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10 Attorneys for Plaintiff Julie Gram

11
12 UNITED STATES DISTRICT COURT
13 FOR THE CENTRAL DISTRICT OF CALIFORNIA
14

15 JULIE GRAM, on behalf of herself
and all others similarly situated,

16 Plaintiff,

17 vs.

18 INTELLIGENDER, LLC, and DOES 1
19 through 10,

20 Defendants.

Case No. CV10 4210-ABC
(VBKx)

**SECOND AMENDED
COMPLAINT FOR
DAMAGES AND EQUITABLE
RELIEF; DEMAND FOR
JURY TRIAL**

(Class Action)

Action Filed: June 7, 2010

Assigned to the Hon. Audrey B.
Collins, Courtroom 680

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25 Plaintiff Julie Gram (hereafter sometimes referred to as "Plaintiff"), on
26 behalf of herself and all other similarly situated persons in the United States,
27 alleges the following upon information and belief based upon investigation of
28 counsel, published reports, and personal knowledge:

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CENTRAL DISTRICT OF CALIF.
LOS ANGELES, CA

FILED

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NATURE OF THE CASE

1. This is a class action brought on behalf of all consumers nationwide who have purchased the Intelligender Gender Prediction Test, including a subclass of consumers who reside in California. This Court has diversity jurisdiction over this class action pursuant to 28 U.S.C. § 1332, as amended by the Class Action Fairness Act of 2005, because the matter in controversy exceeds \$5,000,000, exclusive of interest and costs, and is a class action in which some members of the class are citizens of different states than the Defendant. *See* 28 U.S.C. § 1332(d)(2)(A).

JURISDICTION AND PARTIES

2. Plaintiff Julie Gram is a resident of Los Angeles County, California.

3. Defendant Intelligender, LLC (“Defendant” or “Intelligender”) is a Texas limited liability company with its principal place of business in Plano, Texas.

4. The true names and capacities of the Defendants sued herein as DOE DEFENDANTS 1 through 10, inclusive, are currently unknown to Plaintiff, who therefore sues such Defendants by fictitious names. Each of the Defendants designated herein as a DOE is legally responsible for the unlawful acts alleged herein. Plaintiff will seek leave of Court to amend the Complaint to reflect the true names and capacities of the DOE Defendants when such identities become known.

5. At all relevant times, each and every Defendant was acting as an agent and/or employee of each of the other Defendants and was acting within the course and scope of said agency and/or employment with the full knowledge and consent of each of the other Defendants. Each of the acts and/or omissions complained of herein was made known to, and ratified by, each of the other Defendants.

1 having a boy or girl as early as 10 weeks into the pregnancy. Intelligender stated
2 on its website that the Test would predict the gender of unborn children within
3 minutes through the use of a simple-to-use urine test. Intelligender also
4 represented on its website that the Test was proven to be approximately 80-90%
5 accurate at predicting the sex of unborn children. Plaintiff viewed and relied
6 upon all of the above representations in making her decision to purchase the Test.
7 Plaintiff did not wish to wait for a sonogram in order to know the sex of her
8 unborn child, and was willing to pay \$29.99 for a non-invasive urine test that
9 could give her the same results as a sonogram before a sonogram could do so.
10 The touted ability of the Test to predict the sex of her unborn child prior to a
11 sonogram being able to do so; the ease of obtaining quick results with the Test;
12 and the advertised high accuracy rates of the Test were all material to Plaintiff in
13 purchasing the Test.

14 12. Upon purchasing the Test, Plaintiff observed and relied upon similar
15 representations on the Test's box and packaging regarding the ability of the Test
16 to predict the gender of unborn children as early as 10 weeks into the pregnancy
17 through a simple urine test that would provide accurate results within minutes.

18 13. Intelligender markets itself as providing an opportunity to learn the
19 gender of an unborn child faster than is possible by a sonogram or ultrasound.
20 According to the Intelligender website:

21 Our Gender Prediction Test™ is the fun pre-birth experience
22 moms are talking about! Discover whether you're having a boy or girl
23 as early as 10 weeks pregnant.

