

To Conform

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5 Attorney for Plaintiffs
6 **ROBIN BERTSCH**

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 FOR THE COUNTY OF LOS ANGELES

11 **ROBIN BERTSCH,**
12 Plaintiff,
13 vs.
14 **THE WELLNESS HOUR, INC.;**
15 **THOMAS D. WAIS., D.D.S.;**
16 **OBI FOUNDATION FOR**
BIOESTHETIC DENTISTRY and
17 **DOES 1 through 50, inclusive,**
18 Defendants.

Case No. ^{37-2010-00051507-CU-FR-NC}

COMPLAINT FOR DAMAGES:

1. Intentional Infliction of Emotional Distress
2. Negligent Infliction of Emotional Distress
3. Intentional Misrepresentation
4. Negligent Misrepresentation
5. Conspiracy to Commit Fraud
6. Invasion of Privacy
7. Statutory Violation of Civil Code §3344
8. Unfair Competition pursuant to Business & Professions Code §17200

20 COMES NOW Plaintiff ROBIN BERTSCH and alleges as follows:

PARTIES

22 1. Plaintiff ROBIN BERTSCH is, and at all times herein mentioned was, a
23 resident of Arizona.

24 2. Defendant THE WELLNESS HOUR, INC. (hereinafter "WELLNESS HOUR")
25 is, and at all times herein mentioned was, a California corporation with its principal
26 place of business at 300 Carlsbad Village Drive, Suite 220, Carlsbad, California 92008,
27 which broadcast a cable television program which advertised itself as "America's cable
28 television leader in health news and information" and as a health information program

1 promoting, marketing and advertising "health care options". THE WELLNESS HOUR,
2 INC. marketed itself as "The Most Watched Cable Health TV Talk Show in the World"
3 with viewership "in over 47 million homes nationwide and in Canada".

4 Historically, for the past ten years, Defendant the WELLNESS HOUR states it
5 has delivered essential and cutting-edge medical information making the show "a
6 trusted resource in both the U.S. and Canada". According to the WELLNESS HOUR,
7 practitioners use their interviews with CEO and founder Randy Alvarez to advertise and
8 promote their medical and dental practices on local cable or broadcast television, their
9 websites, social media outlets such as Facebook, Twitter and Youtube and as a
10 custom DVD for marketing purposes, all to enhance the financial gain of the
11 medical/dental practitioner interviewees which, according to the WELLNESS HOUR's
12 advertising, has "driven hundreds of new patients" to the practices of the WELLNESS
13 HOUR interviewees such as co-Defendant Thomas Wais, D.D.S.

14 3. Defendant THOMAS D. WAIS, D.D.S. (hereinafter "WAIS") is, and at all times
15 herein mentioned was, a dentist licensed to practice dentistry by the State of Arizona,
16 with his principal place of business located at 9188 East San Salvador Drive, Suite
17 102, Scottsdale, Arizona 85258 and, at all times herein mentioned, identified himself
18 as a bioesthetic dentist practicing the tenets of OBI dentistry who advertised and
19 marketed his dental practice outside the boundaries of Arizona by publicizing his
20 practice on his website (www.drTomWais.com) and appearing on the worldwide web,
21 Internet and television interviews such as produced by co-Defendant THE WELLNESS
22 HOUR, INC.

23 4. Defendant OBI FOUNDATION FOR BIOESTHETIC DENTISTRY (hereinafter
24 "OBI FOUNDATION") is, and at all times herein mentioned was, a business entity with
25 its principal place of business located at 3990 Cherry Avenue NE, Suite 100, Keizer,
26 Oregon 97303, which systematically and continually, at all times herein mentioned,
27 marketed the Foundation, including in the State of California, for purposes of soliciting
28 dentists to practice bioesthetic dentistry.

1 5. Plaintiff is informed and believes and thereon alleges that, at various times
2 herein mentioned, each of the defendants was the agent, servant, representative or
3 employee of each of the remaining defendants and, in engaging in certain acts
4 hereinafter alleged, was acting within the course and scope of said agency, service,
5 representation, or employment and materially assisted the other defendants. Plaintiff
6 is further informed and believes and thereon alleges that each of the defendants
7 ratified the acts of the remaining defendants.

