IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

CIVIL TRIAL DIVISION

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. 051340

OPINION

This Opinion addresses the motion of plaintiffs, Jason Tesauro and Elizabeth Eley, to certify a national class of all persons who, between August 15, 1996 and November 20, 1999, purchased Cold-Eeze Zinc Lozenges or Cold-Eezer Plus Zinc Gluconate Lozenges (collectively "Cold-Eeze") manufactured by defendant, the Quigley Corporation. This class action seeks to remedy the alleged wrongdoing of defendant in marketing and advertising Cold-Eeze through express and/or implied false and misleading representations.

For the reasons set forth in this Opinion, the Court is granting the Motion for Certification as to Counts II for breach of the implied warranty of merchantability, pursuant to 13 Pa. C.S.A. § 2314, and as to Count III for Unjust Enrichment, but only as to the Cold-Eeze product and not the Cold-Eezer product. However, the court is denying the Motion for Certification as to the remaining count under the Pennsylvania Unfair Trade Practices and Consumer Protection Law ("UTP/CPL"), codified at 73 P.S. §§ 201-1 et seq, because plaintiffs failed to meet the typicality element to support their motion on that claim.

FINDINGS OF FACT

1. Plaintiff Jason Tesauro ("Tesauro") is an adult individual residing at 232 Sydney Street, Atlanta, Georgia, who purchased and used between twelve (12) and twenty (20) boxes of Cold-Eeze from August, 1996 through January or February of 2000. Tesauro Dep. at 6, 22-24, 74-75, 80-81.[1]

2. Tesauro paid approximately $5.00 per box of Cold-Eeze, mainly from two health food stores in Atlanta, Georgia, as well as stores in New York and New Jersey, but he has no receipts for these purchases. Tesauro Dep. at 16-21, 44-45, 53-54.

3. Tesauro never purchased Cold-Eeze in Pennsylvania, and he did not purchase or use Cold-Eezer at any time. Tesauro Dep. at 22, 46, 48, 70.

4. Tesauro's purpose in purchasing Cold-Eeze was to alleviate cold symptoms and improve his immune system, but his purchases were not used to alleviate the symptoms stated in the advertisements which are specifically referenced to in the Complaint at paragraph 2. Tesauro Dep. at 26-28, 32-34, 45, 52-53, 73.

5. Tesauro never saw, heard or relied on any of the radio, television or internet advertisements that are the subject of the instant complaint. Tesauro Dep. at 13-15, 45, 58-59, 64, 69-70.

6. His purchase and use of Cold-Eeze was upon the recommendation of his mother, a chiropractic student, his own research on the use of zinc to reduce cold symptoms and the product's packaging

[1]The transcript of Tesauro's deposition, dated July 31, 2001, was attached at Exhibit A to defendant's Memorandum of Law in Opposition to the Motion for Class Certification. It was also submitted in its entirety as Exhibit D-2 at the hearing on November 16, 2001.

itself. Tesauro Dep. at 29-32, 41-43, 58-59, 68.

7. Plaintiff Elizabeth Eley ("Eley") is an adult individual residing at 232 Sydney Street, Atlanta Georgia. Eley Dep. at 6.[2]

8. Eley purchased and used Cold-Eeze from approximately the Winter of 1996 through the end of 1999 or beginning of 2000. Eley Dep. at 28, 47.

9. During that time period, Eley purchased approximately $70.00 to $90.00 worth of Cold-Eeze at CVS drug stores and perhaps Eckerd drug stores in Atlanta, Georgia. Eley Dep. at 29-30, 32, 53, 62-63.

10. Eley never purchased Cold-Eeze in Pennsylvania, and she does not recall if the product she purchased was Cold-Eezer or just Cold-Eeze. Eley Dep. at 33.

11. Eley's initial purchase of Cold-Eeze was because her brother told her that it would reduce and relieve cold symptoms. Eley Dep. at 19-21.

