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BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91164265
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Consolidated Proceeding:

In re Application Serial No. 76/512,629 – "NITRO"
Published: October 12, 2004

In the matter of Trademark Registration No. 2931393
For the mark: "NITRO RACING"
Date Registered: March 8, 2005

LLOYD LIFESTYLE LIMITED and LLOYD IP LIMITED; and VSJ LIMITED, Opposers/Petitioners, v. SOARING HELMET CORPORATION, Applicant/Respondent.	Opposition No.: 91164265 Cancellation No.: 92045075

OPPOSERS/PETITIONERS' REPLY BRIEF

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I. INTRODUCTION

Applicant/Respondent Soaring Helmet Corporation ("Soaring Helmet") claims, in a nutshell, that it is entitled to register the "Nitro" mark and to maintain the registration of the "Nitro Racing" mark because it was the first to use the marks in the United States. To make this argument, Soaring Helmet tries to wish away the dispositive fact that, as a controlled licensee of the "Nitro" and "Nitro Racing" marks (the "Nitro Marks"), its first use inured to the benefit of Opposers/Petitioners (the "Lloyd Group"), as licensor. That the parties' relationship was in fact a licensing relationship is supported by a mass of contemporaneous documents as well as by the conduct of the parties. Unable to explain away this objective, contemporaneous evidence, Soaring Helmet instead relies on the uncorroborated, contradictory and self-serving testimony of Mr. Xu and Ms. DeMund (its principals) to concoct a facially implausible and internally inconsistent "story" that is contradicted by the parties' contemporaneous written communications. Critically, even Soaring Helmet's implausible version of events concedes, as it must, that it acquired the right to use the Nitro Marks through an oral agreement with the Lloyd Group.

Soaring Helmet claims that it is nonetheless entitled to use the Nitro Marks in the United States for free and forever, without any restriction, because (it alleges) Mr. Lloyd told Mr. Xu that the Lloyd Group "had no interest in" or "did not care about" the U.S. market. See, e.g., Soaring Helmet's Trial Brief ("SHC Br.") at 15-17. At the beginning of these proceedings, Soaring Helmet asserted that Mr. Lloyd simply gave away the valuable Nitro Marks for free and forever, notwithstanding the already smashing success of the Nitro Marks in the world marketplace and the Lloyd Group's enormous investment of money, time and effort to develop, design, supervise the manufacture of, and market products under the Nitro Marks (the "Nitro Products").[1]

As if realizing that this "story" is simply too incredible to be believed, in deposition Mr. Xu for the first time claimed that Mr. Lloyd agreed to "disavow" any interest in the U.S. market because the

[1] See Soaring Helmet's Answer to First Interrogatory #4 ("Soaring Helmet confirmed the absence of prior use by others through the assurance of Opposer, who represented to Soaring Helmet that it would not use the trademark NITRO in the United States"); Soaring Helmet's Answer to Second Interrogatory #4 (same with respect to Nitro Racing).

Lloyd Group was "caught" secretly using Soaring Helmet's helmet designs and graphics in manufacturing Nitro helmets in MHR's factory in China. See, e.g., SHC Br., 16, 51. Soaring Helmet claims that the parties agreed that each could use and register the other's trademark in their respective jurisdictions (i.e., Soaring Helmet to register the Nitro Marks in the U.S. in its own name, and the Lloyd Group to register Soaring Helmet's Vega mark in Europe in its own name). Xu Tr., 151, 223-26; DeMund Tr., 50, 118; see also SHC Br., 16. Soaring Helmet further claims the parties agreed that they could assign the trademarks back to the other, but only on the condition that the assignor be granted a perpetual, free and exclusive license. Xu Tr., 151, 223-26; see also SHC Br., 43.

As set forth below, aside from the fact that these important new details were mysteriously omitted from Soaring Helmet's interrogatory answers, the story as supplemented is still not credible, as it is either directly contradicted by the evidence in the record (including, in some instances, by Mr. Xu or Ms. DeMund's own testimony), wholly unsupported by the evidence (contemporaneous or otherwise), or nonsensical.

II. THE ISSUES IN DISPUTE

While Soaring Helmet's overall version of events is implausible, it is sufficient to defeat Soaring Helmet's registration that the record clearly establishes that Soaring Helmet's first use in the United States was for the benefit of the Lloyd Group because Soaring Helmet was the Lloyd Group's controlled licensee. Accordingly, the issues in dispute are: (A) Whether there was an oral agreement between the parties? (B) Whether the oral agreement was a license agreement? and (C) Whether the license agreement was a controlled license?

