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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

12 PAUL DE LA TORRE and JOSHUA
13 OGDEN, individually and on behalf of all
14 others similarly situated,

15 Plaintiffs,

16 v.

17 GNC HOLDINGS, INC., GENERAL
18 NUTRITION CORPORATION,
19 GENERAL NUTRITION CENTERS,
20 INC.,

21 Defendants.

**CLASS ACTION AND REPRESENTATIVE
ACTION**

**COMPLAINT FOR DAMAGES,
EQUITABLE AND INJUNCTIVE RELIEF**

JURY TRIAL DEMANDED

21 Plaintiffs Paul de la Torre and Joshua Ogden (“Plaintiffs”), through their undersigned
22 attorneys, bring this lawsuit against GNC Holdings, Inc., General Nutrition Corporation, and
23 General Nutrition Centers, Inc. (hereinafter “GNC” or “Defendants”) as to their own acts upon
24 personal knowledge, and as to all other matters upon information and belief. In order to remedy the
25 harm arising from Defendants’ illegal conduct, which has resulted in unjust profits, Plaintiffs bring
26 this action on behalf of California consumers specifically defined herein, who purchased either:
27

28 (a) GNC “Herbal Plus” Gingko Biloba

- 1 (b) GNC “Herbal Plus” St. John's Wort
- 2 (c) GNC “Herbal Plus” Ginseng
- 3 (d) GNC “Herbal Plus” Echinacea

4 **INTRODUCTION**

5 1. On February 2, 2015, New York Attorney General Eric T. Schneiderman sent a
6 demand letter to GNC Holdings, Inc.’s CEO Michael G. Archbold, ordering GNC to immediately
7 cease and desist engaging in the sale of adulterated and mislabeled herbal dietary supplements.
8 These products included various GNC “Herbal Plus” supplements, including GNC “Herbal Plus”
9 Ginkgo Biloba, GNC “Herbal Plus” St. John’s Wort, GNC “Herbal Plus” Ginseng, and GNC
10 “Herbal Plus” Echinacea (“the Misbranded GNC “Herbal Plus” Products”) that either could not be
11 verified to contain the labeled substance, or which were found to contain ingredients not listed on
12 the labels.

13
14 2. Attorney General Schneiderman requested that GNC provide detailed information
15 relating to the production, processing and testing of herbal supplements sold at their stores, as well
16 as set forth a thorough explanation of quality control measures in place.

17 3. The Attorney General’s letter expressly warned Defendants that, “contamination,
18 substitution and falsely labeling herbal products constitute deceptive business practices and, more
19 importantly, present considerable health risks for consumers.” (Exhibit 1, Attorney General Letter
20 to GNC).

21
22 4. The letter came as DNA testing, performed as part of an ongoing investigation by
23 the Attorney General’s Office, revealed that all of the products purchased by Plaintiffs in this
24 cause tested negative for the ingredient listed on the front of the package.

25 5. An expert in DNA barcoding technology, Dr. James A. Schulte II of Clarkson
26 University in Potsdam, N.Y., was hired by the Attorney General’s office to perform the testing.
27
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1 6. DNA barcodes are short genetic markers in an organism’s DNA and are used to
2 identify it as belonging to a particular species. Barcodes provide an unbiased, reproducible
3 method of species identification. Barcodes can be used to determine the exact plant species being
4 tested.

5 7. All of the Misbranded GNC “Herbal Plus” Products tested negative for the
6 advertised package contents. In reality, they contained garlic, rice, pine or material originating
7 from the daisy or buttercup families, and *none* of the ginkgo biloba, St. John's wort, ginseng, or
8 echinacea claimed on the products’ labels.

9 8. Plaintiffs relied on Defendants’ representations that the Misbranded GNC “Herbal
10 Plus” Products were what they purported to be: supplements containing ginkgo biloba, St. John’s
11 wort, ginseng, or echinacea. Plaintiffs did not purchase Defendants’ supplement to ingest garlic,
12 rice or material originating from the daisy family.

13 9. Studies conducted by the Centre for Biodiversity Genomics at the University of
14 Guelph and others have previously alerted the dietary supplement industry to the fact that it is not
15 providing the public with authentic products without substitution, contamination or fillers.