8 6. Plaintiff is ignorant of the true names and capacities, whether individual,
9 corporate, associate or otherwise, of defendants sued herein as DOES 1 through 50,
10 inclusive, and therefore sues said defendants by such fictitious names. Plaintiff is
11 informed and believes, and upon such information and belief, alleges that each of the
12 defendants designated herein as a DOE is legally responsible in some manner for the
13 events and happenings referred to herein and caused the damages proximately
14 thereby to Plaintiff as hereinafter alleged. Plaintiff will seek leave of court to amend
15 this Complaint to show the true names and capacities of the defendants designated
16 herein as DOES when the same have been ascertained.

17 **STATEMENT OF FACTS**

18 7. On or about December 2004, Plaintiff sought dental treatment from
19 Defendant WAIS which treatment continued through February 2008. The outcome of
20 that treatment was severely unsatisfactory and deleterious to Plaintiff. For the
21 unsatisfactory and ultimately injurious dental treatment he received from Defendant
22 WAIS, Plaintiff incurred expenses in excess of \$70,000.00.

23 8. On or about May 10, 2008, Plaintiff sent Defendant WAIS a certified letter
24 outlining his grievances as to the quality of the treatment he had received from
25 Defendant WAIS and demanding remuneration for the damages he had suffered as
26 a result of Defendant WAIS' negligent dental treatment. That letter was received and
27 signed for by Defendant WAIS. Defendant WAIS forwarded that letter and the
28 information contained therein to his dental malpractice insurance carrier, Continental

1 Casualty Company (CNA). A true and correct copy of Plaintiff's May 10, 2008, letter
2 is attached hereto as Exhibit "A" and incorporated herein by reference.

3 9. In the same certified letter of May 10, 2008, Plaintiff demanded that his
4 image, including photographs of his face, no longer be utilized by Defendant WAIS for
5 any purpose. WAIS was using photographs of Plaintiff and the purported story of his
6 treatment on the WAIS website for marketing purposes, implying that Plaintiff was a
7 satisfied patient and representing that Plaintiff was an example of Defendant WAIS'
8 successful dental techniques. The truth was that WAIS' treatment of Plaintiff had been
9 abhorrent and had caused Plaintiff irreparable harm. Plaintiff demanded that
10 Defendant WAIS remove any reference to his untruthful and false characterization of
11 Plaintiff's dental treatment on WAIS' website within 48 hours of receipt of Plaintiff's
12 certified letter, a demand with which WAIS complied.

13 10. Thereafter, and in the months following May 2008, Plaintiff was contacted
14 by Defendant WAIS' dental malpractice insurance carrier, Continental Casualty
15 Company (CNA), and entered into settlement negotiations relating to his claims of
16 negligent dental treatment and treatment beneath the standard of care by Defendant
17 WAIS.

18 11. On or about January 2009, without the necessity of instituting a legal action
19 against WAIS, Plaintiff settled his claims of negligent dental treatment against
20 Defendant WAIS in exchange for a payment of \$200,000.00. As a result of that
21 settlement, Plaintiff considered that his personal involvement with Defendant WAIS
22 was at an end. A true and correct copy of the check issued by Continental Casualty
23 Company in the sum of \$200,000.00 to settle Plaintiff's dental malpractice claims is
24 attached hereto as Exhibit "B" and incorporated herein by reference.

25 12. On or about December 4, 2009, Plaintiff reviewed Defendant WAIS' website
26 for current information relating to Defendant WAIS. While perusing the WAIS' website,
27 Plaintiff clicked on the "TMJ" tab and was "invited" to watch a video interview
28 Defendant WAIS had given relating to his success in treating TMJ complaints and

1 which had been broadcast on the WELLNESS HOUR.

2 13. Plaintiff watched Defendant WAIS' interview on the WELLNESS HOUR and
3 was astonished to discover that his photograph was exhibited several times and that
4 his name was referred to by Defendant WAIS when extolling the wonderful results he
5 had obtained whilst treating Plaintiff for TMJ. The photographs which were shown
6 were the exact same photographs which Plaintiff had demanded, on May 10, 2008,
7 that Defendant WAIS remove from his website and never utilize again in marketing his
8 dental practice. True and correct copies of the photographs which had originally
9 appeared on WAIS' website and which Plaintiff had specifically forbade the use of for
10 any marketing purpose are collectively attached hereto as Exhibit "C" and incorporated
11 herein by reference. A true and correct transcription of the relevant portions of the
12 interview given by Defendant WAIS on the WELLNESS HOUR is attached hereto as
13 Exhibit "D" and incorporated herein by reference.

