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FILED
ALAMEDA COUNTY

JUL 29 2019

CLERK OF THE SUPERIOR COURT
By [Signature]
Deputy

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Attorney for Defendants
9 FIRST PRESBYTERIAN CHURCH OF
10 NEWARK dba PARK SIDE PRESCHOOL and
11 HEATHER MITCHELL

12 SUPERIOR COURT OF THE STATE OF CALIFORNIA
13 COUNTY OF ALAMEDA

14 JEREMY OPPERMAN and LEANNE
15 OPPERMAN,

CASE No. RG19002975
Unlimited Civil Action

16 Plaintiffs,

17 vs.

**CROSS-COMPLAINT OF FIRST
PRESBYTERIAN CHURCH dba PARK
SIDE PRESCHOOL AND HEATHER
MITCHELL AGAINST EASTERN
JUNGLE GYM, INC. FOR:**

18 FIRST PRESBYTERIAN CHURCH OF
19 NEWARK dba PARK SIDE PRESCHOOL and
20 HEATHER MITCHELL and DOES ONE through
21 ONE HUNDRED, inclusive,

22 Defendants.

- 1. STRICT LIABILITY -- DESIGN DEFECT
- 2. STRICT LIABILITY FAILURE TO WARN
- 3. NEGLIGENT FAILURE TO WARN
- 4. GENERAL NEGLIGENCE
- 5. IMPLIED WARRANTY OF MERCHANTABILITY
- 6. IMPLIED WARRANTY OF FITNESS FOR A PARTICULAR PURPOSE
- 7. CONTRIBUTION
- 8. DECLARATORY RELIEF

23 FIRST PRESBYTERIAN CHURCH OF
24 NEWARK dba PARK SIDE PRESCHOOL and
25 HEATHER MITCHELL,

26 Cross-Complainant,

27 vs.

28 EASTERN JUNGLE GYM, INC. and DOES ONE
through TEN, inclusive,

Cross-Defendants.

Complaint Filed: January 17, 2019
Trial Date: June 15, 2020

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PERRY, JOHNSON, ANDERSON,
MILLER & MOSKOWITZ LLP

Filed By Fax

1 Cross-Complainants FIRST PRESBYTERIAN CHURCH OF NEWARK dba PARK SIDE
2 PRESCHOOL and HEATHER MITCHELL (“Cross-Complainants”), hereby file this Cross-
3 Complaint against Cross-Defendant EASTERN JUNGLE GYM, INC. (“Cross-Defendant”), and
4 allege as follows:

5 1. Cross-Complainant FIRST PRESBYTERIAN CHURCH OF NEWARK dba PARK
6 SIDE PRESCHOOL is a religious corporation organized under the laws of the State of California
7 and is doing business in the County of Alameda, California, including operating a preschool called
8 Park Side Preschool located at 35450 Newark Boulevard, in the City of Newark, County of
9 Alameda, State of California.

10 2. Cross-Complainant HEATHER MITCHELL served as the Preschool Director for
11 Park Side Preschool from April 2016 – April 2019.

12 3. Cross-Defendant EASTERN JUNGLE GYM, INC. is a private corporation
13 headquartered in Carmel, New York and is doing business across the county through a network of
14 dealers, including Amazon.com, including manufacturing and selling playground equipment.

15 4. The true names and capacities, whether individual, corporate, associate, partnership
16 or otherwise, of Cross-Defendants named herein as ROES 1 through 10 are unknown to Cross-
17 Complainants, who therefore sue said Cross-Defendants by such fictitious names pursuant to
18 California Code of Civil Procedure § 474. When the true names and capacities of said Cross-
19 Defendants are ascertained, Cross-Complainants will amend the Cross-Complaint by inserting said
20 true names and capacities in place of said fictitious names and capacities. Cross-Complainants are
21 informed and believe and thereon allege that ROES 1 through 10, and each of them, are legally
22 responsible in some manner for the events and happenings referred to herein, and proximately
23 caused or contributed to the injuries and damages to Cross-Complainants which are hereinafter
24 alleged. Whenever in this Cross-Complaint any Cross-Defendant is the subject of any charging
25 allegation by Cross-Complainants, it shall be deemed that said Cross-Defendants ROES 1 through
26 10 are likewise the subject of said charging allegation.

27 5. Cross-Complainants are informed and believe, and on the basis of that information
28 and belief allege, that Cross-Defendants, including the ROE Cross-Defendants, were agents and

1 employees of each other and in doing the acts alleged herein were acting within the course and
2 scope of that agency and employment. At all times relevant herein, each of the Cross-Defendants,
3 including the ROE Cross-Defendants, was the agent, servant, partner, officer, director, or employee
4 of each of the remaining Cross-Defendants and was doing the acts herein complained of within the
5 scope of his/her/its agency and employment.

