No. 19-

IN THE

Supreme Court of the United States

LIVING ESSENTIALS, LLC; INNOVATION VENTURES, LLC,

Petitioners,

v.

STATE OF WASHINGTON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE WASHINGTON COURT OF APPEALS, DIVISION ONE

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The State of Washington brought a civil action against Petitioners under its consumer protection law, alleging that their advertisements for 5-hour ENERGY® were deceptive because they were "false" and "unsubstantiated." At trial, however, the State abandoned its claim that the speech was false and instead argued it was deceptive under the Federal Trade Commission's "prior substantiation" doctrine. That doctrine makes a commercial speaker liable if it lacks adequate "substantiation" for its factual claims before making them in an advertisement—even if the speech is never proven to be false. The trial court held that Petitioners had not adequately substantiated certain promotional claims about its product and the Washington Court of Appeals affirmed.

Petitioners argued that the First Amendment does not permit speakers to be punished for failing to adequately "substantiate" their factual claims before exercising their right to free speech. The court of appeals disagreed, concluding that unsubstantiated speech is entitled to *no* First Amendment protection under this Court's commercial speech cases, including *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 563 (1980), because unsubstantiated speech is "misleading" as a matter of law.

The question presented is:

Whether the prior substantiation doctrine violates the First Amendment.

PARTIES TO THE PROCEEDING AND RELATED PROCEEDINGS

The parties to the proceeding below are as follows:

Petitioners are Living Essentials, LLC and Innovation Ventures, LLC. They were the defendants in the district court and the appellants in the court of appeals.

Respondent is the State of Washington. Respondent was the plaintiff in the district court and the appellee in the court of appeals.

The related proceedings below are:

1) *State of Washington v. Living Essentials*, No. 14-2-19684-9 (Wash. Super. Ct.) – Opinion dated October 7, 2016.

2) *State of Washington v. Living Essentials, LLC*, 436 P.3d 857 (Wash. Ct. App.) – Judgment entered March 18, 2019; review denied, 449 P.3d 638 (Oct. 3, 2019).

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Living Essentials, LLC and Innovation Ventures, LLC ("Petitioners") respectfully petition for a writ of certiorari to review the judgment of the Washington Court of Appeals.

OPINIONS BELOW

The opinion of the Washington Court of Appeals is reported at 436 P.3d 857 and is reproduced in the Appendix ("Pet. App.") at 1a-38a. The Washington Supreme Court's order denying Petitioners' petition for review is reported at 449 P.3d 658 and is available at Pet. App. 39a-40a. The opinion of the King County Superior Court is not reported but is reproduced at Pet. App. 51a-132a.

JURISDICTION

The Washington Supreme Court denied discretionary review on October 3, 2019. Pet. App. 40a. This Court granted an extension to file a petition for certiorari to and including February 3, 2020. This Court has jurisdiction pursuant to 28 U.S.C. §1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides: "Congress shall make no law ... abridging the freedom of speech ...."

The Washington Consumer Protection Act provides: "Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any

trade or commerce are hereby declared unlawful." Wash. Rev. Code §19.86.020.

INTRODUCTION

The Washington Court of Appeals held that the State of Washington can ban and punish commercial speech that is "unsubstantiated"—even if the State cannot prove that the speech in question is false. The State instead need only prove that the speaker lacked adequate "substantiation" for his claim. That means the State *never* needs to prove that the speech is false. Indeed, the speaker could be punished even if he is ultimately able to prove that the speech was true. This "prior substantiation" doctrine contradicts controlling precedent, plainly violates the First Amendment, and underscores the deep confusion that has been sown by the Court's misguided commercial speech line of cases.

Petitioners produce and sell the popular energy shot 5-hour ENERGY®. In both print and television advertisements, they claimed that 5-hour ENERGY® contained "B-vitamins …, amino acids and caffeine comparable to a cup of the leading premium coffee" and that these ingredients "work in concert" to provide a "feeling of alertness and energy that lasts for hours." These advertisements also asserted that 5-hour ENERGY® Decaf provides "hours of energy" for people sensitive to caffeine.

The Washington Court of Appeals held that Petitioners violated the state's consumer protection statute because these advertisements were deceptive. The court of appeals, however, did *not* conclude that

the speech was false. Nor could it have. At trial, the State expressly abandoned any such claim. Instead, Petitioners were liable because they lacked adequate "substantiation" for the promotional claims.

This is a clear First Amendment violation. All speech is presumptively valid and is punishable only in rare instances. The Court has held that commercial speech may be banned or punished if the government proves it is false or misleading. But "unsubstantiated" speech falls into neither of these categories. It is bad enough that the doctrine does not require *any* showing that the speech is untruthful. But forcing the speaker to shoulder the burden of proving it had adequately substantiated the claim *before* speaking—as opposed to requiring the government to prove that the speech is false—compounds this serious First Amendment problem.

Furthermore, banning unsubstantiated speech will have a distorting effect that the Constitution does not tolerate. Commercial speakers are likely to alter the content of their speech—or, worse, avoid speaking entirely—in order to avoid risk of punishment. And who could blame them under a regime where even proving that speech is true does not guarantee the speaker can avoid liability. This chilling effect stifles an "uninhibited marketplace of ideas" in which truth will ultimately prevail—one of the First Amendment's essential purposes. The prior substantiation doctrine simply does not provide the "breathing space" that is needed for speech to flourish.

Here, the court of appeals got all of this wrong. It never required the State to prove the speech was false. And, according to the court, the "prior substantiation" doctrine forces the commercial speaker to bring forth scientific evidence to prove that it had substantiation for its claims *before* speaking. The idea that any of this complies with the First Amendment is untenable.

None of this would even be debatable but for the Court's misguided commercial speech doctrine, which treats commercial speech as having diminished value. This doctrine has been roundly criticized as lacking historical foundation, producing unpredictable results based on inherently subjective policy judgments, and failing to protect valuable speech. The ruling below is plainly erroneous under existing precedent. But the Court should abandon its commercial speech doctrine if necessary to protect Petitioners' First Amendment rights.

This case exemplifies the incoherence of the commercial speech doctrine. In the non-commercial context, the First Amendment protects speakers who lie about winning the Congressional Medal of Honor, who defame a public figure with unknowingly false speech, and who unintentionally lie when soliciting a donation. Yet Petitioners' advertisements—speech they believe to be true and that the State could not prove was false—somehow received *no* First Amendment protection. The court of appeals would not have reached this result but for the Court's deeply flawed commercial speech line of cases. They warrant reconsideration.

Commercial speech deserves better. It provides the consuming public with critical information about the availability, nature, and prices of products and services. And it often spurs discussion of important public policy issues. The prior substantiation doctrine, as adopted and applied by the State of Washington in this case, punishes and chills that protected speech. The Court should grant review.

STATEMENT OF THE CASE

A. The treatment of commercial speech under the First Amendment.

The First Amendment, made applicable to the states through the Fourteenth Amendment, keeps the government from "abridging the freedom of speech." The First Amendment embodies "[o]ur profound national commitment to the free exchange of ideas." *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 686 (1989). "As a general matter, the First Amendment means that government has no power to restrict expression because of its messages, its ideas, its subject matter or its content." *Ashcroft v. Am. Civil Liberties Union*, 535 U.S. 564, 573 (2002) (cleaned up). These principles are vital to ensuring "an uninhibited marketplace of ideas in which truth will ultimately prevail." *McCullen v. Coakley*, 573 U.S. 464, 476 (2014) (citation omitted).

Commercial speech is—or at least should be—no exception. "The commercial marketplace, like other spheres of our social and cultural life, provides a forum where ideas and information flourish." *United*

States v. United Foods, Inc., 533 U.S. 405, 409 (2001) (citation omitted). Thus, "even a communication that does no more than propose a commercial transaction is entitled to the coverage of the First Amendment." *Edenfield v. Fane*, 507 U.S. 761, 767 (1993). "Some of the ideas and information are vital, some of slight worth. But the general rule is that the speaker and the audience, not the government, assess the value of the information presented." *Id.*

Yet this Court "accords lesser protection to commercial speech than to other constitutionally guaranteed expression." *Central Hudson Gas & Electric Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 563 (1980). Under *Central Hudson*, the Court asks, "as a threshold matter," whether the commercial speech concerns "unlawful activity" or is false or misleading. *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 367 (2002). If it does, then "the speech is not protected by the First Amendment." *Id.* As to all other commercial speech, the government may regulate it if the government's "interest is substantial," and the regulation "directly advances the governmental interest asserted" and "is not more extensive than is necessary to serve that interest." *Central Hudson*, 447 U.S. at 566.

Since its inception, "judges, scholars, and *amici curiae* have advocated repudiation of the *Central Hudson* standard and implementation of a more straightforward and stringent test for assessing the validity of governmental restrictions on commercial speech." *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 184 & n.3 (1999). The

commercial speech doctrine has been consistently criticized as lacking historical foundation, causing unpredictable results because it requires case-by-case policy judgments, and failing to protect important speech. *See, e.g.*, *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 522-27 (1996) (Thomas, J., concurring in part and concurring in the judgment); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 493-97 (1995) (Stevens, J., concurring in the judgment).

B. The "prior substantiation" doctrine of the Federal Trade Commission.

Section 5 of the Federal Trade Commission Act of 1914 declares unlawful "unfair or deceptive acts or practices in or affecting commerce," and the statute empowers the FTC to prevent such acts or practices. 15 U.S.C. §45(a). The FTC has long used Section 5 to prosecute those who disseminate false commercial speech. *See, e.g.*, *Fed. Trade Comm'n v. Winsted Hosiery Co.*, 258 U.S. 483, 490-93 (1922) (advertising was "literally false").

In 1984, the FTC issued a "policy statement" expanding its authority under Section 5 to punish the dissemination of advertisements. *See generally Policy Statement Regarding Advertising Substantiation Program*, 49 Fed. Reg. 30999-03 (Aug. 2, 1984). The FTC declared that companies would violate Section 5 if they "lack[ed] a reasonable basis" for their claims "prior to disseminating an advertisement." *Id.* at 31001. The FTC described this prior substantiation regime as a "law enforcement tool" and gave notice that it would direct "requests for substantiation" to

"individual companies via an informal access letter or, if necessary, a formal civil investigative demand." *Id.* at 31000. If a company lacks adequate substantiation, it may be "subject to prosecution." *Id.* at 31001.

Importantly, a speaker could not avoid liability by proving that an advertisement was actually true. *Id.* at 31000-01. All that matters to the FTC is whether the speaker has "a reasonable basis *before* an ad is disseminated." *Id.* at 31001 (emphasis added). "Subsequent evidence of truthfulness," that is, does not "absolve[] a firm of liability for failing to possess prior substantiation for a claim"; such evidence could only "shed[] light" on the adequacy of "pre-existing substantiation." *Id.* The FTC continues to enforce this "prior substantiation" program. Stephanie W. Kanwit, 2 Fed. Trade Comm'n §22:7 (2018).

C. Proceedings below

Petitioners produce and sell the well-known energy shot 5-hour ENERGY®. At approximately $3 a bottle, 5-hour ENERGY® is popular among truck drivers, college students, police officers, and others who seek a healthy, low-cost boost of energy. Unlike many energy drinks, 5-hour ENERGY® has no sugar and contains a variety of important vitamins and nutrients. Pet. App. 56a-63a. As of 2016, consumers were purchasing more than nine million bottles of 5-hour ENERGY® every week in the United States.

Petitioners regularly promote their products through print, radio, and television advertisements. In the mid-2000s, Petitioners began running a variety

of television and print advertisements to promote the conclusions they had reached about the benefits of 5-hour ENERGY®. Pet. App. 63a. For example, one print advertisement stated that 5-hour ENERGY® contained "B-vitamins …, amino acids and caffeine comparable to a cup of the leading premium coffee" and that these ingredients "work in concert" to provide a "feeling of alertness and energy that lasts for hours." Pet. App. 68a (emphasis omitted). These advertisements ran throughout the continental United States, including Washington. Pet. App. 63a.

Petitioners similarly used their website, press releases, and bottle packaging to promote the conclusions they had reached about the benefits of 5-hour ENERGY® Decaf. Pet. App. 70a-71a. For example, 5-hour ENERGY® Decaf's bottle packaging stated that the product would provide "hours of energy" for people sensitive to caffeine. Pet. App. 44a.

The State of Washington never received any consumer complaints that Petitioners' advertisements were deceptive or that their products did not work as advertised. Pet. App. 136a-37a. In 2012, the State nonetheless opened an investigation into Petitioners' advertisements, issued a civil investigative demand, and ordered them to submit "prior substantiation" for the claims made in their advertisements. In response, Petitioners provided the State with scientific studies, reports, and analyses that supported those assertions.

Despite Petitioners' substantiation and the lack of evidence of consumer harm, the State brought a civil action against Petitioners under the Washington

Consumer Protection Act ("CPA") on the ground that their advertisements were "unfair or deceptive acts or practices in the conduct of any trade or commerce." Wash. Rev. Code §19.86.020. The State, in particular, alleged that Petitioners' advertisements were "false and/or misleading" because 5-hour ENERGY® "*in fact* [is] not superior to consuming an equivalent amount of caffeine from coffee" and 5-hour ENERGY® Decaf "does not *in fact* provide the claimed benefits." Pet. App. 181a (emphasis added).

The State further alleged that Petitioners were liable under the CPA because they "lacked competent and reliable scientific evidence to substantiate [their] claims." *Id*. The trial court agreed that the State could rely on the prior substantiation doctrine to find Petitioners liable under the CPA. In so holding, the court rejected Petitioners' argument that imposing liability under the prior substantiation doctrine would violate their First Amendment rights. Pet. App. 133a-34a.[1]

At trial, the State abandoned its claims that Petitioners' advertisements were actually false, and instead proceeded solely on its claims that Petitioners' advertisements were unsubstantiated. *See* Pet. App. 166a-67a ("[T]he State's claim is based on the Section 5, FTC standard, where we are proceeding on the

[1] The State also brought claims alleging that Petitioners' "Ask Your Doctor" advertisements violated the CPA because they were misleading. Pet. App. 73a-77a. The trial court ruled for the State on this claim, despite finding that "the statistics displayed in the ads and the words used in the ad were literally true." Pet. App. 129a.

argument that the ads aren't substantiated by competent, reliable evidence at the time that they were made."). The State therefore did not seek to establish that Petitioners' advertisements were false. Pet. App. 78a-99a.

Petitioners presented evidence and testimony at trial that their claims about the effects of 5-hour ENERGY® and 5-hour ENERGY® Decaf had been "adequately substantiated." Pet. App. 152a-53a, 155a-63a, 144a-45a, 139a-42a. Petitioners' marketing director also testified that he believed that the advertisements were in fact true and had been scientifically supported. Pet. App. 172a-74a, 167a-69a.

Following a two-week bench trial, the court ruled for the State. Pet. App. 120a-32a. The trial court held that Petitioners were liable unless they had a "reasonable basis" for their claims "prior to making [them]." Pet. App. 115a-16a. The court considered "post-claim scientific evidence" as well but found it relevant only to the extent that it could "shed light on pre-claim studies." Pet. App. 86a & n.4.

Reviewing the record, the court agreed with Petitioners that "nutritional science supports the general proposition that the vitamins and nutrients in 5-Hour ENERGY®" are "physiologically beneficial, even to healthy well-nourished adults." Pet. App. 120a. These ingredients "support metabolism which affects energy," "can help reduce fatigue," "can help increase blood flow to the brain," and "support the

generation of neurotransmitters, which can affect alertness and focus." *Id*.

Nevertheless, the court found that some of Petitioners' advertisements were "unsubstantiated" because the evidence did not "clearly establish" that 5-hour ENERGY®'s "vitamins and nutrients work synergistically with caffeine to make these benefits last longer than they would last with caffeine alone." Pet. App. 122a. While Petitioners' claims were "certainly plausible, given the science presented to the Court," the claims "remained a hypothesis, not an established scientific fact." Pet. App. 125a. The court also found that Petitioners "lack[ed] competent and reliable scientific evidence" for the claim that "Decaf 5-Hour ENERGY® will generate energy and alertness that 'lasts for hours.'" Pet. App. 126a. While there was "competent and reliable scientific evidence to support a claim that the Decaf 5-Hour Energy® shot may provide a short-term benefit in terms of energy," the court held that Petitioners' evidence was nevertheless insufficient in certain regards. Pet. App. 127a.

The court imposed monetary penalties of more than $2,000,000. Pet. App. 47a. The penalties for these advertisements were justified, according to the trial court, because Petitioners "spent more time trying to justify the science behind their ads after-the-fact than they did *before* marketing the products in Washington." Pet. App. 46a. The court also enjoined Petitioners from making similar claims in the future. Pet. App. 48a.

The Washington Court of Appeals affirmed. Relying on *Central Hudson*, it rejected Petitioners' argument that imposing liability without making the State prove falsity violated the First Amendment. Because the advertisements were "unsubstantiated," the court of appeals held, Petitioners' advertisements were necessarily "misleading" and thus entitled to no protection under the First Amendment. Pet. App. 11a, 19a-20a, 27a. Petitioners' argument therefore "fail[ed] at the first prong" of *Central Hudson*. Pet. App. 19a. The court also rejected Petitioners' argument that the trial court had improperly shifted the burden of proof to Petitioners. Pet. App. 10a-11a, 15a n.6, 25a-26a. Reviewing the record, the court of appeals affirmed the trial court's determination that Petitioners had lacked sufficient substantiation before running their advertisements. Pet. App. 22a-31a.

The Washington Supreme Court denied discretionary review on October 3, 2019. Pet. App. 39a-40a.

REASONS FOR GRANTING THE PETITION

The Washington Court of Appeals has "decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. Rule 10(c). This case presents an important question under the First Amendment about whether the government can punish commercial speech if the speaker lacks prior substantiation that its factual claims are true. The Washington Court of Appeals erred in holding the State may do so. The Court should grant review.

I. Review is required because the decision below contravenes the First Amendment.

A. Controlling precedent requires the government to shoulder the burden of proving that the speech it seeks to prohibit is unprotected.

As a general matter, "the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Bolger v. Youngs Drug Prod. Corp.*, 463 U.S. 60, 65 (1983). Although this principle is "not absolute," *Ashcroft*, 535 U.S. at 573, such restrictions are permissible only when the speech falls within "narrowly limited classes of speech," *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942).

Within these narrow categories, "[t]he line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished" is "finely drawn." *Speiser v. Randall*, 357 U.S. 513, 525 (1958). That is because "error in marking that line exacts an extraordinary cost" in the loss of First Amendment freedoms. *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 817 (2000). Governments thus must use "sensitive tools" to separate "legitimate from illegitimate speech." *Speiser*, 357 U.S. at 525.

Such precision is critical when the right to speak turns on a question of fact. "Where particular speech falls close to the line separating the lawful and

the unlawful, the possibility of mistaken factfinding—inherent in all litigation—will create the danger that the legitimate utterance will be penalized." *Id.* at 526. To avoid chilling protected speech the Court has insisted on "exacting proof requirements" to ensure "sufficient breathing room for protected speech." *Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 620 (2003) (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964)).

The most fundamental of these "exacting proof requirements" is the principle that the government—not the speaker—must carry the burden of proof. The Court has "long cautioned that, to avoid chilling protected speech, the government must bear the burden of proving that the speech it seeks to prohibit is unprotected." *Madigan*, 538 U.S. at 620 n.9. That is because a person "who knows that he must bring forth proof and persuade another of the lawfulness of his conduct necessarily must steer far wider of the unlawful zone than if the State must bear these burdens." *Speiser*, 357 U.S. at 526; *see also Smith v. California*, 361 U.S. 147, 150-51 (1959) (prohibiting placing "burden of proof" on the defendant if doing so will "have the collateral effect of inhibiting the freedom of expression").

This burden is no different in the context of restrictions on commercial speech. "The party seeking to uphold a restriction on commercial speech carries the burden of justifying it." *Bolger*, 463 U.S. at 71 n.20. "The State's burden is not slight; the free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of

distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful." *Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation, Bd. of Accountancy*, 512 U.S. 136, 143, (1994) (citation omitted). "Mere speculation or conjecture will not suffice." *Id.* (cleaned up).

The court below violated this fundamental rule. Under the Court's precedents, the government can ban or punish commercial speech if it proves that the speech is false. *Central Hudson*, 447 U.S. at 563-64. Time and again, the Court has held that a defendant cannot be punished for his speech unless the plaintiff (or the government) proves falsity. *See, e.g.*, *New York Times*, 376 U.S. at 279-80 (defamation of public figure); *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777 (1986) (defamation of private individual); *Madigan*, 538 U.S. at 620 (fraud when soliciting a donation); *Time, Inc. v. Hill*, 385 U.S. 374, 390 (1967) (false-light tort actions); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988) (intentional infliction of emotional distress); *Brown v. Hartlage*, 456 U.S. 45, 61 (1982) (prohibition on factual misstatements in the course of political debate). The prior substantiation doctrine relieves the government of this burden. The doctrine allows the government to punish commercial speech it *suspects* is false without *proving* it is actually false—only that it is "unsubstantiated." The decision below thus contravenes longstanding precedent.

The Court also recognizes that the government can ban or punish commercial speech that it proves is "misleading." *Central Hudson*, 447 U.S. at 564. But

"unsubstantiated" speech does not fit within this category either. The Washington Court of Appeals held that Petitioners' advertisements could be banned—without *any* First Amendment scrutiny—because "unsubstantiated" speech is, *as a matter of law*, "misleading," and "misleading advertising may be prohibited entirely." Pet. App. 11a, 19a, 27a (quoting *In re R.M.J.*, 455 U.S. 191, 203 (1982)). But so-called "unsubstantiated" speech—absent a finding that the speech itself is factually false or misleading—is not one of those few "historic and traditional categories" of speech that can be banned without it "rais[ing] any Constitutional problem." *United States v. Stevens*, 559 U.S. 460, 468-69 (2010).

Nor do this Court's precedents require this speech to be "added to the list." *Id.* at 469. Petitioners' speech was not "inherently" misleading, *In re RMJ*, 455 U.S. at 199, as the "particular method" by which Petitioners delivered their information (*e.g.*, television and print advertisements) is not "inherently conducive to deception and coercion," *Peel v. Attorney Registration & Disciplinary Comm'n of Illinois*, 496 U.S. 91, 112 (1990) (Marshall, J., concurring in the judgment). Nor was Petitioners' speech "actually" misleading; indeed, no consumers ever complained. *Ibanez*, 512 U.S. at 145. Because the State never proved whether Petitioners' claims were "in fact" false or misleading, *In re R.M.J.*, 455 U.S. at 202, 207, the State could never show that "any … person was actually misled or deceived" by them, *Peel*, 496 U.S. at

101 (plurality); *id.* at 112 (Marshall, J., concurring) (same).[2]

What the State really seeks is an exception to the normal rule that the government cannot prohibit speech unless it carries the burden of proving it is unprotected—*i.e.*, false or misleading. The prior substantiation doctrine requires the court to accept, as a matter of law, that *every* consumer in every circumstance expects a "reasonable basis" for product claims and therefore a speaker who lacks sufficient substantiation necessarily has misled the consumer. Pet. App. 11a; *see also Policy Statement Regarding Advertising Substantiation Program*, 49 Fed. Reg. at 31000. But this is just an end-run for the government to avoid having to prove that the speech is false or misleading. *Supra* 16. The Court rightly rejects such maneuvers. *See, e.g., Ibanez*, 512 U.S. at 146 (refusing to allow the "rote invocation of the words 'potentially misleading' to supplant the [government's] burden"); *see also Edenfield*, 507 U.S. at 776 (similar).

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[2] The court of appeals cited three federal circuit court opinions that it believed "upheld the prior substantiation doctrine against similar constitutional challenges." Pet. App. 20a. But those cases "impose[d] the requirement of prior substantiation as a *reasonable remedy for past violations* of the Act." *Jay Norris, Inc. v. FTC*, 598 F.2d 1244, 1252 (2d Cir. 1979) (emphasis added); *Sears, Roebuck & Co. v. FTC*, 676 F.2d 385, 399 (9th Cir. 1982) (same); *United States v. Reader's Digest Ass'n, Inc.*, 662 F.2d 955, 965 (3d Cir. 1981) (same). The power of the FTC to fashion *remedial* relief raises different concerns not present here. *See FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 395 (1965).

Even if the First Amendment permitted the government to punish unsubstantiated speech—in addition to false or misleading speech—the prior substantiation doctrine lacks the safeguards needed to ensure "breathing room" for protected speech. *Madigan*, 538 U.S. at 620. The prior substantiation doctrine does not require "clear and convincing" evidence that the speakers lacked substantiation. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974); *Madigan*, 538 U.S. at 620. It does not require the speakers to have acted "with knowledge that [the speech] was [unsubstantiated] or with reckless disregard of whether it was [unsubstantiated]." *New York Times*, 376 U.S. at 279-80; *Hill*, 385 U.S. at 390; *Hustler Magazine*, 485 U.S. at 56; *Garrison v. State of La.*, 379 U.S. 64, 73-75 (1964); *Hartlage*, 456 U.S. at 61; *Gertz*, 418 U.S. at 349; *Madigan*, 538 U.S. at 602. And it does not require the government to prove there was "actual injury" to any consumer. *Gertz*, 418 U.S. at 349-50; *Madigan*, 538 U.S. at 620; *see also Alvarez*, 567 U.S. at 734-46 (Breyer, J., concurring) (identifying state laws that "limit the scope of their application … by requiring proof of specific harm to identifiable victims"). This lack of safeguards dooms any attempt to uphold the prior substantiation doctrine.

Not surprisingly, the State satisfied none of these exacting proof requirements. The trial court recognized the narrow margin by which the State had prevailed, as it found that Petitioners' claims were "certainly plausible, given the science presented to the Court," but they "remained a hypothesis, not an established scientific fact." Pet. App. 125a. Petitioners believed that their advertisements were true and

adequately substantiated, and the State did not show otherwise. Pet. App. 167a-69a, 172a-74a. And the State never proved that a single person was harmed or misled by Petitioners' advertisements. Pet. App. 136a-37a. The First Amendment simply does not countenance imposing liability based on such insubstantial evidence. *See, e.g.*, *Madigan*, 538 U.S. at 620 (finding it of "prime importance" that the State had to show through "clear and convincing evidence" that the defendant "made a false representation of a material fact knowing that the representation was false," that the representation was made "with the intent to mislead the listener," and that "it succeeded in doing so").

The State no doubt finds it "more convenient" to impose liability upon a mere showing that a speaker lacks sufficient evidence to prove the truth of his speech before speaking. *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 649 (1985). But "the First Amendment does not permit the State to sacrifice speech for efficiency." *NIFLA v. Becerra*, 138 S. Ct. 2361, 2376 (2018) (citation omitted). The Court's precedents demand that the government carry the weighty burden of proving that Petitioners' speech is not protected by the First Amendment. The court of appeals erred in relieving the State of its burden.

B. The Court should grant the petition to overrule *Central Hudson* if necessary to protect Petitioners' freedom of speech.

The unconstitutionality of the State's actions would not be debatable but for the Court's "continued reliance on the misguided approach adopted in *Central Hudson*," which "makes this case appear more difficult than it is." *Rubin*, 514 U.S. at 493-97 (1995) (Stevens, J.). The Court should overrule *Central Hudson* if that is necessary to protect Petitioners' speech.

Central Hudson has long been "subject to … criticism." *United Foods, Inc.*, 533 U.S. at 409-10. "[S]everal Members of the Court have expressed doubts about the *Central Hudson* analysis," *Thompson*, 535 U.S. at 367-68, and have "advocated repudiation of the *Central Hudson* standard" in favor of "a more straightforward and stringent test for assessing the validity of governmental restrictions on commercial speech," *Greater New Orleans Broad. Ass'n*, *Inc*, 527 U.S. at 184; *see, e.g., 44 Liquormart*, 517 U.S. at 522 (Thomas, J., concurring); *id.* at 517 (Scalia, J.); *Rubin*, 514 U.S. at 493-97 (Stevens, J.); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 571-72 (2001) (Kennedy, J., concurring). So too have "parties, scholars, and *amici curiae*" supported revisiting the doctrine. *See Greater New Orleans Broad. Ass'n, Inc.*, 527 U.S. at 184 & n.3 (citing Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 Va. L. Rev. 627, 635-38 (1990) and other authorities).

The criticisms of *Central Hudson* are well documented and well taken. Fundamentally, there is no "philosophical or historical basis for asserting that 'commercial' speech is of 'lower value' than 'noncommercial' speech." *44 Liquormart*, 517 U.S. at 522 (Thomas, J., concurring). Indeed, "some historical materials suggest to the contrary." *Id.* (collecting sources); *see City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 421 n.17 (1993) ("[W]e are not the first to recognize the value of commercial speech.") (citing I. Thomas, *History of Printing in America with a Biography of Printers, and an Account of Newspapers* (2d ed. 1810)).

Nor are the Court's modern justifications persuasive. The Court has claimed that commercial speech needs less scrutiny because it is "more easily verifiable" and "more durable" because of the speaker's profit motive. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 n.24 (1976). But that is not always true. *See 44 Liquormart*, 517 U.S. at 523 n.4 (Thomas, J., concurring). As this case demonstrates, "many claims about commercial products involve scientific assertions that are often subject to complex and controversial debate." Martin H. Redish, *False Commercial Speech and the First Amendment: Understanding the Implications of the Equivalency Principle*, 25 Wm. & Mary Bill Rts. J. 765, 791 (2017). And commercial speakers "are often likely to be among the most risk averse of speakers, always concerned about the possibility of government penalization for their actions." *Id.*; *see* Kozinski & Banner, *supra*, 635-38 (same).

As a practical matter, moreover, *Central Hudson* is "very difficult to apply with any uniformity," *44 Liquormart*, 517 U.S. at 526-27 (Thomas, J.), as there are no "bright lines that will clearly cabin commercial speech in a distinct category" from non-commercial speech, *Discovery Network*, 507 U.S. at 419. When this line is blurred, companies, "out of reasonable caution or even an excess of caution, may censor their own expression well beyond what the law may constitutionally demand." *Nike, Inc. v. Kasky*, 539 U.S. 654, 683 (2003) (Breyer, J., dissenting from the dismissal of writ of certiorari improvidently granted).

Central Hudson also imposes an "inherently nondeterminative … case-by-case balancing 'test,'" which makes it more likely that "individual judicial preferences will govern application of the test." *44 Liquormart*, 517 U.S. at 527 (Thomas, J., concurring). What is a "substantial" interest for one court, is an "insubstantial" interest for another. Thus, "[u]nless a case has facts very much like those of a prior case, it is nearly impossible to predict the winner." Kozinski & Banner, *supra*, 631.

This case is a perfect example of *Central Hudson*'s inherent incoherence. In the non-commercial context, the First Amendment often protects *verifiably false* speech. The First Amendment protects, for example, a blatant lie that a person won the Congressional Medal of Honor, *United States v. Alvarez,* 567 U.S. 709 (2012), unknowingly false speech defaming a public figure, *New York Times*, 376 U.S. at 279, and unknowingly false speech made when

soliciting a donation, *Madigan*, 538 U.S. at 619-21. Yet the court below found that Petitioners' advertisements about a legal product—where Petitioners believed their speech to be true and the government could not prove it was false—somehow deserved *no* First Amendment protection. Any doctrine requiring such a result is broken beyond repair.

