

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

TOM SABATANO, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

IOVATE HEALTH SCIENCES U.S.A. INC.
A/K/A MUSCLETECH,

Defendant.

Civil Action No.

CLASS ACTION COMPLAINT

JURY TRIAL DEMANDED

Plaintiff Tom Sabatano (“Plaintiff”) brings this action on behalf of himself and all others similarly situated against Defendant Iovate Health Sciences U.S.A. Inc. a/k/a Muscletech (“Defendant” or “Iovate”). Plaintiff makes the following allegations pursuant to the investigation of his counsel and based upon information and belief, except as to the allegations specifically pertaining to himself, which are based on personal knowledge.

NATURE OF THE ACTION

1. This is a class action lawsuit against Iovate for selling a defective dietary supplement product, Platinum 100% BCAA¹ 8:1:1 (“Platinum BCAA” or the “Product”), through its Muscletech brand which purports to “Promote[] Muscle Protein Synthesis,” “ensure[] that your muscles are primed for musclebuilding,” and provide the user with the “key building blocks of muscle.” But actually, based on independent, peer-reviewed research, BCAA supplements decrease muscle protein synthesis and are wholly incapable of building muscle on their own. Dr. Robert Wolfe, a renowned and highly-respected authority in the area of amino

¹ The acronym “BCAA” stands for “branched-chain amino acids.”

acid metabolism, concludes that consumption of BCAA supplements actually **negatively impacts** muscle protein synthesis due to lack of all essential amino acids (“EAA”), which causes EAAs stored in the muscle to be catabolized, thereby perpetuating a catabolic state of muscle protein breakdown. To build muscle, the body must have an abundant availability of all EAAs, which must be consumed through the diet. Anything less than a full panel of EAAs will grind any increase in muscle protein synthesis to a halt due to lack of sufficient raw materials with which the body can use to build muscle mass. Platinum BCAA contains only three of the nine EAAs, and therefore it cannot, in fact, build muscle. As such, Iovate’s claims that the Product “Promotes Muscle Protein Synthesis,” “ensures that your muscles are primed for musclebuilding,” and provides “key building blocks of muscle” are false and misleading based on peer-reviewed scientific data. In fact, the Product negatively impacts protein synthesis, thereby leaving Plaintiff and Class members (defined below) in a **worse position than if not taking the product at all**. Plaintiff brings this class action lawsuit on behalf of himself and purchasers of the Platinum BCAA dietary supplement.

A. Overview of Amino Acids

2. Amino acids are known as “building blocks” for protein, in that protein is made up of a sequence of amino acids held together by peptide bonds.²
3. A total of twenty amino acids comprise muscle protein.³ They are classified as either essential, non-essential, or conditionally essential. Nine of the twenty are known as “essential amino acids” (EAA) because “they cannot be produced by the body in physiologically

² <https://medlineplus.gov/ency/article/002222.htm> (last visited 8/28/19)

³ Robert R. Wolfe, *Branched-chain Amino Acids And Muscle Protein Synthesis In Humans: Myth Or Reality?* (J. Int’l Society of Sports Nutrition Aug. 22, 2017), at 1 (attached hereto as Exhibit A).

significant amounts, and therefore are crucial components of a balanced diet.”⁴ Non-essential amino acids are those produced in the body and therefore are not required to be consumed in the diet.⁵ Conditionally-essential amino acids are those which are usually non-essential except in certain circumstances, such as illness.⁶

Essential	Conditionally Non-Essential	Non-Essential
Histidine	Arginine	Alanine
Isoleucine	Cystine	Asparagine
Leucine	Glutamine	Aspartate
Lysine	Glycine	Glutamate
Methionine	Proline	Serine
Phenylalanine	Tyrosine	
Threonine		
Tryptophan		
Valine		

4. Three of the nine essential amino acids are known as branched-chain amino acids (“BCAAs”), which are leucine, valine, and isoleucine.⁷ They are called “branched-chain amino acids” because of their branched molecular structure.

B. Role of Amino Acids in Muscle Building

5. “Muscle protein is in a constant state of turnover, meaning that protein synthesis is occurring continuously to replace protein lost as a consequence of protein breakdown.”⁸

6. The “anabolic state,” or muscle growth, occurs when the rate of muscle protein synthesis is greater than the rate of protein breakdown.⁹

⁴ *Id.*

⁵ <https://medlineplus.gov/ency/article/002222.htm> (last visited 8/28/19)

⁶ *Id.*

⁷ Ex. A, at 1.

