

**WRIT OF SUMMONS IN PRELIMINARY RELIEF PROCEEDINGS FOR AN ACCELERATED  
PROCEDURE**

Today, the

two thousand and nineteen,

**AT THE REQUEST OF:**

The company incorporated under Irish law, Monster Energy Limited, having its corporate seat in Ireland and its place of business at 6th Floor, South Bank House, Barrow Street, Dublin 4 in Ireland, choosing its address for service in this case in Amsterdam at Claude Debussylaan 247 (1082 MC), at the office address of Simmons & Simmons LLP, with a current account with national cover, number 88170281, of which firm B.J. Berghuis van Woortman and P.L. Tjiam are appointed as counsel and will act in such capacity on its behalf,

I,

**PURSUANT TO A WRITTEN MANDATE OF THE PRELIMINARY RELIEF JUDGE OF THE  
DISTRICT COURT OF AMSTERDAM DATED 27 MARCH 2019 DID SUMMON IN PRELIMINARY  
RELIEF PROCEEDINGS:**

- I. the company incorporated under foreign law **Vital Pharmaceuticals, Inc.**, trading as VPX Sports, with its corporate seat in the United States of America and its place of business at 1600 N Park Dr., Weston, FL 33326, Florida in the United States, choosing its address for service in this matter at the offices of G. Vos (Brinkhof) in Amsterdam at Lairesestraat 111, serving my writ at the elected address for service and leaving a copy of this writ and exhibits with:

employed there;

- I. the private company with limited liability **Bang Energy B.V.**, with its corporate seat at (6131 AL) Rijksweg 27, Sittard in the Netherlands, choosing its address for service in this matter at the offices of G. Vos (Brinkhof) in Amsterdam at Lairesestraat 111, serving my writ at the elected address for service and leaving a copy of this writ and exhibits with:

employed there;

- I. the natural person **John Henry Owoc**, residing at 1721 SW 131st Terrace, Davie, 33325 Florida in the United States, choosing his address for service in this matter at the offices of G. Vos (Brinkhof) in Amsterdam at Lairesestraat 111, serving my writ at the elected address for service and leaving a copy of this writ and exhibits with:

employed there;

- I. the company incorporated under foreign law **LuckyVitamin LLC**, with its corporate seat in the United States of America and its place of business at 555 E. North Lane, Suite 6050, Conshohocken, 19428 Pennsylvania in the United States, choosing its address for service in this matter at the offices of D. Stols (Boekx advocaten) in Amsterdam at Leidsegracht 9, serving my writ at the elected address for service and leaving a copy of this writ and exhibits with:

employed there;

- II. the company incorporated under foreign law **Predator Nutrition Online Limited**, with its corporate seat in the United Kingdom and its place of business at No. 2 Silkwood Office Park, Fryers Way, Wakefield, West Yorkshire, WF5 9TJ in the United Kingdom,

to this end, I have, by virtue of Article 56(2) of the Dutch Code of Civil Procedure and in my capacity of transmitting agency within the meaning of EU Regulation number 1393/2007 of the Council of the European Union of 13 November 2007 (EU Service Regulation), sent two copies of this writ and the following documents:

TO THE FOLLOWING RECEIVING AGENCY

Royal Courts of Justice

Room E16, Strand

WC2A 2LL London (United Kingdom)

This transmission was effected today by UPS courier and included the following documents:

- two translations of this writ and related title in the English language and
- the form within the meaning of article 4, third paragraph, of the aforementioned EU Service Regulation, filled out in the English language.

I have requested the receiving agency to serve/notify this writ and aforesaid title, accompanied by an English translation, upon Predator Nutrition Online Limited, such in the manner set out under 5 in the aforementioned form "application for service or notification of documents" being service according to the laws of the requested state (form 5.1).

**MOREOVER, TO SERVE / NOTIFY SAID DOCUMENTS UPON PREDATOR NUTRITION ONLINE LIMITED, MENTIONED ABOVE**

I will send a copy of this writ, as well as an English translation of those documents, today, in accordance with Article 56(3) Dutch Code of Civil Procedure and Article 14 of the aforementioned Service Regulation, by UPS couriers, to the address of the aforementioned Predator Nutrition Online Limited accompanied by the standard form mentioned in Article 8 of the Service Regulation, included in Schedule II to the Service Regulation, with notification that Predator Nutrition Online Limited may refuse to accept this document if it is not written in a language, or is not accompanied by a translation, as referred to in Article 8(1) of the Service Regulation and that the refused documents are to be returned within the period mentioned in that Article

- III. the company incorporated under foreign law The Protein Pick and Mix Ltd., with its corporate seat in the United Kingdom and its principal place of business at Shernfold Lodge, Frant, Tunbridge Wells, Kent, TN3 9DL in the United Kingdom,

to this end, I have, by virtue of Article 56(2) of the Dutch Code of Civil Procedure and in my capacity of transmitting agency within the meaning of EU Regulation number 1393/2007 of the Council of the European Union of 13 November 2007 (EU Service Regulation), sent two copies of this writ and the following documents:

**TO THE FOLLOWING RECEIVING AGENCY**

Royal Courts of Justice  
Room E16, Strand  
WC2A 2LL London (United Kingdom)

This transmission was effected today by UPS courier and included the following documents:

- two translations of this writ and related title in the English language and
- the form within the meaning of article 4, third paragraph, of the aforementioned EU Service Regulation, filled out in the Engels language.

I have requested the receiving agency to serve/notify this writ, accompanied by an English translation, upon The Protein Pick and Mix Ltd, such in the manner set out under 5 in the aforementioned form "application for service or notification of documents" being service according to the laws of the requested state (form 5.1).

**MOREOVER, TO SERVE/NOTIFY SAID DOCUMENTS UPON The Protein Pick and Mix Ltd, AFOREMENTIONED**

today a copy of this writ, with translations of said documents in the English language will be sent by me, in accordance with article 56 (3) of the Dutch Code of Civil Procedure and article 14 of the aforementioned EU Service Regulation, by UPS courier to the address of The Protein Pick and Mix Ltd mentioned above, together with the model

form mentioned in article 8 EU Service Regulation, included in annex II of the EU Service Regulation, stating that **The Protein Pick and Mix Ltd** may refuse this document if it is not drawn up in a language, or accompanied by a translation, within the meaning of article 8 (1) of the EU Service Regulation and that refused documents must be sent back within the term specified in the aforementioned article.

**TO:**

appear on Thursday the eighteenth of April two thousand and nineteen (18-04-2019), either in person or represented by counsel, at the hearing of the Preliminary Relief Court of the Amsterdam District Court, civil-law division, which hearing will be held then and there in one of the rooms of the Amsterdam District Court on Parnassusweg 220-228, Parnassusweg 220, 1076 AV Amsterdam, (main entrance Tower G on Fred Roeskestraat);

**WITH NOTICE:**

Bijzondere verzoeken	Verkorting dagvaardingstermijn: <input checked="" type="checkbox"/> <i>Telefonische genagade</i> Verlenging zittingsduur: <input type="checkbox"/> Ja, met 2 uur <i>uit buitenlandse gedaagde</i>
Bijzonderheden/ motivering	Gelet op het aantal van 6 gedaagden en de verschillende vorderingen tegen verschillende gedaagden, verzoekt Monster een verlenging van de pleittijd als volgt: eiseres en gedaagden: 60 min eerste termijn en 15 min tweede termijn.
Belangrijke mededeling	U wordt verzocht de mededeling van de behandeldingsdatum af te wachten. Raadpleeg voor de geldende procedureregels het (landelijke) Procesreglement kort gedingen Rechtbanken civiel/familie op <a href="http://www.rechtspraak.nl">www.rechtspraak.nl</a> . Voor het geldende griffierecht voor een gedaagde in kort geding wordt u verwezen naar de tabel bij de Wet griffierechten in burgerlijke zaken.
<i>In te vullen door de rechtbank</i>	
Zaak-/kort gedingnummer	<i>662000 KG ZA 19-215</i>
Zittingsdatum en tijdstip	<i>Donderdag 18 april 2019 te 9:30 uur</i>
Voorzieningenrechter Mr	<i>A.J. Benkenhorst</i>
Voorwaarden	<input checked="" type="checkbox"/> Verlof verkorte termijn verleend onder de voorwaarde dat de dagvaarding uiterlijk aan de partij wordt betekend op <i>29/3/19</i> <input checked="" type="checkbox"/> Onverwijld mededeling zittingsdatum en -tijdstip en toezending concept-dagvaarding aan de gedaagde partij. <input type="checkbox"/> Overige voorwaarden: <input checked="" type="checkbox"/> Vermelding van deze voorwaarden in de dagvaarding.
Bijzonderheden	<i>Voorlopig is 3 uur voor de zaak uitgetrokken</i> <i>Dit als duidelijk is hoeveel advocaten aan de zijde van gedaagden het woord zullen nemen, kan over de spreiding worden beslist.</i> <i>2.6.17</i> <i>1/3/19</i> <i>BB</i> <i>per mail 1/3 BBW</i>

Mogelijk wordt deze zaak aangekondigd in de digitale Nieuwsbrief ([www.rechtbankamsterdam.nl](http://www.rechtbankamsterdam.nl)). Wilt u ook de gedaagde partij(en) daarvan op de hoogte brengen? Eventueel bezwaar tegen opname graag gemotiveerd kenbaar maken. Daarop

**WITH NOTICE THAT:**

- I. if the prescribed time periods and formalities have been observed and the defendant fails to appear at the hearing either in person or represented by a lawyer, the court will declare the defendant to be in default of appearance and allow the claim set out below, unless the court deems this claim unlawful or unfounded;
- II. if at least one of the defendants appears at the hearing either in person or represented by a lawyer, one judgment will be rendered among all parties, which will be considered a judgment rendered in a defended action;
- III. upon appearing before the court, each of the defendants will be charged a court fee to be paid within four weeks after the date of appearance;
- IV. the amount of the court fee is stated in the most recent appendix to the Dutch Court Fees in Civil Cases Act, which can be found on the following website: [www.kbvg.nl/griffierechtentabel](http://www.kbvg.nl/griffierechtentabel);
- V. a person of limited means will be charged a lower court fee for indigent persons pursuant to the law, if at the time the court fee is charged the following has been submitted:
  - a. a copy of the decision to grant legal aid referred to in Article 29 of the Dutch Legal Aid Act, or if this is not possible as a result of circumstances which are not reasonably attributable to him, a copy of the application referred to in Article 24(2) of the Dutch Legal Aid Act, or;
  - b. a statement from the Legal Aid Board, within the meaning of Article 7(3)(e) of the Dutch Legal Aid Act, showing that his income does not exceed the amounts stated in the general administrative order by virtue of Article 35(2) of this Act;
- VI. a joint court fee will be levied once only on Defendants appearing by the same lawyer and delivering identical statements or setting forth an identical defence, based on Article 15 of the Dutch Court Fees in Civil Cases Act;



**IN ORDER TO:**

Hear the following arguments and claims on behalf of Monster Energy Limited ("**Monster**"):

**1. INTRODUCTION**

- 1.1 This dispute concerns unfair business practices, misleading advertising, impermissible comparative advertising, actions in violation of (European) commodities legislation and unlawful use of health claims and medical claims.
- 1.2 Defendants Bang Energy B.V. ("**Bang EU**") and parent company Vital Pharmaceuticals Inc. ("**VPX**", together with Bang EU also "**Bang Energy**") market various flavours and types of energy drinks with the brand name *Bang* ("**Bang Drinks**"). The energy drinks are marketed via online sales, among other channels, on the Dutch and European markets. Consumers can order the products online from fitness nutrition web shops. Fitness nutrition web shops offering Bang products are defendant Predator Nutrition Online Limited ("**Predator Nutrition**"), defendant The Protein Pick and Mix Ltd. ("**The Protein**") and defendant LuckyVitamin ("**LuckyVitamin**"). These web shops target the European market, including the Dutch market.
- 1.3 Bang Energy brings Bang Drinks to the attention of the global public by promoting it as a healthy, medicinal miracle drink. Bang Energy's promotional efforts qualify as extreme and dangerous. First of all, drinking Bang Drinks is said to counter "mental retardness" and supposedly helps combat diseases including Parkinson's, Huntington's and Alzheimer's. Second, drinking Bang Drinks is said to promote brain health. Third, drinking Bang Drinks is said to promote the formation of muscle mass. Fourth, Bang Drinks are promoted that contain food supplements that have not yet been approved by the European authorities. Fifth, Bang Drinks are promoted in which supplements that have not been approved and supplements that have been approved have been incorporated to an unclear degree. Sixth, Bang Energy promotes an ingredient that appears to have been processed only in minute (ineffective) quantities. Seventh, Bang Energy claims that the consumption of all other energy drinks is irresponsible *and* poses an acute health risk.
- 1.4 Monster has taken note of various (promotional) statements, product claims, health claims and medical claims about Bang Drinks that are made by Bang Energy and its founder and director Jack Owoc ("**Owoc**"). They make these statements and claims on their own websites<sup>1</sup> and via their own social media channels, including Instagram, Facebook and YouTube. Parts of the website and the Instagram account will be displayed below to substantiate Monster's statements and claims. The statements by Bang Energy and Owoc are in violation of legislation on unlawful competition and are unlawful by themselves. Moreover, the health claims and medical claims were not approved in advance, for which reason alone the health claims are unlawful (aside from the fact that these claims are incorrect by themselves). Furthermore, it is problematic that Bang Energy's unlawful

<sup>1</sup> It concerns the websites linked to the domain names [www.bang-energy.com](http://www.bang-energy.com) and [www.bangenergy.eu](http://www.bangenergy.eu)

statements are blindly copied by intermediate vendors and (online) suppliers of Bang Energy Drinks, resulting in the spread of the statements across a worldwide audience.

