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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92074702
Party	Defendant Bang Holdings Corp.
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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

PHD MARKETING, INC., a California corporation

Plaintiff,

v.

VITAL PHARMACEUTICALS, INC.; JHO INTELLECTUAL PROPERTY HOLDINGS, LLC; ELITE IP HOLDINGS, LLC; and DOES 1-10 INCLUSIVE,

Defendants.

Case No. 2:20-cv-04417-RSWL-JC

FIRST AMENDED COMPLAINT FOR:

(1) DECLARATORY RELIEF OF NO INFRINGEMENT OF A REGISTERED TRADEMARK UNDER 15 U.S.C. §1114;
(2) DECLARATORY RELIEF OF NO VIOLATION UNDER 15 U.S.C. §1125(A);
(3) CANCELLATION OF FEDERAL REGISTRATIONS NOS. 4,985,030 AND 4,990,091;
(4) INTERFERENCE WITH CONTRACTUAL RELATIONS;
(5) INTERFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE;
(6) CIVIL CONSPIRACY; AND
(7) TRADEMARK INFRINGEMENT [15 U.S.C. §1025(A)];
(8) CANCELLATION OF FEDERAL REGISTRATIONS NOS. 4,744,797; 4,744,798; 4,929,022; 4,929,023; 4,929,024; AND

(9) UNFAIR COMPETITION [CAL. BUS. & PROF. CODE § 17200]

DEMAND FOR JURY TRIAL

PhD Marketing, Inc. ("**PhD**" or "**Plaintiff**"), by and through its attorneys of record, complains against Defendants Vital Pharmaceuticals, Inc. ("**Vital**"), JHO Intellectual Property Holdings, LLC ("**JHO**"), Elite IP Holdings, LLC ("**Elite**") and DOES 1 through 10 ("**Does**") (VITAL, JHO, Elite, and DOES are collectively "**Defendants**"), alleging as follows:

INTRODUCTION AND SUMMARY OF CASE

1. This case represents a good faith attempt by PhD to protect itself and its customers from the anti-competitive tactics of Defendants. For well about seven years, PhD and Defendants co-existed without complaint, as PhD used its BANG marks to sell e-cigarette products while Defendants used a distinguishable BANG mark to promote "health" supplements and energy drinks, a completely different industry with a different target market. That changed in May 2020, when Defendants and their owner and CEO, Jack Owoc ("**Owoc**") began executing on their plan to start a new e-cigarette business. At that time, and by virtue of their very different products and markets, Defendants had no priority as to the BANG mark within the e-cigarette industry. That made little difference to Defendants who, using one of their favorite tactics – threatening bogus trademark litigation in "a thinly-veiled effort to stifle legitimate competition"[1] – began threatening PhD's customers for the specific purpose of disrupting and destroying PhD's business, thereby opening the way for Defendants to move in and take those customers for themselves.

PARTIES

2. Plaintiff PhD is a California corporation headquartered and doing business in the County of Los Angeles.

3. Defendant Vital is a Florida corporation with its principal office located at 1600 N. Park Drive, Weston, FL 33326. On information and belief, Vital does business as

[1] *Vital Pharm. Inc. v. American Body Building Products*, 510 F.Supp.2d 1043, 1052 (S.D. Fla. 2007).

"VPX Sports" and identifies its website as www.vpxsports.com. As discussed below, Vital regularly does substantial business in the State of California and the County of Los Angeles, and has numerous other contacts with the State, including distribution and sales operations, warehouses and employees located here.

4. Defendant JHO is a single member Florida limited liability company with its principal office located at 1600 N. Park Drive, Weston, FL 33326. As discussed below, JHO is apparently a shell entity - owned and controlled by Owoc – which exists for the sole purpose of holding certain of Vital's intellectual property assets.

5. Defendant Elite is also a single member Florida limited liability company with its principal office located at 1600 N. Park Drive, Weston, FL 33326. On information and belief, Elite – like JHO – is a shell entity owned and controlled by Owoc.

6. DOES 1 through 10, inclusive, are unknown to PhD, who therefore sues said Defendants by such fictitious names. PhD will ask leave of Court to amend this Amended Complaint and insert the true names and capacities of said Defendants when the same have been ascertained. PhD is informed and believes and, upon such, alleges that each of the Defendants designated here as a "Doe" is legally responsible in some manner for the events and happenings herein alleged, and that PhD's damages as alleged herein were proximately caused by such Defendants.

A. Defendants are Alter-Egos

7. All three Defendants are solely owned and operated by Owoc. Vital is the central entity promoting and distributing "health" supplements and energy drinks under the BANG mark. JHO is essentially a shell entity which exists for the sole purpose of holding certain of Vital's trademark registrations. Elite is also a shell entity which exists for the sole purpose of holding certain of Vital's trademark applications.

8. By his own account, Owoc is an "integral part of VPX's day-to-day operations," who personally oversees "all of its corporate operations, including … product development, testing, quality control, manufacturing, distribution, graphics, marketing, media and sales." As an example of Defendants' general disregard for any distinction

between Owoc and these individual entities, Owoc boasted in a video promoting ***Vital's*** launch of a new product that "***I [Jack Owoc]*** am the sole and exclusive owner of the USPTO Registered REIGN® Trademark!!," even though that particular mark was in fact owned by ***JHO***.

9. Owoc is also identified as (1) Vital's owner and CEO, (2) JHO's sole manager, and (3) Elite's sole manager, meaning that one man controls the day-to-day operations of all three entities. Neither JHO nor Elite seem to have offices of their own, but rather both list the same corporate address as Vital. JHO's "authorized representative" is also identified as Vital's Secretary; and JHO, Elite and Vital all share the same registered agent.

