

John B. Sganga, Jr. (SBN 116,211)
john.sganga@kmob.com
KNOBBE, MARTENS, OLSON & BEAR, LLP
2040 Main Street
Fourteenth Floor
Irvine, CA 92614
Phone: (949) 760-0404
Facsimile: (949) 760-9502

Brian C. Horne (SBN 205,621)
brian.horne@kmob.com
Laura M. Blau (SBN 265,106)
laura.blau@kmob.com
KNOBBE, MARTENS, OLSON & BEAR, LLP
10100 Santa Monica Boulevard
Suite 1600
Los Angeles, CA 90067
Phone (310) 551-3450
Facsimile: (310) 551-3458

Attorneys for Plaintiff,
THE FRS COMPANY

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

THE FRS COMPANY, a California
corporation,

Plaintiff,

v.

REVIVE FRANCHISING, LLC, a limited
liability company; RYLO PRODUCTS,
LLC, a limited liability company; SITO
MARKETING, LLC, a limited liability
company, d/b/a Revive Energy Mints;
CHRISTOPHER ROBERTSON, an
individual; MICHAEL KELTY, an
individual; and WILLIAM WOTOCHEK,
an individual

Defendants.

Civil Action No. 3:12-cv-02420-RS

**FIRST AMENDED COMPLAINT FOR
(1) FEDERAL TRADEMARK
INFRINGEMENT; (2) FALSE
DESIGNATION OF ORIGIN; (3)
COMMON LAW TRADEMARK
INFRINGEMENT; AND (4) UNFAIR
COMPETITION**

DEMAND FOR JURY TRIAL

1 Plaintiff The FRS Company (hereinafter "Plaintiff") hereby alleges against Revive
2 Franchising, LLC; Rylo Products, LLC; Sito Marketing, LLC, dba Revive Energy Mints;
3 Christopher Robertson; Michael Kelty; and William Wotochek (jointly "Defendants") as
4 follows:

5 **I. JURISDICTION AND VENUE**

6 1. This is an action for: (1) trademark infringement arising under 15 U.S.C. §
7 1114, (2) false designation of origin arising under 15 U.S.C. § 1125(a), (3) trademark
8 infringement arising under the common law of the State of California, and (4) unfair
9 competition arising under California Business & Professions Code § 17200 et seq.

10 2. This Court has subject matter jurisdiction pursuant to 15 U.S.C. § 1121 and
11 28 U.S.C. §§ 1331, 1338(a) and (b) and 1367(a).

12 3. Venue is proper in this Judicial District pursuant to 28 U.S.C. § 1391(b) and
13 (c).

14 4. Revive Franchising, LLC is subject to the general and specific jurisdiction of
15 this Court by virtue of its substantial contacts with California, including its participation in
16 the acts and events in this Judicial District described herein.

17 5. Rylo Products, LLC is subject to the general and specific jurisdiction of this
18 Court by virtue of its substantial contacts with California, including its participation in the
19 acts and events in this Judicial District described herein.

20 6. Sito Marketing, LLC dba Revive Energy Mints is subject to the general and
21 specific jurisdiction of this Court by virtue of its substantial contacts with California,
22 including its participation in the acts and events in this Judicial District described herein.

23 7. Christopher Robertson is subject to the general and specific jurisdiction of this
24 Court by virtue of his substantial contacts with California arising from his participation in the
25 acts and events in this Judicial District described herein.

26 8. Michael Kelty is subject to the general and specific jurisdiction of this Court
27 by virtue of his substantial contacts with California arising from his participation in the acts
28 and events in this Judicial District described herein.

1 **III. ALLEGATIONS FOR ALL CLAIMS OF RELIEF**

2 **A. FRS's Trademarks**

3 17. FRS is well known for its various nutritional products and beverages.

