

1 SEYFARTH SHAW LLP  
Lawrence E. Butler (SBN 111043)  
2 lbutler@seyarth.com  
Giovanna A. Ferrari (SBN 229871)  
3 gferrari@seyfarth.com  
Sara Rogers (SBN 292316)  
4 srogers@seyfarth.com  
560 Mission Street, 31st Floor  
5 San Francisco, California 94105  
Telephone: (415) 397-2823  
6 Facsimile: (415) 397-8549

7 SEYFARTH SHAW LLP  
Joseph J. Orzano (SBN 262040)  
8 jorzano@seyfarth.com  
Seaport East, Suite 300  
9 Two Seaport Lane  
Boston, MA 02210  
10 Telephone: (617) 946-4800  
Facsimile: (617) 946-4801

11 SEYFARTH SHAW LLP  
Aaron Belzer (SBN 238901)  
12 abelzer@seyfarth.com  
2029 Century Park East, Suite 3500  
13 Los Angeles, CA 90067-3201  
14 Telephone: (310) 277-7200  
Facsimile: (310) 201-5219

15 Attorneys for Defendant  
16 PHARMACARE U.S., INC.

17  
18 UNITED STATES DISTRICT COURT  
19 SOUTHERN DISTRICT OF CALIFORNIA  
20

21 MONTIQUENO CORBETT, DAMARIS  
LUCIANO, and ROB DOBBS individually  
22 and on behalf of all others similarly  
situated,

23 Plaintiffs,

24 v.

25 PHARMACARE U.S., INC., a Delaware  
26 Corporation,

27 Defendant.  
28

Case No. 3:21-cv-00137-GPC-AGS

**DEFENDANT PHARMACARE U.S.,  
INC.'S ANSWER TO PLAINTIFFS'  
SECOND AMENDED CLASS  
ACTION COMPLAINT**

1 Defendant PHARMACARE U.S., INC. (“Pharmacare”) hereby answers the Second  
2 Amended Class Action Complaint (“SAC”) of Plaintiffs MONTIQUENO CORBETT,  
3 DAMARIS LUCIANO, and ROB DOBBS, individually and on behalf of all others  
4 similarly situated (“Plaintiffs”), dated November 29, 2021 in the above-captioned action  
5 as follows:

6 Defendant answers and responds only to those allegations contained in the SAC that  
7 remain and are directed towards them. Defendant denies all allegations contained in the  
8 SAC to the extent that they assert or suggest, individually or collectively, that Defendant  
9 engaged in any actionable conduct or are otherwise liable to the Plaintiffs.

10 Except as otherwise indicated, the responses herein are made on personal knowledge  
11 with respect to allegations specifically relating to Defendant, and on information and belief  
12 with respect to all other allegations (including based on information obtained from  
13 documents and/or other knowledgeable individuals). Defined terms shall have the definition  
14 ascribed to them in the SAC, unless otherwise defined herein.

15 In further response to the SAC, Defendant state as follows:

16 **NATURE OF THE ACTION**

17 1. Pharmacare admits that Plaintiffs purport to bring a class action on behalf of  
18 consumers who purchased

19 2. Pharmacare admits that Elderberries come from a tree variety known as  
20 *Sambucus*, but otherwise deny the allegations in paragraph 2.

21 3. Pharmacare lacks knowledge or information sufficient to form a belief about  
22 the truth of the allegations in paragraph 3.

23 4. Pharmacare lacks information sufficient to form a belief as to the truth or  
24 falsity of the allegations in paragraph 4.

25 5. Pharmacare alleges that its website speaks for itself, and to the extent that  
26 the allegations in paragraph 5 vary therewith, Pharmacare denies such allegations.

27 Pharmacare denies the remainder of the allegations in paragraph 5.  
28



1 **JURISDICTION AND VENUE**

2 18. Pharmacare lacks knowledge or information sufficient to form a belief about  
3 the truth of the allegations in paragraph 18.

4 19. Pharmacare admits it is a resident of California, over which this Court has  
5 personal jurisdiction, but otherwise denies the remainder of the allegation in paragraph 19.

6 20. Pharmacare admits that venues is proper in this District because Pharmacare  
7 is a resident in this Court’s judicial district, but otherwise denies the remainder of the  
8 allegations in paragraph 20.

