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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

ARSENAL, INC.,
Plaintiff,
v.
ADAM NEAL,
Defendant.

Case No. 2:11-cv-01628-KJD-CWH

ORDER

Presently before the Court is Plaintiff's Motion for Summary Judgment (#11). Though the time for doing so has passed, no response in opposition has been filed. Therefore, in accordance with Local Rule 7-2(d) ("LR 7-2"), and having considered the motion on the merits, the Motion for Summary Judgment is granted in part and denied in part.

I. Background

Plaintiff, Arsenal, Inc. ("Arsenal"), is a licensed U.S. manufacturer of firearms. Beginning on July 1, 2010, Defendant Adam Neal ("Neal") published three videos on his YouTube channel, "MrAk47Master," that undermined the quality of Arsenal's goods and services.

In the first video (the "Combat Ready Video"), posted on July 9, 2010, Neal claimed that Arsenal goods were not "combat ready." As of December 26, 2012, the Combat Ready Video has been viewed 24,199 times. In the second video (the "Boycott Video"), posted on July 18, 2010, Neal

1 called for a boycott of Arsenal because of its allegedly fraudulent behavior. As of December 26,
2 2012, the Boycott Video has been viewed 12,572 times. In the third video (the “Test Video”), posted
3 August 12, 2010, Neal performed a test on the rifle, which included firing the gun rapidly and
4 throwing dirt on it. After the gun jammed several times, Neal concluded that the gun did not perform
5 as it should have. As of December 26, 2012, the Test Video has been viewed 12,465 times.

6 On July 27, 2010, Arsenal mailed Neal, via certified mail, a cease and desist letter.
7 Specifically, the letter requested that Neal immediately remove the videos and informed Neal of the
8 industry-approved military specification requirements (“MIL-SPEC”). Defendant did not comply
9 with the cease and desist letter.

10 On October 7, 2011, Arsenal filed a complaint with this Court, alleging business
11 disparagement and interference with prospective economic advantage and seeking injunctive relief.
12 On November 14, 2011, Neal filed an answer to the complaint, alleging that his statements were
13 mere opinion and protected by the First Amendment. On December 31, 2012, Arsenal filed the
14 present motion for summary judgment. Neal did not respond to the motion.

15 II. Summary Judgment Standard

16 LR 7-2 provides that the “failure of an opposing party to file points and authorities in
17 response to any motion shall constitute a consent to the granting of the motion.” Arsenal contends
18 that because Defendant has failed to respond to its motion for summary judgment, he has consented
19 to the Court granting it. Although LR 7-2 allows the Court to grant a summary judgment motion on
20 the basis of no response, two considerations impede such a swift resolution: (1) for pro se litigants,
21 other motions or pleadings may be eligible to oppose this motion, and (2) a local rule must be
22 compatible with federal law. See Jones v. Blanas, 393 F.3d 918, 923 (9th Cir. 2004) (citing McElyea
23 v. Babbitt, 833 F.2d 196, 197 (9th Cir. 1987)); Henry v. Gill Industries, Inc., 983 F.2d 943, 950 (9th
24 Cir. 1993).

25 First, although Defendant has not responded to the summary judgment motion, in evaluating
26 a motion leveled against a pro se defendant, the Court must consider all of Defendant’s “contentions

1 offered in motions and pleadings, where such contentions are based on personal knowledge and set
2 forth facts that would be admissible in evidence, and where [Defendant] attested under penalty of
3 perjury that the contents of the motions or pleadings are true and correct.” Jones, 393 F.3d at 923
4 (citing McElyea, 833 F.2d at 197)). The only contention Defendant has submitted is his answer to the
5 complaint. While the assertions contained therein are based on personal knowledge and present facts
6 potentially admissible as evidence, Defendant did not attest to their truth under penalty of perjury,
7 making them unfit for consideration in opposing this motion. Thus, the motion is entirely unopposed.

