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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

FLOYD LUMAN and JOEL AMKRAUT,  
individually and on behalf of all others similarly  
situated,

Plaintiffs,

v.

NAC MARKETING COMPANY, LLC d/b/a  
NEW VITALITY and JOE THEISMANN,

Defendants.

Case No. 2:13-CV-00656-KJM-AC

**FIRST AMENDED CLASS  
ACTION COMPLAINT**

**JURY TRIAL DEMANDED**

1 Plaintiffs Floyd Luman and Joel Amkraut (collectively, “Plaintiffs”) bring this action on  
2 behalf of themselves and all others similarly situated against Defendants NAC Marketing  
3 Company, LLC d/b/a New Vitality (“New Vitality”) and Joseph Theismann (collectively,  
4 “Defendants”). Plaintiffs make the following allegations pursuant to the investigation of their  
5 counsel and based upon information and belief, except as to the allegations specifically pertaining  
6 to themselves, which are based on personal knowledge.

### 7 INTRODUCTION

8 1. This is a class action lawsuit on behalf of purchasers Super Beta Prostate, which  
9 Defendants market as a treatment for the symptoms of benign prostate hyperplasia (“BPH”).  
10 Defendants’ marketing and promotion of Super Beta Prostate is an elaborate hoax involving a  
11 falsified medical endorsement by Dr. Jeffrey J. Zielinski, and false claims that the product will treat  
12 the symptoms of BPH. The product was created by Roger Mason, a convicted felon who pleaded  
13 guilty to conspiracy to distribute phencyclidine (“PCP”). Defendant New Vitality describes Mr.  
14 Mason as a “research chemist.” His latest concoction, “Super Beta Prostate,” is an illegal drug that  
15 contains dangerously high doses of mixed sterols, including B-sitosterol, a drug that had been  
16 marketed in Europe under the trade names Harzol® and Azuprostat®. These compounds are no  
17 longer considered suitable for the treatment of BPH. Indeed, in 1995, a researcher studying  
18 Harzol® wrote:

19 “The effect of phytopharmaceuticals [such as B-sitosterol] on BPH is  
20 controversial because no clear mechanisms of action have been  
21 established, and their effect has been attributed to placebo responses.  
22 ... Since other forms of medical treatment of BPH have been shown  
23 to be effective, it is questionable whether phytopharmaceutical drugs  
24 should continue to be prescribed.”

25 R.R. Berges, *et al.* (1995) The Lancet, “Randomised, placebo-controlled, double-blind clinical trial  
26 of B-sitosterol in patients with benign prostatic hyperplasia” (underlining added).

27 2. Jeffrey J. Zielinski, the doctor who appears to endorse Super Beta Prostate in  
28 Defendants’ commercials, has recanted. In a sworn declaration provided to the undersigned  
counsel, he states that he is an actor, and that he has not practiced medicine since 2009. After an

1 audition in which he was provided with no information about the product, he was called to a  
2 commercial shoot and asked to don a white doctor's coat, stand in front of a green screen, and read  
3 lines from a teleprompter.



16 In his sworn declaration provided to the undersigned counsel, Dr. Zielinski states:

17 “I was provided with a white doctor’s coat with my name on it.  
18 After donning the white coat I was directed to stand in front of a  
19 green screen and to read lines from a teleprompter. After I saw the  
20 commercials air on television, I understood that a doctor’s office was  
speaking from a doctor’s office. ...

21 “As far as I understood, I was hired as an actor. I was to play the  
22 role of a doctor, reading lines from a script. And that is what I did. I  
23 had no input in the creation of the script or the content of the  
advertisements. I did not intend to provide medical advice to  
anyone, or to provide a medical endorsement of the product.”

24 Dr. Zielinski continues:

25 “If I were a practicing physician, I would not recommend Super Beta  
26 Prostate for the treatment of BPH or its symptoms. ... I would not  
27 recommend Super Beta Prostate to anyone for any purpose. I believe  
28 it is unsuitable for the treatment of BPH, and possibly unsafe because  
it is a formulation that has never been studied and it includes mixed

1                   sterols in very high doses that could cause significant adverse  
2                   events.”

3 Defendants’ representation that Super Beta Prostate is endorsed by Dr. Zielinski is false.

4                   3.        Super Beta Prostate’s labeling and advertising also represents that the product  
5                   “Helps to Support Healthy Urinary Flow and Function” and contains “All Natural Ingredients.”  
6 Defendants advertise and market that “[b]y taking this natural supplement each day, you can start  
7 the path to getting out of the bathroom and back to your life.” Additionally, as a result of taking  
8 Super Beta Prostate, Defendants advertise that users will experience the following benefits:  
9 “Stronger Urinary Flow,” “Improved Bladder Emptying,” “Healthy Sleeping Habits,” “Healthy  
10 Prostate Function,” “Less Frequent Bathroom Trips,” reducing “that sudden urge to go,” “More  
11 complete bladder emptying,” “Sleep[ing] more through the night,” “Wak[ing] up feeling more  
12 refreshed,” not needing to “get up at night as much,” improved intimacy, and “Feel[ing] younger  
13 and more energetic!” (the “Express Warranties” or the “Misrepresentations”).

14                  4.        Each of the Express Warranties is false and misleading. Super Beta Prostate is not,  
15 in fact, effective for any of these purposes. Nor is Super Beta Prostate suitable or fit for any of  
16 these intended purposes.

17                  5.        Furthermore, Super Beta Prostate is illegally distributed under federal law because  
18 the product’s labeling, website, and advertising materials suggests the use of Super Beta Prostate  
19 for the treatment of BPH, which is a progressive disease. Super Beta Prostate is therefore a “drug”  
20 as defined by the Federal Food, Drug, and Cosmetic Act. *See* 21 U.S.C. § 321(g)(1)(B) and (C).  
21 Furthermore, Super Beta Prostate falls with the definition of a “new drug” because it “is not  
22 generally recognized among experts ... as safe and effective for use under the condition prescribed,  
23 recommended, or suggested.” 21 U.S.C. § 321(p)(1). Thus, without FDA approval, it is illegal to  
24 distribute Super Beta Prostate in interstate commerce. 21 U.S.C. § 355(a).

