UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS

THOMAS R. GUARINO, on behalf of Himself and all other similarly situated,	)	
Plaintiffs,	)	Case No. 3:13-cv-00101-GPM-PMF
v.	)	
INNOVATION VENTURES, LLC., d/b/a LIVING ESSENTIALS, a Michigan Corporation,	)	
Defendant.	)	

FIRST AMENDED CLASS ACTION COMPLAINT

Comes now Plaintiff, THOMAS R. GUARINO, on his behalf and behalf of others similarly situated, by and through counsel, who alleges as follows:

THE PARTIES

1. Plaintiff, THOMAS R. GUARINO, is a citizen of the State of Illinois who currently lives in the County of Madison.

2. Defendant, INNOVATION VENTURES, LLC., d/b/a LIVING ESSENTIALS (hereinafter "Innovation") is a Michigan corporation with its principal place of business located in Farmington Hills, Michigan. Defendant lists as a registered agent with the Department of Licensing and Regulatory Affairs, as Matthew S. Dolmage, 38955 Hills Tech Drive, Farmington Hills, MI 48331. Defendant is a "citizen" of the State of Michigan for purposes of diversity. Defendant owns and maintains an interactive website, *http://www.5hourenergy.com/index.asp*, which is accessible to citizens of this jurisdictional district, and which sells the Product in this jurisdiction and in this judicial district, and has substantial contacts with Madison County,

Illinois through its intentional distribution and marketing of the product in Madison County, Illinois.

JURISDICTION AND VENUE

3. Plaintiff, Thomas Guarino, is a citizen of the state of Illinois.

4. Defendant, Innovation Ventures LLC d/b/a Living Essentials ("Innovation") is a Michigan corporation with its principal place of business located in Farmington Hills, Michigan. Accordingly, Innovation is a Michigan citizen for purposes of diversity jurisdiction.

5. 28 U.S.C. §1332(d)(2) provides that district courts have "original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of $5,000,000" and is a class action in which "any member of a class of plaintiffs is a citizen of a State different than from any Defendant." 28 U.S.C. §1332(d)(2). This Court has jurisdiction over this matter pursuant to the Class Action fairness Act, 28 USCA § 1332, because the amount in controversy exceeds $5,000,000 and the Plaintiff is a citizen of a State different from Innovation. Plaintiff is a citizen of Illinois while Innovation is a citizen of Michigan. The amount in controversy is satisfied because there are tens of thousands, if not hundreds of thousands, of Class members.

FACTUAL ALLEGATIONS

6. Defendant sells and advertises through distributors and retailers, 5-Hour ENERGY® (the "Product"), as a dietary supplement.

7. The following depicts an example of a true and correct copy of the Product's packaging and labeling, substantially similar to the Product purchased by Plaintiff:

8. Below is an example of how the Product's material display appeared at the time Plaintiff selected the Product from the **LOCATION**:

9. As materially illustrated above, the Products display that faces the consumer states the Products name, "5-hour ENERGY," in large bold black font. The display depicts fruit representing the flavor of the product.

10. Immediately below the Product's name, in bright yellow font, are the material statements: "Hours of energy now – No crash later," "Sugar free," "Only four calories," "Berry Flavor," "2 FL OZ," and "Dietary Supplement."

11. The representation and message on the display and packaging is clear to purchasers and consumers of the Product who purchased the Product during the Class period listed below.

12. The display and label presents a clear message to consumers of the Product; a message that just two ounces of the Product will provide five hours of sustained energy within minutes, without negative "crash" side effects later.

13. The claim that the Product has "no crash later" is not true, as admitted on the Defendant's website and hidden behind the bottles in the display, which reads: "No crash means no sugar crash." The Product's display and label is not only deceptive and untrue, but Plaintiff alleges based upon information and belief that Defendant has knowledge of studies that refute Defendant's claims that the Product will provide five hours of energy with no crash later.

14. Any attempt by Defendant to disclaim the representation made in its advertising does not shield Defendant from its untruthful and deceptive claims. Reasonable consumers should not be expected to look beyond deceptive representation made on the display and label to discover the truth about a product from an ingredient list set out in small print on the side of the package, or on the Defendant's website.

15. As a result of Defendant's unified and deceptive representations, Defendant has been able to charge a price premium for the Product over other similar energy drinks.

16. Plaintiff has purchased the Product in reliance of Defendant's material, deceptive labeling set forth above. Plaintiff purchased the Product instead of other similar products in reliance on Defendant's deceptive representations. He reasonably relied on those representations because Defendant has marketed itself as a reputable company that sells its Product through reputable retailers. Additionally, Plaintiff did experience a crash.