10. More critically, all three entities have conspired through a coordinated effort to engage in the tortious conduct complained of herein.

JURISDICTION AND VENUE

A. This Court Has Subject Matter Jurisdiction In This Dispute

11. This is a civil action primarily arising against Defendants for declaratory relief (28 U.S.C. §2201-02) for non-infringement of Defendants' alleged rights under the Lanham Act (15 U.S.C. §§ 1051 *et seq.*). PhD also seeks relief against Defendants for the assertion of bad faith claims designed to interfere with PhD's business and to steal PhD's customers for Defendants' own new business, resulting in severe harm to PhD, some of which may become irreversible and non-remediable by way of monetary compensation. Finally, PhD seeks relief against Defendants for infringement of PhD's rights under the Lanham Act (15 U.S.C. §§ 1051 *et seq.*).

12. This court has subject matter jurisdiction under 28 U.S.C. §§ 1331 and 2201-02 (Federal Declaratory Judgment Act) because of claims involving questions of rights and responsibilities pursuant to federal trademark laws (the Lanham Act), claims for federal trademark infringement, and pendant jurisdiction over the remaining claims pursuant to 28 U.S.C. § 1367.

B. Defendants Are Subject To General And Specific Jurisdiction In This Court

13. Defendants are subject to the general and specific personal jurisdiction of this Court because of their extensive contacts with the State of California, including their actions as alleged in this Amended Complaint.

14. PhD is a California-based entity, with over fifty percent of its sales of the products at issue taking place in California, primarily to smoke shops and other specialty locations. Accordingly, its contractual and customer relationships are indelibly tied to California. Defendants' deliberate and tortious interference with those contractual and economic relationships in California, including the interference with PhD's relationship with at least ***seven*** of its current, California customers (some of which are distributors to local retailers), therefore caused injury within the State.

15. Moreover, Defendants' tortious conduct with respect to PhD's customers is not Defendants' only connection to California. Rather, Defendants regularly conduct business within the State, including the distribution and sales of their products in California, marketing directed at the State, and the maintaining of a network of employees, representatives, distributors, and sales personnel in California.

16. Defendants themselves claim to have substantial sales in California and to hold nearly a 10% share of the West Coast energy drink market with respect to their products marketed under the BANG mark. Defendants' products are sold throughout the state, primarily in retail locations such as grocery stores and health-focused locations such as vitamin and supplement shops.

17. As part of their operations, Defendants own or lease at least two warehouses in Ontario, California and Los Angeles, California.

18. Defendants also employ numerous individuals in California, including warehouse loaders, marketing individuals tasked with local marketing efforts and sales personnel accountable for "in store execution" within stores selling Defendants' products in the State.

19. All of these contacts apply equally to JHO, Elite, and Vital because of their ties to the BANG trademark. JHO and Elite both own numerous trademark applications and registrations claiming ownership of marks containing or comprising the mark BANG for a variety of products and services, including energy drinks.[2] Vital claims to be the exclusive licensee of the mark BANG as used on energy drinks. Thus, JHO, Elite, and Vital each claim ties to the alleged ownership or use of the mark BANG on energy drinks, which are sold in this jurisdiction - JHO and Elite through the contradicting claims of ownership of BANG marks, and Vital through its claims of being the exclusive licensee of the BANG marks.

20. Defendants also regularly utilize the benefits of California' judicial system. Over the past several years, Defendants have been or are currently parties to no less than twenty-one lawsuits in California, including fifteen in this very district. On at least two of these occasions, Defendants themselves are the plaintiffs and specifically chose to file suit in this judicial district. Indeed, Vital previously litigated over trademark usage of the mark BANG in the Central District of California as Case No. 2:2009-cv-06551-MMM.

21. JHO and Elite are further tied to California because they are effectively the alter egos of Vital for jurisdictional purposes. Accordingly, Vital's numerous contacts with California apply with equal force to JHO and Elite.

22. Indeed, the entire Vital enterprise – including all three of these entities – is essentially Owoc's business. By his own account, he is an "integral part of VPX's day-to-day operations," who personally oversees "all of its corporate operations, including … product development, testing, quality control, manufacturing, distribution, graphics, marketing, media and sales." As an example of Defendants' general disregard for any distinction between Owoc and these individual entities, Owoc boasted in a video promoting ***Vital's*** launch of a new product that "***I [Jack Owoc]*** am the sole and exclusive owner of the USPTO Registered REIGN® Trademark!!," even though that particular mark was in fact

[2] Compare U.S. Trademark Application Serial No. 88844605 for JHO and Serial Nos. 88947042 and 90206381 for Elite.

owned by ***JHO***.

23. Owoc is also identified as (1) Vital's owner and CEO, (2) JHO's sole manager, and (3) Elite's sole manager, meaning that one man controls the day-to-day operations of all three entities. Neither JHO nor Elite have offices of their own, but rather both list the same corporate address as Vital. JHO's "authorized representative" is also identified as Vital's Secretary; and JHO, Elite and Vital all share the same registered agent.

24. On information and belief, and as further alleged in this Amended Complaint, Defendants conspired to each play a role in an anti-competitive scheme aimed at PhD and PhD's customers in California. Two entities (Vital and JHO) focused on swaying PhD's customers away under threat of bogus trademark litigation. The third co-conspirator (Elite) subversively attempted to acquire trademark rights to e-cigarettes without exposing its co-conspirators. On information and belief, these coordinated actions were undertaken for the specific purpose of disrupting and destroying PhD's business in California, thereby opening the way for Defendants to move in and take those customers for themselves.

