

Internet & Intellectual Property Alert

Michigan Jury Awards Maker of 5 Hour Energy \$10 Million for Trademark Infringement



Innovation Ventures (“IV”) began selling its *5 Hour Energy* single shots targeted to working adults in 2004 and soon became the market leader, triggering numerous competitors. NVE, Inc. introduced its *6 Hour POWER* and *POWER Energy* shots in 2006. IV sued it for trademark infringement and in 2010 the court granted summary judgment in favor of NVE, finding the mark merely descriptive:

The court is unwilling to hold that there is a likelihood of confusion merely because defendant’s mark, like plaintiff’s mark, describes the number of hours of energy that it will provide, especially where one focuses on ENERGY and the other focuses on POWER. To hold otherwise would, in essence, give plaintiff a monopoly on the use of all marks in connection with energy products that describe the amount of hours or other denomination of time for which the products function.

IV appealed and the Sixth Circuit reversed because the lower court’s finding of no likelihood of confusion heavily relied on its ruling that IV’s mark was descriptive. The Court determined it is a suggestive mark entitled to full trademark protection.

Discovery proceeded on remand, resulting in a four week trial on IV’s claim of trademark infringement and NVE’s counterclaim for false advertising.

The jury just returned its verdict, awarding IV \$10,616,992. as damages caused by NVE’s trademark infringement. It also found that NVE failed to establish its false advertising claim. IV may also seek treble damages and its attorneys’ fees under the Lanham Act.

IV has filed infringement suits against other competitors, including the maker of *6 Hour Energy* liquid energy shots, against which it obtained a \$1.75 million judgment. Another IV suit which alleged trademark infringement and false advertising against the maker of *Mr. Energy 8-Hr. Maximum Strength ENERGY* settled this month. IV also sued the maker of *8 Hour Buzz* for trademark and trade dress infringement, false advertising and copyright infringement and the parties are awaiting ruling on summary judgment.



***Innovation Ventures, LLC v. N.V.E., Inc.* (Feb. 26, 2016 E.D. Mich.)**

Prior decisions at 747 F.Supp.2d 853 (E.D. Mich. 2010) and 694 F.3d 723 (6th Cir. 2012).

If you have any questions concerning this bulletin or Tressler’s Intellectual Property Practice Group, please contact the editor: Jacqueline Criswell, 312.627.4003 | jcriswell@tresslerllp.com

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