

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
) Civil No. 3:15-cv-01203-G
 v.)
)
 MICHAELS STORES, INC., and MICHAELS)
 STORES PROCUREMENT CO., INC.,)
)
 Defendants.)
 _____)

**UNITED STATES' UNOPPOSED MOTION FOR LEAVE TO FILE
AN AMENDED COMPLAINT TO WITHDRAW COUNT III**

Plaintiff the United States respectfully seeks leave to amend its Complaint (Dkt. #1) pursuant to Fed. R. Civ. P. 15(a)(2), in order to withdraw Count III and thus streamline this case going forward. Defendants have consented to the filing of the proposed amended complaint attached as Exhibit 1 to this Motion.

Background

A. Background Relevant to Motion to Amend

The United States filed this case on April 21, 2015, for injunctive relief and civil penalties based on Michaels' alleged violations of various provisions of the Consumer Product Safety Act ("CPSA"). Counts I and II of the Complaint allege that between approximately September 2008 and February 2010, Michaels failed to report immediately information reasonably supporting the conclusion that the glass vases (1) contained a defect that could create a substantial product hazard, and (2) created an unreasonable risk of serious injury. Count III of the Complaint alleges that Michaels violated the CPSA by knowingly making a material misrepresentation to the CPSC during the course of the agency's investigation. (Dkt. #1 at ¶¶ 12, 15, 31-35, 44-45). September

9, 2016 was the agreed-upon deadline for motions to amend the pleadings. (Dkt. # 40). However, the United States has determined that it would be more efficient to proceed without Count III, to allow the parties and the Court to focus on the most critical issue at the heart of the case—the violations alleged in Counts I and II.

Counsel for the parties met and conferred by telephone on March 30, 2017 regarding Plaintiff's request to amend the complaint. On March 31, 2017, Defendants indicated in writing that they do not oppose Plaintiff's request.

Argument

The United States' unopposed motion seeks relief that should help resolve this case more efficiently and expeditiously. Allowing the United States to drop Count III from the Complaint (Dkt. #1) would substantially limit the facts and legal determinations to be adjudicated at summary judgment and at trial. Because this Motion to Amend is after the September 9, 2016 deadline for amending the pleadings, Fed. R. Civ. P. 15(a)(2) applies. *Three Legged Monkey, LP et al. v. City of El Paso, Texas, et al.*, No. EP-14-CV-00260-FM, 2014 U.S. Dist. LEXIS 194502, *9 (W.D. Tex. Nov. 3, 2014). Rule 15(a)(2) provides that a party may amend its pleading before trial only with written consent of the opposing party or leave of court, and specifies that the Court "should freely give leave when justice so requires." Defendants have given written consent to amend the Complaint to withdraw Count III, thus satisfying Rule 15(a)(2)'s conditions. The United States respectfully requests that the Court grant its motion to amend and file the proposed Amended Complaint attached as Exhibit 1 to the Motion. The resources of the parties and the Court will be conserved by narrowing the issues for summary judgment, pretrial filings, and trial.

Based on the foregoing, the United States respectfully requests that the Court grant its Motion to Amend the Complaint.

Dated: April 3, 2017

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Respectfully submitted,

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CERTIFICATE OF CONFERENCE

Undersigned counsel for the United States certifies that the parties met and conferred about the substance of this motion. On March 30, 2017, counsel participated in a telephone conference to discuss the issues raised herein. On March 31, 2017, counsel for the Defendants notified the United States in writing that they consent to this motion.

/s/ Lisa K. Hsiao
LISA K. HSIAO

CERTIFICATE OF SERVICE

The undersigned certifies that on April 3, 2017, a true and correct copy of the foregoing document was forwarded via ECF to the following counsel of record:

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA,)
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 Plaintiff,)
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 MICHAELS STORES, INC., and MICHAELS)
 STORES PROCUREMENT CO., INC.,)
)
 Defendants.)
 _____)

**AMENDED COMPLAINT FOR CIVIL PENALTIES AND PERMANENT
INJUNCTIVE RELIEF**

Plaintiff, United States of America, by its undersigned attorneys, alleges:

1. This action relates to twenty-inch glass vases that were imported and sold to consumers by Michaels Stores, Inc. and Michaels Stores Procurement Co., Inc. (“Michaels”). Michaels failed to report on a timely basis to the U.S. Consumer Product Safety Commission (the “Commission” or “CPSC”) that the glass walls of the vases are too thin to withstand normal handling and that, as a result, the vases can break or shatter in consumers’ hands, causing lacerations. The vases inflicted serious injuries, such as severed tendons and nerve damage, that required stitches and surgery. Michaels knew of this danger at least as early as September 2008, but Michaels provided no notice and no information to the CPSC until February 22, 2010.

