

Barry Himmelstein (SBN 157736)
barry@himmellaw.com
HIMMELSTEIN LAW NETWORK
2000 Powell St., Suite 1605
Emeryville, CA 94608-1861
Telephone: (510) 450-0782
Facsimile: (510) 924-0403

Attorney for Plaintiffs
Brian O'Toole, Robert Sokolove,
and Michael Bitton

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

BRIAN O'TOOLE, ROBERT
SOKOLOVE, and MICHAEL
BITTON, on behalf of themselves and
all others similarly situated,

Plaintiffs,

v.

GENCOR NUTRIENTS, INC.; GE
NUTRIENTS, INC.; JITH
VEERAVALLI; R.V. VENKATESH;
GENERAL NUTRITION
CORPORATION; GNC
CORPORATION; GENERAL
NUTRITION CENTERS, INC.; S&G
PROPERTIES, LLC; DIRECT
DIGITAL LLC; BRANDON
ADCOCK; PAUL REICHEL; JOHN
KIM; TRUDERMA, LLC; FORCE
FACTOR LLC; and DOES 1-10,

Defendants.

Case No.:

**COMPLAINT FOR
VIOLATIONS OF RACKETEER
INFLUENCED AND CORRUPT
ORGANIZATIONS ACT;
VIOLATIONS OF CONSUMER
LEGAL REMEDIES ACT;
VIOLATIONS OF UNFAIR
COMPETITION LAW;
VIOLATIONS OF FALSE
ADVERTISING LAW; BREACH OF
EXPRESS WARRANTY; BREACH
OF IMPLIED WARRANTY OF
MERCHANTABILITY; BREACH
OF IMPLIED WARRANTY OF
FITNESS FOR A PARTICULAR
PURPOSE; FRAUD; NEGLIGENT
MISREPRESENTATION;
RESTITUTION; VIOLATIONS OF
NY GBL § 349; and VIOLATIONS
OF NY GBL § 350**

CLASS ACTION

DEMAND FOR JURY TRIAL

1 Plaintiffs Brian O'Toole, Robert Sokolove, and Michael Bitton, on behalf of
2 themselves and all others similarly situated, allege as follows:

3 **SUMMARY OF ACTION**

4 1. Defendants manufacture, market, and sell Testofen or nutritional
5 supplements containing Testofen, an extract of the herb fenugreek. Defendants
6 advertise and market these products as "testosterone boosters," representing that
7 Testofen has been "clinically proven" to increase free testosterone levels. These
8 representations are false, based on universally-accepted principles of statistical
9 analysis that have been adopted by the regulatory bodies of every "first world"
10 country, including the United States.

11 2. Plaintiffs and the other members of the class, who purchased these
12 products based on these false representations, are entitled to get their money
13 back. Treble and punitive damages should be also assessed against defendants,
14 who have sold or continue to sell these products as clinically proven testosterone
15 boosters, despite knowledge of the falsity of these representations.

16 3. GNC provides the exclusive "launch" platform for a steady stream
17 of new "testosterone boosters," including Nugenix, Troxyphen, and High T
18 products, giving GNC 100% of the revenue from the retail sales of these
19 products. As both GNC and the manufacturers acknowledge, GNC uses its
20 market dominance and influence with its customers to quickly drive sales of these
21 products to levels far beyond what the manufacturers could otherwise achieve.

22 4. The manufacturers then introduce "new" and purportedly improved
23 versions of each product, and GNC dubs each successive version as the "Newest
24 Latest Greatest," creating an ever-growing product category, occupying ever-
25 growing shelf space, and bringing ever-growing revenues and profits to GNC and
26 its associates in the RICO "Testofenterprise."
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JURISDICTION

5. This Court has original jurisdiction over this action pursuant to the Class Action Fairness Act, 28 U.S.C. § 1332(d), in that members of the proposed plaintiff class are citizens of a State different from one or more defendants, and the amount in controversy exceeds the sum of \$5,000,000.

6. Pursuant to 18 U.S.C. § 1964 and 28 U.S.C. § 1331, this Court also has original jurisdiction over Plaintiffs' claims for violations of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961, *et seq.* ("RICO"). Pursuant to 28 U.S.C. § 1367, this Court also has supplemental jurisdiction over Plaintiffs' state law claims, which are so related to Plaintiffs' RICO claims that they form part of the same case or controversy.

VENUE

7. Venue in this district is proper pursuant to 28 U.S.C. § 1391(b)(2), because a substantial part of the events or omissions giving rise to Plaintiffs' claims occurred in this district.

PARTIES

I. Plaintiffs

8. Plaintiff BRIAN O'TOOLE ("O'Toole") is an individual residing in Los Angeles County, California.

9. Plaintiff ROBERT SOKOLOVE ("Sokolove") is an individual residing in Sussex County, Delaware.

10. Plaintiff MICHAEL BITTON ("Bitton") is an individual residing in Los Angeles County, California.

II. Defendants

A. Gencor Defendants

11. Defendant GENCOR NUTRIENTS, INC. ("Gencor") is a California corporation having its principal place of business in Orange County, California.

1 Prior to August 2008, Gencor was known as Gencor Pacific, Inc. Gencor is the
2 manufacturer of Testofen, a standardized fenugreek extract.

3 12. Defendant GE NUTRIENTS, INC. (“GE Nutrients”) is a California
4 corporation having its principal place of business in Orange County, California.
5 A February 20, 2014 article in the Orange County Business Journal reports that
6 GE Nutrients “operates as Gencor.”

7 13. Defendant JITH VEERAVALLI (“Veeravalli”) is, and at all relevant
8 times has been, the President and Chief Executive Officer of Gencor and GE
9 Nutrients.

10 14. Defendant R.V. VENKATESH (“Venkatesh”) is, and at all relevant
11 times has been, the Managing Director of Gencor and GE Nutrients.

12 15. Veearavalli and Venkatsh exercise dominion and control over
13 Gencor and GE Nutrients, and are equally responsible for the wrongful acts
14 alleged herein. Gencor, GE Nutrients, Veeravalli and Venkatesh are collectively
15 referred to herein as the “Gencor Defendants.”
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17 **B. GNC**

18 16. Defendant GENERAL NUTRITION CORPORATION is a
19 Pennsylvania corporation having its principal place of business in Pittsburgh,
20 Pennsylvania. GENERAL NUTRITION CORPORATION manufactures and
21 sells products containing Testofen through GNC branded stores and its website,
22 www.gnc.com.

23 17. Defendant GNC CORPORATION is a Delaware corporation having
24 its principal place of business in Pittsburgh, Pennsylvania. GNC
25 CORPORATION sells products containing Testofen.
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1 18. Defendant GENERAL NUTRITION CENTERS, INC. is a Delaware
2 corporation having its principal place of business in Pittsburgh, Pennsylvania.
3 GENERAL NUTRITION CENTERS, INC. sells products containing Testofen.

4 19. Defendant S&G PROPERTIES, LLC is a Pennsylvania limited
5 liability company having its principal place of business in Norristown,
6 Pennsylvania. S&G PROPERTIES, LLC sells products containing Testofen
7 through its website, www.LuckyVitamin.com.

8 20. Defendants GENERAL NUTRITION CORPORATION, GNC
9 CORPORATION, GENERAL NUTRITION CENTERS, INC., and S&G
10 PROPERTIES, LLC (collectively, “GNC”) are wholly-owned subsidiaries of
11 GNC Holdings, Inc., a publicly-traded corporation.

12 **C. Direct Digital Defendants**

13 21. Defendant DIRECT DIGITAL, LLC (“Direct Digital”) is a
14 Delaware limited liability company having its principal place(s) of business in
15 Boston, Massachusetts and/or Charlotte, North Carolina. Direct Digital
16 manufactures and sells Nugenix Natural Testosterone Booster, which contains
17 Testofen.
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19 22. Defendant BRANDON ADCOCK (“Adcock”) is an individual
20 residing in North Carolina. Adcock is a co-founder and President of Direct
21 Digital.

22 23. Defendant PAUL REICHELT (“Reichelt”) is an individual residing
23 in North Carolina. Reichelt is a co-founder and Chief Marketing Officer of
24 Direct Digital.

25 24. Defendant JOHN KIM (“Kim”) is an individual residing in
26 Massachusetts. Kim is a co-founder and manager of Direct Digital.
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1 25. Adcock, Reichelt, and Kim exercise dominion and control over
2 Direct Digital, and are equally responsible for the wrongful acts alleged herein.
3 Direct Digital, Adcock, Reichelt, and Kim are collectively referred to herein as
4 the “Direct Digital Defendants.”

5 **D. Truderma**

6 26. Defendant TRUDERMA, LLC (“Truderma”) is a Nevada limited
7 liability company having its principal place of business in Las Vegas, Nevada.
8 Truderma manufactures and sells Troxyphen and Troxyphen Elite, which contain
9 Testofen.

10 **E. Force Factor**

11 27. Defendant FORCE FACTOR LLC (“Force Factor”) is a Delaware
12 limited liability company having its principal place of business in Boston,
13 Massachusetts. Force Factor manufactures and sells several products containing
14 Testofen, including Test X180 Testosterone Booster, Test X180 Alpha, Test
15 X180 Ignite, and Stack Factor 2 With Test X180.

16 **F. Additional Manufacturers**

17 28. The entities identified below manufacture and sell products
18 containing Testofen. As class members who have purchased these products step
19 forward to serve as additional class and subclass representatives, this complaint
20 will be amended to name the manufacturers of these products as additional
21 defendants.

22 29. NAC MARKETING COMPANY, LLC dba New Vitality (“NAC”)
23 is a Delaware limited liability company having its principal place of business in
24 Farmingdale, New York. NAC manufactures and sells Ageless Male containing
25 Testofen.
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1 30. KINGFISHER MEDIA, LLC (“KingFisher”) is a Delaware limited
2 liability company having its principal place of business in Midvale, Utah.
3 KingFisher manufactures and sells several products containing Testofen,
4 including High T Testosterone Booster, High T Senior Testosterone Booster,
5 High T Black Hardcore Formulation Testosterone Booster, and High T Black
6 Caffeine Free Hardcore Formulation Testosterone Booster.

7 31. DREAMBRANDS, INC. (“DreamBrands”) is an Arizona
8 corporation having its principal place of business in Phoenix, Arizona.
9 DreamBrands manufactures and sells products containing Testofen, including
10 Mdrive and Mdrive Elite Athlete Formula, which contain Testofen.

11 32. PHARMAFREAK HOLDINGS INC. (“PharmaFreak”) is a
12 Canadian corporation having its principal place of business in Toronto, Ontario.
13 PharmaFreak manufactures and sells Test Freak Hybrid Pro-Testosterone
14 Stimulator, which contains Testofen.

15 33. NDS NUTRITION PRODUCTS, INC. (“NDS”) is a Florida
16 corporation having its principal place of business in Omaha, Nebraska. NDS
17 manufactures and sells PMD N-TEST 600, which contains Testofen, and PMD
18 Flex Stack, which includes PMD N-TEST 600.

19 34. MEDICAL RESEARCH INSTITUTE, INC. (“MRI”) is a California
20 corporation having its principal place of business in the County of Los Angeles,
21 California. MRI manufactures and sells NO2 Red Test, which contains Testofen.

22 35. PREVENTION, LLC is a Delaware limited liability company
23 having its principal place of business in Orange County, California. Naturade, a
24 division of Prevention, LLC, manufactures and sells several products containing
25 Testofen, including Ageless Ultra T Gold, Vitali-T-Aid, and Vitali-T-Aid
26 Energy. Prior to the formation of Prevention, LLC in March 2012, these products
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1 were manufactured and sold by Naturade as a division of NNC LLC, a Delaware
2 limited liability company, which maintains its principal place of business at the
3 same address as Prevention, LLC. Prevention, LLC and NNC LLC are
4 individually and collectively referred to herein as “Naturade.”

5 36. PREMIUM NUTRACEUTICALS, LLC (“Premium
6 Nutraceuticals”) is a Georgia limited liability company having its principal place
7 of business in Martinez, Georgia. Premium Nutraceuticals manufactures and
8 sells Testoril, which contains Testofen.

9 **G. Doe Defendants**

10 37. Plaintiffs are ignorant of the true names and capacities of the
11 defendants sued herein under the fictitious names Does 1 through 10. Each of the
12 fictitiously named defendants is responsible in some manner for the acts herein
13 alleged, and proximately caused Plaintiffs’ damages. Plaintiffs will seek leave of
14 court to amend this complaint to allege said defendants’ true names and
15 capacities as soon as Plaintiffs ascertain them. Plaintiffs have limited the number
16 of fictitiously named defendants in accordance with Local Rule 19-1, but
17 discovery may reveal a greater number of such defendants.

18 **H. Civil Conspiracy, Agency, and Alter Ego**

19 38. At all times mentioned herein, each defendant was the agent for each
20 other defendant, was acting in the course and scope of such agency, and was
21 engaged in a civil conspiracy to do the things herein alleged.

22 39. At all times mentioned herein, Direct Digital was and is the alter ego
23 of Adcock, Reichelt, and Kim, and Gencor and GE Nutrients was and is the alter
24 ego of Veeravalli and Venkatesh.
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COMMON FACTUAL ALLEGATIONS

III. Gencor's Representations Concerning Testofen

40. Gencor's website, www.gencorpacific.com, states that its mission is to "support changing human health needs across the lifespan through innovative, clinically proven ingredients," and that "Our herbal ingredients have been clinically studied and shown effective in both animal and human clinical trials."

41. One of the herbal ingredients manufactured and sold by Gencor is Testofen, a standardized extract of the herb *Trigonella foenum-graecum*, commonly known as fenugreek. The name of the product, Testofen, is an amalgamation of the words "testosterone" and "fenugreek." Gencor sells Testofen to manufacturers of nutritional supplements, including the other defendants named herein, for inclusion in their products, which are marketed and sold as clinically-proven "testosterone boosters."

42. On the page devoted to Testofen (Exh. 1), Gencor's website states that:

Testofen is the branded name for Gencor's fenugreek extract. Fenugreek is a well-known, versatile herb that contains over 100 phytochemical constituents, including Furostanol Saponins and Steroidal Saponins. While fenugreek has multiple health applications, the active constituents included in Testofen have been shown to boost testosterone levels and thereby increase libido, lean muscle mass and immune functions. The group of saponin glycosides that Testofen is standardized to is named Fenuside.

After age 30, most men begin to experience a natural and gradual decline in testosterone levels, which can result in reduced drive and libido and a slow loss of muscle tone and definition. Most of the testosterone found in men is bound to the Sex Hormone Binding Globulin (SHBG) and Albumin. Only 2–3% of the testosterone present in the human body is typically in a free state.

Testofen has been shown to increase free testosterone, up to 98 percent, in an eight-week trial (see below).

