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KING COUNTY SUPERIOR COURT
STATE OF WASHINGTON

STATE OF WASHINGTON,

Plaintiff,

v.

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

Defendants.

NO.

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.

1 2.2 Defendant Living Essentials, LLC (“LE”) is a privately-held limited liability
2 company that is organized and existing under the laws of the State of Michigan, with its
3 principal place of business located at 38955 Hills Tech Dr., Farmington Hills, Michigan 48331.
4 LE is a wholly-owned subsidiary of Defendant Innovation Ventures, LLC. LE markets and
5 sells energy supplements to wholesale dealers and retailers in the United States. At all relevant
6 times, LE manufactured, marketed, distributed, advertised, and sold 5-hour ENERGY®
7 products both in retail outlets and online. LE sells approximately 9 million bottles of 5-hour
8 ENERGY® per week in the United States. Its annual national sales are approximately \$1
9 billion per year. At all relevant times, LE has done substantial business in the state of
10 Washington and in King County.

11 2.3 Defendant Innovation Ventures, LLC (“IV”) is a privately-held limited liability
12 company that is organized and existing under the laws of the State of Michigan, with its
13 principal place of business located at 38955 Hills Tech Dr., Farmington Hills, Michigan 48331.
14 IV owns a controlling interest in defendant LE and is the parent company of LE. IV developed
15 the formula for 5-hour ENERGY in 2004. In court pleadings, it identifies itself as “Innovation
16 Ventures, LLC d/b/a/ Living Essentials, LLC.” At all relevant times, IV has done substantial
17 business in the state of Washington. IV has an open account with the Washington State
18 Department of Revenue, UBI No. 60289592, and a Washington State Reseller Permit, No. A15
19 3286 17. The Washington State Department of Revenue lists IV’s “business name” as “Living
20 Essentials.”

21 2.4 IV and LE are collectively referred to herein as “Defendants.” Acts done by
22 one Defendant were done in furtherance of the business practices of the other. Defendants
23 individually and together, for the benefit of their business enterprise in marketing and selling
24 5-Hour ENERGY® products, directed, created, executed, participated in and controlled, had
25 the authority to control or participate in, and had knowledge of, the acts and practices set forth
26

1 in this Complaint. Upon information and belief, both Defendants received significant proceeds
2 from the business practices identified in this Complaint.

3 2.5 Defendants design, manufacture, market and sell three 5-hour ENERGY®
4 products: Original, Decaf, and Extra Strength.

5 **III. JURISDICTION AND VENUE**

6 3.1 The Attorney General is authorized under RCW 19.86.020, RCW 19.86.080 and
7 RCW 19.86.140 to bring suit to enforce the CPA's prohibitions on unfair or deceptive acts or
8 practices in the conduct of trade or commerce.

9 3.2 The claims for relief alleged herein arise from advertisements and promotional
10 representations and claims that appeared in Washington, and sales of the 5-hour ENERGY®
11 products occurred in Washington and/or were made to Washington residents and consumers.

12 3.3 This Court has personal jurisdiction over Defendants pursuant to RCW
13 19.86.160, RCW 4.28.180, and RCW 4.28.185. Defendants have transacted substantial
14 business in this state and the acts alleged herein have been committed in this state. Defendants
15 purposefully marketed and sold millions of bottles of the 5-hour ENERGY® products in
16 Washington and/or to Washington residents and consumers. As a result of their marketing and
17 sales of the 5-hour ENERGY® products, Defendants derived substantial profits from
18 Washington consumers. In sum, this action arises from Defendants' purposeful contacts with
19 Washington, exercise of personal jurisdiction over Defendants comports with traditional
20 notions of fair play and substantial justice, and jurisdiction is not inconsistent with the United
21 States Constitution or the Washington State Constitution.

22 3.4 Venue is proper in King County pursuant to RCW 4.12.025 because the
23 Defendants transact business in King County and transacted business in King County at the
24 time the causes of action in this Complaint arose.

1 near the impulse buying area located in the checkout aisle. 5-hour ENERGY® is also sold
2 online at www.5hourenergy.com, by Defendant LE, as well as at other online retailers.

3 4.4 Defendants market, advertise, distribute, and sell 5-hour ENERGY® to
4 consumers in King County, throughout Washington State, and across the United States. Since
5 2004, they have disseminated their advertisements on the radio, on television, on the Internet,
6 and in print advertisements in Washington and across the United States. via a massive
7 advertising campaign. As is alleged herein, Defendants consistently represent that 5-hour
8 ENERGY® has attributes it does not have, and Defendants lack competent and reliable
9 scientific evidence to support their claims about the products.

10 4.5 Beginning in 2013, the State of Washington participated in a multistate
11 Attorneys General investigation of Defendants' practices regarding the marketing, promotion
12 and sales of 5-hour ENERGY® and whether Defendants possessed bases for the claims made
13 in their advertisements, as detailed herein.

14 4.6 The health effects of 5-hour ENERGY® products' ingredients, including
15 tyrosine and phenylalanine when combined with caffeine, are not known.¹ Questions about the
16 safety of 5-hour ENERGY® have been serious enough to prompt investigations by the FDA
17 and members of Congress.²

18 4.7 In June of 2013, the American Medical Association called for a temporary ban
19 on marketing stimulant drinks to those under 18, until possible adverse health effects on this
20

21 ¹ See Melanie Haiken, Can Energy Drinks Kill, Reprise? New FDA Investigation This Time Names 5-
22 hour ENERGY®, Forbes, available at <http://www.forbes.com/sites/melaniehaiken/2012/11/15/can-energy-drinks-kill-reprise-new-fda-investigation-this-time-names-5-hour-energy> (last visited July 9, 2014).

23 ² See Michelle Castillo, FDA Investigating 13 Deaths Tied to 5-hour ENERGY®, CBS NEWS, available
24 at www.cbsnews.com/news/fda-investigating-13-deaths-tied-to-5-hour-energy/ (last visited July 9, 2014); Report
25 from staff of Congressman Edward J. Markey, in coordination with the staff of Senators Richard J. Durbin and
26 Richard Blumenthal, *What's All the Buzz About? A Survey of Popular Energy Drinks Finds Inconsistent Labeling, Questionable Ingredients and Targeted Marketing to Adolescents* (April 10, 2013) at 2, 7, available at http://www.durbin.senate.gov/public/index.cfm/files/serve?File_id=361241d9-4e28-4cd7-b14d-698660b9b998 (last visited July 9, 2014).

1 demographic can be assessed. Each bottle of 5-hour ENERGY® says “Do not take if you are
2 pregnant or nursing, or under 12 years of age” or similar language, implying that the product is
3 suitable for those aged 12 and over. When asked in the investigative stage of this litigation for
4 substantiation of the above label claims, Defendants offered no scientific studies or data to
5 support such suitability claims.

