IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

MATTHEW SCHMITT, individually and on behalf of all others similarly situated, Plaintiff, v. NEWELL BRANDS INC. and GRACO CHILDREN'S PRODUCTS INC. Defendants.	20 Civ. 16240-MAS-LHG

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS UNDER FED. R. CIV. P. 12(b) AND 12(b)(6)

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Plaintiff Matthew Schmitt respectfully submits this Memorandum of Law in Opposition to Defendant Newell Brands Inc. and Defendant Graco Children's Product Inc.'s Motion to Dismiss Plaintiff's Amended Complaint under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).

PRELIMINARY STATEMENT

This is a classic case of consumers receiving less than what they were promised. Here, the product is children's car seats, which Defendants advertise to their customers as having a certain useable life. In fact, Defendants instruct their customers to destroy their car seats at the conclusion of that useable life. But the problem here is that Defendants delivers their seats to online consumers with a very substantial portion of that life expired. Like a consumer who buys a pound of beef, a gallon of gas, or a yard of fabric, Plaintiff Matthew Schmitt paid for a discrete amount of useable product. Instead, he received an expensive car seat that arrived with a large proportion of that discrete useful life already expended.

In defense of this practice, Defendants' flagship argument is essentially that there is no injury in providing customers with less than what was promised. Such argument is absurd. In essence, Defendants argue that it is acceptable for a butcher to put his finger on the scale so long as the family does not ultimately starve. Plaintiff need not wait years, and after the statute of limitations has expired, to allege that the seat he was sold was of less value than represented. This is a

standard benefit-of-the-bargain injury and Plaintiff has standing to seek relief in court.

Seeking injunctive relief and compensation for this practice, Plaintiff has pled sufficient facts to put Defendants on notice of exactly the precise misconduct alleged here. Indeed, Defendants never argue that they do not understand the charges, nor could they, but instead argue that advertising a product with a ten-year lifespan, and then selling a product with a significantly reduced lifespan, ultimately does not amount to a deceptive practice. In fact, Plaintiff has pled all the elements for claims under the NJCFA and for common law fraud: (1) he has alleged particular deceptive statements, namely the ten-year guarantee found on Defendants' website; (2) he has alleged an ascertainable loss, the difference in value between a new car seat with a ten-year lifespan and a used car seat with its lifespan substantially reduced; (3) he has alleged Defendants' knowledge of this practice; and (4) and he has alleged his own reliance upon the ten-year guarantee at the time of purchase. There is no reason to dismiss either the NJCFA claim or the fraud claim.

Plaintiff's remaining claims are also sufficiently pled. Plaintiff has alleged a misrepresentation in his complaint, namely the guarantee that the car seats at issue would last ten years from the time of purchase. Similarly, Plaintiff has alleged an inequitable practice which forms the basis of his unjust enrichment claim, again the

selling of car seats with a lifespan significantly less than the lifespan advertised. Finally, "money had and received" is its own cause of action which, while similar, is not identical to an unjust enrichment claim, and should be allowed to proceed in the alternative at this early stage in the litigation. Defendants' motion should be denied in its entirety.

STATEMENT OF FACTS

Plaintiff's claim is a fairly simple one. On August 31, 2020 Plaintiff went to gracobaby.com to purchase a car seat for his daughter. (Am. Compl. ¶ 12.) On the website he saw a statement that the car seat he purchased would have a useful life of ten years. (*Id.* ¶ 17.) This is a common statement on Defendants' website, and Defendants routinely advertise car seats as "giv[ing] you 10 years with one car seat." (*Id.*). Relying upon this statement, Plaintiff purchased this car seat. (*Id.* ¶ 19.)

When the car seat arrived, a sticker affixed to the seat disclosed that it had been manufactured on March 7, 2019. (*Id.* ¶ 13.) The car seat was therefore nearly a year-and-a-half old at the time it arrived. (*Id.* ¶ 14.) This is significant because as Defendants' own product manual directs, the car seat should not be used after ten years. (*Id.* ¶ 15.) Plaintiff therefore did not receive a car seat with ten years of useful life, as Defendants advertised, and as Plaintiff expected based on those advertisements, but one with a significantly reduced useful life.

Plaintiff now seeks economic damages on behalf of himself and purchasers like him, representing the difference in value between a new car seat with a discrete amount of useful life (*i.e.*, what was promised) and a car seat with a substantially reduced life (*i.e.*, what was received). Plaintiff also seeks injunctive relief which would prohibit Defendants from engaging in this practice and require them to provide purchasers with accurate statements regarding the car seat purchased, much like Defendants do for in-store purchases.