4 18. In January 2007, prior to the acts of Defendants described herein, FRS
5 commenced use of the mark HEALTHY ENERGY on its products. Accordingly, since at
6 least as early as January 2007, FRS has offered various items under the mark HEALTHY
7 ENERGY, including, but not limited to, non-alcoholic beverages; nutritional supplements;
8 nutritional fortified chews; nutritionally fortified beverages; powdered nutritional supplement
9 drink mix and concentrate; energy drinks; and concentrates and powders used in the
10 preparation of energy drinks and fruit-flavored beverages.

11 19. FRS is the current owner of United States Trademark Registration No.
12 3,544,234 for its mark HEALTHY ENERGY. A true and correct copy of the Certificate of
13 Registration is attached hereto as Exhibit 1.

14 20. Since at least January 2007, FRS has continuously used its HEALTHY
15 ENERGY mark in connection with its business on an ever increasing scope of goods.

16 21. An example of one of FRS's HEALTHY ENERGY products is shown below:



27 22. Through its substantial use and promotion, and at great expense and effort,
28 FRS has built up extensive goodwill in its HEALTHY ENERGY mark and brand.

23. By virtue of FRS's widespread and continuous use of its HEALTHY ENERGY mark, FRS has established extensive common law rights in the HEALTHY ENERGY mark.

B. Defendants' Infringement of FRS's HEALTHY ENERGY Mark

24. Defendants are engaged in the business of producing, selling, marketing, franchising, and distributing nutritionally fortified mints, both directly and through a network of franchisees and distributors, including franchisees located in the State of California.

25. Without permission or authority from FRS, Defendants have infringed FRS's HEALTHY ENERGY mark in interstate commerce by making, using, promoting, advertising, selling and/or offering to sell a line of nutritionally fortified mints using the marks "Healthy Energy" and "Healthy Energy Mint."

26. Examples of Defendants' use of the marks "Healthy Energy" and "Healthy Energy Mint" are shown below:



1 27. Defendants' products compete directly with products of FRS, and are sold and
2 marketed in directly competing channels of trade to similarly situated consumers.

3 28. By virtue of the acts complained of herein, Defendants have caused a
4 likelihood of consumer confusion as to the source of origin of Defendants' goods and as to
5 whether there is a relationship between FRS and Defendants, and have otherwise competed
6 unfairly with FRS.

7 29. FRS has notified Defendants that Defendants' use of the marks "Healthy
8 Energy" and "Healthy Energy Mint" on Defendants' products and otherwise in connection
9 with the promotion and sale of Defendants' products is unlawful and in violation of FRS's
10 trademark rights. However, Defendants refused to cease their infringing use(s).

11 30. FRS is informed and believes, and on that basis alleges, that Defendants' acts
12 complained of herein are willful and deliberate.

13 31. On information and belief, Defendants Robertson, Kelty, and Wotochek have
14 personally engaged in, directed and overseen the wrongful acts alleged herein.

15 32. Former and current employees, franchisees, and distributors have accused
16 Defendants of fraudulent and deceptive practices in the conduct of their business and in their
17 relationships with franchisees and distributors. These complaints create a substantial risk of
18 injury to the reputation and goodwill of FRS, if consumers, retailers, distributors, and others
19 mistakenly associate Defendants' business and products with FRS.

20 33. Defendants' acts complained of herein have caused and threaten to cause FRS
21 to suffer irreparable injury to its business. FRS will suffer substantial loss of goodwill and
22 reputation unless and until Defendants are enjoined from the wrongful actions complained of
23 herein.

24 **IV. FIRST CAUSE OF ACTION FOR TRADEMARK INFRINGEMENT IN**
25 **VIOLATION OF SECTION 32(1) OF THE LANHAM ACT, 15 U.S.C. § 1114**

26 34. FRS hereby repeats, realleges, and incorporates by reference Paragraphs 1-33
27 of this Complaint as though fully set forth herein.

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1 35. This is an action for trademark infringement of a federally registered
2 trademark, arising under Section 32(1) of the Lanham Act, 15 U.S.C. § 1114.

3 36. Defendants' acts, as complained of herein, including Defendants' use of the
4 HEALTHY ENERGY mark on their products constitute trademark infringement of FRS's
5 federal registration for its HEALTHY ENERGY mark.

