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VITAL PHARMACEUTICALS, INC. and

JHO INTELLECTUAL PROPERTY

HOLDINGS, LLC

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
EASTERN DIVISION

VITAL PHARMACEUTICALS,
INC.

and JHO INTELLECTUAL
PROPERTY HOLDINGS, LLC,

Plaintiffs,

v.

ORANGE BANG, INC., and
MONSTER ENERGY COMPANY,

Defendants.

Case No. 5:20-cv-1464-DSF-SHK

**PLAINTIFFS' NOTICE OF
MOTION AND MOTION TO
VACATE ARBITRATION
AWARD; MEMORANDUM OF
POINTS AND AUTHORITIES**

[Declaration of Daniel M. Janssen
with Exhibits and [Proposed] Order
filed concurrently herewith]

Date: June 27, 2022

Time: 1:30 P.M.

Place: Courtroom 7D

TO ALL PARTIES TO THIS ACTION AND TO THEIR RESPECTIVE ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on June 27, 2022 at 1:30 p.m., or as the Court may otherwise order, in the above-titled Court, located at First Street Courthouse, 350 West 1st Street, Courtroom 7D, Los Angeles, California, Plaintiffs Vital Pharmaceuticals, Inc. (“VPX”) and JHO Intellectual Property Holdings, LLC (“JHO,” and, together with VPX, “Plaintiffs”) will move, and hereby do move, this Court to vacate the final award entered by the Arbitrator in the Arbitration¹ on April 4, 2022 (the “Award”) (ECF No. 60 – 1) in favor of Orange Bang, Inc. (“OBI”) and Monster Energy, Inc. (“Monster,” and, together with OBI, “Defendants”). Plaintiffs make this Motion in accordance with the Court’s April 15, 2022 Order (ECF No. 71).

Under controlling Supreme Court and Ninth Circuit precedent, this Court must vacate the Award pursuant to Sections 10(a)(2) and 10(a)(4) of the Federal Arbitration Act. 9 U.S.C. §§ 10(a)(2) and 10(a)(4). Without finding any willful breach or infringement by VPX or any lost sales, customers, or profits to OBI, and in direct contravention of the 2010 settlement agreement at issue, [REDACTED]

[REDACTED] In fashioning this extraordinary remedy, the Arbitrator “stray[ed] from interpretation and application” of the written settlement agreement between OBI and VPX at issue in the Arbitration and effectively “dispense[ed his] own brand” of economic “justice,” in a manner that can only be explained as the product of bias. *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 663 (2010); *see also Aspic Engineering & Constr. Co. v. ECC Centcom*

¹ The “Arbitration” refers to *Orange Bang, Inc. and Monster Energy Company v. Vital Pharmaceuticals, Inc., d/b/a VPX Sports*, Case No. 01-20-0005-6081 before the American Arbitration Association (“AAA”) and arbitrator Bruce Isaacs (the “Arbitrator”). JHO was never made party to the Arbitration.

1 *Constructors LLC*, 913 F.3d 1162, 1169 (9th Cir. 2019) (vacating award where the
 2 arbitrator “disregard[ed] the plain text of a contract without legal justification simply
 3 to reach a result that he believes is just”). The “completely irrational” Award lacks
 4 “any contractual basis,” and repeatedly disregards, contravenes, and ultimately
 5 destroys the unambiguous terms of the settlement agreement under which the
 6 parties—OBI and VPX—mutually performed for more than a decade. *Stolt-Nielsen*,
 7 559 U.S. at 668-69, 671-75, 676 (2010) (award vacated); *see also United*
 8 *Paperworkers Int’l Union v. Misco, Inc.*, 484 U.S. 29, 38 (1987) (“The arbitrator may
 9 not ignore the plain language of the contract.”) (award confirmed).

10 Under the August 2010 settlement agreement, VPX resolved trademark
 11 infringement challenges brought by OBI, a small local southern California company
 12 that sold whipped fountain beverages, over VPX’s BANG! pre-workout drink, which
 13 VPX advertised as containing the Creatinol-O-Phosphate (“COP”) form of creatine.
 14 It was a branding dispute, focused on what appeared on the product label, not what
 15 was in the beverage. Under the fully-integrated settlement agreement, OBI expressly
 16 permitted VPX, without restriction, to continue to sell its existing “creatine-based”
 17 Pre-Workout (then its only BANG product) and future products that were “creatine-
 18 based” in the same way without restriction, and nutritional products without creatine
 19 through vitamin stores and other defined “Nutritional” channels. In negotiating the
 20 settlement agreement, the parties used the term “creatine-containing” and “creatine-
 21 based” interchangeably, never discussed their meanings other than as descriptors of
 22 the Pre-Workout and future VPX’s products to distinguish them from OBI’s fountain
 23 drinks, and never once discussed the creatine content, efficacy or restrictions on the
 24 VPX’s future products. Reasonably relying on OBI’s express releases, permissions,
 25 and covenants not to sue, VPX invested hundreds of millions of dollars and achieved
 26 astronomical success over the next decade, launching numerous “creatine-based”
 27 products with different forms of creatine displayed on the label. All the while, OBI
 28 sat silently by and watched, because, as the Award found, it believed and accepted

1 that VPX was selling “creatine-based” products in accordance with the settlement
2 agreement.

3 In late 2019, after VPX launched a specialty diet product that did not contain
4 creatine, OBI commenced another branding dispute, contending that VPX had
5 breached the settlement agreement by selling a product that did not “*d[id] not list*
6 *creatine as an ingredient, and thus d[id] not appear to be creatine-based.*” After
7 VPX filed an action seeking a declaration of its rights, OBI learned that Monster was
8 pursuing false advertising litigation against VPX claiming, for strategic purposes,
9 that the forms of creatine VPX advertised in its products were supposedly not “pure”
10 creatine, i.e., creatine monohydrate powder (“CM”). OBI opportunistically disclosed
11 the confidential settlement agreement to Monster, VPX’s principal competitor, and
12 secretly purported to assign its rights (including its right to demand arbitration) under
13 the settlement agreement to Monster, while retaining all of its trademark claims and
14 marks and all of its obligations owing to VPX. Thus, after splitting up OBI’s rights,
15 Defendants reconfigured as two claimants seeking to recover the same damages and
16 same relief on distinct claims. Without disclosing the assignment of OBI’s litigation
17 rights to Monster, Defendants affirmatively misled the state court and VPX, causing
18 VPX to dismiss its declaratory judgment action and agree to arbitrate OBI’s limited,
19 discrete claims concerning VPX’s specialty diet product.

20 In June 2020, Defendants ambushed VPX with a surprise \$1.2 billion
21 arbitration demand, which asserted split contract claims by Monster and trademark
22 claims by OBI challenging not just VPX’s specialty diet product, but all of VPX’s
23 products, including the Pre-Workout released under the settlement agreement and its
24 flagship product BANG Energy RTD, which contains a form of creatine that VPX
25 advertises as “Super Creatine.” Defendants brought the Arbitration under the exact
26 same theories that Monster is asserting in its flawed false advertising litigation
27 against VPX, only repackaged as a breach of the settlement agreement. In effect,
28 Monster had purchased from OBI the opportunity to pre-try its false advertising

1 claims in the Arbitration. Thereafter, the AAA appointed the single Arbitrator, who
 2 commenced the proceedings by refusing to appoint a 3-member panel as required by
 3 AAA rules, and then, after keeping the case all to himself, proceeded to issue an
 4 Award that is so irrational and punitive that it can only be explained as being a
 5 product of the Arbitrator's own personal, extra-contractual agenda and partiality.

6 Embracing the arguments promoted by Monster, a stranger to the settlement
 7 agreement, and without any legal justification, the Arbitrator rewrote the fully-
 8 integrated contract and issued an Award that is so ludicrous that it defeats the
 9 foundational purpose of VPX and OBI's negotiated settlement, ignores and nullifies
 10 express contractual terms, denies VPX the benefit of its 2010 bargain with OBI, and
 11 awards an incoherent and legally baseless windfall of duplicative and punitive
 12 damages and equitable relief in favor of both Defendants that threatens VPX's very
 13 existence. The Arbitrator supplanted the contract's plain language and undisputed
 14 objectives at the time of its formation and imposed in their place a "brand new deal"
 15 of his own design that, repeatedly and in inexplicable ways, seeks to benefit Monster,
 16 a southern California company with a well-known reputation for the rate at which it
 17 generates lucrative arbitrations. *See Monster Energy Co. v. City Beverages, LLC*, 940
 18 F.3d 1130, 1136 (9th Cir. 2019) (vacating JAMS award in favor of Monster based on
 19 undisclosed conflicts of interest related to financial incentives resulting from
 20 Monster's "average rate of more than one arbitration per month" in southern
 21 California). The result is an Award that cannot rationally be reconciled with the
 22 written terms of the agreement and the parties' shared understanding of those terms,
 23 as evidenced by their near decade of mutual performance prior to Monster's contrived
 24 intervention.

