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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

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

Plaintiff,

v.

NEW VITALITY CORP. and JOE  
THEISMANN,

Defendants.

Case No. \_\_\_\_\_

**CLASS ACTION COMPLAINT**

**JURY TRIAL DEMANDED**

1 Plaintiff Floyd Luman (“Plaintiff”) brings this action on behalf of himself and all others  
2 similarly situated against Defendants New Vitality Corp. (“New Vitality”) and Joseph Theismann  
3 (collectively, “Defendants”). Plaintiff makes the following allegations pursuant to the  
4 investigation of his counsel and based upon information and belief, except as to the allegations  
5 specifically pertaining to himself, which are based on personal knowledge.

### 6 INTRODUCTION

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

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

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

26 2. Jeffrey J. Zielinski, the doctor who appears to endorse Super Beta Prostate in  
27 Defendants’ commercials, has recanted. In a sworn declaration provided to the undersigned  
28 counsel, he states that he is an actor, and that he has not practiced medicine since 2009. After an  
audition in which he was provided with no information about the product, he was called to a

1 commercial shoot and asked to don a white doctor's coat, stand in front of a green screen, and read  
2 lines from a teleprompter.



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

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

20 “As far as I understood, I was hired as an actor. I was to play the  
21 role of a doctor, reading lines from a script. And that is what I did. I  
22 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.”

23 Dr. Zielinski continues:

24 “If I were a practicing physician, I would not recommend Super Beta  
25 Prostate for the treatment of BPH or its symptoms. ... I would not  
26 recommend Super Beta Prostate to anyone for any purpose. I believe  
27 it is unsuitable for the treatment of BPH, and possibly unsafe because  
28 it is a formulation that has never been studied and it includes mixed  
sterols in very high doses that could cause significant adverse  
events.”

1 Defendants' representation that Super Beta Prostate is endorsed by Dr. Zielinski is false.

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

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

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

23 6. Mr. Luman is a purchaser of Super Beta Prostate who assert claims for violation of  
24 the Magnuson Moss Warranty Act, breach of express warranty, breach of the implied warranty of  
25 merchantability, breach of the implied warranty of fitness for a particular purpose, unjust  
26 enrichment, violation of the California Consumers Legal Remedies Act ("CLRA"), violation of the  
27 California Unfair Competition Law ("UCL"), and violation of the California False Advertising  
28 Law ("FAL").

**PARTIES**

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2           7. Plaintiff Floyd Luman is a citizen of California. In 2012, Mr. Luman purchased  
3 Super Beta Prostate for the treatment of his BPH symptoms based on Joe Theismann’s  
4 recommendation. After several weeks of use, Mr. Luman concluded that Super Beta Prostate was  
5 ineffective. Mr. Luman then called New Vitality’s Customer Service line to complain. During that  
6 call, an agent explained that Super Beta Prostate takes time to work and encouraged him to  
7 continue taking the product. Mr. Luman followed the agent’s advice and continued to take Super  
8 Beta Prostate, but the product was still ineffective.

9           8. Defendant New Vitality Corp. (“New Vitality”) is a New York corporation with its  
10 principal place of business at 260 Smith Street, Farmingdale, NY 11735. New Vitality is the  
11 distributor and seller of Super Beta Prostate and participated in creating the product formulation,  
12 dosage form, delivery system, branding, packaging and design, logistics and distribution,  
13 marketing, and advertising. New Vitality’s activities caused the sale of Super Beta Prostate  
14 through the Internet and retail venues including club, food, drug, mass market, and health food  
15 stores. New Vitality endorsed, adopted, and utilized the Express Warranties and  
16 Misrepresentations to effectuate the Defendants’ joint plan to market Super Beta Prostate as  
17 described herein.

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

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

3 **JURISDICTION AND VENUE**

4 11. This Court has subject matter jurisdiction under 28 U.S.C. § 1331. This Court has  
5 supplemental jurisdiction over state law claims pursuant to 28 U.S.C. § 1367.

