SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

LYMAN GOOD, Plaintiff, v. GASPARI NUTRITION, INC., RICHARD GASPARI, HI-TECH PHARMACEUTICALS, INC., JARED R. WHEAT, and VITAMIN SHOPPE, INC., Defendants.	Index no. SUMMONS *Basis of venue:* *Plaintiff's residence:* 320 East 115 Street New York County

To: Gaspari Nutrition, Inc.
6025 A Unity Drive
Norcross, GA 30071

YOU ARE HEREBY SUMMONED to answer the verified complaint in this action, and to serve a copy of your answer, or, if the complaint is not served with this summons to serve a notice of appearance on the plaintiff's attorney within twenty (20) days after the service of this summons exclusive of the day of service, where service is made by delivery upon you personally within the state, or within thirty (30) days after completion of service where service is made in any other manner. In case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated: Garden City, New York
October 16, 2017

DAVID M. FISH P.C.

By: David Fish
David M. Fish
Attorney for Plaintiff
400 Garden City Plaza, Suite 432
Garden City, New York 11530
(212) 869-1040
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To: Richard Gaspari
c/o Gaspari Nutrition, Inc.
6025 A Unity Drive
Norcross, GA 30071

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To: Hi-Tech Pharmaceuticals, Inc.
6015 Unity Drive. #B
Norcross, GA 30071

YOU ARE HEREBY SUMMONED to answer the verified complaint in this action, and to serve a copy of your answer, or, if the complaint is not served with this summons to serve a notice of appearance on the plaintiff's attorney within twenty (20) days after the service of this summons exclusive of the day of service, where service is made by delivery upon you personally within the state, or within thirty (30) days after completion of service where service is made in any other manner. In case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

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To: Jared R. Wheat
Hi-Tech Pharmaceuticals, Inc.
6015 Unity Drive. #B
Norcross, GA 30071

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To: Vitamin Shoppe, Inc.
2101 91st Street
North Bergen, NJ 07047

YOU ARE HEREBY SUMMONED to answer the verified complaint in this action, and to serve a copy of your answer, or, if the complaint is not served with this summons to serve a notice of appearance on the plaintiff's attorney within twenty (20) days after the service of this summons exclusive of the day of service, where service is made by delivery upon you personally within the state, or within thirty (30) days after completion of service where service is made in any other manner. In case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

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SUPREME COURT OF THE STATE OF NEW YORK
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LYMAN GOOD, Plaintiff, v. GASPARI NUTRITION, INC., RICHARD GASPARI, HI-TECH PHARMACEUTICALS, INC., JARED R. WHEAT, and VITAMIN SHOPPE, INC., Defendants.	Index no. COMPLAINT

Plaintiff Lyman Good ("Plaintiff"), brings this action against defendants Gaspari Nutrition, Inc. ("Gaspari Nutrition"), Richard Gaspari ("Gaspari"), Hi-Tech Pharmaceuticals, Inc. ("HTP"), Jared R. Wheat ("Wheat") (together, "GNI Defendants") and Vitamin Shoppe, Inc. ("Vitamin Shoppe") (all collectively, "Defendants") and each of them, upon personal knowledge as to allegations concerning Plaintiff and as to all other matters, upon information and belief based on the investigation of counsel.

I. PRELIMINARY STATEMENT

1. This is an action for restitution, damages, injunctive, and related legal and equitable relief under New York statutory and common law against GNI Defendants for conducting an ongoing, fraudulent scheme to adulterate certain products with anabolic steroids and misbrand those products as "dietary supplements" to defraud consumers. The purpose was and is to intentionally deceive consumers into believing that Gaspari Nutrition manufactured superior "dietary supplements." Instead, harmful, illegal drugs were added in order to increase

sales in the competitive dietary supplements industry. This action is also against Vitamin Shoppe for breach of warranty and other claims for selling the adulterated products despite its assurances of product quality and control.

2. GNI Defendants manufacture, label, and sell products that they purport to be dietary supplements. GNI Defendants "control every step in the supply chain and production process" of Gaspari Nutrition products. One such product is Anavite, which is labeled as a dietary supplement and specifically, a multivitamin. Anavite has been on the market since around February 22, 2010.

3. GNI Defendants represent to the public that:

a. "our products are safe";

b. "our products are safe from adulteration, contamination, and ingredient substitution";

c. "you're getting what's on the label"; and

d. the products are fit for any "category bodybuilder, MMA athlete or weekend warrior."

4. These representations are false and misleading as Anavite contains 1-androstenedione ("1-andro"), which is not disclosed on the label and is prohibited for use by certain mixed martial arts ("MMA") athletes.

5. 1-andro is a synthetic, androgenic-anabolic steroid that can cause muscle growth and severe, potentially lethal medical conditions. It is a "drug" under the Federal Food, Drug, and Cosmetic Act ("FDCA"), 21 U.S.C. § 301 *et seq.*, a "controlled substance" under Controlled Substances Act ("CSA"), 21 U.S.C. § 801 *et seq.*, and a "banned substance" from certain U.S. sports since 2006. Under the FDCA, "dietary supplements containing andro[] are adulterated."

6. The goal of Defendants' conduct is to deceive consumers into believing that Anavite is a superior dietary supplement so that consumers continue to buying the product and generate revenue for Defendants. GNI Defendants disregard safety because they know that consumers judge by labels and results, hence their selling point: "our products work better than our competitors."

