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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

FALCON STAINLESS, INC.,)	SA CV 08-00926 AHS (MLGx)
)	
Plaintiff,)	
)	
v.)	ORDER: (1) GRANTING
)	DEFENDANTS' MOTION FOR JUDGMENT
RINO COMPANIES, INC., et al.,)	AS A MATTER OF LAW (ECF NO.
)	480); (2) GRANTING DEFENDANTS'
Defendants.)	MOTION FOR NEW TRIAL (ECF NO.
)	481); AND (3) DENYING
)	PLAINTIFF'S MOTION FOR
)	ATTORNEYS' FEES (ECF NO. 471)

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I.

INTRODUCTION

On February 25, 2011, a jury returned a verdict in favor of plaintiff Falcon Stainless, Inc. ("Plaintiff" or "Falcon") on all claims. On August 17, 2011, Falcon filed a motion for attorneys' fees. On August 30, 2011, defendants Rino Companies, Inc., John Novello, and Harry Rieger (collectively, "Rino" or "Defendants") filed a renewed motion for judgment as a matter of law and a motion for new trial.¹ Having read and considered the motions, oppositions thereto, and replies, and having reviewed the trial record, the Court, by this order, grants Rino's renewed motion for judgment as a matter of law, grants Rino's motion for new trial, and denies Falcon's motion for attorneys' fees.²

II.

DEFENDANTS' RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW

Under Rule 50(b) of the Federal Rules of Civil Procedure, Rino renews its motion for judgment as a matter of law on the following claims: (1) Falcon's first claim for false designation of origin under 15 U.S.C. § 1125(a); (2) Falcon's third claim for common law trademark infringement; (3) Falcon's fourth claim for intentional interference with prospective economic advantage; and (4) Falcon's sixth claim for unfair

¹ Defendant South Sea Metals, Inc. ("South Sea") settled with plaintiff post-verdict and was dismissed from the action.

² Because the parties are familiar with the facts, they are not recited here except as necessary for discussion of the pending motions.

1 competition under California Business and Professions Code
2 section 17200.³

3 **A. Legal Standard**

4 When reviewing a renewed motion for judgment as a
5 matter of law after a jury verdict, the Court “`must view the
6 evidence in the light most favorable to the nonmoving party
7 . . . and draw all reasonable inferences in that party’s favor.”
8 DSPT Int’l, Inc. v. Nahum, 624 F.3d 1213, 1218 (9th Cir. 2010)
9 (quoting Josephs v. Pac. Bell, 443 F.3d 1050, 1062 (9th Cir.
10 2006)). “[A] reasonable inference ‘cannot be supported by only
11 threadbare conclusory statements instead of significant probative
12 evidence.’” Lakeside-Scott v. Multnomah Cnty., 556 F.3d 797, 802
13 (9th Cir. 2009) (quoting Barnes v. Arden Mayfair, Inc., 759 F.2d
14 676, 680-81 (9th Cir. 1985)). However, “[a] jury’s verdict must
15 be upheld if it is supported by substantial evidence, which is
16 evidence adequate to support the jury’s conclusion, even if it is
17 also possible to draw a contrary conclusion.” DSPT Int’l, 624
18 F.3d at 1218 (quoting Pavao v. Pagay, 307 F.3d 915, 918 (9th Cir.
19 2002)). “A jury verdict should be set aside only when ‘the
20 evidence permits only one reasonable conclusion, and that

21
22 ³ As a threshold matter, the Court rejects Falcon’s
23 contention that “Defendants attempt to raise numerous new issues
24 regarding the intentional infringement of the Diamond ‘F’ Mark
25 not raised in their Rule 50(a) motion,” and that “[t]he same is
26 true with Defendants [sic] introduction of new issues regarding
27 the part marks in the current Rule 50(b) motion that were not
28 earlier raised.” (Pl.’s Combined Opp’n to Defs.’ Mot. for J. as
a Matter of Law & Mot. for New Trial (“Pl.’s Opp’n”), Sept. 26,
2011, ECF No. 490, at 4-5.) Rino previously moved for judgment
under Rule 50(a) of the Federal Rules of Civil Procedure on all
grounds put forward in its Rule 50(b) motion. (See Defs.’ Mot.
for J. as a Matter of Law, Feb. 20, 2011, ECF No. 382, at 4-8.)

1 conclusion is contrary to the jury's verdict.'" Id. (quoting
2 Josephs, 443 F.3d at 1062). Judgment as a matter of law is
3 "appropriate when the jury could have relied only on speculation
4 to reach its verdict."⁴ Lakeside-Scott, 556 F.3d at 803.

5 **B. Discussion**

6 **1. Claim 1: False Designation of Origin**

7 Falcon's first claim for false designation of origin
8 concerns Rino's alleged trademark infringement of Falcon's
9 parts-numbering system and its diamond "F" product mark. The
10 evidence introduced at trial supporting Falcon's claim was
11 discussed at length in the Court's findings of fact and
12 conclusions of law issued at the time of its order denying
13

14 ⁴ Falcon urges the Court to disregard Mr. Novello's and Mr.
15 Wu's testimony "because their concocted stories and self-admitted
16 perjurious statements contradict common sense and are
17 untruthful," and to "ignore Mr. Mark Irons [sic] biased testimony
18 as a result of his vitriol for Falcon arising from Falcon's
19 complaints to his supervisors." (Pl.'s Opp'n at 3-4 (citing
20 Johnson v. Paradise Valley Unified School Dist., 251 F.3d 1222,
21 1227 (9th Cir. 2001)).) While Johnson states that a court "must
22 disregard all evidence favorable to the moving party that the
23 jury is not required to believe," 251 F.3d at 1227 (citation and
24 internal quotation marks omitted), a jury is not required to
25 believe the testimony of any witness. However broadly construed,
26 Johnson cannot stand for the proposition that only favorable
27 evidence (or witnesses) for the nonmoving party should be
28 considered on a Rule 50 motion. This is especially true because
the Court may not "weigh the evidence or assess the credibility
of witnesses in determining whether substantial evidence exists."
Landes Constr. Co. v. Royal Bank of Canada, 833 F.2d 1365, 1371
(9th Cir. 1987). Thus, notwithstanding the fact that the Court
found certain witnesses to be credible as discussed infra, the
Court considers all admissible evidence on a Rule 50(b) motion
and assesses whether there was any "relevant evidence as
reasonable minds might accept as adequate to support a conclusion
even if it is possible to draw two inconsistent conclusions from
the evidence." Id.

1 Falcon's motion for a permanent injunction. (Order Denying
2 Plaintiff's Motion for Enhanced Damages, Disgorgement of Profits,
3 and Permanent Injunction ("Permanent Injunction Order"), Aug. 2,
4 2011, ECF No. 469.) When viewed in the light most favorable to
5 Falcon, as well as drawing all reasonable inferences in Falcon's
6 favor, the only "reasonable conclusion" that can be drawn from
7 the evidence presented at trial is that there was no
8 infringement: Falcon did not establish that it acquired a
9 protectable ownership interest in its parts numbers, Falcon did
10 not establish that Rino's parts numbers were likely to be
11 confused with Falcon's numbers, and Falcon did not establish that
12 Rino's product mark was likely to be confused with Falcon's
13 diamond "F" mark. Because the record evidence is "contrary to
14 the jury's verdict," Rino is entitled to judgment. DSPT Int'l,
15 624 F.3d at 1218.

16 a. There was no evidence that Falcon had a
17 protectable ownership interest in its parts
18 numbers

19 To prevail in a trademark infringement action, Falcon
20 must first demonstrate that it has a protectable ownership
21 interest in its marks.⁵ Network Automation, Inc. v. Advanced
22 Sys. Concepts, Inc., 638 F.3d 1137, 1144 (9th Cir. 2011). A
23 protectable ownership interest can be established in one of three
24 ways: (1) a federally registered mark, (2) a descriptive mark
25

26 ⁵ The test for false designation of origin under 15 U.S.C.
27 § 1125(a) "is exactly the same as for trademark infringement."
28 Century 21 Real Estate Corp. v. Sandlin, 846 F.2d 1175, 1179 (9th
Cir. 1988).

1 that has acquired a secondary meaning in the market, or (3) a
2 suggestive mark that is inherently distinctive. Applied Info.
3 Scis. Corp. v. eBay, Inc., 511 F.3d 966, 970 (9th Cir. 2007).
4 Falcon's parts numbers were not federally registered, nor were
5 they inherently distinctive. Instead, they were descriptive
6 marks entitled to trademark protection only upon proof of
7 secondary meaning. See, e.g., Arrow Fastener Co. v. Stanley
8 Works, 59 F.3d 384, 391 (2d Cir. 1995) ("Model numbers, while
9 often arbitrary in that they do not refer to characteristics of
10 the item they demark, are nevertheless generally descriptive
11 because they serve to distinguish a single source's products from
12 each other."); Wesley-Jessen Div. of Schering Corp. v. Bausch &
13 Lomb Inc., 698 F.2d 862, 865 (7th Cir. 1983) ("Terms that
14 originally designated style, grade or size are treated as any
15 other merely descriptive terms and such terms can acquire
16 secondary meaning."); Ford Motor Co. v. B&H Supply Inc., 646 F.
17 Supp. 975, 995 n.27 (D. Minn. 1986) ("A [part] numbering system
18 used to describe a plaintiff's product is entitled to protection
19 under § 43(a) of the Lanham Act if the numbering system has
20 acquired secondary meaning.")

