

United States District Court
Southern District of New York

1:20-cv-01409-LJL

Akash Budhani, individually and on behalf
of all others similarly situated,

Plaintiff,

- against -

Monster Energy Company,

Defendant

Third Amended
Class Action Complaint

Plaintiff by attorneys allege upon information and belief, except for allegations pertaining to plaintiff, which are based on personal knowledge:

1. Monster Energy Company (“defendant”) manufactures, distributes, markets, labels and sells espresso beverages made from real coffee and real cream and purporting to have a non-negligible amount of real extract of vanilla under their Monster brand (“Vanilla Cream Monster” or “Product”).
2. The relevant front label statements include “Espresso,” “Energy Espresso,” “Vanilla Cream” and “Triple Shot.”
3. The front label images include six coffee beans, a “shot” of actual espresso and an image of the vanilla flower and two cured vanilla beans.



4. The imagery on the Product label and its context suggest that the Product contains a non-negligible amount of extract from vanilla beans.

5. The top of the can features the language “Espresso” next to the brand name “Monster.”

6. The representation “Vanilla Cream” is printed in all capital letters next to the Monster “Claw” logo in the middle of the can.

7. The can contains a large image of a vanilla flower just below the words “Vanilla Cream,” conveying that the flavor of vanilla comes at least in part from the bean that is attached to the flower.

8. This message is reinforced by the graphics of the packaging and language and imagery that is given equivalent focus on the can.

9. On the right side, the can states, “Triple Shot” above images of coffee beans.

10. The words “Vanilla Cream” are written in the same size, font, and color, as well as printed at the same level, as “Triple Shot.”

11. The size and flower of the vanilla flower is equivalent in prominence to the coffee beans and shot of espresso.

12. The images of the coffee beans, cup of espresso, and the words “Espresso,” “Triple Shot” and “Cream” inform consumers that the Product contains these ingredients – three shots of espresso derived from real coffee beans and actual cream, not substitutes for coffee beans or cream.

13. The side panel of the Product confirms it is not merely an energy drink but an actual coffee drink that is made with three shots of espresso and real cream, and that the energy blend only enhances the other ingredients:

Italians are famous for artistic masterpieces, fast cars, fashion, beautiful women and the perfect espresso. The latest trend is the Macchiato, a blend of strong espresso and milk.

We liked the idea so much we traveled to Europe to create our latest *coffee*, Espresso Monster. *Three shots of espresso (ya 3)* blended with *milk* and enhanced with Monster’s Espresso Energy Blend.

(emphasis added).

14. To reasonable consumers, these impressions could be confirmed by the text on the side of the can which conveys that the Product is not just an energy drink but a coffee drink, and that it contains both real espresso and real cream and that the energy blend only enhances the other ingredients:

15. The ingredient list confirms a reasonable consumer’s understanding of the Product, by listing “Brewed Imported Espresso Coffee (Water, Coffee)” and “Cream.”



INGREDIENTS: BREWED IMPORTED ESPRESSO COFFEE (WATER, COFFEE), SKIM MILK, SUGAR, CREAM, GLUCOSE, **NATURAL FLAVORS**, TAURINE, NIACINAMIDE (VIT. B3), PYRIDOXINE HYDROCHLORIDE (VIT. B6).

16. The ingredients also include “Skim Milk” and “Sugar,” which are typically added to espresso.

17. Several facts support why the representations, in context, cause consumers to expect a non-negligible amount of vanilla derived from vanilla beans.

18. First, the Product’s ingredient list indicates it contains real espresso, derived from actual coffee beans, shown in the pictures on the front label by the shot of espresso and six coffee beans.

19. The Product also contains real cream, referenced prominently on the front label – “Vanilla Cream,” and “Cream” is indicated on the ingredient list.

20. Second, the imagery on the Product label and its context suggest that the Product contains extract from a vanilla bean.

21. Since the Product obviously contains a non-negligible amount of espresso from real coffee beans and cream, which are pictured and referenced on the front label, consumers will likewise expect a non-negligible amount of real extract from the vanilla bean.

22. While the Product contains a mixture of ingredients that contribute to its function as an energy drink – taurine, niacinamide (Vit. B3), pyridoxine hydrochloride (Vit. B6) – almost all the energy and caffeine it provides are from the real coffee ingredients.

23. Therefore, it is reasonable to expect a non-negligible amount of its vanilla taste to come from extract from vanilla beans.

24. If the ingredient list did not include real coffee and real cream, consumers might not reach this conclusion.

25. However, because the ingredient list confirms the presence of real coffee and real cream in non-de minimis amounts, consumers will expect the same for extract from vanilla beans.

26. That the ingredient list does not include the term “vanilla extract” is not sufficient for consumers to somehow be aware that the Product is not promising any amount of vanilla.