6 4.8 While many of the 5-hour ENERGY® advertisements refer to the fact that the
7 product is intended for “hard working adults” or “hard working people,” the ubiquitous nature
8 of the product, as well as the product advertising on sports channels, at sports events and on
9 television channels such as the Cartoon Network, bolsters the products’ appeal to teenagers
10 whose active lives and late nights make energy drinks highly attractive.³

11 **B. Defendants’ Unfair and/or Deceptive Claims Regarding 5-hour ENERGY®**

12
13 4.9 In an effort to maintain and/or grow their market share in the face of
14 competition in the energy drink market, Defendants have made several unfair or deceptive
15 claims about their 5-hour ENERGY® products. These misleading promotional representations
16 fall into four categories: (1) representations regarding what 5-hour ENERGY® products do
17 and how they do it; (2) representations regarding whether 5-hour ENERGY® consumers
18 experience a “crash”; (3) representations regarding whether 5-hour ENERGY® is
19 recommended by doctors; and (4) representations that 5-hour ENERGY® is appropriate for
20 adolescents age 12 and older.

21
22
23 ³ A study by the Yale University Rudd Center for Food Policy and Obesity released on July 29, 2013
24 regarding energy drink marketing to teens noted that “[e]xamination of the networks where energy drink ads
25 appeared confirms that 5-hour Energy...continued to place a high proportion of advertising on programs viewed
26 most by teens, including Adult Swim, MTV, and MTV2” and the average monthly number of teen visitors to
http://www.yaleruddcenter.org/resources/upload/docs/what/advertising/Energy_Drink_Marketing_Teens.pdf (last
visited July 9, 2014).

1 4.10 These representations are unfair and/or deceptive because they are false,
2 misleading, and unsubstantiated by competent and reliable scientific evidence. The four
3 categories of claims are described in more detail below.

4 **1. Deceptive or Unfair Claims Regarding What 5-hour ENERGY® Does and**
5 **How It Does It**

6 4.11 Defendants have made several unfair and/or deceptive representations that the
7 non-caffeine ingredients contained in the current or previous formulations of the 5-Hour
8 ENERGY® products somehow provide consumers with benefits such as energy, alertness,
9 and/or focus. These claims are unfair and/or deceptive because these ingredients do not, in
10 fact, provide any of the claimed benefits, and because Defendants have no competent and
11 reliable scientific evidence to show that they do. Any meaningful effect for most consumers
12 using 5-hour ENERGY® as directed comes only from a concentrated shot of caffeine. 5-hour
13 ENERGY® is simply a caffeine delivery device, and Defendants' Decaf formulation is not
14 even that.

15 4.12 These misrepresentations regarding how 5-hour ENERGY® products work fall
16 into three categories:

- 17
- 18 a. Claims that the proprietary combination of “vitamins, enzymes and amino
19 acids”, and other non-caffeine ingredients in Original or Extra Strength 5-
20 hour ENERGY® provide consumers with benefits like energy, alertness,
21 or focus;
 - 21 b. Claims that Original and Extra-Strength 5-hour ENERGY® are superior to
22 an equivalent amount of caffeine from coffee or another source in
23 providing consumers with benefits like energy, alertness, or focus; and
 - 23 c. Claims that Decaf 5-hour ENERGY® provides users with any promoted
24 benefits aside from the biochemical stimulation caused by its caffeine
25 content.

24 Each of these unfair and/or deceptive representations is described in more detail below.
25
26

1 **a. Claims That Original and Extra Strength 5-hour ENERGY®’s Non-**
2 **Caffeine Ingredients Provide Benefits Like Energy, Alertness, or**
3 **Focus**

4 4.13 Defendants misrepresent how 5-hour ENERGY® works by claiming that the
5 non-caffeine ingredients in the Original and Extra Strength formulations – the “vitamins,
6 enzymes, and amino acids” – somehow work to provide consumers with benefits like energy,
7 alertness, or focus. This claim is deceptive and/or unfair because the non-caffeine ingredients
8 in Original and Extra Strength 5-hour ENERGY® in fact do not provide any of the claimed
9 benefits, and because Defendants have no competent and reliable scientific evidence to support
10 these claims.

11 4.14 The ingredients in 5-hour ENERGY® are on the back of the bottles—see 4.16
12 and 4.18 below. The “% Daily Value” and the “Energy Blend” appear under the heading
13 “Supplement Facts.” The ingredients in the Energy Blend are likewise identified (albeit not
14 the actual amounts because Defendants have asserted in the investigative phase that 5-hour
15 ENERGY® is formulated from a proprietary recipe of vitamins and amino acids).

16 4.15 Daily values were developed by the FDA to help consumers determine the level
17 of various nutrients in a standard serving of food in relation to consumers’ approximate
18 requirement for that nutrient. For 5-hour ENERGY®, the % daily value refers to the amount
19 of vitamins and sodium in each bottle. The vitamin amounts in 5-hour ENERGY® equal or
20 well exceed 100% of the % Daily Value. Defendants claim that these mega-doses of vitamins
21 (including 8333% of the recommended daily allowance of Vitamin B12 and 2000% of the
22 recommended daily allowance of Vitamin B6), coupled with 5-hour’s “Energy Blend” (which
23 includes, in order of decreasing prevalence, taurine, glucuronic acid, malic acid, N-acetyl-L-
24 tyrosine, L-phenylalanine, caffeine, and citicoline) create the “alert productive feeling you
25 want” because the product “contains a powerful blend of B-vitamins for energy and amino acids
26 for focus.”

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



5-hour ENERGY® Original

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

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



<http://www.5hourenergy.com/healthfacts.asp> (last visited July 9, 2014).

4.17 Representative examples of 5-hour ENERGY®’s advertisements that also reflect the claimed benefits include the following:

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

-Tagline: “How to survive your longest day”

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

8 -Tagline: “From don’t want to to can’t stop me”

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

12 -Tagline: “Why do energy drinks make you crash?”

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

21 4.18 The ingredients panel for Extra Strength 5-hour ENERGY® is as follows:



22 **5-hour ENERGY®**
 23 **Extra Strength**

24 **Supplement Facts**
 25 Serving Size 1.93 fl. oz.

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

26 ‡Daily value not established.

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



1 <http://www.5hourenergy.com/healthfacts.asp> (last visited July 9, 2014).

2 4.19 The website for Extra Strength 5-hour ENERGY®,
3 <http://www.5hourenergy.com/5hrextrastrength.asp> (last visited July 10, 2014), claims that if
4 consumers are “extra hard working” and “Ready to kick it up a notch,” consumers should use
5 this product because:

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

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

11 4.20 While Defendants’ advertisements vary in the activities depicted, the above
12 sample representations that 5-hour ENERGY® provides “B-vitamins for energy and amino
13 acids for focus” are consistent. However, aside from the effect of the caffeine in the products,
14 Defendants’ claims are untrue. Defendants have no competent and reliable scientific evidence
15 to support their claims that the non-caffeine ingredients in Original or Extra Strength 5-hour
16 ENERGY® contribute in any meaningful way to energy, alertness, or focus.

17 4.21 The Chief Executive Officer of LE and 5-hour ENERGY®’s founder, Manoj
18 Bhargava, insisted that the purported beneficial effects of 5-hour ENERGY® are the result of
19 the non-caffeine ingredients, and that the caffeine is there simply to help the body absorb the
20 other ingredients. In an interview published on April 10, 2012, Mr. Bhargava stated:

21 Interviewer: So what’s in it without divulging trade secrets?

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

24 Interviewer: And you’ve said “it’s not an energy drink, it’s a focus drink,” right? So
25 what is it? Because you did arrive in a market where Red Bull for example already
26

1 existed. So you know everybody's notions back then of an energy drink. So how did
2 you think that this would be different?

