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7
8 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**
9 **IN AND FOR THE COUNTY OF MARICOPA**

10
11 STATE OF ARIZONA, ex rel., TERRY
GODDARD, Attorney General,

12 Plaintiff,

13 v.

14 SECOND CHANCE BODY ARMOR,
15 INC., a foreign corporation,

16 Defendant.

Case No. CV2004-000736

**FIRST AMENDED
COMPLAINT**

17 The State of Arizona, ex rel. Terry Goddard, the Attorney General (the "State") for its
18 First Amended Complaint herein alleges as follows:

19 **INTRODUCTION**

20 The Attorney General brings this action pursuant to the Arizona Consumer Fraud Act,
21 A.R.S. § 44-1521 et seq., arising out of Second Chance Body Armor, Inc.'s ("Second
22 Chance") fraudulent conduct in connection with the advertisement and sale of "bulletproof"
23 vests made with "Zylon," a synthetic fiber manufactured and sold by Toyobo Co. Ltd
24 ("Toyobo"). The vests are currently used by law enforcement officers and others throughout
25 the State of Arizona.
26

1 Based on tests conducted by Toyobo and provided to Second Chance during December
2 1998 through January 2003, Second Chance knew that Zylon rapidly and permanently loses
3 strength when exposed to such common conditions as high humidity and heat, fluorescent
4 light and sunlight. By at least December 2001, Second Chance also knew that the ballistic
5 protection of its Zylon vests sold during 1998 through 2001 was degrading at an alarming
6 rate, and that some vests may fail before the expiration of their five-year warranty. However,
7 unwilling to incur the expense of a recall, Second Chance not only failed to notify its
8 customers of the problem, it continued to manufacture and sell Zylon vests without warning
9 customers not to expose the vests to conditions known to cause degradation.

10 On June 24, 2003, Officer Edward Limbacher, a member of the Forest Hills,
11 Pennsylvania, Police Department, was seriously injured when a .40 caliber bullet passed
12 through the front panel of his Second Chance Zylon vest and into the officer's abdomen. The
13 vest was six months old and was rated to stop the bullet that penetrated the vest.

14 In the wake of this incident, Second Chance took two of its Zylon vests (the *Ultima*
15 and the *Ultimax*) off the market, reporting for the first time that "it is possible the vests could
16 wear out sooner than expected under certain conditions." Nevertheless, Second Chance has
17 refused to provide full refunds or free replacement vests to its customers. Moreover, Second
18 Chance continued to manufacture and sell at least one Zylon "hybrid" vest (the *Tri-Flex*),
19 which uses Zylon in combination with other materials for ballistic protection. While Second
20 Chance has recently taken the *Tri-Flex* off the market, it has failed to provide *Tri-Flex* owners
21 with any remedy, maintaining that it still has "confidence" in the *Tri-Flex*.

22 Based on Second Chance's misconduct, law enforcement officers and others using
23 Second Chance's Zylon-based vests are at unacceptable risk of serious physical injury or
24 death. Among other things, Second Chance should immediately be required to provide full
25 refunds for all discontinued Zylon vests and be enjoined from selling any other body armor
26 using Zylon for ballistic protection until Second Chance has demonstrated the effectiveness

1 of such vests and fully and accurately disclosed the risks associated with using Zylon in body
2 armor.

3 THE PARTIES

4 1. The plaintiff in this action is the State of Arizona, ex rel. Terry Goddard, the
5 Attorney General (the "State").

6 2. Defendant Second Chance Body Armor, Inc. ("Second Chance" or "defendant")
7 is a Michigan corporation with its principal place of business in Central Lake, Michigan.

8 3. Second Chance is in the business of designing, manufacturing, advertising,
9 distributing, and selling body armor, including what are commonly referred to as
10 "bulletproof" or "bullet resistant" vests (hereinafter "bulletproof vests").

11 JURISDICTION AND VENUE

12 4. The Attorney General is authorized to bring this action pursuant to A.R.S. § 44-
13 1528.

14 5. This Court has jurisdiction over the subject matter of this action pursuant to
15 A.R.S. § 44-1528 & -1531.

16 6. The Court has personal jurisdiction over Defendant under Ariz. R. Civ. P.
17 4.2(a).

18 7. Venue is proper pursuant to A.R.S. § 12-401(17).

19 FACTUAL ALLEGATIONS

20 Background

21 8. Second Chance is a major manufacturer of body armor, including bulletproof
22 vests. Second Chance advertises, distributes and sells its products to law enforcement officers
23 and others in the State of Arizona and throughout the United States.

24 9. The models of bulletproof vests manufactured and sold by Second Chance
25 during the past five years include the *Ultima*, the *Ultimax* and the *Tri-Flex* (sometimes
26 collectively referred to herein as "the Zylon vests").

1 levels of protection) tended to be thick and heavy.

2 15. In May of 1996, Second Chance approached Toyobo about the possibility of
3 "evaluating PBO fiber as a candidate for soft body armor" and becoming Toyobo's "exclusive
4 US partner in this venture." Discussions ensued, and by the end of 1996, Second Chance
5 viewed Zylon as a potential next generation fiber that would yield a ballistic fabric that could
6 be converted into a "high end dollar vest." By 1998, Second Chance had decided to
7 manufacture two Zylon-based vests: the *Ultima*, which uses 100% Zylon for ballistic
8 protection, and the *Tri-Flex*, which uses 20-31% Zylon in combination with other ballistic
9 materials.

10 16. On August 31, 1998, Second Chance informed Toyobo that it planned to
11 position the *Ultima* above Second Chance's premier Kevlar vest, the "Monarch," and to
12 mount an aggressive advertising campaign in support of Zylon:

13 Second Chance has decided to position its Zylon offering(s) **ABOVE**
14 **MONARCH**, by creating a whole new product line and value point. We will
15 call the product line "ULTIMA", and our by-line will be "The impossible vest-
16 made possible!" Naturally, our advertising will be aggressive and feature
17 Zylon, GORE-TEXT ComfortCOOL, etc. Promotional literature is being
designed now. This decision is because we think Zylon is such a big jump in
technology that it should have its own distinct place at the very pinnacle of our
product line. I wonder how our friends at DuPont, AKZO and Allied will react
to "THE NEW SHERIFF IN TOWN"!!!!

