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**SUPERIOR COURT BERGEN COUNTY  
FILED**

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*Jim Goodman*  
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ACCOUNT NO.: 141867

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ATTORNEY FOR PLAINTIFF INDIVIDUALLY AND IN BEHALF OF THE CLASS OF PURCHASERS OF  
STACKER 2 ENERGY SHOT

**HAROLD M. HOFFMAN**, Individually and in  
behalf of the class of purchasers of Stacker 2  
Energy Shot,  
  
Plaintiff,  
  
vs.  
  
N.V.E., INC.,  
  
Defendant.

SUPERIOR COURT OF NEW JERSEY  
BERGEN COUNTY - LAW DIVISION  
  
DOCKET NO.: BER-L- 10993 -10  
  
CIVIL ACTION  
  
COMPLAINT AND JURY  
DEMAND IN CLASS ACTION

RECEIVED  
2010 NOV 12 P 2:22  
CIVIL DIVISION  
CASE PROCESSING

Plaintiff Harold M. Hoffman, a resident of the State of New Jersey, County of Bergen,

individually and in behalf of the class of purchasers of Stacker 2 Energy Shot, by way of class  
action complaint against the defendant above named, respectfully alleges as follows:

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**Relevant Factual Allegations**

1. At all relevant times, plaintiff was and is a consumer, residing in the State of New Jersey, County of Bergen.
2. Upon information and belief, at all relevant times, defendant was a New Jersey corporation, doing business under the fictitious name "NVE Pharmaceuticals," with a principal place of business in Andover, NJ. Defendant did, and continues to do, substantial business in the State of New Jersey.
3. At all relevant times, defendant constituted a "person" as defined in the Consumer Fraud Act, N.J.S.A. 56:8-1(d).
4. In or about November of 2010, and prior thereto, defendant, through television, radio,

internet, electronic mail, telephone, and other media, as well as in retail outlets throughout this State and elsewhere, marketed, advertised and offered to consumers a product called Stacker 2 Energy Shot, which is two fluid ounces of a liquid that if consumed, according to defendant, enhances the consumer's sharpness, alertness and energy level, for five hours. According to defendant, the foregoing results – enhanced sharpness, alertness and energy level – are delivered to consumers of Stacker 2 Energy Shot by virtue of its specially formulated blend of B-vitamins, in specific concentrations set out on the product label as well as in various marketing advertisements and promises. Based upon the foregoing representations, the named plaintiff (and putative class members) purchased defendant's product and consumed it. The named plaintiff purchased and consumed defendant's product in Bergen County, NJ.

5. Folic acid (also known as Folate) is a significant B-vitamin and, purportedly, a principal ingredient in defendant's product, in a specified concentration (based on product labeling and defendant's other marketing advertisements and promises). Folic acid is purportedly contained within defendant's product because medical science has demonstrated that Folic acid helps to produce and maintain new cells in the human body. Folic acid aids in red blood cell production by carrying the carbon molecule to the larger heme molecule, which is the iron-containing part of hemoglobin (the oxygen-carrying molecule of the red blood cells). B-vitamins, and specifically Folic acid, are essential for bodily health, but the body cannot produce them; instead, the body gets them from diet or from supplements. Food sources of Folic acid include leafy green vegetables, fruits, dried beans and peas.

6. Defendant promises and represents to consumers, on the Stacker 2 Energy Shot product label and in various other marketing advertisements, promises and representations, that

Stacker 2 Energy Shot contains 400 mcg of Folic Acid. Defendant purports to include this concentration of Folic acid in its product because of the known association of Folic acid with cell production, energy and vigor.

7. But defendant, among other things, has significantly misrepresented the concentration of Folic acid in its product. According to detailed, independent, third-party laboratory analysis of defendant's product, defendant has overstated the concentration of Folic Acid in its product by far more than half. In truth and in fact, Stacker 2 Energy Shot contains approximately 40% of the represented concentration of Folic acid (on the Stacker 2 Energy Shot product label and in defendant's marketing promises and advertisements).