9 **FACTUAL ALLEGATIONS**

10 21. Pharmacare alleges that its product labels, website and marketing materials  
11 speak for themselves, and to the extent that the allegations in paragraph 21 vary  
12 therewith, Pharmacare denies such allegations. Pharmacare admits that it offers its  
13 products for sale on its website to all 50 states, that it sells its products through  
14 distributors, and that its products are sold by retailers in the United States. Except as  
15 expressly admitted, Pharmacare denies the allegations in paragraph 21.

16 22. Pharmacare admits that its Sambucol products contain Elderberry extract.  
17 Pharmacare alleges that its product labels, website and marketing materials speak for  
18 themselves, and to the extent that the allegations in paragraph 21 vary therewith,  
19 Pharmacare denies such allegations.

20 23. Pharmacare denies the allegation in paragraph 23.

21 24. Pharmacare alleges that its product labels, website and marketing materials  
22 speak for themselves, and to the extent that the allegations in paragraph 24 vary  
23 therewith, Pharmacare denies such allegations. Pharmacare denies the remainder of the  
24 allegations in paragraph 24.

25 25. Pharmacare alleges that 21 U.S.C. §301, et seq., and any parallel state  
26 statutes speak for themselves, and to the extent that the allegations in paragraph 25 vary  
27 therewith, Pharmacare denies such allegation. Pharmacare admits it is a distributor of the  
28 Products and denies the remainder of the allegations in paragraph 25.

1           26.    Pharmacare alleges that 21 U.S.C. § 321(ff) speaks for itself, and to the  
2 extent that the allegations in paragraph 26 vary therewith, Pharmacare denies such  
3 allegations.

4           27.    Pharmacare admits that the Dietary Supplement Health Education Act  
5 (“DSHEA”) was signed into law on October 25, 1994. Pharmacare alleges that DSHEA  
6 speaks for itself, and to the extent that the allegations in paragraph 27 vary therewith,  
7 Pharmacare denies such allegations.

8           28.    Pharmacare alleges that DSHEA speaks for itself, and to the extent that the  
9 allegations in paragraph 28 vary therewith, Pharmacare denies such allegations.

10          29.    Pharmacare denies, on information and belief, the allegations in paragraph  
11 29.

12          30.    Pharmacare alleges that DSHEA speaks for itself, and to the extent that the  
13 allegations in paragraph 30 vary therewith, Pharmacare denies such allegations.  
14 Pharmacare further alleges that the website of the Food and Drug Administration  
15 (“FDA”) speaks for itself, and to the extent that the allegations in paragraph 30 vary  
16 therewith, Pharmacare denies such allegations.

17          31.    Pharmacare alleges that DSHEA speaks for itself, and to the extent that the  
18 allegations in paragraph 31 vary therewith, Pharmacare denies such allegations.

19          32.    Pharmacare alleges that DSHEA speaks for itself, and to the extent that the  
20 allegations in paragraph 32 vary therewith, Pharmacare denies such allegations.

21          33.    Pharmacare admits that it did not submit a New Dietary Ingredient (“NDI”)  
22 notification to the FDA for its Elderberry extract, but denies that it was required to do so  
23 under DSHEA.

24          34.    Pharmacare alleges that DSHEA and the Federal Drug and Cosmetics Act  
25 (“FDCA”) speak for themselves, and to the extent that the allegations in paragraph 34  
26 vary therewith, Pharmacare denies such allegations.

27          35.    Pharmacare denies the allegation in paragraph 35.  
28

1           36. Pharmacare alleges that California’s Sherman Food, Drug and Cosmetic Act  
2 speaks for itself, and to the extent that the allegations in paragraph 36 vary therewith,  
3 Pharmacare denies such allegations. Pharmacare denies the remainder of the allegations  
4 in paragraph 36.

5           37. Pharmacare alleges that the FDCA and any purported “parallel state statutes  
6 cited in [Plaintiff’s] Class Action Complaint,” speaks for themselves, and to the extent  
7 that the allegations in paragraph 37 vary therewith, Pharmacare denies such allegations.

8           38. Pharmacare alleges that 21 U.S.C. § 343(r)(6) speaks for itself, and to the  
9 extent that the allegation in paragraph 38 varies therewith, Pharmacare denies such  
10 allegation.

11           39. Pharmacare denies the allegation in paragraph 39.

12           40. Pharmacare alleges that its product labels, website and marketing materials  
13 speak for themselves, and to the extent that the allegations in paragraph 40 vary  
14 therewith, Pharmacare denies such allegations. Pharmacare denies the remainder of the  
15 allegations in paragraph 40.