As in other cases, "there is no need to break new ground" because the prior substantiation doctrine is unconstitutional even under *Central Hudson*. *Greater New Orleans Broad.*, 527 U.S. at 184. Most obvious, the prior substantiation doctrine is "more extensive than is necessary to serve" any government interest. *Central Hudson*, 447 U.S. at 566. Indeed, the doctrine is wildly overinclusive. It applies to *every* company advertising in the marketplace, even if the company has no history of false statements and is selling products that do not endanger the health or safety of any consumer. Pet. App. 25a; *see also* Jane R. Bambauer, *Snake Oil Speech*, 93 Wash. L. Rev. 73, 117-24 (2018). The First Amendment does not permit such "[b]road prophylactic rules in the area of free expression." *Edenfield*, 507 U.S. at 777 (citation omitted). "[I]f the Government could achieve its interests in a manner that does not restrict speech, or that restricts less speech, the Government must do so." *Thompson*, 535 U.S. at 371.

The sounder approach, however, would be to abandon the doctrine entirely, and "treat speech as speech, commercial or not." Kozinski & Banner, *supra*, 651. The Court's existing doctrines—

addressing viewpoint discrimination, content discrimination, prior restraints, and the like—can be applied regardless whether the speech is commercial. *See Sorrell v. IMS Health Inc.*, 564 U.S. 552, 566 (2011) ("The First Amendment requires heightened scrutiny whenever the government creates a regulation of speech because of disagreement with the message it conveys," and "[c]ommercial speech is no exception.").

Absent *Central Hudson*, this is not a difficult case. As explained, a longstanding principle of First Amendment jurisprudence is that it is the *government's* burden—not the speaker's—to prove that speech is unprotected by the First Amendment. In no other context but commercial speech would the State's prior substantiation regime even arguably pass constitutional muster. Commercial speech should be "no exception" to these First Amendment principles. *Sorrell*, 564 U.S. at 566. The Court should overrule *Central Hudson* if necessary to protect the important speech at issue here.

II. This is an appropriate case in which to resolve these important First Amendment issues.

Consumers have a "substantial" interest in the free flow of commercial speech. *Bates v. State Bar of Arizona*, 433 U.S. 350, 364 (1977). Commercial speech ensures that consumers are aware of "the availability, nature, and prices of products and services" *Id.* Though perhaps mundane, this information is important to individuals' day-to-day lives. Indeed, a

"consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue." *Sorrell*, 564 U.S. at 566 (citation omitted).

Commercial speech benefits more than individual consumers; it promotes "societal interests" too. *Bates*, 433 U.S. at 364. Because commercial speech ensures that economic decisions "in the aggregate [are] intelligent and well informed," *Va. State Bd. of Pharmacy*, 425 U.S. at 765, it "performs an indispensable role in the allocation of resources in a free enterprise system," *Bates*, 433 U.S. at 364. Commercial speech also often "carr[ies] information of import to significant issues of the day," *id.*, which can promote discussion of issues of public concern, such as racism, economic inequality, and public corruption, *Matal v. Tam*, 137 S. Ct. 1744, 1764-65 (2017); *see, e.g.*, Ben Popken*, Nike Takes Heat for New Kaepernick Ad—But Is Social Activism Just the New Ad Hook?*, NBCNews (Sept. 4, 2018), https://nbcnews.to/2vh3url ("More companies have been wading into social issues … and consumers have shown a willingness to express their political views through their purchasing.").

The prior substantiation doctrine restrains this critical flow of information. By placing the burden of truth on the *speaker*—instead of the government—companies will refrain from speaking because of "doubt whether [their speech] can be proved in court." *New York Times*, 376 U.S. at 279. This chilling effect exists even if the speech is "believed to be true" and even if it "is in fact true." *Id*.

And, because the critical inquiry is whether the company possessed sufficient evidence *before* it spoke, a commercial speaker cannot avoid liability by ultimately proving the truth of its claims. Pet. App. 25a, 86a n.4. The company thus must refrain from speaking—even if confident in the truth of its assertions—until it has sufficient documentation in case the government comes calling; even then, it might turn out that the State is still dissatisfied. The Court has long recognized that these types of procedural hurdles hinder, delay, and suppress protected speech. *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 711-13 (1931) (imposing liability unless the speaker is "prepared with legal evidence to prove the truth of" his speech is the "essence of censorship").

Trying to comply with the prior substantiation doctrine is thus no easy task. The State requires speakers to have "competent and reliable scientific evidence" before publishing the advertisement. Pet. App. 15a-17a. As this case shows, however, scientific conclusions are notoriously debatable. Indeed, "most of the scientific claims that are relevant to consumers … are tentative and have an insufficient base of evidence to deem them either true or false." Bambauer, *supra,* 76. When companies lack confidence that their speech will pass the evidentiary threshold, they are more likely to remain silent.

This is not to say that companies should be free to assert baseless claims about their products without consequence. The government need not "sit idly by and allow their citizens to be defrauded." *Riley*, 487 U.S. at 795. But the federal government and the states

have numerous enforcement tools to punish and prevent such falsehoods. The FTC can (and does) prosecute those who publish false advertisements. *Supra* 7-8. The states, including Washington, do too. *See* Restatement (Third) of Unfair Competition §2 (1995) (collecting state laws); Wash. Rev. Code §19.86.020. And private citizens can seek liability for harms they have suffered from false advertising. *See* Restatement (Third) of Unfair Competition §1 (1995) (collecting state laws); Wash. Rev. Code §19.86.090. Given these existing laws that deter and punish false speech, there is simply no justification for the prior substantiation doctrine.

Moreover, reevaluating *Central Hudson* would bring uniformity and predictability to the First Amendment. For example, the constraints imposed by the prior substantiation doctrine would never be tolerated outside the context of commercial speech. Consider a law requiring a publisher to have two "competent and reliable" sources before it can publish a story involving public corruption. Such a law would surely decrease the number of false public-corruption stories, but it would stop countless *true* stories from being published too. *See Philadelphia Newspapers, Inc.*, 475 U.S. at 776-77. Such a law would be rightly condemned as a "step to a complete system of censorship." *Near*, 283 U.S. at 721 (invalidating a state law allowing censorship if the speaker could not "produce proof of the truth … of what he intended to publish").

That the petition does not present a circuit split should not deter this Court's review. The Court does

not hesitate to "grant[] certiorari to consider [an] important [First Amendment] question," even if no division of authority exists. *Janus v. Am. Fed'n of State, Cty., & Mun. Employees, Council 31*, 138 S. Ct. 2448, 2462 (2018); *e.g., Snyder v. Phelps*, 562 U.S. 443, 451 (2011) (same). "First Amendment cases" also are one of the few "prominent types of cases in which the Court" has "granted certiorari predominantly to correct an erroneous ruling on the particular facts." Stephen M. Shapiro et al., *Supreme Court Practice*, §4.14 (11th ed. 2019).

This is especially true for commercial speech cases. A substantial portion of the Court's commercial speech doctrine has arisen out of cases reviewing state laws with no apparent circuit split. *See, e.g., Liquormart*, 517 U.S. at 495 (state statute prohibiting advertisement of liquor prices); *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 621 (1995) (state bar rules prohibiting lawyers from engaging in certain solicitation); *Ibanez*, 512 U.S. at 142 (state bar rules prohibiting certain advertising); *Edenfield*, 507 U.S. at 763-65 (state ban on in-person solicitation by certified public accountants); *Discovery Network*, 507 U.S. at 416 (city ordinance prohibiting news racks containing "commercial handbills"); *Peel*, 496 U.S. at 94 (state rules prohibiting attorney from holding himself out as a specialist). This petition falls squarely within this line of cases. The First Amendment issues presented in this case deserve the Court's attention.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX

APPENDIX A — OPINION OF THE COURT OF APPEALS OF THE STATE OF WASHINGTON, FILED MARCH 18, 2019

IN THE COURT OF APPEALS OF
THE STATE OF WASHINGTON

No. 76463-2-I
DIVISION ONE
PUBLISHED OPINION

THE STATE OF WASHINGTON,

Respondent,

v.

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

Appellants.

March 18, 2019, Filed

MANN, A.C.J. — The State of Washington sued Living Essentials LLP and Innovative Ventures LLP (collectively Living Essentials) under the Washington Consumer Protection Act (CPA), chapter 19.86 RCW, alleging that Living Essentials violated the CPA by making deceptive advertising claims about its product, 5-Hour ENERGY®. After a bench trial, the trial court agreed that three of Living Essentials' advertising campaigns violated the

CPA. The trial court assessed a civil penalty against Living Essentials and awarded the State its attorney fees and costs.

Living Essentials argues on appeal that (1) the trial court erred by adopting the Federal Trade Commission's (FTC) "prior substantiation doctrine," (2) the "prior substantiation doctrine violates article I, section 5 of the Washington State Constitution, (3) Living Essentials' claims were mere puffery, which did not require substantiation, (4) the trial court applied the wrong standard for necessary substantiation, and (5) the trial court erred in concluding that Living Essentials' "Ask Your Doctor" claim was deceptive. Living Essentials also challenges the trial court's penalty and award of attorney fees. We affirm.[1]

I.

Living Essentials produces and markets the energy drink 5-Hour ENERGY®. During its advertising campaign, Living Essentials made numerous claims about the efficacy of 5-Hour ENERGY®. Three of those claims are relevant to this appeal.

First, Living Essentials claimed that 5-Hour ENERGY® was "Superior to Coffee" (Superior to Coffee claim). Specifically, Living Essentials claimed that "the

1. The State filed a motion to strike or disregard portions of appellants' opening and reply briefs. Because the State prevailed in this appeal, it is unnecessary for us to consider the merits of this motion. The State's motion is denied.

key vitamins and nutrients [in 5-Hour ENERGY®] work synergistically with caffeine to make the biochemical or physiological effects last longer than caffeine alone." Second, Living Essentials claimed that the decaffinated (decaf) variety of 5-Hour ENERGY® provided energy, alertness, and focus "for hours." (Decaf claim). Living Essentials provided the basic message, if you do not like caffeine then "Decaf 5-Hour ENERGY® … can provide the alertness you want without the 'caffeine feeling' you don't." Third, Living Essentials implied that 73 percent of doctors would recommend 5-Hour ENERGY® (Ask Your Doctor claim). In an ad that ran on national television, a spokesperson said

> We asked over 3,000 doctors to review 5-hour Energy®, and what they said is amazing. Over 73% who reviewed 5-hour Energy® said they would recommend a low calorie energy supplement to their healthy patients who use energy supplements. 73%. 5-hour Energy® has 4 calories and is used over nine million times a week. Is 5-hour Energy® right for you? Ask your doctor. We already asked 3,000.

After an 11-day bench trial involving testimony and transcripts of testimony from 20 lay and expert witnesses and the admission of approximately 500 exhibits, the trial court issued a 57-page decision including detailed findings of fact and conclusions of law. Following FTC guidance, the trial court concluded that Living Essentials Superior to Coffee, Decaf, and Ask Your Doctor claims were deceptive and violated the CPA.

With respect to the Superior to Coffee claim, the trial court found that the real takeaway was "that the combination of caffeine, B vitamins and amino acids would provide energy that would last longer than consumers would experience from a cup of premium coffee (and in some of the ads, longer than 3 or 4 cups of coffee)." The court further found that "[t]he studies [Living Essentials presented] do not clearly establish that 5-Hour ENERGY®'s vitamins and nutrients work synergistically with caffeine to make these benefits last longer than they would last with caffeine alone." Living Essentials' claim that "5-Hour ENERGY® works better than caffeine alone … is certainly plausible, given the science presented to the Court, but it remains a hypothesis, not an established scientific fact." The court concluded that "Living Essentials violated the [CPA] when it aired or published ads that represented that the energy, alertness and focus from 5-hour ENERGY® lasts longer than a cup of coffee because of the synergistic effects of caffeine, B vitamins and nutrients in the product."

The trial court also found that "Living Essentials lacks competent and reliable scientific evidence to claim that decaf 5-Hour ENERGY® will generate energy and alertness that 'lasts for hours.'" The trial court concluded that "Living Essentials violated the [CPA] when it claimed in a press release and on its web site that Decaf 5-hour ENERGY® will provide energy, alertness and focus that lasts for hours."

Finally, the trial court determined that the Ask Your Doctor claim was deceptive. The court found that the "net

impression" from the ad was that "a substantial majority of doctors believe 5-Hour ENERGY® is a safe and effective nutritional supplement that doctors would recommend to their patients." The court noted that "while the statistics displayed … were *literally* true, the impression left by the ads was not."

Based on the number of times the ads aired or the number of bottles of product sold, the trial court imposed a $2,183,747 civil penalty and awarded the State its attorney fees and costs. Living Essentials appeals.

II.

Living Essentials first raises multiple challenges to the trial court's findings and conclusions that Living Essentials' Superior to Coffee, Decaf, and Ask Your Doctor claims were deceptive and violated the CPA.

"[W]hether a particular action gives rise to a Consumer Protection Act violation is reviewable as a question of law." *Leingang v. Pierce County Med. Bureau*, 131 Wn.2d 133, 150, 930 P.2d 288 (1997). Whether a party committed the particular violation, however, is reviewed under the substantial evidence test. *Leingang*, 131 Wn.2d at 150. "Substantial evidence is evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premise." *Holland v. Boeing Co.*, 90 Wn.2d 384, 390-91, 583 P.2d 621 (1978). "The substantial evidence standard is 'deferential and requires the court to view the evidence and reasonable inferences in the light most favorable to the party who prevailed'" below. *Mansour*

v. King County, 131 Wn. App. 255, 262-63, 128 P.3d 1241 (2006) (quoting *Sunderland Family Treatment Servs. v. City of Pasco*, 127 Wn.2d 782, 788, 903 P.2d 986 (1995)).

Unchallenged findings of fact are verities on appeal. *State v. Reader's Digest Ass'n*, 81 Wn.2d 259, 263-64, 501 P.2d 290 (1972).[2] Further, mere assertions of error are not enough. When a challenged finding is unsupported by argument on appeal, this court need not consider the assignment of error. *Bryant v. Palmer Coking Coal Co.*, 86 Wn. App. 204, 216, 936 P.2d 1163 (1997).[3] Even where the evidence conflicts, the appellate court need determine only "whether the evidence most favorable to the prevailing party supports the challenged findings." *Prostov v. Dep't of Licensing*, 186 Wn. App. 795, 820, 349 P.3d 874 (2015). Finally, the reviewing court "defer[s] to the trier of fact regarding witness credibility or conflicting testimony." *Weyerhaeuser v. Tacoma-Pierce County Health Dep't*, 123 Wn. App. 59, 65, 96 P.3d 460 (2004). Reviewing courts will not reweigh the evidence or the credibility of witnesses on appeal. *Wash. Belt & Drive Sys., Inc. v. Active Erectors*, 54 Wn. App. 612, 616, 774 P.2d 1250 (1989).[4]

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2. Living Essentials does not assign error to numerous findings of fact. See, for example, unchallenged findings 1-9, 1, 13-14(d)(6), 15-16(a)-(c)(1), and 16(d)(1)-(4), and portions of 10, 16(c)(2), 16(d)(5)-(6), 17, 19, 20, and 22.

3. Living Essentials assigns error to several findings but fails to provide argument in support of the assignment. *See, e.g.*, Findings 14(d)(7), 16(c)(2), 19(i), 20(d), 22(a), 22(a)(2)-(3).

4. Living Essentials assigns error to several of the trial court's credibility determinations and weighing of evidence. *See, e.g.*, Findings 16, 16(c)(2), 16(d)(5)-(6), 17(c), 19, 20, 22.

Appendix A

A.

Living Essentials' primary contention is that the trial court erred by relying on the FTC's prior substantiation doctrine because it has not been adopted in Washington, cannot be judicially adopted, and is inconsistent with Washington CPA law. We disagree. A brief review of the CPA and FTC's prior substantiation doctrine is helpful.

1.

The CPA prohibits "unfair or deceptive acts or practices in the conduct of any trade or commerce." RCW 19.86.020. The purpose of the CPA is "to protect the public and foster fair and honest competition." RCW 19.86.920. The CPA is meant to be liberally construed to serve this purpose. *Short v. Demopolis*, 103 Wn.2d 52, 60-61, 691 P.2d 163 (1984).

The Washington attorney general may bring an enforcement action under the CPA. The State must prove three elements: "(1) an unfair or deceptive act or practice (2) occurring in trade or commerce, and (3) public interest impact." *State v. Kaiser*, 161 Wn. App. 705, 719, 254 P.3d 850 (2011). The State is not required to prove that the unfair or deceptive advertisements actually injured consumers or that consumers relied on deceptive ads when deciding whether to purchase or consume the advertised products. *Kaiser*, 161 Wn. App. at 719. A CPA claim "'does not require a finding of an intent to deceive or defraud and therefore good faith on the part of the seller is immaterial.'" *Wine v. Theodoratus*, 19 Wn. App. 700, 706,

577 P.2d 612 (1978) (quoting *Fisher v. World-Wide Trophy Outfitters*, 15 Wn. App. 742, 748, 551 P.2d 1398 (1976)).

The CPA does not define "unfair or deceptive acts or practice." Instead, our Supreme Court has allowed the definition to evolve through the "'gradual process of judicial inclusion and exclusion.'" *Klem v. Wash. Mut. Bank*, 176 Wn.2d 771, 785, 295 P.3d 1179 (2013) (internal quotation marks omitted) (quoting *Saunders v. Lloyd's of London*, 113 Wn.2d 330, 344, 779 P.2d 249 (1989)). "Given that there is 'no limit to human inventiveness,' courts, as well as legislatures, must be able to determine whether an act or practice is unfair or deceptive to fulfill the protective purpose of the CPA." *Klem*, 176 Wn.2d at 786 (quoting *Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 48, 204 P.3d 885 (2009)).

A claim under the CPA may be predicated on (1) a per se violation of statute, (2) an act or practice that has the capacity to deceive substantial portions of the public, or (3) an unfair or deceptive act or practice not regulated by statute but in violation of public interest. *Klem*, 176 Wn.2d at 787. "An act is deceptive if it is likely to mislead a reasonable consumer." *State v. Mandatory Poster Agency, Inc.*, 199 Wn. App. 506, 512, 398 P.3d 1271, *review denied*, 189 Wn.2d 1021 (2017). "A plaintiff need not show that the act in question was *intended* to deceive, but that the alleged act had the *capacity* to deceive a substantial portion of the public." *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 785, 719 P.2d 531 (1986). Further, a truthful statement "may be deceptive by virtue of the 'net impression' it conveys." *Panag*, 166 Wn.2d at 50.

Appendix A

Washington's CPA was initially adopted in 1961 and modeled generally after section 5 of the Federal Trade Commission Act (FTCA), 15 U.S.C. § 45(a)(1). *Hangman Ridge*, 105 Wn.2d at 783. As with the CPA, the FTCA broadly prohibits "unfair or deceptive acts or practices." The CPA was intended to "complement the body of federal law governing restraints of trade, unfair competition and unfair, deceptive, and fraudulent acts or practices." RCW 19.86.920. As such, "in construing this act, the courts [should] be guided by final decisions of the federal courts and final orders of the federal trade commission." RCW 19.86.920; *State v. Black*, 100 Wn.2d 793, 799, 676 P.2d 963 (1984) ("When the Legislature enacted the Consumer Protection Act, it anticipated that our courts would be guided by the interpretation given by federal courts to their corresponding federal statutes.").

Washington courts have repeatedly adopted federal court interpretations of section 5 of the FTCA when reviewing CPA cases. *See Boeing Co. v. Sierracin Corp.*, 108 Wn.2d 38, 57, 738 P.2d 665 (1987) ("In the absence of Washington cases discussing when assertion of trade secrets constitutes a violation of antitrust laws, [courts] are guided by interpretations of the federal courts." (citing RCW 19.86.920)); *Fisher*, 15 Wn. App. at 748 (using the Second Circuit's interpretation of an unfair or deceptive act (citing *Exposition Press, Inc. v. Fed. Trade Comm'n*, 295 F.2d 869, 873 (2d Cir. 1961)); *see also Panag*, 166 Wn.2d at 50 ("Deception exists 'if there is a representation, omission or practice that is likely to mislead.'" (quoting *Sw. Sunsites, Inc. v. Fed. Trade Comm'n*, 785 F.2d 1431, 1435 (9th Cir. 1986))); *Blewett v. Abbott Labs.*, 86 Wn.

App. 782, 787, 938 P.2d 842 (1997) ("The directive to be 'guided by' federal law does not mean we are bound to follow it. But neither are we free to ignore it, and indeed in practice Washington courts have uniformly followed federal precedent in matters described under the [CPA].").

Under section 5 of the FTCA, in order to prove that an advertisement is deceptive, the FTC must establish (1) that the advertisement conveys a representation through either express or implied claims, (2) that the representation is likely to mislead consumers, and (3) that the misleading representation is material. *Fed. Trade Comm'n v. Direct Mktg. Concepts, Inc.*, 569 F. Supp. 2d 285, 297 (D. Mass. 2008), *aff'd*, 624 F.3d 1 (1st Cir. 2010). "Neither proof of consumer reliance nor consumer injury is necessary to establish a § 5 violation." *Fed. Trade Comm'n v. Freecom Commc'ns, Inc.*, 401 F.3d 1192, 1203 (10th Cir. 2005). The FTC can prove that a representation is likely to mislead consumers by establishing either (1) actual falsity of express or implied claims ("falsity" theory) or (2) that the advertiser lacked a reasonable basis for asserting the representation was true ("reasonable basis" theory). *Fed. Trade Comm'n v. Pantron I Corp.*, 33 F.3d 1088, 1096 (9th Cir. 1994) (quoting *Thompson Med. Co.*, 104 F.T.C. 648, 818-19 (1984)); *Fed. Trade Comm'n v. John Beck Amazing Profits, LLC*, 865 F. Supp. 2d 1052, 1067 (C.D. Cal. 2012).[5]

Under the reasonable basis theory, if an advertisement states or impliedly suggests that a product successfully

5. Here, because the State was proceeding only under the reasonable basis theory, the trial court did not analyze Living Essentials' claims under the falsity theory.

performs an advertised function or yields an advertised benefit, the advertiser must have a "reasonable basis" for the claim. *Fed. Trade Comm'n v. COORGA Nutraceuticals Corp.*, 201 F. Supp. 3d 1300, 1308-09 (D. Wyo. 2016) (citing *Pfizer, Inc.*, 81 F.T.C. 23 (1972)). Further, the advertiser must have some recognizable substantiation for the representation *prior* to advertising it. *John Beck Amazing Profits*, 865 F. Supp. 2d at 1067. Where an advertiser lacks adequate substantiation, it necessarily lacks any reasonable basis for its claims and the advertisement is deceptive as a matter of law. *Direct Mktg. Concepts, Inc.*, 624 F.3d at 8. This is known as the FTC's prior substantiation doctrine.

2.

Living Essentials contends that the trial court erred by adopting the prior substantiation doctrine—effectively creating a new per se unfair trade practice. We agree that our Supreme Court has determined that it is for the legislature, not the courts, to declare whether a statutory violation is a per se unfair trade practice. *Hangman Ridge*, 105 Wn.2d at 787. We disagree, however, that the trial court adopted the prior substantiation doctrine as a new per se unfair trade practice.

Living Essentials relies primarily on this court's decision in *State v. Pacific Health Center, Inc.*, 135 Wn. App. 149, 143 P.3d 618 (2006). In *Pacific Health*, the State alleged that various alternative medicine practitioners violated the CPA because they were practicing medicine, naturopathy, and acupuncture without a license. *Pac.*

Health, 135 Wn. App. at 153. The State had argued that by engaging in health care practices, the defendants represented that they possessed the expertise and training that only licensed health care providers possessed—a misrepresentation and violation of the CPA. The defendants argued that the State was attempting to create a new per se violation of the CPA: practicing medicine without a license.

The *Pacific Health* court agreed with the defendants because, despite being unlicensed, they were actually skilled at performing the tests and diagnoses that they performed. The court concluded that the advertisements that claimed the defendants were skilled at performing medical tests, but not asserting that they were licensed doctors, were not deceptive. The court further concluded that if it were to find the ads deceptive simply because the defendants were unlicensed, it would amount to a new per se unfair trade practice. *Pac. Health*, 135 Wn. App. at 149.

In reaching its conclusion, the *Pacific Health* court analogized to *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 675 P.2d 193 (1983) (plurality opinion). In *Bowers*, a title insurance company prepared closing documents in preparation for a sale despite not being licensed to practice law. The *Pacific Health* court explained that "[t]he crucial point for our CPA analysis is not simply that [the appellants in *Bowers*] were unqualified to practice law, but rather that the record demonstrated they were, in fact, not skilled in preparing the very closing documents they held themselves out as qualified to prepare." *Pac. Health*, 135 Wn. App. at 172.

The *Pacific Health* court's analysis of *Bowers* clarifies that a decision does not risk creating a new per se unfair trade practice when, on the facts of the case, the alleged violators' conduct actually constituted deception. In *Pacific Health*, the unlicensed defendants were actually skilled at performing the tests and diagnosis for which they had advertised. Therefore, to hold that they violated the CPA would have created a new per se unfair trade practice because the doctors' advertisements were not, in fact, deceptive. Whereas in *Bowers*, because the advertisements were actually deceptive the case did not risk creating a new per se unfair trade practice.

Living Essentials' argument might be persuasive *if* the trial court had declared that simply because Living Essentials lacked prior substantiation, its advertisements were per se deceptive, without any analysis of whether the claims were actually deceptive. But this is not what the trial court did. While the trial court explained the FTC's prior substantiation doctrine as part of its conclusions of law, the court specifically declined to rely only on prior substantiation:

> The State argues that any scientific evidence developed or relied upon after Living Essentials aired or published its ads is legally irrelevant because the FTC guidelines required pre-claim substantiation. While this Court acknowledges that both the FTC guidelines and federal case law indicate that pre-claim substantiation is required, the Court also concludes that subsequent scientific studies may shed light

> on pre-claim studies and are thus relevant and material to the Court's CPA analysis.

More importantly, a review of the trial court's extensive findings of fact demonstrates that the court carefully considered Living Essentials' preclaim substantiation as well as an extensive list of postclaim studies and expert trial testimony in making its findings. The trial court found—with respect to Living Essentials' Superior to Coffee claim—that there was insufficient scientific evidence to support Living Essentials' express claims that people who drink 5-hour ENERGY® will experience hours of energy, alertness, and focus because the vitamins and nutrients extend the effects of caffeine. As a result of the lack of scientific evidence, the trial court found the ads materially misleading and in violation of the CPA.

Similarly, after reviewing both pre- and postclaim studies and expert trial testimony, the trial court found:

> While there is competent and reliable scientific evidence to support a claim that the Decaf 5-hour ENERGY® shot may provide a short-term benefit in terms of energy, the science is insufficient to substantiate the claim that this benefit will endure over a five hour period. For this reason, the Court finds the Decaf Claims to be materially misleading and a violation of the CPA.

Thus, while the trial court was appropriately guided by the FTC's prior substantiation doctrine, it did not adopt

the doctrine as a per se violation of the CPA. Instead after weighing all of the evidence before it, the court found that Living Essentials' Superior to Coffee and Decaf claims were materially misleading.

B.

Living Essentials next contends that application of the prior substantiation doctrine is contrary to article I, section 5 of the Washington Constitution and the First Amendment to the United States Constitution. We disagree.

1.

Living Essentials first argues that the trial court's standard for adequate substantiation required "competent and reliable scientific evidence"—an unconstitutionally vague standard for penalizing and suppressing speech.[6] Living Essentials argues that "competent and reliable" is just as vague as requiring "credible and reliable" identification of a criminal suspect, which the United States Supreme Court has found unconstitutional. *See*

6. Living Essentials also argues that the trial court violated the First Amendment by shifting the burden of proof and not requiring the government to prove Living Essentials' ads were misleading. Living Essentials bases this claim on one isolated statement in the trial court's extensive findings and conclusions and then contends that the court did not require the government to prove anything. Living Essentials fails, however, to cite to anywhere in the trial court's findings or conclusions that actually shifted the government's burden of proof. Its claim is without merit.

Kolender v. Lawson, 461 U.S. 352, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983).

The due process clause of the Fourteenth Amendment requires that notice be given of what is prohibited. *Reader's Digest*, 81 Wn.2d at 273. Whether "'notice is, or is not "fair" depends upon the subject matter to which it relates'" and "'[c]ommon intelligence' is the test of what is fair warning." *Reader's Digest*, 81 Wn.2d at 273 (quoting *Winters v. New York*, 333 U.S. 507, 524, 68 S. Ct. 665, 92 L. Ed. 840 (1948) (FRANKFURTER, J., dissenting) and citing *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391, 46 S. Ct. 126, 70 L. Ed. 322 (1926)). "In the field of regulatory statutes governing business activities, greater leeway is allowed in applying the test." *Reader's Digest*, 81 Wn.2d at 273-74. Thus, statutes using words or phrases well enough known to enable those expected to use them to correctly apply them, or statutes that use words with a well settled common law meaning, will be sustained against a vagueness challenge. *Reader's Digest*, 81 Wn.2d at 273-74.

[24, 25] ¶34 The phrase "competent and reliable scientific evidence" has been a benchmark for determining whether ad claims have a reasonable basis since at least 1984. *See Sterling Drug, Inc. v. Fed. Trade Comm'n*, 741 F.2d 1146, 1156-57 (9th Cir. 1984) (performance claims must be supported by "competent and reliable scientific evidence"). Our Supreme Court has held that where federal courts have "amassed an abundance of law giving shape and definition" to the law, there is sufficiently well established meaning in federal trade law to meet a constitutional challenge of vagueness. *Reader's Digest*, 81

Wn.2d at 274. Given the weight of federal court decisions, FTC decisions, orders, and guidance surrounding both the requirement of "competent and reliable scientific evidence" and what advertisers may do to market dietary supplements in a fair and nondeceptive manner, the trial court did not err in following FTC guidance.

2.

Living Essentials argues next that article I, section 5 of the Washington State Constitution affords greater protection of commercial speech than the First Amendment and requires application of strict scrutiny.

Living Essentials contends that it is an open question whether article I, section 5 of the Washington Constitution provides broader protection than the First Amendment to the United States Constitution. Living Essentials argues that the open nature of this question means that this court must undergo a *Gunwall* analysis to determine whether commercial speech is afforded greater protection under article I, section 5 than the First Amendment. *State v. Gunwall*, 106 Wn.2d 54, 58, 720 P.2d 808 (1986).

[26, 27] ¶37 While Living Essentials is correct that we use the *Gunwall* factors to analyze whether the Washington Constitution provides a broader right than the federal constitution, contrary to Living Essentials' claims, our Supreme Court has already answered that question regarding commercial speech. In *National Federation of Retired Persons v. Insurance Commissioner*, the court determined that because "Washington case law provides

no clear rule for constitutional restrictions on commercial speech … [w]e therefore follow the interpretative guidelines under the federal constitution." 120 Wn.2d 101, 119, 838 P.2d 680 (1992) (describing the test that the United States Supreme Court established in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 563, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980)); *see also Ino Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103, 116, 937 P.2d 154 (1997) (plurality opinion) ("The federal analysis also applies when confronting [article I, section 5] challenges to regulations of commercial speech.").

