BREAKOUT 6B: SURVEYS IN FALSE ADVERTISING CASES
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- *Monster Energy Co. v. Vital Pharmaceuticals Inc. et al.*, Case No. 5:18-cv-01882 (C.D. Cal. 2018)
    - Plaintiff Monster Energy Co. alleged that Vital Pharmaceuticals was falsely advertising the super creatine ingredient of the Bang energy drink as actual creatine. Monster claimed $272 million in lost profits and also alleged that it lost about $21.2 million from the purported shelf space theft and over $4.1 million from the trade secrets theft. The case resulted in a verdict in Monster's favor for a total of $293 million against VPX Sports.
    - VPX Sports stated that its super creatine provided benefits similar to traditional creatine which allegedly enhances performance, muscle strength, and is believed to improve brain function. But VPX Sports failed to provide studies to support the claims about the benefits of super creatine.
    - The court relied on Monster's consumer survey that showed about one in five sales of VPX's product Bang would have gone to Monster beverages but for the super creatine claim or if Bang buyers were more informed about the amount of super creatine in each can. The survey conducted was an online survey using Qualtrics.com and involved a nationwide sample of 18–64-year-old individuals who are likely to purchase energy drinks in the next three months. The target quota of 300 respondents for the survey was met.
    - The survey asked: (1) how they would describe the product to someone else; (2) what they thought the wording "super creatine" on the can meant; and (3) whether knowing that the product has super creatine in it made the person more likely to buy or less likely to buy the energy drink or whether would it make no difference. The control cell included the following questions: "Does the bar code make you more likely to buy or less likely to buy this brand of energy drink or would it make no difference to you and why?" The survey results showed that over one-third of prospective energy drink purchasers (34.9%) understood VPX's claim to mean that its bang product included more creatine and that over one-

quarter of respondents (26.4%) were more likely to purchase BANG because of super creatine.

- *Becerra v. Dr Pepper/Seven Up, Inc.*, 945 F.3d 1225 (9th Cir. 2019)
    - Plaintiff Share Becerra argued in her putative class action suit that consumers expect Diet Dr Pepper to be a healthier alternative when studies allegedly show many people end up consuming more calories when they drink diet soda.
    - The suit stems from a dispute back in 2017, when Becerra presented scientific evidence that shows non-nutritive sweeteners, like aspartame in Diet Dr Pepper, interferes with the body's ability to properly metabolize calories leading to weight gain and an increased risk of diabetes, cardiovascular disease, and other health issues.
    - In her third amended complaint, Becerra introduced a survey with 400 California soft-drink consumers and 400 nationwide soft-drink consumers with four questions concerning consumers expectations of losing weight: (1) Do you expect soft drinks labeled "diet" to help you lose weight? (2) Do you expect soft drinks labeled "diet" to help you maintain/not affect your weight? (3) Do you expect soft drinks labeled diet will make you gain weight? or (4) Do you not have an expectation of what "diet" will do to your weight? Only 12.5 percent of California consumers expected diet soft drinks to help them lose weight (compared to 15 percent nationwide), while 63.3 percent of California consumers believed that diet soft drinks help maintain their weight or not affect it (compared to 62 percent nationwide).
    - The Ninth Circuit ruled that the survey did not address or shift the prevailing understanding of what a reasonable consumer would understand the word "diet" to mean or that reasonable consumers were misled by the term "diet." The court ultimately ruled that "no reasonable consumer would assume that Diet Dr Pepper's use of the term 'diet' promises weight loss or management." The court stated that just because some consumers may unreasonably interpret the term differently does not mean that the use of diet in a soda's brand name was false or deceptive.

- *Ackerman v. Coca-Cola Co. et al*, Case No. 1:09-cv-00395 (E.D.N.Y. Jan. 29, 2009)
    - Coca-Cola settled allegations in New York federal court that it falsely advertised Vitaminwater's sugar content. Coca-Cola was told to place the words "with sweeteners" on two panels of the product's labeling and the number of calories per bottle on the product's main display panel.
    - Coca-Cola argued that it provided all the information on its sweeteners and amount of sugar on its FDA mandated label. The plaintiff, however, cited the FDA director stating that surveys have shown that "only 60% - 80% of food shoppers said that they'd read the food label before buying a new food." This supported the court's conclusion that a reasonable consumer may not read the nutritional label before every purchase and that the FDA label is not conclusive against the possibility that reasonable consumers may be misled.
    - Coca Cola challenged the claim that consumers sought a drink with no sugar and conducted a survey to identify why consumers bought vitamin water. The survey questioned a wide variety of Vitaminwater consumers on their reasons for purchasing Vitaminwater, including whether they knew it contained calories or if it contained sugar. The survey identified that: (1) consumers had more than 50 different reasons for buying Vitaminwater; (2) that 47.2% of respondents knew it contained calories; and (3) 58% of respondents thought Vitaminwater contained some form of sugar. The survey was used to support Coca Cola's opposition to the plaintiff's class certification and challenged the allegations regarding consumer confusion regarding the contents of Vitaminwater. But the court ultimately held the survey went to the merits and need not be considered for purposes of class certification.
- *Smith v. Keurig Green Mountain, Inc.*, Case No. 4:18-cv-06690 (N.D. Cal. 2018)
    - Class action suit brought against Keurig Green Mountain, Inc. regarding a recyclable claim on its single-serve coffee pods. The court claimed that although the pods were labeled recyclable, municipal recycling facilities were not properly equipped to handle the pods.

- The plaintiff contended that online studies stated that in 2014 alone, over 9.7 billion K-Cups were produced which is enough to circle the world 12.4 times. But allegedly most of those 9.7 billion K-Cups ended up in landfills because no end market existed to reuse the materials. The class action suit resulted in a settlement of $10 million for all members of the class.