

CANADA

(Class Action)
SUPERIOR COURT

PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

J. ROSEN

NO: 500-06-000498-101

Petitioner

-vs.-

GAIAM, INC., legal person duly
constituted, having its head office at 833
West South Boulder Road, City of
Louisville, State of Colorado, 80027,
USA

Respondent

**MOTION TO AUTHORIZE THE BRINGING OF A CLASS ACTION
&
TO ASCRIBE THE STATUS OF REPRESENTATIVE
(Art. 1002 C.C.P. and following)**

TO ONE OF THE HONOURABLE JUSTICES OF THE SUPERIOR COURT,
SITTING IN AND FOR THE DISTRICT OF MONTREAL, YOUR PETITIONER
STATES AS FOLLOWS:

I. GENERAL PRESENTATION

A) The Action

1. Petitioner wishes to institute a class action on behalf of the following group, of which he is a member, namely:

- all residents in Canada who purchased a Gaiam reusable aluminum water bottle (the “Water Bottle”), or any other group to be determined by the Court;

Alternately (or as a subclass)

- all residents in Quebec who purchased a Gaiam reusable aluminum water bottle (the “Water Bottle”), or any other group to be determined by the Court;

B) The Respondent

2. Respondent is an American company that markets and sells “eco-friendly, organic products and healthy living solutions to help you live your best life” (taken from their website at www.gaiam.com);
3. Respondent sells its products, including the Water Bottle, either directly or indirectly throughout Canada, including in the Province of Quebec;

C) The Situation

4. In recent years, a lot of research has been dedicated to the chemical Bisphenol A (“BPA”) and its effects on health. BPA is an industrial chemical that mimics estrogen and has been linked to obesity, attention deficit hyperactivity disorder, breast cancer, uterine cancer, prostate cancer, immune system dysfunction, early puberty in females, decreased testosterone levels, higher rates of miscarriage, a wide range of developmental problems, behavioural disorders, reproductive health problems, decreased sperm count, higher risk of heart disease and diabetes;
5. BPA has also been detected in the environment – in surface water, sediments and groundwater. It is acutely toxic to aquatic organisms. Low doses of BPA can have adverse effects on fish and reptiles, particularly at sensitive developmental stages;
6. BPA is a manufactured chemical compound commonly used in the production of hard, clear plastic known as polycarbonate – which in turn, is used to make a number of common consumer products, including reusable water bottles, baby bottles, pitchers, tableware and storage containers. The concern is that humans are exposed to BPA when it leaches into our food and drink;
7. On April 19th 2008, Environment Canada recommended that BPA be classified as “toxic” under the Canadian Environmental Protection Act, 1999 (“CEPA”), the whole as appears more fully from extracts of the Canada Gazette, Part I, Vol. 142, No. 16, produced herein as **Exhibit R-1**;
8. On October 18th 2008, the government of Canada finalized its assessment of BPA and concluded that it is “toxic” under the CEPA, which means that it is considered a substance that “may be entering the environment in a quality or concentration or under conditions that constitute or may constitute a danger in Canada to human life and health” (article 64 of CEPA), the whole as appears more fully from extracts of the Canada Gazette, Part I, Vol. 142, No. 42, produced herein as **Exhibit R-2**;

9. The government of Canada has proposed a ban on the importation, sale and advertising of baby bottles made with BPA and to set limits on the presence of BPA in canned baby food;
10. In response to these widespread concerns, many manufacturers and retailers have decided of their own volition to phase out products that contain BPA;
11. The Respondent, who holds itself out to the public as an earth-conscious company, sought to capitalize on the concerns that consumers have with respect to BPA and its effects on human health and the environment by aggressively marketing and selling its reusable aluminum Water Bottles as being “BPA-free”;
12. For example, as recently as in the Spring 2009 catalogue, Gaiam made the following claim:

« new
Aluminum Water Bottles

Our BPA-free aluminum bottle keeps your water clear and fresh, while keeping disposable water bottles out of landfills. Generous, 20-oz. size with ring-top screw cap (Grass features sports top). Choose from six new designs. 9^{3/4}” H x 2^{3/4}” diameter. China. »

the whole as appears more fully from an extract from the Spring 2009 catalogue, produced herein as **Exhibit R-3**;

