

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION**

WILLIAM FORREST, on behalf of himself
and all others similarly situated,

Plaintiff,

v.

INNOVATION VENTURES, LLC d/b/a
LIVING ESSENTIALS, LLC, a Michigan
Corporation,

Defendant.

CASE NO.: 13-172

JURY TRIAL DEMANDED

CLASS ACTION COMPLAINT

CLASS ACTION COMPLAINT

Plaintiff, William Forrest, by and through undersigned counsel, brings this action on his own behalf and on behalf of a Class and Subclass of persons and entities defined herein against Defendant Innovation Ventures, LLC d/b/a Living Essentials, LLC (hereinafter referred to as “Living Essentials” or “Defendant”) and for his Complaint alleges, upon information and belief and based on the investigation to date of his counsel, as follows:

INTRODUCTION

1. This is a nationwide class action brought by Plaintiff pursuant to Rule 23 of the Federal Rules of Civil Procedure on his own behalf and on behalf of a Class and Subclass of all similarly situated consumers who purchased 5-hour ENERGY shots designed, manufactured, warranted, marketed, advertised, and sold by Defendant, Living Essentials, or its predecessors, successors or subsidiaries.

2. Defendant manufactured and marketed its product under various brands and product names including, but not limited to, 5-hour ENERGY, Extra Strength 5-hour ENERGY,

and Decaf 5-hour ENERGY shot (“5-hour Energy” or the “Product”). Defendant has marketed, advertised and sold 5-hour Energy throughout Missouri, the United States and other countries.

3. Defendant represents to consumers, among other representations as alleged herein, that 5-Hour Energy produces a sustained level of “energy” for five hours, that the consumer will have “hours of energy now, no crash later,” “contains B Vitamins for energy and amino acids for focus,” and that you can “drink it in seconds and in minutes you’re feeling alert and productive and that feeling lasts for hours”.

4. Defendant claims to base its representations upon scientific studies which it claims demonstrates the superior nature of 5-hour Energy branded drinks over simpler and less expensive caffeine only products, such as a caffeine tablet or a cup of coffee.

5. Upon information and belief there is no genuine scientific research and there are no scientifically reliable studies in existence that support Defendant’s claims that 5-hour Energy drinks provide any additional benefits over a caffeine tablet or a cup of coffee.

6. Through its extensive and comprehensive nationwide marketing campaign, Defendant engaged in improper advertising, sales and marketing practices in an attempt to defraud Plaintiff and members of the class by disseminating false and misleading information via television commercials, internet websites and postings, radio media, advertising and packaging, all of which is intended to induce consumers, including Plaintiff and members of the Class, into purchasing, at a premium price, millions of dollars worth of 5-hour Energy shots, which are manufactured, distributed, marketed, advertised and/or sold by the Defendant.

7. Defendant knew or should have known that there is no greater benefit of ingesting 5-hour Energy than ingesting an equivalent dose of caffeine and has taken no meaningful steps to clear up consumer misconceptions regarding its product.

8. As a result of Defendant's pervasive pattern of fraudulent, deceptive, false, and otherwise improper advertising, sales, and marketing practices and through other actions and inactions complained of herein, Defendant breached express warranties, committed fraud through uniform written misrepresentations and common omissions. To remedy Defendant's illegal conduct, Plaintiff on behalf of himself and other similarly situated purchasers seeks monetary damages, equitable relief, declaratory relief and/or disgorgement of profits in connection with the 5-hour Energy designed, manufactured, warranted, marketed, advertised, and sold by the Defendant, or its predecessors, successors or subsidiaries.

JURISDICTION AND VENUE

9. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1332(d)(2) (diversity jurisdiction) and the Class Action Fairness Act, in that (i) there is complete diversity (Plaintiff is a citizen of Missouri and Defendant is domiciled and incorporated in Michigan and otherwise maintains its principal place of business in Michigan, (ii) the amount in controversy exceeds \$5,000,000.00 (Five Million Dollars) exclusive of interests and costs, and (iii) there are 100 or more members of the proposed Plaintiff class.

10. Defendant conducts substantial business in Missouri, including the sale and distribution of 5-hour Energy, and has sufficient contacts with Missouri or otherwise intentionally avails itself of the laws and markets of Missouri, so as to sustain this Court's jurisdiction over Living Essentials.

11. Venue lies in this District, pursuant to 28 U.S.C. §1391, because a substantial part of the events or omissions giving rise to Plaintiff's claims occurred in this Judicial District. In addition, Living Essentials does business and/or transacts business in this Judicial District, and therefore, is subject to personal jurisdiction in this Judicial District and resides here for venue purposes.

PARTIES

12. Plaintiff William Forrest is a resident and citizen of St. Louis, Missouri. Plaintiff last purchased 5-Hour Energy manufactured and marketed by Defendant in December 2012. He has purchased 5-Hour Energy for 4-5 years in the St. Louis, Missouri area, including but not limited to purchasing 5-Hour Energy from a gas station near West County mall in St. Louis, Missouri.

13. Defendant Living Essentials is a Michigan corporation with its principal place of business at 38955 Hills Tech Drive Farmington Hills, Michigan 48331. Defendant is one of the largest manufacturers and sellers of energy drinks in the country with annual sales of more than \$1 billion and sells about 9 million bottles of 5-hour Energy a week in North America.

14. Defendant designed, tested, manufactured, marketed, advertised, warranted and/or sold 5-hour Energy in Missouri and throughout the United States.

FACTUAL ALLEGATIONS

15. 5-hour Energy is a flavored energy shot brand made by the Defendant. It is sold in 1.93-oz (57 mL) containers. Defendants introduced 5-hour Energy in 2004 as part of a wave of "energy shot" dietary supplements.

16. Defendant sells or distributes 5-hour Energy to consumers throughout Missouri and the United States in three varieties: Original, Extra Strength, and Decaffeinated and available in multiple flavors including pink lemonade, grape, pomegranate, berry, orange, and lemon-lime. 5-hour Energy contains caffeine, citicoline, tyrosine, phenylalanine, taurine, malic acid, glucuronolactone, and a blend of vitamins B6, B12, Niacin and folic acid. 5-hour Energy Decaf, which contains choline, is alleged to contain only half as much caffeine as a half cup of decaffeinated coffee, and no Niacin.

17. In the Spring of 2004, health chain, GNC, began to stock 5-hour Energy in its stores. Soon after the product began to appear in Walgreens, Rite Aid, and regional chain stores. Currently the product is available for purchase at gas stations, Wal-Marts, and supermarkets.

18. Defendant grossed more than \$600 million dollars in 2011 off \$1 billion retail sales, according to Forbes Magazine and is said to have 90% of the so-called “energy shot” market.

19. Defendant asserts that in addition to the light and portable container, in which the product comes, 5-hour Energy is packed with vitamins and amino acids, contains no sugar, zero herbal stimulants and is only four calories.

20. Defendant’s main point of sale is that unlike energy drinks and common caffeine products, 5-hour Energy produces “no crash later”.

21. Although Defendant points to purported scientific studies to and research to this claim, only reports to the contrary have been published.

22. Earlier this month the New York Times published an article titled “Energy Drinks promised Edge, but Experts say Proof is Scant” (Barry Meier, January 1, 2013), citing

widespread scientific and governmental criticism of manufacturers assertion that energy drinks provided any more benefit than the average dose of caffeine consumed in a cup of coffee.

23. According to Defendant's website 5-hour Energy significantly outperformed placebo in a clinical trial on continuity of attention and self-related awareness implying that consumption of 5-hour Energy will improve concentration and alertness. However, nothing in that comparison to a placebo supports Defendant's assertion that 5-hour Energy provides anything more for concentration or awareness than any other product which contains caffeine.

24. Despite the lack of any reported scientific support for a claim that 5-hour Energy provides more benefit to consumers than a caffeine tablet or cup of coffee, Defendant continues to market their product as a superior source of energy worthy of a premium price.

25. Additionally, Defendant's web site asserts that the product is "packed with vitamins".

26. A study undertaken at Vanderbilt University specifically directed at 5-Hour Energy, sheds light on the true effects and dangers of some of these ingredients:¹

- a. Niacin: A Niacin Flush can cause liver toxicity, worsening of stomach ulcers, and altered blood sugar or insulin levels or uric acid concentrations;
- b. Vitamin B6: It has yet to be shown that B6 supplementation in healthy people causes enhanced cognitive function;
- c. Folic Acid: Giving folate to a person with a B12 deficiency can cause irreversible neurologic damage;
- d. Vitamin B12: There is no evidence of the efficacy of vitamin B12 on cognitive function.

¹ 5-Hour Energy: The Health Energy Drink? <http://healthpsych.psy.vanderbilt.edu/2008/5-HourEnergy.htm>

27. The ultimate conclusion, based in part off of another scientific study, was that B6, B12, and folic acid supplementation, alone or in combinations, do not provide adequate evidence for a beneficial effect of supplementation on cognitive function testing in people with either normal or impaired cognitive function.

28. The significance of this conclusion is that it highlights the discrepancy between the advertising claims and the actual science and research.

29. In a 2003 article titled “Debunking the Effects of Taurine in Red Bull Energy Drink”², the study concluded that the claimed improvement in cognitive capabilities and muscular performance were more plausibly related to caffeine alone rather than the purported unique combination of the key components of caffeine, taurine, and glucuronolactone.

30. The report concluded that “it seems that drinking a cold cup of coffee may induce the same ‘energizing and refreshing’ effects of drinking Red Bull - and best of all, at one-third the cost.” These same key ingredients are also all found in 5-hour Energy.

31. More recently, a study on the cognitive effects of key energy drink ingredients caffeine, taurine, and glucose, similarly concluded that caffeine content, but not taurine or glucose in energy drinks drives cognitive improvements in executive control, working memory, and psychomotor performance.³

32. Another study reached a similar conclusion after its evaluation of multiple ingredients commonly found in energy drinks such as 5-hour Energy, including taurine,

² “Debunking the Effects of Taurine in Red Bull Energy Drink”, Kim, Woojae, Nutrition Bytes, Department of Biological Chemistry, UCLA, David Geffen School of Medicine, UC Los Angeles, 2003.

³ “Differential cognitive effects of energy drink ingredients: Caffeine, taurine, and glucose”, Giles, Grace, Mahoney, Caroline, et al, Pharmacology, Biochemistry, and Behavior 102 (2012) 569-577.

glucuronolactone, glucose, B vitamins, guarana, yerbe mate, carnitine, St. John's wort, and ginseng.⁴ The study concluded that there is little, if any, solid evidence to support an increase in either physical or mental energy due to consumption of energy drinks except for the increases attributable to caffeine.

33. Finally, the European Food and Safety Commission undertook a study of taurine and found that no cause and effect relationship has been established between taurine and its contribution to cognitive function, cardiac function, and a delay in the onset of physical fatigue.⁵

34. 5-hour Energy claims to provide more than 8,000% of the recommended daily intake for B12 and 2000% of the recommended intake of B6. However, according to Dr. Brent Bauer, director of the Complementary and Integrative Medicine Program at the Mayo Clinic, high doses of B vitamins are not going to boost energy unless someone is B-deficient.⁶

⁴ "Do energy drinks contain active components other than caffeine?", McLellan, Tom and Lieberman, Harris, Nutrition Reviews, Vol. 70(12):730-744.

⁵ EFSA Journal 2011; 9(4):2035.

⁶ Energy Shots Review: Do they work? Are they safe? <http://www.webmd.co/food-recipes/features/energy-shots-review?print=true>



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).



The Product and Living Essentials' Advertising

35. Defendant's exhaustive advertising campaign builds on this deception. In truth, Defendant has no independent, reliable, or competent support for its claims.

36. Throughout the Class Period, Defendant has marketed 5-hour Energy as producing "hours of energy now-no crash later" and that the consumer "can feel it in minutes and it lasts for hours".

37. In the "Frequently Asked Questions" section of 5-hour Energy's website (<http://www.5hourenergy.com/QandA.asp>), Defendant represents that the product is "a liquid energy shot that can help you feel sharp and alert for hours."

38. In 2007, National Advertising Division, an advertising watchdog group affiliated with the Council of Better Business Bureau conducted a review of popular energy drinks and shots, which included 5-hour Energy. According to results reported by the New York Times, 24 percent of the people who used 5-hour energy had a "moderately severe" crash afterward.

http://www.nytimes.com/2013/01/03/business/5-hour-energys-no-crash-later-claim-is-disputed.html?ref=business&_r=2&

39. The review concluded that while the company's 2007 study had shown there was evidence to support a "qualified claim that 5-hour Energy results in less of a crash than Red Bull and Monster" Energy, the study showed that 5-hour Energy users experienced caffeine-related crashes, and therefore the product was inadequate to support a "no crash" claim.

40. Following the study the group recommended that Defendant discontinue the "no crash claim" based on Defendant's own evidence.

41. Instead, Defendant added an asterisk-like symbol and footnote to its no-crash claim explaining that the user would have "no sugar crash" as the product did not contain sugar.

42. Andrea C. Levine, director of the National Advertising Division, recently reopened the group's review of the "no crash later" claim after Defendant incorrectly asserted in a public statement that the National Advertising Division had found all of Living Essentials' claims to be substantiated. Ms. Levine asserted that Defendant had apparently decided to use only select portions of the report and failed to follow the group's recommendation that they drop the language and instead added language of its choosing. In the event that the company fails to respond or inadequately responds, the National Advertising Division will likely refer the matter to the Federal Trade Commission.

43. Defendant's nationwide advertising campaign for 5-hour Energy has been extensive and comprehensive throughout the Class Period. Defendant has spent millions of dollars conveying the persistently deceptive message that 5-hour Energy is a superior energy product to consumers across the United States.

44. Defendant has orchestrated its deceptive 5-hour Energy advertising campaign by using a variety of media, including television, newspapers, radio, media tours, the Internet, email

blasts, video news releases, point of sale displays, and prominently on the product's packaging. As a result of its pervasive and uniform advertising campaign, Defendant has elevated 5-hour Energy to become one of the top sellers in the energy drink category.

45. As a result of Defendant's deceptive and misleading messages and omissions about 5-hour Energy, conveyed directly through its marketing and advertising campaigns, Defendant has been able to charge a significant price premium for 5-hour Energy over traditional caffeine products, which it has convinced consumers to pay for a purportedly superior product, as its advertising misleadingly conveys.

46. Defendant's false and misleading representations as to the Product's superior energy producing ingredients have been – and continue to be – material to consumers, including Plaintiff and other members of the Class, and Defendant knows that its misleading representations are material in nature.

The False, Misleading, and Deceptive Claims

47. Defendant's claims about 5-hour Energy's effectiveness in increasing cognitive function and superiority over similar products or a cup of coffee are false, deceptive, unfair, and unconscionable because there is not sufficient, competent and/or reliable scientific evidence and/or substantiation for 5-hour Energy's effectiveness and superiority claims when the Product is used by the consuming public in real world settings.

48. There is no competent, credible, and reliable scientific evidence that is sufficient in quality and quantity, based on standards generally acceptable in the relevant scientific fields, when considered in light of the entire body of relevant and reliable scientific evidence, to substantiate its claims regarding the superior effectiveness of 5-hour Energy.

49. Defendant's purported scientific evidence is neither competent nor reliable. Defendant does not possess any tests, analyses, research, or studies that have been conducted and evaluated in an objective manner. To the contrary, Defendant's claims appear to be based only on a single, in-house study, in which Defendant's product is compared against a placebo which Defendant has failed to describe.

Health Related Concerns

50. In December 2012, the nonprofit Center for Science in the Public Interest ("CSPI") issued a warning to consumers due to Living Essentials' self-serving attempt in a web advertisement to imply that CSPI and director Michael Jacobson had endorsed the safety of 5-hour Energy.⁷

51. In fact, the CSPI stated that 5 hour Energy could be linked to insomnia, anxiety, reduced fertility, as well as the more serious, life threatening events, as reported by the New York Times due to the interactions and blend of chemicals in 5-hour Energy.

52. Director Jacobson even went so far as to advise consumers not to use 5-hour Energy. The CSPI warning quotes Senator Durbin who stated that Defendant's "ad campaign was misleading and should be stopped.," and that the "amount of caffeine and other additives in many of these energy drinks is way in excess of what is health for children and adolescents". Additionally, Representative Edward Markey recommended that "all Americans, particularly younger ones, should be cautious before consuming them."

53. As discussed herein, Defendant's national advertising campaign for 5-hour Energy targets children, adolescents, and young adults.

⁷ <http://cspinet.org/new/201212051.html> (last visited January 19, 2013)

54. A study titled Health Effects of Energy Drinks on Children, Adolescents and Young Adults, made the following conclusions with respect to the supplements:⁸

- a. Energy drinks have no therapeutic benefit, and both known and unknown pharmacology of various ingredients, combined with reports of toxicity, suggest that these drinks may put some children at risk for serious adverse health effects;
- b. Typically, energy drinks contain high levels of caffeine, taurine, and guarine, which have stimulant properties and cardiac and hematologic activity, but manufacturers claim that energy drinks are nutritional supplements which shields them from the caffeine limits imposed on sodas and the safety testing and labeling required of pharmaceuticals;
- c. Other ingredients vary, are understudied, and are not regulated;
- d. Youth-aimed marketing and risk taking adolescent development tendencies combine to increase over-dose potential;
- e. High consumption is suggested by self-report surveys but is under documented in children (deleterious associations with energy drink consumption have been reported globally in case reports and popular media); and
- f. Interactions between compounds, additive and dose-dependent effects, long-term consequences, and dangers associated with risky behavior in children remain to be determined.

55. As a result of Defendant's deceptive and misleading messages and omissions about 5-hour Energy, conveyed directly through its marketing and advertising campaigns, Defendant has been able to charge a significant price premium for 5-hour Energy over traditional

⁸ "Health Effects of Energy Drinks on Children Adolescents, and Young Adults", Seifert, Sara, Schaechter, Judith, et al, Pediatrics, February 14, 2011.

caffeine products, which it has convinced consumers to pay for a purportedly superior product, which may in fact pose serious undisclosed health risks.

CLASS ACTION ALLEGATIONS

56. Plaintiff brings this class action on behalf of himself and all others similarly situated as Class Members pursuant to Rule 23 of the Federal Rules of Civil Procedure.

57. Plaintiff seeks to represent a “National Class” defined as follows:

All United States residents who purchased 5-hour Energy excluding Defendant, Defendant’s officers, directors, and employees, Defendant’s subsidiaries, those who purchased the products for the purpose of resale, the Judge to which this case is assigned and the immediate family of the Judge to which this case is assigned.

58. Plaintiff seeks to represent a “Missouri Subclass” defined as follows:

All Missouri residents who purchased 5-hour Energy excluding Defendant, Defendant’s officers, directors, and employees, Defendant’s subsidiaries, those who purchased the products for the purpose of resale, the Judge to which this case is assigned and the immediate family of the Judge to which this case is assigned.

59. Plaintiff is a member of the Class that he seeks to represent. Plaintiff is a United States resident who purchased 5-hour Energy.

60. Plaintiff is a member of the Class that he seeks to represent. Plaintiff is a Missouri resident who purchased 5-hour Energy.

61. The definition of the Class is narrowly tailored so as to include only identifiable Class Members who can be identified through Defendant’s wholesale sale information. The Class has no time limit because, as discussed below, the statute of limitations has been tolled by the Defendant’s fraudulent concealment of the true nature of the Product purchased by Class Members.

