

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF KENTUCKY**

RICHARD E. FRAZIER III, on behalf of  
himself, and on behalf of all others similarly  
situated,

Plaintiff,

v.

GENERAL NUTRITION  
CORPORATION  
300 Sixth Avenue  
Pittsburgh, Pennsylvania 15222-02

Serve: CT Corporation System  
306 West Main Street  
Suite 512  
Frankfort, Kentucky 40601

No. 3:15-CV-158-DJH

**CLASS ACTION COMPLAINT**

**JURY TRIAL DEMAND**

**CLASS ACTION COMPLAINT AND DEMAND FOR JURY TRIAL**

Plaintiff, Richard E. Frazier III (“Plaintiff”), and on behalf of himself and a class of consumers, brings this lawsuit against Defendant General Nutrition Corporation alleging violations of state consumer fraud and deceptive trade practices laws, negligent misrepresentation, common law fraud, breach of warranty, and unjust enrichment and equitable relief. The facts and information averred herein are based upon Plaintiff’s personal knowledge and beliefs and upon investigation of counsel. Plaintiff alleges as follows:

**I. NATURE OF THE CASE**

1. Plaintiff and Class Member Consumers paid all or a portion of the cost of Herbal Plus Ginkgo Biloba (“Ginkgo Biloba”), Herbal Plus St. John’s Wort (“St. John’s Wort”), Herbal Plus Ginseng (“Ginseng”), Herbal Plus Echinacea (“Echinacea”), and/or Herbal Plus Saw Palmetto (“Saw Palmetto”) (hereinafter collectively “Herbal Plus Supplements”), each of which are herbal supplements (“supplements”) marketed by Defendant General Nutrition Corporation (and any of its predecessors-in-interest) (hereinafter “Defendant” or “GNC”).

2. These supplements were marketed as containing various herbs that are believed by some to confer various health benefits. However, the GNC Herbal Plus Supplements do not contain the advertised herbs. As a direct result of Defendant’s fraudulent marketing, Plaintiff was financially injured by paying for herbal supplements that, unbeknownst to consumers, did not contain the advertised herb.

3. According to the American Botanical Council, herbal dietary supplement sales in the United States are driven by “the increasing level of interest and confidence that American consumers place in the herbal sector of the dietary supplement market.”<sup>1</sup> American consumers’ interest and confidence has translated into big business for retailers like GNC.

4. According to the American Botanical Council, sales of herbal dietary supplements in the United States increased by 7.9% in 2013 to a total estimated figure of six billion dollars for the first time. 2013 marked the tenth consecutive year that herbal supplement sales have increased according to the American Botanical Council. It is expected that this increase in sales will continue.

5. Unlike prescription and over-the-counter medications, herbal supplements have limited FDA oversight. However, FDA regulations impose many important requirements on the labeling for herbal supplements:

- A Statement of Identity indicating a supplement's common or usual name.<sup>2</sup>
- Identification of all ingredients either via an Ingredient List or the Supplemental Facts Panel.<sup>3</sup>

6. Recent studies have found that herbal supplements often do not contain the herb listed on the Statement of Identity, Ingredient List and/or Supplemental Facts Panel. Dr. Steven G. Newmaster and other scientists were concerned that “herbal products available to consumers in the marketplace may be contaminated or substituted with alternative plant species and fillers that are not listed on the labels.” For this reason, Dr. Newmaster and his co-authors conducted testing using DNA barcoding to check for authenticity of 44 herbal products. The article, *DNA Barcoding Detects Contamination and Substitution in North American Herbal Products*, published in 11 BMC Medicine 222 (October 2013) revealed that “most of the herbal products tested were of poor quality, including considerable product substitution, contamination and use of fillers.”<sup>4</sup>

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<sup>1</sup>

[http://cms.herbalgram.org/press/2014/2013\\_Herb\\_Market\\_Report.html?ts=1423075139&signature=66e806c5aaebf2c2243a1b8320930d2](http://cms.herbalgram.org/press/2014/2013_Herb_Market_Report.html?ts=1423075139&signature=66e806c5aaebf2c2243a1b8320930d2)

<sup>2</sup> 21 CFR 101.1 and 21 CFR 101.3.

<sup>3</sup> 21 CFR 101.4.

<sup>4</sup> <http://www.biomedcentral.com/1741-7015/11/222/abstract>

7. More recently, the New York State Attorney General's office conducted testing of GNC's Herbal Plus Gingko Biloba, Herbal Plus St. John's Wort, Herbal Plus Ginseng, Herbal Plus Echinacea, and Herbal Plus Saw Palmetto. The testing revealed that Spring Valley Herbal Supplements either did not contain the herb listed on the Statement of Identity and/or contained filler and substitute ingredients that were not identified on the supplement's labeling.

