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FILED

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

STATE OF OREGON, *ex rel.* ELLEN F.
ROSENBLUM, in her official capacity as
Attorney General for the State of Oregon,

Plaintiff,

v.

LIVING ESSENTIALS, LLC, a Michigan
limited liability company, and INNOVATION
VENTURES, LLC, a Michigan limited
liability company,

Defendants.

Case No.

COMPLAINT

Oregon Unlawful Trade Practices Act
ORS 646.605 *et seq.*

**CLAIM NOT SUBJECT
TO MANDATORY ARBITRATION**

ORS 20.140 - State fees deferred at filing

INTRODUCTION

This is a lawsuit by Ellen F. Rosenblum, Attorney General of Oregon, against Living Essentials, LLC and Innovation Ventures, LLC for violations of Oregon's Unlawful Trade Practices Act ("UTPA"). Defendants have repeatedly violated the UTPA by making deceptive promotional claims about their 5-hour ENERGY® products, claims that are false, misleading, and/or unsubstantiated by competent, reliable scientific evidence. Through ubiquitous print, television, Internet, and radio advertising, Defendants have claimed that 5-hour ENERGY® contains a unique blend of ingredients that provide consumers with benefits such as energy, alertness, and focus, when in reality the only significant effect from the product comes from its concentrated dose of caffeine. The other ingredients do not provide any of the benefits Defendants say they do. Defendants have also misleadingly claimed that the product does not cause consumers to experience a "crash", deceptively claimed that 5-hour ENERGY® has been

1 recommended by doctors in a way that it has not, and implied that the product is appropriate for
2 adolescents age 12 and older.

3 As a result of their repeated violations of the UTPA, Defendants are liable for civil
4 penalties, injunctive relief, restitution, disgorgement, and other appropriate relief, as set forth
5 below.

6 **PARTIES**

7 1. Ellen F. Rosenblum is the Attorney General for the State of Oregon and sues in her
8 official capacity pursuant to ORS 646.605(5) and ORS 646.632(1).

9 2. Defendant Living Essentials, LLC (“LE”) is a privately-held limited liability
10 company organized and existing under the laws of the State of Michigan with its principal place
11 of business at 38955 Hills Tech Dr., Farmington Hills, MI 48331. LE markets energy
12 supplements to wholesale dealers and retail markets in the United States. LE manufactured,
13 marketed, distributed and advertised and sold 5-hour ENERGY® at all times relevant hereto. LE
14 sells approximately 9 million bottles of 5-hour ENERGY® per week in the United States. Its
15 annual sales are about \$1 billion per year. At all relevant times, LE has done substantial business
16 in Oregon. LE is a wholly-owned subsidiary of Innovation Ventures, LLC.

17 3. Defendant Innovation Ventures, LLC (“IV”) is a privately held limited liability
18 company that is organized and existing under the laws of the State of Michigan, with its principal
19 place of business at 38955 Hills Tech Dr., Farmington Hills, MI 48331. IV developed a formula
20 for 5-hour ENERGY® in 2004 and is the worldwide, exclusive licensee of the 5-hour
21 ENERGY® trademark, copyright and trade dress. IV owns a controlling interest in LE. In court
22 pleadings, IV sometimes identifies itself as “Innovation Ventures, LLC d/b/a/ Living Essentials.
23 LLC.” At all relevant times, IV has done substantial business in Oregon.

24 4. All acts committed by LE were done in concert with, and for the benefit of, IV.
25 Similarly, all acts committed by IV were done in concert with, and for the benefit of, LE.

26 5. IV and LE are sometimes collectively referred to herein as “Defendants.”

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10. Venue is proper pursuant to ORS 646.632(1) and ORS 14.080 because Defendants are alleged to have committed violations of the UTPA in Multnomah County and conduct regular business in Multnomah County.

14. Violations of the UTPA are willful if a person knew or should have known that their conduct was a violation of the law. ORS 646.605(10).

1 **FACTS**

2 **Background**

3 15. Defendants manufacture, market, and sell 5-hour ENERGY®, a 1.93 ounce
4 “energy shot.” 5-hour ENERGY® was introduced by LE in 2004, and competes in the energy
5 drink market. It has been identified and marketed by Defendants as a dietary supplement.

6 16. Bottles of 5-hour ENERGY® are sold individually as well as in 2, 6, 12, and 24-
7 packs. An individual bottle sells for approximately \$2.99.

8 17. There are three types of 5-hour ENERGY®: Original, Extra Strength, and
9 Decaffeinated. According to Defendants, Original 5-hour ENERGY® contains “caffeine equivalent
10 to a cup of the leading premium coffee,” Extra Strength 5-hour ENERGY® contains “caffeine
11 equivalent to 12 ounces of the leading premium coffee,” and Decaf 5-hour ENERGY® contains
12 “about as much caffeine as a half a cup of decaffeinated coffee.”

13 18. In addition to caffeine, 5-hour ENERGY® contains vitamins and a so-called
14 “Energy Blend.” According to the ingredient statement on the product label, the “Energy Blend”
15 for the Original and Extra Strength formulations is comprised of (in order of decreasing prevalence)
16 taurine, glucuronic acid, malic acid, N-acetyl L-tyrosine, L-phenylalanine, caffeine, and citicoline.
17 The “Energy Blend” for the Decaf formulation is comprised of (in order of decreasing prevalence)
18 taurine, choline, glucuronic acid, N-acetyl L-tyrosine, L-phenylalanine, malic acid, and caffeine.

19 19. Despite making statements about the benefits provided by the “Energy Blend”,
20 Defendants do not disclose the exact amounts of the ingredients it contains, except for the caffeine.

21 20. 5-hour ENERGY® is sold at over 100,000 retail locations in the U.S, including
22 convenience stores, generally near the checkout aisle or cash register. It is sold at numerous retail
23 stores throughout Oregon. It is often placed near the impulse buying area located in the checkout
24 aisle—usually near products like baseball cards, sugary bubble gum, and candy that appeal to
25 children or adolescents. 5-hour ENERGY® is also sold online at www.5hourenergy.com, as well
26 as at other online retailers.

