

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
MEMPHIS DIVISION**

**MONICA ROSS HASSELL, individually)
and as surviving spouse of ANTONIO)
JAMES HASSELL,)**

Plaintiff)

vs.)

**INNOVATION VENTURES, LLC)
dba Living Essentials, a Michigan)
corporation; BIO CLINICAL)
DEVELOPMENT, INC.; and)
MANOJ BHARGAVA)**

Defendants)

CASE NO. 2-10-cv-02557-JPM-cgc

JURY DEMAND

FIRST AMENDED COMPLAINT FOR DAMAGES

NATURE OF THE CASE

1. This is an action for personal injuries and wrongful death brought by Monica Hassell as the surviving spouse of Antonio James Hassell who, at age twenty-seven, suffered a sudden heart attack (ventricular arrhythmia) on August 2, 2009 and subsequently died on March 1, 2010 in Memphis, Tennessee as a direct and proximate result of his consumption of the widely advertised “5-hour ENERGY” drink. This lawsuit asserts claims for negligence, strict product liability for design defect, strict product liability for failure to warn, breach of implied warranty and punitive damages against each defendant. Each defendant was responsible for the design, manufacture, production, testing, study, inspection, mixture, labeling, marketing, advertising, sales, promotion, and/or distribution of “5-hour ENERGY. ”

JURISDICTION AND VENUE

2. This court has subject matter jurisdiction over this matter pursuant to 28 U.S.C. §1332 (diversity of citizenship). The matter in controversy in this civil action exceeds the sum or value of \$75,000, exclusive of costs and interests, as to each defendant, and is between citizens of different states.

3. Venue in this District is proper under 28 U.S.C. §1391. The events giving rise to this cause of action occurred in substantial part in this District, where defendants transact business.

THE PARTIES

Plaintiff

4. Plaintiff Monica Hassell seeks wrongful death and survivor damages as a result of her husband's consumption of defendants' homeopathic "energy drink" product – "5-hour ENERGY." Plaintiff Monica Hassell and her deceased husband, Antonio J. Hassell were at all times relevant citizens and residents of Tennessee.

Defendants

5. Defendant, Innovation Ventures, LLC d/b/a Living Essentials ("Innovation" or "Living Essentials" herein), is a Michigan limited liability company with its principal place of business in Novi, Michigan. At all relevant times, this defendant was engaged in the design, manufacture, production, testing, study, inspection, mixture, labeling, marketing, advertising, sales, promotion, and/or distribution of "5-hour ENERGY." Defendant, Innovation Ventures, LLC d/b/a Living Essentials may be served with process by service on its registered agent for service of process: Matthew S. Dolmage, 39855 Farmington Hills, Michigan 48331.

6. Defendant Bio Clinical Development, Inc. is a Michigan corporation with its principal place of business in Farmington Hills, Michigan. At all relevant times, this

defendant was engaged in the design, manufacture, production, testing, study, inspection, mixture, labeling, marketing, advertising, sales, promotion, and/or distribution of “5-hour ENERGY.” Defendant Bio Clinical Development, Inc. may be served with process by service on its registered agent for service of process: Oakland Law Group, PLLC, 39855 Hills Tech Drive, Farmington Hills, Michigan 48331. Plaintiff avers, upon information and belief, that Bio Clinical Development, Inc. and/or Defendant Manoj Bhargava are operating Innovation and Living Essentials as an alter ego or as a single business enterprise.

7. Defendant Manoj Bhargava is a citizen and resident of Michigan. At all relevant times, this defendant was engaged in the design, manufacture, production, testing, study, inspection, mixture, labeling, marketing, advertising, sales, promotion, and/or distribution of “5-hour ENERGY.” He may be served with process at: 34643 Berkshire Court, Farmington Hills, Michigan 48331. Plaintiff avers, upon information and belief, that Bio Clinical Development, Inc. and Innovation are the alter ego of Manoj Bhargava and he runs these companies as a single business enterprise.

8. For purposes of this Complaint, all of the above defendants, companies, corporations, subsidiaries, and divisions will be collectively referred to as “Innovation.” “Innovation” includes any and all parents, subsidiaries, affiliates, divisions, franchises, partners, joint venturers and organizational units of any kind, their predecessors, successors and assigns and their present officers, directors, employees, agents, representatives and other persons acting on their behalf, including but not limited to Innovation Ventures, LLC; Living Essentials, LLC; Bio Clinical Development, Inc. and Manoj Bhargava.