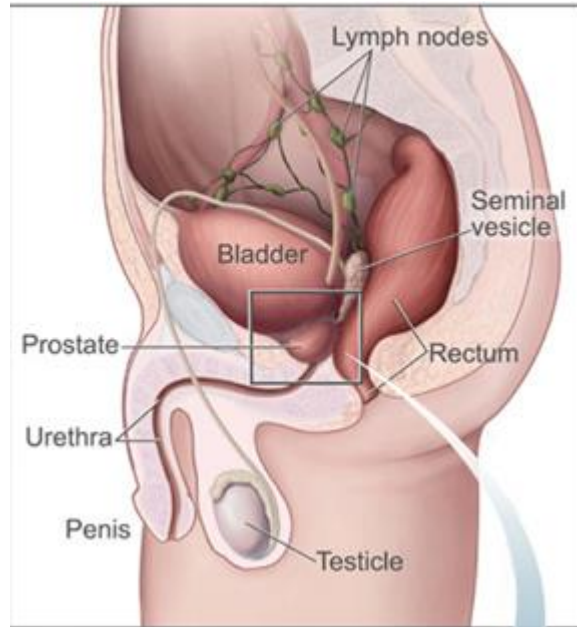
6 12. This Court also has subject matter jurisdiction pursuant to 28 U.S.C.  
7 § 1332(d)(2)(A) because this case is a class action where the aggregate claims of all members of  
8 the proposed class are in excess of \$5,000,000.00, exclusive of interest and costs, and Plaintiff, as  
9 well as most members of the proposed class, are citizens of states different from the states of at  
10 least one of the Defendants. In their commercials, Defendants represent that they sold over 5  
11 million bottles of Super Beta Prostate to over 2 million men.

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

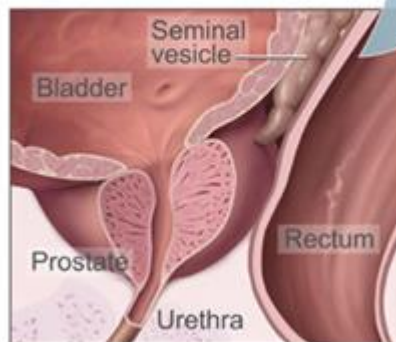
17 **FACTS COMMON TO ALL CAUSES OF ACTION**

18 - **Benign Prostate Hyperplasia Is A Progressive Disease That Causes**  
19 **Urinary Problems**

20 14. The prostate is an exocrine gland of the male reproductive system. It surrounds the  
21 top of the urethra, where it connects to the bladder.



This shows the prostate and nearby organs.



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

15. 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.

16. 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           17.     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           18.     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           19.     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           20.     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           21.     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           22.     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 23. 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 24. 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 25. Defendant New Vitality ran a series of advertisements that claimed Super Beta  
17 Prostate would treat and cure BPH. Stills from one of these advertisements are incorporated into  
18 the text below.

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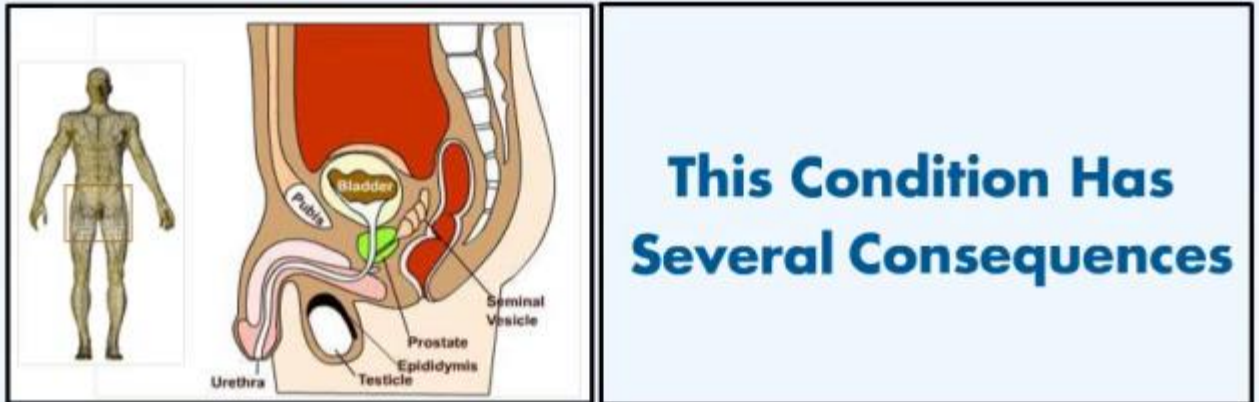
**25 Million Men  
40-80 Years**



## **Experience Benign Prostatatic Hyperplasia**

27. 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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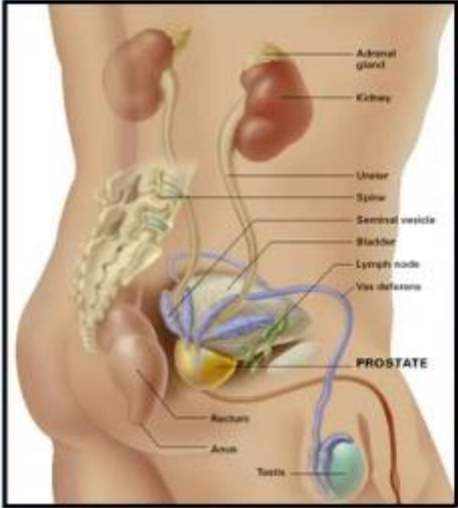


