

1 Trenton R. Kashima (SBN No. 291405)
2 **MILBERG COLEMAN BRYSON**
3 **PHILLIPS GROSSMAN PLLC**
4 402 West Broadway St., Suite 1760
5 San Diego, CA 92101
6 Tel: (619) 810-7047
7 tkashima@milberg.com

8 *Attorneys for Plaintiffs and the Class*

9 [Additional Counsel Listed on Signature Page]

10 **UNITED STATES DISTRICT COURT**

11 **FOR THE SOUTHERN DISTRICT OF CALIFORNIA '23CV1318 JES BGS**

12 LINDA SUNDERLAND and
13 BENJAMIN BINDER individually and
14 on behalf of all others similarly situated,

15 Plaintiffs,

16 v.

17 PHARMACARE U.S., INC., a
18 Delaware Corporation, and
19 PHARMACARE LABORATORIES
20 PTY LTD., an Australian company,

21 Defendant.

22 Case No. [REDACTED]

23 **PLAINTIFFS' CLASS ACTION
24 COMPLAINT**

25 **JURY TRIAL DEMANDED**

1 Plaintiffs Linda Sunderland and Benjamin Binder (collectively “Plaintiffs”),
2 through their undersigned attorneys, file this Class Action Complaint against
3 Defendant PharmaCare U.S., Inc. and Pharmacare Laboratories PTY Ltd.
4 (“Defendants”), individually and on behalf of all others similarly situated, and allege
5 upon personal knowledge as to themselves and their own acts and experiences and,
6 as to all other matters, upon information and belief, including investigation
7 conducted by their attorneys:

8 **NATURE OF THE ACTION**

9 1. This class action is brought individually by Plaintiffs on behalf of
10 consumers who purchased Defendants’ Elderberry Original Syrup, Sambucol Black
11 Elderberry Sugar Free, Sambucol Black Elderberry Syrup for Kids, Sambucol Black
12 Elderberry Effervescent Tablets, Sambucol Black Elderberry Chewable, Sambucol
13 Black Elderberry Pastilles, Sambucol Black Elderberry Daily Immune Drink
14 Powder, and Sambucol Black Elderberry Advanced Immune Syrup (collectively the
15 “Elderberry Products” or the “Products”) in California, New York, and nationwide
16 (the “Class”).

17 2. Black elderberry, which is derived from a flowering plant called
18 *Sambucus*, has become a popular dietary supplement in recent years. The increased
19 popularity of “natural remedies” drives sales of elderberry products. According to a
20 report published by the American Botanical Council in 2019, sales of elderberry
21 supplements more than doubled in the United States between 2017 and 2018 to a
22 total of nearly \$51 million. Between January and March of 2018, elderberry
23 supplement sales were more than \$100 million dollars in the US alone. Elderberry
24 sales in the first half of 2020 grew by triple digits compared to sales during the same
25 period in 2019, showing the greatest growth in the mainstream dietary supplement
26 market, where it is currently the third top-selling herbal ingredient. The mainstream
27 dietary supplement market includes grocery stores, drug stores, and mass
28

1 merchandisers such as club, dollar, and military stores.¹

2 3. According to IRI (now known as Circana), a market research firm that
3 tracks retail sales of supplements, in March 2020, sales of elderberry supplements
4 increased by 415% over the prior year as consumers sought products that might offer
5 protection from the novel coronavirus.² The “immune support” dietary supplement
6 market, including supplements containing elderberry, is thus an extraordinarily fast-
7 growing segment of the dietary supplement market, in part due to the Coronavirus
8 Pandemic.

9 4. With hundreds of elderberry supplement options available for
10 consumers to purchase, in order to stand out from the competition, Defendants
11 promote its Elderberry Products as “the most trusted brand sold worldwide” and
12 prominently displays a badge on its website proclaiming that its Products are the
13 “No. 1 Best Selling Black Elderberry in the US.”³

14 5. To further stand out from the competition, on the labels of its Elderberry
15 Products, as well as on its website and in other marketing directed at consumers,
16 Defendants state: “*Developed by a world renowned virologist*, Sambucol is the
17 *unique* black elderberry extract that has been used in scientific studies. By using a
18 *proprietary method* of extraction, *only Sambucol can guarantee* consistent, immune
19 supporting properties in every serving.” (Emphasis added). A reasonable consumer
20 would understand such claims to mean that the Elderberry Products contain a unique
21 elderberry extract, which has been developed by a virologist (thus, likely with anti-
22 viral properties), using a method of extraction that cannot be found in other
23 elderberry dietary supplements.

24
25 ¹ <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>.

26
27 ² <https://www.nytimes.com/2020/03/23/well/live/coronavirus-supplements-herbs-vitamins-colds-flu.html>.

28 ³ <https://sambucolusa.com/>.

Sambucol®
BLACK ELDERBERRY

BLACK ELDERBERRY

GLUTEN FREE

Great Tasting Syrup

Scientifically Tested
Supports Immunity*
High antioxidant levels

7.8 Fl oz
230ml
SYRUP

Dietary Supplement

Sambucol®
BLACK ELDERBERRY

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

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

Trusted by millions worldwide, **Sambucol®** 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®** that you purchase. If you are dissatisfied, please visit our website for full details on our refund policy.

Sambucol® is a registered trademark of PharmaCare Laboratories Pty Ltd.

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

Sambucol®
BLACK ELDERBERRY

- ✓ Supports immune system
- ✓ Virologist developed
- ✓ Scientifically tested
- ✓ Great tasting syrup
- ✓ Naturally flavored with the goodness of Elderberry

Use daily for maximum benefit

Directions for use:
For Daily Maintenance:
Adults and Children over 4 years:
Take 2 teaspoons (10ml) daily.
For Intensive Use:
Adults and Children over 4 years:
Take 2 teaspoons (10ml) four times daily. If desired, mix syrup in water, fruit juice, smoothies, yogurt, or most anything!
Sealed for your protection. Do not use if seal is broken or missing.
To preserve quality and freshness, keep tightly sealed and keep in a cool, dry place.
Keep out of reach of children.
See the full line of Sambucol® products at our website.