25 The Arbitrator's imposition of a fundamentally implausible creative
 26 "standard" (imported by Monster from the false advertising case), which corrupted
 27 the entire Award, leads to a cascade of non-sensical and unjust results. Among other
 28 things, the Award (i) penalizes VPX with respect to issues it concedes were never

submitted to the Arbitrator’s review, (ii) nullifies VPX’s express and unambiguous rights under the 2010 Settlement to market and sell “creatine-based” products, (iii) effectively unsettles OBI’s 2010 lawsuit against VPX by resurrecting and awarding a windfall of damages on claims that were released, forever waived and dismissed with prejudice by an Order of this Court, (iv) awards damages and forward-looking relief to (a) both Defendants on VPX sales that the Award concedes were made in compliance with the settlement agreement and (b) to each Defendant on claims they individually did and could not bring, and (v) disregards directly controlling California law and the limits of an arbitrator’s authority under the FAA. And, having allowed OBI and Monster to split their claims and proceed as distinct entities, the Arbitrator put those claims back together again—exceeding his authority and demonstrating his personal bias— by treating Monster and OBI as if they were one in the same. The Arbitrator’s rewriting of the settlement agreement is so irrational that it nullifies the entire settlement agreement.

At bottom, public reports promoted by Monster that refer to the Award as “unprecedented” for ranking “among the largest-ever U.S. trademark awards”² are only half right. While the size of the Award is remarkable, it is the fundamental irrationality of the Award as compared to the simple 2010 settlement agreement and its objectives that makes the Award truly exceptional. Vacatur is not only justified, it is mandated.

This Motion is based on this Notice of Motion, the accompanying Memorandum of Points and Authorities, the Declaration of (“Janssen Decl.”) and accompanying exhibits, all papers and records on file in this case as cited herein, all other matters on which the Court may take judicial notice, and any further argument or evidence that may be made or submitted at the hearing.³

² <https://www.reuters.com/legal/legalindustry/monster-asks-court-enforce-175-mln-award-against-bang-energy-maker-2022-04-06/>.

³ Separately, Monster is not entitled to interest that it claims in connection with the Arbitration, because Defendants legally abandoned Monster’s contract claim upon their election of remedies. *In re Spreckels’ Est.*, 165 Cal. 597, 602 (1913); *Akin v. Certain Underwriters at Lloyd’s London*,

1 Dated: April 29, 2022

Respectfully submitted,

2 **QUARLES & BRADY LLP**

3 By: s/ Daniel M. Janssen

4 Daniel M. Janssen

5 *Attorneys for Plaintiffs Vital*
 6 *Pharmaceuticals, Inc. and*
 7 *JHO Intellectual Property Holdings, LLC*

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 21 140 Cal. App. 4th 291, 296 (2006). Their request for post-award, prejudgment interest is governed
 22 by federal law and is left to the Court's discretion and should be denied. *See Ministry of Def. &*
 23 *Support for the Armed Forces of the Islamic Republic of Iran v. Cubic Def. Sys., Inc.*, 665 F.3d
 24 1091, 1102-03 (9th Cir. 2011); *Frank Music Corp. v. Metro-Goldwyn-Mayer Inc.*, 886 F.2d 1545,
 25 1550-51 (9th Cir. 1989). Even if *some* interest amount were warranted, which it is not, *see, e.g.,*
 26 *GAC Int'l, LLC v. Roth Licensing, LLC*, No. 15-CV-2375, 2019 WL 174972, at *8 (E.D.N.Y. Jan.
 27 11, 2019) (denying post-award, prejudgment interest where award itself already adequately
 28 compensated party), interest should not be awarded on "the entire Award"; rather, only on the
 specific award of damages, and only at the rate as determined by *federal*, not California law as the
 Arbitrator erroneously supposed. *See, e.g., Ministry of Defense*, 665 F.3d at 1102-03; *Lagstein v.*
Certain Underwriters at Lloyd's of London, 725 F.3d 1050 (9th Cir. 2013). As a result of the
 abandonment of Monster's contract claim, the Arbitrator's award of fees to Monster violated *see*
 Cal. Civ. Code § 1717(b)(2); *Donnelly v. Am. Express Bank, FSB*, No. 18-CV-1024-GPC-WVG,
 2018 WL 4759206, at *4 (S.D. Cal. Oct. 2, 2018) ("A plaintiff's abandonment of its claim prior to
 trial constitutes a voluntary dismissal for the purposes of Cal. Civ. Code § 1717(b)(2)"), *aff'd sub*
nom. In re Donnelly, 773 F. App'x 963 (9th Cir. 2019).

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I. INTRODUCTION

The deference owed to arbitration awards under the Federal Arbitration Act (“FAA”) “is not the equivalent of a grant of limitless power.” *Leed Architectural Prods., Inc. v. United Steelworkers of Am., Local 6674*, 916 F.2d 63, 65 (2d Cir. 1990). Exceptional cases demand judicial intervention “[w]hen an arbitrator disregards the plain text of a contract without legal justification simply to reach a result he believes is just [].” *Aspic Eng’g & Constr. Co. v. ECC Centcom Constructors LLC*, 913 F.3d 1162, 1169 (9th Cir. 2019). This is such an exceptional case, where the Arbitrator exceeded his authority by blatantly re-writing and nullifying, without legal justification, a fully-integrated settlement agreement (the “Settlement”), between OBI and VPX to reach a pre-determined result that is punitive, unprecedented and favors VPX’s primary competitor (Monster) who was never a party to the Settlement: liability of [REDACTED]

[REDACTED] Supreme Court and Ninth Circuit precedent mandate vacatur for this abuse of authority and evident partiality.

By its unambiguous terms, the August 2010 Settlement resolved, released and dismissed with prejudice OBI’s trademark infringement claims challenging VPX’s BANG! Pre-Workout drink, (“Pre-Workout”), a liquid nutritional supplement containing Creatinol-O-Phosphate (“COP”), that VPX advertised as the “WORLD’S ONLY STABLE LIQUID CREATINE.” Yet, rather than apply the contract, the Award repeatedly disregards and voids its plain language and undisputed objectives and replaces them with a fundamentally implausible definition of the term “creatine” developed years after-the-fact, not by the parties to the settlement, but by VPX’s competitor, Monster, for use in its parallel false advertising litigation against VPX. There was never any dispute that OBI permitted VPX to sell its “existing creatine-based” Pre-Workout and to sell similar products marketed as “creatine-based,” which

1 is reflected in the written terms of the contract and evidenced by VPX and OBI's
2 mutual performance over more than a decade. Relying on OBI's permission, VPX
3 invested hundreds of millions of dollars to achieve astronomical success in the energy
4 drink market with its BANG Energy RTD product. Ignoring those written terms and
5 VPX and OBI's mutual performance, the Arbitrator destroyed the parties' Settlement
6 and replaced it with his own "brand new deal." He did so, not to construe the contract,
7 as was his task, but to impose his own personal view of economic justice and align
8 with the consumer-centric standard advanced by Monster that was never considered
9 or intended by the parties to the Settlement.

10 The extra-contractual, false advertising definition of "creatine-based" (crafted
11 by Monster in 2018 and) imposed by the Arbitrator in 2021, which infected the entire
12 177-page Award, cannot be applied to the language, circumstances, or objectives of
13 the 2010 Settlement. Its application produces a cascade of absurdities and
14 contradictions that objectively establish that the Arbitrator exceeded his authority and
15 was biased. The most blatant example is the Arbitrator's treatment of Pre-Workout.
16 As re-written by the Arbitrator, the term "creatine-based" excludes Pre-Workout,
17 VPX's only "existing" BANG product, from the permissive scope of the Settlement.
18 That finding, which placed VPX immediately in breach, is "completely irrational"
19 and cannot be squared with the plain language of the Settlement and its undisputed
20 objectives in 2010. It also negates the Settlement's provisions obligating OBI to
21 release, dismiss and forever waive its claims challenging Pre-Workout, and denies
22 the *res judicata* impact of this Court's Order dismissing those very claims with
23 prejudice. And it inexplicably finds VPX liable for infringement on products and
24 sales that the Award concedes adhered to the Settlement's permitted Nutritional
25 Channel of the Settlement, and awards forward-looking relief that replaces the
26 parties' no-money Settlement with the Arbitrator's own "brand new" deal, that,
27 among other things, requires VPX to pay royalties on sales that the Award finds
28 complied with the Settlement.

1 The Award is legally incoherent and impossible to square with the plain
 2 language and admitted objectives of the Settlement, directly controlling law, and
 3 basic notions of due process and fundamental fairness. The Arbitrator’s conclusions
 4 and remedies have no rational connection to the Settlement, and his transparent
 5 efforts to placate Monster, a stranger to the Settlement, can only be explained by his
 6 personal bias and partiality. His intentional disregard of VPX’s and OBI’s
 7 memorialized intentions and understandings from 2010 and embrace of Monster’s
 8 self-serving, *post hoc* creative “standard” as the foundational basis of his Award is
 9 so ludicrous that it renders the entire Settlement ineffective, illusory, and void *ab*
 10 *initio*. For these and the reasons discussed herein, the Award exceeded the
 11 Arbitrator’s authority under §§ 10(a)(2) and (4). This Court “must intervene” to
 12 vacate the Award, *Aspic*, 913 F.3d at 1169, and remedy the manifest injustice
 13 imposed by this rogue Arbitrator who strayed “from interpretation and application of
 14 the agreement and effectively ‘dispens[ed] his own brand of industrial justice.’”
 15 *Sanchez v. Elizondo*, 878 F.3d 1216, 1221 (9th Cir. 2018).

