

**SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION**

Center for Science in the Public Interest,

Plaintiff,

v.

MillerCoors Brewing Corporation,

3939 West Highland Boulevard
Milwaukee, WI 53201

Defendant.

Serve:

§
§
§
§
§
§
§
§
§
§
§
§
§
§
§
§
§
§
§
§
§
§
§
§

Civil Action No. _____

JURY TRIAL DEMANDED

1. Violation of D.C. Consumer Protection Procedures Act: Deception D.C. Code § 28-3901, et seq.
2. Violation of D.C. Consumer Protection Procedures Act: Breach of Implied Warranty of Merchantability D.C. Code §§ 28:2-312-318

ORIGINAL COMPLAINT

PRELIMINARY STATEMENT

1. CSPI brings this action on behalf of itself, its members, and the general public in the District of Columbia (D.C. Consumers), to protect the health and welfare of D.C. Consumers by compelling MillerCoors to stop selling its alcoholic energy drink product line, Sparks, in D.C.

2. CSPI brings this action under D.C. law for equitable relief necessary because of MillerCoors' sale of Sparks products to D.C. Consumers.

JURISDICTION AND VENUE

3. The Court has jurisdiction over this action pursuant to D.C. Code §§ 11-921 and 28-3905(k)(l). The amount in controversy is within the limits of the Court but is less than \$75,000.

4. The Court has jurisdiction over MillerCoors because it is a corporation that is authorized to conduct, and in fact does conduct, substantial business in the District. MillerCoors

has sufficient minimum contacts with the District or otherwise intentionally avails itself of the consumer markets within the District through the promotion, sale, marketing, and/or distribution of its products in the District to render the exercise of jurisdiction by District courts permissible under traditional notions of fair play and substantial justice.

PARTIES

5. CSPI is a non-profit organization based in the District. Since 1971, CSPI has been a strong advocate for nutrition and health, food safety, alcohol policy, and sound science. Its award-winning newsletter, *Nutrition Action Healthletter*, with some 900,000 subscribers in the United States and Canada, is the largest-circulation health newsletter in North America. CSPI has approximately 3,200 members/subscribers in the District. Since its founding by Executive Director Michael Jacobson, Ph.D., and two other scientists, CSPI has carved out a niche as the organized, responsible voice of the American public on nutrition, food safety, health, and other issues. CSPI has long sought to educate the public, advocate government policies that are consistent with scientific evidence on health and environmental issues, and counter industry's powerful influence on public opinion and public policies. Over the years, CSPI has grown along with its reputation as an influential and independent science-based organization. Though CSPI frequently criticizes the performance of the U.S. Food and Drug Administration (FDA), one indication of the respect CSPI has garnered is that the FDA honored it with the Commissioner's Special Citation, the highest award given to outside organizations or individuals (over a decade ago, Dr. Jacobson was honored with the same award).

6. CSPI's accomplishments include leading efforts to win passage of laws that protect the public's health and welfare by requiring Nutrition Facts on packaged foods (and, later, to

include trans fat on those labels), defining the term “organic” for foods, and putting warning notices on alcoholic beverages.

7. CSPI’s Litigation Project, in its four years of existence, has had major victories related to marketing to children and adolescents. These accomplishments include:

- a. A settlement agreement with Anheuser-Busch, Inc. (Anheuser-Busch) regarding the same type of alcoholic energy drinks that are the subject of this action. CSPI notified both Anheuser-Busch and MillerCoors of its intent to sue the companies over these drinks. Unlike MillerCoors, Anheuser-Busch agreed to talk and CSPI was able to reach a settlement without needing to file suit. As part of the settlement with CSPI, Anheuser-Busch will remove the caffeine, guarana, and ginseng from its alcoholic beverages Tilt and Bud Extra. The company also settled with 11 state Attorneys General, and will urge competitors to cease production of their alcoholic energy drinks.
- b. A landmark legal settlement with the Campaign for a Commercial-Free Childhood, two Massachusetts parents, and the Kellogg Company (Kellogg) in which Kellogg agreed to adopt nutrition standards for the foods it advertises to young children, leading other companies to adopt similar standards.
- c. Negotiations with the major soft drink companies to get soft drinks out of public schools, which led to an agreement announced through the Clinton Foundation and the American Heart Association. Coca-Cola, PepsiCo, and Cadbury Schweppes agreed to phase-out sugary soft drinks from schools.