2. This action is brought by the United States of America under the Consumer Product Safety Act (“CPSA”), 15 U.S.C. § 2051 et seq., seeking civil penalties and injunctive relief against Michaels because Michaels knowingly failed to immediately report to the CPSC upon receiving information that reasonably supported the conclusion that the vases:

a. contained a defect that could create a substantial product hazard, and

- b. created an unreasonable risk of serious injury.

JURISDICTION AND VENUE

3. This Court has jurisdiction pursuant to 15 U.S.C. § 2071(a) and 28 U.S.C. §§ 1331, 1345, and 1355(a). Venue in this District is proper pursuant to 28 U.S.C. §§ 1391(b)-(c) and 1395(a).

DEFENDANTS

4. Michaels Stores, Inc. is a Delaware corporation with its principal place of business in Irving, Texas. It is a manufacturer and retailer of consumer products. In 2013, it reported over \$4.5 billion in sales in North America.

5. Michaels Stores Procurement Company, Inc. is a wholly owned subsidiary of Michaels Stores, Inc.

CONSUMER PRODUCT SAFETY ACT

6. The Commission is an independent federal agency created to protect the public against unreasonable risks of injury from consumer products. The Commission enforces the CPSA. The principal offices of the Commission are at 4330 East West Highway, Bethesda, Maryland, 20814. 16 C.F.R. § 1000.4(a). Under the CPSA, every manufacturer or retailer of a consumer product that is distributed in commerce is obligated immediately to notify the CPSC of certain events. 15 U.S.C. § 2064(b). Two of these events are relevant in this case.

7. First, a manufacturer or retailer “who obtains information which reasonably supports the conclusion that such product . . . contains a defect which could create a substantial product hazard” must immediately inform the CPSC “unless such manufacturer . . . or retailer has actual knowledge that the Commission has been adequately informed of such defect”

15 U.S.C. § 2064(b)(3). The CPSA defines “substantial product hazard” as a product defect that “creates a substantial risk of injury to the public.” 15 U.S.C. § 2064(a)(2).

8. Second, a manufacturer or retailer of a consumer product “who obtains information which reasonably supports the conclusion that such product . . . creates an unreasonable risk of serious injury or death” must immediately inform the CPSC “unless such manufacturer . . . or retailer has actual knowledge that the Commission has been adequately informed of . . . such risk.” 15 U.S.C. § 2064(b)(4). The Commission has defined “serious injury” to include any significant injury, including injuries necessitating medical or surgical treatment and lacerations requiring sutures. 16 C.F.R. § 1115.6(c).

9. One purpose of the reporting requirements is to protect the public against unreasonable risks of injury from consumer products. Companies must report “immediately” to enable the CPSC to take action to address the hazard or risk by, for example, implementing a product recall.

10. Failing to furnish information required by 15 U.S.C. § 2064(b) is a prohibited act under the CPSA. 15 U.S.C. § 2068(a)(4).

FACTUAL ALLEGATIONS

The Vases

11. Michaels sold the vases to consumers from in or around June 2006 through March 2010.

12. From in or around June 2006 to in or around February 2010, The Gerson Company (“Gerson”), a Kansas corporation unaffiliated with Michaels, procured for Michaels the manufacture of approximately 203,000 vases, which were imported into the United States by Michaels. The vases were shipped directly from the Chinese factories to Michaels’ freight

forwarder in China. Michaels' freight forwarder accepted delivery of the vases in China and then shipped them to Michaels' distribution centers in the United States. At all relevant times, Michaels was an importer of the vases. Michaels was thus a "manufacturer" of the vases under the CPSA, which defines "manufacturer" to include any person who imports a product into the United States. 15 U.S.C. § 2052(a)(11).

13. From in or around June 2006 to in or around March 2010, Michaels sold approximately 203,000 vases through its retail stores throughout the United States.

14. At all relevant times, Michaels was also a "retailer" of the vases, as defined in 15 U.S.C. § 2052(a)(13).

15. Michaels sold the vases to consumers for use in or around a permanent or temporary household or residence, in recreation or otherwise. Each vase is a "consumer product" as that term is defined in 15 U.S.C. § 2052(a)(5).

