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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

MICHAEL NICHOLS, individually and on
behalf of all others similarly situated,

Civil Action No.:
10-80759-CIV-COHN/SELTZER

Plaintiff,

vs.

**WM. WRIGLEY JR. COMPANY, A
DELAWARE CORPORATION**

Defendant.

AMENDED COMPLAINT

Plaintiff alleges:

I. INTRODUCTION

1. Wrigley, a subsidiary of Mars, markets and sells through retailers various confections, such as gum, mints, candies and chocolate. Among those Products, is a brand of gum named "Eclipse Breeze" that comes in two flavors - Exotic Mint and Exotic Berry ("Product").

2. Wrigley contends that the Product, as stated on the labeling, contains a new ingredient called Cardamom which, in its marketing, advertising and labeling of the Product, they claim is "scientifically proven to neutralize even the toughest breath odors from coffee, garlic, onions and even smoking". Plaintiff contends that this claim is false, deceptive and/or likely to mislead.

3. Furthermore, Wrigley's claims above are not substantiated and Wrigley failed to substantiate the claims at all times that they were made, in violation of Federal and state laws.

1 4. Wrigley engaged in an extensive nationwide advertising campaign, conveying this
2 unsubstantiated and deceptive claim to consumers throughout the United States. Wrigley
3 conveyed, and continues to convey, this deceptive claim through a variety of media, including:
4 point of sale displays, the internet and packaging.

5 5. As a result of the deceptive advertising campaign, and the claims made therein,
6 Wrigley has been able to charge a price premium for the Eclipse Breeze gum over other
7 chewing gum products, including other Wrigley chewing gum products.

8 6. Plaintiff brings this action on behalf of all persons who purchased, other than for
9 resale, Eclipse Breeze chewing gum and seeks to halt the dissemination of the false and
10 deceptive advertising, correct the false and misleading perception that it has created in the
11 minds of consumers of chewing gum and to obtain redress for those who purchased Eclipse
12 Breeze gum.

13 II. PARTIES

14 4. Plaintiff, Michael Nichols ("Plaintiff"), is an individual consumer who resides in, and is
15 a citizen of, North Palm Beach, Florida. He respectfully requests a jury trial on damage claims.

16 5. Defendant, Wrigley ("Defendant") is a corporation organized and existing under the
17 laws of Delaware. It maintains its headquarters at 410 N. Michigan Avenue, Chicago, Illinois
18 60611, and lists with the Illinois Secretary of State an authorized agent for service at that same
19 address by the name of Howard Malovany. For purposes of diversity jurisdiction, Wrigley can
20 be considered a citizen of either Delaware or Illinois. It conducts business in this jurisdiction
21 and in this judicial district by means of its advertising and through the distributors and retailers
22 that deliver and sell the Product to consumers.

23 6. During the relevant class period, Plaintiff was exposed to and saw Wrigley's false and
24 deceptive advertising claims and purchased Eclipse gum, in reliance on these claims. Plaintiff
25 paid a price premium for the Eclipse gum, and would not have paid a price premium, if he knew
26 that the claims made in advertising and packaging, were false or unsubstantiated.

27 7. Plaintiff is informed and believes, and thereon alleges, that at all times herein
28 mentioned, Wrigley and its employees, subsidiaries, affiliates, and other related entities were

1 the agents, servants and employees of each other, and at all times relevant herein, each was
2 acting within the purpose and scope of that agency and employment. Plaintiff further alleges on
3 information and belief that at all times relevant herein, the distributors and retailers who deliver
4 and sell the Product also were Wrigley's agents, servants and employees, and at all times
5 herein, each was acting within the purpose and scope of that agency and employment.

6 8. Whenever reference in this Complaint is made to any act or transaction of the
7 Defendant, such allegation shall be deemed to mean that the principals, officers, directors,
8 employees, agents, and/or representatives of the referenced Defendant committed, knew of,
9 performed, authorized, ratified and/or directed that act or transaction on behalf of the referenced
10 Defendant while actively engaged in the scope of their duties.

11 9. All allegations in this Complaint are based on information and belief and/or are
12 likely to have evidentiary support after reasonable opportunity for further investigation and
13 discovery.

