

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW JERSEY

JENNY MILMAN, a New Jersey Resident, on Behalf of
Herself and All Others Similarly Situated,

Plaintiff,

-against-

THERMOS L.L.C.,

Defendant.

**CLASS ACTION
COMPLAINT**

**JURY TRIAL
DEMANDED**

Plaintiff, Jenny Milman, by and through her undersigned attorneys, brings this action on behalf of herself and all other similarly situated on personal knowledge as to herself and her activities, and on information and belief as to all other matters, against Defendant, Thermos L.L.C. (“Thermos” or “Defendant”), and alleges as follows:

NATURE OF THE ACTION

1. This case is about supposedly “leak-proof” bottles that actually leak. Defendant manufactures two different types of “leak-proof” bottles, intended for use by young children: the Foogo[®] Vacuum Insulated Straw Bottle (the “Vacuum Insulated Bottle”) and the Foogo[®] Plastic Straw Bottle (the “Plastic Bottle”) (collectively the “Bottles”). Defendant consistently advertises the Bottles as being “leak-proof.” In fact, on Defendant’s website (through which consumers can purchase the Bottles) and on other websites selling the Bottles (such as Amazon.com), the Bottles are referred to as the Foogo[®] Vacuum Insulated ***Leak-Proof*** Straw Bottle and the Foogo[®] Plastic ***Leak-Proof*** Straw Bottle. Thus, the very name of the Bottles contains Defendant’s deceptive claim that the Bottles are leak-proof.

2. The Bottles' packaging – which is viewed by every person who purchases a Bottle from a store – also advertises the Bottles as “leak proof” on both the front and back of “hang tags” that are placed on each Bottle available for sale.

3. Unfortunately, however, the “leak-proof” Bottles are anything but “leak-proof.”

4. Defendant specifically markets the Bottles to parents of children 18 months of age or older, insofar as such parents value a bottle designed to prevent leaks when young children knock bottles over, throw them, spill them, or turn them upside down. Thus, a truly “leak-proof” bottle is particularly valuable to the parents of a young child and such representations are material to a purchase decision. The Bottles range in cost from \$6.00 to \$16.99, while similar non-leak-proof bottles cost as little as \$3.00 or less.

5. The Bottles leak from both the straw and the gap between the lid and the straw. Further, because the “push button lid” is easily triggered, the Bottles often pop open, exposing the leaking straw and straw area. These are not leaks associated with years of continuous use – they are instead inherent in the design of the Bottles.

6. Defendant has employed numerous methods to convey to consumers throughout the United States its deceptive claims regarding the supposed “leak-proof” nature of the Bottles, including on its website, on other websites such as Amazon.com, and on the products' packaging, insofar as the hang-tags present on every Bottle sold in stores advertise the Bottles as being “leak-proof.”

7. As a result of Defendant's deceptive claims, consumers – including Plaintiff and the other members of the proposed Class – purchased a product that is advertised as being immune to leaks but in reality leaks regularly and copiously, and thus Plaintiff and

other members of the Class have suffered an ascertainable loss. Moreover, Defendant has been able to charge a significant premium for the Bottles over other, traditional, non-“leak-proof” bottles designed for use by children.

8. Plaintiff brings this lawsuit against Defendant on behalf of herself and other similarly situated consumers who purchased the Bottles in order to (a) halt the dissemination of Defendant’s deceptive advertising message, (b) correct the false and misleading perception Defendant has created in the minds of consumers, and (c) secure redress for consumers who have purchased one or more of the Bottles. Plaintiff, on behalf of herself and all others similarly situated, alleges violations of the New Jersey Consumer Fraud Act, as well as breach of express warranty, and unjust enrichment.

JURISDICTION AND VENUE

9. This Court has original jurisdiction pursuant to 28 U.S.C. § 1332(d)(2). The aggregate claims of Plaintiff and the proposed Class members exceed \$5,000,000, exclusive of interest and costs, and there is diversity of citizenship between at least one member of the proposed Class and Defendant.