17. Moreover, Defendant's advertising seeks to differentiate itself from other energy products, by affirmatively claiming that the Product lasts longer and performs better than traditional energy products, and that it wears off gradually without a "crash."

18. However, Plaintiff alleges that Defendant has knowledge of studies that show that less expensive competing products perform the same as the Product.

19. Plaintiff alleges that rather than providing hours of continuous energy, the Product wears off just as quickly, in not quicker, than other energy product alternatives, and that it delivers the same "crash" after effects.

20. As a direct and proximate result of the Defendant's deceptive representations, Plaintiff has suffered economic damages as a result of purchasing the Product, in that, among other things, he spent money on a Product that didn't work – and therefore lacked the value he had been led to believe the Product had – and for which he paid in the purchase price of the Product.

21. Rather than receive energy within minutes that lasted for five hours with no crash, Plaintiff suffered the same negative "crash" effects that are associated with less expensive energy drinks.

22. An average and reasonable consumer would expect the Product to perform as advertised. The presentations on the Product's label and packaging convey a series of implied claims and/or omissions which it knows are material to the reasonable consumer, and which it intended for consumers to rely upon when choosing to purchase the Product. Defendant's inadequate labeling is an unfair deception because Defendant knows the Product does not provide the purported energizing effect it claims to have without causing the same or similar "crash" effects associated with sugar energy drinks, thus rendering the Product unfit for its intended use.

CLASS ALLEGATIONS

23. Plaintiff brings this class action pursuant to Rule 23 of the Federal Rules of Civil Procedure on behalf of himself individually and the following class of persons: All individuals or entities who reside in the United States and who have purchased defendant's 5-Hour Energy Shot product during the relevant time frame. Excluded from the Class is the Defendant Innovation, any person, firm, trust, corporation or other entity affiliated with Defendant Innovation, and members of the federal judiciary.

24. Pursuant to Rule 23(a)(1) of the Federal Rules of Civil Procedure ("FRCP"), the members of the Class are so numerous and geographically dispersed that joining of all members is impracticable. On information and belief, plaintiff alleges that there are tens of thousands if not hundreds of thousands of Class members throughout the United States.

25. Pursuant to Rule 23(a)(2) F.R.C.P. common questions of law and fact exist as to all members of the Class. These common questions include, but are not limited to, whether:

(a) Whether Defendant engaged in unfair methods of competition; unconscionable acts and practices, and unfair and deceptive acts and practices in the conduct of its labeling and

advertising of the Product, in violation of Illinois Consumer Fraud & Deceptive Practices Act, §815 ILCS 505/1, *et seq*,;

(b) Whether Defendant materially misrepresented that the Product works as advertised, including five hours of energy within minutes without any "crash" effect;

(c) Whether Defendant knew that the Product does not perform as advertised;

(d) Whether Plaintiff and Class Members are entitled to injunctive relief enjoining Defendant from continuing to label the Product as advertised and/or from failing to disclose that the Product does not perform as advertised and that it does cause a "crash" after consuming;

(e) Whether Defendant should be made to engage in a corrective advertising campaign advising consumers that the Product's advertising is untrue; and

(f) Whether Plaintiff and Class Members have been harmed and the proper measure of relief.

26. The questions set forth above predominate over any questions affecting only individual persons, and a class action is superior with respect to considerations of consistency, economy, efficiency, and fairness and equity than other available methods for the fair and efficient adjudication of this controversy.

27. Plaintiff's claim is typical of the claims of absent members of the Class and any applicable Subclasses.

28. Plaintiff will fairly and adequately represent and protect the interests of the Class. Plaintiff has no interests that are antagonistic to the absent Class members. Plaintiff is represented by capable counsel that has experience regarding consumer fraud class actions.

29. Without the Class representation provided by Plaintiff, virtually no Class members will receive legal representation or redress for their injuries; Plaintiff and counsel have

the necessary financial resources to adequately and vigorously litigate this class action, and Plaintiff and Class counsel are aware of their fiduciary responsibilities to the class members and are determined diligently to discharge those duties by vigorously seeking the maximum possible recovery for the Class.

30. Class certification is appropriate under Rule 23(b)(2*)* FRCP with respect to plaintiff's demands for injunctive and declaratory relief against defendant because defendant has acted on grounds generally applicable to the Class as a whole. Therefore, the final injunctive and declaratory relief sought in this case is appropriate with respect to the Class and any applicable Subclasses as a whole.

31. Class certification is also appropriate under Rule 23(b)(3*)* FRCP with respect to plaintiff's demand for damages because common questions of fact or law will predominate in determining the outcome of this litigation and because maintenance of the action as a class action is a superior manner in which to coordinate the litigation.

