

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE
ELECTRONICALLY FILED

Allison Johnson and
Melissa Tantibanchachai, individually and on
behalf of all others similarly situated;

Case No. 3:09cv-669-H

Plaintiff,

v.

ORIGINAL COMPLAINT -
CLASS ACTION

SIGG Switzerland (USA), Inc.,

Defendant.

Serve: Karen W. Myers
Cummings & Lockwood, LLC,
6 Landmark Square, Stamford, CT 06901

Representative Plaintiffs Allison Johnson and Melissa Tantibanchachai, on behalf of themselves and all others similarly situated, allege as follows:

INTRODUCTION

1. Representative Plaintiffs seek to represent a nationwide class of consumers who purchased SIGG reusable aluminum bottles that unbeknownst to them contain bisphenol A (“BPA”), an industrial chemical that mimics estrogen and has raised health concerns in the United States and other countries. Plaintiffs and the class they seek to represent paid more for SIGG bottles than other available alternatives because they believed SIGG’s representations that their bottles were BPA-free. SIGG continued to make these representations about their bottle—and even marketed and sold children’s versions of these bottles to concerned parents—until August 2009 when SIGG finally

revealed that their bottles contained BPA and that SIGG had been trying to develop new bottles without BPA since 2006.

JURISDICTION AND VENUE

2. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1332(d) because the parties are citizens of different States and the matter in controversy exceeds the jurisdictional amount exclusive of interest and costs.

3. Venue is proper under 28 U.S.C. § 1391(a) because Defendant does business in this district, Representative Plaintiff Johnson resides in this district, and she purchased SIGG bottles in this district.

PARTIES

4. Representative Plaintiff Allison Johnson is a citizen of the State of Kentucky, and resides in Louisville.

5. Representative Plaintiff, Melissa Tantibanchachai is a citizen of the State of Texas, and resides in Sugar Land.

6. Defendant, SIGG Switzerland (USA), Inc., is a corporation with its principal place of business in Stamford, Connecticut and may be served with process through its registered agent, Karen W. Myers, Cummings & Lockwood, LLC, 6 Landmark Square, Stamford, CT 06901.

SUMMARY OF FACTS

7. SIGG Switzerland (USA) is a wholly owned subsidiary of SIGG Switzerland, an aluminum product manufacturer. SIGG Switzerland aluminum bottles for both adults and children have become increasingly popular with consumers over the last several years, and in 2005 SIGG created its US subsidiary. At the time SIGG Switzerland (USA) (“SIGG”), US President, Steve

Wasik stated that “Americans are now discovering that using a high quality, reusable bottle like SIGG makes great sense—both financially and environmentally.” (mysigg.com website.)

8. The increasing popularity of SIGG aluminum bottles developed as a result of United States consumers’ efforts to find an alternative to bottles which contained BPA. BPA is a manufactured chemical compound commonly used in the production of plastics and epoxy resins and found to affect the development of animals by acting like the hormone estrogen.

9. Media reports and government agencies in 2007 and 2008 expressed concern about the possibility that BPA could be hazardous to human health. In the fall of 2007, the National Toxicology Program (“NTP”) (an interagency federal government program) issued a brief on BPA based on a report of an expert panel on BPA (“NTP Brief”). The NTP Brief discussed the reproductive and developmental hazards associated with exposure to BPA. The NTP Brief was peer-reviewed in 2008. Among the NTP’s conclusions regarding BPA is that it had “some concern for effects on the brain, behavior, and prostate gland in fetuses, infants, and children at current human exposures to bisphenol A.” (niehs.nih.gov website.) One of the NTP’s recommendations to prevent exposure to BPA is to use baby bottles that are BPA-free. Even today Congress is considering a bill to prohibit the manufacture, sale, or distribution of children’s food and beverage containers composed of BPA. (S.753 BPA-Free Kids Act of 2009.)