18 [Exhibit 2 (emphasis in original)]

19 17. On information and belief, Second Chance announced the *Ultima* at the
20 International Association of Chiefs of Police meeting in October 1998, touting it as providing
21 "world record weights," "world record thin-ness" and "unprecedented performances."

22 [Exhibit 3] Second Chance thereafter embarked on a very aggressive advertising campaign
23 in all major Law Enforcement magazines in its region and targeted direct mail campaign to
24 approximately 35,000 agencies and officers. Although Second Chance did not begin
25 accepting orders for the *Ultima* until December 1998, by the end of April 1999, *Ultima* sales
26 represented 28% of the company's total sales.

1 24. On or about December 18, 1998, Toyobo advised Second Chance that Zylon
2 fabric experienced a decrease in strength when exposed to visible light and "even against the
3 fluorescent lamp." The data supplied by Toyobo showed a 20% decrease in strength in less
4 than a week when exposed to two 35 watt fluorescent lamps about five feet away. Toyobo
5 specifically requested that Second Chance "keep fabrics in the box and not . . . leave fabrics
6 on the table for a long time in your factory." [Exhibit 5]

7 25. In approximately May 2001, Toyobo began conducting tests on Zylon fiber to
8 predict its performance over time (the "aging tests"). Among other things, Toyobo exposed
9 the fiber to 80% relative humidity ("RH") at 80°C, 60°C, and 40°C for certain periods of
10 time, and then measured the fiber's strength retention. [Exhibit 6] Toyobo informed its
11 customers that the purpose of the tests was "to predict the performance of ZYLON after a
12 long time." [Id.]

13 26. On or about July 5, 2001, Toyobo began providing its body armor customers,
14 including Second Chance, with the initial results of the aging tests, informing them that "the
15 strength of ZYLON fiber decreases under high temperature and humidity conditions." The
16 test results supplied by Toyobo revealed, *inter alia*, that after less than 60 days, (i) Zylon fiber
17 exposed to 80°C at 80% RH lost over 35% of its original strength and (ii) Zylon fiber
18 exposed to 60°C at 80% RH lost approximately 20% of its strength. [Id.] Toyobo predicted
19 "almost no strength loss at about 40 degree C even at 80% humidity," but stated that "it will
20 take a long time to reach the conclusion." [Id. (emphasis added)]

21 27. In supplying the above data, Toyobo informed Second Chance that DSM High
22 Performance Fibers ("DSM"), a ballistic materials manufacturer, had halted the market
23 introduction of its PBO fiber containing Zylon-SB10 for the reason that "the use of PBO fiber
24 in bullet resistant vests may not be justified." [Exhibit 7] While Toyobo claimed that "we
25 have not yet confirmed any serious indication about woven fabric made of Zylon fiber at this
26 moment," it advised Second Chance to "carefully examine your product again in this

1 occasion" and "users determine for themselves the suitability for their intended use of the
2 fiber." [Id.]

3 28. On July 19, 2001, Toyobo sent a similar letter to Second Chance and other body
4 armor manufacturers. [Exhibit 8] Toyobo again advised its customers to "re-confirm that
5 their product design containing ZYLON fiber properly meets their customer's requirement
6 and use" and reminded customers that "Toyobo is not in a position to guarantee the
7 performance of end products and of course the lifetime of each end product. Toyobo would
8 like to ask our valued customers to design suitably your own product and determine carefully
9 the lifetime of the product based on the design." [Id.]

10 29. On July 25, 2001, Toyobo informed Second Chance that based on new data
11 points, "we can predict about 10% strength loss after 10 years (3650 days) in the conditions
12 of 40-degree C and 80% humidity." [Exhibit 9]

13 30. On August 28, 2001, Toyobo updated Second Chance on the progress of its
14 Zylon aging tests. [Exhibit 10] Contrary to Toyobo's July 25, 2001, prediction, Toyobo
15 advised Second Chance that the strength of Zylon exposed to 40°C and 80% RH had dropped
16 nearly 10% in just 70 days [id.], and that "[t]his strength loss is much larger than that of
17 Kevlar" [Exhibit 11]. Toyobo further stated that "[w]e hope this information would be a
18 help to the product design of you and your customers. Please share this information with your
19 customers, if it is needed." [Exhibit 10]

20 31. In September 2001, Toyobo published updated technical information about
21 Zylon, entitled "PBO Fiber Zylon." [Exhibit 12] Although Toyobo touted Zylon as "the next
22 generation super fiber," the report warned, *inter alia*, that (i) "the strength of ZYLON®
23 gradually decreases even at the temperature of less than 100°C in high humidity condition,"
24 (ii) "ZYLON® fiber should be stored free from high humidity at normal room temperatures;"
25 (iii) "the strength of ZYLON® decreases with exposure to sunlight;" (iv) "ZYLON® should
26 be protected not only from ultraviolet light but also from visible light;" (v) "the strength

1 decreases sharply at the initial stage of exposure [to light]"; (vi) "the materials are to be stored
2 free from exposure to light;" (vii) "the residual strength of ZYLON® after 6 months exposure
3 to daylight is about 35%;" and (viii) "end products of ZYLON® for outdoor use have to be
4 protected by covering materials." [Id.] Toyobo provided the above report to Second Chance,
5 and directed Second Chance to portions of the report concerning strength change at high
6 temperature with high humidity and strength change under the fluorescent lamp. [Exhibit 12]

7 32. Toyobo thereafter issued regular updates to its customers concerning Zylon
8 strength loss at 80% RH and 40°C (104°F), a temperature that is only slightly above normal
9 body heat and, on information and belief, often is exceeded in daily use. [Exhibits 13-18]
10 Even at this low temperature, Toyobo's reports continued to reflect rapid and substantial loss
11 of strength.

