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9 *Counsel for Plaintiffs and the*  
10 *Proposed Class*



13 **UNITED STATES DISTRICT COURT**  
14 **CENTRAL DISTRICT OF CALIFORNIA**

15 FRANK ORTEGA and TROY  
16 LAMBERT on Behalf of Themselves  
17 and All Others Similarly Situated,  
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19 Plaintiffs,  
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21 v.  
22 NATURAL BALANCE INC.,  
23 NUTRACEUTICAL CORP.,  
NUTRACEUTICAL  
INTERNATIONAL CORP.,  
24 Defendants.

Case No: 2:13-cv-05942-ABC-E  
Pleading Type: Class Action  
**SECOND AMENDED COMPLAINT  
FOR VIOLATIONS OF  
CALIFORNIA'S:**  
**UNFAIR COMPETITION LAW;  
FALSE ADVERTISING LAW; AND  
CONSUMER LEGAL REMEDIES  
ACT**  
DEMAND FOR JURY TRIAL

1 Plaintiffs Frank Ortega and Troy Lambert, on behalf of themselves, all others  
2 similarly situated, and the general public, through undersigned counsel, sue Defendants  
3 Natural Balance, Inc. (“NBI”), Nutraceutical Corporation (“NC”), and Nutraceutical  
4 International Corporation (“NIC”) (collectively “Defendants”) and, upon information and  
5 belief and investigation of counsel, alleges as follows:

6 **INTRODUCTION**

7 1. NBI, NC, and NIC falsely market their dietary supplement “Cobra Sexual  
8 Energy” (“Cobra” or the “Product”) as having beneficial health and aphrodisiac  
9 properties and being scientifically formulated to improve virility, despite that none of the  
10 ingredients in Cobra, individually or in combination, provide such benefits.

11 2. Plaintiffs Frank Ortega and Troy Lambert read, believed, and relied upon  
12 these claims when purchasing Cobra during the Class Period defined herein, and were  
13 damaged as a result.

14 3. Plaintiffs bring this action challenging NBI, NC, and NIC’s claims relating  
15 to Cobra on behalf of themselves and all others similarly situated under California’s  
16 Unfair Competition Law, False Advertising Law, and Consumer Legal Remedies Act.

17 4. Plaintiffs seek an order compelling NBI, NC, and NIC to (1) cease  
18 marketing Cobra using the misleading tactics complained of herein, (2) conduct a  
19 corrective advertising campaign, (3) restore the amounts by which NBI, NC, and NIC  
20 have been unjustly enriched, (4) destroy all misleading and deceptive materials, and for  
21 (5) damages and punitive damages as allowed by law.

22 **JURISDICTION AND VENUE**

23 5. This Court has original jurisdiction under 28 U.S.C. §1332(d)(2) (The Class  
24 Action Fairness Act) because the matter in controversy exceeds the sum or value of  
25 \$5,000,000 exclusive of interest and costs and more than two-thirds of the members of  
26 the Class reside in states other than the state of which Defendants are citizens.

27 6. Venue is proper in this Court pursuant to 28 U.S.C. §1391 because Plaintiffs  
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1 reside in this District; have suffered and continue to suffer injuries as a result of  
2 Defendants' acts in this district; many of the acts and transactions giving rise to this  
3 action occurred in this district; and because NBI, NC, and NIC are authorized to conduct  
4 business in this District, and have intentionally availed themselves of the laws and  
5 markets of this District through the promotion, marketing, distribution, and sale of the  
6 Product in this District; and are subject to personal jurisdiction in this District.

7 7. NBI is subject to personal jurisdiction in California as it promotes,  
8 distributes, advertises, and sells Cobra, directly and through its licensees and  
9 intermediaries, in California.

10 8. NC is registered to do business in California and therefore has consented to  
11 personal jurisdiction in California and this district. NC manufactures, markets,  
12 distributes, and retails Cobra in California. NC also has employees and sales staff in  
13 California.

14 9. NIC is a holding company for NBI and NC. NIC is subject to personal  
15 jurisdiction in California as it manufactures, distributes, markets, and sells Cobra  
16 nationwide, including in California. NIC also has physical facilities and employees in  
17 California.

18 **PARTIES**

19 10. Defendant NBI is a Delaware corporation with its principal place of business  
20 in Park City, Utah. NBI owns the Cobra trademark and its name appears on Cobra bottles  
21 sold during the class period.

22 11. Defendant NIC is a publicly traded Delaware Corporation and the  
23 international parent company of NC and NBI, with its principal place of business in Park  
24 City, Utah.

25 12. Defendant NC is a Delaware corporation with its principal place of business  
26 in Park City, Utah. NC is registered to conduct business in California.

27 13. Plaintiff Frank Ortega is a resident of this District and purchased Cobra for  
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1 his own and household use, and not for resale, in California during the Class Period  
2 defined herein.

3 14. Plaintiff Troy Lambert is a resident of this District and purchased Cobra for  
4 his own and household use, and not for resale, in California during the Class Period  
5 defined herein.

6 **FACTUAL ALLEGATIONS**

7 15. In or around May 2011 through December 2011, Plaintiff Frank Ortega  
8 purchased Cobra from CVS in Reseda, Los Angeles County, California and from Rite-  
9 Aid and Target stores located in Northridge, California. The cost was approximately \$16-  
10 \$17 per bottle.

11 16. At the time of purchase Mr. Ortega saw and relied upon the deceptive claims  
12 (as detailed below) in deciding to purchase Cobra.

13 17. Mr. Ortega first discovered Defendants' unlawful acts described herein in  
14 December 2012, when he learned that the labels of Defendants' Product were untrue  
15 and/or misleading, and that Cobra violates the Federal Food, Drug and Cosmetic Act  
16 ("FDCA") and its implementing regulations.

17 18. Plaintiff Troy Lambert purchased Cobra from the Rite-Aid located at 300  
18 East Willow Street in Long Beach, California approximately ten times. His most recent  
19 purchase was in November 2012. The cost was approximately \$16-17 per bottle.

20 19. At the time of purchase Mr. Lambert saw and relied upon the deceptive  
21 claims (as detailed below) in deciding to purchase Cobra.

22 20. Mr. Lambert first discovered Defendants' unlawful acts described herein in  
23 January 2013, when he learned that the labels of Defendants' Product were untrue and/or  
24 misleading, and that Cobra violates the FDCA and its implementing regulations.

25 21. Plaintiffs are reasonably diligent consumers and exercised reasonable  
26 diligence in their purchasing and use of Cobra, but they could not have discovered  
27 Defendants' unlawful acts earlier because the violations were known to Defendants, and  
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1 not to Plaintiffs, throughout the Class Period defined herein.

