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**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

JENNA KASKORKIS and KIM CARTER,
individually and on behalf of all other
similarly situated,

Plaintiffs,

v.

GENERAL NUTRITION CENTERS, INC.,
a Delaware Corporation, GENERAL
HOLDINGS, INC., a Delaware Corporation,

Defendant.

Case No: 3:16-cv-00990-WQH-JLB

**AMENDED CLASS ACTION
COMPLAINT**

JURY TRIAL DEMANDED

1 Jenna Kaskorkis and Kim Carter (“Plaintiffs”), individually and on behalf of all
2 others similarly situated, based on the investigation of counsel as to the actions and
3 omissions of defendants herein, and by their own individual knowledge as to those
4 averments pertaining to their own circumstances, hereby complain against defendants
5 General Nutrition Centers, Inc. and General Holdings, Inc. (collectively, “GNC” or
6 “Defendants”) as follows:

7 **INTRODUCTION**

8 1. This is a civil class action seeking monetary damages, restitution, and
9 injunctive and declaratory relief from GNC arising from its deceptive and misleading
10 labeling and marketing of merchandise it sells on its Internet website: www.gnc.com.

11 2. During the Class Period, GNC misrepresented the existence, nature, and
12 amount of price discounts on products for sale on its website by purporting to offer
13 steep discounts off of fabricated, arbitrary, and false former prices.

14 3. Specifically, on its website GNC represented “Regular Price(s)” that
15 were artificial, arbitrary, and did not represent a bona fide price at which GNC
16 formerly (or ever) sold the given product. Nor were the advertised “Regular Price(s)”
17 prevailing market retail prices within three months immediately preceding the
18 publication of the advertised former prices, as required by California law.

19 4. Having touted a false “Regular Price,” GNC then offered, on the same
20 web page as the false “Regular Price” representation, to sell the given product at a
21 price termed “Sales Price,” which supposedly represented a discount off of the false
22 “Regular Price.”

23 5. But GNC’s “Regular Price” representation, which represented to
24 consumers the purported market or former price of the given product, was a sham.
25 The “Regular Price” advertised for a given product did not represent a market price at
26 all — much less a former price in the preceding three months. They are fictional
27 creations designed to enable GNC’s phantom markdowns.

28 6. All products can be falsely advertised as “fifty-percent off” if an

1 unscrupulous retailer creates a fictional “Regular Price” that is twice the actual market
2 price of the product. Moreover, all goods can be advertised as on “sale” or
3 “discounted” if the unscrupulous seller uses a fictitious market price as the source of
4 comparison. Dishonest retailers are able to use the above-described deceptive
5 practices to successfully mislead consumers. This is because representations
6 regarding discounts are material; they are a fundamental representation of a good’s
7 value and, therefore, effectively motivate purchases. GNC markets products in this
8 manner, advertising false discounts to increase its sales and promote itself as a low
9 cost retailer.

10 7. The Federal Trade Commission (“FTC”) describes the fictitious pricing
11 scheme employed by GNC as deceptive:

12 One of the most commonly used forms of bargain advertising is to offer a
13 reduction from the advertiser's own former price for an article. *If the*
14 *former price is the actual, bona fide price at which the article was*
15 *offered to the public on a regular basis for a reasonably substantial*
16 *period of time, it provides a legitimate basis for the advertising of a price*
17 *comparison. Where the former price is genuine, the bargain being*
18 *advertised is a true one. If, on the other hand, the former price being*
19 *advertised is not bona fide but fictitious--for example, where an artificial,*
20 *inflated price was established for the purpose of enabling the subsequent*
21 *offer of a large reduction--the “bargain” being advertised is a false one;*
22 *the purchaser is not receiving the unusual value he expects. In such a*
23 *case, the “reduced” price is, in reality, probably just the seller's regular*
24 *price.*

16 C.F.R. § 233.1(a) (emphasis added).

20 8. Similarly, California statutory and regulatory law expressly prohibits
21 false pricing schemes. *Business & Professions Code* § 17501, entitled “*Value*
22 *determinations; Former price advertisements,*” states:

23 For the purpose of this article the worth or value of anything advertised is
24 the prevailing market price, wholesale if the offer is at wholesale, retail if
25 the offer at retail, at the time of publication of such advertisement in the
26 locality wherein the advertisement is published.

27 *No price shall be advertised as a former price of any advertised thing,*
28 *unless the alleged former price was the prevailing market price as above*
defined within three months next immediately preceding the publication

1 *of the advertisement* or unless the date when the alleged former price did
2 prevail is clearly, exactly and conspicuously stated in the advertisement.

3 (emphasis added).

4 9. When marketing products on its website, GNC displays a “sale” price
5 along with a purported “regular” price to invite comparison. The regular price is
6 displayed either in struck-through typeface (*e.g.* “~~Price: \$59.99~~”) or grayed typeface
7 (*e.g.* “Regular Price: \$59.99”) that is placed directly above the more prominently
8 displayed “sale price” presented in red font (*e.g.* “Sales Price: \$59.99”). Any
9 reasonable consumer viewing GNC’s website would believe that the “~~Price:~~
10 ~~\$XX.XX~~” or “Regular Price: \$XX.XX” is GNC’s normal price for the product and/or
11 the prevailing price of the market (*i.e.* the “regular” price). The difference between
12 this “Regular” price and GNC’s “Sales Price” is viewed as a discount or purported
13 savings. GNC’s advertised “discounts,” however, are completely illusory or, at best,
14 grossly overstated.

15 10. GNC’s “regular” price is not the prevailing market price for the subject
16 product from either one of GNC’s competitors or the price charged by GNC for the
17 product in the regular course of its business. Rather, the “regular” price is either (1)
18 the highest price the product has ever been listed for, regardless of when the price was
19 advertised, or (2) is simply a fiction. Stated plainly, GNC cherry-picks the highest
20 price it can find for an item and uses it as a benchmark to create the appearance of a
21 significant price discrepancy and convey the impression of considerable savings.
22 Instead, it is GNC’s “sale” prices that are the regular price for which its subject
23 products are offered.