12 33. On November 26, 2001, Toyobo reported that after 150 days, the Zylon fiber
13 in Toyobo's aging tests had lost approximately 15% of its original strength [Exhibit 13], a
14 drastic departure from Toyobo's July 5, 2001, prediction only four months earlier [Exhibit 6
15 (predicting "almost no strength loss at about 40°C even at 80% humidity")]. Although in
16 January 2002 Toyobo claimed that the November 26, 2001 data were "statistically not correct
17 and not reliable," the revised data still reflected nearly 10% degradation in approximately 80
18 days. [Exhibit 14] Moreover, the downward trend continued. Data released by Toyobo on
19 April 3, 2002, established that after 150 days at 40°C and 80% RH, Zylon fiber suffered a
20 strength reduction of over 10%. [Exhibit 15] On July 15, 2002, Toyobo informed Second
21 Chance that after 275 days of exposure, the fiber lost almost 15% of its strength. [Exhibit 16]
22 On October 16, 2002, after approximately one year of exposure, Toyobo reported degradation
23 of least 15%. [Exhibit 17] On January 6, 2003, after approximately 45 days of exposure,
24 Toyobo reported a degradation of approximately 18%. [Exhibit 18]

25 34. In keeping with this trend, Toyobo's July 14, 2003, update reported that after
26 less than 600 days at 40°C and 80% RH, the tensile strength of Zylon fiber had degraded

1 almost 20%. [Exhibit 19]

2 Second Chance's Attempts to Control Toyobo

3 35. By the time Toyobo began disseminating its aging test reports in July 2001,
4 Second Chance was the largest manufacturer of Zylon vests in the world and had sold
5 thousands of Zylon vests in the United States and Germany.

6 36. On information and belief, having invested so heavily in Zylon products,
7 Second Chance became very concerned about the impact that Toyobo's disclosure of the
8 Zylon degradation problem would have on the market for Zylon (or what one Second Chance
9 officer referred to as "the golden rabbit"), and hence Second Chance's profits.

10 37. When Toyobo began to release its disturbing "aging tests," Second Chance
11 reacted, first, by downplaying the significance of the tests, and second, by urging Toyobo to
12 do the same.

13 38. On July 6, 2001, following the release of Toyobo's first aging test, Second
14 Chance issued a public statement, a copy of which is attached as Exhibit 20, signed by Second
15 Chance President and founder Richard Davis and Vice President Ed Bachner. The statement
16 lauded the "superior" performance of Zylon and reassured consumers that (i) the deterioration
17 was measured only "at high temperatures (60-80°C/140-176° F), way above normal use
18 conditions," (ii) "neither extrapolation of these data nor separate accelerated aging studies at
19 temperatures slightly higher than [sic] normal (40°C/104° F) have indicated any cause for
20 concern," and (iii) "Second Chance Body Armor remains confident that all of its body armor
21 products will continue to meet or exceed design criteria well beyond their stated warranty
22 periods, as long as they are properly cared for." [Id. (emphasis added)]

23 39. On information and belief, on or about July 16, 2001, Second Chance asked
24 Toyobo to issue a similarly reassuring letter, draft attached as Exhibit 21, wherein Toyobo
25 would "clarify" its recent communications on Zylon by stating, *inter alia*, that "Zylon has
26 excellent tensile property retention over time," and "with reasonable care . . . we see no

1 reason why Zylon fibers in woven ballistic fabrics should not maintain their tensile properties
2 for ten years." [Id.] Toyobo declined, explaining that "Toyobo cannot clearly mention about
3 the lifetime of the fiber, because Toyobo only keeps record (data) for the length of two and
4 a half years only, since its market introduction in 1998." [Exhibit 22]

5 40. On information and belief, Toyobo's degradation disclosures proved particularly
6 troublesome for Second Chance in Germany, where Second Chance was attempting to
7 convince German police agencies to purchase large numbers of Zylon vests.

8 41. In an e-mail to Toyobo dated August 24, 2001, Second Chance Vice President
9 Ed Bachner voiced his concerns about the activities of Second Chance's German
10 competitors, who were publicizing information about Zylon's degradation to Second
11 Chance's target market. [Exhibit 23] Mr. Bachner observed, *inter alia*, that:

12 Now there is about a \$100 million Marks worth of armor business available in
13 Germany in the next eighteen months, and "all the dogs (except Second
14 Chance) are barking against PBO. The above activities could all be merely
15 attempts to disrupt changing procurement patterns. However, Armin [Wagner,
16 Second Chance's representative in Germany] is concerned that—if this is
17 allowed to continue unanswered—then "the dogs will eat the golden rabbit."

18 [Id.]

19 42. On August 30, 2001, Armin Wagner, Second Chance's representative in
20 Germany, advised the Second Chance's home office, *inter alia*, that:

21 I guess it is hard for you to imagine the media pressure against Zylon fibers
22 over here. It could be described with a wave that is getting stronger and higher
23 every day and will eventually destroy the Zylon position that we have started
24 to build up. . . . In various discussions I mentioned already the urgent necessity
25 for Toyobo, as the producer of the Zylon fiber, to assume a proactive position
26 in the [G]erman market in order to counterbalance the real high pressure against
its fiber. . . . If Toyobo does not get these activities started immediately, the
market is lost for them and us.

[Exhibit 24]

43. After receiving Toyobo's August 28, 2001 aging test, Second Chance Vice
President Ed Bachner sent Toyobo an e-mail, attached as Exhibit 25, complaining about
Toyobo's aging graphs. Bachner admonished Toyobo that its room temperature graph

1 incorrectly suggests that Zylon suffers a 9.1% strength loss after five years at room
2 temperature, which Second Chance believed would be "disastrous" in the wrong hands. Mr.
3 Bachner further urged Toyobo to stop disseminating all aging graphs to the public:

4 Toyobo, WITH ALL THE BEST INTENTIONS, is still shooting themselves
5 in the foot with bad, alarming communications about this matter. The August
6 28, 2001 letter is just another example. It really bothered Richard and I, and
7 doubtless a few others. PLEASE, PLEASE MAY I HELP YOU WITH
8 HOW YOU SAY WHAT YOU WANT TO SAY.