62. The proposed Class is so numerous that the individual joinder of all its members, in this or any action, is impracticable. The exact number or identification of the members of the Class is presently unknown to Plaintiff, but it is believed to comprise thousands of Missouri residents, and millions of United States residents, thereby making joinder impractical.

63. Common questions of fact and law exist as to all Class Members and predominate over questions affecting only individual members. These include, but are not limited to, the following:

- a. Whether, in their normal and customary use by consumers, 5-hour Energy works as advertised, marketed, and conveyed to consumers;
- b. Whether, in the course of business, Defendant represented that 5-hour Energy has characteristics, uses, benefits or qualities that it does not have when used in a customary manner by consumers;
- c. Whether the claims Defendant made and is making regarding 5-hour Energy's are unfair or deceptive, specifically, whether 5-hour energy provides five hours of energy with no crash later;
- d. Whether Defendant is supplying 5-hour Energy in accordance with its representations that it contains as much caffeine as a cup of leading premium coffee;
- e. Whether Defendant knew at the time the consumer transactions took place that the consumer would not receive the benefits of increased energy and productivity from the 5-hour Energy that Defendant was claiming the consumer would receive;
- f. Whether Defendant knowingly made a misleading statement in connection with a consumer transaction that the consumer was likely to rely upon to his detriment;
- g. Whether Defendant knew or should have known that the representations and advertisements regarding the 5-hour Energy Drinks were unsubstantiated, false and misleading;
- h. Whether Defendant has breached express warranties in the sale and

marketing of 5-hour Energy, specifically “ five hours of energy” and “no crash later”;

- i. Whether Defendant has been unjustly enriched by the sale of 5-hour Energy to the Plaintiff and Class;
- j. Whether the Plaintiff and the Class members that purchased 5-hour Energy suffered monetary damages and, if so, what is the measure of those damages;
- k. Whether Plaintiff and the Class members are entitled to an injunction, damages, restitution, equitable relief and other relief deemed appropriate and the amount and nature of such relief.

64. Plaintiff’s claims are typical of the claims of the Class Members. Plaintiff and all Class Members purchased 5-hour Energy shots that were designed, tested, manufactured, marketed, advertised, warranted and/or sold, and placed in the stream of commerce by Defendants. Plaintiffs and all other Class Members purchased 5-hour Energy that could not perform anywhere near advertised. The nature of the misrepresentation is the same for the Plaintiff and all Class Members, even if they purchase different types or flavors of 5-hour Energy.

65. The factual bases of Defendant’s misconduct are common to the Class Members and represent a common thread of deceptive advertising and breach of warranty resulting in injury to all Class Members. Plaintiff is asserting the same rights, making the same claims, and seeking the same relief for themselves and all other Class Members. The central question of whether Defendant’s representations are accurate and truthful is common to all Class members and predominates over all other questions, legal and factual in this litigation.

66. Plaintiff is an adequate representative of the proposed Class because he is a Class

Member and does not have interests that conflict with those of the other Class members he seeks to represent. Plaintiff is represented by experienced and able counsel, who have litigated numerous class-action lawsuits, and Plaintiff's Counsel intend to prosecute this action vigorously for the benefit of the proposed Class. Plaintiff and their Counsel will fairly and adequately protect the interests of the Class Members.

67. A class action is the superior available method for the efficient adjudication of this litigation because:

- a. The prosecution of separate actions by individual members of the Class would create a foreseeable risk of inconsistent or varying adjudications which would establish incompatible results and standards for Defendant;
- b. Adjudications with respect to individual members of the Class would, as a practical matter, be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their own separate interests;
- c. Class action treatment avoids the waste and duplication inherent in potentially thousands of individual actions, and conserves the resources of the courts; and
- d. The claims of the individual class members are relatively small compared to the burden and expense that would be required to individually litigate their claims against Defendant, so it would be impracticable for the members of the Class to individually seek redress for Defendant's wrongful conduct. Even if the members of the Class could afford individual litigation, the court system could not. Individualized litigation creates a potential for inconsistent or contradictory judgments, and increases the delay and expense to all parties and the court system. By contrast, the class action device presents far fewer management difficulties, and provides the benefits of single adjudication, economy of scale, and comprehensive supervision by a single court.

68. A class action for injunctive and equitable relief pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure is also appropriate. Defendant acted or refused to act on grounds generally applicable to the Class thereby making appropriate final injunctive and equitable relief with respect to the Class as a whole. Defendant's actions are generally applicable to the Class as a whole, and Plaintiff, on behalf of the Class, seeks damages and injunctive relief described herein. Moreover, Defendant's systemic policy and practices make declaratory relief with respect to the Class as a whole appropriate.

FRAUDULENT CONCEALMENT

69. Defendant was and remains under a duty to Plaintiff and the Class to disclose the facts, as alleged herein. The duty to disclose the true facts arises because, as the manufacturers, Defendant is in a superior position to know the true character and quality of their products and the true facts are not something that Plaintiff and Class members could, in the exercise of reasonable diligence, have discovered independently prior to purchasing 5-hour Energy.

70. The facts concealed and/or not disclosed to Plaintiff and the Class, specifically, the crash consumers experience after drinking 5-hour Energy, is a material fact in that a reasonable person would have considered important in deciding whether or not to purchase (or to pay the same price for) 5-hour Energy.

71. Defendant intentionally concealed and/or failed to disclose the shortcomings of 5-hour Energy for the purpose of inducing Plaintiff and Class members to act thereon.

72. Plaintiff and Class members justifiably acted upon, or relied upon to their detriment, the concealed and/or non-disclosed material facts as evidenced by their purchase of 5-

hour Energy. Had they known of the true character and quality of 5-hour Energy, Plaintiff and Class members would not have purchased (or would have paid less for) the Product.

73. As a direct and proximate cause of Defendant's misconduct, Plaintiff and Class members have suffered actual damages. Defendant's conduct has been and is malicious, wanton and/or reckless and/or shows a reckless indifference to the interests and rights of others.

CAUSES OF ACTION

COUNT I

VIOLATION OF THE MISSOURI MERCHANDISING PRACTICES ACT (On Behalf of the Missouri Subclass)

81. Plaintiff, individually, and on behalf of all others similarly situated, adopts and incorporates by reference all allegations contained in the foregoing paragraphs as though fully set forth herein.

82. The Missouri Merchandising Practices Act, Mo. Ann. Stat. § 407.020 (West 2010), provides, in part, as follows:

The act, use or employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, unfair practice or the concealment, suppression, or omission of any material fact in connection with the sale or advertisement of any merchandise in trade or commerce . . . in or from the state of Missouri, is declared to be an unlawful practice . . . Any act, use or employment declared unlawful by this subsection violates this subsection whether committed before, during or after the sale, advertisement or solicitation.

83. This action is brought to secure redress for the unlawful, deceptive and unfair trade practices perpetrated by Defendant on behalf of Plaintiff and the Class members. Defendant's business practices in its advertising, marketing, packaging, labeling and sales of 5-hour Energy shots as unique and superior products justifying substantially higher prices over

alternative sources of “energy” such as coffee, is an unconscionable, unfair, and deceptive act or practice and constitutes multiple, separate violations of Mo. Ann. Stat. § 407.020.

84. Defendants engaged in the unlawful practices set forth in this Complaint in the sale of merchandise in trade or commerce.

85. Plaintiff and members of the Class purchased Defendant’s Products primarily for personal, family, or household purposes.

86. Defendant’s concealment, misrepresentations and/or omissions as set forth in this Complaint are material in that they relate to matters which are important to consumers or are likely to affect the purchasing decisions or conduct of consumers, including Plaintiff and members of the Class regarding Defendant’s products.

87. In violation of the MMPA, Defendants employed fraud, deception, false promise, misrepresentation and the knowing concealment, suppression, or omission of material facts in their sale and advertisement of 5-Hour Energy in the State of Missouri.

88. Defendant engaged in the concealment, suppression, misrepresentations and/or omission of the aforementioned material facts with the intent that others, such as Plaintiff, Class Members, and/or the general public would rely upon the concealment, suppression, misrepresentation and/or omission of such material facts and purchase 5-Hour Energy.

89. The concealment, suppression, misrepresentation and/or omission of the aforementioned material facts had the capacity to, was reasonably foreseeable that it would, and did so deceive a substantial portion.

90. At all times material hereto, it was reasonably foreseeable that Plaintiff, and others similarly situated, would rely on the false and fraudulent advertising, marketing, and packaging made by Defendant. Said reliance has caused Plaintiff, and others similarly situated, to be damaged.

91. Plaintiff and Class Members would not have purchased 5 Hour Energy absent the concealment, suppression, or omission of the aforementioned material facts

92. Plaintiff, and others similarly situated, has suffered actual and ascertainable loss of money and damages as an actual and proximate result of Defendant's intentional misrepresentation and concealment of material facts.

93. Defendant's conduct described herein actually and proximately caused Plaintiff and the Class members to suffer damages as described throughout this Complaint.

94. Plaintiff and the members of the Class are entitled to recover their actual damages, attorneys' fees, and injunctive or other equitable relief, pursuant to Missouri law, including Mo. Ann. Stat. § 407.025.

95. Furthermore, Defendants' unlawful conduct set forth in this Complaint was and is wanton, willful and outrageous, and manifests a reckless disregard for the consequences of Defendant's actions and for the rights of Plaintiff and members of the Class and warrants an award of punitive damages to deter Defendants, and others in similar circumstances, from committing such actions in the future.

COUNT II

BREACH OF EXPRESS WARRANTY

(On Behalf of the National Class or, alternatively, the Missouri Subclass)

96. Plaintiff, individually, and on behalf of all others similarly situated, adopts and incorporates by reference all allegations contained in the foregoing paragraphs as though fully set forth herein.

97. Plaintiff and each member of the Class formed a contract with Defendant at the time they purchased a 5-hour ENERGY shot. The terms of the contract included the promises and affirmations of fact made by Defendant on the label of each of Defendant's 5-hour ENERGY shots, specifically hours of energy now with no crash later. Defendant's branding, labels, and advertising constitute express warranties, and are part of the basis of the bargain and a standard contract between Plaintiff, members of the Class, and Defendant.

98. Alternatively, privity was established between Plaintiff and members of the Class and Defendant and/or its agents because Defendant was substantially if not completely responsible for directly promoting and marketing Defendant's 5-hour ENERGY branded shots to Plaintiff and the Class Member which led to Plaintiff and Class member's purchase of the product. By virtue of this direct promotion and marketing to Plaintiff, Defendant expressly warranted 5-hour ENERGY's attributes and benefits to members of the Class.

99. Defendant breached the terms of the express warranty by failing to provide a product that provided the benefits promised.

100. Plaintiffs relied on Defendant's affirmations of specific benefits and superior performance of alternative, less expensive, but equally effective sources of caffeine.

101. As a result of Defendant's breaches of its express warranties, Plaintiff and the Class have been damaged in an amount to be proven at trial.

102. By reason of the foregoing, Plaintiff, on behalf of herself and all others similarly situated, demand judgment against Defendant for damages, including compensatory, incidental and consequential damages (excepting damages for personal injuries) for itself and each member of the Classes.

COUNT III

UNJUST ENRICHMENT

(On Behalf of the National Class or, alternatively, the Missouri Subclass)

103. Plaintiff, individually, and on behalf of all others similarly situated, adopts and incorporates by reference all allegations contained in the foregoing paragraphs as though fully set forth herein.

104. Plaintiff conferred a tangible economic benefit upon Defendants by purchasing 5-hour energy products. Plaintiff and members of the Class would have expected remuneration from Defendant at the time this benefit was conferred had they known that the Product did not perform as promised and has been widely criticized by government officials and scientists.

105. As a result of Defendant's deceptive, fraudulent, and misleading packaging, advertising, marketing and sales of its 5-hour energy products, Defendant was enriched, at the expense of the Plaintiff and each member of the Class, through the payment of the purchase price for 5-hour energy products.

106. Under the circumstances, it would be against equity and good conscious to permit Defendant to retain the ill-gotten benefits that it received from Plaintiff and members of the Class in light of the fact that the 5-hour energy products purchased by Plaintiff and members of the Class were not as Defendant purports them to be, as set forth more fully above.

107. It would thus be unjust and inequitable for Defendant to retain the benefit without restitution or disgorgement of monies paid to Defendant for 5-hour energy products, or such other appropriate equitable remedy as appropriate, to the Plaintiff and other members of the Class.

COUNT IV

FRAUD BY UNIFORM WRITTEN MISREPRESENTATION AND OMISSION **(On Behalf of the National Class or, alternatively, the Missouri Subclass)**

108. Plaintiff, individually, and on behalf of all others similarly situated, adopts and incorporates by reference all allegations contained in the foregoing paragraphs as though fully set forth herein.

109. Defendant intentionally, willfully, falsely, and knowingly uniformly misrepresented material facts in writing that relate to the character and quality of 5-hour Energy. Specifically, Defendant intentionally and willfully misrepresented that 5-hour Energy provides benefit to consumers in addition to that than a caffeine tablet or cup of coffee, and failed to disclose that it poses health risks on websites, in various media advertising, and at point of sale materials disseminated or caused to be disseminated by Defendant.

110. Defendant also made intentional misrepresentations to Class members who sought to have Defendant honor their warranty. Defendant represented to Class members by affirmative misrepresentations and omissions that 5-hour Energy provides benefits over and above what could be achieved by a caffeine tablet or standard cup of coffee even though it has no competent, credible, and reliable scientific evidence that is sufficient in quality and quantity, based on standards generally acceptable in the relevant scientific fields, when considered in light of the entire body of relevant and reliable scientific evidence, to substantiate its claims regarding the superior effectiveness of 5-hour Energy.

111. Defendant's uniform written misrepresentations were made with the intent that the general public, including Plaintiff and Class, would rely upon them. Defendant's representations were made with knowledge of the falsity of such statements, or in reckless disregard of the truth thereof, and gave Defendant an unjust advantage and caused a loss to Plaintiff and Class Members. The Defendant's claims of superior effectiveness are so central to the consumer's selection of 5-hour Energy that the Defendant knew and intended that consumers would rely on those misrepresentations in determining whether to purchase 5-hour Energy instead of the less expensive alternatives.

112. In actual and reasonable reliance upon Defendant's misrepresentations, Plaintiff and Class members purchased 5-hour Energy for its intended and reasonably foreseeable purposes. Plaintiff and Class members were unaware of the true facts concerning the effectiveness and health risks of 5-hour Energy, which were concealed from the Plaintiff and the Class Members. If Plaintiff and Class members had been aware of the concealed facts, Plaintiff and Class members would not have purchased 5-hour Energy at all or for the premium price paid. Plaintiff's and Class members' reliance on the representations of the Defendant was reasonable.

113. Defendant misrepresented material facts with the intent to defraud Plaintiff and the Class members. Plaintiff and the Class members were unaware of the intent of Defendant and relied upon these representations in agreeing to purchase 5-hour Energy.

114. In actual and reasonable reliance upon Defendant misrepresentations, Plaintiff and Class members purchased 5-hour Energy and did not benefit from the Product as represented, the direct and proximate result of which was injury and harm to Plaintiff and Class members because:

- a. they would not have purchased 5-hour Energy if the true facts concerning its effectiveness had been known;
- b. they paid a price premium due to the mislabeling of 5-hour Energy; and
- c. 5-hour Energy did not (and cannot) perform as promised.

COUNT V

INJUNCTIVE RELIEF

(On Behalf of the National Class or, alternatively, the Missouri Subclass)

115. Plaintiff, individually, and on behalf of all others similarly situated, adopts and incorporates by reference all allegations contained in the foregoing paragraphs as though fully set forth herein.

116. Defendant has refused to act on grounds generally applicable to the Injunctive Relief Plaintiffs and other members of the Injunctive Relief States Classes, thereby making final injunctive relief appropriate.

117. Defendant's conduct, as more fully set forth herein, both in the past and through the present day, has demonstrated a willful disregard for proven scientific facts in a clear attempt to sell a product that is no more effective than other, less expensive caffeine products such as coffee.

118. Defendant persists in its deceptive and unfair marketing and sales practices concerning the Product to the detriment of consumers across the country, including the Injunctive Relief States Class.

119. If Defendant is allowed to continue with these practices, consumers-the Injunctive Relief Plaintiffs and other members of the Injunctive Relief States Class-will be irreparably harmed in that they do not have a plain, adequate, speedy, or complete remedy at law to address all of the wrongs alleged in this Complaint, unless injunctive relief is granted stop Defendant's improper conduct concerning its marketing and sale of the Product.

120. The Injunctive Relief Plaintiff and the other members of the Injunctive Relief States Class, is therefore, entitled to an injunction requiring Defendant its unfair and deceptive practices relating the marketing sale of the Product, as alleged herein, including the effects thereof.

121. The Injunctive Relief Plaintiff seeks a Court Order requiring Defendant to do the following:

- a. discontinue advertising, marketing, packaging and otherwise representing its 5-hour energy products as being superior to conventional caffeine products;
- b. undertake an immediate public information campaign to inform the Injunctive Relief Plaintiff and the other members of the Injunctive Relief State Class, of the truth about Defendant's products and Defendant's prior practices relating thereto; and
- c. correct any erroneous impression the Injunctive Relief Plaintiff and the other members of the Injunctive Relief States Class, may have derived concerning the nature, characteristics, or qualities of 5-hour energy, including without limitation, the placement of corrective advertising and providing written notice to the general public.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, William Forrest, individually and on behalf of other members of the Classes described in this Complaint, respectfully requests that:

- A. the Court certify the Classes pursuant to Fed. R. Civ. P. 23(b)(2) and (b)(3), and adjudge Plaintiff and his counsel to be an adequate representative thereof;
- B. the Court enter and Order requiring Defendant to pay Plaintiff's and other members of the Classes' economic, monetary, actual damages (including multiple damages), consequential, compensatory, or statutory damages, whichever is greater; and, awarding Plaintiff and the other members of the Classes exemplary damages, to the extent permitted under the laws of each of the states implicated in this action;

C. the Court enter an Order awarding restitution and disgorgement of Defendant's revenues arising from its conducts alleged above, or any other appropriate remedy in equity, to Plaintiff and other members of the Classes;

D. the Court enter an Order awarding injunctive relief as permitted by law or equity, including enjoining Defendant from continuing the unlawful practices set forth above; directing Defendant to cease its deceptive and misleading marketing campaign concerning its 5-hour Energy products, and to disgorge all monies Defendant acquired by means of any act or practice declared by this Court to be wrongful;

E. the Court enter and Order awarding Plaintiff, individually and on behalf of the other members of the Classes, their expenses and costs of suit, including reasonable attorneys' fees and reimbursement of reasonable expenses, to the extent provided by the law;

F. the Court enter an Order awarding to Plaintiff individually and on behalf of the other members of the Classes, pre- and post-judgment interest, to the extent allowable ;
and

G. for such other and further relief as may be just and proper.

JURY DEMAND

Pursuant to Federal Rules of Civil Procedure 38(b), Plaintiff, William Forrest, hereby demands a trial by jury of all claims in this Class Action Complaint so triable.