43. Under the heading "Clinical research," Gencor's website states:

Human study on free testosterone levels and performance

Study Results: A double-blind, randomized, placebo-controlled human clinical study of 60 subjects was conducted using Testofen as the sole ingredient. The active group demonstrated the following statistically significant results:

- Significant increase in free testosterone ($p < 0.05$) compared to placebo group

Citation: Wankhede et. al., 2006 “Effect of Testofen on safety, anabolic activity and factors affecting exercise physiology.” To be published.

44. Below the citation to “Wankhede et al.” (hereafter, the “Testofen Study”) is a link for visitors to “Request Complete Study,” which generates a pop-up window stating: “To request the complete study document in PDF format please enter your email address below.” Such requests are consistently ignored by Gencor.

45. Based on the foregoing, the website makes the “Approved health claim” that Testofen “**Increases free testosterone levels.**”

46. The website features a video of Gencor’s Chief Scientific Advisor, Paul Clayton, Ph.D. (available at http://www.youtube.com/embed/NL_4G13Y1is?autoplay=1), whom Gencor describes as “the UK’s leading expert in the fast-developing science of pharmaco-nutrition.” In the video, Dr. Clayton states that Testofen:

results in approximately a doubling of free testosterone levels. Now that’s important because as we get older, and as we get more stressed, more tired by the constant demands of work and life in general, very often testosterone levels fall, and as they do we experience a loss of libido, of drive, muscle tone as well, because testosterone is very important in building muscles. By taking Testofen and achieving a doubling of free testosterone levels all of these adverse changes are reversed

IV. Statistical Principles for Clinical Trials

47. The International Conference on Harmonisation of Technical Requirements for Registration of Pharmaceuticals for Human Use (“ICH”) *Harmonised Tripartite Guideline, Statistical Principles For Clinical Trials, E9* (Feb. 4, 1998) (the “ICH Guideline”) sets forth principles for the statistical analysis of human clinical trials that have been adopted by the regulatory bodies of the European Union, Japan, and the United States, including the U.S. Department of Health and Human Services, Food and Drug Administration’s (“FDA’s”) Center for Drug Evaluation and Research and Center for Biologics Evaluation and Research. The ICH Guideline is available on the FDA’s website at

<http://www.fda.gov/downloads/Drugs/GuidanceComplianceRegulatoryInformation/Guidances/UCM073137.pdf>.

A. Exploratory Studies and Confirmatory Trials

48. The ICH Guideline explains the difference between an “exploratory study” and a “confirmatory trial” as follows:

A confirmatory trial is an adequately controlled trial in which the hypotheses are stated in advance and evaluated. As a rule, confirmatory trials are necessary to provide firm evidence of efficacy or safety. In such trials **the key hypothesis of interest follows directly from the trial’s primary objective, is always pre-defined, and is the hypothesis that is subsequently tested when the trial is complete.** [Section 2.1.2 (emphasis added).]

The rationale and design of confirmatory trials nearly always rests on earlier clinical work carried out in a series of exploratory studies. Like all clinical trials, these exploratory studies should have clear and precise objectives. However, in contrast to confirmatory trials, their objectives may not always lead to simple tests of pre-defined hypotheses. . . . **Such trials cannot be the basis of the formal proof of efficacy,** although they may contribute to the total body of relevant evidence. [Section 2.1.3 (emphasis added).]

B. Primary and Secondary Variables

49. The ICH Guideline explains the difference between a “primary variable” or “endpoint,” and a “secondary variable” as follows:

The primary variable (‘target’ variable, primary endpoint) should be the variable capable of providing the most clinically relevant and convincing evidence directly related to the primary objective of the trial. **There should generally be only one primary variable.**

To avoid multiplicity concerns arising from post hoc definitions, it is critical to specify in the protocol the precise definition of the primary variable as it will be used in the statistical analysis.

Redefinition of the primary variable after unblinding will almost always be unacceptable, since the biases this introduces are difficult to assess. When the clinical effect defined by the primary objective is to be measured in more than one way, the protocol should identify one of the measurements as the primary variable on the basis of clinical relevance, importance, objectivity, and/or other relevant characteristics, whenever such selection is feasible.

Secondary variables are either supportive measurements related to the primary objective or measurements of effects related to the secondary objectives. [Section 2.22 (emphasis added).]

C. Multiplicity

50. In human clinical trials for efficacy, statistical significance is established by having a probability or “p” value of less than 0.05, usually expressed as “ $p < 0.05$.” In layman’s terms, this means that there is less than a 5% (one in twenty) probability that the observed difference in the primary variable between the treatment and placebo or other control group is due to chance. The greater the number of variables being analyzed from a single trial, the greater the likelihood of a false positive result, called “Type I error” in statistical parlance, unless corrective statistical techniques are applied. That is, if each statistical test has a 5% chance of producing a false positive, then the overall chances of *some* false positive amongst *multiple* tests will be much greater than

5%. This is often denoted as the “family-wise Type I error rate,” where “family” refers to the set, or family, of hypotheses being considered.

51. To illustrate, imagine you had a roulette wheel with only 20 pockets in which the ball could land, instead of the usual 38. Place a bet on any single number – a single primary variable, if you will – and the odds that the ball will land in the corresponding pocket, producing a winner, are 1 in 20. Place bets on *two* numbers – two primary variables, if you will – and the odds that the ball will land in *one* of the corresponding pockets, producing a winner, are 1 in 10, not 1 in 20.

52. This problem is known generally as “multiplicity.” See ICH Guideline, Section 2.2.5 (“It may sometimes be desirable to use more than one primary variable The effect on the Type I error should be explained because of the potential for multiplicity problems (*see* Section 5.6); the method of controlling type I error should be given in the protocol.”). As the ICH Guideline explains:

When multiplicity is present, the usual frequentist approach to the analysis of clinical trial data may necessitate an adjustment to the type I error. Multiplicity may arise, for example, from multiple primary variables (see Section 2.2.2) Methods to avoid or reduce multiplicity are sometimes preferable when available, such as the identification of the key primary variable (multiple variables) In confirmatory analyses, any aspects of multiplicity that remain after steps of this kind have been taken should be identified in the protocol; adjustment should always be considered and the details of any adjustment procedure or an explanation of why adjustment is not thought to be necessary should be set out in the analysis plan. [Section 5.6.]

53. Testofen was developed by Indus Biotech Pvt. Ltd., which is located in India. As one Indian medical journal recently explained:

In most of the clinical trials published in Indian medical journals multiple end points are measured and hence multiple statistical tests are used to measure the

difference between groups. This may lead to increase in false positivity or Type 1 error. The P value is based on principal of probability, if with one statistical test the chance of having a significant result is 5%, then after 20 statistical tests it may be more than 40%. This is called inflation of type 1 error. More the number of statistical tests more inflation of Type 1 error. Inflation of type 1 error can be prevented dividing the endpoints at the design phase itself into primary and secondary endpoints. Most important endpoint should be considered as primary endpoint and other endpoints should be considered as secondary endpoints. **If the primary endpoint cannot be restricted to one then multiple endpoints should be adjusted with the help of various adjustment methods like Bonferroni method, least significant difference test, composite endpoint method etc.** In a study . . . done for clinical trials published in Indian medical journals it was found that **about one third of the clinical trials published in four Indian journals were false positive and statistical methods used to adjust this error was not mentioned in even a single trial.**

J. Charan, D. Saxena, *Suggested Statistical Reporting Guidelines for Clinical Trials Data*, Indian J Psychol Med 2012 Jan-Mar; 34(1): 25-29 (available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3361838/>).

D. The Bonferroni Correction

54. The simplest and most commonly used method of making such adjustments is known as the “Bonferroni correction.” *See* http://en.wikipedia.org/wiki/Bonferroni_correction. The correction is based on the observation that, if k tests are being evaluated separately, the family-wise Type I error rate is at most k times 0.05 if each test uses a standard 0.05 significance level. To obtain an overall significance level for the whole family of tests at a significance level of 0.05, the Bonferroni correction states that each individual test should be carried out using a significance level of $0.05/k$. *See* Wright, Adjusted p-values for simultaneous inference, *Biometrics*, 1992, 1005-1013.

55. Accordingly, if there are two primary variables or endpoints, applying the Bonferroni correction, the threshold for statistical significance for

1 each of the two variables is 0.025 (0.05/2). If there are three primary variables,
2 the threshold for statistical significance for each of the three variables is 0.016
3 (0.05/3), etc.

4 **V. The Testofen Study**

5 56. Gencor has made publicly available three versions of the Testofen
6 Study purporting to support its claim that Testofen has been clinically proven to
7 increase free testosterone levels: (1) a version entitled “Testofen Human Clinical
8 Trial,” Copyright 2006 by Gencor Pacific, Inc. (the “2006 Report”) (Exh. 2); (2)
9 a version entitled “Human Clinical Study for Free Testosterone & Muscle Mass
10 Boosting,” Copyright 2008 by Gencor Nutrients, Inc. (the “2008 Report”) (Exh.
11 3); and (3) a duplicate of the 2008 Report, Copyright 2013 by GE Nutrients, Inc.
12 (Exh. 4).

13 **A. The 2006 Report**

14 57. The 2006 Report identifies the Testofen Study as an exploratory
15 study “designed to explore the efficacy and safety of TESTOFEN in healthy male
16 volunteers,” and states that “Primary objectives of the study were to determine
17 the effects of TESTOFEN on free testosterone and body composition during
18 eight weeks of resistance exercise and to evaluate safety of TESTOFEN.”
19

20 58. The 2006 Report shows pre-treatment and post-treatment free
21 testosterone levels for the Testofen group, but makes no claim of statistical
22 significance.

23 59. In addition to body composition measures, the 2006 Report presents
24 blood urea nitrogen (“BUN”) levels as a third variable.

25 60. Under the heading “Safety,” the 2006 Report lists 20 “biochemical
26 parameters [that] were analyzed for the active and placebo groups,” including
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“Creatinine” and “Lymphocytes,” and states that “All of the parameters were normal for all participants.”

B. The 2008 Report

61. The 2008 Report identifies the “PRIMARY CLINICAL END POINTS” of the Testofen Study as “To determine the effect of TESTOFEN on Safety, Anabolic Activity, Blood Testosterone, Immune Function,” and the “SECONDARY CLINICAL END POINTS” as “To determine the effects of TESTOFEN on body composition, Creatinine, Prolactin, and Muscle mass variation.” [Page 3.]

62. The 2008 Report states that:

Primary efficacy was assessed on the basis of following parameters:

- I. Anabolic Activity by Nitrogen Absorption measured by BUN
- II. Blood testosterone both Total and Free
- III. Total Lymphocyte count and check immunity. [Page 8.]

63. The 2008 Report states that:

Secondary efficacy will be assessed on the basis of following parameters:

1. Exercise Physiology Biomarkers
 - Serum Creatinine
 - Serum Prolactin
2. Body Composition
 - Change in Fat-Free Mass
 - Change in Percent Body Fat
 - Change in Fat Mass
 - Change in Body Weight
3. Muscle size
 - Change in thigh: maximal girth, inferior to the gluteal fold.
 - Change in flexed arm: maximal girth at mid upper arm, elbow flexed and muscle contracted.
 - Change in shoulders: across the maximal protrusion of the deltoids.
 - Change in chest: mid-tidal volume. [Page 8.]

64. The 2008 Report presents the results for three “primary efficacy parameters,” BUN, free testosterone, and lymphocytes, followed by the results for the “secondary efficacy parameters” creatinine, prolactin, body composition (three sub-measures), and muscle size (four sub-measures). No results are presented for total testosterone, despite its inclusion in the list of “primary efficacy parameters.”

65. The 2008 Report presents the following results for free testosterone (pg/ml):

PARAMETERS	TESTOFEN	PLACEBO	
Pre Treatment	17.76	21.30	
Post Treatment	35.29	31.70	
P value	0.0001	0.014	
Percentage change	96	48	P Value < 0.05

66. Beneath these figures, the 2008 Report states:

Although there is increase in both groups TESTOFEN group increase is double of Placebo. After adjusting for plasma changes it is significant. ($p < 0.05$). Thus TESTOFEN group has shown significant increase with respect to base line ($p < 0.0001$) and with respect to placebo ($p < 0.05$). [Page 9.]

67. The 2008 Report concludes that the results are statistically significant as to *each of three primary variables*, as well as *two of the four secondary variables*, as follows:

1. TESTOFEN group has demonstrated significant anabolic activity as evidenced by BUN reduction ($p < 0.05$) compared to placebo.
2. **TESTOFEN group has significant increase in Free Testosterone ($p < 0.05$) compared to Placebo.**
3. TESTOFEN group has not only compensated the loss of Immunity significantly compared to Placebo ($p < 0.003$), but has also increased immunity.

4. TESTOFEN group has shown significant reduction in Serum Creatinine levels ($p < 0.02$) compared to placebo signifying Creatine uptake and recycle in muscle cell.
5. TESTOFEN group has shown significant increase in Prolactin compared to Placebo ($p < 0.04$). However this increase is within Physiological limits for men. [Page 11 (emphasis added).]

68. The following table summarizes Gencor's shifting identification of the primary variables, secondary variables, and routine laboratory (*i.e.*, safety) tests, involved in the Testofen Study:

	Primary Variables	Secondary Variables	Safety
2006 Report	Free testosterone Body composition (2 sub-measures)	BUN	Creatinine Lymphocytes
2008 Report	BUN Total testosterone Free testosterone Lymphocytes	Creatinine Prolactin Body Composition (3 sub-measures) Muscle Size (4 sub-measures)	

C. The Results Are Not Statistically Significant

69. A set forth above, in addition to the measurement and comparison of total and free testosterone, the most recent report of the Testofen Study – and the only one to claim statistical significance – written and distributed by Gencor itself, includes not *one* but *four* primary variables: (1) BUN; (2) total testosterone; (3) free testosterone; and (4) lymphocytes. The Bonferroni corrected significance level for each individual test is $0.05/4 = 0.0125$. Accordingly, **the reported results of $p < 0.05$ with respect to free testosterone are not statistically significant.**

70. Gencor has chosen to conceal, and not publish or make publicly available, the results of the Testofen Study with respect to total testosterone, even though Gencor identifies total testosterone as one of the study's primary

1 variables. Assuming, *arguendo*, that total testosterone and free testosterone were
2 perfectly correlated with one another, so that there were effectively only three
3 primary variables instead of four, the Bonferroni corrected significance level for
4 each individual test would be $0.05/3 = 0.0166$, and the results as to free
5 testosterone would still not be statistically significant.

6 71. Gencor's deliberate manipulation of the identification of primary
7 and secondary variables (*see* para. 68, *supra*) constitutes scientific fraud of the
8 highest order, and is compelling evidence of the Gencor Defendants' intent to
9 defraud Plaintiffs and the Class by falsely representing that Testofen has been
10 clinically proven to increase free testosterone levels.