Living Essentials cites to other Washington cases as support for its assertion that it is still an open question whether commercial speech is afforded more protection in Washington than federally. *See Soundgarden v. Eikenberry*, 123 Wn.2d 750, 764, 871 P.2d 1050 (1994) (declining to address the scope of protection under article I, section 5, because the parties "have not addressed the … [*Gunwall*] factors"); *Kitsap County v. Mattress Outlet*, 153 Wn.2d 506, 511 n.1, 104 P.3d 1280 (2005) (plurality opinion) ("Although our state constitution *may be* more protective of free speech than the federal constitution, it is unnecessary to consider a state constitutional analysis because [the ordinance] fails the minimum protection provided under the federal constitution." (emphasis added)). None of the cases Living Essentials cites overrules or meaningfully distinguishes *National Federation of Retired Persons* or *Ino Ino*. If anything, the cases that Living Essentials cites further supports the Supreme Court's statement in *National Federation of Retired Persons* that "Washington case law provides

no clear rule for constitutional restrictions on commercial speech." 120 Wn.2d at 119. Accordingly, the Supreme Court's decisive language that we are to apply the four-part test from *Central Hudson* remains binding authority on this court. *See Nat'l Fed'n of Retired Persons*, 120 Wn.2d at 118; *Ino Ino*, 132 Wn.2d at 116.

In *Central Hudson*, the United States Supreme Court determined that commercial speech is entitled to First Amendment protection. 447 U.S. at 566. However, because commercial speech is not entitled to as much protection as noncommercial speech, the Court established a four-part test to determine if a regulatory burden on commercial speech is constitutional. *Cent. Hudson*, 447 U.S. at 566. In analyzing this question, a court must consider (1) whether the speech concerns a lawful activity and is not misleading, (2) whether the government's interest is substantial, (3) whether the restriction directly and materially serves the asserted interest, and (4) whether the restriction is no more extensive than necessary. *Cent. Hudson*, 447 U.S. at 566.

Applying *Central Hudson* to this case, Living Essentials' argument that the prior substantiation doctrine is unconstitutional fails at the first prong. The United States Supreme Court has continually emphasized that in order to be constitutionally protected, commercial speech must not be misleading or concern unlawful activity. *See In re R.M.J.*, 455 U.S. 191, 203, 102 S. Ct. 929, 71 L. Ed. 2d 64 (1982) ("Misleading advertising may be prohibited entirely."). The Supreme Court has also held that the government may even regulate potentially deceptive

speech without violating the First Amendment. *See Friedman v. Rogers*, 440 U.S. 1, 15-16, 99 S. Ct. 887, 888, 59 L. Ed. 2d 100 (1979) (In upholding a Texas statute that banned the use of trade names the court concluded that "the use of a trade name … enhances the opportunity for misleading practices. … Rather than stifling commercial speech, [the challenged statute] ensures that information … will be communicated more fully and accurately to consumers than it had been in the past.").

Living Essentials concedes that several federal circuit courts of appeals have upheld the prior substantiation doctrine against similar constitutional challenges. *See Jay Norris, Inc. v. Fed. Trade Comm'n*, 598 F.2d 1244 (2d Cir. 1979); *United States v. Readers' Digest Ass'n*, 662 F.2d 955 (3d Cir. 1981); *Sears, Roebuck & Co. v. Fed. Trade Comm'n*, 676 F.2d 385 (9th Cir. 1982). Living Essentials argues that these cases should be disregarded because they were "issued at the dawn of First Amendment protection of commercial speech," but fails to explain why this matters. Living Essentials has not pointed to any case law purporting to overrule or meaningfully distinguish these cases, and the *Central Hudson* analysis suggests that the prior substantiation doctrine remains just as constitutional today as it was when these cases were first decided.

C.

Living Essentials next contends that no substantiation was necessary because the Superior to Coffee and Decaf claims are "mere puffery" and therefore not actionable under the CPA.

The FTC "generally will not bring advertising cases based on subjective claims … [or] cases involving obviously exaggerated or puffing representations, *i.e.*, those that the ordinary consumers do not take seriously."[7] Puffery is defined as "'either vague or highly subjective [claims] and, therefore, incapable of being substantiated.'" *Fed. Trade Comm'n v. Nat'l Uroloqical Grp., Inc.*, 645 F. Supp. 2d 1167, 1205 (N.D. Ga. 2008) (quoting *Sterling Drug, Inc.*, 102 F.T.C. 395, 749 (1983)), *aff'd*, 356 F. App'x 358 (11th Cir. 2009).

Living Essentials' attempt to characterize its claims as subjective by highlighting the use of the word "feeling" in its advertisements is unpersuasive. Living Essentials claimed that the unique blend of vitamins and amino acids in 5-Hour ENERGY® worked synergistically with caffeine to enhance the duration of the energy, alertness, and focus derived from caffeine alone. These are factual representations that are capable of being tested. "Living Essentials intentionally promoted the product's ingredients as changing the way the body functioned [and] [i]t promoted the product as a healthy way to achieve these physiological results." We agree with the trial court that Living Essentials' claims were factual representations and not mere puffery.

Living Essentials also contends that the FTC does not require substantiation where the product involved is "frequently purchased, easily evaluated by

7. FTC Policy Statement on Deception 4 (Oct. 14, 1983), https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf [https://perma.cc/XEU9-NY6R].

consumers, and inexpensive." But this point disregards the underlying policy purposes of the FTC's position: "There is little incentive for sellers to misrepresent … in these circumstances since they normally would seek to encourage repeat purchases. Where … market incentives place strong constraints on the likelihood of deception, the [FTC] will examine a practice closely before proceeding." FTC POLICY STATEMENT ON DECEPTION at 5.[8]

However, in this case the incentive to mislead consumers is still present. There is no way for the consumer to know which ingredients are acting to make the consumer feel more energized. While the evidence suggests that it is the caffeine that is providing the specific effects that the consumer is feeling, Living Essentials expressly advertised that it is 5-Hour ENERGY®'s noncaffeine ingredients that are acting. Therefore, the policy concerns underlying the FTC's guidance do not apply here.

D.

Under the FTC's prior substantiation doctrine, the court must determine the appropriate level of substantiation required for a claim to have a reasonable basis. Living Essentials contends the trial court erred by applying the FTC substantiation standard for claims that "relate to consumer health." While we agree that the trial court misstated the applicable standard, contrary to Living Essentials' argument, the error does not mandate a reversal.

8. FTC POLICY STATEMENT ON DECEPTION (Oct. 14, 1983).

The trial court found that "Living Essentials' ads relate to consumer health" and therefore "require a relatively high level of substantiation."[9] Under this relatively high level of substantiation standard, the court noted that Living Essentials' "Superior to Coffee" claim was "certainly plausible … [but was] not an established scientific fact." Further, the trial court concluded that "[w] hile there is competent and reliable scientific evidence to support a claim that the Decaf 5-Hour ENERGY® shot may provide a short-term benefit in terms of energy, the science is insufficient to substantiate the claim that this benefit will endure over a five hour period." These statements misstated the applicable standard.

The FTC defines a "health claim" as a "representation[ ] about the relationship between a nutrient and a disease or health-related condition." FTC, Dietary Supplements at n.2.[10] When an advertisement alleges that a product has a relationship to a disease or health related condition, the FTC requires a relatively high level of substantiation. *See POM Wonderful, LLC v. Fed. Trade Comm'n*, 414 U.S. App. D.C. 111, 777 F.3d 478, 500 (2015) (the FTC "bars representations about a product's general health

9. (Citing Bureau of Consumer Prot., FTC, Dietary Supplements: An Advertising Guide for Industry (2001), https://www.ftc.gov/system/files/documents/plain-language/bus09-dietary-supplernents-advertising-guide-industry.pdf [https://perma.cc/4XDP-VL7J)].

10. Bureau of Consumer Prot., FTC Dietary Supplements: An Advertising Guide for Industry (2001), https://www.ftc.gov/system/files/documents/plain-language/bus09-dietary-supplements-advertising-guide-industry.pdf [https://perma.cc/4XDP-VL7J].

benefits 'unless the representation is non-misleading' and backed by 'competent and reliable scientific evidence that is sufficient in quality and quantity' to 'substantiate that the representation is true'").

It is undisputed that Living Essentials markets and advertises 5-Hour ENERGY® as a dietary supplement. However, to conclude that 5-Hour ENERGY®'s claims are also health claims was erroneous. Living Essentials has not made any claims that 5-Hour ENERGY® has any direct impact on a disease or health related condition. And to require that Living Essentials establish scientific facts substantiating its claims exceeds even the FTC's standard. As the amici correctly explained, "[T]he competent-and-reliable standard does not envision scientific unanimity and certainly does not require, as the trial court held, that a claim be 'established scientific fact.'"

Similarly, the trial court erred by stating that Living Essentials had to substantiate that Decaf 5-hour ENERGY® lasted for *five* hours. The FTC requires that "the substantiation must be relevant to the claimed benefits," and Living Essentials never advertised that Decaf 5-Hour ENERGY® lasted for *five* hours, but rather that it lasted for *hours*.

However, because this court reviews CPA violations de novo, the trial court's reliance on an erroneous standard does not mandate a reversal; substantial evidence exists to support the trial court's conclusion that Living Essentials' ads violated the CPA. We "defer to the trier of fact regarding witness credibility or conflicting testimony,"

Weyerhaeuser, 123 Wn. App. at 65, will not reweigh the evidence or the credibility of witnesses on appeal, *Wash. Belt & Drive Sys., Inc.*, 54 Wn. App. at 616, and need only determine "whether the evidence most favorable to the prevailing party supports the challenged findings." *Prostov*, 186 Wn. App. at 820. Therefore, based on our independent review of the record and viewing the evidence in the light most favorable to the State, we conclude that reversal is not warranted. *Mansour*, 131 Wn. App. at 263.

In order to satisfy the CPA, an advertiser must have a reasonable basis for its claim. "Under the reasonable basis theory, the advertiser must have had some recognizable substantiation for the representation prior to making it an advertisement." *John Beck Amazing Profits*, 865 F. Supp. 2d at 1067. As the trial court found, Living Essentials failed to present any evidence that "anyone with any science training ever assessed the ad claims and the science backing up those claims against the FTC substantiation guidelines." And we agree with the trial court that "asking an advertising director who lacks any scientific or medical training to conduct internet research is [not] adequate substantiation."

As for Living Essentials' Superior to Coffee claim, first, its expert Dr. David Kennedy conceded that there is no experimental evidence showing that the addition of a multivitamin to a caffeinated energy drink will cause greater improvement in physical and cognitive performance than can be attributed to the effects of caffeine alone. Further, Living Essentials points to no evidence that directly supports its Superior to Coffee

claim. "Dr. Kennedy's summary of the scientific literature does show some different physiological results from caffeine plus vitamins or caffeine plus amino acids, but the results are not the benefits touted by Living Essentials." Specifically, the Giles study shows that taurine counteracts caffeine, rather than enhancing its effects. Further, neither the Glade nor the NERAC study examined whether combining the specific ingredients in 5-Hour ENERGY® with caffeine will cause the energy, alertness, and focus effects of caffeine to last longer than caffeine alone.

Living Essentials pointed to the 2013 Nagrecha study, the 2015 Molnar study, and the 2015 Paulus study as support for its Superior to Coffee claim. But, as the trial court found, none of those studies are sufficiently relevant to substantiate Living Essentials' claim. "The Nagrecha study has limited relevance because its test subjects underwent only one round of testing 40 minutes after ingesting" 5-Hour ENERGY®. The Paulus study had "methodological problems … [that were] significant enough to render [its] results unreliable." The Molnar study was insufficient to substantiate Living Essentials' claims because there was significant disagreement between the testifying experts as to the relevance of the Molnar study and, as the trial court found, the Bloomer study "undercut the reasonability of relying on Molnar as substantiation for Living Essentials' claims."

Finally, the Medicus study does not support 5-Hour ENERGY®'s Superior to Coffee claim. The trial court found Dr. Tom McLellan's testimony to be credible

that there is no basis for concluding that the Medicus study's results "were attributable to any ingredient other than caffeine." As the testifying experts pointed out, the Medicus study was designed in a flawed manner that overemphasized its results with respect to 5-Hour ENERGY®. The study was not designed "to determine whether the non-caffeine ingredients in 5-Hour ENERGY® led to improved performance," and the results "do not show that consuming 5-Hour ENERGY® improved any of the test subjects' cognitive functioning … above baseline."

We conclude that there is sufficient evidence in the record to support the trial court's determination that Living Essentials' Superior to Coffee claim is unsubstantiated.

There is also no substantiation in the record to show that Decaf 5-Hour ENERGY® lasts "for hours." In support of the Decaf claim, Dr. Sanford Bigelow testified that Living Essentials acted reasonably in relying on the 2010 Glade report and the 2007 NERAC report as substantiation. But the trial court found that Dr. Bigelow's testimony was not credible. The Glade report relied on studies that tested doses of 3000mg (milligrams) or more of taurine, but Decaf 5-Hour ENERGY® contains only 483mg of taurine—a differentiation that fatally undermines Dr. Michael Glade's conclusions because the FTC specifically cautions advertisers from relying on studies where the conclusions are based on very different dosages. FTC, DIETARY SUPPLEMENTS at 14, 16.

Dr. Kennedy also testified that the 2015 Shah study supported Living Essentials' Decaf claims. But "the chart on which Dr. Kennedy relie[d] actually show[ed] that the … test results at the 3 hour mark were not statistically significant." Further, the 2013 Kurtz study also contradicts Living Essentials' claim because it found that "consumers drinking Decaf 5-Hour ENERGY® experienced no energy benefits from the ingredients in the drink."

While the trial court may have been incorrect in saying that Living Essentials had to show that Decaf 5-Hour ENERGY® lasted for five hours, there is sufficient evidence in the record to support the trial court's determination that Living Essentials' Decaf Claim was deceptive.

E.

Living Essentials finally argues that the trial court erred in determining that its Ask Your Doctor claim was deceptive.

The trial court found that despite the words in the Ask Your Doctor ad being literally true, the net impression—that 73 percent of doctors had specifically recommended 5-Hour ENERGY® as a healthy and safe dietary supplement—was deceptive. The court first reasoned that Living Essentials' specific goal in creating this ad, as its advertising manager admitted at trial, was to indicate that doctors would recommend 5-Hour ENERGY®. Second, the surveys that Living Essentials used were specifically

designed to elicit a yes response because saying no "suggested that the responding doctor would instead recommend a high fat, high calorie, or high sodium energy supplement." And that "Living Essentials presented the statistics in a way that would lead a reasonable viewer to believe that 73 [percent] of 3,000 doctors surveyed would recommend this product to their patients" when it was actually 73 percent of 503 doctors.

Living Essentials contends that its expert testimony alone is sufficient to establish what message the reasonable consumer would take away from the ad and that there is insufficient evidence in the record to support the trial court's determination. We disagree.

Because "[t]he meaning of an advertisement … is … a question of fact," *Nat'l Urological Grp., Inc.*, 645 F. Supp. 2d at 1189, and a truthful statement "may be deceptive by virtue of the 'net impression' it conveys," *Panag*, 166 Wn.2d at 50, the trial court did not err by concluding that the net impression from the Ask Your Doctor ad was deceptive. "If an advertiser asserts that it has a certain level of support for an advertised claim, it must be able to demonstrate that the assertion is accurate." FTC, Dietary Supplements at 9. "Advertising should not … suggest greater scientific certainty than actually exists." FTC, Dietary Supplements at 16. "In determining the meaning of an advertisement … the important criterion is the net impression that it is likely to make on the general populace." *Grolier, Inc.*, 91 F.T.C. 315, 430 (1978), *order set aside and remanded on other grounds*, 615 F.2d 1215 (9th Cir. 1980), *modified*, 98 F.T.C. 882 (1981), *reissued*, 99 F.T.C. 379 (1982).

In reviewing ads, the court "will often be able to determine meaning through an examination of the representation itself, including an evaluation of such factors as the entire document, the juxtaposition of various phrases in the document, the nature of the claim, and the nature of the transaction." FTC POLICY STATEMENT ON DECEPTION at 2. "When a seller's representation conveys more than one meaning to reasonable consumers, one of which is false, the seller is liable for the misleading interpretation." *Nat'l Comm'n on Egg Nutrition*, 88 F.T.C. 89, 185 (1976), *modified*, 92 F.T.C. 848 (1978).

Here, the State's witness, Dr. Anthony Pratkanis, an expert in the science of consumer behavior and persuasion tactics, testified "that the clear takeaway from these ads was that doctors would recommend 5-Hour ENERGY®." Further, Dr. Pratkanis testified that Living Essentials' "survey questions were biased, leading, and designed to elicit a limited response." The trial court did not err by allowing Dr. Pratkanis's expertise to help guide its ultimate conclusions. The key question that the trial court had to answer was what the reasonable consumer would have taken away from Living Essentials' ad. FTC POLICY STATEMENT ON DECEPTION at 1-2 ("[W]e examine [advertisements] from the perspective of a consumer acting reasonably in the circumstances. … [T]o be deceptive the representation, omission or practice must be likely to mislead reasonable consumers under the circumstances."). Here, there is sufficient evidence in the record—including Dr. Pratkanis's testimony and the text of the Ask Your Doctor ad itself—to support the trial court's conclusion that the reasonable consumer would have been misled by Living Essentials' claim.

III.

Living Essentials next contends that the trial court erred by imposing more than $2 million in penalties. We disagree.

We review the trial court's imposition of a civil penalty for an abuse of discretion. *State v. Ralph Williams' N.W. Chrysler Plymouth, Inc.*, 87 Wn.2d 298, 553 P.2d 423 (1976) (*Ralph Williams* II). An abuse of discretion exists when no reasonable person would take the position adopted by the court. *Griggs v. Averbeck Realty*, 92 Wn.2d 576, 584, 599 P.2d 1289 (1979).

After finding that Living Essentials had violated the CPA, the trial court assessed a $2,183,747 civil penalty against Living Essentials. First, the court concluded that "the most appropriate method of determining the total number of violations for the deceptive advertisements is to determine the number of times the deceptive advertisements were aired in Washington" within the statute of limitations period. The Superior to Coffee claim was included in two different ads that ran in Washington 975 and 1,040 times, respectively. The Ask Your Doctor ad ran 19,716 times in Washington.

As for the Decaf claim, the court concluded that Living Essentials had made deceptive claims in its press release and press kit, and on the bottle packaging, but had not expressly advertised those claims in Washington. The court determined that the press release, dated 2008, was outside of the limitation period. Similarly, the court found

there was no credible evidence introduced to show that the press kit was ever distributed in Washington. However, the court did conclude that deceptively packaged bottles of Decaf 5-Hour ENERGY® were sold in Washington 2,482 times.[11]

Then, the court determined that a civil penalty of $100 per violation for the deceptive advertisements and $4.29 per decaf bottle sold was an appropriate penalty. In determining the proper amount of penalty to assess per violation, the trial court found the following factors significant: (1) Living Essentials generated a substantial amount of revenue in Washington, (2) 5-Hour ENERGY® posed a high risk to the public because it is consumed, so there is no way to reverse the impact such a product may have on an individual, and (3) Living Essentials spent more time trying to substantiate its claims after marketing its products in Washington than before. Accordingly, the court assessed a $1,971,600 penalty for the Ask Your Doctor claim, a $201,500 penalty for the Superior to Coffee claim, and a $10,647 penalty for the decaf packaging, equating to a total civil penalty of $2,183,747.

RCW 19.86.140 provides that "[e]very person [(including corporations)] who violated [the CPA] shall forfeit and pay a civil penalty of not more than two thousand dollars for each violation." Washington courts

11. Living Essentials sold $10,648 worth of Decaf 5-Hour ENERGY® in Washington. The court estimated that a reasonable per bottle price was $4.29, and therefore concluded that Living Essentials sold approximately 2,482 bottles of Decaf 5-Hour ENERGY® in Washington (10,648 / 4.29 = 2,482).

recognize two basic tenets of trade law in effectuating the purpose of chapter 19.86 RCW. "First, no one should be permitted to profit from unfair and deceptive conduct. … Second, fair dealing must be encouraged at all stages of commerce." *See State v. Ralph Williams' N.W. Chrysler Plymouth, Inc.*, 82 Wn.2d 265, 510 P.2d 233 (1973).

While RCW 19.86.140 provides that a statutory penalty for violating the CPA is mandatory, it leaves the amount of the penalty and the factors to consider within the trial court's discretion. *Ralph Williams* II, 87 Wn.2d at 314. Here, the trial court reasoned that "penalties should be large enough to deter future violations and to ensure that defendants do not profit from the deceptive advertising."

Living Essentials asserts that the penalty violates the excessive fines clause of the United States Constitution. *See Timbs v. Indiana*, ___ U.S. ___, 139 S. Ct. 682, 687, 203 L. Ed. 2d 11 (2019) (holding that "[t]he Excessive Fines Clause [of the Eight Amendment] is … incorporated by the Due Process Clause of the Fourteenth Amendment"). Under the excessive fines clause, civil penalties may not be "grossly disproportional to the gravity of a defendant's offense." *United States v. Balakajian*, 524 U.S. 321, 334, 118 S. Ct. 2028, 141 L. Ed. 2d 314 (1998). Living Essentials fails to show how assessing a $100 per violation penalty, despite being statutorily authorized to assess up to $2,000 per violation, is grossly disproportional. Courts have "consistently found that civil penalty awards in which the amount of the award is less than the statutory maximum do not run afoul of the Excessive Fines Clause." *United*

States v. Mackby, 221 F. Supp. 2d 1106, 1110 (N.D. Cal. 2002).

Living Essentials also contends that, under the due process clause, the trial court should have considered (1) the degree of reprehensibility, (2) the award compared to the harm, and (3) the amount of the award compared to other cases. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996). Using this analysis, Living Essentials argues that the fine here violated the due process clause because it was grossly disproportionate to other CPA violations. *See State v. WWJ Corp.*, 138 Wn.2d 595, 980 P.2d 1257 (1999); *Ralph Williams* II, 87 Wn.2d at 306-09. Living Essentials' argument fails for two reasons.

First, this court has already expressly rejected Living Essentials' argument. *See Mandatory Poster*, 199 Wn. App. at 527 (rejecting the argument that *BMW* compelled reversing the trial court's assessment of a civil penalty because "our Supreme Court expressly declined to apply the [*BMW*] factors to cases involving statutory damages" (citing *Perez-Farias v. Global Horizons, Inc.*, 175 Wn.2d 518, 533-34, 286 P.3d 46 (2012))). Second, the cases that Living Essentials cites actually stand for the opposite proposition. In *Ralph Williams* II, the court awarded civil penalties between $250 and $2,000 per violation. 87 Wn.2d at 316 n.11. In *WWJ*, the court awarded a penalty of $2,000 per violation. 138 Wn.2d at 598. Here, the court assessed a penalty, on average, of just $90 per violation. The only reason that the total penalty here is significantly higher than in the cited cases is because

Living Essentials violated the CPA more than 24,000 times. In essence, Living Essentials is suggesting that the penalty is unconstitutionally excessive because they violated the statute too many times. We decline to adopt this interpretation of the due process clause.

We conclude that the trial court's assessment of $2,183,747 in civil penalties for Living Essentials' 24,213 individual violations of the CPA was not an abuse of discretion.

IV.

Living Essentials finally argues that the trial court abused its discretion in its award of attorney fees. We disagree.

There are two relevant inquires in determining an award of attorney fees: first, whether the prevailing party is entitled to legal fees and, second, whether the award of attorney fees is reasonable. *Pub. Util. Dist. No. 1 v. Int'l Ins. Co.*, 124 Wn.2d 789, 814, 881 P.2d 1020 (1994). Whether a party is legally entitled to recover attorney fees is a question of law that we review de novo. *King County v. Vinci Constr. Grands Projets/Parsons RCI/Frontier-Kemper, JV*, 188 Wn.2d 618, 625, 398 P.3d 1093 (2017). Whether the amount of fees awarded was reasonable is reviewed for an abuse of discretion.

Living Essentials does not dispute that the prevailing party in a CPA action is entitled to an award of attorney fees. RCW 19.86.080(1) provides that "the prevailing party

[in a CPA action] may, in the discretion of the court, recover the costs of said action including a reasonable attorney's fee." In interpreting the term "prevailing party," the Washington Supreme Court has taken guidance from federal courts. "[A] plaintiff becomes 'a prevailing party … [i]f the plaintiff has succeeded on any significant issue in litigation which achieve[d] some of the benefit the parties sought in bringing suit.'" *Parmelee v. O'Neel*, 168 Wn.2d 515, 522, 229 P.3d 723 (2010) (most alterations in original) (internal quotation marks omitted) (quoting *Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 109 S. Ct. 1486, 103 L. Ed. 2d 866 (1989)). "'[T]he touchstone of the prevailing party inquiry [is] the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute.'" *Parmelee*, 168 Wn.2d at 522 (first alteration in original) (quoting *Tex. State Teachers Ass'n*, 489 U.S. at 792-93).

"Central to the calculation of an attorney fees award … is the underlying purpose of the statute authorizing the attorney fees." *Brand v. Dep't of Labor & Indus.*, 139 Wn.2d 659, 667, 989 P.2d 1111 (1999). Awarding the State its fees and costs after a CPA action will "encourage an active role in the enforcement of the [CPA,] … places the substantial costs of these proceedings on the violators of the act, and … [will] not drain [the State's] public funds." *Ralph Williams* II, 87 Wn.2d at 314-15.

Below, the trial court determined that the State of Washington was the prevailing party and therefore entitled to recover its attorney fees and costs. The State

brought suit because it believed that Living Essentials had violated the CPA, which the trial court ultimately agreed it had. That the State originally alleged more violations of the CPA than were ultimately found at trial does not change the fact that the State was successful in proving that Living Essentials had violated the CPA. As such, the State succeeded on a significant issue in this case: whether Living Essentials had violated the CPA. Therefore, the State was the prevailing party below.

Further, awarding the State its attorney fees and costs is consistent with the underlying purpose of the CPA. This award will help to encourage the attorney general's active role in CPA enforcement actions, which in turn will help to protect the public from untrue and deceptive advertisements.

Lastly, the trial court did not err in calculating the amount of fees awardable in this case. The trial court awarded the State $1,886,866.71 in attorney fees and $209,125.92 in costs. The trial court found that the State had reasonably incurred such a substantial amount of attorney fees and costs based on the "lengthy and complex nature of the litigation." Further, the court reduced the original amount of fees and costs that the State had requested in order to "reflect time spent on unsuccessful motions or other duplicative time." Accordingly, the court found that there was "no basis to reduce the request" any further.

While Living Essentials argues that the court should have further reduced the award because the

State prevailed only on some of its claims, the trial court expressly stated that it had already taken that into account. In fact, the court reduced the fee award by more than $40,000 "to reflect time spent on unsuccessful motions or other duplicative time." The trial court's finding that there is no basis to reduce the award any further was not an abuse of its discretion.

Fees on Appeal

Both parties have requested their fees on appeal, and RCW 19.86.080(1) allows this court to award fees to the prevailing party. Because the State is the prevailing party on appeal, it is entitled to its reasonable attorney fees and costs on appeal subject to compliance with RAP 18.1.

We affirm.

WE CONCUR: /s/_____

/s/_____ /s/_____

APPENDIX B — ORDER OF THE SUPREME COURT OF WASHINGTON, FILED OCTOBER 3, 2019

THE SUPREME COURT OF WASHINGTON

No. 97324-5

O R D E R

Court of Appeals
No. 76463-2-I

STATE OF WASHINGTON,

Respondent,

v.

LIVING ESSENTIALS, LLC, *et al.*,

Petitioners.

Filed
October 3, 2019

Department II of the Court, composed of Chief Justice Fairhurst and Justices Madsen, Stephens, González and Yu, considered at its October 2, 2019, Motion Calendar whether review should be granted pursuant to RAP 13.4(b) and unanimously agreed that the following order be entered.

Appendix B

IT IS ORDERED:

That the petition for review is denied and the Respondent's request for attorney fees for filing an answer to the petition for review is granted. The Respondent is awarded reasonable attorney fees and expenses pursuant to RAP 18.1(j). The amount of the attorney fees and expenses will be determined by the Supreme Court Clerk pursuant to RAP 18.1. Pursuant to RAP 18.1(d), the Respondent should file an affidavit *with the Clerk of the Washington State Supreme Court.*

DATED at Olympia, Washington, this 3rd day of October, 2019.

For the Court

/s/_____
CHIEF JUSTICE

APPENDIX C — ORDER ON MOTION FOR CIVIL PENALTIES, RESTITUTION, INJUNCTIVE RELIEF, AND ATTORNEY FEES AND COSTS IN THE STATE OF WASHINGTON, KINGS COUNTY SUPERIOR COURT, FILED FEBRUARY 7, 2017

STATE OF WASHINGTON
KING COUNTY SUPERIOR COURT

NO. 14-2-19684-9 SEA

STATE OF WASHINGTON,

Plaintiff,

v.

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

Defendants.

ORDER ON MOTION FOR CIVIL PENALTIES, RESTITUTION, INJUNCTIVE RELIEF, AND ATTORNEY FEES AND COSTS

This matter came before Judge Beth M. Andrus on Plaintiff State of Washington's motion for the imposition of civil penalties, to award restitution, to impose an injunction, and to award attorney fees and costs. The Court has reviewed the materials submitted by the parties and rules as follows:

Appendix C

A. Civil Penalties

As reflected in the Court's Findings of Fact and Conclusions of Law dated December 2, 2016, Defendants violated the Consumer Protection Act, Chapter 19.86 RCW. The CPA declares that "unfair or deceptive acts or practices in the conduct of any trade or commerce are… unlawful." RCW 19.86.020. The statute mandates that the Act be "liberally construed that its beneficial purposes may be served." RCW 19.86.920. Washington courts recognize two basic tenets of trade law in affecting this purpose. First, no one should be permitted to profit from unfair and deceptive conduct. *See State v. Ralph Williams N.W. Chrysler Plymouth, Inc.*, 82 Wn. 2d 265, 510 P. 2d 233 (1973) (*Ralph Williams I).* Second, fair dealing must be encouraged at all stages of commerce. An award of civil penalties, injunctive relief, and attorneys' fees and costs is authorized by the Consumer Protection Act to effectuate its purpose.

The CPA provides that "[e]very person who violates RCW 19.86.020 shall forfeit and pay a civil penalty of not more than two thousand dollars for each violation." RCW 19.86.140. Under RCW 19.86.140, imposition of a statutory penalty is mandatory, but the amount of the penalty is within the Court's discretion. *See State v. Ralph Williams' N.W. Chrysler Plymouth, Inc.*, 87 Wn.2d 298, 314, 553 P.2d 423 (1976) (*Ralph Williams II*). Consumer reliance on a defendant's deceptive representations is not necessary for the imposition of civil penalties. *Ralph Williams II*, 87 Wn.2d at 317.

Appendix C

The parties disagree as to how the Court should count Defendants' CPA violations and how the Court should determine the appropriate amount of per-violation penalty.

This Court concludes that the most appropriate method of determining the total number of violations for the deceptive advertisements is to determine the number of times the deceptive advertisements were aired in Washington. *See Ralph Williams II*, 87 Wn.2d at 317 (rejecting argument that penalties should be limited to one violation per consumer, and instead multiplying causes of action by the number of consumers affected by each); *U.S. v. J.B. Williams*, 354 F. Supp. 521, 547-48 (S.D.N.Y. 1973) (holding that each airing of television advertisement was held to be a separate violation), *aff'd in part rev'd in part on other grounds, U.S. v. J.B. Williams,* 498 F.2d 414 (2d Cir. 1974).

