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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

<p><b>Kevin Gioia and Aurelio Batista, Individually And On Behalf Of All Others Similarly Situated,</b></p> <p><b>Plaintiffs,</b></p> <p><b>v.</b></p> <p><b>GNC HOLDINGS, INC.,</b></p> <p><b>Defendant.</b></p>	<p><b>Case No.: '15CV2871 LAB BLM</b></p> <p><b><u>CLASS ACTION</u></b></p> <p><b>COMPLAINT FOR DAMAGES AND INJUNCTIVE RELIEF</b></p> <p><b>JURY TRIAL DEMANDED</b></p>
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**INTRODUCTION**

- 1
- 2 1. The average consumer spends a mere 13 seconds making an in-store
- 3 purchasing decision, or between 10 to 19 seconds for an online purchase.<sup>1</sup>
- 4 That decision is heavily dependent on a product’s packaging, and particularly
- 5 the package dimensions: “Most of our studies show that 75 to 80 percent of
- 6 consumers don’t even bother to look at any label information, no less the net
- 7 weight . . . . Faced with a large box and a smaller box, both with the same
- 8 amount of product inside . . . consumers are apt to choose the larger box
- 9 because they think it’s a better value.”<sup>2</sup> This lawsuit charges Defendant with
- 10 intentionally packaging its GNC Lean Shake products, including its Total
- 11 Lean, Total Lean Advanced and Total Lean Control and Reduce (collectively,
- 12 “Products”) in large, opaque containers that contain approximately 30%
- 13 empty space. Consumers, in reliance on the size of the containers, paid a
- 14 premium price for the Products, which they would not have purchased had
- 15 they known that the containers were substantially empty.
- 16 2. Kevin Gioia and Aurelio Batista (hereinafter “Plaintiffs”), individually and on
- 17 behalf of all others similarly situated, bring this Class Action Complaint for
- 18 damages, injunctive relief, and any other available legal or equitable
- 19 remedies, resulting from the unlawful and deceptive actions of GNC
- 20 HOLDINGS, INC. (“Defendant” or “GNC”) with respect to the packaging of
- 21 its Products. Plaintiffs allege as follows upon personal knowledge as to
- 22 themselves and their own acts and experiences, and, as to all other matters,
- 23 upon information and belief, including investigation conducted by their
- attorneys

24 <sup>1</sup> [http://www.nielsen.com/us/en/insights/news/2015/make-the-most-of-your-](http://www.nielsen.com/us/en/insights/news/2015/make-the-most-of-your-brands-20-second-window.html)

25 [brands-20-second-window.html](http://www.nielsen.com/us/en/insights/news/2015/make-the-most-of-your-brands-20-second-window.html) (citing the Ehrenberg-Bass Institute of Marketing

Science’s report “Shopping Takes Only Seconds...In-Store and Online”).

26 <sup>2</sup>[http://www.consumerreports.org/cro/magazinearchive/2010/january/shopping/](http://www.consumerreports.org/cro/magazinearchive/2010/january/shopping/product-packaging/overview/product-packaging-ov.htm)

27 [product-packaging/overview/product-packaging-ov.htm](http://www.consumerreports.org/cro/magazinearchive/2010/january/shopping/product-packaging/overview/product-packaging-ov.htm) (quoting Brian Wansink,

28 professor and director of the Cornell Food and Brand Lab, who studies shopping behavior of consumers).

- 1 3. GNC operates bricks-and-mortar and online retail stores, which sell health  
2 and nutrition products including vitamins, supplements, herbs and diet  
3 products. GNC sells products under its own label, as well as third-party  
4 brands. As of March 31, 2015, GNC had more than 8,900 locations, with  
5 more than 6,600 retail locations in the United States, and franchise operations  
6 in more than 50 countries.
- 7 4. GNC relies on its brand recognition in the labeling, marketing and selling of  
8 its products. GNC claims that it “sets the standard in the nutritional  
9 supplement industry by demanding truth in labeling, ingredient safety and  
10 product potency, all while remaining on the cutting-edge of nutritional  
11 science.” See [www.gnc.com](http://www.gnc.com). As touted by GNC, consumers believe that they  
12 are purchasing high-quality products when they buy the GNC brand, for  
13 which they will pay a premium price: “GNC is the world’s largest company  
14 of its kind devoted exclusively to helping its customers improve the quality of  
15 their lives. From scientific research and new product discovery to the  
16 manufacturing and packaging processes, GNC takes pride in our rigorous  
17 approach to ensuring quality.” *Id.*
- 18 5. GNC’s Products sell for between approximately \$39.99 to \$59.99, depending  
19 on the size of the container on the gnc.com website, with a discount for GNC  
20 members. As stated on the GNC website, the Products provide weight  
21 management support.<sup>3</sup>
- 22 6. Plaintiffs purchased the Products, and expected to receive a full container of  
23 Product. The Products are packaged in non-transparent containers, as  
24 depicted below. Plaintiffs were surprised and disappointed when they opened  
25 the Products to discover that the containers had roughly 30% empty space, or  
26 slack-fill. Had Plaintiffs known about the slack-fill at the time of purchase,  
27 they would not have bought Defendant’s Products.

28 <sup>3</sup> See, e.g., <http://www.gnc.com/GNC-Total-Lean-Lean-Shake-25-Natural/product.jsp?productId=64939736>. Accessed on December 16, 2015.

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1 7. Defendant’s conduct violates Consumer protection and labeling laws.

2 **JURISDICTION AND VENUE**

3 8. The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1332,  
4 because this is a class action, as defined by 28 U.S.C § 1332(d)(1)(B), in  
5 which a member of the putative class is a citizen of a different state than  
6 Defendant, and the amount in controversy exceeds the sum or value of  
7 \$5,000,000, excluding interest and costs. *See* 28 U.S.C. § 1332(d)(2).

8 9. The Court has jurisdiction over the state law claims because they form part of  
9 the same case or controversy under Article III of the United States  
10 Constitution.

