

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
FT. MYERS DIVISION

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

CELLMARK BIOPHARMA, LLC, a limited  
liability company; and

DEREK E. VEST, individually and as the owner of  
CellMark Biopharma, LLC,

Defendants.

Case No. \_\_\_\_\_

**COMPLAINT FOR PERMANENT  
INJUNCTION AND OTHER  
EQUITABLE RELIEF**

Plaintiff, the Federal Trade Commission (“FTC”), for its Complaint alleges:

1. The FTC brings this action under Section 13(b) of the Federal Trade Commission Act (“FTC Act”), 15 U.S.C. § 53(b), to obtain permanent injunctive relief, rescission or reformation of contracts, restitution, the refund of monies paid, disgorgement of ill-gotten monies, and other equitable relief for Defendants’ acts or practices in violation of Sections 5(a) and 12 of the FTC Act, 15 U.S.C. §§ 45(a) and 52, in connection with the advertising, marketing, promotion, offering for sale, sale, or distribution of CellAssure and Cognify, health products marketed to cancer patients experiencing malnutrition and cognitive dysfunction.

**JURISDICTION AND VENUE**

2. This Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331, 1337(a), and 1345, and 15 U.S.C. §§ 45(a) and 53(b).

3. Venue is proper in this district under 28 U.S.C. § 1391(b)(1), (b)(2), (c)(1), (c)(2), and (d), and 15 U.S.C. § 53(b).

**PLAINTIFF**

4. The FTC is an independent agency of the United States Government created by statute. 15 U.S.C. §§ 41-58. The FTC enforces Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), which prohibits unfair or deceptive acts or practices in or affecting commerce. The FTC also enforces Section 12 of the FTC Act, 15 U.S.C. § 52, which prohibits false advertisements for food, drugs, devices, services, or cosmetics in or affecting commerce.

5. The FTC is authorized to initiate federal district court proceedings, by its own attorneys, to enjoin violations of the FTC Act and to secure such equitable relief as may be appropriate in each case, including rescission or reformation of contracts, restitution, the refund of monies paid, and the disgorgement of ill-gotten monies. 15 U.S.C. §§ 53(b) and 56(a)(2)(A).

**DEFENDANTS**

6. Defendant CellMark Biopharma, LLC (“CellMark”) is a Delaware limited liability company with its principal place of business at 1591 Hayley Ln., Suite 201, Fort Myers, FL 33907. CellMark transacts or has transacted business in this district and throughout the United States.

CellMark advertised, marketed, distributed, or sold CellAssure and Cognify to consumers throughout the United States.

7. Defendant Derek E. Vest (“Vest”) is the founder and sole owner of CellMark. He is the Chairman of CellMark’s Board of Directors and has served as the Chief Executive Officer of CellMark. At times material to this Complaint, acting alone or in concert with others, he formulated, directed, controlled, had the authority to control, or participated in the acts and practices set forth in this Complaint. Defendant Vest resides in this district and, in connection with the matters alleged herein, transacts or has transacted business in this district and throughout the United States.

### **COMMERCE**

8. At all times material to this Complaint, Defendants have maintained a substantial course of trade in or affecting commerce, as “commerce” is defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

### **DEFENDANTS’ BUSINESS ACTIVITIES**

9. From January 2016 through approximately January 2017, CellMark sold two products, CellAssure and Cognify.

10. CellAssure is a powdered drink mix for cancer patients experiencing malnutrition, including cachexia, a wasting syndrome. Cognify is a supplement for cancer patients suffering from cognitive dysfunction caused by cancer treatment, including Mild Cognitive Impairment. CellMark charged \$248 and \$79 for a one-month supply of CellAssure and Cognify, respectively.

11. CellMark promoted, advertised, or sold CellAssure and Cognify, including through CellMark's website at [www.cellmarkbiopharma.com](http://www.cellmarkbiopharma.com). On its website, CellMark described CellAssure as a medical breakthrough solution with "anti-cancer and anti-tumor properties" for cancer patients suffering from cachexia, a wasting syndrome characterized by muscle loss, loss of appetite, nausea, and diarrhea; other cancer-related malnutrition; and the side effects of cancer treatments. CellMark described Cognify as a medical breakthrough solution for cancer patients suffering from cognitive dysfunction caused by chemotherapy, including Mild Cognitive Impairment ("chemo brain").

12. Defendant Vest exercised final decision-making authority over all aspects of

A. **CellAssure**

1. **Excerpts from [www.cellmarkbiopharma.com](http://www.cellmarkbiopharma.com) (attached as Exhibit 1)**



ADVANCED MEDICAL NUTRITION  
FOR ALL CANCER PATIENTS

. . . **CellAssure™** is an innovative **medical nutrition drink** designed for the needs of 57( n)39oned





- Promote a healthy immune response
- Preserve strength, stamina and appetite
- Stress and anxiety support
- Support and maintain lean body mass
- Help for nausea and diarrhea

(Exh. 3 at 2)

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## **Cancer Nutrition Drink is a Must Have**

**By Dr. Stan Headley**

**20-40% of cancer patients actually die from malnutrition (cachexia) and not cancer itself!**

\* \* \*

CellAssure is a simple once a day drink created from direct requests by physicians, dietitians, and patients battling cancer. CellAssure includes ingredients clinically proven to:

- Demonstrate Anti-Cancer/Anti-tumor effects
- Provide needed nutrition for cancer patients with zero sugar in formula

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**When & how should my patients take Cognify™ to be most effective?**

Cognify™ works on many pathways to help prevent chemo-brain [sic] with its clinically proven neuroprotective active ingredients. Although Cognify™ has been shown to help patients already experiencing “chemo brain” or cognitive decline due to cancer/cancer treatments, it is far more desirable to take Cognify™ prophylactically prior to chemotherapy. This proactive approach will provide you [sic] patient with the ability to deploy the neuroprotective components of our medical nutritional formula and aid in prevention of chemo-brain [sic].