This Court also concludes that the most appropriate method of determining the total number of violations for the sales of the Decaf 5-Hour ENERGY® is to determine the number of times the product was sold using the deceptive packaging.

The Court finds Defendants' deceptive "Construction Site Cowboy" advertisement (Ex. 383) aired in Washington 975 times after July 16, 2012. The Court finds Defendants' deceptive "Choose Wisely" advertisement (Ex. 384) aired in Washington 1,040 times after July 16, 2012. A per-violation penalty for these airings is appropriate.

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In 2012, Defendants aired the deceptive "Ask Your Doctor" ad, which ran on national television for ten weeks. Ex. 649, 650. Defendants aired these advertisements on national television, including in Washington, 19,716 times after July 16, 2012. A per-violation for each of these airings is appropriate.

The Court did not find the Coffee & Vitamins ad to be deceptive. No civil penalty is appropriate for the airing of this ad.

This Court previously found that Defendants' claim that Decaf 5-Hour ENERGY® will generate energy and alertness that "lasts for hours" was deceptive. The State's CPA claim was based on the following exhibits: a press release at product launch (Ex. 722), a press kit developed by an ad agency (Ex. 105), Defendants' web site (Exs. 661, 1283, and 2118), and the packaging on the decaf product bottle (Ex. 101). The press release, dated 2008, falls outside the limitations period and the Court finds that no civil penalty is appropriate for any dissemination of the press release that may have occurred in Washington. Ex. 105, the press kit, does contain a statement that Decaf 5-Hour ENERGY® "provides a sustained energy boost" that falls within the Court's finding of deceptive statements but the Court finds no evidence that this material was ever distributed in Washington. It thus declines to impose civil penalties for Ex. 105. None of the web site screen shots contain the statement the Court found deceptive. The only advertising the Court finds to have been deceptive in the limitations period is the statement on the Decaf packaging, Ex. 101, that the

energy derived from consuming Decaf 5-Hour ENERGY® "lasts for hours." This phrase appeared on every bottle of decaf product Defendants sold in Washington.

Between August 2012 and July 2014, Defendants sold $20,159,987 of 5-Hour ENERGY® products in Washington. Ex. 259. Of these sales, $10,648 related to sales of the decaf version of the product. The Court finds that a reasonable estimated purchase price for each bottle of 5-hour ENERGY® Decaf was $4.29. Using this calculation ($10,648 divided by $4.29 = 2,482), Defendants sold approximately 2,482 bottles of Decaf 5HE in Washington after July 16, 2012 and July 14, 2014. These sales represent 2,482 violations of the CPA.

As to the amount of penalty to be imposed, the CPA does not specify the factors a court must consider in determining the size of the civil penalty. Civil penalties should be large enough to deter future violations and to ensure that defendants do not profit from the deceptive advertising. *U.S. v. Readers' Digest Ass'n Inc.*, 662 F. 2d 955, 967 (3d Cir. 1981).

The Court finds the following factors significant: first, Defendants generated a substantial amount of sales revenue in Washington in a very short period of time (over $20 million in sales in just under a two-year period). Second, the product itself is one people *consume,* as opposed to a wearable consumer product, like a bracelet, that one can take off if deemed by the purchaser to be ineffective. Once a consumer drinks 5-Hour ENERGY®, there is no way to reverse the impact such a product

may have on the consumer's body (except by letting the body digest it). This Court finds that deceptive ads on consumable products present more of a risk to the public than deceptive ads for non-consumable products. This factor weighs in favor of a higher, rather than lower, CPA civil penalty.

Finally, the Court finds that Defendants spent more time trying to justify the science behind their ads after-the-fact than they did *before* marketing the products in Washington. The Court was struck by the fact that Defendants presented no testimony from a single scientist actually involved in developing the contents of this product. There was no evidence as to how the products' formulas came about or why the manufacturer chose these particular combinations of vitamins, nutrients, and caffeine. There was scant evidence as to what science anyone at Living Essentials had ever seen or relied on before it began to sell this product. Marketers and lawyers seemed to be driving the Defendants' advertising decisions, and most of the science presented at trial was compiled by experts retained for this litigation, rather than information gathered by the Defendants while investigating the effectiveness of their own products.

For these reasons, the Court concludes that imposing civil penalties of $100 per violation for each airing of the Ask Your Doctor ads, the Construction Site Cowboy ad, and the Choose Wisely ad is appropriate to deter Defendants from engaging in future deceptive conduct and to ensure that Defendants obtain competent and reliable scientific evidence to support claims they choose to make

in their ads *before* they air them.

As for the decaf packaging, the Court concludes that a civil penalty of $4.29 for each bottle sold is appropriate.

Civil penalties will be assessed as follows:

Advertisement	**Post-July 16, 2012 Conduct**	**Per Violation Amount**	**Total**
Ask Your Doctor (Exs. 649, 650)	19,716 airings	$100	$1,971,600
Construction Site Cowboy (Ex. 383)	975 airings	$100	$97,500
Choose Wisely (Ex. 384)	1,040 airings	$100	$104,000
Decaf packaging	2,482 bottles sold	$4.29	$10,647
Total:			**$2,183,747**

B. Injunctive Relief

RCW 19.86.080 authorizes the Court to enter injunctive relief to prevent Defendants from engaging in the deceptive practices that this Court found violated the CPA. Under the CPA, courts may impose both injunctions and civil penalties, but the two remedies are distinct and may serve the different policy goals.

Defendants argue that the Court should not impose any injunction because the likelihood of violating the

CPA is minimal. This Court, however, disagrees. First, Defendants argued in this case that their ads were merely subjective, making no claims as to how the drink would affect consumers physiologically, and were thus not subject to any scrutiny under the CPA. Although some of Defendants' ads fit into this category, the majority of them did not. The Court previously found that if Defendants promote their product's ingredients as changing the way the body functions, such a claim is objective for which scientific substantiation must exist. This Court concludes that it is appropriate to enjoin Defendants from making any representation about the biochemical or physiological effect of their products on consumers unless Defendants possess and relies upon competent and reliable scientific evidence at the time the claims, statements' or representations are made. The Court also concludes it is appropriate to enjoin Defendants from representing that the ingredients in 5-Hour ENERGY® products work synergistically with caffeine or other ingredients to enhance the duration or efficacy of the products unless Defendants have competent and reliable scientific evidence to support such a claim. Finally, the Court concludes it is appropriate to enjoin Defendants from using or disseminating any advertising or marketing materials for their products that rely upon the use of survey data, unless the survey is created, conducted, and evaluated in an objective manner by persons qualified to do so, using procedures and methods generally accepted in the profession to yield accurate and reliable results, and to enjoin Defendants from expressly or impliedly representing the survey data results in such a manner that the net impression is deceptive.

C. Restitution

Because the amount of revenue derived from the sales of Decaf 5-Hour ENERGY® is so small, the Court declines to require Defendants to pay restitution to consumers who purchased 5-hour ENERGY® Decaf product in Washington. The identity of such purchasers is unknown and the amount of each restitution award would be so small that the cost of setting up and administering a restitution fund would dwarf any benefit consumers would receive from restitution.

D. Attorney Fees and Costs

The State is the prevailing party in this lawsuit. As the prevailing party, the State is entitled to an award of reasonable attorney's fees and costs in pursuing this matter against Defendants. RCW 19.86.080(1). Awarding the State its fees and costs will "encourage an active role in the enforcement of the consumer protection act[,] places the substantial costs of these proceedings on the violators of the act, and [will] not drain [the State's] public funds." *Ralph Williams II*, 87 Wn.2d at 314-15.

The State reasonably incurred $1,886,866.71 in attorney fees and $209,125.92 in costs prevailing on three of five of its CPA claims. These figures are reasonable and they discount duplicative time, clerical work, and time spent on unnecessary and unsuccessful tasks and motions such as the time spent on the State's Motion for Summary Judgment, which was denied by the Court. The hourly rates charged by the attorneys and paralegals are reasonable given their experience and the current market rates.

Appendix C

The State's substantial legal fees are due to the lengthy and complex nature of the litigation. The State began investigating Defendants' deceptive marketing in January 2013. The State incurred significant expenses in dealing with extensive discovery, numerous pretrial motions, and a lengthy trial. The State initially requested an award of $1,927,808.81 but agreed to reduce that request by the sum of $40,942.10 to reflect time spent on unsuccessful motions or other duplicative time. The Court finds no basis to reduce the request beyond this amount and overrules Defendants' other objections to the requested fees and costs. The State is entitled to an award of attorney fees of $1,886,866.71 and an award of costs of $209,125.92.

The Court will enter a final judgment consistent with this order.

DATED THIS 7th day of February, 2017.

JUDGE BETH ANDRUS
King County Superior Court Judge

APPENDIX D — MEMORANDUM DECISION OF THE STATE OF WASHINGTON, KING COUNTY SUPERIOR COURT, DATED OCTOBER 7, 2016

STATE OF WASHINGTON
KING COUNTY SUPERIOR COURT

NO. 14-2-19684-9 SEA

STATE OF WASHINGTON,

Plaintiff,

v.

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

Defendants.

The Honorable Beth M. Andrus
Trial Date: August 22, 2016

COURT'S MEMORANDUM DECISION

[Tables intentionally omitted]

Appendix D

MEMORANDUM DECISION

A. INTRODUCTION

Plaintiff State of Washington ("the State") filed this lawsuit against Defendants Living Essentials, LLC and Innovation Ventures, LLC (referred to jointly as "Living Essentials"), seeking injunctive and declaratory relief under the Consumer Protection Act ("CPA"), RCW ch. 19.86 for alleged deceptive or unfair promotional claims about its 5-hour ENERGY® products.

The Court tried the case from August 22, 2016 to September 8, 2016. The State appeared through counsel, Kimberlee Gunning and Daniel Davies, Assistant Attorneys General, and Elizabeth Erwin and Trisha McArdle, Senior Counsel. Living Essentials appeared through its attorneys, Joel Mullin, Reilley Keating, Timothy Snider, Jill Bowman, Taryn Williams, and Samantha Sondag, from the law firm of Stoel Rives.

The Court heard testimony from Anthony Pratkanis, PhD, Troy Giezentanner, Edward R. Blonz, PhD, Daniel To, Thomas McLellan, PhD, Chad W. Crummer, Carl Sperber, David Kennedy, PhD, Jay Sickler, CPA, Sanford W. Bigelow, PhD, and J. Howard Beales III, PhD. The Court additionally reviewed portions of transcripts and videos portions of the depositions of Carl Sperber, Joseph P. Hennessy, James M. Blum, PhD, Jay Sanjay Udani, MD, Michael Glade, PhD, Marilyn Barrett, PhD, Lynn Petersmarck, Thomas Maronick, and Keith Wesnes, PhD. The Court admitted approximately 500 exhibits.

B. ISSUES

1. Did Living Essentials violate the CPA by making deceptive and/or unfair representations in marketing and promotional materials that the non-caffeine ingredients in its Original, Extra Strength and Decaf 5-Hour ENERGY® provide energy, alertness and focus (the Vitamins Claim)?

2. Did Living Essentials violate the CPA by making deceptive and/or unfair representations in marketing and promotional materials that the effects of Original and Extra Strength 5-Hour ENERGY® are superior to consuming the equivalent amount of coffee and other sources of caffeine (the Superior to Coffee Claim)?

3. Did Living Essentials violate the CPA by making deceptive and/or unfair representations in marketing and promotional materials that Decaf 5-Hour ENERGY® provides energy, alertness and focus (the Decaf Claim)?

4. Did Living Essentials violate the CPA by making deceptive and/or unfair representations in marketing and promotional materials that consumers will not experience a "crash" after drinking 5-Hour ENERGY® (the Crash Claim)?

5. Did Living Essentials violate the CPA by making deceptive and/or unfair representations in its "Ask Your Doctor" advertising campaign by

implying that doctors recommended the use of 5-Hour ENERGY® (the Ask Your Doctor Claim)?

C. SUMMARY OF DECISION

1. The State failed to prove that Living Essentials violated the Consumer Protection Act when it aired or published ads that indicated that the non-caffeine ingredients in 5-Hour ENERGY® promote energy, alertness and focus.

2. Living Essentials violated the Consumer Protection Act when it aired or published ads that represented that the energy, alertness and focus from 5-Hour ENERGY® lasts longer than a cup of coffee because of the synergistic or interactive effects of caffeine, B vitamins and nutrients in the product.

3. Living Essentials violated the Consumer Protection Act when claimed in a press release and on its web site that Decaf 5-Hour ENERGY® will provide energy, alertness and focus that lasts for hours.

4. The State failed to prove that Living Essentials violated the Consumer Protection Act when it aired or published its "no crash" ads.

5. Living Essentials violated the Consumer Protection Act when it aired the Ask Your Doctor ads.

Appendix D

D. FINDINGS OF FACT

1. Procedural History

This case arose out of a 2012 multi-state consumer protection investigation of Living Essentials' advertising and marketing practices. On July 17, 2014, the State filed this CPA enforcement action pursuant to its enforcement authority under RCW 19.86.020; RCW 19.86.110; and RCW 19.86.080. (Dkt. #1).[1] On July 23, 2015, the State filed a Second Amended Complaint for Injunctive and Other Relief removing the dismissed claim but pursuing the five claims outlined above. (Ex. 662). Living Essentials answered the Second Amended Complaint on July 31, 2015, denying any CPA violations. (Ex. 663).

2. Living Essentials' Dietary Supplement Products

Living Essentials is a privately-held limited liability company organized under the laws of the State of Michigan, with its principal place of business in Farmington Hills, Michigan. Living Essentials manufactures, markets, and sells a liquid dietary supplement, 5-Hour ENERGY® nationwide, including in Washington. It introduced Original 5-Hour ENERGY® in 2004, and added an Extra Strength and Decaf variety in 2007.

The 5-Hour ENERGY® products, sold in 2 ounce bottles, contain the following ingredients:

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1. The State's original complaint included a sixth claim for relief, which the Court dismissed pretrial. (Dkt. #23).

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Ingredient	**5-Hour ENERGY® Original**	**5-Hour ENERGY® Extra Strength**	**5-Hour ENERGY® Decaf**
B-3 (Niacin)	30 mg	40 mg	--
B-6	40 mg	40 mg	40 mg
Folic Acid	400 mcg	400 mcg	400 mcg
B-12	500 mcg	500 mcg	500 mcg
Sodium	18 mg	18 mg	18 mg
Taurine	467 mg	529 mg	483 mg
Glucuronolactone	411 mg	379 mg	346 mg
Malic acid	273 mg	320 mg	292 mg
N-Acetyl-L-tyrosine	271 mg	260 mg	237 mg
L-Phenylalanine	229 mg	260 mg	237 mg
Caffeine	200 mg	230 mg	6 mg
Citicoline	19 mg	22 mg	--
Choline Bitartrate	--	--	408 mg

5-Hour ENERGY® is marketed as a "dietary supplement." Under the Dietary Supplement Health and Education Act of 1994 ("DSHEA"), a dietary supplement is a product intended to be ingested to supplement the diet and contains one of several statutorily defined ingredients: a vitamin, a mineral, an herb or botanical, or an amino

acid. 21 U.S.C. §321(ff).

3. The Nutritional Science

The Court heard extensive scientific evidence regarding the ingredients in 5-Hour ENERGY® and their effects on or function within the human body. The following is a summary of the evidence.

a. B Vitamins in General

Living Essential print ads state:

> **Vitamins B6, B12, and B3 (Niacin):** Play a key role in the production of amino acids, the building blocks of protein and aid[] in the processing of carbohydrates for energy. (Ex. 653).

The State does not dispute this description of the role B vitamins play in human bodies.

The State's nutritional expert, Dr. Edward Blonz, and Living Essential's expert, Dr. David Kennedy, agree that B vitamins are essential to metabolism (cellular generation of physiological energy) within the human body. B vitamins prevent the creation of destructive compounds (known as "free radicals") in the body and contribute to the synthesis of important molecules in the body that drive cerebral blood flow to the brain. Humans need B vitamins to turn amino acids such as L-tyrosine into neurotransmitters used in cognitive functioning.

Appendix D

Fatigue is a classic symptom of a B vitamin deficiency. Drs. Blonz and Kennedy agree that there is consensus within the scientific community that the intake of B vitamins from one's diet can reduce tiredness and fatigue.

(i) Niacin (B_3)

Niacin, or vitamin B_3, is an essential nutrient that plays a role in producing co-enzymes involved in energy release. It is quickly absorbed in the stomach and duodenum. Dr. Blonz testified credibly that healthy, well-nourished adults, in general, typically obtain the daily recommended requirement of vitamin B_3 from the foods they consume each day. Dr. Kennedy testified credibly that a niacin deficiency can cause weakness, mood disorders, cognitive problems, personality irritability, and, in extreme cases, psychosis.

5-Hour ENERGY® Original's 30 milligrams of niacin is 150 percent of the minimum amount humans need to consume on a daily basis for healthy physiological functioning. The 40 mg in the Extra Strength formula is 20 times the daily required amount. There is no niacin in the 5-Hour ENERGY® Decaf.

(ii) Vitamin B_6

Vitamin B_6, like niacin, is involved in energy release and protein synthesis. The vitamin contributes to the reduction of tiredness and fatigue. Deficiency levels of vitamin B_6 are in the range of 10.5 percent of the U.S. adult population. According to Dr. Kennedy, a deficiency

of B_6 can cause mood disorders, cognitive problems, personality irritability, and in extreme cases, seizures and convulsions.

(iii) Folic Acid (Vitamin B_9)

Folic acid, also known as folate, is a B vitamin essential for the body to metabolize amino acids and to create tissue within the body. Folate, which is found in leafy green vegetables, fruits, dried beans, and peas (Ex. 653), is important for healthy cardiovascular function (blood flow) and can contribute to the reduction of fatigue and tiredness. If ingested with food, it is absorbed by the body in three to four hours. If ingested on an empty stomach, it can be absorbed by the body within an hour. There is some scientific support that a single dose of this vitamin can improve blood flow. 5-Hour ENERGY®'s 400 mg of folic acid constitutes 100 percent of the recommended daily value of B_9 needed to maintain one's health.

(iv) Vitamin B_{12}

Vitamin B_{12} is another essential nutrient that works with folic acid in a number of biosynthetic processes. This vitamin, which is found in meat or animal products, such as eggs, contributes to normal energy metabolism and to the reduction of tiredness and fatigue. 5-Hour ENERGY® has 83 times the daily amount of B_{12} needed in healthy adults.

At trial, Dr. Kennedy agreed with Dr. McLellan that there is no experimental evidence showing that the addition of B vitamins to a caffeinated energy drink will

cause greater improvement in physical and cognitive performance than can be attributed to the effects of caffeine alone.

b. Amino Acids

(i) Taurine

Taurine is a micronutrient involved in several cellular and physiological functions. Although humans require several hundred milligrams per day of the micronutrient, it is created by the body and people get the rest of the taurine they need from their diet. Taurine can effect endothelial function (blood flow) and can have an effect on one's cognitive function and mood. The experts at trial agreed that there is inconsistent or limited quality experimental evidence indicating that the addition of taurine to a caffeinated energy drink will cause greater improvement in physical and cognitive performance than can be attributed to the effects of caffeine alone.

(ii) Glucuronolactone

Glucuronolactone is a naturally occurring byproduct of metabolism of glucose in the liver. The experts at trial agreed that there is no experimental evidence showing that the addition of glucuronolactone to an energy drink will cause greater improvement in physical and cognitive performance than can be attributed to the effects of caffeine alone.

(iii) Malic acid

Ex. 653, one of Living Essentials' print ads, described malic acid as follows: "the body synthesizes Malic Acid during the process of converting carbohydrates to energy. The main food source of Malic Acid is fruits." There was no other evidence presented by either party at trial regarding this ingredient.

(iv) N-Acetyl-L-tyrosine and L-Phenylalanine

L-Phenylalanine is an essential nutrient derived from a person's diet. It generates the non- essential nutrient L-tyrosine that in turn is converted into neurotransmitters in the brain. L- tryrosine supplementation can contribute to the creation of neurotransmitters depleted by stress. There have been some studies that indicate that low doses of L-tryosine can improve cognitive functioning. According to Living Essentials' print ads, "tyrosine" is an amino acid that transmits nerve impulses to the brain and is found in meat, dairy, fish, and grains. Ex. 653.

c. Caffeine

Caffeine is a chemical compound, found in coffee and tea plants. It acts as a stimulant to the central nervous system. When it is absorbed by the body, it binds to adenosine receptors. These receptors are situated throughout the body in both the tissue and central nervous system in the brain. As a person requires energy, that person's body will produce adenosine. In the brain, adenosine inhibits the release of neurotransmitters,

such as dopamine, adrenaline, serotonin and glutamate. Caffeine antagonizes the effect of adenosine, meaning it causes an increase in the release of neurotransmitters.

Caffeine has been demonstrated to impact cognition and physical performance in humans. The testifying experts agreed, however, that there is little evidence that caffeine improves episodic or long-term memory. Caffeine has a half-life of 3 to 10 hours, meaning the effects of caffeine last for several hours.

d. Citicholine and Choline Bitartrate

Choline is an essential nutrient that works with vitamin B_{12} and folate to contribute to the synthesis of the neurotransmitter, acetylcholine. Citicholine, the nutrient in Original and Extra Strength 5-Hour ENERGY®, is a chemical compound of choline and cytidine. According to Living Essential ads, citicholine is "a water-soluble compound essential for the synthesis of phosphatidyl choline, a constituent of brain tissue. Citicholine plays a role in neurotransmission and can help support brain tissue." (Ex. 653). Citicholine has been shown to improve memory in elderly participants with cognitive decline.

Choline bitartrate is a chemical compound of tartaric acid and choline. Large doses of choline bitartrate (2 grams) have been shown to improve performance on visuomotor tasks but slow reaction times. Because a fraction of choline bitartrate is choline, Dr. Blonz estimated that Decaf 5-Hour ENERGY® contains 167 mg of choline.

The Food and Nutrition Board of the Institute of Medicine recommends that male adults consume 550 mg and female adults consume 425 mg of choline per day.

4. Living Essentials' Ad Claims

In 2004, Living Essentials first began to manufacture and sell the 2 ounce non-carbonated 5-Hour ENERGY® "shot." The competition at the time included Red Bull, Monster, AMP, Full Throttle, and Rock Star, and they were all sweet, carbonated energy drinks that were marketed towards teens. Living Essentials decided to market its product to working adults, rather than teens, and to focus on the health aspects of the product.

Living Essentials began running advertisements in 2005 and television ads in 2006. It has continued to air ads on television and cable channels across the country, including in the State of Washington to the present. Initially, the company sought to educate consumers about the benefits of its product over the competition: the small 2 ounce bottle made 5-Hour ENERGY® much more convenient than large soda-can sized drinks, and the product contained no sugar and only 4 calories. The company's initial ads focused on these educational themes.

a. The Vitamins Claims

Living Essentials has aired and published several ads that make claims regarding the role the non-caffeine ingredients play in 5-Hour ENERGY®. Living Essentials has never denied that its product contains caffeine but it has expressly stated that 5-Hour ENERGY®'s non-

caffeine ingredients are the product's "key" ingredients in the creation of energy, alertness, and focus. The company has chosen to promote 5-Hour ENERGY®'s B vitamins and nutrients as the reason the product is so effective.

Carl Sperber, the company's director of advertising, developed the tag lines "B Vitamins for Energy; Amino Acids Focus & Better Mood," that appeared in early Living Essentials' television ads (Ex. 2005) for this purpose:

See also Ex. 2129 (Living Essentials' print ad claimed that 5-Hour ENERGY® "contains a powerful blend of B-vitamins *formulated* for energy and alertness.") In the print ad (Ex. 653), entitled "The Ten Reasons to Trust 5Hour Energy," Living Essentials provided a detailed description of its "key ingredients" and described why they were beneficial:

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Vitamins B6, B12 & B3 (Niacin): Play a key role in the production of amino acids, the building blocks of protein and aids in the processing of carbohydrates for energy.

Folic Acid (Vitamin B9): Helps produce and maintain new cells in our bodies. Food sources of folate include leafy green vegetables, fruits, dried beans and peas.

Citicoline: Citicoline is a water-soluble compound essential for the synthesis of phosphatidyl choline, a constituent of brain tissue. Citicoline plays a role in neurotransmission and can help support brain function.†

Tyrosine: An amino acid that transmits nerve impulses to the brain. It is present in meat, dairy, fish and grains.

Phenylalanine: An essential amino acid that enhances alertness.† It's found in dairy products, avocados, legumes, nuts, leafy vegetables, whole grains, poultry and fish.

Taurine: A naturally occurring chemical substance present in meat, fish and dairy products. It plays a role in digestion, and the integrity of cell membranes.†

Malic Acid: The body synthesizes Malic Acid during the process of converting carbohydrates to energy. The main food source of Malic Acid are fruits.

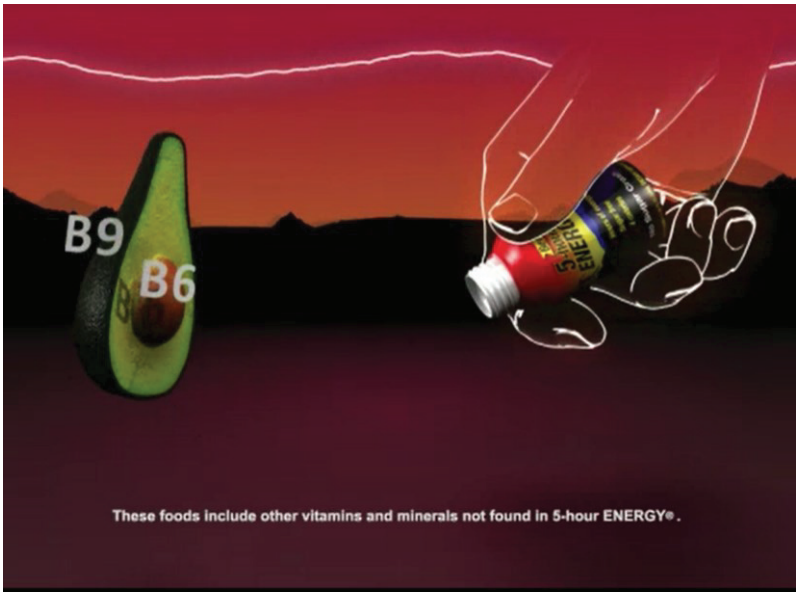
Glucuronolactone: A natural metabolite found in the human body. It has been shown to reduce sleepiness.†

Caffeine*: Provides a boost of energy and feeling of heightened alertness.† Do you avoid caffeine? Then try Decaf 5-hour ENERGY.®

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

In Ex. 382, the Lots of Reasons ad, the narrator describes 5-Hour ENERGY®'s "key ingredients" or the "beneficial ingredients" as those that "are found in every day food like avocados, broccoli and bananas, or already in you." The animation depicts an avocado, a floret of broccoli and a banana emerging from the 5-Hour ENERGY® bottle. (Similar statements about the product's key ingredients are made in Ex. 648, the Diner ad, and in the print ad, Ten Reasons to Trust 5 Hour Energy, Ex.

653). Ex. 630 and 633, the Coffee and Vitamins ads from March 2013, use the same animation and script as Ex. 382, but when the avocado emerges from the bottle, the words "B_9" and "B_6" appear:



When the broccoli emerges, the word "niacin" appears;; when the banana emerges, the word "tyrosine" appears:

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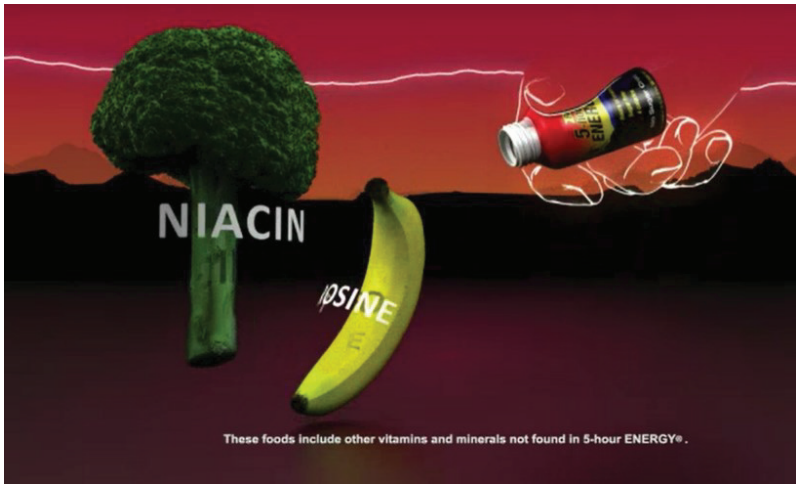

The end tag line is "It's like coffee with vitamins and nutrients. Put them together and it's a great combination."

Living Essentials' ads expressly represent that the vitamins and nutrients in 5-Hour ENERGY® play a role in providing energy, alertness and focus.

b. The Superior to Coffee Claims

Living Essentials' ads also expressly claim that the key vitamins and nutrients work synergistically with caffeine to make the biochemical or physiological effects last longer than caffeine alone. The claims are well summarized in a 2012 press release from Living Essentials (Ex. 113):

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"In today's society we often do not have the time to get enough sleep or to maintain a properly balanced diet. While there is no substitute for a healthy diet and lifestyle, 5-Hour Energy provides a synergistic blend of ingredients (within established safe levels) that enable busy adults to manage their energy needs and keep up with their active lives.

"As 5-Hour Energy's Medical Advisor, Kathleen O'Neil-Smith, M.D., points out, '5-Hour Energy's proprietary blend of B vitamins, amino acids and other nutrients, along with caffeine, together play a critical role in providing an extra boost and a sustained feeling of alertness. The body absorbs as much vitamin B as it needs, and discards what is not absorbed.'

Ex. 635, the "Is It Safe?" ad from April 2013, shows a cup of coffee and a bottle of vitamins. The narrator says "It's simple. Caffeine with vitamins and nutrients. It's the *combination* that makes it so great." The print ad, Ex. 640, carries on with this theme: "It delivers a powerful blend of B-vitamins (B6, B12, Niacin and Folic Acid), amino acids and caffeine comparable to a cup of the leading premium coffee. These and other ingredients *work in concert* to provide a feeling of alertness and energy *that lasts for hours.**"[2] In the Construction Cowboy ad from May 2012 (Ex. 384), Living Essentials claimed that 5-Hour ENERGY® is "packed with B vitamins and nutrients" to make it last longer than 3 or 4 cups of coffee. The "How Much Coffee" radio ad, Ex. 723, and the "Cup after Cup radio" ad, Ex. 724, made the same claims.

The State argues that Living Essentials downplayed or minimized the effects of caffeine in 5- Hour ENERGY®. This Court does not so find. Living Essentials never misled consumers into believing that the product contained no caffeine. In fact, its web site (Ex. 2116) promoted the benefits of caffeine:

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2. This print ad contains a disclaimer at the bottom in small print: "Does not provide caloric energy. Not proven to improve physical performance, dexterity, or endurance. *Individual results may vary."

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But Living Essentials' ads did make objective claims that the duration of the recognized physiological benefits of caffeine would be extended because of the non-caffeine ingredients in 5-Hour ENERGY®. Living Essentials conveyed that its formula of B-Vitamins and amino acids, *in combination with caffeine*, was superior to coffee because the increase in alertness, fatigue reduction, and improved mental functioning lasts longer than caffeine alone.

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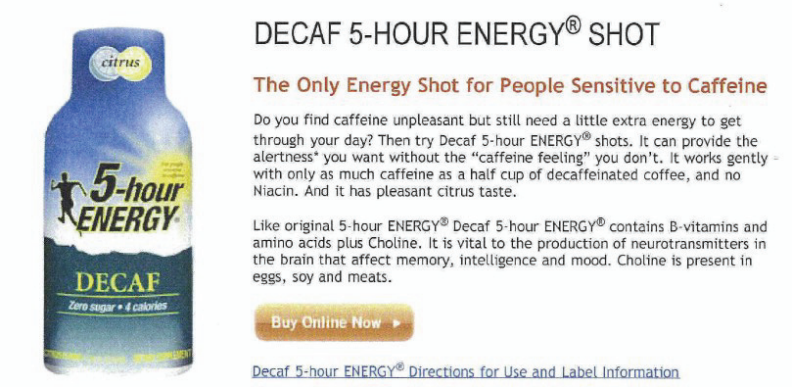
c. The Decaf Claims

Living Essentials began to sell a decaffeinated version of 5-Hour ENERGY® in 2008 to appeal to tired, but caffeine-sensitive people. The decaf formula has no niacin and 6 mg of caffeine. The only other difference is the addition of choline bitartrate in lieu of citicoline, although it is not clear why this particular change was made.

Living Essentials has never advertised Decaf 5-hour ENERGY® on television or on the radio. The extent of the marketing materials presented at trial were a press release when the product launched (Ex. 722), a press kit developed by an ad agency for Living Essentials (Ex. 105), screen shots of Living Essentials' website (Ex. 661, 1283, 2118), and the packaging on the Decaf 5-Hour ENERGY® bottle (Ex. 101). In the press release, Sperber stated that the decaf product provides "a sustained energy boost" for people sensitive to caffeine. Living Essentials claimed on its web site that the Decaf 5-Hour ENERGY® "gently" works to provide alertness, which it attributes to the presence of choline in the product:



The claims in the press release and on the web site are not just claims of subjective "feelings." By linking the physiological benefits of choline with the Decaf product, Living Essentials is implying an objective benefit from drinking Decaf 5-Hour ENERGY®: alertness and sustained energy.

Decaf 5-hour ENERGY® has not been a big seller for Living Essentials, accounting for less than 1% of company sales.

d. The Crash Claims

Sperber testified that he first heard the word "crash" linked to the consumption of sugared, caffeinated energy drinks in a movie starring John Carrey, who in one scene drank multiple cans of an energy drink and in the next scene was seen crashed out on the floor, asleep. Sperber understood that consumers complained that when the sugar and caffeine in energy drinks wore off, they would experience a sudden drop in energy and feel even more tired than before they drank the product. To differentiate 5-Hour ENERGY® from competing energy drinks, he developed an ad campaign revolving around the crash theme:

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In the earliest ads, Living Essentials attributed the "crash" effect to the combination of sugar and caffeine:

Because 5-Hour ENERGY® contains no sugar, Living Essentials believed consumers would not experience a

"crash" relating to a drop in glucose levels after consuming the 5-hour ENERGY® products. Living Essentials began to print the "No Crash Later" tag line on the bottle itself.

In 2007, the National Advertising Division ("NAD") of the Better Business Bureau reviewed Living Essentials' promotional claims regarding 5-hour ENERGY®, including the "no crash later" claim. In response to the NAD investigation, Living Essentials indicated that by "crash," it meant "no sugar crash" because 5-Hour ENERGY® has no sugar. The NAD recommended that Living Essentials modify the "no crash" representation to make it clear that the ads meant that 5-Hour ENERGY® would not produce a "sugar crash." Living Essentials modified its advertisements to qualify the "no crash" language by including an asterisk directing consumers to a small print disclaimer saying "No crash means no sugar crash." (Ex. 382, 383, 384, 638, 648, 651, 2129).

Several of Living Essentials' ads continue to claim that 5-Hour ENERGY® will not cause a "crash." *See* Ex. 629 (Parachute Guy says "hours of energy now, no crash later), Ex. 638 (Parachute Guy 2, same tag line), Ex. 651 (Parachute Guy, same tag line), and Ex. 2005 (Why Crash ad).

e. The Ask Your Doctor Claims

Living Essentials created its "Ask Your Doctor" ("AYD") ad campaign in July 2012. The AYD advertisements (Ex. 649,650) aired for approximately 10 weeks from July 17, 2012 through October 1, 2012. Mr. Sperber's inspiration

for the AYD advertisement came from the Trident sugar-free gum campaign, which said that "[f]our out of five dentists surveyed would choose a sugar-free gum for their patients who [chew] gum" and then told consumers to "[a]sk your dentist about Trident." Sperber wanted to replicate this ad and sought to find a way to do so.

To substantiate a claim that doctors would recommend 5-Hour ENERGY for their patients, the company undertook two surveys—an online survey and a paper survey—of primary care physicians. Living Essentials, through counsel, retained Thomas Maronick, Ph.D., a professor of marketing at Towson University in Maryland and the former Director of Impact Evaluation in the Bureau of Consumer Protection at the FTC to create the online survey. Dr. Maronick retained a marketing research and analytical consulting firm (Decision Analyst) to administer the survey to a panel of primary care physicians on its Physician Advisory Council. Dr. Maronick decided on a target of 500 completed questionnaires, which would be sufficiently large to achieve the desired margin of error. A total of 503 physicians completed the survey.

The survey did not ask doctors for their general opinions about energy drinks or whether they would recommend any energy supplement product for their patients. Instead, the questions asked if the doctor would recommend a low calorie, or a low sodium energy drink for their patients who already consumed such products. Not surprisingly, the majority of doctors said "Yes." The results of the online survey indicated that 73.6% of the physicians said they would recommend a low-calorie

energy product to their healthy patients who use energy drinks.

The doctors were also shown a 5-Hour ENERGY® label and a brief description of the product. They were then asked if they would recommend 5-Hour ENERGY® to their healthy patients who use energy drinks. The survey results indicated that 47.7% of the physicians would specifically recommend 5-hour ENERGY® to their healthy patients who use energy supplements. About 25% of the survey participants responded that they would not recommend 5-hour ENERGY®.

Living Essentials subsequently hired Joe Hennessy, Sales Director for MicroDose, to assist with a paper survey[3] based on questions used in the online survey that Dr. Maronick had designed. Under Hennessy's direction, sales staff would make in-person visits to doctors' offices across the United States to promote 5-Hour ENERGY®. His sales team left samples of the product and brochures describing 5-Hour ENERGY®'s ingredients in these doctors' offices. Living Essential, again through their attorneys at Oakland Law Group, asked Hennessy to have his sales representatives deliver paper copies of the Maronick survey (Ex. 627) to doctors they normally would visit and to ask the doctors to complete the survey. According to Hennessey, he distributed 100,000 copies of the survey to his territorial managers who in turn

3. Living Essentials used the phrase "in-person survey" to describe the second survey. The Court does not find this to be an accurate description of how Living Essentials conducted the survey. No doctors were questioned in a face-to-face meeting.

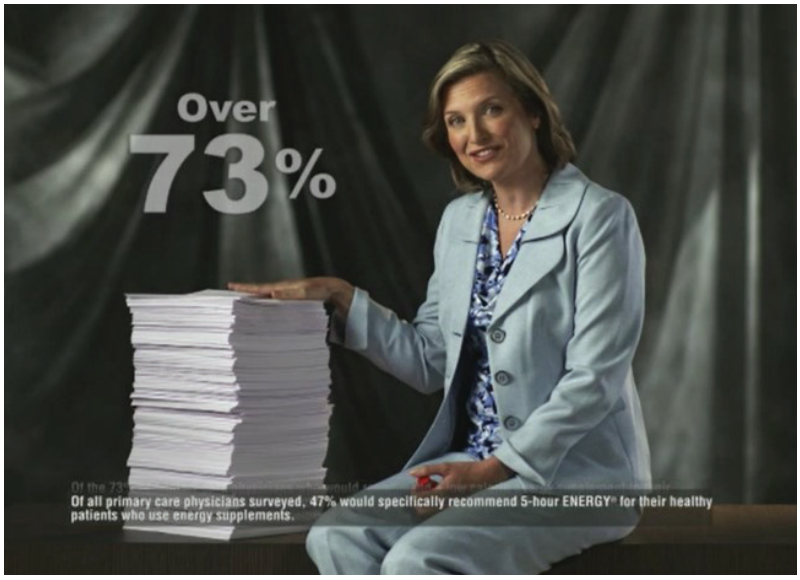
transmitted copies to the sales representatives. Hennessy was instructed to target 2,500 responses. Dr. Maronick was not involved in the paper survey process and had concerns about whether such a method would suffer from biased responses.

Hennessy received 2,659 paper surveys before the cutoff date. Approximately 90% of the physicians responding to the paper survey indicated they would recommend a low-calorie energy supplement to patients who use energy supplements, and 74% would specifically recommend 5- hour ENERGY®.

After receiving the results of the online survey and the paper survey, Living Essentials created three versions of the AYD television commercial, two 30-second spots and one 10-second version. (Exs. 649, 640, and 2098). Sperber was personally involved in the development of the script for these ads. He testified that the intent was to convey to consumers that doctors viewed 5-Hour ENERGY® as a safe and effective nutritional supplement as a way of allaying possible health and safety concerns. He sought to convince consumers that, by and large, doctors recommended a product like 5-Hour ENERGY®.

The script for the 30-second ad (Ex. 2122) said "We asked over 3,000 doctors to review 5- Hour ENERGY®. And what they said was amazing. Over 73 percent who reviewed 5-hour ENERGY said they would recommend a low calorie energy supplement to their healthy patients who use energy supplements. *Seventy-three percent*. 5-hour ENERGY® has four calories and it's used over

nine million times a week. Is 5-hour ENERGY® right for you? Ask your doctor. We already asked 3,000." Placed next to the ad spokeswoman was a large stack of papers, which she flipped through or gestured to while speaking:



The fine print from this screen shot said "Of all primary care physicians surveyed, 47% would specifically recommend 5-Hour ENERGY® for their healthy patients who use energy supplements."

The broadcasting networks ABC and NBC refused to run the AYD ads without some changes to the script. Consumers also complained to Living Essentials about the Ask Your Doctor ads and these complaints were a contributing factor for the company pulling the ads before the end of the campaign.

5. Living Essentials' Claim Substantiation

Before this litigation began, Living Essentials had commissioned three literature reviews and two scientific studies concerning the efficacy of 5-hour ENERGY®.

(i) Glade Reports

In 2007, Living Essentials, through Jonathan Emord, an attorney with Emord & Associates, commissioned Dr. Michael Glade, a Fellow in the American College of Nutrition, to conduct a review of the scientific literature to assess certain Living Essentials promotional claims, including "B-Vitamins for Energy," "Amino Acids for Focus and Better Mood," and "No Crash Later." (Ex. 2071). Dr. Glade testified that he found competent and reliable scientific support for these claims and prepared a written report which he provided to Emord in July 2007. Dr. Glade testified that when he reviewed the scientific literature, he examined the studies to verify that they were conducted in a scientifically sound manner before including them in his literature review.

As to the claim that 5-Hour ENERGY® provides energy that lasts for hours, he concluded that the literature supported this claim because the concurrent consumption of taurine, caffeine, and glucuronolactone increases the conversion of stored triglycerides into energy. As to the claim that B-vitamins in 5-Hour ENERGY® provide energy, he concluded that the literature supported this claim because the daily consumption of niacin, vitamin B_6, vitamin B_{12}, and folate supports the use of fatty acids

for metabolic energy production. As to the claim that the amino acids in 5- Hour ENERGY® provide focus, Dr. Glade concluded that the literature supported this claim because the consumption of N-acetyl-L-tyrosine and L-phenylalanine enhances cognitive functioning. Regarding the "no crash" claim, Dr. Glade repeated his summary of the literature on the effects of caffeine but really does nothing more. . Dr. Glade's report does not discuss what is meant by "crash," or the impact of glucose or caffeine withdrawal on any sudden decrease in energy levels. It is unclear how the studies he cites relate in any way to the "no crash" claim.

At some point, Living Essentials received a copy of the 2007 report because it produced the report to the Attorney General as substantiation in this lawsuit.

In 2010, Living Essentials commissioned Dr. Glade to conduct a similar literature review to assess whether there was competent and reliable scientific evidence to support claims that Living Essentials' Decaf 5-hour ENERGY® provides energy and alertness that lasts for hours without any crash effect. (Ex. 2079). He was also asked to substantiate the claim that the drink contained a "proven blend of B-vitamins, amino acids and essential nutrients to keep you going strong." *Id.* Dr. Glade reviewed some 217 scientific studies and concluded that there was science to back each of these claims. With regard to the contention that the energy provided by the drink would "last for hours," Dr. Glade cited studies relating to taurine, which he concluded demonstrated that daily dietary supplementation of taurine in 3000 mg or more

increased metabolizable energy that could last for at least four hours (Decaf 5-Hour ENERGY® contains only 483 mg of taurine). He also cited studies for the proposition that the daily intake of certain B vitamins supported the production of energy within 2 hours of consumption and for 12 to 24 hours after consumption. As to the "no crash later" claim, Dr. Glade concluded that dietary supplements that do not contain sugar or caffeine cannot produce a "sugar crash" or caffeine withdrawal effect.

Again, there is no evidence that any employee of Living Essentials reviewed Glade's 2010 literature review, but Living Essentials provided it to the Attorney General as substantiation for its decaf claims.

The Court has serious questions about the scientific reliability of Dr. Glade's two reports. First, his analysis was based on a non-quantitative list of ingredients in 5-Hour ENERGY®. He was not given the actual formula, so Dr. Glade was unable to look at the actual amounts of vitamins and amino acids contained in the product to compare to the levels tested in the studies he reviewed. Second, Dr. Glade's 2007 literature review did not evaluate how 5-Hour ENERGY®, or any of its ingredients in the amounts found in 5-Hour ENERGY® would affect healthy, well-nourished individuals. Dr. Glade admitted in his deposition that it was possible that the caffeine, by itself in 5-Hour ENERGY®, could be causing the energy, alertness, and focus that consumers felt after drinking the energy supplement.

Third, Dr. Glade relied on studies that evaluated the consumption of certain vitamins and nutrients in

sick populations. The scientists who testified at trial disagreed as to whether these factors undercut Dr. Glade's conclusions. There was no analysis in either report as to why reliance on the studies he cited was appropriate.

Finally, Dr. Glade did not communicate his conclusions to anyone directly working for Living Essentials. Carl Sperber, the director of advertising, had never seen either of Dr. Glade's reports. Sperber testified that starting in 2007, the company began relying on the Oakland Law Group to review all of the ads he created to ensure that they were backed by adequate substantiation. No one from the Oakland Law Group testified regarding what role, if any, the 2007 Glade Report played in substantiating specific ad representations.

(ii) Blum Study

Living Essentials commissioned James Blum, Ph.D., an epidemiologist, to conduct a clinical trial to assess the effects of the 2004 formulation of 5-hour ENERGY® as compared to two other energy drinks then on the market, but not to a placebo. Dr. Blum tested subjects' peak energy, the duration of energy, and any "crash." He concluded that consumers' self-reported peak energy after drinking 5-Hour ENERGY® occurred at 4.92 hours. The peak energy duration for the two competing products occurred at 4.39 and 4.34 hours, which Dr. Blum felt were similar results. Dr. Blum also asked test subjects whether they experienced a "crash" after drinking the three energy drinks. Dr. Blum testified that he considered a "crash" to be the experience of hitting a "floor or wall" where the test subjects self-reported feeling physiologically stressed.

Based on this definition of "crash," he concluded that 24 percent of the people consuming 5-Hour ENERGY® reported experiencing a "moderately severe" crash. Eighty percent of the Red Bull and 75 percent of the Monster group reported experiencing a similar crash. Dr. Blum did not test the non-caffeine ingredients of 5-Hour ENERGY® and reached no conclusions as to the efficacy of these ingredients in the absence of caffeine.

Dr. Blum provided his final report directly to Living Essentials in May 2007. (Ex. 2153) Living Essentials retained a copy of Dr. Blum's report in its files, and that report constituted part of Living Essentials' substantiation for its promotional claims about the 5-hour ENERGY® products.

(iii) NERAC Report

Also in 2007, Living Essentials, through Jonathan Emord of Emord & Associates, commissioned NERAC, Inc., a global research and advisory firm, to conduct a review of the scientific literature to assess certain promotional claims including "No Crash Later," "B-Vitamins for Energy," "Amino Acids for Focus and Better Mood," and "Reduction in Fatigue." (Ex. 2070) NERAC's team of biochemists, food scientists, and nutritionists sought to find at least one ingredient in 5-Hour ENERGY® that supported each of the company's claims. They looked at the research into B vitamins, the amino acids, and caffeine.

NERAC's conclusions differed from those of Dr. Glade. For example, NERAC concluded that there

was no support in the literature for claiming that glucuronolactone improved memory, supplied energy, or affected fatigue. Although NERAC identified one study that indicated that a high dose of glucuronolactone delayed the onset of fatigue, the dose was 34 times the amount of glucuronolactone in 5-Hour ENERGY®. Because NERAC found no study varying the dosage level of this ingredient, it concluded that one could not say that the glucuronolactone in 5-Hour ENERGY® had a measurable effect on energy or fatigue. With regard to the "B Vitamins for Energy" claim, NERAC concluded that 5-Hour ENERGY® included B vitamins at doses high enough to "promote mental health and support good physical condition and provide energy." With regard to the "Amino Acids for Focus" claim, NERAC concluded that 5-Hour ENERGY® included certain amino acids, namely phenylalanine and tyrosine, had been shown to improve mood and attention, and thus supported the claim.

NERAC's discussion of the "no crash later" claim was quite abbreviated. It stated that the "crash" phenomenon was related to sudden shifts in blood sugar levels and because 5-Hour ENERGY® contains no sugar, it could not contribute to a sudden change in blood sugar levels. NERAC found no published human studies showing a relationship between any of 5-Hour ENERGY®'s ingredients and a "crash" as NERAC defined it.

Living Essentials provided a copy of the NERAC report as part of its substantiation for its promotional claims about the 5-hour ENERGY® products.

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(iv) Medicus Clinical Study

In early 2008, Emord & Associates contacted Dr. Jay Udani, the CEO and Medical Director of Medicus Research LLC, to conduct a clinical trial of 5-Hour ENERGY®. The purpose of the study was to establish the scientific validity of claims the company was either making at the time or intended to make about its product in the future. Medicus retained Dr. Keith Wesnes and his firm, Cognitive Drug Research ("CDR"), to assist with the study. CDR had developed a computerized cognitive assessment tool to assist researchers in evaluating the effect of certain commercial products on human test subjects. (Ex. 1452). CDR's core battery of automated tests included immediate word recall, reaction time to questions, working memory, delayed word recall, word recognition, picture recognition, and self-reported alertness, calmness, and contentment.

Ultimately, Drs. Udani and Wesnes proposed to undertake a 4-arm crossover, randomized, double-blind, placebo-controlled study to assess the efficacy of a single dose of 5-Hour ENERGY® compared to a placebo, and the efficacy of one active comparator (Monster Energy Drink) to a placebo, measured by alertness and cognitive function over a 6-hour period. (Ex. 1455, 1448). The trial involved five separate visits to the test site. The primary objective was to measure the power of attention, continuity of attention (focus), quality of short-term working memory, qualify of episodic (long-term) memory, speed of memory, and self-related alertness. The secondary objective was to assess the effects of 5-Hour ENERGY® on blood glucose levels. The tertiary objective was to assess changes in self-related contentment, calmness, mood, and fatigue.

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Ninety test subjects underwent a screening visit where they were trained on the CDR tests hourly for 4 hours. They were provided standardized frozen foods with low glycemic content to consume the day before each visit. They were instructed not to drink any alcohol or energy drinks the day before each visit and to sleep only 3 to 6 hours the night before. Participants were instructed not to consume more than 4 cups of coffee the day before each visit and not to consume any caffeine or food on the morning of each visit. The subjects were provided the same standardized meal of eggs, bacon and sausage on each study day, two hours after consuming the energy drink or placebo. They were not provided any carbohydrates.

Dr. Udani concluded that 5-Hour ENERGY® had a statistically significant effect on cognitive function and mental energy over a 6-hour test period as compared to the placebo. There was no evidence of a statistically significant drop in blood sugar compared to placebo (and thus no "crash"), and there were no statistically significant diminishment in mood, contentment, calmness, depression, or anxiety that would represent a negative effect of using the product.

The study tested the effects of the 5-Hour ENERGY® formula as a whole. It did not study or test the effects of any of the non-caffeine ingredients. Nor did Dr. Udani examine whether 5- Hour ENERGY® was "superior" to drinking the same amount of caffeine in some other form, such as in coffee. Because the clinical trial did not evaluate separate ingredients in 5-Hour ENERGY®, Dr.

Udani testified it was not possible to draw any conclusions about the benefits of such individual ingredients from the Medicus Report's data.

The experts disagreed about the reliability of the study's data or the validity of any conclusions one could draw from the data, given its design. Dr. McLellan, an expert on caffeine, credibly testified that because Dr. Udano allowed test subjects arrive in a caffeine withdrawn state, and the placebo group's overall performance was so far below baseline, any statistically significance in test scores between the 5-hour ENERGY® group and placebo group was likely attributable to the former group's ingestion of caffeine.

6. Post-Claim Scientific Evidence

Living Essentials presented additional scientific evidence, developed after its ads aired, to substantiate the claims now being challenged by the State.[4]

a. Moat Article (2003)

In 2003, Stuart Moat published an article entitled

4. The State argues that any scientific evidence developed after Living Essentials aired or published its ads is legally irrelevant because the FTC guidelines required pre-claim substantiation. While this Court acknowledges that both the FTC guidelines and federal case law indicate that pre-claim substantiation is required, the Court also concludes that subsequent scientific studies may shed light on pre-claim studies and are thus relevant and material to the Court's CPA analysis.

"Folate, homocysteine, endothelial function and cardiovascular disease," in the Journal of Nutritional Biochemistry. (Ex. 2002). Moat's article is a literature review on the effect of folate or folic acid deficiencies on the cardiovascular system. Moat concluded that that folate can reverse endothelial dysfunction.[5] According to Dr. Kennedy, Moat also found that the cardiovascular benefit of taking a single dose of folate can be detected physiologically within two hours of ingestion, at four hours post- ingestion, and even after six weeks.

b. Scholey & Kennedy Study (2004)

In 2004, Andrew Scholey and David Kennedy co-authored a paper entitled "Cognitive and physiological effects of an "energy drink": an evaluation of the whole drink and of glucose, caffeine and an herbal flavoring fractions." (Ex. 2068). They conducted a double-blind, placebo- controlled crossover study to evaluate the effects of a non-caloric placebo drink with (a) an energy drink containing glucose, caffeine, and guarana; (b) a drink containing only the glucose fraction of the energy drink; (c) a drink containing only the caffeine fraction of the energy drink; and (d) a drink containing only the flavoring fraction of the energy drink. Scholey and Kennedy used CDR's cognitive testing system on their test subjects.

They concluded that there were improvements to cognitive functioning after the consumption of the energy

5. Endothelial function is the measure of how well the body is delivering blood on demand to the periphery, including the brain.

drink but that neither glucose nor caffeine in isolation provided any significant improvements in cognitive functioning. They concluded that their test results strongly suggest that the cognitive enhancing properties of energy drinks containing glucose, caffeine and guarana[6] were attributed to the combination of active ingredients, rather than solely to caffeine.

The study does not directly support the contention that 5-Hour ENERGY®'s ingredients work together to achieve results not attributable to caffeine alone because 5-Hour ENERGY® does not contain any glucose or guarana. But Living Essentials contends and Dr. Kennedy testified that the study is strongly supportive of the proposition that it is not the caffeine alone in 5-Hour ENERGY® that makes it effective.

c. Haskell & Kennedy Study (2005)

Dr. Kennedy testified that in 2005, he and a colleague, Crystal Haskell, co-authored a paper that looked at the effects of both caffeine (given in two different dose levels, 75 mg and 150 mg) in habitual users and non-users by examining cerebral blood flow. (Ex. 2004). They concluded that caffeine improved cognitive performance and mood in healthy, young adults regardless whether the adults were habitual users or non-users of caffeinated products. All of the scientific experts agreed that caffeine is well-documented to improve cognitive performance.

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6. Guarana is a plant containing caffeine.

d. Giles Study (2012)

In 2012, Grace Giles *et al*. published an article entitled "Differential cognitive effects of energy drink ingredients: Caffeine, taurine, and glucose," in the journal Pharmacology, Biochemistry and Behavior. (Ex. 665, 2034). Giles studied the effects of caffeine, taurine, and glucose (both alone and in combination) on cognitive performance and mood in 24-hour caffeine abstaining habitual caffeine consumers. Subjects took cognitive tests 30 minutes and 60 minutes post-ingestion. Giles found that caffeine enhanced executive control and working memory, and reduced simple and choice reaction time, that taurine increased choice reaction times but reduced reaction time in working memory tasks, and that glucose slowed choice reaction time. Glucose, combined with caffeine, enhanced working memory. Taurine, combined with glucose and caffeine, enhanced orienting attention. Caffeine reduced feelings of fatigue and increased tension and vigor. Taurine reversed the effects of caffeine on vigor and caffeine-withdrawal symptoms. Giles' final conclusion, however, was that caffeine, not taurine or glucose, is likely responsible for reported changes in cognitive performance following the consumption of energy drinks, particularly in caffeine-withdrawn habitual caffeine consumers.

e. Wesnes's *Appetite* Article (2013)

In 2013, Dr. Wesnes, along with Dr. Udani and Dr. Barrett, published an article outlining the results of the Medicus Study in the journal, *Appetite*. (Ex. 664, 2107). In the article entitled "An evaluation of the cognitive and mood

effects of an energy shot over a 6 h period in volunteers. A randomized, double-blind, placebo controlled, cross-over study," Dr. Wesnes described the Medicus clinical trial and the results from that trial. The article described the study's results this way: "an energy shot can significantly improve important aspects of cognitive function for up to 6 h[ours] compared to placebo in partially sleep-deprived healthy volunteers." Dr. Wesnes testified that he thought the results of the tests in the Medicus study were "most uncaffeine-like" because the differences in the cognitive performance of the 5-Hour ENERGY® group and the placebo group were significant over the entire 6-hour period.

Dr. Kennedy testified that the results of the Medicus clinical trial demonstrated that 5-Hour ENERGY® provided improvements in attention, working memory, long-term memory, alertness, depression, and anxiety and that these improvements endured for six hours. He also opined that, based on other studies relating to the benefits of caffeine, these effects could not be attributable to caffeine alone. Dr. McLellan disagreed with this interpretation of the data when he testified that 5-Hour ENERGY® did not improve any test scores; it simply showed less of a diminishment of cognitive functioning in sleep-deprived and potentially caffeine withdrawn test subjects, than placebo. He found the test results consistent with prior studies showing the impacts on caffeine over time.

f. Kurtz Article (2013)

In 2013, Abigail Kurtz *et al.* published an article entitled "Effects of Caffeinated Versus Decaffeinated Energy Shots on Blood Pressure and Heart Rate in Healthy Young Volunteers," in the journal Pharmocotherapy. (Ex. 2044). Kurtz's article described a study evaluating the effects of a single dose of caffeinated 5-Hour ENERGY® shot compared with a decaffeinated 5-Hour ENERGY® shot, assessed by changes in blood pressure and heart rates in healthy volunteers. Kurtz sought to determine if the non-caffeine ingredients in 5-Hour ENERGY® were affecting blood pressure. Kurtz found that the caffeinated shot significantly increased systolic and diastolic blood pressure over a three-hour period compared with the decaf version of the drink. She concluded that it was unlikely that the non-caffeine ingredients were contributing to blood pressure increases. Kurtz also reported that self-reported energy levels did not vary significantly between the caffeinated and decaffeinated versions of 5-Hour ENERGY® over time. She concluded that "[i]t appears that the decaffeinated shot provides the same amount of increase in perceived energy without the rise in peripheral blood pressure noted with the caffeinated shot."

g. Nagrecha Study (2013)

Natasha Nagrecha et al. published an article entitled, "The Effect of Caffeine and Choline Combinations on Short-term and Auditory Memory," in 2013 in the journal, *Clinical Pharmacol Biopharmaceutical* (Ex. 2238), in which she reported on a study to determine whether

choline in combination with several doses of caffeine could facilitate short-term visual and verbal memory and attention in adult and middle aged human subjects with normal cognitive function. Subjects underwent computerized testing once 40 minutes after ingestion. The test results showed that subjects ingesting 100 mg caffeine and 2 grams of choline bitartrate and those ingesting choline alone showed no change in performance on short-term memory or attention tests compared to placebo. The group ingesting 50 mg of caffeine and 2 grams of choline bitartrate scored significantly lower on tests for short-term verbal memory and attention than a placebo group. The subjects ingesting 25 mg of caffeine and 2 grams of choline bitartrate scored significantly higher on tests for short-term visual memory than a placebo group.

h. Marczinski Study (2014)

Cecile Marczinski authored an article entitled "Subjective State, Blood Pressure, and Behavioral Control Changes Produced by an 'Energy Shot'" in the Journal of Caffeine Research in 2014. (Ex. 2056) The purpose of the Marczinski Study was to investigate the acute effects of 5-Hour ENERGY® on subjective and objective measures assessed hourly for 6 hours following consumption. Marczinski concluded that while 5-Hour ENERGY® improved subjective feelings of vigor and reduced fatigue, the subjects' objective performance on a computerized cognitive test did not improve, and in fact worsened over time.

Appendix D

i. Shah Study (2015)

Dr. Blonz and Dr. Kennedy both referenced a study published by Sachin Shah entitled "Energy Implications of Consuming Caffeinated Versus Decaffeinated Energy Drinks." According to Dr. Kennedy, Shah's article was published in the Journal of Pharmacy Practice, although the article itself is not in evidence (Ex. 2254, p. 65). Dr. Kennedy summarized Shah's study: Shah conducted two studies to measure subjective energy levels in participants who consumed a caffeinated version of 5–Hour ENERGY® and a decaffeinated version of 5-Hour ENERGY®. Dr. Kennedy testified that Shah's test results indicated that both caffeinated and decaffeinated 5-Hour ENERGY® "significantly boosted energy levels 1 hour after consumption, but caffeinated EDs have a significantly greater boost and it is sustained at least 3 hours after consumption."

j. Buckenmeyer Study (2015)

In 2015, Phillip Buckenmeyer published an article entitled "Cognitive Influence of a 5-h ENERGY® shot: Are effects perceived or real?" (Ex. 1398). Buckenmeyer studied the effects of consumption of a 5-Hour ENERGY® shot on various cognitive functions across five hours on 24 college-aged students using a double-blind, cross-over, placebo-based design. Buckenmeyer concluded that while 90% of the participants subjectively thought that 5-Hour ENERGY® effective one-hour post-ingestion, he found no evidence that it enhanced recognition, reaction time, short-term and working memory, or attention capacity.

