

EXHIBIT 5

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THE HONORABLE JAMES J. ROBERT

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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
FAX (206) 903-6365
TEL (206) 903-6364

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.
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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 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
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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 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.

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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.
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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:
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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

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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1 CERTIFICATE OF SERVICE

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

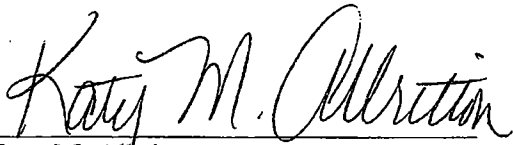
4 On this day, August 27, 2010, I caused to be sent via e-mail and First Class Mail
5 the following documents:
6

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

10 To the following listed counsel of record:

11 Ms. Katherine Hendricks
12 Ms. Stacia N. Lay
13 HENDRICKS & LEWIS, PLLC
14 901 Fifth Avenue, Suite 4100
15 Seattle, WA 98164
16 kh@hllaw.com; sl@hllaw.com

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

18 
19 _____
20 Katy M. Albritton
21 Legal Assistant
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