2 22. Like nearly all consumers, Plaintiffs are not nutritionists, dietary or  
3 supplement experts, or dietary scientists but rather lay consumers who did not have the  
4 specialized knowledge that Defendants had.

5 23. Throughout the Class Period, NBI, NC, and NIC have used various methods  
6 to represent the purported medicinal, healthful, and/or beneficial qualities of Cobra. Such  
7 representations and claims, however, are false and/or misleading since Cobra does not  
8 provide the purported benefits it promises.

9 24. The senior officers and directors of Defendants, including but not limited to  
10 Frank Gay, Gary Hume, Jeffrey Hinrichs, Bruce Hough, Stanley Soper, and Christopher  
11 Neuberger allowed Cobra to be sold with full knowledge or reckless disregard that the  
12 challenged claims are fraudulent, unlawful, and misleading. They had additional notice of  
13 this when a previous class action was filed against Natural Balance, yet choose to  
14 continue to sell Cobra.

15 25. Absent the misstatements and fraudulent claims described herein, Plaintiffs  
16 would not have purchased Cobra.

17 **The Composition of Cobra**

18 26. Cobra primarily consists of a “proprietary blend” of small amounts of  
19 extracts from herbs, roots, and other organic substances, some of which are purported to  
20 have an effect on the human body.

21 27. Cobra, by means of its “proprietary blend,” claims to increase “sexual  
22 energy” in the human body.

23 28. None of the ingredients in Cobra, individually or in combination, however,  
24 increase sexual energy.

25 29. While a few unreplicated scientific studies suggest ingredients in  
26 Defendants’ proprietary blend may, in necessary amounts, have benefits to sufferers of  
27 certain specific conditions, many of the ingredients in Cobra appear to have never been  
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1 studied at all or have not otherwise been shown to have any effect on the human body,  
2 much less to increase “sexual energy.”

3 30. Further, consuming such random herbs and herbal extracts presents a risk of  
4 an allergic or other adverse reaction without any offsetting benefit.

5 **Cobra’s Yohimbe Content Poses Grave and Undisclosed Risks to Human Health**

6 31. The Yohimbe extracts in Cobra present several added risks not stated on  
7 Defendants’ label:

8 32. The National Institute of Health (“NIH”) strongly cautions that sufferers of  
9 anxiety and/or depression should not use yohimbe: “Yohimbe might bring out manic-like  
10 symptoms in people with bipolar disorder or suicidal tendencies in individuals with  
11 depression.”<sup>1</sup>

12 33. The NIH further warns against yohimbe for use by individuals suffering  
13 from diabetes, because it may “interfere with insulin and other medications used for  
14 diabetes and cause low blood sugar.” *Id.*

15 34. Like early antidepressant drugs, yohimbe extracts can lead to serious and in  
16 some cases life-threatening conditions when ingested with any of the many foods  
17 containing significant amounts of the monoamine tyramine.

18 35. Both yohimbe and these first generation antidepressants are referred to as  
19 Monoamine Oxidase Inhibitors (“MAOIs”).

20 36. MAOIs, by inhibiting monoamine oxidase, are also responsible for the  
21 reduction in the breakdown of tyramine, an amino acid in many foods. The retarding of  
22 this process by MAOIs leads to a build-up of tyramine in the body, causing high blood  
23 pressure and severe hypertension.

24 37. The dangerous combination of MAOIs and tyramine can also result in stroke  
25 and cardiac arrhythmia.

26 \_\_\_\_\_  
27 <sup>1</sup> National Institute of Health, *Yohimbe* <http://www.nlm.nih.gov/medlineplus/druginfo/natural/759.html> (last visited June 4, 2013).  
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1 38. As a result, those prescribed MAOIs are warned to avoid these and other  
2 types of tyramine-heavy foods.

3 39. This warning, from the National Institute of Health U.S. Library of  
4 Medicine, is typical:

5 You may experience a serious reaction if you eat foods that are high  
6 in tyramine during your treatment with phenelzine [an MAOI, brand  
7 name: “Nardil”]. Tyramine is found in many foods, including meat,  
8 poultry, fish, or cheese that has been smoked, aged, improperly stored,  
9 or spoiled; certain fruits, vegetables, and beans; alcoholic beverages;  
10 and yeast products that have fermented. Your doctor or dietitian will  
11 tell you which foods you must avoid completely, and which foods you  
12 may eat in small amounts. You should also avoid foods and drinks  
13 that contain caffeine during your treatment with phenelzine. Follow  
14 these directions carefully. Ask your doctor or dietitian if you have any  
15 questions about what you may eat and drink during your treatment.<sup>2</sup>

16 40. Even small amounts of yohimbe may cause high blood pressure.

17 41. Yohimbe itself elevates normal blood pressure levels, and Defendants fail to  
18 warn consumers that, similar to MAOIs, the consumption of yohimbe with common  
19 foods heavy in tyramine presents the risk of hypertension and possibly even stroke or  
20 death; and such foods should be avoided when taking yohimbe.

