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8 ZICAM LLC and MATRIXX
INITIATIVES, INC.

9 UNITED STATES DISTRICT COURT
10 EASTERN DISTRICT OF CALIFORNIA

11
12 YESENIA MELGAR, on Behalf of Herself
and all Others Similarly Situated,

13 Plaintiff,

14 v.

15 ZICAM LLC and MATRIXX
16 INITIATIVES, INC.,

17 Defendants.

Case No. 2:14-cv-00160-MCE-AC

**DEFENDANTS MATRIXX INITIATIVES,
INC.'S AND ZICAM LLC'S ANSWER TO
FIRST AMENDED CLASS ACTION
COMPLAINT**

[DEMAND FOR JURY TRIAL]

18
19 Defendants Matrixx Initiatives, Inc. ("Matrixx") and Zicam LLC ("Zicam") (collectively
20 "Defendants") hereby answer Plaintiff Yesenia Melgar's ("Plaintiff") First Amended Complaint
21 ("Complaint"), as follows:

22
23 1. Defendants admit that Plaintiff purports to bring this action as a class action
24 regarding the sale of Zicam Pre-Cold RapidMelts Original, Zicam Pre-Cold RapidMelts Ultra,
25 Zicam Pre-Cold Oral Mist, Zicam Pre-Cold Ultra Crystals, Zicam Pre-Cold Lozenges, Zicam Pre-
26 Cold Lozenges Ultra, and Zicam Pre-Cold Chewables (hereinafter "Zicam Pre-Cold Products"),
27 but deny that this case is amenable to class treatment. Defendants admit that their Zicam Pre-
28 Cold Products are over-the-counter, homeopathic remedies and that Defendants market them as

1 such. Defendants state that the labeling and advertising for each of the Zicam Pre-Cold Products
2 speaks for itself and should only be quoted verbatim, accurately, in its entirety and in the correct
3 context. To the extent statements attributed to Defendants in paragraph 1 of the Complaint are
4 not verbatim, accurate, complete and used within the correct context, Defendants deny them.

5 Defendants deny that any representations regarding Zicam Pre-Cold Products are false.

6 2. Defendants deny the allegations in paragraph 2 that any of their representations
7 regarding any Zicam Pre-Cold Products are false. Defendants deny the remaining allegations in
8 paragraph 2 of the Complaint. Defendants state that the labeling and advertising of each of the
9 Defendants' Zicam Pre-Cold Products speak for themselves and should only be quoted verbatim,
10 accurately, in their entirety and in the correct context. To the extent statements attributed to
11 Defendants in paragraph 2 of the Complaint are not verbatim, accurate, complete and used within
12 the correct context, Defendants deny them.

13 3. Defendants deny the allegations in paragraph 3 of the Complaint.

14 4. Defendants deny the allegations in paragraph 4 of the Complaint. Defendants
15 deny the allegations that Zicam Pre-Cold Products are ineffective and further deny that the
16 advertising claims and marketing practices were false and misleading. Defendants have
17 insufficient knowledge to form a belief as to the truth of the allegations regarding Plaintiff's or
18 members of the purported class' alleged purchase of Zicam Pre-Cold Products and therefore deny
19 these allegations. Defendants deny the remaining allegations in paragraph 4 of the Complaint.

20 5. Defendants admit that the Complaint seeks relief on behalf of Plaintiff and all
21 purchasers of Zicam Pre-Cold Products, but deny that Plaintiff or purchasers are entitled to any
22 relief. Defendants deny the remaining allegations in paragraph 5 of the Complaint.

23 6. Defendants lack knowledge or information sufficient to form a belief as to the
24 truth of the allegations in paragraph 6 of the Complaint and therefore deny them.

25 7. Zicam admits that it is an Arizona Limited Liability Company with its principal
26 place of business at 16412 North 92nd Street, Scottsdale, Arizona 85260. Zicam admits it is
27 engaged in the business of manufacturing, marketing and selling of Zicam Pre-Cold Products
28

1 under the Zicam brand name. Zicam admits it is a wholly owned subsidiary of Matrixx
2 Initiatives, Inc. Defendants deny the remaining allegations in paragraph 7 of the Complaint.

3 8. Matrixx admits that it is a Delaware corporation with its principal place of
4 business located at 440 Rte. 22 East, 1 Grand Commons, Suite 130, Bridgewater, New Jersey.
5 Defendant admits that it is in the business of the marketing and selling of Zicam Pre-Cold
6 Products under the Zicam brand name. Defendants state that the labeling of each of the
7 Defendants' Zicam Pre-Cold Products and Defendants' website speak for themselves and should
8 only be quoted verbatim, accurately, in their entirety and in the correct context. To the extent the
9 statements attributed to Defendants in Paragraph 8 of the Complaint are not verbatim, accurate
10 and complete and used within the correct context, Defendants deny them. Defendants deny the
11 remaining allegations in paragraph 8 of the Complaint.

12 9. Defendants admit they are engaged in the business of marketing and selling over-
13 the-counter homeopathic cold remedy products under the Zicam brand name and that they
14 conduct business throughout the state of California. Defendants deny the remaining allegations
15 of paragraph 9 of the Complaint.

16 10. Defendants deny the allegations of paragraph 10 of the Complaint.

17 11. Paragraph 11 of the Complaint contains legal conclusions to which no response
18 is required.

19 12. Defendants lack knowledge or information sufficient to form a belief as to the
20 truth of the allegations in paragraph 12 of the Complaint and therefore deny them.

21 13. Defendants admit they do business throughout this district. Defendants are
22 without information sufficient to form a belief as to the remaining allegations of paragraph 13 of
23 the Complaint and therefore deny them.

24 14. Defendants admit that zincum aceticum and zincum gluconicum are the active
25 ingredients in the Zicam Pre-Cold Products and that all Zicam Pre-Cold Products contain those
26 ingredients in homeopathic strengths.

27 15. Defendants state that the labeling for each of Zicam Pre-Cold Product speaks for
28 itself and should only be quoted verbatim, accurately, in its entirety and in the correct context. To

1 the extent the statements attributed to Defendants in paragraph 15 of the Complaint are not
2 verbatim, accurate, complete and used within the correct context, Defendants deny them.

