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HERBERT GELMAN, MICHAEL  
12 THOMPSON, KEITH SENKOWSKI, VANCE  
MONROE individually and on behalf of others  
13 similarly situated.

**SUPERIOR COURT OF THE STATE OF CALIFORNIA**

**COUNTY OF LOS ANGELES**

16 EDWARD WILLIAMS, HERBERT  
GELMAN, MICHAEL THOMPSON,  
17 VANCE MONROE and KEITH  
SENKOWSKI, on behalf of themselves and  
18 other similarly situated persons,

19 Plaintiffs,

20 vs.

21 BIOTAB NUTRACEUTICALS, Inc., a  
corporation, TAMARA GIBSON, an  
individual, ROBERT WINTER, JR., an  
22 individual, ROBERT WINTER, SR., an  
individual, and DOES 1 through 100,  
23 inclusive,

24 Defendants.

CASE NO. BC414808 [consolidated with]  
CASE NO. BC415948

**CLASS ACTION**

**SECOND AMENDED CONSOLIDATED  
COMPLAINT**

Original Complaints Filed:  
CASE NO. BC414808 - May 29, 2009  
CASE NO. BC415948 - June 16, 2009

Hon. Yvette M. Palazuelos

**DEMAND FOR JURY TRIAL**

**CASE NO. BC414808**

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1 Plaintiffs EDWARD WILLIAMS, HERBERT GELMAN, MICHAEL THOMPSON,  
2 VANCE MONROE and KEITH SENKOWSKI (collectively "Plaintiffs"), individually and on  
3 behalf of all others similarly situated, bring this putative consumer class action against Defendants  
4 BIOTAB NUTRACEUTICALS, INC. ("Biotab"), TAMARA GIBSON ("Gibson"), ROBERT  
5 WINTER, JR. ("Winter, Jr."), ROBERT WINTER, SR. ("Winter, Sr."), and DOES 1-50, inclusive  
6 (collectively "Defendants"), and allege, as their Second Amended Consolidated Complaint, as  
7 follows:

8  
9 **SUMMARY OF CONSOLIDATED COMPLAINT**

10  
11 1. Pursuant to Stipulation of all parties, Plaintiffs hereby submit this Second  
12 Amended Consolidated Complaint, which simply adds Vance Monroe as a named Plaintiff in  
13 accordance with the terms of the Settlement reached in this action.

14  
15 2. This action arises out of a massive fraud perpetrated by Defendants' in the  
16 manufacture, marketing and distribution of the ExtenZe Male Enhancement Nutritional  
17 Supplement ("ExtenZe"), which Defendants have sold and continue to sell as "male enhancement"  
18 products. ExtenZe is nothing more than the latest version of the classic "snake oil" scam aimed at  
19 taking advantage of male consumers with lurid promises of a larger penis. Defendants market and  
20 promote ExtenZe as 100% guaranteed to increase penis size. The product, however, does not  
21 work as advertised or guaranteed.

22  
23 3. In the course of manufacturing, marketing, distributing, and selling ExtenZe,  
24 Defendants, individually and acting as agents, employees, servants or alter egos of each other,  
25 have committed and continue to commit illicit business practices in direct violation of: (1) an  
26 Injunction and Final Judgment entered on or about July 14, 2006 by the Superior Court of the

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1 State of California, in and for the County of Orange (hereinafter referred to as the "2006  
2 Injunction," a copy of which is attached hereto as Exhibit "1"); (2) California's Consumer Legal  
3 Remedies Act ("CLRA," *Civil Code* §§ 1750-1784); (3) California's False Advertising Law  
4 ("FAL," *Business & Professions Code* § 17500-17536); (4) California's Unfair Competition Act  
5 ("UCL," *Business & Professions Code* § 17200 *et seq.*); (5) California's Sherman Food, Drug, &  
6 Cosmetic Act (the "Sherman Law," *Health & Safety Code* §§ 108975-111915); and (6)  
7 California's warranty laws. Defendants' wrongful and illegal conduct includes, but is not limited  
8 to, making scientifically unsupported and deceptive claims regarding the purported beneficial  
9 effects of ExtenZe, through package labeling and mass media marketing, which are illegal, false,  
10 misleading and/or omit material facts.

11  
12 4. Defendants, individually and acting as agents, servants or employees of Biotab,  
13 make false representations through mass media advertising, including but not limited to  
14 representations that ExtenZe is a product guaranteed to increase the size of your penis in length  
15 and girth, and that the consumer will see "an increase in size and width." The misrepresentations  
16 made by Defendants in marketing ExtenZe violate California's consumer protection statutes, and  
17 are a direct violation of the 2006 Injunction.

18  
19 5. Defendants, individually and acting as agents, alter-ego's, servants or employees  
20 of each other, assert in advertisements, among other things, false, deceptive and misleading  
21 representations, which include but are not limited to, that:

22  
23 a) "the same type of research that created miracle drugs like Viagra has now  
24 created [ExtenZe];"

25  
26 b) ExtenZe is "clinically tested and doctor approved;"

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- c) "ExtenZe is a safe and effective blood flow stimulator that makes the most of your natural potential. The penis is made up of three erectile chambers. When aroused, blood flow increases into these chambers, and the outflow of blood is decreased, producing an erection. The more blood that is pushed into the chambers, the larger you can become. ExtenZe helps force more blood flow so these chambers stretch, creating substantial growth in both length and girth. In just a few weeks, your penis can be larger. . . ;"
- d) ExtenZe has "the newest, most advanced medically designed formula ever created for male sexual enhancement;"
- e) "ExtenZe is designed to one main thing...increase the size of your penis."
- f) ExtenZe is "The #1 Penis Growth Compound Worldwide;"
- g) "It Doesn't Matter If You're Small, Medium, or Large...ExtenZe Can Make You Up to 25% Larger" (and prominently displaying a picture of two rulers demonstrating the difference between the "average" penis size and a penis that is 25% larger);
- h) "ExtenZe is a revolutionary medically designed malesexual enhancement supplement that can increase the size of your penis in both length and girth";
- i) "GET BIGGER. GET WIDER.";

1 j) "Being larger is not impossible and it doesn't require surgery, prescriptions,  
2 gadgets or exercises. All it takes is taking a simple tablet";  
3

4 See Exhibits 2-7.  
5

6 6. These claims (as well as others) about ExtenZe are false and misleading.  
7 Defendants cannot substantiate any of the claims about ExtenZe and do not have any reliable  
8 scientific evidence to support such claims.  
9

10 7. Defendants' deceptive advertising conveys a single, consistent false and  
11 misleading message to consumers: that ExtenZe can increase penis size. As a result of these  
12 misrepresentations, Defendants have violated the 2006 Injunction and applicable consumer  
13 protection statutes, including but not limited to the UCL, FAL, CLRA, and California's Sherman  
14 Law. Defendants have also illegally marketed ExtenZe as a drug, even though the product has not  
15 been approved as a drug by the Food and Drug Administration ("FDA").  
16

17 8. Defendants, individually and acting as agents, servants or employees of Biotab,  
18 have "misbranded" ExtenZe as a male enhancement drug which will "increase the size of your  
19 penis in just a few weeks." A product is "misbranded" if its labeling is "**false or misleading in**  
20 **any particular.**" *Health & Safety Code* §§ 110660 & 111330 (emphasis added). "In determining  
21 whether the labeling or advertisement of a food, drug, device, or cosmetic is misleading, all  
22 representations made or suggested by **statement, word, design, device**, sound, or any  
23 combination of these, shall be taken into account. The extent that the labeling or advertising fails  
24 to reveal facts concerning the food, drug, device, or cosmetic, or consequences of customary use  
25 of the food, drug, device, or cosmetic, shall also be considered." *Id.* § 110290 (emphasis added).  
26 It is a violation of the Sherman Law for any person to (1) misbrand any food or drug (*Id.* §§

1 110398 & 111445), (2) manufacture, sell, deliver, hold, or offer for sale any food or drug that is  
2 misbranded (*Id.* §§ 110398 & 111440), or (3) receive in commerce any food or drug that is  
3 misbranded, or deliver or proffer it for delivery (*Id.* §§ 110770 & 111450). Defendants' violations  
4 of the UCL, FAL and CLRA are the equivalent of "misbranding" under the Sherman Law and are  
5 in violation of the 2006 Injunction.