9 Free advice. Toyobo should never, ever show any of these graphs to the
10 public. . . .

11 [Id. (emphasis in original)]

12 44. Second Chance also tried to control Toyobo's disclosures, including by urging
13 Toyobo to coordinate its public communications with Second Chance. Although Toyobo
14 rejected Second Chance's suggestion of "joint PR strategy," on information and belief, a very
15 important part of Second Chance's strategy was to coordinate Toyobo's communication,
16 "[b]ecause a horror would be, if [Toyobo] would tell a different story than we do." [Exhibit
17 26] Thus, on November 23, 2001, Second Chance's Armin Wagner approached Toyobo
18 again, stating in an e-mail that:

19 I think that whatever we, your company [Toyobo] and Second Chance,
20 communicate in the market should be carefully considered and coordinated. I
21 would therefore more than appreciate if we consider together the key features
22 of our communication. . . . Whatever new information, that would question
23 [Second Chance's arguments in favor of Zylon] should be discussed between
24 Toyobo and Second Chance first, before officially communicated. Otherwise
25 it might lead again to disturbing discussions in the market place.

26 [Exhibit 27(emphasis added)]

Second Chance's Used Vest Tests

45. On information and belief, based solely on the aging test data obtained by
Second Chance during July 2001 through January 6, 2003, Second Chance knew or should
have known that the Zylon fiber in its bulletproof vests would suffer substantial and
permanent loss of strength if subjected to conditions that occur in day-to-day use, and that

1 such loss may prevent or significantly impair the vests' ability to provide ballistic protection
2 during the five year period for which Second Chance warranted the vests. However, as
3 detailed below, Second Chance also learned that the "laboratory" degradation being reported
4 by Toyobo was being accompanied by severe decreases in the ballistic protection afforded by
5 Zylon vests on the street.

6 46. Shortly after Second Chance received Toyobo's initial aging test, Second
7 Chance began collecting *Ultima* vests being used by law enforcement officers, and sending
8 the samples to ballistics laboratories for "V-50" testing, a standard ballistics test. Second
9 Chance then compared the ballistic performance of the used vests with V-50 tests conducted
10 on "control" vests, to determine whether and to what extent the protection provided by the
11 used vests was degrading ("the used vest tests").

12 47. The used vest tests soon confirmed that the ballistic protection provided by
13 Second Chance's Zylon vests was degrading at a alarming rate. On August 20, 2001, Second
14 Chance informed Toyobo that heavily worn, well cared for vests of up to 2 ½ years from some
15 regions "consistently show a 2-4% performance shift vs. controls" and that heavily worn vests
16 in other regions showed "higher performance shifts in the 8-12% range." [Exhibit 28] The
17 following week, Second Chance sent Toyobo 6 ballistic panels with 9-12% degradation in V-
18 50 performance and one panel with 16% degradation. [Exhibit 29] As the lower performing
19 vests came from "humid regions," Second Chance suspected hydrolysis. [Exhibit 28]

20 48. To make matters worse, in removing the covers of the ballistic pads, Second
21 Chance discovered a "darkening" of the outside layers, which it believed was a result of UV
22 light exposure. [Id.] Although Second Chance had known since at least 1998 that Zylon
23 suffered rapid degradation when exposed to light [see paragraphs 23-24, *supra*], it professed
24 to be "surprised about the amount of light exposure evident in some of the old, used vests"
25 and "amazed that much light is getting past all the barriers of uniform, carrier, and pad cover."
26 [Exhibit 30] Similar results were occurring in Germany, where Second Chance had recorded

1 a "7-8% Performance Loss After 2.5 Years Use" with "Light exposure Most Probable Cause"
2 and a "2% Internal Ply Performance Loss After 2.5 years." [Exhibit 31]

3 49. Calling the issue "very important, but manageable," Second Chance asked for
4 Toyobo's "immediate help in defining the cause or causes of these performance changes,
5 along with effective preventive measures and/or solution(s)." [Exhibit 29]

6 The December 2001 "Zylon Crisis Management Meeting"

7 50. On information and belief, by at least December 2001, Second Chance had
8 concluded that immediate corrective action was necessary. Current vest wearers must be
9 notified of the problem and provided with warranty adjustments. New Zylon vests must be
10 given additional layers of "protection" to ensure that customers would remain protected
11 throughout the warranty period. The problem with such action, however, that it would be
12 very expensive, and that further publicity of the degradation problem would lower Zylon's
13 market value.

14 51. On or about December 13, 2001, Second Chance and Toyobo held a "Zylon
15 Crisis Management Meeting" in Los Angeles, California (the "Crisis Management Meeting"),
16 to address the degradation problem. [Exhibit 32]

17 52. A copy of Second Chance's written presentation at the Crisis Management
18 Meeting bearing notes taken at the meeting, is attached at Exhibit 32. As reflected therein,
19 Second Chance informed Toyobo that its November 26, 2001, Zylon update "shocked
20 [Second Chance] and [the] weaving industry" and Second Chance's own "used vest test
21 results" and "seem[ed] to fit" Toyobo's November 26, 2001, aging test report. [Id.] According
22 to Second Chance President Richard Davis, "Toyobo and Second Chance must act together
23 and immediately to deal properly with this industry problem." [Id. (emphasis in original)]

24 53. Second Chance also provided Toyobo a detailed summary of Second Chance's
25 used vest tests, which it characterized as "disappointing and unexpected." [Id.] By December
26 2001, the tests included 53 *Ultima* vests from 12 states, which had been used for only 9-33

1 months. Upon information and belief, (i) the vests in all but two of the States had ballistic
2 panels that had degraded by over 10% versus the controls, based on V-50 testing, (ii) five of
3 the twelve States had "low" panels with 15% or more degradation and (iii) three of the States
4 had "low" panels with 17-18% degradation. As indicated in a handwritten note on Mr.
5 Bachner's copy of the used vest report, Second Chance recognized that: "This will put us out
6 of express warranty before 5 years. Some vest already iffy on implied warranty. . . . Logic:
7 Can't possibly deny the Zylon Strength loss isn't related to the V-50 decay." [Id.]