12. Eley also continued to purchase Cold-Eeze based on the packaging or "product display" and discussions among her peers, but she did not rely on any of the advertisements broadcast over television, the radio, or the internet. Eley Dep. at 10, 12, 28, 34-38,

13. Tesauro and Eley are engaged to be married. Tesauro Dep. at 10.

14. Defendant, the Quigley Corporation ("Quigley"), is a Nevada corporation with its principal place of business at 10 South Clinton Street, P.O. Box 1349, Doylestown, PA 18901. Compl., ¶ 9.

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[2]The transcript of Eley's deposition, dated July 31, 2001, was attached at Exhibit B to defendant's Memorandum of Law in Opposition to the Motion for Class Certification. It was also submitted in its entirety as Exhibit D-3 at the hearing on November 16, 2001.

15. Since 1994 and throughout the Class Period, Quigley has manufactured, marketed and distributed Cold Eeze and Cold Eezer through numerous independent, chain and discount stores throughout the United States. Compl., ¶ 19; Aff. of Guy J. Quigley, ¶ 9.[3]

16. The Complaint alleges that the consuming public has been inundated with information regarding the alleged beneficial effects of zinc and other dietary supplements and that Quigley has capitalized on that perception and has deceived consumers into paying a premium price to purchase Cold-Eeze zinc lozenges. Compl., ¶ 20.

17. Specifically, the Complaint alleges that Quigley made the following claims regarding its product: that the Cold-Eeze zinc lozenges would prevent users from contracting colds; would reduce the risk of contracting pneumonia; would relieve or reduce the symptoms of hay fever and allergies; would reduce the severity of cold symptoms in children; and would prevent children from contracting colds. Compl., ¶ 2.

18. Quigley allegedly disseminated these representations through advertisements over cable television, the internet and the radio. Compl., ¶ 21.

19. As alleged, in making these claims regarding its product, Quigley falsely represented, expressly or by implication, that it possessed and relied upon a reasonable basis for its claims regarding its product. Compl., ¶¶ 2, 22.

20. In 1997, alone, Quigley allegedly reported that it was shipping $1.5 million of Cold-Eeze per week

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[3]The affidavit of Mr. Guy J. Quigley, president and chief executive officer of Quigley, is attached at Exhibit D to defendant's Memorandum of Law in Opposition to the Motion for Class Certification.

to its customers and that it had achieved a record total of $70.2 million in sales for Cold-Eeze in that year. Compl., ¶¶ 23, 39.

21. In February of 1999, the Federal Trade Commission ("FTC") filed a complaint against Quigley, charging it with violations of the Federal Trade Commission Act as a result of the same allegedly false and misleading representations that are the subject of the instant action. Compl., ¶ 4.

22. In November of 1999, Quigley and the FTC entered into a Consent Order, pursuant to which, Quigley agreed that it would cease and desist from making any of the subject representations, but that Order did not include any remedy for restitution by Quigley to any of its customers who had bought the Cold-Eeze product. Compl., ¶¶ 5-6.

23. Plaintiffs have initiated the present action, asserting claims under Pennsylvania's UTP/CPL, breach of the implied warranty of merchantability in violation of 13 Pa.C.S.A. § 2314, and unjust enrichment.

24. In the present motion, plaintiffs seek certification of a class of "all persons who, between August 15, 1996 and November 20, 1999 (the "Class Period"), purchased [d]efendant's Cold-Eeze Zinc Lozenges and/or Cold-Eezer Plus Zinc Gluconate." Pl. Motion for Certification at 1-2.

DISCUSSION

The purpose behind allowing class action suits is "to provide a means by which the claims of many individuals could be resolved at one time, thereby eliminating the possibility of repetitious litigation and providing small claimants with a method to seek compensation for claims that would otherwise be too small to litigate." DiLucido v. Terminix Int'l, Inc., 450 Pa.Super. 393, 397, 676 A.2d 1237, 1239 (1996) (citing Bell v. Beneficial Consumer Discount Co., 465 Pa. 225, 231, 348 A.2d 734, 737 (1975)). See also,

Lilian v. Commonwealth, 467 Pa. 15, 21, 354 A.2d 250, 253 (1976) ("[t]he class action in Pennsylvania is a procedural device designed to promote efficiency and fairness in the handling of large numbers of similar claims").