24 11. GNC’s “sale” prices, in reality, are often higher than the prices of its
25 competitors and products marked as on “sale” are invariably sold without a true
26 discount. GNC’s customers are not receiving the benefit of the savings advertised by
27 purchasing “discounted” products from GNC. In fact, even if GNC’s prices were
28 competitive with other retailers in the market (which they are not), a customer still

1 incurs higher costs by purchasing a product through GNC.com due to shipping and
2 handling fees, expenses not incurred at traditional brick-and-mortar retailers.

3 12. Thousands of consumers, including the Plaintiffs, were victims of GNC’s
4 deceptive, misleading, and unlawful false pricing scheme and thousands more will be
5 so victimized if the practices continue.

6 13. GNC fraudulently concealed from, and intentionally failed to disclose to,
7 Plaintiffs and others similarly situated, the truth about what it called its “Regular
8 Price(s)” and advertised price discounts from those supposedly former or “Regular”
9 prices.

10 14. Plaintiffs relied upon such false representations of the “Regular Price”
11 and so-called discounts when purchasing goods from the GNC website. Plaintiffs
12 would not have made such purchase, or would not have paid the amount they did, but
13 for GNC’s false representations of the former price or “Regular Price” of the goods
14 they purchased, as compared with the supposedly discounted “Sales Price” at which
15 GNC offered the items for sale.

16 15. Plaintiffs, in short, believed the truth of the price representations attached
17 to the products they purchased from GNC, which expressly told them that they were
18 getting a bargain on their purchases. In fact, Plaintiffs were not receiving bargains at
19 all.

20 16. Through its false and deceptive marketing, advertising, and pricing
21 scheme, GNC violated (and continues to violate) California law prohibiting
22 advertising goods for sale as discounted from former prices which are false, and
23 prohibiting misleading statements about the existence and amount of price reductions.
24 Specifically, GNC violated (and continues to violate) California’s False Advertising
25 Law (“FAL”), CAL. BUS. & PROF. CODE §§ 17501, *et seq.*, the California Consumer
26 Legal Remedies Act (“CLRA”), CAL. CIV. CODE §§ 1770, *et seq.*, the California
27 Unfair Competition Law (“UCL”), CAL. BUS. & PROF. CODE §§ 17000, *et seq.*, and
28 the Federal Trade Commission Act (“FCTA”), which prohibits “unfair or deceptive

1 acts or practices in or affecting commerce” and specifically prohibits false
2 advertisements. 15 U.S.C. § 52(a); 15 U.S.C. § 45(a)(1).

3 17. Plaintiffs, individually and on behalf of all others similarly situated, seek
4 restitution and other equitable remedies, including declaratory relief and and
5 injunctive relief under the UCL, FAL, and CLRA.

6 **JURISDICTION AND VENUE**

7 18. This Court has original jurisdiction over the subject matter of this action
8 pursuant to the Class Action Fairness Act, 28 U.S.C. §§1332(d), 1446, and 1453(b).
9 Plaintiffs and Class members are citizens of different states as the Defendants, and
10 more than two-thirds of the proposed plaintiff class, on the one hand, and Defendants,
11 on the other, are citizens of different states. The aggregate amount in controversy for
12 Plaintiffs and the Class members exceeds \$5 million, exclusive of interest and costs.

13 19. This Court has personal jurisdiction over Defendants because Defendants
14 conduct business in California and otherwise intentionally avail themselves of the
15 markets in California to render the exercise of jurisdiction by this Court proper.
16 Defendant has marketed, promoted, distributed, and sold the products in California.

17 20. Venue is proper in this District pursuant to 28 U.S.C. §1391(b) because a
18 substantial part of the acts and transactions giving rise to the violations of law
19 complained of herein occurred in this District, and because Defendants:

20 (a) conduct business itself or through agent(s) in this District by advertising,
21 marketing, distributing, and/or retailing its products in this District; and/or

22 (b) are licensed or registered in this District; and/or

23 (c) otherwise have sufficient contacts with this District to justify Defendants
24 being fairly brought into court in this District.





25 **PARTIES**

26 21. Plaintiff Jenna Kaskorkis is a resident of San Diego, California. Plaintiff
27 Kim Carter is a resident of Oakland, California. Both Plaintiffs purchased the
28 products alleged herein from GNC.com, while residing in California.

22. Defendants GNC Holdings, Inc. and General Nutrition Centers, Inc., are Delaware Corporations headquartered in Pittsburgh, Pennsylvania. GNC is one of the largest online retailers of nutritional supplements, health and diet products, and beauty supplies in the United States. GNC operates a retail store website: www.gnc.com.

