

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION**

LOUIS SILVERSTEIN,)
Individually and on Behalf of a Class)
of all Others Similarly Situated,)
)
Plaintiff,)
)
v.)
)
THE PROCTER & GAMBLE)
MANUFACTURING COMPANY, et. al.,)
)
Defendants.)

CIVIL ACTION FILE
FILE NO. 1:08-CV-00003 LGW-WLB

SECOND AMENDED CLASS ACTION COMPLAINT

COMES NOW the Plaintiff through counsel and, prior to the filing of an answer, amends his Complaint to show:

PARTIES AND JURISDICTION

1.

Plaintiff is a resident of the State of Georgia.

2.

The Defendant Procter & Gamble Distributing, LLC is a limited liability company organized and existing under the laws of the State of Delaware, with its principal place of business in Cincinnati, Ohio. It may be served by service upon its registered agent CT Corporation System, 1201 Peachtree Street, N.E., Atlanta, Georgia 30361.

3.

The Defendant Procter & Gamble Manufacturing Company is a corporation incorporated under the laws of the State of Ohio, with its principal place of business in Cincinnati, Ohio. It may be served by service upon its registered agent CT Corporation System, 1201 Peachtree Street, N.E.,

Atlanta, Georgia 30361.

4.

This action arises out of torts and wrongful acts that occurred in Richmond County, Georgia. This Court has jurisdiction.

5.

The Defendants conduct business under the name “Procter & Gamble.” The Defendants are herein collectively referred to as “Procter & Gamble.”

GENERAL ALLEGATIONS

6.

Procter & Gamble manufactures and distributes a variety of products, including, but not limited to household cleaners, paper products and oral hygiene products, including Crest Pro-Health mouthwash.

7.

Procter & Gamble markets Crest Pro-Health mouthwash as a product that “fights” plaque, gingivitis and bad breath for twelve hours following use.

8.

The label on bottles of Crest Pro-Health mouthwash further states, “CPC ANTIGINGIVITIS/ ANTIPLAQUE ORAL RINSE” and “KILLS GERMS.”

9.

On the Crest Pro-Health mouthwash label, Procter & Gamble affirmatively represents that the product “PROVIDES DENTIST RECOMMENDED BENEFITS” and includes a symbol of a winged, wrapped stick commonly used as a symbol for the profession of dentistry. Bottles of Crest Pro-Health mouthwash come with an attached cup on the top that states in enlarged letters,

“FIGHTS GINGIVITIS,” “FIGHTS PLAQUE,” and “FIGHTS BAD BREATH.”

10.

The label on the back side of bottles of Crest Pro-Health mouthwash states, “CREST PRO-HEALTH KILLS MILLIONS OF GERMS WITHOUT THE BURN OF ALCOHOL.”

11.

On the back label, Procter & Gamble undertakes to provide consumers with information as to uses, warnings, and directions for the use of Crest Pro-Health mouthwash. Specifically, the label states:

USES

- helps prevent and reduce plaque and gingivitis
- helps control plaque bacteria that contribute to the development of gingivitis and bleeding gums

WARNINGS

Ask a dentist if symptoms persist or condition worsens after regular use

Keep out of reach of children under 6 years of age. If more than used for rinsing is accidentally swallowed, get medical help or contact a Poison Control Center right away.

DIRECTIONS

- use after your normal brushing and flossing routine; rinse toothpaste from mouth prior to use
- adults and children 6 yrs. & older: Rinse for 30 seconds with 20ml (4 teaspoonfuls) twice daily
- do not swallow
- children 6 years to under 12 years of age: supervise use
- children under 6 years of age: do not use

12.

Regular use of Crest Pro-Health mouthwash carries the risk of discoloring the teeth of the user and of impairing the sense of taste.

13.

Procter & Gamble has acknowledged that regular use of Crest Pro-Health mouthwash poses a risk of staining the teeth of users, but contends that this only happens to about three percent of the users.

14.

Procter & Gamble has received numerous complaints of taste impairment and loss of the sense of taste suffered by users of Crest Pro-Health mouthwash.

15.

