

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS**

<p>KALMAN ROSENFELD and LOIS RYDER, individually and on behalf of all others similarly situated,</p> <p style="text-align: right;">Plaintiffs,</p> <p style="text-align: center;">v.</p> <p>AC2T, INC.,</p> <p style="text-align: right;">Defendant.</p>
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Index No.:
COMPLAINT

Plaintiffs Kalman Rosenfeld and Lois Ryder (“Plaintiffs”), by and through undersigned counsel, make the following allegations pursuant to the investigation of their counsel and based upon information and belief, except as to allegations specifically pertaining to themselves and their counsel, which are based on personal knowledge, against Defendant AC2T, Inc. (“Spartan” or “Defendant”).

NATURE OF THE ACTION

1. This is a class action lawsuit on behalf of purchasers of the Spartan Mosquito Eradicator (“SME”) and Spartan Mosquito Eradicator Pro Tech (“Pro Tech,” and together with SME, the “Products”) in the United States.

2. Spartan represents that the Products, which are tubes intended to be hung around a purchaser’s yard, provide “do-it-yourself” mosquito prevention. Each product only has three “active” ingredients -- the Eradicator contains sugar, yeast, and salt, and the Pro Tech contains sugar, yeast, and boric acid instead of salt. Consumers are instructed to add water to the tubes to mix with the “active” ingredients and then hang them around their yards. As shown in the images below, Spartan claims that the SME will “eradicate your mosquito population for up to 90 days,” and that the Pro Tech “kills mosquitoes for up to 30 days”:

Spartan Mosquito Eradicator

SPARTAN MOSQUITO
8 NEMO CLARK DRIVE
LAUREL, MS 39443

DO-IT-YOURSELF MOSQUITO CONTROL
JUST ADD WARM WATER AND SHAKE

ERADICATE YOUR MOSQUITO POPULATION FOR UP TO 90 DAYS THE SPARTAN WAY!

100% AMERICAN MADE ECO-FRIENDLY

THE MOSQUITO ERADICATOR

SEE OUR INSTRUCTIONS ONLINE AT WWW.SPARTANMOSQUITO.COM

LASTS UP TO 90 DAYS
• JUST ADD WATER AND SHAKE •

Take back your outdoor space with the Spartan Mosquito Eradicator. Deploy Spartan Mosquito Eradicators as soon as the weather begins to warm to create a barrier, giving the mosquitoes a target that emits the same attraction triggers as people and animals. Once mosquitoes feed on the water solution, they are eliminated before they can breed again.

The Spartan Mosquito Eradicator is a uniquely effective, long-lasting, continuous mosquito control system. The Spartan Mosquito Eradicator also doesn't require batteries or electricity, just add water and shake! The mosquito population will suffer dramatically in the first 15 days, and will be 95% controlled for up to 90 days.

Spartan Mosquito Pro Tech:

SPARTAN MOSQUITO

DO-IT-YOURSELF MOSQUITO KILLER
JUST ADD WARM WATER AND SHAKE

KILLS MOSQUITOES FOR UP TO 30 DAYS THE SPARTAN WAY!

100% AMERICAN MADE 30 DAY MONEY BACK GUARANTEE

SPARTAN MOSQUITO PRO TECH

SEE BACK PANEL FOR DIRECTIONS FOR USE. READ ENTIRE LABEL BEFORE USE.

Outdoor Application: Prepare Spartan Mosquito Pro Tech by removing all contents from the box. For each tube, remove the temporary white cap and fill with WARM water to the fill line indicated on the back of the tube. Replace white cap. SHAKE THOROUGHLY. Remove white cap. Attach hooks to black caps for hanging, and secure the black caps to the top of the tubes. Hang the tubes along the perimeter/property line of the area to be protected, each tube no more than 180 feet apart. If the area to be protected is one square acre or less, and there are no major mosquito attractors such as a wooded area or a water feature, hang four tubes on the corners of the area to be treated. Hang the tubes at least 80 feet away from areas where people gather, since mosquitoes will gather near them. If you have woods, heavy vegetation, or a water feature that attracts mosquitoes, hang at least one tube near or within that area, 80 feet away from people. Place an additional tube near that area if outside of the protected zone. Hang the tubes approximately six feet above the ground and no more than 180 feet apart. The

3. Unfortunately for consumers, however, each of these representations is false and misleading because the Products do not work as advertised. As explained below, the Products

are ineffective for mosquito prevention because they do not attract mosquitoes and are incapable of killing mosquitoes or decreasing mosquito populations. Defendant is well-aware that the Products are ineffective, yet sells them anyway in pursuit of profit and in clear disregard for public health and safety.