25                  6.        Plaintiffs are purchasers of Super Beta Prostate who assert claims for violation of  
26 the Magnuson Moss Warranty Act, breach of express warranty, breach of the implied warranty of  
27 merchantability, breach of the implied warranty of fitness for a particular purpose, unjust  
28 enrichment, violation of the California Consumers Legal Remedies Act (“CLRA”), violation of the

1 California Unfair Competition Law (“UCL”), and violation of the California False Advertising  
2 Law (“FAL”).

3 **PARTIES**

4 7. Plaintiff Floyd Luman is a citizen of California. In late 2012, Mr. Luman purchased  
5 Super Beta Prostate for personal consumer use. Prior to his purchase, Mr. Luman reviewed the  
6 product’s labeling and watched the advertisement with Joe Theismann, both of which are  
7 reproduced below. *See infra*. Mr. Luman purchased Super Beta Prostate in reliance on the claims  
8 that it would treat the symptoms of benign prostate hyperplasia, including the representations that  
9 the product would: provide “a stronger urine flow,” provide “more complete emptying of the  
10 bladder,” reduce “that sudden urge to go,” reduce the need to “get up at night as much,” allow him  
11 to “wake up refreshed and ready to tackle anything,” and allow him to “sleep through the night.”  
12 Mr. Luman also relied upon the claims of Dr. Jeffrey J. Zielinski, the doctor that appears to endorse  
13 Super Beta Prostate in Defendants’ commercials, who represented: “If you want a stronger urine  
14 flow, and a more complete emptying of your bladder, I would recommend Super Beta Prostate.  
15 Super Beta Prostate works.” Mr. Luman would not have purchased Super Beta Prostate had he  
16 known the true facts concerning its safety, efficacy, and failure to comply with FDA regulations.  
17 After several weeks of use, Mr. Luman concluded that Super Beta Prostate was ineffective. Mr.  
18 Luman then called New Vitality’s Customer Service line to complain. During that call, an agent  
19 explained that Super Beta Prostate takes time to work and encouraged him to continue taking the  
20 product. Mr. Luman ended the call without requesting or expecting a refund, and the agent did not  
21 represent that Mr. Luman would receive a refund. Mr. Luman followed the agent’s advice and  
22 continued to take Super Beta Prostate, but the product was still ineffective. Mr. Luman did not  
23 subsequently request a refund from New Vitality for his past orders of Super Beta Prostate, nor did  
24 he ever return his past orders. Any refund to Mr. Luman’s credit card was unrequested and  
25 involuntary.

26 8. Plaintiff Joel Amkraut is a citizen of California. In early 2013, Mr. Amkraut  
27 purchased Super Beta Prostate for personal consumer use. Prior to his purchase, Mr. Amkraut  
28 reviewed the product’s labeling and watched the advertisement with Joe Theismann, both of which

1 are reproduced below. *See infra*. Mr. Amkraut purchased Super Beta Prostate in reliance on the  
2 claims that it would treat the symptoms of benign prostate hyperplasia, including the  
3 representations that the product would: provide “a stronger urine flow,” provide “more complete  
4 emptying of the bladder,” reduce “that sudden urge to go,” reduce the need to “get up at night as  
5 much,” allow him to “wake up refreshed and ready to tackle anything,” and allow him to “sleep  
6 through the night.” Mr. Amkraut also relied upon the claims of Dr. Jeffrey J. Zielinski, the doctor  
7 that appears to endorse Super Beta Prostate in Defendants’ commercials, who represented: “If you  
8 want a stronger urine flow, and a more complete emptying of your bladder, I would recommend  
9 Super Beta Prostate. Super Beta Prostate works.” Mr. Amkraut would not have purchased Super  
10 Beta Prostate had he known the true facts concerning its safety, efficacy, and failure to comply  
11 with FDA regulations.

12 9. Defendant NAC Marketing Company, LLC d/b/a New Vitality is a Delaware  
13 limited liability company with its principal place of business located at Farmingdale, New York.  
14 New Vitality is the distributor and seller of Super Beta Prostate and participated in creating the  
15 product formulation, dosage form, delivery system, branding, packaging and design, logistics and  
16 distribution, marketing, and advertising. New Vitality’s activities caused the sale of Super Beta  
17 Prostate through the Internet and retail venues including club, food, drug, mass market, and health  
18 food stores. New Vitality endorsed, adopted, and utilized the Express Warranties and  
19 Misrepresentations to effectuate the Defendants’ joint plan to market Super Beta Prostate as  
20 described herein.

21 10. Defendant Joe Theismann is a citizen of Virginia residing in Fairfax County,  
22 Virginia. Formerly a quarterback for the Washington Redskins, Mr. Theismann was twice named  
23 to the NFL Pro Bowl and was the quarterback of the winning team in Super Bowl XVII, and he  
24 was inducted into the College Football Hall of Fame in 2003. Mr. Theismann is the principal  
25 endorser of Super Beta Prostate. He appears on the company’s website and in radio and television  
26 advertisements, where he describes his own struggles with the symptoms of BPH. Mr. Theismann  
27 endorsed, adopted, and utilized the Express Warranties and Misrepresentations to effectuate the  
28 Defendants’ joint plan to market Super Beta Prostate as described herein.

1           11. Each of the Defendants acted jointly to perpetrate the acts described herein. At all  
2 times relevant to the allegations in this matter, each Defendant acted in concert with, with the  
3 knowledge and approval of, and/or as the agent of the other Defendants within the course and  
4 scope of the agency, regarding the acts and omissions alleged.

5   **JURISDICTION AND VENUE**

6           12. This Court has subject matter jurisdiction under 28 U.S.C. § 1331. This Court has  
7 supplemental jurisdiction over state law claims pursuant to 28 U.S.C. § 1367.