8. As discussed above, multiple studies have alerted the dietary supplement industry, including GNC, that supplements were increasingly being found to either not contain the identified herb or contain filler and substitute ingredients that were not identified on the labeling. Defendant knew of and concealed the substitution of identified herbs in its Herbal Plus Supplements. Defendant also knew of and concealed the adulteration of its Herbal Plus Supplements by failing to list filler ingredients on the supplement's Supplement Facts Panel and/or Ingredient List. As part of Defendant's illegal scheme to increase herbal supplement profits, these known misbrandings and adulterations were systematically concealed and minimized from the public.

9. Defendant has been engaged in a fraudulent and illegal promotion of mislabeled and adulterated herbal supplements. Defendant's scheme targeted and defrauded consumers on a massive scale. Defendant's fraudulent practices convinced consumers they could benefit from Herbal Plus Supplements and caused consumers to purchase Herbal Plus Supplements that either did not contain the identified herb and/or contained filler or substitute ingredients that were not listed on the supplement's labeling.

10. Due to Defendant's illegal and fraudulent marketing schemes set forth in detail below, there resulted millions of dollars of sales of Herbal Plus Supplements that did not contain the identified herbs, which continues to this day. Plaintiff and Class Members have purchased millions of Herbal Plus Supplements that do not even contain the listed herb.

11. In addition to the loss of any potential health benefits that may have been conferred by a supplement that actually contained the identified herb, the financial impact of Defendant's false and deceptive marketing of Herbal Plus Supplements has likewise been profound, especially for consumers who bear the ultimate cost of herbal supplements. However, as has recently become clear, consumers across the nation instead were duped by Defendant into paying millions of dollars for bogus Herbal Plus Supplements.

## **II. PARTIES**

12. Plaintiff Richard E. Frazier III is and was at all times relevant hereto a resident and citizen of New Albany, Floyd County, Indiana. At all times material hereto, Plaintiff purchased Defendant's Herbal Plus Supplements at a GNC store located in Louisville, Kentucky.

13. Defendant General Nutrition Corporation is a corporation incorporated in the state of Pennsylvania. Its principal place of business is 300 Sixth Avenue, Pittsburgh, Pennsylvania 15222-02. Defendant General Nutrition Corporation conducts extensive business throughout the United States, including in the Commonwealth of Kentucky. General Nutrition Corporation may be served through its registered agent, CT Corporation System, 306 West Main Street, Suite 512, Frankfort, Kentucky 40601.

## **III. JURISDICTION AND VENUE**

14. This Court has subject matter jurisdiction over all of the claims of Plaintiff and Class Members pursuant to 28 U.S.C. § 1332(d) (CAFA) because there is minimal diversity of citizenship among the parties and the amount in controversy exceeds \$5 million, exclusive of interest and costs.

15. Venue is proper in this District under 28 U.S.C. § 1391 because Defendant engaged in substantial conduct and a substantial part of the events or omissions giving rise to these claims occurred within this District relevant to Plaintiff and Class Members' claims, and have caused harm to Plaintiff and Class Members conducting business and residing within this District. Defendant received substantial compensation from Herbal Plus Supplements' sales in this District, and Defendant made misrepresentations and material omissions about Herbal Plus Supplements in this District.

#### **IV. FACTUAL ALLEGATIONS: FDA REGULATIONS ON SUPPLEMENTS**

16. Dietary supplements, including herbal supplements are regulated by the FDA pursuant to the Dietary supplement Health and Education Act of 1994. Although manufacturers and distributors are not required to get FDA approval before producing or selling dietary supplements, they must make sure that all claims and information on the product labeling is truthful and not misleading. 21 C.F.R. § 111.

17. FDA regulations also require that dietary supplements include a Statement of Identity that indicates a supplement's common or usual name (21 CFR 101.1 and 21 CFR 101.3).

18. Dietary supplements must also identify all ingredients on either an ingredient list or the supplemental facts panel on the labeling (21 CFR 101.4).

19. No Herbal Plus Supplement was exempt from the above referenced requirements for dietary supplement product labeling.

20. This regulatory scheme is designed to protect consumers by ensuring dietary supplements contain the advertised ingredients and not undisclosed substitute or filler ingredients.

## V. DEFENDANT'S FRAUDULENT MARKETING OF HERBAL PLUS SUPPLEMENTS

21. GNC has offered Herbal Plus Supplements for sale both online and in stores to people seeking various health benefits.

22. Herbal Plus Ginkgo Biloba is labeled as an herbal supplement and advertises that it "May Support Mental Sharpness".



23. In direct contradiction to this labeling, Herbal Plus Ginkgo Biloba does not contain Ginkgo Biloba, and numerous samples did not contain plant genetic material of any sort as shown by testing conducted by the New York State Attorney General's Office.

**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.

24. Herbal Plus St. John's Wort is labeled as an herbal supplement and advertises that it "Promotes Positive Mood Balance".



