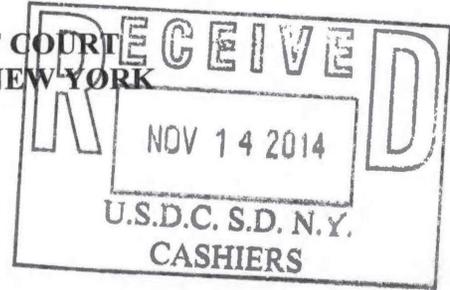


JUDGE BRICCETTI

14 CV 9097

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK



DANI TOCCI, individually and on behalf of  
all others similarly situated,

Plaintiff,

v.

THE ISOPURE COMPANY, LLC, D/B/A  
NATURE'S BEST, GENERAL NUTRITION  
CORP.,

Defendants.

Civil Action No.

**CLASS ACTION COMPLAINT**

**JURY TRIAL DEMANDED**

Plaintiff Dani Tocci ("Plaintiff"), individually and on behalf of herself and all others similarly situated, by and through her attorneys, makes the following allegations pursuant to the investigation of her counsel and based upon information and belief, except as to allegations specifically pertaining to herself and her counsel, which are based on personal knowledge.

**NATURE OF THE ACTION**

1. This is a class action lawsuit against Defendants The Isopure Company, LLC, d/b/a Nature's Best ("Isopure") and General Nutrition Corp. ("GNC") for misrepresenting Isopure Zero-Carb and Low-Carb Protein Powder ("Isopure Protein Powder" or the "Product") as: (i) being "100% Whey Protein Isolate," (ii) having "50 Grams Of Protein From 100% Whey Protein Isolate," and (iii) having "50 Grams [Of] Protein Per Serving" (collectively, the "Misrepresentations"). In reality, Isopure Product Powder is "spiked" with additional and unnecessary free-form amino acids, non-protein amino acids, and a litany of other non-whey ingredients. As a result of Defendants' practices, the Product (a) is not "100% Whey Protein Isolate," and (b) actually contains significantly less whey protein than represented.

2. The whey protein industry is a growing and highly competitive business environment: “during the forecast period, [the market for] protein products is expected to grow by 62% to reach US \$7.8 billion in 2018.”<sup>1</sup> However, the wholesale price of whey protein has continually increased in recent years and is typically purchased for roughly \$15 to \$18 per kilogram, resulting in relatively low profit margins for manufacturers.

3. In an effort to reduce its costs, Isopure adds cheaper free-form amino acids, non-protein amino acids, and other non-whey ingredients to Isopure Protein Powder, including but not limited to taurine and L-glutamine. Thus, the Product is *not* “100% Whey Protein Isolate.”

4. Isopure adds these ingredients to increase the nitrogen content of the Product. Nitrogen is the “marker” used by a common test as a rough estimate of the amount of protein in a product, but it is not a direct measurement of the actual protein content. By adding nitrogen-rich ingredients, Isopure’s products appear to contain more protein than they actually do.

5. This act is commonly referred to as “protein-spiking,” “nitrogen-spiking,” or “amino-spiking,” and was evidenced recently in 2007 when a wide variety of pet foods were recalled due to adulteration with melamine, a compound that contains 67% nitrogen by mass. In the wake of the scandal, *USA Today* reported that, “A leading theory is that [melamine] was added to fake higher protein levels.”<sup>2</sup> The issue arose again in 2008 when a variety of Chinese baby formulas were found to be adulterated with melamine, which was similarly added to

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<sup>1</sup> See <http://www.euromonitor.com/sports-nutrition-in-the-us/report>.

<sup>2</sup> See *Melamine In Pet Food May Not Be Accidental*, [http://usatoday30.usatoday.com/money/industries/2007-04-19-pet-food-usat\\_n.htm](http://usatoday30.usatoday.com/money/industries/2007-04-19-pet-food-usat_n.htm).

increase the apparent protein content in the affected products.<sup>3</sup>

6. Despite knowledge that “protein-spiking” is misleading to consumers, Defendants continue to advertise, distribute, label, manufacture, and market Isopure Protein Powder in a misleading and deceptive manner.

### **THE PARTIES**

7. Plaintiff Dani Tocci is a citizen of New York who resides in Congers, New York. Plaintiff Tocci is a health-conscious consumer with an active lifestyle. In or about September 2014, Plaintiff Tocci purchased a 1 lb. bag of Isopure Low-Carb Protein Powder from a GNC retail store located at 1000 Palisades Center Drive, West Nyack, New York for approximately \$24.99. Prior to purchasing Isopure Protein Powder, Plaintiff Tocci reviewed the product’s labeling and packaging. Specifically, she saw and relied upon the representations that Isopure Protein Powder: (i) was “100% Whey Protein Isolate,” (ii) had “50 Grams Of Protein From 100% Whey Protein Isolate,” and (iii) had “50 Grams [Of] Protein Per Serving.” In making her purchase, Plaintiff Tocci understood these representations to be warranties that (a) Isopure is, in fact, “100% Whey Protein Isolate” and that (b) it actually contains “50 Grams Of Protein From 100% Whey Protein Isolate.” In reliance on these representations and warranties, Plaintiff Tocci paid a tangible increased cost for Isopure Protein Powder, which was worth less than represented because the product is not “100% Whey Protein Isolate” and does not actually contain “50 Grams Of Protein From 100% Whey Protein Isolate.” Accordingly, these representations and warranties were part of the basis of the bargain, in that Plaintiff Tocci attributed value to these promises and would not have purchased Isopure Protein Powder, or would have only paid for the

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<sup>3</sup> See Protein Adulteration In China, [http://en.wikipedia.org/wiki/Protein\\_adulteration\\_in\\_China](http://en.wikipedia.org/wiki/Protein_adulteration_in_China) (“These adulterants can be used to inflate the apparent protein content of products, so that inexpensive ingredients can pass for more expensive, concentrated proteins.”).

protein actually delivered by the Product, if she knew the truth about its protein content and composition. Ultimately, Plaintiff Tocci used the Product as directed but did not receive “100% Whey Protein Isolate” or “50 Grams Of Protein From 100% Whey Protein Isolate” per serving. Plaintiff Tocci also understood that in making the sale, GNC was acting with the knowledge and approval of Isopure and/or as the agent of Isopure. Plaintiff Tocci further understood that the purchase involved a direct transaction between herself and Isopure, because the purchase came with Isopure’s representation and warranty that the Product is “100% Whey Protein Isolate” and contains “50 Grams Of Protein From 100% Whey Protein Isolate.”