STANDARD OF REVIEW

"At any time, a defendant may move to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1). A motion to dismiss for lack of subject matter jurisdiction made prior to the filing of the defendant's answer is a facial challenge to the complaint. A facial 12(b)(1) challenge, which attacks the complaint on its face without contesting its alleged facts, is like a 12(b)(6) motion in requiring the court to consider the allegations of the complaint as true. The Third Circuit has repeatedly cautioned against allowing a Rule 12(b)(1) motion to be turned into an attack on the merits." *Rothman v. DOL & Workforce Dev. Div. of Wage & Hour Compliance, Gen. Enf't*, No. 19-13011 (MAS) (TJB), 2020 U.S. Dist. LEXIS 13407, at *3-4 (D.N.J. Jan. 24, 2020) (quotation marks, citations and alterations omitted) (Shipp, J.).

To satisfy Rule 12(b)(6), a complaint simply requires "sufficient factual material, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Mebuin v. United States*, No. 13-446 (JLL) (JAD), 2015 U.S. Dist. LEXIS 133790, at *9 (D.N.J. Oct. 1, 2015) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). A claim has "facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (quoting *Iqbal*, 556 U.S. at 678). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* "[A]ll well-pleaded allegations of the complaint must be taken as true and interpreted in the light most favorable to the plaintiffs, and all inferences must be drawn in favor of them." *McTernan v. City of York*, 577 F.3d 521, 526 (3d Cir. 2009) (quotation marks and citation omitted). The court's "role is not to determine whether the non-moving party 'will ultimately prevail' but whether that party is 'entitled to offer evidence to support the claims.'" *Byrnes v. Greystone Park Psychiatric Hosp.*, No. 15-7934 (JLL) (JAD), 2016 U.S. Dist. LEXIS 37661, at *6 (D.N.J. Mar. 22, 2016) (quoting *United States ex rel. Wilkins v. United Health Grp., Inc.*, 659 F.3d 295, 302 (3d Cir. 2011)).

ARGUMENT

I. PLAINTIFF HAS ARTICLE III STANDING

Courts apply a "plausibility" standard when evaluating whether factual allegations, taken as a whole, show that the plaintiff possesses Article III standing. *Finkleman v. NFL*, 810 F.3d 187, 194 (3d Cir. 2016). To allege Article III standing, a claimant must allege that he or she (i) suffered an injury in fact, (ii) that is fairly traceable to the challenged conduct, and (iii) that is likely to be redressed by a favorable judicial decision. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). Injury in fact requires that the plaintiff suffered "an invasion of a legally protected interest" that is "concrete and particularized." *Id.* at 1548 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). For an injury to be "particularized," it "must affect the plaintiff in a personal and individual way." *Id.* (quoting *Lujan*, 504 U.S. at 560 n.1). A "concrete" injury "must actually exist," and includes actual "risk of harm" even "if [the victim's] harms may be difficult to prove or measure." *Id.* at 1549. Plaintiff satisfies these standards and has Article III standing.

A. Plaintiff Has Suffered a Concrete and Particularized Injury as a Result of Defendants' Conduct

The injury pled in this matter is straightforward. Defendants advertise on their website that they are selling car seats which have a discrete useful life. The car seat delivered to Plaintiff, like the car seats delivered to numerous other class

members, arrived with a significant portion of that useful life used up. Had Plaintiff been aware that the car seat he was receiving had a useful life of substantially less than advertised he either would not have purchased the car seat through Defendants' website or would have paid substantially less than he did.

This is a standard benefit-of-the-bargain injury for overpayment, something that has long been recognized as the type of concrete and particularized injury which confers standing. *See, e.g.*, *Danvers Motor Co. v. Ford Motor Co.*, 432 F.3d 286, 291, 294 (3d Cir. 2005) (economic harm is a "paradigmatic" form of injury generally supporting standing unless a theory is "totally fanciful"); *Smajlaj v. Campbell Soup Co.*, 782 F. Supp. 2d 84, 99 (D.N.J. 2011) ("The New Jersey Supreme Court has repeatedly and explicitly endorsed a benefit-of-the-bargain theory under the Consumer Fraud Act that requires nothing more than that the consumer was misled into buying a product that was ultimately worth less than the product he was promised."); *In re Gerber Probiotics Sales Practices Litig.*, No. 12-835 (JLL), 2013 U.S. Dist. LEXIS 121192, at *16 (D.N.J. Aug. 22, 2013) (monetary harm based on paying a premium for a misrepresented product is "a classic form on injury in fact" that "is concrete and particularized").[1] Simply put,

[1] *See also Carriuolo v. GM Co.*, 823 F.3d 977, 987 (11th Cir. 2016) (a false or omitted statement allows the seller "to command a price premium and to overcharge customers systematically" in an amount equal to the difference in the market value of the vehicle as delivered and the market value in the condition in which it should have been delivered); *Pulaski & Middleman, LLC v. Google, Inc.*, 802 F.3d 979, 989 (9th Cir. 2015) (restitution focuses on the difference between what was paid and what a reasonable consumer would have paid had the fraudulent or omitted

this is not a case about speculative fear of possible future injury; it is a straightforward case claiming that Plaintiff, and purchasers like him, overpaid as a result of Defendants' deception, resulting in a concrete injury of the sort routinely recognized by courts.

