

# Class Action Notice

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*Corbett and Dobbs v. Pharmicare U.S., Inc.,*

Case No. 21cv137-JES (AHG)

United States District Court for the Southern District of California

*A U.S. District Court authorized this Notice. This is not a Solicitation from a lawyer.*

## **If you were in California or Missouri and purchased certain Sambucol Black Elderberry Dietary Supplements, a class action lawsuit may affect your rights.**

California and Missouri consumers who, while in California or Missouri, purchased certain Sambucol Black Elderberry Dietary Supplements sued Pharmicare U.S., Inc. (“Defendant”), alleging that Defendant violates California and Missouri consumer protection statutes and breaches express and implied warranties by selling certain Sambucol Dietary Supplements without disclosing on the product label or packaging that they contain a new dietary ingredient that has not been approved by the federal Food and Drug Administration (the “NDI Claim”). Dietary supplements are regulated under the Federal Food, Drug, and Cosmetic Act (“FDCA”). The FDCA defines a “dietary supplement” as a “product (other than tobacco) intended to supplement the diet” that contains one or more of the following: (1) vitamins; (2) minerals; (3) herbs or other botanicals; (4) an amino acid; (5) a supplement meant to increase total dietary intake; or (6) a concentrate, metabolite, constituent, extract, or combination of any of the listed ingredients.” 21 U.S.C. § 321(ff)(1). The FDCA does not require FDA approval of dietary supplements before they are sold. However, if a manufacturer wants to market dietary supplements that contain a dietary ingredient that were not marketed in the United States as a dietary supplement before October 15, 1994, they must notify the Food and Drug Administration (“FDA”) about these “new dietary ingredients” before marketing their products. 21 U.S.C. § 350b. But if the “new dietary ingredient” has been present in the global food supply as an ingredient in conventional food, without chemical alteration, no notification is required. *Ibid.* Failure to notify the FDA of a “new dietary ingredient” may result in the FDA deeming any dietary supplement containing that ingredient to be adulterated under the FDCA. *Ibid.*

In their lawsuit, Plaintiffs alleged that the elderberry extract in Defendant’s Sambucol Dietary Supplements is a “new dietary ingredient” requiring FDA notification, which Defendant failed to provide to the FDA. Plaintiffs claim that by not disclosing this on its product’s labels, Defendant violates California and Missouri consumer protection statutes, breaches its express warranty that the Sambucol Dietary Supplements are a “dietary supplement,” and breaches implied warranties of merchantability.

Additionally, California consumers allege that Defendant violates California consumer protection statutes and breaches express and implied warranties through the use of labeling claims that falsely or deceptively imply that certain Sambucol Dietary Supplements can mitigate or prevent disease, when they cannot (the “Implied Disease Claim”). Under the FDCA, dietary

supplement labels or labeling cannot contain statements expressly or implicitly claiming to diagnose, mitigate, treat, cure or prevent disease. 21 U.S.C. 343(r)(6). “For purposes of 21 U.S.C. 343(r)(6), a ‘disease’ is damage to an organ, part, structure, or system of the body such that it does not function properly (e.g., cardiovascular disease), or a state of health leading to such dysfunctioning (e.g., hypertension) ....” 21 C.F.R. § 101.93(g). Plaintiffs allege that the statements “supports immunity,” “scientifically tested,” and “virologist developed,” appearing on the labels of certain Sambucol Dietary Supplements, when considered collectively, violate the FDCA and falsely and deceptively imply that these products can mitigate or prevent disease, when they cannot, in violation of California’s Unfair Competition Law, False Advertising Law and Consumer Legal Remedies Act, and in breach of express and implied warranties.

The lawsuit seeks restitution or damages (*i.e.*, money) for all qualifying California and Missouri consumers who purchased the Sambucol Dietary Supplements.

Defendant denies all of the claims and allegations made in the lawsuit and the Court has yet to decide the merits of the parties’ claims. The Court has not decided whether Defendant has in fact violated the law. The sole purpose of this Notice is to inform you of the lawsuit so that you can make an informed decision as to whether you should participate in or opt out of this Class Action. There is no money available now and no guarantee that there will be.