FACTUAL ALLEGATIONS

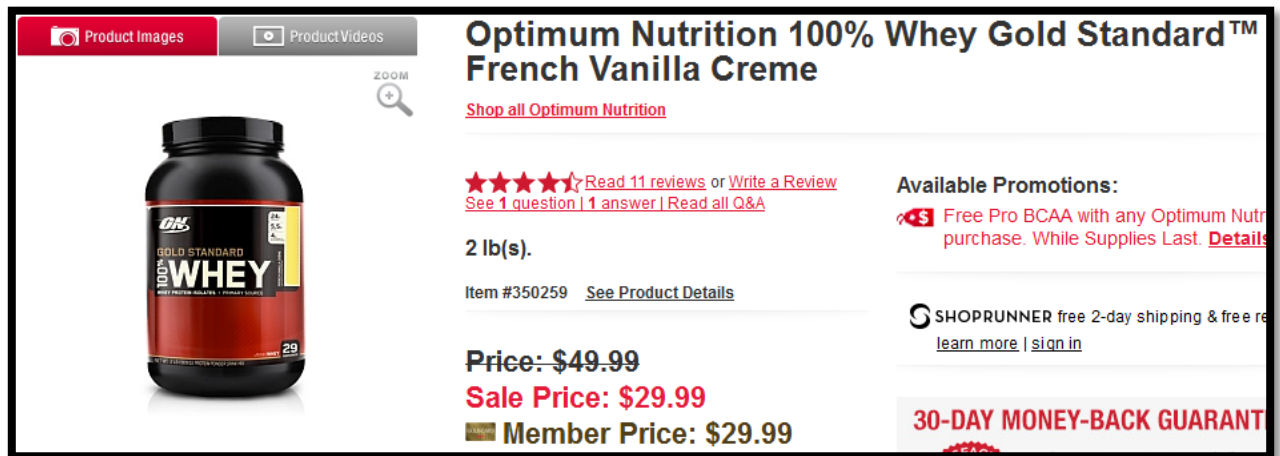
23. Customers of the GNC retail website can navigate its contents by either using a key-word search to find a specific product or by browsing products grouped by category (e.g., “Vitamins,” “Sports Nutrition,” etc.). Regardless of the method, consumers are presented with webpages of “results” responsive to their request. These result webpages provide a title, price, and picture of multiple products fitting the description of the product of interest, so that a consumer can quickly find the item they wish to purchase:

 <p>View All Flavors</p>	<p>GNC Pro Performance® AMP Amplified Wheybolic Extreme 60™ Original 3 lb(s).</p> <p>★★★★★ Read 269 Reviews</p> <p>Price: \$76.99</p> <p>Member Price: \$54.99 Become a Member</p>	 <p>View All Flavors</p>	<p>GNC Pro Performance® 100% Whey Protein 4.79 lb(s).</p> <p>★★★★☆ Read 19 Reviews</p> <p>Price: \$79.99</p> <p>Member Price: \$49.99 Become a Member</p>
 <p>View All Flavors</p>	<p>Optimum Nutrition 100% Whey Gold Standard™ 2 lb(s).</p> <p>★★★★★ Read 11 Reviews</p> <p>Regular Price: \$49.99 to \$49.99 Sale Price: \$32.99 to \$34.99</p> <p>Member Price: \$29.99 Become a Member</p> <p>Free Pro BCAA with any Optimum Nutrition purchase. While Supplies Last.</p>	 <p>View All Flavors</p>	<p>Optimum Nutrition Gold Standard 100% Whey™ 5 lb(s).</p> <p>★★★★★ Read 26 Reviews</p> <p>Regular Price: \$99.99 Sale Price: \$64.99</p> <p>Member Price: \$59.99 Become a Member</p> <p>Free Pro BCAA with any Optimum Nutrition purchase. While Supplies Last.</p>

GNC displays only a limited amount of information on its “results pages.” Among the information provided are the product’s “Regular Price” and its “Sales Price.”

1 Immediately below the regular price is GNC's "Sales Price," which is lower than the
 2 Regular Price and displayed in red, bold font. Sale prices are found only on select
 3 products, thereby reinforcing the perception that these products are on sale.

4 24. When a customer selects a product from the results webpage, they are
 5 directed to a webpage that contains detailed information about the selected product.
 6 GNC's discount pricing is prominently displayed on this webpage as well. Using the
 7 protein powder purchased by Plaintiffs as an example, the following is an excerpt
 8 from GNC's webpage for the Optimum Nutrition 100% Whey protein powder:



17 Similar to the results webpage, GNC uniformly presents its "Regular Price" in
 18 stricken typeface and the "Sales Price" in red font.

19 25. On or about March 10, 2016, Plaintiff Kaskorkis shopped on the GNC
 20 website. She observed that merchandise was advertised with a "Regular Price"
 21 directly next to a significantly reduced "Sale Price." Enticed by the idea of paying a
 22 price significantly less than the market price, Kaskorkis was induced to purchase two
 23 items (Order No. 4480155595): a 2lb container of Optimum Nutrition 100% Whey
 24 Gold Standard™ French Vanilla Creme protein powder, Item No. 3267258 and a 60-
 25 tablet bottle of Healthy Natural Systems' Garcinia Cambogia Extract, Item No.
 26 19152796. GNC represented the Optimum Nutrition Whey 100% Gold Standard™
 27 protein powder as having a "Regular Price" of \$49.99, with a "Sale Price" of \$34.99.
 28 Similarly, GNC advertised the Healthy Natural Systems® Garcinia Cambogia Extract

1 with a “Regular Price” of \$26.99 and a “Sale Price” of \$17.99. Kaskorkis purchased
2 these items for the advertised “Sale Price.”

3 26. By purchasing the Optimum Nutrition Whey 100% Gold Standard™
4 protein powder and Healthy Natural Systems® Garcinia Cambogia Extract for the
5 “Sale Price” of \$34.99 and \$17.99, respectively, instead of the “Regular Price” or
6 market price, Kaskorkis was led to believe that she saved approximately 33% on her
7 purchase. In reality, GNC never intended, nor did it ever, sell these items at the
8 represented market or “Regular Price.” Thus, Kaskorkis was deceived by the false
9 price comparison into making a full retail purchase with no discount.

10 27. Similarly, on February 13, 2016, Plaintiff Carter also purchased a number
11 of products from GNC’s website based on Defendants’ false pricing representations.
12 For example, Carter purchased 12 pack of Quest Protein Bars: Cookies and Crème
13 flavor for the “Sale Price” of \$25.99. The same product also was advertised as having
14 a “Regular Price” of \$35.99. Accordingly, Defendants represented that Carter was
15 saving approximately 30% of the product’s regular price. Defendants, however, had
16 been offering the 12 pack of Quest Protein Bars for \$25.99 in the three months
17 preceding her purchase. Carter saved nothing when compared to Defendants’ regular
18 pricing. But even worse, other retailers, including the manufacturer of the Quest
19 Protein Bars, had been selling the same product for \$24.99 (a dollar less than
20 Defendants’ price) at the same time and in the three months preceding Carter’s
21 purchase. Accordingly, Carter actually paid more purchasing Defendants’ “discount”
22 products than she would have had she purchased them from GNC’s competitors.