16           41. Pharmacare denies the allegation in paragraph 41.

17           42. Pharmacare denies the allegation in paragraph 42.

18           43. Pharmacare alleges that its product labels, website and marketing materials  
19 speak for themselves, and to the extent that the allegations in paragraph 43 vary  
20 therewith, Pharmacare denies such allegations.

21           44. Pharmacare alleges that its product labels, website and marketing materials  
22 speak for themselves, and to the extent that the allegations in paragraph 44 vary  
23 therewith, Pharmacare denies such allegations. Pharmacare denies the remainder of the  
24 allegations in paragraph 44.

25           45. Pharmacare alleges that its Sambucol website speaks for itself, and to the  
26 extent that the allegations in paragraph 45 vary therewith, Pharmacare denies such  
27 allegations.  
28

1           46.    Pharmacare alleges that its Sambucol website speaks for itself, and to the  
2 extent that the allegations in paragraph 46 vary therewith, Pharmacare denies such  
3 allegations.

4           47.    Pharmacare denies the allegation in paragraph 47.

5           48.    Pharmacare denies the allegation in paragraph 48.

6           49.    Pharmacare denies the allegation in paragraph 49.

7           50.    Pharmacare alleges that its product labels, website and marketing materials  
8 speak for themselves, and to the extent that the allegations in paragraph 50 vary  
9 therewith, Pharmacare denies such allegations. Pharmacare denies the remainder of the  
10 allegations in paragraph 50.

11          51.    Pharmacare alleges that its website speaks for itself, and to the extent that  
12 the allegation in paragraph 51 varies therewith, Pharmacare denies such allegation.

13          52.    Pharmacare alleges that its website speaks for itself, and to the extent that  
14 the allegation in paragraph 55 varies therewith, Pharmacare denies such allegation.

15          53.    Pharmacare alleges that its product labels, website and marketing materials  
16 speak for themselves, and to the extent that the allegations in paragraph 53 vary  
17 therewith, Pharmacare denies such allegations. Pharmacare denies the remainder of the  
18 allegations in paragraph 53.

19          54.    Pharmacare alleges that its website speaks for itself, and to the extent that  
20 the allegations in paragraph 54 vary therewith, Pharmacare denies such allegations.  
21 Pharmacare denies the remainder of the allegations in paragraph 54.

22          55.    Pharmacare alleges that its website speaks for itself, and to the extent that  
23 the allegations in paragraph 54 vary therewith, Pharmacare denies such allegations.  
24 Pharmacare denies the remainder of the allegations in paragraph 54.

25          56.    Pharmacare denies the allegations in paragraph 56.

26          57.    Pharmacare denies the allegation in paragraph 57.

1           58.    Pharmacare alleges that 21 CFR 201.5 speaks for itself, and to the extent that  
2 the allegation in paragraph 58 varies therewith, Pharmacare denies such allegation.  
3 Pharmacare denies the remainder of the allegations in paragraph 58.

4           59.    Pharmacare alleges that 21 CFR 201.100(c)(2) and 201.115 speak for  
5 themselves, and to the extent that the allegations in paragraph 59 vary therewith,  
6 Pharmacare denies such allegations. Pharmacare denies the remainder of the allegations  
7 in paragraph 58.

8           60.    Pharmacare alleges that 21 U.S.C. § 331(a) speaks for itself, and to the  
9 extent the allegation in paragraph 59 varies therewith, Pharmacare denies such allegation.

10          61.    Pharmacare alleges that its product labels, website and marketing materials  
11 speak for themselves, and to the extent that the allegation in paragraph 61 varies  
12 therewith, Pharmacare denies such allegation.

13          62.    Pharmacare alleges that its product packaging and labels speak for  
14 themselves, and to the extent that the allegation in paragraph 62 varies therewith,  
15 Pharmacare denies such allegation.

16          63.    Pharmacare alleges that 21 U.S.C. § 343(r)(1)(A) speaks for itself, and to the  
17 extent that the allegation in paragraph 63 varies therewith, Pharmacare denies such  
18 allegation. Pharmacare denies the remainder of the allegation in paragraph 63.

