



Beverage Wholesalers Deal With Bang Bankruptcy

Articles / Publications

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Vital Pharmaceuticals, Inc., the company behind Bang Energy drinks, along with certain affiliated entities, including Quash Seltzer, LLC, filed for Chapter 11 bankruptcy protection on October 10, 2022, in the Southern District of Florida. Vital Pharmaceuticals, Inc. does business as “VPX Sports” and “VPX/Redline.” VPX has corresponded with many of its distributors regarding its plan to emerge from bankruptcy as a stronger company. The bankruptcy appears to have been the result of a variety of issues, including an almost \$300 million judgment entered against Bang in connection with a dispute with Monster Energy Co., as well as potential issues surrounding the recent breakup of the distribution agreements between VPX and PepsiCo. Whatever the reason, distributors of Bang products, both non-alcoholic energy drinks as well as the hard seltzers distributed through Quash Seltzer, LLC, may be concerned about any impact on their business.

As part of the filing of the bankruptcy, VPX requested, and has been granted, an interim order allowing it to remain as a “debtor-in-possession,” and has received substantial debtor-in-possession financing (known as “DIP Financing”) that may be approved by the Bankruptcy Court. VPX has also filed motions seeking to continue its contracts with shippers and warehousemen, as well as “honor or pay certain prepetition obligations to their customers” in the ordinary course of business. These facts may help allay some concerns of wholesalers in connection with the continued distribution of products supplied by VPX and its affiliates; however, bankruptcy cases move quickly, react to outside market pressures, and heavily rely on creditor input and involvement.

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This bankruptcy filing nonetheless creates certain other issues of which wholesalers should be aware, and contacting a bankruptcy attorney is highly recommended. VPX has used a variety of different distribution agreements over the years, including some agreements that Quash Seltzer, LLC has used in connection with distribution of alcohol-based products. Generally, the non-alcoholic beverage distribution agreements used by VPX granted broad rights of termination by VPX where not otherwise limited by a state franchise law. Distributors holding Quash Seltzer, LLC agreements to distribute alcohol products generally have greater franchise protection based upon state law, although as all wholesalers know, these rights may vary substantially from state to state and based upon the specific agreement. There are a few things that wholesalers might keep in mind at this point:

- First and foremost, the Bankruptcy Code provides debtors with a “breathing spell” known as the automatic stay. The automatic stay generally prohibits creditors and other nondebtor parties from contacting the debtor to attempt to collect a debt. A violation of this injunction could result in an award of actual and/or punitive damages against you. It is wise to have your attorney communicate with the debtor’s attorney to avoid any appearance of a stay violation.
- Distribution agreements may be considered executory contracts. Consequently, VPX will have the right to assume or reject any distribution agreement as part of the bankruptcy process. In the same motion where VPX seeks to honor its prepetition obligations to customers, it also requests permission to “renew, replace, [and] implement new, and terminate any existing[,] customer practices as they deem appropriate, in the ordinary course of business without further application to the Court.” So, there may be changes on the horizon. At this point, however, VPX has not taken action or indicated that it plans to reject any distribution agreements, but wholesalers should pay close attention to any notices from VPX or the Bankruptcy Court that they may receive.
- While “businesses as usual” is generally the rule while the debtor-in-possession retains control, wholesalers may want to contact a bankruptcy attorney to assist in monitoring the bankruptcy case, specifically for any orders or motions that may be filed.
- Most distribution agreements may purport to permit the wholesaler to terminate the distribution agreement in the event of the supplier’s bankruptcy filing. This is true of most of the distribution agreements that have been used by VPX and its affiliates (including Quash Seltzer, LLC). However, these clauses, commonly known as “ipso facto” clauses, may be unenforceable in bankruptcy and forbid a nondebtor party from terminating or modifying a contract. Also, the automatic stay may prevent a distributor from terminating any agreement without consent of the Bankruptcy Court or by agreement with the Debtor. Again, this is an issue that wholesalers may want to discuss with a bankruptcy attorney to determine the most appropriate course of action.
- Additionally, bankruptcy cases have many strict deadlines, one of which is the Proof of Claim deadline. A Proof of Claim is filed with the Court and outlines a creditor’s claim to receive payment in a bankruptcy case. If a creditor fails to timely file a Proof of Claim, it could be barred from receiving distributions from the Debtor. Currently, the Proof of Claim deadline is December 19, 2022; however, that is subject to change.

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As in many bankruptcy cases, bankruptcy is used to promote an orderly processing of debts, specifically large jury verdicts. Nevertheless, wholesalers should pay close attention to the bankruptcy proceedings until there is greater certainty as to how VPX will operate, both inside and outside of bankruptcy. This bankruptcy case could result in a reorganization, a sale of VPX's assets (known as a "363 Sale"), or a liquidation and wind-down of the companies. The filing is only the beginning of whatever strategy these Debtors choose to employ.

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