11 72. Plaintiffs have retained Professor Nicholas P. Jewell, a Professor of
12 Biostatistics at the University of California, Berkeley, to determine whether
13 Testofen has been clinically proven to increase free testosterone levels. Professor
14 Jewell is the author of the textbook "Statistics for Epidemiology" (Chapman and
15 Hall, New York 2003), as well as approximately 160 peer-reviewed articles in the
16 field of biostatistics, and recently served as Chair of the Section on Statistics in
17 Epidemiology of the American Statistical Association (2009-2012).

18 73. Professor Jewell has determined that Testofen has *not* been clinically
19 proven to increase free testosterone levels, and that Defendants' claims to the
20 contrary are *false*. Professor Jewell's expert report, redacted to remove
21 references to documents and data produced by Gencor subject to a non-disclosure
22 agreement, is attached as Exhibit 5.

23 **VI. Other Negative Studies**

24 74. In addition to the Testofen Study, at least three other studies
25 sponsored by Indus Biotech have found that fenugreek extract has *no effect* on
26 free testosterone levels.
27
28

75. A human clinical trial conducted in Australia comparing Testofen to placebo found that Testofen “did not affect testosterone” levels. E. Steels, *et al.*, Physiological Aspects of Male Libido Enhanced by Standardized *Trigonella foenum-graecum* Extract and Mineral Formulation, *Phytotherapy Res.* 25: 1294-1300 (2011) (Exh. 6).

76. Another study, sponsored by Indus Biotech, concluded that fenugreek extract has *no effect* on free testosterone levels:

Despite no substantiated claims in human research models, fenugreek has been marketed in dietary products as having anabolic potential for resistance trained athletes. . . . The purpose of this study was to investigate the potential anabolic effects of fenugreek extract supplementation in conjunction with a controlled resistance training program. . . . No significant effects for groups or interactions were observed for the anabolic hormone[] free testosterone . . . (p<0.05). . . . [S]upplementation of fenugreek extract does not appear to affect hormonal status in resistance trained males and shows no anabolic potential as has been purported. This study was supported by INDUS BIOTECH.

B. Bushey, *et al.*, Fenugreek Extract Supplementation Has No Effect on the Hormonal Profile of Resistance-Trained Males, *Int. J. Exerc. Sci.* 2(1): S13, 2009 (Exh. 7).

77. Another study, also sponsored by Indus Biotech, also concluded that fenugreek extract has no effect on free testosterone levels. *See* C. Poole, *et al.*, Effects of TESTOSURGE supplementation on strength, body composition and hormonal profiles during an 8-week resistance training program, *J. Int. Soc. Sports Nutrition* 2009, 6(Suppl. I): P12 (“No significant changes were detected among groups for . . . free testosterone”) (Exh. 8).

78. Yet another study, also sponsored by Indus Biotech, found a significant difference in free testosterone levels between the group taking fenugreek extract and the placebo group, but the difference was *in favor of the*

1 *placebo group*, whose free testosterone levels rose by an average of 10 ng/ml
 2 over the course of the study, compared to the fenugreek group, whose free
 3 testosterone levels *declined* by an average of 4 ng/ml. C. Poole, *et al.*, The
 4 effects of a commercially available botanical supplement on strength, body
 5 composition, power output, and hormonal profiles in resistance-trained males, *J.*
 6 *Int. Soc. Sports Nutrition* 2010, 7:34 (Table 5) (Exh. 9). Rather than finding a
 7 *negative* effect on free testosterone levels, the study concluded that fenugreek
 8 extract has *no* effect:

9 Fenugreek supplementation is surrounded by assertions
 10 of having anabolic potential, even though there is no
 11 scientific data supporting this notion. In the present
 12 study we examined serum hormone variables that
 13 included free testosterone Although a between
 14 group difference was noted for free testosterone at T2
 15 and T3, it has limited relevance due to the fact that it did
 16 not significantly change over time. . . . [D]aily
 17 consumption of the 500 mg commercially available
 18 [fenugreek] supplement in conjunction with a resistance
 19 training program has no anabolic effect on the hormonal
 20 status of resistance trained males. [Page 8.]

21 **VII. False Representations Concerning “Testosterone Boosters”**

22 79. Despite the fact that Testofen has *not* been shown to increase free
 23 testosterone levels, and the existence of *four published studies* showing that it has
 24 no such effect, more than 20 products containing Testofen are marketed and sold
 25 as clinically proven “testosterone boosters.” False representations concerning
 26 each of these products are set forth below.

27 **A. Nugenix**

28 **1. Label and Packaging**

80. The label affixed to the product Nugenix Natural Testosterone
 Booster (“Nugenix”) (Exh. 10) states that “Nugenix is an all natural Testosterone
 booster that contains clinically studied ingredients that are proven to boost free
 testosterone levels.”

1 81. The box in which Nugenix is packaged (Exh. 11) states:

2 RECLAIM YOUR STRENGTH, STAMINA, AND
3 SEXUAL PERFORMANCE . . .

4 As you age testosterone levels can decrease, resulting in
5 lowered muscle mass and decreased libido. All natural
6 Nugenix helps your body restore testosterone levels
7 Clinical studies have shown Testofen to increase free
8 testosterone levels by over 98%.

9 82. The box contains a bar graph entitled “TESTOSTERONE
10 DECLINE,” showing a steady decline in “TESTOSTERONE LEVELS” from
11 age 20 to age 70. Beneath this bar graph, the box states: “After age 30, most
12 men begin to experience a gradual decline in testosterone. Nugenix helps fight
13 this decline.”

14 **2. Website**

15 83. The website www.nugenix.com is owned by defendant Direct
16 Digital. The website (Exh. 12) states:

17 BOOST YOUR FREE TESTOSTERONE NOW

18 Our developers formulated NUGENIX to provide high
19 levels of TESTOFEN...the key to boosting free
20 testosterone.

21 Nugenix Testosterone Booster is a safe and specially
22 formulated dietary supplement that helps your body
23 increase its free testosterone.

24 BOOST YOUR TESTOSTERONE NOW

25 Our Cambridge developers formulated Nugenix to
26 provide some of the highest levels of Testofen ... the
27 Key to Natural Testosterone production.

28 STUDIES AND TESTS SHOW THE MAIN
 INGREDIENT IN NUGENIX IS EFFECTIVE

 Testofen Studies in Irvine, California and Queensland,
 Australia produced the following results.

- Significant increase in natural testosterone compared to placebo test group.

1 And remember, our Cambridge developers created the
2 blend for Nugenix with the clinically proven dosage of
3 Testofen for great results

4 **B. Troxyphen**

5 **1. Label and Packaging**

6 84. The label and packaging for Troxyphen (Exh. 13) describe it as “A
7 unique [weight loss] supplement designed to specifically address the underlying
8 cause of male weight gain: LOW TESTOSTERONE,” and state that it contains
9 “INGREDIENTS SHOWN TO HELP: RAISE TESTOSTERONE.” The
10 remainder of the packaging is devoted to drawing a link between “Low
11 Testosterone and Excess Fat,” and states that Troxyphen is “designed to
12 specifically address the underlying cause of male weight gain. By naturally and
13 significantly increasing your base line testosterone levels”

14 85. The label and packaging for Troxyphen Elite (Exh. 14) state that it is
15 “A Powerful Free Testosterone Booster” containing “INGREDIENTS SHOWN
16 TO HELP: RAISE FREE TEST LEVELS,” and that “TROXYPHEN ELITE
17 helps to increase your free testosterone levels”

18 **2. Radio**

19 86. Troxyphen is the subject of a national radio advertising campaign,
20 on both broadcast and satellite radio, including stations such as CNN. The radio
21 commercial, which has aired thousands of times, states that “Troxyphen is
22 GNC’s best-selling, 100% natural and most powerful testosterone booster.
23 Troxyphen raises testosterone” The commercial states that “Troxyphen is
24 available nationwide at GNC stores,” and also directs listeners to the website,
25 “stoplowt.com” or “raisemytest.com.”

26 **3. Websites**

27 87. The websites stoplowt.com and raisemytest.com (which is redirected
28 to the website www.troxyphen2.com) (Exh. 15) state:

TROXYPHEN
ADVANCED TESTOGENIC
TESTOSTERONE BOOSTING THERMOGENIC

TROXYPHEN IS AN ADVANCED
SUPPLEMENT
DESIGNED TO BOOST FREE
TESTOSTERONE LEVELS

TESTOSTERONE INCREASED 98%

By naturally and significantly increasing your base
line testosterone levels . . .

TROXYPHEN IS SAFE & CLINICALLY
RESEARCHED
TROXYPHEN was developed around the
clinically researched and patented Testofen.

TESTOSTERONE BOOSTING BLEND
The patented test boosting blend was shown in
clinical studies to:
RAISE TESTOSTERONE LEVELS 98.81% IN 8
WEEKS

TESTOFEN
Testofen is a natural solution for promoting
Healthy Free Testosterone levels . . .

THE CHOICE IS YOURS!
DO NOTHING AND GET
Lowering Testosterone Levels

PICK TROXYPHEN AND ENJOY
Increased Testosterone Levels by 98%

C. Ageless Male

1. Label and Packaging

88. The label and packaging for Ageless Male (Exh. 16) state that it has been “Clinically Shown to Increase Free Testosterone Levels,” and contains “Ageless Male Proprietary Blend Testofen,” which “has been shown in a human clinical study to help support healthy free testosterone levels.”

2. Television

89. A 60-second television commercial for Ageless Male, available at <http://www.ispot.tv/ad/7nXX/ageless-male-giveaway>, has aired nationally 4,695 times, including on April 1, 2014 at 10:30 a.m. PST on SYFY. The commercial states that “Ageless Male has ingredients clinically shown to increase free testosterone levels,” and directs viewers to the website AgelessMaleFree.com.

90. A 120-second television commercial for Ageless Male, available at <http://www.ispot.tv/ad/77kP/ageless-male-over-40>, has aired nationally 2,164 times, including on November 29, 2013 at 11:57 a.m. PST on IFC. The commercial states that Ageless Male is “clinically shown to help increase testosterone levels,” and directs viewers to the website TryAgelessMale.com

91. A 121-second television commercial for Ageless Male, available at <http://www.ispot.tv/ad/7nXh/ageless-male-featuring-walt-frazier>, has aired nationally 324 times, including on December 23, 2013 at 2:42 a.m. PST on Smithsonian. The commercial states that Ageless Male’s “active ingredient is clinically shown to boost free testosterone,” and features Darren Clair, M.D., an Age Management Specialist, who states that “[t]he great thing about Ageless Male is it increases your *free* testosterone, and that’s what you want.” The commercial directs viewers to the website MyFreeAgeless.com.

92. A 60-second television commercial for Ageless Male, available at <http://www.ispot.tv/ad/7OSr/ageless-male-signs>, has aired nationally 21 times, including on July 29, 2013 at 2:28 a.m. PST on Discovery. The commercial states that “Ageless Male is made with natural ingredients clinically shown to help boost free testosterone levels,” and directs viewers to the website AgelessMaleFree.com.

3. Websites

93. The website www.newvitality.com is owned by NAC. The website (Exh. 17) states that Ageless Male is “Our Best Selling Formula to Boost Healthy Free Testosterone Levels, and describes the product as “The game-changing free testosterone booster for men!” Under the heading “Ageless Male Benefits,” the website states “Boost Healthy Free Testosterone Levels.”

94. Under the heading “About Ageless Male,” the website states that:

Testosterone is Vital for the Health of Any Man

Perhaps more than any other hormone, testosterone defines who a man is and supports his wellbeing. That’s why it’s so important for men to maintain healthy testosterone levels. The key ingredients in Ageless Male have been clinically-shown to help do just that by supporting free testosterone levels.

Boost Free Testosterone Naturally... and More!

Ageless Male contains an ingredient derived from the Fenugreek herb called Testofen – shown in a human clinical study to significantly help boost free testosterone (the most important form of testosterone which is available for immediate use by the body) in men.

95. Under the heading “FAQs,” the website states:

Q. Why should I consider Ageless Male?

A. Shown to be safe with no major side effects, Ageless Male contains a key ingredient shown in published research to help significantly boost free testosterone in men.¹

Q. What can I expect Ageless Male to do for me?

A. You can expect Ageless Male to help boost your free testosterone levels with correct use.

Q. What is the key ingredient in Ageless Male?

A. It’s a natural component professionally derived from the fenugreek herb. A double-blind, randomized, placebo-controlled human clinical study on this ingredient has shown it can significantly help boost free testosterone in men.¹

Footnote 1 to the FAQs cites the “published research” and “clinical study” as “Effect of TESTOFEN on safety, anabolic activity and factors affecting Exercise Physiology. Wankhede et. al.”

96. The website www.ageless-male.com is owned by NAC. Visitors to TryAgelessMale.com and AgelessMaleFree.com are redirected to www.ageless-male.com, and visitors to MyFreeAgeless.com are presented with the same content.

97. The website (Exh. 18) bills the product as “Ageless Male NATURAL FREE TESTOSTERONE BOOSTER,” and states that “Ageless Male has clinically-tested ingredients shown to: Boost healthy free testosterone levels.” The website states:

An Exciting Breakthrough

The makers of Ageless Male know the importance of having the right testosterone support as you age. That’s why they’ve combined some of the best, clinically-researched ingredients in one distinct formula to help men significantly increase free testosterone levels.

How Does it Work?

Testosterone is what ultimately makes a man “a man.” But did you know free testosterone (the kind available for immediate use in the body) may be the most important type? Ageless Male is made with an ingredient derived from the Fenugreek herb called Testofen— shown in a human clinical study to significantly help boost free testosterone levels.

98. Under the heading “Frequently Asked Questions,” the website contains the same representations as the “FAQs” section of the www.newvitality.com website quoted above.

D. Test X180

1. Label and Packaging

99. The label and packaging for Test X180 Testosterone Booster (“Test X180”) (Exh. 19) contain the following “Product Information”:

How do you safely increase testosterone levels? Well-researched ingredients are the answer, which is why the experts at Force Factor formulated Test X180 with premium, clinically supported compounds like Testofen. There's no reason to take a chance on unsafe, sketchy supplements. The ingredients in our proprietary blend are substantiated with rigorous research and hard, scientific facts – the same smart science behind the entire line of Force Factor products.

100. Under the heading “Test X180 Science,” the label and packaging state that:

The experts at Force Factor carefully formulated Test X180 to provide the boost that every man needs. By naturally raising your levels of free testosterone

Each serving of Test X180 contains clinically researched levels of Testofen Testofen is the well-known, effective compound your body needs to combat natural testosterone decline.

There's no need to take a chance on your health with untested, risky ingredients. Look and feel confident while you perform at your peak with the trusted ingredients in Test X180.

