

No. 25-1264

IN THE
Supreme Court of the United States

JOHN H. OWOC

Petitioner,

v.

MONSTER ENERGY COMPANY

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth
Circuit

PETITION FOR REHEARING

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QUESTION PRESENTED

The Lanham Act authorizes a prevailing false-advertising plaintiff to recover “any damages sustained by the plaintiff.” 15 U.S.C. § 1117(a). By its terms, the statute compensates only the plaintiff’s own injury—damages the plaintiff sustained—and only where the defendant’s false advertising caused that injury. A lost-profits award must therefore rest on proof connecting the challenged advertising to actual consumer deception, reliance, and lost sales to the plaintiff. It cannot rest on causation evidence that never tested the advertising for which damages were sought.

The question presented is:

Whether the Lanham Act, 15 U.S.C. § 1117(a), permits a competitor to recover lost-profits damages absent proof connecting the challenged advertising to actual consumer deception, reliance, and diverted sales, where the only causation evidence tested none of that advertising and no apportionment tied the award to the conduct for which damages were sought.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioner John H. Owoc certifies that he is an individual with no parent corporation. No publicly held corporation owns any interest in Petitioner or has a financial interest in the outcome of this litigation.

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PETITION FOR REHEARING

Petitioner John H. Owoc respectfully petitions for rehearing of this Court's June 22, 2026 order denying certiorari.

Pursuant to Supreme Court Rule 44.2, Petitioner seeks rehearing of this Court's June 22, 2026 order denying the petition for a writ of certiorari. Rule 44 rehearing is extraordinary. This petition does not ask the Court to reweigh trial evidence. It presents grounds not before the Court when it denied certiorari, and rests on two points that converge with unusual force: the dispositive record predicates are undisputed; and recent decisions of this Court, together with its grant of certiorari in *RiseandShine Corp. d/b/a Rise Brewing v. PepsiCo, Inc.*, No. 24-1016, confirm that those predicates present an important and recurring Lanham Act question about consumer perception, proof, causation, and the limits of lost-profits damages.

At the threshold, Petitioner presents a legal question, not a challenge to the sufficiency of the evidence. Whatever the reliability of Monster's survey—a matter Petitioner does not concede—the question is what the Lanham Act requires as a matter of law before a competitor may recover lost-profits damages. On the record as it stands, the answer defeats this award: the sole causation evidence tested none of the advertising for which damages were awarded. That legal defect persists *even taking Monster's proof as Monster itself presented it*.

The dispositive record predicates are stark. Monster's survey expert, Dr. Cowan, showed

respondents only the Bang Energy can. He did not show respondents social-media posts, YouTube videos, retailer materials, distributor communications, PowerPoint presentations, trade materials, or Mr. Owoc's online statements. App. 7a-10a. The can did not contain the challenged efficacy, performance, physiological, social-media, video, retailer, distributor, PowerPoint, or Mr. Owoc statements Monster used to seek damages. App. D. Cowan did not ask when respondents first heard about Bang, first heard about Super Creatine, made any Bang purchase, formed any belief about Super Creatine, or would otherwise have bought Monster. App. 11a. And Monster produced no customer, distributor, retailer, store owner, or purchasing-agent witness who testified that he or she saw a challenged Super Creatine advertisement, believed it, relied on it, bought Bang because of it, or would otherwise have bought Monster. App. 117a-18a.

Monster's damages model then depended entirely on that limited survey. Monster's damages expert, Mr. Tregillis, testified that Cowan's survey supplied the percentage he used to calculate what portion of Bang sales supposedly were attributable to Super Creatine. App. 16a. He testified that Cowan's survey determined where supposedly diverted sales would have gone. App. 18a. He admitted the only advertising Cowan could guarantee respondents saw was the Bang Energy can. App. 20a-23a. And his deposition testimony, read to the jury, stated the controlling fact: "Everything comes from the Cowan survey to get that percentage." App. 24a-25a. Defendants' rebuttal expert, Dr. Voth, confirmed that because Cowan did not show respondents the non-can

advertising, Cowan's survey provided no basis to apportion damages to social media, PowerPoints, distributor communications, retailer communications, or Mr. Owoc's videos. App. 40a-42a. Dr. Chiagouris confirmed the materiality defect: a survey that does not show respondents the advertising claims at issue does not properly test whether those claims were material. App. 30a-33a.

Those predicates present the legal question now sharpened by recent authority from this Court: whether the Lanham Act permits a competitor to recover \$271.9 million in lost-profits damages where the only quantified causal proof showed respondents only the product can, did not show respondents the challenged advertisements or statements used to seek damages, did not test whether any challenged advertisement caused actual deception, reliance, purchasing decisions, diversion, or lost Monster sales, and was nevertheless extrapolated across years of untested advertising without a reliable methodological bridge.

This Court's grant of certiorari in *RiseandShine Corp. d/b/a Rise Brewing v. PepsiCo, Inc.*, No. 24-1016, confirms that this Lanham Act question is live and warrants the Court's attention now. *RiseandShine* is another Lanham Act case arising in the canned beverage market; its question presented concerns whether trademark strength is a question of fact in the likelihood-of-confusion analysis. This case presents the false-advertising damages counterpart: whether a competitor may obtain \$271.9 million in Lanham Act lost-profits damages where the only quantified causal proof did not test the challenged advertisements, no

marketplace witness supplied the missing reliance or diversion evidence, and the damages model extrapolated beyond what the survey tested.

Recent decisions of this Court supply the legal frame, as set forth below. This Court's decisions in *Hikma Pharmaceuticals USA Inc. v. Amarin Pharma, Inc.*, No. 24-889, 608 U.S. ____ (2026), *Cox Communications, Inc. v. Sony Music Entertainment*, No. 24-171, 607 U.S. ____ (2026), and *Dewberry Group, Inc. v. Dewberry Engineers Inc.*, No. 23-900, 604 U.S. ____ (2025), together with the persuasive authority of the Delaware Supreme Court in *In re Zantac (Ranitidine) Litigation*, No. 255, 2024, confirm that this case is not a fact-bound evidentiary dispute. It presents a recurring and important legal question about the limits of Lanham Act lost-profits damages, expert extrapolation, causation, and proof.

GROUND FOR REHEARING

This case warrants rehearing because recent authority confirms that a Lanham Act lost-profits judgment of this magnitude cannot rest on speculation, generalized advertising narratives, or expert extrapolation unsupported by a reliable causal bridge. Monster obtained a \$271.9 million Lanham Act award, plus approximately \$42 million in attorneys' fees, by converting a narrow survey that showed respondents only the Bang Energy can—an item that did not contain the challenged efficacy claims Monster used to seek damages—into a multi-year damages model covering categories of advertising and alleged statements Cowan never showed to survey respondents and never tested.

The appendix record is unusually clear on this point, and it is clear even taking Monster's proof as Monster presented it. Cowan did not show respondents the advertising universe Monster used to seek damages. App. 7a-10a. Cowan did not ask the timing questions necessary to establish the causal sequence Monster's theory required: exposure to a challenged statement, deception, materiality, reliance, purchase of Bang, diversion from Monster, and lost Monster sales. App. 11a. And Monster never called a single marketplace witness—no customer, distributor, retailer, store owner, or purchasing agent—to supply that missing causal proof. As Defendants explained below, "Not one distributor, retailer, or customer was presented to the jury to testify that any advertisement disseminated by Vital resulted in deception or confusion." App. 117a-18a. "That is because Monster produced no such witnesses." App. 175a.

Tregillis nevertheless made Cowan's survey the engine of Monster's lost-profits model. Cowan's survey supplied the damages percentage. App. 16a. Cowan's survey determined where diverted sales supposedly would have gone. App. 18a. The only advertising Cowan could guarantee respondents saw was the can. App. 20a-23a. And Tregillis said it plainly, in deposition testimony read to the jury: "Everything comes from the Cowan survey to get that percentage." App. 24a-25a.

Voth confirmed the gap. Because Cowan showed respondents no social-media posts, no PowerPoints, no distributor or retailer communications, and none of Mr. Owoc's videos, the survey supplied no basis to apportion damages to any

of them. App. 40a-42a. Chiagouris confirmed the materiality defect: a survey that never shows the challenged claims cannot test whether those claims were material. App. 30a-33a.

This is precisely the kind of inferential liability chain recent authority forecloses. In *Hikma*, this Court rejected liability premised on the possibility that third parties might read lawful or vague statements as encouragement to infringe. The legally relevant question was not whether doctors could possibly read the statements in a liability-producing way, but whether the defendant itself actively encouraged the unlawful act. Although *Hikma* arose under the Patent Act, its principle applies here: federal liability cannot be built on vague language plus speculation about how third parties may understand or act upon it.

Monster's theory rested on the same kind of stacked inference. From a survey that showed only the can, Monster asked the jury to infer that consumers were deceived by years of advertisements Cowan never showed them; that those unseen materials were material; that consumers relied on them; that reliance caused Bang purchases; that absent those purchases consumers would have bought Monster; and that this chain supported \$271.9 million in lost profits. On the record as it stands, that is not proof of causation. It is speculation converted into massive damages.

Cox reinforces the point. This Court set aside contributory-liability exposure on a \$1 billion verdict because the lower courts let liability rest on an overexpanded theory that collapsed distinct legal

requirements. *Cox Communications, Inc. v. Sony Music Entertainment*, No. 24-171, 607 U.S. ____ (2026). Although *Cox* arose under the Copyright Act, its lesson is general: the magnitude of a verdict does not cure a defective liability theory—if anything, it makes the defect more consequential. If a \$1 billion award could not stand on such a theory, neither can a \$271.9 million award built on a survey that tested none of the advertising for which damages were sought.

Dewberry is especially important because it arises under the Lanham Act itself. There, this Court set aside a monetary award of nearly \$43 million that swept in the profits of legally separate non-party affiliates, holding that a Lanham Act profits award reaches only the “defendant’s profits” as the statute is written. *Dewberry Group, Inc. v. Dewberry Engineers Inc.*, No. 23-900, 604 U.S. ____ (2025). Lanham Act monetary remedies must remain tethered to the statute’s text and to the proof. The contrast with this case is telling: in *Dewberry*, an award of nearly \$43 million could not stand even though the profits it captured were real—they simply belonged to the wrong entities. Here, an award more than six times larger—\$271.9 million—stood on a theory in which the diverted sales were never shown to exist at all. Monster did not seek disgorgement of Bang’s profits; it obtained its own lost-profits damages—a remedy that, as a matter of law, requires proof that Monster actually lost sales caused by the challenged advertising. Just as *Dewberry* rejected a remedy reaching beyond the defendant’s own profits, the judgment here reached beyond the only causal proof in the record: a can-only survey that tested none of the advertising for which damages were awarded.

The record affirmatively refutes Monster’s diversion theory in any event. The trial evidence showed that Bang did not divert sales from Monster’s existing brands but expanded the market by creating a new “performance energy” subcategory of consumers seeking a zero-calorie, “better-for-you” energy drink—consumers who would not have bought Monster’s sugar-laden flagship in any event. App. 87a (citing trial testimony at Dkt. 923-17, 177:12–178:6). A lost-profits award premised on diverted Monster sales cannot stand where the record shows the challenged product expanded the market rather than capturing Monster’s customers.

Zantac provides a persuasive expert-gatekeeping frame. The Delaware Supreme Court reversed because the trial court treated serious methodology challenges as jury issues, rather than requiring the proponent of expert testimony to prove reliable methodology and reliable application. *In re Zantac (Ranitidine) Litigation*, No. 255, 2024. Though not binding here, its reliable-bridge reasoning illustrates the defect in this record. In *Zantac*, experts could not jump from studies about one compound to conclusions about a different product without reliably linking the two. Monster’s experts made a comparable jump: from a can-only survey to years of untested advertising, and then to a \$271.9 million award.

The problem was compounded by the exclusion of Monster’s own adopted market research. Defendants’ offer of proof established that Monster commissioned the InfoScout/Numerator research, approved its design, circulated the results internally, and relied on them in the ordinary course to understand why consumers bought Bang. App. B.

That evidence directly refuted Monster's theory of materiality, causation, and damages.

Monster's own adopted research identified zero calories—not Super Creatine—as the primary reason consumers purchased Bang. One internal Monster document summarizing the InfoScout study stated that “Zero cal is primary reason.” App. 50a. Indeed, Monster knew before filing suit that “literally 97% of the market did not purchase Bang Energy because of its Super Creatine ingredient.” App. 88a. Yet the jury did not hear Monster's own adopted research. Instead, Monster was permitted to rely on Cowan's narrow can-only survey, and Tregillis was permitted to use that survey to generate an enormous lost-profits number.

This case therefore presents a clean legal question: whether the Lanham Act permits a competitor to recover \$271.9 million in lost-profits damages where the damages model extrapolated from a survey that showed respondents only the Bang Energy can—which did not contain the challenged non-can statements Monster used to seek damages—to years of advertising the survey never showed and never tested, without a reliable methodological bridge tying the survey to actual deception, materiality, reliance, causation, apportionment, or lost Monster sales.

**I. RECENT AUTHORITY CONFIRMS THAT
THE LANHAM ACT DOES NOT PERMIT LOST-
PROFITS DAMAGES BASED ON
SPECULATIVE CAUSAL CHAINS AND
UNRELIABLE EXPERT EXTRAPOLATION.**

Hikma forecloses speculative third-party inference chains. *Cox* holds that even a \$1 billion verdict cannot rest on an overextended liability theory. *Dewberry* enforces statutory and evidentiary limits on Lanham Act monetary remedies. Persuasive authority such as *Zantac* confirms that expert extrapolation requires a reliable methodological bridge. Together, these authorities confirm that Monster's lost-profits judgment cannot stand unless Monster proved that the challenged advertising caused Monster's actual lost sales.

Monster did not make that showing, and its failure appears on the record as it stands. The Lanham Act permits relief for false or misleading representations that cause cognizable commercial injury; it does not authorize a competitor-destroying award built on a generalized advertising narrative. Cowan showed survey respondents none of the advertising Monster relied on at trial. App. 7a-10a. Tregillis nevertheless drew the damages percentage from that survey. App. 24a-25a. Voth confirmed it supplied no basis to apportion to non-can advertising. App. 40a-42a. And Monster produced no marketplace witness to prove that any challenged advertisement caused reliance, purchasing decisions, diversion, or lost Monster sales. App. 117a-118a; App. 173a-177a.

That is the legal defect. The question is not whether a jury could disbelieve Defendants or believe Monster. The question is whether, as a matter of law, the Lanham Act permits lost-profits damages based on a survey that did not test the challenged advertising, no live marketplace witness proving reliance or diversion, and a damages model that extrapolated beyond what the survey could support. Recent authority confirms that it does not.

II. THIS CASE PRESENTS A CLEAN VEHICLE, AND THE CONSEQUENCES ARE EXTRAORDINARY.

This case is an ideal vehicle because the controlling predicates are fixed and appear in the appendix. Cowan tested only the Bang Energy can. App. 7a-10a, 11a. Tregillis's entire lost-profits percentage came from that survey. App. 24a-25a. Voth confirmed no basis to apportion to non-can advertising. App. 40a-42a. Chiagouris confirmed the survey could not test materiality. App. 30a-33a. Monster called no customer, distributor, retailer, store owner, or purchasing-agent witness. App. 118a-19a, 177a. And Monster's own excluded research showed consumers bought Bang for reasons other than Super Creatine. App. B; App. C; App. D.

Those predicates do not require this Court to reweigh testimony. They present a legal question about what proof is required before a plaintiff may obtain Lanham Act lost-profits damages. That makes this case a cleaner vehicle than an ordinary sufficiency challenge.

The consequences are extraordinary. This is not a case of physical injury or a regulated medical product; it is a competitor-versus-competitor advertising dispute over an energy drink. Yet the \$271.9 million award—one of the largest in the history of the Lanham Act—became the economic predicate for the destruction of a major competitor and the transfer of Bang’s assets to Monster. The Lanham Act does not authorize competitor-destroying relief untethered to reliable proof of materiality, causation, apportionment, and actual lost sales.

This Court need not decide whether every challenged statement was true or false, whether Super Creatine was effective or ineffective, or whether the jury should have believed one witness over another. The legal issue is narrower and cleaner: whether the Lanham Act permits \$271.9 million in lost-profits damages where the only quantified causal proof did not test the challenged advertising, no marketplace witness filled that evidentiary gap, and the damages model could not apportion damages to the alleged advertisements it never tested.

It does not.

CONCLUSION

The intervening authority and the undisputed record predicates establish grounds not previously presented to this Court. On those grounds, the petition for rehearing should be granted. The Court should grant rehearing, vacate its June 22, 2026 order denying certiorari, and grant the petition for a writ of certiorari—or, at minimum, call for a response and reconsider the petition in light of this Court’s grant of

certiorari in *RiseandShine Corp. d/b/a Rise Brewing v. PepsiCo, Inc.*, No. 24-1016; this Court's recent decisions in *Hikma Pharmaceuticals USA Inc. v. Amarin Pharma, Inc.*, *Cox Communications, Inc. v. Sony Music Entertainment*, and *Dewberry Group, Inc. v. Dewberry Engineers Inc.*; and the persuasive expert-gatekeeping authority in *In re Zantac (Ranitidine) Litigation*.

Respectfully submitted,

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Date: July 16th, 2026

CERTIFICATE OF PETITIONER

I hereby certify that this Petition for Rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 44.2.

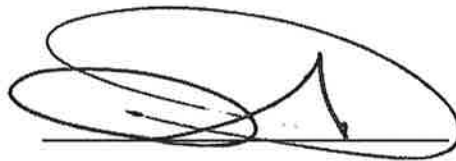
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**APPENDIX E – DEFENDANT VITAL
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AUTHORITIES IN SUPPORT OF MOTION
FOR JNOV, NEW TRIAL AND REMITTITUR
(DE 921-1), FILED FEB. 23, 2023.....107a**

APPENDIX A

**APPENDIX A — DECLARATION OF DAVID
MUTH IN SUPPORT OF DEFENDANTS'
RESPONSE TO PLAINTIFF'S LETTER BRIEF
ON NON-CAN ADVERTISING, FILED
SEPTEMBER 26, 2022**

**IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

**MONSTER ENERGY COMPANY, a
Delaware Corporation,
Plaintiff,
v.**

**VITAL PHARMACEUTICALS, INC.,
d/b/a VPX Sports, a Florida corporation;
and JOHN H. OWOC a.k.a. JACK OWOC,
an individual,
Defendants.**

Case No. 5:18-cv-01882-JGB-SHK

**DECLARATION OF DAVID MUTH IN
SUPPORT OF DEFENDANTS' RESPONSE TO
PLAINTIFF'S LETTER BRIEF ON NON-CAN
ADVERTISING**

I, David Muth, declare as follows:

1. I am an attorney at Quarles & Brady LLP. I am
counsel of record for Defendants Vital

Pharmaceuticals, Inc. and John H. Owoc (“Defendants”) in the above-captioned action. Unless otherwise stated, I have knowledge of all facts set forth in this declaration, and I would, and could, testify competently thereto if called upon to do so.

2. I submit this Declaration in support of Defendants’ Response to Plaintiff’s Letter Brief on Non-Can Advertising.

3. Attached as **Exhibit A** is a true and correct copy of the September 13, 2022 (Charles Cowan) trial transcript.

4. Attached as **Exhibit B** is a true and correct copy of the September 15, 2022 (Christian Tregillis) trial transcript.

5. Attached as **Exhibit C** is a true and correct copy of the September 22, 2022 (Larry Chiagouris) trial transcript.

6. Attached as **Exhibit D** is a true and correct copy of the September 15, 2022 (Drew Voth) trial transcript.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

DATED this 26th day of September, 2022.

QUARLES & BRADY LLP

By: /s/ David Muth
David Muth

Attorneys for Defendants Vital Pharmaceuticals, Inc.
and John H. Owoc

APPENDIX A

**APPENDIX A, EXHIBIT A — TRIAL
TRANSCRIPT OF CHARLES COWAN, FILED
SEPT. 13, 2022**

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
HONORABLE JESUS G. BERNAL, JUDGE
PRESIDING**

**MONSTER ENERGY COMPANY,
Plaintiff,**

vs.

**VITAL PHARMACEUTICALS, INC., ET AL.,
Defendants.**

No. EDCV18-1882-JGB

**REPORTER'S TRANSCRIPT OF
PROCEEDINGS
JURY TRIAL, DAY 11
P.M. SESSION
RIVERSIDE, CALIFORNIA
TUESDAY, SEPTEMBER 13, 2022**

**MIRIAM V. BAIRD, CSR 11893, CCRA
OFFICIAL U.S. DISTRICT COURT REPORTER
350 WEST FIRST STREET, FOURTH FLOOR
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* * * * *

- 1 BY MR. DUCHEMIN:
2 Q. The respondents that selected soy and ginseng
continued
3 on in your survey to answer other questions, true?
4 A. True.
5 MR. DUCHEMIN: Let's go to question 13, please.
[02:51PM]
6 BY MR. DUCHEMIN:
7 Q. Question 13 asks -- well, first I guess it
instructs
8 your respondents that Bang is advertised as
containing Super
9 Creatine, right?
10 A. Yes. [02:52PM]
11 Q. And then it asks: If Super Creatine were
removed from
12 Bang, would that change how much you would be
willing to pay
13 for it? Right?
14 A. Yes.
15 Q. What advertising are you talking about?
[02:52PM]
16 A. Well, the front of the can is considered
advertising.
17 Q. Okay. So you're talking about the front of the
can?
18 A. Not necessarily. They would review other ads
that said
19 Bang has Super Creatine.
20 Q. But you didn't show any of those to your
respondents, [02:52PM]
21 correct?
22 A. I did not.

23 Q. So the only advertising they've seen in the survey that

24 you know of is the can, true?

25 A. Within the survey, yes. *[02:52PM]*

- 1 Q. You have no knowledge whether they've seen
advertising
- 2 outside of looking at the can in your survey,
correct?
- 3 A. I didn't ask that. Instead I asked a different
sequence
- 4 as I described before.
- 5 Q. So the answer is correct? [02:53PM]
- 6 A. You are correct in your statement, yes.
- 7 Q. And again, by this point in time the
respondents were
- 8 asked questions about exercise, forms of exercise.
They saw
- 9 19 different signs of exercise, types of exercises.
- 10 You asked them a question about energy drinks
that [02:53PM]
- 11 listed pre-workout, working out, playing sports,
health
- 12 benefits. You had a list of healthy ingredients,
healthy
- 13 factors. And after all that, you ask whether
removing Super
- 14 Creatine would cause them to change how much
they pay, true?
- 15 A. Correct. [02:53PM]
- 16 Q. You didn't ask this question about caffeine,
correct?
- 17 A. I did not.
- 18 Q. Or B vitamins?
- 19 A. Neither of those is part of the complaint.
- 20 Q. Or natural flavors? [02:53PM]
- 21 A. Not part of the complaint.

22 Q. You didn't ask if their willingness to pay would
differ
23 if the drink were loaded with sugar like Monster's
Green Claw
24 drink, true?
25 MR. KABA: Objection to the foundation of the
[02:54PM]

- 1 removal of the word Super Creatine from the can
would cause a
- 2 consumer to purchase or not purchase Bang, true?
- 3 A. I did not test that.
- 4 Q. You tested whether removal of the ingredient
Super
- 5 Creatine would influence a decision as opposed to
the words, [04:23PM]
- 6 right?
- 7 A. Yes.
- 8 Q. You don't ask any questions about when people
received
- 9 information about energy drinks in general, or
Bang, Monster,
- 10 or any other drink in particular, true? [04:24PM]
- 11 A. I did not ask that.
- 12 Q. You didn't ask a question about whether
consumers saw
- 13 information on a Bang can before your survey,
true?
- 14 A. I did not ask that.
- 15 Q. And you have no way to tell when a respondent
first [04:24PM]
- 16 heard about Bang?
- 17 A. That is correct.
- 18 Q. You have no way to tell whether or when they
first heard
- 19 about Super Creatine, true?
- 20 A. That is also correct. [04:24PM]
- 21 Q. You have no way to determine when any
particular
- 22 purchase of Bang was made by a respondent,
right?

23 A. Yes, that's right.

24 Q. You have no way to determine when
respondents developed

25 the notion that there was a certain amount of
Creatine or *[04:24PM]*

APPENDIX A

**APPENDIX A, EXHIBIT B — TRIAL
TRANSCRIPT OF CHRISTIAN TREGILLIS,
FILED SEPT. 15, 2022**

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
HONORABLE JESUS G. BERNAL, JUDGE
PRESIDING**

**MONSTER ENERGY COMPANY,
Plaintiff,**

vs.

