reach at least 70% of the Settlement Class. (Epiq Decl. ¶ 18). As acknowledged in the Manual for Complex Litigation (§ 21.311 (4th ed. 2004)), "[m]any courts include the Internet as a component of class certification and class notice programs." In addition, the Federal Judicial Center has stated that a publication notice plan that reaches 70% of class members is one that reaches a "high percentage" and is within the "norm." Barbara J. Rothstein & Thomas E. Willging, Federal Judicial Center, *Managing Class Action Litigation: A Pocket Guide for Judges* at 27 (3d ed. 2010).

The Settlement's methods of notice and the proposed forms of notice will ensure that Settlement Class Members receive notice in clear and concise terms about the nature of this case, the terms of the Settlement, and their rights—all of the information required by Rule 23(c)(2)(B). This Court should, therefore, approve the proposed Notice Plan.

IV. CERTIFICATION OF THE SETTLEMENT CLASS IS APPROPRIATE

Rule 23(e)(1) provides that preliminary approval should be granted when the Court "will likely be able to" certify the class for purposes of judgment on the proposed settlement. Fed. R. Civ. P. 23(e)(1)(B)(ii). Class certification is a two-step process. First, Plaintiffs must establish numerosity, commonality, typicality, and adequacy under Rule 23(a). Second, Plaintiffs must establish that one of the bases for certification under Rule 23(b) is met. Plaintiffs contend, and Evenflo does not dispute for settlement purposes only, that the proposed Settlement Class meets the requirements for class certification under Rules 23(a) and 23(b)(3).[10] However, in the settlement context, under Rule 23(b)(3), the Court "need not inquire whether the case, if tried, would present intractable management problems." *Amchem Prods. v. Windsor*, 521 U.S. 591, 620 (1997).

A. The Settlement Class meets the requirements of Rule 23(a).

1. The Class is sufficiently numerous.

Rule 23(a)(1) requires that a class be "so numerous that their joinder before the Court would be impracticable." Fed. R. Civ. P. 23(a)(1). Here, the proposed Settlement Class consists of all persons in the United States who purchased at least one Booster Seat between January 1, 2008, and December 31, 2022. Over that period, millions of Booster Seats were sold. (SAC ¶ 225). Numerosity is clear.

2. Questions of law or fact are common to the Class.

Rule 23(a)(2) requires a showing of the existence of "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). For commonality to be satisfied, there must be at least one common issue of fact or law resolution of which "'affect[s] all or a substantial number of the class

[10] Evenflo expressly denies that class certification would be appropriate if the Court were not to approve the Settlement, and the case continued to be litigated.

members.'" *In re M3 Power Razor Sys. Mktg. & Sales Prac. Litig.*, 270 F.R.D. 45, 54 (D. Mass. 2010) (citation omitted).

Here, there are numerous issues of fact and law common to the Settlement Class, including among others: (a) whether Evenflo's uniform claims about its side-impact testing of Big Kid Booster Seats and the minimum safe weight for their use are false or misleading, (b) whether Settlement Class Members paid an inflated price (a premium) for the Big Kid Booster Seat because of Evenflo's misrepresentations, and (c) how much of a premium the Settlement Class Members paid. The commonality requirement is met.

3. Plaintiffs' claims are typical.

Rule 23(a)(3) requires that the class representatives' claims be "typical of the claims . . . of the class." Fed. R. Civ. P. 23(a)(3). "To establish typicality, the plaintiffs need only demonstrate that 'the claims or defenses of the class and the class representative arise from the same event or pattern or practice and are based on the same legal theory.'" *In re M3 Power Razor Sys.*, 270 F.R.D. at 54. Here, Plaintiffs' claims and the Class Members' claims all arise from the same uniform representations: that the Big Kid Booster Seats were side-impact tested and were safe for children weighing less than 40 pounds. And, as a result of those misrepresentations, purchasers of the Big Kid Booster Seats overpaid for the seats. The proposed Settlement Class meets the typicality requirement.

4. Plaintiffs will fairly and adequately protect the Class.

Rule 23(a)(4) requires that the representative plaintiffs "will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). "This requirement has two parts. The plaintiffs must show first that the interests of the representative party will not conflict with the interests of any of the class members, and second, that counsel chosen by the representative party is qualified,

experienced, and able to conduct the proposed litigation." *In re M3 Power Razor Sys.*, 270 F.R.D. at 55 (cleaned up).

First, Plaintiffs have no interests in conflict with those of the Settlement Class. They all are equally interested in obtaining relief for Evenflo's misconduct in advertising that its Booster Seats were side-impact tested and safe for children under 40 pounds. *See Andrews v. Bechtel Power Corp.*, 780 F.2d 124, 130 (1st Cir. 1985) (finding adequacy requirement satisfied when "the interests of the representative party will not conflict with the interests of any of the class members"); *Bezdek*, 79 F. Supp. 3d at 339 (adequacy requirement met when plaintiff's "interests align with those of the class as a whole, because all seek redress from the same injury"). Plaintiffs have also adequately and vigorously represented their fellow Settlement Class Members by spending significant time assisting Class Counsel, including providing necessary information for complaints, as well as documents and information to respond to Evenflo's discovery requests.

