

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN**

CLAY PITTMAN,
individually and on behalf of all
others similarly situated,

Case No. _____

Plaintiff ,

Hon.

v.

JURY TRIAL DEMANDED

L-3 COMMUNICATIONS
EOTECH, INC. and L-3
COMMUNICATIONS
CORPORATION,

Defendants.

CLASS ACTION COMPLAINT AND JURY DEMAND

Plaintiff Clay Pittman (“Plaintiff”), individually and on behalf of all others similarly situated, states the following for his Class Action Complaint and Jury Demand against Defendants L-3 Communications EOTech, Inc. and L-3 Communications Corporation (“EOTech” or “Defendants”).

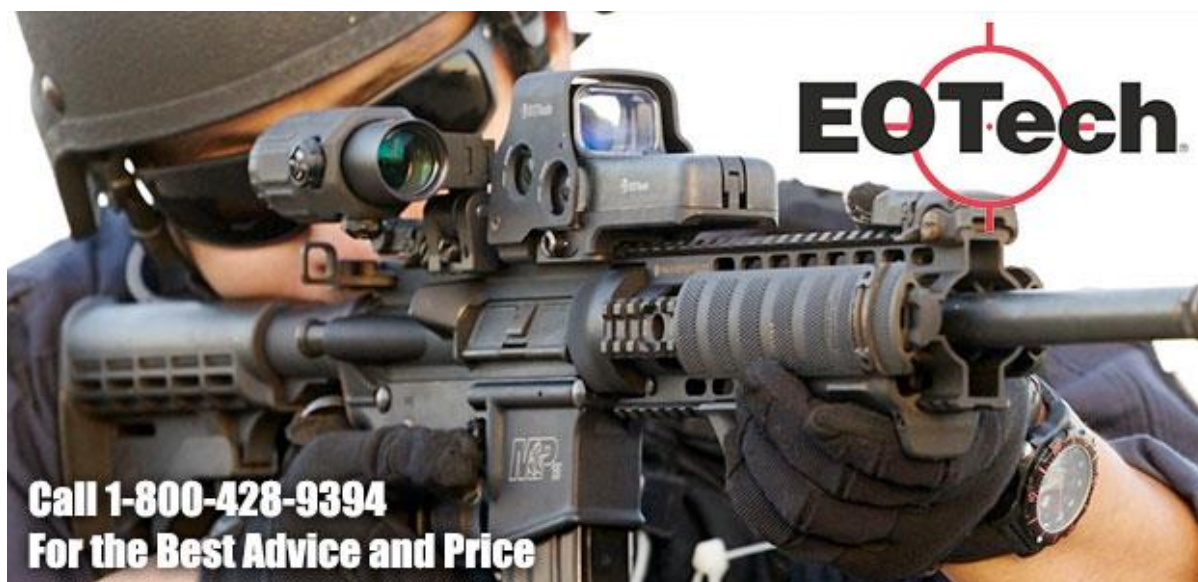
NATURE OF THE ACTION

1. Plaintiff brings this proposed class action individually and on behalf of a proposed class (“Class”) of all consumers who purchased any of EOTech’s holographic weapons sights (“EOTech Sights”) between 2007 and the present.

2. As set forth more fully below, for nearly a decade, Defendants sold holographic weapons sights to consumers throughout the United States that Defendants knew were materially defective.

3. Defendants manufacture EOTech Sights, which are technologically advanced gun sights with a viewing window that superimposes a “reticle” (e.g., crosshairs) upon the object the user is aiming the weapon. The sights are mounted on weapons to accurately engage targets in a range of extreme and varying environmental conditions (various models shown below).





4. Defendants began manufacturing and marketing holographic weapons sights to military and law enforcement agencies in 1996 and later entered the consumer market, representing that the company tested EOTech Sights in accordance with military standards to ensure that they met the advertised specifications.

5. In 2000, Defendants began manufacturing, labeling, marketing, promoting, and distributing EOTech Sights in commerce for use by recreational shooters and hunters. EOTech targeted its marketing of EOTech Sights to outdoorsmen, hunters, and consumers seeking rugged and durable sights capable of rapid and precise target acquisition in harsh conditions.

6. In 2006, Defendants became aware that design defects in the sights caused them to fail in cold temperatures and in humid environments.

7. After a lengthy investigation, the United States of America filed suit against Defendants in U.S. District Court, Southern District of New York (Manhattan) on November 24, 2015 for fraudulent misrepresentation under the False Claims Act and unjust enrichment. The U.S. Government alleged that Defendants knowingly sold defective sights to the military and that Defendants concealed the known defects.¹

8. The next day, November 25, 2015, the court entered a Stipulation and Order of Settlement and Dismissal wherein Defendants admitted that they knowingly sold defective sights to the U.S. Government from 2007 through 2014 and agreed to pay the government \$25.6 million.²

9. In the Settlement Agreement, Defendants admitted that the EOTech Sights exhibited signs of parallax in cold temperatures, an apparent change in the position of an object resulting from a change in position of the observer.

10. Parallax error is measured by minutes of angle (“MOA”). One MOA equals approximately a one-inch variation for every 100 yards the user is away

¹ Complaint and Demand for Jury Trial, *United States of America v. L-3 Communications EOTech, Inc., et al.*, No. 1:15-cv-09262 (S.D.N.Y.) (Nov. 24, 2015).

² Stipulation and Order of Settlement and Dismissal, *United States of America v. L-3 Communications EOTech, Inc., et al.*, No. 1:15-cv-09262 (S.D.N.Y.) (Nov. 25, 2015).

from the target. Thus, the higher the MOA, the greater the discrepancy between the target as viewed in the sight and what the user is actually aiming at.

11. In 2006, Defendants became aware that its sights failed to maintain zero in temperature changes, a condition known as thermal drift. EOTech's sights experience a point of impact shift away from the point of aim when the sight is exposed to a temperature different from the temperature at which the sight was zeroed." At 32°F, the parallax error was 12 MOA (12 inches for every 100 yards); at 5°F, the error was more than 20 MOA (20 inches for every 100 yards).