COUNT ONE

Violations of Illinois Unfair Practices Act

32. Plaintiff and members of the Class re-allege and incorporate by reference each and every allegation contained in Paragraphs 1 through 31.

33. The Illinois Unfair Practices Act, 815 ILCS 505/2, *et seq*. prohibits a corporation from engaging in unfair or deceptive trade practices. The Act provides:

> Unfair methods of competition and unfair or deceptive acts or practices, including but not limited to the use or employment of any deception fraud, false pretense, false promise, misrepresentation or the concealment, suppression or omission of any material fact, with intent that others rely upon the concealment, suppression or omission of such material fact, or the use or employment of any practice described in Section 2 of

> the "Uniform Deceptive Trade Practices Act", approved August 5, 1965, in the conduct of any trade or commerce are hereby declared unlawful whether any person has in fact been misled, deceived or damaged thereby. In construing this section consideration shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to Section 5 (a) of the Federal Trade Commission Act.

34. This Count is brought on behalf of a sub-class consisting of those members of the class who are citizens of the State of Illinois and who purchased Defendant's 5-Hour Energy Shot product as soon as it was released to the market in 2004 up through the date this action is certified. It is believed that this sub-class numbers in the thousands if not tens of thousands of people.

35. This Count is brought pursuant to the provisions of the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/1 et seq.

36. At all relevant times, 5-Hour Energy Shot has been available for purchase by consumers throughout the State of Illinois.

37. At all relevant times, Defendant Innovation has been engaged in advertising, offering for sale, selling and/or distributing 5-Hour Energy Shot directly or indirectly to the residents of the State of Illinois.

38. Plaintiff and the members of the sub-class have purchased 5-Hour Energy Shot for their own personal and/or household use.

39. At all relevant times, Defendant, in connection with its advertisements, offers for sale, sales and distribution of the 5-Hour Energy Shot, knowingly and purposefully misrepresented, concealed, omitted, and/or suppressed the material fact that a "crash" would occur with the Product. Defendant intended that Plaintiff and the members of the putative sub-class would rely upon its misrepresentations, concealments, omissions and/or suppressions so

that Plaintiff and the members of the putative sub-class would purchase the 5-Hour Energy Shot. Defendant's packaging of its 5-Hour Energy Shot product makes false or misleading representations that the Product does not have a "crash" effect which tended to deceive, or deceived or misled, the consumers. In truth, a "crash" does occur with use of the Product.

40. The material misrepresentations and omissions alleged herein constitute deceptive and unfair trade practices, in that they were intended to and did deceive Plaintiff and the general public, particularly working adults, into believing that the Product would provide five hours of energy within minutes, with no negative "crash" effects, when used as directed, when, in fact, as set forth in detail above, it does not provide five hours of energy and causes negative "crash" after effects.

41. Had Plaintiff and Class members known the Product did not perform as advertised, in that it does not provide five hours of energy within minutes, with no negative "crash" effect, they would not have purchased the Product.

42. As a result of Defendant's deceptive and unfair acts, Plaintiff and Class members have been damaged in the amount of the difference between the premium price paid for the Product and the price they would have paid had they known that the Product was not fit when consumed in that it had such effects.

43. Defendant's conduct offends established public policy, and substantially injurious to consumers.

44. Plaintiff and Class members are entitled to damages in an amount to be proven at trial, but not less than the difference between the premium price paid for the Product and the price they would have paid had they known that the Product does not provide five hours of energy and that it causes a negative "crash" after effect.

45. Defendant should also be ordered to cease its deceptive advertising, and should be made to engage in a corrective advertising campaign, to inform consumers that the Product does not actually provide the energizing effect it claims to have, and that a consumer is likely to experience the same and/or similar "crash" effect associated with a less expensive energy drink.

46. Plaintiff and other consumers relied on the false or misleading packaging to their detriment.

47. As a result, plaintiff and other consumers have been injured by defendant's unlawful conduct.

COUNT TWO

Unjust Enrichment

48. Plaintiff and members of the Class re-allege and incorporate by reference each and every allegation contained in Paragraphs 1 through 47.

49. Defendant Innovation has been unjustly enriched by its unlawful, unfair, misleading, and deceptive practices and advertising at the expense of Plaintiff and Class members, under circumstances in which it would be unjust for Defendant to be permitted to retain the benefit.

50. As a result of consuming the Product, Plaintiff did not obtain five hours of energy and he sustained negative "crash" after effects.

51. The Products labeling is insufficient, as it misleads the consumer in to believing that the statements are true, when in fact, they are not. Defendant encourages consumers to ingest the Product at work when energy is needed to get the consumer through the rest of the day, and claims that the Product is superior for this purpose as it lasts longer than energy product alternatives and results in no "crash."

