

# CIVIL COVER SHEET

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. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

**I. (a) PLAINTIFFS**  
 Federal Trade Commission

**(b)** County of Residence of First Listed Plaintiff N/A  
 (EXCEPT IN U.S. PLAINTIFF CASES)

**(c)** Attorney's (Firm Name, Address, and Telephone Number)  
 Harris Senturia, East Central Region, Federal Trade Commission, 1111 Superior Avenue Suite 200, Cleveland Ohio 44114-2507; (216) 263-3420

**DEFENDANTS**  
 Warshak, Steve; Berkeley Premium Nutraceuticals, Inc.; et al.

County of Residence of First Listed Defendant Hamilton  
 (IN U.S. PLAINTIFF CASES ONLY)

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

Attorneys (If Known)  
 Edward Correia, Latham & Watkins LLP, 555 Eleventh St. N.W. Suite 1000, Washington DC 20004-1304; (202) 637-2220

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

1 U.S. Government Plaintiff

2 U.S. Government Defendant

3 Federal Question (U.S. Government Not a Party)

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)

	PTF	DEF		PTF	DEF
Citizen of This State	<input type="checkbox"/> 1	<input type="checkbox"/> 1	Incorporated <i>or</i> Principal Place of Business In This State	<input type="checkbox"/> 4	<input type="checkbox"/> 4
Citizen of Another State	<input type="checkbox"/> 2	<input type="checkbox"/> 2	Incorporated <i>and</i> Principal Place of Business In Another State	<input type="checkbox"/> 5	<input type="checkbox"/> 5
Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	<input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6	<input type="checkbox"/> 6

**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 & 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 <input type="checkbox"/> 196 Franchise	<b>PERSONAL INJURY</b> <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & 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	<b>PERSONAL INJURY</b> <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 <b>PERSONAL PROPERTY</b> <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property 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 USC 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 <b>PROPERTY RIGHTS</b> <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark	<input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input checked="" type="checkbox"/> 890 Other Statutory Actions <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
<b>REAL PROPERTY</b> <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	<b>CIVIL RIGHTS</b> <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 440 Other Civil Rights	<b>PRISONER PETITIONS</b> <input type="checkbox"/> 510 Motions to Vacate Sentence <b>Habeas Corpus:</b> <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	<b>LABOR</b> <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	<b>SOCIAL SECURITY</b> <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)) <b>FEDERAL TAX SUITS</b> <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	

**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

Cite the U.S. Civil Statute under which you are filing. (Do not cite jurisdictional statutes unless diversity):  
 15 U.S.C. §§ 45(a), 52, 53(b); 15 U.S.C. § 1693; 39 U.S.C. § 3009

**VI. CAUSE OF ACTION**  
 Brief description of cause:  
 False and misleading representations in violation of the Federal Trade Commission Act

**VII. REQUESTED IN COMPLAINT:**

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

DEMANDS *Permanent Injunction + other equitable relief*

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

**VIII. RELATED CASE(S) IF ANY** (See instructions): JUDGE \_\_\_\_\_ DOCKET NUMBER \_\_\_\_\_

DATE: 1/30/06 SIGNATURE OF ATTORNEY OF RECORD: s/ Harris A. Senturia by s/ Malini Nihal per telephone authorization

FOR OFFICE USE ONLY

RECEIPT # \_\_\_\_\_ AMOUNT \_\_\_\_\_ APPLYING IFP \_\_\_\_\_ JUDGE \_\_\_\_\_ MAG. JUDGE \_\_\_\_\_

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION

_____ )	
FEDERAL TRADE COMMISSION, )	CIVIL ACTION NO.
) Plaintiff, )	
) v. )	
) )	
STEVE WARSHAK, BERKELEY PREMIUM )	
NUTRACEUTICALS, INC., LIFEKEY, INC., )	COMPLAINT
WARNER HEALTH CARE, INC., and WAGNER )	
NUTRACEUTICALS, INC., )	
) Defendants, and )	
CARRI WARSHAK, HARRIET WARSHAK, and )	
PAUL KELLOGG in his capacity as trustee, )	
) Relief Defendants. )	
_____ )	

Plaintiff, the Federal Trade Commission (“FTC”) through its undersigned attorneys, alleges as follows:

1. Plaintiff brings this action under Sections 5(a), 12, and 13(b) of the Federal Trade Commission Act (“FTC Act”), 15 U.S.C. §§ 45(a), 52, and 53(b); and the Electronic Fund Transfer Act (“EFTA”), 15 U.S.C. § 1693, and the Unordered Merchandise Statute, 39 U.S.C. § 3009, to secure permanent injunctive relief, rescission of contracts and restitution, disgorgement of ill-gotten gains, and other equitable relief from Defendants for engaging in acts or practices violating Sections 5(a) and 12 of the FTC Act, 15 U.S.C. §§ 45(a) and 52; and violating Section 907(a) of the EFTA, 15 U.S.C. § 1693e, Section 205.10(b) of Regulation E, 12 C.F.R. § 205.10(b), and the Unordered Merchandise Statute, 39 U.S.C. § 3009.

