

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

----- X  
MARK ANTHONY INTERNATIONAL, SRL, :

Plaintiff, :

-v.- :

VITAL PHARMACEUTICALS, INC. and  
BANG ENERGY, LLC, :

Defendants. :

No. 21-cv-\_\_\_\_\_

----- X

Plaintiff Mark Anthony International SRL (“Mark Anthony”), by its attorneys Debevoise & Plimpton LLP, for its complaint against Vital Pharmaceuticals, Inc. and Bang Energy, LLC (together “Defendants”), alleges as follows:

**Preliminary Statement**

1. This is a lawsuit for infringement of Mark Anthony’s federally registered MXD trademark used in connection with a line of flavored malt beverages, a category that has grown in popularity among consumers over the last several years. MXD beverages are cocktail-flavored malt beverages sold in cans and feature the flavors Strawberry Daiquiri, Mai Tai, Long Island Iced Tea, and Margarita. In blatant disregard of Mark Anthony’s federally registered trademark rights, Defendants have announced plans to launch competing flavored malt beverages under the trademark MIXX, which also will be sold in cans and will feature cocktail flavors such as Pina Colada, Frosé Rosé, and Lemon Drop.

2. Mark Anthony’s rights in the MXD trademark date back to 2017, when Mark Anthony applied to register the MXD trademark with the United States Patent and Trademark Office (“USPTO”) for an innovative line of ready-to-drink cocktails made

using a patented flavorless malt base. The following year, Mark Anthony launched the MXD brand in 16 ounce cans; the brand has since enjoyed great commercial success, with more than one million case equivalents sold annually. MXD flavored malt beverages are sold in convenience stores, gas stations, liquor stores, grocery stores, supermarkets, restaurants, and bars across the United States.

3. Defendants have announced plans to launch a competing flavored malt beverage in 12- and 16-ounce cans under the confusingly similar name MIXX. Among other channels, Defendants plan to sell their MIXX beverages in QuickTrip and 7-Eleven convenience stores, which also sell Mark Anthony's MXD beverages.

4. Consumers seeing Defendants' MIXX flavored malt beverages likely will be confused into believing that they come from, or are associated with, or are a brand extension of, Mark Anthony's MXD flavored malt beverages. The confusion is likely to be exacerbated given that the products both are sold in cans, will be sold in some of the same channels of distribution, and feature cocktail flavors. Accordingly, Mark Anthony brings this action to enjoin Defendants' use of the MIXX name for flavored malt beverages.

### **The Parties**

5. Plaintiff Mark Anthony is a Barbados Society with Restricted Liability with its registered office at One Haggatt Hall, Haggatt Hall, St. Michael BB 11059, Barbados.

6. Upon information and belief, defendant Vital Pharmaceuticals, Inc. ("VPX") is incorporated under the laws of the State of Florida with its principal place of business at 1600 North Park Drive, Weston, Florida, 33326.

7. Upon information and belief, defendant 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. Upon information and belief, defendant VPX is the parent company of Bang Energy.

**Jurisdiction and Venue**

8. This Court has original jurisdiction over the subject matter of this action pursuant to 15 U.S.C. § 1121 and 28 U.S.C. §§ 1331 and 1338 and has supplemental jurisdiction pursuant to 28 U.S.C. § 1367(a).

9. This Court has personal jurisdiction over Defendants pursuant to New York CPLR 302(1) and (3) because Defendants regularly transacts business in New York and derive substantial revenue from goods sold in New York. Upon information and belief, Defendants intend to sell their MIXX flavored malt beverages in this District.

10. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b).

**THE MXD TRADEMARK**

11. Mark Anthony is the creator behind several well-known and popular alcoholic beverages, including the famous MIKE’S line of hard fruit flavored malt beverages (*i.e.*, MIKE’S Hard Lemonade), the WHITE CLAW line of hard seltzer flavored malt beverages, and the CAYMAN JACK line of Margarita-flavored malt beverages.

12. A malt beverage is a fermented drink where the alcoholic content is derived from the grain of the barley plant, which is malted before it is processed. Beer is one example of a malt beverage. Other alcoholic drinks also can be made using a malt base, with natural or artificial flavors added to create a taste profile that differs from

traditional beer. Flavored malt beverages, such as hard seltzer, ready-to-drink cocktails, hard lemonade, and hard tea, have grown in popularity among consumers in recent years.

13. The MXD brand is Mark Anthony's cocktail-flavored line of malt beverages. Mark Anthony has sold its MXD canned malt beverages in the United States since 2018, and owns Federal Trademark Registration No. 5,782,343, for MXD for use in connection with prepared alcoholic cocktails and flavored alcoholic malt coolers.

14. MXD canned alcoholic beverages are sold in convenience stores such as 7-Eleven, QuickStop, Wawa, Circle K, Stop N Go; gas stations such as Racetrac and Speedway; liquor stores, grocery stores, and restaurants. Since Mark Anthony launched the MXD line in 2018, it has sold over 3 million case equivalents

#### **DEFENDANTS' WRONGFUL CONDUCT**

15. Defendants have announced plans to launch flavored malt beverages under the confusingly similar name MIXX. Defendants have promoted MIXX flavored malt beverages on their website at <[www.mixx.bangstg.com](http://www.mixx.bangstg.com)>.

