

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION**

Civil Case No.:

LAUREN FOSTER, on behalf of herself and :
all others similarly situated, :

Plaintiff, :

vs. :

CHATTEM, INC., a foreign corporation, :

Defendant. :

6:14-cv-346-Orl-18GJK

**CLASS ACTION COMPLAINT FOR EQUITABLE RELIEF AND DAMAGES, AND
DEMAND FOR JURY TRIAL**

Plaintiff, LAUREN FOSTER (“Plaintiff”), by and through her undersigned counsel, hereby files this Class Action Complaint, individually, and on behalf of all others similarly situated—and makes these allegations against Defendant, CHATTEM, INC. (“Defendant”), to challenge Defendant’s violations of Florida state law based on its unlawful, deceptive, unfair and/or misleading business practices, whereby Plaintiff seeks certification of this matter as a class action, by submitting this Class Action Complaint and alleging as follows:

INTRODUCTION

1. Defendant manufactures, labels, markets, advertises, sells and distributes ACT® Restoring™ Anticavity Fluoride Mouthwash (the “Product”) to purchasers throughout the State of Florida in, but not limited, to mass discounters, mass merchandisers, club stores, convenience stores, drug stores and dollar store’s. In marketing, advertising, and labeling the Product, Defendant made and continues to make uniform false, deceptive, unfair, and/or misleading claims regarding its representation that the Product “Rebuilds Tooth Enamel.”

2. At issue here is Defendant's false, unfair and misleading statement that is likely to deceive reasonable consumers. Defendant has mistakenly, misleadingly, or negligently represented that the Product "Rebuilds Tooth Enamel" when in fact, once tooth enamel is gone, it cannot be rebuilt by mouthwash.

3. Defendant's "Rebuilds Tooth Enamel" statement prominently displayed on the Product's packaging and/or labeling is unfair, false, misleading, and likely to deceive a reasonable consumer, such as Plaintiff and members of the Class, because the Product cannot rebuild tooth enamel due to the inability to regrow lost enamel.¹

4. Enamel is the outermost layer that covers the visible crown of the tooth. Enamel helps protect your teeth from daily use such as chewing, biting, crunching, and grinding.² Enamel is not living tissue, so the human body cannot rebuild tooth enamel that has been damaged or worn away from dietary acids.³

5. Contrary to Defendant's express or implied representations, rebuilding enamel is impossible by using its mouthwash; however, enamel can be strengthened by repairing weak spots through a process called remineralization.⁴ Notwithstanding, scientists see mere enamel-

1. Words such as "rebuild" and "restore" act as more of a marketing ploy than an accurate description of what products such as ACT® Restoring Anticavity Fluoride Mouthwash actually do. Once tooth enamel is gone, it cannot be brought back. *See* RONALD PERRY, *Are "restoring" toothpastes and mouthwashes marketing or medicine*, TUFTSNOW (April 9, 2012), available at <http://now.tufts.edu/articles/restoring-toothpastes-mouthwashes> (last visited February 27, 2014) (Ronald Perry is a clinical professor at Tufts School of Dental Medicine)

2. Tooth erosion happens when acids wear away the enamel on teeth. Dentists recommend fluoride to be used because fluoride strengthens enamel, it does not rebuild enamel. *See* Tooth Enamel Erosion and Restoration, available at <http://www.webmd.com/oral-health/guide/tooth-enamel-erosion-restoration> (last visited February 27, 2014).

3. *See* Crest Pro-Health: How to Rebuild Tooth Enamel, <http://www.crestprohealth.com/dental-hygiene-topics/tooth-pain/rebuild-tooth-enamel.aspx> (last visited February 27, 2014).

4. Remineralization is a "process that basically introduces calcium and minerals and adhere to the enamel so it can patch weak spots. This patch is not enamel, but it is hard and lasting. The more correct description of what happens is "strengthening of weak spots." *See* PERRY, *Supra* note 1.

“strengthening” labels on products as “marketing gimmicks,”⁵ and here, Defendant takes it a step further by claiming that its Product can actually rebuild the human body’s tooth enamel.

6. Defendant’s marketing of the Product stating it “Rebuilds Tooth Enamel” is unfair, false, and likely to mislead a reasonable consumer because the only known options by dental professionals to rebuild tooth structure is to either have a tooth bonding or a tooth crown procedure.⁶ Defendant’s Product deceptively misleads the reasonable consumer to believe that its Product can be used as an option to rebuild tooth enamel, when it cannot.

7. Accordingly, Plaintiff brings this class action for injunctive relief, restitution, disgorgement and damages against Defendant for false and misleading advertising in violation the Florida Deceptive and Unfair Trade Practices Act, FLA. STAT. §§ 501.201, *et seq.* (“FDUTPA”), for Unjust Enrichment, and for breach of warranty.