14 14. Although Plaintiff only first became aware on December 4, 2009 that the
15 WAIS interview contained unauthorized use of his image, the WAIS interview had
16 originally been broadcast on the WELLNESS HOUR at least as early as March 12,
17 2009 and, Plaintiff is informed and believes, at earlier dates of which he is currently
18 unaware and continues to be available for viewing from links on both the WELLNESS
19 HOUR and the WAIS websites. Defendant the WELLNESS HOUR cites the interview
20 as being viewed by many members of the general public.

21 15. The WAIS interview on the WELLNESS HOUR broadcast utilizing Plaintiff's
22 image to extol the virtues of OBI dentistry continues to be available on Defendant
23 WAIS' website, as well as the WELLNESS HOUR website, and is in direct
24 contradiction of the demands made by Plaintiff in May of 2008 and which culminated
25 in Plaintiff's settlement of his dental malpractice claims against Defendant WAIS in
26 January of 2009.

27 16. The WAIS interview on the WELLNESS HOUR broadcast utilizing Plaintiff's
28 image to extol the virtues of OBI dentistry is factually untrue and in direct contradiction

1 to statements made by Defendant WAIS to the Arizona State Board of Dental
2 Examiners in an investigative interview given on October 16, 2009, relating to the
3 dental treatment performed by Defendant WAIS on Plaintiff. A true and correct copy
4 of the full transcript of Defendant WAIS' testimony obtained pursuant to A.R.S. §32-
5 3206 is attached hereto as Exhibit "E" and incorporated herein by reference.

6 **FIRST CAUSE OF ACTION**

7 **(For Intentional Infliction of Emotional Distress Against** 8 **Defendants WAIS, WELLNESS HOUR and Does 1 through 10, inclusive)**

9 17. Plaintiff realleges and incorporates herein by reference all of the allegations
10 set forth in paragraphs 1 through 16 as though fully set forth.

11 18. Defendants, and each of them, had knowledge of Plaintiff's particular
12 susceptibility to emotional distress due to his demand in May of 2008 that his image,
13 including recognizable facial photographs and his name, not be used to market
14 Defendant WAIS' dental practice in a positive manner due to the negligent treatment
15 Plaintiff received from Defendant WAIS which was, in truth, abhorrent and resulted in
16 serious consequences, both in physical, emotional and monetary terms, culminating
17 in a \$200,000.00 settlement to Plaintiff from Defendant WAIS' dental malpractice
18 insurance carrier.

19 19. At all times herein mentioned and up to and including February 2010,
20 Defendants, and each of them, unconscionably used Plaintiff's image, including
21 recognizable facial photographs and his name, to positively market and promote
22 Defendant WAIS' dental practice of OBI bioesthetic dentistry without Plaintiff's
23 authorization or consent and in direct contradiction of Plaintiff's demands on which the
24 malpractice settlement with WAIS had been predicated.

25 20. At all times herein mentioned and up to and including February 2010,
26 Defendants, and each of them, unconscionably disseminated Plaintiff's image,
27 including recognizable facial photographs and his name, to the general public through
28 Defendant WAIS' interview as broadcast by Defendant WELLNESS HOUR on its cable

1 television program shown throughout the United States and Canada in order to
2 positively market and promote Defendant WAIS' dental practice of OBI bioesthetic
3 dentistry.

4 21. In direct contravention of the assurances given to Plaintiff by Defendant
5 WAIS, as demonstrated by his compliance with Plaintiff's demand in May of 2008 to
6 immediately remove Plaintiff's photographs and name from WAIS' website,
7 Defendants, and each of them, continued to use and disseminate Plaintiff's image,
8 including recognizable facial photographs and his name, without Plaintiff's knowledge
9 or authorization on a continual basis through at least February 2010.

10 22. The conduct of Defendants, and each of them, was intentional and
11 malicious insofar as their actions were taken with knowledge that Plaintiff's emotional
12 distress would increase as a result of their conduct, but nevertheless undertook and
13 continued such conduct with a wanton and reckless disregard of the consequences to
14 Plaintiff.

15 23. As a proximate result of the conduct alleged herein, Plaintiff suffered
16 humiliation, extreme embarrassment, public ridicule, anger, severe mental anguish and
17 emotional distress, and has been injured in mind and body, all to Plaintiff's damage in
18 an amount presently unknown. Plaintiff will seek leave of court to amend this
19 Complaint to set forth the full amount of damage sustained when ascertained.