15 Thus, Defendants warrant that all of the Products contain its proprietary, virologist
16 developed, elderberry extract. However, such claims are false and misleading.

17 6. Here, Defendants advertise that the Elderberry Products were
18 “developed by a world renowned virologist,” a reference to Dr. Madeleine
19 Mumcuoglu. Dr. Mumcuoglu and her company (Razei Bar Ltd.) originally
20 trademarked the “Sambucol” branding, the same trademark that is currently owned
21 by Defendants. *See* U.S. Trademark Nos. 75326070 and 74680785. Dr. Mumcuoglu
22 also applied for patents for her Trademarked “Sambucol” Elderberry Extract. *See*
23 U.S. Patent No. 4,742,046; Patent Application US2009/0186101 A1. This patented
24 formulation was based on a specific cold pressed Elderberry Extract that contains a
25 unique anti-viral compound, elderberry lectins.

26 7. While uniformly marketing the product as a unique formulation
27 developed by a world-renowned virologist, Defendants have argued that its “unique”
28 and “propriety” Elderberry Extract is simply run-of-the-mill Elderberry Juice during

1 an ancillary litigation. Accordingly, Plaintiffs’ counsel ordered testing to determine
2 if the Defendants’ so-called “unique” and “propriety” Elderberry Extract was
3 actually the same “unique” and “propriety” formula developed by Dr. Mumcuoglu.
4 The results confirm it is not. There are no lectins in the Elderberry Products.

5 8. With knowledge of growing consumer demand for supplements
6 containing elderberry, Defendants intentionally marketed and sold their illegal
7 Elderberry Products using false and misleading labeling and advertising.
8 Defendants’ prominent and systematic mislabeling of the Products and its false and
9 deceptive advertising form a pattern of unlawful and unfair business practices that
10 harms the public and, if unstopped, could lead to substantial societal harm.

11 9. Plaintiffs bring this suit to halt Defendants’ unlawful sales and
12 marketing of its Elderberry Products and for damages they sustained as a result of
13 the illegal sales and false and misleading marketing. Declaratory and injunctive
14 relief is of particular importance given the likely consequences of Defendants’
15 actions.

16 **PARTIES**

17 10. Plaintiff Linda Sunderland is a resident and citizen of New York.

18 11. Plaintiff Sunderland purchased Sambucol Black Elderberry Chewable
19 Tablets over the last two years, with her last purchase in March 2023.

20 12. Prior to and at the time of each purchase of the Sambucol Black
21 Elderberry Chewable Tablets, Plaintiff Sunderland was exposed to, saw, and relied
22 upon Defendants’ materially misleading representations on the Products’ packaging
23 and labelling. She reviewed the product’s labeling, where she saw and relied on
24 Defendants’ claims that its elderberry ingredient was developed by a world
25 renowned virologist and was unique and propriety.

26 13. By purchasing Defendants’ illegally sold and falsely advertised
27 Elderberry Products, Plaintiff Sunderland suffered injury in fact and lost money.

28 14. Plaintiff Sunderland would like to continue purchasing Defendants’

1 Elderberry Products if they were legally sold supplements and if Defendants' false
2 and misleading statements were true. Plaintiff Sunderland is, however, unable to rely
3 on Defendants' representations in deciding whether to purchase Defendants'
4 products in the future.

5 15. Plaintiff Benjamin Binder is a resident and citizen of California.

6 16. Plaintiff Binder purchased Sambucol Black Elderberry Original Syrup
7 over the last four years, with his last purchase in June 2023.

8 17. Prior to and at the time of each purchase of the Sambucol Black
9 Elderberry Original Syrup, Plaintiff Binder was exposed to, saw, and relied upon
10 Defendants' materially misleading representations on the Products' packaging and
11 labelling. He reviewed the product's labeling, where he saw and relied on
12 Defendants' claims that its elderberry ingredient was developed by a world
13 renowned virologist and was unique and propriety.

14 18. By purchasing Defendants' illegally sold and falsely advertised
15 Products, Plaintiff Binder suffered injury in fact and lost money.

16 19. Plaintiff Binder would like to continue purchasing Defendants'
17 Products if they were legally sold supplements and if Defendants' false and
18 misleading statements were true. Plaintiff Binder is, however, unable to rely on
19 Defendants' representations in deciding whether to purchase Defendants' products
20 in the future.

21 20. Defendant PharmaCare U.S., Inc. is a Delaware corporation with its
22 principal place of business at 5030 Camino de la Siesta, Suite 200, San Diego,
23 California 92108. Defendant PharmaCare U.S., Inc. is responsible for the marketing
24 and distribution of the Elderberry Products in the United States. Defendant
25 PharmaCare U.S., Inc. is responsible for reviewing the accuracy of the Elderberry
26 Products labels sold in the United States, and will make periodic changes to such
27 labels.

28 21. Defendant Pharmacare Laboratories Pty Ltd. (or Pharm-A-Care

1 Laboratories Pty. Ltd.) is an Australian company with its principal place of business
2 at 18 Jubilee Ave Warriewood, 2102 Australia. Defendant Pharmacare Pty Ltd.
3 (both individually and through its whole own subsidiaries) owns the Sambucol
4 trademark, is responsible for the formulation and manufacturing of the Elderberry
5 Products (both in the U.S. and internationally), and is responsible for the original
6 labels on the Elderberry Products.

7 **JURISDICTION AND VENUE**

8 22. This Court has original jurisdiction over this controversy pursuant to 28
9 U.S.C. § 1332(d). The amount in controversy in this class action exceeds
10 \$5,000,000, exclusive of interest and costs, there are tens of thousands of Class
11 members, and there are numerous Class members who are citizens of states other
12 than Defendants' states of citizenship.

13 23. This Court has personal jurisdiction over Defendant PharmaCare U.S.,
14 Inc.'s in this matter because Defendant is a resident of California, and Defendants'
15 acts and omissions giving rise to this action occurred in the state of California.

16 24. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b)(2) and
17 (c) because a substantial part of the events or omissions giving rise to Plaintiffs'
18 claims occurred in this District and because Defendants transact business and/or has
19 agents within this District and has intentionally availed themselves of the laws and
20 markets within this district.

