LOS ANGELES & SAN FRANCISCO
Daily Journal
www.dailyjournal.com

TUESDAY, JULY 5, 2022

PERSPECTIVE

$175M trademark infringement award upheld

By Skyler Romero
Daily Journal Staff Writer

A federal court in Los Angeles published on Friday what may be the largest trademark infringement arbitration award in U.S. history, confirming a $175 million legal victory for the manufacturers of Monster energy drinks and Orange Bang beverages.

U.S. District Judge Dale S. Fischer upheld arbitrator Bruce A. Isaac's decision Thursday, denying a motion by plaintiff Vital Pharmaceuticals Inc. (VPX) to vacate the award that was made in April.

he award was $175 million, "plus attorney's fees and, very significantly, an annual royalty of 5%," John C. Hueston of Hueston Hennigan LLP, who represented co-defendant Monster Energy Co. in the case, said in an interview Friday. "At their current rate of production" that would be "the equivalent of an additional $65- $70 million at least per year, which we think will track it to be the highest trademark infringement award in U.S. history."

Hueston's colead counsel was Moez M. Kaba of the same firm.

The dispute arose in the wake of a 2010 settlement between Vital Pharmaceuticals Inc. and Orange Bang Inc. The latter manufactures a fountain beverage of the same name. The settlement concerned a bodybuilding supplement called Bang!, which Vital Pharmaceuticals produced at the time.

The confidential settlement resolved all trademark issues between the parties until 2019, when Orange Bang Inc., in conjunction with Monster Energy Co., accused Vital Pharmaceuticals of violating the settlement terms with its own energy drink, known as Bang, which the company launched in 2012. Vital Pharmaceuticals v. Orange Bang Inc., 5:20-cv-01464 (C.D. Cal., filed May 6, 2020).

Per the terms of the 2010 settlement, the matter entered arbitration, where Orange Bang Inc. and Monster Energy Co. prevailed and were granted the $175 million award in April by Isaacs of Signature Resolution. Vital Pharmaceuticals then filed a motion to vacate the arbitration results.

Central to the dispute was language referring to "creatine-based" drinks in the 2010 settlement, which stipulated that Vital Pharmaceuticals was within its rights to use "Bang" for products containing the ingredient.

"Plaintiffs argue that the award does not 'draw its essence from the agreement' because the arbitrator's definition of 'creatine-based' would exclude Plaintiffs' 'Bang Pre-Workout' product, which the parties understood to be 'creatine-based' at the time of the settlement," Fischer wrote in his Thursday ruling.

"But the arbitrator confronted this tension and accepted Orange Bang's contention that it had believed that the 'Bang Pre-Workout' product was creatine-based at the time of settlement because of representations made by Plaintiffs that turned out to be false or misleading," Fischer explained.

"In the trial we showed that VPX or Bang energy was really stumbling along near bankruptcy until they used the Bang mark and pumped it up as a 'super creatine' drink. That was its market differentiator," said Hueston, who is based in Los Angeles.

"What we were able to prove by the end of the case through very extensive expert testimony, as well as lay testimony, in the proving of lies by the founder and inventor of Bang, was that the creatine line was simply a hoax, and that they had created this billion-dollar beverage on the back of a critical lie — the lead marketing piece that they put around the lip of their cans," Hueston continued.

Legal representatives for Vital Pharmaceuticals could not be reached via phone or email for this story.

Fischer concluded the motion to vacate fell short of what Vital Pharmaceuticals needed to prove. "In short, there is no basis to find that the award was 'completely irrational' or that the arbitrator engaged in 'manifest disregard of the law,'" Fischer wrote.

Hueston speculated that Vital Pharmaceuticals could appeal to the 9th U.S. Circuit Court of Appeals, but said his team was not concerned.

"Now that the district court has reviewed the entirety of the 177-page opinion, and made the findings that the court did, we feel very confident that any effort to appeal will be for naught," he said.

skyler_romero@dailyjournal.com