- 1.5 In addition, it appears that Bang Energy is promoting the ingredient “Super Creatine” on the EU market and Bang Drinks are sold on the EU market while prominently depicting the ingredient Super Creatine on the packaging. Super Creatine is an ingredient conceived by Bang Energy and does not comply with requirements pursuant to commodities legislation applicable in the Netherlands and the EU, in particular the Novel Foods and Additives Regulation (EU/2015/2283).<sup>2</sup> It is therefore simply prohibited to market or promote products containing Super Creatine on the EU market.
- 1.6 Other flavour variants of Bang Drinks are explicitly advertised as containing the ingredient “L-Arginine” and allegedly having positive effects for body and mind, whereas it is unclear to what degree this ingredient is contained in Bang Energy’s beverages and whether this ingredient has the alleged effect at all. This marketing method misleads consumers, since in making their purchase decision the thought could form that this ingredient will have a positive effect on the brain and the body. It also turns out that some Bang Drinks contain the additive L-Leucine (E641) whereas that ingredient is not approved in the EU for use in soft drinks and/or energy drinks.
- 1.7 Monster has demanded that Bang Energy cease the use of unlawful statements and unlawful product claims and request that other sellers do the same. Monster furthermore requested Bang Energy, Predator Nutrition, LuckyVitamin and The Protein to cease and desist the selling of products containing unlawful ingredients (Super Creatine and L-Leucine) or that contain the statement “L-Arginine”. Lastly, Monster has asked Bang EU to cease prominently advertising the aforementioned ingredients (both on its cans and otherwise).
- 1.8 The defendants do not want to comply with any of Monster’s requests and this is why Monster is instituting these preliminary relief proceedings.
- 1.9 This summons is organised as follows:

**Chapter 1:** Introduction

**Chapter 2:** The facts

**Chapter 3:** The dispute

**Chapter 4:** Unfair commercial practices vis-à-vis consumers

**Chapter 5:** Unfair commercial practices vis-à-vis businesses

**Chapter 6:** Impermissible comparative advertising

<sup>2</sup> Regulation (EU) 2015/2283 of the European Parliament and of the Council of 25 November 2015 on novel foods, amending Regulation (EU) No 1169/2011 of the European Parliament and of the Council and repealing Regulation (EC) No 258/97 of the European Parliament and of the Council and Commission Regulation (EC) No 1852/2001.

**Chapter 7:** Impermissible health claims

**Chapter 8:** Bang Energy acts in breach of the Food Information Regulation

**Chapter 9:** Unlawful ingredients

**Chapter 10:** Claims

**Chapter 11:** Substantiation

**Chapter 12:** Jurisdiction

**Chapter 13:** Offer of proof



## 2. THE FACTS

### Monster

- 2.1 Monster is the Irish subsidiary of the listed American company Monster Beverage Corporation that was founded in 1990. Monster Beverage Corporation focuses primarily on the production and sale of premium energy drinks under the brand name "Monster Energy". Monster Beverage Corporation is highly successful and has a 21.1% share of the global energy drinks market.<sup>3</sup> This puts them in second place. Forbes business magazine regards Monster as one of the world's most innovative companies.<sup>4</sup>
- 2.2 Monster is responsible for the production and sale of Monster Energy in Europe.

### VPX and Bang EU

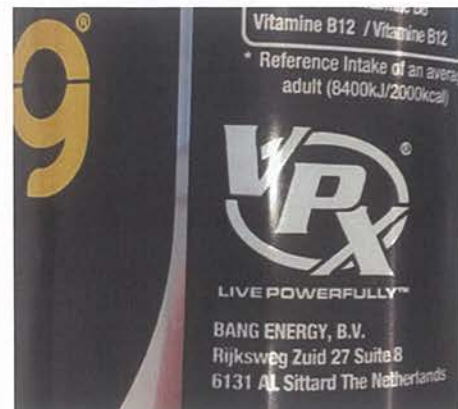
- 2.3 VPX is an American company that, like Monster, produces and sells energy drinks. VPX energy drinks are sold and promoted worldwide under the brand name "Bang".
- 2.4 In Europe, VPX acts together with its Dutch-based subsidiary Bang EU (see **Exhibit 1** for the Chamber of Commerce extract of Bang EU). This follows, among other things, from the EU website: [www.bang-energy.eu](http://www.bang-energy.eu) where VPX is prominently displayed at the top left of the website.



- 2.5 VPX is also mentioned on all packaging material of the Bang Drinks that are sold in the EU. Images of the cardboard packaging boxes and the cans where VPX is clearly depicted are shown below.

<sup>3</sup> <https://www.retaildetail.nl/nl/news/food/monster-energy-de-torero-tegen-red-bull>

<sup>4</sup> Monster is at number 11, <https://www.forbes.com/innovative-companies/#2315b0361d65>



## Jack Owoc

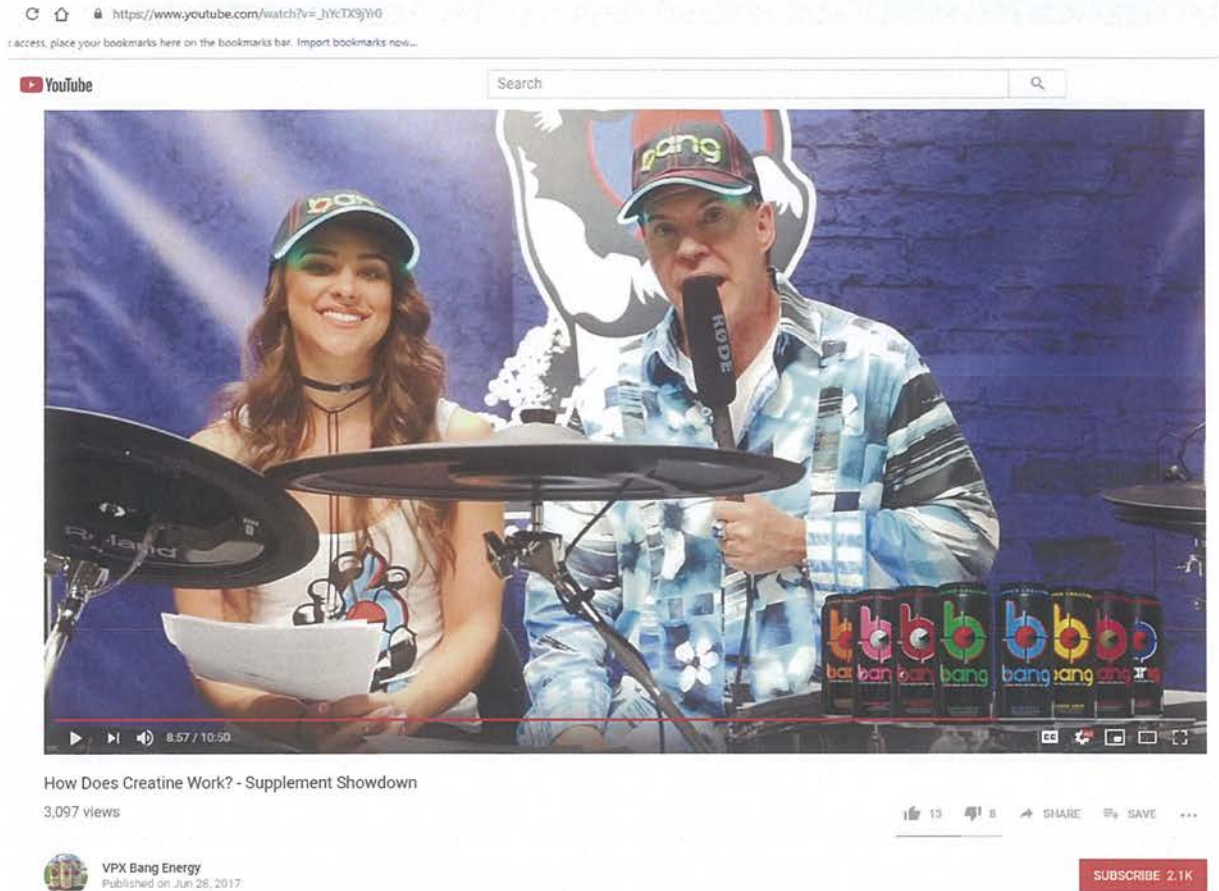
- 2.6 Jack Owoc (“**Owoc**”) is the central person at both VPX and Bang EU. Owoc is the founder and director of both companies. Owoc is also the spokesman of his companies and he promotes Bang Drinks via social media (Twitter, YouTube, Instagram). On the VPX YouTube channel, Owoc also regularly posts videos (vlogs) of himself on YouTube in which he, accompanied by a co-presenter, explains the properties of and special ingredients in Bang Drinks, including the supplement “Super Creatine”. Concisely stated, Super Creatine is creatine that binds to the amino acid L-leucine. Owoc devised the name Super Creatine himself and VPX trademarked it in various countries.<sup>5</sup>
- 2.7 Owoc is a self-proclaimed American miracle doctor. In his videos, Owoc claims that Super Creatine counters mental retardation. He also claims that Super Creatine counters all forms of dementia, including Parkinson’s, Huntington’s and Alzheimer’s. These claims qualify as medical claims (under the Medicinal Products Directive and the Dutch Medicines Act)<sup>6</sup> and health claims (under the Claims Regulation<sup>7</sup>). The videos have been uploaded via the VPX YouTube channel and are targeted to the global audience. It is clear that, with his bizarre and misleading claims, Owoc is trying to persuade consumers to drink Bang Drinks. There is a risk that consumers will believe Owoc, or *want* to believe him, and decide to purchase and drink Bang Drinks on these grounds. Inserted below is a screenshot of one of Owoc’s videos in which he promotes the “beneficial” effect of Bang Drinks.

<sup>5</sup> Trademark View indicates that SUPER CREATINE is trademarked in (at least) six countries, including France.

<sup>6</sup> Directive 2001/83/EC of the European Parliament and Council dated 6 November 2001 for the introduction of a Community code regarding medicinal products for human use.

<sup>7</sup> Regulation (EC) 1924/2006 of the European Parliament and of the Council of 20 December 2006 on nutrition and health claims made on food.





- 2.8 The video and a full transcript thereof are submitted as **Exhibits 2** and **3**.<sup>8</sup> Two quotes of Owoc from the video included below show just how extreme the thoughts of Bang Energy's founder and director are:

*"As you age you become mentally retarded (...) As time goes by, you become more and more mentally retarded. I am sorry to bring that bad news. Now, I have great news. We can possibly reverse that with these new creatine peptides that I've patented. They are miraculous, because peptides could cross the blood brain barrier, better than creatine alone. Because creatine alone is very poor in crossing the blood brain barrier. (...) You can solve mental retardation as we age. (...) The Bang Energy Cans says Super Creatine on top. Super Creatine does refer to the patented amino acid peptide that is in Super Creatine. That's why we call Bang potent brain and body fuel. So it is in the drink, the Bang drink, the Bang beverage."*

*"This is exciting news folks. This is big on the brain. It also helps with all forms of dementia, Alzheimer, Parkinson's, Huntington, and other forms of dementia. Hello! So make sure folks to take either your Bang Master Blaster (...) or drink your Bang Energy Drinks to get your Super Creatine. (...) That's why we call it potent brain and body fuel."*

<sup>8</sup> 2.8 The link to the video in which Owoc makes his statements is: <https://www.youtube.com/watch?v=hYcTX9jYr0>. The video and another video in which Owoc discuss the benefits of Super Creatine ([https://www.youtube.com/watch?v=Obr9G\\_fDe2E](https://www.youtube.com/watch?v=Obr9G_fDe2E)), are submitted on a USB flash drive as Exhibit 2. A full transcript of both videos is submitted as Exhibit 3.

- 2.9 Both Owoc and Bang Energy are responsible and liable for these statements that mainly serve to promote Bang Drinks to a global audience. The statements without doubt qualify as nutrition and health claims and therefore fall within the scope of the Claims Regulation. As Owoc and Bang Energy also claim that drinking Bang Drinks prevents and cures diseases, the claims qualify as medical claims and thereby fall within the scope of the Medicinal Products Directive. As the medical claims have not been proven, using these claims is unlawful. Moreover, based on Article 7(3) of the Food Information Regulation<sup>9</sup> it is impermissible to attribute to a food properties to a foodstuff concerning the prevention, treatment or curing of a human disease. According to that same article, referring to such properties is prohibited as well. These statements by Owoc and Bang Energy are furthermore on the blacklist of Article 6:193g(1) of the Dutch Civil Code (falsely claiming that a product is able to cure illnesses, dysfunction or malformations) and are therefore, under all circumstances, misleading and unlawful. Lastly, these statements are punishable under Dutch criminal law pursuant to Article 326 of the Dutch Penal Code, as Bang Energy incites consumers to buy Bang Drinks on the basis of a tissue of lies (this may be: a false statement of sufficient weight).

#### **Predator Nutrition, LuckyVitamin and The Protein**

- 2.10 Defendants Predator Nutrition, LuckyVitamin and The Protein are well-known European web shops specialised in food supplements. Predator Nutrition and The Protein have their headquarters in the United Kingdom, and LuckyVitamin has its headquarters in the United States. These three web shops target the entire European market, specifically including the Dutch market. This is evident from, for example, the websites of Predator Nutrition and LuckyVitamin, which actively approach and serve Dutch customers:

<sup>9</sup> Regulation (EU) No 1169/2011 of the European Parliament and of the Council of 25 October 2011 on the provision of food information to consumers, amending Regulations (EC) No 1924/2006 and (EC) No 1925/2006 of the European Parliament and of the Council and repealing Directive 87/250/EEC of the Commission, Directive 90/496/EEC of the Council, Directive of the Commission, and Regulation (EC) No 608/2004 of the Commission.

predatornutrition.com

Predator Nutrition (Bodybu...)

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DEAL OF THE WEEK NEW TO SUPPLEMENTS? WANT A TUB OF FREE BCAAs?

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10:47 26/05/2018

luckyvitamin.com

LuckyVitamin Kartingvita...)