12. In 2009, Defendants became aware of an additional problem with its sights. Based on testing a sample of their sights, Defendants found that moisture was entering the sights, which caused reduced optical performance, most notably a dimming of the visible reticle pattern. (e.g., crosshairs). In 2011, Defendants conducted testing of sights sold to the U.S. Government and found thermal drift of 2 to 6 MOA over temperature variations for its carbine sights and up to 6 to 12 MOA for its grenade launcher and heavy machine gun sights.

13. Defendants were legally obligated to disclose these defects to consumers at or before the time of purchase.

14. Throughout its marketing literature, which was freely distributed to the consuming public and on the Internet, Defendants continued to represent that their sights performed in temperatures ranging from -40° to 140°F as well as in

humid conditions and were “parallax free” when they knew of the thermal drift and reticle dimming issues.

15. Despite knowledge of the defects as early as 2006, Defendants continued to sell its sights to consumers. Defendants did not warn consumers until the time of the 2015 Settlement Agreement with the U.S. Government, failing to make any other disclosures for nearly a decade.

16. Plaintiff brings this action for monetary and applicable equitable and injunctive relief to redress misrepresentations made by Defendants in the marketing, advertising, and sale of EOTech Sights under the Magnuson-Moss Warranty Act, the Texas Business and Commerce Code § 17.46, *et seq.*, and common law.

PARTIES

17. Plaintiff, Clay Pittman, is a citizen and resident of the State of Texas, and is the proposed class representative for all class claims brought on behalf of the Texas subclass defined below and all nationwide class claims.

18. Plaintiff purchased an EOTech Sight in 2012, which malfunctions in a 20° temperature change. At the time of the purchase, Plaintiff was unaware, and in the exercise of reasonable diligence could not have discovered that the EOTech Sight he purchased could not properly operate in temperatures from -40° to 140°F and was affected by thermal drift and reticle dimming defects.

19. Defendant L-3 Communications EOTech, Inc. (“EOTech”) is a Delaware corporation that designs, manufactures, and markets holographic weapon sights. From 2005 until 2010, EOTech was a wholly owned subsidiary of L-3. In 2010, as part of a corporate restructuring in connection with L-3’s acquisition of Insight Technology, EOTech became part of the Warrior Systems Division of L-3.

20. EOTech’s principal place of business is at 1201 E. Ellsworth Road, Ann Arbor, Michigan, 48108.

21. Defendant L-3 Communications Corp. is a Delaware corporation with its principal place of business at 600 Third Avenue, New York, New York, 10016.

JURISDICTION AND VENUE

22. This Court has original jurisdiction over this controversy pursuant to the Class Action Fairness Act (28 U.S.C. §1332(d)(2)). The matter in controversy exceeds the sum or value of \$5,000,000.00, exclusive of interest and costs, and this is a Class Action in which any member of the class of Plaintiff is a citizen of a state different from Defendant.

23. This Court also has subject matter jurisdiction under 28 U.S.C. § 1331 because the claims herein arise in part out of violations of federal law.

24. Venue is proper in this District pursuant to 28 U.S.C. §1391(b), (c), and (d) because Defendants transact business and/or resides and/or has agents within this District, Defendants are subject to the personal jurisdiction of this Court

and the State of Michigan with respect to this action, and because Defendant's parent corporation has a registered agent in this District. Venue is proper in this Division pursuant to Local Rule 83.10.

GENERAL ALLEGATIONS

A. Holographic Weapons Sights

25. A holographic weapon sight is a non-magnifying weapon sight that allows the user to look through an optical window and see a "reticle image," (i.e., crosshairs, circle and aiming dot, or another representation of a targeting image). The reticle is superimposed on an image of the field of view.

26. A holographic weapon sight can have advantages over other types of weapon sights. Unlike telescopic gun sights, which require users to close one eye, a holographic weapon sight allows the user to keep both eyes open, improving peripheral vision. Additionally, unlike typical "red-dot" sights, which project a red dot on the point at which the weapon is aimed, a holographic weapon sight does not emit light that may reveal the user's location.

27. EOTech's holographic weapon sight technology is used in a variety of weapon sighting/targeting platforms, including individual-user weapons (e.g., rifles, grenade launchers), crew-served weapons, such as heavy machine guns, and heads-up displays used in aircraft and other vehicles.

28. Some of EOTech's sights are designed particularly for military use. EOTech's Model MK 56 (military nomenclature: SU-264/PEQ) is designed specifically for crew-served weapons and Model M40GL (SU-253/PEQ) is designed exclusively for grenade launchers. EOTech's Model 553 (SU-231/PEQ) has been used for years by soldiers in the U.S. Special Operations Command.

29. Beginning in 2000, Defendants began manufacturing, labeling, marketing, promoting and distributing EOTech Sights in commerce for use by recreational shooters and hunters.

30. EOTech has earned millions of dollars from selling its weapons sights to consumers and Government agencies.

31. As seen in EOTech's advertisements below, military sales are not only a source of profit for EOTech, but also a powerful marketing tool for the consumer market.

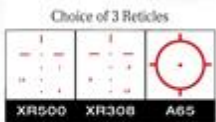
MODEL 553™

Selected by USSOCOM to withstand the demands of our elite fighting forces, the 553 delivers precise accuracy with state-of-the-art holographic sight technology and extreme durability in even the harshest conditions. This Night Vision-compatible sight offers a quick-detach lever and waterproof capability up to 66 ft.

(Note: Certain commercial variants of the MIL-STD-1913 rail specification may not be compatible with the Model 553 mounting assembly)



See page 13 for info.



MODEL 552™

Standardized by the DEA, ATF, and FBI HRT, the Model 552 offers Night Vision-compatibility. The AA battery model is the sight of choice by military units like Stryker Brigade, 10th Mountain and 3rd Infantry. It is battle-proven to withstand the abuse that any harsh environment, high-powered weapon platform, or military mission can dish out.

