IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
GREENBELT DIVISION

DANIEL METAGUE, on behalf of himself and all others similarly situated, Plaintiff, v. EVLUTION NUTRITION, LLC c/o Charles Hemmingway 4631 Johnson Rd., Suite 1 Coconut Creek, FL 33073 Defendant.	Case No: 8:22-cv-2925 CLASS ACTION COMPLAINT JURY TRIAL DEMANDED

Plaintiff Daniel Metague ("Plaintiff Metague" or "Mr. Metague"), on behalf of himself and all others similarly situated, by and through his undersigned counsel, brings this action against Evlution Nutrition, LLC ("Evlution" or "Defendant Evlution"). For his Complaint, Plaintiff alleges the following based upon personal knowledge as to his own acts and experiences and upon the investigation conducted by counsel as to all other allegations:

SUMMARY OF THE ACTION

1. Plaintiff brings claims under the Maryland Consumer Protection Act ("MCPA"), Md. Code, Com. Law §§ 13-101, et seq., against Defendant Evlution as a class action on behalf of himself and all putative members of the "Class" as defined below.

2. This action arises from the deceptive trade practices of Defendant in its manufacture and sale of nutritional powders containing branched-chain amino acids labeled "BCAA ENERGY" (the "Product") and its advertisements which imply or claim that the Product contains "0 Calories." The Product line includes the following flavor variations: Furious Grape,

Blue Raz, Cherry Limeade, Fruit Punch, Green Apple, Lemon Lime, Orange Blast, Peach Mango, Pink Lemonade, Pink Starburst, Acai Berry, Vanilla Iced Coffee, and Watermelon. Moreover, the Product is one sub-brand of the Evlution portfolio, which contains other similar products (*e.g.,* "BCAA 5000," "BCAA LEAN ENERGY," "LEANBCAA," etc.) and several dozen stock keeping units ("SKUs"), all of which have similarly, purposely misbranded calorie content of "0 Calories," or which omit caloric information altogether from their respective nutritional labels. Meanwhile, the actual calorie estimate for the Product is approximately ***35 Calories***, depending on formulation and use guidance, which can include multiple servings per day.

3. Evlution's representations regarding the number of Calories in the Product on its labels, webpages and other marketing and advertising media and materials is purposely deceptive to create a competitive advantage against compliant competitors. However, it is the consumers that ultimately suffer by this deviant and non-compliant behavior because Evlution knowingly provides non-factual information and omits relevant information in an attempt to deceive and entice sales to these consumers who are seeking to purchase "0 Calorie" products conducive to weight loss and control.

4. Title 21 of the Code of Federal Regulations relating to nutritional labeling of food states that Calories are to be expressed to the nearest 5-Calories on labels. *See* 21 CFR 101.9(c)(1). The Food and Drug Administration ("FDA") guidance relating to nutritional labeling of food describes several methods for estimating Calories in 21 CFR § 101.9(c)(1)(i). Of these methods, only five are relevant to the Product. These methods include (1) calories based on a per gram measurement of protein, fat, and carbohydrate of specific foods and other ingredients (this method is known as the Atwater Method); (2) calories calculated by assigning four, four, and nine calories per gram for protein, total carbohydrate, and total fat, respectively; (3) calories calculated by

assigning four, four, and nine calories per gram for protein, total carbohydrate, and total fat, respectively, but then subtracting two calories per gram for non-digestible carbohydrates and between zero and three calories per gram of sugar alcohols; (4) using data for specific food factors for particular foods or ingredients approved by the FDA; and (5) using bomb calorimetry data. *See* 21 CFR § 101.9(c)(1)(i).

5. Furthermore, per the FDA, Calories are a "Third Group" nutrient, which means they are nutrients associated with health concerns. Accordingly, like saturated fat, cholesterol, sodium, and other Third Group nutrients, the actual Calorie level/serving must not exceed greater than 20% of labeled claim. *See* 21 CFR 101.9(g)(5)). Further, if Calories are stated in the Supplement Facts panel, actual Calories cannot be >20% of that labeled number, pursuant to 21 CFR 101.9(g)(5).

6. Plaintiff conducted independent Calorie calculation testing of the Product, which testing revealed that the Product contained approximately 397 Calories per 100 grams. Assuming a serving size of 9 grams, each serving contains approximately 35 Calories – significantly more than the "0 Calories" advertised. Thus, consumers in the state of Maryland, such as Plaintiff, as well as consumers across the nation, have been, and continue to be, misled into purchasing Defendant's nutritional powders with the belief that they do not contain any Calories.

7. Plaintiff has analyzed the Product and evaluated it in accordance with each of the five methods provided by the FDA regulations and has concluded that every one of the five methods' results yield a calorie value that exceeds the claims on the products' label by more than 20%.

8. Evlution's product representations are in direct violation of FDA guidance for labeling Calories when present at levels at or above 5 Calories/serving (*see* 21 CFR § 101.9(c)).

The FDA requires marketers to declare Calories and Calorie-containing nutrients within the Nutrition Facts and Supplement Facts if they are determined to be in significant amounts. Moreover, in accordance with 21 CFR 101.60(a)(4), dietary supplements may only make nutrient content claims related to Calories when there are less than 5 Calories per labeled serving.