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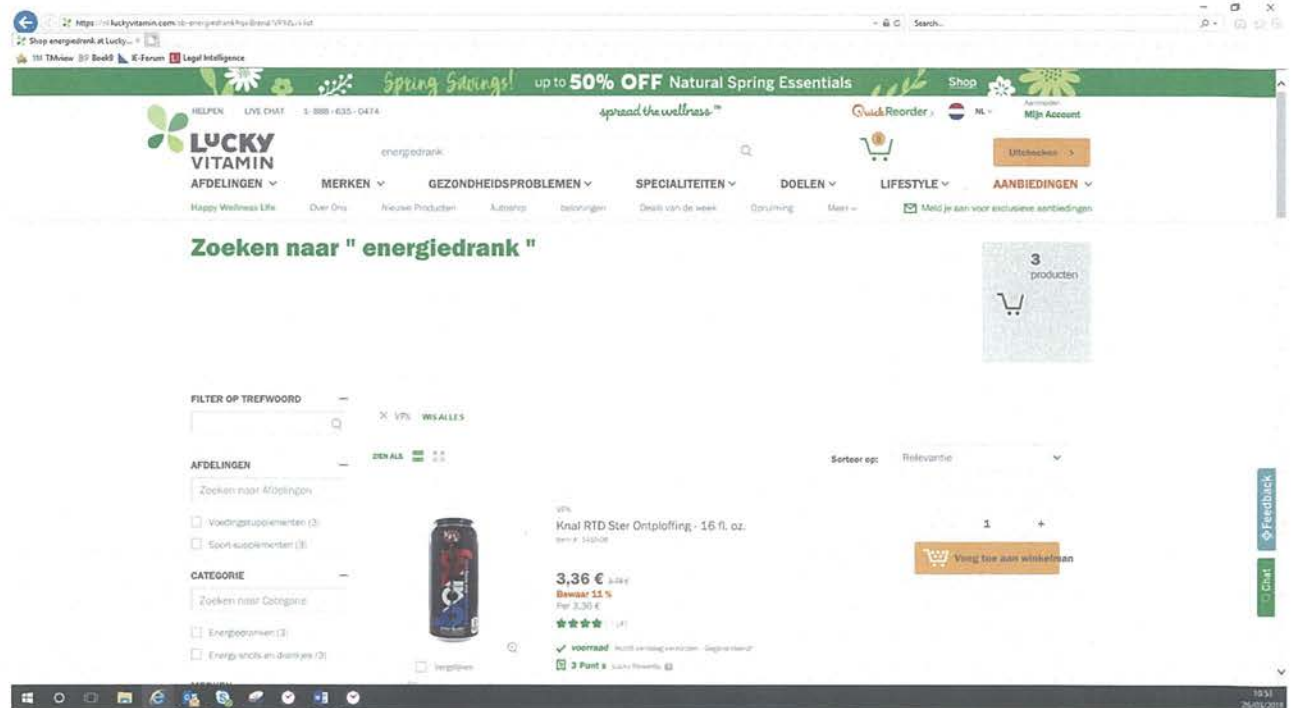
Shop

Aanbevolen afdelingen

LuckyVitamin Brands Voedingssupplementen Persoonlijke verzorging & schoonheid Vitamine en mineralen Eten en snacks Sport-supplementen

19:55 26/05/2018





## Promotion and sale of “Super Creatine”

- 2.11 Although Bang Drinks have already been available on the American market for a number of years, they have only been offered on the European market since April 2018. Bang Energy promotes the drinks via the websites [www.bangenergy.eu](http://www.bangenergy.eu) and [www.bang-energy.com](http://www.bang-energy.com), and via its Instagram accounts, Facebook accounts, Twitter accounts and YouTube, which have a global range.
- 2.12 One of the elements highlighted by Bang Energy in its promotion of Bang Drinks is the supplement conceived by it, Super Creatine, which has not yet been approved as food ingredient in the EU. Bang Energy does so by, among other things, showing cans of energy drink that clearly display the text “Super Creatine”. A selection of the advertisements published by Bang Energy on social media is submitted as **Exhibit 4**. Two of these advertisements are depicted below.

## Bang EU's Instagram page





bangenergy.eu • Follow

bangenergy.eu Sunday Funday 😊 always starts with a @bangenergy.eu Star Blast! What are you celebrating today!? Let us know in the comments below! Inventor & CEO: @bangenergy.ceo

#Bangenergy #Energydrink #energy #europe #england #france #italy #germany #sweden #eu #austria #norway #spain #portugal #croatia #hungary #bangenergyCEO #SundayFunday #colorful

cicistamper ♥♥

### Bang EU's Facebook page

**Bang Energy Europe**  
November 1, 2018 · 🌐

#BangEnergy est avec toi quand t'ai besoin d'aide pour terminer la semaine !! 🇫🇷 @bangenergy.eu 🌟

@bangenergy.ceo 🌟  
#bangenergy #energydrink #energy #europe #england #france #italy #germany #sweden #eu #austria #norway #spain #portugal #croatia #hungary #bangenergyCEO

See Translation

**Community** See All

👤 Invite your friends to like this Page

👍 100 people like this

👤 102 people follow this

**About** See All

✉ Send Message

🌐 www.instagram.com/bangenergy.eu

📁 Product/Service

✎ Suggest Edits

**Related Pages**

**Bang Revolution Appa...** Clothing Store Like

**Jack Owoc** Author Like

**The Bang Revolution** Product/Service Like

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Information about Page Insights Data  
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Facebook © 2019

- 2.13 Bang Drinks with "Super Creatine" are marketed on the Dutch and European markets via web shops. Monster made several test purchases, from outlets including Predator Nutrition, The Protein and LuckyVitamin (screenshots of the promotions on these online stores are submitted as **Exhibit 5** and reports of the test purchases are submitted as **Exhibit 6**). These web shops supply Bang Drinks with Super Creatine. Two close-up images are depicted below of Bang Drinks with Super Creatine that were bought at these web shops in the Netherlands and delivered in the Netherlands.



- 2.14 After sending the draft summons (early March 2019) Bang Energy has stopped all promotion of Super Creatine on its Bang EU social media channels. Dozens of Instagram and Facebook posts advertising Super Creatine have been removed by Bang Energy.

#### **Promotion and sale of “L-Arginine”**

- 2.15 Bang EU’s website ([www.bangenergy.eu](http://www.bangenergy.eu)) offers energy drinks in cans that do not state the words: “Super Creatine”, but do prominently state the words: “L-ARGININE” on the top of the cans. Monster made test purchases via Bang EU’s website. Photographs of the cans and the report of the test purchase are submitted as **Exhibit 7**. By way of illustration, a photograph is shown below that illustrates at once just how prominent the ingredient is mentioned on the packaging.



- 2.16 In summary: Bang Energy offers and sells two types of Bang Drinks on the Dutch market. The first is Bang Drinks with the words “Super Creatine” stated on the packaging. The second is Bang Drinks with the word “L-ARGININE” stated on the packaging.


#### **Bang Energy’s unlawful advertising statements**

- 2.17 Bang Energy’s marketing statements are aggressive, denigrating, misleading and (therefore) unlawful. Moreover, third parties selling Bang Energy’s products (mostly web shops) appear to be copying these unlawful statements. The statements speak for themselves. A number of these statements from the website of Bang EU are displayed below for illustration. See **Exhibit 8** for an overview of statements by Bang Energy.




# BANG<sup>®</sup> ENERGY DRINKS


BANG<sup>®</sup> Energy drinks are not your stereotypical high sugar, life-sucking soda masquerading as an energy drink! High sugar drinks spike blood sugar producing metabolic mayhem causing you to crash harder than a test dummy into a brick wall. Power up with BANG Energy Drink's potent brain & body-rocking fuel: L-Arginine, Natural Caffeine, & BCAAs (Branched Chain Amino Acids).\*




L-Arginine




Natural Caffeine



BCAAs



RECOMMENDED PER BLIK



Qty:  €28.80

[ADD TO CART](#)

SKU: 0006 CATEGORIES: BANG, PERFORMANCE ENHANCEMENT BEVERAGES TAG: ENERGY

Description    Nutritional Information

### Description

Make no Mistake – BANG<sup>®</sup> is not your stereotypical high sugar, life-sucking soda masquerading as an energy drink! High sugar drinks spike blood sugar producing metabolic mayhem causing you to crash harder than a test dummy into a brick wall. Power up with BANG's potent brain & body-rocking fuel: L- Arginine, Natural Caffeine, & BCAAs (Branched Chain Amino Acids).

**WARNINGS**

Do not use this product if you are pregnant or nursing. Do not consume this product if you are taking any prescription drug and/or have any medical condition. The user of this product assumes all liability if this product is used in a manner not consistent with label guidelines. This product contains caffeine and should not be used with any other caffeine containing products. This product is intended for use by healthy individuals only.

- 2.18 The relevant advertising statements regarding Bang Drinks are copied and translated virtually word-for-word on the Dutch-language and English-language websites, respectively, for example on LuckyVitamin's English-language website (see Exhibit 5C).

## OVERZICHT

Merken	Size / Vorm	Item #	UPC #	Verzendgewicht	Dosering
VPX	16 fl. oz.	126559	610764863577	1.09 Lb (s)	1 kan (en)

## BESCHRIJVING

VPX - Bang OTO Lemon Drop - 16 oz. (1 pt / 473 ml)

VPX Knaal Klaar naar Drinken is een krachtig hersenen en lichaam brandstof dat bevat BCAA aminozuren en creatine/glutamine peptiden. Van de makers van de legendarische energieproducten van Redline. Vergis je niet - Bang is niet je stereotiepe hoge suiker, levenszuigende frisdrank die zich voordoeft als een energiedrank! Dranken met hoge suiker spike bloedsuiker produceren metabolische chaos waardoor u harder dan een testpop crasht in een bakstenen muur. Maak gebruik van de krachtige brain & body-rocking-brandstof van Bang: Creatine, cafeïne en BCAA's (vertakte ketenaminozuren). Leven is een Xtreme Sport en Knaal is de Xtreme energie bron naar Wonen Leven Xtreme!

Bevat Per Can:

- 0 Calorieën
- 0 g Totaal koolhydraten
- 0 Suikers
- 0 Calorieën
- 0 Kunstmatige kleuren

- 2.19 LuckyVitamin's English-language website, directed at the EU, contains the following text about Bang Drinks:

## OVERVIEW

Brand	Size/Form	Item #	UPC #	Ship Weight	Dosage
VPX	16 fl. oz.	126559	610764863577	1.09 Lb(s)	1 Can(s)

## DESCRIPTION

VPX - Bang RTD Lemon Drop - 16 oz. (1 pt / 473 ml)

VPX Bang Ready to Drink is a potent brain and body fuel that contains BCAA aminos and creatine/glutamine peptides. By the makers of the legendary Redline energy products. Make no mistake - Bang is not your stereotypical high sugar, life sucking soda masquerading as an energy drink! High sugar drinks spike blood sugar producing metabolic mayhem causing you to crash harder than a test dummy into a brick wall. Power up with Bang's potent brain & body-rocking fuel: Creatine, Caffeine & BCAAs (Branched chain amino acids). Life is an Xtreme Sport and Bang is the Xtreme energy source to Live Life Xtreme!

Contains Per Can:

- 0 Calories
- 0 g Total Carbs
- 0 Sugars
- 0 Calories
- 0 Artificial Colors

- 2.20 Via the Bol.com website, Bang Drinks are promoted by branding other energy drinks as "irresponsible". This allegation can also be found in multiple Bang Energy advertising statements that were copied by third parties (**Exhibit 9**). By branding other energy drinks as "irresponsible", it is incorrectly suggested that Bang Energy supposedly *is* responsible.



Merk: [VPX Sports](#)

Zie label [kj](#)

[> Alle productspecificaties](#)

## Productbeschrijving

BANG ENERGY DRINK RTD van VPX SPORTS geeft een boost op elk moment!

Geen toegevoegde suikers, heerlijke smaken en perfect voor elk moment!

**BANG ENERGY DRINK RTD VPX SPORTS EIGENSCHAPPEN:** Drink nooit meer een onverantwoorde Energizer; kies voor Bang Energy Drink RTD! Super compleet met o.a. Cafeïne, BCAA's, Vitamine B-12, Vitamine B-6 en Niacine.

**BANG ENERGY DRINK RTD VPX SPORTS KENMERKEN:** \* Verkrijgbaar in heerlijke smaken \* 1 pak bevat 12 blikken \* Geen toegevoegde suikers \* Slechts 6kcal per blik

## Productspecificaties

### Etiketinformatie

Ingrediënten : Supplement

Aantal artikelen in verpakking : 1 stuk(s)

### 3. THE DISPUTE

- 3.1 Before discussing this dispute in more detail, Monster emphasises that it is in favour of competition. Monster is a company with American roots and believes in the added value of competition. Competition keeps Monster on its toes. It forces Monster to continue developing and innovating, which is also seen and recognised by leading media outlets such as Forbes, given the eleventh position in the prestigious list of *The World's Most Innovative Companies*. At the end of the day, both the company and the consumer will benefit from a competitive market.
- 3.2 It is important that the players in the market adhere to the rules of fair competition and therefore also advertise in a fair manner and offer products that comply with Dutch and European food and commodities legislation. Indeed: consumers do not want to be deceived and consequently buy products they would not have bought had they been aware of the actual situation.<sup>10</sup> Competitors like Monster, in turn, suffer damage because consumers act on the basis of deceptive advertising and as a consequence buy the products of other vendors. The marketing tactics used by Bang Energy, which include luring consumers with self-conceived and unapproved supplements, defamatory statements about competitors' products and attributing qualities to Bang Drinks that are not reasonably true, are clear examples of advertising that is considered unacceptable.

#### Legal framework

- 3.3 The legal framework of this dispute is determined by the following statutory regulations.
- I. Unfair commercial practices vis-à-vis consumers (B2C). Articles 6:193a – j of the Dutch Civil Code
  - II. Misleading advertising vis-à-vis companies (B2B). Article 6:194 of the Dutch Civil Code
  - III. Impermissible comparative advertising. Article 6:194a of the Dutch Civil Code
  - IV. Impermissible health claims, impermissible medical claims and impermissible food information claims.
  - V. Unlawful ingredients

<sup>10</sup> Cf. Gielen et al, *Kort Begrip*, 13<sup>th</sup> edition, Wolters Kluwer, Deventer 2018, p. 677 et seq.



#### 4. UNFAIR COMMERCIAL PRACTICES VIS-À-VIS CONSUMERS

- 4.1 Although in the past there was discussion about the question whether a competitor could directly invoke the Unfair Commercial Practices Directive<sup>11</sup> (implemented in Section 3.3a of Book 6), there is now consensus in literature and case law that a competitor can indeed invoke the Directive, and therefore also Article 6:193a – j of the Dutch Civil Code.

See: Amsterdam District Court 28 March 2017, ECLI:NL:RBAMS:2017:2017 (*Dyson/Miele*), ground 43 and also see: Amsterdam Court of Appeal 31 October 2017, IEPT 20171031 (*Dyson/Miele*); Midden-Nederland District Court 13 April 2016, IEF 15872 (*Tel Sell/Tommy Teleshopping*), Gelderland District Court 19 July 2017, ECLI:NL:RBGEL:2017:4187 (*AG Industries/Airtrack Factory*), The Hague District Court 8 November 2017, ECLI:NL:RBDHA:2017:12687, cf. also ground 40 of ECJ 17 October 2013, C-391/12, ECLI:EU:C:2013:669 (*RLvS/Stuttgarter Wochenblatt*).

The literature also unanimously shows that competitors can invoke Article 6:193a - j of the Dutch Civil Code. See: Hoogenraad, "Reclamerecht, Van de brug af gezien, Kroniek over 2017", in: IER 2018/11: "The good news is that after years of discussion about the implementation of the Unfair Commercial Practices rules from the Unfair Commercial Practices Directive in Article 6:193a et seq. of the Dutch Civil Code now appear to have led to a clear conclusion." The question whether competitors can also invoke those articles can be answered affirmatively."

In addition, please see the review articles from Heerma van Voss with the clear title "There is no longer any reason to prevent competitors from invoking Articles 6:193a-j of the Dutch Civil Code", in: IER 2017/23. And furthermore Gielen, *Kort Begrip* 2018, p. 687 – 688.

- 4.2 To successfully invoke Article 6:193a – j of the Dutch Civil Code, VPX and/or Bang EU must be guilty of unfair commercial practices vis-à-vis consumers.
- 4.3 In this case, VPX and Bang EU are guilty of misleading commercial practices on the basis of Article 6:193c(1)(b) of the Dutch Civil Code, given that the information Bang Energy provides to consumers:

- I. is factually incorrect; and
- II. is misleading with regard to the principal features of the product.

