



1 considered the subsequently filed objections and  
2 responses thereto (Doc. Nos. 293-96). Having considered  
3 all the evidence presented by the parties, as well as the  
4 argument and briefing by counsel, the Court makes the  
5 following Findings of Fact and Conclusions of Law  
6 pursuant to Federal Rule of Civil Procedure 52 as to the  
7 equitable issues and relief sought in the Complaint.  
8

## 9 **FINDINGS OF FACT<sup>1</sup>**

### 10 **I. BACKGROUND FACTS**

#### 11 **A. The Parties**

12 1. K&N and Spectre sell competing automotive air  
13 intake products - high performance washable air filters  
14 (including those replacing original equipment  
15 manufacturer ("OEM") disposable air filters) and high  
16 performance air intake systems, which replace the entire  
17 factory-installed air path to the engine and include an  
18 air filter.

19 2. K&N is an inventor, manufacturer, distributor,  
20 and the leading innovator of cotton gauze reusable air  
21 filters for use in automobiles and motorcycles. K&N has  
22 sold more than 32 million reusable air filters since  
23 1969; it sells more than 3,000 different cotton gauze air  
24 filters.

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27 <sup>1</sup> To the extent any of the Findings of Fact should  
28 more properly be considered Conclusions of Law, they  
shall be deemed as such.

1           3.   K&N also designs, builds, and tests air intake  
2 systems.   K&N currently manufactures more than 600  
3 different air intake systems.   Since 1992, K&N has sold  
4 more than 2.2 million air intake systems in the United  
5 States and abroad.

6           4.   Spectre began selling cotton reusable air  
7 filters in or about 2004, and it began selling complete  
8 air intake systems in or about 2007.   Spectre's catalog  
9 on its website includes about 142 different air filters  
10 and about 31 different air intake systems (exclusive of  
11 air intake systems that customers may build using  
12 Spectre's modular intake kits).

13  
14           **B.   The Products at Issue**

15           5.   Reusable, high performance air filters and air  
16 intake systems are added to vehicles as "upgrade" or  
17 "premium" products, replacing disposable OEM filters and  
18 stock air intakes.

19           6.   These air filters and air intake systems are  
20 designed to reduce the restriction on the amount of air  
21 flowing into a vehicle's engine caused by the stock air  
22 filter and intake, and thereby potentially increasing the  
23 vehicle's engine power.

24           7.   The restrictiveness of air filters is typically  
25 measured by the air flow they allow, measured in cubic  
26 feet per minute ("CFM") at a particular pressure

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1 differential. Engine power is typically measured in  
2 horsepower ("HP").

3 8. Air intake systems are not legal for highway use  
4 in California for a particular automotive application  
5 (model, make, year, and engine size) unless the  
6 California Air Resources Board ("CARB") has issued an  
7 Executive Order for that particular application. See  
8 Cal. Veh. Code § 27156. Many air intake systems will fit  
9 more than one vehicle application.

10 9. Sellers of air intake systems for applications  
11 as to which there is no Executive Order are required to  
12 include a disclaimer of limitations on sale or use of the  
13 systems with every advertisement in California that makes  
14 clear that the systems are not legal for highway use in  
15 California. See 13 Cal. Code Reg. § 2222.

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### 17 **C. Air Flow Testing**

18 10. The restriction of air flow created by an  
19 automotive filter or air intake system creates an air  
20 pressure differential between two points in an air filter  
21 system, usually from a point upstream from the filter to  
22 a second point just downstream from it. This pressure  
23 differential is commonly referred to as the "pressure  
24 drop" and it is commonly measured in inches of water.

25 11. For any given rate of air flow, a less  
26 restrictive filter will create a smaller pressure drop.

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1 Conversely, at a constant pressure drop, a less  
2 restrictive filter will allow a higher air flow rate.

3 12. Therefore, the relative restrictiveness of  
4 different air filters can be compared by comparing the  
5 air flow through the filters, measured at the same  
6 pressure drop and in the same manner. Air flow  
7 measurements are meaningless without reference to the  
8 pressure drop at which they were taken.

9

#### 10 **D. Dyno Testing**

11 13. K&N, Spectre, and their competitors, use chassis  
12 dynamometer ("dyno") tests to evaluate the performance of  
13 their own parts and competitors' parts, including air  
14 intake systems.

