

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF LOUISIANA**

WILLIAM WARING, on behalf of himself  
and all others similarly situated,

Plaintiff,

v.

INNOVATION VENTURES, LLC dba  
LIVING ESSENTIALS, LLC, a Michigan  
Corporation,

Defendant.

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CASE NO.:

**CLASS ACTION COMPLAINT**

**JURY TRIAL DEMANDED**

**CLASS ACTION COMPLAINT**

Plaintiff, WILLIAM WARING, by and through undersigned counsel, brings this action on his own behalf and on behalf of a Class and Subclass of persons and entities defined herein against Defendant INNOVATION VENTURES, LLC d/b/a LIVING ESSENTIALS, LLC (hereinafter referred to as “Living Essentials” or “Defendant”) and for his Complaint alleges, upon information and belief and based on the investigation to date of his counsel, as follows:

**INTRODUCTION**

1. This is a nationwide class action on behalf of a proposed class and subclass (“Class” or “Classes”), as more fully defined below, of similarly situation consumers who purchased 5-hour ENERGY shots designed, manufactured, warranted, marketed, advertised, and sold by Defendant, Living Essentials, or its predecessors, successors or subsidiaries.

2. Defendant manufactured and marketed its product under various brands and product names including, but not limited to, 5-hour ENERGY, Extra Strength 5-hour ENERGY, and Decaf 5-hour ENERGY shot (“5-hour Energy” or the “Product”). Defendant has marketed,

advertised and sold 5-hour Energy throughout Louisiana the United States and other countries.

3. Defendant represents to consumers, among other representations as alleged herein, that 5-Hour Energy produces a sustained level of “energy” for five hours, that the consumer will have “hours of energy now, no crash later”, “contains B Vitamins for energy and amino acids for focus”, and that you can “drink it in seconds and in minutes you’re feeling alert and productive and that feeling lasts for hours”.

4. Defendant claims to base its representations upon scientific studies which it claims demonstrates the superior nature of 5-hour Energy branded drinks over simpler and less expensive caffeine only products, such as a caffeine tablet or a cup of coffee.

5. Upon information and belief there is no genuine scientific research and there are no scientifically reliable studies in existence that support Defendant’s claims that 5-hour Energy drinks provide any additional benefits over a caffeine tablet or a cup of coffee.

6. Through its extensive and comprehensive nationwide marketing campaign, Defendant engaged in improper advertising, sales and marketing practices in an attempt to defraud Plaintiff and members of the class by disseminating false and misleading information via television commercials, internet websites and postings, radio media, advertising and packaging, all of which is intended to induce consumers, including Plaintiff and members of the Class, into purchasing, at a premium price, millions of dollars worth of 5-hour Energy shots, which are manufactured, distributed, marketed, advertised and/or sold by the Defendant.

7. Defendant knew or should have known that there is no greater benefit of ingesting 5 -hour Energy than ingesting an equivalent dose of caffeine and has taken no meaningful steps to clear up consumer misconceptions regarding its product.

8. As a result of Defendant's pervasive pattern of fraudulent, deceptive, false, and otherwise improper advertising, sales, and marketing practices and through other actions and inactions complained of herein, Defendant breached express warranties, committed fraud through uniform written misrepresentations and common omissions. To remedy Defendant's illegal conduct, Plaintiff on behalf of himself and other similarly situated purchasers seeks monetary damages, equitable relief, declaratory relief and/or disgorgement of profits in connection with the 5-hour Energy designed, manufactured, warranted, marketed, advertised, and sold by the Defendant, or its predecessors, successors or subsidiaries.

### **JURISDICTION AND VENUE**

9. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1332(d)(2) (diversity jurisdiction) and the Class Action Fairness Act, in that (i) there is complete diversity (Plaintiff is a citizen of Louisiana and Defendant is domiciled and incorporated in Michigan and otherwise maintains its principal place of business in Michigan, (ii) the amount in controversy exceeds \$5,000,000.00 (Five Million Dollars) exclusive of interests and costs, and (iii) there are 100 or more members of the proposed Plaintiff class.

10. Defendant conducts substantial business in Louisiana, including the sale and distribution of 5-hour Energy, and has sufficient contacts with Louisiana or otherwise intentionally avails itself of the laws and markets of Louisiana, so as to sustain this Court's jurisdiction over Living Essentials.

11. Venue lies in this District, pursuant to 28 U.S.C. §1391, because a substantial part of the events or omissions giving rise to Plaintiff's claims occurred in this Judicial District. In addition, Living Essentials does business and/or transacts business in this Judicial District, and

therefore, is subject to personal jurisdiction in this Judicial District and resides here for venue purposes.

### **PARTIES**

12. Plaintiff Will Waring is a resident and citizen of Orleans Parish, Louisiana. Plaintiff purchased 5-hour Energy manufactured and marketed by the Defendant, on or about December 31, 2012, at JetGo gas station located at 3720 Magazine Street, New Orleans, Orleans Parish, Louisiana 70115.

13. Defendant Living Essentials is a Michigan corporation with its principal place of business at 38955 Hills Tech Dr. Farmington Hills, Michigan 48331. Defendant is one of the largest manufacturers and sellers of energy drinks in the country with annual sales of more than \$1 billion and sells about 9 million bottles of 5-hour Energy a week in North America.