9. The FDA provides a clear (high resolution) example of labeling Calories for an amino acid-based supplement via https://www.fda.gov/media/99158/download. This FDA example, as pictured below, displays approximately 4 grams of total amino acids, which would approximate 16 Calories and is listed as 15 based on rounding rules. The full FDA label set is included in **Appendix 1**. These labeling examples provided by the FDA remove any possibility of misunderstanding of the guidance given as such guidance pertains to this Complaint. The relevant example provided by the FDA is as follows:

Supplement Facts

Serving Size 1 Tablet
Servings Per Container 50

Amount Per Tablet	
Calories	15
Isoleucine (as L-isoleucine hydrochloride)	450 mg*
Leucine (as L-leucine hydrochloride)	620 mg*
Lysine (as L-lysine hydrochloride)	500 mg*
Methionine (as L-methionine hydrochloride)	350 mg*
Cystine (as L-cystine hydrochloride)	200 mg*
Phenylalanine (as L-phenylalanine hydrochloride)	220 mg*
Tyrosine (as L-tyrosine hydrochloride)	900 mg*
Threonine (as L-threonine hydrochloride)	300 mg*
Valine (as L-valine hydrochloride)	650 mg*

* Daily Value not established.

Other ingredients: Cellulose, lactose, and magnesium stearate.

10. Nonetheless, Evlution continued to sell its products with misleading labels despite knowing the inaccuracy of such representations. Evlution chose, and continues to choose, financial gain at the expense of consumers by concealing and omitting disclosure of this critical misrepresentation to consumers who, like Plaintiff, purchased the Product based specifically upon this "0 Calories" representation, for purposes of weight loss and control.

11. Plaintiff does not seek to impose requirements greater than those required by FDA regulations. Plaintiff's claims do not seek to expand upon, or call for stricter standards than, the labeling or marketing requirements of caloric content established by FDA regulations.

PARTIES

12. Plaintiff Daniel Metague is a citizen and resident of Montgomery County, Maryland. Beginning in or around June of 2019, Plaintiff purchased the Evlution Product from Amazon.com after viewing pictures of its label, which omitted all mention of Calories, implying that 0 Calories were present. However, independent testing demonstrated that the Product contained substantially more Calories than Defendant advertised on the Product's label.

13. At no point, either during Plaintiff Metague's research on the Product or at the point of sale, did Defendant disclose that the Product actually contained significantly more Calories than the "0 Calories" it inaccurately advertised.

14. Defendant Evlution is a limited liability corporation with its principal office in the State of Florida. Evlution makes and distributes health supplements, vitamins, and nutritional protein powders throughout the United States and, specifically, to consumers in the state of Maryland.

15. Defendant's Product is sold on its own and other third-parties' websites, along with through various physical retailers, including Walmart and the Vitamin Shoppe. The Product is purchased by consumers for personal use and consumption in the state of Maryland and throughout the United States.

JURISDICTION AND VENUE

16. This action is properly before this Court, and this Court has subject matter jurisdiction over this action under the Class Action Fairness Act. Specifically, at least one member

of the proposed class is a citizen of a different state from Evlution, the number of proposed Class members exceeds 100, and the aggregate amount in controversy exceeds the sum or value of $5,000,000.00, exclusive of interests and costs. *See* 28 U.S.C. § 1332(d)(2)(A).

17. This Court has general and specific jurisdiction over the Defendant because Defendant Evlution has sufficient minimum contacts within the state of Maryland to establish Defendant's presence in the state of Maryland, and certain material acts upon which this suit is based occurred within the state of Maryland. Evlution does substantial business in the state of Maryland and within this District, and otherwise maintains requisite minimum contacts with the state of Maryland. Specifically, Evlution distributed and sold the Product in the state of Maryland.

18. Venue is also proper in this District under 28 U.S.C. § 1391(b)(2) because Defendant is subject to personal jurisdiction within the state of Maryland and a substantial part of the events or omissions giving rise to the claims asserted herein occurred in this District, including that Plaintiff purchased and used the Product in the state of Maryland and in this District. Additionally, Evlution distributes the Product in this District, receives substantial compensation and profits from the sale and lease of Product in this District, and has and continues to conceal and make misrepresentations and material omissions in this District.

FACTUAL BACKGROUND AND SUBSTANTIVE ALLEGATIONS

THE SALE OF UNHEALTHY CALORIE-LADEN PROTEIN POWDERS AS A DECEPTIVE TRADE PRACTICE

19. Each of the preceding paragraphs is incorporated by reference herein.

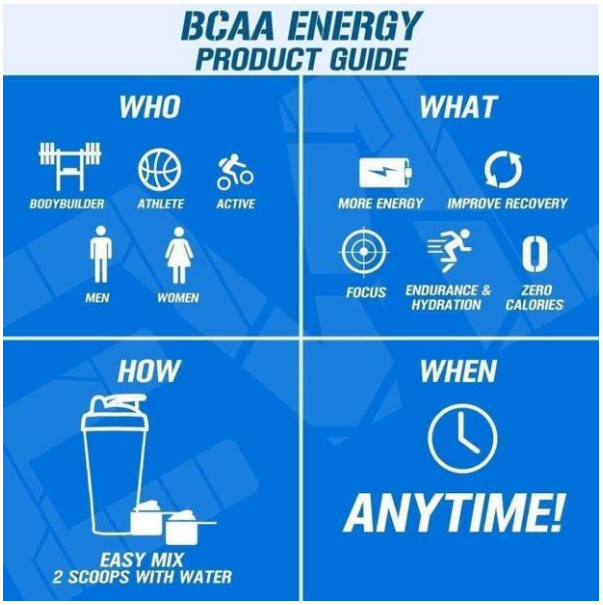
20. Advertisements, packages, and labels should provide consumers with accurate information as to the nature and quality of a product's contents and should them assist in making informed decisions. When a company misrepresents material information about a product, it is deceptive and misleading to reasonable consumers.

