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MAY 24 2007

SUPERIOR COURT OF NEW JERSEY  
COUNTY OF BERGEN  
FINANCE DIVISION

*For Plaintiffs Gregory Geis and Rachel LaRusso*

**IN THE SUPERIOR COURT OF THE STATE OF NEW JERSEY**

**FOR THE COUNTY OF BERGEN**

**DOCKET NO. BER-L-**

GREGORY GEIS, on behalf of himself and all  
others similarly situated,

and

RACHEL LARUSSO, on behalf of herself and  
all others similarly situated,

Plaintiffs,

Civil Action No.

**DAVID M. WACKSMAN, ESQ., LLC**

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HACKENSACK, NJ 07601**

**TELEPHONE 201-906-0275 • FACSIMILE 201-678-9444**

**Email: DWacksman@dwcounsel.com**

DATE: June 5, 2007  
RE: Airborne

TO: Jon Tycko, Esq. (facsimile number: (202) 973-0950)

FROM: David M. Wacksman, Esq.

**Attached is a filed copy of the Complaint.**

This Fax contains 38 page(s), including this cover sheet.

If you do not receive all the pages, please call our office.

This Facsimile contains privileged and confidential information intended only for the use of the individual or entity named above. If the reader of this facsimile is not the intended recipient or the employee or agent responsible for delivering it to the intended recipient, do not read, disseminate or copy this facsimile. If you have received this facsimile in error, please notify us immediately by telephone and return the original facsimile to us at the above address. Thank you.

v.

AIRBORNE HEALTH, INC.;  
WALGREEN, CO.; and  
SHOPRITE SUPER MARKETS, INC.  
Defendants.

**COMPLAINT**

Plaintiffs, GREGORY GEIS and RACHEL LaRUSSO, for their complaint against defendants Airborne Health, Inc., Walgreen, Co., and ShopRite Supermarkets, Inc. (collectively "Defendants"), allege as follows:

**INTRODUCTION**

1. Defendant Airborne Health, Inc. (referred to hereinafter as "Airborne Health"), is a Delaware corporation, with its principal place of business in Bonita Springs, Florida.

2. Defendant Walgreen, Co. (referred to hereinafter as "Walgreen"), is an Illinois corporation, with its principal place of business in Deerfield, Illinois.

3. Defendant ShopRite Supermarkets, Inc. (referred to hereinafter as "ShopRite") is a New Jersey corporation, with its principal place of business in Edison, New Jersey.

4. Plaintiff, Gregory Geis, is a resident of New Jersey.

5. Plaintiff, Rachel LaRusso, is a resident of New Jersey.

6. Airborne Health markets and sells a group of products under the trademark "Airborne." For purposes of this complaint, "Airborne" refers to this group of products. The products currently include Airborne Original, Airborne On-The-Go, Airborne NightTime and two varieties that are marketed as "for kids," namely Airborne Jr. and Airborne Power Pixies. Airborne Health sold more than \$100 million of Airborne in 2006.

7. Airborne Health markets Airborne as a product that can protect a user from illness caused by "germs and viruses" by somehow "boosting" a user's "immune system." Airborne Health's marketing efforts and public statements about Airborne are intended to convey a simple message, namely, that by consuming Airborne a user will decrease his or her likelihood of getting or remaining sick. That message is deceptive and misleading, and numerous specific public statements made by the Airborne Health in support of that message are also deceptive and misleading.

8. In fact, no evidence exists that Airborne protects users from illness caused by "germs and viruses" or otherwise decreases the likelihood that users will either become sick or remain sick.

9. Walgreen markets and sells Airborne, both in its retail outlets and online via its website, [www.walgreens.com](http://www.walgreens.com).

10. Walgreen also promotes, markets, and sells a competing product called "Wal-borne". At various times during the proposed class period, this product has been sold as "Wal-borne" and/or "Wal-born". For purposes of this complaint, "Wal-borne"

refers to this group of products. The products currently include Wal-born and Wal-born Gold.

11. Wal-borne is marketed and sold as being substantially similar to Airborne. The packaging for Wal-borne includes a statement that prospective purchasers “compare [Wal-borne] to Airborne ingredients.”

12. Wal-borne purports to offer the same “health” formula as Airborne. Walgreen markets Wal-borne as a product that can protect a user from illness caused by “airborne viruses” and as a form of “immune system defense.” Walgreen’s marketing efforts and public statements about Wal-borne are intended to convey a simple message, namely, that by consuming Wal-borne a user will decrease his or her likelihood of getting or remaining sick. That message is deceptive and misleading, and numerous specific public statements made by Walgreen in support of that message are also deceptive and misleading.

13. In fact, no evidence exists that Wal-borne protects users from illness caused by “germs and viruses” or otherwise decreases the likelihood that users will either become sick or remain sick.

14. ShopRite markets and sells Airborne, both in its retail outlets and online via its website, [www.shoprite.com](http://www.shoprite.com).

15. Plaintiffs have purchased Airborne during the past six years.

16. Plaintiff Gregory Geis has purchased Wal-borne during the past six years.

17. Plaintiff Gregory Geis purchased Airborne from Walgreen.

18. Plaintiff Rachel LaRusso purchased Airborne from ShopRite.

19. By way of this lawsuit, plaintiffs, on behalf of themselves and a class of others who have purchased Airborne, allege claims against each of the defendants for violations of the New Jersey Consumer Fraud Act, for breach of warranty, for unjust enrichment, and for negligent misrepresentation. Plaintiffs seek various forms of relief, including injunctions prohibiting defendants from continuing to employ the misleading and deceptive advertising and packaging described herein, as well as actual damages, punitive damages and treble damages.