After consideration of the threshold issue of standing, see Point III, below, the Lloyd Group demonstrates below that the record clearly establishes each of these three dispositive questions must be answered in the affirmative. See Points IV.A-C, below.

III. THE LLOYD GROUP HAS STANDING.

Soaring Helmet fails in its half-hearted attempt to dispute the Lloyd Group's standing "because its clear lack of interest in the U.S. market precludes it from claiming it will sustain any damage as a

result of Soaring Helmet's registration and use of the marks in the U.S." SHC Br., 28. The obvious problem with Soaring Helmet's standing argument is that it is completely circular, taking as its premise the assumed conclusion that it will prevail on the issue of ownership of the Nitro Marks. Of course, ownership of those marks is precisely what is in dispute!

In any case, Soaring Helmet is wrong that the Lloyd Group lacks an interest in the U.S. market. Standing is a "threshold inquiry" and is not about the merits of the case. Lloyd Op. Br., 24. The Lloyd Group need only show that it is not merely a "gratuitous interloper or a vicarious avenger of someone else's rights". Id. By claiming that it is the true owner and licensor of the Nitro Marks in the United States, the Lloyd Group has certainly made such a showing. That the Lloyd Group did not plan to market its products in the United States directly does not establish a lack of interest in the United States, but rather establishes a motive for entering the market, as it did, through a licensee.

Soaring Helmet's standing argument relies on facially inapplicable authority. In particular, Soaring Helmet cites Havana Club Holding, S.A. v. Galleon, S.A., 203 F.3d 116, 53 U.S.P.Q.2d 1609 (2d Cir. 2000), for the proposition that even "if the Lloyd Group intended in the future to enter the U.S. market, such intent is too speculative to confer standing". SHC Br., 27. Not only is this assertion factually inapposite – since the Lloyd Group claims not only that it intended to enter the U.S. market but that it took steps to do so through Soaring Helmet as licensee – but Havana Club is legally irrelevant, as its holding is limited to false advertising claims under Section 43(a) of the Lanham Act. Havana Club, 203 F.3d at 130. Indeed, Havana Club specifically distinguished the standing issues presented by case law relating to trademarks. Id., 132 ("However, Paddington and the other cases HCI cites are inapposite because they involve trademark claims, not false advertising claims").

IV. SOARING HELMET WAS A CONTROLLED LICENSEE OF THE LLOYD GROUP.[2]

A. It is Undisputed That There was an Oral Agreement Between the Parties.

Even under Soaring Helmet's implausible version of events, the parties did reach an oral agreement allowing the use of the Nitro Marks in the United States. While the parties disagree about the terms of that agreement, Soaring Helmet's recognition that it needed some form of agreement before it could use the Nitro Marks is overwhelming evidence that the Lloyd Group had an ownership interest in the Nitro Marks with respect to the United States, and that Soaring Helmet understood this. Otherwise, Mr. Xu would not have needed to engage in discussion with Mr. Lloyd at all. Soaring Helmet could simply have started marketing its own Nitro helmets.

Mr. Xu's testimony shows that he clearly understood that the Lloyd Group owned the Nitro Marks and that he needed agreement from the Lloyd Group to authorize his use of the marks:

> "We had agreement -- basically, we had an oral agreement. They use our helmet and our design, our graphics. I use their design, their jacket, their name . . ." Xu Tr., 141.
>
> "[Mr. Lloyd] said, look, I have no interest in the US market, and you can take this product, sell in the US market. For exchange, he take [sic] our helmets and the graphic designs". Id. at 65.
>
> "Then I said if you -- if you let me use those and -- jackets and boots, I will let you use the helmet and the graphics". Id. at 79.
>
> "They [Lloyd Group] told us they will trademark Vega and we can trademark Nitro in the United States. Then once we're done, we swap, or if we wanted, for one or $10.00. That's our agreement. For lifetime uses." Id. at 151.
>
> "The agreement is he [Mr. Lloyd] trademark [sic] Vega. Okay. We trademark Nitro in the United States . . . And if we work out good, then we can assign back to each other. Okay. He can then assign to us for lifetime use $10 a year. We assign to them lifetime use $10 a year. That's our agreement". Id. at 223.

See also SHC Br., 16 (quoting Xu's description of "our original deal"); 22-23 (arguing that the Lloyd Group's proposed written license agreement "differed from the previous understanding").

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[2] Soaring Helmet makes the puzzling claim that "the Lloyd Group has now conceded that Soaring Helmet did not make false statements" with respect to its Nitro Marks applications. SHC Br., 51. To the contrary, Soaring Helmet's Nitro Marks applications were knowingly false because the Lloyd Group is the owner of the Nitro Marks in the United States.

