VT SUPERIOR COURT
WASHINGTON UNIT
CIVIL DIVISION

STATE OF VERMONT
SUPERIOR COURT
WASHINGTON UNIT

2014 JUL 17 P 2:12

STATE OF VERMONT,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL DIVISON
	)	Docket No. 443-7-14 Wnov
	)	
LIVING ESSENTIALS, LLC, and	)	
INNOVATION VENTURES, LLC,	)	
	)	
Defendants.	)	

FILED

CONSUMER PROTECTION COMPLAINT

Introduction

The Vermont Attorney General brings this suit against Living Essentials, LLC and Innovation Ventures, LLC for violations of Vermont's Consumer Protection Act. Defendants have violated the Vermont Consumer Protection Act by making deceptive promotional claims about their 5-hour ENERGY® products, for which the Attorney General seeks civil penalties, injunctive relief, restitution, disgorgement, fees and costs, and other appropriate relief.

I. PARTIES, JURISDICTION AND RELATED MATTERS

A. Defendants

1. Defendant Living Essentials, LLC ("LE") is a privately-held limited liability company organized and existing under the laws of the State of Michigan with its principal place of business at 38955 Hills Tech Dr., Farmington Hills, MI 48331. LE markets energy supplements to wholesale dealers and retail markets in the United States. LE manufactured, marketed, distributed, advertised and sold 5-hour ENERGY®

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at all times relevant hereto. LE is a wholly-owned subsidiary of Innovation Ventures, LLC.

2. Defendant Innovation Ventures, LLC ("IV") is a privately held limited liability company organized and existing under the laws of the State of Michigan, with its principal place of business at 38955 Hills Tech Dr., Farmington Hills, MI 48331. IV developed a formula for 5-hour ENERGY® in 2004. IV, which is the parent of LE, is the worldwide, exclusive licensee of the 5-hour ENERGY® trademark, copyright and trade dress. In court pleadings, IV identifies itself as "Innovation Ventures, LLC d/b/a/ Living Essentials, LLC".

3. IV and LE are collectively referred to herein as "Defendants."

B. <u>Jurisdiction and Related Matters</u>

4. The claims described in this Complaint arise from a series of deceptive advertisements and promotional claims for 5-hour ENERGY® that appeared in Vermont, and from sales of 5-hour ENERGY® that occurred in Vermont.

5. The Vermont Attorney General is authorized, under the Vermont Consumer Protection Act, 9 V.S.A. §2458(b), to sue to enforce the Act's prohibitions on unfair and deceptive acts and practices in commerce.

6. This Court has personal jurisdiction over Defendants and is the proper venue for this action, based on Defendants' sale and advertising of 5-hour ENERGY® throughout Vermont, including in Washington County.

7. This action follows an investigation of Defendants by the Vermont Attorney General's Office, including the issuance of civil investigative subpoenas to Defendants pursuant to the Vermont Consumer Protection Act, 9 V.S.A. §2460(a).

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8. This action is in the public interest.

II. STATUTORY FRAMEWORK

9. The Vermont Consumer Protection Act prohibits unfair and deceptive acts and practices in commerce. 9 V.S.A. §2453(a)

10. Deceptive advertising and marketing, including the misrepresentation of facts likely to mislead consumers and affect their decisions to purchase products, and making claims that are not substantiated by competent and reliable scientific evidence, violates the Vermont Consumer Protection Act's prohibition against unfair and deceptive acts and practices in commerce.

III. FACTS

A. Background

11. Defendants sell and market Original, Extra Strength and Decaf versions of their energy shot under the name 5-hour ENERGY®. 5-hour ENERGY® is reportedly the leading "energy shot" on the market.

12. Based on checkout scan data, analysts believe 5-hour ENERGY® may have 90% of the market.

13. 5-hour ENERGY® was introduced by LE in 2004 and competes in the energy drink market.

14. 5-hour ENERGY® has been identified and marketed by Defendants as a dietary supplement. It is sold as a liquid in 1.93-ounce bottles. It is sold in individual bottles and in 2-, 6-, 12- and 24-packs. An individual bottle sells for approximately $2.99.

15. Original 5-hour ENERGY® has about 200 mg of caffeine per serving, about 5 times the amount of caffeine in a can of caffeinated soda.

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16. Extra Strength 5-hour ENERGY® has about 250 mg of caffeine per serving, about 6 times the amount of caffeine in a can of caffeinated soda.

17. Decaf 5-hour ENERGY® has only about 6 mg of caffeine per serving. It is principally comprised of vitamins and an "Energy Blend".

18. The Original and Extra Strength formulations also contain vitamins and an Energy Blend.

19. Despite making statements about the benefits provided by the "Energy Blend", Defendants assert that the exact formula for 5-hour ENERGY® is a trade secret, and have not publicly disclosed the amounts of the ingredients in the Energy Blend, except for caffeine.

20. 5-hour ENERGY® is sold at over 100,000 retail locations in the U.S, including convenience stores.

21. 5-hour ENERGY® is often placed next to the cash register or near the impulse buying area located in the checkout aisle.

22. 5-hour ENERGY® is also sold online at www.5hourenergy.com, as well as at other online retailers.

23. Defendants market, advertise, distribute, and sell 5-hour ENERGY® to consumers throughout Vermont and across the U.S. They have disseminated their advertisements on the radio, on television, on the Internet, and in print advertisements, via an advertising campaign that has not relented since 2004.

