

1 DANIEL L. WARSHAW (Bar No. 185365)
 2 dwarshaw@pswlaw.com
 3 BOBBY POUYA (Bar No. 245527)
 4 bpouya@pswlaw.com
 5 MATTHEW A. PEARSON (Bar No. 291484)
 6 mapearson@pswlaw.com
 7 **PEARSON, SIMON & WARSHAW, LLP**
 8 15165 Ventura Boulevard, Suite 400
 9 Sherman Oaks, California 91403
 10 Telephone: (818) 788-8300
 11 Facsimile: (818) 788-8104

12 Attorneys for Plaintiff James Eashoo,
 13 individually and behalf of all others
 14 similarly situated

15 **UNITED STATES DISTRICT COURT**
 16 **CENTRAL DISTRICT OF CALIFORNIA**

17 JAMES EASHOO, individually and on
 18 behalf of all others similarly situated,

19 Plaintiff,

20 vs.

21 IOVATE HEALTH SCIENCES
 22 U.S.A., INC.,

23 Defendant.

CASE NO. 2:15-cv-01726-BRO-PJW

**FIRST AMENDED CLASS ACTION
 COMPLAINT**

JURY TRIAL DEMANDED

Assigned to the Honorable Beverly Reid
 O’Connell

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 15165 VENTURA BOULEVARD, SUITE 400
 SHERMAN OAKS, CALIFORNIA 91403

PEARSON, SIMON & WARSHAW, LLP
15165 VENTURA BOULEVARD, SUITE 400
SHERMAN OAKS, CALIFORNIA 91403

1 Plaintiff James Eashoo (“Plaintiff”), on behalf of himself and all others
2 similarly situated, brings this class action against Defendant Iovate Health Sciences
3 U.S.A., Inc. (“Iovate” or “Defendant”), and alleges the following:

4 **I. INTRODUCTION**

5 1. Iovate is a global manufacturer of health and wellness products
6 including, protein supplements, weight management products, and other nutrition
7 products. It manufactures, markets, and sells a variety of bodybuilding and workout
8 supplements throughout the United States. Among these supplements are protein
9 shakes and beverages, both liquid (ready to drink) and powdered form, as well as,
10 bars and gels sold under the various brand names including, but not limited to,
11 MuscleTech, Six Star, Sam’s Club, Fuel One, and EPIQ, which are the subject of the
12 instant lawsuit (the “Products” or “Protein Products”).¹

13 2. Protein Products are some of the most popular supplements in the multi-
14 billion dollar dietary supplement industry. The Protein Products are advertised,
15 marketed and sold to consumers as a readily available and healthy source of protein.
16 Since one of the primary purposes of the Protein Products is provide or increase the
17 protein consumed by customers, the amount, quality, and purity of the protein
18 contained in the Products is essential to customers’ decision to purchase and
19 consume the Products. Accordingly, as detailed herein, the focus of Defendant’s
20 advertising for the Protein Products is the amount and quality of the protein
21 contained in the Protein Products.

22 3. This is a class action lawsuit against Defendant for misrepresenting its
23 Protein Products as having higher levels of protein than is actually contained in the
24 product. Plaintiff is informed, believes, and thereon alleges that the amounts of
25 protein allegedly contained in the Protein Products are grossly inaccurate and inflated
26 _____

27 ¹ A complete list of the Protein Products is set forth in ¶ 19 herein.
28

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1 because Defendant has engaged in a practice commonly known as “protein spiking;”
2 whereby the Products are “spiked” with amino acids which falsely register as
3 proteins.

4 4. Plaintiff alleges that during the Class Period,² Defendant has engaged in
5 the practice of misrepresenting and artificially inflating the amount of protein in the
6 Protein Products because of the addition of these non-protein additives. As a result
7 of this practice, Defendant’s Protein Products contain significantly less protein than
8 what was represented to Plaintiff as well as others similarly situated.

9 5. The failure to warn and/or disclaim the above facts is a
10 misrepresentation and/or omission of material fact that renders the Protein Products
11 defective. But for Defendant’s misrepresentations and/or omissions of material fact,
12 Plaintiff and similarly situated purchasers of the Protein Products would not have
13 purchased or paid the price they did for the Protein Products.

14 6. Plaintiff is among the thousands of consumers who purchased one or
15 more of the Protein Products during the four years preceding the filing of this
16 Complaint. Plaintiff and other similarly situated purchasers of the Protein Products
17 relied on Defendant’s misrepresentations and/or omissions of material fact in
18 purchasing the Protein Products, and would not have paid as much, if anything, for
19 the Protein Products had the true facts regarding the true protein content been
20 disclosed.

21 7. Plaintiff brings this class action on behalf of himself and all similarly
22 situated consumers in the United States who purchased Defendant’s Protein Products
23 during the Class Period for personal use and not for resale (the “Class”).³ Plaintiff
24

25 _____
26 ² The term “Class Period” as used herein shall mean between March 10, 2011 and the
27 present.

28 ³ The complete definition of the “Class” is set forth in paragraph 42 herein.

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1 seeks damages, restitution, and injunctive relief on behalf of the Class for Iovate’s
2 false and misleading marketing and sale of the Protein Products. Pursuant to
3 California Code of Civil Procedure § 1021.5, Plaintiff and the Class seek reasonable
4 attorneys’ fees as this lawsuit seeks the enforcement of an important right affecting
5 the public interest and satisfies the statutory requirements for an award of attorneys’
6 fees.