21. On its own website and other websites where the Product is sold, including Bodybuilding.com, Amazon and Walmart, Evlution prominently represents that the Product contains "0 Calories" per serving and could, therefore, "make a big difference" for individuals during "caloric restriction" or a "caloric deficit."[1] For reference, some of these digital marketing images, along with direct Product labels, can be found below. Of note is the nutritional label affixed to each Product, whose image appears as a key advertising agent on many websites and prominently, purposefully excludes any Caloric information. This packaging omission, coupled with the explicit marketing of the Product as containing "0 Calories" and being congruent with consumer use in "a Calorie deficit," is a deliberate message to consumers that the Calorie content of the Product is an irrelevant nutritional factor. In other words, Defendant, explicitly and by omission, claims that the Calorie content of the Product is negligible.

[1] See Evlution-Product Page; Body Building-Product Page; Amazon-Product Page; Walmart-Product Page


BCAA
ENERGY
5G PREMIUM BCAAs
ENERGY+ENDURANCE**
RECOVERY SUPPORT*
MENTAL FOCUS*
USE ANYTIME
GLUTEN FREE
BLUE RAZ
30 SERVINGS
DIETARY SUPPLEMENT NET WT 9.52 OZ (270g)
THE EVLUTION OF BCAAs ENGINEERED AND ENERGIZED FOR USE BEFORE, DURING OR AFTER TRAINING TO SUPPORT:
RECOVERY*
ENERGY*
ENDURANCE**
PERFORMANCE*
MENTAL FOCUS*
BUILDING MUSCLE*
STEPS TO USE:
FOR ANYTIME ENERGY* & BCAAs: Use 1 serving (2 scoops)
FOR INTENSE TRAINING & BCAAs: Use 1.5 servings (3 scoops)
FOR RECOVERY* & BCAAs: Use 1 serving (2 scoops)
BCAA ENERGY® contains caffeine and Beta-Alanine. Beta-Alanine can create a temporary tingling feeling on your skin. This is normal and diminishes with continued use.
**Endurance benefits from branched chain amino acids.
ANYTIME ENERGY* 2 scoops 5 grams 6.5 grams 110mg
INTENSE TRAINING 3 scoops 7.5 grams 9.75 grams 165mg
RECOVERY* 2 scoops 5 grams 6.5 grams 110mg
*These statements have not been evaluated by the Food and Drug Administration. This product is not intended to diagnose, treat, cure or prevent any disease.
Warning: This product is intended for use by healthy adults 18 years of age or older. Do not use this product if you have any pre-existing or suspected medical condition, or if you are taking prescription or OTC medication. Not for use by women who are pregnant, nursing or trying to get pregnant. Discontinue use 2 weeks prior to surgery. Do not use if you are caffeine sensitive. Do not exceed daily recommended serving amount of 3 scoops. Keep out of reach of children.
This product is made in the USA and manufactured by a (GMP) registered facility, and contains ingredients of domestic and international origin.
Supplement Facts
Serving Size 2 scoops (9g) Blue Raz
Servings Per Container 30
Amount Per Serving %DV
Vitamin C (as Ascorbic Acid) 90mg 100%
Vitamin B6 (as Pyridoxine HCl) 10mg 588%
Vitamin B12 (as Methylcobalamin) 30mcg 1250%
2:1:1 BCAA Matrix
L-Leucine (Instantized) 2,500mg †
L-Isoleucine 1,250mg †
L-Valine 1,250mg †
Beta-Alanine 600mg †
L-Alanine 500mg †
Taurine 500mg †
Natural Energizers 110mg †
Natural Caffeine (from Coffee Bean), Green Tea Extract (standardized for EGCG) (leaf)
Percent Daily Values are based on a 2,000 calorie diet.
† Daily value (DV) not established.
Other Ingredients: Citric Acid, Natural & Artificial Flavors, Sucralose, Silica, FD&C Blue #1
EVLNUTRITION.COM
@EVLSports #EVL
MADE IN THE USA
Exclusively Engineered by:
EVLUTION NUTRITION®
1560 Sawgrass Corporate Parkway,
4th Floor, Sunrise, Florida, 33323
1(855)385-2300


BCAA
ENERGY®
5G BCAAs NATURAL ENERGIZERS FOCUS* RECOVERY*
BCAAs+ENERGY*+RECOVERY*


BCAA ENERGY
PRODUCT GUIDE
WHO
BODYBUILDER
ATHLETE
ACTIVE
MEN
WOMEN
WHAT
MORE ENERGY
IMPROVE RECOVERY
FOCUS
ENDURANCE & HYDRATION
ZERO CALORIES
HOW
EASY MIX
2 SCOOPS WITH WATER
WHEN
ANYTIME!


BCAA LEAN ENERGY
WEIGHT MANAGEMENT SUPPORT*
5G PREMIUM BCAAs
ENERGY+ENDURANCE*
RECOVERY SUPPORT*
FAT BURNING*
USE ANYTIME
GLUTEN FREE
CHERRY LIMEADE
30 SERVINGS
BCAA LEAN ENERGY
5 GRAMS OF BCAAS
WEIGHT MANAGEMENT SUPPORT*
1G CLA+500MG CARNITINE
SUPPORTS RECOVERY*
ZERO SUGAR/CARB/CALORIE
GLUTEN FREE


EVLUTIONNUTRITION
BCAA5000
MUSCLE BUILDING + ENDURANCE + RECOVERY
5G
TOTAL BCAAs
STIMULANT FREE
ULTRA-FAST ABSORPTION
0 SUGAR
0 CARBS
0 CALORIES
5000MG PURE BCAAs
MUSCLE RECOVERY*
BUILD LEAN MUSCLE*
ENDURANCE*
BLUE RAZ
30 SERVINGS
ULTRA PREMIUM BCAAs WITH PROVEN 2:1:1 RATIO