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

4 Interviewer: At a natural products fair?

5 Manoj Bhargava: Yeah and I thought "Wow, this is amazing." So I could sell this
6 and so I figured it out. Basically what it has in it is brain nutrients, for brain health.
7 So there is caffeine in it, but the purpose of caffeine is to get everything else absorbed.
8 Most of the people don't know that one of the great qualities of caffeine is it allows
9 you to absorb nutrients and it does it quickly, and so when it does it quickly, you
10 focus and when you focus you think you have energy." (emphasis added).⁴

11 4.22 In fact, the vitamins and the amino acids contained in 5-hour ENERGY® are
12 typically present in the normal diet of an otherwise healthy individual and amounts consumed
13 in excess of bodily needs are typically excreted. Describing normal metabolic functions of
14 nutrients, then claiming that mega-doses of those nutrients provided by 5-hour ENERGY®
15 will cause consumers to function at an enhanced level, is false, and is not supported by
16 competent and reliable scientific evidence.

17 **b. Claims That Original and Extra Strength 5-hour ENERGY® Are
18 Superior to the Equivalent Amount of Caffeine from Coffee or
19 Other Sources**

20 4.23 Defendants have also misrepresented how 5-hour ENERGY® works by
21 claiming that the Original and Extra Strength versions are superior to consuming an equivalent
22 amount of caffeine from coffee or other sources. This is unfair or deceptive because these
23 products are not superior to consuming an equivalent amount of caffeine from coffee and
24 because Defendants have no competent and reliable scientific evidence to support such
25 superiority claims.

26 4.24 The advertising and marketing campaign for 5-hour ENERGY® has likewise
focused on delivering the message that 5-hour ENERGY® is distinctly different and better

⁴ NDTV, Full Transcript, "In Conversation with Manoj Bhargava,"
<http://www.ndtv.com/article/india/full-transcript-in-conversation-with-manoj-bhargava-196198> (last visited July
10 2014).

1 than caffeine or coffee containing an equivalent amount of caffeine in providing consumers
2 with energy, alertness, or focus. For example, 5-hour ENERGY®'s web page represents that
3 5-hour ENERGY® has less caffeine than Starbucks coffee, "plus vitamins and nutrients" and
4 that "It's the combination that makes it so great":
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5-hour ENERGY® en Español | 5-hour ENERGY® International: Select Country/Region: Buy Online | Find a Store

HOME | OUR ENERGY SHOTS | HOW TO USE | FAQs | FAN ZONE | 5-HOUR ENERGY® HELPS | NEWS | CONTACT US

f t g+ p

5-hour ENERGY® and caffeine - the facts

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

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



Source: www.starbucks.com



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

Moderate caffeine consumption

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

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

"When caffeine is consumed in moderation by the majority of the population there are unlikely to be many negative side effects."

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

What's in 5-hour ENERGY®?

Click on the table below to find out more.