21 42. Of significant concern is a study published in 2008, which in a yearlong  
22 surveillance study of dietary supplement-related poison control center calls, found that  
23 yohimbe products accounted for almost a fifth of all exposures to dietary supplements  
24 that led to negative symptoms, despite being a very small percentage of dietary  
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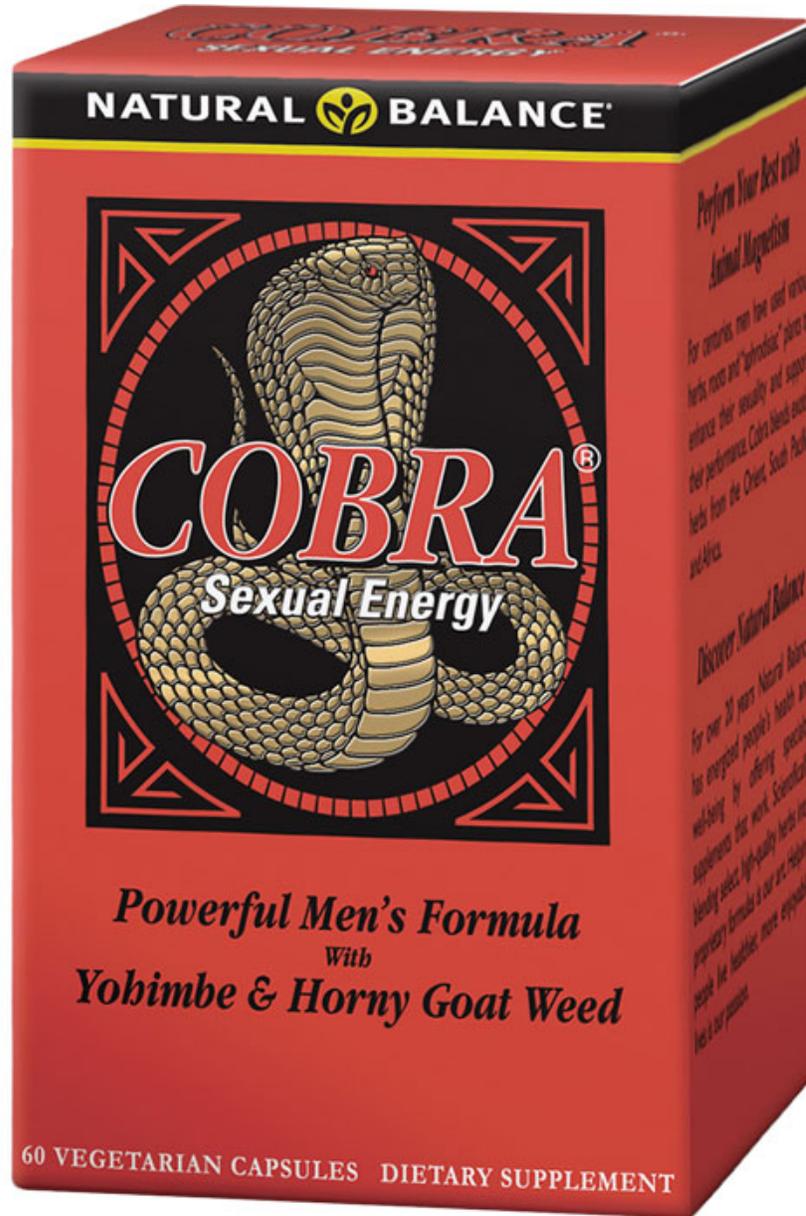
26  
27 <sup>2</sup> *Id.*  
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1 supplement sales.<sup>3</sup>

2 43. These symptoms include: anxiety, tremulousness, diaphoresis, hypertension,  
3 palpitations, headache, chest pain, tachycardia, shortness of breath, stroke, dizziness,  
4 agitation, and abnormally dilated pupils.

5 **Specific Misrepresentations and Deceptive Acts**

6 Front Label:



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27 <sup>3</sup> C. Haller et al., *Dietary Supplement Adverse Events: Report of a One-Year Poison*  
28 *Center Surveillance Project*, 4 J. Med. Toxicology 84 (June 2008).

1           44.   **Misleading supplement name:** Defendants prominently label their product  
2 under the name “Cobra Sexual Energy” despite that it fails to improve human sexual  
3 energy and there is no evidence it contributes to human sexual energy.

4           45.   **Misleading graphic:** Defendants place a graphic of cobra snake with an  
5 erect head on the front of the Cobra box, implying clear phallic overtones of the  
6 purported effect of Defendants’ Product.

7           46.   **Misleading sub-heading:** The front of the Cobra label features the  
8 misleading sub-heading “Powerful Men’s Formula,” suggesting that not only does its  
9 proprietary blend work in the way advertised, but has a strong “powerful” effect.

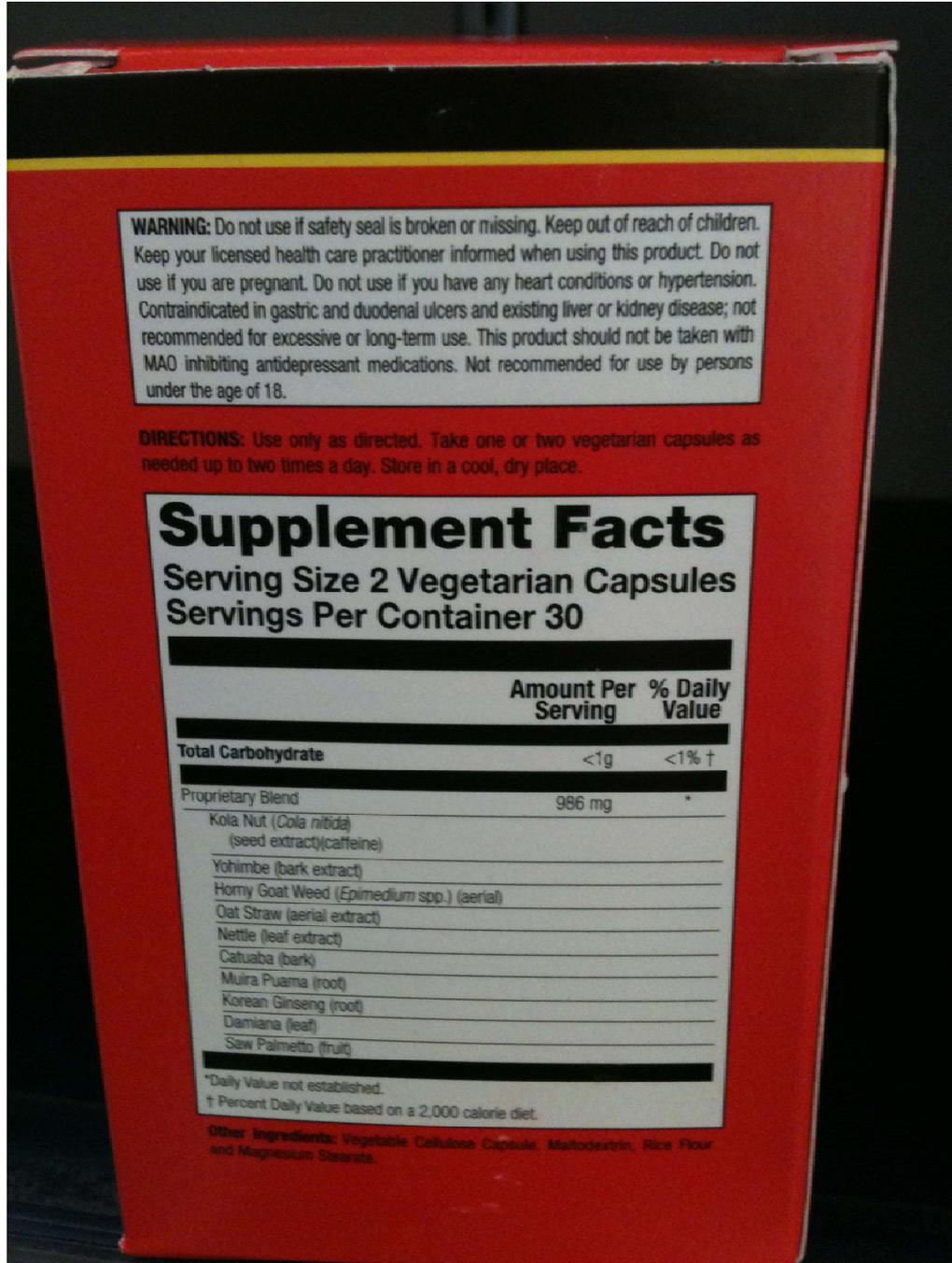
10          47.   Furthermore, beneath this misleading sub-heading, the label features in large  
11 bolded and italicized words, the phrase “with Yohimbe & Horny Goat Weed.” This claim  
12 suggests that these two proprietary blend ingredients are present in the amounts necessary  
13 to be effective and are effective in the manner in which Defendants present them in  
14 Cobra.