7 **II. THE PARTIES**

8 **A. Plaintiff:**

9 8. Plaintiff James Eashoo is a resident of Los Angeles County, California.
10 During the Class Period, Plaintiff purchased one or more of Defendant’s Protein
11 Products in Los Angeles County, California.

12 9. In purchasing the Protein Products, Plaintiff relied on Iovate’s
13 misrepresentations of fact and/or omissions of material fact regarding the true protein
14 content in the Protein Products. Plaintiff would not have paid as much, if anything,
15 for the Product had he known that it contained less protein than claimed by
16 Defendant. As a result, Plaintiff suffered injury in fact and lost money or property.

17 **B. Defendant:**

18 10. Defendant Iovate Health Sciences, U.S.A., Inc. is a Delaware
19 corporation located at 1105 North Market Street, Suite 1330, Wilmington, Delaware
20 19801. Iovate Health Sciences, U.S.A., Inc. is the American subsidiary of Iovate
21 Health Sciences, Inc. and is responsible for the manufacture, distribution, and
22 marketing of the Protein Products throughout the United States.

23 **III. JURISDICTION AND VENUE**

24 11. This Court has subject matter jurisdiction over this civil action pursuant
25 to 28 U.S.C. § 1331. Additionally, this Court has supplemental jurisdiction over state
26 law claims pursuant to 28 U.S.C. § 1367.

27 12. Jurisdiction is proper in this court pursuant to 28 U.S.C. § 1332(d),
28 because there are at least 100 Class Members in the proposed Class, the combined

1 claims of proposed Class Members exceed \$5,000,000 exclusive of interest and
2 costs, and at least one Class Member is a citizen of a state other than Defendant’s
3 state of citizenship.

4 13. This Court has personal jurisdiction over Defendant because Defendant
5 conducts substantial business within the State of California, such that Defendant has
6 significant, continuous, and pervasive contacts with the State of California.

7 14. Venue is proper in this District pursuant to 28 U.S.C. § 1391 because
8 Defendant does substantial business in this District, and a substantial part of the
9 events giving rise to Plaintiff’s claims took place within this judicial district,
10 including his purchase of Defendant’s Protein Products.

11 **IV. FACTUAL ALLEGATIONS**

12 **A. The Protein Supplement Industry**

13 15. Dietary supplements are a multi-billion dollar industry in the United
14 States. One of the major sectors of this industry is protein supplements. The protein
15 supplement industry is rapidly growing and is very competitive. A May 2014 Sports
16 Nutrition Industry report stated that “protein products were expected to grow by 62%
17 to reach US \$7.8 billion in 2018.”⁴

18 16. Although the demand for protein supplements is rapidly increasing, so
19 are the wholesale costs for the protein contained therein. The U.S. food market has
20 seen a steep increase in the cost of milk (the root source of whey protein) due to a
21 variety of reasons including virus outbreaks and the increase in exports of U.S.
22 supplies.⁵

23 _____

24 ⁴ Euromonitor International, *Sports Nutrition in the US*,
25 <http://www.euromonitor.com/sports-nutrition-in-the-us/report> (last accessed Jan 21,
26 2015).

27 ⁵ USA Today, *Rising food prices pinching consumers*,
28 <http://www.usatoday.com/story/money/business/2014/04/16/cpi-shows-food-prices->
(footnote continued)

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1 17. Due to the highly competitive nature of the protein supplement industry,
2 manufacturers such as Defendant has been looking for more ways to lower their
3 costs. One method employed by Defendant to lower its costs is to engage in protein
4 spiking.

5 **B. Defendant Prominently Advertised and Misrepresented the Amount of**
6 **Protein Contained in the Protein Supplements**

7 18. Iovate manufactures, markets, and sells the Protein Products throughout
8 the United States, including California, as dietary supplements designed to enhance
9 protein consumption, athletic performance, strength, and/or energy of its users.

10 19. The Protein Products at issue in this case include all protein
11 supplements manufactured, distributed, or sold by Defendant under any brand name
12 including, but not limited, to MuscleTech, Six Star, Epic, Sam’s Club, or Fuel 1; and,
13 in any flavor or variety including, but not limited to, the following: MuscleTech
14 NitroTech, MuscleTech Phase8, MuscleTech MassTech, Six Star Whey Protein Plus,
15 Six Star Protein Bars, Six Star Muscle Building Milkshake, Six Star Recovery
16 Protein, Six Star Whey Isolate Plus, Six Star 100% Whey Isolate Protein Gel, EPIQ
17 Isolate, and Fuel One Gainer. Each of these Protein Products comes in one or more
18 flavors, such as, milk chocolate, chocolate fudge, vanilla, French vanilla cream,
19 strawberry, strawberry smoothie, cookies and cream, triple chocolate, peanut butter
20 chocolate, and white chocolate.

21 20. The labels of each of the Protein Products features the name of the
22 product, the supplement facts, some of its key characteristics, and representations
23 regarding amount of protein allegedly contained in the product. Defendant
24 prominently displays the amount of protein contained on the packaging and labeling
25 of each of the Protein Products.

