

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS**

COLLEEN GORMAN, individually and on behalf of all others similarly situated,)	
)	
Plaintiff,)	Civil Action No.
)	
v.)	Judge:
)	
EDGEWELL PERSONAL CARE COMPANY and EDGEWELL PERSONAL CARE, LLC)	JURY TRIAL DEMANDED
)	
Defendants.)	
)	

CLASS ACTION COMPLAINT

Plaintiff Collen Gorman (“Plaintiff”) brings this action on behalf of herself and all others similarly situated against Defendant Edgewell Personal Care Company and Edgewell Personal Care, LLC (collectively, “Edgewell” or “Defendant”). Plaintiff makes the following allegations pursuant to the investigation of her counsel and based upon information and belief, except as to the allegations specifically pertaining to herself, which are based on personal knowledge.

NATURE OF THE ACTION

1. This is a class action against Defendant for falsely and misleadingly advertising that its Banana Boat Kids Tear-Free Sting-Free Lotion (the “Product”) is Sun Protection Factor (“SPF”) 50 when, in fact, it is SPF 8. On the Product’s packaging, it clearly and boldly states on the front of the packaging “50” and “Broad Spectrum SPF 50”. This representation is false.

2. Independent laboratory testing reveals that the Product is not in fact SPF 50. In fact, the SPF has been found to be 8, a much lower rating that makes it much less effective than advertised.¹

3. SPF is a rating system that measures the fraction of the Sun's ultraviolet ("UV") rays that reach the surface of the skin. As a result, for SPF 50, 1/50th of the UV rays of the Sun reach the skin past the sunscreen. At SPF 8, a much higher fraction, 1/8th, do.

4. As a direct and proximate result of Defendant's false and misleading advertising claims and marketing practices, Plaintiff and the members of the Class, as defined herein, purchased the Product and paid more for the Product because they were deceived into believing that the Product was SPF 50. Because the Product is, in fact, SPF 8, Plaintiff and Class members have suffered an ascertainable and out-of-pocket loss.

5. Plaintiff seeks relief in this action individually and on a class-wide basis for breach of express and implied warranties, negligent misrepresentation, fraud, unjust enrichment, and for violations of the Illinois Consumer Fraud Act, 815 ILCS 505/1, *et seq.*

THE PARTIES

6. Plaintiff Colleen Gorman is a resident of the State of Illinois, residing in Cook County. Plaintiff Gorman has purchased the Product from a Walgreen's retail store located in or near Tinley Park, Illinois in the Spring of 2016. She paid approximately \$7 for the Product. In purchasing the Product, Plaintiff read and relied on the prominent representation on the front of the Product label – that the Product is "SPF 50". Plaintiff reasonably understood this representation to mean that the Product is of a high SPF that is highly effective in blocking UV rays. Plaintiff would not have purchased the Product or would not have paid as much for the

¹ See <http://www.cbsnews.com/news/consumer-reports-which-sunscreens-live-up-to-product-claims-keep-skin-safe/>, last accessed June 23, 2016.

Product, had she known that the “SPF 50” representation is false and misstates the amount, percentage, and quality of UV ray blockage provided by the Product. Plaintiff suffered an injury in fact and lost money as a result of Defendant’s deceptive, misleading, false, unfair, and fraudulent practices, as described herein.

7. Defendant Edgewell Personal Care Company is a Delaware corporation with headquarters in St. Louis, Missouri. Defendant develops, manufactures, distributes, sells, and advertises its Banana Boat Kids Tear-Free Sting-Free Lotion nationwide, including in Illinois and in this District. Defendant has been and still is engaged in the business of distributing, marketing, and selling Banana Boat Kids Tear-Free Sting-Free Lotion throughout the United States. On July 1, 2015 Energizer Holdings spun off its household products division as Energizer Holdings while retaining its personal care products (including the Banana Boat brand) under the new name of Edgewell Personal Care Company².

