

Monster Wins \$293M Verdict Against VPX In False Ad Trial

By Craig Clough

Law360 (September 29, 2022, 8:47 PM EDT) -- A California federal jury awarded Monster Energy Co. nearly \$293 million and teed up possible enhanced and punitive damages Thursday after finding Vital Pharmaceuticals Inc. and its CEO falsely advertised the "super creatine" ingredient of Bang energy drink, handing Monster a potentially record-breaking verdict following the monthlong trial.

The nine-person jury also found that Vital — which does business as VPX — and its CEO, Jack Owoc, acted willfully and deliberately in violating the federal Lanham Act by falsely advertising the health benefits of Bang. That decision puts VPX and Owoc on the hook for possible enhanced damages, which could triple the award.

The verdict is a devastating blow to Vital, whose attorney acknowledged in court recently that an adverse outcome could push the company into bankruptcy. It's the second nine-figure court loss Vital suffered to Monster this year.

"We are grateful for the jury delivering what we believe is the largest Lanham Act jury trial award in U.S. history," John C. Hueston of Hueston Hennigan LLP, who represents Monster, told Law360 after the verdict.

Moez M. Kaba of Hueston Hennigan told Law360 the purpose of the lawsuit was to "reveal that Vital Pharmaceuticals has been engaged in an at least seven-year long campaign of deception, and we believe that the jury's resounding verdict combined with the \$185 million from our earlier case against Vital Pharmaceuticals — which totals about half a billion dollars in recovery — really sends that message once and for all. We're very proud of that and our whole team is really proud of that work."

Vital, Owoc and their counsel declined to comment.

The jury also ruled in Monster's favor on several state law claims, finding that VPX stole trade secrets and



A survey conducted by Monster Energy Co. found that it lost \$271.9 million in profits since 2015 due to Vital Pharmaceuticals Inc.'s false advertising of an ingredient that's been dubbed super creatine. (iStock.com/PaulMcKinnon)

interfered with Monster's contracts over shelf space with some major retailers. The jury cleared Owoc of any liability on the contract claim, and he was not a defendant with respect to the trade secrets claim.

The jury awarded Monster \$271,924,174 for the Lanham Act claim — the full amount Monster asked for — and awarded only slightly less than what Monster sought on the state law claims. Earlier in the week, Monster asked the jury for a total of \$297 million.

Under the Lanham Act, the court can order disgorgement of ill-gotten profits as well as an award of treble damages, which is typically premised on a finding of willfulness. U.S. District Judge Jesus Bernal oversaw the trial and will rule on any enhanced damages and disgorgement at a later date.

The jury also found that VPX is liable for potential punitive damages on the state law claims. Following the verdict, VPX attorney David P. Muth of Quarles & Brady LLP waived the company's right to have the jury decide the punitive damages in favor of allowing Judge Bernal to do so following briefing on the issue.

VPX went from an obscure company facing financial ruin in 2015 to the No. 3 energy drink company in the United States within a few short years, according to evidence presented at trial. But Monster convinced the jury that VPX's meteoric rise was due largely to the false advertising of super creatine, which VPX touted as offering enormous health benefits.

Monster hinged its false advertising damages theory on a survey that found about one in five cans of Bang sold would go to Monster beverages if super creatine were removed or if Bang buyers were more informed about the amount of super creatine in each can.

The survey concluded Monster lost \$271.9 million in profits since 2015 due to the false advertising of super creatine, while VPX made \$173 million in profits.

According to Monster's 2018 lawsuit, super creatine 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.

Owoc is the founder, CEO and sole owner of VPX, and much of the trial focused on his own statements in social media videos and other posts about the wonders of super creatine, which included his saying it can help people suffering from Parkinson's disease and Alzheimer's, as well as build muscle and improve overall brain function.

Monster alleged these statements were key to Bang's success because the company never used traditional advertising such as television or magazine ads, but rose to prominence through social media as well as direct marketing pitches to retailers and distributors that were laced with false claims about super creatine.

No studies were ever shown to the jury by VPX backing up its past claims about the benefits of super creatine, while studies conducted by Monster and presented to the jury concluded super creatine is a useless ingredient that does not increase creatine levels in the body.

Computer programmer Brent Tuominen served as the jury's foreperson and told Law360 that none of the jurors felt that super creatine was the equivalent of creatine.

"The first question is: Is super creatine, or creatyl L-Leucene — see I can rattle these things off now — is it creatine?" Tuominen told Law360. "There was not anybody in the room at any point that said 'yes'."

A highlight of the trial was Owoc's two-day appearance on the witness stand, where he verbally sparred with Monster's counsel and had much of his testimony stricken from the record.

Owoc often appeared to contradict himself, telling the jury super creatine is "by far" the greatest invention in the history of supplements, but is not responsible in any way for Bang's success. He also said no studies are needed to prove super creatine's effectiveness because it is a combination of the creatine molecule and the leucine molecule, both of which have been studied on their own. But he also suggested some studies are in the works.

He also insisted that he is a scientist despite holding no scientific academic degrees.

Owoc was often aggressive and pugnacious with Hueston, broadly accusing him of committing a "fraud on the court" when asked to read from documents or witness testimony without being allowed to read the entire document out loud. The comments were frequently stricken by Judge Bernal, who lectured him that he as judge decides "what is and is not against the law."

Many of the jurors often did not look directly at Owoc during his testimony, appearing uncomfortable with his attitude. At one point Owoc directly implored the jurors to "look at me" as he made a direct pitch to them, and some appeared to reluctantly turn their heads before looking away when he was finished speaking.

Tuominen said he would describe Owoc as "entertaining" but that his personality didn't impact the jury's deliberations much.

VPX and Owoc suffered several unfavorable rulings about admissible evidence both before and during the trial, which hamstrung their ability to counter the scientific results presented by Monster's witnesses.

Unable to present a study Judge Bernal ruled inadmissible because it was brought forward far after a deadline, VPX was left in the position of having to criticize the Monster studies while also pulling out elements from them that could be seen as favorable to VPX.

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

VPX lost trade dress claims in 2021 following a trial against Monster over claims Monster copied Bang's design with a "knockoff" version of Bang called Reign. In April, Monster and a small family-owned business called Orange Bang Inc. also scored a \$175 million trademark win in arbitration against VPX which also requires Vital to pay \$9.3 million in attorney fees.

Monster Energy Co. is represented by John C. Hueston, Moez M. Kaba, Lauren M. Johnson, Sara Haji, Sourabh Mishra and Allison L. Libeu of Hueston Hennigan LLP.

Vital Pharmaceuticals Inc. and VPX CEO Jack Owoc are represented by David P. Muth, Brittany S. Ogden,

Matthew J. Duchemin, Joshua B. Fleming, Nolan J. Mitchell 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 Robert Rudinger.

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