13. In fact, Gaiam’s reusable aluminum Water Bottles’ internal surface is lined with an epoxy resin which does contain BPA and such BPA does leach;
14. In the Fall 2009 catalogue, Gaiam quietly removed the representation that its aluminum Water Bottles were “BPA-free”, but still failed to inform consumers that these Water Bottles do indeed contain BPA, by making the following claim:

« new Aluminum Water Bottles

Now in even fresher designs and colors, our exclusive aluminum bottles keep your water clear and fresh, while keeping disposable water bottles out of landfills. Generous, lightweight bottle with ring-top screw cap (Grass features sports top) is 100% recyclable. 750ml. 9^{3/4}” H x 2^{3/4}” diameter. Hand wash. China. See more exclusive aluminum water bottle designs on p. 54. »

the whole as appears more fully from an extract from the Fall 2009 catalogue, produced herein as **Exhibit R-4**;

15. Then, at some time between September 30th 2009 and October 7th 2009, Gaiam admitted on its website that independent lab tests revealed BPA leaching at 23.8 parts per billion in its reusable aluminum Water Bottles;
16. Yet, Gaiam continues even to this day, to place the following statement on the Water Bottles' labelling:

« When you use an aluminum bottle, your water remains free of unhealthy plastic residue. »

II. FACTS GIVING RISE TO AN INDIVIDUAL ACTION BY THE PETITIONER

17. Petitioner purchased a Gaiam reusable aluminum Water Bottle called "Tree of Life" on or about August/September 2009 for approximately \$15 (including taxes) at Chapters on Sainte-Catherine Street West, in Montreal, Quebec;
18. When Petitioner bought the Water Bottle, he sincerely believed that he was making a healthy and environmentally responsible choice;
19. Petitioner specifically purchased the Water Bottle because he was under the distinct impression that it was BPA-free;
20. Had he known that the Water Bottle was not BPA-free, Petitioner would have bought a different water bottle made of stainless steel or glass at a cheaper price;
21. Petitioner has since discovered that these Water Bottle's actually do contain BPA, contrary to his personal beliefs and contrary to Gaiam's representations;
22. Petitioner now believes that Gaiam induced him into error through their false and misleading advertising regarding their Water Bottles;
23. Petitioner is also aware, through his own internet research, that there are at least two (2) class actions that have been instituted in the USA based on the false and misleading advertising of these Water Bottles, the whole as appears more fully from a copy of said Class Action Complaints, produced herein as **Exhibit R-5 en liasse**;
24. Since the time that Petitioner has discovered the truth about his Water Bottle, he no longer uses it;
25. Petitioner's damages are a direct and proximate result of the Respondent's conduct and their false and misleading advertising;
26. In consequence of the foregoing, Petitioner is justified in claiming damages;

III. FACTS GIVING RISE TO AN INDIVIDUAL ACTION BY EACH OF THE MEMBERS OF THE GROUP

28. Every member of the class owns a Gaiam reusable aluminum Water Bottle which they purchased believing that they were making a healthy and environmentally responsible choice;
29. The Respondent was fully aware that class members were under the reasonable impression that their Water Bottles were BPA-free. Respondent did nothing to change this belief held by its customers and, in fact, actively promoted it;
30. The class members were, therefore, induced into error by the Respondent's false and misleading advertising;
31. Had the Respondent disclosed the truth about its Water Bottles, reasonable consumers would not have bought these Water Bottles as there were ample stainless steel and glass water bottles available on the market, which do not contain BPA;
32. Each member of the class is justified in claiming at least one or more of the following as damages:
 - a. Purchase price of the Water Bottles;
 - b. Loss of use and enjoyment of their Water Bottles;
 - c. Trouble and inconvenience;
 - d. Punitive and/or exemplary damages;
33. Respondent engaged in wrongful conduct, while at the same time obtaining, under false pretences, significant sums of money from class members;
34. All of these damages to the class members are a direct and proximate result of the Respondent's conduct and their false and misleading advertising;
35. Further, even today, Gaiam has done nothing concrete to inform consumers that the "BPA-free" Water Bottles that they purchased actually do contain BPA;