7. Plaintiff, a mixed martial arts fighter in the Ultimate Fighting Championship ("UFC"), reasonably believed that Anavite was appropriate for any athlete (many of whom, including Plaintiff, are forbidden from using anabolic steroids), and that Anavite was a "dietary supplement," which, by law, must not contain any drug or controlled substance, like 1-andro.

8. Plaintiff purchased Anavite that contained 1-andro.

9. Plaintiff discovered the adulteration of Anavite soon after he was suspended on October 24, 2016 for testing positive for 1-andro and its metabolite. Plaintiff's suspension prompted him – knowing he never used anabolic steroids – to submit unopened Anavite bottles to LGC Science, Inc. for testing. The United States Anti-Doping Agency ("USADA") conducted its own analysis. Both USADA and LGC detected 1-andro in Anavite. USADA now warns athletes to not consume Anavite.

10. Defendants initiated and have continued this fraudulent scheme of adulteration and steroid distribution despite prior and ongoing lawsuits against them for similar conduct, as they appear to believe that this scheme is still profitable. For this reason, Plaintiff seeks injunctions and punitive damages to punish and deter the repeated, unlawful behavior of Defendants.

11. Vitamin Shoppe knows that adulteration pervades dietary supplements and consciously disregards the adulteration of Anavite, yet distributes and delivers Anavite to

trusting customers. In addition, Vitamin Shoppe encourages customers to buy through their stores by claiming to enforce strict quality assurance procedures and by claiming to be a source of specialized knowledge on dietary supplements. Vitamin Shoppe failed to honor its warranties and procedures to the detriment of Plaintiff and others.

II. VENUE

12. Venue is proper in this county pursuant to Civil Procedure Law and Rule 503(a) because Plaintiff is and was a resident of New York County at the time that this action commenced and during the facts that give rise to this action. Defendants conduct substantial and/or regular business in this venue. Defendants received substantial payments from consumers in this venue for Anavite.

III. PARTIES

13. Plaintiff Lyman Good ("Plaintiff") is an individual and resident of New York County. Plaintiff is a 32-year-old mixed martial arts ("MMA") athlete, who has been competing professionally since 2005, and has been under contract with the UFC since July 2015. He has enjoyed tremendous success through his training, diet, and overall dedication to MMA, all while working full-time, teaching martial arts to children and adults.

14. On October 24, 2016, USADA suspended Plaintiff after he tested positive for 1-andro. The suspension was reduced after finding that Anavite contained, but did not disclose, 1-andro as an ingredient.

15. Defendant Gaspari Nutrition was a New Jersey corporation with its principal place of business in New Jersey. On April 5, 2016, Gaspari Nutrition became a Georgia

corporation and maintained its principal place of business in New Jersey. Gaspari Nutrition manufactures, labels, packages, markets, and sells products as dietary supplements, such as Anavite, both wholesale and retail, to distributors, retailers, and consumers nationwide. As of April 5, 2016, Gaspari Nutrition uses HTP's four production and warehouse facilities in Georgia and Pennsylvania for Anavite. Upon information and belief, Gaspari Nutrition continues to use its New Jersey facilities.

16. Defendant Gaspari is an individual, New Jersey resident, and former professional bodybuilder. He is the founder, President, and former CEO of Gaspari Nutrition. He was the sole director of Gaspari Nutrition, at a minimum, until it filed for bankruptcy on October 14, 2014.

17. Defendant Wheat is an individual, Georgia resident, and founder, CEO, CFO, and Secretary of HTP. In April 2016, Wheat purchased an ownership interest in Gaspari Nutrition and became its CEO, CFO, and Secretary in order to control the entire supply chain of Gaspari Nutrition products by using HTP's facilities and supply chain management. On April 5, 2016, Wheat caused Gaspari Nutrition to incorporate in Georgia.

18. Defendant HTP is a Georgia corporation with its principal place of business in Georgia, two production facilities in Georgia, and another two facilities in Pennsylvania. HTP manufactures, labels, packages, and sells products as dietary supplements, both wholesale and retail, to retailers, distributors, and consumers nationwide. Since April 5, 2016, HTP uses its facilities and resources for Gaspari Nutrition's operations and to manage Gaspari Nutrition's supply chain.

19. Defendant Vitamin Shoppe is a New Jersey Corporation headquartered in North Bergen, New Jersey. Vitamin Shoppe is a retailer of nutritional products and sports supplements

as well as herbs, homeopathic remedies, and beauty aids. Vitamin Shoppe sells products through more than 775 retail stores throughout the United States, including New York, and its website, www.vitaminshoppe.com. Vitamin Shoppe is a public company with shares that trade on the New York Stock Exchange under the symbol "VSI".

IV. STATEMENT OF FACTS

A. Background

a. Pharmacology of Anabolic Steroids

20. Androstenedione ("andro") is an androgen, like testosterone. Androgens are "male" sex steroids because they stimulate or control the development and maintenance of male, secondary sex characteristics.

21. Andro is also an anabolic-androgenic steroid ("anabolic steroid"). Anabolic steroids are synthetic androgens and variants of testosterone that induce anabolic or androgenic responses in the body. "Anabolic" refers to muscle building, and "androgenic" refers to male sex characteristics.

22. 1-androstenedione, or 5α-androst-1-ene-3,17-dione ("1-andro"), is one type of andro. 1-andro is synthetic and "exogenous," *i.e.*, not naturally produced in the human body.