20 24. As a further proximate result of the conduct alleged herein, Plaintiff has
21 incurred and will in the future incur, sundry expenses in the examination, care and
22 treatment of Plaintiff's emotional injuries, the exact nature and extent of which are
23 presently unknown to Plaintiff. Plaintiff will seek leave of court to amend this Complaint
24 to set forth the full amount of damage sustained when ascertained.

25 25. The acts of Defendants, and each of them, were wilful, wanton, malicious
26 and oppressive, and thereby justify an award of exemplary and punitive damages.

27 **SECOND CAUSE OF ACTION**

28 **(For Negligent Infliction of Emotional Distress Against**

Defendants WAIS, WELLNESS HOUR and Does 1 through 10, inclusive)

26. Plaintiff realleges and incorporates herein by reference all of the allegations set forth in paragraphs 1 through 16 as though fully set forth.

27. Defendants, and each of them, were aware and knew, or should have known, of Plaintiff's particular susceptibility to emotional distress due to his demand in May of 2008 that his image, including recognizable facial photographs and his name, not be used to market Defendant WAIS' dental practice in a positive manner due to the negligent and abhorrent treatment Plaintiff received from Defendant WAIS which resulted in serious consequences, both in physical, emotional and monetary terms, and culminated in a \$200,000.00 settlement to Plaintiff from Defendant WAIS' dental malpractice insurance carrier.

28. At all times herein mentioned and up to and including February 2010, Defendants, and each of them, engaged in negligent conduct by unconscionably using Plaintiff's image, including recognizable facial photographs and his name, to positively market and promote Defendant WAIS' dental practice of OBI bioesthetic dentistry without Plaintiff's authorization or consent and in direct contradiction of Plaintiff's demands on which the malpractice settlement with WAIS had been predicated.

29. At all times herein mentioned and up to and including February 2010, Defendants, and each of them, engaged in negligent conduct by unconscionably disseminating Plaintiff's image, including recognizable facial photographs and his name, to the general public through Defendant WAIS' interview as broadcast by Defendant WELLNESS HOUR on its cable television program shown throughout the United States and Canada in order to positively market and promote Defendant WAIS' dental practice of OBI bioesthetic dentistry.

30. At all times herein mentioned, Defendants, and each of them, continued the use and dissemination of Plaintiff's image, as described herein, after Defendant WAIS had given assurances that Plaintiff's image would not be utilized on Defendant WAIS' website or in any marketing fashion after May 2008.

1 31. In direct contravention of the assurances given to Plaintiff by Defendant
2 WAIS, Plaintiff's image continued to be used and disseminated by Defendants, and
3 each of them, without Plaintiff's authorization on a continual basis through at least
4 February 2010.

5 32. As a proximate result of the negligent conduct of Defendants, and each of
6 them, and the consequences proximately caused thereby, Plaintiff suffered humiliation,
7 extreme embarrassment, public ridicule, anger, and severe emotional distress and
8 mental suffering, all to his damage in a sum which cannot presently be ascertained.
9 Plaintiff will seek leave of court to amend this Complaint to set forth the full amount of
10 said damage when ascertained.

11 33. As a further proximate result of the negligent conduct of Defendants, and
12 each of them, Plaintiff has incurred and will in the future incur, sundry expenses in the
13 examination, care and treatment of Plaintiff's emotional injuries, the exact nature and
14 extent of which are presently unknown to Plaintiff. Plaintiff will seek leave of court to
15 amend this Complaint to set forth the full amount of damage sustained when
16 ascertained.

17 **THIRD CAUSE OF ACTION**

18 **(For Intentional Misrepresentation by Defendants WAIS**
19 **and Does 11 through 20, inclusive)**

20 34. Plaintiff realleges and incorporates herein by reference all of the allegations
21 set forth in paragraphs 1 through 16 as though fully set forth.

22 35. On or about May 12, 2008, Defendant WAIS falsely and fraudulently
23 represented to Plaintiff that he would cease and desist in using and disseminating
24 Plaintiff's image, including recognizable facial photographs and his name, in any
25 manner, including but not limited to WAIS' website, the Internet or in live interviews
26 such as was given by WAIS to Defendant the WELLNESS HOUR in order to positively
27 market and promote his practice of OBI bioesthetic dentistry.

28 36. The representation made by Defendant WAIS that he would cease and

1 desist in using and disseminating Plaintiff's image was false. The true facts were that
2 Defendant WAIS continued to use and disseminate Plaintiff's image, including
3 recognizable facial photographs and his name, on WAIS' website, on the Internet and
4 in the WELLNESS HOUR interview in which he touted his OBI dentistry practice as
5 effectively treating TMJ, through at the least February 2010.

