

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY**  
**FIRST JUDICIAL DISTRICT OF PENNSYLVANIA**

**CIVIL TRIAL DIVISION**

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JASON TESAURO and ELIZABETH ELEY; on behalf of themselves and all others similarly situated,	:	AUGUST TERM, 2000
	:	No. 1011
Plaintiffs	:	
	:	
v.	:	COMMERCE PROGRAM
	:	
THE QUIGLEY CORPORATION,	:	
	:	
Defendant	:	Control No. 021867

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**OPINION**

Presently before this court is Defendant’s Motion for Judgment on the Pleadings, or in the Alternative, for Class Decertification or Modification of the Class, and Plaintiff’s Response in Opposition thereto.<sup>1</sup> Defendant’s motion raises the issue that the Complaint fails to allege pre-filing notice of a defect in Defendant’s cold remedy product (“Cold Eeze”) and fails to allege a manifestation of a defect which are purportedly two requisite allegations to support a breach of the implied warranty of merchantability claim, pursuant to 13 Pa.C.S.A. § 2314. In conjunction with this assertion, Defendant argues that the unjust enrichment claim also fails because it is dependent on the breach of warranty claim.

For the reasons set forth in this Opinion, Defendant’s Motion is denied in its entirety.

**BACKGROUND**

In two previous Opinions, this Court extensively described the facts of this case. See Tesauro v. Quigley Corp., 2002 WL 372947, \*1-3 (C.P. Phila. Jan. 25, 2002)(granting the motion for class

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<sup>1</sup>On May 8, 2002, pursuant to a companion motion of Defendant, this Court stayed class action notification pending resolution of the present motion.

certification for breach of implied warranty of merchantability and unjust enrichment claims based on the assertion that defendant's Cold Eeze product was not merchantable and that defendant received an unlawful premium paid by plaintiffs for Cold Eeze) ("Tesauro II") and Tesauro v. Quigley Corp., 2001 WL 1807782, \*1, 5-6 (C.P. Phila. Apr. 9, 2001) (overruling preliminary objections, in part, as to breach of implied warranty and unjust enrichment claims) ("Tesauro I"). For purposes of this motion, we will rely on the facts laid out in those two opinions.

## DISCUSSION

In its present motion, Defendant makes three alternative requests which will be addressed *seriatim*.

### I. Defendant's Motion for Judgment on the Pleadings

Rule 1034 of the Pennsylvania Rules of Civil Procedure ["Pa.R.C.P."] provides that "[a]fter the relevant pleadings are closed, but within such time as not to unreasonably delay the trial, any party may move for judgment on the pleadings." Pa.R.C.P. 1034(a). On a motion for judgment on the pleadings, which is similar to a demurrer, the court accepts as true all well-pleaded facts of the non-moving party, but only those facts specifically admitted by the nonmovant may be considered against him. Mellon Bank v. National Union Ins. Company of Pittsburgh, 2001 WL 79985, at \*2 (Pa.Super.Ct. Jan. 31, 2001). However, "neither party will be deemed to have admitted conclusions of law." Id. See also, Flamer v. New Jersey Transit Corp., 414 Pa.Super. 350, 355, 607 A.2d 260, 262 (1992) ("While a trial court cannot accept the conclusions of law of either party when ruling on a motion for judgment on the pleadings, it is certainly free to reach those same conclusions independently.") (citations omitted). In ruling on a motion for judgment on the pleadings, the court should confine itself to the pleadings, such as the complaint, answer, reply to new matter and any documents or exhibits properly attached to them. Kelly v. Nationwide

Ins. Co., 414 Pa.Super. 6, 10, 606 A.2d 470, 471 (1992). See also, Kotvosky v. Ski Liberty Operating Corp., 412 Pa.Super. 442, 445, 603 A.2d 663, 664 (1992). Such a motion may only be granted in cases where no material facts are at issue and the law is so clear that a trial would be a fruitless exercise. Ridge v. State Employees Retirement Board, 690 A.2d 1312, 1314 n.5 (Pa.Cmmw.Ct. 1997)(citations omitted).