4. First, there is no evidence that mosquitoes are attracted to the Products' ingredients such that they could be lured into the tubes to drink the supposedly deadly solution inside. Indeed, contrary to Defendant's early marketing claims that the sugar and yeast in the Products produce mosquito-attracting levels of carbon dioxide through fermentation, a wide range of mosquito experts who have evaluated the Products disagree.

5. Second, peer-reviewed research and expert analysis has shown that mosquitoes will not even enter the Products' tubes to access the solution inside because the holes in the tubes, which are approximately 3/16 of an inch wide, are simply too small. According to a 2018 study, mosquitoes almost never enter holes smaller than 8-9 millimeters – roughly double the size of the holes in the Products.¹ Unsurprisingly, two mosquito scientists who Defendant itself hired to conduct testing on the Products – the Vice President of the American Mosquito Control Association and a professor of entomology from the University of Southern Mississippi – each concluded that the Products did not work in part because the holes in the tubes were too small.

6. The Pro Tech is a newer version of the SME that contains sugar and yeast, but substitutes boric acid for salt. Like the SME, the Pro Tech is incapable of mosquito prevention because mosquitoes are not attracted to the meager amount of carbon dioxide produced by

¹ Dickerson, et al., *Void Entry by Aedes aegypti (Diptera: Culicidae) Mosquitoes Is Lower Than Would Be Expected by a Randomized Search*, JOURNAL OF INSECT SCIENCE, 2018, Vol. 18, No. 6, available at <https://pdfs.semanticscholar.org/460a/99e58210f2bd2fc406731614666bb428ee66.pdf>.

fermentation in the Pro Tech's tubes, and even if they were, they are not able to enter the Pro Tech's tubes to access the boric acid solution inside because the holes in the Pro Tech are no larger than those in the SME.

7. Defendant has sold tens of millions of dollars' worth of the Products through their false promises of effectiveness to consumers in the United States.

8. They have done so by capitalizing on health risks posed by mosquitoes to humans.

9. Plaintiffs are purchasers of the Products who assert claims on behalf of themselves and similarly situated purchasers of the Products for violations of the consumer protection laws of New York, breach of express warranty, and for fraud.

PARTIES

10. Plaintiff Kalman Rosenfeld is a citizen of New York who resides in Brooklyn, New York. In the summer of 2019, Mr. Rosenfeld purchased an SME from a Home Depot store in Brooklyn for approximately \$25. Prior to purchase, Mr. Rosenfeld carefully read the SME's labeling, including the representations that it "eradicate[s] your mosquito population for up to 90 days," and that it provides "do-it-yourself mosquito control." Mr. Rosenfeld believed these statements to mean that the SME would effectively eliminate mosquitoes. Mr. Rosenfeld relied on these representations in that he would not have purchased the SME at all, or would have only been willing to pay a substantially reduced price for the SME, had he known that these representations were false and misleading. Mr. Rosenfeld used the SME according to the directions, but it did not provide effective mosquito control or prevention as advertised.

11. Plaintiff Lois Ryder is a citizen of New York who resides in Copiague, New York. In September of 2020, Ms. Ryder purchased the Pro Tech from an online retailer for approximately \$60. Prior to purchase, Ms. Ryder carefully read the Pro Tech's labeling,

including the representations that it “kills mosquitoes for up to 30 days,” and that it is a “do-it-yourself mosquito killer.” Ms. Ryder believed these statements to mean that the Pro Tech would effectively eliminate mosquitoes. Ms. Ryder relied on these representations in that she would not have purchased the Pro Tech at all, or would have only been willing to pay a substantially reduced price for the Pro Tech, had she known that these representations were false and misleading. Ms. Ryder used the Pro Tech according to the directions, but it did not provide effective mosquito prevention as advertised.

12. Defendant AC2T, Inc. is a Mississippi corporation with its principal place of business in Laurel, Mississippi. Defendant AC2T, Inc., manufactures and sells the Products under the Spartan Mosquito brand name.