19          64.    Pharmacare alleges that 21 CFR 101.54(g) speaks for itself, and to the extent  
20 that the allegation in paragraph 64 varies therewith, Pharmacare denies such allegation.  
21 Pharmacare denies the remainder of the allegation in paragraph 64.

22          65.    Pharmacare alleges that 21 CFR 101.54(g)(1) speaks for itself, and to the  
23 extent that the allegation in paragraph 64 varies therewith, Pharmacare denies such  
24 allegation.

25          66.    Pharmacare alleges that its product labels speaks for themselves, and to the  
26 extent that the allegation in paragraph 66 varies therewith, Pharmacare denies such  
27 allegation.  
28

1           67.    Pharmacare alleges that its website speaks for itself, and to the extent that  
2 the allegations in paragraph 67 vary therewith, Pharmacare denies such allegation.  
3 Pharmacare denies the remainder of the allegations in paragraph 67.

4           68.    Pharmacare denies the allegation in paragraph 68.

5           69.    Pharmacare alleges that 21 CFR 101.54(g)(4) speaks for itself, and to the  
6 extent that the allegation in paragraph 64 varies therewith, Pharmacare denies such  
7 allegation. Pharmacare denies the remainder of the allegations in paragraph 69.

8           70.    Pharmacare alleges that its product labels speak for themselves, and to the  
9 extent that the allegation in paragraph 70 varies therewith, Pharmacare denies such  
10 allegation. Pharmacare denies the remainder of the allegation in paragraph 70.

11          71.    Pharmacare alleges that its product packaging speaks for itself, and to the  
12 extent that the allegations in paragraph 71 vary therewith, Pharmacare denies such  
13 allegations. Pharmacare denies the remainder of the allegations in paragraph 71.

14          72.    Pharmacare denies the allegations in paragraph 72.

15          73.    Pharmacare denies the allegations in paragraph 73.

16          74.    Pharmacare denies the allegations in paragraph 74.

17          75.    Pharmacare denies the allegation in paragraph 75.

18          76.    Pharmacare denies the allegation in paragraph 76.

19          77.    Pharmacare denies the allegation in paragraph 77.

20          78.    Pharmacare denies the allegation in paragraph 78.

21          79.    Pharmacare denies the allegation in paragraph 79.

22                   **FACTUAL ALLEGATIONS SPECIFIC TO PLAINTIFFS**

23 **Plaintiff Montiqueno Corbett**

24           80.    Pharmacare lacks knowledge or information sufficient to form a belief about  
25 the truth of the allegations in paragraph 80.

26           81.    Pharmacare alleges that its product packaging and labeling speak for  
27 themselves, and to the extent the allegations in paragraph 81 vary therewith, Pharmacare  
28 denies such allegations. Pharmacare further alleges that the Amazon website and Google

1 advertisements speak for themselves, and to the extent that the allegations in paragraph  
2 81 vary therewith, Pharmacare denies such allegations. Pharmacare denies that it made  
3 any materially misleading representations on its product packaging, labels, website or  
4 marketing materials. Pharmacare lacks information sufficient to admit or deny the  
5 remainder of the allegations in paragraph 81.

6 82. Pharmacare lacks knowledge or information sufficient to form a belief about  
7 the truth of the allegations in paragraph 82.

8 83. Pharmacare lacks knowledge or information sufficient to form a belief about  
9 the truth of the allegations in paragraph 83.

10 84. Pharmacare denies that it made any materially misleading representations  
11 regarding the elderberry ingredient in its products. Pharmacare lacks information  
12 sufficient to admit or deny the remainder of the allegations in paragraph 81.

13 85. Pharmacare denies the allegation in paragraph 85.

14 86. Pharmacare denies the allegation in paragraph 86.

15 87. Pharmacare denies the allegations in paragraph 87.

16 **Plaintiff Damaris Luciano**

17 88. Pharmacare lacks knowledge or information sufficient to form a belief about  
18 the truth of the allegations in paragraph 88.

19 89. Pharmacare alleges that its product labels, website and marketing materials  
20 speak for themselves, and to the extent that the allegations in paragraph 89 vary  
21 therewith, Pharmacare denies such allegations. Pharmacare denies the remainder of the  
22 allegations in paragraph 89.

23 90. Pharmacare lacks knowledge or information sufficient to form a belief about  
24 the truth of the allegations in paragraph 90.

25 91. Pharmacare lacks knowledge or information sufficient to form a belief about  
26 the truth of the allegations in paragraph 91.