FACTUAL ALLEGATIONS

Antonio J. Hassell's Injuries

9. Antonio J. Hassell consumed defendants' energy drink supplement "5-hour ENERGY." He began consuming this product in June 2009 to help keep him awake and alert at work in a warehouse where he worked from 4:00 p.m. until 1:00 and 2:00 a.m. He bought "5-hour ENERGY" at a local Exxon gas station and, on occasion at Walgreens.

10. Antonio J. Hassell had a sudden cardiac event (arrhythmia) while playing basketball on August 2, 2009 at Overton High School in Memphis, Tennessee with his friends. He was transported to the hospital and physicians at Delta Medical Center concluded that the energy drink "5-hour ENERGY" was the cause of Mr. Hassell's cardiac event because of his consumption of "5-hour ENERGY."

11. Mr. Hassell sustained anoxic encephalopathy and suffered seizures. He was transferred to Baptist East Hospital and died on March 1, 2010 from acute respiratory failure and pneumonia associated with sepsis and anoxic encephalopathy.

12. Mr. Hassell was survived by his wife and two young children (Jhamya L. Hassell, now age 5 and Antonio J. Hassell, Jr., now 3). Mr. Hassell also supported Monica Hassell's six year old son Jhamal Ross.

13. Mr. Hassell worked as an "order puller" at a warehouse in Memphis and earned \$17.61/hr.

Defendants' Misconduct

14. At all material times, each defendant was responsible for designing, manufacturing, producing, testing, studying, inspecting, mixing, labeling, marketing, advertising, selling, promoting, and/or distributing "5-hour ENERGY" described herein, which Mr. Hassell consumed.

15. Defendant Manoj Bhargava started a tiny company in suburban Detroit called Living Essentials, which began sales with only one "product" -- a claimed antihangover pill called "Chaser". The FDA chastised Mr. Bhargava for making unfounded drug

claims that “Chaser” helped to prevent hangovers and helped to prevent hangovers by absorbing elements in beer, wine and liquor that cause hangovers. In fact the “Chaser” pill product marketed by Bhargava contained vegetable carbon and activated calcium carbonate.

16. On or about 2004 Bhargava and his “Living Essentials” LLC began selling a product called “5-hour ENERGY”, a concoction of caffeine and amino acids packaged in small plastic bottles. Today, “5-hour ENERGY” accounts for about 80 percent of the rapidly expanding “energy drinks” market market, according to published reports. Living Essentials heavily advertises “5-hour ENERGY”. It spends \$60 million a year on television advertising.

17. Initially Living Essentials hired against a Texas company called Custom Nutrition Laboratories to develop the formula for 5-hour ENERGY and Custom Nutrition Laboratories first manufactured and bottled 5-hour ENERGY and Living Essentials and handled the marketing, distribution and sales. Then, in late 2007, Living Essentials fired Custom Nutrition and at the times material herein manufactured 5-hour ENERGY at its new plant in Warsaw, Indiana at the site of a former Superfund clean up site.

18. Both companies (Custom Nutrition and Innovation/Living Essentials) claimed ownership of 5-hour ENERGY’s supposedly secret recipe. Unlike older energy drinks, 5-Hour Energy does not contain sugar and has no real “energy” ingredients that would fuel a human body. The principal ingredients of 5-Hour Energy are caffeine combined in an “energy blend” with taurine, glucuronolactone, malic acid, N-acetyl, L-Tyrosine, L- phenylalanine and citicoline. Defendants, however, refuse to reveal exactly what is in the product, saying only that it is about as much caffeine as in a cup of coffee.

The caffeine in coffee can vary widely, from about 80 to 175 milligrams in an eight ounce cup. Living Essentials makes broad claims for 5-Hour Energy, saying that it is “packed with B vitamins for energy and amino acids for alertness and focus.”