JURISDICTION AND VENUE

13. This Court has personal jurisdiction over Defendant because Defendant conducts significant business in New York.

14. Venue is proper in this district pursuant to NY CPLR § 503 because a substantial part of the events or omissions giving rise to the claims asserted herein occurred in this County.

CLASS REPRESENTATION ALLEGATIONS

15. Plaintiffs seek to represent a class defined as all persons in the United States who purchased the Products (the “Class”). Excluded from the Class are persons who made such purchase for purpose of resale.

16. Plaintiffs also seek to represent a subclass defined as all Class members who purchased the Products in New York (the “New York Subclass”).

17. Members of the Class and New York Subclass are so numerous that their individual joinder herein is impracticable. On information and belief, members of the Class and

New York Subclass number in the millions. The precise number of Class members and their identities are unknown to Plaintiffs at this time but may be determined through discovery. Class members may be notified of the pendency of this action by mail and/or publication through the distribution records of Defendant and third parties.

18. Common questions of law and fact exist as to all Class members and predominate over questions affecting only individual Class members. Common legal and factual questions include, but are not limited to whether Defendant's labeling, marketing and promotion of the Products is false and misleading.

19. The claims of the named Plaintiffs are typical of the claims of the Class in that the named Plaintiffs were exposed to Defendant's false and misleading marketing and promotional materials and representations, purchased the Products, and suffered a loss as a result of that purchase.

20. Plaintiffs are adequate representatives of the Class and Subclass because their interests do not conflict with the interests of the Class members they seek to represent, they have retained competent counsel experienced in prosecuting class actions, and they intend to prosecute this action vigorously. The interests of Class members will be fairly and adequately protected by Plaintiffs and their counsel.

21. The class mechanism is superior to other available means for the fair and efficient adjudication of the claims of Class members. Each individual Class member may lack the resources to undergo the burden and expense of individual prosecution of the complex and extensive litigation necessary to establish Defendant's liability. Individualized litigation increases the delay and expense to all parties and multiplies the burden on the judicial system presented by the complex legal and factual issues of this case. Individualized litigation also presents a potential for inconsistent or contradictory judgments. In contrast, the class action

device presents far fewer management difficulties and provides the benefits of single adjudication, economy of scale, and comprehensive supervision by a single court on the issue of Defendant's liability. Class treatment of the liability issues will ensure that all claims and claimants are before this Court for consistent adjudication of the liability issues.

COUNT I

Deceptive Acts Or Practices, New York Gen. Bus. Law § 349

22. Plaintiffs incorporate by reference and re-allege each and every allegation set forth above as though fully set forth herein.

23. Plaintiffs bring this claim individually and on behalf of members of the New York Subclass against Defendant.

24. By the acts and conduct alleged herein, Defendant committed unfair or deceptive acts and practices by making false representations about the efficacy of the Products.

25. The foregoing deceptive acts and practices were directed at consumers.

26. The foregoing deceptive acts and practices are misleading in a material way because they fundamentally misrepresent the ability of the Products to control mosquitoes.

27. Plaintiffs and members of the New York Subclass were injured as a result because (a) they would not have purchased the Products if they had known that the Products were ineffective for their stated purposes, and (b) they overpaid for the Products on account of Defendant's misrepresentations that the SME "eradicate[s] your mosquito population for up to 90 days," that the Pro Tech "kills mosquitoes for up to 30 days," and that both Products provide "do-it-yourself" mosquito prevention.

28. On behalf of themselves and other members of the New York Subclass, Plaintiffs seek to enjoin the unlawful acts and practices described herein, to recover their actual damages or fifty dollars, whichever is greater, three times actual damages, and reasonable attorneys' fees.

COUNT II**False Advertising, New York Gen. Bus. Law § 350**

29. Plaintiffs incorporate by reference and re-allege each and every allegation set forth above as though fully set forth herein.

30. Plaintiffs bring this claim individually and on behalf of members of the New York Subclass against Defendant.

31. Based on the foregoing, Defendant has engaged in consumer-oriented conduct that is deceptive or misleading in a material way which constitutes false advertising in violation of Section 350 of the New York General Business Law because it fundamentally misrepresents the ability of the Products to control mosquitoes.