8. Plaintiff further seeks an Order prohibiting Defendant from representing the Product as a mouthwash that “Rebuilds” tooth enamel when rebuilding tooth enamel is not possible by using a mouthwash. Defendant should be required to remove the “Rebuilds Tooth Enamel” statement for it acts as a false, deceptive, unfair, and/or misleading representation, which is likely to mislead, and actually does mislead, the reasonable consumer.

JURISDICTION AND VENUE

9. This Court has jurisdiction over the subject matter presented by this Complaint because it is a class action arising under the Class Action Fairness Act of 2005 (“CAFA”), Pub.

5. See LAURA JOHANNES, *The Acid Test for Enamel-Saving Toothpastes*, Wall Street Journal <http://online.wsj.com/news/articles/SB10001424052748704141104575588374178767514> (Nov. 1, 2010) (last visited Feb. 27, 2014).

6. There are two options that a dental professional may recommend to rebuild tooth structure and that is 1) Tooth Bonding, which involves attaching tooth-colored composite resin to the tooth to fill in the damaged area; and 2) Tooth Crown, which can rebuild tooth structure by covering the damaged enamel to help prevent further erosion. See Crest Pro-Health, *Supra* note 3.

L. No. 109-2, 119 Stat. 4 (2005), which explicitly provides for the original jurisdiction of the Federal Courts of any class action in which any member of the plaintiff class is a citizen of a state different from any Defendant, and in which the matter in controversy exceeds in the aggregate the sum of \$5,000,000.00, exclusive of interest and costs.

10. Plaintiff alleges that the total claims of the individual members of the Plaintiff Class in this action are in excess of \$5,000,000.00 in the aggregate, exclusive of interest and costs, as required by 28 U.S.C. § 1332(d)(2), (5). As set forth below, Plaintiff is a citizen of Florida, and Defendant can be considered a citizen of Tennessee. Therefore, diversity of citizenship exists under CAFA and diversity jurisdiction, as required by 28 U.S.C. §§ 1332(a)(1), (d)(2)(A). Furthermore, the total number of members of the proposed Plaintiff Class is greater than 100, pursuant to 28 U.S.C. § 1332(d)(5)(B).

11. Venue in this judicial district is proper pursuant to 28 U.S.C. §1391(a) because, as set forth below, Defendant conducts business in this district, and Plaintiff purchased the subject Product of this action in this judicial district, and resides in this judicial district.

PARTIES

12. Plaintiff is an individual more than 18 years old, and is a citizen and resident of Florida. Plaintiff respectfully requests a jury trial on all claims. Plaintiff purchased the Product in Florida, within this judicial district, during the four (4) years prior to filing of the original Complaint (the “Class Period”). Plaintiff purchased the Product for personal use during the Class Period.

13. Plaintiff purchased the Product in October, 2013, from a supermarket located within this judicial district; a Walmart Supercenter located at 2400 Veterans Memorial Parkway, Orange City, FL, 32763.

14. Plaintiff purchased the Product in reliance on Defendant's false and misleading claim that it "Rebuilds" tooth enamel. Plaintiff paid approximately \$4.12, plus tax for the 18 fluid-ounce bottle of the Product.⁷ A color copy of an example of the Product as it appeared on the shelf before purchased by Plaintiff is depicted below for demonstrative purposes:



15. Defendant Chatterm, Inc. is a subsidiary of the French multinational pharmaceutical company Sanofi. Defendant is incorporated in Tennessee and maintains its principle place of business at 1715 West 38th Street, Chattanooga, Tennessee 37409. Therefore, Defendant can be considered a "citizen" of the State of Tennessee for purposes of diversity

7. ACT® Restoring Anticavity Fluoride Mouthwash comes in two known sizes: the 18 fluid ounce bottle and the 33.8 fluid ounce bottle. The "Product" includes all sizes manufactured by Defendant, as they are not only substantially similar, other than the literal size of the bottle, they are identical.

jurisdiction or diversity of citizenship. Defendant lists Mr. Theodore K. Whitfield, Jr as its registered agent, and can be found at the same address listed above.

16. Defendant is the owner, manufacturer and distributor of the Product, and is the company that created and/or authorized the false, misleading and deceptive labeling and advertising for the Product and is the company that promoted, marketed, and sold the Product at issue in this judicial district.

17. The labeling and advertising for the Product relied upon by Plaintiff and other reasonable consumers was prepared and/or approved by Defendant and its agents, and was disseminated by Defendant and its agents through labeling and advertising containing the misrepresentations alleged herein. The labeling and advertising for the Product was designed to encourage consumers to purchase the Product and reasonably misled the reasonable consumer, i.e. Plaintiff and the Class.

18. Defendant affirmatively misrepresented, and continues to misrepresent, the uses and benefits of the Product to convince the public to purchase and use the Product, resulting in significant detriment to the consuming public.