## **The Most Stigmatized of Which are Nocturia and Incontinence**

28. 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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**If Done at an Inappropriate Age**

**Removal Can Lead to Erectile Dysfunction**

**Bowel Incontinence**

**and persistent urinary incontinence.**

29. The advertisement continues: “But wait! Surgery is not the option [sic] to your problems.”



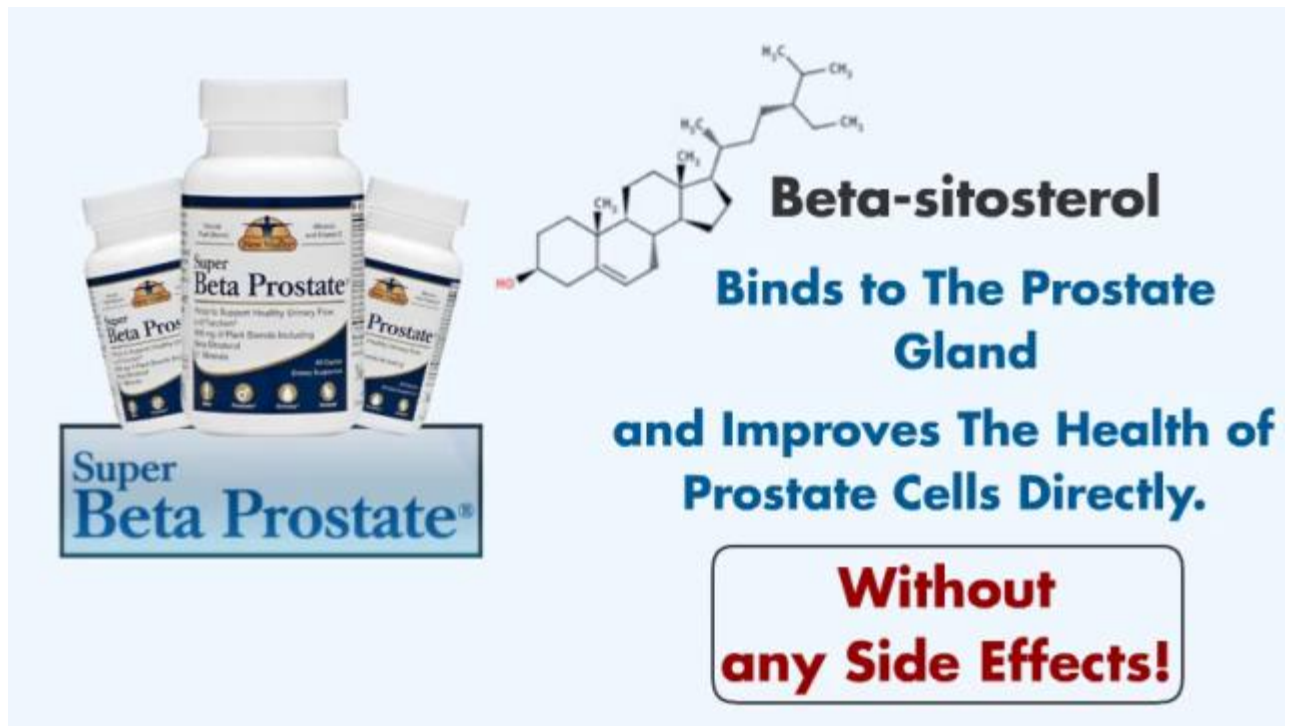
**Not The Solution to Your Problems**

30. 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 31. 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 for Super Beta Prostate features three white plastic bottles of the supplement on the left. The central bottle is prominently displayed, showing its label which includes the product name and a list of ingredients. To the right of the bottles is a chemical structure diagram of Beta-sitosterol, a steroid molecule with a hydroxyl group and several methyl and ethyl side chains. Below the chemical structure, the text reads: "Beta-sitosterol Binds to The Prostate Gland and Improves The Health of Prostate Cells Directly." At the bottom right, a red-bordered box contains the text: "Without any Side Effects!".

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

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

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

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

<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           35. 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           36. 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           37. 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           38. 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           39. 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”).





1           41. 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           42. 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           43. 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           44. 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       45.     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       46.     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       47.     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       48.     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 49. 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 50. Each of these statements is false and misleading because Super Beta Prostate does  
13 not, in fact, treat the symptoms of BPH. Nor does it produce the effects described.