10. SIGG benefited financially from the public’s concerns regarding BPA and consumers’ desire to purchase BPA-free products. SIGG directly and indirectly represented that its bottles, including the bottles it designed and sold for children, were BPA-free. The SIGG bottles cost significantly more than comparable plastic bottles but were seen as worth the added cost by

consumers who wanted to avoid BPA products. SIGG was aware that consumers believed its bottles to be BPA-free and did nothing to change this generally held belief among consumers.

11. To the contrary, when consumer groups stated that SIGG's bottles might contain BPA, SIGG struck back. In early 2007, the Environmental Working Group ("EWG") published a guide to BPA-free products and stated its belief that SIGG water bottles contained BPA. In response, SIGG President Wasik demanded that EWG either furnish proof of its "allegations" or remove SIGG from its report. President Wasik wrote:

On March 9th, it was brought to my attention that a website sponsored by Environmental Working Group (EWG) made mention that SIGG bottles contain plastic liners with bisphenol A (BPA).

I can assure you that SIGG bottles are **absolutely not made with a plastic liner and are in fact lined with a proprietary, non-toxic, water-based resin** which has been refined over decades of study and is extremely safe & stable.

Based on the confidence we have in our product backed by numerous laboratory studies, we questioned the EWG and requested that they provide us with the testing they have conducted on SIGG—or alternatively remove the "SIGG" mention from their website if they have not tested SIGG.

(emphasis added.) In March 2007, another group, the Organic Consumers Association ("OCA"), reported that consumers should avoid SIGG bottles along with other products that contained BPA. Soon thereafter, the OCA also changed its position and stated that SIGG "has since gone BPA-free, so it is now safe to purchase SIGG water bottles." While consumer groups expressed concern about the lining in SIGG's bottles, SIGG changed the description of its lining in its product catalogs from "micro-epoxy" to a more vague description which eliminated the term "epoxy." Retailers selling SIGG bottles included REI and Whole Foods. A retailer industry website confirmed that retailers were representing to consumers that SIGG bottles as BPA-free. (August 19, 2009 SNEWS article

Aluminum bottles you are selling may NOT be BPA-free.) Mr. Wasik himself later stated in an interview that he was aware that some retailers were marketing SIGG bottles as BPA-free.

12. On April 16, 2008, in a press release, SIGG made even more aggressive statements claiming its bottles were BPA-free. SIGG titled its press release “SIGG Quality & Safety Guarantee” and stated in the strongest possible terms that its testing:

has consistently shown SIGG bottles have **no** presence of lead, phthalates, Perfluorooctanoic Acid (PFOA), Bysphenol A (BPA), Bysphenol B (BPB) or any other chemicals which scientists have deemed as potentially harmful.

Significantly, SIGG’s emphasis, in the form of a bold, underlined, and italicized “**no**” is in the original press release. SIGG also highlighted in its press release two bullets regarding the testing of SIGG’s own bottles:

- New SIGG bottles– no detectable BPA
- Used SIGG bottles (2 years old)– no detectable BPA

As a result, in April 2008, SIGG proclaimed to the public in writing and supported by “testing” that its bottles were BPA-free.

13. In August 2009, SIGG changed its public position for the first time and finally disclosed to the public that its bottles contained BPA. At that time, Mr. Wasik, now the CEO of SIGG Switzerland revealed that, starting in 2006, SIGG began a program to develop a new liner for its bottles. SIGG began producing this new BPA-free “EcoCare” liner in August 2008. This was the first press release from a SIGG CEO admitting that SIGG bottles produced before August 2008 contained BPA and that as early as 2006 SIGG was working to replace its water based epoxy bottle liner that contained BPA. CEO Wasik attempted to justify SIGG’s concealment of BPA in its bottles by “distinguishing” between what he described as “last year[s]” concern among the public about

“BPA leaching from bottles” and what he viewed as the current concern about the “mere presence of BPA.”

14. Mr. Wasik separately confirmed to the media in August 2009 that he knew in 2006 that SIGG’s bottles contained BPA:

Once I was able to talk to our supplier in June of 2006, I learned that the water-based epoxy being used in our bottles contained BPA, but I was also assured that our lining was the best in the world and contained very low levels of BPA. . . . I went to our board and CEO and told them we needed to make a change to a new coating.