52. Plaintiff (alternatively) does not have an adequate remedy at law against Defendant.

53. Plaintiff and Class members are entitled to restitution of the excess amount paid for the Product, over and above what they would have paid had they known that the Product was not safe when consumed.

54. Innovation should be required to disgorge itself of its ill gotten gains.

COUNT THREE

Breach of Implied Warranty of Merchantability

55. Plaintiff and members of the Class re-allege and incorporate by reference each and every allegation contained in Paragraphs 1 through 54.

56. Plaintiff and other members of the Class sought an energy enhancing product. In doing so, Plaintiff and other Members of the Class reasonably relied on Defendant's skill and judgment to select and furnish suitable goods for that purpose, and on or about that time, Defendant sold the Product to Plaintiff and other members of the Class.

57. At the time of sale, Defendant had reason to know of the intended purpose for which the goods were required (to provide energy for five hours, with no crash after effect), and that Plaintiff and members of the Class were relying on Defendant's skill and judgment to select and furnish suitable and harmless goods, so there was an implied warranty that the goods were fit for this intended purpose.

58. However, Defendant breached the warranty implied at the time of sale in that Plaintiff and members of the Class did not receive suitable goods, and the goods were not reasonably fit for the intended purpose for which they were made, as set forth above.

59. As a proximate result of this breach of warranty by Defendant, Plaintiff and members of the Class have suffered actual damages in an amount to be determined at trial, in that they were induced to purchase a product they would not have purchased had they known the true facts about, and that lacks the value Defendant represented the Product had, which was reflected in the purchase price.

COUNT FOUR

Violation of the Magnuson-Moss Warranty Act (15 U.S.C. §§2301 *et seq.)*

60. Plaintiff and members of the Class re-allege and incorporate by reference each and every allegation contained in Paragraphs 1 through 59.

61. Defendant has breached implied warranty of merchantability regarding the Product, as described in paragraphs 54 through 58, Count Three above. Plaintiff re-alleges and incorporates by reference the allegations in said paragraphs, as if fully set forth herein.

62. Plaintiff and the Class are consumers as defined in 15 U.S.C. §2301(3).

63. Defendant is a supplier and warrantor as defined in 15 U.S.C. §2301(4)(5).

64. The Product is a consumer product as defined in 15 U.S.C. §2301(6).

65. By reason of Defendant's breach of the above implied warranty of merchantability, Defendant has violated the statutory rights due to Plaintiff and members of the Class pursuant to Magnuson-Moss Warranty Act, 15 U.S.C. §§2301 *et seq.*, thereby economically damaging Plaintiff and the Class. The Act is intended to increase the enforceability of these warranties.

66. Therefore, Plaintiff and the Class seek all available remedies, damages, and awards under the Magnuson-Moss Warranty Act.

COUNT FIVE

Breach of Express Warranty

67. Plaintiff and members of the Class re-allege and incorporate by reference each and every allegation contained in Paragraphs 1 through 66.

68. Plaintiff brings this Count Five individually and on behalf of the members of the national Class against Defendant.

69. Defendant placed into the stream of commerce and did cause the product described herein to be sold to Plaintiff.

70. Defendant expressly warranted in their marketing, advertising and promotion of 5-Hour Energy products by representing that those products were superior to other similar products as the energy effect lasts longer and results in no "crash."

71. Plaintiff and members of the Class purchased 5-Hour Energy products baded on theose promises and/or affirmatives.

72. Defendants breached the express warranty by failing to provide a product that did not cause a "crash."

73. Plaintiffs and members of the Class were not required to provide notice to Defendant of the breach of warranty as Defendant had actual knowledge of the defect in the product.

74. As a proximate result of this breach of warranty by Defendant, Plaintiff and members of the Class have suffered actual damages in an amount to be determined at trial, in that they were induced to purchase a product they would not have purchased had they known the true facts about, and that lacks the value Defendant represented the Product had, which was reflected in the purchase price.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, on his own behalf and on behalf of the members of the Class, prays for the following relief:

A. An order that this action may be maintained as a class action under Rules 23(b)(1)(A) or 23(b)(2) and/or 23(b)(3);

B. An order requiring defendant Innovation to pay plaintiff statutory damages under the Illinois Unfair Trade Practices Act and to pay class members actual damages with any such amount to include pre-judgment and post-judgment interest at the legal rate;

C. An order enjoining defendant from making any further false or misleading statements to plaintiff and members of the Class;

D. An award of attorneys' fees and expenses; and

E. Any other further or different relief to which the Plaintiff may be entitled.

Plaintiff respectfully demands a jury trial.

Respectfully submitted,

GORI, JULIAN & ASSOCIATES, P.C.

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