No. 19-988

In the Supreme Court of the United States

LIVING ESSENTIALS, LLC; INNOVATION VENTURES, LLC,

PETITIONERS,

v.

STATE OF WASHINGTON,

RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI
TO THE WASHINGTON COURT OF APPEALS,
DIVISION ONE

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Do companies have a First Amendment right to make scientific claims in advertisements about their products that the companies have no reasonable basis to believe are true?

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INTRODUCTION

Petitioner Living Essentials asks this Court to grant certiorari and hold that companies have a First Amendment right to advertise their products using scientific claims that they have no reasonable basis to believe are true. No court has ever recognized such a right, and this Court's precedent provides no support for creating such a right, which would be disastrous for consumers and responsible businesses. The Court should deny certiorari.

Living Essentials seeks certiorari based on three claims, none of which is accurate.

First, while acknowledging that "the petition does not present a circuit split," Pet. 28, the company claims that the decision below conflicts with this Court's precedent. Not so. For decades, this Court has held that "false, deceptive, or misleading commercial speech" is not protected by the First Amendment. *E.g.*, *Ibanez v. Florida Dep't of Bus. & Prof'l Regulation*, 512 U.S. 136, 142 (1994); *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 638 (1985) (same); *Bates v. State Bar of Arizona*, 433 U.S. 350, 383 (1977) (same). The Federal Trade Commission and lower federal courts have uniformly held that unsubstantiated health claims about products are deceptive, and thus subject to regulation. The lower court simply applied these well-settled principles here, creating no conflict.

Second, implicitly recognizing that the decision below is consistent with this Court's precedent, Living Essentials presents this case as an opportunity for the Court to overturn its precedent, specifically the multi-prong test for evaluating commercial speech

restrictions adopted in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980). But this test does not apply to false, misleading, or deceptive advertisements, which the First Amendment has never protected in the first place. *See, e.g.*, *Ibanez*, 512 U.S. at 142; *Zauderer*, 471 U.S. at 638; *Bates*, 433 U.S. at 383. This case thus presents no opportunity to revisit *Central Hudson*; instead, for the Court to rule for Living Essentials, it would need to overturn dozens of cases adopting the threshold principle that deceptive commercial speech falls outside the First Amendment's protections.

Third, Living Essentials claims that this longstanding principle restricts free speech by discouraging a potential advertiser "from speaking—even if confident in the truth of its assertions—until it has sufficient documentation" to support its claims. Pet. 27. This argument refutes itself—how can a company be "confident in the truth of its assertions" if it lacks any evidence to support them? This Court has always described the value of commercial speech as society's "interest[] in broad access to complete and accurate commercial information." *Edenfield v. Fane*, 507 U.S. 761, 766 (1993). Allowing companies to use false, deceptive, or misleading claims to advertise their products undermines this goal and contributes nothing to the "marketplace of ideas."

In short, Living Essentials seeks factbound error correction where there is no error. The rule it proposes would undermine First Amendment values and public confidence in the accuracy of advertising claims. There is no basis to grant certiorari.

STATEMENT OF THE CASE

A. Washington's Consumer Protection Act and the FTC Treat Unsubstantiated Advertisements as Deceptive

Washington modeled its Consumer Protection Act (CPA) after the Federal Trade Commission Act (FTCA), 15 U.S.C. § 45(a)(1). *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wash. 2d 778, 783, 719 P.2d 531 (1986). Like the FTCA, the CPA prohibits "unfair or deceptive acts or practices in the conduct of any trade or commerce[.]" Wash. Rev. Code § 19.86.020; 15 U.S.C. § 45(a)(1). Under Washington's statute, federal decisions interpreting the FTCA and final orders of the Federal Trade Commission guide courts when construing the CPA. Wash. Rev. Code § 19.86.920.

The FTC has long considered unsubstantiated promotional claims unfair and deceptive. *See* Federal Trade Commission, *FTC Policy Statement Regarding Advertising Substantiation* (*FTC Policy Statement*) (Nov. 23, 1984), https://www.ftc.gov/public-statements/1984/11/ftc-policy-statement-regarding-advertising-substantiation; *In re Pfizer Inc.*, 81 F.T.C. 23, *29 (1972). According to the FTC, "failure to possess and rely upon a reasonable basis for objective claims constitutes an unfair or deceptive act or practice" in violation of the FTCA. *FTC Policy Statement*; *In re Pfizer*, 81 F.T.C. at *37. With respect to promotional claims regarding dietary supplements, the FTC applies a substantiation standard of "competent and reliable scientific evidence." Federal Trade Commission, *Dietary Supplements: An Advertising Guide for Industry* 3 (Apr. 2001), https://www.ftc.gov/

system/files/documents/plain-language/bus09-dietary-supplements-advertising-guide-industry.pdf.

Courts have repeatedly endorsed and affirmed the FTC's substantiation requirement for a wide range of products. *See, e.g.*, *POM Wonderful, LLC v. FTC*, 777 F.3d 478, 490 (D.C. Cir. 2015) (pomegranate juice), *cert. denied*, 136 S. Ct. 1839 (2016); *Removatron Int'l Corp. v. FTC*, 884 F.2d 1489, 1498 (1st Cir. 1989) (hair removal product); *Porter & Dietsch, Inc. v. FTC*, 605 F.2d 294, 302 n.5 (7th Cir. 1979) (weight loss pills). Courts have also applied the FTC's substantiation rule in consumer protection actions brought by state attorneys general. *See, e.g.*, *State v. Hydro Mag Ltd.*, 436 N.W.2d 617, 622 (Iowa 1989) (citing FTC cases and holding defendant's unsubstantiated advertising claims regarding electromagnetic water treatment devices were misrepresentation under consumer protection statute); *T-Up, Inc. v. Consumer Prot. Div.*, 801 A.2d 173, 178-80 (Md. Ct. Spec. App. 2002) (citing *FTC Policy Statement* and upholding consumer protection claim arising from unsubstantiated advertising claims for cancer and AIDS "cures").

B. Living Essentials Aired Unsubstantiated Advertisements

Living Essentials, LLC and Innovation Ventures, LLC (Living Essentials) manufacture, market, and sell nationwide a liquid dietary supplement, 5-hour ENERGY®. In 2012 and 2013, Living Essentials aired a series of advertisements for 5-hour ENERGY® in Washington. The advertisements ran over 20,000 times in

Washington during that two-year period. Pet. App. 43a-44a.

First, Living Essentials aired advertisements indicating that 73% of doctors recommend 5-hour ENERGY® (the "Ask Your Doctor" advertisements):

> We asked over 3,000 doctors to review 5-Hour ENERGY®. And what they said is amazing. Over 73 percent who reviewed 5-hour ENERGY said they would recommend a low-calorie energy supplement to their healthy patients who use energy supplements. *Seventy-three percent*. 5-hour ENERGY® has four calories and it's used over nine million times a week. Is 5-hour ENERGY® right for you? Ask your doctor. We already asked 3,000.

Pet. App. 76a-77a.

While the advertisement suggested that 73% of doctors recommend 5-hour ENERGY®, in fact, the doctors had simply said that if a patient was already consuming energy drinks, "the doctor would recommend a low calorie" energy drink. Pet. App. 74a. Multiple TV networks refused to air the ad out of concerns about its deceptiveness, consumers complained about the ads being misleading, and Living Essentials ended the ad campaign early in part because of these complaints. Pet. App. 77a.

Second, Living Essentials aired advertisements claiming that 5-hour ENERGY® increases energy levels for longer than coffee would. As summarized by the trial court after reviewing numerous advertisements asserting that 5-hour ENERGY® was superior to coffee:

> Living Essentials advertised that the combination of caffeine, B vitamins and amino acids would provide energy that would last longer than consumers would experience from a cup of premium coffee (and in some of the ads, longer than 3 or 4 cups of coffee).

Pet. App. 121a.