Amount per Serving	% Daily Value
16oz (480 mL) 5-hour ENERGY	150%
Vitamin B12 (100mcg)	2000%
Vitamin B6 (100mcg)	1000%
Vitamin B3 (100mcg)	2000%
Vitamin B2 (100mcg)	2000%
Vitamin B1 (100mcg)	2000%
Vitamin C (100mg)	2000%
Vitamin E (100IU)	2000%
Vitamin K (100mcg)	2000%
Vitamin D (100IU)	2000%
Vitamin A (100IU)	2000%
Vitamin H (100IU)	2000%
Vitamin I (100IU)	2000%
Vitamin J (100IU)	2000%
Vitamin K (100IU)	2000%
Vitamin L (100IU)	2000%
Vitamin M (100IU)	2000%
Vitamin N (100IU)	2000%
Vitamin O (100IU)	2000%
Vitamin P (100IU)	2000%
Vitamin Q (100IU)	2000%
Vitamin R (100IU)	2000%
Vitamin S (100IU)	2000%
Vitamin T (100IU)	2000%
Vitamin U (100IU)	2000%
Vitamin V (100IU)	2000%
Vitamin W (100IU)	2000%
Vitamin X (100IU)	2000%
Vitamin Y (100IU)	2000%
Vitamin Z (100IU)	2000%
Vitamin AA (100IU)	2000%
Vitamin AB (100IU)	2000%
Vitamin AC (100IU)	2000%
Vitamin AD (100IU)	2000%
Vitamin AE (100IU)	2000%
Vitamin AF (100IU)	2000%
Vitamin AG (100IU)	2000%
Vitamin AH (100IU)	2000%
Vitamin AI (100IU)	2000%
Vitamin AJ (100IU)	2000%
Vitamin AK (100IU)	2000%
Vitamin AL (100IU)	2000%
Vitamin AM (100IU)	2000%
Vitamin AN (100IU)	2000%
Vitamin AO (100IU)	2000%
Vitamin AP (100IU)	2000%
Vitamin AQ (100IU)	2000%
Vitamin AR (100IU)	2000%
Vitamin AS (100IU)	2000%
Vitamin AT (100IU)	2000%
Vitamin AU (100IU)	2000%
Vitamin AV (100IU)	2000%
Vitamin AW (100IU)	2000%
Vitamin AX (100IU)	2000%
Vitamin AY (100IU)	2000%
Vitamin AZ (100IU)	2000%
Vitamin BA (100IU)	2000%
Vitamin BB (100IU)	2000%
Vitamin BC (100IU)	2000%
Vitamin BD (100IU)	2000%
Vitamin BE (100IU)	2000%
Vitamin BF (100IU)	2000%
Vitamin BG (100IU)	2000%
Vitamin BH (100IU)	2000%
Vitamin BI (100IU)	2000%
Vitamin BJ (100IU)	2000%
Vitamin BK (100IU)	2000%
Vitamin BL (100IU)	2000%
Vitamin BM (100IU)	2000%
Vitamin BN (100IU)	2000%
Vitamin BO (100IU)	2000%
Vitamin BP (100IU)	2000%
Vitamin BQ (100IU)	2000%
Vitamin BR (100IU)	2000%
Vitamin BS (100IU)	2000%
Vitamin BT (100IU)	2000%
Vitamin BU (100IU)	2000%
Vitamin BV (100IU)	2000%
Vitamin BW (100IU)	2000%
Vitamin BX (100IU)	2000%
Vitamin BY (100IU)	2000%
Vitamin BZ (100IU)	2000%
Vitamin CA (100IU)	2000%
Vitamin CB (100IU)	2000%
Vitamin CC (100IU)	2000%
Vitamin CD (100IU)	2000%
Vitamin CE (100IU)	2000%
Vitamin CF (100IU)	2000%
Vitamin CG (100IU)	2000%
Vitamin CH (100IU)	2000%
Vitamin CI (100IU)	2000%
Vitamin CJ (100IU)	2000%
Vitamin CK (100IU)	2000%
Vitamin CL (100IU)	2000%
Vitamin CM (100IU)	2000%
Vitamin CN (100IU)	2000%
Vitamin CO (100IU)	2000%
Vitamin CP (100IU)	2000%
Vitamin CQ (100IU)	2000%
Vitamin CR (100IU)	2000%
Vitamin CS (100IU)	2000%
Vitamin CT (100IU)	2000%
Vitamin CU (100IU)	2000%
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Vitamin CW (100IU)	2000%
Vitamin CX (100IU)	2000%
Vitamin CY (100IU)	2000%
Vitamin CZ (100IU)	2000%
Vitamin DA (100IU)	2000%
Vitamin DB (100IU)	2000%
Vitamin DC (100IU)	2000%
Vitamin DD (100IU)	2000%
Vitamin DE (100IU)	2000%
Vitamin DF (100IU)	2000%
Vitamin DG (100IU)	2000%
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Vitamin DI (100IU)	2000%
Vitamin DJ (100IU)	2000%
Vitamin DK (100IU)	2000%
Vitamin DL (100IU)	2000%
Vitamin DM (100IU)	2000%
Vitamin DN (100IU)	2000%
Vitamin DO (100IU)	2000%
Vitamin DP (100IU)	2000%
Vitamin DQ (100IU)	2000%
Vitamin DR (100IU)	2000%
Vitamin DS (100IU)	2000%
Vitamin DT (100IU)	2000%
Vitamin DU (100IU)	2000%
Vitamin DV (100IU)	2000%
Vitamin DW (100IU)	2000%
Vitamin DX (100IU)	2000%
Vitamin DY (100IU)	2000%
Vitamin DZ (100IU)	2000%
Vitamin EA (100IU)	2000%
Vitamin EB (100IU)	2000%
Vitamin EC (100IU)	2000%
Vitamin ED (100IU)	2000%
Vitamin EE (100IU)	2000%
Vitamin EF (100IU)	2000%
Vitamin EG (100IU)	2000%
Vitamin EH (100IU)	2000%
Vitamin EI (100IU)	2000%
Vitamin EJ (100IU)	2000%
Vitamin EK (100IU)	2000%
Vitamin EL (100IU)	2000%
Vitamin EM (100IU)	2000%
Vitamin EN (100IU)	2000%
Vitamin EO (100IU)	2000%
Vitamin EP (100IU)	2000%
Vitamin EQ (100IU)	2000%
Vitamin ER (100IU)	2000%
Vitamin ES (100IU)	2000%
Vitamin ET (100IU)	2000%
Vitamin EU (100IU)	2000%
Vitamin EV (100IU)	2000%
Vitamin EW (100IU)	2000%
Vitamin EX (100IU)	2000%
Vitamin EY (100IU)	2000%
Vitamin EZ (100IU)	2000%
Vitamin FA (100IU)	2000%
Vitamin FB (100IU)	2000%
Vitamin FC (100IU)	2000%
Vitamin FD (100IU)	2000%
Vitamin FE (100IU)	2000%
Vitamin FF (100IU)	2000%
Vitamin FG (100IU)	2000%
Vitamin FH (100IU)	2000%
Vitamin FI (100IU)	2000%
Vitamin FJ (100IU)	2000%
Vitamin FK (100IU)	2000%
Vitamin FL (100IU)	2000%
Vitamin FM (100IU)	2000%
Vitamin FN (100IU)	2000%
Vitamin FO (100IU)	2000%
Vitamin FP (100IU)	2000%
Vitamin FQ (100IU)	2000%
Vitamin FR (100IU)	2000%
Vitamin FS (100IU)	2000%
Vitamin FT (100IU)	2000%
Vitamin FU (100IU)	2000%
Vitamin FV (100IU)	2000%
Vitamin FW (100IU)	2000%
Vitamin FX (100IU)	2000%
Vitamin FY (100IU)	2000%
Vitamin FZ (100IU)	2000%
Vitamin GA (100IU)	2000%
Vitamin GB (100IU)	2000%
Vitamin GC (100IU)	2000%
Vitamin GD (100IU)	2000%
Vitamin GE (100IU)	2000%
Vitamin GF (100IU)	2000%
Vitamin GG (100IU)	2000%
Vitamin GH (100IU)	2000%
Vitamin GI (100IU)	2000%
Vitamin GJ (100IU)	2000%
Vitamin GK (100IU)	2000%
Vitamin GL (100IU)	2000%
Vitamin GM (100IU)	2000%
Vitamin GN (100IU)	2000%
Vitamin GO (100IU)	2000%
Vitamin GP (100IU)	2000%
Vitamin GQ (100IU)	2000%
Vitamin GR (100IU)	2000%
Vitamin GS (100IU)	2000%
Vitamin GT (100IU)	2000%
Vitamin GU (100IU)	2000%
Vitamin GV (100IU)	2000%
Vitamin GW (100IU)	2000%
Vitamin GX (100IU)	2000%
Vitamin GY (100IU)	2000%
Vitamin GZ (100IU)	2000%
Vitamin HA (100IU)	2000%