Defendant first asserts that it is entitled to judgment on the pleadings on the claim for breach of the implied warranty of merchantability, pursuant to 13 Pa.C.S.A. § 2314, based on (1) the failure of the Complaint to allege that Plaintiffs provided notice to the Defendant of any breach of warranty; alleged defect in its Cold Eeze product; and (2) that the Complaint fails to allege a manifestation of any defect. Defendant further argues that the unjust enrichment claim cannot survive absent a viable breach of warranty claim.

Plaintiffs, in response, argue that (1) the filing of a Complaint is sufficient to confer the requisite notice of a breach of warranty; (2) the issue of whether Defendant received pre-filing notice of defects is disputed on the face of the pleadings; (3) Defendant's maintenance of a list of persons who have returned the product constitutes an admission that it received pre-filing notice; and (4) that the alleged defect, i.e., that Cold Eeze, as a matter of scientific fact, has no effect on the common cold and associated symptoms, would manifest itself each time it was ingested by the consumer.

First, the issue of notice of a breach of warranty was not raised either by preliminary objections, which this Court overruled as to the breach of the implied warranty claim finding that the allegations were sufficient, nor was the issue raised during the certification process. Tesauro I, 2001 WL 1807782, \*5-6; Tesauro II, 2002 WL 372947, \*5. Defendant did allege lack of notice "of any alleged nonconforming

Cold Eeze within a reasonable time after discovery of such nonconformance” in paragraph 69 of its New Matter. See Def. Answer with New Matter, ¶ 69. Plaintiff denied this allegation in its Reply to New Matter. See Pl. Reply to New Matter, ¶ 69. Thus, at first glance, it appears that a genuine issue of material fact remains as to whether notice was given and whether it was given within a reasonable time. For this reason alone, the Court should deny the Motion for Judgment on the Pleadings.

Additionally, it is not clear under Pennsylvania law that the filing of a complaint is not sufficient for purposes of notice or even if pre-filing notice is required to maintain a breach of the implied warranty of merchantability. As noted in this Court’s previous Opinion, Section 2314 of Pennsylvania’s Uniform Commercial Code allows a plaintiff to recover for a breach of the implied warranty of merchantability if he/she shows that the seller was a merchant and the goods were not merchantable at the time of the sale. 13 Pa.C.S.A. § 2314. See Tesauro II, 2002 WL 372947, \*5 n.6. The language of Section 2314 has no explicit requirement that notice of a defect is required to recover for a breach of the implied warranty of merchantability. However, it is also true that Section 2607 of Pennsylvania’s Uniform Commercial Code (“U.C.C.”) provides, in pertinent part, that: “[w]here a tender [of goods] has been accepted . . .the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller or be barred from a remedy...”. 13 Pa.C.S.A. § 2607(c)(1). Comment 4 to Section 2607 states that:

‘A reasonable time’ for notification from a retail consumer is to be judged by different standards so that in his case it will be extended, for the rule requiring notification is designed to defeat commercial bad faith, not to deprive a good faith consumer of his remedy.

The content of the notification need merely be sufficient to let the seller know that the transaction is still troublesome and must be watched. There is no reason to require that the notification which saves the buyer’s rights under this section must include a clear statement of all the objections that will be relied on by the buyer,

as under the section covering statements of defects upon rejection (Section 2-605). Nor is there reason for requiring the notification to be a claim for damages or of any threatened litigation or other resort to a remedy. The notification which saves the buyer's rights under this Article need only be such as informs the seller that the transaction is claimed to involve a breach, and thus opens the way for normal settlement through negotiation.

Cmt. 4 to § 2607. Further, Comment 6 to Section 2607 re-emphasizes that the burden of proof to establish the breach rests on the buyer after acceptance, but that this rule is “one purely of procedure when the tender accepted was non-conforming and the buyer has given the seller notice of breach under subsection (3).” Cmt. to § 2607.

