

Plaintiffs, the Federal Trade Commission (“FTC”) and the State of Maine, for their Complaint allege:

1. The FTC brings this action under Section 13(b) of the Federal Trade Commission Act (“FTC Act”), 15 U.S.C. § 53(b), and the Telemarketing and Consumer Fraud and Abuse Prevention Act (“Telemarketing Act”), 15 U.S.C. §§ 6101-6108, and the Electronic Fund Transfer Act (“EFTA”), 15 U.S.C. §§ 1693-1693r, to obtain permanent injunctive relief, rescission or reformation of contracts, restitution, the refund of monies paid, disgorgement of ill-gotten monies, and other equitable relief for Defendants’ acts or practices in violation of Sections 5(a) and 12 of the FTC Act, 15 U.S.C. §§ 45(a) and 52, the FTC’s Trade Regulation Rule entitled “Telemarketing Sales Rule” (“TSR”), 16 C.F.R. Part 310, and the EFTA and its implementing Regulation E, 12 C.F.R. § 1005.10 (“Reg. E”), in connection with the labeling, advertising, marketing, distribution, and sale of products purported to provide joint pain relief and to prevent or mitigate cognitive decline.

2. The State of Maine brings this action pursuant to the Telemarketing Act, 15 U.S.C. §§ 6101-6108, and the Maine Unfair Trade Practices Act, ME. REV. STAT. tit. 5, §§ 205-A through 214 (“Maine UTPA”), to permanently enjoin and restrain Defendants from engaging in certain unlawful unfair and deceptive acts or practices in the conduct of trade or commerce, and to obtain relief for Defendants’ acts or practices in violation of the TSR and the Maine UTPA in connection with the labeling, advertising, marketing, distribution, and sale of products purported to provide joint pain relief and to prevent or mitigate cognitive decline, such relief to include rescission or reformation of contracts, the refund of monies paid, disgorgement, restitution, civil penalties, other relief as provided in the Maine UTPA, and other equitable relief.

JURISDICTION AND VENUE

3. This Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331, 1337(a), and 1345, and 15 U.S.C. §§ 45(a), 53(b), 1607(c), 6102(c), and 6105(b).

4. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 6103(a) and supplemental jurisdiction over the claims of the State of Maine pursuant to 28 U.S.C. § 1367.

5. Venue is proper in this district under 28 U.S.C. § 1391(b), (c), and (d), and 15 U.S.C. §§ 53(b) and 6103(e).

PLAINTIFFS

6. The FTC is an independent agency of the United States Government created by statute. 15 U.S.C. §§ 41-58. The FTC enforces Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), which prohibits unfair or deceptive acts or practices in or affecting commerce. The FTC also enforces Section 12 of the FTC Act, 15 U.S.C. § 52, which prohibits false advertisements for food, drugs, devices, services, or cosmetics in or affecting commerce; the TSR, which prohibits deceptive and abusive telemarketing acts or practices; and the EFTA, which regulates the rights, liabilities, and responsibilities of participants in electronic fund transfer systems.

7. The FTC is authorized to initiate federal district court proceedings, by its own attorneys, to enjoin violations of the FTC Act, the TSR, and the EFTA, and to secure such equitable relief as may be appropriate in each case, including rescission or reformation of contracts, restitution, the refund of monies paid, and the disgorgement of ill-gotten monies. FTC Act, 15 U.S.C. § 53(b), TSR, 15 U.S.C. §§ 6102(c), 6105(b), and EFTA, 15 U.S.C. § 1693o(c).

8. Plaintiff State of Maine is one of fifty sovereign states of the United States. Janet T. Mills is the duly elected and qualified Attorney General acting for Plaintiff State of Maine and

is authorized to enforce the Maine UTPA pursuant to ME. REV. STAT. tit. 5, §§ 191 and 209 and the powers vested in her by common law.

9. This Court has supplemental jurisdiction over Plaintiff State of Maine's claims under 28 U.S.C. § 1367.

10. Pursuant to the authority found in the Telemarketing Act at 15 U.S.C. § 6103(a), Plaintiff State of Maine is authorized to initiate federal district court proceedings to enjoin telemarketing activities that violate the TSR and, in each such case, to obtain damages, restitution and other compensation on behalf of Maine residents, or to obtain such further and other relief as the Court may deem appropriate.

DEFENDANTS

11. Defendant XXL Impressions LLC, also doing business as Better Health Nutritionals ("XXL Impressions"), is a Wyoming limited liability company. At all times material to this Complaint, XXL Impressions has identified its principal place of business to consumers, businesses, and the general public as 165 Pleasant Avenue, South Portland, Maine, which is the location of Ship-Right Solutions, LLC, the shipping vendor for XXL Impressions, and also has done business at that address where it markets various products, including FlexiPrin, a product purported to provide relief from joint pain and rebuild cartilage, and CogniPrin, a product purported to prevent, treat, or mitigate cognitive decline. During this time, XXL Impressions contracted with Argo Marketing Group, Inc., located at 64 Lisbon Street in Lewiston, Maine, to provide telemarketing services related to the sales by XXL Impressions of Flexiprin and Cogniprin. Acting alone or in concert with others, XXL Impressions has labeled, advertised, marketed, distributed, sold, or offered for sale these products in this District and throughout the United States and Canada.

12. Defendant Jeffrey R. Powlowsky (“Powlowsky”) is the sole manager and member of XXL Impressions and is its sole owner. At all times material to this Complaint, he has identified his principal place of business to consumers, businesses, and the general public as 165 Pleasant Avenue, South Portland, Maine. At all times material to this Complaint, acting alone or in concert with others, Powlowsky has formulated, directed, controlled, had the authority to control, or participated in the acts and practices of XXL Impressions, including the acts and practices set forth in this Complaint. In connection with the matters alleged herein, he transacts or has transacted business in this District and throughout the United States and Canada.

13. Defendant J2 Response L.L.P., also doing business as J2 Response (“J2 Response”), is a North Dakota limited liability partnership. At all times material to this Complaint, J2 Response’s principal place of business has been 547 S. 7th Street, #305, Bismarck, ND 58504, where it has marketed a variety of products, including FlexiPrin and CogniPrin. At all times material to this Complaint, acting alone or in concert with others, J2 Response has advertised, marketed, distributed, sold, or offered for sale these products in this District and throughout the United States and Canada.

14. Defendant Justin Bumann (“Bumann”) is a 50 percent owner of J2 Response. At all times material to this Complaint, Bumann’s principal place of business has been 547 S. 7th Street, #305, Bismarck, ND 58504. Acting alone, or in concert with others, Bumann has formulated, directed, controlled, had the authority to control, or participated in the acts and practices of J2 Response, including the acts and practices set forth in this Complaint. In connection with the matters alleged herein, he transacts or has transacted business in this District and throughout the United States and Canada.

15. Defendant Justin Steinle (“Steinle”) is a 50 percent owner of J2 Response. At all times material to this Complaint, Steinle’s principal place of business has been 547 S. 7th Street, #305, Bismarck, ND 58504. Acting alone, or in concert with others, Steinle has formulated, directed, controlled, had the authority to control, or participated in the acts and practices of J2 Response, including the acts and practices set forth in this Complaint. In connection with the matters alleged herein, he transacts or has transacted business in this District and throughout the United States and Canada. Hereafter, Defendants Powlowsky, XXL Impressions, J2 Response, Bumann, and Steinle shall be referred to collectively as “the Powlowsky Defendants.”

16. Defendant Synergixx, LLC, also doing business as CTF Media (“Synergixx”), is a Massachusetts limited liability company. At all times material to this Complaint, Synergixx’s principal places of business have been 589 Mantua Boulevard, Sewell, NJ 08080 and 433 Woodbury Glassboro Road, Sewell, NJ 08080. Synergixx has advertised and marketed a variety of products, including FlexiPrin and CogniPrin. At all times material to this Complaint, acting alone or in concert with others, Synergixx has advertised, marketed, sold, and offered for sale these products in this District and throughout the United States and Canada.

17. Defendant Charlie R. Fusco (“Fusco”) is the Chief Executive Officer, President, and 100 percent owner of Synergixx. At all times material to this Complaint, Fusco’s principal places of business have been 589 Mantua Boulevard, Sewell, NJ 08080, and 433 Woodbury Glassboro Road, Sewell, NJ 08080. At all times material to this Complaint, acting alone or in concert with others, Fusco has formulated, directed, controlled, had the authority to control, or participated in the acts and practices of Synergixx. In connection with the matters alleged herein, she transacts or has transacted business in this District and throughout the United States

and Canada. Hereafter Defendants Fusco and Synergixx shall be referred to collectively as “the Fusco Defendants.”