16 **II. RELEVANT FACTS**

17 **A. The 2009 Dispute Over VPX’s “Creatine-Based” Pre-Workout**

18 The genesis of this Arbitration is a trademark dispute that OBI initiated in 2009
 19 against VPX. (A11.) At the time, VPX was a relatively small Florida-based company
 20 that sold sports nutritional supplements and “ready to drink” beverages “designed to
 21 enhance health and athletic performance” under various brands. (A11 & n.4; Ex. 2 at
 22 ¶ 5.) The product in dispute was Pre-Workout, which VPX had launched in 2008
 23 under registered trademarks in Class 5 and 32. (Ex. 2 ¶ 4.) As the label disclosed,
 24 Pre-Workout contained 300 mg of caffeine and a “proprietary blend” of nutrients,
 25 including “Creatinol-O-Phosphate” (“COP”), which the product label advertised as
 26 the “WORLD’S ONLY STABLE LIQUID CREATINE!” (A9; *see also* Ex. 3 at 1.)

27 OBI was—and still is—is a small business that, since the 1970s, has sold “a
 28 whipped, frothy and sugar-loaded orange-flavored drink sold out of a fountain

1 dispenser” called “Orange Bang” to restaurants and convenience stores almost
 2 exclusively in southern California; it has never sold any creatine-based beverage.
 3 (A7-8.) OBI has held U.S. trademark registrations for BANG in Class 32 since 1983.
 4 (A8.) In early 2009, OBI sent cease-and-desist letters to VPX concerning its use of
 5 BANG!. (A10-11.) In April 2009, VPX disputed OBI’s claims and distinguished its
 6 “creatine containing” Pre-Workout. (A11; Ex. 6 at 7-8.) Five months later, OBI filed
 7 a complaint (the “2009 Complaint”) against VPX in this Court alleging that its Pre-
 8 Workout infringed OBI’s BANG marks under the Lanham Act. (ECF 34-1). OBI’s
 9 2009 filing confirms its understanding that VPX advertised Pre-Workout as
 10 containing the COP form of creatine, described its product and ingredients as “cutting
 11 edge,” and *differentiated* COP from CM powder. (*Id.* at 26-28; Ex. 4, at 32-36.)⁴

12 In January 2010, OBI proposed a non-monetary settlement to VPX premised
 13 on OBI’s agreement to release and dismiss its pending trademark infringement claims
 14 with prejudice and allow VPX to continue to sell its existing “creatine-based” Pre-
 15 Workout if VPX would agree to abandon its IC 32 trademark registrations and sell
 16 no other BANG beverages. (A15-16; Ex. 6, at 6.) OBI’s proposal described Pre-
 17 Workout interchangeably as “creatine-containing” and “creatine-based” without any
 18 differentiation, confirmed the product description on VPX’s website, and
 19 acknowledged VPX’s April 2009 letter regarding the product’s “intended uses,”
 20 retail channels, and consumer appeal. (*Id.* at 10-12 (pdf).) VPX rejected OBI’s initial

21
 22 ⁴ As Monster has admitted in its false advertising case against VPX, “[m]any forms of creatine
 23 exist in the marketplace,’ including formulations combining creatine with other amino acids.”
 24 *Monster Energy Co. v. Vital Pharms., Inc.*, 2019 WL 3099711, at *4 (C.D. Cal. 2019). As Judge
 25 Bernal recently found, “Monster concedes that ‘creatine’ also holds more than one meaning. One
 26 expert report explains that ‘creatine’ has at least three different usages: (1) naturally occurring
 27 creatine, or ‘endogenous creatine’..., (2) ‘creatine monohydrate,’ which is what ‘the sports
 28 nutrition and exercise science community’ understand as ‘creatine,’ and (3) alternate and ‘novel
 forms’ of creatine that are not creatine monohydrate.” *Monster Energy Co. v. Vital Pharms., Inc.*,
 5:18-cv-01882, ECF 740, at 12 (C.D. Cal. 2022). “It is undisputed that creatine is an amino acid
 that naturally occurs in the human body, that many forms of synthetic creatine exist in the
 marketplace, and that Super Creatine is not creatine monohydrate.” *Id.* at 22; *see In re Bang Energy
 Drink Mktg. Litig.*, 2021 WL 3277267, at *1 (N.D. Cal. 2021) (dismissing claims challenging
 VPX’s marketing of products containing “Super Creatine”). CM is the most well-researched form,
 but it is not suitable for a ready-to-drink beverage. (A53 n.15.)

1 proposal and negotiated for additional “flexibility” in its future uses of the mark. (Ex.
 2 5 at 716:23-723:6; *see* A15-17.) Ultimately, OBI agreed “to allow VPX [i] to sell its
 3 **currently offered** BANG . . . **creatine-based** beverage under the BANG mark” (i.e.,
 4 Pre-Workout), [ii] “to **label** beverages which have changes to the formula, provided
 5 it **remains** a . . . creatine based beverage,” and [iii] “to use the BANG mark” in
 6 connection with other “creatine-based” products, all “without restricting the trade
 7 channels.” (Ex. 6, at 2 (emphasis added).)

8 VPX and OBI used the terms “creatine-based” and “creatine-containing”
 9 interchangeably during their negotiations to describe Pre-Workout and to distinguish
 10 the parties’ products and respective “Marketing and Sales” “lanes.” (A16, A58-59,
 11 Ex. 5, at 714:16-23, Ex. 6, at 15-16 (pdf).) The parties never discussed the meaning
 12 of “creatine-based,” debated the difference between “creatine-based” and “creatine-
 13 containing,” or used those terms in the context of Pre-Workout’s efficacy; since OBI
 14 did not sell or plan to sell any “creatine-based” products, there was no need for further
 15 distinction. (A16; *see generally* Ex. 5.) OBI also had no understanding of or interest
 16 in creatine science or its forms in 2010; it knew and cared about only what was on
 17 VPX’s label, website and ads. (A58-A59.) OBI asked no questions of VPX, sought
 18 no discovery, and did **nothing** to educate itself about creatine, its forms, or VPX’s
 19 products in 2010 (or any time after). (*Id.*) Although OBI proposed using “creatine”
 20 as the basis for the parties’ settlement (A15-16), it “did not even know what COP
 21 was at the time.” (A58.) OBI never expressed any interest in or discussed with VPX
 22 how much creatine Pre-Workout contained, how COP functioned or complemented
 23 other “cutting edge compounds.” (Ex. 4, at 34-36.) Nor did OBI and VPX ever
 24 discuss or agree to any restrictions on the form, amount, or standard of efficacy of
 25 the creatine that VPX could use in its future products. (Ex. 5, at 592:12-18; 584:1-
 26 585:19.) Instead, OBI’s primary focus and “purpose” in settling with VPX “[wa]s to
 27 avoid the hassle and expense associated with the lawsuit, including formal
 28 discovery.” (Ex. 7, at 3.) And, as the Award finds, OBI represented to VPX that,

1 under the Settlement, VPX could “continue” to sell its “creatine-based” Pre-Workout
 2 “*as it is now*,” without any changes to the product or its “existing” formulation. (A16
 3 (emphasis added).)

4 OBI and VPX eventually executed the Settlement on August 11, 2010. Signed
 5 by both parties (and, “as to form and content,” by their counsel), the fully-integrated
 6 Settlement expressed the parties’ clear, objective and mutual intent that (i) their
 7 contract embodied the full, final and exclusive statement of their rights and
 8 obligations and “supersede[d] all prior and contemporaneous oral and written
 9 agreements and discussions;” (ii) no promise other than those expressly set forth in
 10 writing would be “binding or valid on any party;” (iii) no party had relied on any
 11 representation or promise that it did not contain; and (iv) any modification, alteration
 12 or amendment that was not in writing and signed by all parties “shall be void and of
 13 no effect.” (¶¶ 20, 24.) The Settlement is governed by California law (¶ 21).

14 The fundamental purpose of the confidential Settlement was to *settle* the
 15 pending trademark litigation and the parties’ dispute over VPX’s use of BANG on
 16 Pre-Workout by carving out “Marketing and Sales” channels through which each
 17 could sell its existing products. (A28; ¶ 12.) Thus, it required OBI to dismiss with
 18 prejudice its pending litigation (¶ 8) and release its claims challenging Pre-Workout
 19 (¶ 6), and it forever barred OBI from relitigating those released claims in *any* forum.
 20 (¶ 11; *see also* ¶ 18(b).) The parties’ key promises regarding their uses of the BANG
 21 mark in their respective “Marketing and Sales” channels (“lanes”) are memorialized
 22 in Paragraph 7, in which OBI expressly grants VPX permission to:

- 23 A. Continue to use the BANG mark in association with its existing ... *creatine-based*
 24 beverage [i.e., Pre-Workout].
- 25 B. Make changes to its formula for its BANG product, provided that it remains a ...
 26 *creatine-based* beverage.
- 27 C. Use the BANG mark in connection with other *creatine-based* ... dietary
 28 supplement and nutritional products.