6 37. When Defendant WAIS made this representation to Plaintiff, he knew it to
7 be false. Defendant WAIS made such material representation with an intent to deceive
8 Plaintiff to allow WAIS to continue using and disseminating Plaintiff's image with the
9 intent and reasonable expectation of inducing Plaintiff to rely upon this representation,
10 all to Plaintiff's detriment.

11 38. Plaintiff, at the time Defendant WAIS made this representation, was ignorant
12 of the falsity of Defendant's representation and believed that Defendant's assurance
13 that he would cease and desist in using and disseminating Plaintiff's image to be true.
14 In justifiable reliance on Defendant WAIS' representation, Plaintiff was lulled into a
15 false sense of security, believing that his image would no longer be used and
16 disseminated to portray his dental treatment by Defendant WAIS as successful or
17 WAIS' use of OBI bioesthetic techniques as successful, until he inadvertently
18 happened upon WAIS' interview on the WELLNESS HOUR on December 4, 2009.

19 39. As a proximate result of Defendant WAIS' misrepresentation, Plaintiff was
20 subjected to extreme emotional distress by having his image positively used and
21 disseminated by Defendant WAIS when Plaintiff's treatment had, in actuality, been so
22 damaging.

23 40. As a further proximate result of Defendant WAIS' representation, Plaintiff
24 has sustained injury to his mental and emotional health, strength and activity, all of
25 which injuries have caused, and continue to cause, Plaintiff great mental, emotional
26 and nervous pain and suffering. Plaintiff will seek leave of court to amend this
27 Complaint to set forth the full amount of damage sustained as a result thereof when
28 ascertained.

1 effectively treating TMJ, through at the least February 2010.

2 47. When Defendant WAIS made this representation to Plaintiff, he had no
3 reasonable ground for believing it to be true, in that he knew, or should have known,
4 that Plaintiff's image was going to continue to be used and disseminated in Defendant
5 WAIS' marketing and promotion of his OBI bioesthetic dentistry practice.

6 48. Defendant WAIS made this representation with the intention of inducing
7 Plaintiff to act in reliance on his representation that no further use or dissemination of
8 Plaintiff's image would be made in false advertising, promotion and marketing of
9 Defendant WAIS's dentistry practice.

10 49. Plaintiff, at the time Defendant WAIS made this representation, was ignorant
11 of the falsity of Defendant's representation and believed that Defendant's assurance
12 that he would cease and desist in using and disseminating Plaintiff's image to be true.
13 In justifiable reliance on Defendant WAIS' representation, Plaintiff was lulled into a
14 false sense of security, believing that his image would no longer be used and
15 disseminated to portray his dental treatment by Defendant WAIS as successful or
16 WAIS' use of OBI bioesthetic techniques as successful, until he inadvertently
17 happened upon WAIS' interview on the WELLNESS HOUR on December 4, 2009.

18 50. As a proximate result of Defendant WAIS' misrepresentation, Plaintiff was
19 subjected to extreme emotional distress by having his image positively used and
20 disseminated by Defendant WAIS when Plaintiff's treatment had, in actuality, been so
21 damaging.

22 51. As a further proximate result of Defendant WAIS' representation, Plaintiff
23 has sustained injury to his emotional and mental health, strength and activity, all of
24 which injuries have caused, and continue to cause, Plaintiff great mental, emotional
25 and nervous pain and suffering. Plaintiff will seek leave of court to amend this
26 Complaint to set forth the full amount of damage sustained as a result thereof when
27 ascertained.

28 52. As a further proximate result of Defendant WAIS' representation, Plaintiff

1 has sustained, and will continue to sustain, serious and permanent emotional injuries,
2 all to Plaintiff's general damage in an amount presently unascertainable. Plaintiff will
3 seek leave of court to amend this Complaint to set forth the full amount of damage
4 sustained as a result thereof when ascertained.

5 53. As a further proximate result of Defendant WAIS' representation, Plaintiff
6 has incurred, and will in the future incur, sundry expenses in the examination, care and
7 treatment of Plaintiff's emotional injuries, the exact nature and extent of which are
8 presently unknown to Plaintiff. Plaintiff will seek leave of court to amend this Complaint
9 to set forth the full amount of damage sustained when ascertained.