The Honorable James E. Simmons, Jr., United States District Court Judge for the Southern District of California, has approved Rachel Soffin, Nick Suciu III, and Trenton R. Kashima, of Milberg Coleman Bryson Phillips Grossman PLLC as counsel for the following Classes:

- **California NDI Claim Class:** All persons who, from January 21, 2017 to March 29, 2024, while in California, purchased Defendant’s Sambucol Black Elderberry Original Syrup, Sambucol Black Elderberry Advanced Immune Syrup, Sambucol Black Elderberry Sugar Free Syrup, Sambucol Black Elderberry Syrup for Kids, Sambucol Black Elderberry Gummies, Sambucol Black Elderberry Gummies for Kids, Sambucol Black Elderberry Advanced Immune Capsules, Sambucol Black Elderberry Effervescent Tablets, Sambucol Black Elderberry Chewable Tablets, Sambucol Black Elderberry Pastilles (Throat Lozenges), Sambucol Black Elderberry Daily Immune Drink Powder, and Sambucol Black Elderberry Infant Drops for personal or household use and not for resale.
- **California Implied Disease Claim Class:** All persons who, from January 21, 2017 to March 29, 2024, while in California, purchased Defendant’s Sambucol Black Elderberry Original Syrup (only 4 oz and 7.8 oz sizes), Sambucol Black Elderberry Sugar Free, Sambucol Black Elderberry Syrup for Kids, Sambucol Black Elderberry Effervescent Tablets, Sambucol Black Elderberry Chewable, Sambucol Black Elderberry Pastilles, Sambucol Black Elderberry Daily Immune Drink Powder, and Sambucol Black Elderberry Advanced Immune Syrup for personal or household use and not for resale.
- **Missouri NDI Claim Class:** All persons who, from January 21, 2016 to March 29, 2024, while in Missouri, purchased Defendant’s Sambucol Black Elderberry Original Syrup, Sambucol Black Elderberry Advanced Immune Syrup, Sambucol Black Elderberry Sugar Free Syrup, Sambucol Black Elderberry Syrup for Kids, Sambucol Black Elderberry Gummies, Sambucol Black Elderberry Gummies for Kids, Sambucol Black Elderberry Advanced Immune Capsules, Sambucol Black Elderberry Effervescent Tablets, Sambucol Black Elderberry Chewable Tablets, Sambucol Black Elderberry Pastilles (Throat Lozenges), Sambucol Black

Elderberry Daily Immune Drink Powder, and Sambucol Black Elderberry Infant Drops for personal or household use and not for resale.

The Court has not decided the merits of the claims in this case and a trial has not been scheduled. There is no guarantee of success and the form and type of relief available to the members of the class, if any, remains to be decided by the Court. However, your rights may be affected by the action, and you now have a choice to make.

**YOUR LEGAL RIGHTS AND OPTIONS IN THIS LAWSUIT:**

**DO NOTHING**

Stay in this lawsuit and await the outcome. You share in possible benefits and give up right(s) to sue. By doing nothing, you retain the possibility of receiving a partial refund for the relevant Sambucol Black Elderberry Dietary Supplements that you purchased within the above stated time period or such other benefits that may come from a trial or a settlement but you will be bound by the decisions of the Court and give up your individual right to sue on your own about the same legal claims in this lawsuit.

**ASK TO BE EXCLUDED**

**If you meet the criteria for class membership but ask to be excluded, you will** receive no benefit(s), if any, from it. You will retain the right to proceed with your individual lawsuit by retaining your own lawyer. If you ask to be excluded and money or benefits are later awarded, you will not share in the money and/or benefits. However, you retain any right(s) to sue on your behalf about the same legal claims as in this lawsuit.

This notice explains your options. **To be excluded from this case, you must act by October 6, 2024.**

QUESTIONS OR COMMENTS? CALL 1-888-871-4823 TOLL FREE OR EMAIL INFO@ELDERBERRYCLASSACTION.COM. ADDITIONAL INFORMATION CAN BE FOUND AT WWW.ELDERBERRYCLASSACTION.COM.