A motion for class certification addresses not the substance of a plaintiff's claims but rather the procedure by which those claims should be addressed. See Pa.R.C.P. 1707 - Explanatory Note-1977 (noting that the hearing for certification "is not concerned with the merits of the controversy."). This principle requires that the court focus on the factors set forth in the Pennsylvania Rules of Civil Procedure, not the defendant's specific behavior and legal violations, as alleged in the Complaint. For a suit to proceed as class action, Pennsylvania Rule of Civil Procedure 1702 requires that five criteria be met:

> (1) the class is so numerous that joinder of all members is impracticable;
> (2) there are questions of law or fact common to the class;
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class;
> (4) the representative parties will fairly and adequately assert and protect the interests of the class under the criteria set forth in Rule 1709; and
> (5) a class action provides a fair and efficient method for adjudication of the controversy under the criteria set forth in Rule 1708.

Pa.R.C.P. 1702.[4] The burden of proving each of these elements is initially on the moving party, although this burden "is not heavy and is thus consistent with the policy that decisions in favor of maintaining a class action should be liberally made." Cambanis v. Nationwide Ins. Co., 348 Pa.Super. 41, 45, 501 A.2d 635, 637 (1985) (citing Bell v. Beneficial Consumer Discount Co., 241 Pa.Super. 192, 205, 360 A.2d 681, 688 (1976)). Once the moving party has established that each of the elements is satisfied, "the class

[4] It has been noted that "the requirements for class certification are closely interrelated and overlapping . . . ." Janicik v. Prudential Ins. Co., 305 Pa.Super. 120, 130, 451 A.2d 455 (1982) (citations omitted).

opponent shoulders the burden, which has shifted, of coming forward with contrary evidence challenging the prima facie case." D'Amelio v. Blue Cross of Lehigh Valley, 347 Pa.Super. 441, 449, 500 A.2d 1137, 1141 (1985)(citations omitted).

Applying each of these elements to the present case, this court finds that plaintiffs have satisfied their motion for certification as to Count II of the Complaint, for breach of the implied warranty of merchantability, and as to Count III of the Complaint, for unjust enrichment. However, plaintiffs cannot meet the typicality element or show a sufficiently predominant commonality of issues as to their UTP/CPL claim since the named plaintiffs never saw, heard or relied upon any of the allegedly false advertisements. At oral argument on this motion, plaintiffs conceded that they would not be able to proceed on their UTP/CPL claim given the decision in Weinberg v. Sun Co., Inc., – Pa. –, 777 A.2d 442 (2001).[5] See 11/16/01 N.T. 9-10. As such, this court's Opinion will focus on the certification requirements as to the other two claims.

I. Numerosity

The numerosity requirement set forth in Pa.R.C.P. 1702(1) is not determined by applying a specific formula. As stated by the Pennsylvania Superior Court:

> Whether the number is so large as to make joinder impracticable is dependent not upon any arbitrary limit, but rather upon the circumstances surrounding [each] case. In determining numerosity, the court should examine whether the number of potential individual plaintiffs would pose a grave imposition on the resources

[5]In Weinberg, an action brought under the false advertising provisions of the UTP/CPL, the Pennsylvania Supreme Court determined that the questions of fact as to causation and reliance for each individual private plaintiff would be "numerous and extensive" and would predominate over the common issues. 777 A.2d at 446. Thus, the Court agreed with the trial court's denial of class certification. Id.

> of the court and an unnecessary drain on the energies and resources of the litigants. The class representative need not plead or prove the number of class members so long as [he/]she is able to define the class with some precision and affords the court with sufficient indicia that more members exist than it would be practicable to join.