16. The vases contained a defect because the glass was too thin for the intended use and could break or fracture during normal handling, posing a laceration hazard to consumers.

17. The vases thus contained a defect which could create a substantial product hazard.

18. The vases also created an unreasonable risk of serious injury to consumers.

Defendants' Knowledge of the Defective and Hazardous Nature of the Vases and Failure to Report Immediately to the CPSC

19. Michaels received the following consumer incident reports related to the defect or risk of the vases at or around the time of their occurrence:

- a. On or about October 19, 2007, a consumer notified Michaels of injuries caused by a vase that shattered in her hand. She reported that surgery was

required to repair tendon and nerve damage, and that she had suffered permanent impairment of her left thumb. An expert's report prepared in connection with the resulting litigation, provided to Michaels in or around September 2008, concluded that the vase was "unreasonably dangerous for its normal use" and that the thinnest portions of the vase's glass were comparable in thickness to a light bulb.

b. On or about February 22, 2009, a vase shattered, injuring a consumer as she was checking out at the cash register at a Michaels store. A Michaels employee filed an injury report documenting the incident.

c. On or about March 13, 2009, a consumer's thumb was lacerated when a vase broke while she was shopping at a Michaels store. An injury report completed by a store employee noted: "customer grasped vase and vase broke in middle. Poorly made—thin glass in middle of vase."

d. On or about April 20, 2009, another consumer suffered a laceration caused by a vase while shopping in a Michaels store. A store employee filled out an injury report and discarded the vase in the trash. Michaels forwarded the claim to Gerson, noting that the vase "sheared in the middle and a 'sheet of glass came down and cut her hand between her thumb and forefinger.'" The consumer reported that she underwent surgery, required a cast for five weeks, and had lost nerve sensation in her fingers.

e. On or about July 18, 2009, yet another consumer received a laceration caused by a vase and reported that she was injured when she put her "right thumb through a glass vase she purchased and it shattered." She required surgery to repair tendon and nerve damage.

f. On or about September 24, 2009, a consumer sustained injuries when a vase shattered in his hand after he filled it with water. The consumer required surgery to repair a damaged tendon and nerve. His recovery was complicated by an infection that required him to seek additional medical attention.

g. On or about October 31, 2009, a consumer reported that she received a serious hand laceration when a vase broke as she attempted to pick it up while in the parking lot of a Michaels store. The consumer was taken from the Michaels store to a hospital in an ambulance and required eight stitches to her hand.

h. On or about December 22, 2009, a consumer reported that a vase shattered in her hands after she took it home.

i. On or about December 10, 2009, a consumer reported that when she picked up a vase in a Michaels store, her thumb went through the glass, resulting in a laceration at the base of her thumb.

20. Despite having knowledge of information about the defect or risk of the vases shattering in consumers' hands and causing serious injuries to consumers at least as early as September 2008, Michaels did not submit any information to the CPSC before February 22, 2010. On that date, Michaels finally submitted an Initial Report to the CPSC.

21. By knowingly failing to report immediately to the Commission, Michaels violated the CPSA. 15 U.S.C. § 2064(b)(3). Under the Commission's regulations, "immediately" means "within 24 hours," 16 C.F.R. § 1115.14(e), but Michaels failed to report for well over a year. Michaels acted "knowingly" within the meaning of the CPSA, because it either had actual knowledge of the defect or risk or could have obtained such knowledge upon the exercise of due care. 15 U.S.C. § 2069(d).

Defendants' Failure to Report Information Required by Law

22. On February 22, 2010, Michaels submitted an Initial Report to the CPSC pursuant to 16 C.F.R. § 1115.13(b), a regulatory provision which applies to retailers and distributors—not to manufacturers. Michaels' Initial Report provided only the limited information required to be furnished by distributors and retailers under that provision. *See* 16 C.F.R. § 1115.13(b) (distributors and retailers must provide a description of the defect or risk to the CPSC, as well as to the manufacturer or importer); 16 C.F.R. § 1115.13(d) (distributors and retailers satisfy their reporting obligations by complying with § 1115.13(b)).

23. Under 15 U.S.C. § 2064(b), the obligation to report persists until a firm “has actual knowledge that the Commission has been adequately informed” of the defect or risk. Michaels did not have actual knowledge that the Commission had been adequately informed concerning the vases, within the meaning of 15 U.S.C. § 2064(b), at the earliest, until it reported to the Commission on February 22, 2010.

24. Michaels' violations of the CPSA reporting requirements, under 15 U.S.C. § 2064(b), thus began in or before September 2008 and continued until at least in or around February 2010.

