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12
13 **UNITED STATES DISTRICT COURT**
14 **SOUTHERN DISTRICT OF CALIFORNIA**

15 JOHN SANDOVAL, on behalf of
16 himself and all others similarly
17 situated,

18 Plaintiff,

19 v.

20 PHARMACARE US, INC.,

21 Defendant.

Case No: **'15CV0738 JLS NLS**

Pleading Type: Class Action

COMPLAINT FOR VIOLATIONS OF:

CAL. BUS. & PROF. CODE §§17200 *et seq.*;

CAL. BUS. & PROF. CODE §§17500 *et seq.*;

CAL. CIV. CODE §§ 1750 *et seq.*;

BREACH OF EXPRESS WARRANTIES;

BREACH OF IMPLIED WARRANTIES; and

15 U.S.C. §§ 2301, *et seq.*

Demand for Jury Trial

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1 Plaintiff John Sandoval, on behalf of himself, all others similarly situated, and the
2 general public, by and through undersigned counsel, hereby sues Defendant PharmaCare
3 US, Inc. (“PharmaCare” or “Defendant”), and upon information and belief and
4 investigation of counsel, alleges as follows:

5 **I. JURISDICTION AND VENUE**

6 1. This Court has original jurisdiction over this action under 28 U.S.C. §
7 1332(d)(2) (The Class Action Fairness Act) because the matter in controversy exceeds
8 the sum or value of \$5,000,000 exclusive of interest and costs and because more than
9 two-thirds of the members of the Class defined herein reside in states other than the state
10 of which Defendant resides.

11 2. Venue is proper in this Court pursuant to 28 U.S.C. § 1391 because
12 Defendant conducts business in this District, has an office in this District, and a related
13 case is currently pending in this District. *See Kanfer v. PharmaCare US, Inc.*, No. 3:15-
14 cv-00120-H-JLB (S.D. Cal.).

15 3. Additionally, Defendant’s subsidiary, Real Health Laboratories, is located in
16 San Diego, California and is responsible for the sale and marketing of IntenseX.

17 **II. NATURE OF THE ACTION**

18 4. Defendant sells an over-the-counter pill called “IntenseX” (the “Product”).

19 5. Defendant claims IntenseX has aphrodisiac properties that increase “Sexual
20 Power and Performance.”

21 6. None of the ingredients in the Product, individually or in combination,
22 provide such benefits.

23 7. Plaintiff John Sandoval read, believed, and relied upon Defendant’s claims
24 when purchasing the Product during the Class Period, defined herein, and was damaged
25 as a result.

26 8. Plaintiff brings this action challenging Defendant’s claims relating to
27 IntenseX on behalf of himself and all others similarly situated under California’s Unfair
28 Competition Law, False Advertising Law, and Consumer Legal Remedies Act,

1 California's express and implied warranty provisions and Magnuson Moss Warranty Act.

2 9. Plaintiff seeks in equity an order compelling PharmaCare US, Inc. to (1)
3 cease marketing IntenseX using the misleading tactics complained of herein, (2) conduct
4 a corrective advertising campaign, (3) restore the amounts by which Defendant has been
5 unjustly enriched, and to (4) destroy all misleading and deceptive materials.

6 10. Plaintiff further seeks actual and punitive damages, pre- and post-judgment
7 interest, attorneys' fees, and costs.

8 **III. PARTIES**

9 11. Defendant PharmaCare US, Inc. is a Delaware corporation with its principal
10 place of business located at 101 Montgomery Street, Suite 2050, San Francisco,
11 California 94104.

12 12. Defendant is registered to do business in California as entity number
13 C3217079.

14 13. Defendant PharmaCare US, Inc. is a manufacturer, distributor, and marketer
15 of a variety of natural health products and supplements.

16 14. Defendant markets its products under a variety of brand names, including
17 "Sambucol," "Skin Doctors," and "Real Health Laboratories."

18 15. IntenseX is sold and marketed under Defendant's "Real Health
19 Laboratories" brand.

20 16. In the "contact us" sections of the PharmaCare US, Inc. website, the Real
21 Health Laboratories website, and the IntenseX website, Defendant's contact address is
22 listed as PO Box 122950 San Diego, California 92112-2950.

23 17. In addition, the contact phone number has a San Diego area code— (858)
24 997-1156.

25 18. Plaintiff John Sandoval is a resident of California who repeatedly purchased
26 the Product for personal and household consumption.

27 **IV. FACTUAL ALLEGATIONS**

28 19. Defendant has distributed, marketed, and sold IntenseX on a nationwide

1 basis, both online and at retail store locations. IntenseX is available in a bottle of 20
2 tablets and retails for approximately \$9.99.