DATED: January 25, 2013

Respectfully submitted,

By: /s/ Eric D. Holland

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Counsel for Plaintiffs

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION**

WILLIAM FORREST, on behalf of himself
and all others similarly situated,

Plaintiff,

v.

INNOVATION VENTURES, LLC d/b/a
LIVING ESSENTIALS, LLC, a Michigan
Corporation,

Defendant.

CASE NO.: 13-172

JURY TRIAL DEMANDED

CLASS ACTION COMPLAINT

CLASS ACTION COMPLAINT

Plaintiff, William Forrest, by and through undersigned counsel, brings this action on his own behalf and on behalf of a Class and Subclass of persons and entities defined herein against Defendant Innovation Ventures, LLC d/b/a Living Essentials, LLC (hereinafter referred to as “Living Essentials” or “Defendant”) and for his Complaint alleges, upon information and belief and based on the investigation to date of his counsel, as follows:

INTRODUCTION

1. This is a nationwide class action brought by Plaintiff pursuant to Rule 23 of the Federal Rules of Civil Procedure on his own behalf and on behalf of a Class and Subclass of all similarly situated consumers who purchased 5-hour ENERGY shots designed, manufactured, warranted, marketed, advertised, and sold by Defendant, Living Essentials, or its predecessors, successors or subsidiaries.

2. Defendant manufactured and marketed its product under various brands and product names including, but not limited to, 5-hour ENERGY, Extra Strength 5-hour ENERGY,

and Decaf 5-hour ENERGY shot (“5-hour Energy” or the “Product”). Defendant has marketed, advertised and sold 5-hour Energy throughout Missouri, the United States and other countries.

3. Defendant represents to consumers, among other representations as alleged herein, that 5-Hour Energy produces a sustained level of “energy” for five hours, that the consumer will have “hours of energy now, no crash later,” “contains B Vitamins for energy and amino acids for focus,” and that you can “drink it in seconds and in minutes you’re feeling alert and productive and that feeling lasts for hours”.

4. Defendant claims to base its representations upon scientific studies which it claims demonstrates the superior nature of 5-hour Energy branded drinks over simpler and less expensive caffeine only products, such as a caffeine tablet or a cup of coffee.

5. Upon information and belief there is no genuine scientific research and there are no scientifically reliable studies in existence that support Defendant’s claims that 5-hour Energy drinks provide any additional benefits over a caffeine tablet or a cup of coffee.

6. Through its extensive and comprehensive nationwide marketing campaign, Defendant engaged in improper advertising, sales and marketing practices in an attempt to defraud Plaintiff and members of the class by disseminating false and misleading information via television commercials, internet websites and postings, radio media, advertising and packaging, all of which is intended to induce consumers, including Plaintiff and members of the Class, into purchasing, at a premium price, millions of dollars worth of 5-hour Energy shots, which are manufactured, distributed, marketed, advertised and/or sold by the Defendant.

7. Defendant knew or should have known that there is no greater benefit of ingesting 5-hour Energy than ingesting an equivalent dose of caffeine and has taken no meaningful steps to clear up consumer misconceptions regarding its product.

8. As a result of Defendant's pervasive pattern of fraudulent, deceptive, false, and otherwise improper advertising, sales, and marketing practices and through other actions and inactions complained of herein, Defendant breached express warranties, committed fraud through uniform written misrepresentations and common omissions. To remedy Defendant's illegal conduct, Plaintiff on behalf of himself and other similarly situated purchasers seeks monetary damages, equitable relief, declaratory relief and/or disgorgement of profits in connection with the 5-hour Energy designed, manufactured, warranted, marketed, advertised, and sold by the Defendant, or its predecessors, successors or subsidiaries.

JURISDICTION AND VENUE

9. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1332(d)(2) (diversity jurisdiction) and the Class Action Fairness Act, in that (i) there is complete diversity (Plaintiff is a citizen of Missouri and Defendant is domiciled and incorporated in Michigan and otherwise maintains its principal place of business in Michigan, (ii) the amount in controversy exceeds \$5,000,000.00 (Five Million Dollars) exclusive of interests and costs, and (iii) there are 100 or more members of the proposed Plaintiff class.

10. Defendant conducts substantial business in Missouri, including the sale and distribution of 5-hour Energy, and has sufficient contacts with Missouri or otherwise intentionally avails itself of the laws and markets of Missouri, so as to sustain this Court's jurisdiction over Living Essentials.

11. Venue lies in this District, pursuant to 28 U.S.C. §1391, because a substantial part of the events or omissions giving rise to Plaintiff's claims occurred in this Judicial District. In addition, Living Essentials does business and/or transacts business in this Judicial District, and therefore, is subject to personal jurisdiction in this Judicial District and resides here for venue purposes.

PARTIES

12. Plaintiff William Forrest is a resident and citizen of St. Louis, Missouri. Plaintiff last purchased 5-Hour Energy manufactured and marketed by Defendant in December 2012. He has purchased 5-Hour Energy for 4-5 years in the St. Louis, Missouri area, including but not limited to purchasing 5-Hour Energy from a gas station near West County mall in St. Louis, Missouri.

13. Defendant Living Essentials is a Michigan corporation with its principal place of business at 38955 Hills Tech Drive Farmington Hills, Michigan 48331. Defendant is one of the largest manufacturers and sellers of energy drinks in the country with annual sales of more than \$1 billion and sells about 9 million bottles of 5-hour Energy a week in North America.

14. Defendant designed, tested, manufactured, marketed, advertised, warranted and/or sold 5-hour Energy in Missouri and throughout the United States.

FACTUAL ALLEGATIONS

15. 5-hour Energy is a flavored energy shot brand made by the Defendant. It is sold in 1.93-oz (57 mL) containers. Defendants introduced 5-hour Energy in 2004 as part of a wave of "energy shot" dietary supplements.

16. Defendant sells or distributes 5-hour Energy to consumers throughout Missouri and the United States in three varieties: Original, Extra Strength, and Decaffeinated and available in multiple flavors including pink lemonade, grape, pomegranate, berry, orange, and lemon-lime. 5-hour Energy contains caffeine, citicoline, tyrosine, phenylalanine, taurine, malic acid, glucuronolactone, and a blend of vitamins B6, B12, Niacin and folic acid. 5-hour Energy Decaf, which contains choline, is alleged to contain only half as much caffeine as a half cup of decaffeinated coffee, and no Niacin.

17. In the Spring of 2004, health chain, GNC, began to stock 5-hour Energy in its stores. Soon after the product began to appear in Walgreens, Rite Aid, and regional chain stores. Currently the product is available for purchase at gas stations, Wal-Marts, and supermarkets.

18. Defendant grossed more than \$600 million dollars in 2011 off \$1 billion retail sales, according to Forbes Magazine and is said to have 90% of the so-called “energy shot” market.

19. Defendant asserts that in addition to the light and portable container, in which the product comes, 5-hour Energy is packed with vitamins and amino acids, contains no sugar, zero herbal stimulants and is only four calories.

20. Defendant’s main point of sale is that unlike energy drinks and common caffeine products, 5-hour Energy produces “no crash later”.

21. Although Defendant points to purported scientific studies to and research to this claim, only reports to the contrary have been published.

22. Earlier this month the New York Times published an article titled “Energy Drinks promised Edge, but Experts say Proof is Scant” (Barry Meier, January 1, 2013), citing

widespread scientific and governmental criticism of manufacturers assertion that energy drinks provided any more benefit than the average dose of caffeine consumed in a cup of coffee.

23. According to Defendant's website 5-hour Energy significantly outperformed placebo in a clinical trial on continuity of attention and self-related awareness implying that consumption of 5-hour Energy will improve concentration and alertness. However, nothing in that comparison to a placebo supports Defendant's assertion that 5-hour Energy provides anything more for concentration or awareness than any other product which contains caffeine.

24. Despite the lack of any reported scientific support for a claim that 5-hour Energy provides more benefit to consumers than a caffeine tablet or cup of coffee, Defendant continues to market their product as a superior source of energy worthy of a premium price.

25. Additionally, Defendant's web site asserts that the product is "packed with vitamins".

26. A study undertaken at Vanderbilt University specifically directed at 5-Hour Energy, sheds light on the true effects and dangers of some of these ingredients:¹

- a. Niacin: A Niacin Flush can cause liver toxicity, worsening of stomach ulcers, and altered blood sugar or insulin levels or uric acid concentrations;
- b. Vitamin B6: It has yet to be shown that B6 supplementation in healthy people causes enhanced cognitive function;
- c. Folic Acid: Giving folate to a person with a B12 deficiency can cause irreversible neurologic damage;
- d. Vitamin B12: There is no evidence of the efficacy of vitamin B12 on cognitive function.

¹ 5-Hour Energy: The Health Energy Drink? <http://healthpsych.psy.vanderbilt.edu/2008/5-HourEnergy.htm>

27. The ultimate conclusion, based in part off of another scientific study, was that B6, B12, and folic acid supplementation, alone or in combinations, do not provide adequate evidence for a beneficial effect of supplementation on cognitive function testing in people with either normal or impaired cognitive function.

28. The significance of this conclusion is that it highlights the discrepancy between the advertising claims and the actual science and research.

29. In a 2003 article titled “Debunking the Effects of Taurine in Red Bull Energy Drink”², the study concluded that the claimed improvement in cognitive capabilities and muscular performance were more plausibly related to caffeine alone rather than the purported unique combination of the key components of caffeine, taurine, and glucuronolactone.

30. The report concluded that “it seems that drinking a cold cup of coffee may induce the same ‘energizing and refreshing’ effects of drinking Red Bull - and best of all, at one-third the cost.” These same key ingredients are also all found in 5-hour Energy.

31. More recently, a study on the cognitive effects of key energy drink ingredients caffeine, taurine, and glucose, similarly concluded that caffeine content, but not taurine or glucose in energy drinks drives cognitive improvements in executive control, working memory, and psychomotor performance.³

32. Another study reached a similar conclusion after its evaluation of multiple ingredients commonly found in energy drinks such as 5-hour Energy, including taurine,

² “Debunking the Effects of Taurine in Red Bull Energy Drink”, Kim, Woojae, Nutrition Bytes, Department of Biological Chemistry, UCLA, David Geffen School of Medicine, UC Los Angeles, 2003.

³ “Differential cognitive effects of energy drink ingredients: Caffeine, taurine, and glucose”, Giles, Grace, Mahoney, Caroline, et al, Pharmacology, Biochemistry, and Behavior 102 (2012) 569-577.

glucuronolactone, glucose, B vitamins, guarana, yerbe mate, carnitine, St. John's wort, and ginseng.⁴ The study concluded that there is little, if any, solid evidence to support an increase in either physical or mental energy due to consumption of energy drinks except for the increases attributable to caffeine.

33. Finally, the European Food and Safety Commission undertook a study of taurine and found that no cause and effect relationship has been established between taurine and its contribution to cognitive function, cardiac function, and a delay in the onset of physical fatigue.⁵

34. 5-hour Energy claims to provide more than 8,000% of the recommended daily intake for B12 and 2000% of the recommended intake of B6. However, according to Dr. Brent Bauer, director of the Complementary and Integrative Medicine Program at the Mayo Clinic, high doses of B vitamins are not going to boost energy unless someone is B-deficient.⁶

⁴ "Do energy drinks contain active components other than caffeine?", McLellan, Tom and Lieberman, Harris, Nutrition Reviews, Vol. 70(12):730-744.

⁵ EFSA Journal 2011; 9(4):2035.

⁶ Energy Shots Review: Do they work? Are they safe? <http://www.webmd.co/food-recipes/features/energy-shots-review?print=true>



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).



The Product and Living Essentials' Advertising

35. Defendant's exhaustive advertising campaign builds on this deception. In truth, Defendant has no independent, reliable, or competent support for its claims.

36. Throughout the Class Period, Defendant has marketed 5-hour Energy as producing "hours of energy now-no crash later" and that the consumer "can feel it in minutes and it lasts for hours".

37. In the "Frequently Asked Questions" section of 5-hour Energy's website (<http://www.5hourenergy.com/QandA.asp>), Defendant represents that the product is "a liquid energy shot that can help you feel sharp and alert for hours."

38. In 2007, National Advertising Division, an advertising watchdog group affiliated with the Council of Better Business Bureau conducted a review of popular energy drinks and shots, which included 5-hour Energy. According to results reported by the New York Times, 24 percent of the people who used 5-hour energy had a "moderately severe" crash afterward.

http://www.nytimes.com/2013/01/03/business/5-hour-energys-no-crash-later-claim-is-disputed.html?ref=business&_r=2&

39. The review concluded that while the company's 2007 study had shown there was evidence to support a "qualified claim that 5-hour Energy results in less of a crash than Red Bull and Monster" Energy, the study showed that 5-hour Energy users experienced caffeine-related crashes, and therefore the product was inadequate to support a "no crash" claim.

40. Following the study the group recommended that Defendant discontinue the "no crash claim" based on Defendant's own evidence.

41. Instead, Defendant added an asterisk-like symbol and footnote to its no-crash claim explaining that the user would have "no sugar crash" as the product did not contain sugar.

42. Andrea C. Levine, director of the National Advertising Division, recently reopened the group's review of the "no crash later" claim after Defendant incorrectly asserted in a public statement that the National Advertising Division had found all of Living Essentials' claims to be substantiated. Ms. Levine asserted that Defendant had apparently decided to use only select portions of the report and failed to follow the group's recommendation that they drop the language and instead added language of its choosing. In the event that the company fails to respond or inadequately responds, the National Advertising Division will likely refer the matter to the Federal Trade Commission.

43. Defendant's nationwide advertising campaign for 5-hour Energy has been extensive and comprehensive throughout the Class Period. Defendant has spent millions of dollars conveying the persistently deceptive message that 5-hour Energy is a superior energy product to consumers across the United States.

44. Defendant has orchestrated its deceptive 5-hour Energy advertising campaign by using a variety of media, including television, newspapers, radio, media tours, the Internet, email

blasts, video news releases, point of sale displays, and prominently on the product's packaging. As a result of its pervasive and uniform advertising campaign, Defendant has elevated 5-hour Energy to become one of the top sellers in the energy drink category.

45. As a result of Defendant's deceptive and misleading messages and omissions about 5-hour Energy, conveyed directly through its marketing and advertising campaigns, Defendant has been able to charge a significant price premium for 5-hour Energy over traditional caffeine products, which it has convinced consumers to pay for a purportedly superior product, as its advertising misleadingly conveys.

46. Defendant's false and misleading representations as to the Product's superior energy producing ingredients have been – and continue to be – material to consumers, including Plaintiff and other members of the Class, and Defendant knows that its misleading representations are material in nature.

The False, Misleading, and Deceptive Claims

47. Defendant's claims about 5-hour Energy's effectiveness in increasing cognitive function and superiority over similar products or a cup of coffee are false, deceptive, unfair, and unconscionable because there is not sufficient, competent and/or reliable scientific evidence and/or substantiation for 5-hour Energy's effectiveness and superiority claims when the Product is used by the consuming public in real world settings.

48. There is no competent, credible, and reliable scientific evidence that is sufficient in quality and quantity, based on standards generally acceptable in the relevant scientific fields, when considered in light of the entire body of relevant and reliable scientific evidence, to substantiate its claims regarding the superior effectiveness of 5-hour Energy.

49. Defendant's purported scientific evidence is neither competent nor reliable. Defendant does not possess any tests, analyses, research, or studies that have been conducted and evaluated in an objective manner. To the contrary, Defendant's claims appear to be based only on a single, in-house study, in which Defendant's product is compared against a placebo which Defendant has failed to describe.

Health Related Concerns

50. In December 2012, the nonprofit Center for Science in the Public Interest ("CSPI") issued a warning to consumers due to Living Essentials' self-serving attempt in a web advertisement to imply that CSPI and director Michael Jacobson had endorsed the safety of 5-hour Energy.⁷

51. In fact, the CSPI stated that 5 hour Energy could be linked to insomnia, anxiety, reduced fertility, as well as the more serious, life threatening events, as reported by the New York Times due to the interactions and blend of chemicals in 5-hour Energy.

52. Director Jacobson even went so far as to advise consumers not to use 5-hour Energy. The CSPI warning quotes Senator Durbin who stated that Defendant's "ad campaign was misleading and should be stopped.," and that the "amount of caffeine and other additives in many of these energy drinks is way in excess of what is health for children and adolescents". Additionally, Representative Edward Markey recommended that "all Americans, particularly younger ones, should be cautious before consuming them."

53. As discussed herein, Defendant's national advertising campaign for 5-hour Energy targets children, adolescents, and young adults.

⁷ <http://cspinet.org/new/201212051.html> (last visited January 19, 2013)

54. A study titled Health Effects of Energy Drinks on Children, Adolescents and Young Adults, made the following conclusions with respect to the supplements:⁸

- a. Energy drinks have no therapeutic benefit, and both known and unknown pharmacology of various ingredients, combined with reports of toxicity, suggest that these drinks may put some children at risk for serious adverse health effects;
- b. Typically, energy drinks contain high levels of caffeine, taurine, and guarine, which have stimulant properties and cardiac and hematologic activity, but manufacturers claim that energy drinks are nutritional supplements which shields them from the caffeine limits imposed on sodas and the safety testing and labeling required of pharmaceuticals;
- c. Other ingredients vary, are understudied, and are not regulated;
- d. Youth-aimed marketing and risk taking adolescent development tendencies combine to increase over-dose potential;
- e. High consumption is suggested by self-report surveys but is under documented in children (deleterious associations with energy drink consumption have been reported globally in case reports and popular media); and
- f. Interactions between compounds, additive and dose-dependent effects, long-term consequences, and dangers associated with risky behavior in children remain to be determined.

55. As a result of Defendant's deceptive and misleading messages and omissions about 5-hour Energy, conveyed directly through its marketing and advertising campaigns, Defendant has been able to charge a significant price premium for 5-hour Energy over traditional

⁸ "Health Effects of Energy Drinks on Children Adolescents, and Young Adults", Seifert, Sara, Schaechter, Judith, et al, Pediatrics, February 14, 2011.

caffeine products, which it has convinced consumers to pay for a purportedly superior product, which may in fact pose serious undisclosed health risks.

CLASS ACTION ALLEGATIONS

56. Plaintiff brings this class action on behalf of himself and all others similarly situated as Class Members pursuant to Rule 23 of the Federal Rules of Civil Procedure.

57. Plaintiff seeks to represent a “National Class” defined as follows:

All United States residents who purchased 5-hour Energy excluding Defendant, Defendant’s officers, directors, and employees, Defendant’s subsidiaries, those who purchased the products for the purpose of resale, the Judge to which this case is assigned and the immediate family of the Judge to which this case is assigned.

58. Plaintiff seeks to represent a “Missouri Subclass” defined as follows:

All Missouri residents who purchased 5-hour Energy excluding Defendant, Defendant’s officers, directors, and employees, Defendant’s subsidiaries, those who purchased the products for the purpose of resale, the Judge to which this case is assigned and the immediate family of the Judge to which this case is assigned.

59. Plaintiff is a member of the Class that he seeks to represent. Plaintiff is a United States resident who purchased 5-hour Energy.

60. Plaintiff is a member of the Class that he seeks to represent. Plaintiff is a Missouri resident who purchased 5-hour Energy.