21 Secondary meaning is present when the purchasing public
22 associates a mark with a particular source. Vision Sports, Inc.
23 v. Melville Corp., 888 F.2d 609, 615 (9th Cir. 1989). To
24 determine whether the purchasing public associates a mark with a
25 particular source, four factors are analyzed: (1) whether actual
26 purchasers associate the claimed trademark with the producer; (2)
27 the degree and manner of advertising under the claimed trademark;
28 (3) the length and manner of use of the claimed trademark, and

1 (4) whether the use of the claimed trademark has been exclusive.
2 Yellow Cab Co. of Sacramento v. Yellow Cab of Elk Grove, Inc.,
3 419 F.3d 925, 930 (9th Cir. 2005). The most significant evidence
4 of secondary meaning is survey evidence. See Vision Sports, 888
5 F.2d at 615 ("An expert survey of purchasers can provide the most
6 persuasive evidence of secondary meaning.").

7 Falcon uses alpha-numeric parts numbers for its
8 stainless steel connectors so that wholesale distributors can
9 specify which products they are ordering. (See Pender Trial Tr.,
10 Feb. 8, 2011, ECF No. 360, at 72:13-21, 76:15-23.) Falcon's
11 president, Gray Pender, testified that the alphabetic prefixes of
12 the parts numbers, "SWC" and "FF", are abbreviations for
13 "stainless water connector," or "female-by-female." (Pender
14 Trial Tr., Feb. 8, 2011, ECF No. 360, at 72:15; Feb. 9, 2011, ECF
15 No. 361, at 83:4-6, 83:18-20, 85:16-18.) Mr. Pender also
16 testified that the numerical suffixes of the parts numbers
17 indicate the diameter and length of Falcon's stainless steel
18 connectors. (Pender Trial Tr., Feb. 8, 2011, at 73:19-20.) For
19 example, the "SWC 10018" denotes a connector 1 inch in diameter
20 and 18 inches long, and "FF 34018" denotes a connector 3/4 of an
21 inch in diameter and 18 inches long. (Id., *passim.*) The letters
22 and numbers that constitute Falcon's parts numbers describe the
23 function and fit of Falcon's connectors.

24 Falcon presented no evidence at trial that its parts
25 numbers had acquired secondary meaning. Although Falcon used its
26 parts numbers since the mid-1980s, and there was evidence that
27 some plumbing wholesalers could "recognize" a Falcon number,
28 Falcon did not advertise its parts numbers (other than by listing

1 them on price sheets and on its website). (Pask Trial Tr., Feb.
2 10, 2011, ECF No. 362, at 8:25-9:9; Wiist Trial Tr., Feb. 15,
3 2011, ECF No. 371, at 89:3-11; Novello Trial Tr., Feb. 17, 2011,
4 ECF No. 378, at 38:11-15; Irons Trial Tr., Feb. 11, 2011, ECF No.
5 363, at 46:7-9; Ramirez Trial Tr., Feb. 9, 2011, ECF No. 370, at
6 91:24-25.) Falcon did not conduct a customer survey to show that
7 its parts numbers acquired a secondary meaning. (Pender Trial
8 Tr., Feb. 10, 2011, ECF No. 362, at 76:25-77:18.) Falcon offered
9 no testimony from any plumbing wholesaler that Rino parts were
10 purchased instead of Falcon parts owing to confusion over the
11 parts numbers. Two of Falcon's customers -- Mark Irons of
12 Ferguson Enterprises and Roy Ramirez of Hajoca Corporation --
13 both testified that they used Falcon and Rino parts numbers
14 interchangeably because they found it too time consuming to
15 update their computer systems to reflect the differences between
16 various manufacturers' numbers. (Irons Trial Tr., Feb. 11, 2011,
17 ECF No. 363, at 46:4-47:4; Ramirez Trial Tr., Feb. 9, 2011, ECF
18 No. 370, at 80:22, 81:12, 87:22-88:5; Trial Ex. 235.) This was a
19 common industry practice, which was not limited to Falcon and
20 Rino. (Ramirez Trial Tr., Feb. 9, 2011, ECF No. 370, at 95:4-
21 12.) Rather, it is a plumbing industry convention to use parts
22 numbers similar to those used by Falcon and Rino. (See Novello
23 Trial Tr., Feb. 17, 2011, ECF No. 378, at 18:15-20:4 and Trial
24 Ex. 56 (identifying Watts' FFSS12 as a "female-female stainless
25 12-inch long [water] connector"); Irons Trial Tr., Feb. 11, 2011,
26 at 42:21-22.) Mr. Iron's and Mr. Ramirez's testimony
27 demonstrated that Falcon's parts numbers were used in a generic
28 sense to identify "what" something was (i.e., stainless steel

1 water connector), instead of "who" something was (i.e., a water
2 connector made by Falcon or Rino). See Yellow Cab, 419 F.3d at
3 929 (describing the "who-are-you/what-are-you test" and stating
4 that a generic name answers the question "What are you?", while a
5 descriptive mark answers the question "Who are you?" or "Where do
6 you come from?"). Both Mr. Irons and Mr. Ramirez testified that
7 referencing Rino parts using Falcon parts numbers did not result
8 in any unintended sales or product confusion. (Irons Trial Tr.,
9 Feb. 11, 2011, ECF No. 363, at 72:17-19; Ramirez Trial Tr., Feb.
10 9, 2011, ECF No. 370, at 88:6-8.)

11 Falcon argues that Rino copied Falcon's parts numbers,
12 which establishes secondary meaning as a matter of law. (Pl.'s
13 Opp'n at 15-16.) While "[p]roof of exact copying, without any
14 opposing proof, can be sufficient to establish a secondary
15 meaning" because "[t]here is no logical reason for the precise
16 copying save an attempt to realize upon a secondary meaning that
17 is in existence," Transgo, Inc. v. Ajac Transmission Parts
18 Corp., 768 F.2d 1001, 1016 (9th Cir. 1985) (quoting Audio
19 Fidelity, Inc. v. High Fidelity Recordings, Inc., 383 F.2d 551,
20 557 (9th Cir. 1960)), there was no evidence of "exact copying"
21 here. Rino's parts numbers always contain at least one different
22 letter and sometimes use different number combinations to
23 identify the size and fit of the connectors. Given the fact that
24 similar parts-numbering systems are used throughout the plumbing
25 industry, anything less than "exact copying" is insufficient to

26 //

27 //

28 //

1 establish secondary meaning.⁶

2 Thus, to summarize the evidence presented at trial,
3 there was no evidence that actual purchasers associated Falcon's
4 parts numbers exclusively with Falcon, there was no evidence that
5 Falcon advertised its parts numbers, and there was no evidence
6 that Falcon's use of its parts numbers was exclusive, given the
7 widespread industry convention to use similar marks. For these
8 reasons, there was insufficient evidence to conclude that
9 Falcon's part numbers acquired a secondary meaning.

10 b. There was no likelihood of confusion between
11 Falcon and Rino parts numbers

12 A trademark infringement claim also requires Falcon to
13 demonstrate that Rino's use of its parts numbers would likely
14 cause consumer confusion. Network Automation, 638 F.3d at 1144.
15 To determine "whether consumers would likely be confused by
16 related goods," the following factors are analyzed: "[1]
17 strength of the mark; [2] proximity of the goods; [3] similarity
18 of the marks; [4] evidence of actual confusion; [5] marketing
19 channels used; [6] type of goods and the degree of care likely to
20 be exercised by the purchaser; [7] defendant's intent in
21 selecting the mark; and [8] likelihood of expansion of the

23 ⁶ Falcon cites to testimony in which Mr. Novello
24 acknowledged that he was aware of Falcon's parts numbers and that
25 he could pick any letters in the alphabet if he wanted them. The
26 fact remains that Mr. Novello did not copy Falcon's numbering
27 system, nor did he admit that Rino's system was based on Falcon's
28 system. Falcon also argues that evidence of actual confusion can
establish secondary meaning. However, as discussed infra, Falcon
did not establish any actual confusion that was tied to the
parts-numbering systems.

1 product lines.'" Id. at 1145 (quoting AMF Inc. v. Sleekcraft
2 Boats, 599 F.2d 341, 348-349 (9th Cir. 1979)). These so-called
3 "Sleekcraft factors" are not "exhaustive" nor a "rote checklist,"
4 but rather "are intended as an adaptable proxy for consumer
5 confusion." Id. at 1145, 1153. "Other variables may come into
6 play depending on the particular facts presented." Id. at 1153
7 (quoting AMF Inc., 599 F.2d at 348 n.11). For the same reasons
8 that Falcon could not establish a secondary meaning associated
9 with its parts numbers, Falcon did not establish a likelihood of
10 confusion.

11 (1) Strength of mark

12 The conceptual strength of parts numbers is weak. See
13 Arrow Fastener, 59 F.3d at 391-92 ("The tendency of this type of
14 trademark [i.e., part or model numbers] to cause confusion,
15 however, may be substantially less than that of a conventional
16 trademark.") (quoting 3 R. Callmann, Callmann on Unfair
17 Competition, Trademarks & Monopolies § 17.19, at 19 (4th ed.
18 Supp. 1994)). Falcon's parts numbers are "descriptive" terms
19 that had little conceptual strength. Network Automation, 638
20 F.3d at 1149; Arrow Fastener, 59 F.3d at 391-92. This factor
21 weighs strongly in Rino's favor.

22 (2) Proximity of products or services

23 Falcon and Rino manufacture stainless steel water
24 connectors, and the connectors are distributed to the same market
25 and used for the same purposes. Because "[r]elated goods are
26 generally more likely than unrelated goods to confuse the public
27 as to the producers of the goods," Network Automation, 638 F.3d
28 at 1150 (quoting Brookfield, 174 F.3d at 1055), this factor

1 weighs in Falcon's favor.