(August 19, 2009 SNEWS article *Aluminum bottles you are selling may NOT be BPA-free.*) Mr. Wasik’s candor with his own board differed from his and SIGG’s absolute lack of candor with consumers who believed they were purchasing BPA-free bottles. He and SIGG repeatedly displayed this lack of candor and efforts to mislead the public, including by: (a) challenging EWG in March 2007 to remove SIGG from its BPA product report; (b) issuing his April 16, 2008, press release; (c) not correcting reviews of SIGG bottles that described them as BPA-free; and (d) deciding to let retailers repeatedly promote SIGG bottles as BPA-free, even though he and SIGG knew this was not true.

15. In early 2008, Plaintiff Johnson purchased two SIGG bottles, including one for her child. She paid more for these bottles than other readily available reusable bottles. Ms. Johnson made the decision to purchase SIGG bottles only after learning about public health concerns regarding BPA and conducting extensive research regarding BPA-free bottles. She read articles reviewing SIGG bottles and describing them as being BPA-free, and she reviewed retailer information describing these bottles as being BPA-free. Ms. Johnson and her child regularly used both bottles until August 2009 when she learned of CEO Wasik’s letter admitting that these bottles contained BPAs.

16. Plaintiff Tantibanchachai purchased two SIGG water bottles, one for herself and one for her child, in May 2008. She paid more for these bottles than other readily available reusable bottles. Ms. Tantibanchachai made this decision to purchase SIGG bottles only after learning about public health concerns regarding BPA and conducting extensive research regarding BPA-free bottles. She read articles reviewing SIGG bottles and describing them as being BPA-free, and she reviewed retailer information describing these bottles as being BPA-free. She and her child regularly used both bottles until August 2009 when she learned of CEO Wasik's letter admitting that these bottles contained BPAs.

CLASS ACTION ALLEGATIONS

17. Representative Plaintiffs bring this action on behalf of herself and all others similarly situated, as a member of a proposed nationwide plaintiff class (the "Class") initially defined as:

All persons in the United States who purchased SIGG bottles that contained BPA. Excluded from this Class is any person, firm, trust, corporation, or other entity related to or affiliated with SIGG and any person, firm trust corporation, or other entity who purchased for resale SIGG bottles.

18. This action is brought and may properly be maintained as a class action pursuant to Federal Rules of Civil Procedure 23(a)(1)-(4), 23(b)(2), and 23(b)(3). This action satisfies these provisions' numerosity, commonality, typicality, adequacy, predominance, and superiority requirements.

19. The Class is so numerous that the individual joinder of all members is impracticable. While the Class's exact number and the identity of class members is currently unknown and can only be ascertained through appropriate discovery, Representative Plaintiffs are informed and believe that the Class includes thousands of individuals.

20. Common legal and factual questions exist that predominate over any questions affecting only individual Class members. These common questions, which do not vary from Class member to Class member, and which may be determined without reference to any Class member's individual circumstances, include, but are not limited to whether:

- a. SIGG concealed the presence of BPA in its bottles;
- b. SIGG breached its contract with consumers by selling them bottles containing BPA;
- c. SIGG breached its express warranties relating to the fitness and quality of the bottles;
- d. SIGG is subject to an implied warranty relating to the fitness and quality of its bottles;
- e. SIGG breached express or implied warranties as a result of selling the bottles with BPA as described herein;
- f. SIGG's engaged in unfair, false, misleading, or deceptive acts or practices regarding its marketing and sale of the bottles;
- g. SIGG's conduct regarding the marketing and sale of its bottles violates the Kentucky Consumer Protection Act ("CPA"). KRS 367.110 *et seq.*
- h. the Class is entitled to injunctive and other equitable relief, including restitution and disgorgement, and if so, the nature of such relief;
- i. the Class is entitled to compensatory damages, and if so, the amount of such damages; and
- j. whether SIGG is liable for punitive damages, and if so, the amount of such damages.

21. Representative Plaintiffs' claims are typical of the Class members' claims. Defendants' common course of conduct caused Representative Plaintiffs and all Class members the same damages. In particular, Defendants' conduct caused each Class member's economic losses. Likewise,

Representative Plaintiff and other Class members must prove the same facts in order to establish the same claims.

22. Representative Plaintiffs are adequate Class representatives because they are Class members and their interests do not conflict with Class interests. Representative Plaintiffs retained counsel competent and experienced in products liability and mass torts class actions, and together Representative Plaintiffs and counsel intend to prosecute this action vigorously for the Class's benefit. Representative Plaintiffs and their counsel will fairly and adequately protect Class interests.

23. A class action is superior to other available methods for the fair and efficient adjudication of this litigation because individual litigation of each Class member's claim is impracticable. Even if each Class member could afford individual litigation, the court system could not. It would be unduly burdensome if thousands of individual cases proceed. Likewise, individual litigation presents a potential for inconsistent or contradictory judgments, the prospect of a race for the courthouse, as well as the risk of an inequitable allocation of recovery among those with equally meritorious claims. Individual litigation further increases the expense and delay to all parties and the courts because it requires individual resolution of common legal and factual questions. By contrast, the class action device presents far fewer management difficulties and provides the benefit of a single adjudication, economies of scale, and comprehensive supervision by a single court.

24. The various claims asserted in this action are additionally or alternatively certifiable under the provisions of Federal Rules of Civil Procedure 23(b)(1) and/or 23(b)(2) because:

- a. Separate actions would create a risk of inconsistent or varying adjudications with respect to individual Class members, thus establishing incompatible standards of conduct for Defendants.

- b. Separate actions would create the risk of adjudications that would, as a practical matter, be dispositive of other non-party Class member's interests, thereby substantially impairing or impeding non-party Class members' ability to protect their interests.
- c. Defendants have acted or refused to act on grounds generally applicable to the entire Class, thereby making appropriate final declaratory and injunctive relief with respect to the Class as a whole.

CLAIMS FOR RELIEF

25. SIGG represented, marketed and sold its bottles as being BPA-free. SIGG also concealed from consumers that its bottles contained BPA. SIGG owed a legal duty to Representative Plaintiffs and Plaintiff Class Members not to represent, market, and sell to them bottles described as BPA-free when the bottles actually contained BPA. SIGG breached its duty and proximately caused Representative Plaintiffs' and Plaintiff Class Members' damages.

FIRST CLAIM FOR RELIEF (Breach of Contract)

26. Representative Plaintiffs, individually and on behalf of the Class, re-allege the allegations contained in the foregoing paragraphs as if set forth verbatim.

27. SIGG entered into a contract with the Representative Plaintiffs and the Class to sell them BPA-free bottles. Though SIGG received payment from the Representative Plaintiffs and the Class, SIGG breached the contract by supplying these individuals with bottles that contained BPA.

28. As a direct and proximate result of Defendants' breach of its contract, Representative Plaintiffs and the Class have sustained economic losses, and are therefore entitled to compensatory damages and attorney fees and costs according to proof.

**SECOND CLAIM FOR RELIEF
(Breach of Express Warranty)**

29. Representative Plaintiffs, individually and on behalf of the Class, re-allege the allegations contained in the foregoing paragraphs as if set forth verbatim.

30. SIGG (and/or its authorized agents or sales representatives) expressly warranted that its bottles, which it designed, manufactured, assembled, promoted and sold to Representative Plaintiffs and the Class, did not contain BPA. SIGG further expressly warranted that its bottles were fit for the particular purpose for which they were to be used. Representative Plaintiffs and the Class relied on SIGG's skill, judgment, representations, and express warranties. SIGG's warranties and representations were false because the bottles contained BPA.

31. SIGG's bottles were unmerchantable and unfit for the particular, express purpose for which they were sold, namely as BPA-free bottles. Therefore, SIGG breached its express warranties when it sold its bottles to Representative Plaintiffs and the Class, in that the bottles failed to function as represented and intended.

32. As a direct and proximate result of SIGG's breach of its express warranties, Representative Plaintiffs and the Class have sustained economic losses, and are therefore entitled to compensatory damages and equitable relief according to proof.

**THIRD CLAIM FOR RELIEF
(Breach of Implied Warranty)**

33. Representative Plaintiffs, individually and on behalf of the Class, re-allege the allegations contained in the foregoing paragraphs as if set forth verbatim.

34. SIGG (and/or its authorized agents or sales representatives) impliedly warranted that its bottles, which Defendant designed, manufactured, assembled, promoted and sold to Representative Plaintiffs and the Class, were merchantable, fit and safe for ordinary use and did not contain BPA. SIGG further impliedly warranted that its bottles were fit for the particular purpose for which the product was to be used.

35. SIGG's bottles were unmerchantable and unfit for the particular purpose for which they were sold, namely as BPA-free bottles. Therefore, SIGG breached the implied warranties of merchantability and fitness for a particular purpose when it sold its bottles to Representative Plaintiffs and the Class, in that the bottles failed to function as represented and intended.

36. As a direct and proximate result of SIGG's breach of the implied warranties of merchantability and fitness for a particular purpose, Representative Plaintiffs and the Class have sustained economic losses, and are therefore entitled to compensatory damages and equitable relief according to proof.

FOURTH CLAIM FOR RELIEF
(Violation of the Kentucky Consumer Protection Act)

37. Representative Plaintiffs, individually and on behalf of the Class, re-allege the allegations contained in the foregoing paragraphs as if set forth verbatim.

38. Representative Plaintiffs and the Class are natural "persons" within the meaning of KRS 367.110.

39. Representative Plaintiffs and the Class bring this cause of action pursuant to the Kentucky Consumer Protection Act, in that Representative Plaintiffs and the Class purchased the bottles primarily for personal, family or household purposes and thereafter suffered damages. KRS 367.220.

40. SIGG engaged in unfair, false, misleading, or deceptive acts or practices regarding its marketing and sale of its bottles. KRS 367.170.

41. SIGG represented to consumers that its bottles were BPA-free and omitted information from materials provided to the public regarding the presence of BPA in its bottles.

42. SIGG's representations and/or omissions regarding its bottles were likely to mislead consumers. Representative Plaintiffs and the Class reasonably interpreted SIGG's statements and/or omissions to mean that the bottles were BPA-free.

43. As a direct and proximate result of SIGG's conduct, Representative Plaintiffs and the Class have sustained economic losses, and are therefore entitled to actual damages, equitable relief, attorneys' fees and costs according to proof. KRS 367.220.

44. As said violation was willful, wanton, and malicious Representative Plaintiffs and the Class are entitled to punitive damages.

PRAYER FOR RELIEF

45. WHEREFORE, Representative Plaintiffs and the Class pray for judgment against SIGG as follows:

- a. For an Order certifying the Class and any appropriate subclasses thereof under the appropriate provisions of Federal Rule of Civil Procedure 23, and appointing Representative Plaintiff sand her counsel to represent the Class;
- b. For the equitable relief requested;
- c. For compensatory damages according to proof;
- d. For punitive damages against SIGG, consistent with the degree of SIGG's willful, wanton, and malicious conduct.
- e. For all applicable statutory damages under the consumer protection act of Kentucky;
- f. For a restitution and disgorgement of profits;
- g. For an award of attorneys' fees and costs;
- h. For prejudgment interest and the costs of suit; and
- i. For such other and further relief as this Court may deem just and proper.

JURY DEMAND

Representative Plaintiffs hereby demand a trial by jury.

Dated this 28th day of August, 2009.

Respectfully submitted,

/s/ Michael A. Caddell

Michael A. Caddell

(pro hac admission pending)

Cynthia B. Chapman

(pro hac admission pending)

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(pro hac admission pending)

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