On information and belief, Procter & Gamble has taken the position that Crest Pro-Health mouthwash, “literally ruptures germs, leaving their yucky residue on teeth.”

16.

Procter & Gamble acknowledges receiving complaints of, “taste alteration or taste loss” from users of Crest Pro-Health mouthwash. Procter & Gamble contends that, “this is temporary and typically resolved shortly after product use is stopped.”

17.

It is not reasonable to assume that users of Crest Pro-Health mouthwash suffering tooth staining, impairment of the sense of taste or loss of the sense of taste will self diagnose the cause of these conditions or know what do about them.

18.

As a defensive measure, Procter & Gamble has undertaken to give specific advice to users of Crest Pro-Health mouthwash who suffer adverse reactions, who conclude that it could be caused by the mouthwash, and who make a specific complaint to Procter & Gamble. In response to complaints, Procter & Gamble advises the users to discontinue use of Crest Pro-Health mouthwash.

As to impairment or loss of the sense of taste, Procter & Gamble advises:

Furthermore, regarding the reported taste alteration, some individuals using Crest Pro Health Rinse have reported taste alteration or taste loss during use. This is temporary, and typically resolves shortly after product use is stopped. If symptoms persist after product use is discontinued, we recommend discussing the experience and/or any persisting symptoms with a physician/dentist or health care provider. They are the best source of information about medical/dental history and health.

Letter of October 8, 2007, from Procter & Gamble.

19.

Procter & Gamble has actual knowledge that users of Crest Pro-Health mouthwash who suffer tooth staining, impairment of the sense of taste or loss of the sense of taste should immediately quit using Crest Pro-Health mouthwash, and should further consult a physician, dentist or health care provider if symptoms persist.

20.

The product label on Procter & Gamble's bottles of Crest Pro-Health mouthwash are deceptively incomplete and misleading in that the warnings and directions do not include the known potential side effects of tooth staining, impairment of the sense of taste and loss of the sense of taste, and do not warn users that if such occurs that they should stop use of Crest Pro-Health mouthwash and should further consult a physician, dentist or health care provider if the symptoms persist.

21.

The American Dental Association is the national organization for dentists in the United States. The American Dental Association has since 1931, had a program for endorsement of certain products that have met its standards for acceptance. (Exhibit A)

22.

Procter & Gamble is aware of this procedure for approval of products by the American Dental Association and, in fact, certain of its products have been awarded the Seal of Acceptance

of the American Dental Association. (Exhibit B)

23.

A number of mouthwashes have been awarded the ADA Seal of Acceptance. (Exhibit C)
However, Crest Pro-Health mouthwash has not been awarded the ADA Seal of Acceptance.

24.

The use by Procter & Gamble of the symbol for dentistry and the statement, “provides dentist recommended benefits” deceptively implies approval by the dental profession of Crest Pro-Health mouthwash and its purported benefits.

25.

There is a significant scientific and medically recognized distinction between products that may have the benefit of delaying the onset of certain pathologies and products that are proven to treat, mitigate and cure those pathologies.

26.

Procter & Gamble’s repeated use of the terms, “fights plaque, fights gingivitis and fights bad breath” imply that Crest Pro-Health mouthwash has been proven to treat, mitigate and cure plaque and gingivitis. In fact, Procter & Gamble’s research indicates that regular use of Crest Pro-Health mouthwash, along with good oral hygiene, should help to delay development of plaque and gingivitis.

27.

Procter & Gamble’s use of the term “fights” is ambiguous and deceptive in that such labeling implies that the mouthwash has the proven result and benefit of curing gingivitis and plaque.

28.

The Plaintiff purchased Crest Pro-Health mouthwash in Richmond County, Georgia, and

used the product as directed.

29.

After the Plaintiff began using Crest Pro-Health mouthwash, he noticed that his teeth had acquired a brown stain.

30.

Following repeated use of Crest Pro-Health mouthwash, the Plaintiff's sense of taste was impaired.

CLASS ACTION ALLEGATIONS

31.

