

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

MARK ANTHONY INTERNATIONAL
SRL,

Plaintiff,

v.

VITAL PHARMACEUTICALS, INC. and
BANG ENERGY, LLC,

Defendants.

Civil Action No. 1:21-cv-03683

**VITAL PHARMACEUTICALS, INC. AND
BANG ENERGY, LLC'S AMENDED
ANSWER AND AFFIRMATIVE
DEFENSES**

Defendants Vital Pharmaceuticals, Inc. and Bang Energy, LLC (collectively "Defendants") hereby submit the following amended answer to the Complaint filed by Plaintiff Mark Anthony International SRL ("Plaintiff" or "Mark Anthony"). Defendants deny the allegations and characterizations in Plaintiff's Complaint unless expressly admitted in the following paragraphs.

PRELIMINARY STATEMENT

1. Defendants lack knowledge or information sufficient to form a belief regarding the allegations regarding "MXD beverages," and, on such basis, deny the same. Defendants deny the remaining allegations of this paragraph.

2. Defendants lack knowledge or information sufficient to form a belief regarding the allegations of this paragraph. On such basis, Defendants deny the allegations of this paragraph.

3. Defendants deny the allegations of this paragraph.

4. Defendants lack knowledge or information sufficient to form a belief regarding the purpose of Mark Anthony's reasoning for bringing this action, and on such basis, deny this allegation. The remaining allegations against Defendants in Paragraph 4 contain legal conclusions

to which a responsive pleading is not required. To the extent a response is required, Defendants deny the allegations of this paragraph.

The Parties

5. Defendants lack knowledge or information sufficient to form a belief regarding the allegations of this paragraph. On such basis, Defendants deny the allegations of this paragraph.

6. Defendants admit the allegations of this paragraph.

7. Defendants admit Bang Energy, LLC (“Bang Energy”) is organized under the laws of the State of Florida with its principal place of business at 1600 North Park Drive, Weston, Florida, 33326. Defendants deny the remaining allegations of this paragraph.

Jurisdiction and Venue

8. The allegations in this paragraph contain legal conclusions to which a responsive pleading is not required. To the extent a response is required, Defendants deny the allegations of this paragraph.

9. Defendants deny the allegations of this paragraph.

10. The allegations in this paragraph contain legal conclusions to which a responsive pleading is not required. To the extent a response is required, Defendants deny the allegations of this paragraph.

THE MXD TRADEMARK

11. Defendants lack knowledge or information sufficient to form a belief regarding the allegations of this paragraph. On such basis, Defendants deny the allegations of this paragraph.

12. Defendants lack knowledge or information sufficient to form a belief regarding the allegations of this paragraph. On such basis, Defendants deny the allegations of this paragraph.

13. Defendants lack knowledge or information sufficient to form a belief regarding the allegations of this paragraph. On such basis, Defendants deny the allegations of this paragraph.

14. Defendants lack knowledge or information sufficient to form a belief regarding the allegations of this paragraph. On such basis, Defendants deny the allegations of this paragraph.

DEFENDANTS' WRONGFUL CONDUCT

15. Defendants deny the allegations of this paragraph.

16. Defendants deny the allegations of this paragraph.

17. Defendants lack knowledge or information sufficient to form a belief regarding the allegations of this paragraph. On such basis, Defendants deny the allegations of this paragraph.

18. The allegations against Defendants in Paragraph 18 contain legal conclusions to which a responsive pleading is not required. To the extent a response is required, Defendants lack knowledge or information sufficient to form a belief regarding the allegations related to third party sales of products and, on such basis, deny the allegations of this paragraph. Defendants deny the remaining allegations in this paragraph.

19. Defendants lack knowledge or information sufficient to form a belief regarding the allegations of this paragraph regarding the sales of malt beverages. On such basis, Defendants deny the allegation. Defendants deny the remaining allegations of this paragraph.

20. The allegations against Defendants in Paragraph 20 contain legal conclusions to which a responsive pleading is not required. To the extent a response is required, Defendants deny the allegations of this paragraph.

21. Defendants deny they have plans to expand the MIXX Mark to other ready-to-drink flavored malt beverage cocktails. Terms contained in public websites and intent-to-use trademark applications speak for themselves and the allegations related thereto require no affirmation or

denial by Defendants. To the extent that Plaintiff's characterization, summary, restatement or quotation, in whole or part, of those public websites and intent-to-use trademark applications differ from the actual records, Defendants deny any such allegations in this paragraph. The remaining allegations in Paragraph 21 contain legal conclusions to which a responsive pleading is not required. To the extent a response is required, Defendants deny the allegations of this paragraph.