20. Plaintiff Gregory Geis, on behalf of himself and a class of others who have purchased Wal-borne, alleges claims against Walgreen for violations of the New Jersey Consumer Fraud Act, for breach of warranty, for unjust enrichment, and for negligent misrepresentation. Plaintiff seeks various forms of relief, including injunctions prohibiting Walgreen from continuing to employ the misleading and deceptive advertising and packaging described herein, as well as actual damages, punitive damages and treble damages.

**Airborne Health's Misrepresentations and/or Deceptive Practices**

21. Airborne Health has engaged in deceptive practices and made misrepresentations regarding Airborne in all of the various marketing media that it uses. These include, but are not necessarily limited to, Airborne Health's website, the various commercials that Airborne Health has aired on television, and the packaging in which Airborne is sold.

22. Airborne Health's entire marketing campaign is designed to convince consumers that Airborne provides protection or relief from illnesses caused by "germs and viruses."

23. In fact, however, Airborne Health has no scientific or otherwise legitimate basis for making such claims, and such claims are deceptive and/or misleading.

24. Airborne Health owns and operates a website at [www.airbornehealth.com](http://www.airbornehealth.com), through which it markets and sells Airborne. As of the filing of this Complaint, that website made numerous deceptive and/or misleading representations, including the following:

a. On the website's homepage ([www.airbornehealth.com/index.php](http://www.airbornehealth.com/index.php)) Airborne Health describes Airborne as an "effervescent health formula." In bold, capitalized, orange letters, Airborne Health states, "GERMS ARE EVERYWHERE," below which appears the text, "Take Airborne to boost your immune system." In addition, when the homepage first opens, a voice announces: "Germs are everywhere. Have you taken your Airborne?"

b. On the page titled "About Airborne" ([www.airbornehealth.com/about\\_index.php](http://www.airbornehealth.com/about_index.php)) Airborne Health states: "Airborne is the best-selling herbal health formula that boosts your immune system to help your body combat germs."

c. On the page titled "History" ([www.airbornehealth.com/about\\_history/php](http://www.airbornehealth.com/about_history/php)), Airborne Health tells the "story" of how Airborne came into existence, and that story clearly is intended to convey

(and does, in fact, convey) that Airborne was formulated to provide users with protection from “germs and viruses.” The History page states that Victoria Knight-McDowell was the “developer” of the “Airborne health formula.” It states that she “taught second grade,” and quotes her as saying that, “[b]ack to school meant back to being exposed to germy students.” According to the History page, this exposure to “germy students” allegedly “inspired her” to create a “formula that would give her immune system a fighting chance against germs and viruses.” The page states that, “[a]fter consulting with nutrition experts and herbalists, she experimented with different formulations and delivery methods before creating the blend that would eventually become Airborne.” The page quotes Ms. Knight-McDowell as stating that, “[w]e called it Airborne because it combats the airborne germs and viruses that are all around in places like classrooms, offices and airplanes.” The page then notes that Airborne is sold in the “cough and cold aisle” of “drugstores, supermarkets and mass merchant retailers nationwide.” The History page concludes with the statement that Airborne “remains true” to Ms. Knight-McDowell’s “philosophy” and “its humble origins” – a reference to the desire of the elementary school teacher to gain protection from “germy students” – and the representation that Airborne was “made by a teacher who refused to be grounded by germs and viruses.”

d. The page titled “Who Uses Airborne” ([www.airbornehealth.com/about\\_whousesairborne.php](http://www.airbornehealth.com/about_whousesairborne.php)) contains a series of testimonials from various people who allegedly work in germ-filled environments,

and who have successfully used Airborne to gain protection. The intended and actual meaning conveyed by this page, by itself and in the context of the website, is that people who work in such environments can obtain protection from sickness caused by germs and viruses by consuming Airborne.

e. The page titled "Airborne Products" provides links to separate pages for each of the products. The page for "Airborne Original Zesty Orange" ([www.airbornehealth.com/products\\_original.php](http://www.airbornehealth.com/products_original.php)) states that that it is "[t]he famous original formula" that was "created by a schoolteacher" and that it is "[t]he number one selling item in the cough and cold section of your pharmacy." The page for "Airborne NightTime" ([www.airbornehealth.com/products\\_nighttime.php](http://www.airbornehealth.com/products_nighttime.php)) states that it is "made with the same immune-boosting formula as original Airborne, but with added ingredients to help you get a good night's rest." The page for "Power Pixies" ([www.airbornehealth.com/products\\_pixies.php](http://www.airbornehealth.com/products_pixies.php)) states that it "gives kids the immune-boosting formula of Airborne in a great-tasting, fun-to-take packet." All of these statements, individually and in the context of other statements on the website, are intended to convey, and do convey, that Airborne provides protection from sickness caused by germs and viruses.

f. The "Press Room" page of the website provides links to various "Press Releases" that were issued by Airborne Health. These press releases also contain deceptive and misleading statements. For example, a press release dated January 8, 2007, titled "Airborne Returns To Sundance," announced that Airborne



Health would sponsor an "Airborne Lounge" at the Sundance Film Festival," and stated that "Airborne returns to the Film Festival to once again keep the immune systems of Hollywood's A-list and festival attendees going at peak performance." According to the press release, the Airborne Lounge would offer Film Festival participants and visitors "an effervescent Airborne beverage to help ward off germs."

g. Another press release, dated September 25, 2006, titled "Airborne Launches New Additions to Immune-Boosting Lineup: Airborne On-the-Go and Airborne Nighttime," announced that Airborne Health was "launching two new products to help consumers boost their immune system and stay healthy all year round." The press release included the following quote, attributed to a doctor: "It is very important to build one's natural defenses against germs and viruses . . . Airborne's nutritional ingredients have been the subject of scientific studies showing effectiveness in supporting stronger immune system function. The Chinese herbs in Airborne have been used safely and effectively in traditional Chinese medicine for literally thousands of years, and the other nutrients extensively for several decades."