6 6. Plaintiffs JEREMY OPPERMAN and LEANNE OPPERMAN (“Plaintiffs”) filed
7 the Complaint in the above-entitled action seeking damages for injuries allegedly sustained in an
8 accident which occurred on or about October 19, 2018, as detailed in the Plaintiffs’ Complaint filed
9 in the within action. Said Complaint is hereby referred to for the limited purpose of setting forth the
10 nature of the claims of the Plaintiffs against the Cross-Complainants.

11 7. Cross-Complainants herein deny that they are in any way responsible for the events
12 or happenings or damages mentioned in the Complaint of this action. However, if Cross-
13 Complainants are held responsible to any party in this action for any of the matters alleged in the
14 Complaint, such liability will be at least partially due to the fault of the Cross-Defendants, and each
15 of them, in their actions which caused the events leading to the injuries of the Plaintiffs, and Cross-
16 Defendants will therefore be liable and bound to pay Cross-Complainants herein a portion of any
17 and all damages which might be adjudged to be due and owing to Plaintiffs from Cross-
18 Complainants which corresponds to the portion of Cross-Defendants’ respective fault.

19 8. Adjudication of this Cross-Complaint in conjunction with Plaintiffs’ action herein
20 will prevent a multiplicity of trials and will be in the furtherance of the interests of justice and
21 expedition of the business of the above-entitled court.

22 **FIRST CAUSE OF ACTION**

23 **[Strict Liability – Design Defect Against All Cross-Defendants]**

24 9. Cross-Complainants refer to the allegations contained in paragraphs 1 through 8
25 above and incorporate them by reference as though fully set forth anew.

26 10. On or about September 6, 2018, a volunteer for Cross-Complainants purchased
27 “Easy 1-2-3 A-Frame Swing Set Brackets Complete Set 2 Brackets with All Mounting Hardware”
28 (“A-Frame Brackets”) sold by Cross-Defendants via Amazon.com.

1 11. The volunteer for Cross-Complainants did not receive any written materials,
2 including but not limited to instructions or warnings, with the A-Frame Brackets, and he relied
3 upon the installation information provided by the Cross-Defendants on the A-Frame Brackets
4 product page on Amazon.com.

5 12. On or about September 6, 2018, on the Amazon.com website for the A-Frame
6 Brackets, the section labeled "From the manufacturer" contained the following statement: "The
7 safest, strongest and easiest way to build a Swing Set!" and "Our kit comes complete with
8 everything you need to build a DIY A-Frame, all you need is the lumber and your choice of
9 swings."

10 13. On or about September 6, 2018, on the Amazon.com website for the A-Frame
11 Brackets, the section labeled "From the manufacturer" contained text that appeared as follows:

12 **What's included in this Swing Set Bracket Kit?**

- 13 • 2 - Easy 1-2-3 A-Frame Swing Set Brackets
- 14 • 2 - Easy 1-2-3 A-Frame Bracket Hardware Kits

15
16 14. On or about September 6, 2018, on the Amazon.com website for the A-Frame
17 Brackets, the section labeled "From the manufacturer" contained the text that appeared as follows:

18 **Recommended Installation Information: Easy 1-
19 2-3 A-Frame Swing Set Bracket**

20 **Looking to build a basic Wooden A-Frame structure using our
21 Easy A-Frame Bracket?**

22 We've got you covered! Here at Eastern Jungle Gym we
23 manufacture, deliver and install Wooden Swing Sets every day.
24 We are the experts in our field and can help guide you on building
25 the best Backyard A-Frame Swing Set! Take a look to the right to
26 see a list of everything you need to build your Play Set and below
27 to see our lumber recommendations. Don't forget to look above
28 at some of our popular A-Frame Models for inspiration.

25 **Recommended Wood List**

26 1 - 120" 4x6 Top Beam.

27 4 - 96" 4x4 Side Support Legs.

28 **Completed Dimensions when using our recommendations:**

20 **What do I need to build
21 my DIY Swing Set?**

- 22 • 2 - Easy 1-2-3 A-Frame
23 Swing Set Brackets
- 24 • 2 - Sets of Easy 1-2-3
25 A-Frame Bracket
26 Hardware
- 27 • 1 - 4x6 Top Beam
- 28 • 4 - 4x4 Side Support
Legs
- Up to 3 Swing Set
Swings
- Mounting Hardware for
Swings
- 4 - Ground Anchors (if
desired)

1 15. On or about October 12, 2018, in accordance with the manufacturer's instructions
2 on the Amazon.com website for the A-Frame Brackets, the parent volunteer who purchased the A-
3 Frame Brackets installed the A-Frame swing set on Park Side Preschool's playground and
4 suspended a plastic tire swing to the A-Frame swing set (the "A-Frame Swing Set").