1           92.    Pharmacare denies that it made any materially misleading representations  
2 regarding the elderberry ingredient in its products. Pharmacare lacks information  
3 sufficient to admit or deny the remainder of the allegations in paragraph 92.

4           93.    Pharmacare denies the allegation in paragraph 93.

5           94.    Pharmacare denies the allegation in paragraph 94.

6           95.    Pharmacare denies the allegations in paragraph 95.

7 **Plaintiff Rob Dobbs**

8           96.    Pharmacare lacks knowledge or information sufficient to form a belief about  
9 the truth of the allegations in paragraph 96.

10          97.    Pharmacare alleges that its product labels, packaging and website speak for  
11 themselves, and to the extent the allegations in paragraph 97 vary therewith, Pharmacare  
12 denies such allegations. Pharmacare further alleges that the Amazon website and Google  
13 advertisements speak for themselves, and to the extent that the allegations in paragraph  
14 97 vary therewith, Pharmacare denies such allegations. Pharmacare denies that it made  
15 any materially misleading representations on its product packaging, labels, website or  
16 marketing materials. Pharmacare lacks information sufficient to admit or deny the  
17 remainder of the allegations in paragraph 97.

18          98.    Pharmacare lacks knowledge or information sufficient to form a belief about  
19 the truth of the allegations in paragraph 99.

20          99.    Pharmacare lacks knowledge or information sufficient to form a belief about  
21 the truth of the allegations in paragraph 91.

22          100. Pharmacare denies that it made any materially misleading representations  
23 regarding the elderberry ingredient in its products. Pharmacare lacks information  
24 sufficient to admit or deny the remainder of the allegations in paragraph 100.

25          101. Pharmacare denies the allegation in paragraph 101.

26          102. Pharmacare denies the allegation in paragraph 102.

**CLASS ACTION ALLEGATIONS**

1  
2 103. Pharmacare admits that Plaintiffs purport to bring this action individually  
3 and as representatives of a purported national class, and purported California,  
4 Massachusetts and Missouri subclasses. Pharmacare denies that Plaintiffs can certify  
5 their defined classes, and that they can adequately and fairly represent any of their  
6 defined classes.

7 104. Pharmacare admits that Plaintiffs purport to exclude certain persons and  
8 entities from their defined classes.

9 105. Pharmacare denies the allegations in paragraph 105.

10 106. Pharmacare denies the allegations in paragraph 106.

11 107. Pharmacare denies the allegations in paragraph 107.

12 108. Pharmacare denies the allegations in paragraph 108.

13 109. Pharmacare denies the allegations in paragraph 109.

14 110. Pharmacare denies the allegations in paragraph 110.

15 111. Pharmacare denies the allegations in paragraph 111.

16 112. Pharmacare denies the allegations in paragraph 112.

17 113. Pharmacare denies the allegations in paragraph 113.

18 **CAUSES OF ACTION**

19 **COUNT I**

20 **California's Unfair Competition Law**  
21 **Cal. Bus. & Prof. Code § 17200 et seq. ("UCL")**  
**(On Behalf of the National Class and California Subclass)**

22 114. Pharmacare incorporates its introductory paragraphs and responses to the  
23 allegations contained in the preceding paragraphs as though set forth fully herein.

24 115. Pharmacare admits that Plaintiff Corbett purports to bring this claim  
25 individually and on behalf of a purported national class and California subclass.  
26 Pharmacare denies that Plaintiff Corbett can certify the defined classes, and that he can  
27 adequately and fairly represent a national class or California subclass.  
28

1 116. Pharmacare alleges that Cal. Bus. & Prof. Code §§ 17200 *et seq.* (“UCL”)  
2 speaks for itself, and to the extent the allegation in paragraph 116 varies therewith,  
3 Pharmacare denies such allegation.

4 117. Pharmacare denies the allegation in paragraph 117.

5 118. Pharmacare denies the allegations in paragraph 118.

6 119. Pharmacare denies the allegations in paragraph 119.

7 120. Pharmacare denies the allegations in paragraph 120.

8 121. Pharmacare denies the allegations in paragraph 121.

9 122. Pharmacare alleges that the UCL speaks for itself, and to the extent the  
10 allegation in paragraph 117 varies therewith, Pharmacare denies such allegation.

11 123. Pharmacare denies the allegations in paragraph 123.

12 124. Pharmacare denies the allegation in paragraph 124.

13 125. Pharmacare denies the allegations in paragraph 125.

14 126. Pharmacare denies the allegations in paragraph 126.

15 127. Pharmacare admits that Plaintiff Corbett seeks the relief set forth in  
16 paragraph 127 individually and on a class wide basis. Pharmacare denies Plaintiff  
17 Corbett or any proposed class is entitled to such relief.

18 128. Pharmacare admits that Plaintiff Corbett seeks the relief set forth in  
19 paragraph 128 individually and on a class wide basis. Pharmacare denies Plaintiff  
20 Corbett or any proposed class is entitled to such relief.

21 **COUNT II**

22 **California’s False Advertising Law**  
23 **Cal. Bus. & Prof. Code § 17500 (“FAL”)**  
24 **(On Behalf of the California Subclass)**

25 129. Pharmacare incorporates its introductory paragraphs and responses to the  
26 allegations contained in the preceding paragraphs as though set forth fully herein.

27 130. Pharmacare admits that Plaintiff Corbett purports to bring this claim  
28 individually and on behalf of a purported California subclass. Pharmacare denies that

1 Plaintiff Corbett can certify the defined classes, and that he can adequately and fairly  
2 represent a California subclass.

3 131. Pharmacare alleges that Cal. Bus. & Prof. Code §§ 17500 *et seq.* (“FAL”)   
4 speaks for itself, and to the extent the allegation in paragraph 131 varies therewith,   
5 Pharmacare denies such allegation.

6 132. Pharmacare alleges that the FAL speaks for itself, and to the extent the   
7 allegation in paragraph 132 varies therewith, Pharmacare denies such allegation.

8 133. Pharmacare denies the allegations in paragraph 133.

9 134. Pharmacare denies the allegations in paragraph 134.

10 135. Pharmacare denies the allegations in paragraph 135.

11 136. Pharmacare denies the allegations in paragraph 136.

12 137. Pharmacare denies the allegations in paragraph 137.

13 138. Pharmacare admits that Plaintiff Corbett seeks the relief set forth in   
14 paragraph 138 individually and on a class wide basis. Pharmacare denies Plaintiff   
15 Corbett or any proposed class is entitled to such relief.

16 **COUNT III**

17 **California’s Consumer Legal Remedies Acts**  
18 **Cal. Civ. Code § 1750 (“CLRA”)**  
19 **(On Behalf of the California Subclass)**

20 139. Pharmacare incorporates its introductory paragraphs and responses to the   
21 allegations contained in the preceding paragraphs as though set forth fully here.

22 140. Pharmacare admits that Plaintiff Corbett purports to bring this claim   
23 individually and on behalf of a purported California subclass. Pharmacare denies that   
24 Plaintiff Corbett can certify the defined classes, and that he can adequately and fairly   
25 represent a California subclass.

26 141. Pharmacare alleges that Cal. Civ. Code §§ 17500 *et seq.* (“CLRA”) speaks   
27 for itself, and to the extent the allegation in paragraph 141 varies therewith, Pharmacare   
28 denies such allegation.





1           166. Pharmacare admits that Plaintiff Dobbs purports to bring this claim  
2 individually and on behalf of a purported Missouri subclass. Pharmacare denies that  
3 Plaintiff Dobbs can certify the defined classes, and that he can adequately and fairly  
4 represent a Missouri subclass.

5           167. Pharmacare alleges that Mo. Ann. Stat. § 407.010 *et seq.* (“MMPA”) speaks  
6 for itself, and to the extent the allegations in paragraph 167 vary therewith, Pharmacare  
7 denies such allegations.

8           168. Pharmacare alleges that the MMPA speaks for itself, and to the extent the  
9 allegations in paragraph 168 vary therewith, Pharmacare denies such allegations.

10           169. Pharmacare alleges that the MMPA speaks for itself, and to the extent the  
11 allegations in paragraph 169 vary therewith, Pharmacare denies such allegations.

12           170. Pharmacare lacks knowledge or information sufficient to form a belief about  
13 the truth of the allegations in paragraph 170.

14           171. Pharmacare denies the allegations in paragraph 171.

15           172. Pharmacare alleges that the MMPA speaks for itself, and to the extent the  
16 allegations in paragraph 172 vary therewith, Pharmacare denies such allegations.

17           173. Pharmacare alleges that the MMPA speaks for itself, and to the extent the  
18 allegations in paragraph 173 vary therewith, Pharmacare denies such allegations.