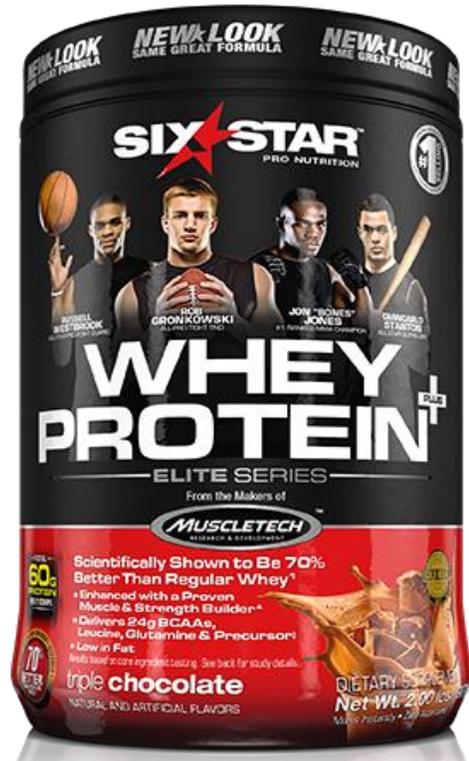
26 _____
27 rising/7742669/ (April 16, 2014).

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21. Below are examples of labels that are typical for Defendant's Products:



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1 22. Furthermore, Defendant emphasizes the qualities, benefits and
2 characteristics of the protein contained in the Protein Products. For example,
3 Defendant advertises the following products stating that:

4 a. MuscleTech NitroTech is a product containing “protein sourced
5 primarily from whey protein isolate – one of the cleanest and purest protein
6 sources available to athletes.”⁶

7 b. With respect to MuscleTech Phase8; “Each scoop of
8 PHASE8 contains an impressive 26-gram blend of milk-derived proteins that
9 supplies a sustained-release of amino acids.”⁷

10 c. MuscleTech Platinum 100% Iso-Whey contains “ultra-pure,
11 microfiltered whey protein isolates, the purest form of whey protein you can
12 feed your body.”⁸

13 d. MuscleTech Platinum Iso-Zero as “an ultra-premium, ultra-clean
14 formula that has zero fat, carbohydrates, sugar, or lactose.”⁹

15 **C. Defendant Spiked The Protein Products to Increase Profits**

16 23. Amino acids are the biological compounds that compose protein
17 molecules. Breaking down protein will yield 22 known amino acids consisting of
18 indispensable (essential), conditionally dispensable, and dispensable amino acids.¹⁰

19 24. Indispensable amino acids, also called essential amino acids, must be
20 supplied to the body from food or supplements. Conditionally dispensable amino
21 _____

22 ⁶ <http://www.muscletech.com/products/performance-series/#sthash.8dET4ikl.dpuf>

23 ⁷ *Id.*

24 ⁸ *Id.*

25 ⁹ *Id.*

26 ¹⁰ Vanderbilt University, *Essential Amino Acids as Ergogenic Aids*,
27 http://www.vanderbilt.edu/AnS/psychology/health_psychology/amino.htm (Last
28 accessed Jan 21, 2015)

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1 acids are based on the body's ability to actually synthesize them from other amino
2 acids. Dispensable amino acids, also called nonessential amino acids, can be
3 synthesized by the body from other amino acids.¹¹

4 25. Amino acids are not the same thing as complete proteins and do not
5 have the same nutritional value. As such, it is not possible to replicate the benefits
6 and qualities of proteins by adding amino acids to the Protein Products.

7 26. Plaintiff is informed, believes, and thereon alleges that Defendant has
8 improperly manipulated, misrepresented, and inflated the true protein content of the
9 Protein Products by adding or “spiking” them with amino acids.

10 27. Defendant’s Protein Products are labeled as having a specified amount
11 of protein per serving. However, contrary to Defendant’s misrepresentations, the
12 Protein Products contain less than the claimed amount of protein as a result of
13 protein spiking. This total claimed amount of protein is overstated because of the
14 addition of non-protein amino acids.

15 28. Defendant spikes its products with amino acids and misrepresents the
16 amount of protein in the Protein Products, based purely on economical reasoning.
17 Defendant effectively minimizes the amount of true protein in its Protein Products
18 without telling consumers, and without lowering the price of the Protein Products.

19 29. In truth, once the amino acids are removed from the Protein Products,
20 the protein content per serving is significantly less than what is labeled, advertised,
21 and represented to Plaintiff and the Class by Defendant.

22 30. This is significant in two respects. First, the primary use for the Protein
23 Products is as a source of protein to promote muscle growth and increased strength.
24 Therefore, the less protein contained in a Protein Product, the less value and benefit
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26 _____
27 ¹¹ Getbig.com, Barry Finnin, PhD, and Samuel Peters, *Amino Acids & Bodybuilding*,
28 <http://www.getbig.com/articles/protein.htm> (last visited Jan 20, 2015)

1 it has to the consumer. Second, the Defendant's Protein Products are advertised and
 2 sold to consumers as having the claimed amount of amino acids *in addition to*
 3 proteins. In truth, Defendant uses the amino acids to mask and reduce of actual
 4 protein content in the Protein Products resulting in products that have amino acid
 5 *instead of* proteins.