25. As further detailed below, Defendants' intended or actual sale of e-cigarettes under the BANG mark infringes on PhD's marks BANG and VAPE WITH A BANG. The sale of said infringing products are likely to confuse the public and cause deception and mistake among the consuming public and trade by creating the erroneous impression that the Defendants' e-cigarette products have been manufactured, approved, sponsored, endorsed or guaranteed by, or in some way are affiliated with PhD in violation of the Lanham Act 43(a) [15 U.S.C. §1125(a)]. More than 50% of PhD customers, as well as end users, are in California. As such, a great deal of PhD's harm and significant consumer confusion is believed to occur in California.

C. Venue Is Proper

26. Venue is proper in this district under 28 U.S.C. §§ 1391(b) and (c) in that PhD's claims arise in this Judicial District, the Defendants may be found and transact business in this Judicial District, and/or the injuries suffered by PhD took place in this District.

FACTS COMMON TO ALL COUNTS

A. PhD's Smoking Articles Business and BANG Marks

27. PhD has been a manufacturer, importer, and distributor of smoker's articles since 2010. Over the years PhD has distributed a number of third-party marks as well as produced its own popular marks, such SQUARE®.

28. Beginning in 2013, PhD began using the marks BANG and VAPE WITH A BANG on e-cigarettes, e-hookahs, and other vaping devices (hereinafter, the marks BANG and BANG WITH A VAPE are referred to as "**PhD's BANG Marks**"), as depicted below.

Given that the word "BANG" is larger than the other wording, it is a separate and distinct mark as well as part of the mark VAPE WITH A BANG.

29. In late 2018, PhD launched a line of electronic cigarettes and related cartridges under the mark BANG. These electronic vaporizer products underwent a number of marketing refinements since their launch, finally settling on the look depicted below in June 2019:

(Hereinafter "**PhD's BANG E-Cigs**")

30. In February 2020, PhD filed for a U.S. Trademark Application Serial No. 88/786,734 for the mark BANG as used on electronic cigarettes in Class 34.

31. Despite wide distribution for about seven years, particularly in California, PhD has not received a single question or comment from anyone related to any potential confusion between PhD and Defendants – as they pertain to the products identified in Defendants' Asserted Marks - arising from the sale of PhD's BANG E-Cigs (except the claims from Defendants themselves discussed below).

B. Third-Party BANG Marks

32. The use of the term "bang" in marks in the field of tobacco-related products is not unique to PhD or any one entity. Prior to October 1, 2020, non-party Bang Holdings Corp. ("BHC") held five federal registrations for marks consisting or containing the word BANG for e-cigarettes and related tobacco products, one of which has a first use date of over five years ago. Currently, there are also use-based federal applications for the marks BANG AROMA and BANG POP AROMA filed by non-party SD Import, LLC for e-cigarettes (and other goods) as well as common law users such as BANG BANG VAPOR.

33. The BHC Marks are the subject of three TTAB cancellation proceedings. The first, filed on May 26, 2020 by JHO, is Cancellation Proceeding No. 92074327. The second, filed on July 2, 2020 by SD Import, LLC, is Cancellation Proceeding No. 92074702. The third, filed on August 7, 2020 by PhD, is Cancellation Proceeding No. 92074922. On information and belief, each petitioner has sought to at least investigate and/or purchase these registrations during the pendency of the above cancellation proceedings.

34. On information and belief, Defendants filed Proceeding No. 92074327 with the intention of pressuring BHC to sell the them the following registrations for BANGVAPS (Reg. No. 4,744,797); BANGVAPORIZERS (Reg. No. 4,744,798); BANG (Reg. No. 4,929,022); BANG VAPOR (Reg. No. 4,929,023), and BANG VAPOR CLUB

(Reg. No. 4,929,024) (collectively the "BHC Marks").[3]

C. Defendants' Energy Drink And Supplement Business And Conflicting Trademark Ownership Claims

35. Defendants sell health related products, including energy drinks, under the marks BANG and a B design. A screen capture of a page of Defendants' website showing a sample of Defendants' energy drink product is reproduced below:

36. JHO is listed as the owner of a number of federal trademark registrations, including the following:

U.S. TM Reg. No.	Mark	Int'l Class	Goods
3,545,129	Bang	005	Nutritional supplements and ready to drink nutritionally fortified beverages

[3] Defendants recently purchased the BHC Marks ***after*** this action was filed, implicitly admitting that they did not have rights to these marks in May 2020 when they threatened PhD's customers. Their attempts to establish some basis for their threats after the fact by acquiring the BHC Marks does not change the fact that the damage from their tortious and otherwise illegal conduct has already been done. Moreover, PhD has priority of use of its mark over the BHC Marks and, for the reasons set forth in the various cancellation proceedings, the BHC Marks are invalid in any event and therefore do not provide Defendants with the cover they quite apparently now believe they need.

4,985,030		005	Dietary and nutritional supplements; Nutritional supplements; Nutritionally fortified beverages
4,990,091		032	Energy drinks; Sports drinks

(Hereinafter "**Defendants' Asserted Marks**")

37. U.S. Trademark Registration Nos. 4,985,030 and 4,990,091 are not valid as a result of Defendants' false statements to the United States Patent and Trademark Office regarding the use and ownership of the marks. For example, Vital asserted that it began using the B design mark (Reg. Nos. 4,985,030 and 4,990,091) in or about 2015. This mark is effectively just a small component of the larger BANG mark Vital purportedly owned and was using on its energy drinks at that time. However, even though this mark was purportedly being used by Vital and is merely a component of another logo owned (at that time) by Vital, the registrations were filed by a completely different entity – Bang Energy, LLC – which claimed to be the owner of the mark. Thus, the wrong entity appears to have filed these two registrations, rendering them void ab initio.