23 28. Plaintiffs’ and class members’ reliance on GNC’s false price comparison
24 advertising was reasonable. In fact, empirical market studies provide an incentive for
25 retailers to engage in this false and fraudulent behavior:

26 [c]omparative price advertising offers consumers a basis for comparing
27 the relative value of the product offering by suggesting a monetary worth
28 of the product and any potential savings...[A] comparative price
advertisement can be construed as deceptive if it makes any

1 representation, ... or involves any practice that may materially mislead a
2 reasonable consumer.

3 Dhruv Grewal and Larry D. Compeau, *Comparative Price Advertising: Informative or*
4 *Deceptive?*, JOURNAL OF PUBLIC POLICY & MARKETING, Vol. 11, No. 1, at 52 (Spring
5 1992). In short:

6 [b]y creating an impression of savings, the presence of a higher reference
7 price enhances subjects' perceived value and willingness to buy the
8 product... Thus, if the reference price is not truthful, a consumer may be
encouraged to purchase as a result of a false sense of value.

9 *Id.* at 55-56.

10 29. By using both a "Regular" and a "Sale" price, Defendant communicates
11 that its products are discounted from their normal, everyday pricing, and are less
12 expensive than the market price. Plaintiffs and the putative class rely on these
13 representations to make purchasing decisions. Thus, GNC makes the "regular" price
14 as large as possible to exaggerate the savings that are supposedly realized by either (1)
15 using the highest "Regular" price at which a product has ever been listed on its
16 website (regardless of when the price was established or if it represents the price at
17 which the product would normally be sold by GNC), or (2) completely fabricating the
18 baseline price. Accordingly, GNC knows, or should have known, that it misinforms
19 its consumers regarding the discount pricing of its products.

20 30. GNC's illusory discounts are particularly misleading because consumers
21 often decide to make purchases based on an internal reference price – *i.e.*, customers
22 will often make a purchasing decision when they believe products to be less expensive
23 than the perceived "normal" value of a given item. By featuring "discounts" derived
24 from improper price comparisons, GNC takes advantage of this well-documented
25 behavior in order to influence its customers into purchasing an item. GNC's practices
26 also mollify consumers' concerns about missing a "better deal" and discourages
27 comparison shopping by creating a false sense of urgency (an impression that the
28 "sale" pricing is temporary and that a consumer should act quickly or lose significant

1 savings).

2 31. GNC also inflates its “Regular” prices to maintain the illusion that GNC
3 pricing is consistently lower than other retailers. “Online retailers don’t use blowout
4 sales since it’s so easy to shop there. But to provide confidence to consumers that
5 they are consistently getting good deals, it’s even more important for them to provide
6 price comparisons.”¹ If GNC actually advertised a valid “Regular” price that
7 accurately reflected the current market price of a product, consumers would be aware
8 that GNC does not provide the deals it purportedly offers and would not make
9 purchases from its website.

10 32. By way of example, at the time of Plaintiff Kaskorkis’ purchase, and in
11 the three months preceding, Bodybuilding.com offered the Optimum Nutrition 100%
12 Whey Gold Standard Protein Powder, 2 lbs, for approximately \$29.98 while
13 Amazon.com offered the same product for approximately \$29.99. GNC’s price, as
14 paid by Plaintiff Kaskorkis, was significantly more expensive at \$34.99. Even the
15 manufacturer, Optimum Nutrition, offers this product for the lessor price of \$29.99
16 through its website. Yet, GNC advertises that its Optimum Nutrition 100% Whey
17 Gold Standard protein powder is substantially discounted from the “Regular Price” of
18 \$49.99, even though this was not the actual, *bona fide* price at which the product was
19 offered on either GNC.com or at any of its major competitors for the past three
20 months.

21 33. Furthermore, the “Regular Price” for the Healthy Natural Systems
22 Garcinia Cambogia Extract was not actually \$26.99 and this product was not on
23 “sale.” Neither GNC nor its major competitors had sold this Garcinia Cambogia
24 Extract for \$26.99 – which is two dollars more than the Manufacturer’s Suggested
25

26 ¹ See David Streitfeld, *It’s Discounted, but Is It a Deal? How List Prices Lost*
27 *Their Meaning*, NEW YORK TIMES (March 6, 2016), available at
28 <<http://www.nytimes.com/2016/03/06/technology/its-discounted-but-is-it-a-deal-how-list-prices-lost-their-meaning.html>>.

1 Retail Price – in the three months preceding Plaintiff’s purchase. GNC had instead
2 sold the Healthy Natural Systems Garcinia Cambogia Extract for as little as \$13.99 in
3 September of last year. Thus, Plaintiff did not receive the benefit of GNC’s advertised
4 bargain.

5 34. These false discounts are not limited to the products that Plaintiff
6 purchased. Instead, these false and misleading discounts appear on a large percentage
7 of GNC’s products.

8 35. Despite the “Regular Price”/“Sale Price” scheme used by GNC, Plaintiffs
9 would purchase GNC products in the future from the GNC website and/or other retail
10 establishments, if discount representations accurately reflect former prices and
11 discounts. Currently, however, Plaintiff and California consumers have no realistic
12 way to know which — if any — of GNC’s price comparisons are truthful. If the
13 Court were to issue an injunction ordering GNC to comply with California’s
14 comparative price advertising laws, and prohibiting GNC’s use of the deceptive
15 practices discussed herein, Plaintiffs would likely shop for GNC products again in the
16 near future on the GNC website.

17 36. By marketing products’ “Regular” prices at artificially high levels –
18 levels that would not be competitive in the current prevailing market – GNC concocts
19 discounts that do not exist.