Full Extent of Injuries Caused by the Vases

25. Michaels knew of at least nine reported injuries when it filed its Initial Report on February 22, 2010. Since that time, consumers have reported many additional injuries to Michaels. Like the injuries discovered earlier, several of these additional injuries were very severe, involving nerve or tendon damage and necessitating surgery.

Defendants' Ongoing Activities

26. At the time of its February 22, 2010 Initial Report to the CPSC, Michaels had no formal compliance program for reporting to the CPSC defects, substantial product hazards, or unreasonable risks of serious injury associated with its products. Michaels also had no internal procedures or internal controls to identify potential defects and escalate these issues to management, no central safety database to track product incidents, and no system for its employees to record customers' reasons for product returns.

27. Thus, Michaels had neither implemented nor maintained a reasonable and effective program or system for complying with the reporting requirements of the CPSA and related regulations, nor had Michaels adopted appropriate internal controls to ensure and monitor compliance with CPSA and related regulations.

28. There is a reasonable likelihood that Defendants will continue to violate the CPSA reporting requirements.

COUNT I

29. Paragraphs 1-28 are incorporated by reference and realleged as if set forth fully herein.

30. Separately as to each individual vase distributed in commerce, Defendants knowingly failed to immediately inform the CPSC upon obtaining information that reasonably supported the conclusion that the vases contained a defect (including but not limited to, a defect or defects in design or manufacturing) that could create a substantial product hazard (i.e., a defect that could create a substantial risk of injury to the public) in violation of 15 U.S.C. §§

2064(a)(2), 2064(b)(3), and 2068(a)(4). These violations began when Defendants obtained the information regarding the defect and continued until Defendants obtained actual knowledge that the CPSC was adequately informed of the defect or risk of injury.

COUNT II

31. Paragraphs 1-28 are incorporated by reference and realleged as if set forth fully herein.

32. Separately as to each individual vase distributed in commerce, Defendants knowingly failed to immediately inform the CPSC upon obtaining information that reasonably supported the conclusion that the vases created an unreasonable risk of serious injury, in violation of 15 U.S.C. §§ 2064(b)(4) and 2068(a)(4). These violations began when Defendants obtained the information regarding the unreasonable risk of serious injury and continued until the Defendants obtained actual knowledge that the CPSC was adequately informed of the unreasonable risk of serious injury.

COUNT III

33. Paragraphs 1-28 are incorporated by reference and realleged as if set forth fully herein.

34. There is a reasonable likelihood that Defendants will continue to violate the CPSA reporting requirements, warranting injunctive relief pursuant to 15 U.S.C. §§ 2064(b), 2068(a)(4), and 2071(a).

JURY DEMAND

The United States demands a trial by jury on all Counts so triable.

RELIEF REQUESTED

WHEREFORE, the United States respectfully requests that this Court:

I. Assess civil penalties, as authorized by 15 U.S.C. § 2069, against Defendants for each separate violation and the related series of violations alleged in Counts I and II of this Complaint;

II. Award injunctive relief, as authorized by 15 U.S.C. § 2071, against Defendants as set forth in Count III that would: (1) require Defendants to comply with the reporting requirements of the CPSA and its accompanying regulations; (2) assure such compliance by requiring Defendants to establish internal recordkeeping and compliance monitoring systems, and related internal controls, designed to provide timely reports to the CPSC whenever Defendants obtain information which reasonably supports the conclusion that any of its products contains a defect which could create a substantial product hazard or creates an unreasonable risk of serious injury to consumers; and (3) provide for liquidated damages in the event that Defendants fail to comply with the requirements of the CPSA; and

III. Award plaintiff judgment for its costs and for such other and further relief that this Court deems just and proper.

Dated: April 3, 2017

Respectfully submitted,

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| |) | |
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| _____ |) | |

**[PROPOSED] ORDER GRANTING THE UNITED STATES’
UNOPPOSED MOTION FOR LEAVE TO FILE
AN AMENDED COMPLAINT TO WITHDRAW COUNT III**

The Court considered the United States’ Unopposed for Leave to File an Amended Complaint to Withdraw Count III (the “Motion”). After considering the Motion, the Court is of the opinion that the Motion should be, and is hereby, **GRANTED**.

Plaintiff’s amended complaint shall be deemed filed as of the date of this Order.

SO ORDERED.

Dated: _____, 2017

JUDGE A. JOE FISH
United States District Judge
Northern District of Texas