24 Our urine-based test is easy to perform in the privacy of your
25 home, with results ready in minutes!

1 IntelliGender’s Gender Prediction Test bridges the curiosity gap
2 between conception and sonogram.¹

3 14. Intelligender claims the Test is “over 90% accurate” in laboratory
4 results and 82% accurate in “real world” results.² The packaging of the Test
5 states that it is “Proven over 90% accurate.”³

6 15. According to Intelligender’s website, the Test works as follows:
7 IntelliGender has invested heavily the past several years in
8 developing, refining and testing the specific proprietary formula that
9 successfully reacts to the chemicals in the urine produced by the
10 mother and baby combination. This exciting, revolutionary new
11 formula produces a “dark, smoky green” reaction to the urine of a
12 mother carrying a male baby and an “orange tinted” reaction to the
13 urine of a mother pregnant with a girl. A color chart on our G.P.T.
14 label matches to the various shades produced for an easy-to-read
15 determination of the unborn baby’s gender.⁴

16 16. Intelligender markets the Test as a legitimate scientific product.
17 Intelligender’s website states that:

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20 ¹ <http://www.intelligender.com/home.html> (last accessed on October 18,
21 2010).

22 ² See Letter from San Francisco City Attorney Dennis Herrera to
23 Intelligender, March 10, 2010 (available at:
24 <http://www.sfcityattorney.org/Modules/ShowDocument.aspx?documentid=535>)
(last accessed on October 18, 2010).

25 ³ <http://cdn2.overstock.com/images/products/P11781723.jpg> (last accessed
26 on October 18, 2010).

27 ⁴ <http://www.intelligender.com/gpt-how-developed.html> (last accessed on
28 October 18, 2010).

1 From inception there has been a firm belief in solid science, strong
2 investments in research and continual product and process
3 improvement. Early after initial research began, the company
4 founders sought out the foremost experts in the field. Shortly after the
5 initial product was launched, a Nobel Prize winning chemist was
6 added to the research team making significant contributions to
7 continued product enhancements. Recently the company added a
8 renowned microbiologist to the team tasked with bringing even more
9 product innovations to the market.⁵

10 17. The Test is actually no more scientific than flipping a coin.
11 According to Dr. Jeffrey Ecker, a high-risk obstetrician at Massachusetts General
12 Hospital and a Harvard Medical School professor, “If people ask me, I tell them
13 not to waste their money ... I don’t know of anything that would show up in the
14 urine at that point in a pregnancy... that would be useful.”⁶

15 18. Plaintiff is informed and believes and thereon alleges that
16 Intelligender only recently added any disclaimers to its website about its accuracy
17 rate.

18 19. Intelligender has refused to disclose the purported scientific basis for
19 the Test, previously claiming that patent applications were pending.

20 20. Consumers are fooled into believing that the Test scientifically
21 adduces the gender of their unborn babies, when in fact the Test simply produces
22 a 50-50 guess. If the Test is correct, Intelligender has a happy customer; if not,
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24 ⁵ <http://www.intelligender.com/about-intelligender.html> (last accessed on
25 October 18, 2010).

26 ⁶ See Mitch Lipka, “IntelliGender Gender Prediction Test as accurate as a
27 coin toss, doctors say,” (available at:
28 <http://www.walletpop.com/blog/2010/05/12/intelligender-gender-prediction-test-just-as-accurate-as-a-coin/>) (last accessed on October 18, 2010).

1 Intelligender refers consumers to hidden “disclaimers” suggesting the Test is “just
2 for fun.” Actually, both consumers have been ripped off by a useless product.

3 **CLASS ACTION ALLEGATIONS**

4 21. Plaintiff brings this action, pursuant to Rule 23(a) and (b)(3) of the
5 Federal Rules of Civil Procedure, or pursuant to Rule 23(a) and (b)(2) of the
6 Federal Rules of Civil Procedure, on behalf of herself and all others similarly
7 situated, defined as follows: All consumers nationwide who have purchased an
8 Intelligender Gender Prediction Test (the “Class”). The Class includes a subclass
9 of California consumers (the “Subclass”).

10 22. Specifically excluded from the proposed Class and Subclass are
11 Defendant, any entities in which Defendant has a controlling interest, and the
12 officers, directors, affiliates, legal representatives, successors, subsidiaries and/or
13 assigns of Defendant.

14 23. This action has been brought and may properly be maintained as a
15 class action, satisfying the numerosity, commonality, typicality, adequacy, and
16 superiority requirements of Rule 23 of the Federal Rules of Civil Procedure,
17 because:

18 a) Individual joinder of Class and Subclass members would be
19 impracticable. Plaintiff is informed and believes and thereon alleges that the
20 Class and Subclass consist of many thousands of persons.