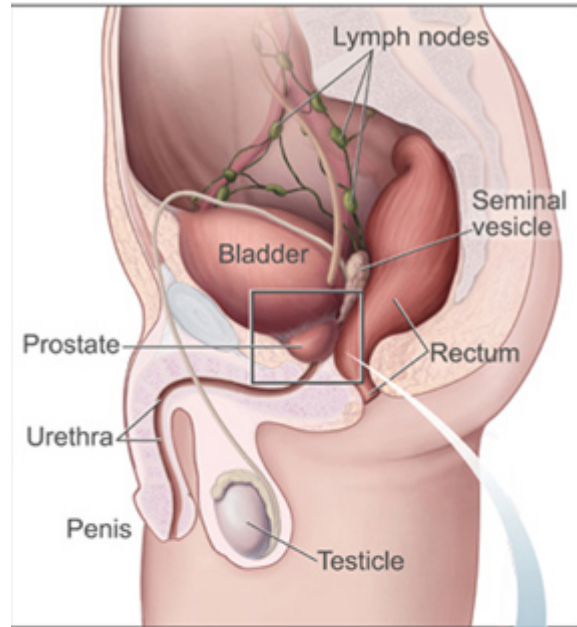
8           13. This Court also has subject matter jurisdiction pursuant to 28 U.S.C.  
9 § 1332(d)(2)(A) because this case is a class action where the aggregate claims of all members of  
10 the proposed class are in excess of \$5,000,000.00, exclusive of interest and costs, and Plaintiffs, as  
11 well as most members of the proposed class, are citizens of states different from the states of at  
12 least one of the Defendants. In their commercials, Defendants represent that they sold over 5  
13 million bottles of Super Beta Prostate to over 2 million men.

14           14. Pursuant to 28 U.S.C. § 1391, this Court is the proper venue for this action because  
15 a substantial part of the events, omissions and acts giving rise to the claims herein occurred in this  
16 District. Defendants distributed, advertised, and sold Super Beta Prostate, which is the subject of  
17 the present complaint, in this District. Moreover, Plaintiffs purchased Super Beta Prostate from  
18 Defendants in California.

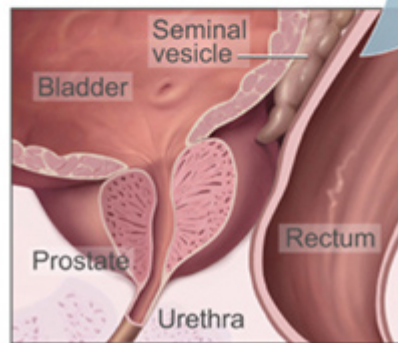
19   **FACTS COMMON TO ALL CAUSES OF ACTION**

- 20           - Benign Prostate Hyperplasia Is A Progressive Disease That Causes  
21           Urinary Problems

22           15. The prostate is an exocrine gland of the male reproductive system. It surrounds the  
23 top of the urethra, where it connects to the bladder.  
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This shows the prostate and nearby organs.



This shows the inside of the prostate, urethra, rectum, and bladder.

16. The main purpose of the prostate is aid in the process of ejaculation. The prostate's role is to secrete a slightly alkaline fluid, which is milky or white in appearance and constitutes about 50-75% of the volume of semen. The alkaline nature of prostatic fluid help sperm survive in the vagina, which is acidic. Additionally, sperm in prostatic fluid are also more mobile than when in seminal vesicular fluid.

17. Another purpose of the prostate is to expel semen during the process of ejaculation. To aid in the process, the prostate contains smooth muscle fibers that expels fluid during each ejaculate fraction.



1           18.     Benign prostate hyperplasia is a progressive disease caused by an enlarged prostate.  
2 A healthy prostate is around the size of a walnut, but men’s prostates begin to slowly grow around  
3 age thirty.

4           19.     The prostate’s growth may be due to an increased number of cells, an increase in the  
5 size each cell, or both. Technically, an increase in the number of cells causes benign prostate  
6 *hyperplasia*, while an increase in the size of each cell causes benign prostate *hypertrophy*. In  
7 practice, however, urologists commonly refer to both conditions as benign prostate hyperplasia.

8           20.     If the prostate grows too large, it compresses the urethra and causes an obstruction.  
9 An obstruction of the urethra by the prostate, which may be partial or complete, leads to the  
10 symptoms of BPH. The Mayo Clinic explains: “[P]rostate gland enlargement can cause  
11 bothersome urinary symptoms. Untreated prostate gland enlargement can block the flow of urine  
12 out of the bladder and can cause bladder, urinary tract or kidney problems.”<sup>1</sup>

13           21.     The symptoms of BPH include difficulty beginning urination, being unable to  
14 completely empty the bladder during urination, feeling the need to urinate frequently, increased  
15 risk of urinary tract infections, and painful urination. Secondary symptoms include disturbed sleep  
16 due to frequent urination, increased risk of bladder stones from urine left in the bladder, and sexual  
17 dysfunction.

18           22.     An estimated 50% of men have histologic evidence of BPH by age 50 years and  
19 75% by age 80 years. In 40-50% of these cases, BPH becomes clinically significant.

20           23.     After lifestyle changes, prescription medicine is the first-line treatment for BPH.  
21 There is a wide range of prescriptions available for BPH. Alpha-blockers, which relax the prostate  
22 to reduce obstruction of the urethra, include tamsulosin (sold as Flomax), terazosin (sold as  
23 Hytrin), doxazosin mesylate (sold by Pfizer as Cardura), alfuzosin (sold by Sanofi Aventis as  
24 Uroxatral), and silodosin (sold as Rapaflo). Another common line of prescriptions are 5 $\alpha$ -  
25 reductase inhibitors, which helps limit the production of DHT, a hormone responsible for enlarging  
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28 <sup>1</sup> *Prostate Gland Enlargement*, Mayo Clinic, <http://www.mayoclinic.com/health/prostate-gland-enlargement/DS00027>.

1 the prostate. These medications include finasteride (sold by Merck as Proscar) and dutasteride  
2 (sold by GlaxoSmithKline as Avodart).

3 24. If prescription medications are ineffective, or if their side effects are intolerable, the  
4 next line of treatment includes office-based procedures performed by a urologist. The two most  
5 common FDA-approved procedures are transurethral microwave thermotherapy (“TUMT”) and  
6 transurethral needle ablation (“TUNA”). In both of these procedures, local anesthetic is applied  
7 and a catheter is slowly inserted into the urethra until it reaches the prostate. Then, the catheter  
8 head outputs a known quantity of heat energy, causing cell death (necrosis) to the prostate. As  
9 these cells die, the prostate shrinks.