16 10. According to Attorney General Schneiderman:

17 “this investigation makes one thing abundantly clear: the old adage ‘buyer beware’ may
18 be especially true for consumers of herbal supplements,” “The DNA test results seem to
19 confirm long-standing questions about the herbal supplement industry. Mislabeling,
20 contamination, and false advertising are illegal. They also pose unacceptable risks to New
21 York families—especially those with allergies to hidden ingredients. At the end of the day,
22 American corporations must step up to the plate and ensure that their customers are getting
23 what they pay for, especially when it involves promises of good health.”

24 11. According to Arthur P. Grollman, M.D., Professor of Pharmacological Sciences at
25 Stony Brook University, “this study undertaken by Attorney General Schneiderman’s office is a
26 well-controlled, scientifically-based documentation of the outrageous degree of adulteration in the
27 herbal supplement industry.”
28

1 18. Plaintiff Joshua Ogden is a resident of San Jose, California, who purchased
2 Defendants' misbranded and adulterated products in California during the Class Period.
3 Specifically, Mr. Ogden purchased the following of Defendants' misbranded and adulterated
4 products: GNC "Herbal Plus" Gingko Biloba, GNC "Herbal Plus" St. John's Wort, GNC "Herbal
5 Plus" Ginseng, and GNC "Herbal Plus" Echinacea.
6

7 19. Defendant General Nutrition Centers, Inc. is a Pennsylvania Corporation operating
8 in California with a principal place of business at 300 Sixth Ave., Pittsburgh, PA 15222.
9 Defendant General Nutrition Corporation, doing business as GNC, is a Pennsylvania Corporation
10 operating in California with a principal place of business at 300 Sixth Ave., Pittsburgh, PA 15222.
11 Defendant GNC Holdings, Inc. is a Pennsylvania Corporation operating in California with a
12 principal place of business at 300 Sixth Ave., Pittsburgh, PA 15222.
13

14 20. California law applies to all claims set forth in this Complaint because Plaintiffs live
15 in California and purchased Defendants' products here. Also, Defendants sell products in
16 California. The misconduct alleged herein was implemented in California and has a shared nexus
17 with California. The formulation and execution of the unlawful practices alleged herein occurred
18 in, or emanated from, California. Accordingly, California has significant contacts and/or a
19 significant aggregation of contacts with the claims asserted by Plaintiffs and all Class members.
20

21 **JURISDICTION AND VENUE**

22 21. This Court has original jurisdiction over this action under 28 U.S.C. § 1332(d)
23 because this is a class action in which: (1) there are over 100 members in the proposed class;
24 (2) members of the proposed class have a different citizenship from Defendant; and (3) the claims
25 of the proposed class members exceed \$5,000,000 in the aggregate.

26 22. The Court has jurisdiction over the federal claim alleged herein pursuant to 28 U.S.C.
27 § 1331, because it arises under the laws of the United States.
28

1 30. Specifically, GNC “Herbal Plus” Gingko Biloba contains no gingko biloba, but
2 instead contains oryza (rice) and/or allium (garlic), among other substances; GNC “Herbal Plus” St.
3 John’s Wort product contains no St. John’s Wort, but instead contains oryza, allium, and/or
4 dracaena (a tropical house plant); GNC “Herbal Plus” Ginseng contains no ginseng, but instead
5 contains, among other substances, oryza, dracaena, and/or pinus strobus (white pines); and GNC
6 “Herbal Plus” Echinacea contains no echinacea, but instead contains pine and/or ranunculaceae
7 (flowering plants from the buttercup family), or no plant substances at all .
8

9 31. In other words, while Defendants purport to sell their customers herbal supplements,
10 the supplements are a sham, containing none of the active ingredient promised in the product’s
11 name and on the label.

12 32. The adulterated and misbranded GNC “Herbal Plus” Products are worthless.

13 33. A reasonable purchaser would believe that Defendants’ products did in fact contain
14 the ingredients listed on the labels.
15

16 34. A reasonable purchaser would believe that Defendants’ GNC “Herbal Plus” Gingko
17 Biloba actually contained gingko biloba.

18 35. A reasonable purchaser would believe that Defendants’ GNC “Herbal Plus” St.
19 John’s Wort actually contained St. John’s wort.
20

21 36. A reasonable purchaser would believe that Defendants’ GNC “Herbal Plus” Ginseng
22 actually contained ginseng.

23 37. A reasonable purchaser would believe that Defendants’ GNC “Herbal Plus”
24 Echinacea actually contained echinacea.