B. The Oral Agreement was a License Agreement.

1. The evidence in the record overwhelmingly supports the existence of an oral license agreement.

The following record evidence overwhelmingly establishes that the agreement between the parties was in fact an oral license agreement:

a. It is undisputed that Soaring Helmet sought an oral agreement between the parties before making use of the Nitro Marks. See Point IV.A, above.

b. Mr. Lloyd testified that the parties agreed to a license agreement. See Lloyd Op. Br., 13-14, 31.

c. It is undisputed that Soaring Helmet used the Nitro Marks, and the Nitro logos and product packaging, developed by the Lloyd Group, in connection with the Nitro Products sold in the United States. See Lloyd Op. Br., 12.

d. It is undisputed that Soaring Helmet in fact purchased Nitro Products from the Lloyd Group's authorized manufacturers in China (Soaring Helmet purchased helmets from MHR, and clothing and boots from the Lloyd Group's authorized suppliers). See Lloyd Op. Br., 13-14; see also SHC Br., 35; Xu Tr., 179-80; DeMund Tr., 56-57, 65. In fact, Soaring Helmet has never purchased Nitro clothing and boots from suppliers other than the original two suppliers initially authorized by Mr. Lloyd.[3] Xu Tr., 180.

e. The contemporaneous, written correspondence between the parties support the existence of an oral license agreement and directly refute Soaring Helmet's implausible story. For example, these writings show that Soaring Helmet agreed to the assignment of the Nitro trademark applications back to the Lloyd Group without any license-back condition or any other conditions. See Exhs. 15, 17. They also show that Soaring Helmet requested a written exclusive license agreement from the Lloyd Group. See Lloyd Op. Br., 33-36; see also Exhs. 15-18. Soaring Helmet also forwarded to the Lloyd Group draft license agreements from its attorneys, which expressly state, among other things, that the Lloyd Group is the owner of the Nitro Marks. See Lloyd Op. Br., 20; see also Exh. 22. These admissions are powerful evidence that Soaring Helmet itself recognized the Lloyd Group's ownership interest in the Nitro Marks and that Soaring Helmet was a mere non-exclusive licensee.

f. Soaring Helmet's awareness that it was a mere licensee of the Nitro Marks is also evidenced by its secretive attempt to register the Nitro Marks in its own name without telling the Lloyd Group. See Lloyd Op. Br., 14-15, 32; see also Hank Thorp, Inc. v. Minilite, Inc., 474 F.

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[3] Soaring Helmet makes much of the fact that it is now manufacturing Nitro helmets through a Chinese company wholly owned by Mr. Xu. SHC Br., 35. Soaring Helmet's reliance on its own violation of the parties' license agreement proves nothing. By the time Soaring Helmet started manufacturing Nitro products itself, rather than buying them from the Lloyd Group's suppliers, the parties were already in the midst of a dispute concerning ownership of the Nitro Marks. See Xu Tr., 43, 46 (Soaring Helmet started manufacturing Nitro helmets in Mr. Xu's factory at the end of 2004); see also Exhs. 16, 17 (demanding return of Nitro Marks in December 2003); Lloyd Op. Br., 22 (by the end of 2004, after endless and fruitless discussions with Mr. Xu, Mr. Lloyd was fed up with Mr. Xu's giving him the "runaround"). By that time, of course, it was too late for Soaring Helmet to retroactively acquire ownership of the marks by its unilateral (and secret, see Xu Tr., 294) decision to manufacture Nitro helmets.

Supp. 228, 238, 205 U.S.P.Q. 598 (D. Del. 1979) (from events leading up to registration and secrecy with which respondent sought to register mark, court inferred that respondent "knew his company did not own the United States right" to the mark). See Point IV.B.3. below.

2. Soaring Helmet fails to undermine the effect of its many written admissions that the Lloyd Group owned the Nitro Marks.

Soaring Helmet attempts to avoid the clear implication of its own December 2003 emails promising to transfer the Nitro trademark applications to the Lloyd Group by recasting its unconditional promises as merely an offer to assign the Nitro applications contingent on "reaching a larger agreement" that "also gave Soaring Helmet the exclusive right to keep using the mark without cost". SHC Br., 43-44. This argument is nothing more than a retroactive attempt to rewrite its own emails. See Exhs. 15, 17.

First, though Soaring Helmet now tries to link its promise to return the Nitro marks to a further agreement that Soaring Helmet could "keep using the mark without cost", the email it relies upon (see SHC Br. at 43) says nothing of the kind:

> Mark Jordan, our attorney, received a letter from your attorney, requesting that the "Nitro" trademark application we started be assigned to you. Of course we will arrange for that. We would like to develop an agreement between our companies that we can be the exclusive authorized [sic] for use of the "Nitro" brand name in the U.S..[sic] If you agree in principle, we will ask Mark to draft an an [sic] initial proposal. Please let me know if we can proceed with this.