21 **FACTUAL ALLEGATIONS**

22 25. This dispute arises out of Defendants' marketing of the Sambucol
23 branded dietary supplements, which contains as its primary dietary ingredient, Black
24 Elderberry extract.

25 26. Black Elderberry (also known as *Sambucus nigra*) is a flowering plant
26 that produces small clusters of small black berries. Elderberries have been used for
27 hundreds of years. However, raw elderberries, as well as elderberry seeds, stems,
28 and leaves, contain a toxin, cyanogenic glycosides, that can cause serious illness and

1 even death. Accordingly, elderberries have to be cooked before they can be used, in
2 order to neutralize the cyanogenic glycosides. This is traditionally done by boiling
3 the elderberries, using the resulting juice or mash. This method is also used to create
4 traditional elderberry juices and extracts.

5 27. In May 3, 1988, a patent was filed by Madeleine Bliah (later known as
6 Madeleine Mumcuoglu), U.S. Patent No. 4,742,046. Patent No. US4742046. This
7 Patent described the use of *lectins* obtained from the *Sambucus nigra* plant for
8 inhibiting the activity of enveloping viruses (particularly influenza virus type A).
9 The Patent described the method of extraction for Dr. Mumcuoglu's therapeutic
10 elderberry extract, which focused on isolating elderberry lectins (which Dr.
11 Mumcuoglu claimed had anti-viral properties):

12 elderberries from *Sambucus nigra I* may be pressed without crushing
13 the seeds and the extract recovered by centrifugation and filtration. The
14 extract should then be ultra-centrifuged. The lectins may be recovered
15 from the extract by affinity chromatography on a Sepharose-galactose
16 column followed by elution. The lactose may be removed (for example,
17 by passage through a Sephadex G25 column). The desorbed material is
18 then resubjected to affinity chromatography on a Sepharose-galactose
19 column. The first two peaks recovered during desorption are dialyzed
20 against water and lyophilized. The first peak comprises *Sambucus nigra II*
lectin which is not appreciably adsorbed on to the Sepharose-
galactose column and the second peak comprises *Sambucus nigra I*
lectin

21 *Id.* at p. 4. The Patent warns that “[d]uring the drug processing the temperature
22 should not exceed 70° C. since some lectins are destroyed by heat at that level.” *Id.*

23 28. This temperature limitation is an important note, as most pasteurization
24 process for commercial juice products will normally exceed this temperature. *See*
25 FDA, Guidance for Industry: Juice Hazard Analysis Critical Control Point Hazards
26 and Controls Guidance, First Edition (2004), available at
27 [https://www.fda.gov/regulatory-information/search-fda-guidance-](https://www.fda.gov/regulatory-information/search-fda-guidance-documents/guidance-industry-juice-hazard-analysis-critical-control-point-hazards-)
28 [documents/guidance-industry-juice-hazard-analysis-critical-control-point-hazards-](https://www.fda.gov/regulatory-information/search-fda-guidance-documents/guidance-industry-juice-hazard-analysis-critical-control-point-hazards-)

1 and-controls-guidance-first (recommended pasteurization for fruit juice at a
2 minimum of 71.1° C (160° F) for 6 seconds, but may be much higher). This is likely
3 the reason for Dr. Mumcuoglu’s specific method of extraction.

4 29. Accordingly, the formula that Dr. Mumcuoglu developed, which
5 Defendants touted in its marketing and labeling of the Elderberry Products, was not
6 traditional elderberry juice. Instead, it was a method of isolating the lectins within
7 elderberries for their anti-viral properties.

8 30. During this period, Dr. Mumcuoglu also started an Israeli health
9 products company, Razei Bar Ltd., to market her elderberry extract. In April 1995,
10 Razei Bar Ltd. applied for a U.S. trademark, No. 74680785, on the word “Sambucol”
11 for “dietary supplements, namely liquid extracts and throat lozenges composed
12 primarily of elderberry juice.” The “Sambucol” trademark would eventually
13 become the property of Defendant PharmaCare Laboratories Pty Ltd.

14 31. In 2009, Dr. Mumcuoglu would file a patent application, No.
15 US2009/0186101 A1, to test this same elderberry extract discussed in the above
16 patent as a novel method for the treatment of the avian flu virus. Patent Application
17 US2009/0186101 A1. In this patent application, Dr. Mumcuoglu would specifically
18 refer to her previous patented therapeutic elderberry extract using the trademarked
19 term “Sambucol.” *Id.* Additionally, there is no doubt that these patents describe the
20 unique “Sambucol” elderberry extract that Dr. Mumcuoglu developed and
21 trademarked.

22 32. In order to increase demand, the Elderberry Products’ labeling
23 specifically advertises that the Products contained a “unique” and “proprietary”
24 elderberry extract “developed by a world renowned virologist.” The virologist
25 referenced was Dr. Mumcuoglu. Defendants originally included Dr. Mumcuoglu’s
26 name on some of the Products’ labels, but this reference was removed. It appears
27 that there is currently no connection between Dr. Mumcuoglu and Defendants or the
28 current version of the Elderberry Products.

1 33. Nonetheless, Defendants continued to advertise on several of the
2 Products' labels that the Products were in fact virologist developed. For example,
3 the label of the Products contained statements, such as:

- 4 • the Products were "Virologist developed"
- 5 • "Developed by a [world renowned] virologist, Sambucol® is the
6 unique black elderberry extract that has been used in scientific studies. By
7 using a proprietary method of extraction, only Sambucol® can guarantee
8 consistent, immune supporting properties in every serving."
- 9 • "Developed by a world renowned virologist, Sambucol® is the
10 unique manufacturing process preserves and maximizes the naturally
11 occurring health benefits of the Black Elderberry."
- 12 • "Developed by a world renowned virologist, Sambucol® has
13 been trusted by millions worldwide."

14 It is believed that Defendants included this language to build trust in the Sambucol
15 brand and gain a competitive advantage in the marketplace.