14. Defendant designed, tested, manufactured, marketed, advertised, warranted and/or sold 5-hour Energy in Louisiana and throughout the United States.

### **FACTUAL ALLEGATIONS**

15. 5-hour Energy is a flavored energy shot brand made by the Defendant. It is sold in 1.93-oz (57 mL) containers. Defendants introduced 5-hour Energy in 2004 as part of a wave of “energy shot” dietary supplements.

16. Defendant sells or distributes 5-hour Energy to consumers throughout Louisiana and the United States in three varieties: Original, Extra Strength, and Decaffeinated and available in multiple flavors including pink lemonade, grape, pomegranate, berry, orange, and lemon-lime. 5-hour Energy contains caffeine, citicoline, tyrosine, phenylalanine, taurine, malic acid, glucuronolactone, and a blend of vitamins B6, B12, Niacin and folic acid. 5-hour Energy Decaf,

which contains choline, is alleged to contain only half as much caffeine as a half cup of decaffeinated coffee, and no Niacin.

17. In the Spring of 2004, health chain, GNC, began to stock 5-hour Energy in its stores. Soon after the product began to appear in Walgreens, Rite Aid, and regional chain stores. Currently the product is available for purchase at gas stations, Wal-Marts, and supermarkets.

18. Defendant grossed more than 600 million dollars in 2011 off 1 billion dollars of retail sales, according to Forbes Magazine and is said to have 90 percent of the so-called “energy shot” market.

19. Defendant asserts that in addition to the light and portable container, in which the product comes, 5-hour Energy is packed with vitamins and amino acids, contains no sugar, zero herbal stimulants and is only four calories.

20. Defendant’s main point of sale is that unlike energy drinks and common caffeine products, 5-hour Energy produces “no crash later”.

21. Although Defendant points to purported scientific studies to and research to this claim, only reports to the contrary have been published.

22. Earlier this month the New York Times published an article titled “Energy Drinks promised Edge, but Experts say Proof is Scant” (Barry Meier, January 1, 2013), citing widespread scientific and governmental criticism of manufacturers assertion that energy drinks provided any more benefit than the average dose of caffeine consumed in a cup of coffee.

23. According to Defendant’s website 5-hour Energy significantly outperformed placebo in a clinical trial on continuity of attention and self-related awareness implying that consumption of 5-hour Energy will improve concentration and alertness. However, nothing in that comparison to a placebo supports Defendant’s assertion that 5-hour Energy provides

anything more for concentration or awareness than any other product which contains caffeine.

24. Despite the lack of any reported scientific support for a claim that 5-hour Energy provides more benefit to consumers than a caffeine tablet or cup of coffee, Defendant continues to market their product as a superior source of energy worthy of a premium price.

25. Additionally, Defendant's web site asserts that the product is "packed with vitamins".

26. A study undertaken at Vanderbilt University specifically directed at 5 Hour Energy, sheds light on the true effects and dangers of some of these ingredients:<sup>1</sup>

- a. Niacin: A Niacin Flush can cause liver toxicity, worsening of stomach ulcers, and altered blood sugar or insulin levels or uric acid concentrations;
- b. Vitamin B6: It has yet to be shown that B6 supplementation in healthy people causes enhanced cognitive function;
- c. Folic Acid: Giving folate to a person with a B12 deficiency can cause irreversible neurologic damage;
- d. Vitamin B12: There is no evidence of the efficacy of vitamin B12 on cognitive function.

27. The ultimate conclusion, based in part off of another scientific study, was that B6, B12, and folic acid supplementation, alone or in combinations, do not provide adequate evidence for a beneficial effect of supplementation on cognitive function testing in people with either normal or impaired cognitive function.

28. The significance of this conclusion is that it highlights the discrepancy between the advertising claims and the actual science and research.

29. In a 2003 article titled "Debunking the Effects of Taurine in Red Bull Energy

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<sup>1</sup> 5-Hour Energy: The Health Energy Drink? <http://healthpsych.psy.vanderbilt.edu/2008/5-HourEnergy.htm>

Drink”<sup>2</sup>, the study concluded that the claimed improvement in cognitive capabilities and muscular performance were more plausibly related to caffeine alone rather than the purported unique combination of the key components of caffeine, taurine, and glucuronolactone.

30. The report concluded that “it seems that drinking a cold cup of coffee may induce the same ‘energizing and refreshing’ effects of drinking Red Bull - and best of all, at one-third the cost.” These same key ingredients are also all found in 5-hour Energy.

31. More recently, a study on the cognitive effects of key energy drink ingredients caffeine, taurine, and glucose, similarly concluded that caffeine content, but not taurine or glucose in energy drinks drives cognitive improvements in executive control, working memory, and psychomotor performance.<sup>3</sup>

32. Another study reached a similar conclusion after its evaluation of multiple ingredients commonly found in energy drinks such as 5-hour Energy, including taurine, glucuronolactone, glucose, B vitamins, guarana, yerbe mate, carnitine, St. John’s wort, and ginseng.<sup>4</sup> The study concluded that there is little, if any, solid evidence to support an increase in either physical or mental energy due to consumption of energy drinks except for the increases attributable to caffeine.