25 38. Plaintiffs reasonably relied on Defendants’ package labeling of its Misbranded GNC
26 “Herbal Plus” Products.
27

28 39. At point of sale, Plaintiffs did not know, and had no reason to know, that Defendants’

1 Misbranded GNC “Herbal Plus” Products were misbranded and adulterated as set forth herein.
2 Plaintiffs would not have bought the Misbranded GNC “Herbal Plus” Products had they known the
3 truth that the products contained none of the ingredients listed on the front of package label.

4 40. As a result of Defendants’ misrepresentations of content, Plaintiffs and thousands of
5 others in California purchased the products at issue.

6 41. Defendants’ labeling as alleged herein is false and misleading and designed to
7 increase sales of the products at issue.
8

9
10 **CLASS ACTION ALLEGATIONS**

11 42. Plaintiffs bring this action as a class action pursuant to Federal Rule of Civil
12 Procedure 23(b)(2) and 23(b)(3) on behalf of the following classes:

13 **California Class:** All persons in the state of California who, within the
14 last four years, purchased any of Defendants’ GNC “Herbal Plus”
products including:

- 15 (a) GNC “Herbal Plus” Gingko Biloba
16 (b) GNC “Herbal Plus” St. John’s Wort
17 (c) GNC “Herbal Plus” Ginseng
18 (d) GNC “Herbal Plus” Echinacea

19 43. The following persons are expressly excluded from the Class: (1) Defendants and
20 their subsidiaries and affiliates; (2) all persons who make a timely election to be excluded from the
21 proposed Class; (3) governmental entities; and (4) the Court to which this case is assigned and its
staff.

22 44. This action can be maintained as a class action because there is a well-defined
23 community of interest in the litigation and the proposed Class is easily ascertainable.

24 45. **Numerosity:** Based upon Defendants’ publicly available sales data with respect to
25 the misbranded products at issue, it is estimated that the Class numbers in the thousands, and that
26 joinder of all Class members is impracticable.

27 46. **Common Questions Predominate:** This action involves common questions of law
28 and fact applicable to each Class member that predominate over questions that affect only

1 individual Class members. Thus, proof of a common set of facts will establish the right of each
2 Class member to recover. Questions of law and fact common to each Class member include, for
3 example:

4 a. Whether Defendants engaged in unlawful, unfair or deceptive business practices
5 by failing to properly package and label its Misbranded GNC “Herbal Plus” Products sold
6 to consumers;

7 b. Whether the Misbranded GNC “Herbal Plus” Products are worthless;

8 c. Whether Plaintiffs and the Class are entitled to equitable and/or injunctive relief;

9 d. Whether Defendants’ unlawful, unfair and/or deceptive practices harmed Plaintiffs
and the Class; and

10 e. Whether Defendants were unjustly enriched by its deceptive practices.

11 47. Typicality: Plaintiffs’ claims are typical of the claims of the Class because Plaintiffs
12 bought Defendants’ Misbranded GNC “Herbal Plus” Products during the Class Period.
13 Defendants’ unlawful, unfair, and/or fraudulent actions concern the same business practices
14 described herein irrespective of where they occurred or were experienced. Plaintiffs and the Class
15 sustained similar injuries arising out of Defendants’ conduct in violation of California law. The
16 injuries of each member of the Class were caused directly by Defendants’ wrongful conduct. In
17 addition, the factual underpinning of Defendants’ misconduct is common to all Class members and
18 represents a common thread of misconduct resulting in injury to all members of the Class.
19 Plaintiffs’ claims arise from the same practices and course of conduct that give rise to the claims of
20 the Class members and are based on the same legal theories.

21 48. Adequacy: Plaintiffs will fairly and adequately protect the interests of the Class.
22 Neither Plaintiffs nor Plaintiffs’ counsel have any interests that conflict with or are antagonistic to
23 the interests of the Class members. Plaintiffs have retained highly competent and experienced class
24 action attorneys to represent their interests and those of the members of the Class. Plaintiffs and
25 Plaintiffs’ counsel have the necessary financial resources to adequately and vigorously litigate this
26 class action, and Plaintiffs and counsel are aware of their fiduciary responsibilities to the Class
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1 members and will diligently discharge those duties by vigorously seeking the maximum possible
2 recovery for the Class.