Buckenmeyer did not use CDR's test battery but instead used a web-delivered cognitive assessment from Lumosity.com.

k. Molnar Study (2015)

Janos Molnar authored an article entitled "Evaluation of the Effects of Different Energy Drinks and Coffee on Endothelial Function." Molnar looked at four different treatments: 5-Hour ENERGY® (230 mg of caffeine), Red Bull (80 mg caffeine), a drink called NOS (120 mg caffeine), and coffee (240 mg caffeine), and compared test subjects' endothelial function over a 4 hour period. (Ex. 2137). The endothelium is the lining of the blood vessels. The endothelium responds to signals from the brain to dilate or contract blood vessels. The body needs to ensure that blood is delivered to working muscles. A properly functioning vasculature, reflected in endothelial function, provides this service to the body. Molnar found a significant improvement in endothelial function (or blood flow) 1 ½ and 4 hours after the subjects consumed 5-Hour ENERGY® and Red Bull. Neither NOS nor the coffee, containing the same amount of caffeine as 5-Hour ENERGY®, changed endothelial function significantly.

The Molnar Study did not test energy, alertness or focus. It looked at endothelial function as a proxy for coronary function, or how the heart works. Dr. Blonz did not find the Molnar Study to be relevant for this reason. Dr. Kennedy opined that the Molnar Study supported the proposition that the physiological effects of 5-Hour ENERGY® cannot be attributed to caffeine alone.

Because endothelial functioning relates to how well the body delivers blood on demand to the brain, Dr. Kennedy testified that it is reasonable to conclude from Molnar's results that 5-Hour ENERGY® would have a greater impact on cognitive functioning than would caffeine alone.

l. Jacobson Study (2015)

In 2015, B.H. Jacobson published a study in the journal *Perceptual & Motor Skills*, entitled "Effect of Energy Drinks on Selected Fine Motor Tasks." (Ex. 2060). Jacobson assessed the effect of energy shots on certain fine motor skills of college-aged males. Jacobson noted that the stimulant energy blends present in most of the commercially available energy shots and energy drinks include caffeine, taurine, guarana, ginseng, glucose, and B vitamins. He notes that "very little research on the combined or synergistic effects of these ingredients" has been done. After summarizing the conflicting results of studies examining the effect of caffeine combined with taurine or glucose, he stated that the purpose of his study was to "compare hand steadiness, choice reaction time, pursuit rotor tracing, and simple reaction time following ingestion of a commercially available energy shot or a placebo." The energy shot involved in the test was 5-Hour ENERGY® Extra Strength.

Jacobson's study showed that the ingredients in 5-Hour ENERGY® did affect the subjects' physical performance. The energy shot did not improve hand steadiness over the placebo but did improve reaction times, which the author surmised may be the result of the caffeine in 5-Hour ENERGY®.

Appendix D

m. Bloomer Study (2015)

Richard Bloomer published the article, "Comparison of 5-Hour ENERGY and Caffeine on Cognitive Performance and Subjective Feelings in Young Men and Women," in the Journal of Caffeine Research in 2015. (Ex. 1397). Bloomer sought to compare the effects of 5-Hour ENERGY® to caffeine only and to a placebo on subjective feelings of energy and mood, objective measures of cognitive performance, heart rate, and blood pressure in men and women. Bloomer's study concluded that neither caffeine nor 5-Hour ENERGY® resulted in an improvement in subjective feelings of energy or mood or in objective cognitive performance. The results clearly diverge from those of the Medicus Study. Dr. Blonz attributed the difference to the design of the study: the Bloomer participants were allowed to eat breakfast on the day of testing, suggesting that the lack of food impacted the Medicus test results. Dr. Kennedy felt that the Bloomer study must have been flawed because the lack of improved functioning after ingesting the caffeine-only drink was inconsistent with most of the recognized science relating to caffeine but he was unable to identify what any such flaws were.

n. Pomportes Study (2015)

Laura Pomportes et al. wrote the article, "Heart Rate Variability and Cognitive Function Following a Multi-Vitamin and Mineral Supplementation with Added Guarana (*Paullinia cupana*), in the journal, Nutrients (Ex. 2062). The Pomportes Study assessed cognitive

performance and heart rate variability following the ingestion of either a multivitamin and mineral combination supplemented with 300 mg of guarana, compared to a caffeine supplement or a placebo. Test participants were asked to perform cognitive tasks 15 minutes after ingestion and then every 15 minutes over a 3-hour period. The results indicated that those ingesting the multivitamin/mineral/guarana product performed better on cognitive tests than the caffeine only or placebo. Dr. Kennedy testified that the study is significant in that it demonstrated that a mixture of multivitamins, minerals and guarana worked better in improving cognitive functioning than caffeine.

o. Paulus Study (2015)

In May 2015, an undergraduate student in Ohio named Ryan Paulus published an article documenting a study he and colleagues performed to test cognitive functioning and self-related mood of college students after consuming 5-Hour ENERGY®, or a Starbucks DoubleShot®, or a drink containing caffeine powder. Paulus concluded that the 5-Hour ENERGY® appeared to perform better than the other two products. Experts for both parties agree that this study has some fairly basic methodological problems. The study was not blind, for example, and there were limited controls on the test subjects' food consumption and activities during the tested time periods.

p. Cheskin Study (2016)

In July 2016, Lawrence J. Cheskin, a researcher at Johns Hopkins Bloomberg School of Public Health, issued

a report to the Oregon Department of Justice entitled "Randomized, Placebo-Controlled Crossover Trial of an Energy Drink." (Ex. 2247). Cheskin stated that the most common active ingredient in energy drinks is caffeine "but whether energy drinks boost energy due to caffeine, other non-herbal (vitamins, minerals, amino-acids) and herbal ingredients that may be present, or a combination remains unclear." He stated that all previous studies of the efficacy of energy drinks "lacked sufficient power and were generally not placebo-controlled." Because he did not find sufficient evidence to determine the effect of any ingredients other than caffeine, in boosting energy, Cheskin sought to test the efficacy of 5-Hour ENERGY® Decaf, compared to a placebo drink.

Cheskin's study involved 147 participants who were given Decaf 5-Hour ENERGY® or a placebo drink and then underwent computerized cognitive tests at 30 minutes, 1 ½ hours and 5 hours post-ingestion. The Cheskin data indicate that there was no significant improvement in cognitive, behavioral, or energy-level performance after consuming 5-Hour ENERGY® Decaf compared to the placebo drink. After comparing the relative reliability of his study results as compared to those of Paulus, Kurtz and Giles, he concluded "We found strong evidence that 5- Hour ENERGY Decaf is not efficacious in enhancing energy levels or any related cognitive behavioral parameters measured."

Dr. Blonz believed that the Cheskin Study was competent and reliable; Dr. Kennedy did not. Dr. Kennedy criticized the design of Cheskin's study because 38 percent

of the participants were morbidly obese, and thus might suffer from obesity-related illness; the age range of the participants was overly large, from age 18 to 70, which could confound the cognitive test results; and the cognitive tests were run over the weekend when it would have been difficult to control for sleep, food intake, caffeine intake, or alcohol use.

7. The Blonz/McLellan/Kennedy Scientific Disputes

The scientists presented by the State and Living Essentials disagreed on several key issues. The Court summarizes its understanding of these disputes below.

a. Whether caffeine is the sole active ingredient in 5-Hour ENERGY®.

The complaint alleges that caffeine is the sole active ingredient in 5-Hour ENERGY®. By "active ingredient," the Court adopts Dr. Blonz's definition: an ingredient that has a physiological effect on the human body. Dr. Kennedy presented convincing testimony, and the studies each side cited also support the conclusion, that the B-vitamins, and the amino acids can have a physiological effect on the body. The Court finds from this evidence that caffeine is not the sole active ingredient in 5-Hour ENERGY®. As previously described above, B vitamins, taurine, tyrosine and choline are bioactive. B vitamins, in general, promote metabolism which plays a role in the generation of physiological energy and can affect cognitive function and mood. Taurine can improve endothelial function and reduce subjective

feelings of fatigue. Tyrosine can promote the formation of neurotransmitters.

It does not necessarily follow, however, that these bioactive ingredients in 5-Hour ENERGY®, in the amounts found in that product, are efficacious in providing consumers with the advertised benefits of "energy, alertness, and focus." Dr. Kennedy agreed with Dr. McLellan that there is no experimental evidence showing that the addition of multivitamins to a caffeinated energy drink will cause greater improvement in physical and cognitive performance than can be attributed to the effects of caffeine alone.

b. Whether healthy, well-nourished adults can benefit physiologically from vitamins and amino acids in 5-Hour ENERGY®.

Dr. Blonz testified that healthy, well-nourished adults will receive no benefit from the B-vitamins and amino acids found in 5-Hour ENERGY® and that these ingredients provide no physiological benefit and would simply be excreted. Dr. Kennedy strongly disagrees with this opinion and testified that the recommended daily allowance of a particular vitamin is a minimum that humans should receive each day to prevent disease. He provided the results of a study he conducted and published in the article "Multivitamins and minerals modulate whole-body energy metabolism and cerebral blood-flow during cognitive task performance: a double-blind, randomized, placebo-controlled trial," in the journal *Nutrition & Metabolism* in 2016. This study investigated

whether supplementing the diet of healthy females with a multivitamin could affect metabolic and cerebral blood flow consequences, assessed through cognitive tasks. He found that just a single dose of Vitamins C and B led to an increase in fat oxidation and total energy expended. The Court finds this evidence to be compelling proof that healthy, well-nourished adults can benefit from some of the vitamins in 5-Hour ENERGY®. The State has not shown that the vitamins and nutrients in 5-Hour ENERGY® provide no benefit whatsoever.

c. Whether the Medicus Study supports Living Essentials' claims that non-caffeine ingredients contribute to the overall effectiveness of 5-Hour ENERGY®.

The Medicus Study concluded that subjects who drank 5-Hour ENERGY® performed better on tests of power of attention, continuity of attention, quality of working memory, and quality of episodic memory at several measurement points throughout the 6 hours. Dr. McLellan, an expert on caffeine, testified that there is no basis for concluding that these results were attributable to any ingredient other than caffeine. Dr. Kennedy disagrees. He testified that because caffeine has not been demonstrated to improve episodic memory and the 5-Hour ENERGY® improved episodic memory, there must be some interaction between the caffeine and the other bioactive ingredients causing this result.

After reviewing the scientific evidence and the testimony of Drs. McLellan and Kennedy, the Court finds

Dr. McLellan's opinion to be the more credible. First, Medicus did not design its study to determine whether the **non-caffeine** ingredients in 5-Hour ENERGY® led to improved performance on these cognitive tests. One of the study's co-authors, Marilyn Barrett, testified on that "the study was not designed to show what kind of effect there was with caffeine and the other ingredients. It could have been additive. It could have been synergistic. It could be no effect. The study was not designed to show that." (Barrett Dep. 70:19-23).

Second, the Court agrees with Dr. McLellan that the test results from the Medicus clinical trial do not show that consuming 5-Hour ENERGY® **improved** any of the test subjects' cognitive functioning, including episodic memory, above baseline. The results merely indicate that the cognitive performance of the 5-Hour ENERGY® group did not diminish as much as that of the placebo group.

Third, the Court also finds compelling Dr. McLellan's testimony that the Medicus study had design flaws that, whether intentional or not, inflated the positive results of the study in favor of 5-Hour ENERGY®. Test subjects were asked to perform the computerized tests in a state of sleep deprivation, which Dr. Udani acknowledged would have a negative impact on cognition and affective processing. (Ex. 1458). Limiting test subjects' sleep ensured a greater impact from the caffeine in 5- Hour ENERGY®, resulting in higher test scores by participants who received 5-Hour ENERGY® as opposed to those receiving the placebo. The test subjects were additionally not permitted to consume caffeine on the day of testing,

which meant that for those who regularly drink caffeine, they were arriving in a caffeine withdrawn state. Because scientific literature demonstrates that caffeine withdrawal has a negative effect on performance, those test subjects who were habituated to caffeine and received the placebo would have inevitably performed more poorly than the test subjects who received the caffeinated 5-Hour ENERGY®.

Finally, episodic memory has little to do with the claimed benefit of "energy, alertness and focus." The evidence presented at trial makes it clear that caffeine provides these benefits. While it is certainly plausible that the non-caffeine ingredients have a synergistic effect with the caffeine to enhance or extend the effect of the caffeine, that question has not been studied. The Court finds that the Medicus Study does not support a claim that the non-caffeine ingredients in 5-Hour ENERGY® contribute to the effectiveness of 5-Hour ENERGY®.

d. Whether the Monster Arm data undermines Living Essentials' contention that the cognitive benefits from 5-Hour ENERGY® seen in the Medicus Study are attributable to its non-caffeine ingredients.

The *Appetite* article made two controversial statements about the Medicus Study results. First, Drs. Wesnes, Udani, and Barrett wrote that the caffeine in 5-Hour ENERGY® was unlikely to account for the effects seen in study participants because caffeine's effects dissipate after 90 minutes. Second, they wrote that "no other study with an energy shot has yet demonstrated such a

widespread improvement to various aspects of cognitive function which have sustained to 6 h." (Ex. 2107).

On the eve of trial, the Court ordered Living Essentials to produce documents relating to data Medicus collected from a part of its study known as the "Monster Arm." These documents revealed that in addition to testing subjects after consuming 5-Hour ENERGY®, the Medicus team had also tested the same subjects after they consumed a competitor energy drink, Monster, and a placebo. Thus, there were in fact four "arms" to the Medicus Study: 5-Hour ENERGY®, a comparison placebo, Monster, and a comparison placebo. The Court rejects Living Essentials' argument that the Monster Arm was a "completely different study." The IRB protocol and IRB approval was the same; the test subjects were the same. Test participants took the same battery of computerized tests and answered the same questionnaire about calmness, alertness, and contentment after consuming all four drinks.

The Court also rejects Living Essentials' contention that the Monster Arm data was never analyzed. In fact, the Medicus Study team prepared a fairly extensive analysis of the two arms of the study. The team labeled the 5-Hour ENERGY® drink as "Drink A," and its comparison placebo as "Drink B." The Monster drink was labeled as "Drink E," and its comparison placebo labeled "Drink D." In a summary of the data comparing Drinks A and B and Drinks D and E, the Medicus team reported that the all of the composite scores between 5-Hour ENERGY® and the placebo were different, with the 5-Hour ENERGY® group

outperforming the placebo group on all performance measures except self-rated calmness. With regard to the Monster group, the team concluded that four of the five major composite scores and self-ratings were significantly different between the Monster and placebo. Monster outperformed the placebo on four performance measures (power of attention, continuity of attention, quality of working memory, and quality of episodic memory), as well as on self-rated alertness and contentment.

While the Medicus team concluded that the cognitive benefits of 5-Hour ENERGY® over the placebo were generally greater and "more statistically reliable" than those of Monster over the placebo, the data nevertheless showed statistically significant cognitive benefits from Monster lasting the entire 6 hours. According to Ex. 666, Dr. McLellan's article relating to energy drinks, Monster contains 80 mg of caffeine (compared to 5-Hour ENERGY®'s 200 mg), 1,000 mg of taurine (compared to 5-Hour ENERGY®'s 467 mg), 5 mg of glucuronolactone (compared to 411 mg in 5-Hour ENERGY®), 27 grams of sugar, an unknown amount of vitamins B_2, B_3, B_5, and B_{12}, 5 mg of guarana and 200 mg of ginseng. Guarana is a plant that contains caffeine. Monster appears to contain no Vitamin B_6 or B_9, no choline or citicoline, no malic acid, no N-Acetyl-L-tyrosine, and no L-Phenylalanine.

The Court agrees with Dr. McLellan's opinion that the Monster Arm data directly contradict statements made in *Appetite*. The data demonstrates that subjects consuming 5-Hour ENERGY® **or** Monster performed better on the cognitive tests than did the subjects consuming the

comparable placebo drink. Some of the early cognitive performance results from Monster could be attributable to the glucose. But, according to Dr. McLellan, the glucose would have raised the blood glucose levels over the first 30 minutes but those levels would have returned to baseline within 60 minutes. This conclusion appears credible given Dr. McLellan's analysis in Ex. 666 of the limited scientific evidence suggesting that the addition of glucose to a caffeinated energy drink will cause greater improvements in cognitive performance than can be attributed to the effects of caffeine alone. The Medicus Study showed differences in cognitive performance from Monster over placebo over the entire 6-hour period—long after the blood glucose levels would have returned to baseline. The Court agrees with Dr. McLellan that the cognitive benefits Medicus found from Monster are unlikely to be attributable to glucose alone.

According to Dr. McLellan, the caffeine in both energy drinks, however, would have remained elevated throughout the duration of the 6 hours. Any contention by Drs. Wesnes, Udani and Barrett that the effects of the caffeine would have disappeared after 90 minutes is also not supported by the science on caffeine. The Court agrees with Dr. McLellan that the Monster Arm data makes it impossible to conclude that the cognitive benefits achieved from 5-Hour ENERGY® are attributable to its non-caffeine ingredients. The Court also finds that Living Essentials' failure to disclose, discuss, and account for the Monster arm data undercuts the credibility of Living Essentials' claim that the non-caffeine ingredients of 5-Hour ENERGY® are working synergistically with

caffeine to enhance or extend the duration of any energy, alertness, and focus than the caffeine would otherwise provide.

e. Whether the Cheskin Study undermines Living Essentials' claims about the Decaf 5-Hour ENERGY® product.

Dr. Cheskin's study concluded that 5-Hour ENERGY Decaf does not enhance energy levels or cognitive functioning. The experts who testified at trial disagree on the reliability of Dr. Cheskin's study results. Dr. Blonz testified that the Cheskin study was competent and reliable scientific evidence. Dr. Kennedy, on the other hand, deemed the study "an appalling piece of work." Dr. Kennedy criticized the methodology: (1) the principal investigator was an obesity doctor with inadequate experience in the area of brain science; (2) he believed the study was designed to reach the results the Oregon Department of Justice wanted; (3) Dr. Cheskin included participants between 18 and 70 years of age, which undercuts the reliability of the test results because cognitive function varies with age; (4) Dr. Cheskin included a significant number of morbidly obese individuals which would confound the test results; (5) the tests were done over the weekend when participants probably had been out "clubbing" and came in with either too little or too much sleep; (6) Dr. Cheskin did not train the participants on the computerized tasks to make sure they could do the tasks in the first place; (7) there were no usable baseline results because of the lack of this training; (8) Dr. Cheskin did not use one of the valid tests (POMS scale) more than once

after 30 minutes which would pick up any effect from the small amount of caffeine in the product but would not pick up any effect of the other bioactive ingredients.

The Court did not hear from Dr. Cheskin himself and Dr. Blonz did not or could not rebut these criticisms. Based on Dr. Kennedy's credible review, the Court finds that the Cheskin Study is not sufficiently reliable to consider when assessing Living Essentials' claims regarding its decaffeinated product.

8. Living Essentials' expert testimony on substantiation standard of care and advertising subjectivity analysis.

Living Essentials presented evidence through Dr. Sanford Bigelow that it complied with industry standards in substantiating its ad claims, first, by having Carl Sperber conduct internet research on the formula's ingredients, then by instituting a process for legal and regulatory review by an outside law firm, followed by retaining Dr. Glade and NERAC to perform literature reviews, and finally, by asking Dr. Blum and then Medicus to undertake clinical studies. Dr. Bigelow concluded that Living Essentials "exceeded industry standards" in substantiating its product claims.

The Court finds some of Dr. Bigelow's opinions credible and some not. First, the Court cannot find that asking an advertising director who lacks any scientific or medical training to conduct Internet research is adequate substantiation. Mr. Sperber had no ability or training to assess the scientific reliability of anything he read online.

Second, the Court also cannot find that Living Essentials' regulatory or legal review was reasonable to substantiate the ad claims. There was no testimony from anyone who performed this review as to what they looked at or how they analyzed its accuracy and reliability. Dr. Bigelow had no idea how this regulatory review was conducted, or what criteria were applied when evaluating substantiation. There is simply no evidence in the record that anyone with any science training ever assessed the ad claims and the science backing up those claims against the FTC substantiation guidelines, as Dr. Bigelow testified he performed for his various employers and clients.

Third, there is no evidence that anyone within the company ever saw Dr. Glade's reports or the NERAC report. Although Living Essentials produced them to the Attorney General in this litigation as claim substantiation, the Court cannot find that Living Essentials knew about the reports when they were prepared. Mr. Sperber did not know about them and no one else from the company testified. Dr. Bigelow admitted that he has no idea whether Living Essentials even knew of or relied on the FTC substantiation guidelines when it took action to substantiate its ad claims. Thus, Dr. Bigelow's opinion that Living Essentials met the standard of care in substantiating its ad claims by procuring these reports is not supported by evidence in the record.

The Court does find that some of Dr. Bigelow's opinions are credible. For example, as set out below, the Court finds credible his testimony that the European Food Safety Authority ("EFSA") reports substantiate the

general contention that certain B vitamins can help reduce fatigue and contribute to energy metabolism. The Court also agrees with Dr. Bigelow that Living Essentials acted reasonably in undertaking clinical studies. The question, however, is not whether choosing to pay for clinical studies was reasonable or met the standard of care. The question is whether the studies are adequate to support the ads' claims.

Living Essentials also presented the expert testimony of J. Howard Beales, III, a professor of strategic management and public policy at George Washington University. Dr. Beales, the former Director of the Consumer Protection Division of the Federal Trade Commission, testified that none of the claims in Living Essentials' ads are all subjective, rather than objective, and thus are not deceptive. He opined that subjective claims cannot be supported by scientific evidence.

The Court finds that Living Essentials' claims are not subjective. The company intentionally promoted the product's ingredients as changing the way the body functioned. It promoted the product as a healthy way to achieve these physiological results. The company spent a significant amount of money on clinical studies to establish that 5-Hour ENERGY® was having a biochemical or physiological effect on the bodies of its consumers. As Dr. Beale admitted, if an advertiser claims that a product will change or affect the physiological functioning of the body, that is an objective claim for which scientific substantiation exist. This Court so finds.

E. APPLICABLE PRINCIPLES OF LAW

The Consumer Protection act prohibits companies like Living Essentials from engaging in "unfair or deceptive acts or practices in the conduct of any trade or commerce." RCW 19.86.020. The purpose of this act is to protect the public and foster fair and honest competition. RCW 19.86.920. The act is meant to be liberally construed to serve this purpose. *Short v. Demopolis*, 103 Wn.2d 52, 60-1, 691 P.2d 163 (1984); *Michael v. Mosquera-Lacy*, 165 Wn.2d 595, 602, 200 P.3d 695, 699 (2009).

The Washington Attorney General may bring an enforcement action under the CPA. RCW 19.86.080. In this CPA enforcement action, the State must prove three elements: (1) an unfair or deceptive act or practice (2) committed by Living Essentials in trade or commerce (3) that has a public interest impact. *State v. Kaiser*, 161 Wn. App. 705, 719, 254 P.3d 850 (2011). The State is not required to prove that Living Essentials' unfair or deceptive advertisements injured consumers or that consumers relied on particular 5-Hour ENERGY® ads when deciding whether to purchase or consume the dietary supplement. *Id.* A CPA claim also "does not require a finding of an intent to deceive or defraud. Good faith on the part of the seller is immaterial to liability. *Wine v. Theodoratus*, 19 Wn. App. 700, 706, 577 P.2d 612 (1978).

1. Unfair or Deceptive Act or Practice

Whether a party committed a particular act is an issue of fact. *See Leingang v. Pierce County Med. Bur., Inc.* 131

Wn.2d 133, 150, 930 P.2d 288 (1997). Whether a particular act is unfair or deceptive for purposes of the CPA – in other words, the determination of whether the CPA applies to a factual situation – is a question of law for the Court. *See Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 47, 204 P.3d 885 (2009) (citing *Leingang*, 131 Wn.2d at 150). The CPA does not define "unfair or deceptive act or practice." The Court has allowed the definition of unfair or deceptive to evolve through the "gradual process of judicial inclusion and exclusion." *Klem v. Washington Mut. Bank*, 176 Wn.2d 771, 785, 295 P.3d 1179 (2013) (citing *Saunders v. Lloyd's of London*, 113 Wn.2d 330, 344, 779 P.2d 249, 256 (1989)). There is no limit to human inventiveness, so the courts and the legislature are left to define an unfair or deceptive act in order to fulfill the protective purposes of the CPA. *Id.* at 786.

Washington state courts have concluded that there are several routes a court can take when determining if a company's conduct is unfair or deceptive. *See Klem*, 176 Wn.2d at 787. Blatant, false misrepresentations that result in actual deception are obviously deceptive, although actual deception is not required, only the capacity to deceive. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 785, 719 P.2d 531 (1986). In addition, a truthful statement "may be deceptive by virtue of the 'net impression' it conveys[.]" *Panag*, 166 Wn.2d at 50 (citing FTC cases).

2. FTC Advertising Substantiation Requirement

The CPA also provides that courts can be guided in their determination of whether conduct is unfair or

deceptive by federal court decisions and "final orders of the federal trade commission interpreting the various federal statutes dealing with the same or similar matters" as the CPA. RCW 19.86.920; *CertainTeed Corp. v. Seattle Roof Brokers*, C 09-563 RAJ, 2010 WL 2640083, at *6 (W.D. Wash. June 28, 2010); *State v. Black*, 100 Wn.2d 793, 799, 676 P.2d 963, 967 (1984) ("When the Legislature enacted the Consumer Protection Act, it anticipated that our courts would be guided by the interpretation given by federal courts to their corresponding federal statutes"). The CPA was modeled after Section 5 of the FTC Act, 15 U.S.C. § 45(a)(1), which, like the CPA, includes a broad prohibition on "unfair or deceptive acts or practices." *Hangman Ridge*, 105 Wn.2d at 783. Washington courts have relied on cases interpreting Section 5 of the FTC Act when determining if certain conduct is unfair or deceptive. *See, e.g., Panag*, 166 Wn.2d at 49-50.

Under Section 5 of the FTC Act, to prove that an ad is deceptive, the FTC must establish (1) that an advertisement conveys a representation through either express or implied claims; (2) that the representation is likely to mislead consumers; and (3) that the misleading representation is material. *F.T.C. v. Direct Mktg Concepts, Inc.*, 569 F.Supp.2d 285, 297 (D. Mass. 2008), *aff'd*, 624 F.3d 1 (1st Cir. 2010). Neither proof of consumer reliance nor consumer injury is necessary to establish a Section 5 violations. *F.T.C. v. Freecom Commc'ns, Inc.,* 401 F.3d 1192, 1203 (10th Cir.2005); *F.T.C. v. Direct Mktg.*, 569 F. Supp.2d at 297-98. The Court will apply this test to the Living Essential ads in this case.

Appendix D

An advertisement's meaning is a question of fact. *FTC v. Nat'l Urological Grp., Inc.*, 645 F.Supp.2d 1167, 1189 (N.D. Ga. 2008), *aff'd*, 356 Fed. Appx. 358 (11th Cir. 2009). The Court must look at the advertisement's overall, net impression, rather than the literal truth or falsity of the words of the ad. *Id.* Where implied claims are conspicuous and reasonably clear from the face of the advertisement, extrinsic evidence is not required to prove the existence of implied claims. *U.S. v. Bayer Corp.*, 2015 WL 5822595, at *11 (D. N.J. Sept. 24, 2015). The Court can ascertain an advertisement's meaning by examining the ad itself. *F.T.C. v. U.S. Sales Corp.*, 785 F. Supp. 737, 745 (N.D. Ill. 1992). Even an accurate communication can be deceptive if the "net impression" it conveys is deceptive. *Panag*, 166 Wn.2d at 50. Courts "will often be able to determine meaning through an examination of the representation itself, including an evaluation of such factors as the entire document, the juxtaposition of various phrases in the document, the nature of the claim, and the nature of the transaction." FEDERAL TRADE COMMISSION, *Policy Statement on Deception* (1983), *at* http://www.ftc.gov/bcp/policystmt/ad-decept.htm (last accessed October 7, 2016). With respect to extrinsic evidence of the "takeaway" from an ad, consumer survey evidence or consumer testimony is not required. *F.T.C. v. Medlab, Inc.*, 615 F. Supp. 2d 1068, 1077-78 (N.D. Cal. 2009) (citing cases and rejecting defendant's argument that consumer survey evidence or consumer testimony must be presented to support a finding as to the meaning of an ad). Extrinsic evidence can include expert testimony. *FTC Policy Statement on Deception*, n.8.

Appendix D

In analyzing a representation, the FTC can prove that a representation is likely to mislead consumers by establishing either (1) actual falsity of express or implied claims ("falsity" theory);; or (2) that the advertiser lacked a reasonable basis for asserting that the message was true ("reasonable basis" theory). *F.T.C. v. Pantron I Corp.*, 33 F.3d 1088, 1096 (9th Cir.1994) (citing

In the Matter of Thompson Med. Co., Inc., 104 F.T.C. 648 (1984)); *F.T.C. v. John Beck Amazing Profits, LLC*, 865 F.Supp.2d 1052, 1067 (C.D.Cal.2012). The FTC may prove the claims are literally false if all reasonable scientists would agree that the claims do not provide the benefits as asserted. *Mullins v. Premier Nutrition Corp.*, 2016 WL 1534784, at *16 (N.D. Cal. Apr. 15, 2016) (citing *In re GNC Corp.*, 789 F.3d 505, 515 (4th Cir.2015)). The FTC may do this by showing the advertiser's expert opinions are unreasonable or that no expert believes in the assertion. *Id.* at *17. The State has indicated that it is not proceeding on the actual falsity theory but is instead proceeding solely on the reasonable basis theory. Thus, the Court will not apply the "all reasonable scientists" standard to Living Essentials' substantiation evidence in this case.

If an ad expressly states or impliedly suggests that a product successfully performs an advertised function or yields an advertised benefit, the advertiser must have a "reasonable basis" for the claim. *F.T.C. v. COORGA Nutraceuticals Corp.*, 2016 WL 4472994, at *4 (D. Wyo. 2016) (*citing In re Pfizer, Inc.*, 81 F.T.C. 23 (1972)). Under the reasonable basis theory, the advertiser must have had some recognizable substantiation for the representation

prior to making it an advertisement. *John Beck Amazing Profits, LLC*, 865 F.Supp.2d at 1067. The advertiser has the burden of establishing what substantiation it relied on for a claim, and the State has burden of establishing that that substantiation is inadequate. *F.T.C. v. Johnson*, 96 F. Supp. 3d 1110, 1120 (D. Nev. 2015). Where an advertiser lacks adequate substantiation evidence, they necessarily lack any reasonable basis for their claims and the ad is deceptive as a matter of law. *Direct Mktg. Concepts, Inc.*, 624 F.3d at 8. In determining whether an advertiser has satisfied the reasonable basis requirement, the Commission or court must first determine what level of substantiation the advertiser is required to have for his advertising claims. Then, the adjudicator must determine whether the advertiser possessed that level of substantiation." *Pantron I Corp.,* 33 F.3d at 1096; *John Beck Amazing Profits, LLC*, 865 F. Supp.2d at 1067.

Under FTC guidance to advertisers of dietary supplements, claims about the efficacy of dietary supplements must be supported by "competent and reliable scientific evidence," which the FTC defines as "tests, analyses, research, studies or other evidence, based on the expertise of professionals in the relevant area, that have been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results. *See* FEDERAL TRADE COMMISSION, *Dietary Supplements: An Advertising Guide for Industry* (2001*), at* https://www.ftc.gov/system/files/documents/plain- language/bus09-dietary-supplements-advertising-guide-industry.pdf (last accessed October 7, 2016), at 9.