Even assuming that notice of a breach is required for all warranties under Pennsylvania's version of the U.C.C., the filing of a complaint has been held to satisfy the notice requirement. See Yates v. Clifford Motors, Inc., 283 Pa.Super. 293, 308-09, 423 A.2d 1262, 1270 (1980)(holding that, in a suit for damages resulting in the rescission of a contract for the purchase for a truck , the filing of the complaint was adequate notice that the truck was being rejected given the fact that Section 1-102(1) of the U.C.C. requires liberal construction of the Code's provisions); Beneficial Commercial Corp. v. Brueck, 23 Pa. D. & C.3d 34, , 40, n.3 (C.P. Allegheny Cty. 1982)(“Under certain circumstances, it appears that a third party complaint may meet the requirements of both [section 2607(c) and 2607(e)].”). See also, Bednarski v. Hideout Homes & Realty, Inc., 709 F.Supp. 90, 92-93 (M.D. Pa. 1988)(applying Pennsylvania law)(recognizing that a third party complaint may serve as adequate notice as required by Section 2607 and that the issue of whether such notice was provided within a reasonable time is a jury question); In re Bridgestone/Firestone, Inc. Tires Products Liability Litigation, 155 F.Supp.2d 1069, 1110-1111, 2001 WL 883151, \*29-30 (S.D. Ill. 2001), rev'd, in part, on other grounds, 288 F.3d 1012 (7<sup>th</sup> Cir.

2002)(holding that the filing of a complaint may be sufficient to satisfy the notice requirements of § 2-607 under certain circumstances)(comparing cases which have held both ways).

Defendant relies on Connick v. Suzuki Motor Co., Ltd., 174 Ill.2d 482, 494, 675 N.E.2d 584, 590, 221 Ill. Dec. 389, 395 (Ill. 1997)(noting that under either Illinois or Pennsylvania versions of the U.C.C., “[o]nly a consumer plaintiff who suffers a personal injury may satisfy the section 2-607 notice requirement by filing a complaint stating a breach of warranty action against the seller” because of the U.C.C.’s preference that the breach be cured without a lawsuit.). This Court does not find Connick to be controlling or persuasive, but rather finds that the circumstances of this case and the case law cited above would deem that the filing of the complaint in this matter constitutes sufficient notice of the breach of the implied warranty of merchantability. Moreover, even prior to the filing of this action, the Federal Trade Commission (“FTC”) had filed a complaint against Defendant, asserting violation of the Federal Trade Commission Act as a result of allegedly false and misleading representations made in connection with the sale of Cold Eeze products. See Compl., ¶ 4. Though the FTC action did not question the “merchantability” of Cold Eeze or whether the product worked as advertised, that action did alert Defendant as to a potential problem with its product. Further, Defendant may have been on notice of potential problems as evidenced by the list it maintains of persons who have “returned the product because they were dissatisfied.” Def. Proposed Notification Procedure and Proposed Form of Notice for Class Members, at 6. In any event, it is not clear that Defendant is entitled to its Motion for Judgment on the Pleadings on the grounds of lack of notice.

As noted above, to recover on its breach of warranty claim, Plaintiffs need to allege and ultimately prove that Cold Eeze was defective. Examining the allegations in the Complaint, this Court finds that they

did comply with this requisite allegations. In its breach of warranty claim (Count II), Plaintiffs alleged, in pertinent part, that:

. . . Defendant impliedly affirmed, promised and/or warranted to Plaintiffs and the class members that Cold-Eeze zinc lozenges, which Defendant manufactured, promoted, advertised, offered for sale, and sold to Plaintiff and the class members was of merchantable quality, fit for use and consumption as: preventing users from contracting colds; reducing the risk of contracting pneumonia; relieving or reducing the symptoms of hay fever and allergies; reducing the severity of cold symptoms in children; and preventing children from contracting colds . . . .

Defendant's Cold-Eeze zinc lozenges were unfit for its purpose, was misbranded, and caused loss or damage to the Plaintiff and the class members . . . .

Compl., ¶¶ 32-33. Plaintiffs also alleged that Defendant breached its implied warranty by *inter alia* mislabeling its product and that the product was not fit for its ordinary purpose, resulting in injury to Plaintiffs. *Id.* at ¶ 35.