Janicik v. Prudential Ins. Co., 305 Pa.Super. 120, 131-32, 451 A.2d 451, 456 (1982)(citations and quotation marks omitted). See also, Weismer by Weismer v. Beech-Nut Nutrition Corp., 419 Pa.Super. 403, 408, 615 A.2d 428, 430 (1992).

In support of this element, plaintiffs assert that they have averred that defendant's annual sale of zinc lozenges during the Class Period amounted to approximately $70 million. Compl., ¶¶ 23, 39. Further, an individual box of Cold-Eeze cost approximately $5.00. See Finding of Fact, # 2. While plaintiffs do not set forth a precise number of purchasing consumers, the estimated sales figure, combined with the definition of the Class which includes all purchasers of Cold-Eeze nationwide during the Class Period satisfies the numerosity requirement. Contrary to defendant's assertion, the putative class is not imprecisely defined. Further, the issue as to whether the injured parties saw, heard or relied on the subject advertisements is no longer relevant to the present determination since plaintiffs have conceded that they can not proceed on the UTP/CPL claim and claims for breach of the warranty of merchantability or for unjust enrichment do not require reliance on the allegedly false advertisements.

II. Commonality

A sustainable class action requires a plaintiff to show commonality of issues:

> The common question of fact means precisely that the facts must be substantially the same so that proof as to one claimant would be proof as to all. This is what gives the class action its legal viability. If . . . each question of disputed fact has a different origin, a different manner of proof and to which there are different defenses, we cannot consider them to be common questions of fact within the meaning of Pa.R.C.P. 1702.

Allegheny County Housing Auth. v. Berry, 338 Pa.Super. 338, 342, 487 A.2d 995, 997 (1985) (citation omitted). See also, D'Amelio, 347 Pa.Super. at 452, 500 A.2d at 1142 ("[w]hile the existence of individual questions is not necessarily fatal, it is essential that there be a predominance of common issues shared by all class members which can be justly resolved in a single proceeding").

A plaintiff generally satisfies its burden of showing commonality where "the class members' legal grievances arise out of the same practice or course of conduct on the part of the class opponent." Foust v. Southeastern Pa. Transp. Auth., 756 A.2d 112, 119 (Pa.Commw.Ct. 2000)(citing Janicik, 305 Pa.Super. at 133, 451 A.2d at 457)(quotation marks omitted). In examining the commonality of claims, a court should focus on the cause, and not the amount, of the alleged damages. Weismer, 419 Pa.Super. at 409, 615 A.2d at 431 ("[o]nce a common source of liability has been clearly identified, varying amounts of damages among the plaintiffs, will not preclude class certification.").

Here, with respect to the breach of the implied warranty of merchantability and the unjust enrichment claims, plaintiff asserts that the common questions of law and fact include:

> (1) whether defendant violated its warranty [of merchantability] with respect to its zinc lozenges; and
>
> (2) whether the monies that defendant received for its zinc lozenge products at the time of its alleged misrepresentation of its product amounted to unjust enrichment.

See Pl. Proposed Order in Support of their Motion for Certification. Contrary to defendant's position, it does appear that the claims of plaintiffs and of the putative class members do arise from the same general legal grievance, i.e., that the Cold-Eeze product was somehow not merchantable and that defendant received an unlawful premium paid by plaintiffs for Cold-Eeze, retention of which would unjustly enrich the

defendant.

In its memorandum of law, defendant's main argument in opposition to certification focused on the UTP/CPL claim, which is no longer relevant. However, at oral argument, defendant relied upon Berry, 338 Pa.Super. at 343, 487 A.2d at 998, for the proposition that breach of an implied warranty must be decided on a case-by-case basis as to the materiality of the breach. See 11/16/01 N.T. 33. However, Berry involved a breach of the implied warranty of habitability and the court determined that a class action was not suitable because each case would require different proof as to whether the condition was breached by the landlord, whether there was negligence on the part of the tenant or third party and whether the tenant failed to give notice of the condition. 338 Pa.Super. at 343, 487 A.2d at 998. This court does not find Berry to be instructive. Rather, without looking at the merit of the claim for breach of the implied warranty of merchantability under the Uniform Commercial Code ("UCC"),[6] it does appear that common questions of law and fact exist as to whether or not defendant's Cold-Eeze product was merchantable.

