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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 RESPONSE TO MOTION
TO STRIKE

1 **I. Introduction**

2 Defendant has failed to depose any of Plaintiff's witnesses, despite the fact that
3 Plaintiff disclosed these witnesses nearly a year and a half ago. Defendant has elected not to
4 take full discovery, and its motion appears to be a desperate attempt to cover up defects in
5 Defendant's case preparation. It is undisputed that Plaintiff's witnesses were disclosed
6 numerous times, yet Defendant has moved to strike, now claiming to be "surprised" by
7 Plaintiff's response to Defendant's summary judgment motion. Defendant's motion must be
8 denied.

9 **II. Evidence Relied Upon**

10 This Response is supported by the Declaration of Heather Morado and the exhibits
11 thereto.

12 **III. Factual Background**

13 Well over a year ago, on August 17, 2009, Plaintiff Soaring Helmet Corporation
14 ("Soaring Helmet") served its initial disclosures on Defendant. See Declaration of Heather
15 M. Morado in Support of Plaintiff's Response to Motion to Strike ("Morado Dec.") ¶ 2, Exh.
16 A. In its disclosures, Soaring Helmet listed six witnesses likely to have discoverable
17 information related to Soaring Helmet's claims, including Jeanne DeMund, Lou Xu, Wayne
18 Layman, and Claudia Mallard. *Id.* Jeanne DeMund and Lou Xu are the owners of Soaring
19 Helmet; and Wayne Layman and Claudia Mallard are sales representatives for Soaring
20 Helmet's VEGA products. In its initial disclosures, Soaring Helmet stated that the above
21 witnesses "may be called to testify concerning their knowledge of all matters relevant to
22 these proceedings, including the trademarks at issue; financial information; customer base;
23

1 marketing and advertising; defendant's infringement; and confusion regarding marketing and
2 advertising on Google." *Id.* On February 1, 2010, Soaring Helmet served its amended initial
3 disclosures on Defendant, for the second time, again listing these same witnesses and the
4 subjects that these witnesses would testify to. Morado Dec., ¶ 3, Exh. B.

5 On June 21, 2010, Soaring Helmet answered Defendant's first set of interrogatories.
6 Defendant's interrogatory number 2 requested information related to any instances of actual
7 confusion between Soaring Helmet's and Defendant's products or services. Morado Dec., ¶
8 4, Exh. C. In response, Soaring Helmet identified Jim Squire, the owner of Holiday
9 Powersports in Michigan, as the retailer that refused to do business with Soaring Helmet after
10 viewing the false Google advertisement. *Id.* In addition, Soaring Helmet identified one of its
11 sales representatives, Joy Loga, as the individual who alerted Soaring Helmet to Defendant's
12 infringement in connection with its sale of "XElement Extreme Vega" motorcycle jackets.
13 *Id.* Further, Defendant's interrogatory number 22 asked Soaring Helmet to identify any other
14 persons that would have information concerning the facts stated in Soaring Helmet's
15 responses to the interrogatories. Morado Dec., ¶ 5, Exh. D. In response, Soaring Helmet, for
16 the third time, listed Jeanne DeMund, Lou Xu, Wayne Layman, and Claudia Mallard. *Id.*

17 In late August, 2010, Defendant expressed an interest in deposing Jeanne DeMund,
18 Lou Xu, Claudia Mallard, Wayne Layman, and Joy Loga. Morado Dec., ¶ 6, Exh. E.
19 However, Defendant never followed up with notices of depositions, phone calls, or requests
20 for firm dates. *Id.* Soaring Helmet even offered to agree to stipulate to an extension of the
21 discovery period in order to accommodate Defendant's scheduling of depositions, but
22 Defendant elected not to take a single deposition of any of Soaring Helmet's witnesses. *Id.*

1 Soaring Helmet's sales representatives Joy Loga, Wayne Layman, and Claudia
2 Mallard are not employees of Soaring Helmet, but instead work as sales representatives for
3 VEGA on an independent contractor basis. All of the independent contractors are located
4 outside of the state of Washington: Claudia Mallard is based in Tennessee, Wayne Layman is
5 based in Michigan, and Joy Loga is based in Maryland. Soaring Helmet obtained the
6 documents in the possession and control of these witnesses for the first time in preparation
7 for Soaring Helmet's response to Defendant's motion for summary judgment. Morado Dec.,
8 ¶ 7. Defendant attempts to blame Soaring Helmet for failing to produce documents that were
9 in the possession and control of these witnesses. However, these third party witnesses are
10 not employees or under the control of Soaring Helmet, nor can they be compelled to testify at
11 trial through the Court's subpoena power.

12 IV. Argument

13 Under FRCP 26(a)(1), a party is required to include the following information in its
14 initial disclosures:

- 15 (i) the name and, if known, the address and telephone number of each individual
16 likely to have discoverable information - along with the subjects of that
17 information - that the disclosing party may use to support its claims or
18 defenses...[and]
(ii) a copy...of all documents...that the disclosing party has in its possession,
custody, or control and may use to support its claims or defenses.

19 Further, a party has an obligation to conduct a reasonable inquiry into the factual
20 basis of its responses to discovery requests. Fed.R.Civ.P. 26(g) Advisory Committee's Note;
21 *National Ass'n of Radiation Survivors v. Turnage*, 115 F.R.D. 543, 554-56 (N.D.Cal.1987).
22 Accordingly, a party has an "affirmative duty to seek that information reasonably available to
23 [it] from [its] employees, agents, or others subject to [its] control." *A. Farber & Partners*,

1 *Inc. v. Garber*, 234 F.R.D. 186, 189 (C.D. Cal. 2006). Soaring Helmet has clearly met this
2 burden.

3 A) **Defendant’s Motion to Strike Portions of the Mallard, Loga, Layman,**
4 **and DeMund Declarations Must Be Denied.**

5 Defendant moves to strike portions of the testimony of Soaring Helmet’s witnesses
6 related to instances of actual confusion arising out of Defendant’s false Google advertisement
7 and Defendant’s infringement involving the “XELEMENT Extreme Vega” motorcycle jacket,
8 erroneously claiming that these witnesses and the subjects they would testify to were not
9 disclosed in discovery. In fact, the information was disclosed numerous times: first in
10 Soaring Helmet’s initial disclosures, again in Soaring Helmet’s amended initial disclosures,
11 and yet again in Soaring Helmet’s interrogatory answers. Defendant was free to depose these
12 witnesses, to conduct telephone interviews, or to conduct follow-up discovery, but Defendant
13 elected not take advantage of any of these options. Instead, Defendant has chosen not to
14 conduct the very discovery it now complains about, and has waited until summary judgment
15 to be “surprised” by the testimony of Soaring Helmet’s witnesses. Soaring Helmet clearly
16 conducted a reasonable inquiry into the basis of testimony of its witnesses, despite the fact
17 that its out-of-state sales representatives are not employees of Soaring Helmet nor are they
18 subject to Soaring Helmet’s control. Thus, Defendant’s motion to strike the testimony of
19 Soaring Helmet’s witnesses that was clearly disclosed to Defendant nearly a year and a half
20 ago must be denied.¹

21 _____
22 ¹ Further, the only case cited by Defendant is easily distinguishable. In *Yeti*, the trial court’s sanction was
23 upheld because there was failure to provide an expert witness report for over two and a half years after
disclosing the expert, and for almost two years after the close of discovery. See *Yeti By Molly Ltd. v. Deckers
Outdoor Corp.*, 259 F.3d 1101, 1106 (9th Cir. 2001). Also, there was no evidence in *Yeti* (as here) that the party
seeking sanctions had deliberately and inexplicably elected not to conduct discovery of the very facts that they

1 CERTIFICATE OF SERVICE

2 I hereby certify that on December 28, 2010, I electronically filed the foregoing with
3 the Clerk of the Court using the CM/ECF system which will send notification of such filing
4 to the following persons/attorneys of record:
5

6 Ms. Katherine Hendricks
7 Ms. Stacia N. Lay
8 HENDRICKS & LEWIS, PLLC
9 901 Fifth Avenue, Suite 4100
10 Seattle, WA 98164

11 EXECUTED at Seattle, Washington on December 28, 2010.

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14 Sara J. Russell
15 Legal Secretary
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