EVLUTIONNUTRITION
BCAAs+ENERGY
MUSCLE BUILDING + ENDURANCE + RECOVERY
5G TOTAL BCAAs
6.5G TOTAL AMINOS
110MG NATURAL ENERGY
0 SUGAR
0 CARBS
0 CALORIES
BCAA ENERGY
5G PREMIUM BCAAs
ENERGY+ENDURANCE*
RECOVERY SUPPORT*
BLUE RAZ
BCAAs + NATURAL ENERGIZERS + AMINOS + ANTIOXIDANTS

22. Despite Evlution's omission of Calories on every Product's label and the clear representations on its website and other marketing material that the Product contains "0 Calories," independent laboratory testing has revealed that the Product actually contains approximately 397 Calories per 100 grams. Following Evlution's standard serving size recommendation of 9 grams, each serving contains approximately thirty-five (35) Calories – far more Calories than the "0 Calories" represented and implied by omission on the Product's packaging and appearing prominently in Evlution's advertising and promotional materials.

23. Evlution's sale of the Product deceives consumers, such as Plaintiff, because the package is materially misleading in that it includes no Caloric information and, therefore, in violation of FDA regulations, indicates the absence of any Calories per serving of its contents.

24. Evlution's advertising deceives consumers, such as Plaintiff, by explicitly and prominently stating that the Product contains "0 Calories" per serving.

25. Evlution's sale of the Product is deceptive to reasonable consumers, including Plaintiff Metague, who are in the market for 0 Calorie products due to health and fitness considerations, because there is no practical way for consumers to know prior to purchase and consumption that the Product is laden with Calories despite being marketed as containing none per serving.

CLASS ACTION ALLEGATIONS

26. Under Fed. R. Civ. P. 23(b)(2), (b)(3) and/or (c)(4), Plaintiff intends to seek certification of a Nationwide Class consisting of:

> **All persons who purchased the Product in the United States from within four years of the filing of this action through the present.**

27. Plaintiff also intends to seek certification of a Maryland Subclass consisting of:

All natural persons who purchased the Product in the state of Maryland from within four years of the filing of this action through the present.

28. Plaintiff reserves the right to re-define the Class and Subclass at the conclusion of discovery as to class certification.

29. Collectively, unless otherwise so stated, the above-defined Nationwide Class and Maryland Subclass are referred to herein as the "Class."

30. Excluded from the Class are Defendant; any affiliate, parent, or subsidiary of Defendant; any entity in which Defendant has a controlling interest; any officer, director, or employee of Defendant; any successor or assign of Defendant; anyone employed by counsel for Plaintiff in this action; any judge to whom this case is assigned, his or her spouse, and all persons within the third degree of relationship to either of them and the spouses of such persons.

NUMEROSITY

31. The members of the Class are so numerous that joinder of all members is impracticable. While the exact number of Class members is unknown and such information is in the exclusive control of Defendant, Plaintiff believes that the Class encompasses thousands of individuals who are geographically dispersed throughout the nation; therefore, the number of persons who are members of the Class are so numerous that joinder of all members in one action is impracticable.

COMMON QUESTIONS OF LAW AND FACT PREDOMINATE

32. There is a well-defined community of interest in the questions of law and fact affecting the Class members.

33. There are questions of law and fact common to all members of each Class: specifically, Plaintiff's claims arise from the same event or practice or course of conduct by the

Defendant giving rise to those claims of the putative Class, and Plaintiff's claims are based upon the same legal theories as those of the putative Class. The Defendant has engaged in a pattern and practice, in violation of the law, of misrepresenting and omitting the number of Calories in the Product. The resolution of this issue—to wit, whether Defendant knowingly sold the Product with misleading labels and did not inform Plaintiff and Class members—is a common question of fact and law that will affect all members of the Class in the same manner.

34. Other questions of law and fact common to the Class that predominate over questions that may affect individual members include:

a. The nature, scope, and operation of Defendant's wrongful practices;

b. The uniformity of the advertisements created through Defendant's marketing materials;

c. Whether Evlution misrepresented and omitted the number of Calories in the Product;

d. Whether Defendant engaged in fraudulent practices as to the Class members;

e. Whether Evlution violated state consumer protection laws by misrepresenting and concealing the number of Calories in the Product;

f. Whether Defendant's conduct amounts to violations of the MCPA;

g. Whether Evlution deliberately misrepresented and omitted material facts to Plaintiff and the Class members;

h. Whether members of the Class may be notified and warned about the contents of the Product and have the entry of final and injunctive relief compelling Evlution to stop its misrepresentations; and

i. Whether Plaintiff and the Class suffered damages because of Defendant's misconduct and if so, the proper measure of damages.

TYPICALITY

35. The claims and defenses of Plaintiff Metague are representative of the Class members he seeks to represent and typical of the claims of the Class because the Plaintiff and the Class members all purchased the Product. Plaintiff, like all Class members, purchased the Product when it was advertised by Defendant as containing "0 Calories."

ADEQUACY OF REPRESENTATION

36. Plaintiff Metague will fairly and adequately assert and protect the interests of the proposed class because:

a. He has hired attorneys who are experienced in prosecuting class action claims and will adequately represent the interests of the Class;

b. He has no conflict of interest that will interfere with the maintenance of this class action; and

c. He has suffered consumer-related injuries and damages.