Living Essentials did not conduct any tests or commission any studies comparing the relevant effectiveness of coffee and 5-hour ENERGY® to support this claim. Instead, Living Essentials based this claim solely on internet research performed by its advertising director, who had no scientific training or expertise. Pet App. 3a, 25a.

Third, Living Essentials claimed that decaffeinated 5-hour ENERGY® provides "hours of energy." Again, Living Essentials did not perform any tests to determine how long Decaf 5-hour ENERGY® provided energy—or whether it provided consumers with any energy at all—and relied solely on internet research performed by its advertising director. Pet. App. 3a, 25a.

Washington opened an investigation of Living Essentials' advertisements beginning in January 2012. Living Essentials' claims were concerning because "claims that significantly involve health" are material and Living Essentials had implied that doctors recommend its product. *FTC v. QT, Inc.*, 448 F. Supp. 2d 908, 960 (N.D. Ill. 2006), *aff'd*, 512 F.3d 858 (7th Cir. 2008). The investigation revealed that Living Essentials lacked any reasonable

substantiation for its advertising claims, which is deceptive per well-settled FTC case law and guidance.

The State filed a complaint against Living Essentials, alleging its advertisements were deceptive and violated the CPA. Pet. App. 175a-82a.

C. The Trial Court Ruled That Living Essentials Violated the Consumer Protection Act by Airing Unsubstantiated Advertisements

The parties engaged in a bench trial from August 22, 2016, through September 8, 2016. The trial court reviewed approximately 500 exhibits and heard testimony from nineteen witnesses. The witnesses included Living Essentials' advertising director, the creator of the survey Living Essentials relied upon to support its "Ask Your Doctor" claim, and experts on the science of dietary supplement ingredients including caffeine. Pet. App. 52a. The court reviewed both Living Essentials' purported pre-claim substantiation for its ad claims and research Living Essentials attempted to collect after airing the advertisements. Pet. App. 14a.

On the eve of trial, Washington learned that Living Essentials had failed to turn over part of one of the studies it relied upon to claim substantiation. The hidden portion of the study was highly relevant and negated a significant part of Living Essentials' substantiation claim. BIO App. 25a (Order on Sanctions). The court found Living Essentials engaged in willful "cherry-picking" and excluded portions of testimony relating to the study from

evidence, but did not exclude the complete study itself. BIO App. 25a-27a.

After reviewing the extensive evidence, the court concluded that "the Superior to Coffee Claims are [] materially misleading" (Pet. App. 125a), and found "the Decaf Claims to be materially misleading[.]" Pet. App. 127a. The court determined that Living Essentials aired the advertisements without "anyone with any science training ever assess[ing] the ad claims and the science backing up those claims[.]" Pet. App. 109a. It concluded that "asking an advertising director who lacks any scientific or medical training to conduct Internet research is [not] adequate substantiation" for dietary supplement claims. Pet. App. 108a.

The court further held that the "Ask Your Doctor" ads were unfair or deceptive because they deceptively implied that a substantial majority of doctors recommend 5-hour ENERGY®. Pet. App. 128a-29a.

The trial court held that because Living Essentials disseminated unsubstantiated ads thousands of times in Washington, it had violated the CPA. Pet. App. 43a-44a.

D. The Washington Court of Appeals Affirmed

The Washington Court of Appeals, Division I, affirmed the trial court's decision. Pet. App. 2a. It held that Living Essentials did not need to prove its claims with scientific certainty, but needed to reasonably substantiate its ad claims before making them. Pet. App. 23a. The Court of Appeals agreed with the trial

court that "asking an advertising director who lacks any scientific or medical training to conduct internet research is [not] adequate substantiation" for dietary supplement claims. Pet. App. 24a-25a (alteration in original).

Living Essentials petitioned the Washington Supreme Court to review its case, and the Washington Supreme Court denied the petition on October 3, 2019. Pet. App. 40a.

REASONS WHY THE PETITION SHOULD BE DENIED

Petitioners claim a First Amendment right to make scientific claims in advertisements without any reasonable basis to support the claims. No court, anywhere, has ever endorsed such a right, and there is no reason for this Court to grant certiorari in this case to announce such a right. The decisions below correctly analyzed the extensive evidence here and applied over forty years of unanimous FTC rulings and federal case law in holding that Living Essentials' ads were deceptive.

Recognizing that the decision below creates no conflict in the lower courts, Living Essentials argues that the FTC's longstanding prior substantiation doctrine is unconstitutional and that this Court should overrule *Central Hudson* if it stands in the way of that outcome. But this case presents no opportunity to overrule *Central Hudson*, and in any event, there is also no good reason to upend this Court's precedent, because requiring a reasonable basis for advertising claims furthers the First Amendment value of providing accurate information to consumers.

A. The Decision Below Creates No Conflict With Decisions of This Court or Any Other Court

This Court has long held that deceptive advertisements are outside the First Amendment's protection. Lower courts have routinely and uniformly held that advertisements that make unsubstantiated claims about a product are deceptive, and thus constitutionally unprotected. Indeed, Petitioners admit that "the petition does not present a circuit split[.]" Pet. 28. The trial court and Court of Appeals here correctly ruled that Living Essentials' advertisements were deceptive. Pet. App. 30a, 125a, 127a. Petitioners thus seek only factbound error correction where there is no error.

In an unbroken string of cases going back decades, this Court has held that advertising that is false, misleading, or deceptive is not protected by the First Amendment. *See, e.g.*, *Ibanez v. Florida Dep't of Bus. & Prof'l Regulation*, 512 U.S. 136, 142 (1994) ("[F]alse, deceptive, or misleading commercial speech may be banned."); *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 638 (1985) ("The States and the Federal Government are free to prevent the dissemination of commercial speech that is false, deceptive, or misleading . . . ."); *Bates v. State Bar of Arizona*, 433 U.S. 350, 383 (1977) ("Advertising that is false, deceptive, or misleading of course is subject to restraint." (citing *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771-72, & n.24 (1976))).

Petitioners misrepresent this longstanding principle by first claiming that the Court has found commercial speech unprotected only where the state "proves that the speech is false." Pet. 16. Not so.

This Court has repeatedly held that advertisements can be deceptive—and thus constitutionally unprotected—even if they are not technically false. "Advertisements as a whole may be completely misleading although every sentence separately considered is literally true." *Donaldson v. Read Magazine, Inc.*, 333 U.S. 178, 188 (1948). "This may be because things are omitted that should be said, or because advertisements are composed or purposefully printed in such way as to mislead." *Id.* For example, an advertisement for a product aimed at treating baldness that said "Our product has been clinically proven to grow hair" might technically be true, but would be entirely deceptive if clinical trials had shown it to grow hair only on one's feet.

Because of this commonsense principle, this Court has held repeatedly that "false, deceptive, *or* misleading commercial speech may be banned." *Ibanez*, 512 U.S. at 142 (emphasis added); *Zauderer*, 471 U.S. at 638 ("The States and the Federal Government are free to prevent the dissemination of commercial speech that is false, deceptive, *or* misleading . . . ." (Emphasis added.)); *Bates*, 433 U.S. at 383 ("Advertising that is false, deceptive, *or* misleading of course is subject to restraint." (Emphasis added.)). The Court has not been careless in using the disjunctive over and over; rather, the Court has intentionally and clearly held that even when "commercial speech is not provably false, or even wholly false, but only deceptive or misleading,"

it receives no constitutional protection. *Virginia State Bd. of Pharmacy*, 425 U.S. at 771; *Friedman v. Rogers*, 440 U.S. 1, 9 (1979) (same, citing *Virginia State Bd. of Pharmacy*).[1]

In short, contrary to Petitioners' argument here, this Court has never required proof that an advertisement "is false" for it to be unprotected. Pet. 16. Instead, advertising may be restricted if it is "deceptive," which is "determined in the light of the effect advertisements would most probably produce on ordinary minds." *Donaldson*, 333 U.S. at 189.