101. The label and packaging for Test X180 Alpha (Exh. 20) call the product “THE PREFERRED TESTOSTERONE BOOSTER OF ELITE MEN;” state that “the natural ingredient Testofen is clinically demonstrated to raise your body's free testosterone levels;” and state that “The Force Factor team perfected the Test X180 Alpha formula with one of the only natural ingredients clinically demonstrated to increase free testosterone levels: Testofen.” The label and packaging for Test X180 Ignite (Exh. 21) state that the product “was developed to be the ultimate all-in-one free testosterone booster, using safe, trusted ingredients backed by real science. Test X180 Ignite is fueled by Testofen”

2. Website

102. The website www.forcefactor.com is owned by defendant Force Factor. The website (Exh. 22) contains the same representations regarding Test X180, Test X180 Alpha, and Test X180 Ignite quoted above, and states that:

You're probably asking: "How do I safely increase my testosterone levels?" Well-researched natural testosterone boosters are the answer. That's how the experts at Force Factor formulated Test X180 – with premium, clinically supported compounds like Testofen that will pump up your testosterone to superhero levels as part of your workout routine.

Test X180 is backed by smart science, not fly-by-night sketchy "science." There's no reason to risk your health and your life with disreputable natural solutions. It's just not worth it.

NATURAL TESTOSTERONE BOOSTER CLINICALLY RESEARCHED INGREDIENTS

HOW TEST X180 WORKS

When taken along with regular exercise, Test X180 works with your body to naturally raise your levels of free testosterone. It doesn't contain any mysterious substances – only premium, rigorously researched, natural ingredients.

STEP ONE

Test X180 permeates the bloodstream

STEP TWO

Testofen goes to work raising your levels of free testosterone.

SERIOUSLY POWERFUL INGREDIENTS

The ingredients in our proprietary blend are substantiated with rigorous research and hard, scientific facts.

TESTOFEN

This clinically researched natural fenugreek seed extract has been shown to help men add hard, sculpted muscle to their bodies by increasing their levels of free testosterone safely and effectively.

E. High T

1. Label and Packaging

103. The label and packaging for High T Testosterone Booster ("High T") (Exh. 23), High T Senior Testosterone Booster ("High T Senior") (Exh. 24), and High T Black Hardcore Formulation Testosterone Booster ("High T Black") (Exh. 25) contain a graph entitled "Male Testosterone Production With Age,"

showing a steady decline in “Testosterone Production Capacity %” from age 20 to age 90, and state that “High T has been clinically proven to boost free Testosterone levels” The label and packaging for High T Black Caffeine Free Hardcore Formulation Testosterone Booster (“High T Caffeine Free”) (Exh. 26) contains the same graph in another format, and states that “High T has been scientifically formulated to help Testosterone levels”

2. Websites

104. The website www.hightproducts.com is owned by defendant KingFisher. The website (Exh. 27) states that High T “boosts testosterone naturally” by increasing “Testosterone levels,” and that Testofen “improves testosterone levels” and “helps promote healthy testosterone levels.” The website states that High T Senior “is scientifically formulated to benefit a man’s health by improving Testosterone levels,” and states that the product will “BOOST YOUR TESTOSTERONE LEVELS TODAY By increasing your testosterone levels” The website states that “High T Black has been clinically proven to boost free testosterone levels.”

105. Under the heading “Science Report” (Exh. 28), the website states that “Key ingredients in High T have been clinically proven to boost free testosterone levels,” and that “High T Black has been clinically proven to boost free testosterone levels.”

F. Mdrive

1. Label and packaging

106. The label and packaging for Mdrive (Exh. 29) state:

M drive
naturally increase testosterone

*Contains a clinically proven ingredient which promotes
free testosterone

M-Drive contains Testofen – a Fenugreek Seed Extract clinically proven to promote healthy free testosterone levels

Ingredients in M-Drive have been shown to increase testosterone levels

*A clinical study of Testofen revealed that it promoted healthy free testosterone levels in the active group of subjects by 98%.

107. A package insert (Exh. 30) states:

You are, no doubt, aware that very few male performance products actually work as advertised. Mdrive is different. It is backed by legitimate science and formulated with a clinically proven ingredient.

Our star ingredient is a very specific **Fenugreek Seed Extract** called Testofen A clinical study of Testofen revealed that it promoted healthy free testosterone levels.

108. The label and packaging for Mdrive Elite Athlete Formula (“Mdrive Elite”) (Exh. 31) state that the product is an “Energizing Testosterone Booster” containing “Clinically Tested Ingredients,” “Promotes healthy free testosterone levels within the normal range,” and “naturally increases healthy free testosterone levels.” Under the heading, “clinically tested ingredients. At the clinical levels,” the label and packaging state:

Increase Testosterone
Testofen’s clinical results confirmed a boost in free testosterone levels in men

109. A package insert (Exh. 32) states:

Boost Free Testosterone
Mdrive Elite contains Fenugreek Seed Extract which has been shown in clinical studies to raise free testosterone levels

2. Television

110. A thirty-second television commercial for Mdrive, available at <http://www.ispot.tv/ad/7ZNs/mdrive>, has aired nationally 67 times, including on February 23, 2014 at 11:48 a.m. PST on NBA TV. The commercial, which also

1 features the GNC logo, states that “Mdrive is formulated for guys . . . who crave
 2 more . . . free testosterone,” and directs viewers to the website
 3 www.Mdrive4men.com for more information.

4 **3. Websites**

5 111. The websites www.mdriveformen.com and www.Mdrive4men.com
 6 are owned by defendant DreamBrands, and have the same content. The websites
 7 (Exh. 33) state that Mdrive “contains a clinically tested ingredient that naturally
 8 increases healthy testosterone in the body;” “Testofen’s clinical results confirmed
 9 a boost in free testosterone levels;” and “Mdrive is the only clinically proven
 10 formula.”

11 112. Under the heading “MDrive Science,” the websites state that “we
 12 added a specific fenugreek seed extract . . . to ensure increased healthy normal
 13 levels of free testosterone;” that MDrive contains “specific ingredients that have
 14 been clinically tested and shown to increase free testosterone;” and that
 15 “Testofen’s clinical results confirmed a boost in free testosterone levels in men . .
 16 . . .”

17 113. The website www.dreambrands.com is owned by defendant
 18 DreamBrands. The website (Exh. 34) states that Mdrive “Naturally Increase[s]
 19 Testosterone,” “contains a clinically tested ingredient that naturally increases
 20 healthy testosterone in the body,” and “contains Testofen. A clinical study of
 21 Gencor’s Testofen revealed that it promoted healthy free testosterone levels in
 22 the active group of subjects.” The website also states, as to both Mdrive and
 23 Mdrive Elite:
 24

25 **Increase Testosterone**

26 Testofen’s clinical results confirmed a boost in free
 27 testosterone levels in men
 28

1 **G. Test Freak**

2 **1. Label and packaging**

3 114. The label and packaging for Test Freak Hybrid Pro-Testosterone
4 Stimulator (“Test Freak”) (Exh. 35) state that the product “Increases Free
5 Testosterone,” and is “The World’s Most Cutting Edge Testosterone-Boosting
6 Formula!” The packaging states that the product “is “Unquestionably the Most
7 Powerful Test Booster Ever Created!” and that the product:

8 Supplies more TESTOFEN than any other test booster on
9 the market! On its own, TESTOFEN is clinically shown
10 to boost free testosterone levels in humans by an
11 incredible average of 98.8%!

12 **2. Website**

13 115. The website www.pharmafreak.com is owned by defendant
14 PharmaFreak. The website (Exh. 36) states that Test Freak “Helps Increase Free
15 Testosterone! Helps Increase Total Testosterone!”, and “Provides clinically
16 researched testosterone-boosting ingredients!”

17 **H. PMD N-TEST 600/Flex Stack**

18 **1. Label and packaging**

19 116. The packaging for PMD Flex Stack (Exh. 37), which contains a
20 bottle of PMD N-TEST 600, states:

21 **Natural Testosterone Booster:** N-TEST 600 is fully
22 jacked with 600 mg of Testofen, the clinically studied
23 amount necessary to increase free flow testosterone
24 levels up to 98%.*

25 DYNAMIC RESULTS WITH TESTOFEN!

26 Clinically Studied*
27 **Testofen**

28 98% INCREASE IN FREE TESTOSTERONE

*Effect of Testofen on safety, anabolic activity and
factors affecting exercise physiology. Copyright by
Gencor Nutrients, Inc.

117. The label for PMD N-TEST 600 (Exh. 38) states:

INSANE TESTOSTERONE BOOST

600 mg of
Testofen
Clinically Proven Amount*

Increase Free Testosterone Levels Up to 98%*
With 600 mg of Clinically Studied Testofen

*Effect of Testofen on safety, anabolic activity and
factors affecting exercise physiology. Copyright 2008 by
Gencor Nutrients, Inc.

2. Website

118. The website www.ndsnutrition.com is owned by defendant NDS.

The website (Exh. 39) states:

N-TEST 600 is a strong natural testosterone booster fully
loaded with 600 mg of Testofen, the clinically studied
amount necessary to increase free testosterone levels up
to 98%†

†Effect of Testofen on safety, anabolic activity and
factors affecting exercise physiology. Copyright 2008 by
Gencor Nutrients, Inc.

I. NO2 Red Test

1. Label

119. The label for NO2 Red Test (Exh. 40) states:

NATURALLY BOOST TESTOSTERONE LEVELS
WITH CLINICALLY TESTED INGREDIENTS*
98% INCREASE IN FREE TESTOSTERONE

2. Website

120. The website www.mri-performance.com is owned by defendant

MRI. The website (Exh. 41) states:

NO2 RED TEST – the scientific, MRI approach to
naturally boosting testosterone levels. Through an
impressive line-up of powerful, clinically tested
ingredients, NO2 RED TEST drives an incredible 98%
increase in free testosterone.

J. Ultra T Gold

1. Label and Packaging

121. The label and packaging for Ultra T Gold (Exh. 42) state:
with clinically studied Testofen

**ALL-NATURAL
FREE TESTOSTERONE BOOSTER**

Naturally increases free testosterone
Clinically tested

Are you Looking to Boost Testosterone?

Ultra T Gold is a natural solution for boosting free
testosterone levels

The all natural key ingredient in Ultra T Gold was shown
in [a] double-blind, placebo controlled, human clinical
stud[y] . . . to be a safe and effective way to significantly
boost free testosterone levels

2. Website

122. The website www.naturade.com is owned by Naturade. The website
(Exh. 43) contains the same representations concerning Ultra T Gold as the label
and packaging.

K. Vitali-T-Aid

1. Label and Packaging

123. The label and packaging for Vitali-T-Aid (Exh. 44) state:

BOOST TESTOSTERONE
with clinically studied Testofen

- Naturally increases free testosterone
- Clinically tested

Are you looking to Boost Testosterone?

Vitali-T-Aid is a natural solution for boosting free
testosterone levels

The all natural key ingredient in Vitali-T-Aid was shown
in [a] double-blind, placebo controlled, human clinical
stud[y], . . . to be a safe and effective way to significantly
boost free testosterone levels

124. The label and packaging for Vitali-T-Aid Energy (Exh. 45) state:

with clinically studied Testofen

- Supports natural increases of free testosterone in men

Are you Looking to Help Boost Free Testosterone?

Vitali-T-Aid [ENERGY] is a solution for supporting free testosterone levels

Clinically Studied Ingredient

The all natural key ingredient in Vitali-T-Aid [ENERGY] was shown in [a] double-blind, placebo controlled, human clinical stud[y], . . . to be a safe and effective way to significantly help boost free testosterone levels

2. Websites

125. The website www.naturade.com is owned by Naturade. The website contains the same representations concerning Vitali-T-Aid (Exh. 46) and Vitali-T-Aid Energy (Exh. 47) as the label and packaging.

3. Television and Print Advertising

126. A press release issued by Naturade (Exh. 48) stated that “Vitali-T-Aid is being launched with a multi-million dollar direct response television and print advertising campaign”

127. A television commercial for Vitali-T-Aid, available at <http://www.youtube.com/watch?v=XgiFqcl5dnA>, states that Vitali-T-Aid “will boost your free testosterone levels Clinical tests have shown that Vitali-T-Aid significantly increases free testosterone levels”

L. Testoril

1. Label and packaging

128. The label and packaging for Testoril (Exh. 49) state that it is a “Clinically Proven Testosterone Booster With Clinically Studied Testofen.” A package insert states that “You’ve just purchased the world’s #1 testosterone booster. We guarantee it.” The package insert states that “Testoril ingredients have been scientifically researched and clinically tested.”

2. Website

129. The website www.testoril.com is owned by defendant Premium Nutraceuticals. The website (Exh. 50) states:

Clinically Proven
THE STRONG, POWERFUL & Effective Testosterone
Booster

Most importantly, our formulators developed the
Testoril blend with the clinically proven dosage of
Testofen

A DAILY SUPPLEMENT OF TESTORIL CAN HELP
BOOST YOUR TESTOSTERONE NATURALLY!

Unlike other over the counter testosterone supplements,
the featured ingredient in Testoril, Testofen, has been
clinically proven to increase testosterone production.

STUDIES AND TESTS HAVE SHOWN THAT
TESTOFEN -- THE FEATURED INGREDIENT IN
TESTORIL CAN PRODUCE EFFECTIVE RESULTS!

Consider this: Testoril has been formulated based on the
most current emerging medical research and clinical
trials on the effects that dietary supplementation has on
aging and features Testofen which is supported by
clinical studies.

A Daily Supplement of Testoril Can Help Boost Your
Testosterone Naturally

Testoril has been formulated with Testofen to help your
body begin releasing higher levels of your own, naturally
produced hormones like free testosterone.

Testoril has been formulated to help men suffering with
Testosterone deficiency take that first step in reclaiming
their life.

Male Testosterone deficiency is REAL and there's
something you can do about it. You have nothing to lose
and everything to gain!

TESTOFEN (Standardized Fenugreek Seed Extract)
You are probably asking: "How do I safely increase my
free testosterone levels?" Well researched testosterone
boosters, like Testoril, can be the answer.

To view the results of the latest clinical study of Testofen
please Click Here To Review This Clinical Study.

Testoril is backed by smart science, not fly-by-night data.
There is no reason to risk your health by using
disreputable testosterone boosters with cheap ingredients.
It's just not worth it!

Proven Ingredients That Work
Clinically Studied for Ultimate Performance

130. Visitors to the website who “Click Here To Review This Clinical Study” are taken to Gencor’s 2006 “Testofen Human Clinical Trial” report.