8 Second, LR 7-2 must be construed as to not conflict with federal law. Henry, 983 F.2d at 950.
9 Specifically, in the summary judgment context, LR 7-2 must be compatible with Rule 56. Fed. R.
10 Civ. P. 56. Pursuant to Rule 56, summary judgment may be granted if “the pleadings, depositions,
11 answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there
12 is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a
13 matter of law.” Fed. R. Civ. P. 56(c); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).
14 The moving party bears the initial burden of showing the absence of a genuine issue of material fact.
15 See Celotex, 477 U.S. at 323. And all justifiable inferences must be viewed in the light most
16 favorable to the nonmoving party. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S.
17 574, 587 (1986); Anderson v. Liberty Lobby Inc., 477 U.S. 242, 255 (1986). The burden then shifts
18 to the nonmoving party to set forth specific facts demonstrating a genuine factual issue for trial. See
19 Fed. R. Civ. P. 56(e); Matsushita, 475 U.S. at 587. Thus, under federal law, a summary judgment
20 motion cannot be granted unless the moving party meets its burden and the nonmoving party fails to
21 demonstrate a genuine factual issue. A summary judgment motion “cannot be granted simply as a
22 sanction for a local rule violation.” See Ghazali v. Moran, 46 F.3d 52, 54 (9th Cir. 1995).
23 Accordingly, the Court must consider the merits of Arsenal’s summary judgment motion to
24 determine if it has met its burden.

25 Before proceeding to the merits, the Court must address a unique issue raised by the peculiar
26 facts of this case. As mentioned previously, Neal’s allegedly offensive conduct has been distributed

1 to his audience through three YouTube videos. Thus, there are three distinct segments at issue.
2 Arsenal attempts to characterize these videos as a series, allowing it to group them together for the
3 purpose of satisfying the elements of its claims. As it pertains to the Combat Ready Video and Test
4 Video, the Court finds this appropriate, because the Combat Ready Video is merely an analysis of the
5 Test Video’s results. However, the Boycott Video is not substantially related to the content of the
6 Combat Ready Video and Test Video. Thus, while, for the purposes of analysis, the Combat Ready
7 Video and Test Video will be considered in conjunction (collectively, the “Combat/Test series”), the
8 Boycott Video will be treated as distinct and independent.

9 III. Business Disparagement

10 Arsenal meets its burden for business disparagement as it relates to the Combat/Test series,
11 but not as it relates to the Boycott Video. Under Nevada law, a business disparagement claim
12 requires the Plaintiff to show the following: (1) a false and disparaging statement, (2) the
13 unprivileged publication by the defendant, (3) malice, and (4) special damages. Clark Cnty. Sch.
14 Dist. v. Virtual Educ. Software, Inc., 213 P.3d 496, 504 (Nev. 2009).

15 A. False and Disparaging Statement

16 As to the Combat/Test series, Neal’s statement that the Arsenal rifle “can’t possibly be MIL-
17 SPEC” is false (the “MIL-SPEC statement”). Ex. 3, Combat Ready Video transcript 5:23-24.
18 According to Harry Pakhanyan’s declaration, Neal’s test is not the test used to evaluate whether a
19 rifle meets the MIL-SPEC standard, and the true test would have showed that Arsenal rifles meet the
20 MIL-SPEC standard. The MIL-SPEC statement is disparaging because “it casts doubt upon the
21 quality” of the product and Neal intended this result. See Restat 2d of Torts, § 629.

22 As to the Boycott video, Neal’s statement that Arsenal’s behavior is fraudulent is based on
23 Neal’s belief that Arsenal paid Nutnfancy, another YouTube user, to publish a favorable review.
24 Read in context, fraudulent is used in its colloquial sense, meaning deceptive or dishonest. If Neal’s
25 allegations are true, that Arsenal has paid Nutnfancy to give a positive review, the fraudulent
26 characterization is arguably true. At the summary judgment stage, the Court must construe

1 everything in the light most favorable to the nonmoving party. Matsushita, 475 U.S. at 587.

2 Accordingly, because Arsenal has not provided evidence to disprove the Boycott Video’s assertions,
3 the Court assumes them to be true. Because this is the only statement at issue in the Boycott Video
4 and Arsenal has not met its burden as to the first element, the Court will not explore the other
5 business disparagement elements as they pertain to this video.

6 B. Unprivileged Publication

7 The MIL-SPEC statement is not privileged. Arsenal relies on defamation case law to assert
8 that, although Neal claims his statements are opinions, they carry factual implications not within the
9 protection of the First Amendment. See Milkovich v. Lorain Journal Co., 497 U.S. 1, 2 (2009).

