

EXHIBIT 5

{81600.DOC}

THE HONORABLE JAMES J. ROBART

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

SOARING HELMET CORPORATION, a
Washington Corporation,

Plaintiff,

v.

NANAL, INC., a Nevada corporation, d/b/a
LEATHERUP.COM,

Defendant.

Cause No. C09-0789 JLR

MOTION FOR LEAVE TO FILE
SECOND AMENDED COMPLAINT

NOTE ON MOTION CALENDAR:
April 13, 2010

I. RELIEF REQUESTED

Plaintiff, Soaring Helmet Corporation ("Soaring Helmet"), respectfully requests
this Court to enter an order pursuant to FRCP 15(a) allowing it to amend its Complaint to
add a second trademark infringement claim against Defendant.

MOTION FOR LEAVE TO FILE SECOND AMENDED
COMPLAINT – 1

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1 **II. STATEMENT OF FACTS**

2 On June 9, 2009, Soaring Helmet filed a Complaint asking for injunctive relief,
3 damages, attorney fees and other relief against defendant Nanal, Inc., d/b/a/
4 Leatherup.com ("Leatherup"). In its Complaint, Soaring Helmet asserted claims for
5 federal trademark infringement, false designation of origin, false advertising and unfair
6 competition and tortious interference with prospective economic advantage against
7 Leatherup.

8 Both Soaring Helmet and Leatherup sell products to motorcycle enthusiasts.
9 Soaring Helmet's claims arise out of Leatherup's use of Soaring Helmet's trademark
10 "VEGA" in false and misleading sponsored listings on internet search engines. Soaring
11 Helmet believes that Leatherup's false and misleading sponsored listings falsely lure
12 consumers to Leatherup's website, unfairly trade on the favorable goodwill and cachet of
13 Soaring Helmet's VEGA mark, and create initial interest confusion among consumers.

14 On or about December 2009, Soaring Helmet discovered that Leatherup was
15 selling "XElement Extreme VEGA" motorcycle jackets, which Soaring Helmet believes is
16 a second infringement of its VEGA mark. See Declaration of Heather M. Morado in
17 Support of Plaintiff's Motion for Leave to File Amended Complaint ("Morado Dec.") at ¶
18 2. Soaring Helmet discovered the infringement when one of Soaring Helmets' clients
19 inquired as to whether Soaring Helmet was the manufacturer of the "XElement Extreme
20 VEGA" jacket. Id.

21 Although the "XElement Extreme VEGA" motorcycle jackets were offered for
22 sale on Leatherup's website, it was unclear whether Leatherup was the manufacturer of
23

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1 the jackets. Morado Decl., ¶ 3. Although a “who is” domain name registry search listed a
 2 Leatherup phone number and e-mail address under the contact information for the
 3 XElement brand website, the mailing address differed from the Leatherup address. *Id.*
 4 Since Soaring Helmet had reason to believe that XElement Leather Brand and Leatherup
 5 were affiliated, Soaring Helmet sent the cease and desist letter to both the address for
 6 XElement Leather Brand and to counsel for Leatherup. Morado Decl., ¶ 4. In March
 7 2010, counsel for Leatherup confirmed that XElement Leather Brand was a Leatherup
 8 brand of motorcycle jackets. See Morado Decl., ¶ 6. Counsel for Leatherup also
 9 confirmed that Leatherup had removed the “VEGA” designation from their XElement
 10 brand motorcycle jackets. *Id.* However, Soaring Helmet has still been damaged by
 11 Leatherup’s past infringing sales, and the actual confusion that occurred with at least one
 12 of Soaring Helmet’s clients.

13 **III. STATEMENT OF ISSUE**

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 15 Should Soaring Helmet be allowed to amend its Complaint to add a second
 16 trademark infringement claim against Leatherup?

17 **IV. EVIDENCE RELIED UPON**

18 This motion is based on the Declaration of Heather M. Morado, the exhibits
 19 attached thereto, and all pleadings and papers filed in this case.

20 **V. AUTHORITY**

21 FRCP 15(a) states that “a party may amend the party’s pleading only by leave of
 22 court or by written consent of the adverse party; and leave shall be freely given when
 23 justice so requires.” Courts generally permit amendments with “extreme liberality.”

MOTION FOR LEAVE TO FILE SECOND AMENDED
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1 *Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074, 1079 (9th Cir.1990). When
2 considering a motion for leave to amend, a district court considers whether the proposed
3 amendment results from undue delay, is made in bad faith, will cause prejudice to the
4 opposing party, or is a dilatory tactic. *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 9
5 L.Ed.2d 222 (1962).

6 This case is still in the early stages, as the deadline for amending pleadings does
7 not occur until August 4, 2010, and the discovery cutoff date is October 4, 2010. Thus,
8 allowing the amended complaint will not cause undue delay or prejudice to Leatherup.
9 Further, Soaring Helmet did not discover the infringement until December 2009, and was
10 not able to confirm that XElement was a Leatherup brand until March 2010. Thus, the
11 present motion was not made in bad faith or as a dilatory tactic.

12 Soaring Helmet claims in its' original complaint and in its proposed second
13 amended complaint both arise out of Leatherup's infringement of Soaring Helmet's
14 VEGA mark. Allowing Soaring Helmet to add its additional trademark infringement
15 claim against Leatherup in this case will ensure that this case is adjudicated in the most
16 efficient way possible, without requiring Soaring Helmet to file a separate lawsuit against
17 Leatherup, arising out of the same trademark.
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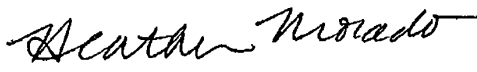
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VI. CONCLUSION

For all the foregoing reasons, Soaring Helmet respectfully requests that the Court grant leave to amend the Complaint to add a second trademark infringement claim against Leatherup in this action.

DATED April 2, 2010.

INVICTA LAW GROUP, PLLC

By 
Heather M. Morado, WSBA No. 35135
Stacie Foster, WSBA No. 23397
Attorneys for Plaintiff

MOTION FOR LEAVE TO FILE SECOND AMENDED
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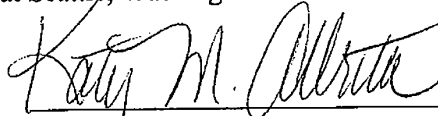
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following persons/attorneys of record:

Ms. Katherine Hendricks
Hendricks & Lewis, PLLC
901 Fifth Avenue, Suite 4100
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Dated this 2nd day of April 2010, at Seattle, Washington.


Katy M. Albritton
Legal Assistant

MOTION FOR LEAVE TO FILE SECOND AMENDED
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