Within this framework, the FTC has long held, and lower courts have unanimously affirmed, that it is deceptive for an advertiser to make claims about its products that it cannot substantiate. The FTC articulated this principle well fifty years ago, explaining that: "The consumer is entitled . . . to rely upon the manufacturer to have a 'reasonable basis' for making performance claims. A consumer should not be compelled to enter into an economic gamble to determine whether a product will or will not perform as represented." *In re Pfizer*, 81 F.T.C. at *29; *see also FTC v. Standard Educ. Soc.*, 302 U.S. 112, 116 (1937) ("There is no duty resting upon a citizen to suspect the

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[1] Kentucky's amicus brief supporting Petitioners unwittingly emphasizes this point, noting that all 50 states have consumer protection laws that prohibit false, misleading, or deceptive trade practices, States' Amicus Br. 21, and "[w]hen a state prohibits false, misleading, or deceptive trade practices, those laws (to the extent they restrict speech) restrict the kind of speech that already falls outside the First Amendment." States' Amicus Br. 22.

honesty of those with whom he transacts business."). Federal courts have repeatedly and uniformly affirmed this idea, holding that because consumers expect advertisers to have a reasonable basis for their claims, making claims without prior substantiation is deceptive. *See, e.g.*, *Jay Norris, Inc. v. FTC*, 598 F.2d 1244, 1252 (2d Cir. 1979) ("The use of the requirement of substantiation as regulation is clearly permissible."); *Bristol-Myers Co. v. FTC*, 738 F.2d 554, 562 (2d Cir. 1984); *POM Wonderful, LLC*, 777 F.3d 478 (holding that pomegranate juice ad claims that were not supported by competent and reliable scientific evidence were deceptive); *FTC v. Nat'l Urological Group, Inc.*, 645 F. Supp. 2d 1167, 1186 (N.D. Ga. 2008), *affirmed without discussion*, 356 F. App'x 358 (11th Cir. 2009), *cert. denied*, 562 U.S. 1003 (2010); *Sears, Roebuck & Co. v. FTC*, 676 F.2d 385, 399-400 (9th Cir. 1982) (prohibiting unsubstantiated home appliance claims); *Firestone Tire & Rubber Co. v. FTC*, 481 F.2d 246, 251 (6th Cir.) (affirming trial court determination that unsubstantiated tire effectiveness claims were deceptive), *cert. denied*, 414 U.S. 1112 (1973). Living Essentials admits the federal courts of appeals are not split on this issue, Pet. 28, and this Court has declined to review the issue multiple times. *E.g.*, *POM Wonderful, LLC*, 136 S. Ct. 1839; *Firestone Tire*, 414 U.S. 1112.

The trial court and Court of Appeals correctly applied this well-established law in determining that the First Amendment did not protect Living Essentials' deceptive advertisements. While Living Essentials seeks to portray its objection to this ruling as turning on the legal standard, as

detailed above the legal standard is universally applied and accepted. What Living Essentials really asks is that this Court review the extensive trial court record and determine that the trial court erred in finding the advertisements deceptive. But Living Essentials does not identify any errors in the trial court's factual findings, nor does Living Essentials identify a single case where analogous conduct was not considered deceptive.

Living Essentials incorrectly suggests that it unconstitutionally bore the burden of proving the ad claims were not deceptive. Pet. 3, 16. Nowhere does the Court of Appeals decision hold that Living Essentials must prove its speech is true. Rather, the State bore the burden of proving that Living Essentials' advertising claims were deceptive because they were not supported by reasonable prior substantiation. Pet. App. 7a, 15a n.6. The State proved that Living Essentials based two ad claims solely on internet research performed by its advertising director, who had no scientific training or expertise. The State further proved that Living Essentials' "Ask Your Doctor" ad deceptively suggested that 73% of doctors recommend 5-hour ENERGY® because it mischaracterized the results of a poorly crafted survey. Pet. App. 130a; *cf. United States v. Alpine Indus., Inc.*, 352 F.3d 1017, 1027 (6th Cir. 2003) (requiring advertisers to support ad claims with "competent and reliable scientific evidence" did not improperly shift burden of proof).

Living Essentials also claims that its ads are not deceptive because they "might" be true, even though the company had no reasonable basis to believe the ads were, in fact, true. But this Court has

repeatedly held that advertisers have no constitutional right to make baseless claims about their products and force consumers to take their chances in deciding whether to believe them, explaining that "[p]eople have a right to assume that fraudulent advertising traps will not be laid to ensnare them. 'Laws are made to protect the trusting as well as the suspicious.'" *Donaldson*, 333 U.S. at 189 (quoting *Standard Educ. Soc.*, 302 U.S. at 116). Here, Living Essentials omitted the material fact that it had no reasonable support for its advertising claims when making them, so that if its advertising claims turned out to be true, it was pure luck. Per well-established law, these omissions were deceptive.[2]

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[2] Several amici suggest the State did not prove Living Essentials' ads were deceptive, but the trial court specifically held Living Essentials' ads were "materially misleading." Pet. App. 125a, 127a; *e.g.*, States' Amicus Br. 18; Robert M. McKenna and Michael C. Turpen Amicus Br. 2 (suggesting unsubstantiated speech is not deceptive). Notably, every single state that signed Kentucky's amicus brief has required businesses to reasonably substantiate their advertising claims, just as the Washington Court of Appeals required in this case. *See, e.g.*, BIO App. 2a-4a (*State v. Airborne Health, Inc.*: listing all amici states as party to the multi-state action); BIO. App. 5a-8a (*In the matter of Dell Inc.*: same); BIO App. 12a-14a (*State v. The Dannon Co.*: same); BIO App. 18a, 20a-21a (*State v. Skechers USA, Inc.*: same). Amicus Robert McKenna likewise alleged unsubstantiated ads are deceptive in violation of the CPA in at least thirteen different consumer protection matters during his own tenure as Washington Attorney General. *See In re LA Weight Loss Centers, Inc.*, No. 05-2-02490-6 (Thurston County 2005); *State v. Berkeley Premium Nutraceuticals, Inc.*, No. 06-2-00426-1, Complaint ¶¶ 16-21 (Thurston County Mar. 2, 2006); *In re Ceragem International Inc.*, No. 08-2-02494-3, Assurance of Discontinuance ¶ 4.3.1-3 (Thurston County Oct. 28, 2008); *State v. Airborne Health, Inc.*, No. 08-2-42958-0 SEA, Complaint ¶ 42

In sum, the decision below is entirely in harmony with this Court's decisions and decisions of other courts. Living Essentials seeks factbound error correction where there is no error.

B. This Case Presents No Opportunity to Revisit *Central Hudson*

The Court also should deny certiorari because this case does not provide an opportunity to reconsider *Central Hudson*, as Living Essentials and amici urge. *Central Hudson* proscribes a multi-pronged test for determining when protected commercial speech may be regulated. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 557, 564-65 (1980). But this test does not apply to false, misleading, or deceptive advertisements, which the First Amendment has never protected in the first place. *See, e.g.*, *Ibanez*, 512 U.S. at 142; *Zauderer*, 471 U.S. at 638; *Bates*, 433 U.S. at 383; *R.A.V. v. City of St. Paul, Minnesota*, 505 U.S. 377 (1992)

(King County Dec. 16, 2008); *In the Matter of Dell Inc.*, No. 09-2-00055-4, Assurance of Discontinuance ¶ 28 (Thurston County Jan. 12, 2009); *State v. Evans Glass Inc.,* No. 09-2-33914-7, Consent Decree ¶ 3.4.i (King County Sept. 16, 2009); *State v. Statewide, Inc.*, No. 10-2-08534-3 SEA, Consent Decree ¶ 3.4.e (King County Mar. 1, 2010); *State v. DMZ Group LLC,* No. 10-2-21187-0 SEA, Consent Decree ¶ 4.3.4 (King County June 16, 2010); *State v. Energy Exteriors LLC*, No. 10-2-10871-3, Consent Decree ¶ 3.4.f (Pierce County July 7, 2010); *State v. Seattle's Best Home Improvements, Inc.*, No. 10-2-11196-0, Consent Decree ¶ 3.4.f (Pierce County July 19, 2010); *State v. Great Lakes Window, Inc.*, No. 10-2-12769-6, Consent Decree ¶ 3.4.b (Pierce County Sept. 2, 2010); *State v. The Dannon Co.*, No. 10-2-43197-7 SEA, Complaint ¶ 7.3 (King County Dec. 15, 2010); *State v. Skechers USA, Inc.*, No. 12-2-17364-8 SEA, Complaint ¶ 24 (King County May 3, 2012).

(identifying fraud as historical exception to First Amendment); *United States v. Stevens*, 559 U.S. 460 (2010) (fraud historical First Amendment exception since 1791); *Friedman*, 440 U.S. at 15; *Virginia State Bd. of Pharmacy*, 425 U.S. at 771-72, & n.24.

Because the *Central Hudson* test applies only to protected commercial speech, it has no bearing on the trial court's ruling, which concerns deceptive advertisements that are not protected speech in the first place. *See Nat'l Urological Group, Inc.*, 645 F. Supp. 2d at 1186 (finding unsubstantiated ads deceptive and rejecting First Amendment argument by noting "defendants employ circular logic" when "contend[ing] that the court must use the *Central Hudson* test—which only applies to protected speech—to determine whether or not speech is protected").

Even if the Court granted certiorari, reviewed the trial court record, and concluded that Living Essentials' advertisements were not deceptive and thus fall within *Central Hudson*'s bounds, the Court still would not have the opportunity to revisit *Central Hudson* in this case. The trial court ruled Living Essentials violated the CPA because it committed a deceptive act; it did not suggest that the State could punish Living Essentials under *Central Hudson* if the ads were non-deceptive. If this Court reached the factbound conclusion that Living Essentials' advertisements were not deceptive, reversal would be warranted regardless of the *Central Hudson* test. This case thus amounts to no more than a request for error correction in an area of law so well-settled that Living Essentials cannot cite any contrary authority.

C. There is No Reason to Jettison the Court's Longstanding Conclusion that Deceptive Commercial Speech Receives no First Amendment Protection

Faced with the lack of precedent supporting its argument, Living Essentials argues that the Court should "abandon the [commercial speech] doctrine entirely, and 'treat speech as speech, commercial or not.'" Pet. 24 (quoting Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 Va. L. Rev. 627, 651 (May 1990)); *see also* States' Amicus Br. at 2 (same argument). This radical argument not only asks the Court to overturn dozens of cases, it also misunderstands the rationale underlying the Court's commercial speech doctrine and would undermine the very values the First Amendment is intended to further.

While Living Essentials at times frames its petition as targeting only *Central Hudson*, in reality its attack on precedent is far broader. Living Essentials acknowledges, as it must, that non-commercial speech is routinely protected even when intentionally misleading or false. *See* Pet. 23-24 (citing *United States v. Alvarez*, 567 U.S. 709 (2012); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)). No one can be punished for claiming that the Earth is flat, even if they know that to be untrue. But when it comes to commercial speech, this Court has held in dozens of cases, before and after *Central Hudson*, that the government can regulate or ban "false, misleading, or deceptive" claims. *See, e.g.*, *Thompson v. Western States Med. Ctr.*, 535 U.S. 357, 367 (2002);

Ibanez, 512 U.S. at 142; *Zauderer*, 471 U.S. at 638; *Bates*, 433 U.S. at 383; *Virginia State Bd. of Pharmacy*, 425 U.S. at 771-72. While living Essentials cites many concurrences and dissents critiquing *Central Hudson*, not one has critiqued this fundamental distinction.

The Court has always drawn this distinction, and with good reason. From the moment the Court first recognized that speech that "does no more than propose a commercial transaction" was entitled to any protection under the First Amendment, it has simultaneously allowed for regulation to ensure that "the stream of commercial information flow[s] cleanly as well as freely." *Virginia State Bd. of Pharmacy*, 425 U.S. at 776, 772. The Court has repeatedly explained that "the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information[.]" *Zauderer*, 471 U.S. at 651; *Edenfield v. Fane*, 507 U.S. 761, 766 (1993) ("First Amendment coverage of commercial speech is designed to safeguard" society's "interest[] in broad access to complete and accurate commercial information"); *Central Hudson*, 447 U.S. at 563 (explaining that the First Amendment's concern for commercial speech "is based on the informational function of advertising" (citing *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978))); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 496 (1996) (explaining extension of First Amendment protection to commercial speech as reflecting "the public's interest in receiving accurate commercial information"). Commentators have noted this is one area where commercial speech is distinguished from more protected speech: "Commercial speech differs

from public discourse because it is constitutionally valued merely for the information it disseminates, rather than for being itself a valuable way of participating in democratic self-determination." Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. Rev. 1, 4 (Oct. 2000).

Because the rationale of extending First Amendment protection to commercial speech is primarily (if not exclusively) the value of conveying accurate information to consumers, "there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity." *Central Hudson*, 447 U.S. at 563. *Bates*, 433 U.S. at 383 ("[T]he public and private benefits from commercial speech derive from confidence in its accuracy and reliability."). Thus, "[t]he government may ban forms of communication more likely to deceive the public than to inform it[.]" *Central Hudson*, 447 U.S. at 563. Put another way, "[w]hen a state regulates commercial messages to protect consumers from misleading, deceptive, or aggressive sales practices, or requires the disclosure of beneficial consumer information, the purpose of its regulation is consistent with the reasons for according constitutional protection to commercial speech" in the first place. *44 Liquormart*, 517 U.S. at 501; *see also Friedman*, 440 U.S. at 16 ("Rather than stifling commercial speech, [the challenged statute] ensures that information . . . will be communicated more fully and accurately to consumers than it had been in the past.").

The First Amendment value of commercial speech—i.e., conveying accurate information to the public—also explains the Court's repeated conclusions that unlike other speech, commercial speech may be regulated through prior restraint and compelled disclosures. *E.g.*, *Virginia State Bd. of Pharmacy*, 425 U.S. at 771 n.24 (noting that regulation of commercial speech may include prior restraints and warnings or disclaimers); *Zauderer*, 471 U.S. 626. "Because the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides, appellant's constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal." *Zauderer*, 471 U.S. at 651 (citation omitted).

Another distinction underlying the Court's commercial speech jurisprudence is that such speech "occurs in an area traditionally subject to government regulation[.]" *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 554 (2001) (quoting *Central Hudson*, 447 U.S. at 562). "It is the State's interest in protecting consumers from 'commercial harms' that provides 'the typical reason why commercial speech can be subject to greater governmental regulation than noncommercial speech.'" *44 Liquormart, Inc.*, 517 U.S. at 502 (quoting *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 426 (1993)). Given the close connection between a commercial transaction, which is fully subject to state regulation, and the communication proposing the commercial transaction, the Court has always allowed greater regulation of commercial speech. *E.g.*, *City of Cincinnati*, 507 U.S. at 426 (citing *Bolger*

v. Youngs Drug Prods. Corp., 463 U.S. 60, 81 (1983)); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455-56 (1978).

The Court has also cited several commonsense distinctions between commercial speech and other speech, and it is these distinctions on which Living Essentials and its amici focus their fire. *E.g.*, Pet. 22. First, the Court has recognized that the truth of commercial speech may be more easily verifiable because of the nature of advertisements and because commercial speakers "have extensive knowledge of both the market and their products." *Central Hudson*, 447 U.S. at 564 n.6. Thus, commercial speakers are in a better position to know of the accuracy of their statements. *Id.* (citing *Bates*, 433 U.S. at 381). Second, as the "offspring of economic self-interest," commercial speech is not as susceptible as other speech to "being crushed by overbroad regulation." *Id.*

Living Essentials and amici critique these commonsense observations, but this Court has never departed from them, and they provide just a few of the many reasons why commercial speech is subject to greater regulation than noncommercial speech. The fact that some commercial speech may not be readily verifiable does not change that in general scientific claims about a product in advertisements are generally more verifiable. Nor does it change that businesses are often in a good position to know of the accuracy of their statements. *See, e.g.*, *Sears, Roebuck & Co.*, 676 F.2d at 400 (holding that forbidding false and unsubstantiated claims was not ambiguous because advertiser knows own products).

Living Essentials also claims that the prior substantiation doctrine causes a company to refrain from speaking "even if confident in the truth of its assertions" because it requires evidence before the company makes claims, and the company may not have sufficient documentation for its confidence. Pet. 27. This begs the question of how the company can be confident in the truth of its assertions without having a reasonable basis for them. Such assertions of fact without reasonable basis are exactly what the prior substantiation requirement seeks to prevent. *See* 2 Stephanie W. Kanwit, *Federal Trade Commission: Regulation of Advertising* § 22:8 (2019 & Suppl. 2019).

Living Essentials also argues that being burdened with having a reasonable basis for a claim before advertising it to the public is "no easy task" because scientific conclusions are often debatable. Pet. 26-27. This complaint rings hollow here, where Living Essentials made its scientific claims without engaging in *any* scientific testing or even having anyone with science training review relevant information. Pet. App. 25a. In any event, the prior substantiation doctrine does not require absolute proof that a scientific claim is true, only that the advertiser have a reasonable basis for the claim. Pet. App. 24a (competent-and-reliable standard does not require that a claim be established scientific fact); *In re Pfizer Inc.*, 81 F.T.C. at *23 (well-controlled scientific studies not always required to show reasonable basis for claim).

Living Essentials and some of its amici implicitly recognize the absurd results of their argument. For example, Living Essentials argues that "[t]his is not to say that companies should be free to assert baseless claims about their products without consequence." Pet. 27. Amici make similar disclaimers. *E.g.*, States' Amicus Br. 21 (arguing that states will remain able to regulate "false, misleading, and deceptive trade practices"). Yet in this petition Living Essentials seeks to avoid consequences for making baseless claims about its products. Indeed, the trial court here held that Living Essentials asserted baseless claims in violation of the very statute Living Essentials cites to argue that other mechanisms would still exist to establish a "consequence." Pet. 28 (citing Wash. Rev. Code § 19.86.020).

Other amici admit that repudiation of this Court's long recognition of the unique character of false, misleading, or deceptive commercial speech would cripple consumer protection efforts. Amicus Goldwater Institute forthrightly explains that such repudiation would mean that misleading speech would generally not be subject to regulation. Goldwater Institute Amicus Br. 12; *see also* Liberty Justice Center Amicus Br. 13 (recognizing that but for the Court's commercial speech doctrine, Living Essentials could make false claims and still receive First Amendment protection). In the world Living Essentials advocates, consumers will take cold

comfort knowing that attempts to prevent misleading speech about a product that could kill or seriously injure them "might" survive strict scrutiny. Goldwater Institute Amicus Br. 12 (citing Kathleen M. Sullivan, *Cheap Spirits, Cigarettes, and Free Speech: The Implications of 44 Liquormart*, 1996 Sup. Ct. Rev. 123, 155 (1996)).

In addition to crippling consumer protection efforts to prevent false, misleading, or deceptive claims in advertising, Living Essentials' approach would also call into question efforts to require advisories or warnings in advertising. *See Virginia State Bd. of Pharmacy*, 425 U.S. at 771 n. 24 (noting that attempts to ensure non-deceptive and accurate commercial speech, unlike other speech, can include requiring warnings or disclaimers). Without the Court's recognition that the First Amendment value of commercial speech is ensuring the flow of accurate and non-deceptive information, all manner of advisories would be called into question: surgeon general warnings on tobacco products or alcohol; ingredient lists and nutritional information on food products; required disclosures for the sale of securities; octane ratings for gasoline; and countless others. Neither this Court's precedent, nor the First Amendment, requires this dangerous result.

In short, requiring a reasonable basis for advertising claims supports the First Amendment value of ensuring a free flow of accurate information

to consumers far more than the "catch me if you can" approach that Living Essentials proposes.

CONCLUSION

The petition for writ of certiorari should be denied.

RESPECTFULLY SUBMITTED.

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June 29, 2020

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STATE OF WASHINGTON
KING COUNTY SUPERIOR COURT

STATE OF WASHINGTON, Plaintiff, v. AIRBORNE HEALTH, INC., *doing business as* AIRBORNE and AIRBORNE, INC., *formerly doing business as* KNIGHT MCDOWELL LABS; AIRBORNE HOLDINGS, INC., VICTORIA KNIGHT MCDOWELL, *individually*, and THOMAS JOHN MCDOWELL, *individually*, Defendants.	NO. 08-2-42958-0 SEA CONSENT DECREE AND JUDGMENT [Clerk's Action Required]

I. JUDGMENT SUMMARY

Judgment Creditor:	State of Washington
Judgment Debtors:	AIRBORNE HEALTH, INC., *dba* AIRBORNE and AIRBORNE, INC., *formerly dba* KNIGHT-MCDOWELL LABS; AIRBORNE HOLDINGS, INC., VICTORIA KNIGHT MCDOWELL, and THOMAS JOHN MCDOWELL
Principal Judgment Amount:	All injunctive and compliance provisions as set forth in Paragraphs 16-19 of

the Consent Decree, plus $7,000,000 for all 26 states plus the District of Columbia, of which Washington State shall receive $150,000 under the terms set forth in Paragraph 20. Washington State's share may be used for any purpose permitted under Paragraph 20, including but not limited

* * * * *

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of Airborne Original, or any substantially similar products that are produced, owned, distributed, or manufactured by any of the Defendants intended for human use.

O. "Settling Attorneys General" shall mean the Attorneys General Offices of the States of Alaska, Arkansas, California, Connecticut, Delaware, Florida, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Vermont, Washington, Wisconsin, and the District of Columbia.

P. "Structure/Function Claim" means statements that describe the role of a nutrient or dietary ingredient intended to affect the structure or function in humans or that characterize the documented mechanism by which a nutrient or dietary ingredient acts to maintain such structure

or function, provided that such statements do not purport to diagnose, treat, cure, or prevent any disease.

VI. PERMANENT INJUNCTION

16. Pursuant to R.C.W. 19.86.080, and subject to any jurisdictional limitations of such statute, Corporate Defendants (as defined above), Individual Defendants (as defined above), and anyone acting indirectly or directly on behalf of the Individual Defendants are hereby permanently enjoined and restrained from:

A. Making any express or implied statement in connection with the Marketing or Advertisement of any Product that is false, or has the capacity, tendency or effect of deceiving or misleading consumers; or omitting any material information such that the express or implied statement deceives or tends to deceive consumers.

B. Making any express or implied claim, in connection with the Marketing or Advertising of its Products, that a Product may be used in the diagnosis, cure, mitigation, treatment or prevention of a disease in humans except as provided in paragraph 17.

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C. Making any express or implied Structure/Function Claim in connection with the Marketing or Advertising of its Products unless at the time the claim is made, Competent and Reliable Scientific Evidence exists substantiating such claim, and except as provided in paragraph 17.

D. Making any express or implied claim in connection with the Marketing or Advertising of its

Products, concerning the health benefit, performance, efficacy or safety of a Product marketed as a Dietary Supplement unless at the time the claim is made, Competent and Reliable Scientific Evidence exists substantiating such claim, and except as provided in paragraph 17.

E. Making any representation, in connection with the Marketing or Advertising of a Product, about research that has been performed, including but not limited to any representation that a Product has been clinically tested unless at the time the claim is made, Competent and Reliable Scientific Evidence exists substantiating such claim, and except as provided in paragraph 17.

F. Making, in connection with the Marketing or Advertising of a Product, in addition to any and all requirements set forth in this Judgment, any statements or representations concerning a Product that materially contradict or conflict with any other statements or representations the Defendants make about such Product and render such statements or representations misleading and/or deceptive.

G. For any Product Labeled as a Dietary Supplement requiring or demanding, that a Product be placed in the "cough/cold" aisle or department of any retail facility or otherwise influencing a Product's placement in the "cough/cold" aisle or department of any retail facility through direct affirmative action taken by the Individual or Corporate Defendants.

☐ EXPEDITE
x No Hearing Set
☐Hearing is Set
Date:
Time:

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

In the matter of: DELL, INC. and DELL FINANCIAL SERVICES, L.L.P., Respondents.	NO. 09-2-00055-4 ASSURANCE OF VOLUNTARY COMPLIANCE

The State of Washington, by and through its attorneys, Robert M. McKenna, Attorney General, and Katherine Tassi, Assistant Attorney General, files the attached Multi-State Assurance pursuant to RCW 19.86.100.

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ASSURANCE OF VOLUNTARY COMPLIANCE[1]

This Assurance of Voluntary Compliance (“Assurance”) is entered into by the Attorneys General of the States of Arizona, Arkansas, California, Connecticut, Delaware, Florida, Illinois, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, North

Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Washington, West Virginia, Vermont, and Wisconsin (hereafter "States"), acting pursuant to their respective consumer protection statutes,[2] and Dell Inc. (hereafter "Dell") and Dell Financial Services, LLC (hereafter "DFS").

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1 This Assurance of Voluntary Compliance shall, for all necessary purposes, also be considered an Assurance of Discontinuance.

2 ARIZONA - Arizona Consumer Fraud Act, A.R.S. §§ 44-1521, *et seq.*; ARKANSAS - Deceptive Trade Practices, Ark. Code Ann. § 4-88-101, *et seq.*; CALIFORNIA - Business and Professions Code sections 17200 and 17500; CONNECTICUT - Unfair Trade Practices Act, Conn. Gen. Stat. §§ 42-110a, *et seq.*; DELAWARE - Delaware Consumer Fraud Act, Del. Code Ann. tit. 6, 2511 to 2527; FLORIDA - Florida Deceptive and Unfair Trade Practices Act, Part II, Chapter 501.201, *et seq.*, Florida Statutes; ILLINOIS, Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505; IOWA - Iowa Code section 714.16, the Iowa Consumer Fraud Act; KENTUCKY - Consumer Protection Act, KRS 367.170, Ky. Rev. Stat. §§ 367.110 to 367.990; LOUISIANA - Louisiana Unfair Trade Practices and Consumer Protection Act, L.A.-R.S. 51:1401, *et seq.*; MAINE - Maine Unfair Trade Practices Act, 5 M.R.S.A. § 210; MARYLAND - Maryland Consumer Protection Act, Maryland Commercial Law Code Annotated 13-101, *et seq.*; MASSACHUSETTS - Mass. Gen. Laws c. 93A, §§ 2 and 4; MICHIGAN - Michigan Consumer Protection Act, MCL 445.901, *et seq.*; MISSISSIPPI-Miss. Code Ann. Section 75-24-1, *et seq.*; MISSOURI - MO ST §407.010 to 407.130; MONTANA - Mont. Code Ann. § 30-14-101, *et seq.*; NEBRASKA - Nebraska

Consumer Protection Act, Neb. Rev. Stat. §§ 59-1601, *et seq.*, and Nebraska Uniform Deceptive Trade Practices Act, Neb. Rev. Stat. §§ 87-301; NEVADA - Nevada Deceptive Trade Practices Act, Nevada Revised Statutes 598.0903 to 598.0999; NEW MEXICO - New Mexico Unfair Practices Act, NMSA 1978, S 57-12-1, *et seq.*; NORTH CAROLINA - North Carolina Unfair and Deceptive Trade Practices Act, N.C.G.S. 75-

[end of page: truncated footnote]

* * * * *

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customer did not agree to have service scheduled on the next business day, or requested service on another day.

23. Dell shall fulfill its warranty obligations within thirty (30) days from the date that it receives notice of a warranty claim from a consumer or, in cases where the product must be sent to Dell, within thirty (30) days of Dell's receipt of the product; provided, however, that if Dell makes good-faith efforts to fulfill its warranty obligations within this thirty (30) day time period, nothing in this Paragraph shall be interpreted to hold Dell in violation of this requirement if further repairs or replacement parts are required after the thirty (30) day period.

24. In cases where a consumer has made a warranty claim within the warranty period, Dell shall fulfill its obligations under the warranty regardless of whether the service is performed after the expiration of the warranty period.

25. Dell shall honor all implied warranties to the extent required by each State's applicable state law.

26. DFS shall comply fully with all federal and state debt-collection and credit-reporting laws. Without limitation thereto, DFS shall not report any late payments to collection agencies if a consumer has alleged that the debt is invalid and has offered documentation supporting his or her allegation.

27. Dell shall not use the term "award winning," or similar language, in describing its customer service unless the award was received within eighteen (18) months of the date of any published use of such term.

28. Dell and DFS shall not make any claims relating to the promptness, reliability, and/or quality of its customer service without possessing, and providing to the Attorney General of any State requesting it, substantiation of the claim(s).

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C. Rebates

29. Dell shall provide or make available to consumers all required rebate documentation prior to, or at the time the relevant product is delivered; or, for service, at the time the service is provided or promptly thereafter.

30. Dell shall not make any representation, in any manner, expressly or by implication, about the time in which any rebate will be mailed, or otherwise be provided to purchasers unless, at the time the representation is made, Dell has a reasonable basis for such representation.

31. Dell shall mail any rebate payment to the consumer within a reasonable period of time, which shall mean the time specified in the rebate documentation provided to the consumer pursuant to paragraph 29, or, if no time is specified, the earlier of: (1) within thirty (30) days of receiving a properly completed request for such rebate; or (2) such other time period as required by law.

D. Process for Handling Consumer Complaints

32. With respect to consumer complaints received on or after the Effective Date, Dell and DFS shall:

a. Provide the States with a proper mailing address, fax number, and e-mail address to which consumer complaints may be forwarded by the States;

b. Thoroughly and expeditiously review and resolve any complaint forwarded by any State and respond to such complaint in writing to the State within twenty (20) business days, if such a complaint was sent to the mailing address, fax number or email address provided pursuant to in sub-part (a) of this Paragraph;

* * * * *

STATE OF WASHINGTON
KING COUNTY SUPERIOR COURT

STATE OF WASHINGTON, Plaintiff, v. THE DANNON COMPANY, INC., a Delaware corporation, Defendant.	NO. 10-2-43197-7 SEA CONSENT DECREE AND JUDGMENT

JUDGMENT SUMMARY

Judgment Creditor:	State of Washington
Judgment Debtor:	The Dannon Company, Inc.
Principal Judgment Amount:	All injunctive provisions as detailed in Sections VII and VIII of this Consent Decree and Judgment plus $21,000,000 for all 39 participating states, of which the State of Washington shall received approximately $425,000. Washington's share may be used for any purpose permitted under Paragraph 9.1, including costs and attorneys fees and cy pres.
Costs and Attorney's Fees:	See Paragraph 9.1
Total Judgment for Washington:	$425,000

Post-judgment Interest Rate:	None if paid in accordance with the time Provisions in Paragraph 9.1; otherwise the maximum rates allowed by law.

* * * * *

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other differences do not change the form of the product or involve the ingredients from which the functional benefit is derived), if reliable scientific evidence generally accepted by experts in the field demonstrates that the amount of additional ingredients, combination of additional ingredients, and any other differences in formulation are unlikely to impede or inhibit the effectiveness of the ingredients in the Essentially Equivalent Product.

K. **"Including"** shall mean including, without limitation.

L. **"Label"** shall mean a display of written, printed or graphic matter upon the immediate container of any article, or on the outside container or wrapper, if any, of the retail package of such article.

M. **"Labeling"** shall mean all Labels and other written, printed, or graphic matter upon any article or any of its containers or wrappers, or accompanying such article.

N. **"Marketing"** shall mean any act or process or technique of promoting, offering, selling or distributing a product or service.

0. **"Probiotics"** shall mean live microorganisms, which when administered in

adequate amounts, confer a health benefit on the host, excluding the cultures Streptococcus thermophilus and Lactobacillus bulgaricus.

P. **"Settling States"** shall mean all states that sign on to this settlement, which at this time are thought to include: Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois,

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Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Vermont, Washington, West Virginia, and Wisconsin.

Q. **"State,"** "State of Washington" or **"Attorney General"** refers to the Plaintiff and shall mean the Office of the Washington Attorney General.

III. JURISDICTION

3.1. Jurisdiction of this Court over the subject matter and over the Defendant for the purpose of entering into and enforcing this Judgment is admitted. Jurisdiction is retained by this Court for the purpose of enabling the State to apply to this Court for such further Judgments and directions as may be necessary or appropriate for the construction, modification or execution of this Judgment, including the enforcement of compliance therewith and remedies, penalties and sanctions for violation thereof. The Defendant agrees to pay all court costs and attorneys' fees associated with any successful

petition to enforce any provision of this Judgment against the Defendant.

IV. VENUE

4.1 Pursuant to RCW 4.12, venue as to all matters between the parties relating hereto or arising out of this Judgment shall be in the King County Superior Court of Washington.

* * * * *

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VII. PERMANENT INJUNCTION

7.1 All of the requirements of this section, Part VII, are cumulative and any representation that Defendant makes shall comply with each and every provision in this Part VII. Except as provided in paragraph 7.2, upon entry of this Judgment, the Defendant, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, is hereby permanently enjoined and restrained pursuant to RCW 19.86.080 from:

A. Making any express or implied representation in connection with the Advertising, Marketing, or Labeling of a Covered Product, including through the use of a product name, endorsement, depiction, or illustration, which in the context of the Labeling, Advertisement, or Marketing material, directly states or implies that such Product may be used in the diagnosis, cure, mitigation, treatment, or prevention of a Disease, including but not limited to:

1. Using:
    a. the term *L. casei Defensis*;
    b. the phrase, "strengthens your body's defenses;" or
    c. any depictions, characters or vignettes that imply active germ fighting;
2. Representing that any Covered Product can be used to treat, mitigate, cure or prevent diarrhea; provided, however, a structure/ function claim that the Covered Product supports or promotes relief from temporary or occasional diarrhea is not

    [original page 10]

    prohibited, if the Defendant possesses and relies upon competent and reliable scientific evidence that is sufficient in quality and quantity based on standards generally accepted in the relevant scientific fields when considered in light of the entire body of relevant and reliable scientific evidence that substantiates that the representation is true. For purposes of this Paragraph, competent and reliable scientific evidence means tests, analyses, research, or studies that have been conducted and evaluated in an objective manner by qualified persons and are generally accepted in the profession to yield accurate and reliable results.
3. Representing that any Covered Product can be used to treat, mitigate, cure, or prevent constipation, including through the use of depictions to symbolize relief from

constipation; provided, however a structure/ function claim that the Covered Product supports or promotes relief from temporary and occasional constipation is not prohibited, if the Defendant possesses and relies upon competent and reliable scientific evidence that is sufficient in quality and quantity based on standards generally accepted in the relevant scientific fields when considered in light of the entire body of relevant and reliable scientific evidence that substantiates that the representation is true. For purposes of this Paragraph, competent and reliable scientific evidence means

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STATE OF WASHINGTON
KING COUNTY SUPERIOR COURT

STATE OF WASHINGTON, Plaintiff, v. SKECHERS USA, INC., d/b/a/ SKECHERS, a Delaware corporation, Defendant.	NO. 12-2-17364-8 SEA CONSENT DECREE [Clerk's Action Required]

I. JUDGMENT SUMMARY

1.1 Judgment Creditor:	State of Washington
1.2 Judgment Debtor:	Skechers USA, Inc., d/b/a/ Skechers
1.3 Principal Judgment Amount:	$117,138 (Paragraphs 29-30)
1.4 Total Judgment:	$117,138 (Paragraphs 29-39)
1.5 Attorney for Judgment Creditor:	Robert A. Lipson and Elizabeth J. Erwin, Assistant Attorneys General
1.6 Attorney for Judgment Debtor:	Fred B. Burnside, Davis Wright Tremaine LLP; Daniel M. Petrocelli, Jeffrey Barker, Maryanne Kane, O'Melveny & Myers LLP

INTRODUCTION

1. The Plaintiff, the State of Washington, Office of the Attorney General, by and through its attorneys, Robert M. McKenna, Attorney General; and Elizabeth J. Erwin, Assistant

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Attorney General, and Skechers USA, Inc., ("Defendant"), as evidenced by the signatures below, do consent to the entry of this Judgment and its provisions. This Consent Decree (hereinafter also referred to as "Judgment") is part of a larger forty-five member multistate action[1] and is being filed in concert with consent judgments in those jurisdictions, as well as a stipulated judgment reached with the Federal Trade Commission.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED:

2. After engaging in settlement discussions, the Defendant, without admitting any liability or wrongdoing, agrees to the entry of this Judgment. The Defendant states that it does so solely to avoid the time, further expense, inconvenience, and interference with its business operations associated with litigation. Nothing in this Judgment shall constitute an admission of Defendant's liability or be used as evidence of Defendant's liability.

3. The Defendant hereby accepts and expressly waives any defect in connection with the service of process of the Summons and Complaint in this matter. The Defendant expressly waives notice of the Plaintiff's intention to file an action.

4. This Judgment is entered into by the Defendant as its own free and voluntary act and with full knowledge and understanding of the nature of the proceedings and the obligations and duties imposed upon it by this Judgment, and it consents to its entry without further notice and avers that no offers, agreements or inducements of any nature whatsoever have been made to it by the Plaintiff or their attorneys or any State employee to procure this Judgment.

5. The Defendant has, by signature of counsel hereto, waived any right to add, alter, amend, appeal, petition for *certiorari*, or move to reargue or rehear or be heard in connection

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[1] The multistate consists of Attorneys General from the States of Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Missouri, Montana, Mississippi, Nebraska, Nevada, New York, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Oregon, Rhode Island, Vermont, Virginia, West Virginia, and Wisconsin. The State of Hawaii is represented by the State of Hawaii Office of Consumer Protection and the State of Georgia is represented by the Georgia Governor's Office of Consumer Protection.

* * * * *

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all times relevant hereto, the Defendant engaged in trade affecting consumers in the State of Washington, including but not limited to King County.

13. The Defendant acknowledges that it understands that the Plaintiff and this Court expressly rely upon all representations and warranties in this Judgment. The Defendant further acknowledges and understands that if the Defendant makes any false or deceptive representation or warranty, the Plaintiff has the right to move that the Defendant making such false, or deceptive representation(s) or warranty(ies) be held in contempt and to seek sanctions and remedies under any other law, regulation or rule together with any and all such other sanctions, remedies or relief as may be available to the Plaintiff in law or equity if the Plaintiff so elects.

PLAINTIFF

14. The Plaintiff has commenced this action pursuant to RCW 19.86, the Consumer Protection Act. The Plaintiff is appearing by and through its attorneys Robert McKenna, Attorney General, and Assistant Attorneys General Robert A. Lipson and Elizabeth J. Erwin.

APPLICATION OF JUDGMENT

15. Unless otherwise expressly stated, the Defendant agrees that the duties, responsibilities, burdens and obligations it is undertaking pursuant to this Judgment shall apply to the Defendant, as defined above.

PERMANENT INJUNCTION

16. The Defendant, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, and its officers, agents, servants, representatives, employees, and all persons

or entities in active concert or participation with them who receive actual notice of this Judgment, by personal service or otherwise, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any Covered Product in or affecting trade or commerce:

[original page 7]

Compliance with State Consumer Laws

(A) Shall be permanently restrained and enjoined from engaging, or assisting others in engaging, in any unfair or deceptive acts or practices in the conduct of trade or commerce or its business and shall fully abide by all provisions of the Consumer Protection Act which prohibit any and all unfair and/or deceptive acts or practices.