16. Defendants' website promotes MIXX flavored malt beverages in cocktail flavors such as Piña Colada, Frosé Rosé, and Lemon Drop.

17. News reports have stated that Defendants will sell MIXX flavored malt beverages in 12- and 16-ounce cans in convenience stores, including 7-Eleven and QuickTrip, both chains where Mark Anthony sells its MXD flavored malt beverages..

18. Confusion between MIXX and MXD beverages is particularly likely given the similarity between the marks and the intersection of different lines of malt beverages. Indeed, many companies sell malt beverages as well as other alcoholic beverages such as spirits and wine. For example, Barefoot sells both Barefoot wine and

Barefoot hard seltzer flavored malt beverages; Brown Forman sells both Jack Daniels whiskey and Jack Daniels Country Cocktails flavored malt beverages; and Smirnoff sells Smirnoff vodka, Smirnoff Ice flavored malt beverages, and Smirnoff Spiked Sparkling Seltzer flavored malt beverages. Similarly, the same company often sells multiple malt beverage products. For example, as noted above, Mark Anthony sells several lines of flavored malt beverages; similarly, beer and hard seltzer flavored malt beverages both are sold under the Budweiser, Corona, and Michelob brands.

19. Malt beverages (including beers as well as flavored malt beverages such as hard seltzers, ready-to-drink cocktails, hard lemonades and hard teas) are sold in the same convenience stores and other retail outlets. Consumers seeing cans of MXD cocktail-flavored malt beverages and MIXX cocktail-flavored hard seltzer malt beverages will be confused into believing that the two brands come from, are manufactured by, are sponsored by, or are associated or affiliated with, the same company.

20. Unlike Defendants, other companies that sell malt beverages marketed as flavored hard seltzer do so under names that are not confusingly similar to MXD, such as Barefoot, Smirnoff, Truly, Bon Viv, Vizzy, Arctic Chill, Mighty Swell, Fick's, and Henry's, among others. As the junior users, it was Defendants' obligation to select a name for their new hard seltzer malt beverage that is not confusingly similar to the registered trademarks for other malt beverages and sold in United States commerce.

21. Defendants appear to have plans to expand their confusingly similar MIXX mark to other ready-to-drink flavored malt beverage cocktails. Defendants' website stated that the MIXX trademark is owned by, and is used by Defendants with permission from, Entourage IP Holdings, LLC ("Entourage IP"), which has the same

business address as Defendants in Weston, Florida. Entourage IP's United States intent-to-use trademark application for MIXX (App. Ser. No. 90/286,761) states that, in addition to its intent to use the MIXX mark for hard seltzer, Entourage IP has a bona fide intent to use the mark for "prepared alcoholic cocktail[s]."

22. If Defendants are not enjoined from infringing Mark Anthony's MXD mark, Mark Anthony will suffer irreparable harm, and the goodwill that Mark Anthony has spent considerable time, effort, and resources cultivating will be eroded.

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

23. Mark Anthony repeats and realleges each and every allegation in the foregoing paragraphs as if fully set forth herein.

24. The MXD trademark is registered with the USPTO as Trademark Registration No. 5,782,343.

25. The federally-registered MXD trademark is valid, subsisting, used in commerce, and inherently distinctive.

26. Defendants' use of the MIXX trademark for flavored malt beverages is likely to cause confusion with Mark Anthony's federally-registered MXD trademark for prepared alcoholic cocktails and flavored alcoholic malt coolers. In particular, Defendants' manufacture, distribution, advertising and sale of its MIXX flavored malt beverages is likely to cause confusion and mistake and to deceive consumers as to the source, origin, or sponsorship of its product. Consumers seeing a flavored malt beverage marketed under the MIXX mark, especially in flavors common to mixed cocktails, will

believe that MIXX flavored malt beverages are sponsored by, associated with, or otherwise affiliated with creator of MXD flavored malt beverages, or vice versa.

27. Defendants' use of this confusingly similar trademark is likely to cause irreparable injury to the reputation of Mark Anthony as well as the goodwill developed by Mark Anthony for its products and the MXD brand. The extent of this harm cannot be ascertained at this time, leaving Mark Anthony without any adequate remedy at law.

28. Defendants' current use of the MIXX trademark on its website, and planned use of the MIXX trademark for flavored malt beverages constitutes infringement of the federally-registered MXD trademark in violation of Section 32 of the Lanham Act, 15 U.S.C. § 1114.

29. By reason of the foregoing, Mark Anthony is entitled to injunctive relief against Defendants, restraining them from further acts of infringement of Mark Anthony's federally-registered trademark and, after trial, recovery of any damages (to the extent calculable) proven to have been caused by reason of Defendants' aforesaid acts.

**COUNT TWO**  
**(Trademark Infringement**  
**Under Section 43(a) of the Lanham Act)**

30. Mark Anthony repeats and realleges each and every allegation in the foregoing paragraphs as if fully set forth herein.

31. The MXD trademark is used in commerce in the United States.

32. Defendants' use of the MIXX trademark for flavored malt beverages is likely to cause confusion with Mark Anthony's common law MXD trademark for prepared alcoholic cocktails and flavored alcoholic malt coolers. In particular, Defendants' manufacture, distribution, advertising and sale of its MIXX flavored malt

beverages is likely to cause confusion and mistake and to deceive consumers as to the source, origin, or sponsorship of its product. Consumers seeing a flavored malt beverage marketed under the MIXX mark, especially in flavors common to mixed cocktails, will believe that MIXX flavored malt beverages are sponsored by, associated with, or otherwise affiliated with creator of MXD flavored alcoholic beverages, or vice versa.

33. Defendants' use of this confusingly similar trademark is likely to cause irreparable injury to the reputation of Mark Anthony as well as the goodwill developed by Mark Anthony for its products and the MXD brand. The extent of this harm cannot be ascertained at this time, leaving Mark Anthony without any adequate remedy at law.

34. Defendants' current use of the MIXX trademark on its website, and planned use of the MIXX trademark for flavored malt beverages, constitutes infringement of the common law MXD trademark in violation of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a).

35. By reason of the foregoing, Mark Anthony is entitled to injunctive relief against Defendants, restraining them from further acts of infringement of Mark Anthony's common law trademark and, after trial, recovery of any damages (to the extent calculable) proven to have been caused by reason of Defendants' aforesaid acts.

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

36. Mark Anthony repeats and realleges each and every allegation in the foregoing paragraphs as if fully set forth herein.

37. The aforementioned acts of Defendants constitute trademark infringement and unfair competition in violation of New York law.



38. By reason of the foregoing, Mark Anthony is entitled to injunctive relief against Defendants, restraining them from any further acts of trademark infringement and, after trial, recovery of any damages (to the extent calculable) proven to have been caused by reason of Defendants' aforesaid acts.

**PRAYER FOR RELIEF**

WHEREFORE, Mark Anthony respectfully prays:

1. That Defendants and all those in active concert or participation with them (including, but not limited to, their officers, directors, agents, servants, wholesalers, distributors, retailers, employees, representatives, attorneys, subsidiaries, related companies, successors, assigns, and contracting parties) be temporarily, preliminarily, and then permanently enjoined and restrained from:

- i. manufacturing, distributing, shipping, offering for sale, or selling any flavored malt beverage or other alcoholic beverage, including but not limited to hard seltzer and cocktail-flavored alcoholic beverages, under the MXD or MIXX mark, or any trademark, trade name, or other name or designation, or any other marks, names or slogans that are confusingly similar to the MXD mark;
- ii. representing, by any means whatsoever, that any products manufactured, distributed, advertised, offered, or sold by Defendants are Mark Anthony's products or vice versa, and from otherwise acting in a way likely to cause confusion, mistake, or deception on the part of purchasers or consumers as to the origin or sponsorship of such products; and

2. That Defendants and all those in active concert or participation with them (including, but not limited to, their officers, directors, agents, servants, wholesalers, distributors, retailers, employees, representatives, attorneys, subsidiaries, related companies, successors, assigns, and contracting parties) take affirmative steps to dispel such false impressions that heretofore have been created by their use of the MIXX trade name, including, but not limited to, recalling from any and all channels of distribution any and all infringing products and associated materials.

3. That Defendants account to Mark Anthony for their profits and any damages sustained by Mark Anthony, to the extent calculable, arising from the foregoing acts of trademark infringement, false designation of origin, and deceptive acts and practices.

4. That, in accordance with such accounting, Mark Anthony be awarded judgment for such profits, pursuant to 15 U.S.C. § 1117.

5. An award of Mark Anthony's actual money damages, trebled, pursuant to 15 U.S.C. § 1117.

6. That Mark Anthony have and recover its costs, including its reasonable attorneys' fees and disbursements in this action, pursuant to 15 U.S.C. § 1117.

7. That Defendants deliver up for destruction all infringing products in its possession or control and all means of making the same in accordance with 15 U.S.C. § 1118.

8. That Defendants file with the Court and serve on counsel for Mark Anthony within thirty (30) days after entry of any injunction issued by the Court in this action, a sworn written statement pursuant to 15 U.S.C. § 1116(a) setting forth in detail

the manner and form in which Defendants have complied with any injunction which the Court may enter in this action.

9. That Mark Anthony have such other and further relief as the Court may deem just and proper.

**JURY TRIAL DEMAND**

Mark Anthony demands a trial by jury on all claims as to which a jury trial may be had.

Dated: April 26, 2021  
New York, New York

DEBEVOISE & PLIMPTON LLP

By: /s/ David H. Bernstein  
David H. Bernstein  
(dhbernstein@debevoise.com)  
Jared I. Kagan  
(jikagan@debevoise.com)

919 Third Avenue  
New York, New York, 10022  
(212) 909-6696

*Attorneys for Plaintiff*  
*Mark Anthony International SRL*