61. The definition of the Class is narrowly tailored so as to include only identifiable Class Members who can be identified through Defendant’s wholesale sale information. The Class has no time limit because, as discussed below, the statute of limitations has been tolled by the Defendant’s fraudulent concealment of the true nature of the Product purchased by Class Members.

62. The proposed Class is so numerous that the individual joinder of all its members, in this or any action, is impracticable. The exact number or identification of the members of the Class is presently unknown to Plaintiff, but it is believed to comprise thousands of Missouri residents, and millions of United States residents, thereby making joinder impractical.

63. Common questions of fact and law exist as to all Class Members and predominate over questions affecting only individual members. These include, but are not limited to, the following:

- a. Whether, in their normal and customary use by consumers, 5-hour Energy works as advertised, marketed, and conveyed to consumers;
- b. Whether, in the course of business, Defendant represented that 5-hour Energy has characteristics, uses, benefits or qualities that it does not have when used in a customary manner by consumers;
- c. Whether the claims Defendant made and is making regarding 5-hour Energy's are unfair or deceptive, specifically, whether 5-hour energy provides five hours of energy with no crash later;
- d. Whether Defendant is supplying 5-hour Energy in accordance with its representations that it contains as much caffeine as a cup of leading premium coffee;
- e. Whether Defendant knew at the time the consumer transactions took place that the consumer would not receive the benefits of increased energy and productivity from the 5-hour Energy that Defendant was claiming the consumer would receive;
- f. Whether Defendant knowingly made a misleading statement in connection with a consumer transaction that the consumer was likely to rely upon to his detriment;
- g. Whether Defendant knew or should have known that the representations and advertisements regarding the 5-hour Energy Drinks were unsubstantiated, false and misleading;
- h. Whether Defendant has breached express warranties in the sale and

marketing of 5-hour Energy, specifically “ five hours of energy” and “no crash later”;

- i. Whether Defendant has been unjustly enriched by the sale of 5-hour Energy to the Plaintiff and Class;
- j. Whether the Plaintiff and the Class members that purchased 5-hour Energy suffered monetary damages and, if so, what is the measure of those damages;
- k. Whether Plaintiff and the Class members are entitled to an injunction, damages, restitution, equitable relief and other relief deemed appropriate and the amount and nature of such relief.

64. Plaintiff’s claims are typical of the claims of the Class Members. Plaintiff and all Class Members purchased 5-hour Energy shots that were designed, tested, manufactured, marketed, advertised, warranted and/or sold, and placed in the stream of commerce by Defendants. Plaintiffs and all other Class Members purchased 5-hour Energy that could not perform anywhere near advertised. The nature of the misrepresentation is the same for the Plaintiff and all Class Members, even if they purchase different types or flavors of 5-hour Energy.

65. The factual bases of Defendant’s misconduct are common to the Class Members and represent a common thread of deceptive advertising and breach of warranty resulting in injury to all Class Members. Plaintiff is asserting the same rights, making the same claims, and seeking the same relief for themselves and all other Class Members. The central question of whether Defendant’s representations are accurate and truthful is common to all Class members and predominates over all other questions, legal and factual in this litigation.

66. Plaintiff is an adequate representative of the proposed Class because he is a Class

Member and does not have interests that conflict with those of the other Class members he seeks to represent. Plaintiff is represented by experienced and able counsel, who have litigated numerous class-action lawsuits, and Plaintiff's Counsel intend to prosecute this action vigorously for the benefit of the proposed Class. Plaintiff and their Counsel will fairly and adequately protect the interests of the Class Members.

67. A class action is the superior available method for the efficient adjudication of this litigation because:

- a. The prosecution of separate actions by individual members of the Class would create a foreseeable risk of inconsistent or varying adjudications which would establish incompatible results and standards for Defendant;
- b. Adjudications with respect to individual members of the Class would, as a practical matter, be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their own separate interests;
- c. Class action treatment avoids the waste and duplication inherent in potentially thousands of individual actions, and conserves the resources of the courts; and
- d. The claims of the individual class members are relatively small compared to the burden and expense that would be required to individually litigate their claims against Defendant, so it would be impracticable for the members of the Class to individually seek redress for Defendant's wrongful conduct. Even if the members of the Class could afford individual litigation, the court system could not. Individualized litigation creates a potential for inconsistent or contradictory judgments, and increases the delay and expense to all parties and the court system. By contrast, the class action device presents far fewer management difficulties, and provides the benefits of single adjudication, economy of scale, and comprehensive supervision by a single court.

68. A class action for injunctive and equitable relief pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure is also appropriate. Defendant acted or refused to act on grounds generally applicable to the Class thereby making appropriate final injunctive and equitable relief with respect to the Class as a whole. Defendant's actions are generally applicable to the Class as a whole, and Plaintiff, on behalf of the Class, seeks damages and injunctive relief described herein. Moreover, Defendant's systemic policy and practices make declaratory relief with respect to the Class as a whole appropriate.

FRAUDULENT CONCEALMENT

69. Defendant was and remains under a duty to Plaintiff and the Class to disclose the facts, as alleged herein. The duty to disclose the true facts arises because, as the manufacturers, Defendant is in a superior position to know the true character and quality of their products and the true facts are not something that Plaintiff and Class members could, in the exercise of reasonable diligence, have discovered independently prior to purchasing 5-hour Energy.

70. The facts concealed and/or not disclosed to Plaintiff and the Class, specifically, the crash consumers experience after drinking 5-hour Energy, is a material fact in that a reasonable person would have considered important in deciding whether or not to purchase (or to pay the same price for) 5-hour Energy.

71. Defendant intentionally concealed and/or failed to disclose the shortcomings of 5-hour Energy for the purpose of inducing Plaintiff and Class members to act thereon.

72. Plaintiff and Class members justifiably acted upon, or relied upon to their detriment, the concealed and/or non-disclosed material facts as evidenced by their purchase of 5-

hour Energy. Had they known of the true character and quality of 5-hour Energy, Plaintiff and Class members would not have purchased (or would have paid less for) the Product.

73. As a direct and proximate cause of Defendant's misconduct, Plaintiff and Class members have suffered actual damages. Defendant's conduct has been and is malicious, wanton and/or reckless and/or shows a reckless indifference to the interests and rights of others.

CAUSES OF ACTION

COUNT I

VIOLATION OF THE MISSOURI MERCHANDISING PRACTICES ACT (On Behalf of the Missouri Subclass)

81. Plaintiff, individually, and on behalf of all others similarly situated, adopts and incorporates by reference all allegations contained in the foregoing paragraphs as though fully set forth herein.

82. The Missouri Merchandising Practices Act, Mo. Ann. Stat. § 407.020 (West 2010), provides, in part, as follows:

The act, use or employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, unfair practice or the concealment, suppression, or omission of any material fact in connection with the sale or advertisement of any merchandise in trade or commerce . . . in or from the state of Missouri, is declared to be an unlawful practice . . . Any act, use or employment declared unlawful by this subsection violates this subsection whether committed before, during or after the sale, advertisement or solicitation.

83. This action is brought to secure redress for the unlawful, deceptive and unfair trade practices perpetrated by Defendant on behalf of Plaintiff and the Class members. Defendant's business practices in its advertising, marketing, packaging, labeling and sales of 5-hour Energy shots as unique and superior products justifying substantially higher prices over

alternative sources of “energy” such as coffee, is an unconscionable, unfair, and deceptive act or practice and constitutes multiple, separate violations of Mo. Ann. Stat. § 407.020.

84. Defendants engaged in the unlawful practices set forth in this Complaint in the sale of merchandise in trade or commerce.

85. Plaintiff and members of the Class purchased Defendant’s Products primarily for personal, family, or household purposes.

86. Defendant’s concealment, misrepresentations and/or omissions as set forth in this Complaint are material in that they relate to matters which are important to consumers or are likely to affect the purchasing decisions or conduct of consumers, including Plaintiff and members of the Class regarding Defendant’s products.

87. In violation of the MMPA, Defendants employed fraud, deception, false promise, misrepresentation and the knowing concealment, suppression, or omission of material facts in their sale and advertisement of 5-Hour Energy in the State of Missouri.

88. Defendant engaged in the concealment, suppression, misrepresentations and/or omission of the aforementioned material facts with the intent that others, such as Plaintiff, Class Members, and/or the general public would rely upon the concealment, suppression, misrepresentation and/or omission of such material facts and purchase 5-Hour Energy.

89. The concealment, suppression, misrepresentation and/or omission of the aforementioned material facts had the capacity to, was reasonably foreseeable that it would, and did so deceive a substantial portion.

90. At all times material hereto, it was reasonably foreseeable that Plaintiff, and others similarly situated, would rely on the false and fraudulent advertising, marketing, and packaging made by Defendant. Said reliance has caused Plaintiff, and others similarly situated, to be damaged.

91. Plaintiff and Class Members would not have purchased 5 Hour Energy absent the concealment, suppression, or omission of the aforementioned material facts

92. Plaintiff, and others similarly situated, has suffered actual and ascertainable loss of money and damages as an actual and proximate result of Defendant's intentional misrepresentation and concealment of material facts.

93. Defendant's conduct described herein actually and proximately caused Plaintiff and the Class members to suffer damages as described throughout this Complaint.

94. Plaintiff and the members of the Class are entitled to recover their actual damages, attorneys' fees, and injunctive or other equitable relief, pursuant to Missouri law, including Mo. Ann. Stat. § 407.025.

95. Furthermore, Defendants' unlawful conduct set forth in this Complaint was and is wanton, willful and outrageous, and manifests a reckless disregard for the consequences of Defendant's actions and for the rights of Plaintiff and members of the Class and warrants an award of punitive damages to deter Defendants, and others in similar circumstances, from committing such actions in the future.

COUNT II

BREACH OF EXPRESS WARRANTY

(On Behalf of the National Class or, alternatively, the Missouri Subclass)

96. Plaintiff, individually, and on behalf of all others similarly situated, adopts and incorporates by reference all allegations contained in the foregoing paragraphs as though fully set forth herein.

97. Plaintiff and each member of the Class formed a contract with Defendant at the time they purchased a 5-hour ENERGY shot. The terms of the contract included the promises and affirmations of fact made by Defendant on the label of each of Defendant's 5-hour ENERGY shots, specifically hours of energy now with no crash later. Defendant's branding, labels, and advertising constitute express warranties, and are part of the basis of the bargain and a standard contract between Plaintiff, members of the Class, and Defendant.

98. Alternatively, privity was established between Plaintiff and members of the Class and Defendant and/or its agents because Defendant was substantially if not completely responsible for directly promoting and marketing Defendant's 5-hour ENERGY branded shots to Plaintiff and the Class Member which led to Plaintiff and Class member's purchase of the product. By virtue of this direct promotion and marketing to Plaintiff, Defendant expressly warranted 5-hour ENERGY's attributes and benefits to members of the Class.

99. Defendant breached the terms of the express warranty by failing to provide a product that provided the benefits promised.

100. Plaintiffs relied on Defendant's affirmations of specific benefits and superior performance of alternative, less expensive, but equally effective sources of caffeine.

101. As a result of Defendant's breaches of its express warranties, Plaintiff and the Class have been damaged in an amount to be proven at trial.

102. By reason of the foregoing, Plaintiff, on behalf of herself and all others similarly situated, demand judgment against Defendant for damages, including compensatory, incidental and consequential damages (excepting damages for personal injuries) for itself and each member of the Classes.

COUNT III

UNJUST ENRICHMENT

(On Behalf of the National Class or, alternatively, the Missouri Subclass)

103. Plaintiff, individually, and on behalf of all others similarly situated, adopts and incorporates by reference all allegations contained in the foregoing paragraphs as though fully set forth herein.

104. Plaintiff conferred a tangible economic benefit upon Defendants by purchasing 5-hour energy products. Plaintiff and members of the Class would have expected remuneration from Defendant at the time this benefit was conferred had they known that the Product did not perform as promised and has been widely criticized by government officials and scientists.

105. As a result of Defendant's deceptive, fraudulent, and misleading packaging, advertising, marketing and sales of its 5-hour energy products, Defendant was enriched, at the expense of the Plaintiff and each member of the Class, through the payment of the purchase price for 5-hour energy products.

106. Under the circumstances, it would be against equity and good conscious to permit Defendant to retain the ill-gotten benefits that it received from Plaintiff and members of the Class in light of the fact that the 5-hour energy products purchased by Plaintiff and members of the Class were not as Defendant purports them to be, as set forth more fully above.

107. It would thus be unjust and inequitable for Defendant to retain the benefit without restitution or disgorgement of monies paid to Defendant for 5-hour energy products, or such other appropriate equitable remedy as appropriate, to the Plaintiff and other members of the Class.

COUNT IV

FRAUD BY UNIFORM WRITTEN MISREPRESENTATION AND OMISSION **(On Behalf of the National Class or, alternatively, the Missouri Subclass)**

108. Plaintiff, individually, and on behalf of all others similarly situated, adopts and incorporates by reference all allegations contained in the foregoing paragraphs as though fully set forth herein.

109. Defendant intentionally, willfully, falsely, and knowingly uniformly misrepresented material facts in writing that relate to the character and quality of 5-hour Energy. Specifically, Defendant intentionally and willfully misrepresented that 5-hour Energy provides benefit to consumers in addition to that than a caffeine tablet or cup of coffee, and failed to disclose that it poses health risks on websites, in various media advertising, and at point of sale materials disseminated or caused to be disseminated by Defendant.

110. Defendant also made intentional misrepresentations to Class members who sought to have Defendant honor their warranty. Defendant represented to Class members by affirmative misrepresentations and omissions that 5-hour Energy provides benefits over and above what could be achieved by a caffeine tablet or standard cup of coffee even though it has no competent, credible, and reliable scientific evidence that is sufficient in quality and quantity, based on standards generally acceptable in the relevant scientific fields, when considered in light of the entire body of relevant and reliable scientific evidence, to substantiate its claims regarding the superior effectiveness of 5-hour Energy.

111. Defendant's uniform written misrepresentations were made with the intent that the general public, including Plaintiff and Class, would rely upon them. Defendant's representations were made with knowledge of the falsity of such statements, or in reckless disregard of the truth thereof, and gave Defendant an unjust advantage and caused a loss to Plaintiff and Class Members. The Defendant's claims of superior effectiveness are so central to the consumer's selection of 5-hour Energy that the Defendant knew and intended that consumers would rely on those misrepresentations in determining whether to purchase 5-hour Energy instead of the less expensive alternatives.

112. In actual and reasonable reliance upon Defendant's misrepresentations, Plaintiff and Class members purchased 5-hour Energy for its intended and reasonably foreseeable purposes. Plaintiff and Class members were unaware of the true facts concerning the effectiveness and health risks of 5-hour Energy, which were concealed from the Plaintiff and the Class Members. If Plaintiff and Class members had been aware of the concealed facts, Plaintiff and Class members would not have purchased 5-hour Energy at all or for the premium price paid. Plaintiff's and Class members' reliance on the representations of the Defendant was reasonable.

113. Defendant misrepresented material facts with the intent to defraud Plaintiff and the Class members. Plaintiff and the Class members were unaware of the intent of Defendant and relied upon these representations in agreeing to purchase 5-hour Energy.

114. In actual and reasonable reliance upon Defendant misrepresentations, Plaintiff and Class members purchased 5-hour Energy and did not benefit from the Product as represented, the direct and proximate result of which was injury and harm to Plaintiff and Class members because:

- a. they would not have purchased 5-hour Energy if the true facts concerning its effectiveness had been known;
- b. they paid a price premium due to the mislabeling of 5-hour Energy; and
- c. 5-hour Energy did not (and cannot) perform as promised.

COUNT V

INJUNCTIVE RELIEF

(On Behalf of the National Class or, alternatively, the Missouri Subclass)

115. Plaintiff, individually, and on behalf of all others similarly situated, adopts and incorporates by reference all allegations contained in the foregoing paragraphs as though fully set forth herein.

116. Defendant has refused to act on grounds generally applicable to the Injunctive Relief Plaintiffs and other members of the Injunctive Relief States Classes, thereby making final injunctive relief appropriate.

117. Defendant's conduct, as more fully set forth herein, both in the past and through the present day, has demonstrated a willful disregard for proven scientific facts in a clear attempt to sell a product that is no more effective than other, less expensive caffeine products such as coffee.

118. Defendant persists in its deceptive and unfair marketing and sales practices concerning the Product to the detriment of consumers across the country, including the Injunctive Relief States Class.

119. If Defendant is allowed to continue with these practices, consumers-the Injunctive Relief Plaintiffs and other members of the Injunctive Relief States Class-will be irreparably harmed in that they do not have a plain, adequate, speedy, or complete remedy at law to address all of the wrongs alleged in this Complaint, unless injunctive relief is granted stop Defendant's improper conduct concerning its marketing and sale of the Product.

120. The Injunctive Relief Plaintiff and the other members of the Injunctive Relief States Class, is therefore, entitled to an injunction requiring Defendant its unfair and deceptive practices relating the marketing sale of the Product, as alleged herein, including the effects thereof.

121. The Injunctive Relief Plaintiff seeks a Court Order requiring Defendant to do the following:

- a. discontinue advertising, marketing, packaging and otherwise representing its 5-hour energy products as being superior to conventional caffeine products;
- b. undertake an immediate public information campaign to inform the Injunctive Relief Plaintiff and the other members of the Injunctive Relief State Class, of the truth about Defendant's products and Defendant's prior practices relating thereto; and
- c. correct any erroneous impression the Injunctive Relief Plaintiff and the other members of the Injunctive Relief States Class, may have derived concerning the nature, characteristics, or qualities of 5-hour energy, including without limitation, the placement of corrective advertising and providing written notice to the general public.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, William Forrest, individually and on behalf of other members of the Classes described in this Complaint, respectfully requests that:

A. the Court certify the Classes pursuant to Fed. R. Civ. P. 23(b)(2) and (b)(3), and adjudge Plaintiff and his counsel to be an adequate representative thereof;

B. the Court enter and Order requiring Defendant to pay Plaintiff's and other members of the Classes' economic, monetary, actual damages (including multiple damages), consequential, compensatory, or statutory damages, whichever is greater; and, awarding Plaintiff and the other members of the Classes exemplary damages, to the extent permitted under the laws of each of the states implicated in this action;

C. the Court enter an Order awarding restitution and disgorgement of Defendant's revenues arising from its conducts alleged above, or any other appropriate remedy in equity, to Plaintiff and other members of the Classes;

D. the Court enter an Order awarding injunctive relief as permitted by law or equity, including enjoining Defendant from continuing the unlawful practices set forth above; directing Defendant to cease its deceptive and misleading marketing campaign concerning its 5-hour Energy products, and to disgorge all monies Defendant acquired by means of any act or practice declared by this Court to be wrongful;

E. the Court enter and Order awarding Plaintiff, individually and on behalf of the other members of the Classes, their expenses and costs of suit, including reasonable attorneys' fees and reimbursement of reasonable expenses, to the extent provided by the law;

F. the Court enter an Order awarding to Plaintiff individually and on behalf of the other members of the Classes, pre- and post-judgment interest, to the extent allowable ;
and

G. for such other and further relief as may be just and proper.

JURY DEMAND

Pursuant to Federal Rules of Civil Procedure 38(b), Plaintiff, William Forrest, hereby demands a trial by jury of all claims in this Class Action Complaint so triable.