VIII. GNC’s Central Role In Marketing “Testosterone Boosters”

A. GNC’s Dominant Role in the Supplements Industry

131. In its most recent annual report, GNC describes itself as “the leading global specialty retailer of health and wellness products, including vitamins, minerals and herbal supplement products, sports nutrition products and diet products.” As of December 31, 2013, GNC operated 3,342 company-owned stores in the United States and Canada, and there were another 3,036 franchise locations in the United States.

132. In 2013, domestic retail sales at GNC’s company-owned stores and its website, www.gnc.com totaled over \$1.7 billion, including \$765 million in sports nutrition products, GNC’s largest product category, which includes most of the products sold by GNC containing Testofen.

133. GNC describes its dominant position in the marketplace, its close relationships with supplement manufacturers, and the trust and confidence placed in GNC by its customers, as follows:

We believe that the strength of our GNC brand, which is distinctively associated with health and wellness, combined with our stores and online channels, gives us broad access to consumers and uniquely positions us to benefit from the favorable trends driving growth in the nutritional supplements industry and the broader health and wellness sector.

[O]ur network of domestic retail locations is approximately ten times larger than the next largest

United States specialty retailer of nutritional supplements and provides a leading platform for our vendors to distribute their products to their target consumers. Our close relationships with our vendor partners have enabled us to negotiate first-to-market opportunities. In addition, our in-house product development capabilities enable us to offer our customers proprietary merchandise that can only be purchased through our locations or through GNC.com. Because the nutritional supplement consumer often requires knowledgeable customer service, we also differentiate ourselves from mass and drug retailers with our well-trained sales associates who are aided by in-store technology. We believe that our expansive retail network, differentiated merchandise offering and quality customer service result in a unique shopping experience that is distinct from that of our competitors.

We believe we distinguish ourselves from mass and drug retailers with our well-trained sales associates, who offer educated service and trusted advice.

B. GNC's Exclusive Arrangements With Its Vendor Partners

134. Among the “first-to-market opportunities” that GNC has negotiated through its “close relationships” with its “vendor partners” are three of GNC’s best-selling products, Nugenix, Troxyphen, and High T.

1. Nugenix

135. An August 16, 2012 press release (Exh. 51) announced that:

Direct Digital, LLC . . . recently announced the launch of NUGENIX, an all-new, natural testosterone booster

NUGENIX, a first-of-its-kind product in the Men’s Vitality category, will initially be offered exclusively at GNC, and is already available at GNC.com.

Based upon the on-going successful partnership between GNC and Direct Digital, the exclusive launch of NUGENIX within GNC stores is the perfect platform to present such a revolutionary new product offering.

136. A September 11, 2012 press release (Exh. 52) announced that:

NUGENIX Natural Testosterone Booster Tops Men’s Vitality Category Sales on GNC.com

NUGENIX, a first-of-its kind men’s wellness product that naturally boosts testosterone, . . . recently launched online and was GNC.com’s top-selling Men’s Vitality product for the month of August 2012.

Despite having only been available for a matter of weeks, NUGENIX has proven so popular, it has completely sold-out online via its exclusive web retailers. However, it is once again available in its various e-tail venues and will soon be offered in nearly 5,000 U.S.-based GNC retail locations.

“The decision to launch on GNC.com has definitely proven to be the right one. NUGENIX is GNC’s top online seller within the Men’s Vitality category despite limited launch distribution. In fact, it is a top-seller and will not even reach all their retail locations until later this month,” stated Brandon Adcock, co-founder and president of Direct Digital, LLC, the developer and marketer of NUGENIX. “Through our ongoing partnership . . . we’ve been confident since day one that GNC was the ideal retail channel to educate the core consumer regarding the numerous benefits associated with every Direct Digital nutritional support product. We are thrilled with the overwhelming response and record-breaking sales NUGENIX has experienced in its first month of existence.”

137. According to Direct Digital:

Nugenix was the number one selling Men’s Vitality product in GNC during 2013 and continues this year [2014] to be the top selling Men’s Vitality product in GNC.

138. On February 19, 2014, GNC “announced the winners of its prestigious Vendor Awards for 2013, recognizing their commitment to achieving customer satisfaction through innovative sports and wellness products,” which GNC describes as “our opportunity to recognize publicly their contributions to innovation, product quality and consumer information” (Exh. 53.) In the category of “Product Information,” the award went to Nugenix.

139. In GNC’s list of award recipients, the word “Nugenix” hyperlinks to the following product information (Exh. 54):

How to Boost Your Free Testosterone: GNC’s #1 Selling & Award Winning Free Testosterone Booster

On February 19th, 2014 GNC the nation’s largest specialty vitamin retailer announced its annual product award winners. GNC singled out less than ten companies and products for special awards.

One award winner in particular received strong praise. Nugenix a free testosterone booster and the top selling product in the Men's Vitality category.

Over the years, any number of pills, potions, and gels have claimed to work wonders for men's free testosterone. In reality, few of these options do any good.

Nugenix, which triggers your body into increasing its levels of free testosterone, helped break the stereotype that free testosterone boosters are only for hardcore bodybuilders. GNC stores secured the exclusive rights to Nugenix's US launch and within three months it was one of the top selling vitality supplements in the entire GNC chain.

The key ingredient is Testofen which is made from the rare Fenugreek plant. Testofen has been shown in clinical trials to boost free testosterone levels

GNC stores secured the exclusive retail rights to Nugenix's US launch and it's carried in GNC stores nationwide. **Click Here >**

140. Clicking on "Click Here" redirects visitors to the website, <https://www.nugenix.com/trial/> (Exh. 55) which states, under the GNC logo:

"It is always a pleasure to deliver these well-deserved awards that our vendor partners work so hard to achieve," said Tom Dowd, GNC Executive Vice President, and Chief Merchandising Officer & General Manager. "This is our opportunity to recognize publicly their contributions to . . . consumer information"

141. After being redirected to the website <https://www.nugenix.com/trial/>, visitors are presented with a "pop-up" window with the GNC logo (Exh. 56), which states:

NUGENIX PRODUCTS AVAILABLE AT
GNC Live Well
SHOP NATIONWIDE OR AT GNC.COM
Testosterone Booster
SHOP NOW

142. Clicking on "SHOP NOW" redirects visitors to the GNC website, <http://www.gnc.com>, to purchase Nugenix.

143. A 60-second television commercial for Nugenix, available at <http://www.ispot.tv/ad/7dIG/nugenix>, has aired nationally 6,967 times, including on April 15, 2014 at 5:23 a.m. PST on Smithsonian. The commercial is co-branded with GNC, and directs viewers to the website “TRYNUGENIX.COM” (Exh. 54), which contains the same product information and links presented *supra*.

2. Troxyphen

144. A February 23, 2013 press release (Exh. 57) announced that:

Troxyphen the first product to be launched under truDERMA’s new pŭrFORMANCE line for men is available now exclusively at GNC stores nationwide, <http://www.gnc.com>.

Troxyphen naturally and significantly increases your base line testosterone levels

“Troxyphen is a natural testosterone booster for men We are thrilled to introduce Troxyphen exclusively at GNC.

Troxyphen is available at a GNC store near you or online at <http://www.gnc.com>

145. As set forth above, a nationwide radio commercial for Troxyphen, which has aired thousands of times, states that “Troxyphen is GNC’s best-selling, 100% natural and most powerful testosterone booster,” and that “Troxyphen is available nationwide at GNC stores.” The commercial also directs listeners to the website “stoplowt.com” or “raisemytest.com” (which is redirected to www.troxyphen2.com), which are co-branded with GNC.

3. High T

146. An October 10, 2011 press release (Exh. 58) states:

Kingfisher Media . . . today announced the introduction of its all natural testosterone booster High T through GNC stores nationwide.

The initial launch will consist of 800 stores with an additional 2,000 stores by end of Q1 2012.

“We are very pleased to partner with GNC in High T’s introduction to the market and we believe, given their reputation for high quality products and cutting edge sports science, that GNC is the perfect venue for High T,” said a spokesperson representing Kingfisher Media. “GNC’s customer base – health-conscious individuals who are savvy and informed about supplement quality – is the ideal market for High T.”

4. PMD N-TEST 600/Flex Stack

147. PMD N-TEST 600 and PMD Flex Stack are sold exclusively through GNC.

5. NO2 Red Test

148. NO2 Red Test is sold exclusively through GNC.

C. GNC’S Dominant Role in the Marketing and Sale of “Testosterone Boosters”

149. GNC markets and sells at least nineteen products containing Testofen as clinically proven to increase free testosterone levels, including Nugenix, Troxyphen, Troxyphen Elite, Ageless Male, Test X180, Test X180 Alpha, Test X180 Ignite, Stack Factor 2 With Test X180, High T, High T Senior, High T Black, High T Caffeine Free, Mdrive, Mdrive Elite, Test Freak, PMD N-TEST 600, PMD Flex Stack, NO2 Red Test, and Ultra-T-Gold. GNC and its “vendor partners” market these products through a variety of channels and co-branding arrangements, including television, radio, websites, direct mail, email, and point-of-sale displays at GNC retail locations.

1. Retail Displays

150. GNC retail locations have standardized point-of-sale displays, including shelf signage, floor displays, and checkout displays.

151. Each GNC retail location has a “Men’s Health” section (Exh. 59), located in a high-visibility position within the store. The Men’s Health section displays a sign (Exh. 60) entitled “Testosterone Support,” featuring the image of

1 Frank J. Costa, M.D., a “Member of the GNC Medical Advisory Board” and
2 “World-Renowned Urologist and Expert in Prostate Health.”

3 152. The Men’s Health section displays most of the products sold by
4 GNC containing Testofen, including, without limitation, Nugenix, Ageless Male,
5 and the full range of Test X180 and High T products. Signage identifies certain
6 products, such as High T, as a “Best Seller.”

7 153. Each GNC retail location has a “Newest Latest Greatest” section
8 (Exh. 61), located in a high-visibility position within the store. The Newest
9 Latest Greatest section features a number of products containing Testofen,
10 including, without limitation, Nugenix, Troxyphen, and Test X180, High T, and
11 Mdrive products.

12 154. GNC retail locations also display products containing Testofen in
13 other locations within the store (Exh. 62), including, without limitation, Nugenix,
14 Troxyphen, Test Freak, and Test X180, High T, and Mdrive products.

15 155. Each GNC retail location has a “Hot New Products” display (Exh.
16 63) located at the checkout counter. The Hot New Products display features
17 products containing Testofen, including, without limitation, High T and Test
18 X180 products.

19 156. GNC retail locations also feature floor and hanging shelf displays
20 for products containing Testofen, including a floor display for “NUGENIX
21 NATURAL TESTOSTERONE BOOSTER” featuring the GNC logo (Exh. 64),
22 hanging shelf displays for Test X180 Alpha (Exh. 65), and floor and shelf
23 displays for High T products.

24 157. An August 6, 2012 press release (Exh. 66) states:

25 Kingfisher Media . . . today announced that GNC will be
26 introducing new point of sale displays nationally to
27 promote the High T family of products.
28

The Point of Purchase (POP) displays consist of two distinct units: a sleek black upright unit for the *Ultimate Stack* – a triple combination of Black High T, High G, and High T Gel – and a gravity feed rack for High T White. The High T White gravity feed racks will be placed in 4,000 total stores while the Ultimate Stack displays will be found in 1,400 locations. Both units have been met with enthusiasm from customers.

“These displays are an additional step in cementing High T’s brand awareness among GNC customers,” said D. William Pettigrew, Director of Sales and Marketing for Kingfisher Media. “Our point of sale displays will be placed in prime locations within GNC’s stores to highlight the High T name. This roll-out represents GNC’s support of and commitment to our brand.”

2. Mailers

158. GNC regularly sends mailers to its customers for whom it has postal addresses advertising products containing Testofen (Exh. 67), including, without limitation, Nugenix, Troxyphen, Test X180, and High T products.

3. Email

159. GNC sends email messages to its customers for whom it has email addresses advertising products containing Testofen (Exh. 112), including, without limitation, Nugenix, Troxyphen, Test X180, and High T products.

D. GNC’s Representations Concerning Its Vendor Partners’ “Testosterone Boosters”

1. Nugenix

160. On its websites, www.gnc.com (Exh. 68) and www.LuckyVitamin.com (Exh. 69), GNC states that “Nugenix Natural Testosterone Booster is an all natural Testosterone booster that contains clinically studied ingredients that are proven to boost free testosterone levels.”

2. Troxyphen

161. On its websites, www.gnc.com (Exh. 70) and www.LuckyVitamin.com (Exh. 71), GNC states that Troxyphen contains “Ingredients Shown to Help Raise Testosterone,” and that Troxyphen “naturally

and significantly increase[es] your base line Testosterone levels” On its websites, www.gnc.com (Exh. 72) and www.LuckyVitamin.com (Exh. 73), GNC states that Troxyphen Elite is “A Powerful Free Testosterone Booster” with “INGREDIENTS SHOWN TO HELP: Raise Free Test Levels” that “naturally and significantly increase[es] your base line Testosterone levels.”

3. Ageless Male

162. On its websites, www.gnc.com and www.LuckyVitamin.com (Exh. 74), GNC states that:

Ageless Male is made with a standardized extract called Testofen, which is clinically-tested ingredient derived from the fenugreek herb. A double-blind, randomized, placebo-controlled human clinical study on Testofen has shown it can significantly help boost free testosterone in men.

The key ingredient in Ageless Male has been shown in published human research to help significantly boost free testosterone levels

What is the key ingredient in Ageless Male?

It’s called Testofen, which is a natural and clinically-tested ingredient derived from the fenugreek herb. A double-blind, randomized, placebo-controlled human clinical study on Testofen has shown it can significantly help boost free testosterone in men

4. Test X180

163. On its websites, www.gnc.com (Exh. 75) and www.LuckyVitamin.com (Exh. 76), GNC states that:

The experts at Force Factor carefully formulated Test X180 to provide the boost that every man needs. By naturally raising your levels of free testosterone

Each serving of Test X180 contains clinically researched levels of Testofen Testofen is the well-known, effective compound your body needs to combat natural testosterone decline.

There’s no need to take a chance on your health with untested, risky ingredients. Look and feel confident

1 while you perform at your peak with the trusted
2 ingredients in Test X180.