**GNC HERBAL PLUS® STANDARDIZED**

For more information:  
1-888-482-2548  
Visit us at [www.gnc.com](http://www.gnc.com)  
Distributed by:  
General Nutrition  
Corporation  
Pittsburgh, PA 15222  
Made in the USA



**ST. JOHN'S WORT**  
HERBAL SUPPLEMENT

Promotes Positive Mood Balance\*  
**300 mg • 0.3% Hypericin**  
**200 Vegetarian CAPSULES**

\* This statement has not been evaluated by the Food and Drug Administration. This product is not intended to diagnose, treat, cure, or prevent any disease.

CODE 194521 JFG  
Directions: As a dietary supplement, take one to three capsules daily.

**Supplement Facts**  
Serving Size One Capsule

Amount Per Serving	
St. John's Wort Herb Extract ( <i>Hypericum perforatum</i> ) (0.3% Hypericin = 0.9mg)	300 mg*

\* Daily Value not established.

Other Ingredients: Cellulose, Vegetable Cellulose Capsule.

Potency verified by GNC procedure #5286. Conforms to USP <2091> for weight. Meets USP <2040> disintegration.

No Sugar, No Artificial Colors, No Artificial Flavors, Sodium Free, No Wheat, No Gluten, No Soy, No Dairy, Yeast Free.

**WARNING:** Consult your physician prior to using this product if you are pregnant, nursing, taking medication, or have a medical condition. Discontinue use two weeks prior to surgery. Use of this product may cause your skin to be extra sensitive to UV sources such as artificial or natural sunlight. Avoid excessive exposures from these sources.

**KEEP OUT OF REACH OF CHILDREN**  
Store in a cool, dry place.

Lot No./Best By:

25. In direct contradiction to this labeling, Herbal Plus St. John's Wort does not contain St. John's Wort as shown by testing conducted by the New York State Attorney General's Office.

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).

26. Herbal Plus Ginseng is labeled as an herbal supplement under the names "Triple Ginsa" and "Triple Ginsa Rush". Triple Ginsa advertises that it "Supports Vitality" and Triple Ginsa Rush advertises that it "Supports Vitality and Energy".

**GNC HERBAL PLUS® STANDARDIZED**

No Sugar, No Artificial Colors, No Artificial Flavors, Sodium Free, No Wheat, No Gluten, No Soy, No Dairy, Yeast Free.

**KEEP OUT OF REACH OF CHILDREN.**  
Store in a cool, dry place.

For more information:  
1-888-482-2548  
**SHOP NOW @ GNC.COM**

Distributed by:  
General Nutrition  
Corporation  
Pittsburgh, PA 15222



**TRIPLE GINSA™**  
HERBAL SUPPLEMENT

Supports Vitality\*  
**Standardized Extract Blend**

**200 CAPSULES**

CODE 374702 AMG  
Directions: As a dietary supplement, take one or two capsules daily.

**Supplement Facts**  
Serving Size One Capsule

Amount Per Serving	
Panax Ginseng Root Extract ( <i>Panax ginseng</i> ) (3% Ginsenosides = 12mg)	400 mg*
American Ginseng Root Extract ( <i>Panax quinquefolium</i> ) (3% Ginsenosides = 6mg)	200 mg*
Siberian Root Extract ( <i>Eleutherococcus senticosus</i> ) (0.8% Eleutherosides = 0.8mg)	100 mg*

\* Daily Value not established.

Other Ingredients: Gelatin, Cellulose.

**WARNING:** Consult your physician prior to using this product if you are pregnant, nursing, taking medication, or have a medical condition. Discontinue use two weeks prior to surgery. Potency of ginsenosides and eleutherosides verified by GNC procedure #5131 and #5276. Conforms to USP <2091> for weight. Meets USP <2040> disintegration.

\* This statement has not been evaluated by the Food and Drug Administration. This product is not intended to diagnose, treat, cure, or prevent any disease.

Lot No./Best By:





27. In direct contradiction to this labeling, Herbal Plus Ginseng does not contain Ginseng as shown by testing conducted by the New York State Attorney General’s Office.

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.

28. Herbal Plus Echinacea & Vitamin C is labeled as an herbal supplement and advertises that it “Supports the Immune System & Protects Against Cell-Damaging Free Radicals”.



29. In direct contradiction to this labeling, Herbal Plus Echinacea & Vitamin C does not contain Echinacea as shown by testing conducted by the New York State Attorney General’s

Office.

**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.

30. Herbal Plus Saw Palmetto Extract is labeled as an herbal supplement and advertises that it “Supports Healthy Prostate Function”.



31. In direct contradiction to this labeling, Herbal Plus Saw Palmetto Extract either did not contain Saw Palmetto, or contained other unidentified ingredients as shown by testing conducted by the New York State Attorney General’s Office.