24. Defendants sell approximately 9 million bottles of 5-hour ENERGY® per week in the United States, with total annual retail sales of over $1 billion. According to a December 2012 Complaint filed by Defendants in an anti-counterfeiting

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case in the Eastern District of New York, over 1.5 billion bottles of 5-hour ENERGY® had been manufactured and sold by the end of 2012. Defendants said that they had spent $500 million in the last 5 years on advertising and promoting 5-hour ENERGY® in order to maintain its market share.

B. Defendants' Deceptive Claims Regarding 5-hour ENERGY®

25. Defendants have aggressively marketed 5-hour ENERGY® in an effort to maintain and/or grow their market share.

26. In promoting their 5-hour ENERGY® products, Defendants have made misrepresentations about those products which were likely to mislead consumers, and to affect consumers' decisions to purchase those products. The meaning ascribed to Defendants' claims herein is reasonable given the nature of those claims.

27. In promoting 5-hour ENERGY® products, Defendants have made claims about those products which they are unable to substantiate with competent and reliable scientific evidence.

28. Defendants' misrepresentations about 5-hour ENERGY® fall into four categories: (1) claims regarding what 5-hour ENERGY® does and how it does it; (2) claims regarding whether 5-hour ENERGY® users experience a "crash"; (3) claims regarding whether 5-hour ENERGY® is recommended by doctors; and (4) claims that 5-hour ENERGY® is appropriate for adolescents age 12 and older. Each of the four categories of claims is addressed below.

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1. Deceptive Claims Regarding What 5-hour ENERGY® Does and How it Does it

a. Deceptive Claims that the Non-Caffeine Ingredients in Original and Extra Strength 5-hour ENERGY ® Provide Benefits Such as Energy, Alertness, or Focus

29. Widespread 5-hour ENERGY® advertisements depict people engaged in a variety of activities, and with a variety of responsibilities, from working mothers to race car drivers and people engaged in athletics. Innumerable print, Internet, radio and television advertisements carry essentially the same message that 5-hour ENERGY® users will feel "energized, "alert", or "focused."

30. Those feelings are attributed to the fact that 5-hour ENERGY® is, for example, "packed with B- vitamins for energy and amino acids for focus," and "enzymes to help you feel it faster."

31. The ingredients in 5-hour ENERGY® are reflected on the back of the bottle. The "% Daily Value" and the "Energy Blend" appear under the heading "Supplement Facts." The ingredients in the Energy Blend are identified, but not the ingredient amounts.

32. The ingredients panel for Original 5-hour ENERGY® is as follows:

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5-hour ENERGY®
Original

Supplement Facts
Serving Size 1.93 fl. oz.

Amount Per Serving	% Daily Value
Niacin (as Niacinamide) 30mg	150%
Vitamin B6 (as Pyridoxine Hydrochloride) 40mg	2000%
Folic Acid 400mcg	100%
Vitamin B12 (as Cyanocobalamin) 500mcg	8333%
Sodium 18mg	<1%
Energy Blend 1870mg	‡
Taurine, Glucuronic acid (as or from glucuronolactone), Malic Acid, N-Acetyl L-Tyrosine, L-Phenylalanine, Caffeine, Citicoline	

‡Daily value not established.

Other Ingredients: Purified Water; Natural and Artificial Flavors; Sucralose; Potassium Sorbate, Sodium Benzoate and EDTA (to protect freshness).

http://www.5hourenergy.com/healthfacts.asp (last visited June 24, 2014)

33. The ingredients panel for Extra Strength 5-hour ENERGY® is as follows:

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5-hour ENERGY®
Extra Strength

Supplement Facts
Serving Size 1.93 fl. oz.

Amount Per Serving	% Daily Value
Niacin (as Niacinamide) 40mg	200%
Vitamin B6 (as Pyridoxine Hydrochloride) 40mg	2000%
Folic Acid 400mcg	100%
Vitamin B12 (as Cyanocobalamin) 500mcg	8333%
Sodium 18mg	<1%
Energy Blend 2000mg	‡
Taurine, Glucuronic acid (as or from glucuronolactone), Malic Acid, N-Acetyl L-Tyrosine, L-Phenylalanine, Caffeine, Citicoline	

‡Daily value not established.

Other Ingredients: Purified Water; Natural and Artificial Flavors; Sucralose; Potassium Sorbate, Sodium Benzoate and EDTA (to protect freshness).

http://www.5hourenergy.com/healthfacts.asp (last visited June 14, 2014)

34. As a general matter, "% daily values" are intended to assist consumers in interpreting information about the amount of a substance that is present in the product. Daily values were developed by the FDA to help consumers determine the level of various nutrients in a standard serving of food in relation to consumers' approximate requirement for that nutrient. http://ods.od.nih.gov/HealthInformation/dailyvalues.aspx .

35. For 5-hour ENERGY®, the % daily value refers to the amount of vitamins and sodium in each bottle. As shown above, the vitamin amounts in 5-hour ENERGY® equal or well exceed 100% of the % Daily Value.

