

1 district.

2 10. Defendant Eddie Mishan (“Mishan”) is the President of Wellquest. At
3 all times relevant to the complaint, acting individually or in concert with others, he
4 has formulated, directed, or controlled the policies, acts, or practices of Wellquest,
5 including the acts or practices alleged in this complaint. He transacts business in
6 this district.

7 11. Defendant Tony Hoffman Productions, Inc. (“THPI”) is a Nevada
8 Corporation with its principal place of business at 1290 Rancho Conejo Boulevard,
9 Newbury Park, California 91230. THPI transacts business in this district.

10 12. Defendant Anthony Hoffman (“Hoffman”) is President and sole owner
11 of THPI. At all times relevant to the complaint, acting individually or in concert
12 with others, he has formulated, directed, or controlled the policies, acts, or
13 practices of THPI, including the acts or practices alleged in this complaint. He
14 transacts business in this district.

15 13. Defendant Mark J. Buchfuhrer, M.D. (“Buchfuhrer”) is a physician
16 licensed to practice by the State of California. Dr. Buchfuhrer's business address
17 is 10800 S. Paramount Blvd., Downey, CA 90241. He has aided in the promotion
18 of D-Snore throat spray, a purported treatment for snoring, by providing
19 endorsements for the product in advertisements. Dr. Buchfuhrer resides or
20 transacts business in this district.

21 14. Relief Defendants Jeffrey Mishan, Steven Mishan, Al Mishan, Isaac
22 Mishan, and Morris Mishan (“Relief Defendants”) are shareholders of Wellquest
23 who received funds and other property that were derived unlawfully from payments
24 by consumers as a consequence of the Defendants’ acts and practices complained
25 of herein. They transact business in this district.

1 **COMMERCE**

2 15. The acts and practices of Defendants alleged in this complaint have
3 been in or affecting commerce, as "commerce" is defined in Section 4 of the
4 Federal Trade Commission Act.

5
6 **DEFENDANTS' COURSE OF CONDUCT**

7 16. Since at least 1999, Defendants Wellquest and Mishan have
8 manufactured, labeled, offered for sale, advertised, and sold products to the public
9 throughout the United States, including Bloussant dietary supplement, EnerX
10 dietary supplement, and D-Snore throat spray. Defendants primarily advertise and
11 offer these products for sale through print ads, direct mail inserts, and television
12 infomercials. In these ads, Defendants Wellquest and Mishan provide a toll-free
13 telephone number for consumers to call to purchase the products. In addition,
14 Defendants Wellquest and Mishan advertise and offer these products for sale
15 through a website, www.wellquestintl.com. Further, Defendants Wellquest and
16 Mishan, through THPI and Hoffman, upsell third-party buying service
17 memberships at the end of telephone calls where consumers order Wellquest's
18 products.

19 17. Since at least 1999, Defendants THPI and Hoffman have prepared
20 advertising for Wellquest products, including Bloussant and D-Snore. In addition,
21 Defendants THPI and Hoffman operate a telemarketing call center that sells
22 Bloussant, EnerX, and D-Snore, as well as third-party buying service memberships,
23 to consumers who call the toll-free number contained in Wellquest advertisements.

24
25
26 **Bloussant**

1 18. Bloussant, a purported breast enhancement product, contains saw
2 palmetto, fennel seed, dong quai, damiana, blessed thistle, dandelion, watercress,
3 black cohosh, and wild yam. The price for a two-month supply of Bloussant is
4 \$229; the price for a four-month supply is \$344; and the price for an eight-month
5 supply is \$574. Sales of Bloussant have exceeded \$70 million.

6 19. To induce consumers to purchase Bloussant, Defendants Wellquest,
7 Mishan, THPI, and Hoffman have prepared, and Wellquest and Mishan have
8 widely disseminated, or caused to be widely disseminated, program-length
9 television (infomercial), magazine, direct mail, and Internet advertisements,
10 including but not limited to the attached Exhibits A through E. These
11 advertisements contain, among other things, the following statements or depictions:

12 a. Increase Breast Size & Firmness . . . Naturally!

13 Finally, an all natural, non-surgical way to larger and firmer
14 looking breasts. . . .

14 **CLINICALLY PROVEN FORMULA**

15 Clinically proven, studies state, *“the conclusions clearly*
16 *indicate that the majority of women experience positive*
17 *results”* and also touts Bloussant as a *“fast-acting. . . less*
18 *invasive alternative to cosmetic surgery.”* Imagine how great
19 it will be to get **increased cleavage** and to gain back the
20 **firmness you had as a teenager**. In a few weeks you’ll see
21 results... and so will everyone else; your confidence level will
22 soar!

19 **“WAKE-UP” YOUR BODY’S GROWTH PROCESS.**

20 **Professionally formulated, Bloussant’s pure and natural**
21 **botanical ingredients** actually stimulate the inter-cellular
22 substance in the breast that becomes dormant following the
23 teenage years. This stimulation regenerates the growth process
24 in a natural and clinically proven method.