38. The history gets even more convoluted with the introduction of JHO – the owner of Defendants' Asserted Marks - in 2016. The design mark registrations were apparently assigned from Bang Energy, LLC to JHO on August 30, 2016. But the underlying word mark for BANG was not assigned to JHO until July 31, 2017, nearly a year later. The specimens submitted to the USPTO in 2016 show that Vital was, at that time, seemingly using both marks on its products. In other words, for at least some period

of time, Vital was using marks owned by two different entities on the same product – highlighting questions of invalidity.

39. Elite adds an additional layer of potential validity issues. Elite's trademark applications include the mark BANG for, amongst other goods, bags, chewing gum, caffeine chewing gum, energy candy, jewelry, sunglasses, and e-cigarettes; BANG ENERGY for chewing gum and caffeine chewing gum; BANG GAMES, BANG GAMING, and BANG BITES for dietary supplemental drinks, nutritional supplements, energy drinks, and sports drinks; BANG SELTZER for alcoholic beverages; and B design for jewelry and sunglasses.[4] These conflicting ownership claims raise substantial validity questions with respect to Defendants' Asserted Marks on the grounds of abandonment, non-use, and fraud, among others.

D. Defendants' Unfair Competition And Unlawful Attempts To Take PhD's Customers For Their New E-Cigarette Venture

40. Vital holds itself out to have been created "[in] disgust for unscrupulous supplement manufacturers who were intentionally mislabeling their supplements and ripping the public off." In furtherance of that mission, Defendants provide written claims that their energy drinks are "brain and body fuel" and their supplements are a "master blaster to build muscle faster."

41. On September 4, 2018, Monster Energy (a Coca Cola subsidiary) filed a lawsuit against Vital. Monster contends that Vital's BANG energy drinks are falsely advertised as being able to cure Alzheimer's Disease, Parkinson's Disease, Huntington's Disease, and other forms of dementia. Monster also alleges that Vital lies to consumers with promises of Bang's "Super Creatine" ingredient that will "fight depression and reverse mental retardation." The case is currently pending in the Central District of California as Case No. 5:18-cv-01882-JGB-SHK.

[4]See U.S. Trademark Application Serial Nos. 90221701, 90210093, 90179627, 88958698, 90109562, 88907227, 90206381, 88861555, 88861532, 88947042, 90099452, 88958713, and 90109607.

42. Mr. Owoc is pictured below:

43. From PhD's launch of its BANG E-Cigs until May 2020, PhD and Defendants peacefully coexisted, which is unsurprising given the significant differences between their products and target markets. That changed in April 2020, when Owoc decided to get into the e-cigarette business and to take PhD's market for himself, rather than compete honestly.

44. On or about April 3, 2020, Owoc formed a new entity, Elite. The purpose of Elite was revealed a month later, when on May 8, 2020, Elite filed U.S. Trademark Application No. 88/907,227 to use the mark BANG for, amongst other things, e-cigarettes.

45. In the meantime, Owoc (through Defendants) decided to clear the market by any means necessary. Defendants up until this point (and even through today) never sold smoker's articles or any other similar products under the mark BANG. Their own products are significantly different, catering to entirely different customers in an entirely different market and marketed through entirely different means. Thus, Defendants' Asserted Marks have no priority within the field of e-cigarettes, as Defendants well knew, and there is little chance of customer confusion between the parties' respective products.

46. Furthermore, the mark BANG and marks featuring the single letter "b" are commonly used in ***both*** the beverage market and the smoking market, further reducing the chances that the average consumer would mistakenly purchase one believing it to be associated with the other.

47. Nevertheless, Defendants jointly decided to pursue one of their favorite tactics – asserting a frivolous trademark claim for an anticompetitive purpose – rather than be forced to start from scratch and compete against the already-existing BANG e-cigarettes sold by PhD and others.

48. Starting as early as May 9, 2020 – just one day after Elite filed its trademark application for BANG e-cigarettes – Vital and JHO sent a number of threatening letters to PhD's California customers, asserting that these customers were selling "unauthorized" products, and demanding they comply with a host of onerous requirements. The letters stated that Defendants were "prepared to take all steps necessary, including the filing and service of the Complaint attached (to the letter) … without further notice to you." True and correct copies of an exemplary letter and complaint are attached hereto at **Exhibits A & B** (internal exhibits omitted).

49. Notably, these letters were never sent to PhD, only PhD's customers. The reason for this is that Defendants were not prepared to address the merits of their dubious claims by confronting PhD. Rather, they were trying to scare PhD's customers into abandoning contractual obligations to PhD, and to direct them to Owoc's new venture instead.

50. Owoc and Defendants are no strangers to this strategy of threatening or pursuing meritless litigation to attack their competitors. For example, Vital once attempted to assert trade dress rights in "a standard, 8 ounce, stock aluminum bottle" in "a thinly-veiled effort to stifle legitimate competition, competition that is legal under the law" (*Vital v. American Body Building Products*, 510 F.Supp.2d at 1048-1052). Citing "the unconvincing trial testimony of the Plaintiff's CEO, Mr. Owoc [which] confirmed my belief that this case was commenced in bad faith for an anticompetitive purpose," the court chastised Vital at length, finding that its "tactics reveal that VPX really seeks to use the Lanham Act and the threat of litigation as a weapon to drive other RTD supplement makers out of the market. Rather than engage in a thorough investigation to see if there is a

colorable legal claim under the Lanham Act, Plaintiff chooses to immediately threaten potential competitors with costly litigation." *Id.* at 1052.