20 37. Such practice is not novel or unique; unscrupulous retailers have
21 historically used the same misleading tactic. Both California lawmakers and federal
22 regulators prohibited such injurious conduct. As stated above, California Business &
23 Professions Code, section 17501, specifically states that:

24 No price shall be advertised as a former price of any advertised thing,
25 unless the *alleged former price was the prevailing market price as above*
26 *defined within three months next immediately preceding the publication*
27 *of the advertisement or unless the date when the alleged former price did*
prevail is clearly, exactly and conspicuously stated in the advertisement.

28 (Emphasis added).

1 42. Excluded from the Class are GNC, its parents, subsidiaries, affiliates,
2 officers and directors, any entity in which GNC has a controlling interest, all
3 customers who make a timely election to be excluded, governmental entities, and any
4 judge, justice or judicial officer presiding over this matter and members of their
5 immediate families and judicial staff.

6 43. Plaintiffs reserve the right to amend the Class definition if further
7 investigation and discovery indicates that the Class definition should be narrowed,
8 expanded, or otherwise modified.

9 44. Numerosity. While the exact number of Class members is unknown to
10 Plaintiffs at this time, and will be ascertained through appropriate discovery, Plaintiffs
11 are informed and believes that the Class consists of thousands of members. The
12 number of individuals who comprise the Class is so numerous that joinder of all such
13 persons is impracticable and the disposition of their claims in a class action, rather
14 than in individual actions, will benefit both the parties and the courts.

15 45. Typicality. Plaintiffs' claims are typical of the claims of the other
16 members of the Class. All members of the Class have been and/or continue to be
17 similarly affected by GNC's wrongful conduct as complained of herein, in violation of
18 federal and state law. Plaintiffs are unaware of any interests that conflict with or are
19 antagonistic to the interests of the Class.

20 46. Adequacy of Representation. Plaintiffs will fairly and adequately protect
21 the Class members' interests and have retained counsel competent and experienced in
22 consumer class action lawsuits and complex litigation. Plaintiffs and their counsel
23 have the necessary financial resources to adequately and vigorously litigate this class
24 action, and Plaintiffs are aware of their duties and responsibilities to the Class.

25 47. Commonality. GNC has acted with respect to the Class in a manner
26 generally applicable to each Class member. Common questions of law and fact exist
27 as to all Class members and predominate over any questions wholly affecting
28 individual Class members. There is a well-defined community of interest in the

1 questions of law and fact involved in the action, which affect all Class members.
2 Among the questions of law and fact common to the Class are, *inter alia*:

3 a. Whether, during the Class Period, GNC used false representations
4 and falsely advertised price discounts on its products sold on the GNC website;

5 b. Whether, during the Class Period, GNC advertised its “discounted”
6 products in a deceptive, false, or misleading manner;

7 c. Whether, during the Class Period, the market prices advertised by
8 GNC were the prevailing market prices for the respective products sold at the GNC
9 website during the three month periods preceding the dissemination and/or publication
10 of the advertised former prices;

11 d. Whether, during the Class Period, GNC’s advertised “Regular”
12 prices for its products are determined by averaging the price of the given product in
13 the prevailing market over the previous three months;

14 e. Whether GNC engaged in unfair, unlawful, and/or fraudulent
15 business practices under California Law;

16 f. Whether GNC misrepresented and/or failed to disclose material
17 facts about its product pricing and discounts;

18 g. Whether GNC has made false or misleading statements of fact
19 concerning the reasons for, existence of, or amounts of price reductions;

20 h. Whether GNC advertised the date on which the “Regular” price of
21 a product was determined;

22 i. Whether GNC’s alleged business practices constitute unfair
23 methods of competition and unfair or deceptive acts or practices in violation of, *inter*
24 *alia*, CAL. BUS. & PROF. CODE §§ 1770, *et seq.*, by making false or misleading
25 statements of fact concerning reasons for, existence of, or amounts of price reductions;

26 j. Whether GNC’s business practices, alleged herein, constitute
27 misleading and deceptive advertising under, *inter alia*, CAL. BUS. & PROF. CODE §§
28 17500-01;

1 k. Whether GNC's business practices, alleged herein, constitute
2 "unlawful," "unfair," or "fraudulent" business acts or practices under, *inter alia*, CAL.
3 BUS. & PROF. CODE §§ 17200, including: whether GNC's advertisement of illusory
4 discounts constitutes "unlawful" or "unfair" business practices by violating the public
5 policies set out in CAL. CIV. CODE §§ 1770(a)(13), CAL. BUS. & PROF. CODE §§
6 17500-01, 16 C.F.R. § 233.1, and other California and federal statutes and regulations;

7 l. Whether GNC's conduct, as alleged herein, was intentional and
8 knowing;

9 m. Whether Class members are entitled to damages and/or restitution,
10 and in what amount;

11 n. The nature and extent of equitable remedies, including restitution
12 of shipping costs; and declaratory and injunctive relief to which Plaintiffs and the
13 Class are entitled

14 o. Whether GNC is likely to continue using false, misleading or
15 illegal price comparisons such that an injunction is necessary; and

16 p. Whether Plaintiffs and Class members are entitled to an award of
17 reasonable attorneys' fees, pre-judgment interest, and costs of suit.

18 48. Superiority of Class Action. A class action is superior to all other
19 available methods for the fair and efficient adjudication of this controversy since
20 joinder of all members is impracticable. Furthermore, as the damages suffered by
21 individual Class members may be relatively small, the expense and burden of
22 individual litigation make it virtually impossible for Class members to individually
23 redress the wrongs done to them. There will be no difficulty in managing this action
24 as a class action.

25 **FIRST CAUSE OF ACTION**

26 **Violation of CAL. BUS. & PROF. CODE §§ 17500, *et seq.* -**
27 **Untrue, Misleading and Deceptive Advertising**

28 49. Plaintiffs hereby incorporate by reference each of the allegations

1 contained in the preceding paragraphs of this Complaint.