6  
7 9. The ExtenZe packaging displays the disclaimer that the statements made on the  
8 packaging "have not been evaluated by the [FDA]." In this action, Plaintiffs do not sue to subject  
9 Defendants to the FDA pre-market approval process, but rather, to stop the false advertising and  
10 marketing of ExtenZe as described herein.

11  
12 10. Defendants, individually and acting as agents, servants or employees of Biotab,  
13 further fail to honor their warranty obligations by providing a product that: (1) fails to pass  
14 without objection in the trade under the description provided; (2) is not fit for the ordinary purpose  
15 for which such goods are used; (3) is not fit for the particular purpose for which it was sold (4) is  
16 not adequately contained, packaged, and labeled; (5) does not conform to the promises or  
17 affirmations of fact made on the container or label; and/or (6) violates the warranties contained in  
18 the California *Uniform Commercial Code*, §§ 2313, 2314, and 2315.

19  
20 11. Defendants do not have and never have had "scientific substantiation," as that  
21 concept is defined in the 2006 Injunction, for their claims that ExtenZe improves, among other  
22 things, penis size and male sexual prowess. In July of 2006, the 2006 Injunction was entered  
23 enjoining the Defendants, individually, and all officers, employees, representatives, persons,  
24 corporations or other entities acting by, through and on behalf of Defendants, including  
25 Defendants' employees acting within the scope of their employment, from making factual  
26 representations about the nature, efficacy and/or safety of ExtenZe (or any other "Covered

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1 Product”) without “scientific substantiation” of those claims, as that concept is defined in the 2006  
2 Injunction. Defendants, individually and acting as agents, alter egos, servants or employees of  
3 each other, continue to make factual assertions about the nature, efficacy and/or safety of ExtenZe  
4 without any scientific substantiation. Defendants Gibson, Winter, Jr. and Winter, Sr., as owners,  
5 managers, officers and/or directors of the company [Biotab’s predecessor] making such  
6 representations at the time the 2006 Injunction was entered, are expressly subject to the injunction,  
7 have affirmative notice as a result, and are therefore subject to a legally enforceable mandate to  
8 cease and desist from such unsupported representations. As owners, managers, officers and/or  
9 directors of Biotab, Defendants Gibson, Winter, Jr. and Winter, Sr., as well as Defendant Biotab,  
10 are thus in violation of the 2006 Injunction as a result of their wrongful conduct as herein  
11 described.

12  
13 12. Plaintiffs and other members of the putative class have suffered injury in fact and  
14 have lost money as a result of Defendants’ false representations. Plaintiffs purchased ExtenZe  
15 because of the claims by Defendants that ExtenZe is capable of increasing penis size. Plaintiffs  
16 would not have purchased ExtenZe if they had known that this advertising was false.

17  
18 13. Defendants’ false and misleading statements should be enjoined because there is  
19 no scientific substantiation for their claims regarding the ability of ExtenZe to increase penis size.  
20 In addition, Defendants should be compelled to provide restitution and award damages, costs and  
21 attorneys fees, to Plaintiffs and other members of the putative class whom Defendants duped into  
22 purchasing ExtenZe.

23  
24 **VENUE AND JURISDICTION**

25  
26 14. Venue is proper in this Court pursuant to California *Code of Civil Procedure* §

1 395(a) and California *Civil Code* §1780(d), in that defendant Biotab has its principal place of  
2 business in the County of Los Angeles. Plaintiffs are informed and believe that defendants  
3 Gibson, Winter, Jr. and Robert Winter, Sr. also may reside in the County of Los Angeles, and  
4 work at the Biotab offices located in Monrovia, California and/or Pasadena, California in the  
5 County of Los Angeles.

6  
7 15. This Court has subject matter jurisdiction over this class action pursuant to *Bus.*  
8 *& Prof. Code* § 17200, et seq., *Bus. & Prof. Code* § 17500, et seq., *Civ. Code* § 1750, et seq.,  
9 *Code of Civil Procedure* § 382, and other provisions of the California Codes.

10  
11 16. Defendant Biotab is incorporated under the laws of the state of California, and its  
12 principal place of business is located in Monrovia, California, County of Los Angeles. California  
13 has a significant contact or aggregation of contacts to the claims at issue herein. Defendant Biotab  
14 does business in California, Defendant Biotab's headquarters and principal offices are in  
15 California, a significant number of Defendant Biotab's customers are California residents, and the  
16 wrongful acts alleged herein, which have affected members of the putative class throughout the  
17 United States, emanated from Defendant Biotab's owners, managers, officers, directors and/or  
18 employees in California and were effectuated in California.

19  
20 17. Plaintiffs are informed and believe that each of the individual Defendants,  
21 Gibson, Winter, Jr. and Robert Winter, Sr. (hereinafter collectively the "Individual Defendants"),  
22 is a citizen and resident of the state of California, and is employed and doing business in the city  
23 of Monrovia, state of California.

24  
25 **THE PARTIES**

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1           18. Defendant Biotab Nutraceuticals, Inc. is a California corporation, with its  
2 principal place of business at 401 East Huntington Drive, Monrovia, California, 91016, in Los  
3 Angeles County. Defendant Biotab, directly and through its agents, officers, employees and  
4 affiliates, has substantial contacts with and receives benefits and income from and through the  
5 State of California. Plaintiffs are informed and believe that defendant Biotab is the owner,  
6 manufacturer and distributor of ExtenZe, and, through its agents, officers, employees and  
7 affiliates, created and/or authorized the false, misleading and deceptive advertisements and/or  
8 packaging and labeling for ExtenZe.

9  
10           19. Plaintiffs are informed and believe that defendant Tamara Gibson is currently  
11 Chief Executive Officer, Chief Financial Officer and a Director of defendant Biotab, and 50%  
12 owner of the company, and is a resident of the State of California.

13  
14           20. Plaintiffs are informed and believe that defendant Robert Winter, Jr. is currently  
15 Secretary and a Director of defendant Biotab, and 50% owner of the company, and is a resident of  
16 California.

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18           21. Plaintiffs are informed and believe that defendant Robert Winter, Sr. is a current  
19 or former owner, director, officer, employee and/or manager of defendant Biotab, and is a resident  
20 of California.

21  
22           22. Individual and representative plaintiff Edward Williams is a resident of the city  
23 of Lithonia in the state of Georgia. Plaintiff Williams purchased ExtenZe tablets by telephone  
24 communication to Defendants in California after he saw Defendants' television advertisements.  
25 Plaintiff Williams did not experience an increase in the size of his penis as a result of using  
26 ExtenZe. Plaintiff Williams is informed and believes that the ExtenZe product he purchased was

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1 manufactured in California and shipped to him from California, that Defendants' advertisements  
2 emanated from California, that his credit card was charged from Defendants' location in  
3 California, and that, as a result, his purchase occurred in California.

4  
5 23. Individual and representative plaintiff Herbert Gelman is an individual residing  
6 in Los Angeles County, California. Plaintiff Gelman purchased ExtenZe tablets on-line. In doing  
7 so, Plaintiff Gelman relied upon Defendants' advertising on television and the internet, on the print  
8 advertising mailed to him with his first shipment of ExtenZe and other promotional materials,  
9 which were prepared and approved by Defendants and their agents and disseminated through  
10 national advertising media and mailed directly to him, and which contained the misrepresentations  
11 alleged herein. Plaintiff Gelman did not experience an increase in the size of his penis as a result  
12 of using ExtenZe. Plaintiff Gelman is informed and believes that the ExtenZe tablets he  
13 purchased were manufactured in California and shipped to him from California, that Defendants'  
14 advertisements emanated from California, that his credit card was charged from Defendants'  
15 location in California, and that, as a result, his purchase occurred in California.

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17 24. Individual and representative plaintiff Michael Thompson is a resident of the city  
18 of Moreno Valley in the state of California. Plaintiff Thompson purchased ExtenZe tablets by  
19 telephone communication to Defendants in California after he saw Defendants' television  
20 advertisements. Plaintiff Thompson did not experience an increase in the size of his penis as a  
21 result of using ExtenZe. Plaintiff Thompson is informed and believes that the ExtenZe product he  
22 purchased was manufactured in California and shipped to him from California, that Defendants'  
23 advertisements emanated from California, that his credit card was charged from Defendants'  
24 location in California, and that, as a result, his purchase occurred in California.