10 **FIFTH CAUSE OF ACTION**

11 **(For Conspiracy to Commit Fraud Against WAIS, OBI** 12 **FOUNDATION and Does 21 through 30, inclusive)**

13 54. Plaintiff realleges and incorporates herein by reference all of the allegations
14 set forth in paragraphs 1 through 16 as though fully set forth.

15 55. Plaintiff is informed and believes, and thereon alleges, that at all times
16 presently unknown to Plaintiff, Defendants, and each of them, knowingly and wilfully
17 conspired and agreed among themselves to perpetrate a fraud on Plaintiff by
18 convincing him of the effectiveness of OBI dentistry in treating his dental complaints
19 in order to utilize his image, including recognizable facial photographs and his name,
20 in advertising, promoting and marketing bioesthetic dentistry as promulgated by
21 Defendant OBI FOUNDATION and practiced by Defendant WAIS.

22 56. Pursuant to said conspiracy, and in furtherance thereof, Defendants, and
23 each of them, represented to Plaintiff that bioesthetic dentistry would alleviate his
24 dental complaints and be a more successful treatment than traditional dental
25 techniques so that Plaintiff would agree to the treatment. Conversely, bioesthetic
26 dentistry caused Plaintiff such severe and deleterious damage to his mouth, jaw, neck
27 and upper back, requiring extensive rehabilitative treatment, that Defendant WAIS'
28 dental malpractice insurance carrier settled Plaintiff's claims for \$200,000.00.

1 57. Defendants, and each of them, demonstrated their agreement to perpetrate
2 a fraud on Plaintiff, by extolling the virtues of bioesthetic dentistry, although having no
3 scientific support, to effectively treat Plaintiff's dental complaints so as to be able to
4 utilize and disseminate Plaintiff's image in the marketing campaign to promote the OBI
5 FOUNDATION's advocacy of bioesthetic dentistry and WAIS' use of OBI techniques
6 in his dental practice.

7 58. Plaintiff, at the time representations were made to him as to the
8 effectiveness of OBI bioesthetic dentistry, was ignorant of the falsity of these
9 representations and believed them to be true. In justifiable reliance upon these
10 representations, Plaintiff underwent treatment utilizing OBI bioesthetic techniques and
11 procedures which enabled Defendants OBI FOUNDATION and WAIS to utilize and
12 disseminate Plaintiff's image in marketing a form of dentistry which, at the time
13 Plaintiff's image was used, Plaintiff had repudiated.

14 59. As a proximate result of Defendant WAIS' misrepresentation, Plaintiff was
15 subjected to extreme emotional distress by having his image positively used and
16 disseminated by Defendant WAIS when Plaintiff's treatment had, in actuality, been so
17 damaging.

18 60. As a further proximate result of Defendant WAIS' representation, Plaintiff
19 has sustained injury to his emotional and mental health, strength and activity, all of
20 which injuries have caused, and continue to cause, Plaintiff great mental, emotional
21 and nervous pain and suffering. Plaintiff will seek leave of court to amend this
22 Complaint to set forth the full amount of damage sustained as a result thereof when
23 ascertained.

24 61. As a further proximate result of Defendant WAIS' representation, Plaintiff
25 has sustained, and will continue to sustain, serious and permanent emotional injuries,
26 all to Plaintiff's general damage in an amount presently unascertainable. Plaintiff will
27 seek leave of court to amend this Complaint to set forth the full amount of damage
28 sustained as a result thereof when ascertained.

1 68. Defendants WAIS and the WELLNESS HOUR disabused Plaintiff's right of
2 privacy by using and disseminating his image on WAIS' website, the Internet and, in
3 a continuing and abhorrent manner, by touting the effectiveness of OBI bioesthetic
4 dentistry as it personally applied to Plaintiff in an interview on a public cable television
5 station which was broadcast nationally and in Canada and conceivably seen (and later
6 observed via the Internet) by millions of members of the general public.

7 69. The conduct of Defendants, and each of them, in using and disseminating
8 Plaintiff's image in such a false and deceptive manner was a serious invasion of
9 Plaintiff's right to privacy and such an egregious breach of social norms that Plaintiff
10 was, as a result thereof, subjected to extreme emotional distress.

11 70. As a proximate result of the conduct of Defendants, and each of them,
12 Plaintiff has suffered emotional distress, mental suffering and invasion of his
13 Constitutional right to privacy in a sum which is presently unascertainable. Plaintiff will
14 seek leave of court to amend this Complaint to set forth the full amount of said damage
15 when ascertained.