1 21. Defendants sell over 9 million bottles of 5-hour ENERGY® per week. Annual
2 sales of 5-hour ENERGY® are over \$1 billion. According to a December 28, 2012 complaint
3 filed by Defendants in the United States District Court for the Eastern District of New York, over
4 1.5 billion bottles of 5-hour ENERGY® had been manufactured and sold by the end of 2012.
5 Defendants also stated that they had already spent \$500 million on advertising and promoting 5-
6 hour ENERGY® in order to maintain its market share.

7 22. Defendants market, advertise, distribute, and sell 5-hour ENERGY® to
8 consumers throughout Oregon and across the U.S. They have disseminated their advertisements
9 on the radio, on television, on the Internet, and in print advertisements in Oregon and across the
10 U.S. via a massive advertising campaign that has not let up since 2004. As is discussed herein,
11 Defendants make a number of claims that cause consumers to believe that 5-hour ENERGY®
12 has attributes it does not have, and for which they lack competent and reliable scientific
13 evidence.

14 **Safety concerns regarding 5-hour ENERGY®**

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

20 24. Questions about the safety of 5-hour ENERGY® have been serious enough to
21 prompt investigations by the FDA and members of Congress. *See* Michelle Castillo, *FDA*
22 *Investigating 13 Deaths Tied to 5-hour ENERGY®*, CBS NEWS, available at
23 www.cbsnews.com/news/fda-investigating-13-deaths-tied-to-5-hour-energy/; Report from Staff
24 of Congressman Ed Markey, Senator Richard Durbin, and Senator Richard Blumenthal, *What's*
25 *All the Buzz About? A Survey of Popular Energy Drinks Finds Inconsistent Labeling*,
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1 [http://www.markey.senate.gov/documents/04-10-13%20-](http://www.markey.senate.gov/documents/04-10-13%20-%20Energy%20Drink%20report%20FINAL.pdf)
2 [%20Energy%20Drink%20report%20FINAL.pdf](http://www.markey.senate.gov/documents/04-10-13%20-%20Energy%20Drink%20report%20FINAL.pdf).

3 **Defendants' deceptive claims regarding 5-hour ENERGY®**

4 25. Defendants aggressively market 5-hour ENERGY® in Oregon in an effort to
5 maintain and/or grow their market share in the face of competition in the energy drink market.
6 Much of Defendants' marketing involves a variety of deceptive claims about 5-hour ENERGY®.
7 These misleading promotional claims fall into four categories: (1) claims regarding what 5-hour
8 ENERGY® does; (2) claims regarding whether 5-hour ENERGY® consumers experience a
9 "crash"; (3) claims regarding whether 5-hour ENERGY® is recommended by doctors; and (4)
10 claims that 5-hour ENERGY® is appropriate for adolescents age 12 and older.

11 26. These promotional claims are deceptive because they are false, misleading, and/or
12 unsubstantiated by competent and reliable scientific evidence. Each of the four categories of claims
13 is described in more detail below.

14 **I. Deceptive claims regarding what 5-hour ENERGY® does**

15 27. Defendants have made a series of deceptive claims that the non-caffeine ingredients
16 contained in the current or previous formulations of 5-Hour ENERGY® -- vitamins, amino acids,
17 enzymes and other ingredients -- somehow provide consumers with benefits such as extra energy,
18 alertness, or focus. These claims are deceptive because these ingredients do not, in fact, provide any
19 of the claimed benefits, and because Defendants have no competent and reliable scientific evidence
20 to show that they do. In reality, any meaningful effect from using 5-hour ENERGY® as directed
21 comes only from a concentrated shot of caffeine. 5-hour ENERGY® is simply a caffeine delivery
22 device, and in its Decaf formulation, it is not even that.

23 28. These fundamental misrepresentations regarding how 5-hour ENERGY® works fall
24 into three categories:

- 25 a. Claims that the proprietary combination of vitamins,
26 enzymes, amino acids, and other non-caffeine ingredients in
Original or Extra Strength 5-hour ENERGY® provide
consumers with benefits like extra energy, alertness, or focus;

- 1 b. Claims that Original and Extra-Strength 5-hour ENERGY®
2 are superior to an equivalent amount of caffeine from coffee
3 or another source in providing consumers with benefits like
4 energy, alertness, or focus; and
5 c. Claims that Decaf 5-hour ENERGY® provides consumers
6 with any promoted benefits aside from the biochemical
7 stimulation caused by its caffeine content.

8 Each of these deceptive claims is described in more detail below.

9 **A. Deceptive claims that 5-hour ENERGY®’s non-caffeine ingredients
10 provide benefits like extra energy, alertness, or focus (*Original & Extra
11 Strength*)**

12 29. Defendants misrepresent how 5-hour ENERGY® works by claiming that non-
13 caffeine ingredients in Original and Extra Strength formulations – vitamins, enzymes, amino acids
14 and other ingredients – somehow work to provide consumers with benefits like extra energy,
15 alertness, and/or focus. This is deceptive because the non-caffeine ingredients in Original and Extra
16 Strength 5-hour ENERGY® in fact do not provide any of the claimed benefits, and because
17 Defendants have no competent and reliable scientific evidence to support these claims. Any of the
18 claimed effects of Original or Extra Strength 5-hour ENERGY® come from their caffeine content,
19 and nothing else. There is no competent and reliable scientific evidence that the other ingredients in
20 5-hour ENERGY®, when taken as directed, have any meaningful effect.

21 30. 5-hour ENERGY® advertisements – print, Internet, television, and radio – all carry
22 the same essential message: that 5-hour ENERGY® provides consumers with energy, alertness, and
23 focus. These effects are consistently attributed to the non-caffeine ingredients in the product. For
24 example, Defendants claim 5-hour ENERGY® is “packed with B- vitamins for energy and amino
25 acids for focus,” and “enzymes to help you feel it faster.”

26 31. In reality, both 5-hour ENERGY® and 5-hour ENERGY® Extra Strength are
 concentrated shots of caffeine in a bottle, and the only ingredient that can contribute to the claimed
 effects is that concentrated dose of caffeine, a commonly-used stimulant. Defendants lack

competent and reliable scientific evidence that the non-caffeine ingredients in Original and Extra Strength 5-hour ENERGY® have any meaningful effect on the body when the product is used as directed.