22 **ORDER PURE & NATURAL BLOUSSANT™ TODAY!**

23 Delivered discreetly to you in just days. 60 day money back guarantee
24 or send back for a full product refund!

24 – Exhibit A, magazine advertisement

25 b. **ON SCREEN: You are watching a paid advertisement for**
26 **Bloussant.**

1 * * *

2 UNIDENTIFIED FEMALE: Let's face it, ladies, not all of us
3 are satisfied with our small bust size. But we're not left with
4 many options. For years, our only choice was to live with small
5 breasts, use artificial padding or have very expensive surgical
6 implants, taking the chance of losing feeling in our breasts or
7 worse, having them feel too hard. . . .

8 **ON SCREEN: Bloussant bottle**
9 **All Natural Herbal Breast Enhancer . . .**
10 **Increase Your Bust Size by 2 Cups!**

11 UNIDENTIFIED FEMALE: But now there's Bloussant, the all-
12 natural herbal breast enhancement tablet that will increase your
13 bust line by one-half to two cup sizes in just two weeks. That's
14 right.

15 **ON SCREEN: Enhance cleavage**
16 **Gain Size and firmness**

17 UNIDENTIFIED FEMALE: With Bloussant, you'll gain the
18 increased cleavage you've always wanted and regain the
19 firmness you had as a teenager. . . .

20 UNIDENTIFIED FEMALE: Bloussant's clinically proven formula has
21 been increasing breast sizes in Europe for years. . .

22 **ON SCREEN: Diagram of female upper body**
23 **Bloussant Regenerates Growth**
24 **All Natural and Proven Safe!**
25 * * *

26 UNIDENTIFIED FEMALE: Bloussant's professionally
27 formulated breast enhancer stimulates the intercellular hormone
28 substance that becomes dormant following your teenage years.
This stimulation regenerates the growth process in an all-natural
and clinically proven safe method. In just weeks you'll see the
results and so will everyone else.

– Exhibit B, pp. 1- 4, pages from
infomercial script and Exhibit C
(infomercial tape)

c. Clinically Proven to Enhance Your Bust Size. . .
Increase Breast Size. . .

CLINICALLY PROVEN FORMULA

Clinically proven, studies state, *"the conclusions clearly indicate
that the majority of women experience positive results"* . . .

-Exhibit D, direct mail advertisement

1 d. **Bloussant** – The all-natural breast enhancement –
2 gradually augments the size and shape of your breasts using a formula
3 that promotes a healthy transformation. With Bloussant breast
4 enhancement, adding inches to your bust is now a less expensive
5 alternative to costly surgery.

6 Bloussant offers a non-surgical solution to attaining fuller, firmer
7 breasts with the help of a balanced combination of safe, all-
8 natural ingredients. This formula helps you look and feel your
9 best and delivers beautiful results in just weeks.
10 * * *

11 **Bloussant Frequently Asked Questions**

12 **Is there any Adverse reaction?**

13 • None, it is an all natural product and there are no known side
14 effects.

15 **How long will it take to see affects [sic]?**

16 • There will be some firming in about four weeks, but most
17 growth will be between one and two months. At the end of two
18 months you should see a half a cup to a full cup size. For most
19 women, a continued use will increase the cup by two sizes.

20 **Is there a need to continue taking Bloussant?**

21 • Some women may not need to continue once you [sic] have
22 reached the optimum size and firmness, but some women have
23 to take Bloussant two or three times a week to keep the firmness
24 and the size.

25 – Exhibit E, pp. 1, 2,
26 www.wellquestintl.com

27 20. Consumers may purchase Bloussant over the Internet or by calling a
28 toll-free number. When a consumer calls the toll-free number to inquire about
Bloussant, the THPI telemarketing sales representative makes a presentation based
upon a script and a “frequently asked questions” (“FAQ”) guide sheet. These
materials contain, among other things, the following statements:

What are you hoping **Bloussant** will do for you? What results are
you looking for? (Wait for Response
Well, from what I have heard and seen Bloussant will help you achieve
those results.

Bloussant comes in tablets and you just take two in the morning and
two at night each day and in six to eight weeks you will see
results. . . You could increase your bust size up to two [c]ups and
you’ll have a much firmer feel.

1
2 **EnerX**

3 21. EnerX is promoted as a remedy for men with erectile dysfunction. It
4 contains yohimbine, yohimbe bark, Tribulus terrestris, panax ginseng, guarana
5 seed, ashwagandha, l-arginine, damiana, ginkgo biloba, saw palmetto, muira puama,
6 and other ingredients. The label directs consumers to take one capsule in the
7 morning, one in the evening, and one an hour before “vigorous physical activity.”
8 Three capsules of EnerX contain 13.5 mg of yohimbine. A two-month supply of
9 EnerX costs \$109, a four-month supply is \$169, and an eight-month supply is
10 \$269. Sales of EnerX have exceeded \$24 million.