8. Defendant The Isopure Company, LLC, d/b/a Nature’s Best (“Isopure”) is a Delaware limited liability company with its principal place of business located at 195 Engineers Road, Hauppauge, New York. Isopure designed, manufactured, promoted, marketed, distributed, and sold Isopure Protein Powder across the United States, including to hundreds of thousands of consumers in New York. Isopure was recently purchased by an Irish food group for \$153 million.<sup>4</sup>

9. Defendant General Nutrition Corp. (“GNC”) is a Pennsylvania corporation with its principal place of business located at 300 Sixth Avenue, Pittsburgh, Pennsylvania. GNC is a leading retailer in the United States of dietary supplements. GNC advertised, promoted, distributed, and sold Isopure Protein Powder across the United States, including to hundreds of thousands of consumers in New York.

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<sup>4</sup> <http://www.irishtimes.com/business/sectors/agribusiness-and-food/glanbia-completes-153m-acquisition-of-us-brand-isopure-1.1964254>.

**JURISDICTION AND VENUE**

10. This Court has subject matter jurisdiction over this civil action pursuant to 28 U.S.C. § 1331 (federal question). This Court has supplemental jurisdiction over state law claims pursuant to 28 U.S.C. § 1367.

11. This Court also has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1332(d) because there are more than 100 class members and the aggregate amount in controversy exceeds \$5,000,000, exclusive of interest, fees, and costs, and at least one Class member is a citizen of a state different from Defendants.

12. This Court has personal jurisdiction over Defendants because Defendants conduct substantial business within New York, such that Defendants have significant, continuous, and pervasive contacts with the State of New York.

13. Venue is proper in this District pursuant to 28 U.S.C. § 1391 because Defendants do substantial business in this District, and a substantial part of the events giving rise to Plaintiff's claims took place within this judicial district, including her purchase of Isopure Protein Powder.

**FACTUAL BACKGROUND**

**The Differences Between Whey Protein And Free Form Amino Acids**

14. Whey is a complete protein source, in that it contains all the essential amino acids the human body needs to build protein-based compounds such as muscle tissue, skin, fingernails, hair, and enzymes. One's daily protein needs depend on his or her size, gender, and activity levels, although it likely amounts to somewhere between 46 grams and 56 grams for most individuals. For athletes, daily protein requirements are well over 100 grams, which is often difficult to obtain from eating food alone. Whey protein powder is considered an especially valuable source of protein because it is rich in branched-chain amino acids – leucine, isoleucine,

and valine – which are metabolized directly within the muscles as opposed to being processed in the liver first.

15. According to the 2005 dietary reference intake (“DRI”) guidance from the National Academy of Sciences, protein is comprised of long links of certain types of amino acids. Stated otherwise, certain types of amino acids are the “building blocks” of protein.

16. However, other types of amino acids, such as taurine (an ingredient in Isopure Protein Powder), is not naturally found in whey protein and is not processed by the body into protein. “Although most amino acids are needed to build protein, taurine does not help to build muscle because it doesn’t link with other amino acids or the building blocks of protein,” explains Roberta Anding, RD, American Dietetic Association spokesperson and sports dietitian for the Houston Texans football team.

17. Furthermore, although amino acids are the building blocks of protein, they do not have the same beneficial effects of whole protein when they are free-form (*i.e.*, not part of a complete protein). In fact, several studies have shown that protein is absorbed more effectively than free-form amino acids in isolation.<sup>5</sup>

18. First, at least one study was conducted to determine whether the positive effects of whey protein ingestion on the accrual of muscle protein are due solely to its constituent amino acids, or whether the ingestion of complete proteins is more beneficial. The study included a comparison of three trial groups. The first group was provided intact whey protein, in the form of whey protein powder. The other two groups were provided free-form amino acids in isolation. The researchers concluded that ingestion of complete whey protein improves skeletal

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<sup>5</sup> See, e.g., Mauro G. Di Pasquale, *Amino Acids and Proteins for the Athlete: The Anabolic Edge* 190 (2d ed. 2008).

muscle protein accrual through mechanisms that are beyond those attributed to free-from amino acids in isolation.<sup>6</sup>

19. Second, another study found that “the lack of recovery after immobilization-induced atrophy during ageing is due to an ‘anabolic resistance’ of protein synthesis to amino acids during rehabilitation.” The study’s results “highlight a novel approach to induce muscle mass recovery following atrophy in the elderly by giving soluble milk protein or high protein diets.”<sup>7</sup>

20. Third, yet another study concluded that, “the bound form of an EAA [essential amino acid] may be more efficiently utilized than when delivered in its free-form [in isolation].”<sup>8</sup>

#### **Isopure’s False And Misleading Labeling Of Isopure Protein Powder**

21. Isopure features the ingredient sought by millions of American consumers, “whey protein,” by prominently featuring it on the Products’ labeling. The Product’s label plainly states: (i) “100% Whey Protein Isolate,” (ii) “50 Grams Of Protein From 100% Whey Protein Isolate,” and (iii) “50 Grams [Of] Protein Per Serving,” on both the front and back:

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<sup>6</sup> Christos S. Katsanos, *et al.*, *Whey Protein Ingestion In Elderly Results In Greater Muscle Protein Accrual Than Ingestion Of Its Constituent Essential Amino Acid Content*, 28 *Nutr. Res.* 651 (Oct. 2008), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2612691>.