32. The ingredients in 5-hour ENERGY® are reflected on the back of the bottle. The ingredients in the “Energy Blend” are likewise identified on the bottle, although not the amounts thereof, because Defendants have asserted that the “Energy Blend” 5-hour ENERGY® is a secret, “formulated from a proprietary recipe of vitamins and amino acids.”

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



5-hour ENERGY® Original

Supplement Facts	
Serving Size 1.93 fl. oz.	
Amount Per Serving	% Daily Value
Niacin (as Niacinamide) 30mg	150%
Vitamin B6 (as Pyridoxine Hydrochloride) 40mg	2000%
Folic Acid 400mcg	100%
Vitamin B12 (as Cyanocobalamin) 500mcg	8333%
Sodium 18mg	<1%
Energy Blend 1870mg	†
Taurine, Glucuronic acid (as or from glucuronolactone), Malic Acid, N-Acetyl L-Tyrosine, L-Phenylalanine, Caffeine, Citicoline	
†Daily value not established.	

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



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



5-hour ENERGY®
Extra Strength

Supplement Facts	
Serving Size 1.93 fl. oz.	
Amount Per Serving	% Daily Value
Niacin (as Niacinamide) 40mg	200%
Vitamin B6 (as Pyridoxine Hydrochloride) 40mg	2000%
Folic Acid 400mcg	100%
Vitamin B12 (as Cyanocobalamin) 500mcg	8333%
Sodium 18mg	<1%
Energy Blend 2000mg	‡
Taurine, Glucuronic acid (as or from glucuronolactone), Malic Acid, N-Acetyl L-Tyrosine, L-Phenylalanine, Caffeine, Citicoline	
‡Daily value not established.	

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



35. As shown above, the vitamin amounts in 5-hour ENERGY® equal or well exceed 100% of the % Daily Value recommended by the FDA. Defendants claim that these mega-doses of vitamins (including 8333% of the recommended daily allowance of Vitamin B12 and 2000% of the recommended daily allowance of Vitamin B6), coupled with 5-hour ENERGY®'s "Energy Blend" create the "alert productive feeling you want" because the product "contains a powerful blend of B-vitamins for energy and amino acids for focus."

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

-Tagline: "It's all about focus" (print)

"To get in the zone-no matter what you're doing-try 5-hour ENERGY®. It contains the powerful blend of B-vitamins for energy, and amino acids for focus. The two-ounce shot takes seconds to drink and in minutes you're feeling bright, alert, and ready for action. And the feeling lasts for hours-without the crash or jitters."

-Tagline : “How to survive your longest day” (print)

“With 5-hour ENERGY® you can leave grogginess behind and sail through the most demanding shifts without feeling jittery, tense or crashing. That’s because 5-hour ENERGY® is packed with B-vitamins for energy, and amino acids for a sharp focused mind. There’s zero sugar and only eight calories. The two-ounce bottle takes seconds to drink and in minutes you’re feeling awake, alert and productive. And that feeling lasts for hours.

-Tagline: “From don’t want to to can’t stop me” (print)

“The blend of B-vitamins, amino acids, nutrients and caffeine in 5-hour ENERGY® will give you the bright, alert feeling you need to really get into it”

-Tagline: Why do energy drinks make you crash? (television)

“Why do energy drinks make you crash? One minute you’re wired up, the next you feel worse than before. The answer is large amounts of sugar and caffeine.[...] With 5-hour ENERGY®, you can leave grogginess behind and sail through your day without feeling jittery, tense, or you know [crash]. That’s because 5-hour ENERGY® contains a powerful blend of B-vitamins for energy, amino acids for focus and better mood, and enzymes to help you feel it faster. [...] Hours of energy now, no crash later.”

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

Some people, maybe you, need a lot of extra energy It’s the energy shot for extra busy, extra hard working people that need a big boost of extra energy.

Extra Strength 5-hour ENERGY® features a beefed up energy blend and a cool new look. It contains as much caffeine as 12 ounces of premium coffee. Like original 5-hour ENERGY® shots, Extra Strength 5-hour ENERGY® contains zero sugar and 4 calories.

38. While Defendants’ advertisements vary in the activities depicted, the misrepresentations that 5-hour ENERGY® provides “B-vitamins for energy and amino acids for focus” are consistent. However, aside from the effect from the caffeine present, Defendants’ claims are untrue, and Defendants have no competent and reliable scientific evidence to support their claims that the other ingredients in Original or Extra Strength 5-hour ENERGY® contribute in any meaningful way extra energy, alertness, or focus.

1 39. In fact, the vitamins and the amino acids contained in 5-hour ENERGY® are
2 typically present in the normal diet of an otherwise healthy individual; amounts consumed in excess
3 of bodily needs are typically excreted. Describing normal metabolic functions of nutrients, then
4 claiming that mega-doses of those nutrients will cause consumers to function at an enhanced level is
5 false, and is not supported by competent and reliable scientific evidence.

6 40. In addition, the “RECOMMENDED USE” statement on the bottles for Original and
7 Extra Strength 5-hour ENERGY® and on the 5-hour ENERGY® website directs consumers to
8 drink “one half (1/2) bottle for moderate *energy*. Drink one whole bottle for *maximum energy*.”
9 [emphases added]. This is further evidence that the only ingredient providing any claimed effect is
10 caffeine, because it is the only ingredient that consumers meaningfully increase their intake of by
11 drinking the second half of the bottle. The other ingredients are already in surplus amounts, even in
12 a half-bottle amount.

13 41. The Chief Executive Officer of LE and 5-hour ENERGY®’s founder, Manoj
14 Bhargava, has insisted that the purported beneficial effects of 5-hour ENERGY® are the result of
15 the non-caffeine ingredients, and that the caffeine is there simply to help the body absorb the other
16 ingredients. In an April 2012 interview with New Delhi Television, Mr. Bhargava stated:

17 **NDTV:** So what’s in it without divulging trade secrets?

18 **Manoj Bhargava:** No, actually it’s right on the label. It’s basically
19 nutrients that make you focus.

20 **NDTV:** And you’ve said “it’s not an energy drink, it’s a focus
21 drink,” right? So what is it? Because you did arrive in a market
22 where Red Bull for example already existed. So you know
23 everybody’s notions back then of an energy drink. So how did you
24 think that this would be different?