18. Defendant Ronald Jahner (“Jahner”) lives in Buffalo Grove, Illinois, where he works as a board-certified naturopathic physician. He owns and manages naturopathic clinics in Algonquin and Parkridge, Illinois. Jahner has acted as a paid expert endorser for CogniPrin and FlexiPrin, appearing as Dr. Ronald Jahner in radio and print advertising throughout the United States and in Canada. He also has promoted CogniPrin and FlexiPrin through website advertising, is credited as the author of books promoting CogniPrin and FlexiPrin, and has trained XXL Impressions’ third-party sales representatives how to promote the products. At all times material to this Complaint, acting alone or in concert with others, Jahner has transacted business in this District and throughout the United States and Canada.

19. Defendant Brazos Minshew (“Minshew”) lives in Scottsdale, Arizona. He has acted as an expert endorser for CogniPrin, appearing under the pseudonym “Samuel Brant,” a purported “brain scientist,” in radio and print advertising nationwide and in Canada. He also has trained XXL Impressions’ inbound call-room representatives how to promote CogniPrin. At all times material to this Complaint, acting alone or in concert with others, Minshew has transacted business in this District and throughout the United States and Canada.

COMMERCE

20. At all times material to this Complaint, all of the Defendants have maintained a substantial course of trade in or affecting commerce, as “commerce” is defined in Section 4 of the FTC Act, 15 U.S.C. § 44, and as “trade and commerce” are defined in Section 206(3) of the Maine UTPA, ME. REV. STAT. tit. 5, § 206(3).

DEFENDANTS' BUSINESS ACTIVITIES

21. Beginning on or before December 1, 2010 and continuing to the present, all of the Defendants have employed unfair or deceptive acts or practices in the advertising, marketing, distribution, and sale of FlexiPrin and CogniPrin. Defendants sell these products directly to consumers, primarily through radio and print advertising nationwide and in Canada, which has garnered in excess of \$6.5 million in gross sales from January 1, 2012 through April 30, 2015.

FLEXIPRIN ADVERTISING

22. One bottle of FlexiPrin sells for approximately \$32 to \$65 and contains 60 capsules. It is usually sold as a bundle of either three bottles for \$129.90 or six bottles for \$194.85. According to the FlexiPrin website, the recommended serving size is four capsules per day for the first month, then two capsules per day thereafter. FlexiPrin purportedly contains 1,052 mg of a proprietary blend comprised of the following ingredients:

- Perluxan® Proprietary Hops Extract (*Humulus lupulus* L.) (30% Alpha Acids)
- FruiteX-B® Calcium Fructoborate
- Cynatine FLX® (Solubilized Keratin)
- BosPure® Boswellia Serrata Powdered Extract (standardized to 10% AKBA)
- Hyal-Joint® (natural rooster comb extract, min. 60% hyaluronic acid, min. 10% hydrolyzed collagen, min. 10% other glucosaminoglycans)
- Ginger Powdered Extract
- Turmeric Powdered Extract
- Black Pepper Extract

23. Radio advertisements for FlexiPrin created by Defendants Synergixx, Fusco, J2 Response, Bumann, and Steinle, and reviewed and approved by Defendants XXL Impressions and Powlowsky promote FlexiPrin through 30-minute “cutting edge health and wellness news” programs featuring a radio host, Defendant Fusco, interviewing a purported pain relief expert, Defendant Jahner. Exh. A-1 (FlexiPrin radio audio file) at 24:44-24:47; Exh. A-2 (FlexiPrin radio transcript excerpt) at 17:5. In the introduction, the interviewer announces, “We’re going to

be talking about pain today.” Defendant Fusco then introduces Defendant Jahner as a naturopathic physician with expertise in pain management. Exh. A-1 (FlexiPrin radio audio file) at 00:25-00:39; 01:18-01:33; Exh. A-2 (FlexiPrin radio transcript excerpt) at 3:14-19; and 4:10-15. Defendant Fusco does not disclose in the advertisement that the toll-free number she gives consumers to claim their “free supply” is that of a call center owned by the Fusco Defendants. Furthermore, the Powlowsky Defendants pay Defendants Jahner and Synergixx a percentage of revenues generated from FlexiPrin sales. However, Defendants Fusco and Jahner do not disclose these royalty payments, nor do they disclose that the show is actually an advertisement paid for by the Powlowsky Defendants, thereby implying that Defendants Jahner and Fusco are stating independent, objective, and, in the case of Jahner, expert opinions about FlexiPrin. Exh. A-1 (FlexiPrin radio audio file); Exh. A-2 (FlexiPrin radio transcript excerpt).

24. In the radio ad, Defendant Jahner states “[FlexiPrin] targets the tissue and it’s an amazing anti-inflammatory. But the best part is [that] it works fast. Within two hours, people are getting relief.” Exh. A-1 (FlexiPrin radio audio file) at 06:28-06:36; Exh. A-2 (FlexiPrin radio transcript excerpt) at 7:11-15. Defendant Jahner goes on to state: “[M]ost people actually experience relief in the first two hours to two days. Those clinical studies I mentioned showed that 80 percent of the participants were able to reduce or eliminate their pain medications. . . . And, in fact, in that same four week period, one month, 100 percent of the participants were able to perform their daily tasks better, reported less stiffness in the morning.” Exh. A-1 (FlexiPrin radio audio file) at 07:07-07:31; Exh. A-2 (FlexiPrin radio transcript excerpt) at 8:8-18.

25. During the radio program, Defendant Fusco states that “the manufacturers are guaranteeing people that they’re going to get out of pain in as little as two hours, because these five ingredients are so powerful.” Exh. A-1 (FlexiPrin radio audio file) at 05:12-05:19; Exh. A-2

(FlexiPrin radio transcript excerpt) at 5:25-6:2. Dr. Jahner claims that “[FlexiPrin] provides the key building blocks for joint repair, reduces inflammation, which we’ve already talked about, and it also is a very powerful antioxidant.” Exh. A-1 (FlexiPrin radio audio file) at 08:59-09:06; Exh. A-2 (FlexiPrin radio transcript excerpt) at 9:25-10:3. Defendant Fusco then states, “Now, we’re talking about a supplement that has this wonderful hops extract with the clinical studies that says, hey, you’re going to be out of pain in two hours, proven clinically.” Exh. A-1 (FlexiPrin radio audio file) at 11:23-11:30; Exh. A-2 (FlexiPrin radio transcript excerpt) at 11:24-12:2. She continues, “[W]e’re going to send you a free supply of FlexiPrin, and with no risk to you, and it’s going to get you out of pain in two hours or you’re not going to pay for it.” Exh. A-1 (FlexiPrin radio audio file) at 20:50-20:57; Exh. A-2 (FlexiPrin radio transcript excerpt) at 15:1-4.

26. Defendant Fusco then claims that FlexiPrin will “get [you] out of pain in two hours . . . ,” to which Defendant Jahner responds, “Exactly,” adding, “[W]ith FlexiPrin, you get the results and you get them clinically.” Exh. A-1 (FlexiPrin radio audio file) at 20:53-21:14; Exh. A-2 (FlexiPrin radio transcript excerpt) at 15:3-13.

27. Defendant Jahner further claims, “Well, you’re going to get an immediate effect. In almost every case, within two hours to two days, you’re going to get relief from the acute pain. Then it’s going to begin the process of controlling long-term inflammation, which helps prevent further deterioration. Then you get the ingredients that the body uses to actually rebuild not only the joint, but the bone and also the synovial fluid.” Exh. A-1 (FlexiPrin radio audio file) at 22:47-23:08; Exh. A-2 (FlexiPrin radio transcript excerpt) at 16:7-14.

28. Nowhere in FlexiPrin radio advertising is it disclosed that Defendant Jahner receives a percentage of revenues generated from FlexiPrin sales.

29. A FlexiPrin print ad created by Defendants Synergixx, Fusco, J2 Response, Bumann, and Steinle, and reviewed and approved by Defendants XXL Impressions and Powlowsky, begins with the headline “**Thousands Combat Back Pain in 2 Hours Without Side Effects ...**” The print ad goes on to claim that FlexiPrin’s “*Natural ‘fire extinguishing’ nutrients quell inflammation that causes lower, middle and upper back pain as well as improves stiffness in joints and revives flexibility.*” Defendant Jahner then claims:

By reducing inflammation you reduce pain and you encourage healing. This allows the other proprietary ingredients in Flexiprin™ to start repairing and rebuilding the cartilage within your joints – which gives you amazing freedom and allows you to start living your life again – PAIN FREE!

Exh. B (FlexiPrin print ad) (emphasis in original).

30. In that print ad, the Powlowsky Defendants and the Fusco Defendants claim that “FlexiPrin™’s ingredients have been proven effective in multiple clinical studies” and “**Clinical Studies Prove 2 Hour Pain Relief.**” The Powlowsky Defendants and the Fusco Defendants further claim:

And the clinical results are nothing short of impressive. Immediately FlexiPrin™ can improve joint comfort and flexibility in as little as 2 hours . . . Long term, in about 4 weeks, 80% of users reported using less medication or stopped taking them all together [sic].

Exh. B (FlexiPrin print ad) (emphasis in original).