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36. Defendants claim that these mega-doses of vitamins (including 8333% of the recommended daily allowance of Vitamin B12 and 2000% of the recommended daily allowance of Vitamin B6), coupled with the Original and Extra Strength "Energy Blend" (which includes (in order of decreasing prevalence)) taurine, glucuronic acid, malic acid, N-acetyl-L-tyrosine, L-phenylalanine, caffeine, and citicoline), create the "alert productive feeling you want." Defendants say that users get that feeling because the product "contains a powerful blend of B-vitamins for energy and amino acids for focus."

37. Representative examples of 5-hour ENERGY®'s advertisements that also reflect the claimed benefits include the following:

> -Tagline: "It's all about focus" (In Print Media)
>
> "To get in the zone-no matter what you're doing-try 5-hour ENERGY®. It contains the powerful blend of B-vitamins for energy, and amino acids for focus. The two-ounce shot takes seconds to drink and in minutes you're feeling bright, alert, and ready for action. And the feeling lasts for hours-without the crash or jitters."
>
> -Tagline: "How to survive your longest day" (Print)
>
> "With 5-hour ENERGY® you can leave grogginess behind and sail through the most demanding shifts without feeling jittery, tense or crashing. That's because 5-hour ENERGY® is packed with B-vitamins for energy, and amino acids for a sharp focused mind. There's zero sugar and only eight calories. The two-ounce bottle takes seconds to drink and in minutes you're feeling awake, alert and productive. And that feeling lasts for hours. (Print)
>
> -Tagline: "From don't want to can't stop me" (Print)
>
> "The blend of B-vitamins, amino acids, nutrients and caffeine in 5-hour ENERGY® will give you the bright, alert feeling you need to really get into it."
>
> -Tagline: Why do energy drinks make you crash? (Television)
>
> "Why do energy drinks make you crash? One minute you're wired up, the next you feel worse than before. The answer is large amounts of sugar and caffeine.[...] With 5-hour ENERGY®, you can leave grogginess behind and sail through your day without

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> feeling jittery, tense, or you know [crash]. That's because 5-hour ENERGY® contains a powerful blend of B-vitamins for energy, amino acids for focus and better mood, and enzymes to help you feel it faster. [...] Hours of energy no, no crash later."

38. The website page for Extra Strength 5-hour ENERGY® claims that if you are "extra hard working" and "Ready to kick it up a notch," you should use it because:

> Some people, maybe you, need a lot of extra energy . . . . It's the energy shot for extra busy, extra hard working people that need a big boost of extra energy.
>
> Extra Strength 5-hour ENERGY® features a beefed up energy blend and a cool new look. It contains as much caffeine as 12 ounces of premium coffee. Like original 5-hour ENERGY® shots, Extra Strength 5-hour ENERGY® contains zero sugar and 4 calories.

http://www.5hourenergy.com/5hrextrastrength.asp (last visited July 16, 2014)

39. While Defendants' advertisements vary in the activities depicted (e.g. sports, office work, child care), its representations that 5-hour ENERGY® provides "B-vitamins for energy and amino acids for focus" are consistent.

40. Aside from the effect on consumers from the caffeine present in the Original and Extra Strength products, Defendants' claims are untrue.

41. Defendants claim that the non-caffeine ingredients in the Original and Extra Strength formulations – the proprietary combination of vitamins, enzymes, amino acids and other ingredients – provide users with benefits like energy, alertness or focus. The non-caffeine ingredients in Original and Extra Strength 5-hour ENERGY® do not provide any of the claimed benefits.

42. In fact, the vitamins and the amino acids contained in 5-hour ENERGY® are typically present in the normal diet of an otherwise healthy individual; amounts consumed in excess of bodily needs are typically excreted. Describing normal metabolic functions of nutrients, then claiming that mega-doses of those nutrients provided by 5-hour

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ENERGY® will cause users to function at an enhanced level, is false and is not supported by competent and reliable scientific evidence.

43. The "RECOMMENDED USE" statement on the bottles for Original and Extra Strength 5-hour ENERGY® and on the 5-hour ENERGY® website directs consumers to drink "one half (1/2) bottle for moderate *energy*. Drink one whole bottle for *maximum energy*." (emphasis added). These statements are further evidence that the only ingredient providing any claimed effect is caffeine, since caffeine is the only ingredient that is meaningfully increased when consumers drink the second half of the bottle. The other ingredients are already in surplus amounts, even in a half-bottle amount.

44. Any claimed effects of Original or Extra Strength 5-hour ENERGY® come from their caffeine content, and nothing else. Both products are concentrated shots of caffeine in a bottle and the only ingredient that can contribute to the claimed effects is the concentrated dose of caffeine, a commonly used stimulant. Defendants have no competent and reliable scientific evidence to support their assertions that the other ingredients in 5-hour ENERGY®, when taken as directed, contribute in any meaningful way to provide energy, alertness or focus.

b. Deceptive Claims That Original and Extra Strength 5-hour ENERGY® are Superior to the Equivalent Amount of Caffeine from Coffee or Another Source

45. The advertising and marketing campaign for 5-hour ENERGY® has also focused on delivering the message that 5-hour ENERGY® is distinctly different from, and better than, an equivalent amount of caffeine from coffee or another source in providing consumers with energy, alertness, or focus. For example, the home page for the company's website talks about the fact that 5-hour ENERGY® has less caffeine than

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Starbucks coffee, "plus vitamins and nutrients" and that "It's the combination that makes it so great":

5-hour ENERGY® and caffeine - the facts

Americans consume over 2 billion cups of coffee every week*, so we're pretty comfortable with caffeine. 5-hour ENERGY® products have less caffeine than some Starbucks® coffee drinks, plus vitamins and nutrients. **It's the combination that makes it so great.**†

5-hour ENERGY® products have less caffeine than some Starbucks® coffees‡.