8. Defendant Edgewell Personal Care LLC is a Delaware Limited Liability Corporation with its headquarters in St. Louis, Missouri. Defendant Edgewell Personal Care Brands LLC is a wholly-owned subsidiary of and/or 100% controlled by Edgewell Personal Care Company.

JURISDICTION AND VENUE

9. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1332(d) because there are more than 100 Class members, the aggregate amount in controversy exceeds \$5,000,000.00, exclusive of interest, fees, and costs, and at least one Class member is a citizen of a state different from either Defendant.

² See Edgewell Personal Care Company Form 10-Q for the quarterly period ending June 30, 2015 at <https://www.sec.gov/Archives/edgar/data/1096752/000109675215000080/epc10q63015.htm>, last accessed June 23, 2016.

10. Venue is proper in this District pursuant to 28 U.S.C. § 1391 because a substantial part of the events or omissions giving rise to Plaintiff's claims occurred in this District as Defendant does business throughout this District, including selling and distributing the products at issue in this District.

FACTUAL ALLEGATIONS COMMON TO ALL CLAIMS

11. Consumers purchasing Defendant's Product are presented with a prominent marketing claim on Defendant's Product packaging. Defendant proclaims the Product is "Broad Spectrum SPF 50". The packaging also shows a prominent red shield that says "50" or "50+" indicating an SPF of 50 or greater. Further, the Product's packaging states that it provides "UVA/UVB Protection":



12. Plaintiff and other consumers rely on Defendant's claims that the Product provides a Sun Protection Factor of at least 50. They reasonably interpret and understand the claims to mean that the Product is of a high SPF that is 'highly effective' in blocking the sun's ultraviolet rays.

13. However, Defendant's claims are untrue. Defendant's Product does not provide a Sun Protection Factor of 50. In fact, independent laboratory testing reveals that the Product provides a Sun Protection Factor of 8³, meaning that the Product allows 1/8th of the sun's radiation through its protection, rather than 1/50th.

14. Consumer Reports states that its "Tested SPF" ratings are "based on the average results for each sunscreen, not how close a sunscreen comes to meeting its SPF claim, and is used to calculate [its] UVB scores." Further, "[t]o test for UVA, we smear sunscreen on plastic plates and pass UV light through and measure the amount of UVA and UVB rays that are absorbed. That information is then used to calculate our UVA score." *Id.*

15. This tested SPF rating of 8 is far below that recommended by the American Academy of Dermatology, which recommends all people use a sunscreen with an SPF of at least 30.⁴

16. Further, Defendant specifically markets this sunscreen for children, saying on its website that, "This lotion spray is so gentle, it won't irritate your child's eyes or skin. Plus, the white lotion lets Mom see where she's applied it – no more missed spots!"⁵

17. Defendant's false advertising is not limited to its Product's labels. For example, Defendant has represented on its website and in store displays that the Product is SPF 50. *Id.*

³ See Consumer Reports, July 2016, "Ratings: Sunscreen Lotions, Sprays, and Sticks", p. 28.

⁴ See <https://www.aad.org/media/stats/prevention-and-care/sunscreen-faqs>, last accessed June 23, 2016.

⁵ See <http://www.bananaboat.com/products/kids-tear-free-sunscreen>, last accessed June 13, 2016.

18. Defendant continues to make this false and misleading labeling claim regarding the quality of its Product. In doing so, Defendant has misled and continues to mislead consumers throughout the United States and is able to charge more for its Product than it otherwise could.

CLASS ACTION ALLEGATIONS

19. Plaintiff brings this action as a class action under Federal Rule of Civil Procedure 23 on behalf of all persons in the United States who, within the relevant statute of limitations period, purchased the Product (the “Class”).

20. Plaintiff seeks to represent a subclass defined as all members of the Class who purchased the Product in Illinois (the “Illinois Subclass”).