3 Defendants admit that Zicam Pre-Cold Products contain zinc gluconate and/or zinc acetate in
4 homeopathic strengths as set forth on their labels. Defendants deny the remaining allegations of
5 paragraph 15 of the Complaint.

6 16. Defendants state that the labeling of Zicam Cold Remedy products speaks for itself
7 and should only be quoted verbatim, accurately, in its entirety and in the correct context. To the
8 extent the statements attributed to Defendants in paragraph 16 of the Complaint are not verbatim,
9 accurate, complete and used within the correct context, Defendants deny them. Defendants admit
10 that Zicam Pre-Cold Products contain zinc gluconate and/or zinc acetate in homeopathic strengths
11 as set forth on their labels. Defendants deny the remaining allegations of paragraph 16 of
12 the Complaint.

13 17. Defendants state that the labeling of Zicam Cold Remedy products speaks for itself
14 and should only be quoted verbatim, accurately, in its entirety and in the correct context. To the
15 extent the statements attributed to Defendants in paragraph 17 of the Complaint are not verbatim,
16 accurate, complete and used within the correct context, Defendants deny them. Defendants deny
17 the remaining allegations of paragraph 17 of the Complaint.

18 18. Defendants state that the labeling of Zicam Pre-Cold Products speaks for itself and
19 should only be quoted verbatim, accurately, in its entirety and in the correct context. To the
20 extent statements attributed to Defendants in paragraph 18 of the Complaint are not verbatim,
21 accurate, complete and used within the correct context, Defendants deny them. Defendants admit
22 that the term "Pre-Cold" is described and defined on the label of Zicam Pre-Cold Products.
23 Defendants deny the remaining allegations in paragraph 18 of the Complaint.

24 19. Defendants state that the labeling of Zicam Pre-Cold Products speaks for itself and
25 should only be quoted verbatim, accurately, in its entirety and in the correct context. To the
26 extent statements attributed to Defendants in paragraph 19 of the Complaint are not verbatim,
27 accurate, complete and used within the correct context, Defendants deny them. Defendants admit
28

1 that Zicam Pre-Cold Products reduce the duration and shorten colds. Defendants deny the
2 remaining allegations in paragraph 19 of the Complaint.

3 20. Defendants state that the labeling of Zicam Pre-Cold Products speaks for itself and
4 should only be quoted verbatim, accurately, in its entirety and in the correct context. To the
5 extent statements attributed to Defendants in paragraph 20 of the Complaint are not verbatim,
6 accurate, complete and used within the correct context, Defendants deny them. Defendants admit
7 that Zicam Pre-Cold Products reduce the severity of cold symptoms. Defendants deny the
8 remaining allegations in paragraph 20 of the Complaint.

9 21. Defendants deny the allegations in paragraph 21 of the Complaint.

10 22. Defendants admit that Matrixx retained the design firm of Beardwood & Co. to
11 help design the packaging for Zicam Pre-Cold Products. Defendants state that the quotes of Ms.
12 Julia Beardwood speak for themselves and should only be quoted verbatim, accurately, in their
13 entirety and in the correct context. To the extent the quotes from Ms. Beardwood are not
14 verbatim, accurate, complete and used within the correct context, Defendants deny them.
15 Defendants state that the labeling of Zicam Pre-Cold Products speaks for itself and should only be
16 quoted verbatim, accurately, in its entirety and in the correct context. To the extent statements
17 attributed to Defendants in paragraph 22 of the Complaint are not verbatim, accurate, complete
18 and used within the correct context, Defendants deny them. Defendants deny the remaining
19 allegations of paragraph 22 of the Complaint.

20 23. Defendants state any quotes of Leslie Molloy speak for themselves and should
21 only be quoted verbatim, accurately, in their entirety and in the correct context. To the extent the
22 quotes attributable to Ms. Malloy or Defendants in paragraph 23 of the Complaint are not
23 verbatim, accurate, or complete and used within the correct context, Defendants deny them.
24 Defendants admit that the Pre-Cold logo is on the label of Zicam Pre-Cold Products. Defendants
25 deny the remaining allegations in paragraph 23 of the Complaint.

26 24. Defendants admit that beginning in 2012 they ran commercials with the
27 “Cold Monster” on national television. Defendants state that the commercials and advertising of
28 Zicam Pre-Cold Products speak for themselves and should only be quoted verbatim, accurately, in

1 their entirety and in the correct context. To the extent the statements attributed to Defendants in
2 paragraph 24 of the Complaint are not verbatim, accurate, complete and used within the correct
3 context, Defendants deny them.

4 25. Defendants deny the allegations of paragraph 25 of the Complaint.

5 26. Defendants admit the allegations of paragraph 26 of the Complaint.

6 27. Defendants admit the allegations of paragraph 27 of the Complaint.

7 28. Defendants admit that beginning in 2012 they ran commercials with the
8 “Cold Monster.” Defendants state that the commercials and advertising of Zicam Pre-Cold
9 Products speak for themselves and should only be quoted verbatim, accurately, in their entirety
10 and in the correct context. To the extent the statements attributed to Defendants in paragraph 28
11 of the Complaint are not verbatim, accurate, complete and used within the correct context,
12 Defendants deny them. Defendants admit that the still image in paragraph 28 is from the
13 commercial and, except as expressly admitted, deny the remaining allegations.

14 29. Defendants admit that beginning in 2012 they ran commercials with the
15 “Cold Monster.” Defendants state that the commercials and advertising of Zicam Pre-Cold
16 Products speak for themselves and should only be quoted verbatim, accurately, in their entirety
17 and in the correct context. To the extent the statements attributed to Defendants in paragraph 29
18 of the Complaint are not verbatim, accurate, complete and used within the correct context,
19 Defendants deny them. Defendants admit that the still image in paragraph 29 is from the
20 commercial and, except as expressly admitted, deny the remaining allegations.

21 30. Defendants admit that beginning in 2012 they ran commercials with the
22 “Cold Monster.” Defendants state that the commercials and advertising of Zicam Pre-Cold
23 Products speak for themselves and should only be quoted verbatim, accurately, in their entirety
24 and in the correct context. To the extent the statements attributed to Defendants in paragraph 30
25 of the Complaint are not verbatim, accurate, complete and used within the correct context,
26 Defendants deny them. Defendants admit that the still image in paragraph 30 is from the
27 commercial and, except as expressly admitted, deny the remaining allegations.