15 14. One requirement for reliable comparative dyno  
16 testing is the control of a number of variables that can  
17 affect test results. These variables include air intake  
18 and coolant temperature, under-hood temperature, oil  
19 temperature, air/fuel ratio, ignition timing or spark  
20 advance, tire pressure, condition of the engine,  
21 barometric pressure, use of shop fans, and tie down  
22 tension.

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#### 24 **II. THE PARTIES' CLAIMS**

25 15. K&N and Spectre have asserted the same four  
26 claims for relief against each other: (1) false  
27 advertising (15 U.S.C. § 1125(a)); (2) statutory false  
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1 advertising (Cal. Bus. & Prof. Code §§ 17500 et seq.);  
2 (3) statutory unfair competition (Cal. Bus. & Prof. Code  
3 §§ 17200 et seq.); and (4) common law unfair competition.

4 16. The parties' claims for false advertising under  
5 15 U.S.C. § 1125(a) and common law unfair competition are  
6 to be decided by the jury. The parties' claims for  
7 statutory false advertising under Cal. Bus. & Prof. Code  
8 §§ 17500 et seq. and statutory unfair competition under  
9 Cal. Bus. & Prof. Code §§ 17200 et seq. are to be decided  
10 by the Court.

11  
12 **A. K&N's Claims Against Spectre**

13 17. K&N's claims against Spectre are based upon four  
14 different allegedly false and misleading advertising  
15 claims made by Spectre: (a) fuel economy claims; (b)  
16 filtration claims; (c) performance (horsepower and air  
17 flow) claims; and (d) claims relating to the pollution  
18 control legality of Spectre intake systems.

19  
20 **1. Fuel Economy**

21 18. On product packaging for all of its air filters  
22 and its air intake systems, Spectre claims that using a  
23 Spectre air filter "Saves Gas." Under the heading "Saves  
24 Gas / Ultra Efficient," some of the packaging states that  
25 "Government studies show that an efficient air filter can  
26 give you up to 10% better fuel economy, which translates  
27 to money in your pocket." Spectre has no basis for this  
28

1 claim other than United States government websites.

2 These statements are both false.

3 19. Since about February 2009, the United States  
4 Department of Energy's website has stated:

5 NEW INFORMATION: Replacing a Clogged Air  
6 Filter on Modern Cars Improves Performance but Not  
7 MPG

8 A new study shows that replacing a clogged air  
9 filter on cars with fuel-injected,  
10 computer-controlled gasoline engines does not  
11 improve fuel economy but it can improve  
12 acceleration time by around 6 to 11 percent. This  
13 kind of engine is prevalent on most gasoline cars  
14 manufactured from the early 1980s onward.

15 Tests suggest that replacing a clogged air  
16 filter on an older car with a carbureted engine  
17 may improve fuel economy 2 to 6 percent under  
18 normal replacement conditions or up to 14 percent  
19 if the filter is so clogged that it significantly  
20 affects drivability.

21 The effect of a clogged air filter on diesel  
22 vehicles will be tested in the near future.

23 <http://www.fueleconomy.gov/feg/maintain.shtml>.

24 20. That website posts a February 2009 report,  
25 prepared by researchers at the Oak Ridge National  
26 Laboratory, entitled "Effect of Intake Air Filter  
27 Condition on Vehicle Fuel Economy." Kevin Norman, et  
28 al., Effect of Intake Air Filter Condition on Vehicle  
29 Fuel Economy, available at [http://www.fueleconomy.gov/  
30 feg/pdfs/Air\\_Filter\\_Effects\\_02\\_26\\_2009.pdf](http://www.fueleconomy.gov/feg/pdfs/Air_Filter_Effects_02_26_2009.pdf).

31 21. The report explains that "clogging the air  
32 filter has no significant effect on the fuel economy of  
33 the newer vehicles," because "[t]he engine control  
34 systems were able to maintain the desired AFR [air to  
35 fuel ratio] regardless of intake restrictions, and  
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1 therefore fuel consumption was not increased." Id. at  
2 25.

3 22. The report further states that although "[t]he  
4 carbureted engine did show a decrease in fuel economy  
5 with increasing restriction," "the level of restriction  
6 required to cause a substantial (10-15%) decrease in fuel  
7 economy . . . was so severe that the vehicle was almost  
8 undrivable." Id.