14 III. VENUE AND JURISDICTION

15 10. This Court has jurisdiction over the subject matter presented by this Complaint because
16 it is a class action arising under 18 U.S.C. § 1332(d), which, under the Class Action Fairness
17 Act of 2005 ("CAFA"), Pub. L. No. 109-2, 119 Stat. 4 (2005), explicitly provides for the
18 original jurisdiction of the Federal Courts of any class action in which any member of the
19 Plaintiff class is a citizen of a state different from any Defendant, and in which the matter in
20 controversy exceeds in the aggregate the sum of \$5,000,000, exclusive of interest and costs.
21 Plaintiff alleges that the total claims of individual class members in this action are in excess of
22 \$5,000,000 in the aggregate, exclusive of interest and costs, as required by 28 U.S.C. §
23 1332(d)(2), (5). Plaintiff is a citizen of the State of Florida, whereas, as set forth above, and
24 Wrigley can be considered a citizen of Delaware. Wrigley also can be considered a citizen, of
25 Illinois, for the purposes of diversity. Therefore, diversity of citizenship exists under CAFA as
26 required by 28 U.S.C. § 1332(d)(2)(A). Furthermore, Plaintiff alleges that the total number of
27 members of the proposed Plaintiff Class is greater than 100, pursuant to 28 U.S.C. §
28 1332(d)(5)(B).

1 11. Venue in this district is proper pursuant to 28 U.S.C. §1391(b) because Defendant
2 conducts business within, may be found in, and is subject to personal jurisdiction in this judicial
3 district.

4 **IV. FACTUAL ALLEGATIONS**

5 12. As set forth above, Wrigley sells through retailers is a brand of gum named "Eclipse
6 Breeze", which makes claims on its labels to neutralize the toughest breath odors.

7 13. The Product includes the following claims made in print advertising and on product
8 packaging (attached hereto as Exhibit A):

- 9
- 10 a. With Cardamom to neutralize the toughest breath odors"
- 11 b. "Cardamom is a natural ingredient that has been used for centuries
12 in Asia and India to freshen breath and is scientifically
13 proven to neutralize even the toughest breath odors from coffee,
14 garlic, onions and even smoking." (emphasis added).
- 15

16 14. Defendant's representations as to "Eclipse Breeze" that "Cardamom is scientifically
17 proven to neutralize even the toughest breath odors from coffee, garlic, onions and even
18 smoking" is false, deceptive and/or misleading and Defendant has no credible, competent and
19 reliable scientific evidence to support or substantiate the claims related to its product and its
20 properties to neutralize toughest breath odors .

21 15. In its' patent application for the use of Cardamom oil, Wrigley states that "In vitro tests
22 were conducted" using Cardamom oil, gram positive supragingival plaque bacterium
23 (Streptococcus mutans) and two subgingival plaque bacteria associated with oral malodor
24 (Porphyromonas gingivalis and Fusobacterium nucleatum). Upon information and belief, these
25 tests were performed "in-house" by Wrigley and are thus subject to bias. Furthermore, Wrigley
26 does not cite any in vivo studies that support its' representation that Cardamom oil neutralizes
27 breath odors from coffee, garlic, onions and smoking".
28

1 16. As a result, Wrigley should have stopped advertising the Product as set forth above,
2 because the “toughest breath odor neutralizing” claims are not supported by any credible,
3 competent and reliable scientific studies.

4 17. Plaintiff has purchased the Product several times since its introduction into the
5 marketplace in 2009, through and including April 2010. Plaintiff most often purchased the
6 product at CVS and Walgreens stores in Palm Beach County.

7 18. He had been exposed to Defendant’s advertising campaign described above, and in
8 particular, had relied upon the representations made on the labeling of the Product claiming that
9 its ingredient was “scientifically proven to neutralize even the toughest breath odors from
10 coffee, garlic, onions and even smoking.” He selected the Product over other similar products
11 and paid a price premium, because of the above labeling claims he saw at the time of purchase,
12 reasonably relying upon the purportedly good reputation of Wrigley.

13 19. Plaintiff contends that he has been misled by Defendant’s labeling claims into
14 purchasing and paying for a product that was not what it was represented to be, and that he has,
15 as a direct result, suffered actual damages in that he has been deprived of the benefit of his
16 bargain and has spent money on a product that had less value than was reflected in the purchase
17 price he paid for the product.

18 20. Plaintiff further contends that the product did not perform as advertised and did not
19 neutralize breath odors from coffee, garlic, onions and smoking.

20 **V. CLASS ALLEGATIONS**

21 21. For brevity, Plaintiff realleges and incorporates by reference the General and Factual
22 allegations set forth in paragraphs 1-20 of this Complaint.