Vitamin HB (100IU)	2000%
Vitamin HC (100IU)	2000%
Vitamin HD (100IU)	2000%
Vitamin HE (100IU)	2000%
Vitamin HF (100IU)	2000%
Vitamin HG (100IU)	2000%
Vitamin HH (100IU)	2000%
Vitamin HI (100IU)	2000%
Vitamin HJ (100IU)	2000%
Vitamin HK (100IU)	2000%
Vitamin HL (100IU)	2000%
Vitamin HM (100IU)	2000%
Vitamin HN (100IU)	2000%
Vitamin HO (100IU)	2000%
Vitamin HP (100IU)	2000%
Vitamin HQ (100IU)	2000%
Vitamin HR (100IU)	2000%
Vitamin HS (100IU)	2000%
Vitamin HT (100IU)	2000%
Vitamin HU (100IU)	2000%
Vitamin HV (100IU)	2000%
Vitamin HW (100IU)	2000%
Vitamin HX (100IU)	2000%
Vitamin HY (100IU)	2000%
Vitamin HZ (100IU)	2000%
Vitamin IA (100IU)	2000%
Vitamin IB (100IU)	2000%
Vitamin IC (100IU)	2000%
Vitamin ID (100IU)	2000%
Vitamin IE (100IU)	2000%
Vitamin IF (100IU)	2000%
Vitamin IG (100IU)	2000%
Vitamin IH (100IU)	2000%
Vitamin II (100IU)	2000%
Vitamin IJ (100IU)	2000%
Vitamin IK (100IU)	2000%
Vitamin IL (100IU)	2000%
Vitamin IM (100IU)	2000%
Vitamin IN (100IU)	2000%
Vitamin IO (100IU)	2000%
Vitamin IP (100IU)	2000%
Vitamin IQ (100IU)	2000%
Vitamin IR (100IU)	2000%
Vitamin IS (100IU)	2000%
Vitamin IT (100IU)	2000%
Vitamin IU (100IU)	2000%
Vitamin IV (100IU)	2000%
Vitamin IW (100IU)	2000%
Vitamin IX (100IU)	2000%
Vitamin IY (100IU)	2000%
Vitamin IZ (100IU)	2000%
Vitamin JA (100IU)	2000%
Vitamin JB (100IU)	2000%
Vitamin JC (100IU)	2000%
Vitamin JD (100IU)	2000%
Vitamin JE (100IU)	2000%
Vitamin JF (100IU)	2000%
Vitamin JG (100IU)	2000%
Vitamin JH (100IU)	2000%
Vitamin JI (100IU)	2000%
Vitamin JJ (100IU)	2000%
Vitamin JK (100IU)	2000%
Vitamin JL (100IU)	2000%
Vitamin JM (100IU)	2000%
Vitamin JN (100IU)	2000%
Vitamin JO (100IU)	2000%
Vitamin JP (100IU)	2000%
Vitamin JQ (100IU)	2000%
Vitamin JR (100IU)	2000%
Vitamin JS (100IU)	2000%
Vitamin JT (100IU)	2000%
Vitamin JU (100IU)	2000%
Vitamin JV (100IU)	2000%
Vitamin JW (100IU)	2000%
Vitamin JX (100IU)	2000%
Vitamin JY (100IU)	2000%
Vitamin JZ (100IU)	2000%
Vitamin KA (100IU)	2000%
Vitamin KB (100IU)	2000%
Vitamin KC (100IU)	2000%
Vitamin KD (100IU)	2000%
Vitamin KE (100IU)	2000%
Vitamin KF (100IU)	2000%
Vitamin KG (100IU)	2000%
Vitamin KH (100IU)	2000%
Vitamin KI (100IU)	2000%
Vitamin KJ (100IU)	2000%
Vitamin KK (100IU)	2000%
Vitamin KL (100IU)	2000%
Vitamin KM (100IU)	2000%
Vitamin KN (100IU)	2000%
Vitamin KO (100IU)	2000%
Vitamin KP (100IU)	2000%
Vitamin KQ (100IU)	2000%
Vitamin KR (100IU)	2000%
Vitamin KS (100IU)	2000%
Vitamin KT (100IU)	2000%
Vitamin KU (100IU)	2000%
Vitamin KV (100IU)	2000%
Vitamin KW (100IU)	2000%
Vitamin KX (100IU)	2000%
Vitamin KY (100IU)	2000%
Vitamin KZ (100IU)	2000%
Vitamin LA (100IU)	2000%
Vitamin LB (100IU)	2000%
Vitamin LC (100IU)	2000%
Vitamin LD (100IU)	2000%
Vitamin LE (100IU)	2000%
Vitamin LF (100IU)	2000%
Vitamin LG (100IU)	2000%
Vitamin LH (100IU)	2000%
Vitamin LI (100IU)	2000%
Vitamin LJ (100IU)	2000%
Vitamin LK (100IU)	2000%
Vitamin LL (100IU)	2000%
Vitamin LM (100IU)	2000%
Vitamin LN (100IU)	2000%
Vitamin LO (100IU)	2000%
Vitamin LP (100IU)	2000%
Vitamin LQ (100IU)	2000%
Vitamin LR (100IU)	2000%
Vitamin LS (100IU)	2000%
Vitamin LT (100IU)	2000%
Vitamin LU (100IU)	2000%
Vitamin LV (100IU)	2000%
Vitamin LW (100IU)	2000%
Vitamin LX (100IU)	2000%
Vitamin LY (100IU)	2000%
Vitamin LZ (100IU)	2000%
Vitamin MA (100IU)	2000%
Vitamin MB (100IU)	2000%
Vitamin MC (100IU)	2000%
Vitamin MD (100IU)	2000%
Vitamin ME (100IU)	2000%
Vitamin MF (100IU)	2000%
Vitamin MG (100IU)	2000%
Vitamin MH (100IU)	2000%
Vitamin MI (100IU)	2000%
Vitamin MJ (100IU)	2000%
Vitamin MK (100IU)	2000%
Vitamin ML (100IU)	2000%
Vitamin MM (100IU)	2000%
Vitamin MN (100IU)	2000%
Vitamin MO (100IU)	2000%
Vitamin MP (100IU)	2000%
Vitamin MQ (100IU)	2000%
Vitamin MR (100IU)	2000%
Vitamin MS (100IU)	2000%
Vitamin MT (100IU)	2000%
Vitamin MU (100IU)	2000%
Vitamin MV (100IU)	2000%
Vitamin MW (100IU)	2000%
Vitamin MX (100IU)	2000%
Vitamin MY (100IU)	2000%
Vitamin MZ (100IU)	2000%
Vitamin NA (100IU)	2000%
Vitamin NB (100IU)	2000%
Vitamin NC (100IU)	2000%
Vitamin ND (100IU)	2000%
Vitamin NE (100IU)	2000%
Vitamin NF (100IU)	2000%
Vitamin NG (100IU)	2000%
Vitamin NH (100IU)	2000%
Vitamin NI (100IU)	2000%
Vitamin NJ (100IU)	2000%
Vitamin NK (100IU)	2000%
Vitamin NL (100IU)	2000%
Vitamin NM (100IU)	2000%
Vitamin NN (100IU)	2000%
Vitamin NO (100IU)	2000%
Vitamin NP (100IU)	2000%
Vitamin NQ (100IU)	2000%
Vitamin NR (100IU)	2000%
Vitamin NS (100IU)	2000%
Vitamin NT (100IU)	2000%
Vitamin NU (100IU)	2000%
Vitamin NV (100IU)	2000%
Vitamin NW (100IU)	2000%
Vitamin NX (100IU)	2000%
Vitamin NY (100IU)	2000%
Vitamin NZ (100IU)	2000%
Vitamin OA (100IU)	2000%
Vitamin OB (100IU)	2000%
Vitamin OC (100IU)	2000%
Vitamin OD (100IU)	2000%
Vitamin OE (100IU)	2000%
Vitamin OF (100IU)	2000%
Vitamin OG (100IU)	2000%
Vitamin OH (100IU)	2000%
Vitamin OI (100IU)	2000%
Vitamin OJ (100IU)	2000%
Vitamin OK (100IU)	2000%
Vitamin OL (100IU)	2000%
Vitamin OM (100IU)	2000%
Vitamin ON (100IU)	2000%
Vitamin OO (100IU)	2000%
Vitamin OP (100IU)	2000%
Vitamin OQ (100IU)	2000%
Vitamin OR (100IU)	2000%
Vitamin OS (100IU)	2000%
Vitamin OT (100IU)	2000%
Vitamin OU (100IU)	2000%
Vitamin OV (100IU)	2000%
Vitamin OW (100IU)	2000%
Vitamin OX (100IU)	2000%
Vitamin OY (100IU)	2000%
Vitamin OZ (100IU)	2000%
Vitamin PA (100IU)	2000%
Vitamin PB (100IU)	2000%
Vitamin PC (100IU)	2000%
Vitamin PD (100IU)	2000%
Vitamin PE (100IU)	2000%
Vitamin PF (100IU)	2000%
Vitamin PG (100IU)	2000%
Vitamin PH (100IU)	2000%
Vitamin PI (100IU)	2000%
Vitamin PJ (100IU)	2000

