

**IN THE COURT OF COMMON PLEAS
MONTGOMERY COUNTY, OHIO**

DAVID PARKER)
4551-B Lansmore Drive.)
Dayton, Ohio 45415)

Plaintiff,)

v.)

BERKELEY PREMIUM)
NUTRACEUTICALS, INC.,)
f/k/a LifeKey, Warner Health Care, Wagner)
Pharmaceuticals, and Boland Naturals)
1661 Waycross Road)
Cincinnati, Ohio 45240)

C/O Statutory Agent)
Paul J. Kellogg, Esq.)
1 West Fourth Street, Suite 900)
Cincinnati, Ohio 45202,)

and)

ABC Corporations 1-20)
Names Unknown)

Defendants.)

Case No.

JUDGE:

**CLASS ACTION COMPLAINT
WITH JURY DEMAND ENDORSED
HEREON**

CERTIFIED MAIL SERVICE
REQUESTED ON DEFENDANT,
DEFENDANT'S STATUTORY
AGENT AND ON OHIO ATTORNEY
GENERAL PURSUANT TO O.R.C. §
1345.09

Plaintiff, David Parker, by his undersigned attorneys for this class action complaint, alleges upon personal knowledge as to himself and his own actions, and upon information and belief, including the investigation of counsel, as to all other matters, as to which allegations they believe substantial evidentiary support will exist after a reasonable opportunity for further investigation and discovery, as follows:

I. NATURE OF THIS ACTION

1. This is a class action brought on behalf of thousands of individuals victimized by a scheme to defraud and obtain money through the unfair, deceptive and fraudulent marketing and selling of Enzyte, a nutraceutical touted by Defendant nationwide as a product that would actually increase the size of a man's penis. More specifically, Defendant promoted Enzyte as "[t]he first all-natural male enhancement program that adds one to three inches to your size" and as "100% Safe with a 98.3% Success Rate." Defendant 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, your erectile chambers, as well as your penis, will enlarge up to 41%."

2. Berkeley made these uniform advertising claims despite its knowledge that there was no legitimate scientific basis supporting the claims that Enzyte increased penis size.

3. In fact, Berkeley's founder and Chief Executive Officer, Steven Warshak, recently admitted that the company withdrew its claims that Enzyte added inches to a man's penis because no third-party independent trials were conducted to substantiate the claim. "When we brought that [claims concerning enlargement] to new partners who know this industry a lot better than we had, it was clear that unless it was a third-party independent trial, you shouldn't use it." See James McNair, *Herbal Entrepreneur Proving That Sex Sells*, THE CINCINNATI ENQUIRER, Sunday, February 22, 2004, attached as Exhibit C.

4. Indeed, the current Enzyte website now discloses that "there is no known ingestible proven to alter the natural size or shape of the penis," and "[t]o understand what Enzyte can do for you, it's first important to understand what it cannot do. Enzyte will not alter the size or shape of your penis," although Berkeley continues to insist that "Enzyte can help your body achieve full, strong erections." See www.enzyte.com/nme.html; www.enzyte.com/about_enzyte.html.

5. Nonetheless, Defendant earned tens-of-millions of dollars in revenues while promoting Enzyte as a substance that will increase penis size. Moreover, it routinely failed to provide its represented "double your money back" guarantee to unsatisfied consumers, including

Plaintiff. Further, rather than honoring its “double your money back” guarantee, Defendant provided complaining customers with the “Non-Authorization Packet,” a deliberately confusing and deceptive document that, if executed by the customer, allegedly waives the customer’s right to recover under Defendant’s prior “double your money back” guarantee.

6. Moreover, Defendant continues to engage in unfair, deceptive and fraudulent promotions and advertising by propagating a claim of “male enhancement” that is no less misleading than its former, explicit claim of penis enlargement. Its latest unfair, deceptive and fraudulent claims are 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.” *See* www.enzyte.com.

7. This proposed nationwide class action is necessary to remedy Defendant’s unlawful conduct. Plaintiff brings class claims for Defendants’ violations of the Ohio Consumer Sales Practices Act, Ohio’s Deceptive Trade Practices Act, negligent misrepresentation, fraud, unjust enrichment, breach of contract, and breach of implied and express warranty.

II. PARTIES

8. Plaintiff David Parker is a resident of Montgomery County, Ohio and was a resident of Montgomery County, Ohio at all times relevant to this Complaint.

9. Defendant Berkeley is an Ohio Corporation headquartered in Cincinnati, Ohio, and does substantial business in Ohio, including Montgomery County, and throughout the United States, and therefore is subject to this Court's personal jurisdiction.

10. Defendant Berkeley distributes Enzyte and its other products throughout the United States.

11. Defendants ABC Corporations 1-20, names unknown and addressed unknown, are believed to be predecessors, successors-in-interest or other corporate entities related to Berkeley or are otherwise involved in the manufacture, sale, design or marketing of Enzyte. Plaintiff could not discover, despite the exercise of reasonable diligence, the names of these twenty defendants.

III. JURISDICTION AND VENUE

12. This Court has jurisdiction over the parties because Plaintiff is an Ohio resident and Defendant Berkeley is an Ohio Chartered corporation and maintains its national headquarters and principal place of business in Hamilton County, Ohio. Furthermore, Berkeley conducts most, if not all, of its operations from its headquarters in Ohio. Most of the events, actions, inactions, decisions, wrongful conduct and transactions complained of herein occurred in Ohio and/or were originated and controlled from Ohio.

13. Venue is proper in Montgomery County, Ohio because Defendant Berkeley conducted extensive and ongoing business activity in Montgomery County, Ohio that gave rise to the claims for relief and/or because Montgomery County, Ohio is the county in which all or a part of the claims for relief arose. In addition, Plaintiff resides in Montgomery County, Ohio.