14 - Super Beta Prostate’s Label

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

20 - Super Beta Prostate Is Illegally Distributed Under Federal Law

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

27 53. Super Beta Prostate falls with the definition of a “new drug” because it “is not  
28 generally recognized among experts ... as safe and effective for use under the condition prescribed,

1 recommended, or suggested.” 21 U.S.C. § 321(p)(1). Thus, without FDA approval, it is illegal to  
2 distribute Super Beta Prostate in interstate commerce. 21 U.S.C. § 355(a).

3 54. Similarly, federal law prohibits marketers of dietary supplements from making any  
4 claim suggesting use of the supplement for the diagnosis, mitigation, treatment or cure of a disease  
5 unless the claim is specifically authorized by an FDA finding that there is “significant scientific  
6 agreement” to support the claim, or the claim is based on “authoritative statements” from certain  
7 federal scientific bodies, such as NIH and the National Academy of Sciences. *See* Dietary  
8 Supplement Health Education Act (“DSHEA”), 21 U.S.C. § 343(r)(3).

9 55. The claims identified above specifically suggest the use of Super Beta Prostate to  
10 treat the symptoms of benign prostate hyperplasia. These claims have not been authorized by the  
11 FDA or any scientific body.

12 56. Super Beta Prostate is thus “misbranded” and bears a “false or misleading label”  
13 under 21 U.S.C. § 343.

#### 14 **CLASS REPRESENTATION ALLEGATIONS**

15 57. Plaintiff seeks to represent a class defined as all persons in the United States who  
16 purchased Super Beta Prostate, excluding those that made such purchase for purpose of resale (the  
17 “Class”).

18 58. Plaintiff also seeks to represent a subclass of all Class members who purchased the  
19 product in California (the “California Subclass”).

20 59. Defendants state they sold over 5 million bottles of Super Beta Prostate to over 2  
21 million men. Accordingly, members of the Class and Subclasses are so numerous that their  
22 individual joinder herein is impracticable. The precise number of Class members and their  
23 identities are unknown to Plaintiff at this time but may be determined through discovery. Class  
24 members may be notified of the pendency of this action by mail and/or publication through the  
25 distribution records of Defendants and third party retailers and vendors.

26 60. Common questions of law and fact exist as to all Class members and predominate  
27 over questions affecting only individual Class members. Common legal and factual questions  
28

1 include, but are not limited to whether Defendants' labeling, marketing and promotion of Super  
2 Beta Prostate is false, misleading, and unsubstantiated.

3 61. The claims of the named Plaintiff are typical of the claims of the Class in that the  
4 named Plaintiff was exposed to Defendants' false, misleading and unsubstantiated marketing and  
5 promotional materials, purchased Super Beta Prostate, and suffered a loss as a result of that  
6 purchase.

7 62. Plaintiff is an adequate representative of the Class and Subclasses because his  
8 interests do not conflict with the interests of the Class members he seeks to represent, he has  
9 retained competent counsel experienced in prosecuting class actions, and he intends to prosecute  
10 this action vigorously. The interests of Class members will be fairly and adequately protected by  
11 Plaintiff and his counsel.

12 63. The class mechanism is superior to other available means for the fair and efficient  
13 adjudication of the claims of Class and Subclass members. Each individual Class member may  
14 lack the resources to undergo the burden and expense of individual prosecution of the complex and  
15 extensive litigation necessary to establish Defendants' liability. Individualized litigation increases  
16 the delay and expense to all parties and multiplies the burden on the judicial system presented by  
17 the complex legal and factual issues of this case. Individualized litigation also presents a potential  
18 for inconsistent or contradictory judgments. In contrast, the class action device presents far fewer  
19 management difficulties and provides the benefits of single adjudication, economy of scale, and  
20 comprehensive supervision by a single court on the issue of Defendants' liability. Class treatment  
21 of the liability issues will ensure that all claims and claimants are before this Court for consistent  
22 adjudication of the liability issues.

23 **COUNT I**

24 **Violation Of Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301, et seq.**

25 64. Plaintiff hereby incorporates by reference the allegations contained in all preceding  
26 paragraphs of this complaint.

27 65. Plaintiff brings this claim individually and on behalf of the members of the  
28 proposed Class and California Subclass against all Defendants.









1 Prostate was a safe and effective treatment for the symptoms of BPH when in fact it was not, which  
2 caused injuries to Plaintiff and Class members because they would not have purchased Super Beta  
3 Prostate if the true facts had been known.

4 98. Because Defendants' retention of the non-gratuitous benefits conferred on them by  
5 Plaintiff and Class members is unjust and inequitable, Defendants must pay restitution to Plaintiff  
6 and the Class members for their unjust enrichment, as ordered by the Court.