28

1 31. Defendants admit that beginning in 2012 they ran commercials with the
2 “Cold Monster.” Defendants state that the commercials and advertising of Zicam Pre-Cold
3 Products speak for themselves and should only be quoted verbatim, accurately, in their entirety
4 and in the correct context. To the extent the statements attributed to Defendants in paragraph 31
5 of the Complaint are not verbatim, accurate, complete and used within the correct context,
6 Defendants deny them. Defendants admit that the still image in paragraph 31 is from the
7 commercial and, except as expressly admitted, deny the remaining allegations.

8 32. Defendants admit that beginning in 2012 they ran commercials with the
9 “Cold Monster.” Defendants state that the commercials and advertising of Zicam Pre-Cold
10 Products speak for themselves and should only be quoted verbatim, accurately, in their entirety
11 and in the correct context. To the extent the statements attributed to Defendants in paragraph 32
12 of the Complaint are not verbatim, accurate, complete and used within the correct context,
13 Defendants deny them. Defendants admit that the still image in paragraph 32 is from the
14 commercial and, except as expressly admitted, deny the remaining allegations.

15 33. Defendants admit that beginning in 2012 they ran commercials with the
16 “Cold Monster.” Defendants state that the commercials and advertising of Zicam Pre-Cold
17 Products speak for themselves and should only be quoted verbatim, accurately, in their entirety
18 and in the correct context. To the extent the statements attributed to Defendants in paragraph 33
19 of the Complaint are not verbatim, accurate, complete and used within the correct context,
20 Defendants deny them. Defendants admit that the still image in paragraph 33 is from the
21 commercial and, except as expressly admitted, deny the remaining allegations.

22 34. Defendants admit that beginning in 2012 they ran commercials with the
23 “Cold Monster.” Defendants state that the commercials and advertising of Zicam Pre-Cold
24 Products speak for themselves and should only be quoted verbatim, accurately, in their entirety
25 and in the correct context. To the extent the statements attributed to Defendants in paragraph 34
26 of the Complaint are not verbatim, accurate, complete and used within the correct context,
27 Defendants deny them. Defendants admit that the still image in paragraph 34 is from the
28 commercial and, except as expressly admitted, deny the remaining allegations.

1 35. Defendants admit that beginning in 2012 they ran commercials with the
2 “Cold Monster.” Defendants state that the commercials and advertising of Zicam Pre-Cold
3 Products speak for themselves and should only be quoted verbatim, accurately, in their entirety
4 and in the correct context. To the extent the statements attributed to Defendants in paragraph 35
5 of the Complaint are not verbatim, accurate, complete and used within the correct context,
6 Defendants deny them. Defendants admit that the still image in paragraph 35 is from the
7 commercial and, except as expressly admitted, deny the remaining allegations.

8 36. Defendants admit that beginning in 2012 they ran commercials with the
9 “Cold Monster.” Defendants state that the commercials and advertising of Zicam Pre-Cold
10 Products speak for themselves and should only be quoted verbatim, accurately, in their entirety
11 and in the correct context. To the extent the statements attributed to Defendants in paragraph 36
12 of the Complaint are not verbatim, accurate, complete and used within the correct context,
13 Defendants deny them. Defendants admit that the still image in paragraph 36 is from the
14 commercial and, except as expressly admitted, deny the remaining allegations.

15 37. Defendants admit that beginning in 2012 they ran commercials with the
16 “Cold Monster.” Defendants state that the commercials and advertising of Zicam Pre-Cold
17 Products speak for themselves and should only be quoted verbatim, accurately, in their entirety
18 and in the correct context. To the extent the statements attributed to Defendants in paragraph 37
19 of the Complaint are not verbatim, accurate, complete and used within the correct context,
20 Defendants deny them. Defendants deny the remaining allegations in paragraph 37.

21 38. Defendants admit the allegations of paragraph 38 of the Complaint.

22 39. Defendants deny the allegations of paragraph 39 of the Complaint.

23 40. Defendants deny the allegations of paragraph 40 of the Complaint.

24 41. Defendants admit that Zicam was the subject of a Direct Marketing News article.
25 The article speaks for itself and should only be quoted verbatim, accurately, in its entirety and in
26 the correct context. To the extent the statements from the article in paragraph 41 of the
27 Complaint are not verbatim, accurate, complete and used within the correct context, Defendants
28 deny them. Defendants deny the remaining allegations of paragraph 41 of the Complaint.

1 42. Defendants state that the labeling of Zicam Pre-Cold Products and the Zicam
2 website speak for themselves and should only be quoted verbatim, accurately, in their entirety and
3 in the correct context. To the extent statements attributed to Defendants in paragraph 42 of the
4 Complaint are not verbatim, accurate, complete and used within the correct context, Defendants
5 deny them. Defendants admit that the “Cold Monster” image was added to Defendants’ website
6 in 2012. The content of Defendants’ website speaks for itself and should only be quoted
7 verbatim, accurately, in its entirety and in the correct context. To the extent the statements from
8 the article in paragraph 42 of the Complaint are not verbatim, accurate, complete and used within
9 the correct context, Defendants deny them. Defendants deny the remaining allegations in
10 paragraph 42 of the Complaint.

11 43. Defendants deny the allegations in the first sentence of paragraph 43 of
12 the Complaint. Defendants admit the second two sentences of paragraph 43. The statements in
13 the footnote are not directed at Defendants and do not require a response; to the extent they do,
14 Defendants deny them.

15 44. Defendants admit that Zicam Pre-Cold RapidMelts contain a 2x homeopathic
16 strength of zinc acetate and a 1x homeopathic strength of zinc gluconate. Defendants admit that
17 the first two sentences of paragraph 44 of the Complaint state some methods for homeopathic
18 dilution, but the listed methods are not complete. Defendants further admit that they used a
19 decimal scale to describe the strength of the active ingredients in Zicam Pre-Cold Products.
20 Defendants deny the remaining allegations in paragraph 44 of the Complaint.

21 45. Defendants admit that shaking and pounding are part of the succussion process,
22 but otherwise deny the remaining allegations of paragraph 45 of the Complaint.