3 20. Defendant prominently labels its product under the name “IntenseX”
4 implying that the Product’s ingredients will enable “intense sex” despite that the Product
5 is not effective as an aphrodisiac.



17 21. Defendant further claims that IntenseX increases “Sexual Power and
18 Performance,” and that “IntenseX is designed to intensify your endurance, stamina and
19 sexual performance.”

20 22. The Product’s label further states that the “fast acting formula quickly
21 dissolves in the body releasing an energy packed blend of potent herbal extracts” and that
22 with the Product a user can “[a]chieve peak performance to maximize the experience
23 when you want it most.”

24 23. Additionally, the label claims that the Product is “laboratory quality tested,”
25 contains a “proprietary stamina blend,” and is “produced using the highest manufacturing
26 standards.”

27 24. These labeling claims are false and misleading for the reasons described
28 herein.

A. The Composition of IntenseX

25. IntenseX consists of a blend of small amounts of extracts from herbs, roots, and other organic substances, some of which are purported to have an effect on the human body.

26. The figure below shows the ingredients in IntenseX:

Supplement Facts		
Serving Size: 2 tablets		Servings Per Container: 10
Amount Per Serving		% Daily Value
Calcium (as calcium carbonate)	575 mg	58%
Guarana, 6:1 Extract, containing 88 mg caffeine (<i>Paullinia cupana</i>) (seed)	400 mg	†
Muira Puama, 4:1 Extract (<i>Ptychopelatum olacoides</i>)(root)	250 mg	†
Catuaba, 4:1 Extract (<i>Erythroxylum catuaba</i>)(bark)	250 mg	†
Ginkgo Biloba 24/6% Extract (leaf)	40 mg	†
PROPRIETARY STAMINA BLEND	200 mg	†
Avena Sativa (herb), Cordyceps (<i>Cordyceps sinensis</i>)		
Ashwaganda (<i>Withania somnifera</i>)(root)		
PROPRIETARY ENERGY BLEND	100 mg	†
Tribulus Terrestris 40% Extract (herb), American Ginseng 5% Extract (<i>Panax quinquefolium</i>)(root), Korean Ginseng 7% Extract (<i>Panax ginseng</i>)(root)		
PROPRIETARY WARMING BLEND	200 mg	†
Ginger (<i>Zingiber officinale</i>) (bark), Cinnamon (<i>Cinnamomum casia</i>) (bark)		
Nutmeg (<i>Myristica fragrans</i>) (seed), Cayenne (<i>Capsicum annuum</i>) (fruit)		
† Percent Daily Values have not been established.		V.1
Other ingredients: Microcrystalline cellulose, stearic acid, croscarmellose sodium, silicon dioxide, magnesium stearate, and clear coating.		
Storage: Product should be stored in a cool, dry place, away from direct light and heat.		
These statements have not been evaluated by the Food and Drug Administration. This product is not intended to diagnose, treat, cure, or prevent any disease.		

27. IntenseX, by means of its ingredients, claims to increase “Sexual Power & Performance” and suggests to consumers that it is effective as an aphrodisiac drug product.

28. This, however, is false and/or misleading because none of the ingredients in IntenseX, individually or in combination, increase male strength and performance or are effective as an aphrodisiac.

29. Some of the ingredients in IntenseX include Catuaba, Avena Sativa, Muira Puama, and Tribulus Terrestris.

30. According the New York University’s Langone Medical Center, “there is as yet no real evidence that [Catuaba, Avena Sativa, Muira Puama, and Tribulus Terrestris]

offer any benefits”¹ for increasing sexual performance or desire. Moreover, the Langone Medical Center has noted that there are no reliable scientific studies to establish that Ginkgo Biloba— another ingredient in IntenseX— improves sexual function. In fact, at least two studies have shown that “ginkgo failed to improve sexual function to any greater extent than placebo.”

31. While a few unreplicated scientific studies suggest ingredients in the Product may, in necessary amounts, have benefits to individuals suffering certain specific conditions, many of the ingredients in the Product appear to have never been studied at all or have not otherwise been shown to have any effect on the human body, much less to increase sexual power and performance.

32. Further, consuming such random herbs and herbal extracts presents a risk of an allergic or other adverse reaction without any offsetting benefit.

B. Specific Misrepresentations and Deceptive Acts

33. **Misleading supplement name:** Defendant prominently labels their product under the name “IntenseX,” falsely implying it is an aphrodisiac.