23. Anabolic steroids may be used non-medically, which is illegal.

24. Medical use is legal in the United States if the Federal Drug Administration ("FDA") approves.

25. "Doping" or "steroid abuse" is the nonmedical use of anabolic steroids, typically for athletic performance enhancement or bodybuilding. This is extremely dangerous and potentially lethal.

26. Short-term steroid abuse can cause body swelling, an increased risk of tendinitis and tendon rupture, severe acne, infections or diseases via injection (such as HIV or hepatitis), and psychiatric disorders, such as paranoid jealousy, extreme irritability, delusions, impaired judgment, addiction, depression, extreme mood swings, aggression, and violent rage (commonly known as "roid rage").

27. Long-term abuse can cause serious and permanent, health problems, such as: kidney failure; liver damage, toxicity, and tumors; heart enlargement; high blood pressure; increased low-density lipoprotein (LDL) cholesterol ("bad" cholesterol); decreased high-density lipoprotein (HDL) cholesterol ("good" cholesterol); increased risk of stroke and heart attack; and mood disorders.

28. Withdrawal symptoms for steroid use include mood swings, fatigue, restlessness, irritability, loss of appetite, decreased libido, insomnia, and serious (sometimes suicidal) depression.

29. In men, steroid abuse can also cause prostate gland enlargement, increased risk of prostate cancer, shrunken testicles, decreased sperm count, infertility, impotence, breast development, and baldness.

30. In women, steroid abuse can also cause increased facial hair and body hair, male-pattern baldness, infrequent or absent periods, clitoris enlargement, and a deeper voice.

31. In teens, steroid abuse can also cause stunted height and bone growth, infertility, and impotence.

32. These risks multiply when the anabolic steroid is manufactured or handled under unsafe or unsanitary conditions or mislabeled.

33. In response to these risks and growing abuse, Congress passed a series of legislation to strictly regulate the entire supply chain of anabolic steroids as a "controlled substance," "drug," and "prescription drug" in order to promote public health and safety.

b. Andro and the Controlled Substances Act

34. Congress passed the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236 (Oct. 27, 1970), which consists of the Controlled Substances Act of 1970, 21 U.S.C. § 801 *et seq.*, and provisions regarding imports and exports (collectively, "CSA"), to prohibit various activities in controlled substances.

35. A "controlled substance" is "a drug or other substance, or immediate precursor" in schedule I, II, III, IV, or V, excluding alcohol products and tobacco. *See id.* § 802(6).

36. The CSA assigns each controlled substance to one of the five schedules based on the substance's potential for abuse, accepted medical use, and potential for psychological and physical dependence. *See id.* § 812(a).

37. Schedule III includes controlled substances that (A) have "a potential for abuse less than [those] . . . in schedules I and II," (B) have "a currently accepted medical use in treatment in the United States," and (C) "may lead to moderate or low physical dependence or high psychological dependence." *Id.* § 812(b)(3).

38. The Anabolic Steroids Control Act of 1990, Pub. L. 101-647, Title XIX, § 1901, 104 Stat. 4851 (Nov. 29, 1990), amended the CSA to, among other things, define "anabolic steroid" and add specific anabolic steroids to schedule III. *See* 21 U.S.C. §§ 802(41)(A), 812.

39. The Anabolic Steroid Control Act of 2004, Pub. L. 108-358 118 Stat. 1661, (Oct. 22, 2004) amended the CSA by slightly redefining "anabolic steroid," which is current, *see* 21

U.S.C. § 802(41)(A), and listing more anabolic steroids, such as andro, *see* 802(41)(A)(iv)(I). An "anabolic steroid" is "any drug or hormonal substance, chemically and pharmacologically related to testosterone." 21 U.S.C. § 802(41)(A).

40. The Designer Anabolic Steroid Control Act of 2014, Pub. L. 113-260, 128 Stat. 2929 (Dec. 18, 2014) added more anabolic steroids to schedule III, and prohibits the "[f]alse labeling of anabolic steroids" that would otherwise legally be in commerce under the CSA, 21 U.S.C. § 825(e).

c. Andro is a Drug and not a Dietary Ingredient under the FDCA

41. Andro is a "drug" under the FDCA. *See* 21 U.S.C. § 321(g)(1).

42. The FDCA defines "drug," *id.*, in relevant part, as:

> . . . (B) [A]rticles intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man . . . ; and (C) articles (other than food) intended to affect the structure or any function of the body of man . . . ; and (D) articles intended for use as a component of any article specified in clause (A), (B), or (C).

43. Andro is intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man. *See* § 321(g)(1). Andro, like other anabolic steroids, "ha[s] approved medical uses, though improving athletic performance is not one of them."

44. According to the Mayo Clinic, androstenedione is used for, among other things: (1) diagnosis and differential diagnosis of hyperandrogenism; (2) diagnosis of congenital adrenal hyperplasia (CAH); (3) monitoring CAH treatment; and (4) diagnosis of premature adrenarche.

45. Andro is also a non-food article intended to affect the structure and functions of the human body. *See* § 321(g)(1).

46. Though andro is a "drug," the FDA does not approve andro for use as a drug. No FDA-approved drug contains andro according to "Drugs@FDA," the FDA's comprehensive database of "FDA Approved Drug Products."

47. It is unlawful to introduce or deliver for introduction into interstate commerce an unapproved new drug, such as andro. *See* 21 U.S.C. § 331(d) (citing 21 U.S.C. § 355).

48. Andro is also a "prescription drug" because it is "a drug for human use subject to section 353(b)(1) of this title." 21 U.S.C. § 360eee.