33. Finally, the European Food and Safety Commission undertook a study of taurine and found that there a cause and effect relationship has not been established between taurine and

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<sup>2</sup> “Debunking the Effects of Taurine in Red Bull Energy Drink”, Kim, Woojae, Nutrition Bytes, Department of Biological Chemistry, UCLA, David Geffen School of Medicine, UC Los Angeles, 2003.

<sup>3</sup> “Differential cognitive effects of energy drink ingredients: Caffeine, taurine, and glucose”, Giles, Grace, Mahoney, Caroline, et al, Pharmacology, Biochemistry, and Behavior 102 (2012) 569-577.

<sup>4</sup> “Do energy drinks contain active components other than caffeine?”, McLellan, Tom and Lieberman, Harris, Nutrition Reviews, Vol. 70(12):730-744.

its contribution to cognitive function, cardiac function, and a delay in the onset of physical fatigue.<sup>5</sup>

34. 5-hour Energy claims to provide more than 8000 percent of the recommended daily intake for B12 and 2000 percent of the recommended intake of B6. However, according to Dr. Brent Bauer, director of the Complementary and Integrative Medicine Program at the Mayo Clinic, high doses of B vitamins are not going to boost energy unless someone is B-deficient.<sup>6</sup>



| <b>Supplement Facts</b>  |               |
|--|---------------|
| 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).



<sup>5</sup> EFSA Journal 2011; 9(4):2035.

<sup>6</sup> Energy Shots Review: Do they work? Are they safe? <http://www.webmd.co/food-recipes/features/energy-shots-review?print=true>



**The Product and Living Essentials' Advertising**

35. Defendant's exhaustive advertising campaign builds on this deception. In truth, Defendant has no independent, reliable, or competent support for its claims.

36. Throughout the Class Period, Defendant has marketed 5-hour Energy as producing "hours of energy now-no crash later" and that the consumer "can feel it in minutes and it lasts for hours".

37. In the "Frequently Asked Questions" section of 5-hour Energy's website (<http://www.5hourenergy.com/QandA.asp>), Defendant represents that the product is "a liquid energy shot that can help you feel sharp and alert for hours."

38. In 2007, National Advertising Division, an advertising watchdog group affiliated with the Council of Better Business Bureau conducted a review of popular energy drinks and shots, which included 5-hour Energy. According to results reported by the New York Times, 24 percent of the people who used 5-hour energy had a "moderately severe" crash afterward. <http://www.nytimes.com/2013/01/03/business/5-hour-energys-no-crash-later-claim-is-disputed.html?ref=business&r=2&>

39. The review concluded that while the company's 2007 study had shown there was evidence to support a "qualified claim that 5-hour Energy results in less of a crash than Red Bull and Monster" Energy, the study showed that 5-hour Energy users experienced caffeine-related crashes, and therefore the product was inadequate to support a "no crash" claim.

40. Following the study the group recommended that Defendant discontinue the "no crash claim" based on Defendant's own evidence.

41. Instead, Defendant added an asterisk-like symbol and footnote to its no-crash

claim explaining that the user would have “no sugar crash” as the product did not contain sugar.

42. Andrea C. Levine, director of the National Advertising Division, recently reopened the group’s review of the “no crash later” claim after Defendant incorrectly asserted in a public statement that the group had found all of Living Essentials’ claims to be substantiated. Ms. Levine stated that apparently Living Essentials had decided to use only select portions of the report and failed to follow the group’s recommendation that Living Essentials drop the language. Ms. Levine stated that Living Essentials added self-serving language of its choosing in the statement as well. In the event that Living Essentials fails to respond or inadequately responds, the National Advertising Division has stated it will likely refer the matter to the Federal Trade Commission.

43. Defendant’s nationwide advertising campaign for 5-hour Energy has been extensive and comprehensive throughout the Class Period. Defendant has spent millions of dollars conveying its persistently deceptive message that 5-hour Energy provides superior energy or alertness benefits to consumers over a caffeine tablet or standard cup of coffee across the United States.

44. Defendant has orchestrated its deceptive 5-hour Energy advertising campaign by using a variety of media, including television, newspapers, radio, media tours, the Internet, email blasts, video news releases, point of sale displays, and prominently on the product’s packaging. As a result of its pervasive and uniform advertising campaign, Defendant has elevated 5-hour Energy to become one of the top sellers in the energy drink category.

45. As a result of Defendant’s deceptive and misleading messages and omissions about 5-hour Energy, conveyed directly through its marketing and advertising campaigns, Defendant has been able to charge a significant price premium for 5-hour Energy over traditional

caffeine products, which it has convinced consumers to pay for a purportedly superior product, as its advertising misleadingly conveys.

46. Defendant's false and misleading representation claiming 5-hour Energy provides superior energy or alertness benefits to consumers over a caffeine tablet or standard cup of coffee and omissions regarding the Products potential health risks have been – and continue to be – material to consumers, including Plaintiff and other members of the Class, and Defendant knows that it is misleading representations are material in nature.