1 D. Use the BANG mark in association with any nutritionally fortified beverage
 2 which enhances performance, and *which is not creatine based*, so long as the
 3 beverage or dietary supplement is only marketed and sold through vitamin and
 4 nutritional supplement stores [i.e., the “Nutritional Channel”].

5 (¶ 7 (emphasis added).) The Arbitrator referred to Paragraphs 7A through 7D as the
 6 “**VPX Marketing and Sales Restrictions.**” (A29 (emphasis added).)

7 Thus, while the term “creatine based” is not defined in the Settlement, the
 8 parties understood and acknowledged that Pre-Workout was “creatine based” based
 9 on the contents of its label and VPX’s marketing, and that VPX would be permitted
 10 to sell Pre-Workout and similarly-labeled and marketed “creatine based” beverages
 11 without infringing OBI’s marks. Consistent with the parties’ negotiations, the
 12 Settlement contains: (1) no restrictions on the form, amount, or standard of efficacy
 13 of the creatine that VPX could use in its current or future “creatine-based” products;
 14 (2) no representations or warranties by VPX as to the efficacy of COP, “creatine,” its
 15 Pre-Workout, or any future “creatine-based” products, nor any indication that OBI
 16 had any such expectations or reason to care; (3) no standards or benchmarks to assess
 17 whether VPX’s products complied with any requirements relating to functionality,
 18 efficacy, health and safety, intended uses or anything else; (4) no provisions granting
 19 OBI rights to inspect or test those products for compliance, or requiring disclosure of
 20 its proprietary formulas; and (5) no provisions that would have even alerted VPX to
 21 the existence or nature of any such requirements. (*See* Ex. 2.)

22 **B. The Parties’ Decade of Mutual Performance**

23 As permitted under the 2010 Settlement, VPX continued to sell its Pre-
 24 Workout through 2013. (A9.) In 2015, VPX introduced BANG Energy RTD, which
 25 contained 300 mg of caffeine per can and a proprietary amount of “Creatyl-L-Leucine
 26 (Creatine bonded to L-Leucine)” (“CLL”), marketed as “Super Creatine®.” (Ex. 8;
 27 Ex. 10.) Through April 2019, VPX launched additional BANG products, all of which
 28 disclosed on the label the particular form of “creatine” they contained. (*See* Ex. 8.)

1 Relying on the Settlement, including OBI's express permission, VPX invested
 2 "hundreds of millions of dollars promoting the BANG brand," "implement[ed] a
 3 highly effective but expensive social media marketing campaign," and built out a
 4 national distribution network. (A34, 97.) As a result of VPX's efforts, by 2018,
 5 BANG Energy RTD had become a "smash hit" with "astronomical sales" that made
 6 it the third best-selling energy drink and created a new "performance energy"
 7 subcategory. (A34, A126.) During this time, OBI never claimed that VPX's BANG
 8 products were not "creatine-based" under the Settlement; questioned the form,
 9 amount, efficacy or scientific support of the creatine on its labels; or tested a can.
 10 Over these years, as the Award found, OBI "***believed*** that BANG Energy RTD was
 11 'creatine-based' and in compliance with the 2010 Settlement" because ***VPX sold and***
 12 ***marketed it to consumers as a 'creatine-based' product.***" (A33–35, A58-59.) VPX
 13 also believed it was adhering to the contract. (A29, A33-35.)

14 C. Monster Interjects Its False Advertising Theories

15 In late 2018, VPX launched a new specialty diet product that did not contain
 16 creatine, BANG Keto Coffee. (A37.) OBI promptly issued a demand letter in March
 17 2019 alleging that BANG Keto Coffee breached the Settlement because it "*d[id] not*
 18 *list creatine as an ingredient, and thus d[id] not appear to be creatine-based.*" (Ex.
 19 11 (emphasis added); A38.) Thus, OBI confirmed that, like VPX, it understood that
 20 VPX was staying within its "creatine-based" lane in the Settlement if its products
 21 were "list[ed]" (or ***labeled and marketed***) as containing a form of creatine. (*See id.*)

22 The Settlement, and nearly a decade of VPX and OBI's peaceful existence
 23 thereunder, changed after Monster intervened.⁵ In August 2019, after OBI rejected a
 24 settlement offer from VPX and threatened suit, VPX filed an action in California
 25 state court seeking declaratory relief. (A39.) Coincidentally, OBI learned that Monster
 26 was pursuing its false advertising claims against VPX challenging whether CLL was

27 ⁵ For example, before Monster assumed the reigns of this dispute for OBI, OBI had never claimed
 28 or believed that VPX's products were not "creatine-based." (A57-58). OBI simply cared whether
 VPX's products "list[ed]" any form of creatine on the products' labels. (Ex. 11.)

1 “creatine” and VPX’s use of the term “Super Creatine®” to market BANG Energy
 2 RTD. (A40.) OBI’s then 92-year-old owner cold-called Monster and, almost
 3 immediately, found himself in a conference room, without counsel, with Monster’s
 4 CEO, General Counsel, and outside lawyers in the False Advertising Case. (A40.) At
 5 that and following meetings, he disclosed the terms of the confidential Settlement (in
 6 breach of its terms), provided Monster with a copy, and agreed to sell (via a dubious
 7 “assignment”) OBI’s contract claims under the Settlement to Monster and support
 8 Monster’s pursuit of its “creatine” challenges based on the false advertising theories
 9 alleged in its separate suit. (A40-41.)

10 In late September 2019, after the effective date of the assignment, OBI,
 11 through its counsel, Mr. Borrowman (and with Monster’s assistance) moved to
 12 compel arbitration in the state court action, purporting to assert on OBI’s behalf the
 13 arbitration rights contained in the Settlement with respect to KETO Coffee that OBI
 14 had assigned away. (Exs. 12, 13.) OBI’s motion contains a judicial admission that, at
 15 the time of the Settlement, OBI knew that the creatine in VPX’s Pre-Workout was
 16 COP, i.e., “Creatinol-O-Phosphate,’ which VPX advertised as ‘the world’s only
 17 stable liquid creatine.’” (Ex. 12, at 3–4 (emphasis added).) Mr. Borrowman continued
 18 to engage with VPX’s counsel at Monster’s urging without disclosing the assignment
 19 and under the false pretense that OBI still had arbitration rights. Relying on OBI’s
 20 misrepresentations, and without knowledge of Monster’s surreptitious intervention,
 21 VPX withdrew its complaint and proceeded to arbitration with OBI on its discrete
 22 KETO Coffee claims. (ECF 1, ¶ 38.)⁶

23 ⁶ The Arbitrator determined, contrary to this Court’s ruling (ECF 50), that he had jurisdiction to
 24 determine the question of Arbitrability (which he found) and also refused VPX’s request for
 25 appointment of a 3-member Tribunal, disregarding AAA Rules providing for appointment of a
 26 panel in large complex cases (though he billed at the large complex case rate). (See Ex. 17; see also
 27 AAA Commercial Rule L-2(a), CommercialRules_Web.pdf (adr.org).) The Arbitrator thus
 28 reserved to himself the lucrative decisions regarding his own jurisdiction and whether to appoint
 others to the panel, and each time found in his own favor. VPX never agreed arbitration with
 Monster and challenged OBI’s purported assignment of its rights to Monster, which is invalid,
 among other reasons, because giving it effect requires the Court to interpret the Settlement’s
 arbitration agreement to be an “infinite arbitration clause,” contrary to *Revitch v. DIRECTV, LLC*,
 977 F.3d 713, 719 (9th Cir. 2020). Even if the assignment to Monster were valid, it would mean

1 **D. The Irrational And Biased Award**

2 On January 6, 2022, following the conclusion of Phase I of the Arbitration, the
 3 Arbitrator issued a 149-page “reasoned” Interim Award (Ex. 14) (“IA”) in which he
 4 found that VPX’s sales of most of its Bang products since August 2010 supposedly
 5 breached the Settlement because they failed to adhere to Monster’s efficacy-based
 6 false advertising “standard.” (IA62-63; *see* IA 46.) The Arbitrator imposed binding
 7 obligations on VPX that he derived, not from the terms of the contract or even the
 8 parties’ settlement communications, but from OBI’s extra-contractual, subjective
 9 impressions and beliefs about VPX’s products. (A32-34, A57-59.) Although the
 10 Arbitrator acknowledged that the issues in Monster’s false advertising case were not
 11 submitted to him (A43-44), he nevertheless applied the exact same “scientific,”
 12 efficacy-based “creatine” standard that Monster developed and is advancing in that
 13 case. (A49-57; *see* 5:18-cv-01882, ECF 740, at 12.) By treating OBI as a consumer,
 14 substituting VPX’s consumer advertising for the terms of the parties’ fully-integrated
 15 contract (which nowhere contains any efficacy-based standard or mentions efficacy),
 16 and accepting a competitor’s *post hoc*, extra-contractual “standard” in place of the
 17 meaning intended by VPX and OBI, the Arbitrator decided the very false advertising
 18 issues he acknowledged he had no authority to adjudicate. (A32-35 & n.7, A47, A57-
 19 60.) And, after negating VPX’s express rights in the Settlement in this manner, the
 20 Arbitrator proceeded to hold that VPX infringed OBI’s marks. (IA79.)

21 It is undisputed that there was “no evidence” that OBI had lost any sales,
 22 customers or profits to VPX on account of its use of BANG in the decade since the
 23 Settlement. (IA79, IA127, IA130.) Nonetheless, the Arbitrator proceeded to offer up
 24 to Defendants a menu of different potential damages on their distinct contract and
 25 trademark claims, and directed them to elect their preferred remedy from among the

26
 27 that OBI assigned away all its contractual rights to Monster and thus had no right to demand
 28 arbitration against VPX and JHO. In any event, Plaintiffs reserve all issues addressed by this Court
 (ECF 50) for appeal or cross-appeal, including their arguments challenging arbitrability and the
 validity and effect of the assignment.

1 options he presented. (IA146-147.) The Arbitrator also awarded [REDACTED]

4 [REDACTED] (IA133-134.) Alternatively, [REDACTED]

7 [REDACTED] (IA147.)

8 On April 4, 2022, following additional briefing and argument centered on
 9 Monster's motion to "correct" the Interim Award, the Arbitrator issued the final
 10 Award. It confirmed Defendants' election of "the highest award, the disgorgement
 11 of profits award for trademark infringement in the amount of [REDACTED]," which
 12 he ordered VPX to pay to both Defendants (although Monster had no trademark claim
 13 submitted in the Arbitration or rights in OBI's marks). (A138.) Among other things,
 14 the Award orders VPX to pay trademark damages on Defendants' claims challenging
 15 VPX's Pre-Workout that were expressly waived, released and dismissed with
 16 prejudice by this Court, and compels VPX to disgorge profits on sales that the
 17 Arbitrator found complied with the Settlement. (A128.)

18 The Award also substantively amended, in the guise of "clarification," the
 19 scope of the relief in the Interim Award, and did so only after [REDACTED]
 20 [REDACTED] Among other changes, the Award
 21 altered the scope of the [REDACTED], revising it to [REDACTED]
 22 [REDACTED]
 23 [REDACTED] and requiring [REDACTED]
 24 [REDACTED] (A147; *see* Ex. 16, at
 25 79:19-92:24).)

26 The Arbitrator also altered the Interim Award to order [REDACTED]
 27 [REDACTED]
 28 [REDACTED] (A137.) The Arbitrator acknowledged that the restrictions imposed by

1 [REDACTED]
 2 [REDACTED] (A131), but, at Monster's request, [REDACTED]
 3 [REDACTED] (A147.) Thus, VPX must now [REDACTED]
 4 [REDACTED]
 5 [REDACTED] (A153–54; ECF 50, at 9.) In
 6 addition to windfall damages and forward-looking relief, the Arbitrator awarded
 7 Defendants [REDACTED], including [REDACTED]
 8 [REDACTED] (A169.)

9 III. LEGAL ARGUMENT

10 A. The FAA Requires Vacatur of the Award

11 Section 10(a)(4) of the FAA requires courts to vacate an award “where the
 12 arbitrators exceeded their powers.” 9 U.S.C. § 10(a)(4). Supreme Court precedent
 13 holds that § 10(a)(4) requires vacatur of awards that lack “any contractual basis,”
 14 including awards that disregard, contravene, or destroy the unambiguous terms of a
 15 contract. *Stolt-Nielsen S.A.*, 559 U.S. at 668–69, 671–76 (award vacated); *see also*
 16 *United Paperworkers Int’l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 38 (1987)
 17 (“The arbitrator may not ignore the plain language of the contract.”).

18 “[A]n arbitrator’s task is to interpret and enforce a contract,” and, accordingly,
 19 they “exceed” that authority when they “stray[] from interpretation and application
 20 of the agreement and effectively “dispense [their] own brand” of “economic”
 21 “justice[.]” *Stolt-Nielsen*, 559 U.S. at 663. An award thus must be vacated if it does
 22 not “draw[] its essence from the” agreement, *United Steelworkers of Am. v. Enter.*
 23 *Wheel & Car Corp.*, 363 U.S. 593, 597 (1960), in the sense that the Award does not
 24 even “arguably” “interpret,” “constru[e] or apply[] the contract.” *Oxford Health*
 25 *Plans LLC v. Sutter*, 569 U.S. 564, 569 (2013).

26 An award does not “draw its essence” from the agreement when it: (1) conflicts
 27 with the agreement’s express terms; (2) imposes requirements not in the agreement;
 28 (3) is not rationally derived from the agreement; or (4) is based on “general

1 considerations of fairness and equity” instead of the contract. *Dallas & Mavis*
 2 *Forwarding Co. v. Local Union No. 89*, 972 F.2d 129, 134 (6th Cir. 1992) (citations
 3 omitted)). The Ninth Circuit refers to such awards as “completely irrational.”
 4 *Lagstein v. Certain Underwriters at Lloyd’s, London*, 607 F.3d 634, 642 (9th Cir.
 5 2010); *Holly Sugar Corp. v. Distillery, Rectifying, Wine & Allied Workers Int’l*
 6 *Union*, 412 F.2d 899, 903 (9th Cir. 1969) (award completely irrational where it did
 7 not “represent[] a ‘plausible interpretation of the contract in the context of the parties’
 8 conduct”). The “completely irrational” standard requires vacatur where an arbitrator
 9 “disregard[s] contract provisions to achieve a desired result,” *Aspic*, 913 F.3d at 1167,
 10 or issues an award that “conflicts directly with the contract.” *Pac. Motor Trucking*
 11 *Co. v. Auto. Machinists Union*, 702 F.2d 176, 177 (9th Cir. 1983).

12 Thus, while an arbitrator may interpret ambiguous language, if he “interprets
 13 unambiguous language in any way different from its plain meaning, the arbitrator
 14 amends or alters the agreement and acts without authority.” *Missouri River Servs.,*
 15 *Inc. v. Omaha Tribe of Nebraska*, 267 F.3d 848, 855 (8th Cir. 2001) (cleaned up);
 16 *see Inter-City Gas Corp. v. Boise Cascade Corp.*, 845 F.2d 184, 187 (8th Cir. 1988).

17 **B. The Arbitrator Rewrote the Agreement**

18 The Award must be vacated because it cannot be squared with, and indeed
 19 ignores, the plain language of the Settlement, basic principles of contract formation,
 20 and the undisputed and legally-dispositive facts. The Arbitrator’s irrational
 21 destruction of the Agreement and manifest disregard of fundamental and controlling
 22 contract principles corrupts the entire Award, which exceeded his powers.

23 **1. The Award’s Creatine-Based Standard Nullifies Paragraph 7A**

24 The Award deconstructs the terms “creatine” and “creatine-based” in ways that
 25 cannot even arguably be reconciled with the Settlement. Under the FAA, “[i]f the
 26 language of an agreement is clear and unequivocal, an arbitrator cannot give it a
 27 meaning other than that expressed by the agreement.” *Poland Spring Corp. v. United*
 28 *Food & Com. Workers Int’l Union*, 314 F.3d 29, 33 (1st Cir. 2002). Here, the

1 Arbitrator exceeded his authority by imposing a meaning on “creatine-based” that
 2 cannot be applied to VPX’s only “existing” BANG product in 2010 or accomplish
 3 its objectives in settling OBI’s 2009 case, as memorialized in the Settlement. As the
 4 Award expressly finds, “*Paragraph 7A is clear that VPX is permitted to sell the*
 5 *Bang Preworkout product because, as the parties believed at the time, it was a*
 6 *‘nutritionally fortified, creatine-based’ beverage.*” (A29 (emphasis added).) Thus,
 7 the Arbitrator unequivocally acknowledged that OBI and VPX understood and
 8 intended the term “creatine-based” to describe Pre-Workout, and that OBI agreed
 9 VPX could continue to sell that one “existing” product “as it [was]” at the time of
 10 settlement without infringing its products. (A16.)

11 There is no ambiguity in the parties’ intent in Paragraph 7A to use the term
 12 “creatine-based” to describe and permit VPX to sell its COP-containing Pre-
 13 Workout. (A29-39.) The Arbitrator, however, supplanted the parties’ “clear” mutual
 14 understanding and intention with (a) Monster’s false advertising “standard” and (b)
 15 his own notions of economic justice, and declared that COP is not “creatine” and Pre-
 16 Workout is not “creatine-based” under his extra-contractual definition. (A54-57.) By
 17 imposing Monster’s “standard,” rather than adhering to the plain meaning of the
 18 contract, the Award nullified OBI’s unambiguous promise that VPX could continue
 19 to sell its existing “creatine-based” Pre-Workout as-is and without restriction,
 20 obliterated material consideration supporting VPX’s consent to the Settlement, and
 21 defeated the contract’s stated objectives. (A58-59.) As such, the Award disregards
 22 “*what the parties meant*” by their words and replaces it with a meaning that the
 23 parties “never intended,” contrary to fundamental principles of contract formation.
 24 *See Pac. Gas. & Elec. Co. v. G.W. Thomas Drayage*, 69 Cal. 2d 33, 38 n.5 (1968).
 25 Because its “standard” cannot be reconciled with the plain meaning and intent of
 26 Paragraph 7A, and voids it, the Award exceeded the Arbitrator’s authority. *See*
 27 *Lockyer v. R.J. Reynolds Tobacco Co.*, 107 Cal. App. 4th 516, 524 (2003).

28 The Award’s nullification of Paragraph 7A, in and of itself, requires vacatur,

1 but there are additional grounds. The undisputed, objectively-verifiable facts
 2 foreclose any conclusion that the parties did not understand and mutually intend the
 3 term “creatine” to include COP, or “creatine-based” to include VPX’s COP-
 4 containing Pre-Workout. Indeed, that VPX repeatedly disclosed to OBI and
 5 advertised to the world that its Pre-Workout contained the COP form of creatine, and
 6 not the CM form, is a legally dispositive fact. It proves that the Award’s COP-
 7 excluding standard does not effectuate the parties’ intent at the time of settlement
 8 and, in view of the undisputed record (including the Pre-Workout label and OBI’s
 9 own judicial admissions), is “so firmly established that an arbitrator cannot fail to
 10 recognize [it] without manifestly disregarding the law.” *Coutee v. Barington Cap.*
 11 *Grp., L.P.*, 336 F.3d 1128, 1133 (9th Cir. 2003) (courts “will not confirm an
 12 arbitration award that is legally irreconcilable with the undisputed facts”).⁷

13 The Award expressly recognized that the parties were in complete agreement
 14 that whatever they intended “creatine-based” to mean, Pre-Workout was creatine-
 15 based, and the reason it was creatine-based had nothing to do with whether Pre-
 16 Workout was delivering the benefits of creatine to consumers in the same manner as
 17 CM, whether COP was or was not a form of creatine, or whether the amount of COP
 18 in the product was or was not sufficient to make Pre-Workout creatine-based:

- 19 • “In 2010, [OBI] **assumed** that Bang Pre-Workout was ‘creatine-based’ because
 20 it believed the product contained creatine.” (A58).
- 21 • In 2010, “[OBI] **believed** that Bang Pre-Workout met the ‘creatine-based’
 22 standard.” (Award at 58.)

23 ⁷ OBI’s supposed failure to understand, appreciate or pay attention to VPX’s accurate disclosures
 24 about its Pre-Workout—articulated for the first time during the Phase I hearing after Monster’s
 25 coaching—is legally irrelevant and cannot establish a breach by VPX or support windfall damages.
 26 *See Hedging Concepts, Inc. v. First All. Mortg. Co.*, 41 Cal. App. 4th 1410, 1421 (1996) (courts
 27 will not set aside contractual obligations “merely because one of the parties claims to have been
 28 ignorant of, or to have misunderstood, the provisions of the contract”). Even if OBI made a
 “[u]nilateral mistake” of fact as the form of creatine in Pre-Workout or other products (Cal. Civ. §
 1577), it would only provide grounds “for relief” if its “mistake is due to the fault of [VPX] or
 [VPX] kn[ew] or ha[d] reason to know of the mistake,” which does not help OBI here in view of
 its own admissions and VPX’s disclosures. *Architects & Contractors Estimating Servs., Inc. v.*
Smith, 164 Cal. App. 3d 1001, 1007–08 (Ct. App. 1985); *see also* Civ. Code §§ 1565, 1567(5).

1 • “Relatedly, and even more basic, [OBI] *had no understanding* about COP
2 whatsoever. [OBI] *did not even know what COP was* at the time it entered into
3 the 2010 Settlement Agreement.” (A58-59.)

4 • “No witness testified that there was ever any pre-contract communication, oral
5 or written, which focused on COP . . . *The topic never came up.*” (A59.)

6 (Emphasis added.) The parties’ complete agreement on these points, as found in the
7 Award, irrefutably contradicts the Arbitrator’s conclusion that Pre-Workout—and
8 other beverages that were also “creatine-based”—were somehow *not* creatine-based.

9 As in *Stolt-Nielsen*, the Arbitrator had “no occasion to ‘ascertain the parties’
10 intention’ in the present case because the parties were in complete agreement
11 regarding their intent” about whether Pre-Workout, and other products like it, were
12 “creatine-based.” *Stolt-Nielsen*, 559 U.S. at 676. “[A]ny inquiry into that settled
13 question. . . [was] outside the. . . [Arbitrator’s] assigned task.” *Stolt-Nielsen*, 559 U.S.
14 at 676. And just as the arbitrators in *Stolt-Nielsen* exceeded their powers by not giving
15 effect to the parties’ stipulation that they had reached no agreement about class action
16 consent, and by issuing an award that lacked a basis in the contract, so too did the
17 Arbitrator here exceed his powers by not giving effect to VPX and OBI’s agreement
18 that Pre-Workout, and beverages like it, were “creatine-based[,]” and instead
19 substituted his own notions of economic justice. *See Stolt-Nielsen*, 559 U.S. at 663.

20 The Arbitrator disregarded his own findings concerning the parties’ mutual
21 intent and objectives at the time of settlement, and purported to absolve OBI of its
22 promises and agreements on the basis of its own inattention and lack of diligence.
23 (A34–35, A57–58.) And he did so to reach the very false advertising issues the Award
24 acknowledges were not submitted to him. (A43–44.) Thus, the Award purports to
25 derive the meaning of the term “creatine-based” from OBI’s subjective beliefs and
26 impressions of VPX’s marketing, treating OBI as if it were a “consumer” of VPX’s
27 products rather than the counterparty to a commercial contract (A32–35 & n.7, A47,
28 A58–60). In the process he completely re-wrote and impermissibly modified (*see ¶*

1 24) VPX’s rights and obligations under the Settlement to achieve his own ends.⁸

2 The Award purports to excuse OBI’s performance and negate VPX’s rights by
 3 claiming OBI was “too unsophisticated” to “fully understand,” *Aspic*, 913 F.3d at
 4 1169, the terms and subject matter of its agreements negotiated by its outside legal
 5 counsel (who signed the Settlement confirming his understanding (§§ 20, 24)). That
 6 is incredible. And, in place of the parties’ intended meaning, the Arbitrator adopted
 7 the very same consumer-oriented “standard” that (a highly sophisticated) Monster is
 8 advancing in its false advertising case and then rendered findings on the very same
 9 issues the Arbitrator recognized he was not empowered to address. (*See* A33–35;
 10 A42–43, A57–58.) In *Aspic*, the Ninth Circuit affirmed vacatur after the arbitrator
 11 similarly “voided and reconstructed” a contract between a California-based
 12 contractor and its Afghanistan-based subcontractor based on his view that the
 13 subcontractor had “primitive” business practices and should not be “required to
 14 comply” with the complex contracts. *Aspic*, 913 F.3d at 1162, 67–68. In doing so, he
 15 went far outside his authority by “disregarding the plain text of [the] contract without
 16 legal justification simply to reach a result that he believes just.” *Id.* at 1169; *see*
 17 *Patten v. Signator Ins. Agency Inc.*, 441 F.3d 230, 236 (4th Cir. 2006); *El Mundo*
 18 *Broad. v. United Steelworkers Of Am.*, 116 F.3d 7, 10 (1st Cir. 1997). So too here.⁹

19 ⁸ The Award thus fails to draw its essence from the Settlement because it is not grounded in any
 20 meeting of the minds. *Monster Energy Co. v. Schechter*, 7 Cal. 5th 781, 789 (2019). In California,
 21 subjective “undisclosed intent or understanding is irrelevant.” *Cedars-Sinai Med. Ctr. v. Shewry*,
 22 137 Cal.App.4th 964, 980 (Ct. App. 2006). The Arbitrator paid lip service to that rule (A13), but
 23 then imposed a “creatine-based” standard to effectuate OBI’s “beliefs,” “assumptions” and
 24 “impressions” about “creatine” and Pre-Workout that OBI announced for the first time at the Phase
 I hearing and that he concedes OBI *never* communicated to VPX in 2010 or the decade after. (A15–
 16, A32–34; A57–58; *see* Ex. 7.) And he relied on “expert opinions” that did not reflect the views
 of VPX (A50) or OBI in 2010, (A58–59; A29), and “science” that did not exist in 2010. (*Compare*
 A55–56, *with* Ex. 18 (dates).) *Bionghi v. Metro. Water Dist.*, 70 Cal. App. 4th 1358, 1367 (1999).

25 ⁹ The punitive findings and remedies in the Award are not motivated by any willful or even knowing
 26 breach or infringement by VPX. The Arbitrator acknowledged that VPX believed—and continues
 27 to “emphatic[ally]” believe—that its products are “creatine-based” under the Settlement, and
 28 ultimately found that it “failed to appreciate” the restrictions in Paragraph 7. (A129.) He attempts
 to justify his draconian remedies by claiming VPX exhibited an “aura of indifference” to OBI’s
 rights, solely because VPX did not inform others of the retrospective “standard” that the Arbitrator
 himself imposed a decade later (A31–32, A77–78, A116, A127)—and which he concedes VPX did
 not believe applied to its products. (A29, A48–49.) Rather than apply the contract or the law, the

1 The Arbitrator’s suggestion that VPX somehow “misled” OBI about whether
 2 Pre-Workout was “creatine-based” is irrelevant for another reason. Defendants did
 3 not submit to arbitration a claim for fraud in the inducement or seek to reform (i.e.,
 4 rewrite) the contract based on fraud or mistake. (ECF 34-5.) The parties’ submission
 5 “serves not only to define but to circumscribe the authority of the arbitrators.” *Ottley*
 6 *v. Schwartzberg*, 819 F.2d 373, 376 (2d Cir. 1987); *Schoendube Corp. v. Lucent*
 7 *Technologies*, 442 F.3d 727, 732 (9th Cir. 2006); *Piggly Wiggly Operators’*
 8 *Warehouse, Inc. v. Piggly Wiggly Operators’ Warehouse Independent Truck Drivers*
 9 *Union, Local No. 1*, 611 F.2d 580, 583-84 (5th Cir. 1980). “When arbitrators rule on
 10 a matter not submitted to them, or act outside the scope of the parties’ contractual
 11 agreement, the award may be overturned because the arbitrators exceeded the scope
 12 of their authority.” *Michigan Mut. Ins. Co. v. Unigard Sec. Ins. Co.*, 44 F.3d 826, 830
 13 (9th Cir. 1995). Here, the parties did not submit to the Arbitrator a fraud claim or a
 14 claim that the contract should be reformed based on fraud or mistake. (ECF 34-5.)
 15 As such, deciding those claims was “outside the . . . [Arbitrator’s] assigned task[.]”
 16 *Stolt-Nielsen*, 559 U.S. at 676, and exceeded his powers. The Arbitrator’s attempt to
 17 conceal his rewriting of the contract as alleged misrepresentation is therefore
 18 irrelevant and ineffective.

19 **2. The Award Destroys VPX and OBI’s 2010 Settlement**

20 The Award also undid VPX and OBI’s 2010 settlement, the fundamental
 21 purpose of which was always to “fully and finally settle” OBI’s 2009 claims
 22 challenging VPX’s Pre-Workout. (¶ 6.) By replacing the parties’ intended meaning
 23 with his own COP-excluding “creatine-based” standard, the Arbitrator voided
 24 express provisions of the Settlement requiring OBI to release (¶ 6), dismiss with
 25 prejudice (¶ 8), and forever waive any “Further Claims” (¶ 11) alleging that Pre-

26
 27 Arbitrator set out to punish VPX because, having accepted Monster’s false advertising standard, he
 28 personally did not believe VPX “should” market and sell its products to consumers as “creatine-
 based” (e.g., A50, A58-60), which is the very false advertising issue he was not empowered to
 address (A43–44). That exceeded his powers.

1 Workout infringed OBI's marks, defeating the parties' foremost objectives in
 2 entering into the Settlement. (A85 n.22, A94 & n.25, A107, A110.) There could be
 3 no starker example of an arbitrator "disregard[ing] the plain text of [the] contract
 4 without legal justification simply to reach a result that he believes just." *Aspic*, 913
 5 F.3d at 1169; *see also Stolt-Nielsen S.A.*, 559 U.S. at 675.

6 The Award acknowledges that Paragraph 6 "effects a release *with respect to*
 7 *the BANG Pre-workout product*" (A94 n.25 (emphasis added)), and that VPX's
 8 "sales of Bang Pre-Workout were made within the Nutritional Channel" and
 9 complied with Paragraph 7D of the Settlement (A85 n.22). However, the Arbitrator
 10 refused to give effect to OBI's release or VPX's rights under Paragraph 7D, and
 11 awarded Defendants damages on those contractually-permitted sales. (A94 n.25;
 12 A128; *see* A105-112.) The Arbitrator thus invalidated VPX's express, bargained-for
 13 rights in Paragraph 6 *and* in Paragraph 7D, and did so in order to replace the
 14 Settlement with his own "brand new deal." (A94.) That is, without more, another,
 15 independent ground for vacating the award. *See Dewan v. Walia*, 544 F. App'x 240,
 16 247 (4th Cir. 2013) ("[I]n purporting to construe the release and waiver provision to
 17 apply only to tort and contractual claims Walia might file in federal or state court,
 18 the Arbitrator rewrote the release[.]" (unpublished) (cleaned up).

19 The Arbitrator also disregarded VPX's rights under Paragraph 8 and this
 20 Court's August 19, 2010 Order dismissing OBI's Pre-Workout claims with prejudice
 21 (Ex. 17). *See Collins v. D.R. Horton, Inc.*, 505 F.3d 874, 880 (9th Cir. 2007)
 22 ("Arbitrators are not free to ignore the preclusive effect of prior judgments under the
 23 doctrines of res judicata[.]"); *Concha v. London*, 62 F.3d 1493, 1507 (9th Cir. 1995);
 24 *see also Miller Brewing Co. v. Fort Worth Distrib.*, 781 F.2d 494, 499 (5th Cir.
 25 1986). And he ignored and rendered meaningless Paragraph 11, which prohibits OBI
 26 from initiating claims in *any forum* challenging Pre-Workout, without exception,
 27 which "conflicts directly with the contract." *Pac. Motor*, 702 F.2d at 177.

28 Further, the Award disregarded and nullified Paragraphs 20 and 24 of the

1 Settlement, which prohibited the Arbitrator's efforts to conjure up binding
 2 obligations on VPX that were not "expressly contained" in the contract, supposedly
 3 from OBI's admittedly *uncommunicated* "impressions," "assumption[s]" and
 4 "beliefs" about VPX's products formed during the parties' "superseded" discussions,
 5 nearly all of which were derived from VPX's extrinsic consumer marketing. (A16,
 6 A33–34, A49, A57–58.) In California (A13–14), those provisions show that the
 7 parties "intended their writing to serve as the exclusive embodiment of their
 8 agreement" subject to the more restrictive § 1856(b) of the parol evidence rule, which
 9 prohibits use of extrinsic evidence to impose even "consistent additional terms" to
 10 "explain[] or supplement[]" written contract terms. *Kanno v. Marwit Cap. Partners*
 11 *II, L.P.*, 18 Cal. App. 5th 987, 1000–01 (Ct. App. 2017); *see BMW of N. Am., Inc. v.*
 12 *New Motor Vehicle Bd.*, 162 Cal. App. 3d 980, 990 (Ct. App. 1984). Thus, the Award
 13 is premised on a "violation of an express and explicit restriction on the arbitrator's
 14 power," and "cannot be a plausible interpretation" under the FAA. *Fed. Emps. of*
 15 *Nevada, Inc. v. Teamsters Loc. No. 631*, 600 F.2d 1263, 1265 (9th Cir. 1979).¹⁰

16 The Arbitrator's forced imposition of Monster's efficacy-based standard
 17 produces "absurd results" that cannot be squared with the language, purpose or
 18 circumstances of the Settlement, or the Award's express findings concerning the
 19 parties' intent and objectives in 2010. In each case, the prejudice works in only one
 20 direction: VPX is denied its express rights and OBI is permitted to avoid its
 21 obligations, so that the Arbitrator can impose his own "brand new deal." (A94.)
 22 Monster's false advertising definition of "creatine-based" cannot be rationally
 23 applied to the Settlement without destroying it. The Award thus does not draw its
 24 essence from the Settlement—it completely disregards and nullifies it and its
 25 objectives. *See, e.g., Revitch v. DIRECTV, LLC*, 977 F.3d 713, 717 (9th Cir. 2020)

26
 27 ¹⁰ *See, e.g., W. Emps. Ins. Co. v. Jefferies & Co.*, 958 F.2d 258, 261 (9th Cir. 1992); *Excel Corp. v.*
 28 *United Food & Com. Workers Int'l Union, Loc. 431*, 102 F.3d 1464, 1468 (8th Cir. 1996) (vacating
 award for ignoring integration provision); *see also Pace v. Honolulu Disposal Serv., Inc.*, 227 F.3d
 1150, 1160 (9th Cir. 2000).

(rejecting construction of agreement under FAA where “absurd results follow”); *Pac. Motor Trucking Co. v. Auto. Machinists Union*, 702 F.2d 176, 177 (9th Cir. 1983); *Int’l Paper Co. v. United Paperworkers Int’l Union*, 215 F.3d 815, 817 (8th Cir. 2000); *see also Leines v. Homeland Vinyl Prod., Inc.*, 2020 WL 4194054, at *5 (E.D. Cal. 2020) (if contract language is not “‘reasonably susceptible to the interpretation urged,” there is no ambiguity and “*the case is over*” (emphasis added)).

3. The Inconsistent Relief Exceeds the Arbitrator’s Authority

The Arbitrator also exceeded his authority because the relief in the Award conflicts directly with the Settlement and is legally incompatible with his own express findings. *See Phoenix Newspapers v. Phoenix Mailers Local 752*, 989 F.2d 1077, 1083 (9th Cir. 1993). Indeed, the relief is so nonsensical in relation to the Settlement that it results in the contract’s effective nullification.

An arbitration remedy must “draw its essence from, and is therefore limited by,” the parties’ contract. *Phoenix Newspapers*, 989 F.2d at 1082. It must be “‘rationally derived from some plausible theory of the general framework or intent of the agreement,’” taking account of the contract’s “‘language, its content, and any other indicia of the parties’ intention.” *Phoenix Newspapers*, 989 F.2d at 1082 (quoting *Desert Palace, Inc. v. Local Joint Executive Bd.*, 679 F.2d 789, 792–93 (9th Cir. 1982)). Although the Arbitrator found “no evidence” that VPX caused OBI to lose a single sale, customer or dollar over ten years (A80, A127, A130), he concocted a series of draconian remedies that were not “based on a plausible interpretation of the Agreement, [were] not within the contemplation of the parties, and [were] not a fair resolution of the dispute,” and which impose on VPX “specific performance” of an entirely different agreement. *Phoenix Newspapers*, 989 F.2d at 1083.

First, the Award negates express rights and obligations under the Settlement by ordering [REDACTED]

[REDACTED] which he concedes “were not a breach of the 2010

1 Settlement because [REDACTED] (A85.) Although the
 2 Arbitrator [REDACTED]
 3 [REDACTED]
 4 [REDACTED] (A150; A97; A41 n.8), he ignored his own findings by
 5 [REDACTED]
 6 [REDACTED]
 7 [REDACTED]
 8 (A129 (emphasis added).) On its face, the Award imposes [REDACTED]
 9 [REDACTED]
 10 [REDACTED] rendering OBI's promises in
 11 Paragraph 7D illusory and ineffective *ab initio*. (A128.)

12 Second, the Award prospectively negates VPX's rights under the Settlement
 13 by issuing [REDACTED]
 14 [REDACTED]
 15 [REDACTED]
 16 [REDACTED]
 17 [REDACTED]
 18 [REDACTED] (A147 (emphasis added); *see* A141.)
 19 Thus, the Arbitrator [REDACTED] under
 20 Paragraph 7D "*altogether*" with respect to [REDACTED]
 21 [REDACTED] but nonetheless [REDACTED]
 22 [REDACTED] (*See* A141.) In complete
 23 derogation of an arbitrator's duty to apply and not modify the contract (§ 24), he
 24 replaced the parties' agreed-upon mutual "lanes" with his own one-way street. *Cf.*
 25 *Comedy Club, Inc. v. Improv West Associates*, 553 F.3d 1277 (9th Cir. 2009).

26 Further, in order to stay the injunction, the Award requires [REDACTED]
 27 [REDACTED]
 28 [REDACTED] (A149-50.) The Arbitrator's compulsory "new

1 deal” supplants the written terms and intent of the Settlement at the time of its
 2 formation, and obligates [REDACTED]
 3 [REDACTED] (A95). That exceeded the Arbitrator’s authority because it “established a
 4 new term and condition . . . for which the parties did not bargain.” *See Phoenix*
 5 *Newspapers, Inc.*, 989 F.2d at 1082 (vacating award).

6 The Award also selectively and inexplicably ignores the Defendants’ separate
 7 identities and claims. By awarding [REDACTED] to both
 8 Defendants at the same time (A130, A150-51), the Award [REDACTED]
 9 [REDACTED], although it has no [REDACTED]
 10 [REDACTED], and grants [REDACTED] to which it has no
 11 rights under the Settlement. (ECF 50, at 9.) That is irrational, disregarded the
 12 contract, controlling law, and basic principles of justiciability, and “exceeded the
 13 scope of [the Arbitrator’s] authority.” *Michigan Mut. Ins.*, 44 F.3d at 830.

14 In fashioning remedies that contradict and substantively amend the Settlement,
 15 “[t]he arbitrator did not do his job.” *Mountaineer Gas Co. v. Oil, Chem. & Atomic*
 16 *Workers Int’l Union*, 76 F.3d 606, 610 (4th Cir. 1996); *Coast Trading Co. v. Pac.*
 17 *Molasses Co.*, 681 F.2d 1195, 1198 (9th Cir. 1982); *Missouri River Servs., Inc.*, 267
 18 F.3d at 855. He fundamentally modified the Settlement, and did so both historically
 19 and prospectively in ways that are inconsistent and irreconcilable with his authority.

20 **4. The Award Imposes Penalties Prohibited Under the Lanham Act**

21 The Award also exceeded the Arbitrator’s authority, and manifestly
 22 disregarded controlling law (A85, A130), because its [REDACTED]
 23 is grossly excessive and violates the Lanham Act’s strict rule that monetary relief
 24 must “constitute compensation and not a penalty.” 15 U.S.C. § 1117(a). The
 25 Arbitrator found no willful infringement (A116), economic harm to OBI (A80), or
 26 evidence of actual confusion (A74-75), but his award is among the “largest-ever.” It
 27 represents nearly [REDACTED] OBI’s annual profits, approximately [REDACTED] its
 28

1 *net sales* in 2010 (which have since declined substantially), and more money than it
 2 earned [REDACTED]. (A7.) The Arbitrator has turned VPX's supposed "breach" and
 3 "infringement" into the best thing that ever happened to OBI (and to Monster, a
 4 stranger to the Settlement, but a fierce competitor of VPX), which is perverse and
 5 shows that the Arbitrator exceeded his authority. 5 McCarthy on Trademarks and
 6 Unfair Competition § 30:84; *Trovan, Ltd. v. Pfizer, Inc.*, 2000 WL 709149, at *15
 7 (C.D. Cal. 2000).

8 C. The Award Must Be Vacated For Evident Partiality

9 The Award should also be vacated on grounds of the Arbitrator's "prejudicial
 10 conduct" and "evident partiality," as demonstrated by the Arbitrator's repeated
 11 efforts to pander to Monster. 9 U.S.C.A. § 10(a)(2). Among other things, he
 12 Arbitrator amended the scope of the relief he awarded only after VPX had made its
 13 election in incoherent ways to benefit Monster and prejudice VPX. Thus, he realigned
 14 the very trademark and contract claims that Defendants split in order to initiate the
 15 Arbitration, and inexplicably awarded both Monster and OBI *shared* damages as if
 16 they were one in the same, offering them up their choice of a menu of windfall
 17 damages. He permitted Monster to avoid the consequences of its election
 18 (abandonment and dismissal), *In re Spreckels' Est.*, 165 Cal. 597, 602 (1913); *Akin*
 19 *v. Certain Underwriters at Lloyd's London*, 140 Cal. App. 4th 291, 296 (2006), by
 20 awarding it [REDACTED] contrary to California law, Cal. Civ.
 21 Code § 3392, thereby extending the Award's forward-looking relief to [REDACTED]
 22 [REDACTED] (A95), imposing a
 23 naked restraint on competition in favor of VPX's competitor contrary to public
 24 policy, Cal. Civ. Code § 16600; *cf. Comedy Club, Inc.*, 553 F.3d at 1293, and
 25 principles of judicial estoppel, *Whaley v. Belleque*, 520 F.3d 997, 1002 (9th Cir.
 26 2008), and even though ***Monster has no rights in OBI's marks going forward.*** (ECF
 27 50, at 9). He awarded also prevailing party fees to Monster prohibited by Cal. Civ.
 28

1 Code § 1717(b)(2). *Donnelly v. Am. Express Bank, FSB*, 2018 WL 4759206, at *4
 2 (S.D. Cal. 2018).

3 Further, although the Arbitrator made clear at the Phase II hearing that he had
 4 limited [REDACTED]

5 [REDACTED], he then materially modified the scope to [REDACTED]
 6 [REDACTED]

7 [REDACTED] Indeed, during the
 8 Phase II hearings, the Arbitrator effectively conceded what the Award makes plain:
 9 he would do whatever Defendants requested. The Arbitrator made clear that he had
 10 limited the scope of the injunction in the Interim Award to require compliance with
 11 Paragraph 7D in just 12 states because that was what Defendants had asked for
 12 (contradicting his statements in the final Award that his expansion of the injunction
 13 was a “clarification”), and directed Defendants’ counsel to “confer with [more senior
 14 lawyers on his] team” to discuss whether they were willing to “risk” vacatur by
 15 granting yet another request to expand the scope of his injunction, adding (for the
 16 record) that he was “not trying to give any legal advice,” when his “suggestions”
 17 could not be construed in any other way. (Ex. 16, at 83:25-94:23.) This evident
 18 partiality and prejudicial conduct in favor of a Southern California company is further
 19 grounds for vacatur. *See Monster Energy Co. v. City Beverages, LLC*, 940 F.3d 1130,
 20 1136 (9th Cir. 2019).

21 **IV. CONCLUSION**

22 For the foregoing reasons, VPX and JHO respectfully request that the Court
 23 grant their motion in its entirety, vacate the Award, and remand this matter to a
 24 neutral arbitration panel for a new hearing
 25
 26
 27
 28

1 Dated: April 29, 2022

Respectfully submitted,

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