25  
26 25. Individual and representative plaintiff Keith Senkowski is a resident of the city

1 of Grayling in the state of Michigan. Plaintiff Senkowski purchased ExtenZe tablets at a Walmart  
2 after he saw Defendants' television advertisements. Plaintiff Senkowski did not experience an  
3 increase in the size of his penis as a result of using ExtenZe. Plaintiff Senkowski is informed and  
4 believes that the ExtenZe product he purchased was manufactured in California and shipped to  
5 Walmart from California, and that Defendants' television advertisements emanated from  
6 California.

7  
8 26. Individual and representative plaintiff Vance Monroe is a resident of the state of  
9 California. Plaintiff Monroe purchased ExtenZe tablets at GNC and CVS after he saw Defendants'  
10 television advertisements in or around 2009. Plaintiff Monroe did not experience an increase in the  
11 size of his penis as a result of using ExtenZe.

12  
13 27. The true names and capacities, whether individual, corporate, associate or  
14 otherwise of defendants Does 1 through 100, inclusive, and each of their roles in this case, are  
15 unknown to Plaintiffs, who therefore sues said defendants by such fictitious names. Plaintiffs  
16 further allege that each of said fictitiously named defendants is in some manner responsible for the  
17 acts and occurrences set forth herein. Plaintiffs will amend this Consolidated Complaint to show  
18 their true names and capacities when the same is ascertained, as well as the manner in which each  
19 fictitiously named defendant is responsible.

20  
21 28. All Defendants, individually and acting as agents, servants or employees of  
22 Biotab, are authorized to do business in California, have sufficient minimum contacts with  
23 California, and/or otherwise have intentionally availed themselves of the markets in California  
24 through the promotion, marketing and sale of their products in California, such that the exercise of  
25 jurisdiction by this Court is permissible under traditional notions of fair play and substantial  
26 justice.



1 substantial profits to Defendants, all to the detriment of the consuming public. Thus, Defendants  
2 aided and abetted and knowingly assisted each other in breach of their respective duties and  
3 obligations as herein alleged.

4  
5 **FACTUAL ALLEGATIONS COMMON TO ALL CAUSES OF ACTION**  
6

7 32. Each of the Defendants named in this action has played a role in the unlawful,  
8 fraudulent and unfair business practices that give rise to this lawsuit.

9  
10 33. Defendants represent that the ExtenZe Products are scientifically designed,  
11 “clinically tested,” and “doctor approved” to increase penis size, and that ExtenZe is capable of  
12 making a man’s penis “25% larger.”

13  
14 34. Defendants guarantee that consumers will see results within a week of taking the  
15 ExtenZe capsule.

16  
17 35. Defendants instruct all members of the class that consumers must take ExtenZe  
18 for four months before the product will reach its “full potential” and states “ExtenZe takes  
19 between three and four months to reach its full potential....don’t stop after the first month. This  
20 product was designed to take a gradual three to four month period to work...During the fourth  
21 month, the maximum increase in length and width will be realized....You’ve now made the  
22 decision to increase your size...stick with it for a full four months. Don’t stop taking ExtenZe  
23 until you’re happy with your new size.” These statements and others were used to dupe customers  
24 into purchasing at least four packages of ExtenZe, even though Defendants knew they had no  
25 evidence to back these claims and that such claims were false.



1 member of the class. Specifically, Defendants misrepresent that ExtenZe is a “clinically tested”  
2 and “doctor approved” “male enhancement” that will increase penis size. These  
3 misrepresentations are made uniformly to every member of the class because they are contained  
4 on the packaging of ExtenZe and in advertisements and promotional material for ExtenZe.  
5

6 39. Defendants, individually and acting as agents, alter egos, servants or employees  
7 of each other, have adopted varying types of pseudo-scientific nomenclature to refer to the product  
8 commercially known as "ExtenZe," a registered trademark. On the packaging ExtenZe is  
9 denominated "ambesium labidrol," a phrase which has no discernible scientific meaning or  
10 history, and is apparently the product of Defendants' creative entrepreneurship. ExtenZe is also  
11 referred to by Defendants in their literature as "aunctus philtrum," another seemingly scientific  
12 label apparently invented by Defendants. In fact, Plaintiffs are informed and believe that the only  
13 things about ExtenZe which Defendants actually created are the different names used for the  
14 product. The active ingredients in ExtenZe are claimed to be pro-hormones (specifically DHEA  
15 and pregnenolone) and a so-called "proprietary" blend of herbs and hormone stimulants,  
16 euphemistically referred to by Defendants as the "ExtenZe Sexual Response Enhancement Blend."  
17 The ExtenZe herbal blend primarily consists of several well-known ancient herbal supplements,  
18 such as African Yohimbe bark extract, Tribulus terrestris extract, and Korean Ginseng, among  
19 others, which are purported to have various beneficial medicinal attributes. But there is no  
20 scientific support for the claim that the combination of ingredients in ExtenZe is effective or safe  
21 for the advertised and intended use of the product, and this is a direct violation of the 2006  
22 Injunction. The representations, claims, warranties and guarantees made by Defendants regarding  
23 ExtenZe, individually and acting as agents, servants or employees of Biotab, are false, misleading  
24 and/or omit material information. Moreover, ExtenZe is labeled, advertised, marketed, and  
25 promoted as if it has characteristics, uses and/or benefits which in fact the product does not have.  
26 In addition, Defendants have advertised ExtenZe with the intent not to sell the product as

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1 advertised. Of equal importance is the fact that Defendants do not have and never have had,  
2 “scientific substantiation,” and have misbranded the product, within the meaning of the 2006  
3 Injunction, for their false and deceptive representations about the nature, efficacy and/or safety of  
4 ExtenZe.

5  
6 40. Section 201(g)(1) [21 U.S.C. § 321(g)(1)] governs structure/function claims  
7 made for a "dietary supplement," and such claims must be made in accordance with Section  
8 403(r)(6) of the FDCA (21 U.S.C. § 343(r)(6), or the product is subject to regulation as a drug.  
9 Section 403(r)(6) authorizes representations that describe the role of *each* nutrient or dietary  
10 ingredient intended to affect the structure or function of the body, or characterize the way in which  
11 a nutrient or dietary ingredient maintains the structure or function of the body. In the case of  
12 ExtenZe, the penis enlargement structure/function claims made by Defendants do not describe the  
13 effects of *each* nutrient or dietary ingredient included in the product. Instead, Defendants' claims  
14 are made with respect to ExtenZe as a whole.

15  
16 41. The product is misbranded under Section 403(r)(1)(A) of the FDCA and the  
17 Food Labeling Regulations (21 C.F.R. 101, et seq.) in that the labeling makes the unauthorized  
18 nutrient content claim that ExtenZe is "Maximum Strength" when the "Supplement Facts"  
19 included on the packaging admit that most of the ExtenZe ingredients, including the supposedly  
20 active ingredients, do not have established Reference Daily Intake ("RDI") or Daily Reference  
21 Value ("DRV"). The FDA only allows such "maximum" or "high potency" claims to be used to  
22 describe nutrients which are present at 100 per cent or greater of the RDI per reference amount  
23 customarily consumed. In addition, ExtenZe is misbranded because the label bears the claim  
24 "Maximum Strength" but does not indicate which ingredients are described by the claim. These  
25 activities and representations are in direct violation of the 2006 Injunction as set forth herein.

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42. In addition, ExtenZe is misbranded as a dietary supplement under Section 403(r)(1)(B) of the FDCA and the Food Labeling Regulations in that the ExtenZe labeling makes the claim that the product is a male enhancement product which increases penis size, but the mandatory disclaimer that the product is not intended to diagnose, cure, treat, mitigate or prevent a disease is not adjacent to the claim or set off in a box and linked to the claim with an appropriate symbol. While ExtenZe includes a disclaimer in a box on the back panel of the packaging, the pertinent "enhancement" claims are set forth on the front panel, and the only symbol in the disclaimer box links it to an unrelated statement on the rear panel regarding daily values for the folic acid and zinc ingredients in ExtenZe. These activities and representations are in direct violation of the 2006 Injunction as set forth herein.