10 Because of the difficulty involved in ascertaining whether a statement is an opinion protected by the
11 First Amendment or an actionable assertion of fact, the Ninth Circuit has adopted a three-factor test
12 designed to answer this question:

13 First, we look at the statement in its broad context, which includes the general tenor of the
14 entire work, the subject of the statements, the setting, and the format of the work. Next we
15 turn to the specific context and content of the statements, analyzing the extent of figurative
16 or hyperbolic language used and the reasonable expectations of the audience in that particular
17 situation. Finally, we inquire whether the statement itself is sufficiently factual to be
18 susceptible of being proved true or false.

19 Underwager v. Channel 9 Austl., 69 F.3d 361, 366 (9th Cir. 1995) (citing Partington v. Bugliosi, 56
20 F.3d 1147, 1153 (9th Cir. 1994)).

21 Concerning the Combat/Test series, the MIL-SPEC statement is actionable: the broad
22 purpose of the video is to discover an objective fact, the statement is presented as a finding of an
23 objective test, and the statement is sufficiently factual that it can be disproven by applying the true
24 MIL-SPEC test.

25 C. Malice

26 Arsenal has proven that Neal’s statements in the Combat/Test series were made with a
reckless disregard for the truth. “Malice is proven when the plaintiff can show either that the
defendant published the disparaging statement with the intent to cause harm to the plaintiff’s

1 pecuniary interests, or the defendant published a disparaging remark knowing its falsity or with
2 reckless disregard for its truth.” Clark County, 213 P.3d at 504-05 (citing Pegasus v. Reno
3 Newspapers, Inc., 57 P.3d 82, 92-93 (2002)). After Neal received notice that his understanding and
4 application of the MIL-SPEC test was erroneous and misleading, he had no excuse to not, at the very
5 least, amend the Combat/Test series to reflect the truth. By continuing to make the video available to
6 the public, Neal has demonstrated, at the very least, a reckless disregard for the truth.

7 D. Special Damages

8 Arsenal has proven that it has suffered economic loss as a result of the Combat/Test series.
9 To succeed in a business disparagement claim, the plaintiff must “set forth evidence proving
10 economic loss that is attributable to the defendant's disparaging remarks.” Id. at 505 (citing
11 Advanced Training Sys. v. Caswell Equip. Co., 352 N.W.2d 1, 7-8 (Minn. 1984)). Arsenal has
12 submitted several comments of prospective buyers who have chosen to not purchase Arsenal
13 products after watching Neal’s Combat/Test series. This evidence is sufficient to establish special
14 damages because it shows both loss and causation.

15 Arsenal has adequately proven that the Combat/Test series satisfies the elements of business
16 disparagement. However, because the Boycott Video deals with a subject distinct from the
17 Combat/Test series and does not contain a statement that Arsenal has proven false, it does not satisfy
18 the elements of business disparagement.

19 IV. Interference with Prospective Economic Advantage

20 Arsenal has adequately established the elements of interference with prospective economic
21 advantage for the Combat/Test series, but not for the Boycott Video. Under Nevada law, to succeed
22 on a claim for interference with prospective economic advantage the plaintiff must prove the
23 following: “(1) a prospective contractual relationship between the plaintiff and a third party; (2)
24 knowledge by the defendant of the prospective relationship; (3) intent to harm the plaintiff by
25 preventing the relationship; (4) the absence of privilege or justification by the defendant; and (5)

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1 actual harm to the plaintiff as a result of the defendant's conduct.” Wichinsky v. Mosa, 847 P.2d 727,
2 729-30 (Nev. 1993).

3 In addition to these elements, “a plaintiff must show that the means used to divert the
4 prospective advantage was unlawful, improper or was not fair and reasonable.” Custom Teleconnect,
5 Inc. v. Int'l Tele-Services, Inc., 254 F. Supp. 2d 1173, 1181 (D. Nev. 2003). As an extension of this
6 notion, tortious interference generally cannot be found on the basis of true statements, for such will
7 not generally be unlawful or otherwise improper. See Herman Miller, Inc. v. Teknion Furniture Sys.,
8 1996 U.S. Dist. LEXIS 8585, 7 (N.D. Ill. June 19, 1996) (citing Delloma v. Consolidation Coal Co.,
9 996 F.2d 168, 172 (7th Cir. 1993)) (internal quotations omitted). Courts from other jurisdictions have
10 explicitly addressed the issue, explaining that “true statements with or without a privilege are not a
11 valid basis for a claim of tortious interference with prospective economic advantage.” Id; see also
12 Restat 2d of Torts, § 772 (explaining that communicating truthful information to a third party is not
13 tortious interference).

14 As for the Combat/Test series, Arsenal succeeds in proving its interference with prospective
15 economic advantage claim. Arsenal sells and distributes firearms all over the world, and Neal was
16 aware of the company’s products, services, and prospective buyers. That is evidently clear because,
17 on his channel, Neal reviews goods and services in an effort to provide useful information for
18 consumers. The evidence sufficiently clarifies that Neal cannot feign ignorance, for he was informed
19 and knew of the inaccuracy expressed in the MIL-SPEC statement when he received Arsenal’s cease
20 and desist letter. His refusal to remove the videos after learning of the MIL-SPEC statement’s falsity
21 demonstrates that Neal was not interested in disseminating truth but in damaging Arsenal. Although
22 the Boycott Video is considered separately for purposes of establishing the elements of the claim, it
23 is appropriate here to consider the implications of intent contained therein. The explicit purpose of a
24 boycott is to deter future contractual relationships, to harm a corporation by impeding sales. Thus,
25 viewing the refusal to remove the Combat/Test series in light of the Boycott Video makes Neal’s
26 intent to do harm adequately clear. Neal’s false statements are not justified or privileged, and they

1 caused the plaintiff actual harm by deterring prospective buyers from purchasing Arsenal’s products.
2 Lastly, by establishing the elements of business disparagement, Arsenal has demonstrated that the
3 means used to deter the prospective economic advantage were unlawful.

4 Assuming for the sake of argument that Arsenal has established the other elements of its
5 intentional interference claim with respect to the Boycott Video, it has failed to provide evidence that
6 the means used to divert the advantage were unlawful or improper. As stated previously, Arsenal has
7 failed to prove that the Boycott Video contains false statements. Accordingly, the Court assumes
8 them to be true. A truthful statement cannot be the basis for a tortious interference claim, unless the
9 plaintiff can demonstrate that the interference was otherwise unlawful or improper. Plaintiff has not
10 provided evidence to support any such finding. Thus, the Boycott Video does not establish a claim
11 for intentional interference with prospective economic advantage.

12 V. Injunctive Relief

13 Pursuant to the above analysis, the Court grants Arsenal the preliminary injunctive relief it
14 requests as it pertains to the Combat/Test series, but not as it pertains to the Boycott Video. In order
15 for the Court to grant a preliminary injunction, the plaintiff must “establish that he is likely to
16 succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief,
17 that the balance of equities tips in his favor, and that an injunction is in the public interest.” Winter v.
18 NRDC, Inc., 555 U.S. 7, 20 (2008). Arsenal has adequately established a probability of success and
19 irreparable harm. It has established that its hardship will outweigh Neal’s hardship. Additionally, it is
20 in the public’s interest that truth concerning MIL-SPEC qualifications be promulgated.

21 Notwithstanding these findings, the Court recognizes the importance of Neal’s First
22 Amendment rights at stake. For this reason, the Court emphasizes that the MIL-SPEC statement is
23 the only assertion not within its protections. Thus, the Combat/Test series, meaning the Combat
24 Ready Video and Test Video, is the only content the Court’s order affects.

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In accordance with finding Arsenal eligible for preliminary injunctive relief, the Court orders Neal to remove the Combat/Test series, meaning the Combat Ready Video and Test Video. However, Neal is under no legal obligation to remove the Boycott Video.

VI. Conclusion

Accordingly, IT IS HEREBY ORDERED that Plaintiff's Motion for Summary Judgment (#11) is **GRANTED IN PART** and **DENIED IN PART**;

IT IS FURTHER ORDERED that Plaintiff submit a proposed injunction granting its motion for injunctive relief in accordance with this order.

DATED this 31st day of May 2013



Kent J. Dawson
United States District Judge