

RECEIPT NUMBER
200523790

ORIGINAL

42

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ELVIRA PRICE, an individual who resides in the State of Michigan;
ROBERT PRICE, an individual who resides in the State of Michigan;
JULIEANN FIRLE, an individual who resides in the State of New York;
JOHN PAGE, an individual who resides in the State of Georgia;
JAMES JONES, an individual who resides in the State of Texas;
RICHARD GARNETT, an individual who resides in the State of New York;
ROBERT PADILLA, an individual who resides in the State of Florida;
JOHN DOE, an individual who resides in a State that is currently
unknown to Plaintiffs; on behalf of themselves and all
others similarly situated,

Plaintiffs,

vs.

JUDGE : Hood, Denise Page
DECK : S. Division Civil Deck
DATE : 04/07/2005 @ 15:57:43
CASE NUMBER : 2:05CV71369
CMP PRICE ET AL V. BERLELEY
PREMIUMNUTRACEUTICALS INC ET AL
(DA)

BERKELEY PREMIUM NUTRACEUTICALS, INC
an Ohio for-profit corporation and successor corporation
to Warner Health Care, Inc., Wagner Nutraceuticals, Inc.,
Lifekey, Inc., and Boland Naturals, Inc.;
BOLAND NATURALS, INC., an Ohio for-profit corporation,
and a predecessor corporation to, and wholly owned subsidiary
of, Berkeley Premium Nutraceuticals, Inc.;
LIFEKEY, INC., an Ohio for-profit corporation, and a
predecessor corporation to, and wholly owned subsidiary of,
Berkeley Premium Nutraceuticals, Inc.;
WAGNER NUTRACEUTICALS, INC., an Ohio for-profit
corporation, and a predecessor corporation to, and wholly
owned subsidiary of, Berkeley Premium Nutraceuticals, Inc.;
WARNER HEALTH CARE, INC., an Ohio for-profit corporation,
and a predecessor corporation to, and wholly owned subsidiary
of, Berkeley Premium Nutraceuticals, Inc.; and
STEVEN WARSHAK, Founder and Chief Executive Officer of
Berkeley Premium Nutraceuticals, Inc., Warner Health Care, Inc.,
Wagner Nutraceuticals, Inc., Lifekey, Inc., and Boland
Naturals, Inc., Ohio for-profit corporations; jointly and severally,

Defendants.

MAGISTRATE JUDGE MORGAN

COMPLAINT FOR
DECLARATORY
INJUNCTIVE RELIEF
AND DAMAGES AND
JURY DEMAND

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Stephen F. Wasinger (P25963) Law Offices of Stephen F. Wasinger, P.L.C. Attorneys for Plaintiffs 26862 Woodward Avenue Royal Oak, MI 48607-0968 248-414-9900/Fax: 248-414-9906	
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There is a previously dismissed case in the Eastern District of Michigan which arises out of the same facts and circumstances as the instant case, Price, et al. v. Berkeley Premium Nutraceuticals, et al., ED Mich No. 04-73166, Honorable Avern Cohn.

**COMPLAINT FOR DECLARATORY INJUNCTIVE RELIEF
AND DAMAGES AND JURY DEMAND**

Plaintiffs, by their counsel, and for their Compliant and Declaratory Injunctive Relief and Damages and Jury Demand state:

I. NATURE OF THIS ACTION

1. This is a class action brought by the above-referenced Plaintiffs on behalf of themselves and thousands of individuals who have fallen victim to Defendants' unfair, deceptive and fraudulent nationwide marketing and sales of their product line of herbal "nutraceutical" supplements known as Avlimil, Altovis, Enzyte, Ogöplex, Rogisen and Rovicid (hereinafter collectively referred to as "Nutraceutical Product Line") by the Defendants, Berkeley Premium Nutraceuticals, Inc., Warner Health Care, Inc., Wagner Nutraceuticals, Inc., Lifekey, Inc., and/or Boland Naturals, Inc. (hereinafter collectively referred to as "Defendants"). Defendants' exploitation of Plaintiffs and Class by their unfair, deceptive and fraudulent nationwide advertising, marketing, and sales of their Nutraceutical Product Line has generated revenues for Defendants of approximately \$100 million in 2003 and \$260 million in projected sales for 2004.

2. Defendants' fraudulent course of conduct was perpetrated by written uniform sales presentations and advertisements, including representations made on Defendants' web sites, and the fraudulent course of conduct included failing to disclose material facts about Defendants' products and about Defendants' sales practices, including Defendants' billing and cancellation policies as well as Defendants' so-called "Automatic Shipping Program."

3. Defendants' fraudulent course of conduct violates the Unordered Merchandise Statute, 39 U.S.C. § 3009; the Electronic Funds Transfer Act, 15 U.S.C. § 1693; the Ohio Consumer Sales Practices Act; and the common law.

II. PARTIES

A. *Plaintiffs*

4. Plaintiff Elvira Price is an individual who resides in the State of Michigan, County of Wayne.

5. Plaintiff Robert Price is an individual who resides in the State of Michigan, County of Wayne.

6. Plaintiff Julicann Firlie is an individual who resides in the State of New York.

7. Plaintiff John Page is an individual who resides in the State of Georgia.

8. Plaintiff James Jones is an individual who resides in the State of Texas.

9. Plaintiff Richard Garnett is an individual who resides in the State of New York

10. Plaintiff Robert Padilla is an individual who resides in the State of Florida.

11. Plaintiff Robert Evans Doe is an individual who resides in the State of Missouri.

B. *Defendants*

12. Defendant Berkeley Premium Nutraceuticals, Inc. ("Berkeley") is an Ohio Corporation established by Defendant Steven Warshak that does substantial business throughout the United States, including the State of Michigan, County of Wayne. Berkeley is a successor

United States, including the State of Michigan, County of Wayne, at all times relevant to this Complaint.

18. Defendant Warshak has abused the corporate form by engaging in a pattern of fraudulent activity that has bilked consumers out of millions of dollars. Evidence of Defendant Warshak's fraudulent activity and abuse of the corporate form include an unauthorized billing scheme implemented by Defendant Warshak through Defendant Berkeley Premium Nutraceuticals, Inc., Defendant Boland Naturals, Inc., Defendant Lifekey, Inc., Defendant Wagner Nutraceuticals, Inc., and Defendant Warner Health Care, Inc. This scheme consists of, by way of illustration and not limitation:

- a. Defendants offering consumers "free" samples of one or more products in their Nutraceutical Product Lines for which said consumers must pay a nominal shipping and handling fee, typically \$4.95;
- b. Defendants obtaining credit/debit card account information from consumers under the guise of charging said accounts only the said nominal shipping and handling fee; and
- c. Defendants subsequently making unauthorized charges to said credit/debit card accounts in amounts exponentially greater than the amount, if any, that may have been initially approved by said consumers, typically \$70.00.

19. In 2003, Defendants' fraudulent billing scheme generated approximately \$100 million in revenues for Defendants. Defendant Warshak estimates that this fraudulent billing scheme will generate approximately \$260 million in sales during 2004.

20. Defendant Warshak has further engaged in a pattern of fraudulent corporate activity which constitutes an abuse of the corporate form by causing or acquiescing in Defendants' representations regarding their sexual enhancement nutraceutical products, including but not limited to representations that their product Enzyte, a purported "all-natural male enhancement," a) "adds one to three inches" to the size of a user's penis, b) is "100% Safe with a 98.3% Success Rate," c) causes an average 24% increase in erection size, and d) causes a

user's erectile chamber and penis to enlarge up to 41% over the course of their eight-month program.

21. Defendant Warshak has caused or acquiesced in Defendants making these misrepresentations despite there being no legitimate scientific basis supporting the claims that Enzyte could increase penis size and despite a warning by the Food and Drug Administration (FDA) issued over a decade ago that at least one ingredient in Enzyte was potentially dangerous.

22. Defendant Warshak caused the corporate Defendants, which he controls as Founder and Chief Executive Officer, in this pattern of fraud and abuse of the corporate form, which he currently implements through the Berkeley Premium Nutraceutical, Inc. entity.

23. Defendant Warshak has invoked the fiction of these corporations being entirely separate entities from their stockholders to implement his fraudulent scheme and thereby subvert Justice.