49. Under 21 U.S.C. § 353(b)(1):

> A drug intended for use by man which—
>
> (A) because of its toxicity or other potentiality for harmful effect . . . is not safe for use except under the supervision of a practitioner licensed by law to administer such drug; . . .
>
> shall be dispensed only (i) upon a [] prescription of a practitioner licensed by law to administer such drug . . . . The act of dispensing a drug contrary to the provisions of this paragraph shall be deemed to be an act which results in the drug being misbranded while held for sale.

50. The Dietary Supplement Health and Education Act of 1994, Pub. L. 103-147, 108 Stat. 4325 (Oct. 25, 1994) ("DSHEA") amended the FDCA to protect public health, foster proper nutrition, and regulate the dietary supplement industry. *See* § 2 of the DSHEA.

51. A dietary supplement is deemed to be a food under the FDCA unless it qualifies as a drug. *See* 21 U.S.C. § 321(ff)(3)(B).

52. No dietary supplement may contain any drug unless the supplement complies with all laws and regulations for drugs.

53. A "dietary supplement" under 21 U.S.C. § 321(ff)(1) is, in relevant part, a non-tobacco product "intended to supplement the diet that bears or contains one or more of the following dietary ingredients:

(A) a vitamin;
(B) a mineral;
(C) an herb or other botanical;
(D) an amino acid;
(E) a dietary substance for use by man to supplement the diet by increasing the total dietary intake; or
(F) a concentrate, metabolite, constituent, extract, or combination of any ingredient described in clause (A), (B), (C), (D), or (E).

54. Andro is not a dietary ingredient. *See* 21 U.S.C. 321(ff)(1).

d. Andro is a Banned Substance under USADA

55. The World Anti-Doping Agency ("WADA") was established in 1999 as an international, independent agency that seeks to ensure doping-free sports participation. WADA develops anti-doping capacities and monitors compliance with the World Anti Doping Code (the "Code"). The Code, effective since January 1, 2004, includes anti-doping policies and rules for sports organizations and among public authorities worldwide.

56. The Code mandates the publication and enforcement of an annual List of Prohibited Substances and Methods ("Prohibited List"). The substances on that list are known as "banned substances." WADA first added andro to the 2006 Prohibited List.

57. In 2001, Congress "recognize[d] the United States Anti-Doping Agency (USADA) as the official anti-doping agency for Olympic, Pan American, and Paralympic sport in the United States." Section 644 of the Treasury and General Government Appropriations Act, 2002, Pub. L. 107-67, 115 Stat. 514 (Nov. 12, 2001). USADA is a compliant signatory to the Code and therefore, enforces the Prohibited List.

58. On July 1, 2015, the drug-testing policy of the UFC became effective. The UFC selected USADA as the independent administrator for the policy, which was modeled after the Code and bans andro.

59. USADA and the Department of Defense each maintain a "High Risk" list of dietary supplements that contain banned substances. As of around June 2017, Anavite was added to both databases.

B. Anavite is Discovered to Contain Andro

60. Since becoming a professional combat sports athlete in or about October 2005, Plaintiff has been consistently testing for prohibited substances and performance enhancing drugs, including by USADA, as recently as November 5, 2015, and had never been flagged until the test at issue in this matter.

61. Plaintiff never knowingly used anabolic steroids.

62. On October 14, 2016, at approximately 6:00 a.m., Plaintiff was drug tested, out-of-competition, by USADA under the UFC Anti-Doping Program. Plaintiff's sample was analyzed by the World Anti-Doping Agency ("WADA") laboratory in Los Angeles, California (the "California Laboratory").

63. On October 24, 2017, the California Laboratory reported Plaintiff's sample as adverse for the presence of 1-androstenedione and its metabolite 1-(5α)-androsten-3α-ol-17-one, a "Prohibited Substance" on the WADA Prohibited List since 2016.

64. Prior and up to October 2016, he had been consuming Anavite.

65. Plaintiff sent an unopened bottle of Anavite to LGC Science, Inc. ("LGC").

66. LGC is the only laboratory that Informed-Choice, a certification program for the sports supplements industry, uses to grant its certification.

67. LGC detected 1-andro and Dehydroepiandrosterone (or "DHEA") in Anavite.

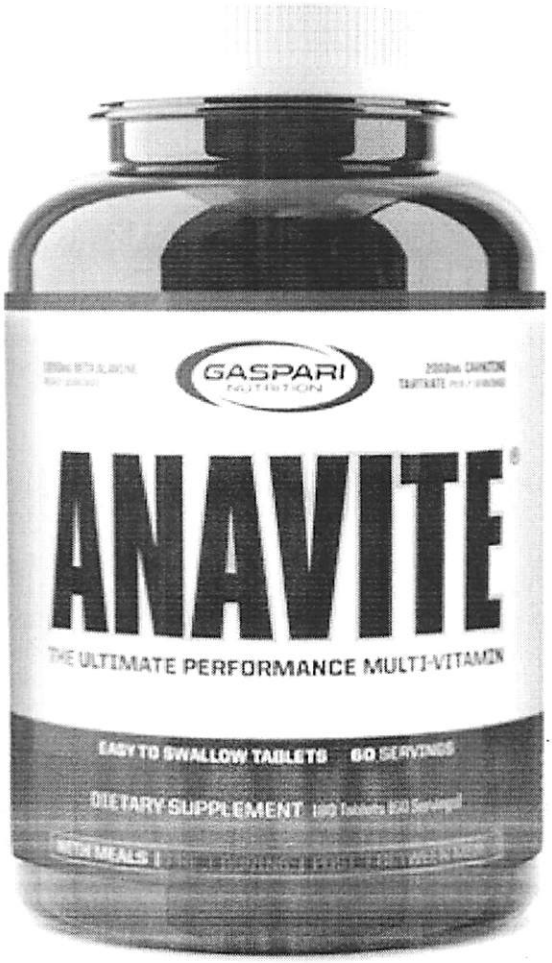
68. As a result, USADA added Anavite to its "High Risk List" of adulterated supplements which it maintains on its online dietary supplement safety education and awareness website, Supplement 411 (www.Supplement411.org). That site indicates that laboratory testing of Anavite "revealed the presence of 1-Androstenedione."