#### **Misleading Claim 1: the prominent mention of L-ARGININE on the packaging of Bang Drinks**

- 4.4 Bang EU emphasises the ingredient L-ARGININE on its packaging, its website and on social media.


<sup>11</sup> Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council.




- 4.5 This creates the impression with the consumer that this ingredient is incorporated into the product and that the quantities of this ingredient have a positive effect on the body and brain of the consumer. The pictograms shown once again below and the description on the website emphasise this image.

## BANG<sup>®</sup> ENERGY DRINKS


BANG<sup>®</sup> Energy drinks are not your stereotypical high sugar, life-sucking soda masquerading as an energy drink! High sugar drinks spike blood sugar producing metabolic mayhem causing you to crash harder than a test dummy into a brick wall. Power up with BANG Energy Drink's potent brain & body-rocking fuel: L-Arginine, Natural Caffeine, & BCAAs (Branched Chain Amino Acids).\*



**L-Arginine**



**Natural Caffeine**



**BCAAs**

Description
Nutritional Information

**Description**

Make no Mistake – BANG<sup>®</sup> is not your stereotypical high sugar, life-sucking soda masquerading as an energy drink! High sugar drinks spike blood sugar producing metabolic mayhem causing you to crash harder than a test dummy into a brick wall. Power up with BANG's potent brain & body-rocking fuel: L- Arginine, Natural Caffeine, & BCAAs (Branched Chain Amino Acids).

- 4.6 For L-Arginine and BCAA Aminos, too, each health claim is unlawful, as no health claim with regard to these ingredients has been authorised within the EU.
- 4.7 The validated study conducted by the RSSL foodstuffs laboratory found that the quantity of Arginine was below 17,4 mg per litre (**Exhibit 10**). It is noted that the laboratory did not draw a distinction between the different types of Arginine, namely D-Arginine and L-Arginine. That is irrelevant to this case, because the test revealed that the quantity of Arginine (whether or not this is D-Arginine or L-Arginine) is maximum 17,4 mg/l. The amino acid L-Arginine is known to have positive effects on health. Normally, sufficient L-Arginine is produced in the human body. Supplements containing L-Arginine are sold to people who do not produce it

quantities, or to professional athletes to increase sports performance. A study published on the website of *Nature*, in the European Journal of Clinical Nutrition, shows that male athletes can benefit from L-Arginine as a supplement for their sports performance, but only if they ingest a dose of 2000 mg per day for a period of at least 45 days (**Exhibit 11**).<sup>12</sup> In other words, one would have to drink thousands of cans of Bang Drinks a day to get to this amount. All claims regarding L-Arginine, on the cans and on the website, are therefore misleading and unlawful.

**Misleading Claim 2: drinking Bang Drinks supposedly helps with Parkinson's Disease, Huntington's Disease and Alzheimer's**

- 4.8 The VPX YouTube Channel features a video in which Owoc, director of Bang EU and VPX, promotes the ingredient Super Creatine and Bang Drinks to a global audience. Owoc talks a great deal of nonsense in this video, which includes the statement that vegetarians would be able to improve their IQ by ingesting creatine. But the low-point is the assertion that drinking Bang Drinks help with all forms of dementia:

*"This is exciting news folks. This is big on the brain. It also helps with all forms of dementia, Alzheimer, Parkinson's, Huntington, and other forms of dementia. Hello! So make sure folks to take either your Bang Master Blaster (...) or drink your Bang Energy Drinks to get your Super Creatine. (...) That's why we call it potent brain and body fuel."*

- 4.9 This claim is evidently misleading and the claim is also punishable (pursuant to Article 326 of the Dutch Penal Code, see also marginal 2.9 above). Falsely claiming that a product is able to cure illnesses, dysfunction or malformation is moreover on the blacklist of Article 6:193g(q) of the Dutch Civil Code. Moreover, there are a health claim and a medical claim that have not been authorised by the European authorities.
- 4.10 The adverse consequence of such statements cannot be underestimated. It is precisely people afflicted with a serious and incurable disease that are susceptible to quackery. If they are led to believe that Super Creatine can have a beneficial effect on their disease, there is a risk that some of them will search for this product on the internet, and will buy and consume it. If only because of this unlawful statement, an injunction with rectification is in place.

**Misleading Claim 3: Bang Drinks is allegedly a potent brain and body fuel.**

- 4.11 Bang Energy claims that Bang Drinks are "*potent brain and body fuel*". The full quote is as follows: "*VPX Bang Ready to Drink is a potent brain and body fuel that contains BCAA aminos and creatine/glutamine peptides.*"
- 4.12 This translates into Dutch as *effectieve brandstof voor de hersenen en het lichaam*. This qualifies as a health claim and therefore the claim falls within the scope of the Claims

<sup>12</sup> N. Pahlavani, M.H. Entezari, M. Nasiri, A. Miri, M. Rezaie, M. Bagheri-Bidakhavidi and O Sadeghi, The effect of L-Arginine supplementation on body composition and performance in male athletes: a double-blinded randomized clinical trial, in: European Journal of Clinical Nutrition 71, 544 – 548 (2017), the extract can be read on the website of Nature: <https://www.nature.com/articles/ejcn2016266>



Regulation.<sup>13</sup> Bang Energy's claim is already unlawful because there is no authorised claim that creatine and/or BCAA Aminos are beneficial for the brain. In addition, the claim is misleading with regard to the main features of the product, since there is no evidence that Bang Drinks would be an effective fuel to the brain.

4.13 The following applies with regard to a potential beneficial effect of creatine on the body. Monster emphasises that it may be possible that the individual substances listed on the Bang Drinks ingredients list could under certain circumstances in themselves have a positive effect on the body. But whether or not there is a real effect (causal relationship) of course depends on the quantity of the substance that is incorporated in the product.

4.14 The following serves to render this concrete. Under the Claims Regulation, the following claim about creatine is authorised: *"Creatine increases physical performance in successive bursts of short-term, high intensity exercise"*, on the condition that the daily intake of creatine is 3 grams. This claim furthermore may only be made for *"foods targeting adults performing high intensity exercise"*<sup>14</sup>. Bang Energy does not meet any of these conditions:

- I. Two types of Bang Drinks are offered and sold in the Netherlands and the EU. The first of which mentions "Super Creatine" on the packaging, whereby, according to Bang Energy, this supplement is not the same as regular "creatine". The list of ingredients on the packaging does not mention what this of creatine this allegedly is. Neither of the two types of Bang Drinks contains the required quantity of creatine to attain the desired effect (i.e. 3 grams), insofar as Bang Drinks contains any creatine at all.
- II. Bang Energy's products are not aimed at the specific target group *"adults performing high-intensity exercise"*, but at a very wide audience of young adults.

4.15 The above leads to the existence of a misleading claim. The statement therefore qualifies as an unfair commercial practice within the meaning of Article 6:193c(1)(b) of the Dutch Civil Code. The claim is also in violation of Article 7(1)(a) - (b) of the Food Information Regulation and therefore unlawful on this basis as well.

#### **Misleading Claim 4: Bang EU shows misleading pictograms**

4.16 On the website [www.Bangenergy.eu](http://www.Bangenergy.eu) the following image is shown:

<sup>13</sup> On the basis of Article 2(2)(1) and (5) of the Claims Regulation.

<sup>14</sup> EU Register on nutrition and health claims:  
[http://ec.europa.eu/food/safety/labelling\\_nutrition/claims/register/public/?event=search](http://ec.europa.eu/food/safety/labelling_nutrition/claims/register/public/?event=search)



## BANG® ENERGY DRINKS

BANG® Energy drinks are not your stereotypical high sugar, life-sucking soda masquerading as an energy drink! High sugar drinks spike blood sugar producing metabolic mayhem causing you to crash harder than a test dummy into a brick wall. Power up with BANG Energy Drink's potent brain & body-rocking fuel: L-Arginine, Natural Caffeine, & BCAAs (Branched Chain Amino Acids)\*



L-Arginine



Natural Caffeine



BCAAs

Get Your Bang On!

4.17 For the sake of clarity, a close-up of the pictograms is shown below:

## BANG® ENERGY DRINKS

BANG® Energy drinks are not your stereotypical high sugar, life-sucking soda masquerading as an energy drink! High sugar drinks spike blood sugar producing metabolic mayhem causing you to crash harder than a test dummy into a brick wall. Power up with BANG Energy Drink's potent brain & body-rocking fuel: L-Arginine, Natural Caffeine, & BCAAs (Branched Chain Amino Acids)\*



L-Arginine



Natural Caffeine






BCAAs

4.18 The red round pictograms suggest the effect of the ingredients stated below it. What is more, drawings are expressly included under the definition of a health claim. Based on established case law, muscle mass building claims are also considered health claims.<sup>15</sup> This is reinforced by the - likewise misleading - phrase "brain and body rocking fuel" that is contained in the text above the image. The claims are incorrect and misleading:

<sup>15</sup> ECJ 6 September 2012, C-544/10 (*Deutsches Weintor eG v. Land Rheinland-Pfalz*).



 <b>L-Arginine</b>	<p>This pictogram suggests that L-Arginine allegedly promotes the building of muscle mass. This alleged effect is not scientifically proven. Moreover, in the EU there is no authorised claim about L-Arginine. Consequently, this claim is unlawful.</p>
 <b>Natural Caffeine</b>	<p>Caffeine does not have a beneficial effect on the brain as such (this is even apart from the on hold claim that caffeine has the ability to promote alertness). The health claim that caffeine supposedly has a beneficial or positive effect on the brain is unauthorised. This claim is also unlawful.</p>
 <b>BCAAs</b>	<p>Starting from the assumption that the dumbbell, like the muscle drawn above, relates to promoting the building of muscle mass, it suggests a relationship with BCAA. This health claim is not authorised in the EU either, and therefore cannot be made. This claim is unlawful.</p>

- 4.19 The pictograms are misleading and unlawful. An average consumer who visits the Bang EU website and looks at the pictograms will think that drinking Bang Drinks (a) promotes the building of muscle mass and (b) is beneficial to the brain. That is not substantiated, baseless and it means these claims are misleading within the meaning of Article 6:193c(1)(b) of the Dutch Civil Code. Moreover, the health claims are not authorised and are unlawful for that reason alone. Lastly, the claims are also in violation of Article 7(1)(a) - (b) of the Food Information Regulation and therefore unlawful on the basis of this third ground as well.

#### Misleading Claim 4: Bang Drinks are allegedly *performance enhancement beverages*

- 4.20 Bang EU asserts on its website that Bang Drinks are “*performance enhancement beverages*”.



ARTIFICIAL  
COLORS  
KUNSTMATIGE  
KLEURSTOFFEN

TOTAL CARBS  
PER CAN  
TOTAAL AANTAL  
KOOHYDRATEN  
PER BLIK

SUGARS  
PER CAN  
SUIKER  
PER BLIK



Qty: 1

€28.80

ADD TO CART

SKU: 0003 CATEGORIES: BANG, PERFORMANCE ENHANCEMENT  
BEVERAGES TAG: ENERGY



- 4.21 This claim is unsubstantiated and baseless. This claim, too, is misleading and qualifies as an unfair commercial practice within the meaning of Article 6:193c(1)(b) of the Dutch Civil Code. Furthermore, this too is a health claim that is not authorised and for this reason the claim is also unlawful. Lastly, this claim is in violation of Article 7(1)(a)-(b) of the Food Information Regulation and therefore unlawful on the basis of this third ground as well.

5. **MISLEADING ADVERTISING VIS-À-VIS BUSINESSES (ARTICLE 6:194 OF THE DUTCH CIVIL CODE)**

- 5.1 Given that Bang Energy does not distinguish in its advertising (on its website or via social media) between selling to traders or to consumers, what is stated above in Chapter 4 applies, *mutatis mutandis*, also in the direct relationship between Bang Energy and Monster. In this case it consistently concerns misleading on the basis of Article 6:194(1)(a) of the Dutch Civil Code. This is furthermore governed by the Directive on misleading advertising and comparative advertising.<sup>16</sup>

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<sup>16</sup> Directive 2006/114/EC of 12 December 2006 on misleading advertising and comparative advertising.

6. **IMPERMISSIBLE COMPARATIVE ADVERTISING (ARTICLE 6:194A OF THE DUTCH CIVIL CODE)**

6.1 In addition to the forms of misleading advertising described above, Bang Energy is also guilty of impermissible comparative advertising. Although Bang Energy usually does not mention any competitors by name in its advertisements, it still involves a comparison, since already the reference to a certain product type, in this case an energy drink, is sufficient to fall under comparative advertising within the meaning of the Directive on misleading advertising and comparative advertising.<sup>17</sup>

6.2 Monster in particular objects to the following two advertising statements of Bang Energy:

- I. ***“BANG® Energy drinks are not your stereotypical high sugar, life-sucking soda masquerading as an energy drink! High sugar drinks spike blood sugar producing metabolic mayhem causing you to crash harder than a test dummy into a brick wall.”***
- II. ***“Never again drink an irresponsible Energizer. Choose Bang Drink RTD.”***

6.3 Case law demonstrates that the advertising statement must be evaluated as a whole, in other words, the claim by Bang Energy itself and all relevant circumstances.

**Claim I: “BANG® Energy drinks are not your stereotypical high sugar, life-sucking soda masquerading as an energy drink! High sugar drinks spike blood sugar producing metabolic mayhem causing you to crash harder than a test dummy into a brick wall.”**

6.4 The first impermissible comparative advertising statement consists of the following five sub-claims, which are not complete, not objective, incorrect and, moreover, unnecessarily defamatory. On the basis of this, all five of these claims, taken separately and as a whole, are in breach of Article 6.194a of the Dutch Civil Code. Given that the claims are misleading in and of themselves, they also qualify as misleading commercial practices as defined by Article 6:194 of the Dutch Civil Code and the Unfair Commercial Practices Directive.

- I. other energy drinks supposedly have a high sugar content (*“other energy drinks contain high sugar”*);
- II. other energy drinks supposedly suck life from one’s body (*“BANG® Energy drinks are not your stereotypical high sugar, life-sucking soda masquerading as an energy drink”*);
- III. Bang Drinks supposedly do not contain sugar but do provide energy (i.e. unlike other energy drinks);

<sup>17</sup> Cf. ECJ 19 April 2007, C-381/05 (*Landtheer/CIVC & Veuve Clicquot*)

- IV. energy drinks with a high sugar content supposedly spike blood sugar, causing metabolic mayhem (*"High sugar drinks spike blood sugar which result in metabolic mayhem"*);
- V. the choice for the words *"to spike"* and *"mayhem"* moreover wrongly suggests that consuming other energy drinks, or at least those that contain sugar, pose a health risk.

