

Monster Lost \$272M From VPX's Alleged False Ads, Jury Told

By Craig Clough

Law360 (September 15, 2022, 10:49 PM EDT) -- A damages expert hired by Monster Energy Co. told a California federal jury on Thursday that the beverage giant suffered almost \$272 million in damages as a result of Vital Pharmaceutical Inc.'s alleged false advertising of "super creatine" in its Bang energy drink.

Christian Tregillis, a forensic accountant and partner with Hemming Morse LLP, told the jury he determined Monster logged \$854 million in sales from its marketing of super creatine as a key ingredient in Bang. He said he reached that conclusion by analyzing the results of a survey another Monster expert conducted asking Bang drinkers if they would stop buying the beverage if it no longer included super creatine or upon learning of its relatively tiny amount of 25 mg in each 16 ounce can.

By calculating how many Bang drinkers in the survey said they would stop or reduce their monthly purchase of Bang and then applying how many said they would switch to a Monster-owned drink, Tregillis argued Monster lost a total of \$271.9 million in profits since 2015, when Vital first started marketing super creatine in Bang, through April of this year.

"This is what Monster lost as result of the advertising," Tregillis said.

The analysis assumed the false advertising claims alleged by Monster are true, Tregillis said, adding that the ultimate decision is up to the jury.

Tregillis said he concluded that Vital, which does business as VPX Sports, made over \$173 million in profits from the claims at the center of the suit, but about two-thirds of its sales were not related to super creatine. Of the one-third of customers that would be lost, the survey found 18.9% of those would switch to Monster or its affiliated Reign beverage line, according to Tregillis.

VPX reports a relatively low per-can profit margin of about 20% and included some costs Tregillis said he disagreed with — such as VPX CEO Jack Owoc's private jet — but he nonetheless accepted VPX's figures. Monster, on the other hand, reports about a 50% per-can profit margin, which accounts for it losing much more than VPX gained from the false advertising, according to Tregillis' analysis.

Monster alleges in its 2018 lawsuit against Vital that the super creatine in Bang energy drink offers none of the benefits of traditional creatine, which bodybuilders and athletes take to enhance performance and muscle strength and is believed to improve brain function. Creatine is not water-soluble and is generally sold in powder form, but Vital claimed to have solved the problem in 2015 with the water-soluble super creatine it puts in Bang, according to Monster.

The trial, which began Aug. 26 and could last up to a month, also focuses on claims that Vital interfered with Monster's retailer contracts over shelf space and stole trade secrets.

Tregillis found the alleged trade secrets theft cost Monster \$15,000 due to the cost of its investigation and did not offer a damages estimate on any contract interference.

Matthew Duchemin of Quarles & Brady LLP, who represents Vital and Owoc, pointed out on cross-examination that Tregillis was using the answers of 122 survey participants who said they would stop or reduce their purchase of Bang, and applying them over seven years of sales and roughly 2.5 billion cans of Bang sold during that time.

Tregillis said he did not do a "capacity analysis" to determine if Monster had the ability to produce the extra cans it allegedly lost in sales lost to VPX, but rather determined Monster had the capacity because it lost market share since Bang came on the market, so it only would have need to maintain its previous pace.

Guillaume Weaver, a vice president at Monster, also testified on Thursday and told the jury that VPX swapped contracted Monster shelf space at hundreds of Walmart Inc. stores with Bang.

Weaver said that while he served in a previous role at the company, he would typically visit about 50 Walmart stores a month because Monster had a major contract with the retail giant. According to Weaver, between mid-2018 to mid-2019, he personally witnessed Vital's Bang energy drinks placed in coolers where Monster's drinks were contracted to be.

Between what he saw, what he was told by other employees and instances he guesses he never heard about because the problem was fixed by Monster's distributor or a store employee, Weaver estimated the swapping took place in about 100 stores a month. The only explanation was an effort by Vital, he added.

"I know it's not a store owner because they would be breaking the policy, and again all that space is mapped," Weaver said. "And I know it's not a customer because it was happening across the country, so unless there was a band of a bunch of crazy customers who got together it doesn't make any sense."

"I mean it's very labor-intensive to fill those coolers as well," he added. "And to do that, they would need to appear to be an actual vendor because a customer taking an hour to fill a cooler would definitely get the attention of the store."

The jury already heard from previous witnesses that the majority of energy drinks are sold as single cans in coolers, and shelf space in those coolers is often reserved through multimillion-dollar contracts with major retailers such as 7-Eleven Inc., Costco Wholesale Corp. and Walmart. As part of its lawsuit, Monster accuses VPX of undertaking an organized effort to steal its shelf space.

Under cross-examination by VPX's attorney Brittany S. Ogden of Quarles & Brady LLP, Weaver said he never personally witnesses any VPX employee placing Bang in Monster's contracted space at any store. He said he is also unaware of Monster sending VPX any cease-and-desist letter over the issue and is unaware of any video footage of the swapping from any store.

But Weaver also insisted he didn't "have to witness it, all my years of experience tell me exactly how that happened."

Mario Miguel Suarez, a vice president with Monster, also testified Thursday and told a similar story to Weaver's about Bang drinks ending up in Monster's contracted space at Circle K stores on a large scale. On cross-examination, he said he never witnessed any of the alleged wrongdoing himself.

The trial is part of an increasingly bitter series of legal disputes between Monster and Vital, another chapter of which opened in Florida last month when VPX filed a suit of its own against Monster, asserting that it ignored reports of "hazardous" ingredients and engaged in "trademark bullying."

VPX lost trade dress claims in 2021 following a trial against Monster over claims it copied Bang's design with a "knockoff" version called Reign. Monster and a small family-owned business called Orange Bang Inc. also scored a \$175 million trademark win in arbitration against VPX.

Monster Energy Co. is represented by John C. Hueston, Moez M. Kaba and Allison L. Libeu of Hueston Hennigan LLP.

Vital Pharmaceuticals Inc. and Owoc are represented by David P. Muth, Brittany S. Ogden, Matthew J. Duchemin, Joshua B. Fleming, Nolan J. Mitchell, Jonathan Paul Labukas and Daniel M. Janssen of Quarles & Brady LLP.

The case is Monster Energy Co. v. Vital Pharmaceuticals Inc. et al., case number 5:18-cv-01882, in the U.S. District Court for the Central District of California.

--Additional reporting by Jasmin Jackson and Mike Curley. Editing by Kristen Becker.