<sup>7</sup> Hugues Magne, *et al.*, *Contrarily To Whey And High Protein Diets, Dietary Free Leucine Supplementation Cannot Reverse The Lack Of Recovery Of Muscle Mass After Prolonged Immobilization During Ageing*, 590 *J. of Physiology* 2035 (Apr. 2012), available at <http://jp.physoc.org/content/590/8/2035.long>.

<sup>8</sup> Juha J. Hulmi, *et al.*, *Effect Of Protein/Essential Amino Acids And Resistance Training On Skeletal Muscle Hypertrophy: A Case For Whey Protein*, 7 *Nutrition & Metabolism* 51 (2010), available at <http://www.nutritionandmetabolism.com/content/7/1/51>.



**NATURE'S BEST**

NATURALLY AND ARTIFICIALLY FLAVORED  
**CREAMY VANILLA**

# ISO PURE

PROTEIN POWDER

**ZERO CARB** — NET WT. 4.5 LB (2041G)

WITH 50 GRAMS OF PROTEIN FROM 100% WHEY PROTEIN ISOLATE

NOTICE: USE THIS PRODUCT AS A FOOD SUPPLEMENT ONLY. DO NOT USE FOR WEIGHT REDUCTION.

**50 GRAMS** **100% WHEY** **PROTEIN ISOLATE**

**PROTEIN** **10,900 MG BCAA'S** **PER SERVING**

**PER SERVING** **4.6G L-GLUTAMINE** **PER SERVING**

**GLUTEN** **FREE** **INSTANTIZED**

**LACTOSE**

**ASPARTAME**

**WE'RE ALL MORE THAN MUSCLE**

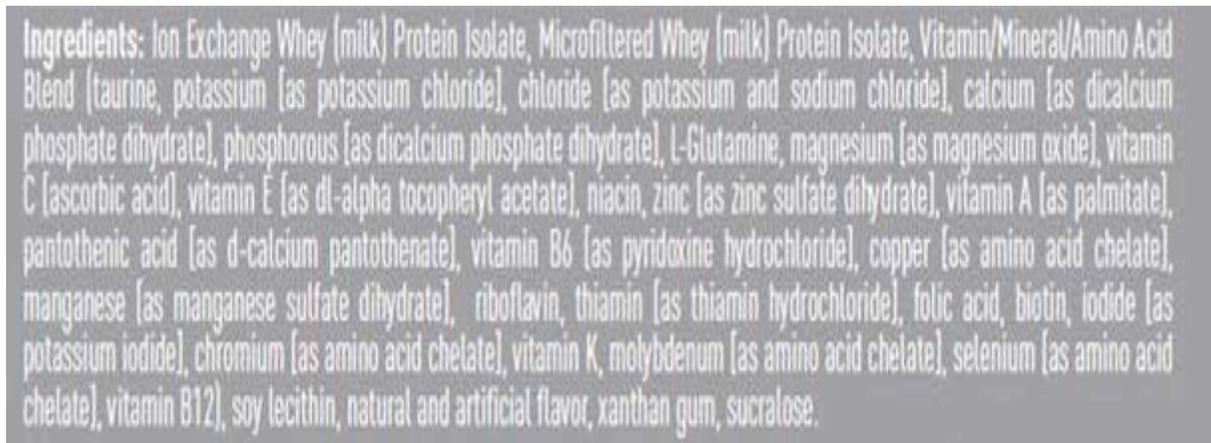
**LEAN MEAN CARB FREE MACHINES**

50 grams of 100% pure whey protein isolate and not a carb in sight. And it still comes with glutamine and nutrients, but no lactose or impurities, so it's easy to drink. Your gut will agree.

22. However, the Product's "100% Whey Protein Isolate" claim is false. In fact, Isopure Protein Powder contains, for the purposes of "protein-spiking," free-form amino acids, including L-glutamine.

23. Even worse, Isopure Protein Powder includes the non-protein amino acid taurine, which is not naturally found in whey protein and is not processed by the body into protein.

24. Moreover, Isopure Protein Powder includes a litany of other non-whey ingredients: chloride, magnesium, vitamin C, vitamin E, niacin, zinc, vitamin A, pantothenic acid, vitamin B6, copper, manganese, riboflavin, thiamin, folic acid, biotin, iodide, chromium, vitamin K, molybdenum, selenium, vitamin B12, xanthan gum, and sucralose. The complete list of ingredients is as follows:



Ingredients: Ion Exchange Whey (milk) Protein Isolate, Microfiltered Whey (milk) Protein Isolate, Vitamin/Mineral/Amino Acid Blend (taurine, potassium [as potassium chloride], chloride [as potassium and sodium chloride], calcium [as dicalcium phosphate dihydrate], phosphorous [as dicalcium phosphate dihydrate], L-Glutamine, magnesium [as magnesium oxide], vitamin C [ascorbic acid], vitamin E [as dl-alpha tocopheryl acetate], niacin, zinc [as zinc sulfate dihydrate], vitamin A [as palmitate], pantothenic acid [as d-calcium pantothenate], vitamin B6 [as pyridoxine hydrochloride], copper [as amino acid chelate], manganese [as manganese sulfate dihydrate], riboflavin, thiamin [as thiamin hydrochloride], folic acid, biotin, iodide [as potassium iodide], chromium [as amino acid chelate], vitamin K, molybdenum [as amino acid chelate], selenium [as amino acid chelate], vitamin B12), soy lecithin, natural and artificial flavor, xanthan gum, sucralose.