This action is brought by the named Plaintiff, individually and on behalf of other residents of the State of Georgia similarly situated, as a class action under the provisions of Rule 23 of the Federal Rules of Civil Procedure, on behalf of a class of persons who used Crest Pro-Health mouthwash.

32.

The class of Plaintiffs for whose benefit the named Plaintiff brings this action is defined as follows:

All natural persons residing in the State of Georgia who have purchased Crest Pro-Health mouthwash in the State of Georgia, and all persons who have used Crest Pro-Health mouthwash that was purchased in the State of Georgia by someone in the user's household. Expressly excluded from the class are employees, officers and directors of Defendants.

33.

The class is so numerous that joinder of all members is impracticable.

34.

Questions of law or fact common to the Class include, but are not limited to the following:

- a. Whether Procter & Gamble knew or should have known that Crest Pro-Health mouthwash stains teeth;
- b. Whether Procter & Gamble knew or should have known that Crest Pro-Health mouthwash impairs the sense of taste;
- c. Whether Procter & Gamble took reasonable measures to notify consumers about the possible side effects of Crest Pro-Health mouthwash;
- d. Whether Procter & Gamble had a duty to warn consumers about the possible side effects of Crest Pro-Health mouthwash;
- e. Whether Procter & Gamble fulfilled its duty to warn consumers about the possible adverse side effects that could result from the use of Crest Pro-Health mouthwash;
- f. Whether Procter & Gamble provided adequate warnings and directions to consumers using Crest Pro-Health mouthwash as to how they might reduce the risk of staining of their teeth and impairment of their sense of taste;
- g. Whether Procter & Gamble provided adequate warnings and directions to consumers using Crest Pro-Health mouthwash as to how they should treat tooth staining or impairment of the sense of taste caused by use of the mouthwash;
- h. Whether Procter & Gamble markets Crest Pro-Health mouthwash as a *premium product*;
- i. Whether Procter & Gamble engaged in deceptive or misleading trade practices in its marketing of Crest Pro-Health mouthwash;
- j. Whether or not Crest Pro-Health mouthwash is reasonably fit for its intended purpose;
- k. Whether or not Crest Pro-Health mouthwash is merchantable;

- l. Whether purchasers of Crest Pro-Health mouthwash have a right to rescind the purchase of the mouthwash and receive a full refund from Procter & Gamble;
- m. Whether or not members of the Plaintiff class are entitled to recover consequential damages from Procter & Gamble;
- n. Whether Procter & Gamble's conduct was intentional;
- o. Whether Procter & Gamble's conduct was so reckless as to reflect a conscious disregard of consequences;
- p. Whether or not the Plaintiff and members of the Plaintiff class are entitled to an injunction enjoining the sale and marketing of Crest Pro-Health mouthwash by Procter & Gamble without adequate warnings and directions;
- q. The entitlement of Plaintiff and members of the Plaintiff class to expenses of litigation, including reasonable attorney fees;
- r. The entitlement of Plaintiff and members of the Plaintiff class to exemplary damages.

35.

The claims of the named Plaintiff are typical of the claims of members of the Plaintiff class.

36.

Plaintiff is committed to pursuing this action and has retained competent counsel experienced in class actions. Plaintiff will fairly and adequately protect the interests of each member of the class. Plaintiff specifically reserves the right to move to add additional class representatives.

37.

Without a class action mechanism, members of the class would be substantially, if not completely, impaired or impeded in their abilities to protect their interests.

38.

The prosecution of such claims outside of a class action will not be economical.

39.

The claims of the named Plaintiff are meritorious. The named Plaintiff reasonably believes that he will prevail on the merits.

40.

A final judgment on the merits of the Plaintiff's claims and the liability issues with regard to causation would be dispositive of the claims and interests of those similarly situated who are not specifically named herein as plaintiffs.

COUNT I

GEORGIA UNIFORM DECEPTIVE TRADE PRACTICES ACT

41.

Paragraphs one through thirty are incorporated as if fully set forth herein.

42.

The product's label implies that Crest Pro-Health mouthrinse is a dentist-recommended product.

43.