**The False, Misleading, and Deceptive Claims**

47. Defendant's claims about 5-hour Energy's effectiveness and superiority with regard to energy or alertness benefits to consumers over a caffeine tablet or standard cup of coffee are false, deceptive, unfair, and unconscionable because there is not sufficient, competent and/or reliable scientific evidence and/or substantiation for 5-hour Energy's effectiveness and superiority claims when the Product is used by the consuming public in real world settings.

48. There is has no competent, credible, and reliable scientific evidence that is sufficient in quality and quantity, based on standards generally acceptable in the relevant scientific fields, when considered in light of the entire body of relevant and reliable scientific evidence, to substantiate its claims regarding the superior effectiveness of 5-hour Energy.

49. Defendant's purported scientific evidence is neither competent nor reliable. Defendant does not possess any tests, analyses, research, or studies that have been conducted and evaluated in an objective manner. To the contrary, Defendant's claims appear to be based only on a single, in-house study, in which Defendant's product is compared against a placebo, which Defendant has failed to describe.

**Health Related Concerns**

50. In December 2012, the nonprofit Center for Science in the Public Interest (“CSPI”) issued a warning to consumers due to Living Essentials’ self-serving attempt in a web advertisement to imply that CSPI and director Michael Jacobson had endorsed the safety of 5-hour Energy.<sup>7</sup>

51. In fact, the CSPI stated that 5 hour Energy could be linked to insomnia, anxiety, reduced fertility, as well as the more serious, life threatening events, as reported by the New York Times due to the interactions and blend of chemicals in 5-hour Energy.

52. Director Jacobson even went so far as to advise consumers not to use 5-hour Energy. The CSPI warning quotes Senator Durbin who stated that Defendant’s “ad campaign was misleading and should be stopped.,” and that the “amount of caffeine and other additives in many of these energy drinks is way in excess of what is health for children and adolescents”. Additionally, Representative Edward Markey recommended that “all Americans, particularly younger ones, should be cautious before consuming them.”

53. As discussed herein, Defendant’s national advertising campaign for 5-hour Energy targets children, adolescents, and young adults.

54. A study titled Health Effects of Energy Drinks on Children, Adolescents and Young Adults, made the following conclusions with respect to the supplements:<sup>8</sup>

- a. Energy drinks have no therapeutic benefit, and both known and unknown pharmacology of various ingredients, combined with reports of toxicity, suggest that these drinks may put some children

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<sup>7</sup> <http://cspinet.org/new/201212051.html> (last visited January 19, 2013)

<sup>8</sup> “Health Effects of Energy Drinks on Children Adolescents, and Young Adults”, Seifert, Sara, Schaechter, Judith, et al, Pediatrics, February 14, 2011.

at risk for serious adverse health effects;

- b. Typically, energy drinks contain high levels of caffeine, taurine, and guarine, which have stimulant properties and cardiac and hematologic activity, but manufacturers claim that energy drinks are nutritional supplements which shields them from the caffeine limits imposed on sodas and the safety testing and labeling required of pharmaceuticals;
- c. Other ingredients vary, are understudied, and are not regulated;
- d. Youth-aimed marketing and risk taking adolescent development tendencies combine to increase over-dose potential;
- e. High consumption is suggested by self-report surveys but is under documented in children (deleterious associations with energy drink consumption have been reported globally in case reports and popular media); and
- f. Interactions between compounds, additive and dose-dependent effects, long-term consequences, and dangers associated with risky behavior in children remain to be determined.

55. As a result of Defendant's deceptive and misleading messages and omissions about 5-hour Energy, conveyed directly through its marketing and advertising campaigns, Defendant has been able to charge a significant price premium for 5-hour Energy over traditional caffeine products, which it has convinced consumers to pay for a purportedly superior product, which may in fact pose serious undisclosed health risks.

#### **CLASS ACTION ALLEGATIONS**

56. Plaintiff brings this class action on behalf of himself and all others similarly situated as Class Members pursuant to Rule 23 of the Federal Rules of Civil Procedure.

57. Plaintiff seeks to represent a "National Class" defined as follows:

**All United States residents who purchased 5-hour Energy excluding Defendant, Defendant's officers, directors, and employees, Defendant's subsidiaries, those who purchased the products for the purpose of resale, the Judge to which this case is assigned and the immediate family of the Judge to which this case is assigned.**

58. Plaintiff seeks to represent a "Louisiana Class" defined as follows:

**All Louisiana residents who purchased 5-hour Energy excluding Defendant, Defendant's officers, directors, and employees, Defendant's subsidiaries, those who purchased the products for the purpose of resale, the Judge to which this case is assigned and the immediate family of the Judge to which this case is assigned.**

59. Plaintiff is a member of the Class that he seeks to represent. Plaintiff is a United States resident who purchased 5-hour Energy.

60. Plaintiff is a member of the Class that he seeks to represent. Plaintiff is a Louisiana resident who purchased 5-hour Energy.

61. The definition of the Class is narrowly tailored so as to include only identifiable Class Members who can be identified through Defendant's wholesale sales information. The Class has no time limit because, as discussed below, the statute of limitations has been tolled by the Defendant's fraudulent concealment of the true nature of the Product purchased by Class Members.

62. The proposed Class is so numerous that the individual joinder of all its members, in this or any action, is impracticable. The exact number or identification of the members of the Class is presently unknown to Plaintiff, but it is believed to comprise thousands of Louisiana residents, and millions of United States residents, thereby making joinder impractical.

