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The Honorable Beth M. Andrus

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

STATE OF WASHINGTON,

Plaintiff,

v.

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

Defendants.

No. 14-2-19684-9 SEA

FINAL JUDGMENT

Clerk's Action Required

I. JUDGMENT SUMMARY

- 1.1 Judgment Creditor: State of Washington
- 1.2 Attorneys for Judgment Creditor: Elizabeth J. Erwin
Trisha L. McArdle
Senior Counsels
Daniel T. Davies
Assistant Attorney General
- 1.3 Judgment Debtors: LIVING ESSENTIALS, LLC, a
Michigan limited liability company,
and INNOVATION VENTURES,
LLC, a Michigan limited Liability
company.
- 1.4 Attorneys for Judgment Debtors: Joel A. Mullin
Timothy W. Snider
Reilley D. Keating
Samantha K. Sondag

Jill D. Bowman
Taryn K. Williams

1.5	Principal Judgment Amount	\$2,183,747
1.6	Attorney's fees and costs	\$2,095,992.63
1.7	Post Judgment Interest Rate	12 percent per annum.

II. JUDGMENT

Based on the Court's Memorandum Decision dated October 7, 2016, the Court's Findings of Fact and Conclusions of Law dated December 2, 2016, and the Court's Order on Motion for Civil Penalties, Restitution, Injunctive Relief, and Attorney Fees and Costs dated February 7, 2017, the Court hereby enters judgment in favor of Plaintiff State of Washington and against Defendants Living Essentials LLC and Innovative Ventures LLC as follows:

A. CIVIL PENALTIES

Pursuant to RCW 19.86.140, Defendants are jointly and severally liable for, and are hereby ordered to pay, civil penalties to the Plaintiff State of Washington in the amount of \$2,183,747.

B. INJUNCTION

Pursuant to RCW 19.86.080(1), Defendants, as well as their officers, agents, servants, employees, representatives, and all other persons in active concert or participation with them, are **PERMANENTLY ENJOINED** as follows:

- a. In connection with the advertising, promotion, offering for sale, sale, or distribution of 5-Hour ENERGY®, Defendants shall not make any express or implied claim, statement, or representation about the biochemical or physiological effect of the products on consumers unless Defendants possess and rely upon competent and reliable scientific evidence at the time the claims, statements' or representations are made, and
- b. Defendants will not represent 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 such claims are supported by competent and reliable

1 scientific evidence; and

- 2 c. Defendants will not use or disseminate any advertising or marketing materials for their
3 products that rely upon the use of survey data, unless the survey upon which
4 Defendants rely was created, conducted, and evaluated in an objective manner by
5 persons qualified to do so, using procedures and methods generally accepted in the
6 profession to yield accurate and reliable results, and Defendants will not expressly or
7 impliedly represent the survey data results in such a manner that the net impression is
8 deceptive.

9 **C. COSTS AND ATTORNEYS' FEES**

10 Pursuant to RCW 19.86.080, Defendants are jointly and severally liable for and are
11 hereby ordered to pay Plaintiff State of Washington attorney fees in the amount of
12 \$1,886,866.71, and costs in the amount of \$209,125.92.

13 **D. POST JUDGMENT INTEREST**

14 Defendants shall be jointly and severally liable for post-judgment interest in the amount
15 of 12 percent per annum.

16 **III. ENFORCEMENT**

17 Payment under this provision shall be paid in full immediately in the form of a valid
18 check paid to the order of the "Attorney General—State of Washington." Payment shall be sent
19 to the Office of the Attorney General, Attention: Cynthia Lockridge, Administrative Office
20 Manager, 800 Fifth Avenue, Suite 2000, Seattle, Washington, 98104-3188.

21 Nothing in this Judgment shall be construed as to limit or bar any other governmental
22 entity or any consumer in the pursuit of other remedies against Defendants. Representatives of
23 the Office of the Attorney General shall be permitted, upon reasonable notice to Defendants, to
24 access and inspect all business records or documents under the control of the Defendants to
25 monitor compliance with the terms of this Judgment. Pursuant to RCW 19.86.140 any violation
26 of the terms of this Judgment shall form the basis for further enforcement proceedings,
including, but not limited to contempt of Court proceedings and forfeiture of the civil penalty of
up to twenty-five thousand dollars (\$25,000.00) for violations committed after the date of this

1 Judgment. The violation of any of the injunctive terms of this Judgment shall constitute a
2 violation of RCW 19.86.020.