31. Defendant Jahner also appears on the FlexiPrin website created by or at the direction of Defendants J2 Response, Bumann, and Steinle, and approved by Defendants XXL Impressions and Powlowsky, www.flexiprin.com. Exh. C (FlexiPrin website). From at least January 1, 2012 through January 7, 2015, that website prominently displayed a column with Defendant Jahner’s image and a description of his credentials, accompanied by the claim:

Dr. Ronald Jahner recommends FlexiPrin™ within his practice and the results have been a miracle[,] as his patients stated . . .

“FlexiPrin™ has been extinguishing inflammation by flooding dry joints with rejuvenating lubrication and rebuilding damaged cartilage.”

Exh. C (FlexiPrin website), at 2-3.

32. That same FlexiPrin website featured the following claims:

**REDUCE JOINT PAIN,
INFLAMMATION AND STIFFNESS
IN AS LITTLE AS TWO HOURS!**

* * *

How does Flexiprin™ help with Arthritis?

FlexiPrin's ingredients have been proven effective in multiple clinical studies. The proprietary blend of ingredients is the only product on the market that specifically targets the cause of your joint pain AND provides the nutrients necessary to rebuild cartilage and connective tissues.

First it triggers a deactivation of the inflammatory process in the joints. By taking FlexiPrin™[,] it turns off the killer t-cells and tells them to stop attacking our joints.

* * *

Are the ingredients in Flexiprin™ Clinically Studied?

The ingredients in FlexiPrin™ have been clinically studied to:

- Improves [*sic*] joint comfort and flexibility in as little as 2 hours...not months like other products

After 4 Weeks:

- 80% reported using less medication or stopped taking them all together [*sic*]
- 100% had improved function for daily tasks (getting out of bed, taking off shoes and socks...)
- 100% had either less stiffness in the morning or no stiffness

After 8 Weeks:

- 88% found improvement in the pain experienced during walking
- 78% experienced better joint movement
- 83% had less pain while climbing stairs

Exh. C (FlexiPrin website), at 7-8.

33. On this website the Powlowsky Defendants also claim that FlexiPrin is “a breakthrough joint supplement that includes the TOP 5 CLINICALLY TESTED ingredients for stopping inflammation and pain,” and that these ingredients “work together to reduce the painful

inflammation while they rebuild joint cartilage.” Exh. C (FlexiPrin website), at 2. The website claims that “FlexiPrinTM also provides clinically proven nutrients to help rebuild . . . cartilage . . . that has been . . . damaged.” Exh. C (FlexiPrin website), at 2.

34. A print ad created by Defendants Synergixx, Fusco, J2 Response, Bumann, and Steinle and reviewed and approved by Defendants XXL Impressions and Powlowsky features testimonials from product endorsers who claim that FlexiPrin provides immediate pain relief more effectively than prescription drugs. “R. Kelly” claims that “[a]fter one dose of FlexiPrinTM I knew that I could be pain free again.” In that same print ad, “Scott P” claims, “I had major back surgery. I was told it would be months before I could move around easily and even longer before i [sic] could ween [sic] off the pain medications. FlexiPrinTM had me moving around in under 30-days.” Exh. B (FlexiPrin print ad). The Powlowsky Defendants and the Fusco Defendants have no basis for determining the existence or truthfulness of these endorsers, and they do not know how these endorsers, if they exist, may be identified or contacted.

35. The Powlowsky Defendants paid Defendant Jahner to train their call center representatives to repeat advertising claims to customers that the product works as advertised and has been clinically proven to work. Inbound sales scripts created by Defendants Synergixx, Fusco, J2 Response, Bumann, and Steinle, and reviewed and approved by Defendants XXL Impressions and Powlowsky, claim that FlexiPrin is clinically proven to reduce inflammation and rebuild cartilage.

COGNIPRIN ADVERTISING

36. One bottle of CogniPrin sells for approximately \$32 to \$65 and contains 60 capsules. It is usually sold as part of a minimum order of three bottles for \$99.90. The

recommended serving size is four capsules per day for the first month, then two capsules per day thereafter. CogniPrin purportedly contains the following ingredients:

- Vitamin B12 (as methylcobalamin), 1,000 mcg
- Proprietary Blend, 238 mg, comprised of:
 - Sharp PS® GOLD Conjugated PS DHA (Phosphatidylserine Docosahexanoic Acid)
 - d-Alpha Lipoic Acid
 - Nicotinamide Adenine Dinucleotide (NADH)
 - Bioperine®
 - Vinpocetine®
 - Huperzine-A

37. Radio advertisements for CogniPrin created by Defendants Synergixx, Fusco, J2 Response, Bumann, and Steinle, and reviewed and approved by Defendants XXL Impressions and Powlowsky, are presented as 30-minute news programs, featuring a radio host, Defendant Fusco, identified as “Natalie Day,” interviewing a purported medical expert, Defendant Minshew, identified only as “Samuel Brant.” Exh. D-1 (CogniPrin/Minshew radio audio file) at 00:05-01:05; Exh. D-2 (CogniPrin/Minshew radio transcript excerpt) at 3:4-4:1. Natalie Day and Samuel Brant are stage names.

38. Defendant Fusco introduces the radio program as one directed to those who “have been dealing with memory issues, forgetfulness, [and] brain fog” and introduces Defendant Minshew, appearing as Samuel Brant, as a “brain scientist” and “past director of the Neurological Treatment Center for Tiena Health.” Exh. D-1 (CogniPrin/Minshew radio audio file) at 00:05-01:19; Exh. D-2 (CogniPrin/Minshew radio transcript excerpt) at 3:5-4:6. Defendant Minshew does not possess expertise in neurology, brain science, or cognitive decline.

39. In this radio advertisement the Powlowsky Defendants, the Fusco Defendants, and Defendant Minshew claim that CogniPrin:

fight[s] off this brain erosion and increase[s] our memory by up to 44 percent.
Just imagine, being 44 percent sharper than you are today or remembering 44

percent more than you do today, or . . . getting back the memory you had up to 12 years ago.

Exh. D-1 (CogniPrin/Minshew radio audio file) at 15:00-15:14; Exh. D-2 (CogniPrin/Minshew radio transcript excerpt) at 7:11-16. Defendant Fusco states, “Again, the reports out of Stanford University have shown that these brain-specific nutrients can help restore up to 12 years of memory loss . . .” Exh. D-1 (CogniPrin/Minshew radio audio file) at 07:22-07:29; Exh. D-2 (CogniPrin/Minshew radio transcript excerpt) at 6:9-12.

40. In this radio ad, Defendant Minshew also claims that “over 64 clinical studies on the ingredients in CogniPrin prove that we can get back to having a clear, sharp, focused mind with no brain fog, no forgetfulness.” Exh. D-1 (CogniPrin/Minshew radio audio file) at 6:35-6:46; Exh. D-2 (CogniPrin/Minshew radio transcript excerpt) at 5:21-24. Defendant Minshew also claims:

CogniPrin is guaranteed to reduce that mental decline CogniPrin is backed by research that proves it works. The support includes more than 64 worldwide clinical studies and more than 2,800 research papers documenting the effectiveness and safety of this brain-boosting memory-protecting nutrient.

Exh. D-1 (CogniPrin/Minshew radio audio file) at 24:56-25:19; Exh. D-2 (CogniPrin/Minshew radio transcript excerpt) at 10:14-20. Similarly, Defendant Fusco claims, “The research here is clear. Sixty-four clinical trials and over 2,800 research papers prove that the ingredients in CogniPrin can give you back the sharp mind you once had.” Exh. D-1 (CogniPrin/Minshew radio audio file) at 7:03-7:15; Exh. D-2 (CogniPrin/Minshew radio transcript excerpt) at 6:4-7.

41. In the same radio ad, Defendant Minshew claims:

Now, take [CogniPrin] for three weeks and then ask your wife or husband or children or the people around you, ask them, am I -- does it look to you like my processing speed is speeding up here? Because that should be observable as well as something we experience.

Exh. D-1 (CogniPrin/Minshew radio audio file) at 20:08-20:23; Exh. D-2 (CogniPrin/Minshew radio transcript excerpt) at 8:19-23.

42. Another CogniPrin radio advertisement presented as a 30-minute news program, created by Defendants Synergixx, Fusco, J2 Response, Bumann, and Steinle, and reviewed and approved by Defendants XXL Impressions and Powlowsky, features Defendant Fusco interviewing a purported medical expert, Defendant Jahner. Defendant Fusco claims to be hosting a program “about the brain and memory loss and how you can easily improve your memory, focus and concentration.” She interviews Defendant Jahner, introducing him as a national board-certified naturopathic physician. Exh. E-1 (CogniPrin/Jahner radio audio file) at 00:10-00:15, 01:04-01:09; Exh. E-2 (CogniPrin/Jahner radio transcript excerpt) at 3:6-7, 3:24-4:1. Defendant Fusco does not disclose in the advertisement that the toll-free number she gives consumers to claim their “free supply” is that of an inbound call center owned and operated by the Fusco Defendants. The Powlowsky Defendants pay Defendants Jahner and Synergixx a percentage of revenues generated from CogniPrin sales. However, Defendants Fusco and Jahner do not disclose these payments, nor do they disclose that the show is actually an advertisement paid for by the Powlowsky Defendants, thereby giving consumers the impression that Defendants Jahner and Fusco are stating independent, objective, and, in the case of Jahner, expert opinions about CogniPrin. Exh. E-1 (CogniPrin/Jahner radio audio file); Exh. E-2 (CogniPrin/Jahner radio transcript excerpt).

