

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY**

LEONARD H. NIEDERMAYER,
on behalf of himself and all others
similarly situated,

Plaintiff,

v.

GNC HOLDINGS, INC.,

Defendant.

Document Electronically Filed

Civil Action No. _____

**NOTICE OF REMOVAL TO THE
UNITED STATES DISTRICT
COURT**

PLEASE TAKE NOTICE that Defendant GNC Holdings, Inc. (“GNC”), by and through its attorneys, hereby removes this action from the Superior Court of New Jersey, Law Division, Camden County to the United States District Court for the District of New Jersey, pursuant to 28 U.S.C. §§ 1332, 1441 and 1446, as amended in relevant part by the Class Action Fairness Act of 2005 (“CAFA” or “the Act”), and authorized by 28 U.S.C. § 1453. CAFA was signed into law on February 18, 2005, with the express purpose of expanding federal jurisdiction to allow for the liberal removal of interstate class actions to federal court. See S. REP. NO. 109-14, at 6 (2005); 151 Cong. Rec. H730 (statement of Rep. F. James Sensenbrenner); see also Standard Fire Ins. Co. v. Knowles, 133 S.Ct. 1345, 185 L.Ed.2d 439, 2013 WL 1104735 (U.S. Mar. 19, 2013).

As grounds for removal, GNC states the following:

BACKGROUND

1. On or about February 4, 2015, Plaintiff Leonard H. Niedermayer (“Plaintiff”), through his attorneys DeNittis Osefchen, P.C., on behalf of himself, and purportedly on behalf of all others similarly situated, filed a putative class action complaint (“Complaint”) with the Clerk of the Superior Court of New Jersey, Law Division, Camden County, New Jersey, naming GNC as a defendant (“State Court Action”). The State Court Action was assigned Docket No. CAM-L-450-15. No further proceedings before the state court have occurred.

2. Pursuant to 28 U.S.C. § 1446(a), a true and correct copy of all process, pleadings, and orders served upon GNC in the State Court Action, namely the Summons and Complaint, is attached hereto as **Exhibit A**.

3. This action was brought by one putative representative person (Plaintiff) on behalf of a proposed class of individuals who allegedly purchased GNC store brand “Ginkgo Biloba” from a GNC store located in New Jersey. Compl. ¶¶ 21, 22, Ex. A. As such, this matter is a purported class action as that term is defined pursuant to 28 U.S.C. § 1332(d)(1)(B).

4. This action originally could have been filed in this Court under 28 U.S.C. § 1332(d) because this matter was brought as a class action; Plaintiff is a citizen of a State different from GNC, the number of members of the alleged class

is at least 100, and the amount in controversy exceeds, in the aggregate, \$5,000,000 exclusive of interest and costs. Removal is therefore proper pursuant to 28 U.S.C. §§1446 and 1453.

5. Plaintiff alleges that he resides in Camden County, New Jersey, and is a New Jersey citizen. Compl. ¶¶ 17-18, Ex. A.

6. GNC is a Delaware corporation with its principal place of business located at 300 Sixth Avenue, Pittsburgh, Pennsylvania 15222. Accordingly, GNC is a citizen of Delaware and Pennsylvania for purposes of determining diversity jurisdiction.

7. Plaintiff's Complaint alleges a total of four causes of action: (1) injunctive and declaratory relief under the New Jersey Declaratory Judgments Act, N.J. Stat. Ann. § 2A:16-51 et seq.; (2) violation of the New Jersey Consumer Fraud Act ("CFA"), N.J. Stat. Ann. § 56:8-1 et seq.; (3) breach of express warranty; and (4) violation of the Truth in Consumer Contract, Warranty and Notice Act, ("TICWNA"), N.J. Stat. Ann. § 56:12-14 et seq., all relating to the purchase of GNC store brand "Ginkgo Biloba" from GNC stores located in New Jersey. Specifically, Plaintiff claims that GNC mislabeled the Ginkgo Biloba product when it knew or should have known that it did not contain any ginkgo biloba. Compl. ¶ 51, Ex. A.

8. Plaintiff seeks to represent a class of over 7,000 class members defined as: “All New Jersey citizens who, between February 4, 2009 and the present, purchased GNC store brand ‘Ginkgo Biloba’ from a GNC store located in New Jersey.” Compl. ¶¶ 21 and 24, Ex. A.

9. In addition, Plaintiff seeks to represent one subclass (including 2,000 of the over 7,000 class members) defined as: “All New Jersey citizens who, between February 4, 2009 and the present, purchased the 60 mg size of the GNC store brand ‘Ginkgo Biloba’ in a GNC store located in New Jersey and who paid \$16.99 for that product.” Compl. ¶¶ 22 and 24, Ex. A.

10. Plaintiff’s Complaint requests various types of alleged relief, including: (1) injunctive and declaratory relief that GNC store brand “Ginkgo Biloba” does not contain ginkgo biloba; (2) damages suffered as a result of the alleged conduct described in the Complaint; (3) reasonable attorneys’ fees and costs; (4) an award of treble damages for the class; and (5) a \$100 statutory penalty for each class member. Compl. “Prayer for Relief,” Ex. A.

STATUTORY REQUIREMENTS – CLASS ACTION FAIRNESS ACT

11. This Court has original subject matter jurisdiction under CAFA. Pursuant to 28 U.S.C. § 1332, as amended by CAFA, a putative “class action” commenced after the effective date of CAFA, may be removed to the United States District Court embracing the state court where the action was filed if: (1) there is

“minimal diversity,” that is, at least one class member is a citizen of a state different from any defendant; (2) the class has at least 100 members; and (3) the aggregate amount in controversy exceeds the sum or value of \$5,000,000, exclusive of interest and costs. See 28 U.S.C. § 1332(d)(2), (d)(5B), (d)(6). Complete diversity between the parties is not required. 28 U.S.C. § 1332(d)(2)(A).

12. CAFA defines a “class action” as any case that a plaintiff files as a proposed class action under Rule 23 of the Federal Rules of Civil Procedure or any case “that is removed to a district court of the United States that was originally filed under a State statute or rule” similar to Rule 23. See 28 U.S.C. § 1711(2). The term “class members” is defined as those “persons who fall within the definition of the proposed or certified class in a class action.” See 28 U.S.C. § 1711(4).

13. CAFA is applicable to the State Court Action because it was commenced after February 18, 2005, the effective date of the Act. See Notes to 28 U.S.C. §§ 1332, 1453 (“The amendments made by this Act shall apply to any civil action commenced on or after the date of enactment of this Act.”) (citing Class Action Fairness Act of 2005, Pub. L. No. 109-2 § 9, 119 Stat. 4 (2005)).

14. Minimal Diversity. The requisite diversity of citizenship exists under 28 U.S.C. §§ 1332(d)(2) and (d)(7). As established in Paragraph 6 above, GNC is a citizen of Delaware and Pennsylvania. By contrast, on information and belief,

Plaintiff resides in and is a citizen of New Jersey. Compl. ¶¶ 17-18, Ex. A. Therefore, GNC is a citizen of a state different from at least one class member. See 28 U.S.C. § 1332(d)(A).

15. There is also minimal diversity of citizenship between GNC and members of the putative class in that the putative class is allegedly comprised of citizens of New Jersey who purchased GNC store brand “Gingko Biloba” from New Jersey GNC stores. Compl. ¶¶ 21-22, Ex. A.

16. Class Size. Pursuant to the express language of the CAFA, the class must have at least 100 members. 28 U.S.C. § 1332(d)(6). Plaintiff alleges that there are 7,000 members in the putative class, which satisfies the membership requirement under CAFA. Compl. ¶ 24, Ex. A.