43. Defendants, individually and acting as agents, alter egos, servants or employees of each other, further represent in their mass media advertising for ExtenZe, and on the product packaging, that ExtenZe has been "clinically tested" and is "doctor approved." As support for their claims that ExtenZe increases the length and width of the penis, Defendants refer to "clinical tests" and endorsements by Daniel S. Stein, M.D. ("Stein"), who is represented to be a licensed physician and an authority on sexual health and medicine, and an organization known as The Foundation for Intimacy. Plaintiffs are informed and believe that Stein is the founder and medical director of The Foundation for Intimacy. Plaintiffs are further informed and believe that Stein has a financial interest in ExtenZe and/or otherwise profits from the sales of ExtenZe. Stein is therefore not an independent medical doctor but rather a biased promoter of ExtenZe with a vested financial interest in the resulting sales. Plaintiffs are informed and believe that Stein's purported "clinical tests" do not provide the "scientific substantiation" for Defendants' ExtenZe claims which is required by the 2006 Injunction. Therefore Defendants' claims and the resulting sales of

1 ExtenZe are in direct violation of the 2006 Injunction. Such “scientific substantiation” must  
2 consist of objective, factual, competent and reliable testing, analysis or research, based on the  
3 expertise of professionals in the relevant subject matter area, and must be conducted pursuant to a  
4 manner and procedure accepted in the scientific community.  
5

6 44. Defendants, individually and acting as agents, alter egos, servants or employees  
7 of each other, rely on purported studies of ExtenZe conducted by Stein and The Foundation for  
8 Intimacy in 2004 and 2008. However, these studies are procedurally deficient, subjective, and too  
9 limited in size and duration to support Biotab's sweeping conclusions. For example, the results of  
10 the 2004 study are set forth in a document dated February 12, 2004 entitled "ExtenZe Clinical  
11 Study." The 2004 ExtenZe study is based on a "study group" consisting of a mere 20 individuals  
12 who were asked to try the product for only eight (8) weeks in the privacy of their homes, rather  
13 than a clinical setting, and instructed to make and record their own measurements of penis size.  
14 Based on the unverifiable measurements of penis size reported by each participant, Defendants  
15 concluded that ExtenZe increases penis size. The 2004 ExtenZe study is inadequate support for  
16 Defendants' claim of clinical testing and medical approval. The 2008 ExtenZe study is similarly  
17 deficient. Thus, the 2004 and 2008 ExtenZe studies conducted by Stein do not constitute  
18 “scientific substantiation” as required by the 2006 Injunction. Further, and in any event, the  
19 studies relied upon by Defendants do not support the claims made by Defendants in marketing the  
20 product, even if such studies constituted "scientific substantiation" (which they are not), as  
21 ExtenZe does not increase the size of a penis beyond that which would normally be obtained  
22 through erection without use of the product, among other things.  
23

24 45. The definition of “scientific substantiation” used by the Orange County Superior  
25 Court in the 2006 Injunction parrots the definition for “competent and reliable scientific evidence”  
26 the Federal Trade Commission ("FTC") has used when addressing other herbal supplements, that

1 is, "tests, analyses, research, studies, or other evidence based on the expertise of professionals in  
2 the relevant area, that has been conducted and evaluated in an objective manner by persons  
3 qualified to do so, using procedures generally accepted in the profession to yield accurate and  
4 reliable results." The clinical studies by Stein and the Foundation for Intimacy do not meet this  
5 criteria because, *inter alia*, the studies were biased, conducted by unqualified persons, and used  
6 procedures not accepted in the profession to yield accurate and reliable results. Defendants'  
7 advertisement of ExtenZe as having been clinically tested is thus misleading and likely to deceive.  
8 Similarly, Defendant's omission of the material fact that the claimed "doctor approv[al]" was from  
9 a biased individual who financially benefits from sale of the product is likewise deceptive and  
10 violates California consumer protection laws and the 2006 Injunction.

11  
12 46. Curiously, in a document entitled "ExtenZe: Medical Reflections," Defendants  
13 tout the alleged beneficial sexual enhancement effects of African Yohimbe bark, the primary  
14 herbal nutrient contained in ExtenZe, but the only purported clinical evidence Defendants cite as  
15 confirming the claimed benefits of Yohimbe consists of animal studies, including a study of the  
16 effects of Yohimbe on 18 male *crocodiles*. Thus, based on a study of reptilian sexual activity,  
17 Defendants conclude that Yohimbe enhances human male sexual performance and increases penis  
18 size.

19  
20 47. As a result of the foregoing, Defendants have misrepresented the testing,  
21 approval and/or certification of ExtenZe. Defendants have misrepresented the affiliation,  
22 connection or association with, or certification by, another, with respect to their "clinical testing"  
23 and "doctor approval" claims for ExtenZe. Thus, Defendants have falsely advertised and  
24 mislabeled the product. Defendants' conduct is in direct violation of the 2006 Injunction.

25  
26 48. Defendants, individually and acting as agents, servants or employees of Biotab,

1 refuse to refund charges to dissatisfied customers upon request despite the fact the product is sold  
2 with a "100% money back guarantee" if the consumer is dissatisfied with the results. However,  
3 Plaintiffs are informed and believe that Defendants' burdensome refund policies and procedures  
4 discourage consumers from pursuing refunds, and that, contrary to their representations,  
5 Defendants do not make refunds available to all dissatisfied ExtenZe purchasers. Significantly,  
6 the 2006 Injunction provides as follows: "The consumer's right to a refund may be conditioned or  
7 denied only on such grounds as are fair and lawful and which are clearly and conspicuously  
8 disclosed at the outset to the consumer." (2006 Injunction, Exh. "A", ¶3(G).) Contrary to the  
9 requirements of the 2006 Injunction, Defendants make it extremely difficult, if not impossible, for  
10 the customer to obtain a refund. Defendants put up unfair road blocks to the claimed "guaranteed  
11 refund" in the form of hidden terms, complex conditions, labyrinthine telephone message systems,  
12 use of mandatory refund vouchers/ ID numbers, outright refusals, required return of unused  
13 product and packaging, and a policy denying refunds for in-store purchasers. Defendants'  
14 actions, therefore, contravene the laws of the State of California and are in violation of the 2006  
15 Injunction.

16  
17 49. Plaintiffs are informed and believe that Defendants also use various distributors  
18 to market and sell the product pursuant to licensing agreements, by which Defendants provide the  
19 distributors with statements and representations to use in promotion of the product. As these  
20 agreements are not available to the consuming public, Plaintiffs are currently unaware of the scope  
21 and nature of these agreements or the extent of the control Defendants exercise over these  
22 distributors. Once discovery is obtained in this regard, Plaintiffs will seek to further amend this  
23 Complaint to set forth the facts concerning the various distributors of the product.

24  
25 **PLAINTIFFS' EXPERIENCES WITH EXTENZE**





1 The commercial included representations that ExtenZe would increase the size and width of the  
2 penis. In making the order, Plaintiff Thompson relied upon these representations. Plaintiff  
3 Thompson provided his debit card number to Defendants to cover the postage cost of his order.  
4

5 62. Defendants, individually and acting as agents, servants or employees of Biotab,  
6 mailed Plaintiff Thompson a seven-day sample of ExtenZe via regular U.S. mail.  
7

8 63. Plaintiff Thompson used ExtenZe pursuant to the directions provided on the  
9 packaging.  
10

11 64. ExtenZe did not increase the size or width of Plaintiff Thompson's penis.  
12

13 65. Subsequently, Plaintiff Thompson received two full month's supplies of ExtenZe  
14 which Defendants' charged to his debit card. Defendants continued to send shipments of ExtenZe  
15 to Plaintiff Thompson from Fall 2007 to December 2008, and Defendants' made charges to  
16 Plaintiff's debit card of approximately \$300.00 over that period. Plaintiff Thompson continued to  
17 use the ExtenZe he received for a few months to see if it would work, but the product did not work  
18 as advertised.  
19

20 66. Beginning in the summer of 2008, Plaintiff Thompson contacted Defendants  
21 numerous times requesting that his money be refunded. Initially, Plaintiff Thompson was unable  
22 to speak to a customer service representative of Defendants in person, but instead he was  
23 repeatedly connected to defendant Biotab's automated system. Although Plaintiff Thompson left a  
24 voice mail message with his name and telephone number, Defendants never responded to his  
25 message. In the Fall of 2008, Plaintiff Thompson was finally able to speak with a Biotab customer  
26 service representative, at which time Plaintiff Thompson informed the representative that he

1 wanted to cancel all orders and obtain a refund. The representative took his cancellation order and  
2 gave Plaintiff Thompson a claim reference number, but no further refund instructions.  
3 Nonetheless, Defendants continued to ship product to Plaintiff Thompson and charge his debit  
4 card thereafter, until December of 2008. At that point, because he did not believe Defendants  
5 would honor his cancellation and refund requests, Plaintiff Thompson canceled his debit card and  
6 discarded all of his remaining ExtenZe product and packaging. Plaintiff Thompson has never  
7 received a refund of any amounts from Defendants.