21 b) Common questions of law and fact exist as to all members of the
22 Class and Subclass that predominate over any question that affects only
23 individual Class or Subclass members. These common questions of law and fact
24 include, without limitation:

- 25 1) Whether the Intelligender Gender Prediction Test is 82%
26 accurate in the real world, as claimed in Intelligender’s
27 marketing;
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- 1 2) Whether the Intelligender Gender Prediction Test is 90%
- 2 accurate in the laboratory, as claimed in Intelligender's
- 3 marketing;
- 4 3) Whether the Intelligender Gender Prediction Test is based on
- 5 significant scientific research, as claimed in Intelligender's
- 6 marketing;
- 7 4) Whether the Intelligender Gender Prediction Test can
- 8 accurately predict an unborn baby's gender within 10 weeks of
- 9 conception, as claimed in Intelligender's marketing;
- 10 5) Whether Defendant is liable as a result; and
- 11 6) The nature and extent of restitution and/or damages and other
- 12 remedies to which the conduct of Intelligender entitles the Class
- 13 and Subclass members.

14 c) Plaintiff's claims are typical of the claims of the Class and Subclass
15 because Plaintiff is a person residing in California who purchased an Intelligender
16 Gender Prediction Test.

17 d) Plaintiff is an adequate representative of the Class and Subclass
18 because she shares the same interest as all Class and Subclass members and
19 because her claims and losses are typical of those of the Class and Subclass
20 members. Plaintiff has retained competent counsel who are experienced in class
21 action litigation and who will fairly and adequately protect the interests of the
22 Class and Subclass.

23 e) A class action is superior to other available methods for the fair and
24 efficient adjudication of this litigation, because individual joinder of all persons
25 who purchased an Intelligender Gender Prediction Test would be impracticable.
26 Most such persons' losses are modest in relation to the expense and burden of
27 individual prosecution of the litigation necessitated by Defendant's wrongful
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1 conduct. It would be virtually impossible for plaintiff Class members to
2 efficiently redress their wrongs individually. Even if all plaintiff Class members
3 themselves could afford such individual litigation, the Court system would benefit
4 from a class action. The prosecution of separate claims by individual members of
5 the Class would create a risk of inconsistent or varying adjudications concerning
6 individual members of the Class which would establish incompatible standards of
7 conduct for the party opposing the Class, as well as create the potential for
8 inconsistent or contradictory judgments. Furthermore, the prosecution of separate
9 claims by individual members of the Class would create a risk of adjudications
10 concerning individual members of the Class which would, as a practical matter,
11 be dispositive of the interests of other members of the Class who are not parties to
12 the adjudications, or substantially impair or impede the ability of other members
13 of the Class who are not parties to the adjudications to protect their interests.
14 Individualized litigation would also magnify the delay and expense to all parties
15 and to the court system presented by the issues of the case. By contrast, the class
16 action device presents far fewer management difficulties and provides the benefit
17 of comprehensive supervision by a single court, as well as economy of scale and
18 expense.

19 24. Furthermore, Defendant has acted or refused to act on grounds
20 generally applicable to all the members of the Class, thereby making final
21 injunctive relief or declaratory relief concerning the Class as a whole appropriate,
22 pursuant to Federal Rules of Civil Procedure, Rule 23(b)(2).
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25 25. Plaintiff believes that notice to the Class is necessary and proposes
26 that notice of this class action be provided by individual mailings to plaintiff
27 Class members and/or by publication in national publications.
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1 **FIRST CAUSE OF ACTION**

2 **RELIEF UNDER TEXAS BUSINESS AND COMMERCE CODE**

3 **SECTIONS 17.50, ET SEQ.**

4 (Plaintiff and Plaintiff Class Members Against All Defendants)

5 26. Plaintiff repeats, reiterates, and realleges each and every allegation
6 contained in the preceding paragraphs of this complaint.

7 27. Texas Business and Commerce Code section 17.50 is part of Texas'
8 Deceptive Trade Practices-Consumer Protection Act ("DTPA") and provides in
9 relevant part:

10 (a) A consumer may maintain an action where any of the
11 following constitute a producing cause of economic damages or
12 damages for mental anguish:

13 (1) the use or employment by any person of a false,
14 misleading, or deceptive act or practice that is:

15 (A) specifically enumerated in a subdivision of
16 Subsection (b) of Section 17.46 of this subchapter; and

17 (B) relied on by a consumer to the consumer's
18 detriment;

19 . . .

20 (2) breach of an express or implied warranty; [or]

21 (3) any unconscionable action or course of action by any
22 person

23 28. In doing the acts alleged above, Defendant breached implied
24 warranties, in violation of Texas Business and Commerce Code section
25 17.50(a)(2).