SUPERIORITY

37. A class action provides a fair and efficient method for the adjudication of the instant controversy for the following reasons:

a. The common questions of law and fact set forth above predominate over questions affecting only individual Class members;

b. The proposed class is so numerous that joinder would prove impracticable. The proposed Class, however, is not so numerous as to create manageability problems; moreover, no unusual legal or factual issues render the Class unmanageable;

c. Prosecution of separate actions by individual members of the class would risk inconsistent and varying adjudications against Defendant;

d. The claims of the individual Class members are small in relation to the expenses of litigation, making a class action the only procedure in which Class members can, as a practical matter, recover for the damages done to them by Evlution; and

e. A class action would be superior to, and more efficient than, adjudicating thousands of individual lawsuits.

38. In the alternative, the proposed Class may be certified because:

a. the prosecution of separate actions by the individual members of the proposed Class would create a risk of inconsistent or varying adjudication regarding individual Class members, which would establish incompatible standards of conduct for Evlution;

b. the prosecution of separate actions by individual Class members would create a risk of adjudications dispositive of the interests of other Class members, not parties to the adjudications and substantially impair or impede their ability to protect their interests; and

c. Evlution has acted or refused to act on grounds generally applicable to the proposed class, which justifies final and injunctive relief for the members of the proposed Class as a whole.

ESTOPPEL FROM PLEADING AND TOLLING OF APPLICABLE STATUTES OF LIMITATIONS

39. Defendant Evlution possessed exclusive knowledge about the number of Calories contained in the Product, including from its customer complaint and warranty records, internal emails, reports, analyses, and assessment of engineers, that is unavailable to Plaintiff and the proposed Class members.

40. Throughout the time period relevant to this action, Defendant concealed the contents of the Product. As a result, neither Plaintiff nor the absent Class members could have discovered the number of Calories actually contained in the Product, even upon reasonable exercise of diligence.

41. Despite its knowledge of the above, Defendant (a) failed to disclose, (b) concealed, and (c) continues to conceal critical information relating to the Product's caloric content, even

though, at any point in time, it could have communicated this material information to Plaintiff and the Class through individual correspondence, media releases, or other means.

42. Plaintiff and Class members relied on Defendant to disclose the number of Calories in the Product because the contents could not be discovered through reasonable efforts by Plaintiff and the Class members.

43. Thus, the running of all applicable statutes of limitations have been suspended with respect to any claims that Plaintiff and the Class members have against Defendant as a result of Defendant's misrepresentations and omissions, by virtue of the fraudulent concealment doctrine.

44. Evlution was under a continuous duty to Plaintiff and Class members to disclose the true nature, quality, and character of its Product. However, Defendant concealed the true nature, quality, and character of the Product, as described herein. Defendant knew about the number of Calories contained in the Product for years but concealed it and/or failed to alert purchasers or potential purchasers. Defendant maintained exclusive control over information concerning the number of Calories in the Product. Based upon the foregoing, Evlution is estopped from relying on any statutes of limitation or repose that might otherwise apply to the claims asserted by Plaintiff herein. in defense of this action.

FIRST CLAIM FOR RELIEF
Breach of Implied Warranty
(On behalf of the Nationwide Class and, alternatively, on behalf of the Maryland Subclass)

45. Plaintiff hereby incorporates each and every allegation as though fully set forth herein.

46. Evlution sold the Product to Class members under implied warranties of merchantability and fitness. Evlution impliedly warranted the Product to be merchantable, fit for the ordinary purposes for which they were intended to be used (including the guarantee that they

were in a safe and non-defective condition for use by their purchasers for the ordinary purpose for which they were intended and were not otherwise injurious). Evlution is under a duty to design, manufacture, label, and test the Product to make them suitable for the ordinary purposes of their use—a dietary supplement that may support, and certainly not impede, weight loss and management.

47. Evlution breached its implied warranties for the Product by misrepresenting the actual number of Calories contained in the Product, failing to disclose the true number of Calories contained in the Product, and otherwise inadequately marketing the product as a dietary supplement that is congruent to weight loss, weight management, and lean muscle development, thus making the Product defective, unfit for the ordinary purposes for which it was intended to be used, and not merchantable.

48. When Plaintiff and the Class members purchased the Product, Defendant promised them a dietary supplement that (a) contained "0 Calories," (b) would be adequately labeled, (c) would pass without objection in the trade, and (d) would be fit for the ordinary purposes for which dietary supplement powders are used.

49. Defendant knew that its Product would be purchased by consumers seeking weight loss and management or otherwise tracking Calorie intake, so it developed the Product and its related marketing and advertisements for these specific purposes. Defendant knew that the Product would be sold by retailers for use by consumers with these specific weight loss and management and dietary needs. Accordingly, direct privity is not required to bring this cause of action.

50. Because the Product contains significantly more than the "0 Calories" that were promised and represented by Defendant to Plaintiff and the Class, the Product purchased and used by Plaintiff and Class members is not merchantable. Evlution breached the implied warranty of

merchantability in the sale of the Product to Plaintiff and the Class members in that the Product was not fit for its ordinary purpose and not merchantable.

51. Evlution has been on notice of these material omissions and/or misrepresentations through, upon information and belief, its own internal research and development process, and through the nutritional disclosures made it to by its suppliers of ingredients for the Product. Evlution has had the opportunity to correct the number of Calories in the Product and/or correct its misrepresentations of the Product's caloric content but has chosen not to do so. Moreover, Plaintiff has sent a notice letter to the Defendant and immediate seller seeking a remedy for the material omissions and/or misrepresentations alleged herein. When confronted with the allegations herein, neither Defendant nor the immediate seller have remedied the omissions and/or misrepresentations.