43. In the radio ad, the Powlowsky Defendants, the Fusco Defendants, and Defendant Jahner claim that:

Thanks to a breakthrough in the nutritional world, we can now all safely and easily roll back mental decline by as much as 12 years. This means we can improve our memory by 44 percent right now.

* * *

[CogniPrin] sharpens focus, clears away brain fog and erases 12 years of lost Memory power.

* * *

The ingredients in CogniPrin have been thoroughly researched and are proven to improve mental function in almost everyone who takes it.

Exh. E-1 (CogniPrin/Jahner radio audio file) at 00:42-00:55, 05:09-05:14, 04:42-04:50; Exh. E-2 (CogniPrin/Jahner radio transcript excerpt) at 3:17-21, 5:12-13, 5:3-6.

44. In this radio ad Defendant Jahner claims that “In fact, the studies say the ingredient[s] in CogniPrin can improve your memory by up to 44 percent.” Exh. E-1 (CogniPrin/Jahner radio audio file) at 11:39-11:44; Exh. E-2 (CogniPrin/Jahner radio transcript excerpt) at 6:19-20. Similarly, Defendant Jahner claims:

* * *

[B]ased on research done at Stanford University, they tested some of the key ingredients in CogniPrin and they actually were able to show significant improvement in all aspects of cognitive function. That includes learning, memory, recalling numbers, names, faces. And the results were so dramatic that they actually felt that the average person in the study had reversed their cognitive decline by 10 to 12 years.

Exh. E-1 (CogniPrin/Jahner radio audio file) at 16:32-16:56; Exh. E-2 (CogniPrin/Jahner radio transcript excerpt) at 8:8-15.

45. In the same radio ad, Defendant Fusco states:

[T]he makers of CogniPrin are making a guarantee to everyone in my listening audience today. What they’re saying is try CogniPrin just even for three weeks and you’re going to improve your memory and reduce mental decline or it’s free, you won’t pay for it.

Exh. E-1 (CogniPrin/Jahner radio audio file) at 12:07-12:20; Exh. E-2 (CogniPrin/Jahner radio transcript excerpt) at 7:6-10.

46. A print ad created by Defendants J2 Response, Bumann, and Steinle, and reviewed and approved by Defendants XXL Impressions and Powlowsky, claims that CogniPrin is clinically proven.

This powerful formula helps sluggish, tired, forgetful brains to snap alert
In a peer-reviewed research study, participants not only saw improvement in their memory, mood and concentration, but they also regained lost brain power [so that] their brains were equal to that of someone 15 years younger . . . in just 30 days!

Exh. F. (CogniPrin Print Ad)

47. The same print ad features testimonials from purported product endorsers such as “Jeff S.,” who claims that he “feels so much more focused and more energized now that [he is] no longer fearful of forgetting things,” and “Jessica T.,” who claims:


I was about ready to see a neurologist when I came across this product. In about a month, it was like a light switch. My memories just flooded back to me. And I have my clarity and focus back as well.

Exh. F (CogniPrin print ad). The Powlowsky Defendants have no information concerning the existence or truthfulness of these endorsers, and they do not know how these endorsers, if they exist, can be identified or contacted.

48. The Powlowsky Defendants paid Defendant Jahner to train the Fusco Defendants’ inbound sales representatives to repeat the Powlowsky Defendants’ advertising claims to customers. Also, the inbound sales scripts written by Defendants Synergixx, Fusco, J2 Response, Bumann, and Steinle, and reviewed and approved by Defendants XXL Impressions and Powlowsky instruct inbound sales representatives to tell customers that CogniPrin users “will recover as much as 12 years of mental sharpness,” “improve your memory by 44 percent,” and that “you can actually start to feel that difference in as little as three weeks.”

49. On a website, www.cogniprin.com, created by or at the direction of Defendants J2 Response, Bumann, and Steinle, and reviewed and approved by Defendants XXL Impressions

and Powlowsky, Defendant Jahner makes claims about the effectiveness of CogniPrin. Exh. G (CogniPrin website). The website features a captioned photo of Defendant Jahner, accompanied by the following text:

 <p>Dr. Ronald Jahner</p>	<p>Doctor discovers a brain oxygen boosting miracle that energizes your mind, mood, and memory in as little as 3 weeks.</p> <hr/> <p>It sharpens focus, clears away brain fog and erases 12 years of lost memory power.</p>
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Exh. G (CogniPrin website), at 1. On that same website, the Powlowsky Defendants claim:

Dr. Ronald Jahner has dedicated over 30 years of his life to studying, practicing, and teaching natural alternatives to medicine . . . He has spent time researching the brain and it's [sic] cognitive functions of processing emotions, thoughts, and memories. ***It was during this time Dr. Jahner discovered CogniPrin™.***

Exh. G (CogniPrin website), at 3-4 (emphasis in original). Nowhere on the CogniPrin website do either the Powlowsky Defendants or Defendant Jahner disclose that Defendant Jahner receives a percentage of revenues generated from FlexiPrin sales. Exh. G (CogniPrin website).

50. On or about March 16, 2014, Defendant Jahner posted a blog entry entitled, "Cogniprin for Maximizing Brain Power!" on a third-party website, Good Gut Solution Powered by Crohns.net (www.crohns.net/blog). Exh. H (Good Gut Solution website). In the blog post, Defendant Jahner makes several efficacy claims about CogniPrin, including:

Thanks to breakthroughs in the nutraceutical world, we can safely and easily roll back, **yes! We can roll back . . .**

1. **mental decline up to 12 years,**
2. **improve our memory by 44%,**
- . . .
4. **get rid of brain fog,**
5. **improve recall, and even,**
6. **wake up brain cells that have been sleeping!**

* * *

. . . By replacing this key resource, Cogniprin helps rejuvenate brain function and roll back the clock on our ability to think and remember.

* * *

Cogniprin is a unique, proprietary blend of key nutrients researched to improve memory and brain function. . . .

– Dr. Ron Jahner

Exh. H (Good Gut Solution website), at 2.

51. In that blog post, Defendant Jahner fails to disclose that he receives a percentage of revenues generated from CogniPrin sales, thereby giving consumers the impression that he is writing an independent, objective, and expert review of CogniPrin. Exh. H (Good Gut Solution website).

52. In his blog post about CogniPrin, Defendant Jahner makes clinically proven claims about CogniPrin. For example, Defendant Jahner claims:

Cogniprin works on many different levels to help the body and especially the brain and nervous system. We know that because the ingredients in Cogniprin have far more clinical testing than almost any other nutraceutical product on the market. Cogniprin truly maximizes brain power.

Exh. H, at 2.

**THE POWLOWSKY DEFENDANTS’ AND THE FUSCO DEFENDANTS’
MARKETING PRACTICES**

53. FlexiPrin and CogniPrin are sold almost exclusively through inbound sales calls generated by print and radio advertising. In the case of FlexiPrin, these radio and print ads claim that ordering the product is “risk-free” and backed by a 90-day money back guarantee. For example, one of the FlexiPrin radio advertisements claims, “The manufacturer is . . . willing to let you try [FlexiPrin] risk-free for a full 90 days . . . [Y]our satisfaction is guaranteed.” Exh. A-

1 (FlexiPrin radio audio file) at 07:55-08:12; Exh. A-2 (FlexiPrin radio transcript excerpt), at 9:1-8.

54. In the case of CogniPrin, the radio and print ads claim that “every new customer will automatically receive a free 30-day supply,” and that CogniPrin will “improve your memory and reduce mental decline or it’s free, you won’t pay for it.” Exh. E-1 (CogniPrin/Jahner radio audio file) at 12:53-12:57, 12:18-12:21; Exh. E-2 (CogniPrin/Jahner radio transcript excerpt) at 7:19-20, 7:9-10.

55. Consumers who call to order FlexiPrin and CogniPrin are told that there is an unconditional, 90 Day MONEY BACK GUARANTEE on their orders. However, in order to receive these products consumers must pay for a 90-day supply, accept a 90-day continuity plan, and pay an initial shipping charge of \$9.95.

56. Typically, consumers receive their products between 7 and 10 days after placing the order. Many consumers believe that the 90-day money-back guarantee starts when they receive the product, giving them 90 days to try it. The Powlowsky Defendants and the Fusco Defendants do not disclose, either before or after the initial offer, that the Powlowsky Defendants compute the 90-day money-back guarantee to begin on the date of the initial sales call, nor do they disclose that the continuity shipment is sent on or before 90 days after the date of the initial sales call.