Second, Plaintiffs have retained qualified and competent counsel with extensive experience litigating, trying, and settling class actions, including consumer protection cases like this one, throughout the country. (Chalos Decl. ¶¶ 24-33). Through investigation and discovery, Class Counsel gathered sufficient information to assess the strengths and weaknesses of this case and balance the benefits of settlement against the risks of litigation. *Glass Dimensions, Inc. v. State St. Bank & Tr. Co.*, 285 F.R.D. 169, 179 (D. Mass. 2012) (requiring that "the counsel chosen by the class representative must be 'qualified, experienced, and able to vigorously conduct the proposed litigation'" (citation omitted)).

The requirements of Rule 23(a) are, therefore, met for the purposes of certifying a Settlement Class.

B. The Class meets the requirements of Rule 23(b)(3) for purposes of a settlement class.

Certification is appropriate under Rule 23(b)(3) if (1) common questions of law or fact predominate over those affecting only individual class members and (2) class treatment is superior to other adjudication methods. *See* Fed. R. Civ. P. 23(b)(3); *Meaden*, 2023 WL 3529762, at *3.

1. Common questions of law or fact predominate over individual issues.

Rule 23(b)(3) requires a finding that common issues of law or fact predominate over any issues unique to individual class members. Predominance requires that "questions common to the class predominate, not that those questions will be answered, on the merits, in favor of the class." *Amgen, Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 459 (2013). Additionally, "[t]his standard can be met if the common issues predominate, even if some individual issues arise in the course of litigation." *Meaden*, 2023 WL 3529762, at *2 (citing *Smilow v. Sw. Bell Mobile Sys., Inc.*, 323 F.3d 32, 39 (1st Cir. 2003)).

Here, the common questions discussed above predominate because there are few, if any, individualized factual issues. The core facts of this case involve Evenflo's uniform conduct that harmed all Settlement Class members in the same manner and the impact of the false advertising on the price that Plaintiffs and the proposed Settlement Class paid for the Booster Seats that they purchased. In other words, Plaintiffs claim "that all class members are entitled to the same legal remedies premised on [Defendant's] same alleged wrongdoing, and the issues affecting every claimant are substantially the same." *Meaden*, 2023 WL 359762, at *3. This case thus falls within the "types of cases . . . uniquely well-suited to class adjudication." *In re M3 Power Razor Sys. Mktg. & Sales Prac. Litig.*, 270 F.R.D. at 56.

2. Class treatment is the superior method of adjudication.

Rule 23(b)(3) requires a class action to be "superior to other available methods for fairly and efficiently adjudicating the controversy." Where "there are thousands of potential class

members with small claims resulting from a common issue" (here, millions of potential class members), "a class action is the most feasible mechanism for resolving the dispute." *Meaden*, 2023 WL 3529762, at *3. In fact, there is no realistic alternative to a class action, as individual lawsuits by the potential class members would be inefficient and, realistically, no individual lawsuit would be financially viable. *See Gintis v. Bouchard Transp. Co.*, 596 F.3d 64, 66-67 (1st Cir. 2010) ("Rule 23 has to be read to authorize class actions in some set of cases where seriatim litigation would promise such modest recoveries to be economically impracticable."); *Smilow*, 323 F.3d at 41-42 ("'The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights.'" (citation omitted)).

Therefore, this Court "will likely be able to" certify the class for purposes of judgment on the proposed Settlement under Rule 23(e). Fed. R. Civ. P. 23(e)(1)(B).

C. This Court should appoint Co-Lead Counsel as Settlement Class Counsel.

Rule 23(g) separately requires the court to appoint Class Counsel when it certifies a class. At the outset of this MDL, this Court carefully considered the experience and credentials of the attorneys seeking to lead this litigation and appointed as Co-Lead Counsel Steve W. Berman of Hagens Berman Sobol Shapiro LLP, Martha A. Geer of Whitfield Bryson LLP (now Milberg Coleman Bryson Phillips Grossman PLLC), and Mark P. Chalos of Lieff Cabraser Heimann & Bernstein, LLP. (ECF No. 51). Co-Lead Counsel have vigorously litigated this case, including investigation of claims, litigation of dispositive motions, appellate briefing, and discovery. Given the work Co-Lead Counsel have performed, their experience in consumer class action litigation, their knowledge of the applicable law, and the resources they have already committed, they should be appointed as Class Counsel under Fed. R. Civ. P. 23(g)(1)(A).

V. CONCLUSION

For the above reasons, Plaintiffs respectfully request that this Court grant this Motion and enter an order substantially similar to the contemporaneously-filed proposed Preliminary Approval Order.

Dated: March 20, 2025

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 20, 2025, I caused the foregoing to be filed via the Court's electronic filing system which will notify all counsel of record of the same.

/s/ *Steve W. Berman*
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