h. Another press release, dated September 5, 2006, titled "Keeping Kids Healthy In School," begins by warning of the health dangers lurking in schools: "Back-to-school time means back to classrooms, buses and cafeterias filled with germs. According to experts, an average of 10 million bacteria lurk on each school desk surface. With dirty hands sharing scissors, toys and books, one

thing is clear—germs are everywhere.” The press release notes statistics from the Centers for Disease Control and Prevention indicating that “children miss 22 million days of school each year,” and warning that “once kids bring germs home, it’s not long before they spread throughout the household.” Airborne Health then offers “tips to keep your kids healthy,” which include the following: “Give your immune system a healthy boost. Airborne and Airborne Jr. are the best ways to boost your whole family’s immune systems.”

i. The statements in these press releases, individually and in the context of other statements on the website, are intended to convey, and do convey, that Airborne provides protection from illness caused by germs and viruses.

j. The website contains a “FAQ” page ([http://www.airbornehealth.com/cnav\\_faqs.php](http://www.airbornehealth.com/cnav_faqs.php)), which contains the following question: “Is there scientific evidence to support that Airborne really works?” Until recently, the FAQ page provided the following answer: “Airborne has always been committed to researching and developing the highest quality, most efficacious products to meet consumers’ needs. To help accomplish this, we established a Medical Advisory Board, comprised of leading experts in the fields of microbiology/immunology and integrative medicine, to advise the company on all scientific matters and to create a strong foundation of support for our immune-boosting formula. Each ingredient in the Airborne formula has been repeatedly documented in published studies to contribute to a strong, healthy immune system. Additionally, we conducted a study in 2003 that showed Airborne had a marked

effect on reducing the duration of symptoms. Our Medical Advisory Board members are currently formulating a study that in addition to the studies in the literature, will further support Airborne's immune boosting properties." As of the date of filing of this Complaint, the answer reads: "The law requires that we have competent and reliable scientific evidence to support the claims for our product. The science demonstrates that our product helps to boost your immune system, and have confirmed this fact through independent scientific experts."

- i. Both answers provided above are false and misleading. The "study in 2003" to which the first answer makes reference did not, in fact, provide "scientific evidence" that Airborne "works" or that it reduces "the duration of symptoms." (See also, Paragraph 29 of this Complaint, which contains additional information concerning this alleged "study.")

25. Airborne Health has aired various television commercials that have made deceptive and/or misleading representations. For example:

- a. In a commercial titled "Germs Never Miss A Flight," a man dressed as a giant germ walks onto a crowded airplane, takes a seat next to other passengers, and then sneezes on them. An announcer then states: "Germs are everywhere. Take Airborne. The immune-boosting tablet that helps your body fight germs."

- b. In a commercial titled "Back-to-school means Back-to-germs," a man dressed as a giant germ is seen in a children's school, breathing on food,

sneezing on the water fountain, and spitting on his hands before touching playground equipment. An announcer then states: "At the end of the day, germs and viruses come home soon, and they love to meet parents. Take Airborne. The immune-boosting tablet that helps your body fight germs."

c. In a commercial titled "Germs Wear You Down All Day," a man dressed as a giant germ is seen riding a bus while sneezing on money, then in a conference room putting his hands on a plate of bagels, then entering a crowded minivan and sneezing on a basketball. An announcer then states: "When germs wear you down all day, take Airborne NightTime. All the immune boosting benefits, plus natural herbs that can help you get a good night's rest and stay healthy. Have you taken your Airborne?" The commercial ends with an image of a person sleeping in bed, with the man dressed as a giant germ climbing up a ladder to the window of the person's bedroom, with the obvious intent of trying to enter the bedroom.

d. In a commercial titled "Germs Always Show Up For Work," a man dressed as a giant germ walks into a crowded elevator, sneezes, and states: "I should have stayed home today." The man dressed as a giant germ is then seen in an office scooping mints out of a bowl with a spoon, and putting the spoon in his mouth. The man dressed as a giant germ is then seen in a crowded conference room, using another person's handkerchief to wipe his nose and then handing back the handkerchief. An announcer then states: "Germs are everywhere. Take Airborne to boost your immune system, fight viruses, and help you stay healthy."

26. The packaging in which Airborne Health has marketed and sold Airborne has contained numerous deceptive and/or misleading representations. For example:

a. The packaging for Airborne Original states that the product is an “effervescent health formula,” features pictures of germs, and contains the statements, “[t]ake at the FIRST sign of cold symptoms or before entering crowded environments,” and, in a different location, “[t]ake at the first sign of cold symptom or in crowded places.” The “Directions” on the the packaging state: “At the first sign of a cold symptom, simply drop (1) Airborne tablet in a small amount of plain water, let dissolve (about 1 minute) and drink. Repeat every three hours as necessary.” The “Directions” also contain the following statement: “Effervescent technology offers 100% immediate absorption!” The outside of the packaging also contains the following statement: “Airborne was developed by a school teacher who was sick of getting sick in the classroom. It can be taken 2 ways: at the first sign of a cold symptom, or before entering crowded environments, like airplanes and offices.” The packaging also features what purports to be a picture of Victoria Knight-McDowell, with the following quotation from her: “I created Airborne because, as a teacher dealing with young children, I was sick of catching colds in the classroom.”

b. The packaging for Airborne NightTime contains many of the same deceptive and/or misleading representations, and also contains additional deceptive and/or misleading representations. The packaging states that Airborne NightTime has “[t]he same immune-boosting herbal formula as AIRBORNE with

added ingredients to soothe and relax for a better night's sleep." The packaging states: "Airborne was developed by a school teacher to boost her immune system, so that it could help her body fight against germs that abound in the classroom." The packaging also features what purports to be a picture of Victoria Knight-McDowell, with the following quotation from her: "I created Airborne because, as a teacher I needed help supporting my immune system, especially in the classroom."

c. The packaging for the other varieties of the Airborne products sold by Airborne Health all contain substantially similar representations, which are deceptive and/or misleading.