8 54. While Second Chance recognized the *necessity* for addressing the degradation
9 problem, *cost* remained a major concern. As Second Chance frankly admitted to Toyobo, the
10 "current . . . exposure" included 77,000 *Ultima* vests, 38,000 *Tri-Flex* vests, and 71,000
11 German vests, all of which were well within warranty. [Id.]

12 55. The "corrective actions" proposed by Second Chance at the meeting included:
13 (i) redesigning the *Ultima* with extra layers of ballistic protection (the "Ultima 2002"); (ii)
14 "concurrent communication of the problem" upon introduction of the *Ultima 2002*
15 (characterized by Second Chance as "positive, honest, ethical, safety oriented Second Chance
16 & Toyobo integrity"); and (iii) providing Second Chance's existing *Ultima* owners with
17 various alternatives, including (a) a "warranty adjustment program" with "deep discounts for
18 new *Ultima 2002*'s," (b) "aramid alternative when necessary" and (c) an "upgrade pack fall
19 back." [Id.] Second Chance also proposed an extensive "communication strategy" to be used
20 in communicating the degradation problem, including a suggestion that the parties "Pray!!"
21 [Id.]

22 56. To implement the necessary corrections, Second Chance sought financial and
23 other concessions from Toyobo, including (i) free Zylon for warranty adjustments, upgrade
24 kits and U.S. vest redesigns; (ii) payment of testing costs for U.S. vest re-designs; (iii)
25 payment of money to distributors and representatives, and (iv) indemnification of weavers and
26 vest manufacturers. [Id.] Second Chance also sought price discounts on future Zylon sales,

1 arguing that "new market value requires new prices." [Id.]

2 57. Toyobo refused to provide the requested assistance, informing Second Chance
3 by letter faxed December 20, 2001, that "as a fiber maker, we have repeatedly stated that
4 Toyobo is not in a position to refer to the suitability of any processed goods using Zylon, such
5 as woven fabric, shield and body armor. Toyobo has made no warranties to any Zylon
6 customer with respect to merchantability or fitness for particular purpose." [Exhibit 33]

7 Dr. Westrick's Recommendations

8 58. On information and belief, Toyobo's failure to agree to Second Chance's
9 proposals at the Crisis Management Meeting left Second Chance to consider whether to move
10 forward independently with its plan to publicly disclose the degradation problem in its Zylon
11 vests (i.e., "positive, honest, ethical, safety oriented Second Chance . . . integrity") or to
12 continue concealing the issue from its customers.

13 59. After the Crisis Management Meeting, but two days before Toyobo's formal
14 rejection, Second Chance's Director of Research, Dr. Aaron Westrick, advised Second
15 Chance President Richard Davis that lives were at stake and that Second Chance should
16 immediately disclose the degradation problem to customers. In a memo to Mr. Davis,
17 attached hereto as Exhibit 34, Dr. Westrick stated unequivocally that:

- 18 • "Second Chance should immediately notify [its] customers of the degradation
19 problems we are experiencing with Ultima armor;"
- 20 • "Second Chance should clarify this issue with major customers that have placed
21 orders and after clarification, cancel orders if requested;"
- 22 • "Second Chance should make the right difficult decisions regarding this issue.
23 Lives and our credibility are at stake"; and
- 24 • You should cease all bonuses' etc. to keep funds within the company."

25 Dr. Westrick further stated that "We will only prevail if we do the right things and not
26 hesitate. This issue should not be hidden for obvious safety issues and because of future

1 litigation.” [Id.](emphasis added)

2 Second Chance’s Continuing Awareness Of The Critical
3 Dangers Posed By the Zylon Vests

4 60. Second Chance’s ongoing recognition of the dangers posed by Zylon’s
5 degradation and the immediate need to disclose the problem is further reflected in Exhibit 35,
6 an unsigned letter from Second Chance to Toyobo, labeled “END OF DAY–Executive
7 Meeting Revisions–December 20,2001–TOYOBO.” On information and belief, the letter was
8 prepared by Second Chance following its receipt of Toyobo’s December 20, 2001 fax
9 confirming that Toyobo would not agree to Second Chance’s proposal at the Crisis
10 Management Meeting.

11 61. As reflected in the letter, Second Chance recognized that “Now we are facing
12 a crisis: There are over 80,000 Zylon Ultima vests being worn by American Law Enforcement
13 Officers. Preliminary test results indicate that Zylon appears to be degrading at a faster rate
14 than any of us ever anticipated. . . . “[I]t is clear that we, Toyobo and Second Chance, need
15 to address the Zylon degradation problem while there is still time to correct it.” [Id.]

16 62. The letter further recognizes that the “solution to the Zylon problem” must
17 include both past and future sales, including: (i) re-certifying all new Zylon Ultimas with six
18 extra layers and a new Gore-Tex pad cover with sealed seams, which “should be enough of
19 an ‘over-build’ to enable the vests to last through the five year warranty;” (ii) offering all
20 present Ultima owners a warranty adjustment after three years to purchase the re-engineered
21 Ultima; and (iii) free six-layer ‘upgrade pads’ to those who did not want or could not pay for
22 the re-engineered Ultima.