51. It is unclear how many letters Defendants have issued. However, PhD's customers were understandably upset by these threats, prompting multiple requests for indemnification from PhD and at least one customer's outright cancellation of any additional product orders. To date, ***at least seven*** California-based customers have notified PhD that they are aware of Defendants' threats and have sought indemnification or other relief. These customers are located in Garden Grove, El Cajon, Tarzana, Los Angeles, and Buena Park.[5]

52. In view of the foregoing, Defendants took these actions to disrupt lawful competition rather than to protect any purported rights. Defendants purposefully targeted PhD's California customers, inflicting damage in an important market for PhD.

53. On information and belief, Defendants conspired in a scheme to rid the e-cigarette market of legitimate competition before launching their own new product. Just as they attempted in *Vital v. American Body Building Products*, Defendants asserted their claims "in bad faith for an anticompetitive purpose." They seek "to use the Lanham Act and the threat of litigation as a weapon to drive" PhD's customers away from PhD and thus drive PhD "out of the market. Rather than engage in a thorough investigation to see if there is a colorable legal claim under the Lanham Act, [Defendants] choos[e] to immediately threaten potential competitors with costly litigation." On that basis, PhD believes that Defendants' conduct reeks of anti-competitiveness, restraint of trade, and abuse of process.

54. Defendants' actions are causing substantial harm to PhD. If Defendants' actions continue, there exists a substantial probability that PhD will lose its customers permanently, amongst other harms.

55. PhD is informed and believes and thereon alleges that Defendants acted with

[5] Names have been withheld to prevent the disclosure of PhD's customs (trade secret) in a public forum. The identities of these customers will be produced under an appropriate protective order in discovery.

actual malice and reckless disregard of PhD's rights.

56. Unless and until enjoined and restrained by order of this Court, Defendants' continued acts will cause PhD severe and irreparable injury which cannot adequately be compensated by monetary damages. By reason of the foregoing, PhD is entitled to preliminary and permanent injunctive relief enjoining Defendant's unlawful interference with PhD's non-infringing BANG E-Cigs and customer relationships.

FIRST CAUSE OF ACTION

(Declaratory Judgment of No Infringement Of A Registered Trademark Under 15 U.S.C. §1114 – Against Defendants Vital and JHO)

57. PhD incorporates by reference the allegations in paragraphs 1 through 56.

58. An actual case and controversy now exists between PhD and Defendants as to their respective rights and responsibilities with respect to the mark BANG and B design on unrelated products in unrelated industries.

59. Defendants have asserted that PhD's BANG E-Cigs infringe one or more of Defendants' Asserted Marks within the meaning of 15 U.S.C. §1114. Although these assertions were initially made to PhD's customers, Defendants' threats were predicated on the BANG marks supplied by PhD to its customers and not any independent actions of the customers. Moreover, Defendants specifically threaten legal action based on their claims, creating an actual case or controversy, and actually sued PhD (after the filing of this action) for trademark infringement of the BANG and B design marks in the Southern District of Florida as Case No. 0:20-cv-60993-WPD. That matter was subsequently transferred to the Central District of California as Case No. 2:20-cv-06745-RSWL-JC.

60. PhD's BANG E-Cigs do not infringe any of Defendants' Asserted Marks within the meaning of 15 U.S.C. §1114. PhD's BANG E-Cigs are unlikely to be confused with any of the Defendants' non-e-cigarette related offerings under the BANG and B design marks, as the channels of trade, consumers, products, and even the marks themselves are not sufficiently related. This is particularly the case given the crowded field

of third-party BANG and B design marks for relevant goods and services.

61. To resolve the legal and factual questions raised by Defendants and to afford relief from the uncertainty which has precipitated, PhD is entitled to issuance of an order stating its rights pursuant to 28 U.S.C. §§ 2201-02 that PhD and those distributors/retailers downstream are free to sell PhD's non-infringing BANG E-Cigs throughout the U.S., without fear of infringing any of Defendants' Asserted Marks.

SECOND CAUSE OF ACTION

(Declaratory Judgment of No Violation Under 15 U.S.C. §1125(a) – Against Defendants)

62. PhD incorporates by reference the allegations in paragraphs 1 through 61.

63. An actual case and controversy now exists between PhD and Defendants as to their respective rights and responsibilities with respect to the mark BANG and B design on unrelated products in unrelated industries.

64. Defendants have asserted that PhD's BANG E-Cigs result in a false designation of origin and/or unfair competition withing the meaning of 15 U.S.C. §1125(a) with respect to one or more of Defendants' Asserted Marks.

65. PhD's BANG E-Cigs do not result in a false designation of origin and/or unfair competition withing the meaning of 15 U.S.C. §1125(a) with respect to one or more of Defendants' Asserted Marks. Consumers of PhD's BANG E-Cigs are unlikely to ascribe them as products of Defendants and the competition is fair because there is no likelihood of confusion with Defendants' Asserted Marks.

66. To resolve the legal and factual questions raised by Defendants and to afford relief from the uncertainty which has precipitated, PhD is entitled to issuance of an order stating its rights pursuant to 28 U.S.C. §§ 2201-02 that PhD and those distributors/retailers downstream are free to sell PhD's non-infringing BANG E-Cigs throughout the U.S., without fear of being adjudged as unfairly competing and/or engaged in false designation within the meaning of 15 U.S.C. §1125(a).

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THIRD CAUSE OF ACTION

(Cancellation of Federal Registrations Nos. 4,985,030 and 4,990,091 – Against Defendant JHO)

67. PhD incorporates by reference the allegations in paragraphs 1 through 66.

68. PhD by this Count seeks cancellation of Defendants' U.S. Trademark Registration Nos. 4,985,030 and 4,990,091 on the ground that these registrations were void ab initio in that they were listed as owned by two different entities while concurrently used on the same product.

