

The Honorable Beth Andrus

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

v.

LIVING ESSENTIALS, LLC, a Michigan
limited liability company, and
INNOVATION VENTURES, LLC, a
Michigan limited liability company,

Defendants.

No. 14-2-19684-9 SEA

ORDER GRANTING IN PART AND
DENYING IN PART PLAINTIFF'S
MOTION FOR SANCTIONS

THIS MATTER came before the Court on Plaintiff State of Washington's ("State") motion to sanction Defendants for alleged discovery violations. The Court has considered the materials filed in support of and in opposition to the motion, the federal file relating to *Hansen Beverage Co. v. Innovation Ventures, LLC*, No. 08-cv-1166 IEG (S.D. Cal. 2008), and has heard oral argument by the parties. Being fully advised and having considered the factors set out in *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997) as the Court orally explained on the record on September 8, 2016, the Court hereby ORDERS that the State's motion is GRANTED IN PART AND DENIED IN PART as follows:

Willfulness: Living Essentials did not have a good faith basis for asserting an attorney-client or work product privilege over many of the documents it withheld and identified in a privilege log. Many of the documents pre-dated the *Hansen* litigation. Many withheld

documents did not discuss the Monster Arm portion of the Medicus Study. Many of the documents that discussed the Monster Arm also discussed the manner in which the 5-Hour ENERGY® arm was conducted and were thus highly relevant to this lawsuit and responsive to discovery requests. Even though Living Essentials could have asserted a privilege over all of the Udani documents, it did not do so. Living Essentials raised, as a defense to the State's claims, the issue of there were other studies relating to other energy drinks that substantiated its advertising claims. Thus, Living Essentials essentially cherry-picked which documents it wanted to cover with the privilege and which ones it did not. Such cherry-picking is not "fair and reasoned resistance to discovery" permitted under *Fisons*. Withholding highly relevant and responsive documents without a legal basis for doing so is a willful and deliberate violation of Washington's rules of discovery.

Prejudice: The Court concludes that the State has been prejudiced in preparing for trial because it did not have the relevant documents in sufficient time to question Dr. Udani and Prof. Wesnes about them and to prepare Dr. Blonz to address any of the information they provided in their responses. Dr. McLellan was able to address some of the issues but only based on his interpretation of the documents, not based on the testimony of the authors of the documents.

Lesser Sanctions: The State asked the Court to exclude all evidence related to the Medicus study and the *Appetite* article and testimony from any witness regarding this study and article. The Court denied this request because to do so would have essentially precluded Living Essentials from presenting a defense to the claims. The Court determines that the State's request that the Court exclude all such evidence is not the least severe sanction necessary to advance the purposes of discovery in this case.

The Court determines that sanctions are warranted for Living Essentials' willful violation. The Court considered the State's broad exclusion request, as well as other sanctions, including recessing the trial to give the State time to conduct discovery on the newly produced documents, and a partial exclusion of evidence. The Court concludes that the most appropriate

sanction is a tailored, partial exclusion of certain evidence whereby the Court will disregard some of the evidence presented by Defendants.

The Court will exclude and disregard any testimony from Dr. Udani or Professor Wesnes relating to their conclusions that the results of the 5-hour ENERGY® study cannot be the result of caffeine alone. Specifically, the Court excludes and disregards Udani's deposition testimony at page and line numbers 150:1-151:11; 151:24-152:13, and 153:16-154:19, and Professor Wesnes's testimony at page and line numbers 79:9-22 and 95:23-96:24.

The Court will disregard and exclude any testimony from Dr. Kennedy regarding the Monster Arm documents, but not his own independent opinions about the non-caffeine ingredients. Specifically, the Court will:

- a. Disregard any testimony regarding the Monster arm as contained in Dr. Kennedy's live presentation, Exhibit 2254, slides 19 and 58, and any testimony from August 31 or September 1, 2016 regarding the entries in these slides;
- b. Disregard the testimony from pages 97 to 109 of the September 1, 2016 trial transcript regarding the Monster arm;
- c. Exclude from consideration Exhibits 2251 and 2257.

The State is awarded its reasonable attorney fees incurred in bringing the motion to compel the Monster arm documents before the special master, any cost of the special master's time incurred by the State in obtaining his ruling on the motion to compel, and the cost of bringing the motion for sanctions.

The Court's oral ruling is incorporated herein by reference (Ex. 1) as is the Special Discovery Master's Findings, Decision and Order Granting Plaintiff's Motion to Compel (Ex. 2)

IT IS SO ORDERED this 12th day of October, 2016

Electronic signature attached

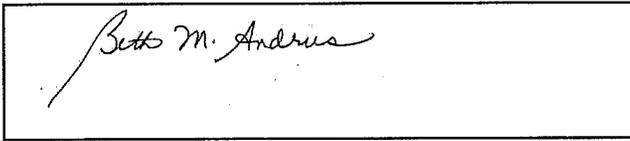
Honorable Beth M. Andrus

King County Superior Court
Judicial Electronic Signature Page

Case Number: 14-2-19684-9
Case Title: WASHINGTON STATE OF VS LIVING ESSENTIALS ET ANO

Document Title: ORDER SANCTIONS

Signed by: Beth Andrus
Date: 10/12/2016 3:34:06 PM



Judge/Commissioner: Beth Andrus

This document is signed in accordance with the provisions in GR 30.

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Exhibit 1

1 THE COURT: All right. Are there any other exhibit
2 issues that -- from either side that we need to attend
3 to?

4 MR. MULLIN: No, your Honor. So I can say defendants
5 officially rest.

6 THE COURT: Thank you. And plaintiffs, as well?

7 MS. GUNNING: That is correct, Your Honor.

8 (Plaintiff and Defendants rest; court's
9 ruling)

10 THE COURT: All right. At this time what I would like
11 to do before openings is I would like to provide the
12 parties with my oral ruling on the motion for sanctions.
13 I will want to do it now, because it could affect what
14 folks talk about in closing, so I want to share with you
15 the court's analysis.