14. Federal jurisdiction over this action does not exist. The amount in controversy as to Plaintiff does not exceed \$75,000. The damages, attorneys' fees and costs of individual class members may not be aggregated to meet the jurisdictional amount.

15. Plaintiff and the class assert no federal question. Plaintiff's state law causes of action are not federally preempted. Ohio law applies and may constitutionally be applied to plaintiff and each class members' claim. The acts of which Plaintiff complains on behalf of himself and all class members stem from conduct that occurred in Ohio and throughout the United States.

IV. ESTOPPEL FROM PLEADING AND TOLLING OF APPLICABLE STATUTES OF LIMITATIONS

16. Berkeley is estopped from relying on any statutes of limitation by virtue of its fraudulent acts of concealment concerning the true impact of Enzyte on penis size. Berkeley actively concealed the true nature of Enzyte as alleged in this Complaint and continues to market, advertise and sell Enzyte based upon benefits such as "firmer, fuller, better quality erections" that infer that Enzyte will increase penis size.

17. Because Berkeley continues to advertise, market and sell the product in a fashion intended to convey to consumers that Enzyte increases penis size and offers other unproven benefits, Berkeley continues its deception to the present.

18. Because of Berkeley's nondisclosure of the true nature of Enzyte, Plaintiff and the class could not reasonably have discovered the wrongdoing alleged above. Given Berkeley's failure to disclose and/or to conceal this non-public information over which it had exclusive control, and because Plaintiff could not reasonably have known that Berkeley's Enzyte was in violation of Ohio law, Berkeley is estopped from relying on any statutes of limitations that might otherwise apply to the claims asserted herein. Further, any such statutes of limitations have been tolled by Berkeley's concealment of the scam.

V. CLASS ACTION ALLEGATIONS

19. Plaintiff brings all claims herein as class claims pursuant to Civ. R. 23. The requirements of Rule (A), (B)(2) and (B)(3) are met with respect to the class defined below.

A. Class Definition

20. The class consists of:

All persons in the United States, except California, who have purchased Enzyte. Excluded from the class are any owners, officers and employees of Defendant and any person claiming personal injury or wrongful death.¹

B. Numerosity

21. At this time, Plaintiff does not know the exact size of the Class; however, due to the nature of the trade and commerce involved, Plaintiff believes that the Class members are so numerous that joinder of all members is impracticable. The number of class members can be determined by appropriate discovery. In addition, Berkeley's CEO recently claimed that over 2 million consumers have purchased and used Enzyte.

¹ Plaintiff reserves the right to amend the class definition until the time of trial based upon class discovery.

C. Commonality

22. There are questions of law or fact common to the class, including at least the following:

- a. Whether Defendant Berkeley labeled, advertised, marketed and sold Enzyte to Plaintiff and the members of the Class using false and/or misleading statements or representations including the statement or representation that Enzyte increases penis size;
- b. Whether Defendant Berkeley labeled, advertised, marketed and sold Enzyte to Plaintiff and the members of the Class using false and/or misleading statements or representations including the statement or representation that class members would receive “double your money back” if not satisfied;
- c. Whether Defendant Berkeley labeled, advertised, marketed and sold Enzyte to Plaintiff and the members of the Class using false and/or misleading statements or representations including the use of the “Non-Authorization Packet;”
- d. Whether Defendant Berkeley's labeling, advertising, marketing and selling of Enzyte constitutes an unfair, deceptive or unconscionable consumer sales practice or a deceptive trade practice;
- e. Whether Defendant Berkeley's labeling, advertising, marketing and selling of Enzyte constitutes fraud;
- f. Whether Defendant Berkeley's labeling, advertising, marketing and selling of Enzyte constitutes negligent misrepresentation;
- g. Whether Defendant Berkeley's labeling, advertising, marketing and selling of Enzyte constitutes unjust enrichment.

D. Typicality

23. Plaintiff has the same interests in this matter as all other members of the class, and his claims are typical of all members of the class.

E. Adequacy

24. Plaintiff is committed to pursuing this action and has retained competent counsel experienced in consumer class actions. Plaintiff will fairly and adequately represent the interests of the class members and does not have interests adverse to the class.

F. The Prerequisites to Maintaining a Class Action For Injunctive and Corresponding Declaratory Relief Are Readily Apparent

25. The prerequisites to maintaining a class action for injunctive and equitable relief pursuant to Civ. R. 23(B)(2) exist as Defendant has acted or refused to act on grounds generally applicable to the class thereby making appropriate final injunctive and equitable relief with respect to the class as a whole.

26. The prosecution of separate actions by members of the class would create a risk of establishing incompatible standards of conduct for Berkeley. For example, one court might decide that the challenged actions are illegal and enjoin them, while another court might decide that those same actions are not illegal. Individual actions may, as a practical matter, be dispositive of the interests of the class, who would not be parties to those actions.

27. Berkeley's actions are generally applicable to the class as a whole, and Plaintiff seeks, *inter alia*, equitable remedies with respect to the class as a whole.

28. Berkeley's systemic policy and practices make declaratory relief with respect to the class as a whole appropriate.

G. Common Questions Predominate, and the Class Action Device Is Superior Under Rule 23(B)(3)

29. The common questions of law and fact enumerated above predominate over questions affecting only individual members of the class, and a class action is the superior method for fair and efficient adjudication of the controversy. The likelihood that individual members of the class will prosecute separate actions is remote due to the extensive time and

considerable expense necessary to conduct such litigation, especially in view of the relatively modest amount of monetary, injunctive, and equitable relief at issue 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 national class action, except California, as defined above.