3 Dated the 7th day of February, 2017.

Electronic signature attached

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JUDGE BETH ANDRUS
King County Superior Court Judge

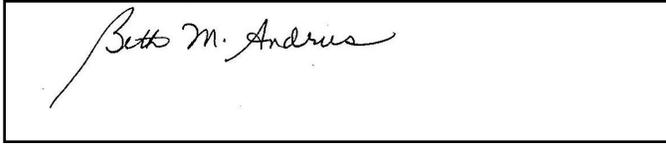
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King County Superior Court
Judicial Electronic Signature Page

Case Number: 14-2-19684-9
Case Title: WASHINGTON STATE OF VS LIVING ESSENTIALS ET ANO

Document Title: ORDER FINAL JUDGMENT

Signed by: Beth Andrus
Date: 2/7/2017 2:44:54 PM



Judge/Commissioner: Beth Andrus

This document is signed in accordance with the provisions in GR 30.

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**STATE OF WASHINGTON
KING COUNTY SUPERIOR COURT**

STATE OF WASHINGTON,

Plaintiff,

v.

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

Defendants.

NO. 14-2-19684-9 SEA

**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:

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

1 from unfair and deceptive conduct. *See State v. Ralph Williams N.W. Chrysler Plymouth, Inc.*,
2 82 Wn. 2d 265, 510 P. 2d 233 (1973) (*Ralph Williams I*). Second, fair dealing must be
3 encouraged at all stages of commerce. An award of civil penalties, injunctive relief, and
4 attorneys' fees and costs is authorized by the Consumer Protection Act to effectuate its purpose.

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

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

14 This Court concludes that the most appropriate method of determining the total number
15 of violations for the deceptive advertisements is to determine the number of times the deceptive
16 advertisements were aired in Washington. *See Ralph Williams II*, 87 Wn.2d at 317 (rejecting
17 argument that penalties should be limited to one violation per consumer, and instead multiplying
18 causes of action by the number of consumers affected by each); *U.S. v. J.B. Williams*, 354 F.
19 Supp. 521, 547-48 (S.D.N.Y. 1973) (holding that each airing of television advertisement was
20 held to be a separate violation), *aff'd in part rev'd in part on other grounds*, *U.S. v. J.B. Williams*,
21 498 F.2d 414 (2d Cir. 1974).

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

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

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

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

11 This Court previously found that Defendants’ claim that Decaf 5-Hour ENERGY® will
12 generate energy and alertness that “lasts for hours” was deceptive. The State’s CPA claim was
13 based on the following exhibits: a press release at product launch (Ex. 722), a press kit developed
14 by an ad agency (Ex. 105), Defendants’ web site (Exs. 661, 1283, and 2118), and the packaging
15 on the decaf product bottle (Ex. 101). The press release, dated 2008, falls outside the limitations
16 period and the Court finds that no civil penalty is appropriate for any dissemination of the press
17 release that may have occurred in Washington. Ex. 105, the press kit, does contain a statement
18 that Decaf 5-Hour ENERGY® “provides a sustained energy boost” that falls within the Court’s
19 finding of deceptive statements but the Court finds no evidence that this material was ever
20 distributed in Washington. It thus declines to impose civil penalties for Ex. 105. None of the
21 web site screen shots contain the statement the Court found deceptive. The only advertising the
22 Court finds to have been deceptive in the limitations period is the statement on the Decaf
23 packaging, Ex. 101, that the energy derived from consuming Decaf 5-Hour ENERGY® “lasts
24 for hours.” This phrase appeared on every bottle of decaf product Defendants sold in
25 Washington.
26

1 Between August 2012 and July 2014, Defendants sold \$20,159,987 of 5-Hour
2 ENERGY® products in Washington. Ex. 259. Of these sales, \$10,648 related to sales of the
3 decaf version of the product. The Court finds that a reasonable estimated purchase price for each
4 bottle of 5-hour ENERGY® Decaf was \$4.29. Using this calculation (\$10,648 divided by \$4.29
5 = 2,482), Defendants sold approximately 2,482 bottles of Decaf 5HE in Washington after July
6 16, 2012 and July 14, 2014. These sales represent 2,482 violations of the CPA.