IV. CONDITIONS REQUIRED TO INSTITUTE A CLASS ACTION

- A) The composition of the class renders the application of articles 59 or 67 C.C.P. difficult or impractical
36. Petitioner is unaware of the specific number of persons who purchased the Water Bottles, however, it is safe to estimate that it is in the tens of thousands (if not hundreds of thousands);
37. Class members are numerous and are scattered across the entire province and country;
38. In addition, given the costs and risks inherent in an action before the courts, many people will hesitate to institute an individual action against the Respondent. Even if the class members themselves could afford such individual litigation, the court system could not as it would be overloaded. Further, individual litigation of the factual and legal issues raised by the conduct of the Respondent would increase delay and expense to all parties and to the court system;
39. Also, a multitude of actions instituted in different jurisdictions, both territorial (different provinces) and judicial districts (same province), risks having contradictory judgements on questions of fact and law that are similar or related to all members of the class;
40. These facts demonstrate that it would be impractical, if not impossible, to contact each and every member of the class to obtain mandates and to join them in one action;
41. In these circumstances, a class action is the only appropriate procedure for all of the members of the class to effectively pursue their respective rights and have access to justice;
- B) The questions of fact and law which are identical, similar, or related with respect to each of the class members with regard to the Respondent and that which the Petitioner wishes to have adjudicated upon by this class action
42. Individual questions, if any, pale by comparison to the numerous common questions that predominate;
43. The damages sustained by the class members flow, in each instance, from a common nucleus of operative facts, namely, Respondent's misconduct;
44. The recourses of the members raise identical, similar or related questions of fact or law, namely:

- a. Did Gaiam engage in unfair, false, misleading, or deceptive acts or practices regarding the marketing and sale of its Water Bottles?
 - b. Did Gaiam conceal the presence of BPA in its Water Bottles?
 - c. Is Gaiam responsible for all related damages (including, but not limited to, the purchase price, the loss of use and enjoyment, trouble and inconvenience) to class members as a result of its misconduct?
 - d. Should an injunctive remedy be ordered to force Gaiam to cease from continuing its unfair and/or deceptive conduct, issue an order that requires the Respondent to affirmatively and meaningfully notify class members that the Water Bottles do contain BPA, and provide class members with an opportunity to make an appropriate exchange and/or to receive a refund?
 - e. Is Gaiam responsible to pay compensatory, moral, punitive and/or exemplary damages to class members and in what amount?
 - f. Should Gaiam be ordered to disgorge all of its profits related to the sale of the Water Bottles?
45. The interests of justice favour that this motion be granted in accordance with its conclusions;

V. NATURE OF THE ACTION AND CONCLUSIONS SOUGHT

46. The action that the Petitioner wishes to institute on behalf of the members of the class is an action in damages;
47. The conclusions that the Petitioner wishes to introduce by way of a motion to institute proceedings are:

GRANT the class action of the Petitioner and each of the members of the class;

ORDER the Defendant to cease from continuing its unfair and/or deceptive conduct;

ORDER the Defendant to affirmatively and meaningfully notify class members that the Water Bottles do contain BPA;

ORDER the Defendant to provide class members with an opportunity to make an appropriate exchange and/or to receive a refund for their Water Bottles;

DECLARE the Defendant liable for the damages suffered by the Petitioner and each of the members of the class;

CONDEMN the Defendant to pay to each member of the class a sum to be determined in compensation of the damages suffered, and ORDER collective recovery of these sums;

CONDEMN the Defendant to pay to each of the members of the class, punitive damages, and ORDER collective recovery of these sums;

CONDEMN the Defendant to pay interest and additional indemnity on the above sums according to law from the date of service of the motion to authorize a class action;

ORDER the Defendant to deposit in the office of this court the totality of the sums which forms part of the collective recovery, with interest and costs;

ORDER that the claims of individual class members be the object of collective liquidation if the proof permits and alternately, by individual liquidation;

CONDEMN the Defendant to bear the costs of the present action including expert and notice fees;

RENDER any other order that this Honourable court shall determine and that is in the interest of the members of the class;

A) The Petitioner requests that he be attributed the status of representative of the Class

48. Petitioner is a member of the class;

49. Petitioner is ready and available to manage and direct the present action in the interest of the members of the class that they wish to represent and is determined to lead the present dossier until a final resolution of the matter, the whole for the benefit of the class, as well as, to dedicate the time necessary for the present action before the Courts of Quebec and the *Fonds d'aide aux recours collectifs*, as the case may be, and to collaborate with his attorneys;

50. Petitioner has the capacity and interest to fairly and adequately protect and represent the interest of the members of the class;

51. Petitioner has given the mandate to his attorneys to obtain all relevant information with respect to the present action and intends to keep informed of all developments;

52. Petitioner, with the assistance of his attorneys, is ready and available to dedicate the time necessary for this action and to collaborate with other members of the class and to keep them informed;

53. Petitioner is in good faith and has instituted this action for the sole goal of having his rights, as well as the rights of other class members, recognized and protected so that they may be compensated for the damages that they have suffered as a consequence of the Respondent's conduct;

54. Petitioner understands the nature of the action;

55. Petitioner's interests are not antagonistic to those of other members of the class;

B) The Petitioner suggests that this class action be exercised before the Superior Court of justice in the district of Montreal

56. A great number of the members of the class reside in the judicial district of Montreal and in the appeal district of Montreal;

57. The Petitioner's attorneys practice their profession in the judicial district of Montreal;

58. The present motion is well founded in fact and in law.

FOR THESE REASONS, MAY IT PLEASE THE COURT:

GRANT the present motion;

AUTHORIZE the bringing of a class action in the form of a motion to institute proceedings in damages;

ASCRIBE the Petitioner the status of representative of the persons included in the class herein described as:

- all residents in Canada who purchased a Gaiam reusable aluminum water bottle (the "Water Bottle"), or any other group to be determined by the Court;

Alternately (or as a subclass)

- all residents in Quebec who purchased a Gaiam reusable aluminum water bottle (the “Water Bottle”), or any other group to be determined by the Court;

IDENTIFY the principle questions of fact and law to be treated collectively as the following:

- a. Did Gaiam engage in unfair, false, misleading, or deceptive acts or practices regarding the marketing and sale of its Water Bottles?
- b. Did Gaiam conceal the presence of BPA in its Water Bottles?
- c. Is Gaiam responsible for all related damages (including, but not limited to, the purchase price, the loss of use and enjoyment, trouble and inconvenience) to class members as a result of its misconduct?
- d. Should an injunctive remedy be ordered to force Gaiam to cease from continuing its unfair and/or deceptive conduct, issue an order that requires the Respondent to affirmatively and meaningfully notify class members that the Water Bottles do contain BPA, and provide class members with an opportunity to make an appropriate exchange and/or to receive a refund?
- e. Is Gaiam responsible to pay compensatory, moral, punitive and/or exemplary damages to class members and in what amount?
- f. Should Gaiam be ordered to disgorge all of its profits related to the sale of the Water Bottles?

IDENTIFY the conclusions sought by the class action to be instituted as being the following:

GRANT the class action of the Petitioner and each of the members of the class;

ORDER the Defendant to cease from continuing its unfair and/or deceptive conduct;

ORDER the Defendant to affirmatively and meaningfully notify class members that the Water Bottles do contain BPA;

ORDER the Defendant to provide class members with an opportunity to make an appropriate exchange and/or to receive a refund for their Water Bottles;

DECLARE the Defendant liable for the damages suffered by the Petitioner and each of the members of the class;

CONDEMN the Defendant to pay to each member of the class a sum to be determined in compensation of the damages suffered, and ORDER collective recovery of these sums;

CONDEMN the Defendant to pay to each of the members of the class, punitive damages, and ORDER collective recovery of these sums;

CONDEMN the Defendant to pay interest and additional indemnity on the above sums according to law from the date of service of the motion to authorize a class action;

ORDER the Defendant to deposit in the office of this court the totality of the sums which forms part of the collective recovery, with interest and costs;

ORDER that the claims of individual class members be the object of collective liquidation if the proof permits and alternately, by individual liquidation;

CONDEMN the Defendant to bear the costs of the present action including expert and notice fees;

RENDER any other order that this Honourable court shall determine and that is in the interest of the members of the class;

DECLARE that all members of the class that have not requested their exclusion, be bound by any judgement to be rendered on the class action to be instituted in the manner provided for by the law;

FIX the delay of exclusion at thirty (30) days from the date of the publication of the notice to the members, date upon which the members of the class that have not exercised their means of exclusion will be bound by any judgement to be rendered herein;

ORDER the publication of a notice to the members of the group in accordance with article 1006 C.C.P. within sixty (60) days from the judgement to be rendered herein in LA PRESSE and the NATIONAL POST;

ORDER that said notice be available on the Respondent's website with a link stating "Notice to Gaiam Reusable Aluminum Water Bottle Users";

RENDER any other order that this Honourable court shall determine and that is in the interest of the members of the class;

THE WHOLE with costs including publications fees.

Montreal, January 28, 2010

Me Jeff Orenstein
CONSUMER LAW GROUP
Attorney for the Petitioner