16 The plaintiff has moved under CR 37(b) and 26(g) to
17 exclude all evidence relating to the Medicus study and
18 the resultant Appetite Journal article based on alleged
19 willful and deliberate withholding of relevant and
20 critical evidence during discovery by the defendants,
21 Living Essential and Innovation Ventures.

22 The court is going to grant, in part, and deny, in
23 part, the motion, based on the following analysis. The
24 court spent some time looking at the factual chronology
25 of events leading up to the ultimate decision to withhold

1 certain documents. The court noted that in November of
2 2007, NAD issued -- N-A-D issued a decision regarding
3 Living Essentials's ads, and that case was closed at that
4 point, several months before this court's analysis,
5 before anyone contacted Medicus or Dr. Udani.

6 In March or April of 2008, the Emord Law Firm
7 contacted Medicus and retained it to conduct a clinical
8 trial of at that time 5-hour ENERGY and Amp, a competing
9 product, and the privilege log contains references to a
10 draft protocol for the Living Essentials 5-hour ENERGY
11 study, starting with the dates of April 16, 2008.

12 Dr. Udani testified that in his deposition that he
13 prepared the protocol for approval by the IRB, and
14 denominated that study with the designation of Livi,
15 L-I-V-I, 1000, and he testified in his deposition that
16 this was the designation of the study, of the Medicus
17 study, that ultimately became the study on which the
18 defendants are relying in this lawsuit for substantiation
19 of their ad claims.

20 The privilege log lists multiple draft budgets for
21 that study from April 2008, starting with Udani's 7658.
22 These were identified in the privilege log and withheld
23 from production. And at that time there was no NAD
24 proceeding nor any lawsuit pending, and nor had the
25 defendants provided the court with any evidence that the

1 retention of Medicus was done in anticipation of any
2 litigation.

3 On May 7, 2008, CDR provided a cross-proposal to Dr.
4 Udani for the use of CDR's computerized cognitive testing
5 for subjects, and that's Exhibit 1416. And per that
6 proposal, quote, Medicus was planning to conduct a study,
7 examining a cognitive effect of a sugar-free energy
8 drink, and the energy will be compared against a
9 comparative drink and against a placebo, and this
10 document was produced in discovery.

11 So at that point someone made a determination that
12 some of these documents that referenced a comparator arm
13 was not work product.

14 Dr. Udani testified in his deposition that there was a
15 master clinical trial agreement dated June 10, 2008,
16 between Medicus and Emord & Associates, and that's
17 referenced in Exhibit 39 to his deposition.

18 But the various versions of this agreement were not
19 produced. They were identified on a privilege log as
20 Udani's 7672 to 7705, and were withheld from production
21 based on a work product and attorney/client privilege,
22 even though the draft agreements predated the Hanson
23 litigation and related specifically to the 5-hour ENERGY
24 arm of the Medicus study.

25 Then came the Hanson litigation, and the parties

1 should know that I did, in fact, review all of the
2 pleadings in the federal file relating to the Hanson
3 litigation so that I could understand the chronology of
4 events.

5 On July 1, 2008, Hanson, the manufacturer of Monster,
6 filed a federal lawsuit against Innovation Ventures in
7 the U.S. District Court for the Southern District of
8 California.

9 Hanson alleged that claims of false advertising, in
10 violation of 15 USC, Section 1125a and California law,
11 and they specifically challenged the veracity of Living
12 Essentials's contention that 5-hour ENERGY gave
13 consumers, quote, hours of energy now, no crash later.

14 It also claimed as false Living Essentials's
15 contention that 5-hour ENERGY provided B vitamins for
16 energy, and amino acids for focus, alertness, and better
17 mood.

18 They also alleged that Living Essentials claimed that
19 the decaf product provided, quote, hours of energy now,
20 that could be felt minutes, that would last for hours,
21 was false.

22 At that point everything that Dr. Udani was doing in
23 the Medicus study, including the 5-hour ENERGY arm, that
24 had just had -- that has been revealed or relied on in
25 this litigation, was arguably work product and relevant

1 to the Hanson litigation, not just the Monster arm. And,
2 in fact, Living Essentials resisted producing any Medicus
3 documents and any Medicus study to Hanson in that
4 litigation for months on the ground that all of the work
5 that Dr. Udani was doing was work product and thus
6 privileged, until such time as the deadline for producing
7 expert reports arrived.

8 In August of 2008, Dr. Udani notified the IRB of a
9 protocol change to the study he denominated Livi 1000,
10 and this related to dosing change, but Amp still remained
11 the comparator product, and that's in Exhibit 1451.

12 Monster was not even mentioned in this document, but,
13 never the less, Living Essentials withheld the document
14 from production, contending that the document had been
15 generated as part of the Hanson litigation.

16 At some point thereafter and after the Hanson lawsuit
17 was filed, Mr. Emord did contact Dr. Udani and asked him
18 to change the scope of the study to replace Amp for
19 Monster, and the IRB approved the change to the study to
20 what was then noted to be a four-armed study, and that's
21 Exhibit 1455.

22 As a result of that change, in September and October
23 of 2008, Dr. Udani prepared several revised budget
24 proposals. All were identified in the privilege log and
25 withheld from production. And that's Udani's 7706 to

1 7722.

2 It's not clear if these budget proposals specifically
3 related to the Monster arm, because neither Dr. Udani nor
4 Mr. Emord indicated in their declarations when Mr. Emord
5 first contacted Dr. Udani to make the swap of Amp for
6 Monster.

7 But we do know that by December of 2008, Dr. Udani did
8 notify the IRB of the decision to change the protocol to
9 include a Monster placebo arm. And at that time he
10 called the title of the study a four-armed, crossover,
11 randomized, double-blind, placebo-controlled study, and
12 that's Exhibit 1455.

13 They did say in there that Monster was being included
14 as a comparator, even though there wouldn't be a, quote,
15 direct comparison.