30. The application of Ohio law to the class members of 49 states is appropriate. Reasons include that Berkeley seeks to bind consumers providing information to Berkeley through its website to agree to be subject to Ohio law. *See* www.berkeleypremiumnutraceuticals.com/privacy.html. (“You transmit data to our Website subject to U.S. and Ohio law. Do not transmit data to our Website unless you agree to be bound by U.S. and Ohio law.”; “Any claim relating to the Website, our Terms of Use, and the relationship between you and us shall be governed by the laws of the United States and the State of Ohio without regard to its conflict of law provisions.”). Further, it is appropriate to apply Ohio to class members in the 49 states, except California, because Berkeley is an Ohio corporation that is incorporated in Ohio and has its principal place of business in Ohio. Further, most, if not all, of its operations are based in Ohio. In addition, most of the events, actions, decisions and transactions complained of herein occurred in Ohio and were originated and controlled from Ohio. Thus, there is a meaningful nexus and significant connection and contact between the State of Ohio and the conduct under dispute. There is no actual conflict between Ohio's law and the law of the other states. Thus, this Court, as a branch of the government of the State of Ohio, and Ohio as a forum state have a strong judicial, governmental, and policy interest in ensuring that the wrongful conduct and Ohio law violations complained of here are addressed here before this Court under Ohio law.

VI. FACTS

A. Enzyte

31. Defendant Berkeley promises consumers that it is “A Name You Can Trust” in the arena of natural supplements. Its website proclaims, “[i]n 2001, Berkeley Premium

Nutraceuticals opened our doors with the desire to provide a wide range of trustworthy, nonprescription options to address some of the most common consumer healthcare concerns.”

See www.berkeleypremiumnutraceuticals.com.

32. A significant market exists for so-called “penis enlargement products” (“PEP”), herbal concoctions typically sold as dietary supplements and frequently marketed on the basis of medically impossible promises of physical transformation and sexual prowess.

33. It is estimated that some 50 companies are in the PEP business, each directing their sales pitch at a common male anxiety, as “[c]oncerns over penile size and a desire for a longer penis are common in the male population.” N. Mondaini, et al., *Penile Length is Normal in Most Men Seeking Penile Lengthening Procedures*, 14 INT’L J. OF IMPOTENCE RES. 283, 283 (2002). In some men, these concerns can rise to a pathological level, interfering with social and sexual functioning. See J. Murtagh, *The “Small” Penis Syndrome*, 18 AUSTL. FAM. PHYSICIAN 218 (Mar. 1989).

34. Defendant Berkeley capitalizes upon and targets this market. In 2001 it began selling Enzyte, which according to its labeling and advertising, claimed to actually increase penis size. At least tens of thousands of consumer class members have purchased the product based on the expectation and the truth of the claim that Enzyte would increase the size of each man’s penis.

35. From the product’s inception in 2001 throughout the summer of 2003, Berkeley systematically, uniformly, and fraudulently advertised, marketed and sold Enzyte nationwide as a product that would actually increase the size of an individual’s penis.

36. Enzyte was and is advertised on television, radio and various print media. The television campaign focuses on “Smiling Bob,” “the Everyman who upgrades his lifestyle, adds a mysterious extra lift to his persona, and brings a smile to every woman’s lips.” See www.enzyte.com/news/112503.html. Berkeley even sponsors a “Team Enzyte” Nascar race car.

37. Berkeley's advertisement in the December, 2001 edition of *Esquire* magazine included the following claim: "The first all-natural male enhancement program that adds one to three inches to your size in just eight months or get double your money back." (See Exhibit A.)

38. Berkeley's website during this time period included the claim that individuals who took Enzyte experienced, on average, a 24% increase in erection size.

39. Berkeley's advertisement in the October-December, 2001 editions of *Gentlemen's Quarterly* included the claims that Enzyte was "100% Safe with a 98.3% Success Rate," and that, "[o]ver the course of the eight month program, your erectile chambers, as well as your penis, will enlarge up to 41%." (See Exhibit B.)

40. These representations concerning increased penis size were central to Defendant's advertisements, marketing and sales programs through the summer of 2003 and were material to Plaintiff's and the Class's purchases of Enzyte.

41. Berkeley made these claims despite its knowledge that there was no competent and reliable scientific evidence supporting the claims that Enzyte increased penis size.

42. In fact, Berkeley's founder and Chief Executive Officer, Steven Warshak, recently admitted that the company withdrew its claims that Enzyte added inches to a man's penis because no third-party independent trials were conducted to substantiate the claim. "When we brought that [claims concerning enlargement] to new partners who know this industry a lot better than we had, it was clear that unless it was a third-party independent trial, you shouldn't use it." See James McNair, *Herbal Entrepreneur Proving That Sex Sells*, THE CINCINNATI ENQUIRER, Sunday, February 22, 2004, attached as Exhibit C.

43. Indeed, the current Enzyte website now discloses that "there is no known ingestible proven to alter the natural size or shape of the penis," and "[t]o understand what Enzyte can do for you, it's first important to understand what it cannot do. Enzyte will not alter the size or shape of your penis," although Berkeley continues to insist that "Enzyte can help your body achieve full, strong erections." See www.enzyte.com/nme.html; www.enzyte.com/about_enzyte.html.

44. Thus, at least according to Berkeley's website it has apparently dropped the explicit claim that Enzyte increases penis size, opting to instead propagate the vague and nebulous claim of "male enhancement," the net effect of which is no less misleading to consumers purchasing the product. Its current unfair, deceptive and fraudulent claims are 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." See www.enzyte.com.

45. Upon information and belief, Berkeley's Enzyte product was advertised and marketed in an identical or substantially similar manner in all 50 states through all media including television, radio, magazines, the internet, and newspapers.

B. Plaintiff Purchased Berkeley's Enzyte Product

46. On October 23, 2001, Plaintiff David Parker purchased an eight month supply of Enzyte for \$399.60 and materially relied upon Berkeley's false and misleading representations that the product would increase penis size, and as such is a member of the class as defined above.

47. After Plaintiff purchased the product and while Plaintiff continued to take Enzyte, Berkeley continued to represent and assure Plaintiff that Enzyte would increase the size of his penis:

Thank you for purchasing Enzyte, the world's first all natural male enhancement product.