17. Amount in Controversy. Pursuant to the express language of CAFA, the amount in controversy in a putative class action is determined by aggregating the amount allegedly at issue on behalf of all members of the alleged class. 28 U.S.C. § 1332(d)(6); see Brill v. Countrywide Home Loans, Inc., 427 F.3d 446, 448 (7th Cir. 2005) (“The question is not what damages the plaintiff will recover, but what amount is ‘in controversy’ between the parties.”). A defendant’s notice of removal need only include a plausible allegation that the amount in controversy exceeds the jurisdictional threshold. See Dart Cherokee Basin Operating Co., LLC v. Owens, 135 S. Ct. 547, 554, 190 L. Ed. 2d 495 (2014). GNC denies that

Plaintiff or any putative class member is entitled to recover any amount, and specifically denies that Plaintiff or any putative class member is entitled to relief in the various forms and amounts sought. Based on the allegations of Plaintiff's Complaint, however, were Plaintiff to succeed in his claims for purposes of this removal only and with no admissions by GNC, the aggregate recovery in this action would exceed the jurisdictional threshold of \$5,000,000, exclusive of interest and costs, thereby satisfying the amount in controversy in at least three separate and distinct ways.

18. *First*, while Plaintiff states that the sum being sought is under \$5,000,000, given the size of the putative class, the cost of the products at issue and the 6-year class period, the amount in controversy will most certainly exceed \$5,000,000. See Standard Fire Ins. Co. v. Knowles, 133 S. Ct. 1345, 1350, 185 L. Ed. 2d 439 (2013) (disallowing plaintiff's practice of pleading less than \$5 million to escape a CAFA amount in controversy issue absent a binding, amount-limiting stipulation); Morgan v. Gay, 471 F.3d 469, 474 (3d Cir. 2006), cert. denied, 128 S. Ct. 66, 169 L. Ed. 2d 243 (2007) (noting that while "plaintiff is the master of her own claim...[t]here is, however, a broad good faith requirement in a plaintiff's complaint with respect to the amount in controversy. Good faith in this context is entwined with the 'legal certainty' test, so that a defendant will be able to remove the case to federal court by 'show[ing] to a legal certainty that the amount

in controversy exceeds the statutory minimum[.]”)) (quoting Samuel-Bassett v. KIA Motors Am., Inc., 357 F.3d 392, 398 (3d Cir. 2004), and citing St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 294, 58 S.Ct. 586, 82 L.Ed. 845 (1938)).

19. Where the amount in controversy is ambiguous, courts have held that the removing defendant must prove by a “preponderance of the evidence” that the amount in controversy exceeds the \$5,000,000 jurisdictional threshold. See Frederico v. Home Depot, 507 F.3d 188, 196 n.6 (3d Cir. 2007) (“[T]he burden rests on the defendant in a removal action to prove that the amount in controversy is sufficient... by a preponderance of the evidence... which we take to mean proof to a reasonable probability that jurisdiction exists.”); Penn v. Wal-Mart Stores, Inc., 116 F.Supp.2d 557, 562 (D.N.J. 2000) (“In the absence of Third Circuit precedent on the issue of what the defendant needs to show to satisfy the amount in controversy requirements when the plaintiff alleges unspecified damages, the Court will adopt the preponderance of the evidence standard.”). Thus, where the complaint is ambiguous on the amount in controversy, the burden falls on the removing party to show what the stakes are, and could be, based on the plaintiff’s claims and demands. If recovery is more likely than not to exceed \$5,000,000 for the class as a whole, then the amount in controversy requirement is satisfied. In other words, the case “must be remanded if it appears to a legal certainty that the

plaintiff cannot recover the jurisdictional amount.” Frederico, 507 F.3d at 197. Against this framework, an analysis of Plaintiff’s claims reveals an amount in controversy in excess of \$5,000,000 with respect to the proposed class.

20. Plaintiff seeks damages for the amount class members paid for “Ginkgo Biloba” products that Plaintiff alleges did not contain ginkgo biloba, along with statutory damages pursuant to the CFA, and a statutory penalty of \$100 for each class member based on an alleged violation of the TICWNA. Compl. “Prayer for Relief,” Ex. A. Given the CFA’s allowance for treble damages (N.J. Stat. Ann. § 56:8-19), the \$100 per class member statutory penalty sought, and Plaintiff’s allegations that the class is comprised of over 7,000 class members, and based on the over six-year time period and the cost of the products at issue (see Bender Certification, Ex. 1, GNC Ginkgo Biloba Product List, available at <http://www.gnc.com/Herbs/HerbsFN/family.jsp?categoryId=12953620&f=Taxonomy%2FGNC%2F2109025&fbc=1&lmdn=Category&fbn=Taxonomy%7CGinkgo+Biloba>), the damages would be well in excess of \$5,000,000. Even assuming each class member took the *minimum* daily dosage as set forth on the products’ label and we used the average cost for the 5,000 who purchased the other GNC brand Ginkgo Biloba products (i.e., not the 60mg/100 capsule product that the subclass of 2,000 class members purchased), the total amount of damages would be \$7,913,839, and would therefore far exceed the \$5,000,000 requirement.

21. *Second*, Plaintiff requests an award of all litigation expenses and reasonable attorneys' fees. Compl. "Prayer for Relief," Ex. A. Although 28 U.S.C. § 1332 excludes "interest and costs" from the amount in controversy, it is entirely appropriate to consider statutory attorneys' fees in determining the amount in controversy "if such fees are available to successful plaintiffs under the statutory cause of action." Suber v. Chrysler Corp., 104 F.3d 578, 585 (3d Cir. 1997). Such is the case here based on Plaintiff's allegations under the CFA and TICWNA. Typically, attorneys' fees may be "as much as thirty percent of the judgment." Frederico v. Home Depot, 507 F.3d 188, 199 (3d Cir. 2007) (quoting In re Rite Aid Corp. Sec. Lit., 396 F.3d 294, 303 (3d Cir. 2005) (noting study done by the Federal Judicial Center that found a median percentage recovery range of 27-30% for all class actions resolved or settled over a four-year period)).

22. *Third*, Plaintiff requests "injunctive and declaratory relief" precluding GNC from selling the Gingko Biloba product in New Jersey. Compl., "Prayer for Relief," Ex. A. Taking into consideration the value of selling the Gingko Biloba product in New Jersey and the obvious cost of injunctive relief upon GNC, the aggregate amount in controversy further exceeds \$5,000,000. Indeed, the sponsors of CAFA recognized and determined that virtually every assertion of a right to this type of "business conduct" relief, standing alone, is likely sufficient on its own to

meet the requisite \$5 million aggregate asserted value of class claims for purposes of calculating the amount in controversy:

“The Sponsors intend that in a case seeking injunctive relief, a matter be subject to Federal jurisdiction under this provision if the value of the matter in litigation exceeds \$5 million either from the viewpoint of the plaintiff or the defendant, and regardless of the type of relief sought (e.g., damages, injunctive relief, or declaratory relief). Similarly, in assessing the jurisdictional amount in declaratory relief cases, the Federal court should include in its assessment the value of all relief and benefits that would logically flow from granting the declaratory relief sought by the claimants. For example, a declaration that a defendant's conduct is unlawful or fraudulent will carry certain consequences, such as the need to cease and desist from that conduct, that will often "cost" the defendant in excess of \$5 million.” [151 Cong. Rec. H723-01 at pp. H727-H728.]

23. While GNC denies that any putative class member is entitled to any relief and denies that the case is appropriate for class certification, GNC has shown that based on the allegations in the Complaint, the aggregate amount in controversy in this putative class action far exceeds \$5,000,000, regardless of interest and costs.

24. It is long established that courts generally place the burden on the party opposing removal to prove that an exception to removal under CAFA exists. See Breuer v. Jim's Concrete of Brevard, Inc., 538 U.S. 691, 698 (2003) (“Since 1948, therefore, there has been no question that whenever the subject matter of an action qualifies it for removal, the burden is on a plaintiff to find an express exception.”); Harvey v. Blockbuster Inc., 384 F. Supp. 2d 749, 752 (D.N.J. 2005) (“[I]t appears that the party opposing removal under Section 1332 (d) bears the initial burden of demonstrating that an action should be remanded.”). Therefore,

GNC does not bear the burden of showing that an exception to removal exists under 28 U.S.C. § 1332(d). Even if it did, this action would not satisfy the requirements of 28 U.S.C. § 1332(d)(3) or (4) in that GNC is not a citizen of the State in which this action was originally filed.