6 37. Defendants have used in commerce, without permission of FRS, marks that
7 are confusingly similar to FRS's HEALTHY ENERGY mark.

8 38. Defendants' trademark infringement will continue unless enjoined by this
9 Court.

10 39. Defendants did so with the intent to unfairly compete against FRS, to trade
11 upon FRS's reputation and goodwill by causing confusion and mistake among customers and
12 the public, and to deceive the public into believing that Defendants' products are associated
13 with, sponsored by or approved by FRS, when they are not.

14 40. Defendants have actual knowledge of FRS's ownership and prior use of FRS's
15 HEALTHY ENERGY mark, and without the consent of FRS, have willfully violated 15
16 U.S.C. § 1114.

17 **V. SECOND CAUSE OF ACTION FALSE DESIGNATION OF ORIGIN AND**
18 **UNFAIR COMPETITION IN VIOLATION OF SECTION 43(A) OF THE LANHAM**
19 **ACT, 15 U.S.C. § 1125**

20 41. FRS hereby repeats, realleges, and incorporates by reference, the allegations of
21 Paragraphs 1-40 of this Complaint as though fully set forth herein.

22 42. This is a claim for unfair competition and false designation of origin and arises
23 under Section 43(a) of the Lanham Act, 15 U.S.C. §1125(a).

24 43. Defendants' acts, as complained of herein, including Defendants' use of the
25 HEALTHY ENERGY mark, constitute unfair competition and false designation of origin
26 under Section 43(a) of the Lanham Act, 15 U.S.C. §1125(a).

27 44. The aforesaid acts of unfair competition and false designation of origin were
28 and continue to be willful and intentional.

1 45. The aforesaid acts of unfair competition and false designation of origin will
2 continue unless enjoined by this Court.

3 **VI. THIRD CAUSE OF ACTION FOR TRADEMARK INFRINGEMENT UNDER**
4 **CALIFORNIA COMMON LAW**

5 46. FRS hereby repeats, realleges, and incorporates by reference paragraphs 1-45
6 of this Complaint as though fully set forth herein.

7 47. This is a claim for trademark infringement and arises under California
8 common law.

9 48. Defendants' acts, as complained of herein, including Defendants' use of the
10 HEALTHY ENERGY mark, constitute infringement of FRS's trademark rights in the
11 HEALTHY ENERGY mark under California common law, as the HEALTHY ENERGY
12 mark is protected under the common law.

13 49. Defendants' trademark infringement was and continues to be willful and
14 intentional.

15 50. Defendants' trademark infringement will continue unless enjoined by this
16 Court.

17 **VII. FOURTH CAUSE OF ACTION FOR CALIFORNIA STATUTORY UNFAIR**
18 **COMPETITION**

19 51. FRS hereby repeats, realleges, and incorporates by reference paragraphs 1-50
20 of this Complaint as though fully set forth herein.

21 52. This is an action for unfair competition arising under Cal. Bus. & Prof. Code §
22 17200, et. seq.

23 53. By virtue of the acts complained of herein, Defendants have intentionally
24 caused a likelihood of confusion among the public and have unfairly competed in violation of
25 Cal. Bus. & Prof. Code § 17200, et. seq.

26 54. Defendants' aforementioned acts constitute unlawful, unfair, or fraudulent
27 business practices, which have injured and damaged FRS.

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1 55. By their actions, Defendants have irreparably injured FRS. Such irreparable
2 injury will continue unless Defendants are preliminarily and permanently enjoined by this
3 Court from further violation of FRS's rights, for which FRS has no adequate remedy at law.