32. EOTech advertises that its Model 552 is “[s]tandardized by the DEA [Drug Enforcement Agency], ATF [Bureau of Alcohol, Tobacco, Firearms and Explosives], and FBI [Federal Bureau of Investigation]...” and that its Model 553

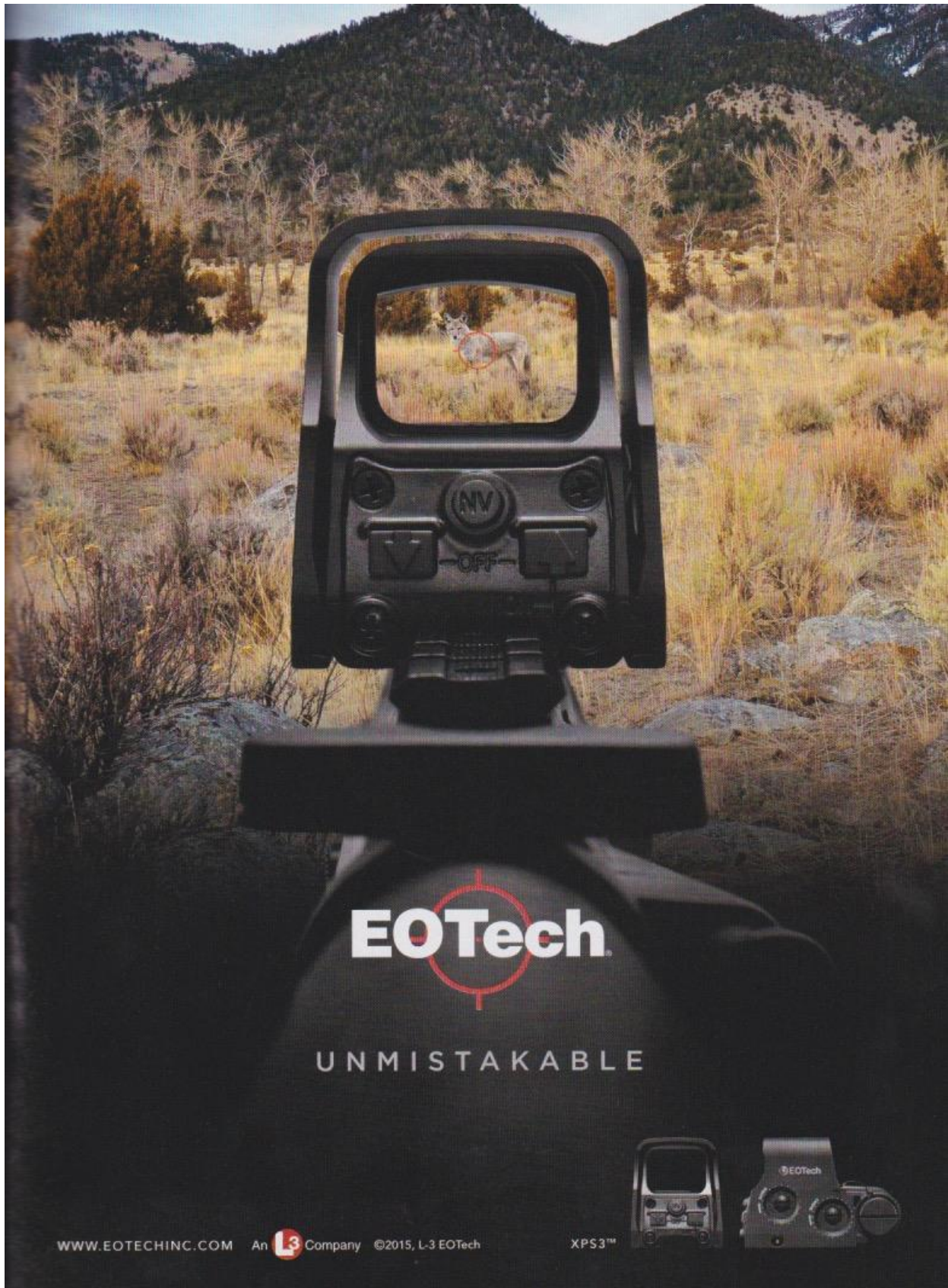
was “[s]elected by USSOCOM [U.S. Special Operations Command] to withstand the demands of our elite fighting forces.”

33. In the company profile section of its website, EOTech also advertises the following:

- The EOLAD™ 552 with Integrated Laser Aiming Device was produced in 2007 for the U.S. Special Forces.
- The Model M40GL™ ECOS-GL Grenade Launcher Sight was designed in 2008 for USSOCOM.
- Several new HWS models were designed in 2009 to meet the specific needs of the U.S. Marine Corps and other customers.

34. EOTech Sights are marketed and sold through distributors/wholesalers, retailers and internet retailers. EOTech supplies these distributors/wholesalers, retailers and internet retailers with flyers, specification sheets and point of sale material with the intent that they be distributed and re-published to consumers.

35. EOTech’s advertisements stress the importance of accuracy, as shown by the company’s print ads featuring, among other shooting scenarios, a hostage situation and hunting, emphasizing accurate, “unmistakable” shot placement:





36. Defendants have represented that EOTech Sights perform in extreme environmental conditions. Among other places, Defendants make these representations in the company's "General Equipment Description," a comprehensive summary of the technical capabilities and operating parameters of the sight. The General Equipment Description, among other things, defines "the basic operation, features/benefits" of the sight and details the "core optical, electrical, mechanical, and environmental operation of the sight." In addition, Defendants made these representations in product brochures that set forth the technical operating specifications applicable to the company's "commercial off the shelf" ("COTS") units.³

37. The General Equipment Description, at section 14.0, sets forth the "Environmental Parameters," that is, the "environmental conditions the [holographic weapon sight] was designed to operate within." Defendants made specific representations about the performance of its sights in both cold temperature and humid environments.⁴

B. Thermal Drift Defects

38. For the past decade, Defendants have represented that EOTech Sights operate at temperatures ranging from a low of -40° to a high of 140° F.

³ U.S. Complaint, *supra* n. 1 at ¶ 30.

⁴ *Id.*

39. Within that temperature range, Defendants repeatedly represented that its sights were “parallax free” or “100% parallax free.” “Parallax” refers to the apparent movement of the reticle relative to the target, and “parallax error” is typically measured in minutes of angle or “MOA.” One MOA translates approximately to a one-inch variation every 100 yards.

40. The greater the parallax error, the greater the discrepancy between the actual target and the point at which the user is aiming.

41. Defendants’ marketing materials represented that the EOTech Sights were “parallax free.” For example, in the Operator’s Manual for EOTech’s XPS2 HWS (Holographic Weapon Sight) distributed in March 2010 stated the following about the sight’s “key attributes”:

The XPS2 HWS® is a lightweight, non-magnifying, optical sight designed for Close Quarter Battle. It allows very fast target acquisition and engagement at short ranges while providing aiming capability out to 300 meters equal to or better than iron sights.

