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AL9545

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY**

FEDERAL TRADE COMMISSION,)
600 Pennsylvania Avenue, NW, Washington, DC 20580,)
)
Plaintiff,)
)
v.)
)
ROBERT CHINERY, JR., 2231 Landmark Place, Manasquan, NJ)
08736, TRACY A. CHINERY, 2231 Landmark Place, Manasquan,)
NJ 08736, RTC RESEARCH & DEVELOPMENT, LLC, 2231)
Landmark Place, Manasquan, NJ 08736,)
)
Defendants.)
)

Hon.
Civil Action No.

COMPLAINT FOR INJUNCTIVE AND OTHER EQUITABLE RELIEF

Plaintiff, the Federal Trade Commission (“FTC” or “Commission”), for its Complaint

alleges:

1. Plaintiff FTC brings this action under Section 13(b) of the Federal Trade Commission Act (“FTC Act”), 15 U.S.C. § 53(b), to secure injunctive relief, rescission, restitution, disgorgement, and other equitable relief against Defendants for engaging in deceptive acts or practices and false advertising in connection with the advertising, marketing, and sale of Xenadrine EFX (also known as Xenadrine-EFX and Xenadrine[®]-EFX[™]), a purported weight loss product, in violation of Sections 5(a) and 12 of the FTC Act, 15 U.S.C. §§ 45(a) and 52.

JURISDICTION AND VENUE

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

3.

material to this Complaint, acting individually or in concert with others, Tracy Chinery has formulated, directed, participated in, or had authority to control the policies, acts, or practices of Nutraquest and RTC, including the acts or practices alleged in this Complaint. Tracy Chinery resides and transacts or has transacted business in the District of New Jersey.

8. Defendants Robert Chinery, Tracy Chinery, and RTC have operated a common business enterprise while engaging in the deceptive acts and practices alleged below and are therefore jointly and severally liable for said acts and practices.

to ten weeks. None of these studies show substantial weight loss caused by Xenadrine EFX. According to one of these studies, subjects taking Xenadrine EFX on average lost only 1.5 pounds over ten weeks, while the control group taking a placebo instead of Xenadrine EFX lost on average 2.5 pounds over the same time period.

13. In May 2003, Defendant Robert Chinery, together with others, established Cytodyne, LLC. In May 2003, the purported license between Nutraquest and Defendant RTC was terminated. Cytodyne, LLC then entered into a licensing agreement with RTC and took over the marketing and sale of Xenadrine EFX. The license between Cytodyne, LLC and RTC includes a clause that requires Cytodyne, LLC to disclose Xenadrine EFX advertising to RTC and gives RTC the right to disapprove the advertising. Since May 2003, Cytodyne, LLC has labeled, advertised, offered for sale, sold, and distributed Xenadrine EFX to the public. From June 2003 through mid-August 2004, sales of Xenadrine EFX exceeded \$61 million. During that latter period, Cytodyne, LLC made royalty payments to RTC of over \$6 million.

14. Defendants have advertised Xenadrine EFX through nationally disseminated television advertisements, magazine advertisements, and the www.cytodyne.com and www.xenadrine.com websites. Magazine advertisements for Xenadrine EFX have appeared in *People*, *TV Guide*, *Cosmopolitan*, *Glamour*, *Let's Live*, *Men's Fitness*, *Women's World*, and other publications. The product was available for purchase from retail stores, over the Internet, and through direle for pu

These advertisements contain the following statements and depictions, among others:

Nutraquest Advertisements

a. **Introducing the most advanced fat-loss formula ever created!**

Clinically Proven to Deliver Dramatic Results – Fast!

New Xenadrine-EFX has only been available for a very short time, and already it's the fastest growing fat-burning supplement on the market. The reason is simple. It's [sic] revolutionary new thermogenic formula burns body-fat faster than any other product on the market today! . . . Look at Bobby Aldridge. He's just one of thousands of Americans who are quickly finding out how well this amazing supplement can change their lives. . . . This new entry represents an entirely new level of effectiveness and the next generation in weight-loss technology.