25 **Manoj Bhargava:** Well look I found it at one place.

26 **NDTV:** At a natural products fair?

Manoj Bhargava: Yeah and I thought “Wow, this is amazing.” So I
could sell this and so I figured it out. Basically what it has in it is
brain nutrients, for brain health. So there is caffeine in it, *but the*
purpose of caffeine is to get everything else absorbed. Most of the
people don’t know that one of the great qualities of caffeine is it

1 *allows you to absorb nutrients and it does it quickly, and so when it*
2 *does it quickly, you focus and when you focus you think you have*
3 *energy.” (emphasis added).*

4 42. These claims are misleading because in fact, as is the case with caffeinated 5-hour
5 ENERGY®, adequate levels of the vitamins and amino acids contained in Decaf 5-hour
6 ENERGY® are typically available from the diet of an otherwise healthy, well-nourished individual.
7 When excess amounts are consumed, they are typically excreted. Moreover, Defendants have no
8 competent and reliable scientific evidence to support their claims that the mega-doses of vitamins
9 and the amino acids in Decaf 5-hour ENERGY® will do anything to provide extra energy,
10 alertness, or focus.

11 **B. Deceptive claims that 5-hour ENERGY® is superior to the equivalent**
12 **amount of caffeine from coffee or another source (*Original and Extra***
13 ***Strength*)**

14 43. Defendants have also misrepresented how 5-hour ENERGY® works by claiming
15 that the Original and Extra Strength versions are superior to consuming an equivalent amount of
16 caffeine from coffee or other sources. This is deceptive because these products are not superior to
17 consuming an equivalent amount of caffeine from coffee or another source, and because Defendants
18 have no competent and reliable scientific evidence to support such superiority claims.

19 44. The advertising and marketing campaign for 5-hour ENERGY® has likewise
20 focused on delivering the message that 5-hour ENERGY® is distinctly different and better than an
21 equivalent amount of caffeine from coffee or another source in providing consumers with extra
22 energy, alertness, or focus. For example, the company’s website states that 5-hour ENERGY® has
23 less caffeine than Starbucks coffee, “plus vitamins and nutrients” and that “It’s the combination that
24 makes it so great”:

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5-hour ENERGY® and caffeine - the facts

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

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

20oz Venti
415mg caffeine

16oz Grande
330mg caffeine

12oz Tall
260mg caffeine

200mg
caffeine

Source: www.starbucks.com



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

Moderate caffeine consumption

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

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

Regulatory Compliance

5-hour ENERGY® complies with

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

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

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

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

Tagline: "Choose Wisely" (television)

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

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

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

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

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

47. Defendants lack competent and reliable scientific evidence to substantiate claims that either Original or Extra Strength 5-hour ENERGY® is different and better than the equivalent amount of coffee or caffeine in providing consumers with extra energy, alertness, and focus. In fact, as stated above, any of the claimed effectiveness of Original or Extra Strength 5-hour ENERGY® is solely related to the concentrated caffeine contained therein.

C. Deceptive claims that Decaf 5-hour ENERGY® provides consumers with any claimed benefits at all (Decaf)

48. Another way in which Defendants misrepresent the way that 5-hour ENERGY® works (or does not work) is by claiming that the Decaf formulation of the product provides any of the promoted benefits, when it does not. These claims are misleading because Decaf 5-hour ENERGY® provides no feeling of extra energy, alertness, or focus. The only ingredient in Defendants' line of products that provides any meaningful effect when taken as directed is caffeine,

1 and the amount of caffeine in Decaf 5-hour ENERGY is insufficient to have a physiological effect
2 in most consumers. These claims are also misleading because Defendants have no competent and
3 reliable scientific evidence to support a claim that any of the other ingredients in Decaf 5-hour
4 ENERGY® provide any of the promoted benefits to consumers.

5 49. Decaf 5-hour ENERGY® was launched by Defendants in or about March 2008.
6 They describe it as “having about as much caffeine as a half cup of decaffeinated coffee.”
7 Defendants misrepresent that there is a benefit to consuming Decaf 5-hour ENERGY®, stating, for
8 example, that it is “designed for people who avoid caffeine, but still need an extra boost to help
9 them function during the day.”

10 50. The 5-hour ENERGY® website touts Decaf 5-hour ENERGY®’s benefits as
11 providing extra energy and alertness, together with its vitamins and amino acids, as follows:

12 **The Only Energy Shot for People Sensitive to Caffeine**

13 Do you find caffeine unpleasant but still need a little extra energy to get
14 through your day? Then try Decaf 5-hour ENERGY® shots. It can provide
15 the alertness* you want without the “caffeine feeling” you don’t. It works
16 gently - with only as much caffeine as a half cup of decaffeinated coffee,
17 and no Niacin. And it has pleasant citrus taste.

18 Like original 5-hour ENERGY® Decaf 5-hour ENERGY® contains B-vitamins
19 and amino acids plus Choline. It is vital to the production of
20 neurotransmitters in the brain that affect memory, intelligence and mood.
21 Choline is present in eggs, soy and meats.

22 51. Prior iterations of the 5-hour ENERGY® website contain similar claims about the
23 benefits of Decaf 5-hour ENERGY®. For example, Defendants’ websites from June 2008, January
24 2009, July 2011, and October 2012 all claimed that Decaf 5-hour ENERGY® provides benefits like
25 alertness and focus, and attributed those benefits to ingredients like B-vitamins, amino acids, and
26 choline.

52. Defendants’ website currently claims that consumers should drink “one whole
bottle” of Decaf 5-hour ENERGY® “for maximum energy.” Defendants have also claimed that

1 Decaf 5-hour ENERGY® provides “Hours of energy now” and that consumers “Feel it in minutes –
2 Lasts for hours.”

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

6 **How are 5-Hour Energy shots different from canned energy**
7 **drinks?**

8 5-Hour Energy is different from canned energy drinks in several
9 ways:

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

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

15 54. All of these types of claims are misleading because in reality, it is only caffeine that
16 provides any claimed effect for 5-hour ENERGY® consumers. As is the case with caffeinated 5-
17 hour ENERGY®, adequate levels of the vitamins and amino acids contained in Decaf 5-hour
18 ENERGY® are typically available from the diet of an otherwise healthy, well-nourished individual.
19 When excess amounts are consumed, they are typically excreted.