Defendant relies on Grant, et al. v. Bridgestone/Firestone, Inc., et al., 2002 WL 372941, at \*4-5 (C.P. Phila. Jan. 14, 2002) which dismissed the breach of the implied warranty of merchantability because the named plaintiffs had not actually experienced the alleged defect of the tendency to suffer sudden and complete tread separation in their own tires. In Grant, this Court noted that “a breach of implied warranty of merchantability theory in Pennsylvania states that a merchant is ‘only liable for harm caused by a defect in their product.’” *Id.* at \*4 (citing Thomas v. Carter-Wallace Inc., 27 Pa. D. & C.4th 146, 149 (C.P. Monroe 1994)). See also, Dambacher by Dambacher v. Mallis, 336 Pa.Super. 23, 485 A.2d 408 (1984), aff'd, 449 Pa.Super. 711, 673 A.2d 412 (1995); Altronics of Bethlehem, Inc. v. Repco, Inc., 957 F.2d 1102, 1105 (3d Cir.1992)(an implied warranty of merchantability plaintiff must establish, inter alia, “that the product malfunctioned”); Chin v. Chrysler Corp., 182 F.R.D. 448, 460 (D.N.J.1998)(“[i]n most

jurisdictions, the courts recognize that unless a product actually manifests the alleged defect, no cause of action for breach of express or implied warranty or fraud is actionable.”); Briehl v. General Motors Corp., 172 F.3d 623, 628 (8th Cir.1999)(dismissing plaintiff’s breach of implied warranty claim where the plaintiffs suffered no injury); Jarman v. United Indus. Corp., 98 F.Supp.2d 757, 768 (S.D.Miss.2000) (a warranty claim requires that “there is actually a failure in product performance,” and “[m]ere suspicion of a lost bargain ... will not support an award of damages.”); In re Air Bag Prods. Liab. Litig., 7 F.Supp.2d 792, 805 (E.D.La.1998)(“the absence of a manifested defect precludes a cognizable claim .”); Yost v. General Motors Corp., 651 F.Supp. 656 (D.N.J.1986)(holding that damage is a necessary element of breach of warranty claim); American Suzuki Motor Corp. v. Superior Ct., 44 Cal.Rptr.2d 526, 529 (Cal.Ct.App.1995)(holding that, “in the case of automobiles, the implied warranty of merchantability can be breached only if the vehicle manifests a defect that is so basic it renders the vehicle unfit for its ordinary purpose of providing transportation.”).

Unlike Grant, here, Plaintiffs did allege that they suffered injury as a result of the Cold Eeze being defective or unmerchantable or not fit for its ordinary purpose. Compl., ¶¶ 32-36. It is true that Plaintiffs did not specifically allege that the defect was that Cold Eeze, as a matter of science, does not “work on the common cold and its symptoms” and did not allege that each time Cold Eeze is ingested, the defect manifests itself. See Pl. Mem. of Law, at 16-17. Nonetheless, the absence of these allegations is not fatal to Plaintiffs’ breach of implied warranty claim. It is reasonable to infer that the alleged defect and resultant injury is that Plaintiffs ingested Cold Eeze which was warranted to have an effect on the common cold and that it did not work as warranted.

Additionally, this Court found in Weiler v. SmithKline Beecham Corp., 53 Pa. D. &C.4th 449,

2001 WL 1807382, \*6 (C.P. Phila. Oct. 6, 2001) that Pennsylvania does not require physical harm but may recover economic injuries for breach of warranty. Id. at \*6 (citing Altronics of Bethlehem, Inc. v. Repco, Inc., 957 F.2d 1102, 1106-07 (3<sup>rd</sup> Cir. 1992); and Rivera v. Wyeth Ayerst Laboratories, 121 F.Supp.2d 614 (S.D. Tex. 2000)). It is of no import that Altronics did not involve the ingestion of a product but concerned a dispute over whether a radio-operated security system was defective. 957 F.2d at 1104. It also does not matter that, subsequent to the Weiler decision, the Court of Appeals for the Fifth Circuit reversed Rivera on the grounds that the plaintiffs had not alleged how the drug was defective as to them and had thus not suffered any injury in fact. 283 F.3d 315, 319-320 (5<sup>th</sup> Cir. 2002). The Pennsylvania Superior Court allows a plaintiff in all breach of warranty cases brought under the warranty provisions of the UCC to recover all types of damages sought, including personal injury, property damage or economic loss. Moscatiello v. Pittsburgh Contractors Equip. Co., 407 Pa.Super. 378, 390, 595 A.2d 1198, 1203 (1991)(citations omitted).