63. Common questions of fact and law exist as to all Class Members and predominate over questions affecting only individual members. These include, but are not limited to, the

following:

- a. Whether, in their normal and customary use by consumers, 5-hour Energy works as advertised, marketed, and conveyed to consumers;
- b. Whether, in the course of business, Defendant represented that 5-hour Energy has characteristics, uses, benefits or qualities that it does not have when used in a customary manner by consumers;
- c. Whether the claims Defendant made and is making regarding 5-hour Energy are unfair or deceptive, specifically, whether 5-hour energy provides five hours of energy with no crash later and whether it provides additional energy or alertness benefits to consumers over a caffeine tablet or standard cup of coffee;
- d. Whether Defendant is supplying 5-hour Energy in accordance with its representations including whether 5-hour Energy provides five hours of energy with no crash later and whether it provides additional energy or alertness benefits to consumers over a caffeine tablet or standard cup of coffee;
- e. Whether Defendant knew at the time the consumer transactions took place that the consumer would not receive the benefit of five hours of energy with no crash later or additional energy or alertness benefits to consumers over a caffeine tablet or standard cup of coffee from 5-hour Energy that Defendant was claiming the consumer would receive;
- f. Whether Defendant knowingly made a misleading statement in connection with a consumer transaction that the consumer was likely to rely upon to his detriment;
- g. Whether Defendant knew or should have known that the representations and advertisements regarding the 5-hour Energy were unsubstantiated, false, and misleading;
- h. Whether Defendant has breached express and implied warranties in the sale and marketing of 5-hour Energy and/or 5-hour Energy contains redhibitory defects;
- i. Whether Defendant has been unjustly enriched by the sale of 5-hour Energy to the Plaintiff and Class;

- j. Whether the Plaintiff and the Class members that purchased 5-hour Energy suffered monetary damages and, if so, what is the measure of those damages;
- k. Whether Plaintiff and the Class members are entitled to an injunction, damages, restitution, equitable relief and other relief deemed appropriate and the amount and nature of such relief.

64. Plaintiff's claims are typical of the claims of the Class members. Plaintiff and all Class members purchased 5-hour Energy shots that were designed, tested, manufactured, marketed, advertised, warranted and/or sold, and placed in the stream of commerce by Defendants. Plaintiffs and all other Class members purchased 5-hour Energy that could not perform anywhere near advertised. The nature of the misrepresentation is the same for the Plaintiff and all Class members, even if they purchased different types or flavors of 5-hour Energy.

65. The factual bases of Defendant's misconduct are common to the Class Members and represent a common thread of deceptive advertising and breach of warranty resulting in injury to all Class Members. Plaintiff is asserting the same rights, making the same claims, and seeking the same relief for themselves and all other Class Members. The central question of whether Defendant's representations are accurate and truthful is common to all Class members and predominates over all other questions, legal and factual in this litigation.

66. Plaintiff is an adequate representative of the proposed Class because he is a Class Member and does not have interests that conflict with those of the other Class members he seeks to represent. Plaintiff is represented by experienced and able counsel who have litigated numerous class-action lawsuits, and Plaintiff's Counsel intend to prosecute this action vigorously for the benefit of the proposed Class. Plaintiff and his Counsel will fairly and adequately protect



the interests of the Class Members.

67. A class action is the superior available method for the efficient adjudication of this litigation because:

- a. The prosecution of separate actions by individual members of the Class would create a foreseeable risk of inconsistent or varying adjudications which would establish incompatible results and standards for Defendant;
- b. Adjudications with respect to individual members of the Class would, as a practical matter, be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their own separate interests;
- c. Class action treatment avoids the waste and duplication inherent in potentially thousands of individual actions, and conserves the resources of the courts; and
- d. The claims of the individual class members are relatively small compared to the burden and expense that would be required to individually litigate their claims against Defendant, so it would be impracticable for the members of the Class to individually seek redress for Defendant's wrongful conduct. Even if the members of the Class could afford individual litigation, the court system could not. Individualized litigation creates a potential for inconsistent or contradictory judgments, and increases the delay and expense to all parties and the court system. By contrast, the class action device presents far fewer management difficulties, and provides the benefits of single adjudication, economy of scale, and comprehensive supervision by a single court.

68. A class action for injunctive and equitable relief pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure is also appropriate. Defendant acted or refused to act on grounds generally applicable to the Class thereby making appropriate final injunctive and

equitable relief with respect to the Class as a whole. Defendant's actions are generally applicable to the Class as a whole, and Plaintiff, on behalf of the Class, seeks damages and injunctive relief described herein. Moreover, Defendant's systemic policy and practices make declaratory relief with respect to the Class as a whole appropriate.

### **FRAUDULENT CONCEALMENT**

69. Defendant was and remains under a duty to Plaintiff and the Class to disclose the facts, as alleged herein. The duty to disclose the true facts arises because, as the manufacturers, Defendant is in a superior position to know the true character and quality of their products and the true facts are not something that Plaintiff and Class members could, in the exercise of reasonable diligence, have discovered independently prior to purchasing 5-hour Energy.