52. As a direct and proximate result of Evlution's breach of the implied warranty of merchantability and fitness for a particular purpose, Plaintiff and Class members did not receive the benefit of their bargains.

53. Plaintiff and Class members are entitled to damages and other legal and equitable relief, including the purchase price of the Product, overpayment, or loss of the benefit of the bargain.

SECOND CLAIM FOR RELIEF
Breach of Express Warranty
(On behalf of the Nationwide Class and, alternatively, on behalf of the Maryland Subclass)

54. Plaintiff hereby incorporates each and every allegation as though fully set forth herein.

55. Defendant extended, by way of the Product label, Product descriptions and representations as to the Product's qualities and characteristics, on its website, and via Product

advertisements (among other in-person and digital marketing methods, as detailed herein) express warranties to Plaintiff and Class members that the Product contained "0 Calories." These promises and representations became part of the basis of the bargain between the parties and thus constituted an express warranty.

56. Defendant sold the Product, and Plaintiff and Class members purchased the Product, based upon these representations and express warranty.

57. However, Defendant breached the express warranty in that the Product did in fact contain approximately 35 Calories per serving, as set forth in detail herein. As a result of this breach of the express warranty, Plaintiff and other consumers in did not receive the Product as warranted by Defendant.

58. Evlution has been on notice of these material omissions and/or misrepresentations through, upon information and belief, its own internal research and development process, and through the nutritional disclosures made it to by its suppliers of ingredients for the Product. Evlution has had the opportunity to correct the number of Calories in the Product and/or correct its misrepresentations of the Product's caloric content but has chosen not to do so. Moreover, Plaintiff has sent a notice letter to the Defendant and immediate seller seeking a remedy for the material omissions and/or misrepresentations alleged herein. When confronted with the allegations herein, neither Defendant nor the immediate seller have remedied the omissions and/or misrepresentations.

59. As a proximate result of this breach of express warranty by Defendant, Plaintiff and the Class have suffered damages, injury in fact, and ascertainable loss in an amount to be determined at trial.

THIRD CLAIM FOR RELIEF
Fraud By Omission

(On behalf of the Nationwide Class and, alternatively, on behalf of the Maryland Subclass)

60. Plaintiff hereby incorporates each and every allegation as though fully set forth herein.

61. At all relevant times, Evlution was engaged in the business of designing, manufacturing, and selling the Product.

62. Defendant, acting through its representatives or agents, delivered the Product to distributors, manufacturers, and various other distribution channels.

63. Defendant willfully, falsely, and knowingly omitted material facts regarding the quality and character of the Product.

64. Rather than disclosing material facts to Class members, including but not limited to, the fact that the Product does not contain "0 Calories," Evlution concealed material information related to the Product's Calorie content and continued manufacturing and selling the Product without making any disclosures.

65. Evlution omitted and misrepresented the number of Calories in the Product to drive up sales and maintain its market power, since Evlution knew consumers would not purchase the Product (or would pay substantially less for the Product), had the Product's true caloric content been advertised and represented to consumers.

66. Consumers could not have discovered the actual contents of the Product on their own. Evlution was in exclusive possession of such information.

67. Although Evlution had a duty to ensure the accurate representation of its Product and to ensure accuracy of information regarding the Product's health benefits, it did not fulfill these duties.

68. Plaintiff and Class members sustained injury due to the purchase of the Product containing more than the "0 Calories" advertised by Defendant. Plaintiff and Class members are entitled to recover full refunds for the Product, or they are entitled to damages for loss of the benefit of the bargain or the diminished value of the Product, amounts to be determined at trial.

69. Defendant's acts were done wantonly, maliciously, oppressively, deliberately, with intent to defraud; in reckless disregard of the rights of Plaintiff and Class members; and to enrich themselves. Its misconduct warrants an assessment of punitive damages in an amount sufficient to deter such conduct in the future. Punitive damages, if assessed, shall be determined according to proof at trial that Defendant's acts were done maliciously, oppressively, deliberately, and with intent to defraud, and in reckless disregard of Plaintiff's and Class members' rights, and in part to enrich itself at the expense of consumers. Defendant's conduct warrants an assessment of punitive damages in an amount sufficient to deter such conduct in the future.

FOURTH CLAIM FOR RELIEF
Equitable Injunctive and Declaratory Relief
(On behalf of the Nationwide Class and, alternatively, on behalf of the Maryland Subclass)

70. Plaintiff hereby incorporates each and every allegation as though fully set forth herein.

71. Evlution is under a continuing duty to inform its customers of the nature and existence of Calories in the Product that it has sold.

72. Plaintiff, members of the Class, and members of the general public will suffer irreparable harm if Evlution is not ordered to seize misrepresenting and omitting material information regarding the number of Calories contained in the Product.

73. Injunctive relief is particularly necessary in this case because: (1) Plaintiff and the absent Class members desire to purchase products with the same qualities and attributes as

Defendant advertised the Product to have; (2) if Defendant actually manufactures the Product with the amount of Calories advertised, Plaintiff and Class members would purchase the Product; (3) Plaintiff and Class members do not have the ability to determine whether Defendant's representations concerning the Product will be truthful if they purchase the Product.

74. Despite Plaintiff's and Class members' desire to purchase the Product in the future, they expect that Defendant will continue to misrepresent or conceal the amount of Calories in the Product and will thus suffer harm that cannot be adequately remedied by the additional claims for damages alleged herein.