16 In Exhibit 1454, however, the subject consent form,
17 which was dated December 5, 2008, per the privilege log,
18 and not produced in discovery, Medicus informed the study
19 participants that, quote, Medicus is evaluating the
20 results of effect of a single dose of the 5-hour ENERGY
21 drink compared with Monster Energy Drink and placebo on
22 cognitive function, mood, and blood glucose levels, in
23 healthy volunteers.

24 On April 21, 2009, that appears to be the earliest
25 draft of the Medicus report, as identified on the

1 privilege log, and, as it was denominated in the IRB,
2 final IRB protocol, it was called a four-armed crossover
3 study.

4 And the purpose of the study, at page 7, says that it
5 was to test the hypothesis that the ingestion of 5-hour
6 ENERGY supplement will increase levels of alertness and
7 cognitive function compared to placebo, and an active
8 comparator Monster Energy Drink is also included for
9 comparison. Throughout the text the reference was to a
10 single study, not to two studies.

11 On April 23, 2009, a 96-page draft of report from the
12 study was created, and this is the one that's -- the date
13 that is taken from the privilege log, it's Exhibit 1456.

14 Somebody wrote in this study that the Monster Energy
15 Drink and the eight-ounce placebo were coded as drinks E
16 and D, respectively, and then goes on to talk about the
17 Monster Energy Drink's performance, and then wrote,
18 overall, the cognitive benefits of 5-hour ENERGY
19 supplement over the two-ounce placebo were generally
20 greater and more statistically reliable than those of the
21 Monster Energy Drink, over the eight-ounce placebo.
22 Someone had to have done some analysis of some data in
23 order to come to that conclusion.

24 The draft contains plots of the results of the data
25 collected from the CDR system for, both, the 5-hour

1 ENERGY arm, and the Monster arm.

2 On April 24, 2009, Professor Wesnes prepared a set of
3 PowerPoint slides for what he called, again, the
4 four-armed crossover study, with a single-blind active
5 comparator, and that's Exhibit 1457.

6 Now, the slides seem to show that Professor Wesnes ran
7 computer analysis of the data to compare drinks A to B
8 and drink D to E, and then he presented that information
9 to compare the results of 5-hour ENERGY and Monster.

10 We do not know to whom this data was presented, other
11 than to Dr. Udani. Mr. Emord and Dr. Udani claimed that
12 no one saw this data.

13 I find these statements hard to believe. Given the
14 fact that at that very moment Living Essentials was in
15 active litigation with Monster, a competitor, I do not
16 find it credible that Living Essentials, or at least its
17 California counsel who was at that very time trying to
18 decide whether to identify Dr. Udani as an expert, would
19 not want to know the results of a test of a competitor's
20 product.

21 What is clear is that between April 24, 2009, and
22 May 15, 2009, someone told Dr. Udani and Professor Wesnes
23 not to include any data relating to the Monster arm in
24 the Medicus report.

25 This court can only conclude that someone determined

1 that from a legal perspective it was not within Living
2 Essentials's benefit to reveal that information to
3 Hanson, and, if they did so, if they identified it, then
4 they would have to disclose it in the Hanson litigation.

5 On May 15, 2009, Medicus provided Emord & Associates
6 with the report containing only the data from the 5-hour
7 ENERGY placebo arm of the clinical trial, and that's
8 Exhibit 1448.

9 Now, within days Hanson issued a subpoena to Medicus,
10 seeking the production of this study, and the very next
11 day, Living Essentials, in the federal case, disclosed
12 Dr. Udani for the first time as a supplemental expert
13 witness in the Hanson litigation.

14 In his testimony, in that disclosure, was described as
15 including, quote, clinical studies and other issues
16 regarding the efficacy, duration, and effects of energy
17 supplements, including 5-hour ENERGY.

18 Now, at that point everything that Dr. Udani would
19 have done, including the Medicus study that the defense
20 is relying on here, would have been covered by, arguably,
21 a work product privilege.

22 Medicus and Living Essentials then sought to quash the
23 Medicus subpoena, claiming that Medicus -- quote, Medicus
24 is involved in the preparation of an in-depth study that
25 will form the basis of an expert report in support of

1 Living Essentials's defenses in this litigation regarding
2 the truthfulness of Living Essentials's advertising
3 claims asserted by Hanson to be false.

4 And Living Essentials claims that it would be
5 premature to disclose any of the Medicus documents at
6 that time.

7 They also made reference to the fact that on May 22,
8 2009, Living Essentials submitted to NAD, N-A-D, a copy
9 of a report from the results of the Medicus study.

10 Now, the expert disclosure deadlines in the Hanson
11 litigation were continued on several occasions, and
12 ultimately the deadline was set for September 2010, which
13 is when the litigation was resolved by settlement, and,
14 as a result, none -- from what I can tell, none of the
15 Medicus materials were turned over to Hanson in that
16 litigation.

17 This chronology of events seems to make sense, given
18 the draft expert report we've seen, dated September 14,
19 2010, which is Exhibit 1458, and the expert witness time
20 log that was produced and not withheld from production,
21 which is Exhibit 59 to the Udani's deposition.

22 Now, it is accurate that Dr. Udani was asked about
23 whether or not any information or data gathered in the
24 course of Medicus study had been omitted from the report
25 that had been produced to the Oregon Department of

1 Justice, and Dr. Udani said, "not to his recollection."
2 And he did indicate in that deposition that none of the
3 data had been analyzed to the point where conclusions
4 could be reached about that separate arm.

5 In January of 2016, Living Essentials did produce
6 three spreadsheets that did provide details of the data
7 collected, what appeared to me to be the CDR test results
8 for, both, the Monster arm and the 5-hour ENERGY arm,
9 even though it wasn't called the Monster arm in those
10 spreadsheets.

11 Now, what's interesting is there is inconsistent
12 positions being taken about what documents are privileged
13 and what documents aren't, because if the data from the
14 Monster arm was privileged, I don't understand why that
15 was produced, where documents that clearly were related
16 to the 5-hour ENERGY arm, including the IRB protocol and
17 the contract, were not.