10. This Court has personal jurisdiction over Defendant because Defendant has purposefully availed itself of the privilege of conducting business in the State of New Jersey.

11. Venue is proper in this Court pursuant to 28 U.S.C. § 1391 because many of the acts and transaction giving rise to this action occurred in this district and because Defendant:

- a. has intentionally availed itself of the laws and markets within this district through the promotion, marketing, distribution and sale of its products in this district;
- b. does substantial business in this district; and
- c. is subject to personal jurisdiction in this district.

PARTIES

Plaintiff

12. Plaintiff is an individual residing in Hoboken, New Jersey and thus is a citizen of New Jersey. During the relevant period, Plaintiff was exposed to and saw Defendant's material deceptive labeling and advertising claims, purchased the premium-priced Foogo[®] Vacuum Insulated Straw Bottle and the premium-priced Foogo[®] Plastic Straw Bottle and, as a result of the material deceptive claims, suffered injury in fact and lost money.

13. On or about February 3, 2013, Plaintiff purchased one Foogo[®] Vacuum Insulated Leak-Proof Straw Bottle via Amazon.com at the price of \$16.99. On or about February 22, 2013, Plaintiff purchased one more Foogo[®] Vacuum Insulated Leak-Proof Straw Bottle at the price of \$16.93, and two Foogo[®] Plastic Leak-Proof Straw Bottles at the price of \$6.00 per bottle. Plaintiff was specifically seeking to purchase a leak-proof bottle for her infant son's use, and Plaintiff would not have purchased the Bottles had they not been advertised as being "leak-proof."

Defendant

14. Thermos L.L.C. is a Delaware limited liability company. Its corporate headquarters are located at 475 North Martingale Road, Suite 1100, Schaumburg, Illinois, 60173.

15. Plaintiff is informed and believes, and thus alleges, that at all times herein, Defendant's agents, employees, representatives, and/or partners were acting within the course and scope of such agency, employment, and representation, on behalf of such limited liability corporation.

FACTUAL ALLEGATIONS

16. Defendant describes itself as a "leading manufacturer worldwide of insulated food and beverage containers, children's lunch kits and other innovative consumer products." *See* "About Thermos," *available at* <http://www.thermos.com/About.aspx>, last visited July 15, 2013.

17. The Foogo[®] line of Defendant's products is designed for use by infants and young children, and includes "sippy cups" and food jars as well as the Bottles. *See* "Better Fresh Than Sorry," *available at* <http://www.thermos.com/foogo.aspx>, last visited July 15, 2013.

18. The Bottles are available in several different colors and designs, but all of them are referred to on the Thermos website as the Foogo[®] Vacuum Insulated Leak-Proof Straw Bottle or the Foogo[®] Plastic Leak-Proof Straw Bottle.

