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The Honorable James L. Robart

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SOARING HELMET CORPORATION, a
Washington corporation,

Plaintiff,

v.

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

Defendant.

No. C09-789-JLR

DEFENDANT NANAL, INC.'S REPLY
IN SUPPORT OF MOTION FOR
SUMMARY JUDGMENT

NOTE ON MOTION CALENDAR:
November 26, 2010

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1 Plaintiff Soaring Helmet Corporation sued Defendant Nanal, Inc. nearly a year and a half
2 ago and has had the opportunity to conduct full discovery to obtain evidence to prove the
3 allegations of its complaint. Yet Plaintiff's opposition to Nanal's summary judgment motion is
4 nothing more than a restatement of the unsubstantiated allegations of its complaint, irrelevant
5 attacks upon Nanal and its president, Albert Bootesaz, and an improper attempt to shift the
6 burden of proof on Plaintiff's claims to Nanal. The simple fact remains that Plaintiff has failed
7 to carry its burden of establishing that any genuine issues of material fact exist as to essential
8 elements of each of its claims and those claims therefore should be summarily dismissed.

9 **I. REBUTTAL FACTS.**

10 Plaintiff's purported "factual" statement includes a number of inaccuracies and
11 mischaracterizations as to tangential issues that do not demonstrate that *genuine* issues of
12 *material* fact exist. For example, Plaintiff refers to Mr. Bootesaz's other business interests
13 (Plaintiff's Response to Defendant's Motion for Summary Judgment ("Opp."), Docket No. 60, at
14 p. 4); claims for the first time that Plaintiff attempted to contact Nanal before sending a cease and
15 desist letter (Opp. at p. 5); blames Nanal for Plaintiff's initial failure to name the correct
16 defendant (Opp. at p. 5); and alleges that Nanal "refused" to answer Plaintiff's complaint (Opp.
17 at p. 5). Responding to each of these and other irrelevancies is counterproductive to the ultimate
18 resolution of this case, however. Therefore, Nanal focuses only on the pertinent issues and
19 responds to Plaintiff's factual allegations with respect to those issues below.

20 **II. ARGUMENT.**

21 **A. Motion to Strike Plaintiff's Untimely Disclosed Evidence.**

22 Plaintiff offers information in opposition to summary judgment that Nanal requests be
23 stricken and given no consideration in resolving its summary judgment motion under CR 7(g).
24 Specifically, Nanal moves to strike the following information: (1) Exhibit N to the Declaration
25 of Heather M. Morado (Docket No. 66); (2) Exhibits A, B and C to the Declaration of Claudia
26 Mallard as well as the allegations contained in paragraphs 10-14 and 16-20 of the declaration
27 (Docket No. 64); (3) the allegations contained in paragraphs 4-11 of the Declaration of Joy Loga
28

1 (Docket No.63); (4) the allegations contained in paragraphs 8-14 of the Declaration of Wayne
2 Layman (Docket No. 62); and (5) the allegations contained in paragraphs 20-22 of the
3 Declaration of Jeanne DeMund (Docket No. 61).

4 This purported evidence should be stricken pursuant to Rule 37, which provides that:

5 [i]f a party fails to provide information or identify a witness as required by Rule
6 26(a) or (e), the party is not allowed to use that information or witness to supply
7 evidence on a motion, at a hearing, or at a trial, unless the failure was
8 substantially justified or is harmless.

9 FED. R. CIV. P. 37(c)(1).¹ Rule 37(c)(1) is a broadening of the Court's sanctioning power and is
10 a "self-executing," "automatic" sanction. *Yeti By Molly Ltd. v. Deckers Outdoor Corp.*, 259
11 F.3d 1101, 1106 (9th Cir. 2001) (quoting Rule 37 advisory committee's note (1993)). The
12 automatic sanction is intended to provide "a strong inducement for disclosure of material that the
13 disclosing party would expect to use as evidence, whether at a trial, at a hearing, or on a motion,
14 such as one under Rule 56." Rule 37 advisory committee's note (1993); *see also Yeti*, 259 F.3d
15 at 1106. The Court may exclude evidence under Rule 37(c)(1) even absent an explicit order
16 requiring disclosure or a showing of bad faith or willfulness. *Yeti*, 259 F.3d at 1106.