70. The facts concealed and/or not disclosed to Plaintiff and the Class, specifically that consumers do not receive the benefit of five hours of energy with no crash later or energy or alertness benefits to consumers over a caffeine tablet or standard cup of coffee, are material facts in that a reasonable person would have considered them important in deciding whether or not to purchase (or to pay the same price for) 5-hour Energy.

71. Defendant intentionally concealed and/or failed to disclose the shortcomings of 5-hour Energy for the purpose of inducing Plaintiff and Class members to act thereon.

72. Plaintiff and Class members justifiably acted upon, or relied upon to their detriment, the concealed and/or non-disclosed material facts as evidenced by their purchase of 5-hour Energy. Had they known of the true character and quality of 5-hour Energy, Plaintiff and Class members would not have purchased (or would have paid less for) the Product.

73. As a direct and proximate cause of Defendant's misconduct, Plaintiff and Class members have suffered actual damages. Defendant's conduct has been and is malicious, wanton

and/or reckless and/or shows a reckless indifference to the interests and rights of others.

**CAUSES OF ACTION**

**COUNT I**  
**BREACH OF WARRANTY – REDHIBITION**  
**(on behalf of the Louisiana Class)**

74. Plaintiff, individually, and on behalf of all others similarly situated, adopts and incorporates by reference all allegations contained in the foregoing paragraphs as though fully set forth herein.

75. Plaintiff and Class members are “buyers” and Defendant is the “manufacturer” of 5-hour Energy under La. C.C. Art. 2520, *et seq.*

76. Under Louisiana law, the manufacturer warrants the buyer against redhibitory defects or vices in the things sold. La. C.C.P. Art. 2520.

77. Under Louisiana Civil Code Article 2520, a defect is redhibitory in two situations: (1) where the defect “renders the thing useless, or its use so inconvenient” that it has to be presumed that the buyer would not have bought the thing had he known of the defect or (2) where, “without rendering the thing totally useless,” the defect diminishes the product’s usefulness or its value such that it must be presumed that the buyer would still have bought it but for a lesser price.

78. Had Plaintiff and Class members known of that 5-hour Energy provides no more benefit to consumers than a caffeine tablet or cup of coffee, and that it poses undisclosed health risks they would not have purchased 5-hour Energy at all, or at least not for the premium price paid.

79. In particular, 5-hour Energy possesses a redhibitory defect because the Defendant has no competent, credible, and reliable scientific evidence that is sufficient in quality and

quantity, based on standards generally acceptable in the relevant scientific fields, when considered in light of the entire body of relevant and reliable scientific evidence, to substantiate its claims regarding the superior effectiveness of 5-hour Energy.

80. At the time of the sale of 5-hour Energy to Plaintiff and Class members, Defendant had actual or constructive notice of ineffectiveness of 5-hour Energy and its potential health risks because numerous complaints were made to Defendant.

81. Despite this knowledge and opportunity to cure the redhibitory defect, Defendant has failed to take any action to correct the erroneous information disseminated by its national advertising campaign.

82. Defendant is a “manufacturer” of 5-hour Energy under La. C.C. Art. 2520, *et seq.* As a manufacturer, Defendant is deemed to know that its products it sells contain a redhibitory defect. La. C.C.P. Art. 2545.

83. Plaintiff and members of the Class are entitled to injunctive relief, compensatory damages, equitable and declaratory relief, costs and reasonable attorneys’ fees.

**COUNT TWO**  
**UNJUST ENRICHMENT**  
**(on behalf of the National Class or, alternatively, the Louisiana Class)**

84. Plaintiff, individually, and on behalf of all others similarly situated, adopts and incorporates by reference all allegations contained in the foregoing paragraphs as though fully set forth herein.

85. Plaintiff pleads this count in the alternative.

86. Substantial benefits have been conferred on Defendant by Plaintiff and the Class by purchasing 5-hour Energy, and Defendant has knowingly and willingly accepted and enjoyed these benefits.

87. Defendant either knew or should have known that the payments rendered by Plaintiff and the Class were given and received with the expectation that 5-hour Energy would perform as represented and warranted. For Defendant to retain the benefit of the payments under these circumstances is inequitable.

88. Defendant's acceptance and retention of these benefits under the circumstances make it inequitable for Defendant to retain the benefit without payment of the value to the Plaintiff and the Class.

89. Plaintiff and the Class are entitled to recover from Defendant all amounts wrongfully collected and improperly retained by Defendant, plus interest thereon.

90. As a direct and proximate result of Defendant's wrongful conduct and unjust enrichment, Plaintiff and the Class are entitled to an accounting, restitution from, and institution of, a constructive trust disgorging all profits, benefits, and other compensation obtained by Defendant, plus attorneys' fees, costs, and interest thereon.

**COUNT THREE**  
**FRAUD BY UNIFORM WRITTEN MISREPRESENTATION AND OMISSION**  
**(on behalf of the National Class or, alternatively, the Louisiana Class)**

91. Plaintiff, individually, and on behalf of all others similarly situated, adopts and incorporates by reference all allegations contained in the foregoing paragraphs as though fully set forth herein.