11 22. To induce consumers to purchase EnerX, Defendants Wellquest and
12 Mishan have widely disseminated, or caused to be disseminated, 30-second
13 television ads, and magazine and Internet advertisements, including but not limited
14 to the attached Exhibits F, G, and E. These advertisements contain, among other
15 things, the following statements and depictions:

16 a. Are you one of the millions of American males who would like
17 increased sexual energy? . . . EnerX is all natural with no side effects.
Get results using the safe, all natural alternative. – EnerX.

18 – Exhibit F, script of ad displayed on
19 television and web site

20 a. Now, millions of active American men have a **safer, natural,**
more affordable alternative to prescription drugs when they want to
21 enhance strength, stamina, performance and an extra burst of
energy. . . .

22 c. No more expensive prescription drugs
23 which are notorious for causing dangerous side effects.
EnerX is a safe, NATURAL, proven effective alternative
24 **that’s affordable,** and it gets the results men want.

25 **WE GUARANTEE IT!**

26 EnerX will enhance your male performance or send it back for a full
product refund!

27 – Exhibit G, magazine ad

1 a. Snore-Free Nights
2 *The Very First Night Guaranteed!*

3 It's True! A quick spray with D-Snore before bed and you'll sleep like
4 a baby all night long! This amazing fast-acting, all-natural formula
5 instantly moistens the membranes of the soft palette to allow free and
6 easy breathing that lasts. Forget surgery, special pillows, and all the
7 other contraptions – D-Snore is the safe, affordable solution you've
8 been looking for.

9 **CLINICALLY PROVEN FORMULA!**

10 Clinical Studies boast an 84% success rate. Studies also state that
11 people using D-Snore showed an increase in their deep sleep. That
12 means feeling more rested when you wake.

13 **ACTUAL RESULTS TAKEN FROM THE CLINICAL STUDY:**

14 *"The decrease in the average snoring level represents a very
15 significant change. 84% of the subjects showed a significant
16 improvement while using D-Snore."*

17 ***

18 **! SAFE–**
19 *All-Natural Throat Spray*

20 **! FAST–**
21 *Treats Snoring Instantly*

22 **! EFFECTIVE–**
23 *One Quick Spray Lasts All Night*

24 **Guaranteed Snore-Free nights!**

25 One quick spray with D-Snore and you and your loved ones will sleep
26 snore-free for a great night's sleep. Actually works ***the very first***
27 ***night!*** We **guarantee it!** Try D-Snore—if you don't stop snoring the
28 very first night, just send it back for a full product refund.

- Exhibit H, magazine advertisement

29 b. MALE ANNOUNCER: Do you snore? Does your spouse
30 snore? Are you tired of sleeping on the couch? Then stop. Forget
31 the painful surgery. Forget all the gimmicks and masks. Now there's
32 D-Snore, the all-natural, herbal spray that stops the noise of snoring
33 the very first night you use it.

34 **ON SCREEN: D-Snore**

35 ***

36 LISA WILLIAMS: All right. My question is, my husband snores, so
37 are there other health concerns involved?

38 DR. MARK BUCHFUHRER: Well, there's a lot of health concerns
involved. First of all, for your husband, we know he's not going to get

1 the deep restorative sleep that he really needs, and he may not be able
2 to function that well the next day. . . . Especially for things like driving
3 and other tasks that really --
LISA WILLIAMS: Concentration.
DR. MARK BUCHFUHRER: -- need your concentration for. . .

4 ***

5 DR. MARK BUCHFUHRER: And what you see for snoring is that
6 the back of the throat kind of collapses as you're breathing in and the
7 tissues are really floppy instead of nice contracted muscles. We don't
8 understand why this happens, but when it does happen, you get a
9 narrow passageway, air blasting through there and those tissues just
vibrate. . . what D-Snore does is it coats those tissues, stabilizes them,
and the air can flow through smoothly and you get the snoring
eliminated.

10 ***

11 D-Snore will work for you, too. It's guaranteed. If you don't stop
snoring the very first night, D-Snore will cost you nothing. Just send it
back for a full prompt refund.

12 ***

13 LAURA: I have been married for 12 years and my husband has always
snored. He's actually had some surgery done on his sinuses, and it
14 didn't help his snoring at all. And one day I was looking in the
newspaper and saw your ad for the D-Snore product, and I got [it] for
him, and the first night, it worked. . .

15 LISA WILLIAMS: And did he notice as far as an increase of energy
and all the things we've been talking about? A lot of times, the person
that's snoring doesn't realize they're losing that precious sleep.

16 LAURA: Yes.

LISA WILLIAMS: Did he notice?