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## BASIC INFORMATION

### 1. Why was this notice issued?

A Court has “certified” that this case can proceed as a class action lawsuit. If you purchased certain Sambucol Black Elderberry Dietary Supplements you may be included in the class action and have legal rights and options prior to the Court deciding whether the claims being made on your behalf will succeed or fail. This notice explains the lawsuit, who is affected, and all of your options.

Judge James E. Simmons Jr. of the United States District Court for the Southern District of California is currently overseeing this case. The case is known as *Corbett and Dobbs v. Pharmicare U.S., Inc.*, Case No. 21cv137-JES (AHG). The consumers who sued (Montiqueno Corbett and Rob Dobbs) are called the Class Representatives or Plaintiffs. Pharmicare U.S., Inc., sells certain dietary supplements under the brand name Sambucol and is called the Defendant.

### 2. What is a class action?

In a class action, one or more people sue on behalf of all persons who have substantially similar claims. Together, these persons are called a Class or Class Members. One court resolves the issues for all Class Members, except those who chose to exclude themselves from the Class.

### 3. Why is this lawsuit a class action?

The Court decided that certain claims in this lawsuit could move toward trial as a class action because the Class Members share common legal and factual issues. The Court determined that those common issues will drive resolution of the litigation for all Class Members because the Plaintiffs’ claims are typical of the other Class Members. The Court analyzed the Plaintiffs and their lawyers for conflicts of interest and capability before determining that they will fairly represent your interests. The case also qualified to proceed as a class action because thousands of consumers purchased the Sambucol Black Elderberry Dietary Supplements that make the same alleged false and deceptive representations that are key to the case.

More information about why the Court is allowing this lawsuit to proceed as a class action can be found in the *Order Granting Motion for Class Certification*, available at [www.ElderberryClassAction.com/Home/Documents](http://www.ElderberryClassAction.com/Home/Documents).

## THE CLAIMS IN THE LAWSUIT

### 4. What does the lawsuit complain about?

Plaintiffs rely on two underlying theories in their complaint. First, Plaintiffs on behalf of California and Missouri consumers who purchased certain Sambucol Black Elderberry Dietary Supplements sued Pharmicare U.S., Inc. (“Defendant”), alleging that Defendant violates California and Missouri consumer protection statutes and breaches express and implied warranties by selling certain Sambucol Dietary Supplements without disclosing on the product label or packaging that they contain a new dietary ingredient that has not been approved by the federal Food and Drug Administration (the “NDI Claim”). Dietary supplements are regulated under the Federal Food, Drug, and Cosmetic Act (“FDCA”). The FDCA defines a “dietary supplement” as a “product (other than tobacco) intended to supplement the diet” that contains one or more of the following: (1) vitamins; (2) minerals; (3) herbs or other botanicals; (4) an amino acid; (5) a

supplement meant to increase total dietary intake; or (6) a concentrate, metabolite, constituent, extract, or combination of any of the listed ingredients.” 21 U.S.C. § 321(ff)(1). The FDCA does not require FDA approval of dietary supplements before they are sold. However, if a manufacturer wants to market dietary supplements that contain a dietary ingredient that were not marketed in the United States as a dietary supplement before October 15, 1994, they must notify the Food and Drug Administration (“FDA”) about these “new dietary ingredients” before marketing their products. 21 U.S.C. § 350b. But if the “new dietary ingredient” has been present in the global food supply as an ingredient in conventional food, without chemical alteration, no notification is required. *Ibid.* Failure to notify the FDA of a “new dietary ingredient” may result in the FDA deeming any dietary supplement containing that ingredient to be adulterated under the FDCA. *Ibid.*

In their lawsuit, Plaintiffs alleged that the elderberry extract in Defendant’s Sambucol Dietary Supplements is a “new dietary ingredient” requiring FDA notification, which Defendant failed to provide. Plaintiffs claim that by not disclosing this on its product’s labels, Defendant violates California’s Unfair Competition Law (“UCL”), Cal. Bus. & Prof. Code § 17200 *et seq.*, (“UCL”), California’s False Advertising Law, Cal. Bus. & Prof. Code § 17500 *et seq.* (“FAL”); (3) California’s Consumer Legal Remedies Act, Cal. Civ. Code § 1750 *et seq.* (“CLRA”); and (4) Missouri’s Merchandising Practices Act (“MPPA”), Mo. Ann. Stat. § 407.010 *et seq.* Plaintiffs further allege that Defendant breached express warranties by describing its Sambucol Dietary Supplements as “dietary supplements” when, according to Plaintiffs they are not, and breached the implied warranty of merchantability because the Sambucol Dietary Supplements contain an unreported “new dietary ingredient.”

Second, Plaintiffs on behalf of California consumers allege that Defendant violates California consumer protection statutes and breaches express and implied warranties through the use of labeling and packaging containing statements that falsely or deceptively imply that certain Sambucol Dietary Supplements can mitigate or prevent disease, when they cannot (the “Implied Disease Claim”). Under the FDCA, dietary supplement labels or labeling cannot contain statements expressly or implicitly claiming to diagnose, mitigate, treat, cure or prevent disease. 21 U.S.C. 343(r)(6). “For purposes of 21 U.S.C. 343(r)(6), a “disease” is damage to an organ, part, structure, or system of the body such that it does not function properly (e.g., cardiovascular disease), or a state of health leading to such dysfunctioning (e.g., hypertension) ....” 21 C.F.R. § 101.93(g). Plaintiffs allege that the statements “supports immunity,” “scientifically tested,” and “virologist developed,” appearing on the labels of certain Sambucol Dietary Supplements, when considered collectively, violate the FDCA and falsely and deceptively imply that these products can mitigate or prevent disease, when they cannot, in violation of California’s UCL, FAL and CLRA, and in breach of its express and implied warranties. Under these California and Missouri claims, Class Members can seek restitution or damages.

The Court has certified Plaintiffs’ claims for class litigation. This allows the Plaintiffs to represent the Classes identified below for asserting these legal claims.

A copy of *Plaintiffs’ Second Amended Complaint* can be found at [www.ElderberryClassAction.com/Home/Documents](http://www.ElderberryClassAction.com/Home/Documents).

## **5. How does Defendant answer?**

Defendant denies all of the claims and allegations made by Plaintiffs. Specifically, Defendant denies that they have made any misrepresentations that are false or misleading or that

have resulted in damages to consumers. Defendant further denies that the elderberry extract in its Sambucol Dietary Supplements is an NDI and further contends that even if it was an NDI, no notification to the FDA was required because it is not chemically different from elderberry juice or other elderberry extracts that have been present in the global food supply as an article of food or an ingredient in conventional food. Defendant further claims that the FDCA expressly and implicitly preempts Plaintiffs' NDI Claim. Defendant also denies that any statement appearing on the labels or packaging of its Sambucol Dietary Supplements, whether considered collectively or individually, make an unambiguous, implied disease claim and further contends that its express disclaimer of any implied disease claims appearing on the labeling and packaging of its products dispels any alleged consumer deception or confusion, as a matter of law.

A copy of *Defendant's Answer to Plaintiffs' Second Amended Complaint* can be found at [www.ElderberryClassAction.com/Home/Documents](http://www.ElderberryClassAction.com/Home/Documents).

#### **6. Has the Court decided who is right?**

No. The Court has not decided whether the Plaintiffs or Defendant are legally correct. By allowing the Class and ordering that this Notice be provided, the Court is not suggesting the Plaintiffs will win or lose this case through trial. Plaintiffs must prove their case at a trial which has not been scheduled.

#### **7. What are the Plaintiffs/Class Representatives asking for?**

The Plaintiffs are seeking to recover money for the Classes. Specifically: (1) restitution or damages in the amount of price premium paid by Class Members due to the NDI and Implied Disease Claims; (2) interest on the amount Class members are awarded; and (3) reasonable attorneys' fees, costs, and expenses as approved by the Court.

#### **8. Is there any money available now?**

No. There is no money or benefits available now because the Court has not yet decided whether Defendant violated the law and the Plaintiffs and Defendant have not settled the case. There is no guarantee that any money will ever be awarded or obtained. If they are, you will be notified about how to ask for your share (unless you ask to be excluded from the Classes).

