

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS**

KATIE COSS, individually and on behalf of all
others similarly situated;

Plaintiffs,

v.

PLAYTEX PRODUCTS LLC, a Delaware
corporation,

Defendant.

No.: 08-CV-50222
Judge Frederick J. Kapala
Magistrate Judge P. Michael
Mahoney

AMENDED CLASS ACTION COMPLAINT

Plaintiff Katie Coss, individually and on behalf of others similarly situated, alleges for her Class Action Complaint against defendant Playtex Products, LLC (“Playtex” or “Defendant”), upon personal knowledge as to herself and her own acts, and as to all other matters upon information and belief, based upon, *inter alia*, the investigation made by her attorneys, as follows:

INTRODUCTION

1. This is a proposed class action brought by Plaintiff individually and on behalf of a class of retail purchasers of Playtex VentAire and VentAire Advanced baby bottles (collectively, “VentAire”), as defined more fully herein.

2. Flexible nipple baby bottles have the drawback that as the baby takes in the liquid a vacuum forms in the bottle making it harder for the baby to get more fluid and the baby then also takes in air causing unpleasant burping, coughing and even colic like symptoms.

Eliminating the air intake of the baby during feeding is a much sought after goal by many parents. Several flexible nipple bottles have been designed to eliminate the vacuum effect.

Playtex has entered this part of the baby bottle market designing, manufacturing and selling at a premium its VentAire bottles. However, VentAire bottles do not function as intended. Rather, because of a design defect with the vent disc or diaphragm – well known to and documented by Playtex – VentAire bottles do not prevent the vacuum effect of flexible nipple bottles and/or leak out from the vent disc or diaphragm located on the bottom of the bottle, and as a result, are not fit for their intended use. Playtex failed to disclose the known risk of failure inherent in its VentaAire bottles as it sold them at a premium price.

3. Playtex's acts and omissions constitute: (a) unjust enrichment, (2) violation of consumer protection laws and (b) breach of implied warranties.

PARTIES

4. **Plaintiff** Katie Coss is a natural person and citizen of Illinois.

5. **Defendant** Playtex Products, LLC is a corporation organized under the laws of Delaware with its principal place of business in Westport, Connecticut.

JURISDICTION AND VENUE

6. This Court has subject matter jurisdiction of the claims asserted herein pursuant to 28 U.S.C. §§ 1331 and 1332(d)(2)(A) in that the amount in controversy exceeds the sum or value of \$5,000,000, exclusive of interest and costs, and is a class action in which members of the putative plaintiff class are citizens of States different from Defendant.

7. Venue is proper pursuant to 28 U.S.C. § 1391. Defendant regularly transacts and conducts substantial business in this District.

FACTUAL ALLEGATIONS

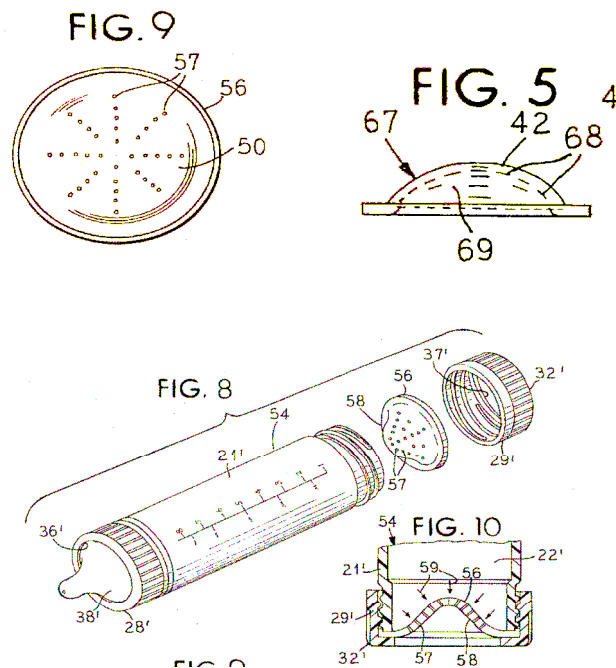
8. Baby bottles with flexible nipples form a vacuum during use as the fluid is withdrawn. The vacuum makes it harder for the baby to get more fluid. Also, air passes through

the nipple during feeding to equalize the reduced air pressure. Air intake by the baby during feeding causes unpleasant burping, coughing and even colic like symptoms.

9. As early as 1996, solutions for venting baby bottles included the use of a perforated elastomeric vent disc or diaphragm attached to the bottom of the bottle.