17 LAURA: That's right. We just went on a trip and he usually could
18 never drive for more than an hour without falling asleep driving, of
course. And this time, he drove the whole time and did not get sleepy.

19 – Exhibit I, pages from transcript of
20 infomercial, and Exhibit J, infomercial
tape

21 c. D-Snore, the answer for all of your snoring problems!

22 Do you or your partner keep each other awake at night with a loud
23 case of snoring? Those nights are now over when you use D-Snore.
Just two to three little sprays at bedtime and the snoring will disappear
24 or become so minor you will not believe it!

25 No more sleepless nights, no more snoring, just pure restful sleep!

26 ***

27 **D-Snore Frequently Asked Questions**

1 **Has it been tested?**

2 **!** Downy, CA. [sic] Medical Clinic did the clinical study and showed
3 a reduction in each patient tested.

4 – Exhibit E, pp. 6, 7,
5 www.wellquestintl.com

6 26. Defendant Buchfuhrer authored a report regarding a study of D-Snore
7 that purportedly demonstrated that D-Snore significantly reduced snoring levels for
8 84% of the study subjects. He has made statements as an expert endorser in
9 advertisements for D-Snore, including, but not necessarily limited to, the attached
10 Exhibits H, I, and J. The aforesaid advertisements contain the following statements
11 or depictions among others:

12 a. *"The decrease in the average snoring level represents a very
13 significant change. 84% of the subjects showed a significant
14 improvement while using D-Snore."*

15 – Mark J. Buchfuhrer, M.D.

16 - Exhibit H, magazine advertisement

17 b. LISA WILLIAMS: All right. My question is, my husband
18 snores, so are there other health concerns involved?

19 DR. MARK BUCHFUHRER: Well, there's a lot of health concerns
20 involved. First of all, for your husband, we know he's not going to get
21 the deep restorative sleep that he really needs, and he may not be able
22 to function that well the next day.

23 ***

24 DR. MARK BUCHFUHRER: And what you see for snoring is that
25 the back of the throat kind of collapses as you're breathing in and the
26 tissues are really floppy instead of nice contracted muscles. We don't
27 understand why this happens, but when it does happen, you get a
28 narrow passageway, air blasting through there and those tissues just
vibrate. . . what D-Snore does is it coats those tissues, stabilizes them,
and the air can flow through smoothly and you get the snoring
eliminated.

LISA WILLIAMS: There you go. Well, we've got the results here,
and a test was done at the Downey Sleep Clinic in Downey, California.

Now, Dr. Mark, you're going to share with us a little bit of the results

1 that happened there, right?

2 DR. MARK BUCHFUHRER: Yeah. That was a very interesting
3 study that was done by the Downey Sleep Associates. . . . And I
4 looked at the data and I was very impressed. Every single patient got
5 some benefit and over 80 percent got a very significant improvement
6 in their snoring. . . . This is one of the few products that I've said
7 many times that really has no downside. It's an all-natural spray.
8 There's nothing in there that can hurt you. All it can do is help you.

9 – Exhibit I, pages from transcript of
10 infomercial, and Exhibit J, infomercial
11 tape

12 27. Consumers may purchase D-Snore over the Internet or by calling a
13 toll-free number. When a consumer calls the toll-free number to inquire about D-
14 Snore, the THPI telemarketing sales representative makes a presentation based
15 upon a script. These materials contain, among other things, the following
16 statements that telemarketers are to make to consumers:

17 a. **Has it been Tested?**

18 Downy, Ca. Medical Clinic did the clinical study and showed a
19 reduction in each patient tested.

20 b. **Benefits:** D-Snore is an all-natural spray that lubricates the
21 throat, palate and uvula with rich emollients that lasts for eight hours
22 of relief from the noise associated with snoring.

23 Medical studies have proven D-Snore to be effective in every case
24 ranging from 50% reduction of the noise level to complete elimination
25 of the noise

26 **Refund Practices**

27 28. Wellquest's advertising, prepared by THPI, guaranteed to provide
28 purchasers of Bloussant, EnerX and D-Snore a "full product refund" if desired.
29 Defendants Wellquest and THPI failed to advise consumers prior to purchase, in a
30 manner that would be noticed and understood, of material limitations to the
31 guarantee, including time limitations. Additionally, in many instances, Defendants
32 Wellquest and THPI engaged in conduct that hindered returns, such as failing to
33 respond to consumer inquiries seeking return shipping instructions and failing to
34 note receipt of returned goods. These practices prevented many consumers from

1 requesting and/or obtaining a full refund. Many consumers who obtained refunds
2 from Defendants Wellquest and THPI received them only after complaining to a
3 Better Business Bureau.

4 5 **Third-Party Buying Service Memberships**

6 29. When a consumer placed an order for a Wellquest product,
7 Defendants Wellquest and Mishan, through THPI's telemarketing staff, generally
8 asked the consumer to provide billing information, such as a credit card or bank
9 account number, to pay for the Wellquest goods or services.