17 The evidence Nanal requests be stricken relates to Plaintiff's allegations of actual
18 confusion and Plaintiff's purported damages. As to the allegations of actual confusion, in its
19 interrogatory responses, Plaintiff described only two purported incidents of confusion that
20 involved a person identified as "Jim Squire" of Holiday Powersports in Michigan and Plaintiff's
21 sales representative, Joy Loga. (Declaration of Stacia N. Lay in Support of Defendant Nanal,
22 Inc.'s Motion for Summary Judgment ("Lay Decl."), Docket No. 59, at pp. 115-16, 132-33.)
23 Plaintiff did not identify any documents relating to these alleged incidents² or identify any other

24 ¹ Rule 26(a)(1) requires a party to identify each individual "likely to have discoverable information . . . that the
25 disclosing party may use to support its claims" and "a copy—or a description by category and location—of all
26 documents . . . that the disclosing party has in its possession, custody, or control and may use to support its
27 claims[.]" FED. R. CIV. P. 26(a)(1)(A)(i) and (ii). Rule 26(e) requires a party that has made a disclosure under Rule
28 26(a) or responded to a discovery request to supplement or correct the disclosure or response "in a timely manner if
the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the
additional or corrective information has not otherwise been made known to the other parties during the discovery
process or in writing[.]" FED. R. CIV. P. 26(e)(1)(A).

² Nanal propounded document requests to Plaintiff seeking documents relating to Plaintiff's allegations of actual
confusion. (*See, e.g.*, Lay Decl. at pp. 94-97, 99-100, 104-105, 182.)

1 individuals—whether by name or otherwise—that purportedly were involved in these incidents.
2 Nor has Plaintiff ever supplemented or amended these interrogatory responses. Yet now, two
3 months after the close of discovery, Plaintiff’s summary judgment declarations contain
4 information and attach documents that were not disclosed in Plaintiff’s discovery responses.³

5 Similarly, as to Plaintiff’s purported damages, Plaintiff attaches more than 31 pages of
6 “spreadsheets” to the summary judgment declaration of its counsel, claiming they are “true and
7 correct copies of the US and Michigan spreadsheets used to average the amount of the dealer
8 purchases.” (Morado Decl. ¶ 16, Exh. N.) But there is no indication that the spreadsheets were
9 produced in discovery: they are not Bates numbered and counsel does not state that they were
10 produced.⁴ Moreover, even if the spreadsheets had been produced to Nanal during discovery,
11 neither the information contained in them nor the documents themselves were identified in
12 Plaintiff’s responses to interrogatories that specifically asked Plaintiff to detail each category of
13 claimed damages, including the computation of those purported damages and any claimed lost
14 sales.⁵ (See Lay Decl. at pp. 146-47.) In fact, Plaintiff’s interrogatory responses contain *no*
15 specification or computation of any claimed damages.⁶

16 Plaintiff offers no explanation for its failure to proffer this information and documents
17 until months after the discovery deadline and only in response to Nanal’s summary judgment

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19 ³ For example, as to the Michigan retailer, Plaintiff now identifies two individuals—Ed and Jim Machnik—who
20 were not identified in either Plaintiff’s initial disclosures or interrogatory responses and does not even mention the
21 “Jim Squire” individual named in its interrogatory responses. (Mallard Decl. ¶¶ 10-14, 16-20; Layman Decl. ¶¶ 8-
22 14; Lay Decl. at pp. 40, 115-16, 132.) Additionally, Plaintiff attaches documents related to this alleged incident that
23 were not produced to Nanal in discovery. (Mallard Decl. Exhs. A-C.) Similarly, as to the alleged incident involving
24 Plaintiff’s sales representative, Joy Loga, Plaintiff now claims that she received a call from a customer (who
25 Plaintiff *still* does not identify even though it clearly knows the identity) asking if Plaintiff was selling leather
26 jackets. (Loga Decl. ¶¶ 4-11; DeMund Decl. ¶¶ 20-22.) But that alleged call was not mentioned in Plaintiff’s
27 interrogatory responses. (Lay Decl. at pp. 116, 132-33.)