26 29. In doing the acts alleged above, Defendant also engaged in an
27 unconscionable action or course of action, in violation of Texas Business and
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1 Commerce Code section 17.50(a)(3). Specifically, Defendant engaged in acts or
2 practices which, to Plaintiff's and plaintiff Class members' detriment, took
3 advantage of the lack of knowledge, ability, experience or capacity of Plaintiff
4 and plaintiff Class members to a grossly unfair degree. Defendant's
5 unconscionable actions and courses of action include but are not limited to, the
6 following, which is set forth more fully above: Defendant misrepresented and
7 deceived customers into believing they would receive a highly accurate gender
8 prediction test when in fact they were purchasing a product with no better
9 predictive accuracy than pure chance.

10 30. Defendant knew at the time that it made its representations and
11 omissions that they were false. Nevertheless, it took advantage of Plaintiff's and
12 plaintiff Class members' lack of knowledge by aggressively marketing its Tests
13 and inducing Plaintiff and plaintiff Class members to purchase them.

14 31. Defendant also engaged in an unconscionable action or course of
15 action by engaging in acts or practices which, to Plaintiff's and plaintiff Class
16 members' detriment, resulted in a gross disparity between the value received and
17 the consideration paid for the Tests, since Defendant represented that the Tests
18 were over 90% accurate but, in truth, the Tests had no better predictive accuracy
19 than pure chance, and were therefore worthless, despite the consideration paid.

20 32. In doing the acts alleged above, Defendant also engaged in the
21 following acts set forth in Texas Business and Commerce Code section 17.46,
22 among others, which provides in pertinent part:

23 (a) False, misleading, or deceptive acts or practices in the
24 conduct of any trade or commerce are hereby declared unlawful

25 . . .

1 (b) Except as provided in Subsection (d) of this section, the
2 term “false, misleading, or deceptive acts or practices” includes,
3 but is not limited to, the following acts: ...

4 (5) representing that goods or services have ...
5 characteristics, ... [or] benefits ... which they do not have ... ;

6 (7) representing that goods or services are of a
7 particular standard, quality, or grade, ... if they are of another; ...

8 (9) advertising goods or services with intent not to sell
9 them as advertised; ...

10 (24) failing to disclose information concerning goods
11 or services which was known at the time of the transaction if such
12 failure to disclose such information was intended to induce the
13 consumer into a transaction into which the consumer would not
14 have entered had the information been disclosed.

15 33. Plaintiff and plaintiff Class members relied on Defendant’s conduct
16 to their detriment. As set forth above, Plaintiff visited Intelligender’s website
17 prior to purchasing the Test and relied upon Intelligender’s representations
18 regarding the high accuracy rates of the Test and the ability of the Test to predict
19 the sex of unborn children as early as 10 weeks into the pregnancy, prior to a
20 sonogram being able to do so, through a simple urine test. These representations
21 were material to Plaintiff, and she relied on them to her detriment in purchasing
22 the Test. Plaintiff also relied on similar representations regarding the ability of
23 the Test to predict the gender of unborn children on the Test’s packaging.

24 34. Plaintiff and plaintiff Class members have sustained “economic
25 damages” as defined in the DTPA as a result of Defendant’s violations of the
26 DTPA.

1 (Plaintiff and Plaintiff Class Members Against All Defendants, Or, Alternatively,
2 Plaintiff and Plaintiff Subclass Members Against All Defendants)

3 40. Plaintiff repeats, reiterates, and realleges each and every allegation
4 contained in the preceding paragraphs of this complaint.

5 41. Defendant impliedly warrants that its Tests are fit for the ordinary
6 purpose for which they are sold.

7 42. The ordinary purpose for which Defendant's Tests are sold is to
8 provide purchasers with a prediction of the gender of their unborn children that is
9 greater than 90% accurate.

10 43. Defendant breached its implied warranty of merchantability by
11 selling Tests which were so defective as to render them less accurate than
12 advertised and provide no better predictions than pure 50/50 chance.

13 44. Plaintiff, and every member of the Class alleged herein have been
14 similarly damaged as a result of this breach of warranty.

15 45. Plaintiff brings this cause of action on behalf of the nationwide Class
16 under Texas law. In the alternative, pursuant to Federal Rules of Civil Procedure,
17 Rule 8(a)(3) and (d)(2), Plaintiff brings this cause of action on behalf of the
18 California Subclass under California law.