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.

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

48. Upon information and belief, the so-called "research" referenced did not exist or did not constitute competent and reliable scientific evidence.

C. Enzyte Did Not Work, And Berkeley Failed To Provide The Promised Refund

49. As a result of the on-going and continuing representations made by Defendant regarding increases in penis size, Plaintiff continued to take Enzyte for the eight month period as directed by Defendant, who urged:

Stay on the program.

Do not stop taking Enzyte. Results will come. Just like lifting weights and working out, you will see an initial increase then you will level off and plateau. Significant increases will be attained during the 7th and 8th month.

You will reach your maximum potential at the 8th month mark. Most men report a one to three inch gain in length and 27% increase in roundness.

After completing the eighth month supply of Enzyte, Plaintiff experienced no increase in penis size.

50. Around June, 2002, having concluded that Enzyte would not increase his penis size, Plaintiff contacted Defendant to exercise his rights under Defendant's "double your money back" refund program. Instead of honoring its "double your money back" guarantee as Plaintiff requested, Defendant instead deliberately evaded its promise by forwarding the deceptive and misleading "Non-Authorization Packet" in an attempt to confuse and mislead Plaintiff into waiving his refund rights. Even more egregious, Defendant advised Plaintiff that it had unilaterally decided to revoke the "double your money back" guarantee.

51. After many months and multiple unsuccessful attempts by Plaintiff to resolve the rebate issue, Defendant eventually refunded a portion of the money owed to Plaintiff; however, Defendant never paid Plaintiff double the purchase price as promised.

52. Upon information and belief, involving Plaintiff's experience coupled with complaints made to the Better Business Bureau, Defendant has a standardized and uniform policy of not promptly honoring its money-back guarantee or, if honoring it, doing so only in part and/or only after wrongfully seeking to evade its promise by needlessly subjecting consumers to an extensive and misleading process. Indeed, Leslie Kish, the director of

operations for the Cincinnati-area Better Business Bureau, recently reported that Berkeley “is clearly the No. 1 generator of complaints for us.”

53. The foregoing course of conduct on the part of Berkeley was for the purpose, in whole or in part, of uniformly misleading and fraudulently inducing Plaintiff and members of the class to purchase Enzyte. Berkeley knowingly and continuously misrepresented Enzyte’s impact on penis size with the intent of inducing reliance by Plaintiff and members of the class.

54. Berkeley’s failure to honor its “double your money back” guarantee was deceptive, unconscionable, and fraudulent.

55. Berkeley’s use of the “Non-Authorization Packet” was deceptive, unconscionable, and fraudulent.

56. These and other aspects of Berkeley’s unfair, deceptive, unconscionable, fraudulent and otherwise illegal course of conduct, including claims regarding or related to increased penis length, “natural male enhancement” and “fuller-feeling erections,” were common to all purchasers of Enzyte and violated Ohio’s consumer protection laws, Deceptive Trade Practices Act, and other common law actions.

57. As a direct result of these systematic, unfair, deceptive, unconscionable and fraudulent practices related to the advertising, marketing, and sale of Enzyte and related to customer service issues including refunds and the non-authorization packets, Defendant has wrongfully made tens of millions of dollars. In 2003 alone, Berkeley posted \$100 million in sales.

COUNT I

UNFAIR OR DECEPTIVE CONSUMER SALES PRACTICE UNDER O.R.C. §1345.02

58. Plaintiff realleges and incorporates the preceding and subsequent paragraphs as if fully set forth herein.

59. Plaintiff's first cause of action is for damages and all other appropriate legal, injunctive and equitable relief based on an unfair or deceptive consumer sales practice on behalf of the national class, except California, as defined above.

60. Each of the following constitute separate violations of O.R.C. §1345.02: (1) Berkeley continuously represented during all relevant time periods through the summer of 2003 that its Enzyte product increases penis size, when in fact it does not; (2) Berkeley failed to honor and/or continually and systemically acted to avoid or evade the ability of requesting consumers to exercise their right to the "double your money back" refund guarantee; and (3) Berkeley systemically and uniformly utilized the deceptive and misleading "Non-Authorization Packet" to confuse and mislead class members and to continually stall to avoid or evade its "money back" refund guarantee responsibilities.

61. Such uniform representations are false and/or deceptive in violation of O.R.C. §1345.02(A), and is specifically in violation of O.R.C. §1345.02(B)(1) in that Berkeley represents that its Enzyte product has performance characteristics and benefits that it does not have, including the claim that it increases penis size and is subject to a "double your money back" guarantee. Also, such representations are false and/or deceptive in violation of O.R.C. §1345.02(A), and are specifically in violation of O.R.C. §1345.02(B)(10) in that Berkeley represents that the sale of its Enzyte product involves a warranty or other rights, remedies or obligations and that representation is false. Defendant's representations are also contrary to the The Federal Trade Commission Policy Statement Regarding Advertising Substantiation that recognizes that advertisers must have a reasonable basis for advertising claims before such claims are disseminated. (See <http://www.ftc.gov/bcp/guides/ad3subst.htm>)