27. “Natural Flavor” refers to an ingredient which contains some extract from vanilla.

28. However, the exact proportion of extract of vanilla beans contained in the “Natural Flavor” is unknown to consumers, but they will reasonably expect a non-negligible amount, based on the other representations and overall context.

29. The Product’s label conveys that it contains extract from vanilla beans.

30. However, extract from vanilla beans is not present in greater than trace amounts.

31. Consumers will reasonably expect a non-negligible amount of extract from vanilla because companies “are dropping artificial flavors, coloring, preservatives and other additives with scary names and focusing more on natural, wholesome and fresh ingredients.”¹

32. Nielsen has reported that 62% of consumers say they try to avoid artificial flavors.²

33. New Hope Network concluded that “71% of consumers today are avoiding artificial

¹ Jeff Daniels, [Why your favorite foods may be getting new recipes](#), CNBC, September 19, 2016

² Nielsen, [Reaching For Real Ingredients: Avoiding The Artificial](#), Sept. 6, 2016.

flavors.”³

34. Label Insight determined that 76% of consumers avoid artificial flavors in favor of flavors from actual ingredients like extracts from vanilla beans.⁴

35. As “natural, organic and better-for-you trends proliferate, demand has flourished for naturally sourced vanilla.”⁵

36. Manufacturers have responded, “by transitioning from artificial to natural ingredients,” including “natural vanilla ingredients.”⁶

37. Plaintiff expected that the amount of vanilla extract was sufficient to provide a vanilla taste to the Product, even if he did not expect all or most of the vanilla taste was from non-vanilla sources.

38. This conclusion is consistent with a consumer survey of four hundred (400) consumers finding that almost sixty-four (63.5) percent of expected, based on the representations of the vanilla beans and vanilla flower, pictures of a cup of espresso and coffee beans, and the statements, “Espresso,” “Triple Shot” and “Vanilla Cream.”

39. Fifty-six percent of those asked indicated that based on the representations, they expected a non-negligible amount of vanilla.

40. However, the Product contains a negligible amount of vanilla.

41. Defendant’s branding and packaging of the Product is designed to – and does – deceive, mislead, and defraud plaintiff and consumers.

42. Defendant sold more of the Product and at higher prices than it would have in the

³ Alex Smolokoff, [Natural color and flavor trends in food and beverage](#), Natural Products Insider, Oct. 11, 2019.

⁴ Thea Bourianne, [Exploring today’s top ingredient trends and how they fit into our health-conscious world](#), March 26-28, 2018.

⁵ Amanda Del Buono, [Suppliers utilize cost-effective vanilla ingredient solutions](#), Beverage Industry (last updated Oct. 14, 2016).

⁶ David Andrews, [Synthetic ingredients in Natural Flavors and Natural Flavors in Artificial flavors](#), Environmental Working Group (EWG).

absence of this misconduct, resulting in additional profits at the expense of consumers like plaintiff.

43. The value of the Product that plaintiff purchased and consumed was materially less than its value as represented by defendant.

44. Had plaintiff and class members known the truth, they would not have bought the Product or would have paid less for them.

45. As a result of the false and misleading labeling, the Product are sold at a premium price, approximately no less than \$3.89 per unit, compared to other similar products represented in a non-misleading way, and higher than the price of the Product if it were represented in a non-misleading way.

Jurisdiction and Venue

46. Jurisdiction is proper pursuant to Class Action Fairness Act of 2005 (“CAFA”). 28 U.S.C. § 1332(d)(2)

47. Plaintiff Akash Budhani is a citizen of New York.

48. Defendant Monster Energy Company, is a Delaware corporation with a principal place of business in Corona, Riverside County, California and is a citizen of California.

49. Diversity exists because plaintiff Akash Budhani and defendant are citizens of different states.

50. Upon information and belief, sales of the Product in New York exceed \$5 million per year, exclusive of interest and costs, and the aggregate amount in controversy exceeds \$5 million per year.

51. Venue is proper in this judicial district because a substantial part of the events or omissions giving rise to the claim occurred in this District, *viz*, the decision of plaintiff to purchase

the Product and the misleading representations and/or their recognition as such.

52. This court has personal jurisdiction over defendant because it conducts and transacts business, contracts to supply and supplies goods within New York.

Parties

53. Plaintiff Akash Budhani is a citizen of New York, New York, New York County,

54. Defendant Monster Energy Company is a Delaware corporation with a principal place of business in Corona, California, Riverside County and is a citizen of California.

55. Defendant is one of the largest sellers of energy drinks in the world.

56. Most of defendant's beverages contain unpronounceable ingredients made in a lab to boost energy and alertness.

57. Defendant's Vanilla Cream Espresso is distinctly different, as it promises ingredients that are recognizable to consumers – espresso from real coffee beans, real cream and a non-negligible amount of extract from vanilla beans.

