

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to the hearing, the claim against The Protein Pick and Mix Ltd., (with its official seat in the United Kingdom) was withdrawn.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