7 **COUNT VI**

8 **Violation Of California's Consumers Legal Remedies Act,**

9 **California Civil Code §§ 1750, *et seq.***

10 99. Plaintiff hereby incorporates by reference the allegations contained in all preceding  
11 paragraphs of this complaint.

12 100. Plaintiff brings this claim individually and on behalf of the members of the  
13 proposed California Subclass against all Defendants.

14 101. California's Consumers Legal Remedies Act, Cal. Civ. Code § 1770(a)(5), prohibits  
15 "[r]epresenting that goods or services have sponsorship, approval, characteristics, ingredients, uses,  
16 benefits, or quantities which they do not have or that a person has a sponsorship, approval, status,  
17 affiliation, or connection which he or she does not have." Defendants violated this provision by  
18 making the Misrepresentations and by suggesting that Dr. Zielinski endorsed the product when in  
19 fact he did not.

20 102. Cal. Civ. Code § 1770(a)(7) prohibits "[r]epresenting that goods or services are of a  
21 particular standard, quality, or grade, or that goods are of a particular style or model, if they are of  
22 another." Defendants violated this provision by making the Misrepresentations.

23 103. Plaintiff and the California Subclass members suffered injuries caused by  
24 Defendants' misrepresentations because they would not have purchased Super Beta Prostate if the  
25 true facts had been known.

26 104. On January 21, 2013, prior to the filing of this Complaint, a CLRA notice letter was  
27 served on Defendants which complied in all respects with California Civil Code § 1782(a).  
28 Plaintiff Floyd Luman, by and through his counsel, sent Defendants a letter via certified mail,

1 return receipt requested, advising Defendants they were in violation of the CLRA and must correct,  
2 repair, replace or otherwise rectify the goods alleged to be in violation of § 1770.

3 105. Wherefore, Plaintiff seeks damages, restitution, and injunctive relief for this  
4 violation of the CLRA.

5 **COUNT VII**

6 **Violation Of California's Unfair Competition Law,**  
7 **California Business & Professions Code §§ 17200, *et seq.***

8 106. Plaintiff hereby incorporates by reference the allegations contained in all preceding  
9 paragraphs of this complaint.

10 107. Plaintiff brings this claim individually and on behalf of the members of the  
11 proposed California Subclass against all Defendants.

12 108. Defendants are subject to the Unfair Competition Law ("UCL"), Bus. & Prof. Code  
13 §§ 17200, *et seq.* The UCL provides, in pertinent part: "Unfair competition shall mean and include  
14 unlawful, unfair or fraudulent business practices and unfair, deceptive, untrue or misleading  
15 advertising..."

16 109. Defendants' conduct, described herein, violated the "unlawful" prong of the UCL  
17 by violating the Magnuson-Moss Warranty Act, CLRA, FAL, FDCA, DSHEA, and regulations  
18 promulgated thereunder.

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

22 111. Defendants' conduct, described herein, violated the "fraudulent" prong of the UCL  
23 by making the Misrepresentations.

24 112. Plaintiff and California Subclass members suffered lost money or property as a  
25 result of Defendants' UCL violations because they would not have purchased Super Beta Prostate  
26 if the true facts concerning its lack of safety and efficacy had been known.

**COUNT VIII**

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

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

113. Plaintiff hereby incorporates by reference the allegations contained in all preceding paragraphs of this complaint.

114. Plaintiff brings this claim individually and on behalf of the members of the proposed California Subclass against all Defendants.

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

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

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

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

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

**PRAAYER FOR RELIEF**

WHEREFORE, Plaintiff, individually and on behalf of all others similarly situated, seeks judgment against Defendants, as follows:

- a. For an order certifying the nationwide Class and the Subclass under Rule 23 of the Federal Rules of Civil Procedure and naming Plaintiff as representative of the Class



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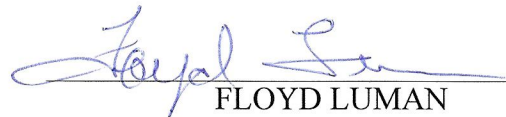
I, Floyd Luman, declare as follows:

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

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

3. While living in California, I purchased Super Beta Prostate for personal consumer use. I read the label for Super Beta Prostate, and purchased it in reliance on the claims that it would treat the symptoms of benign prostate hyperplasia. I would not have purchased Super Beta Prostate had I known the true facts concerning its safety, efficacy, and failure to comply with FDA regulations.

I declare under the penalty of perjury under the laws of the State of California that the foregoing is true and correct, executed on March 18, 2013 at Rancho Murietta, California.

  
FLOYD LUMAN