C. Anavite Is "Adulterated" and "Misbranded" Because It Contains Andro

69. On or around February 22, 2010, Anavite became commercially available.

70. Anavite was marketed and labeled as a dietary supplement, specifically, a multivitamin.

71. The label, below, identifies Anavite as a "DIETARY SUPPLEMENT" and "MULTI-VITAMIN."



72. However, contrary to that representation, Anavite is not a dietary supplement because it contains andro. *See* 21 U.S.C. § 321(ff).

OTHER INGREDIENTS: Microcrystalline Cellulose, Stearic Acid, Croscarmellose Sodium, Polyvinyl Alcohol, Titanium Dioxide, Polyethylene Glycol, Talc, Copovidone, Magnesium Stearate, Silica, Hydroxypropyl Cellulose.

Supplement Facts

Serving Size: 3 Tablets
Servings Per Container: 60

Amount Per Serving		% Daily Value
Vitamin A (as beta-Carotene)	5000IU	100%
Vitamin C (as calcium ascorbate)	250mg	417%
Vitamin D (as cholecalciferol)	1000IU	250%
Vitamin E (as d-alpha tocopheryl acetate)	30IU	100%
Vitamin K2 (as menaquinone-4)	45mcg	56%
Vitamin B1 (as thiamine mononitrate)	15mg	1000%
Vitamin B2 (as riboflavin)	20mg	1176%
Niacin (as niacinamide)	50mg	250%
Vitamin B6 (as pyridoxal 5-phosphate)	10mg	500%
Folate (as folic acid)	200mcg	50%
Vitamin B12 (as methylcobalamin)	250mcg	4167%
Biotin	300mcg	100%
Pantothenic Acid (as d-calcium pantothenate)	50mg	500%
Calcium (as Calci-K® calcium potassium phosphate-citrate)	121mg	12%
Phosphorus (as Calci-K® calcium potassium phosphate-citrate)	58mg	6%
Iodine (from Kelp)	75mcg	50%
Magnesium (as Albion® magnesium aspartate)	200mg	50%
Zinc (as TRAACS® zinc glycinate chelate‡)	15mg	100%
Selenium (as Albion® selenium amino acid complex)	35mcg	50%
Copper (as TRAACS® copper glycinate chelate‡)	1mg	50%
Manganese (as TRAACS® manganese glycinate chelate‡)	1mg	50%
Chromium (as TRAACS® chromium nicotinate glycinate chelate‡)	60mcg	50%
Molybdenum (as TRAACS® molybdenum glycinate chelate‡)	4mcg	5%
Potassium (as Calci-K® calcium potassium phosphate-citrate)	100mg	3%
CarnoSyn® Beta-Alanine	1600mg	**
Carnitine-Tartrate	1000mg	**
Boron (as Albion® bororganic glycine‡)	25mcg	**

** Daily Value not established.

73. Anavite's Supplement Facts label does not disclose andro, as shown above.

74. Anavite is "adulterated" under the FDCA because it contains andro. 21 U.S.C. § 342(f).

75. According to the FDA:

> . . . FDA is aware of no history of use or other evidence of safety establishing that androstenedione will reasonably be expected to be safe as a dietary ingredient. Therefore, we believe that *dietary supplements containing androstenedione are adulterated* regardless of whether the notification requirement has been met.

76. Anavite is a drug under 21 U.S.C. § 321(g)(1) because it contains andro, which is a drug and not a dietary ingredient under 21 U.S.C. § 321(ff).

77. Anavite is misbranded because it is a drug that is labeled as a dietary supplement, which is "false or misleading." *See* 21 U.S.C. § 343(a).

78. Anavite is improperly dispensed because it was dispensed without a prescription. *See* 21 U.S.C. § 353(b)(1).

79. Anavite is misbranded under 21 U.S.C. § 352(f)(1) because it is a drug that fails to bear "adequate directions for use." Under 21 C.F.R. § 201.5, "adequate directions for use" means "directions under which the layman can use a drug safely and for the purposes for which it is intended." Prescription drugs can be used safely only at the direction and under the supervision of a licensed practitioner. Therefore, it is impossible to write "adequate directions for use" for prescription drugs.

80. Anavite is not an FDA-approved drug, so its labeling is exempt from the requirement that they bear adequate directions for use by a layperson. *See* 21 C.F.R. §§ 201.100(c)(2) and 201.115. Therefore, Anavite labeling fails to bear adequate directions for its intended use, so it is misbranded under 21 U.S.C. § 352(t)(1). The introduction or delivery for introduction into interstate commerce of these misbranded products violates 21 U.S.C. § 331(a).

81. Thus, GNI Defendants committed the following violations of 21 U.S.C. § 331:

> (a) The introduction or delivery for introduction into interstate commerce of any food[or] drug . . . that is adulterated or

misbranded.