19 Pharmacare further alleges that the case of *State ex rel. Danforth v. Independence Dodge,*  
20 *Inc.*, 494 S.W.2d 362, 368 (Mo. App. 1973) speaks for itself, and to the extent that the  
21 allegations in paragraph 173 vary therewith, Pharmacare denies such allegations.

22           174. Pharmacare denies the allegations in paragraph 174.

23           175. Pharmacare denies the allegations in paragraph 175.

24           176. Pharmacare denies the allegations in paragraph 176.

25           177. Pharmacare denies the allegations in paragraph 177.

**COUNT VI**

**Breach of Express Warranties  
(On Behalf of the National Class and Subclasses)**

1  
2  
3 178. Pharmacare incorporates its introductory paragraphs and responses to the  
4 allegations contained in the preceding paragraphs as though set forth fully here.

5 179. Pharmacare admits that Plaintiffs purport to bring this claim individually and  
6 on behalf of a purported National class and California, Massachusetts and Missouri  
7 subclasses. Pharmacare denies that Plaintiffs can certify the defined classes, and that  
8 they can adequately and fairly represent any purported class or subclass.

9 180. Pharmacare alleges that its product labels, website and marketing materials  
10 speak for themselves, and to the extent that the allegations in paragraph 6 vary therewith,  
11 Pharmacare denies such allegations. Pharmacare denies the remainder of the allegations  
12 in paragraph 6.

13 181. Pharmacare denies the allegations in paragraph 181.

14 182. Pharmacare denies the allegations in paragraph 182.

15 183. Pharmacare denies the allegations in paragraph 183.

16 184. Pharmacare denies the allegations in paragraph 184.

17 185. Pharmacare denies the allegations in paragraph 185.

18 186. Pharmacare denies the allegations in paragraph 186.

19 187. Pharmacare denies the allegations in paragraph 187.

**COUNT VII**

**Breach of Implied Warranty of Merchantability  
(On Behalf of the National Class and Subclasses)**

21 188. Pharmacare incorporates its introductory paragraphs and responses to the  
22 allegations contained in the preceding paragraphs as though set forth fully here.

23 189. Pharmacare admits that Plaintiffs purport to bring this claim individually and  
24 on behalf of a purported National class and California, Massachusetts and Missouri  
25 subclasses. Pharmacare denies that Plaintiffs can certify the defined classes, and that  
26 they can adequately and fairly represent any purported class or subclass.  
27  
28

1 190. Pharmacare denies the allegations in paragraph 190.

2 191. Pharmacare lacks knowledge or information sufficient to form a belief about  
3 the truth of the allegations in paragraph 191.

4 192. Pharmacare lacks knowledge or information sufficient to form a belief about  
5 the truth of the allegations in paragraph 192.

6 193. Pharmacare denies the allegations in paragraph 193.

7 194. Pharmacare denies the allegations in paragraph 194.

8 195. Pharmacare denies the allegations in paragraph 195.

9 196. Pharmacare denies the allegations in paragraph 196.

10 197. Pharmacare denies the allegations in paragraph 197.

11 198. Pharmacare denies the allegations in paragraph 198.

12 199. Pharmacare denies the allegations in paragraph 199.

13 **PRAYER FOR RELIEF**

14 These allegations constitute a prayer for relief requiring neither an admission nor a  
15 denial by Pharmacare. To the extent an answer is required, Pharmacare denies that  
16 Plaintiffs or any purported class member is entitled to any relief whatsoever.

17 **JURY DEMAND**

18 Pharmacare admits that Plaintiffs purport to demand a trial by jury on all issues so  
19 triable.

20 **AFFIRMATIVE DEFENSES**

21 Pharmacare alleges the following separate affirmative defenses, and in so doing, does  
22 not assume the burden to establish any fact or proposition necessary to that defense where  
23 that burden is properly imposed on Plaintiffs. All defenses are asserted as to Plaintiffs and,  
24 in the event that their action is permitted to proceed on a class basis, as to any other member  
25 of the purported class, or Plaintiffs.

1 **First Affirmative Defense**

2 **(Failure to State a Claim)**

3 Plaintiffs SAC, and each claim alleged therein, fails, in whole or in part, to state a  
4 claim upon which relief can be granted.