11 10. The Court has personal jurisdiction over Defendant because its Products are  
12 advertised, marketed, distributed and sold through the State of California;  
13 Defendant engaged in the wrongdoing alleged in this Complaint throughout  
14 the United States, including in the State of California; Defendant is authorized  
15 to do business in the State of California; and Defendant has sufficient  
16 minimum contacts with the State of California, rendering the exercise of  
17 jurisdiction by the Court permissible under traditional notions of fair play and  
18 substantial justice. Moreover, Defendant is engaged in substantial activity  
19 with the State of California.

20 11. Venue is proper in the United States District Court for the Southern District of  
21 California pursuant to 28 U.S.C. § 1391(b) because a substantial part of the  
22 events giving rise to the claims occurred within this judicial district,  
23 Defendant has marketed and sold the Products at issue in this action in this  
24 judicial district, and it conducts business within this judicial district. In  
25 addition, Plaintiff Kevin Gioia resides in this judicial district.

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**PARTIES**

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- 2 12. Plaintiff Kevin Gioia (“Gioia”) is a citizen of the State of California and
- 3 resides in San Diego, California. On or about November 19, 2015, Plaintiff
- 4 Gioia purchased a GNC Total Lean Lean Shake Product for personal
- 5 consumption in San Diego, California. Plaintiff Gioia purchased the Product
- 6 in reliance on Defendant’s packaging in containers made, formed or filled as
- 7 to be misleading and containing non-functional slack-fill. Had Plaintiff Gioia
- 8 known the truth about Defendant’s misrepresentations, he would not have
- 9 purchased the premium priced Product.
- 10 13. Plaintiff Aurelio Batista (“Batista”) is a citizen of the State of New York and
- 11 resides in Haverstraw, New York. On or about October 22, 2015, Plaintiff
- 12 Batista purchased a GNC total Lean Lean Shake Product for personal
- 13 consumption in West Nyack, New York. Plaintiff Batista purchased the
- 14 Product in reliance on Defendant’s packaging in containers made, formed or
- 15 filled as to be misleading and containing non-functional slack-fill. Had
- 16 Plaintiff Batista known the truth about Defendant’s misrepresentations, he
- 17 would not have purchased the premium priced Product.
- 18 14. Defendant GNC Holdings, Inc. is a publicly-traded corporation with its
- 19 headquarters in Pittsburg, PA. GNC “is a leading global specialty health,
- 20 wellness and performance retailer, which is built on 80 years of superior
- 21 product quality and innovation. GNC connects customers to their best by
- 22 offering a premium assortment of vitamins, minerals, herbal supplements,
- 23 diet, sports nutrition and protein products.” See [www.gnc.com](http://www.gnc.com). This
- 24 premium assortment of products includes the proprietary GNC brand and the
- 25 Products at issue.

**FACTUAL ALLEGATIONS**

**Federal and State Laws Prohibit Non-functional Slack Full**

- 26
- 27 15. The Federal Food Drug and Cosmetic Act (“FDCA”), 21 U.S.C. §§ 301 *et*
- 28 *seq.*, governs the sale of foods, drugs and cosmetics in the United States. The

1 classification of a product as a food, drug, or cosmetic affects the regulations  
 2 by which the manufacturer must abide. In general, a product is characterized  
 3 according to its intended use, which may be established, among other ways,  
 4 by: (a) claims stated on the product's labeling, in advertising, on the Internet,  
 5 or in other promotional materials; (b) consumer perception established  
 6 through the product's reputation, for example by asking why the consumer is  
 7 buying it and what the consumer expects it to do; or (c) the inclusion of  
 8 ingredients well-known to have therapeutic use, for example fluoride in  
 9 toothpaste. The Products are characterized and understood by consumers to be  
 10 a food.

11 16. Under the FDCA, the term "false" has its usual meaning of untruthful, while  
 12 the term "misleading" is a term of art. Misbranding reaches not only false  
 13 claims, but also those claims that might be technically true, but still  
 14 misleading. If any one representation in the labeling is misleading, the entire  
 15 Product is misbranded. No other statement in the labeling cures a misleading  
 16 statement. "Misleading" is judged in reference to "the ignorant, the  
 17 unthinking and the credulous who, when making a purchase, do not stop to  
 18 analyze." *United States v. El-O-Pathic Pharmacy*, 192 F.2d 62, 75 (9th Cir.  
 19 1951). Under the FDCA, it is not necessary to prove that anyone was actually  
 20 misled.

21 **A. Misbranding of Foods**

22 17. The Product labels contain numerous ingredients found in or derived from  
 23 food, including whey protein, milk, oat bran and cocoa. The Products are  
 24 marketed and advertised as "Shakes," "Meal replacement" and as a  
 25 component of a meal and exercise plan.

26 18. Under the Federal Food Drug and Cosmetic Act ("FDCA"), 21 U.S.C. §  
 27 343(d), a food shall be deemed to be misbranded if "(a) . . . (1) its labeling is  
 28 false or misleading in any particular"; or "(d) If its container is so made,  
 formed, or filled as to be misleading."

1 19. Pursuant to 21 C.F.R. §100.100, a food is misbranded if “its container is so  
2 made, formed or filled as to be misleading.” In addition, “(a) A container that  
3 does not allow the consumer to fully view its contents shall be considered to  
4 be filled as to be misleading if it contains nonfunctional slack-fill. Slack-fill  
5 is the difference between the actual capacity of a container and the volume of  
6 product contained therein. Nonfunctional slack-fill is the empty space in a  
7 package that is filled to less than its capacity for reasons other than:

- 8 (1) Protection of the contents of the package;  
9 (2) The requirements of the machines used for enclosing the contents in such  
10 package;  
11 (3) Unavoidable product settling during shipping and handling;  
12 (4) The need for the package to perform a specific function (e.g., where  
13 packaging plays a role in the preparation or consumption of a food), where  
14 such function is inherent to the nature of the food and is clearly  
15 communicated to consumers;  
16 (5) The fact that the product consists of a food packaged in a reusable  
17 container where the container is part of the presentation of the food and has  
18 value which is both significant in proportion to the value of the product and  
19 independent of its function to hold the food, e.g., a gift product consisting of  
20 a food or foods combined with a container that is intended for further use  
21 after the food is consumed; or durable commemorative or promotional  
22 packages; or  
23 (6) Inability to increase level of fill or to further reduce the size of the  
24 package . . . .”

