

**Orange County Paralegal Association
Educational Conference
Presentation**

Orange Bang, Inc.

v.

VPX



Orange Bang Products





Int. Cl.: 32

Prior U.S. Cl.: 45

United States Patent and Trademark Office

Reg. No. 1,223,619

Registered Jan. 11, 1983

TRADEMARK

Principal Register

BANG!

Orange Bang, Inc. (California corporation)
8600 Tamarack Ave.
Sun Valley, Calif. 91352

For: WHIPPED FRUIT JUICE DRINKS AND
CONCENTRATES THEREFOR, in CLASS 32
(U.S. Cl. 45).

First use Aug. 3, 1971; in commerce Sep. 8, 1973.

Ser. No. 296,012, filed Feb. 6, 1981.

JULIE B. SEYLER, Examining Attorney

VPX Begins Using The “Bang” Mark



.....● 2009

Bang Pre-Workout

Pre-Workout

Muscle Nitrous™

BANG!®



VPX's BANG! Is now the world's only stable liquid creatine. One serving of BANG! with an array of muscle-pumping anabolic nutrients such as leucine and creatinol-o-phosphate

5,000+ milligrams per bottle



enhance immune function, and increase protein synthesis.

Cex 84, Cex 2053

SUPPLEMENT FACTS

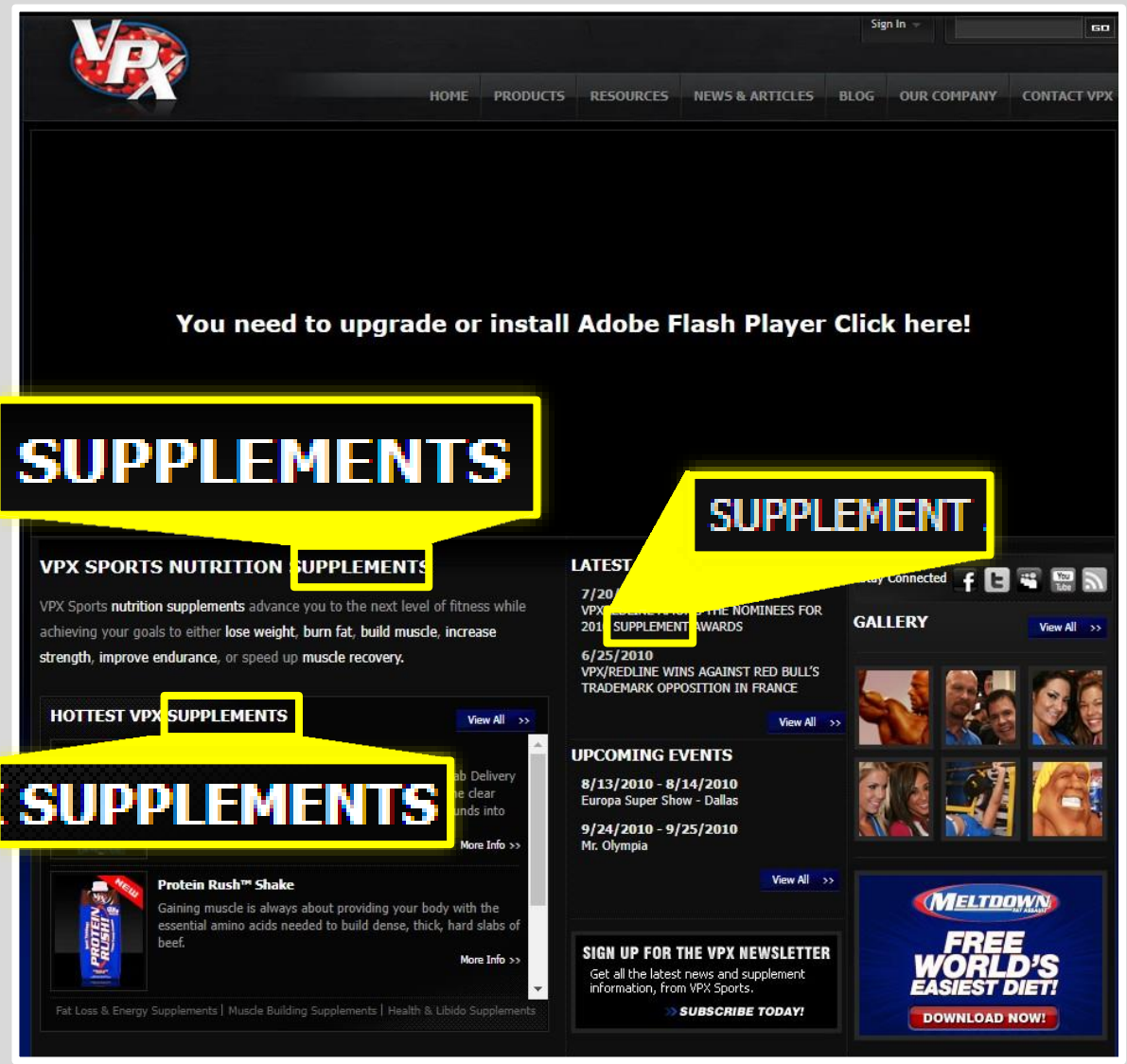
Servings per Container: 2			
Calories	24/48	Amt per Serv.	Amt per Bottle
%DV [†]			
Total Carbohydrates	2.5 g	5 g	0.5-1%
Sugars	0 g	0 g	0%
Total Fat	0 g	0 g	0%
Saturated Fat	0 g	0 g	0%
Unsaturated Fat	0 g	0 g	0%
Protein	3.5 g	7 g	7-14%
Potassium (as Potassium Phosphate Dibasic)			1.5-3%
Sodium (as Sodium Chloride)			0.5-1%
Proprietary Blend	5,842 mg	11,648 mg	
COP [®] Creatinol-O-Phosphate			†
Glycerine			†
L-Leucine (BCAA)			†
L-Isoleucine (BCAA)			†
L-Valine (BCAA)			†
Caffeine Anhydrous			†
Anserine (beta-alanyl-1-methyl-histidine)			†
L-Theanine			†
Gamma-Butyrobetaine (GBB)			†
Magnesium Tanshinoate B			†
Geranamine			†
Bis Picolinate Oxo Vanadium (BPOV)			†
Ilex Paraguariensis (Standardized for 1,3-di-n-propyl-7-propargylxanthine)			†
[†] Percent daily values (DV%) are based on a 2000 calorie diet.			
[†] Daily values not established.			

