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10 **UNITED STATES DISTRICT COURT**  
11 **FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

12 MONTIQUENO CORBETT,  
13 DAMARIS LUCIANO, and ROB  
14 DOBBS individually and on behalf of  
15 all others similarly situated,

16 Plaintiffs,

17 v.

18 PHARMACARE U.S., INC., a  
19 Delaware Corporation,

20 Defendant.

Civil Action No.:  
3:21-cv-00137-GPC-AGS

**CLASS ACTION COMPLAINT**

**JURY TRIAL DEMANDED**

21 **SECOND AMENDED CLASS ACTION COMPLAINT**

22 Plaintiffs Montiqueno Corbett, Damaris Luciano, and Rob Dobbs  
23 (collectively “Plaintiffs”), through their undersigned attorneys, file this Second  
24 Amended Class Action Complaint against Defendant PharmaCare U.S., Inc.  
25 (“Defendant”), individually and on behalf of all others similarly situated, and  
26 complain and allege upon personal knowledge as to themselves and their own acts  
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1 and experiences and, as to all other matters, upon information and belief, including  
2 investigation conducted by their attorneys:

3 **NATURE OF THE ACTION**  
4

5 1. This is a civil class action brought individually by Plaintiffs on behalf  
6 of consumers who purchased Defendant PharmaCare’s Sambucol Black Elderberry  
7 Original Syrup, Sambucol Black Elderberry Advanced Immune Syrup, Sambucol  
8 Black Elderberry Sugar Free Syrup, Sambucol Black Elderberry Syrup for Kids,  
9 Sambucol Black Elderberry Gummies, Sambucol Black Elderberry Gummies for  
10 Kids, Sambucol Black Elderberry Advanced Immune Capsules, Sambucol Black  
11 Elderberry Effervescent Tablets, Sambucol Black Elderberry Chewable Tablets,  
12 Sambucol Black Elderberry Pastilles (Throat Lozenges), Sambucol Black  
13 Elderberry Daily Immune Drink Powder, and Sambucol Black Elderberry Infant  
14 Drops (collectively the “Elderberry Products” or the “Products”).  
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18 2. Elderberry, which is derived from a flowering plant called *Sambucus*,  
19 has become a popular dietary supplement in recent years.  
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21 3. The increased popularity of “natural remedies” drives sales of  
22 elderberry products. According to a report published by the American Botanical  
23 Council in 2019, sales of elderberry supplements more than doubled in the United  
24 States between 2017 and 2018 to a total of nearly \$51 million. Between January and  
25 March of 2018, elderberry supplement sales were more than \$100 million dollars in  
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1 the US alone. Elderberry sales in the first half of 2020 grew by triple digits compared  
2 to sales during the same period in 2019, showing the greatest growth in the  
3 mainstream dietary supplement market, where it is currently the third top-selling  
4 herbal ingredient. The mainstream dietary supplement market includes grocery  
5 stores, drug stores, and mass merchandisers such as club, dollar, and military stores.<sup>1</sup>  
6

7  
8 4. According to IRI, a market research firm that tracks retail sales of  
9 supplements, in March 2020, sales of elderberry supplements increased by 415%  
10 over the prior year as consumers sought products that might offer protection from  
11 the novel coronavirus.<sup>2</sup> The “immune support” dietary supplement market,  
12 including supplements containing elderberry, is thus an extraordinarily fast-growing  
13 segment of the dietary supplement market, in part due to the Coronavirus Pandemic.  
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15  
16 5. With hundreds of elderberry supplement options available for  
17 consumers to purchase, in order to stand out from the competition, Defendant  
18 promotes its Elderberry Products as “the most trusted brand sold worldwide” and  
19 prominently displays a badge on its website proclaiming that its Products are the  
20 “No. 1 Best Selling Black Elderberry in the US.”<sup>3</sup>  
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23 <sup>1</sup> <https://www.globenewswire.com/news-release/2020/08/31/2086400/0/en/US-Herbal-Supplement-Sales-Increase-by-8-6-in-2019-Record-Breaking-Sales-Predicted-for-2020.html>.

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25 <sup>2</sup> <https://www.nytimes.com/2020/03/23/well/live/coronavirus-supplements-herbs-vitamins-colds-flu.html>.

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27 <sup>3</sup> <https://sambucolusa.com/>.

1           6.       On the labels of its Elderberry Products, as well as on its website and  
2 in other marketing directed at consumers, Defendant states: “*Developed by a world*  
3 *renowned virologist*, Sambucol is the unique black elderberry extract that has been  
4 used in scientific studies. By using a proprietary method of extraction, *only*  
5 *Sambucol can guarantee* consistent, immune supporting properties in every  
6 serving.” (Emphasis added.). Additionally, Defendant promises consumers on its  
7 packaging: “Sambucol® Black Elderberry extract conveniently arms you with some  
8 of the best protection nature has to offer.” Defendant also represents that the  
9 Elderberry Products help to protect consumers from catching a virus or other illness,  
10 or to fight off a virus or other illness: “Stress can wreak havoc on our immune  
11 system. This leaves us open to the possibility of more frequently catching a virus or  
12 other illness. Sambucol Black Elderberry helps to support a healthy immune system  
13 so even on my most hectic days; I am giving my body the immune support it needs.”<sup>4</sup>

14           7.       Defendant warrants that all of the Products contain its proprietary  
15 elderberry extract and are legal for consumers to purchase for their personal use and  
16 not for resale.

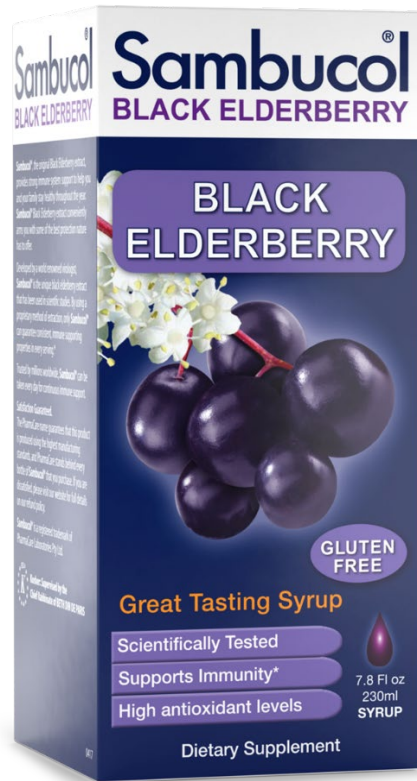
17           8.       However, under the Dietary Supplement Health and Education Act (the  
18 “DSHEA”), Defendant’s Products are illegal to sell.

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<sup>4</sup> [https://sambucolusa.com/blogs/news/womens-health-month?\\_pos=1&\\_sid=ed9b47f7b&\\_ss=r](https://sambucolusa.com/blogs/news/womens-health-month?_pos=1&_sid=ed9b47f7b&_ss=r) (last accessed December 17, 2020).

1           9.       Moreover, Defendant’s uniform representations on its packaging and in  
2 its marketing that its Elderberry Products (a) were developed by “a world renowned  
3 virologist,” (b) “help you and your family stay healthy throughout the year,” (c)  
4 “arm[] you with some of the best protection nature has to offer,” and (d) are the only  
5 elderberry supplements that “can guarantee consistent, immune supporting  
6 properties in every serving,” unlawfully convey to consumers that its Elderberry  
7 Products will protect consumers and their children from diseases such as viruses.<sup>5</sup>  
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26 <sup>5</sup> <https://sambucolusa.com/collections/shop-all/products/black-elderberry-large-original-syrup-7-8-ounces> (last accessed December 17, 2020).  
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**Sambucol<sup>®</sup>**  
**BLACK ELDERBERRY**


**Sambucol<sup>®</sup>**, the original Black Elderberry extract, provides strong immune system support to help you and your family stay healthy throughout the year. **Sambucol<sup>®</sup>** Black Elderberry extract conveniently arms you with some of the best protection nature has to offer.

Developed by a world renowned virologist, **Sambucol<sup>®</sup>** is the unique black elderberry extract that has been used in scientific studies. By using a proprietary method of extraction, only **Sambucol<sup>®</sup>** can guarantee consistent, immune supporting properties in every serving.\*

Trusted by millions worldwide, **Sambucol<sup>®</sup>** can be taken every day for continuous immune support.

**Satisfaction Guaranteed.**  
The PharmaCare name guarantees that this product is produced using the highest manufacturing standards, and PharmaCare stands behind every bottle of **Sambucol<sup>®</sup>** that you purchase. If you are dissatisfied, please visit our website for full details on our refund policy.

**Sambucol<sup>®</sup>** is a registered trademark of PharmaCare Laboratories Pty Ltd.

 **Kosher: Supervised by the Chief Rabbinate of BETH DIN DE PARIS**

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10. To further achieve a competitive advantage in this highly lucrative market, Defendant asserts on its packaging, on its labels, and in its marketing materials that the Elderberry Products are “Scientifically tested,” that its proprietary extract has been used in published studies, and that its extract is “the most extensively researched Black Elderberry product in the world.” These deceptive and

1 misleading statements are intended to and do falsely suggest to reasonable  
2 consumers that scientific research has conclusively established the effectiveness of  
3 Defendant's Elderberry Products. In addition, Defendant's portrayal of its Products  
4 as being the focus of scientists throughout the world (including a world renowned  
5 virologist) who have extensively tested, researched, and studied them further  
6 conveys Defendant's intended impression that its Products are akin to drugs capable  
7 of preventing or mitigating disease.  
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10 11. With knowledge of growing consumer demand for supplements  
11 containing elderberry, Defendant has intentionally marketed and sold its illegal  
12 Elderberry Products using false and misleading labeling and advertising.  
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14 12. Defendant's prominent and systematic mislabeling of the Products and  
15 its false and deceptive advertising form a pattern of unlawful and unfair business  
16 practices that harms the public and, if unstopped, could lead to substantial societal  
17 harm.  
18

19 13. Plaintiffs bring this suit to halt Defendant's unlawful sales and  
20 marketing of its Elderberry Products and for damages they sustained as a result of  
21 the illegal sales and false and misleading marketing. Declaratory and injunctive  
22 relief is of particular importance given the likely consequences of Defendant's  
23 actions.  
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**PARTIES**

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2 14. Plaintiff Montiqueno Corbett is a resident and citizen of San Diego,  
3 California in San Diego County, California.

4  
5 15. Plaintiff Damaris Luciano is a resident and citizen of Holyoke,  
6 Massachusetts in Hampden County, Massachusetts.

7  
8 16. Plaintiff Rob Dobbs is a resident and citizen of Florissant, Missouri in  
9 St. Louis County, Missouri.

10 17. Defendant PharmaCare U.S., Inc. is a Delaware corporation with its  
11 principal place of business at 5030 Camino de la Siesta, Suite 200, San Diego,  
12 California 92108.

13  
14 **JURISDICTION AND VENUE**

15 18. This Court has original jurisdiction over this controversy pursuant to 28  
16 U.S.C. § 1332(d). The amount in controversy in this class action exceeds  
17 \$5,000,000, exclusive of interest and costs, there are tens of thousands of Class  
18 members, and there are numerous Class members who are citizens of states other  
19 than Defendant’s states of citizenship.  
20

21  
22 19. This Court has personal jurisdiction over Defendant in this matter  
23 because Defendant is a resident of California, and acts and omissions giving rise to  
24 this action occurred in the state of California.  
25



1           25. As the manufacturer and distributor of the Products, Defendant has an  
2 affirmative duty to comply with the FDCA, 21 U.S.C. § 301, et seq., as well as any  
3 parallel state statute.

4           26. Dietary supplements are defined by the FDCA as a “product (other than  
5 tobacco) intended to supplement the diet” that contains one or more of the following:  
6 (1) vitamins; (2) minerals; (3) herbs or other botanicals; (4) an amino acid; (5) a  
7 supplement meant to increase total dietary intake; or (6) a concentrate, metabolite,  
8 constituent, extract, or combination of any of the listed ingredients. 21 U.S.C. §  
9 321(ff)(1).

10           27. In 1994, the Dietary Supplement Health and Education Act (the  
11 “DSHEA”) was passed into law, establishing a new framework to govern the  
12 composition, safety, labeling, manufacturing, and marketing of dietary supplements.  
13

14           28. Under the DSHEA, dietary ingredients that were marketed in the United  
15 States before 1994 may be used in dietary supplements without first notifying the  
16 FDA.

17           29. Defendant’s extract was not marketed as a dietary ingredient in the  
18 United States before 1994 and thus does not qualify for this exemption.

19           30. Notice of “new” dietary ingredients (i.e., those not used in the United  
20 States before 1994) must be submitted to the FDA prior to sale unless the ingredient  
21 has been “present in the food supply as an article used for food without being  
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1 chemically altered.” 21 U.S.C. § 350b(a)(1). As the FDA has explained further, “if  
2 the dietary ingredient has not been present in the food supply as an article used for  
3 food *in the same chemical form that you plan to use in your dietary supplement*,”  
4 then notice prior to sale must be given to the FDA.<sup>6</sup> (Emphasis added)

6 31. For dietary ingredients not used in the United States prior to 1994, the  
7 manufacturer or distributor must, at least 75 days before the introduction of the new  
8 dietary ingredient (“NDI”) into the market, provide the FDA with information that  
9 demonstrates that the “history of use or other evidence of safety establish that the  
10 NDI when used under the conditions recommended or suggested in the labeling of  
11 the NDI will reasonably be expected to be safe.” 21 U.S.C. § 350b(a)(2).

14 32. After receiving information regarding an NDI, the FDA may then  
15 determine that the manufacturer or distributor has not provided an adequate basis to  
16 conclude that the NDI is reasonably expected to be safe, which would prevent the  
17 marketing of the NDI.

19 33. Although required to do so, Defendant did not provide the FDA with  
20 the required NDI notification for its extract.

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25 <sup>6</sup> *New Dietary Ingredients in Dietary Supplements – Background for Industry*,  
26 [https://www.fda.gov/food/new-dietary-ingredients-ndi-notification-process/new-](https://www.fda.gov/food/new-dietary-ingredients-ndi-notification-process/new-dietary-ingredients-dietary-supplements-background-industry#what_is)  
27 [dietary-ingredients-dietary-supplements-background-industry#what\\_is](https://www.fda.gov/food/new-dietary-ingredients-ndi-notification-process/new-dietary-ingredients-dietary-supplements-background-industry#what_is).

1           34. Dietary supplements that contain undisclosed NDIs are considered  
2 adulterated for purposes of the FDCA: “[I]f a notification is required for a product  
3 containing a new dietary ingredient and the product is marketed without the required  
4 notification, the product is adulterated as a matter of law.”<sup>7</sup>

6           35. Defendant was fully aware that its extract was an NDI and that its  
7 extract had not been used for food in the same chemical form as used in its Products,  
8 but nevertheless included it in its Products without notification to the FDA.

10           36. Defendant’s conduct is also deceptive, unfair, and unlawful in that it  
11 violates the prohibition against the sale of adulterated and misbranded products  
12 under California’s Sherman Laws, which adopt the federal labeling regulations as  
13 the food and dietary supplement labeling requirements of the state. Cal. Health &  
14 Safety Code § 110095 (“All special dietary use regulations and any amendments to  
15 regulations adopted pursuant to the federal act, in effect on November 23, 1970, or  
16 adopted on or after that date, are the special dietary use regulations of this state.”);  
17 *Id.* § 110100 (“All food labeling regulations and any amendments to those  
18 regulations adopted pursuant to the federal act, in effect on January 1, 1993, or  
19 adopted on or after that date shall be the food labeling regulations of this state.”).  
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26 <sup>7</sup> *Id.*





1           46. The Sambucol website also proclaims “BEHOLD THE SUPER  
2 IMMUNITY BERRY” and promises that “elderberries can help empower your  
3 immune system by fighting free radicals that damage it.”  
4

5           47. “Immunity” is defined as “a condition of being able to resist a particular  
6 disease....”<sup>9</sup>  
7

8           48. Plaintiffs, Class Members, and reasonable consumers would  
9 understand from Defendant’s labels and marketing that the Products, through their  
10 claimed impact on the immune system, independently and in conjunction with the  
11 other marketing and labeling claims, protect them and their families from disease by  
12 either limiting or preventing diseases.  
13

14           49. Defendant’s emphasis that its extract was developed by a world  
15 renowned virologist and has been extensively and scientifically tested, studied, and  
16 researched, when combined with Defendant’s claims regarding its Products’ impact  
17 on immune systems, would lead Plaintiffs, Class Members, and reasonable  
18 consumers to believe that the Products help prevent, mitigate or cure viruses such as  
19 colds and the flu.  
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22           50. Defendant’s marketing, including its own website, implicitly points to  
23 the Products providing protection from colds and the flu by urging consumers to  
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25 \_\_\_\_\_  
26 <sup>9</sup> See <https://www.merriam-webster.com/dictionary/immunity> (last accessed  
27 November 11, 2020).  
28

1 “use it during the winter season” and assuring them the Products would help them  
2 “stay healthy through the toughest season.” Defendant urges: “Falling temperatures  
3 and falling leaves, don’t fall down on your immune support.” The “winter season”  
4 and “the toughest season” would be understood by reasonable consumers to be the  
5 “cold and flu season.”  
6

7 51. On its website, Defendant also references an article from an alternative  
8 health expert who recommends the Elderberry Products for use during cold season.<sup>10</sup>  
9

10 52. On Defendant’s website under the FAQ section asking, “What are the  
11 traditional uses of black elderberry,” Defendant states that elderberry is “used in  
12 traditional remedies for colds, coughs, and upper respiratory infections.”<sup>11</sup>  
13

14 53. Next, the name of Defendant, “PharmaCare,” which is listed on the  
15 back of the Products’ labels and packaging, also suggests that the Products are drugs  
16 to prevent or treat diseases because the name implies that the company is somehow  
17 a pharmaceutical company rather than a nutraceutical company.  
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25 <sup>10</sup> [https://sambucolusa.com/blogs/news-1/is-your-medicine-cabinet-ready-for-winter?\\_pos=2&\\_sid=db728cfdc&\\_ss=r](https://sambucolusa.com/blogs/news-1/is-your-medicine-cabinet-ready-for-winter?_pos=2&_sid=db728cfdc&_ss=r) (last accessed December 17, 2020).

26 <sup>11</sup> <https://sambucolusa.com/pages/faqs> (last accessed January 11, 2021).  
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1 54. Further, Defendant’s website identifies Sambucol as the “#1  
2 Pharmacist Recommended Brand,” also implying that the Products are drugs or  
3 meant to treat diseases.<sup>12</sup>  
4

5 55. Currently, the opening page of Defendant’s Sambucol website  
6 proclaims: “Get that NOT WORRIED ABOUT A 5 HOUR FLIGHT IN THE  
7 MIDDLE SEAT kinda feeling.”<sup>13</sup> In the context of the COVID pandemic and the  
8 accompanying concerns about transmission of the COVID virus during flights, a  
9 reasonable consumer would understand this statement as indicating that Defendant’s  
10 Elderberry Products will protect them from COVID or other transmissible diseases.  
11

12 56. The aforementioned claims are implied disease claims under 21 C.F.R.  
13 101.93(g)(2), and therefore the Products are misbranded under 21 U.S.C. 343(r)(6).  
14

15 ***INADEQUATE DIRECTIONS FOR USE***  
16

17 57. Defendant’s Products are also misbranded within the meaning of  
18 section 502(f)(1) of the FDCA, 21 U.S.C. 352(f)(1), in that their labeling fails to  
19 include adequate directions for use.  
20

21 58. “Adequate directions for use” means directions that enable a layperson  
22 to use a drug safely and for the purposes for which it is intended. *See* 21 CFR 201.5.  
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24  
25 <sup>12</sup> [https://sambucolusa.com/pages/sambucol-pharmacist-recommended-](https://sambucolusa.com/pages/sambucol-pharmacist-recommended-brand?_pos=1&_sid=4387abf49&_ss=r)  
26 [brand?\\_pos=1&\\_sid=4387abf49&\\_ss=r](https://sambucolusa.com/pages/sambucol-pharmacist-recommended-brand?_pos=1&_sid=4387abf49&_ss=r) (last accessed July 7, 2021).

27 <sup>13</sup> <https://sambucolusa.com/> (last accessed July 7, 2021).  
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1 The Products are offered for conditions that are not amenable to self-diagnosis and  
2 treatment by individuals who are not medical practitioners; therefore, adequate  
3 directions for use cannot be written so that a layperson can use these drugs safely for  
4 their intended purposes.  
5

6 59. FDA-approved prescription drugs that bear their FDA-approved  
7 labeling are exempt from the requirements that they bear adequate directions for use  
8 by a layperson. However, Defendant’s Products are not exempt from the requirement  
9 that their labeling bear adequate directions for use, 21 CFR 201.100(c)(2) and  
10 201.115, because no FDA-approved applications are in effect for Defendant’s  
11 Products.  
12  
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14 60. The introduction or delivery for introduction into interstate commerce  
15 of these misbranded drugs violates section 301(a) of the FD&C Act, 21 U.S.C.  
16 331(a).  
17

18 ***ANTIOXIDANT MISBRANDING CLAIMS***

19 61. Defendant claims that its Products have “high antioxidant levels.”  
20

21 62. As shown for Black Elderberry Original Syrup, the “high antioxidant  
22 levels” claim appears on both the packaging and the label:  
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63. Characterizing the level of a nutrient in food labeling without complying with the specific requirements pertaining to nutrient content claims for that nutrient constitutes misbranding under 21 U.S.C. § 343(r)(1)(A).

64. Nutrient content claims using the term “antioxidant” must comply with the requirements listed in 21 CFR 101.54(g). Defendant’s claim that its Products have “High antioxidant levels” is a nutrient content claim that must comply with 21 CFR 101.54(g).

65. 21 CFR 101.54(g)(1) requires as a precondition for “[a] nutrient content claim that characterizes the level of antioxidant nutrients present in a food” that “[a]n RDI has been established for each of the nutrients[.]”

66. As acknowledged on the Products’ label, there is no established Reference Daily Intakes (“RDI”) for Defendant’s Elderberry Extract (berry):

<b>Supplement Facts</b>		
Serving Size 2 teaspoons (10ml)		
Serving Per Container 12		
<b>Amount per Serving % Daily Value</b>		
Calories	30	
Total Carbohydrate	8g	3%†
Sugars	8g	**
Elderberry Extract (berry)	3.8g	**
† Percent Daily Values are based on a 2,000 calorie diet.		
** Daily Value not established.		
<b>OTHER INGREDIENTS: GLUCOSE SYRUP, PURIFIED WATER, CITRIC ACID, POTASSIUM SORBATE (TO RETARD SPOILAGE)</b>		

67. In addition, no established RDI exists for the anthocyanins that Defendant claims on its website are responsible for the alleged antioxidant benefits of Defendant’s Extract.

68. Because the nutrient and dietary ingredient have no RDI, Defendant has misbranded its Products when claiming that they have “High antioxidant levels.”

69. Additionally, 21 CFR 101.54(g)(4) requires that “[t]he names of the nutrients that are the subject of the [antioxidant] claim are included as part of the claim (e.g., ‘high in antioxidant vitamins C and E’).” Because Defendant fails to list any specific nutrients that are the basis of its claim of “High antioxidant levels,” it

1 violates 21 CFR 101.54(g)(4), and its Products are misbranded for that reason as  
2 well.

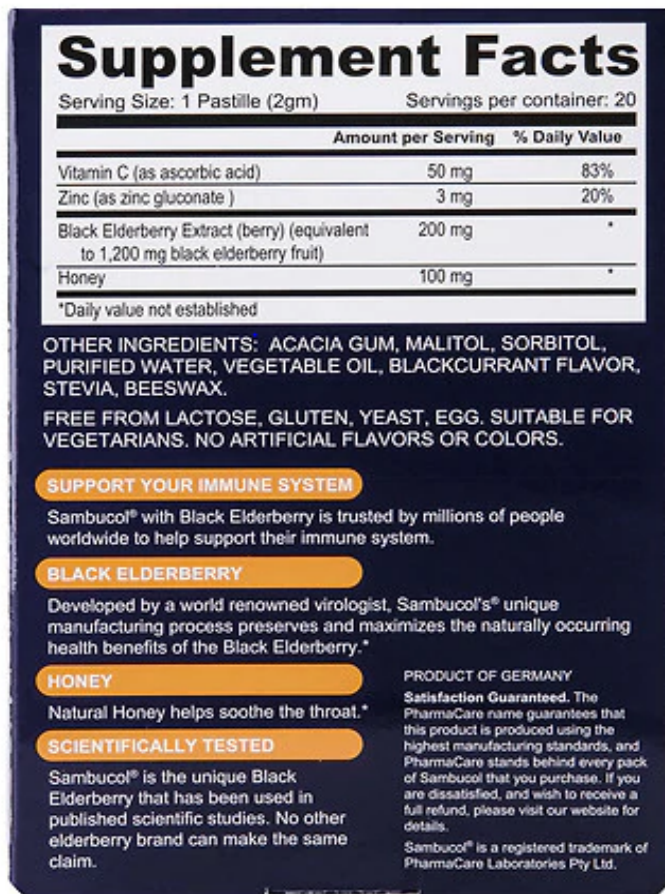
3 **DEFENDANT’S “SCIENTIFICALLY TESTED” CLAIM IS MISLEADING<sup>14</sup>**  
4

5 70. To further boost its sales and separate itself from the competition, the  
6 labels on Defendant’s Products misleadingly state that the Products are  
7 “Scientifically Tested.”  
8

9 71. Defendant also claims on its packaging that Sambucol includes “the  
10 unique black elderberry extract that has been used in scientific studies. No other  
11 elderberry brand can make the same claim.” An image of this representation, which  
12 appears on the packaging for Sambucol Black Elderberry Pastilles, is reproduced  
13 below:  
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25 <sup>14</sup> Per the Order Granting in Part and Denying in Part Defendant’s Motion to Dismiss  
26 (ECF No 29), Plaintiffs’ challenges to the “Scientifically Tested” claim do not apply  
27 to the UCL, FAL and CLRA causes of action herein.



72. In fact, there are no published studies at all that test the Products. The Products have not been scientifically tested. Defendant’s statements that the Products have in fact been “scientifically tested” are, therefore, deceptive and misleading.

73. In addition, the formulation of the Sambucol elderberry extract used in the Products currently being sold is not the same elderberry extract formulation used in published studies. Because the Products being sold are made with formulations that do not match the tested or studied formulations, Defendant’s claims that its

1 Sambucol Elderberry Extract “has been used in published scientific studies” is,  
2 therefore, also deceptive and misleading.

3 74. Further, reasonable consumers will interpret Defendant’s  
4 representations on the Product labels that its Products are “Scientifically Tested”  
5 and, unlike any other elderberry brand, have been used in scientific studies as  
6 meaning that scientists have determined that Defendant’s Products are effective in  
7 keeping consumers and their families safe from diseases when this is not the case.  
8 These representations are deceptive and misleading for this reason as well.

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11 75. Defendant has included its reference to “Scientific testing” and the use  
12 of Defendant’s extract in scientific studies specifically in order to lead consumers  
13 into believing scientists have concluded that its Products are effective in preventing  
14 or mitigating diseases.

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17 76. Contrary to these representations, clinical studies of formulations of  
18 Defendant’s proprietary extract and of elderberry generally have not conclusively  
19 established that elderberry and Defendant’s Products are in fact effective, which  
20 confirms that Defendants’ “Scientifically Tested” representation is deceptive and  
21 misleading to reasonable consumers.

22  
23  
24 77. Defendant intended for Plaintiffs and the Class members to be deceived  
25 or misled.

1           78. Defendant’s deceptive and misleading practices proximately caused  
2 harm to the Plaintiffs and the Class members.

3           79. Plaintiffs and the Class members would not have purchased the  
4 Products or would not have paid as much for the Products had they known the truth  
5 about the mislabeled and falsely advertised Products.  
6

7                           **FACTUAL ALLEGATIONS SPECIFIC TO PLAINTIFFS**

8  
9           **Plaintiff Montiqueno Corbett**

10           80. Plaintiff Montiqueno Corbett purchased Sambucol Black Elderberry  
11 Capsules, Sambucol Black Elderberry Syrup Original, and Sambucol Black  
12 Elderberry Gummies over the period from approximately November 2017 through  
13 January 2020 on Amazon and at a CVS Pharmacy in San Diego, California.  
14

15           81. Beginning in September or October of 2017 and prior to and at the time  
16 of each purchase of the Sambucol products from approximately November 2017  
17 through January 2020, Plaintiff Corbett was exposed to, saw, and relied upon  
18 Defendant’s materially misleading representations on the Products’ packaging and  
19 labelling (at the CVS Pharmacy), the Sambucol website, Amazon’s website and in  
20 Google advertisements that its elderberry ingredient (a) was developed by a  
21 virologist, (b) supports immunity, (c) supports the immune system, (d) is  
22 scientifically tested, (e) has been used in clinical studies, (f) has high antioxidant  
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1 levels, (g) helps you and your family stay healthy throughout the year, and (h) arms  
2 you with the best protection nature has to offer.

3 82. When Plaintiff Corbett purchased Defendant's Elderberry Products, he  
4 believed that they were legally sold supplements.  
5

6 83. Plaintiff Corbett experienced no improvement in his health as a result  
7 of using Defendant's Products.  
8

9 84. Plaintiff Corbett's decision to buy the Elderberry Products was directly  
10 impacted and caused by the materially misleading representations that Defendant  
11 made that its elderberry ingredient (a) was developed by a virologist, (b) supports  
12 immunity, (c) supports the immune system, (d) is scientifically tested, (e) has been  
13 used in clinical studies, (f) has high antioxidant levels, (g) helps you and your family  
14 stay healthy throughout the year, and (h) arms you with the best protection nature  
15 has to offer.  
16  
17

18 85. Had Plaintiff Corbett known that the Elderberry Products were not  
19 legally sold supplements and had he known the truth about Defendant's materially  
20 misleading representations and omissions, he would not have purchased the  
21 Elderberry Products.  
22

23 86. By purchasing Defendant's illegally sold and falsely advertised  
24 Products, Plaintiff Corbett suffered injury in fact and lost money.  
25  
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1 87. Plaintiff Corbett would like to continue purchasing Defendant's  
2 Products if they were legally sold supplements and if Defendant's false and  
3 misleading statements were true. Plaintiff Corbett is, however, unable to rely on  
4 Defendant's representations in deciding whether to purchase Defendant's products  
5 in the future.

7 **Plaintiff Damaris Luciano**

8  
9 88. Plaintiff Damaris Luciano purchased Sambucol Black Elderberry  
10 Gummies at Walgreens in Holyoke, Massachusetts, starting in approximately late  
11 2018 to early 2019 and continuing through February 2020.

12  
13 89. A couple of months before she first purchased the Sambucol Black  
14 Elderberry Gummies, she started seeing commercials on a major network, most  
15 likely NBC, which indicated that Sambucol would help prevent her from getting  
16 sick. Shortly prior to and at the time of each purchase of the Sambucol product,  
17 Plaintiff Luciano was exposed to, saw, and relied upon Defendant's materially  
18 misleading representations on the Products' packaging and labelling at Walgreens  
19 and on a website describing the Sambucol products, which claimed that Defendant's  
20 elderberry ingredient supports immunity, supports the immune system, has high  
21 antioxidant levels, and has been clinically and scientifically tested.

22  
23  
24  
25 90. When Plaintiff Luciano purchased the Elderberry Products, she  
26 believed that they were legally sold supplements.

1           91. Plaintiff Luciano experienced no improvement in her health as a result  
2 of using Defendant's Products.

3           92. Plaintiff Luciano's decision to buy the Elderberry Products was directly  
4 impacted and caused by the materially misleading representations that Defendant  
5 made that its elderberry ingredient supports immunity, supports the immune system,  
6 has high antioxidant levels, and has been clinically and scientifically tested.  
7

8           93. Had Plaintiff Luciano known that the Elderberry Products were not  
9 legally sold supplements and had she known the truth about Defendant's materially  
10 misleading representations and omissions, she would not have purchased the  
11 Elderberry Products.  
12

13           94. By purchasing Defendant's illegally sold and falsely advertised  
14 Products, Plaintiff Luciano suffered injury in fact and lost money.  
15

16           95. Plaintiff Luciano would like to continue purchasing Defendant's  
17 Products if they were legally sold supplements and if Defendant's false and  
18 misleading statements were true. Plaintiff Luciano is, however, unable to rely on  
19 Defendant's representations in deciding whether to purchase Defendant's products  
20 in the future.  
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1 **Plaintiff Rob Dobbs**

2 96. Plaintiff Rob Dobbs purchased Sambucol Black Elderberry Gummies  
3 over the period from August 2019 through April 2020 through Amazon.  
4

5 97. Prior to and at the time of each purchase of the Sambucol Black  
6 Elderberry Gummies from August 2019 through April 2020, Plaintiff Dobbs was  
7 exposed to, saw, and relied upon Defendant's materially misleading representations  
8 on the Products' packaging and labelling, in television commercials on a major  
9 network, on the Sambucol website, and on the Amazon website. Plaintiff Dobbs  
10 saw the commercials several times in the weeks before his first purchase in August  
11 2019 and heard and relied on Defendant's representations that the elderberry  
12 ingredient supports the immunity system. He reviewed the product marketing,  
13 advertising, and labeling on the Amazon and Sambucol websites in the days prior to  
14 his initial purchase, where he saw and relied on Defendant's claims that its  
15 elderberry ingredient (a) was developed by a world renowned virologist, (b) supports  
16 immunity and supports the immune system, (c) has been scientifically tested, (d) has  
17 been used in clinical studies, (e) has high antioxidant levels, (f) helps you and your  
18 family stay healthy throughout the year, and (g) arms you with the best protection  
19 nature has to offer.  
20  
21  
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24

25 98. When Plaintiff Dobbs purchased the Elderberry Products, he believed  
26 that they were legally sold supplements.  
27

1            99. Plaintiff Dobbs experienced no improvement in his health as a result of  
2 using Defendant's Products.

3            100. Plaintiff Dobbs' decision to buy the Elderberry Products was directly  
4 impacted and caused by the materially misleading representations that Defendant  
5 made that its elderberry ingredient (a) was developed by a world renowned  
6 virologist, (b) supports immunity and supports the immune system, (c) has been  
7 scientifically tested, (d) has been used in clinical studies, (e) has high antioxidant  
8 levels, (f) helps you and your family stay healthy throughout the year, and (g) arms  
9 you with the best protection nature has to offer. Had Plaintiff Dobbs known that the  
10 Elderberry Products were not legally sold supplements and had he known the truth  
11 about Defendant's materially misleading representations and omissions, he would  
12 not have purchased the Elderberry Products.  
13  
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17            101. By purchasing Defendant's illegally sold and falsely advertised  
18 Products, Plaintiff Dobbs suffered injury in fact and lost money.

19            102. Plaintiff Dobbs would like to continue purchasing Defendant's  
20 Products if they were legally sold supplements and if Defendant's false and  
21 misleading statements were true. Plaintiff Dobbs is, however, unable to rely on  
22 Defendant's representations in deciding whether to purchase Defendant's products  
23 in the future.  
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**CLASS ACTION ALLEGATIONS**

1  
2 103. Plaintiffs bring this action individually and as representatives of all  
3 those similarly situated, pursuant to Federal Rule of Civil Procedure 23, on behalf  
4 of the below-defined Classes:  
5

6 **National Class: During the fullest period allowed by law, all persons in**  
7 **the United States who purchased the Products (the “National Class”) for**  
8 **personal use and not for resale.**  
9

10 **California State Subclass: During the fullest period allowed by law, all**  
11 **persons in the State of California who purchased the Products (the “California**  
12 **Subclass”) for personal use and not for resale.**  
13

14 **Massachusetts State Subclass: During the fullest period allowed by law,**  
15 **all persons in the State of Massachusetts who purchased the Products (the**  
16 **“Massachusetts Subclass”) for personal use and not for resale.**  
17

18 **Missouri State Subclass: During the fullest period allowed by law, all**  
19 **persons in the State of Missouri who purchased the Products (the “Missouri**  
20 **Subclass”) for personal use and not for resale.**  
21

22 104. Specifically excluded from these definitions are: (1) Defendant, any  
23 entity in which Defendant has a controlling interest, and its legal representatives,  
24 officers, directors, employees, assigns and successors; (2) the Judge to whom this  
25 case is assigned and any member of the Judge’s staff or immediate family; and (3)  
26

1 Class Counsel. Plaintiffs reserve the right to amend the Class definition and Subclass  
2 definitions as necessary.

3 105. Certification of Plaintiffs' claims for class-wide treatment are  
4 appropriate because Plaintiffs can prove the elements of the claims on a class-wide  
5 basis using the same evidence that individual Class members would use to prove  
6 those elements in individual actions alleging the same claims.  
7

8 106. Numerosity: The Members of the Class are so numerous that joinder of  
9 all members is impracticable. While the exact number of Class Members is presently  
10 unknown, it likely consists of thousands of consumers. The number of Class  
11 Members can be determined by sales information and other records. Moreover,  
12 joinder of all potential Class Members is not practicable given their numbers and  
13 geographic diversity. The Class is readily identifiable from information and records  
14 in the possession of Defendant and its authorized retailers.  
15  
16  
17

18 107. Typicality: The claims of the representative Plaintiffs are typical in that  
19 Plaintiffs, like all Class Members, purchased the Products that were manufactured,  
20 marketed, advertised, distributed, and sold by Defendant. Furthermore, the factual  
21 basis of Defendant's misconduct is common to all Class Members because  
22 Defendant has engaged in systematic fraudulent behavior that was deliberate,  
23 includes negligent misconduct, and results in the same injury to all Class Members.  
24  
25  
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28



1 g. Whether Defendant knew or should have known that the  
2 representations and advertisements regarding the Products were false and  
3 misleading;

4  
5 h. Whether Defendant has breached express and implied warranties in the  
6 sale and marketing of the Products;

7 i. Whether Defendant's conduct violates public policy;

8 j. Whether Defendant's acts and omissions violate California law;

9 k. Whether Defendant's acts and omissions violate Massachusetts law;

10 l. Whether Defendant's acts and omissions violate Missouri law;

11 m. Whether Defendant has been unjustly enriched by the sale of the  
12 Products to the Plaintiffs and the Class Members;

13 n. Whether Plaintiffs and the Class Members did not receive the benefit  
14 of their bargain when purchasing the Products;

15 o. Whether the Plaintiffs and the Class Members suffered monetary  
16 damages, and, if so, what is the measure of those damages;

17 p. Whether Plaintiffs and the Class Members are entitled to an injunction,  
18 damages, restitution, equitable relief, and other relief deemed appropriate, and, if so,  
19 the amount and nature of such relief.

20  
21 109. Adequate Representation: Plaintiffs will fairly and adequately protect  
22 the interests of Class Members. They have no interests antagonistic to those of Class  
23

1 Members. Plaintiffs retained attorneys experienced in the prosecution of class  
2 actions, including consumer and product defect class actions, and Plaintiffs intend  
3 to prosecute this action vigorously.  
4

5 110. Injunctive/Declaratory Relief: The elements of Rule 23(b)(2) are met.  
6 Defendant will continue to commit the unlawful practices alleged herein, and Class  
7 Members will remain at an unreasonable and serious safety risk as a result of the  
8 Defect. Defendant has acted and refused to act on grounds that apply generally to  
9 the Class, such that final injunctive relief and corresponding declaratory relief is  
10 appropriate respecting the Class as a whole.  
11  
12

13 111. Predominance and Superiority: Plaintiffs and Class Members have all  
14 suffered and will continue to suffer harm and damages as a result of Defendant's  
15 unlawful and wrongful conduct. A class action is superior to other available methods  
16 for the fair and efficient adjudication of the controversy. Absent a class action, Class  
17 Members would likely find the cost of litigating their claims prohibitively high and  
18 would therefore have no effective remedy at law. Because of the relatively small size  
19 of Class Members' individual claims, it is likely that few Class Members could  
20 afford to seek legal redress for Defendant's misconduct. Absent a class action, Class  
21 Members will continue to incur damages, and Defendant's misconduct will continue  
22 without remedy. Class treatment of common questions of law and fact would also  
23 be a superior method to multiple individual actions or piecemeal litigation in that  
24  
25  
26  
27

1 class treatment will conserve the resources of the courts and the litigants and will  
2 promote consistency and efficiency of adjudication.

3 112. Plaintiffs know of no difficulty to be encountered in the maintenance  
4 of this action that would preclude its maintenance as a class action.  
5

6 113. Defendant has acted or refused to act on grounds generally applicable  
7 to the Class, thereby making appropriate final injunctive relief or corresponding  
8 declaratory relief with respect to the Class appropriate.  
9

10 **CAUSES OF ACTION**

11 **COUNT I**

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

15 114. Plaintiffs reallege and incorporate by reference the allegations  
16 contained in the preceding paragraphs as though set forth fully herein.

17 115. Plaintiff Corbett brings this claim individually and on behalf of all  
18 members of the National Class and California Subclass against Defendant.  
19

20 116. The UCL prohibits any "unlawful, unfair or fraudulent business act or  
21 practice." Cal. Bus. & Prof. Code § 17200.  
22

23 117. The acts, omissions, misrepresentations, practices, and non-disclosures  
24 of Defendant as alleged herein constitute business acts and practices.  
25  
26  
27



1 outweighed by benefits to consumers or competition, and not one consumer  
2 themselves could reasonably have avoided.

3 122. Fraudulent: A statement or practice is “fraudulent” under the UCL if it  
4 is likely to mislead or deceive the public, applying an objective reasonable consumer  
5 test.  
6

7 123. As set forth in detail above, Defendant has fraudulently labeled its  
8 Products as legal dietary supplements when in fact they are illegal to sell; has  
9 fraudulently misbranded and mislabeled in violation of the FDCA; and has made  
10 false and misleading statements that are likely to mislead reasonable consumers.  
11

12 124. Defendant profited from its sale of the falsely, deceptively, and  
13 unlawfully advertised and packaged Products to unwary consumers.  
14

15 125. Plaintiff Corbett and the Class Members are likely to continue to be  
16 damaged by Defendant’s deceptive trade practices, because Defendant continues to  
17 disseminate misleading information on the Products’ packaging. Plaintiff Corbett  
18 and the Class Members lack an adequate remedy at law to prevent this prospective  
19 harm and, therefore, injunctive relief enjoining Defendant’s deceptive practices is  
20 proper.  
21

22 126. Defendant’s conduct caused and continues to cause substantial injury  
23 to Plaintiff Corbett and the Class Members. Plaintiff Corbett and the Class Members  
24 have suffered injury in fact as a result of Defendant’s unlawful conduct.  
25  
26



1 to dispose of real or personal property or to perform services” to disseminate any  
2 statement “which is untrue or misleading, and which is known, or which by the  
3 exercise of reasonable care should be known, to be untrue or misleading.” Cal. Bus.  
4 & Prof. Code § 17500.  
5

6 132. It is also unlawful under the FAL to disseminate statements concerning  
7 property or services that are “untrue or misleading, and which is known, or which  
8 by the exercise of reasonable care should be known, to be untrue or misleading.” *Id.*  
9

10 133. As alleged in detail above, the advertisements, labeling, policies, acts,  
11 and practices of Defendant relating to the Products misled consumers acting  
12 reasonably regarding the ingredients and that the Products were legally labeled  
13 dietary supplements when in fact they were and are illegal.  
14

15 134. Plaintiff Corbett and the Class Members suffered injury in fact as a  
16 result of Defendant’s actions as set forth herein because they purchased the Products  
17 in reliance on Defendant’s labeling claims that under the FDCA and DSHEA amount  
18 to intentional mislabeling and misbranding of the Products, including among other  
19 things, Defendant’s claims that the Products are legal dietary supplements when they  
20 are not.  
21  
22

23 135. Defendant’s business practices as alleged herein constitute deceptive,  
24 untrue, and misleading advertising pursuant to the FAL because Defendant has  
25 advertised the Products in a manner that is untrue and misleading, which Defendant  
26  
27

1 knew or reasonably should have known, and omitted material information from its  
2 advertising.

3 136. Defendant profited from its sale of the falsely and deceptively  
4 advertised Products to unwary consumers.

6 137. As a result, Plaintiff Corbett, the California Subclass Members, and the  
7 general public are entitled to injunctive and equitable relief, restitution, and an order  
8 for the disgorgement of the funds by which Defendant was unjustly enriched.

10 138. Pursuant to Cal. Bus. & Prof. Code § 17535, Plaintiff Corbett, on behalf  
11 of himself and the California Subclass, seek an order enjoining Defendant from  
12 continuing to engage in deceptive business practices, false advertising, and any other  
13 act prohibited by law, including those set forth in this Complaint.

15 **COUNT III**  
16 **California’s Consumer Legal Remedies Act**  
17 **Cal. Civ. Code § 1750 et seq. (“CLRA”)**  
18 **(On Behalf of the California Subclass)**

19 139. Plaintiffs reallege and incorporate by reference the allegations  
20 contained in the preceding paragraphs as if fully set forth herein.

21 140. Plaintiff Corbett brings this claim individually and on behalf of the  
22 members of the California Subclass against Defendant.

24 141. Defendant is a “person” under the CLRA, Cal. Civ. Code § 1761(c).



1 146. Defendant’s wrongful business practices constituted, and constitute, a  
2 continuing course of conduct in violation of the CLRA.

3 147. Pursuant to the provisions of Cal. Civ. Code § 1782(a), on October 26,  
4 2021, Plaintiff Corbett, through counsel, mailed Defendant a letter by certified mail  
5 addressed to its headquarters in San Diego, California (with a copy sent to  
6 Defendant’s counsel as well), providing notice of Defendant’s alleged violations of  
7 the CLRA, demanding that Defendant correct such violations, and providing  
8 Defendant with the opportunity to correct its business practices. See Exhibit A.  
9 Plaintiff Corbett specifically identified which provisions of Cal. Civ. Code § 1770  
10 Defendant had violated. Defendant did not, however, correct its business practices,  
11 and more than 30 days have passed since Defendant received Plaintiff Corbett’s  
12 notice on October 29, 2021. See Exhibit B. Plaintiff lacks an adequate remedy at  
13 law to prevent prospective harm from defendant’s unlawful business practices.  
14  
15  
16  
17

18 148. Pursuant to California Civil Code § 1780, Plaintiff Corbett seeks  
19 monetary relief, injunctive relief, his reasonable attorneys’ fees and costs, and any  
20 other relief that the Court deems proper.  
21

22 **COUNT IV**  
23 **VIOLATIONS OF MASS. GEN. LAWS CHAPTER 93A, § 2**  
24 **(On Behalf of the Massachusetts Subclass)**

25 149. Plaintiffs reallege and repeat the allegations set forth in the preceding  
26 paragraphs as if fully set forth herein.  
27

1           150. Massachusetts law prohibits “unfair or deceptive acts or practices in the  
2 conduct of any trade or commerce.” Mass. Gen. Laws Ch. 93a, § 2.

3           151. Plaintiff Luciano, members of the Massachusetts Subclass, and  
4 Defendant are “persons” within the meaning of Mass. Gen. Laws Ch. 93a, § 1(a).

5           152. Defendant is engaged in “trade” or “commerce,” within the meaning of  
6 Mass. Gen. Laws Ch. 93A, § 2.  
7

8           153. The Elderberry Products at issue constitute property under Mass. Gen.  
9 Laws Ch. 93A.  
10

11           154. Defendant engaged in one or more of the following unfair or deceptive  
12 acts or practices as prohibited by Mass. Gen. Laws Ch. 93A, § 2:

- 13
- 14           a. Misrepresenting the approval or certification of goods;
  - 15           b. Representing that goods have sponsorship, approval, characteristics,  
16 uses, benefits, or quantities which they do not have;
  - 17           c. Representing that goods are of a particular standard, quality, or grade,  
18 if they are of another;
  - 19           d. Disparaging the goods, services, or business of another by false or  
20 misleading representation of fact;
  - 21           e. Advertising goods with intent not to sell them as advertised;
  - 22           f. Engaging in other conduct which created a likelihood of confusion or  
23 of misunderstanding;
  - 24
  - 25
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  - 27
  - 28

1 g. Using or employing deception, fraud, false pretense, false promise or  
2 misrepresentation, or the concealment, suppression, or omission of a material fact  
3 with intent that others rely upon such concealment, suppression or omission, in  
4 connection with the advertisement and sale of the Products, whether or not any  
5 person has in fact been misled, deceived or damaged thereby; and  
6

7 h. Representing that goods have been supplied in accordance with a  
8 previous representation when they have not.  
9

10 155. Defendant's acts and omissions are unfair in that they (1) offend public  
11 policy; (2) are immoral, unethical, oppressive, or unscrupulous; and (3) cause  
12 substantial injury to consumers. Defendant has, through knowing, intentional,  
13 material omissions, sold illegally labeled dietary supplements.  
14

15 156. Defendant's acts and omissions are also unfair in that they cause  
16 substantial injury to consumers far in excess of any conceivable benefit; and are  
17 injuries of a nature that they could not have been reasonably avoided by consumers.  
18

19 157. Defendant's foregoing unfair methods of competition and unfair or  
20 deceptive acts or practices, including its omissions, were and are committed in its  
21 course of trade or commerce, directed at consumers, affect the public interest, and  
22 injured Plaintiff and Subclass members.  
23

24 158. Plaintiff Luciano and the members of the Massachusetts Subclass have  
25 suffered injury in fact, including economic injury, and actual damages resulting from  
26  
27

1 Defendant's material omissions and misrepresentations because, *inter alia*, they lost  
2 money when they purchased the Products and/or paid an inflated purchase price for  
3 the Products.

4  
5 159. Defendant knew, should have known, or was reckless in not knowing,  
6 that the defect in the Products rendered them not suitable for their intended use.

7  
8 160. Defendant had a duty to disclose mislabeling and misbranding because  
9 Defendant had knowledge of the true facts related to the Products prior to making  
10 sales of the Products.

11  
12 161. Pursuant to Mass. Gen. Laws Ch. 93A § 9(3), on October 26, 2021,  
13 more than 30 days prior to the filing of this Second Amended Class Action  
14 Complaint, Plaintiff Luciano, through Counsel, mailed Defendant through its  
15 registered agent (with a copy mailed to Defendant's counsel) a written demand for  
16 relief that identified Plaintiff Luciano and reasonably described the unfair or  
17 deceptive acts or practices relied upon and the injury suffered. See Exhibit C.  
18 Defendant received the demand on October 29, 2021. See Exhibit D.

19  
20  
21 162. As a direct and proximate result of Defendant's unfair methods of  
22 competition and unfair or deceptive acts or practices, Plaintiff and Subclass members  
23 have been damaged as alleged herein and are entitled to recover actual damages to  
24 the extent permitted by law, including class action rules, in an amount to be proven  
25 at trial.  
26

1 163. Plaintiff and other Subclass members have suffered ascertainable  
2 losses, which include but are not limited to, the costs they incurred paying for a  
3 product which was not the one that had been represented to them.  
4

5 164. Pursuant to Mass. Gen. Laws, Chapter 93A § 9, Plaintiff Luciano and  
6 the Massachusetts Subclass seek an order enjoining Defendant's unfair and/or  
7 deceptive acts or practices, and awarding damages, punitive damages, reasonable  
8 attorney's fees, costs, and any other just and proper relief available under  
9  
10 Massachusetts law.

11 **COUNT V**  
12 **Violation of Missouri Merchandising Practices Act ("MMPA")**  
13 **Mo. Ann. Stat. § 407.010, *et. seq.***  
14 **(On Behalf of Missouri Subclass)**

15 165. Plaintiffs reallege and repeat the allegations set forth in the preceding  
16 paragraphs as if fully set forth herein.

17 166. Plaintiff Dobbs brings this action on behalf of himself and the Missouri  
18 State Class against Defendant.  
19

20 167. Plaintiff Dobbs, members of the Missouri Subclass, and Defendant are  
21 all persons within the meaning of Mo. Ann. Stat. § 407.010  
22

23 168. Defendant is engaged in "trade" or "commerce" within the meaning of  
24 Mo. Ann. Stat. § 407.010.  
25  
26  
27

1           169. The Products are “merchandise” within the meaning of Mo. Ann. Stat.  
2 § 407.010.

3           170. Plaintiff Dobbs purchased the Products for personal, family, or  
4 household purposes.

5           171. Plaintiff Dobbs and Subclass members suffered an ascertainable loss of  
6 money as a result of Defendant’s conduct.

7           172. The MMPA prohibits “the act, use or employment by any person of any  
8 deception, fraud, false pretense, false promise, misrepresentation, unfair practice or  
9 the concealment, suppression, or omission of any material fact in connection with  
10 the sale or advertisement of any merchandise in trade or commerce.” Mo. Ann. Stat.  
11 § 407.020.

12           173. The MMPA protects consumers by expanding the common law  
13 definition of fraud “to preserve fundamental honesty, fair play and right dealings in  
14 public transactions.” *State ex rel. Danforth v. Independence Dodge, Inc.*, 494 S.W.2d  
15 362, 368 (Mo.App.1973).

16           174. Through the course of their business, Defendant violated the MMPA.  
17 Defendant knew or should have known that its representations regarding the  
18 Products were false or misleading.

19           175. In the course of business, Defendant engaged in unlawful trade  
20 practices by employing deception, deceptive acts or practices, fraud,  
21

1 misrepresentations, or concealment, suppression, or omission of any material with  
2 the intent that others rely upon such concealment, suppression, or omission, in  
3 connection with the sale of the Products, including, but not limited to:

4 a. Misrepresenting the Products as legal dietary supplements when under  
5 the FDCA and DSHEA, they are illegal;

6 b. Mislabeling and misbranding the Products and making false and  
7 deceiving representations regarding the Products' ability to mitigate, prevent, or cure  
8 a disease or class of diseases;

9 c. Mislabeling and misbranding the Products under the FDCA and  
10 DSHEA by failing to include adequate directions for the Products' use;

11 d. Mislabeling and misbranding the Products under the FDCA and  
12 DSHEA by unlawfully claiming that the Products have "high antioxidant levels";  
13 and

14 e. Making false and misleading claims that science has established the  
15 effectiveness of the Products.  
16

17  
18 176. Defendant's actions have the tendency or capacity to mislead, deceive,  
19 cheat, or create a false impression or misrepresentation for the average consumer,  
20 and did mislead Plaintiff Dobbs and the Missouri State Class.  
21

22  
23 177. As a direct and proximate result of Defendant's deceptive acts,  
24 practices, fraud, and misrepresentations, Plaintiff Dobbs and the Missouri State  
25

1 Class suffered significant damages, and seek damages in an amount to be determined  
2 at trial.

3  
4 **COUNT VI**  
5 **Breach of Express Warranties**  
6 **(On Behalf of the National Class and Subclasses)**

7 178. Plaintiffs reallege and incorporate by reference the preceding  
8 paragraphs as if fully set forth herein.

9 179. Plaintiffs bring this claim individually and on behalf of the members of  
10 National Class and the California, Massachusetts, and Missouri Subclasses against  
11 Defendant.

12 180. Through the Products' labels and advertising, Defendant made  
13 affirmations of fact or promises, or description of goods, described above, which  
14 were "part of the basis of the bargain," in that Plaintiffs and the Class Members  
15 purchased the Products in reasonable reliance on those statements.

16 181. Plaintiffs and the Class Members have privity of contract with  
17 Defendant through their purchase of the Elderberry Products, and through the  
18 express warranties that Defendant issued to its customers. Defendant's warranties  
19 accompanied the Elderberry Products and were intended to benefit end-users of the  
20 Elderberry Products. To the extent that Plaintiffs and/or the Class Members  
21 purchased the Elderberry Products from third-party retailers, privity is not required  
22  
23  
24  
25  
26

1 because Plaintiffs and the Class Members are intended third-party beneficiaries of  
2 the contracts between Defendant and third-party retailers, and because the express  
3 warranty is intended to benefit purchasers or owners subsequent to the third-party  
4 retailers. In other words, the contracts are intended to benefit the ultimate consumer  
5 or user of the Elderberry Products.  
6

7 182. Defendant breached the express warranties by selling Products that are  
8 illegally labeled as dietary supplements.  
9

10 183. Plaintiffs and the Class Members would not have purchased the  
11 Products had they known that the Products are illegally labeled as dietary  
12 supplements. Plaintiffs and the Class Members relied on Defendant's  
13 misrepresentations and misstatements.  
14

15 184. That breach actually and proximately caused injury in the form of the  
16 lost purchase price that Plaintiffs and Class members paid for the Products.  
17

18 185. Furthermore, Defendant had actual knowledge that the Products were  
19 not legal dietary supplements because it has actual knowledge of the nature,  
20 ingredients and qualities of the ingredients in its Products and it knows that the  
21 affirmations and representations it makes concerning the legality of the Products' on  
22 their labeling and on Defendant's website and advertising are false.  
23  
24

25 186. Plaintiffs provided Defendant with notice of the alleged breach within  
26 a reasonable time after they discovered the breach or should have discovered it.  
27



1           193. Plaintiffs and the Class Members purchased the Elderberry Products  
2 manufactured and marketed by Defendant by and through Defendant’s authorized  
3 sellers for retail sale to consumers, or were otherwise expected to be the third-party  
4 beneficiaries of Defendant’s contracts with authorized sellers, or eventual purchasers  
5 when bought from a third party. Defendant knew or had reason to know of the  
6 specific use for which the Elderberry Products were purchased.  
7

8  
9           194. However, Defendant breached the implied warranty of merchantability  
10 in that the Products are not lawfully labeled as legal dietary supplements.  
11

12           195. Plaintiffs provided Defendant with notice of the alleged breach within  
13 a reasonable time after they discovered the breach or should have discovered it.  
14

15           196. As an actual and proximate result of Defendant’s conduct, Plaintiffs  
16 and the Class Members did not receive goods as impliedly warranted by Defendant  
17 to be merchantable in that they did not conform to promises and affirmations made  
18 on the container or label of the Products nor are they fit for their ordinary purpose  
19 of providing the benefits as promised.  
20

21           197. Here, privity is not required because the implied warranty claim relates  
22 to food or other substances intended for human consumption by consumers, such as  
23 the Products.  
24

25           198. To the extent that Privity is required, Defendant entered into contracts  
26 with the authorized retailers from whom Plaintiffs and the Class Members purchased  
27

1 the Products, and Plaintiffs and the Class Members were the intended third-party  
2 beneficiaries of those contracts, an exception to the privity requirement.

3 199. Plaintiffs and the Class Members have sustained damages as a  
4 proximate result of the foregoing breach of implied warranty in the amount of the  
5 Products' purchase prices.  
6

7 **PRAYER FOR RELIEF**  
8

9 WHEREFORE, Plaintiffs pray that this case be certified and maintained as a  
10 class action and for judgment to be entered against Defendant as follows:

- 11 A. Enter an order certifying the proposed Class (and subclasses, if  
12 applicable), designating Plaintiffs as the class representatives, and  
13 designating the undersigned as class counsel;  
14  
15 B. Enter an order awarding Plaintiffs and the class members their actual  
16 damages, treble damages, and/or any other form of monetary relief  
17 provided by law;  
18  
19 C. Declare that Defendant is financially responsible for notifying all Class  
20 members of the mislabeling and misbranding of the Products;  
21  
22 D. Declare that Defendant must disgorge, for the benefit of the Class, all  
23 or part of the ill-gotten profits it received from the sale of the Products,  
24 or order Defendant to make full restitution to Plaintiffs and the  
25 members of the Class;  
26  
27

- 1 E. Defendant shall audit and reassess all prior customer claims regarding  
2 the Products, including claims previously denied in whole or in part;  
3 F. An order awarding Plaintiffs and the Classes pre-judgment and post-  
4 judgment interest as allowed under the law;  
5 G. Grant reasonable attorneys' fees and reimbursement of all costs for the  
6 prosecution of this action, including expert witness fees; and  
7 H. Grant such other and further relief as this Court deems just and  
8 appropriate.  
9  
10  
11

12 **JURY DEMAND**

13 Plaintiffs hereby demand a trial by jury on all issues so triable.  
14

15 Dated: November 29, 2021

Respectfully Submitted,

16 By: /s/ Alex Straus

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***Counsel for Plaintiffs and the Class***

**CERTIFICATE OF SERVICE**

I hereby certify that on November 29, 2021, I caused the foregoing to be filed via the Court’s electronic filing system which will notify all counsel of record of the same.

/s/ Alex R. Straus  
Alex R. Straus