19. In a court cases between Custom Nutrition, Innovation/Living Essentials and Manoj Bhargava, Custom Nutrition asserted that Manoj Bhargava ran defendant Innovation Ventures, LLC dba Living Essentials as his alter ego and intentionally transferred virtually all assets out of Innovation Ventures, LLC dba Living Essentials to make the company “judgment proof.” In fact in a brief filed by Manoj Bhargava, he admitted that “Kevin Zwierchowski and Tom Morse, two former employees of Living Essentials, both said Bhargava told them that he wanted to distribute as much cash out of the company as possible to keep it judgment proof, and both said cash distributions were made consistently.” In the same brief Bhargava admitted that in a deposition, Bhargava testified “that the net income for the year 2007 was. \$5,000 less than total distributions.” The trial court found Bhargava was subject to personal jurisdiction in Texas as an *individual* defendant. A copy of the subject brief is attached as *Exhibit A* to this Complaint. This case was settled on appeal. Accordingly, Plaintiff submits these admissions by Bhargava in his appellate brief and the ruling of the Texas court stand as irrefutable proof and collateral estoppel on the alter-ego issue.

20. Each defendant had an independent obligation to know, analyze, and disclose scientific and medical information about its “5-hour ENERGY” drink in a timely and adequate manner, and to provide warnings about risks and side effects as soon as it was aware of them. Each defendant failed to do so with respect to the “5-hour ENERGY” that Mr. Hassell consumed, including by failing to know, analyze, and/or disclose an

increased incidence and risk of heart attacks, compromised cardiac function, strokes and increased risk of cardiac arrhythmia.

21. Reliable scientific and medical evidence establish that “energy drinks” containing caffeine and amino acids (e.g. taurine) present material adverse health risks including the risk of heart attack, seizures, detrimental heart effects and death.

22. In a 2008 review article published in the *Journal of the American Pharmacists Association*, 48 J. Am. Ph. Ass’n No. 3 (May-June 2008), the authors reviewed the medical literature and stated : “[f]our documented case reports of caffeine-associated deaths were found, as well as four separate cases of seizures associated with the consumption of energy drinks.”

23. Health Canada (the Canadian “FDA”) has received 59 adverse reaction reports associated with energy drinks including nausea, vomiting and heart irregularities.

24. On July 29, 2010 Canada’s leading medical journal published an editorial calling for strict regulations for high-caffeine energy drinks noting:

“Energy drinks are very effective high-concentration caffeine delivery systems. These sugar-loaded syrups typically contain 80 to 140 mg of caffeine per 250 mL — the equivalent caffeine in one cup of coffee or two cans of cola. However, beverage companies are offering formulations with caffeine concentrations as high as 500 mg.”

...

Given the potential for harm, regulatory authorities such as Health Canada should step in. Regulations could include government-mandated restrictions on labelling, sales and marketing, or self-imposed industry-wide standards with clear labelling accompanied by public education. Many countries have either imposed or tried to impose strict regulations because of potential health risks of caffeine. Until 2008, France did not even allow the sale of Red Bull™, and in Denmark, sale was prohibited as of 2009.”

“Caffeinating Children and Youth,” *Canadian Medical Association Journal* (July 29, 2010).

25. In a study published in March 2009 in *The Annals of Pharmacotherapy* medical researchers at Wayne State University and Henry Ford Hospital in Detroit

conducted a study to “determine the cardiac effects of a commercially available, multicomponent energy drinks.” The study found that in healthy volunteers heart rate increased an average 5-7 beats/min and systolic blood pressure increased 10 mm Hg after energy drink consumption. “Effect of ‘Energy Drink’ Consumption on Hemodynamic and Electrocardiographic Parameters in Healthy Young Adults in healthy volunteers,” *The Annals of Pharmacotherapy*: Vol. 43, No. 4, pp. 596-60 (March 2009).

26. According to this study 47% of the subjects reported shakiness or being jittery (n=4), gastrointestinal symptoms or abdominal cramping (n=3), increased urination (n=1) and more forceful heart beats (n=1) at some point during the seven day study period.

27. Under the Wayne State/Henry Ford Hospital study an increase in blood pressure was also noted. The increase in pulse pressure occurred most prominently on the 7th day suggesting that this effect occurs with repeated use of energy drinks.

28. According to Dr. Kalus a consumer product that increased blood pressure could have significant health implications. According to the lead author of the study, Dr. James Kalus, a 50/50 chance of experiencing an adverse side effect is significant. The blood pressure findings in the study were material enough for the authors to recommend that persons with high blood pressure or heart disease should avoid energy drinks.