With respect to the unjust enrichment claim, defendant, at oral argument, relied upon MacAleer

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[6]To recover for a breach of the implied warranty of merchantability under the UCC, as adopted in Pennsylvania, a plaintiff must show that the seller was a merchant and the goods were not merchantable at the time of the sale. 13 Pa.C.S.A. § 2314.

Here, it is undisputed that defendant was a merchant and this court previously overruled the demurrer to the UCC implied warranty claim, finding that Cold-Eeze lozenges were clearly goods. See Tesauro, et al. v. The Quigley Corp., August 2000, No. 1011, slip op. at 11 (C.P. Phila. Apr. 9, 2001)(Herron, J.)(citing 13 Pa.C.S.A. § 2105(a)).

Though it is not apparent to this court how plaintiffs will ultimately prove the merit of this claim, i.e., that the Cold-Eeze zinc lozenges were not fit for their ordinary purpose or otherwise not merchantable, that determination is not before this court in the present motion.

v. Sun Oil Co., 280 Pa.Super. 148, 152, 421 A.2d 449, 450 (1980), which determined that to succeed on an unjust enrichment claim in a class action, there must be a showing of detrimental reliance on the part of the class due to the representation made by defendant, bad faith by defendant, and that an unjust enrichment would accrue to defendant. This was the only case cited and the only case which this court could find that required detrimental reliance to make out an unjust enrichment claim. More recently, the Pennsylvania Superior Court required the following elements for an unjust enrichment claim: "benefits conferred on defendant by plaintiff, appreciation of such benefits, and acceptance and retention of such benefits under such circumstances that it would be inequitable for defendant to retain the benefit without payment of value." Wiernik v. PHH U.S. Mortgage Corp., 736 A.2d 616, 622 (Pa.Super.Ct. 1999), app. denied, 561 Pa. 700, 751 A.2d 193 (2000). As such, this court does not agree that detrimental reliance is a requisite element to proceed as a class action on an unjust enrichment claim. Defendant's argument is more directed to the merits of the claim, which again is not before this court with this motion. Rather, this court finds that there is sufficient commonality as to plaintiffs' unjust enrichment claim as it stems from the same legal grievance. The fact that there may be a difference as to the amount of damages with regard to amount paid by individual members of the class for Cold-Eeze does not preclude class certification. See Weismer, 419 Pa.Super. at 409, 615 A.2d at 431.

III. Typicality

As the third element in the certification test, the moving plaintiff must show that the putative class members' claims and defenses are typical of the entire class. The purpose behind this requirement "is to determine whether the class representatives' overall position on the common issues is sufficiently aligned with that of the absent class members, to ensure that the pursuit of their interests will advance those of the

proposed class members." DiLucido., 450 Pa.Super. at 404, 676 A .2d at 1242. The existence of "factual differences with regard to each member of the class does not render the named parties' claims atypical of the class as a whole." Cribb v. United Health Clubs Inc., 336 Pa.Super. 479, 484, 485 A.2d 1182, 1185 (1985) (citing Ablin, Inc. v. Bell Tel. of Pa., 291 Pa.Super. 40, 435 A.2d 208 (1981)).

Here, the claims asserted on behalf of Tesauro and Eley do appear to be sufficiently typical with respect to the claims of the putative class members. The mere fact that the named representatives did not purchase Cold-Eeze in Pennsylvania does not mean that Pennsylvania law does not apply or that the laws of other states would present any conflict of laws issue. Defendant does not point to any reason, let alone a significant one, as to why Pennsylvania's adoption of the UCC's breach of the implied warranty of merchantability would not apply to plaintiffs' claims and the claims of the class members. Nor did defendant point to any conflict between an unjust enrichment claim in Pennsylvania and one in another state. Therefore, this court finds that the typicality element has been met with respect to Cold-Eeze. However, neither Tesauro nor Eley appear to have ever purchased or used Cold-Eezer. See Findings of Fact, ## 3, 10. Therefore, plaintiffs cannot satisfy the typicality requirement as to that product and will not be certified with respect to Cold-Eezer.