DATED: January 25, 2013

Respectfully submitted,

By: /s/ Eric D. Holland

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**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION**

WILLIAM FORREST, on behalf of himself
and all others similarly situated,

Plaintiff,

v.

INNOVATION VENTURES, LLC d/b/a
LIVING ESSENTIALS, LLC, a Michigan
Corporation,

Defendant.

CASE NO.: 13-172

JURY TRIAL DEMANDED

CLASS ACTION COMPLAINT

CLASS ACTION COMPLAINT

Plaintiff, William Forrest, by and through undersigned counsel, brings this action on his own behalf and on behalf of a Class and Subclass of persons and entities defined herein against Defendant Innovation Ventures, LLC d/b/a Living Essentials, LLC (hereinafter referred to as “Living Essentials” or “Defendant”) and for his Complaint alleges, upon information and belief and based on the investigation to date of his counsel, as follows:

INTRODUCTION

1. This is a nationwide class action brought by Plaintiff pursuant to Rule 23 of the Federal Rules of Civil Procedure on his own behalf and on behalf of a Class and Subclass of all similarly situated consumers who purchased 5-hour ENERGY shots designed, manufactured, warranted, marketed, advertised, and sold by Defendant, Living Essentials, or its predecessors, successors or subsidiaries.

2. Defendant manufactured and marketed its product under various brands and product names including, but not limited to, 5-hour ENERGY, Extra Strength 5-hour ENERGY,

and Decaf 5-hour ENERGY shot (“5-hour Energy” or the “Product”). Defendant has marketed, advertised and sold 5-hour Energy throughout Missouri, the United States and other countries.

3. Defendant represents to consumers, among other representations as alleged herein, that 5-Hour Energy produces a sustained level of “energy” for five hours, that the consumer will have “hours of energy now, no crash later,” “contains B Vitamins for energy and amino acids for focus,” and that you can “drink it in seconds and in minutes you’re feeling alert and productive and that feeling lasts for hours”.

4. Defendant claims to base its representations upon scientific studies which it claims demonstrates the superior nature of 5-hour Energy branded drinks over simpler and less expensive caffeine only products, such as a caffeine tablet or a cup of coffee.

5. Upon information and belief there is no genuine scientific research and there are no scientifically reliable studies in existence that support Defendant’s claims that 5-hour Energy drinks provide any additional benefits over a caffeine tablet or a cup of coffee.

6. Through its extensive and comprehensive nationwide marketing campaign, Defendant engaged in improper advertising, sales and marketing practices in an attempt to defraud Plaintiff and members of the class by disseminating false and misleading information via television commercials, internet websites and postings, radio media, advertising and packaging, all of which is intended to induce consumers, including Plaintiff and members of the Class, into purchasing, at a premium price, millions of dollars worth of 5-hour Energy shots, which are manufactured, distributed, marketed, advertised and/or sold by the Defendant.

7. Defendant knew or should have known that there is no greater benefit of ingesting 5-hour Energy than ingesting an equivalent dose of caffeine and has taken no meaningful steps to clear up consumer misconceptions regarding its product.

8. As a result of Defendant's pervasive pattern of fraudulent, deceptive, false, and otherwise improper advertising, sales, and marketing practices and through other actions and inactions complained of herein, Defendant breached express warranties, committed fraud through uniform written misrepresentations and common omissions. To remedy Defendant's illegal conduct, Plaintiff on behalf of himself and other similarly situated purchasers seeks monetary damages, equitable relief, declaratory relief and/or disgorgement of profits in connection with the 5-hour Energy designed, manufactured, warranted, marketed, advertised, and sold by the Defendant, or its predecessors, successors or subsidiaries.

JURISDICTION AND VENUE

9. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1332(d)(2) (diversity jurisdiction) and the Class Action Fairness Act, in that (i) there is complete diversity (Plaintiff is a citizen of Missouri and Defendant is domiciled and incorporated in Michigan and otherwise maintains its principal place of business in Michigan, (ii) the amount in controversy exceeds \$5,000,000.00 (Five Million Dollars) exclusive of interests and costs, and (iii) there are 100 or more members of the proposed Plaintiff class.

10. Defendant conducts substantial business in Missouri, including the sale and distribution of 5-hour Energy, and has sufficient contacts with Missouri or otherwise intentionally avails itself of the laws and markets of Missouri, so as to sustain this Court's jurisdiction over Living Essentials.

11. Venue lies in this District, pursuant to 28 U.S.C. §1391, because a substantial part of the events or omissions giving rise to Plaintiff's claims occurred in this Judicial District. In addition, Living Essentials does business and/or transacts business in this Judicial District, and therefore, is subject to personal jurisdiction in this Judicial District and resides here for venue purposes.

PARTIES

12. Plaintiff William Forrest is a resident and citizen of St. Louis, Missouri. Plaintiff last purchased 5-Hour Energy manufactured and marketed by Defendant in December 2012. He has purchased 5-Hour Energy for 4-5 years in the St. Louis, Missouri area, including but not limited to purchasing 5-Hour Energy from a gas station near West County mall in St. Louis, Missouri.

13. Defendant Living Essentials is a Michigan corporation with its principal place of business at 38955 Hills Tech Drive Farmington Hills, Michigan 48331. Defendant is one of the largest manufacturers and sellers of energy drinks in the country with annual sales of more than \$1 billion and sells about 9 million bottles of 5-hour Energy a week in North America.

14. Defendant designed, tested, manufactured, marketed, advertised, warranted and/or sold 5-hour Energy in Missouri and throughout the United States.

FACTUAL ALLEGATIONS

15. 5-hour Energy is a flavored energy shot brand made by the Defendant. It is sold in 1.93-oz (57 mL) containers. Defendants introduced 5-hour Energy in 2004 as part of a wave of "energy shot" dietary supplements.

16. Defendant sells or distributes 5-hour Energy to consumers throughout Missouri and the United States in three varieties: Original, Extra Strength, and Decaffeinated and available in multiple flavors including pink lemonade, grape, pomegranate, berry, orange, and lemon-lime. 5-hour Energy contains caffeine, citicoline, tyrosine, phenylalanine, taurine, malic acid, glucuronolactone, and a blend of vitamins B6, B12, Niacin and folic acid. 5-hour Energy Decaf, which contains choline, is alleged to contain only half as much caffeine as a half cup of decaffeinated coffee, and no Niacin.

17. In the Spring of 2004, health chain, GNC, began to stock 5-hour Energy in its stores. Soon after the product began to appear in Walgreens, Rite Aid, and regional chain stores. Currently the product is available for purchase at gas stations, Wal-Marts, and supermarkets.

18. Defendant grossed more than \$600 million dollars in 2011 off \$1 billion retail sales, according to Forbes Magazine and is said to have 90% of the so-called “energy shot” market.

19. Defendant asserts that in addition to the light and portable container, in which the product comes, 5-hour Energy is packed with vitamins and amino acids, contains no sugar, zero herbal stimulants and is only four calories.

20. Defendant’s main point of sale is that unlike energy drinks and common caffeine products, 5-hour Energy produces “no crash later”.

21. Although Defendant points to purported scientific studies to and research to this claim, only reports to the contrary have been published.

22. Earlier this month the New York Times published an article titled “Energy Drinks promised Edge, but Experts say Proof is Scant” (Barry Meier, January 1, 2013), citing

widespread scientific and governmental criticism of manufacturers assertion that energy drinks provided any more benefit than the average dose of caffeine consumed in a cup of coffee.

23. According to Defendant's website 5-hour Energy significantly outperformed placebo in a clinical trial on continuity of attention and self-related awareness implying that consumption of 5-hour Energy will improve concentration and alertness. However, nothing in that comparison to a placebo supports Defendant's assertion that 5-hour Energy provides anything more for concentration or awareness than any other product which contains caffeine.

24. Despite the lack of any reported scientific support for a claim that 5-hour Energy provides more benefit to consumers than a caffeine tablet or cup of coffee, Defendant continues to market their product as a superior source of energy worthy of a premium price.

25. Additionally, Defendant's web site asserts that the product is "packed with vitamins".

26. A study undertaken at Vanderbilt University specifically directed at 5-Hour Energy, sheds light on the true effects and dangers of some of these ingredients:¹

- a. Niacin: A Niacin Flush can cause liver toxicity, worsening of stomach ulcers, and altered blood sugar or insulin levels or uric acid concentrations;
- b. Vitamin B6: It has yet to be shown that B6 supplementation in healthy people causes enhanced cognitive function;
- c. Folic Acid: Giving folate to a person with a B12 deficiency can cause irreversible neurologic damage;
- d. Vitamin B12: There is no evidence of the efficacy of vitamin B12 on cognitive function.

¹ 5-Hour Energy: The Health Energy Drink? <http://healthpsych.psy.vanderbilt.edu/2008/5-HourEnergy.htm>

27. The ultimate conclusion, based in part off of another scientific study, was that B6, B12, and folic acid supplementation, alone or in combinations, do not provide adequate evidence for a beneficial effect of supplementation on cognitive function testing in people with either normal or impaired cognitive function.

28. The significance of this conclusion is that it highlights the discrepancy between the advertising claims and the actual science and research.

29. In a 2003 article titled “Debunking the Effects of Taurine in Red Bull Energy Drink”², the study concluded that the claimed improvement in cognitive capabilities and muscular performance were more plausibly related to caffeine alone rather than the purported unique combination of the key components of caffeine, taurine, and glucuronolactone.

30. The report concluded that “it seems that drinking a cold cup of coffee may induce the same ‘energizing and refreshing’ effects of drinking Red Bull - and best of all, at one-third the cost.” These same key ingredients are also all found in 5-hour Energy.

31. More recently, a study on the cognitive effects of key energy drink ingredients caffeine, taurine, and glucose, similarly concluded that caffeine content, but not taurine or glucose in energy drinks drives cognitive improvements in executive control, working memory, and psychomotor performance.³

32. Another study reached a similar conclusion after its evaluation of multiple ingredients commonly found in energy drinks such as 5-hour Energy, including taurine,

² “Debunking the Effects of Taurine in Red Bull Energy Drink”, Kim, Woojae, Nutrition Bytes, Department of Biological Chemistry, UCLA, David Geffen School of Medicine, UC Los Angeles, 2003.

³ “Differential cognitive effects of energy drink ingredients: Caffeine, taurine, and glucose”, Giles, Grace, Mahoney, Caroline, et al, Pharmacology, Biochemistry, and Behavior 102 (2012) 569-577.

glucuronolactone, glucose, B vitamins, guarana, yerbe mate, carnitine, St. John's wort, and ginseng.⁴ The study concluded that there is little, if any, solid evidence to support an increase in either physical or mental energy due to consumption of energy drinks except for the increases attributable to caffeine.

33. Finally, the European Food and Safety Commission undertook a study of taurine and found that no cause and effect relationship has been established between taurine and its contribution to cognitive function, cardiac function, and a delay in the onset of physical fatigue.⁵

34. 5-hour Energy claims to provide more than 8,000% of the recommended daily intake for B12 and 2000% of the recommended intake of B6. However, according to Dr. Brent Bauer, director of the Complementary and Integrative Medicine Program at the Mayo Clinic, high doses of B vitamins are not going to boost energy unless someone is B-deficient.⁶

⁴ "Do energy drinks contain active components other than caffeine?", McLellan, Tom and Lieberman, Harris, Nutrition Reviews, Vol. 70(12):730-744.

⁵ EFSA Journal 2011; 9(4):2035.

⁶ Energy Shots Review: Do they work? Are they safe? <http://www.webmd.co/food-recipes/features/energy-shots-review?print=true>



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).



The Product and Living Essentials' Advertising

35. Defendant's exhaustive advertising campaign builds on this deception. In truth, Defendant has no independent, reliable, or competent support for its claims.

36. Throughout the Class Period, Defendant has marketed 5-hour Energy as producing "hours of energy now-no crash later" and that the consumer "can feel it in minutes and it lasts for hours".

37. In the "Frequently Asked Questions" section of 5-hour Energy's website (<http://www.5hourenergy.com/QandA.asp>), Defendant represents that the product is "a liquid energy shot that can help you feel sharp and alert for hours."

38. In 2007, National Advertising Division, an advertising watchdog group affiliated with the Council of Better Business Bureau conducted a review of popular energy drinks and shots, which included 5-hour Energy. According to results reported by the New York Times, 24 percent of the people who used 5-hour energy had a "moderately severe" crash afterward.

http://www.nytimes.com/2013/01/03/business/5-hour-energys-no-crash-later-claim-is-disputed.html?ref=business&_r=2&

39. The review concluded that while the company's 2007 study had shown there was evidence to support a "qualified claim that 5-hour Energy results in less of a crash than Red Bull and Monster" Energy, the study showed that 5-hour Energy users experienced caffeine-related crashes, and therefore the product was inadequate to support a "no crash" claim.

40. Following the study the group recommended that Defendant discontinue the "no crash claim" based on Defendant's own evidence.

41. Instead, Defendant added an asterisk-like symbol and footnote to its no-crash claim explaining that the user would have "no sugar crash" as the product did not contain sugar.

42. Andrea C. Levine, director of the National Advertising Division, recently reopened the group's review of the "no crash later" claim after Defendant incorrectly asserted in a public statement that the National Advertising Division had found all of Living Essentials' claims to be substantiated. Ms. Levine asserted that Defendant had apparently decided to use only select portions of the report and failed to follow the group's recommendation that they drop the language and instead added language of its choosing. In the event that the company fails to respond or inadequately responds, the National Advertising Division will likely refer the matter to the Federal Trade Commission.

43. Defendant's nationwide advertising campaign for 5-hour Energy has been extensive and comprehensive throughout the Class Period. Defendant has spent millions of dollars conveying the persistently deceptive message that 5-hour Energy is a superior energy product to consumers across the United States.

44. Defendant has orchestrated its deceptive 5-hour Energy advertising campaign by using a variety of media, including television, newspapers, radio, media tours, the Internet, email

blasts, video news releases, point of sale displays, and prominently on the product's packaging. As a result of its pervasive and uniform advertising campaign, Defendant has elevated 5-hour Energy to become one of the top sellers in the energy drink category.

45. As a result of Defendant's deceptive and misleading messages and omissions about 5-hour Energy, conveyed directly through its marketing and advertising campaigns, Defendant has been able to charge a significant price premium for 5-hour Energy over traditional caffeine products, which it has convinced consumers to pay for a purportedly superior product, as its advertising misleadingly conveys.

46. Defendant's false and misleading representations as to the Product's superior energy producing ingredients have been – and continue to be – material to consumers, including Plaintiff and other members of the Class, and Defendant knows that its misleading representations are material in nature.

The False, Misleading, and Deceptive Claims

47. Defendant's claims about 5-hour Energy's effectiveness in increasing cognitive function and superiority over similar products or a cup of coffee are false, deceptive, unfair, and unconscionable because there is not sufficient, competent and/or reliable scientific evidence and/or substantiation for 5-hour Energy's effectiveness and superiority claims when the Product is used by the consuming public in real world settings.

48. There is no competent, credible, and reliable scientific evidence that is sufficient in quality and quantity, based on standards generally acceptable in the relevant scientific fields, when considered in light of the entire body of relevant and reliable scientific evidence, to substantiate its claims regarding the superior effectiveness of 5-hour Energy.

49. Defendant's purported scientific evidence is neither competent nor reliable. Defendant does not possess any tests, analyses, research, or studies that have been conducted and evaluated in an objective manner. To the contrary, Defendant's claims appear to be based only on a single, in-house study, in which Defendant's product is compared against a placebo which Defendant has failed to describe.

Health Related Concerns

50. In December 2012, the nonprofit Center for Science in the Public Interest ("CSPI") issued a warning to consumers due to Living Essentials' self-serving attempt in a web advertisement to imply that CSPI and director Michael Jacobson had endorsed the safety of 5-hour Energy.⁷

51. In fact, the CSPI stated that 5 hour Energy could be linked to insomnia, anxiety, reduced fertility, as well as the more serious, life threatening events, as reported by the New York Times due to the interactions and blend of chemicals in 5-hour Energy.

52. Director Jacobson even went so far as to advise consumers not to use 5-hour Energy. The CSPI warning quotes Senator Durbin who stated that Defendant's "ad campaign was misleading and should be stopped.," and that the "amount of caffeine and other additives in many of these energy drinks is way in excess of what is health for children and adolescents". Additionally, Representative Edward Markey recommended that "all Americans, particularly younger ones, should be cautious before consuming them."

53. As discussed herein, Defendant's national advertising campaign for 5-hour Energy targets children, adolescents, and young adults.

⁷ <http://cspinet.org/new/201212051.html> (last visited January 19, 2013)

54. A study titled Health Effects of Energy Drinks on Children, Adolescents and Young Adults, made the following conclusions with respect to the supplements:⁸

- a. Energy drinks have no therapeutic benefit, and both known and unknown pharmacology of various ingredients, combined with reports of toxicity, suggest that these drinks may put some children at risk for serious adverse health effects;
- b. Typically, energy drinks contain high levels of caffeine, taurine, and guarine, which have stimulant properties and cardiac and hematologic activity, but manufacturers claim that energy drinks are nutritional supplements which shields them from the caffeine limits imposed on sodas and the safety testing and labeling required of pharmaceuticals;
- c. Other ingredients vary, are understudied, and are not regulated;
- d. Youth-aimed marketing and risk taking adolescent development tendencies combine to increase over-dose potential;
- e. High consumption is suggested by self-report surveys but is under documented in children (deleterious associations with energy drink consumption have been reported globally in case reports and popular media); and
- f. Interactions between compounds, additive and dose-dependent effects, long-term consequences, and dangers associated with risky behavior in children remain to be determined.

55. As a result of Defendant's deceptive and misleading messages and omissions about 5-hour Energy, conveyed directly through its marketing and advertising campaigns, Defendant has been able to charge a significant price premium for 5-hour Energy over traditional

⁸ "Health Effects of Energy Drinks on Children Adolescents, and Young Adults", Seifert, Sara, Schaechter, Judith, et al, Pediatrics, February 14, 2011.

caffeine products, which it has convinced consumers to pay for a purportedly superior product, which may in fact pose serious undisclosed health risks.

CLASS ACTION ALLEGATIONS

56. Plaintiff brings this class action on behalf of himself and all others similarly situated as Class Members pursuant to Rule 23 of the Federal Rules of Civil Procedure.

57. Plaintiff seeks to represent a “National Class” defined as follows:

All United States residents who purchased 5-hour Energy excluding Defendant, Defendant’s officers, directors, and employees, Defendant’s subsidiaries, those who purchased the products for the purpose of resale, the Judge to which this case is assigned and the immediate family of the Judge to which this case is assigned.

58. Plaintiff seeks to represent a “Missouri Subclass” defined as follows:

All Missouri residents who purchased 5-hour Energy excluding Defendant, Defendant’s officers, directors, and employees, Defendant’s subsidiaries, those who purchased the products for the purpose of resale, the Judge to which this case is assigned and the immediate family of the Judge to which this case is assigned.

59. Plaintiff is a member of the Class that he seeks to represent. Plaintiff is a United States resident who purchased 5-hour Energy.

60. Plaintiff is a member of the Class that he seeks to represent. Plaintiff is a Missouri resident who purchased 5-hour Energy.