62. Pursuant to O.R.C. §1345.09(B), these violations were acts or practices declared to be deceptive or unconscionable by administrative rule adopted under division (B)(2) of §1345.05 of the Revised Code before the transactions on which this action is based, including but not limited to O.A.C. Chapter 109:4-3-10 which states that "[i]t shall be a deceptive act or practice in connection with a consumer transaction for a supplier to: (A) Make any

representations, claims, or assertions of fact, whether orally or in writing, which would cause a reasonable consumer to believe such statements are true, unless, at the time such representations, claims, or assertions are made, the supplier possesses or relies upon a reasonable basis in fact such as factual, objective, quantifiable, clinical or scientific data or other competent and reliable evidence which substantiates such representations, claims, or assertions of fact.” Other applicable rules include, but are not limited to O.A.C. 109:4-3-02 which states that “it is a deceptive act or practice in connection with a consumer transaction for a supplier, in the sale or offering for sale of goods or services, to make any offer in written or printed advertising or promotional literature without stating clearly and conspicuously in close proximity to the words stating the offer any material exclusions, reservations, limitations, modifications, or conditions. Disclosure shall be easily legible to anyone reading the advertising or promotional literature and shall be sufficiently specific so as to leave no reasonable probability that the terms of the offer might be misunderstood.” Further, Pursuant to O.R.C. §1345.09(B), these violations were acts or practices determined by a court of this state to violate sections 1345.02 or 1345.03 of the Revised Code and were committed after the decisions containing these determinations has been made available for public inspection under division (A)(3) of section 1345.05 of the Revised Code. These cases included, but are not limited to: *State of Ohio ex rel. Celebreeze, Jr. v. Cupid’s Corner, Inc. et al.*, Case No. 39883 (C.P., Cuyahoga Co., 12-12-84); *State of Ohio ex rel. Brown v. Interstate Warranty Co.*, Case No. 82-1301 (C.P., Lucas, 5-27-82); *State of Ohio ex rel. Celebreeze v. Ferraro*, 63 Ohio App.3d 168, 578 N.E.2d 492 (Montgomery Cty. 1989); *Fletcher v. Don Foss of Cleveland, Inc.*, 90 Ohio App.3d 82, 628 N.E.2d 60 (Cuyahoga Cty. 1993); *State ex rel. Fisher v. Warren Star Theater*, 84 Ohio App.3d 435, 616 N.E.2d 1192 (Trumbull Cty. 1992); *Brown v. Lyons*, 43 Ohio Misc. 14, 332 N.E.2d 380 (C.P. 1974); *State ex rel. Celebreeze v. Lewis Auto Sales, Inc.*, Case No. 82-2039 (C.P., Montgomery, 2-11-83); *State ex rel. Brown (Celebreeze) v. Sandpiper Pool & Products Co. Inc.*, Case No. 79-525-L (C.P., Richland, 3-29-82); *State ex rel. Celebreeze v. Mosley, Nationwide Promotions*, Case No. 87 CV-04-2228 (C.P., Franklin Co., 5-8-87); *State ex rel. Brown v. Silzar, Inc.*, Case No. 78-2552

(C.P. Montgomery, 3-21-80); *State ex rel. Montgomery v. Marcum dba Custom Home Improvements*, Case No. 01 CVH 0403650 (C.P. Franklin, 1-16-01); *State ex rel. Celebreeze v. Moore, Bob's Appliance Services*, 1987 WL 421778, Case No. 86CV-02-1297 (C.P., Franklin, 4-30-87); *Wrobel v. Carpets by Otto*, Case No. 98-00910 (Toledo Muni. Ct., Lucas, 2-19-98); *State ex rel. Fisher v. National Information Group*, Case No. 93 CVH09-6323 (C.P., Franklin, 10-19-94); *State ex rel. Fisher v. Collins dba Ken Scott Appliance*, Case No. 199286 (C.P., Cuyahoga, 6-29-92); *State ex rel. Montgomery v. White dba Harvest Auto Body Shop*, Case No. 95 CVH 107591 (C.P. Franklin, 4-18-97); and *Bonded Home Care v. Chase*, Case No. 80 CVF 3775 (Muni. Ct., Montgomery, 6-24-81).

63. As a direct and proximate result of Defendant's violation of O.R.C. §1345.02(B)(1), Plaintiff and the class have been damaged in an amount that will be proven at trial.

COUNT II

UNCONSCIONABLE CONSUMER SALES PRACTICE UNDER O.R.C. §1345.03

64. Plaintiff realleges and incorporates the preceding and subsequent paragraphs as if fully set forth herein.

65. Plaintiff's second cause of action is for an unconscionable consumer sales practice on behalf of the national class, except California, defined above.

66. Each of the following constitute separate violations of O.R.C. §1345.03: (1) Berkeley continuously represented during all relevant time periods through the summer of 2003 that its Enzyte product increases penis size, when in fact it does not; (2) Berkeley failed to honor and/or continually stalled to avoid or evade its "double your money back" refund guarantee; and (3) Berkeley utilized the deceptive and misleading "Non-Authorization Packet" to confuse and mislead class members and to continually stall to avoid or evade its "money back" refund guarantee responsibilities.

67. Each representation and action described above is unconscionable in violation of O.R.C. §1345.03(A), and is specifically, among others and not limited to, in violation of: (1) O.R.C. §1345.03(B)(3) in that the Defendant knew at the time the consumer transaction was entered into of the inability of Plaintiff and class members to receive a substantial benefit from Enzyte, the “double your money back” guarantee, and/or the Non-Authorization Packet; and (2) O.R.C. §1345.03(B)(6) in that Defendant knowingly made a misleading statement of opinion on which Plaintiff and consumers were likely to rely to their detriment. These misleading statements of opinion include but are not limited to: (a) the statement that taking Enzyte will enlarge your penis; (b) the statement that if you are not satisfied with Enzyte, you will receive “double your money back”; and (c) the statements contained in the “Non-Authorization Packet.” Defendant’s representations are also contrary to The Federal Trade Commission Policy Statement Regarding Advertising Substantiation, 104 F.T.C. 648, that recognizes that advertisers must have a reasonable basis for advertising claims before such claims are disseminated.