6 **D. Plaintiff and the Class Relied on Defendant's Material Misrepresentations**

7 31. The amount of protein contained in the Protein Products was heavily
 8 promoted by Defendant with the intent that Plaintiff and the Class would rely on
 9 these representations.

10 32. The amount of protein contained in the Protein Products is a material
 11 fact that a reasonable consumer would consider important. Had Plaintiff and the
 12 Class known that the Protein Products contained significantly less protein than what
 13 was represented by Defendant, they would not have paid as much, if anything, for the
 14 Protein Products.

15 33. Given the foregoing, Plaintiff and the Class were induced by Defendant
 16 into purchasing the defective Protein Products, which they would not have purchased
 17 or paid as much for the Protein Products, had they known the truth about the actual
 18 amounts of protein in the Products.

19 34. As a direct and proximate result of Defendant's conduct, Plaintiff and
 20 the Class have suffered injury in fact and lost money or property. Defendant, despite
 21 having knowledge that its representations are misleading to Plaintiff and the Class,
 22 continue to label, advertise, manufacture, and market its Protein Products in a
 23 deceptive and deceiving manner.

24 **V. RULE 9(b) ALLEGATIONS**

25 35. Federal Rule of Civil Procedure ("Rule") 9(b) provides that "[i]n
 26 alleging fraud or mistake, a party must state with particularity the circumstances
 27 constituting fraud or mistake." Fed. R. Civ. P. 9(b). As detailed in the paragraphs
 28 above, Plaintiff has satisfied the requirements of Rule 9(b) by establishing the

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1 following elements with sufficient particularity:

2 36. WHO: Defendant made material misrepresentations and failed to
3 disclose, or adequately disclose, material facts regarding the actual amount of protein
4 contained in the Protein Products. Except as identified herein, Plaintiff is unaware,
5 and therefore unable to identify, the true names and identities of those individuals at
6 Iovate who are responsible for such material misrepresentations and/or omissions.

7 37. WHAT: Defendant made material misrepresentations regarding the
8 characteristics of Protein Products. Specifically, as alleged in detail herein, the
9 Protein Products contained significantly less protein than what was represented and
10 advertised by Defendant to Plaintiff and others similarly situated.

11 38. WHEN: Defendant made the material misrepresentations, omissions,
12 and non-disclosures detailed herein continuously throughout the Class Period.

13 39. WHERE: Defendant’s material misrepresentations, omissions, and non-
14 disclosures detailed herein were made, *inter alia*, on the packaging Defendant’s
15 Protein Products, on Defendant’s websites (www.muscletech.com,
16 www.sixstarpro.com, www.epiqresults.com), via the Internet, and through
17 Defendant’s other advertisements.

18 40. HOW: Defendant made numerous, written material misrepresentations
19 on the packaging of its Protein Products, and on its website and other advertising
20 regarding the Protein Products, which were designed to, and in fact did, mislead
21 Plaintiff and others similarly situated members into purchasing or paying more for
22 the Products than they otherwise would have.

23 41. WHY: Defendant engaged in the material misrepresentations,
24 omissions, and non-disclosures detailed herein for the express purpose of inducing
25 Plaintiff and other reasonable consumers to purchase and/or pay a price premium for
26 Defendant’s Protein Products based on the belief that the Products would build more
27 muscle, increase strength and supplement the consumers diet as advertised.

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1 Defendant profited by selling its Protein Products to thousands of unsuspecting
2 California consumers.

3 **VI. CLASS ACTION ALLEGATIONS**

4 42. Plaintiff brings this action individually and as a class action on behalf of
5 the following Class: All persons in the United States of America who purchased one
6 or more of Defendant’s Protein Products at any time between from March 10, 2011
7 and the present.

8 43. Plaintiff reserves the right to redefine the Class prior to certification.

9 44. Excluded from the Class is any entity in which Defendant has a
10 controlling interest, officers or directors of Iovate, all government entities, and any
11 justice or judicial officer presiding over this matter.

12 45. This action is brought and may properly be maintained as a class action
13 pursuant to Federal Rule of Civil Procedure 23. This action satisfies the numerosity,
14 typicality, adequacy, predominance and superiority requirements of those provisions.

15 46. The Class is so numerous that the individual joinder of all of its
16 members is impracticable. The exact number and identities of members of the Class
17 is unknown to Plaintiff at this time and can only be ascertained through appropriate
18 discovery.

19 47. Common questions of law and fact exist as to all members of the Class
20 which predominate over any questions affecting only individual members of the
21 Class. These common legal and factual questions, which do not vary from Class
22 member to Class member, and which may be determined without reference to the
23 individual circumstances of any Class member include, but are not limited to, the
24 following:

- 25 a. Whether Defendant’s labeling, marketing, advertising, and
- 26 promotion of its Protein Products was false and misleading;
- 27 b. Whether Defendant’s efficacy claims are properly substantiated;
- 28 c. Whether Defendant’s conduct constitutes breach of express

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- 1 warranty;
- 2 d. Whether Defendant’s conduct constitutes negligent
- 3 misrepresentation;
- 4 e. Whether Defendant’s conduct constitutes a violation of the
- 5 Consumers Legal Remedies Act (Cal. Civ. Code §§ 1750, *et*
- 6 *seq.*);
- 7 f. Whether Defendant’s conduct constitutes a violation of
- 8 California’s false advertising law (Cal. Bus. & Prof. Code §§
- 9 17500, *et seq.*);
- 10 g. Whether Defendant’s conduct constitutes an unfair, unlawful,
- 11 and/or fraudulent business practice in violation of California’s
- 12 unfair competition law (Cal. Bus. & Prof. Code §§ 17200, *et*
- 13 *seq.*);
- 14 h. Whether Defendant’s conduct violates the Magnuson-Moss
- 15 Warranty Act (15 U.S.C. §§ 2301);
- 16 i. Whether Plaintiff and the Class are entitled to compensatory
- 17 damages, and if so, the nature of such damages;
- 18 j. Whether Plaintiff and the Class are entitled to restitutionary relief;
- 19 and,
- 20 k. Whether Plaintiff and the Class are entitled to injunctive relief.