19 **THIRD CAUSE OF ACTION**

20 **BREACH OF IMPLIED WARRANTY OF FITNESS**

21 **FOR A PARTICULAR PURPOSE**

22 (Plaintiff and Plaintiff Class Members Against All Defendants, Or, Alternatively,
23 Plaintiff and Plaintiff Subclass Members Against All Defendants)

24 46. Plaintiff repeats, reiterates, and realleges each and every allegation
25 contained in the preceding paragraphs of this complaint.

26 47. Intelligender is, and at all relevant times has been, in the business of
27 designing, manufacturing, distributing, and selling gender prediction tests.
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1 48. Intelligender knew, at the time it sold its Tests, that such Tests would
2 be used by Plaintiff and Class members for the specific purpose of attempting to
3 predict the gender of their unborn children.

4 49. Intelligender knew that consumers who purchased its Tests relied
5 upon Defendant's expertise and skill, judgment and knowledge in furnishing tests
6 which were capable of predicting the gender of their unborn children with a
7 greater than 90% accuracy rate.

8 50. Intelligender's Tests are not fit for that purpose in that their design or
9 manufacture is so defective as to render them less accurate than advertised and
10 provide no better predictions than pure 50/50 chance.

11 51. Plaintiff, and every member of the Class alleged herein, have been
12 similarly damaged as a result of this breach of warranty.

13 52. Plaintiff brings this cause of action on behalf of the nationwide Class
14 under Texas law. In the alternative, pursuant to Federal Rules of Civil Procedure,
15 Rule 8(a)(3) and (d)(2), Plaintiff brings this cause of action on behalf of the
16 California Subclass under California law.

17 **FOURTH CAUSE OF ACTION**

18 **FRAUD**

19 (Plaintiff and Plaintiff Class Members Against All Defendants, Or, Alternatively,
20 Plaintiff and Plaintiff Subclass Members Against All Defendants)

21 53. Plaintiff repeats, reiterates, and realleges each and every allegation
22 contained in the preceding paragraphs of this complaint.

23 54. Defendant Intelligender made the following material representations
24 to Plaintiff and plaintiff Class members in writing:

25 A. That Defendant's Test is over 90% accurate in the laboratory.
26 Defendant made this representation on its Website, in its Twitter feed at
27 <http://www.twitter.com/IntelliGender>, and on its packaging, among other places.
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1 B. That Defendant’s Test’s in-home results are approximately 82%
2 accurate. Defendant made this representation on its Web site and in its Twitter
3 feed at <http://www.twitter.com/IntelliGender>, among other places.

4 55. Defendant made substantially the same representations to Plaintiff
5 and each plaintiff Class member. Representations “A” and “B” above were
6 communicated to the general public.

7 56. The foregoing representations were false. In truth, Defendant’s Test
8 is not over 90% accurate in the laboratory, and it is not approximately 82%
9 accurate in-home.

10 57. At the time these representations were made, Defendant knew them
11 to be false. Defendant made these representations with the intention to deceive
12 and defraud Plaintiff and plaintiff Class members, and to induce them to act in
13 reliance on these representations by purchasing its Tests.

14 58. Plaintiff and plaintiff Class members were ignorant of the falsity of
15 Defendant’s representations at the time they were made and at the time Plaintiff
16 and plaintiff Class members purchased their Tests, and believed them to be true.
17 As set forth above, Plaintiff visited Intelligender’s website prior to purchasing the
18 Test and reasonably relied upon Intelligender’s representations regarding the high
19 accuracy rates of the Test and the ability of the Test to predict the sex of unborn
20 children as early as 10 weeks into the pregnancy, prior to a sonogram being able
21 to do so, through a simple urine test. These representations were material to
22 Plaintiff, and she reasonably relied on them to her detriment in purchasing the
23 Test. Plaintiff also relied on similar representations regarding the ability of the
24 Test to predict the gender of unborn children on the Test’s packaging.

25 59. In reliance on these representations, Plaintiff and plaintiff Class
26 members were induced to and did purchase the Tests to their detriment. Had
27 Plaintiff and plaintiff Class members known the true facts, they would not have
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1 taken such action. Plaintiff's and plaintiff Class members' reliance on
2 Defendant's representations was justified because Defendant was the one offering
3 the Test for sale, and possessed superior knowledge of the facts, as they were
4 peculiarly within the knowledge of Defendant.

5 60. Defendant made substantially the same representations to all plaintiff
6 Class members who purchased the Tests. Because the representations were
7 material, reliance and justification for the reliance may be inferred or presumed
8 on a class-wide basis for Plaintiff and all plaintiff Class members.