4 **VIII. PRAYER FOR RELIEF**

5 WHEREFORE, Plaintiff prays for judgment as follows:

6 A. That the Court enter judgment in favor of FRS and against Defendants on all
7 claims for relief alleged herein;

8 B. That the Court enter judgment that Defendants have willfully violated the
9 provisions of 15 U.S.C. § 1114 by infringing FRS's trademark rights in its federally
10 registered HEALTHY ENERGY mark;

11 C. That the Court enter judgment that Defendants have willfully violated the
12 provisions of 15 U.S.C. § 1125 by infringing FRS's trademark rights in its HEALTHY
13 ENERGY mark;

14 D. That the Court enter judgment that Defendants have infringed FRS's
15 trademark rights in its HEALTHY ENERGY mark under the common law of the State of
16 California;

17 E. That Defendants be adjudged to have unfairly competed with FRS under Cal.
18 Bus. & Prof. Code § 17200, et. seq.;

19 F. That Defendants, their agents, servants, employees, attorneys, affiliates,
20 licensees, franchisees, subsidiaries, successors, and assigns, and all other persons in active
21 concert or participation with any of them who receive actual notice of the injunction by
22 personal service or otherwise, be forthwith preliminarily and permanently enjoined from:

- 23 1. using FRS's HEALTHY ENGERGY mark connection with
- 24 Defendants' goods, using the HEALTHY ENERGY mark in
- 25 advertising or promoting Defendants' goods, and/or using confusingly
- 26 similar variations of the HEALTHY ENERGY mark in any manner
- 27 that is likely to create the impression that Defendants' goods originate

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1 from FRS, are endorsed by FRS, or are connected in any way with
2 FRS;

3 2. otherwise infringing the HEALTHY ENERGY mark;

4 3. falsely designating the origin of Defendants' goods;

5 4. unfairly competing with FRS in any manner whatsoever; and

6 5. causing a likelihood of confusion or injury to FRS's business
7 reputation;

8 G. That Defendants be directed to file with this Court and serve on FRS within
9 thirty (30) days after the service of the injunction, a report, in writing, under oath, setting
10 forth in detail the manner and form in which Defendants have complied with the injunction
11 pursuant to 15 U.S.C. § 1116;

12 H. That an award of reasonable costs, expenses and attorneys' fees be awarded to
13 FRS pursuant to 15 U.S.C. § 1117;

14 I. That Defendants be required to deliver and destroy all devices, literature,
15 advertising, goods and other materials bearing the infringing marks pursuant to 15 U.S.C. §
16 1118; and

17 J. That FRS be awarded such other and further relief as this Court may deem just
18 and proper.

19
20 Respectfully submitted,

21 KNOBBE, MARTENS, OLSON & BEAR, LLP

22 Dated: June 19, 2012

By: /s/John B. Sganga, Jr.

23 John B. Sganga, Jr.

24 Brian C. Horne

Laura M. Blau

25 Attorneys for Plaintiff,
26 The FRS Company
27
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DEMAND FOR JURY TRIAL

Plaintiff The FRS Company, hereby demands a trial by jury as to all triable issues in this matter.

Respectfully submitted,

KNOBBE, MARTENS, OLSON & BEAR, LLP

Dated: June 19, 2012 By: /s/John B. Sganga, Jr.

John B. Sganga, Jr.

Brian C. Horne

Laura M. Blau

Attorneys for Plaintiff,
The FRS Company

13388147

Exhibit 1

Int. Cl.: 32

Prior U.S. Cls.: 45, 46, and 48

Reg. No. 3,544,234

United States Patent and Trademark Office

Registered Dec. 9, 2008

**TRADEMARK
PRINCIPAL REGISTER**

Healthy Energy

THE FRS COMPANY (DELAWARE CORPORATION)
101 LINCOLN CENTRE DRIVE
SUITE 500
FOSTER CITY, CA 94404

THE MARK CONSISTS OF STANDARD CHARACTERS WITHOUT CLAIM TO ANY PARTICULAR FONT, STYLE, SIZE, OR COLOR.

FOR: NON-ALCOHOLIC FRUIT JUICE BEVERAGES, IN CLASS 32 (U.S. CLS. 45, 46 AND 48).

SN 77-126,151, FILED 3-8-2007.

FIRST USE 1-0-2007; IN COMMERCE 1-0-2007.

ELLEN PERKINS, EXAMINING ATTORNEY