25. The presence of these "protein spiking" agents and other ingredients necessarily means that Isopure Protein Powder is not "100% Whey Protein Isolate."

26. In fact, Isopure recognizes the misleading nature of its labeling. On another product, Isopure *Natural* Protein Powder, Isopure also claims that the product contains "100% Whey Protein Isolate." However, by contrast, Isopure Natural Protein Powder contains only a small fraction of the ingredients found in the Product at issue here: Ion Exchange Whey (milk) Protein Isolate, Microfiltered Whey (milk) Protein Isolate, and soy lecithin.

27. Moreover, the presence of free-form amino acids, non-protein amino acids, and a litany of other non-whey ingredients necessarily means that Isopure Protein Powder does not contain “50 Grams Of Protein From Whey Protein Isolate.” Simply put, consumers are misled into believing that every gram of protein in the product is comprised solely of 100% whey protein.

28. Furthermore, Isopure Protein Powder does not contain “50 Grams [Of] Protein Per Serving” due to the inclusion of ingredients added for the purpose of “protein spiking,” such as L-glutamine and taurine.

### **Defendant GNC’s Liability**

29. Defendant GNC incorporates all of the Isopure Protein Powder’s label claims and product images described herein on its website at <http://gnc.com/>. In fact, GNC’s website advertises Isopure Protein Powder as a “Whey Protein,” rather than a “Protein Blend.”<sup>9</sup>



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<sup>9</sup> See <http://www.gnc.com/Protein/category.jsp?categoryId=3593187&cp=3593186.45669936>.

30. On information and belief, GNC employees review all labels and marketing materials of vendors, including Defendant Isopure, and have the ability to change false and misleading marketing materials, request different product formulations, and ultimately reject products from being sold in its brick/mortar retail stores and online store.

31. On information and belief, GNC has the ability to obtain certificates of analysis for review prior to approving a product for sale in its stores and website.

32. Ironically, GNC has been a member of the American Herbal Products Association (“AHPA”), an organization of dietary supplement manufacturers, since at least 2003. AHPA has condemned “protein-spiking” and issued a standard for manufacturers for measuring protein which expressly “exclude[es] any ‘non-protein nitrogen-containing substances’ when counting total protein content.”<sup>10</sup>

33. Additionally, GNC has also set up an informational website called “Is Your Protein Scamming You?”<sup>11</sup> On this site, GNC criticizes the practice of “protein-spiking,” while simultaneously selling Isopure Protein Powder online and in its retail stores. GNC’s informational website explains:

[M]any protein products on the market are taking part in a practice called “protein spiking” or “amino spiking” that is cheating their customers. Independent testing confirms that these protein supplements use added ingredients to spike their protein test results, making it appear that the products contain more protein than they actually do.

You can feel confident when you take home a GNC product because we guarantee that each and every one of our more than 300 GNC protein supplements contains the full amount of protein stated on the label and is **100% Real Protein with NO protein**

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<sup>10</sup> See <http://www.ahpa.org/Default.aspx?tabid=441> (Apr. 1, 2014).

<sup>11</sup> See <http://www.gnclivewell.com/realprotein/>.

**spiking. In fact, we GUARANTEE it!**

...

In order to accurately calculate the amount of real protein in a protein supplement, the nitrogen from other ingredients such as amino acids betaine and creatine must be subtracted from the total to determine the real protein amount. Some protein supplement companies use these ingredients to spike their protein test results because they do not subtract the nitrogen from these other sources.

This practice is referred to as “protein spiking” or “amino spiking.” It is when ingredients that are not whole proteins are being used to spike protein test results. (emphasis in original).

34. GNC’s informational website also offers the “GNC Guarantee”:

- Every GNC protein product contains 100% Real Protein with no overstated protein values.
- GNC never spikes protein amounts, ever!
- GNC proudly stands behind the quality, potency and taste of our protein supplements – Guaranteed!

35. In connection with the “GNC Guarantee,” the informational website also offers GNC’s seal of approval, assuring consumers that GNC’s products are “One Hundred Percent Real Protein Guarantee – No Protein Spiking”:



36. Each of these representations, warranties, and guarantees are false and misleading. Isopure Protein Powder is not “100% Whey Protein Isolate,” does not contain “50

Grams Of Protein From 100% Whey Protein Isolate,” and is spiked with free-form amino acids, non-protein amino acids, and a litany of other non-whey ingredients

**Defendants’ Conduct Harmed Plaintiff And Class Members**

37. Plaintiff and members of the Class and New York Subclass were in fact misled by Defendants’ Misrepresentations regarding the true nature of Isopure Protein Powder.

38. The difference between Isopure Protein Powder as promised and the Product as sold is significant. First, the Product does not contain “100% Whey Protein Isolate,” as represented. Second, the amount of actual protein provided, and the measure of protein per serving, has real impacts on the benefits provided to consumers, and the actual value of the Product itself.

39. As aforementioned, whey protein is a superior to free-form amino acids as a protein source. Consumers, therefore, are getting an inferior product in comparison to what they bargained for because the product is not “100% Whey Protein Isolate,” but instead contains free-form amino acids, non-protein amino acids, and other non-whey ingredients.

40. Furthermore, consumers are left with a product that contains less protein than represented, due to the presence of “protein-spiking” ingredients.

41. Plaintiff and members of the Class and New York Subclass would not have purchased Isopure Protein Powder, or would have only paid for the whey protein actually delivered by Isopure Protein Powder, if they had known the truth regarding the Product.