Appendix D

The FTC lists a number of factors (known as the *Pfizer* factors) to considering the appropriate amount and type of substantiation:

- **The Type of Product.** Generally, products related to consumer health or safety require a relatively high level of substantiation.

- **The Type of Claim.** Claims that are difficult for consumers to assess on their own are held to a more exacting standard. Examples include health claims that may be subject to a placebo effect or technical claims that consumers cannot readily verify for themselves.

- **The Benefits of Truthful Claims and The Cost/Feasibility of Developing Substantiation for the Claim.** These factors are often weighed together to ensure the valuable product information is not withheld from consumers because the cost of developing substantiation is prohibitive. This does not mean, however, that an advertiser can make any claim it wishes without substantiation, simply because the cost of research is too high.

- **The Consequences of a False Claim.** This includes physical injury, for example, if a consumer relies on an unsubstantiated claim about the therapeutic benefit of a product

> and foregoes a proven treatment. Economic injury is also considered.
>
> - **The Amount of Substantiation that Experts in the Field Believe is Reasonable.** In making this determination, the FTC gives great weight to accepted norms in the relevant fields of research …. Where there is an existing standard for substantiation developed by a government agency or other authoritative body, the FTC accords great deference to that standard.

Id. at 8-9. A guiding principle for determining the amount and type of evidence needed is what experts in the relevant area of study would consider to be adequate. *Id.* at 10. The FTC will look at the amount and type of substantiation. For example, the most reliable evidence comes from well-controlled human clinical trials. *Id.* It will look at the quality of the evidence by examining the validity of the methodology used in any clinical trials. *Id.* at 12. The FTC cautions advertisers not to rely on the fact that a study was published as proof of scientific reliability without assessing the quality of the research. *Id.* The FTC also requires that advertisers of dietary supplements consider the totality of the scientific evidence and not cherry pick the studies that support their claims and ignore conflicting study results. Finally, the studies on which an advertiser is relying must be relevant to the claims being made in ads:

> Therefore, advertisers should ask questions such as: How does the dosage and formulation

> of the advertised product compare to what was used in the study? Does the advertised product contain additional ingredients that might alter the effect of the ingredients in the study? Is the advertised product administered in the same manner as the ingredient used in the study? Does the study population reflect the characteristics and lifestyle of the population targeted by the ad? If there are significant discrepancies between the research conditions and the real life use being promoted, advertisers need to evaluate whether it is appropriate to extrapolate from the research to the claimed effect."

Id. at 16. "Claims that do not match the science, no matter how sound that science is, are likely to be unsubstantiated." *Id.*

3. Materiality

Implicit in the term "deceptive" in the CPA is "the understanding that the actor misrepresented something of material importance." *Hiner v. Bridgestone/Firestone, Inc.,* 91 Wn. App. 722, 730, 959 P.2d 1158 (1998), *rev'd on other grounds,* 138 Wn.2d 248, 978 P.2d 505 (1999); *Stephens v. Omni Ins. Co.*, 138 Wn. App. 151, 166, 159 P.3d 10, 18–19 (2007), *aff'd sub nom. Panag v. Farmers Ins. Co. of Washington*, 166 Wn. 2d 27, 204 P.3d 885 (2009). Express claims, deliberately implied claims, and claims that "significantly involve health," are presumed material. *Kraft, Inc. v. F.T.C.*, 970 F.2d 311, 322-3 (7th Cir.

1992); *F.T.C. v. COORGA Nutraceuticals Corp.*, 2016 WL 4472994, at *3 (D. Wyo. 2016). A presumption of actual reliance by consumers arises once the State proves that the defendant made material misrepresentations, that they were widely disseminated, and that consumers purchased the defendant's product. *F.T.C. v. Figgie Int'l, Inc.*, 994 F.2d 595, 605 (9th Cir. 1993).

F. ANALYSIS

1. Living Essentials' Vitamin Claims are not deceptive.

Living Essentials' claims that that B vitamins promote energy and amino acids promote alertness and focus are not deceptive. Nutritional science supports the general proposition that the vitamins and nutrients in 5-Hour ENERGY® are physiologically beneficial, even to healthy, well-nourished adults. They support metabolism which affects energy. They can help reduce fatigue. They can help increase blood flow to the brain and support the generation of neurotransmitters, which can affect alertness and focus. Dr. Kennedy's testimony regarding the general health benefits of B vitamins, choline, taurine, and L-tyrosine, was compelling and credible. Dr. Sanford Bigelow testified credibly that the dosages found in 5-Hour ENERGY® are sufficient in quantity to provide the claimed benefits. There is adequate scientific substantiation predating July 2012 to support Living Essentials' claim that the vitamins and nutrients in 5-Hour ENERGY® help promote energy, alertness and focus. For this reason, the Court finds that the State has

not established that Living Essentials' Vitamins Claims violated the CPA.

2. Living Essentials' Superior to Coffee Claims are deceptive.

Living Essentials, however, claims that the B vitamins and amino acids do not just promote energy, alertness and focus. Living Essentials also claims that these vitamins and amino acids work *synergistically* with caffeine (or interacts with caffeine) to enhance the *duration* of the energy, alertness and focus derived from caffeine.[7] This is the takeaway of the Superior to Coffee Claims. Living Essentials advertised that the combination of caffeine, B vitamins and amino acids would provide energy that would last longer than consumers would experience from a cup of premium coffee (and in some of the ads, longer than 3 or 4 cups of coffee).

While the Court finds competent and reliable scientific evidence that caffeine in 5-Hour ENERGY® is probably interacting with its B vitamins, taurine, glucuronolactone, and other non- caffeine ingredients, the Court cannot find that this evidence supports the specific benefit Living Essentials is claiming. Dr. Kennedy's summary of the

7. Although some of the studies suggest that caffeine does not improve episodic memory, and that 5-Hour ENERGY® provides some improvement in this area, none of Living Essentials' ads claim such a benefit from the product. Carl Sperber testified that he was not even aware of what "episodic memory" was. He certainly did not use these words in any Living Essential ads. These studies are thus irrelevant to the Court's analysis.

scientific literature does show some different physiological results from caffeine plus vitamins or caffeine plus amino acids, but the results are not the benefits touted by Living Essentials. The Giles study, for example, actually supports the proposition that taurine *counteracts* the caffeine, rather than enhancing its effects. The studies do not clearly establish that 5-Hour ENERGY®'s vitamins and nutrients work synergistically with caffeine to make these benefits last longer than they would last with caffeine alone.

As set out in the FTC dietary supplement guidelines, the substantiation must be relevant to the claimed benefits. None of the studies Living Essentials submitted to the Court support the claim that combining specific B vitamins, taurine, choline, glucuronolactone and tyrosine with caffeine will cause the energy, alertness and focus effects of caffeine to last longer than if the caffeine were consumed alone. Neither Glade nor NERAC examined this issue. The only corporate representative to testify regarding the substantiation Living Essentials relied on when airing its ads was Carl Sperber. Sperber cited the Medicus Study as the only substantiation he was aware of, other than his own Internet research. But the Medicus study had no separate caffeine arm against which to compare 5-Hour ENERGY®.

At trial, Living Essentials presented several studies on which it now relies to substantiate its Superior to Coffee Claims. Living Essentials points to the 2013 Nagrecha Study, the 2015 Molnar Study and the 2015 Paulus Study. The Court has reviewed each study presented and the

testimony of the experts regarding these studies and finds none that are sufficiently relevant to substantiate the Superior to Coffee Claims. The Nagrecha study has limited relevance because its test subjects underwent only one round of testing 40 minutes after ingesting the caffeine/choline drink. There is no data in the Nagrecha study to indicate that adding choline to a caffeinated drink extends the benefits of caffeine past that 40 minute mark.

The 2015 Paulus study compared 5-Hour ENERGY® to a Starbucks DoubleShot and to caffeine by itself. In his tests, Paulus found that the 5-Hour ENERGY group outperformed the other two groups. But the Court finds the methodological problems, specifically the lack of blinding of the participants and lack of other controls, to be significant enough to render the Paulus Study results unreliable.

The 2015 Molnar Study comes the closest. Molnar found a significant improvement in endothelial function (blood flow) 1 ½ and 4 hours after the subjects consumed 5-Hour ENERGY® and Red Bull, and no similar improvement in endothelial function was seen for those ingesting NOS or coffee. Dr. Blonz testified that the Molnar study was not relevant to the claims Living Essentials was making in the ads because Molnar did not test cognitive functioning to evaluate energy, alertness and focus. Molnar was merely looking at endothelial function as a proxy for coronary function. Dr. Kennedy disagreed and testified that endothelial function is a measure of how well the body is delivering blood on demand to the brain. In Dr. Kennedy's opinion, the more blood delivered to the brain, the better

the cognitive functioning. But the Bloomer study concluded that neither caffeine nor 5-Hour ENERGY® resulted in an improvement in subjective feelings of energy or mood or in objective cognitive performance, seeming to undercut the reasonability of relying on Molnar as substantiation for Living Essentials' claims.

Ultimately, the question the Court confronts is whether the Molnar study, by itself, suffices to substantiate the efficacy claims Living Essentials made in ads years before the study was published and whether it now suffices to justify these claims. Dr. Beales opined that very little substantiation should be required because "there is not very much at stake for consumers" under the factors set out in *Pfizer, Inc.*, 81 F.T.C. 23, 62 (1972). The Court rejects this opinion. Because the Court finds that Living Essentials' ads relate to consumer health, the Court concludes that the better approach is that set out in the FTC dietary supplement guidelines: "Generally, products related to consumer health or safety require a relatively high level of substantiation."

After careful consideration, the Court finds that Living Essentials lacked adequate competent and reliable scientific evidence to make the Superior to Coffee Claim. First, Dr. Kennedy admitted that there is no study that has looked at the effects of the combination of ingredients in 5-Hour ENERGY® on energy, alertness and focus as compared to caffeine. He also conceded that there is no evidence that the addition of multivitamins, taurine, or glucuronolactone to a caffeinated energy drink will cause greater improvement in physical and cognitive

performance that can be attributed to the effects of caffeine alone. As he testified, "At this stage, we don't know which of the other micronutrients [or] the other bioactives [] interact with caffeine." He opined that a number of different non-caffeine ingredients in 5-Hour ENERGY® **could be interacting** to extend one's energy, alertness and focus, but there are studies that support this hypothesis and there are studies that undermine it.

Second, caffeine may not improve endothelial function for as long as 5-Hour ENERGY® does. It does not necessarily follow, however, that caffeine's impact on cognitive performance ends when its impact on endothelial function ends. Dr. McLellan testified that caffeine can cross the blood/brain barrier and, because of its half-life, remains in and affects cognitive performance for a significant period of time. Living Essentials is claiming that 5-Hour ENERGY® works *better than caffeine alone in sustaining energy, alertness and focus over several hours*. This claim is certainly plausible, given the science presented to the Court, but it remains a hypothesis, not an established scientific fact.

The Court finds that the Superior to Coffee claims were express claims and are thus material under the CPA. The ads expressly state that people who drink 5-Hour ENERGY® will experience hours of energy, alertness and focus because the vitamins and nutrients extend the effects of caffeine. There is insufficient scientific evidence to support this express health-related claim. The Superior to Coffee Claims are thus materially misleading.

For these reasons, Living Essentials violated the CPA when it aired or disseminated ads that expressly or impliedly stated that the energy, alertness and focus derived from 5-Hour ENERGY® will be greater than or last longer than any similar physiological benefits derived from coffee.

3. The Decaf ads are deceptive.

The Court finds that Living Essentials lacks competent and reliable scientific evidence to claim that Decaf 5-Hour ENERGY® will generate energy and alertness that "lasts for hours."[8] Dr. Bigelow testified that Living Essentials acted reasonably in relying on the 2010 Glade Report and the 2007 NERAC Report to substantiate this decaf claim. The Court does not find this testimony credible. Dr. Glade relied on taurine studies that demonstrated that daily dietary supplementation of taurine in 3000 mg or more increased metabolizable energy that could last for at least four hours. Decaf 5-Hour ENERGY® contains only 483 mg of taurine. The FTC guidelines on dietary supplements specifically cautions advertisers from relying on studies the conclusions of which are based on very different dosages. Such is the case here with the taurine studies on which Dr. Glade relied. Dr. Glade also cited studies for the proposition that the daily intake of between 6 mcg and 5000 mcg of B_{12} supports the production of energy within 2 hours of consumption and for 12 to 24 hours after consumption.

8. The Court dismissed the State's challenge to representations in Exhibit 641 as non-actionable on Living Essentials' CR 41(b)(3) motion.

Dr. Kennedy testified that the 2015 Shah Study demonstrated that both caffeinated and decaffeinated energy drinks "significantly" boosted energy level one hour after consumption. But the chart on which Dr. Kennedy relies (Ex. 2254, slide 65) actually shows that the decaf energy level test results at the 3 hour mark were *not* statistically significant. And the 2013 Kurtz study also found that consumers drinking Decaf 5-Hour ENERGY® experienced no energy benefits from the ingredients in the drink.

While there is competent and reliable scientific evidence to support a claim that the Decaf 5-Hour ENERGY® shot may provide a short-term benefit in terms of energy, the science is insufficient to substantiate the claim that this benefit will endure over a five hour period.

For this reason, the Court finds the Decaf Claims to be materially misleading and a violation of the CPA.

4. The "No Crash" ads are not deceptive.

The State contends that Living Essentials claims that consumers will experience no sugar or caffeine crash after drinking 5-Hour ENERGY. The main problem with the State's allegation is that there appears to be no accepted meaning of the word "crash" when applied to energy drinks. Dr. Pratkanis testified that the phrase "crash feeling" is left open to the consumer to interpret any way they feel in their experience. Dr. Blonz interpreted the term "crash" as a non-scientific term dealing with caffeine withdrawal effects.

By 2007, Living Essentials began to use the phrase "no crash" to mean "no sugar crash," or the absence of the sudden feeling a consumer may experience following ingestion of sugar (which 5-hour ENERGY® does not contain). Because there is no sugar in 5-hour ENERGY®, a person will not experience a "crash" relating to a drop in glucose levels after consuming the 5- hour ENERGY® products. Each of Living Essentials' ads referencing "crash" after July 17, 2012 contained an asterisk directing consumers to a statement that "no crash means no sugar crash," or contained only the language "no sugar crash."

The Court rejects Dr. Blonz's theory that the term "crash" in the 5-hour ENERGY® advertisements refers to feelings of fatigue or tiredness that a person who is habituated to caffeine may experience after not having had caffeine for a certain period. There is no empirical evidence for the existence of a caffeine-related crash. Habituation does not develop after a single ingestion of caffeine, and a caffeine-related "crash" is physiologically implausible because of caffeine's half-life. Dr. Blonz cited no studies showing evidence of a "caffeine crash."

The State has failed to establish that Living Essentials' "no crash" claims are misleading or deceptive under the CPA.

5. The Ask Your Doctor Ads were deceptive under the CPA.

The Court finds that the net impression from the AYD ads was that a substantial majority of doctors believe

5-Hour ENERGY® is a safe and effective nutritional supplement that they would recommend to their patients. While the statistics displayed in the ads and the words used in the ad were *literally* true, the impression left by the ads was not. Dr. Anthony Pratkanis, an expert in the science of consumer behavior and persuasion tactics, testified credibly that the clear takeaway from these ads was that "doctors would recommend" 5-Hour ENERGY®. The Court agrees.

First, Sperber testified that when he developed the script, he wanted to allay consumers' concerns about the safety or nutritional value of 5-Hour ENERGY® by indicating that doctors would recommend the product. Neither of the surveys (Ex. 436; Ex. 627) asked physicians if they thought 5-Hour ENERGY® was healthy or safe. Instead, the doctors were informed that 5-Hour ENERGY® low fat, low calorie, low sodium, sugar-free drink. The survey then asked if the physicians would recommend 5-Hour ENERGY® for healthy patients who already use energy supplements:

Based on the information you just read about 5-hour ENERGY®, would you recommend 5-hour ENERGY® for healthy patients who use energy supplements?

- ☐ Yes
- ☐ No
- ☐ Don't know/not sure

Dr. Pratkanis testified that the survey questions were biased, leading, and designed to elicit a limited response. Due to the phrasing of the questions that preceded this question, a "no" response to this question suggested that

the responding doctor would instead recommend a high fat, high calorie, or high sodium energy supplement, rather than allowing doctors the option of saying they do not recommend energy supplements at all. It is thus not surprising that 47 percent of the doctors responding to the online survey responded in the affirmative, and 74 percent of the doctors responding to the paper survey responded in the affirmative.

Second, the statistics Living Essentials presented in the ads ("over 73%") were the results of the online survey of 503 doctors, but the reference to "3,000 doctors" was a combination of both surveys. Although the statistics in the AYD ads were technically an accurate depiction of the online survey, the statistics presented in the ad were only accurate for responses from 503 doctors, not for responses from 3,000 doctors, as the ads state. The Court finds credible Dr. Pratkanis's testimony that the survey methods used for the online survey and the paper survey differed so dramatically that the surveys could not reasonably be combined and represented as the same survey. The 2,600 doctors who participated in the paper survey were not randomly selected. They were specifically chosen by sales representatives making sales calls on doctors' offices. Yet, the company presented the statistics in a way that would lead a reasonable viewer to believe that 73% of 3,000 doctors surveyed would recommend this product to their patients.

Living Essentials argues that even if the ads were not accurate, they were not materially misleading. They presented Dr. Christopher Stomberg, an expert on

econometrics (the application of statistics to economic questions) who testified that the online survey statistic results contained in the AYD ads were accurate and representative of the opinions of primary care doctors across the United States. Living Essentials argues that because the survey results were representative of what 3,000 randomly selected primary care doctors would have said had they been surveyed in a scientifically valid manner, the ads cannot be found to be misleading in any material way.

G. CONCLUSIONS OF LAW

Based on the analysis set out above, the Court concludes the following:

1. The State failed to prove that Living Essentials violated the Consumer Protection Act when it aired or published ads that indicated that the non-caffeine ingredients in 5-Hour ENERGY® promote energy, alertness and focus.

2. Living Essentials violated the Consumer Protection Act when it aired or published ads that represented that the energy, alertness and focus from 5-Hour ENERGY® lasts longer than a cup of coffee because of the synergistic or interactive effects of caffeine, B vitamins and nutrients in the product.

3. Living Essentials violated the Consumer Protection Act when claimed in a press release and on its web site that Decaf 5-Hour ENERGY® will provide energy, alertness and focus that lasts for hours.

4. The State failed to prove that Living Essentials violated the Consumer Protection Act when it aired or published its "no crash" ads.

5. Living Essentials violated the Consumer Protection Act when it aired the Ask Your Doctor ads.

At trial, the parties agreed to postpone a remedy phase of the proceeding until the Court issued this decision. The parties shall contact the Court's bailiff to schedule a status conference in this matter.

DATED this 7th day of October, 2016.

_____

Honorable Beth M. Andrus
King County Superior Court

APPENDIX E — ORDER OF THE SUPERIOR COURT OF THE STATE OF WASHINGTON, COUNTY OF KING, FILED AUGUST 1, 2016

IN THE SUPERIOR COURT OF
THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

No. 14-2-19684-9 SEA

STATE OF WASHINGTON,

Plaintiff,

v.

LIVING ESSENTIALS, LLC, *et ano.*,

Defendant.

ORDER DENYING MOTION FOR RECONSIDERATION

THIS MATTER is before the Court on the State's Motion for Reconsideration of the Court's Order Denying Summary Judgment. The Court has reviewed the State's Motion, the Defendant's Response and the State's Reply as well as the electronic court record. The State has raised the following issues in their motion:

1. Can the Defendant's failure to substantiate their advertising claims before those claims are made be an unfair or deceptive act or practice under

the CPA? Yes. But whether or not the Defendants had adequate substantiation prior to running their ads is a question of fact.

2. What evidence is required to show that an act or practice has the capacity to deceive a substantial portion of the public? This is a factual question that should be addressed at trial.

3. Can a statement capable of being substantiated also be non-actionable puffery? Defendant's subjective claims that 5HE increases users' feelings of energy and alertness are not capable of being substantiated by competent and reliable scientific evidence and are therefore puffery.

IT IS ORDERED that the State's Motion for Reconsideration is DENIED.

IT IS FURTHER ORDERED that the State's alternative request that this court certify these issues for immediate review under CR 54(b) is DENIED. The Court of Appeals can review all of these issues at the conclusion of the trial.

Dated this 1st day of August, 2016.

/s/_____
The Honorable Mariane C. Spearman

APPENDIX F — EXCERPT OF TRANSCRIPT OF PROCEEDINGS OF THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF KING, DATED SEPTEMBER 8, 2016

[1822]IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

No. 14-2-19684-9 SEA
COA NO. 76463-2-I

STATE OF WASHINGTON,

Plaintiff,

vs.

LIVING ESSENTIALS, LLC, A MICHIGAN LIMITED LIABILITY COMPANY, AND INNOVATION VENTURES, LLC., A MICHIGAN LIMITED LIABILITY COMPANY,

Defendants.

THE HONORABLE BETH ANDRUS, JUDGE

REPORTER'S TRANSCRIPT OF
PROCEEDINGS HELD ON
September 8, 2016

* * *

[1989] court to Hangman Ridge, which actually was the first case to really confirm what the public interest standard was, because before that there was some dispute.

The Anhold case was a case that was often cited, that did have an injury element in it, and in Hangman Ridge the court definitively says, "Here's the factors we're going to use, in terms of public interest."

They kind of divided it in two. There are factors they use when it's a consumer transaction, and those are the ones I presented today; there are factors to use when, I would say, in more of a business, one-on-one type of situation, but Hangman Ridge is what we look to to determine public interest impact.

The other quirky thing about it is that in the last 10 years the legislature sought fit to amend the CPA, it's Section 4.3, to provide a test whereby private plaintiffs can use that statute to demonstrate public interest impact, but, on its face, it doesn't apply to the State, so we're still stuck with Hangman Ridge. But, in any case, that is the appropriate standard for determining whether there's a public interest impact.

Consumer complaints. This continues to be a red herring, and I can represent to the court that in pretty much every investigation that our office opens and pretty much every enforcement action that we file, we hear about [1990]this from the defendant or the party, we don't have any consumer complaints. And it really is -- we do sometimes, sometimes we don't, but they're not required.

They're not required for us to initiate investigation, to send a civil investigative demand, and they're not required -- we're not required to have consumer complaints to file an action.

The reason for that is pretty clear. Hangman Ridge points out that the whole purpose of the capacity to deceive test is to detour deceptive conduct before the injury occurs. There's absolutely nothing in Washington Supreme Court decisions or in the statute that requires the State to have consumer complaints, one, two, or any number, before filing an action. It's not material to the elements the court -- the State must prove, because we don't have to prove injury, we don't have to prove causation. It's not like a class action, where you would have to show some type of reliance and that consumers had standing and seen the ad and so on.

I think -- let's see. I think the only other issue that I wanted to address was counsel's point -- and I think he used the word "shocking" -- that there was nothing in Dr. Blonz's testimony or nothing in Dr. Blonz's report about caffeine, which is absolutely incorrect, and I won't -- unless the court would like, I

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APPENDIX G — EXCERPT OF TRANSCRIPT OF PROCEEDINGS OF THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF KING, DATED SEPTEMBER 7, 2016

[1725]IN THE SUPERIOR COURT OF
THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

No. 14-2-19684-9 SEA
COA No. 76463-2-I

STATE OF WASHINGTON,

Plaintiff,

vs.

LIVING ESSENTIALS, LLC,

Defendants.

VERBATIM REPORT OF PROCEEDINGS

Heard before:	The Honorable Beth Andrus
Date:	September 7th, 2016
Time:	1:30 p.m.

* * *

[1727]caffeine interacts with many other bioactive compounds in a way where it's the combination effects may be different from the individual parts.

Q. Thank you. To your knowledge, from your perspective, do the federal regulatory requirements require that an advertiser be able to explain the specific mechanisms of action of one of its products?

A. No, they don't. The focus is on the product performance and not on what specific aspect of the product it is that produces that performance.

Q. So just bring that example home. Must an advertiser be able to tease out, for example, if B vitamins are a contributing factor to energy in order to make a claim, "B vitamins for energy" on a product that provides energy?

A. If the product provides energy, I mean, that is the key. And that's the performance feature that is what consumers are interested in. Teasing out the role of the individual ingredients in producing that effect is not necessary, it has to have vitamin B. But other than that, I don't believe there is any requirement.

Q. So let's take just a hypothetical example here. If you have a product with a randomized clinical trial that concludes that the product provides energy and you have studies saying that ingredients in that product, [1728]say, B vitamins, contribute generally to energy, from a federal regulatory perspective, do you have a reasonable basis to say, for example, "B vitamins for energy"?

A. I think you do. The product delivers the core benefit. There is literature that indicates B vitamins contribute

to that and -- in part, because I think the standard is low for what you need to substantiate, the mechanism of action part of the claim. I think that's a reasonable basis for saying the B vitamins are for energy.

Q. Now, let's advance to the next slide. Did you also evaluate the claims in the -- to the extent implied, claims were made relating to, "Superior to coffee or to caffeine alone"?

A. I did.

Q. And what was your -- what's your opinion, from a federal regulatory perspective, as to whether the defendants had a reasonable basis to substantiate any such implied claims?

A. I thought claims that it was -- that 5-Hour ENERGY was superiority to caffeine alone were supported by competent, reliable scientific evidence.

Q. Okay. And you list, again, a number of studies. Let's just take each one. And you list Paulus. [1729]Explain to the Court how Paulus -- the Paulus study here informs your opinion.

A. The Paulus study is the most direct comparison because it is -- it is 5-Hour ENERGY versus, among other things, Starbucks Double Shot and versus caffeine alone. And what it shows is superiority for 5-Hour ENERGY in the parameters that Paulus measured. Also, I think significant is the Molnar study, which looked at endothelial function. It finds endothelial function effects from

5-Hour ENERGY that are not attributable to caffeine alone. Again, it has a direct caffeine comparison. I think the Kennedy report, again, is particularly important here because of the evidence that he cites that caffeine interacts with other bioactive compounds. It's clear from the literature about some of the other ingredients, that they are bioactive compounds. And in the presence of an interaction with caffeine that produces the superiority results, it is something that is superior to caffeine alone. I think the Wesnes study also supports that conclusion. Wesnes finds effects on aspects of cognitive function that Kennedy says are not usually attributable to caffeine. And if there is effects not attributable to caffeine that are established in the Wesnes study, I think that, too, is competent and [1730]reliable evidence, that's scientific evidence of superiority to caffeine alone.

Q. Thank you. Now, you make a reference to the -- and court has heard a lot about the NAD decision, 2007. How does that -- is that an element to this?

A. I don't think it is, by any means, definitive. The FTC would make its own evaluation of the evidence in figuring out whether it thought the claims were substantiated or not, were it to look at the same claims that the NAD did. But it is -- I think the NAD process is one that is well-respected, that numerous commissioners and high staff officials at the FTC over many, many years have said is a good and useful process. And any advertiser who had been through a NAD review of its claims, where the NAD said those claims were substantiated, would think reasonably that it had adequate substantiation for the claims that NAD had reviewed.

Q. Now, let's move to the next slide. Did you also evaluate, from a federal regulatory perspective, whether the defendants had a reasonable basis for any decaf-related advertising claims?

A. I did. I think they do have a reasonable basis for the decaf version of the product. I note, in looking at the evidence that the product is marketed, in the [1731] advertising that I saw, to people who are sensitive to caffeine, who are sort of self-identified as sensitive to caffeine, and there is some caffeine in it, albeit not very much. Second, I think the studies we have already talked about show that the non-caffeine ingredients contribute to the effects of 5-Hour ENERGY, and that that is, I mean, all of that evidence bears on the reasonable basis for claims for the decaffeinated version, because those other ingredients are contributing based on the other studies. I would point, in particular to -- I mean, for the claims for the increases in energy, alertness and focus, I would point to the Kennedy report, who reached that conclusion based on his review of the evidence and the nature of the interaction between even small amounts of caffeine and other bioactive substances. And I would also cite the Kurtz study, which looked at -- which looked at the decaffeinated version of 5-Hour ENERGY and found -- it found the blood pressure effects that were attributable to caffeine in the caffeine group, but it didn't find any difference in the level of energy between the caffeinated product and the decaffeinated product.

Q. Now, moving forward, the last category of claims, did you evaluate -- you can advance the slide -- the no

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APPENDIX H — EXCERPT OF TRANSCRIPT OF PROCEEDINGS OF THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF KING, DATED SEPTEMBER 6, 2016

[1575]IN THE SUPERIOR COURT OF
THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING
THE HONORABLE BETH ANDRUS, JUDGE

STATE OF WASHINGTON,

Plaintiff,

vs.

LIVING ESSENTIALS, LLC, A MICHIGAN LIMITED LIABILITY COMPANY, AND INNOVATION VENTURES, LLC., A MICHIGAN LIMITED LIABILITY COMPANY,

Defendants.

No. 14-2-19684-9 SEA
COA NO. 76463-2-I

REPORTER'S TRANSCRIPT
OF PROCEEDINGS HELD ON
September 6, 2016
AFTERNOON SESSION, 2:55 P.M.

* * *

[1602]Q. Let's go to the next slide.

Did you also evaluate whether defendants had, from an industrial standards point of view, from an industry standard perspective, whether defendants complied with industry standards in substantiating any implied claims that 5-hour ENERGY may be superior to caffeine or coffee?

A. Yes. After looking at the complaint, I also reread the literature reviews and expert opinions that NERAC played in Kennedy, all of which consistently showed that non-caffeine ingredients contributed to feelings of energy, alertness, and focus.

Q. Did you also evaluate -- I don't want to go through those reports again, I think we've been through them, but the clinical studies in connection with evaluating whether defendants met or exceeded the standard of care for substantiating advertising claims about superiority to coffee?

A. Yes. I note here that Blum and Medicus has published as Wesnes, and I note here in the Wesnes 2013 in the conclusions that Wesnes provides his expert opinion as the effects of caffeine are unlikely to account for these effects, as benefits are generally seen in 90 minutes following ingestion, and even in caffeine-deprived subjects.

And my sense is that if there is an implied claim of [1603]superiority, there is evidence for -- insofar that duration of effect is different, that the duration of effect

of 5-hour ENERGY is superior to the one-hour, two-hour effect that is commonly attributed to coffee consumption.

Q. Now, again, from an industry standards perspective, do you have an opinion as to whether defendants would act reasonably and within the industry standard of care in making implied claims about superiority to coffee based upon the literature reviews and clinical studies that you've reviewed?

A. Yes, they acted within the industry standard of care for these implied claims.

Q. Go to the next slide.

Did you also review the materials relating to any decaf claims, claims about the decaf product?

A. Yes, I did.

Q. And what did you review in connection with evaluating whether defendants met the industry standard of care to the extent they made any claims about the decaf product?

A. They have commissioned Glade to look at a whole host of claims in 2010, and he came up with confident and reliable scientific evidence for all of them.

Published findings demonstrated that the decaf ingredients were beneficial for focus, alertness, and [1604] energy metabolism.

Q. Now, can you take a look at Exhibit 2079, please.

Exhibit 2079, what is Exhibit 2079?

A. It's Glade 2010, as I've listed here on my slide.

Q. Okay. Did you review Exhibit 2079 in evaluating whether defendant met the industry standard of care with respect to any decaf claims that have been made?