57. When consumers call customer service toward the end of their 90-day trial periods to cancel their FlexiPrin and CogniPrin orders and get their money back, they discover that the time for cancellation has expired because the Powlowsky Defendants use the initial order date — not the date of receipt — as the beginning of the 90-day trial period. Also, the Powlowsky Defendants ship continuity orders of FlexiPrin and CogniPrin on or before 90 days

following the initial order date, subsequently denying refunds to consumers for initial purchases because of a previously undisclosed condition that disallows refunds for initial purchases after a continuity order has shipped. The application of this undisclosed condition significantly shortens the risk-free 90-day money back guarantee.

58. Even when consumers attempt to cancel their FlexiPrin and CogniPrin orders within the initial 90-day money-back guarantee period, they are required to meet a number of conditions not disclosed by the Powlowsky Defendants and the Fusco Defendants in the initial offer. In order to take advantage of the 90-day money-back guarantee, consumers must:

- a. Call customer service to obtain a Return Merchandise Authorization number;
- b. Return, at their own expense, all products, including empty bottles, to the company; and
- c. Pay for and track return shipments.

In numerous instances, the Powlowsky Defendants deny refunds to consumers who fail to comply with these undisclosed conditions.

59. Once the continuity shipment has been sent, the Powlowsky Defendants offer consumers only store credit for their first purchase in the form of exchanges for other merchandise. Obtaining store credit is difficult or impossible because it requires consumers to pay for the return of unopened products, which in most cases have already been opened and used during the free-trial period.

60. If consumers calling to order CogniPrin decline to purchase a 90-day supply, the Powlowsky Defendants and the Fusco Defendants disclose, for the first time, that in order to take advantage of the advertised 30-day free trial offer for CogniPrin, consumers must agree to a 60-

day continuity plan and must provide a credit or debit card number to pay an initial shipping charge of \$9.95 in order to receive their free trial.

61. Consumers who agree to enroll in the 60-day continuity plan are sent a purported 30-day free supply of CogniPrin. Under this plan, a new shipment of CogniPrin is sent to consumers 21 days after the initial order, and every 60 days thereafter. Because the initial 30-day “free trial” supply takes 7 to 10 days to reach consumers, consumers have less than two weeks to take advantage of their purported 30-day “free trial.” Consumers who choose to cancel within 30 days of receiving their initial “free trial” often discover that they are too late. Twenty-one days after the initial order, the Powlowsky Defendants charge \$99.90 to consumers’ credit or debit card numbers on file for the first 60-day continuity shipment of CogniPrin, plus an additional \$9.95 for shipping. On many occasions, the Powlowsky Defendants refuse to refund these charges to consumers.

**The Powlowsky Defendants’ and the Fusco Defendants’
Offers on Behalf of Third Parties**

62. Once consumers accept the Powlowsky Defendants’ and the Fusco Defendants’ primary offer (*i.e.*, FlexiPrin or CogniPrin), the Fusco Defendants’ inbound sales representatives offer consumers a series of “upsells” in the form of additional goods and services sold by third parties (“external upsells”). The Powlowsky Defendants and the Fusco Defendants receive commissions when consumers accept free or low-cost trial offers for these additional goods and services, which are “read on,” in industry parlance, after the initial product sale is completed.

63. The Powlowsky Defendants and the Fusco Defendants sell two discount buying clubs together as a package, Savers Central and Holiday Savers, which cost \$17.83 per month each after a low-cost 14-day trial period. They also sell a supplemental health savings plan, CARExpress Health Savings Program, which costs \$39.99 per month after a free 14-day trial

period. At the end of the free or low-cost trial period, these charges are billed to the same credit and debit cards used by consumers to place initial orders for FlexiPrin and CogniPrin. All of these services are automatically billed to consumers by these third parties every month after the expiration of the trial period (*i.e.*, a negative option); however, in numerous instances, the Powlowsky Defendants and the Fusco Defendants fail to disclose all material terms and conditions for this negative option feature. In addition, the Powlowsky Defendants and the Fusco Defendants represent to consumers that they will honor requests for refunds and cancellations. However, in numerous instances, they fail to disclose all material terms and conditions for cancellation of these services. The Powlowsky Defendants and Fusco Defendants also fail to disclose the identity of the third parties providing the services being upsold. Finally, they cause consumers' billing information to be submitted for payment, directly or indirectly, without consumers' express informed consent.

**Failure to Obtain Authenticated Authorization Under Regulation E
in Advance of Charging Debit Cards**

64. The Powlowsky Defendants obtain debit card numbers from many consumers with the intention of charging them for continuity plans but fail to obtain consumers' written or other similarly authenticated authorization in advance that describes the terms of the preauthorized transfer in a clear and understandable form.

VIOLATIONS OF THE FTC ACT

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

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

67. Section 12 of the FTC Act, 15 U.S.C. § 52, prohibits the dissemination of any

false advertisement in or affecting commerce for the purpose of inducing, or which is likely to induce, the purchase of food, drugs, devices, services, or cosmetics. For the purposes of Section 12 of the FTC Act, 15 U.S.C. § 52, FlexiPrin and CogniPrin are “drugs,” as defined in Section 15(c) of the FTC Act, 15 U.S.C. § 55(c). The term “false advertisement” means an advertisement, other than labeling, which is misleading in a material respect. 15 U.S.C. § 55(a)(1).

COUNT I

THE POWLOWSKY DEFENDANTS’ AND THE FUSCO DEFENDANTS’ FALSE OR UNSUBSTANTIATED CLAIMS ABOUT FLEXIPRIN

68. Through the means described in Paragraphs 24 through 29 and 31 through 32, including, but not limited to, the statements and representations contained in advertising and telemarketing scripts attached as Exhibits A-1 through C, the Powlowsky Defendants and the Fusco Defendants have represented, directly or indirectly, expressly or by implication, that:

- a. FlexiPrin reduces joint and back pain, inflammation, and stiffness in as little as two hours;
- b. FlexiPrin rebuilds damaged joints and cartilage; and
- c. FlexiPrin has been clinically proven to:
 - i. Reduce the need for medication in 80% of users;
 - ii. Reduce joint stiffness in the morning in 100% of users;
 - iii. Relieve joint pain in two hours;
 - iv. Provide better joint flexibility; and
 - v. Rebuild damaged joints and cartilage.

69. The representations set forth in Paragraph 68 are false or misleading, or, with respect to the representations set forth in Paragraph 68 a and b, were not substantiated at the time

the representations were made. Therefore, the making of the representations set forth in Paragraph 68 constitutes a deceptive act or practice and the making of false advertisements, in or affecting commerce, in violation of Sections 5(a) and 12 of the FTC Act, 15 U.S.C. §§ 45(a) and 52.

COUNT II

THE POWLOWSKY DEFENDANTS' AND THE FUSCO DEFENDANTS' FALSE OR UNSUBSTANTIATED CLAIMS ABOUT COGNIPRIN

70. Through the means described in Paragraphs 39 through 41 and 43 through 45, including, but not limited to, the statements and representations contained in advertising and telemarketing scripts attached as Exhibits D-1 through H, the Powlowsky Defendants and the Fusco Defendants have represented, directly or indirectly, expressly or by implication, that:

- a. CogniPrin reverses mental decline by twelve years;
- b. CogniPrin improves memory by 44 percent;
- c. CogniPrin improves memory in as little as three weeks; and
- d. CogniPrin is clinically proven to improve memory.

71. The representations set forth in Paragraph 70 are false or misleading, or, with respect to the representations set forth in Paragraph 70 a through c, were not substantiated at the time the representations were made. Therefore, the making of the representations set forth in Paragraph 70 constitutes a deceptive act or practice and the making of false advertisements in or affecting commerce, in violation of Sections 5(a) and 12 of the FTC Act, 15 U.S.C. §§ 45(a) and 52.

COUNT III

EXPERT ENDORSERS' FALSE OR UNSUBSTANTIATED CLAIMS ABOUT FLEXIPRIN AND COGNIPRIN

72. Through the means described in Paragraphs 24 through 27, 43 through 44, 49 through 50, and 52, Defendant Jahner, appearing as a medical or expert endorser, has represented, directly or indirectly, expressly or by implication, that:

- a. FlexiPrin reduces joint pain, inflammation, and stiffness in as little as two hours;
- b. FlexiPrin rebuilds damaged joints and cartilage;
- c. FlexiPrin has been clinically proven to:
 - i. Reduce the need for medication in 80% of users;
 - ii. Reduce joint stiffness in the morning in 100% of users; and
 - iii. Relieve joint pain in two hours;
- d. CogniPrin reverses mental decline by twelve years;
- e. CogniPrin improves memory by 44 percent;
- f. CogniPrin increases memory in as little as three weeks; and
- g. CogniPrin is clinically proven to improve memory.

73. Through the means described in Paragraphs 39 through 41, Defendant Minshew, appearing as a medical or expert endorser, has represented, directly or indirectly, expressly or by implication, that:

- a. CogniPrin reverses mental decline by twelve years;
- b. CogniPrin improves memory by 44 percent;
- c. CogniPrin increases memory in as little as three weeks; and
- d. CogniPrin is clinically proven to improve memory.