5 16. On or about October 19, 2018, three children were swinging on the A-Frame Swing
6 Set, including 3-year-old Macie Opperman.

7 17. As alleged in the Complaint, on or about October 19, 2018, the A-Frame swing Set
8 was not "affixed, harnessed, or secured to the ground," and the A-Frame Swing Set "toppled over,
9 causing Macie Opperman to suffer severe head and brain trauma."

10 18. As alleged in the Complaint, "Macie Opperman sustained fatal injuries which
11 caused her death on or about October 19, 2018."

12 19. At all times relevant to the action brought by Plaintiffs, Cross-Defendants designed,
13 tested, manufactured, packaged, labeled, marketed, distributed, promoted, and sold the A-Frame
14 Brackets, placing the A-Frame Brackets into the stream of commerce.

15 20. At all times relevant to the action brought by Plaintiffs, as set forth above, Cross-
16 Defendants' installation information stated that Ground Anchors were only needed "if desired."

17 21. At all times relevant to the action brought by Plaintiffs, Cross-Defendants did not
18 include ground anchors in their sale of the A-Frame Brackets, despite stating that: "Our kit comes
19 complete with everything you need to build a DIY A-Frame, all you need is the lumber and your
20 choice of swings."

21 22. At all times relevant to the action brought by Plaintiffs, the Cross-Defendants knew
22 or should have known that the A-Frame Swing Set had potential risks that were known or
23 knowable in light of the knowledge generally accepted in the industry at the time of the sale of the
24 A-Frame Swing Set.

25 23. At all times relevant to the action brought by Plaintiffs, the Cross-Defendants knew
26 or should have known that the risks presented a substantial danger when the A-Frame Swing Set is
27 used or misused in an intended or reasonably foreseeable way.

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1 24. On October 19, 2018, the A-Frame Swing Set did not perform as safely as an
 2 ordinary consumer would have expected it to perform when used or misused in an intended or
 3 reasonably foreseeable way.

4 25. After October 19, 2018, Cross-Defendants changed their Recommended Installation
 5 Information on Amazon.com to state: “We recommend anchoring the swing set to the ground and
 6 not exceeding 8 feet side support legs.” Cross-Defendants also removed the “(if desired)” phrase
 7 that had previously appeared after “Ground Anchors.”

8 **Recommended Installation Information: Easy**
 9 **1-2-3 A-Frame Swing Set Bracket**

What do I need to build
my DIY Swing Set?

10 Looking to build a basic Wooden A-Frame structure using our
Easy A-Frame Bracket?

- 2 - Easy 1-2-3 A-Frame Swing Set Brackets
- 2 - Sets of Easy 1-2-3 A-Frame Bracket Hardware
- 1 - 4x6 Top Beam
- 4 - 4x4 Side Support Legs
- Up to 3 Swing Set Swings
- Mounting Hardware for Swings
- 4 - Ground Anchors

11 We've got you covered! Here at Eastern Jungle Gym we
 12 manufacture, deliver and install Wooden Swing Sets every day.
 13 We are the experts in our field and can help guide you on building
 14 the best Backyard A-Frame Swing Set! Take a look to the right to
 15 see a list of everything you need to build your Play Set and below
 16 to see our lumber recommendations. Don't forget to look above
 17 at some of our popular A-Frame Models for inspiration.

16 **Recommended Wood List**

- 17 1 - 120" 4x6 Top Beam.
- 18 4 - 96" 4x4 Side Support Legs.

19 *We recommend anchoring the swing set to the ground and not

20 26. To the extent Cross-Complainants are held liable to Plaintiffs for damages alleged in
 21 the Complaint, Cross-Defendants are strictly liable to Cross-Complainants, because the A-Frame
 22 Brackets' design was a substantial factor in causing harm to Plaintiffs.

23 **SECOND CAUSE OF ACTION**

24 **[Strict Liability – Failure To Warn Against All Cross-Defendants]**

25 27. Cross-Complainants incorporate herein by reference paragraphs 1 through 26 as
 26 though fully set forth herein.

27 28. At all times relevant to the action brought by Plaintiffs, Cross-Defendants designed,
 28 tested, manufactured, packaged, labeled, marketed, distributed, promoted, and sold the A-Frame

1 Brackets, placing the A-Frame Brackets into the stream of commerce.

2 29. Cross-Defendants have a duty to provide adequate warnings and instructions for
3 their products, including their A-Frame Brackets.