15          48.   The combined effect of these misleading statements, together and in context  
16 with other labeling claims, is that Defendants falsely suggest there is a scientific and/or  
17 research basis for claims about Cobra.

18          49.   Neither Yohimbe nor Horny Goat Weed, however, improve human “sexual  
19 energy.”  
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Back Label:

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Side Label:



50. **Misleading heading:** The side label of Cobra prominently claims: “Perform Your Best with Animal Magnetism”; and “For centuries, men have used various herbs, roots and ‘aphrodisiac’ plants to enhance their sexuality and improve their performance. Cobra blends exotic herbs from the Orient, South Pacific, and Africa.”

1           51. Such claims, alone, and even more so taken together with the rest of the  
2 label, convey a misleading impression of what the product will do for the consumer,  
3 implying that the “exotic herbs” in Defendants’ proprietary blend are not only similar to  
4 those that have been used for “centuries” around the world, but have the effects of  
5 “enhance[d] sexuality” and “improve[d] performance.”

6           52. **Misleading second heading claims:** The second section of this side of the  
7 Cobra label prominently claims “Discover Natural Balance” in large, bolded, italicized  
8 font. Defendants further claim that: “Scientifically blending select, high-quality herbs  
9 into proprietary formulas is our art.”

10           53. This statement implies that the ingredients, which constitute Cobra’s  
11 “proprietary” blend, have been chosen based on scientific research in order to achieve the  
12 Product’s advertised effect. Such an implication is false and the statement, both alone and  
13 taken together with the rest of the package, is misleading.

14           54. Also beneath this large heading, the Cobra label states: “For over 20 years  
15 Natural Balance has energized people’s health and well-being by offering specialty  
16 supplements that work.”

17           55. This sentence makes the dual claim that Natural Balance has historically  
18 contributed to people’s overall “health” and “well-being,” and that Natural Balance  
19 “energize[s]” consumers. The pervasive context of Defendants’ Cobra label promotes the  
20 idea that Cobra is healthy to consume despite significant evidence that it poses serious  
21 health risks to consumers, and whose main function is to promote “energy” of a sexual  
22 nature when this is untrue, and further where there is no competent evidence  
23 demonstrating this to be true either.

24           56. These express claims therefore are both false and misleading.

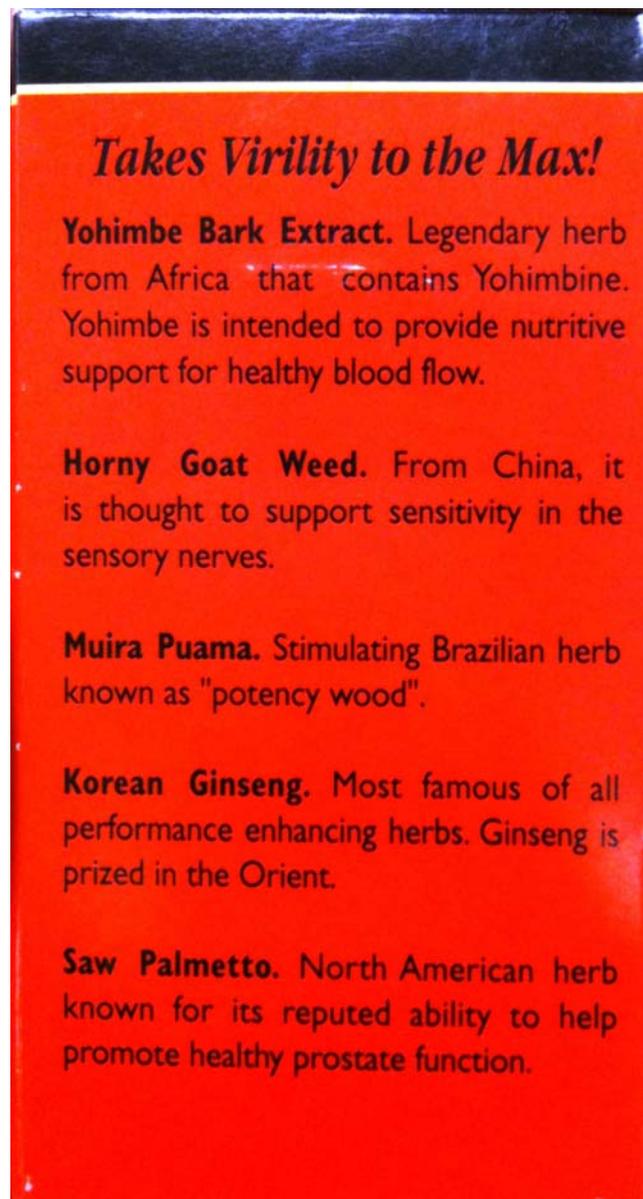
25           57. The above sentence also explicitly states that Defendants “[offer] specialty  
26 supplements that work.” Unfortunately for consumers, at least in regards to Cobra, the  
27 Defendants fail even this modest claim. “Cobra Sexual Energy” is little more than  
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1 aggressively advertised snake oil.

2 58. Further, this part of the Cobra label concludes with the claim: “Helping  
3 people live healthier, more enjoyable lives is our passion.”

4 59. This claim misleads consumers to believe that, because of Defendants’ stated  
5 “passion” in life, they are safe to assume that in purchasing Cobra they are purchasing a  
6 product that will contribute to a “healthier” life and “enjoy” the benefits Defendants  
7 claim their Product will give them.

8 Side Label:



1           60.   **Misleading Heading:** The side label of Cobra states in large type: “Take  
2 Virility to the Max!”

3           61.   “Virility” means sexual energy and vigor, and in the sexual context of  
4 Defendants’ Product, misleadingly implies Cobra Sexual Energy delivers the advertised  
5 result with “max[imum]” effectiveness.

6           62.   The ingredients at the levels found in Cobra, individually or in any  
7 combination, fail to provide sexual energy for the human body.

8           63.   There is no scientific evidence that the ingredients at the levels found in  
9 Cobra, individually or in any combination, provide sexual energy for the human body.