23 63. While the letter postures that “the Zylon problem is a Toyobo problem” [id.
24 (“Our attorneys advise us that the failure of Zylon to meet industry standards violates the
25 ‘warranty of merchantability. . . . We believe strongly that Toyobo has a legal, moral and
26 ethical responsibility to stand behind their customers and their product.)], it also

1 acknowledges Second Chance's own responsibility as the manufacturer and seller of the vests,
2 stating that: "Toyobo and Second Chance can, and must, take the lead and properly deal with
3 this industry-wide problem. . . Most importantly, we all must do what is necessary to ensure
4 the safety of those who have placed their trust in their Zylon vest." [Id. (emphasis in original)]

5 64. In January 2002, Second Chance President Richard Davis made another attempt
6 to persuade Toyobo to address what he characterized as "the unfortunate circumstances which
7 face our companies." Requesting a meeting with Toyobo "to finalize a solution to this
8 problem in partnership," Mr. Davis sent Toyobo a detailed summary of "the costs associated
9 with correcting this problem," attached as Exhibit 36. The summary included, *inter alia*, the
10 estimated cost of "providing warranty adjustments to customers," "cost of supplying a 6 layer
11 enhancement pad for US customers," and "increased cost of design alterations" (including
12 adding "enhancement pads" to future products). [Id.] Once again, Toyobo refused.

13 Second Chance Abandons its Customers

14 65. On information and belief, following Toyobo's refusal to agree to Second
15 Chance's December 2001 and January 2002 proposals to face up to the Zylon degradation
16 problem, Second Chance eventually determined that it was unwilling to incur the costs that
17 it believed would attend proper disclosures. In the meantime, the evidence against Zylon
18 continued to mount.

19 66. On information and belief, the used vest tests conducted by Second Chance after
20 the Crisis Management Meeting further confirmed that *Ultima* vests well within warranty
21 were experiencing serious degradation in ballistic performance. An update of Second
22 Chance's used vest study entitled "3/11/02 Executive Committee Update: Zylon Used Vest
23 Studies," attached as [Exhibit 37], reveals by March 11, 2002, Second Chance had studied
24 68 *Ultima* vests from 15 states, all of which had been used for only 9-33 months. According
25 to the Executive Committee Update (i) the V-50 ballistics performance of at least some vests
26 in all states had degraded, (ii) all 15 states had one or more vests with 6%-18% degradation,

1 (iii) vests in 7 of 15 states had V-50 degradation between 15-18%, and (iv) vests from 9 states
2 were within 7-10% of being out of certification. [Id]

3 67. Second Chance also received disturbing news from other sources. For example,
4 in June 2002, Second Chance obtained data from Twaron concerning tests conducted on
5 Twaron and Zylon fabric, which had been aged for 18 weeks at 37°C and 95%RH, then
6 subjected to V-50 ballistics tests. The V-50 score on the aged Zylon (1151) was 18% lower
7 than the V-50 on the unaged Zylon (1403). Similar tests conducted on Twaron fabric reflect
8 less than 2% reduction. [Exhibit 38; see also Exhibit 39]

9 68. The following month, Second Chance obtained a study by Mehler Vario System
10 GmbH ("Mehler") entitled "Investigations by Mehler on the PBO-Fiber Zylon from Toyobo,"
11 which reported that Mehler, a competing body armor manufacturer, had submitted Zylon
12 protective panels to an independent laboratory, which had aged the material at 70°C/80RH
13 for 8 weeks and then conducted V-50 testing. The reported drop in V-50 performance was
14 over 15% for most of the tested panels. [Exhibit 40] Six months later, Mehler released a
15 follow-up study on a "6 month wearer trial," using Zylon vests manufactured by Mehler and
16 an unnamed manufacturer. Mehler reported that after only six months of wear (i) the three
17 Mehler vests showed a significant drop in V-50 (7.24%-10.55%) and energy absorption
18 (13.95%-17.98%) and (ii) the "other manufacturer" vests recorded V-50 drops of 6.30% and
19 7.67% and energy absorption decreases of 12.21% and 14.74%. [Exhibit 41]

20 69. An internal Second Chance memo entitled "Current Technology Related
21 Challenges" prepared by Second Chance Vice President Ed Bachner (dated June 10, 2001 and
22 July 1, 2002), attached as Exhibit 42, reveals defendant's "ZYLON CONCERNS
23 GROWING" in light of Toyobo's accelerated aging tests, Second Chance's "used Zylon Vest
24 Tests," and accelerated aging tests conducted by Profi-Style and Twaron. [Id.] Bachner's
25 recommendation included that Second Chance "launch and promote [a] 50% Zylon BiFlex
26 Solution," "(Quietly) Drive Sales From 100% Zylon" and "Begin Preparation for Possible

1 Early Trade-Ins" on 100% Zylon products. [Id. (emphasis added)] Nowhere, however, did
2 Mr. Bachner suggest that Second Chance warn its customers.

3 70. Second Chance's ongoing appreciation of the grave threat posed by its Zylon
4 vests is further reflected in Exhibit 43, a July 29, 2002 document entitled "Letter to the
5 Executive Board by Richard C. Davis, Company President." In the letter, the author
6 acknowledges that "on average, Zylon seems to be losing about 4% [V-50] per year!"
7 (emphasis in original) compared with about 1% for Twaron and Kevlar, and that "after 5 years
8 many Zylon vests will have lost 20% of their V-50!" [Id.] Yet, as indicated above, the
9 company's current "solution" was "[w]e continue operating as though nothing is wrong until
10 one of our customers is killed or wounded, or Germany, Japan, Dupont, or some other entity
11 exposes the Zylon problem." [Id. (emphasis added)] The problem with such an approach, the
12 author states, is

13 Either a Law Enforcement Officer will be killed wearing one of
14 our vests, or an involuntary exposure will lead to gross
15 exaggeration. In either case, we will be forced to make excuses
16 as to why we didn't recognize and correct the problem. In the
eyes of law enforcement we will either be stupid for not
knowing, or greedy and uncaring for knowing and not doing
anything about it.

17 [Id. (emphasis added)]

18 71. As an alternative to the above "solution," the Davis letter proposes, *inter alia*,
19 that Second Chance stop making 2A Zylon vests altogether, and began manufacturing a new
20 product, called "BiFlex," made of 60% Zylon and 40% Twaron. Even here, Second Chance
21 recognized that the Zylon in the Bi-Flex would result in a V50 degradation of approximately
22 12% over five years, which is "just barely acceptable in Levels 2 and 3A, but . . . is not
23 acceptable in level 2A." "Thus, we should not make a Level 2A Bi-Flex." [Id.]