PROCEDURAL REQUIREMENTS AND LOCAL RULES

25. Removal to Proper Court. This Court is part of the “district and division” embracing the place where this action was filed in Camden, New Jersey. 28 U.S.C. § 1446(a).

26. Removal is Timely. GNC, by and through its attorneys, was served with the Summons and Complaint on February 9, 2015. This Notice of Removal is being filed with the United States District Court for the District of New Jersey within thirty days after receipt of the State Court Action Summons and Complaint by counsel, and is therefore timely under 28 U.S.C. §1446(b) and 28 U.S.C. §1453.

27. Jurisdiction. Jurisdiction is mandatory, not discretionary, under CAFA because the only defendant in the case, GNC, is a citizen of Delaware and Pennsylvania, not New Jersey where the instant action was filed. See 28 U.S.C. §§ 1332(d)(3)-(d)(4).

28. Signature. This Notice of Removal is signed pursuant to the Federal Rule of Civil Procedure 11. See 28 U.S.C. § 1446(a).

29. Notice. Pursuant to 28 U.S.C. § 1446(d), written notice of this Notice of Removal of the State Court Action is being immediately filed with the Superior Court of New Jersey, Law Division, Camden County. Pursuant to 28 U.S.C. § 1446(d), a copy of this Notice of Removal of the State Court Action is being caused to be served upon Plaintiff's counsel.

30. No Previous Application. No previous application has been made for the relief requested herein.

31. Consent to Removal. Pursuant to 28 U.S.C. § 1453(b), consent to removal is not required.

32. No Bond or Verification Required. Pursuant to Section 1016 of the Judicial Improvements and Access to Justice Act of 1988 ("Justice Act"), no bond is required in connection with this Notice of Removal. Pursuant to Section 1016 of the Justice Act, verification is not a necessary requirement for removal.

33. Reservation. To the extent that Plaintiff seeks to dispute the existence of subject matter jurisdiction under CAFA, GNC reserves the right, and requests the opportunity, to supply the Court with additional evidence in support of this Notice of Removal through affidavits, declarations, and documents, as is necessary and appropriate.

34. Based upon the foregoing, this Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1332, as amended by CAFA, and this action is properly removed to this Court.

WHEREFORE, this action is hereby removed to and should proceed in the United States District Court for the District of New Jersey.

DATED: March 11, 2015

REED SMITH LLP

/s/ Aaron M. Bender

Aaron M. Bender
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Attorneys for Defendant GNC Holdings, Inc.

JS 44 (Rev. 12/12)

CIVIL COVER SHEET

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

I. (a) PLAINTIFFS
LEONARD H. NIEDERMAYER

DEFENDANTS
GNC HOLDINGS, INC.

(b) County of Residence of First Listed Plaintiff Camden
(EXCEPT IN U.S. PLAINTIFF CASES)

County of Residence of First Listed Defendant N/A
(IN U.S. PLAINTIFF CASES ONLY)

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

(c) Attorneys (Firm Name, Address, Email and Telephone Number)
DeNittis Osefchen, PC
1515 Market St., Suite 1200
Philadelphia, PA 19102 (215-564-1721)

Attorneys (If Known)
Aaron M. Bender
Reed Smith LLP
136 Main St., Suite 250, Princeton, NJ 08540 (609-520-6015)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

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

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

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

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

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

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

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

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

VI. CAUSE OF ACTION

Brief description of cause:
Alleged consumer fraud product mislabeling putative class action

VII. REQUESTED IN COMPLAINT:

☒ CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P.

DEMAND \$ over 5,000,000.00

CHECK YES only if demanded in complaint:

JURY DEMAND: ☐ Yes ☒ No

VIII. RELATED CASE(S) IF ANY

Stacey A. Wright v. GNC Holdings, Inc.
(See Instructions): JUDGE Wendy Beetlestone

DOCKET NUMBER 2:15-cv-00566

DATE

SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY

RECEIPT #

AMOUNT

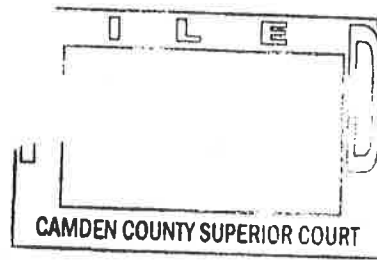
APPLYING IFP

JUDGE

MAG. JUDGE

EXHIBIT A

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Marlton, New Jersey 08053
(856) 797-9951
Attorneys for Plaintiff



LEONARD H. NIEDERMAYER, on behalf of
himself and all others similarly situated.

Plaintiff,

v.

GNC HOLDINGS, INC.,

Defendants

SUPERIOR COURT OF NEW JERSEY

LAW DIVISION
CAMDEN COUNTY

DOCKET NUMBER: CAM-L- 450-15

CLASS ACTION COMPLAINT

INTRODUCTION

1. This is a class action, brought under New Jersey law, on behalf of a class of New Jersey citizens who purchased GNC store brand "Ginkgo Biloba" in a GNC store located in New Jersey, between February 4, 2009 and the present.

2. The label of this product states on the front of the package in large letters "Ginkgo Biloba."

3. Moreover, the "Supplement Facts" label on each and every container of GNC store brand "Ginkgo Biloba" states in uniform language that this product contains "Ginkgo Biloba Leaf Extract."

4. This written, uniform statements of fact on both the front label and each such "Supplement Facts" label are false.

5. In actuality, as confirmed in multiple tests recently conducted by the New York Attorney General, GNC store brand "Ginkgo Biloba" actually contains no Ginkgo Biloba whatsoever.

6. Indeed, the recent tests conducted by the New York Attorney General found that GNC store brand "Ginkgo Biloba" contains no plant DNA whatsoever.

7. As a result of these tests, the New York Attorney General has used a "Cease and Desist" order to GNC, directing GNC to cease the sale of this mislabeled product in the State of New York. See Attachment A, Cease and Desist letter by the New York Attorney General to GNC.

8. The GNC store brand "Ginkgo Biloba" sold in GNC stores is identical in every respect to the product tested by the New York Attorney General, in that it was produced by the same manufacturer and label and contains the same ingredients.

9. Despite this, no action has been taken in the State of New Jersey to recall this product or withdraw it from sale and the GNC store brand Ginkgo Biloba continues to be sold in GNC stores in New Jersey at the present time

10. Upon information and belief, GNC has been fully aware that the GNC store brand "Ginkgo Biloba" actually contained no Ginkgo Biloba.

11. Indeed, GNC's website brags to consumers about the accuracy of its labels, stating:

"When you read a GNC label, you know exactly what you're getting in that product. It's all part of our truth in labeling policy."

12. It defies belief that GNC could not be aware of the contents of its own store brand or Of the fact that a product which GNC chose to name "Ginkgo Biloba" actually contained no Ginkgo Biloba whatsoever.

13. This complaint seeks injunctive, declaratory and monetary relief for Plaintiff and the proposed class of New Jersey purchasers, under the New Jersey Declaratory Judgment Act, N.J.S.A. 2A:16-51 et seq., the New Jersey Consumer Fraud Act, N.J.S.A. 56:8-1 et seq., New

Jersey common law relating to express warranty and the New Jersey Truth in Consumer Contract, Warranty and Notice Act, N.J.S.A. 56:12-14 through 18.

JURISDICTION AND VENUE

14. All claims in this matter arise exclusively under New Jersey law.

15. This matter is properly venued in the New Jersey Superior Court of New Jersey, Camden County, in that Plaintiff Niedermayer purchased GNC store brand “Ginkgo Biloba” at the GNC store located at 640 West Cuthbert Boulevard, Westmont, New Jersey, GNC does does business, inter alia, in Camden County, New Jersey and Plaintiff resides in Camden County.

16. This action does not raise any federal claims and the total amount in controversy in this matter, including attorney’s fees, is less than \$5 million.

THE PARTIES

17. Plaintiff Niedermayer resides in Camden County, New Jersey.

18. Like all members of the proposed class, Plaintiff Niedermayer is a New Jersey citizen who purchased GNC store brand “Ginkgo Biloba” from a GNC store located in New Jersey between February 4, 2009 and the present, which stated on “Supplement Facts” label that the product contained “Ginkgo biloba Leaf Extract.”

19. Specifically, Plaintiff Niedermayer purchased this product on various dates between February 4, 2009 and the present at the GNC store located at 640 West Cuthbert Boulevard, Westmont, New Jersey for \$16.99, each of which stated in large letters on the front label that the product was, “Ginkgo Biloba” and which stated on the “Supplemental Facts” label on the rear of the product that the product contains “Ginkgo biloba Leaf Extract.”

20. Defendant GNC Holdings Inc. (“GNC”) is a Delaware corporation with its principle place of business located at 300 Sixth Avenue, Pittsburgh, PA 15222.

CLASS ACTION ALLEGATIONS

21. Plaintiff brings this action as a class action pursuant to R. 4:32, on behalf of a class defined as:

All New Jersey citizens who, between February 4, 2009 and the present, purchased GNC store brand "Ginkgo Biloba" from a GNC store located in New Jersey.

22. Plaintiff also brings this action as a class action pursuant to R 4:32, on behalf of a sub-class defined as:

All New Jersey citizens who, between February 4, 2009 and the present, purchased the 60 mg size of the GNC store brand "Ginkgo Biloba" in a GNC store located in New Jersey and who paid \$16.99 for that product.

23. The class and sub-class for whose benefit this action is brought are so numerous that joinder of all members is impracticable.

24. Upon information and belief, the proposed class is composed of over 7,000 persons and the proposed sub-class is composed of at least 2,000 persons.

25. No violations alleged in this complaint are a result of any oral communications or individualized interaction of any kind between class members and any defendant.

26. Rather, all claims in this matter arise from the identical, false, written affirmative statements on the product label as described herein.

27. There are common questions of law and fact affecting the rights of the class and subclass members, including, inter alia, the following:

- a. **Whether GNC store brand "Ginkgo Biloba" actually contains any Ginkgo Biloba whatsoever;**
- b. **Whether Defendants were aware that GNC store brand "Ginkgo Biloba" actually contained no Ginkgo Biloba whatsoever;**

- c. **The date Defendants became aware that GNC store brand “Ginko Biloba” actually contained no Ginkgo Biloba whatsoever;**
- d. **Whether Defendants’ act in placing the words “Gingko Biloba” in large letters on the front of this product was a false, misleading or deceptive affirmative representation of fact in violation of N.J.S.A. 56:8-2 , the New Jersey Consumer Fraud Act;**
- e. **Whether Defendants’ act in placing the words “Gingko biloba Leaf Extract” on the rear “Supplement Facts” label on the rear of this product was a false, misleading or deceptive affirmative representation of fact in violation of N.J.S.A. 56:8-2 , the New Jersey Consumer Fraud Act;**
- f. **Whether Defendants’ act in placing the words “Gingko Biloba” on the front and rear of this product violated New Jersey common law regarding express warranty;**
- g. **Whether Defendants’ act in placing the words “Gingko Biloba” on the front and rear labels of this product violated New Jersey Foods 365 Everyday Value Plain Greek Yogurt” violated the New Jersey Truth in Consumer Contract, Warranty and Notice Act; and**
- h. **Whether Plaintiff and the class are entitled to an order for declaratory and injunctive relief directing Defendants to recall the mislabeled product and/or to cease sale of this mislabeled product in New Jersey.**

28. Plaintiff is a member of the class and sub-class he seeks to represent.

29. The claims of Plaintiff are not only typical of all class and sub-class members, they are identical.

30. All claims of plaintiff and the class and sub-class arise from the same identical, false, written statement of affirmative fact on the labels of GNC store brand “Gingko Biloba.”

31. All claims of plaintiff and the class are based on the exact same legal theories.

32. Plaintiff has no interest antagonistic to, or in conflict with, the class or sub-class.

33. Plaintiff will thoroughly and adequately protect the interests of the class and sub-

class, having retained qualified and competent legal counsel to represent himself and the class and sub-class.

34. Defendants have acted and refused to act on grounds generally applicable to the class and sub-class, thereby making appropriate injunctive and declaratory relief for the class as a whole.

35. The prosecution of separate actions by individual class members would create a risk of inconsistent or varying adjudications.

36. A class action is the only practical, available method for the fair and efficient adjudication of the controversy since, inter alia, the damages suffered by each class member were less than \$20 per container purchased and, as such, individual actions are not economically feasible.

37. Common questions will predominate, and there will be no unusual manageability issues.

FACTUAL ALLEGATIONS

38. Defendants are in the business of manufacturing, distributing, marketing, and selling, inter alia, GNC store brand “Ginkgo Biloba.”

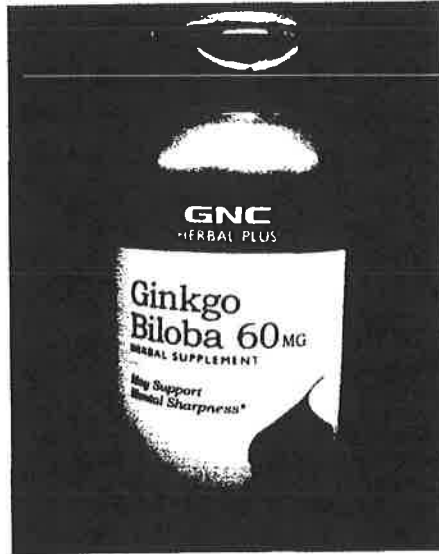
39. GNC store brand “Ginkgo Biloba” is a an exclusive GNC store brand, which, as with Defendants’ other products, Defendants sell under the store motto **“GNC: QUALITY YOU CAN TRUST.”**

40. GNC’s website brags to consumers about its commitment to accurate labeling, telling consumers:

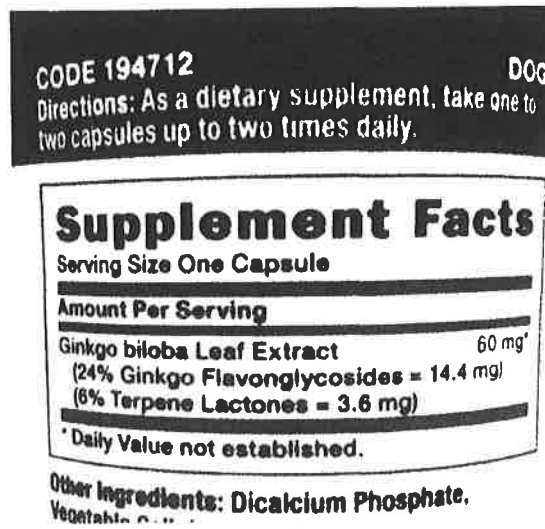
“When you read a GNC label, you know exactly what you're getting in that product. It's all part of our truth in labeling policy.”

41. GNC store brand "Ginkgo Biloba" is a mass-produced product, each container of which is chemically identical and each container of which contains exactly the same ingredients.

42. Since the initial offering of GNC store brand "Ginkgo Biloba," each and every front label on each container of this product has stated in large letter "Ginkgo Biloba."



43. Since the initial offering of GNC store brand "Ginkgo Biloba," each and every rear label on each container of this product has stated in "Supplement Facts" section that the product contains "Ginkgo biloba Leaf Extract."



44. On February 3, 2015, the New York Attorney General announced results of over 20 DNA tests conducted on samples of GNC store brand “Gingko Biloba” which were gathered by his office from four GNC stores.

45. Those DNA tests revealed that 100% of the samples of GNC store brand “Gingko Biloba” tested contained no Gingko Biloba whatever.

46. Indeed, those tests revealed that the GNC store brand “Gingko Biloba” contained no plant material of any kind.

47. On February 3, 2015, the New York Attorney General issued a “Cease and Desist” order to GNC, directing it to immediately cease selling this mislabeled product in the State of New York. See Attachment A.

48. The chemical content and ingredients in the GNC store brand “Gingko Biloba” sold in New Jersey are identical in every respect to those sold in New York and the labels of all such products are also identical.

49. Despite this, GNC has not pulled this mislabeled product from the shelves of GNC stores in the State of New Jersey and continues to sell this mislabeled product in New Jersey.

50. Defendants, as developers, manufacturers, and exclusive sellers and distributors of GNC store brand “Gingko Biloba” have been aware since the product’s inception that the product contains no Gingko Biloba whatsoever.

51. It was Defendants’ conscious intent to induce consumers to purchase GNC store brand “Gingko Biloba” by falsely stating that this product actually contained Gingko Biloba.

COUNT I

**INJUNCTIVE AND DECLARATORY RELIEF UNDER THE
NEW JERSEY DECLARATORY JUDGMENTS ACT**

N.J.S.A. 2A:16-51 et seq.

52. Plaintiff incorporates all preceding paragraphs as though fully set forth at length herein.

53. Plaintiff and the class need, and are entitled to, a declaration that GNC store brand “Gingko Biloba” contains no Gingko Biloba whatsoever.

54. Each Plaintiff and class member has a significant interest in this matter.

55. A justifiable controversy was presented in this case, rendering declaratory judgment appropriate.

56. In addition, because the unlawful uniform conduct of GNC continues, and is on-going, the class also needs, and is entitled to, an order enjoining GNC from selling GNC store brand “Gingko Biloba” with the current erroneous label in New Jersey.

COUNT II

THE NEW JERSEY CONSUMER FRAUD ACT

N.J.S.A. 56:8-1 et seq.

57. Plaintiff incorporates all preceding paragraphs of this complaint as if set forth fully herein.

58. This action does not raise any claims of common law fraud.

59. This action does not raise any federal claims.

60. The New Jersey Consumer Fraud Act clearly applies to all sales of GNC store brand “Gingko Biloba” sold to New Jersey consumers in GNC stores located in New Jersey.

61. The New Jersey Consumer Fraud Act ("CFA") was enacted to protect consumers against sharp and unconscionable commercial practices by persons engaged in the sale of goods or services. See Marascio v. Campanella, 298 N.J. Super. 491, 500 (App. Div. 1997).

62. The CFA is a remedial statute which the New Jersey Supreme Court has repeatedly held must be construed liberally in favor of the consumer to accomplish its deterrent and protective purposes. See Furst v. Einstein Moomjy, 182 N.J. 1, 11-12 (2004) ("The Consumer Fraud Act is remedial legislation that we construe liberally to accomplish its broad purpose of safeguarding the public.").

63. With regard to the CFA, "[t]he available legislative history demonstrates that the Act was intended to be one of the strongest consumer protection laws in the nation." New Mea Const. Corp. v. Harper, 203 N.J. Super. 315, 319 (App. Div. 1986).

64. For this reason, the "history of the Act is one of constant expansion of consumer protection." Kavky v. Herballife International of America, 359 N.J. Super. 497, 504 (App. Div. 2003).

65. The CFA was intended to protect consumers "by eliminating sharp practices and dealings in the marketing of merchandise and real estate." Lemelledo v. Beneficial Management Corp., 150 N.J. 255, 263 (1997).

66. Specifically, N.J.S.A. 56:8-2 of the CFA prohibits "unlawful practices," which are defined as:

"The act, use or employment of any unconscionable commercial practice, deception, fraud, false pretense, misrepresentation, or the knowing, concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission whether or not any person has in fact been misled, deceived or damaged thereby."

67. The catch-all term “**unconscionable commercial practice**” was added to the CFA by amendment in 1971 to ensure that the Act covered, *inter alia*, “**incomplete disclosures.**” Skeer v. EMK Motors, Inc., 187 N.J. Super. 465, 472 (App. Div. 1982).

68. In describing what constitutes an “**unconscionable commercial practice,**” the New Jersey Supreme Court has noted that it is an amorphous concept designed to establish a broad business ethic. See Cox v. Sears Roebuck & Co., 138 N.J. 2, 18 (1994).

69. GNC store brand “Ginkgo Biloba” is a “credence good,” because its properties and purported benefits cannot be independently assessed or verified by the consumer at the time of purchase and such properties and benefits are made known to consumers only through the information provided on the label by the product's manufacturer and distributor. See Lee v. Carter-Reed Co., L.L.C. 203 N.J. 496, 522 (2010). See also Richard A. Posner, An Economic Approach to the Law of Evidence, 51 Stan. L.Rev. 1477, 1489 (1999) (“**A good is a credence good if the consumer cannot readily determine its quality by inspection or even use, so that he has to take its quality ‘on faith.’**”).

70. The New Jersey Supreme Court in Lee v. Carter-Reed Co., L.L.C. 203 N.J. 496, 522 (2010), recently spoke regarding the relationship between dishonest product labeling and credence goods, stating:

“A rational consumer does not randomly take a bottle of pills off a shelf and then purchase it without reading the packaging and labeling.”

71. In order to state a cause of action under the CFA, a plaintiff does not need to show reliance by the consumer. See Varacallo v. Massachusetts Mut. Life Ins. Co., 332 N.J. Super. 31, 43, 752 A.2d 807 (App.Div.2000); Gennari v. Weichert Co. Realtors, 148 N.J. 582, 607-608, 691

A.2d 350 (1997) (holding that reliance is not required in suits under the CFA because liability results from “**misrepresentations whether ‘any person has in fact been misled, deceived or damaged thereby’**”).

72. Rather, the CFA requires merely a causal nexus between the false statement and the purchase, not actual reliance. See Lee v. Carter-Reed Co., L.L.C. 203 N.J. 496, 522 (2010) (“**causation under the CFA is not the equivalent of reliance**”).

73. As stated by the New Jersey Supreme Court in Lee, 203 N.J. at 528:

“It bears repeating that the CFA does not require proof of reliance, but only a causal connection between the unlawful practice and ascertainable loss.”

74. The purchase of a credence good, where the label on the product contains false misrepresentations of material fact, by itself, establishes a presumption of a causal nexus under the CFA. See Lee v. Carter-Reed Co., L.L.C., 203 N.J. 496 (2010). See also Varcallo, at *49 (“**the purchase of the policy by a person who was shown the literature would be sufficient to establish prima facie proof of causation.**”).

75. By the acts alleged herein, GNC violated the CFA.

76. Specifically, GNC made identical, false, written, misstatements of affirmative fact on the front and rear labels on each container of GNC store brand “Gingko Biloba” sold between February 4, 2009 and the present, each of which stated in uniform language that the product contained that the product contained Gingko Biloba.

77. This statement was false and GNC knew or should have known that this statement was false when it was made.

78. As a result of this false, written affirmative misstatement of material fact, Plaintiff and the class have suffered an ascertainable loss of money.

79. Specifically, Plaintiff and the class have been deprived of the benefit of their bargain – a valid measure of “ascertainable loss” under the CFA according to the New Jersey Supreme Court and New Jersey Appellate Division – in that Plaintiff and the class received something less than what was represented in Defendants’ label: a product containing Gingko Biloba.

80. In the case of Plaintiff and each class member, they paid \$16.99 per container for a product called “Gingko Biloba” which did not actually contain any Gingko Biloba whatsoever.

COUNT III

NEW JERSEY BREACH OF EXPRESS WARRANTY

81. Plaintiff incorporates all preceding paragraphs of this complaint as if set forth fully herein.

82. By operation of New Jersey law, Defendants entered into a contract with each New Jersey class member when the member purchased a container of GNC store brand “Gingko Biloba” in New Jersey.

83. By operation of New Jersey law, the terms of this contract included an express warranty incorporating the identical affirmation, promise and description by GNC regarding this product, made in writing on the front and rear label, including the “Supplement Facts” label stating that the good contained “Gingko biloba Leaf Extract.”

84. The relevant terms and language of the express warranty between GNC and each member of the class are identical because these labels were each identical.

85. GNC breached the terms of this express warranty in an identical manner for each class member because GNC store brand “Gingko Biloba” did not and could not conform to the affirmation, promise and description on this label because, in fact, the product actually contained no Gingko Biloba whatsoever.

86. As a direct and proximate result of this breach of express warranty by GNC, each member of the class has suffered economic loss.

COUNT IV

**TRUTH IN CONSUMER CONTRACT,
WARRANTY AND NOTICE ACT**

N.J.S.A. 56:12-14 et seq

87. Plaintiff incorporates all preceding paragraphs as though fully set forth at length herein.

88. Plaintiff and the class are “consumers” within the meaning of N.J.S.A. 56:12-15 and 16.

89. Defendants are “sellers” within the meaning of N.J.S.A. 56:12-15 and 16.

90. The “Supplement Facts” label on GNC store brand “Ginkgo Biloba” is both a consumer “notice” and “warranty” within the meaning of N.J.S.A. 56:12-15 and 16.

91. By the acts alleged herein, GNC has violated N.J.S.A. 56:12-16 because, in the course of GNC’s business, GNC offered written consumer notices and warranties to Plaintiff and the class which contained provisions which violated their clearly established legal rights under state law, within the meaning of N.J.S.A. 56:12-15.

92. Specifically, the clearly established rights of Plaintiff and the class under state law include the right not to be subjected to false written affirmative statements of fact in the sale of goods, as prohibited by N.J.S.A. 56:8-2.

93. The clearly established rights under state law also include the rights conferred by New Jersey law regarding express and implied warranties.

94. Pursuant to N.J.S.A. 56:12-17, this class complaint seeks a statutory penalty of \$100

for each class member, as well as actual damages and attorney's fees and costs.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff asks this court to:

- a. Certify the proposed class as a class action pursuant to R 4:32;
- b. Enter an order for injunctive and declaratory relief as described herein;
- c. Enter judgment in favor of each class member for damages suffered as a result of the conduct alleged herein, to include interest and pre-judgment interest;
- d. Award plaintiff reasonable attorneys' fees and costs;
- e. Award plaintiff and the class treble damages;
- f. Award each class member a \$100 statutory penalty under N.J.S.A. 56:12-17; and
- i. Grant such other and further legal and equitable relief as the court deems just and equitable.

JURY DEMAND

Plaintiff hereby demands a trial by jury as to all issues so triable.

DeNITTIS OSEFCHEN, P.C.

By: 

STEPHEN P. DENITTIS

Dated: February 4, 2015

CERTIFICATION PURSUANT TO R. 4:5-1

To the best of Plaintiff's knowledge, there are no other actions based on the same facts pending against Defendant in New Jersey or any New Jersey law. No arbitration proceeding is pending or contemplated. There is an action against Defendant in federal court in Massachusetts that does not raise any claims under New Jersey law. There are no other parties known to Plaintiff at this time who should be joined in this action.

CERTIFICATION PURSUANT TO N.J.S.A. 56:8-1 et seq.

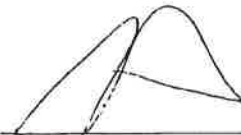
The undersigned hereby certify that a copy of this complaint has been forwarded to the Attorney General of the State of New Jersey.

DESIGNATION OF TRIAL COUNSEL

Pursuant to R. 4:25-4, Stephen DeNittis is designated as trial counsel.

DeNITTIS OSEFCHEN, P.C.

By:



STEPHEN P. DENITTIS

Dated: 2/4/15



STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

ERIK T. SCHNEIDERMAN
ATTORNEY GENERAL

DIVISION OF REGIONAL AFFAIRS

February 2, 2015

Michael G. Archbold, CEO
GNC Holdings, Inc.
300 Sixth Avenue
Pittsburgh, Pennsylvania 15222

Certified—Return Receipt Requested

Re: **CEASE & DESIST NOTIFICATION**
Herbal Plus—GNC Distributed Herbal Dietary Supplements

Dear Mr. Archbold:

This letter constitutes a demand to cease and desist engaging in the sale of adulterated and/or mislabeled herbal dietary supplements, and in particular to immediately stop the sale of five “Herbal Plus” dietary supplements as identified by lot number in the exhibit annexed hereto.

Be advised that the Attorney General is authorized by Executive Law § 63(12) to investigate allegations and prosecute businesses which perpetuate fraud upon consumers or engage in illegality in their business practices. General Business Article 22-b further authorizes this office to redress deceptive business acts and practices and false advertising. Of late, the topic of purity (or lack thereof) in popular herbal dietary supplements has raised serious public health and safety concerns,¹ and also caused this office to take steps to independently assess the validity of industry representations and advertising.

In an investigation recently conducted by the Attorney General’s Office, six popular GNC “Herbal Plus” brand dietary supplement products were purchased at four different New York State locations and were then genetically tested five times per sample, yielding 120 results. The supplements tested included Gingko Biloba, St. John’s Wort, Ginseng, Garlic, Echinacea, and Saw Palmetto. By using established DNA barcoding technology, analytic testing disclosed that 5 out of 6 types of dietary supplement products tested were either unrecognizable or a substance other than what they claimed to be, and therefore constitute contaminated or substituted products. Twenty-two (22) percent of the tests yielded DNA matching the product label; 33% tested for botanical material other than what was on the label; and 45% yielded no plant DNA at all.

¹See, e.g., Newmaster, et al., “DNA Barcoding Detects Contamination and Substitution in North American Herbal Products,” *BMC Medicine*, 2013, 11:222 (<http://www.biomedcentral.com/1741-7015/11/222>).

Contamination, substitution and falsely labeling herbal products constitute deceptive business practices and, more importantly, present considerable health risks for consumers. The Attorney General's testing upon the products purchased revealed the following:

Ginkgo Biloba: Negative. No ginkgo biloba DNA was identified. The only DNA identified was allium (x5), "oryza" (x4) (commonly known as rice), spruce, and asparagaceae. Nine of the tests revealed no plant DNA whatsoever.

St. John's Wort: Negative. No St. John's Wort DNA was identified. Of the 20-tests performed, only three identified any DNA, and it included allium, oryza, and dracaena (tropical houseplant).

Ginseng: Negative. No ginseng DNA was identified. The testing yielded identification of oryza, dracaena, pinus strobus, wheat/grass, and citrus spp., with 15 of the tests identifying no genetic material at all.

Garlic: Positive. All 20 tests yielded DNA from allium.

Echinacea: Negative. Five tests identified oryza DNA, one other yielded the DNA of pinus or ranunculaceae. Fourteen tests detected no plant DNA of any sort in the product labeled Echinacea.

Saw Palmetto: Qualified negative. Only 6 of 20 tests did identify the presence of saw palmetto, but the positive results were principally from one sample. The results did not replicate in the three other samples. One sample demonstrated no plant DNA, another revealed the presence of asparagaceae, and oryza, while a fourth was positive for DNA from the primrose family as well as saw palmetto.

Studies conducted by the Centre for Biodiversity Genomics at the University of Guelph and others have previously alerted the dietary supplement industry to the fact that it is not providing the public with authentic products without substitution, contamination or fillers. It is disappointing that over a year later the Attorney General's researcher reached similar conclusions, demonstrating that the industry has failed to clean up its practices.

To assist in the Attorney General's ongoing investigation of this matter, and pursuant to the above authority, please supply the following information as it pertains to the identified lot numbers, as well as for all companies presently producing these product lines:

1. The name of the manufacturer and the location of the production of each of the herbal products identified.
2. A listing of any DNA testing or any other analytic testing for content and quality (including but not limited to chemical composition) of the herbal products listed above and copies of such testing results.
3. Copies of all licensing and production contracts with any party involved in the production and distribution of the herbal products identified above.
4. A listing of all ingredients used in the products identified above and a measurement of the amount of each ingredient in each of the herbal products identified above.

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5. Identify the standards or procedures followed to authenticate the content of the herbal products listed above.
6. Produce the relevant Bioterrorism Registration documentation for the manufacturer of the dietary supplements.
7. Articulate the acquisition, production protocol, and quality assurance measures undertaken by the manufacturer of the products tested, including all such protocols undertaken to comply with current Dietary Supplement Current Good Manufacturing Practices (CGMPs) for quality control.
8. Produce any and all serious adverse event reports associated with use of any GNC herbal dietary supplement in the United States

Please provide the requested information to me at the following address: NYS Attorney General's Office, Dulles State Office Building, 317 Washington Street, Watertown, New York 13601. Kindly respond on or before 5:00 P.M. on February 9, 2015. If you have any questions, you may contact Assistant Attorney General Deanna R. Nelson at 315-785-2444.

The foregoing shall not constitute a waiver of or limitation on the Attorney General's authority to issue subpoenas or take enforcement action pursuant to applicable law.

Thank you for your anticipated cooperation.

Very truly yours,

MARTIN J. MACK
Executive Deputy Attorney General
In Charge of Regional Affairs

Enc.


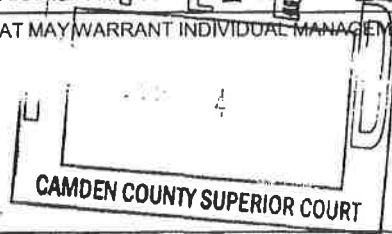

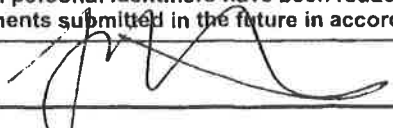
Supplements by Lot #: As a courtesy, store location for the tested supplement is also listed. Kindly remove all of the supplements identified below which may bear the lot number indicated no matter the store location.

OAG #	Product	Address	Lot #
Bi-G-1	Gingko Biloba	GNC # 00369, 3111 E. Main Street, Johnson City, NY 13790	4783GM1834
Bi-G-2	St. John's Wort	GNC # 00369, 3111 E. Main Street, Johnson City, NY 13790	6736JN1945
Bi-G-3	Ginseng	GNC # 00369, 3111 E. Main Street, Johnson City, NY 13790	8173LN3748
Bi-G-5	Echinacea	GNC # 00369, 3111 E. Main Street, Johnson City, NY 13790	8273LN1987
Bi-G-6	Saw Palmetto	GNC # 00369, 3111 E. Main Street, Johnson City, NY 13790	2660DN3972
Su-G-1	Gingko Biloba	GNC # 05057, 899 Montauk Highway, Bayport, NY 11705	0624AN1834
Su-G-2	St. John's Wort	GNC # 05057, 899 Montauk Highway, Bayport, NY 11705	0822BN1945
Su-G-3	Ginseng	GNC # 05057, 899 Montauk Highway, Bayport, NY 11705	1376BN3748
Su-G-5	Echinacea	GNC # 05057, 899 Montauk Highway, Bayport, NY 11705	1985CO1987
Su-G-6	Saw Palmetto	GNC # 05057, 899 Montauk Highway, Bayport, NY 11705	2617DO3972
H-G-1	Gingko Biloba	GNC # 09903, 121 West 125th Street, New York, NY 10027	2447DO1947
H-G-2	St. John's Wort	GNC # 09903, 121 West 125th Street, New York, NY 10027	1930DO1945
H-G-3	Ginseng	GNC # 09903, 121 West 125th Street, New York, NY 10027	2096DO3747
H-G-5	Echinacea	GNC # 09903, 121 West 125th Street, New York, NY 10027	1247BO1941
Pl-G-1	Gingko Biloba	GNC # 06698, 114 Consumer Square, Plattsburgh, NY 12901	2447DO1947
Pl-G-2	St. John's Wort	GNC # 06698, 114 Consumer Square, Plattsburgh, NY 12901	1930DO1945
Pl-G-3	Ginseng	GNC # 06698, 114 Consumer Square, Plattsburgh, NY 12901	2096DO3747
Pl-G-5	Echinacea	GNC # 06698, 114 Consumer Square, Plattsburgh, NY 12901	1985CO1987
Pl-G-6	Saw Palmetto	GNC # 06698, 114 Consumer Square, Plattsburgh, NY 12901	0256AO3972

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Appendix XII-B1

() Cash (X) Check

CIVIL CASE INFORMATION STATEMENT (CIS)		FOR USE BY CLERK'S OFFICE ONLY	
 <p>Use for initial Law Division Civil Part pleadings (not motions) under Rule 4:5-1 Pleading will be rejected for filing, under Rule 1:5-6(c), if information above the black bar is not completed or attorney's signature is not affixed</p>		PAYMENT TYPE: <input type="checkbox"/> CK <input checked="" type="checkbox"/> CC <input type="checkbox"/> CA CHG/CK NO. FEB - 4 2015 AMOUNT: 947.2 OVERPAYMENT: Amount \$ 250 SIGN # 0983 BATCH NUMBER:	
ATTORNEY / PRO SE NAME Stephen P. DeNittis, Esquire X		TELEPHONE NUMBER (856) 797-9951	COUNTY OF VENUE Camden <input checked="" type="checkbox"/>
FIRM NAME (if applicable) DeNittis Osefchen, P.C.		DOCKET NUMBER (when available) L 450-15	
OFFICE ADDRESS 525 Route 73 North, Suite 410 Marlton, New Jersey 08053		DOCUMENT TYPE Complaint	
		JURY DEMAND <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No	
NAME OF PARTY (e.g., John Doe, Plaintiff) Neidermayer, Plaintiff		CAPTION Neidermayer v. GNC Holdings, Inc., et al	
CASE TYPE NUMBER (See reverse side for listing) 699	HURRICANE SANDY RELATED? <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO	IS THIS A PROFESSIONAL MALPRACTICE CASE? <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO IF YOU HAVE CHECKED "YES," SEE N.J.S.A. 2A:53 A -27 AND APPLICABLE CASE LAW REGARDING YOUR OBLIGATION TO FILE AN AFFIDAVIT OF MERIT.	
RELATED CASES PENDING? <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO		IF YES, LIST DOCKET NUMBERS	
DO YOU ANTICIPATE ADDING ANY PARTIES (arising out of same transaction or occurrence)? <input checked="" type="checkbox"/> YES <input type="checkbox"/> NO		NAME OF DEFENDANT'S PRIMARY INSURANCE COMPANY (if known) <input type="checkbox"/> NONE <input checked="" type="checkbox"/> UNKNOWN	
THE INFORMATION PROVIDED ON THIS FORM CANNOT BE INTRODUCED INTO EVIDENCE.			
CASE CHARACTERISTICS FOR PURPOSES OF DETERMINING IF CASE IS APPROPRIATE FOR MEDIATION			
DO PARTIES HAVE A CURRENT, PAST OR RECURRENT RELATIONSHIP? <input checked="" type="checkbox"/> YES <input type="checkbox"/> NO		IF YES, IS THAT RELATIONSHIP: <input type="checkbox"/> EMPLOYER/EMPLOYEE <input type="checkbox"/> FRIEND/NEIGHBOR <input type="checkbox"/> OTHER (explain) <input type="checkbox"/> FAMILIAL <input checked="" type="checkbox"/> BUSINESS	
DOES THE STATUTE GOVERNING THIS CASE PROVIDE FOR PAYMENT OF FEES BY THE LOSING PARTY? <input checked="" type="checkbox"/> YES <input type="checkbox"/> NO			
USE THIS SPACE TO ALERT THE COURT TO ANY SPECIAL CASE CHARACTERISTICS THAT MAY WARRANT INDIVIDUAL MANAGEMENT OR ACCELERATED DISPOSITION <div style="text-align: right;">  </div>			
 DO YOU OR YOUR CLIENT NEED ANY DISABILITY ACCOMMODATIONS? <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO		IF YES, PLEASE IDENTIFY THE REQUESTED ACCOMMODATION	
WILL AN INTERPRETER BE NEEDED? <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO		IF YES, FOR WHAT LANGUAGE?	
I certify that confidential personal identifiers have been redacted from documents now submitted to the court, and will be redacted from all documents submitted in the future in accordance with Rule 1:38-7(b).			
ATTORNEY SIGNATURE: 			

Side 2



CIVIL CASE INFORMATION STATEMENT (CIS)

Use for initial pleadings (not motions) under Rule 4:5-1

CASE TYPES (Choose one and enter number of case type in appropriate space on the reverse side.)**Track I - 150 days' discovery**

- 151 NAME CHANGE
- 175 FORFEITURE
- 302 TENANCY
- 399 REAL PROPERTY (other than Tenancy, Contract, Condemnation, Complex Commercial or Construction)
- 502 BOOK ACCOUNT (debt collection matters only)
- 505 OTHER INSURANCE CLAIM (including declaratory judgment actions)
- 506 PIP COVERAGE
- 510 UM or UIM CLAIM (coverage issues only)
- 511 ACTION ON NEGOTIABLE INSTRUMENT
- 512 LEMON LAW
- 801 SUMMARY ACTION
- 802 OPEN PUBLIC RECORDS ACT (summary action)
- 999 OTHER (briefly describe nature of action)

Track II - 300 days' discovery

- 305 CONSTRUCTION
- 509 EMPLOYMENT (other than CEPA or LAD)
- 599 CONTRACT/COMMERCIAL TRANSACTION
- 603N AUTO NEGLIGENCE - PERSONAL INJURY (non-verbal threshold)
- 603Y AUTO NEGLIGENCE - PERSONAL INJURY (verbal threshold)
- 605 PERSONAL INJURY
- 610 AUTO NEGLIGENCE - PROPERTY DAMAGE
- 621 UM or UIM CLAIM (includes bodily injury)
- 699 TORT - OTHER

Track III - 450 days' discovery

- 005 CIVIL RIGHTS
- 301 CONDEMNATION
- 602 ASSAULT AND BATTERY
- 604 MEDICAL MALPRACTICE
- 606 PRODUCT LIABILITY
- 607 PROFESSIONAL MALPRACTICE
- 608 TOXIC TORT
- 609 DEFAMATION
- 616 WHISTLEBLOWER / CONSCIENTIOUS EMPLOYEE PROTECTION ACT (CEPA) CASES
- 617 INVERSE CONDEMNATION
- 618 LAW AGAINST DISCRIMINATION (LAD) CASES

Track IV - Active Case Management by Individual Judge / 450 days' discovery

- 156 ENVIRONMENTAL/ENVIRONMENTAL COVERAGE LITIGATION
- 303 MT. LAUREL
- 508 COMPLEX COMMERCIAL
- 513 COMPLEX CONSTRUCTION
- 514 INSURANCE FRAUD
- 620 FALSE CLAIMS ACT
- 701 ACTIONS IN LIEU OF PREROGATIVE WRITS

Multicounty Litigation (Track IV)

- | | |
|--|---|
| 266 HORMONE REPLACEMENT THERAPY (HRT) | 288 PRUDENTIAL TORT LITIGATION |
| 271 ACCUTANE/ISOTRETINOIN | 289 REGLAN |
| 274 RISPERDAL/SEROQUEL/ZYPREXA | 290 POMPTON LAKES ENVIRONMENTAL LITIGATION |
| 278 ZOMETA/AREDIA | 291 PELVIC MESH/GYNECARE |
| 279 GADOLINIUM | 292 PELVIC MESH/BARD |
| 281 BRISTOL-MYERS SQUIBB ENVIRONMENTAL | 293 DEPUY ASR HIP IMPLANT LITIGATION |
| 282 FOSAMAX | 295 ALLODERM REGENERATIVE TISSUE MATRIX |
| 284 NUVARING | 296 STRYKER REJUVENATE/ABG II MODULAR HIP STEM COMPONENTS |
| 285 STRYKER TRIDENT HIP IMPLANTS | 297 MIRENA CONTRACEPTIVE DEVICE |
| 286 LEVAQUIN | 601 ASBESTOS |
| 287 YAZ/YASMIN/OCELLA | 623 PROPECIA |

If you believe this case requires a track other than that provided above, please indicate the reason on Side 1, in the space under "Case Characteristics."

Please check off each applicable category

☒ Putative Class Action☐ Title 59

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY**

LEONARD H. NIEDERMAYER,

on behalf of himself and all others
similarly situated,

Plaintiff,

v.

GNC HOLDINGS, INC.,

Defendant.

Document Electronically Filed

Civil Action No. _____

**CERTIFICATION OF AARON M.
BENDER IN SUPPORT OF NOTICE
OF REMOVAL**

Aaron M. Bender, Esquire, hereby certifies:

1. I am an attorney-at-law of the State of the New Jersey and an associate in the law firm of Reed Smith LLP, counsel for Defendant GNC Holdings, Inc. in the above-captioned matter.

2. I have read the foregoing Notice of Removal, and I certify that to the best of my information and belief, the contents thereof are true and correct.

3. Attached hereto as **Exhibit 1** is a true and correct copy of a print-out of GNC's Ginkgo Biloba Product List as of March 11, 2015, available at <http://www.gnc.com/Herbs/HerbsFN/family.jsp?categoryId=12953620&f=Taxonomy%2FGNC%2F2109025&fbc=1&lmdn=Category&fbn=Taxonomy%7CGinkgo+Biloba>.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

DATED: March 11, 2015

REED SMITH LLP

/s/ Aaron M. Bender

Aaron M. Bender
REED SMITH LLP
Princeton Forrestal Village
136 Main Street, Suite 250
Princeton, New Jersey 08540
Tel. (609) 514-5955
Fax (609) 951-0824
abender@reedsmith.com
Attorneys for Defendant GNC Holdings, Inc.

Exhibit 1

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BY PRODUCT FORM

Capsule (4)

Liquid (1)

BY PRICE RANGE

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BY BRAND

GNC Herbal Plus[®] (5)

Prince of Peace (1)

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

LEONARD H. NIEDERMAYER,

on behalf of himself and all others
similarly situated,

Plaintiff,

v.

GNC HOLDINGS, INC.,

Defendant.

Document Electronically Filed

Civil Action No. _____

DISCLOSURE STATEMENT

The undersigned counsel for GNC HOLDINGS, INC.
certifies that this party is a non-governmental corporate party and that:

- ☒ This party's parent corporation, and all publicly held corporations owning 10% or more of this party's stock, are listed here:

GNC Holdings, Inc. is publicly traded. While not a publicly held corporation, FMR LLC owns 10% or more of GNC Holdings, Inc.'s stock.

OR

- ☐ This party does not have a parent corporation, nor is there any publicly held corporation that owns 10% or more of this party's stock.

/s/ Aaron M. Bender
Signature of Attorney

AARON M. BENDER
Print Name

March 11, 2015
Date

REED SMITH LLP
Name of Firm

Princeton Forrestal Village
136 Main Street, Suite 250
Address

Princeton, NJ 08540
City/State/Zip Code

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY**

LEONARD H. NIEDERMAYER,
on behalf of himself and all others
similarly situated,

Plaintiff,

v.

GNC HOLDINGS, INC.,

Defendant.

Document Electronically Filed

Civil Action No. _____

CERTIFICATION OF SERVICE

I hereby certify that on this date, I caused to be filed, via electronic filing (“ECF”), the following documents with the United States District Court for the District of New Jersey:

1. Notice of Removal to the United States District Court;
2. Certification of Aaron M. Bender, Esq.
3. Civil Cover Sheet;
4. Corporate Disclosure Statement; and
5. This Certification of Service.

I hereby certify that on this date, I caused copies of the foregoing documents to be served via hand delivery upon:

Stephen P. DeNittis
DeNittis Osefchen, P.C.
5 Greentree Centre
525 Route 73 North, Suite 410
Marlton, NJ 08053
Attorney for Plaintiffs

I hereby certify that the foregoing statements are true and correct to the best of my knowledge. I am aware that if any of the foregoing statements made by me are willfully false, I may be subject to punishment.

DATED: March 11, 2015

REED SMITH LLP

/s/ Aaron M. Bender

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