19. The following pictures are representative of the Vacuum Insulated Bottles:

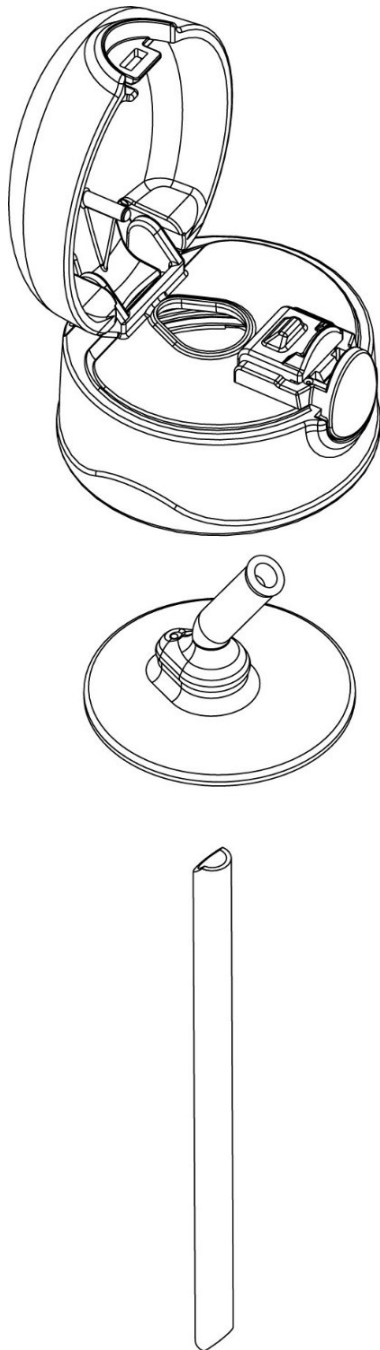


20. The following pictures are representative of the Plastic Bottles:



21. All of the Bottles (both Vacuum Insulated and Plastic) are equipped with a “hygienic push button lid.” When the large button is pushed, the lid opens, exposing the “pop-up silicone straw.” *See, e.g., “Blue Foogo[®] Vacuum Insulated Leak-Proof Straw Bottle,” available at <http://www.thermos.com/products/blue-foogo-vacuum-insulated-leak-proof-straw-bottle.aspx>, last visited July 15, 2013.*

22. The following drawing and photograph depict the lid and straw design of every Bottle:



Defendant's Deceptive Advertising and Marketing

23. Defendant's deceptive advertising of the Bottles as "leak-proof" takes two primary forms: online and in-store advertising. Online advertising appears on the Thermos website, where the Bottles are available for purchase, as well as other websites

where the Bottles are sold, such as Amazon.com. In-store advertising appears in the many baby and children's supplies stores where the Bottles are sold.

24. Defendant's online advertising for the Foogo[®] Vacuum Insulated Leak-Proof Straw Bottle and the Foogo[®] Plastic Leak-Proof Straw Bottle begins with the products' very names as they appear on Defendant's website: "**Leak-Proof**." By naming the Bottles as "Leak-Proof," Thermos leads consumers to believe that the Bottles will not leak under any circumstances.

25. Further, Defendant consistently represents in its online advertising that the Bottles are designed to endure falls and spills without leaking. A video on the Thermos website advertising the Foogo[®] line of products depicts a Foogo[®] sippy cup falling from a high chair to the floor, and states:

LEAK-PROOF, WORRY-FREE LID

If it flies off the high chair, or flips upside down in your purse, Thermos Foogo[®] products keep liquids where they belong.

See "Better Fresh Than Sorry," available at <http://www.thermos.com/foogo.aspx>, last visited July 15, 2013.

26. Elsewhere on its website, Defendant claims that the Bottle's "[p]ush-button lid is **leak-proof** and hygienic; soft silicone straw is durable and easy to sip." See, e.g., "Blue Foogo[®] Vacuum Insulated Leak-Proof Straw Bottle," available at <http://www.thermos.com/products/blue-foogo-vacuum-insulated-leak-proof-straw-bottle.aspx>, last visited July 15, 2013 (emphasis added).

27. Similar claims are made on other websites where the Bottles are sold, including Amazon.com, where the Bottles are described as follows:

Kid proof design: unbreakable stainless steel interior and exterior inhibits bacteria growth; ***leak proof valve prevents messes*** and is easy to clean.

Featuring an easy-grip contoured body and a soft, durable silicone straw, this bottle makes sipping clean, easy, and fun. The hygienic, pop-up straw opens easily with a push of a button and ***is completely leak-proof***.

See, e.g., “Thermos Foogo Phases Leak Proof Stainless Steel Straw Bottle, 10 Ounce,”

available at [http://www.amazon.com/Thermos-Phases-Stainless-Bottle-Purple/dp/](http://www.amazon.com/Thermos-Phases-Stainless-Bottle-Purple/dp/B002UJGK1C#productDetails)

[B002UJGK1C#productDetails](http://www.amazon.com/Thermos-Phases-Stainless-Bottle-Purple/dp/B002UJGK1C#productDetails), last visited July 15, 2013 (emphasis added).