#### **The Lack Of Scientific Basis For Airborne Health's Representations**

27. Despite Airborne Health's explicit and implicit claims to the contrary, no scientific evidence exists that Airborne is capable of preventing, curing or alleviating illness caused by "germs and viruses."

28. Airborne Health has publicly claimed that "clinical trial results" prove the efficacy of Airborne in curing or preventing certain symptoms of upper respiratory infections. But the "clinical trial" was a sham, and known by Airborne Health to be such.

29. In approximately late-2002 or early-2003, Airborne Health publicly announced that "clinical trial results" proved the efficacy of Airborne. At about that time, Airborne Health posted on its website, and distributed through other means, a document titled Final Report For Protocol KML001 (hereinafter the "Clinical Trial Report"), which purported to be the results of a "double-blind, placebo controlled, multi-

center, randomized clinical trial to evaluate Airborne against the reduction of upper respiratory infection symptoms in subjects with newly development upper respiratory infections.”

30. The Clinical Trial Report purportedly was prepared by a company called GNG Pharmaceutical Services (hereinafter “GNG”). In the Clinical Trial Report, GNG is described as “an independent company that performs the management and monitoring of clinical trials.”

31. However, in February of 2006, ABC News reported as follows: “GNG is actually a two-man operation started up just to do the Airborne study. There was no clinic, no scientists and no doctors. The man who ran things said he had lots of clinical trial experience. He added that he had a degree from Indiana University, but the school says he never graduated.”

32. Airborne Health removed the Clinical Trial Report from its website, and reportedly now refuses to provide copies of it to customers who request it. One customer who requested a copy reportedly received this email response from Airborne Health: “The 2003 trial was a small study conducted for what was then a small company. While it yielded very strong results, we feel that the methodology (protocol) employed is not consistent with our current product usage recommendations. Therefore, we no longer make it available to the public.”

33. Yet, although it now refuses to make it public, Airborne Health’s website has cited the Clinical Trial Report as “scientific evidence” that Airborne “really works.”

See supra at Paragraph 24(j)(i).

34. In addition, other websites continue to tout the Clinical Trial Report. For example, the website [www.airborne-cold-remedy-formula-medicine.com](http://www.airborne-cold-remedy-formula-medicine.com) is an advertisement for Airborne, and it contains the following text: "Is there clinical proof that Airborne cold medicine really works? Yes. Beyond the million (sic) of loyal customers who swear by Airborne, there is now a clinical study that shows that Airborne does shorten the length of the common cold." Upon information and belief, this website is owned or controlled by Airborne Health or its agents.

35. Upon information and belief, Airborne Health has neither conducted nor commissioned any subsequent scientific study to determine whether or not any of its claims concerning Airborne's ability to prevent or cure illness are, or are not, true.

**Airborne Health's Contradictory And Ineffectual Fine-Print Disclaimer**

36. In fine print on its packaging and other advertising materials, Airborne Health has included a disclaimer that typically states: "This product is not intended to diagnose, treat, cure or prevent any disease."

37. For at least two reasons, that disclaiming language does not render Airborne Health immune from liability for the claims alleged herein.

38. First, the disclaiming language used by Airborne Health is typically in fine print (particularly in contrast to the other statements made in Airborne Health's marketing materials), and placed in a style and location such that typical and reasonable consumers will not read the disclaiming language.

39. Second, the disclaiming language is directly contrary to other statements made more prominently by Airborne Health. The disclaiming statement that Airborne "is



not intended to diagnose, treat, cure or prevent any disease” is irreconcilably inconsistent with Airborne Health’s numerous (and much more prominent) statements that Airborne does treat, cure or prevent disease. Indeed, Airborne Health’s entire marketing effort is designed and directed towards convincing consumers that Airborne provides protection from “germs and viruses.”

#### **Walgreen’s Misrepresentations and/or Deceptive Practices**

40. Walgreen has engaged in deceptive practices and made misrepresentations regarding Wal-borne in all of the various marketing media that it uses to sell Wal-borne. These include, but are not necessarily limited to, Walgreen’s website and the packaging in which Wal-borne is sold.

41. Walgreen’s marketing campaign is designed to convince consumers that Wal-borne provides protection or relief from illnesses caused by “airborne viruses.”

42. Walgreen’s marketing activities are also designed to trade off on the increasing popularity and recognition of Airborne. Upon information and belief, Wal-borne is purposefully shelved next to or nearby Airborne in Walgreen’s stores.

43. Wal-borne’s product packaging is substantially similar to the packaging for Airborne. Like Airborne, Wal-borne’s packaging includes the following deceptive and/or misleading representations intended to convince consumers that Wal-borne provides protection or relief from illness:

- a. The packaging for Wal-born Gold states that the product is an “effervescent health formula,” and features an image with black band over the picture of a bus, an airplane and the word “GERMS.”

- b. The packaging for Wal-born Gold also contains the statement, "Immune system Defense Against Airborne Viruses."
- c. The outside of the packaging also contains the following statement: "For Use in Schools, Offices, Theaters, Airplanes, Restaurants, Health Clubs."

44. The packaging for Wal-borne contains many of the same deceptive and/or misleading representations, and also contains additional deceptive and/or misleading representations.

45. Walgreen owns and operates a website at [www.walgreens.com](http://www.walgreens.com), through which it markets and sells Wal-borne. As of the filing of this Complaint, that website made numerous deceptive and/or misleading representations intended to convince consumers that Wal-borne provides protection or relief from illness, including the following:

- a. On one of the website's pages ([www.walgreens.com/store/product.jsp?CATID=10189&navAction=jump&navCount=2&id=prod2497554](http://www.walgreens.com/store/product.jsp?CATID=10189&navAction=jump&navCount=2&id=prod2497554)), Walgreen describes Wal-borne as an "immune system defense against airborne viruses" and as an "effervescent health formula." Walgreen specifically instructs potential purchasers of Wal-borne to "Compare to Airborne ingredients," below which appears the text, "take at the first sign of a cold symptom or before entering crowded, germ filled environments, like airports, offices and schools."
- b. The aforementioned webpage goes on to state that Wal-borne's "effervescent technology offers 100% immediate absorption" and that users

should “take [Wal-borne] to boost your immune system before entering a crowded environment.”