24 72. So severe was the Zylon problem that the above letter advises that even in
25 Germany, where Second Chance had upgraded its vests to 36 layers, the German V-50 would
26 likely "fall below the acceptable level" within 6 to 18 months, and that if Second Chance had

1 not upgraded the German vests, "it is likely that our vests would have already failed."
2 According to the author, "We need to develop an orderly plan to correct this inevitable
3 dilemma. . . . If we have an orderly plan in place, there will be no trouble getting into the
4 'lifeboat' when the 'Zylon ship' begins to sink." [Id.]

5 73. Nevertheless, on information and belief, Second Chance continued operating
6 as though nothing was wrong.

7 The Forest Hills Incident

8 74. On June 24, 2003, Officer Edward Limbacher, a member of the Forest Hills,
9 Pennsylvania, Police Department, was seriously injured when a .40 caliber bullet passed
10 through the front panel of his Second Chance *Ultima* vest and into the officer's abdomen. The
11 vest was six months old, was warranted to last five years, and was rated to stop the bullet that
12 penetrated the vest.

13 75. On July 11, 2003, Second Chance acknowledged that the *Ultima* vest worn by
14 Officer Limbacher was a "level 2A," i.e. rated to stop .40 caliber rounds. Nevertheless,
15 Second Chance failed to disclose the known degradation problems with Zylon and falsely
16 stated to the public that "we at Second Chance Body Armor maintain complete confidence
17 in our products." [Exhibit 44 (emphasis added)] Second Chance accused others publicizing
18 the Forest Hills incident of "negative publicity, sensationalism, unethical competitive
19 practices and self-serving claims that contribute to misinformation in the market place." [Id.]

20 76. As the investigation into the Forest Hills incident progressed, Second Chance
21 finally began to acknowledge that the *Ultima* and *Ultimax* vests had early degradation
22 problems.

23 77. On September 9, 2003, Second Chance informed its customers that it was
24 willing to upgrade or replace the *Ultima* and *Ultimax* vests "because it is possible the vests
25 could wear out sooner than expected under certain conditions." [Exhibit 45]

26

1 78. On September 15, 2003, Second Chance announced that it had discontinued the
2 *Ultima* and *Ultimax* vests. [Exhibit 46] Still failing to acknowledge the Toyobo aging tests,
3 Second Chance explained its decision to discontinue the *Ultima* and *Ultimax* vests stating
4 Second Chance's own tests had indicated the "unexpected" decrease in "ZYLON fiber
5 strength." [Id. (emphasis added)] Second Chance admitted that there was no way for a
6 customer to tell whether a particular vest had been affected "without ballistic tests that destroy
7 the armor." [Id.]

8 79. Although the *Tri-Flex* vest also used Zylon for ballistic protection, Second
9 Chance continued to manufacture and sell the *Tri-Flex*. On April 13, 2004, Second Chance
10 finally announced that *Tri-Flex* would also be discontinued. [Exhibit 47]

11 80. In so doing, Second Chance cited preliminary NIJ studies that "have indicated
12 that the fiber degrades at an accelerated rate" and noted that "[a]s a result, Zylon-based soft,
13 concealable body armor vests may wear out sooner than expected, thus creating a potential
14 law enforcement officer safety issue." At the same time, adopting a "trust me" approach,
15 Second Chance reassured its customers that "[a]ll used Tri-Flex® testing continues to support
16 our confidence in the performance of Tri-Flex vests in use in all threat levels." [Id.]

17 Second Chance's Upgrade/Replacement Program

18 81. Notwithstanding the life-threatening defects it had identified with its Zylon
19 vests, the only no-cost remedy provided by Second Chance was to offer to send *Ultima* and
20 *Ultimax* customers additional ballistic pads (called "upgrade packs" or "performance pacs")
21 made from non-Zylon ballistic material, which customers could then insert into the *Ultima*
22 and *Ultimax* vests.

23 82. On information and belief, the "upgrade packs" offered by Second Chance add
24 significant weight, heat and bulk to the *Ultima* and *Ultimax* vests. Moreover, the proposed
25 solution has not been certified or validated by the NIJ, and therefore provides inadequate
26 assurance of protection.

1 83. In commenting on Second Chance's upgrade pack proposal, the NIJ warned that
2 "NIJ cannot validate the ongoing performance capabilities of armor models being used by law
3 enforcement agencies (or the performance of these models when used in conjunction with an
4 'upgrade pack'), because factors exist that may affect the ballistic-resistant properties of body
5 armor models over time. . . . Agencies are encourage to exercise caution with respect to any
6 armor modifications or add-on accessories because it is not known how these changes may
7 affect the ballistic-resistant capabilities of the armor." [Exhibit 48]

8 84. While Second Chance also permits customers to "trade in" *Ultima* and *Ultimax*
9 vests still in warranty for lower-cost non-Zylon models, Second Chance only allows partial
10 credit on the trade in. [See Exhibit 51 (discussing "Warranty Adjustment Program Trade-In
11 Program" and "Monarch Summit Replacement Trade-In Offer")] In other words, even though
12 Second Chance sold bulletproof vests to consumers it now acknowledges may be defective,
13 Second Chance requires its customers to pay additional money before Second Chance will
14 supply a lower-priced but functional vest.

15 85. Notwithstanding the inadequacy of Second Chance's "warranty adjustment"
16 program, Second Chance has demanded that customers receiving partial credit for their Zylon
17 vests sign a release, stating that "The warranty adjustment option . . . will be a complete
18 resolution of your warranty claims concerning your body armor. By signing this document
19 you release Second Chance . . . , its agents, employees, representatives and dealers from any
20 and all claims relating to your *Ultima* or *Ultimax* body armor." [Exhibit 49] By so doing,
21 Second Chance has attempted to force law enforcement officers and other customers to chose
22 between (i) preserving their safety by trading in a defective vest for a non-defective vest at
23 only partial credit and (ii) waiving all claims they may have against Second Chance and its
24 agents, employees, representatives and dealers. This is an unconscionable choice.

