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Tracking Down a Counterfeiter, Bottle by Bottle, and Finding Justice

From the Experts

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Living Essentials Marketing LLC, the makers of 5-Hour Energy drinks, spent nearly \$3.5 million tirelessly tracking down, bottle by bottle, a large counterfeiting ring that was producing and selling fake drinks in 2011 and 2012.

The Farmington Hills, Michigan-based company's efforts paid off.

Last week, the U.S. Federal District Court in San Jose sentenced a key defendant to seven years in prison as part of the first-ever U.S. criminal prosecution of a food or beverage counterfeiting operation.

Walid Jamil, of Troy, Michigan, pleaded guilty in October to one count of conspiracy to traffic in counterfeit goods and one count of conspiracy to commit criminal copyright infringement and to introduce misbranded food into interstate commerce. Jamil is the first in the ring to be sentenced; seven others who are criminally charged await



Geoffrey Potter of New York's Patterson Belknap Webb & Tyler *Courtesy photo*

sentencing. Eleven defendants initially were charged with conspiracy by federal prosecutors in June 2015 in connection with the scheme. In addition to the prison sentence, U.S. District Judge Lucy Koh imposed three years of probation on Jamil once he is released. Jamil's lawyer did not return messages seeking comment.

Geoffrey Potter, lead counsel for 5-Hour Energy and head of the anti-counterfeiting practice at Patterson Belknap Webb & Tyler, said he was pleased with the sentence.

"I am gratified not only as 5-Hour Energy's lawyer, but also as a consumer and as a parent," Potter said. "All counterfeiting is theft, but counterfeiting something that we eat is

an especially horrific crime.” Potter said all the counterfeit bottles had been removed from stores in 2012.

The lawyer, who led the investigation into the ring, added, “It’s also very gratifying to start with one counterfeit bottle and trace it to the end.”

Using private investigators, Potter said that from one bottle they were able to track down a store, then a distributor, then more stores and more distributors. Each time they were able to go to court *ex parte*, and with their evidence were able to obtain an order of seizure. Then they went to law enforcement to seize the counterfeit products and any documentation.

Potter said they kept following the money until the trail eventually ended at “a filthy factory running 50-worker shifts around the clock near San Diego, producing almost 1.5 million bottles a month.”

In all, some 5 million counterfeit bottles were produced and filled with an apparently harmless “home brew,” he said.

On the same day as the factory seizure, Potter, accompanied by lawyers and investigators, went to Jamil’s home in a Detroit suburb, where they found truckloads of evidence. A dramatic moment?

“Not really,” Potter said. “It is much more exciting in the movies. This was

just lawyers and investigators carrying boxes and hard drives, and making copies of computer data, phone records and other documents.”

There was so much evidence, including product, packaging and equipment, that “we had to bring in heavy equipment movers and trailer trucks to remove it all,” he said. From start to finish, the investigation took about 60 days, he said.

They confronted Jamil later that day in his lawyer’s office.

In a written declaration submitted by prosecutors at Jamil’s sentencing, Potter wrote that he invited Jamil at that time to help investigators find any remaining bottles of the counterfeit brew in the interest of public safety. Jamil refused.

“I told him that I was sure that one day he would be subject to criminal prosecution for his role in this dangerous scheme,” the declaration states, “and that if he did not cooperate at this juncture, at the time of his ultimate sentencing I would inform the court that Walid Jamil had been provided a full and fair opportunity to remediate the harm that he had caused at a crucial time in our investigation, and had refused to do so.”

Potter filed two civil suits against some 100 defendants, including Jamil and seven others criminally charged in the ring who await sentencing,

plus distributors and others. One civil suit went after defendants on the East Coast, the other on the West Coast.

“We prevailed against every one,” Potter said, resulting in a \$10 million judgment plus restitution of the nearly \$3.5 million in investigative costs. Has he been successful in such investigations before?

“We’ve never failed to track down the source of a counterfeit,” he said. “The tools are very powerful, such as the court seizure order, and if they are used appropriately, and the client has the resources and will to see it through to the end, you can always succeed.”

Potter explained, “One of the unexpected things, frightening things really, is that most of them [counterfeiters] consider themselves mere businessmen, which is why we can find them.”

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