**Sub-claim I: other energy drinks supposedly have a high sugar content (*"other energy drinks contain high sugar"*)**

This claim is misleading and incorrect. The claim compares the quantity of sugar in Bang Drinks to the quantity of sugar in non-light energy drinks. Bang Drinks are light or *zero sugar* products. All competing energy drink manufacturers offer light and zero sugar energy drink variants. See **Exhibit 12** for a list of sugar-free energy drinks. It is known that light/zero sugar energy drink variants (and soft drinks) attract their own audience and thus have an independent position in the market.

Accordingly, a light energy drink must be compared to a light energy drink and not a variant that contains sugar. Bang Energy should therefore have compared the Bang Drinks with energy drinks without sugar. By making a comparison with energy drinks that contain sugar, Bang Energy is acting in violation of the requirement that comparative advertising can only be permitted if one or more essential, relevant and representative features are compared. By comparing products that have essentially different features with each other, Bang Energy has misled the average consumer of energy drinks. This is also demonstrated by Article 9(1) of the Claims Regulation, which stipulates that a comparison is only permitted when this concerns foodstuffs from the same category, and a number of foodstuffs from that category are included in the comparison. Sub-claim I is in breach of Article 6:194a of the Dutch Civil Code.

**Sub-claim II: other energy drinks supposedly suck life from one's body (*BANG® Energy drinks are not your stereotypical high sugar, life-sucking soda masquerading as an energy drink*)**

- This claim is misleading because other energy drinks besides Bang Drinks do indeed have an effect on energy and do not suck life from one's body. Unless Bang Energy can support its claim with objective, scientific evidence, this claim is unlawful. In addition, the statement *"life-sucking soda masquerading as an energy drink"* is unlawful in and of itself because it is unnecessarily defamatory towards other energy drinks. The wording *"life-sucking"* wrongly creates the impression that other energy drinks pose a health hazard whereas Bang Drinks do not. This is incorrect and, as such, this misleading comparative claim violates Article 6:194a of the Dutch Civil Code. What's more, *"life-sucking"* is an incorrect, defamatory and exaggerated characterization that violates Article 6:194a(2)(e) of the Dutch Civil Code.

**Sub-claim III: Bang Energy Drinks do not contain any sugar but supposedly do provide energy**

This claim is misleading in multiple respects. In the first place, Bang Energy is wrongly creating the impression here that it is a healthy alternative compared with energy drinks containing sugar. In the second place, it is wrongly creating the impression that, unlike light drinks, Bang Drinks do provide energy. Both claims are incorrect and are not based on any research.

**Sub-claims IV and V: energy drinks with a high sugar content spike blood sugar, causing metabolic mayhem (*High sugar drinks spike blood sugar which result in metabolic mayhem*); the choice for the words “to spike” and “mayhem” moreover wrongly suggests that consuming other energy drinks, or at least those that contain sugar, pose a health hazard.**

- This claim is a misleading comparison. This statement is subjective, incorrect, incomplete and exaggerated. In the first place, the comparison is made only with drinks containing sugar. In the second place, the claim wrongly creates the impression that drinking Bang Drinks does not cause “*metabolic mayhem*”. In other words, drinking Bang Drinks supposedly has a much better effect on the metabolic system than drinking other energy drinks (with or without sugar).<sup>18</sup> This claim is unfounded. In the third place, the claim that consuming an energy drink causes serious health risks (“*metabolic mayhem*”) is incorrect and therefore misleading. Considering that the first sentence of Bang Energy’s claim refers solely to energy drinks and the second sentence seems to refer only to drinks with a high sugar content, it is unclear when the claim is read as a whole whether Bang Energy’s claim pertains only to drinks with a high sugar content or also to energy drinks as a category of drinks with a high sugar content. Whatever the case may be, drinking an energy drink will not immediately pose serious health risks.

**Claim 2: “Never again drink an irresponsible Energizer. Choose Bang Drink RTD.”**

- 6.5 This second claim is an extension of Bang Energy's other claims in which it wrongly claims that all types of energy drinks are irresponsible, whereas Bang Energy is a “responsible” energy drink. In doing so, Bang presents itself as a responsible, or healthy, alternative to all other energy drinks on the market, which according to Bang Energy, are supposedly all irresponsible and unhealthy.
- 6.6 This comparison is misleading, since:
  - I. energy drinks are not by definition irresponsible; and
  - II. Bang Drinks are not responsible energy drinks.
- 6.7 Based on these findings alone, the advertising is impermissible, pursuant to Article 6:194a(2)(a) of the Dutch Civil Code.
- 6.8 In addition, it is unclear what type of energy drinks are compared. As indicated above, a large proportion of the energy drinks (just like Bang Energy's energy drink) are sugar-free. It seems as if Bang Energy wants to compare sugary energy drinks with her own energy

<sup>18</sup> In our view, this is a dubious claim given that light drinks also have an effect on the metabolic system. See: [https://www.cell.com/current-biology/fulltext/S0960-9822\(17\)30876-X](https://www.cell.com/current-biology/fulltext/S0960-9822(17)30876-X)

drinks that do not contain sugar. This means Bang Energy is comparing apples and oranges, which is not permitted on the basis of Article 6:194a(2), (b) and (c) of the Dutch Civil Code.

- 6.9 In addition, it is unclear what exactly Bang Energy means by "responsible" and "irresponsible". By placing a mere statement without any nuance and thus disqualifying an entire product group with one sentence, this constitutes impermissible comparative advertising on the basis of Article 6:194a(2)(c) of the Dutch Civil Code.



## 7. IMPERMISSIBLE, UNAUTHORIZED HEALTH CLAIMS, MEDICAL CLAIMS

- 7.1 The misleading product and health claims of Bang Energy described above are not only forms of misleading advertising, they also fall under the scope of the Claims Regulation<sup>19</sup>, the European Medicinal Products Directive, the Dutch Medicines Act.
- 7.2 In addition, by using these product claims, the Bang Drinks are wrongly positioned as medicinal products, given the definition of Medicinal Product in Article 1(2) of the European Medicinal Products Directive, as implemented in Article 1(1)(a) and (c) of the Dutch Medicines Act, i.e. “*a substance or combination of substances presented in any way as suitable for the cure or prevention of disease, infirmity, wound or pain in humans*” or “*restoring, correcting or otherwise modifying physiological functions in humans by exerting a pharmacological, immunological or metabolic action*”. Pursuant to Article 84(1) of the Dutch Medicines Act, such product claims may only be used for products that are admitted as medicinal products to the various EU member states on the basis of European Medicinal Product legislation *and* the Dutch Medicines Act.
- 7.3 In order to prevent repetition, in what follows we will suffice with a list of health claims and/or medicinal product claims made by Bang Energy that are not authorised by European authorities or cannot be used for products that are not admitted as medicinal products:
- I. Bang Drinks are allegedly “*potent brain and body fuel*” and as such beneficial to the brain.
  - II. (Super) Creatine allegedly has a positive effect on the brain.
  - III. The assertions that drinking Bang could counter diseases such as Alzheimer’s, Parkinson’s and Huntington’s.
  - IV. The assertion that Bang Drinks are *power enhancing beverages*.
  - V. The assertions in the pictograms:
    - that L-Arginine and BCAA Aminos allegedly have a positive effect on building muscle mass; and
    - that caffeine is allegedly beneficial to the brain.
- 7.4 None of the claims stated above are authorised by the competent authorities. As such, these claims are contrary to the provisions of Article 10(1) of the Claims Regulation and Article 84(1) of the Dutch Medicines Act, and on this basis these claims are not only misleading but also unlawful. These claims are also unlawful because they are contrary to Article 7(a)-(b) of the Food Information Regulation. Lastly, the food information provided by YouTube that

<sup>19</sup> On the basis of Article 2(2)(1) and (5) of the Claims Regulation.

drinking Bang Drinks is said to counter dementia is in violation of Article 7(3) of the aforementioned regulation.

**Interim conclusion**

- 7.5 It is clear from Chapters 4 - 7 that Bang Energy is guilty of unfair commercial practices, misleading advertising and impermissible comparative advertising, whereby Bang acts in a clearly unlawful manner, also within the meaning of Article 6:162 of the Dutch Civil Code. The unlawful statements described in these chapters are also referred to below as **"Unlawful Statements"**.

## 8. BANG ENERGY IS ACTING IN BREACH OF THE FOOD INFORMATION REGULATION

- 8.1 Bang Energy is acting in breach of Article 9 in conjunction with Article 22(1) preamble and (b) of the Food Information Regulation.<sup>20</sup> Article 22(1)(b) of the Food Information Regulation stipulates:

*“The indication of the quantity of an ingredient or category of ingredients used in the manufacture or preparation of a food shall be required where the ingredient or category in question: (...)*

*b) is emphasised on the labelling in words, pictures or graphics*

- 8.2 The words “BCAA AMINOS”, “L-ARGININE” and “B VITAMINS” are written in big capital letters on an eye-catching coloured band on the top of the cans in which Bang Drinks are sold.



- 8.3 The consumer's attention is specifically drawn to the ingredients BCAA Aminos and L-Arginine; Bang Energy therefore bears the responsibility to specify their quantities on the packaging.
- 8.4 An obvious reason why Bang Energy has not complied with this obligation under EU law is that the quantity of L-Arginine incorporated into one can is below the detection rate and is therefore not sufficient to have any effect.
- 8.5 Bang Energy is committing an unlawful act vis-à-vis Monster by engaging in this commercial practice. When choosing an energy drink, consumers are partially guided by packaging. If the packaging of one energy drink prominently states certain appealing ingredients and the packaging of another energy drink does not, this will obviously influence the consumer's choice. It is not for nothing that specific ingredients or other product features are stated prominently on the packaging of foods and beverages. This is done to attract consumers.

<sup>20</sup> Article 22(1)(b) of the Food Information Regulation stipulates: “The indication of the quantity of an ingredient or category of ingredients used in the manufacture or preparation of a food shall be required where the ingredient or category in question

## 9. UNLAWFUL INGREDIENTS

### Super Creatine

- 9.1 One of the variants from the Bang Drinks product range promoted and offered in the Netherlands and Europe contains Super Creatine. This ingredient is prominently stated on the can.
- 9.2 Compared to creatine (monohydrate), Super Creatine (creatyl-L-leucine) is a new synthetic chemical compound that is created when a covalent bond is made between creatine and the amino acid L-leucine. This an intentionally modified structure because creatine and leucine do not naturally bind to one another.
- 9.3 On the basis of Article 3(2)(a)(i) of Regulation (EU) 2015/2283 on novel foods, Super Creatine qualifies as a novel food: *any food that was not used for human consumption to a significant degree within the Union before 15 May 1997, irrespective of the dates of accession of Member States to the Union, and that falls under at least one of the following categories:*
  - (i) *food with a new or intentionally modified molecular structure, where that structure was not used as, or in, a food within the Union before 15 May 1997*
- 9.4 A brief overview explaining the new chemical structure of Super Creatine is submitted as **Exhibit 13**.
- 9.5 Consequently, the admissions procedure should have been followed for Super Creatine in accordance with the Regulation. This was not done; Super Creatine was neither evaluated nor admitted. Therefore, it is unlawful to market products containing Super Creatine.
- 9.6 Besides this unlawfulness, there appears to be absolutely no analysis available demonstrating that Super Creatine is suitable and safe for human consumption. It is evident from the brief scientific literature that is available (Reddeman et al. published in the International Journal of Toxicology (2018), see **Exhibit 14**) that “*no formal toxicological, pharmacokinetic, or human studies*” have been published (see *Introduction*, page 171). VPX (Weston, Florida) financed the study performed by Reddeman et al. (see *Funding* section, page 186). Reddeman also concludes that Super Creatine qualifies as a novel ingredient (see *Introduction*, page 171).
- 9.7 As stated above, it is evident from Bang Energy’s website and Instagram and Facebook pages that Bang Drinks are available throughout the EU and promoted throughout the EU. Purchases have also demonstrated that various online resellers supply Bang Drinks containing the ingredient Super Creatine in the EU, in any case to customers in the Netherlands, England and Germany (see *Exhibit 6*).
- 9.8 A cross-border prohibition is justified, given the circumstances that products containing Super Creatine are actively offered for supply in various EU countries, and the prominent promotion of this ingredient by both Bang Energy and other online suppliers in Europe. This applies in particular as the products of Bang Energy enter the EU market directly via online sales. Moreover, the packaging does not indicate anywhere that sales of the product are



restricted to a certain region or certain country, which means that all varieties will and can be sold everywhere.

- 9.9 Bang Energy must cease offering, promoting, selling and supplying these products and Bang Energy must also request that all resellers do the same. After all, resellers can only offer, sell and supply Super Creatine products if Bang Energy makes it possible for them to do so. It is illustrative in this context that promotional messages by resellers are indiscriminately translated and posted on websites.

#### **B-vitamins, L-arginine and BCAAs**

- 9.10 Other Bang Drinks prominently state the presence of other ingredients, namely: “*B-vitamins*”, “*L-arginine* ” and “*BCAA Aminos*”. Bang Energy typically presents these ingredients as promoting increased muscle mass. Because there is no information anywhere on the packaging about the quantity of these ingredients, it is unclear whether these quantities are enough to have any effect.
- 9.11 Moreover, according to the labelling, these products contain an additive that has not been approved for use in beverages or at least not in energy drinks. This concerns L-Leucine (E641). For this reason as well, a prohibition against offering, selling, supplying and marketing these products on the European, or at least Dutch, market is justified.

**10. CLAIMS**

**Monster has an urgent interest in the award of its cross-border claims**

- 10.1 Under Article 6:195 of the Dutch Civil Code, the burden of proof of the lawfulness of promotional statements must be borne by the party bearing responsibility for those statements, in this case Bang Energy.
- 10.2 Monster has a right to and interest in a cross-border prohibition and cross-border rectification because the defendants' products are offered and supplied unlawfully on the EU market and wrongly presented as a better alternative.
- 10.3 The playing field is not fair as long as Bang Energy can continue to make unlawful statements, unlawful comparisons and defamatory statements and can continue to deceptively convince consumers to make purchases.
- 10.4 Marketing products containing novel foods without having followed the admissions procedure is also clearly unlawful in respect of manufacturers in the energy drinks segment. The same goes for marketing products that do not comply with labelling requirements or that contain ingredients that are not permitted. Consequently, the defendants must immediately cease making or otherwise issuing unlawful statements and selling products that do not comply with European and/or Dutch commodities legislation.
- 10.5 Monster considers the rectification claims necessary given the fact that Owoc and Bang Energy are emphatically convinced of the beneficial effects of Bang Drinks and given the way they approach the public with this misleading and dangerous message. The rectification claims must be posted on the social media on which the unlawful statements were also made.
- 10.6 The aforementioned infringements are continuing despite Monster's cease-and-desist demand.

**Penalties are appropriate**

- 10.7 Monster requests that this District Court attach penalties to the awarded claims.
- 10.8 Thus far, Bang Energy has refused to heed demands and its unlawful acts continue. Monster believes the chances are slim that Bang Energy will comply with a prohibition against its unlawful activities voluntarily. A penalty as an incentive for compliance is accordingly appropriate.
- 10.9 As regards Owoc and the web shops Predator Nutrition, The Protein and LuckyVitamin, Monster believes a lower penalty is appropriate, to be determined by this Preliminary Relief Court in the proper administration of justice.