Source: www.starbucks.com

Source:Effects of Caffeine on Human Health, Food Directorate, Health Canada

Moderate caffeine consumption

1. Increases alertness and reduces fatigue.
2. Improves performance on vigilance tasks.
3. Improves mental function.
4. Most people are very good at controlling their caffeine consumption.

Source: Effects of Caffeine on Human Behavior; Center for Occupational and Health Psychology; Cardiff University, UK

Regulatory Compliance

http://www.5hourenergy.com/index.asp (last visited June 11, 2014)

46. The 5-hour ENERGY® website poses the question: "So what do you do? Run for the coffee? Grab a soda? But how long does that last before you need more? Try this instead-take one 5-hour ENERGY® shot. It's quick, simple and made to help hard working people."

47. Examples of advertisements for 5-hour ENERGY® that make similar claims about superiority to coffee include:

Tagline: "What's Your 2:30 Feeling Like?" (television)

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"What's your 2:30 feeling like? Well it's like my brain just stops working…I feel fuzzy, groggy, I can barely keep my eyes open. So what do you do? Well, I used to get another coffee…yeah, coffee or soda…then another coffee. But then I switched to 5-hour ENERGY®. Just one 5-hour Energy and the rest of the day I'm great."

Tagline: "Choose Wisely" (television)

"Another cup of coffee? How long is this one going to last? 45 minutes, an hour? Listen, 5-hour ENERGY® lasts a whole lot of hours. Take one in the afternoon and you'll feel alert and energized until the cows come home. And it's packed with B-vitamins and nutrients to make it last. So what's it going to be, partner? 5-hour ENERGY®. Wise choice."

Tagline: "How much coffee are you going to need today?" (radio)

"How much coffee are you going to need today? Four, five cups? It doesn't last very long, does it. Listen: one 5-Hour Energy® lasts for several hours so you can get a lot done without refills. It's packed with B-vitamins and nutrients to make it last. Plus, 5-hour ENERGY® has zero sugar and 4 calories. So the next time that 2:30 feeling hits, you have a choice: two or three more cups of coffee or one 5-Hour Energy®."

Tagline: "How long is your next cup of coffee going to last?" (radio)

"How long is your next cup of coffee going to last? 45 minutes? An hour? Listen: one 5-hour ENERGY® lasts for several hours. Take one in the morning to feel alert past lunch, take one in the afternoon to feel energized into the evening. 5-hour ENERGY® is packed with B-vitamins and nutrients to make it last. Plus it has zero sugar and four calories. The choice is yours: cup after cup of coffee or one 5-hour ENERGY®."

48. Defendants have claimed that the Original and Extra Strength versions of 5-hour ENERGY® are superior to consuming an equivalent amount of caffeine from coffee or another source in providing users with benefits like energy, alertness or focus, but that is untrue.

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49. There is no competent and reliable scientific evidence to substantiate the claims made by Defendants that either Original or Extra Strength 5-hour ENERGY® is superior to consuming the equivalent amount of coffee or caffeine from another source in providing consumers with energy, alertness, or focus.

50. In fact, as stated above, any claimed effectiveness of 5-hour ENERGY® Original or Extra Strength is related solely to the concentrated dose of caffeine therein.

c. Deceptive Claims That Decaf 5-hour ENERGY® Provides Consumers With Any Benefit

51. Decaf 5-hour ENERGY® was launched by Defendants in or about March 2008. They describe it as "having about as much caffeine as a half cup of decaffeinated coffee." http://www.5hourenergy.com/health facts.asp (last visited June 17, 2014).

52. Defendants represent that there is a benefit to consuming Decaf 5-hour ENERGY®, stating, for example, that it is "designed for people who avoid caffeine, but still need an extra boost to help them function during the day."

53. The 5-hour ENERGY® website touts Decaf 5-hour ENERGY®'s benefits as providing energy and alertness, together with its vitamins, amino acids and choline, as follows:

> **The Only Energy Shot for People Sensitive to Caffeine**
> Do you find caffeine unpleasant but still need a little extra energy to get through your day? Then try Decaf 5-hour ENERGY® shots. It can provide the alertness* you want without the "caffeine feeling" you don't. It works gently – with only as much caffeine as a half cup of decaffeinated coffee, and no Niacin. And it has pleasant citrus taste.
>
> Like original 5-hour ENERGY® Decaf 5-hour ENERGY® contains B-vitamins and amino acids plus Choline. It is vital to the production of neurotransmitters in the brain that affect

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> memory, intelligence and mood. Choline is present in eggs, soy and meats.

http://www.5hourenergy.com/5hrdecaf.asp (last visited June 17, 2014).

54. Prior iterations of the 5-hour ENERGY® website contain similar claims about the benefits of Decaf 5-hour ENERGY®. For example, Defendants' websites from June 2008, January 2009, July 2011, and October 2012 all claimed that Decaf 5-hour ENERGY® provides benefits like alertness and focus, and attributed those benefits to ingredients like B vitamins, amino acids and choline.

