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JS-6

**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA**

INNOVATION VENTURES LLC, a  
Michigan limited liability company,

Plaintiff

vs.

HOODIAMAX USA, a Virginia  
corporation, and THOMAS McCABE, an  
individual,

Defendants.

) Case No. CV 09-5426 AHM  
(SHx)

) **FINAL JUDGMENT AND  
PERMANENT INJUNCTION  
WITH RESPECT TO  
DEFENDANT THOMAS  
MCCABE**

\_\_\_\_\_  
HOODIAMAX USA, a Virginia  
corporation,

Counterclaimant,

vs.

INNOVATION VENTURES LLC, a  
Michigan limited liability company,

Counter-defendant

) *Fact Discovery Cutoff: 07/12/10*  
) *Pretrial Conference: 10/18/10*  
) *Trial: 11/02/10*

1 WHEREAS, by Order dated July 22, 2010, the Court entered an Order Granting  
2 Plaintiff's Motion for Terminating Sanctions against Thomas McCabe for His  
3 Violation of this Court's May 25, 2010 Order (Court Docket Entry No. 71) ("Order  
4 Granting Default Judgment"), whereby the Court struck Mr. McCabe's answer and  
5 entered default judgment against him in this litigation;

6  
7 THEREFORE, the Court AJUDGES and DECREES as follows:

8  
9 **FINDINGS OF FACT**

10 The Court makes the following findings of fact vis-à-vis Defendant Thomas  
11 McCabe:

12 1. Innovation Ventures is a Michigan limited liability company, having its  
13 principal offices at 38955 Hills Tech Drive, Farmington Hills, Michigan 48331.

14 2. Defendant Thomas McCabe ("Mr. McCabe") is an individual with a  
15 residence address located at 71 Queens Road, Richmond, Surrey, TW10 6HJ, United  
16 Kingdom.

17 3. Defendant Mr. McCabe is the sole officer, director, employee, and owner  
18 of defendant Hoodiamax USA, a Virginia Corporation ("Hoodiamax"), against whom  
19 the Court has already entered a Final Judgment and Injunction (*see* Court Docket  
20 Entry No. 60).

21 4. Hoodiamax distributes, offers for sale and sells dietary supplements in 2-  
22 ounce shot form in the United States, in the State of California, and in this District.  
23 Hoodiamax also operates the website [www.hoodiamax.com](http://www.hoodiamax.com) where dietary  
24 supplements in two ounce shot form can be purchased in the United States and in this  
25 District.

26 5. Mr. McCabe is in control of defendant Hoodiamax and also induces  
27 and/or directs the acts of Hoodiamax for which the Court as already entered Final  
28 Judgment against Hoodiamax in this action.

1           6.     Innovation Ventures is a national marketer and distributor of nutritional  
2 and dietary supplements.

3           7.     Innovation Ventures is the owner of the 5-HOUR ENERGY trademark.  
4 The 5-HOUR ENERGY mark has been used by Innovation Ventures in the United  
5 States since at least 2004 as a trademark for use with the 5-HOUR ENERGY product.

6           8.     Innovation Ventures has used the 5-HOUR ENERGY trademark  
7 continuously since at least 2004 to the present. The 5-HOUR ENERGY product is  
8 sold at over 100,000 retail locations nationwide and is widely available on the  
9 Internet. Sales of the 5-HOUR ENERGY product since 2004 have amounted to well  
10 over \$400 million dollars. Further, Innovation Ventures has spent over \$100 million  
11 in advertising and promoting the 5-HOUR ENERGY product. As such, the 5-HOUR  
12 ENERGY is widely recognized by the general consuming public as a designation  
13 associated with goods/services originating from Plaintiff.

14           9.     The 5-HOUR ENERGY trademark symbolizes the business goodwill of  
15 Innovation Ventures, and is an intangible asset of substantial commercial value.