16 34. At all relevant times, Defendants marketed its Products in a consistent
17 and uniform manner. Each of the Class Products' labels specifically reference that
18 they were virologist developed and contained the same elderberry extracts.
19 Defendants sell the Products in all 50 states on its website and through various
20 distributors and retailers across the United States.

21 35. For the first time during an ancillary litigation, Defendants' counsel
22 revealed that these claims may be false. During a discovery hearing, where the
23 plaintiffs were seeking formulations for the Products, Defendants' counsel claimed
24 that:

25 I don't know why plaintiff is saying he needs the formulation for it to
26 determine chemical analysis. You literally have the manufacturing
27 process for turning elderberries into elderberry juice, from which an
28 expert should be able to opine on whether that results in any chemical
alteration to the elderberry juice.

1 *Corbett et al. v. Pharmicare U.S., Inc.*, No: 3:21-cv-00137-JES-AHG, ECF No. 119,
2 at p. 29:20-25. The import of this statement is significant, as it seems to be a judicial
3 admission that the “unique” and “proprietary” Elderberry Extract in the Elderberry
4 Products (touted to have been developed by a virologist), was simply elderberry
5 juice.

6 36. Notably, with respect to the virologist developed extract that
7 Defendants tout on its marketing and labeling, Dr. Mumcuoglu (the referenced
8 virologist) applied for two Patents for the use of an extract containing the *lectins*
9 obtained from the *Sambucus nigra* plant for inhibiting the activity of viruses, namely
10 the flu. Lectins are the defining component of Dr. Mumcuoglu’s formula.

11 37. Plaintiffs testing of the Elderberry Products confirm that there are no
12 elderberry lectins in the Products. Therefore, Defendants are not using Dr.
13 Mumcuoglu’s unique and proprietary formulation, which was developed (in part) to
14 retain the lectins. Accordingly, Defendants’ “virologist developed” claims are
15 demonstrably false.

16 38. Defendants knew, or could not be unaware, of the falsity of the
17 Elderberry Products’ labels as alleged herein. Defendants both reviewed and created
18 the labels on the Elderberry Products, as well as their formulations. Defendants also
19 purchased the ingredients within the Elderberry Products, including the Elderberry
20 Extract. Finally, Defendants were also aware of Dr. Mumcuoglu’s Elderberry
21 Extract formulation (as it was in a publicly available patent) and her involvement in
22 the development of the Sambucol dietary supplements. Indeed, even during
23 Defendants’ ownership of the Elderberry Products, some of the Products’ labels still
24 referenced Dr. Mumcuoglu. Thus, Defendants could not have been unaware that the
25 Elderberry Products did not contain an “unique” and “proprietary” Elderberry
26 Extract, developed by a virologist. Instead, it contained simply elderberry juice.

27 39. Defendants continue to falsely label its Elderberry Products as being
28 “virologist developed” and containing an “unique” and “proprietary” Elderberry

1 Extract. Yet, without complex and costly scientific testing, consumers would be
2 unable to determine that Defendant’s labels are false. Without injunctive relief,
3 consumers will be unable to determine if Defendants’ labels remain incorrect or if
4 the Elderberry Products actually use Dr. Mumcuoglu’s formulation. Additionally,
5 Plaintiffs and other consumers continue to be injured by Defendants’ fraudulent
6 business practices.

7 40. Additionally, Defendants cause consumers to suffer a monetary injury.
8 Each of the Elderberry Products do not contain the “unique” and “proprietary”
9 virologist developed Elderberry Extract, as advertised and warranted. Accordingly,
10 Plaintiffs and other claims members are entitled to the difference between the
11 Elderberry Products provided and the Elderberry Products as warranted.

12 **TOLLING AND ESTOPPEL ALLEGATIONS**

13 41. Defendants have actual knowledge, or should have actual knowledge,
14 that its Elderberry Products do not contain the “unique” and “proprietary” virologist
15 developed Elderberry Extract, as advertised and warranted for the reasons stated
16 above.

17 42. Although Defendants were aware of the deception in their advertising,
18 marketing, packaging, and sale of the Elderberry Products chemicals, it took no steps
19 to disclose to Plaintiffs or Class Members that their Products do not contain the
20 “unique” and “proprietary” virologist developed Elderberry Extract.

21 43. Despite their knowledge otherwise, Defendants have fraudulently
22 misrepresented the Elderberry Products contain the “unique” and “proprietary”
23 virologist developed Elderberry Extract, actively concealing this fact from Plaintiffs
24 and other Class Members.

25 44. Defendants have made, and continue to make, affirmative false
26 statements and misrepresentations to consumers, regarding the inclusion of the
27 purported “unique” and “proprietary” virologist developed Elderberry Extract in the
28 Elderberry Products.

1 45. The exact formulation of the Elderberry Extract in the Elderberry
2 Products is not reasonably detectible to Plaintiffs and Class Members.

3 46. At all times, Defendants actively and intentionally misrepresented the
4 qualities and characteristics of the Elderberry Products, while concealing the true
5 nature of the Elderberry Extract in its Products. Accordingly, Plaintiffs' and Class
6 Members' lack of awareness was not attributable to a lack of diligence on their part.

7 47. Defendants misrepresented the Elderberry Products and concealed the
8 true nature of the Elderberry Extract in their Products for the purpose of delaying
9 Plaintiffs and Class Members from filing a complaint on their causes of action.

10 48. As a result of Defendants' intentional misrepresentations and active
11 concealment of the true nature of the Elderberry Extract in their Elderberry Products,
12 any and all applicable statutes of limitations otherwise applicable to the allegations
13 herein have been tolled. Furthermore, Defendants are estopped from relying on any
14 statutes of limitations in light of its intentional misrepresentations and active
15 concealment of the true nature of the Elderberry Extract in their Elderberry Products.