(b) The adulteration or misbranding of any food[or] drug . . . in interstate commerce.

(c) The receipt in interstate commerce of any food[or] drug . . . that is adulterated or misbranded, and the delivery or proffered delivery thereof for pay or otherwise.

82. Andro is not a dietary ingredient, so it is banned from dietary supplements.

D. Wheat Becomes CEO of Gaspari Nutrition and Uses HTP to Continue Anavite Operation

83. In April 2016, Wheat purchased an ownership interest in Gaspari Nutrition, becoming its CEO, CFO, and Secretary.

84. On April 5, 2015, Wheat caused Gaspari Nutrition to incorporate in Georgia.

85. Wheat sought to, and did, control and integrate Gaspari Nutrition's entire supply chain using HTP facilities and resources.

86. Doing so required understanding all of Gaspari Nutrition's operations and suppliers.

87. Wheat and HTP reviewed and learned Gaspari Nutrition's processes and activities.

88. Wheat caused Gaspari Nutrition to use HTP's manufacturing, warehouse, and other facilities and resources.

89. GNI Defendants continued to obtain andro and use it to adulterate Anavite.

90. On May 9, 2016, HTP updated the domain registration of gasparinutrition.com, Gaspari Nutrition's website, on behalf of Gaspari Nutrition.

91. HTP's website is hitechpharma.com.

92. The homepage of gasparinutrition.com directs users to email customerservice@hitechpharma.com.

93. Wheat and HTP control Gaspari Nutrition.

E. Vitamin Shoppe

94. Vitamin Shoppe owns and operates more than four hundred retail locations in thirty-seven states and represents itself as a source, both in stores and online, for education about health and the products that they offer. In stores, Vitamin Shoppe provides free magazines about health and fitness information, and its store employees educate and advise customers on products, including the ingredients and their effects. Vitamin Shoppe also maintains a robust website with scores of articles and health information for customers.

95. Vitamin Shoppe also affirms quality control from its third-party vendors. Form 10K for VS Holdings, Inc. (Vitamin Shoppe's former parent company), represents:

> [W]e have established quality control operating procedures to review vendors of third-party products for their track records on issues such as quality, efficacy and safety, to ensure that all third-party vendors meet the manufacturing and advertising standards required by the regulatory agencies to satisfy our standards. We further review each new product proposed to be carried by us to assure the safety of the ingredients. We reject those products that do not comply with the law or contain ingredients that we believe may be unsafe.

96. Customers reasonably rely on Vitamin Shoppe to provide safe, effective, and lawfully labeled products.

97. Vitamin Shoppe holds itself out as a company with superior knowledge, ability, and motivation to establish and enforce quality control and standards, including vetting third party vendors on behalf of consumers. Vitamin Shoppe represents to consumers that it should be trusted, and its products are safe and effective in meeting their needs.

FIRST CAUSE OF ACTION
BREACH OF EXPRESS WARRANTY

98. Plaintiff repeats and realleges each and every paragraph above as if stated here.

99. Each Defendant is a manufacturer or seller of Anavite.

100. Each purchase of Anavite that Plaintiff made constituted a contract with Defendants. The contract includes the promises and statements of fact that Defendants made or caused to be made on Anavite's packaging and through marketing and advertising. The labeling, marketing, and advertising constitute express warranties and became part of the basis of the bargain and the contract.

101. Defendants breached express warranties about Anavite and its qualities because Defendants' omissions and statements about Anavite were false and because Anavite does not conform to Defendants' affirmations and promises described in this complaint. Plaintiff would not have purchased Anavite had he known the true nature of Anavite's ingredients.

102. "DIETARY SUPPLEMENT" is one such promise and statement of fact on the labeling and in the marketing and advertising of Anavite. The statement promises and states the fact that, among other things, the product does not contain any drug.

103. "DIETARY SUPPLEMENT" is a false statement of fact and broken promise because Anavite contains the drug andro, so Anavite is not a dietary supplement.

104. Plaintiff reasonably relied on that stated fact and promise.

105. Plaintiff, when he purchased Anavite, performed all conditions precedent to Defendants' liability under this contract.

106. Defendants' breach of that and other express warranties caused Plaintiff irreparable damage, beginning with crushing his dream of competing in Madison Square Garden when he was removed from UFC 205 only weeks before his scheduled bout before his

hometown family and fans. Plaintiff has and will lose substantial income in "fight purses," as well as sponsorships (which may have been lucrative given his Puerto Rican/New York City background).

107. In addition, Plaintiff suffered irreparable damage to his reputation and career, and severe emotional distress.

108. Plaintiff was a role model to children and adult martial artists and students. Since October 24, 2016, Plaintiff's reputation has been damaged, as evidenced, in part, by emails, media attention, and social media content from third-parties.

109. Accordingly, Defendants are liable to Plaintiff for breach of warranty under common law and N.Y. U.C.C. Law § 2-313.

SECOND CAUSE OF ACTION
BREACH OF IMPLIED WARRANTY OF MERCHANTABILITY

110. Plaintiff repeats and realleges each and every paragraph above as if stated here.

111. The above mentioned contract contains the implied warranty merchantability.

112. GNI Defendants and Vitamin Shoppe and third-party retailers from whom Plaintiff purchased Anavite are merchants of goods of a kind, that kind being dietary supplements.