**VITAL PHARMACEUTICALS, INC., ET AL.,
Defendants.**

No. EDCV18-1882-JGB

**REPORTER'S TRANSCRIPT OF
PROCEEDINGS
JURY TRIAL, DAY 13
P.M. SESSION
RIVERSIDE, CALIFORNIA
THURSDAY, SEPTEMBER 15, 2022**

**MIRIAM V. BAIRD, CSR 11893, CCRA
OFFICIAL U.S. DISTRICT COURT REPORTER
350 WEST FIRST STREET, FOURTH FLOOR
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* * * * *

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* * * * *

- 1 seeing these internal communications, the
advertising at
- 2 trade shows, consumer statements, people who
are saying that
- 3 they're very excited about Super Creatine.
- 4 Q. Now, I know you have got some examples of
the evidence
- 5 that you looked at on this slide here. Is that all
that you [02:52PM]
- 6 looked at, or did you see other examples about
whether Super
- 7 Creatine matters?
- 8 A. Many examples, but I can't take the time to go
through
- 9 all of them.
- 10 Q. Now, are you suggesting that all sales of Bang
are [02:53PM]
- 11 because of Super Creatine?
- 12 A. No, I'm not. Like I said, there's that step where
you
- 13 start with all sales and then get to the piece that
is
- 14 because of the advertising.
- 15 Q. So what did you -- what did you use? What
data did you [02:53PM]
- 16 use to determine the percentage of Bang's sales
that are due
- 17 to Super Creatine as opposed to some other
factors?
- 18 A. Well, fortunately Dr. Cowan did a survey that
addressed
- 19 that exact question. There was information
generally telling

20 me that Super Creatine advertising was
important, but with [02:53PM]
21 Dr. Cowan, he did a survey that got to the exact
questions
22 that I needed.
23 He got to that issue of if there hadn't been this
24 advertising, how many of those sales, VPX's sales
of Bang,
25 would go away? [02:53PM]

- 1 the way others in your field calculate lost profits?
2 A. Yes. It maps exactly to the lost profits practice
aid
3 that I wrote.
4 Q. So describe for us what does this slide depict.
5 A. Well, as I said earlier, if you have VPX sales of
Bang [03:13PM]
6 that would not have happened, those sales could
have gone to
7 other energy drinks and beverages. They could've
gone to
8 Monster and Reign. They could even have turned
into no sale.
9 So I needed to account for how many of these
would have been
10 Monster and Reign sales. [03:13PM]
11 Q. So your first step, if I understand it correctly,
is to
12 figure out where VPX's sales would have gone?
Would it be
13 Monster? Would it be another company? Would it
be somewhere
14 else?
15 A. Right. [03:13PM]
16 Q. Now, what did you use to determine the
number of Bang
17 sales that would have gone to Monster as opposed
to other
18 beverage companies or just nothing?
19 A. The survey by Dr. Cowan did that.
20 Q. And again, did Dr. Cowan's survey on this
issue ask [03:14PM]

- 21 questions related to both the Super Creatine claims and the
- 22 Creatine content claims?
- 23 A. Yes.
- 24 Q. Okay. So what questions did Dr. Cowan's survey ask?
- 25 Let's start with the Super Creatine claims. What questions *[03:14PM]*

- 1 Q. And you're not a survey expert?
- 2 A. I'm not holding myself out to be a survey expert.
- 3 Q. Right. You didn't design the survey?
- 4 A. I talked to him about survey design, but I did not
- 5 design it. [04:08PM]
- 6 Q. You relied on him to ensure that the survey would be
- 7 designed properly, correct?
- 8 A. Right. He's the survey expert.
- 9 Q. Okay. Thank you.
- 10 The only advertising that was shown in that survey [04:08PM]
- 11 was a can of Bang, correct?
- 12 A. I think that in the prompt, that was shown to him. I
- 13 think he also testified that to the extent there was other
- 14 advertising that had been exposed to respondents in their
- 15 history, that was all part of what they knew. But part of [04:09PM]
- 16 the survey was just showing them that can image. That's
- 17 right.
- 18 Q. You were clearly paying attention to Dr. Cowan's
- 19 testimony, right? He said -- the only thing he showed them
- 20 was a can, and the only thing he could guarantee they ever [04:09PM]
- 21 saw was the can, right?

22 A. I think that's right. I think that's what he said.

23 Q. And whether they had seen advertising
somewhere else, it

24 wasn't something he was aware of, right?

25 A. I don't think he had specific knowledge of the
[04:09PM]

- 1 respondents seeing particular other advertising.
2 Q. Okay. Now, this 34.1 percent, this number
starts with
3 analyzing the answers that the 376 Bang
purchasers gave; is
4 that true?
5 A. Yes. [04:09PM]
6 Q. And those are the people who said that they
purchased at
7 least one can of Bang per month in response to
question 16 of
8 the Cowan survey, right?
9 A. I think that's right.
10 Q. And in case you ever want to -- we're going to
talk [04:09PM]
11 about the survey a bit today. If you want to look
at the
12 survey questions, I handed you a looseleaf version
of the
13 survey questions there.
14 A. Okay. Great.
15 Q. So they're next to the binder. And the
documents we [04:10PM]
16 talked about today are also in your binder. They'll
also be
17 on your screen. So whatever works best for you.
18 A. Thank you.
19 Q. Okay. So 376, those are the people who said
they
20 purchased one can of Bang per month. Then they
said that [04:10PM]
21 they would purchase fewer cans under certain
circumstances

22 presented by other questions like question 17A.

Fair?

23 A. I think that's right. I will check 17A just to make

24 sure you're right.

25 Q. And if you could for the record just tell me what the *[04:10PM]*

- 1 A. I think there would be a hole for one of the
2 steps. I
3 could have the rest of the calculations because
4 there are
5 more inputs, but they's need that Cowan study
6 information to
7 be complete.
8 Q. Okay. [04:13PM]
9 MR. DUCHEMIN: If we could please have
10 Mr. Tregillis's deposition previewed at page 89,
11 lines 9 to
12 17.
13 Your Honor, I would request to publish.
14 THE COURT: You may. [04:13PM]
15 BY MR. DUCHEMIN:
16 Q. Mr. Tregillis, you gave a deposition in this
17 matter,
18 right?
19 A. Yes.
20 Q. Okay. [04:13PM]
21 And the question here says:
22 "Question: Okay. And you would agree with me
23 that
24 you can't do any of the quantifications that you
25 just went
26 through in the last answer without the Cowan
27 survey; is that
28 right? [04:13PM]
29 "Answer: That's right. All of this is discussing
30 my use of the information from the Cowan survey.
31 Everything
32 gets to the percentage which is used to calculate
33 my lost

24 profits number. Everything comes from the
Cowan survey to
25 get that percentage." [04:14PM]

APPENDIX A

**APPENDIX A, EXHIBIT C — TRIAL
TRANSCRIPT OF LARRY CHIAGOURIS,
FILED SEPT. 22, 2022**

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
EASTERN DIVISION-RIVERSIDE

- - -

HONORABLE JESUS G. BERNAL, DISTRICT
JUDGE PRESIDING

- - -

MONSTER ENERGY COMPANY, a
Delaware corporation,
Plaintiff,

vs.

VITAL PHARMACEUTICALS, INC., d/b/a
VPX Sports, a Florida corporation;
and JOHN H. OWOC a.k.a. JACK OWOC,
an individual,
Defendants.

**No. EDCV 18-1882-JGB
Trial Day 18
AM Session**

**REPORTER'S TRANSCRIPT OF JURY TRIAL
PROCEEDINGS**

Riverside, California
Thursday, September 22, 2022
9:11 a.m.

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- 1 Dr. Cowan on -- this document is talking about an
A/B test,
2 right?
3 A. Yes.
4 Q. Dr. Cowan didn't do an A/B test, did he?
5 A. No, he did not. [11:49]
6 Q. Thanks.
7 MR. DUCHEMIN: Let's go to page 6, please. And
if we
8 could look at acquiescence bias, the first
paragraph.
9 BY MR. DUCHEMIN:
10 Q. Dr. Chiagouris, what's acquiescence bias?
[11:49]
11 A. Being agreeable.
12 Q. Is this what you were talking about in your
direct
13 examination about a problem with Dr. Cowan's
survey?
14 A. It's another label for the similar issues, yes.
15 Q. So even Mr. Stewart says that that can be a
problem, [11:49]
16 right?
17 A. Yes.
18 MR. DUCHEMIN: Let's go to page 10, please.
Okay. I
19 would like to enlarge the "Failure to expose," the
header in
20 the first paragraph. [11:50]
21 BY MR. DUCHEMIN:
22 Q. Now, I understand you were criticized for not
showing

23 social media and other things to your
respondents. I also
24 believe that wasn't the purpose of your survey; is
that right?
25 A. That is correct. *[11:50]*

- 1 Q. It appears that Monster's position is that that
was
2 somehow part of Dr. Cowan's survey; is that your
understanding?
3 A. Yes.
4 Q. He didn't show them either, right?
5 A. Not that I recall. I didn't recall seeing it. [11:50]
6 Q. And does Mr. Stewart criticize that as away to
conduct and
7 design a survey?
8 A. Well, he says here, "Failure to show
respondents the
9 advertising or otherwise obtain a response to
advertising
10 claims at issue in the case makes the Kraft
survey in this case [11:50]
11 an inappropriate test of materiality."
12 Q. Right. So Dr. Cowan and Monster are trying to
take the
13 position that Dr. Cowan somehow addressed the
social media, but
14 he never showed it to them, and Dr. Stewart says
that's a
15 problem, right? [11:51]
16 A. Dr. Stewart says it's a problem and I would
agree with
17 Dr. Stewart.
18 Q. In fact, he says it would be inappropriate test
of
19 materiality; is that right?
20 A. Right. Because what your -- what, in effect, Dr.
Cowan [11:51]

21 was relying on is the memories of people who may
never even
22 seen any of these things. So there is not even a
memory of the
23 things that's he's basically -- the assertion that,
you know, I
24 didn't show social media. Well -- but I showed the
can.
25 Dr. Cowan didn't show social media, but he's
asking [11:51]

- 1 A. It certainly could have, yes.
- 2 Q. In your opinion, would he have any ability to
opine about
- 3 whether health benefits, when selected, pertain to
anything
- 4 they've seen in the past as opposed to what they
were directed
- 5 to see in the survey? [11:57]
- 6 A. No.
- 7 MR. DUCHEMIN: Your Honor, I'll pass the
witness.
- 8 THE COURT: Thank you.
- 9 Mr. Mishra, I think you've just about exhausted
the
- 10 value of this witness's testimony, so be brief.
[11:57]
- 11 MR. MISHRA: I will be very brief.
- 12 RECROSS-EXAMINATION
- 13 BY MR. MISHRA:
- 14 Q. Dr. Chiagouris, Dr. Cowan separated
responses between Bang
- 15 consumers and non Bang consumers, correct?
[11:57]
- 16 A. Yes.
- 17 Q. And you already admitted that Bang
consumers were more
- 18 likely to have been exposed to advertising outside
of the can
- 19 than non Bang consumers, right?
- 20 A. It's reasonable to believe that that's possible,
but I [11:57]
- 21 don't have evidence that it is. But it's reasonable
to believe
- 22 that it's possible.

23 Q. And Dr. Cowan's survey relied on the
responses of 376
24 actual Bang consumers and what mattered to
them. You don't
25 even know if a single Bang consumer was in your
survey or if [11:58]

APPENDIX A

**APPENDIX A, EXHIBIT D — TRIAL
TRANSCRIPT OF ANDREW (DREW) VOTH,
FILED SEPT. 23, 2022**

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
EASTERN DIVISION-RIVERSIDE

- - -

HONORABLE JESUS G. BERNAL, DISTRICT
JUDGE PRESIDING

- - -

MONSTER ENERGY COMPANY, a
Delaware corporation,
Plaintiff,

vs.

VITAL PHARMACEUTICALS, INC., d/b/a
VPX Sports, a Florida corporation;
and JOHN H. OWOC a.k.a. JACK OWOC,
an individual,
Defendants.

No. EDCV 18-1882-JGB
Trial Day 19
AM Session

**REPORTER'S TRANSCRIPT OF JURY TRIAL
PROCEEDINGS**

Riverside, California
Friday, September 23, 2022
9:16 a.m.

PHYLLIS A. PRESTON, CSR, FCRR
Federal Official Court Reporter
United States District Court
3470 Twelfth Street
Riverside, California 92501
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- 1 A. Yes.
- 2 MR. DUCHEMIN: Your Honor, I'd move Exhibit
TX-6980,
- 3 please, the Monster can.
- 4 MS. LIBEU: Objection. Relevance.
- 5 MR. DUCHEMIN: He just said he used it in his
work, [10:29]
- 6 Your Honor.
- 7 THE COURT: It's received.
- 8 (Defendants' Exhibit No. 6980 was admitted.)
- 9 MR. DUCHEMIN: Thank you.
- 10 BY MR. DUCHEMIN: [10:29]
- 11 Q. Now Dr. Cowan didn't show any social media
posts to his
- 12 respondents, true?
- 13 A. Not that I know of.
- 14 Q. Dr. Cowan showed his respondents the cans,
right?
- 15 A. That's my understanding. [10:30]
- 16 Q. And he showed a can of Bang and a can of
Monster, fair?
- 17 A. Yes.
- 18 Q. Dr. Cowan did not show any PowerPoint
presentations or
- 19 other communications to his respondents, true,
just the cans?
- 20 A. Yes. [10:30]
- 21 Q. So Dr. Cowan's survey doesn't provide a basis
for
- 22 apportioning damages to social media, does it?
- 23 A. No.
- 24 Q. Or to PowerPoint presentations, true?
- 25 A. That's true, it doesn't. [10:30]

- 1 Q. Dr. Cowan's survey doesn't provide a basis for
doing
2 apportionment to communications with
distributors and
3 retailers, right?
4 A. Correct, it doesn't.
5 Q. Or Mr. Owoc's videos on the Internet, right?
[10:30]
6 A. Right, it doesn't.
7 Q. Mr. Tregillis doesn't offer any opinion on
apportionment
8 specifically directed to social media either, right?
9 A. That's correct, he doesn't.
10 Q. And so Mr. Tregillis's apportionment, that
34.1, is also [10:30]
11 limited to the can, right?
12 A. It is. It's just based on the Cowan survey which
is based
13 on the cans.
14 Q. That 34.1 percent number is one you disagree
with, true?
15 A. Absolutely, as we talked about yesterday.
[10:31]
16 Q. For all the reasons we've talked about?
17 A. Yes.
18 MR. DUCHEMIN: Thank you. Nothing further,
Your
19 Honor.
20 THE COURT: Very well. Ms. Libeu. [10:31]
21 MS. LIBEU: I'll try to be very expeditious, Your
22 Honor, and efficient and get the jury out of here
in five or
23 ten minutes.
24 THE COURT: Okay.

25 RECROSS-EXAMINATION *[10:31]*

APPENDIX B

**APPENDIX B — DEFENDANTS’ OFFER OF
PROOF REGARDING INFOSCOUT SURVEY
AND REPORTS (DE 859), FILED SEPT. 22, 2022**

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MONSTER ENERGY COMPANY, a
Delaware Corporation,
Plaintiff,

vs.

VITAL PHARMACEUTICALS, INC.,
d/b/a VPX Sports, a Florida corporation; and
JOHN H. OWOC a.k.a. JACK OWOC, an individual,
Defendants.

Case No. 5:18-cv-01882-JGB-SHK

**DEFENDANTS’ OFFER OF PROOF
REGARDING
INFOSCOUT SURVEY AND REPORTS**

As discussed with the Court on September 21,
2022, Defendants Vital Pharmaceuticals, Inc.
("VPX") and John H. Owoc (together with VPX,
"Defendants") submit this Offer of Proof in support of
the admissibility of the InfoScout survey

commissioned, approved, and adopted by Plaintiff Monster Energy Co. (“Monster”) and its results.¹

In its August 2, 2022 Order, the Court found that the InfoScout Surveys and related Reports are “relevant because they tend to show what aspects of Bang are material to its purchasers,” and that relevant surveys conducted according to accepted principles are admissible either as non-hearsay or pursuant to a hearsay exception, including the residual hearsay exception applicable where there are “circumstances guarantees of trustworthiness.” (ECF 798 at 17.) Although the Court acknowledged that Monster’s contention that Defendants could not demonstrate that the surveys were conducted according to accepted scientific principles was “somewhat facetious,” it nonetheless granted Monster’s motion to exclude “standalone evidence of the InfoScout Surveys and InfoScout Reports” on the grounds that “Defendants have not identified a witness who can testify about the InfoScout Surveys’ design or methodology” and, on the record before it, could not “find that the surveys are supported by sufficient guarantees of trustworthiness.” (Id. at 17-18.) Thereafter, on various occasions over the course of the trial, the Court declined to permit Defendants to introduce evidence or question witnesses concerning the InfoScout Surveys and Reports on various occasions, including as summarized or excerpted in Monster’s contemporaneous presentations and business records. (See generally

¹In lieu of publicly filing the documents referenced herein, Defendants will present the Court with physical hardcopies on the morning of September 23, 2022 along with a supporting declaration.

ECF 865-2 through 865-4.) As a result, Defendants have been unable to introduce evidence in support of the reliability and admissibility of the InfoScout Surveys and Reports.

The InfoScout Surveys and Reports are critical to various defenses of Defendants and highly probative of the deficiencies in Monster's false advertising claim, including without limitation its inability to prove materiality, causation or damages. As such, the exclusion of such evidence is highly prejudicial to Defendants. Defendants therefore submit this Offer of Proof to provide the Court with a complete record as to factual basis for their contention that the InfoScout Surveys and Reports should be received into evidence because, among other things, they are reliable and admissible. Among other things, Monster commissioned, participated in the design of, and ultimately approved the InfoScout surveys and questionnaires and relied on and adopted the surveys and reports in the normal course of its business.

Defendants summarize select testimony and evidence that they would have introduced and elicited had they been permitted to examine Monster's witnesses regarding the InfoScout survey and results.

A. Select Deposition Testimony Concerning InfoScout

Richard Frediani. Mr. Frediani, Monster's Vice President Global Category Management & Insights, testified as follows at his deposition concerning Monster's involvement in designing, approving and using the InfoScout Surveys and

Reports. Monster commissioned consumer research studies in or around May 2018 on the “Better for You category in general,” with BANG “one of the main brands in the study.” (Frediani Dep. Tr. 101:22-3.) Monster hired InfoScout (now known as Numerator²) to assist with that consumer research, including a survey of shoppers (Frediani Dep. Tr. 117:8-22), in order learn “about the [BANG] brand, who the consumer was, [and] some of the main reasons they are buying performance energy products.” (Frediani Dep. Tr. 207:2-13).³

Although InfoScout “led ... the survey design,” including which choices to include in the survey in regard to drivers of Bang consumption, Monster “reviewed” and approved it. (Frediani Dep. Tr. 119:16-25.) InfoScout “built out” the initial survey design and questionnaire, which Monster reviewed, edited and ultimately approved. (Frediani Dep. Tr. 150:4-25.) Monster understood the survey specifications, including without limitation the gender, age and other demographic information of the panelists who participated, the sample size, and how and when the survey was conducted. (Frediani Dep. Tr. 208:17-212:18.) Monster weighed in on how the consumers who were surveyed by InfoScout were

²InfoScout rebranded and changed its name to “Numerator” in October 2018. See <https://www.businesswire.com/news/home/20181004005123/en/Market-Track-and-InfoScout-Rebrand-to-Numerator-Launch-Omnichannel-Panel-of-Record-Solution>

³InfoScout rebranded and changed its name to “Numerator” in October 2018. See <https://www.businesswire.com/news/home/20181004005123/en/Market-Track-and-InfoScout-Rebrand-to-Numerator-Launch-Omnichannel-Panel-of-Record-Solution>

selected, including their geographic and demographic proportionality to the total US population. (Frediani Dep. Tr. 197:22-199:20.) After the first InfoScout Survey results were received, moreover, Monster commissioned another “follow up” study. (Frediani Dep. Tr. 103:6-19.)

Although the consumer “Insights” in the Surveys and Reports were developed by InfoScout and reflect its own conclusions from the study (and never mention creatine) (Frediani Dep. Tr. 123:5-116; 124:6-15), Monster included InfoScout’s conclusions and recommendations in its own presentations circulated to Monster’s senior leadership (Frediani Dep. Tr. 104:8-9; 125:7-15; 126:13-17; 146:6-7; 147:14-22; see, e.g., TX-6164 (Frediani Dep. Ex. 8); TX-0018 (Frediani Dep. Ex. 10)). Monster “utilized” a questionnaire that was “based off” the InfoScout survey questions commissioned and approved by Monster when developing its own internal consumer surveys. (Frediani Dep. Tr. 156:7-19; 158:8-24; 159:6-18; 159:22-160:5.)

Emily Tirre. Ms. Tirre, Monster’s President of the Americas, testified about her familiarity with InfoScout. She explained that InfoScout/Numerator “was a company that Monster started to engage with in or around 2018 in which we were gathering consumer insights ... from the actual consumer,” and explained that it “is a service that [Monster] pay[s] for, and they capture not only consumer insights but also shopper insights because a shopper may be different than the consumer.” (Tirre Dep. Tr. 20:21-21:4). Ms. Tirre received InfoScout Surveys and Reports along with internal Monster presentations

adopting those findings, as did other senior executives. (Tirre Dep. Tr. 31:24-35:3.) David Van Winkle. Mr. Van Winkle, Monster's Chief Customer Officer, testified, among other things, concerning Monster's use and reliance on InfoScout survey results and data. He explained that Monster has had a financial and contractual relationship with InfoScout/Numerator since approximately 2015 or 2016, which more recently has been managed by Richard Frediani and the category management team. (Van Winkle Dep. Tr. 201:19-202:13) Mr. Frediani and his team "directed [InfoScout/Numerator] in their work for Monster," although Mr. Van Winkle has also had "direct interactions." (Van Winkle Dep. Tr. 37:15-38:4.) Monster's category management team included consumer research commissioned from InfoScout in presentations to senior leadership, including to gain insight as to the reasons consumers purchased particular brands. (Van Winkle Dep. Tr. 55:20-57:22.) Monster used and relied on InfoScout/Numerator data in the course of its business, which he testified "allowed Monster to have consumer insights that you don't necessarily get out of just straight Nielson analytics." (Van Winkle Dep. Tr. 188:4-25.)

Monster's category management team uses "Numerator data to build support, consumer insight support for content [Monster] need[s] . . . to support presentations to retailers." (Van Winkle Dep. Tr. 191:15-192:6.) Thus, for example, Monster relied on and utilized data from InfoScout/Numerator to "pitch" Reign to retailers and secure additional space, including "with respect to the launch of Reign in Kroger." (Van Winkle Tr. 176:3-177:9.) Numerator

survey data was used “to support Reign from a consumer insight standpoint,” including to “better understand” issues, including consumer preferences, that are “very important when you’re launching a new brand.” (Van Winkle Dep. Tr. 198:1-199:5.)

**B. Select Monster Business Records
Concerning the InfoScout Surveys and
Results**

1. ***TX-0013***. May 31, 2018 E-mail from R. Frediani to R. Sacks forwarding Bang deck updated - please review and comment, w/ Bang Update 3.0.pdf. This is an email to Rodney Sacks, the co-CEO of Monster, forwarding an internal Monster presentation discussing the analysis of data originating from the InfoScout survey, including slides describing drivers of VPX Bang consumption, motivation for switching brands of energy drinks, consumers’ ideal level of caffeine in an energy drink, and other metrics of consumer purchasing decisions regarding energy drinks. This presentation also includes insights, action items, strategies and recommendations for Monster developed in response to the information obtained by the InfoScout survey, showing that Monster adopted, relied on, and used the results of this survey.
2. ***TX-0018***. May 10, 2018 Email from Richard Frediani to Andrew Wilkinson regarding Bang Update with attached presentation titled “VPX Bang Update May 2018”. This internal Monster presentation comprises several slides containing data originating from the InfoScout survey, including slides describing drivers of VPX Bang

consumption, motivation for switching brands of energy drinks, consumers' ideal level of caffeine in an energy drink, and other metrics of consumer purchasing decisions regarding energy drinks. This document shows Monster adopted and relied on the results from the InfoScout survey showing that product attributes such as caffeine, flavor, and no sugar, no calories, and no carbohydrates were the main drivers of Bang consumption.

3. ***TX-0019***. September 25, 2018 Email from Dean Zurliene to various other Monster employees with attached presentation titled "BANG Insights from InfoScout." The email conveying the presentation summarizes the main insights of the InfoScout study, and specifically states that "Zero cal is primary reason." This document shows evidence that Monster adopted and relied on the information in the InfoScout survey, as Mr. Zurliene specifically asks Monster to focus on its zero calorie product Monster Ultra in order to compete with Bang.
4. ***TX-0165***. Presentation from InfoScout titled "Monster Energy: VPX Bang." This presentation summarizes the results from a survey commissioned by Monster. The presentation discusses the survey methodology and results, including slides describing drivers of VPX Bang consumption and customer demographics. This presentation also includes insights, action items, strategies and recommendations for Monster to more effectively compete with Bang developed in response to the information obtained by the InfoScout survey.

5. **TX-0737.** February 2020 presentation titled “CCNA FSOP Leadership Meeting.” This presentation contains data from Numerator, including demographic information of customers and a survey quantifying the reasons consumers purchase energy drinks. This is evidence that Monster relied on InfoScout/Numerator data in its regular course of business and included InfoScout/Numerator data in presentations to retailers and distributors.
6. **TX-6128.** September 10, 2018 Email from S. DeLorme to M. Hall RE Bang report with attachment Bang Update 3.1.pptx. This document comprises an email circulating an internal Monster presentation. The presentation contains several slides containing data originating from the InfoScout survey, including slides describing drivers of VPX Bang consumption, motivation for switching brands of energy drinks, consumers’ ideal level of caffeine in an energy drink, and other metrics of consumer purchasing decisions regarding energy drinks. This presentation also includes insights, action items, strategies and recommendations for Monster developed in response to the information obtained by the InfoScout survey.
7. **TX-6164.** June 1, 2018 E-mail from R. Frediani to E. Tirre, Re: Updated Bang deck, w/ Bang Update 3.0.pdf. This internal Monster presentation comprises several slides containing data originating from the InfoScout survey, including slides describing drivers of VPX Bang consumption, motivation for switching brands of

energy drinks, consumers' ideal level of caffeine in an energy drink, and other metrics of consumer purchasing decisions regarding energy drinks. This presentation also includes insights, action items, strategies and recommendations for Monster developed in response to the information obtained by the InfoScout survey, showing that Monster adopted, relied on, and used the results of this survey.

8. **TX-6166.** May 11, 2018 E-mail from R. Frediani to M. Hall, Re: VPX Bang Survey Re-Launch, w/ Monster_VPX_Bang_Re-launch v1_0.docx. This is an internal Monster email circulating draft survey questions for a second survey to be conducted by InfoScout regarding consumers' purchasing decisions related to energy drinks and Bang energy. This document is evidence that Monster was aware of and participated in the development of the methodology of the InfoScout survey.
9. **TX-6211.** July 19, 2018 E-mail from E. Tirre to M. Hall, Fwd: bang Deck, w/ Bang-Jeff Swift 7.13.pptx. This document comprises an email circulating an internal Monster presentation. The presentation contains several slides containing data originating from the InfoScout survey, including slides describing drivers of VPX Bang consumption, purchase frequency, which other brands consumers would purchase if Bang were not available, and other metrics of consumer purchasing decisions regarding energy drinks. This presentation also includes Bang share and sales performance metrics. This presentation is

evidence that Monster relied on and accepted the InfoScout survey data and used it to educate its employees about Bang energy, which Monster considers competition.

