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13
14 **UNITED STATES DISTRICT COURT**
FOR THE CENTRAL DISTRICT OF CALIFORNIA
15 **WESTERN DIVISION**

16 FEDERAL TRADE COMMISSION,
17 Plaintiff,

v.)

18 WELQUEST INTERNATIONAL, INC.,
19 EDDIE MISHAN, TONY HOFFMAN
PRODUCTIONS, INC., ANTHONY
20 HOFFMAN, AND MARK J.
BUCHFUEHRER,

Defendants, and

21 JEFFREY MISHAN, STEVEN MISHAN
22 AL MISHAN, ISAAC MISHAN, and
MORRIS MISHAN,

23 Relief Defendants)

Hon.
Civil Action No.

COMPLAINT FOR
PERMANENT INJUNCTION
AND OTHER EQUITABLE
RELIEF

24
25 Plaintiff, the Federal Trade Commission (“FTC” or “Commission”) through
26 its undersigned attorneys, for its Complaint alleges:
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1 5. Plaintiff FTC brings this action under Section 13(b) of the Federal
2 Trade Commission Act (“FTC Act”), 15 U.S.C. § 53(b), to secure a permanent
3 injunction, consumer redress, disgorgement, and other equitable relief against
4 Defendants for engaging in deceptive acts or practices in violation of Sections 5(a)
5 and 12 of the FTC Act, 15 U.S.C. §§ 45(a) and 52.

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7 **JURISDICTION AND VENUE**

8 6. This Court has jurisdiction over this matter pursuant to 15 U.S.C. §§
9 45(a), 52, 53(b), and 28 U.S.C. §§ 1331, 1337(a) and 1345.

10 7. Venue in this District is proper under 15 U.S.C. § 53(b) and 28 U.S.C.
11 § 1391(b) and (c).

12
13 **THE PARTIES**

14 8. Plaintiff, the Federal Trade Commission, is an independent agency of
15 the United States Government created by statute. 15 U.S.C. §§ 41-58. The
16 Commission enforces Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), which
17 prohibits unfair or deceptive acts or practices in or affecting commerce. The
18 Commission also enforces Section 12 of the FTC Act, 15 U.S.C. § 52, which
19 prohibits false advertisements for food, drugs, devices, services, or cosmetics in or
20 affecting commerce. The Commission, through its own attorneys, may initiate
21 federal district court proceedings to enjoin violations of the FTC Act and to secure
22 such equitable relief, including consumer redress, as may be appropriate in each
23 case. 15 U.S.C. § 53(b).

24 9. Defendant Wellquest International, Inc. (“Wellquest”) is a New York
25 corporation with offices located at 101 Hodencamp Road, Room 209, Thousand
26 Oaks, California and in New York, New York. Wellquest transacts business in this

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.

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26 **Bloussant**

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18. Bloussant, a purported breast enhancement product, contains saw

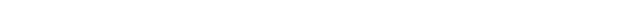


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UNIDENTIFIED FEMALE: Let's face it, ladies, not all of us are satisfied with our small bust size. But we're not left with many options. For years, our only choice was to live with small breasts, use artificial padding or have very expensive surgical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

ON SCREEN: Bloussant bottle



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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 follow Intu,vve exceed <</ <</MCIDGi

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d. EnerX Frequently Asked Questions

What is EnerX?

- EnerX is a safe, all natural alternative when you want that extra burst of sexual energy.

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

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

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

the deep restorative sleep that he really needs, and he may not be able to function that well the next day. . . . Especially for things like driving and other tasks that really --

LISA WILLIAMS:

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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,IWILLIAMS:
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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
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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.

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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
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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.

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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
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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.

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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:

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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
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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.

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

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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.

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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).

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DISGORGEMENT OF RELIEF DEFENDANTS' ILL-GOTTEN GAINS
COUNT XII (Benefit from Funds Directly Traceable to Consumers)

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.

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4 Respectfully submitted,

5 WILLIAM E. KOVACIC
6 General Counsel

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8 _____
9 JANET M. EVANS
10 JILL F. DASH
11 LEMUEL DOWDY
12 JOCK CHUNG

13 _____
14 RAY MCKOWN

15 Attorneys for PLAINTIFF FEDERAL
16 TRADE COMMISSION
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