3 164. On its websites, www.gnc.com (Exh. 77) and
4 www.LuckyVitamin.com (Exh. 78), GNC states that “The Force Factor team
5 perfected the Test X180 Alpha formula with one of the only natural ingredients
6 clinically demonstrated to increase free testosterone levels: Testofen,” and that
7 “the natural ingredient Testofen is clinically demonstrated to raise your body’s
8 free testosterone levels.” On its websites, www.gnc.com (Exh. 79) and
9 www.LuckyVitamin.com (Exh. 80), GNC states that “Test X180 Ignite was
10 developed to be the ultimate all-in-one free testosterone booster, using safe,
11 trusted ingredients backed in real science. Test X180 Ignite is fueled by
12 Testofen, a natural fenugreek seed extract,” and that “Testofen helps raise your
13 body’s levels of free testosterone”

14 **5. High T**

15 165. On its websites, www.gnc.com (Exh. 81) and
16 www.LuckyVitamin.com (Exh. 82), GNC describes High T as an “ALL
17 NATURAL TESTOSTERONE BOOSTER” that “has been clinically proven to
18 boost free Testosterone levels;” states that “High T has been clinically proven to
19 boost free Testosterone levels;” and states that “Testofen is an all natural extract
20 that has been clinically proven in human studies to boost Testosterone levels . . .
21 .” On its websites, www.gnc.com (Exh. 83) and www.LuckyVitamin.com (Exh.
22 84), GNC describes High T Black as a “Testosterone Booster.” On its websites,
23 www.gnc.com (Exh. 85) and www.LuckyVitamin.com (Exh. 86), GNC describes
24 High T Caffeine Free as a “Testosterone Booster” that “has been scientifically
25 formulated to help Testosterone levels”
26
27
28

6. **Mdrive**

166. On its websites, www.gnc.com (Exh. 87) and www.LuckyVitamin.com (Exh. 88), GNC represents that:

Ingredients in M-Drive have been shown to increase testosterone levels Developed with intensive research, M-Drive uses the most effective natural ingredients.

*M-Drive contains Testofen - a Fenugreek Seed Extract clinically proven to promote healthy free testosterone levels

*A clinical study of Testofen revealed that it promoted healthy free testosterone levels in the active group of subjects by 98%.

167. On its websites, www.gnc.com (Exh. 89) and www.LuckyVitamin.com (Exh. 90), GNC describes Mdrive Elite as “an Energizing Testosterone Booster” that “contains the same trusted premium compounded formula as the original Mdrive. It still naturally increases healthy free testosterone levels.” GNC states that the product contains:

Clinically Tested Ingredients
At the Clinical Levels.

- **Increase Testosterone**
Testofen’s clinical results confirmed a boost in free testosterone levels in men
- **Clinically Proven Ingredients**
- **Increase Free Testosterone**
- **Testofen Fenugreek is clinically proven to increase healthy free testosterone.**

7. **Test Freak**

168. On its website, www.gnc.com (Exh. 91), GNC states that Test Freak contains:

100% Clinically-Proven and Organically Altered Pro Testosterone Compounds

- Increases Free Testosterone!
- Increases Total Testosterone!

The World's Most Cutting Edge Testosterone-Boosting Formula!

TEST FREAK is hands-down one of the strongest testosterone boosters legally available! It has been created specifically for hardcore bodybuilders and extreme athletes who are looking to crank testosterone levels to the max! . . . TEST FREAK's one-of-a-kind formula contains clinically-proven dosages of the most heavily researched testosterone-boosting compounds . . .

8. PMD N-TEST 600/Flex Stack

169. On its website, www.gnc.com (Exh. 92), GNC states that PMD N-TEST 600, included in PMD Flex Stack, is a "Natural Testosterone Booster" which "is fully jacked with 600 mg of Testofen, clinically studied amount necessary to increase free flow testosterone levels up to 98%. . . . N-TEST 600 increases testosterone levels naturally"

9. NO2 Red Test

170. On its websites, www.gnc.com (Exh. 93) and www.LuckyVitamin.com (Exh. 94), GNC states that:

NO2 Red Test will naturally boost testosterone levels with clinically tested ingredients.

- 98% Increase in Free Testosterone

NO2 Red Test - the scientific, MRI approach to naturally boosting testosterone levels. Through an impressive line-up of powerful, clinically tested ingredients, NO2 Red Test drives an incredible 98% increase in free testosterone.

10. Ultra T Gold

171. On its website, www.LuckyVitamin.com (Exh. 95), GNC states that:

Ageless Foundation Ultra T Gold All-Natural Free Testosterone Booster is a natural solution for increasing free testosterone levels

Ageless Foundation Ultra T Gold All-Natural Free Testosterone Booster contains clinically studied levels of Testofen. Ageless Foundations Testofen is a natural solution for boosting free testosterone levels In human trials, Testofen was shown to:

- Increase free testosterone levels by 98%

172. The foregoing statements appear by default on the www.gnc.com and www.LuckyVitamin.com webpage dedicated to each product, under the “Description” tab.

173. On the website, www.gnc.com, there are five tabs on each such product page, the third of which is “Health Notes.” Clicking on the “Health Notes” tab on the product pages for Troxyphen, Troxyphen Elite, Test X180, Test X180 Alpha, Test X180 Ignite, High T, High T Black, High T Black Caffeine Free, Mdrive, Mdrive Elite, and Test Freak presents the following disclaimer:

Disclaimer: This scientific independent research is provided by Aisle7 and is for informational use only. GNC provides this information as a service but does not endorse it. Likewise, Aisle7 does not recommend or endorse any specific products.

174. After clicking on “I accept these terms,” the website displays the following information about Troxyphen (Exh. 96), Troxyphen Elite (Exh. 97), Test X180 (Exh. 98), Test X180 Alpha (Exh. 99), Test X180 Ignite (Exh. 100), High T (Exh. 101), High T Black (Exh. 102), High T Caffeine Free (Exh. 103), Mdrive (Exh. 104), Mdrive Elite (Exh. 105), and Test Freak (Exh. 106):

Natural Testosterone Support

In men, testosterone levels peak in young adulthood and decline over time. A number of supplements are marketed as natural testosterone support, **though these effects have not been demonstrated in clinical research** [emphasis added].

E. GNC’s Watered-Down Representations Concerning Its Own Products Containing Testofen

175. In addition to the marketing and sale of “testosterone boosters” manufactured by its vendor partners, GNC manufactures, markets, and sells its own products containing Testofen, including GNC Pro Performance Hybrid Test

Complex (“Hybrid Test Complex”), GNC Beyond Raw Re-Test Hardcore Anabolic Enhancer (“Re-Test”), and GNC Preventive Nutrition Healthy Testosterone Formula (“Healthy Testosterone Formula”).

176. In its most recent annual report, GNC explains that:

We have an internal research and development group that performs scientific research on potential new products and enhancements to existing products, in part to assist our product development team in creating new products, and in part to support claims that may be made as to the purpose and function of the product.

177. The GNC Medical Advisory Board (Exh. 107):

is comprised of Board Certified and world-renowned physicians who aid in the creation and ongoing development of GNC products. Using their years of medical experience, in-depth knowledge of the latest advancements in medical research and nutritional supplementation, . . . the Board provides invaluable insight that keeps GNC on the forefront of product innovation and delivering on our commitment to helping you LIVE WELL.

178. The label for GNC’s Healthy Testosterone Formula (Exh. 108) states that:

GNC Preventive Nutrition Products have been scientifically developed utilizing the expertise of the GNC Medical Advisory Board. . . . This line of products is precisely formulated to provide clinical strength ingredients and additional nutrients that address key health concerns.

DEVELOPED WITH AND ENDORSED BY
GNC MEDICAL ADVISORY BOARD
ADVANCED KNOWLEDGE FOR BETTER HEALTH

The GNC Medical Advisory Board utilizes their in-depth medical knowledge and experience to aid in the creation and ongoing development of GNC products

179. Unlike the products containing Testofen manufactured by its vendor partners, GNC does *not* represent that any of its *own* products containing Testofen are clinically proven to increase free testosterone levels.

180. GNC represents that its Hybrid Test Complex (Exh. 109) “Helps to Support Testosterone Levels,” and contains “600 mg Testofen Fenugreek to Trigger Anabolic Factors.”

181. GNC represents that its Re-Test (Exh. 110) “supports healthy testosterone levels with a clinically advanced anabolic primer.”

182. GNC represents that its Healthy Testosterone Formula is “designed to support testosterone . . . levels that decline with age,” and “contains clinically studied ingredients” including “Testofen from fenugreek seed extract, clinically shown to improve sexual health”

IX. Defendants’ Knowledge That Testofen Has *Not* Been Clinically Proven to Increase Free Testosterone Levels

A. GNC

183. GNC’s “watered-down” claims regarding its own products containing Testofen are compelling evidence that the GNC Medical Advisory Board has concluded that Testofen has *not* been clinically proven to increase free testosterone levels.

184. GNC’s statements on its website, www.gnc.com, that Troxyphen, Troxyphen Elite, Test X180, Test X180 Alpha, Test X180 Ignite, High T, High T Black, High T Black Caffeine Free, Mdrive, Mdrive Elite, and Test Freak “are marketed as natural testosterone support, though these effects have not been demonstrated in clinical research” (para. 174, *supra*) are conclusive evidence that GNC is fully aware that Testofen has *not* been clinically proven to increase free testosterone levels.

B. Gencor Defendants

185. The Gencor Defendants’ deliberate manipulation of the identification of the primary and secondary variables in the Testofen Study (para.

68, *supra*) is compelling evidence that the Gencor Defendants are fully aware that Testofen has *not* been clinically proven to increase free testosterone levels.

186. On November 21, 2013, the Gencor Defendants and the Direct Digital Defendants received Professor Jewell's unredacted report (Exh. 5) concluding that Testofen has *not* been clinically proven to increase free testosterone levels, and that Gencor's claims to the contrary are *false*. Professor Jewell's report is complete, and was marked "preliminary" only in anticipation of a response from the Gencor Defendants and the Direct Digital Defendants which was never received. Over five months later, the Gencor Defendants continue to market and sell Testofen for inclusion in "Testosterone Boosters" based on their false representation that Testofen has been clinically proven to increase free testosterone levels.

C. Direct Digital Defendants

187. A May 23, 2013 press release (Exh. 111) states that:

Direct Digital, LLC . . . is pleased to announce it has selected and partnered with world-renowned physician, Dr. David Katz. Dr. Katz will join the organization as its Chief Scientific and Medical Advisor. Direct Digital is the creator of such leading supplement brands as . . . Nugenix Natural Testosterone Booster

Dr. Katz serves as the Director and Co-Founder of the Yale Prevention Research Center, the Director of Integrative Medicine at Griffin Hospital in Derby, CT, the President Elect of the American College of Lifestyle Medicine, and is the President and Founder of the Turn the Tide Foundation. Dr. Katz is also a Fellow of the American College of Preventive Medicine (FACPM), and the American College of Physicians (FACP).

As Charlotte's fastest growing private company in 2012 (as recognized by the Charlotte Business Journal), Direct Digital understands the significance of developing quality products, backed by solid science. By bringing Dr. Katz on board to consult regarding current and future product formulations, it was yet another way the company could demonstrate its commitment to the

highest standards of business and the most significant levels of research and development.

“[D]evising the best products requires hard work, diligent attention to the details of science, and a commitment to a cautious approach that puts safety first. I've been very impressed that Direct Digital embodies just such principles. I am delighted to serve in a role that will allow me to offer candid, evidence-based guidance in the service of developing and making available products that combine safety with the greatest possible therapeutic effects,” said Dr. Katz.

188. Notwithstanding the Direct Digital Defendants’ purported “diligent attention to the details of science” and “evidence-based guidance,” five months following the receipt of Professor Jewell’s report, they continue to create and disseminate *new* advertisements falsely stating that “Testofen has been shown in clinical trials to boost free testosterone levels” (para. 139, *supra*).

X. Plaintiffs’ Purchases of “Testosterone Boosters”

189. Plaintiff O’Toole purchased a bottle of Nugenix at a GNC retail location in Los Angeles County, California.

190. Plaintiff Sokolove purchased a bottle of Troxyphen at a GNC retail location in Westchester County, New York.

191. A bottle of Test X180 was shipped to, and purchased by Plaintiff Bitton in, Los Angeles County, California.

192. In making their purchases, Plaintiffs relied on the representations, set forth above, that the product they purchased was clinically proven to increase free testosterone levels.

CLASS ACTION ALLEGATIONS

193. Plaintiffs bring this action on behalf of themselves and a Class, defined as: All persons who purchased any of the following products (a “Testosterone Booster”):

- Nugenix

- Troxyphen
- Troxyphen Elite
- Ageless Male containing Testofen
- Test X180
- Test X180 Alpha
- Test X180 Ignite
- Stack Factor 2 With Test X180
- High T
- High T Senior
- High T Black
- High T Caffeine Free
- Mdrive
- Mdrive Elite
- Test Freak
- PMD N-TEST 600
- PMD Flex Stack
- NO2 Red Test
- Ultra T Gold
- Vitali-T-Aid
- Vitali-T-Aid Energy
- Testoril

194. Plaintiffs reserve the right to supplement this list to include additional or subsequently-introduced products containing Testofen.

195. Plaintiffs O'Toole and Sokolove also bring this action on behalf of a GNC Subclass, defined as all persons who purchased any Testosterone Booster from GNC.

1 196. Plaintiff O'Toole also brings this action on behalf of a Nugenix
2 Subclass, defined as all persons who purchased Nugenix.

3 197. Plaintiff Sokolove also brings this action on behalf of a Troxyphen
4 Subclass, defined as all persons who purchased Troxyphen or Troxyphen Elite.

5 198. Plaintiff Bitton also brings this action on behalf of a Test X180
6 Subclass, defined as all persons who purchased Test X180, Test X180 Alpha,
7 Test X180 Ignite, or Stack Factor 2 With Test X180.

8 199. Plaintiff Sokolove also brings this action on behalf of a New York
9 Subclass, defined as all Class members who purchased any Testosterone Booster
10 in the State of New York.

11 200. Excluded from the Class and Subclasses are the officers, directors,
12 and employees of any Defendant, any judicial officer presiding over this action,
13 and the members of his or her immediate family and judicial staff.

14 201. Certification of the Class and Subclasses is sought pursuant to Rules
15 23(a), 23(b)(1), 23(b)(2), and 23(b)(3) of the Federal Rules of Civil Procedure.

16 202. While Defendants have not made sales figures publicly available,
17 the Class and Subclasses each have many thousands of members, and are so
18 numerous that joinder of all members is impracticable.

19 203. There are numerous questions of fact and law common to the
20 members of the Class and Subclasses which predominate over any questions
21 affecting only individual members, including, without limitation: (a) whether
22 Testofen has been clinically proven to increase free testosterone levels; (b)
23 whether Defendants represented to Plaintiffs, the Class, and the Subclasses that
24 Testofen has been clinically proven to increase free testosterone levels; (c)
25 whether Defendants knew that these representations were false; (d) whether
26 Defendants made these representations without a sufficient basis to believe that
27
28

1 they were true; (e) whether Defendants expressly warranted that Testosterone
2 Boosters had been clinically proven to increase free testosterone levels; (f)
3 whether Testosterone Boosters fail to conform to such express warranty, or the
4 implied warranties of merchantability and fitness for a particular purpose; (g)
5 whether Defendants' conduct violates Cal. Civ. Code § 1770(a)(2), (5), and/or
6 (7); (h) whether Defendants' conduct constitutes fraudulent business acts or
7 practices and/or deceptive, untrue, and misleading advertising in violation of the
8 Unfair Competition Law, Cal. Bus. & Prof. Code § 17200, *et seq.*; and (i)
9 whether Defendants engaged in false advertising in violation of Cal. Bus. & Prof.
10 Code § 17500, *et seq.*

11 204. Plaintiffs' claims are typical of the claims of the Class and
12 Subclasses they represent, as Defendants' liability to each member of the Class
13 and Subclasses is predicated on the same material misrepresentation.