9 23. Prior versions of the website stated that  
10 replacing a clogged air filter can significantly improve  
11 gas mileage.

12 24. Spectre's "saves gas" claims do not state that  
13 replacing a clogged air filter, i.e., one at the end of  
14 its useful life, will improve fuel economy. They state  
15 that using an "efficient" air filter, such as a Spectre  
16 air filter, will improve fuel economy. These claims are  
17 false.

18 25. Moreover, almost all of the Spectre air filters  
19 and air intake systems with "saves gas" on their  
20 packaging are intended for use on gasoline cars  
21 manufactured from the early 1980s onward with  
22 fuel-injected, computer-controlled engines - the cars for  
23 which the government study shows that replacing even  
24 clogged air filters will not increase fuel economy.

25 26. Furthermore, neither the Department of Energy's  
26 website nor the report posted thereon states or suggests  
27 that replacing an air filter that is not clogged with an  
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1 "efficient" air filter may improve the fuel economy of an  
2 older automobile with a carbureted engine. Instead, the  
3 website and the report state only that replacing a  
4 "clogged" air filter on a carbureted engine may improve  
5 fuel economy.

6 27. K&N has suffered injury as a result of Spectre's  
7 false advertising. (See Special Verdict Form 1 (Doc. No.  
8 288) at 1 (finding Spectre engaged in false advertising);  
9 Jury Instruction No. 14 (instructing the jury that in  
10 order to find in favor of the party pursuing the false  
11 advertising claim, the jury must conclude that party was  
12 injured as a result of the false statement).)

13 28. Spectre has sold air filters and air intake  
14 systems as a result of its false advertising.

## 15 16 **2. Filtration**

17 29. Spectre claims on the packaging for its air  
18 filters and air intake systems that "[a]ll Speed By  
19 Spectre hpR filters are tested at independent labs using  
20 ISO 5011 standards, and have been proven to filter 99.6%  
21 of particles."

22 30. Spectre obtained the 99.6% result in a single  
23 ISO 5011 test of a single filter. That filter was not a  
24 filter from a production run. It was a sample supplied  
25 by Spectre's filter source, HKR, which HKR sent to  
26 solicit purchases from Spectre. It was hand-oiled by  
27 Spectre extensively; the tested filter contained  
28

1 approximately 41ml of oil, whereas Spectre's production  
2 filters indicated only 30ml of oil was required.

3 31. Spectre has not commissioned ISO 5011 tests on  
4 any of its production filters. It has not performed any  
5 total filtration efficiency tests on any of the filters  
6 sold in the packaging advertising 99.6% filtration  
7 efficiency.

8 32. The filtration efficiency of a filter is  
9 affected by a large number of characteristics, including  
10 its size, shape, pleat count, and pleat depth.  
11 Therefore, there is no basis on which to conclude that  
12 that any hpR filter sold by Spectre will have the same  
13 efficiency as the sample filter that was tested.

14 33. K&N commissioned the same independent laboratory  
15 Spectre used to test some of Spectre's filters for  
16 filtration efficiency. It told the lab to choose the  
17 testing parameters the lab believed were appropriate.<sup>2</sup>

18 34. Of the four Spectre filters tested, three had  
19 filtration efficiencies of 93.96%, 94.85%, and 97.44%.  
20 (The cumulative efficiency of the fourth filter could not  
21 be measured because the filter stopped functioning in  
22 accordance with test conditions during the initial  
23 efficiency test.)

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26 <sup>2</sup> These parameters were somewhat different from the  
27 procedures Spectre specified for its tests. In  
28 particular, the lab chose to use the "fine dust test"  
rather than the "coarse dust test." That choice likely  
affected the results the lab obtained.

1           35. The packaging for Spectre's "P-filter" or  
2 "PowerAdder" products includes a chart labeled "Filter  
3 Particle Retention" that claims that the Spectre  
4 "PowerAdder" filter traps a higher percentage of  
5 particles of various sizes than "Brand K" air filters.

6           36. Documents introduced at trial confirm that the  
7 "Brand K" air filter identified on that chart is a K&N  
8 filter.<sup>3</sup>

9           37. They also confirm that Spectre had test results  
10 showing that Spectre filters performed materially worse.

11           38. K&N has suffered injury as a result of Spectre's  
12 false advertising. See Finding of Fact No. 28.