(Exh. 1 at 9)

**2. Excerpt from CellMark YouTube channel profile page (attached at Exhibit 2)**

Cognify is the first nutritional supplement specifically formulated to protect against and /or help reduce brain fog (a|k|a [sic] chemo brain) associated with cancer and cancer treatments such as chemo therapy.

**3. Excerpt from Cognify Video, Breast Cancer Survivor Talks About Cognify and Brain Fog (video attached as Exhibit 4-A and transcript attached as Exhibit 4-B)**

SUE HABERKORN: Hi, I'm Sue, a recent breast cancer survivor. While I was on chemo, I noticed that I was having much more difficulty remembering ordinary objects and names of people. I was having a real brain fog, worse than normal senior moments. I had been working with

doctors to stay as healthy as I could during the cancer treatment process. He suggested I try Cognify to help with the chemo brain fog.

Less than two weeks after I started taking the Cognify, I began to be able to remember the names of places and people and things. I was just thinking more clearly. I don't think I even realized how bad the brain fog was until it started to lift. But I did wonder if it was just because I was no longer on chemo or if it was because I was taking the Cognify.

Then I went on vacation for some R&R and stopped taking the Cognify. Literally, within one day, I couldn't remember the names of simple objects. Now I knew it really was the Cognify.

Thank you, Cognify, for lifting my brain fog.

**VIOLATIONS OF THE FTC ACT**

15. Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), prohibits “unfair or deceptive acts or practices in or affecting commerce.”

16. Misrepresentations or deceptive omissions of material fact constitute deceptive acts or practices prohibited by Section 5(a) of the FTC Act.

17. Section 12 of the FTC Act, 15 U.S.C. § 52, prohibits the dissemination of any false advertisement in or affecting commerce for the purpose of inducing, or which is likely to induce, the purchase of food, drugs, devices, services, or cosmetics. For the purposes of Section

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19. The representations set forth in Paragraph 18 are false or misleading, or were not substantiated at the time the representations were made. Therefore, the making of the representations as set forth in Paragraph 18 of this Complaint constitutes a deceptive act or practice and the making of false advertisements, in or affecting commerce, in violation of Sections 5(a) and 12 of the FTC Act, 15 U.S.C. §§ 45(a) and 52.

**Count II: False Establishment Claims**

20. Through the means described in Paragraph 13, Defendants have represented, directly or indirectly, expressly or by implication that:

- A. CellAssure is clinically proven to:
  - 1. treat cachexia and cancer-related malnutrition; and
  - 2. treat cancer, including cancer tumors; and
- B. Cognify is clinically proven to treat, mitigate, and prevent cognitive dysfunction caused by cancer treatment, including Mild Cognitive Impairment, memory loss, and attentional deficits.

21. In truth and in fact,

- C. CellAssure is not clinically proven to:
  - 1. treat cachexia and cancer-related malnutrition; or
  - 2. treat cancer, including cancer tumors; and
- D. Cognify is not clinically proven to treat, mitigate, or prevent cognitive dysfunction caused by cancer treatment, including Mild Cognitive Impairment, memory loss, and attentional deficits.

22. The representations set forth in Paragraph 20 are false or misleading. Therefore, the making of representations set forth in Paragraph 20 of this Complaint constitutes a deceptive act or practice and the making of false advertisements, in or affecting commerce, in violation of Sections 5(a) and 12 of the FTC Act, 15 U.S.C. §§ 45(a) and 52.

### **CONSUMER INJURY**

28. Consumers have suffered and will continue to suffer substantial injury as a result of Defendants' violations of the FTC Act. In addition, Defendants have been unjustly enriched as a result of their unlawful acts or practices. Absent injunctive relief by this Court, Defendants are likely to continue to injure consumers, reap unjust enrichment, and harm the public interest.

### **THIS COURT'S POWER TO GRANT RELIEF**

29. Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), empowers this Court to grant injunctive and such other relief as the Court may deem appropriate to halt and redress violations of any provision of law enforced by the FTC. The Court, in the exercise of its equitable jurisdiction, may award ancillary relief, including rescission or reformation of contracts, restitution, the refund of monies paid, and the disgorgement of ill-gotten monies, to prevent and remedy any violation of any provision of law enforced by the FTC.

### **PRAYER FOR RELIEF**

30. Wherefore, Plaintiff, pursuant to Sections 13(b) of the FTC Act, 15 U.S.C. § 53(b), and the Court's own equitable powers, requests that the Court:

^A. Enter a permanent injunction to prevent future violations of FTC Act but

Re: Award such relief as the Commission deems necessary to redress injury to consumers

limited resulting from Defendants' violation of the FTC Act, including but not