10. ***TX-6216***. May 30, 2018 E-mail from R. Frediani to M. Hall, Re Bang deck updated - please review and comment, w/ Bang Update 3.0.pdf. This internal Monster presentation comprises several slides containing data originating from the InfoScout survey, including slides describing drivers of VPX Bang consumption, motivation for switching brands of energy drinks, consumers' ideal level of caffeine in an energy drink, and other metrics of consumer purchasing decisions regarding energy drinks. This presentation also includes insights, action items, strategies and recommendations for Monster developed in response to the information obtained by the InfoScout survey, showing that Monster adopted, relied on, and used the results of this survey.
11. ***TX-6381***. January 10, 2019 E-mail from C. Schmidt to M. Trento et al., Re Bang Survey Questions, w/Bang Update 3.1.pptx. This document comprises an email circulating an internal Monster presentation. The presentation contains several slides containing data originating from the InfoScout survey, including slides describing drivers of VPX Bang consumption, motivation for switching brands of energy drinks, consumers' ideal level of caffeine in an energy drink, and other metrics of consumer purchasing decisions regarding energy drinks. This presentation also includes insights, action

items, strategies and recommendations for Monster developed in response to the information obtained by the InfoScout survey. The cover email of this document provides evidence that Monster adopted and used the InfoScout survey data internally when discussing or otherwise analyzing information related to Bang energy drinks.

12. ***TX-6495***. August 21, 2018 internal Monster email circulating a presentation with the filename “Bang Update 3.1.pptx.” The presentation contains several slides containing data originating from the InfoScout survey, including slides describing drivers of VPX Bang consumption, motivation for switching brands of energy drinks, consumers’ ideal level of caffeine in an energy drink, and other metrics of consumer purchasing decisions regarding energy drinks. This presentation also includes insights, action items, strategies and recommendations for Monster developed in response to the information obtained by the InfoScout survey. The presentation was circulated in response to a request from Jim Conway to Gui Weaver. This is evidence that Monster adopted and used internally the results from the InfoScout survey.
13. ***TX-6502***. November 30, 2018 internal Monster email circulating several presentations that Monster described as containing information that “can help sell against Bang.” One such presentation is an internal Monster presentation comprises several slides containing data originating from the InfoScout survey, including slides describing drivers of VPX Bang

consumption, motivation for switching brands of energy drinks, consumers' ideal level of caffeine in an energy drink, and other metrics of consumer purchasing decisions regarding energy drinks. This presentation also includes insights, action items, strategies and recommendations for Monster developed in response to the information obtained by the InfoScout survey, showing that Monster adopted, relied on, and used the results of this survey. Additionally, the cover email is evidence that Monster shared the information from these presentations, including the InfoScout information, with third party retailers in order to increase sales of its own products against Bang energy drink.

14. **TX-6584.** Presentation titled "Monster Energy Category Management presentation - VPX Bang: Market Update." Monster-branded presentation including slides describing drivers of VPX Bang consumption, motivation for switching brands of energy drinks, consumers' ideal level of caffeine in an energy drink, and other metrics of consumer purchasing decisions regarding energy drinks. The presentation includes slides discussing the development and methodology of the InfoScout survey. This presentation also includes insights, action items, strategies and recommendations for Monster developed in response to the information obtained by the InfoScout survey, showing that Monster adopted, relied on, and used the results of this survey.
15. **TX-6905.** Presentation titled "VPX Bang: Market Update" and with the file name "VPX Bang:

Market Update Bang Update 3.0.pptx.” Monster-branded presentation discussing the analysis of data originating from the InfoScout survey, including slides describing drivers of VPX Bang consumption, motivation for switching brands of energy drinks, consumers’ ideal level of caffeine in an energy drink, and other metrics of consumer purchasing decisions regarding energy drinks. This presentation also includes insights, action items, strategies and recommendations for Monster developed in response to the information obtained by the InfoScout survey, showing that Monster adopted, relied on, and used the results of this survey.

16. ***TX-6907.*** Monster-branded presentation discussing the analysis of data originating from the InfoScout survey, including slides describing drivers of VPX Bang consumption, motivation for switching brands of energy drinks, consumers’ ideal level of caffeine in an energy drink, and other metrics of consumer purchasing decisions regarding energy drinks. The presentation includes slides discussing the development and methodology of the InfoScout survey. This presentation also includes insights, action items, strategies and recommendations for Monster developed in response to the information obtained by the InfoScout survey, showing that Monster adopted, relied on, and used the results of this survey.

DATED this 22nd day of September, 2022.

QUARLES & BRADY LLP

By: /s/ David Muth
David Muth
Attorneys for Defendants Vital Pharmaceuticals, Inc.
and John H. Owoc

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the above document was served on all counsel of record via the Court's ECF system on this the 22nd day of September, 2022. Copies of the documents referenced herein will be provided in hardcopy.

/s/ David Muth
David Muth

APPENDIX C

**APPENDIX C — DEFENDANTS' SUBMISSION
REGARDING THE DISCLOSURE OF THIRD-
PARTY MARKET RESEARCH THROUGH THE
TESTIMONY OF DR. LARRY CHIAGOURIS (DE
857), FILED SEPT. 22, 2022**

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MONSTER ENERGY COMPANY, a
Delaware Corporation,
Plaintiff,

vs.

VITAL PHARMACEUTICALS, INC.,
d/b/a VPX Sports, a Florida corporation; and
JOHN H. OWOC a.k.a. JACK OWOC, an
individual,
Defendants.

Case No. 5:18-cv-01882-JGB-SHK

**DEFENDANTS' SUBMISSION REGARDING
THE DISCLOSURE
OF THIRD-PARTY MARKET RESEARCH
THROUGH THE
TESTIMONY OF DR. LARRY CHIAGOURIS**

Federal Rule of Evidence 703 expressly
permits “the proponent” of an expert opinion to

disclose to the jury inadmissible facts and data that he relied on to formulate his opinion subject to a balancing test. Thus, on its face, the Rule permits those underlying facts and data to be elicited on direct examination and, under the governing standard, Dr. Chiagouris should be permitted to testify to them because they support and directly validate his opinions. See Wright & Miller, 29 Fed. Prac. & Proc. Evid. § 6273 (2d ed.) (where underlying “facts and data” are inadmissible under “rules concerning hearsay, best evidence, and authentication ... most courts agree that an expert should be permitted to offer the opinion and describe the otherwise inadmissible evidence on which she relies” because it “is merely offered to provide the jury with grounds to weigh the expert's testimony”).

Rule 703 “requires a court to ask two questions when evaluating otherwise inadmissible evidence. The first question is whether the facts are of a type reasonably relied on by experts in the particular field. The second question is whether the probative value of the underlying data substantially outweighs its prejudicial effect.” *Turner v. Burlington N. Santa Fe R. Co.*, 338 F.3d 1058, 1061 (9th Cir. 2003) (quoting Fed. R. Evid. 703); see also *U.S. v. W.R. Grace*, 504 F.3d 745, 766 (9th Cir. 2007) (explaining that “703 balancing” and “403 balancing” are distinct). Where, as here, the answer to both questions is yes, then the inadmissible evidence may be considered by the jury “as a basis for the expert opinion and not as substantive evidence,” and the Court may issue a limiting instruction to that effect. See *Paddack v. Dave Christensen, Inc.*, 745 F.2d at 1262 (citing to *United States v. Sims*, 514 F.2d 147 (9th Cir.)).

There is no question that survey evidence is of a type reasonably relied on by marketing experts; indeed, Monster itself proffered a marketing expert who relied on consumer surveys in formulating his opinions, including the very same InfoScout survey that Monster is seeking to prevent Dr. Chiagouris from testifying about. (See, e.g., Carpenter Report at ¶ 137.) Further, the probative value of disclosing the results of a pre-litigation consumer survey that was commissioned, approved, adopted and relied on by Monster in the ordinary course of its business, and provides the basis for Dr. Chiagouris's opinions, substantially outweighs any conceivable prejudicial effect from its disclosure to the jury. See *United States ex rel. Landis v. Tailwind Sports Corp.*, 2017 WL 5905509, at *11 (D.D.C. 2017) (noting that although underlying advertising reports were “not themselves admissible,” expert was “permitted to rely on those reports in estimating the value of earned revenue attributable to the sponsorship” under Rule 703; “[a]fter all, the reports were commissioned by USPS, and in internal correspondence USPS cited figures from the reports with approval”); see also *Droplets, Inc. v. Yahoo! Inc.*, 2021 WL 9038355, at *11 (N.D. Cal. 2021) (denying motion to exclude expert's opinions which relied, in part, on studies which “appear to be in line with [defendant's] own internal analysis, notwithstanding the different contexts”).

Indeed, Monster has conceded, among other things:

- Its most senior executives—including Rodney Sacks and Mark Hall—“reviewed and approved” and, indeed, incorporated the InfoScout survey

and its results into internal business presentations (see TX-6164¹ (“Bang Market Update”); see also 5/27/21 Deposition Testimony of Richard Frediani (“Frediani Dep.”) at 106:9-11 (“Q. So Mr. Hall and Mr. Sacks had approved this slide deck, which is attached to your email, correct? A. Yes.”));

- Monster approved of the methodology and questionnaire used in the InfoScout study (Frediani Dep. 150:23-25 (“Q. And in the end, Monster approved what Numerator [i.e., InfoScout] came up with, correct? A. Yes.”)); and,
- Monster relied on and made use of the InfoScout survey results (see, e.g., TX-0018; TX-0019; TX-6128), including in a presentation to Coca Cola (TX-0737).

The foregoing points also confirm the lack of prejudice to Monster in admitting the InfoScout survey results under Rule 703. This information was not created by VPX or its expert. Rather, the pre-litigation InfoScout survey results were commissioned, approved and adopted by Monster. See *United States ex rel. Landis*, 2017 WL 5905509, at *11 (“[a]fter all, the reports were commissioned by USPS, and in internal correspondence USPS cited figures from the reports with approval”); *Fed. Trade Commn. v. Qualcomm Inc.*, 2018 WL 6576029 (N.D. Cal. Dec. 13, 2018) (incorporation of presentation to

¹The exhibits and transcripts cited herein have not been admitted at trial and have been marked with confidentiality designations by Monster. In the interest of efficiency, Defendants will have hard copies of these exhibits and deposition transcript excerpts available for the Court to review in lieu of filing them under seal.

Qualcomm's Board of third party analysis and conclusions demonstrates that Qualcomm adopted that analysis, and documents were admissible under FRE 801(d)(2)(B), governing statements adopted by a party, and FRE 801(d)(2)(D), governing statements by a party's agent).

Further, the InfoScout survey results corroborate the results of Dr. Chiagouris' own surveys and demonstrate the flaws he identifies in the litigation survey and results proffered by Dr. Cowan. (Chiagouris Report at ¶¶ 63–71.) As discussed in Dr. Chiagouris' report, moreover, under the theory of "triangulation," consistent, repetitive results obtained through multiple methods and measures serve to validate the reliability of the research. (Chiagouris Report at ¶ 63.) Thus, disclosure of these facts and data validating Dr. Chiagouris' results and criticisms of Monster's experts is critical to enable the jury to evaluate the substance of both experts' opinions. And, while Monster may not like the InfoScout results, they are not prejudicial or unfair in any respect. To the contrary, they are indisputably relevant to the opinions that Dr. Chiagouris disclosed in his report, and Monster is seeking to conceal them from the jury because they do not help its case. As such, while Monster is free to cross-examine Dr. Chiagouris as to its post-litigation criticisms of its own pre-litigation survey and may request a limiting instruction, its efforts to exclude those facts and data from the jury's consideration will only deprive the jury of information that will "assis[t] the jury to evaluate the expert's opinion." Advisory Committee's 2000 Notes on Fed. Rule Evid. 703; see also *Doherty v. State Farm Gen. Ins. Co.*, 2021 WL 6104170, at *6 (C.D. Cal. 2021) (explaining that "[t]he lab results"

relied on by the expert “are not the type of ‘substantive evidence of [an expert's] ultimate conclusions’” that may be barred under Rule 703 “but instead constitute data “of the type reasonably relied upon by experts in the field” and “as [the adverse party] fails to persuasively argue how the lab results are unfairly prejudicial, the Court finds no basis to exclude them”).²

Finally, preventing Dr. Chiagouris from testifying to and thus disclosing the facts and data upon which he relied in forming his opinions is also inconsistent with the position Monster took with its own marketing expert and with the Court’s prior rulings under Rule 703. In particular, the Court repeatedly permitted Monster to elicit testimony from its own marketing expert, Dr. Carpenter, and publish to the jury the substance of numerous inadmissible third-party “consumer” statements over Defendants’ continuing Rule 703 objection. Compare Sept. 14, 2022 Tr. Transcript at 46:8-47:9 (overruling Defendants’ Rule 703 objection to Dr. Carpenter’s publication of “statements on the internet” supposedly made by third-parties in comments and posts), and 49:7-17 (overruling Defendants’ “continuing objection” to publication of additional third party consumer statements), with 50:9-51:24 (ruling that same alleged third-party “consumer” posts were inadmissible hearsay). It would be manifestly prejudicial and unfair to apply a different

²Defendants do not concede that the InfoScout survey and results are inadmissible but understand that the Court has previously held to the contrary. Defendants reserve all rights with respect to the admissibility of the InfoScout survey and results.

standard to Defendants' marketing expert, and by so doing prevent Dr. Chiagouris from disclosing highly probative evidence upon which he relied in forming his opinions and disclosed in his report.³ For this reason too, the Court should permit Dr. Chiagouris to testify to the InfoScout survey and results that corroborate his opinions.

Dr. Chiagouris should be permitted to testify to the InfoScout survey and results to help the jury understand his thought process and to determine what weight to give his opinion. Monster cannot demonstrate any prejudice, of the type the Rules of Evidence are intended to prevent, by permitting Dr. Chiagouris to offer such testimony, particularly when Monster commissioned, approved and adopted the information. And, even if there were minimal prejudice, it would be substantially outweighed by the probative value, and a limiting instruction would further assure that balance remains intact.
DATED this 22nd day of September, 2022.

QUARLES & BRADY LLP

By: /s/ David Muth
David Muth
Attorneys for Defendants Vital Pharmaceuticals, Inc.
and John H. Owoc

³By contrast, the small set of cherry-picked consumer statements that Dr. Carpenter was allowed to disclose to the jury were significantly and unfairly prejudicial to Defendants and, in isolation, had little if any probative value with respect to the opinions Dr. Carpenter offered.

APPENDIX D

**APPENDIX D — VITAL’S REPLY IN SUPPORT
OF MOTION FOR JNOV, NEW TRIAL, AND
REMITTITUR (DE 957), FILED APRIL 10, 2023**

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MONSTER ENERGY COMPANY, a
Delaware Corporation,
Plaintiff,

vs.

VITAL PHARMACEUTICALS, INC.,
d/b/a VPX Sports, a Florida corporation; and
JOHN H. OWOC a.k.a. JACK OWOC, an individual,
Defendants.

Case No. 5:18-cv-01882-JGB-SHK

**DEFENDANT VITAL PHARMACEUTICALS,
INC.’S REPLY
IN SUPPORT OF MOTION FOR JNOV, NEW
TRIAL
AND REMITTITUR**

Judge: Hon. Jesus G. Bernal
Place: Courtroom 1
Trial: August 9, 2022
Verdict: September 29, 2022

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INTRODUCTION

The jury did not read, or even hear, the InfoScout Surveys, along with other material evidence essential to Vital's right to a fair trial. Monster took advantage of these prejudicial exclusions, which led to a runaway jury verdict of historic proportions that is unwarranted by the trial record. Additionally, Monster simply failed to prove the elements necessary for liability and damages for each of its claims.

Vital is mindful that overriding the jury's shocking verdict requires it to demonstrate unusual circumstances. But Vital respectfully submits that it has done so and now requests the Court perform its solemn duty to prevent a miscarriage of justice.

ARGUMENT

I. The Court should grant a new trial because critical evidence was not presented to the jury which caused significant prejudice to Vital.

A. The Court should grant Vital a new trial to correct its mistaken and prejudicial exclusion of the InfoScout Surveys.

While multiple evidentiary rulings prejudiced Vital, perhaps the most damaging was the Court prohibiting Vital from examining witnesses with evidence of Monster's adopted InfoScout Surveys.¹

¹Monster apparently contends certain InfoScout data actually supports its position on materiality with respect to "consumers' purchasing decision." (Dkt. 950 at n.2). Though Monster

The Court previously held that Vital could introduce the InfoScout Surveys in its in limine ruling. (Dkt. 798, the “MIL Order”). Based on that MIL Order, Vital could have convinced the jury, through expert testimony, that Monster could not meet the materiality element of its Lanham Act claims. This argument is laid out in Section I(A)(1) below. Additionally, as explained in Section I(A)(2), the Court should have permitted the same evidence on the cross-examination of Monster’s lay executive witnesses.

1. The Court should grant a new trial to Vital to correct its mistaken and prejudicial exclusion of the InfoScout Surveys through expert testimony.

First, Monster simply misconstrues the MIL Order, arguing that the Court had only permitted Vital to use the InfoScout Surveys one way: “i.e., on cross-examination of [Monster’s] expert” witnesses. (Dkt. 950 at 7). And therefore, according to Monster, Vital was forbidden from introducing the evidence through its own experts at trial. That assertion, however, is thoroughly debunked by the MIL Order itself, wherein the Court unqualifiedly and unambiguously ruled in limine that the InfoScout Surveys were “admissible to examine Dr. Chiagouris on the basis of his opinions,” and that the InfoScout Surveys may be used

actually misconstrues this data, it nonetheless should be permitted to use it in a new trial, along with Vital’s presentation of the damning InfoScout Surveys that were the subject of the MIL Order. The new jury can make up its own mind after finally hearing all of the relevant evidence.

“to question the basis of an expert’s opinion.”² (Dkt. 798 at 16–18).

Second, Monster mistakenly asserts that “Rule 703 prohibits” the precise ruling of the Court. (Dkt. 950 at 17). Monster again simply disregards what the Court expressly ruled in limine. More specifically, the Court explicitly held that the criteria of Rule 703 were met with respect to the InfoScout Surveys. The Court’s ruling even tracked the language of Rule 703. That is, Rule 703 permits expert testimony based on hearsay where “experts in the particular field would reasonably rely on those kinds of facts or data”; compare the Rule with the Court’s holding that the InfoScout Surveys were typical (or not “atypical”) of “the kinds of evidence that consumer experts rely on.” In short, the MIL Order does not conflict with Rule 703—it proves that the Rule 703 criteria had been fulfilled.³

Third, Monster distorts the degree to which the MIL Order was “always preliminary.” (Dkt. 950 at 10). A party like Vital reasonably expected the court “to adhere to its earlier [in limine] ruling if no facts or circumstances arise to warrant a reversal.” Such was the holding in *United States v. Bensimon*, 172 F.3d 1121, 1127 (9th Cir. 1999), cited by the

²Monster claims Vital uses a “cherry-picked quote” from the MIL Order relating to “the Court’s recitation of case law, not from its ruling.” (Dkt. 950 at 7). This is a nonsensical statement. Monster simply ignores the parts of the MIL Order that contradict its argument.

³The *Mest*, *Wi-LAN, Inc.*, and *Marvel Characters* decisions (Dkt. 950 at 7) cited in Monster’s brief are not from the Ninth Circuit or its District Courts, and have no bearing on Vital’s pending Motion.

Court under the “Legal Standards” section of its MIL Order. (Dkt. 798 at 7). See also, *City of Pomona v. SQM N. Am. Corp.*, 866 F.3d 1060, 1070 (9th Cir. 2017) (same). The Court’s MIL Order was issued on August 2, 2022, literally weeks before the trial was scheduled to commence. There were no “facts or circumstances” that changed in the interim, and Vital, in preparing for trial, was plainly entitled, as a matter of fundamental fairness, to rely, and did rely, upon a rightful expectation that it would be permitted to discuss the InfoScout Surveys in the course of examining experts. Vital, however, was ambushed at trial when, without warning, the Court reversed course.

Fourth, Monster wrongly claims that the InfoScout Surveys were (perhaps *de facto*?) presented to the jury. The statement is false. The die was cast the morning that Vital’s survey expert, Dr. Chiagouris, intended to testify about the InfoScout Surveys. The Court ruled that the testimony was prohibited by Rule 703, a one-hundred-eighty-degree move away from the MIL Order explicitly permitting the same. (Dkt. 923-17 at 5:13–20). At best, it was cold comfort that Dr. Chiagouris was allowed to opaquely refer the jury to an unnamed and mysterious document obtained “during the discovery process,” without being able to testify with particularity about the InfoScout Surveys’ detailed conclusions that were devastating to Monster’s claim of materiality. (Ex. 14 (9/22 Trial Tr. (Chiagouris)) at 11:12–20). There is no reason to believe the jury had any foundation to even begin understanding this hazy testimony, much less the subsequent testimony

of Mr. Voth, given the extremely narrow channel that remained with the Court's guardrails in place.⁴

Fifth, though not actually supported by authority, Monster inaccurately claims the Court's error was immaterial; since Vital's "refrain to the jury" during trial was that consumers bought Bang Energy for reasons other than Super Creatine. (Dkt. 950 at 22). It is true, Vital made the best of a bad situation and did, in fact, present the limited evidence allowed by the Court. But this is Monster knocking down the straw man. Vital is not arguing that the Court disallowed the introduction of any evidence relating to materiality. Instead, the Court forbid Vital from presenting its best evidence to the jury in the form of the InfoScout Surveys, thus materially prejudicing Vital's position at trial. Monster clearly recognized that material distinction, as it fought tenaciously to uphold the Court's newly reversed position throughout the trial. Sixth, and finally, Monster's recitation of the pretrial procedural history surrounding the InfoScout Surveys is either incomplete (at best) or simply misstated.⁵ Vital's prior counsel served a subpoena on Market Track (the successor to InfoScout) for May 28, 2021, enabling counsel to complete the intended Rule 30(b)(6) deposition prior to the close of discovery

⁴Monster oddly refers to stricken testimony of Mr. Owoc. (Dkt. 950 at n.5). The whole point of Vital's pending Motion is that the jury should have been permitted to hear such testimony and read the InfoScout Surveys. This includes testimony from Mr. Owoc.

⁵The substantial merits of Vital's pending Motion turn on the express language of the MIL Order—not on the diligence of Vital's former counsel. As described above, prior counsel certainly was diligent in any event.

in this matter. (Monster Energy Co. v. Vital Pharms. Inc., No. 1:21-cv-3067 (N.D. Ill. filed June 8, 2021), Dkt. 1 at 2). Monster implies discovery was extended here to permit Vital “to take InfoScout’s deposition,” when the truth is that the extension was only needed to fight off Market Track’s objections to the same. (Dkt. 950 at 5). Ultimately a different District Court largely denied Vital’s motion to compel and, necessarily, deprived Vital of much of the relevant underlying data being sought. (Monster Energy Co. v. Vital Pharms. Inc., No. 1:21-cv-3067 (N.D. Ill. filed June 8, 2021), Dkt. 14). None of this history affects, in any way, Vital’s right to the relief it presently requests.

2. The Court should grant Vital a new trial to permit lay testimony about the InfoScout Surveys.

The Court went down the wrong path in its MIL Order, when it initially characterized the InfoScout Surveys as documents that “contain hearsay.” (Dkt. 798 at 17). The Court should have instead properly ruled that the data in the reports was not hearsay under Fed. R. Evid. 801(d)(2)(B).⁶ To Vital’s detriment, the Court excluded considerable evidence that, as Rule 801(d)(2)(B) reads, Monster “manifested that it adopted or believed” the InfoScout Surveys “to be true.” Such evidence includes, for example, the slide deck written by Monster’s Vice President of the Americas (Emelie

⁶This is a category of admissible evidence distinct from: (i) inadmissible hearsay, defined in Rule 801(c), and (ii) non-hearsay evidence, for example, statements admitted for reasons other than the truth of the matter asserted.

Tirre), who presented the InfoScout Surveys to none other than Monster's owner, Coca-Cola North America. (Dkt. 923-24).⁷

When InfoScout's findings were adopted by Monster, they became not hearsay. How and why they were adopted are concerns beyond the scope of Rule 801(d)(2)(B).⁸ The District Court's decision in *F.T.C. v. Qualcomm Inc.*, 2018 WL 6576029 (C.D. Cal. 2018), is dead-on-point: the defendant's agent (here, InfoScout for Monster) made statements that were admissible, just as if they were the defendant's own statements.

Additionally, Monster makes two fallacious arguments associated with its lay witness conclusion: that the Court properly denied Vital the right to cross-examine its highest-ranking decision makers (including co-CEO Rodney Sacks) about the conclusions of the InfoScout Surveys. The record proves otherwise.

First, Monster unfairly downplays the degree to which the InfoScout Surveys were purchased,

⁷And this is just the tip of the iceberg. In its earlier-filed brief opposing Monster's motion for equitable relief, Vital cataloged many (though certainly not all) of the exhibits proving that Monster adopted and advocated the InfoScout Surveys' findings—regardless of whether the principles underlying the survey were sound. (Dkt. 948-2 at 28).

⁸Taking an extreme example, to make the point, Mr. Sacks might have adopted the propositions of the InfoScout Surveys because of dream or a vision. They would nonetheless continue to constitute "not hearsay." That said, had the Court properly admitted the InfoScout Surveys, Vital reasonably believes the jury would have conclude Mr. Sacks and his executive team believed the data to be true because it was true.

constructed, vetted, accepted, adopted, implemented, and supported by Monster. And while Monster's lawyers report Mr. Sacks believed that the InfoScout Surveys were "rubbish," this contention is exactly why he should have been cross-examined, with the jury then believing—or more likely not believing—his biased view.⁹ (Dkt. 950 at 15).

Second, Monster attempts to convince the Court that it actually permitted introduction of the InfoScout Surveys, subject to foundational testimony. (Dkt. 950 at 19). This is simply false. The Court was steadfast in its position that the InfoScout Surveys were not coming in under any circumstances. With respect to Mario Suarez, a witness mentioned by Monster in its brief, the Court ruled:

Not in this world at all. You can ask the witness if he reviewed this document and took any action as a result of this document, but the document doesn't come in.

(Dkt. 923-13 at 172:19–22) (emphasis added).

And Vital did try, despite the Court's MIL Order, to introduce the InfoScout Surveys with witnesses who absolutely had sufficient foundation to testify. As Monster's counsel stated to the Court at sidebar during the testimony of Ms. Tirre: "The survey—anything questioning about, you know, her seeing a survey, it's just the same thing they've tried over and over again with every witness and it's just improper.

⁹Monster brazenly cites to Mark Hall as a source on the credibility of the InfoScout Surveys. (Dkt. 950 at 15). This, after Monster vigorously (and unfortunately successfully) refused to produce Mr. Hall to testify at trial. (Dkt. 708 at 10). If Mr. Hall really does feel as strongly as Monster suggests, Monster should voluntarily produce him for cross-examination at a new trial.