68. Pursuant to O.R.C. §1345.09(B), this violation was an act or practice declared to be deceptive or unconscionable by rule adopted under division (B)(2) of §1345.05 of the Revised Code before the transactions on which this action is based, including but not limited to O.A.C. Chapter 109:4-3-10 which states that “[i]t shall be a deceptive act or practice in connection with a consumer transaction for a supplier to: (A) Make any representations, claims, or assertions of fact, whether orally or in writing, which would cause a reasonable consumer to believe such statements are true, unless, at the time such representations, claims, or assertions are made, the supplier possesses or relies upon a reasonable basis in fact such as factual, objective, quantifiable, clinical or scientific data or other competent and reliable evidence which substantiates such representations, claims, or assertions of fact.” Other applicable rules include, but are not limited to O.A.C. 109:4-3-02 which states that “it is a deceptive act or practice in connection with a consumer transaction for a supplier, in the sale or offering for sale of goods or services, to make any offer in written or printed advertising or promotional literature without stating clearly and conspicuously in close proximity to the words stating the offer any material

exclusions, reservations, limitations, modifications, or conditions. Disclosure shall be easily legible to anyone reading the advertising or promotional literature and shall be sufficiently specific so as to leave no reasonable probability that the terms of the offer might be misunderstood.” Further, Pursuant to O.R.C. §1345.09(B), this violation was an act or practice determined by a court of this state to violate sections 1345.02 or 1345.03 of the Revised Code and was committed after the decisions containing these determinations has been made available for public inspection under division (A)(3) of section 1345.05 of the Revised Code. These cases included, but are not limited to: *State of Ohio ex rel. Celebreeze, Jr. v. Cupid’s Corner, Inc. et al.*, Case No. 39883 (C.P., Cuyahoga Co., 12-12-84); *State of Ohio ex rel. Brown v. Interstate Warranty Co.*, Case No. 82-1301 (C.P., Lucas, 5-27-82); *State of Ohio ex rel. Celebreeze v. Ferraro*, 63 Ohio App.3d 168, 578 N.E.2d 492 (Montgomery Cty. 1989); *Fletcher v. Don Foss of Cleveland, Inc.*, 90 Ohio App.3d 82, 628 N.E.2d 60 (Cuyahoga Cty. 1993); *State ex rel. Fisher v. Warren Star Theater*, 84 Ohio App.3d 435, 616 N.E.2d 1192 (Trumbull Cty. 1992); *Brown v. Lyons*, 43 Ohio Misc. 14, 332 N.E.2d 380 (C.P. 1974); *State ex rel. Celebreeze v. Lewis Auto Sales, Inc.*, Case No. 82-2039 (C.P., Montgomery, 2-11-83); *State ex rel. Brown (Celebreeze) v. Sandpiper Pool & Products Co. Inc.*, Case No. 79-525-L (C.P., Richland, 3-29-82); *State ex rel. Celebreeze v. Mosley, Nationwide Promotions*, Case No. 87 CV-04-2228 (C.P., Franklin Co., 5-8-87); *State ex rel. Brown v. Silzar, Inc.*, Case No. 78-2552 (C.P. Montgomery, 3-21-80); *State ex rel. Montgomery v. Marcum dba Custom Home Improvements*, Case No. 01 CVH 0403650 (C.P. Franklin, 1-16-01); *State ex rel. Celebreeze v. Moore, Bob’s Appliance Services*, 1987 WL 421778, Case No. 86CV-02-1297 (C.P., Franklin, 4-30-87); *Wrobel v. Carpets by Otto*, Case No. 98-00910 (Toledo Muni. Ct., Lucas, 2-19-98); *State ex rel. Fisher v. National Information Group*, Case No. 93 CVH09-6323 (C.P., Franklin, 10-19-94); *State ex rel. Fisher v. Collins dba Ken Scott Appliance*, Case No. 199286 (C.P., Cuyahoga, 6-29-92); *State ex rel. Montgomery v. White dba Harvest Auto Body Shop*, Case No. 95 CVH 107591 (C.P. Franklin, 4-18-97); and *Bonded Home Care v. Chase*, Case No. 80 CVF 3775 (Muni. Ct., Montgomery, 6-24-81).

69. As a direct and proximate result of Defendant's violation of O.R.C. §1345.02(B)(3) and (6), Plaintiff and the class have been damaged in an amount that will be proven at trial.

COUNT III

DECEPTIVE TRADE PRACTICE UNDER O.R.C. §4165.02

70. Plaintiff realleges and incorporates the preceding and subsequent paragraphs as if fully set forth herein.

71. Plaintiff's third cause of action is for deceptive trade practice on behalf of the national class, except California, defined above.

72. Each of the following constitute separate violations of O.R.C. §4165.02: (1) Berkeley continuously represented during all relevant time periods that Enzyte increases penis size, when in fact it does not; (2) Berkeley failed to honor and/or continually stalling to avoid or evade its "double your money back" refund guarantee; and (3) Berkeley utilized the deceptive and misleading "Non-Authorization Packet" to confuse and mislead class members and to continually stall to avoid or evade its "money back" refund guarantee responsibilities.

73. Such representations, individually and collectively, were made by Berkeley in the course of its business, and in violation of O.R.C. §4165.02(A)(7), in that Berkeley represents that its Enzyte product has characteristics benefits and qualities that it does not have, namely that it increases penis size and is subject to a guarantee.

74. By making such representations, individually and collectively, Berkeley willfully engaged in a deceptive trade practice listed in O.R.C. §4165.02(A)(7), knowing it to be deceptive.

75. Plaintiff and the class have been injured as a direct and proximate result of Defendant's commission of a Deceptive Trade Practice listed in O.R.C. §4165.02(A)(7), and were damaged in an amount that will be proven at trial.

COUNT IV

NEGLIGENT MISREPRESENTATION

76. Plaintiff realleges and incorporates the preceding and subsequent paragraphs as if fully set forth herein.

77. Plaintiff's fourth cause of action is for negligent misrepresentation on behalf of the national class, except California, defined above.

78. In the course of its business dealings, Berkeley had a duty to supply accurate and non-misleading information to Plaintiff concerning Enzyte. Further, Berkeley had a duty to exercise reasonable care and competence in obtaining, verifying and communicating the information about the impact, or lack thereof, of Enzyte upon penis size and about any money back guarantees.