**CLASS ACTION ALLEGATIONS**

42. Plaintiff seeks to represent a class defined as all persons in the United States who purchased Isopure Protein Powder (the “Class”) and a subclass of Class members who purchased Isopure Protein Powder in New York (the “New York Subclass”). Excluded from the Class and

New York Subclass is any entity in which Defendants have a controlling interest, and officers or directors of Defendants.

43. Members of the Class and New York Subclass are so numerous that their individual joinder herein is impracticable. On information and belief, members of the Class and New York Subclass number in the millions. The precise number of Class members and their identities are unknown to Plaintiff at this time but may be determined through discovery. Class members may be notified of the pendency of this action by mail and/or publication through the distribution records of Defendants and third party retailers and vendors.

44. Common questions of law and fact exist as to all Class members and predominate over questions affecting only individual Class members. Common legal and factual questions include, but are not limited to, whether Defendants' labeling, marketing, advertising, and promotion of Isopure Protein Powder was false and misleading.

45. The claims of the named Plaintiff are typical of the claims of the Class in that the named Plaintiff was exposed to Defendants' false and misleading labeling, marketing, advertising, and promotion, purchased Isopure Protein Powder, and suffered a loss as a result of that purchase.

46. Plaintiff is an adequate representative of the Class and New York Subclass because her interests do not conflict with the interests of the Class members she seeks to represent, she has retained competent counsel experienced in prosecuting class actions, and she intends to prosecute this action vigorously. The interests of Class members will be fairly and adequately protected by Plaintiff and her counsel.

47. The class mechanism is superior to other available means for the fair and efficient adjudication of the claims of Class and New York Subclass members. Each individual Class

member may lack the resources to undergo the burden and expense of individual prosecution of the complex and extensive litigation necessary to establish Defendants' liability. Individualized litigation increases the delay and expense to all parties and multiplies the burden on the judicial system presented by the complex legal and factual issues of this case. Individualized litigation also presents a potential for inconsistent or contradictory judgments. In contrast, the class action device presents far fewer management difficulties and provides the benefits of single adjudication, economy of scale, and comprehensive supervision by a single court on the issue of Defendants' liability. Class treatment of the liability issues will ensure that all claims and claimants are before this Court for consistent adjudication of the liability issues.

**COUNT I**

**(Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301, *et seq.*)**

48. Plaintiff repeats the allegations contained in the foregoing paragraphs as if fully set forth herein.

49. Plaintiff brings this claim individually and on behalf of members of the Class and New York Subclass against all Defendants.

50. Isopure Protein Powder is a consumer product as defined in 15 U.S.C. § 2301(1).

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

52. Defendants are suppliers and warrantors as defined in 15 U.S.C. §§ 2301(4) and (5).

53. In connection with the sale of Isopure Protein Powder, Defendants issued written warranties as defined in 15 U.S.C. § 2301(6), by making express warranties that Isopure Protein Powder: (i) is "100% Whey Protein Isolate," (ii) contains "50 Grams Of Protein From Whey Protein Isolate," and (iii) contains "50 Grams [Of] Protein Per Serving." Thus, a reasonable consumer would expect that Isopure Protein Powder is, in fact, 100% whey protein isolate, and

does, in fact, contain 50 grams of protein from 100% whey protein isolate.

54. However, Isopure Protein Powder does not conform to the express warranties because the Product is not, in fact, 100% whey protein isolate, and does not, in fact, contain 50 grams of protein from 100% whey protein isolate.

55. By reason of Defendants' breach of express warranty, Defendants violated the statutory rights due to Plaintiff and Class members pursuant to the MMWA, thereby damaging Plaintiff and Class members. *See* 15 U.S.C. §§ 2301, *et seq.*

56. Plaintiff and members of the Class were injured as a direct and proximate result of Defendants' breach because (a) they would not have purchased Isopure Protein Powder if they had known that the product does not contain 100% whey protein isolate, and does not contain 50 grams of protein from 100% whey protein isolate; (b) they paid a price premium for Isopure Protein Powder based on Defendants' express warranties; and (c) Isopure Protein Powder did not have the characteristics, uses, or benefits as promised, namely that the product contains "100% Whey Protein Isolate" and/or contains "50 Grams Of Protein from 100% Whey Protein Isolate."

57. Pursuant to 15 U.S.C. § 2310(d)(1), Plaintiff and the Class are entitled to recover the damages caused to them by Defendants' breach of written and implied warranty, which either constitute the full purchase price of Isopure Protein Powder or the difference in value between Isopure Protein Powder as warranted and the products as sold. In addition, pursuant to 15 U.S.C. § 2310(d)(2), Plaintiff and the Class are entitled to recover a sum equal to the aggregate amount of costs and expenses (including attorneys' fees based on actual time expended) determined by the Court to have been reasonably incurred by Plaintiff and the Class in connection with the commencement and prosecution of this action.

58. On November 10, 2014, prior to filing this action, a pre-suit notice letter was

served on Defendants which complies in all respects with the MMWA. Plaintiff sent Defendants a letter advising them that they are in violation of the MMWA and demanded that they cease and desist from such violations and make full restitution by refunding the monies received therefrom. A true and correct copy of Plaintiff's letter is attached hereto as Exhibit A.

**COUNT II**  
**(Breach of Express Warranty)**

59. Plaintiff repeats the allegations contained in the foregoing paragraphs as if fully set forth herein.

60. Plaintiff brings this claim individually and on behalf of members of the Class and New York Subclass against all Defendants.