34. **Misleading heading:** Displayed at the top of the Product’s front label are the words “Fast Acting!” which misleadingly implies purchasers will receive a benefit quickly, however, the Product provides no benefit, sexual or otherwise, quickly or slowly.

35. **Misleading sub-heading:** The front of the Product’s label features the misleading sub-heading “Sexual Power & Performance” despite that the Product fails to improve human sexual power and there is no evidence is contributes to human sexual performance.

36. **Misleading claim:** The labeling of the Product claims “IntenseX is designed to intensify your endurance, stamina, and sexual performance” despite that the Product fails to intensify or enhance endurance, stamina or sexual performance.

¹ See <http://www.med.nyu.edu/content?ChunkIID=21720> (last visited Jan. 5, 2015).

1 37. **Misleading claim:** The labeling of the Product claims “This fast acting
2 formula quickly dissolves in the body releasing an energy packed blend of potent herbal
3 extracts” suggesting that the Product provides a benefit quickly, however, it fails to
4 provide any benefit.

5 38. **Misleading claim:** The labeling of the Product states “Achieve peak
6 performance to maximize the experience when you want it most” suggesting the Product
7 will improve your sexual performance or experience despite having no effect on human
8 sexual performance or experience.

9 39. **Misleading claim:** The labeling of the Product claims it is “Laboratory
10 Quality Tested.” This statement implies that the Product has passed and met laboratory
11 tests and standards that support its claims, when in fact the Product does not work as
12 advertised.

13 40. **Misleading claim:** The labeling of the Product claims it is a “Proprietary
14 Stamina Blend.” This statement implies that the ingredients which constitute the Product
15 have been chosen based on scientific research in order to increase stamina. In fact, none of
16 the ingredients in the Product, individually or in combination, increases stamina.

17 41. **Misleading claim:** The labeling of the Product claims it is “Produced using
18 the highest manufacturing standards.” This statement implies that the Product met
19 standards that support its claims, when in fact the Product does not work as advertised.

20 42. **Misleading claim:** The labeling of the Product contains directions for
21 “Recommended Use” that states “recommended use is one to two tablets 30-60 minutes
22 before benefit is desired.” This statement implies that the Product is efficacious and
23 provides real benefits within a specific amount of time. The Product, however, does not
24 provide any benefit, nor does it do so within the specified time period.

25 **C. IntenseX is a Misbranded Drug**

26 43. The labeling described above, including but not limited to “IntenseX,”
27 “Sexual Power & Performance,” and “IntenseX” is designed to intensify your endurance,
28 stamina, and sexual performance” alone and in context with other labeling claims and

1 packaging graphics, evidence the Product's intended use as an aphrodisiac, to arouse or
2 increase sexual desire or energy, or improve sexual performance.

3 44. Pursuant to Title 21 of the Code of Federal Regulations, Part 310.528 (21
4 C.F.R. § 310.528) any OTC drug product that is labeled, represented, or promoted for use
5 as an aphrodisiac, like IntenseX, is regarded as a "new drug" within the meaning of
6 section 201(p) of the FDCA (located at 21 U.S.C. § 355(p)).

7 45. The FDCA requires any new drug to have an application approved by the
8 Food and Drug Administration ("FDA") before the drug can be marketed to the public,
9 and further that the drug's label be approved by the FDA prior to marketing or selling the
10 drug to the public. *See, generally, id.*; 21 U.S.C. §§ 355(a), (b) [New Drug Application],
11 (j) [Abbreviated New Drug Application, for generic drugs].

12 46. Defendant's Product violates Section 505(a) of the FDCA since the
13 adequacy of the labeled directions for its "aphrodisiac" uses has not been approved by the
14 FDA prior to the Product being marketed to the public (*see* 21 U.S.C. § 355(a)).²
15 Accordingly, the Product is misbranded under section 502(f)(1) of the FDCA (located at
16 21 U.S.C. § 352).

17 47. Further, IntenseX includes Ginseng, Muira Puma, and Catuaba. The FDA
18 has specifically found these are not safe and effective for OTC use as an aphrodisiac. 21
19 C.F.R. § 310.528. The FDA bars these false, misleading, and unsupported by scientific
20 data label claims. *Id.* Thus, based on the evidence currently available, any OTC drug
21 product containing ingredients for use as an aphrodisiac, including IntenseX, cannot be
22 generally recognized as safe and effective, and instead are misbranded new drugs. *See id.*

23 48. Although Defendant labels its IntenseX product as a dietary supplement, the
24 Product is really a misbranded aphrodisiac drug product. Specifically, federal regulations
25 prohibit Defendant from making "disease claims" on dietary supplements. *See* 21 C.F.R.