**JURISDICTION AND VENUE**

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

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

#### **THE PARTIES**

4. Plaintiff Federal Trade Commission is an independent agency of the United States Government created by the FTC Act, 15 U.S.C. §§ 41 *et seq.* The FTC enforces the FTC Act, which prohibits unfair or deceptive acts or practices in or affecting commerce. The FTC also enforces EFTA, which regulates the rights, liabilities, and responsibilities of participants in electronic funds transfer systems, and the Unordered Merchandise Statute. The FTC may initiate federal district court proceedings, through its own attorneys, to enjoin violations of the FTC Act, EFTA, and the Unordered Merchandise Statute and to secure such other equitable relief, including rescission of contracts and restitution, and disgorgement of ill-gotten gains, as may be appropriate in each case. 15 U.S.C. §§ 45(a) and 53b.

5. Defendants Berkeley Premium Nutraceuticals, Inc., LifeKey, Inc., Warner Health Care, Inc., and Wagner Nutraceuticals, Inc. (the “corporate Defendants”) are all Ohio corporations with their principal place of business located within the Southern District of Ohio. LifeKey, Inc., Warner Health Care, and Wagner Nutraceuticals are all subsidiaries of Berkeley Premium Nutraceuticals. Berkeley Premium Nutraceuticals, Warner Health Care, and Wagner Nutraceuticals are located at 1661 Waycross Road, Cincinnati, Ohio 45240. LifeKey, Inc. is located at 4181 Waycross Road, Cincinnati, Ohio 45236. All corporate Defendants transact or have transacted business in this district.

6. Defendant Steve Warshak has been the Chief Executive Officer of Berkeley Premium Nutraceuticals and President of LifeKey, Inc., Warner Health Care, and Wagner

Nutraceuticals. At all times material to this Complaint, acting alone or in concert with others, he has formulated, directed, controlled, and/or participated in the acts and practices of the corporate Defendants set forth in this Complaint. Mr. Warshak transacts or has transacted business in this district.

7. Mr. Warshak and one or more of the corporate Defendants have operated as a common enterprise to advertise, promote, offer for sale, sell, or distribute dietary supplements including but not limited to Avlimil and Enzyte (purported to treat sexual dysfunction), Altovis (purported to fight fatigue), and Rogisen (purported to improve night vision).

8. Relief Defendant Carri Warshak is the wife of Defendant Steve Warshak. She has received funds and other property that were derived unlawfully from unauthorized charges to consumers' credit and debit cards as a consequence of the Defendants' acts and practices complained of herein. She resides or has resided in this district.

9. Relief Defendant Harriet Warshak is the mother of Defendant Steve Warshak. She has received funds and other property that were derived unlawfully from unauthorized charges to consumers' credit and debit cards as a consequence of the Defendants' acts and practices complained of herein. She resides or has resided in this district.

10. Relief Defendant Paul Kellogg is the general counsel of Defendant Berkeley Premium Nutraceuticals Inc. and the trustee of the Carri E. Warshak 2004 QTIP Trust U/A 10/1/04 and the Warshak 2004 Gift Trust U/A 10/1/04. In his capacity as trustee of these trusts, he has received funds and other property that were derived unlawfully from unauthorized charges to consumers' credit and debit cards as a consequence of the Defendants' acts and practices complained of herein. He resides or has resided in this district and transacts or has transacted

business in this district.

## COMMERCE

11. At all times relevant to this Complaint, Defendants' course of business, including the acts and practices alleged herein, have been and are in or affecting commerce, as "commerce" is defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

## DEFENDANTS' COURSE OF CONDUCT

12. Since at least January 2002, Defendants, as a common enterprise, have advertised, marketed, promoted, offered to sell, and sold several dietary supplements through television commercials, radio advertising, print advertising, Internet advertising, and inbound telemarketing calls. The Defendants have disseminated ads for their dietary supplements on cable-television networks including, but not limited to, ESPN, Comedy Central, Oxygen, Soap Net, and Lifetime, and in magazines including, but not limited to, *Forbes*, *Playboy*, *Cosmopolitan*, *Oprah*, *Better Homes and Garden*, *Psychology Today*, and *Redbook*. The Defendants also have advertised their dietary supplements on websites for the products, including [www.avlimil.com](http://www.avlimil.com), [www.enzyte.com](http://www.enzyte.com), [www.altovis.com](http://www.altovis.com), and [www.rogisen.com](http://www.rogisen.com).