10 30. After obtaining the billing information to process a sales transaction
11 for Bloussant, D-Snore, EnerX, or other Wellquest products, THPI's
12 telemarketing staff, on behalf of Wellquest, attempted to "upsell" the consumer.
13 "Upselling" is a telemarketing technique where one seller sells its products or
14 services through a telemarketing call, and then solicits the purchase of additional
15 goods or services after the consumer has provided his/her payment information.

16 31. Often, the THPI telemarketing staff, on behalf of Wellquest,
17 introduced the upsell offers as a bonus, to thank the customer for his or her order.
18 The sales scripts stated that the consumer was now a "Wellquest Preferred Buyer,"
19 entitled to discounts and free bonuses. They stated that "we" would like to send
20 you a "free" 7- or 30-day trial membership in a buying service, that is, in a program
21 or plan providing discount priced services, such as telephone, buying, travel, or
22 legal services, or coupons for consumer goods. In many instances, the scripts
23 described the trial membership as entailing "no obligation," or as being "risk free."
24 The scripts advised that if consumers were not satisfied with the product, they
25 could cancel "at any time." The sales script stated that if the consumer chose to
26 continue as a member after the conclusion of the trial period, the service would
27

1 cost a specified amount – in one case, an annual, up-front charge of \$96, and in the
2 other cases, between \$8.95 and \$39.95 monthly. These references, among others,
3 reinforced consumers’ general understanding that they must affirmatively act before
4 a charge could be placed on their accounts. Following the consumers’ acceptance
5 of the trial offer, the telemarketers transmitted the consumer’s credit card
6 information to the third party that was responsible for the product or service that
7 was the subject of the upsell.

8 32. The scripts did not disclose, in a manner consumers were likely to
9 notice and understand, (a) that the buying service would charge the consumer’s
10 credit card shortly after the trial membership ended, unless the consumer called the
11 third-party cancellation number within the trial period to cancel the membership, (b)
12 that the third party would charge the consumer’s credit card every thirty days
13 thereafter, in the case of a 30-day membership, or annually, in the case of an annual
14 membership, unless the consumer called the third party to cancel the membership,
15 and (c) that the additional goods or services were offered on behalf of a third party.

16
17 33. Further, in many instances, the scripts did not require the consumer to
18 expressly agree to the offer, closing, for example, with an ambiguous, “okay.” At
19 that juncture, unless the consumer expressly objected to receipt of the free trial
20 membership, the credit card information was transferred to the third party
21 responsible for the upsell. In other instances, THPI’s telemarketing staff, acting on
22 behalf of Wellquest, simply announced that the consumer would receive a trial
23 membership, and transferred the consumer’s credit card information to the third
24 party to be charged for that membership. In these cases, they made no attempt to
25 request the consumer’s authorization to send the membership kit or to seek the
26 consumer’s authorization for the transfer of the credit card charge.

27 34. Shortly after receiving the consumer’s name and billing information
28

1 from Wellquest, the third party mailed a membership kit to the consumer. The kit
2 stated that the consumer had to call to cancel the membership to avoid a credit card
3 charge, and included the telephone number that the consumer had to call to cancel
4 the membership. Many consumers, however, did not open these kits because the
5 kits appeared to be unsolicited promotional or sales materials from a company the
6 consumer had never heard of. Shortly after the completion of the 7- or 30-day trial
7 period, with no further authorization from the consumer, the third party would
8 charge the consumer's credit card for the membership. It would continue to bill
9 the consumer's credit card for the buying service membership every month
10 thereafter, in the case of a monthly membership, or would renew the membership
11 after one year, in the case of an annual membership, unless the consumer
12 successfully cancelled.

13 35. Defendants Wellquest and THPI received many complaints from
14 consumers who stated that they were signed up for memberships they had not been
15 offered, or that they were charged for memberships without their authorization.
16 Included in the complaints were some that expressly stated that an upsell charge
17 appeared after the purchase of a Wellquest product, and that the consumer had not
18 authorized the charge. Despite this, Defendants Wellquest and THPI, through the
19 telemarketing staff, continued to send consumers' charging information to third
20 parties without (a) taking adequate steps to ensure that consumers were told that
21 their credit card numbers and other billing information were being turned over to
22 third-party marketers for the purposes of enrolling consumers in, and charging
23 consumers for, the third-party membership services; and (b) taking adequate steps
24 to ensure that consumers authorized the transfer.