9 61. As a result of Defendant's fraudulent conduct as alleged above,
10 Plaintiff and plaintiff Class members have suffered damages.

11 62. The foregoing conduct of Defendant (i) constituted an intentional
12 misrepresentation, deceit, or concealment of a material fact known to the
13 Defendant with the intention on the part of Defendant of thereby depriving
14 Plaintiff and plaintiff Class members of property or legal rights or otherwise
15 causing Plaintiff and plaintiff Class members injury; (ii) was intended by
16 Defendant to cause injury to Plaintiff and plaintiff Class members or was
17 despicable conduct that was carried on by Defendant with a willful and conscious
18 disregard of the rights or safety of others; and/or (iii) was despicable conduct that
19 subjected Plaintiff and plaintiff Class members to cruel and unjust hardship in
20 conscious disregard of Plaintiff's and plaintiff Class members' rights so as to
21 justify an award of punitive damages against Defendant.

22 63. Plaintiff brings this cause of action on behalf of the nationwide Class
23 under Texas law. In the alternative, pursuant to Federal Rules of Civil Procedure,
24 Rule 8(a)(3) and (d)(2), Plaintiff brings this cause of action on behalf of the
25 California Subclass under California law.

26 **FIFTH CAUSE OF ACTION**
27 **FOR UNJUST ENRICHMENT**
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1 (Plaintiff and Plaintiff Class Members Against All Defendants, Or, Alternatively,
2 Plaintiff and Plaintiff Subclass Members Against All Defendants)

3 64. Plaintiff repeats, reiterates, and realleges each and every allegation
4 contained in the preceding paragraphs of this complaint.

5 65. Defendant has received a benefit at the expense of Plaintiff and
6 plaintiff Class members.

7 66. Defendant improperly obtained money from Plaintiff and plaintiff
8 Class members as a result of their purchases of the Test despite not providing a
9 product up to the promised standards. No substantial justification exists for
10 Defendant's conduct. Accordingly, Defendant has received a benefit and has
11 unjustly retained this benefit at the expense of Plaintiff and the plaintiff Class.

12 67. As a direct and proximate result of Defendant's misconduct, Plaintiff
13 and plaintiff Class members have paid money for goods not provided and are
14 thereby entitled to restoration of their monies.

15 68. Plaintiff brings this cause of action on behalf of the nationwide Class
16 under Texas law. In the alternative, pursuant to Federal Rules of Civil Procedure,
17 Rule 8(a)(3) and (d)(2), Plaintiff brings this cause of action on behalf of the
18 California Subclass under California law.

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22 **SIXTH CAUSE OF ACTION**

23 **VIOLATION OF CALIFORNIA'S UNFAIR COMPETITION LAW**

24 (Plaintiff and Plaintiff Subclass Members Against All Defendants)

25 69. Plaintiff repeats, reiterates, and realleges each and every allegation
26 contained in the preceding and subsequent paragraphs of this complaint.
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1 70. California Business and Professions Code §§ 17200, *et seq.*, also
2 known as the California Unfair Competition Law (“UCL”), prohibits acts of
3 “unfair competition,” including any unlawful, unfair, fraudulent or deceptive
4 business act or practice as well as “unfair, deceptive, untrue or misleading
5 advertising.”

6 71. Defendant violated and continues to violate the UCL through one or
7 more of the following unlawful practices:

- 8 a. Violating the California False Advertising Law, Business and
9 Professions Code sections 17500, *et. seq.*, by disseminating or
10 causing to be disseminated untrue or misleading advertising;
- 11 b. Committing common law fraud; and
- 12 c. Violating the other statutes and common law causes of action as
13 alleged in the instant Complaint.

14 72. Defendant also violated and continues to violate the UCL through
15 one or more of the following unfair and/or fraudulent practices:

- 16 a. Selling to Plaintiff and Subclass members a product not suited for its
17 advertised use; and
- 18 b. Failing to disclose to Plaintiff and Subclass members that the Tests
19 sold do not perform at the advertised accuracy rate.

20 73. Plaintiff relied on Defendant’s conduct to her detriment. As set forth
21 above, Plaintiff visited Intelligender’s website prior to purchasing the Test and
22 relied upon Intelligender’s representations regarding the high accuracy rates of
23 the Test and the ability of the Test to predict the sex of unborn children as early as
24 10 weeks into the pregnancy, prior to a sonogram being able to do so, through a
25 simple urine test. These representations were material to Plaintiff, and she relied
26 on them to her detriment in purchasing the Test. Plaintiff also relied on similar
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1 representations regarding the ability of the Test to predict the gender of unborn
2 children on the Test's packaging.