19. Plaintiff alleges that, at all relevant times, Defendant and its affiliates, and other related entities, as well as their respective employees, were the agents, servants and employees of Defendant, and at all relevant times, each acted within the purpose and scope of that agency and employment. Plaintiff further alleges on information and belief that at all times relevant herein, the distributors and retailers who delivered and sold the Product, as well as their respective employees, also were Defendant's agents, servants and employees, and at all times herein, each was acting within the purpose and scope of that agency and employment.

20. Additionally, Plaintiff alleges that, in committing the wrongful acts alleged herein, Defendant, in concert with its affiliates, and/or other related entities and their respective employees, planned, participated in and furthered a common scheme to induce members of the public to purchase the Product by means of false, misleading, unfair, deceptive and fraudulent representations, and that Defendant participated in the making of such representations in that it disseminated those misrepresentations and/or caused them to be disseminated.

21. Whenever reference in this Complaint is made to any act by Defendant or its affiliates, distributors, retailers and other related entities, such allegation shall be deemed to mean that the principals, officers, directors, employees, agents, and/or representatives of Defendant committed, knew of, performed, authorized, ratified and/or directed that act or transaction on behalf of Defendant while actively engaged in the scope of their duties.

FACTUAL ALLEGATIONS

22. Defendant has uniformly represented throughout the Class Period, and continues to represent that the Product “Rebuilds Tooth Enamel” (the “Statement”) by prominently displaying this language in large letters on the front of the Product’s packaging, and in other advertising. However, contrary to Defendant’s representations, the Product cannot rebuild tooth enamel because it is impossible to actually rebuild tooth enamel by using a mouthwash once it is gone. The sodium fluoride found within the Product is meant to “strengthen” what is left of the existing remaining enamel through a remineralization process, but it cannot rebuild lost enamel back to its original state.

23. Manufacturers must comply with parallel federal and state laws and regulations governing labeling products. Among these are the Federal Food, Drug and Cosmetic Act (FDCA) and its labeling regulations.

24. The Product is misbranded because the “Rebuilds Tooth Enamel” Statement is false and/or misleading to a reasonable consumer.

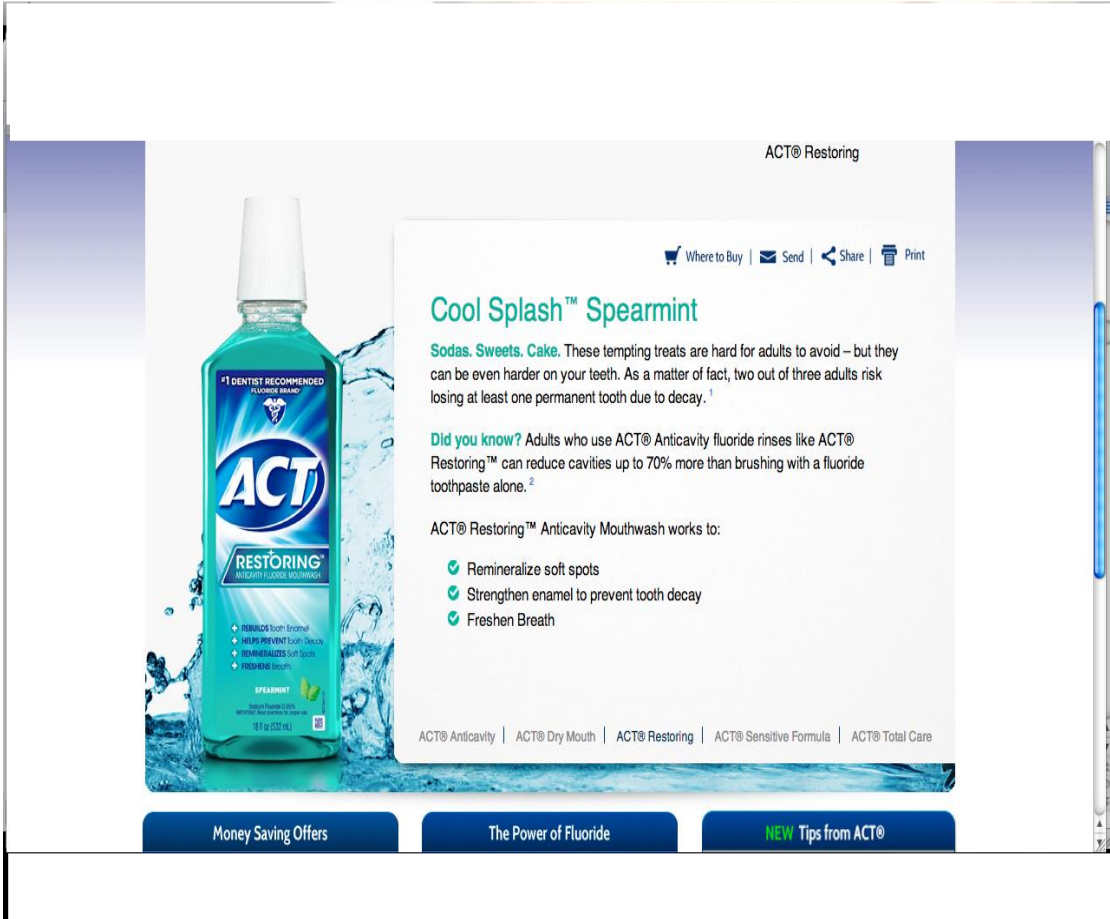
25. The Statement is an unfair business practice, and is false, deceptive, and misleading to a reasonable consumer because the Product cannot rebuild and otherwise regrow enamel to its original state once it is lost. The Statement misleads the reasonable consumer to believe the Product not only remineralizes and/or strengthens the soft spots of existing tooth enamel, but that it also rebuilds inorganic tooth enamel that has been lost to its original condition.