The major combat advantage of the HWS® is extremely rapid reticle-on-target acquisition. As quickly as a target is identified, the holographic reticle can be superimposed on the target. The sight allows operators to maintain eye contact on the target and to place the holographic reticle onto the target without shifting focus. Operators can quickly acquire the target and reticle in the same focal plane for fast and accurate shot placement.

The HWS® appears to project the holographic image of a reticle on the target plane. The sight can be used as a bright open reticle image or a fine dot which is limited only by the acuity of the shooter’s eye. *The reticle pattern is parallax free and the holographic heads up*

*display window allows an undistorted and unrestricted view of the target.*⁵

42. Parallax error is measured by minutes of angle (“MOA”). One MOA equals approximately a one-inch variation for every 100 yards the user is away from the target. Thus, the higher the MOA, the greater the discrepancy between the target as viewed in the sight and what the user is actually aiming at.

43. Defendants’ representations that the EOTech Sights were parallax free and could operate in temperatures from -40° to 140°F are material to consumers because recreational shooters and hunters need to quickly and accurately acquire and hit a target in harsh conditions with widely varying temperatures. Additionally to ensure both safety and the humane taking of game, sights must stay zeroed to point of impact in various conditions. Consumers purchased the EOTech sights for rapid and accurate target acquisition and repeatability of “zero.”

44. In 2006, Defendants became aware that its sights failed to maintain zero in temperature changes, a condition known as thermal drift. “EOTech’s sights experience a point of impact shift away from the point of aim when the sight is exposed to a temperature different from the temperature at which the sight was

⁵ Operator’s Manual for XPS2 HWS (Holographic Weapon Sight) <http://www.eotechinc.com/sites/default/files/manuals/XPS2%20user%20manual.pdf> (emphasis added).

zeroed.”⁶ At 32°F, the parallax error was 12 MOA (12 inches for every 100 yards); at 5°F, the error was more than 20 MOA (20 inches for every 100 yards).

45. To put this in perspective, a hunter shooting 100 yards away from a target could fire at the center of the vital zone necessary for a humane shot and still miss by ten inches to one side or the other because of parallax error. The greater the parallax error, the greater the discrepancy between the actual target and the target at which the user is aiming.

46. Defendants’ misrepresentations that EOTech Sights function properly in operating temperatures from -40° to 140° F and are parallax free pertain to the quality, durability, functionality and value of the sights. Plaintiff and members of the class purchased products that they would not have purchased or would not have paid as much for if the EOTech Sights had Defendants marketed and advertised them truthfully.

C. Reticle Dimming Defects

47. Since at least 2003, Defendants have represented that EOTech Sights “can operate in an environment with relative humidity at 95% for an indefinite time interval with no degradation to the sight’s performance.”⁷

⁶ EOTech Letter to Consumers, <http://www.eotechinc.com/dear-valued-eotech-customer> (last accessed March 18, 2016).

⁷ U.S. Complaint, *supra* n. 1 at ¶ 40.

48. For example, EOTech's General Equipment Description indicates that the sight "has sealed optical and electrical subassemblies to ensure the sight is waterproof" that the sight's "internal optics remains moisture free and fog proof in any operating environment," and that "the optical cavity is purged, nitrogen filled and sealed to ensure waterproof and fog proof operation."⁸

49. In the Operator's Manual for the M553/SU-231, EOTech also described the "[s]ealing" of the sights as "[f]ogproof internal optics," and represented that the sights were waterproof up to 66 feet in depth.⁹

50. As early as 2008, Defendants knew that their sights failed to perform as represented in humid environments. Defendants knew that the sights leaked, allowing moisture to enter and causing a degradation of the reticle (*i.e.*, the circle and aiming dot in the sight necessary for acquiring a target). In 2008, Defendants inspected a large shipment of returns from the U.S. Department of Defense and noticed damage caused by moisture in nearly every sight. In the years that followed, moisture-related complaints (typically dimming or disappearing reticles) became the number one reason for Defendants' customer returns, and Defendants'

⁸ *Id.*

⁹ *Id.* at ¶ 4.

own testing repeatedly confirmed that the sights were not properly sealed and quickly degraded when exposed to moisture.¹⁰

51. In June of 2009, EOTech sent a sample of newly-manufactured sights to an independent testing laboratory to determine whether the seal on the sight was an effective barrier against ambient air and moisture. The laboratory checked for “gross leaks” (typically indicating that the seal can be penetrated by a liquid) by immersing the sights in fluid and checking for bubbles emanating from the seal area. The laboratory reported to Defendants that “[t]he results of the gross leak testing revealed all four devices failed hermetic testing. . . . Bubbles were evident from the devices at various locations. . . .” The laboratory identified three to four leak paths on each sight.¹¹

¹⁰ *Id.* at ¶ 7; According to the U.S. Complaint, in March 2011, an EOTech test engineer asked the laboratory to conduct gross leak bubble testing on an additional five sights. Again, the laboratory reported that “[a]ll devices exhibited bubbling.” In April of 2013, an EOTech test engineer asked the laboratory to identify a leak path in the sights, and acknowledged in an email that “our products are not hermetically sealed. . . The upper cavity (viewing portion) is nitrogen filled to prevent fogging of the optics, but we know they slowly leak over time.” In June of 2014, the laboratory conducted gross leak testing on five sights and, again, found all of them to have significant gross leaks. The tested sights were found to have leak rates between four and thirty-three times the gross leak threshold. In short, the testing results again demonstrated that the sight’s seal is not an effective barrier against moisture. U.S. Complaint, *supra* n. 1 at ¶ 111-13.

¹¹ *Id.* at ¶ 106.

52. Since 2009, Defendants have been aware of the moisture incursion problem with its sights, but continued to sell them to the U.S. Government and to consumers nationwide.

53. In July 2014, the U.S. Government conducted ten-day humidity testing on newly delivered sights from Defendants that were under contract. The government conducted the testing in accordance with military standards and tested the sight's ability to withstand 95% humidity at temperatures at the higher end of the operating range over a ten-day period.

54. Twenty-five sights were selected for testing, all of which had a manufacture date in or around March of 2014. Of the 25 sights subjected to humidity testing, 23 failed.¹²

55. Despite Defendants' knowledge that the EOTech Sights failed to perform as represented in extreme temperatures and in humid environments, they failed to disclose the defects to consumers and continued selling them for nearly ten years.

56. Plaintiff and other class members paid hundreds of millions of dollars to EOTech for sights that Defendants knew were defective.

D. Defendants' \$25.6 Million Settlement with United States

¹² *Id.* at ¶ 131, 133.

57. On November 24, 2015, the United States Attorney for the Southern District of New York filed a claim against EOTech; its parent corporation, L-3 Communications Corporation; and its CEO, Paul Mangano, under the False Claims Act (31 U.S.C. § 3729(a)(2) (2006)) on behalf of the Department of Defense, the Federal Bureau of Investigation, and the Department of Homeland Security.

58. In the False Claims Act Complaint, the United States alleged EOTech knew since no later than 2006 that the EOTech Sights could not operate properly in temperatures ranging from -40° to 140°F as represented.

59. The Complaint further alleged EOTech knew since no later than 2007 that the EOTech sights suffered from thermal drift of up to 20 MOA (“minutes of angle”), or 20 inches per one hundred yards, and parallax error at low temperatures, once again contrary to representations made to both the government agencies and consumers.

60. The Complaint also alleged that by 2008 EOTech knew their sights were not fogproof and failed to perform as represented in humid environments. Specifically, EOTech knew that the sights were not waterproof and allowed moisture to cause a degradation of the reticle image.

61. The following day, on November 25, 2015, EOTech, its CEO and L-3 Communications Corp., entered into a Stipulation and Order of Settlement and

Dismissal with the United States Attorney and agreed to pay the U.S. Government \$25.6 million.

62. In the Stipulation, EOTech admitted the following facts:
 - A. In 2006, EOTech became aware that its sights failed to maintain zero with temperature changes, a condition it referred to as “thermal drift.”
 - B. Beginning in 2011, EOTech conducted testing of sights sold to Crane [the government contracting entity] and found thermal drift of 2 to 6 MOA over temperature variations for its carbine sights and up to 6 to 12 MOA over temperature variations for its grenade launcher and heavy machine gun sights.
 - C. In early 2007, EOTech became aware that its sights were experiencing increasing parallax error in cold temperature. At 32° F, the parallax error was 12 MOA, i.e., 12 inches for every hundred yards, when measured from outside edge to outside edge of the sight; and at 5° F, the error was more than 20 MOA, from outside edge to outside edge.
 - D. In February 2009, EOTech became aware, based on testing a sample of sights, that moisture was entering its sights. When moisture enters a sight, it can cause a dimming of the reticle.
 - E. Reticle dimming can occur more quickly in humid environments. An optic's reticle is necessary to allow the user to acquire a target.
63. In sum, Defendants admitted that:
 - A. Defendants knew the EOTech sights sold to the U.S. Government and consumers could not “maintain zero” in the operating temperature ranges as represented;

- B. The EOTech sights were substantially affected by parallax error in certain operating temperatures; and
- C. The EOTech Sights were not fogproof, but in fact suffered from moisture damage in humid environments, which caused reticle dimming.

CLASS ACTION ALLEGATIONS

64. Plaintiff brings this class action on behalf of himself and all others similarly situated as members of the proposed Class. The proposed Class, which Plaintiff seeks to represent, is comprised of all individuals who purchased EOTech Sights in the United States (the “Class”) from 2006 until the present (the “Class Period”).

65. Excluded from the Class are all Federal judges and members of their families within the first degree of consanguinity, Defendants, any entity in which Defendants have a controlling interest, and any of its subsidiaries, affiliates, and officers, directors of the entity Defendants, or employees, and any legal representative, heir, successor, or assignee of Defendants.

66. Plaintiff also brings this class action on behalf of himself and all others similarly situated as members of the “Texas Subclass.” The proposed Texas Subclass, which Plaintiff seeks to represent, is comprised of all individuals who reside in Texas and own EOTech sights or have purchased EOTech Sights in Texas during the Class Period.

67. Excluded from the Texas Subclass are Defendants, any entity in which Defendants have a controlling interest, and any of its subsidiaries, affiliates, and officers, directors of the entity Defendants, or employees, and any legal representative, heir, successor, or assignee of Defendants.

68. **Numerosity.** Members of the Class and Texas Subclass are so numerous that their individual joinder herein is impracticable. On information and belief, members of the Class and subclasses number in the tens of thousands. The precise number of Class members and their identities are unknown to Plaintiff at this time but will be determined through discovery.

69. Class members may be notified of the pendency of this action by mail and/or publication through the distribution records of Defendants and third party retailers and vendors.

70. **Existence and Predominance of Common Questions.** Common questions of law and fact exist as to all Class members and predominate over questions affecting only individual Class members. Common legal and factual questions include, but are not limited to:

- A. Whether Defendants advertised or marketed EOTech Sights in a way that is false or misleading;
- B. Whether EOTech Sights failed to conform to the representations, which were published, disseminated, and advertised to Plaintiff and the Class;

- C. Whether Defendants concealed from Plaintiff and the Class that EOTech Sights did not conform to its stated representations;
- D. Whether, by the misconduct set forth in this Complaint, Defendants engaged in unfair, fraudulent, or unlawful business practices with respect to the advertising, marketing, and sales of EOTech Sights.

71. **Typicality**. Plaintiff's claims are typical of the claims of the members of the Class as each member of the Class are similarly affected by Defendants' wrongful conduct. Plaintiff has no interests antagonistic to the interests of the other members of the Class. Plaintiff and all members of the Class have sustained economic injury arising out of Defendants' violations of common and statutory law as alleged herein.

72. **Adequacy**. Plaintiff is an adequate representative of the Class because his interest does not conflict with the interests of the Class members he seeks to represent, he has retained counsel competent and experienced in prosecuting class actions, and he intends to prosecute this action vigorously. Plaintiff and his counsel will fairly and adequately protect and represent the interests of Class members.

73. **Superiority**. The class mechanism is superior to other available means for the fair and efficient adjudication of the claims of Plaintiff and Class members. Each individual Class member may lack the resources to undergo the burden and expense of individual prosecution of the complex and extensive litigation necessary to establish Defendants' liability. Individualized litigation

increases the delay and expense to all parties and multiplies the burden on the judicial system presented by the complex legal and factual issues of this case. Individualized litigation also presents a potential for inconsistent or contradictory judgments. In contrast, the class action device presents far fewer management difficulties and provides the benefits of single adjudication, economy of scale, and comprehensive supervision by a single court on the issue of Defendants' liability. Class treatment of the liability issues will ensure that all claims and claimants are before this Court for consistent adjudication of the liability issues.

TOLLING OF THE STATUTE OF LIMITATIONS

74. Any applicable statute of limitations that might otherwise bar any class member's claims is tolled by Defendants' knowing and active concealment of the material defects in the EOTech Sights. Defendants kept Plaintiff and the members of the class ignorant of vital information essential to the pursuit of their claims. Class members could not reasonably have discovered that their sights were materially defective until it settled the False Claims Act Suit with the United States on November 25, 2015.

COUNT I **VIOLATION OF MAGNUSON-MOSS WARRANTY ACT** **(15 U.S.C. §§ 2301 et seq.)**

75. Plaintiff incorporates by reference each preceding allegation as if specifically set forth herein and further alleges as follows.

76. EOTech Sights are consumer products as defined in 15 U.S.C. § 2301(1).

77. Plaintiff and Class members are consumers as defined in 15 U.S.C. § 2301(3).

78. Defendants are suppliers and warrantors as defined in 15 U.S.C. § 2301(4) and (5).

79. In connection with the sale of EOTech Sights, Defendants issued written warranties as defined in 15 U.S.C. § 2301(6), which warranted that EOTech Sights could operate in temperatures from -40° to 140°F, were parallax free and were fogproof. In fact, EOTech Sights suffered from thermal drift, could not maintain zero at lower temperatures, suffered parallax error, and due to moisture suffered from reticle dimming or fogging in higher humidity.

80. By reason of Defendants' breach of the express written warranties stating that EOTech Sights could operate in temperatures from -40° to 140°F, were parallax free and were fogproof, Defendants violated the statutory rights of Plaintiff and Class members pursuant to the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301 *et seq.*, thereby damaging Plaintiff and the Class members.

81. It is futile to require Plaintiff and the Class members to provide Defendants notice pursuant to 15 U.S.C. § 2310(a)(3)(c)(ii), as Defendant were

parties to a lawsuit with the United States and subsequently entered a settlement involving identical issues identified in the instant complaint.

82. Wherefore, Plaintiff and Class Members are entitled to recover actual, consequential, punitive and/or exemplary damages, equitable and declaratory relief, costs, and reasonable attorneys' fees.

COUNT II
**VIOLATION OF STATE UNFAIR AND DECEPTIVE
TRADE PRACTICES ACTS AND/OR CONSUMER PROTECTION ACTS**

83. Plaintiff incorporates by reference each preceding allegation as if specifically set forth herein and further alleges as follows.

84. Defendants had a statutory duty to refrain from unfair or deceptive acts or practices in the advertising, marketing, and/or sale of the EOTech Sights.

85. Defendants made deceptive and/or misleading representations regarding the EOTech Sights during the Class Period that would have deceived an objectively reasonable person into believing the products were suitable for use as represented by Defendants.

86. Had Defendants not engaged in unfair or deceptive acts or practices in the marketing, advertising, and/or sale of the EOTech Sights, Plaintiff and Class Members would not have purchased and/or paid for the products.

87. Defendants' unfair, deceptive, and/or untruthful representations and material omissions to consumers and the public regarding the true nature of the

EOTech purchased and used by Plaintiff and Class Members constituted unfair and deceptive acts and practices in violation of the following state consumer protection statutes: Ala. Code § 8-19-1, *et seq.*; Alaska St. § 45.50.471, *et seq.*; Ariz. Re. Stat. Ann § 44-1522, *et seq.*; Ark. Code § 4-88-101, *et seq.*; Cal. Civ. Code § 1770, *et seq.*, and Cal Bus. & Prof. Code § 17200, *et seq.*; Colo. Rev. Stat. § 6-1-105, *et seq.*; Conn. Gen. Stat. § 2-110a, *et seq.*; 6 Del. Code §§ 2511, *et seq.*, and 2531, *et seq.*; D.C. Code § 28-3901, *et seq.*; Fla. Stat. § 501.201, *et seq.*; Ga. Stat. §§ 10-1-372, *et seq.*, 10-1-392 and 10-1-420; Haw. Rev. Stat. § 480-1, *et seq.*, Idaho Code § 48-601, *et seq.*; 815 ILCS § 505/1, *et seq.*, Ind. Code Ann. § 24-5-0.5-1, *et seq.*, Iowa Code § 714.16, *et seq.*, Kan. Stat. § 50-623, *et seq.*, Ky. Rev. Stat. § 367.170, *et seq.*, La. Rev. Stat. § 51:1401, *et seq.*, 5 Me. Rev. Stat. § 205A, *et seq.*, Md. Com. Law Code § 13-101, *et seq.*, Mass Gen. L. Ch. 93 A § 2-314, *et seq.*, Mich. Comp. Laws Ann. § 445.901, *et seq.*, Minn. Stat. §§ 325D.43, *et seq.*, 325 F.67, *et seq.*; and 325 F.68, *et seq.*; Miss. Code Ann. § 75-24-1, *et seq.*, Vernon's Ann. Missouri Stat. § 407.010, *et seq.*, Mont. Code Ann. § 30-14-101, *et seq.*, Neb. Rev. Stat. § 59-1601, *et seq.*; Nev. Rev. Stat. Ann. § 59S.0903, *et seq.*, N.H. Rev. Stat. § 358-A:1, *et seq.*, N.J. Rev. Stat. § 56:8-1, *et seq.*, N.M. Stat. § 57-12-1, *et seq.*, N.Y. Gen. Bus. Law §§ 349, *et seq.*, and 350-e, *et seq.*, N.C. Gen. Stat. § 75-1.1, *et seq.*, N.D. Cent. Code §§ 51-12-01, *et seq.*, and 51-15-01, *et seq.*, Ohio Rev. Stat. § 1345.01, *et seq.*, Okla. Stat. § 15751, *et seq.*, Or. Rev. Stat. § 6464.605, *et seq.*, 73

Pa. Stat. § 201-1, *et seq.*, R.I. Gen. Laws § 6-13.1-1, *et seq.*, S.C. Code Laws § 39-5-10, *et seq.*, S.D. Codified Laws § 37-24-1, *et seq.*, Tenn. Code § 47-18-101, *et seq.*, Tex. Bus. & Com. Code. § 17.41, *et seq.*, Utah Code § 13-11-1, *et seq.*, 9 Vt. § 2451, *et seq.*, Va. Code § 59.1-196, *et seq.*, Wash. Rev. Code § 19.86.0 10, *et seq.*, West Virginia Code § 46A-6-101, *et seq.*, Wis. Stat. § 100.20, *et seq.*, Wyo. Stat. § 40-12-101, *et seq.*

88. Defendants made deceptive and/or misleading representations regarding the EOTech Sights that would have deceived an objectively reasonable person into believing the products were suitable for use as represented by Defendants.

89. Defendants' deceptive and/or misleading statements include statements made on its in their product brochures, website, advertising materials, specifications as well as in the materials submitted to the U.S. Government.

90. Defendants' unfair practices offend public policy and are unethical, oppressive, and substantially injurious to consumers.

91. Defendants profited from the sale of their EOTech Sights to Plaintiff and Class Members.

92. Wherefore, Plaintiff and Class Members are entitled to recover actual, consequential, punitive and/or exemplary damages, equitable and declaratory relief, costs, and reasonable attorneys' fees.

COUNT III
TEXAS CONSUMER PROTECTION ACT

93. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of Texas Business and Commerce Code § 17.46, *et seq.* In particular, Texas law provides:

[T]he term “false, misleading, or deceptive acts or practices” includes, but is not limited to, the following acts: (5) representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have or that a person has a sponsorship, approval, status, affiliation, or connection which the person does not; (7) representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another; (9) advertising goods or services with intent not to sell them as advertised;¹³

94. Defendants’ misrepresentations, concealments and/or failure to inform constitute unfair, unconscionable, or deceptive acts or practices within the meaning of Texas Business and Commerce Code § 17.46, *et seq.* directly and proximately causing damage to Plaintiff and Class Members.

95. Wherefore, Plaintiff and Class Members are entitled to recover actual, consequential, equitable and declaratory relief, costs, and reasonable attorneys’ fees.

COUNT IV
VIOLATION OF TEXAS REVISED STATUTES
IMPLIED WARRANTY OF MERCHANTABILITY
(TEXAS BUSINESS AND COMMERCE CODE § 2.2314)

¹³ Texas Business and Commerce Code § 17.41(a)(5), (7), (9).

96. Plaintiffs incorporate by reference each preceding allegation as if specifically set forth herein and further alleges as follows.

97. Plaintiffs bring this claim on behalf of themselves and on behalf of the members of the Texas Subclass.

98. EOTech Sights are “goods” within the meaning of TEX BC. CODE § 2.314(a).

99. Defendants are “merchants” within the meaning of TEX BC. CODE § 2.314(a).

100. Defendant impliedly warranted to Plaintiffs and the Texas Subclass that the EOTech Sights were “merchantable” within the meaning of TEX BC. CODE § 2.314(a).

101. TEX BC. CODE § 2.314(a)(b)(1)-(6) states:

[A] warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. . . .Goods to be merchantable must be at least such as:

- (1) Pass without objection in the trade under the contract description;
- (2) In the case of fungible goods, are of fair average quality within the description;
- (3) Are fit for the ordinary purposes for which such goods are used;
- (4) Run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved;
- (5) Are adequately contained, packaged and labeled as the agreement may require; and
- (6) Conform to the promises or affirmations of fact made on the container or label if any.

102. As described above, the EOTech Sights are objectionable in the trade under the contract description because they malfunction at certain temperatures, because they are not parallax free, and because they experience reticle degradation due to exposure to moisture and humidity.

103. As described above, the EOTech Sights are not fit for ordinary purposes for which such goods are used.

104. EOTech Sights are not adequately labeled because the labeling misrepresents that the sights comply with standards imposed by the federal government for optical sights, because the sights experience thermal drift under the circumstances more fully described above, because the sights are not parallax free, and because the sights are not “fog proof.”

105. Defendants’ conduct deprived Plaintiffs and the proposed Texas Class of the benefit of their bargain in that they paid more than the EOTech Sights were worth in their actual condition.

106. As a direct and proximate result of Defendants’ breach of their duties, Plaintiffs and proposed Texas Class members received goods whose condition substantially impairs their value. Plaintiffs and the proposed Texas Class have been damaged by the diminished value of the EOTech Sights and the sights’ malfunctioning.

107. Plaintiffs and Class members have complied with all obligations under

the warranty, or otherwise have been excused from performance of said obligations as a result of Defendants' conduct described herein.

108. Wherefore, Plaintiffs and Class Members are entitled to recover actual, consequential, equitable and declaratory relief, costs, and reasonable attorneys' fees.

COUNT V
FRAUD/INTENTIONAL MISREPRESENTATION

109. Plaintiff incorporates by reference each preceding allegation as if specifically set forth herein and further alleges as follows.

110. During the Class Period, Defendants were engaged in the business of designing, manufacturing, marketing, distributing, or selling EOTech Sights which are the subject of the present litigation.

111. Defendants, acting through their officers, agents, servants, representatives, or employees, directly marketed and advertised EOTech Sights to consumers and delivered EOTech Sights to retail stores, distributors, and various other distribution channels.

112. Defendants willfully, falsely, and knowingly misrepresented material facts relating to the character and quality of EOTech Sights. These misrepresentations were contained in EOTech's website, advertising, product brochures, packaging, product inserts, product descriptions, operating manuals and other marketing materials disseminated or caused to be disseminated by

Defendants, and such misrepresentations were reiterated and disseminated by officers, agents, representatives, servants, or employees of Defendants, acting within the line and scope of their authority, so employed by Defendants to merchandise and market the product.

113. Defendants' representations were made with the intent that the general public, including Plaintiff and Class members, rely upon them. Defendants' representations were made with knowledge of the falsity of such statements, or in reckless disregard of the truth thereof.