(B) Shall be permanently restrained and enjoined from making, or assisting others in making, any statement or representation that goods or services have uses or benefits that they do not have.

Prohibited Representations: Strengthening Claims

(C) Shall be permanently restrained and enjoined from making, or assisting others in making, directly or by implication, including through the use of a product name, endorsement, depiction, or illustration, any representation that such Covered Product is effective in strengthening muscles unless the representation is non-misleading and non-deceptive, and at the time of making such representation, the Defendant possesses and relies upon competent and reliable scientific evidence that substantiates that the representation is true. For

purposes of this Paragraph 16(C), competent and reliable scientific evidence shall consist of at least one adequate and well controlled human clinical study of the Covered Product that conforms to acceptable designs and protocols, is of at least six-weeks duration, and the result of which, when considered in light of the entire body of relevant and reliable scientific evidence, is sufficient to substantiate that the representation is true.

Prohibited Representations: Weight Loss Claims

(D) Shall be permanently restrained and enjoined from making, or assisting others in making, directly or by implication, including through the use of a product name, endorsement, depiction, or illustration, any representation that such Covered Product causes weight loss unless the representation is non-misleading, and non-deceptive, and at the time of making such representation, Defendant possesses and relies upon competent and reliable

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scientific evidence that substantiates that the representation is true. For purposes of this Paragraph 16(D), competent and reliable scientific evidence shall consist of at least two adequate and well-controlled human clinical studies of the Covered Product, conducted by different researchers, independently of each other, that conform to acceptable designs and protocols and whose results, when considered in light of the entire body of relevant and reliable scientific evidence, are sufficient to substantiate that the representation is true.

Prohibited Representations: Other Health or Fitness-Related Claims

(E) Shall be permanently restrained and enjoined from making, or assisting others in making, directly or by implication, including through the use of a product name, endorsement, depiction, or illustration, any representation other than representations covered under Paragraph 16(C) and/or Paragraph 16(D) of this Judgment, about the health or fitness benefits of any Covered Product, including but not limited to representations regarding caloric expenditure, calorie burn, blood circulation, aerobic conditioning, muscle tone, and muscle activation, unless the representation is non-misleading and non-deceptive and, at the time of making such representation, the Defendant possesses and relies upon competent and reliable scientific evidence that is sufficient in quality and quantity based on standards generally accepted in the relevant scientific fields, when considered in light of the entire body of relevant and reliable scientific evidence, to substantiate that the representation is true. For purposes of this Paragraph 16(E), competent and reliable scientific evidence means tests, analyses, research, or studies that have been conducted and evaluated in an objective manner by qualified persons and are generally accepted in the profession to yield accurate and reliable results.

Prohibited Representations: Tests or Studies

(F) Shall be permanently restrained and enjoined from misrepresenting, or assisting others in misrepresenting, in any manner, directly or by implication, including through the use of any product

name, endorsement, depiction, or illustration, the existence, contents, validity, results, conclusions, or interpretations of any test, study, or research including, but not

* * * * *

The Honorable Beth Andrus

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

STATE OF WASHINGTON, Plaintiff, v. LIVING ESSENTIALS, LLC, a Michigan limited liability company, and INNOVATION VENTURES, LLC, a Michigan limited liability company, Defendants.	No. 14-2-19684-9 SEA ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION FOR SANCTIONS

THIS MATTER came before the Court on Plaintiff State of Washington's ("State") motion to sanction Defendants for alleged discovery violations. The Court has considered the materials filed in support of and in opposition to the motion, the federal file relating to *Hansen Beverage Co. v. Innovation Ventures, LLC*, No. 08-cv-1166 IEG (S.D. Cal. 2008), and has heard oral argument by the parties. Being fully advised and having considered the factors set out in *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997) as the Court orally explained on the record on September 8, 2016, the Court hereby ORDERS that the State's motion is GRANTED IN PART AND DENIED IN PART as follows:

Willfulness: Living Essentials did not have a good faith basis for asserting an attorney-client or

work product privilege over many of the documents it withheld and identified in a privilege log. Many of the documents pre-dated the *Hansen* litigation. Many withheld

[original unnumbered page 2]

documents did not discuss the Monster Arm portion of the Medicus Study. Many of the documents that discussed the Monster Arm also discussed the manner in which the 5-Hour ENERGY® arm was conducted and were thus highly relevant to this lawsuit and responsive to discovery requests. Even though Living Essentials could have asserted a privilege over all of the Udani documents, it did not do so. Living Essentials raised, as a defense to the State's claims, the issue of there were other studies relating to other energy drinks that substantiated its advertising claims. Thus, Living Essentials essentially cherry-picked which documents it wanted to cover with the privilege and which ones it did not. Such cherry-picking is not "fair and reasoned resistance to discovery" permitted under *Fisons*. Withholding highly relevant and responsive documents without a legal basis for doing so is a willful and deliberate violation of Washington's rules of discovery.

Prejudice: The Court concludes that the State has been prejudiced in preparing for trial because it did not have the relevant documents in sufficient time to question Dr. Udani and Prof. Wesnes about them and to prepare Dr. Blonz to address any of the information they provided in their responses. Dr. McLellan was able to address some of the issues but only based on his interpretation of the

documents, not based on the testimony of the authors of the documents.

Lesser Sanctions: The State asked the Court to exclude all evidence related to the Medicus study and the *Appetite* article and testimony from any witness regarding this study and article. The Court denied this request because to do so would have essentially precluded Living Essentials from presenting a defense to the claims. The Court determines that the State's request that the Court exclude all such evidence is not the least severe sanction necessary to advance the purposes of discovery in this case.

The Court determines that sanctions are warranted for Living Essentials' willful violation. The Court considered the State's broad exclusion request, as well as other sanctions, including recessing the trial to give the State time to conduct discovery on the newly produced documents, and a partial exclusion of evidence. The Court concludes that the most appropriate

[original unnumbered page 3]

sanction is a tailored, partial exclusion of certain evidence whereby the Court will disregard some of the evidence presented by Defendants.

The Court will exclude and disregard any testimony from Dr. Udani or Professor Wesnes relating to their conclusions that the results of the 5-hour ENERGY® study cannot be the result of caffeine alone. Specifically, the Court excludes and disregards Udani's deposition testimony at page and line numbers 150:1-151:11; 151:24-152:13, and

153:16-154:19, and Professor Wesnes's testimony at page and line numbers 79:9-22 and 95:23-96:24.

The Court will disregard and exclude any testimony from Dr. Kennedy regarding the Monster Arm documents, but not his own independent opinions about the non-caffeine ingredients. Specifically, the Court will:

a. Disregard any testimony regarding the Monster arm as contained in Dr. Kennedy's live presentation, Exhibit 2254, slides 19 and 58, and any testimony from August 31 or September 1, 2016 regarding the entries in these slides;

b. Disregard the testimony from pages 97 to 109 of the September 1, 2016 trial transcript regarding the Monster arm;

c. Exclude from consideration Exhibits 2251 and 2257.

The State is awarded its reasonable attorney fees incurred in bringing the motion to compel the Monster arm documents before the special master, any cost of the special master's time incurred by the State in obtaining his ruling on the motion to compel, and the cost of bringing the motion for sanctions.

The Court's oral ruling is incorporated herein by reference (Ex. 1) as is the Special Discovery Master's Findings, Decision and Order Granting Plaintiff's Motion to Compel (Ex. 2)

IT IS SO ORDERED this 12th day of October, 2016

<u>*Electronic signature attached*</u>
Honorable Beth M. Andrus

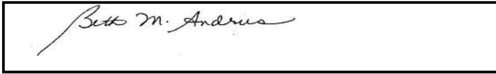
[original page "4 of 4"]

King County Superior Court
Judicial Electronic Signature Page

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

Document Title: ORDER SANCTIONS

Signed by: Beth Andrus
Date: 10/12/2016 3:34:06 PM



Judge/Commissioner: Beth Andrus

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

Certificate Hash: D92F76D12132FF531AF16720A721F097AC7A50B6

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