32. The foregoing advertising was directed at consumers and was likely to mislead a reasonable consumer acting reasonably under the circumstances.

33. These misrepresentations have resulted in consumer injury or harm to the public interest.

34. As a result of these misrepresentations, Plaintiffs and members of the New York Subclass have suffered economic injury because (a) they would not have purchased the Products if they had known that the Products were ineffective for their stated purposes, and (b) they overpaid for the Products on account of Defendant's misrepresentations that the SME "eradicate[s] your mosquito population for up to 90 days," that the Pro Tech "kills mosquitoes for up to 30 days," and that both Products provide "do-it-yourself" mosquito prevention.

35. On behalf of themselves and other members of the New York Subclass, Plaintiffs seek to enjoin the unlawful acts and practices described herein, to recover their actual damages or five hundred dollars, whichever is greater, three times actual damages, and reasonable attorneys' fees.

COUNT III**Breach of Express Warranty**

36. Plaintiffs incorporate by reference and re-allege each and every allegation set forth above as though fully set forth herein.

37. Plaintiffs bring this claim individually and on behalf of members of the Class and New York Subclass against Defendant.

38. In connection with the sale of the Products, Defendant, as the designer, manufacturer, marketer, distributor, and/or seller issued written warranties by representing that the SME “eradicate[s] your mosquito population for up to 90 days,” that the Pro Tech “kills mosquitoes for up to 30 days,” and that both Products provide “do-it-yourself” mosquito prevention.

39. In fact, the Products do not conform to the above-referenced representations because they are ineffective for their stated purposes.

40. Plaintiffs and Class members were injured as a direct and proximate result of Defendant’s breach because (a) they would not have purchased the Products if they had known that the Products were ineffective for their stated purposes, and (b) they overpaid for the Products on account of Defendant’s misrepresentations that the SME “eradicate[s] your mosquito population for up to 90 days,” that the Pro Tech “kills mosquitoes for up to 30 days,” and that both Products provide “do-it-yourself” mosquito prevention.

41. On March 16, 2020, a pre-suit notice letter was sent to Defendant via certified mail that provided notice of Defendant’s breach of warranty and demanded that Defendant rectify the breaches of warranty complained of herein.

COUNT IV**Fraud**

42. Plaintiffs hereby incorporate by reference and re-allege each and every allegation set forth above as though fully set forth herein.

43. Plaintiffs bring this claim individually and on behalf of the members of the proposed Class and New York Subclass against Defendant.

44. As discussed above, Defendant misrepresented that the SME “eradicate[s] your mosquito population for up to 90 days,” that the Pro Tech “kills mosquitoes for up to 30 days,” and that both Products provide “do-it-yourself” mosquito prevention.

45. The false and misleading representations and omissions were made with knowledge of their falsehood.

46. The false and misleading representations and omissions were made by Defendant, upon which Plaintiffs and members of the proposed Class and New York Subclass reasonably and justifiably relied, and were intended to induce and actually induced Plaintiffs and members of the proposed Class and New York Subclass to purchase the Products.

47. The fraudulent actions of Defendant caused damage to Plaintiffs and members of the proposed Class and Subclass, who are entitled to damages and other legal and equitable relief as a result.

RELIEF DEMANDED

48. WHEREFORE, Plaintiffs, individually and on behalf of all others similarly situated, seek judgment against Defendant, as follows:

- a. For an order certifying the nationwide Class and the New York Subclass and naming Plaintiffs as representatives of the Class and New York Subclass and Plaintiffs’ attorneys as Class Counsel to represent the Class and New York Subclass members;

- b. For an order declaring that Defendant's conduct violates the statutes referenced herein;
- c. For an order finding in favor of Plaintiffs, the nationwide Class, and the New York Subclass on all counts asserted herein;
- d. For compensatory, statutory, and punitive damages in amounts to be determined by the Court and/or jury;
- e. For prejudgment interest on all amounts awarded;
- f. For an order of restitution and all other forms of equitable monetary relief;
- g. For an order awarding Plaintiffs and the Class and New York Subclass their reasonable attorneys' fees and expenses and costs of suit.

JURY TRIAL DEMANDED

Plaintiffs demand a trial by jury on all claims so triable.

Dated: March 6, 2023

Respectfully submitted,

BURSOR & FISHER, P.A.

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