61. The definition of the Class is narrowly tailored so as to include only identifiable Class Members who can be identified through Defendant’s wholesale sale information. The Class has no time limit because, as discussed below, the statute of limitations has been tolled by the Defendant’s fraudulent concealment of the true nature of the Product purchased by Class Members.

62. The proposed Class is so numerous that the individual joinder of all its members, in this or any action, is impracticable. The exact number or identification of the members of the Class is presently unknown to Plaintiff, but it is believed to comprise thousands of Missouri residents, and millions of United States residents, thereby making joinder impractical.

63. Common questions of fact and law exist as to all Class Members and predominate over questions affecting only individual members. These include, but are not limited to, the following:

- a. Whether, in their normal and customary use by consumers, 5-hour Energy works as advertised, marketed, and conveyed to consumers;
- b. Whether, in the course of business, Defendant represented that 5-hour Energy has characteristics, uses, benefits or qualities that it does not have when used in a customary manner by consumers;
- c. Whether the claims Defendant made and is making regarding 5-hour Energy's are unfair or deceptive, specifically, whether 5-hour energy provides five hours of energy with no crash later;
- d. Whether Defendant is supplying 5-hour Energy in accordance with its representations that it contains as much caffeine as a cup of leading premium coffee;
- e. Whether Defendant knew at the time the consumer transactions took place that the consumer would not receive the benefits of increased energy and productivity from the 5-hour Energy that Defendant was claiming the consumer would receive;
- f. Whether Defendant knowingly made a misleading statement in connection with a consumer transaction that the consumer was likely to rely upon to his detriment;
- g. Whether Defendant knew or should have known that the representations and advertisements regarding the 5-hour Energy Drinks were unsubstantiated, false and misleading;
- h. Whether Defendant has breached express warranties in the sale and

marketing of 5-hour Energy, specifically “ five hours of energy” and “no crash later”;

- i. Whether Defendant has been unjustly enriched by the sale of 5-hour Energy to the Plaintiff and Class;
- j. Whether the Plaintiff and the Class members that purchased 5-hour Energy suffered monetary damages and, if so, what is the measure of those damages;
- k. Whether Plaintiff and the Class members are entitled to an injunction, damages, restitution, equitable relief and other relief deemed appropriate and the amount and nature of such relief.

64. Plaintiff’s claims are typical of the claims of the Class Members. Plaintiff and all Class Members purchased 5-hour Energy shots that were designed, tested, manufactured, marketed, advertised, warranted and/or sold, and placed in the stream of commerce by Defendants. Plaintiffs and all other Class Members purchased 5-hour Energy that could not perform anywhere near advertised. The nature of the misrepresentation is the same for the Plaintiff and all Class Members, even if they purchase different types or flavors of 5-hour Energy.

65. The factual bases of Defendant’s misconduct are common to the Class Members and represent a common thread of deceptive advertising and breach of warranty resulting in injury to all Class Members. Plaintiff is asserting the same rights, making the same claims, and seeking the same relief for themselves and all other Class Members. The central question of whether Defendant’s representations are accurate and truthful is common to all Class members and predominates over all other questions, legal and factual in this litigation.

66. Plaintiff is an adequate representative of the proposed Class because he is a Class

Member and does not have interests that conflict with those of the other Class members he seeks to represent. Plaintiff is represented by experienced and able counsel, who have litigated numerous class-action lawsuits, and Plaintiff's Counsel intend to prosecute this action vigorously for the benefit of the proposed Class. Plaintiff and their Counsel will fairly and adequately protect the interests of the Class Members.

67. A class action is the superior available method for the efficient adjudication of this litigation because:

- a. The prosecution of separate actions by individual members of the Class would create a foreseeable risk of inconsistent or varying adjudications which would establish incompatible results and standards for Defendant;
- b. Adjudications with respect to individual members of the Class would, as a practical matter, be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their own separate interests;
- c. Class action treatment avoids the waste and duplication inherent in potentially thousands of individual actions, and conserves the resources of the courts; and
- d. The claims of the individual class members are relatively small compared to the burden and expense that would be required to individually litigate their claims against Defendant, so it would be impracticable for the members of the Class to individually seek redress for Defendant's wrongful conduct. Even if the members of the Class could afford individual litigation, the court system could not. Individualized litigation creates a potential for inconsistent or contradictory judgments, and increases the delay and expense to all parties and the court system. By contrast, the class action device presents far fewer management difficulties, and provides the benefits of single adjudication, economy of scale, and comprehensive supervision by a single court.

68. A class action for injunctive and equitable relief pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure is also appropriate. Defendant acted or refused to act on grounds generally applicable to the Class thereby making appropriate final injunctive and equitable relief with respect to the Class as a whole. Defendant's actions are generally applicable to the Class as a whole, and Plaintiff, on behalf of the Class, seeks damages and injunctive relief described herein. Moreover, Defendant's systemic policy and practices make declaratory relief with respect to the Class as a whole appropriate.

FRAUDULENT CONCEALMENT

69. Defendant was and remains under a duty to Plaintiff and the Class to disclose the facts, as alleged herein. The duty to disclose the true facts arises because, as the manufacturers, Defendant is in a superior position to know the true character and quality of their products and the true facts are not something that Plaintiff and Class members could, in the exercise of reasonable diligence, have discovered independently prior to purchasing 5-hour Energy.

70. The facts concealed and/or not disclosed to Plaintiff and the Class, specifically, the crash consumers experience after drinking 5-hour Energy, is a material fact in that a reasonable person would have considered important in deciding whether or not to purchase (or to pay the same price for) 5-hour Energy.

71. Defendant intentionally concealed and/or failed to disclose the shortcomings of 5-hour Energy for the purpose of inducing Plaintiff and Class members to act thereon.

72. Plaintiff and Class members justifiably acted upon, or relied upon to their detriment, the concealed and/or non-disclosed material facts as evidenced by their purchase of 5-

hour Energy. Had they known of the true character and quality of 5-hour Energy, Plaintiff and Class members would not have purchased (or would have paid less for) the Product.

73. As a direct and proximate cause of Defendant's misconduct, Plaintiff and Class members have suffered actual damages. Defendant's conduct has been and is malicious, wanton and/or reckless and/or shows a reckless indifference to the interests and rights of others.

CAUSES OF ACTION

COUNT I

VIOLATION OF THE MISSOURI MERCHANDISING PRACTICES ACT (On Behalf of the Missouri Subclass)

81. Plaintiff, individually, and on behalf of all others similarly situated, adopts and incorporates by reference all allegations contained in the foregoing paragraphs as though fully set forth herein.

82. The Missouri Merchandising Practices Act, Mo. Ann. Stat. § 407.020 (West 2010), provides, in part, as follows:

The act, use or employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, unfair practice or the concealment, suppression, or omission of any material fact in connection with the sale or advertisement of any merchandise in trade or commerce . . . in or from the state of Missouri, is declared to be an unlawful practice . . . Any act, use or employment declared unlawful by this subsection violates this subsection whether committed before, during or after the sale, advertisement or solicitation.

83. This action is brought to secure redress for the unlawful, deceptive and unfair trade practices perpetrated by Defendant on behalf of Plaintiff and the Class members. Defendant's business practices in its advertising, marketing, packaging, labeling and sales of 5-hour Energy shots as unique and superior products justifying substantially higher prices over

alternative sources of “energy” such as coffee, is an unconscionable, unfair, and deceptive act or practice and constitutes multiple, separate violations of Mo. Ann. Stat. § 407.020.

84. Defendants engaged in the unlawful practices set forth in this Complaint in the sale of merchandise in trade or commerce.

85. Plaintiff and members of the Class purchased Defendant’s Products primarily for personal, family, or household purposes.

86. Defendant’s concealment, misrepresentations and/or omissions as set forth in this Complaint are material in that they relate to matters which are important to consumers or are likely to affect the purchasing decisions or conduct of consumers, including Plaintiff and members of the Class regarding Defendant’s products.

87. In violation of the MMPA, Defendants employed fraud, deception, false promise, misrepresentation and the knowing concealment, suppression, or omission of material facts in their sale and advertisement of 5-Hour Energy in the State of Missouri.

88. Defendant engaged in the concealment, suppression, misrepresentations and/or omission of the aforementioned material facts with the intent that others, such as Plaintiff, Class Members, and/or the general public would rely upon the concealment, suppression, misrepresentation and/or omission of such material facts and purchase 5-Hour Energy.

89. The concealment, suppression, misrepresentation and/or omission of the aforementioned material facts had the capacity to, was reasonably foreseeable that it would, and did so deceive a substantial portion.

90. At all times material hereto, it was reasonably foreseeable that Plaintiff, and others similarly situated, would rely on the false and fraudulent advertising, marketing, and packaging made by Defendant. Said reliance has caused Plaintiff, and others similarly situated, to be damaged.

91. Plaintiff and Class Members would not have purchased 5 Hour Energy absent the concealment, suppression, or omission of the aforementioned material facts

92. Plaintiff, and others similarly situated, has suffered actual and ascertainable loss of money and damages as an actual and proximate result of Defendant's intentional misrepresentation and concealment of material facts.

93. Defendant's conduct described herein actually and proximately caused Plaintiff and the Class members to suffer damages as described throughout this Complaint.

94. Plaintiff and the members of the Class are entitled to recover their actual damages, attorneys' fees, and injunctive or other equitable relief, pursuant to Missouri law, including Mo. Ann. Stat. § 407.025.

95. Furthermore, Defendants' unlawful conduct set forth in this Complaint was and is wanton, willful and outrageous, and manifests a reckless disregard for the consequences of Defendant's actions and for the rights of Plaintiff and members of the Class and warrants an award of punitive damages to deter Defendants, and others in similar circumstances, from committing such actions in the future.

COUNT II

BREACH OF EXPRESS WARRANTY

(On Behalf of the National Class or, alternatively, the Missouri Subclass)

96. Plaintiff, individually, and on behalf of all others similarly situated, adopts and incorporates by reference all allegations contained in the foregoing paragraphs as though fully set forth herein.

97. Plaintiff and each member of the Class formed a contract with Defendant at the time they purchased a 5-hour ENERGY shot. The terms of the contract included the promises and affirmations of fact made by Defendant on the label of each of Defendant's 5-hour ENERGY shots, specifically hours of energy now with no crash later. Defendant's branding, labels, and advertising constitute express warranties, and are part of the basis of the bargain and a standard contract between Plaintiff, members of the Class, and Defendant.

98. Alternatively, privity was established between Plaintiff and members of the Class and Defendant and/or its agents because Defendant was substantially if not completely responsible for directly promoting and marketing Defendant's 5-hour ENERGY branded shots to Plaintiff and the Class Member which led to Plaintiff and Class member's purchase of the product. By virtue of this direct promotion and marketing to Plaintiff, Defendant expressly warranted 5-hour ENERGY's attributes and benefits to members of the Class.

99. Defendant breached the terms of the express warranty by failing to provide a product that provided the benefits promised.

100. Plaintiffs relied on Defendant's affirmations of specific benefits and superior performance of alternative, less expensive, but equally effective sources of caffeine.

101. As a result of Defendant's breaches of its express warranties, Plaintiff and the Class have been damaged in an amount to be proven at trial.

102. By reason of the foregoing, Plaintiff, on behalf of herself and all others similarly situated, demand judgment against Defendant for damages, including compensatory, incidental and consequential damages (excepting damages for personal injuries) for itself and each member of the Classes.

COUNT III

UNJUST ENRICHMENT

(On Behalf of the National Class or, alternatively, the Missouri Subclass)

103. Plaintiff, individually, and on behalf of all others similarly situated, adopts and incorporates by reference all allegations contained in the foregoing paragraphs as though fully set forth herein.

104. Plaintiff conferred a tangible economic benefit upon Defendants by purchasing 5-hour energy products. Plaintiff and members of the Class would have expected remuneration from Defendant at the time this benefit was conferred had they known that the Product did not perform as promised and has been widely criticized by government officials and scientists.

105. As a result of Defendant's deceptive, fraudulent, and misleading packaging, advertising, marketing and sales of its 5-hour energy products, Defendant was enriched, at the expense of the Plaintiff and each member of the Class, through the payment of the purchase price for 5-hour energy products.

106. Under the circumstances, it would be against equity and good conscious to permit Defendant to retain the ill-gotten benefits that it received from Plaintiff and members of the Class in light of the fact that the 5-hour energy products purchased by Plaintiff and members of the Class were not as Defendant purports them to be, as set forth more fully above.

107. It would thus be unjust and inequitable for Defendant to retain the benefit without restitution or disgorgement of monies paid to Defendant for 5-hour energy products, or such other appropriate equitable remedy as appropriate, to the Plaintiff and other members of the Class.

COUNT IV

FRAUD BY UNIFORM WRITTEN MISREPRESENTATION AND OMISSION
(On Behalf of the National Class or, alternatively, the Missouri Subclass)

108. Plaintiff, individually, and on behalf of all others similarly situated, adopts and incorporates by reference all allegations contained in the foregoing paragraphs as though fully set forth herein.

109. Defendant intentionally, willfully, falsely, and knowingly uniformly misrepresented material facts in writing that relate to the character and quality of 5-hour Energy. Specifically, Defendant intentionally and willfully misrepresented that 5-hour Energy provides benefit to consumers in addition to that than a caffeine tablet or cup of coffee, and failed to disclose that it poses health risks on websites, in various media advertising, and at point of sale materials disseminated or caused to be disseminated by Defendant.

110. Defendant also made intentional misrepresentations to Class members who sought to have Defendant honor their warranty. Defendant represented to Class members by affirmative misrepresentations and omissions that 5-hour Energy provides benefits over and above what could be achieved by a caffeine tablet or standard cup of coffee even though it has no competent, credible, and reliable scientific evidence that is sufficient in quality and quantity, based on standards generally acceptable in the relevant scientific fields, when considered in light of the entire body of relevant and reliable scientific evidence, to substantiate its claims regarding the superior effectiveness of 5-hour Energy.

111. Defendant's uniform written misrepresentations were made with the intent that the general public, including Plaintiff and Class, would rely upon them. Defendant's representations were made with knowledge of the falsity of such statements, or in reckless disregard of the truth thereof, and gave Defendant an unjust advantage and caused a loss to Plaintiff and Class Members. The Defendant's claims of superior effectiveness are so central to the consumer's selection of 5-hour Energy that the Defendant knew and intended that consumers would rely on those misrepresentations in determining whether to purchase 5-hour Energy instead of the less expensive alternatives.

112. In actual and reasonable reliance upon Defendant's misrepresentations, Plaintiff and Class members purchased 5-hour Energy for its intended and reasonably foreseeable purposes. Plaintiff and Class members were unaware of the true facts concerning the effectiveness and health risks of 5-hour Energy, which were concealed from the Plaintiff and the Class Members. If Plaintiff and Class members had been aware of the concealed facts, Plaintiff and Class members would not have purchased 5-hour Energy at all or for the premium price paid. Plaintiff's and Class members' reliance on the representations of the Defendant was reasonable.

113. Defendant misrepresented material facts with the intent to defraud Plaintiff and the Class members. Plaintiff and the Class members were unaware of the intent of Defendant and relied upon these representations in agreeing to purchase 5-hour Energy.

114. In actual and reasonable reliance upon Defendant misrepresentations, Plaintiff and Class members purchased 5-hour Energy and did not benefit from the Product as represented, the direct and proximate result of which was injury and harm to Plaintiff and Class members because:

- a. they would not have purchased 5-hour Energy if the true facts concerning its effectiveness had been known;
- b. they paid a price premium due to the mislabeling of 5-hour Energy; and
- c. 5-hour Energy did not (and cannot) perform as promised.

COUNT V

INJUNCTIVE RELIEF

(On Behalf of the National Class or, alternatively, the Missouri Subclass)

115. Plaintiff, individually, and on behalf of all others similarly situated, adopts and incorporates by reference all allegations contained in the foregoing paragraphs as though fully set forth herein.

116. Defendant has refused to act on grounds generally applicable to the Injunctive Relief Plaintiffs and other members of the Injunctive Relief States Classes, thereby making final injunctive relief appropriate.

117. Defendant's conduct, as more fully set forth herein, both in the past and through the present day, has demonstrated a willful disregard for proven scientific facts in a clear attempt to sell a product that is no more effective than other, less expensive caffeine products such as coffee.

118. Defendant persists in its deceptive and unfair marketing and sales practices concerning the Product to the detriment of consumers across the country, including the Injunctive Relief States Class.

119. If Defendant is allowed to continue with these practices, consumers-the Injunctive Relief Plaintiffs and other members of the Injunctive Relief States Class-will be irreparably harmed in that they do not have a plain, adequate, speedy, or complete remedy at law to address all of the wrongs alleged in this Complaint, unless injunctive relief is granted stop Defendant's improper conduct concerning its marketing and sale of the Product.

120. The Injunctive Relief Plaintiff and the other members of the Injunctive Relief States Class, is therefore, entitled to an injunction requiring Defendant its unfair and deceptive practices relating the marketing sale of the Product, as alleged herein, including the effects thereof.

121. The Injunctive Relief Plaintiff seeks a Court Order requiring Defendant to do the following:

- a. discontinue advertising, marketing, packaging and otherwise representing its 5-hour energy products as being superior to conventional caffeine products;
- b. undertake an immediate public information campaign to inform the Injunctive Relief Plaintiff and the other members of the Injunctive Relief State Class, of the truth about Defendant's products and Defendant's prior practices relating thereto; and
- c. correct any erroneous impression the Injunctive Relief Plaintiff and the other members of the Injunctive Relief States Class, may have derived concerning the nature, characteristics, or qualities of 5-hour energy, including without limitation, the placement of corrective advertising and providing written notice to the general public.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, William Forrest, individually and on behalf of other members of the Classes described in this Complaint, respectfully requests that:

A. the Court certify the Classes pursuant to Fed. R. Civ. P. 23(b)(2) and (b)(3), and adjudge Plaintiff and his counsel to be an adequate representative thereof;

B. the Court enter and Order requiring Defendant to pay Plaintiff's and other members of the Classes' economic, monetary, actual damages (including multiple damages), consequential, compensatory, or statutory damages, whichever is greater; and, awarding Plaintiff and the other members of the Classes exemplary damages, to the extent permitted under the laws of each of the states implicated in this action;

C. the Court enter an Order awarding restitution and disgorgement of Defendant's revenues arising from its conducts alleged above, or any other appropriate remedy in equity, to Plaintiff and other members of the Classes;

D. the Court enter an Order awarding injunctive relief as permitted by law or equity, including enjoining Defendant from continuing the unlawful practices set forth above; directing Defendant to cease its deceptive and misleading marketing campaign concerning its 5-hour Energy products, and to disgorge all monies Defendant acquired by means of any act or practice declared by this Court to be wrongful;

E. the Court enter and Order awarding Plaintiff, individually and on behalf of the other members of the Classes, their expenses and costs of suit, including reasonable attorneys' fees and reimbursement of reasonable expenses, to the extent provided by the law;

F. the Court enter an Order awarding to Plaintiff individually and on behalf of the other members of the Classes, pre- and post-judgment interest, to the extent allowable ;
and

G. for such other and further relief as may be just and proper.

JURY DEMAND

Pursuant to Federal Rules of Civil Procedure 38(b), Plaintiff, William Forrest, hereby demands a trial by jury of all claims in this Class Action Complaint so triable.