**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.

**VI. DEFENDANT’S TARGETING OF CONSUMERS**

32. Defendant’s fraudulent, deceptive, and misleading marketing increased the sales of Herbal Plus Supplements during the relevant time period. Because GNC withheld and misrepresented material information about the contents, ingredients, efficacy, and usefulness of Herbal Plus Supplements, consumers did not have the knowledge necessary to make informed

decisions regarding purchasing and using Herbal Plus Supplements. Plaintiff and Class Members, unaware of Defendant's scheme, purchased and used Herbal Plus Supplements to confer the advertised health benefits, relying on many of the misrepresentations by Defendant. Defendant's promotion and marketing of Herbal Plus Supplements based upon false promises of contents, ingredients, and efficacy has been highly successful, resulting in Defendant receiving millions of dollars in profits, representing ill-gotten gains to which Defendant was not entitled.

**VII. HERBAL PLUS SUPPLEMENTS DO NOT CONTAIN ADVERTISED  
HERB AND DO NOT CONFER ADVERTISED BENEFITS**

33. Defendant misrepresented that Herbal Plus Supplements contained the advertised herbs and were effective in conferring various health benefits.

34. As it has come to light that Herbal Plus Supplements do not contain the listed herbs, they cannot confer the various health benefits that are supposedly conferred by using Herbal Plus Supplements.

35. Defendant omitted and/or fraudulently misrepresented the contents and efficacy of Herbal Plus Supplements.

36. On February 2, 2015, the Office of the Attorney General for the State of New York issued a cease and desist notification to GNC for its Herbal Plus Supplements. The Attorney General's Office notified GNC that its Herbal Plus Supplements "were either unrecognizable or a substance other than what they claimed to be, and therefore fairly constitute contaminated or substituted products".

37. Prior to the New York Attorney General's cease and desist letter, studies conducted by the Centre for Biodiversity Genomics at the University of Guelph and others alerted the dietary supplement industry, including the Defendant, that it is not providing the public with authentic herbal supplements without substitution, contamination, or fillers.

38. According to the State of New York, GNC's failure "to clean up its practices" is "disappointing." According to the laws of the State of Kentucky, it's illegal and tortious.

39. Defendant's advertising sought to create the image and belief by consumers that Herbal Plus Supplements contained the listed herbs and that their use was an effective method of boosting their health, even though Defendant knew these assertions to be false and had no reasonable grounds to believe they were true.

40. Defendant concealed materially relevant information from potential Herbal Plus Supplements users and from Plaintiff and Class Members.

41. Even after multiple notifications that Herbal Plus Supplements do not contain the listed herbs, Defendant has failed and continues to fail to mention the absence of these herbs in its online and print advertising and labeling, and falsely represents the Herbal Plus Supplements contain the listed herbs and are effective in conferring various health benefits. Had Defendant adequately disclosed the true facts associated with Herbal Plus Supplements, consumers in Kentucky would not have sought out and purchased anywhere near the volume of Herbal Plus Supplements that have been sold.

42. The absence of listed ingredients in Herbal Plus Supplements and lack of efficacy are common to the entire class of Herbal Plus Supplements users.

#### **VIII. DEFENDANT'S CONCEALMENT OF THEIR FRAUDULENT CONDUCT**

43. The applicable statutes of limitations regarding the claims of Plaintiff and the Class Members have been tolled by Defendant's fraudulent concealment of its unlawful, conspiratorial deceit, as alleged in detail throughout this Complaint.

44. As evidenced by the allegations in this Complaint, Defendant has employed and continues to employ practices and techniques of secrecy in order to avoid detection of, and to fraudulently conceal, their deceptive and conspiratorial behavior regarding the contents and

efficacy of Herbal Plus Supplements.

45. Despite taking on the responsibility to reveal this information to the general public, Defendant has kept such information hidden.

46. As such, Plaintiff and the Class Members were not effectively alerted to the existence and scope of this industry-wide fraud and were not on notice of their potential claims until shortly prior to the filing of this Complaint.

47. Plaintiff and the Class Members could not have acquired such knowledge through the exercise of reasonable diligence. Through their public statements, marketing and advertising, Defendant's self-concealing scheme and affirmative conduct to perpetuate its fraud deprived Plaintiff and the Class Members of actual or presumptive knowledge of facts sufficient to put them on notice as to their potential claims.

48. Any applicable statutes of limitation have been tolled by Defendant's knowing and active concealment and denial of the facts alleged herein. Plaintiff and the other Class Members have been kept in ignorance of vital information essential to the pursuit of these claims without any fault or lack of diligence on their part. Plaintiff and the other Class Members could not have reasonably discovered the fraudulent nature of Defendant's conduct. Accordingly, Defendant is estopped from relying on any statute of limitations to defeat any of Plaintiff's or the other Class Members' claims.

49. Finally, Defendant concealed the absence of listed ingredients from Herbal Plus Supplements, described above, which were known to Defendant. Plaintiff and Class Members could not have known nor could they have reasonably discovered Herbal Plus Supplements' failure to contain the listed herbs and/or adulteration through the inclusion of filler and/or substitute ingredients, which were not generally known until very recently.