23 46. To the extent Plaintiff alleges the contents of the documents cited, the documents
24 speak for themselves, and Defendants deny the allegations in paragraph 46 to the extent they are
25 inconsistent with the contents of such documents. Except as specifically admitted, Defendants
26 deny the allegations in paragraph 46 of the Complaint.

27 47. To the extent Plaintiff alleges the contents of the documents cited, the documents
28 speak for themselves, and Defendants deny the allegations in paragraph 47 to the extent they are

1 inconsistent with the contents of such documents. Except as specifically admitted, Defendants
2 deny the allegations in paragraph 47 of the Complaint.

3 48. To the extent Plaintiff alleges the contents of the documents cited, the documents
4 speak for themselves, and Defendants deny the allegations in paragraph 48 to the extent they are
5 inconsistent with the contents of such documents. Except as specifically admitted, Defendants
6 deny the remaining allegations in paragraph 48 of the Complaint.

7 49. To the extent Plaintiff alleges the contents of the documents cited, the documents
8 speak for themselves, and Defendants deny the allegations in paragraph 49 to the extent they are
9 inconsistent with the contents of such documents. Except as specifically admitted, Defendants
10 deny the remaining allegations in paragraph 49 of the Complaint.

11 50. Defendants admit the allegations in the first sentence in paragraph 50 of the
12 Complaint. Defendants admit that the results were published in The Lancet but deny the
13 remaining allegations in the second sentence of paragraph 50 of the Complaint. To the extent the
14 remaining allegations in paragraph 50 allege the contents of the document cited, that document
15 speaks for itself, and Defendants deny the remaining allegations in paragraph 50 to the extent
16 they are inconsistent with such document. Except as specifically admitted, Defendants deny the
17 remaining allegations in paragraph 50 of the complaint.

18 51. To the extent Plaintiff alleges the contents of the document cited, that document
19 speaks for itself, and Defendants deny the allegations in paragraph 51 to the extent they are
20 inconsistent with the contents of such document. Except as specifically admitted herein,
21 Defendants deny each and every remaining allegation in paragraph 51 of the Complaint.

22 52. To the extent Plaintiff alleges the contents of the document cited, that document
23 speaks for itself, and Defendants deny the allegations in paragraph 52 to the extent they are
24 inconsistent with the contents of such document. Except as specifically admitted herein,
25 Defendants deny each and every remaining allegation in paragraph 52 of the Complaint.

26 53. To the extent Plaintiff alleges the contents of the document cited, that document
27 speaks for itself, and Defendants deny the allegations in paragraph 53 to the extent they are
28

1 inconsistent with the contents of such document. Except as specifically admitted herein,
2 Defendants deny each and every remaining allegation in paragraph 53 of the Complaint.

3 54. To the extent Plaintiff alleges the contents of the document cited, that document
4 speaks for itself, and Defendants deny the allegations in paragraph 54 to the extent they are
5 inconsistent with the contents of such document. Except as specifically admitted herein,
6 Defendants deny each and every remaining allegation in paragraph 54 of the Complaint.

7 55. Defendants admit that Zicam Pre-Cold Products are clinically proven to shorten a
8 cold. Defendants state that Defendants' website speaks for itself and should only be quoted
9 verbatim, accurately, in its entirety and in the correct context. To the extent the statements
10 attributed to Defendants in paragraph 55 of the Complaint are not verbatim, accurate and
11 complete and used within the correct context, Defendants deny them. Defendants admit the
12 efficacy of zinc in reducing duration of cold is supported by multiple clinical trials. Except as
13 expressly admitted herein, Defendants deny the remaining allegations of paragraph 55 of
14 the Complaint.

15 56. To the extent Plaintiff alleges the contents of the document cited, that document
16 speaks for itself, and Defendants deny the allegations in paragraph 56 of the Complaint to the
17 extent they are inconsistent with the contents of such document. Except as specifically admitted,
18 Defendants deny the remaining allegations in paragraph 56 of the Complaint.

19 57. Defendants deny the allegations in paragraph 57 of the Complaint

20 58. To the extent Plaintiff alleges the contents of the document cited, that document
21 speaks for itself, and Defendants deny the allegations in paragraph 58 of the Complaint to the
22 extent they are inconsistent with the contents of such document. Except as specifically admitted,
23 Defendants deny the remaining allegations in paragraph 58 of the Complaint.

24 59. To the extent Plaintiff alleges the contents of the document cited, that document
25 speaks for itself, and Defendants deny the allegations in paragraph 59 of the Complaint to the
26 extent they are inconsistent with the contents of such document. Except as specifically admitted,
27 Defendants deny the remaining allegations in paragraph 59 of the Complaint.

28 60. Defendants deny the allegations in paragraph 60 of the Complaint.

1 61. Defendants admit the allegations in paragraph 61 of the Complaint.

2 62. Defendants deny the allegations in paragraph 62 of the Complaint.

3 63. To the extent Plaintiff alleges the contents of the document cited, that document
4 speaks for itself, and Defendants deny the allegations in paragraph 63 of the Complaint to the
5 extent they are inconsistent with the contents of such document. Except as specifically admitted,
6 Defendants deny the remaining allegations in paragraph 63 of the Complaint.

7 64. Paragraph 64 contains legal conclusions to which no response is required. To the
8 extent Plaintiff alleges the contents of the Food, Drug and Cosmetic Act or the Statutes and
9 Regulations, the Act and Statutes and Regulations speak for themselves, and Defendants deny the
10 allegations of Plaintiff to the extent they are inconsistent with the contents of the Act and Statutes
11 and Regulations. Except as expressly admitted, Defendants deny each and every allegation
12 contained in paragraph 64 of the Complaint.

13 65. Paragraph 65 contains legal conclusions to which no response is required. To the
14 extent Plaintiff alleges the contents of the Food, Drug and Cosmetic Act or the Statutes and
15 Regulations, the Act and Statutes and Regulations speak for themselves, and Defendants deny the
16 allegations of Plaintiff to the extent they are inconsistent with the contents of the Act and Statutes
17 and Regulations. Except as expressly admitted, Defendants deny each and every allegation
18 contained in paragraph 65 of the Complaint.

19 66. Defendants admit that the Zicam Pre-Cold Products are not required to go through
20 the FDA's new drug application approval process. Defendants deny the remaining allegations in
21 paragraph 66 of the Complaint.

