

# THE DAILY RECORD

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## IPFRONTIERS

### Red Bull (does not) give you wings

*Company agrees to \$13M settlement of false advertising claim in NY Federal District Court*

Red Bull GmbH has agreed to pay more than \$13 million to settle a class action lawsuit that alleges false advertising in connection with its energy drinks. The class action was brought by lead plaintiff Benjamin Careathers on Jan. 16, 2013, in the U.S. District Court for the Southern District of New York stemming from the company's "Red Bull gives you wings" advertising campaign.

The plaintiff alleges that Red Bull's advertising statements, disseminated to the public through print, TV and Internet marketing campaigns, which promote that the consumption of Red Bull leads to an increase in performance, concentration and reaction speed are false and deceptive.

Careathers is an individual from the Bronx, who has been purchasing and drinking Red Bull energy drinks since approximately 2002. According to the complaint, Red Bull preys upon consumers by promising that, among other things, "Red Bull gives you wings" by providing a mixture of ingredients that, when ingested, significantly improves the consumer's physiological and mental performance beyond what a simple cup of coffee or caffeine pill would do for a consumer's physiological and mental performance.

The class action lawsuit alleges breach of express warranty, unjust enrichment, and violations of over 30 state consumer protection acts, including New York General Business Law (GBL) §349 and §350. Section 349 prohibits deceptive trade practices and section 350 prohibits false advertising.

While claims under New York's GBL §§349 and 350 are often asserted in conjunction with claims under section 43 of the federal Lanham Act, which also prohibits false advertising, §§349 and 350 address a broader spectrum of conduct than the Lanham Act.

To be clear, the primary issue in the lawsuit is not whether Red Bull does, in fact, cause the consumer to sprout wings and fly.

Red Bull correctly argued that such a statement is considered mere "puffery," which is not an actionable basis for a false advertising claim.

Puffery is defined as an exaggeration, hyperbole, subjective opinion or undue praise that cannot be scientifically verified. These statements are non-actionable based upon the rationale that no reasonable buyer would believe such a claim to be actually true.

For example, in a false advertising suit brought by Pizza Hut against Papa John's, the Fifth Circuit found Papa John's claim, "Better Ingredients. Better Pizza," to be mere puffery. The Fifth Circuit reasoned that the statement standing alone was not a verifiable fact that would be relied upon by consumers.

On the other hand, the Ninth Circuit determined that the statement "50 Percent Less Mowing," which was made by a defendant in association with its lawn care product, was not mere puffery. Statements like that one that are objective in nature, i.e., that may be proven true or false through experimentation, are actionable if they cannot be substantiated.

Turning back to the Red Bull case, the crux of the class action lawsuit stems from the alleged lack of scientific support for Red Bull's advertising claim that its product provides more energy than a cup of coffee. According to the plaintiff, the only ingredient in Red Bull's product that provides either physical or mental "energy" is caffeine.

The complaint cites several reports and studies by The New York Times, the European Food Safety Authority and scientific journal Nutrition Reviews that found caffeine to be the only ingredient in energy drinks like Red Bull that provides a significant source of "energy." The complaint further asserts that Red Bull lacks any scientific support for its claim that its unique blend of ingredients (including caffeine, glucose, taurine, etc.) is responsible for the purported superior benefits.

Assuming for a moment that the plaintiff's allegations are true, the energy provided by a Red Bull product is equivalent to the amount of caffeine in the product, which is substantially less than the amount of caffeine in an equivalent sized cup of coffee.

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As alleged in the complaint, despite the lack of scientific evidence, Red Bull consistently marketed its product as a superior source of "energy" worthy of a premium price over a cup of coffee or other sources of caffeine even though it contains less caffeine.

For example, an 8.4 ounce can of Red Bull Energy Drink costs \$2.19 or more and contains 80 mg of caffeine, whereas a typical caffeine pill costs approximately 30 cents and contains 100 mg of caffeine. Similarly, a 7 ounce cup of gourmet coffee contains approximately 115 to 175 mg of caffeine, and even a 12 ounce serving of Starbucks coffee costs \$1.85 and contains significantly more caffeine than a serving of Red Bull. To add perspective, another popular energy drink, Rockstar, contains twice as much caffeine as Red Bull's product, and a 5-Hour Energy shot contains over 200 mg.

According to the court documents filed prior to settlement, Red Bull "denies any wrongdoing or liability, and while Red Bull believes that its marketing and labeling have always been entirely truthful and accurate, it confirms that all future claims about the functional benefits of its products will be medically and/or scientifically supported." Red Bull then released the following statement following the settlement:

Red Bull settled the lawsuit to avoid the cost and distraction of litigation. However, Red Bull maintains that its marketing and labeling have always been truthful and accurate, and denies any and all wrongdoing or liability.

Under the settlement, Red Bull will reimburse disappointed customers who have purchased at least one can of Red Bull over

the past 12 years with either a cash payment of \$10 or a voucher for \$15 worth of Red Bull products.

Because it is a class action suit, before the settlement is finalized, it must be approved by the federal district court in New York City. A hearing is presently scheduled for March 2015. In the meantime, consumers who would like to make a claim can fill out a form at [www.energydrinksettlement.com](http://www.energydrinksettlement.com), call (877) 495-1568 or write to Energy Drink Settlement, c/o GCG, P.O. Box 35123, Seattle, Washington, 98124. No proof of purchase is necessary.

However, under the settlement, the payments max out at \$13 million, at which point that amount will be divided by the number of claims, and people could get less than \$10. Based upon initial reports of the number of claims submitted the first week the website went live (the week of Oct. 12), payouts could be substantially less than \$10.

The Red Bull case highlights the importance of considering false advertising liability in a company's overall intellectual property strategy. A successful intellectual property plan includes not only steps to protect and enforce your business' trademarks, copyrights and patents, but also to monitor and mitigate any risk of liability in connection with false advertising. Website content, marketing material and advertising campaigns should be carefully reviewed prior to publication to confirm that the statements can either be scientifically substantiated or constitute non-actionable, mere puffery.

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