8. Moreover, defendant has significantly misrepresented and understated the amount of caffeine in its product. The defendant's product label and its various marketing promises and advertisements represent that the amount of caffeine in Stacker 2 Energy Shot is comparable to that in a cup of "brewed coffee". In truth and in fact, according to detailed, independent, third-party laboratory analysis of defendant's Stacker 2 Energy Shot product, it contains 156 mg of caffeine. However, this is 64% higher than what you would get from a cup (8 fluid ounces) of brewed coffee based on measurements by the USDA of coffee brewed at home and from fast food restaurants (*see*, USDA National Nutrient Database 2010).

9. In essence, defendant, in marketing a purported energy drink, with specified vitamin-based, energy producing ingredients in specific concentrations, has affirmatively misrepresented and overstated, by more than two-fold, the amount of energy producing B-vitamins in its product, including but not limited to Folic acid, and simply overloaded the product with a significantly misrepresented concentration of caffeine. In reality, defendant's product is not a B-vitamin

energy shot, as represented. It is, instead, contrary to its labeling and defendant's affirmative marketing representations, an overloaded, non-disclosed caffeine shot.

10. The affirmative promises and representations made by defendant – both in product labeling and in marketing representations – in connection with the constituent ingredients in its Stacker 2 Energy Shot product, are false and misleading.

11. The New Jersey Administrative Code, at § 13:45A-9.2, entitled “General Advertising Practices,” provides, in pertinent part, that the failure of an advertiser to substantiate through documents, records or other written proof any claim made regarding the safety, performance, efficiency, quality or price of advertised merchandise, shall constitute a *per se* violation of the New Jersey Consumer Fraud Act [N.J.S.A. 56:8-1 *et seq.*]. Defendant has no written substantiation as to the constituent ingredients in its product, specifically Folic acid and caffeine, and its affirmative representations concerning the concentrations of constituent ingredients in its product, are false.

12. Plaintiff and members of the class who purchased and consumed Stacker 2 Energy Shot were entitled to trust the defendant's labeling and marketing representations with respect to Stacker 2 Energy Shot and, among other things, its constituent ingredients. The product delivered by defendant to plaintiff and members of the putative class misrepresented these constituent ingredients. Indeed, the misrepresented product delivered by defendant to consumers, without B-vitamin concentrations as promised by defendant, lacked the energy producing capabilities promised by defendant. And, product consumers who purchased and consumed defendant's product, including but not limited to the named plaintiff, were entirely dissatisfied with it.

13. Plaintiff and members of the putative class are purchasers of Stacker 2 Energy Shot

and, prior to purchasing the product, saw, read and/or heard defendant's advertisements, promises and representations as aforesaid. Plaintiff and members of the class, prior to purchasing the product, saw, read and/or heard defendant's promises and representations as aforesaid, and then made an out of pocket payment (purchase price) in response thereto.

14. The very purpose of the New Jersey Consumer Fraud Act is to protect consumers, such as the putative class members at bar, from being victimized, by being lured into a purchase through fraudulent or deceptive selling or advertising practices, precisely as accomplished by the advertising, selling and marketing misrepresentations made by defendant at bar.

15. Defendant misrepresented the constituent ingredients in its Stacker 2 Energy Shot product thus rendering it a different and lesser product than that represented and promised by defendant. Here, consumers, including plaintiff, made purchasing decisions and did, in fact, make purchases from defendant based upon product labeling and marketing promises made by defendant with respect to the constituent ingredients of Stacker 2 Energy Shot.

16. Defendant's advertisements, promises and representations to New Jersey and other consumers concerning Stacker 2 Energy Shot are false and constitute a deception; a misrepresentation; an unconscionable trade practice; a sharp and deceitful marketplace practice, and are a false promise.

17. Defendant's advertisement, promise and representations to New Jersey and other consumers concerning, among other things, the constituent ingredients in Stacker 2 Energy Shot result in New Jersey and other consumers being subjected to misrepresentation, false promise, fraud, deceit, trickery and false and deceptive advertising.

18. Defendant has made affirmative misrepresentations in connection with the sale, marketing and/or advertisement of its product, Stacker 2 Energy Shot.

