

IN THE CIRCUIT COURT FOR THE TWENTIETH JUDICIAL CIRCUIT
ST. CLAIR COUNTY, ILLINOIS

<p>JUSTIN SWIRES, individually and on behalf of others similarly situated,</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">v.</p> <p>CNS, INC. <i>a subsidiary of GlaxoSmithKline Consumer Healthcare, L.P.</i> Serve: 3900 Stinson Blvd Minneapolis, MN 55421</p> <p style="text-align: center;">Defendant.</p>	<p>Case No. 11LS87</p> <p>Div.</p> <p>CLASS ACTION COMPLAINT</p> <p>JURY TRIAL DEMANDED</p> <p>FILED ST. CLAIR COUNTY OCT 18 2011</p> <p><i>Kathleen A. Brown</i> CIRCUIT CLERK</p>
---	---

CLASS ACTION COMPLAINT

Plaintiff Justin Swires, individually and on behalf of others similarly situated, alleges for his Class Action Complaint against Defendant CNS, INC ("Defendant" or "CNS"), upon personal knowledge as to himself and his own acts, and as to all other matters upon information and belief, based upon, inter alia, the investigation made by his attorneys, as follows:

NATURE OF THE ACTION

1. This is a proposed Illinois-only class action brought by Plaintiff and a class of those similarly situated against CNS to redress its unjust, unfair and deceptive practice of failing to disclose that its "Breath Right Snore Relief" throat spray product does not reduce loudness and/or frequency of snoring, despite uniformly representing to the contrary.
2. CNS's acts and omissions constitute, *inter alia*: (1) violations of Illinois Consumer Fraud Act, and (2) unjust enrichment.

JURISDICTION AND VENUE

3. Jurisdiction over Defendant is proper under 735 ILCS 5/2-209(a)(1) (transaction of any business within this State), Section 2-209(a)(7) (making or performance of any contract

or promise substantially connected with this State), Section 2-209(b)(4) (corporation doing business within this State), and Section 2-209(c) (any other basis now or hereafter permitted by the Illinois Constitution and the Constitution of the United States). 735 ILCS 5/2-209(a)(1), (a)(7), (b)(4) and (c). There is no federal jurisdiction over this case. The Class Action Fairness Act ("CAFA") does not apply as the aggregate total of the proposed class does not exceed five million dollars. Further, Plaintiff seeks no individual relief, cause of action, remedy or damages in excess of \$75,000; and no claims asserted herein arise under the laws of the United States.

4. Venue is proper because the transaction at issue occurred in this County. 735 ILCS 5/2-101-103. Venue in this County is further appropriate under Section 10a(b) of the Illinois Consumer Fraud and Deceptive Business Practices Act, as Defendant is doing business in this County. 810 ILCS 505/10a(b).

PARTIES

5. Plaintiff Justin Swires is an individual consumer who, at all times material hereto, was a citizen of St. Clair County, Illinois. Plaintiff purchased Breath Right Snore Relief throat spray from a Walgreens Store located in St. Clair County, Illinois.

6. Defendant CNS is a corporation organized and existing under the laws of the State of Minnesota with its principal executive offices and principal place of business located at Minneapolis, Minnesota. As of December 19, 2006, CNS, Inc. is a subsidiary of GlaxoSmithKline Consumer Healthcare, L.P.

BACKGROUND OF BREATH RIGHT SNORE RELIEF MEDICAL EFFICACY SCHEME

7. Defendant CNS promotes and sells "Breath Right Snore Relief," an orally ingested throat spray, under the familiar "Breath Right" brand. CNS represents that the "Breath Right Snore Relief" product can help "85% of snorers get relief."

8. CNS markets and sells "Breath Right Snore Relief" to create in purchasers the reasonable expectation that the Snore Relief product: (1) reduces loudness and frequency of snoring; (2) provides "30 quite nights"; (3) "can help 85% of snorers get relief"; and (4) "lubricates throat tissues to minimize vibrations and control the snoring sound." However, in truth and fact, Snore Relief does none of these things. The medical efficacy assertions are false as the Snore Relief product does not reduce the frequency of snoring, reduce loudness of snoring, control the snoring sound, and/or provide 30 quiet nights.

9. CNS has no scientific or otherwise legitimate basis for making any of its efficacy claims. As such, these claims are unfair, unjust, and deceptive.

CLASS ACTION ALLEGATIONS

10. This action is brought by Plaintiff individually and on behalf of the class persons defined infra, pursuant to Section 801 et seq. of the Illinois Code of Civil Procedure, 735 ILCS 5/2-801 et seq.