A. The Greenwood Circular Diaphragm

10. On March 19, 1996, U.S. Patent No. 5,499,729 was issued to Greenwood et al. Greenwood designed a diaphragm with a central portion that is domed and provided with apertures that are sealed shut when the diaphragm is relaxed and opened when the diaphragm is expanded responsive to differential air pressure, such as the vacuum when a baby uses the bottle. The following are the patent drawings of the Greenwood diaphragm and the placement of the diaphragm in the bottle:



B. Playtex Criticized The Circular Diaphragm For Its Drawbacks

11. Playtex was critical of the Greenwood diaphragm and stated the following:

However, the structure as disclosed in the Greenwood et al. patent suffers from one drawback. The diaphragm is merely pressed into engagement with the cap, and is only loosely retained therein by the threads of the cap before the cap is screwed onto the bottle. It is not affixed to the cap. While fluid does not leak through the multiple perforations in the central portion of the diaphragm, many users have experienced leakage due to improper placement of the diaphragm in its securing cap. If the elastomeric rim of the diaphragm is not replaced properly in the cap after cleaning, a seal will not form between the bottom of the bottle, the diaphragm's rim, and the cap. Fluid will then leak around the diaphragm and out of the air holes in the cap.

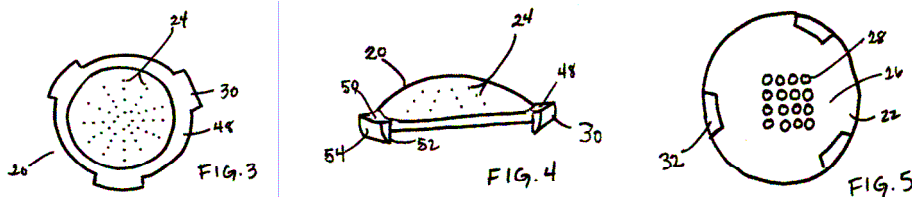
Patent No. 6,053,342, April 25, 2000.

12. Further, Playtex recognized:

Accordingly, an improved bottle assembly is required that ensures that the diaphragm is properly and sealingly seated in the cap, to prevent leakage of fluid from the assembly. Moreover, such an improved assembly permits a user to disassemble and reassemble conveniently and without the concern that leakage will occur due to misalignment.

Id.

13. To overcome the shortcomings of the circular diaphragm, Playtex's patent presented a diaphragm design that has at least one integral tab extending there from that is to be inserted into a corresponding slot in the vented end cap. The following drawings from Playtex's patent show the tabbed diaphragm and slotted end cap suggested by Playtex:



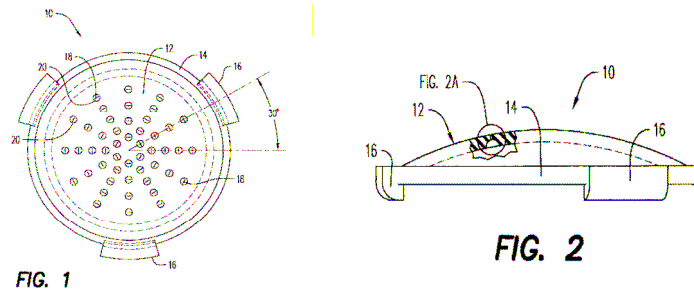
Id.

14. Playtex's patent application recognized that securing the diaphragm to the end cap is an important element in the successful design of a vented bottle, as well as to protect its monetary interests, Playtex further stated:

It is obvious that the tabs 30 and slots 32 of the present invention can take a variety of interlocking configurations. While three sets of tabs 30 and slots 32 are preferred, any number of sets can be used. In addition, a slot or other aperture on the diaphragm could be sealingly engaged by a tab or other protrusion on the interior surface of the cap. Any structures sufficient to affix the diaphragm to the cap, while preventing fluid leakage, are within the scope of the present invention. These structures may be integral to the cap, the diaphragm, or both, or can be independent clips, retaining rings or other such devices. In addition, structures other than the cap disclosed herein can be used to mount the diaphragm to the bottle.

Id.

