

EXHIBIT 8

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THE HONORABLE JAMES J. ROBERT

RECEIVED
HENDRICKS & LEWIS
8-27-2010

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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

PLAINTIFF'S SUPPLEMENTAL
ANSWERS TO DEFENDANT NANAL,
INC.'S FIRST SET OF
INTERROGATORIES NOS. 1-22 TO
PLAINTIFF SOARING HELMET
CORPORATION

Pursuant to Rules 26 and 33 of the Federal Rules of Civil Procedure and the Local Civil Rules of the United States District Court for the Western District of Washington, Defendant Nanal, Inc. ("Defendant" or "Nanal") hereby propounds the following interrogatories to Plaintiff Soaring Helmet Corporation ("Plaintiff" or "Soaring Helmet") to be responded to separately and fully under oath within thirty (30) days from the date of service.

PLAINTIFF'S SUPPLEMENTAL ANSWERS TO DEFENDANT
NANAL, INC.'S FIRST SET OF INTERROGATORIES - 1

INVICTA LAW GROUP, PLLC
1000 SECOND AVENUE, SUITE 3310
SEATTLE, WA 98104-1019
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INSTRUCTIONS

1. These discovery requests impose a continuing obligation upon Plaintiff to furnish all information requested herein until final disposition of this case. Corrections or additional information are sought as required by the Federal Rules of Civil Procedure and the Local Civil Rules of the United States District Court for the Western District of Washington.

2. Where information is requested of you, such request is intended to include any and all information and documents in the possession, custody or control of Plaintiff and/or any of Plaintiff's employees, representatives, and agents, as well as experts, persons consulted concerning any factual matters or matters of opinion relating to any of the facts or issues involved in this action and, unless privileged, Plaintiff's attorneys.

3. With respect to any response or portion of any response to any of the following discovery requests not made on or with the present knowledge of the person signing and swearing to such response, identify each person from whom information was obtained, on which such response or any part thereof was based. When a response is made by a legal entity, state the name, title and address of the person signing and swearing to such response, and the name, title and address of each person from whom information was obtained, on which such response or any part thereof was based, and the source of such person's information.

4. To the extent that you consider any of the following discovery requests objectionable, respond to as much of each request and each part thereof as is not, in your view, objectionable, as required by the Federal Rules of Civil Procedure. Separately state that part of each request as to which you raise objection and specify, with particularity, the grounds for each such objection.

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DEFINITIONS

As used herein, the following terms shall have the meanings set forth below and as defined herein, words used in the singular include the plural and vice versa:

5. **“Document”** shall mean all materials within the scope of Rule 34 of the Federal Rules of Civil Procedure and as defined in Rule 1001 of the Federal Rules of Evidence, including all written, typed, printed, recorded, graphic, audio, visual, photographic or electronically-stored information, whether contained on paper, magnetic storage media (e.g., hard drives or disks), optical storage media (e.g., CDs, DVDs), or in any other form that are in your actual or constructive possession, custody or control or of which you have knowledge, wherever located, whether an original or a copy, including all copies on which any mark, alteration, writing or any other change from the original has been made, and including all drafts or iterations of such materials. **“Electronically-stored information”** is included within the definition of “document” and includes information stored in, or accessible through, computer or other informational retrieval systems, whether in electrical, magnetic, optical, or other form, and expressly includes documents stored in personal computers, workstations, minicomputers, mainframes and servers.

6. **“Communication”** shall mean any telephone conversation, oral conversation other than a telephone conversation or meeting, or any writing, transcription, or other document memorializing the same. For all communications, include all iterations and versions, and all printed and electronic versions including creation date, register and folder data.

7. **“Person”** shall mean any individual, partnership, corporation, limited liability company, firm, association, or other business or legal entity and includes any present and former director, officer, member, employee and agent, including any legal counsel, consultant, accountant, representative and private investigator of such person.

1 8. **“You,” “your,” or “Plaintiff”** shall mean and refer to Plaintiff Soaring
2 Helmet Corporation, together with any agents, representatives, attorneys, employees, and
3 other persons or entities acting or purporting to act on its behalf.

4 9. **“This Action”** shall mean the above-entitled action, *Soaring Helmet*
5 *Corporation v. Nanal, Inc.*, No. C09-0789-JLR (W.D. Wash.), including but not limited to
6 any and all claims, counterclaims and defenses alleged in such action.

7 10. **“VEGA” or “the Mark”** shall mean Plaintiff’s alleged trademark and any
8 variation or derivative thereof.

9 11. **“And” and “or”** shall, unless the context clearly indicates otherwise,
10 embrace both the conjunctive and disjunctive.

11 12. **“Relating to,” “referring to,” “pertaining to,” “evidencing,” or**
12 **“concerning”** and all variations thereof shall mean constituting or evidencing and directly
13 or indirectly mentioning, containing, discussing, embodying, reflecting, identifying,
14 stating, about, involving, describing, regarding, referring to, explaining, relevant to or
15 reflecting upon the stated subject matter.

16 13. **“Identify”** means:

17 a. When used in reference to a natural person, to state his or her full
18 name, residential address and telephone number, business title, business affiliation and
19 business address and telephone number, or, if the foregoing is not known, such
20 information as was last known during the relevant time period. If such person has, or
21 during the relevant time period had, any relationship to you or to any other party to this
22 action, “identify” shall also mean to state what that relationship is or was and, if
23 applicable, the inclusive dates of same.

 b. When used in reference to a business or legal entity to state the full
legal name of such entity, each name under which such entity does business, the entity’s
street address and telephone number, the identity of the chief operating officer, manager,

1 trustee or other principal or representative and the identity of those persons employed by or
2 otherwise acting for such entity who are known or believed to possess the knowledge or
3 information responsive to the interrogatory for which the entity was identified.

4 c. When used in reference to a document that has been produced in this
5 Action, to state the Bates or other production number. In all other instances, identification
6 of a document shall mean to state the type of document (e.g., letter, email, contract, etc.),
7 its date(s), author(s), addressee(s), if any, and its present location or custodian. If any
8 such document is no longer in your possession, custody or control, "identify" shall also
9 mean to state what disposition was made of it and the date of such disposition. Such
10 identification should be with reasonable particularity so as to enable Defendant to request
11 production of such document pursuant to Rule 34 of the Federal Rules of Civil Procedure
12 and the Local Civil Rules of the United States District Court for the Western District of
13 Washington.

14 14. **"Identify," "describe" or "state"** when used in reference to a basis, cause
15 or reason, shall mean to describe in detail all underlying and relevant facts, including
16 without limitation, all relevant dates, names of persons or entities, places involved, acts,
17 and all subsidiary facts and other pertinent information.

18 15. **"Identify," "describe" or "state"** when used in reference to an act,
19 occurrence, transaction, decision, statement, communication or conduct shall mean to
20 describe in substance the event or events constituting such act and the place(s) and date(s)
21 thereof, and to identify the persons present, the persons involved, and the documents
22 referring or related thereto.

23 16. **"State with specificity" or "describe with specificity"** when used with
reference to a matter of fact means to state every material fact and circumstance
specifically and completely (including but not limited to date, time, location, and the

1 identity of all participants), and whether each such fact or circumstance is stated on
2 knowledge, information, or belief, or is alleged without Plaintiff's knowledge.

3 **GENERAL OBJECTIONS**

4 **1. Plaintiff reserves the right to amend and supplement these responses in**
5 **the event additional information is obtained or in the event of an error, mistake or**
6 **omission.**

7 **2. Plaintiff objects to the discovery to the extent the definitions seek to**
8 **impose upon Plaintiff the duty to provide information and documents of dubious**
9 **relevance, and which can be obtained by Defendant through other means, including**
10 **other types of discovery, far more easily and inexpensively than through**
11 **interrogatories and document production requests.**

12 **3. Plaintiff objects to the discovery to the extent that it seeks to require**
13 **Plaintiff to supplement its answers and responses beyond that required by the Federal**
14 **Rules of Civil Procedure.**

15 **4. Plaintiff objects to the Interrogatories to the extent they seek**
16 **information, documents and things not presently in the custody and control of Plaintiff.**
17 **Plaintiff has not completed its investigation, discovery and evaluation of this matter**
18 **and facts relevant to this matter are in the exclusive custody and control of Defendant,**
19 **and will be the subject of discovery.**

20 **5. Plaintiff objects to the Interrogatories on the grounds that Plaintiff has**
21 **not yet completed its investigation, discovery and evaluation of this matter, and has not**
22 **yet completed its preparation for trial.**
23

PLAINTIFF'S SUPPLEMENTAL ANSWERS TO DEFENDANT
NANAL, INC.'S FIRST SET OF INTERROGATORIES - 6

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1 Plaintiff's VEGA mark on the Google search engine. The results of the dealer's Google
2 search triggered an advertisement for Defendant, falsely stating that Defendant offered
3 "50% off VEGA helmets." Holiday Powersports refused to become an authorized dealer
4 of Plaintiff's products because they mistakenly believed that Plaintiff sold its products to
5 "deep discount" online retailers. The contact information for Jim Squire is as follows:
6 4501 Page Avenue, Michigan Center, Michigan, 49254, (517) 764-3600. Further, in
7 approximately December 2009, one of Plaintiff's sales representatives, Joy Loga, spoke
8 on the telephone with Plaintiff regarding a product offered for sale on Defendant's
9 Leatherup.com website. The product on Defendant's website was a motorcycle jacket
10 sold under the designation, "Xelement Extreme Vega." The representative inquired as to
11 whether Plaintiff was the manufacturer of the jacket.
12

13 **INTERROGATORY NO. 3:** Please set forth in detail all facts and identify all
14 documents concerning the allegations in paragraph 4.3 of the Second Amended Complaint
15 that "Soaring Helmet has invested substantial sums of time, money and effort to develop,
16 use, advertise and promote the Mark. As a result, the Mark has become an integral and
17 indispensable part of Soaring Helmet's business."