4 30. At all times relevant to the action brought by Plaintiffs, the Cross-Defendants knew
5 or should have known that the A-Frame Swing Set had potential risks that were known or
6 knowable in light of the knowledge generally accepted in the industry at the time of the sale of the
7 A-Frame Swing Set.

8 31. At all times relevant to the action brought by Plaintiffs, the potential risks presented
9 a substantial danger when the A-Frame Brackets were used or misused in an intended or
10 reasonably foreseeable way.

11 32. At all times relevant to the action brought by Plaintiffs, ordinary consumers would
12 not have recognized the potential risks.

13 33. At all times relevant to the action brought by Plaintiffs, Cross-Defendants knew or
14 reasonably should have known that the Recommended Installation Information failed to properly
15 warn of the risks of serious injury and/or death associated with A-Frame Swing Sets, including but
16 not limited to the risk of the swing set toppling over if not anchored and causing serious injury
17 and/or death.

18 34. At all times relevant to the action brought by Plaintiffs, Cross-Defendants failed to
19 provide sufficient warnings and instructions that would have put Cross-Complainants and the
20 general public on notice of the dangers and risks associated with the A-Frame Swing Set,
21 including, but not limited to, the risk that the A-Frame Swing Set could topple over if not anchored.

22 35. Cross-Complainants herein deny that they are in any way responsible for the
23 damages alleged in the Complaint of this action. However, if Cross-Complainants are held
24 responsible to Plaintiffs for any of the matters alleged in the Complaint, Cross-Defendants' lack of
25 sufficient instructions or warnings was a substantial factor in causing Plaintiffs' harm.

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1 **THIRD CAUSE OF ACTION**

2 **[Negligent Failure To Warn Against All Cross-Defendants]**

3 36. Cross-Complainants incorporate herein by reference paragraphs 1 through 35 as
4 though fully set forth herein.

5 37. At all times relevant to the action brought by Plaintiffs, Cross-Defendants designed,
6 tested, manufactured, packaged, labeled, marketed, distributed, promoted, and sold the A-Frame
7 Brackets, placing the A-Frame Brackets into the stream of commerce.

8 38. At all times relevant to the action brought by Plaintiffs, Cross-Defendants knew or
9 reasonably should have known that the A-Frame Swing Set was dangerous or was likely to be
10 dangerous when used or misused in a reasonably foreseeable manner.

11 39. At all times relevant to the action brought by Plaintiffs, Cross-Defendants knew or
12 reasonably should have known that users would not realize the danger.

13 40. At all times relevant to the action brought by Plaintiffs, Cross-Defendants failed to
14 adequately warn of the danger or instruct on the safe use of the A-Frame Swing Set.

15 41. At all times relevant to the action brought by Plaintiffs, a reasonable manufacturer
16 under the same or similar circumstances would have warned of the danger or instructed on the safe
17 use of the product.

18 42. Cross-Complainants herein deny that they are in any way responsible for the
19 damages alleged in the Complaint of this action. However, if Cross-Complainants are held
20 responsible to Plaintiffs for any of the matters alleged in the Complaint, Cross-Defendants' lack of
21 sufficient instructions or warnings was a substantial factor in causing Plaintiffs' harm.

22 **FOURTH CAUSE OF ACTION**

23 **[General Negligence Against All Cross-Defendants]**

24 43. Cross-Complainants incorporate herein by reference paragraphs 1 through 42 as
25 though fully set forth herein.

26 44. At all times relevant to the action brought by Plaintiffs, Cross-Defendants designed,
27 tested, manufactured, packaged, labeled, marketed, distributed, promoted, and sold the A-Frame
28 Brackets, placing the A-Frame Brackets into the stream of commerce.

1 portion of any and all damages which might be adjudged to be due and owing to Plaintiffs from
2 Cross-Complainants which corresponds to the portion of Cross-Defendants' respective fault.

3 **EIGHTH CAUSE OF ACTION**

4 **[Declaratory Relief Against All Cross-Defendants]**

5 64. Cross-Complainants incorporate herein by reference paragraphs 1 through 63 as
6 though fully set forth herein.

7 65. An actual controversy has arisen between Cross-Complainants and Cross-
8 Defendants, and each of them, with respect to the rights, obligations, and duties of the parties: (a)
9 Cross-Complainants contend that they are without fault, responsibility, or blame for any of the
10 damages which the Plaintiffs may have suffered. If there is any fault, these acts were committed by
11 the Cross-Defendants and not the Cross-Complainants. Cross-Complainants contend that they are
12 entitled to contribution from Cross-Defendants, and each of them; and (b) Cross-Complainants are
13 informed and believed and thereon allege that the Cross-Defendants, and each of them, contend to
14 the contrary.