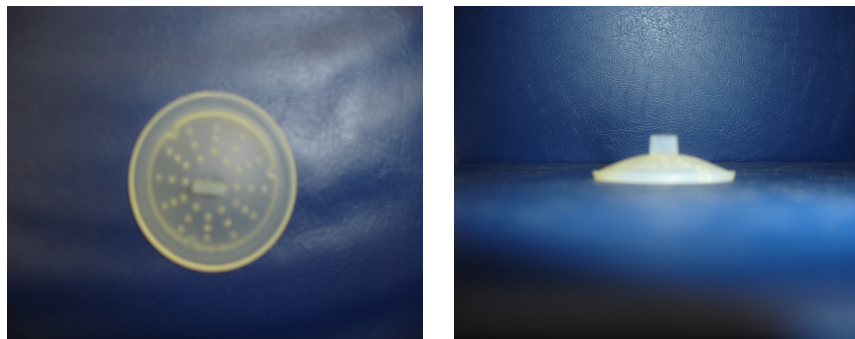
15. Playtex further refined the slotted diaphragm and the apparatus to manufacture the same and secured Patent No. 6,138,710 on October 31, 2000, showing the tabbed diaphragm as the following:



C. Despite Playtex's Knowledge Of The Inherent Defects In A Non-Tabbed Circular Diaphragm Playtex Uses A Non-Tabbed Circular Diaphragm In Its VentAire Bottles That Does Not Implement The Assorted Improvements Of Tabbing Included In Playtex's Patent

16. Despite its criticism of a circular diaphragm, and its own efforts in designing a tabbed circular diaphragm to eliminate the inherent defects of a circular diaphragm, Playtex

continued to manufacture and sell the following non-tabbed circular diaphragm in its VentAire bottles:



17. The inherent defects Playtex found with a non-tabbed diaphragm are present in the non-tabbed diaphragm Playtex manufactures and sells in its VentAire bottles.

18. Playtex is manufacturing and selling its VentAire bottles with a diaphragm it knows is defective, and knew from at least as early as April 25, 2000, that it was defective.

19. Playtex thus knew there was a substantial risk its VentAire bottles would leak under normal usage.

20. Playtex failed to disclose to consumers of its VentAire bottles that there was a substantial risk that VentAire bottles would leak under normal usage.

21. This omission is itself a material fact to a consumer purchasing a VentAire bottle.

22. In addition, VentAire bottles fail to prevent the vacuum effect of flexible nipple bottles. Plaintiff's children still needed to be burped after drinking from the VentAire bottles. Playtex charges a premium for the air venting function, and that function does not work. Moreover, VentAire bottles that leak through the vent disc or diaphragm fail to function as even a normal bottle would.

23. In essence, Playtex knew prior to sale that VentAire bottles would not prevent the vacuum effect of flexible nipple bottles and/or would leak through the circular vent disc or

diaphragm. Nevertheless, Playtex failed to disclose those risks and thereby deprived consumers of the opportunity to negotiate a lower price to reflect the risk or simply avoid the risk (and premium price paid) altogether by purchasing a different manufacturer's bottles. Thereafter, the undisclosed risk(s) occurred.

24. Consumers reasonably expect that if Playtex knew that its VentAire bottles contained an inherent design defect as described herein, then a manufacturer such as Playtex would disclose the defect(s) to consumers.

25. The defects in the VentAire bottles become evident to consumers after a short period of time, frequently within the first two weeks of usage. It is inconceivable that Playtex did not know of these issues if it performed testing that approximates actual consumer usage patterns. Because of the inherent defects in circular vent discs or diaphragms, Playtex knew or should have known within a short period of time of utilizing a circular vent disc or diaphragm in its VentAire bottles, that the VentAire bottles were defective.

26. Plaintiff and the Class have been damaged in the amount it will cost to or the amount they have paid to replace the bottles, an amount to be proven at trial.

27. Defendant's VentAire bottles are in direct competition with flexible nipple bottles from other manufacturers that successfully prevent the vacuum effect and/or that do not leak.

NAMED PLAINTIFF'S ALLEGATIONS

28. In or about July 2007, Plaintiff purchased several VentAire bottles, which she began using in October 2007 after giving birth earlier in September. Plaintiff promptly discovered that VentAire bottles leaked through the bottom and that the bottles did not prevent air from making it to the baby during feeding.

CLASS ACTION ALLEGATIONS

29. Plaintiff brings all claims herein as class claims pursuant to Fed. R. Civ. P. 23.

The requirements of Fed. R. Civ. P. 23(a), (b)(2) and (b)(3) are met with respect to the class defined below.