23 22. Pursuant to Section 768.734, Florida Statutes, Florida Rule of Civil Procedure 1.220 and
24 Federal Rule of Civil Procedure 23, Plaintiff brings this action on behalf of himself and all other
25 Florida consumers who purchased Defendant’s Product during the Class Period, who then used
26 it for its intended and foreseeable purposes. Defendant’s practices and omissions were applied
27 uniformly to all members of the Florida Class, so that the questions of law and fact are common
28 to all members of the Florida Class. All putative Florida Class members were and are similarly

1 affected by having purchased, who used it for its intended and foreseeable purpose, and the
2 relief sought herein is for the benefit of Plaintiff and members of the putative Florida Class.
3 Plaintiff is informed and believe, and on that basis allege, that the Florida Plaintiff Class is so
4 numerous that joinder of all members would be impractical.

5 23. Paragraphs 24 through 30 constitute the class action allegations requested by Southern
6 District Local Rule 23.1(b).

7 24. Based on the annual sales of the Product and the popularity of the Product, it is apparent
8 that the number of consumers of the Product would at least be in the many thousands, thereby
9 making joinder impossible.

10 25. Questions of law and fact common to the Florida Plaintiff Class and the subclasses exist
11 that predominate over questions affecting only individual members, including, inter alia:

- 12 a. Whether Defendant misrepresented or omitted material facts in
13 connection with the promotion, marketing, advertising, packaging,
14 labeling and sale of the Products;
- 15 b. Whether Defendant's practices and representations made in connection
16 with the labeling, advertising, marketing, promotion and sales of the
17 Products were false and/or misleading;
- 18 c. Whether Defendant's conduct in connection with the practices and
19 representations made in the labeling, advertising, marketing, promotion
20 and sales of the Product breached express warranties with regard to the
21 Product thereby causing harm to Plaintiff and Florida Class members;
- 22 d. Whether Defendant's acts and practices in connection with the
23 promotion, marketing, advertising, packaging, labeling and sale of the
24 Products unjustly enriched Defendant at the expense of, and to the
25 detriment of, Plaintiff and Florida Class members; and
- 26 e. Whether Defendant's conduct as set forth above injured consumers and
27 if so, the extent of the injury.

28

1 26. The claims asserted by Plaintiff in this action are typical of the claims of the members of
2 the Florida Plaintiff Class as the claims arise from the same course of conduct by Defendant,
3 and the relief sought is common.

4 27. Plaintiff will fairly and adequately represent and protect the interests of the members of
5 the Florida Plaintiff Class. Plaintiff has retained counsel competent and experienced in both
6 consumer protection and class action litigation.

7 28. Certification of this Florida class action is appropriate under FRCP 23(b) and Florida
8 Rule of Civil Procedure 1.220 because the questions of law or fact common to the respective
9 Florida Class members predominate over questions of law or fact affecting only individual
10 members. This predominance makes class litigation superior to any other method available for
11 the fair and efficient adjudication of these claims. Absent a Florida class action, it would be
12 highly unlikely that the representative Plaintiff or any other Florida Class member would be
13 able to protect their own interests because the cost of litigation through individual lawsuits
14 might exceed expected recovery. Certification is also appropriate because Defendant acted or
15 refused to act on grounds generally applicable to the Florida Class, thereby making appropriate
16 final injunctive relief with respect to the Florida Class as a whole. Further, given the large
17 number of consumers of the Product, allowing individual actions to proceed in lieu of a class
18 action would run the risk of yielding inconsistent and conflicting adjudications.

19 29. A Florida class action is a fair and appropriate method for the adjudication of the
20 controversy, in that it will permit a large number of claims to be resolved in a single forum
21 simultaneously, efficiently, and without the unnecessary hardship that would result from the
22 prosecution of numerous individual actions and the duplication of discovery, effort, expense
23 and burden on the courts that such individual actions would engender. The benefits of
24 proceeding as a Florida class action, including providing a method for obtaining redress for
25 claims that would not be practical to pursue individually, outweigh any difficulties that might
26 be argued with regard to the management of this class action.

27 30. In the aggregate, the claims of the individual Florida Class members exceed the sum of
28 \$5,000,000.00, exclusive of interest and costs.