18 **ANSWER TO INTERROGATORY NO. 3:** Soaring Helmet has invested a total
19 of over \$600,000.00 advertising and promoting its VEGA brand since 1994. Soaring
20 Helmet participates in two major industry trade shows: the V-Twin Expo and the
21 Advanstar Dealernews Powersports Expo. Soaring Helmet has also advertised its
22 products via its website, vegahelmet.com, since 1996. Soaring Helmet produces over
23 10,000 printed catalogs each year which are distributed to retail dealers, and advertises in

1 industry and consumer magazines such as Dealer News, Motorcycle Industry Magazine,
2 Iron Horse Magazine, Wing World Magazine, and Motorcycle Product News. Soaring
3 Helmet has sales representatives in each state with the exception of North Dakota, Hawaii,
4 Alaska, Wyoming, Kansas, Oklahoma, Montana, New Mexico, Wisconsin, and
5 Minnesota. Soaring Helmet has also maintained a toll-free telephone customer service
6 number since 1995.

7 **INTERROGATORY NO. 4:** Please set forth in detail all facts and identify all
8 documents concerning the allegation in paragraph 5.3 of the Second Amended Complaint
9 that “Defendant’s use of the Mark as a keyword to place its sponsored listing
10 advertisements for Leatherup.com, has and is likely to cause initial interest confusion of
11 consumers that are in fact searching solely for Soaring Helmet’s Mark.”

12 **OBJECTION:** Plaintiff objects to this interrogatory to the extent it calls for a legal
13 conclusion about the ultimate legal issue in the case. Plaintiff objects on the grounds that
14 the parties have just begun formal discovery in this matter, which is continuing. Subject
15 to and without waiver of the foregoing objections, Plaintiff responds:

16 **ANSWER TO INTERROGATORY NO. 4:** Initial interest confusion occurs
17 when a defendant uses the plaintiff’s trademark in a manner calculated to capture initial
18 consumer attention, even though no actual sale is finally completed as a result of the
19 confusion. *Interstellar Starship Services, Ltd. v. Epix Inc.*, 304 F.3d 936, 941 (9th Cir.
20 2002). Although there is no source confusion in the sense that consumers know they are
21 patronizing defendant rather than plaintiff, there is nevertheless initial interest confusion
22 in the sense that, by using plaintiff’s mark to divert people looking for plaintiff’s
23

1 product to its website, defendant improperly benefits from the goodwill that plaintiff
2 developed in its mark. *Id.*

3 In the context of the Web, the three most important “likelihood of confusion
4 factors” are (1) the similarity of the marks, (2) the relatedness of the goods or services,
5 and (3) the parties’ simultaneous use of the Web as a marketing channel. *Interstellar*
6 *Starship*, 304 F.3d at 942. When this ‘controlling troika,’ or ‘internet trinity,’ suggests
7 confusion is likely, the other factors must weigh strongly against a likelihood of
8 confusion to avoid the finding of infringement. *Id.*

9 In this case, Defendant should not have siphoned the goodwill associated with
10 Plaintiff’s VEGA mark by luring consumers to the Leatherup website under the false
11 pretense that it sold Plaintiff’s products. Consumers should not have been induced to
12 purchase Defendant’s products based on an association with a trademark that Plaintiff
13 exclusively owns. In light of the similarity of the marks, the directly competitive goods
14 and services, and the parties’ simultaneous use of the internet as a marketing channel, the
15 use of Plaintiff’s VEGA mark by Defendant both unfairly trades on the favorable
16 goodwill of Plaintiff’s VEGA mark, and creates initial interest confusion among
17 consumers.
18

19 **INTERROGATORY NO. 5:** Please set forth in detail all facts and identify all
20 documents concerning the allegation in paragraph 5.4 of the Second Amended Complaint
21 that “Defendant’s use of the Mark in connection with the marketing, advertising, and sale
22 of motorcycle jackets has and is likely to deceive customers and prospective customers
23

1 into believing that Defendant's products are that of Soaring Helmet, and, as a
2 consequence, are likely to divert customers away from Soaring Helmet."

3 **OBJECTION:** Plaintiff objects to this interrogatory to the extent it calls for a legal
4 conclusion about the ultimate legal issue in the case. Plaintiff objects on the grounds that
5 the parties have just begun formal discovery in this matter, which is continuing. Subject
6 to and without waiver of the foregoing objections, Plaintiff responds:

7 **ANSWER TO INTERROGATORY NO. 5:** In determining whether a
8 defendant's use of a mark creates a likelihood of confusion, the court will consider the
9 following "Sleekcraft factors": (1) the similarity of the marks; (2) the relatedness or
10 proximity of the two companies' products or services; (3) the strength of the registered
11 mark; (4) the marketing channels used; (5) the degree of care likely to be exercised by the
12 purchaser in selecting goods; (6) the accused infringers' intent in selecting its mark; (7)
13 evidence of actual confusion; and (8) the likelihood of expansion in product lines.

14
15 Soaring Helmet's products and those of Defendant are directly competitive, as both
16 parties market and sell motorcycle jackets and accessories. Further, Defendant's use of
17 VEGA is identical in sight, sound, and meaning to Soaring Helmet's VEGA mark.
18 Purchasers of the parties' products are unlikely to exercise a high degree of care, since the
19 products are not prohibitively expensive for the average consumer. Soaring Helmet has
20 not yet been able to conduct discovery with regard to the issues of the marketing channels
21 used, Defendant's intent, and evidence of actual confusion.

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INTERROGATORY NO. 6: Please set forth in detail all facts and identify all documents concerning the allegation in paragraph 5.11 of the Second Amended Complaint that “Defendant has continued to use the Mark notwithstanding that they have actual knowledge of Soaring Helmet’s superior trademark rights as alleged herein, as well as knowledge of the actual confusion suffered by Soaring Helmet’s customers. Defendant’s infringement of the Soaring Helmet VEGA Mark accordingly constitutes intentional, willful, knowing and deliberate trademark infringement throughout the United States, including Washington State.”

OBJECTION: Plaintiff objects to this interrogatory to the extent it calls for a legal conclusion about the ultimate legal issue in the case. Plaintiff objects on the grounds that the parties have just begun formal discovery in this matter, which is continuing. Subject to and without waiver of the foregoing objections, Plaintiff responds:

ANSWER TO INTERROGATORY NO.6: Since at least from April 2009 to the present, Defendant has had actual knowledge of Soaring Helmet’s superior trademark rights. Thus, Defendant’s continued infringement notwithstanding actual notice from Soaring Helmet constitutes intentional trademark infringement.

INTERROGATORY NO. 7: Please set forth in detail all facts and identify all documents concerning the allegation in paragraph 6.2 of the Second Amended Complaint that “[t]he actions of Defendant as alleged herein constitute false designation of origin, false advertising and unfair competition pursuant to Section 43(a) of the Lanham Act, 15 U.S.C. §1125(a).

1 **OBJECTION:** Plaintiff objects to this interrogatory to the extent it calls for a legal
2 conclusion about the ultimate legal issue in the case. Subject to and without waiver of the
3 foregoing objection, Plaintiff responds:

4 **ANSWER TO INTERROGATORY NO. 7:** Section 43(a) of the Lanham Act,
5 15 U.S.C. 1125(a), proscribes both express and implied false representations made in
6 connection with the sale of goods and renders the maker of any such representations
7 liable to those damaged by the misrepresentations. *Consumers Union of United States,*
8 *Inc., v. General Signal Corp.*, 724 F.2d 1044, 1051, (2nd Cir. 1984). Section 43(a)
9 provides:

10 Any person who, on or in connection with any goods or services, or any
11 container for goods, uses in commerce any word, term, name, symbol, or device,
12 or any combination thereof, or any false designation of origin, false or misleading
description of fact, or false or misleading representation of fact, which-

13 (A) is likely to cause confusion, or to cause mistake, or to deceive as to
14 the affiliation, connection, or association of such person with another
15 person, or as to the origin, sponsorship, or approval of his or her
goods, services, or commercial activities by another person, or

16 (B) in commercial advertising or promotion, misrepresents the nature,
17 characteristics, qualities, or geographic origin of his or her or another
person's goods, services, or commercial activities,

18 shall be liable in a civil action by any person who believes that he or she is or is
19 likely to be damaged by such act.

20 Although 43(a) does not codify *all* the law of "unfair competition," it is the foremost
21 federal vehicle for the assertion of certain types of "unfair competition": false
22 designations of origin, false descriptions, and false representations in the advertising and
23 sale of goods and services. *Jack Russell Terrier Network of Northern California v.*
American Kennel Club, Inc., 407 F.3d 1027, 1036 (9th Cir. 2005); McCarthy on

PLAINTIFF'S SUPPLEMENTAL ANSWERS TO DEFENDANT
NANAL, INC.'S FIRST SET OF INTERROGATORIES - 13

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1 Trademarks § 27:52. Thus, § 43(a) tracks classic state unfair competition laws, and the
2 same facts that support an action for trademark infringement will support an action
3 under 43(a). *Cuisinarts, Inc., v. Robot-Coupe Intn'l Corp.*, 509 F.Supp. 1036, 1042
4 (S.D.N.Y. 1981).

5 Initial interest confusion occurs when a defendant uses the plaintiff's trademark
6 in a manner calculated to capture initial consumer attention, even though no actual sale
7 is finally completed as a result of the confusion. *Interstellar Starship Services, Ltd. v.*
8 *Epix Inc.*, 304 F.3d 936, 941 (9th Cir. 2002). Although there is no source confusion in
9 the sense that consumers know they are patronizing defendant rather than plaintiff, there
10 is nevertheless initial interest confusion in the sense that, by using plaintiff's mark to
11 divert people looking for plaintiff's product to its website, defendant improperly benefits
12 from the goodwill that plaintiff developed in its mark. *Id.*

13 In the context of the Web, the three most important likelihood of confusion
14 factors are (1) the similarity of the marks, (2) the relatedness of the goods or services,
15 and (3) the parties' simultaneous use of the Web as a marketing channel. *Interstellar*
16 *Starship*, 304 F.3d at 942. When this 'controlling troika,' or 'internet trinity,' suggests
17 confusion is likely, the other factors must weigh strongly against a likelihood of
18 confusion to avoid the finding of infringement. *Id.*

19 In this case, Defendant should not have siphoned the goodwill associated with
20 Plaintiff's VEGA mark by luring consumers to the Leatherup website under the false
21 pretense that it sold Plaintiff's products. Consumers should not have been induced to
22 purchase Defendant's products based on an association with a trademark that Plaintiff
23 exclusively owns. In light of the similarity of the marks, the directly competitive goods
and services, and the parties' simultaneous use of the internet as a marketing channel, the
use of Plaintiff's VEGA mark by Defendant both unfairly trades on the favorable

1 goodwill of Plaintiff's VEGA mark, and creates initial interest confusion among
2 consumers.

3 In determining whether a defendant's use of a mark creates a likelihood of
4 confusion, the court will consider the following "Sleekcraft factors": (1) the similarity of
5 the marks; (2) the relatedness or proximity of the two companies' products or services; (3)
6 the strength of the registered mark; (4) the marketing channels used; (5) the degree of care
7 likely to be exercised by the purchaser in selecting goods; (6) the accused infringers'
8 intent in selecting its mark; (7) evidence of actual confusion; and (8) the likelihood of
9 expansion in product lines.

10 Soaring Helmet's products and those of Defendant are directly competitive, as both
11 parties market and sell motorcycle jackets and accessories. Further, Defendant's use of
12 VEGA is identical in sight, sound, and meaning to Soaring Helmet's VEGA mark.
13 Purchasers' of the parties' products are unlikely to exercise a high degree of care, since
14 the products are not prohibitively expensive for the average consumer. Soaring Helmet
15 has not yet been able to conduct discovery with regard to the issues of the marketing
16 channels used, Defendant's intent, and evidence of actual confusion.

17 **INTERROGATORY NO. 8:** Please set forth in detail all facts and identify all
18 documents concerning the allegation in paragraph 6.3 of the Second Amended Complaint
19 that "[t]he actions of Defendant have and are likely to continue to deceive customers and
20 prospective customers into believing that Defendant sells the products of Soaring Helmet,
21 and, as a consequence, are likely to divert customers away from Soaring Helmet
22 throughout the United States, including Washington state.
23

1 **OBJECTION:** Plaintiff objects to this interrogatory to the extent it calls for a legal
2 conclusion about the ultimate legal issue in the case. Plaintiff objects on the grounds that
3 the parties have just begun formal discovery in this matter, which is continuing. Subject
4 to and without waiver of the foregoing objection, Plaintiff responds:

5 **ANSWER TO INTERROGATORY NO. 8:** Section 43(a) of the Lanham Act,
6 15 U.S.C. 1125(a), proscribes both express and implied false representations made in
7 connection with the sale of goods and renders the maker of any such representations
8 liable to those damaged by the misrepresentations. *Consumers Union of United States,*
9 *Inc., v. General Signal Corp.*, 724 F.2d 1044, 1051, (2nd Cir. 1984). Section 43(a)
10 provides:

11 Any person who, on or in connection with any goods or services, or any
12 container for goods, uses in commerce any word, term, name, symbol, or device,
13 or any combination thereof, or any false designation of origin, false or misleading
description of fact, or false or misleading representation of fact, which-

14 (C) is likely to cause confusion, or to cause mistake, or to deceive as to
15 the affiliation, connection, or association of such person with another
16 person, or as to the origin, sponsorship, or approval of his or her
goods, services, or commercial activities by another person, or

17 (D) in commercial advertising or promotion, misrepresents the nature,
18 characteristics, qualities, or geographic origin of his or her or another
person's goods, services, or commercial activities,

19 shall be liable in a civil action by any person who believes that he or she is or is
20 likely to be damaged by such act.

21 Although 43(a) does not codify *all* the law of "unfair competition," it is the foremost
22 federal vehicle for the assertion of certain types of "unfair competition": false
23 designations of origin, false descriptions, and false representations in the advertising and

1 sale of goods and services. *Jack Russell Terrier Network of Northern California v.*
2 *American Kennel Club, Inc.*, 407 F.3d 1027, 1036 (9th Cir. 2005); McCarthy on
3 Trademarks § 27:52. Thus, § 43(a) tracks classic state unfair competition laws, and the
4 same facts that support an action for trademark infringement will support an action
5 under 43(a). *Cuisinarts, Inc., v. Robot-Coupe Intn'l Corp.*, 509 F.Supp. 1036, 1042
(S.D.N.Y. 1981).

6 Initial interest confusion occurs when a defendant uses the plaintiff's trademark
7 in a manner calculated to capture initial consumer attention, even though no actual sale
8 is finally completed as a result of the confusion. *Interstellar Starship Services, Ltd. v.*
9 *Epix Inc.*, 304 F.3d 936, 941 (9th Cir. 2002). Although there is no source confusion in
10 the sense that consumers know they are patronizing defendant rather than plaintiff, there
11 is nevertheless initial interest confusion in the sense that, by using plaintiff's mark to
12 divert people looking for plaintiff's product to its website, defendant improperly benefits
13 from the goodwill that plaintiff developed in its mark. *Id.*

14 In the context of the Web, the three most important likelihood of confusion
15 factors are (1) the similarity of the marks, (2) the relatedness of the goods or services,
16 and (3) the parties' simultaneous use of the Web as a marketing channel. *Interstellar*
17 *Starship*, 304 F.3d at 942. When this 'controlling troika,' or 'internet trinity,' suggests
18 confusion is likely, the other factors must weigh strongly against a likelihood of
19 confusion to avoid the finding of infringement. *Id.*

20 In this case, Defendant should not have siphoned the goodwill associated with
21 Plaintiff's VEGA mark by luring consumers to the Leatherup website under the false
22 pretense that it sold Plaintiff's products. Consumers should not have been induced to
23 purchase Defendant's products based on an association with a trademark that Plaintiff
exclusively owns. In light of the similarity of the marks, the directly competitive goods
and services, and the parties' simultaneous use of the internet as a marketing channel, the

1 use of Plaintiff's VEGA mark by Defendant both unfairly trades on the favorable
2 goodwill of Plaintiff's VEGA mark, and creates initial interest confusion among
3 consumers.

4 In determining whether a defendant's use of a mark creates a likelihood of
5 confusion, the court will consider the following "Sleekcraft factors": (1) the similarity of
6 the marks; (2) the relatedness or proximity of the two companies' products or services; (3)
7 the strength of the registered mark; (4) the marketing channels used; (5) the degree of care
8 likely to be exercised by the purchaser in selecting goods; (6) the accused infringers'
9 intent in selecting its mark; (7) evidence of actual confusion; and (8) the likelihood of
10 expansion in product lines.

11 Soaring Helmet's products and those of Defendant are directly competitive, as both
12 parties market and sell motorcycle jackets and accessories. Further, Defendant's use of
13 VEGA is identical in sight, sound, and meaning to Soaring Helmet's VEGA mark.
14 Purchasers' of the parties' products are unlikely to exercise a high degree of care, since
15 the products are not prohibitively expensive for the average consumer. Soaring Helmet
16 has not yet been able to conduct discovery with regard to the issues of the marketing
17 channels used, Defendant's intent, and evidence of actual confusion.

18 **INTERROGATORY NO. 9:** Please set forth in detail all facts and identify all
19 documents concerning the allegation in paragraph 6.6 of the Second Amended Complaint
20 that "[t]he actions of Defendant as alleged herein constitute intentional, willful, knowing
21 and deliberate unfair competition and false advertising pursuant to Lanham Act Section
22 43(a)."

23 **OBJECTION:** Plaintiff objects to this interrogatory to the extent it calls for a legal
conclusion about the ultimate legal issue in the case. Plaintiff objects on the grounds that

1 the parties have just begun formal discovery in this matter, which is continuing. Subject
2 to and without waiver of the foregoing objection, Plaintiff responds:

3 **ANSWER TO INTERROGATORY NO. 9:** Section 43(a) of the Lanham Act,
4 15 U.S.C. 1125(a), proscribes both express and implied false representations made in
5 connection with the sale of goods and renders the maker of any such representations
6 liable to those damaged by the misrepresentations. *Consumers Union of United States,*
7 *Inc., v. General Signal Corp.*, 724 F.2d 1044, 1051, (2nd Cir. 1984). Section 43(a)
8 provides:

9 Any person who, on or in connection with any goods or services, or any
10 container for goods, uses in commerce any word, term, name, symbol, or device,
11 or any combination thereof, or any false designation of origin, false or misleading
description of fact, or false or misleading representation of fact, which-

12 (E) is likely to cause confusion, or to cause mistake, or to deceive as to
13 the affiliation, connection, or association of such person with another
14 person, or as to the origin, sponsorship, or approval of his or her
goods, services, or commercial activities by another person, or

15 (F) in commercial advertising or promotion, misrepresents the nature,
16 characteristics, qualities, or geographic origin of his or her or another
person's goods, services, or commercial activities;

17 shall be liable in a civil action by any person who believes that he or she is or is
18 likely to be damaged by such act.

19 Although 43(a) does not codify *all* the law of "unfair competition," it is the foremost
20 federal vehicle for the assertion of certain types of "unfair competition": false
21 designations of origin, false descriptions, and false representations in the advertising and
22 sale of goods and services. *Jack Russell Terrier Network of Northern California v.*
23 *American Kennel Club, Inc.*, 407 F.3d 1027, 1036 (9th Cir. 2005); McCarthy on
Trademarks § 27:52. Thus, § 43(a) tracks classic state unfair competition laws, and the

1 same facts that support an action for trademark infringement will support an action
2 under 43(a). *Cuisinarts, Inc., v. Robot-Coupe Intn'l Corp.*, 509 F.Supp. 1036, 1042
3 (S.D.N.Y. 1981).

4 Initial interest confusion occurs when a defendant uses the plaintiff's trademark
5 in a manner calculated to capture initial consumer attention, even though no actual sale
6 is finally completed as a result of the confusion. *Interstellar Starship Services, Ltd. v.*
7 *Epix Inc.*, 304 F.3d 936, 941 (9th Cir. 2002). Although there is no source confusion in
8 the sense that consumers know they are patronizing defendant rather than plaintiff, there
9 is nevertheless initial interest confusion in the sense that, by using plaintiff's mark to
10 divert people looking for plaintiff's product to its website, defendant improperly benefits
11 from the goodwill that plaintiff developed in its mark. *Id.*

12 In the context of the Web, the three most important likelihood of confusion
13 factors are (1) the similarity of the marks, (2) the relatedness of the goods or services,
14 and (3) the parties' simultaneous use of the Web as a marketing channel. *Interstellar*
15 *Starship*, 304 F.3d at 942. When this 'controlling troika,' or 'internet trinity,' suggests
16 confusion is likely, the other factors must weigh strongly against a likelihood of
17 confusion to avoid the finding of infringement. *Id.*

18 In this case, Defendant should not have siphoned the goodwill associated with
19 Plaintiff's VEGA mark by luring consumers to the Leatherup website under the false
20 pretense that it sold Plaintiff's products. Consumers should not have been induced to
21 purchase Defendant's products based on an association with a trademark that Plaintiff
22 exclusively owns. In light of the similarity of the marks, the directly competitive goods
23 and services, and the parties' simultaneous use of the internet as a marketing channel, the
use of Plaintiff's VEGA mark by Defendant both unfairly trades on the favorable
goodwill of Plaintiff's VEGA mark, and creates initial interest confusion among
consumers.

1 In determining whether a defendant's use of a mark creates a likelihood of
2 confusion, the court will consider the following "Sleekcraft factors": (1) the similarity of
3 the marks; (2) the relatedness or proximity of the two companies' products or services; (3)
4 the strength of the registered mark; (4) the marketing channels used; (5) the degree of care
5 likely to be exercised by the purchaser in selecting goods; (6) the accused infringers'
6 intent in selecting its mark; (7) evidence of actual confusion; and (8) the likelihood of
expansion in product lines.

7 Soaring Helmet's products and those of Defendant are directly competitive, as both
8 parties market and sell motorcycle jackets and accessories. Further, Defendant's use of
9 VEGA is identical in sight, sound, and meaning to Soaring Helmet's VEGA mark.
10 Purchasers' of the parties' products are unlikely to exercise a high degree of care, since
11 the products are not prohibitively expensive for the average consumer. Soaring Helmet
12 has not yet been able to conduct discovery with regard to the issues of the marketing
channels used, Defendant's intent, and evidence of actual confusion.

13 Since at least from April 2009 to the present, Defendant has had actual knowledge
14 of Soaring Helmet's superior trademark rights. Thus, Defendant's continued infringement
15 notwithstanding actual notice from Soaring Helmet constitutes intentional trademark
16 infringement.

17 **INTERROGATORY NO. 10:** Please set forth in detail all facts and identify all
18 documents concerning the allegation in paragraph 7.2 of the Second Amended Complaint
19 that "Defendant has engaged in unfair and deceptive acts or practices by using the Mark in
20 connection with both the sale of products and in false and misleading advertising in
21 Washington thereby creating a likelihood of public confusion as to the source of the goods
22 and services.
23

1 **OBJECTION:** Plaintiff objects to this interrogatory to the extent it calls for a legal
2 conclusion about the ultimate legal issue in the case. Plaintiff objects on the grounds that
3 the parties have just begun formal discovery in this matter, which is continuing. Subject
4 to and without waiver of the foregoing objection, Plaintiff responds:

5 **ANSWER TO INTERROGATORY NO. 10:** Washington state courts have
6 adopted a “likelihood of confusion” test for statutory unfair competition claims.
7 *eAcceleration Corp. V. Trend Micro, Inc.*, 408 F. Supp. 2d 1110, 1114 (W.D. Wash.
8 2006); *Nordstrom, Inc. v. Tampourlos*, 107 Wash.2d 735, 739, 733 P.2d 208, 210 (1987)
9 (infringement of another’s trade name constitutes violation of RCW 19.86). The analysis
10 of an unfair competition claim under the Washington CPA will generally follow that of
11 the federal trademark infringement claim and will turn on the likelihood of consumer
12 confusion. *See Seattle Endeavors v. Mastro*, 123 Wn.2d 339, 350 (Wash. 1994).

13
14 Initial interest confusion occurs when a defendant uses the plaintiff’s trademark
15 in a manner calculated to capture initial consumer attention, even though no actual sale
16 is finally completed as a result of the confusion. *Interstellar Starship Services, Ltd. v.*
17 *Epix Inc.*, 304 F.3d 936, 941 (9th Cir. 2002). Although there is no source confusion in
18 the sense that consumers know they are patronizing defendant rather than plaintiff, there
19 is nevertheless initial interest confusion in the sense that, by using plaintiff’s mark to
20 divert people looking for plaintiff’s product to its website, defendant improperly benefits
21 from the goodwill that plaintiff developed in its mark. *Id.*

1 In the context of the Web, the three most important likelihood of confusion
2 factors are (1) the similarity of the marks, (2) the relatedness of the goods or services,
3 and (3) the parties' simultaneous use of the Web as a marketing channel. *Interstellar*
4 *Starship*, 304 F.3d at 942. When this 'controlling troika,' or 'internet trinity,' suggests
5 confusion is likely, the other factors must weigh strongly against a likelihood of
6 confusion to avoid the finding of infringement. *Id.*

7 In this case, Defendant should not have siphoned the goodwill associated with
8 Plaintiff's VEGA mark by luring consumers to the Leatherup website under the false
9 pretense that it sold Plaintiff's products. Consumers should not have been induced to
10 purchase Defendant's products based on an association with a trademark that Plaintiff
11 exclusively owns. In light of the similarity of the marks, the directly competitive goods
12 and services, and the parties' simultaneous use of the internet as a marketing channel, the
13 use of Plaintiff's VEGA mark by Defendant both unfairly trades on the favorable
14 goodwill of Plaintiff's VEGA mark, and creates initial interest confusion among
15 consumers.

16 In determining whether a defendant's use of a mark creates a likelihood of
17 confusion, the court will consider the following "Sleekcraft factors": (1) the similarity of
18 the marks; (2) the relatedness or proximity of the two companies' products or services; (3)
19 the strength of the registered mark; (4) the marketing channels used; (5) the degree of care
20 likely to be exercised by the purchaser in selecting goods; (6) the accused infringers'
21 intent in selecting its mark; (7) evidence of actual confusion; and (8) the likelihood of
22 expansion in product lines.

23 Soaring Helmet's products and those of Defendant are directly competitive, as both
parties market and sell motorcycle jackets and accessories. Further, Defendant's use of
VEGA is identical in sight, sound, and meaning to Soaring Helmet's VEGA mark.
Purchasers' of the parties' products are unlikely to exercise a high degree of care, since

1 the products are not prohibitively expensive for the average consumer. Soaring Helmet
2 has not yet been able to conduct discovery with regard to the issues of the marketing
3 channels used, Defendant's intent, and evidence of actual confusion.

4 **INTERROGATORY NO. 11:** Please set forth in detail all facts and identify all
5 documents concerning the allegation in paragraph 7.3 of the Second Amended Complaint
6 that "Defendant's deceptive acts or practices injured Soaring Helmet."

7 **OBJECTION:** Plaintiff objects to this interrogatory to the extent it calls for a legal
8 conclusion about the ultimate legal issue in the case. Subject to and without waiver of the
9 foregoing objection, Plaintiff responds:

10 **ANSWER TO INTERROGATORY NO. 11:** In approximately April 2009, a
11 potential dealer of Plaintiff's products, Jim Squire of Holiday Powersports in Michigan
12 Center, Michigan, refused to do business with Plaintiff after it performed a search of
13 Plaintiff's Vega mark on the Google search engine. The results of the dealer's Google
14 search triggered an advertisement for Defendant, falsely stating that Defendant offered
15 "50% off VEGA helmets." Holiday Powersports refused to become an authorized dealer
16 of Plaintiff's products because they mistakenly believed that Plaintiff sold its products to
17 "deep discount" online retailers. The contact information for Jim Squire is as follows:
18 4501 Page Avenue, Michigan Center, Michigan, 49254, (517) 764-3600. Further, in
19 approximately December 2009, one of Plaintiff's sales representatives, Joy Loga, spoke
20 on the telephone with Plaintiff regarding a product offered for sale on Defendant's
21 Leatherup.com website. The product on Defendant's website was a motorcycle jacket
22
23

1 sold under the designation, "Xelement Extreme Vega." The representative inquired as to
2 whether Plaintiff was the manufacturer of the jacket.

3 **INTERROGATORY NO. 12:** Please set forth in detail all facts and identify all
4 documents concerning the allegation in paragraph 7.4 of the Second Amended Complaint
5 that "Defendant's actions offend the public, are unethical, oppressive and unscrupulous,
6 affecting trade and commerce now and in the future both within Washington State and
7 elsewhere."

8 **OBJECTION:** Plaintiff objects to this interrogatory to the extent it calls for a legal
9 conclusion about the ultimate legal issue in the case. Subject to and without waiver of the
10 foregoing objection, Plaintiff responds:

11 **ANSWER TO INTERROGATORY NO. 12:** Washington state courts have
12 adopted a "likelihood of confusion" test for statutory unfair competition claims.
13 *eAcceleration Corp. V. Trend Micro, Inc.*, 408 F. Supp. 2d 1110, 1114 (W.D. Wash.
14 2006); *Nordstrom, Inc. v. Tampourlos*, 107 Wash.2d 735, 739, 733 P.2d 208, 210 (1987)
15 (infringement of another's trade name constitutes violation of RCW 19.86). The analysis
16 of an unfair competition claim under the Washington CPA will generally follow that of
17 the federal trademark infringement claim and will turn on the likelihood of consumer
18 confusion. *See Seattle Endeavors v. Mastro*, 123 Wn.2d 339, 350 (Wash. 1994).

19
20 Initial interest confusion occurs when a defendant uses the plaintiff's trademark
21 in a manner calculated to capture initial consumer attention, even though no actual sale
22 is finally completed as a result of the confusion. *Interstellar Starship Services, Ltd. v.*
23 *Epix Inc.*, 304 F.3d 936, 941 (9th Cir. 2002). Although there is no source confusion in

1 the sense that consumers know they are patronizing defendant rather than plaintiff, there
2 is nevertheless initial interest confusion in the sense that, by using plaintiff's mark to
3 divert people looking for plaintiff's product to its website, defendant improperly benefits
4 from the goodwill that plaintiff developed in its mark. *Id.*

5 In the context of the Web, the three most important likelihood of confusion
6 factors are (1) the similarity of the marks, (2) the relatedness of the goods or services,
7 and (3) the parties' simultaneous use of the Web as a marketing channel. *Interstellar*
8 *Starship*, 304 F.3d at 942. When this 'controlling troika,' or 'internet trinity,' suggests
9 confusion is likely, the other factors must weigh strongly against a likelihood of
10 confusion to avoid the finding of infringement. *Id.*

11 In this case, Defendant should not have siphoned the goodwill associated with
12 Plaintiff's VEGA mark by luring consumers to the Leatherup website under the false
13 pretense that it sold Plaintiff's products. Consumers should not have been induced to
14 purchase Defendant's products based on an association with a trademark that Plaintiff
15 exclusively owns. In light of the similarity of the marks, the directly competitive goods
16 and services, and the parties' simultaneous use of the internet as a marketing channel, the
17 use of Plaintiff's VEGA mark by Defendant both unfairly trades on the favorable
18 goodwill of Plaintiff's VEGA mark, and creates initial interest confusion among
19 consumers.

20 In determining whether a defendant's use of a mark creates a likelihood of
21 confusion, the court will consider the following "Sleekcraft factors": (1) the similarity of
22 the marks; (2) the relatedness or proximity of the two companies' products or services; (3)
23 the strength of the registered mark; (4) the marketing channels used; (5) the degree of care
likely to be exercised by the purchaser in selecting goods; (6) the accused infringers'
intent in selecting its mark; (7) evidence of actual confusion; and (8) the likelihood of
expansion in product lines.

1 Soaring Helmet's products and those of Defendant are directly competitive, as both
2 parties market and sell motorcycle jackets and accessories. Further, Defendant's use of
3 VEGA is identical in sight, sound, and meaning to Soaring Helmet's VEGA mark.
4 Purchasers' of the parties' products are unlikely to exercise a high degree of care, since
5 the products are not prohibitively expensive for the average consumer. Soaring Helmet
6 has not yet been able to conduct discovery with regard to the issues of the marketing
7 channels used, Defendant's intent, and evidence of actual confusion.

8 **INTERROGATORY NO. 13:** Please set forth in detail all facts and identify all
9 documents concerning the allegation in paragraph 7.5 of the Second Amended Complaint
10 that "[a] causal link exists between the deceptive act and the resulting injury."

11 **OBJECTION:** Plaintiff objects to this interrogatory to the extent it calls for a legal
12 conclusion about the ultimate legal issue in the case. Subject to and without waiver of the
13 foregoing objection, Plaintiff responds:

14 **ANSWER TO INTERROGATORY NO. 13:** Washington state courts have
15 adopted a "likelihood of confusion" test for statutory unfair competition claims.
16 *eAcceleration Corp. V. Trend Micro, Inc.*, 408 F. Supp. 2d 1110, 1114 (W.D. Wash.
17 2006); *Nordstrom, Inc. v. Tampourlos*, 107 Wash.2d 735, 739, 733 P.2d 208, 210 (1987)
18 (infringement of another's trade name constitutes violation of RCW 19.86). The analysis
19 of an unfair competition claim under the Washington CPA will generally follow that of
20 the federal trademark infringement claim and will turn on the likelihood of consumer
21 confusion. *See Seattle Endeavors v. Mastro*, 123 Wn.2d 339, 350 (Wash. 1994).
22
23

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1 Initial interest confusion occurs when a defendant uses the plaintiff's trademark
2 in a manner calculated to capture initial consumer attention, even though no actual sale
3 is finally completed as a result of the confusion. *Interstellar Starship Services, Ltd. v.*
4 *Epix Inc.*, 304 F.3d 936, 941 (9th Cir. 2002). Although there is no source confusion in
5 the sense that consumers know they are patronizing defendant rather than plaintiff, there
6 is nevertheless initial interest confusion in the sense that, by using plaintiff's mark to
7 divert people looking for plaintiff's product to its website, defendant improperly benefits
8 from the goodwill that plaintiff developed in its mark. *Id.*

8 In the context of the Web, the three most important likelihood of confusion
9 factors are (1) the similarity of the marks, (2) the relatedness of the goods or services,
10 and (3) the parties' simultaneous use of the Web as a marketing channel. *Interstellar*
11 *Starship*, 304 F.3d at 942. When this 'controlling troika,' or 'internet trinity,' suggests
12 confusion is likely, the other factors must weigh strongly against a likelihood of
13 confusion to avoid the finding of infringement. *Id.*

13 In this case, Defendant should not have siphoned the goodwill associated with
14 Plaintiff's VEGA mark by luring consumers to the Leatherup website under the false
15 pretense that it sold Plaintiff's products. Consumers should not have been induced to
16 purchase Defendant's products based on an association with a trademark that Plaintiff
17 exclusively owns. In light of the similarity of the marks, the directly competitive goods
18 and services, and the parties' simultaneous use of the internet as a marketing channel, the
19 use of Plaintiff's VEGA mark by Defendant both unfairly trades on the favorable
20 goodwill of Plaintiff's VEGA mark, and creates initial interest confusion among
21 consumers.

21 In determining whether a defendant's use of a mark creates a likelihood of
22 confusion, the court will consider the following "Sleekcraft factors": (1) the similarity of
23 the marks; (2) the relatedness or proximity of the two companies' products or services; (3)

1 the strength of the registered mark; (4) the marketing channels used; (5) the degree of care
2 likely to be exercised by the purchaser in selecting goods; (6) the accused infringers'
3 intent in selecting its mark; (7) evidence of actual confusion; and (8) the likelihood of
4 expansion in product lines.

5 Soaring Helmet's products and those of Defendant are directly competitive, as both
6 parties market and sell motorcycle jackets and accessories. Further, Defendant's use of
7 VEGA is identical in sight, sound, and meaning to Soaring Helmet's VEGA mark.
8 Purchasers' of the parties' products are unlikely to exercise a high degree of care, since
9 the products are not prohibitively expensive for the average consumer. Soaring Helmet
10 has not yet been able to conduct discovery with regard to the issues of the marketing
11 channels used, Defendant's intent, and evidence of actual confusion.

12 **INTERROGATORY NO. 14:** Please set forth in detail all facts and identify all
13 documents concerning the allegation in paragraph 7.6 of the Second Amended Complaint
14 that "Soaring Helmet has suffered damages relating to violation of the Consumer
15 Protection Act RCW 19.86 by Defendants [sic]."

16 **OBJECTION:** Plaintiff objects to this interrogatory to the extent it calls for a legal
17 conclusion about the ultimate legal issue in the case. Subject to and without waiver of the
18 foregoing objection, Plaintiff responds:

19 **ANSWER TO INTERROGATORY NO. 14:** Washington state courts have
20 adopted a "likelihood of confusion" test for statutory unfair competition claims.
21 *eAcceleration Corp. V. Trend Micro, Inc.*, 408 F. Supp. 2d 1110, 1114 (W.D. Wash.
22 2006); *Nordstrom, Inc. v. Tampourlos*, 107 Wash.2d 735, 739, 733 P.2d 208, 210 (1987)
23 (infringement of another's trade name constitutes violation of RCW 19.86). The analysis

1 of an unfair competition claim under the Washington CPA will generally follow that of
2 the federal trademark infringement claim and will turn on the likelihood of consumer
3 confusion. *See Seattle Endeavors v. Mastro*, 123 Wn.2d 339, 350 (Wash. 1994).

4 Initial interest confusion occurs when a defendant uses the plaintiff's trademark
5 in a manner calculated to capture initial consumer attention, even though no actual sale
6 is finally completed as a result of the confusion. *Interstellar Starship Services, Ltd. v.*
7 *Epix Inc.*, 304 F.3d 936, 941 (9th Cir. 2002). Although there is no source confusion in
8 the sense that consumers know they are patronizing defendant rather than plaintiff, there
9 is nevertheless initial interest confusion in the sense that, by using plaintiff's mark to
10 divert people looking for plaintiff's product to its website, defendant improperly benefits
11 from the goodwill that plaintiff developed in its mark. *Id.*

12 In the context of the Web, the three most important likelihood of confusion
13 factors are (1) the similarity of the marks, (2) the relatedness of the goods or services,
14 and (3) the parties' simultaneous use of the Web as a marketing channel. *Interstellar*
15 *Starship*, 304 F.3d at 942. When this 'controlling troika,' or 'internet trinity,' suggests
16 confusion is likely, the other factors must weigh strongly against a likelihood of
17 confusion to avoid the finding of infringement. *Id.*

18 In this case, Defendant should not have siphoned the goodwill associated with
19 Plaintiff's VEGA mark by luring consumers to the Leatherup website under the false
20 pretense that it sold Plaintiff's products. Consumers should not have been induced to
21 purchase Defendant's products based on an association with a trademark that Plaintiff
22 exclusively owns. In light of the similarity of the marks, the directly competitive goods
23

PLAINTIFF'S SUPPLEMENTAL ANSWERS TO DEFENDANT
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1 and services, and the parties' simultaneous use of the internet as a marketing channel, the
2 use of Plaintiff's VEGA mark by Defendant both unfairly trades on the favorable
3 goodwill of Plaintiff's VEGA mark, and creates initial interest confusion among
4 consumers.

5 In determining whether a defendant's use of a mark creates a likelihood of
6 confusion, the court will consider the following "Sleekcraft factors": (1) the similarity of
7 the marks; (2) the relatedness or proximity of the two companies' products or services; (3)
8 the strength of the registered mark; (4) the marketing channels used; (5) the degree of care
9 likely to be exercised by the purchaser in selecting goods; (6) the accused infringers'
10 intent in selecting its mark; (7) evidence of actual confusion; and (8) the likelihood of
11 expansion in product lines.

12 Soaring Helmet's products and those of Defendant are directly competitive, as both
13 parties market and sell motorcycle jackets and accessories. Further, Defendant's use of
14 VEGA is identical in sight, sound, and meaning to Soaring Helmet's VEGA mark.
15 Purchasers' of the parties' products are unlikely to exercise a high degree of care, since
16 the products are not prohibitively expensive for the average consumer. Soaring Helmet
17 has not yet been able to conduct discovery with regard to the issues of the marketing
18 channels used, Defendant's intent, and evidence of actual confusion.

19
20 **INTERROGATORY NO. 15:** Please set forth in detail all facts and identify all
21 documents concerning the allegation in paragraph 8.4 of the Second Amended Complaint
22 that "Defendant intentionally interfered with Soaring Helmet's business expectancy and
23 destroyed Soaring Helmet's opportunity to obtain prospective business customers.

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1 Defendant knew that the interference was certain or substantially certain to occur as a
2 result of their [sic] actions.”

3 **OBJECTION:** Plaintiff objects to this interrogatory to the extent it calls for a legal
4 conclusion about the ultimate legal issue in the case. Plaintiff objects on the grounds that
5 the parties have just begun formal discovery in this matter, which is continuing. Subject
6 to and without waiver of the foregoing objection, Plaintiff responds:

7 **ANSWER TO INTERROGATORY NO. 15:** In order to state a claim for
8 tortious interference with prospective business advantage, a plaintiff must allege: (1) the
9 existence of a valid contractual relationship or business expectancy; (2) that defendant had
10 knowledge of that relationship or business expectancy; (3) an intentional interference
11 inducing or causing a breach or termination of the relationship or expectancy; (4) that
12 defendant interfered for an improper purpose or used improper means; and (5) resultant
13 damage. *Newton Insurance Agency, & Brokerage, Inc., v. Caledonian Insurance*
14 *Group, Inc.*, 114 Wn.App. 151, 158 (2002).

15
16 The tort of intentional interference with prospective business advantage protects
17 not only the opportunity to consummate but also the opportunity to obtain business
18 relationships. *Caruso v. Local Union No. 690 for Intern. Broth. Of Teamsters,*
19 *Chauffeurs, Warehousemen and Helpers of America*, 33 Wn. App. 201, 207 (1982),
20 *reversed on other grounds* 100 Wn.2d 343 (1983), *appeal after remand* 107 Wn.2d 524
21 (1987), cert. denied 484 U.S. 815 (1987). A valid business expectancy includes any
22 prospective contractual or business relationship that would be of pecuniary value. *Newton*
23 *Insurance Agency, & Brokerage, Inc., v. Caledonian Insurance Group, Inc.*, 114

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1 Wn.App. 151, 157 (2002). Proof of a specific contract is not required. *Caruso*, 33 Wn.
2 App. at 207. While the plaintiff must show that future business opportunities and profits
3 are a reasonable expectation, certainty of proof is not required. *Caruso*, 33 Wn. App. at
4 208. It is sufficient if the evidence reveals that the alleged interferor *knew or should have*
5 *known* of the business opportunity or expectancy. *Caruso*, 33 Wn. App. at 207 (emphasis
6 added). Finally, interference with a business expectancy is intentional “if the actor desires
7 to bring it about or if he knows that the interference is certain or substantially certain to
8 occur as a result of his action.” *Newton Insurance Agency, & Brokerage, Inc. v.*
9 *Caledonian Insurance Group, Inc.*, 114 Wn.App. 151, 158 (2002).

10 In this case, Plaintiff had a reasonable and valid expectation that potential
11 customers searching for Soaring Helmet’s VEGA trademark would not be lured to a
12 website that does not in fact sell any of Soaring Helmet’s products. Defendant knew or at
13 the very least, should have known that its use of Plaintiff’s VEGA mark would interfere
14 with Plaintiff’s right to obtain prospective customers. Defendant intentionally interfered
15 with Soaring Helmet’s business expectancy because the luring of Soaring Helmet’s
16 potential customers to the Leatherup.com website was certain or at the very least,
17 substantially certain to occur as a result of Defendant’s use of the VEGA mark.

18
19 **INTERROGATORY NO. 16:** Please set forth in detail all facts and identify all
20 documents concerning the allegation in paragraph 8.5 of the Second Amended Complaint
21 that “Defendant’s interference with Soaring Helmet’s business expectancy was improper
22 and the means used was innately wrongful and predatory in character.”
23

1 **OBJECTION:** Plaintiff objects to this interrogatory to the extent it calls for a legal
2 conclusion about the ultimate legal issue in the case. Plaintiff objects on the grounds that
3 the parties have just begun formal discovery in this matter, which is continuing. Subject
4 to and without waiver of the foregoing objection, Plaintiff responds:

5 **ANSWER TO INTERROGATORY NO. 16:** In order to state a claim for
6 tortious interference with prospective business advantage, a plaintiff must allege: (1) the
7 existence of a valid contractual relationship or business expectancy; (2) that defendant had
8 knowledge of that relationship or business expectancy; (3) an intentional interference
9 inducing or causing a breach or termination of the relationship or expectancy; (4) that
10 defendant interfered for an improper purpose or used improper means; and (5) resultant
11 damage. *Newton Insurance Agency, & Brokerage, Inc., v. Caledonian Insurance*
12 *Group, Inc.*, 114 Wn.App. 151, 158 (2002).

13 The tort of intentional interference with prospective business advantage protects
14 not only the opportunity to consummate but also the opportunity to obtain business
15 relationships. *Caruso v. Local Union No. 690 for Intern. Broth. Of Teamsters,*
16 *Chauffeurs, Warehousemen and Helpers of America*, 33 Wn. App. 201, 207 (1982),
17 *reversed on other grounds* 100 Wn.2d 343 (1983), *appeal after remand* 107 Wn.2d 524
18 (1987), cert. denied 484 U.S. 815 (1987). A valid business expectancy includes any
19 prospective contractual or business relationship that would be of pecuniary value. *Newton*
20 *Insurance Agency, & Brokerage, Inc., v. Caledonian Insurance Group, Inc.*, 114
21 Wn.App. 151, 157 (2002). Proof of a specific contract is not required. *Caruso*, 33 Wn.
22 App. at 207. While the plaintiff must show that future business opportunities and profits
23

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1 are a reasonable expectation, certainty of proof is not required. *Caruso*, 33 Wn. App. at
2 208. It is sufficient if the evidence reveals that the alleged interferor *knew or should have*
3 *known* of the business opportunity or expectancy. *Caruso*, 33 Wn. App. at 207 (emphasis
4 added). Finally, interference with a business expectancy is intentional “if the actor desires
5 to bring it about or if he knows that the interference is certain or substantially certain to
6 occur as a result of his action.” *Newton Insurance Agency, & Brokerage, Inc. v.*
7 *Caledonian Insurance Group, Inc.*, 114 Wn.App. 151, 158 (2002).

8 In this case, Plaintiff had a reasonable and valid expectation that potential
9 customers searching for Soaring Helmet’s VEGA trademark would not be lured to a
10 website that does not in fact sell any of Soaring Helmet’s products. Defendant knew or at
11 the very least, should have known that its use of Plaintiff’s VEGA mark would interfere
12 with Plaintiff’s right to obtain prospective customers. Defendant intentionally interfered
13 with Soaring Helmet’s business expectancy because the luring of Soaring Helmet’s
14 potential customers to the Leatherup.com website was certain or at the very least,
15 substantially certain to occur as a result of Defendant’s use of the VEGA mark.

17 **INTERROGATORY NO. 17:** Please set forth in detail all facts and identify all
18 documents concerning the allegation in paragraph 8.6 of the Second Amended Complaint
19 that “Soaring Helmet has suffered damages relating to violation of its business expectancy
20 by Defendant.”

21 **OBJECTION:** Plaintiff objects to this interrogatory to the extent it calls for a legal
22 conclusion about the ultimate legal issue in the case. Plaintiff objects on the grounds that
23

1 the parties have just begun formal discovery in this matter, which is continuing. Subject
2 to and without waiver of the foregoing objection, Plaintiff responds:

3 **ANSWER TO INTERROGATORY NO. 17:** In order to state a claim for
4 tortious interference with prospective business advantage, a plaintiff must allege: (1) the
5 existence of a valid contractual relationship or business expectancy; (2) that defendant had
6 knowledge of that relationship or business expectancy; (3) an intentional interference
7 inducing or causing a breach or termination of the relationship or expectancy; (4) that
8 defendant interfered for an improper purpose or used improper means; and (5) resultant
9 damage. *Newton Insurance Agency, & Brokerage, Inc., v. Caledonian Insurance*
10 *Group, Inc.*, 114 Wn.App. 151, 158 (2002).

11 The tort of intentional interference with prospective business advantage protects
12 not only the opportunity to consummate but also the opportunity to obtain business
13 relationships. *Caruso v. Local Union No. 690 for Intern. Broth. Of Teamsters,*
14 *Chauffeurs, Warehousemen and Helpers of America*, 33 Wn. App. 201, 207 (1982),
15 *reversed on other grounds* 100 Wn.2d 343 (1983), *appeal after remand* 107 Wn.2d 524
16 (1987), cert. denied 484 U.S. 815 (1987). A valid business expectancy includes any
17 prospective contractual or business relationship that would be of pecuniary value. *Newton*
18 *Insurance Agency, & Brokerage, Inc., v. Caledonian Insurance Group, Inc.*, 114
19 Wn.App. 151, 157 (2002). Proof of a specific contract is not required. *Caruso*, 33 Wn.
20 App. at 207. While the plaintiff must show that future business opportunities and profits
21 are a reasonable expectation, certainty of proof is not required. *Caruso*, 33 Wn. App. at
22 208. It is sufficient if the evidence reveals that the alleged interferer *knew or should have*
23

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1 *known* of the business opportunity or expectancy. *Caruso*, 33 Wn. App. at 207 (emphasis
2 added). Finally, interference with a business expectancy is intentional “if the actor desires
3 to bring it about or if he knows that the interference is certain or substantially certain to
4 occur as a result of his action.” *Newton Insurance Agency, & Brokerage, Inc. v.*
5 *Caledonian Insurance Group, Inc.*, 114 Wn.App. 151, 158 (2002).

6 In this case, Plaintiff had a reasonable and valid expectation that potential
7 customers searching for Soaring Helmet’s VEGA trademark would not be lured to a
8 website that does not in fact sell any of Soaring Helmet’s products. Defendant knew or at
9 the very least, should have known that its use of Plaintiff’s VEGA mark would interfere
10 with Plaintiff’s right to obtain prospective customers. Defendant intentionally interfered
11 with Soaring Helmet’s business expectancy because the luring of Soaring Helmet’s
12 potential customers to the Leatherup.com website was certain or at the very least,
13 substantially certain to occur as a result of Defendant’s use of the VEGA mark.

14 **INTERROGATORY NO. 18:** Please state whether Plaintiff has knowledge of
15 any third parties who have, or Plaintiff believes have, purchased in connection with any
16 Internet search engine keywords encompassing or including the term “vega,” and if so,
17 identify each such third party and describe with specificity all actions Plaintiff has taken
18 with respect to such third parties.

19 **ANSWER TO INTERROGATORY NO. 18:** Soaring Helmet previously learned
20 that when the query “Vega Helmets” was searched via the Yahoo.com search engine, an
21 advertisement appeared under Yahoo’s sponsored listings that misleadingly stated that the
22 website Best-Price.com offered “Vega Helmets – up to 75% less.” However, Best-
23

1 Price.com did not sell any of Soaring Helmet's products. Best-Price.com appeared to be
2 an aggregator of search engine results, and did not sell any products or services. After
3 receipt of Soaring Helmet's cease and desist letter, the misleading advertisement ceased to
4 appear as a result of a search on the Yahoo.com search engine.

5 **INTERROGATORY NO. 19:** Please set forth in detail each category of damage
6 Plaintiff claims to have incurred arising from the acts of Defendant complained of in the
7 Second Amended Complaint, including the computation of the amount of damages
8 Plaintiff claims to have incurred for each category.

9 **ANSWER TO INTERROGATORY NO. 19:** Plaintiff has suffered damages
10 arising out of the lost dealer in Michigan and lost sales arising out of initial interest
11 confusion. Damages will be calculated based on either: i) the average amount of dealer
12 purchases in Michigan; ii) the average amount of dealer purchases nationwide; or iii) the
13 amount of defendant's profits. The Lanham Act provides for the recovery of the
14 defendant's profits. See *15 U.S.C. §1117(a)*. Critically, a plaintiff does not need to show
15 actual damage to obtain an award reflecting the infringer's profits. *Lindy Pen Co. v. Bic*
16 *Pen Corp.*, 982 F.2d 1400, 1410-11 (9th Cir. 1993). Because proof of actual damage is
17 often difficult, a court may award damages based solely on defendant's profits on a theory
18 of unjust enrichment. *Id.* at 1407.

19
20 **INTERROGATORY NO. 20:** Please state whether Plaintiff has lost sales by the
21 acts of Defendant complained of in the second Amended Complaint, and, if so, set forth in
22 detail the computation of those lost sales.
23

1 **ANSWER TO INTERROGATORY NO. 20:** Plaintiff has suffered damages
2 arising out of the lost dealer in Michigan and lost sales arising out of initial interest
3 confusion. Damages will be calculated based on either: i) the average amount of dealer
4 purchases in Michigan; ii) the average amount of dealer purchases nationwide; or iii) the
5 amount of defendant's profits. The Lanham Act provides for the recovery of the
6 defendant's profits. See 15 U.S.C. §1117(a). Critically, a plaintiff does not need to show
7 actual damage to obtain an award reflecting the infringer's profits. *Lindy Pen Co. v. Bic*
8 *Pen Corp.*, 982 F.2d 1400, 1410-11 (9th Cir. 1993). Because proof of actual damage is
9 often difficult, a court may award damages based solely on defendant's profits on a theory
10 of unjust enrichment. *Id.* at 1407.

11 **INTERROGATORY NO. 21:** Please set forth in detail all facts and identify all
12 documents concerning Plaintiff's claim for treble damages in this Action.

13 **OBJECTION:** Plaintiff objects to this interrogatory to the extent it calls for a legal
14 conclusion about the ultimate legal issue in the case. Plaintiff objects on the grounds that
15 the parties have just begun formal discovery in this matter, which is continuing. Subject
16 to and without waiver of the foregoing objection, Plaintiff responds:

17 **ANSWER TO INTERROGATORY NO. 21:** Section 43(a) of the Lanham Act,
18 15 U.S.C. 1125(a), proscribes both express and implied false representations made in
19 connection with the sale of goods and renders the maker of any such representations
20 liable to those damaged by the misrepresentations. *Consumers Union of United States,*
21 *Inc., v. General Signal Corp.*, 724 F.2d 1044, 1051, (2nd Cir. 1984). Section 43(a)
22 provides:
23

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1 Any person who, on or in connection with any goods or services, or any
2 container for goods, uses in commerce any word, term, name, symbol, or device,
3 or any combination thereof, or any false designation of origin, false or misleading
4 description of fact, or false or misleading representation of fact, which-

5 (G) is likely to cause confusion, or to cause mistake, or to deceive as to
6 the affiliation, connection, or association of such person with another
7 person, or as to the origin, sponsorship, or approval of his or her
8 goods, services, or commercial activities by another person, or

9 (H) in commercial advertising or promotion, misrepresents the nature,
10 characteristics, qualities, or geographic origin of his or her or another
11 person's goods, services, or commercial activities,

12 shall be liable in a civil action by any person who believes that he or she is or is
13 likely to be damaged by such act.

14 Although 43(a) does not codify *all* the law of "unfair competition," it is the foremost
15 federal vehicle for the assertion of certain types of "unfair competition": false
16 designations of origin, false descriptions, and false representations in the advertising and
17 sale of goods and services. *Jack Russell Terrier Network of Northern California v.*
18 *American Kennel Club, Inc.*, 407 F.3d 1027, 1036 (9th Cir. 2005); McCarthy on
19 Trademarks § 27:52. Thus, § 43(a) tracks classic state unfair competition laws, and the
20 same facts that support an action for trademark infringement will support an action
21 under 43(a). *Cuisinarts, Inc., v. Robot-Coupe Intn'l Corp.*, 509 F.Supp. 1036, 1042
22 (S.D.N.Y. 1981).

23 Initial interest confusion occurs when a defendant uses the plaintiff's trademark
in a manner calculated to capture initial consumer attention, even though no actual sale
is finally completed as a result of the confusion. *Interstellar Starship Services, Ltd. v.*
Epix Inc., 304 F.3d 936, 941 (9th Cir. 2002). Although there is no source confusion in
the sense that consumers know they are patronizing defendant rather than plaintiff, there
is nevertheless initial interest confusion in the sense that, by using plaintiff's mark to

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1 divert people looking for plaintiff's product to its website, defendant improperly benefits
2 from the goodwill that plaintiff developed in its mark. *Id.*

3 In the context of the Web, the three most important likelihood of confusion
4 factors are (1) the similarity of the marks, (2) the relatedness of the goods or services,
5 and (3) the parties' simultaneous use of the Web as a marketing channel. *Interstellar*
6 *Starship*, 304 F.3d at 942. When this 'controlling troika,' or 'internet trinity,' suggests
7 confusion is likely, the other factors must weigh strongly against a likelihood of
8 confusion to avoid the finding of infringement. *Id.*

9 In this case, Defendant should not have siphoned the goodwill associated with
10 Plaintiff's VEGA mark by luring consumers to the Leatherup website under the false
11 pretense that it sold Plaintiff's products. Consumers should not have been induced to
12 purchase Defendant's products based on an association with a trademark that Plaintiff
13 exclusively owns. In light of the similarity of the marks, the directly competitive goods
14 and services, and the parties' simultaneous use of the internet as a marketing channel, the
15 use of Plaintiff's VEGA mark by Defendant both unfairly trades on the favorable
16 goodwill of Plaintiff's VEGA mark, and creates initial interest confusion among
17 consumers.

18 In determining whether a defendant's use of a mark creates a likelihood of confusion, the
19 court will consider the following "Sleekcraft factors": (1) the similarity of the marks; (2)
20 the relatedness or proximity of the two companies' products or services; (3) the strength
21 of the registered mark; (4) the marketing channels used; (5) the degree of care likely to be
22 exercised by the purchaser in selecting goods; (6) the accused infringers' intent in
23 selecting its mark; (7) evidence of actual confusion; and (8) the likelihood of expansion in
product lines.

1 Soaring Helmet's products and those of Defendant are directly competitive, as both
2 parties market and sell motorcycle jackets and accessories. Further, Defendant's use of
3 VEGA is identical in sight, sound, and meaning to Soaring Helmet's VEGA mark.
4 Purchasers' of the parties' products are unlikely to exercise a high degree of care, since
5 the products are not prohibitively expensive for the average consumer. Soaring Helmet
6 has not yet been able to conduct discovery with regard to the issues of the marketing
7 channels used, Defendant's intent, and evidence of actual confusion.

8 Since at least from April 2009 to the present, Defendant has had actual knowledge
9 of Soaring Helmet's superior trademark rights. Thus, Defendant's continued infringement
10 notwithstanding actual notice from Soaring Helmet constitutes intentional trademark
11 infringement.

12 **INTERROGATORY NO. 22:** Identify all persons who have or whom you
13 believe have any knowledge or information concerning each fact stated in your responses
14 to the interrogatories.
15

16 **ANSWER TO INTERROGATORY NO. 22:**

17 Lou Xu, President

18 Jeanne DeMund, Vice President

19 Wayne Layman, Michigan territory sales representative

20 Claudia Mallard, Southeast US sales representative
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DATED August 27, 2010.

INVICTA LAW GROUP, PLLC

By: s/Heather Morado/
Stacie Foster, WSBA No. 23397
Heather M. Morado, WSBA No. 35135
Steven W. Edmiston, WSBA No. 17136
Attorneys for Plaintiff

PLAINTIFF'S SUPPLEMENTAL ANSWERS TO DEFENDANT
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1 **ATTORNEY'S FED. R. CIV. P. CERTIFICATION**

2 The undersigned attorney certifies pursuant to Fed. R. Civ. P. 26(g) that he or she
3 has read each response and objection to these discovery requests, and that to the best of
4 his or her knowledge, information, and belief formed after a reasonable inquiry, each is
5 (1) consistent with the Civil Rules and warranted by existing law or a good faith argument
6 for the extension, modification, or reversal of existing law; (2) not interposed for any
7 improper purpose, such as to harass or to cause unnecessary delay or needless increase in
8 the costs of litigation; and (3) not unreasonable or unduly burdensome or expensive, given
9 the needs of the case, the discovery already had in the case, the amount in controversy,
10 and the importance of the issues at stake in the litigation.
11

12 DATED August 27, 2010.
13

14 INVICTA LAW GROUP, PLLC

15 By: s/Heather Morado/
16 Stacie Foster, WSBA No. 23397
17 Heather M. Morado, WSBA No. 35135
18 Steven W. Edmiston, WSBA No. 17136
19 Attorneys for Plaintiff
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CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

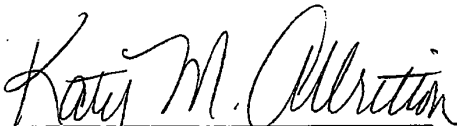
On this day, August 27, 2010, I caused to be sent via e-mail and First Class Mail the following documents:

1. Plaintiff's Supplemental Answers to Defendant Nanal, Inc.'s First Set of Interrogatories Nos. 1-22 to Plaintiff Soaring Helmet Corporation with Certificate of Service

To the following listed counsel of record:

Ms. Katherine Hendricks
Ms. Stacia N. Lay
HENDRICKS & LEWIS, PLLC
901 Fifth Avenue, Suite 4100
Seattle, WA 98164
kh@hllaw.com; sl@hllaw.com

Dated this 27st day of August, 2010, at Seattle, Washington.


Katy M. Albritton
Legal Assistant