50. The accrual of all of Plaintiff and Class Members' claims is tied to the revelation of Herbal Plus Supplements' failure to contain the advertised ingredients. From an economic damages perspective, the degree to which Plaintiff and Class Members have been injured is based on the cost of Herbal Plus Supplements. Plaintiff and Class Members did not discover their injury until the class wide issues of failure to include advertised ingredients, and the inclusion of ingredients not on the label, in Herbal Plus Supplements was revealed. These recent discoveries took place within the limitations period.

### **IX. CLASS ACTION ALLEGATIONS**

51. Plaintiff brings this suit as a Class action pursuant to Rule 23 of the Federal Rules of Civil Procedure, on behalf of a Class consisting of:

All natural persons in the Commonwealth of Kentucky, who paid or incurred costs for the Herbal Plus Supplements, for purposes other than resale. Excluded from the Class are employees of Defendant, including its officers or directors, and the Court to which this case is assigned.

52. The proposed Class is sufficiently numerous, as thousands of members of the Class were induced to purchase Herbal Plus Supplements through Defendant's scheme. The Class Members are so numerous and dispersed throughout the United States that joinder of all members is impracticable. The Class is composed of thousands of consumers, and the disposition of their claims in a Class action will benefit both the parties and the Court. Defendant sells hundreds of thousands of Herbal Plus Supplements in the Commonwealth of Kentucky every year, and thus the Class is sufficiently numerous to make joinder impracticable, if not outright impossible. The Class Members can be identified by, *inter alia*, records maintained by Defendant.

53. Common questions of law and fact exist as to all members of the Class and predominate over any questions affecting solely individual members of the Class. Among the questions of law and fact common to the Class Members are:

- a) Whether Defendant misrepresented the ingredients of Herbal Plus Supplements;
- b) Whether Defendant's acts and omissions violate, *inter alia*, the Kentucky Consumer Protection Act and common law claims;
- c) Whether Defendant made material misrepresentations of fact, or omitted to state material facts regarding the effectiveness of Herbal Plus Supplements in conferring various health benefits, which material misrepresentations or omissions operate as a fraud and deceit upon the Class;
- d) Whether the Class Members paid more for Herbal Plus Supplements than for other efficacious supplements that were available at a cheaper price;
- e) Whether, in marketing and selling Herbal Plus Supplements, Defendant failed to disclose the contents of Herbal Plus Supplements to persons ingesting the supplements;
- f) Whether Defendant misrepresented in their materials, among other things, the efficacy and convenience of Herbal Plus Supplements; and
- g) Whether Defendant knew or should have known that the Herbal Plus Supplements do not contain the listed and advertised ingredients.

54. The conduct and patterns of conduct alleged herein, relating to the Defendant's sale and marketing of Herbal Plus Supplements, occurred between the date of Herbal Plus Supplements initial sale by the Defendant up to the present day.

55. The conduct and patterns of conduct alleged herein, relating to the sale and marketing of Herbal Plus Supplements, took place throughout the Commonwealth of Kentucky, as well as various other territories and states.

## **X. CLAIMS FOR RELIEF**

### **FIRST CLAIM FOR RELIEF**

#### **Violation of Kentucky Consumer Protection Act, KRS 367.120, et seq.**

56. Plaintiff repeats and realleges each of the preceding paragraphs, as if fully set forth herein.



57. The Defendant engaged in deceptive or unfair acts or practices in violation of the Kentucky Consumer Protection Act, KRS 367.120, *et seq.* when the Defendant knowingly and intentionally made numerous misrepresentations regarding the contents, ingredients, efficacy, effectiveness, and usefulness of Herbal Plus Supplements.

58. These material representations made by the Defendant were false as proven by testing conducted by the New York State Attorney General's Office.

59. When the Defendant made these material representations it knew they were false, and/or it made the material representations recklessly without any knowledge of their truth and with a positive assertion.

60. The Plaintiff and Class Members were induced to purchase Herbal Plus Supplements for personal use by relying on the statements and representations made by the Defendant that were false, misleading, and deceptive in violation of Kentucky law as set forth in KRS 367.170 because the Herbal Plus Supplements do not contain the advertised herb, contain ingredients that are not listed on the ingredient list or supplement panel, and do not provide any of the benefits represented by the Defendant as set forth in detail above.

61. The unfair, false, misleading, and deceptive practices of the Defendant did cause the Plaintiff and the Class to incur actual damages, including financial loss, loss of the benefit of a genuine supplement, and expenses.

62. As a result of Defendant's violations of KRS 367.170, Defendant has been unjustly enriched at the expense of Plaintiff and Class Members. Absent Defendant's unlawful, fraudulent, and deceptive conduct, Plaintiff and Class Members would not have purchased Herbal Plus Supplements.

63. The deceptive acts of Defendant have injured and present a continuing injury and threat of injury to Plaintiff and Class Members in that Defendant's conduct has proximately

caused Plaintiff and Class Members to pay for Herbal Plus Supplements.

64. As alleged herein, Defendant has been unjustly enriched as a result of this unfair marketing. Plaintiff and Class Members are accordingly entitled to actual damages, equitable relief including restitution and/or disgorgement of all revenues, earnings, profits, compensation, and benefits which may have been obtained by Defendant as a result of such business acts or practices, and punitive or exemplary damages, in addition to any other remedy allowable at law.

## **SECOND CLAIM FOR RELIEF**

### **Fraud**

65. Plaintiff repeats and realleges each of the preceding paragraphs, as if fully set forth herein.

66. Plaintiff and Class Members assert a common law fraud claim under Kentucky law against the Defendant.

67. The Defendant knowingly made false representations or omissions of material fact for the purpose of inducing Plaintiff and Class Members to act thereon when the Defendant knowingly and intentionally misrepresented the contents, ingredients, efficacy, effectiveness, and usefulness of Herbal Plus Supplements.

68. The Defendant's false representations and omissions of material fact were false and were known to be false or known to have been asserted without knowledge of their truth by the Defendant.

69. The Defendant intended Plaintiff and Class Members to rely on the Defendant's false representations or omissions of material fact to induce Plaintiff and Class Members to purchase and consume Herbal Plus Supplements. This reliance was at Plaintiff's and Class Members' detriment.

70. The Defendant's false representations or omissions of material fact made with the intent to defraud caused Plaintiff's and Class Members' injuries.

71. Plaintiff and Class Members were injured as a result of the Defendant's fraudulent representations or omissions, and are entitled to compensatory damages, exemplary and/or punitive damages, to the extent allowable at law, costs and attorney's fees, as well as any other damages or relief allowable at law.

**THIRD CLAIM FOR RELIEF**  
**Breach of Express Warranty**

72. Plaintiff incorporates by reference all preceding paragraphs as if fully set forth herein.

73. The Defendant did expressly warrant to consumers, including Plaintiff and the Class, that Herbal Plus Supplements contained advertised ingredients and were effective in conferring various health benefits.

74. The Plaintiff and the Class did rely on these affirmations of fact and promises made by the Defendant when they purchased and ingested Herbal Plus Supplements to confer various health benefits.

75. The Defendant breached the express warranties it made to the Plaintiff and Class in that the Herbal Plus Supplements sold by the Defendant did not contain the advertised ingredients, were adulterated as a result of the use of substitute or filler ingredients, and/or did not confer the advertised health benefits.

76. As a direct and proximate result of the Plaintiff's and Class' reliance on these affirmations of fact and promises made by the Defendant, Plaintiff and Class suffered damages.

**FOURTH CLAIM FOR RELIEF**  
**Breach of Implied Warranty**

77. Plaintiff incorporates by reference all preceding paragraphs as if fully set forth herein.

78. Defendant is a merchant with respect to herbal supplements like the Herbal Plus Supplements purchased by the Plaintiff and the Class.

79. The Defendant impliedly warranted that the Herbal Plus Supplements were merchantable.

80. The Defendant breached its implied warranty of merchantability to the Plaintiff and Class in that the Herbal Plus Supplements which were sold by the Defendant were unmerchantable because:

- a. The Herbal Plus Supplements were not effective for their intended use;
- b. The Herbal Plus Supplements were not adequately packaged and labeled;
- c. The Herbal Plus Supplements did not conform to statements made on the labels.

81. As a direct and proximate result of the breach of the implied warranty of merchantability by the Defendant, the Plaintiff and the Class suffered damages.

**FIFTH CLAIM FOR RELIEF**  
**Breach of Implied Warranty of Fitness for Particular Purpose**

82. Plaintiff incorporates by reference all preceding paragraphs as if fully set forth herein.

83. The Defendant is a merchant with respect to herbal supplements like the Herbal Plus Supplements purchased and ingested by the Plaintiff and the Class and it impliedly warranted that the Herbal Plus Supplements were fit for the particular purpose of being ingested to confer health benefits.

84. The Defendant knew or had reason to know of the purposes for which the Herbal Plus Supplements would be used by consumers including the Plaintiff and the Class, and that purpose included supplementing certain herbal intake to confer health benefits.

85. The Plaintiff and the Class relied on the skill and judgment of the Defendant when it selected herbal supplements that they believed to be appropriate for use in supplementing herbal intake and conferring health benefits.

86. The Defendant breached its implied warranty of fitness for a particular purpose to the Plaintiff and Class in that the Herbal Plus Supplements were defective because they did not contain the advertised ingredients, were adulterated as a result of the inclusion of unlisted substitute or filler ingredients, and/or did not confer the advertised health benefits.

87. As a direct and proximate result of the breach of the implied warranty of fitness for a particular purpose by the Defendant, the Plaintiff and the Class suffered damages.

**SIXTH CLAIM FOR RELIEF**  
**Restitution/Disgorgement for Unjust Enrichment**

88. Plaintiff incorporates by reference all preceding paragraphs as if fully set forth herein.

89. Defendant has been and continues to be enriched by its fraudulent acts and/or omissions alleged herein for Kentucky wherein Class Members reside.

90. In exchange for payments they made for Herbal Plus Supplements and at the time these payments were made, Plaintiff and Class Members expected that the Herbal Plus Supplements contained the advertised herbs and were a safe and medically effective supplement for treating various conditions, illnesses, disorders, or symptoms.

91. Defendant voluntarily accepted and retained these payments with full knowledge and awareness that, as a result of its wrongdoing, Plaintiff and Class Members paid for Herbal

Plus Supplements when they otherwise would not have done so and paid for the Herbal Plus Supplements at a higher price than would have been paid for but for Defendant's wrongful conduct.

92. These fraudulent acts and omissions allow Defendant to gain millions of dollars in profits that would not have been gained but for Defendant's fraudulent acts and omissions.

93. Plaintiff and Class Members and those similarly situated paid and continue to pay Defendant an amount that exceeds the value of the products identified herein as a result of Defendant's fraudulent acts and omissions.

94. Plaintiff and the Class Members suffered damages due to Defendant's acts and omissions as alleged herein.

95. Defendant has and continues to be unjustly enriched as a result of its fraudulent acts and omissions.

96. Defendant lacks any legal justification for engaging in a course of fraudulent acts and omissions as alleged herein at Plaintiff and the Class' expense.

97. No other remedy at law can adequately compensate Plaintiff and Class Members for the damages occasioned by Defendant's conscious choice to engage in a course of fraudulent acts and omissions.

98. Plaintiff and Class Members are entitled in equity to seek restitution of Defendant's wrongful profits, revenues, and benefits to the extent and in the amount, deemed appropriate by the Court and such other relief as the Court deems just and proper to remedy Defendant's unjust enrichment.

**SEVENTH CAUSE OF ACTION**  
**Equitable Relief**

99. Plaintiff incorporates by reference all preceding paragraphs as if fully set forth

herein.

100. Defendant is under a legal duty imposed by the FDA to advise consumers of the ingredients of its Herbal Plus Supplements. Such communication, however, is limited to future labeling. No notice is going to be provided to the proposed Class herein.

101. Pursuant to the equitable relief provisions of Kentucky law, Plaintiff seeks temporary and/or permanent injunctive relief directing Defendant to notify in writing, and through other appropriate forms of notice, all members of the class as to the true contents and ingredients of the Herbal Plus Supplements.

102. Without such notice, Plaintiff and the Class risk irreparable harm in paying for and using Herbal Plus Supplements believing that they contain ingredients that they do not and that they confer health benefits that they do not.

103. The equitable relief sought pursuant to the applicable Kentucky laws is within the jurisdiction of this Honorable Court. The proposed notice class meets the requirements of FRCP 23. Under this claim, Plaintiff seeks no monetary damages on behalf of the proposed class. As noted herein, the proposed class meets the requirements of Rule 23. As such, equitable relief under Rule 23 is appropriate and a class should be certified for the purposes of notice to consumers as set forth herein.

## **XI. DEMAND FOR RELIEF**

WHEREFORE, Plaintiff and Class Members demand judgment against Defendant, jointly and severally, as follows:

- a) On Plaintiff's First, Second, Third, Fourth and Fifth Claims for Relief, an award to each Plaintiff of the maximum allowable damages under such statute(s) or laws, including but not limited to compensatory and punitive damages;
- b) On Plaintiff's Sixth Claim for Relief, an award to each Plaintiff of disgorgement of



all sums improperly received by Defendant;

- c) On Plaintiff's Seventh Claim for Relief, all the equitable relief allowed;
- d) An award of prejudgment interest in the maximum amount allowable by law;
- e) An award to Plaintiff of his costs and expenses in this litigation and reasonable attorney fees and expert fees and expenses; and,
- f) An award to Plaintiff of such other and further relief as may be just and proper under the circumstances.