55. The ingredients in Decaf 5-hour ENERGY® are reflected on the back of the bottle. The "% Daily Value" and the "Energy Blend" appear under the heading "Supplement Facts". The ingredients panel for Decaf 5-hour ENERGY® is as follows:

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5-hour ENERGY®
Decaf

Supplement Facts
Serving Size 1.93 fl. oz.

Amount Per Serving	% Daily Value
Vitamin B6 (as Pyridoxine Hydrochloride) 40mg	2000%
Folic Acid 400mcg	100%
Vitamin B12 (as Cyanocobalamin) 500mcg	8333%
Sodium 18mg	<1%
Energy Blend 2009mg	‡
Taurine, Choline, Glucuronic acid (as or from glucuronolactone), N-Acetyl L-Tyrosine, L-Phenylalanine, Malic Acid, Caffeine (6mg)	

‡Daily value not established.

Other Ingredients: Purified Water; Natural and Artificial Flavors; Sucralose; Potassium Sorbate, Sodium Benzoate and EDTA (to protect freshness).

http://www.5hourenergy.com/healthfacts.asp (last visited June 11, 2014)

56. As stated in paragraph 34 above, "% daily values" are intended to assist consumers in interpreting information about the amount of a substance that is present in the product. For Decaf 5-hour ENERGY®, the % daily value refers to the amount of vitamins and sodium in each bottle.

57. The vitamin amounts in Decaf 5-hour ENERGY® equal or well exceed 100% of the % daily value and include over 83 times (8333%) the recommended daily allowance of Vitamin B12, and 20 times (2000%) the recommended daily allowance of Vitamin B6.

58. Defendants point out that "like original 5-hour ENERGY®", the Decaf product contains B-vitamins and amino acids "plus Choline", thus implying that the

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addition of Choline to the Energy Blend used for caffeinated 5-hour ENERGY® –and which they describe as "vital to the production of neurotransmitters in the brain that affect memory, intelligence and mood" - will have a positive effect on the consumer. It does not, and there is no competent and reliable scientific evidence that the choline contained in 5-hour ENERGY® will have any meaningful effect on neurotransmitter production in an otherwise healthy, well-nourished individual.

59. One of choline's functions is to serve in the manufacture of neurotransmitters in the human body. A healthy body produces the amount of choline that is necessary to do so. If a person consumes choline orally, the body may use that choline rather than the choline it would otherwise make. The body only makes what it needs. If a person consumes choline orally, the body will simply synthesize less.

60. Thus, there is no evidence or reason to believe that the choline ingested in 5-hour ENERGY® has any impact on the amount of neurotransmitters manufactured in the body.

61. Defendants' website currently claims that consumers should drink "one half (1/2) bottle" of Decaf 5-hour ENERGY® for moderate energy and "one whole bottle for maximum energy."

62. Elsewhere, Defendants have used the claims for Original and Extra Strength 5-hour ENERGY® interchangeably with the Decaf version. The following is from 5-hour ENERGY®'s website in August 2010. It ascribes the benefits of all three formulations of the product:

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"How are 5-Hour Energy shots different from canned energy drinks?

5-Hour Energy is different from canned energy drinks in several ways:

Lasts Longer: When you're tired, *5-Hour Energy shots can help you feel bright, alert and focused for hours without the crash**.

Works Faster: Since it's a 2-ounce energy shot and not a 16-ounce carbonated energy drink, you can slam it down in seconds. *You can feel it start working in minutes.*

Small and Portable: You can carry a 5-Hour Energy shot with you whenever you go. It fits neatly in your pocket, purse, desk, locker, car or truck cab. Best of all, you don't have to nurse a big 16-ounce energy drink. *Once quick sip and 5-Hour Energy is in your system and out of your hands.*

No Refrigeration Required: Warm carbonated energy drinks don't taste so good. But 5-Hour Energy tastes fine at room temperature.

What flavors do 5-Hour Energy shots come in?

Original (red label): Berry, lemon-lime and orange.
Extra Strength (black label): Berry
Decaf (blue label): Citrus

63. Defendants have also said that Decaf 5-hour ENERGY® provides "hours of energy now" and that consumers "feel it in minutes. Lasts for hours."

64. Defendants have misrepresented the way 5-hour ENERGY® works (or does not work) by claiming that the Decaf formulation of the product provides any of the promoted benefits, when it does not provide such benefits. These claims are misleading because Decaf 5-hour ENERGY® provides no feeling of energy, alertness or focus. The only ingredient in Defendants' line of products that provides any meaningful effect when taken as directed is caffeine, and the amount of caffeine in Decaf 5-hour ENERGY® is insufficient to have a physiologic effect in most users.

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65. Defendants have no competent and reliable scientific evidence to support their claims that the non-caffeine ingredients in Decaf 5-hour ENERGY® (mega-doses of vitamins, enzymes, amino acids and other ingredients) in Decaf 5-hour ENERGY® will do anything to provide energy, alertness, or focus.

66. As is the case with Original and Extra Strength 5-hour ENERGY®, adequate levels of the vitamins, amino acids and enzymes contained in Decaf 5-hour ENERGY® are typically available from the diet of an otherwise healthy, well-nourished individual. When excess amounts are consumed, they are typically excreted.