It should not come in.” (Dkt. 923-15 at 12:13–16). Despite a clear opening to impeach Ms. Tirre, the Court mistakenly ruled, “Do not ask a question the only answer to which is InfoScout.” (Id. at 13:9–10).

B. The Court should grant Vital a new trial to correct its mistaken and prejudicial exclusion of the Rodent Study.

Without question, Monster repeatedly opened the door at trial for Vital to use the Rodent Study in its examination of witnesses from both parties. Monster wrongly focuses (once again) on the straw man argument: that the Rodent Study (which Monster’s counsel artfully labeled the “Untimely Study”) was produced outside of the Court’s scheduling order deadlines for written expert reports.¹⁰ In fact, the first three pages of its argument are devoted exclusively to knocking this straw man. (Dkt. 950 at 13–15). Monster gives the real argument but short shrift: that Vital is entitled to a new trial, not because the Rodent Study was timely disclosed, but because Monster’s counsel misleadingly framed questions throughout the weeks of trial that warranted, and indeed required, its introduction.

¹⁰There is no reason to address Monster’s Klein, Brown and Encompass decisions (Dkt. 950 at 24), though distinguishable, as none address curative admission or Monster’s chronic inability to ask examination questions in a way that avoids application of the doctrine.

1. Monster brazenly opened the door during the cross-examination of Meg Owoc.

Monster brazenly opened the door to the Rodent Study when Ms. Libeu cross-examined Ms. Owoc on the afternoon of September 6. Ms. Libeu asked, “To this day, Ms. Owoc, you don’t know whether any studies have been done on Super Creatine, correct?” (Dkt. 923-7 at 160:17–18 (emphasis added)). In four words Ms. Owoc replied, “Yes. There are studies.” (Id. at 160:19). First, Monster misquotes the record to suggest Ms. Owoc “had no basis to answer” Ms. Libeu’s question. (Dkt. 950 at 27). The truth is that, in the questions-and-answers identified in Monster’s brief, Ms. Libeu asked Ms. Owoc whether she had knowledge of Super Creatine studies in 2017—five years before the Rodent Study. (Id.) The very last answer given by Ms. Owoc, before Ms. Libeu opened the door, was as follows: “We don’t make any claims about Super Creatine. This was in 2017.” (Dkt. 923-7 at 160:15–16). At that moment, the door was not yet open. But Monster could not resist going too far, as Ms. Libeu then asked Ms. Owoc—not about 2017—but whether “[t]o this day” she had knowledge of Super Creatine studies. Ms. Owoc said “yes.”

Second, Monster says it withdrew the question. And yes, it did. But it happened during a sidebar, outside the attention of the jury, and after the damage had been done. The jury heard Ms. Owoc testify under oath that studies like the Rodent Study exist. The question was not withdrawn before Ms. Owoc answered. Whether Ms. Libeu withdrew her question is immaterial—a door, once opened, cannot

be unopened any more than a bell, once rung, cannot be “unrung.” Monster brought this problem on itself by asking the question in the first place. And respectfully, it appears the Court also knew the damage had been done:

MR. JANSSEN: So if she knows about the Peking rat study, then the door has been opened, correct?

THE COURT: I guess, depending on the answer.

(Id. at 161:15–17).

Third, and finally, Monster immaterially argues that other studies with respect to Super Creatine were admitted. Monster references a study—it was the proponent—that it introduced with its Dr. Kreider where he opined that he believed Super Creatine was not the equivalent of creatine monohydrate. (Ex. 3 (8/31 Trial Tr. (Kreider)) at 24:9–14). Monster also refers to twelve lines (literally twelve lines) of testimony by Mr. Owoc, seemingly about a toxicology study that was not permitted to be shown to the jury. (Ex. 5 (9/2 Trial Tr. (Owoc)) at 106:2–13). Monster never bothers to explain how any of these specks of testimony cure (or even relate to) its repeated opening of the door to the Rodent Study.

2. Monster started opening the door for the Rodent Study during opening statements and continued during every week of the trial.

First, it would have been easy for Monster’s lawyer to avoid the error in his opening statement.

All he needed to tell the jury was that, in his opinion, “No studies proving that Super Creatine is creatine or provides the benefits of creatine [existed at the time Vital’s witnesses were deposed].”¹¹ Yet, Mr. Hueston could not help himself, and instead omitted the bracketed language. And he further opened the door two more times, loudly boasting “No studies!” (Dkt. 923-2 at 55:11–16). The statements were clear falsities communicated to the jury that Vital was entitled to rebut with evidence of the Rodent Study. Vital’s position is bolstered by *United States v. Sine*, 493 F.3d 1021, 1038 (9th Cir. 2007). There, the Ninth Circuit held that testimony, in the nature of Monster’s opening statement, that presented the jury with an “inaccurate portrait” of Vital’s efforts to test Super Creatine, would in fact open the door to otherwise inadmissible evidence.

Second, Monster is wrong when it tries to minimize its chronic door-opening to “merely” Mr. Hueston’s opening statement and Ms. Libeu’s examination of Ms. Owoc. As if these were not enough already (and they plainly were) the unfair practice happened over, and over, and over. Its lawyers refused to properly condition questions about studies by limiting their inquiries to specific points in time. For example, by routinely prefacing non-impeachment questions with “at the time of your deposition,” and thereupon deceptively reciting the witness’ deposition testimony in the present, as opposed to past tense. (Ex. 7 (9/7 Trial Tr. (Li)) at 138:25–139:14; Ex. 8 (9/8 Trial Tr. (Li)) at 54:10–55:3). The Court issued such warnings, including to

¹¹The bracketed language would have been the fair and truthful qualification to what was actually communicated the jury.

Ms. Libeu: “So you have to be careful what you ask.” (Dkt. 923-2 at 161:24).

Monster’s third and final argument is that (in its obviously biased opinion) the Rodent Study was not actually persuasive evidence in support of Vital’s defenses. Monster knows this statement is not accurate, which explains its fervent desire to prevent the jury from hearing even the name of the Rodent Study. Regardless, Monster could have explored any perceived weaknesses in the Rodent Study on cross-examination, had the Court properly admitted the evidence. And Monster can still do so during a new trial.

C. The Court should grant Vital a new trial to correct its mistaken and prejudicial exclusion of other commercial creatine variants.

The Court withheld from the jury some of the most relevant and probative evidence in support of Vital’s Lanham Act defense. Namely, that the market contains numerous salts, serums, gummies, pills, and powders containing derivative forms of creatine. These products would have proven that Super Creatine, itself a creatine analog (as Monster’s Dr. Kreider conceded (Dkt. 921-4 at 121:21–122:1, 161:6–14)), was not a fake ingredient. Instead, the Court wrongly permitted Monster itself to unilaterally define for the jury the term “creatine,” as solely and exclusively creatine monohydrate; when instead, the consumer’s understanding of “creatine” was something Monster should have been required to prove to the jury.

Monster's first argument inaccurately suggests the Court did, in fact, permit Vital to show the jury the many forms of commercially available creatine other than creatine monohydrate. None were permitted with Monster's Dr. Kreider, though Monster spends briefing space making the irrelevant point that Dr. Kreider's earlier published work acknowledges the existence of such substances on a molecular level. (Dkt. 950 at 30). The products were also not permitted to any meaningful degree during the examination of Dr. Parang, a fact that Monster fails to clearly explain in its response. (Ex. 13 (9/21 Trial Tr.) at 26:4–33:19).

Second, the three so-called “other people do it” decisions cited by Monster are not relevant to any argument made by Vital (or Monster for that matter). (Dkt. 950 at 31). In *Seismic*, the defendant claimed its distribution of spyware causing computers to crash was a “widely-accepted practice.” The defendant in *FMC* engaged in “nearly verbatim copying of competitors’ labels” and argued it was “common practice.” And last, and also probably least, the defendant in *Ideal Toy* conceded it sold “knock off” copies of the plaintiff’s product, but pleaded it was just “one of many.”¹² These cases have nothing—nothing—to do with Vital’s relevant evidence that the market contains numerous creatine derivatives, whose very existence rebuts Monster’s contention that literally just one kind of real creatine exists in the form of creatine monohydrate.

¹²Full citations, and pin cites are set forth in Monster’s brief. (Dkt. 950 at 31).

Third and finally, admitting evidence of creatine derivate products would not have created the necessity for mini-trials. Proof of this proposition is empirical. Though done in an unduly limited and prejudicial manner, the Court did permit a very few such examples with Dr. Parang, all without triggering the parade of horrors threatened by Monster. (Dkt. 923-16 at 76:3–79:1). And the decisions cited by Monster have nothing in common with the issues raised in this appeal, and little in common with each other (except for use of Monster’s talismanic word “mini-trial”).

D. The Court mistakenly ruled that evidence of Monster’s own false advertising campaign was inadmissible.

Monster does not dispute the existence of records, withheld from the jury at the Court’s behest, where Monster instituted an illegal campaign to frighten retailers from selling Bang Energy because of its 300 milligrams of caffeine. The documents were plainly relevant to prove that consumers were purchasing Bang Energy because of its caffeine content, and not because of Super Creatine. In other words, the evidence would have disproven the materiality element of Monster’s Lanham Act claim. Monster could have argued to the jury what it now, unbelievably, argues to the Court: that the documents merely identified “potential regulatory risk.” (Dkt. 950 at 24). This is not at all how the documents read, especially in the context of Monster (following the suggestions of InfoScout) introducing

Reign with its own identical caffeine content.¹³ (Dkt. 923-22 at 2 and 6).

II. The Court should enter an order for remittitur because the weight of the evidence did not support the jury's verdict.

A. No reasonable juror could conclude Monster is entitled to almost \$272 million under its false advertising claims.

Monster misses Vital's point about Monster's purported lost sales for the "Monster Green," its flagship beverage. Dr. Cowan's study did not show any survey participant any Monster product except its sugar-free version, Monster Ultra (Dkt. 923-66; Ex. 15). Mr. Tregillis also admitted he did not know, for any survey participant, what Monster product they might have purchased if not Bang Energy. (Ex. 10 (9/15 Trial Tr. (Tregillis)) at 263:17–264:1). Instead, Mr. Tregillis simply chose a weighted average in making his damage calculations, which included lost sales of Monster Green without any rational basis to tie those lost sales to the survey participants. (Id. at 277:17–23). But the evidence convincingly established that Vital's sales of Bang Energy did not affect sales of Monster's existing brands. Instead, Bang Energy expanded the market by creating a new "performance energy" subcategory

¹³In addition to the caffeine-scare records, the Court should also have permitted further evidence of Monster's efforts to develop Reign to directly compete with Bang Energy. Not because of trade dress concerns that were the subject of other trials, as Monster argues, but as further evidence on materiality. (Dkt. 950 at 32). That is, with caffeine being the reason (among others) that consumers bought Bang Energy.

that brought in new customers who wanted a zero calorie, zero carbohydrate, “better-for-you” energy drink. (Dkt. 923-17 at 177:12–178:6). Further, consumers who purchased Bang Energy would never have purchased Monster Green with its fifty-four grams of soda-level sugar. (Ex. 14 (9/22 Trial Tr. (Voth)) at 185:3–9). Thus, Mr. Tregillis comparing Bang Energy to Monster Green is not an apples-to-apples comparison, and Monster simply ignores this critical point. Accordingly, the jury verdict is not supported by the evidence and remittitur is appropriate.

Monster relies on Dr. Carpenter’s testimony to support its mistaken claim that Super Creatine was material to customers’ purchasing decisions. Dr. Carpenter spoke to exactly zero consumers of energy drinks. Or more correctly, spoke with exactly zero people. (Ex. 9 (9/14 Trial Tr. (Carpenter)) at 13:8–17). This Court, in its MIL Order, held that Dr. Carpenter’s methodology “is shaky at best.” (Dkt. 798 at 33). As such, the Court correctly ruled, before the trial began, that Dr. Carpenter could not opine about the unknown and unknowable beliefs of the individuals whose social media posts he reviewed. (Id. at 34).

Prejudicially and mistakenly at trial, and over Vital’s objections, the Court changed course. The Court permitted Dr. Carpenter to testify about inadmissible hearsay internet social media posts referencing Super Creatine. (Ex. 9 (9/14 Trial Tr. (Carpenter)) at 9:14–11:9, 47:2–9, 48:15–49:24). Where the Court forbid Vital’s experts from even uttering the word “InfoScout,” as hearsay, it unfairly

permitted Dr. Carpenter to testify about random internet pabulum. This uneven playing field severely prejudiced Vital, as the jury was presented with only Monster's theory as to why consumers purchased Bang Energy. Such rulings were reversible error that justify remittitur (if not a new trial).

Additionally, as explained at length in Vital's opening brief, the Court would not permit Vital to cross-examine Dr. Carpenter or Dr. Cowan using Monster's bought-and-paid-for InfoScout Surveys. The Court's evidentiary rulings prevented the jury from making critical credibility determinations using all of the relevant facts. The same rulings also prevented the jury from having access to, and a complete understanding of, the trial's most critical evidence.

Before filing this lawsuit, Monster knew that literally 97% of the market did not purchase Bang Energy because of its Super Creatine ingredient. Had the jury heard such evidence, it almost certainly would not have awarded the excessive amount. The jury also should have heard evidence that Monster followed each and every recommendation contained in the InfoScout Surveys. Based upon the InfoScout Surveys, Monster created Reign to compete with Bang Energy (Ex. 12 (9/20 Trial Tr. (Tirre)) at 47:10–14; Dkt. 923-22 at 3; Dkt. 923-23 at 18); elected not to use the Monster name on Reign cans (Dkt. 923-23 at 18); manufactured Reign with ten calories, three grams of carbohydrates, zero sugar, and with amino acids; and placed Reign next to Bang Energy cans in stores wherever possible. (Ex. 12 (9/20 Trial Tr. (Tirre)) at 46:4–47:4; 48:3–6). Not one juror would

have believed Mr. Sacks' incredible description of the InfoScout Surveys as "rubbish."

But alas, the jury did not see the InfoScout Surveys. The jury could not, for example, determine whether Monster's position was credible in light of Monster's own conduct, dictated by its pre-litigation survey. Nor could the jury compare the InfoScout Surveys with Dr. Cowan's million-dollar survey, the latter reaching an entirely contrary and bogus conclusion. This lack of information resulted in a runaway jury that reached an award unsupported by the record. Thus, an order of remittitur is appropriate.

**B. No reasonable juror could conclude
Monster is entitled to \$18 million on its
tortious interference with contract claims.**

Monster presented the jury with no evidence to justify an award of \$18 million with respect to its claim that Vital interfered with its contracted-for shelf space. The three Monster employees merely (and barely) testified that Monster's cans were not where Monster expected them to be in certain AMPM, Walmart, and Circle K chain stores—with specific locations, times, and all other supporting details unaddressed.

Based on this anemic record, the Court cannot uphold the jury's award. To summarize the testimony of these three witnesses: each generally lacked foundational first-hand knowledge of even the limited and anecdotal circumstances regarding cans said to have been moved from shelf-to-shelf; and

none could testify about even the fact of damages, much less the extent of damages, if any. (Ex. 10 (9/15 Trial Tr. (Weaver)) at 93:9–11, 94:15–19; Dkt. 923-13 at 158:20–159:9, 160:25–161:3, 161:18–24; Dkt. 946-14 at 161:25–162:4, 162:10–17; Dkt. 946-15 at 24:5–11, 40:15–17).

Yet the Court wrongly allowed the jury to consider the claim, where Monster simply hypothesized that its damages could be based upon a multiplier applied to every single chain store location in the United States. The law requires the Court to right this wrong. If anything, the jury's verdict on Monster's shelf space claim is so tainted that it calls into question the remainder of the same verdict.

The Ninth Circuit's decision in *Skydive Arizona, Inc. v. Quattrocchi*, 673 F.3d 1105 (9th Cir. 2012) is inapposite. The dispute involved a trademark and the court held “a mark holder is held to a lower standard in proving the exact amount of actual damages.” *Id.* at 1112. The court also noted that, unlike here, the plaintiff provided an “array of customer evidence” as well as other financial records in support of its damages claim. *Id.* But perhaps most importantly, the plaintiff in *Skydive* presented the jury with multiple declarations and witnesses from an expansive geographical reach to demonstrate the scope of the claimed harm. *Id.* at 1112–13. Monster provided no such evidence. Or any evidence really, that would justify a national multiplier. Its damage claim was lodged solely and mistakenly upon numbers literally generated, in the first instance, by Monster's lawyer in his closing argument. (Dkt. 923-19 at 98:10–13, 98:22–99:3, 99:13–18).

Monster's other cited authorities also do not support a national multiplier where, as here there is literally no evidence in support. See, e.g., *Intel Corp. v. Terabyte Int'l, Inc.*, 6 F.3d 614 (9th Cir. 1993) (upheld damage award on counterfeit claims where defendant failed to provide information in its possession); *Morse v. Cty. of Merced*, 2018 WL 3469062 (E.D. Cal. 2018) (future economic damages upheld for false arrest claim even though they could not be computed with mathematical certainty).

C. No reasonable juror could conclude that Monster is entitled to \$3 million under its trade secret claim.

Despite being given every opportunity in its opposition brief, Monster still cannot identify evidence presented to the jury that: Vital misappropriated any trade secret or even a single trade secret; how any trade secret was used to unjustly enrich Vital; when any trade secret was used; with whom any trade secret was used; or, specifically, where any trade secret was used. Defaulting to hyperbole, Monster falsely insists it introduced evidence of "hundreds" of "trade secrets" that a former Monster employee possessed on flash drives when he left Monster. And according to Monster, it is now somehow entitled to \$3 million in damages. Monster's generic claims of misappropriation, without more, are sufficient merely for nominal damages. See *InteliClear, LLC v. ETC Glob. Holdings, Inc.*, 978 F.3d 653, 658 (9th Cir. 2020) ("plaintiff 'should describe the subject matter of the trade secret with sufficient particularity'" and

must clearly refer to tangible trade secret information and not simply rely upon “catchall” phrases) (emphasis in original) (quoting *Imax Corp. v. Cinema Techs., Inc.*, 152 F.3d 1161, 1164 (9th Cir. 1998)).

Mr. Swift’s testimony was surely inadequate to prove Vital somehow actually used Monster’s trade secrets to damage Monster. He testified only that Vital “could have” used undefined information to undercut Monster’s prices at undisclosed locations in an unknown manner to cause injury to Monster’s business. (Ex. 11 (9/16 Trial Tr. (Swift)) at 67:10–22). But that is not enough to carry the day. Mr. Swift needed (and miserably failed) to specifically identify a specific trade secret Vital used to its benefit and to Monster’s detriment. (Id. at 93:14–94:9, 95:4–8). Simply because a former Monster employee possessed information that arguably might have been a trade secret is not enough to warrant damages.

Droeger v. Welsh Sporting Goods Corp., 541 F.2d 790, 792–93 (9th Cir. 1976) (“In light of the emphasis in trade-secret law on unfair use, it is generally not appropriate to direct a jury to impute an agent’s knowledge of a secret to the principal. Such an instruction would permit recovery even when the trade secret was not actually communicated to or used by the principal.”) Rather, Monster had to present evidence of a trade secret and how it was taken and used by Vital. Id. at 792.¹⁴ It did not.

¹⁴See also, *ChromaDex, Inc. v. Elysium Health, Inc.*, 2019 WL 7166056, at *1 (C.D. Cal. 2019) (“Under both California and

Monster's reliance on *SPS Techs., LLC v. Briles Aerospace, Inc.*, 2021 WL 4913509 (C.D. Cal. 2021), is unavailing, as the plaintiff's damage expert focused on the plaintiff's lost profits resulting from the misappropriation of trade secrets. *Id.* at *3. Monster's Mr. Tregillis did not make any estimation of Monster's lost profits resulting from any alleged trade secret misappropriation. Instead, he focused on Vital's profits under an unjust enrichment theory. (Dkt. 923-13 at 221:20–222:15, 223:3–6, and 224:12–13).

This dispute, and the pending motion, are controlled by *O2 Micro Int'l Ltd. v. Monolithic Power Sys., Inc.*, 399 F. Supp. 2d 1064 (N.D. Cal. 2005). Like Mr. Tregillis, the plaintiff's expert chose to improperly bundle all the plaintiff's alleged trade secrets to calculate a sum supposedly representing unjust enrichment. Instead, each trade secret should have been individually defined before being presented to the jury for consideration. Monster refused to provide the jury with instructions specifically identifying each purported individual trade secret. (Ex. 1 at 27–35). As such, it is impossible to know whether the jury found that Vital misappropriated all of the claimed hundreds of trade secrets or even more than one. Just like in *O2*, the jury was forced to guess about the correct amount to award for unjust enrichment. 399 F. Supp. 2d at 1077. The court refused to uphold the jury's verdict, as the Court should here. *Id.*

federal law, a complainant may recover damages for (a) actual loss and (b) unjust enrichment caused by misappropriation") (emphasis in original); and *Brocade Commc'ns Sys., Inc. v. A10 Networks, Inc.*, 2013 WL 831528, at *2 (N.D. Cal. 2013).

Vital tried to avoid the error that tainted this trial, moving the Court to require Monster to list each specific trade secret it claimed was misappropriated in the jury's instructions. (Ex. 1 at 27–35). Monster objected, claiming there were simply too many to list on the verdict form. (Id.). But the reality is Monster knew there weren't too many; there were none. Monster presented no evidence for even one trade secret meeting all the elements of liability and damages. Monster's reference to Vital's sales in Georgia in no way relieves it from proving it had been damaged (or, indeed, proving what specific trade secret had been misappropriated). As O2 holds, that is not the law.

At best, Monster is entitled to one dollar of nominal damages for its trade secret claim. It certainly did not present actual evidence in the record to support an award of \$3 million. Accordingly, remittitur is appropriate.

III. The Court should grant JNOV because Monster failed to meet its burden.

A. Monster should have been limited to evidence of the commercial advertisements on the Bang Energy can because the can was the only proffered evidence of confusion.

Recognizing it has a clear evidentiary problem, Monster now seeks to excuse the failure to provide evidence of materiality as to any “commercial advertisement” other than the Bang Energy can itself. Monster hopes the Court will excuse this fatal

shortcoming and hold that, somehow, the Court should hold post-trial that other commercial advertisements constituted literal falsehoods such that materiality may be presumed. Of course, a review of the summary judgment rulings shows no such finding. Nor does the jury's verdict support any such conclusion. The very fact that Monster seeks such a finding after the jury verdict was rendered shows exactly why JNOV is appropriate here.

1. Monster's evidence of commercial advertising in Dr. Cowan's survey was limited to the can.

Monster puts the cart before the horse, claiming it did not need to prove materiality. There has been no finding of literal falsehood by the Court or jury in this case. Nor could there be given the limitations of Monster's survey evidence presented through Dr. Cowan.

Try as it might, Monster cannot show Dr. Cowan asked a single survey participant any questions involving any alleged false advertising by Vital other than the Bang Energy can. (Dkt. 923-11 at 12). Nor did Dr. Cowan ask a single survey participant about any other alleged false advertisements, such as whether they believed "Super Creatine has been proven to have several cognitive benefits" (TX-1896-A; Dkt. 923-11 at 13–14); or, incredibly, even whether any survey participant believed that Vital had represented that drinking a can of Bang Energy would, for example, increase lean muscle mass, or heal burn injuries. Monster's reliance on *Wing Enters., Inc. v. Tricam Indus., Inc.*, 829 Fed. App'x 508 (Fed. Cir. 2020) does

not excuse Dr. Cowan's failure to present survey participants with other allegedly false advertisements. The court did not hold that different instances of allegedly false advertising could be bundled together; and that, collectively, this hypothetical bundle might satisfy each element of a Lanham Act claim.

Monster's presentation of *Kraft, Inc. v. F.T.C.*, 970 F.2d 311 (7th Cir. 1992) is even more misleading. The Federal Trade Commission ("FTC") asserted that Kraft misrepresented the amount of calcium contained in its cheese slices. The court held the FTC (unlike Monster in the present case) was entitled to apply a presumption of materiality for specific types of claims, such as those that significantly involve health, safety or other areas with which reasonable consumers would be concerned. *Id.* at 322. The court rejected Kraft's argument that the milk content, as opposed to the calcium content, was the critical focus for Kraft's increased sales. *Id.* at 324.

Monster tries, without success, to list six other categories of evidence of materiality that it claims were presented to the jury in addition to Dr. Cowan's limited, flawed, million-dollar survey contradicting InfoScout. (Dkt. 950 at 39–41). Each argument fails, leaving Monster with no proof beyond Dr. Cowan.

(1) Inherent Characteristics. Monster would like the Court to start with the false presumption that the can communicates Super Creatine provides the same benefits as creatine monohydrate. But the can makes no such representations about creatine monohydrate or the efficacy of the Super Creatine

ingredient. As trial testimony demonstrated, Super Creatine is “super” simply because it is the only derivative form of creatine that is shelf stable. (Ex. 4 (9/1 Trial Tr. (J. Owoc)) at 178:3–22). There is no advertising about the inherent characteristic of Super Creatine anywhere on the Bang Energy can. (Id. at 220:17–25).

(2) Intent to deceive. Monster presented no evidence of any intent to deceive. Vital’s advertisements made absolutely clear that Super Creatine was not creatine monohydrate. (Dkt. 923-47). Monster cites *Broadcom Corp. v. SiRF Tech., Inc.*, 2009 WL 10672287 (C.D. Cal. 2009), where the district court addressed Lanham Act amendments to a complaint; an issue irrelevant to Monster’s request that the Court ignore the materiality element Monster was obligated to prove at trial—months after the trial is finished.

(3) and (4) Marketing testimony and consumer comments. For the reasons described above, Dr. Carpenter’s attempts to back-door hearsay comments from unknown persons (or bots) he found on the internet cannot be an admissible basis for any finding of materiality. Even Monster concedes in its opposition brief that “courts must police evidence proffered on direct examination under Rule 703 because an expert cannot be a ‘mouthpiece’ for inadmissible evidence.” (Dkt. 950 at 17).

(5) Vital’s “admissions” and documents. Monster next claims that Vital’s documents and testimony prove materiality, wrongly relying upon *Testone v. Barlean’s Organic Oils, LLC*, 2021 WL

4438391 (S.D. Cal. 2021). The court in Testone was called upon to determine the degree of evidence of materiality sufficient for class certification. The court held proof of merely a common question of materiality and reliance was needed. *Id.* at *14. Finding sufficient evidence, the court also relied upon expert testimony, the defendant's unspecified admissions, and documents showing intent to deceive. *Id.* Here, Monster presented no evidence of materiality, on the basis of Vital's intent to deceive the public with any commercial advertisement.

(6) Increased sales. Monster defaults again to Kraft, mistakenly claiming that increased sales are a substitute basis to find materiality. (Dkt. 950 at 41). However, Kraft involved an FTC action where the rules for determining materiality are different than the Lanham Act. Further, Kraft admitted the specific advertisement at issue caused its sales to increase. Kraft, 970 F.2d at 324. During her testimony, Meg Owoc testified that Super Creatine had not been a material point of Vital's marketing campaigns since 2017. (Muth Decl. ¶¶ 8–9, Exs. 6–7). Additionally, Gene Bukovi explained that Vital's performance improved because of its transition to a national distribution network—not Super Creatine. (Ex. 2 (8/30 Trial Tr. (Bukovi)) at 75:1–20).

2. Dr. Cowan's survey necessarily must limit any damages incurred by Monster solely to the Bang Energy can.

Mr. Tregillis specifically testified it was only appropriate for the jury to award damages for Vital's allegedly false advertisements "if" consumers

received information of Vital's social media commercial advertisements. (Ex. 10 (9/15 Trial Tr. (Tregillis)) at 279:8–280:2). That is literally all Monster offers this Court to support its alleged damages for non-label advertisements.

Mr. Tregillis provided no testimony that any consumer actually saw any of Vital's advertisements, believed them, and made purchasing decisions because of them. And he obviously had no foundation to provide such testimony. He relied solely on the survey evidence prepared by Dr. Cowan when testifying about his opinions on damages. (Dkt. 923-13 at 195:15–25, 210:16–23, 236:12–25). Because Dr. Cowan did not establish any of the Lanham Act elements as to any advertisement, other than the Bang Energy can (the survey's lone stimulus), Mr. Tregillis' opinions are speculation and provide no basis to support the jury's award.

Monster erroneously claims it did not need to prove actual damages to prevail under its Lanham Act claim. (Dkt. 950 at 42). Monster completely misses the simple, anything but sublime, point that "lost profits" means profits that are proven to have been lost. In order to recover almost \$272 million in lost profits, Monster was actually obligated to prove it in fact lost \$272 million as a direct and proximate result of Vital's alleged false advertisement. *Kurin, Inc. v. Magnolia Med. Techs., Inc.*, 473 F. Supp. 3d 1117, 1144 (S.D. Cal. 2020), *aff'd in part*, appeal dismissed in part, 2021 WL 5823707 (9th Cir. 2021). While Monster may ask for other relief (such as injunctive relief), it cites no authority for the remarkable proposition that it may recover such a

windfall without actually tying its purported lost profits to a specific false advertisement that meets all of the required elements of the Lanham Act.

3. Monster did not prove the falsity of any advertisement.

Curiously, Monster argues Vital did not move for a directed verdict during trial. Vital absolutely did so. (Dkt. 923-18 at 107:6–11, 110:12–19, 117:4–118:10). It was unnecessary for Vital’s oral motion to be further duplicated with a written filing. See, e.g., *Cortex v. Life Ins. Co. of N. Am.*, 408 F.2d 500, 503 (8th Cir. 1969).

At the risk of repetition, an extremely basic proposition deserves to be emphasized once again. That is, Monster cannot prove a Lanham Act claim by satisfying one element of the claim from one alleged false commercial advertisement, while satisfying a different element with a wholly distinct advertisement. *Verisign, Inc. v. XYZ.COM LLC*, 848 F.3d 292, 299 (4th Cir. 2017) (“[A] Lanham Act claimant may not mix and match statements, with some satisfying one Lanham Act element and some satisfying others.”).

Using Monster’s example, even if Trial Exhibit 1896-A was wrongly assumed to be literally false, such that materiality was presumed, the presumption would stop with that specific document. Materiality would not be presumed to spread across all of Vital’s other advertisements. And this was one of this trial’s fatal flaws: Monster was permitted to tell the jury it could lump together every Vital advertisement and find in its favor. Monster never

actually proved to the jury that even one discrete advertisement met each element of Lanham Act liability, causation and damages.

In short, Monster had to prove to the jury how each of Vital's specific commercial advertisements were false; why each commercial advertisement was material to the customer's purchasing decision; and why Monster was injured by each and every one of those commercial advertisements. Instead, Monster tried to take the easy way out, spending hours showing the jury hundreds of advertisements without proving the individual elements of its claim as to even one.

Monster brought this reversible error upon itself, insisting to the Court, over Vital's objections, that the jury could consider every advertisement admitted into evidence during trial, most all of which were presented to the witnesses, and necessarily the jury, literally for mere seconds. (Dkt. 923-18 at 116:12–117:2).

The law is absolutely clear: Monster absolutely had to present proof of every Lanham Act element for each and every advertisement. See *Verisign*, 848 F.3d at 299. See also, *Johnson & Johnson Vision Care, Inc. v. 1-800 Contacts, Inc.*, 299 F.3d 1242, 1248 (11th Cir. 2002). But Dr. Cowan never surveyed a single person on any commercial advertisement except the Bang Energy can itself. Because there was no other evidence of any specific commercial advertisement other than the can, Monster's false advertising claims should have been limited to the can.

Monster mistakenly claims Vital intentionally deceived consumers, so materiality can be presumed. Which commercial advertisement is it relying upon? Which commercial advertisement did Vital use to intentionally deceive consumers? All of them? Some of them? Which one? No one knows, as Monster never bothered to say. The jury made no finding that even one specific commercial advertisement was intended by Vital to deceive consumers.

Just because Monster claims Vital's can advertises Bang Energy provides the benefits of creatine does not make it so. It lists Super Creatine as an ingredient. That's it. This case is different than In-N-Out Burgers vs. Smashburger IP Holder LLC, 2019 WL 1431904 (C.D. Cal. 2019), where the court held that defendant's use of the phrase "double the beef" for is triple double burger, when made with the same amount of beef (but in two patties, as opposed to one patty) in its classic burger, was literally false. Id. at *5. The court cautioned that only an unambiguous message may be found to be literally false. Id. at *4.

The Bang Energy can's reference to the Super Creatine ingredient does not trigger the presumption of materiality Monster desperately desires that the Court accept as true. The evidence proved only that can contains a derivative form of creatine, "super" because it is the only shelf stable form of creatine in the marketplace. (Ex. 4 (9/1 Trial Tr. (J. Owoc)) at 178:3–22). This is at most an ambiguous claim, and one not found anywhere on the can. Vital makes no comparative claims like the defendant in In-N-Out Burger. It makes no efficacy claims on the Bang

Energy can. There is no connection between the decision's holding and the trial record before this Court.

The district court's decision in *K&N Eng'g, Inc. v. Spectre Performance*, 2012 WL 12893797 (C.D. Cal. 2012) does not excuse Monster from satisfying every element for at least one specific commercial advertisement. (Dkt 950 at 43). In that case, the court found the plaintiff had actually done what Monster could not—satisfy each element as to multiple, separate claims of false advertising to support the jury's award. *Id.* at *1.

With respect to Mr. Owoc, Monster presented no evidence that he authorized or directed any specific “commercial advertisement” in a manner that would give rise to personal liability. Mr. Owoc's comments about a future creatine derivative, that could assist with mental decline (Dkt. 923-55), were introduced for only one reason: to improperly influence juror passion and prejudice. This approach was especially tailored by Monster for juror number four, who indicated a loved one with developmental disabilities. (Dkt. 923-1 at 128:12–14). Such actions were more than adequate for this Court to declare a mistrial.

B. There is no basis to support liability or damages under Monster's shelf space claim.

Monster's evidence of tortious interference was limited to Walmart, Circle K, and AMPM. Three Monster employees testified that, on days they could not remember, they entered stores they could not specifically identify, and saw Monster cans on shelves they believed were misplaced. (Ex. 10 (9/15

Trial Tr. (Weaver) at 94:15–19; Dkt. 923-13 at 158:20–159:9, 160:25–161:3, 161:18–24; Dkt. 946-14 at 161:25–162:4, 162:10–17; Dkt. 946-15 at 40:15–17).

That's it. That is the entire record responsible for Monster receiving an \$18 million award under a theory that Vital's interference was nationwide, and a multiplier should be used for Monster's total damages. The result would border on comical, had the ramifications of this runaway jury verdict not been so crippling to Vital. It is absolutely essential the Court correct this miscarriage of justice.

No witness testified, or could have testified, that Monster suffered shelf space interference throughout the entire country; such evidence is a critical condition for the jury to even consider using the multiplier concocted during Monster's closing argument. This is not a case where the Court denied summary judgment relying on direct and circumstantial evidence. See, e.g., *Sebastion Int'l, Inc. v. Russolillo*, 162 F. Supp. 2d 1198 (C.D. Cal. 2001). This is a straightforward question of whether Monster met its burden of proof to support the jury verdict. It clearly did not.

Because Monster provided no credible basis for any award of damages, Vital renews its motion and JNOV on this claim is appropriate.

CONCLUSION

For all of the reasons explained above, Vital requests that the Court grant JNOV, remittitur or,

alternatively, a new trial to correct this miscarriage of justice.

Dated: April 10, 2023

QUARLES & BRADY LLP

By: /s/ David P. Muth

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SPORTS

L.R. 11-6.2 CERTIFICATE OF COMPLIANCE

The undersigned, counsel of record for Defendant, certifies that pursuant to the Court's order entered on January 4, 2023, this brief is exempt from the word limits contained in L.R. 11-6.1 and instead complies with the Court's order that the brief shall not exceed twenty-five (25) pages in length.

Dated: April 10, 2023

QUARLES & BRADY LLP

By: /s/ David P. Muth

David P. Muth

Attorneys for Defendant

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SPORTS

APPENDIX E

**APPENDIX E — DEFENDANT VITAL
PHARMACEUTICALS, INC.’S MEMORANDUM
OF POINTS AND AUTHORITIES IN SUPPORT
OF MOTION FOR JNOV, NEW TRIAL AND
REMITTITUR (DE 921-1), FILED FEBRUARY
23, 2023**

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MONSTER ENERGY COMPANY, a
Delaware Corporation,
Plaintiff,

vs.

VITAL PHARMACEUTICALS, INC.,
d/b/a VPX Sports, a Florida corporation; and
JOHN H. OWOC a.k.a. JACK OWOC, an individual,
Defendants.

Case No. 5:18-cv-01882-JGB-SHK

**DEFENDANT VITAL PHARMACEUTICALS,
INC.’S MEMORANDUM
OF POINTS AND AUTHORITIES IN SUPPORT
OF MOTION
FOR JNOV, NEW TRIAL AND REMITTITUR**

Judge: Hon. Jesus G. Bernal

Place: Courtroom 1
Trial: August 9, 2022
Verdict: September 29, 2022

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I. INTRODUCTION

Due to prejudicial errors committed by the Court during trial, the runaway jury awarded a historically perverted verdict in favor of Monster Energy Company (“Monster”) on its false advertising and other claims against Vital Pharmaceuticals, Inc. (“Vital”) and John H. Owoc (“Owoc”). More specifically, against the great weight of evidence and due to the Court’s prejudicial exclusion of critical evidence, the jury awarded a grossly excessive and nonsensical verdict for Monster on its false advertising, tortious interference and trade secrets claims.¹ Notable not only for its errors but also its size, the award has been reported as one of the largest Lanham Act awards in the history of the United States—a fact that, by itself, warrants the Court’s closer examination of the evidence in relation to the verdict. As a result of the errors repeated over the course of this six-week trial, the verdict played a material role in forcing the bankruptcy filing of Vital, a company founded by Owoc decades earlier and employing thousands. The jurors’ verdict in this case is a textbook example why the Federal Rules Civil Procedure provide several mechanisms for this Court to correct this verdict.

This Court should exercise its discretion to remedy this injustice. As to its false advertising claims, Monster failed to tie even a single specific “commercial advertisement” for Bang Energy drinks to a single lost sale of Monster’s beverages. Not one

¹The jury found no liability as to Owoc on the tortious interference claims and, at trial, the trade secret claims were limited to Vital.

distributor, retailer, or customer was presented to the jury to testify that any advertisement disseminated by Vital resulted in deception or confusion. The complete dearth of such witness testimony is easily explained: Vital's use of its trademark "Super Creatine" on the Bang Energy can was accurate. That is, Super Creatine—or creatyl-L-leucine ("CLL")—is a derivative form of creatine that is water-stable, allowing the ingredient to survive months in the supply chain before the consumers' purchase and consumption.

The Bang Energy can itself makes no claims with respect to Super Creatine, beyond truthfully being listed as an ingredient. The Bang Energy can neither states nor implies that drinking Bang Energy will have any effect on mental or physical acuity. Vital makes no claim on the can, for example, that consuming Bang Energy will increase muscle mass, improve one's bench press in the gym, or heighten mental concentration and focus. The Bang Energy can simply identifies Super Creatine along with the many other healthy ingredients that make it an attractive option for health-conscious buyers. Such ingredients and attributes include zero calories, zero sugar, zero carbohydrates, as well as 300 milligrams of caffeine, CoQ10, and amino acids. Monster's trove of internal documents—which the Court mistakenly wouldn't permit the jury to see—confirm that Super Creatine was never a material ingredient to anyone purchasing a Bang Energy drink. The jury should have been allowed to consider such critical evidence, and its exclusion can only be remedied with a new trial.

Errors were also committed by the Court with respect to Monster's tortious interference claims, weakly based upon the theory that Vital employees theoretically moved Monster's cans to different shelves in three retail chain stores. The claim was so thin that Monster provided no "evidence" of the purported amount of its damages until its lawyer literally created a number during his closing argument. The lawyer's *ipse dixit* was contrary to Monster's paid expert—from whom Monster elicited no testimony with respect to damages (even though his written report suggested possibly nominal losses). Under these circumstances, the jury's \$18 million award is irrational and excessive. Remittitur is appropriate where, as here, the jury was so confused that an outrageous sum was awarded against the clear weight of evidence.

Finally, Monster failed to present evidence for each of the necessary elements of its trade secret claim, and instead offered the jury a confusing mishmash of computer file titles all claimed to be confidential. Monster was allowed by the Court to argue Vital was the recipient of purportedly hundreds of so-called "trade secrets," but never presented evidence proving, among other elements, how the "trade secrets" were used by Vital or how Monster was damaged.

For all of these reasons, and as explained below, Vital respectfully moves the Court as follows:

1. For a new trial on all claims to avoid a miscarriage of justice;

2. Alternatively, as to the false advertising claims, for remittitur in the amount of \$828,530 or a new trial pursuant to Fed. R. Civ. P. 59;
3. Alternatively, as to the tortious interference claims, for remittitur of nominal damages in the amount of \$1 or a new trial pursuant to Fed. R. Civ. P. 59;
4. As to the trade secret claims, for remittitur of nominal damages in the amount of \$1 or a new trial pursuant to Fed. R. Civ. P. 59; or
5. For a judgement notwithstanding the verdict (“JNOV”) as to Monster’s false advertising and tortious interference claims pursuant to Fed. R. Civ. P. 50.

II. STATEMENT OF FACTS

A. Monster’s false advertising claims.

Vital sells a number of “better-for-you” products, including supplements, energy drinks, and hardcore pre-work-out products. (Ex. 3 ²(8/30 Trial Tr. (Bukovi)) at 76:21–77:5, 105:24–107:2; Ex. 5 (9/1 Trial Tr. (J. Owoc)) at 26:4–12.)³ Monster alleges that Vital and Owoc falsely represented that Vital’s Bang Energy drink, on its label and through various other social media posts, would increase one’s muscle mass, increase strength, and have other

² “Ex.” refers to exhibits attached to the Declaration of David Muth in Support of Vital’s Motion for JNOV, New Trial, and Remittitur, filed herewith.

³ “Trial Tr.” refers to the transcript of the trial in this case, the cited excerpts of which are attached to the Muth Declaration

physical/mental benefits associated with the novel ingredient found in Bang Energy referred to as CLL/Super Creatine. (Dkt. 61, ¶¶ 2, 43, 46–47.)

One of the many critical flaws in Monster’s case was its inability to introduce evidence to the jury proving that any of Vital’s advertising was widely disseminated. Specifically, Monster did not provide any evidence that a consumer who purchased a can of Bang Energy was motivated, in some material way, by the statements Vital had made about Super Creatine. Nor did Monster prove, or even attempt to prove, that even one consumer would have purchased Monster’s soda-like products, loaded with sugar, but for reading or watching a single Bang Energy advertisement. Monster’s proof, such as it was, was instead limited solely and entirely to the testimony of Dr. Cowan, its hired expert witness. Dr. Cowan attempted to backfill the consumer testimony that Monster should have provided to the jury with a survey he conducted with nothing other than photos of the Bang Energy can for Vital’s alleged advertising. (Ex. 11 (9/13 Trial Tr. (Cowan)) at 184:23–25; TX-6097-A.)⁴The survey respondents, for reasons never rationally explained, were not shown even one of the purportedly hundreds of deceptive advertisements that Vital was said to have published that were alleged to be false. (Ex. 11 (9/13 Trial Tr. (Cowan)) at 184:7–22 and 235:9–236:4.) Thus, the only evidence to support Monster’s false advertising claims was Dr. Cowan’s survey evidence, which was limited solely to the Bang Energy can. (Id. at 184:23–25.) And if the can itself does not falsely make any

⁴“TX” refers to exhibits admitted into evidence during trial in this case and are attached to the Muth Declaration.

efficacy claims—which it is undisputed it does not—then Monster failed to meet its burden at trial.

Monster’s damages expert, Mr. Tregillis, admitted his damage model rested solely on the results of Dr. Cowan’s survey to determine the percentage of Bang Energy sales that would have otherwise been consummated by Monster but for the alleged false representations. (Ex. 13 (9/15 Trial Tr. (Tregillis)) at 195:15–25, 210:16–23, and 236:12–25; see also Ex. 18 (9/23 Trial Tr. (Voth)) at 57:21–58:13 (confirming the only basis for apportionment of damages is Dr. Cowan’s survey).) No other witness provided the jury with any foundation for the losses claimed by Monster at trial. Thus, the universe of Monster’s evidence for its damage model is limited to the Bang Energy can.

Because Monster’s false advertising damages evidence at trial was limited to the Bang Energy can, and because there is nothing literally false on the Bang Energy can, Monster failed to prove all the elements necessary to support a Lanham Act violation. Defendants thus moved for a directed verdict on the false advertising claims. (Ex. 18 (9/23 Trial Tr.) at 110:11–19, 117:4–118:10.) As explained in greater detail below, Monster never tied all of the elements necessary to establish a Lanham Act claim to a single commercial advertisement. Because no single advertisement can satisfy all required elements, Vital’s motion for JNOV as to the false advertising claims should be granted.

**B. Monster’s tortious interference claims
based on shelf space**

Monster's tortious interference claims at trial were limited to allegations that Vital interfered with Monster's contractually purchased shelf space at three stores: Walmart, AMPM, and Circle K. (Dkt. No. 889, Jury Instruction No. 40.)

Monster's tortious interference claims should be dismissed. No witness—including Monster's damages expert Mr. Tregillis—provided any evidentiary basis for a damages model apart from an inference—arguably—of nominal damages. Vital moved for directed verdict as to the tortious interference claims. (Ex. 18 (9/23 Trial Tr.) at 107:6–108:5.) Specifically, Vital argued there was nothing in the record to show any evidence that would allow the jury to make any reasonable approximation of Monster's damages. (Id. at 107:22–108:5.)

Instead, Monster witnesses testified only as to alleged instances of product interference at each of the three chain stores on a periodic basis. (Ex. 18 (9/23 Trial Tr.) at 108:8–14.) Specifically, Mr. Weaver testified as to Walmart, Mr. Suarez as to Circle K, and Mr. Salerno as to AMPM. (Id.) However, none of these witnesses ever testified that they saw anyone, from Vital or otherwise, moving Monster's drinks from shelves. Monster also argued during the directed verdict motion that it didn't have to prove any damages other than nominal harm to survive the motion. (Id. at 109:4–12.)

This Court ruled that Monster's evidence was "barely" enough to survive the directed verdict motion. (Id. at 110:2–3.) Additionally, the Court found that there was "thin circumstantial evidence" that certain shelf space may or may not have been

interfered with “at a rate really unknown for a period of time relatively unknown.” (Id. at 110:5–8.) Ultimately, the Court allowed the claim to go to the jury but noted that as to damages the jury “could award [Monster] \$1 or \$2.19, the value of a Monster can” (Id. at 110:8–9.)

But that is not what the jury did. At closing, Monster’s counsel argued that Mr. Weaver’s testimony as to Walmart was that “at least once a month in every 50 stores he visited, he would see Bang Energy taking Monster’s contracted for space.” (Ex. 19 (9/27 Trial Tr.) at 98:8–10.) Never mind there was no evidence of which stores, what dates the alleged shelf space interference occurred, or even who actually moved the alleged Monster product off the shelves. Then, Monster’s counsel—as if testifying during closing argument—declared that one could extrapolate that completely speculative and unsupported testimony of Mr. Weaver to support an award by using a multiplier against Vital for \$660,000 as to Monster’s shelf space contract with Walmart. (Id., at 98:10–13.)⁵

Additionally, as to Circle K, Mr. Suarez testified generally he had observed Bang Energy product in Monster’s shelf space at certain Circle K locations “8 to 10 times a week.” (Ex. 13 (9/15 Trial Tr. (Suarez)) at 152:24–153:3.) Again, there is no evidence from Mr. Suarez specifically as to who removed the product, where the stores were all located when this

⁵ Monster included a demonstrative of this calculation in its closing deck. Because closing decks were not exchanged between the parties, Vital is unable to provide the Court with this slide.

had purportedly occurred, or even why it had been removed—Mr. Suarez never saw any product actually being removed. (Id. at 158:20– 159:9 and 160:25–161:3.) Nonetheless, Monster’s counsel improperly argued that based exclusively on Mr. Suarez’s testimony, it was reasonable for the jury to use a multiplier and find that Monster lost profits of \$19 million at Circle K. (Ex. 19 (9/27 Trial Tr.) at 98:22–99:3.)

Finally, for AMPM, Monster’s counsel at closing argued that Mr. Salerno’s testimony was that he believed Monster products were moved approximately 5 to 10 times per month. (Id. at 99:13–18.) Based solely on Mr. Salerno’s completely speculative testimony, Monster asked the jury to award it \$1.375 million in lost profits, again using a multiplier. (Id.)

Inexplicably, the jury awarded Monster \$18 million in lost profits on

Monster’s shelf space claims. (Dkt. 890 at 4.) There is simply no possible basis— none—to justify such an award, except juror confusion.

C. Monster’s trade secret claims.

Despite the Court providing Monster with weeks of trial time to provide its prima facie case to the jury, Monster failed to identify a single specific trade secret with reasonable particularity to link all of the elements necessary to support a finding of liability as to its trade secret claims.

Instead, Monster clumsily presented a flurry of electronic file names—not even the files themselves—contained on thumb drives Mr. Stephen Cohen had in his possession when he left Monster to work at Vital. (Ex. 13 (9/15 Trial Tr. (Cohen)) at 68:9–24.) There is no evidence that Mr. Cohen, or anyone at Vital, ever used any Monster information on those thumb drives, in any capacity, to damage Monster or unjustly enrich Vital. In short, Monster failed to prove that all of the required elements to establish a trade secret claim were met as to any specific trade secret.

Mr. Cohen's testimony was clear: to the extent he maintained any information in his possession from Monster post-termination, he never used any such information once employed with Vital. (Id. at 54:17–19.) The thumb drives were Monster's key evidence for its trade secrets claims. Yet Monster never provided any evidence as to a specific Monster trade secret that it claimed Vital used or how Vital harmed Monster in any capacity whatsoever. The trial is over, and Vital still has no idea what trade secret Monster claims Vital misappropriated. Further, as one example, if Vital did possess Monster's confidential pricing information, how did Vital in fact use that information to harm Monster or to unjustly enrich Vital? Monster also failed to answer that fundamental question. Nor did Monster even bother to explain how a competitor could use any of its alleged trade secret information to harm Monster—instead, Monster simply pointed to a screen showing a flurry of files on the thumb drives, without identifying the actual trade secret(s) at issue. Taking the pricing information as an example, Monster

never provided evidence as to exactly how Vital or any competitor could use that information to harm Monster, only that it claimed it was “possible.” (Ex. 14 (9/16 Trial Tr. (Swift) at 94:14–23.)

Accordingly, Monster failed to prove the causation and other elements required to support a trade secret claim. There was no specific trade secret used that was a substantial factor in causing Monster to be harmed or permitting Vital to be unjustly enriched. As to damages, Monster’s only evidence was Mr. Tregillis’ opinion that sales in Georgia increased over a specific period of time. (Ex. 13 (9/15 Trial Tr. (Tregillis)) at 221:20–222:15 and 223:3–6.) Mr. Tregillis testified that, if those increased sales had been the result of the improper use of trade secrets, then the jury could award those increased sales as damages. (Id. at 266:21–267:4.) But guesswork and speculation are not evidence, and wholly insufficient for Monster to prove its damages. Monster never met its burden.

III. PROCEDURAL HISTORY

On September 4, 2018, Monster filed a complaint against Vital and Owoc asserting four causes of action. (Dkt. 1.) Monster amended its complaint on April 3, 2019, to include twelve claims. (Dkt. 61.) By trial, Monster’s claims were reduced to seven against Vital (Lanham Act, shelf space interference, trade secret, and CFAA) and four as against Owoc (Lanham Act and shelf space interference).

Following a 20-day trial, the jury reached a verdict in favor of Monster awarding the following damages:

A. False Advertising – Lanham Act \$271,924,174
(Vital & Owoc)

B. Intentional Interference with Contracts \$
18,000,000 (Vital only)

C. Trade Secret Misappropriation \$ 3,000,000 (Vital
only)

D. CFAA⁶ \$ 15,587 (Vital only)

(Dkt. 890.)

The jury found that Vital and Owoc had acted willfully and deliberately as to the Lanham Act claims. (Id.) The jury also found that Vital (and only Vital, not Owoc) had acted either maliciously, oppressively, fraudulently, or in reckless disregard as to the tortious interference claim. (Id.) Finally, the jury found that Vital acted maliciously or willfully as to the trade secret claim. (Id.)

IV. ARGUMENT

The Federal Rules of Civil Procedure provide several mechanisms for this Court to address a jury verdict that is completely irrational or unjust in relation to the evidence presented by Monster. For the below stated reasons, Vital respectfully moves

⁶ Except as to its motion for new trial on all claims, *infra*, Vital is not filing postverdict relief as to Monster's Computer Fraud and Abuse Act Claim.

the Court to order a new trial on all claims because the jury's verdict is completely irrational, grossly excessive, and would create a miscarriage of justice if allowed to stand. Alternatively, the Court should reduce the jury award to \$828,530 for the false advertising claims and \$1 in nominal damages for the tortious interference and trade secret claims. If Monster declines to accept the remittitur on those claims, then the Court should order a new trial on those claims. Finally, in lieu of a new trial or remittitur, this Court should exercise its discretion to avoid a gross miscarriage of justice, and grant Vital's Motion for JNOV as to the false advertising and intentional interference with contract claims.

A. The Court should grant a new trial because the clear weight of the evidence does not support causation/liability and, based on the excessive awards, it would be a gross miscarriage of justice to allow this verdict to stand in any capacity due to the improperly excluded evidence the jury did not consider.

1. Standard of review.

Fed. R. Civ. P. 59 provides that the Court may grant a new trial to Vital, but does not expressly provide the standard for doing so. Instead, Rule 59 provides a new trial may be provided "for any reason for which a new trial has heretofore been granted in an action at law in federal courts." This provision has been interpreted to provide this Court with broad discretion when deciding whether to grant a new trial. *Murphy v. City of Long Beach*, 914 F.2d 183, 186 (9th Cir. 1990) (quoting *Allied Chem. Corp. v.*

Daiflon, Inc., 449 U.S. 33, 36 (1980)). In exercising this discretion, this Court is entitled to reweigh the evidence independently of the jury's verdict and may grant a new trial based solely on the Court's own assessment. See *Sagicor Life Ins. Co. v. Jang*, No. EDCV192028JGBKKX, 2022 WL 17328237, at *3 (C.D. Cal. Oct. 27, 2022) (J. Bernal).

This Court's discretion to grant a new trial includes overturning the verdict for excessiveness and ordering a new trial without qualification, or, as discussed further in Section B *infra*, conditioned on Monster's refusal to agree to a reduction (*remittitur*). *Gasperini v. Ctr. for Humans, Inc.*, 518 U.S. 415, 433 (1996); *Molski v. M.J. Cable, Inc.*, 481 F.3d 724, 728 (9th Cir. 2007) (grounds for new trial include verdict against weight of evidence, excessive damages,⁷ or “for other reasons, the trial was not fair to the party moving.”) (citation omitted).

A new trial may also be granted to prevent, in the sound discretion of this Court, a miscarriage of justice. *Silver Sage Partners, Ltd. v. City of Desert Hot Springs*, 251 F.3d 814, 819 (9th Cir. 2001). Further, when an excessive award is so large that it can no longer be considered merely excessive and is so exaggerated as to indicate bias, passion, prejudice, corruption, or improper motive, then *remittitur* is inappropriate and the only proper remedy is a new trial. *Wells v. Dallas Indep. Sch. Dist.*, 793 F.2d 679,

⁷ While deference is given to a jury's damages findings, awards that are “grossly excessive or monstrous, clearly not supported by the evidence, or only based on speculation or guesswork” should not be upheld. See *L.A. Mem'l Coliseum Comm'n v. Nt'l Football League*, 791 F.2d 1356, 1360 (9th Cir. 1986) (citation and internal quotation marks omitted).

683–84 (5th Cir. 1986); *Dossett v. First State Bank*, 399 F.3d 940, 947 (8th Cir. 2005) (“[I]f passion or prejudice influenced the jury’s damages decision, then that same passion or prejudice may well have affected its decision on the issue of liability as well,” making a new trial the proper remedy). The grossly excessive jury verdict in this case is just such an award, and requires, in the interests of justice, a new trial on all counts.

A new trial is also appropriate if the improper admission or exclusion of evidence prejudiced Vital and Owoc. *Transbay Auto Serv., Inc. v. Chevron USA Inc.*, 807 F.3d 1113, 1122 (9th Cir. 2015) (prejudicial “evidentiary error merits a new trial.”); *Dorn v. Burlington N. Santa Fe R.R. Co.*, 397 F.3d 1183, 1189 (9th Cir. 2005) (“A district court abuses its discretion in denying a motion for a new trial when its erroneous inclusion or exclusion of evidence in the underlying proceeding prejudices a party’s right to a fair trial.”); *Dabney v. Montgomery Ward & Co., Inc.*, 692 F.2d 49, 51–53 (8th Cir. 1982) (District court abused its discretion in denying a new trial in light of its erroneous exclusion of evidence). As explained in greater detail below, the Court prevented Vital from introducing a number of critical exhibits and testimony. Thus, the jury never understood the totality of the facts, defenses, and limitations on Monster’s purported damages during their deliberations. As a result of the exclusion of this highly crucial information, a new trial is warranted.

Indeed, a refusal to grant a new trial based on these errors, ones that unfairly shaped the evidentiary landscape of the case, would be

inconsistent with substantial justice. Fed. R. Civ. P. 61; *Gordon Mailloux Enters., Inc. v. Firemen's Ins. Co. of Newark, N.J.*, 366 F.2d 740, 742 (9th Cir. 1966) (ordering new trial, holding “although the errors requiring reversal, if considered separately, were perhaps harmless, their cumulative effect was prejudicial.”).

Vital was precluded from giving a complete, accurate, and relevant chronology of the key facts and defenses to Monster’s claims such that the jury was left confused as to critical portions of the testimony and was either forced to speculate and reject those critical, key missing facts/exhibits or conclude no such evidence existed. Based on this alone, this Court should grant a new trial on all claims. *Transbay Auto Serv.*, 807 F.3d at 1113 (holding prejudicial admission or exclusion of evidence warrants a new trial).

In particular, the following evidentiary errors prejudiced Vital in this case that the only possible just remedy is a new trial on all claims.

2. The Court precluded Vital from presenting the InfoScout surveys to the jury even though it found them admissible in its earlier ruling.

Monster’s liability claims hinged on proving that Super Creatine was material to the general public’s purchasing decision in buying Bang Energy. Monster’s pre-litigation survey by InfoScout showed only three percent of the public surveyed said Super Creatine was material to their purchasing decisions. (Ex. 23 at 7.) In other words, before filing a lawsuit

claiming that Super Creatine was material to the purchasing public, Monster’s own study proved the exact opposite.

The Ninth Circuit has held that a defendant, like Vital, has a right to introduce evidence to negate an essential element of the plaintiff’s case. *Geurin v. Winston Indus., Inc.*, 316 F. 3d 879, 885 (9th Cir. 2002); see also *DeMartini v. DeMartini*, 833 Fed. App’x 128, 132 (9th Cir. 2020). In advertising disputes as here, pre-litigation surveys—like InfoScout—are generally treated with more weight than surveys performed after litigation has ensued.⁸

a. The Court ignored its earlier ruling when it refused to permit Vital’s expert to testify about the InfoScout Survey.

On August 2, 2022, the Court ruled the InfoScout Surveys were admissible through the parties’ experts, including defendants’ survey expert Dr. Chiagouris:

Accordingly, [the InfoScout Surveys] are admissible to examine Dr. Chiagouris on the basis of his opinions. . . To the extent the Defendants seek to

⁸See *Nestle Co. v. Chester’s Mkt., Inc.*, 571 F. Supp. 763, 776 (D. Conn. 1983), subs. order rev’d on other grounds, 609 F. Supp. 588 (D. Conn. 1985) (noting that pre-litigation surveys “are inherently more trustworthy, especially when the results are against the developer’s interest, as is the case here.”); Shari Seidman Diamond, J.D., Ph.D., “Reference Guide on Survey Research,” Ref. Manual on Scientific Evid., 373 (Fed. Jud. Ctr., 3d ed. 2011).

introduce the InfoScout Surveys and InfoScout Reports to question the basis of an expert's opinions, they are generally admissible

(Dkt. 798 at 16–17.) In reaching its decision, the Court correctly held that the InfoScout Surveys “are relevant because they tend to show what aspects of Bang Energy are material to its purchasers.” (*Id.*) Monster’s concerns about the methodology of the InfoScout Surveys, according to the Court, could be presented to the jury as issues attendant to weight—but they did not bear upon admissibility. (*Id.*)

In clear error, the Court, in contravention of its own ruling, refused to admit the surveys. More specifically, Vital presented the testimony of its own survey expert, Dr. Larry Chiagouris, who specifically identified the InfoScout Surveys—by name—in his report as a basis for his opinion that consumers do not purchase Bang Energy due to the Super Creatine ingredient. (Ex. 45.) When it came time to present the jury with this essential testimony, and outside the presence of the jury, Vital’s counsel reminded the Court of its pre-trial motion in limine ruling: “It was our understanding of the Court’s motion in limine ruling that an expert who relied upon that [InfoScout] data to form opinions, which Dr. Chiagouris did, would be entitled to explain the basis for the opinions.” (Ex. 16 (9/21 Trial Tr.) at 234:19–22.) To the great surprise of Vital, the Court ruled that Dr. Chiagouris could not testify with regard to the InfoScout Report because “you are eliciting hearsay statements from your own expert.” (*Id.* at 240:4–10.)

As Vital advised the Court repeatedly, including in Defendants' Offer of Proof Regarding InfoScout Survey and Reports ("Offer of Proof," Dkt. 859), the InfoScout Surveys were the evidence most singularly critical to Vital's defense of this nine-figure Lanham Act lawsuit. Hired by Monster prior to the filing of this lawsuit to determine why consumers purchase Bang Energy, InfoScout concluded: of twelve potential attributes and drivers of Bang Energy consumption, only **3% of the 407 consumers** surveyed selected "Super Creatine" as a reason for purchasing Bang Energy. (Ex. 23 at 7 (emphasis added).)

The Court's ruling was devastating and highly prejudicial for two reasons. First, the Court had already addressed and resolved the question of hearsay in its Order. Specifically, the Court held that the InfoScout Surveys were hearsay, but were "admissible under Federal Rule of Evidence 703." (Dkt. 798 at 17.)⁹ And in the **very next sentence** the Court held that the InfoScout surveys were admissible "to question the basis of an expert's opinion." (*Id.*) Second, if the Court had been inclined to reconsider its Order, Vital had no idea that such a ruling was imminent. Vital justifiably relied upon the Order to plan its case presentation and strategy, and the Court's reconsideration of the Order turned all of that planning upside down.

⁹ The correct nature of the Court's August Order was further described by Vital in its Submission Regarding the Disclosure of Third-Party Market Research Through the Testimony of Dr. Larry Chiagouris. (Dkt. 857.)

With all respect to the Court, its Order was clear as to how the InfoScout Surveys could—and could not—be used by Vital at trial. And throughout trial Vital simply was not permitted to use the evidence even when permission was sought with Dr. Chiagouris. The subject was addressed at length at the parties’ charging conference with the Court on the afternoon of September 23, 2022. The Court stated that it was aware of the “importance” of the InfoScout Surveys and that (though Vital disagrees) “the wording on the motion in limine is not clear.” (Ex. 18 (9/23 Trial Tr. at 105:9–10.)) The Court advised that, in reflection, it thought the InfoScout surveys would only be “introduced on cross-examination.” (Id. at 105:18–21.) But that is not how the Order reads: “The Court DENIES Plaintiff’s MIL No. 1 to the extent that the parties seek to introduce the InfoScout Surveys and InfoScout Reports to examine the basis of an expert’s opinion.” (Dkt. 798 at 17 (emphasis added).) Vital’s inability to have its own expert testify on InfoScout was arguably the most significant and prejudicial error of the trial resulting in the runaway jury verdict. Only a new trial can correct this error.

b. The Court erred in refusing Vital’s efforts to cross-examine Monster’s lay witnesses about InfoScout.

It would be challenging to exaggerate the degree to which Monster’s personnel shared, confirmed, adopted, analyzed, relied upon, planned around, and utilized the InfoScout Surveys. And the list of Monster witnesses directly involved with these

actions is lengthy.¹⁰The Court refused, in error, to allow the cross-examination of lay witnesses as to the survey findings that included Chad Henry (Ex. 12 (9/14 Trial Tr. (Henry)) at 214:9–11), Mario Suarez (Ex. 13 (9/15 Trial Tr. (Suarez)) at 172:14–16) and Emily Tirre (Ex. 15, 9/20 Trial Tr. (Tirre)) at 13:9–10). Monster incorporated the InfoScout findings into numerous internal documents relating to Monster’s business strategies and marketing—all of which made clear that Monster, outside of this litigation, did not believe creatine was material to the public’s decision to purchase an energy drink.¹¹

The degree of prejudice suffered by Vital as a result of the Court’s repeated erroneous rulings was enormous. The use of the InfoScout Surveys, even if not fully admitted, and at least by way of impeachment, would have permitted Vital to attack the credibility of Monster’s lay witnesses who freely offered false testimony that consumers purchase Bang Energy beverages primarily because of the Super Creatine ingredient, including Monster’s CEO, Rodney Sacks—who had actual knowledge of the survey findings before this lawsuit was filed. (Ex. 20.) Monster’s lay witnesses simply knew they could get away with the testimony; and the Court’s ruling protected them from being held accountable to the jury for their own contradictory e-mail messages discussing, attaching, and adopting the InfoScout Surveys showing clearly that the public did not purchase Bang Energy due to Super Creatine. The

¹⁰At least sixteen of the many relevant and unadmitted exhibits created internally at Monster adopting the InfoScout findings are identified in the Offer of Proof (Dkt. 859 at 5–11.)

¹¹See Exs. 20–24, 26, 28–29, 31–33, 36–38, and 40–41.

inability to properly cross-examine these lay witnesses greatly prejudiced Vital at trial.

As just one example, the InfoScout evidence would have been especially effective in the cross-examination of Ms. Tirre (Monster's President of the Americas), who executed a Declaration stating she actually believed Super Creatine motivated customer purchases of Bang Energy when she knew at the time of that Declaration the only evidence proved the exact opposite. The Court held its ground, even in this context, when the clear basis for impeachment was explained to the Court at sidebar during her cross-examination. (Ex. 15 (9/20 Trial Tr. (Tierre)) at 12:3–10.)

c. The Court's failure to admit the InfoScout Surveys caused Vital's presentation of Monster's damning Reign evidence to, at best, confuse the jury.

It was the InfoScout surveys that first recommended to Monster that it create Reign—without creatine—to compete with Bang Energy. (Ex. 22 at 2.) Based upon InfoScout, Monster confidently invested millions of dollars researching and developing Reign to compete with Bang Energy even though Reign contained no form of creatine. If creatine was indeed material to the public's decision to buy Bang Energy, it defies logic that Monster would create a non-creatine energy drink to compete directly with Bang Energy. Yet that is exactly what Monster Energy did.

But Vital was precluded from explaining this critical fact to the jury, or even showing the jury the numerous internal Monster documents incorporating the InfoScout findings into Monster's business plans for the eventual creation of Reign. All of which consistently showed Monster believed no one bought Bang Energy due to Super Creatine, but instead because it tasted great, had elevated caffeine, and, unlike Monster Green, Bang Energy was a better-for-you energy drink with no sugar. (Ex. 23 at 5.) The inability to provide this critical information to the jury, at best, confused the jury as to the importance of why Monster created Reign. At worst, it caused the jury to give too much credence to Monster's damages theory.

The errors around the InfoScout reports pervade this trial and Vital should have a new trial. It is the only way to ensure that a historic trial that was historically flawed may be fairly corrected. Geurin, 316 F. 3d at 885 (exclusion of evidence "highly prejudicial" to defendant and "tainted the jury's verdict.").

3. Monster repeatedly opened the door for Vital to present evidence of the Rodent Study.

To the extreme prejudice of Vital, the Court prohibited Vital from presenting the jury with evidence of the existence of a rodent study (the "Rodent Study") conducted by the Peking Union Medical College and described in the Supplemental Expert Report of Dr. Keykavous Parang (the "Supplemental Report"). (Dkt. 788.) Vital expected

Dr. Parang would testify regarding the reliability of the Rodent Study and its conclusions.

Evidence of the Rodent Study couldn't possibly have been more relevant and material to Vital's defense: the author of the Rodent Study concluded that Super Creatine, when ingested by rodents, resulted in elevated creatine levels in blood circulation. (Dkt. 841-1 at 15–16.) In other words, the Rodent Study constituted damning evidence striking at the heart of Monster's claim that consumers were fooled into purchasing Bang Energy under the mistaken assumption that the beverage contained creatine. The Rodent Study proves it does.

The Court will recall that, prior to the beginning of trial, it issued an order (the "Rodent Study Order") granting Monster's ex parte application to exclude the Supplemental Report as not timely disclosed. (Dkt. 788.) Despite Vital's offer to make Dr. Parang available for an additional deposition and provide further discovery (Dkt. 772 at 2), the Court nonetheless determined that Monster had not "had any opportunity to seek discovery about the underlying study." (Id.)

Significant and highly prejudicial error occurred repeatedly during the trial when Monster's counsel consistently, prejudicially and without remorse, abused the Rodent Study Order. And the exploitation began literally with Monster's opening statement, where Monster's counsel falsely advised the jury:

Folks, here is what you're going to hear
from all the top Vital executives, their

affiliated scientists, and their expert witnesses: No studies proving that Super Creatine is creatine or provides the benefits of creatine. Let me say that again. No studies. Not like there's some and it's a battle of experts. No studies.

(Ex. 2 (8/26 Trial Tr.) at 55:11–16; see also *id.* at 56:11 (“No studies to support the claims.”).) That is, on the first day of trial, Monster began a recurring theme of misrepresenting to the jury that the Peking Rodent Study did not exist.

Monster repeated this misrepresentation during the cross-examination of multiple lay and expert witnesses offered by Vital¹² and Monster,¹³ but perhaps most flagrantly with Meg Owoc. Monster's counsel asked: “To this day, Ms. Owoc, you don't know whether any studies have been done on Super Creatine, correct?” (Ex. 7 (9/6 Trial Tr. (M. Owoc)) at 160:17–18.) In response to a door completely opened by Monster's lawyer, Ms. Owoc responded directly and honestly: “Yes. There are studies.” (*Id.* at 160:19.) During an immediate sidebar conducted after Ms. Owoc's answer, Vital's counsel correctly

¹²Ex. 2 (8/26 Trial Tr. (Bukovi)) at 164:5–13, 165:2–11 and 200:3–11; Ex. 16 (9/21 Trial Tr. (Parang)) at 141:8–25.

¹³Ex. 4 (8/31 Trial Tr. (Kreider)) at 213:13–16 (“Q. So I want to ask you, then, sir: How many studies support Vital Pharmaceuticals' and Mr. Owoc's claims about what Super Creatine can do? A. Zero. No data.”) and 221:18–23 (“Q. Sir, is there any study in the history of the world that you are aware of that shows Bang, drinking the carbonated beverage delivers Creatine to the human body? A. No. As we saw, there's no delivery, no entrance in the blood, even at much higher levels than is found in a Bang energy drink or the Bang Master Blaster.”); Ex. 15 (9/20 Trial Tr. (Escalante)) at 190:7–13.

argued that Monster's question to Ms. Owoc, without a doubt, opened the door to the Rodent Study and Monster had to live with whatever answer Ms. Owoc would provide the jury. And it appeared the Court initially accepted this proposition:

MR. JANSSEN: So if she knows about the Peking rat study, then the door has been opened, correct?

THE COURT: I guess, depending on the answer.

(Id. at 161:15–17.) Despite the Court's comment above, it refused the request of Vital's counsel to ask Ms. Owoc about the Rodent Study when Monster withdrew the question. (Id. at 162:4–11.)¹⁴

Such exchanges, of the kind described above, hopelessly confused the jury. Members of the jury were left with the misimpression, created by Monster's counsel, that literally no Super Creatine studies were conducted by Vital. This, juxtaposed against the plain answers of witnesses, like Ms. Owoc, who testified that studies did indeed exist left the jury without the benefit of any explanation from Ms. Owoc (or others) actually providing the critical details of the Rodent Study and with testimony stricken. In short, Monster's door-opening questions improved its position with the jury—wrongly

¹⁴The Court instructed Monster on how it could properly ask questions without opening the door. That is, the Court told Ms. Libeu, for example, that she should preface her questions with a temporal limitation prior to the completion of the Rodent Study. (Id. at 162:1–3.) Of course, by this time the door had already been opened and the damage had been done.

creating a storyline that Ms. Owoc and others provided false testimony that was in reality the truth, and they were excluded from explaining and clarifying the confusion of the jurors on this central topic.

The case law in support of Vital's position is extensive and was provided earlier to the Court in the Bench Memorandum Re: Curative Admissibility of Dr. Keykavous Parang's Study on Super Creatine. (Dkt. 842.)¹⁵In the Ninth Circuit, as elsewhere, pursuant to "the rule of curative admissibility or the 'opening the door' doctrine, the introduction of inadmissible evidence by one party allows an opponent, in the court's discretion, to introduce evidence on the same issue to rebut any false impression that might have resulted from the earlier admission." *Microsoft Corp. v. Motorola, Inc.*, 795 F.3d 1024, n.23 (9th Cir. 2005). The door may be opened, as here, as early as an opening statement. *United States v. Croft*, 124 F.3d 1109, 1120 (9th Cir. 1997). But there is no doubt that Monster's repeated questions opened the door to the Rodent Study throughout the trial.

The errors that permitted Monster to mislead the jury, while tying Vital's hands, cannot be corrected other than through a new trial in front of a new jury. Only a new jury could impartially assess Monster's Lanham Act claims, either by (i) hearing a full presentation of the Rodent Study or (ii) being shielded from questions posed by Monster's lawyers

¹⁵Additional authority for these propositions was included in the Bench Memorandum, which is incorporated herein by reference. (Dkt. 842 at 2, 4 and 5.)

that are designed to deliberately abuse the Rodent Study Order.

4. Failure to admit into evidence other forms of creatine in the marketplace.

Another critical and prejudicial error during the trial as to Monster's false advertisement claims was the Court's decision to allow Monster to control the standard for what would, and what would not, constitute a false representation as to Vital's use of the term "Super Creatine."

Specifically, Monster repeatedly argued that the phrase "Super Creatine" was an inherently false description of the ingredient, unless Super Creatine acted as a source of creatine or had the same benefits to the body as creatine monohydrate. Creatine monohydrate is a powdered form of creatine that must be consumed almost immediately after mixing with water. (Ex. 3 (8/30 Trial Tr. (Kreider)) at 231:17–232:1 and 232:20–233:3; Ex. 4 (8/31 Trial Tr. (Kreider)) at 27:19–23; Ex. 11 (9/13 Trial Tr. (Candow)) at 18:15–19:1.)

Vital intended to introduce into evidence, through its experts, that a number of forms of creatine are marketed and promoted to consumers throughout the United States. (Ex. 16 (9/21 Trial Tr.) at 26:4–27:19.) The relevance of this information was self-evident: the market contains many alternative forms of creatine other than creatine monohydrate—be it in salts, serums, gummies, pills, powders, etc.—with a large variance on the molecular structure, makeup, compounds, and efficacy. (Ex. 4 (8/31 Trial Tr. (Kreider)) at 121:21–122:1 and 161:6–14; Ex. 11

(9/13 Trial Tr. (Cadow)) at 22:5–8; Ex. 16 (9/21 Trial Tr. (Parang)) at 76:3–79:1.) Vital did not intend to create mini-trials on whether these products were or were not as effective as creatine monohydrate. Rather, these products refuted Monster’s claim that a customer would be deceived by the term “Super Creatine” into believing Bang Energy contained creatine monohydrate—something Owoc repeatedly made clear was untrue in numerous videos and social media posts. (TX-0070; TX-0884-A; TX-1305; TX-1700.) Further, these products demonstrated that there were already numerous creatine-derivatives in the marketplace other than creatine monohydrate, and thus there was nothing false in advertising/marketing a derivative form of creatine in Bang Energy.

Although the Court permitted expert testimony as to the clinical composition of Super Creatine and permitted the introduction of a few other forms of creatine in the marketplace, the inability to include all of the proffered forms severely limited Vital’s defense as to whether a false representation had been made to the public. No matter how much Drs. Parang and Escalante discussed the technical and scientific issues relative to Super Creatine, a juror can far more easily understand, and consider in deliberations, the fact that there are dozens of products in the market using derivative forms of creatine other than creatine monohydrate when deciding whether a purchaser of an energy drink was in fact deceived into believing they were purchasing creatine monohydrate simply by reference to a creatine derivative on the label.

The jury did not have complete testimony on these other forms of creatine in the marketplace. The Court's ruling was especially prejudicial to Vital in its cross-examination of Dr. Kreider. Dr. Kreider parroted Monster's claims that, contrary to the clear evidence in the marketplace, Super Creatine must convert to free creatine in the blood and store creatine in tissue in order to be considered a form of creatine. (Ex. 4 (8/31 Trial Tr. (Kreider)) at 27:16-23.) The inability to vigorously cross-examine Monster's key expert on his opinions—showing dozens of products already in the market using derivative forms of creatine that did not meet his creatine definition—was prejudicial. Such error can only be corrected with a new trial.

Without access to the full picture due to the excluded evidence, the jury had little reason to question Dr. Kreider's position—even though it is completely contrary to reality in the marketplace. Fundamental fairness makes clear the Court should order a new trial. See *Jan. v. Dr Pepper Snapple Grp., Inc.*, 594 F. App'x 907, 910 (9th Cir. 2014) (remanding for new trial based on district court's exclusion of crucial evidence with instruction to permit introduction of excluded evidence on retrial).

5. This Court's motion in limine ruling excluded evidence that Reign was a copycat and knock-off designed exclusively to compete with Bang Energy in the performance energy subcategory.

Reign is a product Monster created that had virtually all of the same attributes as Bang Energy, and was specifically created by Monster in response

to Bang Energy to counter the success Bang Energy had in the marketplace. This evidence was probative and exculpatory for two separate reasons: (1) it proved Monster knew that Super Creatine was not material to the public's decision to purchase a zero-calorie/carbohydrate/sugar energy drink that was "better-for-you" than the traditional (Monster Green) energy drinks that contained a large amount of sugar; and (2) Monster's claimed damages from its lost sales of Monster Green were completely untethered from reality because Monster created Reign to gain market share from new consumers who would purchase a "performance energy" drink but not traditional energy drinks such as Monster Green. However, the Court precluded this information from being provided to the jury. (Dkt. 798 at 23–24.)

The evidence was plainly relevant. Monster's entire lawsuit was premised on the assumption that Super Creatine was the ingredient that motivated consumers to buy Bang Energy instead of purchasing Monster Green. Yet Monster's position collapses on itself, when the indisputable evidence proved that Monster created its own drink to compete with Bang Energy that did not have contain the supposed market-killing Super Creatine ingredient. That is, Reign contained no Super Creatine, creatine monohydrate or creatine of any kind whatsoever. Monster reached this conclusion, as described above, because its InfoScout surveys conclusively established consumers did not buy Bang Energy because of Super Creatine. They instead bought Bang Energy because of multiple other attributes such as 300 milligrams of caffeine—the exact amount included in Reign.

The creation of Reign also proves that Monster adopted, internalized and executed upon InfoScout. Monster learned that consumers want a great tasting energy drink with no sugar or carbohydrates, representing a healthier alternative to the high sugar energy drinks Monster already promoted in the market. Monster literally created Reign to mimic all of Bang Energy's attributes—right down to the bright colors and most fanciful flavor names:



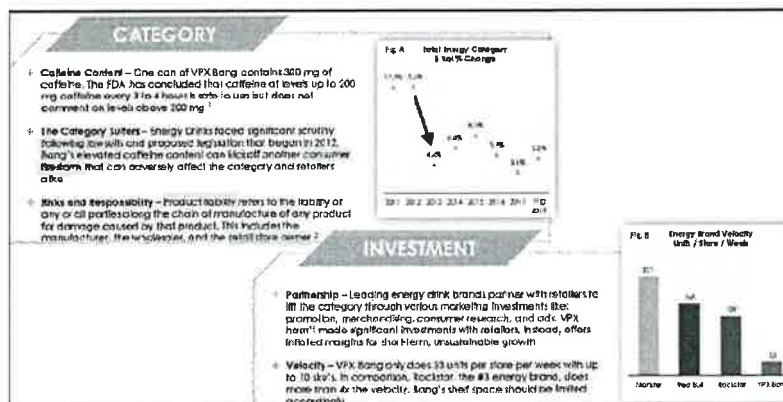
(Exs. 43, 44)

But the jury didn't get to consider this evidence because it was excluded. That failure, in part, led to the grossly excessive verdict award. It put Vital in bankruptcy. The award should not—and cannot—stand in light of the record and the excluded evidence demonstrating that virtually no one cared about creatine, Super Creatine, or muscle/cognitive enhancement when choosing an energy drink. Instead, customers want a healthy, great-tasting drink that will provide them a boost when they are in need of it—be it a nurse working a double shift, an over-extended parent, an over-worked lawyer pulling an all-nighter on a post-verdict brief, or anyone else in the public who wants a boost of energy.

6. The Court excluded evidence related to Monster's efforts to scare stores from placing Bang Energy on their shelves based upon threats of potential lawsuits due to Bang Energy having 300 mg of caffeine.

In its motion in limine ruling, this Court precluded Vital and Owoc from introducing evidence that Monster had attempted (and succeeded, in some instances) to scare stores from placing Bang Energy on their shelves due to its high caffeine content. (Dkt. 798 at 25; Dkt. 663 at 4.)

Examples of relevant evidence excluded at trial include the following document Monster created and used to scare store owners from putting Bang Energy on their shelves:



(Ex. 42 at 9 (emphasis added); see also Ex. 27; Ex. 30 at 2; Ex. 34 at 1; Ex. 35; Ex 38 at 26.)

The exclusion of this evidence prevented Vital from explaining to the jury that Monster's actual

motivation in bringing this lawsuit was to prevent an upstart competitor with a wildly successful product from continuing to gain market share. Further, this evidence was relevant to demonstrate Monster no longer understood what the market wanted from an energy drink. Although Vital was able to argue generally that Monster had “failed to innovate” and was content with maintaining the “status quo,” (Ex. 2 (8/26 Trial Tr.) at 67:21–68:4 and 107:23–108:2) Vital was unable to provide a complete picture of Monster’s failure to innovate and desire to maintain status quo without the use of this information, to Vital’s prejudice.

B. The Court should grant a remittitur because the weight of the evidence did not support the jury damage awards as to the false advertising, shelf space or the trade secret claims.

1. Standard of review.

Remittitur is the Rule 59 procedure this Court should exercise to reduce the excessive award by the jury to Monster. *Hill Phoenix v. Classic Refrigeration SoCal, Inc.*, No. SA CV19-00695-DOC-JDE, 2021 WL 8820858, at *4 (C.D. Cal. Dec. 12, 2021); *Diaz v. Tesla, Inc.*, 598 F. Supp. 3d 809, 825 (N.D. Cal. 2022), motion to certify appeal denied, No. 17-CV-06748-WHO, 2022 WL 2046827 (N.D. Cal. June 7, 2022) (remitting excessive damages award). When an award is reduced, the award should reflect the “maximum amount sustainable by proof.” *Oracle Corp. v. SAP AG*, 765 F.3d 1081, 1095 (9th Cir. 2014) (internal quotation omitted).

Once the Court decides to reduce the verdict, the Court should then offer Monster the option of accepting the reduced amount determined reasonable by the Court. If Monster rejects the reduced amount, then the Court must order a new trial. *Fenner v. Dependable Trucking Co. Inc.*, 716 F.2d 598, 603 (9th Cir. 1983). For the reasons explained below, the jury verdict as to false advertising, shelf space, and trade secrets are all grossly excessive and should be reduced. The false advertising verdict should be reduced to \$828,530. The shelf space and trade secret claims should each be reduced to \$1 in nominal damages.

For the following reasons, in the event the Court does not grant a new trial on all claims, Vital and Owoc alternatively request that Court grant remittitur on Monster's claims as follows:

<u>Monster Claim(s)</u>	<u>Verdict Award</u>	<u>Requested Remittitur</u>
Lanham Act	\$271,924,174.00	\$828,530.00
Shelf Space	\$18,000,000.00	\$1.00
Trade Secret	\$3,000,000.00	\$1.00

2. No reasonable juror could conclude Monster is entitled to almost \$272 million under its false advertising claims.

Monster argued at trial that its damages caused by Vital's alleged false advertising of Super Creatine caused customers to not purchase two Monster beverages. The first product was "Monster Green," its flagship, high-sugar product. Monster's

claimed damages for lost sales of Monster Green are from August 1, 2015, through April 30, 2022. (Ex. 13 (9/15 Trial Tr. (Tregilis)) at 190:21–191:10.) The other product allegedly harmed by Vital’s advertising was Reign, a new product designed specifically to compete with Bang Energy. Reign’s alleged damages did not accrue until the Reign product launched in approximately March 2019, and damages were calculated through April 30, 2022. (*Id.* at 213:18–214:19.)

Mr. Tregillis, Monster’s damages expert, testified that 34.1% of Vital’s Bang Energy sales would not have been made without the alleged false statements pertaining to Super Creatine. (*Id.* at 203:20–204:9.) Of that 34.1% in Vital sales, Tregillis testified that 14.6% would have gone to Monster Green and 4.3% to Reign. (*Id.* at 212:6–15.) See *BMMG v. Am.-Telecast Corp.*, No. CV92-3308-HLH, 1993 WL 850564, at *3 (C.D. Cal. May 6, 1993), *aff’d* sub nom. *BMMG, Inc. v. Am. Telecast Corp.*, 42 F.3d 1398 (9th Cir. 1994) (“Here, it is important to note that we are considering the causal connection between the falsity and the claimed drop in sales, not the connection, if any, between defendants’ overall sales and the drop in plaintiffs’ sales.”)

With respect to Monster Green, the record is replete with evidence that Bang Energy did not take sales from existing brands. Rather, Bang Energy created a new performance energy market that brought new customers into the energy space. (TX-6070 at 6; TX-6124; Ex. 14 (9/16 Trial Tr. (Trento)) at 138:13–20; Ex. 15 (9/20 Trial Tr. (Tirre)) at 40:3–8; Ex. 17 (9/22 Trial Tr. (Voth)) at 177:7–180:4.)

Emily Tirre, President of the Americas for Monster, admitted that Monster was late to introduce a product into the performance energy space—Reign—and that Monster’s delay had permitted Vital to penetrate and dominate the new energy subcategory. (Ex. 15 (9/20 Trial Tr. (Tirre)) at 41:2–5.) That delay by Monster in getting into the performance energy subcategory cost Monster profits, not Super Creatine.

Additional evidence made clear that consumers drink Bang Energy because, unlike Monster’s flagship beverage—Monster Green—with over 54 grams of sugar per 16 ounce can (Ex. 9 (9/8 Trial Tr. (Sacks)) at 211:3–8), Bang Energy has no sugar. (Ex. 8 (9/7 Trial Tr. (M. Owoc)) at 15:6–7.) Additionally, Bang Energy distinguished itself in the marketplace by its unique flavor profiles, the inclusion of amino acids, CoQ10, and 300 mg caffeine. (Ex. 3 (8/30 Trial Tr. (Bukovi)) at 77:15– 22; Ex. 7 (9/6 Trial Tr. (M. Owoc)) at 234:2–11; TX-6036.) Multiple Monster witnesses conceded at trial that Monster Green does not have any of these attributes. (Ex. 9 (9/8 Trial Tr. (Sacks)) at 177:8–15; Ex. 15 (9/20 Trial Tr. (Tirre)) at 21:17– 25.) Accordingly, Monster Green cannot claim lost sales from customers who simply didn’t want what Monster was offering—an energy drink loaded with sugar, calories, carbohydrates, and containing no amino acids or CoQ10.

Monster’s own internal documents also concede that Bang Energy’s sales velocity was not the result of Super Creatine, but instead the above “better-for-you” ingredients, attributes and flavors.

In January 2018, Monster acknowledged that Bang Energy's 300 mg of caffeine was their point of difference. (TX-6036.) In the summer of 2018, Monster knew that Vital was "definitely not playing up Super Creatine" in their in-store displays. (TX-6062; Ex. 15 (9/20 Trial Tr. (Tirre)) at 31:17–24.) Another Monster employee advised senior management at Monster that Vital's social media presence was something Monster should seek to replicate because of its effectiveness. (TX-6458.)

In 2018, Monster commissioned a third-party study from InfoScout. That survey concluded that Super Creatine was not material to the consumer's purchasing decision and that only 3% of those surveyed found Super Creatine to be important to their purchasing decision. (Ex. 23 at 7.)

In fact, 88% of the survey participants identified the other following characteristics of Bang Energy as more important than Super Creatine to their purchasing decisions:

No sugar, carbs, calories	23%
Healthier alternative to energy drinks	18%
Great taste/flavor	16%
Lasting Energy	13%
No crash	7%
300 mg Caffeine	6%
BCAAs	5%

(*Id.*)

Based on its survey data, InfoScout concluded and advised Monster that "[s]hoppers purchase Vital Bang because it has 0 sugar/calories/carbs and is a healthy alternative to energy drinks." (*Id.* at 5.)

InfoScout also acknowledged that customers loved the 300 mg of caffeine. (*Id.*)

InfoScout also recommended Monster create a similar product to Bang Energy in order to help Monster “reach a consumer target that may view traditional energy drinks as ‘unhealthy’ or too full of sugar and calories.” (*Id.*) InfoScout also advised that Monster’s new product should not use the Monster name to avoid cannibalization from Monster’s current customer base. (*Id.*) Finally, InfoScout recommended that if Monster introduced a product with similar benefits, “it will provide an opportunity to gain a usage occasion currently not fulfilled by Monster” (*Id.*)

The findings and recommendations from InfoScout were adopted, considered, analyzed and incorporated into over a dozen internal Monster presentations given to the highest executives of Monster who were deciding how to address the “Bang threat.” (Exs. 20–24, 26, 28–29, 31–33, 36–38, and 40–42). Monster followed InfoScout’s recommendations to the letter. Monster created Reign, a low calorie/low carbohydrate/no sugar energy drink that—to the surprise of no one—copied Bang Energy’s 300 mg of caffeine, amino acids, and, as part of the name, the phrase “Total Body Fuel.” (Ex. 9 (9/8 Trial Tr. (Sacks)) at 176:9–16; Ex. 10 (9/9 Trial Tr. (Sacks)) at 24:23–25:6.)¹⁶Reign was literally created by Monster so that Monster had a drink in the market that had the attributes

¹⁶Monster’s own CEO, Rodney Sacks, admitted that Reign’s tag line “Total Body Fuel” is mere puffery. (Ex. 10 (9/9 Trial Tr. (Sacks)) at 25:17–18.)

consumers had proven they wanted and was why Bang Energy sales had exploded.

Monster's marketing campaign was very simple: put Reign next to Bang Energy wherever Bang Energy was shelved—period. (Ex. 15 (9/20 Trial Tr. (Tirre)) at 48:3–6.) Internally at Monster, Reign was referred to as the “answer to Bang” and Monster's “Bang killer.” (*Id.* at 47:5–9.) Monster also copied Bang Energy's color schemes and chose its original Reign flavors based upon Bang Energy's largest volume flavor sales. (Exs. 25, 43, and 44.)

The Court did not allow the jury to see or hear any of this evidence. Nor was Vital permitted a vigorous cross (or, indeed, any cross) of Monster's witnesses on the InfoScout survey findings or how Monster adopted the InfoScout findings into Monster's own internal business plans, marketing strategies, and the creation of a new drink—Reign—designed specifically to compete with those customers who purchased Bang Energy. The Court's Order on Monster's motion in limine held that the InfoScout survey would be admissible through the parties' experts at trial. (Dkt. 798 at 17–18.) However, during trial, the Court ultimately decided that the jury would not be allowed to learn of the existence of these critical documents. (Ex. 12 (9/14 Trial Tr. (De Lorme)) at 128:6–131:13; *Id.* (9/14 Trial Tr. (Henry)) at 210:23–214:11; Ex. 13 (9/15 Trial Tr. (Suarez)) at 172:7–22; Ex. 15 (9/20 Trial Tr. (Tirre)) at 64:2– 66:23.) During its sixth plea for the Court to reconsider its ruling on this fundamentally critical issue, Vital's counsel indicated the failure to introduce the report or Monster's dozens of internal

documents referencing the InfoScout report to the jury would hamstring Vital and Owoc's defense and result in bankrupting the #3 energy drink maker in the United States. (Ex. 18 (9/23 Trial Tr.) at 97:15–100:16.) Ultimately, that dire prediction came to pass.

During trial, the Court held that the InfoScout survey, or any cross-examination of Monster's experts, or direct examination of Vital's experts relating to InfoScout was excluded. (Ex. 17 (9/22 Trial Tr.) at 4:25–5:20; Ex. 16 (9/21 Trial Tr.) at 234:11–241:10.) The Court permitted Vital vague and general references to the survey via Vital's experts, but even then, the Court refused Vital any opportunity to demonstrate Monster's own pre-litigation survey and internal documents showed consumers simply didn't care about Super Creatine when purchasing Bang Energy. (Ex. 17 (9/22 Trial Tr. (Chiagouris)) at 7:2–8:13; Ex. 18 (9/23 Trial Tr. (Voth)) at 47:23–50:11.)

As a result, the jurors were left confused by the expert testimony, and Vital was forced to alter its defense strategy which had focused on extensive use of the pre-litigation studies as the key exculpatory evidence to refute Monster's inflated claims of lost profits via all of the experts—both Monster and Vital—during trial. The inability to do so, when the Court's original motion in limine ruling suggested Vital would be allowed to do so, was devastating to Vital's trial strategy and fundamentally unfair in preventing the jurors from considering this evidence before rendering their verdict.

The reality is customers purchase Bang Energy for a number of reasons. Super Creatine is not one of them, and Monster knew that when it filed this lawsuit. Nor should it be—the Bang Energy label makes no promises of increasing muscle, strength, improving cognitive disabilities, or anything at all. It is an energy drink with a high caffeine content, ammino acids, and CoQ10 that tastes great.

Based upon the fact that virtually no one is buying Bang Energy because of Super Creatine, and because no one is confused by what they were getting when they buy a can of Bang Energy, the jury's verdict is excessive. Monster's evidence does not show that Monster Green lost market share. To the contrary, Monster's own internal documents demonstrate Monster lacked a product to compete with Bang Energy and needed to make a new energy drink with Bang Energy's attributes to have any hope of competing with Bang Energy in the marketplace. (TX-6139; TX-6354; TX-6461; Ex. 10 (9/9 Trial. Tr. (Sacks)) at 40:12–15; Ex. 39.)

When Monster finally placed Reign into the marketplace—without Super Creatine, or any creatine—it is undisputed that Reign impacted Bang Energy sales. (Ex. 6 (9/2 Trial Tr. (J. Owoc)) at 179:4–13; Ex. 9 (9/8 Trial Tr. (Sacks)) at 149:18– 21.) Customers who had been buying Bang Energy switched to Reign with its high caffeine and no creatine. (TX-6171; TX-7180; Ex. 15 (9/20 Trial Tr. (Tirre)) at 49:5– 50:13 and 53:19–54:12.) If Super Creatine was the key point of differentiation, and Reign indisputably does not have Super Creatine,

then it is simply not possible that Reign would have materially impacted Bang Energy sales under Monster's damages theory. The claimed damages are completely inconsistent with the evidence of consumer purchasing decisions in the marketplace. But Vital was precluded from providing this key evidence to the jury.

To the extent the Court finds a Lanham Act violation exists, (and Vital vigorously asserts it did not deceive the public and Monster has not proven all six elements to prove a Lanham Act violation as to any one specific commercial advertisement), Vital requests the Court to reduce the verdict award to \$828,530. This number is calculated by removing from Dr. Cowan's survey those respondents who falsely claimed to drink Bang Energy because it contained ginseng or soy (it doesn't); those who claimed to buy an energy drink called All-Fit which doesn't exist, and those survey participants who would not commit to purchasing an energy drink in the future. (Ex. 13 (9/15 Trial Tr. (Tregillis)) at 251:2–8.) This reduces the total percentage of the general public—at best—who purchased Bang Energy over Reign based on Super Creatine in Mr. Tregillis' damages opinion down to 0.08%, which would reduce the jury award to \$828,530. (Ex. 19 (9/27 Trial Tr.) at 191:20–192:24.)

3. No reasonable juror could conclude Monster is entitled to \$18 million under its tortious interference claims.

The jury award of \$18 million for Monster's shelf space claims is outrageously excessive. The entire foundation of this award is based on nothing

more than speculation, generalization, and guesswork. Applying a multiplier to every store in the United States based on the limited testimony of a few, self-serving statements from Monster's employees turns the burden of proof on its head.

In the event this Court does not dismiss these claims outright, then the Court should reduce the award to nominal damages of \$1.00. There is just simply no nexus—none at all—between the extrapolation of one Monster's employee's casual observations a few times, at a few stores, to awarding a multiplier as to every Walmart store subject to Monster's contract in the United States.

There is also no evidence even showing Vital moved Monster's product. And there is evidence in the record showing the store owners, not Vital, moved product—whether because Monster failed to provide product timely (TX-003; TX-6299; Ex. 15 (9/20 Trial Tr. (Tirre)) at 59:15–60:24), Bang Energy sold better (Ex. 3 (8/30 Trial Tr. (Bukovi)) at 26:6–13 and 80:3–5), or the product was in flex-space as opposed to contract space. (Ex. 3 (8/30 Trial Tr. (Bukovi)) at 16:18–17:8.) Simply put, Monster failed to prove any damages above a nominal award.

4. No reasonable juror could conclude that Monster is entitled to \$3 million under its trade secret claim.

Monster's entire damages theory for its trade secret claims was that a former Monster employee, Stephen Cohen, left Monster while still in possession of five thumb drives that Monster claims contained

trade secrets. (Ex. 13 (9/15 Trial Tr. (Tregillis)) at 220:7–12.)

Like its false advertising claims, Monster failed to connect the dots for even a single trade secret as to all required elements. See, e.g., *In re First All. Mortg. Co.*, 471 F.3d 977, 1003 (9th Cir. 2006) (remanding for further proceedings, noting “the district court bent over backwards to find a potentially valid basis in the record for the jury verdict, but that rationale is obviously not tethered to the law or the facts of the case.”). Monster not only failed to show a specific trade secret met all five elements necessary to establish liability—but the jury award of \$3,000,000 was excessive and should be reduced to nominal damages of \$1.00.

Monster’s only evidence of damages for trade secret misappropriation was that sales in a specific territory increased after Mr. Cohen left his position at Monster and began employment with Vital. (Ex. 13 (9/15 Trial Tr. (Tregillis)) at 220:23–222:15.) Specifically, Mr. Tregillis testified that Vital’s sales in Georgia increased starting with Mr. Cohen’s employment with Vital. (*Id.*) Mr. Tregillis therefore concluded that if Mr. Cohen had actually used Monster’s trade secrets (and Mr. Tregillis of course had no personal knowledge as to whether that was true or not), then it would be reasonable to award Monster the \$4 million in increased profits during that time. (*Id.* at 224:1–13.) Of course, Mr. Tregillis had absolutely no evidence to support Monster’s claims that Vital actually used any Monster trade secret, what trade secret had been used, or even how it could be used by Vital to harm Monster.

Mr. Tregillis' testimony is literally the sole evidence proffered by Monster in support of its trade secret damages. Such short-sided assumptions, without anything more, cannot form the basis of a damages verdict. *O2 Micro Int'l Ltd. v. Monolithic Power Sys., Inc.*, 399 F. Supp. 2d 1064, 1077 (N.D. Cal. 2005), amended sub nom. *O2 Micro Int'l Ltd. v. Monolithic Power Sys., Inc.*, 420 F. Supp. 2d 1070 (N.D. Cal. 2006), *aff'd*, 221 F. App'x 996 (Fed. Cir. 2007), and *aff'd*, 221 F. App'x 996 (Fed. Cir. 2007) ("[T]he jury's award of unjust enrichment damages was based on speculation and guesswork, not on evidence."). Indeed, what Mr. Tregillis merely assumed was that, because sales increased in Georgia for several months after Mr. Cohen arrived at Vital, it thereby followed that the only conceivable possibility of those sales increases was due to Mr. Cohen's purported theft of Monster's trade secrets. *See Isaksen v. Vermont Castings, Inc.*, 825 F.2d 1158, 1165 (7th Cir. 1987) ("Post hoc ergo propter hoc is not a valid methodology of damage calculation, especially when it is apparent that other causal factors are at work.").

Mr. Swift, a Monster employee, testified to the jury that the thumb drives contained Monster confidential information that he could use to devastate Monster's interests if he worked for a competitor. (Ex. 14 (9/16 Trial Tr. (Swift)) at 66:7–16 and 67:10–22.) However, Mr. Swift never actually identified even a single trade secret on the thumb drives, how Monster had kept it confidential, how it could actually be used to damage Monster, or even any information to suggest that it was, in fact, used by anyone at Vital to cause Monster harm. (Ex. 14

(9/16 Trial Tr. (Swift)) at 84:3–5, 93:14–16, and 95:4–8.) Put bluntly, Monster does not come close to meeting its burden.

While increased market share may be used for damages calculations in trade secret cases, simply pointing to increased market share—without anything more, as Monster did here—is wholly inadequate to prove a trade secret claim, and justice demands the verdict award be reduced. *ChromaDex, Inc. v. Elysium Health, Inc.*, No. SACV1602277CJCDFMX, 2019 WL 7166056, at *1 (C.D. Cal. Oct. 9, 2019) (“Under both California and federal law, a complainant may recover damages for . . . (b) unjust enrichment caused by misappropriation. . . . Causal chains may have more than one link, but those links must be ‘not hypothetical or tenuous,’ and remain plausible.”) (emphasis in the original); Cf. *Aviva Sports, Inc. v. Fingerhut Direct Mktg., Inc.*, 829 F. Supp. 2d 802, 816 (D. Minn. 2011) (“[T]he change in the parties’ sales positions is simply that, a change.”)

Based on this record, the jury award of \$3 million is excessive. Monster failed to even identify what trade secret had been misappropriated and how that unidentified trade secret was used by Vital to cause harm to Monster or even benefit Vital.¹⁷ This Court should use its equitable powers and reduce the trade secret award to nominal damages of \$1.00. See A.L.

¹⁷Monster has an opposition brief. Vital challenges Monster to identify a single trade secret—just one—where Monster believes the record establishes it satisfied all five elements necessary to prove a trade secret misappropriation claim, and that would justify sustaining the existing award of \$3 million.

Lab'ys, Inc. v. Philips Roxane, Inc., 803 F.2d 378, 383 (8th Cir. 1986) (affirming decision to reduce compensatory damages to nominal damages of \$1).

C. The Court should grant JNOV on the false advertising claims and tortious interference claims.

1. Standard of review.

Pursuant to Fed. R. Civ. P. 50(b), this Court may: (a) allow the verdict to stand, (b) order a new trial, or (c) direct entry of judgment as a matter of law. In determining whether to grant judgment as a matter of law, this Court should determine whether the jury had a legally sufficient evidentiary basis to find for Monster. *Zion v. Cnty. of Orange*, No. 8:14-cv-01134-JVS-JDE, 2019 WL 8064611, at *6 (C.D. Cal. Apr. 17, 2019) (quoting *Tortu v. Las Vegas Metro. Police Dep't*, 556 F.3d 1075, 1083 (9th Cir. 2009)).

In making its decision on Defendants' directed verdict motion, this Court should determine whether the evidence, construed in the light most favorable to Monster, permits only one reasonable conclusion, and if that conclusion is contrary to that of the jury verdict. *White v. Ford Motor Co.*, 312 F.3d 998, 1010 (9th Cir. 2002), opinion amended on denial of reh'g, 335 F.3d 833 (9th Cir. 2003) (quoting *Forrett v. Richardson*, 112 F.3d 416, 419 (9th Cir. 1997)). If so, then Vital and Owoc are entitled to judgment on all or a portion of the claims on which Monster prevailed. See, e.g., *Ace v. Aetna Life Inc. Co.*, 139 F.3d 1241, 1243 (9th Cir. 1998), as amended on reh'g (Mar. 12, 1998).

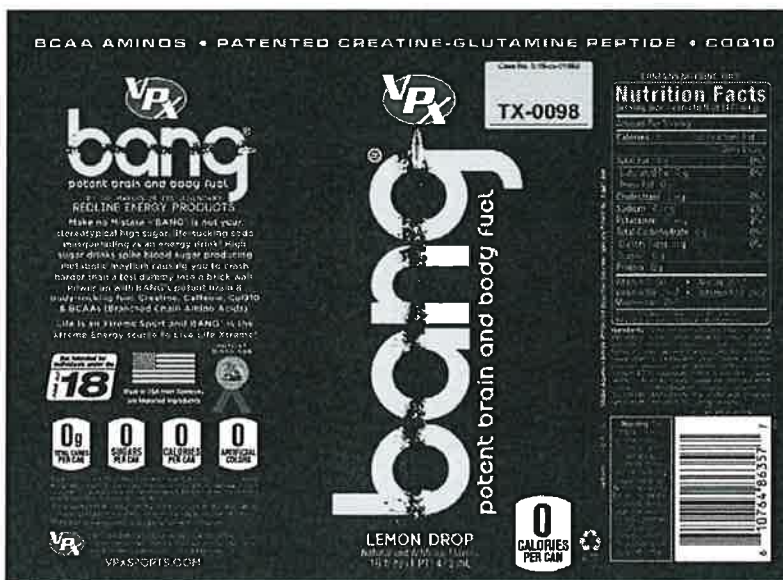
For the reasons explained below, the evidence only permits one conclusion as to the false advertising and shelf space claims. Accordingly, the Motion for JNOV should be granted as to those claims.

2. The alleged false statements considered by the jury should have been limited to the Bang Energy label because only the Bang Energy label was shown to Dr. Cowan's survey participants and the survey was the only evidence of confusion.

Vital produces a number of "better-for-you" products that include powder supplements, hydration beverages and energy drinks. Out of all of Vital's products, only Vital's Bang Energy drink is at issue in this lawsuit. A picture of the two Bang Energy labels made for the energy drink during the relevant time periods are pictured below:



(TX-0098)



(TX-0113)

The central theme of Monster's allegations is that Vital falsely deceived consumers into believing that if they drink Bang Energy, then they will obtain the benefits of creatine/creatine monohydrate (i.e., increased lean muscle mass and strength). Further, Monster alleged that Vital promised consumers that Bang Energy is a source of creatine (Ex. 12 (9/14 Trial Tr. (Carpenter)) at 38:15–21; Ex. 15 (9/20 Trial Tr. (Escalante)) at 189:8–14 and 199:11–20.) Thus, Monster argues, Vital promised the public that Super Creatine breaks down in the body and increases creatine levels in the human blood stream such that Vital promised enhanced physical and cognitive benefits simply by drinking Bang Energy. (Ex. 2 (8/26 Trial Tr.) at 34:20–36:21.) Specifically, Monster claims that Vital promised that drinking Bang Energy “will build lean muscle and improve brain function” (Dkt. 61 at ¶ 2), or fight depression and reverse mental retardation. (*Id.* at ¶ 3.) Of course, it is undisputed the Bang Energy label makes none of these claims.

The only evidence Monster put into the record for the entire universe of alleged false “commercial advertisements” by Vital is the survey evidence and expert opinion of Dr. Cowan. And, again, the only commercial advertisement Dr. Cowan showed any of the survey participants was the Bang Energy label. (Ex. 11 (9/13 Trial Tr. (Cowan)) at 184:7–25 and 235:9–236:4.) Monster cannot point to any other Vital “commercial advertisement” that Dr. Cowan showed to any survey participant, or any other evidence demonstrating any customer confusion as to any commercial advertisement made by Vital other than the label on the energy drink itself. Defendants

moved before trial to exclude all testimony and evidence from Dr. Cowan. (Dkt. 569.) This Court found the Cowan survey admissible and “probative of whether Defendants’ allegedly false statements, including ‘Super Creatine’ on Bang Energy cans, has the tendency to deceive a substantial segment of its audience.” (Dkt. 798 at 36.)

On September 23, 2022, Defendants moved for directed verdict on Monster’s false advertising claims because Dr. Cowan’s survey was limited to the can and thus the commercial advertisements must in fact be limited to representations on the Bang Energy can. (Ex. 18 (9/23 Trial Tr.) at 110:12–19.) During oral argument on the directed verdict motions, the Court noted that it was a “key question” as to whether all of the other commercial advertisements were an independent action or were instead offered to support that what is contained on the Bang Energy can is false. (*Id.* at 110:20–25.)

When the Court asked Monster’s counsel to summarize Dr. Cowan’s opinions about other Vital commercial advertisements other than the Bang Energy can, Monster responded that Dr. Cowan asked the survey participants about creatine generally. (*Id.* at 112:13–113:15.) And that is consistent with Dr. Cowan’s survey in terms of a few general questions about creatine, including self-serving questions about creatine monohydrate without any questions as to whether the survey respondent even knew what creatine monohydrate was. (TX-6602 at 20 (“Q44 Finally, please answer a few questions about creatine. Creatine monohydrate, the most common form of creatine, increases the

body's circulating creatine levels. If a product is advertised as containing Super Creatine, would you expect that product to increase the body's circulating creatine levels?" "Q45 Creatine monohydrate is the most common form of creatine. What do you believe Super Creatine's effect is on the human body compared to creatine monohydrate's effect on the human body?") But Monster could not show Dr. Cowan surveyed any participants as to any social media posts or materials Monster claimed falsely represented Bang Energy to distributors, store owners, purchasing agents, trade shows, etc. because it is undisputed that Dr. Cowan did not do so.

During oral argument on the directed verdict, the Court expressed concern about potential juror confusion with Monster's false advertising theory. (Ex. 18 (9/23 Trial Tr.) at 116:12–16.) Monster's response was unequivocal—that the jury should consider each of the advertising statements as an independently actionable false statement, and its false advertising claims should not be limited to the Bang Energy label. (*Id.* at 110:17–25 and 112:13–15.)

After taking the matter under advisement and after supplemental briefing by both sides on the issues (Dkt. 861; Dkt. 864; and Dkt. 867), the Court denied the motion for directed verdict. (Ex. 19 (9/27 Trial Tr.) at 50:16–19.) Specifically, the Court ruled as follows immediately before closing arguments to the jury: "So my ruling on that is that Monster can argue the non-can advertising. There's sufficient basis in the evidence for them to be able to argue it, so they will be allowed to do that." (*Id.*)

The evidence at trial, even when construed in the light most favorable to Monster, simply does not permit any possible conclusion that Monster satisfied all six elements of its false advertising claim as to a single commercial advertisement. Permitting Monster to so argue resulted in the very juror confusion the Court had expressed concern over.

None of Vital's commercial advertisements, other than the Bang Energy can, were ever surveyed by Dr. Cowan. Additionally, Mr. Tregillis—the only witness who provided any testimony as to Monster's lost profits from the alleged false advertising—admits his entire opinion was based exclusively on the Cowan survey. (Ex. 13 (9/15 Trial Tr. (Tregillis)) at 236:17–25.) Thus, for all other alleged false advertisements, JNOV is appropriate—Monster cannot meet its burden on elements 3, 4, or 6 to satisfy a viable claim.¹⁸ *Scranton Gillette Commc'ns, Inc. v. Dannhausen*, No. 96 C 8353, 1999 WL 558134, at *3 (N.D. Ill. July 27, 1999).

In *Scranton*, the Court granted defendants' motion for judgment notwithstanding the verdict as

¹⁸Monster was required to prove the following six elements at trial: 1) Vital and/or Owoc made a false or misleading statement of fact regarding the ingredients in Bang, Monster's products, or the ingredients in Monster's products; 2) The false or misleading statement(s) was made in a commercial advertisement or promotion; 3) The false or misleading statement(s) deceived or had the tendency to deceive a substantial segment of its audience; 4) The deception was material, in that it is likely to influence the purchasing decision; 5) Vital and/or Owoc caused the false or misleading statement(s) to enter interstate commerce; and 6) Monster was or is likely to be injured as a result of the false or misleading statement(s). (Dkt. 889, Jury Instruction No. 25.)

to the plaintiff's Lanham Act claims because there was no evidence in the record of any customer confusion. Specifically, the Court held that "[h]ere, the plaintiff offered no evidence that a single recipient of the *Greenhouse Business* promotional literature was confused by the false statements contained therein. Moreover, the plaintiff offered no evidence that even one of the 700 recipients of the *Greenhouse Business* promotional literature declined to contract with it in reliance on McCormick Communications' false statements. In other words, the plaintiff failed to prove the necessary elements to recover of damages under § 43(a) of the Lanham Act, and therefore, it is not entitled to such relief." *Id.* at *3.

Monster is thus left only to argue its damages as a result of the Bang Energy label because that is the only evidence in the record. But that still does not carry the burden for Monster and entitle it to an approximate \$271,000,000 verdict on its false advertising claims. Even if Monster arguably provided evidence as to the Bang Energy label for elements 3, 4, and 6, Monster still must establish the Bang Energy label meets its burden as to element 1 of a false advertising claim, which required Monster to prove that Vital and Owoc made one or more false/misleading statements about Bang Energy or Bang Energy's ingredients. And that Monster cannot do, because as already stated, the Bang Energy label, viewed independently, makes absolutely no efficacy claims.

Specifically, the Bang Energy label never claims (1) to be a source of creatine; (2) to permit

CLL to enter the bloodstream as well or better than creatine monohydrate—or even to enter the bloodstream at all; (3) to cure mental retardation, Alzheimer’s or any other cognitive issue; (4) that Super Creatine improved any cognitive abilities at all; (5) that Super Creatine increases creatine levels in the body; (6) that Super Creatine will build lean muscle mass; or (7) absolutely any other promise of any kind whatsoever as to the consumption of Super Creatine.

To the contrary, Vital, at best, used the tag line “Potent Brain and Body Fuel” on the can. (TX-6097-A; TX-6968.) Monster has never argued or provided any evidence that Vital’s tagline for Bang Energy gave rise to a false advertising claim, or provided evidence that it met all six elements needed to prove a Lanham Act claim. Nor could it, because this statement has already been deemed non-actionable puffery. (*In re Bang Energy Drink Mktg. Litig.*, No. 18-CV-05758-JST, 2020 WL 9815622, at *3 (N.D. Cal. Sept. 14, 2020) (“The Court has already held that the term ‘potent,’ the statement ‘power up with BANG®’s potent brain & body-rocking fuel,’ and the use of ‘ultra’ to modify ‘CoQ10’ are non-actionable puffery.”) At worst, it is reasonable for a purchaser of Bang Energy to interpret the tag line meaning Bang Energy will provide a consumer with energy—which is in fact delivered through the large amount of caffeine in the Bang Energy beverage. In other words, a reasonable consumer of an energy drink expects the beverage will provide an energy boost—and with 300 mg of caffeine, it is undisputed Bang Energy does exactly that. It is not by oversight that Monster failed to produce anyone from the general

public claiming they thought Bang Energy would deliver the same type of efficacy results as Bang Master Blaster—because no one was, in fact, confused by the two products. CLL, or Super Creatine, is a dipeptide contained in Bang Energy. Super Creatine is a trademark and it is truthful: it is a creatine molecule bonded to a leucine molecule and is “super” because it is water soluble. When the covalent bond is broken, CLL converts to creatine and leucine. (Ex. 16 (9/21 Trial Tr. (Parang)) at 79:2–17.) There is simply nothing on the Bang Energy label that supports Monster’s false advertising claim because there is nothing on the Bang Energy label making any efficacy or performance claim whatsoever. It must therefore be dismissed.

3. Monster failed to prove that any one advertisement by Vital met all elements required to prove a Lanham Act claim.

Monster’s promises on what it would prove at trial fell short. To succeed on its Lanham Act claim, Monster was required to prove:

1. Vital and/or Owoc made one or more false or misleading statements of fact about Bang Energy, the ingredients in Bang Energy, Monster’s products, or the ingredients in Monster’s products;
2. The false or misleading statement(s) was made in a commercial advertisement or promotion;
3. The false or misleading statement(s) deceived or had the tendency to deceive a substantial segment of its audience;

4. The deception was material, in that it is likely to influence the purchasing decision;
 5. Vital and/or Owoc caused the false or misleading statement(s) to enter interstate commerce; and
 6. Monster was or is likely to be injured as a result of the false or misleading statement(s).
- (Dtk. 889, Jury Instruction No. 25.)

While true that Monster chose to use its time at trial to introduce a number of documents it claims constituted “commercial advertisements” under the Lanham Act, the law is clear that Monster was obligated to show, for at least one commercial advertisement, that all six of the above elements were met. *Verisign, Inc. v. XYZ.com LLC*, 848 F.3d 292, 299 (4th Cir. 2017); see, e.g., Dkt. 889. Jury Instruction No. 25 (“To succeed on this claim, Monster must prove each of the following by a preponderance of the evidence. . . . If, on the other hand, you find that Monster has failed to prove any one of these elements, you must find for Vital and/or Mr. Owoc.”) (emphasis added). Monster failed to do so, and thus JNOV on Monster’s Lanham Act claim is appropriate.

Specifically, as to all other “commercial advertisements”¹⁹ Monster introduced during trial,

¹⁹Vital asserts that an email to a distributor, purchasing agreement for a store, materials used at a trade show, or a single power point to a store or distributor is inadequate to constitute a commercial advertisement because it was not extensively disseminated and no one in the general public (the basis for Monster’s lost profit numbers) ever saw any of those

the record is completely devoid that, other than the Bang Energy label, any of the commercial advertisements deceived the general public, the materiality of the deception influenced a general public's purchasing decision, or that Monster was or is likely to be injured as a result of the false or misleading statement(s). In other words, excepting only the expert testimony of Dr. Cowan and Mr. Tregillis, there is no evidence in the record that Monster can point to that any Vital commercial advertisement satisfies elements 3, 4, or 6 of Jury Instruction No. 25 (False Advertising Lanham Act – Elements). Not a single customer, distributor, store owner or purchasing agent testified about any confusion/deceit or even relying upon any of the “commercial advertisements” to influence their purchasing decision of Bang Energy. That is because Monster produced no such witnesses.

purported “commercial advertisements.” See, e.g., Court’s Order on Mot. for Summ. J. (Dkt. No 740) at 16, n. 10 (holding that emails are not commercial advertisements or promotions); *Maximum Availability Ltd. v. Vision Sols., Inc.*, No. CV 10-1488-GW(RZX), 2011 WL 13176820 (C.D. Cal. Dec. 12, 2011) (internal guidelines given to sales force to disseminate to customers insufficient to constitute commercial advertisement); *eMove Inc. v. SMD Software Inc.*, No. CV-10-02052-PHX-JRG, 2012 WL 1379063 (D. Ariz. Apr. 20, 2012) (evidence of a general message conveyed to unspecified customers at unspecified time, in an unspecified manner by unspecified persons is not commercial advertisement under Lanham Act). However, for purposes of this JNOV motion, Vital simply states that even if such statements qualify as commercial advertisements, it is still appropriate to dismiss the Lanham Act claims because Monster never tied those advertisements to all six elements necessary to prove a false advertising claim.

Generally speaking, proving materiality or that Vital's "commercial advertisements" influenced a consumer's purchasing decision and had the tendency to deceive a substantial segment of the general public may be done via expert/survey evidence. However, in order for the expert/survey evidence to actually satisfy Monster's burden, the survey respondents must in fact review the commercial advertisement and provide survey evidence adequate to allow the expert to have a reasonable basis to opine that the commercial advertisement: (1) deceived or had the tendency to deceive the general public; (2) was likely to influence the purchasing decision; and (3) Monster was injured as a result. See, e.g., *Kournikova v. Gen. Media Commc'ns Inc.*, 278 F. Supp. 2d 1111, 1125 (C.D. Cal. 2003) (finding survey unreliable where survey participants were not shown relevant materials).

It is common sense in a Lanham Act lawsuit that Monster must establish Vital's commercial advertisement(s) is not just false, but also influenced the consumer and caused damages. *LivePerson, Inc. v. [24]7.ai, Inc.*, No. 17-CV-01268- JST, 2018 WL 5849025, at *7 (N.D. Cal. Nov. 7, 2017). A false statement that no one believed or relied upon in making a purchasing decision—i.e., world's best cup of coffee—is inadequate to give rise to a viable claim. See *Fisher v. Monster Beverage Corp.*, No. EDCV 12-02188-VAP, 2013 WL 4804385, at *13 (C.D. Cal. July 9, 2013) (identifying examples of non-actionable puffery). Monster must be able to point to at least one challenged statement that satisfies all of these elements, because "a Lanham Act claimant may not mix and match statements, with some satisfying one

Lanham Act element and some satisfying others.” *Verisign, Inc.*, 848 F.3d at 299; see also *Johnson & Johnson Vision Care, Inc. v. 1-800 Contacts, Inc.*, 299 F.3d 1242, 1248 (11th Cir. 2002) (rejecting argument that challenged statements should be evaluated in concert to determine whether any or all violated Lanham Act). Because Monster cannot do so, JNOV is appropriate.

4. There is insufficient evidence to support a finding of personal liability as against Jack Owoc on the false advertising claims.

First, if Vital is found not to have any liability under Monster’s false advertising claims, then obviously neither can Owoc. Next, in order to find that Owoc is personally liable, it is not enough that Owoc is simply the CEO of Vital. Were the standard so low, every managing agent, C-suite executive, and other senior level management would be liable for any act performed by or on behalf of the corporation—such a nonsensical position is not the law.

Instead, the law requires Monster to prove that Owoc authorized or directed the false advertisement(s) at issue giving rise to the liability. *POM Wonderful LLC v. Purely Juice, Inc.*, 362 F. App’x 577, 581 (9th Cir. 2009). Put another way, Owoc is only personally liable if he in fact committed the tort/false advertisement and is an actual participant in the tort giving rise to the injury and deceit to the general public. *Id.* (citing J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition*, § 25:24 (5th ed. 2022)).

In this case, there is no evidence that Owoc directed any false advertisement that gives rise to liability meeting all six elements Monster had to establish for a Lanham Act violation. The Bang Energy can does not contain any false or misleading statements. The can references “Super Creatine”, which is a dipeptide with a strong covalent bond. When that covalent bond is broken, CLL breaks into a creatine molecule and a leucine molecule (Ex. 16 (9/21 Trial Tr. (Parang)) at 79:2–17.) Super Creatine is “super” because it is the only form of creatine that is shelf stable—a true statement that Owoc made clear time and time again. (TX-1089; TX-1281-A; TX-1700; Ex. 5 (9/1 Trial Tr. (J. Owoc)) at 228:14–24 and 245:11–14.) Owoc also repeatedly made clear in his social media posts that Super Creatine is not creatine monohydrate (TX-0070; TX-884-A; TX-1305; TX-1700.) Monster cannot point to a single commercial advertisement (or any document/video) where Owoc claimed Super Creatine was either creatine monohydrate or as effective as creatine monohydrate. The Bang Energy label makes no efficacy claims whatsoever. Thus, if the Bang Energy label makes no efficacy claims, and the claims are limited to the Bang Energy label, then Owoc could not have specifically authorized or directed any false advertisement as to the efficacy of Super Creatine.

One additional issue must be raised. Monster repeatedly and inappropriately appealed to the jurors’ passions by alleging that Vital and Owoc claimed Bang Energy could cure Alzheimer’s, Parkinson’s, and reverse mental retardation (Ex. 2 (8/26 Trial Tr.) at 37:15–21 and 60:25–61:12; *Id.* (8/26 Trial Tr. (Bukovi)) at 198:9– 11 (“Q. Again, this

post about your new product with Super Creatine includes claims that Creatine could prevent mental retardation and Alzheimer's, right?"); Ex. 4 (8/31 Trial Tr. (Kreider)) at 217:4-7 ("Q. Sir, how many studies support the idea what Mr. Owoc claims here: You can solve mental retardation with his Super Creatine? A. Zero.") The evidence offered in support of Monster's claim was a social media video. (TX-4609.) In that video, here is what Owoc actually said:

Owoc: Rrrrrrrrrrrrip like Rambo. Smart like Picasso, because again the future of creatine is more about brains, than brawn. Yes, you can get ripped like Rambo because obviously you lift more weights, you have greater endurance, you can perform better, but, the future of creatine, remember, is going to be more about the brain than the body. As you age you have creatine transport deficiency syndrome, where creatine does not cross the blood/brain barrier as well as it does when you're younger. Because of this, as you age, you become mentally retarded. So everybody watching this, as time goes by, every day that goes by, that you are becoming more and more mentally retarded. I'm sorry to bring you that news but it's true. Now . . .

Maegan: That's bad news.

Owoc: ... we have great news though. We could possibly reverse that with these new creatine peptides that I've patented.

They're miraculous because peptides could cross the blood/brain barrier better than creatine alone.

Maegan Wait

Owoc: Because creatine alone is very poor at crossing the blood/brain barrier.

Maegan: Jack, somebody's going to ask me what is the blood/brain barrier.

Owoc: It's just a barrier that prevents certain things from entering your brain and other things it allows to enter. Now, if you take a creatine peptide, in other words, creatine attached to glycine, or leucine or isoleucine for example and you attach a fat to it, a long chain fatty acid estorent, aliphatic ester, then this creatine can readily cross the blood/brain barrier. Because the blood/brain barrier is lipophilic, which means fat loving. So if you have a creatine peptide and you have a long-change fat on it, the longer change the fat, the more it readily crosses into the brain, you can solve creatine transport deficiency syndrome. You can solve mental retardation as we age.

(TX-4609 at 3:10–5:07 (emphasis added).)

In this social media clip, Owoc was clearly referencing the potential for creatine, in the future, to assist with certain cognitive impairments.

Specifically, Owoc was discussing future scientific breakthroughs where arguably scientists would be able to attach a fatty acid to a creatine peptide that would allow that specific peptide to cross the blood brain barrier better than creatine. As one ages, it is undisputed it becomes increasingly difficult for creatine to cross the blood brain barrier. Owoc specifically talked in terms of “possibly” and “could,” so there is no possible way one can construe his comments to make any such efficacy claims as to the present, and certainly not as to the Bang Energy drink. Equally as important, it is undisputed that Super Creatine does not have a fatty acid chain attached to it, so Owoc could not have been making any efficacy claims as to Super Creatine having any ability to reverse mental retardation, cure Parkinson’s disease, or any other cognitive development. For Monster to suggest otherwise is frivolous, and was done intentionally to influence the jurors’ passions.

Juror #4, in *voir dire*, disclosed that he has a loved one with developmental disabilities. (Ex. 1 (8/25 Trial Tr.) at 128:12–14.) Monster improperly attempted to influence Jury #4’s passions by seeking to vilify Owoc based upon a false statement that he never said. Monster should not be rewarded for such a blatant, untruthful argument designed to improperly appeal to jury passion and prejudices. See *Tillman v. Freightliner, LLC*, 247 F. App’x 867, 869 (9th Cir. 2007) (remanding and remitting for excessive damages figure based on evidence of passion and prejudice); *Watson v. City of San Jose*, 800 F.3d 1135, 1142 (9th Cir. 2015) (affirming grant of new trial as a result of juror passion and

prejudice); *Athena Cosms., Inc. v. AMN Distrib. Inc.*, No. 220CV05526SVWSHK, 2021 WL 6882299, at *5 (C.D. Cal. Dec. 21, 2021) (ordering new trial based on passion and prejudice resulting from attorney misconduct during trial); *Call Delivery Sys., LLC v. Morgan*, No. 220CV04637CBMPDX, 2022 WL 18143363, at *5 (C.D. Cal. Sept. 20, 2022) (same).

5. There is no basis to support liability or damages under Monster’s shelf-space claim.

Monster’s tortious interference with contract claims were limited to its contracts with only three stores: Walmart, Circle K and AMPM. (Dkt. 889, Jury Instruction No. 40.)

As explained in the fact section, *supra*, Monster’s three lay witnesses each testified they saw Monster product was not on shelves they believed it was supposed to be on. (Ex. 18 (9/23 Trial Tr.) at 108:8–14.) Not a single witness testified they saw Vital move Monster’s product. Monster argued such testimony—a few Walmart stores in a specific territory, for example—was adequate to impose a multiplier on all Walmart stores in the United States. Additionally, Monster argued for the same multiplier for AMPM and Circle K. The law is clear that speculation and guesswork are inadequate to provide a basis for damages. See *McClaran v. Plastic Indus., Inc.*, 97 F.3d 347, 356 (9th Cir. 1996) (“A jury’s award of damages may be stricken where an assumption necessary to support that award is wholly speculative.”). In this case, the purported general observations of three Monster witnesses—observing that Monster product was not in specific

shelves—on a number of store visits, without any breakdown of length of time, store names, store dates, etc. is wholly inadequate to justify an award of \$18 million. The jury’s verdict shows they simply did not understand the facts or their instructions in awarding such an irrational amount.

The Court, on Vital and Owoc’s motion for directed verdict, allowed Monster to proceed on a nominal damage theory. (Ex. 18 (9/23 Trial Tr.) at 110:5–10.) But Monster did not seek nominal damages. Vital respectfully moves this Court to correct this error and now dismiss the tortious interference claims in their entirety for a complete failure to prove any damages.

V. CONCLUSION

For all of the reasons explained above, Vital requests that the Court enter an order as follows:

1. Granting a new trial as to all of Monster’s claims to avoid a miscarriage of justice;
2. Alternatively, reducing Monster’s false advertising verdict to \$828,530 and its tortious interference and trade secret claims to \$1.00; with Monster given the option to accept the reduced amounts or agree to a new trial as to those claims; or
3. Alternatively, dismissing Monster’s false advertising and shelf space claims in their entirety pursuant to Fed. R. Civ. P. 50.

Dated February 23, 2023

QUARLES & BRADY LLP

By: /s/ David Muth

David P. Muth

Attorneys for Defendant

VITAL PHARMACEUTICALS, INC., D/B/A VPX
SPORTS

L.R. 11-6.2 CERTIFICATE OF COMPLIANCE

The undersigned, counsel of record for Defendant, certifies that pursuant to the Court's order entered on January 4, 2023, this brief is exempt from the word limits contained in L.R. 11-6.1 and instead complies with the Court's order that the brief shall not exceed fifty (50) pages in length.

Dated: February 23, 2023

QUARLES & BRADY LLP

By: /s/ David P. Muth

David P. Muth

Attorneys for Defendant

**VITAL PHARMACEUTICALS, INC., D/B/A VPX
SPORTS**