22 67. To the extent Plaintiff alleges the contents of the document from which she quotes,
23 that document speaks for itself, and Defendants deny the allegations in paragraph 67 to the extent
24 that they are inconsistent with the contents of such document. Except as specifically admitted,
25 Defendants deny the remaining allegations of paragraph 67 of the Complaint.

26 68. Defendants lack knowledge or information sufficient to form a belief as to the
27 truth of the allegations in paragraph 68 of the Complaint and therefore deny them.

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1 69. Defendants lack knowledge or information sufficient to form a belief as to the
2 truth of the allegations in paragraph 69 of the Complaint and therefore deny them.

3 70. Defendants lack knowledge or information sufficient to form a belief as to the
4 truth of the allegations in paragraph 70 of the Complaint and therefore deny them.

5 71. Defendants deny that Zicam Pre-Cold RapidMelts are not effective for treating
6 cold symptoms. Defendants lack knowledge or information sufficient to form a belief as to the
7 truth of the allegations in paragraph 71 of the Complaint and therefore deny them.

8 **CLASS ACTION ALLEGATIONS**

9 72. Defendants admit that Plaintiff purports to bring this action as representative of a
10 class consisting of all persons in the United States who purchased Zicam Pre-Cold Products, but
11 deny that this case is amenable to class treatment. Defendants deny the remaining allegations of
12 paragraph 72 of the Complaint.

13 73. Defendants admit that Plaintiff purports to represent a sub-class of purchasers of
14 Zicam Pre-Cold Products in California, as defined in paragraph 73 of the Complaint, but deny
15 that this case is amenable to class treatment. Defendants deny the remaining allegations in
16 paragraph 73 of the Complaint.

17 74. The allegations in paragraph 74 of the Complaint are not directed at Defendants
18 and no response is required. To the extent a response is required, Defendants deny them.
19 Defendants deny that this case is amenable to class treatment.

20 75. The allegations in paragraph 75 of the Complaint are not directed at Defendants
21 and no response is required. To the extent a response is required, Defendants deny them.
22 Defendants deny that this case is amenable to class treatment.

23 76. Defendants lack sufficient knowledge or information sufficient to form a belief as
24 to the truth of the allegations in paragraph 76 of the Complaint and therefore deny them.

25 77. Defendants admit that Zicam Pre-Cold Products were sold at major retailers across
26 the United States, including Wal-Mart, CVS Pharmacy, Walgreens, Costco, and Target, as well as
27 through online retailers. The remaining allegations in paragraph 77 of the Complaint state
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1 conclusions of law to which no response is required. To the extent a response is required,
2 Defendants deny them. Defendants deny that this case is amenable to class treatment.

3 78. Defendants deny the allegations of paragraph 78 of the Complaint.

4 79. Defendants deny the allegations of paragraph 79 of the Complaint.

5 80. Defendants deny the allegations of paragraph 80 of the Complaint.

6 81. Defendants deny the allegations of paragraph 81 of the Complaint.

7 82. Defendants deny the allegations of paragraph 82 of the Complaint.

8 83. Defendants incorporate by reference all of their responses set forth in paragraphs 1
9 through 82 above, as though fully set forth herein.

10 84. Defendants admit that Plaintiff purports to bring this claim individually and on
11 behalf of members of a class, but deny this case is amenable to class treatment.

12 85. The allegations in paragraph 85 of the Complaint state conclusions of law to which
13 no response is required. To the extent a response is required, Defendants deny them.

14 86. The allegations in paragraph 86 of the Complaint state conclusions of law to which
15 no response is required. To the extent a response is required, Defendants deny them.

16 87. The allegations in paragraph 87 of the Complaint state conclusions of law to which
17 no response is required. To the extent a response is required, Defendants deny them.

18 88. Defendants deny the allegations of paragraph 88 of the Complaint.

19 89. Defendants deny the allegations of paragraph 89 of the Complaint.

20 90. Defendants deny the allegations of paragraph 90 of the Complaint.

21 91. Defendants deny the allegations of paragraph 91 of the Complaint.

22 92. Defendants deny the allegations of paragraph 92 of the Complaint.

23 93. Defendants admit that they received correspondence from counsel on behalf of
24 Ms. Melgar and that the content of the correspondence speaks for itself. Except as expressly
25 admitted herein, Defendants deny the remaining allegations in paragraph 93 of the Complaint.

26 94. Defendants incorporate by reference all of the responses set forth in paragraphs 1
27 through 93 of the Complaint, as though fully set forth herein.

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1 95. Defendants admit that Plaintiff purports to bring this claim individually and on
2 behalf of members of a class, but deny that this case is amenable to class treatment.

3 96. Defendants deny the allegations of paragraph 96 of the Complaint.

4 97. Defendants deny the allegations of paragraph 97 of the Complaint.

5 98. Defendants deny the allegations of paragraph 98 of the Complaint.

6 99. Defendants deny the allegations of paragraph 99 of the Complaint.

7 100. Defendants incorporate by reference all of their responses set forth in paragraphs 1
8 through 99 above, as though fully set forth herein.

9 101. Defendants admit that Plaintiff purports to bring this claim individually and on
10 behalf of members of a class, but deny that this case is amenable to class treatment.

11 102. Defendants deny the allegations in paragraph 102 of the Complaint.

12 103. Defendants deny the allegations in paragraph 103 of the Complaint.

13 104. Defendants deny the allegations in paragraph 104 of the Complaint.

14 105. Defendants deny the allegations in paragraph 105 of the Complaint.

15 106. Defendants deny the allegations in paragraph 106 of the Complaint.

16 107. Defendants incorporate by reference all of their responses set forth in paragraphs 1
17 through 106 above, as though fully set forth herein.

18 108. Defendants admit that Plaintiff purports to bring this claim individually and on
19 behalf of members of a class, but deny that this case is amenable to class treatment.

20 109. Defendants deny the allegations of paragraph 109 of the Complaint.

21 110. Defendants lack sufficient information to form a belief as to the truth of the
22 allegations in paragraph 110 of the Complaint and therefore deny them.

23 111. Defendants lack sufficient information to form a belief as to the truth of the
24 allegations in paragraph 111 of the Complaint and therefore deny them.

25 112. Defendants deny the allegations of paragraph 112 of the Complaint.