Procter & Gamble emphasizes the product's purported benefits, such as allegedly controlling plaque bacteria, whereas they fail to disclose the product's potential for tooth discoloration or taste impairment. Procter & Gamble's only warnings on the product label are ambiguous, and because of its placement directly under the "Uses" section of the label, may be read as referring only to symptoms or conditions resulting from gingivitis and bleeding gums. Procter & Gamble has affirmatively made representations as to the benefits and uses of its product, and further undertaken

to include a “warnings” section without including either the known side effects of teeth discoloration and taste impairment or the instructions as to what users who suffer these averse effects should do.

44.

Procter & Gamble thus wrongfully misrepresents the characteristics, uses, benefits and **qualities of Crest Pro-Health mouthwash.**

45.

Procter & Gamble has knowingly marketed and disseminated its product without disclosing the potential side effects of tooth discoloration and taste impairment with the intent to hide that knowledge from potential consumers.

46.

The failure of Procter & Gamble to disclose in their advertising, labeling and promotional materials the propensity of its mouthwash to stain teeth and to impair the user’s sense of taste is conduct that creates a likelihood of confusion and misunderstanding in purchasers and users of Crest Pro-Health mouthwash, including all members of the Plaintiff class.

47.

As set out above, the Crest Pro-Health mouthwash label by representations, by use of artfully ambiguous terminology and by omissions has deceptively and unfairly misrepresented the sponsorship, approval, characteristics, uses and benefits of Crest Pro-Health Mouthwash.

48.

As set out above, the Crest Pro-Health mouthwash label by representations, by use of artfully ambiguous terminology and by omissions has deceptively and unfairly misrepresented the standard, quality and grade of Crest Pro-Health mouthwash.

49.

For the reasons set out above, Procter & Gamble has made misrepresentations, has artfully used ambiguous terminology and has omitted material information, and has thereby engaged in conduct that creates a likelihood of confusion or of misunderstanding.

50.

The Plaintiff and all members of the Plaintiff class are entitled to an injunction enjoining Procter & Gamble from marketing Crest Pro-Health mouthwash in the State of Georgia without adequate and full disclosure to purchasers of the propensities of Crest Pro-Health mouthwash to stain teeth and to impair the sense of taste, and without full disclosure of the actions that should be undertaken by those who suffer these adverse effects.

51.

The use of the winged symbol of the dental profession and the words, “provides dentist recommended benefits,” without disclosing that Crest Pro-Health mouthwash has not been awarded the seal of acceptance by the American Dental Association causes a likelihood of confusion or misunderstanding as to the sponsorship, approval or certification of Crest Pro-Health mouthwash, and further causes a likelihood of confusion or of misunderstanding as to connection or association with or certification by another.

52.

The Plaintiff and members of the Plaintiff class are entitled to an injunction enjoining Procter & Gamble from implying sponsorship, approval or certification by the profession of dentistry.

53.

The Plaintiff and members of the Plaintiff class are entitled to such further equitable relief as the Court deems just.

54.

The Plaintiff and all members of the Plaintiff class are entitled to recover their expenses of litigation, including reasonable attorney fees.

55.

The Plaintiff and all members of the Plaintiff class are entitled to recover exemplary damages sufficient to punish Procter & Gamble and to deter Procter & Gamble from further like wrongful conduct.

COUNT II

EQUITABLE FRAUD

56.

Paragraphs one through thirty and forty-two through forty-nine are incorporated as if fully set forth herein.

57.

Pursuant to O.C.G.A. § 23-2-50, in all cases of fraud, except fraud in the execution of a will, equity has concurrent jurisdiction with the law.

58.

Procter & Gamble affirmatively undertook to provide consumers and potential consumers of its Crest Pro-Health mouthwash with information regarding the uses, warnings, directions, benefits and professional approval of Crest Pro-Health mouthwash, thereby undertaking and assuming the duty to make full, unambiguous and nondeceptive disclosures concerning the mouthwash.

59.

Procter & Gamble's nondisclosure of the risk of tooth staining and the actions that a

consumer who suffers such should take renders its label materially misleading and deceptive and constitutes actual and constructive fraud.