16 71. The conduct of Defendants was wilful, wanton, malicious and oppressive,
17 and justifies the award of exemplary and punitive damages.

18 **SEVENTH CAUSE OF ACTION**

19 **(For Statutory Violation of *Civil Code* §3344 Against**
20 **Defendants WAIS, WELLNESS HOUR and Does 31-40, inclusive)**

21 72. Plaintiff realleges and incorporates herein by reference all of the allegations
22 set forth in paragraphs 1 through 16 as though fully set forth.

23 73. On or about March 12, 2009, and up to and including February 2010,
24 Defendants WAIS and the WELLNESS HOUR knowingly appropriated Plaintiff's
25 photographs and name by utilizing Plaintiff's image in an interview of WAIS conducted
26 by and broadcast on the WELLNESS HOUR, both on cable television and via the
27 Internet, wherein Plaintiff was identified as a satisfied patient of Defendant WAIS and
28 the beneficiary of successful OBI bioesthetic dental techniques performed on Plaintiff

1 by Defendant WAIS.

2 74. In reality, Plaintiff was not a satisfied patient of Defendant WAIS and rather
3 considered that WAIS' treatment caused him grievous harm which resulted in Plaintiff
4 outlining his grievances with WAIS in his May 10, 2008, letter, which culminated in
5 WAIS' dental malpractice insurance carrier settling Plaintiff's claims for dental
6 treatment below the standard of care for \$200,000.

7 75. The appropriation of Plaintiff's photographs and name by Defendants WAIS
8 and the WELLNESS HOUR was unauthorized and without the prior consent of Plaintiff.

9 76. The appropriation by Defendants WAIS and the WELLNESS HOUR was for
10 the purpose of marketing, promoting and advertising WAIS' dental practice of OBI
11 bioesthetic dentistry in a concerted effort to solicit patients for his own enrichment and
12 financial gain, a benefit of the WELLNESS HOUR which represents that "doctors from
13 all over the U.S. and Canada have used this talk show format to drive hundreds of new
14 patients to their practice".

15 77. As a proximate result of the wrongful conduct of Defendants, and each of
16 them, Plaintiff was subjected to extreme emotional distress by having his image
17 positively used and disseminated by Defendant WAIS when Plaintiff's treatment had,
18 in actuality, been so damaging.

19 78. As a further proximate result of the wrongful conduct of Defendants, and
20 each of them, Plaintiff has sustained injury to his emotional and mental health, strength
21 and activity, all of which injuries have caused, and continue to cause, Plaintiff great
22 mental, emotional and nervous pain and suffering. Plaintiff will seek leave of court to
23 amend this Complaint to set forth the full amount of damage sustained as a result
24 thereof when ascertained.

25 79. As a further proximate result of the wrongful conduct of Defendants, and
26 each of them, Plaintiff has sustained, and will continue to sustain, serious and
27 permanent emotional injuries, all to Plaintiff's general damage in an amount presently
28 unascertainable. Plaintiff will seek leave of court to amend this Complaint to set forth

1 the full amount of damage sustained as a result thereof when ascertained.

2 80. As a further proximate result of the wrongful conduct of Defendants, and
3 each of them, Plaintiff has incurred, and will in the future incur, sundry expenses in the
4 examination, care and treatment of Plaintiff's emotional injuries, the exact nature and
5 extent of which are presently unknown to Plaintiff. Plaintiff will seek leave of court to
6 amend this Complaint to set forth the full amount of damage sustained when
7 ascertained.

8 81. The conduct of Defendants was wilful, wanton, malicious and oppressive,
9 and justifies the award of exemplary and punitive damages.

10 **EIGHTH CAUSE OF ACTION**

11 **(For Unfair Competition pursuant to *Business & Professions*** 12 ***Code §17200 Against All Defendants*)**

13 82. Plaintiff realleges and incorporates herein by reference all of the allegations
14 set forth in paragraphs 1 through 16 as though fully set forth.

15 83. In or about December 2004 through at the least February 2010, Defendants
16 WAIS and OBI FOUNDATION promoted OBI bioesthetic dentistry to the general
17 public, including Plaintiff, as a revolutionary method of resolving dental complaints,
18 including TMJ.

