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7 8	LINITED STATES	DISTRICT COURT
9	SOUTHERN DISTRICT OF CALIFORNIA	
10	500 ment distri	
11	HANSEN BEVERAGE COMPANY,	CASE NO. 08cv1545-IEG(WVG)
12	Plaintiff,	Order Granting in Part and Denving in
13	VS.	Part Defendant Vital Pharmaceutical, Inc.'s Motion for Summary Judgment
14	VITAL PHARMACEUTICAL, INC aka VPX, a Florida corporation,	[Doc. No. 156]
15	Defendant.	
16		
17	Presently before the Court is the motion for summary judgment filed by Defendant Vital	
18	Pharmaceutical, Inc. ("VPX"). Plaintiff Hansen Beverage Company ("Hansen") has filed an	
19	opposition and VPX has filed a reply. The Court found the motion appropriate for submission on	
20	the papers and without oral argument, and previously vacated the hearing date. For the reasons	
21	explained herein, VPX's motion is GRANTED IN PART AND DENIED IN PART.	
22	<u>Background</u>	
23	By order filed April 27, 2010, the Court granted in part and denied in part the parties' cross	
24	motions for summary judgment. The Court denied VPX's motion for partial summary judgment	
25	on Hansen's claims that Power Rush (a) provides seven hours of energy, (b) results in "No Crash,"	
26	and (c) is "The #1 Energy Shot in Los Angeles." [Doc. No. 128, p. 21.] The Court also denied	
27	VPX's motion for partial summary judgment on Hansen's claims relating to Redline Princess. [Id.]	
28	As to each of these claims, the Court found there	were genuine issues of material fact precluding

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summary judgment. [Doc. No. 28, pp. 13 (7-hour duration claim), 14 ("no crash" claim), 16-17
 (Redline Princess claim), 17 (#1 in L.A.).] Thereafter, by order filed August 3, 2010, the Court
 granted VPX's motion for summary judgment regarding damages, leaving only equitable remedies
 at issue in this case. [Doc. No. 148.]

At the time of the Pretrial Conference on August 23, 2010, counsel for VPX inquired
whether the parties could file new summary judgment motions prior to trial. The Court indicated
counsel could file new summary judgment motions, but only if such motions were based upon new
or additional evidence. [Doc. No. 153, p. 15.]

9 VPX filed the current summary judgment motion on December 1, 2010, arguing that
10 because this matter will be submitted as a bench trial, the Court should reconsider its previous
11 denial of summary judgment. Most of the evidence VPX submits in support of its current motion
12 was previously considered by the Court in denying VPX's motion for partial summary judgment.¹
13 VPX submits only one new piece of evidence – a declaration by its President and CEO, stating that
14 VPX has not run the "No. 1 in L.A. Ad" since May of 2009 and has no plans to run it in the future.
15 [Declaration of John H. Owoc, Doc. No. 156-2, ¶ 9.]

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Discussion

Because no final judgment has been entered in this case, the Court has the discretion to
review, reconsider, and modify its prior order denying summary judgment in this case. <u>United</u>
<u>States v. Martin</u>, 226 F.3d 1042, 1049 (9th Cir. 2000). VPX argues the Court should at this time
reconsider and modify its prior order, applying a modified summary judgment standard based
upon the fact the remaining equitable issues will be tried by the Court and not a jury.

Where the ultimate factual issues are to be decided by the court, rather than a jury, and
where the credibility of the witnesses' statements or testimony is not at issue, the court has
somewhat greater latitude to dispose summarily of the matter. <u>TransWorld Airlines, Inc. v.</u>
<u>American Coupon Exchange, Inc.</u>, 913 F.2d 676, 684-85 (9th Cir. 1990). However, even where the
underlying facts are undisputed, summary judgment is not appropriate where divergent ultimate

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¹VPX has re-filed the declarations and exhibits, but directs the Court to the location in the docket where such evidence was submitted in support of the prior summary judgment motion.

inferences may reasonably be drawn from those facts. Miller v. Glenn Miller Productions, Inc., 1

2	454 F.3d 975, 932 (9 th Cir. 2006).		
3	Here, the Court previously found the parties' expert testimony created genuine issues of		
4	material fact regarding Hansen's claims that Power Rush provides seven hours of energy and		
5	results in "No Crash," as well as Hansen's claims relating to Redline Princess. Absent some		
6	intervening change in the law, or the discovery of new or different facts, there is no basis for the		
7	Court to modify its prior decision with regard to these claims. In order to determine whether		
8	Hansen is entitled to relief on its claims, the Court will need to weigh the credibility and reliability		
9	of the parties' experts, and consider the evidence supporting the experts' opinions. VPX cites no		
10	authority which permits the Court to weigh evidence and assess credibility on summary judgment.		
11	VPX presents new evidence that its Power Rush "No. 1 in L.A. Ad" stopped running in		
12	May 2009, and there is no likelihood VPX will run the ad again in the future. [Declaration of John		
13	H. Owoc, Doc. No. 156-2, ¶9.] In its opposition, Hansen presents no additional evidence with		
14	regard to this claim and indicates it "would have stipulated and agreed that the 'No. 1 in L.A.' ad		
15	is no longer at issue." [Opposition, Doc. No. 160, p.1, fn.1.] Based thereon, the Court grants		
16	VPX's motion for partial summary judgment on this claim.		
17	Conclusion		
18	For the reasons explained herein, the Court GRANTS VPX's motion for partial summary		
19	judgment as to Hansen's claim based upon the Power Rush "No. 1 in L.A." advertisement. The		
20	Court DENIES VPX's motion in all other respects.		
21	IT IS SO ORDERED.		
22	DATED: January 26, 2011		
23	IRMA E. GONZALEZ, Chief Judge		
24	United States District Court		
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