16           10.    As a result of its continuous use and extensive sales, advertising and  
17 promotion of the 5-HOUR ENERGY trademark by Innovation Ventures, its  
18 authorized dealers, licensees, and distributors, the 5-HOUR ENERGY trademark  
19 enjoys worldwide recognition, is recognized by the public as emanating from  
20 Innovation Ventures, and is famous.

21           11.    The 5-HOUR ENERGY trademark as used on some of Innovation  
22 Ventures' products is illustrated below.

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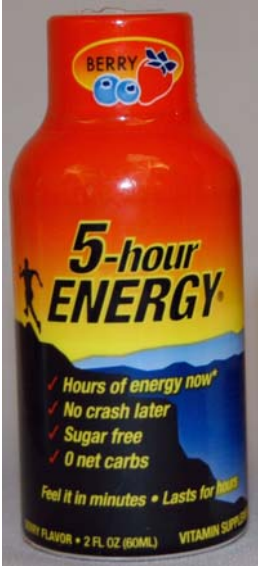
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12. Subsequent to Innovation Ventures' use of the 5-HOUR ENERGY Trademark, and with actual knowledge of Innovation Ventures' use of the 5-HOUR ENERGY trademark, and with the express intent to misrepresent the source of Hoodiamax's goods, Hoodiamax adopted a confusingly similar trademark and color scheme on their packaging in connection with the advertising, offering for sale and sale of supplements in the United States, in the State of California, and this District. A photograph of Defendants' packaging for their "Day" and "Night" products are illustrated below:



1           13. Hoodiamax's packaging prominently features the trademark 5 HOUR  
2 Appetite Suppressant with a "TM" symbol. The "Day" product includes the phrase 5  
3 HOUR Appetite Suppressant *Plus Energy*. Hoodiamax's use of these trademarks and  
4 phrases is without consent, license, approval or other authorization from Innovation  
5 Ventures.

6           14. In addition to the use of 5 HOUR Appetite Suppressant in connection  
7 with the "TM" symbol, defendant Hoodiamax USA has filed a U.S. Trademark  
8 Application (No. 77/689,729) for the mark 5 HOUR APPETITE SUPPRESSANT for  
9 "dietary drink mix for use as a meal replacement" based on use in commerce in the  
10 United States. That application was registered on the Supplemental Register on July  
11 14, 2009 (Reg. No. 3,656,183). Defendant Hoodiamax USA filed two further  
12 applications featuring 5 HOUR APPETITE SUPPRESSANT, namely U.S.  
13 Application No. 77/768,605 for the mark NIGHTSLIM 5 HOUR APPETITE  
14 SUPPRESSANT and U.S. Application No. 77/768,592 for the mark DAYSLIM 5  
15 HOUR APPETITE SUPPRESSANT. Those applications were filed on June 25, 2009  
16 and remain pending.<sup>1</sup>

17           15. Mr. McCabe acted in bad faith in adopting the mark 5 HOUR Appetite  
18 Suppressant in connection with its dietary supplements. On or about April 28, 2009,  
19 Mr. McCabe, Hoodiamax's sole shareholder, officer, owner, and employee, contacted  
20 in-house counsel for Innovation Ventures in Michigan. Mr. McCabe stated that he  
21 was calling to alert Innovation Ventures to his new product to be sold in the United  
22 Kingdom called 5 HOUR Appetite Suppressant and to ask whether "there would be  
23 any issues." He left a telephone number with a "703" area code (Virginia). Defendant  
24 McCabe admitted that his product name was "reaching off" of what Innovation  
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26 <sup>1</sup> The Court is informed that these applications have been conveniently assigned to  
27 Agape Ventures Ltd. after the initiation of this litigation. As set forth in this Court's  
28 Order Granting Default Judgment, it is clear that Mr. McCabe also controls Agape  
Ventures Ltd. and, thus, also controls these applications.

1 Ventures had done. Innovation Ventures advised Mr. McCabe that it indeed had an  
2 issue with his plans and attempted to discuss a change in the name — a change that  
3 was rejected by Mr. McCabe. Subsequently, a formal cease and desist letter and  
4 undertaking was sent to Hoodiamax.