21. Excluded from the Class and Illinois Subclass are the Defendant, the officers and directors of the Defendant at all relevant times, members of their immediate families and their legal representatives, heirs, successors or assigns and any entity in which Defendant has or had a controlling interest.

22. Also excluded from the Class and Illinois Subclass are persons or entities that purchased the Product for purposes of resale.

23. Plaintiff is a member of the Class and Illinois Subclass she seeks to represent.

24. The Class and Illinois Subclass are so numerous that joinder of all members is impractical. Although Plaintiff does not yet know the exact size of the Class, the Product is sold in retail locations throughout the United States, and on information and belief, members of the Class number in the hundreds of thousands.

25. The Class and Illinois Subclass are ascertainable because their members can be identified by objective criteria – the purchase of Defendant’s Product in the United States during

the statute of limitations period. Individual notice can be provided to Class members “who can be identified through reasonable effort.” Fed. R. Civ. P. 23(c)(2)(B).

26. There are numerous questions of law and fact common to the Class which predominate over any individual actions or issues, including but not limited to whether the labeling and marketing of the Product was false and misleading.

27. Plaintiff’s claims are typical of the claims of the members of the Class as all members of the Class are similarly affected by Defendant’s wrongful conduct. Plaintiff has no interests antagonistic to the interests of the other members of the Class. Plaintiff and all members of the Class have sustained economic injury arising out of Defendant’s violations of common and statutory law as alleged herein.

28. Plaintiff is an adequate representative of the Class because her interests do not conflict with the interests of the Class members she seeks to represent, she has retained counsel that is competent and experienced in prosecuting class actions, and she intends to prosecute this action vigorously. The interests of the Class members will be fairly and adequately protected by Plaintiff and her counsel.

29. The class mechanism is superior to other available means for the fair and efficient adjudication of the claims of Plaintiff and Class members. Each individual Class member may lack the resources to undergo the burden and expense of individual prosecution of the complex and extensive litigation necessary to establish Defendant’s liability. Individualized litigation increases the delay and expense to all parties and multiplies the burden on the judicial system presented by the complex legal and factual issues of this case. Individualized litigation also presents a potential for inconsistent or contradictory judgments. In contrast, the class action device presents far fewer management difficulties and provides the benefits of single

adjudication, economy of scale, and comprehensive supervision by a single court on the issue of Defendant's liability. Class treatment of the liability issues will ensure that all claims are consistently adjudicated.

FIRST CLAIM FOR RELIEF

(Breach of Express Warranty)

30. Plaintiff repeats the allegations contained in the paragraphs above as if fully set forth herein.

31. Plaintiff brings this Count individually and on behalf of the members of the Class and Illinois Subclass.

32. In connection with the sale of the Product, Defendant issued express warranties that the Product was of Sun Protection Factor 50.

33. Defendant's affirmations of fact and promises made to Plaintiff and the Class and the Illinois Subclass on the Product labels became part of the basis of the bargain between Defendant on the one hand, and Plaintiff and the Class and Illinois Subclass members on the other, thereby creating express warranties that the Product would conform to Defendant's affirmations of fact, representations, promises, and descriptions.

34. Defendant breached its express warranties because the Product is not, in fact, SPF 50, but is in fact of a much lower SPF.

35. As the manufacturer of the Product, Defendant had or should have had actual knowledge of the breach/misrepresentation regarding the Product, including the specific product purchased by the Plaintiff. Additionally, the results of the independent laboratory tests revealed that the Product was SPF 8, which was made public prior to the filing of this Complaint, and

Plaintiff served notice upon Defendant Edgewell Personal Care LLC of Defendant's breach on June 14, 2016.

36. Plaintiff and Class and Illinois Subclass members were injured as a direct and proximate result of Defendant's breach because: (a) they would not have purchased the Product or would not have paid as much for the Product if they had known the true facts; (b) they purchased and paid more for the Product due to the mislabeling; and (c) the Product did not have the characteristics, quality, or value as promised.

SECOND CLAIM FOR RELIEF

(Breach of Implied Warranty of Merchantability)

37. Plaintiff repeats the allegations contained in the paragraphs above as if fully set forth herein.

38. Plaintiff brings this Count individually and on behalf of the members of the Class and Illinois Subclass.

39. Defendant, as the designer, manufacturer, and/or distributor, impliedly warranted that the Product was fit for its intended purpose in that the Product was SPF 50. Defendant did so with the intent to induce Plaintiff and proposed Class and Illinois Subclass members to purchase the Product.

40. Defendant breached its implied warranties because the Product does not have the characteristics or benefits as promised, as described herein above.

41. As the manufacturer of the Product, Defendant had or should have had actual knowledge of the breach/misrepresentation regarding the Product, including the specific product purchased by the Plaintiff. Additionally, the results of the independent laboratory tests revealed that the Product was SPF 8, which was made public prior to the filing of this Complaint and

Plaintiff served notice upon Defendant Edgewell Personal Care LLC of Defendant's breach on June 14, 2016.

42. Plaintiff and proposed Class and Illinois Subclass members were injured as a direct and proximate result of Defendant's breach because: (a) they would not have purchased the Product or would not have paid as much for the Product if they had known the true facts; (b) they purchased and paid more for the Product due to the implied warranties; and (c) the Product did not have the quality or value as impliedly warranted.

THIRD CLAIM FOR RELIEF

(Unjust Enrichment Plead in the Alternative to the Warranty Claims)

43. Plaintiff repeats the allegations contained in the paragraphs above as if fully set forth herein.

44. Plaintiff brings this Count individually and on behalf of the members of the Class and Illinois Subclass.

45. Plaintiff and members of the Class and Illinois Subclass conferred benefits on Defendant by purchasing the Product.

46. Defendant has been unjustly enriched in retaining revenues derived from Plaintiff's and Class and Illinois Subclass members' purchases of the Product. Retention of that revenue under these circumstances is unjust and inequitable because Defendant misrepresented facts concerning the characteristics, qualities, and value of the Product and caused Plaintiff and Class and Illinois Subclass members to purchase the Product and to pay more for the Product, which they would not have done had the true facts been known.

47. Because Defendant's retention of the non-gratuitous benefits conferred on it by Plaintiff and members of the Class and Illinois Subclass is unjust and inequitable, Defendant

must pay restitution to Plaintiff and members of the Class for its unjust enrichment, as ordered by the Court.

FOURTH CLAIM FOR RELIEF

(Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/1 et seq.)

48. Plaintiff repeats the allegations contained in the paragraphs above as if fully set forth herein. Plaintiff brings this Count individually and on behalf of the members of the Illinois Subclass.

49. This cause of action is brought pursuant to the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/1 et seq. (“ICFA”). The express purpose of the ICFA is to “protect consumers” “against fraud, unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce. . .” 815 ILCS 505/1..

50. Plaintiff and Illinois Subclass members are “consumers” within the meaning of 815 ILCS 505/1(e).

51. Defendant was engaged in “trade or commerce” as defined by 815 ILCS 505/1(f).

52. 815 ILCS 505/2 declares unlawful “unfair methods of competition and unfair or deceptive acts or practices, including but not limited to the use or employment of any deception fraud, false pretense, false promise, misrepresentation or the concealment, suppression or omission of any material fact, with intent that others rely upon the concealment, suppression or omissions of such material fact. . . in the conduct of any trade or commerce.”

53. 815 ILCS 505/2 also states that “consideration shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to Section 5 (a) of the Federal Trade Commission Act.” Defendant’s unfair and deceptive practices are likely to mislead – and

have misled – the consumer acting reasonably in the circumstances, and violate 815 ILCS 505/2 and 21 U.S.C. §352.

54. Defendant has violated the ICFA by engaging in the unfair and deceptive practices as described herein which offend public policies and are immoral, unethical, unscrupulous, and substantially injurious to consumers.

55. Plaintiff and the Illinois Subclass have been aggrieved by Defendant's unfair and deceptive practices in that they purchased the Product, which they would not have purchased or would not have paid as much for had they known the true facts.

56. The damages suffered by Plaintiff and the Illinois Subclass were directly and proximately caused by the deceptive, misleading and unfair practices of Defendant, as more fully described herein.

57. Pursuant to 815 ILCS 505/10a, Plaintiff and the Illinois Subclass seek a court order enjoining the above-described wrongful acts and practices of Defendant and for restitution and disgorgement.

58. Additionally, pursuant to 815 ILCS 505/10a, Plaintiff and the Illinois Subclass make claims for economic damages, punitive damages, and attorneys' fees and costs.

WHEREFORE, Plaintiff prays for relief and judgment, as follows:

- A. Determining that this action is a proper class action;
- B. For an order declaring that the Defendant's conduct violates the statutes referenced herein;
- C. Awarding compensatory and punitive damages in favor of Plaintiff, members of the Class and the Illinois Subclass against Defendant for all damages sustained as a result of Defendant's wrongdoing, in an amount to be proven at trial, including interest thereon;

D. Awarding injunctive relief against Defendant to prevent Defendant from continuing its ongoing unfair, unconscionable, and/or deceptive acts and practices;

E. For an order of restitution and/or disgorgement and all other forms of equitable monetary relief;

F. Awarding Plaintiff and members of the Class and the Illinois Subclass their reasonable costs and expenses incurred in this action, including attorney's fees; and

G. Awarding such other and further relief as the Court may deem just and proper.

JURY DEMAND

Plaintiff hereby demands a trial by jury on all claims so triable in this action.

Dated: June 23, 2016

Respectfully submitted:

By: /s/ Theodore B. Bell
Theodore B. Bell
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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

Collen Gorman

(b) County of Residence of First Listed Plaintiff Cook

(EXCEPT IN U.S. PLAINTIFF CASES)

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

Theodore B. Bell, Carl Malmstrom; Wolf Haldenstein Adler Freeman & Herz LLC; One South Dearborn St., Suite 2122, Chicago, IL 60603; (312) 984-0000

DEFENDANTS

Edgewell Personal Care Company and Edgewell Personal Care LLC

County of Residence of First Listed Defendant St. Louis, MO

(IN U.S. PLAINTIFF CASES ONLY)

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

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)

- Citizen of This State, Citizen of Another State, Citizen or Subject of a Foreign Country, PTF DEF, Incorporated or Principal Place of Business In This State, Incorporated and Principal Place of Business In Another State, Foreign Nation

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

Table with 5 columns: CONTRACT, REAL PROPERTY, TORTS, CIVIL RIGHTS, PRISONER PETITIONS, FORFEITURE/PENALTY, LABOR, IMMIGRATION, BANKRUPTCY, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES. Contains various legal categories and checkboxes.

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 (Enter U.S. Civil Statute under which you are filing and write a brief statement of cause.)

Illinois Consumer Fraud Act and common law breach of warranty

VII. Previous Bankruptcy Matters (For nature of suit 422 and 423, enter the case number and judge for any associated bankruptcy matter previously adjudicated by a judge of this Court. Use a separate attachment if necessary.)

VIII. REQUESTED IN COMPLAINT:

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

DEMAND \$

CHECK YES only if demanded in complaint:

JURY DEMAND: Yes No

IX. RELATED CASE(S) IF ANY

(See instructions):

JUDGE

DOCKET NUMBER

X. This case (check one box) Is not a refile of a previously dismissed action is a refile of case number previously dismissed by Judge

DATE June 23, 2016

SIGNATURE OF ATTORNEY OF RECORD /s/ Theodore B. Bell

Attachment A

Janine L. Pollack

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