⁸ *Id.* at 1-2.

7. For muscle building to occur by way of stimulation of muscle protein synthesis, there must be an “abundant availability of all EAAs.”¹⁰ This is because muscle cannot be built without the necessary raw materials, to wit all EAAs.

8. For this reason, protein sources containing adequate amounts of all nine essential amino acids are known as “complete proteins.”¹¹

9. BCAAs, however, are not “complete proteins” because they are comprised of only three of the nine essential amino acids. As such, a nutritional supplement containing only BCAAs cannot build muscle, because there is not an “abundant availability of all EAAs” required to build muscle. In short, “[m]uscle protein synthesis will be limited by the lack of availability of any of the EAAs. . . .”¹²

10. When insufficient EAAs are consumed, the only potential source for EAAs for muscle protein synthesis are those derived from muscle protein breakdown, and therefore “it is impossible for muscle protein synthesis to exceed the rate of muscle protein breakdown when the precursors are derived entirely from protein breakdown, and thus an anabolic state cannot occur in the absence of exogenous amino acid intake.”¹³

(...footnote continued)

⁹ *Id.* at 3.

¹⁰ *Id.*

¹¹ <https://www.accessdata.fda.gov/scripts/InteractiveNutritionFactsLabel/protein.html> (last visited 8/28/19)

¹² Ex. A, at 3.

¹³ *Id.*

C. Platinum BCAA Does Not Build Muscle Via Enhanced Muscle Protein Synthesis

11. “The sale of BCAAs as nutritional supplements has become a multi-million dollar business.”¹⁴ “At the center of the marketing for these products is the widely-believed claim that consumption of BCAAs stimulates muscle protein synthesis, and as a result elicits an anabolic response.”¹⁵ However, recent peer-reviewed research has determined that these marketing claims are false and misleading.

1. Dr. Robert Wolfe’s Peer-Reviewed Study Finds BCAA Supplements Do Not Build Muscle And Actually Decrease Muscle Protein Synthesis

12. Dr. Robert Wolfe is a highly-regarded researcher in his field. He has published 452 peer-reviewed research articles, 126 review articles, and three books. His papers have been cited 50,663 times.¹⁶ Dr. Wolfe has performed extensive research in the field of muscle metabolism.

13. In August of 2017, Dr. Wolfe published a peer-reviewed study in the Journal of the International Society of Sports Nutrition entitled *Branched-chain amino acids and muscle protein synthesis in humans: myth or reality?* Dr. Wolfe performed a review of both the theoretical considerations and empirical research relating to BCAAs, and concluded that “the claim that consumption of dietary BCAAs stimulates muscle protein synthesis or produces an anabolic response in human subjects is unwarranted.”¹⁷

14. As to the theoretical considerations, Dr. Wolfe explained that in order for the body to reach an anabolic state (i.e. where the rate of muscle protein synthesis exceeds the rate of

¹⁴ *Id.* at 2.

¹⁵ *Id.*

¹⁶ See <http://aging.uams.edu/dr-robert-r-wolfe/> (last visited 8/28/19)

¹⁷ Ex. A, at 1.

muscle protein breakdown), there must be an abundance of all nine EAAs, not just the three BCAAs.¹⁸ “Muscle protein synthesis will be limited by the lack of availability of any of the EAAs, whereas a shortage of [non-essential amino acids] can be compensated for by increased de novo production of the deficient [non-essential amino acids].”¹⁹

15. When less than a full panel of EAAs are ingested (such as when ingesting a BCAA supplement), the only source of EAA precursors for muscle protein synthesis are those derived from muscle breakdown, which means that muscle is being broken down to provide EAAs for protein synthesis, rendering it impossible for the body to reach an anabolic state. Dr. Wolfe explains that “it is impossible for muscle protein synthesis to exceed the rate of muscle protein breakdown when the precursors are derived entirely from protein breakdown, and thus an anabolic state cannot occur in the absence of exogenous amino acid intake.”²⁰

16. Dr. Wolfe then reviewed the empirical evidence from human studies involving the effects of BCAA consumption, which revealed that “BCAA infusion not only fails to increase the rate of muscle protein synthesis in human subjects, but actually reduces the rate of muscle protein synthesis and the rate of muscle protein turnover.”²¹

17. Dr. Wolfe concluded:

When all evidence and theory is considered together, it is reasonable to conclude that there is no credible evidence that ingestion of a dietary supplement of BCAAs alone results in a physiologically significant stimulation of muscle protein. In fact, available evidence indicates that BCAAs actually decrease muscle protein synthesis. All EAAs must be available in abundance for increased anabolic signaling to translate to accelerated muscle protein synthesis.²²

¹⁸ *Id.* at 3.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* at 5.