92. Defendant intentionally, willfully, falsely, and knowingly uniformly misrepresented material facts in writing that relate to the character and quality of 5-hour Energy. Specifically, Defendant intentionally and willfully misrepresented that 5-hour Energy provides benefit to consumers in addition to that than a caffeine tablet or cup of coffee, and failed to

disclose that it poses health risks on websites, in various media advertising, and at point of sale materials disseminated or caused to be disseminated by Defendant.

93. Defendant also made intentional misrepresentations to Class members who sought to have Defendant honor its warranties. Defendant represented to Class members by affirmative misrepresentations and omissions that 5-hour Energy provides energy or alertness benefits over and above what could be achieved by a caffeine tablet or standard cup of coffee even though it has no competent, credible, and reliable scientific evidence that is sufficient in quality and quantity, based on standards generally acceptable in the relevant scientific fields, when considered in light of the entire body of relevant and reliable scientific evidence, to substantiate its claims regarding the superior effectiveness of 5-hour Energy.

94. Defendant's uniform written misrepresentations were made with the intent that the general public, including Plaintiff and Class, would rely upon them. Defendant's representations were made with knowledge of the falsity of such statements, or in reckless disregard of the truth thereof, and gave Defendant an unjust advantage and caused a loss to Plaintiff and Class Members. The Defendant's claims of superior effectiveness are so central to the consumer's selection of 5-hour Energy that the Defendant knew and intended that consumers would rely on those misrepresentations in determining whether to purchase 5-hour Energy instead of the less expensive alternatives.

95. In actual and reasonable reliance upon Defendant's misrepresentations, Plaintiff and Class members purchased 5-hour Energy for its intended and reasonably foreseeable purposes. Plaintiff and Class members were unaware of the true facts concerning the effectiveness and health risks of 5-hour Energy, which were concealed from the Plaintiff and the Class Members. If Plaintiff and Class members had been aware of the concealed facts, Plaintiff

and Class members would not have purchased 5-hour Energy at all or for the premium price paid. Plaintiff's and Class members' reliance on the representations of the Defendant was reasonable.

96. Defendant misrepresented material facts with the intent to defraud Plaintiff and the Class members. Plaintiff and the Class members were unaware of the intent of Defendant and relied upon these representations in agreeing to purchase 5-hour Energy.

- a. In actual and reasonable reliance upon Defendant misrepresentations, Plaintiff and Class members purchased 5-hour Energy and did not benefit from the Product as represented, the direct and proximate result of which was injury and harm to Plaintiff and Class members because: they would not have purchased 5-hour Energy if the true facts concerning its effectiveness had been known;
- b. they paid a price premium due to the mislabeling of 5-hour Energy; and
- c. 5-hour Energy did not (and cannot) perform as promised.

**COUNT FIVE**  
**INJUNCTIVE RELIEF**

**(on behalf of the National Class or, alternatively, the Louisiana Class)**

97. Plaintiff, individually, and on behalf of all others similarly situated, adopts and incorporates by reference all allegations contained in the foregoing paragraphs as though fully set forth herein.

98. Defendant has refused to act on grounds generally applicable to the Injunctive Relief Plaintiffs and other members of the Injunctive Relief States Classes, thereby making final injunctive relief appropriate.

99. Defendant's conduct, as more fully set forth herein, both in the past and through the present day, has demonstrated a willful disregard for proven scientific facts in a clear attempt to sell a product that is no more effective than other, less expensive caffeine products such as coffee.

100. Defendant persists in its deceptive and unfair marketing and sales practices concerning the Product to the detriment of consumers across the country, including the Injunctive Relief States Class.

101. If Defendant is allowed to continue with these practices, consumers-the Injunctive Relief Plaintiffs and other members of the Injunctive Relief States Class-will be irreparably harmed in that they do not have a plain, adequate, speedy, or complete remedy at law to address all of the wrongs alleged in this Complaint, unless injunctive relief is granted to stop Defendant's improper conduct concerning its marketing and sale of the Product.

102. The Injunctive Relief Plaintiff and the other members of the Injunctive Relief States Class, is therefore, entitled to an injunction requiring Defendant its unfair and deceptive practices relating the marketing sale of the Product, as alleged herein, including the effects thereof.

103. The Injunctive Relief Plaintiff seeks a Court Order requiring Defendant to do the following:

- a. discontinue advertising, marketing, packaging and otherwise representing its 5-hour energy products as being superior to conventional caffeine products;
- b. undertake an immediate public information campaign to inform the Injunctive Relief Plaintiff and the other members of the Injunctive Relief State Class, of the truth about Defendant's products and Defendant's prior practices relating thereto; and
- c. correct any erroneous impression the Injunctive Relief Plaintiff and the other members of the Injunctive Relief States Class, may have derived concerning the nature, characteristics, or qualities of 5-hour energy,



including without limitation, the placement of corrective advertising and providing written notice to the general public.

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiff, Will Waring, individually, and on behalf of the Class members, prays that this case be certified and maintained as a class action and for judgment to be entered upon Defendant as follows:

1. For economic and compensatory damages on behalf of Plaintiff and all members of the Class;
2. For restitution;
3. For actual damages sustained;
4. For injunctive and declaratory relief, as claimed herein;
5. For reasonable attorneys' fees and reimbursement of all costs for the prosecution of this action; and
6. For such other and further relief as this Court deems just and appropriate.