Additional Ingredients: Highly Purified Water, Citric Acid, Natural and Artificial Flavor, Malic Acid, Sucralean® Brand Sucralose (a non-nutritive sweetener), Sodium Benzoate, Potassium Sorbate, Na Erythorbate, Nisaplin.

VPX Rebranded Itself As BANG

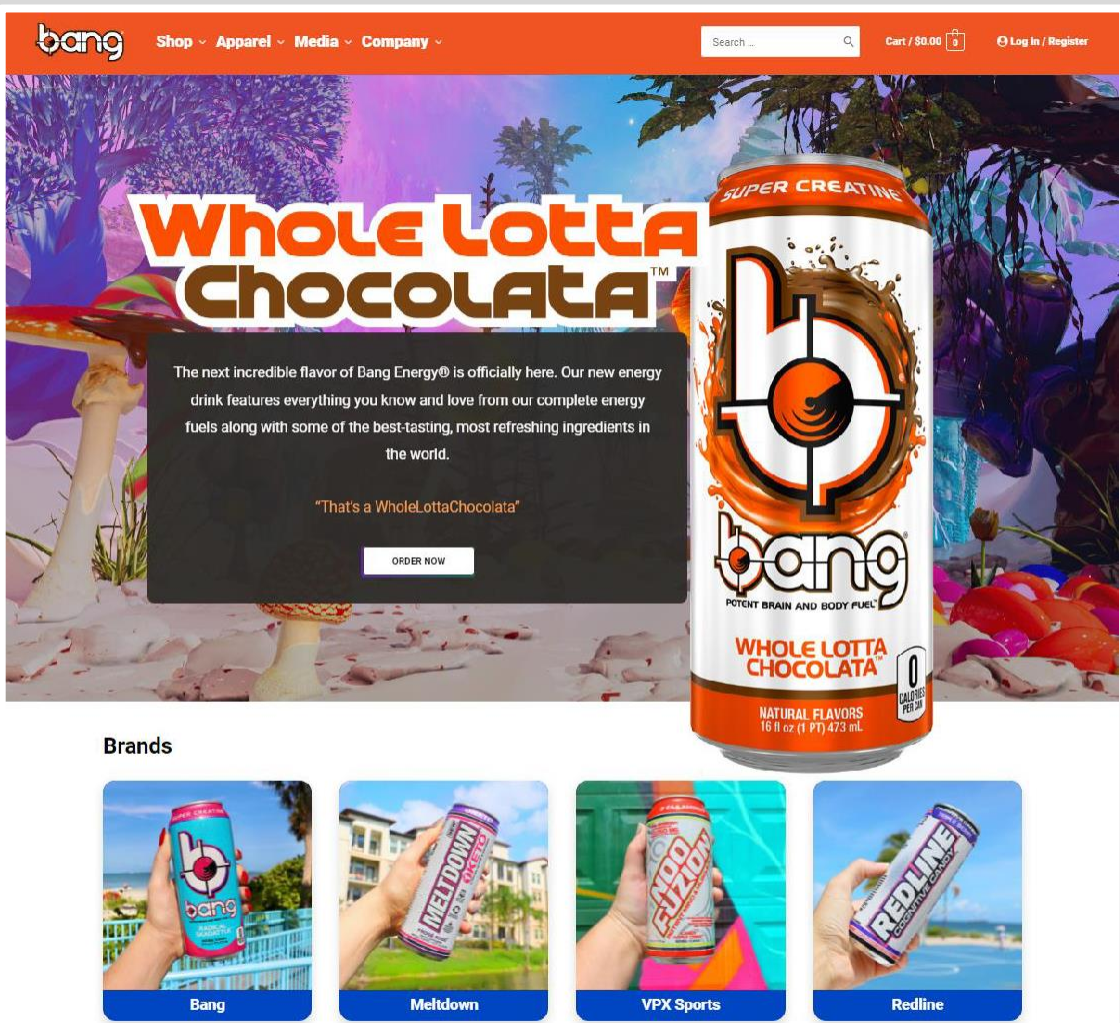
VPX Website: 2010

Cex 2921



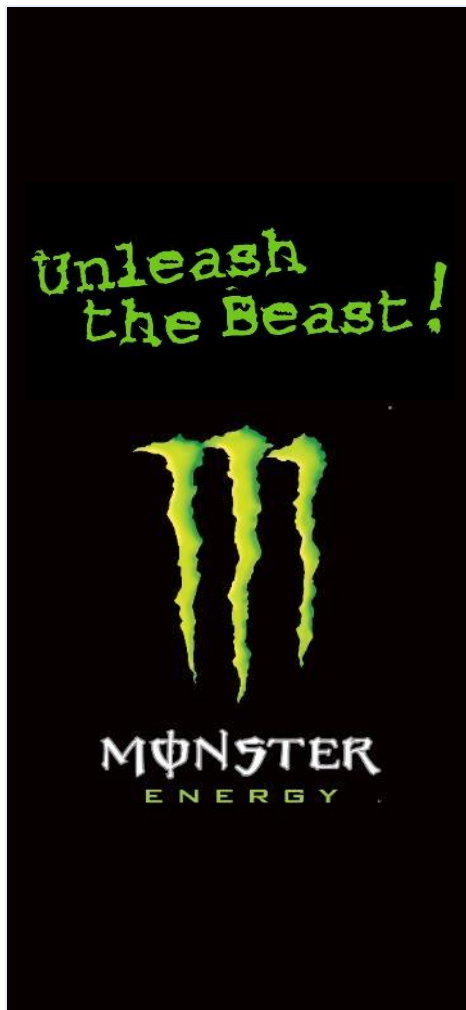
BANG Website: Present Day

Cex 2446









Plaintiff's Closing Argument

Monster Energy Company v. BeastUp LLC

Case No. 2:17-cv-01605-KJM-JDP

Likelihood of Confusion Factors

1

Monster's marks are strong

2

BeastUp uses its marks on identical goods

3

The parties' marks are highly similar

4

Evidence of actual confusion exists

5

BeastUp had knowledge of Monster's marks before using its marks

6

The parties' goods are sold and marketed in the same channels

7

The products are impulse purchases/low degree of care

8

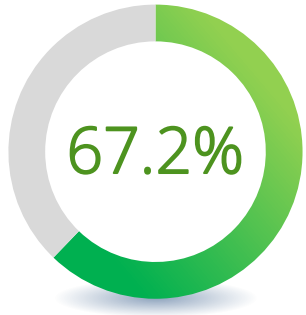
The parties' products are identical – no need to consider expansion



Strength of Monster's Marks (Conceptual)

Monster's Claw Icon and BEAST-inclusive marks are
arbitrary/fanciful

There are ***no other energy drinks*** that use
BEAST or a claw mark

Dr. Simonson's Survey Showed Secondary Meaning



67.2% of respondents associated the  mark (Claw Icon) with Monster after accounting for the survey control ()