21 48. Plaintiff’s claims are typical of the claims of the members of the Class.
 22 Plaintiff and all members of the Class have been similarly affected by Defendant’s
 23 common course of conduct since they all relied on Defendant’s representations
 24 concerning the Protein Products and purchased the Products based on those
 25 representations.

26 49. Plaintiff will fairly and adequately represent and protect the interests of
 27 the Class. Plaintiff has retained counsel with substantial experience in handling
 28 complex class action litigation. Plaintiff and his counsel are committed to vigorously

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1 prosecuting this action on behalf of the Class and have the financial resources to do
2 so. Plaintiff and the members of the Class suffered, and will continue to suffer, harm
3 as a result of Defendant's unlawful and wrongful conduct. A class action is superior
4 to other available methods for the fair and efficient adjudication of the present
5 controversy. Individual joinder of all members of the Class is impracticable. Even if
6 individual members of the Class had the resources to pursue individual litigation, it
7 would be unduly burdensome to the courts in which the individual litigation would
8 proceed. Individual litigation magnifies the delay and expense to all parties in the
9 court system of resolving the controversies engendered by Defendant's common
10 course of conduct. The class action device allows a single court to provide the
11 benefits of unitary adjudication, judicial economy, and the fair and efficient handling
12 of all Class members' claims in a single forum. The conduct of this action as a class
13 action conserves the resources of the parties and of the judicial system and protects
14 the rights of the Class. Furthermore, for many, if not most, a class action is the only
15 feasible mechanism that allows an opportunity for legal redress and justice.

16 50. This action is maintainable as a class action under Federal Rule of Civil
17 Procedure 23(b)(1) because individual actions by Class members would create: (1)
18 inconsistent or varying adjudications that would establish incompatible standards of
19 conduct for Defendant; and/or (2) adjudications that, as a practical matter, would be
20 dispositive of the interests of other class members not parties to the adjudications,
21 and would substantially impair or impede the ability of such non-party class
22 members to protect their interests.

23 51. This action is maintainable as a class action under Federal Rule of Civil
24 Procedure 23(b)(2) because Defendant has acted or refused to act on grounds
25 generally applicable to the Class, thereby making appropriate final injunctive relief
26 respecting the class as a whole.

27 52. This action is maintainable as a class action under Federal Rule of Civil
28 Procedure 23(b)(3) because the common questions of law and fact identified above,

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1 without limitation, predominate over any questions affecting only individual
2 members, and a class action is superior to other available methods for the fair and
3 efficient adjudication of this controversy.

4 **FIRST CAUSE OF ACTION**

5 **VIOLATION OF THE CONSUMERS LEGAL REMEDIES ACT**

6 **(CAL. CIV. CODE §§ 1750, ET SEQ.)**

7 **(Plaintiff and the Class Against Defendant)**

8 53. Plaintiff repeats the allegations contained in the foregoing paragraphs as
9 if fully set forth herein.

10 54. Plaintiff brings this claim individually and on behalf of members of the
11 Class against Defendant.

12 55. Plaintiff has standing to pursue this cause of action because Plaintiff has
13 suffered injury in fact and has lost money as a result of Defendant’s actions as set
14 forth herein. Specifically, Plaintiff purchased Defendant’s Protein Products in
15 reliance on Defendant’s marketing claims and would not have purchased or paid as
16 much for the product but for Defendant’s false and misleading representations.
17 Plaintiff used Defendant’s Protein Products as directed, but it did not work as
18 advertised and did not provide any of the promised benefits.

19 56. Defendant has engaged in and continues to engage in business practices
20 in violation of California Civil Code §§ 1750, *et seq.* (the Consumers Legal
21 Remedies Act) by failing to warn and/or disclaim on the labels of the Protein
22 Products that the amount of protein on the labels of the Protein Products are
23 inaccurate and are inflated by the addition of various amino acids and the non-amino
24 acid compound Creatine Monohydrate to the Products. These business practices are
25 unfair and/or deceptive and should be enjoined.

26 57. Defendant has engaged in unfair or deceptive acts or practices intended
27 to result in the sale of the Protein Products in violation of California Civil Code §
28 1770. Defendant knew and/or should have known that its misrepresentations and/or

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1 omissions of material fact regarding the Protein Products were likely to mislead the
2 public.