22. The allegations against Defendants in Paragraph 22 contain legal conclusions to which a responsive pleading is not required. To the extent a response is required, Defendants deny the allegations of this paragraph.

COUNT ONE

(Registered Trademark Infringement Under Section 32 of the Lanham Act)

23. Defendants repeat, incorporate, and re-allege its responses to the foregoing paragraphs as though fully set forth here.

24. Defendants deny the allegations of this paragraph.

25. Defendants deny the allegations of this paragraph.

26. Defendants deny the allegations of this paragraph.

27. Defendants deny the allegations of this paragraph.

28. Defendants deny the allegations of this paragraph.

29. Defendants deny the allegations of this paragraph.

COUNT TWO

(Registered Trademark Infringement Under Section 43(a) of the Lanham Act)

30. Defendants repeat, incorporate, and re-allege its responses to the foregoing paragraphs as though fully set forth here.

31. Defendants deny the allegations of this paragraph.

32. Defendants deny the allegations of this paragraph.

33. Defendants deny the allegations of this paragraph.

34. Defendants deny the allegations of this paragraph.

35. Defendants deny the allegations of this paragraph.

COUNT THREE

(Unfair Competition and Trademark Infringement Under New York Common Law)

36. Defendants repeat, incorporate, and re-allege its responses to the foregoing paragraphs as though fully set forth here.

37. Defendants deny the allegations of this paragraph.

38. Defendants deny the allegations of this paragraph.

PRAYER FOR RELIEF

Defendants deny the allegations of Plaintiff's Prayer for Relief, including denying that Plaintiff is entitled to any relief whatsoever. Defendants request the Court deny all relief to Plaintiff and enter judgment in Defendants' favor instead.

JURY DEMAND

Defendants do not object to Plaintiff's request for a trial by jury on all issues so triable, in accordance with Federal Rule of Civil Procedure 38.

AFFIRMATIVE DEFENSES

Defendants assert the following affirmative defenses in response to Plaintiff's Complaint. Defendants reserve the right to add additional affirmative defenses or Counterclaims as they become known through the course of discovery in this case. The assertion of any defense is not a concession that Defendants have the burden of proof on the matter.

FIRST AFFIRMATIVE DEFENSE
(Lack of Damages)

Plaintiff has sustained no loss or damages as a result of Defendants' alleged acts.

SECOND AFFIRMATIVE DEFENSE
(No Injunctive Relief)

Plaintiff cannot satisfy the requirements for its request for injunctive relief and has adequate remedies at law.

THIRD AFFIRMATIVE DEFENSE
(Good Faith)

At all times, Defendants have acted in good faith and with a reasonable belief that its actions were legal and appropriate. The term “MXD,” which is simply an abbreviated phonetic form of the common term “mixed” in a general class of alcohol drink, is generic or descriptive and has no secondary meaning. As such, all good faith actions taken by Defendants were reasonable.

FOURTH AFFIRMATIVE DEFENSE
(Invalidity)

U.S. Trademark Registration No. 5,782,343 is invalid because it is generic or merely descriptive without secondary meaning. The term “MXD” for an alcoholic drink product is simply an abbreviated phonetic form of the common term “mixed,” which is a general class of alcohol drink. As such the term MXD is generic for the claimed goods and the mark is not entitled to federal registration. If not invalid because it is generic, the term MXD is merely descriptive without secondary meaning. The term MXD merely describes the nature of the type of drink goods offered by Plaintiff, namely mixed drinks such as Long Island Iced Tea, Mai Tai, Strawberry Daiquiri, and Margarita. The term MXD has not attained any secondary meaning or acquired distinctiveness in the minds of consumers because consumers do not associate the term MXD solely with a single source. As such the term MXD is not entitled to federal registration and U.S. Trademark Registration No. 5,782,343 is invalid.

GORDON REES SCULLY MANSUKHANI LLP
*Attorneys for Vital Pharmaceuticals, Inc. and
Bang Energy, LLC*

By: /s/ Peter G. Siachos

Peter G. Siachos

1 Battery Park Plaza, 28th Floor
New York, New York 10016

T: (973) 549-2500

F: (973) 377-1911

psiachos@grsm.com

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