The Claw Icon has acquired ***strong secondary meaning***

Strength of Monster's Marks

13



mark registrations, the majority of which are incontestable

Undisputed Facts Nos. 6-18
Sacks Testimony, Dec. 7, 2021

10

BEAST-inclusive registrations, nearly all of which are incontestable

Undisputed Facts Nos. 19-28
Sacks Testimony, Dec. 7, 2021

Strength of Monster's Marks (Commercial)

U.S. Sales of beverages displaying both the Claw Icon and a BEAST-inclusive mark

Between 2002 - 2013:	
\$7.5 Billion	6.8 Billion cans

Sacks Testimony, Dec. 7, 2021; Ex. 377

Between 2002 - 2021:	
\$23 Billion	20 Billion cans

Sacks Testimony, Dec. 7, 2021; Ex. 377

U.S. Marketing of beverages

Between 2002 - 2013:
\$2 Billion

Sacks Testimony, Dec. 7, 2021

Between 2002 - 2021:
\$6 Billion

Sacks Testimony, Dec. 7, 2021

Original Monster – Unleash the Beast! (2002)



Lo-Carb Monster – Unleash the Beast! (2003)



Monster Extra Strength – Unleash the Nitro Beast! (2009)



Unleash the Nitro Beast!®



Unleash the Nitro Beast!®



done before.
Unleash the Nitro Beast!®



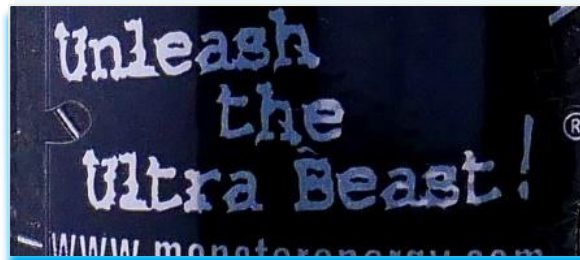
Unleash the Nitro Beast!®

Exs. 462-464 and 466

Monster Rehab – Rehab the Beast! (2011)



Monster Ultra – Unleash the Ultra Beast! (2012)



Muscle Monster – Pump up the Beast! (2013)



Exs. 481-484

2002-2013: 6.8 Billion Cans Sold Bearing Both the Claw Icon and BEAST-inclusive Marks



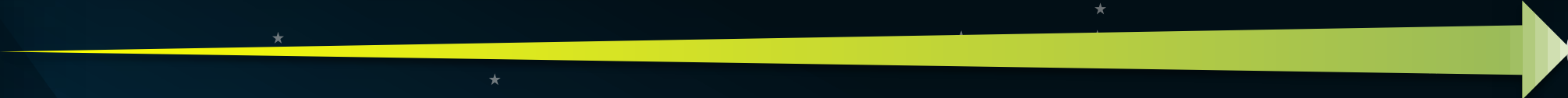
End-to-end, that is enough cans to circle the Earth:

25.8 times

2002-2013: 6.8 Billion Cans Sold Bearing Both the Claw Icon and BEAST-inclusive Marks

Stacked, that is enough cans to reach from the Earth to the Moon:

2.7 times



2002-Sept. 2021: 20.3 Billion Cans Sold Bearing Both the Claw Icon and BEAST-inclusive Marks



End-to-end, that is enough cans to
circle the Earth:

77 times

2002-Sept. 2021: 20.3 Billion Cans Sold Bearing Both the Claw Icon and BEAST-inclusive Marks

Stacked, that is enough cans to reach from
the Earth to the Moon: **8 times**

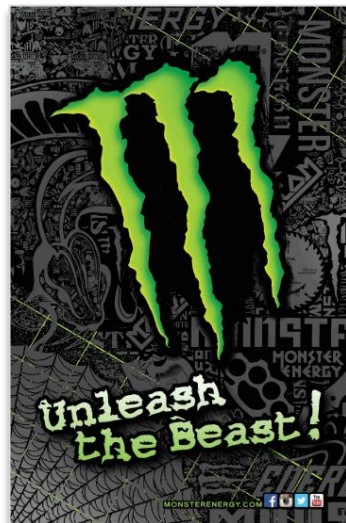
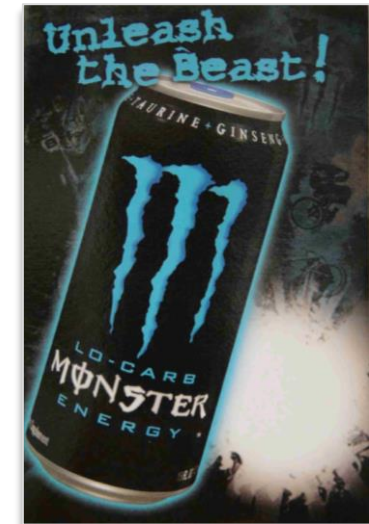