DATED: January 25, 2013

Respectfully submitted,

By: /s/ Eric D. Holland

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**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION**

WILLIAM FORREST, on behalf of himself
and all others similarly situated,

Plaintiff,

v.

INNOVATION VENTURES, LLC d/b/a
LIVING ESSENTIALS, LLC, a Michigan
Corporation,

Defendant.

CASE NO.: 13-172

JURY TRIAL DEMANDED

CLASS ACTION COMPLAINT

CLASS ACTION COMPLAINT

Plaintiff, William Forrest, by and through undersigned counsel, brings this action on his own behalf and on behalf of a Class and Subclass of persons and entities defined herein against Defendant Innovation Ventures, LLC d/b/a Living Essentials, LLC (hereinafter referred to as “Living Essentials” or “Defendant”) and for his Complaint alleges, upon information and belief and based on the investigation to date of his counsel, as follows:

INTRODUCTION

1. This is a nationwide class action brought by Plaintiff pursuant to Rule 23 of the Federal Rules of Civil Procedure on his own behalf and on behalf of a Class and Subclass of all similarly situated consumers who purchased 5-hour ENERGY shots designed, manufactured, warranted, marketed, advertised, and sold by Defendant, Living Essentials, or its predecessors, successors or subsidiaries.

2. Defendant manufactured and marketed its product under various brands and product names including, but not limited to, 5-hour ENERGY, Extra Strength 5-hour ENERGY,

and Decaf 5-hour ENERGY shot (“5-hour Energy” or the “Product”). Defendant has marketed, advertised and sold 5-hour Energy throughout Missouri, the United States and other countries.

3. Defendant represents to consumers, among other representations as alleged herein, that 5-Hour Energy produces a sustained level of “energy” for five hours, that the consumer will have “hours of energy now, no crash later,” “contains B Vitamins for energy and amino acids for focus,” and that you can “drink it in seconds and in minutes you’re feeling alert and productive and that feeling lasts for hours”.

4. Defendant claims to base its representations upon scientific studies which it claims demonstrates the superior nature of 5-hour Energy branded drinks over simpler and less expensive caffeine only products, such as a caffeine tablet or a cup of coffee.

5. Upon information and belief there is no genuine scientific research and there are no scientifically reliable studies in existence that support Defendant’s claims that 5-hour Energy drinks provide any additional benefits over a caffeine tablet or a cup of coffee.

6. Through its extensive and comprehensive nationwide marketing campaign, Defendant engaged in improper advertising, sales and marketing practices in an attempt to defraud Plaintiff and members of the class by disseminating false and misleading information via television commercials, internet websites and postings, radio media, advertising and packaging, all of which is intended to induce consumers, including Plaintiff and members of the Class, into purchasing, at a premium price, millions of dollars worth of 5-hour Energy shots, which are manufactured, distributed, marketed, advertised and/or sold by the Defendant.

7. Defendant knew or should have known that there is no greater benefit of ingesting 5-hour Energy than ingesting an equivalent dose of caffeine and has taken no meaningful steps to clear up consumer misconceptions regarding its product.

8. As a result of Defendant's pervasive pattern of fraudulent, deceptive, false, and otherwise improper advertising, sales, and marketing practices and through other actions and inactions complained of herein, Defendant breached express warranties, committed fraud through uniform written misrepresentations and common omissions. To remedy Defendant's illegal conduct, Plaintiff on behalf of himself and other similarly situated purchasers seeks monetary damages, equitable relief, declaratory relief and/or disgorgement of profits in connection with the 5-hour Energy designed, manufactured, warranted, marketed, advertised, and sold by the Defendant, or its predecessors, successors or subsidiaries.

JURISDICTION AND VENUE

9. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1332(d)(2) (diversity jurisdiction) and the Class Action Fairness Act, in that (i) there is complete diversity (Plaintiff is a citizen of Missouri and Defendant is domiciled and incorporated in Michigan and otherwise maintains its principal place of business in Michigan, (ii) the amount in controversy exceeds \$5,000,000.00 (Five Million Dollars) exclusive of interests and costs, and (iii) there are 100 or more members of the proposed Plaintiff class.

10. Defendant conducts substantial business in Missouri, including the sale and distribution of 5-hour Energy, and has sufficient contacts with Missouri or otherwise intentionally avails itself of the laws and markets of Missouri, so as to sustain this Court's jurisdiction over Living Essentials.

11. Venue lies in this District, pursuant to 28 U.S.C. §1391, because a substantial part of the events or omissions giving rise to Plaintiff's claims occurred in this Judicial District. In addition, Living Essentials does business and/or transacts business in this Judicial District, and therefore, is subject to personal jurisdiction in this Judicial District and resides here for venue purposes.

PARTIES

12. Plaintiff William Forrest is a resident and citizen of St. Louis, Missouri. Plaintiff last purchased 5-Hour Energy manufactured and marketed by Defendant in December 2012. He has purchased 5-Hour Energy for 4-5 years in the St. Louis, Missouri area, including but not limited to purchasing 5-Hour Energy from a gas station near West County mall in St. Louis, Missouri.

13. Defendant Living Essentials is a Michigan corporation with its principal place of business at 38955 Hills Tech Drive Farmington Hills, Michigan 48331. Defendant is one of the largest manufacturers and sellers of energy drinks in the country with annual sales of more than \$1 billion and sells about 9 million bottles of 5-hour Energy a week in North America.

14. Defendant designed, tested, manufactured, marketed, advertised, warranted and/or sold 5-hour Energy in Missouri and throughout the United States.

FACTUAL ALLEGATIONS

15. 5-hour Energy is a flavored energy shot brand made by the Defendant. It is sold in 1.93-oz (57 mL) containers. Defendants introduced 5-hour Energy in 2004 as part of a wave of "energy shot" dietary supplements.

16. Defendant sells or distributes 5-hour Energy to consumers throughout Missouri and the United States in three varieties: Original, Extra Strength, and Decaffeinated and available in multiple flavors including pink lemonade, grape, pomegranate, berry, orange, and lemon-lime. 5-hour Energy contains caffeine, citicoline, tyrosine, phenylalanine, taurine, malic acid, glucuronolactone, and a blend of vitamins B6, B12, Niacin and folic acid. 5-hour Energy Decaf, which contains choline, is alleged to contain only half as much caffeine as a half cup of decaffeinated coffee, and no Niacin.

17. In the Spring of 2004, health chain, GNC, began to stock 5-hour Energy in its stores. Soon after the product began to appear in Walgreens, Rite Aid, and regional chain stores. Currently the product is available for purchase at gas stations, Wal-Marts, and supermarkets.

18. Defendant grossed more than \$600 million dollars in 2011 off \$1 billion retail sales, according to Forbes Magazine and is said to have 90% of the so-called “energy shot” market.

19. Defendant asserts that in addition to the light and portable container, in which the product comes, 5-hour Energy is packed with vitamins and amino acids, contains no sugar, zero herbal stimulants and is only four calories.

20. Defendant’s main point of sale is that unlike energy drinks and common caffeine products, 5-hour Energy produces “no crash later”.

21. Although Defendant points to purported scientific studies to and research to this claim, only reports to the contrary have been published.

22. Earlier this month the New York Times published an article titled “Energy Drinks promised Edge, but Experts say Proof is Scant” (Barry Meier, January 1, 2013), citing

widespread scientific and governmental criticism of manufacturers assertion that energy drinks provided any more benefit than the average dose of caffeine consumed in a cup of coffee.

23. According to Defendant's website 5-hour Energy significantly outperformed placebo in a clinical trial on continuity of attention and self-related awareness implying that consumption of 5-hour Energy will improve concentration and alertness. However, nothing in that comparison to a placebo supports Defendant's assertion that 5-hour Energy provides anything more for concentration or awareness than any other product which contains caffeine.

24. Despite the lack of any reported scientific support for a claim that 5-hour Energy provides more benefit to consumers than a caffeine tablet or cup of coffee, Defendant continues to market their product as a superior source of energy worthy of a premium price.

25. Additionally, Defendant's web site asserts that the product is "packed with vitamins".

26. A study undertaken at Vanderbilt University specifically directed at 5-Hour Energy, sheds light on the true effects and dangers of some of these ingredients:¹

- a. Niacin: A Niacin Flush can cause liver toxicity, worsening of stomach ulcers, and altered blood sugar or insulin levels or uric acid concentrations;
- b. Vitamin B6: It has yet to be shown that B6 supplementation in healthy people causes enhanced cognitive function;
- c. Folic Acid: Giving folate to a person with a B12 deficiency can cause irreversible neurologic damage;
- d. Vitamin B12: There is no evidence of the efficacy of vitamin B12 on cognitive function.

¹ 5-Hour Energy: The Health Energy Drink? <http://healthpsych.psy.vanderbilt.edu/2008/5-HourEnergy.htm>

27. The ultimate conclusion, based in part off of another scientific study, was that B6, B12, and folic acid supplementation, alone or in combinations, do not provide adequate evidence for a beneficial effect of supplementation on cognitive function testing in people with either normal or impaired cognitive function.

28. The significance of this conclusion is that it highlights the discrepancy between the advertising claims and the actual science and research.

29. In a 2003 article titled “Debunking the Effects of Taurine in Red Bull Energy Drink”², the study concluded that the claimed improvement in cognitive capabilities and muscular performance were more plausibly related to caffeine alone rather than the purported unique combination of the key components of caffeine, taurine, and glucuronolactone.

30. The report concluded that “it seems that drinking a cold cup of coffee may induce the same ‘energizing and refreshing’ effects of drinking Red Bull - and best of all, at one-third the cost.” These same key ingredients are also all found in 5-hour Energy.

31. More recently, a study on the cognitive effects of key energy drink ingredients caffeine, taurine, and glucose, similarly concluded that caffeine content, but not taurine or glucose in energy drinks drives cognitive improvements in executive control, working memory, and psychomotor performance.³

32. Another study reached a similar conclusion after its evaluation of multiple ingredients commonly found in energy drinks such as 5-hour Energy, including taurine,

² “Debunking the Effects of Taurine in Red Bull Energy Drink”, Kim, Woojae, Nutrition Bytes, Department of Biological Chemistry, UCLA, David Geffen School of Medicine, UC Los Angeles, 2003.

³ “Differential cognitive effects of energy drink ingredients: Caffeine, taurine, and glucose”, Giles, Grace, Mahoney, Caroline, et al, Pharmacology, Biochemistry, and Behavior 102 (2012) 569-577.

glucuronolactone, glucose, B vitamins, guarana, yerbe mate, carnitine, St. John's wort, and ginseng.⁴ The study concluded that there is little, if any, solid evidence to support an increase in either physical or mental energy due to consumption of energy drinks except for the increases attributable to caffeine.

33. Finally, the European Food and Safety Commission undertook a study of taurine and found that no cause and effect relationship has been established between taurine and its contribution to cognitive function, cardiac function, and a delay in the onset of physical fatigue.⁵

34. 5-hour Energy claims to provide more than 8,000% of the recommended daily intake for B12 and 2000% of the recommended intake of B6. However, according to Dr. Brent Bauer, director of the Complementary and Integrative Medicine Program at the Mayo Clinic, high doses of B vitamins are not going to boost energy unless someone is B-deficient.⁶

⁴ "Do energy drinks contain active components other than caffeine?", McLellan, Tom and Lieberman, Harris, Nutrition Reviews, Vol. 70(12):730-744.

⁵ EFSA Journal 2011; 9(4):2035.

⁶ Energy Shots Review: Do they work? Are they safe? <http://www.webmd.co/food-recipes/features/energy-shots-review?print=true>



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).



The Product and Living Essentials' Advertising

35. Defendant's exhaustive advertising campaign builds on this deception. In truth, Defendant has no independent, reliable, or competent support for its claims.

36. Throughout the Class Period, Defendant has marketed 5-hour Energy as producing "hours of energy now-no crash later" and that the consumer "can feel it in minutes and it lasts for hours".

37. In the "Frequently Asked Questions" section of 5-hour Energy's website (<http://www.5hourenergy.com/QandA.asp>), Defendant represents that the product is "a liquid energy shot that can help you feel sharp and alert for hours."

38. In 2007, National Advertising Division, an advertising watchdog group affiliated with the Council of Better Business Bureau conducted a review of popular energy drinks and shots, which included 5-hour Energy. According to results reported by the New York Times, 24 percent of the people who used 5-hour energy had a "moderately severe" crash afterward.

http://www.nytimes.com/2013/01/03/business/5-hour-energys-no-crash-later-claim-is-disputed.html?ref=business&_r=2&

39. The review concluded that while the company's 2007 study had shown there was evidence to support a "qualified claim that 5-hour Energy results in less of a crash than Red Bull and Monster" Energy, the study showed that 5-hour Energy users experienced caffeine-related crashes, and therefore the product was inadequate to support a "no crash" claim.

40. Following the study the group recommended that Defendant discontinue the "no crash claim" based on Defendant's own evidence.

41. Instead, Defendant added an asterisk-like symbol and footnote to its no-crash claim explaining that the user would have "no sugar crash" as the product did not contain sugar.

42. Andrea C. Levine, director of the National Advertising Division, recently reopened the group's review of the "no crash later" claim after Defendant incorrectly asserted in a public statement that the National Advertising Division had found all of Living Essentials' claims to be substantiated. Ms. Levine asserted that Defendant had apparently decided to use only select portions of the report and failed to follow the group's recommendation that they drop the language and instead added language of its choosing. In the event that the company fails to respond or inadequately responds, the National Advertising Division will likely refer the matter to the Federal Trade Commission.

43. Defendant's nationwide advertising campaign for 5-hour Energy has been extensive and comprehensive throughout the Class Period. Defendant has spent millions of dollars conveying the persistently deceptive message that 5-hour Energy is a superior energy product to consumers across the United States.

44. Defendant has orchestrated its deceptive 5-hour Energy advertising campaign by using a variety of media, including television, newspapers, radio, media tours, the Internet, email

blasts, video news releases, point of sale displays, and prominently on the product's packaging. As a result of its pervasive and uniform advertising campaign, Defendant has elevated 5-hour Energy to become one of the top sellers in the energy drink category.

45. As a result of Defendant's deceptive and misleading messages and omissions about 5-hour Energy, conveyed directly through its marketing and advertising campaigns, Defendant has been able to charge a significant price premium for 5-hour Energy over traditional caffeine products, which it has convinced consumers to pay for a purportedly superior product, as its advertising misleadingly conveys.

46. Defendant's false and misleading representations as to the Product's superior energy producing ingredients have been – and continue to be – material to consumers, including Plaintiff and other members of the Class, and Defendant knows that its misleading representations are material in nature.

The False, Misleading, and Deceptive Claims

47. Defendant's claims about 5-hour Energy's effectiveness in increasing cognitive function and superiority over similar products or a cup of coffee are false, deceptive, unfair, and unconscionable because there is not sufficient, competent and/or reliable scientific evidence and/or substantiation for 5-hour Energy's effectiveness and superiority claims when the Product is used by the consuming public in real world settings.

48. There is no competent, credible, and reliable scientific evidence that is sufficient in quality and quantity, based on standards generally acceptable in the relevant scientific fields, when considered in light of the entire body of relevant and reliable scientific evidence, to substantiate its claims regarding the superior effectiveness of 5-hour Energy.

49. Defendant's purported scientific evidence is neither competent nor reliable. Defendant does not possess any tests, analyses, research, or studies that have been conducted and evaluated in an objective manner. To the contrary, Defendant's claims appear to be based only on a single, in-house study, in which Defendant's product is compared against a placebo which Defendant has failed to describe.

Health Related Concerns

50. In December 2012, the nonprofit Center for Science in the Public Interest ("CSPI") issued a warning to consumers due to Living Essentials' self-serving attempt in a web advertisement to imply that CSPI and director Michael Jacobson had endorsed the safety of 5-hour Energy.⁷

51. In fact, the CSPI stated that 5 hour Energy could be linked to insomnia, anxiety, reduced fertility, as well as the more serious, life threatening events, as reported by the New York Times due to the interactions and blend of chemicals in 5-hour Energy.

52. Director Jacobson even went so far as to advise consumers not to use 5-hour Energy. The CSPI warning quotes Senator Durbin who stated that Defendant's "ad campaign was misleading and should be stopped.," and that the "amount of caffeine and other additives in many of these energy drinks is way in excess of what is health for children and adolescents". Additionally, Representative Edward Markey recommended that "all Americans, particularly younger ones, should be cautious before consuming them."

53. As discussed herein, Defendant's national advertising campaign for 5-hour Energy targets children, adolescents, and young adults.

⁷ <http://cspinet.org/new/201212051.html> (last visited January 19, 2013)

54. A study titled Health Effects of Energy Drinks on Children, Adolescents and Young Adults, made the following conclusions with respect to the supplements:⁸

- a. Energy drinks have no therapeutic benefit, and both known and unknown pharmacology of various ingredients, combined with reports of toxicity, suggest that these drinks may put some children at risk for serious adverse health effects;
- b. Typically, energy drinks contain high levels of caffeine, taurine, and guarine, which have stimulant properties and cardiac and hematologic activity, but manufacturers claim that energy drinks are nutritional supplements which shields them from the caffeine limits imposed on sodas and the safety testing and labeling required of pharmaceuticals;
- c. Other ingredients vary, are understudied, and are not regulated;
- d. Youth-aimed marketing and risk taking adolescent development tendencies combine to increase over-dose potential;
- e. High consumption is suggested by self-report surveys but is under documented in children (deleterious associations with energy drink consumption have been reported globally in case reports and popular media); and
- f. Interactions between compounds, additive and dose-dependent effects, long-term consequences, and dangers associated with risky behavior in children remain to be determined.

55. As a result of Defendant's deceptive and misleading messages and omissions about 5-hour Energy, conveyed directly through its marketing and advertising campaigns, Defendant has been able to charge a significant price premium for 5-hour Energy over traditional

⁸ "Health Effects of Energy Drinks on Children Adolescents, and Young Adults", Seifert, Sara, Schaechter, Judith, et al, Pediatrics, February 14, 2011.

caffeine products, which it has convinced consumers to pay for a purportedly superior product, which may in fact pose serious undisclosed health risks.

CLASS ACTION ALLEGATIONS

56. Plaintiff brings this class action on behalf of himself and all others similarly situated as Class Members pursuant to Rule 23 of the Federal Rules of Civil Procedure.

57. Plaintiff seeks to represent a “National Class” defined as follows:

All United States residents who purchased 5-hour Energy excluding Defendant, Defendant’s officers, directors, and employees, Defendant’s subsidiaries, those who purchased the products for the purpose of resale, the Judge to which this case is assigned and the immediate family of the Judge to which this case is assigned.

58. Plaintiff seeks to represent a “Missouri Subclass” defined as follows:

All Missouri residents who purchased 5-hour Energy excluding Defendant, Defendant’s officers, directors, and employees, Defendant’s subsidiaries, those who purchased the products for the purpose of resale, the Judge to which this case is assigned and the immediate family of the Judge to which this case is assigned.

59. Plaintiff is a member of the Class that he seeks to represent. Plaintiff is a United States resident who purchased 5-hour Energy.

60. Plaintiff is a member of the Class that he seeks to represent. Plaintiff is a Missouri resident who purchased 5-hour Energy.

61. The definition of the Class is narrowly tailored so as to include only identifiable Class Members who can be identified through Defendant’s wholesale sale information. The Class has no time limit because, as discussed below, the statute of limitations has been tolled by the Defendant’s fraudulent concealment of the true nature of the Product purchased by Class Members.