B. Plaintiff Plausibly Alleges Injuries Fairly Traceable to the Challenged Conduct

Again, ignoring Plaintiff's detailed allegations of Defendants' deceptive statements, Defendants contend that Plaintiff has failed to allege injuries fairly traceable to Defendants' conduct. However, the Amended Complaint does precisely that, focusing on Defendants' misrepresentations regarding the useful life of car seats purchased on the Defendants' website. Indeed, Plaintiff has ably pointed to "Defendant[s'] knowledge of the defects . . . and allege[s] that it concealed same." *In re Volkswagen Timing Chain Prod. Liab. Litig.*, Civil Action No.: 16-2765 (JLL), 2017 U.S. Dist. LEXIS 70299, at *52 (D.N.J. May 8, 2017). There is simply no doubt that the purported injury, the receipt of product worth less

information been known), *cert denied*, 136 S. Ct. 2410 (2016); *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1021 n. 13 (9th Cir. 2011) (a "conclusive presumption" of injury exists under the California Unfair Competition Law "when a defendant puts out tainted bait and a person sees it and bites"); *Coghlan v. Wellcraft Marine Corp.*, 240 F.3d 449, 452-53 (5th Cir. 2001) (benefit-of-the-bargain damages recoverable where plaintiffs were promised an all-fiberglass boat but received a hybrid wood-fiberglass boat); *In re Toyota Motor Corp.*, 790 F. Supp. 2d 1152, 1168 (C.D. Cal. 2011) (plaintiffs lost "money or property" under consumer statutes because they alleged "that they would have made a different purchasing decision but for Toyota's misrepresentations"); *Lloyd v. GMC*, 916 A.2d 257, 281 n. 17 (Md. Ct. App. 2007) (loss under consumer protection act includes " a difference between what was expected and what was received").

than the product which was advertised, is directly traceable to Defendants' failure to disclose that purchasers would receive car seats with substantial portions of their useful life essentially expired. Plaintiff easily satisfies this prong of the standing analysis.

C. Plaintiff Has Sufficiently Alleged an Injury Likely to be Redressed by a Favorable Judicial Decision

The benefit-of-the-bargain injury alleged in this matter is easily redressed by damages which would compensate for the amount Plaintiff, and purchasers like him, overpaid for substantially expired car seats. Additionally, under the statutes cited in the Amended Complaint, Plaintiff can recover statutory damages, punitive damages, and the costs and fees associated with this suit. Plaintiff has pled fully redressable injuries and easily satisfies this prong of the Article III standing test as well.

D. Defendants' Arguments Regarding Standing Misread Both the Complaint and the Relevant Case Law

Defendants' argument that Plaintiff lacks Article III is incorrect because it is based on a fundamentally flawed premise, namely, that Plaintiff will only be injured when the car seat he purchased expires, as opposed to when he receives a product worth less than the product advertised. Put another way, Defendants seem to believe that when a gas station gives you eight gallons, despite charging you for ten, the harm only occurs when you run out of gas.

This premise misreads both the allegations in the Amended Complaint and the relevant case law. The gravamen of the Amended Complaint is that Plaintiff purchased a car seat believing he and his family would receive approximately ten years of use. Instead, he has received a product that has a little over eight years of useful life. Importantly, Plaintiff knew the lifespan of the product the moment he received it as Defendants informed him of the actual lifespan upon his receipt of the product. The failure of this product is not an event that may or may not occur at some future date; it is in fact predestined. This guaranteed injury distinguishes the instant case from those cited by Defendants.

Remarkably, Defendants instead posit that Plaintiff lacks standing because of a litany of contingencies Defendants have dreamed up. Plaintiff could have no more children, he could lose the car seat, it could be damaged in an accident. Plaintiff's burden is not to plead past any future scenario Defendants can dream up, but instead to plead a concrete, present injury, which he has, namely the receipt of a product with a lifespan significantly reduced from the lifespan which was advertised. He was, in other words, harmed the day he purchased the seat and got less than he paid for.

Defendants' cited case law is inapposite. Nearly every case cited by Defendants involves a purportedly defective product in which the defect never

manifested.[2] This fundamentally misunderstands the nature of Plaintiff's complaint, which is not that the seats suffer from a particular defect which he must wait to manifest to experience injury. The crux of Plaintiff's complaint is that Defendants advertised that they were selling a car seat with a ten-year lifespan and he received one that, by Defendants' own admission in their product manual, had a lifespan of significantly less than ten years. Put another way, the "defect" at issue is the reduced lifespan (not a particular physical defect) and Plaintiff has already experienced that injury. Plaintiff need not wait until the car seat actually expires to bring Defendants to account for their misleading advertising.

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[2] *See, e.g.*, *In re Johnson & Johnson Talcum Powder Prods. Mktg., Sales Pracs. & Liab. Litig.*, 903 F.3d 278, 289 (3d Cir. 2018) (finding lack of standing where Plaintiff failed to allege she had suffered any injury due to increased risk of ovarian cancer); *O'Neil v. Simplicity, Inc.*, 574 F.3d 501, 504 (8th Cir. 2009) (plaintiff's purportedly defective crib functioned properly); *Rivera v. Wyeth-Ayerst Labs.*, 283 F.3d 315, 320 (5th Cir. 2002) ("Rivera paid for an effective pain killer, and she received just that[.]"); *In re Fruit Juice Prods. Mktg. & Sales Pracs. Litig.*, 831 F. Supp. 2d 507, 512 (D. Mass. 2011) (purported lead amounts in fruit juice did not exceed FDA permitted amounts and plaintiff pled no further economic injury); *Webb v. Carter's Inc.*, 272 F.R.D. 489 (C.D. Cal. 2011) (no allegations that potential class members who children did experience irritation from clothing would ever suffer any injury); *Jasper v. Abbott Labs., Inc.*, 834 F. Supp. 2d 766, 771-72 (N.D. Ill. 2011) (plaintiff alleged only emotional distress regarding possibility that baby formula could have been contaminated with beetle parts); *Medley v. Johnson & Johnson Consumer Cos.*, No. 10-cv-2291 (DMC) (JAD), 2011 U.S. Dist. LEXIS 4627, at *4-7 (D.N.J. Jan. 18, 2011) (No allegations of any injury as a result of presence of methyl chloride in baby shampoo); *Herrington v. Johnson & Johnson Consumer Cos.*, No. C 09-1597 CW, 2010 U.S. Dist. LEXIS 90505, at *16-20 (N.D. Cal. Sept. 1, 2010) (plaintiffs failed to allege any adverse effects of purported carcinogens in baby bath products); *Whitson v. Bumbo*, No. C 07-05597 MHP, 2009 U.S. Dist. LEXIS 32282, at *18-19 (N.D. Cal. Apr. 16, 2009) (plaintiff failed to allege injury when purported baby seat functioned properly and defect never manifested); *In re Canon Cameras Litig.*, 237 F.R.D. 357, 360 (S.D.N.Y. 2006) ("proof of malfunction is a prerequisite to any of plaintiffs' claims" related to purportedly defective cameras).

The more analogous case here is *Cottrell v. Alcon Labs.*, 874 F.3d 154 (3d Cir. 2017), in which the plaintiffs alleged that the design of an eyedrop mechanism resulted in substantially wasted amounts of the eyedrop product at issue. *Id.* at 159-60. As in the instant case, the plaintiff was essentially losing the benefit of his bargain, paying for eyedrop liquid that would by necessity go to waste. *Id.* As in the instant case, the defendant argued that the plaintiffs lacked standing, as their injury was "speculative," a framing that the District Court agreed with. *Id.*at 168-69. The Third Circuit Court of Appeals reversed that decision. *Id.* at 171. The Court of Appeals held that the plaintiffs had in fact pled a concrete injury, namely the reduced doses received from each bottle, an injury which occurred at purchase. *Id.* at 168-70. Similarly, Plaintiff has pled a concrete injury, the reduced lifespan of the car seat he purchased.

Defendants' secondary argument, that Plaintiff fails to allege that he suffered the injury in question, misses the mark entirely. Plaintiff alleges that he was presented with a statement on Defendants' website that the product he purchased would have a ten-year lifespan. (Am Compl. ¶ 17.) To establish the veracity of this allegation, Plaintiff attached to his complaint a similar statement made about a similar product. (*Id.*) However, Plaintiffs' allegation is that the practice at issue, misrepresenting the lifespan of products on Defendants' website, was a practice that applied to many of Defendants' products, including the one he purchased. (*Id.*)

Discovery will help determine the precise scope of Defendants' deceptive practices.[3] Plaintiff's allegations should be taken as true at this stage of litigation and Defendants have presented no reason to doubt Plaintiff's allegation that he was presented with a promise of a ten-year lifespan which ultimately went unfulfilled.[4]

Finally, Plaintiff has set forth a sufficient basis for injunctive relief. Plaintiff seeks more than compensation for past harm. Plaintiff would like to be able to make informed purchasing decisions going forward. Plaintiff has at least one more child on the way, and when he is deciding upon a car seat for that child, he would like to be able to purchase one online knowing what its useful life will be, much as he is able to do at a store, not be presented with untrue statements regarding the useful life of the product he is purchasing.

This is wholly different from the situation in *Tawil v. Ill. Tool Works, Inc.*, No. 15-8747 (FLW) (LHG), 2016 U.S. Dist. LEXIS 105964 (D.N.J. Aug. 11, 2016) and the other cases cited by Defendants. In those matters the product was defective at its very core (*e.g.*, windshield washing fluid that damaged the wiper

[3] Indeed, questions regarding adequacy of class representation and the possibility of sub-classes are "for another day." *Francis E. Parker Mem. Home, Inc. v. Georgia-Pacific LLC*, 945 F. Supp. 2d 543, 577 (D.N.J. 2013).

[4] Defendants' assertion that because Plaintiff pled the ten-year guarantee upon "information and belief" he could not have relied upon the guarantee is logically flawed. Plaintiff's allegation is that based on the information presently available to him, and his own recollection, the same statement was found in Defendants' website messaging for the product he purchased. He specifically alleges in the Amended Complaint that he relied upon this ten-year guarantee. (Am. Comp. ¶ 19.)

system in *Tawil*). Here, Plaintiff would like to be able to make a purchasing decision knowing that the butcher's thumb will not be weighing on the scale, an opportunity he hopes to grant other purchasers as well through this lawsuit. Plaintiff has sufficient standing to seek injunctive relief.

II. PLAINTIFF HAS PROPERLY PLEAD MULTIPLE THEORIES OF LIABILITY UNDER NEW JERSEY'S CONSUMER FRAUD ACT

Plaintiff has alleged a practice by which Defendants routinely represents that it is selling child seats of a certain longevity, but actually provides the car seats to consumers with a significant amount of that longevity depleted. Such allegations of unfair business practices are sufficient to pass muster under several of the NJCFA's broad consumer-protection provisions.

Indeed, the NJCFA is "'intended to be applied broadly in order to accomplish its remedial purpose, namely, to root out consumer fraud.'" *Manahawkin Convalescent v. O'Neill*, 217 N.J. 99, 121 (2014) (citation omitted). Under the NJCFA, a party "must allege sufficient facts to demonstrate: (1) unlawful conduct; (2) an ascertainable loss; and (3) a causal relationship between the unlawful conduct and the ascertainable loss." *Harnish v. Widener Univ. Sch. of Law*, 931 F. Supp. 2d 641, 648 (D.N.J. 2013). Such "unlawful conduct" includes—among other things—an "unconscionable commercial practice," as well as "deception, fraud, false pretense, false promise, misrepresentation, or the knowing,

concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission." N.J. Stat. § 56:8-2.

A. Defendant's Sales Practices Constitute Unlawful Conduct Under the NJCFA

Even under an enhanced pleading standard, Plaintiff's allegations are sufficient allegations of fraudulent and unfair business practices.[5]

Rule 9(b) "does not require specificity just for specificity's sake." *Smajlaj*, 782 F. Supp. 2d at 104. Instead, it is a practical standard that simply requires that a complaint bring "sufficient details to put Defendants on notice of the 'precise misconduct with which they are charged,'" *id.* (citation omitted), or "otherwise inject precision or some measure of substantiation into a fraud allegation." *Frederico v. Home Depot*, 507 F.3d 188, 200 (3d Cir. 2007); *Afzal v. BMW of N.*

[5] As the NJCFA prohibits a range of unlawful conduct, including—but not limited to—fraud, Fed. R. Civ. P. 9(b)'s particularity requirement seems not to apply to instances of unconscionable commercial conduct, such as here. *See Katz v. Live Nation, Inc.*, No. 09-3740 (MLC), 2010 U.S. Dist. LEXIS 60123, at *14 (D.N.J. June 17, 2010) ("Unconscionable commercial practice claims are distinct from NJCFA claims sounding in fraud, and so the heightened pleading standard of Rule 9(b) does not apply."); *see also Smajlaj v. Campbell Soup Co.*, 782 F. Supp. 2d 84, 91 (D.N.J. 2011) ("*To the extent that Plaintiffs' claims sound in fraud or misrepresentation* they 'must state with particularity the circumstances constituting fraud.'" (citation omitted) (emphasis added)); *Pascarella v. Swift Transp. Co.*, 694 F. Supp. 2d 933, 941 (W.D. Tenn. 2010) ("The Court agrees that the NJCFA covers many forms of 'unconscionable commercial practice,' *see* N.J.S.A. 56:8-2, and instances of sharp dealing besides conduct that is 'fraudulent' in the technical sense. . . . As such, Rule 9(b)'s particularity requirement for averments of fraud is inapplicable to Plaintiff's NJCFA claim."); *In re NorVergence, Inc.*, 384 B.R. 315, 356-57 (Bankr. D.N.J. 2008) ("a defendant may be liable under the NJCFA as a result of engaging in an 'unconscionable commercial practice,' without also engaging in an act of fraud); *Payne v. Fujifilm U.S.A., Inc.,* No. 07-385 (JAG), 2007 U.S. Dist. LEXIS 94765, at *28 (D.N.J. Dec. 28, 2007) (same).

Am., LLC, No. 15-8009, 2017 U.S. Dist. LEXIS 118391, at *16-17 (D.N.J. July 27, 2017) ("The purpose of the heightened pleading requirements is to 'give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge." (citation omitted)).