79. Berkeley breached this duty and supplied false information to be used by Plaintiff and class members for their guidance in these business or consumer transactions, namely that Berkeley's Enzyte product would increase penis size, when in fact it does not, and that there was a "double your money back" guarantee when in fact there was none.

80. This false information was justifiably relied upon by Plaintiff and class members and induced them to purchase Enzyte, thereby proximately causing them damages.

81. As a direct and proximate result of this reliance upon the false information, Plaintiff and class members were damaged in an amount which will be proven at trial.

COUNT V

FRAUD

82. Plaintiff realleges and incorporates the preceding and subsequent paragraphs as if fully set forth herein.

83. Plaintiff's fifth cause of action is for fraud on behalf of the national class, except California, defined above.

84. In the course of labeling, advertising, marketing and selling its Enzyte product, Berkeley made representations that Enzyte increases penis size, when in fact it does not. Specifically, these fraudulent representations included, but were not limited to the following: “The first all-natural male enhancement program that adds one to three inches to your size in just eight months or get double your money back.” (*see* advertisement attached as Exhibit A); Berkeley’s advertisement in the October-December, 2001 editions of *Gentlemen's Quarterly* which claimed: “Over the course of the eight month program, your erectile chambers, as well as your penis, will enlarge up to 41%.” (*See* advertisement attached as Exhibit B.) Further, Berkeley represented that it offers a “double your money back” guarantee when in fact it does not. And, despite its duty to the contrary, Berkeley has utilized the deceptive and misleading “Non-Authorization Packet” to confuse, mislead, and conceal from class members the fact that by accepting the “Non-Authorization Packet,” the “double your money back” guarantee is nullified. Berkeley’s use of the “Non-Authorization Packet” also constitutes an affirmative fraudulent representation because the packet is designed to impose unreasonable and time consuming procedures upon class members so that they will abandon or otherwise fail in their efforts to get the promised refund. For example, the “Non-Authorization Packet” states that “Due to card processing regulations, we will not be able to process your request without a notarized signature sent to us certified mail.”

85. Each individual representation, concerning increased penis size, the money back guarantee, and the “Non-Authorization Packet”, as well as the concealment of the true nature of the “Non-Authorization Packet,” was central to Defendant’s advertisements, marketing and sales programs and were material to Plaintiff’s purchase of Enzyte prior to the summer of 2003. Each of these representations, and concealment, is also material to every class members’ purchase subsequent to the Summer of 2003 as long as the class member initially purchased Enzyte prior to the Summer of 2003.

86. As evidenced by the statement in the February 22, 2004 edition of the *Cincinnati Enquirer* made by Defendant’s Chief Executive Officer, Steven Warshak, attached hereto as

Exhibit C, the representations as to increases in penis size were made falsely by Berkeley, with knowledge of its falsity, or were made with such utter disregard and recklessness as to whether it was true or false that knowledge may be inferred. Further, as evidenced by the fact that Plaintiff never received the “double his money back” guarantee despite significant efforts, the multitude of complaints lodged with the Better Business Bureau, and the misleading, deceptive and superfluous content and requirements of the “Non-Authorization Packet,” the representations as to “double your money back” guarantee and the “Non-Authorization Packet” and the concealment related to the “Non-Authorization Packet” were made falsely by Berkeley, with knowledge of its falsity, or were made with such utter disregard and recklessness as to whether it was true or false that knowledge may be inferred.

87. These representations and concealment were made by Berkeley with the intent of misleading consumers, including Plaintiff, into relying upon it.

88. Plaintiff was justified in relying upon such representations and concealment, and did so rely.

89. As a direct and proximate result of this justifiable reliance upon the representations and concealment, Plaintiff and class members were damaged and injured in an amount which will be proven at trial. Further, Plaintiff and the class are entitled to recover punitive damages as a result of Defendant’s egregious fraudulent conduct.

90. Representations made by Berkeley’s standard advertising and labeling are also deceptive and fraudulent, serving as a material inference and evidence of its intent to commit systemic and uniform fraud and deception to induce consumers to purchase its Enzyte product on a nationwide basis.

91. Berkeley’s standard and uniform misrepresentations in its advertising and marketing of its Enzyte product, including, but not limited to, Berkeley’s assertion that its Enzyte product would increase penis size and its “double your money back” guarantee, create a presumption of reliance as to the entire class and obviates the need for individual proof of reliance.

COUNT VI

UNJUST ENRICHMENT

92. Plaintiff realleges and incorporates the preceding and subsequent paragraphs as if fully set forth herein.

93. Plaintiff's sixth cause of action is for unjust enrichment on behalf of the national class, except California, defined above.

94. As a result of Berkeley's deceptive, unconscionable, fraudulent and misleading advertising, marketing and sale of its Enzyte product based upon alleged benefits of increased penis size, its deceptive, unconscionable, fraudulent and misleading guarantees, and its deceptive, unconscionable, fraudulent and misleading use of the "Non-Authorization Packet," Plaintiff has conferred a benefit on Berkeley through payment of the purchase price for Enzyte. Berkeley has received, and is aware it has received, this benefit from consumers such as Plaintiff.

95. Under these circumstances, it would be unjust or inequitable to permit Berkeley to retain the benefit received from consumers, including Plaintiff, without payment back to Plaintiff and class members who conferred the benefit upon Berkeley.

COUNT VII

BREACH OF CONTRACT

96. Plaintiff realleges and incorporates the preceding and subsequent paragraphs as if fully set forth herein.

97. Plaintiff's seventh cause of action is for breach of contract on behalf of national class, except California, defined above.

98. Berkeley, through its advertising, made uniform representations and offers regarding the quality and merit of its Enzyte product, namely that the Enzyte product increases penis size and was subject to a "double your money back" guarantee and that Enzyte could be purchased for a certain price.