8. Defendant MillerCoors Brewing Company is a corporation organized and existing under the laws of the State of Wisconsin, with its principal place of business at 3939 West Highland Boulevard, Milwaukee, Wisconsin, 53201-0482. MillerCoors Brewing Company owns the Sparks product brand line.

9. Various individuals, partnerships, corporations, and associations not named as defendants in this Complaint have participated in the violations alleged herein and have performed acts and made statements in furtherance thereof. In acting or failing to act, each such individual or entity was acting as an agent or representative of MillerCoors.

REPRESENTATIVE, ORGANIZATIONAL, AND ASSOCIATIONAL ACTION

10. CSPI brings this action on behalf of itself, its members, and in the interests of D.C. Consumers pursuant to D.C. Code § 28-3905(k)(l).

CONDITIONS PRECEDENT

11. All conditions precedent to the filing of this case have been performed, have occurred, or have been satisfied.

FACTS ABOUT ALCOHOLIC ENERGY DRINKS

12. Alcoholic beverages – including the entire Sparks product line – that are pre-mixed with the stimulants caffeine and guarana and with other non-traditional substances (such as taurine and ginseng) are of unique concern. The harm to consumers is multiple:

- a. These drinks appeal strongly to underage drinkers, such as college students, because they taste more like a soft drink than an alcoholic beverage.
- b. There is a physiological effect – and marketing message – that consuming alcohol and caffeine together allows one to drink more alcohol without feeling as intoxicated as would otherwise be the case.
- c. No studies ensure the safety of – and new evidence demonstrates the risk of – consuming stimulants and alcohol together;
- d. The FDA does not recognize any of the stimulants and other non-traditional ingredients as Generally Recognized as Safe (GRAS) for use in alcoholic beverages;
- e. MillerCoors capitalizes on the popular belief that taurine and ginseng have a stimulant effect, when in fact there is no adequate substantiation that either has a stimulant effect; and

13. The first two effects are the most serious.

14. Sweetened and flavored alcoholic energy drinks appeal to younger drinkers, including underage drinkers. The added presence of stimulants increases that appeal to underage drinkers. MillerCoors is well aware that Sparks is attractive to, and frequently consumed by, underage drinkers, and its profits from Sparks are significantly increased by sales to underage

drinkers.

15. For new and experienced drinkers alike, the presence of the stimulants is a potentially fatal addition. The stimulants increase the risk that drinkers will engage in dangerous behavior such as driving, because they do not feel drunk, even though their behavior/skills might be degraded. A study on the interaction between alcohol and energy drinks found that stimulants did nothing to reduce alcohol's negative effects on motor coordination skills and visual reaction times, but did reduce subjective perception of alcohol intoxication – thus intoxicated persons do not feel as drunk as they may be.¹

16. In August 2007, a task force of state attorneys general wrote a letter to the federal Alcohol and Tobacco Tax and Trade Bureau (TTB) expressing serious concerns about the marketing of alcoholic energy drinks. In addition to the grave statistics about youth and alcohol in general,² including the approximation that 5,000 people under the age of 21 die each year from alcohol-related injuries,³ the AGs in the Task Force highlighted their concerns about youth and alcoholic energy drinks. The letter warned that “[a]dding caffeine and other stimulants to alcohol may increase the risk to young consumers because those additives tend to reduce the perception of intoxication and make greater quantities of alcohol palatable.”⁴

¹ Sionaldo Eduardo Ferreira, et al., *Effects of Energy Drink Ingestion on Alcohol Intoxication*, 30 ALCOHOLISM: CLINICAL AND EXPERIMENTAL RES. 598 (April 2006).

² As the AG letter to TTB advised, alcohol is the top drug problem of American youth and is involved in the three leading causes of teen death: car accidents, homicides, and suicides. Letter from Attorneys General to the Alcohol and Tobacco Tax and Trade Bureau 2 (Aug. 20, 2007), *available at* www.marininstitute.org/alcopops/resources/TTB_Letter_Final_Sigs_08172007.pdf.