8  
9 **D. PLAINTIFF KEITH SENKOWSKI**

10  
11 67. In the Spring of 2008, Plaintiff Senkowski bought four to five 30-day supplies of  
12 ExtenZe tablets , for approximately \$200.00, from a Wal-Mart located at 3451 Houghton Lake  
13 Drive in Houghton Lake, Michigan. Plaintiff Senkowski made this purchase after viewing a  
14 television commercial for ExtenZe, which included a representation that the product would  
15 increase the size of his penis, and after reading the labeling on the box. In making this purchase,  
16 Plaintiff Senkowski relied upon these representations.

17  
18 68. Plaintiff Senkowski used ExtenZe pursuant to the directions provided on the  
19 packaging, and consumed his entire supply over a period of months.

20  
21 69. ExtenZe did not increase the size of Plaintiff Senkowski's penis or provide the  
22 benefits advertised.

23  
24 70. In October 2009, Plaintiff Senkowski made at least two phone calls to Biotab's  
25 customer service department to inquire about getting a refund for all of the ExtenZe he purchased,  
26 because the product did not work as advertised. When Plaintiff Senkowski first attempted to call

1 and obtain a refund, the customer service representative hung up on him. On the second attempt,  
2 the representative refused to refund Plaintiff Senkowski's purchase price. Plaintiffs are informed  
3 and believe that Defendants have a policy of not refunding any purchases made at a store.

4  
5 **E. PLAINTIFF VANCE MONROE**

6  
7 71. Plaintiff Vance Monroe purchased ExtenZe tablets in San Diego County at CVS  
8 and GNC in or around 2009.

9  
10 72. In purchasing ExtenZe, Plaintiff Monroe relied upon Defendants' advertising on  
11 television and the internet.

12  
13 73. Plaintiff Monroe took the ExtenZe tablets as advertised and in accordance with  
14 its instructions.

15  
16 74. Plaintiff Monroe did not experience an increase in the size of his penis as a result  
17 of using the ExtenZe products.

18  
19 **CLASS ACTION ALLEGATIONS**

20  
21 75. Plaintiffs and other members of the putative class have suffered injury in fact and  
22 have lost money as a result of Defendants' false representations. Indeed, Plaintiffs purchased  
23 ExtenZe because of the claims by Defendants that ExtenZe is capable of increasing penis size.  
24 Plaintiffs would not have purchased ExtenZe if they had known that the advertising as described  
25 herein was false.



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ExtenZe is misleading and deceptive;

- d. Whether Defendants improperly market ExtenZe as a drug;
- e. Whether Defendants falsely claim that ExtenZe has been "clinically tested" and/or "medically approved;"
- f. Whether Defendants' labeling and/or packaging for ExtenZe is misleading, false and/or illegal;
- g. Whether Defendants represent to consumers that ExtenZe has a characteristic, use, benefit or quality that the product does not have;
- h. Whether Defendants knew or should have known that ExtenZe does not have the characteristics, uses, benefits or qualities for which Defendants advertised the product;
- i. Whether Defendants represented that the ExtenZe Products are of a particular standard, quality, or grade, when they are of another
- j. Whether Defendants engaged in unfair, unlawful and/or fraudulent business practices in marketing and distributing ExtenZe;
- k. Whether Defendants engaged in false advertising with respect to ExtenZe;
- l. Whether Defendants have violated express and/or implied warranty statutes;

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- m. Whether Defendants have been unjustly enriched;
  
- n. The nature and extent of damages and other remedies to which the wrongful conduct of Defendants entitle the Class members;
  
- o. Whether Defendants' representations, concealments and non-disclosures concerning ExtenZe are likely to deceive the consumer;
  
- p. Whether Defendants' representations, concealments and non-disclosures concerning ExtenZe violate the CLRA, FAL and/or the UCL;
  
- q. Whether Defendants have violated the 2006 Injunction by advertising that ExtenZe has any effect on the conditions, disorders, or diseases listed in California Health & Safety Code §110403, including but not limited to sexual impotence;
  
- r. Whether Defendants have violated the 2006 Injunction by violating California Health & Safety Code §110760 by manufacturing, selling, delivering, holding, or offering for sale ExtenZe in a manner that is misbranded;
  
- s. Whether Defendants have violated the 2006 Injunction by failing to include on the package label for ExtenZe an accurate statement of the quantity of the contents in terms of weight, measure, or numerical count;
  
- t. Whether Defendants have violated the 2006 Injunction by failing to honor

1 its stated refund policy, by failing to have fair and reasonable refund  
2 policies and procedures, and by advertising a refund or return policy with  
3 respect to ExtenZe without clearly and conspicuously disclosing in close  
4 proximity to the refund or return policy offer what products, if any, are  
5 excluded from such policy.

6  
7 u. Whether Defendants have violated the 2006 Injunction by making factual  
8 representations about the nature, efficacy, or safety of ExtenZe without  
9 "scientific substantiation," as that term is defined by the 2006 Injunction,  
10 for those claims;

11  
12 v. Whether the Class is entitled to injunctive relief prohibiting the challenged  
13 wrongful practices and enjoining such practices in the future;

14  
15 w. Whether the Class is entitled to punitive damages;

16  
17 x. Whether Plaintiffs and the Class are entitled to attorneys' fees and  
18 expenses; and, in what amount; and

19  
20 y. Whether Defendants are in violation of the 2006 Injunction and is the Class  
21 is entitled to injunctive relief prohibiting the challenged wrongful practices  
22 and enjoining such practices in the future.

23  
24 80. Plaintiffs will fairly and adequately represent the interests of the putative Class  
25 in that Plaintiffs are each a typical purchaser of ExtenZe. Furthermore, Plaintiffs have retained  
26 competent counsel experienced in class action litigation. Plaintiffs' counsel will fairly and

1 adequately protect the interests of the putative class.

2

3           81. This class action is superior to the alternatives, if any, for the fair and efficient  
4 adjudication of this controversy. The relief sought per individual member of the putative class is  
5 small given the burden and expense of individual prosecution of the potentially extensive litigation  
6 necessitated by the conduct of Defendants. Furthermore, it would be virtually impossible for the  
7 putative class members to seek redress on an individual basis. Even if the putative class members  
8 themselves could afford such individual litigation, the court system could not.

9

10           82. Individual litigation of the legal and factual issues raised by the conduct of  
11 Defendants would increase delay and expense to all parties and to the court system. The class  
12 action device presents far fewer management difficulties and provides the benefits of a single,  
13 uniform adjudication, economies of scale and comprehensive supervision by a single court. Given  
14 the similar nature of the putative Class members' claims, and the law applicable thereto, the Court  
15 and the parties will easily be able to manage a class action.

16

17           83. Prosecution of separate actions by individual members of the putative Class  
18 would create the risk of inconsistent or varying adjudications, establishing incompatible standards  
19 of conduct for the Defendants.

20

21           84. Injunctive relief is appropriate as to the Class as a whole because Defendants  
22 have acted or refused to act on grounds generally applicable to the Class.

23

24

**FIRST CAUSE OF ACTION**  
**VIOLATION OF THE CONSUMERS LEGAL REMEDIES ACT**  
**(CAL. CIV. CODE § 1750 et seq.)**

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85. Plaintiffs incorporate by reference all the foregoing allegations as if fully set forth herein.

86. Plaintiffs and members of the putative Class are individuals who have purchased goods (i.e., ExtenZe) for personal use. This cause of action is asserted on behalf of a subclass of the putative Class, comprised of those members who purchased ExtenZe within three (3) years of the commencement of this action.

87. Defendants, individually and acting as agents, alter egos, servants or employees of each other, have represented that ExtenZe has characteristics, uses, benefits, or qualities that the Product does not have. The policies, acts, and practices heretofore described were intended to result in the sale of ExtenZe to the consuming public, particularly self-conscious men seeking to increase the size of their penis, and thus Defendants have violated and continue to violate *California Civil Code* § 1770, including but not necessarily limited to Sections 1770(a)(5), 1770(a)(7) and 1770(a)(9), by misrepresenting that ExtenZe is of a particular standard, quality, or grade.

88. Defendants knew or should have known that ExtenZe does not cause penis growth as represented in Defendants' advertisements and on Defendants' packaging.

89. Plaintiffs and members of the putative Class have each been directly and proximately injured by the conduct of Defendants, and such injury includes economic injury for the loss of the sums which constituted payment for the ExtenZe products they purchased.

90. The Court should enjoin the Defendants from any further sales, marketing or

1 advertisement of ExtenZe which contain the misrepresentations detailed herein as to the standard,  
2 characteristics, uses, benefits and/or qualities of the product. Plaintiffs request that this Court  
3 enter a permanent injunction enjoining Defendants, and their agents, servants, employees and all  
4 persons acting under or in concert with them, to cease and desist from the following acts: (a)  
5 selling, marketing, or advertising ExtenZe with any representation or suggestion that the product  
6 increases penis size without having an adequate and reliable scientific basis for such claims; (b)  
7 selling, marketing, or advertising ExtenZe as a drug having beneficial medicinal properties; (c)  
8 selling, marketing, or advertising ExtenZe with any representation or suggestion that the product is  
9 "clinically tested" or "medically approved;" (d) concealing information regarding the true nature  
10 and origin of the herbal nutrients and prohormones contained in ExtenZe; (e) selling, marketing, or  
11 advertising ExtenZe with any representation or warranty that the product is 100% guaranteed; (f)  
12 engaging in any of the illegal, fraudulent, misleading, unlawful, unfair and/or deceptive conduct  
13 described herein; and (g) engaging in any other conduct found by the Court to be illegal,  
14 fraudulent, misleading, unlawful, unfair and/or deceptive conduct.

15  
16 91. Plaintiffs engaged counsel to prosecute this action and is entitled to recover costs  
17 and reasonable attorney's fees according to proof at trial. Defendants, individually and acting as  
18 agent, servants or employees of Biotab have failed to make or provide an appropriate correction,  
19 repair or replacement, or other remedy with respect to the product.

20  
21 92. Pursuant to *California Civil Code* § 1782, Plaintiff Williams, on behalf of  
22 himself and all other similarly situated consumers, notified Defendants on April 2, 2009 (via  
23 letter) of the alleged violations of Section 1770 and demanded that the same be corrected and  
24 refunds provided. Defendants did not provide the requested relief. On June 16, 2009 Plaintiff  
25 Gelman, on behalf of himself and all other similarly situated consumers, notified Defendants via  
26 letter of the alleged violations of Section 1770 and demanded that the same be corrected.

1 Defendants did not respond. Plaintiffs and the members of the class now include a request for  
2 damages.

3  
4 **SECOND CAUSE OF ACTION**  
5 **VIOLATION OF UNFAIR COMPETITION ACT**  
6 **(CAL. BUS. & PROF. CODE § 17200 et seq.)**  
7 **(Fraudulent, Unfair and Unlawful Conduct Prongs of the Act)**  
8

9 93. Plaintiffs incorporate by reference all the above allegations as if fully set forth  
10 herein.

11  
12 94. In the advertising of ExtenZe, Defendants make false and misleading statements  
13 that ExtenZe will increase penis size. Defendants do not have the requisite competent and reliable  
14 scientific evidence to support the claims about ExtenZe made in Defendants' advertising,  
15 packaging and labeling. Defendants are aware the claims they make about ExtenZe are false,  
16 misleading, unsubstantiated and unreasonable.

17  
18 95. The actions of Defendants, as complained herein, constitute fraudulent and unfair  
19 practices committed in violation of the Unfair Competition Act.

20  
21 96. Defendants have peddled, and continue to peddle, their misrepresentations  
22 through a long-term television and internet advertising campaign containing misrepresentations  
23 which constitute fraudulent and unfair practices.

24  
25 97. Plaintiffs and the putative class members were misled into purchasing ExtenZe  
26 by Defendants' deceptive conduct as alleged hereinabove.



1 generally achieve with the advertised product or service in actual, albeit variable, conditions of  
2 use; (3) advertisements presenting endorsements by what are represented, directly or by  
3 implication, to be “actual consumers” utilize actual consumers, or clearly and conspicuously  
4 disclose that the persons in such advertisements are not actual consumers of the advertised  
5 product; (4) the endorsement of a claimed expert be supported by an actual exercise of that  
6 expert's claimed expertise in evaluating product features or characteristics with respect to which he  
7 or she is expert and which are relevant to an ordinary consumer’s use of or experience with the  
8 product; and (5) when there exists a connection between the endorser and the seller of the  
9 advertised product that might materially affect the weight or credibility of the endorsement (i.e.,  
10 the connection is not reasonably expected by the audience), such connection must be fully  
11 disclosed. Defendants' violations of these FTC guidelines regarding endorsements and  
12 testimonials are further evidence that Defendants' conduct in the marketing and sale of ExtenZe is  
13 deceptive and unfair.

14  
15 103. In addition, Defendants’ use of various forms of advertising media to advertise,  
16 call attention to or give publicity to the sale of goods or merchandise which are not as represented  
17 in any manner constitutes unfair competition, unfair, deceptive, untrue or misleading advertising,  
18 and an unlawful business practice within the meaning of *Business & Professions Code* §§ 17531  
19 and 17200, which advertisements have deceived and are likely to deceive the consuming public, in  
20 violation of *Business & Professions Code* § 17500. There were reasonably available alternatives  
21 to further Defendants’ legitimate business interests, other than the conduct described herein. All  
22 of the conduct alleged herein occurs and continues to occur in Defendants’ business. Defendants’  
23 wrongful conduct is part of a pattern or generalized course of conduct.

24  
25 104. Plaintiffs and other members of the putative Class have suffered injury in fact  
26 and have lost money as a result of Defendants' false representations.

1           105. Plaintiffs request that this Court enter such orders or judgments as may be  
2 necessary to restore to any person in interest any money which may have been acquired by means  
3 of the above-referenced unfair and deceptive practices as provided in *Bus. & Prof. Code* § 17203,  
4 and for such other relief as set forth below.

5  
6           106. Defendants have failed and refused to accede to Plaintiffs' requests for refunds of  
7 the amounts spent by Plaintiffs and other putative class members to purchase ExtenZe. Plaintiffs  
8 are informed and believe and thereon alleges that Defendants will continue to fail and refuse to  
9 accede to requests for refunds. Plaintiffs are informed and believe that Defendants have failed to  
10 accede to the requests of Plaintiffs to cease the unfair business acts or practices, and to correct the  
11 misrepresentations and deceptive conduct.

12  
13           107. Plaintiffs request that this Court enter a permanent injunction enjoining  
14 Defendants, and their agents, servants, employees and all persons acting under or in concert with  
15 them, to cease and desist from the following acts: (a) selling, marketing, or advertising ExtenZe  
16 with any representation or suggestion that the product increases penis size without having an  
17 adequate and reliable scientific basis for such claims; (b) selling, marketing, or advertising  
18 ExtenZe as a drug having beneficial medicinal properties; (c) selling, marketing, or advertising  
19 ExtenZe with any representation or suggestion that the product is "clinically tested" or "medically  
20 approved;" (d) concealing information regarding the true nature and origin of the herbal nutrients  
21 and prohormones contained in ExtenZe; (e) selling, marketing, or advertising ExtenZe with any  
22 representation or warranty that the product is "100% guaranteed;" (f) engaging in any of the  
23 illegal, fraudulent, misleading, unlawful, unfair and/or deceptive conduct described herein; and (g)  
24 engaging in any other conduct found by the Court to be illegal, fraudulent, misleading, unlawful,  
25 unfair and/or deceptive conduct and that such conduct is in violation of the 2006 Injunction.