24. Based upon information and belief, Defendants are and/or have been closely held corporations with only a few stockholders that have a unity of interest with Defendants and which have used Defendants' corporate structures in an attempt to avoid the liability that would otherwise inure to them if they were to personally implement said fraudulent scheme.

25. The corporate Defendants serve as an instrumentality of Defendant Warshak and/or the other corporate stockholders that have an interest in them.

26. The corporate Defendants have been used to commit fraudulent wrongdoing which has resulted in unjust loss and injury to thousands of Plaintiffs throughout the United States and other countries, including Canada, Great Britain, and presumably Mexico.

27. Because Defendant Warshak has persisted in a pattern of fraudulent corporate activity, abused the corporate form, and treated Defendants as his own alter ego so as to perpetrate his fraudulent wrongdoing onto thousands of consumers, the fiction of these corporations being entirely separate entities from their stockholders should not be recognized, and Defendant Warshak and any other of Defendants' stockholders should stand in the shoes of

the corporate Defendants and be held accountable for the tens of million of dollars that have been lost by consumers as a result of the fraudulent activity perpetrated by Defendants as controlled, operated, and/or managed by Defendant Warshak.

III. JURISDICTION AND VENUE

28. This Court has jurisdiction pursuant 28 U.S.C. §§ 1331 and 1337(a), as well as principles of supplemental and ancillary jurisdiction. At all times relevant to this Complaint, Defendants' course of business, including the acts and practices alleged herein, has been and is in or affecting commerce. In addition, even if there were no federal questions, this Court would also have jurisdiction under 28 U.S.C. § 1332(d), as amended by the Class Action Fairness Act of 2005, effective February 18, 2005, because the matter in controversy exceeds the sum or value of \$5,000,000, exclusive of interest and costs, and this is a class action in which some members of the class are citizens of a State different from any defendant.

29. This Court has jurisdiction over Defendants because they have engaged in, and continue to engage in, substantial commercial activity throughout the State of Michigan, County of Wayne, including but not limited to a vigorous nationwide television, radio, internet, and print media advertising, marketing, and sales campaign.

30. Venue is proper in this district under 28 U.S.C. § 1391 and because this Court has denied Defendants' motion to transfer venue.

IV. COMMON ALLEGATIONS

31. Defendants have portrayed and continue to portray themselves as providers of nutraceuticals that currently offer "six supplements to address issues including sexual health." Defendants represent on their website that "[n]utraceuticals can provide demonstrated health benefits or reduce the risk of chronic disease, above and beyond their basic nutritional functions." Defendants define the term "nutraceutical" as "a natural, bioactive supplement designed to promote health and help prevent disease" and further claim that "[n]utraceutical

tablets provide a convenient way to boost your general health and address specific concerns such as heart, prostate, or sexual health.”

32. In an effort to attract customers, Defendants represent on their website that they “work with leading medical professionals associated with some of the top universities in the design of all clinical trials” and that they “strongly support . . . regulation in the nutraceutical industry . . . [and] measures . . . to ensure the quality and efficacy of supplements” “by aligning [them]selves with industry experts and conducting clinical trials” on their products.

33. Based upon information and belief, these representations are false and deceptive as evidenced by Defendants’ failure to conduct or sponsor research on its products that is based on competent and reliable scientific evidence.

A. Defendants’ Sexual Enhancement Nutraceutical Product Line (Avlimil, Enzyte, and Ogöplex/Mioplex)

1. Avlimil

34. At all times relevant to this Complaint, Defendants designed, implemented and maintained a nationwide television, radio, internet, and print media advertising, marketing, and sales campaign which represented their herbal nutraceutical supplement, Avlimil, as “an effective formula for improving female sexual response” “that can help enhance libido and restore a woman’s natural balance” and provide its users a “a more energetic love life.”

35. Defendants’ nationwide advertising, marketing, and sales campaign promoted Avlimil by citing an unpublished 2002 Clinical Trial Study (the “Study”) which concluded that Avlimil is “effective in boosting female sexual function” to the extent that “nearly 85 percent of the 49 women who took the supplement reported an overall improvement in their sexual desire.”

36. The Study was conducted by researcher Dr. James M. Blum, Ph.D. Experts who subsequently reviewed the Study opined that it “wasn’t large enough, properly randomized or adequately blinded” and that it “relied on self-reports of effectiveness, another source of potential bias.”

37. When confronted with this informal peer review of the Study, Dr. Blum publicly admitted that these flaws in the Study were the result of cost constraints that, admittedly, weakened the results of the Study. Dr. Blum has since publicly lamented that the unpublished Avlimil study was a project that he would “take back” if he could.

38. Despite Dr. Blum’s publicly expressed remorse and virtual recantation of the Study, Defendants continue to use the Study in their nationwide television, radio, internet, and print media advertising, marketing, and sales campaign to establish the purported scientific validity of Avlimil.

2. Enzyte

39. At all times relevant to this Complaint, Defendants designed, implemented and maintained a nationwide television, radio, internet, and print media advertising, marketing, and sales campaign which represented their herbal “nutraceutical” supplement, Enzyte, as “[t]he first all-natural male enhancement program” that would “add[] one to three inches” to a user’s penis size “in just eight months” or else the user would receive double his money back. Defendants also claimed that individuals who took Enzyte experienced, on average, a 24% increase in erection size, and that, “[o]ver the course of the eight month program” a user’s erectile chamber and penis would “enlarge up to 41%.” Defendants have further represented that Enzyte is “100% Safe” and boasts “a 98.3% Success Rate.”

40. Thousands of consumer Class have purchased Enzyte based upon Defendants’ representations that Enzyte would in fact increase the size of a man’s penis. From 2001 to at least mid-2003, Defendants fraudulently advertised and marketed Enzyte nationwide as a product that would actually increase the size of a man’s penis when in fact it did not and does not have such a capability.

41. Defendants also represented to consumers that “Enzyte was developed by leading medical professionals, who after years of research, concluded that with the right hormonal stimuli, blood can be forced into muscle and tissue chambers of the penis and over a period of time, these chambers will substantially stretch and elongate.” Defendant further represented that

“Enzyte really works” and that “Research shows that after 3 to 4 weeks, most men on the Enzyte plan will experience some gain in both length and roundness.” According to Defendants, “initial results may take from 4 to 6 weeks,” depending on the individual consumer.

42. Based upon information and belief, the “research” referenced in Defendants’ national advertising campaign did not and/or does not constitute competent and reliable scientific evidence.

43. Upon information and belief, Defendants provide their telephone sales representatives with standardized sales scripts from which they provide information to consumers who contact Defendants by telephone in response to Defendants’ advertisements. These scripts, utilized through at least January 2004, encouraged Defendants’ sales representatives to advise consumers that Enzyte could in fact increase a user’s penis size.

44. Defendants made these claims despite the fact there was and is no competent and/or reliable scientific evidence supporting their claims that Enzyte is capable of increasing a man’s penis size.

45. Defendant Warshak recently admitted that Defendants withdrew their claim that Enzyte added inches to a man’s penis because no third-party independent trials had been conducted to substantiate the claim and because others “who know this industry a lot better than we had” made it “clear that unless it was a third-party independent trial, you shouldn’t use” such claims to promote a purported penis enlargement product.

46. Defendants’ current website now discloses that “there is no known ingestible proven to alter the natural size or shape of the penis,” and that “Enzyte will not alter the size or shape of your penis.” However, Defendants continue to maintain on their current website that “Enzyte can help your body achieve full, strong erections.”

47. Although Defendants’ current website renounces their previous claim that Enzyte will increase the size of a man’s penis, it continues to represent Enzyte as a “male enhancement” which continues to mislead consumers into purchasing the product to obtain results that the

product cannot provide to them. Defendants currently represent that Enzyte “help[s] support firmer, fuller-feeling, better quality erections” and that Enzyte, the “once-a-day tablet for natural male enhancement,” is “good news for men who want to have firmer, fuller-feeling erections.”

48. Defendants have represented that Enzyte is “100% Safe” and that it is “as safe to take as a daily vitamin with absolutely no side effects” despite the fact that Enzyte contains yohimbe, a substance which the FDA has publicly announced has well-recognized side effects and is potentially very dangerous to certain groups of consumers who suffer from common medical ailments such as diabetes.

