

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'S SURREPLY BRIEF RE
PLAINTIFF'S "PRAECIPE" AND
SUPPLEMENTAL DECLARATION OF
HEATHER M. MORADO IN SUPPORT
OF PLAINTIFF'S RESPONSE TO
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

Pursuant to CR 7(g), Defendant Nanal, Inc. submits this surreply in opposition to new materials submitted by Plaintiff Soaring Helmet Corporation in support of its opposition to Nanal's summary judgment motion after the close of briefing on the motion. Specifically, Nanal seeks to strike from the summary judgment record the Supplemental Declaration of Heather M. Morado in Support of Plaintiff's Response to Defendant's Motion for Summary Judgment, Docket No. 71, and "Praecipe," Docket No. 70, filed by Plaintiff on November 30, 2010.

In its opposition, filed November 22, to Nanal's summary judgment motion, Plaintiff submitted Exhibit N, attached to the declaration of Plaintiff's counsel, which was described as "copies of the US and Michigan spreadsheets used to average the amount of the dealer purchases." (Declaration of Heather M. Morado in Support of Plaintiff's Response to Defendant's Motion for Summary Judgment ("Morado Decl."), Docket No. 66, ¶ 16.) Consistent with CR 7(g), part of Nanal's summary judgment reply brief, filed November 26, was

1 devoted to moving to strike, in part, Exhibit N for Plaintiff's failure to produce it in discovery.
2 (Defendant Nanal, Inc.'s Reply in Support of Motion for Summary Judgment ("Reply"), Docket
3 No. 67, at pp. 1-4.) In apparent response to the motion to strike, Plaintiff then filed a "Praecipe"
4 that purported to replace the original Exhibit N with a different document, claiming it contained
5 "identical information in a different format" as the original exhibit and that the "wrong version"
6 had "inadvertently" been attached originally. (Praecipe, Docket No. 70; Supplemental
7 Declaration of Heather M. Morado in Support of Plaintiff's Response to Defendant's Motion for
8 Summary Judgment ("Supp. Morado Decl."), Docket No. 71, ¶ 3.)

9 But Plaintiff cannot circumvent Nanal's motion to strike merely by claiming an
10 inadvertent mistake and submitting an entirely new exhibit as a "Praecipe" after the close of the
11 briefing on Nanal's summary judgment motion. Even a quick comparison of the two exhibits
12 demonstrates that they do not contain identical information.

13 First, the new Exhibit N contains figures that were not, for whatever unexplained reason,
14 contained in the original exhibit. (See, e.g., Praecipe at pp. 039,¹ 041, 046-050, 054-055, 058,
15 062, 064, 067-068, 070, 072-073, 075, 077, 079, 081-088, 090, 092, 094-095, 098-099, 104, 108,
16 110, 113-119.) In addition, the new Exhibit N does not specify the "average amount of dealer
17 purchases" in Michigan and the entire United States, which is what the original Exhibit N was
18 cited for by Plaintiff in its summary judgment opposition. (Compare Morado Decl. Exh. N at pp.
19 68, 70 with Praecipe at pp. 106, 112, 118; see also Plaintiff's Response to Defendant's Motion
20 for Summary Judgment, Docket No. 60, at p. 18.)

21 Moreover, the totals in the two exhibits differ, perhaps due in part to figures in the
22 original exhibit that are inconsistent with figures appearing in the new exhibit. The total sales
23 for 2009 for the United States and Michigan in the original exhibit were, respectively,
24 \$8,677,810.33 and \$529,296.87. (Morado Decl. Exh. N at pp. 68, 70.) But the totals for the
25 United States and Michigan in the new exhibit appear to be² \$6,796,077.91 and/or \$7,410,793.34

26 ¹ The page number references are to Plaintiff's numbering, appearing in the bottom left-hand corner of the Praecipe.

27 ² As is apparent from reviewing the new Exhibit N, many of the numbers are difficult to read and are subject to
28 interpretation, thus the reference to what the totals "appear to be."

1 for the United States and \$520,282.04 for Michigan. (Praecepte at pp. 106, 112, 118.) Examples
2 of some of the larger inconsistent figures between the two exhibits perhaps accounting for the
3 different totals include: \$1,165.14 (old exhibit at p. 45) and \$11,655.14 (new exhibit at p. 055);
4 \$263.45 (old exhibit at p. 47) and \$2,663.45 (new exhibit at p. 058); \$1,926.68 (old exhibit at p.
5 55) and \$1,026.68 (new exhibit at p. 077); \$4,984.25 (old exhibit at p. 58) and \$5,984.25 (new
6 exhibit at p. 084); \$1,484,045 (old exhibit at p. 64) and \$1,485.45 (new exhibit at p. 098);
7 \$179.31 (old exhibit at p. 65) and \$1,079.31 (new exhibit at p. 104). Although some of these
8 differences may seem minor, several are clearly significant, perhaps best illustrated by the
9 difference between \$1,484,045 and \$1,485.45.

10 Taken collectively, these issues demonstrate that the “replacement” Exhibit N does *not*
11 contain “identical information in a different format” as the original exhibit. (Supp. Morado
12 Decl. ¶ 3.) Thus, by submitting the new exhibit as a “Praecepte” after the close of briefing on the
13 summary judgment motion, Plaintiff has inappropriately deprived Nanal of an opportunity to
14 respond to different information.³ Plaintiff’s actions also forced Nanal to use its limited space in
15 its reply to move to strike documents that Plaintiff apparently concedes were not produced in
16 discovery and to spend additional time reviewing and comparing the new exhibit to determine
17 the veracity of the exhibits’ claimed identity. As a result, Nanal requests that the supplemental
18 material filed by Plaintiff be stricken from the summary judgment record.

19 DATED this 1st day of December, 2010.

20 Respectfully submitted,

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27 ³ And the new exhibit suffers from the same evidentiary flaws described in Nanal’s reply with regard to the original
28 exhibit. (See Reply at pp. 9-10.)