3 49. Superiority: There is no plain, speedy, or adequate remedy other than by
4 maintenance of this class action. The prosecution of individual remedies by members of the Class
5 will tend to establish inconsistent standards of conduct for Defendants and result in the impairment
6 of Class members' rights and the disposition of their interests through actions to which they were
7 not parties. Class action treatment will permit a large number of similarly situated persons to
8 prosecute their common claims in a single forum simultaneously, efficiently, and without the
9 unnecessary duplication of effort and expense that numerous individual actions would engender.
10 Further, as the damages suffered by individual members of the Class may be relatively small, the
11 expense and burden of individual litigation would make it difficult or impossible for individual
12 members of the Class to redress the wrongs done to them, while an important public interest will be
13 served by addressing the matter as a class action. Class treatment of common questions of law and
14 fact would also be superior to multiple individual actions or piecemeal litigation in that class
15 treatment will conserve the resources of the Court and the litigants, and will promote consistency
16 and efficiency of adjudication.

17 50. The prerequisites to maintaining a class action for injunctive or equitable relief
18 pursuant to FED. R. CIV. P. 23(b)(2) are met as Defendants have acted or refused to act on grounds
19 generally applicable to the Class, thereby making appropriate final injunctive or equitable relief
20 with respect to the Class as a whole.

21 51. The prerequisites to maintaining a class action pursuant to FED. R. CIV. P. 23(b)(3)
22 are met as questions of law or fact common to class members predominate over any questions
23 affecting only individual members, and a class action is superior to other available methods for
24 fairly and efficiently adjudicating the controversy.

25 52. Plaintiffs and Plaintiffs' counsel are unaware of any difficulties that are likely to be
26 encountered in the management of this action that would preclude its maintenance as a class action.
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1 61. Plaintiffs and the Class were injured as a result of Defendants' unfair acts and
2 practices.

3 62. Defendants sold to Plaintiffs and the Class products that were not capable of
4 being legally sold and that have no economic value.

5 63. Plaintiffs and the Class who purchased the Misbranded GNC "Herbal Plus"
6 Products had no way of reasonably knowing that the products were misbranded and were not
7 properly labeled, and thus could not have reasonably avoided injury.

8 64. A reasonable consumer would have relied on Defendants' representations.

9 65. The consequences of Defendants' conduct outweigh any justification, motive or
10 reason therefor.

11 66. As a result of Defendants' conduct, Plaintiffs and the Class, pursuant to Business
12 and Professions Code § 17203, are entitled to an order enjoining such future conduct by
13 Defendants, and such other orders and judgments which may be necessary to disgorge
14 Defendants' ill-gotten gains and restore any money paid for the Misbranded GNC "Herbal Plus"
15 Products.
16 Products.
17

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19 **THIRD CAUSE OF ACTION**
20 **Business and Professions Code § 17200, *et seq.***
21 **Fraudulent Business Acts and Practices**

22 67. Defendants' conduct as set forth herein constitutes fraudulent business practices
23 under California Business and Professions Code § 17200, *et seq.*

24 68. Defendants' misleading packaging and labeling of the Misbranded GNC "Herbal
25 Plus" Products were likely to deceive reasonable consumers.

26 69. As set forth above, Plaintiffs and members of the Class were deceived.

27 70. As set forth above, Defendants engaged in fraudulent business acts and practices.

28 71. Plaintiffs and the Class were injured by Defendants' fraudulent acts and practices.

1 88. As set forth above, these materials misrepresented or omitted the true contents
2 and nature of the Misbranded GNC “Herbal Plus” Products.

3 89. Defendants’ labeling inducements were made in California and come within the
4 definition of advertising contained in Business and Professions Code §17500, *et seq.* where the
5 product labels are intended as inducements to purchase the Misbranded GNC “Herbal Plus”
6 Products, and are statements disseminated by Defendants to Plaintiffs and the Class.
7

8 90. Defendants knew, or in the exercise of reasonable care, should have known, that
9 these statements were untrue and/or misleading.

10 91. As set forth above, Defendants prepared and distributed in California via product
11 packaging and labeling, statements that falsely advertise the composition of the Misbranded
12 GNC “Herbal Plus” Products, and falsely misrepresented the nature of the Misbranded GNC
13 “Herbal Plus” Product.
14

15 92. Plaintiffs and the Class were the intended targets of such representations.