2 50. California Business and Professional Code, section 17501, states that:

3 No price shall be advertised as a former price of any advertised thing,
4 unless the alleged former price was the prevailing market price as above
5 defined within three months next immediately preceding the publication
6 of the advertisement or unless the date when the alleged former price did
prevail is clearly, exactly and conspicuously stated in the advertisement.

7 For the purpose of section 17501, the retail market price at the time of publication of
8 such advertisement is the retail price in locality wherein the advertisement is
9 published.

10 51. At all material times, GNC engaged in a scheme of advertising that its
11 products were subject to a discount when such discounts were illusory and did not
12 reflect the “prevailing marketing price” of the item for a particular time period in a
13 particular location, or even the price at which the product was recently sold on GNC’s
14 website.

15 52. At all material times, GNC did not include the date on which its
16 “Regular” price was established.

17 53. GNC’s advertisement of an inflated “Regular Price” misrepresented
18 and/or omitted the true nature of GNC’s pricing. Said advertisements were made to
19 consumers located within the State of California and come within the definition of
20 advertising as contained in CAL. BUS. & PROF. CODE §§ 17500, *et seq.*, in that such
21 promotional materials were intended as inducements to purchase products on GNC’s
22 website and are statements disseminated by GNC to Plaintiffs and other members of
23 the Class. GNC knew, or in the exercise of reasonable care should have known, that
24 the statements regarding its pricing were false, misleading, deceptive and violated
25 California law.

26 54. GNC has prepared and distributed within the United States, *via* its retail
27 website, www.GNC.com, advertising that its products were subject to substantial
28 discounts. Plaintiffs necessarily and reasonably relied on GNC’s statements regarding

1 the pricing of its products, and all members of the Class were exposed to such
2 statements. Consumers, including Plaintiffs and members of the Class, were among
3 the intended targets of such representations.

4 55. The above acts of GNC, in disseminating said misleading and deceptive
5 statements throughout the United States, including to Plaintiffs and members of the
6 Class, were and are likely to deceive reasonable consumers by obfuscating the true
7 nature of GNC's discounts. Thus, the above acts constitute violations of CAL. BUS. &
8 PROF. CODE §§ 17500, *et seq.*

9 56. Plaintiffs and other members of the Class who purchased products from
10 GNC's website suffered a substantial injury. Had Plaintiffs and members of the Class
11 known that GNC's materials, advertisements, and other inducements misrepresented
12 and/or omitted the true nature of GNC's discounts, they would not have purchased
13 products from GNC.com, or would have paid less for them.

14 57. Plaintiffs, on behalf of themselves and all other similarly situated
15 consumers, and as appropriate, on behalf of the general public, seek restitution and
16 injunctive relief: (1) prohibiting GNC from continuing the unlawful practices alleged
17 herein, (2) directing GNC to make corrective notices both on its website and in other
18 appropriate media, (2) allowing Class members to return any products purchased on
19 GNC's website, at GNC's expense, that were subject to GNC's unlawful pricing
20 policy or, alternatively, requiring GNC to price match any competitor's advertised
21 price for the same product, and refund any shipping and handling fees for any
22 products purchased on GNC's website subject to GNC's unlawful pricing policy, and
23 (4) any other relief deemed proper by the Court.

24 **SECOND CAUSE OF ACTION**

25 **Violation of CAL. CIV. CODE §§ 1750, *et seq.*-**
26 **Misrepresentation of the Existence of a Discount**

27 58. Plaintiffs hereby incorporate by reference each of the allegations
28 contained in the preceding paragraphs of this Complaint.

1 59. GNC sells “goods” and “services” as defined by California Civil Code §
2 1761.

3 60. Each of the Defendants is a "person" as defined by California Civil Code
4 § 1761(c).

5 61. Plaintiffs and Class members are "consumers" within the meaning of
6 California Civil Code §1761(d) because they purchased the products from GNC.com
7 for personal, family or household use.

8 62. The sale of the products to Plaintiffs and Class members *via* GNC’s
9 website is a “transaction” as defined by California Civil Code § 1761(e).

10 63. As described herein, GNC violated the Consumers Legal Remedies Act
11 (“CLRA”) by falsely representing the nature, existence, and amount of price discounts
12 by fabricating inflated market or “Regular” prices. Such a pricing scheme violates
13 California Civil Code: (i) Section 1770(a)(5) because GNC represented that its
14 products have characteristics and benefits (discounts) that they do not have (because
15 the items were not actually sold at the advertised “Regular” price for a reasonable
16 period of time, and thus no true discount is being offered); (ii) Section 1770(a)(7)
17 because GNC represented that its products were of a particular standard, quality, or
18 grade (that the subject products were worth a higher “Regular” price and thus were
19 more valuable) when they are of another (the products are not worth the stated
20 “Regular” price and thus are not as valuable as advertised); (iii) Section 1770(a)(9)
21 because GNC advertised goods with the intent not to sell them as advertised (because
22 Defendant knew the goods were not valued at the advertised “Regular” prices); (iv)
23 Section 1770(a)(13) because GNC made false or misleading statements of fact
24 concerning the amount of a price reduction (because the advertised “Regular” prices
25 were false and inflated, and thus the consumers did not receive the discounts they
26 thought they were receiving); and (v) Section 1770(a)(14) because GNC represented
27 that the transaction confers or involves rights (the right to receive the offered discount
28 amount) which it does not have or involve (the stated discounts are false or inflated, so

1 that the consumer is not receiving the discount that was offered or advertised).

2 64. Plaintiffs relied on GNC's false representations in deciding to purchase
3 goods on the GNC website. Plaintiffs would not have purchased such items absent
4 GNC's unlawful conduct.

5 65. Plaintiffs and Class members were harmed as a result of GNC's unfair
6 competition and deceptive acts and practices. Had GNC disclosed the true nature of its
7 discounts, Plaintiffs and the Class would not have been misled into purchasing
8 products from GNC's website, or, alternatively, would have paid less for them.