³ OFFICE OF THE SURGEON GEN., U.S. DEP'T OF HEALTH AND HUMAN SERV., THE SURGEON GENERAL'S CALL TO ACTION TO PREVENT AND REDUCE UNDERAGE DRINKING 10-12 (U.S. Dep't of Health and Human Serv. 2007), *available at* <http://www.surgeongeneral.gov/topics/underagedrinking/calltoaction.pdf>.

⁴ The AGs in the Task Force are also concerned about alcoholic energy drinks' categorization as malt beverages, even though the drinks' alcohol by volume is significantly greater than that of beer. They wrote: “This classification renders alcoholic energy drinks more readily available to young people, because malt beverages can be purchased in many more places, and at significantly lower prices, than distilled spirits.” Letter from Attorneys General, *supra* note 2.

17. Most disturbing, a recent study of thousands of college students found that the students who drank alcohol mixed with “energy” drinks were more likely to experience negative alcohol-related consequences than were those students who drank only alcohol.⁵ It found students who drank alcohol mixed with energy drinks were twice as likely as students who drank only alcohol to: ride with a driver under the influence, get hurt or injured, require medical treatment, take advantage of another person sexually, or be taken advantage of sexually.⁶

FACTS ABOUT SPARKS

18. On its MillerCoors website, MillerCoors claims that it “created the caffeinated malt beverage segment.”⁷ On its Sparks website, MillerCoors claims “alcohol and caffeine have been consumed in combination or in sequence for decades.”⁸ The MillerCoors website is correct, and the Sparks website is misleading. ***Before Miller invented Sparks, there had never been a caffeinated beer or malt beverage.*** MillerCoors’ Sparks website is a deceptive effort to counter the public criticism these products have generated by stating only partial truths.

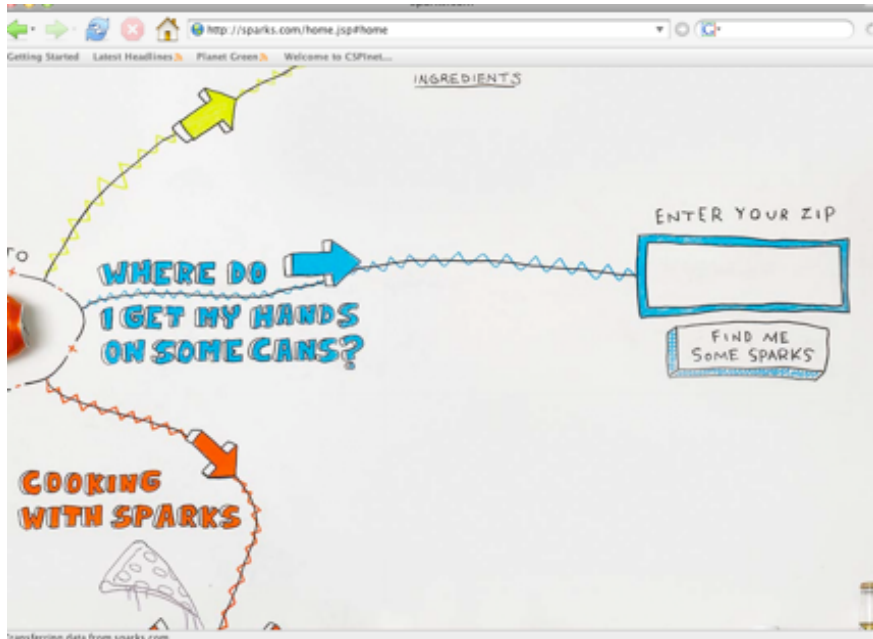
19. MillerCoors’ viral marketing plan for Sparks is deliberately untraditional, in order to appeal to young consumers. This tactic includes using a chaotic, interactive website (www.sparks.com, see below), which offers a local store and venue locator for the drink. This feature certainly makes it easier for young consumers to pinpoint where to obtain the drink.

⁵ “Energy drinks are beverages that claim to provide a burst of energy by using a combination of caffeine (the principal active ingredient), other plant-based stimulants (e.g. guarana, yerba mate), simple sugars (e.g. glucose, fructose), glucuronolactone (a naturally occurring glucose metabolite), amino acids (e.g. taurine, carnatine, creatine), herbs (e.g. ginkgo biloba, ginseng), and vitamins.” Mary Claire O’Brien, MD, et al., *Caffeinated Cocktails: Energy Drink Consumption, High-risk Drinking, and Alcohol-related Consequences among College Students*, 15 ACAD. EMERGENCY MED. 1, 4 (2008).

⁶ *Id.*

⁷ MillerCoors Brewing Co., <http://www.millercoors.com/our-beers/great-beer.aspx> (last visited Aug. 13, 2008).

⁸ Sparks, <http://sparks.com>, see “F.A.Q.” (last visited Aug. 13, 2008).



20. MillerCoors emphasizes the stimulant effect of Sparks through its marketing efforts, starting with the name “Sparks,” which conveys the sense of an electric surge of energy, and continuing on the can itself, which resembles a battery (to deliver an electric charge):



21. To promote its product, MillerCoors hired Street Attack, a firm specializing in so-called guerilla marketing, to “increase awareness for Sparks amongst key influential social scenes and subcultures,” and “to sustain and grow the [perceived] cool-factor of the brand . . .”⁹ Street Attack’s strategy included using “cultural curators” who would “work with Street Attack account teams to continually build new networks, gain sponsorship opportunities, open new bar

⁹ Street Attack, <http://streetattack.com/work.php> (last visited August 13, 2008).

accounts and create [word of mouth] buzz for Sparks. Target scenes included: hipster, indie, DJ, rock, art, graffiti, etc.”¹⁰

22. MillerCoors gives away Sparks for free at “house parties, concert backstage scenes, recording studios and art events.”¹¹ One Street Attack sales rep wrote in an online forum aimed at club-goers: “If you have a party on the horizon, please drop me a line and I can get you some complimentary cases of Sparks.”¹² Private gatherings do not have the same level of licensing requirements, strict regulations, or other safety nets that prevent minors from accessing alcohol in public establishments.

23. In a recent development, after Anheuser-Busch withdrew from the alcoholic energy drink market, MillerCoors announced its expansion of its Sparks product line. This October, MillerCoors will introduce a new Sparks product called Sparks Red, which will contain even more alcohol than current Sparks cans — 8 percent alcohol by volume. An industry publication reports, “As category leader, Sparks must continue to grow volume, increase velocity and build category share of mind,” and, according to MillerCoors introduction materials, “consumers want higher alcohol.”¹³

FACTS ABOUT ADULTERATED FOOD PRODUCTS

24. Food products are regulated both at the local/state level and at the federal level. D.C. Code § 48-103 prohibits adulterated food products in the District. At the federal level, the FDA regulates food products pursuant to the Federal Food, Drug, and Cosmetic Act (FDCA). D.C. Code § 48-103 is, in all relevant aspects, identical to the FDCA. This dual regulatory

¹⁰ *Id.*

¹¹ Tom Daykin, *Miller’s Marketing Goes Under the Radar*, THE MILWAUKEE JOURNAL SENTINEL, Dec. 14, 2007, available at <http://www.jsonline.com/story/index.aspx?id=696926>.

¹² *Id.*

¹³ *New MillerCoors Product Likely to Make Advocates See Red*, 10 INSIGHTS EXPRESS 58 (Beer Marketer’s INSIGHTS, Inc., June 24, 2008).

scheme has existed for decades. The relief sought herein is sought only pursuant to the D.C. Code to protect D.C. citizens, and does not seek to enforce the FDCA, nor does it claim a fraud on the FDA, the TTB, or any other federal agency or department.

25. In 2001, the FDA issued its “Letter to Manufacturers Regarding Botanicals and Other Novel Ingredients in Conventional Foods.”¹⁴ The Letter provides a good summary of the law relating to food additives:

Many ingredients intentionally added to a conventional food are food additives. Food additives require pre-market approval based on data demonstrating safety submitted to the agency in a food additive petition, ordinarily by the producer. The agency issues food additive regulations specifying the conditions under which an additive has been demonstrated to be safe and, therefore, may be lawfully used.

A substance is exempt from the definition of a food additive and thus, from pre-market approval, if, among other reasons, it is generally recognized as safe (GRAS) by qualified experts under the conditions of intended use. Accordingly, for a particular use of a substance to be GRAS, there must be both technical evidence of safety and a basis to conclude that this evidence is generally known and accepted by qualified experts. The technical element of the GRAS standard requires that the information about the substance establish that the intended use of the substance is safe, i.e., that there is a reasonable certainty in the minds of competent scientists that the substance is not harmful under its intended conditions of use. In addition, the data and information to establish the technical element must be generally available, and there must be a basis to conclude that there is consensus among qualified experts about the safety of the substance for its intended use. Any substance added to food that is an unapproved food additive (e.g., because it is not GRAS for its intended use) causes the food to be adulterated (Section 402(a)(2)(C) of the Act), and the food cannot be legally imported or marketed in the United States.

The FDA is concerned that some of the herbal and other botanical ingredients that are being added to conventional foods may cause the food to be adulterated because these added ingredients are not being used in accordance with an approved food additive regulation and may not be GRAS for their intended use.

26. CSPI corresponded on this issue with a top official at the TTB, the Treasury De-

¹⁴ CTR. FOR FOOD SAFETY AND APPLIED NUTRITION, U. S. FOOD AND DRUG ADMIN., LETTER TO MANUFACTURERS REGARDING BOTANICALS AND OTHER NOVEL INGREDIENTS IN CONVENTIONAL FOODS (U.S. Food and Drug Admin. Jan. 30, 2001), *available at* www.cfsan.fda.gov/~dms/ds-ltr15.html.

partment bureau whose mission is to ensure that alcoholic beverages are labeled, advertised, and marketed in accordance with the law.

27. The official wrote to CSPI in April 2007, stating that:

TTB follows the guidance of FDA who has the authority under Federal Food, Drugs, and Cosmetics Act as outlined in 21 CFR 170.3(n)(2). Per section 409 of the Federal Food, Drugs, and Cosmetics Act, any food additive that is to be added to food must first be approved as Generally Recognized as Safe (GRAS) by the FDA. TTB only allows ingredients that FDA has determined GRAS, for alcohol beverages.

In other words, TTB does not permit MillerCoors to use any ingredient that FDA has not affirmatively determined to be GRAS for use in alcoholic beverages.

28. FDA has issued food additive regulations for caffeine (21 CFR 182.1180), guarana (21 C.F.R. 172.510), and taurine (21 C.F.R. 573.980). However, the regulation provides for limited use of these food additives.

- a. Caffeine is only approved as an additive to cola-type beverages in concentrations no greater than 0.02 percent.¹⁵
- b. Guarana is only approved as an additive to be used as a flavoring or adjuvant, in the minimum quantity required to produce the intended physical or technical flavoring effect.¹⁶
- c. Taurine is not approved as an additive to human food, but only to chicken feed.¹⁷

Ginseng is not an approved food additive at all.

29. In addition, not a single one of these products has been approved by the FDA as GRAS for alcoholic beverages or any other food or beverage, which the TTB official authoritatively stated must occur before an ingredient is added to an alcoholic beverage.

30. Therefore, as MillerCoors formulates its Sparks products, the added stimulants and unapproved substances result in products that are poisonous, deleterious, and unsafe.

¹⁵ 21 CFR 182.1180.

¹⁶ 21 C.F.R. 172.510.

¹⁷ 21 C.F.R. 573.980.

31. Specifically, because these beverages contain “poisonous or deleterious substance[s]” (caffeine, guarana, taurine, and ginseng) that “may render [them] injurious to health,” these beverages are “adulterated” in violation of D.C. Code § 48-103(2)(A). Because these beverages contain “added poisonous or added deleterious substance[s] . . . that [are] unsafe within the meaning of section 406 of the Federal Food, Drug, and Cosmetic Act,” these beverages are “adulterated” in violation of D.C. Code § 48-103(2)(B). These Sparks products have ingredients that are neither approved additives for use in alcoholic beverages, nor generally recognized as safe for use in alcoholic beverages, and thus are “adulterated” in violation of D.C. Code § 48-103(2).

32. In September 2007, the Food and Drug Administration Amendments Act of 2007 (FDAAA) was enacted. Section 912 of FDAAA establishes section 301(l) in the FDCA, which adds the following as a prohibited act:

The introduction or delivery for introduction into interstate commerce of any food to which has been added a drug approved under section 505 . . . or a drug . . . for which substantial clinical investigations have been instituted and for which the existence of such investigations has been made public . . .¹⁸

33. Section 301(l) of the FDCA provides four exceptions to its prohibition:

- a. If “such drug . . . was marketing in food before any approval of the drug under section 505 . . . and before any substantial clinical investigations involving the drug . . . have been initiated;”¹⁹
- b. If “the Secretary [of the Department of Health and Human Services]. . . has issued a regulation . . . approving the use of such drug . . . in the food;”²⁰
- c. If “the use of the drug . . . in the food is to enhance the safety of the food

¹⁸ FDCA § 301(l); 21 U.S.C. § 401(l).

¹⁹ FDCA § 301(l)(1); 21 U.S.C. § 401(l)(1).

²⁰ FDCA § 301(l)(2); 21 U.S.C. § 401(l)(2).

[and the use conforms with additional criteria];²¹ and

d. If the drug is a new animal drug whose use is not unsafe . . .²²

34. Section 301(l) of the FDCA identifies a category of foods that cannot be introduced or delivered for introduction into interstate commerce, including food that contains a substance that is an approved drug, or that has been the subject of substantial clinical investigations that have been made public. Caffeine is an approved drug and guarana, taurine, and ginseng have been the subjects of substantial clinical investigations that have been made public.²³ Thus, MillerCoors' Sparks products are prohibited from introduction or delivery for introduction into interstate commerce under FDCA § 301(l).

35. MillerCoors' Sparks products do not meet any of the four exceptions provided in FDCA § 301 to escape prohibition. Caffeine was not marketed in food before any approval under section 505, and guarana, taurine, and ginseng were not marketed in food before substantial clinical investigations of the ingredients had been initiated. The Secretary has not issued a regulation approving the use of caffeine in Sparks products, or in any other alcoholic beverage. The use of caffeine in Sparks products is not to enhance the safety of the products (and, in fact, makes the products more dangerous). Last, caffeine is not a new animal drug whose use is not unsafe under section 512.

²¹ FDCA § 301(l)(3); 21 U.S.C. § 401(l)(3).

²² FDCA § 301(l)(4); 21 U.S.C. § 401(l)(4).

²³ See e.g., C.N. Boozer, et al., *An Herbal Supplement Containing Ma Huang-Guarana for Weight Loss: A Randomized, Double-Blind Trial*, 25(3) INT'L J. OF OBESITY 316 (March 2001); S Uchida, et al. *Taurine Behaves as an Osmolyte in Madin-Darby Canine Kidney Cells. Protection by Polarized, Regulated Transport of Taurine*, 88(2) J CLIN INVEST. 656 (August 1991); Hermann-J. Engels Ph.D., et al., *Failure of Chronic Ginseng Supplementation to Affect Work Performance and Energy Metabolism in Healthy Adult Females*, 16(8) NUTRITION RES. 1295 (August 1996).

COUNT I

VIOLATION OF D.C. CONSUMER PROTECTION PROCEDURES ACT

DECEPTION AND MISREPRESENTATION

36. The D.C. Consumer Protection Procedures Act (CPPA) provides that it is a violation, “whether or not any consumer is in fact misled, deceived or damaged thereby,” for any person to: 1) represent that goods have “characteristics,” “uses,” and “benefits” that they do not have;²⁴ and 2) “fail to state a material fact if such failure tends to mislead.”²⁵

37. MillerCoors violates the CPPA by representing that its goods — Sparks alcoholic energy drinks — have the characteristics, uses, and benefits of giving the consumer energy or counteracting the effects of alcohol, which are characteristics, uses, and benefits that the goods do not have.²⁶

38. MillerCoors further violates the CPPA by:

- a. Failing to state to its customers the material fact that alcoholic energy drinks do not give the consumer energy or counteract the effects of alcohol; and
- b. Failing to state that the consumption of MillerCoors’ Sparks products increases the likelihood of experiencing alcohol-related consequences, such as riding with a driver under the influence; getting hurt or injured; requiring medical treatment; taking advantage of another person sexually; or being taken advantage of sexually.²⁷

39. D.C. Consumers have purchased and consumed MillerCoors’ Sparks products believing that they would gain energy, or that the stimulants in the products would counteract the effects of alcohol.

²⁴ D.C. Code § 28-3904(a).

²⁵ D.C. Code § 28-3904(f).

²⁶ See D.C. Code § 28-3904(a)

²⁷ See D.C. Code § 28-3904(f)

COUNT II

VIOLATION OF D.C. CONSUMER PROTECTION PROCEDURES ACT

BREACH OF IMPLIED WARRANTY OF MERCHANTABILITY

40. The CPPA also provides that it is an unlawful trade practice, and a violation of the act, “to sell consumer goods in a condition or manner not consistent with that warranted by operation of sections 28:2-312 through 318 of the District of Columbia Code,” which is part of the D.C. version of Uniform Commercial Code (UCC).²⁸

41. Section 314 of the D.C. UCC provides:

- a. Unless excluded or modified . . . a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.²⁹
- b. Goods to be merchantable must be at least such as . . .
 - i. In the case of fungible goods, are of fair average quality within the description; and³⁰
 - ii. Are fit for the ordinary purposes for which such goods are used; and . . .³¹
 - iii. Are adequately contained, packaged, and labeled as the agreement may require; and³²
 - iv. Conform to the promises or affirmations of fact made on the container or label if any.³³
- c. Failing to state that the Sparks products are “adulterated” in violation of D.C. Code §48-103(2).

42. These warranties are implied in every sale of MillerCoors’ Sparks products in the

²⁸ D.C. Code § 28:2-3904(x).

²⁹ D.C. Code § 28:2-314(1).

³⁰ D.C. Code § 28:2-314(2)(b).

³¹ D.C. Code § 28:2-314(2)(c).

³² D.C. Code § 28:2-314(2)(e).

³³ D.C. Code § 28:2-314(2)(f).

District and have not been excluded or modified.

43. D.C. Consumers have purchased MillerCoors' Sparks products covered by this implied warranty of merchantability.

44. MillerCoors' Sparks products purchased by D.C. Consumers are not of fair average quality, and are not fit for human consumption, because they are dangerous products that expose D.C. Consumers' health and safety to serious injury. MillerCoors' Sparks products purchased by D.C. Consumers are not adequately labeled to advise D.C. Consumers that they are consuming dangerous products and exposing their health and safety to serious injury, and do not conform to the promises made on the label (through the product name and the semblance of a battery) to give D.C. Consumers energy.

45. Furthermore, MillerCoors' Sparks products are not merchantable because they violate the D.C. Food and Drug Law, D.C. Code § 48-103. The D.C. Food and Drug Law prohibits adulterated food products in the District. According to the D.C. Food and Drug Law, food shall be deemed adulterated, if it bears or contains contain poisonous or deleterious substance which may render it injurious to health, or is otherwise unsafe.³⁴

46. MillerCoors' Sparks products contain artificial, poisonous, and deleterious substances (caffeine, guarana, taurine, and ginseng) that are injurious to health when mixed with alcohol. MillerCoors' Sparks products contain added poisonous or added deleterious substances (caffeine, guarana, taurine, and ginseng) that are unsafe because they are neither approved additives for use in alcoholic drinks, nor generally recognized as safe for use in alcoholic drinks.

47. MillerCoors' Sparks products are adulterated, and thus are not merchantable under the D.C. UCC.

³⁴ D.C. Code § 48-103(2)(A), (B), and (D).

48. Therefore, MillerCoors' practices are not merchantable because MillerCoors' Sparks products are: (1) not of fair or average quality, (2) not fit for the ordinary purpose for which such goods are used, (3) not adequately labeled, and (4) do not conform to the promises or affirmations of fact made on the container or label.³⁵

49. MillerCoors' breaches of implied warranty of merchantability violate the rights of D.C. Consumers protected by the CPPA.

RELIEF SOUGHT

50. The CPPA provides that any "person, whether acting in the interests of itself, its members, or the general public, may bring an action under this chapter in the Superior Court of the District of Columbia seeking relief from the use by any person of a trade practice in violation of a law of the District of Columbia."³⁶

51. Remedies under the CPPA include an injunction against the use of the unlawful trade practice, reasonable attorneys' fees, and any other relief that the Court deems proper.³⁷

Injunctive Relief

52. MillerCoors' Sparks product line has caused, and continues to cause, irreparable harm to the consuming public, thereby entitling CSPI, acting on behalf of itself, its members, and D.C. Consumers, to an injunction ordering MillerCoors to cease: (1) manufacturing and offering for sale any alcoholic beverage that contains caffeine, guarana, taurine, ginseng, or any other ingredient that is not determined by FDA as GRAS for use in alcoholic beverages, including any ingredient that does not serve a functional purpose in the product; (2) representing that Sparks products or the ingredients in the products give the consumer energy or counteract the effects of

³⁵ See D.C. Code § 28:2-314(2)(b), (c), (e), and (f).

³⁶ D.C. Code § 28-3905(k)(l).

³⁷ D.C. Code § 28-3905(k)(l).

alcohol; and (3) all other misleading statements relating to stimulant effects of Sparks products.³⁸

53. None of these changes will require any significant expenditure of money by MillerCoors. The primary injunctive relief sought would force MillerCoors to stop engaging in activities that are illegal under D.C. law, and merely forcing MillerCoors to stop doing something illegal does not count towards an amount in controversy. The other aspects of the injunctive relief sought by CSPI will have insignificant or no financial impact on MillerCoors. Thus, the amount in controversy is far less than \$75,000.

Declaratory Relief

54. An actual controversy has arisen between CSPI, its members, and D.C. Consumers on the one hand, and MillerCoors on the other hand, as to MillerCoors' obligations to persons who: (1) purchased Sparks alcoholic and caffeinated drinks not knowing of the dangerous mixture of the product; (2) purchase Sparks alcoholic and caffeinated drinks in the future not knowing of the dangerous mixture of the product. Specifically, CSPI contends that the acts and practices as alleged in this Complaint are unfair and unlawful under the CPPA, and requests a declaration that MillerCoors' acts and practices as challenged herein are unlawful and deceptive.

Attorneys' fees and costs

55. MillerCoors' acts and practices entitle CSPI to an award of attorneys' fees and costs.³⁹

PRAYER FOR RELIEF

CSPI, on behalf of itself, its members, and D.C. Consumers, prays for relief against MillerCoors, as follows:

³⁸ D.C. Code § 28-3904(x) and § 28-3905(k)(1)(D).

³⁹ D.C. Code § 28-3904(x) and D.C. Code § 28-3905(k)(1)(B).

1. A declaration that MillerCoors' acts and practices as challenged herein are unlawful and deceptive;
2. An order directing MillerCoors to cease: (1) manufacturing and offering for sale any alcoholic beverage that contains caffeine, guarana, taurine, ginseng, or any other ingredient that is not determined by FDA as GRAS for use in alcoholic beverages, including any ingredient that does not serve a functional purpose in the product; (2) representing that Sparks products or the ingredients in the products give the consumer energy or counteract the effects of alcohol; and (3) all other misleading statements relating to stimulant effects of Sparks products;
3. Reasonable attorneys' fees;
4. Costs; and
5. Other relief as the Court deems just and proper under the circumstances.

JURY DEMAND

CSPI demands trial by jury on all claims for which there is a right to a jury trial.

Dated September 8, 2008

Respectfully submitted,

Of counsel:

Mark H. Steinbach (D.C. Bar 212589)
O'Toole, Rothwell, Nassau & Steinbach
1350 Connecticut Avenue, N.W.
Suite 200
Washington, D.C. 20036
(202) 775-1550

Center for Science in the Public Interest
Stephen Gardner, Director of Litigation
(D.C. Bar No. 500296)
Katherine Campbell, Attorney
5646 Milton St., Ste. 211
Dallas, Texas 75206
Telephone: 214-827-2774
Facsimile: 214-827-2787

By:



Stephen Gardner