16 49. Further, the causes of action alleged herein did not occur until Plaintiffs
17 and Class Members discovered that the Products contained PFAS chemicals.
18 Plaintiffs only became aware of the true nature of the Elderberry Extract in their
19 Products through Defendants' admission at a recent hearing before this Court.
20 *Corbett et al. v. Pharmicare U.S., Inc.*, No: 3:21-cv-00137-JES-AHG, ECF No. 119,
21 at p. 29:20-25. Prior to this admission, there was no publicly available information
22 regarding the exact formulation of the Elderberry Extract in Defendants' Elderberry
23 Products which would contradict Defendants' assertion that the Elderberry Extract
24 in their Elderberry Products was a "unique" and "proprietary" virologist developed
25 formulation.

26 **CLASS ACTION ALLEGATIONS**

27 50. Plaintiffs bring this action individually and as representatives of all
28 those similarly situated, pursuant to Federal Rule of Civil Procedure 23, on behalf

1 of the below-defined Classes:

2 **National Class:**

3 All persons in the United States who, during the relevant statute of limitations,
4 purchased the Elderberry Original Syrup, Sambucol Black Elderberry Sugar
5 Free, Sambucol Black Elderberry Syrup for Kids, Sambucol Black Elderberry
6 Effervescent Tablets, Sambucol Black Elderberry Chewable Tablets,
7 Sambucol Black Elderberry Pastilles, Sambucol Black Elderberry Daily
8 Immune Drink Powder, and Sambucol Black Elderberry Advanced Immune
9 Syrup for personal or household use and not for resale.

8 **California Subclass:**

9 All persons in California who, during the relevant statute of limitations,
10 purchased the Elderberry Original Syrup, Sambucol Black Elderberry Sugar
11 Free, Sambucol Black Elderberry Syrup for Kids, Sambucol Black Elderberry
12 Effervescent Tablets, Sambucol Black Elderberry Chewable Tablets,
13 Sambucol Black Elderberry Pastilles, Sambucol Black Elderberry Daily
14 Immune Drink Powder, and Sambucol Black Elderberry Advanced Immune
15 Syrup for personal or household use and not for resale.

13 **New York Subclass:**

14 All persons in New York who, during the relevant statute of limitations,
15 purchased the Elderberry Original Syrup, Sambucol Black Elderberry Sugar
16 Free, Sambucol Black Elderberry Syrup for Kids, Sambucol Black Elderberry
17 Effervescent Tablets, Sambucol Black Elderberry Chewable Tablets,
18 Sambucol Black Elderberry Pastilles, Sambucol Black Elderberry Daily
19 Immune Drink Powder, and Sambucol Black Elderberry Advanced Immune
20 Syrup for personal or household use and not for resale.

21 Specifically excluded from these definitions are: (1) Defendants, any entity in which
22 Defendants have a controlling interest, and its legal representatives, officers,
23 directors, employees, assigns and successors; (2) the Judge to whom this case is
24 assigned and any member of the Judge’s staff or immediate family; and (3) Class
25 Counsel. Plaintiffs reserve the right to amend the Class definition and Subclass
26 definitions as necessary.

27 51. Certification of Plaintiffs’ claims for class-wide treatment are
28 appropriate because Plaintiffs can prove the elements of the claims on a class-wide
basis using the same evidence that individual Class members would use to prove
those elements in individual actions alleging the same claims.

1 52. The Members of the Class are so numerous that joinder of all members
2 is impracticable. While the exact number of Class Members is presently unknown,
3 it likely consists of hundreds of thousands of consumers. The number of Class
4 Members can be determined by sales information and other records. Moreover,
5 joinder of all potential Class Members is not practicable given their numbers and
6 geographic diversity. The Class is readily identifiable from information and records
7 in the possession of Defendants and its authorized retailers.

8 53. The claims of the representative Plaintiffs are typical in that Plaintiffs,
9 like all Class Members, purchased the Elderberry Products that were manufactured,
10 marketed, advertised, distributed, and sold by Defendants. Furthermore, the factual
11 basis of Defendants' misconduct is common to all Class Members because
12 Defendants have engaged in systematic fraudulent behavior that was deliberate,
13 includes negligent misconduct, and results in the same injury to all Class Members.

14 54. Common questions of law and fact exist as to all Members of the Class.
15 These questions predominate over questions that may affect only individual Class
16 Members because Defendants have acted on grounds generally applicable to the
17 Class. Such common legal or factual questions include, *inter alia*:

18 a. Whether the Elderberry Products are advertised and warranted as
19 containing a "unique" and "propriety" Elderberry Extract, developed by a virologist;

20 b. Whether the claims Defendants made and is making regarding the
21 Products are unfair or deceptive, specifically, whether the Elderberry Products
22 actually contain "unique" and "propriety" Elderberry Extract, developed by a
23 virologist;

24 c. Whether Defendants knew or should have known that the
25 representations and advertisements regarding the Products were false and
26 misleading;

27 d. Whether Defendants have breached express warranties in the sale and
28 marketing of the Elderberry Products;

1 e. Whether Defendants' conduct violates public policy;

2 f. Whether Defendants' acts and omissions violate California law;

3 g. Whether Defendants' acts and omissions violate New York law;

4 h. Whether the Plaintiffs and the Class Members suffered monetary
5 injury, and, if so, what is the measure of the appropriate damages or, in the
6 alternative, restitution;

7 i. Whether Plaintiffs and the Class Members are entitled to an injunction,
8 damages, restitution, equitable relief, and other relief deemed appropriate, and, if so,
9 the amount and nature of such relief.

10 55. Plaintiffs will fairly and adequately protect the interests of Class
11 Members. They have no interests antagonistic to those of Class Members. Plaintiffs
12 retained attorneys experienced in the prosecution of class actions, including
13 consumer and product defect class actions, and Plaintiffs intend to prosecute this
14 action vigorously.

15 56. The elements of Rule 23(b)(2) are met. Defendants will continue to
16 commit the unlawful practices alleged herein, and Class Members will remain at an
17 unreasonable and serious safety risk as a result of the Defect. Defendants have acted
18 and refused to act on grounds that apply generally to the Class, such that final
19 injunctive relief and corresponding declaratory relief is appropriate respecting the
20 Class as a whole.