28 ⁴ Yet Plaintiff claims that “[i]n its discovery responses, [Plaintiff] provided spreadsheets showing the average
amount of dealer purchases in Michigan, and the average amount of dealer purchases in the United States,” but cites
only to the spreadsheets attached to its counsel’s declaration. (Opp. at p. 18.) Plaintiff did produce documents that
appear to contain some of the information in the “spreadsheets” but the documents clearly are not identical to the
spreadsheets and the totals appear to differ. (Reply Declaration of Stacia N. Lay in Support of Defendant Nanal,
Inc.’s Motion for Summary Judgment (“Reply Lay Decl.”) ¶ 4, Exh. C.)

⁵ Nanal propounded a corresponding request for production seeking all documents supporting Plaintiff’s claim for
damages and its computation of those alleged damages. (Lay Decl. at p. 105.)

⁶ Notably, as discussed below, even in the face of a motion seeking dismissal of all of Plaintiff’s claims, Plaintiff
still does not provide any specific computation of its purported damages.

1 motion.⁷ Such a flagrant disregard of Plaintiff’s discovery obligations justifies striking this
2 undisclosed evidence from the summary judgment record under FED. R. CIV. P. 37(c)(1).

3 **B. Plaintiff Has Failed to Carry its Summary Judgment Burden.**

4 To withstand summary judgment, Plaintiff was required to do more than rely upon the
5 unproven allegations of its pleadings; rather, it had to offer probative, admissible evidence—
6 properly and timely disclosed—as to the essential elements of its discrete claims from which a
7 fact finder could reasonably find for Plaintiff. FED. R. CIV. P. 56(e); *Anderson v. Liberty Lobby,*
8 *Inc.*, 477 U.S. 242, 252, 256-57, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). Plaintiff has alleged
9 two discrete claims: one based on the Google AdWords advertisement and one based on the
10 Xelement jacket. Plaintiff was required to prove all of the essential elements of each of these
11 claims. And contrary to Plaintiff’s assertion, unsupported trademark claims like Plaintiff’s do
12 not enjoy a special immunity from summary judgment. (Opp. at pp. 7, 9; Defendant Nanal,
13 Inc.’s Motion for Summary Judgment (“Motion”), Docket No. 57, at p. 4.) Nor does Plaintiff
14 support its suggestion that summary judgment is inappropriate due to a lack of a “full record.”
15 (Opp. at p. 9.) That Plaintiff has failed to adduce evidence supporting its claims after nearly a
16 year and a half of litigation does not make the record incomplete; it only demonstrates that
17 summary judgment is appropriate.

18 **C. Plaintiff Cannot Establish a Likelihood of Confusion as a Matter of Law.**

19 Each of the likelihood of confusion factors upon which Plaintiff relies most—similarity,
20 intent and actual confusion—supports the grant of Nanal’s motion for summary judgment. Nor
21 can the remaining factors salvage Plaintiff’s trademark claims.

22 As to the issue of similarity, Plaintiff ridicules Nanal for stating, accurately, that “Vega”
23 is an astronomical term that existed before Plaintiff’s registration of the word as a trademark to

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25 ⁷ In its opposition, Plaintiff derides Nanal’s decision not to incur the cost of deposing Plaintiff’s representatives in
26 light of the lack of evidence supporting Plaintiff’s claims. To the extent Plaintiff would claim that Nanal was
27 required to depose Plaintiff’s representatives in order to obtain this undisclosed information, such a claim should be
28 rejected. There can be no dispute that the undisclosed information was within the scope of Nanal’s discovery
requests and even if it were not, as is evident from the fact that Plaintiff offers the information in opposition to
summary judgment, Plaintiff believes the information supports its claims and therefore should have been disclosed
under Rule 26(a)(1). Thus, whether Nanal took depositions is irrelevant to Plaintiff’s discovery obligations.

1 brand its motorcycle helmets. (Opp. at pp. 8-9.) But the point is that Plaintiff did not invent the
2 word “Vega,” thus the first question must be whether the word is used in the trademark sense
3 that implicates Plaintiff’s trademark rights. As to the Xelement jacket,⁸ Plaintiff fails to respond
4 to the substance of Nanal’s argument with respect to Plaintiff’s inability to show a trademark use
5 of the word in the description on the website screenshot (Motion at pp. 7-8) but instead merely
6 asserts that it is “clear” that there was trademark use (Opp. at p. 9).

7 Nevertheless, Plaintiff’s allegations as to the similarity of the marks do not support a
8 general likelihood of confusion conclusion. Most notably, Plaintiff cannot manufacture a
9 similarity that does not exist simply by disregarding the majority of the alleged “designation.”
10 (Opp. at p. 10.) Plaintiff does not meaningfully dispute that, considered in its proper context
11 there simply is no similarity with Plaintiff’s VEGA mark. The sentence containing the word
12 “Vega” states in its entirety: “Xelement Extreme Vega Black and Gray Tri-Text™ Fabric Jacket
13 with Breathable 3 Way Lining with Level-3 Advanced Armor by Xelement.” (Lay Decl. at p.
14 194.) Plaintiff’s suggestion that the use of “Xelement” somehow increases the likelihood of
15 confusion is not persuasive and Plaintiff provides no evidence to support this theory.

16 Similarly, Plaintiff’s claim of bad faith intent is unsupported and based solely on
17 Plaintiff’s assertion that Nanal must have known of Plaintiff’s VEGA helmets because Plaintiff
18 believes its mark is “well-known and strong.”⁹ (Opp. at p. 12.) But Plaintiff’s opinion of what
19 Nanal knew, or should have known, is not probative evidence of bad faith particularly where
20 there is substantial evidence of Nanal’s good faith actions, which Plaintiff does not dispute.
21 (Motion at pp. 3-4, 10.) Moreover, Plaintiff’s reliance on a statement Nanal’s president made in
22 his deposition on the last day of discovery in this case, nearly a year and a half after Plaintiff
23 sued Nanal, to claim Nanal had knowledge of Plaintiff’s VEGA helmets in 2008 makes no
24 logical sense. (Opp. at p. 12.) After defending against a meritless lawsuit for nearly a year and a

25 ⁸ Throughout its opposition, Plaintiff repeatedly refers to Xelement “jackets” but Plaintiff’s allegations have only
26 related to the single jacket pictured in the website screenshot attached to its complaint.

27 ⁹ The only evidence Plaintiff offers to support the claimed strength of its mark—the allegation that it expended
28 \$600,000 in advertising over a 16 year period, which averages about \$37,500 a year or \$3,125 a month—is not
particularly compelling evidence that a mark is especially strong. (DeMund Decl. ¶ 24.)

1 half, it should hardly come as a surprise that Nanal *now* has knowledge of Plaintiff but that
2 *present* knowledge proves nothing about Nanal's *past* knowledge. Nor would mere knowledge
3 of Plaintiff's mark result in a presumption of bad faith. *PlayMakers, LLC v. ESPN, Inc.*, 297 F.
4 Supp. 2d 1277, 1284 (W.D. Wash. 2003), *aff'd*, 376 F.3d 894 (9th Cir. 2004).

5 Plaintiff also cannot manufacture incidents of relevant confusion where none exist.¹⁰
6 Plaintiff does not respond to the fact that the alleged confusion involving the Michigan retailer is
7 ambiguous at best (Motion at p. 14) but instead alleges facts inconsistent with and not disclosed
8 in its discovery responses. (Compare Lay Decl. at pp. 115-16, 132 with Mallard Decl. ¶¶ 10-14,
9 16-20 and Layman Decl. ¶¶ 8-14.)

10 Additionally, Plaintiff's attempt to argue that the alleged incident involving its own sales
11 representative involves relevant actual confusion is, to use Plaintiff's word, absurd. This
12 argument appears to be based on the theory that Plaintiff's own sales representative could bad
13 mouth Plaintiff's products to purchasers and therefore presented a threat to Plaintiff's goodwill
14 and reputation. (Opp. at p. 14.) Even disregarding Plaintiff's failure to offer any support for its
15 theory, common sense itself refutes it as Plaintiff's sales representative has no incentive to
16 disparage the products she sells. In addition, Plaintiff simply ignores authority cited in Nanal's
17 opening brief demonstrating that the kind of inquiry Plaintiff's sales representative allegedly
18 made actually demonstrates a *lack* of confusion. (Motion at pp. 11-12.) Even if the Court were
19 to accept these two, at best ambiguous, incidents as some evidence of actual confusion, such
20 allegations are too *de minimis* to support a general likelihood of confusion finding.

21 As to the remaining likelihood of confusion factors, Plaintiff's allegations fall short of the
22 "specific facts" necessary to preclude entry of summary judgment. For example, the parties'
23 channels of trade do not converge as Plaintiff alleges. Plaintiff sells wholesale to distributors.
24 Plaintiff admits that it does not sell its products via the Internet and indeed goes to great lengths
25 to disparage Internet retailers. (*See, e.g.*, Opp. at p. 3.) Nanal, in contrast, sells its products

26
27 ¹⁰ Nanal's discussion of Plaintiff's undisclosed allegations of purported actual confusion is not intended to be a
28 waiver of its motion to strike.

1 direct to consumers only through its website. (Lay Decl. at p. 211.) And the allegation that the
2 parties both attended a single rally—which did not involve product sales—is not persuasive
3 evidence of a convergence of trade channels, particularly in the absence of any evidence about
4 the parties’ activities at the rally and no allegation that Nanal used Plaintiff’s VEGA mark at the
5 rally. Similarly, as to the degree of care exercised by purchasers, Plaintiff cites no evidence
6 supporting its conclusion that motorcycle helmets “and accessories” are not “big-ticket items”
7 and “consumers do not exercise exceptional care in their purchasing decisions.” (Opp. at p. 15.)
8 And with respect to the proximity of the goods, Plaintiff’s reliance on its “VEGA TECHNICAL
9 GEAR” registration allegedly used in connection with “motorcycle helmets and protective
10 clothing” is improper in light of Plaintiff’s utter failure to plead its reliance on that registration, a
11 failure Plaintiff does not dispute. (*See* Motion at p. 10 n.4.)

12 Considered as a whole, the alleged evidence Plaintiff offers in support of its allegation of
13 a likelihood of confusion¹¹ is at best “merely colorable” and is not sufficiently probative for a
14 fact finder to render a decision in Plaintiff’s favor. *Anderson*, 477 U.S. at 249-50, 252. As a
15 result, summary judgment on Plaintiff’s trademark claims is appropriate.

16 **D. Plaintiff’s Belatedly Alleged False Advertising Claim is Subject to Dismissal.**

17 Plaintiff does not dispute that it did not specifically plead the elements of a false
18 advertising claim and did not reference those elements in its discovery responses. (*See* Motion at
19 pp. 5-6.) Instead, all of Plaintiff’s claims have been based upon a purported likelihood of
20 confusion with respect to its VEGA mark for “motorcycle helmets,” which differs from the
21 inquiry in a false advertising claim. (Motion at pp. 5-6.) Such a failure to give adequate notice
22 of a false advertising claim should be sufficient to grant summary judgment.

23 But even considering the elements of a false advertising claim, Plaintiff incorrectly
24 claims an entitlement to relief without having to prove injury, causation or damage. Applicable
25 Ninth Circuit law requires the plaintiff, in non-comparative advertising cases such as this, to

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27 ¹¹ Plaintiff also separately asserts that there are issues of fact as to its “initial interest confusion claim” but does not
28 specify those facts or offer any support for the proposition that this constitutes a separate claim. (Opp. at pp. 16-17.)

1 prove an injury causally related to the allegedly false advertising.¹² *See, e.g., William H. Morris*
2 *Co. v. Group W, Inc.*, 66 F.3d 255, 257 (9th Cir. 1995); *Harper House, Inc. v. Thomas Nelson,*
3 *Inc.*, 889 F.2d 197, 210 (9th Cir. 1989); *Nat'l Prods., Inc. v. Gamber-Johnson LLC*, 699 F. Supp.
4 2d 1232, 1241 (W.D. Wash. 2010). (*See also* Motion at pp. 15-16.) And Plaintiff's suggestion
5 that the alleged use of its trademark, in the absence of any reference to Plaintiff's products,
6 makes it comparative advertising and relieves Plaintiff of its burden to prove injury makes no
7 logical sense as no comparison has taken place.

8 Thus, in order to prove an entitlement to damages, Plaintiff had to establish an injury
9 caused by the Google advertisement but failed to do so. Instead, Plaintiff offers a general
10 allegation, with *no* citation to *any* evidence, that it has "clearly shown a diversion of sales and
11 injury to goodwill arising out of" the advertisement. (Opp. at p. 24.) Such a naked allegation
12 cannot satisfy Plaintiff's obligation to set forth sufficient specific facts from which a finder of
13 fact could reasonably find in Plaintiff's favor. *See Anderson*, 477 U.S. at 249, 252. Although
14 Plaintiff claims that a "precise showing" is not required (Opp. at pp. 23-24), at the very least
15 *some* showing is required. Further, Plaintiff's reliance on the case from the First Circuit to avoid
16 its burden of proof as to injury and causation is misplaced. Indeed, in the sentence immediately
17 preceding the sentence quoted by Plaintiff, the First Circuit explicitly places such a burden on
18 Plaintiff: "In order to prove causation under § 1125(a) . . . , the aggrieved party must demonstrate
19 that the false advertisement actually harmed its business." *Cashmere & Camel Hair Mfrs. Inst.*
20 *v. Saks Fifth Ave.*, 284 F.3d 302, 318 (1st Cir. 2002).

21 **E. Plaintiff Has Failed to Demonstrate an Entitlement to Relief.**

22 Plaintiff claims it has "pleaded its damages with sufficient particularity" to stave off
23 summary judgment. (Opp. at p. 17.) But the sufficiency of Plaintiff's pleading on this point is
24 not at issue at this late stage of the litigation. Rather, the question is whether Plaintiff has offered
25

26 ¹² Plaintiff's reliance on a case from the District of New Jersey for a presumption of injury is also not persuasive in
27 part because the court was discussing the issue in connection with the irreparable harm element of a preliminary
28 injunction motion. *Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharms. Co.*, 129 F.
Supp. 2d 351, 367-68 (D. N.J. 2000), *aff'd*, 290 F.3d 578 (3d Cir. 2002).

1 sufficient affirmative evidence on the essential elements of its claims such that a verdict
2 reasonably could be entered in its favor.¹³ *Anderson*, 477 U.S. at 252, 257. The simple answer is
3 that Plaintiff has not done so with respect to its claim for a monetary award.

4 Plaintiff notably offers no evidence demonstrating a causal connection between use of the
5 word “Vega” and any damages Plaintiff claims. Plaintiff makes various conclusory assertions
6 that consumers were “lured” or “diverted” to Nanal’s website after searching for Plaintiff’s
7 VEGA helmets (Opp. at pp. 5, 8, 18), but has no supporting evidence: no evidence as to the way
8 Google’s search engine works to prove the advertisement could not have been triggered solely by
9 the word “helmets;” no evidence proving that it was the word “Vega” that caused the relatively
10 small number of “clicks” as opposed to the other brand name helmets specifically named in the
11 advertisement (*see* Reply Declaration of Albert Bootesaz in Support of Defendant Nanal, Inc.’s
12 Motion for Summary Judgment (“Reply Bootesaz Decl.”) ¶ 4, Exh. B); or any other evidence to
13 substantiate its allegation of a diversion of customers. And with respect to the Xelement jacket,
14 Plaintiff does not even make a general allegation as to causation. Plaintiff simply claims that (1)
15 Nanal used the word “Vega” in the screenshot and (2) Plaintiff is entitled to damages, even
16 though it fails to establish a causal link between the two.

17 Plaintiff’s claim that it has provided evidence of its own damages is untrue. (Opp. at p.
18 18.) Plaintiff does not dispute that, in response to interrogatories asking for computation of
19 Plaintiff’s damages including lost sales, it failed to provide any computation or even identify any
20 specific figures, nor did it cite to any spreadsheets (or any other documents) that reflected its
21 damages. (Motion at p. 18.) Instead, Plaintiff appears to rely entirely on the “spreadsheets”
22 attached to the declaration of Plaintiff’s counsel discussed in Nanal’s motion to strike. But those
23 spreadsheets should not be considered. The figures are hearsay and as offered, not subject to any
24

25 ¹³ Similarly, Plaintiff distorts the burden on summary judgment claiming that Nanal “has very little basis for its
26 claims that Plaintiff lacks evidence” because Nanal did not depose Plaintiff’s representatives. (Opp. at p. 17.) That
27 has nothing to do with whether *Plaintiff* has met its burden of setting forth specific facts showing genuine issues of
28 material fact. If Plaintiff had evidence to refute Nanal’s assertion that essential elements of Plaintiff’s claims suffer
from a fatal lack of proof, Plaintiff was free, and indeed required to, proffer that evidence to avoid entry of summary
judgment. Plaintiff simply has not done so and attempting to place the blame on Nanal will not change that fact.

1 applicable exception. Plaintiff does not adequately authenticate them and offers no explanation
2 of the figures in these documents or even whether the figures relate only to VEGA-branded
3 helmets and jackets, the only conceivably relevant products. Nor does Plaintiff cite authority
4 supporting the proposition that the “average amount of dealer purchases” in Michigan and in the
5 entire United States is an appropriate measure of its claimed damages or that Plaintiff is entitled
6 to its gross sales revenues. (Opp. at p. 18.) Most telling of all, despite the fact that all of the
7 information is in Plaintiff’s possession, **Plaintiff still fails to offer even an estimated**
8 **calculation of its own claimed damages.**

9 Plaintiff also apparently claims damages based on its “lost sales possibilities,” asserting it
10 has provided evidence of those “possibilities” but citing nothing. (Opp. at p. 18.) Moreover,
11 “lost sales possibilities” is nothing more than another way to say “speculation,” which is
12 insufficient to satisfy Plaintiff’s burden of providing a reasonable basis for its (still undisclosed)
13 calculation of damages. *See Lindy Pen Co. v. Bic Pen Corp.*, 14 U.S.P.Q.2d 1528, 1533 (C.D.
14 Cal. 1989), *aff’d*, 982 F.2d 1400 (9th Cir. 1993). Tellingly, Plaintiff does not even suggest how
15 it would calculate these “lost sales possibilities” much less provide any actual calculation.
16 Plaintiff simply cannot satisfy its burden of proof by claiming to have evidence supporting its
17 claimed damages but not specifying that evidence or providing any calculation of those damages.

18 As to the issue of Plaintiff’s claim for an accounting of Nanal’s profits, Plaintiff blatantly
19 misstates Nanal’s statement of the law. (Opp. at p. 19.) Thus, it bears repeating that Ninth
20 Circuit law is clear—when a plaintiff seeks an award of a defendant’s profits under a theory of
21 unjust enrichment, as opposed to as a measure of plaintiff’s own damages, proof of willful
22 infringement is required. That is the proposition for which *Adray v. Adry-Mart, Inc.*, 76 F.3d
23 984, 988 (9th Cir. 1995) was accurately cited, as Plaintiff admits. (Motion at p. 19; Opp. at p.
24 19.) Notably, Plaintiff does not dispute the fact that, as stated in Nanal’s opening brief, Plaintiff
25 seeks an award of Nanal’s profits on a theory of unjust enrichment (not as a measure of
26 Plaintiff’s damages) and indeed admits that fact in its opposition. (*See* Motion at p. 19; Opp. at
27 p. 17.) Although Plaintiff later contradicts itself by claiming that it does seek Nanal’s profits as a
28

1 measure of its own damages, it is clear that Plaintiff has never made such a claim. (*See* Opp. at
2 p. 19.) Consequently, Plaintiff was required to set forth specific facts showing a genuine issue of
3 material fact as to its allegation that Nanal engaged in willful infringement.

4 But in lieu of specific facts, supported by evidence, Plaintiff resorts to the conclusory
5 allegation that considering “all evidence” (none of which Plaintiff specifies) Nanal’s actions
6 were “clearly willful.” (Opp. at pp. 19-20.) The summary judgment standard is meaningless if
7 such a general allegation is sufficient for Plaintiff to force the Court and Nanal to incur the
8 significant investment of time and resources of a trial. *See Celotex Corp. v. Catrett*, 477 U.S.
9 317, 327, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986) (“Rule 56 must be construed with due regard
10 . . . for the rights of persons opposing such claims . . . to demonstrate in the manner provided by
11 the Rule, prior to trial, that the claims . . . have no factual basis.”). And it is certainly not the
12 obligation of the Court to “presume” the facts Plaintiff fails to specify, assuming any such facts
13 even exist. *See Lujan v. Nat’l Wildlife Fed.*, 497 U.S. 871, 889, 110 S. Ct. 3177, 111 L. Ed. 2d
14 695 (1990). Plaintiff’s inadequate showing is particularly deficient in light of the fact that
15 Plaintiff does not dispute the evidence of Nanal’s good faith actions, which do not support a
16 conclusion of willful infringement as a matter of law. (Motion at pp. 3-4, 20.) Plaintiff’s
17 disparaging dismissal of the testimony of Nanal’s president that he thought the word “Vega” was
18 a solar system in no way negates Nanal’s good faith actions.¹⁴ (Opp. at p. 19.)

19 Plaintiff’s failure to make a showing of willful infringement dooms its claim for a
20 windfall accounting of Nanal’s profits and renders irrelevant Plaintiff’s inaccurate accusation
21 that Nanal has not provided evidence of costs. (*See* Opp. at pp. 17, 20-21.) Nevertheless, the
22 accusation warrants correction because Nanal did in fact previously produce evidence of costs
23 related to the Xelement brand as evidenced in the costs analysis attached to the Reply
24 Declaration of Albert Bootesaz. (Reply Bootesaz Decl. ¶ 3, Exh. A; Reply Lay Decl. ¶ 2, Exh.
25 A.) And even if the accusation had been accurate, proof of Nanal’s costs has nothing to do with
26

27 ¹⁴ Given that the word “Vega” is defined as a star in the constellation Lyra (Motion at App. A), it is not clear why
28 the testimony of Nanal’s president “defies belief,” “makes no sense” and is “absurd” (Opp. at pp. 12, 19).

1 Plaintiff's demonstrated inability to establish its entitlement to damages in the first instance.

2 In the end, the lack of evidence supporting Plaintiff's claim to a monetary award is
3 demonstrated by asking a simple question, what are Plaintiff's damages? Despite complete
4 discovery and in the face of a summary judgment motion seeking dismissal of all of Plaintiff's
5 claims, we still do not know the answer. The inability to answer that question demonstrates that
6 Nanal is entitled to summary judgment on Plaintiff's claims for damages.¹⁵

7 **F. Plaintiff's Washington CPA Claim Dies With its Lanham Act Counterparts.**

8 Plaintiff concedes that its Washington's Consumer Protection Act ("CPA") claim is
9 linked to the fate of its Lanham Act claims. (Opp. at p. 21.) Therefore, like those claims,
10 summary judgment should be entered on Plaintiff's CPA claim.

11 **G. Plaintiff Effectively Concedes its Tortious Interference Claim Lacks Merit.**

12 In response to Nanal's demonstration of its entitlement to summary judgment on
13 Plaintiff's tortious interference with prospective economic advantage claim, Plaintiff fails to
14 respond to any of Nanal's arguments and cites no evidence to justify its conclusory statement
15 that "questions of fact exist." (Opp. at p. 22.) In lieu of setting forth specific facts establishing a
16 genuine issue of material fact, Plaintiff merely parrots its generalized conclusory interrogatory
17 response, which does not even mention the Xelement jacket. (Opp. at p. 22; Motion at p. 23.)
18 Plaintiff's lack of any meaningful response demonstrates that its tortious interference claim has
19 no merit and should be summarily dismissed.

20 DATED this 26th day of November, 2010.

21 Respectfully submitted,

22 HENDRICKS & LEWIS PLLC

23 By: s/ Katherine Hendricks

24 Katherine Hendricks (WSBA No. 14040)

25 Stacia N. Lay (WSBA No. 30594)

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28 ¹⁵ Plaintiff does not dispute that injunctive relief is inappropriate in light of the undisputed fact that Nanal voluntarily ceased use of the word "Vega" and there is no evidence that Nanal will re-commence use. (Motion at pp. 16-17, 20-21.) Thus, summary judgment is also appropriate on Plaintiff's claim for injunctive relief.

1 **PROOF OF SERVICE**

2 I am employed in the County of King, State of Washington. I am over the age of
3 eighteen years and am not a party to the within action. My business address is Hendricks &
4 Lewis PLLC, 901 Fifth Avenue, Suite 4100, Seattle, Washington 98164.

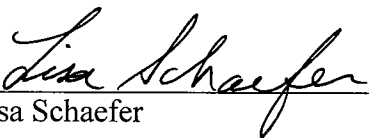
5 I hereby certify that on November 26, 2010, I electronically filed the foregoing with the
6 Clerk of the Court using the CM/ECF system which will send notification of such filing to the
7 following CM/ECF participants:

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17 I declare under penalty of perjury under the laws of the State of Washington that the
18 foregoing is true and correct.

19 Executed November 26, 2010, at Seattle, Washington.

20 
21 Lisa Schaefer