29. In an Australia a man’s heart stopped after consuming the Red Bull energy drink. In a published article, “Man's heart stops after Red Bull overdose” (Daniel Dasey, August 19, 2007) the cardiologist who treated the victim, Dr Malcolm Barlow, a cardiologist at Newcastle's John Hunter Hospital, said “it appeared excessive consumption of energy drinks had precipitated the heart attack.” The article further stated that “NSW Health [New South Wales Health] has urged people to be extremely cautious of overdosing on stimulant products. Department spokesman Dr Robert Batey said “consuming high levels of stimulants had the potential to cause heart attacks.”

30. This case report led to a medical investigation of the case that was published in the *Medical Journal of Australia*, 2009 Jan 5;190(1):41-3: “Cardiac arrest in a young

man following excess consumption of caffeinated 'energy drinks.' The authors reported that an otherwise healthy 28-year-old man had a cardiac arrest after a day of motocross racing. He had consumed excessive amounts of a caffeinated "energy drink" throughout the day. The authors concluded that a combination of excessive ingestion of caffeine- and taurine-containing energy drinks and strenuous physical activity can produce myocardial ischaemia by inducing coronary vasospasm.

31. Energy drinks have also been associated with the onset of seizures. In 2007 an article published in *Epilepsy & Behavior*. 2007 May;10(3):504-8, "New-onset seizures in adults: possible association with consumption of popular energy drinks," medical researchers at the Department of Neurology, Barrow Neurological Institute, St. Joseph's Hospital and Medical Center, Phoenix, reported a series of four patients who had discrete seizures on multiple occasions, following heavy consumption of energy drinks. Once the patients were abstinent from the energy drinks, no recurrent seizures were reported. The authors proposed that the large consumption of energy drinks rich in caffeine, taurine, and guarana seed extract could have provoked these seizures.

32. A medical study conducted in Australia in and published in *The American Journal of Medicine*, "Detrimental Effects of Energy Drink Consumption on Platelet and Endothelial Function," Volume 123, Issue 2, Pages 184-187 (February 2010) noted that energy drink consumption has been anecdotally linked with sudden cardiac death and, more recently, myocardial infarction. As myocardial infarction is strongly associated with both platelet and endothelial dysfunction, the authors *tested* the hypothesis that energy drink consumption alters platelet and endothelial function and found that *it did*.

33. Fifty healthy volunteers (34 male, aged 22±2 years) participated in the study. Platelet aggregation and endothelial function were tested before, and 1 hour after, the consumption of 250 mL (1 can) of a sugar-free energy drink. The authors concluded "Energy drink consumption acutely increases platelet aggregation and decreases endothelial function in healthy young adults" and that "myocardial infarction is strongly

associated with both platelet and endothelial dysfunction.”

34. The published findings in this study were followed up by statements by the study’s authors in articles noting: “Researchers from the Royal Adelaide Hospital are warning that the drink "could be deadly" for people with heart abnormalities. Lead researcher Scott Willoughby stated although the incidence is low “the drink could be more deadly for people who have an unknown cardiovascular abnormality.” “Researchers warn of heart risks from energy drinks,” *Medical News* (August 17 2008).

35. Concerns over the health risks of energy drinks have caused strong warnings and regulations throughout the world except, notably, in the United States where companies and actors like Defendants have sold their products without research, studies, warnings or labeling to alert consumers of the true risks of these products.

36. Deaths attributed to energy drink consumption have been reported in Australia, Ireland and Sweden. “Caffeinated Energy Drinks -- A Growing Problem,” *Drug Alcohol Depend.* 2009 January 1; 99(1-3): 1–10.

37. The European Union requires that energy drinks have a “high caffeine content” label (European Union, 2007) and Canada requires labels indicating that these drinks should not be mixed with alcohol and that maximum daily consumption not be exceeded. (Health Canada, 2005). Norway restricts the sale of Red Bull to pharmacies, while France (until recently) and Denmark have prohibited the sale of Red Bull, for example altogether.

38. In a medical case report published in *Clin Auton Res.* 2008 Aug;18(4):221-3 (Aust 5, 2008) the authors reported postural tachycardia syndrome associated with a vasovagal reaction in a young volleyball player after an excess intake of Red Bull as a refreshing energy drink. The authors concluded the energy drink be considered a possible cause of orthostatic intolerance.