28. Defendant’s in-store advertising is essentially identical and equally deceptive. Every Bottle available for purchase is displayed in the store with a “hang-tag.” A hang-tag is a cardboard tag affixed to the top and body of the Bottle. The hang-tags for the Bottles contain a symbol depicting a drop of water with a line through it, indicating that the Bottles are purportedly “leak-proof.”

29. Further, the Plastic Bottles’ hang-tags’ have a large circular area in the upper right corner advertising the Bottles’ “Leak-Proof Straw Lid.”

30. Finally, the Plastic Bottles’ hang-tags advertise as a “Product Feature,” the Bottles’ “Leak-proof hygienic push-button lid,” and the Vacuum-Insulated Bottles’ hang-tags advertise that the “Push-Button lid is leak-proof and hygienic.”

31. Thus, the overall consistent message of the advertising – whether online or in-store – is that these products are “leak-proof.”

32. By advertising the Bottles as “leak-proof,” Defendant is able to price the Bottles at a premium to other similar non-leak-proof children’s water bottles. While the Vacuum Insulated Bottle retails for \$14.99 to \$16.99 and the Plastic Bottle retails for \$6.00 to \$9.99, similar non-leak-proof stainless steel bottles retail for as little as \$7.99 (see, e.g., Sub Zero Stainless Bottle, available at <http://www.kmart.com/sub-zero->

stainless-bottle-black-750ml/p089W017474090001P?prdNo=10&blockNo=10&blockType=G10 (last visited August 13, 2013)), and similar children's non-leak-proof plastic straw bottles retail for as little \$3.00 or less (*see, e.g.*, Essential Home Butterfly Straw Cup, *available at* <http://www.kmart.com/essential-home-butterfly-straw-cup/p-011W029084440001P?prdNo=42&blockNo=42&blockType=G42> (last visited August 13, 2013)).

33. This is further evidence that the supposed "leak-proof" nature of the Bottles is a material factor in a consumer's decision to purchase the Bottles.

The "Leak-Proof" Bottles Are Not Remotely "Leak-Proof"

34. As Plaintiff and other members of the Class discovered after purchasing the Bottles, they are anything but "leak-proof." Indeed, liquid escapes from both the straw and gap between the straw and part of the lid surrounding the straw when the Bottles are inverted or shaken. If a young child shakes, throws or drops a Bottle – as young children are wont to do – liquid will be released from the mouth of the straw ***and*** from the gap between the straw and the lid.

35. Further, because the "hygienic push-button lid" is so large and so easily triggered, the lid covering the Bottles regularly pops open unintentionally. For example, if a Bottle is being stored in a diaper bag and another item in the diaper bag grazes the push-button lid, the lid will immediately pop open, exposing the straw, which in turn leaks liquid.

36. Numerous purchasers of the Bottles have voiced their dismay with Defendant's deceptive advertising after realizing that the "Leak-Proof" Bottles actually leak.

37. For example, countless purchasers have provided negative or less-than-stellar reviews on Amazon.com. A sample of such reviews appears below:

1.0 out of 5 stars **last less than 1 year**, May 22, 2013

By smiling angel

This review is from: Thermos Foogo Phases Leak Proof Stainless Steel Straw Bottle, Blue/Yellow, 10 Ounce (Baby Product)

At the very beginning we were looking for a straw bottle to keep the juice cold for our 1-year-old. But it turned out that she can't get used to straw until recent, when she is 2 1/2-year-old. So literally we only started using it about 2 months ago. However we began to see sticky juice everywhere. ***Then finally we found out there is a leakage that could not be stopped no matter how tight the screw cap is.***

SO IF YOU WANT A DURABLE BOTTLE FOR YOUR BABY, IT IS NOT THE ONE!

...

1.0 out of 5 stars **Leaks**, April 2, 2012

By ahs

This review is from: Thermos Foogo Phases Leak Proof Stainless Steel Straw Bottle, Pink/Purple, 10 Ounce (Baby Product)

After I received this cup I filled it with water and tipped it upside to see if it would leak and ***it immediately began leaking***. Not worth the price sending it back!!!