74. The representations set forth in Paragraphs 72 and 73 are false or misleading, or, with respect to the representations set forth in Paragraph 72 a, b, and d through f, and Paragraph 73 a through c, were not substantiated at the time the representations were made. Moreover, Defendants Jahner and Minshew did not exercise their purported expertise in the form of an examination or testing of the products. Their purported scientific proof for the representations set forth in Paragraphs 72 and 73 was not the result of an examination or testing at least as extensive as an expert in the represented field of expertise would normally conduct in order to support the conclusions presented in their endorsements.

75. Therefore, the making of the representations as set forth in Paragraphs 72 and 73 of this Complaint constitutes a deceptive act or practice and the making of false advertisements in or affecting commerce, in violation of Sections 5(a) and 12 of the FTC Act, 15 U.S.C. §§ 45(a) and 52.

COUNT IV

FALSE ADVERTISING CLAIMS THROUGH CONSUMER ENDORSERS

76. Through the means described in Paragraph 34, the Powlowsky Defendants and the Fusco Defendants have represented, directly or indirectly, expressly or by implication, that the product users depicted in their advertising were actual persons who had successfully used FlexiPrin to provide relief from back and joint pain.

77. Through the means described in Paragraph 47, the Powlowsky Defendants have represented, expressly or by implication, that the product users depicted in their advertising were actual persons who had successfully used CogniPrin to mitigate cognitive decline.

78. The representations set forth in Paragraphs 76 and 77 are false or misleading. Therefore, the making of the representations set forth in Paragraphs 76 and 77 of this Complaint

constitutes a deceptive act or practice and the making of false advertisements in or affecting commerce, in violation of Sections 5(a) and 12 of the FTC Act, 15 U.S.C. §§ 45(a) and 52.

COUNT V

DECEPTIVE FORMAT OF RADIO ADVERTISING

79. Through the means described in Paragraphs 23, 37, 38, and 42, the Powlowsky Defendants and the Fusco Defendants have represented, directly or indirectly, expressly or by implication, that the FlexiPrin and CogniPrin radio shows referenced in Exhibits A-1, A-2, D-1, D-2, E-1, and E-2 were objective news or informational programming.

80. In fact, the referenced radio programs were not objective news or informational programming. They were paid commercial advertising. Therefore, the making of the representation set forth in Paragraph 79 constitutes a deceptive act or practice and the making of false advertisements in or affecting commerce, in violation of Sections 5(a) and 12 of the FTC Act, 15 U.S.C. §§ 45(a) and 52.

COUNT VI

**FALSE ADVERTISING IN CONNECTION WITH
DEFENDANT JAHNER AS AN ENDORSER**

81. Through the means described in Paragraphs 23 through 28, 42 through 44, and 50 through 52, including, but not limited to the statements and representations contained in radio advertising and an internet blog, attached as Exhibits A-1, A-2, E-1, E-2, and H, the Powlowsky Defendants, the Fusco Defendants, and Defendant Jahner have represented, directly or indirectly, expressly or by implication, that Defendant Jahner was presenting his objective, independent expert opinions regarding the efficacy of FlexiPrin and CogniPrin.

82. The representations set forth in Paragraph 81 are false. In fact, the Powlowsky Defendants made royalty payments to Defendant Jahner to appear as an expert endorser for FlexiPrin and CogniPrin.

83. Therefore, the making of the representation set forth in Paragraph 81 constitutes a deceptive act or practice and the making of false advertisements in or affecting commerce, in violation of Sections 5(a) and 12 of the FTC Act, 15 U.S.C. §§ 45(a) and 52.

COUNT VII

MISREPRESENTATION OF DEFENDANT MINSHEW'S EXPERTISE

84. Through the means described in Paragraphs 37 and 38, including, but not limited to, the statements and representations contained in the radio advertising attached as Exhibits D-1 and D-2, the Powlowsky Defendants, the Fusco Defendants, and Defendant Minshew have represented, directly or indirectly, expressly or by implication, that Defendant Minshew, a/k/a Samuel Brant, is an expert in neurology, brain science, or cognitive decline.

85. The representation set forth in Paragraph 84 is false. In fact, Defendant Minshew, a/k/a Samuel Brant, is not an expert in neurology, brain science, or cognitive decline.

86. Therefore, the making of the representation set forth in Paragraph 84 constitutes a deceptive act or practice and the making of false advertisements in or affecting commerce, in violation of Sections 5(a) and 12 of the FTC Act, 15 U.S.C. §§ 45(a) and 52.

COUNT VIII

FALSE RISK-FREE, UNCONDITIONAL MONEY-BACK GUARANTEE OFFER

87. Through the means described in Paragraphs 53 through 55, the Powlowsky Defendants and the Fusco Defendants have represented to consumers, directly or indirectly,

expressly or by implication, that they could try FlexiPrin or CogniPrin risk-free with an unconditional 90-day money-back guarantee.

88. The representations in Paragraph 87 are false because Defendants required consumers to pay: the cost of the initial shipment, which was not refundable; the cost of returning both full and empty bottles of the product; the full cost of FlexiPrin and CogniPrin if consumers did not follow the undisclosed or inadequately disclosed return and refund policies described in Paragraphs 57 through 59; and additional charges for inadequately disclosed continuity shipments of FlexiPrin and CogniPrin.

89. Therefore, the making of the representation set forth in Paragraph 87 constitutes a deceptive act or practice in or affecting commerce, in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

COUNT IX

MISREPRESENTATION ABOUT THE COGNIPRIN 30-DAY FREE TRIAL OFFER

90. Through the means described in Paragraphs 45 and 60, the Powlowsky Defendants have represented to consumers, directly or indirectly, expressly or by implication, that they could try CogniPrin for 30 days without incurring any financial obligation.

91. The representation in Paragraph 90 is false because the Powlowsky Defendants failed to disclose, or did not adequately disclose, that: (a) in order to qualify for the 30-day free trial, consumers had to accept a 60-day continuity plan that would begin 21 days after placing the order; and (b) consumers would not receive their products until 7 to 10 days after placing their orders, thereby giving them 14 days or less to try the product, as described in Paragraph 61.

92. Therefore, the making of the representation set forth in Paragraph 90 constitutes a deceptive act or practice in or affecting commerce, in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

THE TELEMARKETING SALES RULE

93. Congress directed the FTC to prescribe rules prohibiting abusive and deceptive telemarketing acts or practices pursuant to the Telemarketing Act, 15 U.S.C. §§ 6101-6108. The FTC adopted the original Telemarketing Sales Rule (“TSR”) in 1995, extensively amended it in 2003, and amended certain provisions thereafter. 16 C.F.R. Part 310.

94. The Powlowsky Defendants and the Fusco Defendants are “sellers” and/or “telemarketers” engaged in “telemarketing,” as those terms are defined in the TSR, 16 C.F.R. §§ 310.2(dd), (ff), and (gg). Although the TSR generally exempts “[t]elephone calls initiated by a customer or donor in response to an advertisement through any medium,” 16 C.F.R. § 310.6(b)(5), this exemption does not apply to “any instances of upselling” during those telephone calls. *Id.* The TSR therefore applies to the “upsells” that the Powlowsky Defendants and the Fusco Defendants offer to those purchasing their products over the telephone.

95. The TSR prohibits sellers and telemarketers from failing to disclose truthfully, in a clear and conspicuous manner, before a customer consents to pay for goods or services offered, the following material information: (a) the total costs to purchase, receive, or use, and the quantity of, any goods or services that are the subject of the sales offer; (b) if the seller or telemarketer makes a representation about a refund, cancellation, exchange, or repurchase policy, a statement of all material terms and conditions of such policy; and (c) if the offer includes a negative option feature, all material terms and conditions of the negative option feature, including, but not limited to, the fact that the customer’s account will be charged unless the

customer takes an affirmative action to avoid the charge(s), the date(s) the charge(s) will be submitted for payment, and the specific steps the customer must take to avoid the charge(s). 16 C.F.R. § 310.3(a)(1)(i), (iii), and (vii).

96. “Upselling” is defined by the TSR as “soliciting of the purchase of goods or services following an initial transaction during a single telephone call. The upsell is a separate telemarketing transaction, not a continuation of the initial transaction.” 16 C.F.R. § 310.2(ee).

97. Additionally, the TSR requires sellers or telemarketers in an internal or external upsell to disclose truthfully, promptly, and in a clear and conspicuous manner the following information:

- a. The identity of the seller;
- b. That the purpose of the call is to sell goods or services; and
- c. The nature of the goods or services.

16 C.F.R. § 310.4(d)(1), (2), and (3).

98. The TSR prohibits sellers and telemarketers from “[c]ausing billing information to be submitted for payment, directly or indirectly, without the express informed consent of the customer” 16 C.F.R. § 310.4(a)(7).