20 55. Moreover, Defendants have no competent and reliable scientific evidence to support
21 their claims that the mega-doses of vitamins and the amino acids in Decaf 5-hour ENERGY® will
22 do anything to provide extra energy, alertness, or focus.

23 56. The ingredients in Decaf 5-hour ENERGY® are reflected on the back of the bottle.
24 The “% Daily Value” and the “Energy Blend” appear under the heading “Supplement Facts”. The
25 ingredients in the Energy Blend are likewise identified and are comprised of amino acids and
26 caffeine. The ingredients panel for Decaf 5-hour ENERGY® is as follows:



5-hour ENERGY® Decaf

Supplement Facts

Serving Size 1.93 fl. oz.

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

†Daily value not established.

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



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

58. Defendants point out that “like original 5-hour ENERGY®”, the Decaf product contains B-vitamins and amino acids “plus Choline”, thus implying that the addition of Choline to the Energy blend used for caffeinated 5-hour ENERGY® –and which they describe as “vital to the production of neurotransmitters in the brain that affect memory, intelligence and mood” – will have a positive effect on the user. It does not, and Defendants have no competent and reliable scientific evidence that the choline contained in 5-hour ENERGY® will have any meaningful effect on neurotransmitter production in an otherwise healthy, well-nourished individual.

1 59. One of choline's functions is to serve in the manufacture of neurotransmitters in the
2 human body. A healthy body produces the amount of choline that is necessary to do so. If a person
3 consumes choline orally, the body may use that choline rather than the choline it would otherwise
4 make. The body only makes what it needs. If a person consumes choline orally, the body will
5 simply synthesize less. Thus, there is no evidence or reason to believe that the choline ingested in
6 5-hour ENERGY® has any impact on the amount of neurotransmitters manufactured in the body.

7 **II. Deceptive claims regarding a “crash” associated with 5-hour ENERGY®**

8 60. Defendants have also made misrepresentations regarding whether 5-hour
9 ENERGY® consumers experience a “crash” after using their product. Defendants have
10 misleadingly claimed that the product causes “no crash later” and “hours of energy now, no crash
11 later.”

12 61. Defendants' claim that 5-hour ENERGY® consumers do not experience a crash
13 was false and misleading because Defendants' own clinical evidence showed that in fact, 24% of
14 consumers *did* experience a crash.

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

19 63. In response to NAD's advertising challenge, Defendants provided NAD with a
20 scientific report which Defendants claimed supported the “hours of energy now, no crash later”
21 product tagline. The clinical study that was the subject of that report, which was in Defendants'
22 possession at the time it was making its “no crash claim”, actually failed to support its claim.

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

1 65. Because Defendants' own evidence showed that the "no crash" claim was
2 misleading, NAD advised LE to discontinue it. NAD director Andrea C. Levine told the *The*
3 *New York Times* that "[w]e recommended that the 'no crash' claim be discontinued because their
4 own evidence showed there was a crash from the product."

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

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

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

14 69. 5-hour ENERGY®'s bottle and advertising continued to use the asterisk or cross
15 until early 2013 when it modified the language on its bottle to say "no sugar crash."

16 **III. Misrepresentations involving an "Ask Your Doctor" advertising campaign**

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

20 71. The "Ask Your Doctor" advertising campaign was, in essence, intended to assure
21 consumers that trusted medical experts believe that 5-hour ENERGY® provides benefits and is
22 safe.

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

1 73. The “Ask Your Doctor” campaign
2 was developed by Defendants and approved by
3 CEO Manoj Bhagarva. It included website
4 advertising and 30, 15 and 10 second television
5 advertisements with an authoritative-looking
6 woman sitting beside a large stack of documents.
7 Here is a transcript of the 30-second version of
8 the television advertisement:



9 We asked over 3,000 doctors to review Five-Hour Energy and
10 what they said is amazing. Over 73% who reviewed Five-Hour
11 Energy said that they would recommend a low-calorie energy
12 supplement to their healthy patients who use energy supplements.
13 73%. Five-Hour Energy has four calories and is used over 9
14 million times a week. Is Five-Hour Energy right for you? Ask
15 your doctor. We already asked 3,000.

16 74. The broadcast version misleadingly implied that doctors had recommended Five-
17 hour ENERGY® by name in a way that they had not.

18 75. The online version of the advertisement made the same misleading claims, and
19 also made claims about benefits provided by certain ingredients in 5-hour ENERGY®.

20 76. The “Ask Your Doctor” campaign was misleading in three ways. First, it
21 misleadingly stated the number of doctors that Defendants surveyed and the results of the survey.
22 Second, the survey underlying the campaign used unsound methodology. Third, the
23 advertisement made unsubstantiated claims about the benefits of certain ingredients in 5-hour
24 ENERGY®. Each of these three deceptive aspects of the “Ask Your Doctor” campaign is
25 described in more detail below:

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1 **A. Misleading Statements Regarding the Number of Doctors Surveyed and the**
2 **Results of the Survey**

3 77. The “Ask Your Doctor” advertisements misleadingly claims that Defendants
4 asked over 3,000 doctors to review their product, and that 73% of those doctors specifically
5 recommended 5-hour ENERGY®. That is misleading in multiple ways. Defendants actually
6 surveyed more than 5,500 doctors, 3,000 of whom responded. Of the 3,000 who responded, 73%
7 of *those* doctors said that if their healthy patients *were already using* an energy supplement, then
8 they would recommend a *generic* low-calorie energy supplement.

9 78. The also misleadingly implies that 73% of the 3,000 doctors who were surveyed
10 recommended 5-hour ENERGY® by name. However, only 47% of the doctors who responded
11 to the survey said that they would specifically recommend 5-hour ENERGY®. That fact only
12 appears in exceedingly small print briefly flashed on the screen while the misleading 73% figure
13 is being emphasized by the speaker.

14 **B. Unsound Methodology Underlying the Campaign**

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

20 **C. Unsubstantiated Benefit Claims**

21 80. A central premise of the “Ask Your Doctor” campaign was that 5-hour ENERGY®
22 is different from competitors because of its unique formulation of ingredients. The website
23 component of the campaign included claims about the benefits of specific ingredients in 5-hour
24 ENERGY®.