Contrary to Defendants' averments, the Amended Complaint is replete with allegations that Defendants repeatedly made false statements in the advertising of their car seats, and indeed highlighted their useful life as a selling point for consumers. As alleged, "many of the products on the Graco website specifically state that they will be useable for ten years," including statements that a consumer—such as the Plaintiff—could expect "10 years with one car seat." (Am. Compl. ¶ 17.) Indeed, Graco is clear that its seats may be used a "defined period of time," (*id.* at ¶ 16) and there is no credible suggestion that Plaintiff was given warning that the seat he was purchasing—with a ten-year life—was somehow excepted from these representations. To the contrary, Plaintiff alleges that such a statement was made regarding the very seat he purchased. (*Id.* at ¶ 16.) This is no example of "group pleading," as Defendants assert, but instead allegations that there were actual averments on Defendants' website that were directed at Plaintiff during the purchase of the car seat at issue.

As if these untrue statements were not enough, which they are, Plaintiff has further alleged that the practice was an unconscionable commercial practice by

virtue of concealment and omission. (Am. Compl. ¶¶ 30, 48.) In such a case, a "'plaintiff must show that defendant (1) knowingly concealed (2) a material fact (3) with the intention that plaintiff rely upon the concealment.'" *Harnish v. Widener Univ. Sch. of Law*, 931 F. Supp. 2d 641, 652 (D.N.J. 2013) (citation omitted). Moreover, "'Rule 9(b) allows essential elements of the omission under the NJCFA, such as intent, to be alleged generally.'" *Id.* (citation omitted). Here, the omission—that the new products being shipped are not actually "new"—was assuredly known to Defendants. Putting aside that it is not credible that Defendants are unaware of the status of their supply chain assets, Defendants have "admit[ted] that there is no way for consumers shopping online to protect themselves against receiving these devalued car seats." (Am. Compl. ¶ 22.) Having acknowledged the practice, intent may be squarely inferred.

Of course, even without any actual misrepresentation, Defendants' practice of providing consumers with devalued merchandise at full price is an unconscionable and deceptive trade practice under the NJCFA. "Because unconscionable commercial practices are categorized as 'affirmative acts,' as opposed to knowing omissions, NJCFA claims alleging unconscionable commercial practice as the unlawful activity do not require a showing of 'intent to deceive' or 'knowledge of the falsity of the representation.'" *See Katz v. Live Nation, Inc.*, No. 09-3740 (MLC), 2010 U.S. Dist. LEXIS 60123, at *14 (D.N.J.

June 17, 2010) (citations omitted). Indeed, the levying of arbitrary or opaque business practices that tend to mislead consumers and evince a lack of fair dealing are sufficient under the NJCFA, *id.* at *16-17, as is a "lack of 'good faith, honesty in fact and observance of fair dealing,'" *Cox v. Sears Roebuck & Co.*, 138 N.J. 2, 18 (1994) (citation omitted). As the "capacity to mislead is the prime ingredient of deception or an unconscionable commercial practice," *Fenwick v. Kay American Jeep, Inc.*, 72 N.J. 372, 378 (1977), even statements that can be argued as "literally true" may still ultimately "be misleading to the average consumer" as alleged. *Smajlaj* 782 F. Supp. 2d at 98. Thus, even if representations that consumers were receiving new seats with a certain amount of useable life that turned out not to be the case are not sufficient to qualify as misrepresentations under the NJCFA—which they are—the unconscionable practice of shipping unsuspecting consumers, who are paying full value, products that are substantially devalued is itself an NJCFA violation.

B. This Case Presents a Uniquely Ascertainable Loss

"An ascertainable loss under the NJCFA 'occurs when a consumer receives less than what was promised.'" *Dzielak v. Whirlpool Corp.*, 26 F. Supp. 3d 304, 335 (D.N.J. 2014) (quoting *Union Ink Co. v. AT&T Corp.*, 352 N.J. Super. 617, 646 (App. Div. 2002)). Ascertainability does not require a perfect model of damages to an expert's degree of certainty, but "'an out-of-pocket loss or a

demonstration of loss in value' that is 'quantifiable or measurable.'" *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 606 (3d Cir. 2012) (citations omitted). Indeed, "a plaintiff is not required to show monetary loss, but only that he purchased something and received 'less than what was promised.'" *Id.* (citation omitted); *see also Smajlaj*, 782 F. Supp. 2d at 99 ("The New Jersey Supreme Court . . . requires nothing more than that the consumer was misled into buying a product that was ultimately worth less to the consumer than the product he was promised.").

Here, Plaintiff paid for a "brand new" car seat, which was advertised with a ten-year lifespan. Plaintiff in fact received a car seat that had expired a substantial, measurable amount. Specifically, his car seat was very nearly one-and-a-half years old when he received it, and thus "depreciated of essentially 15% of its useful life." (Am. Compl. ¶¶ 14, 18). Indeed, Defendants admit the existence of this extremely salient metric, but urge—without any attempt at explanation—that it should be simply "rejected." (Br. at 22.) To the contrary, it is hard to imagine a more quantifiable loss, and this is exactly the kind of ascertainable loss required at the pleading stage. *See*, *e.g.*, *Smajlaj*, 782 F. Supp. 2d at 103 ("Plaintiffs have alleged a specific and definite basis for assessing the difference in value between the product promised and the one received that is at least plausible and that permits the court to calculate loss with a reasonable degree of certainty. To ask for more than this from

Plaintiffs in the pleadings would be asking more than the Consumer Fraud Act and the Federal Rules of Civil Procedure require for pleadings.").