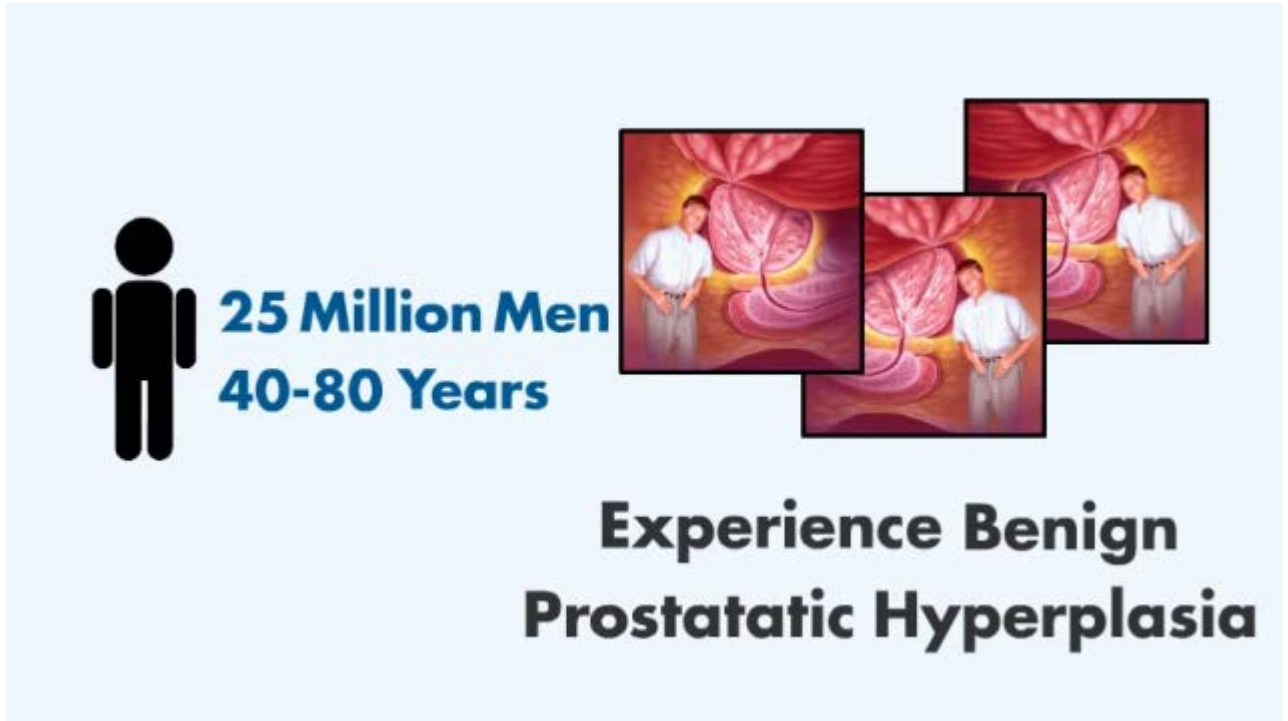
10 25. Surgery is the final option. The most common type of surgery, also the mainstay of  
11 definitive treatment of BPH, is transurethral resection of prostate (“TURP”). In this procedure, the  
12 surgeon will remove part or all of the prostate through the urethra. Unfortunately, surgery may  
13 cause serious complications, such as impotence and incontinence.

14 - Defendants Expressly Represented That Super Beta Prostate Will Cure  
15 BPH

16 26. Defendant New Vitality ran a series of advertisements that claimed Super Beta  
17 Prostate would treat and cure BPH. These advertisements ran on websites that were reviewed and  
18 approved by New Vitality. These advertisements also ran on YouTube, where it was publicly  
19 available until at least April 22, 2013. Stills from one of these advertisements are incorporated into  
20 the text below.

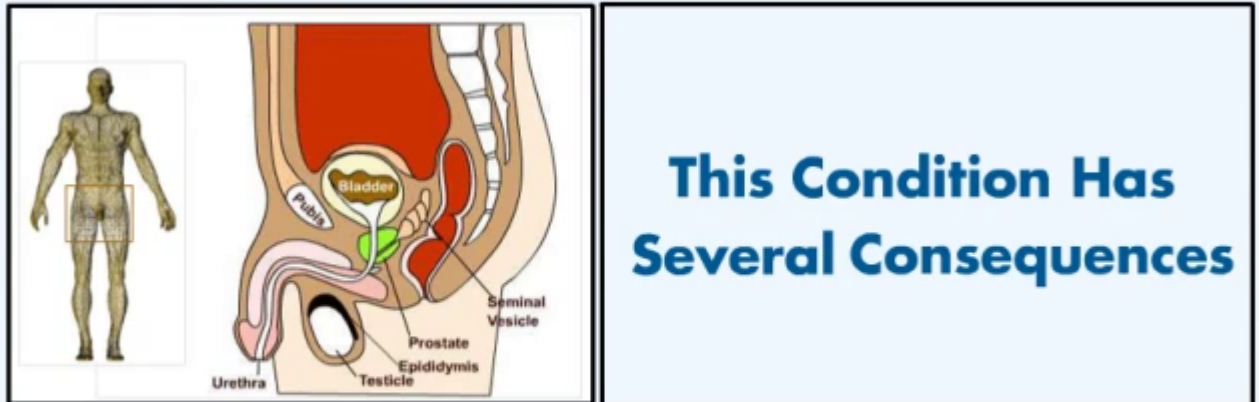
21 27. One of these advertisements begins: “Dear friend in distress. Have all the efforts to  
22 treat your prostate problem proven unsuccessful? Are you tired of staying awake all night to make  
23 hasty trips to the restroom? An estimated 25 million men from the age group of 40-80 years  
24 experience benign prostatic hyperplasia, the benign enlargement of the prostate.”