18 I do not know that the State of Oregon challenged the
19 privilege assertion, leading Living Essentials to file a
20 motion for protection order with Judge Skye, and she
21 granted that motion after an in camera review of the
22 withheld documents.

23 And Living Essentials relies on her decision as
24 providing a good faith basis for their continuing to
25 withhold those documents in this litigation.

1 Now, in this Dr. Thomas McClellan testified that after
2 having reviewed the documents on the privilege log,
3 whether we call them Monster arm documents or just
4 documents that had been withheld, that Dr. Udani's and
5 Professor Wesnes's contention that the Monster arm data
6 was never analyzed is not supported by those documents.

7 He testified that Exhibit 1451 contained all the
8 statistical results for all the CDR testing and the mood
9 questionnaires from both arms, that these documents not
10 only compared each of these two products to the placebo,
11 but also made comparisons between the products, and that
12 the results of the Monster arm supports his contention
13 that it is the caffeine in both products, and not the
14 vitamin blend in 5-hour ENERGY, that are causing the
15 increase in cognitive functioning and mood.

16 In the Oregon trial, Attorney Simon argued that the
17 Monster arm documents had become relevant because of
18 Professor Wesnes's testimony and the results of the 5 --
19 that the results of the 5-hour arm of the Medicus study
20 were so extraordinary, that the results had to be from
21 the non-caffeine products, and because of Dr. Kennedy's
22 testimony that the results of studies relating to
23 competing products, such as Red Bull, were relevant to
24 his contrary -- his opinions, consistent with Professor
25 Wesnes's.

1 Judge Skye concluded that if the defense witnesses
2 were going to extrapolate the scientific studies relating
3 to other energy drinks, that any data collected relating
4 to Monster was relevant, as well, and, in other words,
5 the defendants essentially opened the door when they
6 chose to rely on evidence relating to the efficacy or
7 lack thereof of competing energy drinks.

8 In this case Living Essentials chose to rely on
9 Professor Wesnes's testimony and on Dr. Kennedy's
10 testimony in the same manner, yet Living Essentials would
11 not release the withheld documents to the State of
12 Washington, because they were concerned that to do so
13 would constitute a waiver of the privilege.

14 The special master ordered the documents disclosed on
15 August 21, 2016, in a 10-page, detailed ruling. Judge
16 Hilyer concluded that because the Monster arm portion of
17 the Medicus study was not a separate, distinct
18 engagement, conducted by a law firm for litigation
19 purposes, but was instead appended to an existing study
20 commissioned for business purposes, the documents did not
21 qualify for work product protection.

22 He ruled that it was unfair for one party to access --
23 to have access to all documents from the Medicus study,
24 to pick and choose which documents will be relied on and
25 which ones will be shielded.

1 This court has reviewed Judge Hilyer's analysis and
2 agreed with it.

3 So now we come to the analysis under Burnet and
4 Magana. A court exercises broad discretion in imposing
5 discovery sanctions under CR 26(g) and 37(b). Excluding
6 evidence that would affect a party's ability to present
7 its case because of a failure to comply with discovery
8 rules, is a very, very severe sanction.

9 Such an exclusion order can only be ordered when, one,
10 a party has willfully or deliberately violated discovery
11 rules or court orders; two, the opposing party was
12 substantially prejudiced in its ability to prepare for
13 trial; and, three, the trial court explicitly considers
14 whether less severe sanctions would have sufficed.

15 And the purpose of any sanction must be to detour, to
16 punish, to compensate, and to educate. Under Burnet, a
17 trial court's reasoning for imposing any sanctions must
18 be clearly stated on the record so that meaningful review
19 can occur.

20 So the first Burnet factor is willfulness. In Jones
21 vs. City of Seattle, the Supreme Court held that a
22 failure to comply with a court order would be deemed
23 willful if it occurred without reasonable justification,
24 but that's not every violation of a discovery rule can be
25 deemed willful. As they said in Jones, something more is

1 needed.

2 In Fisons the court said fair and reasoned resistance
3 to discovery is not sanctionable, and thus this court
4 must determine if the circumstances meet the Jones test,
5 as opposed to the Fisons articulation of fair and
6 reasoned resistance to discovery.

7 In this case I find that Living Essentials's failure
8 to disclose all of the documents relating to the 5-hour
9 ENERGY arm to have been willful. Living Essentials did
10 not have a good faith basis for asserting an
11 attorney/client or a work product privilege over many of
12 those documents contained in the privilege log.

13 Many of the documents predate the Hanson litigation,
14 many documents do not even mention Monster, many of the
15 documents that do discuss Monster, also discuss the
16 manner in which the 5-hour ENERGY arm was to be
17 conducted, and thus were very relevant as to this
18 lawsuit.

19 And even though Living Essentials could have asserted
20 the same privilege over all of these Udani's documents,
21 because all were arguably relevant in the Hanson
22 litigation, they chose not to do so, and they also chose
23 to raises a defense here that the studies relating to
24 other energy drinks provided substantiation for their
25 advertising claims.

1 Thus I agree with Judge Hilyer, that Living Essentials
2 essentially cherry-picked which documents it wanted to
3 cover with the privilege and which ones it did not. And
4 this cherry-picking was not consistent.

5 Now, what it appears to this court is that Living
6 Essentials may, for very legitimate, competitive reasons,
7 not have wanted anything relating to Monster to become
8 public, but that is not fair and reasoned resistance to
9 discovery.

10 The decision to assert the privilege was certainly
11 intentional, the withheld documents had high probative
12 value because they directly responded to whether energy
13 products lacking the vitamin content of 5-hour ENERGY,
14 nevertheless, produced the same trend in responses in
15 study subjects on cognitive tests.

16 Thus I conclude that the State has established that
17 Living Essentials engaged in willful and deliberate
18 violations of Washington's rules of discovery by
19 withholding many of the documents on its privilege log.

20 I understand that Judge Skye held that the documents
21 could be withheld from production. I do not know the
22 rules of discovery in Oregon, and I do not have Judge
23 Skye's analysis on this matter in front of me.

24 All I can say is that when I look at the documents on
25 the privilege log, I cannot find an honest way to

1 conclude that the work product privilege extended to many
2 of the documents on that privilege log.

3 The next element is prejudice. Now, as the State
4 noticed, the prejudice prong of the test looks to whether
5 it was prejudiced in preparing for trial, not whether it
6 was prejudiced in obtaining a fair trial.

7 As in Magana, the defendant here has criticized the
8 State's choice of strategy in how it pursued the case,
9 asserting that the State did not challenge the privilege
10 asserted after receiving the log or the texts of the
11 Bayer and Udani's depositions.

12 The Washington Supreme Court rejected that kind of a
13 defense in Magana and said that that defense, quote,
14 completely misses the mark, because Magana was entitled
15 to that discovery, hence never requested a protective
16 order, and the discovery requests were reasonably
17 calculated to lead to the production of admissible
18 evidence.

19 The discovery requested should have been given to
20 Magana in a timely manner. Magana need not have
21 continually requested more discovery and updates on
22 existing requests.

23 Nor did the court find that the burden of filing a
24 motion to compel should be on Magana. The same is true
25 here. Once Living Essentials chose to assert the

1 privilege, knowing that some of the documents on the log
2 specifically related to the 5-hour ENERGY arm of the
3 study, it had the burden of seeking a ruling from a
4 Washington judge and/or a discovery master regarding the
5 legitimacy of the privilege.

6 The court does conclude that the State has been
7 prejudiced in preparing for trial, because it did not
8 have relevant documents in sufficient time to determine
9 whether to question Dr. Udani or Wesnes about them, or to
10 prepare Dr. Blonz to address the information contained in
11 those -- any such depositions.

12 Dr. McLellan was able to address some of the issues,
13 but he was only able to base his opinions on his
14 interpretation of the documents, not based on the
15 testimony of the authors of the documents.

16 That takes us to the sanction prong of the Burnet
17 factors. The State has asked the court to exclude all
18 evidence related to the Medicus study and the Appetite
19 article to remedy its inability to depose Dr. Udani and
20 Wesnes about the Monster arm results and about the
21 content of the other documents that have recently been
22 produced. This is a very, very broad sanction.

23 The court should issue sanctions appropriate to
24 advancing the purposes of discovery, and the discovery
25 sanction should be proportional to the discovery

1 violation and the circumstances of the case.

2 The least severe sanction, adequate to serve the
3 purpose of a particular sanction, should be imposed,
4 although the sanction should not be so minimal that it
5 undermines the purpose of discovery.

6 So the court looked and considered a wide variety of
7 options at this point. I certainly considered the
8 State's request that I exclude all evidence relating to
9 the Medicus study and the Appetite article; I also
10 considered whether to exclude some more limited portion
11 of evidence.

12 I considered whether to impose a monetary fine, and I
13 also considered whether to recess the trial to permit the
14 State to now depose Drs. Udani's and Wesnes, and I have
15 considered each of these sanctions.

16 I conclude that the request that I exclude all
17 evidence about the Medicus study and the Appetite article
18 is not the least severe sanction necessary to advance the
19 purposes of discovery in this case.

20 Much of what is in that study and the article were
21 known to the State, they were the subject of intense
22 discovery, both sides have had ample opportunity to
23 address the validity of the study and the meaning of the
24 test results relating to the 5-hour ENERGY arm, thus a
25 complete exclusion is not necessary, in this court's

1 opinion, under, either, Burnet or Magana.

2 Now, with regard to a potential recess, while I
3 considered this option, I have chosen not to impose it.
4 I have concluded that this sanction would not suffice, as
5 it would simply increase the costs, not only to the
6 State, but to everybody involved, it would be more of a
7 reward for nondisclosure, and it would only exacerbate
8 the lack of finality, which I think everybody here could
9 benefit from.

10 I believe and have determined that the more
11 appropriate sanctions are a tailored, partial exclusion
12 of certain evidence, and in the court's assessment the
13 most appropriate sanction is to disregard some of the
14 evidence presented by Living Essentials.

15 Specifically, the court will exclude and disregard any
16 testimony from Dr. Udani or Professor Wesnes relating to
17 their conclusions that the results of the 5-hour ENERGY
18 study cannot be the result of non-caffeine ingredients in
19 the 5-hour ENERGY product. That is Udani's deposition
20 testimony, page 150, line one, to page 151, line 11.
21 Page 151, line 24, to page 152, line 13, and page 153,
22 line 16, to page 154, line 19.

23 It includes Dr. Wesnes's testimony at page 79, lines 9
24 through 22, and page 95, lines 23, to page 96, line 24.

25 Finally, the court will a disregard and exclude any

1 testimony from Dr. Kennedy regarding the Monster arm
2 documents, not his own independent opinions about the
3 non-caffeine ingredients, but about the Monster arm
4 documents.

5 Specifically, the court will disregard any testimony
6 regarding the Monster arm as contained in his live
7 presentation, Exhibit 2254, at what I have identified as
8 slides 20 and 59, and any testimony from August 31st or
9 September 1, regarding the entries in these slides.

10 In addition, I will exclude and disregard his
11 testimony from pages 97 to 109 of the transcript of
12 September 1 regarding the Monster arm, and I will exclude
13 from consideration Exhibits 2251 and 2257.

14 That is the extent of the evidence that the court will
15 exclude and disregard.

16 Now, I also conclude that some monetary award is
17 warranted. The court may require a party failing to
18 respond to discovery to pay reasonable attorney fees to
19 the other party, and the court will award to the State
20 reasonable attorney fees that it incurred in bringing the
21 motion to compel the Monster arm documents before the
22 special master, any cost of the special master's time
23 incurred by the State in obtaining his ruling on the
24 motion to compel, and the cost of bringing the motion for
25 sanctions.

1 That concludes the court's ruling on the motion for
2 sanctions. I apologize for it being so lengthy.

3 Now, do the parties want to take about a 15-minute
4 break so that we can get ready for closing arguments?

5 MS. GUNNING: The State would greatly appreciate that,
6 Your Honor.

7 THE COURT: All right. Let's take a 15-minute break.

8 (Recess)

9 THE COURT: Please be seated, everyone.

10 MR. MULLIN: Your Honor, one matter for the court.

11 THE COURT: Yes, sir.

12 MR. MULLIN: We have already prepared our findings of
13 fact and conclusions of law, and do include references to
14 some of the items that have been excluded. So we had
15 already prepared and are ready to file our findings of
16 fact and conclusions of law. They include certain of the
17 evidence that has been excluded. We're going to file it
18 as is, in order to preserve our record. Thank you.

19 THE COURT: Thank you. Ms. Gunning, are you ready for
20 closing?

21 MS. GUNNING: There's actually two matters.
22 Inevitably, there are always other matters. First, with
23 respect to the findings of fact and conclusions of law,
24 the State anticipated there might need to be some
25 additional adjustments following the court's ruling

Exhibit 2

1 Commissioned Study in Response to Requests for Production; Defendants' Opposition to
2 Motion to Compel re: Monster Arm of Defendants' Commissioned Study; Declaration of Darin
3 LeBeau In Support of Defendants' Opposition to State's Motion to Compel Production of
4 Documents Relating to Monster Arm of Defendants' Commissioned Study; Declaration of
5 Reilley D. Keating in Support of Defendants' Opposition to Sate's Motion to Compel
6 Production of Documents Relating to Monster Arm if Defendants' Commissioned Study;
7 [Proposed] Order Denying Plaintiffs' Motion to Compel Production of Documents Relating to
8 Monster Arm of Defendants' Commissioned Study in Response to Requests for Production;
9 State's Reply to Motion to Compel Production of Documents Relating to Monster Arm of
10 Defendants' Commissioned Study in Response to Requests for Production

11 At Defendants' request and over Plaintiff's objection, oral argument was heard
12 telephonically on August 19, and after consideration of the evidence and materials recited
13 above, Master hereby orders as follows:

14 **I. PROCEDURAL BACKGROUND**

15 One of the central issues in this case is whether Defendants have a scientific basis for
16 their advertising claims regarding the benefits of ingesting their "5 Hour Energy ("5HE")"
17 product. Plaintiff's position is that 5HE's benefits derive solely from its caffeine content.
18 Defendant contends that it is the overall unique blend of ingredients beyond caffeine that results
19 in 5HE's alertness and sensory benefits.

20 In support of the position that its advertising is not misleading or deceptive and has
21 scientific support, Defendant, through its experts and in response to discovery requests has
22 indicated it is relying at least in part on the 2009 "Medicus study" (Defendants' Opposition,
23 Keating Declaration, Exhibit 4) performed by Dr. Jay Udani, and on a 2013 article based on the
24 *Medicus* study published in the journal *Appetite* (Motion, Irwin Declaration, Exhibit I). The
25 *Medicus* study contained 4 "arms" which reflect 4 different groups of people testing different

1 substances, with the first 2 arms being 5HE versus a placebo, and arms 3 and 4 (referred to as
2 the "Monster arm") given a competitor's Monster Drink versus a placebo. Defendant's
3 Opposition Keating Declaration, Exhibit 3, Deposition of Marilyn Barrett in State of Oregon v
4 Living Essentials Multnomah County # 14CV09149.

5 In response to Plaintiff's discovery requests, Defendant asserted that the "Monster arm"
6 study results were not relevant, were never fully analyzed and were also protected from
7 discovery based on the work product privilege (earlier contentions regarding attorney-client
8 privilege were not pursued in briefing or oral argument). Defendants' Opposition to Motion to
9 Compel. Discovery requests proceeded in both the Washington and Oregon cases, and Dr.
10 Udani's attorney permitted Defendants to review responsive documents for privilege
11 determination. On January 29, 2016, Defendants transmitted to Washington Plaintiff a
12 privilege log identifying documents withheld asserting both "Attorney-Client" and "Work
13 Product" privileges Defendants' Opposition, Keating Declaration Exhibit 15. Plaintiff did not
14 challenge these privilege claims until this motion.

15 The genesis of the current motion and challenge to the privilege asserted for the
16 "Monster arm" documents involved the proceedings in Oregon. In that parallel case, the
17 Oregon Plaintiff objected to the asserted privilege (at oral argument in this case, both sides
18 agreed that the same documents are now at issue here). Defendant then successfully moved to
19 obtain a Protective Order in Oregon to preclude production of the Monster arm documents
20 based on privilege. However, later during the Oregon trial, the Oregon trial judge effectively
21 reversed her ruling remarking "it's [Monster arm] more relevant than I initially thought it was."
22 Plaintiff's Motion, Irwin Declaration, Exhibit G. Then, on July 20, 2016, after he reviewed
23 "Monster arm" documents, the Oregon Plaintiff's expert Dr. Tom McLellan testified (to
24 summarize his opinion) that the Monster arm data was inconsistent with the *Medicus* study
25 conclusions asserted by Plaintiffs regarding 5HE, and he interpreted the Monster arm data as

1 supporting the Plaintiff's position that the effects of SHE were attributable to caffeine. Oregon
2 trial testimony of Tom McClellan, Exhibit K to Erwin Declaration, Plaintiff's Motion;
3 Declaration of Tom McLellan In Support of Plaintiff's Motion Whether to Seal Motion to
4 Compel Defendants To Produce Monster Arm of Commissioned Study. Following McLellan's
5 testimony in the Oregon trial, the Washington case Plaintiff quickly followed up and reasserted
6 its request for the Monster arm data. After Defendants still refused to produce the Monster arm
7 documents, Plaintiffs then brought this Motion to Compel Production.

8 Defendant opposes the Motion arguing that it comes too late, that the Monster arm
9 data is not relevant, and that it is protected by the work product privilege. Each of these
10 contentions is analyzed in turn.

11 II. TIMELINESS AND RELEVANCE.

12 First, while the motion was filed after the discovery cutoff and in close proximity to the
13 trial, the motion is timely. The Plaintiff relied upon Defendants' representations that the
14 Monster data was not analyzed and not relevant until McLellan's testimony in the Oregon court
15 showed otherwise. While Plaintiff could have challenged the asserted privilege based on the
16 privilege log, the Plaintiff had no way to disprove the assertions that the data was not probative
17 without access to the data itself. It ultimately took an expert like McLellan to connect the
18 Monster arm findings with the issues being litigated. While there is much argument among
19 counsel about the relevance of the Monster data, argument is not evidence, and as clearly shown
20 in McLellan's Declaration submitted in the concurrent Motion to Seal, his opinion testimony
21 supports the Plaintiff. The fact that he may have gotten his caffeine doses mixed up (200 vs
22 250) or the fact that another opposing witness (or lawyer) may disagree is not significant. This
23 motion is to determine discovery not the ultimate facts. So long as the Defendant relies on the
24 *Medicus* study and the *Appetite* article, the Monster arm data is relevant for discovery purposes
25 which only requires that it be "reasonably calculated to lead to the discovery of admissible

1 evidence.” CR 26 (b) (1). The Monster arm documents should not have been withheld on the
2 basis of relevancy (not to mention that the discovery rules do not allow unilateral relevancy
3 determinations anyway). Plaintiff acted with all dispatch once it learned that the Monster arm
4 data was relevant. Thus, the motion is both timely and the data sought is relevant for discovery
5 purposes.

6 III. WORK PRODUCT ANALYSIS

7 Defendant’s work product contention relates to an earlier lawsuit when the Hansen
8 Company, which makes the competing product Monster Drink, sued in 2008. Defendants’
9 Opposition, Keating Declaration, Exhibit 1, Declaration of Jonathan Emord. According to
10 Emord, Hansen Beverage Company filed suit against Defendant on July 1, 2008. And Emord
11 testified his firm engaged *Medicus* research in “or around July or August 2008” to “perform
12 servicesin connection with that lawsuit.” *Id.* It is undisputed that the Monster arm
13 documents were not filed or introduced as evidence in the Hansen lawsuit. However, as
14 discussed during oral argument, the actual genesis of the *Medicus* study was unclear prior to
15 the in camera review. During oral argument, Defendants were unable to explain how their work
16 product contention fit with the Cognitive Drug Research (CDR) documents submitted as a
17 “Services and Costs proposal” for the study to *Medicus* Research on May 8, 2008, almost 2
18 months before the Hansen case was filed. Plaintiff’s Motion, Erwin Declaration, Exhibit D. .
19 Further complicating the original basis of the *Medicus* study’s clinical trials was an undated
20 document produced at the Oregon Udani deposition which states that the “Trial Treatments”
21 will be done for SHE and for “AMP Overdrive Energy” which is an entirely different product
22 with no connection to the Hansen litigation or *the* Monster Drink. Plaintiff’s Motion, Erwin
23 Declaration, Exhibit C. Because of the unanswered questions about the genesis of the *Medicus*
24 study and the Monster arm documents, the Discovery Master proposed that he conduct an in
25 camera review of the withheld documents which is now completed.

1 **IV. FINDINGS REGARDING THE MEDICUS STUDY AND THE**
2 **MONSTER ARM DOCUMENTS.**

3 The recitation in the Declaration of Mr. Emord that his law firm retained *Medicus* to
4 perform services related to the Hansen litigation “in or around July or August” after Hansen
5 filed suit against Defendant on July 1, 2008 is at least incomplete and at worst misleading. In
6 fact, the original Draft Protocol for what is now referred to as the *Medicus* study was in
7 discussion in March 2008 and bears no relation to the Hansen litigation. At that time, the
8 Hansen case had not been filed and there is no evidence in the record that it was threatened. As
9 of March, 2008, the protocol for the *Medicus* study contemplated a 3 arm study with 5HE, a
10 different competing product AMP Overdrive, and a placebo. UDANI005679-5709. The
11 entity originally listed as the sponsor which engaged *Medicus* was the Defendant, Living
12 Essentials LLC, and not a law firm defending actual or threatened litigation. UDANI006871-
13 6937. At some point before Monster Drink was substituted for AMP, Emord and Associates
14 P.C. was substituted as “Sponsor” but even then the *Medicus* protocol was for a 3 arm study
15 with 5HE, AMP Overdrive and a placebo. UDANI006082-6118. The change to the protocol
16 substituting Monster Drink for Amp Overdrive was dated November 25, 2008. UDANI007379.
17 While it is possible it could have been missed, no documents were located in which the Emord
18 law firm engaged *Medicus* or CDR as a consulting expert in the Hansen litigation. There were,
19 however, numerous other draft agreements between the Emord firm and *Medicus* not related to
20 the Hansen litigation such as non-disclosure agreements and agreements to perform medical
21 testing. The only series of documents verifying the engagement of *Medicus* by the Emord law
22 firm was a change in the “Study Protocol” as of July 21, 2008 that substituted Emord and
23 Associates P.C. for Living Essentials LLC as “sponsor,” but still indicated that the comparator
24 product was AMP Overdrive. UDANI006082-6091. Also, there are documents which appear
25 to contradict any prior contention that no findings were made regarding the Monster arm of the

1 *Medicus* study. UDANI007389-7419 "Summary of Findings from study entitled: The 5 Hour
2 Energy Dietary Supplement ...4 Arm Crossover...With a Single Blind Comparator."

3 Taking all of this evidence into account, it establishes that the *Medicus* study, which
4 always included a competing product, was begun by Defendant for reasons unrelated to
5 litigation, and then later after the Hansen suit was filed, the AMP arm of the study was changed
6 to Monster plus placebo for a 4 Arm study. The entire study, including the Monster arm, was
7 evidently completed by April 24, 2009 and findings were then summarized. Subsequently,
8 although there were no documents located in the review which specified how, when or why,
9 Defendant asserts that the Monster arm portion of the study was discontinued.

10 V. CONCLUSIONS

11 In asserting work product protection for the Monster arm documents, Defendants
12 contend that they can rely on the 5HE and placebo arm to substantiate their advertising claims,
13 while asserting work product protection and precluding discovery of the other 2 arms including
14 Monster Drink and its placebo.

15 The first question is whether the Monster arm documents qualify as work product. In
16 order to be under that qualified protection, they must have been prepared "in anticipation of
17 litigation." CR 26(b) (4). While the the *Medicus* study itself commenced before the Hansen
18 litigation, the substitution of the Monster Drink in lieu of the AMP product happened after the
19 Hansen suit was filed. To the extent that Defendants posit the Monster arm documents as a
20 separate study from the *Medicus* study, the record indicates otherwise. After the *Medicus* study
21 was completed, its results were summarized including all 4 arms: SHE/placebo and
22 MD/placebo. Because the Monster arm portion of the *Medicus* study was not a separate and
23 distinct engagement conducted by a law firm for litigation purposes, but was appended onto an
24 existing study already commissioned for other business purposes, it would not appear to qualify
25 for work product protection. The burden is on the party asserting the privilege, and no

1 controlling authority has been cited that would bestow a litigation based privilege on what can
2 most favorably be characterized for Defendants as a hybrid study, i.e. partly for business
3 purposes and partly for litigation purposes. The record clearly does not support the conclusion
4 that the Monster arm portion was conceived, implemented or evaluated as a stand-alone
5 litigation based study.

6 The *Medicus* study was conceived as one study with 3 arms, then after the Hansen
7 litigation arose, arm 3 and 4 were changed from AMP to Monster Drink, plus the placebo arm.
8 Under the protocols contained in the withheld documents, the clinical trials for all 4 arms were
9 conducted, and the findings summarized as one study. If Defendant is allowed to pick and
10 choose which arms and documents from the *Medicus* study it will rely upon in trial, and which
11 documents and arms of the study for which it will assert as work product privilege, then Plaintiff
12 is correct that Defendant would be using the *Medicus* study as a "sword and a shield." It is
13 important to recognize that this discovery motion is only that, and the trial court will address
14 admissibility. But under the circumstances of this case, and especially bearing in mind that the
15 *Medicus* study originated for purposes unrelated to litigation, and it was conceived,
16 implemented, and initially evaluated as one study.

17 While there is no Washington case analyzing work product directly on point, the
18 privilege analysis articulated in *State v Tradewell* is instructive. 9 Wn.App.821 (Div III-1973).
19 In that case, the issue was the doctor-patient privilege which by comparison is a stronger
20 privilege than the protection of work product rule which may be overcome by "substantial
21 need." CR 26 (a)(4). In the *Tradewell* case, Defendant was examined by two different doctors,
22 and after calling the more favorable witness then sought to preclude the State from calling in
23 rebuttal the second doctor to testify on the issue of his sanity. The appeals court held that by
24 introducing evidence and calling a physician witness to support his position on insanity, the
25 Defendant waived the physician-patient privilege "as to any medical testimony which tends to

1 impeach or contradict his medical evidence.” Id @824. While this is a discovery motion, and
2 Tradewell was a trial question, that distinction makes it an even stronger argument for Plaintiff
3 at this stage.

4 Plaintiff also cites *Frontier Refining, Inc. v. Gorman-Rupp* 136 F.3d 695 (1998) not for
5 the result reached but for the endorsement of the idea that “a litigant cannot use the work product
6 doctrine as both a sword and shield by selectively using privileged documents to prove a point
7 but then invoking the privilege to prevent an opponent from challenging the assertion.” Id @ p
8 702. While the sword shield metaphor has some appeal, it should not replace careful analysis
9 and the fact that the *Medicus* study is here being used in the first instance by a defendant which
10 is arguably a defensive use, the important point is that it is inconsistent and unfair in this case
11 for the one party who has access to all the documents from the *Medicus* study, both good
12 (according to them) and bad (according to Plaintiffs), to pick and choose which documents will
13 be relied upon and which will be shielded.

14 Plaintiff contends that the Oregon ruling releasing the Monster arm documents was also
15 a waiver of the work product protection, but this action of the court was not the voluntary act
16 of the Defendant so this basis for waiver is rejected. Similarly, Plaintiff’s argument that
17 Defendants’ argument that the Monster arm data actually supports its side is also a waiver is
18 rejected because the arguments of counsel are not evidence.

19 This brings the analysis to the last point that even if the work product privilege was not
20 waived by Defendant and its experts’ reliance, Plaintiffs have demonstrated a “substantial need”
21 and is “unable without undue hardship to obtain the substantial equivalent of the material by
22 other means.” CR 26(b) (4). As indicated by McLellan’s testimony in the Oregon case and his
23 declarations in the record on this motion, in his opinion the Monster arm data undercuts the
24 Defendants’ conclusions about the efficacy of the non-caffeine ingredients of SHE. If so, then
25 the Monster arm documents are critical and unique since they are part of the *Medicus* study

1 upon which Defendants rely. There is no other comparable evidence available that pertains to
2 Defendants' own study. Under these circumstances, the clear criteria for disclosure by the
3 Washington Supreme Court have been met: "The clearest case for ordering production is when
4 the crucial information is in the exclusive control of the opposing party." Heidebrink v
5 Moriwaki 104 Wn.2d 392 (1985).

6
7 **Accordingly, the Motion to Compel the "Monster arm" documents is GRANTED.**

8
9 Pursuant to CR 37 (a) (4) and CR 53.3, Plaintiffs are entitled to an award of their
10 attorney's fees and costs associated with this motion.

11
12 **IT IS SO ORDERED** this 21st day of August, 2016.

13
14 
15 Judge Bruce W. Hilyer (Ret.)
16 Special Discovery Master