A. Yes, I did.

Q. What was Dr. Glade asked to evaluate in the 2010 report?

A. He was asked to evaluate the scientific validity of several specific statements concerning the 5-hour ENERGY decaf dietary supplement product.

Q. And my review of the first three pages of Exhibit 2079, there's many advertising statements; is that fair?

A. Certainly more than 20.

Q. Did you note any that specifically related to decaf?

A. Yes. I noted, hours of energy, no crash later, Decaf 5-hour ENERGY can provide hours of alertness and focus without making you feel jittery, and the next claim, are you sensitive to caffeine but still need a little extra energy to get through your day, then try Decaf 5-hour ENERGY shots. It can provide alertness and focus you want, without the caffeine feeling you don't.

Q. In reviewing advertisements in this case, did you see any ads that actually say the things you just read from [1605]Exhibit 2010?

A. There's like a vitamin shot, and at the bottom of it it said bright, alert, I think, for the decaf product.

Q. Okay, and in your experience, do businesses and advertisers sometimes commission advertising clinics for evaluation and never use them?

A. Very often.

Q. Did you evaluate, in Exhibit 2079, Dr. Glade's conclusions with respect to claims about decaf, specifically?

A. I did look through the document, and I did look at those two particular claims, the last two ones.

Q. What were Dr. Glade's conclusions with respect to the advertising claims and evaluation you did in Exhibit 2079?

A. The two claims I'm referring to, alertness and focus, are described on pages 29, 30, and 31, and with respect to the claimed Decaf 5-hour ENERGY can provide hours of alertness and focus without making you feel jittery, he states, in sum, the quoted statement is well supported by competent and reliable and scientific evidence. The studies documenting the claimed effects are not controversial and are well designed, in accordance with generally accepted scientific principles and procedures.

Q. Now, was it -- in your opinion, was it reasonable within [1606]the industry standard of care to commission Dr. Glade to do a second literature review in connection with now decaf claims?

A. Yes, it was.

Q. In your opinion, would it be reasonable within the industry standard of care for the company to rely upon the Glade 2010 report in connection with advertising claims it might have made with respect to the decaf product?

A. Yes, it is reasonable.

Q. You, again, list the expert opinion of Dr. Kennedy as informing your view of defendants's standard of care conduct.

How did Dr. Kennedy's opinion inform your opinions here with respect to decaf claims?

A. I have it here for clarity. Again, with the value of an expert opinion who works in this field, looks at the cognitive effects -- the nutrient action on cognitive effects in humans, decaf ingredients can result in acute change to physiology, relevant to energy metabolism and brain function, especially in relation to cognitive function.

Q. Now, given the opinions expressed by Dr. Kennedy in this case, in your opinion would -- did the defendants act reasonably and within the industry standard of care in [1607]making claims about the decaf product with respect to energy, metabolism, or cognitive function?

A. Yes.

Q. Now let's flip to the next slide, please.

Did you also evaluate defendant claimed substantiation efforts in connection with the no crash claim?

A. Yes.

Q. And what did you review as part of the claimed substantiation work for that no crash advertising claim?

A. I reviewed the two literature reviews, NERAC and Glade, and who both found independently that there's no scientific literature attributing any crash to any of the ingredients in 5-hour ENERGY.

Q. Now, in reviewing the NERAC, did they have a section in the NERAC report about no crash later that addressed that claim?

A. Yes, they did.

Q. There's been some testimony -- do you recall a citation to Wikipedia?

A. Yes, I do.

Q. Did that cause you any pause or concern, from an industry standard of care point of view, as you evaluate the NERAC report as substantiation for the claim, no crash later?

Appendix H

A. It's not a problem for me. When I conduct my literature reviews, I'll often look at a Wikipedia cite as a first

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APPENDIX I — EXCERPT OF TRANSCRIPT OF PROCEEDINGS OF THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF KING, DATED SEPTEMBER 1, 2016

[1206]IN THE SUPERIOR COURT OF
THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

NO. 14-2-19684-9 SEA
COA NO. 76463-2-I

A.M. SESSION

STATE OF WASHINGTON,

Plaintiff,

vs.

LIVING ESSENTIALS, LLC, A MICHIGAN LIMITED LIABILITY COMPANY, AND INNOVATION VENTURES, LLC., A MICHIGAN LIMITED LIABILITY COMPANY,

Defendants.

THE HONORABLE BETH ANDRUS, JUDGE

REPORTER'S TRANSCRIPT OF
PROCEEDINGS HELD ON September 1, 2016

* * *

[1259]well-nourished individuals, just taken from the population.

In terms of Taurine, we know that it's bioactive, it has physiological energy consequences, so it's the endothelia function, and also has independent effects on cognitive function and mood. Tyrosine, we know that's bioactive. Again, we can sort of see physiological effects of taking it, and well-established cognitive and mood effects, both, at high doses with stress, but more recently at low doses, without stress. Again, that can be detected in the brain using EEG.

And then, finally, choline, again, we know that it's bioactive, we know that -- we can sort of see that it can have cognitive function and mood effects, and, as I said, physiological effects, for instance, the eye construction and what have you, and it can be detected -- this activity can be detected in the brain. So we can see that it's having a direct effect on brain function, using EEG to make electrical activity.

My conclusion would be that all of these ingredients can have an independent effect on the relevance of promises.

MR. MULLIN: Your Honor, we're going to go tie all of this back to the Medicus study, just to give everybody an idea where we're headed on this.

[1260]So let's move to -- let's talk very briefly about – I guess we'll start with that question.

Do the vitamins and amino acids in 5-hour ENERGY have any impact on the effects of the caffeine content with regards to increase in energy, alertness, mood, and/or focus? What is your opinion on that.

A. My opinion is that I think they inevitably will have an impact on the effects of caffeine in the product.

Q. Can you explain, what does that mean, before we go into the detail? I mean, what's -- what do you think is going on with the caffeine and these bioactive ingredients?

A. Well, I think -- I reviewed -- this is the question I also reviewed, and I looked for evidence of studies that had been conducted in such a way that you could really disentangle the effect of caffeine when it was administered with other potentially bioactive components, and what I found is that where it's looked at, if you administer other bioactive compounds with caffeine you, more often than not, will see some kind of interactive effect. It might be an additive effect, it can be a synergistic effect, but the effects of the combination is different from caffeine by itself.

Q. And were you aware of an allegation from the first amended complaint asserted by the State with respect to this issue?

[1261]A. Yes. This was a key, many times repeated, sort of scientific statements in the complaint, and as stated above, any of the claimed effectiveness of original or extra strength 5-hour is solely related to the concentrated caffeine in defendant's products.

Q. Do you have an opinion as to whether or not that statement is accurate?

A. Well, I know that statement is not based on any scientific evidence, and the evidence that I have reviewed, which I'll present to you, would suggest that that is inaccurate.

Q. Why don't we go ahead and look at your evidence with respect to that.

A. Okay. So what I actually did was -- obviously there are certain types of nutrients, so amino acids and vitamins in the product, and there's a certain amount of research that's looked at bioactive, that are not found in 5-hour ENERGY, but I think it's interesting to very briefly go through those, because it shows that where you have other bioactive compounds alongside caffeine, they modulate the effects of caffeine, or vice versa.

Caffeine is not some kind of -- it's been portrayed sort of by Dr. McLellan as the only thing that has any kind of psychoactive effects, and that is patently not the case. Other things have psychological effect.

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[1270]separate experiment, I have to say, so in this one we looked at placebo, caffeine, L-Theonine, by itself, and L-Theonine and caffeine, these two combined, and what we found is that L-Theonine attenuated the effects of caffeine. So we saw effects with the combination, which wasn't present for either of the individual components.

Plus there was a greater effect to caffeine on several cognitive tasks directly relevant, including word recognition tasks, which is a measure of episodic memory.

Q. Is there -- we'll do one more of the nine ingredients to make the point.

What's L, or --

A. Do you want to do that, or do you want to go to the next --

Q. Let's skip L --

A. Okay.

Q. Why don't we go to this study.

A. What's interesting is what happened to this study, it was just looking at energy metabolism, again, using indirect calorimetry, a technique that we used in our study, and the interesting thing is that when -- it's Red Bull in this case, but it's sugar free Red Bull versus the caffeine in sugar free Red Bull.

So in this case the -- so the green line is the sugar free Red Bull, the pink line, I think, is the caffeine. [1271]And what's interesting is the two different statistical analyses here, and what you actually see is this is all of the data from the first 50 minutes sort of averaged in one analysis.

What you see is there's no difference between the Red Bull, which is the green, and the purple, which is

the caffeine, on overall energy expenditure, but there is a significant interaction between the two, in terms of carbohydrate oxidation.

So Red Bull is having a different effect on carbohydrate oxidation. There's no carbohydrate in this product, it's sugar free, than caffeine, the same amount of caffeine by itself, and similarly for -- this is fat oxidation, similarly, there's an interaction, as well.

So the effects of Red Bull minus any carbohydrates, so just Red Bull versus the caffeine in Red Bull, there's a synergistic or interactive effect, whereby they have a different effect on a key physiological measure.

Q. All right. Now, so -- I don't know if, Your Honor, you require a summary of all this. Why don't we quickly summarize the caffeine interactions, and then it will be 10:30, Your Honor; is that okay?

THE COURT: Yes.

A. Okay. So my review suggests -- and it's an area I've been interested in for some years, I've written a review [1272]previously on this, showing -- talking about interactions between caffeine and the other chemicals that you get in caffeine synthesizing plants, but I find there's a consistent pattern whereby you consistently see that caffeine interacts with other bioactive compounds when they're co-consumed, so that you could only -- you can only come to the conclusion that the resultant -- the effects of the resultant combination cannot be attributed to caffeine alone.

And just summarizing what I just did on that, these are compounds not found in 5-hour ENERGY, and what you see with all of these, so with tea, coffee, guarana, and glucose, is clear effects of the combination that differ from the effects of just the caffeine, or they differ between each other because they have different bioactive similar effects, and also compounds classes found in 5-hour ENERGY, all of them differ, so the combinations always differ to the effects of caffeine by themselves.

So it's a very -- you know, across the literature, across all sorts of different nutrients, different classes of nutrients, including the type of compounds found in 5-hour ENERGY, caffeine always, when it's measured, has a different effect to the full product with other bioactive ingredients in it.

Q. It's the combination that makes it so great?

[1273]A. Yes.

MR. MULLIN: Okay. Your Honor, we can continue with the summary, or do you want to take a break?

THE COURT: Let's take our recess. We'll take a 15-minute break.

(Recess)

MR. MULLIN: Thank you, your Honor.

BY MR. MULLIN:

Q. Let's goal to the next slide, and just summarize what the scientific evidence shows with respect to each of these ingredients in 5-hour ENERGY.

A. I think that the key thing, that all of them are bioactive. That's from the previous. And my sort of review of the entire literature, looking at caffeinated products and the studies which have parceled out the effects of caffeine, shows that clearly there are interactions, when you compare with bioactive performance.

Q.So the answer's no?

THE COURT: I do not need it to be repeated. Thank you.

THE WITNESS: Okay.

BY MR. MULLIN:

Q. So let's go on and return to the results of the Wesnes study, comparative caffeine, and this was a slide we saw

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[1283]questions, move to the decaf product.

THE COURT: No, but let me catch up with my notes, would you mind? That was just 2137 we just looked at, right?

MR. MULLIN: It was, yes, Your Honor.

THE COURT: Buckenmeyer was 1398?

MR. MULLIN: Correct, Your Honor.

THE COURT: Got that one. All right. I'm good. Thank you.

MR. MULLIN: Thank you, your Honor.

BY MR. MULLIN:

Q. Let's talk briefly about the decaf product.

Did you look into the question of whether or not the vitamins and amino acids in the decaf product could have impact on feelings of energy, alertness, mood and/or focus?

A. Yes. I think at the start of today I went through the various -- the evidence with regard to the various different vitamins and amino acids, which are the same ones that are contained in the product, and I think those individual vitamins and amino acids could well have effects on increasing energy, alertness, mood and/or focus.

Q. What about -- do you recall the Nagrecha study?

A. Yes, sir.

[1284]Q. Is that relevant to an assessment of the efficacy of the decaf product?

A. It is, inasmuch as the effective dose of choline had 20 milligrams of caffeine in it. So normally -- well, a

decaffeinated product usually has somewhere between five and, typically, nine milligrams of caffeine. A psychoactive dose used in studies would usually be from 75 milligrams sort of upwards, and the fact that there was an interaction between caffeine and choline in a low dose may well be relevant. It may well show that a low dose of caffeine in the decaffeinated product, might also interact with the other components.

Q. Are there any studies that purport to show the cognitive impact of the decaf product?

A. No.

Q. What about Kurtz and Shock (phonetic)?

A. The last slide. Well, cognitive, it's actually a mood effect, so no cognitive effects. But there was a study -- I'll find it if you like. This is just looking at very low doses of caffeine.

Q. Why don't we go back and talk about that for a second.

Are there studies that demonstrate low doses of caffeine can have an impact on mood?

A. Yes. Certainly there's evidence that decaffeinated coffee has its own effects, its own independent effects, [1285]independent of well -- it might have to do with the low doses of caffeine in it, obviously, and decaffeinated coffee has certainly been shown to improve cognitive function and alertness. It might be to do with a small dose of caffeine.

In our own dose, looking at guarana, which we skipped past before, this was a dose ranging study, so we're trying to find what is the effective dose of guarana. In terms of memory performance, what we actually looked at the lower doses administered, we administered four doses, were the most effective, and they actually contain 4.5 and 9 milligrams of caffeine.

So the memory effect you're seeing with very low doses of caffeine, rather than high doses of caffeine.

Q. Do you recall how many milligrams of caffeine there is in a decaf product?

A. Five milligrams of caffeine.

Q. Six milligrams?

A. Six milligrams.

THE COURT: Do we have this -- the guarana, do you have a date on that? I can't read the small print on the slide. 2007, maybe?

THE WITNESS: It's certainly around about then.

THE COURT: Thank you.

MR. MULLIN: We may have marked it as an exhibit, Your [1286]Honor. Your Honor, I don't know that we can find the exhibit, but we've expanded it. It looks like it's 2007.

THE COURT: All right. Thank you.

MR. MULLIN: Yes. There we have it. We actually have it up there.

BY MR. MULLIN:

Q. Now let's talk about Shah, unless you want to talk about something else with respect to this?

A. No. I think I was just going to really make the point, going back to this. I looked at -- what we're lacking, in terms of the 5-hour ENERGY product, is a direct measure, a direct control trial, which looks at the effects of the combined sort of ingredients. But I think there is plenty of evidence, looking at B vitamins, Taurine, Tyrosine, and choline, which suggests, yes, that they have relevance, absolute effects to this.

Q. And now can we look at the -- why don't you go ahead and do what you want.

A. So, and, obviously, having just gone to great pains to sort of point out that I think that this pattern of results is not due just to caffeine, it means that something in here is also having bioactive effects, which could well be relevant to the questions sort of at issue.

Q. Now, is there reported studies that purport to show an impact of 5-hour ENERGY, decaf, on mood?

[1287]A. There is, for mood. So this is a study by Shah, there's actually two studies, where they used a measure

of energy level, so subjective measure of energy level, in both of the studies, which were blood pressure studies, and what they found across the two, so when they combined the data from the two, was that, both, the caffeinated and decaffeinated five-hour product both led to a significant increase in energy, subjective energy, at one hour and three hours, and I believe these were not significantly different than the combined -- I would need to check on that, actually. They both led to the same pattern of increased subjective energy.

Q. Now, one -- and I don't know that we need to spend a great deal of time on this, but Dr. Blonz relied on a study prepared for the Oregon Department of Justice, that's sometimes referred to as the Cheskin report, and we'll need to mark this as the next exhibit.

THE CLERK: Defendant's Exhibit 2255 is marked for identification.

BY MR. MULLIN:

Q.So, Dr. Kennedy -- and I don't want to spend a great deal of time on the Oregon Department of Justice study, but could you tell the court why it is you do not believe it is a valid measure of the impact of or the efficacy of the decaf, 5-hour product?

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APPENDIX J — EXCERPT OF TRANSCRIPT OF PROCEEDINGS OF THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF KING, DATED AUGUST 31, 2016, MORNING SESSION, 9:00 A.M.

[993]IN THE SUPERIOR COURT OF
THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

No. 14-2-19684-9 SEA
COA No. 76463-2

STATE OF WASHINGTON,

Plaintiff,

vs.

LIVING ESSENTIALS, LLC,

Defendants.

VERBATIM REPORT OF PROCEEDINGS

Heard before:	The Honorable Beth Andrus
Date:	August 31st, 2016
Time:	9:00 a.m.

* * *

[1018]motion.

THE COURT: Thank you very much. Mr. Mullin?

MR. MULLIN: Yes, your Honor, briefly. You know, I think the starting point for a response is the actual claims that are alleged in the complaint. And each of those claims allege both falsity and deception and capacity to deceive. They didn't break them out. And so the first question is, with respect to the falsity claims, what is -- and Counsel did not address that issue. What is the State's burden with respect to the falsity claims, with respect to the falsity claims, which is encompassed in each of the --

THE COURT: Let me stop you there.

MR. MULLIN: Okay.

THE COURT: So Ms. Gunning, are you claiming, in claims 1 through 5, a separate cause of action based on falsity, or are you just proceeding on the lack of substantiation as a separate legal theory?

MS. GUNNING: Yes, it is a separate -- it is a separate legal theory.

THE COURT: I understand that. My question is, are you pursuing claims 1 through 5 on both theories, or just on lack of substantiation at the time the statements were made?

[1019]MS. GUNNING: On lack of substantiation, both, as it is broken out in the complaint, because it is unfair and then deceptive, which is a --

THE COURT: So falsity, if you did plead falsity, you are not pursuing falsity at trial? I mean, you may prove, as a matter of fact, that something is false to prove your substantiation claim, but as a legal proposition, are you abandoning any claim that these were false advertisements?

MS. GUNNING: We think the evidence of Dr. Blonz will show that the ads are, indeed, false, but we don't need that to get to a judgment.

THE COURT: Okay. I understand that. What I'm hearing you say, just so we are clear, because this is important, --

MS. GUNNING: Yes.

THE COURT: -- is you are not pursuing, as a separate legal theory, that the ads are false, and therefore the -- you're saying the Lanham doesn't apply, or I don't need to look to Lanham, but you are contending the ads are deceptive or unfair. And to the extent you prove that there are false statements made, that would just be evidence to prove the substantiation claim?

MS. GUNNING: If I have this right, because now [1020]I'm getting confused, not because of anything your Honor has said. Yes, the State's claim is based on the

section 5, FTC standard, where we are proceeding on the argument that the ads aren't substantiated by competent, reliable evidence at the time that they were made.

THE COURT: So again, to the extent the legal theory is falsity, you are not pursuing that at trial?

MS. GUNNING: No.

MR. MULLIN: Okay. That takes care of most of what I was going to talk about, your Honor, because I think that that -- they did plead it, and I think that knocks out most of the claims. So the issue, then, is with respect to substantiation, whether there is a capacity to deceive. And how is the Court going to make that determination? I think that's really the rub here. And what does the law require and what happens if they present on this capacity to deceive issue? And what we have got on capacity to deceive is Dr. Pratkanis, in the first instance. And Dr. Pratkanis's testimony was that there was a unique selling proposition that somehow permeated all of the claims. But what he did not present was any evidence that consumers proceeded in that same way. And so

* * *

[1056]an advertiser, upon reading this?

A. That 5-Hour ENERGY helped you feel alert and energized longer than coffee.

Q. Did you have any reason to believe that these statements in the Appetite article were unfounded?

A. No.

Q. Or were not true?

A. It is a peer-reviewed published article to me, seemed pretty factual.

Q. Okay. Now, you can take that down. Now, you understand that we are here in this court today because the State of Washington contends that certain advertisements that you wrote or produced are unfair or deceptive? You understand that?

A. Yes.

Q. I want to go through some of those advertisements in a moment, but first, sitting here today, do you personally believe the statements and advertising claims that you have written in 5-Hour ENERGY advertisements from its inception?

A. Yes.

Q. Do you believe those statements to be true?

A. Yes.

Q. Do you believe those statements to be scientifically supported to the extent they are required to have [1057] scientific support?

A. I do.

Q. Now, the State, in its trial brief and in some of the evidence before you came in to this courtroom, referred to something called the Mentel reports. Are you familiar with the Mentel reports?

A. Yes.

Q. An the State has contended that you wrote advertisements based on ideas or concepts in the Mentel reports; is that true?

A. One time.

Q. One time?

A. One time I did.

Q. Tell the Court, tell us about the one time you wrote an ad based upon information in a Mentel report, please.

A. It was this year's report, which was dated, I gathered, from last year. And in it, they always make suggestions on what marketers should do in the industry. And one of them, I thought they had a good idea for once, was that millennials, older millennials who are entering career and child-bearing years, who are now experiencing a level of exhaustion they never realized before, would be a good target audience for a product like ours.

* * * *

APPENDIX K — EXCERPT OF TRANSCRIPT OF PROCEEDINGS OF THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF KING, DATED AUGUST 30, 2016

[801]IN THE SUPERIOR COURT OF
THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

No. 14-2-19684-9 SEA
COA No. 76463-2

STATE OF WASHINGTON,

Plaintiff,

vs.

LIVING ESSENTIALS, LLC,

Defendants.

VERBATIM REPORT OF PROCEEDINGS

Heard before:	The Honorable Beth Andrus
Date:	August 30th, 2016
Time:	9:00 a.m.

* * *

[978]seat.

MR. SNIDER: Afternoon, your Honor, I'm back. And I will wait a moment for Ms. Erwin.

Appendix K

Whereupon,

CARL SPERBER,

Having been first duly sworn, was called as a witness herein, and was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SNIDER:

Q. Mr. Sperber, could you please spell your name for the record?

A. Carl, C A R L; Sperber, S P E R B E R.

Q. And maybe for the relief of everyone in the courtroom, are you a scientist?

A. No.

Q. Excellent. Where are you employed?

A. At Agency 5 Media.

Q. What is Agency 5?

A. It is a whole subsidiary of Innovation Ventures.

Q. Innovation Ventures is one of the defendants, in case you didn't understand that.

A. Yes.

Q. Now, prior to being employed by Agency 5, were you employed by Innovation Ventures?

A. Yes.

[979]Q. How long have you been employed by either Agency 5 or Innovation Ventures?

A. Since March of 2001, so 15 years.

Q. What's your job with the companies?

A. Vice -- currently, vice-president of creative.

Q. How long have you held this creative position with the companies?

A. Since the beginning.

Q. So 2001?

A. Yes.

Q. Now, can you describe for the Court, what does it mean to be the director of creative? What are your job responsibilities?

A. Well, anything involving outward facing advertising, really. So I write copy for ads and, you know, whether they are print, or radio, or television. I have formally did a lot

-- all of the graphic design in the company for packaging and, you know, print ads, things like that. I have two designers that work for me, so I don't know do too much of that work anymore. So then, anything like that, anything that gets printed or shown, I'm in charge of.

Q. Okay. Since you have been with the company since 2001, have you either written the copy or produced every advertisement for the 5-Hour ENERGY product?

[980]A. Yes.

Q. And that includes both print advertising and television?

A. Yes, and radio.

Q. All right. Now, when did Living Essentials develop the 5-Hour ENERGY product?

A. In 2004.

Q. And so in 2004, you were employed with the company at that time?

A. Yes.

Q. How many employees worked at -- worked with the company back in 2004 when this product was developed?

A. Not very many. It was, I would say, between five and eight.

Appendix K

Q. And have you heard of the phrase, a start-up company?

A. Yes.

Q. Would you describe the company at this time as a start-up company environment?

A. Very much so.

Q. And what did that mean in terms of your job responsibilities as one of a few employees in a start-up company?

A. Well, it usually means that everybody wears a lot of hats. So my job description was not limited to developing advertising materials, or sales materials,

* * * *

APPENDIX L — EXCERPT OF COMPLAINT FOR INJUNCTIVE AND OTHER RELIEF OF THE KING COUNTY SUPERIOR COURT OF THE STATE OF WASHINGTON, FILED JULY 14, 2017

KING COUNTY SUPERIOR COURT
STATE OF WASHINGTON

NO.

STATE OF WASHINGTON,

Plaintiff,

v.

LIVING ESSENTIALS, LLC, A MICHIGAN LIMITED LIABILITY COMPANY, AND INNOVATION VENTURES, LLC, A MICHIGAN LIMITED LIABILITY COMPANY,

Defendants.

COMPLAINT FOR INJUNCTIVE AND OTHER RELIEF

I. INTRODUCTION

1.1 Plaintiff the State of Washington ("the State"), by and through its attorneys Robert W. Ferguson, Attorney General, and Elizabeth J. Erwin and Kimberlee Gunning, Assistant Attorneys General, brings this action against Defendants Living Essentials, LLC and Innovation Ventures, LLC for violations of the Consumer Protection Act, RCW 19.86 ("CPA"), which the Attorney General is

authorized to enforce. The CPA declares unlawful and prohibits unfair or deceptive acts or practices in the conduct of any trade or commerce. RCW 19.86.020.

***

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

4.53 By stating that 5-hour ENERGY® is inappropriate for children under 12, Defendants are implying that the product is appropriate for adolescents age 12 and older.

4.54 In July, 2013, The American Academy of Pediatrics ("AAP") has stated that "the claimed association of energy drinks and ergogenic and performance enhancing effects of the stimulants in energy drinks has not been adequately studied in adolescents, who are more susceptible to the negative health effects and who do not need stimulants to support physical activity." (Emphasis added).[5]

4.55 According to the Yale Rudd Center for Food Policy & Obesity, of the top 28 beverages ranked by teen (defined as ages 12-17) TV advertisement exposure in 2010, 5-hour ENERGY® ranked number one, outranking drinks like Kool-Aid, Capri Sun, Pepsi or Coke. Teens

5. Senate Testimony of the American Academy of Pediatrics, July 31, 2013 (available at http://www.aap.org/en-us/advocacy-and-policy/federaladvocacy/Documents/SchneiderSenateCommerceCommitteeEnergyDrinksTestimony7_31_13.pdf (last visited July 11, 2014).

saw three times as many TV ads for 5-hour ENERGY® in 2010 than for any other beverage analyzed.[6]

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

V. FIRST CLAIM FOR RELIEF

(Violations of RCW 19.86.020 – Deceptive and/or Unfair Representations Regarding the Effects of Non-Caffeine Ingredients)

5.1 Plaintiff realleges and incorporates by reference the allegations set forth in each of the preceding paragraphs of this Complaint.

5.2 Defendants are "persons" within the meaning of the Consumer Protection Act, RCW 19.86.010(1).

5.3 Defendants conduct "trade" or "commerce" within the meaning of the Consumer Protection Act, RCW 19.86.010(2).

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6. See Yale Rudd Center for Food Policy & Obesity, October 2011, "Sugary Drink Facts: Evaluating Sugary Drink Nutrition and Marketing to Youth" http://www.sugarydrinkfacts.org/resources/SugaryDrinkFACTS_Report.pdf (last visited July 11, 2014).

5.4 Defendants engaged in unfair and/or deceptive acts or practices within the meaning of RCW 19.86.020 by representing that the non-caffeine ingredients in the Original and Extra Strength 5-hour ENERGY® formulations – "vitamins, enzymes, amino acids" and other ingredients – work to provide users with benefits like energy, alertness and/or focus.

5.5 As alleged herein, these representations are false and/or misleading because the non-caffeine ingredients in the Original and Extra Strength 5-hour ENERGY® formulations in fact do not provide any of the claimed benefits and because Defendants lacked competent and reliable scientific evidence to substantiate these claims.

5.6 Defendants' representations are deceptive because they had the capacity to mislead a substantial number of consumers.

5.7 Defendants' representations are unfair because they are unethical, oppressive or unscrupulous.

5.8 Defendants' conduct affected the public interest and therefore constitutes unfair or deceptive acts or practices in trade or commerce in violation of RCW 19.86.020.

Appendix L

VI. SECOND CLAIM FOR RELIEF

(Violations of RCW 19.86.020. – Deceptive and/or Unfair Representations Regarding Superiority to Coffee or Other Sources of Caffeine)

6.1 Plaintiff realleges and incorporates by reference the allegations set forth in each of the preceding paragraphs of this Complaint.

6.2 Defendants are "persons" within the meaning of the Consumer Protection Act, RCW 19.86.010(1).

6.3 Defendants conduct "trade" or "commerce" within the meaning of the Consumer Protection Act, RCW 19.86.010(2).

6.4 Defendants engaged in unfair and/or deceptive acts or practices within the meaning of RCW 19.86.020 by representing that the Original and Extra Strength 5-hour ENERGY® formulations are superior to consuming an equivalent amount of caffeine from coffee or another source.

6.5 As alleged herein, these representations are false and/or misleading because the Original and Extra Strength 5-hour ENERGY® formulations in fact are not superior to consuming an equivalent amount of caffeine from coffee or another source and because Defendants lacked competent and reliable scientific evidence to substantiate these claims.

6.6 Defendants' representations are deceptive because they had the capacity to mislead a substantial number of consumers.

6.7 Defendants' representations are unfair because they are unethical, oppressive or unscrupulous.

6.8 Defendants' conduct affected the public interest and therefore constitutes unfair or deceptive acts or practices in trade or commerce in violation of RCW 19.86.020.

VII. THIRD CLAIM FOR RELIEF

(Violations of RCW 19.86.020 – Deceptive and/or Unfair Representations Regarding Benefits of Decaf 5-hour ENERGY®)

7.1 Plaintiff realleges and incorporates by reference the allegations set forth in each of the preceding paragraphs of this Complaint.

7.2 Defendants are "persons" within the meaning of the Consumer Protection Act, RCW 19.86.010(1).

7 .3 Defendants conduct "trade" or "commerce" within the meaning of the Consumer Protection Act, RCW 19.86.010(2).

7.4 Defendants engaged in unfair and/or deceptive acts or practices within the meaning of RCW 19.86.020 by representing that the Decaf formulation of 5-hour

ENERGY® provides any of the promoted benefits of energy, alertness or focus.

7.5 As alleged herein, these representations are false and/or misleading because the Decaf formulation of 5-hour ENERGY® does not in fact provide the claimed benefits, as the only ingredient in the 5-hour ENERGY® products that provides any meaningful effect when taken as directed is caffeine and the amount of caffeine in Decaf 5-hour ENERGY® is insufficient to have a physiological effect in most users. These representations are also false and/or misleading because Defendants lacked competent and reliable scientific evidence to substantiate these claims.

7.6 Defendants' representations are deceptive because they had the capacity to mislead a substantial number of consumers.

7.7 Defendants' representations are unfair because they are unethical, oppressive or unscrupulous.

7.8 Defendants' conduct affected the public interest and therefore constitutes unfair or deceptive acts or practices in trade or commerce in violation of RCW 19.86.020.

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VIII. FOURTH CLAIM FOR RELIEF

(Violations of RCW 19.86.020 – Deceptive and/or Unfair Representations Regarding a "Crash")

8.1 Plaintiff realleges and incorporates by reference the allegations set forth in each of the preceding paragraphs of this Complaint.

8.2 Defendants are "persons" within the meaning of the Consumer Protection Act, RCW 19.86.010(1).

8.3 Defendants conduct "trade" or "commerce" within the meaning of the Consumer Protection Act, RCW 19.86.010(2).

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