14 205. Plaintiffs will fairly and adequately protect the interests of the Class
15 and Subclasses, as they have no conflicts of interest with the other members of
16 the Class or Subclasses, and have retained counsel experienced in complex
17 consumer class actions.

18 206. The prosecution of separate actions by individual Class and Subclass
19 members would create a risk of inconsistent or varying adjudications that would
20 establish incompatible standards of conduct for Defendants.

21 207. Defendants have acted on grounds that apply generally to the Class
22 and Subclasses, so that final injunctive and declaratory relief is appropriate
23 respecting the Class and Subclasses as a whole.

24 208. A class action is superior to other available methods for fairly and
25 efficiently adjudicating the controversy, in that the costs of litigation would likely
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1 exceed the potential recovery by individual Class and Subclass members, and
 2 there are no unusual difficulties in managing the litigation as a class action.

3 **FIRST CLAIM FOR RELIEF**
 4 **VIOLATIONS OF RACKETEER INFLUENCED AND CORRUPT**
 5 **ORGANIZATIONS ACT, 18 U.S.C. § 1962(c)**

6 (Against Gencor Defendants, GNC, Direct Digital Defendants, Truderma, and
 7 Force Factor, on Behalf of the GNC Subclass)

8 209. The allegations of the preceding paragraphs are incorporated by
 9 reference as if fully set forth herein.

10 210. Plaintiffs O'Toole and Sokolove bring this claim against Gencor
 11 Defendants, GNC, Direct Digital Defendants, Truderma, and Force Factor, on
 12 behalf of the GNC Subclass.

13 211. At all relevant times, Defendants were employed by or associated
 14 with an enterprise engaged in, and the activities of which affect, interstate
 15 commerce.

16 212. The enterprise – the “Testofenterprise” – is comprised of an
 17 association in fact of the Gencor Defendants, GNC, and the “vendor partners”
 18 that supply GNC with Testosterone Boosters: the Direct Digital Defendants,
 19 Truderma, NAC, Force Factor, KingFisher, DreamBrands, PharmaFreak, NDS,
 20 MRI, Prevention, LLC, and NNC LLC.

21 213. Defendants conducted and participated, directly or indirectly, in the
 22 operation and/or management of the enterprise’s affairs through a pattern of
 23 racketeering activity consisting of numerous and repeated uses of the mails,
 24 commercial interstate carriers, and interstate wire communications for the
 25 purpose of executing a scheme or artifice to defraud, all in violation of 18 U.S.C.
 26 § 1962(c).

27 214. The enterprise and its associates share a common purpose: to induce
 28 the members of the GNC Subclass into purchasing Testosterone Boosters based

1 on the false representation that Testofen has been clinically proven to increase
2 free testosterone levels.

3 215. The enterprise and its associates could not achieve their common
4 purpose without one another's participation in its operation and/or management:
5 the Gencor Defendants, to provide the manufacturers with Testofen for inclusion
6 in Testosterone Boosters; the manufacturers, to formulate and provide GNC with
7 Testosterone Boosters; and GNC, to market and sell Testosterone Boosters.

8 216. The enterprise had longevity sufficient to permit its associates to
9 pursue and accomplish the enterprise's purpose: Testosterone Boosters are
10 among GNC's best-selling products.

11 217. GNC provides the exclusive "launch" platform for a steady stream
12 of new and "second generation" Testosterone Boosters, including Nugenix,
13 Troxyphen, and High T products, giving GNC 100% of the revenue from the
14 retail sales of these products.

15 218. As both GNC and the manufacturers acknowledge, GNC uses its
16 market dominance and influence with its customers to quickly drive sales of these
17 products to levels far beyond what the manufacturers could otherwise achieve.

18 219. The manufacturers then introduce "new" and purportedly improved
19 versions of each product, and GNC dubs each successive version as the "Newest
20 Latest Greatest," creating an ever-growing product category, occupying ever-
21 growing shelf space, and bringing ever-growing revenues and profits to GNC and
22 its associates in the "Testofenterprise."

23 220. As stated by GNC itself (at
24 <http://gnc.mediaroom.com/index.php?s=27086>):

25 [W]e continue to maintain our market-leading position by
26 providing our customers with the most comprehensive
27 selection of cutting-edge products. And, we could not
28 possibly provide the largest selection of products without

1 building strong business relationships with each of our
2 vendors. Our vendors help us to better . . . achieve our
goals, and increase the sales and inventory turns on the
products in our stores.

3 221. A picture being worth 1,000 words, the symbiotic relationship
4 between GNC, the Gencor Defendants, and the manufacturers is illustrated most
5 vividly by a photograph (Exh. 113) which depicts the successive versions of each
6 product line touted by GNC.

7 222. In the latest turn of the “Testofenterprise” fraudulent marketing
8 cycle, on May 9, 2014, GNC sent out a mass email (Exh. 114) touting “FORCE
9 FACTOR THE ULTIMATE PERFORMANCE STACK,” which includes a
10 bottle of Test X180, as its “DEAL OF THE DAY.” Clicking on the link to
11 “SHOP NOW” takes recipients of the email to GNC’s website (Exh. 115) to
12 purchase Stack Factor 2 With Test X180, where GNC states unequivocally that
13 “When you work out, the Testofen in Test X180 raises your free testosterone
14 levels.”
15

16 223. The packaging for Stack Factor 2 With Test X180 (Exh. 116),
17 displayed on GNC’s website as well as in its retail stores, states that “The main
18 ingredient, Testofen, is the only natural compound that has been clinically
19 demonstrated to increase free testosterone levels”

20 224. On GNC’s website, clicking on the “Health Notes” tab on the
21 product page for Stack Factor 2 With Test X180 (Exh. 117) brings up a list of 54
22 ingredients and their supposed health benefits. Conspicuously absent from this
23 list is any mention of Testofen. GNC has *omitted* its ineffective and insufficient
24 “disclosure,” buried three levels deep on its product page for Test X180 (*see*
25 para. 174, *supra*), that “A number of supplements are marketed as natural
26 testosterone support, though these effects have not been demonstrated in clinical
27 research.”
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1 225. On May 15, 2014, GNC sent out a mass email (Exh. 118) touting
2 “truDERMA TROXYPHEN or TROXYPHEN ELITE,” which it describes as
3 “the advanced formula,” as its “DEAL OF THE DAY.” Clicking on the link to
4 “SHOP NOW” takes recipients of the email to GNC’s website to purchase
5 Troxyphen or Troxyphen Elite, which GNC identifies as a “NEW” product.
6 While GNC’s website continues to state that Troxyphen contains “Ingredients
7 Shown to Help Raise Testosterone” and “naturally and significantly increase[es]
8 your base line Testosterone levels” (Exh. 70), GNC has now *removed* its
9 ineffective and insufficient “disclosure,” formerly buried three levels deep on its
10 product page for Troxyphen (*see* para. 174, *supra*), that “A number of
11 supplements are marketed as natural testosterone support, though these effects
12 have not been demonstrated in clinical research.”

13 226. Defendants, having devised a scheme or artifice to defraud,
14 transmitted or caused to be transmitted by means of wire, radio, and television
15 communication in interstate commerce, the material misrepresentations set forth
16 above, for the purpose of executing such scheme or artifice to defraud, in
17 violation of 18 U.S.C. § 1343.

18 227. Defendants, having devised a scheme or artifice to defraud, for the
19 purpose of executing such scheme or artifice, deposited or caused to be deposited
20 in the mail and with commercial interstate carriers, including United Parcel
21 Service and Federal Express, matters and things to be sent or delivered by the
22 Postal Service, United Parcel Service, Federal Express, and DHL, including,
23 without limitation, the Testosterone Boosters marketed and sold by Defendants
24 on the websites identified above, in violation of 18 U.S.C. § 1341.

25 228. As a direct and proximate result of Defendants’ racketeering
26 activities and violations of 18 U.S.C. § 1962(c), Plaintiffs have been injured in
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1 their business and property in that they purchased Testosterone Boosters based on
 2 the material and false representation that these products have been clinically
 3 proven to increase free testosterone levels.

4 229. Pursuant to 18 U.S.C. § 1964(c), Plaintiffs and members of the Class
 5 seek actual damages, equal to the amounts paid by Plaintiffs O'Toole, Sokolove,
 6 and the members of the GNC Subclass for any Testosterone Booster purchased
 7 from GNC or any of its franchisees, treble damages, and attorneys' fees and costs.

8
 9 **SECOND CLAIM FOR RELIEF**
VIOLATIONS OF CONSUMER LEGAL REMEDIES ACT

10 (Against All Defendants)

11 230. The allegations of the preceding paragraphs are incorporated by
 12 reference as if fully set forth herein.

13 231. Plaintiffs and the other members of the Class are "consumers" as
 14 defined in Cal. Civ. Code § 1761(d).

15 232. The Testosterone Boosters purchased by Plaintiffs and the other
 16 members of the Class are "goods" as defined in Cal. Civ. Code § 1761(a).

17 233. Defendants' representations, set forth above, that Testosterone
 18 Boosters have been clinically proven to increase free testosterone levels are false,
 19 in violation of § 1770(a)(2), which proscribes "[m]isrepresenting the . . .
 20 approval, or certification of goods"

21 234. Defendants' representations, set forth above, that Testosterone
 22 Boosters have been clinically proven to increase free testosterone levels are false,
 23 in violation of § 1770(a)(5), which proscribes "[r]epresenting that goods . . . have
 24 . . . approval, characteristics, ingredients, uses, [or] benefits . . . which they do not
 25 have"

26 235. Defendants' representations, set forth above, that Testosterone
 27 Boosters have been clinically proven to increase free testosterone levels are false,
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1 in violation of § 1770(a)(7), which proscribes “[r]epresenting that goods or
2 services are of a particular standard, quality, or grade, . . . if they are of another.”

3 236. Pursuant to Cal. Civ. Code § 1780(a)(2), Plaintiffs seek an order
4 enjoining Defendants from the violations of Cal. Civ. Code § 1770(a)(2), (5), and
5 (7) alleged herein.

6 237. On April 18, 2013, the Gencor Defendants, the Direct Digital
7 Defendants, and GNC were served by certified mail, return receipt requested, at
8 their principal places of business with the notice required by Cal. Civ. Code §
9 1782(a), sent on behalf of purchasers of Nugenix, demanding that they provide
10 within 30 days “sufficient information to validate your claim” that Testofen has
11 been clinically proven to increase free testosterone levels, or face litigation
12 seeking “the recovery of all amounts paid by consumers for Nugenix.” Neither
13 the Gencor Defendants, the Direct Digital Defendants, nor GNC responded to the
14 notice within 30 days after its receipt.
15

16 238. Pursuant to Cal. Civ. Code § 1780(a)(1) and (3), Plaintiffs seek
17 actual damages and restitution: (a) against the Gencor Defendants, equal to the
18 amounts paid by Plaintiffs and the members of the Class for any Testosterone
19 Booster; (b) against GNC, equal to the amounts paid by Plaintiffs O’Toole,
20 Sokolove, and the members of the GNC Subclass for any Testosterone Booster
21 purchased from GNC or any of its franchisees; and (c) against the Direct Digital
22 Defendants, equal to the amounts paid by Plaintiff O’Toole and the other
23 members of the Class for Nugenix.

24 239. Pursuant to Cal. Civ. Code § 1780(a)(4), Plaintiffs seek punitive
25 damages against the Gencor Defendants, the Direct Digital Defendants, and GNC
26 for representing that Testosterone Boosters are clinically proven to increase free
27 testosterone levels, with knowledge of the falsity of those representations.
28

1 240. On May 15, 2014, Truderma was served by certified mail, return
2 receipt requested, at its principal place of business with the notice required by
3 Cal. Civ. Code § 1782(a), demanding that it cease the violations alleged herein,
4 and restore to Plaintiff Sokolove and the members of the Troxyphen Subclass all
5 amounts paid for Troxyphen and Troxyphen Elite. Pursuant to Cal. Civ. Code §
6 1782(d), if Truderma has not complied with these demands within 30 days after
7 receipt of the notice, Plaintiffs will amend this Complaint to seek actual damages,
8 restitution, and punitive damages against Truderma.

9 241. On May 15, 2014, Force Factor was served by certified mail, return
10 receipt requested, at its principal place of business with the notice required by
11 Cal. Civ. Code § 1782(a), demanding that it cease the violations alleged herein,
12 and restore to Plaintiff Bitton and the members of the Test X180 Subclass all
13 amounts paid for Test X180, Test X180 Alpha, and Test X180 Ignite. Pursuant
14 to Cal. Civ. Code § 1782(d), if Force Factor has not complied with these
15 demands within 30 days after receipt of the notice, Plaintiffs will amend this
16 Complaint to seek actual damages, restitution, and punitive damages against
17 Force Factor.

18 242. On May 15, 2014, NAC was served by certified mail, return receipt
19 requested, at its principal place of business with the notice required by Cal. Civ.
20 Code § 1782(a), demanding that it cease the false representations alleged herein,
21 and restore to the members of the Class all amounts paid for Ageless Male
22 containing Testofen.

23 243. On May 15, 2014, KingFisher was served by certified mail, return
24 receipt requested, at its principal place of business with the notice required by
25 Cal. Civ. Code § 1782(a), demanding that it cease the false representations
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1 alleged herein, and restore to the members of the Class all amounts paid for High
2 T, High T Senior, High T Black, and High T Caffeine Free.

3 244. On May 15, 2014, DreamBrands was served by certified mail, return
4 receipt requested, at its principal place of business with the notice required by
5 Cal. Civ. Code § 1782(a), demanding that it cease the false representations
6 alleged herein, and restore to the members of the Class all amounts paid for
7 Mdrive and Mdrive Elite.

8 245. On May 15, 2014, PharmaFreak was served by certified mail, return
9 receipt requested, at its principal place of business with the notice required by
10 Cal. Civ. Code § 1782(a), demanding that it cease the false representations
11 alleged herein, and restore to the members of the Class all amounts paid for Test
12 Freak.