10          64.   **Misleading ingredient sub-headings:** The side label of Cobra also lists  
11 several claims related to various ingredients in its proprietary blend:

12          65.   **“Yohimbe Bark Extract”:** Under this sub-heading Defendants’ Cobra label  
13 states: “Legendary herb from Africa that contains Yohimbine. Yohimbe is intended to  
14 provide nutritive support for healthy blood flow.”

15          66.   While some studies possibly support “increased blood flow,” this statement  
16 is misleading in the context of sexual energy. The increase in blood flow Defendants  
17 refer to has not been shown by any scientific study to affect human sexual energy.

18          67.   The NIH has stated that Yohimbe is possibly helpful only for erectile  
19 dysfunction and sexual problems arising from certain medications, but cautions that  
20 Yohimbe has not been adequately researched to justify being described as having these or  
21 any other sexual benefits.<sup>4</sup>

22          68.   Extracts from this bark, aside from not having the healthful benefits claimed  
23 on Defendants’ label, present the added risks described above (hypertension, stroke, and  
24 manic-depressive episodes), which are not indicated on Defendants’ label.<sup>5</sup>

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26 <sup>4</sup> The National Institute of Health, *Yohimbe* [http://www.nlm.nih.gov/medlineplus/  
27 druginfo/natural/759.html](http://www.nlm.nih.gov/medlineplus/druginfo/natural/759.html) (last visited June 4, 2013).

28 <sup>5</sup> *Id.*

1 69. **“Horny Goat Weed”**: Under this sub-heading Defendants’ Cobra label  
2 states: “From China, it is thought to support sensitivity in the sensory nerves.”

3 70. There are no scientific studies substantiating this claim, and stating such a  
4 claim in the context of sexual energy is misleading.

5 71. **“Muir Puama”**: Under this sub-heading Defendants’ Cobra label states:  
6 “Stimulating Brazilian herb known as ‘potency wood’.”

7 72. There are no scientific studies substantiating that extracts from this herb  
8 improve human sexual energy, and extracts do not do so. This claim is misleading  
9 individually and as stated in the overall context of Defendants’ Cobra label.

10 73. **“Korean Ginseng”**: Under this sub-heading Defendants’ Cobra label states:  
11 “Most famous of all performance enhancing herbs. Ginseng is prized in the Orient.”

12 74. There are no scientific studies that demonstrate extracts from this herb  
13 “enhance” sexual performance, and extracts do not do so.

14 75. The NIH has also cautioned that “ginseng may lower levels of blood sugar”;  
15 and that “this effect may be seen more in people with diabetes.”<sup>6</sup> Therefore, Defendants’  
16 Cobra presents an additional risk to the consumer in the absence of any such warning on  
17 its label, without any of the offsetting benefits that it claims to possess.

18 76. As the NIH has also warned that yohimbe, present in Cobra’s “proprietary  
19 blend,” also presents risks for those who suffer from diabetes, Cobra presents a double  
20 risk for such consumers without any such warning on its label.

21 77. **“Saw Palmetto”**: Under this sub-heading Defendants’ Cobra label states:  
22 “North American herb known for its reputed ability to help promote prostate function.”

23 78. While naturally-occurring phytosterol compounds<sup>7</sup> found in nearly all plants,  
24 including Saw Palmetto, have been shown to present certain specific benefits for  
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26 <sup>6</sup> The National Institute of Health, *Herbs at a Glance: Asian Ginseng* <http://nccam.nih.gov/health/asianginseng/> (last visited June 4, 2013).

27 <sup>7</sup> Plant forms of cholesterol.  
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1 sufferers of benign prostate hyperplasia,<sup>8</sup> it is untrue that such phytosterols “promote  
2 healthy prostate function.”

3 79. Furthermore, the NIH has warned that the Cobra ingredient yohimbe “might  
4 make the symptoms of BPH (benign prostatic hyperplasia) worse,” negating any such  
5 implied benefit for the prostate.<sup>9</sup>

6 80. Such a suggestion is not only false but also misleading in the context of  
7 other claims made throughout Defendants’ Cobra label.

8 81. A reasonable consumer would assume significant improvement of prostate  
9 function might also improve “sexual energy” or performance.

10 82. Further, neither phytosterols nor Saw Plametto extracts have ever been  
11 shown by any scientific study to affect human sexual energy levels in any way.

12 **Other Ingredients Listed Under NBI’s Proprietary Blend**

13 83. **“Kola Nut (seed extract)”**: There are no scientific studies showing that seed  
14 extracts from the Kola nut, or any other such extract, improve “sexual energy” levels.

15 84. **“Oat Straw (aerial extract)”**: There are no scientific studies showing that  
16 “aerial” extracts from oat straw, or any other such extract, improve “sexual energy”  
17 levels.

18 85. **“Nettle (leaf extract)”**: There are no scientific studies that demonstrate  
19 extracts from any nettle plant improve “sexual energy” levels.

20 86. **“Catuaba (bark)”**: There are no scientific studies that demonstrate extracts  
21 from Catuaba bark improve “sexual energy” levels.

22 87. **“Damiana (leaf)”**: Also known as *tunera diffusa*, extracts from this plant  
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24 <sup>8</sup> A non-cancerous enlargement of the prostate. *See e.g.*, Berges RR et al., *Randomised,*  
25 *Placebo-Controlled, Double-Blind Clinical Trial of beta-Sitosterol in Patients with*  
*Benign Prostatic Hyperplasia. beta-Sitosterol Study Group*, 345 *Lancet* 1529 (1995).

26 <sup>9</sup> The National Institute of Health, *Yohimbe*  
27 <http://www.nlm.nih.gov/medlineplus/druginfo/natural/759.html> (last visited June 4,  
28 2013).

1 have only been shown to increase the sexual activity and copulation rate of “sexually  
2 sluggish” rats in one study.

3 88. However, rats exhibiting this gain were at the outset “sexually sluggish”  
4 before Damiana extracts were administered in solution. Rats exhibiting normal sexual  
5 behavior, however, showed no such benefit when given the extract as compared to a  
6 control group. The hypothesized mechanisms by which Damiana extracts are purported to  
7 affect “sexually sluggish” rats did not appear to be present in healthy rats:

8 So, from our present data, it would appear that the plant extracts used  
9 in this study, which selectively improve the sexual behavior of  
10 sluggish/impotent rats, *while being ineffective in potent rats*, might act  
11 mainly by increasing central noradrenergic and dopaminergic tone,  
12 and possibly (indirectly) oxytocinergic transmission.<sup>10</sup>

13 89. No human study, however, has replicated this finding in the fourteen years  
14 since this study was performed. Accordingly, claims as to the possible effects and  
15 benefits of Damiana leaf extracts on human beings (let alone human beings not suffering  
16 from the same issues as the “sluggish” rats) are misleading.