99. Plaintiff and class members, by ordering Enzyte, accepted Berkeley's offer and paid the consideration of the purchase price.

100. Berkeley, Plaintiff and class members had the legal capacity to enter into such contracts.

101. Berkeley breached the contracts by not upholding its end of the bargain, namely that Enzyte increases penis length and that Plaintiff and class members could receive “double your money back” if not satisfied.

102. As a direct and proximate cause of Defendant’s breach, Plaintiff and the class members were damaged in amounts which will be proven at trial.

COUNT VIII

BREACH OF EXPRESS WARRANTY (Common Law)

103. Plaintiff realleges and incorporates the preceding and subsequent paragraphs as if fully set forth herein.

104. Plaintiff’s eighth cause of action is for breach of express warranty on behalf of the national class, except California, defined above.

105. Berkeley, through its advertising, made uniform representations regarding the quality and merit of its Enzyte product, namely that the Enzyte product would increase penis size.

106. The representations made by Berkeley were aimed directly at consumers including Plaintiff and the class, urging them to purchase Enzyte.

107. Plaintiff and the class, justifiably relying on Berkeley’s representations about its Enzyte product’s ability to increase penis size, did purchase the product.

108. As a direct and proximate result of that reliance, Plaintiff and the class suffered damages in an amount which will be proven at trial.

109. Berkeley’s standard and uniform misrepresentations in its advertising and marketing of its Enzyte product, including, but not limited to, Berkeley’s assertion that its Enzyte product would increase penis size, create a presumption of reliance as to the entire class and obviates the need for individual proof of reliance.

COUNT IX

BREACH OF IMPLIED WARRANTY OF FITNESS FOR PARTICULAR PURPOSE UNDER O.R.C. §1302.28

110. Plaintiff realleges and incorporates the preceding and subsequent paragraphs as if fully set forth herein.

111. Plaintiff's ninth cause of action is for breach of implied warranty for particular purpose under O.R.C. §1302.28 on behalf of the national class, except California, defined above.

112. At the time that Berkeley sold Enzyte to Plaintiff and members of the class, it had reason to know of the particular purpose for which Enzyte was required and marketed, namely to increase penis size.

113. At the time that Berkeley sold Enzyte to Plaintiff and members of the class, it had reason to know that Plaintiff and members of the class were relying on Berkeley's skill and/or judgment to furnish a suitable product that would increase penis size.

114. By failing to select and/or furnish a suitable product that would increase penis size, Berkeley breached an implied warranty under O.R.C. §1302.28 that Enzyte would be fit for such purpose, namely to increase penis size.

115. As a direct and proximate result of that breach, Plaintiff and the class suffered damages in an amount which will be proven at trial.

COUNT X

BREACH OF EXPRESS WARRANTY UNDER O.R.C. §1302.26

116. Plaintiff realleges and incorporates the preceding and subsequent paragraphs as if fully set forth herein.

117. Plaintiff's tenth cause of action is for breach of express warranty under O.R.C. §1302.26 on behalf of the national class, except California, defined above.

118. Through its uniform advertising, Berkeley made affirmations of fact and/or promises to purchasers of Enzyte, including Plaintiff and the class, that Enzyte would increase penis size.

119. Through its uniform advertising, Berkeley made affirmations of fact and/or promises to purchasers of Enzyte, including Plaintiff and the class, that Enzyte was covered by a “double your money back” guarantee.

120. By making these affirmations of fact and/or promises to purchasers of Enzyte, including Plaintiff and the class, the affirmations and/or promises became part of the basis of the bargain between Berkeley and purchasers of Enzyte, and created an express warranty that Enzyte would conform to the affirmations and/or promises made by Berkeley.

121. By failing to provide a product that would increase penis size and a product that was not covered by a “double your money back” guarantee, Berkeley breached its express warranty to purchasers of Enzyte, including Plaintiff and the class.

122. As a direct and proximate result of that breach, Plaintiff and the class suffered damages in an amount which will be proven at trial.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for the following relief in this action:

1. An order confirming that this class action is properly maintainable as a national class action as defined above and appointing Plaintiff and his undersigned counsel to represent the class;
2. An award of compensatory damages for Plaintiff and members of the class in excess of \$25,000 and all monetary relief authorized by law or referenced in the complaint;
3. An order requiring Berkeley to restore or pay damages to Plaintiff and class members so that they may be restored any money which may have been acquired by means of any unfair, deceptive, unconscionable, fraudulent or negligent action.

4. An order requiring Berkeley to disgorge any benefits received from Plaintiff as a result of Berkeley's improper and misleading advertising and marketing of its Enzyte product.
5. An order requiring Berkeley to cease and desist its deceptive, unconscionable and fraudulent practices.
6. An award of prejudgment and post judgment interest;
7. An award of punitive damages;
8. An award of attorneys' fees; and
9. Such other and further relief as this Court may deem just, equitable or proper.

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John C. Murdock (0063749)
Theresa L. Groh (0029806)
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Of Counsel for Plaintiff

ENDORSEMENT FOR JURY DEMAND

Plaintiff demands trial by jury for all issues triable by law.

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Trial Attorneys for Plaintiff

PRAECIPE TO THE CLERK

Please serve the following via certified mail return receipt requested pursuant to Ohio Rules of Civil Procedure:

BERKELEY PREMIUM
NUTRACEUTICALS, INC.,
f/k/a LifeKey, Warner Health Care, Wagner
Pharmaceuticals, and Boland Naturals
1661 Waycross Road
Cincinnati, Ohio 45240

C/O Statutory Agent
Paul J. Kellogg, Esq.
1 West Fourth Street, Suite 900
Cincinnati, Ohio 45202

ABC Corporations 1-20
Names Unknown

Ohio Attorney General
Consumer Division
30 East Broad Street
14th Floor
Columbus, Ohio 43215

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