21 57. The elements of Rule 23(b)(3) are also met. Plaintiffs and Class
22 Members have all suffered and will continue to suffer harm and damages as a result
23 of Defendants' unlawful and wrongful conduct. A class action is superior to other
24 available methods for the fair and efficient adjudication of the controversy. Absent
25 a class action, Class Members would likely find the cost of litigating their claims
26 prohibitively high and would therefore have no effective remedy at law. Because of
27 the relatively small size of Class Members' individual claims, it is likely that few
28 Class Members could afford to seek legal redress for Defendants' misconduct.

1 Absent a class action, Class Members will continue to incur damages, and
2 Defendants’ misconduct will continue without remedy. Class treatment of common
3 questions of law and fact would also be a superior method to multiple individual
4 actions or piecemeal litigation in that class treatment will conserve the resources of
5 the courts and the litigants and will promote consistency and efficiency of
6 adjudication.

7 58. Plaintiffs know of no difficulty to be encountered in the maintenance
8 of this action that would preclude its maintenance as a class action.

9 59. Defendants have acted or refused to act on grounds generally applicable
10 to the Class, thereby making appropriate final injunctive relief or corresponding
11 declaratory relief with respect to the Class appropriate.

12 **CAUSES OF ACTION**

13 **COUNT I**

14 **California’s Unfair Competition Law**
15 **Cal. Bus. & Prof. Code § 17200 et seq. (“UCL”)**
16 **(On Behalf of the National Class and California Subclass)**

17 60. Plaintiffs reallege and incorporate by reference the allegations
18 contained in the preceding paragraphs as though set forth fully herein.

19 61. Plaintiffs bring this claim individually and on behalf of all members of
20 the National Class and Plaintiff Binder brings this claim individually and on behalf
21 of California Subclass against Defendants.

22 62. The UCL prohibits any “unlawful, unfair or fraudulent business act or
23 practice.” Cal. Bus. & Prof. Code § 17200.

24 63. The acts, omissions, misrepresentations, practices, and non-disclosures
25 of Defendants as alleged herein constitute business acts and practices.

26 64. Unlawful: The acts alleged herein are “unlawful” under the UCL in
27 that they violate at least the following laws: the False Advertising Law, Cal. Bus. &
28 Prof. Code §§ 17500 *et seq.* and the Consumers Legal Remedies Act, Cal. Civ. Code

1 §§ 1750 *et seq.*;

2 65. Unfair: Defendants’ conduct with respect to the labeling, advertising,
3 and sale of the Products was “unfair” because Defendants’ conduct was immoral,
4 unethical, unscrupulous, or substantially injurious to consumers and the utility of
5 their conduct, if any, does not outweigh the gravity of the harm to their victims.

6 66. Defendants’ conduct with respect to the labeling, advertising, and sale
7 of the Products was and is also unfair because it violates public policy as declared
8 by specific constitutional, statutory or regulatory provisions, including but not
9 limited to the applicable sections of the Consumers Legal Remedies Act and the
10 False Advertising Law.

11 67. Defendants’ conduct with respect to the labeling, advertising, and sale
12 of the Products was and is unfair because the consumer injury was substantial, not
13 outweighed by benefits to consumers or competition, and not one consumer
14 themselves could reasonably have avoided.

15 68. Fraudulent: A statement or practice is “fraudulent” under the UCL if it
16 is likely to mislead or deceive the public, applying an objective reasonable consumer
17 test. As set forth in detail above, Defendants have fraudulently labeled its Products
18 as they have made false and misleading statements that are likely to mislead
19 reasonable consumers.

20 69. Defendants profited from its sale of the falsely, deceptively, and
21 unlawfully advertised and packaged Products to unwary consumers.

22 70. Plaintiffs seek an order enjoining Defendant from continuing to
23 conduct business through fraudulent or unlawful acts and practices and to commence
24 a corrective advertising campaign.

25 71. Defendant’s conduct is ongoing and continuing, such that prospective
26 injunctive relief is necessary, especially given Plaintiffs’ desire to purchase the
27 Products in the future if they can be assured that the Products are properly labeled
28 and actually contain a virologist developed elderberry extract.

1 72. Additionally, Plaintiffs seek restitution if monetary damages are not
2 available. Indeed, restitution under the UCL can be awarded in situations where the
3 entitlement to damages may prove difficult. But even if damages were available,
4 such relief would not be adequate to address the injury suffered by Plaintiffs and the
5 Class. Unlike damages, the Court's discretion in fashioning equitable relief is very
6 broad. Thus, restitution would allow recovery even when normal consideration
7 associated with damages would not.

8 73. On behalf of themselves and the Class, Plaintiffs also seek an order for
9 the restitution of all monies from the sale of the Products, which were unjustly
10 acquired through acts of fraudulent, unfair, or unlawful competition.

11
12 **COUNT II**
13 **California's False Advertising Law**
14 **Cal. Bus. & Prof. Code § 17500 ("FAL")**
15 **(On Behalf of the National Class and California Subclass)**

16 74. Plaintiffs reallege and incorporate by reference the allegations
17 contained in the preceding paragraphs as if fully set forth herein.

18 75. Plaintiffs bring this claim individually and on behalf of all members of
19 the National Class and Plaintiff Binder brings this claim individually and on behalf
20 of California Subclass against Defendants.

21 76. The FAL provides that "[i]t is unlawful for any person, firm,
22 corporation or association, or any employee thereof with intent directly or indirectly
23 to dispose of real or personal property or to perform services" to disseminate any
24 statement "which is untrue or misleading, and which is known, or which by the
25 exercise of reasonable care should be known, to be untrue or misleading." Cal. Bus.
26 & Prof. Code § 17500.

27 77. As alleged in detail above, the advertisements, labeling, policies, acts,
28 and practices of Defendants relating to the Elderberry Products misled consumers
acting reasonably regarding the ingredients within said Products.

1 78. Plaintiffs and the Class Members suffered injury in fact as a result of
2 Defendants' actions as set forth herein because they purchased the Products in
3 reliance on Defendants' labeling claims, when such claims were false.

4 79. Defendants' business practices as alleged herein constitute deceptive,
5 untrue, and misleading advertising pursuant to the FAL because Defendants have
6 advertised the Products in a manner that is untrue and misleading, which Defendants
7 knew or reasonably should have known, and omitted material information from its
8 advertising. For example, Defendants advertised that its Elderberry Products
9 contained a virologist developed extract, when it did not.

10 80. Defendants profited from its sale of the falsely and deceptively
11 advertised Products to unwary consumers.

12 81. Plaintiffs seek an order enjoining Defendant from continuing to
13 conduct business through fraudulent or unlawful acts and practices and to commence
14 a corrective advertising campaign.

15 82. Defendant's conduct is ongoing and continuing, such that prospective
16 injunctive relief is necessary, especially given Plaintiffs' desire to purchase the
17 Products in the future if they can be assured that the Products are properly labeled
18 and actually contain a virologist developed elderberry extract.

19 83. Additionally, Plaintiffs seek restitution if monetary damages are not
20 available. Indeed, restitution under the FAL can be awarded in situations where the
21 entitlement to damages may prove difficult. But even if damages were available,
22 such relief would not be adequate to address the injury suffered by Plaintiffs and the
23 Subclass. Unlike damages, the Court's discretion in fashioning equitable relief is
24 very broad. Thus, restitution would allow recovery even when normal consideration
25 associated with damages would not.

26 84. On behalf of themselves and the Class, Plaintiffs also seek an order for
27 the restitution of all monies from the sale of the Products, which were unjustly
28 acquired through acts of fraudulent, unfair, or unlawful competition.

COUNT III

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

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4 85. Plaintiffs reallege and incorporate by reference the allegations
5 contained in the preceding paragraphs as if fully set forth herein.

6 86. Plaintiff Binder brings this claim individually and on behalf of the
7 members of the California Subclass against Defendants.

8 87. Defendants are a “person” under the CLRA, Cal. Civ. Code § 1761(c).

9 88. Plaintiff Binder and California Subclass members are “consumers”
10 under the CLRA, Cal. Civ. Code § 1761(d).

11 89. The CLRA prohibits deceptive practices in connection with the conduct
12 of a business that provides goods, property, or services primarily for personal,
13 family, or household purposes.

14 90. Defendants’ false and misleading labeling and other policies, acts, and
15 practices were designed to, and did, induce the purchase and use of the Products for
16 personal, family, or household purposes by Plaintiff Binder and California Subclass
17 Members, and violated and continue to violate the following sections of the CLRA:

18 a. § 1770(a)(5): representing that goods have characteristics, uses,
19 or benefits which they do not have;

20 b. § 1770(a)(7): representing that goods are of a particular standard,
21 quality, or grade if they are of another;

22 c. § 1770(a)(9): advertising goods with intent not to sell them as
23 advertised; and

24 d. § 1770(a)(16): representing the subject of a transaction has been
25 supplied in accordance with a previous representation when it has not.

26 91. Defendants profited from the sale of the falsely, deceptively, and
27 unlawfully advertised Products to unwary consumers.

28 92. Defendants’ wrongful business practices constituted, and constitute, a

1 continuing course of conduct in violation of the CLRA.

2 93. Pursuant to the provisions of Cal. Civ. Code § 1782(a), concurrently
3 with the filing of this Complaint, Plaintiff Binder, through counsel, mailed
4 Defendants a letter by certified mail addressed to its headquarters (with a copy sent
5 to Defendants’ counsel as well), providing notice of Defendants’ alleged violations
6 of the CLRA, demanding that Defendants correct such violations, and providing
7 Defendants with the opportunity to correct its business practices. Plaintiff Binder
8 specifically identified which provisions of Cal. Civ. Code § 1770 Defendants had
9 violated.

10 94. Pursuant to California Civil Code § 1780, Plaintiff Binder seeks
11 injunctive relief, his reasonable attorneys’ fees and costs, and any other relief that
12 the Court deems proper. Should Defendant not respond to Plaintiff Binder’s CLRA
13 Demand Letter, Plaintiff will amend his complaint to seek additional monetary
14 relief, which may include statutory damages.

15 **COUNT IV**

16 **Violation of New York Deceptive Acts and Practices Law**
17 **(New York General Business Law §§ 349 and 350)**
18 **(On Behalf of Plaintiff Sunderland and the New York Subclass)**

19 95. Plaintiff Sunderland reallege and repeat the allegations set forth in the
20 preceding paragraphs as if fully set forth herein.

21 96. By the acts and conduct alleged herein, Defendants committed
22 deceptive acts and practices in the State of New York by making the above alleged
23 misrepresentations directed to consumers in New York

24 97. Plaintiffs and other members of the New York Class are “consumers”
25 in accordance with New York General Business Law (“GBL”) § 349.

26 98. Defendants’ statements concerning the nature of the Elderberry Extract
27 in the Elderberry Products, alleged above, were advertisements in accordance with
28 GBL § 350.

1 99. Defendants’ statements concerning the nature of the Elderberry Extract
2 in the Elderberry Products, alleged above, were misleading in violation of GBL §§
3 349 and 350.

4 100. At all relevant times, Defendants conducted trade and commerce in
5 New York and elsewhere within the meaning of GBL § 349, and profited from the
6 sale of the Elderberry Products within New York.

7 101. Section 349 allows a plaintiff to recover “actual damages or fifty
8 dollars, whichever is greater.” N.Y. Gen. Bus. L. §349(h). Section 350 allows a
9 plaintiff to recover “actual damages or five hundred dollars, whichever is greater.”
10 Id. §350-e.

11 102. As a direct and proximate result of Defendants’ conduct, Plaintiffs and
12 other members of the Class have suffered damages.

13 103. Accordingly, Plaintiffs and the New York Subclass seek to enjoin the
14 unlawful acts and practices described herein, to recover actual damages or statutory
15 damages of fifty dollars and five hundred dollars under GBL §§ 349 and 350,
16 respectively, whichever is greater, as well punitive damages and reasonable
17 attorneys’ fees and costs.

18 **COUNT VI**
19 **Breach of Express Warranties**
20 **(On Behalf of the National Classes and Subclasses)**

21 104. Plaintiffs reallege and incorporate by reference the preceding
22 paragraphs as if fully set forth herein.

23 105. Plaintiffs bring this claim individually and on behalf of the members of
24 the National Class and the California and New York Subclasses against Defendants.

25 106. Through the Products’ labels and advertising, Defendants made
26 affirmations of fact or promises, or description of goods, described above, which
27 were “part of the basis of the bargain,” in that Plaintiffs and the Class Members
28 purchased the Products in reasonable reliance on those statements.

107. Plaintiffs and the Class Members have privity of contract with

1 Defendants through their purchase of the Elderberry Products, and through the
2 express warranties that Defendants issued to its customers. Defendants’ warranties
3 accompanied the Elderberry Products and were intended to benefit end-users of the
4 Elderberry Products. To the extent that Plaintiffs and/or the Class Members
5 purchased the Elderberry Products from third-party retailers, privity is not required
6 because Plaintiffs and the Class Members are intended third-party beneficiaries of
7 the contracts between Defendants and third-party retailers, and because the express
8 warranty is intended to benefit purchasers or owners subsequent to the third-party
9 retailers. In other words, the contracts are intended to benefit the ultimate consumer
10 or user of the Elderberry Products.

11 108. Defendants breached the express warranties by selling Elderberry
12 Products that contain a “unique” and “propriety” Elderberry Extract, developed by
13 a virologist.

14 109. Plaintiffs and the Class Members would not have purchased the
15 Elderberry Products had they known that the Products are falsely labeled. Plaintiffs
16 and the Class Members relied on Defendants’ misrepresentations and misstatements.

17 110. That breach actually and proximately caused injury in the form of a
18 portion of the purchase price that Plaintiffs and Class members paid for the
19 Elderberry Products.

20 111. Furthermore, Defendants had actual knowledge that the Elderberry
21 Products were falsely labeled because it has actual knowledge of the formulation of
22 the Elderberry Products.

23 112. Plaintiffs provided Defendants with notice of the alleged breach within
24 a reasonable time after they discovered the breach or should have discovered it.

25 113. As a result of Defendants’ breach of warranty, Plaintiffs and the Class
26 Members have been damaged in the amount of the purchase price of the Products
27 and any consequential damages resulting from the purchases.

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PRAYER FOR RELIEF

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

- A. Enter an order certifying the proposed Class (and subclasses, if applicable), designating Plaintiffs as the class representatives, and designating the undersigned as class counsel;
- B. Enter an order awarding Plaintiffs and the class members their actual damages, treble damages, and/or any other form of monetary relief provided by law;
- C. Declare that Defendants are financially responsible for notifying all Class members of the mislabeling and misbranding of the Products;
- D. Declare that Defendants must disgorge, for the benefit of the Class, all or part of the ill-gotten profits it received from the sale of the Products, or order Defendants to make full restitution to Plaintiffs and the members of the Class;
- E. Defendants shall audit and reassess all prior customer claims regarding the Products, including claims previously denied in whole or in part;
- F. An order awarding Plaintiffs and the Classes pre-judgment and post-judgment interest as allowed under the law;
- G. Grant reasonable attorneys' fees and reimbursement of all costs for the prosecution of this action, including expert witness fees; and
- H. Grant such other and further relief as this Court deems just and appropriate.

JURY DEMAND

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

1 Dated: July 18, 2023

Respectfully Submitted,

2
3 By: /s/ Trenton Kashima
4 Trenton R. Kashima (SBN 291405)
5 **MILBERG COLEMAN BRYSON**
6 **PHILLIPS GROSSMAN PLLC**
7 402 West Broadway St., Suite 1760
8 San Diego, CA 92101
9 Tel: (619) 810-7047
10 tkashima@milberg.com

11 Alex Straus (SBN 321366)
12 **MILBERG COLEMAN BRYSON**
13 **PHILLIPS GROSSMAN, PLLC**
14 280 s. Beverly Drive, Ste. PH
15 Beverly Hills, CA 902126
16 Tel: 865-247-0080
17 astraus@milberg.com.com

18 Rachel Soffin*
19 **MILBERG COLEMAN BRYSON**
20 **PHILLIPS GROSSMAN, PLLC**
21 First Tennessee Plaza
22 800 S. Gay Street, Suite 1100
23 Knoxville, Tennessee 37929
24 Tel: 865-247-0080
25 rsoffin@ milberg.com

26 Martha A. Geer*
27 **MILBERG COLEMAN BRYSON**
28 **PHILLIPS GROSSMAN, PLLC**
900 West Morgan Street
Raleigh, NC 27603
Telephone: (919) 600-5000
Facsimile: 919-600-5035
mgeer@milberg.com

Nick Suciu III*
MILBERG COLEMAN BRYSON
PHILLIPS GROSSMAN, PLLC

6905 Telegraph Rd., Suite 115
Bloomfield Hills, MI 48301
Tel: 313-303-3472
nsuciu@milberg.com

** Pro Hac Vice pending*

Counsel for Plaintiffs and the Class

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DECLARATION OF TRENTON KASHIMA

I, Trenton R. Kashima, declare as follows:

1. I am an attorney duly licensed and entitled to practice law in the state of California. I am an attorney of the law firm Milberg Coleman Bryson Phillips Grossman PLLC, attorneys for Plaintiffs in above-captioned action. I have personal knowledge of the facts stated herein, and if called to do so, could and would competently testify thereto.

2. Based on information from the Elderberry Products’ labels and other public sources (including Defendant’s linkedin profile), Defendant PharmaCare U.S., Inc. has its principal place of business, is registered to do business and/or is in fact doing business at 5030 Camino De La Siesta, Ste 200, San Diego, CA 92108, located within the County of San Diego.

3. Accordingly, pursuant to California Code of Civil Procedure, section 1780, the Southern District of California is the proper venue for Plaintiffs’ California Consumer Legal Remedies Act claims.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on July 18, 2023 in San Diego, California



Trenton R. Kashima

ClassAction.org

This complaint is part of ClassAction.org's searchable class action lawsuit database and can be found in this post: [Certain Sambucol Supplements Do Not Contain 'Virologist Developed' Black Elderberry Extract as Advertised, Class Action Says](#)