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26 //

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

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

- 6 • Citicoline, of CDP-Choline, is a water-soluble compound essential for the
7 synthesis of phosphatidyl choline, a constituent of brain tissue.
- 8 • Tyrosine is an amino acid that transmits nerve impulses to the brain. It is
9 present in meat, dairy, fish and grains.
- 10 • Phenylalanine is an essential amino acid that enhances alertness. It is
11 found in dairy products, avocados, legumes, nuts, leafy vegetables, whole
12 grains, poultry and fish.
- 13 • Taurine is a naturally occurring chemical substance. Adult humans have
14 high concentrations of Taurine in white blood cells, skeletal muscles, the
15 heart and central nervous system. It is found in meat, fish and dairy
16 products.
- 17 • Malic Acid is used by the body during the process of converting
18 carbohydrates to energy. The main food source of Malic Acid is fruits,
19 especially apples.
- 20 • Glucuronolactone is a natural metabolite found in the human body. It is
21 produced by the metabolization of glucose in the liver.”

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

26 82. In fact, the claims about the above-described ingredients are misleading because the
ingredients are either insignificant in amount (in the case of citicoline), or are simply non-essential
(in the case of the others) because the substances do not need to be provided by the daily diet. As a
result, the presence of these non-essential ingredients in 5-hour ENERGY® has no impact on focus,
alertness or energy in an otherwise healthy, well-nourished individual.

1 **IV. Misrepresentations regarding suitability for adolescents**

2 83. Defendants have also impliedly claimed that 5-hour ENERGY® is appropriate for
3 use by adolescents age 12 and over, despite lacking competent and reliable scientific evidence for
4 such a claim.

5 84. The bottle for 5-hour ENERGY® products states: “Do not take if you are pregnant
6 or nursing, **or under 12 years of age.**” (emphasis added).

7 85. By stating that 5-hour ENERGY® is inappropriate for children under 12,
8 Defendants are necessarily implying that the product *is* appropriate for adolescents 12 and older.

9 86. The implied claim that 5-hour ENERGY® is appropriate for adolescents age 12 and
10 older is deceptive because Defendants have no competent or reliable scientific evidence to support
11 it. No such evidence exists. The American Academy of Pediatrics (“AAP”) has stated that “the
12 claimed association of energy drinks and ergogenic and performance enhancing effects of the
13 stimulants in energy drinks **has not been adequately studied in adolescents**, who are more
14 susceptible to the negative health effects and who do not need stimulants to support physical
15 activity.” (Emphasis added). Senate Testimony of the American Academy of Pediatrics, July 31,
16 2012 (available at [http://www.aap.org/en-us/advocacy-and-policy/federal-](http://www.aap.org/en-us/advocacy-and-policy/federal-advocacy/Documents/SchneiderSenateCommerceCommitteeEnergyDrinksTestimony_7_31_13.pdf)
17 [advocacy/Documents/SchneiderSenateCommerceCommitteeEnergyDrinksTestimony_7_31_13.pdf](http://www.aap.org/en-us/advocacy-and-policy/federal-advocacy/Documents/SchneiderSenateCommerceCommitteeEnergyDrinksTestimony_7_31_13.pdf))

18 87. The AAP also stated that in addition to that typical cardiac risks presented by
19 caffeine, caffeine presents additional and unique health risks to children. Moreover, when children
20 consume the same amount of caffeine as an average adult, there is an increased risk of toxicity.

21 88. According to the Yale Rudd Center for Food Policy & Obesity, of the top 28
22 beverages ranked by teen (defined as ages 12-17) TV advertisement exposure in 2010, 5-hour
23 ENERGY® ranked number one, outranking drinks like Kool-Aid, Capri Sun, Pepsi or Coke. Teens
24 saw three times as many TV ads for 5-hour ENERGY® in 2010 than for any other beverage
25 analyzed. Yale Rudd Center for Food Policy & Obesity, October 2011, “Sugary Drink Facts:

Evaluating Sugary Drink Nutrition and Marketing to Youth” , available at
http://www.sugarydrinkfacts.org/resources/SugaryDrinkFACTS_Report.pdf .

89. While many of the 5-hour ENERGY® advertisements refer to the fact that the product is intended for “hard working adults” or “hard working people,” the ubiquitous nature of the product, as well as the product advertising on sports channels, at sports events and on night-time television channels such as the Cartoon Network bolster its appeal to adolescents whose active lives and late nights make “energy drinks” attractive.

90. In June of 2013, the American Medical Association called for a temporary ban on marketing stimulant drinks like 5-hour ENERGY® to those under 18, until possible adverse health effects on this demographic can be assessed.

91. Despite the lack of competent, reliable scientific evidence that their products are appropriate for adolescents, and despite the known health risks that caffeine presents to adolescents, Defendants impliedly claim that 5-hour ENERGY® is appropriate for adolescents 12 and older to consume.

CLAIMS FOR RELIEF

92. All of Defendants’ violations of the UTPA set forth below were willful because Defendants knew or should have known that their conduct was in violation of the UTPA.

FIRST CLAIM FOR RELIEF: ORS 646.608(1)(c)

93. ORS 646.608(1)(c) makes it an unlawful trade practice to represent that goods have approval, characteristics, uses, benefits, or qualities that the goods do not have.

Count 1: Misrepresentations Regarding the Effects of Non-Caffeine Ingredients

94. Plaintiff realleges and incorporates each and every allegation contained in the preceding paragraphs as though set forth herein.

95. Defendants represented that Original and Extra Strength 5-hour ENERGY® have characteristics, uses, benefits, and qualities that they do not have when they claimed that the non-

1 caffeine ingredients in those products provide consumers with benefits like energy, alertness, or
2 focus.

3 96. These claims were false and/or misleading, and Defendants lacked competent,
4 reliable scientific evidence to substantiate these claims about Original or Extra Strength 5-hour
5 ENERGY®.

6 97. Each and every instance in which Defendants represented that the non-caffeine
7 ingredients in Original and Extra Strength 5-hour ENERGY® provide consumers with benefits like
8 extra energy, alertness, or focus in an advertisement or promotional claim in Oregon is a separate
9 and distinct violation of ORS 646.608(1)(e).

