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5 UNITED STATES DISTRICT COURT
6 WESTERN DISTRICT OF WASHINGTON
7 AT SEATTLE

8 CASCADE DESIGNS INC.,

9 Plaintiff,

10 v.

11 WINDCATCHER TECHNOLOGY
12 LLC,

Defendant.

C15-1310 TSZ

ORDER

13 THIS MATTER comes before the Court on Plaintiff's Motion to Dismiss
14 Defendant's counterclaims (docket. no. 14). Having reviewed the applicable pleadings,
15 the Court enters the following order.

16 **Background**

17 Windcatcher Technology, LLC ("Windcatcher") developed a technology for the
18 rapid inflation and deflation of inflatable devices. Windcatcher first incorporated its
19 technology into an inflatable sleeping pad, the AirPad, in 2013. Answer & Countercl. at
20 ¶ 8 (docket no. 12 at 12). Using a Kickstarter campaign to fund its initial operations,
21 Windcatcher raised almost \$150,000 from nearly 1,500 customers, and sold all of its
22 available inventory for its first generation product. *Id.* at ¶ 9.

1 On August 14, 2013, Cascade Designs Inc. (“Cascade”) entered into a mutual non-
2 disclosure agreement with Windcatcher (the “NDA”). The NDA provided that the parties
3 were permitted to use any disclosed information “only in pursuance of its business
4 relationship with the Disclosing Party.” Mutual Nondisclosure Agr. at 1, Ex. 1 to Weeks
5 Decl. (docket no. 17-1 at 5). Windcatcher alleges that Cascade used technical
6 information disclosed by Windcatcher to jump-start its own product line, and launched
7 the NeoAir Camper SV, a competing inflatable sleeping pad. Answer & Countercl. at ¶
8 37 (docket no. 12 at 18-19).

9 In August 2015, at the Summer Outdoor Retailer Convention, Windcatcher and its
10 CEO allegedly distributed flyers to retail buyers claiming that Cascade had “stolen”
11 Windcatcher’s technology and retailers would “be subject to injunctions” that
12 Windcatcher planned to file later that year. Mot. to Dismiss at 2 (docket no. 14).
13 Thereafter, Cascade filed a complaint which included claims of unfair competition under
14 the Lanham Act, trade libel, tortious interference, and declaratory judgments of non-
15 infringement of Windcatcher’s patent and trade dress (*see generally*, docket no. 1).
16 Windcatcher has counterclaimed for (1) trade dress infringement of the AirPad product
17 design; (2) Washington trade secret misappropriation; and (3) a breach of contract of the
18 NDA. Answer & Countercl. at ¶¶ 28-43 (docket no. 12 at 17-20).

19 **Discussion**

20 **A. Standard of Review**

21 In ruling on a 12(b)(6) motion to dismiss, the Court must assume the truth of a
22 claimant’s allegations and draw all reasonable inferences in that party’s favor.
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1 *Robertson v. GMAC Mortgage LLC*, 982 F. Supp. 2d 1202, 1206 (W.D. Wash. 2013).
2 However, a court need not accept as true allegations that are contradicted by judicially
3 noticeable facts. *Shwarz v. U.S.*, 234 F.3d 428, 435 (9th Cir. 2000). Additionally, in
4 deciding whether to dismiss a claim under Fed. R. Civ. P. 12(b)(6), a court may look
5 beyond a party’s complaint to matters of public record. *Mack v. South Bay Beer*
6 *Distribs., Inc.*, 798 F.2d 1279, 1282 (9th Cir. 1986).

7 To move beyond a motion to dismiss, a complaint must “contain sufficient factual
8 matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft*
9 *v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009)(citing *Bell*
10 *Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). A
11 claim has facial plausibility when the claimant “pleads factual content that allows the
12 court to draw the reasonable inference” that a party is liable for the misconduct alleged.
13 *Iqbal*, 556 U.S. at 678. Mere “conclusory allegations of law and unwarranted inferences
14 are insufficient to defeat a motion to dismiss.” *Adams v. Johnson*, 355 F.3d 1179, 1183
15 (9th Cir. 2004). If the Court dismisses a claim, it must consider whether to grant leave to
16 amend. *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000).

17 **B. Motion to Dismiss Trade Dress Infringement (First Claim)**

18 To recover for trade dress infringement under section 43(a) of the Lanham Act,
19 15 U.S.C. § 1125(a), a party must show that (1) the design in question is nonfunctional,
20 (2) the design is inherently distinctive or acquired distinctiveness through a secondary
21 meaning, and (3) that another product or service creates a likelihood of consumer
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1 confusion. *See Disc Golf Ass'n, Inc. v. Champion Discs, Inc.*, 158 F.3d 1002, 1005 (9th
2 Cir. 1998).

3 In evaluating whether trade dress is functional, the Court considers the following
4 four factors:

5 (i) the existence of an existing or expired utility patent or other evidence indicating
6 that the design yields a utilitarian advantage; (ii) the availability of alternative
7 designs; (iii) the extent of advertising touting the utilitarian aspects of the design;
8 and (iv) the comparative ease and expense associated with manufacturing the
9 design.

10 *Great Neck Saw Mfrs., Inc. v. Star Asia U.S.A., LLC*, 727 F. Supp. 2d 1038, 1059 (W.D.
11 Wash. 2010) aff'd, 432 F. App'x 963 (Fed. Cir. 2011)(citing *Clamp Mfg. Co. v. Enco Mfg.*
12 *Co.*, 870 F.2d 512, 516 (9th Cir.1989)).

13 Defendant's only claim of a purported trade dress of its AirPad design is
14 descriptions of the overall layout and individual components of the product.¹ Moreover,
15 defendant has filed a patent on its design (docket no. 12 at 3), and has not pled a lack of
16 utilitarian advantage, the availability of alternative designs, nor any attributes of
17 manufacturing costs related to its design that would lead to an inference of non-
18 functionality. As such, defendant has not met its burden in pleading its first counterclaim
19 under the Lanham Act.

20 ¹ Windcatcher claims that the elements of the AirPad trade dress include: (1) an inflatable rectangular
21 mattress; (2) a wide-mouth, rectangular inflation chamber protruding from the narrow end of the mattress
22 and oriented such that its long edges are parallel to the long edges of the mattress body; and (3) a
23 traditional valve located in the corner of the mattress next to the inflation chamber. Answer & Countercl.
at ¶ 13(docket no. 12 at 13-14).

1 The Court GRANTS plaintiff’s motion to dismiss defendant’s first counterclaim,
2 docket no. 14, without prejudice.

3 **C. Motion to Dismiss Misappropriation of a Trade Secret (Second Claim)**

4 A party asserting a trade secret claim bears the burden of “proving that legally
5 protectable secrets exist.” *Boeing Co. v. Sierracin Corp.*, 108 Wn.2d 38, 49 (1987). The
6 Washington Uniform Trade Secrets Act (“WUTSA”) defines a trade secret as
7 information that has independent economic value, is not generally known, and is the
8 subject of reasonable efforts to maintain its secrecy. RCW 19.108.010(4). For trade
9 secrets to exist, they must not be “readily ascertainable by proper means” from some
10 other source, including the product itself. RCW 19.108.010(4)(a). A “vague description”
11 of the product at issue without identification of what components are protected by trade
12 secrets is insufficient to survive a motion to dismiss. *Baden Sports, Inc. v. Wilson*
13 *Sporting Goods Co.*, C11-0603-MJP, 2011 WL 3158607, at *2 (W.D. Wash. July 26,
14 2011) (pleadings are not adequate to survive a 12(b)(6) motion when a party does not
15 specify in its complaint which components, or combination of components, of a device
16 are protected trade secrets).

17 While defendant’s pleadings point to general categories in which it alleges trade
18 secret misappropriation,² it fails to clarify what specific components of the AirPad
19 design, manufacture, and sale are protected by trade secrets. Additionally, as defendant

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21 ² Defendant characterizes the trade secrets at issue as “confidential and proprietary scientific, technical,
22 and business information concerning devices and methods for rapidly inflating and deflating inflatable
23 products, including sleeping pads for outdoor or recreational use.” Answer & Countercl. at ¶ 37 (docket
no. 12 at 18-19).

1 filed a patent application to protect its functional design, U.S. Patent No. 8,978,693
2 (docket no. 12 at 2-3), significant information regarding the AirPad design is available in
3 the public record. Moreover, defendant has made information relating to the design of
4 the AirPad available for public consumption on its Kickstarter Page. Answer &
5 Countercl. at ¶ 11 (docket no. 12 at 2-3). Because defendant fails to plead the details
6 about its AirPad design that make it a trade secret, defendant does not meet the pleading
7 requirements for this claim.

8 The Court GRANTS plaintiff's motion to dismiss defendant's second
9 counterclaim, docket no. 14, without prejudice.

10 **D. Motion to Dismiss Breach of Contract (Third Claim)**

11 Under Washington law, a breach of contract claim requires a showing of "(1) a
12 contract that imposed a duty, (2) breach of that duty, and (3) an economic loss as a result
13 of the breach." *Myers v. State*, 152 Wn.App. 823, 827-828 (2009). In the context of a
14 non-disclosure agreement, a complaint must "identify the confidential information that
15 was allegedly disclosed" to survive a 12(b)(6) motion. *Strich v. Accelitec, Inc.*, 2013 WL
16 5969848 at *1 (W.D. Wash. Nov. 8, 2013).

17 While defendant identified the duty imposed by its mutual NDA with plaintiff
18 (docket no. 12 at 19) and alleged a breach of that duty (*Id.*), defendant's failure to more
19 specifically identify what "trade secrets" or "confidential and proprietary information"
20 plaintiff allegedly misappropriated is fatal to its present claim.

21 The Court GRANTS plaintiff's motion to dismiss defendant's third counterclaim,
22 docket no. 14, without prejudice.