3 74. As a direct and proximate result of Defendant's unlawful, unfair, and
4 fraudulent business practices, Plaintiff and the members of the Subclass have
5 suffered injury and have lost money or property.

6 75. Plaintiff respectfully requests that the Court require Defendant to
7 provide restitution to Plaintiff and Subclass members, award Plaintiff and
8 Subclass members reasonable attorneys' fees and expenses, and award such other
9 relief as the Court may deem just and proper.

10 76. The unlawful, unfair, and fraudulent business practices described
11 herein present a continuing threat to members of the Subclass and members of the
12 general public in that Defendant continues to engage in these practices, and will
13 not cease doing so unless and until forced to do so by this Court. Defendant's
14 conduct will continue to cause irreparable injury to the Subclass unless enjoined
15 or restrained.

16 **SEVENTH CAUSE OF ACTION**

17 **VIOLATION OF CALIFORNIA'S FALSE ADVERTISING LAWS**

18 (Plaintiff and Plaintiff Subclass Members Against All Defendants)

19 77. Plaintiff repeats, reiterates, and realleges each and every allegation
20 contained in the preceding paragraphs of this complaint.

21 78. Business and Professions Code § 17500 provides that "[i]t is
22 unlawful for any . . . corporation . . . with intent . . . to dispose of . . . personal
23 property . . . to induce the public to enter into any obligation relating thereto, to
24 make or disseminate or cause to be made or disseminated . . . from this state
25 before the public in any state, in any newspaper or other publication, or any
26 advertising device, or by public outcry or proclamation, or in any other manner or
27 means whatever, including over the Internet, any statement . . . which is untrue or
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1 misleading, and which is known, or which by the exercise of reasonable care
2 should be known, to be untrue or misleading”

3 79. Defendant’s representations, including statements made on
4 Defendant’s website, packaging, and all other written and oral materials
5 disseminated by Defendant to promote its Test, constitute advertising for
6 purposes of this cause of action.

7 80. Such advertising contained statements which were false, misleading,
8 or which omitted material information which Defendant was under a duty to
9 disclose and which were known or should have been known to Defendant to be
10 false, misleading, or deceptive.

11 81. Plaintiff relied on Defendant’s conduct to her detriment. As set forth
12 above, Plaintiff visited Intelligender’s website prior to purchasing the Test and
13 relied upon Intelligender’s representations regarding the high accuracy rates of
14 the Test and the ability of the Test to predict the sex of unborn children as early as
15 10 weeks into the pregnancy, prior to a sonogram being able to do so, through a
16 simple urine test. These representations were material to Plaintiff, and she relied
17 on them to her detriment in purchasing the Test. Plaintiff also relied on similar
18 representations regarding the ability of the Test to predict the gender of unborn
19 children on the Test’s packaging.

20 82. As a direct and proximate result of Defendant’s misleading
21 advertising, Plaintiff and the members of the Subclass have suffered injury in fact
22 and have lost money or property.

23 83. The misleading advertising described herein presents a continuing
24 threat to the Subclass and members of the public in that Defendant persists and
25 continues to engage in these practices, and will not cease doing so unless and
26 until forced to do so by this Court. Defendant’s conduct will continue to cause
27 irreparable injury to the Subclass unless enjoined or restrained.
28

EIGHTH CAUSE OF ACTION

VIOLATION OF CALIFORNIA’S CONSUMERS LEGAL REMEDIES

ACT

(Plaintiff and Plaintiff Subclass Members Against All Defendants)

84. Plaintiff repeats, reiterates, and realleges each and every allegation contained in the preceding paragraphs of this complaint.

85. This cause of action is brought pursuant to the Consumers Legal Remedies Act, Cal. Civ. Code §§ 1750, *et seq.* (the “CLRA”).

86. The CLRA applies to Defendant’s actions and conduct described herein because it extends to transactions that are intended to result, or which have resulted, in the sale or lease of goods or services to consumers.

87. Plaintiff and members of the Subclass are “consumers” within the meaning of Cal. Civ. Code § 1761(d).

88. The Tests that Plaintiff and each member of the Subclass purchased are “goods” within the meaning of Cal. Civ. Code § 1761(a).