**JURY DEMAND**

Plaintiff, Will Waring, individually, and on behalf of the Class members, hereby demands a trial by jury as to all issues so triable.

DATED: January 28, 2013

Respectfully submitted,

By: /s/ Richard J. Arsenault

Richard J. Arsenault

Douglas E. Rushton

**NEBLETT, BEARD & ARSENAULT**

Post Office Box 1190

Alexandria, Louisiana 71309

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*Counsel for Plaintiff*

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

(b) County of Residence of First Listed Plaintiff (EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)

DEFENDANTS

County of Residence of First Listed Defendant (IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff, 2 U.S. Government Defendant, 3 Federal Question (U.S. Government Not a Party), 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- Citizen of This State, Citizen of Another State, Citizen or Subject of a Foreign Country, PTF DEF, Incorporated or Principal Place of Business In This State, Incorporated and Principal Place of Business In Another State, Foreign Nation

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Table with 5 columns: CONTRACT, REAL PROPERTY, TORTS, CIVIL RIGHTS, PRISONER PETITIONS, FORFEITURE/PENALTY, LABOR, IMMIGRATION, BANKRUPTCY, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES. Contains various legal categories and checkboxes.

V. ORIGIN (Place an "X" in One Box Only)

- 1 Original Proceeding, 2 Removed from State Court, 3 Remanded from Appellate Court, 4 Reinstated or Reopened, 5 Transferred from Another District, 6 Multidistrict Litigation

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity): Brief description of cause:

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. DEMAND \$ CHECK YES only if demanded in complaint: JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY

(See instructions): JUDGE DOCKET NUMBER

DATE SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY

RECEIPT # AMOUNT APPLYING IFP JUDGE MAG. JUDGE

**INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44**

## Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

- I.(a) Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.
- (b) County of Residence.** For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)
- (c) Attorneys.** Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".
- II. Jurisdiction.** The basis of jurisdiction is set forth under Rule 8(a), F.R.Cv.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.  
 United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.  
 United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.  
 Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.  
 Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; **NOTE: federal question actions take precedence over diversity cases.**)
- III. Residence (citizenship) of Principal Parties.** This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.
- IV. Nature of Suit.** Place an "X" in the appropriate box. If the nature of suit cannot be determined, be sure the cause of action, in Section VI below, is sufficient to enable the deputy clerk or the statistical clerk(s) in the Administrative Office to determine the nature of suit. If the cause fits more than one nature of suit, select the most definitive.
- V. Origin.** Place an "X" in one of the six boxes.  
 Original Proceedings. (1) Cases which originate in the United States district courts.  
 Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441. When the petition for removal is granted, check this box.  
 Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.  
 Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.  
 Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.  
 Multidistrict Litigation. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407. When this box is checked, do not check (5) above.
- VI. Cause of Action.** Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC 553 Brief Description: Unauthorized reception of cable service
- VII. Requested in Complaint.** Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.  
 Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction.  
 Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.
- VIII. Related Cases.** This section of the JS 44 is used to reference related pending cases, if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.
- Date and Attorney Signature.** Date and sign the civil cover sheet.

AO 440 (Rev. 06/12) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

Eastern District of Louisiana

William Waring

Plaintiff(s)

v.

Innovation Ventures, LLC d/b/a
Living Essentials, LLC,
a Michigan Corporation

Defendant(s)

Civil Action No.

SUMMONS IN A CIVIL ACTION

To: (Defendant's name and address) Innovation Ventures, LLC d/b/a
Living Essentials, LLC
a Michigan Corporation

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are: Richard J. Arsenault
Neblett, Beard & Arsenault
P.O. Box 1190
Alexandria, LA 71309-1190

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT

Date:

Signature of Clerk or Deputy Clerk

Civil Action No. \_\_\_\_\_

**PROOF OF SERVICE**

*(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))*

This summons for *(name of individual and title, if any)* \_\_\_\_\_  
was received by me on *(date)* \_\_\_\_\_ .

I personally served the summons on the individual at *(place)* \_\_\_\_\_  
\_\_\_\_\_ on *(date)* \_\_\_\_\_ ; or

I left the summons at the individual's residence or usual place of abode with *(name)* \_\_\_\_\_  
\_\_\_\_\_, a person of suitable age and discretion who resides there,  
on *(date)* \_\_\_\_\_ , and mailed a copy to the individual's last known address; or

I served the summons on *(name of individual)* \_\_\_\_\_ , who is  
designated by law to accept service of process on behalf of *(name of organization)* \_\_\_\_\_  
\_\_\_\_\_ on *(date)* \_\_\_\_\_ ; or

I returned the summons unexecuted because \_\_\_\_\_ ; or

Other *(specify)*: \_\_\_\_\_

My fees are \$ \_\_\_\_\_ for travel and \$ \_\_\_\_\_ for services, for a total of \$ \_\_\_\_\_ 0.00 \_\_\_\_\_ .

I declare under penalty of perjury that this information is true.

Date: \_\_\_\_\_

\_\_\_\_\_  
*Server's signature*

\_\_\_\_\_  
*Printed name and title*

\_\_\_\_\_  
*Server's address*

Additional information regarding attempted service, etc: