

The Honorable James L. Robart

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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
OPPOSITION TO PLAINTIFF'S
MOTION IN LIMINE TO EXCLUDE
EVIDENCE REDUCING SOARING
HELMET'S DAMAGES

NOTE ON MOTION CALENDAR:
January 14, 2011

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1 The motion in limine of Plaintiff Soaring Helmet Corporation (“Plaintiff”) is based upon
2 a fundamental misunderstanding or mischaracterization of the position and testimony of
3 Defendant Nanal, Inc. (“Nanal”) with respect to Nanal’s sale of the Xelement motorcycle jacket
4 in connection with which Plaintiff claims Nanal used Plaintiff’s “VEGA” mark. Nanal has never
5 “reversed its position” on that issue; rather, Nanal has always maintained that it did not use
6 Plaintiff’s trademark in connection with the sale of the Xelement jacket but has never denied that
7 it sold the Xelement jacket. In addition, Plaintiff’s motion attempts to create an issue where
8 none exists as to Plaintiff’s contentions under FED. R. CIV. P. 37(c)(1) and lacks legal support
9 with respect to Plaintiff’s assertion of a judicial admission. Thus, for the reasons described in
10 more detail herein, Nanal respectfully requests that Plaintiff’s motion in limine be denied.

11 **I. BACKGROUND FACTS.**

12 The “Factual Background” section of Plaintiff’s motion in limine is decidedly selective
13 and often misrepresentative of the relevant facts pertaining to Plaintiff’s allegations with respect
14 to Nanal’s discovery responses. As a result, an abbreviated summary of the relevant facts,
15 stripped of the argumentative characterizations and with correction of Plaintiff’s erroneous
16 statements, is warranted.

17 Nanal timely served its initial responses to Plaintiff’s interrogatories on July 30, 2010.
18 (Declaration of Stacia N. Lay in Support of Defendant Nanal, Inc.’s Opposition to Plaintiff’s
19 Motion in Limine (“Lay Decl.”) ¶ 2, Exh. 1.) On August 11, Nanal’s counsel requested a
20 conference of counsel to discuss a number of deficiencies in Plaintiff’s responses to Nanal’s
21 discovery requests, which conference was scheduled for August 18. (Lay Decl. ¶ 3.) On August
22 16, Plaintiff’s counsel emailed a list of alleged issues with respect to Nanal’s discovery
23 responses and requested that those issues be discussed in the August 18th discovery conference.
24 (Lay Decl. ¶ 4, Exh. 2.) The discovery conference took place as scheduled during which each
25 party agreed to provide certain additional responses and documents, which agreements were
26 confirmed by counsel in subsequent emails. (Lay Decl. ¶ 5, Exhs. 3, 4.)

1 Two days after the discovery conference on August 20, 2010,¹ Nanal served
2 supplemental interrogatory responses. (Lay Decl. ¶ 6, Exh. 5.) As relevant here, Nanal
3 supplemented its response to Interrogatory No. 3 to state as follows, excluding objections:

4 Nanal did not “use” Plaintiff’s alleged trademark VEGA, Registration No.
5 2,087,637. Nanal selected the keyword terms “vega helmets” using the automated
6 Google AdWords keyword tool that suggests keywords based on user input.
7 Nanal input the generic term “helmet” into the Google AdWords keyword
8 suggestion tool and it suggested “vega helmet.” Albert Bootesaz, President of
9 Nanal, was primarily responsible for selecting the keyword terms through use of
10 Google’s Adwords keyword suggestion tool. **In further response, based on
11 Nanal’s investigation to-date, Nanal did not use the word “vega” in
12 connection with a motorcycle jacket as alleged in Plaintiff’s Second Amended
13 Complaint and Exhibit E thereto.**

14 (Lay Decl. ¶ 6, Exh. 5 at pp. 38-39 (emphasis added).) On September 2, Nanal also served
15 supplemental document production, Bates numbered D 000013 – D 000027, which included
16 documents detailing Nanal’s Google advertising expenses and printing costs for advertising
17 material. (Lay Decl. ¶ 8, Exh. 7.)

18 On September 15, 2010, Plaintiff’s counsel sent a letter to Nanal’s counsel making
19 various allegations about Nanal’s purportedly “deficient” discovery responses and claiming that
20 Nanal had not produced responsive information as agreed during the discovery conference on
21 August 18. (Lay Decl. ¶ 9, Exh. 8 at p. 51.) Because Nanal’s counsel believed the letter did not
22 accurately reflect Nanal’s discovery conduct, counsel responded in a letter dated September 16,
23 correcting the inaccuracies. (Lay Decl. ¶ 10, Exh. 9.)

24 Along with the September 16th letter, Nanal served corrected responses to certain of
25 Plaintiff’s interrogatories. (Lay Decl. ¶ 11, Exh. 10.) Specifically, Nanal had realized that its
26 responses to Interrogatory Nos. 2, 4, 8 and 10 had an inadvertent date error that specified April 3,
27 2010 as the date Nanal discontinued use of the Google AdWords keywords instead of the correct
28 date of April 3, 2009. (Lay Decl. ¶ 11.) The letter accompanying the corrected responses
specifically stated that only Nanal’s responses to Interrogatory Nos. 2, 4, 8 and 10 had been

¹ Also on August 20, the deadline for filing discovery motions, Plaintiff’s counsel sent a letter stating that Plaintiff would not file a motion to compel but purporting to “reserve[] the right to ask the Court for relief” if Nanal did not provide “sufficient” responses to certain of Plaintiff’s discovery requests. (Lay Decl. ¶ 7, Exh. 6 at pp. 45-46.)

1 corrected and those responses were labeled as “Corrected” responses.² (Lay Decl. ¶ 10, Exh. 9 at
2 p. 62, ¶ 11, Exh. 10 at pp. 65, 67-69.) Nanal’s response to Interrogatory No. 3 did *not* change
3 and was identical to the response quoted above provided to Plaintiff on August 20, 2010. (Lay
4 Decl. ¶ 6, Exh. 5 at pp. 38-39, ¶ 11, Exh. 10 at p. 66.) Thus, Plaintiff’s assertion that Nanal
5 “completely reversed its position on the issue, and for the first time contended it never used the
6 term ‘vega’ in connection with the marketing and sale of motorcycle jackets” in the response to
7 Interrogatory No. 3 served on September 16, 2010, is false. (Motion in Limine to Exclude
8 Evidence Reducing Soaring Helmet’s Damages (“Motion”), Docket No. 87, at p. 6.)

9 Also on September 16, 2010, Nanal served supplemental confidential responses to
10 Plaintiff’s Interrogatory Nos. 5, 12 and 14 to include sales and advertising costs information as
11 requested by Plaintiff. (Lay Decl. ¶ 10, Exh. 9 at p. 62, ¶ 12.)

12 The day after the September 20, 2010, deposition of Albert Bootesaz, individually and as
13 the Rule 30(b)(6) designee for Nanal, Plaintiff’s counsel sent a letter to Nanal’s counsel
14 following up on certain requests for information and/or documents that had been made during the
15 deposition. (Lay Decl. ¶ 13, Exh. 11.) On September 27, October 1 and October 15, Nanal’s
16 counsel forwarded additional information and documents in response to the September 21st letter
17 from Plaintiff’s counsel, which specifically included, as relevant here, sales and costs
18 information for the years 2007, 2008 and 2009 for the Xelement brand (boots, saddle bag,
19 jacket). (Lay Decl. ¶¶ 14-16, Exhs. 12, 13, 14.) The majority of these documents produced by
20 Nanal have been identified as trial exhibits by Plaintiff. (Lay Decl. ¶ 17.)

21 On December 23, 2010, Nanal’s counsel sent a letter to Plaintiff’s counsel detailing the
22 issues that Nanal intended to raise in its motions in limine, providing a summary explanation of
23 the basis for each issue, and requesting a conference of counsel pursuant to CR 7(d)(4) to discuss
24 the issues. (Lay Decl. ¶¶ 18-19, Exh. 15.) Counsel subsequently agreed to speak on December
25 29, at 10 a.m. (Lay Decl. ¶ 18.) The afternoon of December 28, the day before the planned

26 _____
27 ² Interrogatory responses that were not corrected, such as the response to Interrogatory No. 3, were included in this
28 set of “corrected” responses purely for organizational purposes so that there would be a complete set of correct, non-
confidential responses. (Lay Decl. ¶ 11.)

1 conference, Plaintiff's counsel sent an email apprising counsel of two motions in limine that
2 Plaintiff might file:

3 The first motion would be to exclude any evidence from Mr. Bootesaz
4 contradicting his statements in his deposition that he never sold "XELEMENT
5 Extreme Vega" motorcycle jackets on the grounds that his statements in his
6 deposition constitute judicial admissions. The second motion would be to exclude
7 any evidence of unrelated uses of the term "Vega," such as evidence that "Vega"
8 is a constellation, on the grounds of relevance.

9 (Lay Decl. ¶¶ 18, 20, Exh. 16 at p. 94.) Notwithstanding the short notice, Nanal's counsel
10 attempted to conduct some factual and legal research in order to be able to discuss Plaintiff's
11 motions in limine as described by counsel in her email. (Lay Decl. ¶ 18.) Counsel spoke as
12 planned on December 29th and the discussion as to Plaintiff's proposed motions in limine was
13 consistent with the subjects identified in counsel's December 28th email. More specifically,
14 counsel discussed Plaintiff's assertion that Mr. Bootesaz's deposition testimony constitutes
15 judicial admissions. (Lay Decl. ¶ 18.) Counsel did not specifically discuss the issue as stated in
16 Plaintiff's filed motion in limine that Nanal should be precluded from introducing evidence as to
17 gross and net profits relating to the Xelement jacket for purportedly failing to produce that
18 information in discovery pursuant to FED. R. CIV. P. 37(c)(1). (Lay Decl. ¶ 18.)

19 **II. ARGUMENT.**

20 **A. Plaintiff Has Not Demonstrated a Basis to Exclude Evidence That There is 21 No Indication Will Be Offered At Trial.**

22 The purpose of a motion in limine is to "expedite the trial by enabling the trial judge to
23 rule in advance on certain anticipated evidence and avoid lengthy argument at, or interruption of,
24 the trial." *Butterfly-Biles v. State Farm Life Ins. Co.*, No. 09-CV-086-CVE-PJC, 2010 WL
25 346838, at *2 (N.D. Okla. Jan. 21, 2010). But "a court is almost always better situated during
26 the actual trial to assess the value and utility of evidence." *Butterfly-Biles*, 2010 WL 346838, at
27 *2. "To exclude evidence before trial, the evidence must clearly be inadmissible on all possible
28 grounds." *W.R. Grace & Co. v. Viskase Corp.*, No. 90 C 5383, 1991 WL 211647, at *1 (N.D. Ill.
Oct. 15, 1991).

 Plaintiff's motion in limine to preclude Nanal from offering evidence pursuant to FED. R.

1 Civ. P. 37(c)(1) is, at best, premature and asks the Court to decide an issue that does not exist.
2 As the history described above reflects, Nanal did produce evidence relating to the Xelement
3 brand, including jackets, which Plaintiff has identified as exhibits it intends to introduce at trial.
4 (Lay Decl. ¶ 17.) Nanal has not identified any evidence relating to its sales and costs that it
5 intends to introduce at trial that was not previously produced to Plaintiff and Plaintiff does not
6 claim to the contrary. Nor has Nanal ever “reversed its position” with respect to Plaintiff’s
7 allegation that Nanal used Plaintiff’s “VEGA” trademark in connection with the Xelement
8 jacket. (Motion at p. 6.) To the contrary, Nanal has always maintained that it did not use
9 Plaintiff’s trademark in connection with the sale of the Xelement jacket but has never denied that
10 it sold the Xelement jacket, a position Mr. Bootesaz confirmed in Nanal’s Rule 30(b)(6)
11 deposition. (*See, e.g.*, Lay Decl. ¶ 6, Exh. 5 at pp. 38-39; Declaration of Heather M. Morado in
12 Support of Motion in Limine to Exclude Evidence Reducing Soaring Helmet’s Damages
13 (“Morado Decl.”), Docket No. 88, Exh. K at p. 66 (54:14-17, 55:12-18), Exh. L at p. 68 (52:11-
14 14, 53:22-24).) Thus, there is no basis for Plaintiff’s assertion that Plaintiff “anticipates” Nanal
15 will “reverse its current contention that it never sold such jackets,” rendering Plaintiff’s motion
16 in limine unsupported and unwarranted. (Motion at p. 2.)

17 In addition, Plaintiff’s motion in limine is so broadly worded that it would improperly
18 preclude evidence that Nanal indisputably did produce to Plaintiff and which Plaintiff itself has
19 identified as trial exhibits. (*See, e.g.*, Morado Decl. Exhs. J, N, O.) Plaintiff asks the Court to
20 preclude Nanal “from offering evidence on the subject of gross and net profits from its sales of
21 XElement Vega jackets, in an attempt to reduce Soaring Helmet’s damages, at trial.”³ (Motion at
22 p. 9.) But that broad statement presumably would include evidence of sales and costs associated
23 with the Xelement brand as a whole, about which, as Plaintiff admits, Nanal did produce
24 evidence and upon which both parties intend to rely at trial should the need arise. (*See* Motion at
25 pp. 1-2.) Such overbreadth alone justifies denying Plaintiff’s motion in limine.

26
27 ³ Plaintiff also even more broadly asks the Court to preclude Nanal “from presenting evidence that seeks to reduce
28 Soaring Helmet’s damages as measured by Defendant’s profits.” (Motion at p. 1.)

1 In short, the issue raised by Plaintiff's motion in limine is illusory; Plaintiff has not
2 demonstrated that Nanal disregarded its discovery obligations or that it intends to offer
3 unspecified evidence at trial that was not previously produced to Plaintiff. Therefore, a pre-trial
4 decision as to unspecified evidence that there is no reason to believe Nanal would offer at trial is
5 not warranted.

6 **B. Nanal's Rule 30(b)(6) Deposition Testimony Does Not Constitute Judicial**
7 **Admissions.**

8 Relying primarily on a single opinion from an Illinois state court, Plaintiff claims that
9 statements made by Albert Bootesaz in the Rule 30(b)(6) deposition of Nanal—which statements
10 Plaintiff typically does not quote in its Motion—constitute judicial admissions that may not be
11 contradicted at trial by different testimony or evidence. (See Motion at pp. 9-10.) Plaintiff is
12 mistaken.

13 Judicial admissions “are formal admissions in the pleadings which have the effect of
14 withdrawing a fact from issue and dispensing wholly with the need for proof of the fact.” *Am.*
15 *Title Ins. Co. v. Lacelaw Corp.*, 861 F.2d 224, 226 (9th Cir. 1988) (quoting *In re Fordson Eng'g*
16 *Corp.*, 25 B.R. 506, 509 (Bankr. E.D. Mich. 1982)). They are usually made by counsel and
17 typically “[s]ome degree of formality is entailed,” in that such admissions generally “arise by
18 way of stipulations, pleadings, statements in pretrial orders, and responses to requests for
19 admissions.” *In re Applin*, 108 B.R. 253, 258 (Bankr. E.D. Cal. 1989). “To qualify as a judicial
20 admission, the admission must be ‘deliberate, clear, and unequivocal.’” *Truckstop.net, L.L.C. v.*
21 *Sprint Communications Co.*, 537 F. Supp. 2d 1126, 1135 (D. Idaho 2008) (quoting *Heritage*
22 *Bank v. Redcom Labs., Inc.*, 250 F.3d 319, 329 (5th Cir. 2001)). “[C]onduct requiring
23 elaboration does not constitute a judicial admission[.]” *Truckstop.net*, 537 F. Supp. 2d at 1136.
24 In addition, the Court “is not compelled to accept [a judicial admission] merely at the instance of
25 a party,” rather, it is a matter of discretion for the Court. *In re Applin*, 108 B.R. at 259.

26 But courts in the Ninth Circuit have unambiguously, and correctly, held that testimony of
27 a Rule 30(b)(6) designee is not akin to a judicial admission:

28 The testimony of the Rule 30(b)(6) designee is deemed to be the testimony of the

1 corporation itself. However, such testimony is not akin to a judicial admission.
2 Rule 30(b)(6) depositions produce evidence, not judicial admissions. *State Farm*
3 *Mutual Auto. Ins. Co. v. New Horizont, Inc.*, 250 F.R.D. 203, 212 (E.D. Pa. 2008).
4 A Rule 30(b)(6) deponent testifies as if he is the corporation, but Rule 30(b)(6)
5 does not “absolutely bind a corporate party to its designee’s recollection.” *A.I.*
6 *Credit Corp. v. Legion Ins. Co.*, 265 F.3d 630, 637 (7th Cir. 2001). Rule 30(b)(6)
7 testimony “can be contradicted and used for impeachment purposes,” but it “is not
8 a judicial admission that ultimately decides an issue.” *Industrial Hard Crome*
9 *[sic], Ltd. v. Hetran, Inc.*, 92 F. Supp. 2d 786, 791 (N.D. Ill. 2000). The
10 testimony of a Rule 30(b)(6) representative, although admissible against the party
11 that designates the representative, is not a judicial admission absolutely binding
12 on that party. Testimony given at a Rule 30(b)(6) deposition is evidence which,
13 like any other deposition testimony, can be contradicted and used for
14 impeachment purposes. *State Farm*, 250 F.R.D. at 212. Such testimony is the
15 statement of the corporate person, which if altered, may be explained and then
16 explored through cross-examination as to why it was altered. *Casper v. Esteb*
17 *Enterprises, Inc.*, 119 Wash. App. 759, 767, 82 P.3d 1223, 1228 (Wash. 2004).

18 *Erickson v. Microaire Surgical Instruments LLC*, No. C08-5745BHS, 2010 WL 1881942, at *2
19 (W.D. Wash. May 6, 2010). See also *Icon Enters. Int’l, Inc. v. Am. Prods. Co.*, No. CV 04-1240
20 SVW (PLAx), 2004 WL 5644805, at *6 (C.D. Cal. Oct. 7, 2004) (“statements made by the [Rule
21 30(b)(6)] designee are *not* ‘tantamount to a judicial admission’”) (quoting *United States v.*
22 *Taylor*, 166 F.R.D. 356, 362 n.6 (M.D.N.C. 1996)).

23 The weight of federal authority supports this conclusion that Rule 30(b)(6) testimony
24 simply does not constitute judicial admissions. See, e.g., *Butterfly-Biles*, 2010 WL 346838, at *2
25 (rejecting motion in limine seeking to limit testimony to Rule 30(b)(6) testimony, stating that it
26 was “well-settled” that such testimony “does not constitute a judicial admission”); *Cont’l Cas.*
27 *Co. v. First Fin. Employee Leasing, Inc.*, 716 F. Supp. 2d 1176, 1190 (M.D. Fla. 2010) (Rule
28 30(b)(6) testimony “does not constitute a judicial admission and the corporation ‘is no more
bound than any witness is by his or her prior deposition testimony’”) (quoting *R & B Appliance*
Parts, Inc. v. Amana Co., 258 F.3d 783, 786-87 (8th Cir. 2001)); *Degrado v. Jefferson Pilot Fin.*
Ins. Co., Civil Action No. 02-cv-01533-WYD-BNB, 2009 WL 279019, at *21 (D. Colo. Feb. 5,
2009) (Rule 30(b)(6) testimony is an evidentiary admission “which may be controverted or
explained” rather than a judicial admission “which is conclusive and cannot be withdrawn
without leave of court”); *First Internet Bank of Ind. v. Lawyers Title Ins. Co.*, No. 1:07-cv-0869-
DFH-DML, 2009 WL 2092782, at *4 (S.D. Ind. July 13, 2009) (“A Rule 30(b)(6) deposition

1 produces evidence, not judicial admissions.”); *Lindquist v. City of Pasadena*, 656 F. Supp. 2d
2 662, 698 (S.D. Tex. 2009) (Rule 30(b)(6) testimony “is not ‘binding’ on the entity . . . in the
3 sense of preclusion or judicial admission”); *Johnson v. Big Lots Stores, Inc.*, Civil Action Nos.
4 04-3201, 05-6627, 2008 WL 6928161, at *3 (E.D. La. May 2, 2008) (Rule 30(b)(6) testimony
5 “does not constitute a ‘judicial admission’ that decides an issue with finality or estops a party
6 from contradicting the testimony of an earlier corporate representative”); *Canal Barge Co. v.*
7 *Commonwealth Edison Co.*, No. 98 C 0509, 2001 WL 817853, at *1 (N.D. Ill. July 19, 2001) (a
8 Rule 30(b)(6) deponent does not make “a judicial admission that formally and finally decides an
9 issue”); *Fed. Mut. Ins. Co. v. Botkin Grain Co.*, Civil Action No. 91-1223-MLB, 1997 WL
10 158399, at *4 (D. Kan. March 27, 1997) (concluding that Rule 30(b)(6) testimony constitutes an
11 evidentiary admission which “ may be controverted or explained,” unlike a judicial admission,
12 which is “a formal concession in a pleading or stipulation which is conclusive and cannot be
13 withdrawn without leave of court”).

14 Thus, the case law does not support Plaintiff’s proposition that the statements made by
15 Mr. Bootesaz in Nanal’s Rule 30(b)(6) deposition constitute judicial admissions. To the extent
16 Plaintiff contends that trial testimony contradicts the deposition testimony, the remedy is to
17 impeach the witness not preclude testimony and other evidence in advance of trial as a
18 conclusive judicial admission. *See Butterfly-Biles*, 2010 WL 346838, at *2 (noting that if
19 defendant took a contrary position to that of its Rule 30(b)(6) witness, plaintiff was free to
20 impeach defendant with the Rule 30(b)(6) testimony); *Whitesell Corp. v. Whirlpool Corp.*, No.
21 1:05-CV-679, 2009 WL 3672751, at *1 (W.D. Mich. Oct. 30, 2009) (noting that to extent
22 evidence at trial contradicted Rule 30(b)(6) testimony, party could use that testimony for
23 impeachment purposes but not precluded from introducing all evidence relating to the designee’s
24 testimony, inconsistent or not); *W.R. Grace*, 1991 WL 211647, at *2 (denying motion to exclude
25 evidence contrary to Rule 30(b)(6) testimony, noting that if a witness made a statement that
26 contradicted Rule 30(b)(6) testimony, defendant may impeach the witness with the testimony).

27 In addition, even if Rule 30(b)(6) testimony could be deemed judicial admissions—which
28

1 it cannot—Plaintiff’s requested judicial admissions do not even accurately reflect Mr. Bootesaz’s
2 testimony. Plaintiff asks the Court to find that Mr. Bootesaz made the judicial admission that (as
3 stated by Plaintiff) “Nanal never sold XElement Vega motorcycle jackets.” (Motion at p. 10.) In
4 deposition transcript excerpts attached to Plaintiff’s motion, Plaintiff has highlighted the
5 following testimony of Mr. Bootesaz:

6 Q. Mr. Bootesaz, would you have been the person to make the
7 decision about whether you use the term “Vega” in connection with the Xelement
8 Extreme jacket? Would that have been your decision?

9 A. To use the term?

10 Q. Yes.

11 A. Yes. But we did not use the term.

12 Q. Did Nanal use my client’s trademark “Vega” in connection with
13 the sale of this jacket?

14 A. No.

15 Q. Why does the Web site indicate the term “Vega”?

16 A. This is doctored. This is made up. This has nothing to do with our
17 Web site.

18

19 A. What I am saying, this jacket is sold. This description is doctored.

20 Q. Doctored by whom?

21 A. The Chinese guy in Seattle.

22 Q. Which Chinese guy in Seattle?

23 A. Owner of Soaring Helmet.

24 (Morado Decl. Exh. K at p. 66 (55:12-18) and Exh. L at pp. 68-69 (53:22-54:3, 54:16-21).) As
25 becomes clear once the testimony is actually quoted, Mr. Bootesaz did not testify, as Plaintiff
26 claims, that “Nanal never sold XElement Vega motorcycle jackets.” (Motion at p. 10.) To the
27 contrary, he testified that Nanal sold the Xelement jacket but that it did not use Plaintiff’s
28 “VEGA” trademark in connection with the jacket.

That distinction is further clarified when one of the questions leading to Mr. Bootesaz’s
answer that is omitted from Plaintiff’s highlighting is included:

Q. So you’re saying that the Xelement Extreme Vega jacket was not
sold on LeatherUp.com?

A. What I am saying, this jacket is sold. This description is doctored.

(Morado Decl. Exh. L at p. 69 (54:14-17).) The distinction is critical because Plaintiff is
attempting to preclude Nanal from offering testimony and other evidence at trial that is in fact
consistent with its Rule 30(b)(6) testimony, namely, that it sold the Xelement jacket but did not

1 use Plaintiff's "VEGA" trademark in connection with the jacket. In any event, at the very least,
2 the alleged statements are not so "deliberate, clear, and unequivocal" to constitute judicial
3 admissions even if they were appropriately labeled as such. *Truckstop.net*, 537 F. Supp. 2d at
4 1135 (quoting *Heritage Bank*, 250 F.3d at 329). *See also In re Applin*, 108 B.R. at 258 n.7 ("The
5 salient point is that judicially admitted matters are so far beyond dispute that evidence is not
6 required.").

7 Thus, Mr. Bootesaz's Rule 30(b)(6) testimony on behalf of Nanal does not constitute
8 judicial admissions, factually or legally, and Plaintiff's motion in limine asserting to the contrary
9 should therefore be denied.

10 DATED this 10th day of January, 2011.

11 Respectfully submitted,

12 HENDRICKS & LEWIS PLLC

13 By: s/Stacia N. Lay

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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.

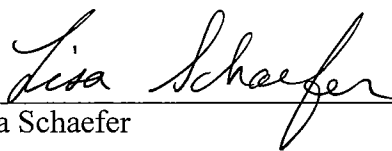
5 I hereby certify that on January 10, 2011, I electronically filed the foregoing with the
6 Clerk of the Court using the CM/ECF system which will send notification of such filing to the
7 following CM/ECF participants:

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17 Helmet Corporation

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

20 Executed January 10, 2011, at Seattle, Washington.

21 
22 Lisa Schaefer