69. In 2008, Vital applied for U.S. Trademark Registration No. 3,545,129 for the BANG word mark. This registration remained in Vital's name until July 31, 2017, when it was assigned to JHO. Thus, Vital represented that it owned the mark from 2008 through 2017. In or about 2015, Vital was purportedly using the BANG mark with the segmented "bulls-eye" in the first letter consisting of the B design mark.

70. However, also in 2015, U.S. Trademark Registration Nos. 4,985,030 and 4,990,091 for the B design mark – which again is the first letter of the BANG mark - were applied for in the name of now-defunct Bang Energy, LLC. Thus, even though the B design mark was at this time purportedly being used and owned by Vital, a completely different entity – Bang Energy, LLC – sought to register it. Thus, upon information and belief, when the B design mark registrations were applied for, the wrong entity was listed as the owner, rendering them void ab initio and invalid. TMEP §1201.02(b).

71. Additionally, on August 30, 2016, the B design mark registrations were purportedly assigned from Bang Energy, LLC to JHO. During that time, Vital was still listed as the owner of the BANG registration, and the specimens submitted to the USPTO in 2016 show that Vital was, at that time, allegedly using both marks on its products. Moreover, Vital's BANG registration was not assigned to JHO until July 31, 2017, which means for a time JHO and Vital also had conflicting ownership claims over the marks.

72. For at least some period of time, three different entities claimed ownership of the same mark on the same products. Pursuant to 15 U.S.C. § 1051(3)(a)-(d), when the

relevant predecessor-in-interest filed their trademark application for Defendants' Asserted Marks, it swore under penalty of perjury that it owns the mark sought to be registered and "no other person has the right to use such mark in commerce either in the identical form thereof or in such near resemblance thereto as to be likely, when used on or in connection with the goods of such other person, to cause confusion, or to cause mistake, or to deceive." If the relevant predecessor-in-interest did not own the mark on the application filing date, the application is void and this defect cannot be cured by amendment or assignment. TMEP, §1201.02(b) (citations omitted.)

73. For the forgoing reasons, Defendants' U.S. Trademark Registration Nos. 4,985,030 and 4,990,091 are due to be cancelled as void ab initio for failure to name the correct owner, amongst other reasons, such as nonuse, abandonment, and potentially fraud depending on Defendants' intent in listing the incorrect applicant.

74. PhD will be damaged by continued registration of Defendants' U.S. Trademark Registration Nos. 4,985,030 and 4,990,091 and seeks an order by this court cancelling same.

FOURTH CAUSE OF ACTION

(Interference with Contractual Relations – Against All Defendants)

75. PhD incorporates by reference the allegations in paragraphs 1 through 74.

76. As described herein, Defendants embarked on a campaign of baseless threats for the purpose of driving PhD's customers away from PhD, at the same time that Defendants began establishing their own, competing business. Defendants' threats were wholly without merit and not asserted in good faith. Had Defendants performed even the most rudimentary analysis, the results would have clearly shown the great improbability of success on the merits, particularly given the use of different, stylized variants of the word "bang" and the completely unrelated products targeted to different clients in completely unrelated industries. It further ignores the relatively common use of marks containing the word "bang" and the letter "b" in both of the parties' respective industries. Further, given

Defendants' insistence that their products are targeted as health-conscious consumers, it is particularly unlikely that such consumers would be confused into purchasing e-cigarettes based solely on the use of the mark BANG.

77. Defendants' conduct was made with the intention of anti-competitiveness, restraining trade, and is in high probability an abuse of process.

78. Defendants' above-described despicable conduct was clearly made with the intention of damaging the sales of PhD's BANG E-Cigs. By virtue of these actions, Defendants either knew or should have known that PhD's contractual relations with its distributors and customers would be negatively impacted.

79. Moreover, Defendants knew that customers would cancel their pending orders with PhD as a result of Defendants' despicable conduct. At minimum, any reasonable person would know that order cancelation would be a direct and foreseeable consequence of Defendants' conduct.

80. Whether intentional or negligent, the harm remains: customers have cancelled their orders (and discontinued reordering), and many more are threatening to do so. PhD has seen a significant reduction in sales following Defendants' actions in May 2020.

81. The total number of cancelled orders exceed $75,000 in value.

82. PhD has been harmed by Defendants' unlawful conduct, and on information and belief, Defendants' conduct is the sole factor in causing PhD's harm. At minimum, Defendants' conduct was a substantial factor in causing PhD's harm.

83. PhD is entitled to an award of all direct and consequential damages in an amount according to proof at the time of trial.

FIFTH CAUSE OF ACTION

(Interference with Prospective Economic Advantage – Against All Defendants)

84. PhD incorporates by reference the allegations in paragraphs 1 through 83.

85. It is common knowledge that companies regularly seek to grow their business relationships and sales with their customers. Defendants had no reason to believe that PhD

would be any different. In other words, Defendants knew that PhD would pursue an expanded economic benefit with its clientele.

86. Defendants knew that customers would not only discontinue sales of PhD's BANG E-Cigs, but other products as well due to Defendants' despicable conduct. At minimum, any reasonable person would know that cancelled orders would be a direct and foreseeable consequence of Defendants' conduct.

87. Defendants' conduct has resulted in not only the returns and/or cancellations of orders of PhD's BANG E-Cigs and related products, but also of customers' and potential customers' decisions to refrain from placing new orders.

88. PhD has therefore been harmed by Defendants' unlawful conduct, and on information and belief, Defendants' conduct is the sole factor in causing PhD's harm. At minimum, Defendants' conduct was a substantial factor in causing PhD's harm.

89. PhD is entitled to an award of all direct and consequential damages in an amount according to proof at the time of trial.

SIXTH CAUSE OF ACTION

(Civil Conspiracy – Against All Defendants)

90. PhD incorporates by reference the allegations in paragraphs 1 through 89.

91. As specified herein, Defendants engaged in a campaign of misusing their BANG trademarks obtained in an unrelated industry (health-focused supplements and energy drinks) to gain a beachhead against PhD in the e-cigarette industry. This beachhead was the staging point upon which Defendants intended to steal the BANG mark with respect to this new market in which Defendants had never previously operated. More critically, however, is that these plans were designed to anti-competitively deprive PhD of the right to lawfully distribute its non-infringing products as further described in this lawsuit.

92. Defendants jointly agreed amongst themselves to commit these wrongful acts, which included interfering with PhD's contractual relationships, interfering with PhD's

prospective economic advantages, and engaging in a scheme to take for itself the use of the BANG mark in the e-cigarettes industry, all for the anticompetitive purpose of clearing the market of pre-existing e-cigarette products marketed under the BANG mark.

93. Further, Defendants conspired to each play a role in a conspiratorial anti-competitive scheme. Two entities (Vital and JHO) focused their efforts on threatening bogus trademark litigation against PhD's customers in "a thinly-veiled effort to stifle legitimate competition" and sway PhD's customers away. The third co-conspirator (Elite) subversively attempted to acquire trademark rights without exposing its co-conspirators. On information and belief, these coordinated actions were undertaken for the specific purpose of disrupting and destroying PhD's business, thereby opening the way for Defendants to move in and take those customers for themselves.

94. The meritless claims were purportedly made by Vital and JHO. However, Elite was aware that the other two Defendants intended to commit these wrongful acts and agreed that they should be committed because they would ultimately benefit Elite given its trademark application for the mark BANG for e-cigarettes.

95. As a result of this civil conspiracy, Vital, JHO, and Elite are jointly and severally responsible for the damages alleged herein resulting from their co-conspirator's tortious actions.

SEVENTH CAUSE OF ACTION

(Trademark Infringement Under 15 U.S.C. §1025(a) – Against All Defendants)

96. PhD incorporates by reference the allegations in paragraphs 1 through 95.

97. In connection with its product and service offerings, PhD has continuously used PhD's BANG Marks over the past seven years (approximately) in connection with the marketing, distribution and sale of PhD's e-cigarettes.

98. PhD's BANG Marks are inherently distinctive. In the alternative, because of PhD's exclusive and extensive use of PhD's BANG Marks, these trademarks have acquired

considerable value and have become well known to the consuming public as identifying and distinguishing PhD exclusively and uniquely as the source of e-cigarettes.

99. PhD has recently learned that on or about October 2, 2020, JHO acquired the rights to the BHC Marks.

100. All of the BHC Marks were registered in 2015 and 2016. This is more than two (2) years after PhD had been using the VAPE WITH A BANG mark.

101. On information and belief, BHC failed to successfully commercialize the products associated with those registrations. In some instances, the products identified in the registrations were never made or sold at all. As a consequence, on information and belief, BHC discontinued all sales in or about late 2016.

102. However, by virtue of Defendants' significant efforts to date, one must infer that Defendants will imminently re-launch a line of e-cigarettes under the BANG mark. This intention is evidenced by Defendants' filing of many trademark applications, including without limitation, U.S. Trademark Application Serial Nos. 90221701, 90210093, 90179627, 88958698, 90109562, 88907227, 90206381, 88861555, 88861532, 88947042, 90099452, 88958713, and 90109607. Further, Defendants have undertaken to acquire a portfolio of junior BHC Marks – marks of dubious history and the subject of multiple cancellation proceedings, including by Defendants. Finally, Defendants have gone to significant lengths in the current litigation as well as in a related case in the Central District of California in Case No. 2:20-cv-06745-RSWL-JC, all with an intention of causing PhD to discontinue sales of it lawfully distributed e-cigarettes using the above referenced marks.

103. On that basis, Defendants have in the past and will continue to advertise, distribute, and sell under the mark BANG. PhD does not consent to or authorize such infringing use by Defendants of any mark containing PhD's BANG Marks as used on e-cigarettes or relate products.

104. Defendants' conduct is likely to confuse the public and cause deception and mistake among the consuming public and trade by creating the erroneous impression that

the Defendants' e-cigarette products have been manufactured, approved, sponsored, endorsed or guaranteed by, or in some way are affiliated with, PhD in violation of the Lanham Act 43(a) [15 U.S.C. §1125(a)].

105. Defendants' products do not have a good reputation and are likely to harm PhD's goodwill. A few consumers have verbally referred to Defendants' products refer to it as the "crack" of the energy drink market when describing the physiological effects of consumption. Further, on September 4, 2018, Monster Energy (a Coca Cola subsidiary) filed a lawsuit against Vital in the Central District of California as Case No. 5:18-cv-01882-JGB-SHK. Monster contends that Vital's BANG energy drinks are falsely advertised as being able to cure Alzheimer's Disease, Parkinson's Disease, Huntington's Disease, and other forms of dementia. Monster also alleges that Vital lies to consumers with promises of BANG'S "Super Creatine" ingredient that will "fight depression and reverse mental retardation."

106. If Defendants are allowed to use the BHC Marks, then PhD will be irreparably harmed and injured. PhD is without adequate remedy at law.

107. PhD is entitled to recover from the Defendants the damages sustained as a result of Defendants' acts in violation of §43(a). PhD is at present unable to ascertain the full extent of the monetary damages suffered by reason of Defendants' acts.

108. PhD is further entitled to recover from the Defendants the gains, profits, and advantages the Defendants have obtained as a result of Defendants' acts in violation of §43(a). 15 U.S.C. §1125(a).

EIGHTH CAUSE OF ACTION

(Cancellation of Federal Registrations Nos. 4,744,797; 4,744,798; 4,929,022; 4,929,023; and 4,929,024 – Against Defendant JHO)

109. PhD incorporates by reference the allegations in paragraphs 1 through 108.

110. PhD by this Count seeks cancellation of the BHC Marks on the grounds of abandonment and nonuse as well as priority and likelihood of confusion.

111. Upon information and belief, the JHO's predecessor in interest did not use the BHC Marks for at least the last three years with the intent not to resume use and therefore the BHC Marks stand abandoned. The assignment of the BHC Marks to JHO does not somehow revive them.

112. One or more of the BHC Marks were not in use in commerce on any of the goods specified in the respective applications when use was alleged. Thus, one or more of the BHC Marks are void ab initio for nonuse at the time of filing the based-on use application(s) or when a statement of use was alleged.

113. PhD used PhD's BANG Marks in commerce prior to the filing of the applications for the BHC Marks, and, upon information and belief, before JHO's or its predecessor in interest's first use of the BHC Marks in commerce in the United States in connection with goods and services specified therein.

114. JHO's' BHC Marks are confusingly and deceptively similar to PhD's BANG Marks. The BHC Marks incorporate the word "bang" in PhD's BANG Marks in its entirety or only add one word to it. The BHC Marks are very similar in sight, sound, connotation, and commercial impression to PhD's BANG Marks.

115. The BHC Marks' specified goods and services are either identical to the goods offered by PhD or are highly similar or related.

116. Upon information and belief, the channels of trade and class of purchasers for the BHC Marks would be identical or very similar to those of PhD if the marks were in use.

117. Due to the similarities between the marks, goods and services, and the likely similarity of the respective channels of trade and classes of purchasers, the continued registration of the BHC Marks will cause great damage and injury to PhD. Persons familiar with the PhD's BANG Marks and the goods offered under PhD's BANG Marks would likely confuse the BHC Marks' goods and services with those provided by PhD. Any defect, objection or fault found with the goods and services under the BHC Marks may reflect upon and expose PhD to liability and seriously injure the reputation and valuable

goodwill that PhD has established and accumulated for its products, thereby causing damage and injury to PhD.

118. PhD will be damaged by the continued registration of the BHC Marks and seeks an order by this court cancelling same on the grounds of nonuse, abandonment, priority and likelihood of confusion, and potentially fraud depending on JHO's predecessor in interest's intent.

119. PhD will be damaged by continued registration of the BHC Marks (*i.e.* Registration Nos. 4,744,797; 4,744,798; 4,929,022; 4,929,023; and 4,929,024) and seeks an order by this court cancelling same.

NINTH CAUSE OF ACTION

(Unfair Competition, California Business & Professions Code § 17200 et seq. – Against All Defendants)

120. PhD incorporates by reference the allegations in paragraphs 1 through 119.

121. The foregoing conduct, as alleged, violates the California Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200 et seq. Section 17200 of the Cal. Bus. & Prof. Code which prohibits unfair competition by prohibiting, inter alia, any unlawful or unfair business acts or practices.

122. Defendants committed acts of unfair competition, as defined by the UCL, by, among other things, engaging in the acts and practices described in this Amended Complaint, including but not limited to asserting meritless trademark infringement claims, meritless unfair competition claims, meritless dilution claims, and intentionally interfering with PhD's contractual relationships and prospective economic advantage, attempting to usurp PhD's goodwill in the VAPE WITH A BANG mark, amongst other bad acts. The above claims of interference with contract, interference with prospective economic advantage, and trademark infringement (as pled above) constitute "unlawful" conduct under California law. Defendants' conduct as herein alleged has damaged PhD by wrongfully interfering with the right to fairly compete, maintain its reputation, and

therefore was substantially injurious to PhD.

123. PhD seeks restitution of lost sales and such other legal and equitable relief from Defendants' unlawful and willful conduct as the Court deems just and proper.

PRAYER FOR RELIEF

WHEREFORE, PhD respectfully request the following relief against Defendants, and each of them, as follows:

1. For a judicial determination and order declaring that the sales and marketing of PhD's BANG E-Cigs, as presented to the Court in this action, by PhD and its downstream distributors and retailers does not infringe any of Defendants' Asserted Marks with the meaning of 15 U.S.C. §1114;

2. For a judicial determination and order declaring that the sales and marketing of PhD's BANG E-Cigs, as presented to the Court in this action, by PhD and its downstream distributors and retailers does not result in false designation of origin and/or unfair competition withing the meaning of 15 U.S.C. §1125(a) with respect to one or more of Defendants' Asserted Marks;

3. For an order directing the USPTO to cancel Reg. Nos. 4,985,030 and 4,990,091;

4. For an order directing the USPTO to cancel Reg. Nos. 4,744,797; 4,744,798; 4,929,022; 4,929,023; and 4,929,024;

5. For injunctive relief;

6. For compensatory damages, including but not limited to, lost actual and prospective sales (plus interest), lost equity, according to proof allowed by law;

7. For restitution and/or disgorgement;

8. For an award of exemplary and punitive damages in amount to be determined by the Court;

9. For PhD's reasonable attorney's fees;

10. For all costs of suit (including expert witness fees);

11. For an award of prejudgment and post-judgment interest; and

12. For such other and further relief as the Court may deem just and equitable.

Dated: October 15, 2020

NEXIO, PC

By: /s/ Imran F. Vakil /
Imran F. Vakil
Attorneys for Plaintiff
PhD Marketing, Inc.

DEMAND FOR JURY TRIAL

Plaintiff previously and hereby demands trial by jury of all issues so triable under the law.

Dated: October 15, 2020

NEXIO, PC

By: /s/ Imran F. Vakil /
Imran F. Vakil
Attorneys for Plaintiff
PhD Marketing, Inc.