17 **Violations of 21 C.F.R. § 310.528**

18 90. The labeling described above, including but not limited to: “Sexual Energy,”  
19 “Powerful Men’s Formula,” “Horny Goat Weed,” “Potency Wood,” “Perform Your Best  
20 with Animal Magnetism,” “enhance. . . sexuality,” “enhance. . . sexual energy,”  
21 “improve. . . performance,” “Take Virility to the Max!,” “performance enhancing,” alone  
22 and in context with other labeling claims and packaging graphics, evidence Cobra’s  
23 intended use as an aphrodisiac, to arouse or increase sexual desire or energy, or improve  
24 sexual performance.

25 91. Pursuant to Title 21 of the Code of Federal Regulations, Part 310.528 (21

26 \_\_\_\_\_  
27 <sup>10</sup> R. Arletti et al., *Stimulating Property of Tunera Diffusa and Pfaffia Paniculata Extracts*  
28 *on the Sexual Behavior of Male Rats*, 143 *Pharmacology* 15 (1999) (emphasis added).

1 CFR § 310.528) any OTC drug product that is labeled, represented, or promoted for use  
2 as an aphrodisiac, like Cobra, is regarded as a “new drug” within the meaning of section  
3 201(p) of the FDCA (located at 21 U.S.C. § 355(p)).

4 92. The FDCA requires any new drug to have an application approved by the  
5 Food and Drug Administration (“FDA”) before the drug can be marketed to the public,  
6 and further that the drug’s label be approved by the FDA prior to marketing or selling the  
7 drug to the public. *See, generally, id.*; 21 U.S.C. §§ 355(a), (b) [New Drug Application],  
8 (j) [Abbreviated New Drug Application, for generic drugs].

9 93. Defendants’ Product violates Section 505(a) of the FDCA since the  
10 adequacy of the labeled directions for its “aphrodisiac” uses has not been approved by the  
11 FDA prior to Cobra being marketed to the public (*see* 21 U.S.C. § 355(a)).<sup>11</sup>  
12 Accordingly, the Product is misbranded under section 502(f)(1) of the FDCA (located at  
13 21 U.S.C. § 352).

14 94. Further, Cobra includes the ingredients: Yohimbe, Horny Goat Weed, Muira  
15 Puama, Korean Ginseng, Saw Palmetto, Kola Nut, Oat Straw, Nettle, Catuaba, and  
16 Damiana. However, none of these are safe and effective for OTC use as an aphrodisiac.  
17 21 C.F.R. § 310.528. The FDA bars these false, misleading, and unsupported by scientific  
18 data label claims. *Id.* Thus, based on the evidence currently available, any OTC drug  
19 product containing ingredients for use as an aphrodisiac, including Cobra, cannot be  
20 generally recognized as safe and effective, and instead are misbranded new drugs. *See id.*

21 **RELIANCE AND INJURY**

22 95. When purchasing Cobra Mr. Ortega and Mr. Lambert were seeking a  
23 product that had the qualities described on Cobra’s label, namely, a high quality and  
24 effective aphrodisiac that enhanced energy, performance, and health.

25 96. When deciding to purchase Cobra, Plaintiffs read and relied on the following

26 \_\_\_\_\_  
27 <sup>11</sup> In addition to proving effectiveness, the manufacturer of a new drug must also prove  
28 the drug’s safety, sufficient to meet FDA standards. 21 U.S.C. § 355(d).

1 deceptive claims contained on the packaging of Cobra. These statements were made by  
2 NBI, NC, and NIC directly on the packaging of Cobra at the times Plaintiffs purchased  
3 Cobra:

- 4 a. the Product’s name, “Cobra Sexual Energy”;
- 5 b. “Powerful Men’s Formula”;
- 6 c. “with Yohimbe & Horny Goat Weed”;
- 7 d. “Perform Your Best with Animal Magnetism”;
- 8 e. “‘aphrodisiac’ plants to enhance . . . sexual energy”;
- 9 f. “improve . . . performance”;
- 10 g. “Scientifically blending select, high-quality herbs”;
- 11 h. “Natural Balance has energized people’s health and well-being”;
- 12 i. “offering specialty supplements that work”;
- 13 j. “Helping people live healthier, more enjoyable lives”;
- 14 k. “proprietary formulas”;
- 15 l. “Take Virility to the Max!”;
- 16 m. “Most famous of all performance enhancing herbs”;
- 17 n. The “graphic of a cobra snake with an erect head on the front of the  
18 Cobra box”;
- 19 o. “Cobra blends exotic herbs from the Orient, South Pacific, and Africa”;
- 20 p. “Discover Natural Balance”;
- 21 q. “Yohimbe Bark Extract” and “Legendary herb from Africa that contains  
22 Yohimbine. Yohimbe is intended to provide nutritive support for healthy  
23 blood flow”;
- 24 r. “Horny Goat Weed” and “From China, it is thought to support sensitivity  
25 in the sensory nerves”;
- 26 s. “Muir Puama” and “Stimulating Brazilian herb known as ‘potency  
27 wood’”;

1 t. “Saw Palmetto” and “North American herb known for its reputed ability  
2 to help promote prostate function”; and

3 u. Cobra’s ingredient list: “Kola Nut (seed extract)”; “Oat Straw (aerial  
4 extract)”; “Nettle (leaf extract)”; “Catuaba (bark)”; and “Damiana (leaf).”

5 97. Based on these representations, Plaintiffs believed Cobra had powerful  
6 aphrodisiac qualities, was based on scientific research, and would improve, sexual health,  
7 energy, and performance.

8 98. Plaintiffs believed Cobra had the qualities they sought based on these  
9 deceptive labeling claims, but the Product was actually unsatisfactory to Plaintiffs for the  
10 reasons described herein, *i.e.*, the Product did not deliver the purported benefits, there is  
11 no evidence the ingredients in Cobra could provide the claimed benefits, and the  
12 ingredients may actually impose an unreasonable risk of danger.

13 99. Cobra costs more than similar products without misleading labeling, and  
14 would have cost less absent the false and misleading statements.

15 100. Plaintiffs paid more for Cobra, and would only have been willing to pay less  
16 or unwilling to purchase the Product at all, absent the false and misleading labeling  
17 complained of herein. Plaintiffs would not have purchased Cobra absent these claims and  
18 advertisements.

19 101. For these reasons, Cobra was worth less than what Plaintiffs paid for it.

20 102. Instead of receiving a product that had actual and substantiated healthful or  
21 other beneficial qualities, the Product Plaintiffs received was one which does not provide  
22 the claimed benefits.