## 11. SUBSTANTIATION

- 11.1 Monster is not familiar with the defendants' defences.

## 12. COMPETENCE OF DISTRICT COURT

- 12.1 The unlawful statements of all defendants are distributed via their websites, Instagram, Facebook and YouTube, which are accessible everywhere and also target the Netherlands. In the Netherlands, the Bang Drinks are supplied by the Dutch company Bang EU (the only EU-based company within the VPX group), Predator Nutrition, LuckyVitamin and The Protein.
- 12.2 Therefore, the Preliminary Relief Court in Amsterdam is competent to hear this dispute, as the infringement-causing fact is occurring throughout the entirety of the Netherlands, including in Amsterdam.
- 12.3 The Amsterdam District Court has the jurisdiction to impose a worldwide, or at least EU-wide, injunction against Bang EU, and, by virtue of Article 7 of the Dutch Code of Civil Procedure, (and insofar as relevant Article 8(1) of the Brussels II Regulation) it also has jurisdiction against the defendants based in the United States and the United Kingdom, since there is such a connection between the claims against the distinct defendants that reasons of effectiveness justify a joint hearing.
- 12.4 In addition, it is established case law of the Supreme Court and of the Amsterdam District Court that Dutch courts in principle have the authority to pronounce a prohibition with regard to unlawful acts committed outside of the Netherlands. This removes the need to conduct separate prohibition proceedings in each of the countries involved in the event of a cross-border unlawful act.

See Supreme Court of the Netherlands, 24 November 1989, ECLI:NL:PHR:1989:AD0964, with commentary by D.W.F. Verkade (*Interlas/Lincoln*), ground 4.2.4: *"Unless provided otherwise by law, the nature of the obligation or a juridical act, the party obliged to give, do or refrain from doing something vis-à-vis another party will be ordered to do so by the court at the suit of the party entitled. In general, there is no reason to assume that there is no room for such an order with respect to obligations [...] that must be performed outside of the Netherlands. A more limited interpretation such as the one defended in the ground for cassation finds no support in law and would in practice, in a time of increasing international contacts, lead to the undesirable result that in case of unlawful acts of an international character [...] an aggrieved Dutch party could be forced to turn to the respective courts of all the countries involved."*

See recently also Preliminary Relief Court of the Amsterdam District Court, 6 July 2018, C/13/648086 / KG ZA 18-476 FB/MV (unpublished), ground 4.4: *"As regards the claim to cease and desist its unlawful conduct around the world, it is worth considering that according to established case law Dutch courts are authorised to pronounce prohibitions even with regard to unlawful acts committed outside of the Netherlands."*

12.5 The District Court has the authority to impose a **global prohibition** against the Unlawful Statements.

### 13. **OFFER OF PROOF**

13.1 Insofar as the burden of proof should lie with Monster pursuant to Article 150 DCCP, Monster offers to prove all its statements by all legal means.

### **WHEREFORE:**

May it please the Preliminary Relief Court of the Amsterdam District Court, based on the grounds set out above, by judgment in preliminary relief proceedings, provisionally enforceable insofar as possible:

- (A) to order Bang EU, VPX, Owoc, The Predator and LuckyVitamin to cease and desist the use of Unlawful Statements within 24 hours after service of the judgment to be rendered in this case;
- (B) to prohibit all defendants from marketing and/or selling and/or supplying and/or promoting in the EU products prominently depicting "*L-arginine*" on their packaging within 24 hours after service of the judgment to be rendered in this case;
- (C) to prohibit all defendants from marketing and/or selling and/or supplying and/or promoting in the EU products containing "Super Creatine" and/or depicting "Super Creatine" on their packaging within 24 hours after service of the judgment to be rendered in this case;
- (D) to prohibit all defendants from marketing and/or selling and/or supplying and/or promoting in the EU products containing "Super Creatine" and/or depicting "Super Creatine" on their packaging within 24 hours after service of the judgment to be rendered in this case;
- (E) to order all defendants to provide the following information with regard to the trade and distribution of the products referred to under (B) – (C) (the "**Unlawful Products**") within 14 days after service of the judgment to be rendered in this matter:
  - I. the number of Unlawful Products purchased, produced (by a third party) and sold in the EU, broken down by year and product;
  - II. a list of all EU-based traders to whom the defendants sold and supplied Unlawful Products, including copies of all sales documentation;
  - III. the names and details of the traders who sold and supplied Unlawful Products to Predator Nutrition, LuckyVitamin and The Protein, including copies of all invoices between these traders and Predator Nutrition, LuckyVitamin and The Protein;
  - IV. the names and details of the manufacturers of the Unlawful Products as well as of the packaging of the Unlawful Products;



- V. the number of Unlawful Products meant for the EU market currently held in stock by each of the defendants; and
  - VI. an overview of the profits made with the sale of the Unlawful Products, broken down by month (including a profit calculation by an accountant).
- (F) to order all defendants to, at their own expense, have a Dutch bailiff destroy the Unlawful Products kept in stock and draw up a report of this destruction, to be sent directly to Monster's lawyers, within 14 days after service of the judgment to be rendered in this matter;
- (G) to order Bang EU, within 8 hours of service of this judgment, to post a link to this judgment on its website linked to the domain name <bangenergy.eu>, in a frame with clear borders, at the top of the home pages of both the Dutch and English versions of said website, spanning at least one quarter of the screen height, written in at least a 16-point black Arial font, including the following statements in the Dutch and English language, placed against a white background, and to keep this posted for at least 90 days:

**"NOTIFICATION OF JUDGMENT ON MISLEADING ADVERTISING**

*Dear customers,*

*The District Court ruled in a judgment of [date] that Bang has misled its customers on Bang Drinks. Therefore, the District Court ordered Bang to inform its customers about its misconduct and to rectify the misleading statements.*

*Bang misleadingly created the impression that Bang Drinks are supposedly better than other energy drinks and good for human health. This is not true.*

*We apologise for misleading our customers.*

*Bang B.V."*

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**"Notification of Court Judgement misleading advertising**

*Dear Customers,*

*The competent District Court of the Netherlands ruled in its judgment of [date] that Bang has misled customers about Bang Drinks. For this reason, the court ordered Bang to inform customers about their misconduct and to rectify the misleading messages.*

*Bang has wrongly created the impression that Bang Drinks are better than other energy drinks and beneficial to your health. This is not true.*

*We offer our sincere apologies for having misled our customers."*

- (H) to order VPX, within 8 hours of service of this judgment, to post a link to this judgment on its website, in a frame with clear borders, at the top of the home pages of both the Dutch and English versions of said website, spanning at least one quarter of the screen height, written in at least a 16-point black Arial font, including the following statements in the Dutch and English language, placed against a white background, and to keep this posted for at least 90 days:

*"Dear customers,*

*The competent District Court of the Netherlands ruled in its judgment of [date] that Bang has misled customers about Bang Drinks. For this reason, the court ordered Bang to inform customers about their misconduct and to rectify the misleading messages.*

*Bang has wrongly created the impression that Bang Drinks are better than other energy drinks and beneficial to your health. This is not true.*

*We offer our sincere apologies for having misled our customers."*

- (I) to order Bang EU and VPX to post on their social media accounts (Instagram and Facebook) within 8 hours of service of this judgment a rectification notice with only the following text, in the usual font and size, in black letters and against a white background, and to maintain this for 14 consecutive days as the most recent post:

*"Dear customers,*

*The competent District Court of the Netherlands ruled in its judgment of [date] that Bang has misled customers about Bang Drinks. For this reason, the court ordered Bang to inform customers about their misconduct and to rectify the misleading messages.*

*Bang has wrongly created the impression that Bang Drinks are better than other energy drinks and beneficial to your health. This is not true.*

*We offer our sincere apologies for having misled our customers."*

- (J) to order Owoc to read out a rectification in a video posted on the YouTube channel of VPX and kept there for at least 90 days, in which Owoc reads out before a camera in a steady tone the following text, and nothing but the following text:

*"Dear customers,*

*The competent District Court of The Netherlands ruled in its judgment of [date] that I have misled customers about Bang Drinks. For this reason, the court ordered me to inform you about my misconduct and to rectify my misleading messages.*

*I have wrongly created the impression that Bang Drinks can cure mental retardation and diseases as Parkinson's, Huntington and Alzheimer. This is not true.*

*To make it very clear, for once and for all. I confirm that Bang Drinks do not cure mental retardation. Bang Drinks do also not cure diseases as Parkinson's, Huntington and Alzheimer.*

*I offer my sincere apologies for having misled you."*

- (K) to order Bang EU and VPX to, within 8 hours of service of the judgment, inform all others sellers of Bang Drinks targeting the EU market in writing of the unlawfulness of presenting Unlawful Statements and to request that these sellers immediately remove any Unlawful Statements from their websites, social media and any and all other channels of communication directed at customers;
- (L) to order Bang EU and VPX to, within 8 hours of service of the judgment, notify all other sellers of Bang Drinks targeting the EU market in writing that the sale of products featuring one or more of the Unlawful Statements or containing Super Creatine or L-Leucine as an ingredient, or the statement of Super Creatine on the packaging is unlawful, and to request that these sellers immediately cease the sale thereof and return any inventory of Bang Drinks at no charge, while keeping Monster's lawyers informed in writing of the traders who return their products and of the number and type of products being returned;
- (M) to order Bang EU and VPX to provide Monster's lawyers with copies of all the written communication referred to under K – L within 24 hours of its dispatch or receipt;
- (N) to order Bang EU and VPX, jointly and severally, to pay Monster a penalty of EUR 10,000 for each time Bang EU and/or VPX acts in violation of one of the obligations under A through L and a penalty of EUR 5,000 for each day that the violation continues;
- (O) to order Predator Nutrition, LuckyVitamin and The Protein to pay Monster a penalty of EUR 1,500 for each time that they act in violation of their obligations under A through F and a penalty of EUR 500 for each day that the violation continues; or, alternatively, a penalty to be determined by the Preliminary Relief Court in the proper administration of justice;
- (P) to order Owoc to pay Monster a penalty of EUR 5,000 for each time that it acts in violation of one of the obligations under A and J and a penalty of EUR 500 for each day that the violation continues; or, alternatively, a penalty to be determined by the Preliminary Relief Court in the proper administration of justice;
- (Q) to order the defendants, jointly and severally, to pay the costs of these preliminary relief proceedings plus the statutory interest referred to in Article 6:119 of the Dutch Civil Code as from fourteen days after the date of the judgment.

The costs incurred by me, bailiff, are: EUR ,

Bailiff

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This case with file number 007038-00031 is handled by attorneys B.J. Berghuis van Woortman, M. Hiemstra and P.L. Tjiam of Simmons & Simmons LLP, Claude Debussylaan 247, 1082 MC Amsterdam, 020 – 722 2302 (B.J. Berghuis van Woortman), fax: 020 – 722 2599, e-mail: [bas.berghuis@simmons-simmons.com](mailto:bas.berghuis@simmons-simmons.com).



In the name of the King

judgment



## **AMSTERDAM DISTRICT COURT**

Private law division, preliminary relief court, civil-law section

case number / cause-list number: C/13/662800 / KG ZA 19-215 AB/MV

### **Judgment in preliminary relief proceedings of 09 May 2019**

in the matter of:

the company incorporated under Irish law

**MONSTER ENERGY LIMITED,**

with its official seat in Dublin, Ireland,

claimant by identical writs of summons dated 29 March 2019,

counsel: B.J. Berghuis van Woortman and P.L. Tjiam, practising in Amsterdam,

versus

1. the company incorporated under foreign law

**VITAL PHARMACEUTICALS, INC., trading as VPX Sports,** with its official seat in Weston, Florida (United States),

2. the private limited-liability company

**BANG ENERGY B.V.,**

with its corporate seat in Sittard,

3. **JOHN HENRY OWOC,**

residing in Davie, Florida (United States),

counsel for defendants 1 to 3 G.S.P. Vos, practising in Amsterdam,

4. the company incorporated under foreign law

**LUCKYVITAMIN LLC,**

with its official seat in Conshohocken, Pennsylvania (United States),

counsel R. Chalmers Hoyneck van Papendrecht, practising in Breda,

5. the company incorporated under foreign law

**PREDATOR NUTRITION ONLINE LIMITED,**

with its official seat in Wakefield, West Yorkshire (United Kingdom),

not having appeared, defendants.

The parties will hereinafter be referred to as Monster, VPX, Bang B.V., Owoc, LuckyVitamin and Predator. VPX and Bang B.V. will also be referred to collectively (in the singular) as Bang.

## **1. The proceedings**

At the hearing of 18 April 2019, Monster has argued and claimed in accordance with the writ of summons, a copy of which is attached to this judgment. It has decreased its claim at the hearing, as set out below under 3.1. The defendants who appeared waged a defence, concluding that the relief sought must be denied. The requirements for service on the defendant who did not appear (Predator) have been satisfied, so that service it can be declared to be in default.

Prior to the hearing, the claim against The Protein Pick and Mix Ltd., (with its official seat in the United Kingdom) was withdrawn.

All parties have entered exhibits and written pleadings into the proceedings.

Insofar as relevant, the following persons were present at the hearing:

on the part of Monster: P. Crook and C. Ryckman with attorneys Berghuis van Woortman and Tjiam;

on the part of VPX, Bang B.V. and Owoc: M. Kesten with attorney Vos and his colleague D.V. Bondarchuk;

on the part of Lucky Vitamin: attorney Chalmers Hoynck van Papendrecht and his colleague P.C.E. Beerman.

Also present were R. Gras and C.J. Lewis, interpreters in the English language. After further debate in court, the parties have requested that judgment be rendered.

## **2. The facts**

2.1. Monster is the Irish subsidiary of Monster Beverage Corporation, a US company incorporated in 1990 that specialises in the production and sale of energy drinks marketed under the brand name ‘Monster Energy’.

2.2. VPX is a US company that likewise focuses on the production and sales of energy drinks. Its products are marketed under the brand name ‘Bang’ (since April 2018 on the European market as well). VPX is the owner of the website [www.bang-energy.com](http://www.bang-energy.com). Bang B.V. is the VPX subsidiary based in the Netherlands. Bang B.V. is the owner of the website [www.bangenergy.eu](http://www.bangenergy.eu). Owoc is a director of VPX and Bang B.V.

2.3. Owoc promotes Bang’s energy drinks via social media (Twitter, YouTube, Instagram). As Exhibits 2 and 3, Monster introduced (the transcript of) a video that can be viewed on the VPX YouTube Channel. In this video, Owoc recommends the Bang energy drink containing the ingredient Super Creatine, whereby the word Super Creatine is prominently displayed on the can. As Exhibit 4, Monster introduced a selection of advertisements posted on various social media accounts of VPX, Bang B.V. and Owoc for the energy drink of Bang containing Super Creatine.