46. In fact, however, Walgreen has no scientific or otherwise legitimate basis for making such claims, and such claims are deceptive and/or misleading.

**Walgreen’s Contradictory And Ineffectual Fine-Print Disclaimer**

47. In fine print on its packaging and on its website, Walgreen has included a disclaimer that typically states: “This product is not intended to diagnose, treat, cure or prevent any disease.”

48. For at least two reasons, that disclaiming language does not render Walgreen immune from liability for the claims alleged herein.

49. First, the disclaiming language used by Walgreen is typically in fine print (particularly in contrast to the other statements made in Walgreen’s marketing materials), and placed in a style and location such that typical and reasonable consumers will not read the disclaiming language.

50. Second, the disclaiming language is directly contrary to other statements made more prominently by Walgreen. The disclaiming statement that Wal-borne “is not intended to diagnose, treat, cure or prevent any disease” is irreconcilably inconsistent with Walgreen’s numerous (and much more prominent) statements that Wal-borne does treat, cure or prevent disease. Indeed, Walgreen’s entire marketing effort is designed and directed towards convincing consumers that Wal-borne is substantially the same as Airborne and, as such, also provides protection from “airborne viruses.”

### CLASS ACTION ALLEGATIONS

51. All the allegations of paragraphs 1 through 50 are incorporated herein by reference as though recited verbatim and at length.

52. Plaintiffs Gregory Geis and Rachel LaRusso seek to represent a class defined as follows: all persons who reside in New Jersey and who purchased an Airborne-branded product during the period beginning six (6) years before the date on which this complaint is filed, and ending on the date that the Court certifies a class, with the exception of any such person who is an employee, officer, director or shareholder of defendant Airborne Health.

53. Plaintiff Gregory Geis seeks to represent a sub-class defined as follows: all persons who reside in New Jersey and who purchased an Airborne-branded product from Walgreen during the period beginning six (6) years before the date on which this complaint is filed, and ending on the date that the Court certifies a class, with the exception of any such person who is an employee, officer, director or shareholder of defendant Airborne Health or defendant Walgreen.

54. Plaintiff Gregory Geis seeks to represent a sub-class defined as follows: all persons who reside in New Jersey and who purchased a Wal-borne-branded product from Walgreen during the period beginning six (6) years before the date on which this complaint is filed, and ending on the date that the Court certifies a class, with the exception of any such person who is an employee, officer, director or shareholder of defendant Walgreen, Co.

55. Plaintiff Rachel LaRusso seeks to represent a sub-class defined as follows: all persons who reside in New Jersey and who purchased an Airborne-branded product from ShopRite during the period beginning six (6) years before the date on which this complaint is filed, and ending on the date that the Court certifies a class, with the exception of any such person who is an employee, officer, director or shareholder of defendant Airborne Health or defendant ShopRite.

56. This action is properly maintainable as a class action pursuant to R. 4:32-1.

57. Plaintiffs do not currently know the exact number of persons that fall within the class; however, Airborne is sold in almost every large pharmacy and supermarket in New Jersey as well as on-line from the Company itself and other sources (including, but not limited to, ShopRite and Walgreen); therefore, upon information and belief, plaintiffs allege that, at a minimum, the class consists of several thousand members.

58. Plaintiffs do not currently know the exact number of persons that fall within the sub-classes of persons who have purchased Airborne at Walgreen and/or ShopRite; however, Airborne is sold in almost every Walgreen and ShopRite store in New Jersey as well as on-line from the respective websites of Walgreen and ShopRite; therefore, upon information and belief, plaintiffs allege that, at a minimum, each of the sub-classes consists of several thousand members.

59. Plaintiff Gregory Geis does not currently know the exact number of persons that fall within the sub-class of persons who have purchased Wal-borne; however, Wal-borne is sold in almost every Walgreen store in New Jersey as well as on-line from the

Walgreen website; therefore, upon information and belief, plaintiff alleges that, at a minimum, this sub-class consists of several thousand members.

60. Plaintiffs will be adequate representatives of the class and of each sub-class, as defined above.

61. Plaintiff Gregory Geis is a member of the overall class of persons who have purchased Airborne as well as the sub-classes of 1) persons who purchased Airborne at Walgreen and 2) persons who purchased Wal-borne at Walgreen. Plaintiff Gregory Geis has no known conflict of interest with other members of the class or either sub-class. Plaintiff Gregory Geis has retained experienced and highly-qualified counsel, and plaintiff's counsel has agreed to advance all necessary costs of this litigation, thereby assuring adequate financial resources to vigorously represent the interests of the class.

62. Plaintiff Rachel LaRusso is a member of the overall class of persons who have purchased Airborne as well as the sub-class of 1) persons who purchased Airborne at ShopRite. Plaintiff Rachel LaRusso has no known conflict of interest with other members of the class or either sub-class. Plaintiff Rachel LaRusso has retained experienced and highly-qualified counsel, and plaintiff's counsel has agreed to advance all necessary costs of this litigation, thereby assuring adequate financial resources to vigorously represent the interests of the class.

63. The questions raised in this Complaint are ones of common and/or general interest.

64. This case presents questions of law and fact common to the class, including the following:

- a. Whether Defendants have made misleading statements in connection with the marketing and sale of Airborne; and
- b. Whether Walgreen has made misleading statements in connection with the marketing and sale of Wal-borne; and
- c. Whether Defendants engaged in unconscionable commercial practice(s), deception(s), fraud(s), false pretense(s) and/or false promise(s) in connection with the marketing and sale of Airborne; and
- d. Whether Walgreen engaged in unconscionable commercial practice(s), deception(s), fraud(s), false pretense(s) and/or false promise(s) in connection with the marketing and sale of Wal-borne; and
- e. Whether Defendants engaged in such deceptive and/or unconscionable practices and/or made such misleading statements with regard to the marketing and sale of Airborne knowingly or recklessly; and
- f. Whether Walgreen engaged in such deceptive and/or unconscionable practices and/or made such misleading statements with regard to the marketing and sale of Wal-borne knowingly or recklessly; and
- g. Whether Defendants breached the implied warranty of merchantability by selling a product, Airborne, that did not perform as advertised; and
- h. Whether Walgreen breached the implied warranty of merchantability by selling a product, Wal-borne, that did not perform as advertised; and

i. Whether Defendants should be enjoined from marketing and selling Airborne through the use of deceptive practices and/or misrepresentations; and

j. Whether Walgreen should be enjoined from marketing and selling Wal-borne through the use of deceptive practices and/or misrepresentations; and

k. Whether Defendants breached its express warranty by selling a product, Airborne, that did not conform with the Company's affirmations and/or promises; and

l. Whether Walgreen breached its express warranty by selling a product, Wal-borne, that did not conform with Walgreen's affirmations and/or promises; and

m. Whether Defendants breached the implied warranty of fitness for a particular purpose by knowingly furnishing a product, Airborne, that does not perform the particular purpose.

n. Whether Walgreen breached the implied warranty of fitness for a particular purpose by knowingly furnishing a product, Wal-borne, that does not perform the particular purpose.

65. The common questions of law and fact listed above in paragraphs 65(a) through 65(n) predominate over any questions affecting individual members of the proposed class and/or subclasses.

66. Because, up upon information and belief, the overall class and each of the subclasses consist of, at a minimum, several thousand members, it is impracticable to bring them all before the court.



67. Plaintiffs' claims and/or defenses are typical of the claims or defenses of members of the proposed overall class and each of the subclasses.

**COUNT ONE**  
**VIOLATION OF N.J.S.A. § 56:8 et seq.: NEW JERSEY CONSUMER FRAUD**  
**ACT**

**(AS TO AIRBORNE)**

68. All the allegations contained in paragraphs 1 through 67 are incorporated herein by reference as though recited verbatim and at length.

69. Airborne is "merchandise" as defined by N.J.S.A. 56:8-1.

70. Defendants are "person[s]" as defined by N.J.S.A. 56:8-1.

71. Plaintiffs are "person[s]" as defined by N.J.S.A. 56:8-1.

72. Each of the various marketing media used by Defendants to sell Airborne including, but not necessarily limited to, Defendants' respective websites, the various commercials that Airborne Health has aired on television, and the packaging in which Airborne is sold, constitute "advertisement[s]" as defined by N.J.S.A. 56:8-1.

73. Plaintiffs' purchase(s) of Airborne from Defendants constitute(s) a "sale" as defined by N.J.S.A. 56:8-1.

74. Defendants violated the New Jersey Consumer Fraud Act, N.J.S.A. 56:8 et seq. ("NJCFA") by using and/or employing unconscionable commercial practice(s), deception(s), fraud(s), false pretense(s), false promise(s), and/or misrepresentation(s) in connection with the sale or advertisement of Airborne. *See*, N.J.S.A. 56:8-2

75. Defendants violated the New Jersey Consumer Fraud Act, N.J.S.A. 56:8 et seq. ("NJCFA") by knowingly concealing, suppressing, and/or omitting material facts

about Airborne with intent that Plaintiffs rely upon such concealment, suppression or omission in connection with the sale or advertisement of Airborne. *See, N.J.S.A. 56:8-2.*

76. As a result of Defendants' deceptive practices, misrepresentations, and knowing omissions concerning Airborne, Plaintiffs suffered ascertainable losses of monies and/or property.

77. As a result of Defendants' deceptive practices, misrepresentations, and knowing omissions concerning Airborne, it is probable that a significant portion of the general public or of Defendants' targeted consumers suffered ascertainable losses of monies and/or property.

**COUNT TWO**  
**VIOLATION OF N.J.S.A. § 56:8 et seq.: NEW JERSEY CONSUMER FRAUD**  
**ACT**

**(AS TO WAL-BORNE)**

78. All the allegations of paragraphs 1 through 77 are incorporated herein by reference as though recited verbatim and at length.

79. Wal-borne is "merchandise" as defined by N.J.S.A. 56:8-1.

80. Walgreen is a "person" as defined by N.J.S.A. 56:8-1.

81. Plaintiff Gregory Geis is a "person" as defined by N.J.S.A. 56:8-1.

82. Each of the various marketing media used by Walgreen to sell Wal-borne including, but not necessarily limited to, Walgreen's website and the packaging in which Wal-borne is sold, constitute "advertisement[s]" as defined by N.J.S.A. 56:8-1.

83. Plaintiff's purchase(s) of Wal-borne from Walgreen constitute(s) a "sale" as defined by N.J.S.A. 56:8-1.

84. Walgreen violated the New Jersey Consumer Fraud Act, N.J.S.A. 56:8 et seq. ("NJCFA") by using and/or employing unconscionable commercial practice(s), deception(s), fraud(s), false pretense(s), false promise(s), and/or misrepresentation(s) in connection with the sale or advertisement of Wal-borne. *See*, N.J.S.A. 56:8-2

85. Walgreen violated the New Jersey Consumer Fraud Act, N.J.S.A. 56:8 et seq. ("NJCFA") by knowingly concealing, suppressing, and/or omitting material facts about Wal-borne with intent that Plaintiff Gregory Geis rely upon such concealment, suppression or omission in connection with the sale or advertisement of Wal-borne. *See*, N.J.S.A. 56:8-2.