10 **Count 2: Misrepresentations Regarding Superiority to Coffee**

11 98. Plaintiff realleges and incorporates each and every allegation contained in the
12 preceding paragraphs as though set forth herein.

13 99. Defendants represented that Original and Extra Strength 5-hour ENERGY® has
14 characteristics, uses, benefits, and qualities that they do not have when they claimed that these
15 products are superior to consuming an equivalent amount of caffeine from coffee or other sources.

16 100. These claims were false and/or misleading, and Defendants lacked competent,
17 reliable scientific evidence to substantiate their claims about Original or Extra Strength 5-hour
18 ENERGY®.

19 101. Each and every instance in which Defendants represented that Original or Extra
20 Strength 5-hour ENERGY® is superior to consuming an equivalent amount of caffeine from coffee
21 or other sources in an advertisement or promotional claim in Oregon is a separate and distinct
22 violation of ORS 646.608(1)(e).

23 **Count 3: Misrepresentations Regarding Decaf 5-hour ENERGY®**

24 102. Plaintiff realleges and incorporates each and every allegation contained in the
25 preceding paragraphs as though set forth herein.

1 103. Defendants represented that Decaf 5-hour ENERGY® has characteristics, uses,
2 benefits, and qualities that it does not have when they claimed that it provides benefits like energy,
3 alertness, or focus.

4 104. These claims were false and/or misleading, and Defendants lacked competent,
5 reliable scientific evidence to substantiate them.

6 105. Each and every instance in which Defendants represented that Decaf 5-hour
7 ENERGY® provides benefits like energy, alertness, or focus in an advertisement or promotional
8 claim in Oregon is a separate and distinct violation of ORS 646.608(1)(e).

9 **Count 4: Misrepresentations Regarding a “Crash”**

10 106. Plaintiff realleges and incorporates each and every allegation contained in the
11 preceding paragraphs as though set forth herein.

12 107. Defendants represented that 5-hour ENERGY® has characteristics, benefits, and
13 qualities that it does not have when they claimed that consumers did not experience a “crash” when
14 using the product.

15 108. This claim was false and/or misleading, because at the time they made the claim,
16 Defendants possessed a study stating that 24% of consumers did, in fact, experience a “crash” when
17 using their product. Defendants also lacked competent, reliable scientific evidence to substantiate
18 their claim.

19 109. Each and every instance in which Defendants represented that consumers did not
20 experience a “crash” in an advertisement or promotional claim in Oregon is a separate and distinct
21 violation of ORS 646.608(1)(e).

22 **Count 5: Misrepresentations Regarding Approval by Doctors**

23 110. Plaintiff realleges and incorporates each and every allegation contained in the
24 preceding paragraphs as though set forth herein.

25 111. Defendants represented that 5-hour ENERGY® has approval and characteristics
26 that it does not have when they claimed in an “Ask Your Doctor” advertising campaign that 73%

1 of 3,000 doctors surveyed said that they would recommend 5-hour ENERGY® to their patients
2 that were already taking energy supplements.

3 112. This claim was false and/or misleading because it presented the results of a survey
4 in a deceptive manner that would lead consumers to believe doctors had approved of 5-hour
5 ENERGY® in a way that they had not. Defendants also lacked competent, reliable scientific
6 evidence to substantiate the ingredient benefit claims made in the “Ask Your Doctor” campaign.

7 113. Each and every instance in which Defendants represented that that 73% of 3,000
8 doctors surveyed said that they would recommend 5-hour ENERGY® to their patients that were
9 already taking energy supplements in an advertisement or promotional claim in Oregon is a
10 separate and distinct violation of ORS 646.608(1)(e).

11 **Count 6: Misrepresentations Regarding Suitability for Adolescents**

12 114. Plaintiff realleges and incorporates each and every allegation contained in the
13 preceding paragraphs as though set forth herein.

14 115. Defendants represented that 5-hour ENERGY® has approval, characteristics, uses,
15 benefits, and qualities that it does not have when they impliedly claimed that the product is
16 appropriate for use by adolescents age 12 and over.

17 116. Defendants lacked competent, reliable scientific evidence to substantiate this claim.

18 117. Each and every instance in which Defendants represented that 5-hour ENERGY® is
19 appropriate for use by adolescents age 12 and over in an advertisement or promotional claim in
20 Oregon is a separate and distinct violation of ORS 646.608(1)(e).

21 **SECOND CLAIM FOR RELIEF: ORS 646.608(1)(g)**

22 118. ORS 646.608(1)(g) makes it an unlawful trade practice to represent that goods are of
23 a particular standard, quality, or grade, if they are of another.

24 **Count 7: Misrepresentations Regarding the Effects of Non-Caffeine Ingredients**

25 119. Plaintiff realleges and incorporates each and every allegation contained in the
26 preceding paragraphs as though set forth herein.

1 120. Defendants represented that Original and Extra Strength 5-hour ENERGY® were of
2 a particular standard, quality, or grade when they were of another when they claimed that the non-
3 caffeine ingredients in those products provide consumers with benefits like energy, alertness, or
4 focus.

5 121. Defendants lacked competent, reliable scientific evidence to substantiate this claim
6 about Original or Extra Strength 5-hour ENERGY®.

7 122. Each and every instance in which Defendants represented that the non-caffeine
8 ingredients in Original or Extra Strength 5-hour ENERGY® provide consumers with benefits like
9 extra energy, alertness, or focus in an advertisement or promotional claim in Oregon is a separate
10 and distinct violation of ORS 646.608(1)(g).

11 **Count 8: Misrepresentations Regarding Superiority to Coffee**

12 123. Plaintiff realleges and incorporates each and every allegation contained in the
13 preceding paragraphs as though set forth herein.

14 124. Defendants represented that Original and Extra Strength 5-hour ENERGY® were of
15 a particular standard, quality, or grade when they were of another when they claimed that these
16 products are superior to consuming an equivalent amount of caffeine from coffee or other sources.

17 125. Defendants lacked competent, reliable scientific evidence to substantiate this claim
18 about Original or Extra Strength 5-hour ENERGY®.