2 (3) Similarity of the marks

3 Falcon's and Rino's parts numbers use an alpha-
4 numerical model. "Where the two marks are entirely dissimilar,
5 there is no likelihood of confusion." Network Automation, 638
6 F.3d at 1150 (quoting Brookfield Commc'ns v. W. Coast Entm't
7 Corp., 174 F.3d 1036, 1054 (9th Cir. 1999)). "[T]he more
8 similar the marks in terms of appearance, sound, and meaning, the
9 greater the likelihood of confusion.'" Id. (quoting Brookfield,
10 174 F.3d at 1054.) "In analyzing this factor, '[t]he marks must
11 be considered in their entirety and as they appear in the
12 marketplace,' with similarities weighed more heavily than
13 differences." Brookfield, 174 F.3d at 1054 (quoting Official
14 Airline Guides, Inc. v. Goss, 6 F.3d 1385, 1392 (9th Cir. 1993)).

15 The parties use different prefixes on all parts
16 numbers: Falcon uses the prefix "SWC" or "FF", while Rino uses
17 the prefix "SWF". The prefix "SWC" stands for "stainless water
18 connector," "FF" for "female-female," and "SWF" for "stainless
19 water flex." The parties sometimes use identical numerical
20 components to identify the dimensions of connectors: e.g.,
21 Falcon's SWC 13418 and Rino's SWF 13418 both identify a connector
22 that is 1 and 3/4 inches in diameter (or in nut size) and 18
23 inches in length. Other connectors use different numerical
24 components to identify their dimensions: e.g., Falcon's SWC
25 10012 and Rino's SWF 112 identify a connector that is 1 inch in
26 diameter (or nut size) and 12 inches in length.

27 There are undisputed similarities between Falcon's and
28 Rino's parts numbers, including the "SW" letters on some parts

1 and the numerical components that identify the parts' dimensions
2 on other parts, which must be "weighed more heavily than
3 differences." Brookfield, 174 F.3d at 1054. However, the fact
4 that Rino consistently uses "SWF" on its parts, while Falcon
5 alternates between "SWC" and "FF", cannot be ignored.
6 Accordingly, this factor does not strongly favor either party.

7 (4) Evidence of actual confusion

8 The evidence introduced at trial demonstrated that
9 Falcon was confused about why it was receiving purchase orders
10 with Rino parts numbers, but Falcon's confusion is not the
11 principal concern under this factor. Instead, consumer confusion
12 is of paramount importance. Network Automation, 638 F.3d at 1150
13 ("`[A] showing of actual confusion among significant numbers of
14 consumers provides strong support for the likelihood of
15 confusion.'") (quoting Playboy Enters., Inc. v. Netscape Commc'ns
16 Corp., 354 F.3d 1020, 1026 (9th Cir. 2004)); Surfvivor Media,
17 Inc. v. Survivor Prods., 406 F.3d 625, 633 (9th Cir. 2005) ("In
18 analyzing this factor, [courts] may consider whether merchants
19 and non-purchasing members of the public, as well as actual
20 consumers, were confused.") There was no evidence of consumer
21 confusion. There was no evidence that plumbing wholesalers, or
22 even non-purchasing members of the public, were confused about
23 Falcon's and Rino's parts numbers.

24 Falcon received numerous purchase orders and request
25 goods authorization ("RGAs") with Rino parts numbers on them.
26 (Trial Ex. 40, Ex. L; Pender Trial Tr., Feb. 9, 2011, ECF No.
27 361, at 34:20-35:24; Wolff Trial Tr., Feb. 15, 2011, ECF No. 372,
28 at 41:5-42:9, 42:7-12; Novello Trial Tr., Feb. 16, 2011, ECF No.

1 376, at 130:10-15; Novello Trial Tr., Feb. 17, 2011, ECF No. 378,
2 at 55:17-19.) However, there was no testimony from any plumbing
3 wholesaler that they purchased Rino parts instead of Falcon parts
4 on account of confusion over the parts numbers.⁷ Ferguson
5 Enterprises acknowledged that it was using Falcon parts numbers
6 for purchases of Rino product for Ferguson's convenience, but
7 Ferguson did not sell Rino products due to any confusion over
8 Falcon's and Rino's parts numbers. (Irons Trial Tr., Feb. 11,
9 2011, ECF No. 363, at 47:7-10, 72:17-19.) Ferguson could
10 confidently state this because plumbers do not ask for parts by
11 their parts numbers on commodity items, but instead refer to the
12 vendor. (Id. at 77:11-16.) Hajoca Corporation also acknowledged
13 that it was using Falcon parts numbers for purchases of Rino
14 product for Hajoca's convenience, but Mr. Ramirez testified that
15 Hajoca did not sell Rino products because of any confusion over
16 Falcon's and Rino's parts numbers. (Ramirez Trial Tr., Feb. 9,
17 2011, ECF No. 370, at 80:22, 81:12, 87:22-88:8; Trial Ex. 235.)

18 Falcon's frustration about receiving purchase orders
19 with Rino parts numbers was primarily due to legitimate business
20 competition over price: Falcon was losing business to Rino
21

22 ⁷ Falcon has maintained that Rino's use of similar parts
23 numbers and product mark was usurping Falcon's business, and it
24 submitted purchase orders and RGAs with Rino's parts numbers as
25 evidence of "confusion." Yet, at trial, Falcon called no witness
26 to corroborate Falcon's claim that the purchase order or RGA was
27 sent due to trademark confusion. The absence of evidence on this
28 point, while illuminating, is by no means conclusive; but, given
the testimony from plumbing wholesalers who did testify that
there was no confusion about parts numbers, the only reasonable
conclusion to draw from these purchase orders and RGAs is that
Falcon was confused -- not anybody else in the plumbing industry.

1 because Rino's connectors were cheaper. (Pender Trial Tr., Feb.
2 9, 2011, ECF No. 370, at 41:18-23.) Falcon attempted to
3 transform this frustration into a trademark claim, but the
4 evidence showed that Falcon received purchase orders and RGAs
5 with Rino parts numbers on them for one of two reasons -- neither
6 of which related to confusion over parts numbers. First, as
7 previously described, it was a standard industry practice for
8 plumbing wholesalers to list parts under the numbers of different
9 manufacturers for the wholesalers' convenience. (Irons Trial
10 Tr., Feb. 11, 2011, ECF No. 363, at 47:7-10; Ramirez Trial Tr.,
11 Feb. 9, 2011, ECF No. 370, at 95:13-15.) Second, Rino's
12 principals, Mr. Novello and Mr. Rieger, were former sales
13 representatives for Falcon, and there was evidence that
14 wholesalers had not updated their systems to reflect a change in
15 sales representatives. (Pender Trial Tr., Feb. 9, 2011, ECF No.
16 361, at 35:10-24.) This latter scenario was exemplified in an
17 RGA request from Express Pipe & Supply Co. to Falcon for Rino
18 parts. (Id.) On the RGA form, "Performance Sales," the Novello-
19 Rieger name for their previous sales business, was listed as the
20 sales representative. (Id.) Falcon, via Ms. Wolff's written
21 note to Express Pipe, asked if Express Pipe could "get this
22 information 'Rino' out of the Express System + corrected,"
23 indicating that Falcon understood that Rino's parts numbers were
24 used because of Performance Sales' previous relationship with
25 Falcon.

26 In summary, no evidence indicates that Falcon customers
27 purchased Rino products on account of confusion over Falcon's and
28 Rino's parts numbers. This factor weighs in Rino's favor.

1 (5) Marketing channels used

2 Falcon and Rino advertise online and distribute price
3 lists to the same wholesalers for their water connectors. This
4 factor weighs slightly in Falcon's favor because of the price
5 list distribution. Nutri/System, Inc. v. Con-Stan Indus., Inc.,
6 809 F.2d 601, 606 (9th Cir. 1987) ("[C]ourts examine the
7 proximity of the marketing channels to one another and whether
8 direct competition exists" with "similarity in advertising as one
9 factor in this examination."); Network Automation, 638 F.3d at
10 1151 (stating that using a "ubiquitous marketing channel," such
11 as advertising online, "does not shed much light on the
12 likelihood of consumer confusion.")

13 (6) Type of goods and degree of care

14 Falcon's and Rino's products are sold to sophisticated
15 retailers and plumbing companies with a strong knowledge of the
16 industry. Because a higher degree of care is expected when
17 purchasing expensive items or when the products "are marketed
18 primarily to expert buyers," Brookfield, 174 F.3d at 1060, this
19 factor supports Rino.

20 (7) Defendants' intent in selecting mark

21 Rino had constructive knowledge of Falcon's mark when
22 it adopted its parts numbers because Novello/Performance Sales
23 was Falcon's former sales representative. Brookfield Commc'ns,
24 Inc., 174 F.3d at 1059 ("This factor favors the plaintiff where
25 the alleged infringer adopted his mark with knowledge, actual or
26 constructive, that it was another's trademark."). However, it is
27 undisputed that use of similar alphanumeric parts-numbering
28 systems is pervasive in the plumbing industry. Drawing all

1 inferences in favor of the nonmoving party, this factor slightly
2 favors Falcon.

3 (8) Likelihood of expansion of product lines

4 Falcon and Rino already compete to a significant
5 extent. Because "[t]he likelihood of expansion in product lines
6 factor is relatively unimportant where two companies already
7 compete to a significant extent," Brookfield, 174 F.3d at 1060,
8 this factor does not weigh in favor of either party.

9 (9) Overall analysis of factors

10 Some of the factors support Falcon: both parties sell
11 the same type of products and use similar marketing channels, and
12 Rino had constructive knowledge of Falcon's parts numbers.
13 However, when faced with the undisputed weakness of Falcon's
14 parts-numbering system, the degree of care likely used by
15 plumbing professionals when viewing the marks, and the evidence
16 that any confusion over Rino's parts numbers was unrelated to
17 parts numbers, the Court must conclude that there was
18 insufficient evidence to support a finding of likelihood of
19 confusion. Brookfield, 174 F.3d at 1054 ("Some factors are much
20 more important than others, and the relative importance of each
21 individual factor will be case-specific.").

22 c. There was no likelihood of confusion between
23 Falcon and Rino product marks

24 Falcon's previous product mark consisted of a letter
25 "F" inscribed within an elongated diamond. (Pender Trial Tr.,
26 Feb. 8, 2011, ECF No. 360, at 72:1-9.) Rino's product mark
27 consists of the letter "S" inscribed within a square-shaped
28 diamond or rotated box. (Wu Trial Tr., Feb. 16, 2011, ECF No.

1 375, at 62:23-63:17; Trial Ex. 351 (photographs of South Sea
2 diamond "S" mark.)) The jury could have reasonably concluded
3 that Falcon met its burden of establishing a protectable
4 ownership interest in its diamond "F" mark because the mark was
5 inherently distinctive and Falcon was the first to use it. (See
6 Order: (1) Denying Defs.' Mot. for Summ. Adjudication of Issues
7 and Claims, and (2) Denying South Sea Metal, Inc.'s Ex Parte
8 Appl., Sept. 24, 2010, ECF No. 241, at 23-24.) However, Falcon
9 did not establish a likelihood of confusion.

10 (1) Strength of the mark

11 While "arbitrary or fanciful marks" are strong marks,
12 "suggestive marks are presumptively weak." Brookfield, 174 F.3d
13 at 1058. At best, Falcon's diamond "F" mark is suggestive.
14 Pursuant to IAPMO standards, the mark indicates that the part was
15 made by Falcon, which is designated by the "F". The mark might
16 be suggestive because "'a consumer must use imagination or any
17 type of multistage reasoning to understand the mark's
18 significance.'" Zobmondo Entm't, LLC v. Falls Media, LLC, 602
19 F.3d 1108, 1114 (9th Cir. 2010) (quoting Kendall-Jackson Winery,
20 Ltd. v. E. & J. Gallo Winery, 150 F.3d 1042, 1047 n.8 (9th Cir.
21 1998)). It is not "arbitrary" or "fanciful" because it does not
22 involve use of common words that have no connection with the
23 actual product. See Surfivor Media, 406 F.3d at 632. Because
24 Falcon's diamond "F" mark is at most suggestive, it is
25 presumptively weak. Brookfield, 174 F.3d at 1058.

26 Although "'advertising expenditures can transform a
27 suggestive mark into a strong mark,'" Fortune Dynamic, Inc. v.
28 Victoria's Secret Stores Brand Mgmt., Inc., 618 F.3d 1025, 1034

1 (9th Cir. 2010) (quoting Brookfield, 174 F.3d at 1058), there is
2 no evidence that Falcon's diamond "F" mark "has achieved actual
3 marketplace recognition," Brookfield, 174 F.3d at 1058, nor is
4 there evidence that its advertising expenditures have transformed
5 the mark into a strong mark. (Wolff Trial Tr., Feb. 15, 2011,
6 ECF No. 372, at 90:13-15, 95:3-5; Pender Trial Tr., Feb. 10,
7 2011, ECF No. 362, at 95:10-12; Wolff Trial Tr. at 92:5-15,
8 92:19-21.) It is undisputed that Falcon never used the diamond
9 "F" mark in its advertising, letterhead, or price lists. (Wolff
10 Trial Tr. at 90:13-15, 93:24-94:1, 94:14-16.) Because the
11 conceptual strength of the diamond "F" mark is weak, and there is
12 no evidence of its commercial strength, this factor favors Rino.

13 (2) Proximity of products or services

14 Falcon and Rino both manufacture stainless steel water
15 connectors that are distributed to the same market and used for
16 the same purposes. This factor weighs in Falcon's favor.

17 (3) Similarity of the marks

18 Falcon's and Rino's product marks are similar to the
19 extent that they both use a box or diamond shape with a letter
20 inscribed within the box/diamond. Falcon's and Rino's product
21 marks are dissimilar primarily because they contain different,
22 distinct letters: an "F" and "S", respectively. They are also
23 dissimilar because their geometric shapes are visibly different:
24 Falcon's "diamond" is smaller and elongated, whereas Rino's box
25 is bigger and squarer, or box-like. It is clear from a visual
26 inspection of the product marks that they are plainly different.

27 It is unlikely that either mark has a phonetic
28 component. The marks were originally adopted pursuant to IAPMO

1 requirements so that parts could be identified if the attached
2 paper label was dislodged. Thus, the purpose of the marks was to
3 visually identify the maker of the part, and there was no
4 evidence introduced at trial that the parts marks acquired a
5 phonetic component.

6 Because of the dissimilarities of the diamond/box
7 shapes and differences in the letters inscribed therein, this
8 factor weighs in favor of Rino.

9 (4) Evidence of actual confusion

10 Falcon did not present any evidence by the customers
11 who returned the parts that Rino's use of its boxed "S" mark led
12 the customers to believe that the parts were manufactured by
13 Falcon. In opposition, Falcon argues that Defendants' own
14 witness, Douglas Moore, "testified that he knew that Falcon owned
15 the Diamond 'F' Mark and that his employees were confused between
16 the parties' products and misdirected the return of Falcon's
17 connectors to Defendants." (Pl.'s Opp'n at 10.) Falcon's
18 argument is carefully phrased. Yes, Mr. Moore testified that he
19 could recognize a Falcon product because of Falcon's diamond "F"
20 mark on the nut along with Falcon's label attached to it.

21 (Moore Trial Tr., Feb. 18, 2011, ECF No. 388, at 34:17, 47:21-
22 48:3.) Yes, Mr. Moore testified that he initially called Rino
23 about Falcon pipes that were leaking. (Moore Trial Tr., Feb. 18,
24 2011, ECF No. 388, at 48:12-18.) But, Mr. Moore did not testify
25 that he called Rino because he was confused by Rino's diamond "S"
26 mark (or Rino's parts numbers, for that matter). Consistent with
27 Falcon's other evidence of alleged "actual confusion," Falcon
28 never established Mr. Moore called Rino due to confusion over the

1 parties' product marks. Falcon established that Mr. Moore's
2 company was confused about who manufactured the defective
3 connectors, (Moore Trial Tr. at 49:4-6), but never causally
4 linked the confusion to any claimed trademark. As noted, there
5 were multiple reasons for these instances of confusion -- all of
6 which indicate that the source of confusion was unrelated to
7 Falcon's product mark.⁸ Moreover, Mr. Irons testified that he
8 was not aware that Falcon used a diamond "F" mark and that
9 Ferguson never chose Rino products over Falcon products due to
10 confusion between the parties' product marks. (Irons Trial Tr.,
11 Feb. 11, 2011, ECF No. 363, at 37:7-9, 72:23-73:1, 72:20-22;
12 Pender Trial Tr., Feb. 8, 2011, ECF No. 360, at 74:12-14.)

13 Falcon points out that Rino's counsel's misstatement at
14 a post-trial hearing, in which counsel stated "[t]he thrust of
15 the motion is that there was insufficient evidence for the jury
16 to find either infringement of the diamond 'S' mark, or -- pardon
17 me, of the diamond 'F' mark, or that . . .," is evidence of
18 actual confusion. (Pl.'s Opp'n at 2 (citing Decl. of Milord A.
19 Keshishian ("Keshishian Decl."), Sept. 26, 2011, ECF No. 490-1,
20 ¶ 6 & Ex. B).) A diamond "F" mark sounds like a diamond "S"
21 mark, and Falcon might have a case if the marks had a phonetic
22 component. But the descriptive terms "diamond 'F' mark" and
23 "diamond 'S' mark" (or "rotated-box 'S' mark") were created by
24

25 ⁸ Falcon received defective connectors bearing the "S" mark.
26 (Wolff Trial Tr., Feb. 15, 2011, ECF No. 372, at 41:7-42:1.)
27 But, Falcon did not present evidence that the connectors were
28 returned due to confusion over the product mark. Instead, the
evidence showed that Mr. Novello's previous relationship with
Falcon was the likely reason behind the returned connectors.

1 counsel for purposes of this litigation. For this reason,
2 Falcon's reliance on Century 21 Real Estate Corp. v. Sandlin, 846
3 F.2d 1175, 1179 (9th Cir. 1988), is inapposite because the
4 trademark in Century 21 had a phonetic component.⁹

5 There is no evidence that anyone -- including counsel
6 -- has ever visually confused the parties' product marks.
7 Accordingly, this factor weighs in Rino's favor.

8 (5) Marketing channels used

9 Falcon and Rino advertise online and distribute price
10 lists to the same wholesalers for their water connectors. This
11 factor weighs slightly in Falcon's favor.

12 (6) Type of goods and degree of care

13 Falcon's and Rino's products are sold to sophisticated
14 retailers and plumbing companies with a strong knowledge of the
15 industry. The product marks are used in limited circumstances --
16 when, for example, the paper label attached to the part is
17 removed. Because it is likely that a professional retailer or
18 plumber would use a higher degree of care in identifying the
19 part's mark in such circumstances, since this would be the only
20 way to track the part's manufacturer, this factor favors Rino.
21 See Brookfield, 174 F.3d at 1060.

22 (7) Defendants' intent in selecting mark

23 Rino had constructive knowledge of Falcon's mark when
24 it adopted its parts numbers because Novello was Falcon's former
25

26 ⁹ Falcon also cites Cooper v. Revolution Records, 1997 U.S.
27 App. LEXIS 8128, at 12-13 (9th Cir. Apr. 21, 1997). This is an
28 impermissible citation because the decision is unpublished and
was issued before January 1, 2007. See Fed. R. App. P. 32.1.

1 sales representative. However, South Sea presented evidence that
2 it used a variation of its rotated-box "S" mark before South Sea
3 manufactured product for Rino. (Wu Trial Tr., Feb. 16, 2011, ECF
4 No. 375, at 66:7-10.) This factor favors neither party.

5 (8) Likelihood of expansion of product lines

6 Falcon and Rino already compete to a significant
7 extent. Therefore, this factor does not weigh in favor of either
8 party.

9 (9) Other factors

10 Falcon abandoned its diamond "F" mark during this
11 litigation after it learned it could not obtain a federally
12 registered trademark. (Pender Trial Tr., Feb. 11, 2011, ECF No.
13 363, at 12:3-14, 16:11-17.) Mr. Pender stated that he did not
14 want to risk association with Rino, and for the past several
15 years Falcon has been using an "FSC" mark instead of its diamond
16 "F" mark. (Id. at 16:14-17, 16:6-9.) The purpose of trademark
17 law, however, is to protect marks that have become associated
18 with a particular source. Falcon's willingness to abandon its
19 mark in the middle of litigation is seemingly at odds with the
20 underlying purpose of trademark law. The fact that Falcon did so
21 without any apparent economic consequences strongly favors Rino.

22 (10) Overall analysis of factors

23 Taken together, the undisputed weakness of Falcon's
24 diamond "F" mark, the degree of care likely used by plumbing
25 professionals when viewing the marks, the lack of any evidence of
26 confusion, and the fact that Falcon abandoned its diamond "F"
27 mark during the course of its current trademark litigation, all
28 preclude a finding of likelihood of confusion. Brookfield, 174

1 F.3d at 1054 ("Some factors are much more important than others,
2 and the relative importance of each individual factor will be
3 case-specific.").

4 **2. Claim 3: Common Law Trademark Infringement**

5 "As a general matter, trademark claims under California
6 law are 'substantially congruent' with federal claims and thus
7 lend themselves to the same analysis." Grupo Gigante SA De CV v.
8 Dallo & Co., 391 F.3d 1088, 1100 (9th Cir. 2004). For the same
9 reasons that substantial evidence did not support Falcon's claim
10 for false designation of origin under 15 U.S.C. § 1125(a),
11 Falcon's claim for common law trademark infringement was not
12 supported by substantial evidence.

13 **3. Claim 4: Intentional Interference with**
14 **Prospective Economic Advantage**

15 Falcon's claim for intentional interference with
16 prospective economic advantage is predicated on Rino's allegedly
17 false labeling and delisting of one water connector and on Rino's
18 advertising comparing the flow rates of various connectors. To
19 prevail on an intentional interference claim, Falcon was required
20 to prove: (1) an economic relationship between itself and a
21 third party that would likely produce future economic benefit to
22 Falcon; (2) Rino's knowledge of the relationship; (3) an
23 intentional act by Rino designed to disrupt the relationship; (4)
24 actual disruption of the relationship; and (5) economic harm to
25 Falcon proximately caused by Rino's acts. Edwards v. Arthur
26 Andersen LLP, 44 Cal. 4th 937, 944 (2008). The interference must
27 be "wrongful, independent of its interfering character," which
28 means that the interfering act must be "'proscribed by some

1 constitutional, statutory, regulatory, common law, or other
2 determinable legal standard.'" Id. (quoting Korea Supply Co. v.
3 Lockheed Martin Corp., 29 Cal. 4th 1134, 1159 (2003)).

4 Falcon failed to produce evidence of any specific
5 prospective relationship that was disrupted by Rino's conduct.
6 Falcon introduced testimony from only two representatives of
7 plumbing wholesalers, Mr. Irons of Ferguson and Mr. Ramirez of
8 Hajoca, and neither representative stated that Rino disrupted
9 their business relationships with Falcon.

10 Mr. Irons testified that Ferguson switched from selling
11 Falcon to Rino connectors (except where customers specifically
12 requested Falcon products) because Falcon had ended a long-
13 standing rebate program and Rino's prices were lower. (Irons
14 Trial Tr., Feb. 11, 2011, ECF No. 363, at 58:5-24, 61:24-62:5,
15 66:5-67:10, 67:25-68:2, 70:23-72:22.) The change had nothing to
16 do with Rino's part numbers, product mark, advertising, or the
17 delisting of one Rino connector. (Id. at 67:25-68:2, 72:17-73:1,
18 82:2-7.) Mr. Irons did not think that the slogan "Rino Beats the
19 Bird" disparaged Falcon products; rather, he viewed it as
20 promoting Rino's products. (Id. at 80:2-20.) Ferguson's
21 termination of its agreement with Falcon was unrelated to
22 anything Mr. Irons learned from Rino's advertising. (Id. at
23 82:2-7.)

24 Mr. Ramirez testified that Hajoca's purchasing
25 decisions were driven by the price of the connectors. (Ramirez
26 Trial Tr., Feb. 9, 2011, ECF No. 370, at 85:10-86:4.) Hajoca
27 originally sold Falcon connectors, but it began selling Rino
28 connectors after Rino offered a cheaper product. (Id.) Hajoca

1 stopped purchasing Rino connectors after Mr. Ramirez "got the
2 pricing that [he] wanted" from Falcon.¹⁰ (Id.) Although Mr.
3 Ramirez stated that he would not purchase any products that were
4 not UPC approved, (id. at 86:22-25), he made clear that his
5 purchasing decisions were solely driven by price considerations:
6 "I just managed to get the pricing that I wanted, and that's the
7 reason why I stayed with Falcon." (Id. at 85:25-86:2.)

8 Thus, Falcon produced evidence of only two business
9 relationships, but neither was actually disrupted by any
10 "wrongful" Rino act. Similarly, there was no evidence of
11 economic harm proximately caused by Rino's acts. Edwards, 44
12 Cal. 4th at 944. Falcon's damages expert, Andrew Safir, could
13 not opine that Rino disrupted any of Falcon's specific business
14 relationships, and his lost profit calculations did not account
15 for individual client relationships. (Safir Trial Tr., Feb. 14,
16 2011, ECF No. 367, at 59:7-60:12.)

17 The fact that Rino and Falcon sold similar products and
18 vied for many of the same customers does not, standing alone,
19 give rise to a claim for intentional interference with
20 prospective economic advantage. Nor is Falcon entitled to
21 damages merely because one of Rino's connectors became delisted
22 while generally advertising UPC compliance. Because the trial
23 record lacks evidence of interference with specific relationships
24 and damages therefrom, Falcon's claim for intentional

25
26 ¹⁰ Mr. Ramirez also stated that there were a couple of
27 complaints about leaking Rino connectors, but "that wasn't the
28 reason why [he] actually pulled [Rino's connectors] off the
shelf." (Id. at 85:21-86:4.)

1 interference with prospective economic advantage was not
2 supported by substantial evidence.

3 **4. Claim 6: Unfair Competition under California**
4 **Business and Professions Code section 17200**

5 Falcon's sixth claim is for violations of the Unfair
6 Competition Law ("UCL"). Cal. Bus. & Profs. Code § 17200 et seq.
7 "The UCL prohibits unlawful and unfair business practices," and
8 "'borrows' violations of other laws and makes them independently
9 actionable as unfair competitive practices." Theme Promotions,
10 Inc. v. News Am. Mktg. FSI, 546 F.3d 991, 1008 (9th Cir. 2008).
11 The remedies available to private parties are limited to
12 injunctive relief and restitution to restore money or property
13 acquired by means of unfair competition. Id. at 1008-09. "While
14 disgorgement orders may include a restitutionary component, they
15 may be impermissibly broad" when they "require the 'surrender of
16 all profits earned as a result of an unfair business practice
17 regardless of whether those profits represent money taken
18 directly from persons who were victims of the unfair practice.'" Id.
19 at 1009 (quoting Kraus v. Trinity Mgmt. Servs., Inc., 23 Cal.
20 4th 116, 126-27 (2000)).

21 Here, Falcon conceded in its Opposition to Defendants'
22 pre-verdict Rule 50(a) Motion for Judgment As a Matter of Law
23 that Falcon sought only a permanent injunction on its UCL claim,
24 and it requested no additional relief in opposition. (Pl.'s
25 Opp'n at 19; Pl.'s Opp'n to Defs.' Mot. for J. as a Matter of
26 Law, Feb. 21, 2011, ECF No. 384, at 9.) The Court, in its August
27 2, 2011 Order, denied Falcon's motion for a permanent injunction
28 and thus foreclosed the only relief available to Falcon under the

1 UCL. Because Falcon cannot recover lost profits or seek
2 disgorgement of Rino's profits under the UCL, Rino is entitled to
3 judgment as a matter of law on this claim.

4 **C. Conclusion on Defendants' Renewed Motion for Judgment**

5 The jury's verdict on Falcon's first claim for false
6 designation of origin and third claim for common law trademark
7 infringement must be set aside. Falcon's parts-numbering system
8 was not a protectable mark because it lacked a secondary meaning,
9 and the only reasonable conclusion to be drawn from the evidence
10 was that Falcon failed to establish any likelihood of confusion
11 concerning its parts-numbering system or its diamond "F" product
12 mark. Likewise, the verdict on Falcon's fourth claim for
13 intentional interference with prospective economic advantage must
14 be set aside because Falcon presented no evidence that Rino
15 disrupted any relationship between Falcon and a third party, nor
16 was there evidence of economic harm proximately caused by Rino.
17 Finally, the verdict on Falcon's sixth claim for unfair
18 competition must be set aside because the Court denied Falcon's
19 request for injunctive relief, the only relief available on
20 Falcon's UCL claim.

21 **III.**

22 **DEFENDANTS' MOTION FOR NEW TRIAL**

23 Under Rule 59(a) of the Federal Rules of Civil
24 Procedure, Rino moves for a new trial on the following claims:
25 (1) Falcon's first claim for false designation of origin under 15
26 U.S.C. § 1125(a); (2) Falcon's second claim for false advertising
27 under 15 U.S.C. § 1125(a); (3) Falcon's third claim for common
28 law trademark infringement; (4) Falcon's fourth claim for

1 intentional interference with prospective economic advantage; (5)
2 Falcon's fifth claim for trade libel/product disparagement; and
3 (6) Falcon's sixth claim for unfair competition under California
4 Business and Professions Code section 17200.

5 **A. Legal Standard**

6 Rule 59(a) provides that a new trial may be granted
7 after a jury trial "for any reason for which a new trial has
8 heretofore been granted in an action at law in federal court."
9 Fed. R. Civ. P. 59(a)(1)(A). A new trial is proper if "the
10 verdict is contrary to the clear weight of the evidence, is based
11 upon false or perjurious evidence, or to prevent a miscarriage of
12 justice.'" Molski v. M.J. Cable, Inc., 481 F.3d 724, 729 (9th
13 Cir. 2007) (quoting Passantino v. Johnson & Johnson Consumer
14 Prods., 212 F.3d 493, 510 n.15 (9th Cir. 2000)). In ruling on a
15 motion for new trial, the court has "the duty . . . to weigh the
16 evidence as [the court] saw it, and to set aside the verdict of
17 the jury, even though supported by substantial evidence, where,
18 in [the court's] conscientious opinion, the verdict is contrary
19 to the clear weight of the evidence.'"¹¹ Id. (quoting Murphy v.

20
21 ¹¹ Falcon incorrectly states that "Ninth Circuit cases
22 consistently hold that a motion for new trial should be rejected
23 to the extent the motion is based on sufficiency of the evidence,
24 if the moving party waived that issue by failing to bring motions
25 that comply with Rule 50." (Pl.'s Opp'n at 5 citing Janes v.
26 Wal-Mart Stores Inc., 279 F.3d 883, 887-88 (9th Cir. 2002).)
27 Rule 50(b)(2) provides for a new trial when a motion for judgment
28 as a matter of law is not granted under Rule 50(a). Fed. R. Civ.
P. 50(b). When a new trial is sought under Rule 50(b)(2), a
motion for judgment as a matter of law must first have been
brought under Rule 50(a) -- including challenges to the
sufficiency of the evidence. See Janes, 279 F.3d at 888. The
notice requirement under Rule 50(a) is important because it gives
"an opportunity for the opposing party to cure any defects in

(continued...)

1 City of Long Beach, 914 F.2d 183, 187 (9th Cir. 1990))
2 (alterations in original); Landes Constr., 833 F.2d at 1371
3 (holding that on a motion for new trial “[t]he judge can weigh
4 the evidence and assess the credibility of witnesses, and need
5 not view the evidence from the perspective most favorable to the
6 prevailing party”).

7 When a court grants a renewed motion for judgment as a
8 matter of law, Rule 50(c)(1) provides that a court “must also
9 conditionally rule on any motion for a new trial by determining
10 whether a new trial should be granted if the judgment is later
11 vacated or reversed.” Fed. R. Civ. P. 50(c)(1).

12 **B. Discussion**

13 **1. Rule 50(c)(1): A New Trial is Warranted on Claims**
14 **1, 3, 4 and 6**

15 As discussed supra, the Court grants Rino’s motion for
16 judgment as a matter of law on Falcon’s claims for trademark
17 infringement (Claim 1 and Claim 3), intentional interference with
18 prospective economic advantage (Claim 4), and unfair competition
19 (Claim 6). For the reasons stated previously, the Court
20 conditionally grants Rino’s request for a new trial on those

21
22 ¹¹(...continued)
23 proof,” and promotes “efficiency in the trial court.” Zhang v.
24 Am. Gem Seafoods, Inc., 339 F.3d 1020, 1033-34 (9th Cir. 2003)
25 (citation and internal quotation marks omitted). The same notice
26 concerns are not present under Rule 59 because the Court must
27 independently assess the evidence and determine whether the
28 verdict is against the clear weight of the evidence (even if the
verdict is supported by substantial evidence), which is a
separate and distinct inquiry from Rule 50(b)’s inquiry into the
sufficiency of the evidence supporting the verdict. See Molski,
481 F.3d at 729 (Rule 59); Nitco Holding Corp. v. Boujikian, 491
F.3d 1086, 1089 (9th Cir. 2007) (Rule 50(b)).

1 claims under Rule 50(c)(1).¹² Freund v. Nycomed Amersham, 347
2 F.3d 752, 764 (9th Cir. 2003) (holding that "Rule 50(c) of the
3 Federal Rules of Civil Procedure requires a district court
4 granting a judgment as a matter of law also to rule on whether to
5 grant a new trial in the event the judgment as a matter of law is
6 reversed on appeal"); Jennings v. Jones, 499 F.3d 2, 21 (1st Cir.
7 2007) (holding that "Federal Rule of Civil Procedure 50(c)(1)
8 requires the district court to rule conditionally on [new trial]
9 motions in the event that the grant of judgment as a matter of
10 law is overruled on appeal").

11 **2. Rule 59(a): A New Trial is Warranted on Claim 2**

12 Falcon's second claim for false advertising concerns
13 Rino's alleged false advertising of water connector flow rates
14 and its UPC certification on one of its connectors. A false
15

16 ¹² In a trademark infringement action, the "likelihood of
17 confusion" analysis requires an assessment of the Sleekcraft
18 factors and other evidence as an "an adaptable proxy for consumer
19 confusion," Network Automation, 638 F.3d at 1145, 1153, which
20 presents somewhat of a challenge on a Rule 50(b) motion because
21 "weighing" the evidence is not permitted. Viewing the evidence
22 through the lens of a summary judgment motion is helpful: had
23 Rino brought a motion for summary judgment on whether Falcon
24 established a protectable ownership interest in its parts
25 numbers, or on whether Falcon could demonstrate a "likelihood of
26 confusion" for either claimed trademark (all of which Rino failed
27 to do), the Court would likely have granted it for the reasons
28 discussed above. Rules 50(b) and 56 both get at the same
evidentiary problem: when drawing all inferences in favor of the
nonmoving party, is there any evidence that would support a claim
(for Rule 56) or verdict (for Rule 50(b))? The jury verdict does
not change the legal conclusion that Falcon failed to establish
infringement -- a conclusion drawn from all admissible evidence.
However, in the event that the Court's Rule 50(b) analysis
impermissibly involved weighing evidence and assessing
credibility, a new trial is warranted under Rule 59. Molski, 481
F.3d at 729.

1 advertising claim under the Lanham Act requires proof that: (1)
2 Rino made a false statement about its own product or Falcon's
3 product; (2) the statement was made in a commercial advertisement
4 or promotion; (3) the statement actually deceived or has the
5 tendency to deceive a substantial segment of its audience; (4)
6 the deception is material, in that it likely will influence the
7 purchasing decision; (5) Rino caused its false statement to enter
8 interstate commerce; and (6) Falcon has been or likely will be
9 injured as a result of the false statement, either by direct
10 diversion of sales from itself to the defendant, or by a
11 lessening of goodwill associated with Falcon's product. Jarrow
12 Formulas, Inc v. Nutrition Now, Inc., 304 F.3d 829, 835 n.4 (9th
13 Cir. 2002).

14 To demonstrate falsity, Falcon must show that the
15 statement was literally false on its face or by necessary
16 implication, or that the statement was likely to mislead or
17 confuse consumers even if literally true. Southland Sod Farms v.
18 Stover Seed Co., 108 F.3d 1134, 1139 (9th Cir. 1997). To prove
19 literal falsehood, Falcon must do more than show that tests
20 supporting the challenged advertising claim are unpersuasive, but
21 rather demonstrate that the tests are not sufficiently reliable
22 to permit a reasonably certain conclusion that they established
23 the advertised claim. Id. This burden can be met by directly
24 attacking the validity of Rino's tests, showing those tests are
25 contradicted by other scientific tests, or showing that the tests
26 do not establish the advertising claim even if the tests are
27 reliable. Id. The publication of false comparative claims
28 "'gives rise to a presumption of actual deception and reliance.'"

1 Id. at 1146 (quoting U-Haul Int'l, Inc. v. Jartran, Inc., 793
2 F.2d 1034, 1040-41 (9th Cir. 1986)).

3 a. Water flow rates

4 Rino published an advertisement comparing its flow rate
5 to those of its competitors, including Falcon, Brasscraft, Watts,
6 LSP Aquaflow, and Braided (hereafter, "Rino's Flow-Rate Ad").

7 (Novello Trial Tr., Feb. 16, 2011, ECF No. 376, at 130:23-131:2;

8 Trial Ex. 6.) Rino's Flow-Rate Ad was entitled "RINO ULTRA FLOW-

9 King of the Jungle," and stated "Whether it's Copper, Braided or

10 Stainless no one exceeds RINO FLEX." (Id.) It also stated:

11 "RINO BEATS THE BIRD," and Rino's "flow rate 7.24 (GPM) Largest

12 ID on the market and still the most flexible hands down over the

13 competition!!" (Id.) The advertisement listed the following

14 information under "Comparison": "Rino Flex SWF 3/4[,] 3/4"OD =

15 .787"ID[,] 7.24GPM [¶] Falcon FF Models[,] 3/4"OD = .720"ID[,]

16 6.345GPM [¶] Brasscraft Copper[,] 3/4"OD = .665"ID[,] 5.412GPM

17 [¶] Watts Copper[,] 3/4"OD = .665"ID[,] 5.412GPM [¶] LSP Aquaflow

18 CSS[,] 3/4"OD = .625"ID[,] 4.78GPM [¶] Braided[,] 3/4"OD =

19 .47"ID[,] 2.703GPM."¹³ (Id. (emphasis on competitors added).)

20 Rino obtained its own flow rate information for its

21 connectors from a laboratory test in China. (Novello Trial Tr.,

22 Feb. 17, 2011, ECF No. 378, at 21:13-25.) Rino obtained the flow

23 rate information of the other connectors used in Rino's Flow-Rate

24 Ad, including Falcon's flow rate, from Falcon's website. (Id. at

25 23:5-19) Rino did not conduct laboratory tests directly

26

27

28 ¹³ "ID" stands for "inner diameter." "OD" stands for "outer diameter." "GPM" stands for "gallons per minute."

1 comparing the flow rate of Rino's connectors to the flow rate of
2 competitors' connectors under the same testing conditions. (Id.
3 at 23:5-24:20)

4 In August 2008, Falcon hired Garwood Laboratories to
5 conduct a comparison test of its water connectors with Rino's
6 water connectors. (Pender Trial Tr., Feb. 9, 2011, ECF No. 361,
7 at 22:25-23:4.) The test compared four of the two companies'
8 water connectors under standardized pressures, ambient
9 conditions, and time measurements. (Id.) The tests showed
10 Falcon's water connectors do not flow less water than Rino's
11 water connectors. (Id.)

12 This evidence is sufficient to support certain elements
13 of a false advertising claim, namely, that (1) Rino made a false
14 statement about Rino's and Falcon's flow rates; (2) the statement
15 was made in a commercial advertisement or promotion; (3) the
16 statement had the tendency to deceive a segment of its audience;
17 (4) the deception is material, in that it could influence a
18 purchasing decision; and (5) Rino caused its false statement to
19 enter interstate commerce. Jarrow Formulas, 304 F.3d at 835 n.4.
20 The jury could have concluded that the tests conducted by the
21 Chinese laboratory were not sufficiently reliable to support
22 Rino's claims made in its Flow-Rate Ad, and a presumption of
23 deception and reliance was warranted because Rino directly
24 compared its flow rates to Falcon's flow rates in the ad.
25 Southland Sod Farms, 108 F.3d at 1139. But, the jury's
26 conclusion that Falcon was injured as a result of Rino's Flow-
27 Rate Ad, either by direct diversion of sales to Rino or by a
28 lessening of goodwill associated with Falcon's product, as well

1 as the jury's damages award, is against the clear weight of the
2 evidence. Molski, 481 F.3d at 729.

3 When one company falsely compares itself or its product
4 to another, it is logical to presume injury and damages because
5 causation is direct. See U-Haul Int'l, Inc. v. Jartran, Inc.,
6 793 F.2d 1034, 1040-41 (9th Cir. 1986). In U-Haul, plaintiff
7 sued defendant for false advertising that compared the rental
8 trucks of the two companies. Id. at 1036. The advertisements
9 made claims such as: "Why rent a truck that may deliver only 5
10 mpg? Jartran guarantees you 10 mpg or more." U-Haul Int'l, Inc.
11 v. Jartran, Inc., 681 F.2d 1159, 1159 (9th Cir. 1982). The
12 appellate court held that a presumption of consumer reliance was
13 appropriate in the context of comparative advertising, and that
14 an appropriate measure of damages was based on plaintiff's
15 corrective advertising expenditures. U-Haul, 793 F.2d at 1041.
16 In non-comparative advertising contexts, presumptive damage
17 awards are improper when "numerous competitors participate in a
18 market" and when "the injury is likely to be slight." Harper
19 House, Inc. v. Thomas Nelson, Inc., 889 F.2d 197, 209 n.8 (9th
20 Cir. 1989) ("[E]ven if consumers are likely to suffer injury from
21 a defendant's deception about its own product, when advertising
22 does not directly compare defendant's and plaintiff's products,
23 when numerous competitors participate in a market, or when the
24 products are aimed at different market segments, injury to a
25 particular competitor may be a small fraction of the defendant's
26 sales, profits, or advertising expenses. Of course, large,
27 presumptive damage awards are improper in a situation where
28 injury is likely to be slight.").

1 Here, Rino's Flow-Rate Ad is an example of comparative
2 advertising because it explicitly refers to the flow rates of its
3 competitors. However, unlike the advertising in U-Haul that
4 involved a direct comparison between two competitors' products,
5 Rino's Flow-Rate Ad made comparisons to five other products.
6 Because other competitors are referenced in Rino's ad, "injury to
7 a particular competitor may be a small fraction of the
8 defendant's sales, profits, or advertising expenses." Id.
9 Falcon did not show why it is more deserving (or more damaged)
10 than any of the other competitors referenced in the ad.¹⁴
11 Awarding damages to Falcon in such circumstances would constitute
12 a windfall for Falcon.

13 More fundamentally, no evidence showed that plumbing
14 wholesalers or other consumers made purchasing decisions
15 principally, or even partially, based on a connector's water flow
16 rate. While there was some evidence that high flow rates are
17 generally desirable, (Ramirez Trial Tr., Feb. 9, 2011, ECF No.
18 370, at 84:6-8; Pask Trial Tr., Feb. 10, 2011, ECF No. 362, at
19 5:25-6:7), the principal driver of water connectors' sales is
20 price. Thus, any claimed injury based on flow rates was
21 undoubtedly "slight." Harper House, 889 F.2d at 209 n.8.

22 Even if there were evidence of diversion of sales or
23 loss of goodwill, the jury's award of damages lacks support. No
24

25 ¹⁴ Although the ad singles out Falcon with its statement
26 "RINO BEATS THE BIRD," the statement is plain puffery. Southland
27 Sod Farms, 108 F.3d at 1145 ("Puffing' is exaggerated
28 advertising, blustering, and boasting upon which no reasonable
buyer would rely and is not actionable under [Lanham Act] §
43(a).'" (quoting 3 J. Thomas McCarthy, McCarthy on Trademarks
and Unfair Competition § 27.04[4][d], at 27-52 (3d ed. 1994)).

1 evidence of corrective advertising expenditures was adduced. See
2 U-Haul, 793 F.2d at 1041 (noting propriety of basing damage award
3 on corrective advertising). As discussed in the Permanent
4 Injunction Order, Falcon's damages expert assumed all of Falcon's
5 lost sales were the result of anticompetitive activity.
6 (Permanent Injunction Order at 12.) He did not account for other
7 competitors in the market, nor did he apportion damages based on
8 specific aclaims.¹⁵ Taken alone, there is no reasonable basis
9 to conclude that an award of more than \$1 million in damages can
10 be based on Falcon's false advertising claims -- let alone Rino's
11 Flow-Rate Ad.

12
13
14 ¹⁵ As a general matter, the standard of proof required for
15 monetary damages may be regarded as higher than the standard for
16 an injunction. As one leading commentator put:

17 Since § 43(a) was passed to protect consumers
18 as well as competitors, the courts are not
19 and should not be reluctant to allow a
20 commercial plaintiff to obtain an injunction
21 even where the likelihood of provable impact
22 on the plaintiff may be subtle and slight.
23 Congressional policy appears to encourage
24 commercial firms to act as the fabled
25 "vicarious avenger" of consumer rights. An
26 injunction, as opposed to money damages, is
no windfall to the commercial plaintiff. An
injunction protects both consumers and the
commercial plaintiff from continuing acts of
false advertising. Money damages, on the
other hand, primarily aid only the
competitor, and he is required to satisfy a
much higher standard of proof as to injury in
order to recover damages.

27 Porous Media Corp. v. Pall Corp., 110 F.3d 1329, 1336 n.8 (8th
28 Cir. 1997) (quoting 3 J. Thomas McCarthy, McCarthy on Trademarks
and Unfair Competition § 27.04[3][d], at 27-48 (3d ed. 1996)).

1 b. UPC certification

2 In December of 2008, Rino's 1 by 18 inch connector was
3 found not compliant with ASME's minimum wall-thickness
4 requirement. (Moinian Trial Tr., Feb. 14, 2011, ECF 366, at
5 20:9-21:23, 71:18-22.) Rino's SWF 118 connector was delisted as
6 of January 12, 2009. (Id.) After its SWF 118 connector was
7 delisted, Rino did not recall ads that listed the SWF 118
8 connector and contained the UPC symbol and/or stated that it met
9 ASME requirements. (Novello Trial Tr., Feb. 16, 2011, ECF No.
10 376, at 116:5-16.) On Rino's web page that listed available
11 connectors, it continued to list the SWF 118 connector as one of
12 approximately 14 connectors while displaying the UPC shield.
13 (Id.) However, there is no evidence that Rino advertised its SWF
14 118 connector with the UPC shield or meeting ASTM A112.18.6 after
15 the SWF 118 was delisted while simultaneously comparing it to
16 Falcon's 1 by 18 inch water connector, nor is there evidence
17 that, after delisting, Rino referenced Falcon in the same
18 advertisements in which it listed the SWF 118 connector.
19 According to Falcon, Rino's non-compliance with IAPMO was harming
20 Falcon's business "because we [Falcon] make corrugated stainless
21 steel and they [Rino] were making corrugated stainless steel . .
22 ., and it could be damaging to our reputation as making a similar
23 product." (Wolff Trial Tr. at 37:14-18.)

24 The foregoing evidence was insufficient to support a
25 false advertising claim. There is no presumption of injury
26 absent comparative advertising. See Nat'l Prods., Inc. v.
27 Gamber-Johnson LLC, 699 F. Supp. 2d 1232, 1241 (W.D. Wash. 2010)
28 (stating that "deliberate falsity yields a presumption of

1 consumer deception in cases of non-comparative advertising and a
2 presumption of consumer deception and injury in cases of direct
3 comparative advertising"); Harper House, 889 F.2d at 209 n.8.
4 Even if Rino's statements about its UPC certification for one
5 connector were false, Falcon did not produce any evidence of
6 injury because there was no evidence of comparative
7 advertising.¹⁶ Instead, the genesis of Falcon's claim seemingly
8 stems from the belief that Rino's non-compliance with IAPMO was
9 harming Falcon's business "because we [Falcon] make corrugated
10 stainless steel and they [Rino] were making corrugated stainless
11 steel, and it could be damaging to our reputation as making a
12 similar product," (Wolff Trial Tr. at 37:14-18), or that Falcon
13 was harmed by being forced to meet Falcon's prices when one of
14 Falcon's connectors was delisted. (Pl.'s Opp'n at 24-25.)
15 Because neither basis involves comparative advertising, a new
16 trial should be granted.

17 **3. Rule 59(a): A New Trial is Warranted on Claim 5**

18 Falcon's claim for trade libel/product disparagement
19 concerns Rino's Flow-Rate Ad and UPC certification. Falcon was
20 required to show that (1) Rino published a statement that (2)
21 tended to disparage Falcon's product, (3) which was provably
22 false, and that (4) Rino acted with knowledge of, or with
23 reckless disregard for, the statement's falsity, and that (5) the
24 statement caused specific pecuniary damage to Falcon. Atl. Mut.

25
26 ¹⁶ Even if there were evidence of comparative advertising, a
27 new trial would be warranted because any injury to Falcon would
28 be slight given numerous other market participants -- each of
whom could claim that they were injured in the same way Falcon
was allegedly injured.

1 Ins. Co. v. J. Lamb, Inc., 100 Cal. App. 4th 1017, 1035 (2002)
2 (quoting Nichols v. Great Am. Ins. Cos., 169 Cal. App. 3d 766,
3 773 (1985)). For the reasons stated previously concerning
4 Falcon's claim for false advertising on Rino's Flow-Rate Ad and
5 UPC Certification, the Court finds that the jury's finding of
6 pecuniary damage to Falcon was against the clear weight of the
7 evidence.

8 **4. Rule 59(a): A New Trial is Warranted on All**
9 **Claims**

10 Upon further consideration of the evidence submitted at
11 trial and the parties' post-judgment motions, the Court concludes
12 that a new trial is warranted to prevent a miscarriage of justice
13 due to erroneous rulings on objections previously made and
14 preserved by defendants: the Court denied Rino's request for a
15 jury instruction on the legality of copying Falcon's unpatented
16 water connectors in China, and the Court omitted Rino's
17 affirmative defense of unclean hands on the revised verdict form.
18 Molski, 481 F.3d at 729.

19 a. Rino's requested jury instruction on right to copy
20 unpatented products

21 Rino requested the following jury instruction: "A
22 company has the legal right to imitate, manufacture and sell
23 substantially similar copies or imitations of products which are
24 not protected by U.S. patents and which are generally available
25 in the market." (Defs.' Objections to Pl.'s Proposed Jury
26 Instructions and Defs.' Proposed Jury Instructions, Nov. 8, 2010,
27 ECF No. 308, at 15-16 (citing Bonito Boats, Inc. v. Thunder Craft
28 Boats, Inc., 489 U.S. 141, 152, 157, 164 (1989)).)

1 Rino's requested instruction was rejected because
2 copying Falcon's product *per se* was not an issue in the case. In
3 retrospect, it seems probable that this non-issue -- Rino's
4 copying of Falcon's connectors in China, which Falcon described
5 as "knocking them off" -- impermissibly became an issue to the
6 jury.¹⁷ If the jury came to believe that taking Falcon's product
7 to China for exact reproduction was contrary to law, then the
8 verdict is contrary to law. Rino's instruction is a correct
9 statement of the law, and, in light of the full trial record, it
10 should have been given. Clem v. Lomeli, 566 F.3d 1177, 1181 (9th
11 Cir. 2009) ("Each party is . . . entitled to an instruction about
12 his or her theory of the case if it is supported by law and has
13 foundation in the evidence." (citation and internal quotation
14

15 ¹⁷ Not accidentally, Falcon's first subheading under
16 "Relevant Factual and Procedural History" in its motion for
17 attorneys' fees is entitled: "DEFENDANTS INTENTIONALLY INFRINGE
18 FALCON'S MARKS BY TAKING FALCON'S CONNECTORS TO CHINA AND KNOCK
19 THEM OFF, BADLY." (Pl.'s Mot. for Attorneys' Fees at 1.) Again,
20 an example from Falcon's combined opposition: "In commencing
21 their illicit competition, Defendants admitted to taking Falcon
22 connectors to China and having them knocked-off." (Pl.'s Opp'n
23 at 1.) Although it is clear as a matter of law that there is no
24 connection between Falcon's trademark claims and Rino's copying
25 of the connectors, it seems likely that this disconnect might not
26 have been clear as a factual matter to the jury. At trial,
27 Falcon's counsel played up the fact that Rino made copies of
28 Falcon's connectors in China. In Falcon's closing argument, for
example, counsel stated: "I think that at the end of day if the
defendants are willing to go out and badly knock off Falcon
products to get into business I don't see any reason why they
wouldn't be willing to badly knock off Falcon product to protect
their business." (Trial Tr., Feb. 22, 2011, ECF No. 392, 40:19-
23.) Counsel's statements may fall short of outright misleading
the jury, but the Court did not fully appreciate how such
improper insinuations might affect the jury in its deliberations
(e.g., that someone who would "knock off" products in China would
also commit infringement and the other wrongs alleged).

1 marks omitted)); Murphy v. City of Long Beach, 914 F.2d 183, 187
2 (9th Cir. 1990) ("It is equally clear that erroneous jury
3 instructions, as well as the failure to give adequate
4 instructions, are also bases for a new trial.")

5 b. Rino's affirmative defense of unclean hands was
6 entitled to a jury finding

7 The special verdict form originally proposed by the
8 parties was long and confusing. After the jury indicated its
9 deadlock, the Court replaced the parties' special verdict form
10 with a general verdict form. In so doing, space for a finding on
11 Rino's affirmative defense of unclean hands was not included.
12 Where the original agreed-upon verdict form allowed for a finding
13 on this issue, and defendants had relied on the defense during
14 their case, the substituted general verdict should have provided
15 for a jury finding on this issue. Because it did not, a new
16 trial is warranted. Cf. Lattimore v. Polaroid Corp., 99 F.3d
17 456, 468 (1st Cir. 1996) (holding that an erroneous general or
18 special verdict form may be grounds for a new trial).

19 **C. Conclusion on Defendants' Motion for New Trial**

20 Under Rule 50(c)(1), the Court, in the alternative to
21 judgment as a matter of law, conditionally grants Rino's request
22 for a new trial on Claims 1, 3, 4, and 6. Fed. R. Civ. P.
23 50(c)(1). Under Rule 59(a), the Court grants a new trial on
24 Falcon's claims for false advertising and trade libel/product
25 disparagement because the verdict was against the clear weight of
26 the evidence. Fed. R. Civ. P. 59(a). The Court also grants a
27 new trial on all claims to prevent a miscarriage of justice for
28 reasons previously stated.

1 IV.

2 PLAINTIFF'S MOTION FOR ATTORNEYS' FEES

3 A. Legal Standard

4 In a Lanham Act lawsuit, "[t]he court in exceptional
5 cases may award reasonable attorney fees to the prevailing
6 party." 15 U.S.C. § 1117(a). A Lanham Act case is "exceptional"
7 where the court finds that the defendant acted maliciously,
8 fraudulently, deliberately, or willfully. Earthquake Sound Corp.
9 v. Bumper Indus., 352 F.3d 1210, 1216 (9th Cir. 2003). The
10 district court must specifically state the reasons for its
11 decision to award attorney fees. Water Co. v. Liu, 403 F.3d 645,
12 656-57 (9th Cir. 2005) (quoting Mattel, Inc. v. Walking Mountain
13 Products, 353 F.3d 792, 815 (9th Cir. 2003)).

14 B. Discussion

15 Because judgment is now granted to Rino on four of
16 Falcon's six claims, and a new trial is ordered on Falcon's
17 remaining two claims for false advertising and trade libel (as
18 well as conditionally to all other claims), Falcon is not
19 entitled to fees because it is not a prevailing party.¹⁸

20
21 ¹⁸ Brief comment on certain of the litigation misconduct in
22 Falcon's motion is due. In the Court's view, Mr. Novello's
23 testimony regarding the so-called "spoliation" of evidence was
24 credible. Rino was not a complex operation, and its principals
25 were not particularly sophisticated business managers. While Mr.
26 Novello and Mr. Rieger should have kept every scrap of paper once
27 the lawsuit began, and it is proper for the jury to draw the
28 inference that they intentionally did not do so, it seemed quite
believable that these salesmen were running a shoe-string
operation with little concept of record-keeping. As for Mr.
Novello's declaration submitted under penalty of perjury, it is
inexcusable. But, after hearing all the evidence about how
plumbing wholesalers care more about prices and pipe dimensions
than who the seller is, one can see how Rino's first attorney got

(continued...)

v.

CONCLUSION

Accordingly, for the foregoing reasons, the Court grants Defendants' Renewed Motion for Judgment as a Matter of Law, grants Defendants' Motion for New Trial, and denies Plaintiff's Motion for Attorneys' Fees.

The Clerk shall serve this Order on counsel for all parties in this action.

IT IS SO ORDERED.

Dated: October 21, 2011.

ALICEMARIE H. STOTLER

ALICEMARIE H. STOTLER
UNITED STATES DISTRICT JUDGE

¹⁸(...continued)

the picture wrong in drafting the Novello declaration that stated Ferguson demanded the numbering system. Although inexcusable, it is at least understandable how Mr. Novello wore weary of reading various drafts of declarations and signed off on the last one. The misstatement was harmless, in any event, because there were numerous other grounds on which to deny a preliminary injunction on Rino's use of parts numbers, as discussed at length herein.