11. The class of persons on whose behalf this action is brought is defined as follows (the "Class"):

All persons and entities in Illinois who purchased Breath Right Snore Relief, but not for resale.

Excluded from the proposed classes are Defendant and its officers, directors, and employees, as well as employees of any of defendant's subsidiaries, affiliates, successors or assignees. Also excluded are the immediate family members of the above persons. Also excluded is any trial judge who may preside over this case.

12. As set forth infra, this action satisfies the requirements of Section 2-801 of the Illinois Code of Civil Procedure, 735 ILCS 5/2-801, making certification of this action as a class action appropriate.

13. The proposed class is so numerous and so geographically dispersed that the individual joinder of all absent class members is impracticable. While the exact number of absent class members is unknown to Plaintiff at this time, it is ascertainable by appropriate discovery and Plaintiff, upon information and belief, alleges that the proposed class may include hundreds of members as Breath Right Snore Relief is sold in merchandise stores, drug stores, grocery stores, warehouse clubs, and online retailers throughout the State of Illinois. The requirement of numerosity is, therefore, satisfied.

14. Plaintiff can and will fairly and adequately represent and protect the interests of the Class, as (a) the claims of Plaintiff are substantially similar (if not identical to) those of absent Class members; (b) there are questions of law or fact that are common to the Class and that overwhelmingly predominate over any individual issues, such that by prevailing on its own claims, Plaintiff necessarily will establish CNS' liability as to all Class members; (c) without the Class representation provided by Plaintiff, virtually no Class members will receive legal representation or redress for their injuries; (d) Plaintiff has retained counsel who have substantial experience in handling class actions and will adequately and vigorously litigate this class action; and (e) Plaintiff and Class counsel are aware of their fiduciary responsibilities to the class members and are determined diligently to discharge those duties by vigorously seeking the maximum possible recovery for the Class.

15. There are questions of law and fact that are common to all class members:

a. Whether Defendant possesses competent and reliable scientific evidence

to support its label and advertising claims;

- b. Whether Defendant labeled, marketed, advertised and/or sold Breath Right Snore Relief to Plaintiff and Class using false, misleading, and/or deceptive statements or representations;
- c. Whether CNS concealed material facts concerning Breath Right Snore Relief;
- d. Whether Defendant participated in and pursued the common course of conduct complained of herein;
- e. Whether CNS' conduct, including its labeling, marketing, advertising, and/or selling of Breath Right Snore Relief, was unfair and/or deceptive;
- f. Whether CNS was unjustly enriched, and if so, by what amount; and
- g. Whether Plaintiff and Class have sustained damages, and if so, the proper measure of their damages.

16. These common questions of law or fact predominate over any questions or issues affecting individual Class members.

17. A class action is appropriate and superior to any other available method for the fair and efficient adjudication of this controversy, given that:

- a. Common questions of law and fact overwhelmingly predominate over any individual questions that may arise, such that there would be enormous economies to the Court and the parties in litigating the common issues on a class-wide instead of a repetitive individual basis;
- b. The size of each Class member's relatively small claim is too insignificant to make individual litigation an economically viable alternative, such that as a practical matter there is no "alternative" means of adjudication to a class action;

- c. Few Class members have any interest in individually controlling the prosecution of separate actions (any that do may opt out);
- d. Class treatment is required for optimal deterrence and compensation and for limiting the court-awarded reasonable legal expenses incurred by Class members;
- e. Despite the relatively small size of individual Class members' claims, their aggregate volume, coupled with the economies of scale inherent in litigating similar claims on a common basis, will enable this class action to be litigated on a cost-effective basis, especially when compared with repetitive individual litigations; and
- f. No unusual difficulties are likely to be encountered in the management of this class action insofar as CNS's liability turns on substantial questions of law or fact that are common to the Class and that predominate over any individual questions.

18. On a class-wide basis, Defendant has reaped millions of dollars (not exceeding five million) in improper revenues through materially misleading and unfair conduct.

COUNT I
Violation of Illinois Consumer Fraud and Deceptive Business Practices Act
(815 ILCS 505/1 et seq.)

19. Plaintiff repeats and re-alleges the allegations set forth in the preceding paragraphs, supra, as if fully set forth herein.

20. At all times relevant hereto, there was in full force and effect the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/1 et seq. Section 2 of provides, in relevant part:

Unfair methods of competition and unfair or deceptive acts or practices, including but not limited to the use of or employment of any deceptive, 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 omission of such material fact, or the use of employment of any practice described in Section 2 of the "Uniform Deceptive Trade Practices Act," approved August 5, 1965, in the conduct of any trade or commerce are hereby declared unlawful whether any person has in fact been misled, deceived or damaged thereby, In construing this section 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.

815 ILCS 505/1 (footnotes omitted).

21. Plaintiff and the Class have standing to assert this claim because they are consumers within the meaning of the Act and Defendant's practices were addressed to the market generally and otherwise implicate consumer protection concerns. At all relevant times, CNS conducted "trade and commerce" within the meaning of 815 ILCS 505/1(f).

22. Defendant has committed unfair and/or deceptive acts by engaging in the acts and practices alleged herein including, but not limited to, failing to disclose that Breath Right Snore Relief has no proven efficacy and/or overstating its efficacy.

23. Defendant intended that Plaintiff and the Class rely on the unfair and deceptive acts and omissions alleged herein so that they would buy, and/or continue to buy, Breath Right Snore Relief.

24. Defendant's actions, which were willful and wanton, constitute intentional violations of the Consumer Fraud Act.

25. Defendant's unlawful, unfair, and/or deceptive practices described herein are continuing in nature and are widespread practices. Plaintiff and Class have been damaged as a proximate result of Defendant's course of conduct and violations of the Consumer Fraud Act in

that they paid for a product that was devoid of any medical efficacy, and thus did not perform as intended and uniformly represented.

26. Defendant's actions and omissions were the direct and proximate cause of Plaintiff and Class's damages

WHEREFORE, Plaintiff and Class pray for the relief requested in the Request for Relief set forth below in this Complaint.

COUNT II
Unjust Enrichment

26. Plaintiff repeats and re-alleges the allegations set forth in the preceding paragraphs, supra, as if fully set forth herein.

27. By selling Breath Right Snore Relief through unfair and deceptive practices, CNS has engaged in inequitable conduct and has received a benefit at the expense of consumers, including Plaintiff Justin Swires and Class.

28. At the time of his purchase of Breath Right Snore Relief, Plaintiff and Class conferred a benefit on CNS, i.e., money and substantial revenue.

29. Breath Right Snore Relief does not prevent or reduce snoring nor does it reduce the loudness of snoring.

30. The profits and/or benefits obtained by CNS through sales of Breath Right Snore Relief are to the detriment of Plaintiff and the Class and violate the fundamental principles of justice, equity, and good conscience.

31. Such benefits constitute unjust enrichment for CNS and it would be inequitable under the circumstances for it to retain the benefits received.

WHEREFORE, Plaintiff and Class pray for the relief requested in the Request for Relief set forth below in this Complaint.

REQUEST FOR RELIEF

Plaintiff and Class request that the Court enter judgment in their favor and against Defendant as follows:

- A. Order that this action be maintained as a class action pursuant to this Court's powers and defining the Class as follows:

All persons and entities in Illinois who purchased Breath Right Snore Relief, but not for resale, on or after September 28, 2004 up to present.

Excluded from the proposed classes are Defendant and its officers, directors, and employees, as well as employees of any of defendant's subsidiaries, affiliates, successors or assignees. Also excluded are the immediate family members of the above persons. Also excluded is any trial judge who may preside over this case.

- B. Designating Plaintiff as representative of the Class and appointing Plaintiff's counsel as counsel for the Class;
- C. Declare that Defendant has committed the violations alleged herein;
- D. Order that Defendant disgorge all money paid by Plaintiff and Class for Defendant's Breath Right Snore Relief, returning such money to Plaintiff and Class;
- E. Award Plaintiff and Class compensatory damages, including any damages caused by such payments;
- F. Award Plaintiff and Class consequential and incidental damages;
- G. Award Plaintiff and Class pre-judgment and post-judgment interest as provided by law;

- H. Entering final judgment in favor of Plaintiff and the Class and against Defendant indemnifying them for their reasonable attorneys' fees, or in the alternative, allowing Class counsel's fees to be paid from any common fund created as a result of this action;
- I. Such further relief as this Court deems just and appropriate.

THE SIMON LAW FIRM, P.C.

By: /s/ John E. Campbell 847419
John E. Campbell, #6292503
Erich V. Vieth, #6285571
Ryan A. Keane, #6301779
800 Market Street, Suite 1700
St. Louis, MO 63101
Phone: 314-241-2929
Facsimile: 314-241-2029
jcampbell@simonlawpc.com
evieth@simonlawpc.com
rkeane@simonlawpc.com
Attorneys for Plaintiff