....

1.0 out of 5 stars **Leaks like crazy!**, July 24, 2011

By L. Scott (Mountain View, Ca) - See all my reviews

This review is from: Thermos Foogo Phases Leak Proof Stainless Steel Straw Bottle, Blue/Yellow, 10 Ounce (Baby Product)

I don't know how they can call this cup leak proof. Mine leaks constantly. I even bought a second one thinking that maybe the first one I had was defective. Unfortunately now I have two cups that leak. And it's not just from the top of the straw- the base of the straw leaks. When you tighten the lid the straw twists and therefore creates a hole where the straw comes out of the lid, and milk is constantly dripping out of there. My 16-month- old son uses this cup and of course drops it at will, so I am constantly cleaning up puddles of milk, especially if I don't catch it right away...

See Amazon.com Customer Reviews of Thermos Foogo Phases Leak Proof Stainless Steel Straw Bottle, available at http://www.amazon.com/Thermos-Phases-Stainless-Bottle-Yellow/product-reviews/B00318CO6G/ref=cm_cr_pr_top_filter_1_star

[?ie=UTF8&filterBy=addOneStar&showViewpoints=0&sortBy=byRankDescending](#) (last visited August 13, 2013).

38. Defendant's deceptive claims regarding the "leak-proof" nature of the Bottles appear on Defendant's website, in Defendant's advertising, and on every single Bottle sold. Bottles are available for sale on Defendant's website, on numerous other websites, and in stores throughout the state of New Jersey and throughout the United States.

Facts Specific to Plaintiff

39. On or about February 3, 2013, Plaintiff conducted an internet search for leak-proof or spill-proof baby bottles. She was hoping to find a bottle that her son, who was approximately one year old at that time, would be able to use without spilling.

40. As a result of her internet search, she found the Foogo[®] Leak-Proof Vacuum-Insulated Straw Bottle (also referenced on the Amazon website as the Thermos Foogo[®] Phases Leak-Proof Stainless Steel Straw Bottle) available for sale at Amazon.com. The Bottle was advertised as being "completely leak-proof." Because the Bottle was advertised as being leak-proof, Plaintiff purchased the Bottle via Amazon.com at the price of \$16.99, and the Bottle was delivered to her home several days later.

41. On or about February 22, 2013, Plaintiff, having not yet noticed that the Bottle was not "leak-proof" as advertised, purchased another Vacuum Insulated Bottle, at the price of \$16.93, as well as two Plastic Bottles, at the price of \$6.00 per bottle. These purchases were also made via Amazon.com. Again, Plaintiff purchased these Bottles because she wanted "leak-proof" bottles for her child, and the Bottles were advertised as "leak-proof."

42. If the Bottles had not been advertised as being “leak-proof,” Plaintiff would not have purchased any of the Bottles.

43. Within a few weeks after the second order of Bottles was delivered, Plaintiff noticed that none of the Bottles was actually leak-proof, as advertised. When Plaintiff’s son would turn a Bottle upside down or shake it, liquid would escape both from the gap between the straw and the lid *and* from the straw itself – *i.e.*, the Bottle would leak.

44. Plaintiff also noticed that the Bottles would leak if placed in a diaper bag. The button on the “push-button lid” is easily triggered, and the Bottles’ lids would pop open, exposing the leak between the straw and the lid and the leaking straw, and thus soaking the other items in the diaper bag with liquid. In fact, at times the Bottles would leak so much from the gap between the straw and the lid that liquid would escape even when the “push-button lid” was closed.

45. Thus, like the other members of the proposed Class, Plaintiff suffered an ascertainable loss as a result of Defendant’s material deceptive claims regarding the supposed “leak-proof” quality of the Bottles.