2.4. As Exhibit 8, Monster entered into the proceedings screenshots of, among other things, the website of Bang B.V. ([www.bangenergy.eu](http://www.bangenergy.eu)) advertising Bang’s energy drink with the ingredient L-Arginine. As Exhibit 9, Monster submitted

screenshots of the website [www.bol.com](http://www.bol.com), also advertising Bang's products.

2.5. LuckyVitamin is an online store based in the US ([www.luckyvitamin.com](http://www.luckyvitamin.com)) that specialises in food supplements. Bang's products can be ordered online via LuckyVitamin. In this context, Monster submitted as Exhibit 5C a number of screenshots of the LuckyVitamin website. Mr Vos entered a demand letter from VPX to LuckyVitamin dated 12 April 2019 into the proceedings as Exhibit 10. In short, it states that certain products of Bang are destined only for the US and that LuckyVitamin is not allowed to distribute these products in the EU in violation of EU regulations. As Exhibit 1, LuckyVitamin submitted screenshots of its website of 10 April 2019, where the following is indicated at the Bang product: *"We are sorry: This product is restricted from shipping to Netherlands"*. The same statement is published on the website in the different EU languages and for the benefit of the different countries in the EU.

2.6. Section 2.14 of the summons indicates that Bang, after dispatch of the draft summons (early March 2019), ceased all promotion of energy drinks containing Super Creatine on its social media accounts of Bang B.V. According to the summons, dozens of Instagram and Facebook posts advertising Super Creatine have been removed by Bang B.V.. The correspondence in question has not been entered into the proceedings.

2.7. Under 3.4 of the written pleadings of Monster's counsel, it is said that Monster demanded on 19 February 2019 that Bang cease the promotion of Super Creatine and Bang afterwards removed the posts on Super Creatine from its European Instagram account. The letter in question has not been entered into the proceedings.

### **3. The dispute**

3.1. Monster decreased its claim at the hearing (see under 8.1 of its counsel's written pleadings) in the sense that it does not claim the order sought under A globally but for the EU.

After decreasing its claim, Monster – in short – claims the following:

A. that Bang B.V., VPX, Owoc, Predator and LuckyVitamin be ordered to cease and desist the unlawful statements as described in the summons (see also under 3.2 below) in the EU;

B. that all defendants be prohibited from trading products in the EU prominently displaying 'L-Arginine' on their packaging;

C. that all defendants be prohibited from, in the EU, trading products containing 'Super Creatine' and/or prominently depicting 'Super Creatine' on their packaging;

D. that all defendants be prohibited from, in the EU, trading products containing 'L-Leucine' and/or prominently depicting 'L-Leucine' on their packaging;

E. that all defendants be prohibited from providing Monster with information about the trade and distribution of the products referred to under B. through D., such as the number of products, an overview of the traders to whom the products have been

sold, the names of the traders who sold the products to Predator and LuckyVitamin, the names of producers, an overview of the stock, and an overview of the profit generated with these products;

F. that all defendants be prohibited from having their own stock of the products referred to under B. through D. destroyed by a Dutch court bailiff;

G. that Bang B.V. be ordered to post a message on its website [www.bangenergy.eu](http://www.bangenergy.eu) in Dutch and in English with the purport that Bang has misled its customers about the Bang energy drinks;

H. that VPX be ordered to post the aforementioned message on its website [www.bang-energy.com](http://www.bang-energy.com) in English;

I. that Bang B.V. and VPX be ordered to post the aforementioned message on its social media accounts (Instagram and Facebook) in English;

J. that Owoc be ordered to post a message as aforementioned in a video to be published on the VPX YouTube channel;

K. that Bang B.V. and VPX be ordered to inform all other sellers of Bang energy drinks focused on the EU in writing about the unlawfulness of the statements as referred to in the summons and to request those sellers to remove those statements from websites and social media;

L. that Bang B.V. and VPX be ordered to inform all other sellers of Bang energy drinks focused on the EU in writing about the unlawfulness of the sales of products featuring statements as referred to in the summons and to request those sellers to cease the sales of products containing the ingredient Super Creatine or listing Super Creatine on their packaging or containing the ingredient L-Leucine and to return the stock of those products;

M. that Bang B.V. and VPX be ordered to submit all written communications as referred to under K. and L. to Monster's counsel;

N. that Bang B.V. and VPX be ordered jointly and severally to pay a penalty for each violation of the claims under A. through L., as well as a penalty for each day that the violation continues;

O. that Predator and LuckyVitamin be ordered to pay a penalty for each violation of the claims under A. through L., as well as a penalty for each day that the violation continues;

P. that Owoc be ordered to pay a penalty for each violation of the claims under A. and J., as well as a penalty for each day that the



violation continues;

Q. that the defendants be ordered jointly and severally to pay the costs of these proceedings, plus the statutory interest.

3.2. To this end, Monster argues – in summary – that numerous (advertising) statements of Bang are unlawful. It is guilty of unfair commercial practices (Article 6:193a through j of the Dutch Civil Code), misleading advertising (Article 6:194 of the Dutch Civil Code) and impermissible comparative advertising (Article 6:194a of the Dutch Civil Code). Moreover, Bang avails itself of impermissible health claims, impermissible medical claims, and impermissible food information claims. Lastly, Bang also uses unlawful ingredients.

3.3. By way of explanation, Monster argues that, on the basis of the unlawful statements included below, there are unfair commercial practices and misleading advertising:

(1) The ingredient L-Arginine is prominently mentioned on the packaging of Bang B.V.'s products. This creates the impression with the consumer that this ingredient is incorporated into the product and that this has a positive effect on the body and brain of the consumer. This is reinforced by the use of three pictograms (including the image of a muscular arm) on the Bang B.V. website. Scientific research has shown that the quantity of L-Arginine in Bang's product has been set at 17.4 mg per litre, whereas at least a dose of 2000 mg per day (i.e. more than 200 cans) must be taken for a period of 45 days before any benefit can be derived from this supplement.

(2) On the VPX YouTube channel, Owoc proclaims to the whole world that the Super Creatine ingredient is good for the brain and helps against all forms of dementia, against Alzheimer's and against Parkinson's disease and Huntington' disease. This claim is punishable under Article 326 of the Dutch Penal Code and is included in the blacklist of Article 6:193g(q) of the Dutch Civil Code. It is precisely people afflicted with a serious and incurable disease that are susceptible to quackery.

(3) Bang claims that its energy drink is an effective fuel for the brain and the body ("*potent brain and body fuel*"). No indication is given as to which substance supposedly generates this positive effect, let alone as to how much of the ingredient has been included. This qualifies as an unfair commercial practice within the meaning of Article 6:193c(1)(b) of the Dutch Civil Code.

(4) The three pictograms referred to above as shown on [www.bangenergy.eu](http://www.bangenergy.eu) are in themselves misleading as well. The muscular arm and dumbbell pictograms suggest that L-Arginine promotes muscle mass, even though this effect has not been scientifically proven. The pictogram depicting the human brain wrongly suggests that caffeine has a beneficial effect on the brain. This too qualifies as an unfair commercial practice within the meaning of Article 6:193c(1)(b) of the Dutch Civil Code.

(5) Bang B.V. asserts on its website that its energy drinks are "*performance enhancement beverages*". This claim has not been substantiated either and qualifies as an unfair commercial practice within the meaning of Article 6:193c(1)(b) of the Dutch Civil Code.

3.4. In addition, according to Monster, Bang is guilty of impermissible comparative advertising. Monster in particular objects to the following two advertising statements of Bang.

(1) *BANG Energy drinks are not your stereotypical high sugar, life sucking soda masquerading as an energy drink! High sugar drinks spike blood sugar producing metabolic mayhem causing you to crash harder than a test dummy into a brick-wall.*

(2) *Never again drink an irresponsible Energizer. Choose Bang Drink RTD.* The first claim, which consists of five subclaims, wrongly suggests that other energy drinks are high in sugar and suck power from your body. It is also suggested that Bang energy drinks, unlike other drinks, do not contain sugar but do provide energy and that other energy drinks cause a blood sugar spike, resulting in serious disruption of the metabolism. Lastly, the choice for the words “to spike” and “mayhem” wrongly suggests that consuming other energy drinks poses a health risk.

The second claim is also misleading because Bang hereby presents itself as a responsible (healthy) energy drink, whereas all other energy drinks are supposedly irresponsible.

3.5. Monster further argues that the above claims (potent brain and body fuel, that Super Creatine has a positive effect on the brain, that Bang energy drinks counter diseases like Alzheimer’s, Parkinson’s and Huntington’s and are power enhancing beverages, and the claims in the pictograms that L-Arginine is good for muscle building and that caffeine is beneficial for the brain) have not been authorised by the competent authorities and are thereby in violation of the Claims Regulation. Consequently, Bang is also acting in violation of the European Medicinal Products Directive and the Dutch Medicines Act. That Bang does not indicate the quantity of L-Arginine on the packaging is contrary to the Food Information Regulation. Because all these violations give Bang an undue advantage over its competitors, it is acting against those competitors in violation of unwritten standards of care.

3.6. Lastly, Monster argues that Bang uses unlawful ingredients, to wit Super Creatine (or creatyl-Leucine). This is a novel food within the meaning of EU Regulation 2015/2283. The admissions procedure according to this regulation has not been completed. It is therefore not certain whether Super Creatine is suitable and safe for human consumption. The same holds for L-Leucine.

3.7. Monster’s claims against LuckVitamin and Predator are based on the fact that they are the world’s largest online stores in the field of food supplements. They focus on the European market and are the two main distribution channels for Bang’s energy drinks in the EU. Although they stopped selling the Bang energy drinks after a demand by Monster, they continue to advertise those products unlawfully and refuse to sign a cease and desist declaration. Monster therefore still has an urgent interest in the allowance of the claims against these two defendants.

3.8. In summary, VPX, Bang B.V. and Owoc wage the defence that multiple proceedings are pending between Monster and VPX in the US. In the US, Bang has

become very successful in a short period of time and Monster is pulling out all the stops to combat this competition. Significant in this context is that Monster uses the slogan *Total Body Fuel* in the US, while in these preliminary relief proceedings it is attacking a similar slogan of Bang, and also that, in terms of the appearance of its packaging, Monster ties in with packaging of Bang (see the photograph under point 10 in Vos's written pleadings).

3.9. Bang further argues that its US and European market are strictly separate and that no products containing Super Creatine are offered in the EU. After all, Bang knows that this ingredient cannot be added to energy drinks in Europe. Monster has not made it plausible at all that Bang offers products containing Super Creatine in the EU. VPX does not offer energy drinks in the EU in any case. Bang B.V. does this and VPX is only a shareholder of Bang B.V. That the VPX logo is depicted on the cans of Bang B.V. does not mean that VPX is active in the EU. The VPX website ([www.bang-energy.com](http://www.bang-energy.com)) is aimed solely at the US. Customers from the EU are referred to [www.bangenergy.eu](http://www.bangenergy.eu). The fact that the VPX website is also accessible from the EU does not mean that it is aimed at the EU. The videos on YouTube in which Owoc appears are also aimed solely at the US market. Incidentally, Monster has not advanced a single reason or legal basis for why Owoc as a director can be held liable in person. In addition, VPX demanded that Lucky Vitamin, Predator and Bol.com cease the sales of products containing Super Creatine in the EU (see Exhibits 10 and 15 of Mr Vos). It should be noted that LuckyVitamin only sent about ten cans containing Super Creatine to the EU in total, presumably to Monster's law firm. The conclusion so far is that the claims against VPX and Owoc should in any case be rejected because they did not make any of the challenged statements in the EU.

3.10. The objections that Monster raised against Bang B.V.'s statements in the EU must be rejected as well. The indication of L-Arginine on the packaging is not a claim within the meaning of the Claims Regulation. The mere statement of an ingredient on a packaging does not suggest a beneficial effect. Monster further claims that the quantity of L-Arginine is not indicated on the packaging and invokes the Food Information Regulation in that context. This invocation does not hold because the enforcement of this regulation is the responsibility of the Nether Food and Consumer Product Safety Authority (NVWA). It should be noted that Bang B.V. is currently in discussion with the NVWA and has been informed by the NVWA for the time being that the packaging is in accordance with the applicable rules.

That, according to Monster, the above should be considered in conjunction with the three pictograms on the website of Bang B.V. is not correct. After all, the point is the statement itself; not the combination. When purchasing a product, the consumer does not look at the website at the same time. The pictograms on the website of Bang B.V. do not qualify as health claims in any case. It is a fact that L-Arginine has a positive effect on muscle building. The pictograms therefore refer to the sports in which the Bang energy drinks can be used, to wit strength training and body building, and to the known effect of caffeine on the brain. Incidentally, Monster and all other producers of energy drinks use similar pictograms and claims and the NVWA has never taken any action against them. The slogan *potent brain and body fuel* is also not a claim that falls within the scope of the Claims Regulation. Here, too, many producers, including Monster itself, use similar slogans. The same applies to the (internal) designation *performance enhancement beverages*.

3.11. Bang B.V. further argues that in this case there is no impermissible comparative advertising either. The statements that Monster refers to in this context draw a comparison with energy drinks containing sugar (and Bang is allowed to draw such a comparison). In addition, the statements contain exaggerations that are common in advertising (especially in energy drinks) and that no one takes literally. The statement is not derogatory either. The European website of Bang B.V. does not claim that other energy drinks are *irresponsible*. Bang B.V. is not responsible for the fact that this statement can or could be found on the Bol.com website. According to Bang B.V., the Bang products do not contain any unlawful ingredients either.

3.12. In summary, LuckyVitamin has argued that, since 2005, it has been serving its customers in the US via the website [www.luckyvitamin.com](http://www.luckyvitamin.com). Since 2015, LuckyVitamin also takes orders from outside the US. With the help of a Google Translate tool, it easily converted its existing website into the languages of other countries. However, LuckyVitamin's involvement in the international process is minimal. Third parties (such as DHL) distribute the products abroad and the costs of transport and any import duties are, in case of delivery outside the US, borne by the customer. This is apparent from the provisions of the International Shipping Policy applied by LuckyVitamin (see Exhibit 2 of LuckyVitamin). The Netherlands is not an important market for LuckyVitamin. There is no such thing as a sales market for Bang products either. Eight cans with a total price of €70.32 were delivered, only as part of a test purchase by Monster's law firm. As there is no question of a Dutch market, there is no evidence of unlawful acts by LuckyVitamin in the Netherlands. LuckyVitamin therefore wonders what it has to do with these preliminary relief proceedings. Moreover, LuckyVitamin has long since rendered the sale of Bang products to the EU via its website impossible, as evidenced by its Exhibit 1. LuckyVitamin has refused to sign the cease and desist declaration drafted by Monster



, because it pertained to the whole world, so including the US. It is also argued that over half of the 12 unlawful statements referred to in the summons were never made by LuckyVitamin. Only the product description drawn up by Bang could be found on the LuckyVitamin website. Lastly, all circumstances of the case must be taken into account when determining whether there has been misleading information. In this case, it is important that a Dutch consumer who ordered a can of Bang via the LuckyVitamin website had to pay no less than €8.80 and wait three weeks for this purchase (by way of comparison: a can of Monster costs €1.23 at the Jumbo supermarket and a can of Red Bull €1.34). The economic behaviour of consumers has therefore not been affected at all by the announcements posted on the LuckyVitamin website.