Exh. 17. Mr. Xu's email in no way suggests the two issues are linked. To the contrary, his promise to assign the marks is unconditional ("Of course we will arrange for that"), while his suggestion that the parties discuss a further agreement is expressly conditional ("We would like"; "If you agree in principle"; "an initial proposal"; "Please let me know if we can proceed"). Moreover, the email acknowledges that the further agreement on Soaring Helmet's becoming the Lloyd Group's exclusive authorized distributor for the Nitro Marks was subject to "develop[ment]" and to the Lloyd Group's consideration of an "initial proposal". This language contemplates a genuine negotiation in which both parties exchange benefits and obligations, not (as Soaring Helmet would now recharacterize it) a one-sided acquiescence by the Lloyd Group in Soaring Helmet's "exclusive right to keep using the mark without cost".[4]

[4] Tellingly, when Mr. Xu was first shown this email (Exh. 17) in deposition, he denied writing it and claimed that Ms. DeMund wrote it -- in a transparent effort to distance himself from the glaring admissions contained therein. In

Second, Soaring Helmet's version of events is contradicted by the draft Nitro License Agreement prepared by its own attorneys. As an initial matter, Soaring Helmet's draft *expressly admits* that the Lloyd Group owns the Nitro Marks. Exh. 22 at SHC 00207, 00208. Likewise, Mr. Xu described the nature of the agreement as "[Lloyd] *gets the mark back*". Xu Tr. at 276 (emphasis added). Soaring Helmet's draft agreement also provides that Soaring Helmet's right to use the Nitro Marks will lapse and revert to the Lloyd Group upon Soaring Helmet's insolvency or material breach, or by consent, Exh. 22 at SHC 00208-09, as well as imposing other duties and restrictions on Soaring Helmet, including a duty to maintain quality control, to notify of infringements, to indemnify, to protect proprietary information, and to assign the agreement only under certain conditions, id. at SHC 00208-11. Quite simply, Soaring Helmet cannot explain why it would agree to *any* obligations or restrictions if, as it now claims, it was really the owner of the Nitro Marks in the United States.

Third, while Soaring Helmet argues that the Lloyd Group's trademark attorneys' letters from December, 2003 to March, 2004, were merely "unilateral assertions by counsel", SHC Br., 44, it is highly probative that these so-called "unilateral assertions" were never disputed by Soaring Helmet, even though Soaring Helmet was represented by counsel at the time (in fact, one of the law firms representing it in these proceedings) and had ample opportunities to disagree, see Lloyd Op. Br., 34, and even though the assertions Soaring Helmet acquiesced in are diametrically opposite to what Soaring Helmet now asserts as its litigation position about the parties' agreement.[5] Indeed, it is black-letter law that "if a party receives

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later testimony, Mr. Xu changed his prior testimony and stated that he could not remember who drafted it. This change of testimony occurred only after Ms. DeMund convincingly testified she did not write it. Compare DeMund Tr., 148-51 to Xu Tr., 277-79; Xu Tr. II, 37-41.

[5] Soaring Helmet's contemporaneous writings also fail to say anything about the Vega mark, which it now claims the Lloyd Group agreed to register in its own name in Europe as part of a larger agreement whereby Soaring Helmet was allowed to register the Nitro Marks in its own name in the United States. SHC Br., 19. As explained in the Opening Brief, the Lloyd Group only registered the Vega mark in Europe, in December 2003, to gain leverage in light of Soaring Helmet's misappropriation of the Nitro Marks, and the Lloyd Group repeatedly offered to assign the Vega registration back to Soaring Helmet upon confirmation that Soaring Helmet had assigned the Nitro applications in the United States to the Lloyd Group. Lloyd Op. Br., 17 n.12; see also Exh. 16, 18, 20 (offering to assign Vega application to Soaring Helmet). The timing of the parties' respective registrations supports Mr. Lloyd's testimony, rather than Mr. Xu's. Soaring Helmet filed the Nitro applications in May 2003. SHC Br., 18. The Lloyd Group filed the Vega application in Europe in December of 2003, after it came to the Lloyd Group's attention that Soaring Helmet had secretly registered the Nitro marks in its own name. Lloyd Op. Br., 15-16. Mr. Xu's testimony

a letter containing several statements, which he or she would naturally deny if untrue, and states a position as to some of the statements but fails to comment on the others, this failure will usually be received as evidence of an admission to those omitted". K. Broun, *et al.,* McCormick on Evidence § 262 (5th ed. 1999); accord Hellenic Lines Ltd. v. Gulf Oil Corp., 340 F.2d 398 (2d Cir. 1965) (oral contract demonstrated by plaintiff's letter referring to oral agreement and defendant's response days later failing to dispute existence of oral agreement).