25
26 **SECTIONS 5 AND 12 OF THE FTC ACT**

27 36. Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), prohibits unfair or
28

1 deceptive acts or practices in or affecting commerce. Section 12(a) of the FTC
2 Act, 15 U.S.C. § 52(a), prohibits the dissemination of any false advertisement in or
3 affecting commerce for the purpose of inducing, or which is likely to induce, the
4 purchase of food, drugs, devices, services, or cosmetics. For the purposes of
5 Section 12 of the FTC Act, each of Bloussant, EnerX, and D-Snore is either a
6 “food” or a “drug” pursuant to Section 15(b) and (c) of the FTC Act, 15 U.S.C. §
7 55(b) and (c). As set forth below, the Defendants have engaged in and are
8 continuing to engage in such unlawful practices in connection with the marketing
9 and sale of Bloussant, EnerX, and D-Snore.

10
11 **VIOLATIONS IN THE COURSE OF MARKETING**
12 **WELLQUEST PRODUCTS**

13 **COUNT I (Bloussant Efficacy and Performance Claims)**

14 37. Through the means described in Paragraphs 15 and 16, Defendants
15 Wellquest, Mishan, THPI, and Hoffman have represented, expressly or by
16 implication, that:

- 17 a. Bloussant works by stimulating breast cells to regenerate the
18 growth process;
- 19 b. Bloussant enlarges the breasts by two cup sizes in most women;
- 20 c. Bloussant firms the breast; and
- 21 d. After optimum breast size is achieved, some women will
22 maintain their increased breast size without continued use of Bloussant; and
23 the remainder of women will maintain the increase in size by taking Bloussant
24 two or three times a week.

25 38. Defendants Wellquest, Mishan, THPI, and Hoffman did not possess
26 and rely upon a reasonable basis that substantiated the representations set forth in
27 Paragraph 33 at the time the representations were made. Therefore, the making of

1 the representations set forth in Paragraph 33, above, constitutes a deceptive
2 practice, and the making of false advertisements, in or affecting commerce, in
3 violation of Sections 5(a) and 12 of the Federal Trade Commission Act, 15 U.S.C.
4 §§ 45(a) and 52.

5
6 **COUNT II (Bloussant Clinical Testing Claims)**

7 39. Through the means described in Paragraph 15, Defendants Wellquest,
8 Mishan, THPI, and Hoffman have represented, expressly or by implication, that:

9 a. Bloussant is clinically proven to increase bust size in the
10 majority of women; and

11 b. Bloussant is clinically proven to be safe.

12 40. In truth and in fact:

13 a. Bloussant is not clinically proven to increase bust size in the
14 majority of women; and

15 b. Bloussant is not clinically proven to be safe.

16 Therefore, the making of the representations set forth in Paragraph 35, above,
17 constitutes a deceptive practice, and the making of false advertisements, in or
18 affecting commerce, in violation of Sections 5(a) and 12 of the Federal Trade
19 Commission Act, 15 U.S.C. §§ 45(a) and 52.

20
21 **COUNT III (EnerX No Side Effects Claim)**

22 41. Through the means described in Paragraphs 18 and 19, Defendants
23 Wellquest and Mishan have represented, expressly or by implication, that EnerX
24 has no harmful side effects.

25 42. In truth and in fact, EnerX does have harmful side effects. EnerX
26 contains one or more ingredients that can substantially increase blood pressure and
27 can interact adversely with other drugs that may be taken by men with conditions

1 that cause erectile dysfunction. Therefore, the making of the representation set
2 forth in Paragraph 37, above, constitutes a deceptive practice, and the making of a
3 false advertisement, in or affecting commerce, in violation of Sections 5(a) and 12
4 of the Federal Trade Commission Act, 15 U.S.C. §§ 45(a) and 52.

5
6 **COUNT IV (EnerX Safety Claim)**

7 43. Through the means described in Paragraphs 18 and 19, Defendants
8 Wellquest and Mishan have represented, expressly by implication, that EnerX is
9 safe.

10 44. Defendants Wellquest and Mishan did not possess and rely upon a
11 reasonable basis that substantiated the representation set forth in Paragraph 39 at
12 the time the representations were made. Among other things, EnerX contains one
13 or more ingredients that can substantially increase blood pressure and can interact
14 adversely with other drugs that may be taken by men with conditions that cause
15 erectile dysfunction. Therefore, the making of the representation set forth in
16 Paragraph 39, above, constitutes a deceptive practice, and the making of a false
17 advertisement, in or affecting commerce, in violation of Sections 5(a) and 12 of the
18 Federal Trade Commission Act, 15 U.S.C. §§ 45(a) and 52.

19
20 **COUNT V (D-Snore Efficacy and Performance Claims)**

21 45. Through the means described in Paragraph 21, Defendants Wellquest,
22 Mishan, THPI, and Hoffman have represented, expressly or by implication, that:

- 23 a. D-Snore significantly reduces or eliminates snoring or the sound
24 of snoring in users of the product;
- 25 b. A single application of D-Snore significantly reduces or
26 eliminates snoring or the sound of snoring for an entire night; and
- 27 c. D-Snore can eliminate, reduce or mitigate the symptoms of

1 sleep apnea including daytime tiredness and frequent interruptions of deep
2 restorative sleep.