CLASS DEFINITION AND ALLEGATIONS

46. Plaintiff brings this action on behalf of herself and members of a Class defined as:

All persons who purchased one or more of Defendant’s Foogo[®] Vacuum Insulated Leak-Proof Straw Bottles or Foogo[®] Plastic Leak-Proof Straw Bottles in the State of New Jersey. Excluded from the Class are Defendant and its officers, directors and employees and those who purchased a Foogo[®] Vacuum Insulated Leak-Proof Straw Bottle or a Foogo[®] Plastic Leak-Proof Straw Bottle for the purpose of resale or who assert claims for personal injury.

47. This action has been brought and may properly be maintained on behalf of the Class proposed above under the criteria of Federal Rule of Civil Procedure 23 (“Rule 23”), insofar as the Class meets all the requirements of Rule 23:

a. ***Numerosity:*** The members of the Class are so numerous that their individual joinder is impracticable. Plaintiff is informed and believes that the proposed Class contains thousands of purchasers of the Bottles who have been damaged by Defendant’s conduct as alleged herein. The precise number of Class members is unknown to Plaintiff. The true number of Class members is known by Defendant, however, and thus potential Class members may be notified of the pendency of this action by first class mail, electronic mail, and/or published notice.

b. ***Existence and Predominance of Common Questions of Law and Fact:*** This action involves common questions of law and fact, which predominate over any questions affecting individual Class members. Common questions of law and fact include, but are not limited to, the following:

i. Whether Defendant’s claims about the Bottles discussed above are true, or are reasonably likely to deceive;

ii. Whether the alleged conduct constitutes violation of the New Jersey Consumer Fraud Act;

iii. Whether the alleged conduct constitutes a breach of the express warranty which exists between Defendant and Plaintiff and other members of the Class;

iv. Whether the alleged conduct constitutes unjust enrichment;

v. Whether Defendant engaged in deceptive advertising;

vi. Whether Defendant knowingly made material deceptive claims regarding the leak-proof nature of the Bottles;

vii. Whether Plaintiff and Class members have sustained monetary loss and the proper measure of that loss; and

viii. Whether Plaintiff and Class members are entitled to injunctive relief.

c. **Typicality:** Plaintiff's claims are typical of the claims of the other members of the Class because, *inter alia*, all Class members were injured through the uniform misconduct described above, and all Class members were subject to Defendant's deceptive statements, including deceptive claims that accompanied each and every Bottle sold. Plaintiff is advancing the same claims and legal theories on behalf of herself and all members of the Class.

d. **Adequacy of Representation:** Plaintiff will fairly and adequately protect the interests of the members of the Class. Plaintiff has retained counsel experienced in complex consumer class action litigation, and Plaintiff intends to prosecute this action vigorously. Plaintiff has no adverse or antagonistic interests to those of the Class.

e. **Superiority:** A class action is superior to all other available means for the fair and efficient adjudication of this controversy. The damages or other financial detriment suffered by individual Class members is relatively small compared to the burden and expense that would be entailed by individual litigation of their claims against Defendant. It would thus be virtually impossible for the Class, on an individual basis, to obtain effective redress for the wrongs done to them by Defendant. Furthermore,

individualized litigation would create the danger of inconsistent or contradictory judgments arising from the same set of facts. By contrast, the class action device provides the benefits of adjudication of these issues in a single proceeding and presents no unusual management difficulties under the circumstances here.

48. Unless a Class is certified, Defendant will retain monies received as a result of its conduct that were taken from Plaintiff and Class members. Unless a Class-wide injunction is issued, Defendant will continue to commit the violations alleged, and the members of the Class and the general public will continue to be deceived.

NOTICE TO ATTORNEY GENERAL OF ACTION

49. Pursuant to N.J. Stat. Ann. §56:8-20, a copy of this Complaint has been mailed to the Attorney General within ten days of the filing of the Complaint.

COUNT I

Violation of New Jersey Consumer Fraud Act

50. Plaintiff repeats and realleges the allegations contained in Paragraphs 1 through 49 above, as if set forth fully herein.