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c. ExtenZe is misbranded because its labeling does not conform with the requirements for nutrient content or health claims as required by *Health & Safety Code* § 110670, which governs Defendants' conduct; and,

d. ExtenZe is unlawfully labeled in violation of *Health & Safety Code* §§ 110760 and 114089, which governs Defendants' conduct;

e. ExtenZe is unlawfully labeled in violation of California law, which governs Defendants' conduct, as the labeling is false and/or misleading in claiming that the product is doctor approved and clinically tested; and,

f. ExtenZe is unlawfully labeled in violation of California law, which governs Defendants' conduct, as the labeling suggests that the product is safe and effective for its intended use when such evidence has not been established.

112. There were reasonably available alternatives to further Defendants' legitimate business interests, other than the conduct described herein.

113. Plaintiffs and other putative class members suffered injury in fact and monetary damage in that they purchased ExtenZe which was being sold illegally since the four years prior to the filing of the original Complaint in this action.

114. Plaintiffs request that this Court enter such orders or judgments as may be necessary to restore to any person in interest any money which may have been acquired by means

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1 of such illegal practices as provided in *Bus. & Prof. Code* § 17203, and for such other relief as set  
2 forth below.

3

4 115. Defendants have made difficult, failed and refused to accede to the request of  
5 Plaintiffs for a refund on the amount spent by Plaintiffs and other putative class members to  
6 purchase ExtenZe. Plaintiffs are informed and believe and thereon allege that Defendants will  
7 continue to make difficult, fail and refuse to accede to requests for refunds. Defendants also have  
8 failed to accede to the request of Plaintiffs to cease the unfair business acts or practices, and to  
9 correct the misrepresentations and deceptive conduct

10

11 116. Plaintiffs request that this Court enter a permanent injunction enjoining  
12 Defendants, and their agents, servants, employees and all persons acting under or in concert with  
13 them, to cease and desist from the following acts: (a) selling, marketing, or advertising ExtenZe  
14 with any representation or suggestion that the product increases penis size without having an  
15 adequate and reliable scientific basis for such claims; (b) selling, marketing, or advertising  
16 ExtenZe as a drug having beneficial medicinal properties; (c) selling, marketing, or advertising  
17 ExtenZe with any representation or suggestion that the product is "clinically tested" or "medically  
18 approved;" (d) concealing information regarding the true nature and origin of the herbal nutrients  
19 and prohormones contained in ExtenZe; (e) engaging in conduct in violation of the California  
20 Health & Safety Code as alleged herein; (f) engaging in any of the illegal, fraudulent, misleading,  
21 unlawful, unfair and/or deceptive conduct described herein; and (g) engaging in any other conduct  
22 found by the Court to be illegal, fraudulent, misleading, unlawful, unfair and/or deceptive conduct.

23

24 Plaintiffs engaged counsel to prosecute this action and is entitled to recover costs and reasonable  
25 attorney's fees according to proof at trial.

26

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**FOURTH CAUSE OF ACTION**

**VIOLATION OF UNFAIR COMPETITION ACT**

**(CAL. BUS. & PROF. CODE § 17200 et seq.)**

**(Unlawful Conduct Prong of the Act – Violations of the 2006 Injunction)**

117. On June 30, 2006, the People of the State of California filed a Complaint for Civil Penalties, Injunction, and other Equitable Relief against Dish Direct, Inc. which is upon information and belief, the parent and/or predecessor of Defendant Biotab, and the owners and managers of Dish Direct, Inc., Defendants Gibson, Winter, Jr., and Winter, Sr. (collectively referred to herein as the “ExtenZe Defendants”) in the Superior Court of the State of California, County of Orange. The Complaint alleged false and misleading advertising in violation of *Bus. & Prof. Code* § 17500 and unfair competition in violation of *Bus. & Prof. Code* § 17200 as a result of the ExtenZe Defendants’ marketing and advertising of ExtenZe. On July 14, 2006, the ExtenZe Defendants entered into a permanent injunction. The 2006 Injunction was effective upon entry of judgment and permanently enjoined and restrained the ExtenZe Defendants, and their “officers, employees, representatives, persons, corporations or other entities acting by, through or on behalf of [the ExtenZe Defendants], or within the course and scope of their employment by [the ExtenZe Defendants], with actual or constructive notice of [the 2006 Injunction]” from, among other things:

- a. advertising that ExtenZe has any effect on the conditions, disorders, or diseases listed in California Health & Safety Code §110403, including but not limited to sexual impotence;
- b. manufacturing, selling, delivering, holding, or offering for sale ExtenZe in a manner that is misbranded;

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- c. failing to include on the package label for ExtenZe an accurate statement of the quantity of the contents in terms of weight, measure, or numerical count;
  
- d. advertising a refund or return policy with respect to ExtenZe without clearly and conspicuously disclose in close proximity to the refund or return policy offer what products, if any, are excluded from such policy and by including in the packaging with all shipments a clear and conspicuous copy of the refund policy.
  
- e. “Making factual representations about the nature, efficacy, or safety of ExtenZe, or any other Covered Products, without SCIENTIFIC SUBSTANTIATION for those claims. SCIENTIFIC SUBSTANTIATION is factual, objective or clinical evidence about the specific ingredients that are present in the applicable Covered Product. SCIENTIFIC SUBSTANTIATION must be competent and reliable and must include tests, analyses, research, studies or other evidence based upon the expertise of professionals in the relevant subject matter area. Such tests, analyses, research, studies or other evidence must have been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the scientific community in North America, Europe, Israel or Japan to yield accurate and reliable results.”

See Exhibit 1, 2006 Injunction, p. 5 (emphasis in original).

118. The 2006 Injunction defines the phrase “Covered Products,” referenced in the

1 above-quoted provision, to include ExtenZe. (2006 Injunction, pp. 2-3.)

2  
3 119. Plaintiffs are informed and believe, based on the 2006 Injunction, that  
4 Defendants Gibson, Winter, Jr., and Winter, Sr. operated, managed, directed and controlled Dish  
5 Direct, Inc. Plaintiffs are informed and believe that Defendants Gibson, Winter, Jr., and Winter,  
6 Sr. also operate, manage, direct and control Biotab, and thus Defendant Biotab, as well as  
7 Defendants Gibson, Winter, Jr., and Winter, Sr., have actual and constructive knowledge of the  
8 2006 Injunction, rendering each of the Defendants in violation of the 2006 Injunction.

9  
10 120. Defendants, individually and as agents, alter egos, servants or employees of each  
11 other, have advertised and marketed ExtenZe using the following factual representations:

- 12 • ExtenZe is a "male enhancement" product 100% guaranteed to increase penis size;
- 13 • "Guaranteed" to increase the size of your penis in length and girth and carries a
- 14 "100% guarantee" that the consumer will see "an increase in size and width."
- 15 • "Clinically tested and doctor approved;"
- 16 • A safe and effective blood flow stimulator; and,
- 17 • Has "the newest, most advanced medically designed formula ever created for male
- 18 sexual enhancement."
- 19
- 20
- 21

22 Defendants' representations, including those of Gibson, Winter, Jr., and Winter, Sr., among others,  
23 violate the 2006 Injunction forbidding factual representations about the nature, efficacy and safety  
24 of ExtenZe without scientific substantiation.

25  
26 121. As more specifically set forth above, the claimed clinical testing and studies of

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1 ExtenZe allegedly performed by Dr. Stein and the Foundation for Intimacy lack any scientific  
2 basis whatsoever, and fail miserably to satisfy the “scientific substantiation” requirement  
3 mandated by the 2006 Injunction. Further, and in any event, the studies relied upon by Defendants  
4 do not support the claims made by Defendants in marketing the product, even if such studies  
5 constituted "scientific substantiation" (which they are not). As a result, Defendants have  
6 misrepresented the testing, approval and/or certification of ExtenZe. Defendants have  
7 misrepresented the affiliation, connection or association with, or certification by another with  
8 respect to their “clinical testing” and “doctor approval” claims for ExtenZe, and have thus violated  
9 the 2006 Injunction.