62. The proposed Class is so numerous that the individual joinder of all its members, in this or any action, is impracticable. The exact number or identification of the members of the Class is presently unknown to Plaintiff, but it is believed to comprise thousands of Missouri residents, and millions of United States residents, thereby making joinder impractical.

63. Common questions of fact and law exist as to all Class Members and predominate over questions affecting only individual members. These include, but are not limited to, the following:

- a. Whether, in their normal and customary use by consumers, 5-hour Energy works as advertised, marketed, and conveyed to consumers;
- b. Whether, in the course of business, Defendant represented that 5-hour Energy has characteristics, uses, benefits or qualities that it does not have when used in a customary manner by consumers;
- c. Whether the claims Defendant made and is making regarding 5-hour Energy's are unfair or deceptive, specifically, whether 5-hour energy provides five hours of energy with no crash later;
- d. Whether Defendant is supplying 5-hour Energy in accordance with its representations that it contains as much caffeine as a cup of leading premium coffee;
- e. Whether Defendant knew at the time the consumer transactions took place that the consumer would not receive the benefits of increased energy and productivity from the 5-hour Energy that Defendant was claiming the consumer would receive;
- f. Whether Defendant knowingly made a misleading statement in connection with a consumer transaction that the consumer was likely to rely upon to his detriment;
- g. Whether Defendant knew or should have known that the representations and advertisements regarding the 5-hour Energy Drinks were unsubstantiated, false and misleading;
- h. Whether Defendant has breached express warranties in the sale and

marketing of 5-hour Energy, specifically “ five hours of energy” and “no crash later”;

- i. Whether Defendant has been unjustly enriched by the sale of 5-hour Energy to the Plaintiff and Class;
- j. Whether the Plaintiff and the Class members that purchased 5-hour Energy suffered monetary damages and, if so, what is the measure of those damages;
- k. Whether Plaintiff and the Class members are entitled to an injunction, damages, restitution, equitable relief and other relief deemed appropriate and the amount and nature of such relief.

64. Plaintiff’s claims are typical of the claims of the Class Members. Plaintiff and all Class Members purchased 5-hour Energy shots that were designed, tested, manufactured, marketed, advertised, warranted and/or sold, and placed in the stream of commerce by Defendants. Plaintiffs and all other Class Members purchased 5-hour Energy that could not perform anywhere near advertised. The nature of the misrepresentation is the same for the Plaintiff and all Class Members, even if they purchase different types or flavors of 5-hour Energy.

65. The factual bases of Defendant’s misconduct are common to the Class Members and represent a common thread of deceptive advertising and breach of warranty resulting in injury to all Class Members. Plaintiff is asserting the same rights, making the same claims, and seeking the same relief for themselves and all other Class Members. The central question of whether Defendant’s representations are accurate and truthful is common to all Class members and predominates over all other questions, legal and factual in this litigation.

66. Plaintiff is an adequate representative of the proposed Class because he is a Class

Member and does not have interests that conflict with those of the other Class members he seeks to represent. Plaintiff is represented by experienced and able counsel, who have litigated numerous class-action lawsuits, and Plaintiff's Counsel intend to prosecute this action vigorously for the benefit of the proposed Class. Plaintiff and their Counsel will fairly and adequately protect the interests of the Class Members.

67. A class action is the superior available method for the efficient adjudication of this litigation because:

- a. The prosecution of separate actions by individual members of the Class would create a foreseeable risk of inconsistent or varying adjudications which would establish incompatible results and standards for Defendant;
- b. Adjudications with respect to individual members of the Class would, as a practical matter, be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their own separate interests;
- c. Class action treatment avoids the waste and duplication inherent in potentially thousands of individual actions, and conserves the resources of the courts; and
- d. The claims of the individual class members are relatively small compared to the burden and expense that would be required to individually litigate their claims against Defendant, so it would be impracticable for the members of the Class to individually seek redress for Defendant's wrongful conduct. Even if the members of the Class could afford individual litigation, the court system could not. Individualized litigation creates a potential for inconsistent or contradictory judgments, and increases the delay and expense to all parties and the court system. By contrast, the class action device presents far fewer management difficulties, and provides the benefits of single adjudication, economy of scale, and comprehensive supervision by a single court.

68. A class action for injunctive and equitable relief pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure is also appropriate. Defendant acted or refused to act on grounds generally applicable to the Class thereby making appropriate final injunctive and equitable relief with respect to the Class as a whole. Defendant's actions are generally applicable to the Class as a whole, and Plaintiff, on behalf of the Class, seeks damages and injunctive relief described herein. Moreover, Defendant's systemic policy and practices make declaratory relief with respect to the Class as a whole appropriate.

FRAUDULENT CONCEALMENT

69. Defendant was and remains under a duty to Plaintiff and the Class to disclose the facts, as alleged herein. The duty to disclose the true facts arises because, as the manufacturers, Defendant is in a superior position to know the true character and quality of their products and the true facts are not something that Plaintiff and Class members could, in the exercise of reasonable diligence, have discovered independently prior to purchasing 5-hour Energy.

70. The facts concealed and/or not disclosed to Plaintiff and the Class, specifically, the crash consumers experience after drinking 5-hour Energy, is a material fact in that a reasonable person would have considered important in deciding whether or not to purchase (or to pay the same price for) 5-hour Energy.

71. Defendant intentionally concealed and/or failed to disclose the shortcomings of 5-hour Energy for the purpose of inducing Plaintiff and Class members to act thereon.

72. Plaintiff and Class members justifiably acted upon, or relied upon to their detriment, the concealed and/or non-disclosed material facts as evidenced by their purchase of 5-

hour Energy. Had they known of the true character and quality of 5-hour Energy, Plaintiff and Class members would not have purchased (or would have paid less for) the Product.

73. As a direct and proximate cause of Defendant's misconduct, Plaintiff and Class members have suffered actual damages. Defendant's conduct has been and is malicious, wanton and/or reckless and/or shows a reckless indifference to the interests and rights of others.

CAUSES OF ACTION

COUNT I

VIOLATION OF THE MISSOURI MERCHANDISING PRACTICES ACT (On Behalf of the Missouri Subclass)

81. Plaintiff, individually, and on behalf of all others similarly situated, adopts and incorporates by reference all allegations contained in the foregoing paragraphs as though fully set forth herein.

82. The Missouri Merchandising Practices Act, Mo. Ann. Stat. § 407.020 (West 2010), provides, in part, as follows:

The act, use or employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, unfair practice or the concealment, suppression, or omission of any material fact in connection with the sale or advertisement of any merchandise in trade or commerce . . . in or from the state of Missouri, is declared to be an unlawful practice . . . Any act, use or employment declared unlawful by this subsection violates this subsection whether committed before, during or after the sale, advertisement or solicitation.

83. This action is brought to secure redress for the unlawful, deceptive and unfair trade practices perpetrated by Defendant on behalf of Plaintiff and the Class members. Defendant's business practices in its advertising, marketing, packaging, labeling and sales of 5-hour Energy shots as unique and superior products justifying substantially higher prices over

alternative sources of “energy” such as coffee, is an unconscionable, unfair, and deceptive act or practice and constitutes multiple, separate violations of Mo. Ann. Stat. § 407.020.

84. Defendants engaged in the unlawful practices set forth in this Complaint in the sale of merchandise in trade or commerce.

85. Plaintiff and members of the Class purchased Defendant’s Products primarily for personal, family, or household purposes.

86. Defendant’s concealment, misrepresentations and/or omissions as set forth in this Complaint are material in that they relate to matters which are important to consumers or are likely to affect the purchasing decisions or conduct of consumers, including Plaintiff and members of the Class regarding Defendant’s products.

87. In violation of the MMPA, Defendants employed fraud, deception, false promise, misrepresentation and the knowing concealment, suppression, or omission of material facts in their sale and advertisement of 5-Hour Energy in the State of Missouri.

88. Defendant engaged in the concealment, suppression, misrepresentations and/or omission of the aforementioned material facts with the intent that others, such as Plaintiff, Class Members, and/or the general public would rely upon the concealment, suppression, misrepresentation and/or omission of such material facts and purchase 5-Hour Energy.

89. The concealment, suppression, misrepresentation and/or omission of the aforementioned material facts had the capacity to, was reasonably foreseeable that it would, and did so deceive a substantial portion.

90. At all times material hereto, it was reasonably foreseeable that Plaintiff, and others similarly situated, would rely on the false and fraudulent advertising, marketing, and packaging made by Defendant. Said reliance has caused Plaintiff, and others similarly situated, to be damaged.

91. Plaintiff and Class Members would not have purchased 5 Hour Energy absent the concealment, suppression, or omission of the aforementioned material facts

92. Plaintiff, and others similarly situated, has suffered actual and ascertainable loss of money and damages as an actual and proximate result of Defendant's intentional misrepresentation and concealment of material facts.

93. Defendant's conduct described herein actually and proximately caused Plaintiff and the Class members to suffer damages as described throughout this Complaint.

94. Plaintiff and the members of the Class are entitled to recover their actual damages, attorneys' fees, and injunctive or other equitable relief, pursuant to Missouri law, including Mo. Ann. Stat. § 407.025.

95. Furthermore, Defendants' unlawful conduct set forth in this Complaint was and is wanton, willful and outrageous, and manifests a reckless disregard for the consequences of Defendant's actions and for the rights of Plaintiff and members of the Class and warrants an award of punitive damages to deter Defendants, and others in similar circumstances, from committing such actions in the future.

COUNT II

BREACH OF EXPRESS WARRANTY

(On Behalf of the National Class or, alternatively, the Missouri Subclass)

96. Plaintiff, individually, and on behalf of all others similarly situated, adopts and incorporates by reference all allegations contained in the foregoing paragraphs as though fully set forth herein.

97. Plaintiff and each member of the Class formed a contract with Defendant at the time they purchased a 5-hour ENERGY shot. The terms of the contract included the promises and affirmations of fact made by Defendant on the label of each of Defendant's 5-hour ENERGY shots, specifically hours of energy now with no crash later. Defendant's branding, labels, and advertising constitute express warranties, and are part of the basis of the bargain and a standard contract between Plaintiff, members of the Class, and Defendant.

98. Alternatively, privity was established between Plaintiff and members of the Class and Defendant and/or its agents because Defendant was substantially if not completely responsible for directly promoting and marketing Defendant's 5-hour ENERGY branded shots to Plaintiff and the Class Member which led to Plaintiff and Class member's purchase of the product. By virtue of this direct promotion and marketing to Plaintiff, Defendant expressly warranted 5-hour ENERGY's attributes and benefits to members of the Class.

99. Defendant breached the terms of the express warranty by failing to provide a product that provided the benefits promised.

100. Plaintiffs relied on Defendant's affirmations of specific benefits and superior performance of alternative, less expensive, but equally effective sources of caffeine.

101. As a result of Defendant's breaches of its express warranties, Plaintiff and the Class have been damaged in an amount to be proven at trial.

102. By reason of the foregoing, Plaintiff, on behalf of herself and all others similarly situated, demand judgment against Defendant for damages, including compensatory, incidental and consequential damages (excepting damages for personal injuries) for itself and each member of the Classes.

COUNT III

UNJUST ENRICHMENT

(On Behalf of the National Class or, alternatively, the Missouri Subclass)

103. Plaintiff, individually, and on behalf of all others similarly situated, adopts and incorporates by reference all allegations contained in the foregoing paragraphs as though fully set forth herein.

104. Plaintiff conferred a tangible economic benefit upon Defendants by purchasing 5-hour energy products. Plaintiff and members of the Class would have expected remuneration from Defendant at the time this benefit was conferred had they known that the Product did not perform as promised and has been widely criticized by government officials and scientists.

105. As a result of Defendant's deceptive, fraudulent, and misleading packaging, advertising, marketing and sales of its 5-hour energy products, Defendant was enriched, at the expense of the Plaintiff and each member of the Class, through the payment of the purchase price for 5-hour energy products.

106. Under the circumstances, it would be against equity and good conscious to permit Defendant to retain the ill-gotten benefits that it received from Plaintiff and members of the Class in light of the fact that the 5-hour energy products purchased by Plaintiff and members of the Class were not as Defendant purports them to be, as set forth more fully above.

107. It would thus be unjust and inequitable for Defendant to retain the benefit without restitution or disgorgement of monies paid to Defendant for 5-hour energy products, or such other appropriate equitable remedy as appropriate, to the Plaintiff and other members of the Class.

COUNT IV

FRAUD BY UNIFORM WRITTEN MISREPRESENTATION AND OMISSION **(On Behalf of the National Class or, alternatively, the Missouri Subclass)**

108. Plaintiff, individually, and on behalf of all others similarly situated, adopts and incorporates by reference all allegations contained in the foregoing paragraphs as though fully set forth herein.

109. Defendant intentionally, willfully, falsely, and knowingly uniformly misrepresented material facts in writing that relate to the character and quality of 5-hour Energy. Specifically, Defendant intentionally and willfully misrepresented that 5-hour Energy provides benefit to consumers in addition to that than a caffeine tablet or cup of coffee, and failed to disclose that it poses health risks on websites, in various media advertising, and at point of sale materials disseminated or caused to be disseminated by Defendant.

110. Defendant also made intentional misrepresentations to Class members who sought to have Defendant honor their warranty. Defendant represented to Class members by affirmative misrepresentations and omissions that 5-hour Energy provides benefits over and above what could be achieved by a caffeine tablet or standard cup of coffee even though it has no competent, credible, and reliable scientific evidence that is sufficient in quality and quantity, based on standards generally acceptable in the relevant scientific fields, when considered in light of the entire body of relevant and reliable scientific evidence, to substantiate its claims regarding the superior effectiveness of 5-hour Energy.

111. Defendant's uniform written misrepresentations were made with the intent that the general public, including Plaintiff and Class, would rely upon them. Defendant's representations were made with knowledge of the falsity of such statements, or in reckless disregard of the truth thereof, and gave Defendant an unjust advantage and caused a loss to Plaintiff and Class Members. The Defendant's claims of superior effectiveness are so central to the consumer's selection of 5-hour Energy that the Defendant knew and intended that consumers would rely on those misrepresentations in determining whether to purchase 5-hour Energy instead of the less expensive alternatives.

112. In actual and reasonable reliance upon Defendant's misrepresentations, Plaintiff and Class members purchased 5-hour Energy for its intended and reasonably foreseeable purposes. Plaintiff and Class members were unaware of the true facts concerning the effectiveness and health risks of 5-hour Energy, which were concealed from the Plaintiff and the Class Members. If Plaintiff and Class members had been aware of the concealed facts, Plaintiff and Class members would not have purchased 5-hour Energy at all or for the premium price paid. Plaintiff's and Class members' reliance on the representations of the Defendant was reasonable.

113. Defendant misrepresented material facts with the intent to defraud Plaintiff and the Class members. Plaintiff and the Class members were unaware of the intent of Defendant and relied upon these representations in agreeing to purchase 5-hour Energy.

114. In actual and reasonable reliance upon Defendant misrepresentations, Plaintiff and Class members purchased 5-hour Energy and did not benefit from the Product as represented, the direct and proximate result of which was injury and harm to Plaintiff and Class members because:

- a. they would not have purchased 5-hour Energy if the true facts concerning its effectiveness had been known;
- b. they paid a price premium due to the mislabeling of 5-hour Energy; and
- c. 5-hour Energy did not (and cannot) perform as promised.

COUNT V

INJUNCTIVE RELIEF

(On Behalf of the National Class or, alternatively, the Missouri Subclass)

115. Plaintiff, individually, and on behalf of all others similarly situated, adopts and incorporates by reference all allegations contained in the foregoing paragraphs as though fully set forth herein.

116. Defendant has refused to act on grounds generally applicable to the Injunctive Relief Plaintiffs and other members of the Injunctive Relief States Classes, thereby making final injunctive relief appropriate.

117. Defendant's conduct, as more fully set forth herein, both in the past and through the present day, has demonstrated a willful disregard for proven scientific facts in a clear attempt to sell a product that is no more effective than other, less expensive caffeine products such as coffee.

118. Defendant persists in its deceptive and unfair marketing and sales practices concerning the Product to the detriment of consumers across the country, including the Injunctive Relief States Class.

119. If Defendant is allowed to continue with these practices, consumers-the Injunctive Relief Plaintiffs and other members of the Injunctive Relief States Class-will be irreparably harmed in that they do not have a plain, adequate, speedy, or complete remedy at law to address all of the wrongs alleged in this Complaint, unless injunctive relief is granted stop Defendant's improper conduct concerning its marketing and sale of the Product.

120. The Injunctive Relief Plaintiff and the other members of the Injunctive Relief States Class, is therefore, entitled to an injunction requiring Defendant its unfair and deceptive practices relating the marketing sale of the Product, as alleged herein, including the effects thereof.

121. The Injunctive Relief Plaintiff seeks a Court Order requiring Defendant to do the following:

- a. discontinue advertising, marketing, packaging and otherwise representing its 5-hour energy products as being superior to conventional caffeine products;
- b. undertake an immediate public information campaign to inform the Injunctive Relief Plaintiff and the other members of the Injunctive Relief State Class, of the truth about Defendant's products and Defendant's prior practices relating thereto; and
- c. correct any erroneous impression the Injunctive Relief Plaintiff and the other members of the Injunctive Relief States Class, may have derived concerning the nature, characteristics, or qualities of 5-hour energy, including without limitation, the placement of corrective advertising and providing written notice to the general public.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, William Forrest, individually and on behalf of other members of the Classes described in this Complaint, respectfully requests that:

- A. the Court certify the Classes pursuant to Fed. R. Civ. P. 23(b)(2) and (b)(3), and adjudge Plaintiff and his counsel to be an adequate representative thereof;
- B. the Court enter and Order requiring Defendant to pay Plaintiff's and other members of the Classes' economic, monetary, actual damages (including multiple damages), consequential, compensatory, or statutory damages, whichever is greater; and, awarding Plaintiff and the other members of the Classes exemplary damages, to the extent permitted under the laws of each of the states implicated in this action;

C. the Court enter an Order awarding restitution and disgorgement of Defendant's revenues arising from its conducts alleged above, or any other appropriate remedy in equity, to Plaintiff and other members of the Classes;

D. the Court enter an Order awarding injunctive relief as permitted by law or equity, including enjoining Defendant from continuing the unlawful practices set forth above; directing Defendant to cease its deceptive and misleading marketing campaign concerning its 5-hour Energy products, and to disgorge all monies Defendant acquired by means of any act or practice declared by this Court to be wrongful;

E. the Court enter and Order awarding Plaintiff, individually and on behalf of the other members of the Classes, their expenses and costs of suit, including reasonable attorneys' fees and reimbursement of reasonable expenses, to the extent provided by the law;

F. the Court enter an Order awarding to Plaintiff individually and on behalf of the other members of the Classes, pre- and post-judgment interest, to the extent allowable ;
and

G. for such other and further relief as may be just and proper.

JURY DEMAND

Pursuant to Federal Rules of Civil Procedure 38(b), Plaintiff, William Forrest, hereby demands a trial by jury of all claims in this Class Action Complaint so triable.

DATED: January 25, 2013

Respectfully submitted,

By: /s/ Eric D. Holland

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