IV. Fair and Adequate Representation

In reviewing whether a class action plaintiff will fairly and adequately represent the class's interests, a court must consider, among other matters,[7] the criteria set forth in Pennsylvania Rule of Civil Procedure

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[7]Courts considering "other matters" have looked at the following:

Evidence of dishonesty, bad character, disregard of duties, abdication to the unfettered discretion of class counsel, or of having been solicited to be class representative by counsel who are

1709, which reviews:

> (1) whether the attorney for the representative parties will adequately represent the interests of the class,
>
> (2) whether the representative parties have a conflict of interest in the maintenance of the class action, and
>
> (3) whether the representative parties have or can acquire adequate financial resources to assure that the interests of the class will not be harmed.

Pa.R.C.P. 1709. Courts have held that "an affidavit of counsel that it will advance the necessary costs is all that is required" to meet the adequate financial resources requirement. Janicik, 305 Pa.Super. at 137-38, 451 A .2d at 459-60. Further, as a preliminary matter, "'[a] litigant must be a member of the class which he or she seeks to represent at the time the class is certified by the . . . court' in order to ensure due process to the absent class members and to satisfy the requirements of standing." Id. at 135, 451 A.2d 458.

First, plaintiffs Tesauro and Eley, as consumer purchasers of Cold-Eeze during the Class Period, are members of the putative class. See Compl., ¶¶ 1, 7, 8. Further, plaintiffs' counsel have attached a copy of the firm biography at Exhibit A to the Motion for Certification. This biography apparently

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conducting the suit for their own gain, will all weigh against the named party's adequacy as a representative. In contrast, evidence of honesty, willingness to pursue the matter, knowledge of facts underlying the action, understanding of the essence of the legal claim, a desire to right a perceived wrong, or the hope of recovery will all support a named party's adequacy as a representative.

Janicik, 305 Pa.Super. at 140, 451 A.2d at 461 (citations omitted). Plaintiffs represent that they "are knowledgeable about the underlying facts which give rise to the claims asserted in the Complaint and are prepared to prosecute these claims vigorously on behalf of all Class members." Pls. Mem. of Law, at 12. There does not appear to been any evidence to the contrary with respect to the representative parties' adequacy.

demonstrates sufficient competency to represent the interests of the class. In addition, it does not appear that any conflicts of interest exist or that plaintiffs do not have adequate financial resources to prosecute the action. In their memorandum of law, plaintiffs state that their "counsel has undertaken to advance all costs and expenses incurred to prosecute the action." Pls. Mem. of Law, at 11. It therefore appears that plaintiffs have met the requirement of showing that they will be fair and adequate representatives of the class.

V. Fair and Efficient Method of Adjudication

A court must also determine that a class action would constitute a fair and efficient method of resolving the issues in dispute, a conclusion that presupposes finding that "common questions of law or fact predominate over any question affecting only individual members." Pa. R.C.P. 1708. In determining fairness and efficiency under Rule 1708, "the court must balance the interests of the litigants, present and absent, and of the court system." Janicik, 305 Pa.Super. at 141, 451 A.2d at 461. Additionally, a Pennsylvania class action need not be "superior" to alternative methods of suit, in contrast to the federal rules. Id. Rather, in striking the balance of the interests of the litigants and the judicial system, the court should be mindful that the class action is a "procedural device designed to promote efficiency and fairness in handling large numbers of similar claims." Id. (citing Lillian v. Commonwealth, 467 Pa. 15, 21, 354 A.2d 250, 253 (1976)).

Pennsylvania Rule of Civil Procedure 1708 sets forth the following criteria to determine if a class action is a fair and efficient method of adjudication:

> (1) whether common questions of law or fact predominate over any question affecting only individual members;
> (2) the size of the class and the difficulties likely to be encountered in the management of

the action as a class action;
(3) whether the prosecution of separate actions by or against individual members of the class would create a risk of
(i) inconsistent or varying adjudications with respect to individual members of the class which would confront the party opposing the class with incompatible standards of conduct;
(ii) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of other members not parties to the adjudications or substantially impair or impede their ability to protect their interests;
(4) the extent and nature of any litigation already commenced by or against members of the class involving any of the same issues;
(5) whether the particular forum is appropriate for the litigation of the claims of the entire class;
(6) whether in view of the complexities of the issues or the expenses of litigation the separate claims of individual class members are insufficient in amount to support separate actions;
(7) whether it is likely that the amount which may be recovered by individual class members will be so small in relation to the expense and effort of administering the action as not to justify a class action.

Pa.R.C.P. 1708(a).[8]

a. Predominancy of Common Questions of Law and Fact

As discussed *supra* in Part II, this court found that the common questions of law and fact do

[8]This criteria applies where monetary recovery alone is sought. Subsection (c) of Rule 1708 requires the court to consider the criteria in both subsections (a) and (b) when both monetary and other relief is sought. Upon examination of the remaining claims in the Complaint, it appears that plaintiffs primarily seek monetary relief, as well as a declaration that defendant breached the implied warranty of merchantability and that defendant's conduct amounts to unjust enrichment. However, in their memorandum of law, plaintiffs maintain that they also seek injunctive relief. Pls. Mem. of Law, at 15. Even if this is the case, and such relief would not be redundant of the FTC Consent Order, subsection (b) of Rule 1708 compels the court to consider the factors in (a)(1)-(5) as well as whether the opposing party has acted or refused to act on grounds generally applicable to the class. As has been discussed in the body of this Opinion, plaintiffs' claims and the claims of the putative class all stem from the same legal grievance with regard to defendant's conduct. Therefore, certification may also be deemed appropriate under Pa.R.C.P. 1708(b).

predominate individual questions since the claims arise from the same legal grievance against the defendant.

b. Management Difficulties

Though a court must consider the potential difficulties in managing a class action, such consideration is not given a great deal of weight and administrative problems alone should not justify the denial of an otherwise appropriate class action in order that the policies underlying this device are upheld. Janicik, 305 Pa.Super. at 142, 451 A.2d at 462. Though it is unclear who possesses what information with regard to the putative class, it seems that there are no administrative or managerial problems which would preclude class certification. Further, contrary to defendant's position, the potential choice of law issues do not support denying class certification. Additionally, the application of other states' consumer protection laws has no relevancy at this juncture.

c. Risk of Separate Actions

In considering the effect of separate actions, the court must consider that "[t]he precedential effect of a decision, even if incorrect, may have a chilling effect on the assertion of similar claims, and, combined with the expiring of statutes of limitations, may often substantially impair or impede potential litigants' abilities to protect their interests." Janicik, 305 Pa.Super. at 143, 451 A.2d at 462 (citations and quotation marks omitted). Further, the court may consider that parties' circumstances and respective ability to pursue separate actions. Id.

Here, the risk of separate and individual lawsuits could potentially clog up the courts with repetitive litigation if the Class is not certified. As previously noted, the fact that damages may differ in terms of what was paid for the Cold-Eeze in different locations should not preclude class certification if liability is premised on the same theory. See Weismer, 419 Pa.Super. at 409, 615 A.2d at 431. Additionally, since

the putative class is brought on a nationwide basis, the potential for separate lawsuits and potentially inconsistent decisions is high. Moreover, separate actions could potentially impose different standards of conduct on the defendant for what essentially amounts to the same legal grievance. A class action would be more comprehensive on a nationwide basis if the claims prove to be meritorious.