61. In connection with the sale of Isopure Protein Powder, Defendants issued written warranties. Defendants, as the designers, manufacturers, marketers, distributors, and/or sellers expressly warranted that Isopure Protein Powder was fit for its intended purpose by making the express warranties: that Isopure Protein Powder (i) is "100% Whey Protein Isolate," (ii) contains "50 Grams Of Protein From Whey Protein Isolate," and (iii) contains "50 Grams [Of] Protein Per Serving."

62. Defendants' express warranties, and their affirmations of fact and promises made to Plaintiff and the Class regarding Isopure Protein Powder, became part of the basis of the bargain between Defendants and Plaintiff and the Class, thereby creating an express warranty that Isopure Protein Powder would conform to those affirmations of fact, representations, promises, and descriptions.

63. Isopure Protein Powder does not, in fact, contain "100% Whey Protein Isolate," nor does it contain "50 Grams Of Protein From 100% Whey Protein Isolate." Instead, the Product contains free-form amino acids, including L-glutamine, non-protein amino acids,

including taurine, and other non-whey ingredients.

64. Plaintiff and members of the Class were injured as a direct and proximate result of Defendants' breach because (a) they would not have purchased Isopure Protein Powder if they had known that the product does not contain 100% whey protein isolate, and does not contain 50 grams of protein from 100% whey protein isolate; (b) they paid a price premium for Isopure Protein Powder based on Defendants' express warranties; and (c) Isopure Protein Powder did not have the characteristics, uses, or benefits as promised, namely that the product contains "100% Whey Protein Isolate" and/or contains "50 Grams Of Protein from 100% Whey Protein Isolate." As a result, Plaintiff and members of the Class have been damaged either in the full amount of the purchase price of Isopure Protein Powder or in the difference in value between Isopure Protein Powder are warranted and the products as sold.

65. On November 10, 2014, prior to filing this action, a pre-suit notice letter was served on Defendants which complies in all respects with N.Y. U.C.C. §§ 2-313, 2-607. Plaintiff sent Defendants a letter advising them that they breached an express warranty and demanded that they cease and desist from such breaches and make full restitution by refunding the monies received therefrom. A true and correct copy of Plaintiff's letter is attached hereto as Exhibit A.

**COUNT III**  
**(Breach Of The Implied Warranty Of Merchantability)**

66. Plaintiff repeats the allegations contained in the paragraphs above as if fully set forth herein.

67. Plaintiff brings this claim individually and on behalf of the members of the Class and New York Subclass against all Defendants.

68. Defendants are and were at all relevant times "merchants" within the meaning of the Uniform Commercial Code ("UCC"). Defendants manufactured, distributed, and marketed

Isopure Protein Powder, which is a “good” within the meaning of the UCC. Consequently, Defendants impliedly warranted that Isopure Protein Powder was merchantable, including that it could pass without objection in the trade under the contract description, that it was fit for the ordinary purposes for which such goods are used, that it was of fair average quality within the description, that it was adequately labeled, and that it would conform to the promises or affirmations of fact made on its label. However, each of these implied warranties were false with respect to the goods of the kind sold to Plaintiff and members of the Class and New York Subclass.

69. In reliance upon Defendants’ skill and judgment and the implied warranties above, Plaintiff and Class members purchased Isopure Protein Powder.

70. Isopure Protein Powder was not altered by Plaintiff or members of the Class.

71. Isopure Protein Powder was defective when it left the exclusive control of Defendants.

72. Defendants knew Isopure Protein Powder would be purchased and consumed by Plaintiff and members of the Class without additional testing. Isopure Protein Powder was not of fair average quality within its description, was not adequately labeled, and does not conform to the promises or affirmations of fact made on its label.

73. More specifically, Defendants breached their implied warranty of merchantability to Plaintiff and the Class because Isopure Protein Powder would not pass without objection in the trade because it does not conform to the promises or affirmation of fact made on its label.

74. As a direct and proximate cause of Defendants’ breach of the implied warranty, Plaintiff and Class members were injured because (a) they would not have purchased Isopure Protein Powder if they had known that the product does not contain 100% whey protein isolate,

and does not contain 50 grams of protein from 100% whey protein isolate; (b) they paid a price premium for Isopure Protein Powder based on Defendants' implied warranties; and (c) Isopure Protein Powder did not have the characteristics, uses, or benefits as promised, namely that the product contains "100% Whey Protein Isolate" and/or contains "50 Grams Of Protein from 100% Whey Protein Isolate." As a result, Plaintiff and members of the Class have been damaged either in the full amount of the purchase price of Isopure Protein Powder or in the difference in value between Isopure Protein Powder as warranted and the products as sold.

75. On November 10, 2014, prior to filing this action, a pre-suit notice letter was served on Defendants which complies in all respects with N.Y. U.C.C. §§ 2-314, 2-607. Plaintiff sent Defendants a letter advising them that they breached an implied warranty and demanded that they cease and desist from such breaches and make full restitution by refunding the monies received therefrom. A true and correct copy of Plaintiff's letter is attached hereto as Exhibit A.

**COUNT IV**  
**(Unjust Enrichment/Common Law Restitution)**

76. Plaintiff repeats the allegations contained in the paragraphs above as if fully set forth herein.

77. Plaintiff brings this claim individually and on behalf of the members of the Class and New York Subclass against all Defendants.

78. Plaintiff and members of the Class conferred benefits on Defendants by purchasing Isopure Protein Powder.

79. Defendants have been unjustly enriched in retaining the revenues derived from Plaintiff's and Class members' purchases of Isopure Protein Powder. Retention of those monies under these circumstances is unjust and inequitable because of Defendants' Misrepresentations about Isopure Protein Powder, which caused injuries to Plaintiff and members of the Class

because they would not have purchased Isopure Protein Powder if the true facts had been known.

80. Because Defendants' retention of the non-gratuitous benefits conferred on them by Plaintiff and members of the Class is unjust and inequitable, Defendants must pay restitution to Plaintiff and members of the Class for their unjust enrichment, as ordered by the Court.

**COUNT V**  
**(Deceptive Acts Or Practices, New York GBL § 349)**

81. Plaintiff repeats the allegations in the foregoing paragraphs as if fully set forth herein.

82. Plaintiff brings this claim individually and on behalf of the members of the New York Subclass against all Defendants.

83. By the acts and conduct alleged herein, Defendants committed unfair or deceptive acts and practices by making the Misrepresentations.

84. The foregoing deceptive acts and practices were directed at consumers.

85. The foregoing deceptive acts and practices are misleading in a material way because they fundamentally misrepresent the characteristics, ingredients, and benefits of Isopure Protein Powder to induce consumers to purchase same.

86. Plaintiff and members of the New York Subclass were injured because (a) they would not have purchased Isopure Protein Powder if they had known that the product does not contain 100% whey protein isolate, and does not contain 50 grams of protein from 100% whey protein isolate; (b) they paid a price premium for Isopure Protein Powder based on Defendants' implied warranties; and (c) Isopure Protein Powder does not have the characteristics, uses, or benefits as promised, namely that the product contains "100% Whey Protein Isolate" and/or contains "50 Grams Of Protein from 100% Whey Protein Isolate." As a result, Plaintiff and members of the New York Subclass have been damaged either in the full amount of the purchase

price of Isopure Protein Powder or in the difference in value between Isopure Protein Powder as warranted and the products as actually sold.

87. On behalf of herself and other members of the New York Subclass, Plaintiff seeks to enjoin the unlawful acts and practices described herein, to recover her actual damages or fifty dollars, whichever is greater, three times actual damages, and reasonable attorneys' fees.

**COUNT VI**  
**(False Advertising, New York GBL § 350)**

88. Plaintiff repeats the allegations in the foregoing paragraphs as if fully set forth herein.

89. Plaintiff brings this claim individually and on behalf of the members of the New York Subclass against all Defendants.

90. Based on the foregoing, Defendants have engaged in consumer-oriented conduct that is deceptive or misleading in a material way which constitutes false advertising in violation of Section 350 of the New York GBL.

91. Defendants' false, misleading, and deceptive statements and representations of fact, including but not limited to the Misrepresentations, were and are directed to consumers.

92. Defendants' false, misleading, and deceptive statements and representations of fact, including but not limited to the Misrepresentations, were and are likely to mislead a reasonable consumer acting reasonably under the circumstances.

93. Defendants' false, misleading, and deceptive statements and representations of fact, including but not limited to the Misrepresentations, have resulted in consumer injury or harm to the public interest.

94. Plaintiff and members of the New York Subclass have been injured because (a) they would not have purchased Isopure Protein Powder if they had known that the product does

not contain 100% whey protein isolate, and does not contain 50 grams of protein from 100% whey protein isolate; (b) they paid a price premium for Isopure Protein Powder based on Defendants' implied warranties; and (c) Isopure Protein Powder does not have the characteristics, uses, or benefits as promised, namely that the product contains "100% Whey Protein Isolate" and/or contains "50 Grams Of Protein from 100% Whey Protein Isolate." As a result, Plaintiff and members of the New York Subclass have been damaged either in the full amount of the purchase price of Isopure Protein Powder or in the difference in value between Isopure Protein Powder as warranted and the products as actually sold.

95. As a result of Defendants' false, misleading, and deceptive statements and representations of fact, including but not limited to the Misrepresentations, Plaintiff has suffered and will continue to suffer economic injury.

96. Plaintiff and members of the New York Subclass suffered an ascertainable loss caused by Defendants' Misrepresentations because they paid more for Isopure Protein Powder than they would have had they known the truth about the product.

97. On behalf of herself and other members of the New York Subclass, Plaintiff seeks to enjoin the unlawful acts and practices described herein, to recover her actual damages or five hundred dollars, whichever is greater, three times actual damages, and reasonable attorneys' fees.

**COUNT VII**  
**(Negligent Misrepresentation)**

98. Plaintiff repeats the allegations in the foregoing paragraphs as if fully set forth herein.

99. Plaintiff brings this claim individually and on behalf of the members of the Class and New York Subclass against all Defendants.

100. As discussed above, Defendants represented that Isopure Protein Powder: (i) is

“100% Whey Protein Isolate,” (ii) contains “50 Grams Of Protein From Whey Protein Isolate,” and (iii) contains “50 Grams [Of] Protein Per Serving,” but failed to disclose that the product contains free-form amino acids, including L-glutamine, non-protein amino acids, including taurine, and other non-whey ingredients. Thus, Product is not “100% Whey Protein Isolate,” nor does it contain “50 Grams Of Protein From 100% Whey Protein Isolate.” Defendants had a duty to disclose this information.

101. At the time Defendants made these representations, Defendants knew or should have known that these representations were false or made them without knowledge of their truth or veracity.

102. At an absolute minimum, Defendants negligently misrepresented and/or negligently omitted material facts about Isopure Protein Powder.

103. The negligent misrepresentations and omissions made by Defendants, upon which Plaintiff and Class members reasonably and justifiably relied, were intended to induce and actually induced Plaintiff and Class members to purchase Isopure Protein Powder.

104. Plaintiff and Class members would not have purchased Isopure Protein Powder if the true facts had been known.

105. The negligent actions of Defendants caused damage to Plaintiff and Class members, who are entitled to damages and other legal and equitable relief as a result.

**COUNT VIII**  
**(Fraud)**

106. Plaintiff repeats the allegations in the foregoing paragraphs as if fully set forth herein.

107. Plaintiff brings this claim individually and on behalf of the members of the Class and New York Subclass against all Defendants.

108. As discussed above, Defendants made false and misleading representations, including the Misrepresentations, and failed to disclose that the Isopure Protein Powder contains free-form amino acids, including L-glutamine, non-protein amino acids, including taurine, and other non-whey ingredients. Thus, the Product is not “100% Whey Protein Isolate,” nor does it contain “50 Grams Of Protein From 100% Whey Protein Isolate.” Defendants had a duty to disclose this information.

109. The false and misleading representations and omissions were made with knowledge of their falsehood.

110. The false and misleading representations and omissions were made by Defendants, upon which Plaintiff and members of the Class and Subclass reasonably and justifiably relied, and were intended to induce and actually induced Plaintiff and Class members to purchase Isopure Protein Powder.

111. The fraudulent actions of Defendants caused damage to Plaintiff and members of the Class and Subclass, who are entitled to damages and other legal and equitable relief as a result.

### **PRAYER FOR RELIEF**

112. WHEREFORE, Plaintiff, individually and on behalf of all others similarly situated, seeks a judgment against Defendants, as follows:

- A. For an order certifying the nationwide Class and the New York Subclass under Rule 23 of the Federal Rules of Civil Procedure and naming Plaintiff as representative of the Class and New York Subclass and Plaintiff’s attorneys as Class Counsel to represent the Class and New York Subclass;
- B. For an order declaring that Defendants’ conduct violates the statutes referenced herein;
- C. For an order finding in favor of Plaintiff, the nationwide Class, and the New York Subclass on all counts asserted herein;

- D. For compensatory, statutory, and punitive damages in amounts to be determined by the Court and/or jury;
- E. For prejudgment interest on all amounts awarded;
- F. For an order of restitution and all other forms of equitable monetary relief;
- G. For injunctive relief as pleaded or as the Court may deem proper; and
- H. For an order awarding Plaintiff and the Class and New York Subclass their reasonable attorneys' fees and expenses and costs of suit.

**JURY DEMAND**

Plaintiff demands a trial by jury on all causes of action and issues so triable.

Dated: November 14, 2014

Respectfully submitted,

**BURSOR & FISHER, P.A.**

By:   
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**EXHIBIT A**



**BURSOR & FISHER**  
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November 10, 2014

**Via FedEx Overnight Delivery**

The Isopure Company, LLC d/b/a Nature's Best  
195 Engineers Road  
Hauppauge, NY 11788

GNC Corp.  
300 Sixth Avenue  
Pittsburgh, PA 15222

*Re: Violation of Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301, et seq.;*  
*Violation of N.Y. U.C.C. Law §§ 2-313, 2-314; and all other applicable laws*

To Whom It May Concern:

This letter serves as a preliminary notice and demand for corrective action by The Isopure Company, LLC, d/b/a Nature's Best ("Isopure") and GNC Corp. ("GNC"), arising from breaches of warranty under the Magnuson-Moss Warranty Act on behalf of our client, Dani Tocci, and a class of all similarly situated purchasers of Isopure Zero-Carb and Low-Carb Protein Powder (collectively, "Isopure Protein"). This letter also serves as notice pursuant to N.Y. U.C.C. Law § 2-607(3)(a) concerning the breaches of express and implied warranties described herein.

You have participated in the manufacture, marketing, and sale of Isopure Protein. The Isopure Protein products have been, and continue to be, marketed and sold as having: (i) "50 Grams Of Protein From 100% Whey Protein Isolate;" (ii) having "50 Grams Protein Per Serving;" and (iii) being comprised of "100% Whey Protein Isolate" (the "Misrepresentations"). In fact, Isopure Protein does not have "50 Grams Of Protein From 100% Whey Protein Isolate," because Isopure Protein contains free form amino acids and non-whey ingredients. These amino acids include, but are not limited to, Taurine and L-Glutamine. Accordingly, these representations, made on Isopure Protein's labeling, are false and misleading.

Ms. Tocci purchased Isopure Protein at a GNC location in West Nyack, New York in reliance on the Misrepresentations. Isopure expressly warranted that Isopure Protein's protein content is 100% from whey. Isopure breached that express warranty because Isopure Protein's protein content is not 100% from whey, but includes amino acids and other non-whey ingredients. *See* N.Y. U.C.C. Law § 2-313.

Isopure's conduct is also a deceptive business practice under New York General Business Law Section 349, and constitutes false advertising under New York General Business Law Section 350.

Ms. Tocci is acting on behalf of a class defined as all persons in the United States who purchased Isopure Protein, and a subclass of class members who purchased Isopure Protein in the State of New York.

To cure these defects, we demand that you (1) cease and desist from further sales of mislabeled Isopure Protein; (2) issue an immediate recall of mislabeled Isopure Protein; and (3) make full restitution to all purchasers of Isopure Protein.

We further demand that you preserve all documents and other evidence which refer or relate to any of the above-described practices including, but not limited to, the following:

1. All documents concerning the design, development, supply, production, extraction, and/or testing of Isopure Protein;
2. All documents concerning the advertisement, marketing, or sale of Isopure Protein;
3. All documents concerning communications with any retailer involved in the marketing or sale of Isopure Protein;
4. All documents concerning communications with purchasers of Isopure Protein;
5. All documents concerning protein content testing;
6. All documents concerning communications with federal or state regulators; and
7. All documents concerning the total revenue derived from sales of Isopure Protein in the United States and New York.

If you contend that any statement in this letter is inaccurate in any respect, please provide us with your contentions and supporting documents promptly.

Please contact me right away if you wish to discuss an appropriate way to remedy this matter. If I do not hear from you promptly, I will take that as an indication that you are not interested in doing so.

Very truly yours,



Neal J. Deckant