25 20. None of the above safe-harbor provisions applies to the Products. Defendant  
26 intentionally incorporated non-functional slack-fill in its packaging of the  
27 Products in order to mislead consumers, including Plaintiffs and Members of  
28 the Class. *Waldman v. New Chapter, Inc.*, 714 F. Supp. 2d 398, 405 (E.D.N.Y.

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2010) (“Misleading consumers is not a valid reason to package a product with slack-fill. *See* 21 C.F.R. § 100.100(a)(1-6).”).

21. Consumer protection and food labeling laws of the states of California and New York impose requirements which mirror the federal law. California Business & Professions Code states, “[n]o container shall be made, formed, or filled as to be misleading” and “[a] container that does not allow the consumer to fully view its contents shall be considered to be filled as to be misleading if it contains nonfunctional slack fill.” *See* Cal. Bus. & Prof. Code § 12606 (incorporating the safe harbor provisions of the CFR). *See also* Cal. Health and Safety Code § 110690 (“Any food is misbranded if its container is so made, formed, or filled as to be misleading.”); NY AGM. Law § 201 (“Food shall be deemed to be misbranded . . . . If its container is so made, formed, colored or filled as to be misleading.”).

**Defendant’s Products Contain Non Functional Slack-Fill**

22. Defendant’s Products are sold in non-transparent containers that contain different net weights. Each of the containers has significant slack-fill, as described below.

23. The container with approximately 27 ounces of Product is roughly 8 inches tall, with a 16 inch circumference. Up to and not including the space where the interior of the container narrows and above the indentation where the lid begins, approximately 30% of the interior of the containers is comprised of empty space, or non-functional slack fill. *See* PHOTO A.



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PHOTO A



- 24. Judging from the sizes of the containers, a reasonable consumer would expect them to be substantially filled with product. Consumers are misled into believing that they are purchasing substantially more Product than they receive.
- 25. There is no functional reason for including approximately 30% slack-fill in the Products.
- 26. On information and belief, consumers have relied upon, and are continuing to rely upon, the size of the Product containers as the basis for making purchasing decisions. Consumers believe that the Products are substantially full because they cannot see the actual contents within the non-transparent container. *See Waldman v. New Chapter, Inc.*, 714 F. Supp. 2d 398, 404 (E.D.N.Y. 2010) (finding that a half-filled supplement container could

1 constitute a “misleading representation” that resulted in the unjust enrichment  
2 of the manufacturer even though the weight of the product and the number of  
3 servings enclosed were clearly listed on the outer packaging).

4 27. On information and belief, Defendant is selling and will continue to sell the  
5 Products using these blatantly deceptive and misleading slack-filled  
6 containers.

7 28. Defendant’s packaging and advertising of the Products violates various state  
8 laws against misbranding, which contain requirements that mirror the FDCA,  
9 as described herein.

10 **Plaintiffs Relied on Defendant’s Misleading and Deceptive Conduct and Were**  
11 **Injured as a Result**

12 29. The types of misrepresentations made, as described herein, were considered  
13 by Plaintiffs and Class Members (as would be considered by a reasonable  
14 consumer) when deciding to purchase the Products. Reasonable consumers,  
15 including Plaintiffs and Class Members, attached importance to whether  
16 Defendant’s Products were misbranded, *i.e.*, not legally salable, or capable of  
17 legal possession, and/or contain non-functional slack-fill.

18 30. Plaintiffs and Class Members did not know, and had no reason to know, that  
19 the Products contained non-functional slack-fill.

20 31. Defendant’s Product packaging was a material factor in Plaintiffs’ and Class  
21 Members’ decisions to purchase the Products. Based on Defendant’s Product  
22 packaging, Plaintiffs and Class Members believed that they were getting more  
23 Product than was actually being sold. Had Plaintiffs known Defendant’s  
24 packaging was slack-filled, they would not have bought the slack-filled  
25 Products.

26 32. Plaintiffs and Class Members paid the full price of the Products and received  
27 less Product than they expected due to the non-functional slack-fill in the  
28 Products.

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1 33. There is no practical reason for the non-functional slack-fill used to package  
2 the Products other than to mislead consumers as to the actual volume of the  
3 Products being purchased by consumers.

4 34. As a result of Defendant’s misrepresentations, Plaintiffs and thousands of  
5 others throughout the United States purchased the Products. Plaintiffs and the  
6 Class (defined below) have been damaged by Defendant’s deceptive and  
7 unfair conduct.

8 **CLASS ACTION ALLEGATIONS**

9 35. Plaintiffs bring this action as a class action pursuant to Rule 23 of the Federal  
10 Rules of Civil Procedure on behalf of themselves and the following National  
11 class and subclasses (collectively, the “Class” or “Classes”), defined as:

12 National Class: All persons in the United States who made retail  
13 purchases of GNC Lean Shake Products in containers made, formed or  
14 filled as to be misleading and with non-functional slack-fill, during the  
15 applicable limitations period, and/or such subclasses as the Court may  
16 deem appropriate.

17 California Subclass: All California residents who made retail purchases  
18 of GNC Lean Shake Products in containers made, formed or filled as to be  
19 misleading and with non-functional slack-fill, during the applicable  
20 limitations period, and/or such subclasses as the Court may deem  
21 appropriate.

22 New York Subclass: All New York residents who made retail purchases of  
23 GNC Lean Shake Products in containers made, formed or filled as to be  
24 misleading and with non-functional slack-fill, during the applicable limitations  
25 period, and/or such subclasses as the Court may deem appropriate.

26 36. The proposed Classes exclude current and former officers and directors of  
27 Defendant, Members of the immediate families of the officers and directors of  
28 Defendant, Defendant’s legal representatives, heirs, successors, assigns, and

1 any entity in which it has or has had a controlling interest, and the judicial  
2 officer to whom this lawsuit is assigned.

3 37. Plaintiffs reserve the right to revise the Class definitions based on facts  
4 learned in the course of litigating this matter.