d. Prior Litigation

Other than the FTC Complaint and the Consent Order in that matter, it does not appear that any other litigation by or against members of the putative class have been filed.

e. Appropriateness of the Forum

The Philadelphia Court of Common Pleas - Trial Division appears to be an appropriate forum for this matter. Defendant is headquartered within the Commonwealth of Pennsylvania. Compl., ¶ 9. Defendant has manufactured, marketed, sold and distributed Cold-Eeze throughout the United States during the defined Class Period. Compl., ¶ 19; Aff. of Guy J. Quigley, ¶ 9. Defendant's distribution of Cold-Eeze clearly originated from its principal place of business in Doylestown, PA. It therefore appears that the most significant nexus between defendant's conduct and the plaintiffs' and class members' claims appears to be located in Pennsylvania.

f. Complexity of Issues or Expenses Deterring Separate Actions

The expenses of litigation may deter individual class members from bringing suit, especially in light of potential attorneys' fees and expert fees. Certification of the class would allow all members to recover from a common fund while individual members may refrain from suing in separate actions. Even though the amount which may be recovered by individual class members may be small, such potential recovery does appear large enough to justify the expense and effort in administering this action as a class action.

Under this analysis, plaintiffs have satisfied all seven elements to show that a class action is a fair and efficient method of resolving this dispute. Plaintiffs are thus entitled to certification of the class.

CONCLUSIONS OF LAW

For the foregoing reasons, the court is satisfied that the present case is appropriate for disposition as a class action and has certified the class with respect to the counts for breach of the implied warranty of merchantability and unjust enrichment with respect to Cold-Eeze only:

1. The class is sufficiently numerous that joinder of all members is impracticable.
2. There are questions of law or fact common to the class.
3. The claims or defenses of the representative plaintiffs are typical of the claims or defenses of the class.
4. The representative plaintiffs will fairly and adequately assert and protect the interests of the class.
5. The representative plaintiffs' attorney will adequately represent the interests of the class.
6. There is no conflict of interest between the representative plaintiffs and the class members which would impede the maintenance of a class action.
7. The representative plaintiffs have or can acquire adequate financial resources to assure that the interests of the class will not be harmed.
8. The class action will provide a fair and efficient method for adjudicating this controversy.
9. Common questions of law or fact, with respect to the remaining claims, predominate over any question affecting only individual members.
10. There are no managerial or administrative difficulties which would preclude litigating this matter as a class action.

11. Prosecution of separate actions by individual class members would create a risk of inconsistent and varying adjudications and might subject Quigley to incompatible standards of conduct.

12. Individual adjudications would, as a practical matter, dispose of the interests of other class members not parties to the adjudication, or would substantially impair their ability to protect such interests.

13. This particular forum is appropriate for the litigation of the implied warranty and unjust enrichment claims on a class-wide basis.

14. The complexities of issues, expenses of litigation and the small amount of each individual class member's claim mitigate against the presentation of separate and individual claims.

On the basis of this record, this court is issuing a contemporaneous Order, certifying the class with respect to the remaining claims.

BY THE COURT,

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JOHN W. HERRON, J.

Dated: January 25, 2002

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

CIVIL TRIAL DIVISION

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. 051340

ORDER

AND NOW, this 25th day of January, 2002, upon consideration of plaintiffs' Motion for Class Certification, defendant's response in opposition thereto, oral argument before the court, all other matters of record and in accord with the Opinion being filed contemporaneously with this Order, it is hereby **ORDERED** and **DECREED** as follows:

1. The above-captioned action is certified as a class action as to the claims for breach of the implied warranty of merchantability and unjust enrichment, but not as to claims under the UTP/CPL;

2. The 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;

3. Plaintiffs Jason Tesauro and Elizabeth Eley shall serve as class representatives; and

4. The parties shall submit proposals for a notification procedure and proposed forms of notice for class members within thirty days from the date of this Order.

BY THE COURT,

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JOHN W. HERRON, J.