3 58. Defendant’s conduct alleged herein violates the Consumers Legal
4 Remedies Act, including but not limited to, the following provisions: (1) using
5 deceptive representations in connection with goods or services in violation of Civil
6 Code § 1770(a)(4); (2) representing that goods or services have sponsorship,
7 approval, characteristics, ingredients, uses, benefits, or quantities which they do not
8 have in violation of Civil Code § 1770(a)(5); and/or (3) advertising goods or services
9 with intent not to sell them as advertised in violation of Civil Code § 1770(a)(9). As
10 a direct and proximate result of Defendant’s conduct, as set forth herein, Defendant
11 has received ill-gotten gains and/or profits, including but not limited to, money.
12 Therefore, Defendant has been unjustly enriched.

13 59. There is no other adequate remedy at law and if an injunction is not
14 ordered, Plaintiff and the Class will suffer irreparable harm.

15 60. Pursuant to California Civil Code §§ 1780(a) and (e), Plaintiff and
16 members of the Class seek: (1) actual damages; (2) an order enjoining Defendant’s
17 unlawful business practices as alleged herein; (3) restitution; (4) ancillary relief; (5)
18 attorneys’ fees and costs to the full extent allowed by law; and (6) Any other relief
19 that the Court deems proper.

20 61. On March 7, 2015 counsel for Plaintiff and the Class provided
21 Defendant with written notice (via Certified Mail, Return Receipt Requested) that its
22 conduct is a breach of warranty and is in violation of the Consumers Legal Remedies
23 Act. More than thirty days have passed since the Plaintiff provided this notice and
24 Defendant has failed to take adequate steps to remedy its unlawful conduct and
25 compensate injured consumers.

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SECOND CAUSE OF ACTION

BREACH OF EXPRESS WARRANTY

(Plaintiff and the Class Against Defendant)

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4 62. Plaintiff repeats the allegations contained in the foregoing paragraphs as
5 if fully set forth herein.

6 63. Plaintiff brings this claim individually and on behalf of members of the
7 Class against Defendant.

8 64. Defendant is a merchant as defined by the applicable California and
9 Uniform Commercial Code provisions and sold goods to Plaintiff and the Class.

10 65. Defendant expressly warranted via its advertising, statements, and
11 website information, and disseminated information to the general public, including to
12 Plaintiff and members of the Class, that the Protein Products contain more protein
13 than what is actually contained in the Products.

14 66. The statements made by Defendant were affirmations of fact that
15 became part of the basis of the bargain and created an express warranty that
16 Defendant’s Protein Products would conform to the stated promises. Plaintiff and
17 members of the Class placed significant importance on Defendant’s representations.

18 67. Defendant breached each of the aforementioned warranties and
19 representations because Defendant’s Protein Products did not contain the true
20 amount of proteins per serving that was advertised, labeled, and marketed. Rather,
21 the Protein Products contained significantly less protein than what was represented to
22 Plaintiff and the Class.

23 68. As a result of Defendant’s breach of express warranty, Plaintiff and
24 members of the Class were injured in the amount of all or a portion of their purchase
25 price of the Protein Products.

26 69. On March 7, 2015 counsel for Plaintiff and the Class provided
27 Defendant with written notice that its conduct is a breach of warranty and is in
28 violation of the Consumers Legal Remedies Act.

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SHERMAN OAKS, CALIFORNIA 91403

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THIRD CAUSE OF ACTION
NEGLIGENT MISREPRESENTATION
(Plaintiff and the Class Against Defendant)

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

71. Plaintiff brings this claim individually and on behalf of members of the Class against Defendant.

72. During the Class Period, Defendant represented to California consumers through the advertising, marketing, and sale of its Protein Products that the Products contained a specific amount of protein per serving, knowing that such information is material to a reasonable consumer’s purchasing decision.

73. Defendant’s misrepresentations regarding the characteristics of the Protein Products were material because a reasonable consumer would attach importance to them in determining whether to purchase and consume Defendant’s products due to the fact that the Products are health related.

74. Defendant’s material misrepresentations concerning the quality of the Protein Products were false and made without reasonable grounds for believing them to be true.

75. Defendant made material misrepresentations concerning the quality of the Protein Products with the intent to induce Plaintiff and the Class to purchase and consume the Products over other competing products.

76. Plaintiff and the Class reasonably and materially relied on Defendant’s material misrepresentations in choosing to purchase and consume Defendant’s Protein Products.

77. As a direct and proximate result of Defendant’s conduct, Plaintiff and the Class have incurred damages in an amount to be proven at trial. Plaintiff and the Class are not seeking damages arising out of personal injuries.

FOURTH CAUSE OF ACTION

VIOLATION OF CALIFORNIA’S FALSE ADVERTISING LAW

(CAL. BUS. & PROF. CODE §§ 17500, ET SEQ.)

(Plaintiff and the Class Against Defendant)

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

79. Plaintiff brings this claim individually and on behalf of members of the Class against Defendant.

80. Plaintiff is informed and believes, and thereon alleges, that Defendant’s actions as described herein constitute unfair competition within the meaning of California’s False Advertising Law (“FAL”) insofar as it has disseminated untrue and/or misleading representations in connections with the sale of the Protein Products.

81. Defendant has engaged, and continues to engage, in false advertising in violation of Cal. Bus. & Prof. Code §§ 17500, *et seq.*, by making untrue and/or misleading representations concerning the quality and characteristics of the Protein Products without having any reasonable basis for doing so. Defendant has materially misrepresented the true amounts of protein in the Protein Products. Reasonable consumers purchased the Protein Products upon the belief that the Products contained the amounts of protein as labeled on the containers when, in fact, the Protein Products contained significantly less protein than what was represented to Plaintiff and the Class.

82. As a direct and proximate result of Defendant’s violation of the FAL, Plaintiff and the Class have suffered injury in fact and have suffered economic harm by losing money as a result of purchasing Defendant’s Protein Products.

83. Defendant’s wrongful business practices constitute a continuing course of conduct of false advertising since Defendant is continuously marketing and selling the Protein Products in a manner likely to deceive the public. Plaintiff and the Class

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1 seek an order of this Court enjoining Defendant from continuing to engage in
2 unlawful and unfair business practices and any other act prohibited by law, including
3 those set forth in the Complaint.

4 84. As a direct and proximate result of Defendant’s conduct, as set forth
5 herein, Defendant has received ill-gotten gains and/or profits. Therefore, Plaintiff
6 requests restitution and restitutionary disgorgement for all sums obtained in violation
7 of the FAL.

8 **FIFTH CAUSE OF ACTION**

9 **MAGNUSON-MOSS WARRANTY ACT**

10 **(15 U.S.C. §§ 2301, et seq.)**

11 **(Plaintiff and the Class Against Defendant)**

12 85. Plaintiff repeats the allegations contained in the foregoing paragraphs as
13 if fully set forth herein.

14 86. Plaintiff brings this claim individually and on behalf of members of the
15 Class against Defendant.

16 87. Defendant’s Protein Products are consumer products as defined in 15
17 U.S.C. § 2301(1).

18 88. Plaintiff and members of the Class are consumers as defined in 15
19 U.S.C. § 2301(3).

20 89. Defendant is a supplier and warrantor as defined in 15 U.S.C. §§
21 2301(4) and (5).

22 90. In connection with the sale of the Protein Products, Defendant issued
23 written warranties as defined in 15 U.S.C. § 2301(6), by making express warranties
24 that the Protein Products contained a certain amount of protein per serving.
25 Therefore, a reasonable consumer would expect that Defendant’s Protein Products do
26 in fact contain the amount of true protein as stated on the label of the Protein
27 Products.

28 91. However, Defendant’s Protein Products do not conform to the express

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1 warranties because the Protein Products are spiked with amino acids and contain less
2 protein than what is represented to Plaintiff and the Class on the labels of the Protein
3 Products.

4 92. By way of Defendant’s breach of express warranty, Defendant has
5 violated the statutory rights owed to Plaintiff and the Class pursuant to the
6 Magnuson-Moss Warranty Act, thereby damaging Plaintiff and the Class. *See* 15
7 U.S.C. §§ 2301, *et seq.*

8 93. As a direct and proximate result of Defendant’s breach, Plaintiff and the
9 Class were injured because: (a) they would not have purchased the Protein Products
10 had they known that the products do not contain the amount of true protein
11 represented on the labels of the Protein Products; (b) they paid a premium for
12 Defendant’s Protein Products based upon the express warranties made by Defendant;
13 and, (c) Defendant’s Protein products did not have the characteristics, benefits,
14 and/or uses as promised by Defendant.

15 94. Pursuant to 15 U.S.C. § 2310(d)(1), Plaintiff and the Class are entitled
16 to recover the amount of damages caused by Defendant’s breach of written and
17 implied warranty, which either constitute the full purchase price of Defendant’s
18 Protein Products or the difference in value between the Protein Products as warranted
19 and the products as sold.

20 95. In addition, pursuant to 15 U.S.C. § 2310(d)(2), Plaintiff and the Class
21 are entitled to recover a sum equal to the aggregate amount of costs and expenses,
22 including attorneys’ fees based on actual time expended, determined by the Court to
23 have been reasonably incurred by Plaintiff and the Class in connection with the
24 commencement and prosecution of this action.

25 96. On March 7, 2015, a pre-suit letter was served on Defendant in
26 compliance with the Magnuson-Moss Warranty Act, advising Defendant of its
27 breach of warranty against Plaintiff and members of the Class and provided
28 Defendant a reasonable opportunity to cure the defect. Defendant has failed to take

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1 any remedial measures to cure the breach in response to this notice by Plaintiff.

2 **SIXTH CAUSE OF ACTION**

3 **UNLAWFUL, FRAUDULENT & UNFAIR BUSINESS PRACTICES**

4 **(CAL. BUS. & PROF. §§ 17200 ET SEQ.)**

5 **(Plaintiff and the Class Against Defendant)**

6 97. Plaintiff repeats the allegations contained in the foregoing paragraphs as
7 if fully set forth herein.

8 98. Plaintiff brings this claim individually and on behalf of members of the
9 Class against Defendant.

10 99. Plaintiff is informed and believes, and thereon alleges that Defendant’s
11 actions as described herein constitute unfair competition within the meaning of
12 California’s Unfair Competition Law (“UCL”), insofar as the UCL prohibits “any
13 unlawful, unfair or fraudulent business act or practice” or “unfair, deceptive, untrue
14 or misleading advertising.”

15 100. Defendant has unfairly and fraudulently made false and/or misleading
16 representations concerning the quality and characteristics of the Protein Products
17 without having any reasonable basis for doing so. Defendant has materially
18 misrepresented the true amounts of protein in the Protein Products. Reasonable
19 consumers purchased the Protein Products upon the belief that the Products
20 contained the amounts of protein as labeled on the containers when, in fact, the
21 Protein Products contained significantly less protein than what was represented to
22 Plaintiff and the Class.