Strength of Monster's Marks

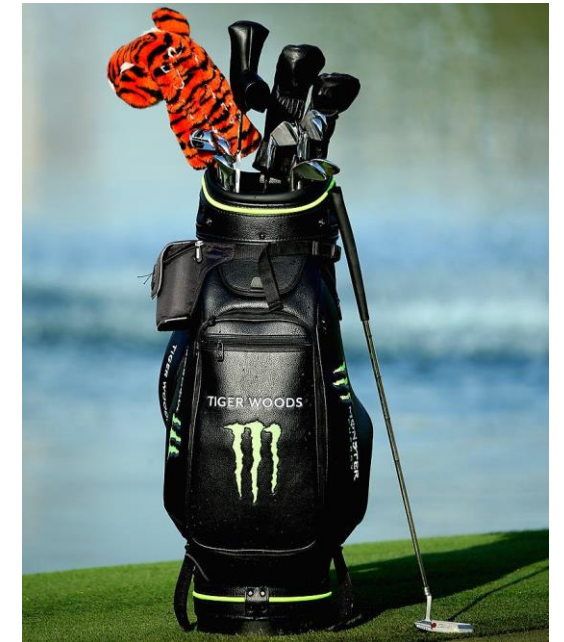


Ex. 157, 317, and 318

Strength of Monster's Marks



Strength of Monster's Marks - Sponsorships



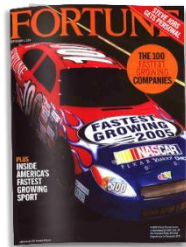
Strength of Monster's Marks



Strength of Monster's Marks

FORTUNE MAGAZINE

Top 100 Fastest Growing Company, Sept. 2005



HANSEN NATURAL 'Unleash the beast!'

Ex. 362



NEWSWEEK

Monster vs. Red Bull, March 20, 2006



Monster in 2002 with testosterone-friendly branding ("Unleash the Beast") and a 16-ounce can that offered twice the volume of Red Bull for the same price.

Ex. 365

BEVERAGE INDUSTRY

Creating a Monster, Dec. 2007



Like those Hollywood figures, the claw logo has become an identifiable symbol for the No. 2 selling brand in the fast-growing energy drink category, which has become a force all its own.






Ex. 357



Strength of Monster's Marks – 2010 FaceBakers Report

9.	<u>Converse</u>	9 317 146	+33.82%
10.	<u>iTunes</u>	8 981 804	+18.92%
11.	<u>Windows Live Messenger</u>	8 859 704	+20.69%
12.	<u>iPod</u>	8 496 372	+32.83%
13.	<u>Pringles</u>	7 952 152	+24.95%
14.	<u>Monster Energy</u>	7 278 632	+29.54%
15.	<u>Victoria's Secret Pink</u>	7 255 113	+14.44%
16.	<u>ZARA</u>	7 187 420	+14.19%
17.	<u>Dr Pepper</u>	6 964 075	+23.34%

Strength of Monster's Marks – 2018 SocialBakers Report

6		Starbucks GLOBAL	37 241 009
7		Walmart UNITED STATES	34 081 605
8		Nike GLOBAL	29 876 169
9		Amazon.com UNITED STATES	28 605 939
10		Monster Energy GLOBAL	26 338 782

Likelihood of Confusion Factors

- 1 Monster's marks are strong
- 2 BeastUp uses its marks on identical goods
- 3 The parties' marks are highly similar
- 4 Evidence of actual confusion exists
- 5 BeastUp had knowledge of Monster's marks before using its marks
- 6 The parties' goods are sold and marketed in the same channels
- 7 The products are impulse purchases/low degree of care
- 8 The parties' products are identical – no need to consider expansion

BeastUp Uses Its Marks on Identical Goods – Energy Drinks



Likelihood of Confusion Factors

- 1 Monster's marks are strong
- 2 BeastUp uses its marks on identical goods
- 3 The parties' marks are highly similar**
- 4 Evidence of actual confusion exists
- 5 BeastUp had knowledge of Monster's marks before using its marks
- 6 The parties' goods are sold and marketed in the same channels
- 7 The products are impulse purchases/low degree of care
- 8 The parties' products are identical – no need to consider expansion

The Parties' Marks Are Highly Similar

The stronger a mark the greater the protection it is accorded.