²² *Id.* at 6.

2. Other Scholars Agree That BCAA Supplements Do Not Build Muscle

18. Researchers at the Gatorade Sports Science Institute reached an identical conclusion to that of Dr. Wolfe regarding the effects of BCAA supplements on muscle protein synthesis. The study concluded that there is “no reason to consume BCAA supplements for enhanced stimulation of [muscle protein synthesis] and/or decreased [muscle protein breakdown].”²³ The researchers further explained:

The claims for [BCAA] products are based on a wide range of mechanisms: from enhanced muscle protein synthesis (MPS) and decreased muscle protein breakdown (MPB) to protection of the immune system, increased fat oxidation and decreased muscle soreness, among many others. The physiological rationale for these claims, let alone robust evidence from well-controlled human studies, is often weak, if not completely lacking.²⁴

19. Dr. Susan Kleiner, a scientist, researcher, and consultant, also concurred with Dr. Wolfe and explained that she does not recommend BCAA supplements, and states that “it may be appropriate to let clients know that BCAA supplementation may decrease their [muscle protein synthesis] and turnover, making them certainly not helpful, and possibly harmful, to their goals.”²⁵

20. Dr. Jose Antonio, CEO of the International Society of Sports Nutrition noted that “BCAAs should not be marketed as a muscle building supplement . . .”²⁶

²³ <https://www.gssiweb.org/sports-science-exchange/article/branched-chain-amino-acid-supplementation-to-support-muscle-anabolism-following-exercise> (last visited 8/28/19).

²⁴ *Id.*

²⁵ <https://www.nutraingredients-usa.com/Article/2017/08/24/Limited-evidence-backs-BCAA-s-muscle-building-benefits-says-new-study#> (last visited 8/28/19).

²⁶ *Id.*

21. Dr. Stuart Phillips of McMaster University states: “Bottom line: If you’re taking in adequate protein [(i.e. a full panel of EAAs)], then BCAAs are a complete waste of money.”²⁷

3. Iovate’s Misrepresentations

22. Despite the findings of Dr. Wolfe and other researchers, Iovate continues to misrepresent that its Platinum BCAA product “Promotes Muscle Protein Synthesis,” “ensures that your muscles are primed for musclebuilding,” and provides “key building blocks of muscle” (the “Misrepresentations”). Each of the Misrepresentations appear on the product’s label.

23. Indeed, the front label panel of Platinum BCAA prominently states “Promotes Muscle Protein Synthesis.”



²⁷ <https://www.menshealth.com/nutrition/a19545329/branched-chain-amino-acids/> (last visited 8/28/19).

24. The Platinum BCAA label indicates to the consumer that use of the Product will lead to muscle growth through increased muscle protein synthesis.

25. The label also states that the Product “ensures that your muscles are primed for musclebuilding,” and provides “key building blocks of muscle” on the side paneling.

26. But, as discussed above, those label claims are false. According to independent research by Dr. Wolfe, “the claim that consumption of dietary BCAAs stimulates muscle protein synthesis or produces an anabolic response in human subjects is unwarranted.”²⁸ Further, according to Dr. Wolfe, studies in human subjects “have reported decreases, rather than increases, in muscle protein synthesis after intake of BCAAs.”²⁹

27. Plaintiff asserts claims on behalf of himself and a nationwide class and New York subclass of purchasers of Platinum BCAA for violation of New York General Business Law §§ 349 and 350 , violation of the Magnuson-Moss Warranty Act (“MMWA”), 15 U.S.C. §§ 2301, *et seq.*, breach of express warranty, breach of the implied warranty of merchantability, unjust enrichment, and fraud.