58. The Product is available to consumers from retail and online stores of third-parties in cans of 8.4 OZ.

59. Plaintiff Akash Budhani purchased the Product on one or more occasions and at stores including, in the spring of 2020, at Whole Foods Market, 808 Columbus Ave, New York, NY 10025 and at local delis and/or bodegas, and chain drugstores.

60. Plaintiff bought the Product at or exceeding the above-referenced price because he wanted an espresso-type drink which had real coffee and real cream, in addition to a non-negligible amount of extract from vanilla beans.

61. Plaintiff was deceived by and relied upon the Product's deceptive labeling because the Product had a negligible amount of vanilla.

62. Plaintiff would not have purchased the Product in the absence of Defendant's

misrepresentations and omissions.

63. The Product was worth less than what Plaintiff paid for it and he would not have paid as much absent Defendant's false and misleading statements and omissions.

64. Plaintiff intends to, seeks to, and will purchase the Product again when he can do so with the assurance that Product's labels are consistent with the Product's components.

Class Allegations

65. The class will consist of all purchasers of the Product who reside in New York during the applicable statutes of limitations.

66. Plaintiff seeks class-wide injunctive relief based on Rule 23(b) in addition to a monetary relief class.

67. Common questions of law or fact predominate and include whether defendant's representations were and are misleading and if plaintiff and class members are entitled to damages.

68. Plaintiff's claims and basis for relief are typical to other members because all were subjected to the same unfair and deceptive representations and actions.

69. Plaintiff is an adequate representative because his interests do not conflict with other members.

70. No individual inquiry is necessary since the focus is only on defendant's practices and the class is definable and ascertainable.

71. Individual actions would risk inconsistent results, be repetitive and are impractical to justify, as the claims are modest relative to the scope of the harm.

72. Plaintiff's counsel is competent and experienced in complex class action litigation and intends to protect class members' interests adequately and fairly.

73. Plaintiff seeks class-wide injunctive relief because the practices continue.

New York General Business Law (“GBL”) §§ 349 & 350
(Consumer Protection Statute)

74. Plaintiff incorporates by reference all preceding paragraphs.

75. Plaintiff and class members desired to purchase and consume products which were as described and marketed by defendant and expected by reasonable consumers, given the product type.

76. Defendant’s acts and omissions are not unique to the parties and have a broader impact on the public.

77. Defendant misrepresented the substantive, quality, compositional and/or organoleptic attributes of the Product by giving consumers the impression the Product had a non-negligible amount of vanilla.

78. Plaintiff relied on the statements, omissions and representations of defendant, and defendant knew or should have known the falsity of same.

79. Plaintiff and class members would not have purchased the Product or paid as much if the true facts had been known, suffering damages.

Breaches of Express Warranty and Implied Warranty of Merchantability

80. Plaintiff incorporates by reference all preceding paragraphs.

81. The Product was manufactured, labeled and sold by defendant or at its express directions and instructions, and warranted to plaintiff and class members that it possessed a non-negligible amount of vanilla

82. Defendant had a duty to disclose and/or provide non-deceptive descriptions and marketing of the Product.

83. This duty is based, in part, on defendant’s position as one of the most recognized companies in the nation in this sector.

84. Plaintiff provided or will provide notice to defendant, its agents, representatives, retailers and their employees.

85. Defendant received notice and should have been aware of these misrepresentations due to numerous complaints by consumers to its main office over the past several years regarding the Product, of the type described here.

86. The Product did not conform to its affirmations of fact and promises due to defendant's actions and were not merchantable.

87. Plaintiff and class members would not have purchased the Product or paid as much if the true facts had been known, suffering damages.

Unjust Enrichment

88. Plaintiff incorporates by reference all preceding paragraphs.

89. Defendant obtained benefits and monies because the Product was not as represented and expected, to the detriment and impoverishment of plaintiff and class members, who seek restitution and disgorgement of inequitably obtained profits.

Jury Demand and Prayer for Relief

Plaintiff demands a jury trial on all issues.

WHEREFORE, Plaintiff prays for judgment:

1. Declaring this a proper class action, certifying plaintiff as representative and the undersigned as counsel for the class;
2. Entering preliminary and permanent injunctive relief by directing defendant to correct the challenged practices to comply with the law;
3. Injunctive relief to remove, correct and/or refrain from the challenged practices and representations, and restitution and disgorgement for members of the class pursuant to the applicable laws;

4. Awarding monetary damages and interest pursuant to the common law and other statutory claims;
5. Awarding costs and expenses, including reasonable fees for plaintiff's attorneys and experts; and
6. Other and further relief as the Court deems just and proper.

Dated: April 12, 2021

Respectfully submitted,

Sheehan & Associates, P.C.

/s/Spencer Sheehan

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