3.13. The arguments of the parties will be discussed hereinafter insofar as relevant.

#### **4. The assessment**

##### *the jurisdiction according to Monster*

4.1. According to Monster, the Preliminary Relief Judge of this District Court has jurisdiction to hear the claims against all defendants, because the unlawful statements were disseminated by all defendants via their websites, Instagram, Facebook and/or YouTube. Those statements are accessible everywhere in the world and also target the Netherlands. The harmful event (see Article 6(e) of the Dutch Code of Civil Procedure) is occurring throughout all of the Netherlands, including in Amsterdam, according to Monster. Monster has also stated that the Preliminary Relief Judge has jurisdiction to impose an EU-wide prohibition against Bang B.V. and he also has jurisdiction on the basis of Article 7 of the Dutch Code of Civil Procedure (and on the basis of Article 8(1) Brussels II Regulations) against the defendants based in the US and UK, given that there is such a connection between the claims against the various defendants that reasons of efficiency justify a joint hearing.

##### *jurisdiction vis-à-vis VPX, Bang B.V. and Owoc*

4.2. In principle, statements on the Internet have a global reach. That is insufficient in and of itself to be able to presume the jurisdiction of the Dutch court. This requires that the statements on the Internet target (consumers in) the Netherlands, for example by the language in which they are phrased. This is the case for Bang B.V., a company also based in the Netherlands (Sittard), that advertises on its European website (among other places) [www.bangenergy.eu](http://www.bangenergy.eu). Dutch consumers can order products (in the Dutch language) from that website and pay in euros. This does not apply to VPX and Owoc. Given their reasoned dispute that they target the European market, it cannot be assumed in these preliminary relief proceedings that VPX and Owoc have engaged in (allegedly) unlawful acts. The website of VPX is in the English language and targets the US. That website contains the following message, for example:

*Shop at bang-energy.com for fast and secure shipping throughout the United States.*  
That website also states:

*For our EU customers, you can now buy Bang Energy Drinks at [bangenergy.eu](http://bangenergy.eu).* The fact that VPX is a shareholder of Bang B.V. is insufficient in and of itself to assume the involvement in product marketing by Bang B.V. in the EU. The same goes for the fact that the VPX logo can be found on Bang's European website and on the products and packaging thereof that are marketed in the EU. After all, the cans clearly state that the product originates from Bang B.V. in the Netherlands. The videos in which Owoc appears (in English) and that can be found on VPX's YouTube channel can also be seen in the Netherlands, but do not specifically target the Netherlands. The Preliminary Relief Judge therefore does not have jurisdiction to hear the claims filed against VPX and Owoc on the basis of Article 6(e) of the Dutch Code of Civil Procedure.

4.3. Monster's reliance on Article 7 of the Dutch Code of Civil Procedure does not work in its favour either. Only if such a connection exists between the different defendants that justify joint handling for reasons of efficiency, the Preliminary Relief Judge would also have jurisdiction vis-à-vis VPX and Owoc. There is no such connection in this case. VPX and Owoc have adequately demonstrated that the European and American market of Bang are strictly separate. Different products, or at least products with different ingredients, are traded and so the associated advertising statements are different. For example, Bang does not sell products with Super Creatine in the EU (anymore) because it knows this is not permitted in the EU. Some of the contested advertising statements pertain only to the products with Super Creatine and those statements are not made in the EU (anymore). The fact that products with Super Creatine are promoted on Bang's international Facebook page showing photos from London and Barcelona is insufficient to be able to assume (still) that that promotion targets the EU (see 3.4 of the pleading notes of Monster's counsel).

4.4. Perhaps unnecessarily, it is considered that it follows from 2.14 of the summons and 3.4 of the pleading notes of Monster's counsel (see 2.6 and 2.7 of this judgment) that Bang changed its actions in response to Monster's summons and to delivery of the draft summons in these preliminary relief proceedings. Accordingly, this happened *before* the summons was issued. Moreover, this indicates that Bang is aware that the promotion and marketing of products containing Super Creatine is not permitted in the EU. If a "prohibited" statement should nevertheless be found on a website or social media account targeting the EU and/or Netherlands, then this is not a wrongful act that

creates jurisdiction for the Preliminary Relief Judge in these preliminary relief proceedings. Why Owoc should be personally liable is also incomprehensible. Nothing has been argued about director's liability and the mere fact that he appears in advertising videos of VPX does not make him personally liable either.

*jurisdiction vis-à-vis LuckyVitamin*

4.5. Here, too, LuckyVitamin does not target the Netherlands with the Bang products (via its website). It is true that it was possible for some time to order Bang energy drinks from countries in the EU (and thus from the Netherlands, as well), but given the high costs this was no longer a theoretical possibility, and this has since been halted (see Exhibit 1 of LuckyVitamin). The English-language website of LuckyVitamin was only translated into Dutch “automatically” in the past, which is evident from the fact that the brand name Bang was translated into KNAL. It can be presumed that Bang products were never ordered from the Netherlands via the LuckyVitamin website, except for the test purchase by Monster's law firm. Given the very high price to be paid for a can of Bang (see 3.12 of this judgment), this is not at all surprising. Accordingly, there is no harmful event caused by LuckyVitamin in the Netherlands as a result of an unlawful act committed by it.

This means that the Preliminary Relief Judge does not have jurisdiction on the basis of Article 6(e) of the Dutch Code of Civil Procedure to hear the claims filed against LuckyVitamin. Nor can that jurisdiction be assumed on the basis of Article 7 of the Dutch Code of Civil Procedure. There is no connection with the claims filed against Bang B.V. as required by that article. LuckyVitamin is a US company that only functions as an online store. It holds a completely different position in this dispute than Bang does. If Bang B.V. should be prohibited from marketing and/or promoting certain products in the EU, it is incomprehensible how this could be negated by LuckyVitamin.

*conclusion with respect to the jurisdiction*

4.6. The Preliminary Relief Judge only has jurisdiction with regard to Bang B.V.

*unfair trade practices/misleading advertising*

4.7. Four of the five statements upon which Monster bases its claim of unfair trade practices/misleading advertising were made by Bang B.V. The statements that the ingredient Super Creatine is good for the brain and helps against all types of dementia, against Alzheimer's, Parkinson's and Huntington's on the YouTube channel of VPX were made by Owoc. The four statements will be discussed below.

*L-Arginine*

4.8. The ingredient L-Arginine is prominently mentioned on the packaging of Bang B.V.'s products marketed in the EU. Such a can looks as follows:



This creates the impression with the consumer that this ingredient is incorporated into the product to a relevant degree and that this has a positive effect on the body of the consumer. Bang B.V. has not disputed that scientific research (Exhibit 10 of Monster) has shown that the quantity of L-Arginine in Bang's product has been set at 17.4 mg per litre, whereas at least a dose of 2000 mg per day (i.e. more than 200 cans) must be taken for a period of 45 days before any benefit can be derived from this supplement (see the study introduced by Monster as Exhibit 11). Pursuant to Article 6:195 of the Dutch Civil Code, Bang B.V. could have been expected to justify the prominent mention of the word "L-Arginine" in these preliminary relief proceedings, or to render plausible the suggestion contained therein. It did not do this. Its defence is only aimed at the use of the "claim" not being in conflict with the Claims Regulation. The prominent mention of the word "L-Arginine", without mentioning how much of that substance is present in the product, is therefore misleading within the meaning of Article 6:194 (1) (a) of the Dutch Civil Code and constitutes an unfair commercial practice within the meaning of Article 6:193c (1) (b) of the Dutch Civil Code (misleading with respect to the main characteristics of the product). Bang B.V. will therefore be forbidden to do so.

#### *potent brain and body fuel*

4.9. On its website, Bang B.V. claims that its energy drink is an effective fuel for the brain and the body ("*potent brain and body fuel*"). This statement can be regarded as an exaggeration common in advertising, which the average consumer will also regard as such. Bang B.V. has shown that specifically in the energy drinks market, exaggeration in advertising is very frequently seen. This is therefore no misleading advertising, nor unfair commercial practice. What is more, in the US Monster uses a similar expression (*total body fuel*).

#### *the three pictograms*

4.10. On the website of Bang B.V. the following three pictograms are shown:

The muscular arm pictogram suggests that L-Arginine promotes muscle mass, whereas this effect has not been scientifically proven, at least not for the small amount of L-Arginine contained in Bang's product (see also 4.8 of this judgment). This qualifies as an unfair commercial practice within the meaning of Article 6:193c(1)(b) of the Dutch Civil Code, and it qualifies as misleading advertising. Again, in view of Article 6:195 of the Dutch Civil Code, Bang B.V. could have been expected to make plausible the correctness of the facts that are contained in, or suggested by, this pictogram. Bang B.V. will therefore be prohibited from further using this pictogram.

The discussion in at the hearing was focused mainly on Super Creatine and L-Arginine. Monster has not rendered plausible that the icon with "Natural Caffeine" suggests more



than that caffeine can promote alertness. Monster's accusation that the pictogram with the dumbbell wrongly suggests that BCAAs, including leucine, have an effect on the muscle mass has also been given insufficient substance, all the less so since Monster uses the same pictogram for its own product Reign. To this extent, the claims cannot be allowed.

#### *performance enhancement beverages*

4.11. This statement by Bang B.V., which can be seen on its website (see 4.20 of the summons), is not an unfair commercial practice within the meaning of Article 6:193c (1) (b) of the Dutch Civil Code, nor is it misleading within the meaning of Article 6:194 of the Dutch Civil Code. This too is an exaggeration common in advertising, which the average consumer will regard as such, while Bang B.V. has shown that exaggeration is a daily phenomenon in the energy drinks sector.

#### *impermissible comparative advertising*

4.10. Pursuant to Article 6:194a of the Dutch Civil Code, comparative advertising is permitted (among other things) if this advertising is not misleading and/or does not denigrate the competitor (see paragraph 2 under a and e of that Article). In this context, Monster objects to the following statement Bang B.V. makes on its website: *BANG Energy drinks are not your stereotypical high sugar, life sucking soda masquerading as an energy drink! High sugar drinks spike blood sugar producing metabolic mayhem causing you to crash harder than a test dummy into a brick wall.* However, Bang B.V. should be allowed to make a comparison between its sugar-free energy drink and many other energy drinks that do contain sugar. The comparison is intended that way and will be understood as such by the average consumer. The comparison exaggerates in a way that is common in advertising for energy drinks. This, too, will be understood as such by the average consumer. Finally, the comparison is not so disparaging that it



would justify a ban.

4.11. Monster also objects to the following statement:

*Never again drink an irresponsible Energizer. Choose Bang Drink RTD.* The word *irresponsible* suggests an objective value judgment that is not substantiated. Bang is therefore at the edge of what is permitted in the framework of comparative advertising. Because it has not been demonstrated that this statement can be found on the website of Bang B.V., however, there is no reason to pronounce a judgment on this point. To the extent the statement can still be found on the website of Bol.com, Bang B.V. rightly asserted that it cannot be held responsible for that.

*Monster's invocation of the Dutch Medicines Act, the Medicinal Products Directive, the Claims Regulation and the Food Information Regulation.*

4.12. It was up to Monster to demonstrate in a substantiated manner that it can directly invoke these regulations in respect of its competitor, and subsequently to clarify based on concrete provisions the extent to which Bang B.V. is breaching them. Its general invocation falls short in that respect and therefore cannot lead to a different outcome.

*the judgments to be rendered against Bang B.V.*

4.13. What it comes down to is that the claims under A. and B. against Bang B.V. are partially awardable. The judgments to be rendered will apply to the entire EU because the rules regarding misleading advertising and unfair trade practices are harmonised in the EU. The periods and penalties stated below appear reasonable. The other claims (such as the nullification and making the statement) are not in any proportion to the relatively small infractions and are rejected as being too far-reaching. Also, not every unlawful act must automatically lead to rectification. In this case, the judgments to be rendered adequately satisfy the (urgent) interests of Monster.

*the proceedings in default of appearance against Predator*

4.14. In the absence of any defence, jurisdiction is assumed on the grounds asserted by Monster. A claim can be awarded in default of appearance if the claim is not deemed to be unlawful or unfounded. Given that Monster itself stated at the hearing that Predator no longer distributes Bang products in the EU and it does not follow from the screenshots of the Predator website introduced into the proceedings by Monster as Exhibit 5a that Predator is making or has made the contested (advertising) statements, the claims against Predator appear unfounded.

*costs of the proceedings*

4.15. Monster is to be deemed the party largely found to be in the wrong against VPX, Bang B.V. and Owoc (who appeared with one lawyer and owe court registry fees

for one time). Monster will therefore be ordered to pay their expenses. Monster will also be ordered to pay LuckyVitamin's expenses.

## **5. The decision**

The Preliminary Relief Judge

5.1. declares Predator to be in default,

5.2. declares that it lacks jurisdiction to hear and adjudicate the claims brought against VPX, Owoc and LuckyVitamin,

5.3. orders Bang B.V., as from one month after service of this judgment, to cease and desist from trading and/or selling and/or delivery and/or promotion of products within the EU in which "L-Arginine" is prominently depicted on the packaging, as printed on the photograph in 4.8 of this judgment, on pain of a penalty of € 2,000 per violation of this order and of € 2,000 for each day that the violation continues, subject to a maximum of € 200,000.

5.4. orders Bang B.V., as from one month after service of this judgment, to cease and desist from the use within the EU of the pictogram shown on the left in 4.10 of this judgment, on pain of a penalty of € 2,000 per violation of this order and of € 2,000 for each day that the violation continues, subject to a maximum of € 200,000.

5.5. orders Monster to pay the costs of these proceedings, estimated thus far on the part of VPX, Bang B.V. and Owoc at € 639 in court registry fees and € 980 in lawyer's fees,

5.6. orders Monster to pay the costs of these proceedings, estimated thus far on the part of LuckyVitamin at € 639 in costs and € 980 in attorney's fees,

5.7. declares this judgment to be provisionally enforceable up to this point;

5.8. denies the relief sought against Predator,

5.9. dismisses any other or further claims.

This judgment was rendered by A.J. Beukenhorst, Preliminary Relief Judge, assisted by M. Veraart, clerk, and was pronounced in open court on 09 May 2019.

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