5 38. Numerosity: This action has been brought and may properly be maintained as  
6 a class action against Defendant under Rules 23(b)(1)(B) and 23(b)(3) of the  
7 Federal Rules of Civil Procedure. While the exact number and identities of  
8 other Class Members are unknown to Plaintiffs at this time, Plaintiffs are  
9 informed and believe that there are hundreds of thousands of Members in the  
10 Class. Based on sales of the Products, it is estimated that the Class is  
11 composed of more than 10,000 persons. Furthermore, even if subclasses need  
12 to be created for these consumers, it is estimated that each subclass would  
13 have thousands of Members. The Members of the Class are so numerous that  
14 joinder of all Members is impracticable and the disposition of their claims in a  
15 class action rather than in individual actions will benefit the parties and the  
16 courts.

17 39. Typicality: Plaintiffs' claims are typical of the claims of the Members of the  
18 Class as all Members of the Class are similarly affected by Defendant's  
19 wrongful conduct, as detailed herein.

20 40. Adequacy: Plaintiffs will fairly and adequately protect the interests of the  
21 Members of the Class in that they have no interests antagonistic to those of  
22 the other Members of the Class. Plaintiffs have retained experienced and  
23 competent counsel.

24 41. Superiority: A class action is superior to other available methods for the fair  
25 and efficient adjudication of this controversy. Since the damages sustained by  
26 individual Class Members may be relatively small, the expense and burden of  
27 individual litigation makes it impracticable for the Members of the Class to  
28 individually seek redress for the wrongful conduct alleged herein.  
Furthermore, the adjudication of this controversy through a class action will

1 avoid the potentially inconsistent and conflicting adjudications of the claims  
2 asserted herein. There will be no difficulty in the management of this action  
3 as a class action. If Class treatment of these claims were not available,  
4 Defendant would likely unfairly receive thousands of dollars or more in  
5 improper revenue.

6 42. Common Questions Predominate: Common questions of law and fact exist as  
7 to all Members of the Class and predominate over any questions solely  
8 affecting individual Members of the Class. Among the common questions of  
9 law and fact applicable to the Class are:

10 i. Whether Defendant labeled, packaged, marketed, advertised and/or  
11 sold Products to Plaintiffs, and those similarly situated, using false,  
12 misleading and/or deceptive packaging and labeling;

13 ii. Whether Defendant's actions constitute violations of 21 U.S.C.  
14 100.100, *et. seq.*;

15 iii. Whether Defendant's actions constitute violations of state consumer  
16 protection laws;

17 iv. Whether Defendant omitted and/or misrepresented material facts in  
18 connection with the labeling, packaging, marketing, advertising and/or sale  
19 of its Products;

20 v. Whether Defendant's labeling, packaging, marketing, advertising and/  
21 or selling of Products constituted an unfair, unlawful or fraudulent practice;

22 vi. Whether Defendant's packaging of the Products constituted  
23 nonfunctional slack-fill;

24 vii. Whether, and to what extent, injunctive relief should be imposed on  
25 Defendant to prevent such conduct in the future;

26 viii. Whether the Members of the Class have sustained damages as a result  
27 of Defendant's wrongful conduct;

28 ix. The appropriate measure of damages and/or other relief; and

1 x. Whether Defendant should be enjoined from continuing its unlawful  
2 practices.

3 43. The class is readily definable, and prosecution of this action as a Class action  
4 will reduce the possibility of repetitious litigation. Plaintiffs know of no  
5 difficulty which will be encountered in the management of this litigation  
6 which would preclude its maintenance as a Class action.

7 44. The prerequisites to maintaining a class action for injunctive relief or  
8 equitable relief pursuant to Rule 23(b)(2) are met, as Defendant has acted or  
9 refused to act on grounds generally applicable to the Class, thereby making  
10 appropriate final injunctive or equitable relief with respect to the Class as a  
11 whole.

12 45. The prerequisites to maintaining a class action for injunctive relief or  
13 equitable relief pursuant to Rule 23(b)(3) are met, as questions of law or fact  
14 common to the Class predominate over any questions affecting only  
15 individual Members; and a class action is superior to other available methods  
16 for fairly and efficiently adjudicating the controversy.

17 46. The prosecution of separate actions by Members of the Class would create a  
18 risk of establishing inconsistent rulings and/or incompatible standards of  
19 conduct for Defendant. Additionally, individual actions may be dispositive of  
20 the interest of all Members of the Class, although certain Class Members are  
21 not parties to such actions.

22 47. Defendant's conduct is generally applicable to the Class as a whole and  
23 Plaintiffs seek, *inter alia*, equitable remedies with respect to the Class as a  
24 whole. As such, Defendant's systematic policies and practices make  
25 declaratory relief with respect to the Class as a whole appropriate.

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**CAUSES OF ACTION**

**COUNT I**

**VIOLATION OF CALIFORNIA’S CONSUMER LEGAL REMEDIES ACT,  
Cal. Civ. Code § 1750, *et seq.***

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- 4 48. Plaintiffs reallege and incorporate herein by reference the allegations
- 5 contained in all preceding paragraphs, and further allege as follows:
- 6 49. Plaintiffs bring this claim individually and on behalf of the Class for
- 7 Defendant’s violations of California’s Consumer Legal Remedies Act
- 8 (“CLRA”), Cal. Civ. Code 1761(d).
- 9 50. Plaintiffs and the Class Members are consumers who purchased the Products
- 10 for personal, family or household purposes. Plaintiffs and the Class Members
- 11 are “consumers” as that term is defined by the CLRA in Cal. Civ. Code
- 12 1761(d). Plaintiffs and the Class Members are not sophisticated experts with
- 13 independent knowledge of corporate branding, labeling and packaging
- 14 practices.
- 15 51. The Products that Plaintiffs and other Class Members purchased from
- 16 Defendant were “goods” within the meaning of Cal. Civ. Code 1761(a).
- 17 52. Defendant’s actions, representations, and conduct have violated, and continue
- 18 to violate the CLRA, because they extend to transactions that intended to
- 19 result, or which have resulted in, the sale of goods to consumers.
- 20 53. Defendant violated federal and California law because the Products are
- 21 packaged in containers made, formed or filled as to be misleading and which
- 22 contain non-functional slack-fill, and because they are intentionally packaged
- 23 to prevent the consumer from being able to fully see their contents.
- 24 54. California’s Consumers Legal Remedies Act, Cal. Civ. Code 1770(a)(5),
- 25 prohibits “Misrepresenting that goods or services have sponsorship, approval,
- 26 characteristics, ingredients, uses, benefits, or quantities which they do not
- 27 have or that a person has a sponsorship, approval, status, affiliation, or
- 28 connection which he or she does not have.” By engaging in the conduct set
- forth herein, Defendant violated and continues to violate Section 1770(a)(5)
- of the CLRA. because Defendant’s conduct constitutes unfair methods of