26 113. Defendants incorporate by reference all of their responses set forth in paragraphs 1
27 through 112 above, as though fully set forth herein.

28

1 114. Defendants admit that Plaintiff purports to bring this claim individually and on
2 behalf of members of a class, but deny that this case is amenable to class treatment.

3 115. The allegations in the second sentence of paragraph 115 contain conclusions of
4 law to which no response is required. To the extent a response is required, Defendants deny the
5 allegations. Defendants are without sufficient knowledge or information to form a belief as to the
6 truth of the remaining allegations of paragraph 115 of the Complaint and therefore deny them.
7 Defendants deny the remaining allegations in paragraph 115 of the Complaint.

8 116. The allegations in paragraph 116 of the Complaint contain conclusions of law to
9 which no response is required. To the extent the response is required, Defendants deny
10 the allegations.

11 117. The allegations in paragraph 117 of the Complaint contain conclusions of law to
12 which no response is required. To the extent the response is required, Defendants deny
13 the allegations.

14 118. The allegations in paragraph 118 of the Complaint contain conclusions of law to
15 which no response is required. To the extent the response is required, Defendants deny
16 the allegations.

17 119. Defendants deny the allegations of paragraph 119 of the Complaint.

18 120. Defendants deny the allegations of paragraph 120 of the Complaint.

19 121. Defendants deny the allegations of paragraph 121 of the Complaint.

20 122. Defendants deny the allegations of paragraph 122 of the Complaint.

21 123. Defendants deny the allegations of paragraph 123 of the Complaint.

22 124. Defendants deny the allegations of paragraph 124 of the Complaint.

23 125. Defendants deny the allegations of paragraph 125 of the Complaint.

24 126. Defendants admit that in December 2013 Plaintiff sent a letter through her counsel
25 to Defendants and that Defendants responded to the letter. The contents of those correspondence
26 speak for themselves. Except as otherwise admitted herein, Defendants deny the allegations of
27 paragraph 126 of the Complaint.

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1 127. Defendants admit that Plaintiff seeks damages, restitution and injunctive relief for
2 an alleged violation of the CLRA. Except as expressly admitted, Defendants deny the remaining
3 allegations contained in paragraph 127.

4 128. Defendants incorporate by reference all of their responses set forth in paragraphs 1
5 through 127 of the Complaint, as though fully set forth herein.

6 129. Defendants admit that Plaintiff purports to bring this claim individually and on
7 behalf of members of a class, but deny that this case is amenable to class treatment.

8 130. The allegations of paragraph 130 state conclusions of law to which no response is
9 required. To the extent a response is required, Defendants deny them.

10 131. Defendants deny the allegations in paragraph 131 of the Complaint.

11 132. Defendants deny the allegations in paragraph 132 of the Complaint.

12 133. Defendants deny the allegations in paragraph 133 of the Complaint.

13 134. Defendants deny the allegations in paragraph 134 of the Complaint.

14 135. Defendants admit that Plaintiff brings this action purportedly pursuant to Business
15 & Professions Code Section 17535 for the reason stated therein, but Defendants deny that this
16 matter is amenable for class treatment. Defendants deny the remaining allegations in paragraph
17 135 of the Complaint.

18 136. Defendants incorporate by reference all of their responses set forth in paragraphs 1
19 through 135 above, as though fully set forth herein.

20 137. Defendants admit that Plaintiff purports to bring this claim individually and on
21 behalf of members of a class, but deny that this case is amenable to class treatment.

22 138. The allegations of paragraph 138 state conclusions of law to which no response is
23 required. To the extent a response is required, Defendants deny them.

24 139. The allegations of paragraph 139 state conclusions of law to which no response is
25 required. To the extent a response is required, Defendants deny them.

26 140. The allegations of paragraph 140 state conclusions of law to which no response is
27 required. To the extent a response is required, Defendants deny them.

28 141. Defendants deny the allegations in paragraph 141 of the Complaint.

1 142. Defendants deny the allegations in paragraph 142 of the Complaint.

2 143. Defendants deny the allegations in paragraph 143 of the Complaint.

3 144. Defendants incorporate by reference all of their responses set forth in paragraphs 1
4 through 143 of the Complaint, as though fully set forth herein.

5 145. Defendants admit that Plaintiff purports to bring this claim individually and on
6 behalf of members of a class, but deny that this case is amenable to class treatment.

7 146. The allegations of paragraph 146 state conclusions of law to which no response is
8 required. To the extent a response is required, Defendants deny them.

9 147. Defendants deny the allegations in paragraph 147 of the Complaint.

10 148. Defendants lack knowledge or information sufficient to form a belief as to the
11 truth of the allegations in paragraph 148 of the Complaint and therefore deny them.

12 149. Defendants deny the allegations in paragraph 149 of the Complaint.

13 150. Defendants deny the allegations in paragraph 150 of the Complaint.

14 151. Defendants deny the allegations in paragraph 151 of the Complaint.

15 152. Defendants incorporate by reference all of their responses set forth in paragraph 1
16 through 151 above, as though fully set forth herein.

17 153. Defendants admit that Plaintiff purports to bring this claim individually and on
18 behalf of members of a class, but deny that this case is amenable to class treatment.

19 154. The allegations of paragraph 154 state conclusions of law to which no response is
20 required. To the extent a response is required, Defendants deny them.

21 155. Defendants deny the allegations in paragraph 155 of the Complaint.

22 156. Defendants deny the allegations in paragraph 156 of the Complaint.

23 157. Defendants deny the allegations in paragraph 157 of the Complaint.

24 158. Defendants deny the allegations in paragraph 158 of the Complaint.

25

26 **AFFIRMATIVE DEFENSES**

27 Defendants have not completed their investigation of the facts of this case, have not
28 completed discovery in this matter, and have not completed preparation for trial. The affirmative

1 defenses asserted herein are based on Defendants' knowledge, information, and belief at this
2 time, and Defendants specifically reserve the right to modify, amend, or supplement any
3 affirmative defenses contained herein at any time. Defendants reserve the right to assert
4 additional defenses as information is gathered through discovery and investigation. In asserting
5 these defenses, Defendants do not allege or admit that they have the burden of proof and/or
6 persuasion with respect to any of these matters, and do not assume the burden of proof and/or
7 persuasion with respect to any matter as to which Plaintiff and the putative class members
8 (collectively "Plaintiffs") have the burden of proof or persuasion.