49. Over a decade ago, the FDA issued a warning that yohimbe could cause “[s]erious adverse effects, including renal failure, seizures and death, have been reported to the FDA with products containing yohimbe and are currently under investigation.” The warning further indicated that yohimbe “causes vasodilatation, thereby lowering blood pressure” and acknowledged that side effects from a chemical contained in yohimbe, *i.e.* yohimbine, “are well recognized and may include central nervous system stimulation that causes anxiety attacks.” The FDA’s warning suggested that yohimbe “be avoided by individuals with hypotension (low blood pressure), diabetes, and heart, liver or kidney disease” and warned that ingesting too much yohimbe could result in “weakness and nervous stimulation followed by paralysis, fatigue, stomach disorders, and ultimately death.”

50. Despite this well-established FDA warning, Defendants designed and implemented a nationwide television, radio, internet, and print media advertising, marketing, and sales campaign, promoting Enzyte as a “100% safe” and “as safe to take as a daily vitamin with absolutely no side effects.”

51. In fact, Defendants’ nationwide advertising, marketing, and sales campaign marketed Enzyte to high-risk users by indicating that Enzyte “may be the answer” for men experiencing “Stage 2 erectile dysfunction,” a disorder which Defendants have acknowledged can be caused by diabetes. Despite the FDA’s warning that yohimbe should be avoided by individuals suffering from diabetes, Defendants engaged in an advertising, marketing, and sales

campaign that promoted the yohimbe-laden Enzyte to consumers suffering from a condition that Defendants knew or reasonably should have known could be a manifestation of diabetes.

52. The Federal Trade Commission ("FTC") has filed at least four complaints against makers of "male potency" supplements for, among other things, falsely claiming that Yohimbe-containing products were safe and free from potential adverse side-effects.

53. Defendants have earned, and continue to earn, tens of millions of dollars in revenues while promoting Enzyte as a product that is 100% safe and which will increase a user's penis size.

3. Ogöplex Pure Extract (Also Known As Mioplex)

54. At all times relevant to this Complaint, Defendants designed, implemented and maintained a nationwide television, radio, internet, and print media advertising, marketing, and sales campaign which represented their herbal "nutraceutical" supplement, Ogöplex Pure Extract (also known as Mioplex) (hereinafter collectively referred to as "Ogöplex"), as "a pure flower seed extract in tablet form" that when taken each morning with juice or coffee will act as "a male orgasm intensifier."

55. Defendants maintain that this pure flower seed extract has been "[s]hown safe and extremely effective" and that it can a) give men "an increased number of ejaculatory contractions for much longer lasting orgasms," b) give men "stronger, deeper contractions that are much fuller from start to finish allowing for significantly more intense orgasms," c) give men "an increase in ejaculate volume for longer, stronger 'release sensation'," and d) give men "faster ejaculate recovery times for much better second orgasms."

56. Defendants further advertise that "Ogöplex Pure Extract will not be fully available to all areas of the United States and Canada until September 2004 and will not be available at all in Mexico until January 2004" and that presently only "[a] limited supply of Ogöplex Pure Extract is available."

57. Defendants have engaged in this advertising, marketing, and sales campaign despite their knowledge that the supply of Ogöplex was not truly "limited" and that their claims as to the capability of Ogöplex to increase the frequency and strength of ejaculatory contractions, to increase ejaculate volume, and to provide for faster ejaculate recovery times for improved second orgasms are false and/or lack any empirical substantiation.

58. Despite Defendants' knowledge of the false, misleading, and fraudulent claims made regarding Ogöplex, they have earned, and continue to earn, millions of dollars in revenues as a result of said representations.

B. Billing Practices Regarding All Products in Defendants' Nutraceutical Product Line

59. Defendants have engaged in deceptive and fraudulent billing practices relating to their entire Nutraceutical Product Line (*i.e.*, Avlimil, Altovis, Enzyte, Ogöplex, Rogisen and Rovicid). Namely, Defendants designed, implemented and maintained a nationwide television, radio, internet, and print media advertising, marketing, and sales campaign in order to obtain information from consumers regarding one or more of their credit/debit card accounts so that Defendants could subsequently make unauthorized charges to said credit/debit card accounts in amounts exponentially greater than the amount, if any, that may have been initially approved by the consumers.

60. By way of example and not limitation, consumers responding to Defendants' advertising, marketing, and sales campaign are routinely informed by Defendants that their credit/debit card accounts will be charged a nominal fee, usually \$4.95, to cover the expenses associated with shipping the "free" product sample to the consumer. Once the consumer provides his or her credit card account information to Defendants, Defendants make one or more charges to the credit card account that is unauthorized and/or exponentially greater than the nominal fee that Defendants represented to the consumers. In 2003, this fraudulent unauthorized billing scheme generated what Plaintiffs believe to be a very substantial portion of Defendants' \$100 million in sales revenues.

61. Defendants' implementation of this deceptive and fraudulent billing practice has taken a variety of forms, including by way of example and not limitation:

- a. Defendants' automatic "enrollment" of purchasers of any of the products in their Nutraceutical Product Line in Defendants' so-called "Managed Care Direct" program (hereinafter "Automatic Shipping Program") which entails subsequent monthly shipments of Defendants' products being automatically delivered to consumers at their expense;
- b. Defendants' publication of one or more telephone numbers for consumers to call to request that they be removed from said Automatic Shipping Program when Defendants knew or reasonably should have known that no one would answer said telephone number(s);
- c. Defendants' publication of one or more telephone numbers for consumers to call to request that they be removed from said Automatic Shipping Program which offered only a voicemail message system to record said consumer requests, when Defendants knew or reasonably should have known that no one would respond to the voicemail messages that were left by consumers requesting their removal from said Automatic Shipping Program;
- d. Defendants' representation to consumers that they would be removed from Defendants' Automatic Shipping Program and/or receive a refund once the consumers returned the products shipment(s) to Defendants, when Defendants knew or reasonably should have known that no refund would be given even if said shipments were returned by the consumers;
- e. Defendants' representation that consumers had knowingly and voluntarily agreed to their enrollment in Defendants' Automatic Shipping Program when said consumers had not agreed to any such enrollment;

- f. Defendants' design, implementation, and maintenance of an online web page order form that has references to the automatic enrollment of Defendants' customers in said Automatic Shipping Program out of view of those browsing said website without scrolling the web page downward and which, as a result of this deceptive web page design, looks like a complete web page order form;
- g. Defendants' representation to consumers that they will be charged only a nominal fee, usually \$4.95, to cover the expenses associated with shipping the "free" product sample to the consumer when Defendants knew or reasonably should have known that said consumers would be automatically enrolled in said Automatic Shipping Program and thereby incur additionally charges that are exponentially greater than the nominal fee that Defendants initially represented to the consumer;
- h. Defendants' representation to consumers that one or more products in their Nutraceutical Product Line provides a money-back guarantee equal to or greater than 100% of the cost of the product when Defendants knew or reasonably should have known that no refund would be provided to those consumers who requested such a refund;
- i. Defendants' representation to consumers that a physician's approval was required to cancel their automatic enrollment in Defendants' Automatic Shipping Program when, aside from Defendants' own fraudulent scheme, no such approval was in fact required;
- j. Defendants' representation to consumers that a notarized form revealing the highly personal nature of the consumers' purchase and use of Defendants' sexual enhancement nutraceutical products was required before a refund could be issued by Defendants when, aside from

Defendants' own fraudulent scheme, no such disclosure or notarization was required;

- k. Other miscellaneous schema whereby Defendants' beguiled consumers to disclose to Defendants information pertaining to one or more of the consumers' credit/debit card accounts so that Defendants could subsequently make unauthorized charges to said credit/debit card accounts in amounts exponentially greater than the amount, if any, that may have been initially approved by the consumers.

V. REPRESENTATIVE PLAINTIFFS' CLAIMS

1. Plaintiffs Robert and Elvira Price (Avlimil)

62. In August 2003, Plaintiff Elvira Price heard a radio advertisement ran by Defendants in which Defendants offered a "free" complimentary sample of their product Avlimil.

63. Shortly after hearing the radio advertisement, Mrs. Price contacted Defendants and requested the "free" sample of Avlimil.

64. Defendants requested that Mrs. Price give them a credit card number solely for the purpose of paying a nominal fee, approximately \$4.95, for the shipping and handling charges of the "free" sample of Avlimil.

65. Mrs. Price gave Defendants a credit number solely for the purpose of paying the nominal fee associated shipping the "free" sample of Avlimil to her.

66. Mrs. Price specifically instructed Defendants not to place any other charge(s) on the credit account except for the nominal shipping and handling charge.

67. Mrs. Price further instructed Defendants not to place any other charge(s) on the credit account for any additional packages of Avlimil other than the "free" complimentary sample of Avlimil.

68. The account for which the credit card was issued was owned jointly by Mrs. Price and her husband, Plaintiff Robert Price.

69. Approximately one week later, Mrs. Price received the complimentary sample of Avlimil in the mail. Approximately one month later, Mrs. Price received a second package of Avlimil from Defendants which she had not ordered.

70. On or about October 21, 2003, Defendants charged thirty-five dollars (\$35) to the credit card account belonging to Mr. and Mrs. Price for the unrequested package of Avlimil.

71. On or about November 17, 2003, Mrs. Price received another package of Avlimil from Defendants that she had not ordered. Mrs. Price contacted Defendants on this same day and inquired about the unrequested packages of Avlimil.

72. Defendants explained to Mrs. Price that Avlimil usually sold for seventy-five dollars (\$75) but had been provided to her at a reduced price of only thirty-five dollars (\$35) as a result of her contract with Defendants.

73. Defendants further informed Mrs. Price that she had been automatically "enrolled" in Defendants' Automatic Shipping Program, which entailed that packages of Avlimil would be automatically shipped to Mrs. Price and that each shipment would result in thirty-five dollars (\$35) being automatically charged to Mr. and Mrs. Price's credit card account.

74. Defendants explained that Mrs. Price could not be removed from their Automatic Shipping Program without first providing to Defendants a physician's written approval. Defendants suggested that Plaintiff Elvira Price obtain a letter from her physician fraudulently claiming that her ingestion of Avlimil made her ill so as to make Mrs. Price eligible for removal from Defendants' Automatic Shipping Program.

75. Mr. Price subsequently telephoned Defendants in an effort to resolve the matter, but was likewise told about Defendants' Automatic Shipping Program and the need for a physician's written approval before Mrs. Price could cancel her automatic enrollment in Defendants' Automatic Shipping Program.

76. Avlimil is an over-the-counter herbal remedy that is not regulated by the FDA or any other government agency and does not require a physician's prescription.

2. Plaintiff Julicann Firle (Altovis and Avlimil)

77. Plaintiff Julicann Firle is an individual who resides in Levittown, New York.

78. On May 15, 2004, Ms. Firle ordered what was represented to her through Defendants' advertising as a "free" sample of Altovis and Avlimil.

79. As with countless other victims, Ms. Firle was required to provide credit card account information to Defendants for the sole purpose of, as represented by Defendants, the payment of a \$4.95 charge associated with shipping the "free" sample to Ms. Firle.

80. Defendants subsequently caused to be shipped to Ms. Firle three packages of Avlimil and one package of Altovis for which her credit card account was charged \$59.00.

81. Ms. Firle subsequently telephoned Defendants to dispute the charges, but Defendants maintained that Ms. Firle had received exactly what she had ordered. Defendants further referred Ms. Firle to the language of their "12 Month Money-Back Guarantee" which provides that if "[a]fter purchasing a full 12 months' supply, if you aren't completely satisfied with the results, [Berkeley will] give you a full money-back refund."

82. Defendants had not apprised Ms. Firle before making her purchase that they would not refund her money unless Ms. Firle purchased a full twelve-month supply of Altovis. Based upon information and belief, Defendants have denied refunds even to those customers who have purchased a full twelve-month supply of Altovis and who subsequently returned the product.

83. On June 10, 2004, Defendants sent to Ms. Firlc three more packages of Altovis which she did not order and for which her credit card account was charged \$70.00. Ms. Firlc learned that, like many other victims, she had been automatically "enrolled" in Berkeley's Automatic Shipping Program without her knowledge, approval, or consent.

84. Ms. Firlc returned the three packages of Altovis to Defendants with correspondence instructing Defendants to remove her from their Automatic Shipping Program. Ms. Firlc telephoned Defendants two weeks later to inquire as to the status of her request and was informed by Defendants that they would not issue a refund to her but that they would reship the product to her at her expense. When Ms. Firlc informed Defendants that she had not enrolled in their Automatic Shipping Program, she was informed that her "membership" in Defendants' Automatic Shipping Program would be cancelled but that she would not be receiving a refund pursuant to the terms of Defendants' "12 Month Money-Back Guarantee," *i.e.*, because Ms. Firlc had not purchased a full one-year supply of Altovis.

3. Plaintiff John Page (Enzyte)

85. Plaintiff John Page is an individual who resides in Marietta, Georgia.

86. On or about September 1, 2002, Mr. Page observed one of Defendants' advertisements on the television. Mr. Page responded to said advertisement by telephoning Defendants and requesting a free trial sample of Enzyte. During said telephone conversation, Defendants represented to Mr. Page that they needed to obtain information regarding one of Mr. Page's credit/debit card accounts so that they could charge said account \$4.95 to cover the expense associated with shipping the "free" trial sample of Enzyte to Mr. Page. Mr. Page gave his credit card account information to Defendants.

87. Mr. Page subsequently received his "free" trial sample of Enzyte for which his credit card account was charged \$60.00. When Mr. Page telephoned Defendants to inquire why he had been charged for the "free" sample, he was informed that he had incurred the charge because Defendants were "all out of the free stuff."

88. Approximately one month later, Defendants caused to be charged to Mr. Page's credit card account \$120 despite the fact that Mr. Page had not received any further shipments of Enzyte or any other of the Defendants' products.

89. When subsequently contacted by Mr. Page regarding the \$120 charge to this credit card account, Defendants refused to give Mr. Page a refund.

90. Mr. Page subsequently filed a complaint with the Office of the Ohio Attorney General who, based upon information and belief, in turn contacted Defendants.

91. As a result of the Office of the Ohio Attorney General contacting Defendants, Defendants caused a \$120 refund to be sent to Mr. Page but did not refund the original \$60 charge for the purported "free" sample of Enzyte.

4. Plaintiff James Jones (Ogöplex Pure Extract)

92. Plaintiff James Jones is an individual who resides in Bulverde, Texas.

93. In early 2003, Mr. Jones' son saw one of Defendants' advertisements for Ogöplex in a magazine and used Mr. Jones' credit card to order a package of Ogöplex which resulted in a \$120 charge to Mr. Jones' credit card account.

94. After receiving the package of Ogöplex, Mr. Jones contacted Defendants and informed them that he had not personally ordered the product with his credit card and that he therefore wished to receive a refund of the \$120 that had been charged to his credit card account.

95. Defendants informed Mr. Jones that they do not give refunds.

96. Mr. Jones subsequently filed a complaint with the Office of the Ohio Attorney General who, based upon information and belief, in turn contacted Defendants.

97. As a result of the Office of the Ohio Attorney General contacting Defendants, Defendants represented that it would refund \$95 to Mr. Jones upon return of the Ogöplex.

98. Although Mr. Jones returned the Ogöplex to Defendants on May 23, 2003, he has yet to receive a refund from Defendants.

5. Plaintiff Richard Garnett (Mioplex)

99. Plaintiff Richard Garnett is an individual who resides in Highland, New York.

100. During January or February 2003, Defendants caused to be sent to Mr. Garnett's electronic mail ("email") account an unsolicited commercial email which advertised Defendants' Mioplex product. There was no language in said email regarding Defendants' Automatic Shipping Program.

101. About March 2003, Mr. Garnett responded to the email advertisement and ordered one trial package of Mioplex at the advertised rate of \$29.

102. After receiving the trial package of Mioplex, Mr. Garnett received six more unrequested shipments of Mioplex during the course of the next several weeks for which he was charged approximately \$63.95 for each shipment for a total of \$319.75.

103. Mr. Garnett subsequently telephoned Defendants and received only a voicemail prompt advising him to leave a message to which a customer service representative would respond. No customer service representative ever returned Mr. Garnett's telephone call.

104. The credit card account holder subsequently refunded to Mr. Garnett \$127.90 of the unauthorized charges, but Mr. Garnett remains uncompensated for approximately \$191.85 of the unauthorized charges that Defendants caused to be made to Mr. Garnett's credit card account.

6. Plaintiff Robert Padilla (Rogisen)

105. Plaintiff Robert Padilla is an individual who resides in Deltona, Florida.

106. On April 4, 2004, Mr. Padilla ordered what was represented to him through Defendants' advertising as a "free" sample of Rogisen.

107. As with countless other victims, Mr. Padilla was required to provide to Defendants credit card account information for the sole purpose of, as represented by Defendants, the payment of a \$4.95 charge associated with shipping the package to Mr. Padilla.

108. On May 24, 2004, Defendants caused Mr. Padilla's credit/debit card account to be charged \$70 for said "free" sample of Rogisen.

109. Defendants subsequently caused to be shipped to Mr. Padilla a second package of Rogisen that was neither ordered nor desired by Mr. Padilla.

110. Mr. Padilla subsequently contacted Defendants twice by mail and twice by telephone in order to dispute the charges, but Defendants have refused to provide a refund to Mr. Padilla. During his contact with Defendants, Mr. Padilla learned that, like many other victims, he had been automatically placed on Defendants' Automatic Shipping Program without his knowledge, approval, or consent.

111. Defendants never apprised Mr. Padilla that he would be billed \$70 for said "free" sample of Rogisen nor did Defendants ever apprise Mr. Padilla that by accepting the "free" sample of Rogisen Mr. Padilla would be "enrolled" in Defendants' Automatic Shipping Program.

7. Plaintiff Robert Evans (Altovis, Avlimil, Rogisen, and Rovacid)

112. Plaintiff Robert Evans is an individual who resides in St. Joseph, Missouri.

113. During early May 2004, Mr. Evans responded to one of Defendants' television advertisements and contacted Defendants to purchase a package of Rogisen.

114. While taking Mr. Evans' order, Defendants' sales representative informed Mr. Evans that he could also receive free samples of Altovis, Avlimil, and Rovacid. Defendants' sales representative informed Mr. Evans of Defendants' Automatic Shipping Program but assured Mr. Evans that he could cancel his enrollment in said program at any time before consuming the entire thirty-day supply of the product(s). On May 21 and 22, 2004, Defendants caused \$18 to be charged to a credit card account belonging to Mr. and Mrs. Evans for the expenses allegedly associated with shipping these products to Mr. Evans.

115. After waiting approximately three weeks and not receiving any of the products, Mr. Evans became concerned, and on June 14, 2004, he contacted Defendants by telephone and requested that his order be cancelled. Defendants informed Mr. Evans that his enrollment could

not be cancelled because the first shipment had already been sent to him. When Mr. Evans inquired why he could not simply refuse the shipment and have it returned to Defendants, Defendants informed him that the products could not be shipped through the mail because they were "pharmaccutical" in nature.

116. On June 18, 20, and 23, 2004, Defendants caused \$279.90 in unauthorized charges to be charged to Mr. and Mrs. Evans' credit card account. These charges were for additional shipments of Altovis, Avlimil, Rogisen, and Rovucid that Defendants had allegedly sent to Mr. Evans as part of his enrollment in Defendants' Automatic Shipping Program.

117. Mr. Evans never received any products from Defendants.

118. When Mr. Evans subsequently telephoned Defendants to discuss the unauthorized charges, a customer service representative caused Mr. Evans to wait on hold for approximately one hour before allowing Mr. Evans to speak with a supervisor.

119. Once Defendants refused to cancel the order or issue a refund, Mr. Evans disputed the charges with the credit card accountholder, and on June 18, 2004, the accountholder gave Mr. Evans a temporary credit of \$279.90 pending investigation of the disputed charges.

120. On July 12, 2004, said \$279.90 temporary credit was rescinded as a result of Defendants informing the accountholder that they have a "no refund" policy.

121. On July 13, 2004, Mr. Evans contacted Defendants by telephone, during which Defendants informed him that his dispute was actually with the accountholder and not with Defendants. Defendants refused to discuss the matter any further or provide Mr. Evans with a street address to which he could submit a written complaint.

VI. CLASS ACTION ALLEGATIONS

122. Plaintiffs bring all claims herein as class claims pursuant to F.R.Civ.P. 23, the requirements of which are met with respect to the class defined below.

A. Class Definitions

123. Plaintiffs sue on behalf of themselves all persons similarly situated who have been damaged by Defendants' fraudulent scheme, including their violations of the Unordered Merchandise Statute, 39 U.S.C. § 3009, Electronic Funds Transfer Act, 15 U.S.C. § 1693, et seq, the Ohio Consumer Sales Practices Act ("CSPA") and the common law claims which challenge Defendants' classwide conduct with respect to all of their products.

124. In addition, to the extent there are separate issues relating to Defendants' fraudulent conduct specific to specific products, Plaintiffs sue on behalf of the following subclasses:

- a. All persons in the United States who have purchased Avlimil, excluding any owners, officers, and/or employees of Defendants and any persons claiming personal injury or wrongful death.
- b. All persons in the United States who have purchased Altovis, excluding any owners, officers, and/or employees of Defendants and any persons claiming personal injury or wrongful death.
- c. All persons in the United States who have purchased Enzyte, excluding any owners, officers, and/or employees of Defendants and any persons claiming personal injury or wrongful death.
- d. All persons in the United States who have purchased Ogöplex/Mioplex, excluding any owners, officers, and/or employees of Defendants and any persons claiming personal injury or wrongful death.

- c. All persons in the United States who have purchased Rogisen, excluding any owners, officers, and/or employees of Defendants and any persons claiming personal injury or wrongful death.
- f. All persons in the United States who have purchased Rovucid, excluding any owners, officers, and/or employees of Defendants and any persons claiming personal injury or wrongful death.

B. Numerosity

125. At this time, the exact size of the respective Classes is unknown. Investigation by counsel has revealed thousands of consumer complaints to a variety of governmental and private consumer entities, including by way of example and not limitation:

- a. Over 2000 consumer complaints made to the Better Business Bureau in the past twelve months, almost 1000 of which involved "Credit or Billing Issues";
- b. Almost 2000 consumer complaints made to the Ohio Office of the Attorney General regarding Defendants' false advertising and/or fraudulent Automatic Shipping Program;
- c. Over approximately 1000 complaints posted at consumer oriented websites or online message boards by individuals claiming to have been victimized by Defendants' false advertising and fraudulent Automatic Shipping Program;
- d. Other individuals who have submitted information via a website posted by Plaintiffs' counsel which allows them to enter their complaint into a database if they wish to participate in this action as a class member; and

- e. A public statement made by Defendant Warshak claiming that over 2 million consumers have purchased and used Enzyte and that over 500,000 consumers have purchased and used Avlimil.

126. Based upon this information, Plaintiffs believe that the Class are so numerous that joinder of all members is impracticable. The number of Class in each Class can be determined during the discovery process.

C. Commonality

127. There are common questions of law and/or fact to all of the Classes, including by way of example and not limitation:

- a. Whether Defendants engaged in a fraudulent scheme, through the use of uniform sales presentations directed at the class without disclosing material facts necessary to make those presentations misleading, including:
 - i. Whether Defendants failed to disclose material facts concerning the effectiveness and safety of their products;
 - ii. whether Defendants omitted to disclose material facts about their refund policies which applied to all products;
 - iii. whether Defendants omitted to disclose material facts about so-called free sample policies;
 - iv. whether Defendants' failed to disclose material facts about Automatic Shipping Program;
- b. whether Defendants made a full, complete and conspicuous disclosure of the nature of the policies to its customers,
- c. whether Defendants' violated the Unordered Merchandise Statute, 39 U.S.C. § 3009;

- d. whether Defendants' violated the Unordered Merchandise Statute, 39 U.S.C. § 3009;
- c. whether Defendants violated the Ohio Consumer Sales Practices Act ("CSPA"),
- f. whether Plaintiffs are entitled to equitable and monetary relief under the CSPA, Ohio R.S. § 1345.09;
- g. Whether injunctive and/or equitable relief is appropriate under the common law claims and, if so, the most appropriate form of such relief; and
- h. whether Plaintiffs and the members of the Classes have suffered damages as a result of the conduct alleged herein and, if so, the appropriate measure of such damages.

D. Typicality

128. Plaintiffs' claims are typical of all members, and they do not have interests adverse to the Classes.

129. Plaintiffs are members of the Class they seek to represent, and Plaintiffs were injured by the same wrongful conduct that injured the other members of the Class.

130. Defendants have acted wrongfully in the same basic manner as to the entire class

E. Adequacy

131. Plaintiffs are committed to pursuing this action and have retained competent counsel experienced in class action litigation. Plaintiffs will fairly and adequately represent the interests of the Class.

F. The Prerequisites to Maintaining a Class Action for Injunctive and Declaratory Relief Have Been Met

132. Class certification for injunctive relief is appropriate because Defendants have acted or refused to act on grounds generally applicable to all of the Classes. Final injunctive and equitable relief with respect to the Classes as a whole is therefore appropriate under the circumstances of this case.

133. Defendants' actions are generally applicable to the Classes as a whole, and Plaintiffs seek, among other relief, equitable remedies with respect to the Classes as a whole.

134. Defendants' systemic policies and practices make declaratory relief with respect to the Classes as a whole appropriate.

G. Common Questions Predominate, and the Class Litigation Device Is Superior

135. The aforementioned common questions of law and/or fact predominate over questions affecting only individual members of the Classes, and a class action is the superior method for fair and efficient adjudication of the controversy. It is unlikely that individual members of the Classes will prosecute separate actions in light of the considerable expense necessary to conduct such litigation for a relatively modest amount of monetary, injunctive, and equitable relief for each individual class member. This action will be prosecuted in a fashion to ensure the Court's able management of this case as a class action.

136. The application of Ohio law to the claims of the class is proper because Defendants conducted their fraudulent scheme from Ohio and because Defendants invoked Ohio law as the governing law in transactions with consumers on their Website. See <http://www.berkeleypremiumnutraceuticals.com/privacy.html>. In addition, Ohio law applies to Plaintiffs' claims under the Ohio Consumer Protection Act.

**FIRST CAUSE OF ACTION:
VIOLATIONS OF THE UNORDERED MERCHANDISE STATUTE**

137. Plaintiffs reallege Paragraphs 1 through 136.

138. In connection with the sale, offering for sale, or distribution of their productions, Defendants have engaged in a policy and practice, through a standardized scheme practiced on a classwide basis, of causing charges to be submitted for payment for subsequent products without the express informed consent of the consumer.

139. Defendants' practices of causing charges to be submitted for payment for subsequent product shipments without the consumer's express consent constitute violations of the Unordered Merchandise Statute, 39 U.S.C. § 3009(a) and (c).

140. As a direct and proximate result of Defendants' violations of the Unordered Merchandise Statute, Plaintiffs and the Class have suffered damages in an amount presently undetermined but believed to be millions of dollars.

**SECOND CAUSE OF ACTION:
VIOLATIONS OF THE UNORDERED MERCHANDISE STATUTE**

141. Plaintiffs reallege Paragraphs 1 through 140.

142. Defendants have engaged in a policy and practice, through a standardized scheme practiced on a classwide basis, of charged the credit card accounts of Plaintiffs and the Class in violation of the without the authorization of Plaintiffs and the Class..

143. Defendants' fraudulent policy and practice of making charges against the credit cards of Plaintiffs and the Class constitute violations of Electronic Funds Transfer Act, 15 U.S.C. § 1693 *et seq.*, which provides, in pertinent part, that a "preauthorized electronic fund transfer from a consumer's account may be authorized by the consumer only in writing, and a copy of such authorization shall be provided to the consumer when made." 15 U.S.C. § 1693e(a).

144. As a direct and proximate result of Defendants' violations of the Unordered Merchandise Statute, Plaintiffs and the Class have suffered damages in an amount presently undetermined but believed to be millions of dollars.

**THIRD CAUSE OF ACTION:
OHIO CONSUMER PROTECTION ACT**

145. Plaintiffs reallege Paragraphs 1 through 144.

146. Defendants' fraudulent course of conduct as described above, including their omissions of material facts regarding the nature and efficacy of their products as well as their failure to disclose material facts concerning their refund, cancellation and billing policies violate the Ohio Consumer Sales Practices Act ("CSPA").

147. Defendants are subject to the CSPA.

148. Plaintiffs are "consumers" and Plaintiffs transactions with Defendants are "consumer transactions" within the meaning of the CSPA, Ohio R.S. § 1345.01.

149. Defendants' fraudulent activities were conducted from Ohio.

150. Defendants fraudulent course of conduct, including misleading description of its goods as well as its fraudulent and misleading refund, cancellation and billing policies constitute "unfair or deceptive acts or practices" within the meaning of Ohio R.S. § 1345.02, which states:

(A) No supplier shall commit an unfair or deceptive act or practice in connection with a consumer transaction. Such an unfair or deceptive act or practice by a supplier violates this section whether it occurs before, during, or after the transaction.

(B) Without limiting the scope of division (A) of this section, the act or practice of a supplier in representing any of the following is deceptive:

- (1) That the subject of a consumer transaction has sponsorship, approval, performance characteristics, accessories, uses, or benefits that it does not have;
- (2) That the subject of a consumer transaction is of a particular standard, quality, grade, style, prescription, or model, if it is not;
- (3) That the subject of a consumer transaction is new, or unused, if it is not;
- (4) That the subject of a consumer transaction is available to the consumer for a reason that does not exist;
- (5) That the subject of a consumer transaction has been supplied in accordance with a previous representation, if it has not, except that the act of a supplier in furnishing similar merchandise of equal or

greater value as a good faith substitute does not violate this section;

- (6) That the subject of a consumer transaction will be supplied in greater quantity than the supplier intends;
- (7) That replacement or repair is needed, if it is not;
- (8) That a specific price advantage exists, if it does not;
- (9) That the supplier has a sponsorship, approval, or affiliation that the supplier does not have;
- (10) That a consumer transaction involves or does not involve a warranty, a disclaimer of warranties or other rights, remedies, or obligations if the representation is false.

151. Defendants have knowingly violated the CSPA.

152. Plaintiffs and the Class have been damaged by Defendants "unfair or deceptive acts and practices."

153. The CSPA, Ohio R.S. § 1345.09, permits a consumer to bring a class action to seek declaratory and injunctive relief and to obtain other remedies, including damages.

154. The CSPA also permits this Court to enter any appropriate remedial order, including damages or other remedies to prevent Defendants from being unjustly enriched by its fraudulent and unfair trade practices.

155. Each Defendant is liable for the violations of the CSPA because they knowingly aided and abetted the corporate defendants' violations.

156. Plaintiffs are entitled to recover their reasonable attorneys' fees and costs under the CSPA; and these fees are a common fund in which the class has a common and undivided interest.

**FOURTH CAUSE OF ACTION:
FRAUD/MISREPRESENTATION**

157. Plaintiffs and Class reallege Paragraphs 1 through 156.

158. Defendants knowingly or recklessly failed to disclose material facts about the nature and effectiveness of their products (as described above).

159. Defendants knowingly or recklessly failed to disclose material facts about Defendants' policies with respect to refunds and cancellation; and Defendants failed to disclose material facts about the way in Defendants administered their refund and cancellations politics, including Defendants' policy and practice of sending unordered merchandise and making inappropriate credit card charges.

160. Defendants knowingly or recklessly failed to disclose material facts about Defendants' billing practices, including the terms and conditions of Defendants' Automatic Shipping Program.

161. Defendants' failures to disclose were supplemented by knowing or reckless classwide misrepresentations in standardized advertising and sales documents. in a uniform manner against every member of the class.

162. Plaintiff Elvira Price and the Class have suffered damages as a result of Defendants' misrepresentations and fraudulent concealments.

**FIFTH CAUSE OF ACTION:
NEGLIGENT MISREPRESENTATION**

163. Plaintiffs and Class reallege Paragraph 1 through 162.

164. Defendants owed Plaintiff a duty of care not to misrepresent the nature of their products, their refund and cancellation policies, including the terms and conditions of Defendants' Automatic Shipping Program.

165. Defendants failed to disclose material facts about Defendants' policies with respect to refunds and cancellation; and Defendants failed to disclose material facts about the way in Defendants administered their refund and cancellations politics, including Defendants' policy and practice of sending unordered merchandise and making inappropriate credit card charges.

166. If Defendants conduct was knowingly fraudulent, then Defendants were negligent in making their misrepresentations and failing to disclose material facts.

167. Plaintiffs and the Class reasonably relied on the uniform written sales presentations and on Defendants' failure to disclose material facts which contradicted those uniform written sales practices.

168. Plaintiff and the Class have suffered damages as a result of Defendants' misrepresentations.

**SIXTH CAUSE OF ACTION:
UNJUST ENRICHMENT**

169. Plaintiffs and the Class incorporate the allegations of Paragraphs 1 through 168.

170. As a result of their fraudulent course of conduct, Defendants have been unjustly enriched because Plaintiffs gave Defendants valuable consideration in an amount totaling millions of dollars, the benefit of which has been fully enjoyed by the Defendants.

**SEVENTH CAUSE OF ACTION:
BREACH OF CONTRACT**

171. Plaintiffs and the Class incorporate the allegations of Paragraphs 1 through 170.

A. *Avlimil*

172. Plaintiffs and Class hereby incorporate the foregoing allegations as if fully set forth herein.

173. Plaintiff Elvira Price and the Class are parties competent to contract with Defendants.

174. Plaintiff Elvira Price's and the Class' agreement to purchase or reimburse Defendants for the costs associated with the shipping of said "free" thirty-day sample of Avlimil is a lawful and proper contractual subject matter.

175. Through their national advertising, marketing, and sales campaign, Defendants made representations to Plaintiff Elvira Price and the Class that Avlimil had been proven

effective through at least one valid scientific study and that a “free” thirty-day sample of Avlimil was available to consumers.

176. By ordering Avlimil, Plaintiff Elvira Price and the Class accepted Defendants’ offer and provided to Defendants consideration in the form of the purchase price of the Avlimil or reimbursement for the costs associated with the shipping of said “free” thirty-day sample of Avlimil to Plaintiff Elvira Price and the Class.

177. Defendants’ offer to provide a “free” thirty-day sample of Avlimil to Plaintiff Elvira Price and the Class in return for the purchase price of the Avlimil or reimbursement for the costs associated with shipping the thirty-day sample of Avlimil gave rise to both a mutuality of agreement and mutuality of obligation between Defendants and Plaintiff Elvira Price and the Class.

178. Defendants breached the contract between themselves and Plaintiff Elvira Price and the Class by not providing a product that had been proven effective through a valid scientific study and by providing to Plaintiff Elvira Price and the Class a product that was not a “free” thirty-day sample.

179. Plaintiff Elvira Price and the Class suffered damages as a direct and proximate cause of Defendants’ breach of said contract.

B. Altovis

180. Plaintiff Julicann Firlé and the Class are parties competent to contract with Defendants.

181. Plaintiff Julicann Firlé’s and the Class’ agreement to purchase or reimburse Defendants for the costs associated with the shipping of said “free” thirty-day sample of Altovis is a lawful and proper contractual subject matter.

182. Through their national advertising, marketing, and sales campaign, Defendants made representations to Plaintiff Julicann Firlé and the Class that Altovis was available to them as a “free” thirty-day sample.

183. By ordering Altovis, Plaintiff Julicann Firle and the Class accepted Defendants' offer and provided to Defendants consideration in the form of reimbursement for the costs associated with the shipping of said "free" thirty-day sample of Altovis to Plaintiff Julicann Firle and the Class.

184. Defendants' offer to provide a "free" thirty-day sample of Altovis to Plaintiff Julicann Firle and the Class in return for reimbursement for the costs associated with shipping the thirty-day sample of Altovis gave rise to both a mutuality of agreement and mutuality of obligation between Defendants and Plaintiff Julicann Firle and the Class.

185. Defendants breached the contract between themselves and Plaintiff Julicann Firle and the Class by not providing a product to said Plaintiffs that was available to them as a "free" thirty-day sample.

186. Plaintiff Julicann Firle and the Class suffered damages as a direct and proximate cause of Defendants' breach of said contract.

C. Enzyte

187. Plaintiffs and Class hereby incorporate the foregoing allegations as if fully set forth herein.

188. Plaintiff John Page and the Class are parties competent to contract with Defendants.

189. Plaintiff John Page's and the Class' agreement to purchase or reimburse Defendants for the costs associated with the shipping of said "free" thirty-day sample of Enzyte was a lawful and proper contractual subject matter.

190. Through their national advertising, marketing, and sales campaign, Defendants made representations to Plaintiff John Page and the Class that Enzyte a) was capable of and in fact would increase its users' penis size, b) was capable of and in fact would produce fuller, firmer erections, c) was 100% safe with absolutely no side effects, d) was subject to a "free"

thirty-day trial period without further obligation, e) came with a double money back guarantee, and f) could be purchased for a certain set price.

191. By ordering Enzyte, Plaintiff John Page and the Class accepted Defendants' offer and provided to Defendants consideration in the form of the purchase price of the Enzyte or reimbursement for the costs associated with the shipping of said "free" thirty-day sample of Enzyte to Plaintiff John Page and the Class.

192. A mutuality of agreement and mutuality of obligation between Defendants and Plaintiff John Page and the Class was created by Defendants' offer to provide, and Plaintiff John Page's and the Class' willingness to accept in return for their consideration, a "free" thirty-day sample of Enzyte that a) was capable of and in fact would increase its users' penis size, b) was capable of and in fact would produce fuller, firmer erections, c) was 100% safe with absolutely no side effects, d) was subject to a "free" thirty-day trial period without further obligation, e) came with a double money back guarantee, and f) could be purchased for a certain set price in return for the purchase price of the Enzyte or reimbursement for the costs associated with shipping the thirty-day sample of Enzyte gave rise to both a mutuality of agreement and mutuality of obligation between Defendants and Plaintiff John Page and the Class.

193. Defendants breached the contract between themselves and Plaintiff John Page and the Class by not providing a product that a) was capable of and in fact would increase its users' penis size, b) was capable of and in fact would produce fuller, firmer erections, c) was 100% safe with absolutely no side effects, d) was subject to a "free" thirty-day trial period without further obligation, e) came with a double money back guarantee, and f) could be purchased for a certain set price.

194. Plaintiff John Page and the Class suffered damages as a direct and proximate cause of Defendants' breach of said contract.

D. *Ogöplex/Mioplex*

195. Plaintiffs and Class hereby incorporate the foregoing allegations as if fully set forth herein.

196. Plaintiff Richard Garnett and the Class are parties competent to contract with Defendants.

197. Plaintiff Richard Garnett's and the Class' agreement to purchase Ogöplex was a lawful and proper contractual subject matter.

198. Through their national advertising, marketing, and sales campaign, Defendants made representations to Plaintiff Richard Garnett and the Class that Ogöplex a) was "a male orgasm intensifier" b) had been "[s]hown safe and extremely effective," c) could give men "an increased number of ejaculatory contractions for much longer lasting orgasms," d) could give men "stronger, deeper contractions that are much fuller from start to finish allowing for significantly more intense orgasms," e) could give men "an increase in ejaculate volume for longer, stronger 'release sensation'," f) could give men "faster ejaculate recovery times for much better second orgasms," and g) was "not be fully available to all areas of the United States" and of "limited supply."

199. By ordering Ogöplex, Plaintiff Richard Garnett and the Class accepted Defendants' offer and provided to Defendants consideration in the form of the purchase price of the Ogöplex.

200. A mutuality of agreement and mutuality of obligation between Defendants and Plaintiff John Page and the Class was created by Defendants' offer to provide, and Plaintiff Richard Garnett and the Class willingness to accept in return for their consideration, a package of Ogöplex that a) was "a male orgasm intensifier" b) had been "[s]hown safe and extremely effective," c) could give men "an increased number of ejaculatory contractions for much longer lasting orgasms," d) could give men "stronger, deeper contractions that are much fuller from start to finish allowing for significantly more intense orgasms," e) could give men "an increase in

ejaculate volume for longer, stronger 'release sensation'," f) could give men "faster ejaculate recovery times for much better second orgasms," and g) was "not be fully available to all areas of the United States" and of "limited supply."

201. Defendants breached the contract between themselves and Plaintiff Richard Garnett and the Class by not providing a product that a) was "a male orgasm intensifier" b) had been "[s]hown safe and extremely effective," c) could give men "an increased number of ejaculatory contractions for much longer lasting orgasms," d) could give men "stronger, deeper contractions that are much fuller from start to finish allowing for significantly more intense orgasms," e) could give men "an increase in ejaculate volume for longer, stronger 'release sensation'," f) could give men "faster ejaculate recovery times for much better second orgasms," and g) was "not be fully available to all areas of the United States" and of "limited supply."

202. Plaintiff Richard Garnett and the Class suffered damages as a direct and proximate cause of Defendants' breach of said contract.

E. Rogisen

203. Plaintiffs and Class hereby incorporate the foregoing allegations as if fully set forth herein.

204. Plaintiff Robert Padilla and the Class are parties competent to contract with Defendants.

205. Plaintiff Robert Padilla's and the Class' agreement to purchase or reimburse Defendants for the costs associated with the shipping of said "free" thirty-day sample of Rogisen is a lawful and proper contractual subject matter.

206. Through their national advertising, marketing, and sales campaign, Defendants made representations to Plaintiff Robert Padilla and the Class that Rogisen was available to them as a "free" thirty-day sample.

207. By ordering Rogisen, Plaintiff Robert Padilla and the Class accepted Defendants' offer and provided to Defendants consideration in the form of reimbursement for the costs

associated with the shipping of said “free” thirty-day sample of Rogisen to Plaintiff Robert Padilla and the Class.

208. Defendants’ offer to provide a “free” thirty-day sample of Rogisen to Plaintiff Robert Padilla and the Class in return for reimbursement for the costs associated with shipping the thirty-day sample of Rogisen to said Plaintiffs gave rise to both a mutuality of agreement and mutuality of obligation between Defendants and Plaintiff Robert Padilla and the Class.

209. Defendants breached the contract between themselves and Plaintiff Robert Padilla and the Class by not providing a product to said Plaintiffs that was available to them as a “free” thirty-day sample.

210. Plaintiff Robert Padilla and the Class suffered damages as a direct and proximate cause of Defendants’ breach of said contract.

F. Rovicid

211. Plaintiffs and Class hereby incorporate the foregoing allegations as if fully set forth herein.

212. Plaintiff Robert Evans and the Class are parties competent to contract with Defendants.

213. Plaintiff Robert Evans’ and the Class’ agreement to purchase or reimburse Defendants for the costs associated with the shipping of said “free” thirty-day sample of Rovicid is a lawful and proper contractual subject matter.

214. Through their national advertising, marketing, and sales campaign, Defendants made representations to Plaintiff Robert Evans and the Class a) that Rovicid was available to them as a “free” thirty-day sample, b) that Plaintiff Robert Evans and the Class could cancel their orders if they so desired, and c) that Plaintiff Robert Evans and the Class could obtain refunds if not fully satisfied with the product.

215. By ordering Rovicid, Plaintiff Robert Evans and the Class accepted Defendants' offer and provided to Defendants consideration in the form of reimbursement for the costs associated with the shipping of said "free" thirty-day sample of Rovicid to Plaintiff Robert Evans and the Class.

216. Defendants' offer to provide a "free" thirty-day sample of Rovicid to Plaintiff Robert Evans and the Class in return for reimbursement for the costs associated with shipping the thirty-day sample of Rovicid to said Plaintiffs gave rise to both a mutuality of agreement and mutuality of obligation between Defendants and Plaintiff Robert Evans and the Class.

217. Defendants breached the contract between themselves and Plaintiff Robert Evans and the Class by a) not providing the product to said Plaintiffs, b) not providing a product to them as a "free" thirty-day sample, c) refusing to cancel their Orders, and/or 4) refusing to issue refunds.

218. Plaintiff Robert Evans and the Class suffered damages as a direct and proximate cause of Defendants' breach of said contract.

WHEREFORE, Plaintiff requests the Court to grant the following relief:

A. Certify this action to be a proper class action with Plaintiffs certified as Class Representatives;

B. Enjoin and restrain Defendants from engaging in the unlawful practices described in this complaint;

D. Enter judgment against Defendants, jointly and severally, for all amounts of compensatory, statutory and punitive damages to which Plaintiffs and the Class may be entitled;

E. Order and direct each Defendant to disgorge all profits which each has unjustly obtained as a result of the fraudulent Scheme;

F. Order and direct each Defendant to pay into a common fund for the benefit of Plaintiffs and all other members of the Class the total amount of compensatory, statutory and

punitive damages to which Plaintiffs and the Class are entitled as well as the monies which each Defendant has been required to disgorge;

G. Appoint a Trustee to seize, manage and distribute in an orderly manner the common fund thus established;

H. Award Plaintiffs the costs and expenses incurred in this action, including reasonable attorneys', accountants', and experts' fees; and

I. Grant any other appropriate relief.


JURY DEMAND

Plaintiffs and the Class demand a trial by jury.

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Attorneys for Plaintiffs

DATED: April 7, 2005

JS 44 11/99

CIVIL COVER SHEET

COUNTY IN WHICH THIS ACTION AROSE: Wayne

The JS-44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet.

I. (a) PLAINTIFFS

Elvira Price, et al.

DEFENDANTS

Berkeley Premium Nutraceuticals, Inc. et al.

(b) County of Residence of First Listed: Wayne

20163

County of Residence of First Listed NA

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED.

(c) Attorneys (Name, Address and Telephone Number)

Hugh M. Davis, P12555 (313)961-2255
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Attorneys (If Known)

HOOD/71369/1/1/04
DENISE PAGE HOOD

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff
- 3 Federal Question (U.S. Government Not a Party)
- 2 U.S. Government Defendant
- 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- Citizen of This State 1 1 Incorporated or Principal of Business in This State 4
- Citizen of Another State 2 2 Incorporated and Principal of Business in Another State 5
- Citizen or Subject of Foreign Country 3 3 Foreign Nation 6

MAGISTRATE JUDGE MORGAN

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES	
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment and Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel And Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury	PERSONAL INJURY <input type="checkbox"/> 362 Personal Injury—Med. Malpractice <input type="checkbox"/> 365 Personal Injury—Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input checked="" type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Product Damage Product Liability	<input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21: 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 R.R. & Truck <input type="checkbox"/> 650 Airline Regs. <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce/ICC <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced & Corrupt Organizations <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes <input type="checkbox"/> 390 Other Statutory Actions
REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	CIVIL RIGHTS <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 440 Other Civil Rights	PRISONER PETITIONS <input type="checkbox"/> 510 Motions to Vacate Sentence Habeas Corpus: <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition	<input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act	<input type="checkbox"/> 470 Racketeer Influenced & Corrupt Organizations <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes <input type="checkbox"/> 390 Other Statutory Actions	

V. ORIGIN (PLACE AN "X" IN ONE BOX ONLY)

- 1 Original Proceeding
- 2 Removed from State Court
- 3 Remanded from Appellate Court
- 4 Reinstated or Reopened
- 5 Transferred from another district (specify)
- 6 Multidistrict Litigation
- 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION (Cite the U.S. Civil Statute under which you are filing and write brief statement of cause. Do not cite jurisdictional statutes unless diversity.)

28 USC 1332(d)
This is a national class action based on Defendant's billing practices under the Ohio Consumer Protection statute.

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

CHECK YES only if demanded in complaint:
JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE Cohn

DOCKET NUMBER 04-73166

DATE

April 7, 2005

SIGNATURE OF ATTORNEY OF RECORD

X Hugh M. Davis

TO LOCAL RULE 83.11

Is this a case that has been previously dismissed?

Yes
 No

If yes, give the following information:

Court: _____

Case No.: _____

Judge: _____

2. Other than stated above, are there any pending or previously discontinued or dismissed companion cases in this or any other court, including state court? (Companion cases are matters in which it appears substantially similar evidence will be offered or the same or related parties are present and the cases arise out of the same transaction or occurrence.)
- Yes
 No

If yes, give the following information:

Court: _____

Case No.: _____

Judge: _____

Notes: