FILED
SUPREME COURT
STATE OF WASHINGTON
6/12/2019 9:30 AM
BY SUSAN L. CARLSON
CLERK

Supreme Court No. 97324-5

SUPREME COURT
OF THE STATE OF WASHINGTON

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No. 76463-2-I

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

*Respondent*,

v.

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

*Petitioners.*

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# PETITION FOR REVIEW

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Joel A. Mullin, OR St. Bar No.862533
(admitted *pro hac vice* in COA)
Reilley D. Keating, WSBA No. 46415
STOEL RIVES, LLP
760 SW Ninth Avenue, Suite 3000
Portland, Oregon 97205-2584
Telephone: (503) 224-3380

Michael B. King, WSBA No. 14405
James E. Lobsenz, WSBA No. 8787
Jason W. Anderson, WSBA No. 30512
CARNEY BADLEY SPELLMAN, P.S.
701 Fifth Avenue, Suite 3600
Seattle, Washington 98104-7010
Telephone: (206) 622-8020

*Attorneys for Petitioners*

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## I. IDENTITY OF PETITIONERS

Petitioners are Living Essentials, LLC, and Innovation Ventures, LLC (collectively, "Living Essentials").

## II. DECISION BELOW

Living Essentials seeks review of the decision issued by Division One of the Court of Appeals on March 18, 2019 (Appendix A). The Court of Appeals denied Living Essentials' timely motion for reconsideration on May 13, 2019 (Appendix B).

## III. ISSUES PRESENTED FOR REVIEW

### A. Per Se Violations of the Consumer Protection Act

Did the courts below violate the rule of *Hangman Ridge*[1] by creating a new *per se* violation of the Consumer Protection Act (CPA) or, alternatively, did the courts import an FTC standard that is both (1) inconsistent with the CPA and (2) incorrect, even under federal law?

### B. Freedom of Speech

1. Is a ban on product claims lacking "adequate substantiation" a prior restraint that violates article I, section 5, of the Washington Constitution or the First Amendment to the U.S. Constitution?

2. Does punishing an advertiser for making a product claim that is not substantiated by "competent and reliable scientific evidence" violate the Due Process Clause of the Fourteenth Amendment or the First Amendment because that phrase is unconstitutionally vague?

3. Does a requirement that an advertiser prove that its product claim is adequately substantiated violate either article I, section 5, or the First Amendment by requiring the speaker to prove that restriction of his speech is not justified, instead of requiring the government to prove that its speech restriction is justified?

[1] *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 719 P.2d 531 (1986).

4. The free-speech guarantees of the Oregon and Pennsylvania Constitutions are identical to article I, section 5, in that they explicitly guarantee the right to "speak freely…on all subjects." Courts in those states have held that because the "all subjects" clause treats all speech equally, commercial speech has the same degree of protection as speech on any other subject, and restrictions on commercial speech are thus subject to strict scrutiny. Does article I, section 5, compel the same result and, if so, does the adequate-substantiation doctrine fail strict scrutiny?

5. Is heightened scrutiny required under the First Amendment because the adequate-substantiation doctrine is not content neutral?

6. Where no consumers have complained that an advertiser's product claim is deceptive or misleading, does a governmental prohibition on making that claim fail to meet the *Central Hudson* test for commercial-speech restrictions under the First Amendment?

### C. Insufficient Basis to Find a Deceptive Net Impression

May a court find that an advertisement gives consumers a deceptive net impression absent any empirical evidence of consumer confusion?

## IV. STATEMENT OF THE CASE

Living Essentials, the maker of 5-hour ENERGY®, made advertising claims about its products, including the "Vitamins," "Superior to Coffee," "Decaf," and "Ask Your Doctor" claims.[2] *Slip Op.* at 2; CP 8069-79. The State sued, alleging that these claims violated the Consumer Protection Act (CPA), chapter 19.86 RCW. At the close of its case in chief, the State *abandoned* its contentions that the "Vitamins," "Superior to Coffee," and "Decaf" claims were false. RP 1018-20. The State instead premised its case as to those claims solely on the contention that they lacked any reasonable basis and were thus not "adequately substantiated." *Id.*

[2] By referring to the claims using the labels employed by the trial court, Living Essentials does not concede that those labels reflect the takeaway of each ad.

The trial court found that the "Vitamins" claim—the principal focus of the State's case—was adequately substantiated. CP 8103. It found that the "Superior to Coffee" claim was "certainly plausible, given the science presented to the Court, but…remains a hypothesis, not an established scientific fact." *Slip Op.* at 3; CP 8106. As to the "Decaf claim" the court found that "Living Essentials lacked competent and reliable scientific evidence to claim that Decaf 5-Hour ENERGY® will generate energy and alertness that 'lasts for hours.'" *Slip Op.* at 3; CP 8107. Finally, the court found that the "Ask Your Doctor" claim was "literally true, [but] the impression left by the ads was not." *Slip Op.* at 4; CP 8109. Finding that Living Essentials violated the CPA, the court entered an injunction banning the ads and imposed over $2.1 million in civil penalties, plus fees and costs totaling nearly that same amount. *Slip Op.* at 4. Despite concluding that the trial court applied an incorrect legal standard reserved for "health" claims, *Slip Op.* at 20, the Court of Appeals affirmed.

## V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

### A. *Per Se* Violations of the Consumer Protection Act

#### 1. The Court of Appeals' recognition of lack of adequate substantiation as a deceptive act or practice constitutes the judicial establishment of a *per se* CPA violation, which conflicts with this Court's holding in *Hangman Ridge* that only the Legislature may establish *per se* violations.

The Court of Appeals acknowledged that the trial court's determination that the "Superior to Coffee" and "Decaf" claims violated the CPA could not be upheld based on a lack of adequate substantiation *prior*

*to making* advertising claims. *Slip Op.* at 11. The court agreed that this would constitute judicial establishment of a new form of *per se* CPA violation and that only the Legislature may establish *per se* violations. *Id.* at 9-11 (citing *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 787, 719 P.2d 531 (1986)). The court nonetheless upheld the trial court's "Superior to Coffee" and "Decaf" determinations by concluding that the trial court "specifically declined to rely only on prior substantiation." *Id*. at 11.

This distinction fails to avoid the problem. For a court to deem lack of either pre- or post-claim substantiation to violate the CPA amounts to establishing a new *per se* violation; in either case, the State is relieved of having to prove a defendant's claim is false or misleading, to prove it is deceptive. The State abandoned its contention that the "Superior to Coffee" and "Decaf" claims were false or misleading. RP 1018-20. Nevertheless, it argued that these claims were deceptive because Living Essentials failed to substantiate them. But the CPA does not say that an advertising claim is deceptive or misleading when the advertiser lacks adequate substantiation.

**2. The Court of Appeals' decision imports into Washington CPA law a concept derived from decisions under the Federal Trade Commission Act that is inconsistent with the CPA's structure.**

As authority for its holding, the Court of Appeals invoked the Legislature's mandate that the CPA should be interpreted consistent with how the federal courts interpret the FTC Act. *Slip Op.* at 7-8. But this statutory mandate is not absolute. *Panag v. Farmers Ins. Co. of Wash.*, 166

Wn.2d 27, 47, 204 P.3d 885 (2009). The Court of Appeals did not address the extensive body of law from other states that have adopted "Little FTC" acts, *all* of which have rejected incorporating federal substantiation concepts. *Hughes v. Ester C Co.*, 930 F. Supp. 2d 439, 456-59 (E.D.N.Y. 2013) (surveying the law of multiple states and concluding that, under state "Little FTC" acts, the "allegation that a given statement is unsubstantiated or unsupported by scientific evidence, standing alone, will not be enough for purposes of showing a deceptive or fraudulent representation," and thus refusing to allow a claim for lack of adequate substantiation under New York's "Little FTC" act); *Gredell v. Wyeth Labs, Inc.*, 367 Ill. App. 3d 287, 854 N.E.2d 752, 756 (2006).[3]

The federal substantiation requirement reflects the structure of the FTC Act, which entrusts to an administrative agency (the Federal Trade Commission) the responsibility to develop expertise in the field of deceptive trade practices and the exclusive authority to enforce Congress's prohibition on such practices. The FTC adopted the concept of adequate substantiation in 1972, and federal courts historically have deferred to an FTC finding of inadequate substantiation because of the agency's recognized expertise. *See, e.g., Bristol-Myers Co. v. F.T.C.*, 738 F.2d 554 (2d Cir. 1984). Unlike the FTC, the Washington attorney-general's office is not an administrative

[3] The California legislature has granted the state attorney general (but not private plaintiffs) authority to demand proof of the factual basis for advertising claims. CAL. BUS. & PROF. CODE § 17508(b); *Nat'l Council against Health Fraud, Inc. v. King Bio Pharms., Inc.*, 107 Cal. App. 4th 1336, 133 Cal. Rptr. 2d 207, 214 (2003). But in an enforcement action, the State still must prove the claim is false or misleading. *Id.* at 214-16; CAL. BUS. & PROF. CODE 17508(f). This is as far as any state, including Washington, has gone to incorporate federal substantiation concepts into its consumer-protection law.

agency, and its views on deceptive advertising are entitled to no special weight in a judicial proceeding. When the Washington Legislature adopted our state's Little FTC Act, it did not establish an agency comparable to the FTC. Instead, the Legislature empowered private parties and the attorney general to bring actions to enforce the CPA's bar against deceptive acts or practices. RCW 19.86.080, .090.

A CPA plaintiff—whether a private party or the attorney general—must show that the alleged deceptive act or practice affects the public interest.[4] *Hangman Ridge*, 105 Wn.2d at 787-92. That burden can be satisfied if the act or practice is a per se CPA violation. *Id*. at 791-92. But again, only the Legislature has the power to establish a per se violation. *Id*. at 787, 791-92. And the Legislature has not declared that making an advertising claim without having "adequate" substantiation for that claim is a per se violation. Without such a legislative declaration, a court may not presume to find on its own that what it considers to be a lack of adequate substantiation—for an advertising claim that has not been shown to be false or misleading—violates the CPA. Yet that is precisely what the trial court did here. The Court of Appeals' affirmance of those determinations conflicts with *Hangman Ridge* and involves an issue of substantial public interest that this Court should decide. RAP 13.4(b)(1), (4).

[4] In *Hangman*, this Court was asked to reconsider its public-interest-showing requirement on the grounds that it represented a minority and overly restrictive gloss on the scope of actions that could be brought for a violation of the CPA's prohibition on deceptive acts or practices. This Court expressly refused to do so and reaffirmed the requirement. The State in this case has never suggested that the requirement—which the Legislature has left undisturbed for over 30 years—should be reconsidered.

**3. Even assuming lack of adequate substantiation can be a proper basis for finding a CPA violation, the Court of Appeals adopted a legally untenable basis for upholding the trial court's finding of lack of adequate substantiation in this case. The proper test for finding inadequate substantiation is a matter of substantial public interest warranting review.**

The Court of Appeals correctly concluded that the trial court erred in ruling that the "Superior to Coffee" and "Decaf" claims should be subject to the FTC substantiation standard for "health" claims. *Slip Op.* at 18-20. In reviewing the evidence, the trial court did not find a total lack of substantiation for Living Essentials' claims. Rather, the court found that the "Superior to Coffee" claim was "certainly plausible, given the science presented to the Court[.]" CP 8106 (FF 19(i)). The trial court also acknowledged the testimony of Dr. Howard Beales, Living Essentials' FTC expert, who pointed out that the FTC requires only *de minimus* substantiation for products that pose no safety risk, are inexpensive, and whose claims are easily verifiable by consumers. CP 8105 (FF 19(g)). The trial court rejected applying such a *de minimus* test only because it concluded Living Essentials made health claims, which are subject to more demanding substantiation requirements under federal law. *See* CP 8105 (FF 19(g)).

Although the Court of Appeals concluded that the trial court erred in finding that Living Essentials had made health claims, the court nonetheless found that Living Essentials lacked a reasonable basis for the claims. *Slip Op.* at 20-22. But that is not the proper inquiry on appeal where, as here, the trial court did not find a total lack of substantiation but

instead found that the substantiation failed to satisfy an inapplicable standard. There is no basis in the trial court's findings for concluding anything other than, if Living Essentials did not make health claims—and it did not—then its "Superior to Coffee" and "Decaf" claims were adequately substantiated.

The trial court found that the takeaway of the "Superior to Coffee" claim was that the vitamins and nutrients in 5-hour ENERGY® "work synergistically to make the biochemical or physiological effects last longer than caffeine alone" and that the takeaway of the "Decaf" claim was that consuming decaf 5-hour ENERGY® provided the benefits of energy, alertness, and focus without what some find to be caffeine's annoying buzz. *See* CP 8071-74 (FF 10, 11). A single shot of these products costs no more than a latte at a coffee shop, and someone who buys and consumes a shot of 5-hour ENERGY® (regular or decaf) will readily determine whether it performs as promised. If it does not, the consumer is out only the price of a latte; there is no safety risk in consuming 5-hour ENERGY®. If regular and decaf 5-hour ENERGY® were not performing as promised, *people would not buy the product*. But they do buy it, and that fact is all the substantiation that should be required, if any is to be required, for no-risk, inexpensive, and consumer-testable products such as these.

In sum, even assuming that the trial court properly subjected Living Essentials' "Superior to Coffee" and "Decaf" claims to a substantiation inquiry, the trial court's findings do not provide a proper basis for affirming the conclusion that the "Superior to Coffee" and "Decaf" claims lacked any

reasonable basis and were thus unsubstantiated. If lack of adequate substantiation is to be recognized as a basis for finding a violation of the CPA's prohibition on deceptive acts or practices, the correct test for substantiation presents an issue of substantial public interest warranting this Court's review under RAP 13.4(b)(4).

## B. Freedom of Speech

### 1. The Court of Appeals' decision conflicts with this Court's decisions in *Marriage of Suggs* and *Soundgarden v. Eikenberry* regarding prior restraints on speech.

The Court of Appeals found no freedom-of-speech concerns with banning ads and punishing a company that makes a claim about its product that is found to lack "adequate substantiation." But as this Court has recognized, prohibiting a speaker from making "unsubstantiated" accusations constitutes a prior restraint that is unconstitutional under the First Amendment. *In re Marriage of Suggs*, 152 Wn.2d 74, 84, 93 P.3d 161 (2004). A substantiation requirement deters people from speaking for fear that their speech "may ultimately be found to be invalid and unsubstantiated by a court." *Id.* This chilling effect is "intolerable in the first amendment context." *Id.*

Although Living Essentials discussed *Suggs* and argued that the substantiation doctrine had a chilling effect on commercial speech, the Court of Appeals never mentioned the case. It is conceivable that the court believed that the constitutional rule against prior restraints has no application to commercial speech, but that rationale would conflict with *Soundgarden v. Eikenberry,* 123 Wn.2d 750, 871 P.2d 1050 (1994), where

this Court applied the rule against prior restraints to commercial speech. *Id.* at 761-68, 773. Because article I, section 5, provides greater protection against prior restraints than the First Amendment, *Bradburn v. N. Cent. Reg'l Library*, 168 Wn.2d 789, 801, 231 P.3d 166 (2010), any rule requiring "adequate substantiation" before a person could speak would necessarily violate article I, section 5, as well as the First Amendment.

**2. The phrase "competent and reliable scientific evidence" is unconstitutionally vague.**

The courts below held that Living Essentials had to prove that its advertising claims were supported by "competent and reliable scientific evidence." Relying on *Kolender v. Lawson*, 461 U.S. 352, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983), and *Pearson v. Shalala* ("*Pearson I*"), 164 F.3d 650 (D.C. Cir. 1999), Living Essentials maintained that this phrase is unconstitutionally vague. In *Pearson I*, dietary-supplement manufacturers challenged as unconstitutionally vague the FDA's rule requiring them to show that their advertising claims were supported by "significant scientific agreement." The D.C. Circuit held it was unnecessary to decide the vagueness question only because the court agreed that it was arbitrary and capricious under the APA to reject the proposed health claims without defining the phrase "significant scientific agreement."[5] *Id.* at 660-61.

[5] The court further suggested it was possible that an FDA standard might be sufficiently defined as to satisfy the federal Administrative Procedure Act and yet be unconstitutionally vague. *Pearson I*, 164 F.3d at 660 n.12. On remand, the district court ruled that the FDA had failed to comply with the circuit court's order and granted a preliminary injunction prohibiting the FDA from enforcing its "significant scientific agreement" rule because the manufacturers had shown a substantial likelihood that they would prevail on their claim that the rule violated the First Amendment. *Pearson v. Shalala*, 130 F. Supp. 2d 105, 112 (D.D.C. 2001).

The Court of Appeals did not discuss *Pearson I*. Instead, it relied on the fact that the "competent and reliable scientific evidence" test had been around since 1984, pointing to *Sterling Drug, Inc. v. F.T.C.*, 741 F.2d 1146 (9th Cir. 1984). The Court of Appeals held that when the federal courts have "amassed an abundance of law giving shape and definition" to a phrase, there is a sufficiently well-established meaning to survive a constitutional challenge of vagueness. *Slip Op.* at 13-14 (citing *State v. Reader's Digest Ass'n*, 81 Wn.2d 259, 274, 501 P.2d 290 (1972)). According to the Court of Appeals, "the weight of federal court decisions" concerning the meaning of the phrase "competent and reliable scientific evidence" constitutes just such an abundance of law giving shape and definition" to the phrase. *Id.* at 14.

But the Court of Appeals did not identify any of these "federal court decisions" that purportedly give "shape and definition" to this phrase. Moreover, *Pearson I* shows the exact opposite. The vagueness question is both a significant question of constitutional law and an issue of substantial public interest that warrants review. RAP 13.4(b)(3), (b)(4).

**3. The Court of Appeals' decision conflicts with several U.S. Supreme Court decisions holding that the government bears the burden of proving that a restriction on commercial speech is justified.**

The decision below effectively eviscerates all First Amendment protection for commercial speech by allowing the government to penalize a company that cannot provide "adequate" scientific evidence to establish that its product claim is true, even though the government cannot prove (and

in this case abandoned any effort to prove) that the claim is false. The only constitutionally acceptable burden-of-proof rule requires the government to prove falsity.

The Court of Appeals cited three pre-1983 circuit-court decisions holding that the adequate-substantiation doctrine generally was constitutional. *Slip Op.* at 16-17.[6] But since 1983, the U.S. Supreme Court has repeatedly held that "government cannot limit speech protected by the First Amendment without bearing the burden of showing that its restriction is justified." *Philadelphia Newspapers v. Hepps*, 475 U.S. 767, 777, 106 S. Ct. 1558, 89 L. Ed. 2d 783 (1986).[7] This Court held the same: "The party seeking to uphold a restriction on commercial speech carries the burden of justifying it." *Kitsap County v. Mattress Outlet*, 153 Wn.2d 506, 512, 104 P.3d 1280 (2005). The Court of Appeals' decision conflicts with all of these decisions, all cited by Living Essentials below and all decided *after* the

[6] The three cases are *Jay Norris, Inc. v. F.T.C.*, 598 F.2d 1244 (2d Cir. 1979); *United States v. Readers' Digest Ass'n*, 662 F.2d 955 (3d Cir. 1981); and *Sears, Roebuck & Co. v. F.T.C.*, 676 F.2d 385 (9th Cir. 1982).

[7] *See also, e.g.*, *Sorrells v. IMS Health, Inc.*, 564 U.S. 552, 571-72, 131 S. Ct. 2653, 180 L. Ed. 2d 544 (2011) ("Under a commercial speech inquiry, it is the State's burden to justify its content-based law as consistent with the First Amendment."); *Thompson v. Western States Med. Ctr.*, 535 U.S. 357, 373, 122 S. Ct. 1497, 152 L. Ed. 2d 563 (2002) ("The Government simply has not provided sufficient justification here."); *Ibanez v. Florida Dep't of Bus. & Prof. Regulation*, 512 U.S. 136, 143, 114 S. Ct. 2084, 129 L. Ed. 2d 118 (1994) ("The State's burden is not slight; the 'free flow of commercial information is valuable enough to justify imposing on the would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful."); *Edenfield v. Fane*, 507 U.S. 761, 770-71, 113 S. Ct. 1792, 123 L. Ed. 2d 543 (1993) ("[A] governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree."); *Bolger v. Young Drugs Prods. Corp*, 463 U.S. 60, 71 n.20, 103 S. Ct. 2875, 77 L. Ed. 2d 469 (1983) ("The party seeking to uphold a restriction on commercial speech carries the burden of justifying it.").

circuit-court decisions the Court of Appeals cited. When the justification for restricting commercial speech is that the unregulated speech lacks a reasonable basis, the government has the burden of proving as much.[8]

**4. The adequate-substantiation doctrine cannot withstand strict scrutiny under article I, section 5.**

Based on the right to "freely speak…on all subjects," Living Essentials argued that article I, section 5, provides greater protection to commercial speech than is afforded by the First Amendment. Living Essentials provided a *Gunwall* analysis in support of this contention.[9] The Court of Appeals ruled that this Court had already held in *National Federation of Retired Persons v. Insurance Commissioner*, 120 Wn.2d 101, 838 P.2d 680 (1992), that commercial speech is not entitled to greater protection under the state free-speech clause. *Slip Op.* at 14-15.[10] But in *National Federation* this Court did not address whether the "all subjects" clause of article I, section 5, affords greater protection to commercial speech than the First Amendment. Without any reference to article I, section 5, or *Gunwall*, this Court simply defaulted to analyzing the commercial speech claim before it under the four-part *Central Hudson* test. Thirteen years later,

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[8] In a footnote, the Court of Appeals asserted that the burden-of-proof argument was "without merit" because the trial court never said it was imposing the burden on Living Essentials. *Slip Op.* at 12-13 n.6. But a substantiation requirement *by definition* requires the speaker to justify his speech.

[9] *Appellants' Br.* at 31-34 (discussing *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986)).

[10] The Court of Appeals also cited this Court's decision in *Ino Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103, 937 P.2d 154 (1997), but that decision, which did not involve commercial speech, merely referred to *National Federation* and contained no analysis of the issue.

in *Kitsap County v. Mattress Outlet*, 153 Wn.2d 506, 104 P.3d 1280 (2005), this Court specifically recognized that whether article I, section 5, provided more constitutional protection to commercial speech than the First Amendment was an *open* question. *Mattress Outlet*, 153 Wn.2d at 511 n.1.[11]

The free-speech clauses of the Oregon and Pennsylvania state constitutions contain the same guarantee of the right to freely speak "on all subjects" as article I, section 5 and, in those states, commercial speech has the same degree of protection as political or religious speech. *See Appellants' Br.* at 29-30 (citing *Ackerly Commc'ns v. Multnomah Cty.*, 72 Or. App. 617, 696 P.2d 1140, 1144 n.5 (1985); *Marks v. Roseburg*, 65 Or. App. 102, 670 P.2d 201, 204 (1983); *Insurance Adjustment Bureau v. Insurance Comm'r for the Commonwealth of Penn.*, 518 Pa. 210, 542 A.2d 1317, 1324 (1988)). Any attempt to regulate the content of commercial speech therefore must serve a compelling state interest and must be the least restrictive means of achieving that interest. This Court has never addressed the effect of the "on all subjects" clause on the regulation of commercial speech, and it should grant review to do so here.

[11] The State in its brief to the Court of Appeals cited *Bradburn v. North Central Regional Library Dist.*, 168 Wn.2d 789, 231 P.3d 16 (2010), in which this Court cited *Ino Ino* for the proposition that article 1, section 5, affords no greater protection to commercial speech than does the First Amendment. But *Bradburn*, like *Ino Ino*, did not involve commercial speech and included no analysis of the issue.

### 5. The adequate-substantiation doctrine cannot withstand heightened scrutiny under the First Amendment.

Even if article I, section 5, did not require restrictions on commercial speech to meet strict scrutiny, the First Amendment requires heightened scrutiny of all content-based restrictions. *Reed v. Town of Gilbert*, _ U.S. _, 135 S. Ct. 2218, 2227, 192 L. Ed. 2d 236 (2015). "Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Id.* A content-based restriction is unconstitutional unless the government proves it is "necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45, 103 S. Ct. 948, 74 L. Ed. 2d 794 (1983); *accord City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 418, 113 S. Ct. 1505, 123 L. Ed. 2d 99 (1993) (applying heightened scrutiny to "a categorical prohibition on the use of newsracks to disseminate commercial messages"). The Supreme Court has explicitly held that heightened scrutiny applies to content-based regulation of commercial speech:

> The First Amendment requires heightened scrutiny whenever the government creates "a regulation of speech because of disagreement with the message it conveys." … ***Commercial speech is no exception***.

*Sorrells*, 564 U.S. at 566 (emphasis added; citations omitted).

"It is also true that the First Amendment does not prevent restrictions directed at commerce or conduct from imposing *incidental burdens* on speech." *Id.* at 567. If the government "imposes more than an incidental burden" on protected speech, strict scrutiny is required, even

when the speech at issue conveys a commercial message. *Id.*; *accord United States v. United Foods, Inc.*, 533 U.S. 405, 410-11, 121 S. Ct. 2334, 150 L. Ed. 2d 438 (2001).

The judgment entered here did far more than impose a mere "incidental" burden. It prohibited Living Essentials from continuing to make the substantiated, but somehow "inadequately substantiated," "Superior to Coffee" and "Decaf" claims targeted by the attorney general, and imposed a substantial penalty. These actions cannot withstand heightened scrutiny. The State *never* received a complaint about Living Essentials' product claims and had no evidence of safety concerns; there was no justification for suppressing and punishing this commercial speech.

**6. Even if the trial court's restrictions on speech could be deemed mere "incidental burdens," they violated the First Amendment because the State also cannot satisfy the less-rigorous *Central Hudson* test.**

When considering whether a law that burdens commercial speech is constitutional, a court considers (1) whether the speech concerns a lawful activity and is not misleading, (2) whether the government's interest is substantial, (3) whether the restriction directly and materially serves the asserted interest, and (4) whether the restriction is no more extensive than necessary. *Central Hudson Gas & Elec. v. Pub. Serv. Comm'n*, 447 U.S.

557, 566, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980). All four *Central Hudson* factors support that imposing liability here violated the First Amendment.[12]

First, selling energy supplements is lawful, and the challenged "Superior to Coffee" and "Decaf" claims are not "misleading"; the State abandoned its falsity theory, and the trial court expressly found that the claims made were "plausible" and had at least some scientific support. The worst that can be said about the claims is that *some* scientists are unconvinced that sufficient competent and reliable scientific evidence presently exists to "substantiate" them.

Second, because the State cannot point to a single consumer complaint about Living Essentials' product claims, it can hardly be said that the State's interest in suppressing these statements is "substantial."

Third, complete suppression of such statements does not materially advance the State's interest in informing consumers that the product claims have not been scientifically substantiated to the State's satisfaction. Suppressing them simply leaves consumers completely uninformed.

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[12] The U.S. Supreme Court has repeatedly struck down speech restrictions that failed to meet either the third or fourth prongs of the *Central Hudson* test. *See* S. Rauer, *When the First Amendment & Public Health Collide: The Court's Increasingly Strict Constitutional Scrutiny of Health Regulations that Restrict Commercial Speech*, 38 AM. J.L. & MED. 690, 691-92 (2012) ("[*Sorrell*] is only the most recent development in the Court's strict treatment of health-related regulations infringing on commercial speech. … [A]lmost all public health regulations that attempt to restrict speech are invalidated under *Central Hudson*[.]"); *see, e.g.*, *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 121 S. Ct. 2404, 150 L. Ed. 2d 532 (2001) (prohibition of outdoor advertising of tobacco within 1,000 feet of a school did not materially advance State's legitimate interest in preventing sales to underage minors); *Discovery Network*, 507 U.S. at 418 (ban on sidewalk newspaper racks failed the third and fourth prongs because the law only minimally served the interest of promoting traffic safety and aesthetics).

Fourth, the restriction imposed—complete suppression—is far more extensive than necessary. The State has other options, such as requiring disclaimers[13] that inform consumers that the product claims have not been scientifically substantiated to the State's satisfaction. For example, in *Pearson I*, the D.C. Circuit held that the FDA failed to show a reasonable fit between the government's goals of protecting public health and preventing consumer fraud and "the means chosen to advance those goals." 164 F.3d at 656-58. The Court rejected the FDA's "outright suppression" of the promotional claims and held that, under Supreme Court precedent, the First Amendment required the use of the less drastic measure of requiring a disclaimer.[14]

On remand, the district court preliminarily enjoined the FDA from suppressing the manufacturer's promotional claims, holding that the manufacturer had shown a substantial likelihood of success on the merits of its First Amendment claim. *Pearson v. Shalala* ("*Pearson II*"), 130 F. Supp.

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[13] *Pearson I* noted that the Supreme Court already had held that "the preferred remedy" for dealing with the problem of potentially misleading commercial speech was "more disclosure, rather than less." *Id.* at 657 (quoting *Bates v. State Bar of Arizona*, 433 U.S. 350, 375, 97 S. Ct. 2691, 53 L. Ed. 2d 810 (1977)). "In more recent cases, the [Supreme] Court has reaffirmed this principle, repeatedly pointing to disclaimers as constitutionally preferable to outright suppression." *Id.* (citing *Peel v. Attorney Registration*, 496 U.S. 91, 110, 110 S. Ct. 2281, 110 L. Ed. 2d 83 (1990); and *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 478, 108 S. Ct. 1916, 100 L. Ed. 2d 475 (1988)).

[14] *Accord Alliance for Natural Health v. Sebelius*, 714 F. Supp. 2d 48 (D.D.C. 2010) (FDA's refusal to permit dietary-supplement manufacturer to make claim that use of selenium reduces risks of prostate cancer was inconsistent with the First Amendment's preference for use of disclaimers instead of suppression); *Whitaker v. Thompson*, 248 F. Supp. 2d 1, 15 (D.D.C. 2002) (FDA's decision to suppress manufacturers' claim that anti-oxidants reduce risk of certain cancers "does not comport with the First Amendment's clear preference for disclosure over suppression of commercial speech").

2d 105, 114 (D.D.C. 2001).[15] The court held that to prohibit the manufacturer from making its claims, the FDA had to show that "the 'weight' of the scientific evidence is 'against'" the truthfulness of the claims. *Id.* at 115. The *manufacturer's* failure to prove that its claim was true did *not* mean that manufacturer's claim was false, and thus the FDA could not suppress the claim: "The mere absence of significant affirmative evidence in support of a particular claim…does not translate into negative evidence 'against' it." *Id.* at 115. Because the FDA could not show that the scientific evidence was "against" the claim, the court held that the FDA erred in determining that the claim was inherently misleading. *Id*. at 116.

In sum, even assuming that the restrictions imposed here are not content based, the "adequate substantiation" requirement does not satisfy even the lower First Amendment standard for incidental restrictions on commercial speech. This and the other significant constitutional questions raised here warrant review under RAP 13.4(b)(3).

### C. Insufficient Basis to Find a Deceptive Net Impression

The trial court found that the "Ask Your Doctor" ad had a deceptive net impression, despite being "literally true." CP 8109 (FF 22(a)). Yet the State presented no consumer testimony, surveys, or empirical evidence,

[15] On remand, the FDA reconsidered the claim that the supplement was more effective in reducing the risk of neural defects than certain common foods and again ruled against the manufacturer, finding that this claim was "inherently misleading" because the manufacturer could not point to affirmative scientific data that supported it. But the district court held that the FDA "failed to comply with the constitutional guidelines outlined in *Pearson [I]*" when it concluded that the manufacturer's claim was inherently misleading. *Pearson II*, 130 F. Supp. 2d at 112. In yet another published decision, the district court denied reconsideration. *Pearson v. Thompson* ("*Pearson III*"), 141 F. Supp. 2d 105 (D.D.C. 2001).

choosing instead to rely solely on unfounded "expert" testimony. In light of federal authority that evaluating consumer impression ordinarily requires empirical evidence, *see, e.g., F.T.C. v. Brown & Williamson Tobacco Corp.*, 778 F.2d 35, 40-41 (D.C. Cir. 1985); *American Brands, Inc. v. R.J. Reynolds Tobacco Co.*, 413 F. Supp. 1352, 1357 (S.D.N.Y. 1976), and the potential to ban even *true* claims based on conjecture that some might misunderstand them, the showing necessary to ban an ad as deceptive is an issue of substantial public importance this Court should decide. RAP 13.4(b)(4).

## VI. CONCLUSION

The decision below conflicts with decisions of this Court and of the U.S. Supreme Court, raises significant constitutional questions, and involves issues of substantial public importance that this Court should decide. RAP 13.4(b)(1), (3), (4). This Court should grant review.

Respectfully submitted this 12th day of June, 2019.

STOEL RIVES, LLP

By MBK #14405 for
Joel A. Mullin, OR St. Bar No. 862533 (admitted *pro hac vice* in COA)
Reilley D. Keating, WSBA No. 46415

CARNEY BADLEY SPELLMAN, P.S.

By Michael B King
Michael B. King, WSBA No. 14405
James E. Lobsenz, WSBA No. 8787
Jason W. Anderson, WSBA No. 30512

*Attorneys for Petitioners*

## CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

☒ Via Appellate Portal to the following:

| | |
|---|---|
| Trisha L. McArdle<br>Elizabeth J. Erwin<br>Daniel T. Davies<br>Office of the Attorney General<br>800 5th Ave Ste 2000<br>Seattle WA 98104-3188<br>DanielD@atg.wa.gov<br>LisaE@atg.wa.gov<br>trisham@atg.wa.gov | Joel A. Mullin<br>Reiley D. Keating<br>Timothy W. Snider<br>Taryn K. Williams<br>Samantha K. Sondag<br>Stoel Rives, LLP<br>900 SW 5th Ave Ste 2600<br>Portland OR 97204-1229<br>joel.mullin@stoel.com<br>timothy.snider@stoel.com<br>reilley.keating@stoel.com<br>taryn.williams@stoel.com<br>samantha.sondag@stoel.com |
| Jill D. Bowman<br>Stoel Rives LLP<br>600 University St., Suite 3600<br>Seattle, WA 98101<br>Jill.bowman@stoel.com | |

DATED this 12th day of June, 2019.

Patti Saiden

Patti Saiden, Legal Assistant

# APPENDIX A

FILED
3/18/2019
Court of Appeals
Division I
State of Washington

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

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| STATE OF WASHINGTON,<br><br>Respondent,<br><br>v.<br><br>LIVING ESSENTIALS, LLC a Michigan limited liability company, and INNOVATION VENTURES, LLC, a Michigan limited liability company,<br><br>Appellants. | No. 76463-2-I<br><br>DIVISION ONE<br><br>PUBLISHED OPINION<br><br>FILED: March 18, 2019 |

MANN, A.C.J. —The State of Washington sued Living Essentials, LLP, and Innovative Ventures, LLP (collectively, Living Essentials) under the Washington Consumer Protection Act (CPA), chapter 19.86 RCW, alleging that Living Essentials violated the CPA by making deceptive advertising claims about its product, 5-Hour ENERGY®. After a bench trial, the trial court agreed that three of Living Essentials' advertising campaigns violated the CPA. The trial court assessed a civil penalty against Living Essentials and awarded the State its attorney fees and costs.

Living Essentials argues on appeal that the trial court (1) erred by adopting the Federal Trade Commission's (FTC) prior-substantiation doctrine, (2) that the prior-substantiation doctrine violates article I, section 5 of the Washington State Constitution, (3) that Living Essentials' claims were mere puffery which did not require substantiation, (4) the trial court applied the wrong standard for necessary substantiation, and (5) the

trial court erred in concluding that Living Essentials' Ask Your Doctor claim was deceptive. Living Essentials also challenges the trial court's penalty and award of attorney fees. We affirm.[1]

II.

Living Essentials produces and markets the energy drink 5-Hour ENERGY®. During its advertising campaign, Living Essentials made numerous claims about the efficacy of 5-Hour ENERGY®. Three of those claims are relevant to this appeal.

First, Living Essentials claimed that 5-Hour ENERGY® was "Superior to Coffee" (Superior to Coffee claim). Specifically, Living Essentials claimed that "the key vitamins and nutrients [in 5-Hour ENERGY®] work synergistically with caffeine to make the biochemical or physiological effects last longer than caffeine alone." Second, Living Essentials claimed that the decaf variety of 5-Hour ENERGY® provided energy, alertness, and focus "for hours." (Decaf claim). Living Essentials provided the basic message, if you do not like caffeine then "Decaf 5-Hour ENERGY®. . . can provide the alertness you want without the 'caffeine feeling' you don't." Third, Living Essentials implied that 73 percent of doctors would recommend 5-Hour ENERGY® (Ask Your Doctor claim). In an ad that ran on national television, a spokesperson said

> We asked over 3,000 doctors to review 5-hour Energy®, and what they said is amazing. Over 73% who reviewed 5-hour Energy® said they would recommend a low calorie energy supplement to their healthy patients who use energy supplements. 73%. 5-hour Energy has 4 calories and is used over nine million times a week. Is 5-hour Energy right for you? Ask your doctor. We already asked 3,000.

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[1] The State filed a motion to strike or disregard portions of appellants' opening and reply briefs. Because the State prevailed in this appeal, it is unnecessary for us to consider the merits of this motion. The State's motion is denied.

After an 11-day bench trial involving testimony and transcripts of testimony from 20 lay and expert witnesses and the admission of approximately 500 exhibits, the trial court issued a 57-page decision including detailed findings of fact and conclusions of law. Following FTC guidance, the trial court concluded that Living Essentials Superior to Coffee, Decaf, and Ask Your Doctor claims were deceptive and violated the CPA.

With respect to the Superior to Coffee claim the trial court found that the real takeaway was "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)." The court further found that "[t]he studies [Living Essentials presented] do not clearly establish that 5-Hour ENERGY®'s vitamins and nutrients work synergistically with caffeine to make these benefits last longer than they would last with caffeine alone." Living Essentials' claim that "5-Hour ENERGY® works better than caffeine alone . . . is certainly plausible, given the science presented to the Court, but it remains a hypothesis, not an established scientific fact." The court concluded that "Living Essentials violated the [CPA] when it aired or published ads that represented that the energy, alertness and from 5-hour ENERGY® lasts longer than a cup of coffee because of the synergistic effects of caffeine, B vitamins and nutrients in the product."

The trial court also found that "Living Essentials lacks competent and reliable scientific evidence to claim that decaf 5-Hour ENERGY® will generate energy and alertness that 'lasts for hours.'" The trial court concluded that "Living Essentials violated the [CPA] when it claimed in a press release and on its web site that Decaf 5-hour ENERGY® will provide energy, alertness and focus that lasts for hours."

Finally, the trial court determined that the "Ask-Your-Doctors" claim was deceptive. The court found that the "net impression" from the ad was that "a substantial majority of doctors believe 5-Hour ENERGY® is a safe and effective nutritional supplement that doctors would recommend to their patients." The court noted that "while the statistics displayed . . . were literally true, the impression left by the ads was not."

Based on the number of times the ads aired or the number of bottles of product sold, the trial court imposed a $2,183,747 civil penalty and awarded the State its attorney fees and costs. Living Essentials appeals.

II.

Living Essentials first raises multiple challenges to the trial court's findings and conclusions that Living Essentials' Superior to Coffee, Decaf, and Ask Your Doctor claims were deceptive and violated the CPA.

"[W]hether a particular action gives rise to a Consumer Protection Act violation is reviewable as a question of law." Leingang v. Pierce County. Med. Bureau, 131 Wn.2d 133, 150, 930 P.2d 288 (1997). Whether a party committed the particular violation, however, is reviewed under the substantial evidence test. Leingang, 131 Wn.2d at 150. "Substantial evidence is evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premise." Holland v. Boeing Co., 90 Wn.2d 384, 390, 583 P.2d 621 (1978). "The substantial evidence standard is deferential and requires the court to view the evidence and reasonable inferences in the light most favorable to the party who prevailed" below. Mansour v. King County, 131 Wn. App. 255, 263, 128 P.3d 1241 (2006).

Unchallenged findings of fact are verities on appeal. State v. Reader's Digest Ass'n, Inc., 81 Wn.2d 259, 263-64, 501 P.2d 290 (1972).[2] Further, mere assertions of error are not enough. When a challenged finding is unsupported by argument on appeal, this court need not consider the assignment of error. Bryant v. Palmer Coking Coal Co., 86 Wn. App. 204, 216, 936 P.2d 1163 (1997).[3] Even where the evidence conflicts, the appellate court need only determine "whether the evidence most favorable to the prevailing party supports the challenged findings." Prostov v. State, Dept. of Licensing, 186 Wn. App. 795, 820, 349 P.3d 874 (2015). Finally, the reviewing court "defer[s] to the trier of fact regarding witness credibility or conflicting testimony." Weyerhaeuser v. Tacoma-Pierce County Health Dep't, 123 Wn. App. 59, 65, 96 P.3d 460 (2004). Reviewing courts will not reweigh the evidence or the credibility of witnesses on appeal. Washington Belt & Drive Sys., Inc. v. Active Erectors, 54 Wn. App. 612, 616, 774 P.2d 1250 (1989).[4]

A.

Living Essentials' primary contention is that the trial court erred by relying on the FTC's "prior substantiation doctrine" because it has not been adopted in Washington, cannot be judicially adopted, and is inconsistent with Washington CPA law. We disagree. A brief review of the CPA and FTC's prior substantiation doctrine is helpful.

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[2] Living Essentials does not assign error to numerous findings of fact. See, e.g., Unchallenged findings 1-9, 1, 13-14(d)(6), 15-16(a)-(c)(1), 16(d(10-(4), and portions of 10, 16(c)(2), 16(d)(5)-(6), 17, 19, 20, 22.

[3] Living Essentials assigns error to several findings but fails to provide argument in support of the assignment. See, e.g., Findings 14(d)(7), 16(c)(2), 19(i), 20(d), 22(a), 22(a)(2)-(3).

[4] Living Essentials assigns error to several of the trial court's credibility determinations and weighing of evidence. See, e.g., Findings 16, 16(c)(2), 16(d)(5)-(6), 17(c), 19, 20, 22.

1.

The CPA prohibits "unfair or deceptive acts or practices in the conduct of any trade or commerce." RCW 19.86.020. The purpose of the CPA is "to protect the public and foster fair and honest competition." RCW 19.86.920. The CPA is meant to be liberally construed to serve this purpose. Short v. Demopolis, 103 Wn.2d 52, 60-61, 691 P.2d 163 (1984).

The Washington Attorney General may bring an enforcement action under the CPA. The State must prove three elements: "(1) an unfair or deceptive act or practice, (2) occurring in trade or commerce, and (3) a public interest impact." State v. Kaiser, 161 Wn. App. 705, 719, 254 P.3d 850 (2011). The State is not required to prove that the unfair or deceptive advertisements actually injured consumers or that consumers relied on deceptive ads when deciding whether to purchase or consume the advertised products. Kaiser, 161 Wn. App. at 719. A CPA claim "does not require a finding of an intent to deceive or defraud and therefore good faith on the part of the seller is immaterial." Wine v. Theodoratus, 19 Wn. App. 700, 706, 577 P.2d 612 (1978).

The CPA does not define "unfair or deceptive acts or practice." Instead, our Supreme Court has allowed the definition to evolve through the "gradual process of judicial inclusion and exclusion." Klem v. Washington Mut. Bank, 176 Wn.2d 771, 785, 295 P.3d 1179 (2013). "Given that there is 'no limit to human inventiveness,' courts, as well as legislatures, must be able to determine whether an act or practice is unfair or deceptive to fulfill the protective purpose of the CPA." Klem, 176 Wn.2d at 786 (quoting Panag v. Farmers Ins. Co. of Wash., 166 Wn.2d 27, 48, 204 P.3d 885 (2009)).

A claim under the CPA may be predicated upon (1) a per se violation of statute, (2) an act or practice that has the capacity to deceive substantial portions of the public, or (3) an unfair or deceptive act or practice not regulated by statute but in violation of public interest. Klem, 176 Wn.2d at 787. "An act is deceptive if it is likely to mislead a reasonable consumer." State v. Mandatory Poster, 199 Wn. App. 506, 512, 398 P.3d 1271 (2017). "A plaintiff need not show that the act in question was intended to deceive, but that the alleged act had the capacity to deceive a substantial portion of the public." Hangman Ridge Training Stables, Inc. v. Safeco Title Insurance Company, 105 Wn.2d 778, 785, 719 P.2d 531 (1986). Further, a truthful statement "may be deceptive by virtue of the 'net impression' it conveys." Panag, 166 Wn.2d at 50.

Washington's CPA was initially adopted in 1961 and modeled generally after section 5 of the Federal Trade Commission Act (FTCA), 15 U.S.C. § 45(a)(1); Hangman Ridge, 105 Wn.2d at 783. As with the CPA, the FTCA broadly prohibits "unfair or deceptive acts or practices." The CPA was intended to "complement the body of federal law governing restraints of trade, unfair competition and unfair, deceptive, and fraudulent acts or practices." RCW 19.86.920. As such, "in construing this act, the courts [should] be guided by the final decisions of the federal courts and final orders of the federal trade commission." RCW 19.86.920; State v. Black, 100 Wn.2d 793, 799, 676 P.2d 963 (1984) ("When the Legislature enacted the Consumer Protection Act, it anticipated that courts would be guided by the interpretation given by federal courts to their corresponding federal statutes.").

Washington courts have repeatedly adopted federal court interpretations of section 5 of the FTCA when reviewing CPA cases. See Boeing Co. v. Sierracin Corp.,

108 Wn.2d 38, 57, 738 P.2d 665 (1987) (citing RCW 19.86.920) ("In the absence of Washington cases discussing when assertion of trade secrets constitutes a violation of antitrust laws, [courts] are guided by interpretations of the federal courts."); Fisher v. World-Wide Trophy Outfitters, 15 Wn. App. 742, 748, 551 P.2d 1398 (1976) (citing Exposition Press, Inc. v. Fed. Trade Comm'n, 295 F.2d 869, 873 (2nd Cir. 1961) (using the Second Circuit's interpretation of an unfair or deceptive act). See also Panag, 166 Wn.2d at 50 (quoting Sw. Sunsites, Inc. v. Fed. Trade Comm'n, 785 F.2d 1431, 1435 (9th Cir. 1986)) (Deception exists "if there is a representation, omission or practice that is likely to mislead."); Blewett v. Abbott Labs, 86 Wn. App. 782, 787, 938 P.2d 842 (1997) ("The directive to be 'guided by' federal law does not mean we are bound to follow it. But neither are we free to ignore it, and indeed in practice Washington courts have uniformly followed federal precedent in matters described under the [CPA].").

Under section 5 of the FTCA, in order to prove that an advertisement is deceptive, the FTC must establish that the advertisement (1) conveys a representation through either express or implied claims; (2) that the representation is likely to mislead consumers; and (3) that the misleading representation is material. Federal Trade Comm'n v. Direct Mktg. Concepts, Inc., 569 F. Supp. 2d 285, 297 (D. Mass 2008), aff'd, 624 F.3d 1 (1st Cir. 2010). "Neither proof of consumer reliance nor consumer injury is necessary to establish a section 5 violation." Federal Trade Comm'n v. Freecom Commc'ns, Inc., 401 F.3d 1192, 1203 (10th Cir. 2005). The FTC can prove that a representation is likely to mislead consumers by establishing either (1) actual falsity of express or implied claims ("falsity" theory); or (2) that the advertiser lacked a reasonable basis for asserting the representation was true ("reasonable basis" theory). Federal

Trade Comm'n v. Pantron I Corp., 33 F.3d 1088, 1096 (9th Cir. 1994) (citing In the Matter of Thompson Med. Co., 104 F.T.C. 648 (1984)); Federal Trade Comm'n v. John Beck Amazing Profits, LLC, 865 F. Supp. 2d 1052, 1067 (C.D. Cal. 2012).[5]

Under the reasonable basis theory, if an advertisement states or impliedly suggests that a product successfully performs an advertised function or yields an advertised benefit, the advertiser must have a "reasonable basis" for the claim. Federal Trade Comm'n v. COORGA Nutraceuticals Corp., 201 F. Supp. 3d 1300, 1308-09 (D. Wyo. 2016) (citing Pfizer, Inc., 81 F.T.C. 23 (1972)). Further, the advertiser must have some recognizable substantiation for the representation prior to advertising it. John Beck Amazing Profits, 865 F. Supp. 2d at 1067. Where an advertiser lacks adequate substantiation, it necessarily lacks any reasonable basis for its claims and the advertisement is deceptive as a matter of law. Direct Mkg. Concepts, Inc., 624 F.3d at 8. This is known as the FTC's prior substantiation doctrine.

2.

Living Essentials contends that the trial court erred by adopting the prior substantiation doctrine—effectively creating a new per se unfair trade practice. We agree that our Supreme Court has determined that it is for the Legislature, not the courts, to declare whether a statutory violation is a per se unfair trade practice. Hangman Ridge, 105 Wn.2d at 787. We disagree, however, that the trial court adopted the prior substantiation doctrine as a new per se unfair trade practice.

Living Essentials relies primarily on this court's decision in State v. Pacific Health Center, Inc., 135 Wn. App. 149, 143 P.3d 618 (2006). In Pacific Health, the State

[5] Here, because the State was proceeding only under the reasonable basis theory, the trial court did not analyze Living Essentials' claims under the falsity theory.

alleged that various alternative medicine practitioners violated the CPA because they were practicing medicine, naturopathy, and acupuncture, without a license. Pacific Health, 135 Wn. App. at 153. The State had argued that by engaging in health care practices, the defendants represented that they possessed the expertise and training that only licensed health care providers possessed—a misrepresentation and violation of the CPA. The defendants argued that the State was attempting to create a new per se violation of the CPA: practicing medicine without a license.

The Pacific Health court agreed with the defendants because, despite being unlicensed, they were actually skilled at performing the tests and diagnoses that they performed. The court concluded that the advertisements that claimed the defendants were skilled at performing medical tests, but not asserting that they were licensed doctors, were not deceptive. The court further concluded that if it were to find the ads deceptive simply because the defendants were unlicensed, it would amount to a new per se unfair trade practice. Pacific Health, 135 Wn. App. at 149.

In reaching its conclusion, the Pacific Health court analogized to Bowers v. Transamerica Title Ins. Co., 100 Wn.2d 581, 675 P.2d 193 (1983). In Bowers, a title insurance company prepared closing documents in preparation for a sale despite not being licensed to practice law. The Pacific Health court explained that "[t]he crucial point for our CPA analysis is not simply that [the appellants in Bowers] were unqualified to practice law, but rather that the record demonstrated they were, in fact, not skilled in preparing the very closing documents they held themselves out as qualified to prepare." Pacific Health, 135 Wn. App. at 172.

The Pacific Health court's analysis of Bowers clarifies that a decision does not risk creating a new per se unfair trade practice when, on the facts of the case, the alleged violators' conduct actually constituted deception. In Pacific Health, the unlicensed defendants were actually skilled at performing the tests and diagnosis for which they had advertised. Therefore, to hold that they violated the CPA would have created a new per se unfair trade practice because the doctor's advertisements were not, in fact, deceptive. Whereas in Bowers, because the advertisements were actually deceptive the case did not risk creating a new per se unfair trade practice.

Living Essentials' argument might be persuasive if the trial court had declared that simply because Living Essentials lacked prior substantiation, its advertisements were per se deceptive, without any analysis of whether the claims were actually deceptive. But this is not what the trial court did. While the trial court explained the FTC's prior substantiation doctrine as part of its conclusions of law, the court specifically declined to rely only on prior substantiation:

> The State argues that any scientific evidence developed or relied upon after Living Essentials aired or published its ads is legally irrelevant because the FTC guidelines required pre-claim substantiation. While this Court acknowledges that both the FTC guidelines and federal case law indicate that pre-claim substantiation is required, the Court also concludes that subsequent scientific studies may shed light on pre-claim studies and are thus relevant and material to the Court's CPA analysis.

More importantly, a review of the trial court's extensive findings of fact demonstrates that the court carefully considered Living Essentials' preclaim substantiation as well as an extensive list of postclaim studies and expert trial testimony in making its findings. The trial court found—with respect to Living Essentials' Superior to Coffee claim—that there was insufficient scientific evidence to support Living

Essentials' express claims that people who drink 5-hour ENERGY® will experience hours of energy, alertness, and focus because the vitamins and nutrients extend the effects of caffeine. As a result of the lack of scientific evidence, the trial court found the ads materially misleading and in violation of the CPA.

Similarly, after reviewing both pre and postclaim studies and expert trial testimony, the trial court found:

> While there is competent and reliable scientific evidence to support a claim that the Decaf 5-hour ENERGY® shot may provide a short-term benefit in terms of energy, the science is insufficient to substantiate the claim that this benefit will endure over a five hour period. For this reason, the Court finds the Decaf Claims to be materially misleading and a violation of the CPA.

Thus, while the trial court was appropriately guided by the FTC's prior substantiation doctrine, it did not adopt the doctrine as a per se violation of the CPA. Instead after weighing all of the evidence before it, the court found that Living Essentials' Superior to Coffee and Decaf claims were materially misleading.

B.

Living Essentials next contends that application of the prior substantiation doctrine is contrary to article I, section 5 of the Washington Constitution and the First Amendment to the United States Constitution. We disagree.

1.

Living Essentials first argues that the trial court's standard for adequate substantiation required "competent and reliable scientific evidence"—an unconstitutionally vague standard for penalizing and suppressing speech.[6] Living

[6] Living Essentials also argues that the trial court violated the First Amendment by shifting the burden of proof and not requiring the government to prove Living Essentials' ads were misleading. Living Essentials bases this claim on one isolated statement in the trial court's extensive findings and

Essentials argues that "competent and reliable" is just as vague as requiring "credible and reliable" identification of a criminal suspect, which the U.S. Supreme Court has found unconstitutional. See Kolendar v. Lawson, 461 U.S. 352, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983).

The due process clause of the Fourteenth Amendment requires that notice be given of what is prohibited. Reader's Digest, 81 Wn.2d at 273. Whether "notice is, or is not 'fair' depends on the subject matter to which it relates" and "'common intelligence' is the test of what is 'fair warning.'" Reader's Digest, 81 Wn.2d at 273 (quoting Connally v. Gen. Constr. Co., 269 U.S. 385, 391, 46 S. Ct. 126, 70 L. Ed. 322 (1926)). "In the field of regulatory statutes governing business activities, greater leeway is allowed in applying the test." Reader's Digest, 81 Wn.2d at 273-74. Thus, statutes using words or phrases well enough known to enable those expected to use them to correctly apply them, or statutes that use words with a well settled common law meaning will be sustained against a vagueness challenge. Reader's Digest, 81 Wn.2d at 273-74.

The phrase "competent and reliable scientific evidence" has been a benchmark for determining whether ad claims have a reasonable basis since at least 1984. See Sterling Drug, Inc. v. Federal Trade Comm'n, 741 F.2d 1146, 1156-57 (9th Cir. 1984) (performance claims must be supported by "competent and reliable evidence."). Our Supreme Court has held that where federal courts have "amassed an abundance of law giving shape and definition" to the law, there is sufficiently well established meaning in federal trade law to meet a constitutional challenge of vagueness. Reader's Digest, 81

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conclusions and then contends that the court did not require the government to prove anything. Living Essentials, fails, however to cite to anywhere in the trial court's findings or conclusions that actually shifted the government's burden of proof. Its claim is without merit.

Wn.2d at 274. Given the weight of federal court decisions, FTC decisions, orders, and guidance surrounding both the requirement of "competent and reliable scientific evidence" and what advertisers may do to market dietary supplements in a fair and non-deceptive manner, the trial court did not err in following FTC guidance.

2.

Living Essentials argues next that article I, section 5 of the Washington State Constitution affords greater protection of commercial speech than the First Amendment and requires application of strict scrutiny.

Living Essentials contends that it is an open question whether article I, section 5 of the Washington Constitution provides broader protection than the First Amendment to the United States Constitution. Living Essentials argues that the open nature of this question means that this court must undergo a Gunwall analysis to determine whether commercial speech is afforded greater protection under article I, section 5, than the First Amendment. State v. Gunwall, 106 Wn.2d 54, 58, 720 P.2d 808 (1986).

While Living Essentials is correct that we use the Gunwall factors to analyze whether the Washington Constitution provides a broader right than the Federal Constitution, contrary to Living Essentials' claims, our Supreme Court has already answered that question regarding commercial speech. In Nat'l Fed. of Retired Persons v. Ins. Com'r., the Court determined that because "Washington case law provides no clear rule for constitutional restrictions on commercial speech . . . [w]e therefore follow the interpretative guidelines under the federal constitution." 120 Wn.2d 101, 118, 838 P.2d 680 (1992) (Describing the test that the United States Supreme Court established in Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York, 447 U.S. 557,

563, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980)). See also, Ino Ino Inc. v. City of Bellevue, 132 Wn.2d 103, 116, 937 P.2d 154 (1997) ("The federal analysis also applies when confronting [article I, section 5] challenges to regulations of commercial speech.").

Living Essentials cites to other Washington cases as support for its assertion that it is still an open question whether commercial speech is afforded more protection in Washington than federally. See Soundgarden v. Eikenberry, 123 Wn.2d 750, 764, 871 P.2d 1050 (1994) (declining to address the scope of protection under article 1, section 5, because the parties "have not addressed the . . . [Gunwall] factors.") and Kitsap County v. Mattress Outlet, 153 Wn.2d 506, 511 n.1, 104 P.3d 1280 (2005) (emphasis added) ("Although our state constitution may be more protective of free speech than the federal constitution, it is unnecessary to consider a state constitutional analysis because [the ordinance] . . . fails the minimum protection provided under the federal constitution."). None of the cases Living Essentials cites overrules or meaningfully distinguishes Nat'l Fed. of Retired Persons or Ino Ino. If anything, the cases that Living Essentials cites further supports the Supreme Court's statement in Nat'l Fed. of Retired Persons that "Washington case law provides no clear rule for constitutional restrictions on commercial speech." 120 Wn.2d at 118. Accordingly, the Supreme Court's decisive language that we are to apply the four-part test from Central Hudson remains binding authority on this court. See Nat'l Fed. of Retired Persons, 120 Wn.2d at 118; Ino Ino, 132 Wn.2d at 116.

In Central Hudson, the United States Supreme Court determined that commercial speech is entitled to First Amendment protection. 447 U.S. at 566. However, because commercial speech is not entitled to as much protection as noncommercial speech, the

Court established a four-part test to determine if a regulatory burden on commercial speech is constitutional. Central Hudson, 447 U.S. at 566. In analyzing this question, a court must consider: (1) whether the speech concerns a lawful activity and is not misleading, (2) whether the government's interest is substantial, (3) whether the restriction directly and materially serves the asserted interest, and (4) whether the restriction is no more extensive than necessary. Central Hudson, 447 U.S. at 566.

Applying Central Hudson to this case, Living Essentials' argument that the prior substantiation doctrine is unconstitutional fails at the first prong. The United States Supreme Court has continually emphasized that in order to be constitutionally protected, commercial speech must not be misleading or concern unlawful activity. See In re R.M.J., 455 U.S. 191, 203, 102 S. Ct. 929, 71 L. Ed 2d 64 (1982) ("Misleading advertising may be prohibited entirely"). The Supreme Court has also held that the government may even regulate potentially deceptive speech without violating the First Amendment. See Friedman v. Rogers, 440 U.S. 1, 16, 99 S. Ct. 887, 888, 59 L. Ed. 2d 100 (1979) (In upholding a Texas statute that banned the use of trade names the court concluded that "the use of a trade name . . . enhances the opportunity for misleading practices. . . . 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.").

Living Essentials concedes that several federal Circuit Courts of Appeal have upheld the prior substantiation doctrine against similar constitutional challenges. See Jay Norris, Inc. v. Federal Trade Comm'n, 598 F.2d 1244 (2d Cir. 1979); United States v. Readers' Digest Ass'n, 662 F.2d 955 (3d Cir. 1981); Sears, Roebuck & Co. v. Federal

Trade Comm'n, 676 F.2d 385 (9th Cir. 1982)). Living Essentials argues that these cases should be disregarded because they were "issued at the dawn of First Amendment protection of commercial speech," but fails to explain why this matters. Living Essentials has not pointed to any case law purporting to overrule or meaningfully distinguish these cases and the Central Hudson analysis suggests that the prior substantiation doctrine remains just as constitutional today as it was when these cases were first decided.

C.

Living Essentials next contends that no substantiation was necessary because the Superior to Coffee and Decaf claims are "mere puffery" and therefore not actionable under the CPA.

The FTC "generally will not bring advertising cases based on subjective claims . . . [or] cases involving obviously exaggerated or puffing representations, i.e., those that the ordinary consumers do not take seriously."[7] Puffery is defined as "either vague or highly subjective [claims] and, therefore, incapable of being substantiated." Federal Trade Comm'n v. Nat'l Urological Grp., Inc., 645 F.Supp.2d 1167, 1205 (N.D. Ga. 2008) aff'd, 356 F. App'x 358 (11th Cir. 2009).[8]

Living Essentials' attempt to characterize its claims as subjective by highlighting the use of the word "feeling" in its advertisements is unpersuasive. Living Essentials claimed that the unique blend of vitamins and amino acids in 5-Hour ENERGY® worked

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[7] FTC POLICY STATEMENT ON DECEPTION 4 (OCT. 14, 1983), HTTPS://WWW.FTC.GOV/SYSTEM/FILES/DOCUMENTS/PUBLIC_STATEMENTS/410531/831014DECEPTIONSTMT.PDF [HTTPS://PERMA.CC/XEU9-NY6R].

[8] Citing Bureau of Consumer Prot., FTC, Dietary Supplements: An Advertising Guide for Industry (2001), https://www.ftc.gov/system/files/documents/plain-language/bus09-dietary-supplements-advertising-guide-industry.pdf [https://perma.cc/4XDP-VL7J]).

synergistically with caffeine to enhance the duration of the energy, alertness, and focus derived from caffeine alone. These are factual representations that are capable of being tested. "Living Essentials intentionally promoted the product's ingredients as changing the way the body functioned [and] [i]t promoted the product as a healthy way to achieve these physiological results." We agree with the trial court that Living Essentials' claims were factual representations and not mere puffery.

Living Essentials also contends that the FTC does not require substantiation where the product involved is "frequently purchased, easily evaluated by consumers, and inexpensive." But this point disregards the underlying policy purposes of the FTC's position: "[t]here is little incentive for sellers to misrepresent . . . in these circumstances since they normally would seek to encourage repeat purchases. Where . . . market incentives place strong constraints on the likelihood of deception, the [FTC] will examine a practice closely before proceeding." FTC, STATEMENT ON DECEPTION at 5.

However, in this case the incentive to mislead consumers is still present. There is no way for the consumer to know which ingredients are acting to make the consumer feel more energized. While the evidence suggests that it is the caffeine that is providing the specific effects that the consumer is feeling, Living Essentials expressly advertised that it is 5-Hour ENERGY®'s non-caffeine ingredients that are acting. Therefore, the policy concerns underlying the FTC's guidance do not apply here.

D.

Under the FTC's prior substantiation doctrine, the court must determine the appropriate level of substantiation required for a claim to have a reasonable basis. Living Essentials contends the trial court erred by applying the FTC substantiation

standard for claims that "relate to consumer health." While we agree that the trial court misstated the applicable standard, contrary to Living Essentials' argument, the error does not mandate a reversal.

The trial court found that "Living Essentials' ads relate to consumer health" and therefore "require a relatively high level of substantiation."[9] Under this relatively high level of substantiation standard, the court noted that Living Essentials' "Superior to Coffee" claim was "certainly plausible. . . [but was] not an established scientific fact." Further, the trial court concluded that "[w]hile there is competent and reliable scientific evidence to support a claim that the Decaf 5-Hour ENERGY® shot may provide a short-term benefit in terms of energy, the science is insufficient to substantiate the claim that this benefit will endure over a five hour period." These statements misstated the applicable standard.

The FTC defines a health claim as a "representation about the relationship between a nutrient and a disease or health-related condition." FTC, DIETARY SUPPLEMENT at n.2. When an advertisement alleges that a product has a relationship to a disease or health related condition, the FTC requires a relatively high level of substantiation. See POM Wonderful v. Federal Trade Comm'n, 777 F.3d 478, 500 (D.C. Cir. 2015) (the FTC "bars representations about a product's general health benefits unless the representation is non-misleading and backed by 'competent and reliable scientific evidence that is sufficient in quality and quantity to substantiate that the representation is true.").

[9] (Citing FTC, Dietary Supplements: An Advertising Guide for Industry (2001) available at https://www.ftc.gov/system/files/documents/plain-language/bus09-dietary-supplements-advertising-guide-industry.pdf).

It is undisputed that Living Essentials markets and advertises 5-Hour ENERGY® as a dietary supplement. However, to conclude that 5-Hour ENERGY®'s claims are also health claims was erroneous. Living Essentials has not made any claims that 5-Hour ENERGY® has any direct impact on a disease or health related condition. And to require that Living Essentials establish scientific facts substantiating its claims exceeds even the FTC's standard. As the amici correctly explained "the competent-and-reliable standard does not envision scientific unanimity and certainly does not require, as the trial court held, that a claim be 'established scientific fact.'"

Similarly, the trial court erred by stating that Living Essentials had to substantiate that Decaf 5-hour ENERGY® lasted for five hours. The FTC requires that "the substantiation must be relevant to the claimed benefits[,]" and Living Essentials never advertised that Decaf 5-Hour ENERGY® lasted for five hours, but rather than it lasted for hours.

However, because this court reviews CPA violations de novo, the trial court's reliance on an erroneous standard does not mandate a reversal; substantial evidence exists to support the trial court's conclusion that Living Essentials' ads violated the CPA. We "defer to the trier of fact regarding witness credibility or conflicting testimony" Weyerhaeuser, 123 Wn. App. at 65, will not reweigh the evidence or the credibility of witnesses on appeal, Washington Belt & Drive Sys., Inc., 54 Wn. App. at 616, and need only determine "whether the evidence most favorable to the prevailing party supports the challenged findings." Prostov, 186 Wn. App. at 820. Therefore, based on our independent review of the record and viewing the evidence in the light most favorable to the State, we conclude that reversal is not warranted. Mansour, 131 Wn. App. at 263

In order to satisfy the CPA, an advertiser must have a reasonable basis for its claim. "Under the reasonable basis theory, the advertiser must have had some recognizable substantiation for the representation prior to making it an advertisement." John Beck Amazing Profits, LLC, 865 F. Supp. 2d at 1067. As the trial court found, Living Essentials failed to present any evidence that "anyone with any science training ever assessed the ad claims and the science backing up those claims against the FTC substantiation guidelines." And we agree with the trial court that "asking an advertising director who lacks any scientific or medical training to conduct internet research is [not] adequate substantiation."

As for Living Essentials' Superior to Coffee claim, first, its expert Dr. David Kennedy conceded that there is no experimental evidence showing that the addition of a multivitamin to a caffeinated energy drink will cause greater improvement in physical and cognitive performance than can be attributed to the effects of caffeine alone. Further, Living Essentials points to no evidence that directly supports its Superior to Coffee claim. "Dr. Kennedy's summary of the scientific literature does show some different physiological results from caffeine plus vitamins or caffeine plus amino acids, but the results are not the benefits touted by Living Essentials." Specifically, the Giles Study shows that taurine counteracts caffeine, rather than enhancing its effects. Further, neither the Glade nor NERAC studies examined whether combining the specific ingredients in 5-Hour ENERGY® with caffeine will cause the energy, alertness, and focus effects of caffeine to last longer than caffeine alone.

Living Essentials pointed to the 2013 Nagrecha study, the 2015 Molnar study, and the 2015 Paulus study as support for its Superior to Coffee claim. But, as the trial

court found, none of those studies are sufficiently relevant to substantiate Living Essentials' claim. "The Nagrecha study has limited relevance because its test subjects underwent only one round of testing 40 minutes after ingesting" 5-Hour ENERGY®. The Paulus study had "methodological problems. . . [that were] significant enough to render [its] results unreliable." The Molnar study was insufficient to substantiate Living Essentials' claims because there was significant disagreement between the testifying experts as to the relevance of the Molnar Study and, as the trial court found, the Bloomer Study "undercut the reasonability of relying on Molnar as substantiation for Living Essentials' claims."

Finally, the Medicus study does not support 5-Hour ENERGY®'s Superior to Coffee claim. The trial court found Dr. Tom McLellan's testimony to be credible that there is no basis for concluding that the Medicus study's results "were attributable to any ingredient other than caffeine." As the testifying experts pointed out, the Medicus study was designed in a flawed manner that overemphasized its results with respect to 5-Hour ENERGY®. The study was not designed "to determine whether the non-caffeine ingredients in 5-Hour ENERGY® led to improved performance[,]" and the results "do not show that consuming 5-Hour ENERGY® improved any of the test subjects' cognitive functioning. . . above baseline."

We conclude that there is sufficient evidence in the record to support the trial court's determination that Living Essentials' Superior to Coffee claim is unsubstantiated.

There is also no substantiation in the record to show that Decaf 5-Hour ENERGY® lasts "for hours." In support of the Decaf claim, Dr. Sanford Bigelow testified that Living Essentials acted reasonably in relying on the 2010 Glad Report and the 2007

NERAC Report as substantiation. But the trial court found that Dr. Bigelow's testimony was not credible. The Glade report relied on studies that tested doses of 3000mg or more of taurine but Decaf 5-Hour ENERGY® contains only 483mg of taurine; a differentiation that fatally undermines Dr. Michael Glade's conclusions because the FTC specifically cautions advertisers from relying on studies the conclusions of which are based on very different dosages. FTC, DIETARY SUPPLEMENTS at 14, 16.

Dr. Kennedy also testified that the 2015 Shah study supported Living Essentials' Decaf claims. But "the chart on which Dr. Kennedy relie[d] actually show[ed] that the. . . test results at the 3 hour mark were not statistically significant." Further, the 2013 Kurtz study also contradicts Living Essentials' claim because it found that "consumers drinking Decaf 5-Hour ENERGY® experienced no energy benefits from the ingredients in the drink."

While the trial court may have been incorrect in saying that Living Essentials had to show that Decaf 5-Hour ENERGY® lasted for 5-hours, there is sufficient evidence in the record to support the trial court's determination that Living Essentials' Decaf Claim was deceptive.

E.

Living Essentials finally argues that the trial court erred in determining that its Ask Your Doctor claim was deceptive.

The trial court found that despite the words in the Ask Your Doctor ad being literally true, the net impression—that 73 percent of doctors had specifically recommended 5-Hour ENERGY® as a healthy and safe dietary supplement—was deceptive. The court first reasoned that Living Essentials' specific goal in creating this

ad, as its advertising manager admitted at trial, was to indicate that doctors would recommend 5-Hour ENERGY®. Second, the surveys that Living Essentials used were specifically designed to elicit a yes response because saying no "suggested that the responding doctor would instead recommend a high fat, high calorie, or high sodium energy supplement." And that "Living Essentials presented the statistics in a way that would lead a reasonable viewer to believe that 73 [percent] of 3,000 doctors surveyed would recommend this product to their patients" when it was actually 73 percent of 503 doctors.

Living Essentials contends that its expert testimony alone is sufficient to establish what message the reasonable consumer would take away from the ad and that there is insufficient evidence in the record to support the trial court's determination. We disagree.

Because "[a]n advertisement's meaning is a question of fact," FTC v. Nat'l Urological Grp., Inc., 645 F.Supp.2d at 1189, and a truthful statement "may be deceptive by virtue of the 'net impression' it conveys[,]" Panag, 166 Wn.2d at 50, the trial court did not err by concluding that the net impression from the "Ask-Your-Doctors" ad was deceptive. "If an advertiser asserts that it has a certain level of support for an advertised claim, it must be able to demonstrate that the assertion is accurate." FTC, DIETARY SUPPLEMENTS at 9. "Advertising should not . . . suggest greater scientific certainty than actually exists." FTC, DIETARY SUPPLEMENTS at 16. "In determining the meaning of an advertisement . . . the important criterion is the net impression that it is likely to make on the general populace." Grolier, Inc., 91 F.T.C. 315, 430 (1978), order

set aside and remanded on other grounds, 615 F.2d 1215 (9th Cir. 1980), modified, 98 F.T.C. 882 (1981), reissued, 99 F.T.C. 379 (1982).

In reviewing ads, the court "will often be able to determine the meaning through an examination of the representation itself, including an evaluation of such factors as the entire document, the juxtaposition of various phrases in the document, the nature of the claim, and the nature of the transaction." FTC, POLICY STATEMENT ON DECEPTION at 2. "When a seller's representation conveys more than one meaning to reasonable consumers, one of which is false, the seller is liable for the misleading interpretation." Nat'l Comm'n on Egg Nutrition, 88 F.T.C. 89, 185 (1976), modified, 92 F.T.C. 848 (1978)

Here, the State's witness, Dr. Anthony Pratkanis, an expert in the science of consumer behavior and persuasion tactics, testified "that the clear takeaway from these ads was that doctors would recommend 5-Hour ENERGY®." Further, Dr. Pratkanis testified that Living Essentials' "survey questions were biased, leading, and designed to elicit a limited response." The trial court did not err by allowing Dr. Pratkanis's expertise to help guide its ultimate conclusions. The key question that the trial court had to answer was what the reasonable consumer would have taken away from Living Essentials' ad. FTC, POLICY STATEMENT ON DECEPTION at 1-2 ("We examine [advertisements] from the perspective of a consumer acting reasonably in the circumstances. . . .To be deceptive the representation, omission or practice must be likely to mislead reasonable consumers under the circumstances."). Here, there is sufficient evidence in the record—including Dr. Pratkanis's testimony and the text of the

"Ask-Your-Doctors" ad itself—to support the trial court's conclusion that the reasonable consumer would have been misled by Living Essentials' claim.

III.

Living Essentials next contends that the trial court erred by imposing more than $2 million in penalties. We disagree.

We review the trial court's imposition of a civil penalty for an abuse of discretion. State v. Ralph Williams' N.W. Chrysler Plymouth, Inc., 87 Wn.2d 298, 553 P.2d 423 (1976) (Ralph Williams II). An abuse of discretion exists when no reasonable person would take the position adopted by the court. Griggs v. Averbeck Realty, 92 Wn.2d 576, 584, 599 P.2d 1289 (1979).

After finding that Living Essentials had violated the CPA, the trial court assessed a $2,183,747 civil penalty against Living Essentials. First, the court concluded that "the most appropriate method of determining the total number of violations for the deceptive advertisements is to determine the number of times the deceptive advertisements were aired in Washington" within the statute of limitations period. The Superior to Coffee claim was included in two different ads that ran in Washington 975 and 1,040 times, respectively. The Ask-Your-Doctor ad ran 19,716 times in Washington.

As for the Decaf claim, the court concluded that Living Essentials had made deceptive claims in its press release, press kit, and on the bottle packaging, but had not expressly advertised those claims in Washington. The court determined that the press release, dated 2008, was outside of the limitation period. Similarly, the court found there was no credible evidence introduced to show that the press kit was ever

distributed in Washington. However, the court did conclude that deceptively packaged bottles of decaf 5-Hour ENERGY® were sold in Washington 2,482 times.[10]

Then, the court determined that a civil penalty of $100 per violation for the deceptive advertisements and $4.29 per decaf bottle sold was an appropriate penalty. In determining the proper amount of penalty to assess per violation, the trial court found the following factors significant: (1) Living Essentials generated a substantial amount of revenue in Washington; (2) 5-Hour ENERGY® posed a high risk to the public because it is consumed, so there is no way to reverse the impact such a product may have on an individual; and (3) Living Essentials spent more time trying to substantiate its claims after marketing its products in Washington than before. Accordingly, the court assessed a $1,971,600 penalty for the Ask-Your-Doctor claim, a $201,500 penalty for the Superior to Coffee claim, and a $10,647 penalty for the decaf packaging, equating to a total civil penalty of $2,183,747.

RCW 19.86.140 provides that "[e]very person [(including corporations)] who violated [the CPA] shall forfeit and pay a civil penalty of not more than two thousand dollars for each violation." Washington courts recognize two basic tenets of trade law in effectuating the purpose of chapter 19.86 RCW. "First, no one should be permitted to profit from unfair and deceptive conduct. . . . Second, fair dealing must be encouraged at all stages of commerce." (Citing State v. Ralph Williams' N.W. Chrysler Plymouth, Inc., 82 Wn.2d 265, 510 P.2d 233 (1973) (Ralph Williams I).

[10] Living Essentials sold $10,648 worth of decaf 5-Hour ENERGY® in Washington. The court estimated that a reasonable per bottle price was $4.29, and therefore concluded that Living Essentials sold approximately 2,482 bottles of decaf 5-Hour ENERGY® in Washington (10,648 / 4.29 = 2482).