39. Each defendant made claims regarding the benefits of using its “energy drink” and wholly failed to warn or disclose and the known risks and side effects of

these “energy drinks.” Each defendant knew or should have known the claims for “5-hour ENERGY” were false and misleading. Each defendant failed to adequately disclose the true health consequences, and the true risks and side effects from “5-hour ENERGY” including the increased incidence and risks of strokes, heart attacks and compromise to cardiac function.

40. Each defendant failed to conduct adequate testing, studies or clinical testing and research, and failed to conduct adequate marketing surveillance, to determine the safety of “5-hour ENERGY” including with respect to the causal connection between “5-hour ENERGY” and risks of strokes, heart attacks and compromise to cardiac function.

41. Each defendant failed to disclose on its warning labels or elsewhere that adequate pre-marketing clinical testing and research, and adequate post-marketing surveillance, had not been done, thereby giving the false impression that “5-hour ENERGY” had been tested. Each defendant knew or should have known that, at all material times, its communications about the benefits, risks, and adverse effects of its of “5-hour ENERGY” including communications in labels, advertisements and promotional materials, were materially false and misleading. In the alternative, the each defendant was ignorant of whether or not its communications about of “5-hour ENERGY” were true in material ways.

42. Antonio J. Hassell would not have used of “5-hour ENERGY” described herein, or would have discontinued their use, or would have used safer alternative products, had each defendant disclosed the true health consequences, risks, and adverse events, including the increased incidence and risk of strokes, blood clots, heart attacks, and other illnesses, caused by energy drinks containing caffeine, taurine and the other ingredients in “5-hour ENERGY.”

43. Each defendant's nondisclosures and misrepresentations as alleged herein were material, and were substantial factors that contributed directly and causally, and naturally and necessarily, to the serious injuries and damages that plaintiff has suffered.

CLAIMS FOR RELIEF
First Claim Against All Defendants
(Negligence)

44. Plaintiff realleges all previous paragraphs.

45. Each defendant introduced of "5-hour ENERGY" described herein into the stream of commerce. At all material times, each defendant had a duty to plaintiff's decedent and other consumers of "5-hour ENERGY" to exercise reasonable care in order to properly design, manufacture, produce, test, study, inspect, mix, label, market, advertise, sell, promote, and distribute these products. This includes a duty to warn of side effects, and to warn of the risks, dangers, and adverse events associated with caffeine "energy drinks" laced with amino acids.

46. Each defendant knew, or in the exercise of reasonable care should have known, that its of "5-hour ENERGY" drink was of such a nature that it was not properly designed, manufactured, produced, tested, studied, inspected, mixed, labeled, marketed, advertised, sold, promoted, and distributed, and they were likely to cause injury to those who ingested them.

47. Each defendant was negligent in the design, manufacture, production, testing, study, inspection, mixture, labeling, marketing, advertising, sales, promotion, and distribution of of "5-hour ENERGY" and breached duties it owed to plaintiff. In particular, each defendant:

- a. Failed to use due care in the preparation of its of "5-hour ENERGY" drink to prevent the aforementioned risks when the drink was consumed, especially in cases of exercise;

- b. Failed to use due care in the design of of “5-hour ENERGY” to prevent the aforementioned risks;
- c. Failed to conduct adequate pre-clinical testing and research to determine the safety of “5-hour ENERGY”;
- d. Failed to conduct adequate post-marketing surveillance to determine the safety of of “5-hour ENERGY”;
- e. Failed to study, develop, and/or acquire safer alternative components to replace the potentially harmful ingredients in of “5-hour ENERGY”;
- f. Failed to accompany its product with proper warnings regarding all possible adverse side effects associated with the use of its product and the comparative severity of these adverse side effects;
- g. Failed to use due care in the development of “5-hour ENERGY” to prevent the aforementioned risks to individuals when the drugs were ingested;
- h. Failed to use due care in the manufacture of of “5-hour ENERGY” to prevent the aforementioned risks to individuals when the so-called “energy shot” was ingested;
- i. Failed to use due care in the inspection of its of “5-hour ENERGY” product to prevent the aforementioned risks to individuals when the drugs were ingested;
- j. Failed to use due care in the labeling of its hormone therapy drugs to prevent the aforementioned risks to individuals when when the so-called “energy shot” was ingested;
- k. Failed to use due care in the marketing of “5-hour ENERGY” to prevent the aforementioned risks to individuals when the product was consumed.
- l. Failed to use due care in the promotion of to prevent the aforementioned risks to individuals when the drugs were ingested;

- m. Failed to use due care in the selling of “5-hour ENERGY” to prevent the aforementioned risks to individuals when the product was ingested;
- n. Failed to warn adequately about the health consequences, risks, and adverse events caused by “5-hour ENERGY”; and
- o. Was otherwise careless and negligent.

48. Each defendant knew or should have known that “5-hour ENERGY” caused unreasonable harm and dangerous side effects that many users would be unable to remedy by any means. Despite this, each defendant continued to promote and market “5-hour ENERGY” its for use by consumers, including plaintiff Antonio Hassell.

49. It was foreseeable to each defendant that consumers, including plaintiff’s decedent, would suffer injury as a result of its failure to exercise ordinary care as described herein.

50. As a direct and proximate result of each defendant’s conduct, Antonio J. Hassell suffered a sudden loss of cardiac function, brain damage and death with substantial injuries and damages specified herein.

Second Claim Against All Defendants

(Strict Liability: Design Defect)

51. Plaintiff realleges all previous paragraphs.

52. Each defendant manufactured, sold, supplied “5-hour ENERGY” and had significant involvement in distribution including the capability of exercising control over quality.

53. Each defendant placed “5-hour ENERGY” into the stream of commerce. “5-hour ENERGY” was expected to, and did, reach Antonio J. Hassell without substantial change in its condition. Antonio J. Hassell consumed 5-hour ENERGY” and it caused his heart attack and death.

54. At the time 5-hour ENERGY” left each defendant’s hands, 5-hour ENERGY” was in a condition not contemplated by plaintiff’s decedent and was unreasonably

dangerous and defective. 5-hour ENERGY” was (and is) dangerous to an extent beyond that which would be contemplated by the ordinary consumer who the supposed “energy drink.” 5-hour ENERGY” was more dangerous than Antonio J. Hassell or reasonable consumers contemplated.

55. The risks of “5-hour ENERGY” outweighs any claimed or perceived utility. There are practicable, feasible safer alternatives to achieve “energy” and increased awareness than defendants’ “5-hour ENERGY”.

56. Defendants’ “5-hour ENERGY” was defective and unreasonably dangerous.

57. As a direct and proximate result of each defendant’s conduct, Antonio J. Hassell suffered the injuries and damages specified herein.

Third Claim Against All Defendants

(Strict Liability: Failure to Warn)

58. Plaintiff realleges all previous paragraphs.

59. Each defendant manufactured, sold, and supplied “5-hour ENERGY” described herein, and at all material times was in the business of doing so. Each defendant placed “5-hour ENERGY” into the stream of commerce. “5-hour ENERGY” was expected to, and did, reach Antonio J. Hassell without substantial change in its condition. Antonio J. Hassell consumed “5-hour ENERGY” and it caused grievous injuries and his death.

60. When each defendant placed “5-hour ENERGY” into the stream of commerce, they failed to accompany “5-hour ENERGY” with adequate warnings. Each defendant failed to warn of the true risks and dangers, and of the symptoms, scope and severity of the potential side effects of the “5-hour ENERGY” product Antonio J. Hassell ingested. These risks, dangers, and side effects include, but are not limited to a significant increased risk of strokes, blood clots, heart attacks and cardiac arrhythmias.

61. Due to the inadequate warnings as alleged herein, at the time “5-hour ENERGY” left each defendant’s hands, “5-hour ENERGY” was in a condition not

contemplated by plaintiff's decedents or reasonable consumers and were unreasonably dangerous to Antonio J. Hassell. "5-hour ENERGY" was dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchased the so-called "energy shot." "5-hour ENERGY" was more dangerous than contemplated. Furthermore, its risks outweighed its utility.

62. Defendants' "5-hour ENERGY" drink described herein is defective and unreasonably dangerous.

63. Had each defendant provided adequate warnings and instructions, plaintiff's decedent would not have consumed "5-hour ENERGY" and would not have suffered the personal injuries and death that ensued.

64. As a direct and proximate result of each defendant's conduct, plaintiff's decedent suffered the injuries and damages specified herein.