3 46. Defendants Wellquest, Mishan, THPI, and Hoffman did not possess
4 and rely upon a reasonable basis that substantiated the representations set forth in
5 Paragraph 41 at the time the representations were made. Among other reasons, the
6 single study that Defendants Wellquest, Mishan, THPI, and Hoffman relied upon
7 failed to utilize an appropriate method to assess sound reduction, failed to include a
8 placebo control, and failed to develop a valid baseline against which any
9 improvement could be measured. Therefore, the making of the representations set
10 forth in Paragraph 41, above, constitutes a deceptive practice, and the making of
11 false advertisements, in or affecting commerce, in violation of Sections 5(a) and 12
12 of the Federal Trade Commission Act, 15 U.S.C. §§ 45(a) and 52.

13
14 **COUNT VI (Buchfuhrer Expert Endorsement)**

15 47. Through the means described in Paragraph 22, Defendant Buchfuhrer
16 has represented, expressly or by implication, that:

- 17 a. D-Snore significantly reduces or eliminates snoring or the sound
18 of snoring in users of the product;
- 19 b. D-Snore can eliminate, reduce, or mitigate the symptoms of
20 sleep apnea including daytime tiredness and frequent interruptions of deep
21 restorative sleep.

22 48. Defendant Buchfuhrer did not possess and rely upon a reasonable
23 basis that substantiated the representations set forth in Paragraph 43 at the time the
24 representations were made. Among other things, the single study that Defendant
25 authored and relied upon failed to utilize an appropriate method to assess sound
26 reduction, failed to include a placebo control, and failed to develop a valid baseline
27 against which any improvement could be measured. Moreover, Defendant

1 Buchfuhrer did not exercise his purported expertise in snoring treatment, in the
2 form of an examination or testing of the D-Snore product at least as extensive as an
3 expert in the field would normally conduct, in order to support the conclusions in
4 the endorsement. Therefore, the making of the representations set forth in
5 Paragraph 43, above, constitutes a deceptive practice, and the making of false
6 advertisements, in or affecting commerce, in violation of Sections 5(a) and 12 of
7 the Federal Trade Commission Act, 15 U.S.C. §§ 45(a) and 52.

8
9 **COUNT VII (D-Snore Establishment Claim)**

10 49. Through the means described in Paragraphs 21 and 22, Defendants
11 have represented, expressly or by implication, that clinical research proves that
12 D-Snore significantly reduces or eliminates snoring or the sound of snoring.

13 50. In truth and in fact, clinical research does not prove that D-Snore
14 significantly reduces or eliminates snoring or the sound of snoring. Therefore, the
15 making of the representation set forth in Paragraph 45, above, constitutes a
16 deceptive practice, and the making of a false advertisement, in or affecting
17 commerce, in violation of Sections 5(a) and 12 of the Federal Trade Commission
18 Act, 15 U.S.C. §§ 45(a) and 52.

19
20 **COUNT VIII (D-Snore Failure to Disclose)**

21 51. Through the means described in Paragraphs 21 and 22, Defendants
22 have represented, expressly or by implication, that the product reduces or
23 eliminates snoring or the sound of snoring and prevents, reduces, or eliminates
24 daytime sleepiness. Defendants have failed to disclose or to disclose adequately
25 that D-Snore is not intended to treat sleep apnea for which snoring and daytime
26 sleepiness are primary symptoms, that sleep apnea is a potentially life-threatening
27 condition, and that persons who have symptoms of sleep apnea should consult a

1 physician. These facts would be material to consumers in their purchase or use of
2 the product. Therefore, the failure to disclose adequately these facts, in light of the
3 representations made, constitutes a deceptive practice, and the making of false
4 advertisements, in or affecting commerce, in violation of Sections 5(a) and 12 of
5 the Federal Trade Commission Act, 15 U.S.C. §§ 45(a) and 52.

6
7 **COUNT IX (False Claims Regarding Refunds)**

8 52. Through the means described in Paragraphs 15, 18, and 21,
9 Defendants Wellquest, Mishan, THPI, and Hoffman have represented, expressly or
10 by implication, that the Bloussant, EnerX, and D-Snore guarantees permit
11 consumers to readily obtain a full refund of the product purchase price if they are
12 dissatisfied with the product.

13 53. In truth and in fact, the Bloussant, EnerX, and D-Snore guarantees do
14 not permit consumers to readily obtain a full refund of the product purchase price if
15 they are dissatisfied with the product. Therefore, the making of the representations
16 set forth in Paragraph 48 above constitutes a deceptive practice, and the making of
17 false advertisements, in or affecting commerce, in violation of Sections 5(a) and 12
18 of the Federal Trade Commission Act, 15 U.S.C. §§ 45(a) and 52.

19
20 **COUNT X (Deceptive Failure to Disclose
21 Negative Option Features)**

22 54. In numerous instances, in connection with the advertising, promotion,
23 marketing, offering for sale, sale, or distribution of third-party buying service
24 memberships, Defendants Wellquest, Mishan, THPI, and Hoffman have
25 represented, expressly or by implication, that consumers who agree to the offer will
26 receive a trial membership without risk or obligation.

27 55. Defendants Wellquest, Mishan, THPI, and Hoffman have failed to
28

1 disclose or to disclose adequately to consumers:

2 a. That a consumer who fails to contact the buying service to
3 cancel before the end of the trial period is automatically enrolled as a
4 member in the buying service and the consumer's credit card is charged a
5 periodic fee; and

6 b. That a member's credit card will be charged a fee on a periodic
7 basis unless the member cancels the membership.

8 These facts would be material to consumers in their decision to accept a trial
9 membership.

10 56. In light of the representation set forth in Paragraph 50, the failure of
11 Defendants Wellquest, Mishan, THPI, and Hoffman to disclose or to disclose
12 adequately this material information is a deceptive act or practice in violation of
13 Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

14
15 **COUNT XI (Unfair Submission of Charges)**

16 57. In numerous instances, in connection with the advertising, promotion,
17 marketing, offering for sale, sale, or distribution of third-party buying service
18 memberships, Defendants Wellquest, Mishan, THPI and Hoffman have caused a
19 charge to be submitted for payment for services without the express informed
20 consent of the consumer.

21 58. Defendants' practice of causing charges to be submitted for payment
22 for the third-party buying service memberships without the consumer's express
23 informed consent causes or is likely to cause substantial injury to consumers that is
24 not reasonably avoidable by consumers themselves and is not outweighed by
25 countervailing benefits to consumers or to competition.

26 59. Therefore, the Defendants' practice, as alleged in paragraph 53, is
27 unfair in violation of Section 5(a) of the FTC Act, 15 U.S.C. §45(a).

1
2 **DISGORGEMENT OF RELIEF DEFENDANTS' ILL-GOTTEN GAINS**

3 **COUNT XII (Benefit from Funds Directly Traceable to Consumers)**

4 60. Paragraphs 1 through 55 are incorporated herein by reference.

5 61. The Relief Defendants received assets, directly or indirectly from
6 Defendants, which either are the proceeds or are traceable to the proceeds of the
7 unlawful activities alleged herein. The Relief Defendants have no legitimate claim to
8 these assets.

9 62. The Relief Defendants obtained the assets as part of, and in
10 furtherance of, the violations of the FTC Act alleged above and under
11 circumstances in which it is unjust, inequitable, or unconscionable for them to retain
12 the assets, and they have been unjustly enriched.

13 63. The Commission is entitled to an order requiring that the Relief
14 Defendants disgorge those assets.

15
16 **INJURY**

17 64. Consumers throughout the United States have suffered and continue
18 to suffer substantial monetary loss as a result of Defendants' unlawful acts or
19 practices. In addition, Defendants have been unjustly enriched as a result of their
20 unlawful practices. Absent injunctive relief by this Court, Defendants are likely to
21 continue to injure consumers, reap unjust enrichment, and harm the public interest.

22
23
24 **THIS COURT'S POWER TO GRANT RELIEF**

25 65. Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), empowers this
26 Court to grant injunctive and such other relief as the Court may deem appropriate
27 to halt and redress violations of the FTC Act. The Court, in the exercise of its

1 equitable jurisdiction, may award other ancillary relief, including consumer redress,
2 disgorgement, and restitution, to prevent and remedy injury caused by Defendants'
3 law violations.

4
5 **PRAYER FOR RELIEF**

6 Wherefore, Plaintiff requests that this Court, as authorized by Section 13(b)
7 of the FTC Act, 15 U.S.C. § 53(b), and pursuant to its own equitable powers:

8 (1) Award Plaintiff all temporary and preliminary injunctive and ancillary relief
9 that may be necessary to avert the likelihood of consumer injury during the
10 pendency of this action;

11 (2) Enjoin Defendants permanently from violating Sections 5 and 12 of the
12 FTC Act in connection with the advertising or sale of food, drugs, devices,
13 cosmetics or other products, services or programs;

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24 (3) Award such equitable relief as the Court finds necessary to redress injury
25 to consumers resulting from Defendants' violations of the FTC Act, including but
26 not limited to rescission of contracts and restitution, other forms of redress, and
27 disgorgement of ill-gotten gains by the Defendants and Relief Defendants; and

1 (4) Award Plaintiff the costs of bringing this action and any other equitable
2 relief the Court may determine to be just and proper.

3
4 Respectfully submitted,

5 WILLIAM E. KOVACIC
6 General Counsel

7
8 _____
9 JANET M. EVANS
10 JILL F. DASH
11 LEMUEL DOWDY
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13 _____
14 RAY MCKOWN

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16 TRADE COMMISSION
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