9 Subject to the preceding qualifications, Defendants allege the following separate
10 affirmative defenses to the Complaint.

11 **FIRST AFFIRMATIVE DEFENSE**

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

13 Plaintiff's Complaint fails to state facts sufficient to constitute any claim
14 against Defendants.

15 **SECOND AFFIRMATIVE DEFENSE**

16 **(Statute of Limitations)**

17 Plaintiff's claims, and each of them, are barred by the applicable statutes of limitations,
18 including but not limited to similar statutes of limitations and statutes of repose under the laws of
19 other states applicable to the claims alleged.

20 **THIRD AFFIRMATIVE DEFENSE**

21 **(Laches)**

22 Plaintiff's Complaint and each and every Cause of Action therein, is barred in whole or in
23 part by the doctrine of laches.

24 **FOURTH AFFIRMATIVE DEFENSE**

25 **(Estoppel)**

26 Plaintiff's claims are barred, in whole or in part, by the doctrine of estoppel.

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FIFTH AFFIRMATIVE DEFENSE

(Waiver)

Plaintiff’s Complaint and the causes of action alleged therein are barred, in whole or in part, because Plaintiffs have waived any right, by reason of their conduct and actions, to assert the causes of action alleged in the Complaint.

SIXTH AFFIRMATIVE DEFENSE

(Lack of Standing)

Plaintiff’s claims are barred, in whole or in part, because she lacks standing to assert them or to recover on behalf of the general public or others.

SEVENTH AFFIRMATIVE DEFENSE

(Preemption)

Plaintiff’s claims are barred, in whole or in part, because state law claims as alleged in the Complaint are preempted in their entirety by federal law.

EIGHTH AFFIRMATIVE DEFENSE

(Abstention)

The Complaint is precluded by the Doctrine of Abstention.

NINTH AFFIRMATIVE DEFENSE

(Primary Jurisdiction)

The Complaint is precluded based on the Doctrine of Primary Jurisdiction.

TENTH AFFIRMATIVE DEFENSE

(Class Certification)

Plaintiffs fail, in whole or in part, to meet the requirements for class certification.

ELEVENTH AFFIRMATIVE DEFENSE

(Compliance with Laws)

At all times applicable, Defendants complied with all applicable laws, industry standards, and regulations.

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1 **TWELFTH AFFIRMATIVE DEFENSE**

2 **(Regulatory Compliance)**

3 Plaintiff's claims are barred because Defendants complied with applicable statutes and
4 with the requirements and regulations of the Food and Drug Administration and all applicable
5 rules, regulations and guidelines for homeopathic remedies. See, e.g., U.S. Const. art. VI, cl. 2.

6 **THIRTEENTH AFFIRMATIVE DEFENSE**

7 **(No Private Cause of Action)**

8 Plaintiff's Complaint fails to state a claim against Defendants because there is no private
9 right of action under the Federal Food, Drug and Cosmetic Act, as amended.

10 **FOURTEENTH AFFIRMATIVE DEFENSE**

11 **(No Private Cause of Action on "Fraud Against FDA")**

12 To the extent Plaintiff's claims are based on alleged misrepresentations or omissions made
13 to the FDA, such claims are barred pursuant to *Buckman Co. v. Plaintiff's Legal Committee*,
14 531 U.S. 341 (2001).

15 **FIFTEENTH AFFIRMATIVE DEFENSE**

16 **(First Amendment: Freedom of Speech)**

17 Plaintiff's claims are barred in whole or in part because the commercial speech of
18 Defendants relating to Zicam is not false or misleading and is protected under the First
19 Amendment of the United States Constitution, and comparable provisions in state constitutions.

20 **SIXTEENTH AFFIRMATIVE DEFENSE**

21 **(Restitution Unconstitutional)**

22 Plaintiff's claims are barred, in whole or in part, because any award of restitution (a)
23 would violate the Excessive Fines Clauses of the Eighth Amendment (as incorporated by the Due
24 Process Clause of the Fourteenth Amendment) to the United States Constitution and of
25 comparable provisions in state constitutions; (b) would violate the Due Process Clause of the
26 Fourteenth Amendment to the United States Constitution, and comparable state constitutional
27 provisions, because the standards of liability under these statutes are unduly vague and subjective,
28 and permit retroactive, random, arbitrary, and capricious punishment that serves no legitimate

1 governmental interest; and, (c) would constitute a taking of property without just compensation in
2 violation of the Takings Clauses of the Fifth Amendment of the United States Constitution (as
3 incorporated by the Due Process Clause of the Fourteenth Amendment to the United States
4 Constitution), and of comparable state constitutional provisions.

5 **SEVENTEENTH AFFIRMATIVE DEFENSE**

6 **(Adequate Remedy at Law)**

7 Plaintiff's Complaint and the causes of action alleged therein are barred, in whole or in
8 part, because the Complaint fails to state a sufficient basis for the Court to grant any equitable
9 relief as an adequate remedy exists at law.

10 **EIGHTEENTH AFFIRMATIVE DEFENSE**

11 **(No Basis for Injunctive Relief)**

12 Plaintiff's Complaint and the causes of action alleged therein are barred, in whole or in
13 part, because Plaintiffs fails to state a sufficient basis for injunctive relief, in that there is no
14 reasonable likelihood that Plaintiffs will succeed on the merits of their claims, and there is no
15 threat of immediate or irreparable harm and no basis for injunctive relief under state and/or
16 federal law.

17 **NINETEENTH AFFIRMATIVE DEFENSE**

18 **(Failure to Mitigate)**

19 If Plaintiffs sustained damages as alleged in the Complaint, which is denied, Plaintiffs
20 failed to mitigate their damages.