26
27 ² In addition to proving effectiveness, the manufacturer of a new drug must also prove the
28 drug's safety, sufficient to meet FDA standards. 21 U.S.C. § 355(d).

1 § 101.93. Disease claims are generally described as statements which claim to diagnose,
2 mitigate, treat, cure or prevent disease where the statements claim “explicitly or
3 implicitly, that the product . . . Has an effect on the characteristic signs or symptoms of a
4 specific disease or class of diseases, using scientific or lay terminology.” *Id.* The labeling
5 of IntenseX leads reasonably prudent consumers into believing that the product can treat
6 premature ejaculation, erectile dysfunction, and diminished libido, which are diseases
7 recognized by the FDA.

8 49. In addition, Defendant violates 21 U.S.C. 343(r)(6), which requires, among
9 other things, that all structure function claims are truthful and not misleading, based on
10 competent scientific evidence, and prominently provide a specified disclaimer explaining
11 that the FDA has not evaluated the structure function claim. *See also* Cal. Health &
12 Safety Code § 110670 (incorporating requirements of 21 U.S.C. § 343(r)(6)).

13 50. California Health and Safety Code, Division 104, Part 5, contains the
14 Sherman, Food, Drug, and Cosmetic Law (“Sherman Law”). Cal. Health & Safety Code
15 §§ 109875-111915. The Sherman Law imposes identical requirements to the federal
16 FDCA: “All nonprescription drug regulations and regulations for new drug applications
17 under the FDCA are the regulations of this State.” Cal. Health & Safety Code §§ 110110-
18 110111, 110115. The Sherman Law also defines a “drug” as “any article other than food,
19 that is used or intended to affect the structure or any function of the body of human
20 beings or any other animal.” Cal. Health & Safety Code § 109925(c).

21 51. In effect, the Sherman Law requires that Federal Law is followed, and where
22 it is not, such a violation of Federal law also violates the Sherman Law.

23 52. The Sherman Law is explicitly authorized by the FDCA because it imposes
24 identical requirements. 21 U.S.C. § 343-1.

25 53. Plaintiff and members of the Class would not have purchased IntenseX if it
26 were known to them that the Product is misbranded pursuant to California’s Sherman
27 Law and FDA regulations.
28

V. RELIANCE AND INJURY

54. Mr. Sandoval purchased IntenseX approximately fourteen months ago in Costa Mesa, California for \$9.99.

55. When purchasing IntenseX, Mr. Sandoval and the Class were seeking a product that had the aphrodisiac qualities promised on the Product's label, namely, a high quality and effective aphrodisiac that enhanced male sexual power and performance.

56. When deciding to purchase IntenseX, Plaintiff read and relied on the following deceptive claims contained on the packaging of IntenseX. These statements were made by Defendant directly on the packaging of IntenseX at the time Plaintiff purchased IntenseX:

- a) the Product's name, "IntenseX"
- b) "Sexual Power and Performance"
- c) "IntenseX is designed to intensify your endurance, stamina, and sexual performance"
- d) "This fast acting formula quickly dissolves in the body releasing an energy packed blend of potent herbal extracts"
- e) "Achieve peak performance to maximize the experience when you want it most"
- f) "Laboratory Quality Tested"
- g) "Proprietary Stamina Blend"
- h) "Produced using the highest manufacturing standards"

57. Based on these representations, Plaintiff believed IntenseX had powerful aphrodisiac qualities and would improve his sexual power and performance.

58. Plaintiff believed IntenseX had the qualities he sought based on these deceptive labeling claims, but the Product was actually unsatisfactory to Plaintiff for the reasons described herein, *i.e.*, the Product did not deliver the purported benefits, there is no evidence the ingredients in IntenseX provide the claimed benefits, and the

1 consumption of IntenseX is potentially dangerous, which is an unfair and unreasonable
2 risk considering it provides no benefit.

3 59. IntenseX costs more than similar products, in particular caffeine pills,
4 without misleading labeling, and would have cost less absent the false and misleading
5 statements.

6 60. Plaintiff would not have been willing to purchase the Product absent its false
7 and misleading claims. Nor would he have purchase IntenseX had he known it is
8 misbranded under California and Federal law.

9 61. For these reasons, IntenseX has no value and should not be consumed by
10 any one.

11 62. Instead of receiving a product that had actual beneficial qualities, the
12 Product Plaintiff and the Class received was one which does not provide the claimed
13 benefits.

14 63. Plaintiff and the Class lost money as a result of Defendant's deceptive
15 claims and practices in that they did not receive what they paid for when purchasing
16 IntenseX.