15 66. If the rights of Cross-Complainants and Cross-Defendants are not determined by
16 this action, Cross-Complainants will be required to file an additional action for that purpose, and
17 Cross-Complainants and Cross-Defendants can avoid a multiplicity of suits and expenses only by
18 the maintenance of this Cross-Complaint so that the rights, duties, and obligations of all parties
19 hereto may be determined in this one action. Cross-Complainants will be subject to unreasonable
20 burden and the risk of irreparable injury if the rights, duties, and obligations of the parties are not
21 determined herein.

22 WHEREFORE, Cross-Complainants First Presbyterian Church of Newark dba Park Side
23 Preschool and Heather Mitchell pray for judgment as follows:

- 24 1. For judgment deciding the rights and duties of Cross-Defendants, and each of them,
25 with respect to Cross-Complainants herein;
- 26 2. In the event that the court determines that there is any sum due to Plaintiffs from
27 Cross-Complainants, the court find, determine, and adjudge that Cross-Defendants
28 be bound to pay Cross-Complainants herein a portion of any and all damages which


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might be adjudged to be due and owing to Plaintiffs from Cross-Complainants which corresponds to the portion of Cross-Complainants' and Cross-Defendants' respective fault;

3. For costs of suit incurred herein;
4. For reasonable attorneys' fees; and
5. For such other and further relief as the court deems just and proper.

DATED: July 26, 2019

PERRY, JOHNSON, ANDERSON,
MILLER & MOSKOWITZ, LLP

By: 

DAVID F. BEACH
SARAH JANE T.C. TRUONG
Attorneys for Defendants
FIRST PRESBYTERIAN CHURCH OF
NEWARK dba PARK SIDE PRESCHOOL
and HEATHER MITCHELL

1 **PROOF OF SERVICE**

2 *Jeremy Opperman and Leanne Opperman v First Presbyterian Church of Newark dba Park Side*
3 *Preschool, Heather Mitchell and DOES 1 through 100, inclusive*
4 *Alameda County Superior Court Case No. RG19002975*

4 **STATE OF CALIFORNIA, COUNTY OF SONOMA**

5 I, the undersigned declare:

6 I am over the age of eighteen (18) years and not a party to the within action. I am an
7 employee of Perry, Johnson, Anderson, Miller, & Moskowitz, LLP's and my address is 438 First
8 Street, 4th Floor, Santa Rosa, California 95401, which is located in the County of Sonoma.

9 On the date below indicated, I served on the interested parties in this action the within
10 documents described as:

- 11 • **CROSS-COMPLAINT OF FIRST PRESBYTERIAN CHURCH dba PARK SIDE
12 PRESCHOOL AND HEATHER MITCHELL AGAINST EASTERN JUNGLE GYM,
13 INC. FOR:**

- 13 1. **STRICT LIABILITY – DESIGN DEFECT**
- 14 2. **STRICT LIABILITY FAILURE TO WARN**
- 15 3. **NEGLIGENT FAILURE TO WARN**
- 16 4. **GENERAL NEGLIGENCE**
- 17 5. **IMPLIED WARRANTY OF MERCHANTABILITY**
- 18 6. **IMPLIED WARRANTY OF FITNESS FOR A PARTICULAR PURPOSE**
- 19 7. **CONTRIBUTION**
- 20 8. **DECLARATORY RELIEF**

21 X **(BY MAIL)** *On July 26, 2019 I caused each envelope, with postage thereon fully prepaid,
22 to be placed in the United States mail at Santa Rosa, California. I am readily familiar with
23 the business practice for collection and processing of mail in this office; that in the
24 ordinary course of business said document would be deposited with the US Postal Service
25 in Santa Rosa on that same day. I understand that service shall be presumed invalid upon
26 motion of a party served if the postal cancellation date or postage meter date on the
27 envelope is more than one day after the date of deposit for mailing contained on this
28 declaration.*

22 **COUNSEL FOR PLAINTIFFS**

23 **Conor M. Kelly, Esq.**
24 **WALKUP, MELODIA, KELLY & SCHOENBERGER**
25 **650 California Street, 26th Floor**
San Francisco, CA 94108

26 I declare under penalty of perjury under the laws of the State of California that the above is
27 true and correct, and that this declaration was executed on July 26, 2019 at Santa Rosa, California.

28 _____
Lourie Rebizzo