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

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

8 Tagline: "Choose Wisely" (television)

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

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

16 "How much coffee are you going to need today? Four, five cups? It
17 doesn't last very long, does it? Listen: one 5 Hour ENERGY® lasts
18 for several hours so you can get a lot done without refills. It's
19 packed with B-vitamins and nutrients to make it last. Plus, 5-hour
20 ENERGY® has zero sugar and 4 calories. So the next time that
21 2:30 feeling hits, you have a choice: two or three more cups of
22 coffee or one 5-Hour Energy."

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

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

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

1 consumers with energy, alertness or focus. That is because, as stated above, any of the claimed
2 effectiveness of Original or Extra Strength 5-hour ENERGY® is solely related to the
3 concentrated caffeine in Defendants' products.

4 **c. Deceptive or Unfair Claims That Decaf 5-hour ENERGY® Provides**
5 **Consumers with Any Claimed Benefits at All**

6 4.27 Another way in which Defendants misrepresent the way that 5-hour ENERGY®
7 works (or does not work) is by claiming that the Decaf formulation of the product provides any
8 of the promoted benefits. These claims are misleading because Decaf 5-hour ENERGY®
9 provides no feeling of energy, alertness, or focus since it contains only minimal caffeine. The
10 only ingredient in Defendants' line of 5-hour ENERGY® products that provides any
11 meaningful effect when taken as directed is caffeine. The amount of caffeine in Decaf 5-hour
12 ENERGY® is insufficient to have a physiological effect in most consumers. These claims are
13 also misleading because Defendants have no competent and reliable scientific evidence to
14 support a claim that any of the other ingredients in Decaf 5-hour ENERGY® provide any of
15 the promoted benefits to consumers.

16 4.28 Decaf 5-hour ENERGY® was launched by Defendants in or about March 2008.
17 They describe it now as having "about as much caffeine as a half cup of decaffeinated coffee."
18 <http://www.5hourenergy.com/healthfacts.asp> (last visited July, 10 2014). Defendants
19 misrepresent that there is a benefit to consuming Decaf 5-hour ENERGY®, stating for
20 example, that it is "designed for people who avoid caffeine, but still need an extra boost to help
21 them function during the day."

22 4.29 The 5-hour ENERGY® website touts Decaf 5-hour ENERGY®'s benefits as
23 providing extra energy and alertness, together with its vitamins and amino acids, as follows:

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

25 Do you find caffeine unpleasant but still need a little extra
26 energy to get through your day? Then try Decaf 5-hour

ENERGY® shots. It can provide the alertness* you want without the “caffeine feeling” you don’t. It works gently - with only as much caffeine as a half cup of decaffeinated coffee, and no Niacin. And it has pleasant citrus taste. Like original 5-hour ENERGY® Decaf 5-hour ENERGY® contains B-vitamins and amino acids plus Choline. It is vital to the production of neurotransmitters in the brain that affect memory, intelligence and mood. Choline is present in eggs, soy and meats.

<http://www.5hourenergy.com/5hrdecaf.asp> (last visited July 10, 2014).

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



**5-hour ENERGY®
Decaf**

Supplement Facts	
Serving Size 1.93 fl. oz.	
Amount Per Serving	% Daily Value
Vitamin B6 (as Pyridoxine Hydrochloride) 40mg	2000%
Folic Acid 400mcg	100%
Vitamin B12 (as Cyanocobalamin) 500mcg	8333%
Sodium 18mg	<1%
Energy Blend 2009mg	‡
Taurine, Choline, Glucuronic acid (as or from glucuronolactone), N-Acetyl L-Tyrosine, L-Phenylalanine, Malic Acid, Caffeine (6mg)	
‡Daily value not established.	

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



<http://www.5hourenergy.com/healthfacts.asp> (last visited July 10, 2014)

1 4.31 As set forth in paragraph 4.15 above, “% daily values” are intended to assist
2 consumers in interpreting information about the amount of a substance that is present in the
3 product. For Decaf 5-hour ENERGY®, the % daily value refers to the amount of vitamins and
4 sodium in each bottle. As shown above, the vitamin amounts in Decaf 5-hour ENERGY®
5 equal or well exceed 100% of the daily value and include over 83 (8333%) times the
6 recommended daily allowance of Vitamin B12 and 20 times (2000%) the recommended daily
7 allowance of Vitamin B6. Defendants point out that “like original 5-hour ENERGY®,” the
8 Decaf product contains B-vitamins and amino acids “plus Choline,” thus implying and
9 representing that the addition of Choline to the Energy Blend will have a positive effect on the
10 consumer. Defendants also misrepresent that the addition of Choline will have this effect:

11 “[it is] vital to the production of neurotransmitters in the brain that affect
12 memory, intelligence and mood”.

13 4.32 There is no competent and reliable scientific evidence that the Choline
14 contained in 5-hour ENERGY® will have any meaningful effect on neurotransmitter
15 production in an otherwise healthy, well-nourished individual. These claims are misleading
16 because in fact, as is the case with caffeinated 5-hour ENERGY®, adequate levels of the
17 vitamins and amino acids contained in Decaf 5-hour ENERGY® are typically available from
18 the diet of an otherwise healthy, well-nourished individual. When excess amounts are
19 consumed, they are typically excreted. Moreover, Defendants have no competent and reliable
20 scientific evidence to support their claims that the mega-doses of vitamins and the amino acids
21 in Decaf 5-hour ENERGY® will do anything to provide energy, alertness, or focus.

22
23 **2. Deceptive and Unfair Representations Regarding A “Crash” Associated
24 with 5-hour ENERGY®**

25 4.33 Defendants have also made misrepresentations and unfair or deceptive claims
26 regarding whether 5-hour ENERGY® consumers experience a “crash” after using their

1 products. Defendants’ claim that 5-hour ENERGY® consumers did not experience a crash
2 was false and misleading because Defendants’ own clinical evidence showed that 24% of
3 consumers did experience a “moderately-severe crash” in their sponsored clinical trial of the
4 product.

5 4.34 Defendants have sought to distinguish 5-hour ENERGY® from its energy drink
6 and energy shot competitors and from alternatives in the marketplace by claiming that the 5-
7 hour ENERGY® products cause “no crash later” and “hours of energy now, no crash later.”

8 4.35 Because Defendants’ own evidence showed that the representation “no crash”
9 claim was inaccurate and after requests from the National Advertising Division of the Council
10 of Better Business Bureaus to change labels, Defendants eventually changed their label.
11 Defendants continued to use the “no crash” language as late as 2009 when they began
12 qualifying the “no crash” claim with an asterisk, cross, or other symbol that purports to direct
13 consumers to another location on the bottle and in advertisements that states in very small print
14 “no crash means no sugar crash.”

15 4.36 5-hour ENERGY®’s bottle and advertising continued to use the asterisk or
16 other symbol until early 2013 when it modified the language on its bottle and in advertisements
17 to say “no sugar crash.”

18 4.37 5-hour ENERGY®’s new label, advertisements, and website information stating
19 “no sugar crash” is also misleading because Defendants still failed to disclose a known
20 material fact--that consumers using their product (at least 24% of consumers in Defendants’
21 own clinical trial) may experience a “moderately-severe” caffeine crash. The “no sugar crash”
22 statement, while true (the product has no sugar), it is unfair or deceptive. “No sugar crash”
23 implies no caffeine crash.
24
25
26

1 **3. Deceptive or Unfair Representations Regarding 5-hour ENERGY®’s “Ask**
2 **Your Doctor” Advertising Campaign.**

3 4.38 Defendants produced an “Ask Your Doctor” advertising campaign that was
4 featured on television and online. The representations in the “Ask Your Doctor” advertising
5 campaign were, in essence, claims about the 5-hour ENERGY® products intended to assure
6 consumers that trusted medical experts believe the product is safe.

7 4.39 The “Ask Your Doctor” campaign initially aired on television on July 18, 2012.
8 The campaign was launched on the Internet on or about July 19, 2012 and continued until
9 approximately early October 2012.

10 4.40 The “Ask Your Doctor” campaign, which was developed and aired by
11 Defendants, was also approved by CEO Manoj Bhargava.