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- 1 competition and unfair or fraudulent acts or practices, in that it misrepresents  
2 that the Products have quantities they do not have.
- 3 55. Cal. Civ. Code 1770(a)(9) further prohibits “[a]dvertising goods or services  
4 with intent not to sell them as advertised.” By engaging in the conduct set  
5 forth herein, Defendant violated and continues to violate Section 1770(a)(9),  
6 because Defendant’s conduct constitutes unfair methods of competition and  
7 unfair or fraudulent acts or practices, in that it advertises goods as containing  
8 more product than they in fact contain.
- 9 56. Plaintiffs and the Class Members are not sophisticated experts about corporate  
10 branding, labeling and packaging practices. Plaintiffs and the Class acted  
11 reasonably when they purchased the Products based on their belief that  
12 Defendant’s representations were true and lawful.
- 13 57. Plaintiffs and the Class suffered injuries caused by Defendant because (a) they  
14 would not have purchased the Products on the same terms absent Defendant’s  
15 illegal and misleading conduct as set forth herein; (b) they paid a price  
16 premium for the Products due to Defendant’s misrepresentations and  
17 deceptive packaging in containers made, formed or filled as to be misleading  
18 and containing non-functional slack-fill; and (c) the Products did not have the  
19 quantities as promised.
- 20 58. On or about December 15, 2015, prior to filing this action, a CLRA notice  
21 letter was sent Defendant which complies with California Civil Code 1782(a).  
22 Plaintiff Gioia sent GNC Holdings, Inc., individually and on behalf of the  
23 proposed Class, a letter via Certified Mail, advising Defendant that it is in  
24 violation of the CLRA and demanding that it cease and desist from such  
25 violations and make full restitution by refunding the monies received  
26 therefrom. A true and correct copy of Plaintiff Gioia’s letter is attached hereto  
27 as EXHIBIT 1.
- 28 59. Wherefore, Plaintiffs seek injunctive relief for these violations of the CLRA.



**COUNT II**

**VIOLATION OF CALIFORNIA’S UNFAIR COMPETITION LAW,  
California Business & Professions Code § 17200, et seq.**

60. Plaintiffs reallege and incorporate herein by reference the allegations contained in all preceding paragraphs, and further allege as follows:

61. Plaintiffs bring this claim individually and on behalf of the Members of the Class for Defendant’s violations of California’s Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200, et seq.

62. The UCL provides, in pertinent part: “Unfair competition shall mean and include unlawful, unfair or fraudulent business practices and unfair, deceptive, untrue or misleading advertising...”

63. Defendant violated federal and California law because the Products are packaged in containers made, formed or filled as to be misleading and that contain non-functional slack-fill and because they are intentionally packaged to prevent the consumer from being able to fully see their contents.

**A. “Unlawful” Prong**

64. Defendant’s business practices, described herein, violated the “unlawful” prong of the UCL by violating Section 352 of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. 301, the CLRA, Cal. Bus. & Prof. Code § 12606, California Health & Safety Code § 110690, and other applicable law as described herein.

65. Defendant violated section 12606 of the Business and Professions Code, in that Defendant packaged its Products in non-conforming type containers. Said non-conforming packages contained extra space by volume in the interior of the container. The extra space provided no benefit to the contents of the packaging and misled consumers. In addition, Defendant packaged its Products in containers made, formed, or filled as to be misleading to a potential customer as to the actual size and filling of the package with Defendant’s Products.

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**B. “Unfair” Prong**

66. Defendant’s business practices, described herein, violated the “unfair” prong of the UCL in that its conduct is substantially injurious to consumers, offends public policy, and is immoral, unethical, oppressive, and unscrupulous, as the gravity of the conduct outweighs any alleged benefits. Defendant’s advertising is of no benefit to consumers.

**C. “Fraudulent” Prong**

67. Defendant violated the “fraudulent” prong of the UCL by misleading Plaintiffs and the Class to believe that the Products contained more content than they actually contain and that such packaging and labeling practices were lawful, true and not intended to deceive or mislead consumers.

68. Plaintiffs and the Class Members are not sophisticated experts about the corporate branding, labeling, and packaging practices of the Products. Plaintiffs and the Class acted reasonably when they purchased the Products based on their belief that Defendant’s representations were true and lawful.

69. Plaintiffs and the Class lost money or property as a result of Defendant’s UCL violations because (a) they would not have purchased the Products on the same terms absent Defendant’s illegal conduct as set forth herein, or if the true facts were known concerning Defendant’s representations; (b) they paid a price premium for the Products due to Defendant’s misrepresentations; and (c) the Products did not have the quantities as represented.

70. The conduct of Defendant as set forth above demonstrates the necessity for granting injunctive relief restraining such and similar acts of unfair competition pursuant to California Business and Professions Code. Unless enjoined and restrained by order of the court, Defendant will retain the ability to, and may engage in, said acts of unfair competition, and misleading advertising. As a result, Plaintiffs and the Class are entitled to injunctive and monetary relief.