13 246. On May 15, 2014, NDS was served by certified mail, return receipt
14 requested, at its principal place of business with the notice required by Cal. Civ.
15 Code § 1782(a), demanding that it cease the false representations alleged herein,
16 and restore to the members of the Class all amounts paid for PMD N-TEST 600
17 and PMD Flex Stack.

18 247. On May 15, 2014, MRI was served by certified mail, return receipt
19 requested, at its principal place of business with the notice required by Cal. Civ.
20 Code § 1782(a), demanding that it cease the false representations alleged herein,
21 and restore to the members of the Class all amounts paid for NO2 Red Test.

22 248. On May 15, 2014, Prevention LLC and NNC LLC were served by
23 certified mail, return receipt requested, at its principal place of business with the
24 notice required by Cal. Civ. Code § 1782(a), demanding that they cease the false
25 representations alleged herein, and restore to the members of the Class all
26 amounts paid for Ultra T Gold, Vitali-T-Aid, and Vitali-T-Aid Energy.
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1 249. On May 15, 2014, Premium Nutraceuticals was served by certified
2 mail, return receipt requested, at its principal place of business with the notice
3 required by Cal. Civ. Code § 1782(a), demanding that it cease the false
4 representations alleged herein, and restore to the members of the Class all
5 amounts paid for Testoril.

6 250. The affidavit required by Cal. Civ. Code § 1780(d) is attached hereto
7 as Exhibit 119.

8 **THIRD CLAIM FOR RELIEF**
9 **VIOLATIONS OF UNFAIR COMPETITION LAW**

10 (Against All Defendants)

11 251. The allegations of the preceding paragraphs are incorporated by
12 reference as if fully set forth herein.

13 252. Defendants' false representations that Testosterone Boosters have
14 been clinically proven to increase free testosterone levels constitute fraudulent
15 business acts or practices and deceptive, untrue, and misleading advertising in
16 violation of the Unfair Competition Law, Cal. Bus. & Prof. Code § 17200, *et seq.*

17 253. Defendants' representations would have been material to a
18 reasonable person in deciding whether or not to purchase a Testosterone Booster.

19 254. Plaintiffs and the Class justifiably relied upon Defendants'
20 representations by purchasing Testosterone Boosters.

21 255. Defendants' violations of Cal. Civ. Code § 1770(a)(2), (5), and (7)
22 alleged herein constitute unlawful business practices in violation of the Unfair
23 Competition Law.

24 256. As a result of Defendants' violations, Plaintiffs and the members of
25 the Class have suffered injury in fact and lost money.
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1 257. Pursuant to Cal. Bus. & Prof. Code § 17203, Plaintiffs seek an order
2 enjoining these violations, and restoring to Plaintiffs and members of the Class
3 all amounts acquired by Defendants as a result of these violations.

4 **FOURTH CLAIM FOR RELIEF**
5 **VIOLATIONS OF FALSE ADVERTISING LAW**

6 (Against All Defendants)

7 258. The allegations of the preceding paragraphs are incorporated by
8 reference as if fully set forth herein.

9 259. Defendants' representations that Testosterone Boosters have been
10 clinically proven to increase free testosterone levels are false.

11 260. Defendants know, or in the exercise of reasonable care should know,
12 that these representations are false.

13 261. Defendants made these representations with the intent to induce
14 Plaintiffs and the members of the Class to purchase Testosterone Boosters.

15 262. Defendants' false representations induced Plaintiffs and the
16 members of the Class to purchase Testosterone Boosters.

17 263. Defendants made or disseminated these representations, or caused
18 them to be made or disseminated, before the public in the State of California, in
19 the manner set forth above, including by television, radio, and over the internet,
20 in violation of the False Advertising Law, Cal. Bus. & Prof. Code § 17500, *et*
21 *seq.*

22 264. The Gencor Defendants made or disseminated these representations,
23 or caused them to be made or disseminated, from the State of California before
24 the public nationally, in violation of Cal. Bus. & Prof. Code § 17500, *et seq.*

25 265. Defendants' representations that Testosterone Boosters have been
26 clinically proven to increase free testosterone levels violate the express terms of
27 Cal. Bus. & Prof. Code § 17508, which makes it "unlawful for any person doing
28

1 business in California and advertising to consumers in California to make any
2 false or misleading advertising claim, including claims that (1) purport to be
3 based on factual, objective, or clinical evidence”

4 266. As a result of these violations, Plaintiffs and the members of the
5 Class have suffered injury in fact and lost money.

6 267. Pursuant to Cal. Bus. & Prof. Code § 17535, Plaintiffs seek an order
7 enjoining these violations, and restoring to Plaintiffs and members of the Class
8 all amounts acquired by Defendants as a result of these violations.

9
10 **FIFTH CLAIM FOR RELIEF**
BREACH OF EXPRESS WARRANTY

11 (Against All Defendants)

12 268. The allegations of the preceding paragraphs are incorporated by
13 reference as if fully set forth herein.

14 269. Testosterone Boosters are goods.

15 270. Plaintiffs and the other members of the Class purchased
16 Testosterone Boosters.

17 271. Defendants’ representations that Testosterone Boosters were
18 clinically proven to increase free testosterone levels constituted an express
19 warranty that Testosterone Boosters conformed to that affirmation or promise.

20 272. Defendants’ descriptions of Testosterone Boosters as having been
21 clinically proven to increase free testosterone levels constituted an express
22 warranty that Testosterone Boosters conformed to that description.

23 273. The Testosterone Boosters purchased by Plaintiffs and the Class
24 were not, in fact, clinically proven to increase free testosterone levels, in breach
25 of these express warranties.

26 274. As a direct and proximate result, Plaintiffs and the Class have
27 sustained damages equal to the amounts paid for Testosterone Boosters.
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SIXTH CLAIM FOR RELIEF
BREACH OF IMPLIED WARRANTY OF MERCHANTABILITY

(Against All Defendants)

275. The allegations of the preceding paragraphs are incorporated by reference as if fully set forth herein.

276. Testosterone Boosters are goods.

277. Plaintiffs and the other members of the Class purchased Testosterone Boosters.

278. At all times relevant herein, Defendants were in the business of selling Testofen or Testosterone Boosters containing Testofen.

279. The implied warranty or merchantability, implied in every contract for the sale of goods, includes the requirement that the goods conform to the promises or affirmations of fact made on the container or label.

280. Testosterone Boosters do not conform to the promises or affirmations of fact made on the container or label, set forth above, that they are clinically proven to increase free testosterone levels, in breach of the implied warranty of merchantability.

281. As a direct and proximate result, Plaintiffs and the Class have sustained damages equal to the amounts paid for Testosterone Boosters.

SEVENTH CLAIM FOR RELIEF
BREACH OF IMPLIED WARRANTY
OF FITNESS FOR A PARTICULAR PURPOSE

(Against All Defendants)

282. The allegations of the preceding paragraphs are incorporated by reference as if fully set forth herein.

283. Testosterone Boosters are goods.

284. Plaintiffs and the other members of the Class purchased Testosterone Boosters for the purpose of increasing their free testosterone levels.

1 285. At the time of purchase, Defendants knew or had reason to know
2 that Plaintiffs and the other members of the Class intended to use Testosterone
3 Boosters for the purpose of increasing their free testosterone levels.

4 286. At the time of purchase, the Gencor Defendants, Direct Digital
5 Defendants, Truderma, and Force Factor knew or had reason to know that
6 Plaintiffs and the other members of the Class were relying on their skill and
7 judgment as manufacturers of nutritional supplements in formulating
8 Testosterone Boosters.

9 287. Plaintiffs and the Class justifiably relied on Defendants' skill and
10 judgment as manufacturers of nutritional supplements in formulating
11 Testosterone Boosters.

12 288. At the time of purchase, GNC knew or had reason to know that
13 Plaintiffs O'Toole, Sokolove, and the other members of the GNC Subclass were
14 relying on GNC's skill and judgment in the selection of Testosterone Boosters.

15 289. Testosterone Boosters are not clinically proven to increase free
16 testosterone levels, in breach of the implied warranty of fitness for a particular
17 purpose.

18 290. As a direct and proximate result, Plaintiffs and the Class have
19 sustained damages equal to the amounts paid for Testosterone Boosters.

20
21 **EIGHTH CLAIM FOR RELIEF**
22 **FRAUD**

23 (Against All Defendants)

24 291. The allegations of the preceding paragraphs are incorporated by
25 reference as if fully set forth herein.

26 292. Defendants' representations that Testosterone Boosters have been
27 clinically proven to increase free testosterone levels, set forth above, are
28 representations of fact.

1 293. Defendants' representations that Testosterone Boosters have been
2 clinically proven to increase free testosterone levels, set forth above, were false
3 when made.

4 294. These representations would have been material to a reasonable
5 person in deciding whether or not to purchase a Testosterone Booster.

6 295. Defendants knew that these representations were false at the time
7 they were made, or acted with reckless disregard as to their truth or falsity.

8 296. Defendants made these representations with the intent to induce
9 Plaintiffs and the Class to purchase Testosterone Boosters.

10 297. Plaintiffs and the Class justifiably relied upon Defendants'
11 misrepresentations by purchasing Testosterone Boosters.

12 298. As a direct and proximate result, Plaintiffs and the Class have
13 suffered damages equal to the amounts paid for Testosterone Boosters.

14 299. To punish and deter their ongoing fraud, Defendants are also liable
15 for punitive or exemplary damages.

16
17 **NINTH CLAIM FOR RELIEF**
18 **NEGLIGENT MISREPRESENTATION**

19 (Against All Defendants)

20 300. The allegations of the preceding paragraphs are incorporated by
21 reference as if fully set forth herein.

22 301. Defendants' representations that Testosterone Boosters have been
23 clinically proven to increase free testosterone levels, set forth above, are
24 representations of fact.

25 302. Defendants' representations that Testosterone Boosters have been
26 clinically proven to increase free testosterone levels, set forth above, were false
27 when made.

1 303. These representations would have been material to a reasonable
2 person in deciding whether or not to purchase a Testosterone Booster.

3 304. Defendants made these representations without reasonable grounds
4 for believing them to be true.

5 305. Defendants made these representations with the intent to induce
6 Plaintiffs and the Class to purchase Testosterone Boosters.

7 306. Plaintiffs and the Class justifiably relied upon Defendants'
8 misrepresentations by purchasing Testosterone Boosters.

9 307. As a direct and proximate result, Plaintiffs and the Class have
10 suffered damages equal to the amounts paid for Testosterone Boosters.

11 **TENTH CLAIM FOR RELIEF**
12 **RESTITUTION**

13 (Against All Defendants)

14 308. The allegations of the preceding paragraphs are incorporated by
15 reference as if fully set forth herein.

16 309. Defendants have received a benefit from Plaintiffs and the Class,
17 who have purchased Testosterone Boosters, profiting Defendants.

18 310. Defendants received these benefits from Plaintiffs and the Class by
19 selling Testosterone Boosters under false pretenses, as set forth above.

20 311. It would be unjust and inequitable to permit Defendants to retain the
21 benefits received from Plaintiffs and the Class.

22 312. Plaintiffs seek restitution of all such benefits, according to proof.
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ELEVENTH CLAIM FOR RELIEF
VIOLATIONS OF NEW YORK GBL § 349

(Against Gencor Defendants, GNC, and Truderma,
on Behalf of the New York Subclass)

313. The allegations of the preceding paragraphs are incorporated by reference as if fully set forth herein.

314. Should the Court determine that the Second and/or Third Claims for Relief alleged herein are unavailable to Class members whose purchases of Testosterone Boosters were made outside the State of California, Plaintiff Sokolove asserts this claim, in the alternative, against Gencor Defendants, GNC, and Truderma on behalf of the New York Subclass.

315. Defendants' false representations, set forth above, that Testosterone Boosters have been clinically proven to increase free testosterone levels constitute deceptive acts or practices in the conduct of business, trade or commerce in violation of N.Y. Gen. Bus. L. § 349.

316. Defendants' false representations were directed at consumers, including Sokolove and the other members of the New York Subclass.

317. Defendants' false representations were likely to mislead a reasonable consumer acting reasonably under the circumstances.

318. As a result of Defendants' violations of N.Y. Gen. Bus. L. § 349, Sokolove and the other members of the New York Subclass have suffered injury, and seek actual damages equal to the amounts paid by them for any Testosterone Booster purchased in the State of New York, reasonable attorneys' fees, and costs.

TWELFTH CLAIM FOR RELIEF
VIOLATIONS OF NEW YORK GBL § 350

(Against Gencor Defendants, GNC, and Truderma,
on Behalf of the New York Subclass)

319. The allegations of the preceding paragraphs are incorporated by reference as if fully set forth herein.

320. Should the Court determine that the Fourth Claim for Relief alleged herein is unavailable to Class members whose purchases of Testosterone Boosters were made outside the State of California, Plaintiff Sokolove asserts this claim, in the alternative, against Gencor Defendants, GNC, and Truderma on behalf of the New York Subclass.

321. Defendants' false representations, set forth above, that Testosterone Boosters have been clinically proven to increase free testosterone levels constitute false advertising in the conduct of business, trade or commerce in violation of N.Y. Gen. Bus. L. § 350.

322. Defendants' false advertising includes the materially misleading labeling of Testosterone Boosters, as set forth above.

323. Defendants' false advertising is directed at consumers, including Sokolove and the other members of the New York Subclass.

324. Defendants' false advertising is likely to mislead a reasonable consumer acting reasonably under the circumstances.

325. As a result of Defendants' violations of N.Y. Gen. Bus. L. § 350, Sokolove and the other members of the New York Subclass have suffered injury, and seek actual damages equal to the amounts paid by them for any Testosterone Booster purchased in the State of New York, reasonable attorneys' fees, and costs.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for relief as follows:

1. For an order enjoining Defendants from continuing the fraudulent business practices and false advertising alleged herein;
2. For an order restoring to Plaintiffs and the members of the Class the amounts wrongfully acquired from them by Defendants;
3. For compensatory damages, according to proof;
4. For actual damages, according to proof;
5. For an order, pursuant to Cal. Civ. Code § 2224, imposing a constructive trust upon the assets of Defendants acquired by means of the wrongful acts alleged;
6. For punitive or exemplary damages;
7. For attorney's fees and costs, as allowed by statute and Cal. Govt. Code § 1021.5; and
8. For such other and further relief as the Court deems just and proper.

DEMAND FOR JURY TRIAL

Plaintiffs demand a trial by jury on all claims so triable.

Respectfully submitted,

Dated: May 15, 2014

/s/ Barry Himmelstein
Barry Himmelstein (SBN 157736)
barry@himmellaw.com
HIMMELSTEIN LAW NETWORK
2000 Powell St., Suite 1605
Emeryville, CA 94608-1861
Telephone: (510) 450-0782
Facsimile: (510) 924-0403

Attorney for Plaintiffs
Brian O'Toole, Robert Sokolove,
and Michael Bitton