12 4.41 The campaign included website advertising and 10, 15 and 30 second television
13 advertisements with a spokeswoman sitting beside a large stack of documents. Here is a
14 transcript of the 30 second version of the advertisement:

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

19 4.42 This advertisement was misleading in at least three ways: (a) it misstated the
20 number of doctors Defendants surveyed and the results of the surveys—Defendants conducted
21 online and in-person surveys of various doctors; (b) the surveys underlying the campaign used
22 unsound methodologies; and (c) the advertisement made unsubstantiated benefit and safety
23 claims about certain ingredients contained in 5-hour ENERGY®. Each is discussed in greater
24 detail below.
25
26

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

3 4.43 The “Ask Your Doctor” advertisement states that Defendants asked over 3,000
4 doctors to review their product. That is misleading. Defendants actually sent surveys to
5 substantially more than the 3,000 doctors who responded. Of the 3,000 who responded, 73% of
6 those doctors said that if their healthy patients were already using an energy supplement, they
7 would recommend a generic low calorie supplement.

8 4.44 The “Ask Your Doctor” advertisement also misleadingly implies that 73% of
9 the 3,000 doctors who were surveyed recommended 5-hour ENERGY® by name. However,
10 only 47% of the doctors who responded to the online survey said that they would specifically
11 recommend 5-hour ENERGY®. That fact only appears in exceeding small print briefly
12 flashed on the screen while the misleading 73% figure is emphasized by the speaker in the
13 advertisement.

14 **b. The Survey Underlying the Campaign Used Unsound Methodologies**

15 4.45 The “Ask Your Doctor” campaign was also misleading because it was based on
16 unsound survey methodology. Defendants were advised by an expert that they had employed
17 an unsound methodology in conducting the survey, and that the results would not be reliable
18 for several reasons. Defendants nonetheless used the unreliable survey results which made the
19 “Ask Your Doctor” campaign inherently misleading.

20 **c. Unsubstantiated Benefit and Safety Claims about Certain**
21 **Ingredients**

22 4.46 A central premise of the “Ask Your Doctor” campaign was that 5-hour
23 ENERGY® is different from competitors because of its unique ingredient formulation. The
24 website component of the campaign included express benefit and implied safety claims about
25 the specific ingredients in 5-hour ENERGY®.

26 4.47 For example, Defendants stated the following about certain 5-hour ENERGY®
 ingredients:

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

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

18 4.48 Regardless of whether these statements about each individual ingredient are true
19 as a general matter, Defendants have no competent and reliable scientific evidence to
20 substantiate the claim that these ingredients, working in concert, provide the benefits
21 Defendants claim they do as part of the 5-hour ENERGY® formulation.

22 4.49 In fact, the claims about the above-described ingredients are misleading because
23 the ingredients are either insignificant in amount (in the case of citicoline), or are simply non-
24 essential because the substances do not need to be provided by the daily diet. As a result, the
25 presence of these non-essential ingredients in 5-hour ENERGY® has no impact on focus,
26 alertness or energy in an otherwise healthy, well-nourished individual.

1 4.50 The claims described in paragraphs 4.46 through 4.47 above also constitute
2 implied safety claims which Defendants are unable to substantiate with competent and reliable
3 scientific evidence. The “Ask Your Doctor” advertising campaign is no longer in use, and 5-hour
4 ENERGY®’s www.doctorsreview5hour.com website is no longer live. However, Defendants
5 continue to make representations implying that doctors may recommend the 5-hour ENERGY®
6 products, with a current Internet ad that appears as follows:

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13

Feeling tired?

Ask Your Doctor About 5-hour ENERGY®

- ✓ Fast and easy to consume
- ✓ B-vitamins and amino acids
- ✓ Zero sugar
- ✓ 4 calories
- ✓ Helps you feel alert and energized†
- ✓ Ingredients found in every day food or already in you

14
15
16

- Berry
- Grape
- Orange
- Lemon-Lime
- Pomegranate
- Pink Lemonade
- Citrus
- DECAF

Most drug and grocery stores carry 5-hour ENERGY® individually and in multi-packs. The manufacturer's suggested retail price is \$3/bottle. Warehouse clubs carry economical 24-packs for an MSRP of \$37.99 (\$1.58/bottle), the best price per bottle available.

Check with your doctor to find out if your lack of energy is due to a medical condition. No sugar crash. 5-hour ENERGY® contains no sugar. Individual results may vary. See www.5hourenergy.com for more details.

† THIS STATEMENT HAS NOT BEEN EVALUATED BY THE FOOD AND DRUG ADMINISTRATION. THIS PRODUCT IS NOT INTENDED TO DIAGNOSE, TREAT, CURE OR PREVENT ANY DISEASE.

17 <http://www.needenergy.com/> (last visited July 10, 2014).

18 4. Misrepresentations Regarding 5-hour ENERGY®’s Suitability for Adolescents

19
20 4.51 The bottle for 5-hour ENERGY® products states: “Do not take if you are
21 pregnant or nursing, or under 12 years of age.” (emphasis added).

22 4.52 5-hour ENERGY® states the following on its website, in relevant part:

23 Who should not take 5-hour ENERGY®?

24 Women who are pregnant or nursing.

25 Children under 12 years of age.

26 People diagnosed with phenylketonuria (PKU).

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

2 4.53 By stating that 5-hour ENERGY® is inappropriate for children under 12,
3 Defendants are implying that the product is appropriate for adolescents age 12 and older.

4 4.54 In July, 2013, The American Academy of Pediatrics (“AAP”) has stated that
5 “the claimed association of energy drinks and ergogenic and performance enhancing effects of
6 the stimulants in energy drinks has not been adequately studied in adolescents, who are more
7 susceptible to the negative health effects and who do not need stimulants to support physical
8 activity.” (Emphasis added).⁵

9 4.55 According to the Yale Rudd Center for Food Policy & Obesity, of the top 28
10 beverages ranked by teen (defined as ages 12-17) TV advertisement exposure in 2010, 5-hour
11 ENERGY® ranked number one, outranking drinks like Kool-Aid, Capri Sun, Pepsi or Coke.
12 Teens saw three times as many TV ads for 5-hour ENERGY® in 2010 than for any other
13 beverage analyzed.⁶

14 4.56 Despite the lack of competent and reliable scientific evidence that their products
15 are appropriate for adolescents ages 12 and over, and the health risks that caffeine presents to
16 adolescents, Defendants impliedly claim that 5-hour ENERGY® is appropriate for adolescents
17 12 and older to consume.

18 **V. FIRST CLAIM FOR RELIEF**
19 **(Violations of RCW 19.86.020 – Deceptive and/or Unfair Representations Regarding the**
20 **Effects of Non-Caffeine Ingredients)**

21
22 ⁵ Senate Testimony of the American Academy of Pediatrics, July 31, 2013 (available at
23 [http://www.aap.org/en-us/advocacy-and-policy/federal-
24 advocacy/Documents/SchneiderSenateCommerceCommitteeEnergyDrinksTestimony_7_31_13.pdf](http://www.aap.org/en-us/advocacy-and-policy/federal-advocacy/Documents/SchneiderSenateCommerceCommitteeEnergyDrinksTestimony_7_31_13.pdf) (last visited
25 July 11, 2014).

26 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).

1 5.1 Plaintiff realleges and incorporates by reference the allegations set forth in each
2 of the preceding paragraphs of this Complaint.