51. The Consumer Fraud Act (“CFA”) was enacted and designed to protect consumers against unfair, deceptive and fraudulent business practices. N.J. Stat. Ann. § 56:8-1 *et seq.*

52. N.J. Stat. Ann. § 56:8-2 provides:

The act, use or employment by any person of any unconscionable commercial practice, 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, in connection with the sale or advertisement of any merchandise or real estate, or with the subsequent performance of such person as aforesaid, whether or not any person has in fact been

misled, deceived or damaged thereby, is declared to be an unlawful practice...

53. Plaintiff, other members of the Class, and Defendant are “persons” within the meaning of the CFA.

54. The Bottles manufactured and sold by Defendant are “merchandise” within the meaning of the CFA, and Plaintiff and other members of the Class are “consumers” within the meaning of the CFA and thus entitled to the statutory remedies made available in the CFA.

55. Defendant, through its advertisements, including its packaging, used unconscionable commercial practices, deception, fraud, false pretense, false promise, and misrepresentation in violation of the CFA in connection with the marketing and sale of the Bottles, as alleged above.

56. Defendant also knowingly concealed, suppressed and consciously omitted material facts to Plaintiff and other members of the Class knowing that consumers would rely on the advertisements and packaging to purchase the Bottles.

57. The misrepresentations and omissions were material and were intended to, and likely to, deceive a reasonable consumer.

58. The foregoing acts, omissions and practices directly, foreseeably and proximately caused Plaintiff and other members of the Class to suffer an ascertainable loss in the form of, *inter alia*, monies spent to purchase the Bottles, and they are entitled to recover such damages, together with appropriate penalties, including treble damages, any other statutory damages, attorneys’ fees and costs of suit.

59. The CFA is, by its terms, a cumulative remedy, such that remedies under its provisions can be awarded in addition to those provided under separate statutory schemes.

60. Plaintiff also seeks a permanent injunction prohibiting Defendants from continuing to engage in the deceptive acts set forth above.

COUNT II

Breach of Express Warranty

61. Plaintiff repeats and realleges the allegations contained in Paragraphs 1 through 49 above, as if set forth fully herein.

62. Plaintiff brings this claim individually and on behalf of the Class.

63. Plaintiff, and each member of the Class, formed a contract with Defendant at the time Plaintiff and the other members of the Class purchased their Bottles. The terms of that contract include the claims regarding the “leak-proof” nature of the Bottles made by Defendant through its marketing and advertising efforts, as set forth above. This product advertising constitutes express warranties, became part of the basis of the bargain, and is part of a standardized contract between Plaintiff and the members of the Class on the one hand, and Defendant on the other.

64. Plaintiff and the Class relied on these express warranties as being a part of the bargain between the parties.

65. All conditions precedent to Defendant’s liability under the contract have been performed by Plaintiff and the Class.

66. Defendant breached the terms of this contract, including the express warranties, with Plaintiff and the Class by failing to provide Bottles which provided the

benefits advertised by Defendant – namely, by failing to provide Bottles which were actually leak-proof.

67. As a result of Defendant's breach of its express warranties, Plaintiff and the Class have been damaged in the amount of the purchase price of the Bottles they purchased.

COUNT III

Unjust Enrichment

68. Plaintiff repeats and realleges the allegations contained in Paragraphs 1 through 49 above, as if set forth fully herein.

69. Plaintiff brings this claim individually and on behalf of the Class.

70. As a result of Defendant's material deceptive advertising, marketing and/or sale of its Bottles, Defendant was enriched at the expense of Plaintiff and all other Class members through their purchase of the Bottles, because the Bottles did not provide the benefits as represented.