89. Defendant has violated, and continues to violate, the CLRA in at least the following respects:

- (a) in violation of Cal. Civ. Code § 1770(a)(5), Defendant has represented that the Test has characteristics and benefits that it does not have;
- (b) in violation of Cal. Civ. Code § 1770(a)(7), Defendant has represented that the Test is of a particular standard when it is not; and
- (c) in violation of Cal. Civ. Code § 1770(a)(9), Defendant has advertised the Test with an intent not to sell it as advertised.

90. Plaintiff relied on Defendant’s conduct to her detriment. As set forth above, Plaintiff visited Intelligender’s website prior to purchasing the Test and

1 relied upon Intelligender's representations regarding the high accuracy rates of
2 the Test and the ability of the Test to predict the sex of unborn children as early as
3 10 weeks into the pregnancy, prior to a sonogram being able to do so, through a
4 simple urine test. These representations were material to Plaintiff, and she relied
5 on them to her detriment in purchasing the Test. Plaintiff also relied on similar
6 representations regarding the ability of the Test to predict the gender of unborn
7 children on the Test's packaging.

8 91. Plaintiff requests that this Court enjoin Defendant from continuing to
9 employ the unlawful methods, acts and practices alleged above, pursuant to Cal.
10 Civ. Code § 1780(a)(2). Unless Defendant is permanently enjoined from
11 continuing to engage in such violation of the CLRA, future consumers of
12 Defendant's Tests will be damaged by Defendant's acts and practices in the same
13 way as have Plaintiff and members of the Subclass.

14 92. Further, as a direct and proximate result of the above-described
15 deceptive practices, Plaintiff and Subclass members have sustained damages in an
16 amount to be proven at trial.

17 93. As a further result of Defendant's conduct alleged above, and
18 because Defendant is guilty of fraud, malice, and/or oppression, Plaintiff and
19 Subclass members are entitled not only to damages as set forth above, but also to
20 exemplary and punitive damages in a sum not presently known, but sufficient for
21 the sake of example and by way of deterring Defendant and others from further
22 such actions.

23 94. On June 7, 2010, Plaintiff provided Defendant with written notice of
24 her claims and the Subclass's claims, via U.S. certified mail, return receipt
25 requested, and demanded that, within 30 days, Defendant correct, repair, replace
26 or otherwise rectify the acts and practices complained of herein for the entire
27 Subclass pursuant to California Civil Code § 1770. Defendant failed to do so or
28

1 agree to do so. Therefore, Plaintiff now seeks damages for such deceptive
2 practices pursuant to California Civil Code § 1782.

3 **PRAYER FOR RELIEF**

4 WHEREFORE, on behalf of herself and all others similarly situated,
5 Plaintiff prays for the following relief;

- 6 1. An order certifying this action as a class action and appointing her as
7 Class representative and her counsel as Class counsel;
- 8 2. For compensatory damages as to all causes of action where
9 compensatory damages are available;
- 10 3. For restitution as to all causes of action where restitution is available;
- 11 4. For disgorgement of all wrongfully obtained compensation as to all
12 causes of action where disgorgement is available;
- 13 5. For preliminary and permanent injunctive relief prohibiting
14 Defendant from continuing the wrongful practices alleged herein;
- 15 6. For exemplary damages as to all causes of action where exemplary
16 damages are available;
- 17 7. For reasonable costs and attorneys' fees as permitted by law; and
18
- 19
- 20
- 21 8. For such other and further relief as the Court may deem proper.

22 DATED: October 18, 2010

Respectfully submitted,

23 STRANGE & CARPENTER

24
 25 By: 
 26 Gretchen Carpenter
 27 Attorneys for Plaintiff
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DEMAND FOR JURY TRIAL

Plaintiff hereby demands a trial by jury as to all claims so triable.

DATED: October 18, 2010

Respectfully submitted,

STRANGE & CARPENTER

By: 
Gretchen Carpenter
Attorneys for Plaintiff

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is:

12100 Wilshire Boulevard, Suite 1900
Los Angeles, California 90025

On October 18, 2010, I served the forgoing document, described as:
SECOND AMENDED COMPLAINT FOR DAMAGES AND EQUITABLE RELIEF; DEMAND FOR JURY TRIAL

on the interested parties in this action: ECF or by placing the original a true copy thereof to in an envelope addressed only as follows:

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Attorney for Plaintiff

VIA U.S. FIRST CLASS MAIL

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As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Los Angeles, California. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

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I delivered such envelope by hand to the addressee.
Executed on October 18, 2010, at Los Angeles, California.

(Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.



Greg Tatum