3 5.2 Defendants are “persons” within the meaning of the Consumer Protection Act,
4 RCW 19.86.010(1).

5 5.3 Defendants conduct “trade” or “commerce” within the meaning of the
6 Consumer Protection Act, RCW 19.86.010(2).

7 5.4 Defendants engaged in unfair and/or deceptive acts or practices within the
8 meaning of RCW 19.86.020 by representing that the non-caffeine ingredients in the Original
9 and Extra Strength 5-hour ENERGY® formulations – “vitamins, enzymes, amino acids” and
10 other ingredients –work to provide users with benefits like energy, alertness and/or focus.

11 5.5 As alleged herein, these representations are false and/or misleading because the
12 non-caffeine ingredients in the Original and Extra Strength 5-hour ENERGY® formulations in
13 fact do not provide any of the claimed benefits and because Defendants lacked competent and
14 reliable scientific evidence to substantiate these claims.

15 5.6 Defendants’ representations are deceptive because they had the capacity to
16 mislead a substantial number of consumers.

17 5.7 Defendants’ representations are unfair because they are unethical, oppressive or
18 unscrupulous.

19 5.8 Defendants’ conduct affected the public interest and therefore constitutes unfair
20 or deceptive acts or practices in trade or commerce in violation of RCW 19.86.020.

21 **VI. SECOND CLAIM FOR RELIEF**
22 **(Violations of RCW 19.86.020. – Deceptive and/or Unfair Representations Regarding**
23 **Superiority to Coffee or Other Sources of Caffeine)**

24 6.1 Plaintiff realleges and incorporates by reference the allegations set forth in each of
25 the preceding paragraphs of this Complaint.
26

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

3 6.3 Defendants conduct “trade” or “commerce” within the meaning of the Consumer
4 Protection Act, RCW 19.86.010(2).

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

9 6.5 As alleged herein, these representations are false and/or misleading because the
10 Original and Extra Strength 5-hour ENERGY® formulations in fact are not superior to
11 consuming an equivalent amount of caffeine from coffee or another source and because
12 Defendants lacked competent and reliable scientific evidence to substantiate these claims.

13 6.6 Defendants’ representations are deceptive because they had the capacity to
14 mislead a substantial number of consumers.

15 6.7 Defendants’ representations are unfair because they are unethical, oppressive or
16 unscrupulous.

17 6.8 Defendants’ conduct affected the public interest and therefore constitutes unfair or
18 deceptive acts or practices in trade or commerce in violation of RCW 19.86.020.

19 **VII. THIRD CLAIM FOR RELIEF**
20 **(Violations of RCW 19.86.020 – Deceptive and/or Unfair Representations Regarding**
21 **Benefits of Decaf 5-hour ENERGY®)**

22 7.1 Plaintiff realleges and incorporates by reference the allegations set forth in each of
23 the preceding paragraphs of this Complaint.

24 7.2 Defendants are “persons” within the meaning of the Consumer Protection Act,
25 RCW 19.86.010(1).
26

1 8.4 Defendants engaged in unfair and/or deceptive acts or practices within the
2 meaning of RCW 19.86.020 by representing that 5-hour ENERGY® users do not experience a
3 “crash” after using the products.

4 8.5 As alleged herein, these representations are false and/or misleading because at
5 the time Defendants made the “no crash” claim, Defendants possessed a study stating that 24%
6 of consumers did, in fact, experience a “crash” when using their product. Defendants lacked
7 competent and reliable scientific evidence to substantiate their representations.

8 8.6 As alleged herein, 5-hour ENERGY®’s current label and claims stating “no
9 sugar crash” are misleading because Defendants do not disclose the material fact that
10 consumers’ use of the product (at least 24% of consumers in Defendants’ own clinical trial)
11 may result in a “moderately-severe” caffeine crash. For this reason, while the “no sugar crash”
12 statement is true, since the product has zero sugar, it is unfair, or deceptive.

13 8.7 Defendants’ representations are deceptive because they had the capacity to
14 mislead a substantial number of consumers.

15 8.8 Defendants’ representations are unfair because they are unethical, oppressive or
16 unscrupulous.

17 8.9 Defendants’ conduct affected the public interest and therefore constitutes unfair
18 or deceptive acts or practices in trade or commerce in violation of RCW 19.86.020.

19 **IX. FIFTH CLAIM FOR RELIEF**
20 **(Violations of RCW 19.86.020 – Deceptive and/or Unfair Representations Regarding**
21 **Approval by Doctors)**

22 9.1 Plaintiff realleges and incorporates by reference the allegations set forth in each of
23 the preceding paragraphs of this Complaint.

24 9.2 Defendants are “persons” within the meaning of the Consumer Protection Act,
25 RCW 19.86.010(1).
26

1 participation with Defendants from continuing or engaging in the unlawful conduct
2 complained of herein, namely, engaging in the business of marketing, advertising, promoting,
3 offering for sale, distributing or selling 5-hour ENERGY® products in Washington in violation
4 of the Consumer Protection Act, RCW 19.86;

5 D. That the Court assess civil penalties, pursuant to RCW 19.86.140, of two
6 thousand dollars (\$2,000) per violation against Defendants for each and every violation of
7 RCW 19.86.020;

8 E. That the Court make such orders pursuant to RCW 19.86.080 as it deems
9 appropriate to provide for restitution to consumers of money or property acquired by
10 Defendants as a result of the conduct complained of herein;

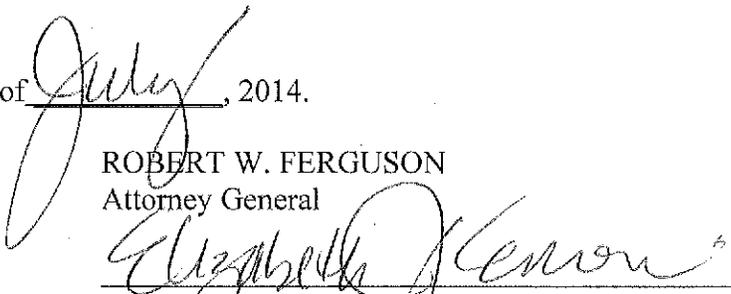
11 F. That the Court make such orders pursuant to RCW 19.86.080 to provide that
12 Plaintiff, the State of Washington, recovers the costs of this action, including reasonable
13 attorneys' fees;

14 G. That the Court grant Plaintiff leave to amend the Complaint to conform to the
15 evidence presented at trial; and

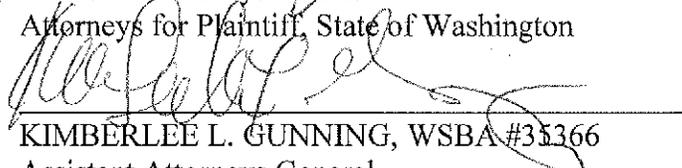
16 H. That the Court order such other or further relief as the Court may deem just and
17 proper.

18 DATED this 17 day of July, 2014.

19
20 ROBERT W. FERGUSON
Attorney General

21 
22 ELIZABETH J. ERWIN, WSBA #16548
Assistant Attorneys General

23 Attorneys for Plaintiff, State of Washington

24 
25 KIMBERLEE L. GUNNING, WSBA #35366
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26 Attorneys for Plaintiff, State of Washington