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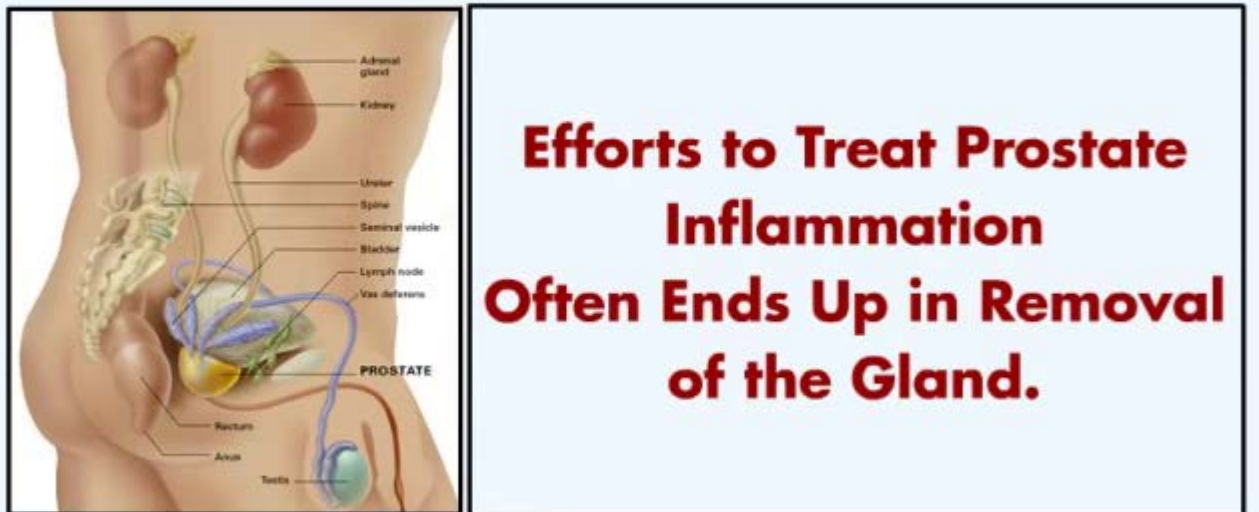
28. The advertisement continues: “This condition has several consequences, the most stigmatized of which are nocturia and incontinence. Nocturia, urination at night, can ruin sleep and make an individual exhausted. Worse is incontinence, where there is an involuntary leakage of urine from the bladder. Men with an enlarged prostate also report persistent feeling of bladder fullness, as they are unable to empty the bladder sufficiently, even after frequent urination. These symptoms are typical of any prostate problem and can be very distressing. Loss of active sexual function only adds to existing woes.”

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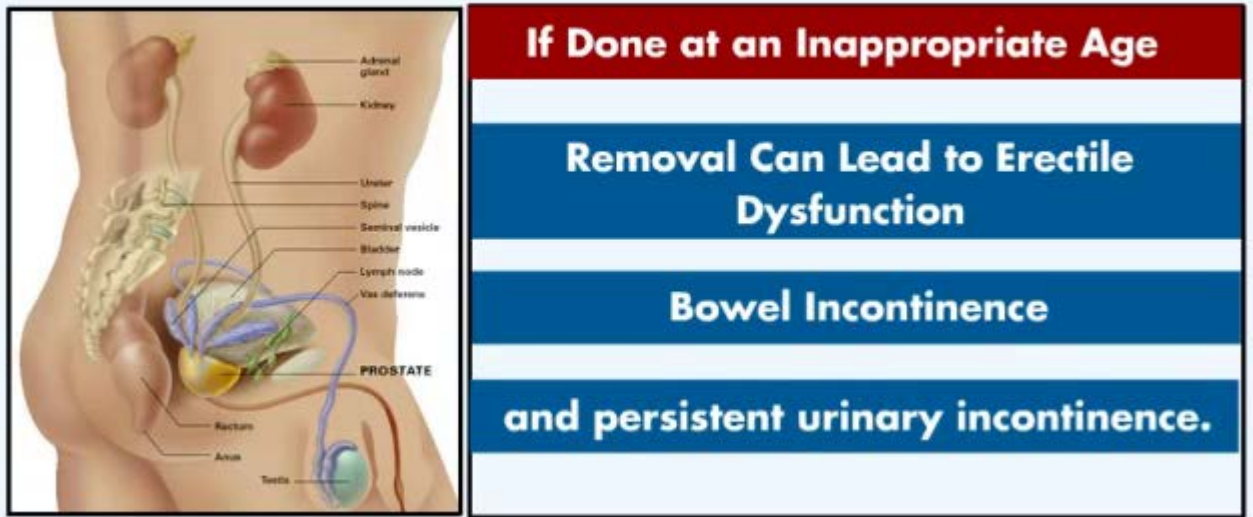


**The Most Stigmatized of Which are  
Nocturia and Incontinence**

29. The advertisement continues: “The health effects apart, efforts to treat prostate inflammation often ends up in removal of the gland. If done at an inappropriate age, removal can lead to erectile dysfunction, bowel incontinence, and persistent urinary incontinence.”



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30. The advertisement continues: "But wait! Surgery is not the option [sic] to your problems."



31. The advertisement continues: "Introducing Super Beta Prostate, an all-natural solution to prostate enlargement. Super Beta Prostate contains beta-sitosterol, a plant extract that

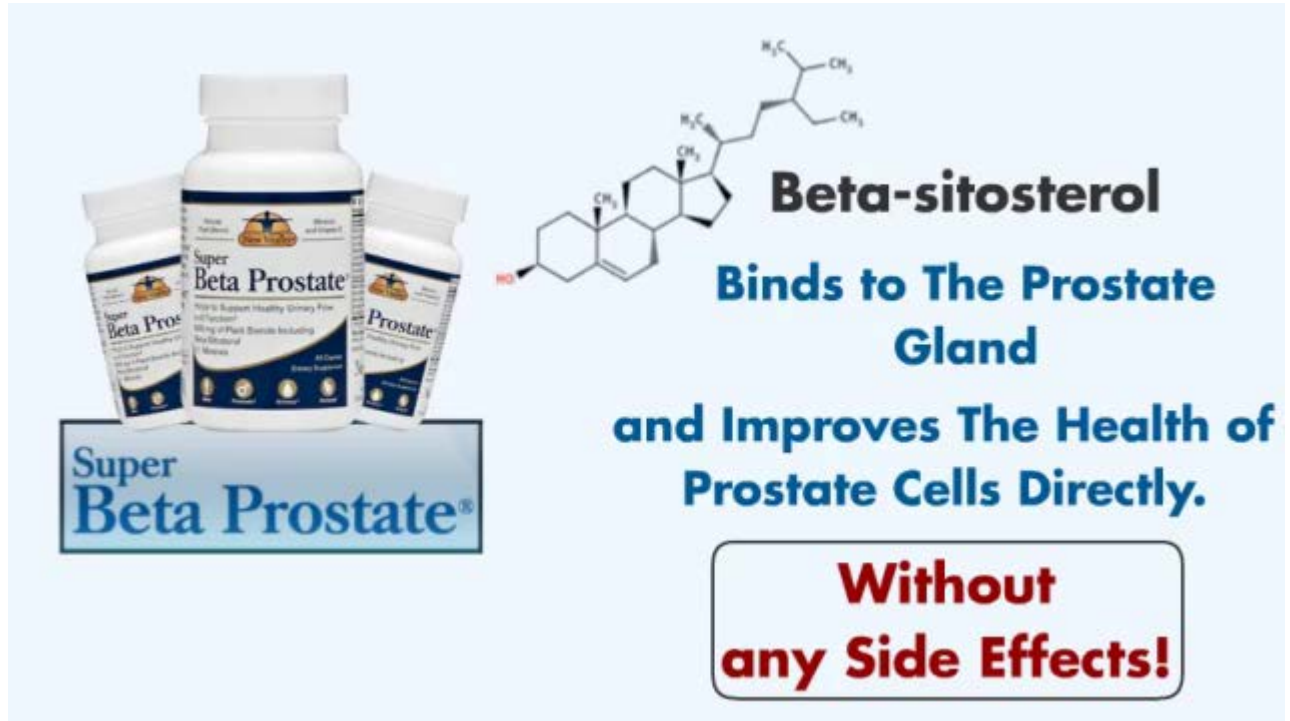
1 reduces prostate swelling. It also contains twelve additional nutrients that help improve prostate  
2 health, body immunity, and urinary flow.”