**COUNT III**

**VIOLATION OF CALIFORNIA’S FALSE ADVERTISING LAW,  
California Business & Professions Code § 17500, *et seq.***

- 1  
2  
3 71. Plaintiffs reallege and incorporate herein by reference the allegations  
4 contained in all preceding paragraphs, and further allege as follows:  
5  
6 72. Plaintiffs bring this claim individually and on behalf of the Members of the  
7 Class for Defendant’s violations of California’s False Advertising Law  
8 (“FAL”), Cal. Bus. & Prof. Code §§ 17500, *et seq.*  
9  
10 73. Under the FAL, the State of California makes it “unlawful for any person to  
11 make or disseminate or cause to be made or disseminated before the public in  
12 this state . . . . in any advertising device . . . or in any other manner or means  
13 whatever, including over the Internet, any statement, concerning . . . personal  
14 property or services, professional or otherwise, or performance or disposition  
15 thereof, which is untrue or misleading and which is known, or which by the  
16 exercise of reasonable care should be known, to be untrue or misleading.”  
17  
18 74. Defendant engaged in a scheme of offering misbranded Products for sale to  
19 Plaintiffs and the Class Members by way of packaging the Products in  
20 containers made, formed or filled as to be misleading and which contain non-  
21 functional slack-fill. Such practice misrepresented the content and quantity of  
22 the misbranded Products. Defendant’s advertisements were made in  
23 California and come within the definition of advertising as contained in Bus.  
24 & Prof Code §§ 17500, *et seq.* in that the product packaging was intended as  
25 inducements to purchase Defendant’s Products. Defendant knew its conduct  
26 was unauthorized, inaccurate, and misleading.  
27  
28 75. Defendant violated federal and California law because the Products are  
packaged in containers made, formed or filled as to be misleading and which  
contain non-functional slack-fill and because they are intentionally packaged  
to prevent the consumer from being able to fully see their contents.

- 1 76. Defendant violated 17500, *et seq.* by misleading Plaintiffs and the Class to  
2 believe that the Product packaging contains more product than it in fact  
3 contains, as described herein.
- 4 77. Defendant knew or should have known, through the exercise of reasonable  
5 care that the Products were and continue to be misbranded, and that its  
6 representations about the quantities of the Products were untrue and  
7 misleading.
- 8 78. Plaintiffs and the Class Members lost money or property as a result of  
9 Defendant's FAL violations because (a) they would not have purchased the  
10 Products on the same terms absent Defendant's illegal conduct as set forth  
11 herein, or if the true facts were known concerning Defendant's  
12 representations; (b) they paid a price premium for the Products due to  
13 Defendant's misrepresentations; and (c) the Products did not have the  
14 benefits, or quantities as promised, and as a result the class is entitled to  
15 monetary and injunctive relief.

16 **COUNT IV**

17 **VIOLATION OF NEW YORK DECEPTIVE TRADE PRACTICES ACT**  
18 **NEW YORK GENERAL BUSINESS LAW § 349**

- 19 79. Plaintiffs reallege and incorporate herein by reference the allegations  
20 contained in all preceding paragraphs, and further allege as follows:
- 21 80. Plaintiffs bring this claim individually and on behalf of the Members of the  
22 Class for Defendant's violations of New York's Deceptive Acts or Practices  
23 Law, NY GBL § 349.
- 24 81. NY GBL § 349 states that "deceptive acts or practices in the conduct of any  
25 business, trade or commerce or in the furnishing of any service in this state  
26 are ... unlawful."
- 27 82. Any person who has been injured by reason of a violation of NY GBL § 349  
28 may bring an action to enjoin such unlawful act or practice, an action to  
recover actual damages or fifty dollars, whichever is greater, or both. The  
court may, in its discretion, increase the award to an amount not to exceed

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1 three times the actual damage, up to one thousand dollars, if the conduct was  
2 willful or knowing.

3 83. It is not necessary to prove justifiable reliance under NY GBL § 349. *See*  
4 *Koch v. Acker, Merrall & Condit. Co.*, 18 N.Y.3d 940, 941 (N.Y. App. Div.  
5 2012) (“To the extent that the Appellate Division order imposed a reliance  
6 requirement on General Business law 349 . . . claims, it was error. Justifiable  
7 reliance by the plaintiff is not an element of the statutory claim.”) (internal  
8 citations omitted).

9 84. Defendant engaged in deceptive acts and practices by offering misbranded  
10 Products for sale in trade or commerce to Plaintiffs and the Class Members by  
11 way of packaging the Products in containers made, formed or filled as to be  
12 misleading and which contain non-functional slack-fill. Such practices were  
13 in violation of NY GBL § 349 and 21 C.F.R. 100.100.

14 85. Defendant violated federal and New York law because the Products are  
15 packaged in containers made, formed or filled as to be misleading and which  
16 contain non-functional slack-fill and because they are intentionally packaged  
17 to prevent consumers from being able to fully see their contents.

18 86. The foregoing deceptive acts and practices were directed at consumers.

19 87. Plaintiffs and the Class Members lost money or property as a result of  
20 Defendant’s violations of NY GBL § 349 because (a) they would not have  
21 purchased the Products on the same terms absent Defendant’s illegal conduct  
22 as set forth herein, or if the true facts were known concerning Defendant's  
23 representations; (b) they paid a price premium for the Products due to  
24 Defendant's misrepresentations; and (c) the Products did not have the benefits,  
25 or quantities as promised, and as a result the class is entitled to monetary and  
26 injunctive relief.

27 ///

28 ///

///

**COUNT V**  
**NEGLIGENT MISREPRESENTATION**

1  
2 88. Plaintiffs repeat and reallege each and every allegation contained above as if  
3 fully set forth herein, and further allege as follows:

4 89. Defendant, directly or through its agents and employees, made false  
5 representations, concealments and non disclosures to Plaintiffs and Members  
6 of the Class.

7 90. Defendant as the manufacturer, packager, labeler and initial seller of the  
8 Products purchased by Plaintiffs and Class Members had a duty to disclose  
9 the true quantity of the Products and to refrain from selling them in containers  
10 made, formed or filled as to be misleading and which contain non-functional  
11 slack-fill. Defendant had exclusive knowledge of material facts not known or  
12 reasonably accessible to Plaintiffs and Class Members; Defendant actively  
13 concealed material facts from Plaintiffs and Class Members and Defendant  
14 made partial representations that are misleading because some other material  
15 fact has not been disclosed. Defendant’s failure to disclose the information it  
16 had a duty to disclose constitutes material misrepresentations and materially  
17 misleading omissions which misled Plaintiffs and Class Members, who relied  
18 on Defendant in this regard to disclose all material facts accurately, truthfully  
19 and fully.