23 103. Plaintiffs lost money as a result of Defendants’ deceptive claims and  
24 practices in that they did not receive what they paid for when purchasing Cobra.

25 104. Plaintiffs altered their position to their detriment and suffered damages in an  
26 amount equal to the amount they paid for Cobra.

1 **CLASS ACTION ALLEGATIONS**

2 105. Plaintiff, Frank Ortega, did not discover that Defendants’ labeling was false,  
3 deceptive, or misleading until December 2012, when he learned that the Defendants’  
4 Product violates the FDCA and its implementing regulations and that the labels were  
5 untrue and/or misleading.

6 106. Plaintiff, Troy Lambert, did not discover that Defendants’ labeling was false,  
7 deceptive, or misleading until January 2013, when he learned that the Defendants’  
8 Product violates the FDCA and its implementing regulations and that the labels were  
9 untrue and/or misleading.

10 107. Plaintiffs are reasonably diligent consumers who exercised reasonable  
11 diligence in their purchasing, use, and consumption of the Product. Nevertheless, they  
12 would not have been able to discover Defendants’ deceptive practices and lack the means  
13 to discover them given that, like nearly all consumers, they are not nutritionists, food  
14 experts, or food scientists, but rather lay consumers who did not have the specialized  
15 knowledge that Defendants had.

16 **CLASS ACTION ALLEGATIONS**

17 108. Plaintiffs bring this action on behalf of themselves and all others similarly  
18 situated (the “Class”) in accordance with Rule 23 of the Federal Rules of Civil Procedure.

19 109. The Class is defined as:

20 All persons (excluding officers, directors, and employees of NBI, NC,  
21 and NIC) who purchased, on or after January 1, 2006, Defendants’  
22 Cobra Products (in all packaging sizes and iterations) in California for  
23 their own use rather than resale or distribution.

24 110. Questions of law and fact common to Plaintiffs and the Class include:

- 25 a. Whether Defendants contributed to, committed, and/or are responsible  
26 for the conduct alleged herein;  
27 b. Whether Defendants’ conduct constitutes the violations of law alleged  
28

1           herein;

2           c. Whether Defendants acted willfully, recklessly, negligently, or with  
3           gross negligence in the violations of law alleged herein; and

4           d. Whether Class members are entitled to compensatory, injunctive, and  
5           other equitable relief.

6           111. By purchasing Cobra, all Class members were subjected to the same  
7 wrongful conduct.

8           112. Absent Defendants' deceptive claims, Plaintiffs and Class members would  
9 not have purchased Cobra.

10          113. Plaintiffs' claims are typical of the Class's claims. Plaintiffs will fairly and  
11 adequately protect the interests of the Class, have no interests that are incompatible with  
12 the interests of the Class, and have retained counsel competent and experienced in class  
13 action litigation.

14          114. The Class is sufficiently numerous, as it includes thousands of individuals  
15 who purchased Cobra throughout California during the Class Period.

16          115. Class representation is superior to other options for the resolution of the  
17 controversy. The relief sought for each Class member is small. Absent the availability of  
18 class action procedures, it would be infeasible for Class members to redress the wrongs  
19 done to them.

20          116. Defendants have acted on grounds applicable to the Class, thereby making  
21 appropriate final injunctive relief or declaratory relief concerning the Class as a whole.

22          117. Questions of law and fact common to the Class predominate over any  
23 questions affecting only individual members.

24          118. Class treatment is appropriate under FRCP 23(a), and both 23(b)(2) and  
25 23(b)(3). Plaintiffs do not contemplate class notice if the Class is certified under FRCP  
26 23(b)(2), which does not require notice, and notice via publication if the Class is certified  
27 under FRCP 23(b)(3) or if the Court determines Class notice is required notwithstanding  
28

1 that notice is not required under FRCP 23(b)(2). Plaintiffs will, if notice is required,  
2 confer with Defendants and seek to present the Court with a stipulation and proposed  
3 order on the details of a Class notice plan.

4 **FIRST CAUSE OF ACTION**

5 **Violations of the Unfair Competition Law, Unlawful Prong**

6 **Cal. Bus. & Prof. Code § 17200 *et seq.***

7 119. Plaintiffs reallege and incorporate the allegations elsewhere in the Second  
8 Amended Complaint as if set forth in full herein.

9 120. California Business and Professional Code § 17200 prohibits any “unlawful,  
10 unfair or fraudulent business act or practice.”

11 121. The acts, omissions, misrepresentations, practices, and non-disclosures of  
12 Defendants as alleged herein constitute “unlawful” business acts and practices in that  
13 Defendants’ conduct violates the False Advertising Law, the Consumer Legal Remedies  
14 Act, and the Lanham Act.

15 122. Defendants’ conduct is further “unlawful” because it violates the FDCA and  
16 its implementing regulations in the following ways:

- 17 a. Defendants’ deceptive statements violate 21 U.S.C. §§ 343(a) and 352,  
18 which deem a food or drug (including nutritional supplements) misbranded  
19 when the label contains a statement that is “false or misleading in any  
20 particular”;
- 21 b. Defendants’ deceptive statements violate 21 C.F.R. § 101.14(b)(3)(i), which  
22 mandates “substances” in dietary supplements consumed must contribute  
23 and retain “nutritive value,” as defined under 21 C.F.R. § 101.14(a)(2)(3)  
24 when consumed at levels necessary to justify a claim;
- 25 c. Defendants’ deceptive statements are *per se* false and misleading because  
26 the FDA has ruled there is a lack of adequate data to establish general  
27 recognition of the safety and effectiveness of any of Cobra’s ingredients, or  
28

1 any other ingredient, for OTC use as an aphrodisiac; and labeling claims for  
2 aphrodisiacs for OTC use are “either false, misleading, or unsupported by  
3 scientific data.” 21 C.F.R. § 310.528(a);

4 d. Defendants’ deceptive statements violate 21 CFR § 310.528(b), which  
5 mandates that any OTC product that is labeled, represented, or promoted for  
6 use as an aphrodisiac, like Cobra, is regarded as a “new drug” within the  
7 meaning of 21 U.S.C. § 355(p), but Defendants do not have new drug  
8 approval for Cobra or its labeling, as required under the FDCA and its  
9 implementing regulations. Accordingly, Defendants’ Product is misbranded  
10 under section 502(f)(1) of the FDCA;

11 e. Defendants’ Product also violates the FDCA because, as an unapproved new  
12 drug and aphrodisiac, Cobra cannot be generally recognized as safe and  
13 effective in the absence of a new drug application as set forth in the FDCA  
14 and its implementing regulations. 21 C.F.R. § 310.528(a);

15 123. Defendants’ conduct is further “unlawful” because it violates The California  
16 Sherman Food, Drug, and Cosmetic Law, *see* Cal. Health & Safety Code § 109875-  
17 111900, which incorporates the provisions of the FDCA. *See id.* §§ 110110-110115.