86. As a result of Walgreen's deceptive practices, misrepresentations, and knowing omissions concerning Wal-borne, Plaintiff Gregory Geis suffered ascertainable loss of monies and/or property.

87. As a result of Walgreen's deceptive practices, misrepresentations, and knowing omissions concerning Wal-borne, it is probable that a significant portion of the general public or of Walgreen's targeted consumers suffered ascertainable losses of monies and/or property.

**COUNT THREE**  
**BREACH OF N.J.S.A. § 12A:2313: EXPRESS WARRANTY BY AFFIRMATION,**  
**PROMISE, DESCRIPTION, SAMPLE**

**(AS TO AIRBORNE)**

88. All the allegations contained in paragraphs 1 through 87 are incorporated herein by reference as though recited verbatim and at length.

89. Defendants have, by express affirmation, promise and/or description, warranted that Airborne is capable of preventing and curing illness caused by germs and viruses.

90. The express affirmations, promises and/or descriptions by Defendants that Airborne is capable of preventing and curing illness caused by germs and viruses is part of the basis of the bargain concerning the sale of Airborne.

91. Airborne is not capable of preventing or curing illness caused by germs and viruses.

92. Thus, Defendants have breached the express warranties created by their affirmations, promises and/or descriptions.

**COUNT FOUR**  
**BREACH OF N.J.S.A. § 12A:2313: EXPRESS WARRANTY BY AFFIRMATION,**  
**PROMISE, DESCRIPTION, SAMPLE**

**(AS TO WAL-BORNE)**

93. All the allegations contained in paragraphs 1 through 92 are incorporated herein by reference as though recited verbatim and at length.

94. Walgreen has, by express affirmation, promise and/or description, warranted that Wal-borne is capable of preventing and curing illness caused by germs and viruses.

95. The express affirmations, promises and/or descriptions by Walgreen that Wal-borne is capable of preventing and curing illness caused by germs and viruses is part of the basis of the bargain concerning the sale of Wal-borne.

96. Wal-borne is not capable of preventing or curing illness caused by germs and viruses.

97. Thus, Walgreen has breached the express warranties created by its affirmations, promises and/or descriptions.

**COUNT FIVE**  
**BREACH OF N.J.S.A. § 12A:2-314: IMPLIED WARRANTY OF**  
**MERCHANTABILITY**

**(AS TO AIRBORNE)**

98. All the allegations contained in paragraphs 1 through 97 are incorporated herein by reference as though recited verbatim and at length.

99. Defendants are "merchant[s]" with respect to Airborne as defined by N.J.S.A. 12A:2-104.

100. Airborne are "goods" as defined by N.J.S.A. 12A:2-105.

101. Purchase of Airborne constitutes a "sale" as defined by N.J.S.A. 12A:2-106.

102. An implied warranty of merchantability is implied in a contract of sale of goods if the seller is a merchant with respect to goods of that kind.

103. Airborne is not fit for the ordinary purposes for which it is used.

104. Airborne does not conform to the promises or affirmations of fact made on the container or label.

105. Thus, Defendants have breached the implied warranty of merchantability.

**COUNT SIX**  
**BREACH OF N.J.S.A. § 12A:2-314: IMPLIED WARRANTY OF**  
**MERCHANTABILITY**

**(AS TO WAL-BORNE)**

106. All the allegations contained in paragraphs 1 through 105 are incorporated herein by reference as though recited verbatim and at length.

107. Walgreen is a "merchant" with respect to Airborne as defined by N.J.S.A. 12A:2-104.

108. Wal-borne are "goods" as defined by N.J.S.A. 12A:2-105.

109. Purchase of Wal-borne constitutes a "sale" as defined by N.J.S.A. 12A:2-106.

110. An implied warranty of merchantability is implied in a contract of sale of goods if the seller is a merchant with respect to goods of that kind.

111. Wal-borne is not fit for the ordinary purposes for which it is used.

112. Wal-borne does not conform to the promises or affirmations of fact made on the container or label.

113. Thus, Walgreen has breached the implied warranty of merchantability.

**COUNT SEVEN**  
**BREACH OF BREACH OF N.J.S.A § 12A:2-315: IMPLIED WARRANTY**  
**OF FITNESS FOR PARTICULAR PURPOSE**

**(AS TO AIRBORNE)**

114. All the allegations contained in paragraphs 1 through 113 are incorporated herein by reference as though recited verbatim and at length.

115. Defendants are sellers of Airborne.

116. Defendants have reason to know that consumers purchase Airborne for the particular purpose of preventing or curing illnesses caused by germs or viruses.

117. Defendants have reason to know that consumers rely on Defendants' skill and judgment to furnish Airborne for that particular purpose.

118. Airborne does not, in fact, prevent or cure illness caused by germs or viruses.

119. Thus, Defendants have breached the implied warranty of fitness for a particular purpose.

**COUNT EIGHT**  
**BREACH OF BREACH OF N.J.S.A § 12A:2-315: IMPLIED WARRANTY**  
**OF FITNESS FOR PARTICULAR PURPOSE**

**(AS TO WAL-BORNE)**

120. All the allegations contained in paragraphs 1 through 119 are incorporated herein by reference as though recited verbatim and at length.

121. Walgreen is a seller of Wal-borne.

122. Walgreen has reason to know that consumers purchase Wal-borne for the particular purpose of preventing or curing illnesses caused by germs or viruses.

123. Walgreen has reason to know that consumers rely on Walgreen's skill and judgment to furnish Wal-borne for that particular purpose.