Pursuant to Section 3(c) of the Telemarketing Act, 15 U.S.C. § 6102(c), and Section 18(d)(3) of the FTC Act, 15 U.S.C. § 57a(d)(3), a violation of the TSR constitutes an unfair or deceptive act or practice in or affecting commerce, in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

VIOLATIONS OF THE TELEMARKETING SALES RULE

COUNT X

**FAILURE TO DISCLOSE MATERIAL TERMS AND CONDITIONS OF
REFUND AND CANCELLATION POLICY**

(By Both Plaintiffs)

99. In numerous instances, in connection with the Powlowsky Defendants' and the Fusco Defendants' efforts to add external upsells of discount buying clubs and a supplemental health savings plan, as described in Paragraphs 62 and 63, before a customer consents to pay for goods or services, the Powlowsky Defendants and the Fusco Defendants represent they will honor requests for refunds and cancellations but fail to disclose truthfully and in a clear and conspicuous manner, a statement of all material terms and conditions of such refund or cancellation policy.

100. The Powlowsky Defendants' and the Fusco Defendants' acts or practices, as described in Paragraph 99, are deceptive telemarketing acts or practices that violate the TSR, 16 C.F.R. § 310.3(a)(1)(iii).

COUNT XI

**FAILURE TO DISCLOSE MATERIAL TERMS AND CONDITIONS
OF NEGATIVE OPTION**

(By Both Plaintiffs)

101. In numerous instances, in connection with the Powlowsky Defendants' and the Fusco Defendants' efforts to upsell discount buying clubs and a supplemental health savings plan, as described in Paragraphs 62 and 63, and before a customer consents to pay for goods and services offered, they represent that customers are being enrolled in a negative option feature, yet the Powlowsky Defendants and the Fusco Defendants fail to disclose truthfully, in a clear and conspicuous manner, a statement of: all material terms and conditions of the negative option

feature, including, but not limited to, the fact that the customer's account will be charged unless the customer takes an affirmative action to avoid the charge(s), the date(s) the charge(s) will be submitted for payment, and the specific steps the customer must take to avoid the charge(s).

102. The Powlowsky Defendants' and the Fusco Defendants' acts or practices, as described in Paragraph 101, are deceptive telemarketing acts or practices that violate the TSR, 16 C.F.R. § 310.3(a)(1)(vii).

COUNT XII

FAILURE TO MAKE REQUIRED ORAL DISCLOSURES

(By Both Plaintiffs)

103. In numerous instances, in connection with the Powlowsky Defendants' and the Fusco Defendants' efforts to externally "upsell" discount buying clubs and a supplemental health savings plan, as described in Paragraphs 62 and 63, they fail to disclose promptly and in a clear and conspicuous manner to consumers the identity of the third-party seller.

104. The Powlowsky Defendants' and the Fusco Defendants' acts or practices, as described in Paragraph 103, are abusive telemarketing acts or practices that violate the TSR, 16 C.F.R. § 310.4(d)(1).

COUNT XIII

FAILURE TO OBTAIN EXPRESS INFORMED CONSENT

(By Both Plaintiffs)

105. In numerous instances, in connection with the Powlowsky Defendants' and the Fusco Defendants' efforts to "upsell" discount buying clubs and a supplemental health savings plan, as described in Paragraphs 62 and 63, the Powlowsky Defendants cause billing information to be submitted for payment without the express informed consent of the consumer.

106. The Powlowsky Defendants' and the Fusco Defendants' acts or practices, as described in Paragraph 105, are abusive telemarketing acts or practices that violate the TSR, 16 C.F.R. § 310.4(a)(7).

VIOLATIONS OF EFTA AND REGULATION E

107. Section 907(a) of the Electronic Fund Transfer Act ("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." Section 903(10) of EFTA, 15 U.S.C. § 1693a(10), provides that the term "preauthorized electronic fund transfer" means "an electronic fund transfer authorized in advance to recur at substantially regular intervals."

108. Section 1005.10(b) of Regulation E, 12 C.F.R. § 1005.10(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."

109. Section 1005.10(b) of the Consumer Financial Protection Bureau's Official Staff Commentary to Regulation E, 12 C.F.R. § 1005.10(b), Supp. I, provides that "[t]he authorization process should evidence the consumer's identity and assent to the authorization." *Id.* ¶ 10(b), cmt. 5. The Official Staff Commentary further provides that "[a]n authorization is valid if it is readily identifiable as such and the terms of the preauthorized transfer are clear and readily understandable." *Id.* ¶ 10(b), cmt. 6.

110. Pursuant to Section 917(c) of EFTA, 15 U.S.C. § 1693o(c), every violation of EFTA and Regulation E constitutes a violation of the FTC Act, 15 U.S.C. §§ 41 et seq.

COUNT XIV

EFTA AND REGULATION E

(By Plaintiff FTC)

111. In numerous instances, the Powlowsky Defendants debit consumers' bank accounts on a recurring basis without obtaining a written authorization signed or similarly authenticated from consumers for preauthorized electronic fund transfers from their accounts, thereby violating Section 907(a) of EFTA, 15 U.S.C. § 1693e(a), and Section 1005.10(b) of Regulation E, 12 C.F.R. § 1005.10(b).

112. In numerous instances, the Powlowsky Defendants debit consumers' bank accounts on a recurring basis without providing to the consumer a copy of a written authorization signed or similarly authenticated by the consumer for preauthorized electronic fund transfers from the consumer's account, thereby violating Section 907(a) of EFTA, 15 U.S.C. § 1693e(a), and Section 1005.10(b) of Regulation E, 12 C.F.R. § 1005.10(b).

113. By engaging in violations of EFTA and Regulation E as set forth in Paragraphs 112 and 113 the Powlowsky Defendants have engaged in violations of 15 U.S.C. § 1693o(c) and the FTC Act, 15 U.S.C. §§ 41 et seq.

VIOLATIONS OF MAINE LAW

114. Section 207 of the Maine UTPA, ME. REV. STAT. tit. 5, § 207, declares unlawful "unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce."

115. Material misrepresentations or omissions of material fact constitute deceptive acts or practices prohibited by Section 207 of the UTPA.

116. Section 206 of the UTPA defines “trade” and “commerce” as including “the advertising, offering for sale, sale or distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity or thing of value wherever situate, and shall include any trade or commerce directly or indirectly affecting the people of this State.” ME. REV. STAT. tit. 5, § 206.

117. Chapter 205-A, “Required Disclosures to Consumers,” of Title 10 of Maine’s statutes prohibits certain practices related to free trial offers. ME. REV. STAT. tit. 10, §§ 1210 through 1210-B.

118. Section 1210(2) prohibits making free offers unless, at the time of the offer, “the seller provides the consumer with clear and conspicuous information regarding the terms of the free offer, including any additional financial obligations that may be incurred as a result of accepting the free offer.” ME. REV. STAT. tit. 10, § 1210.

119. Section 1210-A provides that a violation of Title 10, Chapter 205-A is a violation of the Maine UTPA.

COUNT XV

THE POWLOWSKY DEFENDANTS’ AND THE FUSCO DEFENDANTS’ FALSE OR UNSUBSTANTIATED CLAIMS ABOUT FLEXIPRIN

120. Plaintiff State of Maine incorporates herein by reference all of the allegations contained in Paragraph 68 of this Complaint.

121. The representations set forth in Paragraph 68 are false or misleading, or, with respect to the representations set forth in Paragraph 68 a and b, were not substantiated at the time the representations were made. Therefore, the making of the representations set forth in Paragraph 68 constitutes a deceptive act or practice and the making of false advertisements, in or affecting trade or commerce, in violation of ME. REV. STAT. tit. 5, § 207.

122. The Powlowsky Defendants' and the Fusco Defendants' conduct, as described herein, is intentional.

COUNT XVI

THE POWLOWSKY DEFENDANTS' AND THE FUSCO DEFENDANTS' FALSE OR UNSUBSTANTIATED CLAIMS ABOUT COGNIPRIN

123. Plaintiff State of Maine incorporates herein by reference all of the allegations contained in Paragraph 70 of this Complaint.

124. The representations set forth in Paragraph 70 are false or misleading, or, with respect to the representations set forth in Paragraph 70 a through c, were not substantiated at the time the representations were made. Therefore, the making of the representations set forth in Paragraph 70 constitutes a deceptive act or practice and the making of false advertisements, in or affecting trade or commerce, in violation of ME. REV. STAT. tit. 5, § 207.

125. The Powlowsky Defendants' and the Fusco Defendants' conduct, as described herein, is intentional.

COUNT XVII

EXPERT ENDORSERS' FALSE OR UNSUBSTANTIATED CLAIMS ABOUT FLEXIPRIN AND COGNIPRIN

126. Plaintiff State of Maine incorporates herein by reference all of the allegations contained in Paragraphs 72 and 73 of this Complaint.

127. The representations set forth in Paragraphs 72 and 73 are false or misleading, or, with respect to the representations set forth in Paragraph 72 a, b, and d through f, and Paragraph 73 a through c, were not substantiated at the time the representations were made. Moreover, Defendants Jahner and Minshew did not exercise their purported expertise in the form of an examination or testing of the products. Their purported scientific proof for the representations set forth in Paragraphs 72 and 73 was not the result of an examination or testing at least as

extensive as an expert in the represented field of expertise would normally conduct in order to support the conclusions presented in their endorsements.

128. Therefore, the making of the representation as set forth in Paragraphs 72 and 73 of this Complaint constitutes a deceptive act or practice and the making of false advertisements, in or affecting trade or commerce, in violation of ME. REV. STAT. tit. 5, § 207.

129. The conduct of Defendants Jahner and Minshew, as described herein, is intentional.

COUNT XVIII

FALSE ADVERTISING CLAIMS THROUGH CONSUMER ENDORSERS

130. Plaintiff State of Maine incorporates herein by reference all of the allegations contained in Paragraphs 76 and 77 of this Complaint.

131. The representations set forth in Paragraphs 76 and 77 are false or misleading. Therefore, the making of the representations set forth in Paragraphs 76 and 77 of this Complaint constitutes a deceptive act or practice and the making of false advertisements, in or affecting trade or commerce, in violation of ME. REV. STAT. tit. 5, § 207.

132. The conduct of the Powlowsky Defendants and the Fusco Defendants, as described herein, is intentional.

COUNT XIX

DECEPTIVE FORMAT OF RADIO ADVERTISING

133. Plaintiff State of Maine incorporates herein by reference all of the allegations contained in Paragraph 79 of this Complaint.

134. In fact, the referenced radio programs were not objective news or informational programming. They were paid commercial advertising. Therefore, the making of the representations set forth in Paragraph 79 constitutes a deceptive act or practice and the making of

false advertisements, in or affecting trade or commerce, in violation of ME. REV. STAT. tit. 5, § 207.

135. The conduct of the Powlowsky Defendants and the Fusco Defendants, as described herein, is intentional.

COUNT XX

FALSE ADVERTISING IN CONNECTION WITH DEFENDANT JAHNER AS AN ENDORSER

136. Plaintiff State of Maine incorporates herein by reference all of the allegations contained in Paragraph 81.

137. The representations set forth in Paragraph 81 are false. In fact, the Powlowsky Defendants made royalty payments to Defendant Jahner to appear as an expert endorser for FlexiPrin and CogniPrin.

138. Therefore, the making of the representations set forth in Paragraph 81 constitutes a deceptive act or practice and the making of false advertisements, in or affecting trade or commerce, in violation of ME. REV. STAT. tit. 5, § 207.

139. The conduct of the Powlowsky Defendants, the Fusco Defendants, and Defendant Jahner, as described herein, is intentional.

COUNT XXI

MISREPRESENTATION OF DEFENDANT MINSHEW'S EXPERTISE

140. Plaintiff State of Maine incorporates herein by reference all of the allegations contained in Paragraph 84 of this Complaint.

141. The representation set forth in Paragraph 84 is false. In fact, Defendant Minshew, a/k/a Samuel Brant, is not an expert in neurology, brain science, or cognitive decline

142. Therefore, the making of the representation set forth in Paragraph 84 constitutes a

deceptive act or practice and the making of false advertisements, in or affecting trade or commerce, in violation of ME. REV. STAT. tit. 5, § 207.

143. The conduct of the Powlowsky Defendants, the Fusco Defendants, and Defendant Minsheew, as described herein, is intentional.

COUNT XXII

FALSE RISK-FREE UNCONDITIONAL MONEY-BACK GUARANTEE OFFER

144. Plaintiff State of Maine incorporates herein by reference all of the allegations contained in Paragraph 87 of this Complaint.

145. The representations in Paragraph 87 are false because Defendants charged consumers: the cost of the initial shipment, which was not refundable; the cost of returning both full and empty bottles of the product; the full cost of FlexiPrin and CogniPrin if consumers did not follow the undisclosed or inadequately disclosed return and refund policies described in Paragraphs 57 through 59 and, additional charges for inadequately disclosed continuity shipments of FlexiPrin and CogniPrin.

146. Therefore, the making of the representations set forth in Paragraph 87 constitutes a deceptive practice in or affecting trade or commerce, in violation of ME. REV. STAT. tit. 5, § 207 and ME. REV. STAT. tit. 10, § 1210.

147. The conduct of the Powlowsky Defendants and the Fusco Defendants, as described herein, is intentional.

COUNT XXIII

MISREPRESENTATIONS ABOUT THE COGNIPRIN 30-DAY FREE TRIAL OFFER

148. Plaintiff State of Maine incorporates herein by reference all of the allegations contained in Paragraph 90 of this Complaint.

149. The representation in Paragraph 90 is false because the Powlowsky Defendants failed to disclose, or did not adequately disclose, that: (a) in order to qualify for the 30-day free trial, consumers had to accept a 60-day continuity plan that would begin 21 days after placing the order; and (b) consumers would not receive their products until 7 to 10 days after placing their orders, thereby giving them 14 days or less to try the product, as described in Paragraph 61.

150. Therefore, the making of the representation set forth in Paragraph 90 constitutes a deceptive act or practice in or affecting trade or commerce, in violation of ME. REV. STAT. tit. 5, § 207 and ME. REV. STAT. tit. 10, § 1210.

151. The conduct of the Powlowsky Defendants, as described herein, is intentional.

CONSUMER INJURY

152. Consumers have suffered and will continue to suffer substantial injury as a result of Defendants' violations of the FTC Act, the TSR, the EFTA, the Maine UTPA, and ME. REV. STAT. tit. 10, § 1210. In addition, Defendants have been unjustly enriched as a result of their unlawful acts or practices. Absent injunctive relief by this Court, Defendants are likely to continue to injure consumers, reap unjust enrichment, and harm the public interest.

THE COURT'S POWER TO GRANT RELIEF

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

154. Section 4(a) of the Telemarketing Act, 15 U.S.C. § 6103(a), empowers this Court to grant injunctive and such other relief as the Court may deem appropriate to halt violations of the TSR and to redress injury to consumers, including the award of damages, restitution, or other compensation in an action brought by a state.

155. Pursuant to 28 U.S.C. § 1367, this Court has supplemental jurisdiction to allow Plaintiff State of Maine to enforce its state law claims under the Maine Unfair Trade Practices Act, ME. REV. STAT. tit. 5, §§ 205-a through 214, against Defendants in this Court. Section 209 of the Maine UTPA empowers this Court to grant injunctive and such other relief, including civil penalties for intentional violations, as the Court may deem appropriate to halt and redress violations of any provision of the UTPA enforced by the Maine Attorney General. The Court, in the exercise of its equitable jurisdiction, may award ancillary relief, including rescission or reformation of contracts, restitution, the refund of monies paid, and the disgorgement of ill-gotten monies, to prevent and remedy any violation of the UTPA enforced by the Maine Attorney General.

FTC PRAYER FOR RELIEF

Wherefore, Plaintiff Federal Trade Commission, pursuant to Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), Section 6(b) of the Telemarketing Act, 15 U.S.C. § 6105(b), Section 917(c) of the EFTA, 15 U.S.C. § 1693o(c), and the Court's own equitable powers, requests that the Court:

- A. Enter a permanent injunction to prevent future violations of the FTC Act, the TSR, and the EFTA and its implementing Reg. E by all Defendants;
- B. Award such relief as the Court finds necessary to redress injury to consumers resulting from Defendants' violations of the FTC Act and the TSR, including but

not limited to, rescission or reformation of contracts, restitution, the refund of monies paid, and the disgorgement of ill-gotten monies; and

- C. Award Plaintiff FTC the costs of bringing this action, as well as such other and additional relief as the Court may determine to be just and proper.

MAINE PRAYER FOR RELIEF

Wherefore, Plaintiff State of Maine, pursuant to Section 4(a) of the Telemarketing Act, 15 U.S.C. § 6103(a), Section 209 of the Maine UTPA, ME. REV. STAT. tit. 5, § 209, and the Court's own equitable powers, requests that the Court:

- A. Enter an order declaring Defendants' above-described conduct to be in violation of the TSR and the Maine UTPA, § 207, and to be intentional violations pursuant to the Maine UTPA, § 209;
- B. Enter a permanent injunction to prevent future violations of the TSR and the Maine UTPA by Defendants;
- C. Award such relief as the Court finds necessary to redress injury to consumers resulting from Defendants' violations of the TSR and the Maine UTPA, including but not limited to, rescission or reformation of contracts, restitution, the refund of monies paid, and the disgorgement of ill-gotten monies;
- D. Adjudge civil penalties of not more than ten thousand dollars (\$10,000) for each intentional violation of the Maine UTPA pursuant to ME. REV. STAT. tit. 5, § 209; and

- E. Award Plaintiff State of Maine the costs of bringing this action, prejudgment interest pursuant to ME. REV. STAT. tit. 14, § 1602-B, and such other and additional relief as the Court may determine to be just and proper.

Respectfully submitted,

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