14 32. Defendant New Vitality’s advertisement continues, “Beta-sitosterol binds to the  
15 prostate gland and improves the health of prostate cells directly. And without any side effects! It  
16 also cuts down on cholesterol, which improves blood flow. Twelve other nutrients include zinc,  
17 copper, manganese, iodine, selenium, vitamin D, and others help [sic] in restoring prostate health  
18 and normal urinary function. Enhanced bladder control puts an end to nocturia and incontinence.  
19 Super Beta Prostate restores your sexual vigor. What are you waiting for?”

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The advertisement features three bottles of Super Beta Prostate on the left. To the right is the chemical structure of Beta-sitosterol, a steroid with a hydroxyl group at C3 and a side chain at C17. The text reads: "Beta-sitosterol Binds to The Prostate Gland and Improves The Health of Prostate Cells Directly." Below this is a red-bordered box with the text "Without any Side Effects!".

13 33. Each of these statements is false and misleading. Super Beta Prostate does not, in  
14 fact, treat the symptoms of BPH, or produce any of the effects described in this advertisement.

15 34. In other advertisements, Defendants do not expressly refer to BPH, but instead  
16 discuss the symptoms of an “aging prostate,” such as frequent urination, waking up regularly at  
17 night to urinate, and inadequate emptying of the bladder. These are the *exact symptoms* of BPH.  
18 They are not associated with normal “aging” of the prostate.

19 - The “Reknowned Research Chemist” That Created Super Beta Prostate  
20 Is A Convicted Felon

21 35. Defendants’ website identifies an individual named Roger Mason as “a renowned  
22 research chemist,” whose research “has culminated in several acclaimed formulas; most  
23 distinguished is [sic] Super Beta Prostate.” Defendants represent that “Super Beta Prostate was  
24 formulated by research chemist Roger Mason.” Defendants also represents that “Roger [Mason]  
25 has been an integral part of the natural health industry for more than 30 years. He has done  
26 extensive research into natural health, life extension and healing yourself naturally with whole  
27 foods, proven supplements, natural hormones, and exercise.”<sup>2</sup>

28 <sup>2</sup> Roger Mason: *The Man Behind The Magic*, Super Beta Prostate Website (Mar. 28, 2012),  
<http://web.archive.org/web/20120328124131/http://www.betaprostate.com/roger-mason.aspx>

1           36. Roger Mason is not a “renowned research chemist.” He is not a doctor. He is not a  
2 physician’s assistant. He is not a nurse. He has no training, education or experience relevant to the  
3 treatment of BPH or its symptoms. He has no training, education or experience relevant to the  
4 development of drugs or dietary supplements. He has never held a job in any of these fields.

5           37. Roger Mason is a convicted felon. In 1975 he pleaded guilty to conspiracy to  
6 distribute phencyclidine (“PCP”). In May 1985, while on parole for his prior drug convictions,  
7 Roger Mason was arrested for manufacturing 326 counterfeit credit cards, which were used to  
8 make at least \$10,000 of fraudulent purchases. Roger Mason was released again on parole around  
9 1993.

10           - Joe Theismann’s Endorsement

11           38. Joe Theismann appears in Super Beta Prostate advertisements and purports to  
12 describe his personal struggle with the symptoms of BPH. Stills from one of these advertisements  
13 are incorporated into the text below. On information and belief, Mr. Theismann has never been  
14 diagnosed with BPH or its symptoms. Nor was he a bona fide user of Super Beta Prostate. His  
15 statements concerning his symptoms are completely fabricated.

16           39. Instead of directly referring to BPH, Mr. Theismann describes the disease and its  
17 symptoms are those of an “aging prostate.” But an aging prostate is not a medical condition that  
18 would cause these symptoms. The symptoms described by Mr. Theismann are the classic  
19 symptoms of BPH. Indeed, they are *identical* to the symptoms described in New Vitality’s other  
20 advertisements (discussed above) that expressly promote Super Beta Prostate as a treatment for  
21 BPH.

22           40. In one of the advertisements, Mr. Theismann begins: “Hi, I’m Joe Theismann. And  
23 no matter what stadium I broadcast from, I would always have to find the closest bathroom, just in  
24 case I had that sudden urge to go. My prostate was giving me fits.”

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28 (accessed by searching <http://betaprostate.com/> in the Internet Archive index, navigating to the  
archive from Mar. 28, 2012, and clicking the link titled “Roger Mason”).





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41. Mr. Theismann continues: “But then I heard about Super Beta Prostate’s Nationwide Million Bottle Giveaway, and I got a free bottle. What a difference it made. I don’t have to go as often, and I don’t need to get up at night as much. Now I wake up refreshed and ready to tackle anything.”



1           42. Mr. Theismann continues: “Super Beta Prostate has sold over 5 million bottles,  
2 helping over 2 million men, because 50% of men over 50, and 80% of men over 80 have prostate  
3 issues. Chances are you need Super Beta Prostate.” These statistics are virtually identical to the  
4 rates of BPH in adult men.



17           43. Mr. Theismann continues: “What’s so special about Super Beta Prostate? ... It’s  
18 all-natural, made from a scientific breakthrough plant sterol called beta-sitosterol.” However,  
19 neither Super Beta Prostate, nor its ingredient, beta-sitosterol, is safe or effective for the treatment  
20 of BPH.