FIFTH CLAIM FOR RELIEF
Violation of the Maryland Consumer Protection Act ("MCPA")
Md. Code Ann., Commercial Law § 13-101, et seq.
(On behalf of the Maryland Subclass)

75. Plaintiff hereby incorporates each and every allegation as though fully set forth herein.

76. Evlution is a person as defined by Md. Comm Code § 13-101(h),

77. Evlution's conduct as alleged herein relates to "sales," "offers for sale," or "bailment" as defined by Md. Comm. Code § 13-101(i) and § 13-303.

78. Plaintiff and Class members who purchased the Product are "consumers" as defined by Md. Comm Code § 13-101(c).

79. Evlution advertises, offers, or sells "consumer goods" as defined by Md. Comm. Code § 13-101(d).

80. The MCPA prohibits the use of any "unfair or deceptive trade practice" in the sale or lease of any consumer goods or services.

81. Evlution engaged in unfair and deceptive trade practices, in violation of Md. Comm. Code § 13-301, including (a) false or misleading oral or written representations that have

the capacity, tendency, or effect of deceiving or misleading consumers; (b) representing that consumer goods or services have a characteristic that they do not have; (c) representing that consumer goods or services are of a particular standard, quality, or grade that they are not; (d) failing to state a material fact where the failure deceives or tends to deceive; (e) advertising or offering consumer goods or services without intent to sell, lease, or rent them as advertised or offered; (f) deception, fraud, false pretense, false premise, misrepresentation, or knowing concealment, suppression, or omission of any material fact with the intent that a consumer rely on the same in connection with the promotion or sale of consumer goods or services or the subsequent performance with respect to an agreement, sale lease or rental.

82. Evlution violated the MCPA by mispresenting, concealing, suppressing, or omitting material facts regarding the Product, including, but not limited to, the number of Calories it contains. This concealed or omitted information is the type of information upon which a consumer would be expected to rely on in deciding whether to purchase or how much to pay for the Product.

83. Evlution mispresented, concealed, suppressed or omitted these material facts in conducting trade and commerce with the intent that Plaintiff and the Maryland Subclass members would rely on the omissions in the purchase of the Product.

84. To this day, Evlution continues to violate the MCPA by actively mispresenting or concealing the number of Calories in the Product.

85. Evlution intended that Plaintiff and the Maryland Subclass members would rely on its misrepresentation, concealment and/or omission of material facts, which occurred in the course of conduct involving trade and commerce.

86. Defendant's practices, acts, policies, and course of conduct violated MCPA's prohibition on unfair and deceptive conduct in the following ways:

a. At the time of sale, Defendant knowingly and intentionally misrepresented and omitted the number of Calories in the Product;

b. Thereafter, Defendant failed to disclose its misrepresentations to Plaintiff and the Class members, either through warnings or recall notices, and/or actively concealed from them that the Product contained more than "0 Calories," even though the company knew of the contents of the Product at the time of manufacture, when it created the recipe for the Product; and

c. Based on these and, upon information and belief, other internal studies and investigations, Defendant knew with certainty that it was misrepresenting the contents of the Product.

87. Furthermore, Defendant engaged in materially misleading and deceptive acts by continuing to sell the Product to the consuming public, representing that it would serve its intended purpose as a dietary supplement to lose weight and/or aid in weight and muscle management. Moreover, Defendant represented that the Product was merchantable and not defective, despite Defendant's knowledge that the Product did not contain the advertised number of Calories.

88. Defendant's acts and omissions are unfair in that they (1) offend public policy; (2) are immoral, unethical, oppressive, or unscrupulous; and (3) cause substantial injury to consumers. Defendant has, through knowing, intentional, and material omissions, concealed the true nature of the Product.

89. Defendant's acts and omissions are also unfair in that they cause substantial injury to consumers far in excess of any conceivable benefit and are injuries of a nature that they could not have been reasonably avoided by consumers.

90. As a direct and proximate result of these unfair acts or practices, Plaintiff and Class members have been damaged because they purchased a Product they otherwise would not have,

paid more for a Product than they otherwise would have, and are left with a Product of diminished value and utility because of the number of Calories it actually contains. Meanwhile, Evlution has sold more of the Product than it otherwise could have and charged inflated prices for the Product, thereby unjustly enriching itself.

91. Plaintiff and the Maryland Subclass members seek all monetary and non-monetary relief allowed by law, including damages, disgorgement, and attorneys' fees and costs.

92. Plaintiff and the Maryland Subclass members also seek appropriate equitable relief, including an order requiring Evlution to adequately disclose the contents of the Product and an order enjoining Evlution from misrepresenting the Product as containing "0 Calories."

SIXTH CLAIM FOR RELIEF
Unjust Enrichment
(On behalf of the Nationwide Class and, alternatively, on behalf of the Maryland Subclass)

93. Plaintiff hereby incorporates each and every allegation as though fully set forth herein.

94. To the extent that there is any determination made by the Court that Plaintiff does not have standing to assert any contractual claims asserted against Evlution on the alleged basis of an absence of contractual privity or otherwise, this claim is asserted in the alternative.

95. By its wrongful acts and omissions described herein, including selling the Product with more than the "0 Calories" advertised or implied, Evlution was unjustly enriched at the expense of Plaintiff and the Class.

96. Plaintiff and Class members purchased a Product they otherwise would not have, paid more for a Product than they otherwise would have, and are left with a Product of diminished value and utility because of the number of Calories it actually contains. Meanwhile, Evlution has

sold more of the Product than it otherwise could have and charged inflated prices for the Product, thereby unjustly enriching itself.