18 124. In accordance with Bus. & Prof. Code § 17203, Plaintiffs seek an order  
19 enjoining Defendants from continuing to conduct business through unlawful, unfair,  
20 and/or fraudulent acts and practices, and to commence a corrective advertising campaign.

21 125. Plaintiffs further seek an order for the disgorgement and restitution of all  
22 monies from the sale of the Defendants’ Product, which were acquired through acts of  
23 unlawful, unfair, and/or fraudulent competition.

24 **SECOND CAUSE OF ACTION**

25 **Violations of the Unfair Competition Law, Unfair and Fraudulent Prongs**

26 **Cal. Bus. & Prof. Code § 17200 *et seq.***

27 126. Plaintiffs reallege and incorporate the allegations elsewhere in the Second  
28

1 Amended Complaint as if set forth in full herein.

2 127. California Business and Professional Code § 17200 prohibits any “unlawful,  
3 unfair or fraudulent business act or practice.”

4 128. The acts, omissions, misrepresentations, practices, and non-disclosures of  
5 Defendants as alleged herein also constitute “unfair” business acts and practices under the  
6 UCL in that Defendants’ conduct is immoral, unscrupulous, and offends public policy by  
7 seeking to profit from male vulnerability to false or deceptive virility or aphrodisiac  
8 claims. Further, the gravity of Defendants’ conduct outweighs any conceivable benefit of  
9 such conduct.

10 129. The acts, omissions, misrepresentations, practices, and non-disclosures of  
11 Defendants as alleged herein constitute “fraudulent” business acts and practices under the  
12 UCL in that Defendants’ claims are false, misleading, and have a tendency to deceive the  
13 Class and the general public, as detailed herein.

14 130. In accordance with Bus. & Prof. Code § 17203, Plaintiffs seek an order  
15 enjoining Defendants from continuing to conduct business through unlawful, unfair,  
16 and/or fraudulent acts and practices, and to commence a corrective advertising campaign.

17 131. Plaintiffs further seek an order for the disgorgement and restitution of all  
18 monies from the sale of the Defendants’ Product, which were acquired through acts of  
19 unlawful, unfair, and/or fraudulent competition.

20 **THIRD CAUSE OF ACTION**

21 **Violations of the False Advertising Law,**

22 **Cal. Bus. & Prof. Code § 17500 *et seq.***

23 132. Plaintiffs reallege and incorporate the allegations elsewhere in the Second  
24 Amended Complaint as if set forth in full herein.

25 133. In violation of California Business and Professional Code § 17500 *et seq.*,  
26 the advertisements, labeling, policies, acts, and practices described herein were designed  
27 to, and did, result in the purchase and use of Cobra.

28

1 134. Defendants knew and reasonably should have known that the labels on  
2 Defendants' Product were untrue and/or misleading.

3 135. As a result, Plaintiffs, the Class, and the general public are entitled to  
4 injunctive and equitable relief, restitution, and an order for the disgorgement of the funds  
5 by which Defendants were unjustly enriched.

6 **FOURTH CAUSE OF ACTION**

7 **Violations of the Consumer Legal Remedies Act,**

8 **Cal. Civ. Code § 1750 *et seq.***

9 136. Plaintiffs reallege and incorporate the allegations elsewhere in the Second  
10 Amended Complaint as if set forth in full herein.

11 137. The CLRA prohibits deceptive practices in connection with the conduct of a  
12 business that provides goods, property, or services primarily for personal, family, or  
13 household purposes.

14 138. Defendants false and misleading labeling and other policies, acts, and  
15 practices were designed to, and did, induce the purchase and use of Defendants' Product  
16 for personal, family, or household purposes by Plaintiffs and class members, and violated  
17 and continue to violate the following sections of the CLRA:

- 18 a. § 1770(a)(5): representing that goods have characteristics, uses, or benefits  
19 which they do not have;
- 20 b. § 1770(a)(7): representing that goods are of a particular standard, quality, or  
21 grade if they are of another;
- 22 c. § 1770(a)(9): advertising goods with intent not to sell them as advertised;  
23 and
- 24 d. § 1770(a)(16): representing the subject of a transaction has been supplied in  
25 accordance with a previous representation when it has not.

26 139. As a result, Plaintiffs and the Class have suffered irreparable harm, seek, and  
27 are entitled to, actual damages, punitive damages, injunctive relief, and restitution.

1 140. Pursuant to section 1782 *et seq.* of the CLRA, Plaintiffs notified Defendants  
2 in writing by certified mail of the particular violations of § 1770 of the Act as to the  
3 Product and demanded that Defendants rectify the problems associated with the actions  
4 detailed above and give notice to all affected consumers of its intent to so act.  
5 Defendants' wrongful business practices regarding the Product constituted, and  
6 constitute, a continuing course of conduct in violation of the CLRA since Defendants are  
7 still representing that the Product has characteristics, uses, benefits, and abilities which  
8 are false and misleading, and have injured Plaintiffs and the Class.

9 141. Because Defendants failed to implement remedial measures, Plaintiffs seek  
10 actual and punitive damages for their CLRA claims.

11 **PRAYER FOR RELIEF**

12 WHEREFORE, Plaintiffs, on behalf of themselves, all others similarly situated,  
13 and the general public, pray for judgment and relief against Defendants as follows:

14 A. An Order declaring this action to be a proper class action and appointing  
15 undersigned counsel as class counsel;

16 B. An Order requiring Defendants to bear the cost of class notice;

17 C. An Order compelling Defendants to conduct a corrective advertising  
18 campaign;

19 D. An Order requiring Defendants to disgorge all monies, revenues, and profits  
20 obtained by means of any wrongful act or practice;

21 E. An Order compelling Defendants to destroy all misleading and deceptive  
22 advertising materials and Product labels;

23 F. An Order requiring Defendants to pay restitution to restore all funds  
24 acquired by means of any act or practice declared by this Court to be an unlawful, unfair,  
25 or fraudulent business act or practice, untrue or misleading advertising, or a violation of  
26 the CLRA, plus pre-and post-judgment interest thereon;

27 G. An Order awarding costs, expenses, and reasonable attorneys' fees; and  
28

1 H. Any other and further relief the Court deems necessary, just, or proper.

2 **JURY DEMAND**

3 Plaintiffs demand a trial by jury on all causes of action so triable.

4  
5 DATED: December 23, 2013

Respectfully Submitted,

6 

7 Gregory S. Weston

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