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

11 The Court finds the following factors significant: first, Defendants generated a
12 substantial amount of sales revenue in Washington in a very short period of time (over \$20
13 million in sales in just under a two-year period). Second, the product itself is one people
14 *consume*, as opposed to a wearable consumer product, like a bracelet, that one can take off if
15 deemed by the purchaser to be ineffective. Once a consumer drinks 5-Hour ENERGY®, there
16 is no way to reverse the impact such a product may have on the consumer's body (except by
17 letting the body digest it). This Court finds that deceptive ads on consumable products present
18 more of a risk to the public than deceptive ads for non-consumable products. This factor weighs
19 in favor of a higher, rather than lower, CPA civil penalty.

20 Finally, the Court finds that Defendants spent more time trying to justify the science
21 behind their ads after-the-fact than they did *before* marketing the products in Washington. The
22 Court was struck by the fact that Defendants presented no testimony from a single scientist
23 actually involved in developing the contents of this product. There was no evidence as to how
24 the products' formulas came about or why the manufacturer chose these particular combinations
25 of vitamins, nutrients, and caffeine. There was scant evidence as to what science anyone at
26

1 Living Essentials had ever seen or relied on before it began to sell this product. Marketers and
2 lawyers seemed to be driving the Defendants' advertising decisions, and most of the science
3 presented at trial was compiled by experts retained for this litigation, rather than information
4 gathered by the Defendants while investigating the effectiveness of their own products.

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

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

12 Civil penalties will be assessed as follows:

13 Advertisement	Post-July 16, 2012	Per Violation Amount	Total
14 Ask Your Doctor (Exs. 649, 15 650)	19,716 airings	\$100	\$1,971,600
16 Construction Site Cowboy (Ex. 383)	975 airings	\$100	\$ 97,500
17 Choose Wisely (Ex. 384)	1,040 airings	\$100	\$ 104,000
18 Decaf packaging	2,482 bottles sold	\$4.29	\$ 10,647
Total:			\$2,183,747

19 **B. Injunctive Relief**

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

24 Defendants argue that the Court should not impose any injunction because the likelihood
25 of violating the CPA is minimal. This Court, however, disagrees. First, Defendants argued in
26 this case that their ads were merely subjective, making no claims as to how the drink would

1 affect consumers physiologically, and were thus not subject to any scrutiny under the CPA.
2 Although some of Defendants' ads fit into this category, the majority of them did not. The Court
3 previously found that if Defendants promote their product's ingredients as changing the way the
4 body functions, such a claim is objective for which scientific substantiation must exist. This
5 Court concludes that it is appropriate to enjoin Defendants from making any representation about
6 the biochemical or physiological effect of their products on consumers unless Defendants possess
7 and relies upon competent and reliable scientific evidence at the time the claims, statements' or
8 representations are made. The Court also concludes it is appropriate to enjoin Defendants from
9 representing that the ingredients in 5-Hour ENERGY® products work synergistically with caffeine
10 or other ingredients to enhance the duration or efficacy of the products unless Defendants have
11 competent and reliable scientific evidence to support such a claim. Finally, the Court concludes it
12 is appropriate to enjoin Defendants from using or disseminating any advertising or marketing
13 materials for their products that rely upon the use of survey data, unless the survey is created,
14 conducted, and evaluated in an objective manner by persons qualified to do so, using procedures
15 and methods generally accepted in the profession to yield accurate and reliable results, and to enjoin
16 Defendants from expressly or impliedly representing the survey data results in such a manner that
17 the net impression is deceptive.

18 **C. Restitution**

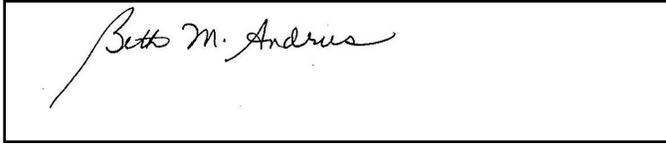
19 Because the amount of revenue derived from the sales of Decaf 5-Hour ENERGY® is
20 so small, the Court declines to require Defendants to pay restitution to consumers who purchased
21 5-hour ENERGY® Decaf product in Washington. The identity of such purchasers is unknown
22 and the amount of each restitution award would be so small that the cost of setting up and
23 administering a restitution fund would dwarf any benefit consumers would receive from
24 restitution.
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King County Superior Court
Judicial Electronic Signature Page

Case Number: 14-2-19684-9
Case Title: WASHINGTON STATE OF VS LIVING ESSENTIALS ET ANO

Document Title: ORDER PENALTIES, ETC.

Signed by: Beth Andrus
Date: 2/7/2017 2:44:54 PM

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Judge/Commissioner: Beth Andrus

This document is signed in accordance with the provisions in GR 30.

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