13           39. Spectre has sold air filters and air intake  
14 systems as a result of its false advertising.

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16                   **3. Performance (Horsepower and Air Flow)**

17           40. Spectre displays a graph entitled "Dyno Gains"  
18 on the packaging for its air filters and air intake  
19 systems and in its catalog and application guide,  
20 accompanied by the statement "Replacing your stock filter  
21 with a Speed By Spectre hpR filter will result in real  
22 power gains."

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26           <sup>3</sup> During this lawsuit, Spectre claimed that the  
27 "Brand K" filter referred to in Spectre's packaging is a  
28 filter made by Accel called "Kool Blue." This contention  
is disproved by the original test results produced by  
Spectre.

1       41. The "Dyno Gains" graph shows a maximum increase  
2 in horsepower and torque of 35% and 30%, respectively,  
3 and an increase in peak horsepower and torque of 12% and  
4 17%, respectively.

5       42. These claims are false because there is no  
6 evidence that replacing a stock air filter with a "Speed  
7 By Spectre hpR" filter will: (a) materially increase  
8 either an engine's horsepower or its torque; or (b) cause  
9 the substantial increases shown in the graph.

10       43. Spectre has no tests supporting this graph.

11       44. Spectre used both this "Dyno Gains" graph and  
12 another similar graph showing gains in horsepower and  
13 torque on the packaging for its air intake systems. The  
14 second graph is also not supported by tests.

15       45. The gains represented in these graphs bear no  
16 relationship to the horsepower gains that might result  
17 from replacing a stock air intake system with the Spectre  
18 system in the packaging bearing the graphs.

19       46. The packaging for each "Speed By Spectre hpR"  
20 air filter and air intake system contains an "Horsepower  
21 Rating" ("HP rating") and a "CFM rating."

22       47. The "CFM Rating" is a measure of the air flow  
23 permitted by the filter, stated in cubic feet per minute.  
24 Although, to be meaningful, air flow measurements must  
25 disclose the pressure drop at which they were taken,  
26 Spectre's CFM Ratings do not disclose the pressure drop  
27 at which they were taken.

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1 48. In ordinary operation, the pressure differential  
2 across an air filter will be less than 3" of water.  
3 Spectre's CFM ratings state air flow rates calculated at  
4 a pressure drop of 20.4" of water.

5 49. Spectre did not derive its HP ratings from  
6 vehicle dyno testing using Spectre's air filters or air  
7 intake systems. Spectre's CFM ratings were not derived  
8 from tests showing that its air filters or air intake  
9 systems are capable of functioning properly at such high  
10 air flows, either in normal operation or at a pressure  
11 drop of 20.4" of water.

12 50. Instead, Spectre used the following procedure  
13 for calculating its HP and CFM ratings. First, it  
14 performed air flow testing on its air filters to  
15 calculate air flow rates in CFM at a pressure drop of  
16 6.8" of water restriction, a pressure differential it  
17 believed to be the maximum that would be experienced by a  
18 well-tuned race car at full throttle. Next, it used a  
19 formula to convert the air flow rates in CFM at 6.8" to  
20 projected air flow rates in CFM at 20.4" of water  
21 restriction.<sup>4</sup> Finally, it divided these projected air  
22 flow rates in CFM by 1.67 to calculate a "horsepower  
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25 <sup>4</sup> K&N tests the air flow of its air filters at a  
26 pressure drop of 1.5" of water. This pressure drop is  
27 commonly experienced by vehicle engines in operation.  
28 The 20.4" number used by Spectre will never be  
experienced in a normally operating vehicle. In the ISO  
5011 standard, an air filter is deemed "clogged" - and  
the test is suspended - when the pressure drop across the  
filter reaches between 10" of water and 14" of water.

1 rating." Spectre rounded its CFM and HP numbers up to  
2 obtain a "marketing" CFM rating and HP rating.

3 51. By this method, Spectre derived HP ratings that  
4 far exceeded the horsepower that a vehicle could actually  
5 achieve in operation and CFM ratings that far exceeded  
6 the air flow rates that a vehicle's engine would actually  
7 experience in operation.

8 52. Spectre has no data showing that its air filters  
9 will actually work - i.e., filter dirt satisfactorily -  
10 at the "rated" CFM.