5 16. As Mr. McCabe expressly admits in his initial responses to Plaintiff’s  
6 First Set of Requests for Admissions to Thomas McCabe, he controls and manages the  
7 day-to-day decisions of Hoodiamax, including, without limitation, all aspects of its  
8 advertising and marketing efforts, all aspects of distribution of its dietary supplements,  
9 its sales activities, and the decision to adopt the mark 5 HOUR Appetite Suppressant  
10 for use on its dietary supplements. (See **Exhibit 2** to the Declaration Of Mark B.  
11 Mizrahi in Support of Plaintiff’s Motion to Compel Thomas McCabe to Provide  
12 Responses to Plaintiff’s Document Requests, to Produce Documents, and to Provide  
13 Further Responses to Interrogatories, Etc., Pursuant to L.R. 37-2.4, Court Docket  
14 Entry No. 53.)

15 17. Hoodiamax’s packaging for its “day” product shares a top coloring  
16 scheme with Innovation Ventures’ caffeinated product, and Hoodiamax’s “night”  
17 packaging shares a top color scheme with Innovation Ventures’ decaffeinated  
18 product.<sup>2</sup>

19 18. Hoodiamax’s products are packaged in 2-ounce bottles that are identically  
20 shaped and wrapped like Innovation Ventures’ 5-HOUR ENERGY products.

21 19. Mr. McCabe has failed to comply with his discovery obligations and has  
22 violated this Court’s May 25, 2010 granting Innovation Ventures’ motion to compel  
23 discovery (Court Docket Entry No. 53).

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26 \_\_\_\_\_  
27 <sup>2</sup> The Court is informed that Hoodiamax has since advertised its “Night” product with  
28 a green color scheme. Regardless, that product is also covered by the terms of this  
Final Judgment.



1           4.     Innovation Ventures' use of the 5-HOUR ENERGY Trademark has  
2 become famous in this state, within the meaning of Cal. Bus. & Prof. Code § 14247.

3           5.     Mr. McCabe adoption and use of the mark “5 HOUR Appetite  
4 Suppressant” (or the designation “5 hour” for that matter) on dietary supplements is  
5 likely to cause confusion, or to cause mistake, or to deceive as to the affiliation,  
6 connection, or association of Hoodiamax and/or Mr. McCabe and/or its/his goods with  
7 Innovation Ventures LLC, or as to the origin, sponsorship, or approval of its/his  
8 goods, services, and/or commercial activities, in violation of 15 U.S.C. § 1125(a).

9           6.     Therefore, Mr. McCabe, like defendant Hoodiamax USA, has violated 15  
10 U.S.C. § 1125(a), has committed common law trademark infringement, has committed  
11 unfair competition under Cal. Bus. & Prof. Code § 17200, has committed trademark  
12 dilution under Cal. Bus. & Prof. Code § 14247, has damaged Plaintiff by such  
13 violations, and Mr. McCabe is liable to Plaintiff for such violations.

14           7.     Mr. McCabe’s violation of Innovation Ventures' rights, as set forth in  
15 paragraphs 5 and 6 immediately above, was/is willful.

16           8.     In view of the Court’s finding set forth in paragraph 7 immediately  
17 above, and Mr. McCabe’s failure to comply with this Court’s May 25, 2010 Order  
18 (Court Dkt. Entry No. 58), and the other grounds set forth in the Order Granting  
19 Default Judgment, make this an “exceptional” case, in the sense of 15 U.S.C. §  
20 1117(a).

21           9.     For the reasons set forth in the Order Granting Default Judgment, entry of  
22 default and default judgment against Mr. McCabe and in favor the plaintiff,  
23 Innovation Ventures, LLC, is warranted.

24           10.    Pursuant to Fed. R. Civ. P. 36, the requests set forth in Second Set of  
25 Requests for Admission to Thomas McCabe, served on April 26, 2010, are hereby  
26 deemed as admitted by Mr. McCabe.

27           11.    Under 15 U.S.C. § 1117, a plaintiff may, subject to the principles of  
28 equity, recover



1           (1) defendant’s profits,  
2           (2) any damages sustained by the plaintiff, and  
3           (3) the costs of the action. The court shall assess such profits and  
4 damages or cause the same to be assessed under its direction. In assessing  
5 profits the plaintiff shall be required to prove defendant’s sales only;  
6 defendant must prove all elements of cost or deduction claimed. In  
7 assessing damages the court may enter judgment, according to the  
8 circumstances of the case, for any sum above the amount found as actual  
9 damages, not exceeding three times such amount. If the court shall find  
10 that the amount of the recovery based on profits is either inadequate or  
11 excessive the court may in its discretion enter judgment for such sum as  
12 the court shall find to be just, according to the circumstances of the case.  
13 Such sum in either of the above circumstances shall constitute  
14 compensation and not a penalty. The court in exceptional cases may  
15 award reasonable attorney fees to the prevailing party.  
16

17           12. As set forth above, under 15 U.S.C. § 1117, Innovation Ventures is  
18 entitled to recover Hoodiamax’s profits as a measure of its damages resulting from  
19 Mr. McCabe’s violation of 15 U.S.C. § 1125(a). This Section further provides that “In  
20 assessing profits the plaintiff shall be required to prove defendant’s sales only;  
21 defendant must prove all elements of cost or deduction claimed.”

22           13. Mr. McCabe, Hoodiamax’s sole shareholder, officer, director, and  
23 employee—and the person otherwise in-control of all of the infringing activities of  
24 Hoodiamax – attested to the fact that, as of November 9, 2009, Hoodiamax’s sales of  
25 the infringing products totaled “less than” \$50,000. (*See* Court Docket Entry No. 29-  
26 2.) Since Hoodiamax has refused to submit to discovery in this case, the Court utilizes  
27 the evidence of record regarding Hoodiamax’s gross sales in this action to determine  
28 the damages for which Hoodiamax and Mr. McCabe are jointly and severally liable,

1 namely, \$45,000 – a figure less than \$50,000, as Mr. McCabe has failed to prove the  
2 elements of cost that should be deducted therefrom. (“In assessing profits the plaintiff  
3 shall be required to prove defendant’s sales only; defendant must prove all elements of  
4 cost or deduction claimed.”).

5 14. Because, as alleged in the Complaint, and determined by this Court, Mr.  
6 McCabe’s infringement was willful, the Court hereby trebles this amount<sup>3</sup> and grant  
7 Innovation Ventures an award in the amount of \$135,000.00.

8 15. In addition, under 15 U.S.C. § 1117, “[t]he court in exceptional cases  
9 may award reasonable attorney fees to the prevailing party.” Here, Mr. McCabe’s  
10 intent to trade off of Innovation Ventures’ good will established in its 5-HOUR  
11 ENERGY mark is readily apparent from the fact that Mr. McCabe made every attempt  
12 to make its product conjure up Innovation Ventures and its 5-HOUR ENERGY  
13 products – by enlarging the designation “5 HOUR” on its product, by using identically  
14 shaped and sized bottles, and by using highly similar labels, in both color and style.  
15 (*See, e.g.*, Complaint, Court Dkt. Entry No. 1, at ¶13.) Moreover, Mr. McCabe’s  
16 violation of this Court’s May 25, 2010 Order, his utter failure to abide by this Court’s  
17 rules or the Federal Rules of Civil Procedure, and his refusals to respond to Innovation  
18 Ventures’ in-depth and substantive discovery requests further support the conclusion  
19 that this is an exceptional case warranting the award of attorney’s fees in favor of  
20 Innovation Ventures. Accordingly, the Court awards Innovation Ventures its  
21 attorney’s fees in the amount of \$5,600, in accordance with the Schedule of Attorneys’  
22 Fees set forth in Local Rule 55-3.  
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27 <sup>3</sup> *See* 15 U.S.C. § 1117: “In assessing damages the court may enter judgment, according to the  
28 circumstances of the case, for any sum above the amount found as actual damages, not exceeding  
three times such amount.”

**IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:**

1  
2 1. The Court enters Judgment against Thomas McCabe and in favor of  
3 Innovation Ventures on all Counts set forth in Innovation Ventures' Complaint in this  
4 action (Court Docket Entry No. 1).

5 2. The Commissioner of Trademarks at the United States Patent and  
6 Trademark Office shall promptly cancel U.S. Registration No. 3,656,183 for the mark  
7 5 HOUR APPETITE SUPPRESSANT.

8 3. Mr. McCabe shall, within ten (10) days of entry of this Order, expressly  
9 abandon U.S. Application No. 77/768,605 and U.S. Application No. 77/768,592,  
10 assigned to Agape Venture LTD, pending before the United States Patent and  
11 Trademark Office.

12 4. Mr. McCabe shall not use or issue, grant, register, license, or otherwise  
13 authorize others to use Plaintiff's 5-HOUR ENERGY mark, or confusingly similar  
14 marks (including, without limitation, the mark "5 HOUR Appetite Suppressant" or the  
15 designation "5 Hour"), in connection with selling, advertising, or promoting of any  
16 products.

17 5. Thomas McCabe, his employees, agents, servants, successors and assigns  
18 and any entity he has an ownership interest in (unless it is a publicly traded company  
19 in which it/he owns or controls less than 10% of issued and outstanding voting stock,  
20 including any stock that could be converted into voting stock), controls directly or  
21 indirectly or for which he is an officer, director, or provides advice or direction, and  
22 all those in active concert and participation with them, and each of them who receives  
23 notice directly or otherwise of such injunctions, are hereby permanently enjoined  
24 from:

- 25 (1) imitating, copying, or making any unauthorized use of the 5-HOUR  
26 ENERGY trademark, or any confusingly similar mark or designation  
27 (including, without limitation, using the mark "5 HOUR Appetite Suppressant"  
28

1 or any other designation that includes the term “5 Hour” alone or in conjunction  
2 with other elements) on or in connection with any dietary supplements;

3 (2) importing, manufacturing, producing, distributing, circulating, selling,  
4 offering for sale, advertising, promoting or displaying any services or product  
5 using any simulation, reproduction, counterfeit, copy, or colorable imitation of  
6 the 5-HOUR ENERGY trademark, or any confusingly similar mark or  
7 designation (including, without limitation, using the mark “5 HOUR Appetite  
8 Suppressant” or any other designation that includes the term “5 Hour” alone or  
9 in conjunction with other elements) on or in connection with any dietary  
10 supplements;

11 (3) using any simulation, reproduction, counterfeit, copy or colorable  
12 imitation of the 5-HOUR ENERGY trademark (including, without limitation,  
13 using the mark “5 HOUR Appetite Suppressant” or any other designation that  
14 includes the term “5 Hour” alone or in conjunction with other elements) in  
15 connection with the promotion, advertisement, display, sale, offer for sale,  
16 manufacture, production, circulation or distribution of any product or service on  
17 or in connection with any dietary supplements; and

18 (4) using any false designation of origin or false description including,  
19 without limitation, any letters, symbols, or designs constituting the 5-HOUR  
20 ENERGY trademark (including, without limitation, using the mark “5 HOUR  
21 Appetite Suppressant” or any other designation that includes the term “5 Hour”  
22 alone or in conjunction with other elements) on or in connection with any  
23 dietary supplements or performing any act which can, or is likely to, lead  
24 members of the trade or public to believe that any service or product  
25 manufactured, distributed or sold by either of the Defendants is in any manner  
26 associated or connected with Innovation Ventures, or the 5-HOUR ENERGY  
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1 trademark, or is sold, manufactured, licensed, sponsored, approved or  
2 authorized by Innovation Ventures.

3 6. Mr. McCabe shall, within fourteen (14) days of entry of this Order,  
4 deliver to Plaintiff for destruction all products, labels, tags, signs, prints, packages,  
5 videos, and advertisements in his possession or under his control, bearing or using the  
6 5-HOUR ENERGY trademark or any simulation, reproduction, counterfeit, copy or  
7 colorable imitation thereof (including, without limitation, using the mark “5 HOUR  
8 Appetite Suppressant” or any other designation that includes the term “5 Hour” alone  
9 or in conjunction with other elements), and all plates, molds, matrices and other means  
10 of making the same, pursuant to 15 U.S.C. § 1118.

11 7. Mr. McCabe, his employees, agents, servants, successors and assigns, and  
12 all others in privity or acting in concert therewith, shall file with this Court, and serve  
13 upon Innovation Ventures' counsel, within thirty (30) days after entry of such  
14 judgment, a written report under oath, setting forth in detail the manner and form in  
15 which it/they have complied with paragraphs 3, 5 and 6, immediately above.

16 8. The Court enters Judgment against Thomas McCabe and in favor of  
17 Innovation Ventures in the amount of \$140,600.00, for which Mr. McCabe and  
18 Hoodiamax are jointly and severally liable, as follows:

19 A. Mr. McCabe, his successors and assigns, shall, within 30 days of this Order,  
20 pay Innovation Ventures in the amount of \$135,000.00, which represents  
21 compensatory damages in the amount of \$45,000.00 trebled, in accordance  
22 with 15 U.S.C. § 1117, to \$135,000.00.

23 B. Mr. McCabe, his successors and assigns, shall, within 30 days of this Order,  
24 pay Innovation Ventures the attorneys' fees it incurred in this action in the  
25 amount of \$5,600.00, as provided for in 15 U.S.C. § 1117, Cal. Bus. & Prof.  
26 Code § 17200, Cal. Bus. & Prof. Code § 14250, and L.R. 55-3, entitled  
27 “Default Judgment - Schedule of Attorneys’ Fees.”  
28

1           9.       This court shall retain jurisdiction of this case for the purpose of enabling  
2 Plaintiff to enforce compliance and to punish violations of the provisions of this Final  
3 Judgment and Permanent Injunction. If it shall be made to appear to the court that  
4 there has been a violation of any of the terms of this Final Judgment and Permanent  
5 Injunction, upon motion, this Court may enter an order to show cause why Defendant  
6 Thomas McCabe, his employees, agents, servants, successors and assigns and any  
7 entity he has an ownership interest in (unless it is a publicly traded company in which  
8 it/he owns or controls less than 10% of issued and outstanding voting stock, including  
9 any stock that could be converted into voting stock), controls directly or indirectly or  
10 for which he is an officer, director, or provides advice or direction, and those in active  
11 concert an participation with them, as the case may be, should not be found in  
12 contempt. Nothing in this document shall bar Plaintiff from seeking, or the court from  
13 imposing, against Mr. McCabe or any other person any relief available under any  
14 other applicable provision of law for violation of this document.

15           10.       The prevailing party in any proceeding to enforce the terms of this Final  
16 Judgment and Permanent Injunction with Respect to Defendant Thomas McCabe shall  
17 be entitled to recover the attorneys' fees and costs incurred therewith.

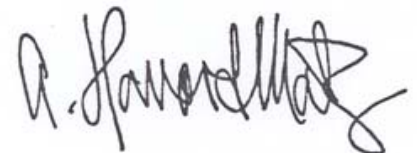
18           11.       Plaintiff Innovation Ventures may issue subpoenas, pursuant to Fed. R.  
19 Civ. P. Rule 45, as appropriate to enable it to police and enforce compliance with this  
20 Final Judgment and Permanent Injunction with Respect to Defendant Thomas  
21 McCabe.

22           12.       Having resolved all the claims in this action in favor of Innovation  
23 Ventures, this case is hereby dismissed.

24           **IT IS SO ORDERED.**

25  
26 Dated: August 09, 2010

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28 **JS-6**



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The Honorable Howard A. Matz,  
United States District Judge