114. In actual and reasonable reliance upon Defendants' misrepresentations, Plaintiff and Class members purchased EOTech Sights for their intended and reasonably foreseeable purposes. Plaintiff and Class members were unaware of the existence of facts that Defendants suppressed and failed to disclose. If they had been aware of the suppressed facts, Plaintiff and Class members would not have purchased the EOTech Sights.

115. Plaintiff and Class members are informed and believe, and thereon allege, that Defendants misrepresented material facts with the intent to defraud Plaintiff and Class members. Plaintiff and Class members were unaware of the intent of Defendants and relied upon the representations of Defendants in deciding to purchase EOTech Sights.

116. Plaintiff's and Class members' reliance on the representations of

Defendants was reasonable.

117. In actual and reasonable reliance upon Defendants' misrepresentations, Plaintiff and Class members purchased the EOTech Sights, the direct and proximate result of which was injury and harm to the Plaintiff and Class members because: (a) they would not have purchased the EOTech Sights on the same terms if the true facts concerning their operation and construction had been known; (b) they paid a price premium due to the mislabeling of EOTech Sights; and (c) EOTech Sights did not have the quality, functionality or value as promised.

118. Wherefore, Plaintiff and Class Members are entitled to recover actual, consequential, punitive and/or exemplary damages, equitable and declaratory relief, costs, and reasonable attorneys' fees.

COUNT VI
FRAUDULENT CONCEALMENT/NONDISCLOSURE

119. Plaintiff incorporates by reference each preceding allegation as if specifically set forth herein and further alleges as follows.

120. EOTech knew at the time of sale that that EOTech Sights could not operate properly in temperatures from -40° to 140°F, were not parallax free and were not fogproof.

121. EOTech fraudulently concealed from and/or intentionally failed to disclose to Plaintiff, the Class, and all others in the chain of distribution (*e.g.*, concealments and omissions in EOTech's communications with wholesalers,

retailers, and others in the chain of distribution that were ultimately passed on to Plaintiff and the Class) that EOTech Sights could not operate properly in temperatures from -40° to 140° F, were not parallax free and were not fogproof, but instead suffered from thermal drift, could not maintain zero at lower temperatures, suffered parallax error, and due to moisture suffered from reticle dimming or fogging in higher humidity.

122. EOTech had exclusive knowledge of the operation and construction of EOTech Sights based upon testing done under military contracts were constructed, and it would not be anticipated that consumers, wholesalers or retailers would conduct independent tests on EOTech Sights to determine whether the EOTech Sights represented by Defendants. The defects in the design, manufacture, construction and operation of EOTech Sights are latent and not something that Plaintiff or the Class members could, in the exercise of reasonable diligence, have discovered independently prior to purchase, because it is not feasible for individual consumers to conduct their own laboratory testing of the sights prior to purchase.

123. EOTech had the capacity to, and did, deceive consumers into believing that they were purchasing holographic weapon sights that could operate properly in temperatures from -40° to 140° F, were parallax free and were fogproof.

124. EOTech undertook active and ongoing steps to conceal the defect. Plaintiff are aware of nothing in EOTech's advertising, publicity or marketing

materials that discloses the truth about the defect, despite EOTech's awareness of the problem.

125. The facts concealed and/or not disclosed by EOTech to Plaintiff and the Class are material facts in that a reasonable person would have considered them important in deciding whether to purchase (or to pay the same price for) a holographic weapon sight.

126. Since EOTech elected to make representations regarding the functionality and operation of EOTech Sights, EOTech had a duty to accurately disclose that functionality and operation of EOTech Sights at the time of sale.

127. EOTech intentionally concealed that EOTech Sights could not operate properly in temperatures from -40° to 140°F, were not parallax free and were not fogproof for the purpose of inducing the Plaintiff and the Class to act thereon.

128. Plaintiff and the Class justifiably acted or relied upon the concealed and/or nondisclosed facts to their detriment, as evidenced by their purchase of EOTech Sights.

129. Had Plaintiff and the Class known of the true functionality and operation of EOTech Sights they would not have purchased (or would have paid less for) EOTech Sights.

130. Wherefore, Plaintiff and Class Members are entitled to recover actual, consequential, punitive and/or exemplary damages, equitable and declaratory

relief, costs, and reasonable attorneys' fees.

COUNT VII
UNJUST ENRICHMENT

131. Plaintiff incorporates by reference each preceding allegation as if specifically set forth herein and further alleges as follows.

132. From 2006 to present, consumers paid hundreds of millions of dollars for EOTech's defective sights due to Defendants' false statements and omissions concerning the sights' ability to perform in temperature extremes and in humid environments.

133. Plaintiff and class members are entitled to the return of all payments by them for defective weapon sights due to the false statements and omissions by the Defendants.

134. By reason of the above-described payments, Defendants have received money, directly or indirectly, to which they were not entitled, at the expense of the Plaintiff and class members. Defendants therefore have been unjustly enriched in an amount to be established at trial.

135. Wherefore, Plaintiff and Class Members are entitled to recover actual, consequential, punitive and/or exemplary damages, declaratory relief, costs, equitable remedies (including disgorgement), and reasonable attorneys' fees.

RELIEF SOUGHT

WHEREFORE, Plaintiff and Class Members respectfully request that the Court:

- A. Certify the nationwide Class and Texas subclass pursuant to Rule 23 of the Federal Rules of Civil Procedure;
- B. Designate and appoint Plaintiff and their counsel, The Miller Law Firm, P.C., to serve as Class Representatives and Class Counsel, respectively;
- C. Issue an order finding in favor of Plaintiff and the Class on liability;
- D. Award damages, including compensatory, statutory, incidental, consequential, actual, and, as applicable, punitive and/or exemplary damages, and statutory penalties to Plaintiff and Class Members in an amount to be determined at trial;
- E. Grant injunctive and equitable relief to Plaintiff and Class Members including, but not limited to, disgorgement, restitution ;
- F. Award Plaintiff and Class Members their expenses and costs of the suit, pre-judgment interest, post-judgment interest, and reasonable attorneys' fees; and
- G. Grant any and all such other relief as the Court deems appropriate.

JURY DEMAND

Plaintiff hereby demands a trial by jury.

Respectfully submitted:
Attorneys for Plaintiff

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