Defendants' reliance on *Arcand* is misplaced. *Arcand v. Brother Int'l Corp.*, 673 F. Supp. 2d 282, 299 (D.N.J. 2009). The problem in Arcand was that printer cartridges were actually performing *as designed*—apparently printing the advertised number of pages—but those plaintiffs nonetheless claimed a loss insofar as the cartridges could not, by design, squeeze out every last bit of ink. *Id.* at 301. Because those plaintiffs did not "allege why they believed that the toner's life was tied to the amount of ink in the cartridge," that court could only "speculate" as to "whether what Plaintiffs received was ostensibly less than what [was] promised" as the product was "as exactly advertised in its user manual. *Id.* at 300-01. Notably, said that court, it "would be a much different case"—and analogous to the case at bar—"if Plaintiffs received materially less than the amount . . . specified in the user manual." *Id.* at 302.

Here Plaintiff received less than the new car seat he was promised; he in fact received a car seat that was measurably devalued in terms of its useful life. This loss is exactly what has been "repeatedly and explicitly endorsed" by the New Jersey Supreme Court as an ascertainable loss: "that the consumer was misled into buying a product that was ultimately worth less to the consumer than the product he was promised." *Smajlaj*, 782 F. Supp. 2d at 99.

C. Plaintiff Has Sufficiently Alleged a Causal Connection Between His Ascertainable Loss and the Unlawful Conduct

The causal connection here is clear and Defendants cannot argue otherwise. Reasonably believing that they were receiving new car seats—and instead receiving a product measurably depleted of its useful life—Defendants' fraudulent and unfair business practices culminated on Plaintiff receiving a product worth ascertainably less than promised. Indeed, Plaintiff is clear in his pleading that he would not have purchased the car seat had he known that it was not actually new but was instead "substantially expired." (Am. Compl. at ¶ 23.) This is alone sufficient to establish causation. *See Ramirez v. STi Prepaid LLC*, 644 F. Supp. 2d 496, 501 (D.N.J. 2009) (finding adequate allegations that plaintiffs would not have purchased the items at issue if truth was disclosed); *see also Mickens v. Ford Motor Co.*, 900 F. Supp. 2d 427, 447 (D.N.J. 2012) ("To survive a motion to dismiss it is sufficient if a plaintiff avers that had the alleged defect been disclosed, consumers would not have purchased defendant's product" (citation, quotation marks, and alteration omitted)).

Thus, having properly alleged an ascertainable harm connected to the Defendant's unconscionable sales practices—and misrepresentations as well—Plaintiff has sufficiently pled a cause of action under the NJCFA.

III. PLAINTIFF HAS SUFFICIENTLY ALLEGED FRAUD AND NEGLIGENT MISREPRESENTATION

For the reasons set forth above, Plaintiff has sufficiently alleged fraud and negligent misrepresentation.

Under New Jersey law, claim of fraud requires "(1) a material misrepresentation of a presently existing or past fact; (2) knowledge or belief by the defendant of its falsity; (3) an intention that the other person rely on it; (4) reasonable reliance thereon by the other person; and (5) resulting damages." *Gennari v. Weichert Co. Realtors*, 148 N.J. 582, 610 (1997). The "key distinction between fraudulent and negligent misrepresentation claims is that fraud requires knowledge of falsity." *Durr Mech. Constr., Inc. v. PSEG Fossil*, *LLC*, No. 18-10675 (KM) (CLW), 2021 U.S. Dist. LEXIS 17186, at *18 (D.N.J. Jan. 29, 2021). Yet, as established above, either of these causes of action are satisfied as Defendants made deliberate omissions and misrepresentations tied to the sale of their car seats—namely that they were new and of a certain useful life—that induced the sale of these seats to consumers, and ultimately harming them.

First, as set forth above, it is alleged that Defendants have been very clear in its statements to consumers that its car seats may be used a "defined period of time," (Am. Compl. at ¶ 16) and that its online customers were receiving new car seats. The status of these seats as new and containing a certain amount of useable life is a crucial presently existing or past fact. *See*, *e.g.*, *In re L'Oreal Wrinkle*

Cream Mktg. & Sales Practices Litig., No. 2:12-03571 (WJM), 2013 U.S. Dist. LEXIS 176969, at *19 (D.N.J. Dec. 9, 2013) (denying motion to dismiss fraud claims where plaintiffs adequately pled misrepresentations that led to purchases).