19. Plaintiff and members of the class suffered ascertainable loss in the form of actual out of pocket payment and expenditure to purchase a misrepresented product. In light of the product's false labeling, the product has a lesser worth than that promised by defendant. Here, plaintiff and members of the class also suffered a second element of ascertainable loss when they received a product less than and different from that promised by defendant. Stacker 2 Energy Shot failed to measure up to the consumers' reasonable expectations based on the representations made by defendant. Thus, purchasers of said product were injured and suffered loss. Specifically, for their money, plaintiff and members of the class received something less than, and different from, what they reasonably expected in view of defendant's representations. As a result, they suffered a second element of ascertainable loss.

20. Defendant marketed and sold Stacker 2 Energy Shot - and consumers purchased it - on the premise that it truly contained ingredients as labeled by defendant. Thus, there is a causal relationship between the defendant's misrepresentations and the loss suffered by plaintiff and class members.

21. As to the individual plaintiff, the amount in controversy in this action, including, without limitation, compensatory, treble, and/or punitive damages and counsel fees, is less than \$75,000.00. As to the putative plaintiff class, the amount in controversy in this action, including, without limitation, compensatory, treble, and/or punitive damages and counsel fees, is less than \$5 million.

### **Allegations Pertinent to the Class**

22. In the instant action, the class is believed to be so numerous that joinder of all members is impracticable; there are questions of law common to all members of the class; the claims and defenses of the parties are typical of the claims and defenses of the class; and, the party-plaintiff will fairly and adequately protect the interests of the class.

23. Moreover, the prosecution of separate actions by members of the class would create a risk of inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class. Further, the party opposing the class has acted on grounds and in a manner generally applicable to the class. Additionally, questions of law common to members of the class predominate over any questions affecting only individual members and a class action is superior to other available methods for fair and efficient adjudication of the controversy.

### **COUNT I**

24. Plaintiff repeats and realleges the prior allegations of this complaint as if fully set forth at length.

25. Defendant's conduct constitutes an unconscionable commercial practice in violation of the New Jersey Consumer Fraud Act, *N.J.S.A. 56:8-2*.

26. As a proximate result of defendant's conduct, plaintiff and members of the class were damaged.

**WHEREFORE**, plaintiff, individually and in behalf of the class, demands judgment against the defendant for treble damages together with pre-judgment and post-judgment interest,

fees, costs, attorney's fees, civil penalties mandated by *N.J.S.A. 56:8-19*, and any other and further relief as the Court deems just and proper.

### COUNT II

27. Plaintiff repeats and realleges the prior allegations of this complaint as if fully set forth at length.

28. Defendant's conduct constitutes deception in violation of the New Jersey Consumer Fraud Act, *N.J.S.A. 56:8-2*.

29. As a proximate result of defendant's conduct, plaintiff and members of the class were damaged.

**WHEREFORE**, plaintiff, individually and in behalf of the class, demands judgment against the defendant for treble damages together with pre-judgment and post-judgment interest, fees, costs, attorney's fees, civil penalties mandated by *N.J.S.A. 56:8-19*, and any other and further relief as the Court deems just and proper.

### COUNT III

30. Plaintiff repeats and realleges the prior allegations of this complaint as if fully set forth at length.

31. Defendant's conduct constitutes fraud in violation of the New Jersey Consumer Fraud Act, *N.J.S.A. 56:8-2*.

32. As a proximate result of defendant's conduct, plaintiff and members of the class were damaged.



**WHEREFORE**, plaintiff, individually and in behalf of the class, demands judgment against the defendant for treble damages together with pre-judgment and post-judgment interest, fees, costs, attorney's fees, civil penalties mandated by *N.J.S.A. 56:8-19*, and any other and further relief as the Court deems just and proper.

#### **COUNT IV**

33. Plaintiff repeats and realleges the prior allegations of this complaint as if fully set forth at length.

34. Defendant's conduct constitutes false pretense, false promise and/or misrepresentation, in violation of the New Jersey Consumer Fraud Act, *N.J.S.A. 56:8-2*.

35. As a proximate result of defendant's conduct, plaintiff and members of the class were damaged.

**WHEREFORE**, plaintiff, individually and in behalf of the class, demands judgment against the defendant for treble damages together with pre-judgment and post-judgment interest, fees, costs, attorney's fees, civil penalties mandated by *N.J.S.A. 56:8-19*, and any other and further relief as the Court deems just and proper.

#### **COUNT V**

36. Plaintiff repeats and realleges the prior allegations of this complaint as if fully set forth at length.

37. Defendant's conduct constitutes knowing concealment, suppression and/or omission of material facts with the intent that others, including members of the plaintiff-class, rely upon

such concealment, suppression and/or omission, in connection with the sale or advertisement of any merchandise in violation of the New Jersey Consumer Fraud Act, *N.J.S.A. 56:8-2*.

38. As a proximate result of defendant's conduct, plaintiff and members of the class were damaged.

**WHEREFORE**, plaintiff, individually and in behalf of the class, demands judgment against the defendant for treble damages together with pre-judgment and post-judgment interest, fees, costs, attorney's fees, civil penalties mandated by *N.J.S.A. 56:8-19*, and any other and further relief as the Court deems just and proper.

#### **COUNT VI**

39. Plaintiff repeats and realleges the prior allegations of this complaint as if fully set forth at length.

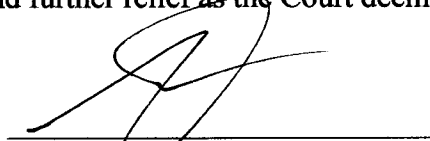
40. Defendant, in the advertisement, marketing and sale of Stacker 2 Energy Shot, deliberately engaged in deception, false pretense, false promise and/or misrepresentation with respect to material facts, and did so with the intent that others, including members of the plaintiff-class, rely upon same, and, upon information and belief, members of the class did justifiably rely upon same to their detriment.

41. Defendant, in the advertisement, marketing and sale of Stacker 2 Energy Shot, deliberately and knowingly engaged in concealment, suppression and/or omission of material facts with the intent that others, including members of the plaintiff-class, rely upon same, and, upon information and belief, members of the class did justifiably rely upon same to their detriment.

42. As a proximate result of defendant's conduct, members of the class were damaged.

43. Defendant's conduct constitutes common law fraud.

**WHEREFORE**, plaintiff, in behalf of the class, demands judgment against the defendant for treble damages and/or punitive damages together with pre-judgment and post-judgment interest, fees, costs, attorney's fees, and any other and further relief as the Court deems just and proper.



Harold M. Hoffman  
Attorney for Plaintiff

November 12, 2010

**JURY DEMAND**

Demand is hereby made for trial by jury as to all issues.

**TRIAL COUNSEL DESIGNATION**

Pursuant to Rule 4:25-4, the Court is respectfully advised that Harold M. Hoffman, Esq., is hereby designated as trial counsel in behalf of plaintiff.

**CERTIFICATION PURSUANT TO RULE 4:5-1**

Harold M. Hoffman, counsel for plaintiff, hereby certifies that the matter in controversy is not the subject of any other known pending action in this or any other Court or any pending arbitration, nor is any other action or arbitration known to be contemplated. At this time, no other known party, other than members of the class, are anticipated for joinder.

I certify that the foregoing is true to the best of my knowledge. I am aware that if any of

the foregoing is wilfully false, I am subject to punishment.

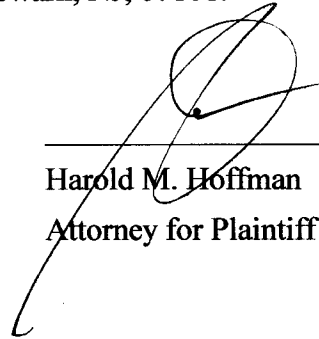


Harold M. Hoffman  
Attorney for Plaintiff

November 12, 2010

**NOTIFICATION TO ATTORNEY GENERAL**

Pursuant to *N.J.S.A. 56:8-20*, I certify that a copy of this complaint will be served on the Office of the Attorney General, CN 080, Trenton, NJ, 08625, as well as the Division of Consumer Affairs, 124 Halsey Street, PO Box 45027, Newark, NJ, 07101.



Harold M. Hoffman  
Attorney for Plaintiff

November 12, 2010