17 64. Plaintiff and the Class altered their position to their detriment and suffered
18 damages in an amount equal to the amount they paid for the Product.

19 65. The senior officers and directors of Defendant allowed IntenseX to be sold
20 with full knowledge or reckless disregard that the challenged claims are fraudulent,
21 unlawful, and misleading.

22 VI. CLASS ACTION ALLEGATIONS

23 66. Plaintiff brings this action, pursuant to Fed. R. Civ. P. 23, on behalf of
24 himself and all others similarly situated (the "Class"). The Class is defined as:

25 All persons in the United States (excluding officers, directors, and
26 employees of Defendant) who purchased IntenseX primarily for
27 personal, family, or household use, and not for resale since January 1,
28 2004.

67. The members in the proposed Class are so numerous that individual joinder of all members is impracticable, and the disposition of the claims of all Class members in a single action will provide substantial benefits to the parties and Court.

68. Questions of law and fact common to Plaintiff and the Class include:

- a) whether Defendant contributed to, committed, and/or is responsible for the conduct alleged herein;
- b) whether Defendant's conduct constitutes the violations of law alleged herein;
- c) whether Defendant acted willfully, recklessly, negligently, or with gross negligence in the violations of law alleged herein; and
- d) whether Class members are entitled to compensatory, injunctive, and/or other equitable relief.

69. Plaintiff's claims are typical of Class members' claims in that they are based on the same underlying facts, events, and circumstances relating to Defendant's conduct.

70. Absent Defendant's deceptive claims, Plaintiff and the Class members would not have purchased IntenseX.

71. Plaintiff will fairly and adequately represent and protect the interests of the Class, has no interests incompatible with the interests of the Class, and has retained counsel competent and experienced in class action litigation.

72. The Class is sufficiently numerous, as the Class contains at least hundreds of thousands of members who purchased IntenseX across the United States.

73. Class treatment is superior to other options for resolution of the controversy because the relief sought for each Class member is small such that, absent representative litigation, it would be infeasible for Class members to redress the wrongs done to them.

74. Questions of law and fact common to the Class predominate over any questions affecting only individual Class members.

75. Defendant has acted on ground applicable to the Class, thereby making appropriate final injunctive and declaratory relief concerning the Class as a whole.

76. Class treatment is appropriate under Fed. R. Civ. P. 23(a) and both Fed. R. Civ. P. 23(b)(2) and 23(b)(3). Plaintiff does not contemplate class notice if the Class is certified under Fed. R. Civ. P. 23(b)(2), which does not require notice. Plaintiff contemplates notice via publication if the Class is certified under Fed. R. Civ. P. 23(b)(3) or if the Court determines class notice is required notwithstanding that notice is not required under Fed. R. Civ. P. 23(b)(2). Plaintiff will, if notice is required, confer with Defendant and seek to present the Court with a stipulation and proposed order on the details of a class notice plan.

VII. CAUSES OF ACTION

FIRST CAUSE OF ACTION

California Unfair Competition Law, Unlawful Prong

Cal. Bus. & Prof. Code §§ 17200 et seq.

77. Plaintiff realleges and incorporates the allegations elsewhere in the Complaint as if set forth in full herein.

78. Cal. Bus. & Prof. Code § 17200 prohibits any “unlawful, unfair or fraudulent business act or practice.”

79. The business practices and omissions of Defendant as alleged herein constitute “unlawful” business acts and practices in that Defendant’s conduct violates the False Advertising Law, the Consumer Legal Remedies Act, and breaches California’s express and implied warranty provisions and Magnuson Moss Warranty Act.

80. Defendant’s conduct is further “unlawful” because it violates the FDCA and its implementing regulations in the following ways:

- a) Defendant’s deceptive statements violate 21 U.S.C. §§ 343(a) and 352, which deem a food or drug (including nutritional supplements) misbranded when the label contains a statement that is “false or misleading in any particular”;
- b) Defendant’s deceptive statements are *per se* false and misleading because the FDA has ruled there is a lack of adequate data to establish general

1 recognition of the safety and effectiveness of any of the ingredients in
2 IntenseX, or any other ingredient, for OTC use as an aphrodisiac; and
3 labeling claims for aphrodisiacs for OTC use are “either false, misleading, or
4 unsupported by scientific data.” 21 C.F.R. § 310.528(a);

5 c) Defendant’s deceptive statements violate 21 C.F.R. § 310.528(b), which
6 mandates that any OTC product that is labeled, represented, or promoted for
7 use as an aphrodisiac, like IntenseX, is regarded as a “new drug” within the
8 meaning of 21 U.S.C. § 355(p), but Defendant does not have new drug
9 approval for IntenseX or its labeling, as required under the FDCA and its
10 implementing regulations. Accordingly, Defendant’s Product is misbranded
11 under section 502(f)(1) of the FDCA;

12 d) Defendant violates 21 C.F.R. § 101.93 because IntenseX’s labeling leads
13 reasonable consumers to believe that the Product can treat or cure maladies
14 including premature ejaculation, erectile dysfunction, and diminished libido;

15 e) Defendant’s Product also violates the FDCA because, as an unapproved new
16 drug and aphrodisiac, IntenseX is not generally recognized as safe and
17 effective in the absence of a new drug application as set forth in the FDCA
18 and its implementing regulations. 21 C.F.R. § 310.528(a).

19 81. Defendant’s conduct is further “unlawful” because it violates the California
20 Sherman Food, Drug, and Cosmetic Law, *see* Cal. Health & Safety Code § 109875-
21 111900, which incorporates the provisions of the FDCA. *See id.* §§ 110110-110115.

22 82. In accordance with Bus. & Prof. Code § 17203, Plaintiff seeks an order
23 enjoining Defendant from continuing to conduct business through unlawful, unfair, and
24 fraudulent acts and practices, and to commence a corrective advertising campaign.

25 83. Plaintiff also seeks an order for the disgorgement and restitution of all monies
26 from the sale of the Product, which were acquired through its unlawful acts of unfair
27 competition.
28

SECOND CAUSE OF ACTION

California Unfair Competition Law, Unfair and Fraudulent Prongs

Cal. Bus. & Prof. Code §§ 17200 *et seq.*

84. Plaintiff realleges and incorporates the allegations elsewhere in the Complaint as if set forth in full herein.

85. California Business and Professions Code § 17200 prohibits any “unlawful, unfair or fraudulent business act or practice.”

86. The acts, omissions, misrepresentations, practices, and non-disclosures of Defendant as alleged herein also constitute “unfair” business acts and practices under the UCL in that their conduct is immoral, unethical, unscrupulous, or substantially injurious to consumers, offends public policy by seeking to profit from male vulnerability to false or deceptive virility or aphrodisiac claims, and the utility of their conduct, if any, does not outweigh the gravity of the harm to Defendant’s victims.

87. The acts, omissions, misrepresentations, practices, and non-disclosures of Defendant as alleged herein constitute “fraudulent” business acts and practices under the UCL in that Defendant’s claims are false, misleading, and have a tendency to deceive the Class and the general public, as detailed herein.

88. Defendant profited from its sales of the fraudulently, falsely, and deceptively advertised Product to unwary consumers.

89. In accordance with Cal. Bus. & Prof Code § 17203, Plaintiff seeks an order enjoining Defendant from continuing to conduct business through unfair acts and practices and to commence a corrective advertising campaign.

90. Plaintiff also seeks an order for the disgorgement and restitution of all monies from the sale of the Product, which were acquired through acts of unfair and fraudulent competition.

THIRD CAUSE OF ACTION

California's False Advertising Law

Cal. Bus. & Prof. Code §§ 17500 *et seq.*

91. Plaintiff realleges and incorporates the allegations elsewhere in the Complaint as if set forth in full herein.

92. In violation of California Business and Professions Code § 17500 *et seq.*, the advertisements, labeling, policies, acts, and practices described herein were designed to, and did, result in the purchase and use of IntenseX.

93. Defendant knew and reasonably should have known that the labeling claims on the Product were untrue or misleading.

94. Defendant profited from its sale of the falsely and deceptively advertised Product to unwary consumers.

95. As a result, Plaintiff, the Class, and the general public are entitled to injunctive and equitable relief, restitution, and an order for the disgorgement of the funds by which Defendants were unjustly enriched.

FOURTH CAUSE OF ACTION

California's Consumer Legal Remedies Act

Cal. Civ. Code §§ 1750, *et seq.*

96. Plaintiff realleges and incorporates the allegations elsewhere in the Complaint as if set forth in full herein.

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

98. Defendant's false and misleading labeling and other policies, acts, and practices were designed to, and did, induce the purchase and use of Defendant's Product for personal, family, or household purposes by Plaintiff and Class members, and violated and continue to violate the following sections of the CLRA:

a) § 1770(a)(5): representing that goods have characteristics, uses, or benefits

1 which they do not have;

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

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

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

8 99. Defendant profited from its sale of the falsely, deceptively and unlawfully
9 advertised Product to unwary consumers.

10 100. As a result, Plaintiff and the Class have suffered irreparable harm; and seek
11 restitution and actual damages in the amount of the total retail sales price of the Product
12 sold throughout the Class period to all Class members, punitive damages in an amount
13 sufficient to deter and punish, injunctive relief in the form of modified advertising and a
14 corrective advertising plan, a complete prohibition on IntenseX's sale, or the sale of any
15 other unlawful unapproved aphrodisiac drug.

16 101. Pursuant to California Civil Code § 1782, in or around February 2015,
17 Plaintiff notified Defendant in writing by certified mail of the particular violations of §
18 1770 of the Act as to the Product and demanded that Defendant rectify the problems
19 associated with the actions detailed above and give notice to all affected consumers of its
20 intent to so act.

21 102. Defendant's wrongful business practices regarding the Product constituted,
22 and constitute, a continuing course of conduct in violation of the CLRA since Defendant
23 is still representing that the Product has characteristics, uses, benefits, and abilities which
24 are false and misleading, and have injured Plaintiff and the Class.

25 103. As Defendant failed to implement remedial measures, Plaintiff and the Class
26 seek injunctive relief under Civil Code § 1782(d), enjoining the above described
27 wrongful conduct by Defendant, as well as, actual and punitive damages for their CLRA
28 claims.

FIFTH CAUSE OF ACTION

Breach of Express Warranty

104. Plaintiff repeats, realleges, and incorporates by reference each and every allegation contained elsewhere in this Complaint, as if fully set forth herein.

105. On the Product's label and through Defendant's marketing campaign as described above, Defendant made affirmations of fact or promises, or description of goods, which formed "part of the basis of the bargain" at the time of purchase in that Plaintiff and the Class purchased the Product in reasonable reliance on those affirmations. Cal. Com. Code § 2313(1). Those affirmations of fact or promises, or descriptions of the goods are fully described in ¶¶ 20-23, 33-42, 56 of this Complaint.

106. Defendant breached its express warranties with Plaintiff and the Class by selling a Product which did not and cannot provide the benefits described above.

107. As a result of Defendant's breach of their warranties, Plaintiff and the Class were damaged in the amount of the purchase price of the Product.

SIXTH CAUSE OF ACTION

Breach of Implied Warranty of Merchantability

108. Plaintiff repeats, realleges, and incorporates by reference each and every allegation contained elsewhere in this Complaint, as if fully set forth herein.

109. Defendant, through its acts and omissions set forth herein, in the sale, marketing and promotion of the Product, made representations to Plaintiff and the Class, on the Product's label, that the Product provides certain claimed benefits or properties that in essence increase "Sexual Power and Performance." Those representations are fully described in ¶¶ 20-23, 33-42, 56 of this Complaint.

110. Plaintiff and the Class bought the Product manufactured, advertised, and sold by Defendant, as described herein.

111. Defendant is a merchant with respect to the goods of this kind which were sold to Plaintiff and the Class, and there was in the sale to Plaintiff and other members of the Class an implied warranty that those goods were merchantable.

112. Defendant breached that implied warranty, however, in that the Product did and does not provide the purported benefits, as set forth in detail herein.

113. As an actual and proximate result of Defendant's conduct, Plaintiff and the Class did not receive goods as impliedly warranted by Defendant to be merchantable in that they did not conform to the promises and affirmations made on the container or label of the goods.

114. Plaintiff and Class have sustained damages as a proximate result of the foregoing breach of implied warranty in the amount of the Product's purchase price.

SEVENTH CAUSE OF ACTION

Violation of the Magnuson-Moss Warranty Act

15 U.S.C. §§ 2301, *et seq.* ("MMWA")

115. Plaintiff repeats, re-alleges, and incorporates the allegations contained in the paragraphs elsewhere in this Complaint, as if fully set forth herein.

116. Plaintiff brings this cause of action individually and on behalf of the members of the Class against Defendant.

117. Plaintiff and the Class assert all state law warranty claims arising under the laws of the State of California, as allowed under section 2310(d) of the MMWA.

118. Defendant's Product is a consumer product as defined in 15 U.S.C. § 2301(1), which costs more than \$5.00.

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

120. Defendant is a supplier and warrantor as defined in 15 U.S.C. §§ 2301(4), (5). In connection with the sale of the Product, Defendant issued written warranties as defined in 15 U.S.C. § 2301(6)(A), by making representations regarding the Product's efficacy. These statements are listed at ¶¶ 20-23, 33-42, 56 of this Complaint (the "Express Warranties").

121. In fact, the Product does not conform to the Express Warranties because the Express Warranties are false and/or deceptive, whereby Defendant breached the Express Warranties made to Plaintiff and the Class.

122. Plaintiff and Class members were injured as a direct and proximate result of Defendant's breach because they would not have purchased the Product absent the Express Warranties, which formed part of the basis of the bargain.

123. By reason of Defendant's breach of warranties, Defendant violated the statutory rights due to Plaintiff and Class members pursuant to the Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301 *et seq.*, thereby damaging Plaintiff and Class members.

124. Plaintiff and the Class seek damages, equitable relief, and attorney's fees and costs pursuant to 15 U.S.C. §§ 2310(d)(1), (2).

VIII. PRAYER FOR RELIEF

WHEREFORE, Plaintiff, on behalf of himself, all others similarly situated, and the general public, prays for judgment against Defendant as follows:

- A. An order confirming that this class action is properly maintainable as a nationwide class action as defined above, appointing Plaintiff John Sandoval and his undersigned counsel to represent the Class, and requiring Defendant to bear the cost of class notice;
- B. An Order compelling Defendant to conduct a corrective advertising campaign;
- C. An Order requiring Defendant to disgorge all monies, revenues, and profits obtained by means of any wrongful act or practice;
- D. An Order compelling Defendant to destroy all misleading and deceptive advertising materials, labels, and unapproved new drugs;
- E. An Order requiring Defendant to pay restitution to restore all funds acquired by means of any act or practice declared by this Court to be an unlawful, unfair, or fraudulent business act or practice, untrue or misleading advertising, plus pre-and post-judgment interest thereon;

- 1 F. An award of pre-judgment and post-judgment interest;
2 G. An award of attorneys' fees and costs;
3 H. Actual and punitive damages of at least \$5 million;
4 I. Such other and further relief as this Court may deem just, equitable or
5 proper.

6 **IX. JURY DEMAND**

7 Plaintiff hereby demands a trial by jury on all issues so triable.

8
9 DATED: April 3, 2015

Respectfully Submitted,

10 /s/ Gregory S. Weston

11 **THE WESTON FIRM**

12 GREGORY S. WESTON

13 PAUL K. JOSEPH

14 1405 Morena Blvd., Suite 201

San Diego, CA 92110

15 Telephone: (619) 798-2006

16 Facsimile: (480) 247-4553

17 ***Counsel for Plaintiff and the Proposed***
18 ***Class***

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

John Sandoval

DEFENDANTS

PharmaCare US, Inc.

(b) County of Residence of First Listed Plaintiff Orange County, CA

(EXCEPT IN U.S. PLAINTIFF CASES)

County of Residence of First Listed Defendant San Diego County

(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

(c) Attorneys (Firm Name, Address, and Telephone Number)

The Weston Firm
1405 Morena Blvd., Suite 201
(619) 798-2006

Attorneys (If Known)

'15CV0738 JLS NLS**II. BASIS OF JURISDICTION** (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
- ☐ 2 U.S. Government Defendant
- ☐ 3 Federal Question
(U.S. Government Not a Party)
- ☒ 4 Diversity
(Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- | | PTF | DEF | | PTF | DEF |
|---|---------------------------------------|----------------------------|---|----------------------------|---------------------------------------|
| Citizen of This State | <input checked="" type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State | <input type="checkbox"/> 4 | <input checked="" type="checkbox"/> 4 |
| Citizen of Another State | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES	
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Medical Malpractice	PERSONAL INJURY <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input checked="" type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Management Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Employee Retirement Income Security Act IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	CIVIL RIGHTS <input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 448 Education	PRISONER PETITIONS Habeas Corpus: <input type="checkbox"/> 463 Alien Detainee <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty Other: <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement			

V. ORIGIN (Place an "X" in One Box Only)

- ☒ 1 Original Proceeding
- ☐ 2 Removed from State Court
- ☐ 3 Remanded from Appellate Court
- ☐ 4 Reinstated or Reopened
- ☐ 5 Transferred from Another District (specify)
- ☐ 6 Multidistrict Litigation

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):

Class Action Fairness Act, 28 U.S.C. Sec. 1332(d)(2)

Brief description of cause:

Violations of Consumer Protection Statutes

VII. REQUESTED IN COMPLAINT:☒ CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P.DEMAND \$
5,000,000.00

CHECK YES only if demanded in complaint:

JURY DEMAND: ☐ Yes ☒ No**VIII. RELATED CASE(S) IF ANY**

(See instructions):

JUDGE Marilyn L. Huff

DOCKET NUMBER 3:15-cv-00120

DATE

04/03/2015

SIGNATURE OF ATTORNEY OF RECORD

/s/ Gregory S. Weston

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____