Brookfield Commc'ns, Inc. v. W. Coast Ent. Corp.,
174 F.3d 1036, 1058 (9th Cir. 1999)

"It is axiomatic in trademark law that 'side-by-side' comparison is not the test."

Levi Strauss & Co. v. Blue Bell, Inc.,
632 F.2d 817, 822 (9th Cir. 1980)

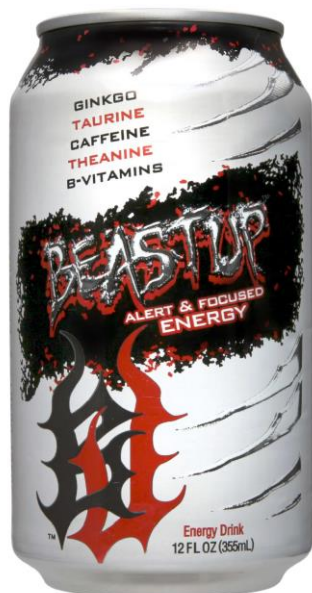
Similarities weigh more heavily than differences.

AMF Inc. v. Sleekcraft Boats,
599 F.2d 341, 351 (9th Cir. 1979)

The Parties' Marks Are Highly Similar



The Parties' Marks Are Highly Similar (Klein Survey)



ID #75 "it has the claw marks"

ID #147 "The name and style of the packaging"

ID #157 "Style of logo. Name 'BEAST'"

ID #159 "the scratches"

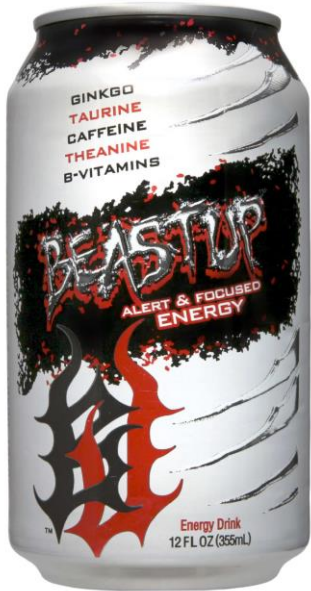
ID #316 "'beast' up"

ID #1514 "The logo at the bottom left looks like their 'M'"

ID #2201 "Because the 'bu' graphic looks similar to the 'Monster' logo"

ID #2474 "The name is Beast up it has the 'claw scratch' marks on the side."

The Parties' Marks Are Highly Similar (Klein Survey)



ID #110

"Graphics remind me of them."

ID #169

"looks similar; style"

ID #276

"Because Monster has a similar style of graphics and the name is very similar to BeastUp"

ID #374

"Because they have similar names"

ID #1422

"It's similar in name."

ID #1497

"The logo and the name seem similar"

ID #1720

"Similar logo"

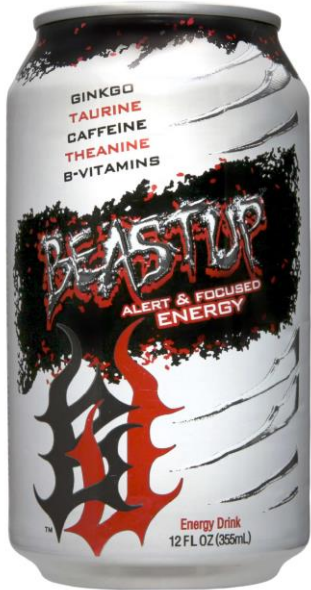
ID #1931

"Monster – Beast connection"

ID #2066

"The label and the name of BeastUp is very similar to Monster"

The Parties' Marks Are Highly Similar (Klein Survey)



ID #30

"Aggressive, macho packaging. Lots of added ingredients"

ID #88

"Looks like their labeling"

ID #115

"Font is similar"

ID #147

"The name and style of the packaging"

ID #199

"Stylization of product/font on packaging"

ID #233

"Trade dress looks similar"

ID #243

"The design on the can looks like something Monster would make"

ID #260

"Looks on brand"

ID #264

"same type of graphics"

The Parties' BEAST Marks Have the Same Connotation and Meaning

Monster's BEAST-inclusive marks are a call to action to ***let your inner self out.***

Sacks Testimony, Dec. 7, 2021

Q. And what was your inspiration for that text?

A. Just what I witnessed with the power – with the word when, you know, just things are tough, they are going to ***release their inner beast*** just by saying the word “BeastUp.” That’s kind of – yeah, you’re just going to, yeah, ***release the beast*** or ***release that inner beast***. I’m sorry.”