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**VI. FIRST CAUSE OF ACTION:
NEGLIGENT MISREPRESENTATION**

31. For brevity, Plaintiff realleges and incorporates by reference the General, Factual and Class allegations set forth in paragraphs 1-30 of this Complaint.

32. Defendant has represented to the public, including Plaintiff, by packaging, labeling and other means, that the Product has a natural ingredient that is "scientifically proven to neutralize even the toughest breath odors from coffee, garlic, onions and even smoking."

33. However, Defendant's representations are untrue in that the scientific record was insufficient to support these claims, all as set forth in detail above and incorporated herein. The Defendant had no credible, competent and reliable scientific evidence to support the representations.

34. Defendant made the representations herein alleged with the intention of inducing consumers to purchase its Product.

35. Plaintiff and other reasonable consumers, including the Florida Class members, relied on Defendant's labeling representations set forth herein, and, in reliance thereon, purchased the Product.

36. The reliance by Plaintiff and Florida Class members was reasonable and justified in that Defendant appeared to be, and represented itself to be, a reputable business, and it distributed the Product through reputable companies.

37. At the time Defendant made the representations described above, Defendant had no the Defendant had no credible, competent and reliable scientific evidence to support the representations.

38. Plaintiff would not have been willing to pay as much for Eclipse Breeze if he knew that it was not "scientifically proven" to neutralize the toughest breath odors

39. As a direct and proximate result of these misrepresentations, Plaintiff and Members of the Class were induced to purchase the Product and use them to neutralize the toughest breath odors from coffee, garlic, onions and even smoking as claimed on the labels, and have suffered damages to be determined at trial in that, among other things, they have been deprived of the

1 benefit of their bargain in that they bought a product that was not what it was represented to be,
2 it did not perform as represented and they have spent money on a product that had less value
3 than was reflected in the premium purchase price they paid for the product.

4 **VII. SECOND CAUSE OF ACTION:**
5 **INTENTIONAL MISREPRESENTATION**

6 40. For brevity, Plaintiff realleges and incorporates by reference the General, Factual and
7 Class allegations set forth in paragraphs 1-30 of this Complaint.

8 41. Defendant has represented to the public, including Plaintiff, by packaging, labeling and
9 other means, that the Product has a natural ingredient that is “scientifically proven to neutralize
10 even the toughest breath odors from coffee, garlic, onions and even smoking.”

11 42. However, Defendant’s representations were untrue in that the scientific record was
12 insufficient to support these claims, all as set forth in detail above and incorporated herein.

13 43. Defendant made the representations herein alleged with the intention of inducing
14 consumers to purchase its Product.

15 44. Plaintiff and other reasonable consumers, including the Florida Class members, relied
16 on Defendant’s labeling representations set forth herein, and, in reliance thereon, purchased the
17 Product.

18 45. The reliance by Plaintiff and Florida Class members was reasonable and justified in
19 that Defendant appeared to be, and represented itself to be, reputable businesses, and they
20 distributed the Product through reputable companies.

21 46. At the time Defendant made the representations described above, Defendant knew they
22 were not true, and that the scientific record was insufficient to support the representations.

23 47. Plaintiff would not have been willing to pay as much for Eclipse Breeze if he knew
24 that it was not “scientifically proven” to neutralize the toughest breath odors

25 48. As a direct and proximate result of the intentional misrepresentation alleged herein,
26 Plaintiff and Florida Class members were induced to purchase the Product and use them use
27 them to neutralize the toughest breath odors from coffee, garlic, onions and even smoking as
28 claimed on the labels, and have suffered damages to be determined at trial in that, among other

1 things, they have been deprived of the benefit of their bargain in that they bought a product that
2 was not what it was represented to be, and have spent money on a product that had less value
3 than was reflected in the purchase price they paid for the product.

4 49. Plaintiff alleges, on information and belief, that Defendant knew that the above
5 representations made for the Product were not true, and that the Defendant had no credible,
6 competent and reliable scientific evidence to support the representations, and that Defendant
7 intended that customers and the unknowing public should rely on Defendant's representations
8 in buying the Product.

9 50. Plaintiff and other members of the general public, in purchasing and using the Product
10 as herein alleged, did rely on Defendant's above representations, all to their damage as alleged.
11 In doing these things, Defendant was guilty of malice, oppression and fraud, and plaintiff and
12 Members of the Class are, therefore, entitled to recover damages.