### **WHO IS IN THE CLASS**

#### **9. How do I know if I am part of this?**

The Court decided to certify the following Classes. If you are included in one of the following Classes, you are a Class member in this case.

- **California NDI Claim Class:** All persons who, from January 21, 2017 to March 29, 2024, while in California, purchased Defendant's Sambucol Black Elderberry Original Syrup, Sambucol Black Elderberry Advanced Immune Syrup, Sambucol Black Elderberry Sugar Free Syrup, Sambucol Black Elderberry Syrup for Kids, Sambucol Black Elderberry Gummies, Sambucol Black Elderberry Gummies for Kids, Sambucol Black Elderberry Advanced Immune Capsules, Sambucol Black Elderberry Effervescent Tablets, Sambucol Black Elderberry Chewable Tablets, Sambucol Black Elderberry Pastilles (Throat Lozenges), Sambucol Black Elderberry Daily Immune Drink Powder, and Sambucol Black Elderberry Infant Drops for personal or household use and not for resale.

- **California Disease Claim Class:** All persons who, from January 21, 2017 to March 29, 2024, while in California, purchased Defendant’s Sambucol Black Elderberry Original Syrup (only 4 oz and 7.8 oz sizes), Sambucol Black Elderberry Sugar Free, Sambucol Black Elderberry Syrup for Kids, Sambucol Black Elderberry Effervescent Tablets, Sambucol Black Elderberry Chewable, Sambucol Black Elderberry Pastilles, Sambucol Black Elderberry Daily Immune Drink Powder, and Sambucol Black Elderberry Advanced Immune Syrup for personal or household use and not for resale.
- **Missouri NDI Claim Class:** All persons who, from January 21, 2016 to March 29, 2024, while in Missouri, purchased Defendant’s Sambucol Black Elderberry Original Syrup, Sambucol Black Elderberry Advanced Immune Syrup, Sambucol Black Elderberry Sugar Free Syrup, Sambucol Black Elderberry Syrup for Kids, Sambucol Black Elderberry Gummies, Sambucol Black Elderberry Gummies for Kids, Sambucol Black Elderberry Advanced Immune Capsules, Sambucol Black Elderberry Effervescent Tablets, Sambucol Black Elderberry Chewable Tablets, Sambucol Black Elderberry Pastilles (Throat Lozenges), Sambucol Black Elderberry Daily Immune Drink Powder, and Sambucol Black Elderberry Infant Drops for personal or household use and not for resale.

**10. I’m still not sure if I am included.**

If you are still not sure whether you are included, you can call (toll free) 1-888-871-4823, or write to Elderberry Class Action Notice Processor, P.O. Box 2700, Portland, OR 97208-2700 or email [info@ElderberryClassAction.com](mailto:info@ElderberryClassAction.com) for more information.

## **YOUR RIGHTS AND OPTIONS**

You have to decide whether to stay in the Class or whether to exclude yourself from it.

**11. What happens if I do nothing at all?**

If you fall within the class definition set forth above, you are a class member. If the Plaintiffs obtain money or benefits from Defendant—either as a result of a trial or a settlement—you may be eligible to receive a share. However, you will be legally bound by all of the decisions that the Court makes and regardless of whether the Plaintiffs win or lose the case, you will not be able to sue, or continue to sue, Defendant for the same legal claims that were made, or could have been made, in this lawsuit ever again.

**12. What happens if I exclude myself?**

If you meet the criteria for Class Membership but exclude yourself from the Class and the Class receives money or benefits—either as a result of a trial or a settlement—you will not get any of that money or those benefits. However, you will not be legally bound by any of the Court’s orders or judgments, and you will be allowed to sue, or continue to sue, Defendant on your own behalf about the same legal claims that are involved in this case, now or in the future.

If you do pursue your own lawsuit after you exclude yourself, you may need to hire and pay your own lawyer for that case, and you’ll have to prove your claims without the benefit of the work performed by Class Counsel in this case. Any separate litigation you choose to bring may be subject to a statute of limitations, or other time-sensitive requirements.