2. <u>Deceptive Claims Regarding a "Crash" Associated With 5-hour ENERGY®</u>

67. Defendants have also made misrepresentations regarding whether 5-hour ENERGY® users experience a "crash" after using their product.

68. Defendants have claimed that the product causes "no crash later" and "hours of energy now, no crash later."

69. The "no crash" claim was the subject of a 2007 inquiry by the National Advertising Division of the Council of Better Business Bureaus ("NAD"), an independent entity that investigates and evaluates claims made in nationally-disseminated advertisements. In 2007, NAD requested documents from Defendants to substantiate the "no crash" claim.

70. In response to NAD's advertising challenge, Defendants provided NAD with a scientific report which they claimed supported the "hours of energy now, no crash later" product tagline. The clinical study that was the subject of that report, which was in Defendants' possession at the time they were making the "no crash claim", actually failed to support its claim.

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71. The clinical study, which was commissioned by Defendants themselves, showed that 24% of the study subjects who used 5-hour ENERGY® suffered a "moderately severe" crash hours after consuming the product.

72. Because Defendants' own evidence showed that the "no crash" claim was misleading, NAD advised them to discontinue it.

73. According to a January 3, 2013 article in *The New York Times,* NAD director Andrea C. Levine told the *The New York Times* that "[w]e recommended that the 'no crash' claim be discontinued because their own evidence showed there was a crash from the product."

74. But, instead of following NAD's recommendation, Defendants decided to modify the "no crash" claim. Defendants continued to use the "no crash" language as late as 2009 when they were again contacted by NAD with concerns. Following the NAD 2009 inquiry, Defendants qualified the "no crash" claim with an asterisk or other symbol that directs consumers to another location on the bottle which states, in very small print, that "no crash means no sugar crash". Defendants did not obtain NAD's approval for the changed language.

75. While Defendants told *The New York Times* that, based on the modification, NAD had found the claim to be substantiated, NAD said Defendants misrepresented its position.

76. NAD had recommended that the "no crash" claim be discontinued.

77. 5-hour ENERGY®'s bottle and advertising continued to use the asterisk or cross until early 2013 when the language on the bottle was modified to say "no sugar crash".

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3. Misrepresentations Involving the "Ask Your Doctor"" Advertising Campaign

78. Following questions about 5-hour ENERGY®'s safety from governmental and third party advocacy groups, Defendants produced an "Ask Your Doctor" advertising campaign that was featured on television and online.

79. The "Ask Your Doctor" advertising campaign was intended to assure consumers that trusted medical experts believe 5-hour ENERGY® provides benefits and that it is safe.

80. The "Ask Your Doctor" campaign initially aired on television on July 18, 2012. The campaign was launched on the Internet on or about July 19, 2012 and continued until approximately early October 2012.

81. The "Ask Your Doctor" campaign was developed by Defendants and approved by Living Essentials Chief Executive Officer, Manoj Bhargava.

82. The "Ask Your Doctor" Advertising campaign was misleading in three ways: a) it misleadingly stated the number of doctors that Defendants surveyed and the results of the survey; b) the survey underlying the campaign used unsound methodology; and c) the portion of the advertising campaign that addressed the ingredients in 5-hour ENERGY® made unsubstantiated benefit claims about certain ingredients contained therein. Each of the deceptive aspects of the campaign is discussed in greater detail below.

83. The campaign included website advertising and 10, 15 and 30 second television advertisements with an authoritative looking woman sitting beside a large stack of documents. Here is a transcript of the 30 second version of the advertisement:

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We asked over 3,000 doctors to review Five-Hour Energy and what they said is amazing. Over 73% who reviewed Five-Hour Energy said that they would recommend a low-calorie energy supplement to their healthy patients who use energy supplements. *73%.* Five-Hour Energy has four calories and is used over 9 million times a week. Is Five-Hour Energy right for you? Ask your doctor. We already asked 3,000.

84. The online version of the advertisement made the same claims, as well as claims about benefits provided by certain ingredients in 5-hour ENERGY®.

a. Misleading Statements About the Number of Doctors Surveyed and the Results of the Survey

85. The "Ask Your Doctor" advertisement states that Defendants asked over 3000 doctors to review their product. That is misleading. Defendants actually surveyed more than 5,500 doctors, 3000 of whom responded. Of the 3,000 who responded, 73% of *those* doctors said that if their healthy patients were already using an energy supplement, they would recommend a generic low calorie supplement.

86. The broadcast version of the "Ask Your Doctor" advertisement misleadingly implies that 73% of the 3,000 doctors who were surveyed recommended 5-hour ENERGY by name. However, only 47% of the doctors who responded to the survey said that they would specifically recommend 5-hour ENERGY. That fact only appears in exceeding small print briefly flashed on the screen while the misleading 73% figure is being emphasized by the speaker.

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b. The Survey Underlying the Campaign Used Unsound Methodolgy

87. The "Ask Your Doctor" campaign was also misleading because it was based on a survey that used an unsound methodology. Defendants were advised by an expert that they had employed an unsound methodology in conducting the survey, and that the results would not be reliable. Defendants nonetheless used the unreliable survey results which made the numbers in the "Ask Your Doctor" campaign inherently misleading.

c. Unsubstantiated Benefit Claim

88. A central premise of the "Ask Your Doctor" campaign was that 5-hour ENERGY® is different from competitors because of its unique ingredient formulation. The website component of the campaign included claims about the benefits of specific ingredients in 5-hour ENERGY®.