21           44. Mr. Theismann is followed on screen by Dr. Zielinski, an actor who is portraying a  
22 doctor, and who appears to endorse the product.

23           45. Defendant’s website at <http://www.betaprostate.com/> includes Mr. Theismann’s  
24 likeness and image on nearly every page.<sup>3</sup>

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<sup>3</sup> One of Mr Theismann’s commercials refers to “SuperBeta.com,” but this website is an automatic  
redirect to <http://www.betaprostate.com/>.



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8       46.     On a page entitled “About Joe Theismann,” Mr. Theismann makes the same  
9 representations that he makes in the television commercials. He explains, “Even when I first  
10 started broadcasting, I’d be hit with sudden urges to go – so I always had to know where the closest  
11 bathroom was. My prostate was really getting to me. Does any of this sound familiar? That’s  
12 because many men over 40 have issues that come with an aging prostate. ... [T]here’s no reason  
13 to accept these issues that come with an aging prostate. Take Super Beta Prostate to help you  
14 support your quality of life – both during the day and at night. I’m so glad I tried it, and you will  
15 be too.”

16       47.     Defendants’ website also contains the image and likeness of Jeff Zielinski and  
17 attributes statements to him that he did not make, or made only when reading from a script he did  
18 not prepare.

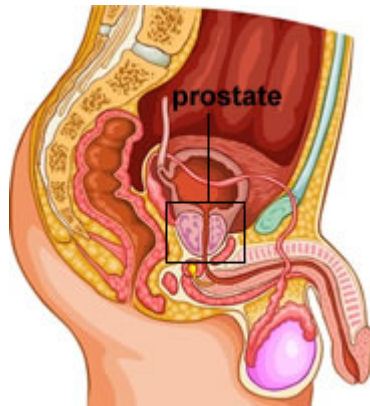
19       48.     The statements attributed to Zielinski include: “Your prostate starts as just a little  
20 gland, but as you get older it can have a big impact on your quality of life. That might be why so  
21 many men over 40 experience changes in their bathroom habits: they need to go much more each  
22 day, they have a weaker urine stream, or they have incomplete bladder emptying. A lot of men  
23 also notice they’re waking up at night once, twice, or more to urinate.” Even though this page does  
24 not use the medical term “benign prostate hyperplasia,” it precisely describes the cause and  
25 symptoms of BPH.

26       49.     Similarly, Defendants’ website has a checklist of “questions [men over 40] must  
27 ask.” These questions include: “Am I urinating more frequently during the day? Do I wake up at  
28 night to urinate? When I urinate, do I empty the bladder completely? Is my romantic life

1 suffering? Do I also keep a lookout for where the nearest bathroom is?” The website explains that  
2 if one answers yes to any of these questions, then the reader may be living with an “aging  
3 prostate.” If this is the case, then “activities like sports could be constantly interrupted by an urge  
4 to go, and you may not feel fully rested when you wake up each morning.” Again, this page  
5 precisely describes the symptoms of BPH.

6 50. Defendants’ website also promises that Super Beta Prostate will treat or cure the  
7 symptoms of BPH. Specifically, Defendants promise that it will result in: “Stronger Urinary  
8 Flow,” “Improved Bladder Emptying,” promote “Healthy Sleeping Habits,” promote “Healthy  
9 Prostate Function,” “Less Frequent Bathroom Trips,” “More complete bladder emptying,”  
10 “Sleep[ing] more through the night,” “Wak[ing] up feeling more refreshed,” and “Feel[ing]  
11 younger and more energetic!”

12 51. Additionally, New Vitality advertises Super Beta Prostate on  
13 <http://thesuperbetaprostate.org/>. The advertisement with Joe Theismann discussed above, *see*  
14 *supra*, starts playing automatically when one visits this website. New Vitality reviewed and  
15 approved the text that appears on this websites, which reads: “One of the main indicators of [a]  
16 slowdown in normal body function in middle-aged men is the expansion of our prostate.” The  
17 website then lists the symptoms of BPH: “Increased urination during the daytime,” “Waking to  
18 urinate at night,” “The feeling of an ‘unempty’ bladder even after urinating,” “The urge to urinate  
19 again right after relieving myself,” and “Problems in the bedroom.” The website then includes a  
20 picture of an enlarged prostate:



52. Each of these statements is false and misleading because Super Beta Prostate does not, in fact, treat the symptoms of BPH. Nor does it produce the effects described.

- Super Beta Prostate's Label

53. The label for Super Beta Prostate includes claims that it "Helps to Support Healthy Urinary Flow and Function," "Reduces Frequent Urination," "Helps Aging Prostate," and "Supports Continuous Sleep." Each of these statements directly addresses a symptom of BPH. Each of these statements is false and misleading because Super Beta Prostate does not, in fact, treat the symptoms of BPH. Nor does it produce the effects described. The label is reproduced below.



- Super Beta Prostate Is Illegally Distributed Under Federal Law

54. Under the Food, Drug, And Cosmetic Act ("FDCA"), 21 U.S.C. § 321(g)(1)(B), articles intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease are drugs. Under § 321(g)(1)(C), articles intended to affect the structure or any function of the body of man are also classified as drugs. Super Beta Prostate's labeling, website, and advertising materials suggests the use of Super Beta Prostate for the treatment of BPH. Super Beta Prostate is therefore a "drug" as defined by 21 U.S.C. § 321(g)(1)(B) and (C).

















1 113. Defendants' conduct, described herein, violated the "unfair" prong of the UCL by  
2 violating the policy or spirit of the Magnuson-Moss Warranty Act, CLRA, FAL, FDCA, DSHEA,  
3 and regulations promulgated thereunder.

4 114. Defendants' conduct, described herein, violated the "fraudulent" prong of the UCL  
5 by making the Misrepresentations.

6 115. Plaintiffs and California Subclass members suffered lost money or property as a  
7 result of Defendants' UCL violations because they would not have purchased Super Beta Prostate  
8 if the true facts concerning its lack of safety and efficacy had been known.

9 **COUNT VIII**

10 **Violation Of California's False Advertising Law,**

11 **California Business & Professions Code §§ 17200, *et seq.***

12 116. Plaintiffs hereby incorporate by reference the allegations contained in all preceding  
13 paragraphs of this complaint.

14 117. Plaintiffs bring this claim individually and on behalf of the members of the  
15 proposed California Subclass against all Defendants.

16 118. California's False Advertising Law, Bus. & Prof. Code §§ 17500, *et seq.*, makes it  
17 "unlawful for any person to make or disseminate or cause to be made or disseminated before the  
18 public in this state, ... in any advertising device ... or in any other manner or means whatever,  
19 including over the Internet, any statement, concerning ... personal property or services, professional  
20 or otherwise, or performance or disposition thereof, which is untrue or misleading and which is  
21 known, or which by the exercise of reasonable care should be known, to be untrue or misleading."

22 119. Defendants committed acts of false advertising, as defined by §17500, by making  
23 the Misrepresentations.

24 120. Defendants knew or should have known, through the exercise of reasonable care  
25 that the Misrepresentations were untrue and misleading.

26 121. Defendants' actions in violation of § 17500 were false and misleading such that the  
27 general public is and was likely to be deceived.  
28

1 122. Plaintiffs and California Subclass members suffered lost money or property as a  
2 result of Defendants' FAL violations because they would not have purchased Super Beta Prostate if  
3 the true facts had been known.

4 **PRAYER FOR RELIEF**

5 WHEREFORE, Plaintiffs, individually and on behalf of all others similarly situated, seek  
6 judgment against Defendants, as follows:

- 7 a. For an order certifying the nationwide Class and the Subclass under Rule 23 of the  
8 Federal Rules of Civil Procedure and naming Plaintiffs as representatives of the  
9 Class and Subclass and Plaintiffs' attorneys as Class Counsel to represent the Class  
10 and Subclass members;
- 11 b. For an order declaring the Defendants' conduct violates the statutes referenced  
12 herein;
- 13 c. For an order finding in favor of Plaintiffs, the nationwide Class, and the Subclass on  
14 all counts asserted herein;
- 15 d. For compensatory and punitive damages in amounts to be determined by the Court  
16 and/or jury;
- 17 e. For prejudgment interest on all amounts awarded;
- 18 f. For an order of restitution and all other forms of equitable monetary relief;
- 19 g. For injunctive relief as pleaded or as the Court may deem proper; and
- 20 h. For an order awarding Plaintiffs and the Class and Subclass their reasonable  
21 attorneys' fees and expenses and costs of suit.

22 **DEMAND FOR TRIAL BY JURY**

23 Plaintiffs demand a trial by jury of all issues so triable.  
24  
25  
26  
27  
28

1 Dated: May 10, 2013

Respectfully submitted,

2 **BURSOR & FISHER, P.A.**

3  
4 By: /s/ L. Timothy Fisher  
L. Timothy Fisher

5 Scott A. Bursor (State Bar No. 276006)  
6 L. Timothy Fisher (State Bar No. 191626)  
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10 E-Mail: scott@bursor.com  
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11 swestcot@bursor.com  
apersinger@bursor.com

12 *Attorneys for Plaintiffs*

1 I, Floyd Luman, declare as follows:

2 1. I am a plaintiff in this action and a citizen of the State of California. I have personal  
3 knowledge of the facts stated herein and, if called as a witness, I could and would testify  
4 competently thereto.

5 2. The complaint filed in this action is filed in the proper place for trial under  
6 California Civil Code Section 1780(d) in that Defendants conduct a substantial amount of business  
7 in this District.

8 3. While living in California, I purchased Super Beta Prostate for personal consumer  
9 use. Prior to my purchase, I reviewed the product's labeling and watched the advertisement with  
10 Joe Theismann discussed in Plaintiffs' Complaint. I purchased Super Beta Prostate in reliance on  
11 the claims that it would treat the symptoms of benign prostate hyperplasia, including the  
12 representations that the product would: provide "a stronger urine flow," provide "more complete  
13 emptying of the bladder," reduce "that sudden urge to go," reduce the need to "get up at night as  
14 much," allow me to "wake up refreshed and ready to tackle anything," and allow me to "sleep  
15 through the night." I also relied upon the claims of Dr. Jeffrey J. Zielinski, the doctor that appears  
16 to endorse Super Beta Prostate in Defendants' commercials, who represented: "If you want a  
17 stronger urine flow, and a more complete emptying of your bladder, I would recommend Super  
18 Beta Prostate. Super Beta Prostate works." I would not have purchased Super Beta Prostate had I  
19 known the true facts concerning its safety, efficacy, and failure to comply with FDA regulations.

20 I declare under the penalty of perjury under the laws of the State of California that the  
21 foregoing is true and correct, executed on May 2<sup>nd</sup>, 2013 at Rancho Murieta, California.  
22

23  
24   
25 FLOYD LUMAN  
26  
27  
28



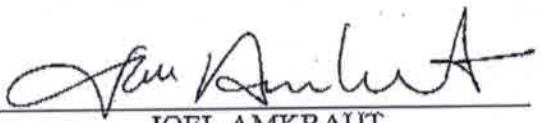
1 I, Joel Amkraut, declare as follows:

2 1. I am a plaintiff in this action and a citizen of the State of California. I have personal  
3 knowledge of the facts stated herein and, if called as a witness, I could and would testify  
4 competently thereto.

5 2. The complaint filed in this action is filed in the proper place for trial under  
6 California Civil Code Section 1780(d) in that Defendants conduct a substantial amount of business  
7 in the Eastern District of California.

8 3. While living in California, I purchased Super Beta Prostate for personal consumer  
9 use. Prior to my purchase, I reviewed the product's labeling and watched the advertisement with  
10 Joe Theismann discussed in Plaintiffs' Complaint. I purchased Super Beta Prostate in reliance on  
11 the claims that it would treat the symptoms of benign prostate hyperplasia, including the  
12 representations that the product would: provide "a stronger urine flow," provide "more complete  
13 emptying of the bladder," reduce "that sudden urge to go," reduce the need to "get up at night as  
14 much," allow me to "wake up refreshed and ready to tackle anything," and allow me to "sleep  
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16 to endorse Super Beta Prostate in Defendants' commercials, who represented: "If you want a  
17 stronger urine flow, and a more complete emptying of your bladder, I would recommend Super  
18 Beta Prostate. Super Beta Prostate works." I would not have purchased Super Beta Prostate had I  
19 known the true facts concerning its safety, efficacy, and failure to comply with FDA regulations.

20 I declare under the penalty of perjury under the laws of the State of California that the  
21 foregoing is true and correct, executed on May 1, 2013 at LOS ANGELES, California.

22  
23  
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25  
26  
27  
28  
JOEL AMKRAUT