20 91. Plaintiffs and Members of the Class reasonably relied on Defendant’s  
21 representation that the Products contain more product than actually packaged.

22 92. In making the representations of fact to Plaintiffs and Members of the Class  
23 described herein, Defendant has failed to fulfill its duties to disclose the  
24 material facts set forth above. The direct and proximate cause of this failure  
25 to disclose was Defendant’s negligence and carelessness.

26 93. Defendant, in making the misrepresentations and omissions, and in engaging  
27 in the acts alleged above, knew or reasonably should have known that the  
28 representations were not true. Defendant made and intended the

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1 misrepresentations to induce the reliance of Plaintiffs and Members of the  
2 Class.

3 94. As the manufacturer of its Products, Defendant is in the unique position of  
4 being able to provide accurate information about those Products. Therefore  
5 there is a special and privity-like relationship between Defendant and  
6 Plaintiffs and other consumers.

7 95. Defendant has a duty to correct the misinformation it disseminated through its  
8 advertising of the Products. By not informing Plaintiffs and Members of the  
9 Class, Defendant breached its duty. Defendant also gained financially from  
10 and as a result of this breach.

11 96. By and through such deceit, misrepresentations and/or omissions, Defendant  
12 intended to induce Plaintiffs and Members of the Class to alter their position  
13 to their detriment. Plaintiffs and Members of the Class relied upon these false  
14 representations when purchasing Products in over-sized containers, which  
15 reliance was justified and reasonably foreseeable.

16 97. As a direct and proximate result of Defendant's wrongful conduct, Plaintiffs  
17 and Members of the Class have suffered and continue to suffer economic  
18 losses and other general and specific damages, including but not limited to the  
19 amounts paid for Products, and any interest that would have been accrued on  
20 all those monies, all in an amount to be determined according to proof at time  
21 of trial.

22 98. Defendant acted with intent to defraud, or with reckless or negligent disregard  
23 of the rights of Plaintiffs and Members of the Class.

24 99. Plaintiffs and Members of the Class are entitled to relief in an amount to be  
25 proven at trial, and injunctive relief.

26 //

27 //

28 //

//

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs pray for relief and judgment as follows:

- (A) For an Order certifying the Class pursuant to Federal Rule of Civil Procedure 23, appointing Plaintiffs as class representatives, and designating Plaintiffs’ counsel as counsel for the Class;
- (B) For an Order certifying the California Subclass, appointing Plaintiff Gioia representative of the California Subclass, and designating his counsel as counsel for the California Subclass;
- (C) For an Order certifying the New York Subclass, appointing Plaintiff Batista representative of the New York Subclass, and designating his counsel as counsel for the New York Subclass;
- (D) For an Order declaring that Defendant’s conduct violated the CLRA, Cal. Civ. Code § 1750, *et seq.*, and awarding (i) injunctive relief, (ii) costs of suit, and (iii) reasonable attorneys’ fees;
- (E) For an Order declaring that Defendant’s conduct violated California’s Unfair Competition Law, Cal. Bus. & Prof. Code § 17200, *et seq.*, and California’s False Advertising Law, Cal. Bus. & Prof. Code § 17500, *et seq.*, and awarding (i) injunctive relief, (ii) actual damages, (iii) prejudgment and post judgment interest, (iv) exemplary and/or punitive damages pursuant to Cal. Civ. Code § 3294, (v) costs of suit, and (vi) reasonable attorneys’ fees pursuant to, *inter alia*, Cal. Code of Civ. Proc § 1021.5;
- (F) For an Order declaring that Defendant’s conduct violated New York Gen Bus Law § 349, and awarding (i) injunctive relief, (ii) actual and statutory damages, (iii) treble damages, (iv) prejudgment and post judgment interest, and (v) reasonable attorneys’ fees;
- (G) For an Order finding that Defendant made Negligent Misrepresentations, and awarding special, general, and compensatory damages to Plaintiffs and the Class;

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- 1 (H) For compensatory damages in amounts to be determined by the Court and/or
- 2 jury;
- 3 (I) For prejudgment interest on all amounts awarded;
- 4 (J) For an order of restitution and all other forms of equitable monetary relief, as
- 5 pleaded;
- 6 (K) For injunctive relief as pleaded or as the Court may deem proper;
- 7 (L) For an Order awarding Plaintiffs and the Class their reasonable attorneys’
- 8 fees and expenses and costs of suit as pleaded; and
- 9 (M) For such other and further relief as the Court deems just and proper.

**DEMAND FOR TRIAL BY JURY**

10 Plaintiffs, individually and on behalf of all others similarly situated, hereby  
11 demand a jury trial on all claims so triable.

12 Dated: December 19, 2015

13 Respectfully submitted,

14 **KAZEROUNI LAW GROUP, APC**

15  
16 By: /s/ Abbas Kazerounian  
17 Abbas Kazerounian

18 ATTORNEY FOR

19 PLAINTIFFS

20 **GOTTLIEB & ASSOCIATES**

21 Jeffrey M. Gottlieb, Esq. (JG-7905)

22 Dana L. Gottlieb, Esq. (DG-6151)

23 Pro hac vice to be filed

24 150 East 18th Street

25 Suite PHR

26 New York, NY 10003

27 NYJG@aol.com

28 danalgottlieb@aol.com

Telephone: (212) 228-9795

Facsimile: (212) 982-6284

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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
Kevin Gioia and Aurelio Batista, Individually And On Behalf of All Others Similarly Situated

DEFENDANTS
GNC Holdings, Inc.

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

County of Residence of First Listed Defendant
(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, and Telephone Number)
Abbas Kazerounian, Esq. (SBN: 249203)
Kazerouni Law Group, APC
245 Fischer Avenue, Suite D1, Costa Mesa, CA 92626 (800) 400-6808

Attorneys (If Known)

'15CV2871 LAB BLM

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)

- Citizen of This State PTF 1 DEF 1
Citizen of Another State PTF 2 DEF 2
Citizen or Subject of a Foreign Country PTF 3 DEF 3
Incorporated or Principal Place of Business In This State PTF 4 DEF 4
Incorporated and Principal Place of Business In Another State PTF 5 DEF 5
Foreign Nation PTF 6 DEF 6

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

Table with 5 columns: CONTRACT, REAL PROPERTY, TORTS, CIVIL RIGHTS, PRISONER PETITIONS, FORFEITURE/PENALTY, LABOR, IMMIGRATION, BANKRUPTCY, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES. Contains various legal categories and checkboxes.