89. For example, Defendants stated the following about certain 5-hour ENERGY® ingredients:

The amounts of the ingredients are under the Upper Limits established by the Food Nutrition Board of the National Academy of Sciences-National Research Council for each ingredient.

- Citicoline, of CDP-Choline, is a water-soluble compound essential for the synthesis of phosphatidyl choline, a constituent of brain tissue.
- Tyrosine is an amino acid that transmits nerve impulses to the brain. It is present in meat, dairy, fish and grains.
- Phenylalanine is an essential amino acid that enhances alertness. It is found in dairy products, avocados, legumes, nuts, leafy vegetables, whole grains, poultry and fish.
- Taurine is a naturally occurring chemical substance. Adult humans have high concentrations of Taurine in white blood cells, skeletal muscles, the heart and central nervous system. It is found in meat, fish and dairy products.

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- Malic Acid is used by the body during the process of converting carbohydrates to energy. The main food source of Malic Acid is fruits, especially apples.
- Glucuronolactone is a natural metabolite found in the human body. It is produced by the metabolization of glucose in the liver."

http://www.doctorsreview5hour.com/review.php (last accessed September 28, 2012)

90. Regardless of whether the statements about each individual ingredient are true as a general matter, Defendants have no competent and reliable scientific evidence to substantiate the claim that these ingredients, working in concert, provide the benefits Defendants claim they do as part of the 5-hour ENERGY® formulation.

91. In fact, Defendants' claims about the above-described ingredients are either insignificant in amount (in the case of citacholine), or are simply non-essential (in the case of others) because they do not need to be provided from the daily diet.

92. As stated above, the presence of these ingredients in 5-hour ENERGY® have no impact on focus, alertness or energy in an otherwise healthy, well-nourished individual. Defendants have no competent and reliable scientific evidence to substantiate a claim that any physiological effects will occur as a result of the inclusion of the above-listed ingredients in 5-hour ENERGY®.

4. Misrepresentations Regarding Suitability for Adolescents

93. The bottle for 5-hour ENERGY® products states: "Do not take if you are pregnant or nursing, **or under 12 years of age**." (Emphasis added).

94. 5-hour ENERGY® states the following on its website, in relevant part:

Who should not take 5-hour ENERGY®?

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- Women who are pregnant or nursing.
- Children under 12 years of age.
- People diagnosed with phenylketonuria (PKU).

http://www.5hourenergy.com/QandA.asp(last visited July 14, 2014)

95. By saying that 5-hour ENERGY® should not be taken by children under 12, Defendants are necessarily implying that the product *is* appropriate for adolescents age 12 and older.

96. According to the Yale Rudd Center for Food Policy & Obesity, of the top 28 beverages ranked by teens (defined as ages 12-17) exposure to TV advertisements in 2010, 5-hour ENERGY® ranked number one, outranking drinks like Kool-Aid, Capri Sun, Pepsi or Coke. Teens saw three times as many TV ads for 5-hour ENERGY® in 2010 than for any other beverages analyzed. Yale Rudd Center for Food Policy & Obesity, October 2011, "Sugary Drink Facts: Evaluating Sugary Drink Nutrition and Marketing to Youth" http://www.sugarydrinkfacts.org/resources/SugaryDrinkFACTS_Report.pdf (last visited July 14, 2014)

97. While some of 5-hour ENERGY®'s advertisements refer to the fact that the product is intended for "hard working people" or "hard working adults", the ubiquitous nature of the product, as well as its advertising on sports channels, at sports events, and on night-time television channels such as the Cartoon Network, bolster its appeal to adolescents.

98. In June of 2013, the American Medical Association adopted a policy supporting a ban on marketing caffeinated energy drinks to those under 18, until possible adverse health effects on this demographic could be assessed.

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99. The health effects of 5-hour ENERGY®'s ingredients, including tyrosine and phenylalanine when combined with caffeine, are not known. *See* Melanie Haiken, *Can Energy Drinks Kill, Reprise? New FDA Investigation This Time Names 5-hour ENERGY®*, Forbes, available at: http://www.forbes.com/sites/melaniehaiken/2012/11/15/can-energy-drinks-kill-reprise-new-fda-investigation-this-time-names-5-hour-energy (last visited June 24, 2014).

100. Questions about the safety of 5-hour ENERGY® have been serious enough to prompt investigations by the FDA and members of Congress. *See* Michelle Castillo, *FDA Investigating 13 Deaths Tied to 5-hour ENERGY®*, CBS NEWS, available at www.cbsnews.com/news/fda-investigating-13-deaths-tied-to-5-hour-energy/ (last visited June 24, 2014); Report from Staff of Congressman Ed Markey, Senator Richard Durbin, and Senator Richard Blumenthal, *What's All the Buzz About? A Survey of Popular Energy Drinks Finds Inconsistent Labeling, Questionable Ingredients and Targeted Marketing to Adolescents* (April 10, 2013) available at http://www.durbin.senate.gov/public/index.cfm/files/serve?File_id=361241d9-4e28-4cd7-b14d-698660b9b998(last visited July 14, 2014)