For these reasons, the Court must deny the Motion for Judgment on the Pleadings on the breach of implied warranty claim. Likewise, Plaintiffs may proceed on their unjust enrichment claim whether or not it is dependent on the breach of warranty claim.

## II. Defendant's Motion for Decertification

Defendant also moved to decertify the Class pursuant to Pa.R.C.P. 1710(d) on the grounds that the question of whether a defect in Cold Eeze actually caused harm is highly individualistic and requires a mini-hearing on the merits of each individual claim. Def. Mem. of Law, at 18. Defendants also speculate that perhaps “some Cold-Eeze users failed to follow Cold-Eeze’s directions and prohibitions about mixing Cold-Eeze with citrus fruit or juice, or they suffered common cold symptoms for reasons unrelated to any

use of Cold-Eeze.” *Id.* Notwithstanding these assertions, Defendant presents no new law or facts which warrant overturning the recent granting of class certification. *Tesauro II*, 2002 WL 372947, \*4-10. Therefore, this Court is denying the Motion to Decertify the Class.

III. Defendant’s Motion for Clarification

Finally, Defendant moves to modify the class definition because the complexion of the case has changed from one of false advertising to a breach of an implied warranty of merchantability and that any possible notice of breach date would be on August 14, 2000, the date upon which the Complaint was filed. Def. Mem. of Law, at 20. Defendant also requests that the Plaintiff supplement the record to specify the specific nature and time frame of the alleged defect, if any, in Cold Eeze. *Id.* Plaintiff, in turn, argues that this request should be summarily denied. This Court agrees.

As noted by the Pennsylvania Superior Court, “[g]enerally, in a breach of warranty action under Section 2714<sup>2</sup> of the Pennsylvania Uniform Commercial Code, the measure of damages is the actual

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<sup>2</sup>Section 2714, which governs a buyer’s damages when the goods are accepted, provides as follows:

- (a) Damages for nonconformity of tender.--Where the buyer has accepted good and given notification (section 2607(c) ) he may recover as damages for any nonconformity of tender the loss resulting in the ordinary course of events from the breach of the seller as determined in any manner which is reasonable.
- (b) Measure of damages for breach of warranty.--The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.
- (c) Incidental and consequential damages.--In a proper case any incidental and consequential damages under section 2715 (relating to incidental and consequential damages of buyer) may also be recovered.

13 Pa.C.S.A. § 2714.

difference in value between the goods as promised and the goods as received.” Price v. Chevrolet Motor Div. of General Motors Corp., 765 A.2d 800, 811 (Pa.Super.Ct. 2000)( citing AM/PM Franchise v. Atlantic Richfield, 526 Pa. 110, 118, 584 A.2d 915, 919 (1990)). As such, the measure of Plaintiffs’ damages would date from the date of purchase, provided Plaintiffs prove that the Cold Eeze was defective on said date.

Here, the class has been defined as follows: “[t]he class shall consist of all persons, who between August 15, 1996 and November 20, 1999 (the “Class Period”), purchased defendant’s Cold-Eeze Zinc Lozenges, but not Cold-Eezer Plus Zinc Gluconate.” Order, dated Jan. 25, 2002, ¶ 2. It is not apparent to this Court why this definition must be modified since it is based on the time period in which the named plaintiffs purchased Cold Eeze. For this reason, this Court is denying Defendant’s Motion to Modify the Class Definition.

### **CONCLUSION**

For the reasons set forth above, this Court is issuing a contemporaneous Order which denies Defendant’s Motion in its entirety.

**BY THE COURT,**

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**JOHN W. HERRON, J.**

**Dated:** July 9, 2002

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**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY**  
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	:	
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**ORDER**

AND NOW, this 9th day of July, 2002, upon consideration of Defendant's Motion for Judgment on the Pleadings, or in the Alternative, for Class Decertification or Modification of the Class ("Motion"), and Plaintiff's Response in Opposition thereto, all other matters of record and in accord with the Opinion being filed contemporaneously with this Order, it is hereby **ORDERED** that the Motion is **Denied** in its entirety.

**BY THE COURT,**  
  
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**JOHN W. HERRON, J.**