9 66. Plaintiffs, on behalf of themselves and all other similarly situated
10 California consumers, and as appropriate, on behalf of the general public of the state
11 of California, seek injunctive relief: (1) prohibiting GNC from continuing the
12 unlawful practices alleged herein, (2) directing GNC to make corrective notices both
13 on its website and in other appropriate media, (3) allowing Class members to return
14 any products purchased on GNC's website, at GNC's expense, which were subject to
15 GNC's unlawful pricing policy, or alternatively requiring GNC to price match any
16 competitor's advertised price for the same product, and refund any shipping and
17 handling fees for any products purchased on GNC's website subject to GNC's
18 unlawful pricing policy, and (4) any other relief deemed proper by the Court.

19 67. Plaintiffs provided each of the Defendants with notice of its alleged
20 violations of the CLRA pursuant to California Civil Code § 1782(a) *via* certified mail,
21 demanding that GNC correct such violations.

22 68. GNC failed to respond to Plaintiffs' CLRA notice within 30 days of its
23 receipt. Thus, Plaintiffs seek all available damages under the CLRA for all violations
24 complained of herein, including but not limited to statutory damages, punitive
25 damages, attorney's fees and cost, and any other relief that the Court deems proper.

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THIRD CAUSE OF ACTION

**Violation of CAL. BUS. & PROF. CODE §§ 17200, *et seq.* -
Unlawful Business Acts and Practices**

69. Plaintiffs hereby incorporate by reference each of the allegations contained in the preceding paragraphs of this Complaint.

70. California Business and Professional Code, section 17501, states:

No price shall be advertised as a former price of any advertised thing, unless the alleged former price was the prevailing market price as above defined within three months next immediately preceding the publication of the advertisement or unless the date when the alleged former price did prevail is clearly, exactly and conspicuously stated in the advertisement.

71. Federal regulations also prohibit the use of deceptive and illusory discounts:

One of the most commonly used forms of bargain advertising is to offer a reduction from the advertiser's own former price for an article. If the former price is the actual, bona fide price at which the article was offered to the public on a regular basis for a reasonably substantial period of time, it provides a legitimate basis for the advertising of a price comparison. Where the former price is genuine, the bargain being advertised is a true one. If, on the other hand, the former price being advertised is not bona fide but fictitious--for example, where an artificial, inflated price was established for the purpose of enabling the subsequent offer of a large reduction--the "bargain" being advertised is a false one; the purchaser is not receiving the unusual value he expects. In such a case, the "reduced" price is, in reality, probably just the seller's regular price.

16 C.F.R. § 233.1(a).

72. California Civil Code § 1770(a)(5) prohibits representing goods or services as having characteristics and benefits that they do not have.

73. California Civil Code § 1770(a)(7) prohibits representing goods or services as having a particular standard, quality, or grade when they are of another.

74. California Civil Code § 1770(a)(9) prohibits advertising goods or

1 services with intent not to sell them as advertised.

2 75. California Civil Code § 1770(a)(13) prohibits making false or misleading
3 statements of fact concerning reasons for or the existence or amounts of price
4 reductions.

5 76. California Civil Code § 1770(a)(14) prohibits representing that a
6 transaction confers or involves rights which it does not have or involve.

7 77. The business practices alleged above are unlawful under California
8 Business & Professional Code §§ 17500, *et seq.*, California Civil Code §§ 1770(a)(9)
9 & (13) and federal regulations, each of which forbids GNC's untrue, fraudulent,
10 deceptive, and/or misleading marketing and advertisements.

11 78. Plaintiffs and Class members were harmed as a result of GNC's unfair
12 competition and deceptive acts and practices. Had GNC disclosed the true nature of
13 its "discounts," Plaintiffs and the Class would not have been misled into purchasing
14 products from GNC's website, or, alternatively, would have paid less for them.

15 79. Plaintiffs, on behalf of themselves and all other similarly situated
16 consumers, and as appropriate, on behalf of the general public, seek restitution and
17 injunctive relief: (1) prohibiting GNC from continuing the unlawful practices alleged
18 herein, (2) directing GNC to make corrective notices both on its website and in other
19 appropriate media, (3) allowing Class members to return any products purchased on
20 GNC's website, at GNC's expense, that were subject to GNC's unlawful pricing
21 policy or, alternatively, requiring GNC to price match any competitor's advertised
22 price for the same product, and refund any shipping and handling fees for any product
23 purchased on GNC's website subject to GNC's unlawful pricing policy, and (4) any
24 other relief deemed proper by the Court.

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FOURTH CAUSE OF ACTION

**Violation of CAL. BUS. & PROF. CODE §§ 17200, *et seq.* -
Unfair Business Acts and Practices**

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3
4 80. Plaintiffs hereby incorporate by reference each of the allegations
5 contained in the preceding paragraphs of this Complaint.

6 81. Plaintiffs and other members of the Class suffered a substantial injury by
7 virtue of GNC's unlawful scheme of advertising that its products were subject to a
8 discount when such discounts were illusory and did not reflect the "prevailing market
9 price" of the item during any particular time period at a particular location or even the
10 price at which the product was previously sold on GNC's website.

11 82. GNC's actions alleged herein violate the laws and public policies of
12 California and the federal government as set out in preceding paragraphs of this
13 Complaint.

14 83. There is no benefit to consumers or competition by allowing GNC to
15 deceptively market and advertise nonexistent discounts in violation of California Law.

16 84. The gravity of the harm visited upon Plaintiffs and Class members
17 outweighs any legitimate justification, motive, or reason for marketing and advertising
18 discounted products in a deceptive and misleading manner which violates California
19 law. Accordingly, GNC's actions are immoral, unethical, and unscrupulous, offend
20 the established California public policies, and cause substantial injury to Plaintiffs and
21 members of the Class.

22 85. The above acts of GNC, in disseminating said misleading and deceptive
23 statements throughout California to consumers, including Plaintiffs and members of
24 the Class, were and are likely to deceive reasonable consumers by obfuscating the true
25 nature and amount of the "discount" and the existence of the "discounted" product in
26 violation of CAL. BUS. & PROF. CODE §§ 17500, *et seq.*, and California Civil Code §§
27 1770(a)(9) & (13).