Second, also set forth above, it was definitely known to Defendants that the new products being shipped are not actually "new." Indeed, Defendants have "admit[ted] that there is no way for consumers shopping online to protect themselves against receiving these devalued car seats." (Am. Compl. ¶ 22). Having acknowledged the practice, intent can be squarely inferred.

Third, Plaintiff has alleged that these statements were intended to induce reliance, an allegation of intent "which is sufficient under Rule 9(b)." *Dewey v. Volkswagen AG*, 558 F. Supp. 2d 505, 525 (D.N.J. 2008) (denying motion to dismiss). Indeed, as these statements and omissions were made in connection with the sale of its product, it can be essentially inferred that they were intending to induce reliance in the form of a sale. Further, "one who elects to speak must tell the truth when it is apparent that another may reasonably rely on the statements made." *Strawn by Strawn v. Canuso*, 271 N.J. Super. 88, 105 (Sup. Ct. App. Div. 1994), *aff'd*, 657 A.2d 420 (N.J. 1995).

Fourth, Plaintiff has alleged that he relied on the statements and omissions. Indeed, even "general allegations of reliance are sufficient in light of the fact that the specific facts as to the misrepresentations are within Defendants' control, not

Plaintiff's." *Dewey*, 558 F. Supp. 2d at 526. Moreover, in the context of Defendants' omissions, such claim need not be pled "as precisely as affirmative misrepresentation claims," "the burden of establishing reliance on an omission is not difficult." *In re Mercedes-Benz Emissions Litig.*, No. 16-881 (JLL) (JAD), 2019 U.S. Dist. LEXIS 16381, at *64, *66 (D.N.J. Feb. 1, 2019) (concluding reliance element met in manufacturer's failure to disclose existence of non-conforming automotive product); *see also Ramirez v. STi Prepaid LLC*, 644 F. Supp. 2d 496, 501 (D.N.J. 2009) (finding adequate allegations that plaintiffs would not have purchased the items at issue if truth was disclosed).

Fifth, and finally, Plaintiff suffered ascertainable damages in purchasing a product that was substantially "used up" and accordingly devalued from the new product that he had been led to believe he was purchasing.

Thus, Plaintiff has adequately pled fraud and negligent misrepresentation as he has provided "the requisite specificity as to the who, what, where, when, and how of the alleged fraud" necessary to satisfy the prerequisites of Rule 9(b). *Weske v. Samsung Elecs., Am., Inc.*, 42 F. Supp. 3d 599, 614 (D.N.J. 2014).

IV. PLAINTIFF HAS SUFFICIENTLY ALLEGED A CLAIM FOR UNJUST ENRICHMENT

Defendants boldly declares that Plaintiff "paid a fair price for the product and cannot argue that he is owed any equitable remuneration." (Br. 26.) Putting aside that this an averment of fact, it is genuinely curious that a company could

believe that its customers would find it "fair" that they were paying full price for a product that was in fact substantially expired. Indeed, they would likely find it all the less "fair" when that product—as here—is an expensive safety item that was expressly advertised as coming with a very specific amount of useful life. As unjust enrichment merely requires a showing a "defendant received a benefit and that retention of that benefit without payment would be unjust," *VRG Corp. v. GKN Realty Corp.*, 135 N.J. 539, 554 (1994), Plaintiff has met his burden in alleging that Defendants received full payment for a car seat that was, in fact, substantially depreciated. *See, e.g.*, *In re Mercedes-Benz Tele Aid Contract Litig.*, 257 F.RD. 46, 72 (D.N.J. Apr. 24, 2009) (in order to successfully prove unjust enrichment claim "Plaintiffs must show that they got something less than they paid for, and Mercedes should be required as a matter of equity to make them whole"). Plaintiff's claim for unjust enrichment should be permitted to proceed.

V. PLAINTIFF HAS SUFFICIENTLY ALLEGED A CLAIM FOR MONEY HAD AND RECEIVED

Defendants cite no authority actually dismissing claims for money had and received as duplicative. Indeed, although courts may address such claims under a similar rubric for efficiency's sake, *see*, *e.g.*, *Zion Chen v. Cline*, No. 12-3051 (JAP), 2013 U.S. Dist. LEXIS 26741, at *16 (D.N.J. Feb. 27, 2013), ultimately "the claims, while similar, are not identical." *In re Skat Tax Refund Scheme Litig.*, 356 F. Supp. 3d 300, 326 (S.D.N.Y. 2019). This is because, generally, "money had

and received is a claim that 'has been considered an action at law' even though it rests on equitable principles." *Id.* (citation omitted). Plaintiff's claim for money had and received should therefore be allowed to proceed at this early stage.

CONCLUSION

For the foregoing, Defendants' Motion to Dismiss Plaintiff's Amended Complaint Under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) should be denied.

DATED: March 22, 2021

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CERTIFICATE OF SERVICE

I hereby certify that on March 22, 2021, I caused a true and correct copy of this memorandum of law to be served via ECF to the following:

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