5 **Second Affirmative Defense**

6 **(Lack of Injury)**

7 Plaintiffs SAC, and each claim alleged therein, fails, in whole or in part, because  
8 Plaintiffs and other members of the purported classes have not sustained any injury or  
9 damages as a result of the conduct alleged.

10 **Third Affirmative Defense**

11 **(Lack of Privity)**

12 Plaintiffs SAC, and each claim alleged therein, fails, in whole or in part, because  
13 Plaintiffs and other members of the proposed classes were not in privity with Pharmicare.

14 **Fourth Affirmative Defense**

15 **(Preemption)**

16 The claims in the SAC are barred, in whole or in part, by the doctrine of federal  
17 preemption for the reasons set forth in Defendant's Motion to dismiss Plaintiffs' First  
18 Amended Complaint.

19 **Fifth Affirmative Defense**

20 **(Lack of Standing)**

21 Plaintiffs lack standing to assert the claims in the SAC and further lack standing to  
22 serve as representatives of the putative classes alleged in the SAC.

23 **Sixth Affirmative Defense**

24 **(Adequate Remedy at Law)**

25 The injury or damage suffered by Plaintiffs and the alleged Classes, if any, would  
26 be adequately compensated in an action at law for damages. Accordingly, Plaintiffs and  
27 the alleged Classes have a complete and adequate remedies at law and are not entitled to  
28 seek equitable relief.

1 **Seventh Affirmative Defense**

2 **(Primary Jurisdiction Doctrine)**

3 Plaintiffs' SAC should be dismissed pursuant to the Primary Jurisdiction Doctrine  
4 because Plaintiffs' claims raise issues that should be addressed in the first instance by the  
5 FDA.

6 **Eighth Affirmative Defense**

7 **(Puffery)**

8 Plaintiffs' claims are barred to the extent that any alleged deceptive statements  
9 constitute puffery, and no reasonable consumer would have reasonably relied on or  
10 misunderstood the representations on the Product's label, website or advertising.

11 **Ninth Affirmative Defense**

12 **(Failure to Mitigate)**

13 Plaintiffs are barred from claiming injury or damages, if any, because they failed to  
14 make reasonable efforts to mitigate such injury or damages by, for example, contacting  
15 Pharmacare for a refund since they claim to have been dissatisfied with the Product. Had  
16 they done so, their alleged injury or damages, if any, would have been prevented or reduced.

17 **Tenth Affirmative Defense**

18 **(Laches)**

19 Plaintiff's claims are barred, in whole or in part, under the equitable defense of  
20 laches.

21 **Eleventh Affirmative Defense**

22 **(Full Faith And Credit)**

23 To the extent Plaintiffs seek to apply California law to transactions that occurred  
24 outside of California, Plaintiffs' claims are barred, in whole or in part, by the Due Process  
25 Clause of the Fourteenth Amendment to the Constitution of the United States and the Full  
26 Faith and Credit Clause. Pursuant to *Mazza v. Am. Honda Motor Co., Inc.*, 666 F.3d 581  
27 (9th Cir. 2012), California law should not apply to transactions in other states by non-  
28 California residents.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**Twelfth Affirmative Defense**

**(Voluntary Payment Doctrine)**

Plaintiffs’ claims, and those of the purported class, are barred, in whole or in part, by the voluntary payment doctrine because Plaintiffs and the purported class members voluntarily paid for Defendants’ Products about which they now complain with full knowledge of the facts and circumstances pursuant to which such amounts were paid, including, for example, that the Products were not intended to diagnose, treat cure or prevent any disease.

**Thirteenth Affirmative Defense**

**(Punitive Damages Barred by Law)**

To the extent Plaintiffs seek punitive damages for an alleged act or omission of Pharmacare, any award of punitive damages is barred under the relevant state law and by state and federal constitutional principles, including but not limited to Article I, section 10, Article IV, section 2, and the First, Fifth, Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States and Article I, section 7, 9, 15, and 17, and Article IV, section 16, of the Constitution of the State of California.

**Fourteenth Affirmative Defense**

**(Statute of Limitations)**

Plaintiffs’ claims are barred, in whole or in part, to the extent they go beyond the applicable statute of limitations, including but not limited to California Civil Code § 1783 (three-year statute of limitations for CLRA claims).

DATED: December 13, 2021

SEYFARTH SHAW LLP

By: /s/ Aaron Belzer

Aaron Belzer  
Attorneys for Defendant

77595933v.2