11 53. Spectre's Horsepower and CFM ratings bear no  
12 relationship to the actual use of the air filter or air  
13 intake system.

14 54. Spectre's air intake systems, as installed, are  
15 incapable of effectively allowing the claimed CFM.

16 55. The engines with which the air filters and air  
17 intake systems are used are generally incapable of  
18 generating the horsepower listed as the horsepower  
19 rating, with or without a Spectre air filter or air  
20 intake system.

21 56. Spectre's catalog (now withdrawn from Spectre's  
22 website) concedes that these ratings have no real-world  
23 applicability:

24 HORSEPOWER AND CFM RATED

25 What does this mean? Each filter has been  
26 tested on a SuperFlow 1200 FlowBench, the  
27 state-of-the-art of FlowBenches. The CFM and  
28 Horsepower ratings are what the filter will  
support in a naturally aspirated engine with no  
measurable loss due to restriction. This is  
important to know if the vehicle has been modified

1 for increased performance as it tells you how much  
2 power the filter will support. These filters are  
3 rated at a much higher number than the  
requirements of the engine. Like speed ratings on  
a tire, it's always better to have more.

4 57. Internal Spectre e-mails show Spectre's  
5 understanding that its HP and CFM ratings were intended  
6 for use as a marketing tool, and that they bear no  
7 relationship to the actual horsepower that could be  
8 achieved by a vehicle using a Spectre air filter or air  
9 intake system or the air flow rate into the engine of  
10 such a vehicle under operating conditions.

11 58. Spectre's disclaimer of the ratings in its  
12 catalog is insufficient to correct the false statements  
13 embodied in its CFM and HP ratings, given that: (1) the  
14 ratings are prominently featured on the packaging for  
15 Spectre products without such disclaimer; (2) the  
16 disclaimer appeared on a single page of Spectre's catalog  
17 separated by several pages from the portions of the  
18 catalogs that state the "ratings" for specific air intake  
19 systems and air filters; and (3) the catalog was removed  
20 from Spectre's web site by October 26, 2009, while the  
21 ratings have remained on the packaging.

22 59. K&N has suffered injury as a result of Spectre's  
23 false advertising. See Finding of Fact No. 28.

24 60. Spectre has sold air filters and air intake  
25 systems as a result of its false advertising.

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1                   **4. The Legality of Spectre Air Intake Systems**

2           61. Spectre has obtained three CARB Executive Orders  
3 allowing highway use in California of certain air intake  
4 systems imported by Spectre for specific models of  
5 vehicles: (1) Executive Order D-629, dated January 8,  
6 2008, permitted the sale of 12 Spectre air intake systems  
7 for specific, identified vehicle applications; (2)  
8 Executive Order D-629-1, dated March 8, 2010, permitted  
9 the sale of 19 Spectre air intake systems for specific,  
10 identified vehicle applications; and (3) Executive Order  
11 D-629-2, dated June 10, 2010, permitted the sale of 18  
12 Spectre air intake systems for specific, identified  
13 vehicle applications.

14           62. Executive Orders D-629-1 and D-629-2 both added  
15 part numbers not covered by Executive Order D-629 and  
16 added applications for part numbers not already covered  
17 by Executive Order D-629.

18           63. Before March 8, 2010, Spectre sold, offered to  
19 sell, and advertised certain air intake systems in  
20 California that were not covered by an Executive Order  
21 until the issuance of Executive Order D-629-1 on that  
22 date, including air intake systems Spectre designated as  
23 Part Nos. 9903, 9924, 9925, and 9931. Spectre did not  
24 limit the sales of these products to non-highway use.

25           64. Before the CARB issued Executive Order D-629-1,  
26 Spectre also sold, offered to sell, and advertised other  
27 air intake systems in California to be used on specific  
28

1 years, makes, and models of automobiles not covered by  
2 Executive Order D-629, and these air intake systems were  
3 therefore not legal for highway use in California on  
4 these vehicles. Spectre did not limit the sales of these  
5 products to non-highway use.

6 65. The Executive Orders the CARB issued to Spectre  
7 provide specifically that "No claim of any kind, such as  
8 'Approved by the Air Resources Board,' may be made with  
9 respect to the action taken herein in any advertising or  
10 other oral or written communication."

11 66. Nevertheless, Spectre stated on its packaging  
12 and in its advertising and marketing in California that  
13 its air intake systems covered by Executive Orders are  
14 "CARB-Approved."

15 67. Spectre has also advertised that a number of air  
16 intake systems not legal for highway use in California  
17 are "C.A.R.B. Approval Pending." Spectre commenced this  
18 advertising months before it applied for an Executive  
19 Order covering those air intake systems.

20 68. Furthermore, parts sold before the CARB issues  
21 an Executive Order covering them are not legal for  
22 highway use in California, either before or after the  
23 Executive Order issues.

24 69. K&N has suffered injury as a result of Spectre's  
25 false advertising. See Finding of Fact No. 28.

26 70. Spectre has sold air filters and air intake  
27 systems as a result of its false advertising.

28

1 **CONCLUSIONS OF LAW**

2 1. The Court has jurisdiction under its federal  
3 question jurisdiction, 28 U.S.C. § 1331 and 1338(a), over  
4 K&N's and Spectre's First Claims for Relief in the  
5 Complaint and Counterclaim, respectively, for false  
6 advertising actionable under the Lanham Act, 15 U.S.C. §§  
7 1051 et seq., because the claims arise under an act of  
8 Congress related to trademarks; and has pendent  
9 jurisdiction under 28 U.S.C. § 1367 over K&N's and  
10 Spectre's Second, Third, and Fourth Claims for Relief for  
11 statutory false advertising (Cal. Bus. & Prof. Code §§  
12 17500 et seq.), statutory unfair competition (Cal. Bus. &  
13 Prof. Code §§ 17200 et seq.), and common law unfair  
14 competition because those claims are joined with a  
15 substantial and related claim under the trademark laws  
16 and because those claims are so related to K&N's and  
17 Spectre's claims within the Court's original jurisdiction  
18 that they form part of the same case or controversy under  
19 Article III of the United States Constitution.

20 Venue is properly laid in the Central District of  
21 California under 28 U.S.C. § 1391 because Defendant  
22 transacts business in this District.

23 2. K&N has standing to pursue its claims against  
24 Spectre because it has suffered actual injury as a result  
25 of Spectre's false advertising.

26 3. California's False Advertising Law, Cal. Bus. &  
27 Prof. Code §§ 17500 et seq., provides:  
28

1           It is unlawful for any . . . corporation . .  
2           . to make or disseminate or cause to be made or  
3           disseminated before the public in this state, . .  
4           . in any newspaper or other publication, or any  
5           advertising device, or by public outcry or  
6           proclamation, or in any other manner or means  
7           whatever, including over the Internet, any  
8           statement, . . . which is untrue or misleading,  
9           and which is known, or which by the exercise of  
10           reasonable care should be known, to be untrue or  
11           misleading. . . .

12 Cal. Bus. & Prof. Code § 17500 (emphasis added).

13           4. California Business & Professions Code section  
14 17508 specifically addresses certain advertising claims:

15           It shall be unlawful for any person doing  
16           business in California and advertising to  
17           consumers in California to make any false or  
18           misleading advertising claim, including claims  
19           that (1) purport to be based on factual,  
20           objective, or clinical evidence, (2) compare the  
21           product's effectiveness or safety to that of other  
22           brands or products, or (3) purport to be based on  
23           any fact.

24 Cal. Bus. & Prof. Code § 17508(a).

25           5. Similarly, California's Unfair Competition Law,  
26 Cal. Bus. and Prof. Code §§ 17200 et seq., broadly  
27 prohibits "any unlawful, unfair or fraudulent business  
28 act or practice and unfair, deceptive, untrue or  
misleading advertising" in violation of Section 17500.

Cal. Bus. & Prof. Code § 17200.

          6. While K&N's Section 17200 and 17500 claims are  
largely duplicative of its Lanham Act claim tried to the  
jury, the statutory claims differ in two important  
respects from the Lanham Act claim.

          7. First, because Section 17200 prohibits unlawful  
business acts or practices without requiring that there

1 be false advertising, that statute allows injunctive  
2 relief against Spectre's violation of CARB regulations  
3 by, e.g., selling air intake systems that are not subject  
4 to an Executive Order without providing the required  
5 disclaimer or advertising its air intake systems as "CARB  
6 Approved," regardless of whether such conduct is  
7 actionable under the Lanham Act.

8 8. Second, Section 17500 allows injunctive relief  
9 against misleading conduct without requiring proof of  
10 actual deception or confusion.

11 9. As one court explained:

12 [I]n order to recover under [section 17500],  
13 it is necessary to show only that members of the  
14 public are likely to be deceived. Actual  
15 deception or confusion is not required. The court  
16 may order relief "without individualized proof of  
17 deception, reliance, and injury if it determines  
18 that such a remedy is necessary to prevent the use  
19 or employment of the unfair practice."  
20 People v. Dollar Rent-A-Car Sys., Inc., 211 Cal. App. 3d  
21 119, 129 (1989) (quoting Comm. on Children's Tele., Inc.  
22 v. Gen. Foods Corp., 35 Cal. 3d 197, 211 (1983)).

23 10. Thus, Section 17500 authorizes injunctive relief  
24 against Spectre's misleading advertisements even in the  
25 absence of proof by K&N of actual deception or an intent  
26 to deceive.

27 11. Injunctive relief for violation of Sections  
28 17200 et seq. and 17500 et seq. is authorized by statute.  
See Cal. Bus. & Prof. Code § 17203 (authorizing  
injunctive relief or other relief "as may be necessary to  
prevent the use or employment by any person of any

1 practice which constitutes unfair competition" under  
2 Sections 17200 et seq.); Cal. Bus. & Prof. Code § 17535  
3 (authorizing injunction against any person who violates  
4 the statutory false advertising laws).

5 12. Under California Vehicle Code section 27156, a  
6 party is prohibited from selling an air intake system for  
7 any application for use on public highways in California  
8 unless the CARB issues an Executive Order for that  
9 application using that system.

10 13. Thus, an air intake system is not legal for sale  
11 for highway use in California unless and until the CARB  
12 has issued an Executive Order for that intake system.

13 14. The CARB's "Procedures for Exemption of Add-On  
14 and Modified Parts" (as amended June 1, 1990) prohibit  
15 claims such as "Approved by the Air Resources Board" in  
16 any advertising or other communication about parts  
17 covered by an Executive Order. CARB Executive Orders  
18 include a similar prohibition.

19 15. Spectre violated Sections 17200 et seq. by  
20 committing an unlawful, unfair or fraudulent business act  
21 or practice and engaging in unfair, deceptive, untrue or  
22 misleading advertising: (a) by advertising that use of a  
23 Spectre air filter "Saves Gas" and can increase fuel  
24 economy by up to 10 percent; (b) by advertising that all  
25 of its air filters have been tested at independent labs  
26 using ISO 5011 standards and have been proven to filter  
27 99.6% of particles and that its PowerAdder filters trap a  
28

1 higher percentage of dust than "Brand K" (i.e., K&N)  
2 filters; (c) by its claim that use of Spectre air filters  
3 will increase horsepower and torque by the amount shown  
4 in the graphs used on Spectre's advertising and its use  
5 of HP Ratings and CFM Ratings that bear no relationship  
6 to the actual horsepower or air flow performance of  
7 Spectre's air filters and air intake systems; (d) its  
8 advertising that certain part numbers of Spectre air  
9 intake systems had been authorized by CARB for highway  
10 use in California for certain applications when they were  
11 not, that certain part numbers of Spectre air intake  
12 systems were "CARB Approval Pending" for certain  
13 applications when Spectre had not applied for an  
14 Executive Order for those part number or applications,  
15 and that certain part numbers of Spectre air intake  
16 systems were "CARB Approved" when CARB does not grant  
17 such approval; and (e) its sale for highway use in  
18 California of certain part numbers of Spectre air intake  
19 systems that were not the subject of Executive Orders in  
20 California and therefore were not legal for highway use  
21 in California without providing the CARB-required  
22 disclosure as to limitations on the use of air intake  
23 systems.

24       16. Spectre made or disseminated advertising devices  
25 in or from the state of California with the intent to  
26 induce the purchase of air filters and air intake  
27 systems.

28

1           17. In those advertising devices, Spectre violated  
2 California Business & Professions Code sections 17500 et  
3 seq. by making the following statements of fact which  
4 were untrue or misleading, and which Spectre knew, or by  
5 the exercise of reasonable care should have known, to be  
6 untrue or misleading: (a) Spectre's advertising that use  
7 of a Spectre air filter "Saves Gas" and can increase fuel  
8 economy by up to 10 percent; (b) Spectre's advertising  
9 that all of its air filters have been tested at  
10 independent labs using ISO 5011 standards and have been  
11 proven to filter 99.6% of particles and that its  
12 PowerAdder filters trap a higher percentage of dust than  
13 "Brand K" (i.e., K&N) filters; (c) Spectre's claim that  
14 use of Spectre air filters will increase horsepower and  
15 torque by the amount shown in the graphs used on  
16 Spectre's advertising and its use of HP Ratings and CFM  
17 Ratings that bear no relationship to the actual  
18 horsepower or air flow performance of Spectre's air  
19 filters and air intake systems; and (d) Spectre's  
20 advertising that certain part numbers of Spectre air  
21 intake systems had been authorized by CARB for highway  
22 use in California for certain applications when they were  
23 not, that certain part numbers of Spectre air intake  
24 systems were "CARB Approval Pending" for certain  
25 applications when Spectre had not applied for an  
26 Executive Order for those part number or applications,  
27 and that certain part numbers of Spectre air intake  
28

1 systems were "CARB Approved" when CARB does not grant  
2 such approval.

3 18. All of these advertising claims purport to: (1)  
4 be based on factual, objective, or clinical evidence, (2)  
5 compare the product's effectiveness or safety to that of  
6 other brands or products, or (3) be based on any fact.  
7 Spectre's claims concerning the "Brand K" chart also  
8 compare the effectiveness of Spectre's products to that  
9 of other brands or products. Accordingly, all of these  
10 claims are subject to California Business & Professions  
11 Code section 17508.

12 19. K&N did not commit any unlawful, unfair or  
13 fraudulent business act or practice or engage in any  
14 unfair, deceptive, untrue or misleading advertising with  
15 regard to its advertisements concerning horsepower gains.

16 20. K&N did not commit any unlawful, unfair or  
17 fraudulent business act or practice or engage in any  
18 unfair, deceptive, untrue or misleading advertising with  
19 regard to AutoAnything.com's advertisements.

20 21. California Business & Professions Code sections  
21 17200 et seq. and sections 17500 et seq. do not authorize  
22 claims for vicarious liability based upon the failure to  
23 control another party's advertisements.

24 22. Spectre offered no post-trial argument as to its  
25 affirmative defenses of laches and unclean hands.  
26 Accordingly, the Court deems Spectre's affirmative  
27 defenses abandoned. See Martinez-Serrano v. INS, 94 F.3d  
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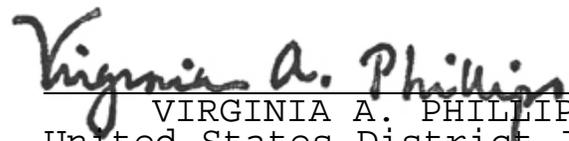
1 1256, 1259 (9th Cir. 1996) ("Issues . . . not supported  
2 by argument are deemed abandoned."); see also Kohler v.  
3 Inter-Tel Tech., 244 F.3d 1167, 1182 (9th Cir. 2001)  
4 ("Issues raised in a brief which are not supported by  
5 argument are deemed abandoned."); Acosta-Huerta v.  
6 Estelle, 7 F.3d 139, 144 (9th Cir. 1992).

7 23. As the factual basis for Spectre's first  
8 counterclaim, which Spectre tried to the jury, is the  
9 same as its second, third, and fourth counterclaims, the  
10 jury's finding against Spectre on its first counterclaim  
11 precludes Spectre from recovery for its second, third,  
12 and fourth counterclaims.

13 24. Based on the overwhelming evidence provided at  
14 trial of Spectre's repeated, deliberate, and willful use  
15 of false statements and matter in its advertising,<sup>5</sup> the  
16 Court finds this is an exceptional case under 15 U.S.C. §  
17 1117(a). Earthquake Sound Corp. v. Bumper Indus., 352  
18 F.3d 1210, 1216 (9th Cir. 2003); see also Love v. Assoc.  
19 Newspapers, Ltd., 611 F.3d 601, 615-16 (9th Cir. 2010).

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Dated: December 8, 2011

  
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VIRGINIA A. PHILLIPS  
United States District Judge

28 <sup>5</sup> See Findings of Fact Nos. 18, 23-25, 27-60, 62-70.