26. The Statement is a marketing scheme because the Product cannot actually rebuild enamel that has been lost.

27. While Defendant boasts the Statement “Rebuilds Tooth Enamel” on the Product’s label, Defendant’s own website contradicts the Product’s label.

28. Defendant’s website concedes that the Product merely works to “Remineralize Soft Spots,” “Strengthen Enamel to Prevent Tooth Decay,” and “Freshen Breath.”⁸ A color copy of an example of the Product and its description as it appears on Defendant’s website is depicted below for demonstrative purposes:

8. See ACT website, <http://www.actoralcare.com/products/act-restoring/cool-splash-mint/> (last visited Feb. 27, 2014).



29. Reasonable consumers, such as Plaintiff, and all other similarly situated consumers, believed that when Defendant used the specific objective statement “Rebuilds Tooth Enamel,” that Defendant meant rebuild to mean the ordinary dictionary definition of the term. Rebuild is defined as “to build again after it has been damaged or destroyed.”⁹ The ordinary definition of rebuild is not what the Product can do, because it is not possible to rebuild enamel back to its original state by using a mouthwash. The Product is intended to strengthen existing enamel to prevent further tooth decay, which helps maintain whatever enamel is left. The statement “Strengthens Enamel to Prevent Tooth Decay” is found only on the Product’s website, and not on the actual label of the Product.

9. See Merriam-Webster Online, <http://www.merriam-webster.com/dictionary/rebuild> (Last visited Feb. 27, 2014)

30. Reasonable consumers understand the statement “Rebuilds Tooth Enamel” to mean its normal and common meaning; that one’s tooth enamel will be rebuilt back to its original state by using the Product. Reasonable consumers should not be expected to be required to decipher Defendant’s fast and loose play on the English language when shopping for mouthwash.

31. As a result, Defendant has made a false, deceptive unfair, and/or misleading material statement and representation regarding the Product that has been relied upon by Plaintiff and members of the Class.

32. Plaintiff, like members of the Class, purchased the product relying on the material misrepresentation that the product “Rebuilds Tooth Enamel” at the time of purchase.

33. Defendant’s “Rebuilds Tooth Enamel” representations convey a series of express and implied claims that Defendant knows are material to the reasonable consumer and which Defendant intends for consumers to rely upon when purchasing the Product. The advertising and marketing for the Product creates the uniform, false, deceptive, unfair and/or misleading impression that the Product can do something that other mouthwashes cannot; rebuild tooth enamel.

Plaintiffs and the Class Suffered Damages

34. All consumers who purchased the Product were exposed to the same “Rebuilds Tooth Enamel” Statement. Unfortunately for consumers, they were induced into purchasing the Product rather than other comparable products, and paid a premium price for a product that allegedly “Rebuilds Tooth Enamel.” Defendant’s prominent statement, “#1 Dentist Recommended Fluoride Brand,” adds to the deception because it leads reasonable consumers to

believe that dentists support the Statement that the Product can “Rebuild” enamel, when they do not.

35. Defendant then charged a premium for the Product that cannot rebuild tooth enamel, and that contains the same ingredients found in other similar mouthwash brands that do not claim to “Rebuild” enamel.

36. Reasonable consumers must and do rely on companies such as Defendant to honestly label their products, and Defendant intends for and knows that consumers rely upon labeling statements in making purchasing decisions. Such reliance by consumers is also eminently reasonable, since Defendant is prohibited from making false or misleading statements on their products under federal and Florida law.

37. Plaintiff and members of the Class have been economically damaged by their purchase of the Product because it cannot “Rebuild” tooth enamel.”

38. Plaintiff has been damaged by her purchase of the Product because the Product is worth less than what Plaintiff paid for it and/or Plaintiff did not receive what she reasonably intended to receive.

39. Plaintiff contends that the Product was rendered valueless because it is misbranded and not what Defendant represented it to be. The Statement constitutes an unfair business practice because the Product cannot do what Defendant claims it does. Thus, Plaintiff and the Class have been economically damaged in the amount of the full retail purchase price charged for each purchase of the Product throughout the Class period, plus tax. An illegal misbranded Product has no market value.

40. Alternatively, because the Product is worth less than what Plaintiff and the Class paid for it, Plaintiff contends that a minimum, she and the Class have been economically

damaged in the amount of the difference between the premium price charged for the Product and the true value of the Product. The Statement allows Defendant to charge a price premium for the Product above its true market value.

41. The true value of the Product is no more than the market value of equivalent mouthwashes, rinses, and toothpastes that do not claim to actually rebuild tooth enamel.

42. Additionally, Plaintiff contends that Defendant should be prohibited from claiming that the Product can “Rebuild” tooth enamel,” when it cannot.

43. Plaintiff contends that Defendant should be required to remove the Statement from the Product so that consumers will receive the benefit of their bargain and no longer be subject to future deception. Without the requested injunctive relief Plaintiff and the Class will continue suffer to future harm, as Defendant’s Statement is meaningless and exposes Plaintiff and the Class to future deception. With such Statement remaining on the Product, Plaintiff is entitled to pursue injunctive relief on behalf of her and all similarly situated consumers in order to protect the consuming public from future false, deceptive, misleading and/or unfair advertising by Defendant.

44. In sum, Plaintiff and the other Class members paid a sum of money for a Product that was not as represented; paid a premium price for a Product that was not as represented; were deprived the benefit of the bargain because the Product they purchased was different than what Defendant warranted; were deprived the benefit of the bargain because the Product they purchased had less value than what was represented by Defendant; did not receive a Product that measured up to their expectations as created by Defendant; used a substance that was other than what was represented by Defendant; used a substance that was of a lower quality than what Defendant promised; and were denied the benefit of a truthful Product labels

45. Plaintiff therefore brings this class action to secure, among other things, equitable relief and damages for the Class against Defendant for false, deceptive, unfair and/or misleading advertising in violation of Florida's Deceptive and Unfair Trade Practices Act, Fla. Stat. §§501.201 et. seq., along with unjust enrichment and breach of warranty claims.

CLASS ACTION ALLEGATIONS

46. Plaintiff incorporates all previous paragraphs alleged in this Complaint as if fully alleged herein.

47. Plaintiff brings this action on behalf of himself and all other similarly situated consumers pursuant to Federal Rules of Civil Procedure 23(a) and 23(b). The Class of persons whom Plaintiffs seek to represent is defined as:

- a) All Florida residents who, within the applicable statute of limitations, purchased the Product, for personal use and not resale, through and to the date Notice is provided to the Class.
- b) Plaintiff reserves the right to broaden or narrow the Class after a reasonable opportunity to conduct discovery.
- c) Excluded from the Class is Defendant, any parent, subsidiary or affiliate of Defendant, any entity in which Defendant has a controlling interest, and the respective officers, directors, employees, agents, legal representatives, heirs, predecessors, successors, and assigns of such excluded persons or entities.

48. Plaintiff and Class members are so numerous that joinder of all members individually, in one action or otherwise, is impracticable.

49. There are questions of law and fact common to the Class.

50. Plaintiff's claims are typical of the claims of other Class members. The named Plaintiff is a member of the Class of affected consumers described herein.

51. The named Plaintiff is willing and prepared to serve the Court and the proposed Class in a representative capacity with all of the obligations and duties material thereto. Plaintiff will fairly and adequately protect the interests of the Class and has no interests adverse to or which directly and irrevocably conflict with the interests of other members of the Class.

52. The self-interests of the named Class representatives are co-extensive with, and are not antagonistic to, those of the absent Class members. The proposed representative will undertake to represent and protect the interests of the absent Class members.

53. The named Plaintiff has engaged the services of counsel indicated below. Counsel are adequately experienced in complex class action litigation, will effectively prosecute this action, and will assert and protect the rights of, and otherwise will represent the named Class representative and absent Class members.

54. This action is also appropriate as a class action pursuant to Rule 23(b)(2) and/or (b)(3) of the Federal Rules of Civil Procedure.

55. This action involves questions of law and fact common to Plaintiff and all members of the Class. These common questions predominate over any issues affecting individual members of the Class and include:

- a) Whether Defendant engaged in unfair methods of competition; unconscionable acts and practices, and unfair and deceptive acts and practices in the conduct of its labeling and advertising of the Product;
- b) Whether Defendant materially misrepresented that the Product can "Rebuild" tooth enamel;

- c) Whether the Product can “Rebuild” tooth enamel;
- d) Whether the Statement “Rebuilds Tooth Enamel” is likely to mislead a reasonable consumer;
- e) Whether Defendant knew that the Product cannot “Rebuild” enamel;
- f) Whether Plaintiff and Class members are entitled to injunctive relief enjoining Defendant from continuing to make the Statement that the Product can “Rebuild” tooth enamel;
- g) Whether Defendant should be made to engage in a corrective advertising campaign advising consumers that the Product cannot “Rebuild” tooth enamel; and
- h) Whether Plaintiff and Class Members have been economically harmed and the proper measure of relief.

56. Judicial determination of the common legal and factual issues essential to this case would be far more efficient and economical as a class action than in piecemeal individual determinations.

57. There is no plain, speedy or adequate remedy other than by maintenance of this lawsuit as a class action because individual damages are relatively small, making it economically infeasible for Class members to pursue remedies individually.

58. The prosecution of separate actions by individual members of the Class, even if theoretically possible, would create a risk of inconsistent or varying adjudications with respect to individual Class members against Defendant and would establish incompatible standards of conduct for Defendant.

59. A class action is superior to other available methods for the fair and efficient adjudication of this controversy for at least the following reasons:

- a) Given the complexity of issues involved in this action and the expense of litigating the claims, few, if any, Class members could afford to seek legal redress individually for the wrongs that Defendant committed against them, and absent Class members have no substantial interest in individually controlling the prosecution of individual actions;
- b) When Defendant's liability has been adjudicated, claims of all Class members can be determined by the Court;
- c) This action will cause an orderly and expeditious administration of the Class claims and foster economies of time, effort and expense, and ensure uniformity of decisions; and
- d) Without a class action, many Class members would continue to suffer injury, and Defendant's violations of law will continue without redress while Defendant continues to reap and retain the substantial proceeds of its wrongful conduct.

60. Plaintiff knows of no difficulty that will be encountered in the management of this litigation, which would preclude its maintenance as a class action.

61. Defendant has acted on grounds applicable to the Class generally; therefore, Plaintiff seeks equitable and injunctive relief on behalf of the entire Class on grounds generally applicable to the entire Class.

COUNT I
VIOLATIONS OF FLORIDA’S DECEPTIVE AND UNFAIR TRADE PRACTICES ACT,
FLA. 501.201, ET SEQ.

62. Plaintiff re-alleges and incorporates by reference the allegations set forth in paragraphs one (1) through sixty-one (61) of this Complaint as if fully set forth herein.

63. This cause of action is brought pursuant to the Florida Deceptive and Unfair Trade Practices Act, Sections 501.201 to 201.213, *Florida Statutes*. The express purpose of the Act is to “protect the consuming public . . . from those who engage in unfair methods of competition, or unconscionable, deceptive, or unfair acts or practices in the conduct of any trade or commerce” Section 501.202(2).

64. The sale of the Product at issue in this cause was a “consumer transaction” within the scope of the Florida Deceptive and Unfair Trade Practices Act, Sections 501.201 to 201.213, *Florida Statutes*.

65. Section 501.204(1), *Florida Statutes* declares as unlawful “unfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce”.

66. Section 501.204(2), *Florida Statutes* states that “due consideration be given to the interpretations of the Federal Trade Commission and the federal courts relating to Section 5(a)(1) of the Trade Commission Act.” Defendant’s unfair and deceptive practices are likely to mislead – and have misled – the consumer acting reasonably under the circumstances and, therefore, violate Section 500.04, Florida Statutes.

67. Defendant has violated the Act by engaging in the unfair and deceptive practices described above, which offend public policies and are immoral, unethical, unscrupulous and

substantially injurious to consumers. Specifically, Defendant has expressly and impliedly represented that the Product will rebuild tooth enamel, when in fact, it cannot.

68. Defendant's sale of the Product is an unfair method of competition, unconscionable act and practice, and an unfair and deceptive act and practice in the conduct of its business.

69. The material misrepresentations and omissions alleged herein constitute deceptive and unfair trade practices, in that they were intended to and did deceive Plaintiff and the general public, into believing that the Product would rebuild tooth enamel that has been lost.

70. Had Plaintiff and Class members known the Product's statement was false and used as a "marketing gimmick," they would not have purchased the Product.

71. As a result of Defendant's deceptive and unfair acts, Plaintiff and Class members have been damaged in the amount of the aggregate retail sales of the Product throughout the Class period. The Product is misbranded and rendered valueless because the Statement is false and misleading, and the Product cannot rebuild tooth enamel. Had Plaintiff and the Class known about the true nature of the Product, they would not have purchased it. Alternatively, Plaintiff and the Class are entitled to the difference between the premium price paid for the Product and the price they would have paid had they known that the Product cannot rebuild tooth enamel. Because Plaintiff and the Class would not have purchased the Product had they known it would not rebuild lost enamel, Plaintiff contends the Class is entitled to restitution of the full retail purchase price.

72. Defendant's conduct offends established public policy, and is immoral, unethical, oppressive, unscrupulous and substantially injurious to consumers.

73. Defendant should also be ordered to cease its deceptive and unfair advertising, and should be made to engage in a corrective advertising campaign, to inform consumers that the Product is promoting something that is not possible to achieve.

WHEREFORE, Plaintiffs seek relief in the form of actual and compensatory damages, injunctive relief in the form of corrective advertising, equitable relief including restitution, pre and post judgment interest, reimbursement of costs, reasonable attorney's fees, and for any other relief that this Court deems just and proper, as set forth more fully below in the Prayer for Relief section of this Complaint.

COUNT II
UNJUST ENRICHMENT

74. Plaintiff re-alleges and incorporates by reference the allegations set forth in paragraphs one (1) through sixty-one (61) of this Complaint as if fully set forth herein.

75. Plaintiff and Class members conferred a benefit on Defendant by purchasing the Product at a premium price.

76. The Product comes in a sealed package, is marketed directly to consumers by Defendant, and does not change from the time it leaves Defendant's hand until it reaches the consumer.

77. Defendant received the money paid by Plaintiff and Class members and thus knew of the benefit conferred upon them.

78. Defendant accepted and retained the benefit in the amount of the profits it earned from sales to Plaintiff and Class members.

79. Defendant has profited from its unlawful, unfair, misleading, and deceptive practices and advertising at the expense of Plaintiff and Class members, under circumstances in which it would be unjust for Defendant to be permitted to retain the benefit.

80. As a result of purchasing the Product, Plaintiff and the Class spent money on a useless Product that they otherwise would not have purchased.

81. Pursuant to Fed. R. Civ. P. 8(d)(2)-(3), Plaintiff (alternatively) does not have an adequate remedy at law against Defendant.

82. Plaintiff and Class members are entitled to restitution of the excess amount paid for the Product, over and above what they would have paid had they known that the Product could not achieve its intended purpose. Because Plaintiff and the Class would not have paid anything for the Product had they known it was merely a marketing “gimmick,” Plaintiff and the Class are entitled to restitution of the full purchase price.

WHEREFORE, Plaintiffs seek relief in the form of injunctive relief in the form of corrective advertising, equitable relief including restitution, pre and post judgment interest, reimbursement of costs, reasonable attorney’s fees, and for any other relief that this Court deems just and proper, as set forth more fully below in the Prayer for Relief section of this Complaint.

COUNT III
BREACH OF IMPLIED WARRANTY OF MERCHANTABILITY

83. Plaintiff re-alleges and incorporates by reference the allegations set forth in paragraphs one (1) through sixty-one (61) of this Complaint as if fully set forth herein.

84. Plaintiff and other members of the Class purchased the Product believing Defendant’s statement that it could rebuild lost tooth enamel. In doing so, Plaintiff and other Members of the Class reasonably relied on Defendant’s skill and judgment to select and furnish

suitable goods for that intended purpose, and on or about that time, Defendant sold the Product to Plaintiff and other members of the Class.

85. Plaintiff and Class members were the foreseeable users of the Product. The Product comes in a sealed package, is marketed directly to consumers by Defendant, and does not change from the time it leaves Defendant's hand until it reaches the consumer

86. At the time of sale, Defendant had reason to know of the ordinary and intended purpose for which the goods were sold, to rebuild lost tooth enamel, and that Plaintiff and members of the Class were relying on Defendant's skill and judgment to select and furnish suitable and harmless goods, so there was an implied warranty that the goods were fit for this intended and ordinary purpose.

87. However, Defendant breached the warranty implied at the time of sale in that Plaintiff and members of the Class did not receive suitable goods, but rather misbranded, defective and non-merchantable goods, and goods that were not fit for the intended purpose of rebuilding enamel. The Product's defective nature existed at the time the Product left the possession of the Defendant. Additionally, as set forth above, the Product was inadequately packaged and labeled.

88. Plaintiff and the Class used the product in its intended manner.

89. As a proximate result of this breach of warranty by Defendant, Plaintiff and members of the Class have suffered actual damages in an amount to be determined at trial, in that they were induced to purchase a product they would not have purchased had they known the true facts about, and that lacks the value Defendant represented the Product had, which was reflected in the purchase price. Plaintiff provided pre-suit notice of this claim to Defendant on or about January 14, 2014.

WHEREFORE, Plaintiffs seek relief in the form of actual and compensatory damages, injunctive relief in the form of corrective advertising, equitable relief including restitution, pre and post judgment interest, reimbursement of costs, reasonable attorney's fees, and for any other relief that this Court deems just and proper, as set forth more fully below in the Prayer for Relief section of this Complaint.

COUNT IV
VIOLATION OF THE MAGNUSON-MOSS WARRANTY ACT (15 U.S.C. §§ 2301 *et seq.*)

90. Plaintiff re-alleges and incorporates by reference the allegations set forth in paragraphs one (1) through sixty-one (61), and eighty-three (83) through eighty-nine (89) of this Complaint as if fully set forth herein.