13
14 **VIII. THIRD CAUSE OF ACTION:**
15 **VIOLATION OF THE FLORIDA DECEPTIVE AND**
16 **UNFAIR TRADE PRACTICES ACT**

17 51. For brevity, Plaintiff realleges and incorporates by reference the General, Factual and
18 Class allegations set forth in paragraphs 1-30 of this Complaint.

19 52. This cause of action is brought pursuant to the Florida Deceptive and Unfair Trade
20 Practices Act, Sections 501.201 to 201.213, Florida Statutes. The express purpose if the Act is
21 to "protect the consuming publicfrom those who engage in unfair methods of competition,
22 or unconscionable, deceptive, or unfair acts or practices in the conduct of any trade or
23 commerce" Section 501.202(2).

24 53. The sale of Eclipse Breeze chewing gum at issue in this cause was a "consumer
25 transaction" within the scope of the Florida Deceptive and Unfair Trade Practices Act, Sections
26 501.201 to 201.213, Florida Statutes.

27 54. Plaintiff is a "consumer" as defined by Section 501.203, Florida Statutes. Eclipse
28 chewing gum is a "good", within the meaning of the Act. Wrigley is engaged in trade or

1 commerce within the meaning of the Act.
2

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

6 56. Section 501.204(2), Florida Statutes states that “due consideration be given to the
7 interpretations of the Federal Trade Commission and the federal courts relating to Section
8 5(a)(1) of the Trade Commission Act”. Wrigley’s unfair and deceptive practices are likely to
9 mislead – and have misled – the consumer acting reasonably under the circumstances and,
10 therefore, violate Section 500.04, Florida Statutes and 21 U.S.C. Section 343. Further, FTC
11 rules and regulations require that Wrigley possess the same level of substantiation for its
12 advertisements at the time that they are made as it claimed in the advertisement. Wrigley claims
13 scientific proof but, upon information and belief, does not possess credible, competent and
14 reliable scientific proof.

15 57. Wrigley has violated the Act by engaging in the unfair and deceptive practices described
16 above, which offend public policies and are immoral, unethical, unscrupulous and substantially
17 injurious to consumers.

18 58. Plaintiff and the class members have been aggrieved by Wrigley’s unfair and deceptive
19 practices in that they paid for Eclipse chewing gum.

20 59. The damages suffered by the Plaintiff and the Class were directly and proximately
21 caused by the deceptive, misleading and unfair practices of Wrigley, as described above.

22 60. Pursuant to Section 501.211(1), Florida Statutes, Plaintiff and the Class seek a
23 declaratory judgment and court order enjoining the above described wrongful acts and practices
24 of the Defendant and for restitution and disgorgement.

25 61. Additionally, pursuant to Section 501.211(2), Florida Statutes and Section 501.2105,
26 Florida Statutes, Plaintiff and the Class make claims for damages, punitive damages, attorneys
27 fees and costs.
28

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, on behalf of himself and for members of the Florida class, prays for relief, jointly and severally, pursuant to each cause of action set forth in this Complaint as follows:

1. For an order certifying that the action may be maintained as a class action.
2. For an award of equitable relief as follows:
 - a. Enjoining Defendant from continuing to engage in the fraudulent business practices and deceptive marketing, promotion, labeling, advertising and selling described in this Complaint;
 - b. Requiring Defendant to make full restitution of all monies wrongfully obtained as a result of the conduct described in this Complaint;
 - c. Requiring Defendant to disgorge all ill-gotten gains flowing from the conduct described in this Complaint; and
 - d. Requiring Defendant to provide public notice of the true nature of the Product.
3. For actual damages in an amount to be proven at trial, including any damages as may be provided for by statute upon the filing of a Complaint.
4. For punitive damages in an amount to be determined at trial.
5. For an award of attorney's fees to class counsel in accordance with prevailing factors and considerations for determination of class counsel fees;
6. For an award of costs and any other relief the Court might deem appropriate.
7. For pre- and post-judgment interest on any amounts awarded.

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JURY DEMAND

Plaintiff demands trial by jury of all issues so triable.

Dated: January 24, 2011.

Respectfully submitted,

/s/ Brian W. Smith

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of January, 2011, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record identified on the attached Service List by either U.S. Mail or transmission of Notices of Electronic Filing generated by CM/ECF.

Respectfully submitted,

/s/ Brian W. Smith
Brian W. Smith, Esq.
Florida Bar No. 0470510
Smith & Vanture, LLP

EXHIBIT A