97. Thus, Plaintiff and the Class members conferred a benefit upon Evlution by purchasing the Product at the full price. Under the circumstances, it would be inequitable for Evlution to retain the profits, benefits, and other compensation obtained through its wrongful conduct in manufacturing, marketing and selling the Product to Plaintiff and Class members based on the misrepresentation or omission that the Product contains "0 Calories."

98. Plaintiff and Class members are entitled to damages in the amount Defendant was unjustly enriched, to be determined at trial.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for judgment as follows:

a. For an order certifying the proposed Class and appointing Plaintiff and Plaintiff's counsel to represent the Class;

b. For an order awarding Plaintiff and Class members actual, statutory, punitive, and/or any other form of damages provided by and pursuant to the statutes cited above;

c. For an order awarding Plaintiff and Class members restitution, disgorgement and/or other equitable relief provided by and pursuant to the statutes cited above or as the Court deems proper;

d. For an order or orders requiring Evlution to adequately disclose the number of Calories in the Product and enjoining Evlution from misrepresenting that the Product contains "0 Calories";

e. For an order awarding Plaintiff and Class members pre-judgment and post-judgment interest;

f. For an order awarding Plaintiff and Class members reasonable attorney fees and costs of suit, including expert witness fees; and

g. For an order awarding such other and further relief as this Court may deem just and proper.

DEMAND FOR JURY TRIAL

Plaintiff, individually and on behalf of the members of the Class, hereby respectfully demands trial by jury of all issues triable by right.

Dated: November 10, 2022

Respectfully submitted,

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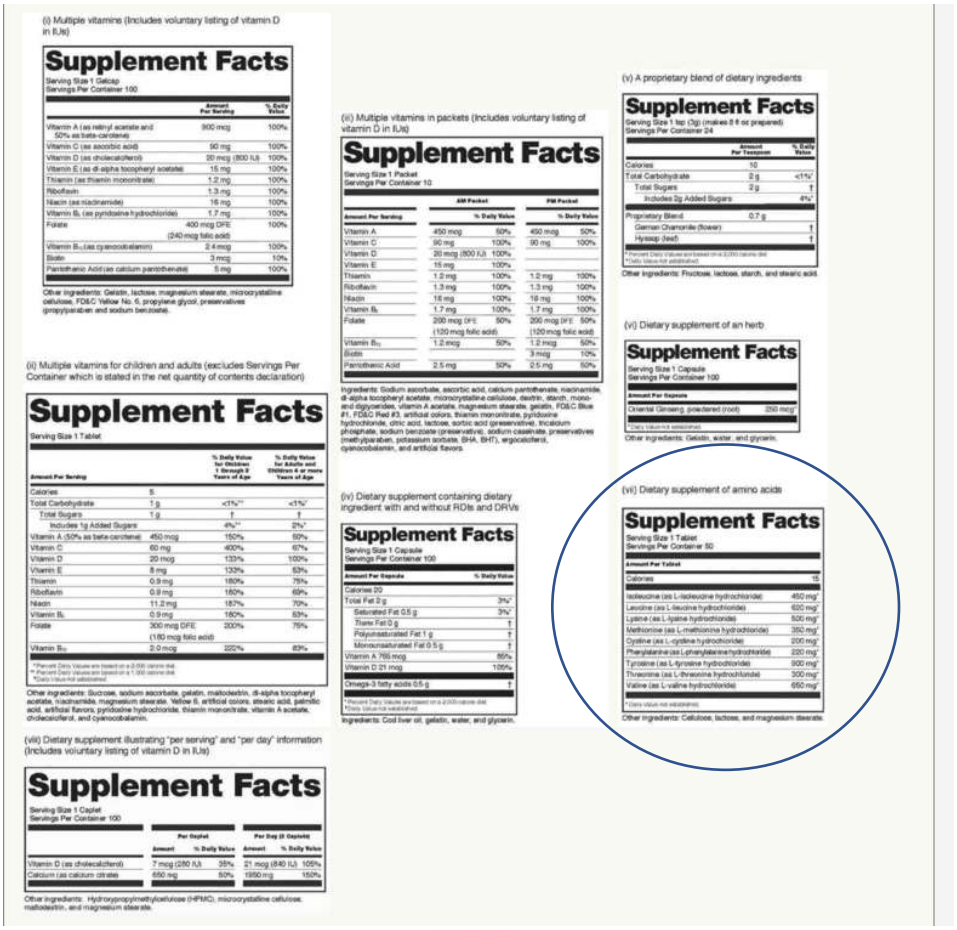
Attorneys for Plaintiff and Putative Class

Appendix 1.



(vii) Dietary supplement of amino acids

Supplement Facts

Serving Size 1 Tablet
Servings Per Container 50

Amount Per Tablet

Calories	15
Isoleucine (as L-isoleucine hydrochloride)	450 mg*
Leucine (as L-leucine hydrochloride)	620 mg*
Lysine (as L-lysine hydrochloride)	500 mg*
Methionine (as L-methionine hydrochloride)	350 mg*
Cystine (as L-cystine hydrochloride)	200 mg*
Phenylalanine (as L-phenylalanine hydrochloride)	220 mg*
Tyrosine (as L-tyrosine hydrochloride)	900 mg*
Threonine (as L-threonine hydrochloride)	300 mg*
Valine (as L-valine hydrochloride)	650 mg*

* Daily Value not established.

Other ingredients: Cellulose, lactose, and magnesium stearate.

Highlighted Supplement Facts displays 4.19g of AAs yielding 16.7 Calories, which in turn has been rounded to 5s when less than 50. Thus, the Calorie declaration is compliant at 15. https://www.fda.gov/media/99158/download.