91. As set forth above, Defendant breached the implied warranty or merchantability regarding the Product.

92. Plaintiff and the Class are consumers as defined in 15 U.S.C. § 2301(3).

93. Defendant is a supplier and warrantor as defined in 15 U.S.C. § 2301(4)(5).

94. The Product is a consumer product as defined in 15 U.S.C. § 2301(6).

95. By reason of Defendant's breach of the above implied warranty merchantability, Defendant has violated the statutory rights due to Plaintiff and members of the Class pursuant to the Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301 *et seq.*, thereby economically damaging Plaintiff and the Class. The Act is intended to increase the enforceability of these warranties.

96. Therefore, Plaintiff and the Class seek all available remedies, damages, and awards under the Magnuson-Moss Warranty act.

WHEREFORE, Plaintiffs seek relief in the form of actual and compensatory damages, injunctive relief in the form of corrective advertising, equitable relief including restitution, pre

and post judgment interest, reimbursement of costs, reasonable attorney's fees, and for any other relief that this Court deems just and proper, as set forth more fully below in the Prayer for Relief section of this Complaint.

PRAYER FOR RELIEF

WHEREFORE, Pursuant to Fed. R. Civ. P. 8(a)(3), Plaintiffs pray this Court:

1. Certify this action as a Plaintiff class action, and appointing Plaintiff as class representative with Plaintiff's counsel Class Counsel;
2. Award actual and compensatory damages as to all Counts where such relief is permitted;
3. Enjoin Defendant's unlawful conduct found to be in violation of FDUTPA, and order Defendant to engage in a corrective advertising and labeling/disclosure campaign;
4. Award equitable monetary relief, including restitution;
5. Award pre-judgment and post-judgment interest at the legal rate;
6. Award Plaintiff and Class members the costs of this action, including reasonable attorney's fees and expenses; and
7. Award such other and further legal and equitable relief as this Court may deem just and proper.

JURY DEMAND

Plaintiff demands a trial by jury on all issues so triable.

DATED: February 28, 2014

Respectfully Submitted,

By:

/s/ Joshua H. Eggnatz
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*Trial Counsel for Plaintiff and the Proposed
Class*

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

LAUREN FOSTER, on behalf of herself and all others similarly situated

(b) County of Residence of First Listed Plaintiff Volusia County
(EXCEPT IN U.S. PLAINTIFF CASES)

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

The Eggnatz Law Firm, P.A.
1920 N. Commerce Parkway, Ste. 1, Weston, FL 33326, (954)634-4355

DEFENDANTS

CHATTEM, INC., a foreign corporation

County of Residence of First Listed Defendant Hamilton County, TN
(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)

	PTF	DEF		PTF	DEF
Citizen of This State	<input checked="" type="checkbox"/> 1	<input type="checkbox"/> 1	Incorporated or Principal Place of Business In This State	<input type="checkbox"/> 4	<input type="checkbox"/> 4
Citizen of Another State	<input type="checkbox"/> 2	<input type="checkbox"/> 2	Incorporated and Principal Place of Business In Another State	<input type="checkbox"/> 5	<input checked="" type="checkbox"/> 5
Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	<input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6	<input type="checkbox"/> 6

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

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES	
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input checked="" type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Medical Malpractice	PERSONAL INJURY <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Management Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Employee Retirement Income Security Act IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes

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

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
28 U.S.C. 1332 (d)(2)
Brief description of cause:
Claims for Violations of Florida's Deceptive & Unfair Trade Practices Act, et al.

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. DEMAND \$ 5,000,000.00 CHECK YES only if demanded in complaint: JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY

(See instructions): JUDGE _____ DOCKET NUMBER _____

DATE 02/28/2014 SIGNATURE OF ATTORNEY OF RECORD

1st Joshua H. Eggnatz

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____

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INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44

Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading 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. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

- I.(a) Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.
 - (b) County of Residence.** For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)
 - (c) Attorneys.** Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".
- II. Jurisdiction.** The basis of jurisdiction is set forth under Rule 8(a), F.R.Cv.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.
 United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.
 United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.
 Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.
 Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; **NOTE: federal question actions take precedence over diversity cases.**)
- III. Residence (citizenship) of Principal Parties.** This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.
- IV. Nature of Suit.** Place an "X" in the appropriate box. If the nature of suit cannot be determined, be sure the cause of action, in Section VI below, is sufficient to enable the deputy clerk or the statistical clerk(s) in the Administrative Office to determine the nature of suit. If the cause fits more than one nature of suit, select the most definitive.
- V. Origin.** Place an "X" in one of the six boxes.
 Original Proceedings. (1) Cases which originate in the United States district courts.
 Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441. When the petition for removal is granted, check this box.
 Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.
 Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.
 Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.
 Multidistrict Litigation. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407. When this box is checked, do not check (5) above.
- VI. Cause of Action.** Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC 553 Brief Description: Unauthorized reception of cable service
- VII. Requested in Complaint.** Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.
 Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction.
 Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.
- VIII. Related Cases.** This section of the JS 44 is used to reference related pending cases, if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.

Date and Attorney Signature. Date and sign the civil cover sheet.