16 93. Defendants’ conduct in disseminating untrue label advertising throughout
17 California deceived Plaintiffs and members of the Class by obfuscating the contents, nature and
18 quality of the Misbranded GNC “Herbal Plus” Products in violation of the “untrue prong” of
19 California Business and Professions Code § 17500.
20

21 94. Plaintiffs and the Class reasonably relied on Defendants’ representations.

22 95. As set forth herein, a reasonable consumer would have relied on Defendants’
23 representations.
24

25 96. Plaintiffs and the Class were injured as a result of Defendants’ acts and practices.

26 97. As a result of Defendants’ violations of the “untrue prong” of California Business
27 and Professions Code § 17500, *et seq.*, Defendants have been unjustly enriched at the expense of
28 Plaintiffs and the Class.

1 methods of competition and unfair or fraudulent acts or practices in that it advertises goods with
2 the intent not to sell the goods as advertised.

3 106. By engaging in the conduct set forth herein, Defendants have violated and
4 continue to violate Section 1770(a)(16) of the CLRA, because Defendants' conduct constitutes
5 unfair methods of competition and unfair or fraudulent acts or practices in that it represents that a
6 subject of a transaction has been supplied in accordance with a previous representation when
7 they have not.

9 107. Plaintiffs and the Class were injured as a result of Defendants' acts and practices.

10 108. Plaintiffs request that the Court enjoin Defendants from continuing to employ the
11 unlawful methods, acts and practices alleged herein pursuant to Cal. Civ. Code § 1780(a)(2).

12 109. If Defendants are not restrained from engaging in these practices in the future,
13 Plaintiffs and the Class will continue to suffer harm.

14 110. In this Complaint, Plaintiffs are not seeking damages pursuant to the CLRA.
15 Plaintiffs will amend this complaint to request damages, after providing Defendants with notice
16 pursuant to Cal. Civ. Code § 1782.

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18 **SEVENTH CAUSE OF ACTION**
19 **Breach of Implied Warranty of Merchantability**

20 111. Implied in the purchase of Misbranded GNC "Herbal Plus" Products by Plaintiffs
21 and the Class is the warranty that the purchased products are legal and can be lawfully resold.

22 112. Defendants knowingly and intentionally misbranded and adulterated the
23 Misbranded GNC "Herbal Plus" Products.

24 113. Defendants knew or should have known that those Misbranded GNC "Herbal
25 Plus" Products were illegal.
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1 114. When Defendants sold those products they impliedly warranted that the products
2 were legal and could be lawfully resold.

3 115. Plaintiffs would not have knowingly purchased products that were illegal and
4 unsellable and which subjected Plaintiffs to criminal prosecution.

5 116. No reasonable consumer would knowingly purchase products that are illegal and
6 unsellable and subject a consumer to criminal prosecution.

7 117. The purchased Misbranded GNC “Herbal Plus” Products were unfit for the
8 ordinary purpose for which Plaintiffs and the Class purchased them.

9 118. In fact, these Misbranded GNC “Herbal Plus” Products were economically
10 worthless.

11 119. As a result, Plaintiffs and the Class were injured through their purchase of an
12 unsuitable, useless, illegal, and unsellable product.

13 120. By reason of the foregoing, Plaintiffs and the Class were damaged in the amount
14 they paid for Misbranded GNC “Herbal Plus” Products.

15
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17 **EIGHTH CAUSE OF ACTION**
18 **Breach of Express Warranty**

19
20 121. Plaintiffs repeat and reallege each of the above allegations as if fully set forth
21 herein.

22 122.. Defendants provided Plaintiffs and other members of the Class with written
23 express warranties, including warranties that its Misbranded GNCs “Herbal Plus” Products
24 contained ginkgo biloba, St. John's wort, ginseng, or echinacea.

25 123. Defendants breached these warranties by providing Misbranded GNCs “Herbal
26 Plus” Products to Plaintiffs and members of the Class that contained no such ingredients and did
27 not otherwise conform to Defendants’ warranties.
28

1 continuing to manufacture, label, market, advertise, distribute, and sell these products in the
2 unlawful manner described herein; and ordering Defendants to engage in corrective action;

- 3 D. For all injunctive relief pursuant to Cal. Civ. Code § 1780;
4 E. For an order awarding attorneys' fees and costs;
5 F. For an order awarding punitive damages;
6 G. For an order awarding pre-and post-judgment interest; and
7 H. For an order providing such further relief as this Court deems proper.
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9 Dated: February 4, 2015

10 Respectfully submitted,

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