## AVLIMIL

13. Since at least January 2003, and continuing thereafter, Defendants have advertised, promoted, offered for sale, sold, and distributed a product called Avlimil, purported to treat female sexual dysfunction, using advertisements in magazines, television, radio, and the Internet. The product label states that Avlimil contains sage leaf, tribulus terrestris extris, red raspberry leaf, bayberry bark, cayenne pepper, damiana leaf, ginger root, valerian root, licorice root, black cohosh root, and isoflavones from kudzu root and red clover flower extract. Defendants

recommend that users consume one tablet daily. A thirty-day supply of Avlimil costs consumers \$35.00.

14. To induce consumers to purchase Avlimil, Defendants have disseminated or have caused to be disseminated advertisements for Avlimil, including but not necessarily limited to the attached Attachments A through F. These advertisements contain the following statements, among others:

A. Print Ads

*They have VIAGRA. Now we have AVLIMIL.*

*AVLIMIL – the once-daily tablet for Female Sexual Dysfunction (FSD)*

*In 1999, the Journal of the American Medical Association (JAMA) published the result of a national broad-range study of sexual behavior in adults. It concluded that 31% of men and an astounding 43% of women have experienced sexual dysfunction.*

*Female Sexual Dysfunction (FSD) can range from a slight decrease in interest to a severe lack of desire and inability to become aroused. Now there's AVLIMIL, the once-daily, non-hormonal tablet that can help women attain an enhanced libido, a more pleasurable plateau, along with a more frequent and more satisfying climax.*

[FROM AD'S SIDE PANEL]

**What is AVLIMIL?**

AVLIMIL . . . is a non-synthetic once-daily, non-hormonal supplement containing a proprietary blend of ingredients shown to have a positive impact on female sexual response. . . .

Reported effects are based on a randomized, double-blind, placebo-based, parallel-group clinical

study conducted by an independent medical research center, with women aged 25-65 . . .

[Attachment A]

\*\*\*\*\*

*Avlimil is now covered by Managed Care Direct.™*

*They have VIAGRA.*

*Now we have AVLIMIL.*

*Introducing Avlimil – the once-daily*

*tablet for Female Sexual Function*

\* \* \*

*Avlimil has been clinically proven to help women regain their sense of sexual enjoyment and fulfillment. In a three month, double-blind clinical study, 84% of Avlimil users between the ages of 25 and 65 consistently reported improvement in sexual response, with measurable improvement in desire, arousal, lubrication, the ability to climax, and overall sexual experience.*

[Attachment B]

\*\*\*\*\*

[FROM AD'S SIDE PANEL]

**Is AVLIMIL safe?** Yes, AVLIMIL is derived from non-synthetic ingredients, and has been clinically tested for safety and effectiveness. . . .

[Attachment C]

B. Television Commercial

***Introducing Avlimil. The non-prescription once-daily supplement made just for women.***

\* \* \*

*The ingredients in Avlimil have been shown to enhance libido . . . .*

Enhance Libido, Arousal and Response

[Attachment D]

C. Internet Web site

Today, there's Avlimil. Avlimil is not a prescription drug. It is a gentle, once-daily, non-hormonal tablet shown to have a positive effect on female sexual response.

\* \* \*

Get a FREE 30-Day Cycle of Avlimil, *and* Our 12-Month Money-Back Satisfaction Guarantee!

\* \* \*

*Avlimil Clinical Trial Study, 2002*

*Women using Avlimil report dramatic results*

\* \* \*

Adverse Events:

No adverse events were reported in this trial.

\* \* \*

Avlimil has been shown to help female sexual response, safely and effectively.... In the population tested, no interactions with medications were reported.

[Attachment E at 2, 5, and 8 (www.avlimil.com September 9, 2003).]



D. Print Brochure

*Frequently Asked Questions.*

\* \* \*

*Q. I have to take prescription drugs. How will Avlimil interact with them?*

*A. In clinical trials, Avlimil has proven to have zero interactions with most medications.*

[Attachment F at 7.]