25 86. On information and belief, Second Chance offers no trade-in or other remedies
26 to customers who have purchased *Tri-Flex* vests.

1 free non-Zylon replacement vests, comparable in value and protection to the *Ultima* and
2 *Ultimax* vests as they were originally advertised and warranted.

3 92. Second Chance failed to accede to those demands.

4 FIRST CAUSE OF ACTION

5 (Consumer Fraud—*Ultima* and *Ultimax* Vests)

6 93. The State repeats and realleges paragraphs 1 through 92 as though set forth in
7 full.

8 94. On information and belief, Second Chance falsely represented, among other
9 things, that the Zylon ballistic panels in the *Ultima* and *Ultimax* vests would protect users for
10 five years at NIJ “threat level” (e.g., NIJ Type IIA, II and/or IIIA) indicated on the vests.
11 Second Chance also falsely represented that it had confidence in the *Ultima* and *Ultimax*
12 vests.

13 95. On information and belief, Second Chance knew or reasonably should have
14 known that the Zylon used in its *Ultima* and *Ultimax* vests degraded under conditions that
15 may render the vests unfit and unsafe during the warranty period, and failed to disclose or
16 adequately warn its customers of those dangers.

17 96. On information and belief Second Chance provided false warranties to
18 consumers.

19 97. On information and belief, at no time before September 15, 2003, did Second
20 Chance retract the statements made in Exhibit 20, in which Second Chance had assured
21 customers, *inter alia*, that Toyobo’s aging data “have indicated any cause for concern,” and
22 that “Second Chance Body Armor remains confident that all of its body armor products will
23 continue to meet or exceed design criteria well beyond their stated warranty periods, as long
24 as they are properly cared for.” Nor did Second Chance adequately notify its customers about
25 the Zylon degradation problem, or warn the public or its customers that the Zylon vests should
26 not be exposed to high humidity and heat, or that the Zylon in the vests may lose strength if

1 exposed to sunlight or fluorescent light.

2 98. Second Chance intentionally concealed, suppressed, or omitted other material
3 facts concerning the *Ultima* and *Ultimax* vests with the intent that consumers rely upon such
4 concealment, suppression or omission, including:

- 5 A. That Zylon fiber rapidly and permanently loses strength when exposed
6 to (i) visible light, (ii) fluorescent light, and (iii) high humidity and heat.
7 B. The rate and extent to which Zylon loses strength when exposed to the
8 above conditions.
9 C. That Second Chance had not conducted adequate testing to determine
10 whether its *Ultima* and *Ultimax* vests would protect wearers against the
11 warranted threat levels during the entire five-year warranty period in
12 conditions such as those present in Arizona.
13 D. That Second Chance had ignored Toyobo's repeated requests that
14 Second Chance provide the aging test data to its customers if needed.
15 E. That Second Chance's own used vest tests had confirmed that Zylon was
16 degrading at an alarming rate and may not protect consumers throughout
17 the five year warranty period.

18 99. Upon information and belief, Second Chance has violated the Consumer Fraud
19 Act, A.R.S. § 44-1521 et seq., by engaging in the act, use, or employment of one or more
20 deceptions, deceptive acts or practices, frauds, false pretenses, false promises,
21 misrepresentations, or concealments, suppressions or omissions of a material fact with the
22 intent that the consumers rely upon such concealment, suppression or omission, in connection
23 with the sale or advertisement of the *Ultima* and *Ultimax* vests.

24

25

26

1 SECOND CAUSE OF ACTION

2 (Willful Violation of Consumer Fraud Act—*Ultima and Ultimax* Vests)

3 100. The State repeats and realleges paragraphs 1 through 99 as though set forth in
4 full.

5 101. Second Chance's conduct as alleged herein was "willful" within the meaning
6 of A.R.S. § 44-1531, in that Defendant knew or should have known that its conduct was of
7 the nature that violated A.R.S. § 44-1522.

8 THIRD CAUSE OF ACTION

9 (Consumer Fraud—*Tri-Flex* Vests)

10 102. The State repeats and realleges paragraphs 1 through 101 as though set forth in
11 full.

12 103. On information and belief, Second Chance knew or reasonably should have
13 known that the Zylon used in its *Tri-Flex* vests degraded under conditions that may render the
14 Zylon unfit and unsafe to provide ballistic protection during the warranty period and thus may
15 render the vests unfit and unsafe to provide ballistic protection during the warranty period,
16 and failed to disclose or adequately warn its customers of those dangers.

17 104. Second Chance intentionally concealed, suppressed, or omitted other material
18 facts concerning the *Tri-Flex* vests with the intent that consumers rely upon such
19 concealment, suppression or omission, including:

- 20 A. That Zylon fiber rapidly and permanently loses strength when exposed
21 to (i) visible light, (ii) fluorescent light, and (iii) high humidity and heat.
- 22 B. The rate and extent to which Zylon loses strength when exposed to the
23 above conditions.
- 24 C. That Second Chance had ignored Toyobo's repeated requests that
25 Second Chance provide the aging test data to its customers if needed.
- 26 D. That Second Chance's own used vest tests had confirmed that Zylon was

1 the body armor will protect the wearer throughout the period for which the body armor is
2 warranted to provide protection.

3 4. Pursuant to A.R.S. § 44-1528, order Second Chance to refund to Arizona
4 Consumers the full purchase price of all Zylon vests purchased by the Arizona Consumers.

5 5. Pursuant to A.R.S. § 44-1531, a penalty of not more than \$10,000 for each willful
6 violation of A.R.S. § 44-1522A.

7 6. Pursuant to A.R.S. § 44-1534, an award of the State's costs, including a sum
8 representing reasonable attorney's fees.

9 7. All other relief available under A.R.S. § 44-1521 et seq. or as may be just and
10 proper.

11 RESPECTFULLY SUBMITTED this 13th day of August, 2004.

12 TERRY GODDARD

13 Attorney General

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