In fact, in a recent landmark university study, Xenadrine-EFX exhibited such extraordinary effects on metabolism and caloric expenditure that even the researchers were shocked! And in recent case studies, every participant dropped body-fat at a record pace, up to 20 pounds in only 14 days! Nothing, not even the most powerful ephedrine-based products can match those results. This one-of-a-kind super supplement also enhances mental focus, provides powerful antioxidant activity and suppresses appetite. You simply cannot find a faster, more effective way to take the weight off.

...

Bobby Aldridge Lost 56 Pounds In 12 Weeks With Xenadrine EFX!

...

The Guaranteed Easiest & Fastest Way to Take the Weight Off!

Exhibit A (magazine advertisement)

b. *"It's True! I lost 16 Pounds in Just 2 Weeks. Unbelievable!" – Lauren Berry*

A Better Body In Just Two Weeks!

The extraordinary power of new Xenadrine-EFX is proving to be the key to a better body for thousands of people all across America. Lauren lost an incredible 16 pounds in just two weeks while dramatically increasing her energy levels. With Xenadrine-EFX, the results aren't just "unbelievable," they're a scientific fact.

You see, Xenadrine-EFX is the only diet supplement of its kind that's

clinically proven to deliver dramatic results – without ephedrine

Woman #1: "I'll never look like that again."
Video: Man #1 next to a "Before" picture of himself and superscript "Lost 75 Pounds!"

Man #1: "Xenadrine means business."
Announcer: "Xenadrine EFX is the first diet supplement of its kind. Clinically proven to deliver dramatic results without ephedrine."
Video: Bottle of "Xenadrine EFX" and superscript: "CLINICALLY PROVEN! EPHEDRINE FREE! DRAMATIC RESULTS!"

Video: Man #2 next to a "Before" picture of himself and superscript: "Lost 37 Pounds!"

Man #2: "Believe me, this stuff really works."
Video: Woman #2 next to a "Before" picture of herself and superscript: "Lost 100 Pounds!"

Woman #2: "I can't believe that was me."
Video: Woman #3 next to a "Before" picture of herself and superscript: "Lost 78 Pounds!"

Woman #3: "How's this for results?"
Announcer: "Xenadrine EFX, the guaranteed easiest and fastest way to take off the weight."
Video: Woman #4 next to a "Before" picture of herself and superscript: "Lost 124 Pounds!"

Woman #4: "Finally something that works."

Exhibit D (thirty-second televisio

millions of people around the world happily counting the pounds they've lost with revolutionary new Xenadrine-EFX.

What makes us different than all the rest? Xenadrine-EFX really works! It's been clinically proven to help you burn fat safely and effectively, without ephedrine. Our incredibly advanced thermogenic formula literally "revs up" your body's metabolism for rapid reductions in body-fat and an incredible boost to your energy levels.

Amazingly, Xenadrine-EFX's unique formula of advanced thermogenic compounds actually triggers unprecedented results without the use of ephedrine. In fact, it's the only product of its kind proven *more effective* than ephedrine-based fat burners in head-to-head clinical testing. Best of all, you'll start to see and feel the difference almost overnight and even without strict dieting or exercise! It's about time you discovered the most incredible weight loss product in the world. Clinically proven Xenadrine-EFX. The Guaranteed Easiest and Fastest Way To Take Off the Weight!

Exhibit E (two-page magazine advertisement)

- f. **Video:** Claudette Garza with a photograph labeled "*Before* Claudette Garza lost **22 Pounds!**"
- Announcer 1:** "Xenadrine EFX, the world's number one diet supplement presents swimsuit season."
- Video:** Joey Anderson with a photograph labeled "*Before* Joey Anderson lost **55 Pounds!**"
- Announcer 2:** "Slip into something sleek and sexy, and start strutting your stuff."
- Video:** Hazel Nelson with a photograph labeled "*Before* Hazel Nelson lost **25 Pounds!**"
- Announcer 1:** "Xenadrine EFX can help make it happen, fast and easy."
- Video:** Dan Tedtman with a photograph labeled "*Before* Dan Tedtman lost **35 pounds!**"
- Announcer 2:** "These real people are living proof of Xenadrine EFX's unsurpassed thermogenic power."
- Video:** Alexis Graham with a photograph labeled "*Before* Alexis Graham lost **113 pounds!**"
- Announcer 2:** "Increase your metabolism and get dramatic results without ephedra."
- Video:** Bot

really works.”
Video: Robert Hale with a photograph labeled “*Before*
Robert Hale lost **85 pounds!**”

Exhibit F (thirty-second television advertisement)

g. **The Shape Of Things To Come
...With Xenadrine-EFX.**

Melissa lost 45 Pounds!	Patrick lost 64 Pounds!	Kelly Lost 110 Pounds!	Jennifer Lost 52 Pounds!
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Melissa, Patrick, Kelly and Jennifer are happier than ever before – because they all lost incredible amounts of weight, and kept it off, with Xenadrine-EFX.

“If it wasn’t for Xenadrine-EFX, I wouldn’t have lost my weight as quickly and as easily as I did.” says Melissa. And Patrick agrees. “I’ve used plenty of products in the past to help with weight loss and improve my energy levels, and Xenadrine-EFX has far surpassed anything I’ve ever used. I’m a new person thanks to Xenadrine-EFX.”

These are just a few of the thousands of people who have achieved real weight loss success with Xenadrine-EFX. Its thermogenic, ephedra-free formula increases metabolism and reduces calories which helped them achieve significant decreases in body fat levels. In fact, the Xenadrine-EFX formula was clinically tested against two leading ephedra-based thermogenic supplements and outperformed them both for the boosting of metabolism and resulting caloric expenditure. [footnotes with citations omitted]

...

Xenadrine-EFX
Real People. Real Science. Real Success.

Exhibit G (magazine advertisement)

h. **Losing Weight
Was The Best Thing
I Ever Did For Myself!**

**Jennifer Lost An Incredible 52 Pounds
And Kept It Off With Xenadrine-EFX!**

“One day, standing in front of my open closet, I started to cry. None of my clothes fit anymore.” That’s when Jennifer made up her mind to do something about it. She started using Xenadrine-EFX, lost 52 pounds, and has kept off the

weight.

“Sure I’d tried other diets, but with Xenadrine-EFX, it was like the pounds just started disappearing,” she says. “And it didn’t make me feel jittery like the stuff I’d used in the past.”

What makes Xenadrine-EFX so different from other diet supplements is the thermogenic, ephedra-free formula that increases your metabolism and helps control your appetite, which helped Jennifer achieve significant decreases in body fat levels. In fact, the Xenadrine-EFX formula was clinically tested against two

Xenadrine . . . The #1 Diet Supplement Worldwide . . . because it works!

Exhibit I (magazine advertisement translated from the original Spanish to English)

- j. “It was marvelous **to lose 20 lbs.** It’s even better **not to gain them back** with **Xenadrine-EFX.**”

Over a year ago, Claudette lost more than 20 pounds thanks to Xenadrine-EFX, and she feels happier than ever. As she, herself, says: “In a few weeks, I went down four clothing sizes. It’s a fact: Xenadrine-EFX changed my life forever!”

But what really makes Claudette’s story so incredible is that she has managed to keep the weight off for more than a year... with the help of Xeandrine-EFX, a sensible diet, and regular exercise.

What makes Xenadrine-EFX so effective is its exclusive ephedra-free thermogenic formu

or “drug” as defined in Section 15(b) and (c) of the FTC Act, 15 U.S.C. §§ 55(b), (c). As set forth below, the Defendants have engaged and/or are continuing to engage in such unlawful practices in connection with the advertising, marketing, and sale of Xenadrine EFX.

UNFAIR OR DECEPTIVE ACTS OR PRACTICES
IN VIOLATION OF THE FTC ACT

COUNT ONE

Deceptive Representations Regarding Xenadrine EFX’s Efficacy and Clinical Proof

17. Through the means described in Paragraph 15, Defendants have represented, expressly or by implication, that:

- a. Xenadrine EFX causes rapid and substantial weight loss;
- b. Xenadrine EFX causes rapid and substantial fat loss;
- c. Xenadrine EFX enables users to lose as much as fifteen pounds in ten days;
- d. Xenadrine EFX causes rapid and substantial weight loss without the need to reduce caloric intake or increase physical activity;
- e. Xenadrine EFX causes permanent or long-term weight loss;
- f. Xenadrine EFX is clinically proven to cause rapid and substantial weight loss;
- g. Xenadrine EFX is clinically proven to be more effective than leading ephedrine-based diet products;
- h. A clinical test that purportedly proves that Xenadrine EFX is more effective than leading ephedrine-based diet products was independent; and
- i. Xenadrine EFX is clinically proven to cause virtually all users to

experience rapid and substantial weight and fat loss, including as much as twenty pounds in fourteen days.

18. The representations set forth in Paragraph 17 are false or were not substantiated at the time the representations were made.

19. Therefore, the making of the representations set forth in Paragraph 17 above constitutes a deceptive practice, and the making of false advertisements, in or affecting commerce, in violation of Sections 5(a) and 12 of the FTC Act, 15 U.S.C. §§ 45(a) and 52.

COUNT TWO

Consumer Endorsement Claims

20. Through the means described in Paragraph 15, Defendants have represented, expressly or by implication, that persons who appeared in Xenadrine EFX advertisements achieved the weight loss reported in those ads solely through the use of Xenadrine EFX.

21. The representation set forth in Paragraph 20 is false. Persons who appeared in the Xenadrine EFX advertisements engaged in rigorous diet and/or exercise programs in order to lose weight, and some were provided with a personal trainer.

22. Therefore, the making of the representation set forth in Paragraph 20 above constitutes a deceptive practice, and the making of false advertisements, in or affecting commerce, in violation of Sections 5(a) and 12 of the FTC Act, 15 U.S.C. §§ 45(a) and 52.

COUNT THREE

Deceptive Representation Regarding Endorsers

23. Through the means described in Paragraph 15, Defendants have presented testimonials for Xenadrine EFX by consumer endorsers who purportedly lost weight in the ordinary course of using the product. Defendants have failed to disclose that Defendants paid the

endorsers from \$1,000 to \$20,000 in connection with their endorsing Xenadrine EFX. This fact would be material to consumers in their purchase or use decisions regarding Xenadrine EFX. Therefore, the failure to disclose this fact, in light of the representation made, constitutes a deceptive practice, and the making of false advertisements, in or affecting commerce, in violation of Sections 5(a) and 12 of the FTC Act, 15 U.S.C. §§ 45(a) and 52.

INJURY

24. Consumers throughout the United States have suffered and continue to suffer substantial monetary loss as a result of Defendants' unlawful acts or practices. In addition, the Defendants have been unjustly enriched as a result of their unlawful practices. Absent relief by this Court, Defendants are likely to continue to injure consumers, reap unjust enrichment, and harm the public interest.

THIS COURT'S POWER TO GRANT RELIEF

25. 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 the FTC Act. The Court, in the exercise of its equitable jurisdiction, may award other ancillary relief, including, but not limited to, rescission of contracts and restitution, and the disgorgement of ill-gotten gains, caused by Defendants' law violations.

PRAYER FOR RELIEF

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

1. Enjoin Defendants permanently from violating Sections 5 and 12 of the FTC Act, in connection with the advertising or sale of food, drugs, dietary supplements, devices, cosmetics, or other products, services or programs;

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

3. Award Plaintiff the costs of bringing this action and any other equitable relief the relief as the Court may determine to be just and proper.

Dated: July 11, 2005

Respectfully submitted,

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