**ROGISEN**

15. Since at least February 2004, and continuing thereafter, Defendants have advertised, promoted, offered for sale, sold, and distributed a purported night vision enhancement product called Rogisen, using advertisements in magazines, television, radio, and the Internet. The product label states that Rogisen contains vitamin A, vitamin C, vitamin E, zinc, selenium, copper, red wine grape skin, orange bioflavonoids, ginkgo biloba leaf standardized extract, european bilberry standardized extracts, l-glutathione, and lutein/zeaxanthin. Defendants recommend that users consume one tablet daily. A thirty-day supply of Rogisen costs consumers \$45.00.

16. To induce consumers to purchase Rogisen, Defendants have disseminated or have caused to be disseminated advertisements for Rogisen, including but not necessarily limited to the attached Attachments G through I. These advertisements contain the following statements, among others:

A. Internet Web site

**rogisen**

*The once-daily caplet to . . . support improved night vision.*

A better way to see the world.

\* \* \*

### **The Importance of Night Vision**

“Night vision” is the term used to describe how well we can see in dim light or at night. As we age, our ability to see at night decreases. The primary cause of this is a deficiency of visual purple (rhodopsin) in the light-sensitive rod cells of the retina at the back of the eye. This phenomenon can make driving at night extremely dangerous. For example, our eyes may not be able to recover as quickly from bright, on-coming headlights.

Essentially, we lose rhodopsin when we do not have enough vitamin A in our diet. Rhodopsin is created when the chemicals retinal and opsin combine within the rods in our eyes. And in order to create retinal, our body needs an ample supply of vitamin A.

But while rhodopsin is the primary factor required for healthy night vision, overall eye health must also be maintained. This requires a host of nutrients, all of which can be found in Rogisen, once-daily caplet to help prevent macular degeneration and support improved night vision.

\* \* \*

### **What Is Rogisen?**

Rogisen is a premium, all-natural supplement specifically designed to boost night vision and improve overall ocular health. .... The contents of Rogisen are ... formulated to help improve night vision and general ocular health.

\* \* \*

***Rogisen's Proprietary Blend***

Rogisen consists of a proprietary blend of key vitamin, mineral, and natural ingredients. These elements are carefully balanced to deliver the maximum benefit for enhancing night vision and general ocular health.

[Attachment G at 1, 3, 6, 7 and 8 (www.rogisen.com April 29, 2004).]

\*\*\*\*\*

**rogisen**

The once daily caplet for night vision

Better Night Vision. Naturally.

***A Rogisen Success Story***

Max is a school bus driver. At age 53, he's been driving for the same school district for nearly 20 years. His duties have him driving at all hours of the day—early morning, mid-morning, afternoon, and also evenings and nights, when he drives the school sports teams to their various events.

Six months ago, Max noticed it was getting tougher to see in the morning light and at night. Since he has to keep a sharp eye out for children around his school bus, he was very concerned about his vision loss.

Max visited his eye doctor for a checkup and mentioned his problem. The doctor examined him and found no serious problems. He told Max that night vision does decrease somewhat as people age, and recommended that Max try Rogisen.

A few months after he started taking Rogisen, Max noticed that it was easier to see in the dim light of mornings and evenings. Now, six months later, Max no longer squints to see in the twilight and can see better after dark, too.

*I have four kids ages 8 to 15, and they're all involved in one after-school event or another. So I do a lot of driving at dusk—the worst time of day to drive. It's hard to see, and the headlights don't help much. Rogisen helps improve my night vision so I can see better in the twilight. Better sight at night. It helps keep my kids safe, it helps keep me safe—what could be more important than that?"*

These statements have not been reviewed by the Food and Drug Administration, and individual results may vary. Individuals shown are paid models and not necessarily Rogisen users. Rogisen should be taken as part of a healthy lifestyle and is not intended to treat or cure any disease.

[Attachment H at 12-13 (www.rogisen.com March 15, 2004).]

B. Television Commercial

Man: I had driven this road lots of time. I know every turn there is. But for awhile I had not been seeing things as clearly as I use to. And that time, I just didn't see it coming. That's when I started taking Rogisen.

*[On Screen: Man in his late 50's or early 60's is driving alone in his car at dusk. He stops at the intersection and looks both ways. Presumably, he does not see a truck that is approaching the intersection. Man pulls into intersection and applies the brakes to avoid collision.]*

Voiceover: Introducing Rogisen, the new non-prescription once a day tablet for improved night

vision and overall ocular health.

Rogisen is taken like a daily vitamin, and includes Lutein, Beta Carotene, and Vitamins E & C for optimal vision enhancement. And now for a limited time you can receive a free 25 day sample case of Rogisen.