101. The American Academy of Pediatrics ("AAP") has stated that "the claimed association of energy drinks and ergogenic and performance enhancing effects of the stimulants in energy drinks has not been adequately studied in adolescents, who are more susceptible to the negative health effects and who do not need stimulants to support physical activity." Senate Testimony of the American Academy of Pediatrics, July 31, 2012 (available at http://www.aap.org/en-us/advocacy-and-policy/federal-

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advocacy/Documents/SchneiderSenateCommerceCommitteeEnergyDrinksTestimony_7_31_13.pdf) (last visited July 14, 2014)

102. The AAP also said:

> Overall, the risks to children and adolescents from consuming energy drinks include increases heart rate, increased blood pressure, increased anxiety, sleep disturbances…effects on the developing neurologic system, precipitation of arrhythmias (irregular heartbeats) and even death. Because these drinks and beverage products are considered dietary supplements, they are not strongly regulated by the Food and Drug Administration…"

Senate Testimony of the American Academy of Pediatrics, *Supra,* July 31, 2012.

103. Despite the fact that they lack competent and reliable scientific evidence that their products are appropriate for adolescents age 12 and over, and the health risks that caffeine presents to adolescents, Defendants impliedly claim that it is appropriate for adolescents to consume 5-hour ENERGY®.

VIOLATIONS OF THE LAW

First Count: Unfair and Deceptive Trade Practices-Claims of Benefits

104. Plaintiff repeats and re-alleges each and every allegation set forth in the preceding paragraphs as though fully set forth herein.

105. Defendants engaged in unfair and deceptive trade practices in commerce, in violation of Vermont Consumer Protection Act, 9 V.S.A. §2453(a), by making misrepresentations about the benefits of their 5-hour ENERGY® products and the superiority of Original and Extra Strength5-hour ENERGY®. These misrepresentations were likely to mislead consumers and affect their decisions to purchase 5-hour ENERGY®

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products. The meaning ascribed to Defendants' claims herein is reasonable given the nature of those claims.

106. Defendants also engaged in unfair and deceptive trade practices in commerce, in violation of Vermont Consumer Protection Act, 9 V.S.A. §2453(a) because those statements were not substantiated by competent and reliable scientific evidence.

Second Count: Unfair and Deceptive Trade Practices-No Crash Claims

107. Plaintiff repeats and re-alleges each and every allegation set forth in the preceding paragraphs as though fully set forth herein.

108. Defendants engaged in unfair and deceptive trade practices in commerce, in violation of the Vermont Consumer Protection Act, 9 V.S.A. §2453(a), by misrepresenting that 5-hour ENERGY® users would not experience a crash from the product. Such statements were likely to mislead consumers and affect their decisions to purchase 5-hour ENERGY® products. The meaning ascribed to Defendants' claims herein is reasonable given the nature of those claims.

109. Defendants also engaged in unfair and deceptive trade practices in commerce, in violation of Vermont Consumer Protection Act, 9 V.S.A. §2453(a) because do not have competent and reliable scientific evidence to substantiate their "no crash" claims.

Third Count: Unfair and Deceptive Trade Practices-"Ask Your Doctor" Campaign

110. Plaintiff repeats and re-alleges each and every allegation set forth in the preceding paragraphs as though fully set forth herein.

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111. Defendants engaged in unfair and deceptive trade practices in commerce, in violation of the Vermont Consumer Protection Act, 9 V.S.A. §2453(a) by making misrepresentations regarding the "Ask Your Doctor" campaign that were likely to mislead consumers and affect their decisions to purchase 5-hour ENERGY® products. The meaning ascribed to Defendants' claims herein is reasonable given the nature of those claims.

112. Defendants also engaged in unfair and deceptive trade practices in commerce, in violation of Vermont Consumer Protection Act, 9 V.S.A. §2453(a) because they do not have competent and reliable scientific evidence to substantiate their benefit claims.

Fourth Count: Unfair and Deceptive Trade Practices-Suitability for Teens

113. Plaintiff repeats and re-alleges each and every allegation set forth in the preceding paragraphs as though fully set forth herein.

114. Defendants engaged in unfair and deceptive trade practices in commerce, in violation of the Vermont Consumer Protection Act, 9 V.S.A. §2453(a) by making statements regarding the suitability of 5-hour ENERGY® for adolescents because they do not have competent and reliable scientific evidence to substantiate their claims.

WHEREFORE, Plaintiff State of Vermont respectfully requests judgment in its favor and the following relief:

1. A judgment determining that Defendants have violated the Vermont Consumer Protection Act;

2. A permanent injunction prohibiting Defendants from engaging in the marketing, advertising, labeling, promoting, offering for sale, distributing

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or selling 5-hour ENERGY® products in Vermont in violation of the Vermont Consumer Protection Act;

3. A judgment requiring Defendants to provide restitution to all Vermont purchasers of Decaf 5-hour ENERGY® for the cost of the product; and to the extent not ascertainable that Defendants pay such amounts in the form of *cy pres*;

4. A judgment requiring Defendants to disgorge all profits obtained as a result of their violations of the Vermont Consumer Protection Act:

5. Civil penalties for up to $10,000 for each violation of the Vermont Consumer Protection Act;

6. The award of investigative and litigations costs and fees to the state of Vermont; and

7. Such other and further relief as the Court may deem appropriate.

Dated: July 17, 2014.

STATE OF VERMONT

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