124. Wal-borne does not, in fact, prevent or cure illness caused by germs or viruses.

125. Thus, Walgreen has breached the implied warranty of fitness for a particular purpose.

**COUNT NINE**  
**UNJUST ENRICHMENT/CONSTRUCTIVE TRUST**

**(AS TO AIRBORNE)**

126. All the allegations contained in paragraphs 1 through 125 are incorporated herein by reference as though recited verbatim and at length.

127. By selling Airborne through deceptive practices and/or misrepresentations, Defendants have engaged in inequitable conduct and have received benefits thereby, at the expense of consumers, including the Plaintiffs and members of the proposed class and sub-classes.

128. At the time of their purchase(s) of Airborne, Plaintiffs conferred a benefit on Defendants *i.e.*, monies.

129. At the time of their purchase(s) of Airborne, Plaintiffs reasonably expected remuneration by Defendants via Airborne *i.e.* that Airborne would prevent or cure illness caused by germs or viruses.

130. Airborne does not, in fact, prevent or cure illness caused by germs or viruses.

131. The profits and/or benefit obtained by Defendants thereby constitute unjust enrichment.

132. Accordingly, the Court should impose a constructive trust on such profits and/or should require Defendants to disgorge those profits and/or make restitution to the Plaintiffs and the members of the proposed class and sub-classes.



**COUNT TEN**  
**UNJUST ENRICHMENT/CONSTRUCTIVE TRUST**

**(AS TO WAL-BORNE)**

133. All the allegations contained in paragraphs 1 through 132 are incorporated herein by reference as though recited verbatim and at length.

134. By selling Wal-borne through deceptive practices and/or misrepresentations, Walgreen has engaged in inequitable conduct and has received a benefit thereby, at the expense of consumers, including the Plaintiff Gregory Geis and members of the proposed sub-class.

135. At the time of his purchase(s) of Airborne, Plaintiff Gregory Geis conferred a benefit on Walgreen i.e. monies.

136. At the time of his purchase(s) of Airborne, Plaintiff Gregory Geis reasonably expected remuneration by Walgreen via Wal-borne i.e. that Wal-borne would prevent or cure illness caused by germs or viruses.

137. Wal-borne does not, in fact, prevent or cure illness caused by germs or viruses.

138. The profits and/or benefit obtained by Walgreen thereby constitute unjust enrichment.

139. Accordingly, the Court should impose a constructive trust on such profits and/or should require Walgreen to disgorge those profits and/or make restitution to Plaintiff Gregory Geis and the members of the proposed sub-class.

**COUNT ELEVEN**  
**NEGLIGENT MISREPRESENTATION**

**(AS TO AIRBORNE)**

140. All the allegations contained in paragraphs 1 through 139 are incorporated herein by reference as though recited verbatim and at length.

141. Defendants have negligently made numerous incorrect statements regarding Airborne via their respective websites, marketing materials, and advertisements.

142. Plaintiffs justifiably relied upon Defendants' incorrect statements in making their decisions to purchase Airborne.

143. Plaintiffs' reliance upon Defendants' incorrect statements resulted in economic loss or injury to Plaintiffs.

**COUNT TWELVE**  
**NEGLIGENT MISREPRESENTATION**

**(AS TO WAL-BORNE)**

144. All the allegations contained in paragraphs 1 through 143 are incorporated herein by reference as though recited verbatim and at length.

145. Walgreen has negligently made numerous incorrect statements regarding Wal-borne via its website and marketing materials.

146. Plaintiff Gregory Geis justifiably relied upon Walgreen's incorrect statements in making his decision to purchase Wal-borne.

147. Plaintiff Gregory Geis' reliance upon Walgreen's incorrect statements resulted in economic loss or injury to Plaintiff.

WHEREFORE, Plaintiffs, on behalf of themselves and all others similarly situated, as defined in the proposed class and sub-classes herein, pray for the following relief:

1. An order certifying the general Class and appointing Plaintiffs and their counsel of record to represent the general Class and;
2. An order certifying the Sub-Class of all persons who purchased Airborne from Walgreen and appointing Plaintiff Gregory Geis and his counsel of record to represent the aforementioned Sub-Class and;
3. An order certifying the Sub-Class of all persons who purchased Airborne from ShopRite and appointing Plaintiff Rachel LaRusso and her counsel of record to represent the aforementioned Sub-Class and;
4. An order certifying the Sub-Class of all persons who purchased Wal-borne from Walgreen and appointing Plaintiff Gregory Geis and his counsel of record to represent the aforementioned Sub-Class and;
5. An order enjoining Defendants from engaging in the conduct and practices complained of herein;
6. Restitution, disgorgement, and such other equitable relief this Court deems proper;
7. Actual damages sustained by Plaintiffs and all others similarly situated as a result of Defendants' unlawful conduct and practices complained of herein;
8. Punitive damages;
9. Pre-judgment and post-judgment interest;

- 10. Treble damages;
- 11. Reasonable attorney's fees and costs of suit; and
- 12. Such other and further relief as the Court deems just and proper.

**DEMAND FOR JURY TRIAL**

PLAINTIFFS DEMAND TRIAL BY JURY OF SIX ON ALL CLAIMS SO TRIABLE.

**CERTIFICATION OF NOTICE PURSUANT TO N.J.S.A. 56:8**

Pursuant to N.J.S.A. 56:8, simultaneous with its filing, a copy of the within complaint is being furnished upon the Office of the Attorney General of the State of New Jersey, CN 080, Trenton, New Jersey 08625.

DAVID M. WACKSMAN, ESQ., LLC

By: 

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**CERTIFICATION PURSUANT TO R. 4:5-1**

I certify that the matter in controversy is not the subject of any other action pending in any court or of pending arbitration proceeding except David Wilson v. Airborne, Inc. et al., Superior Court of California, County of San Bernardino, Case No. RCVRS095262 and that no such action or arbitration proceeding is contemplated, except as aforesaid. To plaintiffs' knowledge no other party should be joined in this action.



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David M. Wacksman

DATED: May 24, 2007