28 86. Plaintiffs and Class members were harmed and suffered actual damages

1 as a result of GNC's unfair competition and deceptive acts and practices. Had GNC
2 disclosed the true nature of the discounts, Plaintiffs and the Class would not have
3 purchased products from GNC's website or, alternatively, would have paid
4 significantly less for them.

5 87. Plaintiffs, on behalf of themselves and all other similarly situated
6 consumers, and as appropriate, on behalf of the general public, seek restitution and
7 injunctive relief: (1) prohibiting GNC from continuing the unlawful practices alleged
8 herein, (2) directing GNC to make corrective notices both on its website and in other
9 appropriate media, (3) allowing Class members to return any products purchased on
10 GNC's website, at GNC's expense, that were subject to GNC's unlawful pricing
11 policy or alternatively requiring GNC to price match any competitor's advertised price
12 for the same product, and refund any shipping and handling fees for any product
13 purchased on GNC's website subject to GNC's unlawful pricing policy, and (4) any
14 other relief deemed proper by the Court.

15 **FIFTH CAUSE OF ACTION**

16 **Violation of CAL. BUS. & PROF. CODE §§ 17200, *et seq.* -**
17 **Fraudulent Business Acts and Practices**

18 88. Plaintiffs hereby incorporate by reference each of the allegations
19 contained in the preceding paragraphs of this Complaint.

20 89. Such acts of GNC as described above constitute a fraudulent business
21 practice under CAL. BUS. & PROF. CODE §§ 17200, *et seq.*

22 90. As more fully described above, GNC misleadingly markets and
23 advertises its products as discounted from a "Regular Price," when such discounts are
24 illusory and/or overstated. GNC's misleading marketing and advertisements are likely
25 to, and do, deceive reasonable consumers. Indeed, Plaintiffs and other members of the
26 Class were unquestionably deceived about the nature of GNC's pricing, as GNC
27 prominently displayed its products as discounted on its website, which consumers
28 must use to purchase GNC's offerings.

1 in the unlawful and unfair business acts and practices as alleged herein;

2 F. For an order directing each of the Defendants to make corrective notices
3 on its website and in other appropriate publications.

4 G. For restitution of all shipping and handling fees charged for products
5 purchased from GNC.com subject to GNC's unlawful advertising;

6 H. For an order awarding Plaintiffs' attorneys' fees and costs of suit,
7 including expert witness fees, as permitted by law; and

8 I. Such other and further relief as this Court may deem just and proper.

9 **JURY TRIAL**

10 Plaintiffs demand a trial by jury for all of the claims asserted in this Complaint
11 so triable.

12 Respectfully submitted,

13 **FINKELSTEIN & KRINSK LLP**

14
15 Dated: August 1, 2016

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25 Dated: August 1, 2016

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15 *Attorneys for Plaintiff and the Putative Classes*

16 **IN THE UNITED STATES DISTRICT COURT**
 17 **FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

18 JENNA KASKORKIS and KIM
 19 CARTER, individually and on behalf of
 20 all other similarly situated,

21 Plaintiffs,

22 v.

24 GENERAL NUTRITION CENTERS,
 25 INC., a Delaware Corporation,
 26 GENERAL HOLDINGS, INC., a
 Delaware Corporation,

27 Defendant.
 28

Case No: 3:16-cv-00990-WQH-JLB

PROOF OF SERVICE

1 I, the undersigned, declare that I am over the age of eighteen (18) years and not
2 a party to the within action. I am employed in the County of San Diego, State of
3 California. My business address is 550 W. C Street, Suite 1760, San Diego, California
4 92101.

5 I served the following document(s) on August 8, 2016:

6 **AMENDED CLASS ACTION COMPLAINT**

7 On the person(s) listed below:

8 JAMES D. NGUYEN (State Bar No. 179370) *Attorneys for Defendants*

9 jimmynguyen@dwt.com

10 SEAN M. SULLIVAN (State Bar No. 229104)

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21 Seattle, WA 98101-3045

22 Telephone: (206) 622-3150

23 Fax: (206) 757-7700

24 By the following means:

25 **VIA OVERNIGHT DELIVERY:** I enclosed the documents in an envelope or
26 package provided by an overnight delivery carrier and addressed to the person(s)
27 at the address listed above. I placed the envelope or package for collection and
28 overnight delivery to an office or a regularly utilized drop box of the overnight
delivery carrier.

VIA FACSIMILE TRANSMISSION: Based on an agreement of the parties to
accept service by fax transmission, I faxed the documents to the person(s) at the
fax number(s) listed above. No error was reported by the fax machine that I used.
A copy of the record of the fax transmission, which I printed out, is attached.

VIA ELECTRONIC TRANSMISSION: Based on a court order or
agreement of the parties to accept electronic service, I caused the documents to
be sent to the person(s) at the electronic service address(es) listed above.

VIA NOTICE OF ELECTRONIC FILING (ECF): Electronic Services via
the Court's CM/ECF system pursuant to CivLR 5.4(c). ____

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VIA PERSONAL SERVICE: I personally delivered the documents to the person(s) at the address(es) listed above. (1) For a party represented by an attorney, delivery was made to the attorney or at the attorney’s office by leaving the documents, in an envelope or package clearly labeled to identify the attorney being served, with a receptionist or an individual in charge of the office, between the hours of nine in the morning and five in the evening. (2) For a party, delivery was made to the party or by leaving the documents at the party’s residence with some person not younger than 18 years of age between the hours of eight in the morning and six in the evening.

I declare under penalty of perjury under the laws of the United States of America, that the foregoing is true and correct and that I am employed in the office, at whose direction the within service was made.

Executed: August 8, 2016, at San Diego, California.

/s/ Trenton R. Kashima
Trenton R. Kashima