Robert Waelty Dep. Testimony

Likelihood of Confusion Factors

- 1 Monster's marks are strong
- 2 BeastUp uses its marks on identical goods
- 3 The parties' marks are highly similar
- 4 Evidence of actual confusion exists**
- 5 BeastUp had knowledge of Monster's marks before using its marks
- 6 The parties' goods are sold and marketed in the same channels
- 7 The products are impulse purchases/low degree of care
- 8 The parties' products are identical – no need to consider expansion

Evidence of Actual Confusion (Klein Survey)



27.9% of respondents associated the BeastUp energy drinks as coming from Monster.

A significant number of consumers are likely to be confused by BeastUp's use of the BeastUp name, stylized logo, and other claw marks on the can.

Klein Survey Unveils Confused Consumers



ID #75 “monster”

ID #147 “Monster”

ID #157 “Monster”

ID #159 “Monster”

ID #316 “monster”

ID #1514 “Monster”

ID #2201 “Monster”

ID #2474 “Monster”

Klein Survey Unveils Confused Consumers



ID #110 “Monster Energy.”

ID #169 “monster”

ID #276 “Maybe Monster”

ID #374 “Monster energy drinks”

ID #1422 “Monster”

ID #1497 “similar to Monster”

ID #1720 “Monster”

ID #1931 “Monster”

ID #2066 “Monster”

Klein Survey Unveils Confused Consumers



ID #30

“Monster Energy”

ID #88

“Monster”

ID #115

“Monster”

ID #147

“Monster”

ID #199

“Monster”

ID #233

“Monster”

ID #243

“Monster Energy Drinks”

ID #260

“Monster”

ID #264

“monster”

Likelihood of Confusion Factors

- 1 Monster's marks are strong
- 2 BeastUp uses its marks on identical goods
- 3 The parties' marks are highly similar
- 4 Evidence of actual confusion exists
- 5 BeastUp had knowledge of Monster's marks before using its marks**
- 6 The parties' goods are sold and marketed in the same channels
- 7 The products are impulse purchases/low degree of care
- 8 The parties' products are identical – no need to consider expansion

BeastUp Had Knowledge of Monster's Marks Before Using Its Marks

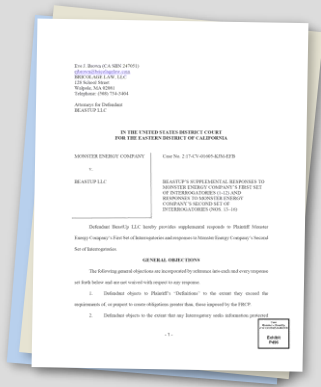
"This factor favors the plaintiff where the alleged infringer adopted his mark with knowledge, actual or constructive, that it was another's trademark."

Brookfield Commc'ns, Inc. v. W. Coast Ent. Corp.,
174 F.3d 1036, 1059 (9th Cir. 1999)

"When an alleged infringer knowingly adopts a mark similar to another's, courts will presume an intent to deceive the public."

Off. Airline Guides, Inc. v. Goss,
6 F.3d 1385, 1394 (9th Cir. 1993)

BeastUp Had Knowledge of Monster's Marks Before Using Its Marks



BeastUp first became aware of Monster in approximately 2004-2005

Ex. 496 (Supp. Resp. Rog. 4)

Q. So before BeastUp launched its BeastUp Energy Drink, you were aware that Monster was using 'Unleash the Beast' on beverages, correct?

A. Yeah.

Jessee Waelty Dep. Testimony



Likelihood of Confusion Factors

- 1 Monster's marks are strong
- 2 BeastUp uses its marks on identical goods
- 3 The parties' marks are highly similar
- 4 Evidence of actual confusion exists
- 5 BeastUp had knowledge of Monster's marks before using its marks
- 6 The parties' goods are sold and marketed in the same channels
- 7 The products are impulse purchases/low degree of care
- 8 The parties' products are identical – no need to consider expansion

The Parties' Goods Are Sold in the Same Channels



Exs. 10 and 11

The Parties' Goods Are Sold in the Same Channels

REQUEST FOR ADMISSION NO. 7:

Admit that Your BeastUp beverages have been sold in gas stations.

RESPONSE:

Admitted.

REQUEST FOR ADMISSION NO. 18:

Admit that Your BeastUp beverages have been sold in convenience stores.

RESPONSE:

Admitted.

REQUEST FOR ADMISSION NO. 27:

Admit that Your BeastUp beverages have been sold in restaurants.

RESPONSE:

Admitted.

REQUEST FOR ADMISSION NO. 34:

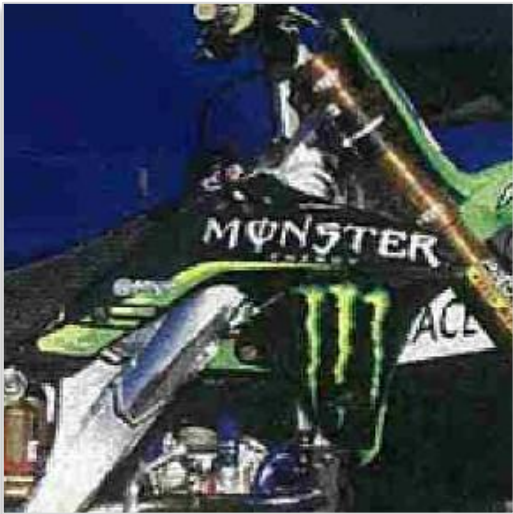
Admit that Your BeastUp beverages have been sold in grocery stores.

RESPONSE:

Admitted.

The Parties' Goods Are Marketed in the Same Channels

Monster



BeastUp



Exs. 18, 55, 156, and 196

The Parties' Goods Are Marketed in the Same Channels



Likelihood of Confusion Factors

- 1 Monster's marks are strong
- 2 BeastUp uses its marks on identical goods
- 3 The parties' marks are highly similar
- 4 Evidence of actual confusion exists
- 5 BeastUp had knowledge of Monster's marks before using its marks
- 6 The parties' goods are sold and marketed in the same channels
- 7 The products are impulse purchases/low degree of care
- 8 The parties' products are identical – no need to consider expansion

Impulse Purchase

- Grab-and-go
- Range from \$2-3



Likelihood of Confusion Factors

- 1 Monster's marks are strong
- 2 BeastUp uses its marks on identical goods
- 3 The parties' marks are highly similar
- 4 Evidence of actual confusion exists
- 5 BeastUp had knowledge of Monster's marks before using its marks
- 6 The parties' goods are sold and marketed in the same channels
- 7 The products are impulse purchases/low degree of care
- 8 The parties' products are identical – no need to consider expansion

Cancellation of Registration



“In any action involving a registered mark the court may [...] order the cancellation of registrations, [...] with respect to the registrations of any party to the action. [...]”

15 U.S.C. § 1119

A valid ground for cancellation exists because the BEASTUP mark creates a likelihood of confusion.

See Synoptek, LLC v. Synaptek Corp.,
309 F. Supp. 3d 825, 835 (C.D. Cal. 2018)

Dilution Factors -

1

Monster's Claw Icon is famous and distinctive

2

BeastUp is making use of the mark in commerce

3

BeastUp's use began after the Claw Icon became famous

4

BeastUp's use of the mark is likely to cause dilution by blurring

Monster's Claw Icon Was Famous Before BeastUp Used Its Marks

Monster's Drinks featuring the  by 2013:

U.S. Retail outlets:	300,000
U.S. Gross sales:	\$10 Billion
U.S. Marketing:	\$2 Billion
U.S. Cans sold:	~9 Billion

Sacks Testimony, Dec. 7, 2021; Undisputed Fact No. 38

BeastUp's Marks Dilute Monster's Claw Icon by Blurring



ID #75 "it has the claw marks"

ID #159 "the scratches"

ID #1497 "The logo and the name seem similar"

ID #1514 "The logo at the bottom left looks like their 'M'"

ID #1720 "Similar logo"

ID #2201 "Because the 'bu' graphic looks similar to the 'Monster' logo"

BeastUp's Infringement Causes Irreparable Harm to Monster

"Should [BeastUp] ultimately prevail in its defense of the lawsuit, Registrant intends to resume use of BEASTUP in connection with its energy drinks soon after judgment is entered in Registrant's favor."

Ex. 95 (Statement of Excusable Non-Use)

Q. What are the plans as far as expanding distribution?

A. Just get our second beverage, [...]. And then just work on getting our new distributors and expand out of this area. *Just try to get some recognition to where maybe somebody notices and maybe want to buy our company out. That's kind of our goal.* Or just maybe partnering with us. That's kind of our goal.

Robert Waelty Dep. Testimony