23 101. Defendant’s conduct constitutes an “unfair” business practice within the
24 meaning of the UCL insofar as Defendant’s business practices alleged herein are
25 immoral, unethical, oppressive, unscrupulous and/or substantially injurious to
26 consumers because Plaintiff and the Class received significantly less protein per
27 serving of the Product as advertised by Defendant.

28 102. Defendant’s conduct constitutes a “fraudulent” business practice within

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1 the context of the UCL insofar as Defendant’s misrepresentations and omissions
2 regarding the safety, efficacy and quality of its Protein Products are likely to deceive
3 members of the public.

4 103. Defendant’s conduct constitutes an “unlawful” business practice within
5 the meaning of the Unfair Competition Law because it violates the Consumers Legal
6 Remedies Act, California’s False Advertising Law, and the Magnuson-Moss
7 Warranty Act.

8 104. These above-described unlawful, unfair and fraudulent business
9 practices and unfair competition by Defendant continue to present a threat to Plaintiff
10 and the Class. Plaintiff is informed and believes, and thereon alleges, that Defendant
11 has systematically perpetrated deceptive and unfair practices upon members of the
12 public and has intentionally deceived Plaintiff and the Class.

13 105. Had Plaintiff and members of the Class known that the Products
14 contained significantly less protein than what was represented by Defendant on the
15 label of the Products, they would not have paid as much, if anything, for the Protein
16 Products. As a direct and proximate result of Defendant’s unlawful, fraudulent and
17 unfair business practices in violation of the UCL, Plaintiff and the Class have
18 suffered injury in fact and have suffered economic harm by losing money as a result
19 of purchasing Defendant’s Protein Products.

20 106. Defendant’s wrongful business practices constitute a continuing course
21 of conduct of unfair competition since Defendant is continuously marketing and
22 selling the Protein Products in a manner likely to deceive the public.

23 107. Defendant has been, and continues to be, unjustly enriched as a result of
24 money collected through the sale of the Protein Products. As a result of the
25 aforementioned conduct, Plaintiff and the Class are entitled to monetary restitution
26 and restitutionary disgorgement of profits.

27 108. Pursuant to California Business and Professions Code § 17203, Plaintiff
28 and the Class seek an order of this Court enjoining Defendant from continuing to

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1 engage in unlawful and unfair business practices and any other act prohibited by law,
2 including those set forth in the Complaint. Plaintiff and the Class also seek an order
3 requiring Defendant to make full restitution of all moneys they wrongfully obtained
4 from Plaintiff and the Class.

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PRAYER FOR RELIEF

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WHEREFORE, Plaintiff and members of the Class pray for relief and judgment against Defendant, as follows:

- 1. For an order certifying the Class, appointing Plaintiff and his counsel to represent the Class and notice to the Class to be paid by Defendant;
- 2. For damages suffered by Plaintiff and the Class;
- 3. For restitution to Plaintiff and the Class of all monies wrongfully obtained by Defendant;
- 4. For injunctive relief requiring Defendant to cease and desist from engaging in the unlawful, unfair, and/or deceptive practices alleged in the Complaint;
- 5. For Plaintiff’s reasonable attorneys’ fees, as permitted by law;
- 6. For Plaintiff’s costs incurred;
- 7. For pre-judgment and post-judgment interest at the maximum allowable rate on any amounts awarded; and
- 8. For such other and further relief that this Court deems just and proper.

DATED: April 10, 2015

PEARSON, SIMON & WARSHAW, LLP
DANIEL L. WARSHAW
BOBBY POUYA
MATTHEW A. PEARSON

By: /s/ Daniel L. Warshaw
DANIEL L. WARSHAW
Attorneys for Plaintiff James Eashoo,
individually and on behalf of all others
similarly situated

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DEMAND FOR JURY TRIAL

Plaintiff hereby demands a trial by jury of all claims and causes of action so triable in this lawsuit.

DATED: April 10, 2015

PEARSON, SIMON & WARSHAW, LLP
DANIEL L. WARSHAW
BOBBY POUYA
MATTHEW A. PEARSON

By: /s/ Daniel L. Warshaw
DANIEL L. WARSHAW
Attorneys for Plaintiff James Eashoo,
individually and on behalf of all others
similarly situated

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15165 VENTURA BOULEVARD, SUITE 400
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AFFIDAVIT OF DANIEL L. WARSHAW PURSUANT TO
CALIFORNIA CIVIL CODE § 1780(d)

Daniel L. Warshaw declares:

1. I am an attorney duly admitted to practice before this Court. I am a partner in the firm of Pearson, Simon & Warshaw, LLP, attorneys of record for Plaintiff James Eashoo.

2. This action has been filed in a county described in California Civil Code § 1780 as a proper place for the commencement of this action.

3. Defendant Iovate Health Sciences U.S.A., Inc. conducts substantial business in the Los Angeles County, California; and a substantial portion of the events complained of by Plaintiff occurred in Los Angeles County, California.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on April 10, 2015, at Sherman Oaks, California.

/s/ Daniel L. Warshaw
Daniel L. Warshaw

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