19 84. On or about March 12, 2009, through at the least February 2010,
20 Defendants WAIS and WELLNESS HOUR used and disseminated Plaintiff's image
21 to promote, advertise and market OBI bioesthetic dentistry in a false and fraudulent
22 light as the outcome of Plaintiff's dental treatment with Defendant WAIS was not
23 successful as advertised in the WELLNESS HOUR interview, but was unsuccessful
24 and debilitating to Plaintiff.

25 85. On or about March 12, 2009, through at the least February 2010, the
26 manner in which Defendant WAIS promoted, marketed and advertised his OBI
27 bioesthetic dental practice during the WELLNESS HOUR interview was unfair,
28 deceptive, untrue and misleading as the outcome of Plaintiff's dental treatment with

1 WAIS was diametrically opposed to the proclamations made by WAIS in the
2 WELLNESS HOUR interview which WAIS himself confirmed, under oath, in his
3 investigatory hearing before the Arizona State Board of Dental Examiners.

4 86. The marketing, promotion and advertising of OBI bioesthetic dentistry as a
5 revolutionary approach to dental complaints and problems was deceptive and
6 misleading and, as to Plaintiff specifically, resulted in his image being used to further
7 the false, misleading and untrue advertising undertaken by Defendants, and each of
8 them.

9 87. The utilization of Plaintiff's image by Defendants, and each of them, without
10 Plaintiff's authorization or consent for the promotion, marketing and advertising of OBI
11 bioesthetic dentistry and Defendant WAIS' dental practice was for the sole purpose of
12 Defendants' financial gain and enrichment, which the WELLNESS HOUR represented
13 as the purpose of its "talk show format" was "to drive hundreds of new patients" to the
14 dental and medical practices of their interviewees, including Defendant WAIS and his
15 OBI bioesthetic dentistry practice.

16 88. The conduct of Defendants, and each of them, as described herein,
17 constitutes unfair competition in violation of *California Business & Professions Code*,
18 §17200.

19 89. Plaintiff, by virtue of the use of his image to unfairly and deceptively market,
20 promote and advertise OBI bioesthetic dentistry, has suffered damage in an amount
21 presently unknown to be proven at the time of trial.

22 WHEREFORE, Plaintiff ROBIN BERTSCH prays for judgment against
23 Defendants as follows:

24 FOR FIRST, SIXTH, AND SEVENTH CAUSES OF ACTION AGAINST WAIS
25 AND WELLNESSHOUR:

- 26 1. For general damages according to proof;
- 27 2. For special damages according to proof;
- 28 3. For interest thereon at the legal rate;

- 1 4. For punitive and exemplary damages according to proof;
2 5. For costs of suit incurred herein; and
3 6. For such other and further relief as the Court deems just and proper.

4 FOR SECOND CAUSE OF ACTION AGAINST WAIS AND WELLNESS HOUR:

- 5 1. For general damages according to proof;
6 2. For special damages according to proof;
7 3. For interest thereon at the legal rate;
8 4. For costs of suit incurred herein; and
9 5. For such other and further relief as the Court deems just and proper.

10 FOR THIRD CAUSE OF ACTION AGAINST WAIS:

- 11 1. For general damages according to proof;
12 2. For special damages according to proof;
13 3. For interest thereon at the legal rate;
14 4. For punitive and exemplary damages according to proof;
15 5. For costs of suit incurred herein; and
16 6. For such other and further relief as the Court deems just and proper.

17 FOR FOURTH CAUSE OF ACTION AGAINST WAIS:

- 18 1. For general damages according to proof;
19 2. For special damages according to proof;
20 3. For interest thereon at the legal rate;
21 4. For costs of suit incurred herein; and
22 5. For such other and further relief as the Court deems just and proper.

23 FOR FIFTH CAUSE OF ACTION AGAINST WAIS AND OBI FOUNDATION:


- 24 1. For general damages according to proof;
25 2. For special damages according to proof;
26 3. For interest thereon at the legal rate;
27 4. For punitive and exemplary damages according to proof;
28 5. For costs of suit incurred herein; and

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6. For such other and further relief as the Court deems just and proper.
FOR EIGHTH CAUSE OF ACTION AGAINST ALL DEFENDANTS:
1. For general damages according to proof;
 2. For special damages according to proof;
 3. For interest thereon at the legal rate;
 4. For costs of suit incurred herein; and
 5. For such other and further relief as the Court deems just and proper.

Dated: 18 Feb. 2010

LAW OFFICES OF DAVID J. WILZIG



DAVID J. WILZIG
Attorney for Plaintiff
Robin Bertsch