21 **TWENTIETH AFFIRMATIVE DEFENSE**

22 **(Failure to Properly Plead Punitive Damages)**

23 Plaintiff's Complaint fails to state facts sufficient to support an award of punitive damages
24 against Defendants.

25 **TWENTY-FIRST AFFIRMATIVE DEFENSE**

26 **(Constitutional Defects with Punitive, Enhanced and/or Exemplary Damages)**

27 Plaintiff's claims are barred, in whole or in part, because any award of punitive, enhanced
28 and/or exemplary damages in this case (a) would violate the Due Process Clauses of the Fifth and

1 Fourteenth Amendments to the United States Constitution, and comparable state constitutional
2 provisions, and would constitute an excessive fine under the Excessive Fines Clauses of the
3 Eighth Amendment (as incorporated by the Due Process Clause of the Fourteenth Amendment) to
4 the United States Constitution; (b) would violate the Fourth, Fifth and Sixth Amendments and the
5 Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution;
6 and (c) would violate the Contracts Clauses of the United States Constitution and comparable
7 clauses in various state constitutions.

8 **TWENTY-SECOND AFFIRMATIVE DEFENSE**

9 **(Punitive Damages)**

10 With respect to Plaintiff's demand for punitive damages, Defendants specifically
11 incorporate by reference all standards and/or limitations regarding the determination and
12 enforceability of punitive damage awards which arise in the decisions of *BMW of North America*
13 *v. Gore*, 517 U.S. 559 (1996), *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S.
14 424 (2001), and *State Farm Mut. Auto. Ins. Co. v. Campbell*, 2003 WL 1791206 (U.S. 2003).

15 **TWENTY-THIRD AFFIRMATIVE DEFENSE**

16 **(Failure to Provide Notice of Alleged Breach of Warranty)**

17 Plaintiffs failed to give notice of any alleged breach of any warranty within a reasonable
18 time after Plaintiffs discovered or should have discovered any such alleged breach of warranty
19 and are, therefore, barred from any recovery for such claims.

20 **TWENTY-FOURTH AFFIRMATIVE DEFENSE**

21 **(No Warranties and Lack of Privity)**

22 There were no warranties, either express or implied, between Plaintiffs and Defendants
23 and/or Plaintiffs are barred from asserting causes of action arising from any such alleged
24 warranties because Plaintiffs are not in privity with Defendants.

25 **TWENTY-FIFTH AFFIRMATIVE DEFENSE**

26 **(Disclaimer of Warranties)**

27 Defendants state that any and all alleged warranties that may form a basis for Plaintiff's
28 claims for relief against Defendants were adequately disclaimed or excluded by Defendants.

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TWENTY-SIXTH AFFIRMATIVE DEFENSE

(Collateral Estoppel/Issue Preclusion)

Plaintiff's Complaint and the causes of action alleged therein are barred, in whole or in part, by the doctrine(s) of collateral estoppel and issue preclusion.

TWENTY-SEVENTH AFFIRMATIVE DEFENSE

(Joinder of Parties)

Plaintiffs have failed to join all necessary and appropriate parties.

TWENTY-EIGHTH AFFIRMATIVE DEFENSE

(Accord and Satisfaction)

Plaintiff's claims are barred, in whole or in part, because they have received and accepted full satisfaction of their claims, if any.

TWENTY-NINTH AFFIRMATIVE DEFENSE

(Contributory Negligence/Comparative Negligence)

The injuries and damages claimed by Plaintiffs resulted from their own conduct so that Plaintiff's claims are barred, in whole or in part, by the comparative negligence, fault, or responsibility of causation attributed to Plaintiffs. Thus, Plaintiff's claims should be dismissed, reduced, offset, or barred in accordance with the principles of contributory negligence and/or comparative negligence.

THIRTIETH AFFIRMATIVE DEFENSE

(Third Party Fault)

The injuries and damages claimed by Plaintiffs were caused, in whole or in part, by the acts or omissions of persons other than Defendants over whom Defendants had no control. Therefore, any recovery by Plaintiffs should be apportioned in direct proportion to such fault in accordance with applicable law.

THIRTY-FIRST AFFIRMATIVE DEFENSE

(Res Judicata)

Plaintiff's Complaint and the causes of action therein are barred, in whole or part, by the doctrine of *res judicata*.

1 **THIRTY-SECOND AFFIRMATIVE DEFENSE**

2 **(Conduct Not Unfair)**

3 Plaintiff's claims that Defendants' conduct is "unfair" are barred, in whole or in part,
4 because the alleged "unfairness" of Defendants' conduct is outweighed by the utility of
5 that conduct.

6 **THIRTY-THIRD AFFIRMATIVE DEFENSE**

7 **(Customer Satisfaction)**

8 Plaintiff's claims that Defendants' conduct is deceptive or fraudulent pursuant to any state
9 or federal statute or principle of common law, are barred, in whole or in part, because
10 Defendants' customers are satisfied with Defendants' products and services.

11 **THIRTY-FOURTH AFFIRMATIVE DEFENSE**

12 **(No Restitution or Disgorgement)**

13 Plaintiff's claims are barred, in whole or in part, because they are not entitled to restitution
14 or disgorgement of profits under California *Bus. & Prof. Code* Sections 17200, *et seq.*, or under
15 any comparable or equivalent law or principle of common law of any other state or
16 federal jurisprudence.

17 **THIRTY-FIFTH AFFIRMATIVE DEFENSE**

18 **(No Restitution or Disgorgement for General Public)**

19 Plaintiff's Complaint and the causes of action alleged therein are barred, in whole or in
20 part, because, to the extent Plaintiffs purports to seek restitution or disgorgement of profits for the
21 benefit of the general public under California *Bus. & Prof. Code* Sections 17200, *et seq.*, or under
22 any comparable or equivalent law or principle of common law of any other state or federal
23 jurisprudence, such relief is barred under law.

24
25 **PRAYER FOR RELIEF**

26 WHEREFORE, Defendants pray that:

- 27 (1) Plaintiffs take nothing by reason of Plaintiff's Complaint;
28 (2) Plaintiff's Complaint against Defendants is dismissed with prejudice in its entirety;

- 1 (3) Defendants recover costs; and
2 (4) This Court awards such other and further relief as this Court deems just
3 and proper.

4
5 **DEMAND FOR JURY TRIAL**

6 Defendants demand a jury trial by the maximum number of jurors allowed by law.
7

8 Dated: March 18, 2014

DRINKER BIDDLE & REATH LLP

9
10 By: /s/ William A. Hanssen

11 Alan J. Lazarus
12 William A. Hanssen
13 Sally F. White

14 Attorneys for Defendants
15 ZICAM LLC and MATRIXX INITIATIVES,
16 INC.
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