71. Under the circumstances, it would be against equity and good conscience to permit Defendant to retain the ill-gotten benefits it received from Plaintiff and the Class as the result of its deceptive marketing and advertising practices. Thus, it would be unjust or inequitable for Defendant to retain the benefit without restitution to Plaintiff and the Class.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for judgment:

A. Certifying the Class as requested herein;

B. Appointing Plaintiff as Class representative and her undersigned counsel as Class counsel;

C. Awarding Plaintiff and the proposed Class members damages;

D. Awarding statutory damages, including treble damages, to the extent available;

E. Awarding restitution and disgorgement of Defendant's revenues to Plaintiff and the proposed Class members;

F. Awarding injunctive relief as permitted by equity, including: enjoining Defendant from continuing the unlawful practices as set forth herein, and directing Defendant to identify, with Court supervision, victims of its conduct and pay them restitution and disgorgement of all monies acquired by Defendant by means of any act or practice declared by this Court to be wrongful;

G. Ordering Defendant to engage in a corrective advertising campaign;

H. Awarding attorneys' fees and costs; and

I. Providing such further relief as may be just and proper.

DEMAND FOR JURY TRIAL

Plaintiff hereby demands a trial of her claims by jury to the extent authorized by law.

Dated: August 16, 2013

WOLF HALDENSTEIN ADLER
FREEMAN & HERZ LLP

/s/ Janine L. Pollack
JANINE L. POLLACK
(N.J. State Bar No. 041671989;
D.N.J. No. JP-0178)
LYDIA A. KEANEY
270 Madison Avenue
New York, New York 10016
Tel: (212) 545-4600
Fax: (212) 545-4653
pollack@whafh.com
keaney@whafh.com

LEE S. SHALOV
MCLAUGHLIN & STERN LLP
270 Madison Avenue
New York, New York 10016
Tel: (646) 278-4298
Fax: (212) 448-0066
lshalov@mclaughlinstern.com

BRETT D. ZINNER
ROSENBERG FORTUNA &
LAITMAN LLP
666 Old Country Road, Suite 810
Garden City, New York 11530
Tel: (516) 228-6666
Fax: (516) 228-6672
brett@rflaw.com

/723629v1

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

Jenny Milman

DEFENDANTS

Thermos LLC

(b) County of Residence of First Listed Plaintiff **Hudson County, NJ**
(EXCEPT IN U.S. PLAINTIFF CASES)

County of Residence of First Listed Defendant _____
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

(c) Attorneys (Firm Name, Address, Email and Telephone Number)

Janine L. Pollack, WOLF HALDENSTEIN ADLER FREEMAN & HERZ
LLP, 270 Madison Ave., New York, NY 10016
Phone: (212) 545-4600 Email: pollack@whafh.com

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
- ☐ 2 U.S. Government Defendant
- ☐ 3 Federal Question (U.S. Government Not a Party)
- ☒ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- | | PTF | DEF | | PTF | DEF |
|---|---------------------------------------|----------------------------|---|----------------------------|---------------------------------------|
| Citizen of This State | <input checked="" type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input checked="" type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES	
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Medical Malpractice	PERSONAL INJURY <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Management Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Employee Retirement Income Security Act IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input checked="" type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	CIVIL RIGHTS <input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 448 Education	PRISONER PETITIONS Habeas Corpus: <input type="checkbox"/> 463 Alien Detainee <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty Other: <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement			

V. ORIGIN (Place an "X" in One Box Only)

- ☒ 1 Original Proceeding
- ☐ 2 Removed from State Court
- ☐ 3 Remanded from Appellate Court
- ☐ 4 Reinstated or Reopened
- ☐ 5 Transferred from Another District (specify)
- ☐ 6 Multidistrict Litigation

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
28 U.S.C. 1332(d)(2); N.J. Stat. Ann. 56:8-1 et seq.

Brief description of cause:

Violation of the NJ Consumer Fraud Act, Breach of Express Warranty, and Unjust Enrichment

VII. REQUESTED IN COMPLAINT:

☒ CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P.

DEMAND \$

5,000,000.00

CHECK YES only if demanded in complaint:

JURY DEMAND: ☒ Yes ☐ No

VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE

DOCKET NUMBER

DATE

08/16/2013

SIGNATURE OF ATTORNEY OF RECORD

/s/ Janine L. Pollack

FOR OFFICE USE ONLY

RECEIPT #

AMOUNT

APPLYING IFP

JUDGE

MAG. JUDGE