THE PARTIES

28. Plaintiff Tom Sabatano is a citizen of New York who resides in Yonkers, New York. In approximately 2018, Mr. Sabatano purchased Iovate’s Platinum BCAA product for approximately \$30 from a GNC location in Yonkers, New York. At all times, Mr. Sabatano used the product as directed on the label. The Platinum BCAA supplement he purchased prominently displayed on the package the phrase “Promotes Muscle Protein Synthesis.” The label also indicated that the Product would “ensure[] that [his] muscles are primed for musclebuilding,” and provide “key building blocks of muscle.” Mr. Sabatano saw these representations prior to

²⁸ Ex. A, at 2.

²⁹ *Id.* At 8.

and at the time of purchase, and understood them as representations and warranties that the product would, in fact, “Promote[] Muscle Protein Synthesis,” “ensure[] that [his] muscles are primed for musclebuilding,” and provide “key building blocks of muscle.” He relied on these representations and warranties in deciding to purchase Iovate’s Platinum BCAA product, and these representations and warranties were part of the basis of the bargain in that he would not have purchased Platinum BCAA if he had known that it would not, in fact, “Promote[] Muscle Protein Synthesis,” “ensure[] that [his] muscles are primed for musclebuilding,” and provide “key building blocks of muscle.”

29. Ultimately, Platinum BCAA was worthless (and certainly worth less than its misrepresentations suggested) because it does not, in fact, “Promote[] Muscle Protein Synthesis,” “ensure[] that [the user’s] muscles are primed for musclebuilding,” and does not provide the user with the “key building blocks of muscle.” In fact, it actually reduces the rate of muscle protein synthesis and the rate of muscle protein turnover. Further, because the Product does not contain all nine EAAs, it cannot build muscle.

30. Defendant Iovate Health Sciences U.S.A. Inc. is a Delaware Corporation with its principal place of business at 1105 North Market Street, Suite 1330, Wilmington, Delaware 19801. Iovate is engaged in the manufacturing, processing, packaging, and distribution of Platinum BCAA. Iovate sells Platinum BCAA throughout New York and the entire United States.

JURISDICTION AND VENUE

31. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1332(d)(2)(A) because this case is a class action where the aggregate claims of all members of the proposed class are in excess of \$5,000,000.00, exclusive of interest and costs, and Plaintiff, as well as most

members of the proposed class, are citizens of states different from Defendant. This Court also has supplemental jurisdiction over state law claims pursuant to 28 U.S.C. § 1367.

32. Pursuant to 28 U.S.C. § 1391, this Court is the proper venue for this action because Plaintiff is a citizen of New York and resides in this District. Moreover, Defendant distributed, advertised, and sold Platinum BCAA, which is the subject of the present complaint, in this District.

CLASS REPRESENTATION ALLEGATIONS

33. Plaintiff seeks to represent a class defined as all persons in the United States who purchased Iovate's (a/k/a Muscletech's) Platinum BCAA (the "Nationwide Class"). Excluded from the Nationwide Class are persons who made such purchase for purpose of resale, Defendant, Defendant's officers, directors, agents, trustees, parents, children, corporations, trusts, representatives, employees, principals, servants, partners, joint venturers, or entities controlled by Defendant, and their heirs, successors, assigns, or other persons or entities related to or affiliated with Defendant and/or Defendant's officers and/or directors, the judge assigned to this action, and any member of the judge's immediate family.

34. Plaintiff also seeks to represent a subclass of all persons who purchased Iovate's Platinum BCAA in New York (the "New York Subclass").

35. Members of the Nationwide Class and New York Subclass are so numerous that their individual joinder herein is impracticable. Defendant's annual sales of Platinum BCAA are in the millions of dollars; thus, members of the Nationwide Class number in the hundreds of thousands and members of the New York Subclass number in the tens of thousands. The precise number of Class members and their identities are unknown to Plaintiff at this time but may be determined through discovery. Class members may be notified of the pendency of this action by

mail and/or publication through the distribution records of Defendant and third-party retailers and vendors.

36. Common questions of law and fact exist as to all Class members and predominate over questions affecting only individual Class members. Common legal and factual questions include, but are not limited to: whether Platinum BCAA actually “Promotes Muscle Protein Synthesis,” “ensures that your muscles are primed for musclebuilding,” and provides “key building blocks of muscle.”

37. The claims of the named Plaintiff are typical of the claims of the Nationwide Class and New York Subclass in that the named Plaintiff was exposed to and relied on Defendant’s false and misleading marketing of Platinum BCAA and suffered a loss as a result of his Platinum BCAA purchase.

38. Plaintiff is an adequate representative of the Nationwide Class and New York Subclass because his interests do not conflict with the interests of the Class members he seeks to represent, he has retained competent counsel experienced in prosecuting consumer class actions, and he intends to prosecute this action vigorously. The interests of the Nationwide Class and New York Subclass members will be fairly and adequately protected by Plaintiff and his counsel.

39. The class mechanism is superior to other available means for the fair and efficient adjudication of the claims of the Nationwide Class and New York Subclass members. Each individual Class member may lack the resources to undergo the burden and expense of individual prosecution of the complex and extensive litigation necessary to establish Defendant’s liability. Individualized litigation increases the delay and expense to all parties and multiplies the burden on the judicial system presented by the complex legal and factual issues of this case. Individualized litigation also presents a potential for inconsistent or contradictory judgments. In

contrast, the class action device presents far fewer management difficulties and provides the benefits of single adjudication, economy of scale, and comprehensive supervision by a single court on the issue of Defendant's liability. Class treatment of the liability issues will ensure that all claims and claimants are before this Court for consistent adjudication of the liability issues.

COUNT I
(Deceptive Acts Or Practices, New York Gen. Bus. Law § 349)

40. Plaintiff hereby incorporates by reference the allegations contained in all preceding paragraphs of this complaint.

41. Plaintiff brings this claim individually and on behalf of the members of the proposed New York Subclass against Defendant.

42. By the acts and conduct alleged herein, Defendant committed unfair or deceptive acts and practices by misrepresenting that the Platinum BCAA product would "Promote[] Muscle Protein Synthesis," "ensure[] that your muscles are primed for musclebuilding," and provide "key building blocks of muscle."

43. The foregoing deceptive acts and practices were directed at consumers.

44. The foregoing deceptive acts and practices are misleading in a material way because they fundamentally misrepresent the characteristics of Platinum BCAA to induce consumers to purchase the same.

45. Plaintiff and members of the New York Subclass were injured because (a) they would not have purchased Platinum BCAA had they known that it would not "Promote[] Muscle Protein Synthesis," "ensure[] that your muscles are primed for musclebuilding," and provide "key building blocks of muscle," (b) they overpaid for Platinum BCAA products because they are sold at a price premium, and (c) Platinum BCAA products did not have the characteristics, uses, or benefits promised, namely that they do not "Promote[] Muscle Protein

Synthesis,” “ensure[] that your muscles are primed for musclebuilding,” or provide “key building blocks of muscle.” As a result, Plaintiff and members of the New York Subclass have been damaged either in the full amount of the purchase price of the Platinum BCAA products or in the difference in value between Platinum BCAA products as warranted and Platinum BCAA products as actually sold.

46. On behalf of himself and other members of the Class and New York Subclass, Plaintiffs seek to enjoin the unlawful acts and practices described herein, to recover their actual damages or fifty dollars, whichever is greater, three times actual damages, and reasonable attorneys’ fees.

COUNT II
(False Advertising, New York Gen. Bus. Law § 350)

47. Plaintiff incorporates by reference and re-alleges herein all paragraphs alleged above.

48. Plaintiffs bring this claim individually and on behalf of the members of the proposed New York Subclass against Defendant.

49. Based on the foregoing, Defendant has engaged in consumer-oriented conduct that is deceptive or misleading in a material way which constitutes false advertising in violation of Section 350 of the New York General Business Law.

50. The foregoing advertising was directed at consumers and was likely to mislead a reasonable consumer acting reasonably under the circumstances.

51. These misrepresentations have resulted in consumer injury or harm to the public interest.

52. Plaintiff and members of the New York Subclass were injured because (a) they would not have purchased Platinum BCAA products had they known that they would not

“Promote[] Muscle Protein Synthesis,” “ensure[] that your muscles are primed for musclebuilding,” or provide “key building blocks of muscle,” (b) they overpaid for Platinum BCAA products because they are sold at a price premium, and (c) Platinum BCAA products did not have the characteristics, uses, or benefits promised, namely that they do not “Promote[] Muscle Protein Synthesis,” “ensure[] that your muscles are primed for musclebuilding,” or provide “key building blocks of muscle.” As a result, Plaintiff and members of the New York Subclass have been damaged either in the full amount of the purchase price of the Platinum BCAA products or in the difference in value between Platinum BCAA products as warranted and Platinum BCAA products as actually sold.

53. On behalf of himself and other members of the New York Subclass, Plaintiff seeks to enjoin the unlawful acts and practices described herein, to recover actual damages or five hundred dollars per violation, whichever is greater, three times actual damages and reasonable attorneys’ fees.

COUNT III
Violation of the Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301, et seq.
(On behalf of Plaintiff and the Nationwide Class)

54. Plaintiff hereby incorporates by reference the allegations contained in all preceding paragraphs of this complaint.

55. Plaintiff brings this claim individually and on behalf of the members of the Nationwide Class and New York Subclass against Defendant.

56. Platinum BCAA is a consumer product as defined by 15 U.S.C. § 2301(1).

57. Plaintiff and members of the Nationwide Class and New York Subclass are consumers as defined by 15 U.S.C. § 2301(3).

58. Defendant is a supplier and/or warrantor as defined in 15 U.S.C. § 2301(4) and (5).

59. In connection with the sale of Platinum BCAA, Defendant issued written warranties as defined in 15 U.S.C. § 2301(6), including that the Product “Promotes Muscle Protein Synthesis,” “ensures that your muscles are primed for musclebuilding,” and provides “key building blocks of muscle.”

60. Defendant breached the written warranties because each of the express warranties is provably false and misleading. Platinum BCAA does not stimulate muscle protein synthesis sufficient to build muscle or produce an anabolic response in human subjects, but actually reduces the rate of muscle protein synthesis and the rate of muscle protein turnover due to lack of all EAAs.

61. By reason of Defendant’s breach of the express written warranties involving Platinum BCAA, Defendant has violated the statutory rights due Plaintiff and members of the Nationwide Class and New York Subclass pursuant to the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301, *et seq.*, thereby damaging Plaintiff and members of the Nationwide Class and New York Subclass.

62. Plaintiff and members of the Nationwide Class and New York Subclass were injured as a direct and proximate result of Defendant’s breach because they would not have purchased Platinum BCAA if they had known the truth about the Product, or would have paid substantially less for it.

63. Pursuant to 15 U.S.C. § 2310(d)(1), Plaintiff and members of the Nationwide Class and New York Subclass are entitled to recover the damages caused to them by Defendant’s breaches of written warranties, which damages constitute the full purchase price of Platinum

BCAA. In addition, pursuant to 15 U.S.C. § 2310(d)(2), Plaintiff and members of the Nationwide Class and New York Subclass are entitled to recover a sum equal to the aggregate amount of costs and expenses (including attorneys' fees based on actual time expended) determined by the Court to have been reasonably incurred by Plaintiff and members of the Nationwide Class and New York Subclass for and in connection with the commencement and prosecution of this action.

64. Prior to filing this action, Plaintiff, by and through his counsel, provided Defendant with written notice of his claims pursuant to 15 U.S.C. § 2310(e) and also notified Defendant that he was acting on behalf of a Class defined as all persons in the United States who purchased Platinum BCAA. The September 20, 2019 letter is attached hereto as **Exhibit B**.

COUNT IV
Breach Of Express Warranty
(On behalf of Plaintiff and the Nationwide Class)

65. Plaintiff hereby incorporates by reference the allegations contained in all preceding paragraphs of this complaint.

66. Plaintiff brings this claim individually and on behalf of the members of the proposed Nationwide Class and New York Subclass against Defendant.

67. On September 20, 2019, Plaintiff provided Defendant with notice of this claim by letter that complied in all respects with U.C.C. § 2-607(3)(a). The September 20, 2019 letter is attached hereto as **Exhibit B**.

68. Defendant, as the designer, manufacturer, marketer, distributor, and/or seller, expressly warranted that Platinum BCAA "Promotes Muscle Protein Synthesis," "ensures that your muscles are primed for musclebuilding," and provides "key building blocks of muscle."

69. In fact, Platinum BCAA does not stimulate muscle protein synthesis sufficient to induce muscle gain or produce an anabolic response in human subjects. It actually reduces the rate of muscle protein synthesis and the rate of muscle protein turnover due to the absence of all EAAs.

70. Mr. Sabatano and members of the Nationwide Class and New York Subclass saw these representations prior to and at the time of purchase, and understood them as representations and warranties that the product would, in fact, “Promote[] Muscle Protein Synthesis,” “ensure[] that [their] muscles are primed for musclebuilding,” and provide “key building blocks of muscle.” Plaintiff and members of the Nationwide Class and New York Subclass relied on these representations and warranties in deciding to purchase Iovate’s Platinum BCAA product, and these representations and warranties were part of the basis of the bargain in that they would not have purchased Platinum BCAA if they had known that it would not, in fact, “Promote[] Muscle Protein Synthesis,” “ensure[] that [their] muscles are primed for musclebuilding,” and provide “key building blocks of muscle.”

71. As a direct and proximate result of Defendant’s breach of express warranty, Plaintiff and the Nationwide Class and New York Subclass members have been injured and harmed because (a) they would not have purchased Platinum BCAA had they known that it would not “Promote[] Muscle Protein Synthesis,” “ensure[] that [their] muscles are primed for musclebuilding,” or provide “key building blocks of muscle”; (b) they overpaid for Platinum BCAA because it is sold at a price premium, and (c) Platinum BCAA did not have the characteristics, uses, or benefits as promised, namely it does not “Promote[] Muscle Protein Synthesis,” “ensure[] that your muscles are primed for musclebuilding,” or provide “key building blocks of muscle.” As a result, Plaintiff and members of the Nationwide Class and New York

Subclass have been damaged either in the full amount of the purchase price of the Platinum BCAA product or in the difference in value between Platinum BCAA as warranted and Platinum BCAA as actually sold.

COUNT V
Breach Of Implied Warranty of Merchantability
(On behalf of Plaintiff and the Nationwide Class)

72. Plaintiff hereby incorporates by reference the allegations contained in all preceding paragraphs of this complaint.

73. Plaintiff brings this claim individually and on behalf of the members of the proposed Nationwide Class and New York Subclass against Defendant.

74. On September 20, 2019, Plaintiff provided Defendant with notice of this claim by letter that complied in all respects with U.C.C. § 2-607(3)(a). See **Exhibit B**.

75. Defendant breached the warranty implied in the contract for the sale of Platinum BCAA because it could not pass without objection in the trade under the contract description, the goods were not of fair and average quality within the description, and the goods were unfit for their intended and ordinary purpose because Platinum BCAA does not stimulate muscle protein synthesis sufficient to build muscle or produce an anabolic response in human subjects. As a result, Plaintiff and the Nationwide Class and New York Subclass members did not receive the goods as impliedly warranted by Defendant to be merchantable.

76. Plaintiff and the Nationwide Class and New York Subclass members purchased Platinum BCAA in reliance upon Defendant's skill and judgment and the implied warranties of fitness for the purpose.

77. The Platinum BCAA product was not altered by Plaintiff or the Nationwide Class or New York Subclass members.

78. The Platinum BCAA product was defective when it left the exclusive control of Defendant.

79. Defendant knew Platinum BCAA would be purchased and used without additional testing by Plaintiff and the Nationwide Class and New York Subclass members.

80. The BCAA product was defectively designed and unfit for its intended purpose, and Plaintiff and the Nationwide Class and New York Subclass members did not receive the goods as warranted.

81. As a direct and proximate cause of Defendant's breach of warranty, Plaintiff and the Nationwide Class and New York Subclass members have been injured and harmed because (a) they would not have purchased Platinum BCAA had they known that it would not "Promote[] Muscle Protein Synthesis," "ensure[] that your muscles are primed for musclebuilding," or provide "key building blocks of muscle"; (b) they overpaid for Platinum BCAA because it is sold at a price premium, and (c) Platinum BCAA did not have the characteristics, uses, or benefits as promised, namely that it does not "Promote[] Muscle Protein Synthesis," "ensure[] that your muscles are primed for musclebuilding," or provide "key building blocks of muscle." As a result, Plaintiff and members of the Nationwide Class and New York Subclass have been damaged either in the full amount of the purchase price of the Platinum BCAA product or in the difference in value between Platinum BCAA as warranted and Platinum BCAA as actually sold.

COUNT VI
Unjust Enrichment
(On behalf of Plaintiff and the Nationwide Class)

82. Plaintiff hereby incorporates by reference the allegations contained in all preceding paragraphs of this complaint.

83. Plaintiff brings this claim individually and on behalf of the members of the proposed Nationwide Class and New York Subclass against Defendant.

84. Plaintiff and the Nationwide Class and New York Subclass members conferred benefits on Defendant by purchasing Platinum BCAA.

85. Defendant has been unjustly enriched in retaining the revenues derived from Plaintiff and the Nationwide Class and New York Subclass members' purchases of Platinum BCAA. Retention of those monies under these circumstances is unjust and inequitable because Defendant's sale of Platinum BCAA resulted in purchasers being denied the full benefit of their purchase because Platinum BCAA does not "Promote[] Muscle Protein Synthesis," "ensure[] that your muscles are primed for musclebuilding," or provide "key building blocks of muscle."

86. Because Defendant's retention of the non-gratuitous benefits conferred on it by Plaintiff and the Nationwide Class and New York Subclass members is unjust and inequitable, Defendant must pay restitution to Plaintiff and the Nationwide Class and New York Subclass members for its unjust enrichment, as ordered by the Court.

COUNT VII
Fraud
(On behalf of Plaintiff and the Nationwide Class)

87. Plaintiff hereby incorporates by reference the allegations contained in all preceding paragraphs of this complaint.

88. Plaintiff brings this claim individually and on behalf of the members of the proposed Nationwide Class and New York Subclass against Defendant.

89. As discussed above, Defendant provided Plaintiff and the Nationwide Class and New York Subclass members with false or misleading material information and failed to disclose material facts about Platinum BCAA, including but not limited to the fact that it does not

“Promote[] Muscle Protein Synthesis,” “ensure[] that your muscles are primed for musclebuilding,” or provide “key building blocks of muscle.” In fact, Platinum BCAA actually reduces the rate of muscle protein synthesis and the rate of muscle protein turnover. These misrepresentations and omissions were made with knowledge of their falsehood.

90. Dr. Wolfe’s study was published in August of 2017, and has been widely publicized in the nutrition and fitness community. Despite the fact that this study has been published for approximately two years, and that other researchers and fitness professionals have joined Dr. Wolfe in concluding that BCAAs, on their own, are ineffective for stimulating muscle growth via increased muscle protein synthesis, Iovate continues to sell its Platinum BCAA product to unsuspecting customers. In short, Iovate continues to sell a product that cannot do what it claims to do based on scientific research which has been widely available for approximately two years. In fact, the research suggests that the Platinum BCAA product actually reduces protein synthesis and perpetuates a catabolic state, directly contrary to the claims on the label. The misrepresentations and omissions made by Defendant, upon which Plaintiff and Class and New York Subclass members reasonably and justifiably relied, were intended to induce and actually induced Plaintiff and Class and New York Subclass members to purchase the Platinum BCAA product.

91. The fraudulent actions of Defendant caused damage to Plaintiff and the Nationwide Class and New York Subclass members, who are entitled to damages and other legal and equitable relief as a result.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, individually and on behalf of all others similarly situated, seeks judgment against Defendant, as follows:

- A. For an order certifying the Nationwide Class and the New York Subclass under Rule 23 of the Federal Rules of Civil Procedure and naming Plaintiff as representative of the Nationwide Class and New York Subclass and Plaintiff's attorneys as Class Counsel to represent the Nationwide Class and New York Subclass Members;
- B. For an order declaring that the Defendant's conduct violates the statutes referenced herein;
- C. For an order finding in favor of Plaintiff, the Nationwide Class, and the New York Subclass on all counts asserted herein;
- D. For compensatory, punitive, and statutory damages in amounts to be determined by the Court and/or jury;
- E. For prejudgment interest on all amounts awarded;
- F. For an order of restitution and all other forms of equitable monetary relief;
- G. For injunctive relief as pleaded or as the Court may deem proper; and
- H. For an order awarding Plaintiff and the Nationwide Class and New York Subclass their reasonable attorneys' fees and expenses and costs of suit.

DEMAND FOR TRIAL BY JURY

Plaintiff demands a trial by jury of all causes of action and issues so triable.

Dated: September 25, 2019

Respectfully submitted,

BURSOR & FISHER, P.A.

By: /s/ Philip L. Fraietta

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