10  
11 122. The 2006 Injunction also enjoins Defendants from, among other things, “. . .  
12 advertising that any of the Covered Product has any effect on any of the conditions, disorders or  
13 diseases listed in Health and Safety Code § 1107403, including but limited to sexual impotence,”  
14 “. . . violating Health and Safety Code § 110760, by manufacturing, selling, delivering, holding,  
15 or offering for sale and Covered Product that is misbranded,” or “. . . failing to respond promptly to  
16 written consumer requests for refunds or information with respect to refunds of any Covered  
17 Product within 30 days of receipt of such request . . . .” Defendants have further violated these  
18 provisions of the 2006 Injunction as a result of the wrongful, fraudulent and illegal conduct  
19 alleged herein.

20  
21 123. Plaintiffs and the putative class members suffered injury in fact and monetary  
22 damage in that they purchased ExtenZe which was being sold illegally since the four years prior to  
23 the filing of the original Complaint in this action.

24  
25 124. Plaintiffs request that this Court enter such orders or judgments as may be  
26 necessary to restore to any person in interest any money which may have been acquired by means

1 of such illegal practices as provided in *Bus. & Prof. Code* § 17203, and for such other relief as set  
2 forth below.

3  
4 125. All of the conduct alleged herein occurs and continues to occur in Defendants'  
5 business. Defendants' wrongful conduct is part of a pattern or generalized course of conduct  
6 repeated on thousands of occasions daily.

7  
8 126. Defendants have failed and refused to accede to Plaintiffs' request for a refund of  
9 the amount spent by Plaintiffs and other putative class members to purchase ExtenZe. Plaintiffs  
10 are informed and believe and thereon allege that Defendants will continue to fail and refuse to  
11 accede to requests for refunds. Defendants also have failed to accede to the request of Plaintiffs to  
12 cease the unfair business acts or practices, and to correct the misrepresentations and deceptive  
13 conduct.

14  
15 127. Plaintiffs request that this Court enter a permanent injunction enjoining  
16 Defendants, and their agents, servants, employees and all persons acting under or in concert with  
17 them, to cease and desist from the following acts: (a) selling, marketing, or advertising ExtenZe  
18 with any representation or suggestion that the product increases penis size without having an  
19 adequate and reliable scientific basis for such claims; (b) selling, marketing, or advertising  
20 ExtenZe as a drug having beneficial medicinal properties; (c) selling, marketing, or advertising  
21 ExtenZe with any representation or suggestion that the product is "clinically tested" or "medically  
22 approved;" (d) concealing information regarding the true nature and origin of the herbal nutrients  
23 and prohormones contained in ExtenZe; (e) engaging in conduct in violation of the 2006  
24 Injunction; (f) engaging in any of the illegal, fraudulent, misleading, unlawful, unfair and/or  
25 deceptive conduct described herein; and (g) engaging in any other conduct found by the Court to  
26 be illegal, fraudulent, misleading, unlawful, unfair and/or deceptive conduct.



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the current injunction.

134. Pursuant to *Business & Professions Code* § 17535, Plaintiffs and members of the putative Class are entitled to remedies as set forth above and below. Specifically, Plaintiffs and the members of the putative Class seek an order of this Court enjoining Defendants from continuing to engage, use, or employ their practice of advertising the sale and use of ExtenZe. Likewise, Plaintiffs and the members of the putative Class seek an order requiring Defendants to disclose such misrepresentations, and additionally request an order awarding Plaintiffs and other members of the putative Class restitution of the money wrongfully acquired by Defendants by means of responsibility attached to Defendants' failure to disclose the existence and significance of said misrepresentations.

135. Plaintiffs and the members of the Class have suffered injury in fact and have lost money as a result of Defendants' false representations.

**SIXTH CAUSE OF ACTION**  
**BREACH OF IMPLIED WARRANTY**  
**(CAL. U. COMM. CODE §§ 2314, 2315 and Common Law)**

136. Plaintiffs incorporate by reference all the above allegations as if fully set forth herein.

137. This cause of action is being asserted on behalf of Plaintiffs and the putative Class members who purchased the product within the applicable statute of limitations period.

138. ExtenZe was sold with the implied warranty of merchantability in that the

1 product would pass without objection in the trade, is fit for the ordinary purpose for which it is  
2 used, is adequately contained, packaged, and labeled, and conforms to the promises or  
3 affirmations of fact made on the container and label. ExtenZe does not meet the foregoing criteria.  
4

5 139. ExtenZe was sold with the implied warranty of fitness in that Defendants had  
6 reason to know of the particular purpose for which the product was required (i.e., as a pill to  
7 enlarge the penis) and Plaintiffs and the putative class members relied upon Defendants' skill and  
8 judgment to furnish suitable goods. ExtenZe is not suitable for the purpose for which it was  
9 required and sold.

10  
11 140. The defects in ExtenZe existed prior to the delivery of the product to Plaintiffs  
12 and the putative Class members.  
13

14 141. Plaintiffs provided Defendants with notice of their warranty claims, on behalf of  
15 themselves and the putative Class members, by virtue of the letter sent to Defendants on April 2,  
16 2009 by Plaintiff Williams. Defendants failed to fulfill their warranty obligations despite said  
17 notices, and such conduct is in violation of the 2006 Injunction.  
18

19 142. Plaintiffs and the putative Class members have incurred damages as described  
20 herein as a direct and proximate result of the defective product and Defendants' breach of the  
21 implied warranties, in that Plaintiffs and the putative Class have paid the purchase price for the  
22 defective product. Plaintiffs, on behalf of themselves and the putative class members, have  
23 requested that Defendants correct the defect and Defendants have refused. Plaintiffs and the  
24 putative Class members are entitled to refund of the purchase price of the product, consequential  
25 and incidental damages, costs and expenses, including attorney's fees.  
26

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**SEVENTH CAUSE OF ACTION**  
**BREACH OF EXPRESS WARRANTY**

**(CAL. U. COM. CODE § 2313)**

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143. Plaintiffs incorporate by reference all the above allegations as if fully set forth herein.

144. ExtenZe was sold with an express warranty, as Defendants made express affirmations of fact and promises regarding the sexual enhancement properties of the product.

145. Defendants have guaranteed that ExtenZe can increase penis size.

146. The product was sold with an express warranty because Defendants' description of the product on the packaging and in mass media advertising (i.e., as a male sexual enhancement product that will increase penis size) was intended to become part of the basis of the bargain. ExtenZe is not suitable for the purpose for which it was required and sold as the Product does not in fact increase penis size.

147. The defect in the product existed prior to the delivery of the product to Plaintiffs and the putative Class members.

148. Plaintiffs, on behalf of themselves and the putative Class members, provided Defendants with notice of their warranty claims by virtue of the letter sent to Defendants on April 2, 2009 by Plaintiff Williams. Defendants failed to fulfill their warranty obligations, despite said notice and that such conduct is in violation of the current injunction.





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- 7. Enforcement of the 2006 Injunction.
  
- 8. For a temporary restraining order, a preliminary injunction, and a permanent injunction enjoining Defendants, and their agents, servants, employees and all persons acting under or in concert with them, to cease and desist from the following acts:
  - a. Violating the 2006 Injunction;
  
  - b. Violating applicable provisions of the California Health & Safety Code;
  
  - c. Selling, marketing, or advertising ExtenZe with any representation or suggestion that the product increases penis size without having an adequate and reliable scientific basis for such claims;
  
  - d. Selling, marketing, or advertising ExtenZe as a drug having beneficial medicinal properties;
  
  - e. Selling, marketing, or advertising ExtenZe with any representation or suggestion that the product is "clinically tested" or "medically approved;";
  
  - f. Concealing information regarding the true nature and origin of the herbal nutrients and prohormones contained in ExtenZe;
  
  - g. Selling, marketing, or advertising ExtenZe with any representation or warranty that the product is "100% guaranteed;

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- h. Engaging in any of the illegal, fraudulent, misleading, unlawful, unfair and/or deceptive conduct described herein; and,
  - i. Engaging in any other conduct found by the Court to be illegal, fraudulent, misleading, unlawful, unfair and/or deceptive conduct.
- 9. For pre-judgment interest from the date of filing this suit;
  - 10. For reasonable attorneys' fees;
  - 11. For costs incurred herein; and,
  - 12. For all general, special, and equitable relief to which the Plaintiffs and the members of the certified class or classes are entitled by law.

DATED: October \_\_, 2010

Respectfully submitted,

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14 **JURY TRIAL DEMANDED**

15 Plaintiffs demand a jury trial on all triable issues.

16 DATED: October \_\_, 2010 Respectfully submitted,

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