While RCW 19.86.140 provides that a statutory penalty for violating the CPA is mandatory, it leaves the amount of the penalty and the factors to consider within the trial court's discretion. Ralph Williams II, 87 Wn.2d at 314. Here, the trial court reasoned that "penalties should be large enough to deter future violations and to ensure that defendants do not profit from the deceptive advertising."

Living Essentials asserts that the penalty violates the excessive fines clause of the U.S. Constitution. See Timbs v. Indiana, No. 17-1091, slip op. at 2 (U.S. Feb. 20, 2019) (holding that "[t]he Excessive Fines Clause [of the Eight Amendment] is . . . incorporated by the Due Process Clause of the Fourteenth Amendment."). Under the excessive fines clause, civil penalties may not be "grossly disproportional to the gravity of a defendant's offense." United States v. Bajakajian, 524 U.S. 321, 334, 119 S. Ct. 2028 141 L. Ed. 2d 314 (1998). Living Essentials fails to show how assessing a $100 per violation penalty, despite being statutorily authorized to assess up to $2000 per violation, is grossly disproportional. Courts have "consistently found that civil penalty awards in which the amount of the award is less than the statutory maximum do not run afoul of the Excessive Fines Clause." U.S. v. Mackby, 221 F. Supp. 2d 1106, 1110 (N.D. Cal. 2002).

Living Essentials also contends that, under the due process clause, the trial court should have considered (1) the degree of reprehensibility, (2) the award compared to the harm, and (3) the amount of the award compared to other cases. BMW of N.A., Inc. v. Gore, 517 U.S. 559, 116 S. Ct. 1589 134 L. Ed. 2d 809 (1996). Using this analysis, Living Essentials argues that the fine here violated the due process clause because it was grossly disproportionate to other CPA violations. See State v. WWJ Corp., 138

Wn.2d 595, 980 P.2d 1257 (1999) and Ralph Williams II, 87 Wn.2d at 306-09. Living Essentials' argument fails for two reasons.

First, this court has already expressly rejected Living Essentials' argument. See Mandatory Poster, 199 Wn. App. at 527 (citing Perez-Farias v. Global Horizons, Inc., 175 Wn.2d 518, 533–34, 286 P.3d 46 (2012)) (rejecting the argument that BMW compelled reversing the trial court's assessment of a civil penalty because "our Supreme Court expressly declined to apply the [BMW] factors to cases involving statutory damages."). Second, the cases that Living Essentials cites actually stand for the opposite proposition. In Ralph Williams II, the court awarded civil penalties between $250 and $2000 per violation. 87 Wn.2d at 316, n.11. In WWJ, the court awarded a penalty of $2000 per violation. 138 Wn.2d at 598. Here, the court assessed a penalty, on average, of just $90 per violation. The only reason that the total penalty here is significantly higher than in the cited cases is because Living Essentials violated the CPA more than 24,000 times. In essence, Living Essentials is suggesting that the penalty is unconstitutionally excessive because they violated the statute too many times. We decline to adopt this interpretation of the due process clause.

We conclude that the trial court's assessment of $2,183,747 in civil penalties for Living Essentials' 24,213 individual violations of the CPA was not an abuse of discretion.

IV.

Living Essentials finally argues that the trial court abused its discretion in its award of attorney fees. We disagree.

There are two relevant inquires in determining an award of attorney fees: first, whether the prevailing party is entitled to legal fees, and second, whether the award of attorney fees is reasonable. Public Util. Dist. 1 v. International Ins. Co., 124 Wn.2d 789, 814, 881 P.2d 1020 (1994). Whether a party is legally entitled to recover attorney fees is a question of law that we review de novo. King County v. Vinci Constr. Grands Projets/Parsons RCI/Frontier-Kemper JV, 188 Wn.2d 618, 625, 398 P.3d 1093 (2017). Whether the amount of fees awarded was reasonable is reviewed for an abuse of discretion.

Living Essentials does not dispute that the prevailing party in a CPA action is entitled to an award of attorney fees. RCW 19.86.080(1) provides that "the prevailing party [in a CPA action] may, in the discretion of the court, recover the costs of said action including a reasonable attorney's fee." In interpreting the term "prevailing party," the Washington Supreme Court has taken guidance from federal courts. "[A] plaintiff becomes 'a prevailing party. . . [i]f the plaintiff has succeeded on any significant issue in litigation which achieve[d] some of the benefit the parties sought in bringing suit.'" Parmelee v. O'Neel, 168 Wn.2d 515, 522, 229 P.3d 723 (2010) (citing Texas St. Teachers Ass'n v. Garland Independent School Dist., 489 U.S. 782, 109 S. Ct. 1486, 103 L. Ed. 2d 866 (1989)). "[T]he touchstone of the prevailing party inquiry [is] the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute." Parmelee, 168 Wn.2d at 522 (citing Texas St. Teachers Ass'n, 489 U.S. at 792-93).

"Central to the calculation of an attorney fees award . . . is the underlying purpose of the statute authorizing the attorney fees." Brand v. Dep't of Labor & Indus,

139 Wn.2d 659, 667, 989 P.2d 111 (1999). Awarding the State its fees and costs after a CPA action will "encourage an active role in the enforcement of the [CPA,] places the substantial costs of these proceedings on the violators of the act, and [will] not drain [the State's] public funds." Ralph Williams II, 87 Wn.2d at 314-15.

Below, the trial court determined that the State of Washington was the prevailing party and therefore entitled to recover its attorney fees and costs. The State brought suit because it believed that Living Essentials had violated the CPA, which the trial court ultimately agreed it had. That the State originally alleged more violations of the CPA than were ultimately found at trial does not change the fact that the State was successful in proving that Living Essentials had violated the CPA. As such, the State succeeded on a significant issue in this case: whether Living Essentials had violated the CPA. Therefore, the State was the prevailing party below.

Further, awarding the State its attorney fees and costs is consistent with the underlying purpose of the CPA. This award will help to encourage the Attorney General's active role in CPA enforcement actions, which in turn will help to protect the public from untrue and deceptive advertisements.

Lastly, the trial court did not err in calculating the amount of fees awardable in this case. The trial court awarded the State $1,886,866.71 in attorney fees and $209,125.92 in costs. The trial court found that the State had reasonably incurred such a substantial amount of attorney fees and costs based on the "lengthy and complex nature of the litigation." Further, the court reduced the original amount of fees and costs that the State had requested in order to "reflect time spent on unsuccessful motions or

other duplicative time." Accordingly, the court found that there was "no basis to reduce the request" any further.

While Living Essentials argues that the court should have further reduced the award because the State only prevailed on some of its claims, the trial court expressly stated that it had already taken that into account. In fact, the court reduced the fee award by more than $40,000 "to reflect time spent on unsuccessful motions or other duplicative time." The trial court's finding that there is no basis to reduce the award any further was not an abuse of its discretion.

*Fees on Appeal*

Both parties have requested their fees on appeal, and RCW 19.86.080(1) allows this court to award fees to the prevailing party. Because the State is the prevailing party on appeal it is entitled to its reasonable attorney fees and costs on appeal subject to compliance with RAP 18.1.

We affirm.

Mann, ACJ

WE CONCUR:

Chun, J.

# APPENDIX B

FILED
5/13/2019
Court of Appeals
Division I
State of Washington

# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

| | |
|---|---|
| STATE OF WASHINGTON,<br><br>Respondent,<br><br>v.<br><br>LIVING ESSENTIALS, LLC a Michigan limited liability company, and INNOVATION VENTURES, LLC, a Michigan limited liability company,<br><br>Appellants. | No. 76463-2-I<br><br>DIVISION ONE<br><br>ORDER DENYING MOTION FOR RECONSIDERATION |

Appellants Living Essentials, LLC, and Innovation Ventures, LLC filed a motion to reconsider the court's opinion filed on March 18, 2019. Respondent State of Washington has filed a response. The panel has determined that the motion for reconsideration should be denied.

Therefore, it is

ORDERED that the motion for reconsideration is denied.

FOR THE PANEL:

Mann, A.C.J.

# APPENDIX C

motion.

THE COURT: Thank you very much. Mr. Mullin?

MR. MULLIN: Yes, your Honor, briefly. You know, I think the starting point for a response is the actual claims that are alleged in the complaint. And each of those claims allege both falsity and deception and capacity to deceive. They didn't break them out. And so the first question is, with respect to the falsity claims, what is -- and Counsel did not address that issue. What is the State's burden with respect to the falsity claims, with respect to the falsity claims, which is encompassed in each of the --

THE COURT: Let me stop you there.

MR. MULLIN: Okay.

THE COURT: So Ms. Gunning, are you claiming, in claims 1 through 5, a separate cause of action based on falsity, or are you just proceeding on the lack of substantiation as a separate legal theory?

MS. GUNNING: Yes, it is a separate -- it is a separate legal theory.

THE COURT: I understand that. My question is, are you pursuing claims 1 through 5 on both theories, or just on lack of substantiation at the time the statements were made?

MS. GUNNING: On lack of substantiation, both, as it is broken out in the complaint, because it is unfair and then deceptive, which is a --

THE COURT: So falsity, if you did plead falsity, you are not pursuing falsity at trial? I mean, you may prove, as a matter of fact, that something is false to prove your substantiation claim, but as a legal proposition, are you abandoning any claim that these were false advertisements?

MS. GUNNING: We think the evidence of Dr. Blonz will show that the ads are, indeed, false, but we don't need that to get to a judgment.

THE COURT: Okay. I understand that. What I'm hearing you say, just so we are clear, because this is important, --

MS. GUNNING: Yes.

THE COURT: -- is you are not pursuing, as a separate legal theory, that the ads are false, and therefore the -- you're saying the Lanham doesn't apply, or I don't need to look to Lanham, but you are contending the ads are deceptive or unfair. And to the extent you prove that there are false statements made, that would just be evidence to prove the substantiation claim?

MS. GUNNING: If I have this right, because now

I'm getting confused, not because of anything your Honor has said. Yes, the State's claim is based on the section 5, FTC standard, where we are proceeding on the argument that the ads aren't substantiated by competent, reliable evidence at the time that they were made.

THE COURT: So again, to the extent the legal theory is falsity, you are not pursuing that at trial?

MS. GUNNING: No.

MR. MULLIN: Okay. That takes care of most of what I was going to talk about, your Honor, because I think that that -- they did plead it, and I think that knocks out most of the claims. So the issue, then, is with respect to substantiation, whether there is a capacity to deceive. And how is the Court going to make that determination? I think that's really the rub here. And what does the law require and what happens if they present on this capacity to deceive issue? And what we have got on capacity to deceive is Dr. Pratkanis, in the first instance. And Dr. Pratkanis's testimony was that there was a unique selling proposition that somehow permeated all of the claims. But what he did not present was any evidence that consumers proceeded in that same way. And so

**CARNEY BADLEY SPELLMAN**

**June 12, 2019 - 9:30 AM**

**Filing Petition for Review**

**Transmittal Information**

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| **Appellate Court Case Number:** | Case Initiation |
| **Appellate Court Case Title:** | State of Washington, Respondent v. Living Essentials, LLC, et ano., Appellants (764632) |

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