A. Class Definition(s)

All persons in Illinois, and/or California, Florida, Massachusetts, Michigan, Minnesota, Missouri, New Jersey, New Mexico, New York, Ohio, Oregon and Washington who purchased Playtex VentAire and/or Ventair Advanced bottles since October 1, 2003 (the "Class").¹

Excluded from the Class are: Defendant, any entities in which it has a controlling interest, any parents, subsidiaries, affiliates, officers, directors, employees and members of such persons immediate families, and the presiding judge(s) in this case and his, her or their immediate family.

B. Numerosity

30. At this time, Plaintiff does not know the exact size of the Class. Nonetheless, due to the thousands of retail purchasers, Plaintiff reasonably believes that the Class members are so numerous that joinder of all members is impracticable. The number and identities of Class members is administratively feasible and can be determined through appropriate discovery.

C. Commonality

31. There are questions of law or fact common to the class, including at least the following:

- (a) Whether Defendant had knowledge that VentAire bottles leaked through the vent disc or diaphragm and/or failed to prevent the vacuum effect associated with flexible nipple bottles;

¹ Plaintiff reserves the right to amend the class definition based upon future investigation, discovery and the proofs at trial.

- (b) Whether Defendant has acted or refused to act on grounds generally applicable to the Class;
- (c) Whether Defendant was unjustly enriched;
- (d) Whether Defendant's conduct constitutes consumer fraud;
- (e) Whether Defendant breached implied warranties; and,
- (f) Whether Plaintiff and other members of the Class have been damaged, and if so, what is the proper measure of such damages?

D. Typicality

32. Plaintiff has the same interests in this matter as all other members of the Class, and her claims are typical of all members of the class.

E. Adequacy

33. Plaintiff is committed to pursuing this action and has retained competent counsel experienced in the prosecution and successful resolution of consumer class actions. Plaintiff will fairly and adequately represent the interests of the Class members and does not have interests adverse to the Class.

F. The Prerequisites of Rule 23(b)(2) are Satisfied

34. The prerequisites to maintaining a class action for injunctive and equitable relief pursuant to Fed. R. Civ. P. 23(b)(2) exist as Defendant has acted or refused to act on grounds generally applicable to the Class thereby making appropriate final injunctive and equitable relief with respect to the Class as a whole.

35. The prosecution of separate actions by members of the class would create a risk of establishing incompatible standards of conduct for Defendant. For example, one court might decide that the challenged actions are illegal and enjoin them, while another court might decide

that those same actions are not illegal. Individual actions may, as a practical matter, be dispositive of the interest of Class members, who would not be parties to those actions.

36. Defendant's actions are generally applicable to the Class as a whole, and Plaintiff seeks, *inter alia*, equitable remedies with respect to the class as a whole.

37. Defendant's systemic policy and practices make declaratory relief with respect to the class as a whole appropriate.

G. The Prerequisites of Rule 23(b)(3) are Satisfied

38. This case satisfies the prerequisites of Fed. R. Civ. P. 23(b)(3). The common questions of law and fact enumerated above predominate over questions affecting only individual members of the Class, and a class action is the superior method for fair and efficient adjudication of the controversy. The likelihood that individual members of the Class will prosecute separate actions is remote due to the extensive time and considerable expense necessary to conduct such litigation, especially when compared to the relatively modest amount of monetary, injunctive and equitable relief at issue for each individual Class member. This action will be prosecuted in a fashion to ensure the Court's able management of this case as a class action on behalf of the class defined above.

CAUSES OF ACTION

COUNT I
(Unjust Enrichment)

39. Plaintiff repeats and realleges the allegations of the prior paragraphs, as if fully stated herein.

40. Playtex VentAire bottles sold at retail fail to prevent the vacuum effect associated with flexible nipple bottles and/or leak through the vent disc or diaphragm.

41. Plaintiff and the Class have conferred benefits on Defendant by purchasing Playtex VentAire bottles.

42. Defendant has knowingly and willingly accepted these benefits from Plaintiff and the Class.

43. Under the circumstances, it is inequitable for Defendant to retain these benefits at the expense of Plaintiff and the Class.

44. Defendant has been unjustly enriched at the expense of and detriment of Plaintiff and the Class by wrongfully collecting money to which Defendant, in equity, is not entitled.

45. Plaintiff and the Class are entitled to recover from Defendants all amounts wrongfully collected and improperly retained by Defendant, plus interest thereon.

46. As a direct and proximate result of Defendant's unjust enrichment, Plaintiff and the Class have suffered injury and are entitled to reimbursement, restitution and disgorgement from Defendant of the benefits conferred by Plaintiff and the Class.

47. Plaintiff and the Class have no adequate remedy at law.

48. Plaintiff seeks to obtain a pecuniary benefit for the Class in the form of all reimbursement, restitution and disgorgement from Defendants. Plaintiff's counsel are entitled to recover their reasonable attorneys' fees and expenses as a result of the conference of a pecuniary benefit on behalf of the Class, and will seek an award of such fees and expenses at the appropriate time.

WHEREFORE, Plaintiff, individually and on behalf of the Class of persons described herein, pray for an Order as follows:

- A. Finding that this action satisfies the prerequisites for maintenance as a class action set forth in Fed. R. Civ. P. 23(a), (b)(2) and/or (b)(3), and certifying the Class defined herein;
- B. Designating Plaintiff as representative of the Class and her counsel as Class counsel;
- C. Entering judgment in favor of Plaintiff and the Class and against Defendant;
- D. Awarding Plaintiff and Class members their individual damages and attorneys' fees and allowing costs, including interest thereon;
- E. Imposing a constructive trust on amounts wrongfully collected from Plaintiff and the Class members pending resolution of their claims herein;
- F. Granting such further relief as the Court deems just.

COUNT II

(Violation of Illinois Consumer Fraud Act and/or Substantially Similar Acts)

49. Plaintiff repeats and re-alleges the allegations of the prior paragraphs as if fully stated herein.

50. At all times relevant hereto, there was in full force and effect the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/1 et seq. (the "Act").

51. Section 2 of the Act provides in relevant part as follows:

Unfair methods of competition and unfair or deceptive acts or practices, including but not limited to the use of or employment of any deceptive, fraud, false pretense, false promise, misrepresentation or the concealment, suppression or omission of any material fact, with intent that others rely upon the concealment, suppression or omission of such material fact, or the use of employment of any practice described in Section 2 of the "Uniform Deceptive Trade Practices Act," approved August 5, 1965, in the conduct of any trade or commerce are hereby declared unlawful

whether any person has in fact been misled, deceived or damaged thereby, In construing this section consideration shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to Section 5(a) of the Federal Trade Commission Act.

815 ILCS 505/2 (footnotes omitted).

52. Plaintiff and Class are consumers within the meaning of Consumer Fraud Acts given that Defendant's business activities involve trade or commerce, are addressed to the market generally and otherwise implicate consumer protection concerns.²

53. Section 2 of the Illinois Consumer Fraud Act, 815 ILCS 505/2, renders unlawful the "use or employment of any deception [including the] concealment, suppression or omission of any material fact, with intent that others rely upon the concealment, suppression or omission of such material fact ... in the conduct of any trade or commerce..." Illinois case law and law in the proposed Class States holds that reliance on the deception is not an element of a consumer fraud claim.

54. Once the prospect that VentAire bottles failed to prevent the vacuum effect of a flexible nipple bottle and/or leaked through the bottom vent disc or diaphragm became significant, consumers (such as Plaintiff) were entitled to disclosure of that fact because failure to prevent the vacuum effect of a flexible nipple bottle and/or producing a bottle that leaks through

² The United States Supreme Court has held that choice-of-law analysis is flexible, not rigid, and has reaffirmed that "a particular set of facts giving rise to litigation could justify, constitutionally, the application of one jurisdiction's laws." *Phillips Petro. Co. v. Shutts*, 472 U.S. 797, 823 (1987). Indeed, "in many situations a state court may be free to apply one of several choices of law." *Id.* Thus, pending discovery, Plaintiff seeks to certify an Illinois only or a specific multi-state class based on substantially uniform laws, though the Court may ultimately apply one state's law to the controversy. Thus, for the time being, the claims of Illinois citizens (such as Plaintiff) are brought under the Illinois Consumer Fraud Act. The claims of non-Illinois citizens are brought under the consumer protection act(s) of their respective states. See e.g., Cal. Bus. & Prof. Code § 17200 *et seq.*, and Cal. Bus. & Prof. Code § 17500 *et seq.* (California); Fla. Stat. Ann. § 501.201 *et seq.* (Florida); 815 ILCS § 505/1 *et seq.* (Illinois); Mass Gen. L. ch. 93A, § 1 *et seq.* (Massachusetts); Mich. Stat. Ann § 445.901 *et seq.*, Mich. Stat. Ann. § 19.418(1) *et seq.* (Michigan); Minn. Stat. § 325F.68 *et seq.*, Minn. Stat. § 8.31 (Minnesota); Mo. Rev. Stat. § 407.010 *et seq.* (Missouri); N.J. Rev. Stat. § 56:8-1 *et seq.* (New Jersey); N.M. Stat. Ann. § 57-12-1 *et seq.* (New Mexico); Ohio Rev. Code Ann. § 1345.01 *et seq.* (Ohio); Ore. Rev. Stat. § 646.605 *et seq.* (Oregon); Wash. Rev. Code § 19.86.010 *et seq.* (Washington).

the vent disc or diaphragm would be a material fact in a consumer's decision-making process, and/or without Playtex's disclosure, consumers would not know that there is any risk of air mixing with the liquid and/or leakage through the vent disc or diaphragm – or that the VentAire bottle was not unique and not worth the premium paid (compared to other baby bottles).

55. Specifically, at all times relevant, Playtex continuously and consistently failed to disclose to consumers (such as Plaintiff) that VentAire bottles failed to prevent the vacuum effect of a flexible nipple bottle and/or failed to prevent leakage through the bottom vent disc or diaphragm.

56. Playtex intended that Plaintiff and the Class would rely on the deception by purchasing VentAire bottles, unaware of the material facts described above. This conduct constitutes consumer fraud within the meaning of the Act.

57. Plaintiff and the Class have been damaged by Playtex because the VentAire bottles failed to prevent the vacuum effect of a flexible nipple bottle and/or leak through the vent disc or diaphragm.

58. Defendant has committed deceptive acts or practices within the meaning of the Act by engaging in the acts and practices alleged herein, including, but not limited to, its failure to disclose the defects with VentAire bottles.

59. Defendant's conduct alleged herein is furthermore unfair insofar as it offends public policy; is so oppressive that the consumer has little alternative but to submit; and causes consumers substantial injury.

60. As a direct and proximate result of the unfair acts or practices of Defendant alleged herein, Plaintiff and other members of the Class were damaged.

WHEREFORE, Plaintiff, individually and on behalf of the Class of persons described herein, pray for an Order as follows:

- A. Finding that this action satisfies the prerequisites for maintenance as a class action set forth in Fed. R. Civ. P. 23(a), (b)(2) and/or (b)(3), and certifying the Class defined herein;
- B. Designating Plaintiff as representative of the Class and her counsel as Class counsel;
- C. Entering judgment in favor of Plaintiff and the Class and against Defendant;
- D. Awarding Plaintiff and Class members their individual damages and attorneys' fees and allowing costs, including interest thereon;
- E. Imposing a constructive trust on amounts wrongfully collected from Plaintiff and the Class members pending resolution of their claims herein;
- F. Granting such further relief as the Court deems just.

COUNT III
(Breach of Implied Warranty of Merchantability)

61. Plaintiff repeats and re-alleges the allegations of the prior paragraphs as if fully stated herein.

62. At all times relevant hereto, there was duty imposed by law which requires that a manufacturer or seller's product be reasonably fit for the purposes for which such products are used and intended, and that product be acceptable in trade for the product description.

63. Notwithstanding the aforementioned duty, at the time of delivery, Playtex VentAire bottles sold to Plaintiff and Class were not merchantable and not fit for their intended and specific purpose.

64. As documented in its own business records and elsewhere, Defendant was notified that VentAire bottles were not merchantable within a reasonable time after the latent defect manifested itself to Plaintiff and Class.

65. As a result of the non-merchantability of VentAire bottles, as described herein, Plaintiff and Class sustained loss and damages.

WHEREFORE, Plaintiff, individually and on behalf of the Class of persons described herein, pray for an Order as follows:

- A. Finding that this action satisfies the prerequisites for maintenance as a class action set forth in Fed. R. Civ. P. 23(a), (b)(2) and/or (b)(3), and certifying the Class defined herein;
- B. Designating Plaintiff as representative of the Class and her counsel as Class counsel;
- C. Entering judgment in favor of Plaintiff and the Class and against Defendant;
- D. Awarding Plaintiff and Class members their individual damages and attorneys' fees and allowing costs, including interest thereon;
- E. Granting such further relief as the Court deems just.

JURY DEMAND

Plaintiff demands a trial by jury on all issues so triable.

DATED: January 26, 2009

Respectfully submitted,

**KATIE COSS,
Class Plaintiff,**

By: /s/George K. Lang
One of Her Attorneys

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**Counsel for Plaintiff
and Proposed Class**

CERTIFICATE OF SERVICE

I hereby declare that on January 26, 2009, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system, which will send notification of such filing to counsel of record.

By: /s/George K. Lang
One of Its Attorneys

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