Man: I started to see things clearer and sharper than ever before. And I wasn't afraid to get out on the road anymore. With Rogisen, it became very clear. Not driving, and missing this, was something I just couldn't see happening.

*[On Screen: Same man is now driving his car with his wife in the passenger seat on a beautiful sunny day. The car stops and they turn to look out the window as their young grandchildren excitedly race from their house to car. The man gets out of his car, looks in their direction, and smiles.]*

Voiceover: For a limited time, you can receive a free 25 day sample case of Rogisen. Just call 1-800-Rogisen or visit Rogisen.com.

[Attachment I]

### **DEFENDANTS' CONTINUITY PROGRAM**

17. Since at least January 2002, Defendants, as a common enterprise, at various times sold dietary supplements by means of a continuity plan. Numerous consumers who responded to Defendants' advertising, by responding to an 800 number in an advertisement or by visiting a website in an ad, were enrolled in a continuity plan. The continuity plans were referred to by various names, including but not limited to "Managed Care Direct," "Home Delivery Plan," and "Value Added Program."

18. As part of campaigns to sell dietary supplements through in-bound telemarketing and through their websites, Defendants disseminated or caused to be disseminated ads for dietary supplements, including but not limited to Avlimil, Rogisen, Altovis, Enzyte, and other dietary supplements (hereinafter referred to as the “products”) on television, radio, in print, and on the internet.

19. In their television ads, Defendants at various times offered “free samples” of a monthly supply of these products. For example, some television ads for the products prominently displayed the “free” sample offers in large borders that appeared above the on-screen action throughout the commercial. These borders contained statements such as “Call now for a free 30-day sample box” or words of similar import. Large borders below the on-screen action displayed a website address for the particular product that was the subject of the ad and one or more toll-free telephone numbers to call. Some ads stated that the charge for the sample consists only of the costs for shipping and handling -- approximately \$4.50 -- without disclosing any other information about the “free” offer. Defendants maintained websites and toll-free numbers by means of which consumers could respond to the ads.

#### **TELEMARKETING OF CONTINUITY PLANS**

20. Defendants used scripts and training to control the pitch made by their telemarketing agents who answered consumers’ calls to the toll-free numbers in Defendants’ ads. In numerous instances, when consumers called the toll-free numbers that appeared in Defendants’ ads to order the “free” samples, Defendants’ telemarketing sales representatives, before collecting payment information, informed consumers that they would be charged only a small fee (*e.g.*,

\$4.50) for the shipping and handling to obtain the “free” sample and asked consumers who indicated they wished to receive the “free” sample whether they “want to use [their] credit or debit card” to pay for the shipping and handling.

21. In numerous instances, after collecting payment information, Defendants’ telemarketers then told consumers they would be enrolled automatically in “Managed Care Direct,” “Home Delivery Plan,” “Value Added Program,” or another continuity program, but the telemarketers failed to explain adequately the costs or obligations of the continuity program. The telemarketers said the continuity programs would allow consumers to receive the product monthly at discounted prices and with free shipping, with “no contracts or obligations.” The telemarketers represented that consumers could “discontinue use at anytime [sic] after the initial shipment.” In a significant number of instances, however, Defendants’ telemarketers did not disclose the monthly costs of the shipments, and in a significant number of other instances, they disclosed the monthly costs only when asked. In a significant number of instances, Defendants’ telemarketers enrolled consumers who attempted to obtain a “free sample” in a continuity plan without obtaining their consent or their authorization to charge the additional shipments to the debit or credit card account that the consumer provided to pay for the shipping and handling for the free sample. Defendants charged customers approximately \$35.00 per monthly supply for the shipments.

22. In numerous other instances, Defendants’ telemarketers, after collecting payment information from consumers who wished to receive the “free” sample, simply enrolled the consumers in a continuity plan without informing them that they were being enrolled. In other instances, consumers seeking only to order the free sample were told by Defendants’

telemarketers that they must enroll in “Managed Care Direct,” “Home Delivery Plan,” or “Value Added Program” to receive the free sample.

23. In numerous instances, Defendants’ telemarketers enrolled consumers in a continuity plan without telling them when subsequent charges would be submitted for payment or how to cancel, including that they must call to cancel before the next month’s shipment to avoid additional shipments and charges, or when that shipment would be sent.

### **WEBSITE SALES OF CONTINUITY PLANS**

24. Defendants’ ads have generally referenced a website for the specific product being advertised (*e.g.*, [www.avlimil.com](http://www.avlimil.com), [www.enzyte.com](http://www.enzyte.com), [www.altovis.com](http://www.altovis.com), and [www.rogisen.com](http://www.rogisen.com).)

In numerous instances, Defendants’ websites included statements representing that consumers could obtain “free” samples, but the websites did not disclose or disclose adequately that consumers were required to enroll in continuity programs to receive the free sample and did not disclose or disclose adequately the costs and obligations of the continuity programs.

25. In numerous instances, when consumers accessed the websites that appeared in Defendants’ ads to order the “free” samples, the front page of the web sites contained a statement such as “Get a Free 30 Day Sample Cycle -- click here for details” or words of similar import. Generally, the front page did not state that the consumer must enroll in a continuity plan to receive a free sample cycle. If the consumer clicked through to the order page, the consumer was offered a free sample (for example, with a statement such as “Free 30 Day Managed Cycle \$0 (just pay \$4.50 rush shipping)” ) with a “Continue” button to click. Several lines below the “Continue” button, there was a statement such as “With your order, you also receive free and automatic



enrollment in Managed Care Direct™.\*” Further down the webpage, which consumers could see only if they scrolled down the page past various other information, information appeared explaining that consumers who ordered a “free sample” would be enrolled in a continuity program in which additional products would be automatically shipped to them and that their credit cards would be billed for these products. Consumers would not see this information if they clicked the “Continue” button next to “Free 30 Day Managed Care Cycle” at the top of the page. When consumers clicked the “Continue” button, they were taken to a “checkout” page.

26. In numerous other instances, when consumers accessed the websites that appeared in Defendants’ ads to order the “free” samples, the front page of the websites contained a statement such as “Get a FREE Sample Cycle.” The front page did not state that the consumer must enroll in a continuity plan to receive a free sample cycle. If the consumer clicked through to the Order page, the consumer was offered a free sample (with statements such as “30 Day Sample” listed at “\$0”). The order page did not state that the consumer must enroll in a continuity plan to receive a free sample. If the consumer clicked on the “Order Now” link next to the “30 Day Sample” option, the consumer was sent to an “Order Information” page, where the consumer was required to fill in information including name, address, telephone, email address, and credit card information. Below the fields for credit card information, a line appeared indicating that the consumer was ordering the “30 Day HDP\* Sample (\$5.90 S & H).” Immediately below was a heading “**BPN Home Delivery Plan**,” followed by several paragraphs of text. A description of the continuity plan was set forth in this section along with other information. At the bottom of the page, after several additional paragraphs of text, the customer was offered a link labeled “I Accept/Continue.”

## **FAILURE TO OBTAIN WRITTEN AUTHORIZATION FOR DEBIT CARDS**

27. In numerous instances, Defendants charged the debit cards of consumers who had ordered a free sample and paid for shipping and handling by debit card for recurring shipments under a continuity plan without obtaining written authorization.

## **CANCELLATIONS**

28. In numerous instances, Defendants failed to fully inform customers as to the terms and conditions of their continuity plans. Additionally, Defendants failed to provide consumers with clear instructions on procedures for canceling a plan. Instead, defendants merely instructed consumers to call a “Customer Care line” with any questions.

29. In numerous instances, however, consumers who called the customer service phone number to cancel their plan or to request a refund were unable to reach an operator either because the number was busy or they were left on hold for unreasonably lengthy periods of time.

30. In numerous instances, Defendants shipped the first shipment under the continuity plan before the 30-day “free sample” would be used completely. In some instances, Defendants shipped the product as soon as seven days after shipping the free sample. Some consumers who attempted to return the product were able to speak with a customer service representative and were told that they should have cancelled before the first continuity shipment to avoid being charged, and they were denied a refund. Some consumers have returned the products to the companies, but have not received refunds.

31. During certain periods, the product websites (*e.g.*, [www.avlimil.com](http://www.avlimil.com), [www.enzyte.com](http://www.enzyte.com), [www.altovis.com](http://www.altovis.com), and [www.rogisen.com](http://www.rogisen.com)) stated that a customer could

discontinue the program at any time but that there were no refunds for orders once shipped. There was no method to cancel available on the product websites themselves. During certain periods, the product websites provided customers who wanted to discontinue the program with a customer care telephone number or with the address of a second website. Some consumers attempted to access the second website but found it to be inoperable. Some consumers attempted to cancel on the second website but were unsuccessful in doing so. Some consumers attempted to cancel by telephone but were unable to do so.

32. In numerous instances, when recipients of unordered shipments contended they had not ordered the shipments or attempted to return them, Defendants, directly or through their representatives, represented that the recipients authorized the purchases and were legally obliged to pay for them. Defendants attempted to obtain payment by refusing to cancel invoices. In some instances, Defendants have required consumers to return the unordered shipments to obtain refunds and represented that the consumers are obligated to pay a substantial “restocking” fee.

### **THE FEDERAL TRADE COMMISSION ACT**

33. Section (5)(a)(1) of the FTC Act, 15 U.S.C. § 45(a)(1), provides that “unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.” The Commission also enforces Section 12 of the FTC Act, 15 U.S.C. § 52, which prohibits false advertisements for foods, drugs, devices, services, or cosmetics in or affecting commerce.

## VIOLATIONS OF THE FTC ACT

### COUNT I

#### Avlimil – False Claims

34. Through the means described in Paragraph 14, including through the statements contained in the advertisements attached as Attachments A-F, Defendants have represented, expressly or by implication, that:

a) Avlimil has been clinically proven to improve desire, arousal, lubrication, ability to climax, strength of climax, and overall sexual experience in a randomized, double-blind, placebo-controlled, parallel-group clinical study conducted by an independent medical research center, with women aged 25-65;

b) In a double-blind clinical trial, 84% of Avlimil users between the ages of 25 and 65 consistently reported measurable improvement in desire, arousal, lubrication, ability to climax, strength of climax, and overall sexual experience; and

c) Avlimil has been clinically tested for safety and has been proven to have zero interactions with most medications.

35. In truth and in fact, Avlimil has not been clinically proven to improve desire, arousal, lubrication, ability to climax, strength of climax, and overall sexual experience in a randomized, double-blind, placebo-controlled, parallel-group clinical study conducted by an independent medical research center, with women aged 25-65. Avlimil's ingredients differ substantially from the ingredients in the product actually tested in the clinical study featured in the Avlimil advertisements and promotions regarding improved sexual response. Accordingly, the representations set forth in Paragraph 34 were, and are, false or misleading.

36. Therefore, the making of the representations set forth in Paragraph 34 constitutes a deceptive 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**

### **Avlimil – Unsubstantiated Claims**

37. Through the means described in Paragraph 14, including through the statements contained in the advertisements attached as Attachments A-F, the Defendants have represented, expressly or by implication, that:

- a) Avlimil is an effective treatment for female sexual dysfunction; and
- b) Avlimil improves a woman's overall sexual experience by enhancing libido, arousal, and response.

38. The Defendants did not possess and rely upon a reasonable basis that substantiated the representations set forth in Paragraph 37, at the time the representations were made. For example, published studies on the ingredients in Avlimil either fail to find the effects claimed in Defendants' advertising or do not indicate that the amount of those ingredients in Avlimil is likely to bring about such effects.

39. Therefore, the making of the representations set forth in Paragraph 37 constitutes a deceptive 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 III**

#### **Rogisen – Unsubstantiated Claim**

40. Through the means described in Paragraph 16, Defendants have represented, expressly or by implication, that Rogisen improves night vision.

41. Defendants did not possess and rely upon a reasonable basis that substantiated the representation set forth in Paragraph 40 at the time the representation was made. For example, available studies on the individual ingredients in Rogisen fail to show that the amount of those ingredients in Rogisen is sufficient to improve night vision.

42. Therefore, the making of the representation set forth in Paragraph 40 constitutes a deceptive 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 IV**

#### **Failure to Disclose Material Terms of Continuity Plan**

43. In numerous instances since January 2002, in connection with the sale, offering for sale, or distribution of dietary supplements, Defendants have represented, expressly or by implication, that consumers may order a “free” sample and will incur only a small cost (*i.e.*, \$4.50) for shipping and handling.

44. Defendants have failed to disclose or to disclose adequately to consumers the material terms and conditions of the offer of a “free” sample, including:

a) that consumers who order the free sample are enrolled in a continuity program and must cancel to avoid additional shipments and charges;

- b) the cost of the additional shipments;
- c) how and when consumers must cancel to avoid further shipments and charges.

45. In light of the representation set forth in Paragraph 43, Defendants' failure to disclose or to disclose adequately the material information set forth in Paragraph 44 is a deceptive act or practice in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

**COUNT V**  
**Unauthorized Billing**

46. In numerous instances since January 2002, in connection with the sale, offering for sale, or distribution of dietary supplements, Defendants have caused charges to be submitted for payment without the express informed consent of the consumer.

47. Defendants' practice of causing charges to be submitted for payment without the consumer's express informed consent causes or is likely to cause substantial injury to consumers that is not reasonably avoidable by consumers themselves and is not outweighed by countervailing benefits to consumers or competition.

48. Therefore, Defendants' practice as alleged in Paragraph 46 is unfair in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

**THE ELECTRONIC FUND TRANSFER ACT AND REGULATION E**

49. Section 907(a) of the EFTA, 15 U.S.C. § 1693e(a), provides 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."

50. Section 205.10(b) of Regulation E, 12 C.F.R. § 205.10(b), provides that “[p]reauthorized electronic fund transfers from a consumer’s account may be authorized only by a writing signed or similarly authenticated by the consumer. The person that obtains the authorization shall provide a copy to the consumer.”

## **COUNT VI**

### **Violations of the Electronic Fund Transfer Act and Regulation E**

51. In numerous instances since January 2002, in connection with the sale, offering for sale, or distribution of dietary supplements, Defendants have debited consumers’ accounts on a recurring basis without obtaining consumers’ written authorization for preauthorized electronic fund transfers from the accounts, thereby violating Section 907(a) of the EFTA, 15 U.S.C. § 1693e(a), and Section 205.10(b) of Regulation E, 12 C.F.R. § 205.10(b).

52. Pursuant to the EFTA, 15 U.S.C. § 1693o(c), every violation of the EFTA and Regulation E constitutes a violation of the FTC Act.

53. By engaging in violations of the EFTA and Regulation E as alleged in Paragraph 51, Defendants have engaged in violations of the FTC Act.

### **THE UNORDERED MERCHANDISE STATUTE**

54. The Unordered Merchandise Statute was enacted in 1970 and since that date has remained in full force and effect. It prohibits the shipping and billing for unordered merchandise that does not fall into narrow exceptions. The statute also prohibits sending dunning communications or bills to recipients of unordered merchandise.



55. Specifically, the Unordered Merchandise Statute, 39 U.S.C. § 3009, reads as follows:

Sec. 3009. Mailing of unordered merchandise

(a) Except for (1) free samples clearly and conspicuously marked as such, and (2) merchandise mailed by a charitable organization soliciting contributions, the mailing of unordered merchandise or of communications prohibited by subsection (c) of this section constitutes an unfair method of competition and an unfair trade practice in violation of section 45(a)(1) of title 15.

(b) Any merchandise mailed in violation of subsection (a) of this section, or within the exceptions contained therein, may be treated as a gift by the recipient, who shall have the right to retain, use, discard, or dispose of it in any manner he sees fit without any obligation whatsoever to the sender. . . .

(c) No mailer of any merchandise mailed in violation of subsection (a) of this section, or within the exceptions contained therein, shall mail to any recipient of such merchandise a bill for such merchandise or any dunning communications.

(d) For the purposes of this section, "unordered merchandise" means merchandise mailed without the prior express request or consent of the recipient.

## **COUNT VII**

### **Violations of the Unordered Merchandise Statute**

56. In numerous instances since January 2002, in connection with the sale, offering for sale, or distribution of dietary supplements, Defendants, who are not a charitable organization

soliciting contributions, have shipped packages of dietary supplements to consumers without the prior express request or consent of the recipients, or without identifying the packages as free samples, and have subsequently sent recipients of such merchandise a bill for such merchandise or dunning communication, thereby violating Sections (a) and (c) of the Unordered Merchandise Statute, 39 U.S.C. § 3009.

57. By engaging in violations of the Unordered Merchandise Statute as alleged in Paragraph 56, Defendants have engaged in violations of the FTC Act.

### **CONSUMER INJURY**

58. Numerous consumers throughout the United States have suffered and continue to suffer substantial monetary loss as a result of Defendants' unlawful acts or practices. In addition, Defendants have been unjustly enriched as a result of their unlawful 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**

59. Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), empowers this Court to grant injunctive and other ancillary relief, including rescission of contracts and restitution, and the disgorgement of ill-gotten gains, to prevent and remedy violations of any provision of law enforced by the Commission.

### **PRAYER FOR INJUNCTIVE AND MONETARY RELIEF**

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

1. Permanently enjoin Defendants from violating Sections 5(a) and 12 of the FTC Act, the EFTA, Regulation E, and the Unordered Merchandise Statute;

2. Award such equitable relief as the Court finds necessary to redress injury to consumers resulting from Defendants' violations of Sections 5(a) and 12 of the FTC Act, the EFTA, Regulation E, and the Unordered Merchandise Statute, including but not limited to, rescission of contracts and restitution, and the disgorgement of ill-gotten gains by the Defendants and Relief Defendants;

3. Award Plaintiff the costs of bringing this action, and any other equitable relief as the

Court may determine to be just and proper.

DATED: 1/30/06

Respectfully submitted,

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