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SUPERIOR COURT OF N.J.
MERCER COUNTY
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SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION
MERCER COUNTY
DOCKET NO. MER-C-_____

ANNE MILGRAM, Attorney General of the
State of New Jersey, and DAVID M.
SZUCHMAN, Director of the New Jersey
Division of Consumer Affairs,

Plaintiffs,

v.

AIRBORNE HEALTH, INC., *doing business as*
AIRBORNE and AIRBORNE, INC., *formerly*
doing business as KNIGHT-MCDOWELL
LABS, AIRBORNE HOLDINGS, INC.,
VICTORIA KNIGHT-MCDOWELL, and
THOMAS JOHN MCDOWELL,

Defendants.

Civil Action

COMPLAINT

1. Plaintiffs Anne Milgram, Attorney General of the State of New Jersey ("Attorney General"), with offices located at 124 Halsey Street, Fifth Floor, Newark, New Jersey, and David M. Szuchman, Director of the New Jersey Division of Consumer Affairs ("Director"), with offices located at 124 Halsey Street, Seventh Floor, Newark, New Jersey (collectively, "Plaintiffs"), bring this civil action in the public interest against Airborne Health, Inc., doing

business as Airborne and Airborne, Inc., formerly doing business as Knight-McDowell Labs, Airborne Holdings, Inc., Victoria Knight-McDowell, and Thomas John McDowell (collectively, “Defendants”), for violating the New Jersey Consumer Fraud Act (“CFA”), N.J.S.A. 56:8-1 et seq., as follows.

2. The Plaintiffs have reason to believe that the above-named Defendants have violated the CFA by, among other things, failing to substantiate health claims associated with their line of dietary supplements.

3. This Complaint is being filed concurrently with Final Consent Judgment.

JURISDICTION AND VENUE

4. This Court has jurisdiction over the subject matter of this action pursuant to the CFA and over Defendant pursuant to the CFA. Venue in this court is proper under R. 4:3-2, because it is a county in which the Defendants have advertised and conducted business and is a county in which at least one of the parties resides.

THE PARTIES

5. Plaintiffs bring this action in the public interest pursuant to the authority granted under the CFA, specifically N.J.S.A. 56:8-8, 56:8-11, 56:8-13 and 56:8-19.

6. Defendant Airborne Health, Inc., also doing business as Airborne and Airborne, Inc. and formerly doing business as Knight-McDowell Labs, is a Delaware corporation with its principal place of business at 26811 South Bay Drive, Suite 300, Bonita Springs, Florida 34134. Airborne Health also has another office located at 100 Clock Tower, Suite 120, Carmel, California 93923. Airborne Health also has an office in New Jersey. Since 2005, Airborne Health has, alone or acting in concert with others, manufactured, marketed, distributed Airborne Products to consumers throughout the United States.

7. Defendant Airborne Holdings, Inc., is a Delaware corporation with its principal place of business at 26811 South Bay Drive, Suite 300, Bonita Springs, Florida 34134. Airborne Holdings is the sole owner of Airborne Health. In May 2005, Summit Partners, a venture capital firm based in Boston, acquired Airborne from Victoria Knight-McDowell and Thomas John McDowell, Airborne's original founders. During this acquisition, Airborne Acquisition Company, a California corporation and wholly owned subsidiary of Airborne Holdings, Inc., merged with and into Airborne, Inc. which also did business under the name Knight-McDowell Labs, a California corporation with its principal place of business in Carmel, California. Through the merger, Airborne Holdings became the parent company of Airborne, Inc. In December 2005, Airborne Holdings merged Airborne, Inc. with and into Airborne Health, Inc., which has continued to use the name "Airborne, Inc." as a business name. In the summer of 2008, Individual Defendants Victoria Knight-McDowell and Thomas John McDowell reacquired Airborne Holdings and are currently majority shareholders of the company. Since May 2005, acting alone or in concert with others, Airborne Holdings has marketed, distributed, and sold Airborne Products to consumers throughout the State of New Jersey ("New Jersey") or has caused the Airborne Products to be marketed, distributed, and sold to consumers throughout New Jersey.

8. Defendant Victoria Knight-McDowell, sued individually, is purportedly the creator of Airborne Health Formula and is the former co-owner, President, and Secretary of Airborne, Inc. Defendant Knight-McDowell currently resides in Pacific Grove, California, and is currently a majority owner and board member of Airborne Holdings along with Defendant Thomas John McDowell and others. At all times relevant to this Complaint, Defendant Knight-

McDowell acting alone or in concert with others has directed, formulated, controlled, or participated in the policies, acts, or practices as set forth herein.

9. Defendant Thomas John McDowell, also known as "Rider" McDowell, sued individually, is Defendant Knight-McDowell's husband. Defendant McDowell also currently resides in Pacific Grove, California, and together with Mrs. Knight-McDowell is a majority owner of Airborne Holdings. At all times relevant to this Complaint, Defendant McDowell acting alone or in concert with others, has directed, formulated, controlled, or participated in the policies, acts, or practices as set forth herein.

10. While the Individual Defendants did not have control over a majority of shares of Airborne Holdings, Inc. during the time of Summit Partners' acquisition, the Individual Defendants actively participated in key decisions of the company including Airborne's marketing and advertising.

GENERAL ALLEGATIONS

11. The Defendants have made health-related claims in the marketing, packaging, advertising, offering, and selling of their line of dietary supplements that were not substantiated by reliable and competent scientific evidence at the time the claims were made. Specifically, the Defendants have explicitly or implicitly claimed to sell a cold prevention remedy, a sore throat remedy, a germ fighter, and an allergy remedy without adequate substantiation to prove that the products could perform as advertised at the time the claims were made. Plaintiffs also allege that the Defendants failed to adequately warn consumers about potential health risks to select populations, including pregnant women, at the time that Airborne contained 5,000 International Units of Vitamin A per dose under prior formulations. Currently, the level of Vitamin A in

Airborne is 2,000 International Units. Under the current directions for use, consumers are directed not to take beyond three doses a day.

12. Airborne Effervescent Health Formula ("Airborne Original") is a dietary supplement containing seventeen herbs and nutrients. Airborne Original is the Defendants' most successful product and has been the number one selling item in the cough and cold section of major retailers within the last two years. Aside from a modest proprietary blend, Airborne consists of Vitamin A, Vitamin C, Vitamin E, Riboflavin, Magnesium, Selenium, Manganese, Potassium, and Amino Acids. Airborne Original is a citrus-flavored effervescent tablet sold in plastic tubes of ten tablets. The directions for Airborne Original instruct the consumer to let the tablet dissolve in a glass of water before drinking it. Airborne Original is also currently sold in lemon-lime and pink grapefruit flavors.

13. Under the control of Airborne Holdings, Airborne Health has expanded the Airborne brand to include several additional lines of products sold as dietary supplements. Additional Airborne products include: (a) Airborne, Jr., a grape flavored effervescent tablet for use by children ages four to ten containing half the dosage of the herbs and nutrients found in Airborne Original; (b) Airborne Nighttime, an apple cider flavored effervescent tablet based on the same formula as Airborne Original; (c) Airborne On-the-Go, a lemon-lime flavored powder that is supposed to be poured directly into a water bottle; (d) Airborne Power Pixies, a cherry flavored powder similar in form to the candy Pixie Stix that is supposed to be poured directly onto the tongue by children between ages four and twelve; (e) Airborne Gummi Lozenges (formerly Airborne Sore Throat Gummi Lozenges), a gelatin-based lozenge that is designed to be dissolved in the mouth; (f) and Airborne Seasonal Relief, a citrus flavored tablet that contains

Vitamin C, Vitamin B6, Pantothenic Acid, Sodium and a proprietary blend of herbal extracts that purports to “promote normal histamine levels.”

14. Airborne products can be found in the cough/cold aisle of most retail stores including Walgreens, CVS, Kroger, Albertson’s, Target, Wal-Mart, Sam’s Club, Trader Joe’s, and Costco, as well as online at www.airbornehealth.com and through third party Internet retailers.

SPECIFIC FACTUAL ALLEGATIONS

15. Since 1997 and continuing thereafter, the Defendants have individually or in concert with others, manufactured, marketed, advertised, promoted, offered for sale, sold, and distributed Airborne Original to the public.

16. National distribution of Airborne Original began on or around 2000.

17. The Defendants have used both traditional (radio, television, print, Internet) and non-traditional (promotions with Airlines and celebrities) media to induce consumers to buy Airborne Original and other Airborne Products.

18. The Defendants have generally run their marketing campaigns from October to February with the greatest spending taking place during November through January, the peak of cold, flu, and cough season.

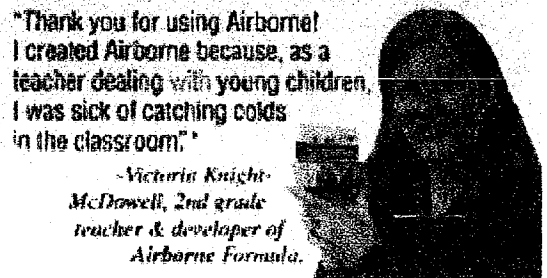
19. The Defendants, alone or in concert with others, have intentionally positioned and marketed Airborne Original and all other Airborne products, with the exception of Airborne Seasonal Relief, as a preventative cold remedy. Until recently, the Defendants also marketed most of their product line as being able to fight germs in crowded areas such as airplanes, restaurants, offices, hospitals, schools, health clubs, carpools, theaters and sports arenas.

20. The Defendants specifically referred to Airborne Original as a cold remedy by making the following claims, primarily on their website:

- (a) "Airborne Effervescent Cold Formula;"
- (b) "A Miracle Cold Buster;"
- (c) "Airborne Cold Remedy;"
- (d) "Sick of Catching Colds? Try Airborne;"
- (e) "Airborne Natural Cold Remedy;"
- (f) "Developed by a school teacher who was sick of catching colds in class an on airplanes!;"
- (g) "Developed by a school teacher who was sick of catching colds in class!;"
- (h) "I created Airborne because, as a teacher dealing with young children, I was sick of catching colds in the classroom;"
- (i) "Take at the first sign of a cold symptom or before entering crowded, potentially germ-infested places!;"
- (j) "Take at the first sign of a cold symptom or before entering crowded environments;"
- (k) "Airborne has become one of the fastest selling health products in retail history – largely by word of mouth—and the #1 selling natural product in the busy cough/cold aisle of all major drug stores;" and
- (l) "Look in the cough-cold aisle of your favorite drug store."



"A Miracle Cold Buster!"
-Carme Grieco, Northbrook, IL



21. The Defendants asked consumers whether they were "Sick of Catching Colds?"

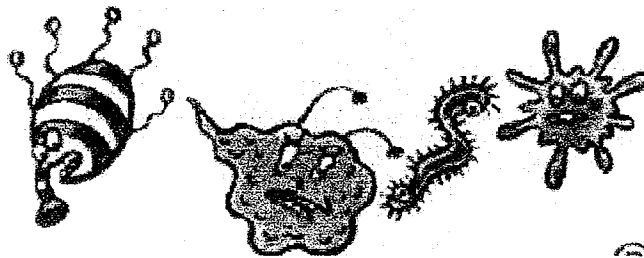


on their previous prior packaging and elsewhere.

22. The Defendants have also made health claims through vignettes of cartoon figures sneezing, coughing, or with other cold and cough indicators on their product packaging and on their marketing materials.



23. The Defendants have also made health claims about their products purported germ fighting abilities throughout. The Defendants, until recently, have featured cartoon and other depictions of germs.



24. In 2004, the Defendants launched a series of national television advertisements with celebrities including Barry Williams, the actor who played Greg Brady on the Brady Bunch. The Defendants posted these advertisements on their website.

25. In one of the advertisements, Barry Williams' character screams each time someone sneezes, coughs or snuffles audibly. The advertisement's tagline states, "Created by a teacher who was sick of catching colds in class." The product shot near the end of the advertisement states across the top of the packaging in a red banner "Sick of Catching Colds?"

26. As part of the same advertising campaign, the Defendants created several promotional photos for use by the press, which were posted on Airborne's website. In a promotional photo featuring Barry Williams, he is pictured with boxing gloves alongside Victoria Knight-McDowell and two individuals dressed up as cold germs.



26. In another promotional photograph, Defendant Knight-McDowell stands next to actor Mickey Rooney and the same two individuals dressed as cold germs. Mr. Rooney's shirt reads "Airborne Natural Cold Remedy."



27. In late 2005, the Defendants purchased advertisements on Howard Stern's radio program. Mr. Stern on several occasions made explicit claims about Airborne's purported cold prevention properties. As an example, Mr. Stern stated, "Airborne Health Formula – whenever I start to feel like I have a cold or feel I'm getting run down . . ."

28. In 2006, the Defendants launched an advertising campaign chiefly for their Airborne Original product that featured a man dressed as a giant germ sneezing on people, coughing on people, and engaging in other unsanitary acts. During this campaign, the Defendants used the tagline "Germs are everywhere? Have you taken your Airborne?"

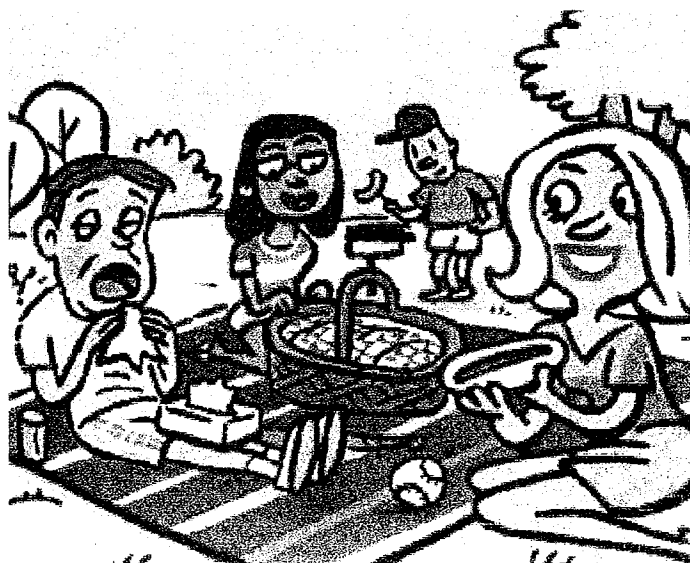
29. While the written claims in the 2006 advertising campaign were confined largely to Airborne's purported ability to "fight germs," a claim that the Plaintiffs allege Airborne also lacked substantiation to make, the visual representations contained in the advertisements still stressed cold and cough symptom indicators.



30. After the first acquisition of the company, the Defendants expanded their product line. As part of this expansion, the Defendants launched a series of new products, including “Airborne Sore Throat Gummi Lozenges.”



31. As part of the expanded product line, the Defendants launched a “Seasonal Relief” product that made implicit unsubstantiated “allergy relief” claims. The marketing campaign for the “Seasonal Relief” product ran during the peak of allergy season and featured individuals in the outdoors sneezing.



32. In November 2006, Defendants Airborne Holdings and Airborne Health purchased advertising space with The Weather Channel for a segment on nationwide influenza reports. The segment featured the Airborne logo and domain name www.airbornehealth.com on screen with a nationwide map depicting influenza reports from the CDC. The feature also depicted a woman blowing her nose into a tissue. The narrator for the spot states, "Have you taken your Airborne? It's the immune-boosting formula that helps your body fight germs and viruses."

33. In another example, Defendants Airborne Holdings and Airborne Health purchased a banner advertisement on a Yahoo! Health web page concerning the cold and flu season that also listed hyper links to the words "Treatments" and "Medications."

34. At no point, did Airborne possess adequate substantiation for their cold prevention, cold treatment, fights germs, sore throat or allergy relief claims.

35. The Defendants made claims in their advertisements and other marketing materials including their cold prevention, cold treatment, sore throat and allergy treatment claims purporting to prevent, treat, or cure disease without lawfully obtaining approval to make such claims.

36. Aside from failing to substantiate, Airborne also failed to disclose material facts concerning their product.

37. Prior formulations of Airborne contained 5,000 International Units of Vitamin A. Currently, the highest dosage of Vitamin A for any Airborne product is 2,000 International Units with directions advising consumers not to exceed three tablets per day.

38. Vitamin A, unlike Vitamin C, is retained longer in the body. Excessive Vitamin A can be toxic to the body at certain levels. While the scientific literature is not completely

uniform, with some studies placing the toxicity levels of Vitamin A at 100,000 International Units of Vitamin A, other studies place the toxicity levels of Vitamin A at much lower amounts, particularly for pregnant women and children.

39. Early versions of Airborne's product packaging did not contain any limitations on the maximum number of doses of Airborne per day, which combined with Airborne's marketing strategy encouraging preventative use, likely caused consumers to ingest high levels of Vitamin A – especially when one accounts for the Vitamin A consumers receive from other sources. Subsequent versions of Airborne's product packaging advised consumers not to take more than three tablets per day. While every packaging version of Airborne contained a statement along the lines of, "As with all dietary supplements, pregnant women should consult a physician before taking" this statement was not clearly and conspicuously disclosed.

COUNT I

VIOLATION OF THE CFA BY DEFENDANTS (UNCONSCIONABLE COMMERCIAL PRACTICES)

40. Plaintiffs repeat and reallege the allegations contained in paragraphs 1 through 39 as if more fully set forth herein.

41. The CFA, N.J.S.A. 56:8-2, prohibits:

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. . .

42. All of the acts and practices engaged in and employed by the Defendants as alleged herein, are unconscionable commercial practices in violation of the CFA. Namely, Defendants violated the CFA by:

- (a) Making health or other claims without competent and reliable scientific evidence to substantiate them;
- (b) Making health claims in their advertisements to prevent, treat, or cure disease that were unlawful because they failed to obtain advance approval for such claims; and
- (c) Failing to clearly and conspicuously disclose the potential harm posed to consumers who ingested excessive levels of Vitamin A during the time under prior formulations of Airborne that contained 5,000 International Units of Vitamin A.

43. Each unconscionable commercial practice by Defendants constitutes a separate violation of the CFA, N.J.S.A. 56:8-2.

PRAYER FOR RELIEF

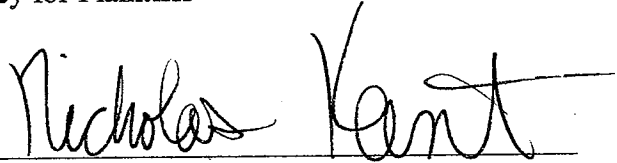
WHEREFORE, based upon the foregoing allegations, Plaintiffs respectfully request that the Court enter judgment against Defendants:

- (a) Finding that the acts and omissions of Defendants constitute multiple instances of unlawful practices in violation of the CFA, N.J.S.A. 56:8-1 et seq.;
- (b) Permanently enjoining Defendants and their owners, officers, directors, shareholders, founders, managers, agents, servants, employees, representatives, independent contractors, corporations, subsidiaries, affiliates, successors, assigns and all other persons or entities directly under their control, from engaging in, continuing to engage in, or doing any acts or practices in violation of the CFA, N.J.S.A. 56:8-1 et seq. including, but not limited to the acts and practices alleged in this Complaint;
- (c) Assessing the maximum statutory civil penalties against Defendants for each and every violation of the CFA, in accordance with N.J.S.A. 56:8-13;

- (d) Directing the assessment of costs and fees, including attorneys' fees, against Defendants, for the use of the State of New Jersey, as authorized by the CFA, N.J.S.A. 56:8-11 and 56:8-19;
- (e) Directing the assessment of restitution amounts against Defendant to restore to any affected person, whether or not named in this Complaint, any money or real or personal property acquired by means of any practice alleged herein to be unlawful and found to be unlawful, as authorized by the CFA, N.J.S.A. 56:8-8; and
- (f) Granting such other relief as the interests of justice may require.

ANNE MILGRAM
ATTORNEY GENERAL OF NEW JERSEY
Attorney for Plaintiffs

By: _____



Nicholas Kant
Deputy Attorney General

Dated: December 16, 2008
Newark, New Jersey


RULE 4:5-1 CERTIFICATION

I certify, to the best of my information and belief, that the matter in controversy in this action involving the aforementioned violations of the CFA, N.J.S.A. 56:8-1 et seq., is not the subject of any other action pending in any other court of this State, other than the action titled Geis, et al. v. Airborne Health, Inc., et al., pending in the United States District Court for the District of New Jersey, Case No. 2:07-cv-04238-KSH-PS. That action is separate and distinct from this action because private plaintiffs could not seek relief demanded by the Attorney General under the CFA.

I further certify that the matter in controversy in this action is not the subject of a pending arbitration proceeding in this State, nor is any other action or arbitration proceeding contemplated.

I certify that there is no other party who should be joined in this action at this time.

ANNE MILGRAM
ATTORNEY GENERAL OF NEW JERSEY
Attorney for Plaintiffs


By: 
Nicholas Kant
Deputy Attorney General

Dated: December 16, 2008
Newark, New Jersey

DESIGNATION OF TRIAL COUNSEL

Pursuant to R. 4:25-4, Nicholas Kant, Deputy Attorney General, is hereby designated as trial counsel on behalf of Plaintiffs in this action.

ANNE MILGRAM
ATTORNEY GENERAL OF NEW JERSEY
Attorney for Plaintiffs

By: 

Nicholas Kant
Deputy Attorney General

Dated: December 16, 2008
Newark, New Jersey