19 126. Each and every instance in which Defendants represented that Original or Extra
20 Strength 5-hour ENERGY® is superior to consuming an equivalent amount of caffeine from coffee
21 or other sources in an advertisement or promotional claim in Oregon is a separate and distinct
22 violation of ORS 646.608(1)(g).

23 **Count 9: Misrepresentations Regarding Decaf 5-hour ENERGY®**

24 127. Plaintiff realleges and incorporates each and every allegation contained in the
25 preceding paragraphs as though set forth herein.

1 128. Defendants represented that Decaf 5-hour ENERGY® was of a particular standard,
2 quality, or grade when it was of another when they claimed that the product provides benefits like
3 energy, alertness, or focus.

4 129. These claims were false and/or misleading, and Defendants lacked competent,
5 reliable scientific evidence to substantiate them.

6 130. Each and every instance in which Defendants represented that Decaf 5-hour
7 ENERGY® provides benefits like energy, alertness, or focus in an advertisement or promotional
8 claim in Oregon is a separate and distinct violation of ORS 646.608(1)(g).

9 **Count 10: Misrepresentations Regarding a “Crash”**

10 131. Plaintiff realleges and incorporates each and every allegation contained in the
11 preceding paragraphs as though set forth herein.

12 132. Defendants represented that 5-hour ENERGY® was of a particular standard, quality,
13 or grade when it was of another when they claimed that consumers did not experience a “crash”
14 when using the product.

15 133. This claim was false and/or misleading, because at the time they made the claim,
16 Defendants possessed a study stating that 24% of consumers did, in fact, experience a “crash” when
17 using their product. Defendants also lacked competent, reliable scientific evidence to substantiate
18 their claim.

19 134. Each and every instance in which Defendants represented that consumers did not
20 experience a “crash” in an advertisement or promotional claim in Oregon is a separate and distinct
21 violation of ORS 646.608(1)(g).

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1 **THIRD CLAIM FOR RELIEF: ORS 646.608(1)(b)**

2 135. ORS 646.608(1)(b) makes it an unlawful trade practice to cause a likelihood of
3 confusion or of misunderstanding as to the approval or certification of goods.

4 **Count 11: Misrepresentations Regarding Approval by Doctors**

5 136. Plaintiff realleges and incorporates each and every allegation contained in the
6 preceding paragraphs as though set forth herein.

7 137. Defendants caused a likelihood of confusion or of misunderstanding as to 5-hour
8 ENERGY®'s approval or certification when they misleadingly claimed in an "Ask Your Doctor"
9 advertising campaign that 73% of 3,000 doctors surveyed said that they would recommend 5-
10 hour ENERGY® to their patients that were already taking energy supplements.

11 138. This claim was false and/or misleading because it presented the results of a survey
12 in a deceptive manner that would lead consumers to believe doctors had approved of 5-hour
13 ENERGY® in a way that they had not. Defendants also lacked competent, reliable scientific
14 evidence to substantiate the ingredient benefit claims made in the campaign.

15 139. Each and every instance in which Defendants represented that that 73% of 3,000
16 doctors surveyed said that they would recommend 5-hour ENERGY® to their patients that were
17 already taking energy supplements in an advertisement or promotional claim in Oregon is a
18 separate and distinct violation of ORS 646.608(1)(b).

19 **FOURTH CLAIM FOR RELIEF: ORS 646.607(1)**

20 140. ORS 646.607(1) makes it an unlawful trade practice to engage in any
21 unconscionable tactic in connection with the sale of goods.

22 **Count 12: Misrepresentations Regarding Approval by Doctors**

23 141. Plaintiff realleges and incorporates each and every allegation contained in the
24 preceding paragraphs as though set forth herein.

25 142. Defendants engaged in unconscionable tactics in connection with the sale of 5-hour
26 ENERGY® when they claimed in an "Ask Your Doctor" advertising campaign that 73% of 3,000

1 doctors surveyed said that they would recommend 5-hour ENERGY® to their patients that were
2 already taking energy supplements.

3 143. This claim was false and/or misleading because it presented the results of a survey in
4 a deceptive manner that would lead consumers to believe doctors had approved of 5-hour
5 ENERGY® in a way that they had not.

6 144. Each and every instance in which Defendants represented that that 73% of 3,000
7 doctors surveyed said that they would recommend 5-hour ENERGY® to their patients that were
8 already taking energy supplements in an advertisement or promotional claim in Oregon is a
9 separate and distinct violation of ORS 646.607(1).

10 **Count 13: Misrepresentations Regarding Suitability for Adolescents**

11 145. Plaintiff realleges and incorporates each and every allegation contained in the
12 preceding paragraphs as though set forth herein.

13 146. Defendants engaged in unconscionable tactics in connection with the sale of 5-hour
14 ENERGY® when they impliedly claimed that the product is appropriate for use by adolescents age
15 12 and over.

16 147. Defendants lacked competent, reliable scientific evidence to substantiate this claim.

17 148. Each and every instance in which Defendants represented that 5-hour ENERGY® is
18 appropriate for use by adolescents age 12 and over in an advertisement or promotional claim in
19 Oregon is a separate and distinct violation of ORS 646.607(1).

20 WHEREFORE, Plaintiff prays for the following relief:

- 21 1. A judgment against Defendants for civil penalties up to \$25,000 for each willful
22 violation of the UTPA, pursuant to ORS 646.642(3);
23 2. A judgment requiring Defendants to disgorge all gains obtained as a result of their
24 violations of the UTPA, pursuant to ORS 646.636;

- 1 3. A judgment requiring Defendants to provide restitution to all Oregon purchasers
2 of Decaf 5-hour ENERGY® for the cost of the product, pursuant to ORS
3 646.636;
4 4. A permanent injunction prohibiting Defendants from engaging in the business of
5 marketing, advertising, labeling, promoting, offering for sale, distributing or
6 selling 5-hour ENERGY® products in Oregon in violation of the UTPA, pursuant
7 to ORS 646.632(1);
8 5. A judgment against Defendants for reasonable attorney fees and investigative
9 costs pursuant to ORS 646.632(8) and ORCP 68; and
10 6. A judgment granting any other and further relief as the court may deem
11 appropriate.

12 DATED July 17, 2014.

13 Respectfully submitted,

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