Fourth Claim Against All Defendants

(Strict Liability: Rest. 2nd § 402B)

65. Plaintiff realleges all previous paragraphs.

66. Section 402B of the Restatement (Second) of Torts provides that a defendant engaged in the business of selling chattels who, by advertising, labels, or otherwise, makes to the public a misrepresentation of a material fact concerning the character or quality of a chattel sold by him is subject to liability for physical harm to a consumer of the chattel caused by justifiable reliance upon the misrepresentation, even though it is not made fraudulently or negligently, and the consumer has not bought the chattel from or entered into any contractual relation with the seller.

67. Here Defendants misrepresented the drink as an "energy drink" promising "hours of energy", "5-hour energy", a recommendation to take "one whole bottle (two ounces) for maximum energy" and a promise of "no crash later." These were misrepresentations. "5-Hour Energy" and the claims made on the bottle and in advertisements ("Hours of Energy Now" and "No Crash Later") are literally false. This

product does not, and cannot, produce energy, a defined scientific term, for the period of time that defendants claimed, in any measurable amount.” Energy is the ability to do work, a scientific meaning, not the “energized feeling” which a user may obtain from substances such as caffeine. Plaintiff supports her argument that “energy” as used on the bottles means physical energy by noting the picture on the bottle (a person running on the top of a mountain) and the pictures contained in defendant's television and print advertisements of people completing physical activities. Defendants clearly intended to convey to the consumer that the “5-hour energy product” gives a person the biomechanical energy to complete athletic endeavors. These claims are false and misleading and induced Antonio Hassell to consume the misrepresented product.

68. At the time each defendant designed, manufactured, produced, tested, studied, inspected, mixed, labeled, marketed, advertised, sold, promoted, and distributed “5-hour ENERGY” each defendant knew of the use for which “5-hour ENERGY” was intended, and impliedly warranted its products to be of merchantable quality and safe and fit for their intended use.

69. Contrary to this implied warranty, defendants’ “5-hour ENERGY” drink was not of merchantable quality or safe or fit for intended use because “5-hour ENERGY” is unreasonably dangerous and unfit for the ordinary purposes for which it is used, as alleged herein.

70. As a direct and proximate result of each defendant’s conduct, plaintiff Antonio J. Hassell suffered the injuries and damages specified herein.

Fifth Claim Against All Defendants

(Punitive Damages)

71. Plaintiff realleges all previous paragraphs.

72. Each defendant's actions, described above, were performed with malice and in conscious and reckless disregard for the rights of Antonio J. Hassell and consumers who took "5-hour ENERGY" in the mistaken belief it provided "energy." Each defendant's failure to investigate and warn against the risks harms of so-called "energy drinks" such as "5-hour ENERGY has resulted substantial cardiac risks and injury in Tennessee alone. Further, each defendant's conduct is continuing as long as it keeps its "5-hour ENERGY" product on the market.

73. At a minimum, each defendant's acts and omissions, when viewed objectively from the standpoint of each defendant at the time of their occurrence, involved an extreme degree of risk, considering the probability and magnitude of the potential harm to others and the negligible (if non-existent "benefit" from the caffeine and amino acid homeopathic cocktail known as "5-hour ENERGY." Each defendant had actual and subjective awareness of the risk involved but nevertheless proceeded to market "5-hour ENERGY" with conscious indifference to the rights, safety or welfare of others, including plaintiff's decedent. Accordingly, plaintiff is entitled to punitive damages against each defendant.

PRAYER FOR RELIEF

74. WHEREFORE, plaintiff, jointly and severally, seeks judgment in their favor against each defendant as follows:

- a. Economic and non-economic damages of fifteen million dollars (\$15,000,000.00) for the personal injury damages, wrongful death survival damages. As a direct and proximate result of the aforementioned actions and omissions of Defendants, Antonio J. Hassell sustained injuries including, but not limited to, physical pain and suffering, emotional pain and suffering, loss of future earning capacity, medical expenses, loss of enjoyment of life. Plaintiff asserts all available damages under Tennessee and Federal law, including loss of spousal and parental consortium

- b. Punitive damages in an amount of one hundred fifty million dollars (\$150,000,000.00) as to each defendant as provided by law and to be supported by the evidence at trial;
- c. An award of attorneys' fees and costs of suit, as provided by law;
- d. Such other legal and equitable relief as this Court deems just and proper.

JURY DEMAND

Plaintiff requests trial by jury.

DATED this 5th day of August, 2010.

Respectfully Submitted,

By: s/ Corey B. Trotz
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