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 Cal. Civ. Code § 1750 et seq; Violations of Cal. Bus & Prof Code §§17200 et seq.

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. DEMAND \$ 5,000,000.00 CHECK YES only if demanded in complaint: JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY

(See instructions): JUDGE DOCKET NUMBER

DATE 12/18/2015 SIGNATURE OF ATTORNEY OF RECORD s/Abbas Kazerounian, Esq.

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.

# PLAINTIFF'S EXHIBIT A

CLRA Letter to GNC Holdings, Inc. Dated December 15,  
2015

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*In The Case Of*

*Kevin Gioia and Aurelio Batista, et al*

*v.*

*GNC Holdings, Inc.*

# KAZEROUNI LAW GROUP, APC

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## Consumer Attorneys

[www.kazlg.com](http://www.kazlg.com)

December 15, 2015

ATTORNEYS (Jurisdictions):  
Abbas Kazerooni, Esq. – Partner (CA, TX, AZ, IL)  
Mohammad Kazerooni, Esq. – Partner (CA)  
Assal Assassi, Esq. – Partner (CA)  
Matthew Loker, Esq. – Managing Associate (CA)  
Jason Ibey, Esq. – Associate (CA)  
Gouya Ranekouhi, Esq. – Associate (CA)  
Mona Amini, Esq. – Associate (CA)  
Danny Horen, Esq. – Managing Associate (NV)  
Matthew Kennedy, Esq. – Managing Associate (TX)  
Ryan McBride, Esq. – Managing Associate (AZ)

Masih Kazerooni, Esq. – Of Counsel (CA)  
Joshua Swigart, Esq. – Of Counsel (CA, DC)  
Robert Hyde, Esq. – Of Counsel (CA, MN)  
Andrei Armas, Esq. – Of Counsel (CA)  
Naomi Spector, Esq. – Of Counsel (CA)

### **SENT BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED**

GNC Holdings, Inc.  
c/o National Registered Agents, Inc. (Agent for Service)  
116 Pine Street, 3rd Floor, Suite 320  
Harrisburg, PA 17101

### **RE: Demand Letter Pursuant to California Civil Code § 1782**

Dear Sir or Madam:

This letter serves as notice and demand for corrective action by GNC Holdings, Inc. (“GNC”) pursuant to the Consumers Legal Remedies Act, California Civil Code § 1782 (“CLRA”). This letter is sent on behalf of our client, Kevin Gioia,<sup>1</sup> a purchaser of a GNC Lean Shake Product in the state of California, and all other persons similarly situated. We hereby demand that you take immediate corrective action within thirty (30) days as further described below.

GNC Lean Shake Products, including its Total Lean, Total Lean Advanced and Total Lean Control and Reduce (collectively, “Products”) are packaged in large, opaque containers that contain significant empty space, or “slack fill.” Consumers, in reliance on the size of the containers, paid a premium price for the Products, which they would not have purchased had they known about the significant slack fill. Among other things, the GNC Products are misbranded under federal and state law. GNC intentionally packed its Products in non-transparent containers with non-functional slack-fill in order to mislead consumers.

The above-described representations are false and misleading and constitute unlawful, unfair, or fraudulent acts or practices and unfair methods of competition in violation of the CLRA, including but not limited to §§ 1770(a)(5) and (9). The representations also

---

<sup>1</sup> This firm represents Mr. Gioia. Please refrain from contacting Mr. Gioia directly. Please direct any and all communications to this office.

**Demand Letter Pursuant to California Civil Code § 1782**  
**GNC Holdings, Inc.**

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Mohammad Kazerouni, Esq. – Partner (CA)  
Assal Assassi, Esq. – Partner (CA)  
Matthew Loker, Esq. – Managing Associate (CA)  
Jason Ibey, Esq. – Associate (CA)  
Gouya Ranekouhi, Esq. – Associate (CA)  
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Joshua Swigart, Esq. – Of Counsel (CA, DC)  
Robert Hyde, Esq. – Of Counsel (CA, MN)  
Andrei Armas, Esq. – Of Counsel (CA)  
Naomi Spector, Esq. – Of Counsel (CA)

violate California's Unfair Competition Law and False Advertising Law, California Business & Professions Code §§ 17200, *et seq.*, and 17500, *et seq.* GNC has and continues to mislead consumers into believing that the Product Containers are full, when in fact they contain substantial slack-fill. These misrepresentations allow GNC to increase its sales, charge a premium price for its products, and capture market share from its competitors.

If our client had known about the slack-fill contained in GNC's Products, he would not have purchased the Product. Our client is a citizen of the State of California and is a consumer as defined in California Civil Code § 1761(d) because he purchased a GNC Product for personal, family, or household purposes. Our client relied on the size of the GNC Product container in purchasing that Product. As a result, our client suffered loss of money.

We hereby demand on behalf of our client and all other similarly situated that GNC immediately: (1) cease and desist from continued sale of all GNC Total Lean Products containing slack-fill; (2) initiate corrective action; and (3) offer to refund the purchase price of all misrepresented GNC Total Lean Products purchased by our client, plus reimbursement for interest. Please comply with this demand within thirty (30) days from receipt of this letter. Additionally, this letter also serves as notice to GNC of its duty to preserve and retain all documents, tangible items, and electronically stored information that is potentially relevant to this matter.

If GNC wishes to enter into discussions to resolve the demands asserted in this letter, please contact me immediately. Your cooperation in this matter would be greatly appreciated.

Yours truly,

*/s/ Abbas Kazerounian*

Abbas Kazerounian, Esq.  
Direct Line: 800-400-6808 Ext: 2  
Email: [ak@kazlg.com](mailto:ak@kazlg.com)

cc: Joshua B. Swigart, Esq.

**Demand Letter Pursuant to California Civil Code § 1782**  
**GNC Holdings, Inc.**

**CALIFORNIA – NEVADA – TEXAS – ARIZONA**