**DEMAND FOR JURY TRIAL**

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

Dated this 15<sup>th</sup> day of February, 2015

Respectfully Submitted

/s/ Vanessa B. Cantley

Vanessa B. Cantley

Nathan D. Williams

BAHE COOK CANTLEY & NEFZGER

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*Counsel for Plaintiff*

JS 44 (Rev. 12/12)

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**

Richard E. Frazier III, on behalf of himself, and on behalf of all others similarly situated,

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

(c) Attorneys (Firm Name, Address, and Telephone Number)  
 Bahe Cook Cantley & Nefzger  
 312 S Fourth St, 6th Floor, Louisville, KY 40202  
 (502) 587-2002

**DEFENDANTS**

General Nutrition Corporation

County of Residence of First Listed Defendant Allegheny County, Penn.  
 (IN U.S. PLAINTIFF CASES ONLY)

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

Attorneys (If Known)

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

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

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

- |   |                                       |                            |   |                            |                                       |
|---|---------------------------------------|----------------------------|---|----------------------------|---------------------------------------|
|   | <b>PTF</b>                            | <b>DEF</b>                 |   | <b>PTF</b>                 | <b>DEF</b>                            |
| Citizen of This State                   | <input 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 checked="" 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	<b>PERSONAL INJURY</b> <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	<b>PERSONAL INJURY</b> <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability <b>PERSONAL PROPERTY</b> <input checked="" type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other <b>LABOR</b> <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 <b>IMMIGRATION</b> <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 <b>PROPERTY RIGHTS</b> <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark <b>SOCIAL SECURITY</b> <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)) <b>FEDERAL TAX SUITS</b> <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
<b>REAL PROPERTY</b> <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	<b>CIVIL RIGHTS</b> <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	<b>PRISONER PETITIONS</b> <b>Habeas Corpus:</b> <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 <b>Other:</b> <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement			

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

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

**VI. CAUSE OF ACTION**

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):  
28 U.S.C. §§ 1332

Brief description of cause:  
Violations of statutory and common law claims regarding mislabeling and fraudulent marketing of supplements

**VII. REQUESTED IN COMPLAINT:**

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. DEMAND \$ 10,000,000.00 CHECK YES only if demanded in complaint: JURY DEMAND:  Yes  No

**VIII. RELATED CASE(S) IF ANY**

(See instructions): JUDGE \_\_\_\_\_ DOCKET NUMBER \_\_\_\_\_

DATE 02/20/2015 SIGNATURE OF ATTORNEY OF RECORD  
/s/ Nathan Williams

**FOR OFFICE USE ONLY**

RECEIPT # \_\_\_\_\_ AMOUNT \_\_\_\_\_ APPLYING IFP \_\_\_\_\_ JUDGE \_\_\_\_\_ MAG. JUDGE \_\_\_\_\_

**INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44**

## Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading 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. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

- I.(a) Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.
- (b) County of Residence.** For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)
- (c) Attorneys.** Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".
- II. Jurisdiction.** The basis of jurisdiction is set forth under Rule 8(a), F.R.Cv.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.  
 United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.  
 United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.  
 Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.  
 Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; **NOTE: federal question actions take precedence over diversity cases.**)
- III. Residence (citizenship) of Principal Parties.** This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.
- IV. Nature of Suit.** Place an "X" in the appropriate box. If the nature of suit cannot be determined, be sure the cause of action, in Section VI below, is sufficient to enable the deputy clerk or the statistical clerk(s) in the Administrative Office to determine the nature of suit. If the cause fits more than one nature of suit, select the most definitive.
- V. Origin.** Place an "X" in one of the six boxes.  
 Original Proceedings. (1) Cases which originate in the United States district courts.  
 Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441. When the petition for removal is granted, check this box.  
 Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.  
 Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.  
 Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.  
 Multidistrict Litigation. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407. When this box is checked, do not check (5) above.
- VI. Cause of Action.** Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC 553 Brief Description: Unauthorized reception of cable service
- VII. Requested in Complaint.** Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.  
 Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction.  
 Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.
- VIII. Related Cases.** This section of the JS 44 is used to reference related pending cases, if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.

**Date and Attorney Signature.** Date and sign the civil cover sheet.



Civil Action No. \_\_\_\_\_

**PROOF OF SERVICE**

*(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))*

This summons for *(name of individual and title, if any)* \_\_\_\_\_  
was received by me on *(date)* \_\_\_\_\_.

I personally served the summons on the individual at *(place)* \_\_\_\_\_  
\_\_\_\_\_ on *(date)* \_\_\_\_\_; or

I left the summons at the individual's residence or usual place of abode with *(name)* \_\_\_\_\_  
\_\_\_\_\_, a person of suitable age and discretion who resides there,  
on *(date)* \_\_\_\_\_, and mailed a copy to the individual's last known address; or

I served the summons on *(name of individual)* \_\_\_\_\_, who is  
designated by law to accept service of process on behalf of *(name of organization)* \_\_\_\_\_  
\_\_\_\_\_ on *(date)* \_\_\_\_\_; or

I returned the summons unexecuted because \_\_\_\_\_; or

Other *(specify)*: \_\_\_\_\_.

My fees are \$ \_\_\_\_\_ for travel and \$ \_\_\_\_\_ for services, for a total of \$ \_\_\_\_\_.

I declare under penalty of perjury that this information is true.

Date: \_\_\_\_\_

\_\_\_\_\_  
*Server's signature*

\_\_\_\_\_  
*Printed name and title*

\_\_\_\_\_  
*Server's address*

Additional information regarding attempted service, etc: