City Attorney Dennis Herrera News Release

For Immediate Release:
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Monster Energy's suit against San Francisco City Attorney is thrown out of federal court

With* Monster v. Herrera*, nation's largest energy drink maker sought to block California case over marketing of harmful caffeinated products to children, youth

RIVERSIDE, Calif. (Dec. 16, 2013)—A U.S. District Court late this morning dismissed a federal lawsuit by Monster Beverage Corporation (NASDAQ: MNST) against San Francisco City Attorney Dennis Herrera that sought to block his investigation and statewide consumer protection litigation against the company for marketing highly-caffeinated energy drinks to children as young as six years old. Today's dismissal of *Monster v. Herrera* by U.S. District Court Judge Virginia A. Phillips clears the way for a state court action Herrera filed in May to proceed on allegations that the nation's largest energy drink manufacturer is violating California law by targeting children and teens with products that pediatric studies show "may lead to significant morbidity in adolescents" from elevated blood pressure, brain seizures, and severe cardiac events.

"Monster Energy's federal suit was a meritless ploy to stop our state consumer protection case, and I'm grateful to the court for issuing an unequivocal dismissal," said Herrera. "Despite the known dangers highly-caffeinated products pose to young people's health and safety, Monster deliberately targets children with its marketing. The U.S. Senate Commerce Committee has expressed grave concerns about aggressive marketing of these products to young people, and the NCAA even prohibits member colleges from giving energy drinks to athletes because of the serious safety risks. It's my hope that Monster Energy will reform its marketing practices before regulators or courts force them to."

The FDA has received numerous reports of adverse events related to consumption of Monster Energy drinks, including five alleged deaths and multiple reported instances of illness, injury and hospitalizations. The alleged wrongful death of a 14-year-old Maryland girl from cardiac arrhythmia due to caffeine toxicity after drinking two 24-ounce servings of Monster Energy is the subject of high-profile private litigation currently pending against the company. Emergency room

[MORE]

visits related to energy drink consumption have spiked dramatically in recent years, according to the U.S. Department of Health and Human Services' Drug Abuse Warning Network, which reported a nearly 14-fold increase in medical events for which emergency invention was sought—from 1,494 instances in 2005, to 20,783 in 2011.

Herrera's Consumer Protection Unit launched an investigation into the Corona, Calif.-based beverage manufacturer's business and marketing practices in 2012 in light of mounting scientific evidence about serious health risks to young people. Lawyers from the San Francisco City Attorney's Office were engaged in negotiations with Monster to secure a voluntary agreement to end an array of marketing practices aimed at children and youth, when the company abruptly filed a pre-emptive federal suit that claimed, among other arguments, a First Amendment right to market its products to children.

Evidence of actionable marketing tactics uncovered in Herrera's investigation include a "Monster Army" social networking community that featured children as young as six years of age, and its promotion of energy drinks at schools and at school-sponsored sporting events. Another objectionable tactic involves the "Monster Energy Drink Player of the Game" series, in which high school athletes are awarded and photographed with twin four-packs—eight 16-ounce cans—of Monster Energy Drinks. At 10 mg of caffeine per ounce, the photos advertise high school athletes, including minors, displaying more than 12-times the generally recommended daily maximum of caffeine for adolescents.

Herrera's complaint alleges that Monster Beverage Corporation's business and marketing practices violate California's Unfair Competition Law and the Sherman Food, Drug and Cosmetic Law. If the San Francisco City Attorney's lawsuit is successful, Monster Energy could be enjoined from continuing illegal conduct deemed harmful to consumers and competitors, and forced to pay significant civil penalties and restitution as a result of its unfair business practices.

Herrera's case is: *People of the State of California v. Monster Beverages Corporation*, San Francisco Superior Court Case No. 531161, filed May 6, 2013. Monster's dismissed federal action is: *Monster Beverage Corporation v. Dennis Herrera*, U.S. District Court, Central District of California, Eastern Division, CV-13-00786, filed April 29, 2013. Additional documentation is available at: http://www.sfcityattorney.org.

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PRIORITY SEND

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES -- GENERAL

Case No. EDCV 13-00786-VAP (OPx) Date: December 16, 2013

Title: MONSTER BEVERAGE CORPORATION, A DELAWARE CORPORATION, AND MONSTER ENERGY COMPANY, A DELAWARE CORPORATION -*v*- DENNIS HERRERA, IN HIS OFFICIAL CAPACITY AS CITY ATTORNEY OF SAN FRANCISCO

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PRESENT: HONORABLE VIRGINIA A. PHILLIPS, U.S. DISTRICT JUDGE

Marva Dillard	None Present
Courtroom Deputy	Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:	ATTORNEYS PRESENT FOR DEFENDANTS:
None	None

PROCEEDINGS: MINUTE ORDER GRANTING MOTION TO DISMISS (IN CHAMBERS)

Before the Court is a renewed motion to dismiss ("Motion" or "Mot.") (Doc. No. 56.) filed by Defendant Dennis Herrera, in his official capacity as City Attorney of San Francisco ("City Attorney" or "Defendant"). The matter came before the Court for hearing on December 9, 2013. The Court considered all papers in support of, and in opposition to, the Motion, and the arguments put forth at the hearing, and for the reasons set forth below, the Court GRANTS the Motion.

I. BACKGROUND

A. Procedural Background

On October 31, 2012, the City Attorney sent Plaintiffs Monster Beverage Corporation, and Monster Energy Company (collectively, "Monster") a letter announcing he had begun an investigation into the safety of Monster Energy drinks ("Monster Drinks"). (Compl. ¶ 44; see also Ex. C to Compl.) After a meeting and an exchange of letters,[1] on March 29, 2013, the City Attorney sent Monster a letter that "demand[ed] that Monster take immediate steps to reformulate its products to safe caffeine levels, provide adequate warning labels, and cease promoting over-consumption." (Id. ¶ 49; see also Ex. F to Compl.) In addition, the letter included a list of steps[2] that Monster must "immediately agree to take" to avoid litigation. (Id. ¶ 50; Ex. F to Compl.) The City Attorney stated that if he "does not receive an adequate response, the City will proceed to file suit forthwith." (Id.)

In response to the City Attorney's letter, Monster filed a Complaint in federal court for Declaratory and Injunctive Relief against the City Attorney on April 29, 2013 (Doc. No. 1) ("Complaint" or "Compl"). Monster alleges five claims for relief: (1) Preemption and Primary Jurisdiction; (2) First and Fourteenth Amendment –- Compelled Speech ("Compelled Speech Claim"); (3) First and Fourteenth Amendment –- Content-Based Speech ("Content-Based Speech Claim"); (4) First and Fourteenth Amendment –- Commercial Speech ("Commercial Speech Claim"); and (5) First and Fourteenth Amendment –- Void for Vagueness as Applied ("Void for Vagueness Claim"). The Complaint requests a Court declaration that the City Attorney's investigation into the safety of Monster Drinks and attempts to regulate Monster Drinks are preempted by the Federal Food, Drug, and Cosmetic Act ("FDCA"), barred by the doctrine of primary jurisdiction, and violate the First and

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[1]For a more detailed background of the meeting and letters exchanged see the August 22, 2013 Minute Order Granting, In Part, and Denying, In Part, Defendant's Motion to Dismiss at pages 5-7. ("MTD I Order") (Doc. No. 44.)

[2]The letter demanded Monster take the following steps: (1) reformulate its product to lower the caffeine content to safe levels; (2) provide adequate warning labels; (3) cease promoting over-consumption in marketing; (4) cease use of alcohol and drug references in marketing; and (5) cease targeting minors.

Fourteenth Amendments. (Prayer for Relief ¶ 1.) In addition, Monster seeks an injunction to enjoin the City Attorney from "enforcing his arbitrary and discriminatory demands on Plaintiffs." (Compl. ¶ 8.)

On May 6, 2013, the City Attorney filed an action, People v. Monster, against Monster in San Francisco Superior Court. ("State Action") (Mot. at 2.) Monster removed the State Action to the Northern District of California on June 3, 2013.

On the same day the State Action was removed, the City Attorney filed a motion to dismiss Monster's Complaint on the grounds the Complaint failed to satisfy Article III; the Younger abstention doctrine required dismissal because there was on an ongoing state proceeding; the remedies sought would violate the City Attorney's First Amendment rights; and each of the claims failed as a matter of law. ("MTD I") (Doc. No. 18.) On August 22, 2013, the Court issued a Minute Order Granting, In Part, and Denying, In Part, Defendant's Motion to Dismiss. ("MTD I Order") (Doc. No. 44.) The Court dismissed Monster's Void for Vagueness Claim and the Declaratory Relief Claim to the extent that claim was based on a violation of the Commerce Clause, and denied the City Attorney's Motion in all other respects. (MTD I Order at 25.) In regard to the Younger abstention doctrine, the Court found it was not applicable as there was no ongoing state proceeding because Monster had removed the State Action. (Id. at 14.) The Court noted that a motion to remand was pending in the removed State Action, and that if the matter was remanded, the Court may, at that point, determine whether abstention is appropriate. (Id. at 14 n. 1.)

On September 18, 2013, the Northern District of California remanded People v. Monster to San Francisco Superior Court. (Mot. at 3.) On October 17, 2013, in light of the remand, the City Attorney filed the instant renewed Motion to dismiss under the Younger abstention doctrine. In addition, the City Attorney argues the Complaint should be dismissed because the relief sought by Monster is prohibited by the Anti-Injunction Act. (Id.) The City Attorney also filed a Request for Judicial Notice in Support of the Renewed Motion to Dismiss and Exhibits A and B. ("RJN") (Doc. No. 57.)

Monster filed their Opposition on November 11, 2013 ("Opposition" or "Opp'n.") (Doc. No. 60.) On November 25, 2013, the City Attorney filed his Reply

("Reply") (Doc. No. 62)[3] and Monster filed a Notice of Supplemental Authority in Support of Plaintiffs' Opposition, notifying the Court of the recent Order Granting Defendants' Motion to Dismiss Fisher v. Monster Beverage Corp., No. EDCV 12-02188-VAP (OPx).[4] (Doc. No. 61.)

On December 9, 2013, the Court heard arguments in support of and in opposition to the Motion. On December 10, 2013, Monster filed the Declaration of Dan Marmalefsky Regarding Defendant's Renewed Motion to Dismiss Under the Younger Abstention Doctrine, and Motion to Dismiss Under the Anti-Injunction Act and Exhibits A and B ("Marmalefsky Decl.") (Doc. No. 63) and Notice of Decision by the United States Supreme Court Limiting Application of Younger Abstention Doctrine ("Notice of Decision") (Doc No. 64). The City Attorney filed a Response to Plaintiffs' Notice of Decision later that day. (Doc. No. 65.)

B. Request for Judicial Notice

With his Motion, the City Attorney filed an RJN, requesting the Court take judicial notice of the Complaint, filed on May 6, 2013, in the matter of People v.

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[3]The briefing schedule was modified pursuant to the parties' Stipulation Concerning Briefing Schedule for Motion to Dismiss. (Order Granting Stipulated Briefing Schedule for Motion to Dismiss (Doc. No. 59).)

[4]Monster v. Herrera was transferred to this Court because it is related to Fisher v. Monster, No. EDCV 12-02188-VAP (OPx). (See Order Re Transfer Pursuant to General Order 08-05 (Doc. No. 16.)) In Fisher, plaintiffs filed a class action against Monster seeking redress for Monster's allegedly unfair and deceptive business and trade practices. Specifically, Plaintiffs alleged that there were misrepresentations on the labels of certain Monster Drinks and that Monster's advertising scheme is deceptive because it targets children without including warnings about the danger of the drinks. On November 11, 2013, the Court dismissed the Complaint on multiple grounds, including failure to state a claim for the misrepresentation claims and preemption for claims that Monster failed to warn or adequately label the drinks. (See November 12, 2013 Order Granting Defendants' Motion to Dismiss, Fisher v. Monster, No. EDCV 12-02188-VAP (OPx) (ECF No. 73.))

Monster Beverage Corp., San Francisco County Superior Court Case No. CGC-13-531161 ("City Attorney's Complaint") and the Order Granting Motion to Remand, in the matter of People v. Monster Beverage Corp., United States District Court, Northern District of California No. C 13-2500-PJH ("Remand Order").

A court may take judicial notice of court filings and other matters of public record. See Reyn's Pasta Bella, LLC v. Visa USA, Inc., 442 F.3d 741, 746 n.6 (9th Cir. 2006) (citing Burbank-Glendale-Pasadena Airport Auth. v. City of Burbank, 136 F.3d 1360, 1364 (9th Cir. 1998)). Since the City Attorney's Complaint and the Remand Order are court filings, they are appropriate for judicial notice. Accordingly, the Court GRANTS the City Attorney's RJN.

II. LEGAL STANDARD

A. Abstention

Generally, "abstention from the exercise of federal jurisdiction is the exception, not the rule." Colorado River Water Conservation Dist. v. U. S., 424 U.S. 800, 813 (1976); San Jose Silicon Valley Chamber of Commerce Political Action Comm. v. City of San Jose, 546 F.3d 1087, 1091 (9th Cir. 2008) ("San Jose Ethics Commission"). The exercise of abstention under the doctrine outlined in Younger v. Harris, 401 U.S. 37 (1971) is such an exception. "Younger abstention is a jurisprudential doctrine rooted in overlapping principles of equity, comity, and federalism." San Jose Ethics Commission, 546 F.3d at 1091. The Younger doctrine "counsels federal-court abstention when there is a pending state proceeding, [and] reflects a strong policy against federal intervention in state judicial processes in the absence of great and immediate irreparable injury to the federal plaintiff." Moore v. Sims, 442 U.S. 415, 423 (1979).

Although Younger itself involved potential interference with a state criminal case, the Supreme Court has extended the doctrine to certain types of state civil proceedings. Huffman v. Pursue, Ltd., 420 U.S. 592, 604 (1975) (extending Younger to civil enforcement proceedings); see also New Orleans Pub. Serv., Inc. v. Council of City of New Orleans, 491 U.S. 350, 368 (1989) ("NOPSI") (recognizing Younger applies to civil enforcement actions). As the Supreme Court recently emphasized, the "[c]ircumstances fitting within the Younger doctrine are 'exceptional'" and include *only* "state criminal prosecutions", "certain civil

enforcement proceedings", and "civil proceedings involving certain orders . . . that are uniquely in furtherance of the state court's ability to perform their judicial functions." Sprint Communications, Inc. v. Jacobs, 571 U.S. ___, No. 12-815, slip op. at 8 (December 10, 2013) (quoting NOPSI, 491 U.S. at 368) (emphasis added).

Application of the Younger doctrine is appropriate when: (1) a state initiated proceeding is ongoing; (2) the state proceedings involve important state interests; (3) the state proceedings afford adequate opportunity to raise any federal constitutional issue; and (4) the federal court action would enjoin the state court proceeding. San Jose Ethics Commission, 546 F.3d at 1092; Middlesex County Ethics Comm'n v. Garden State Bar Ass'n, 457 U.S. 423, 432 (1982) ("Middlesex"). When Younger abstention applies, the district court must dismiss the federal action. Beltran v. State of Cal., 871 F.2d 777, 782 (9th Cir. 1988) (citing Gibson v. Berryhill, 411 U.S. 564, 577 (1973)). The only exception is if there is a "showing of bad faith, harassment, or some other extraordinary circumstance that would make abstention inappropriate." Middlesex, 457 U.S. at 435.

B. Anti-Injunction Act

The Anti-Injunction Act prohibits a federal court from granting an injunction to enjoin proceedings in a state court unless certain exceptions apply. 28 U.S.C. § 2283. The Act limits the equitable relief available to federal courts, but does not negate federal subject matter jurisdiction. See Bank One Delaware, NA v. Wilens, 2003 WL 21703627, at *1 n.1 (C.D. Cal. June 13, 2003). Accordingly, it is properly raised as a defense in a 12(b)(6) motion to dismiss.

Federal Rule of Civil Procedure 12(b)(6) allows a party to bring a motion to dismiss for failure to state a claim upon which relief can be granted. When evaluating a Rule 12(b)(6) motion, a court must accept all material allegations in the complaint — as well as any reasonable inferences to be drawn from them — as true and construe them in the light most favorable to the non-moving party. See Doe v. United States, 419 F.3d 1058, 1062 (9th Cir. 2005); ARC Ecology v. U.S. Dep't of Air Force, 411 F.3d 1092, 1096 (9th Cir. 2005); Moyo v. Gomez, 32 F.3d 1382, 1384 (9th Cir. 1994).

III. DISCUSSION

A. Younger Abstention Doctrine

The City Attorney moves to dismiss the Complaint under the Younger doctrine, and argues that all of the requirements for abstention are met, as (1) state proceedings are on-going because the state court action was initiated before any proceedings of substance occurred in the federal action; (2) the state proceedings implicate important state interests in ensuring food safety, protecting consumers from deceptive marketing practices, and enforcing state laws; (3) the claims are not preempted, and if they are that argument is properly presented to the state court; (4) Monster has an adequate opportunity to raise federal questions in state court; and (5) the relief Monster requests would interfere with the state proceedings. (See generally Mot.)

Monster argues abstention is not appropriate because (1) no state proceeding was pending before a proceeding of substance on the merits took place in federal court; (2) no important state interest is served by the state proceeding because the action is preempted and federal interests outweigh the state interest; and (3) the action does not interfere with state court proceedings because it seeks only to enjoin remedies that are outside the scope of the City Attorney's authority. (See generally Opp'n.)

1. Application of Younger Doctrine

Younger abstention applies to only three classes of state proceedings: state criminal prosecutions, certain civil enforcement actions, and civil proceedings in furtherance of the state courts' ability to perform their judicial functions. See Sprint, slip op. at 8 (citing NOPSI, 491 U.S. at 368.) Generally, the types of civil enforcement proceedings Younger applies to are state proceedings that are "akin to criminal prosecution" in "important respects." Id. at 9 (quoting Huffman, 420 U.S. at 604.) The civil enforcement action is "characteristically initiated to sanction the federal plaintiffs, i.e., the party challenging the state action, for some wrongful act." Id. The "state actor is routinely a party to the state proceeding and often initiates the action." Id. Finally, "[i]nvestigations are commonly involved, often culminating in the filing of a formal complaint or charges." Id.

Applying the Sprint characteristics, the state action initiated by the City Attorney falls within the class of civil enforcement actions in which Younger

abstention may apply.[5] Here, the City Attorney initiated an investigation into the safety of Monster Drinks. As a result of the investigation, the People of the State of California, acting by and through the City Attorney, filed a Complaint in San Francisco Superior Court challenging the "unfair, deceptive, and unlawful business practices" of Monster under California Business and Professions Code section 17200 and seeking an injunction, money damages for affected consumers, and civil penalties. (City Attorney's Compl. ¶ 1; Prayer for Relief ¶¶ 1-5.) The type of lawsuit filed by the City Attorney, seeking injunctive relief and civil penalties, "is fundamentally a law enforcement action designed to protect the public and not to benefit private parties." See People v. Pac. Land Research Co., 20 Cal. 3d 10, 17 (1977). Accordingly, the Younger doctrine extends to the City Attorney's state court action.

2. Ongoing State Proceeding

A state proceeding is considered to be "ongoing" for the purposes of Younger abstention when "state [ ] proceedings are *begun* against the federal plaintiffs after the federal complaint is filed but before any proceedings of substance on the merits have taken place in the federal court." Hicks v. Miranda, 422 U.S. 332, 349 (1975) (emphasis added). The Supreme Court has also stated that state proceedings are ongoing when the state proceedings are "*initiated* before any proceedings of substance on the merits have taken place in the federal court." Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 238 (1984) (citing Hicks, 422 U.S. at 349) (emphasis added). The Ninth Circuit interprets the Supreme Court's use of "begun" and "initiated" to mean that a state proceeding is "ongoing" for the purposes of Younger abstention when it was filed before any proceedings of substance on the merits have taken place in federal court. M&A Gabaee v. Cmty. Redevelopment Agency of City of Los Angeles, 419 F.3d 1036, 1040 (9th Cir. 2005).

Here, the federal action was filed on April 29, 2013, one week before the State

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[5]A proceeding initiated by a municipality is considered "state initiated." See e.g. San Jose Ethics Commission, 546 F.3d at 1092 (proceeding initiated by San Jose Elections Commission, a local government entity established by the city of San Jose was, "state-initiated").

Action was filed on May 6, 2013. On June 3, 2013, the same day that Defendant filed a motion to dismiss based in part on the Younger doctrine, Plaintiffs removed the State Action to federal court, precluding the Court from determining whether Younger abstention applied. On August 22, 2013, the Court issued a Minute Order Denying in Part and Granting in Part Defendant's motion to dismiss, specifically leaving open the possibility that Younger abstention may apply in the State Action was remanded. (MTD I Order at 25.) On September 18, 2013, the State Action was remanded to state court.

The City Attorney argues state proceedings are ongoing because the State Action was initiated on May 6, 2013, before any proceedings of substance on the merits had taken place in federal court. (Mot. at 4-5; Reply at 1-3.) Furthermore, he contends that even if, as Monster argues, the relevant date for this inquiry is the date the State Action was remanded, the MTD I Order was not a proceeding of substance on the merits. (Reply at 2 n.1.) Monster argues that the appropriate test is whether the state proceeding was remanded before any proceedings of substance on the merits took place in federal court, and argues that because the MTD I Order was issued on August 22, 2013, before the State Action was remanded on September 18, 2013, state proceedings are not ongoing. (Opp'n. at 6.)

The Court is not persuaded by Monster's argument that when a state action is removed after being filed, the date of the state action remand is controlling for the Younger "ongoing state proceeding" requirement. Monster relies on Merck Sharp & Dohme Corp. v. Conway, 909 F. Supp. 2d 781, 786-87 (E.D. Ky. 2012), where the Eastern District of Kentucky found that the relevant date for the inquiry into whether a state court proceeding was "ongoing" was the date the action was remanded. In Merck, the Court reasoned that because the state action had been removed at the time the federal action was filed, there was no case pending at the time the federal action was filed. 909 F. Supp. 2d at 787. Since there was no state action pending at the time the federal action was filed, the Court determined whether the state action was "on-going" by looking to the date the state action was remanded, and thus once again "pending". Id. This interpretation is not consistent with the language used by the Supreme Court and the Ninth Circuit, which says that for the purposes of Younger abstention, a case will be "ongoing" when it was "initiated" or "begun" before a proceeding of substance on the merits in federal court. See Hicks,

422 U.S. at 349; Hawaii Hous. Auth., 467 U.S. at 238; M&A Gabaee, 419 F.3d at 1040.

Accordingly, since the State Action was filed on May 6, 2013, before the Court issued its MTD I Order on August 22, 2013, there exists an ongoing state proceeding for the purposes of Younger abstention. Accordingly, the Court does not reach the issue of whether the MTD I Order was a proceeding of substance on the merits.

3. State Proceedings Implicate Important State Interests

Next, under Younger, the Court considers whether the state proceeding implicates an important state interest. In assessing the importance of a state's interest, courts "do not look narrowly to its interest in the outcome of the particular case." NOPSI, 491 U.S. at 365.

When a state action is preempted under federal law, the state action does not implicate important state interests. See Champion Intel Corp. v. Brown, 731 F.2d 1406, 1409 (9th Cir. 1984) ("Montana has no cognizable state interest in enforcing those age discrimination laws that are preempted by federal law."). For a state action to be preempted for the purposes of Younger abstention, the preemption must be "readily apparent." Fresh Intel Corp. v. Agric. Labor Relations Bd., 805 F.2d 1353, 1361 (9th Cir. 1986); Commc'ns Telesystems Intel v. California Pub. Util. Comm'n, 196 F.3d 1011, 1017 (9th Cir. 1999).

The City Attorney argues that the State Action implicates California's important state interests in protecting its residents from unsafe and mislabeled food products, protecting consumers from deceptive marketing practices, and enforcing state laws. (Mot. at 5.) Monster argues that the State Action does not implicate important state interests because the claims do not further the state interests asserted, the claims are preempted, and federal interests outweigh the state interests. (Opp'n. at 9.)

In People v. Monster, the City Attorney claims that Monster has violated California Business and Professions Code sections 17200 and 17500 because (1) Monster misbranded its products as dietary supplements in violation of section 110760 of the Sherman Food, Drug, and Cosmetic Laws ("Sherman Law"); (2)

Monster sells an adulterated product in violation of Section 110620 of the Sherman Law; (3) Monster sells a misbranded product in violation of Section 110660 of the Sherman Law because its labeling is misleading in many material respects, it does not adequately warn of the dangers of consumption, and it encourages consumers to "pound down" or "chug down" Monster Energy Drinks; (4) Monster markets its products to children and adolescents and falsely suggests that Monster Energy Drinks are safe for youth to consume; (5) Monster markets its products to minors using alcohol and drug references, which encourages the unsafe practice of mixing energy drinks with alcohol and drugs; and (6) Monster markets its products with unsubstantiated claims about the purported special benefits of its ingredients and "energy blend." (City Attorney's Comp. ¶ 62.)

Monster alleges the FDA has jurisdiction to regulate the safety and labeling of energy drinks, and the claims in the State Action are both expressly and impliedly preempted.[6] (Opp'n. at 9-12.)

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[6]Monster also argues that the federal interests in the uniform application of food safety and labeling laws outweigh the City Attorney's interest in regulating locally, and thus the State Action does not serve an important state interest. (Opp'n. at 12-13.) The Court is not persuaded that it needs to engage in a weighing of federal versus state interests, aside from the preemption question, in deciding whether an important state interest exists for the purposes of Younger abstention. The cases cited for this argument involve the question of federal versus state jurisdiction on Indian reservations, and the unique relationship between the federal government, states, and Indian Tribes. See Opp'n. at 12-13 (citing Fort Belknap Indian Cmty. of Fort Belknap Indian Reservation v. Mazurek, 43 F.3d 428, 431 (9th Cir. 1994) (finding there is no state interest in the question of whether the state has jurisdiction to prosecute Indians who violate Montana liquor laws on an Indian reservation.) (citing Seneca-Cayuga Tribe of Oklahoma v. State of Okl. ex rel. Thompson, 874 F.2d 709, 712-13 (10th Cir. 1989) (no important state interest because "[t]he presumption and the reality, however, are that federal law, federal policy, and federal authority are paramount in the conduct of Indian affairs in Indian Country."))).

(continued...)

i. State Interest in Food Safety, Protecting Consumers From Deceptive Marketing Practices, and Enforcing State Laws

The state has an important interest in protecting consumers from unfair and deceptive business practices and protecting the health and safety of its residents. See Commc'ns Telesystems Intel v. California Pub. Util. Comm'n, 196 F.3d 1011, 1017 (9th Cir. 1999) (Among the important state interests at issue here are the protection of consumers from unfair business practices). The state also has an important state interest in enforcing a state law. Potrero Hills Landfill, Inc. v. Cnty. of Solano, 657 F.3d 876, 883 (9th Cir. 2011) "The state's interest in a civil proceeding is readily apparent when the state through one of its agencies acts essentially as a prosecutor." Fresh Intel Corp. v. Agric. Labor Relations Bd., 805 F.2d 1353, 1360 n.8 (9th Cir. 1986).

Monster does not dispute that these interests are important, but argues that the interests are not served by the State Action because the City Attorney has singled out Monster and is not investigating other energy drinks. (Opp'n. at 8.) The fact that only Monster is named in the State Action does not defeat the state's important interest in enforcing the law and protecting consumers from deceptive business practices. See NOPSI, 491 U.S. at 365 (looking not at the state's specific concern in the firing of a specific employee, but to the more general interest in preventing employers from engaging in sex discrimination). Therefore, the State Action implicates important state interests.

ii. Express Preemption

Monster argues the State Action is expressly preempted by the FDCA. The FDCA empowers the FDA (a) to protect public health by ensuring that "foods are safe, wholesome, sanitary, and properly labeled," 21 U.S.C. § 393(b)(2)(A); (b) to promulgate regulations implementing the statute; and (c) to enforce its regulations through administrative procedures. See 21 C.F.R. § 7.1, et seq. The FDCA deems a food "misbranded" if its labeling is "false or misleading in any particular." 21

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[6](...continued)

U.S.C. § 343(a).

Congress amended the FDCA by enacting the NLEA "to 'clarify and to strengthen the Food and Drug Administration's legal authority to require nutrition labeling on foods, and to establish the circumstances under which claims may be made about the nutrients in foods.'" Nutritional Health Alliance v. Shalala, 144 F.3d 220, 223 (2d Cir. 1998) (citing H.R. Rep. No. 101-538, at 7 (1990)).

The NLEA added an express preemption provision to the FDCA, prohibiting a state from "directly or indirectly establish[ing]" requirements for food or any labeling requirements for food that are not identical to certain requirements set forth in 21 U.S.C. § 343. See 21 U.S.C. § 343-1(a). 21 U.S.C. § 343 sets forth the circumstances when a food is deemed misbranded.

The NLEA preemption provision does not preempt state laws on the same subject; rather, "it allow[s] States to adopt requirements identical to the federal standards, which could then be enforced under state law." Kosta v. Del Monte Corp., 2013 WL 2147413, at *6 (N.D. Cal. May 15, 2013). Therefore, preemption only occurs when a state law claim requires a party to go beyond the FDA regulations by, for example, "includ[ing] additional or different information on a federally approved label . . . ." Kanter v. Warner-Lambert Co., 99 Cal. App. 4th 780, 795 (2002); Chacanaca v. Quaker Oats Co., 752 F. Supp. 2d 1111, 1121-23 (N.D. Cal. 2010) (UCL and other state law claims that sought to impose labeling requirements not identical to FDA regulations were expressly preempted); see also Kosta, 2013 WL 2147413, at *7. A state law claim imposes a "not identical" requirement if:

> the State requirement directly or indirectly imposes obligations or contains provisions concerning the composition or labeling of food, or concerning a food container, that (i) Are not imposed by or contained in the applicable provision [or regulation] or (ii) Differ from those specifically imposed by or contained in the applicable provision [or regulation].

21 C.F.R. § 100.1(c)(4).

Monster alleges that the City Attorney seeks to impose labeling requirements

and changes to Monster Drinks that are not "identical" to the requirements of the FDA, and thus these claims are expressly preempted. As the Court found in the MTD I Order, Monster sufficiently stated a claim that the City Attorney's demands in the March 29, 2013 letter were expressly preempted. It is not "readily apparent", however, that the City Attorney's entire State Action is expressly preempted by the FDCA. Specifically, the Court notes that the City Attorney claims that Monster markets its products with unsubstantiated claims about the effects of certain ingredients, such as taurine, guarana, ginseng, glucuronolactone, and B-vitamins. (City Attorney's Compl. ¶¶ 51-58, 62.) These claims are not expressly preempted, and are also claims that may not be brought in a private action and may only be brought by the Attorney General and other prosecuting authorities, such as the City Attorney. See Stanley v. Bayer Healthcare LLC, 2012 WL 1132920, at *3 (S.D. Cal. Apr. 3, 2012); Nat'l Council Against Health Fraud, Inc. v. King Bio Pharm., Inc., 107 Cal. App. 4th 1336, 1345 (2003).

Accordingly, it is not "readily apparent" that the State Action is expressly preempted.

iii. Implied Preemption

Monster argues the City Attorney's claims are impliedly preempted because they seek to enforce FDA regulations indirectly through state consumer protection statutes. (Opp'n. at 11-12); see Buckman Co. v. Plaintiffs' Legal Committee, 531 U.S. 341, 349 (2001). In Buckman, the Supreme Court held that because enforcing the FDCA is exclusively the province of the federal government, there is no private right of action under the FDCA. Monster argues that the City Attorney must rely on the FDA's GRAS regulations to prove that Monster drinks are unsafe, and therefore the City Attorney's action is based on the FDA's GRAS requirement rather than state law. (Opp'n. at 11-12.) The City Attorney contends the State Action relies on traditional state laws concerning food and marketing and is not impliedly preempted. (Reply at 5-6.)

The City Attorney's entire State Action does not hinge on the safety of caffeine in Monster Drinks under the GRAS standard. As stated above, the City Attorney's Complaint also includes claims that Monster markets its products with unsubstantiated claims about the effects of specific ingredients. (Ex. A to RJN ¶¶

51-58, 62.) Accordingly, even if the Court assumes without deciding for the purposes of this Motion, that the City Attorney's claim that the amount of caffeine in Monster Drinks violates GRAS is impliedly preempted, it is not "readily apparent" that the entire State Action is impliedly preempted.

Hence, it is not "readily apparent" that all the claims in the State Action are expressly or impliedly preempted by the FDCA. This decision is consistent with the Northern District of California's decision to remand People v. Monster in part because the court found that the claims were not "completely preempted." (Remand Order at 3.)

4. State Proceedings Are Adequate to Raise Federal Claims

Younger requires that state proceedings afford an adequate opportunity to raise any federal constitutional issue. Middlesex, 457 U.S. at 432. This requirement is met as long as there is an opportunity for the presentation of federal constitutional claims in the state proceeding. Gilbertson v. Albright, 381 F.3d 965, 983 (9th Cir. 2004) (citing Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 14-15 (1987). The federal plaintiff bears the burden of showing that state procedural law bars the presentation of constitutional claims. Id.

Here, Monster does not challenge the adequacy of the state court to hear the federal constitutional claims, and instead argues there is no "just cause" requiring abstention because the federal court is more familiar with the issues, and any potential for conflicting state and federal decisions was created by the City Attorney. (Opp'n. at 13-14.) Although touching on the policy considerations underlying Younger abstention, these arguments do not affect the determination that the state proceedings are adequate to raise federal claims.

5. Interference With the State Court Proceedings

Monster seeks a declaratory judgment that "Defendant's investigation and demands are impermissible and preempted by the FDA, subject to the doctrine of primary jurisdiction, and are unconstitutional in that they violate the First and Fourteenth Amendment's prohibitions against compelled speech, content-based speech, and commercial speech, are impermissibly void for vagueness, and/or violate the Commerce Clause" (Prayer for Relief ¶ 1) and an injunction against

Defendant "enjoining him from enforcing, or directing the enforcement of, the provisions of Cal. Bus. & Prof. Code §§ 17200 and 17500 as regards Plaintiffs' energy drinks." (Id. ¶ 2.) If the Court were to grant the relief requested, the City Attorney would be enjoined from enforcing sections 17200 and 17500 against Monster and effectively forced to abandon the State Action against Monster. The effect would be the same even if the Court only granted the request for declaratory judgment, as the judgment would bar all of the State Action claims as preempted and/or unconstitutional. Therefore, the federal action will interfere with the state proceeding.

The Court finds the four factors for Younger abstention are satisfied and accordingly dismisses Monster's Complaint.

B. Anti-Injunction Act

The Anti-Injunction Act provides:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

28 U.S.C. § 2283.

The Act generally prohibits federal courts from interfering with proceedings in the state courts. Chick Kam Choo v. Exxon Corp., 486 U.S. 140, 145 (1988). The Act is designed to "balance the tensions" inherent in a dual system of federal and state courts by limiting the intervention of lower federal courts in state proceedings. Id. The Act permits limited exceptions to this general policy in three specific circumstances: (1) the injunction is expressly authorized by an Act of Congress; (2) it is necessary in aid of the federal court's jurisdiction; or (3) the injunction is necessary to effectuate a federal court's judgment. Id.; 28 U.S.C. § 2283. These exceptions are narrow, and are "not to be enlarged by loose statutory construction." Id.

The Act applies to injunctions directed to parties that have the effect of enjoining state court proceedings. Atl. Coast Line R. Co. v. Bhd. of Locomotive Engineers, 398 U.S. 281, 287 (1970) ("It is settled that the prohibition of section

2283 cannot be evaded by addressing the order to the parties or prohibiting utilization of the results of a completed state proceeding."); Bennett v. Medtronic, Inc., 285 F.3d 801, 805 (9th Cir. 2002). The Act also applies to declaratory judgments if those judgments have the same effect on a state court proceeding as an injunction. California v. Randtron, 284 F.3d 969, 975 (9th Cir. 2002).

The City Attorney argues the declaratory and injunctive relief Monster seeks is barred by the Anti-Injunction Act because the relief would effectively enjoin the State Action. (Mot. at 15.) Monster argues the Anti-Injunction Act does not apply to injunctions that prohibit the initiation of a state court proceeding, and that even if the Act does apply, it does not prohibit the relief Monster seeks. (Opp'n. at 16-20.)

1. Waiver of Anti-Injunction Act Defense

The City Attorney did not raise the Anti-Injunction Act as a defense in his first motion to dismiss. (See generally MTD I.) Monster argues the City Attorney's Anti-Injunction Act argument for dismissal is time-barred under Federal Rule of Civil Procedure 12(g), which prohibits a party from raising a defense or objection in a subsequent Rule 12 motion that was available, but omitted, in an earlier Rule 12 motion. (Opp'n. at 15); see Fed. R. Civ. P. The City Attorney contends that the Anti-Injunction Act defense was not available at the time he filed the first motion to dismiss because on the same day the motion was filed, the State Action was removed to federal court, making the Act inapplicable. The Court notes this position is inconsistent with the fact that the City Attorney filed his MTD in the morning, before the action was removed. (See Marmalefsky Decl.)

The Court will consider the argument despite its untimeliness. The Court could not have ruled on the applicability of the Anti-Injunction Act in the first MTD, and it that sense it was unavailable regardless of the timing of the MTD I and the removal. Furthermore, the Anti-Injunction Act differs from other defenses in that when it applies, the Act limits the Court's jurisdiction to grant equitable relief. Although the Anti-Injunction Act does not affect the Court's subject matter jurisdiction, it prohibits federal district courts from granting an injunction to stay proceedings in a state court except as expressly authorized by an Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments. See 28 U.S.C. § 2283. This prohibition applies regardless of whether the Act's applicability was raised by the

parties in a timely manner.

2. Application of Anti-Injunction Act

The Anti-Injunction Act does not prohibit injunctions that prevent the initiation of a state court proceeding. Dombrowski v. Pfister, 380 U.S. 479, 485 (1965); Bank One Delaware, 2003 WL 21703627, at *2. There is a circuit split as to whether, as is the situation here, the Act applies when the federal injunction is sought before the initiation of state court proceedings, but would not be issued until after the state court suit is filed. Royal Ins. Co. of Am. v. Quinn-L Capital Corp., 3 F.3d 877, 884 (5th Cir. 1993). Three circuits have held that the Act does not apply. See Barancik v. Investors Funding Corp., 489 F.2d 933, 937 (7th Cir. 1973); National City Lines v. LLC Corp., 687 F.2d 1122, 1127 (8th Cir. 1982);; Hyde Park Partners, L.P. v. Connolly, 839 F.2d 837, 842 n.6 (1st Cir. 1988). The majority of circuits that have considered the issue, however, have held the Act applies regardless of the order in which the actions were filed. See Roth v. Bank of the Commonwealth, 583 F.2d 527, 533 (6th. 1978); Royal Ins. Co. of Am., 3 F.3d 877, 884 (5th Cir. 1993); Denny's, Inc. v. Cake, 364 F.3d 521, 529 (4th Cir. 2004); see also Standard Microsystems Corp. v. Texas Instruments, 916 F.2d 58, 61–62 (2d Cir. 1990) (disapproving of the reasoning in Barancik).

In Barancik, the leading opinion holding that the Anti-Injunction Act does not apply, the Seventh Circuit held that whether the mandatory character of the Act applies is determined when the federal court's injunctive powers are invoked. 489 F.2d at 937. The Court reasoned that "unless the applicability of the statutory bar is determined by the state of the record at the time the motion for an injunction is made, a litigant would have an absolute right to defeat a well-founded motion by taking the very step the federal court was being urged to enjoin." Id. The Court concluded that although the Act does not prohibit an injunction when the federal action is filed before the state court action, federal courts should still exercise discretion and consider the "principles of equity, comity and federalism that must restrain a federal court when asked to enjoin a state court proceeding." Id. at 938 (quoting Mitchum v. Foster, 407 U.S. 225, 243 (1972)).

In Denny's, the Fourth Circuit disagreed with the reasoning in Barancik, and found that under the plain language of the Anti-Injunction Act and the Supreme

Court's narrow interpretation of the exceptions of the Act, the Act applies regardless of when the complaint for the injunction was filed. 364 F.3d at 530. The plain language of the Act "clearly and unequivocally prohibits a federal court from granting 'an injunction to stay proceedings in a State court.'" Id. at 529 (citing 28 U.S.C. § 2238). Nothing in the plain language suggests that the Act applies only when the federal plaintiff requests injunctive relief after the state court suit had been filed. Id. The Fourth Circuit discussed the policy concerns cited in Barancik, and found they would be better addressed through the use of temporary restraining orders enjoining the initiation of the state court proceeding. Id. at 530-32. The court concluded that the Act applies regardless of whether the request for a federal injunctive relief was made before or after the state court action was filed. Id.

The Court finds the Fourth Circuit's reasoning in Denny's persuasive, especially in light of the Supreme Court's instruction that "[a]ny doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed in an orderly fashion to finally determine the controversy." Atlantic Coast Line R.R. Co. v. Bhd. of Locomotive Eng'rs, 398 U.S. 281, 297 (1970); Bennett v. Medtronic, Inc., 285 F.3d 801, 805 (9th Cir. 2002) (quoting Atlantic Coast Line R.R. Co., 398 U.S. at 297.) Accordingly, the Court finds the Act applies here, and notes that even if the Act does not apply when a request for a federal injunction is made before the state court proceedings are filed, the Court would exercise its discretion in light of the principles of equity, comity and federalism and refrain from granting an injunction that would effectively enjoin the state court proceeding.

3. Exceptions to the Anti-Injunction Act

Monster argues that the injunctive relief requested is expressly authorized as an exception to the Anti-Injunction Act because Monster seeks to enjoin the City Attorney's actions through 42 U.S.C. § 1983.[7] The Supreme Court has recognized

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[7]Monster also argues that a "private action to enforce a federal agency's primary jurisdiction provides a further exception to the act." (Opp'n. at 19.) The cases Monster cites to support this contention are not persuasive. Monster states a

(continued...)

that section 1983 "is an Act of Congress that falls within the 'expressly authorized' exception of that law" and thus requests for injunctive relief under section 1983 are not prohibited by the Anti-Injunction Act. Mitchum, 407 U.S. at 243 (quoting 28 U.S.C. § 2228). However, the Supreme Court cautioned that recognition that section 1983 injunctions are an expressly authorized exception in no way qualifies the consideration of "the principles of equity, comity, and federalism that must restrain a federal court when asked to enjoin a state court proceeding." Id.

Monster argues that their section 1983 First Amendment claims provide the basis for an exception to the Anti-Injunction Act. (Opp'n. at 19-20.) The City Attorney argues that the section 1983 exception only applies when the state litigation is itself the violation of the Constitution. (Mot. at 16.) Monster contends the exception is broader, and cites to several cases where the Act has not applied to section 1983 actions challenging the constitutionality of state laws. See e.g. Anderson v. Nemetz, 474 F.2d 814, 818 (9th Cir. 1973) (Anti-Injunction Act inapplicable to action brought under section 1983 to challenge the constitutionality of a state statute). Monster does not seek a declaration that the state law itself or the state litigation is unconstitutional. Rather, Monster seeks a declaration that the City Attorney's investigation and demands violate the First and Fourteenth Amendments' prohibitions against compelled and content-based speech. (Prayer for Relief ¶ 1.) Monster claims that the City Attorney's investigation and demands exceed the

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[7](...continued)
private suit that is a "necessary supplement" to agency action for enforcement of the specific provision in question may overcome the Anti-Injunction bar. (Id. at 20.) Monster omits that "necessary supplement" refers specifically to private suits brought to enforce federal securities regulations and statutes. The Supreme Court has specifically recognized these private suits as "'a necessary supplement to Commission action' in providing the protection for investors contemplated by the statute." Studebaker Corp. v. Gittlin, 360 F.2d 692, 698 (2d Cir. 1966) (quoting J.I. Case Co. v. Borak, 377 U.S. 426, 432 (1964)). There is no support for the contention that a private suit to enforce the FDA's primary jurisdiction is similarly a "necessary supplement" to FDA action.

constitutional application of California Business and Professions Code section 17200. Given the nature of Monster's alleged constitutional violation, the Court finds that the principles of comity, equity, and federalism weigh in favor of the Court refraining from granting injunctive relief that would effectively enjoin the state proceeding.

4. Application of Anti-Injunction Act to Request for Declaratory Relief

The Anti-Injunction Act applies to declaratory judgments if those judgments would have the same effect on a state court proceeding as an injunction. Randtron, 284 F.3d at 975. "[O]rdinarily a declaratory judgment will result in precisely the same interference with and disruption of state proceedings that the long-standing policy limiting injunctions was designed to avoid." Samuels v. Mackell, 401 U.S. 66, 71 (1971); Texas Employers' Ins. Ass'n v. Jackson, 862 F.2d 491, 505 (5th Cir. 1988). The City Attorney argues that the declaratory relief sought would have the same effect as an injunction, and is barred under the Act. (Mot. at 15.) Monster contends that the declaratory relief sought would not have the same effect as an injunction because Monster does not seek a declaration that the state law itself is preempted, only that the City Attorney's specific demands and claims under the law are preempted. (Opp'n. at 17-18.)

Granting the declaratory relief sought by Monster would effectively bar all of the City Attorney's claims in the pending state court action, and resolve it just as an injunction would. See Texas Employers' Ins. Ass'n, 862 F.2d at 505; Gilbertson, 381 F.3d at 971. Therefore, the Court finds the declaratory and injunctive relief requested is barred by the Anti-Injunction Act.

IV. CONCLUSION

For the foregoing reasons, the Court GRANTS the City Attorney's motion and DISMISSES without prejudice Monster's Complaint.

IT IS SO ORDERED.