**13. How do I ask to be excluded?**

To exclude yourself from the Class, you must send an email to **OR** mail a letter stating that you want to be excluded from the Class in *Corbett and Dobbs v. Pharmicare U.S., Inc.*, Case No. 21cv137-JES (AHG). Your e-mail or letter also must include your name, address, telephone number, email address, and signature. You must send your e-mail or mail your letter postmarked by **October 6, 2024**, Letters must be sent to: Elderberry Class Action Notice Processor, P.O. Box 2700, Portland, OR 97208-2700. Alternatively, you can email your letter to [info@ElderberryClassAction.com](mailto:info@ElderberryClassAction.com).

A sample exclusion form is available at [www.ElderberryClassAction.com/Home/Documents](http://www.ElderberryClassAction.com/Home/Documents).

**THE LAWYERS REPRESENTING YOU**

**14. Do I have a lawyer in this case?**

The Court appointed Rachel Soffin, Nick Suciu III, and Trenton R. Kashima, of Milberg Coleman Bryson Phillips Grossman PLLC to represent you as “Class Counsel.” More information about Class Counsel is available on this website. Class Counsel are experienced in handling consumer class action cases. Complete contact information for Class Counsel is:

MILBERG COLEMAN BRYSON  
PHILLIPS GROSSMAN PLLC  
800 South Gay Street, Suite 1100,  
Knoxville, TN 37929  
(866) 252-0878  
[ElderberryClassNotice@milberg.com](mailto:ElderberryClassNotice@milberg.com)

**15. How will the lawyers be paid?**

If Class Counsel obtains money or benefits for the Class, they will ask the Court for an award of attorneys’ fees, costs, and expenses. You don’t have to pay any of these fees and expenses. If the Court grants Class Counsel’s request, the fees and expenses would be deducted from the money obtained for the Class or paid separately by Defendant.

**16. Should I get my own lawyer?**

You do not need to hire your own lawyer because Class Counsel is working on your behalf. If you want your own lawyer, you will have to pay for that lawyer. You can ask him or her to appear in Court for you if you want someone other than Class Counsel to speak for you in this case. You may also retain and pay for counsel of your choice to enter an appearance in the lawsuit or to intervene as an individual plaintiff, although doing so is unnecessary.

**THE TRIAL**

**17. How and when will the Court decide who is right?**

If the case is not dismissed or settled, the Plaintiffs will have to prove their claims at a trial, at a time and place to be set. The trial may be announced or moved to a different date or time without additional notice, so it is a good idea to check this website. During the trial, the Judge will hear the evidence so that a decision can be made about whether the Plaintiffs or Defendant are

correct about the claims of the lawsuit. There is no guarantee that the Plaintiffs will win or that they will be awarded any money or benefits for the Class.

**18. Do I have to come to the trial?**

No, you will not need to attend the trial unless you choose to do so or you are asked to attend by the Court. Class Counsel will present the case for the Plaintiffs and the Class and the lawyers for Defendant will present their defenses. You and/or your own lawyer are welcome to attend the trial, at your own expense.

**19. Will I get money after the trial or any settlement?**

If the Plaintiffs obtain money or benefits as a result of the trial or a settlement, you will be notified about how to request a share of the proceeds or your other options at that time. Important information about the case will be posted on this website as it becomes available.

## **GETTING MORE INFORMATION**

**20. Are more details available?**

The following documents related to the case can be found on this website including: (1) the notice of Ruling on Plaintiffs Motion for Class Certification; (2) Plaintiffs' Second Amended Class Action Complaint; and (3) Defendants' Answer to the Second Amended Complaint.

You may also call 1-888-871-4823 for more information or write to Elderberry Class Action Notice Processor, P.O. Box 2700, Portland, OR 97208-2700 or email [info@ElderberryClassAction.com](mailto:info@ElderberryClassAction.com). Additionally, you can access the court records regarding this case from the Court's Case Management/Electronic Case Filing System (CM/ECF) at <https://www.casd.uscourts.gov/cmecf.aspx>.

Class Counsel also welcomes the opportunity to elaborate on the claims in the lawsuit, explain how it is proceeding, and learn more about Class member experiences. You can contact Class Counsel at (866) 252-0878 or email [ElderberryClassNotice@milberg.com](mailto:ElderberryClassNotice@milberg.com).