113. Anavite is not merchantable because it is: illegal due to misbranding, adulterated, and a controlled substance and drug in violation of federal laws; dangerous; unfit for its ordinary purpose of improving health with only dietary ingredients; below fair, average quality due to adulteration; inadequately labeled; fails to conform to the promise and affirmation of fact on the label, "dietary supplement."

114. Therefore, GNI Defendants and Vitamin Shoppe breached the implied warranty

of merchantability under common law and N.Y. U.C.C. § 2-314.

115. Defendants are liable to Plaintiff for restitution and consequential damages, as described above.

THIRD CAUSE OF ACTION
BREACH OF IMPLIED WARRANTY OF FITNESS FOR A PARTICULAR PURPOSE

116. Plaintiff repeats and realleges each and every paragraph above as if stated here.

117. GNI Defendants and Vitamin Shoppe had reason to know that the particular purpose of dietary supplements and multivitamins such as Anavite is to improve health with only dietary ingredients.

118. GNI Defendants and Vitamin Shoppe had reason to know that Plaintiff relied on the skill or judgment of Gaspari Nutrition and Vitamin Shoppe to select or furnish suitable goods.

119. GNI Defendants and Vitamin Shoppe sold Anavite, or caused Anavite to be sold – which contained the dangerous and non-dietary ingredient andro – to Plaintiff.

120. GNI Defendants and Vitamin Shoppe breached the implied warranty of fitness for a particular purpose under common law and N.Y.U.C.C. § 2-315.

121. Accordingly, GNI Defendants and Vitamin Shoppe are liable to Plaintiff for damages as stated in this complaint.

FOURTH CAUSE OF ACTION
FRAUD

122. Plaintiff repeats and realleges each and every paragraph above as if stated here.

123. GNI Defendants label Anavite or cause Anavite to be labeled.

124. GNI Defendants represent, or cause to be represented, in a single, consistent, and uniform manner that Anavite is a dietary supplement, safe, and unadulterated and contains only dietary ingredients, only ingredients on the label, and no drugs.

125. Those statements are false.

126. GNI Defendants market, advertise, and label Anavite using the representations stated in this complaint to target and induce the reliance of Plaintiff.

127. When those representations were made, GNI Defendants knew of the falsity, or recklessly disregarded the truth, of those representations.

128. Plaintiff reasonably relied, in purchasing Anavite, upon the false representations of GNI Defendants.

129. The misleading and fraudulent conduct of GNI Defendants was knowing, deliberate, wanton, willful, oppressive, undertaken in conscious disregard of and with reckless indifference to the interests of Plaintiff, entitling Plaintiff to recover punitive damages.

130. The intentional misrepresentations made and active concealment by GNI caused Plaintiff economic losses, emotional distress and potential physical harm.

131. Plaintiff's reliance on the representations of GNI Defendants was a substantial factor in causing harm to Plaintiff.

FIFTH CAUSE OF ACTION
VIOLATIONS OF NEW YORK STATUTORY DECEPTIVE ACTS AND PRACTICES, N.Y. Gen. Bus. L. § 349

132. Plaintiff repeats and realleges each and every paragraph above as if stated here.

133. New York General Business Law ("GBL") § 349(a) provides, "Deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in

this state are hereby declared unlawful."

134. The deceptive acts and practices of Defendants were directed at consumers within the meaning of § 349.

135. Dietary supplements are typical consumer goods.

136. Anavite sales are private transactions that harm the public because they are fraudulent and because they contain a harmful ingredient, as discussed in this complaint.

137. The Defendants' acts and practices are materially misleading within the meaning of § 349.

138. Defendants' acts and practices are likely to mislead a reasonable consumer acting reasonably under the circumstances.

139. GNI Defendants labeled Anavite, or caused Anavite to be labeled, as a "DIETARY SUPPLEMENT."

140. Every Anavite label displayed online and on the bottle and packaging stated, "DIETARY SUPPLEMENT."

141. Anavite is not a dietary supplement because it contains the drug, andro.

142. The act and practice of labeling Anavite, or causing Anavite to be labeled, as a dietary supplement was likely to mislead a reasonable consumer acting reasonably under the circumstances to believe that Anavite did not contain a drug.

143. Reasonable consumers acting reasonably would not buy a dietary supplement that they knew contained a drug.

144. Reasonable consumers acting reasonably would not buy a dietary supplement that they knew contained a controlled substance.

145. Reasonable consumers acting reasonably would not buy a dietary supplement that

they knew contained a dangerous substance.

146. Plaintiff is and was a reasonable consumer.

147. The acts and practices of GNI Defendants caused Plaintiff to purchase Anavite.

148. The acts and practices of GNI Defendants caused injury to Plaintiff within the meaning of § 349.

149. GNI Defendants are liable to Plaintiff for reasonable attorney's fees and the greater of actual damages or $50.00 in statutory damages.

150. GNI Defendants are liable for treble damages to Plaintiff because they willfully or knowingly violated GBL § 349.

SIXTH CAUSE OF ACTION
VIOLATIONS OF NEW YORK STATUTORY FALSE ADVERTISING, N.Y. Gen. Bus. L. § 350

151. Plaintiff repeats and realleges each and every paragraph above as if stated here.

152. The elements to prove a violation of § 350 are the same as those for § 349 except that § 350 pertains to "false advertising" specifically, rather than any deceptive act.

153. False advertising includes "labeling." GBL § 350-a.

154. The allegations in this complaint that prove violations of GBL § 349 also prove violations of § 350.

155. Therefore, Defendants are liable to Plaintiff for reasonable attorney's fees and the greater of actual damages or $500.00 in statutory damages.

156. The same allegations in this complaint that prove Defendants' intent or knowledge to violate GBL § 349 also prove intent or knowledge to violation GBL § 350.

157. Therefore, Defendants are liable to Plaintiff for treble damages and reasonable

attorney's fees as under § 350.

SEVENTH CAUSE OF ACTION
ASSAULT and BATTERY

158. Plaintiff repeats and realleges each and every paragraph above as if stated here.

159. By GNI Defendants actions described above, GNI Defendants intended to inflict personal injury on Plaintiff without his consent.

160. By GNI Defendants actions described above, GNI Defendants did in fact injure Plaintiff.

161. Accordingly, GNI Defendants are liable to Plaintiff for damages as stated in this complaint.

EIGHTH CAUSE OF ACTION
RECKLESS/INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

162. Plaintiff repeats and realleges each and every paragraph above as if stated here.

163. By Defendants actions described above, Defendants intentionally engaged in extreme and outrageous conduct.

164. Defendants disregarded the substantial probability of causing severe emotional distress to purchasers of Anavite, including Plaintiff.

165. As a direct result of defendants conduct, Plaintiff suffered extreme emotional distress.

166. Accordingly, Defendants are liable to Plaintiff for damages as stated in this complaint.

NINTH CAUSE OF ACTION
STRICT LIABILITY IN TORT FOR PRODUCTS LIABILITY

167. Plaintiff repeats and realleges each and every paragraph above as if stated here.

168. GNI Defendants manufactured Anavite.

169. GNI Defendants placed a defective product (Anavite) in the stream of commerce.

170. Anavite was defective when it left GNI Defendants' hands, and the defect was a substantial factor in causing Plaintiff's injuries.

171. Plaintiff was an intended consumer of Anavite.

172. Plaintiff used Anavite in the manner in which it was intended to be used.

173. Plaintiff did not, and reasonably could not, discover the defect or perceive the danger of Anavite.

174. Plaintiff did not, and reasonably could not, have averted the injury or damages that were caused by Defendants' defective product.

175. The Anavite used by Plaintiff was taken directly from a sealed Anavite bottle and Plaintiff never altered the product in any way.

176. Upon information and belief, Anavite was not subject to any recall.

177. As a result of andro entering Plaintiff's body through Anavite without his consent, Plaintiff suffered injuries, including severe pain and anguish and damage to income and reputation in an amount to be determined by a jury.

TENTH CAUSE OF ACTION
NEGLIGENCE THEORY OF PRODUCTS LIABILITY

178. Plaintiff repeats and realleges each and every paragraph above as if stated here.

179. Plaintiff is an average consumer and therefore a foreseeable plaintiff in this case.

180. Plaintiff used Anavite in the manner in which it was intended to be used.

181. A reasonable manufacturer would have discovered that Anavite was defective.

182. Defendants had a duty not to place the defective product in the stream of commerce.

183. Defendants failed in their duty to their customers and Plaintiff.

184. As a result of Defendants' failure, Plaintiff put a dangerous and unwanted substance, andro, into his body without his consent.

185. As a result of andro entering Plaintiff's body without his consent, Plaintiff suffered injuries, including severe pain and anguish and damage to income and reputation in an amount to be determined by a jury.

ELEVENTH CAUSE OF ACTION
GENERAL NEGLIGENCE

186. Plaintiff repeats and realleges each and every paragraph above as if stated here.

187. Defendants owed a duty to Plaintiff and the public to ensure that Anavite was appropriate for use as a "dietary supplement" which, by law, must not contain any drug or controlled substance, like andro.

188. Defendants breached that duty by permitting andro to be present in Anavite, causing the injuries and damages to Plaintiff.

189. As a proximate result of Defendants' negligence and carelessness, Plaintiff was severely injured, and suffered severe pain and anguish and damage to income and reputation in an amount to be determined by a jury.

PRAYER FOR RELIEF

Plaintiff requests that this Court enter a judgment against Defendants and in favor of Plaintiff and award the following relief:

A. an order awarding compensatory damages to Plaintiff in an amount to be proven at trial;

B. an order awarding damages for future earning capacity;

C. an order awarding damages for lost capacity in living;

D. an order awarding punitive damages to Plaintiff in an amount to be proven at trial;

E. an injunction compelling Defendants to take all reasonable, necessary, and appropriate actions to identify, locate, and warn all purchasers of Anavite with andro the measures that one should take to mitigate digestion of the adulterated Anavite;

F. an injunction compelling Defendant to notify members of the general public of the inherent threat of andro and take any other corrective action that the Courts deems just and proper in order to repair and remedy the existing and unlawful advertising and marketing;

G. an injunction forbidding Defendant from continuing to violate the federal and state statutes cited above;

H. an order awarding pre-judgment and post-judgment interest as provided for by law or allowed in equity;

I. an order awarding Plaintiff his attorney's fees and costs; and

J. such other and further relief as the Court may deem necessary and appropriate.

JURY DEMAND

Plaintiff demands a jury trial for all triable issues.

Dated: Garden City, New York
October 18, 2017

DAVID M. FISH, PC

by David Fish

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

LYMAN GOOD, **Plaintiff,** **v.** **GASPARI NUTRITION, INC., RICHARD GASPARI, HI-TECH PHARMACEUTICALS, INC., JARED R. WHEAT, and VITAMIN SHOPPE, INC.,** **Defendants.**	**Index no.**

SUMMONS and COMPLAINT

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