60.

Procter & Gamble's implication of approval by the dental profession and nondisclosure of the lack of approval by the American Dental Association renders its label materially misleading and deceptive and constitutes actual and constructive fraud.

61.

Procter & Gamble's use of ambiguous terms such as "fight" to imply that Crest Pro-Health mouthwash has been proven to treat and cure plaque and gingivitis and its failure to disclose information needed to render its affirmative disclosures nondeceptive renders it label materially misleading and deceptive and constitutes actual and constructive fraud.

62.

Procter & Gamble acted with the intent to induce individuals to purchase the product.

63.

Procter & Gamble benefitted and continues to benefit from its misrepresentations, deceptions and omissions.

64.

In reliance upon Procter & Gamble's representations, deceptions and omissions, the Plaintiff and members of the Plaintiff class purchased and used Crest Pro-Health mouthwash.

65.

The Plaintiff and all members of the Plaintiff class are entitled to injunctive relief setting aside their purchases of Crest Pro-Health mouthwash and ordering refunds by Procter & Gamble.

66.

The Plaintiff and all members of the Plaintiff class are entitled to such further relief as the Court may deem just.

67.

The Plaintiff and all members of the Plaintiff class are entitled to recover their expenses of litigation, including reasonable attorney fees.

COUNT III

FRAUD AND DECEIT

68.

Paragraphs one through thirty, forty-two through forty-nine and fifty-eight through sixty-four are incorporated as if fully set forth herein.

69.

Procter & Gamble deceived actual and potential consumers of Crest Pro-Health mouthwash by the misrepresentations, use of artful ambiguous language and symbols and omissions as set out above. These deceptions are individually and together material to a consumer's decision as to whether to buy and use Crest Pro-Health mouthwash.

70.

Plaintiff and members of the Plaintiff class reasonably relied upon the fraudulent representations, deceptions and omissions by purchasing and using Crest Pro-Health mouthwash.

71.

Procter & Gamble acted with the intent to induce Plaintiff and members of the Plaintiff class to purchase and use Crest Pro-Health mouthwash.

72.

Procter & Gamble benefitted from its misrepresentations and omissions.

73.

As a result, the Plaintiff and all members of the Plaintiff class have been damaged.

74.

As a matter of law, the Plaintiff and all members of the Plaintiff class are entitled to an affirmative inference of reliance upon the Defendants' fraud by omission.

75.

The Plaintiff and all members of the Plaintiff class are entitled to recover from Procter & Gamble fair compensation for all injuries and damages incurred as a result of the fraud and deceit of Procter & Gamble.

76.

The Plaintiff and all members of the Plaintiff class are entitled to expenses of litigation, including reasonable attorney fees.

77.

The Plaintiff and all members of the Plaintiff class are entitled to exemplary damages sufficient to deter Procter & Gamble from further like conduct.

WHEREFORE, having stated his complaint, the Plaintiff prays as follows:

- a) that process issue and that the Defendants be served as required by law;
- b) that the Court certify the class;
- c) that the Plaintiff and all members of the Plaintiff class receive the equitable relief prayed

for;

d) that the Plaintiff and all members of the Plaintiff class recover from Procter & Gamble all damages flowing from its wrongful conduct;

e) that the Plaintiff and all members of the Plaintiff class recover exemplary damages in an amount to be determined by the enlightened conscious of a fair and impartial jury;

f) that the Plaintiff and all members of the Plaintiff class recover their expenses of litigation, including reasonable attorney fees; and

g) that the Plaintiff and all members of the Plaintiff class have such further relief as the Court deems just.

Respectfully submitted,

BELL & BRIGHAM

s/ John C. Bell, Jr.

John C. Bell, Jr.
Georgia Bar No. 048600
Post Office Box 1547
Augusta, Georgia 30903-1547
(706) 722-2014

Angela McElroy-Magruder
Georgia State Bar No. 113625
Claeys, McElroy-Magruder & Associates
512 Telfair Street
Augusta, Georgia 30901
(706) 722-8998

ATTORNEYS FOR PLAINTIFF