3. Soaring Helmet's explanations about its secret Nitro trademark applications are unconvincing.

Mr. Xu claims that Mr. Lloyd "suggested" to him that Soaring Helmet register the Nitro Marks in Soaring Helmet's name, rather than in Lloyd Group's name. Xu Tr., 205-06. That claim is not only directly contradicted by Mr. Lloyd's testimony (Lloyd Op. Br., 14), but is also unsupported by any documentary evidence. Moreover, Soaring Helmet's admission that it was told by Mr. Lloyd to file the Nitro applications makes no sense in the context of Soaring Helmet's own story. If, as Soaring Helmet claims, the Lloyd Group had absolutely no interest in the Nitro Marks, Mr. Lloyd would not have told Mr. Xu to file anything.

In addition, the record shows that the parties agreed that the Lloyd Group would pay for the costs of the trademark applications, which supports Mr. Lloyd's testimony that the applications were to be in the Lloyd Group's name. See Lloyd Tr., 167-68 (Lloyd Group agreed to pay for trademark applications in Mr. Lloyd's initial conversation with Mr. Xu); see also Exh. 16 (letter from the Lloyd Group's counsel confirming that the Lloyd Group would reimburse Soaring Helmet for costs incurred for applications, an assertion Soaring Helmet never objected to or disagreed with); Xu Tr., 276 (admitting that Mr. Lloyd would pay for the costs of the applications); DeMund Tr., 127-28 (at the time of reading Exhibit 16, Ms. DeMund did not recall thinking any statement in it was false), 159 (Ms. DeMund not "particularly anxious" to be reimbursed by the Lloyd Group for costs of applications, as costs were not significant).

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is simply not credible, because (i) the Lloyd Group never used, and never intended to keep, the Vega mark in Europe; and (ii) the Lloyd Group did not register the Vega mark until seven months after the purported agreement to register each other's marks.

Soaring Helmet also disingenuously argues that since the trademark applications were public filings, they were not done in secret. SHC Br., 18. Obviously, "secret" in this context means without disclosure to the Lloyd Group. While Soaring Helmet claims that there is no evidence that it registered the marks secretly (SHC Br. at 34), it is undisputed that Soaring Helmet did not tell the Lloyd Group that it had registered the marks in its own name rather than in the name of the Lloyd Group. Lloyd Tr., 128; DeMund Tr., 106-07. Since it is also undisputed that Mr. Lloyd asked Soaring Helmet to file the applications (though it is disputed for whom these applications were to be filed), the obvious reason that Soaring Helmet failed to forward copies of the applications to the Lloyd Group was to conceal their contents, i.e., Soaring Helmet's false claim that it owns the Nitro Marks. It is likewise undisputed that, when the Lloyd Group discovered the applications, it promptly demanded that they be assigned back to it, and that Soaring Helmet agreed. For example, on December 9, 2003, the Lloyd Group's trademark attorneys wrote to Soaring Helmet's lawyers that Soaring Helmet "filed the above-referenced Applications on our client's behalf" and requested that they prepare an appropriate assignment (Exh. 16). Neither Soaring Helmet nor its lawyers disputed the claim that the applications were filed on the Lloyd Group's behalf. To the contrary, Mr. Xu wrote back the next day and agreed unequivocally, "Of course we will arrange for that." (Exh. 17.) Revealingly, Mr. Xu described the application as "the 'Nitro' trademark application we started", not as "our 'Nitro' trademark application" (id.).

Soaring Helmet also argues that it took actions "most consistent with the understanding that it was not a licensee", including filing the trademark applications in its own name, investing in designs and a distribution network, and importing "large quantities of goods bearing the marks". SHC Br., 42. Soaring Helmet's reliance on its trademark application obviously fails because the applications were filed in secret. Likewise, the fact that Soaring Helmet invested in the Nitro Marks and imported large quantities of goods does not by itself support the contention that Soaring Helmet was not acting as a licensee. In fact, it indicates the opposite, when combined with Soaring Helmet's secret registration. See Hank Thorp, 474 F. Supp. at 248 (finding distributor did not own mark where, as its investments in the mark grew, it secretly registered the mark in its own name to gain more security for its investments).

4. Soaring Helmet's argument that there must be royalty provisions in a license agreement is simply wrong.

Soaring Helmet seems to argue, without citing any authority, that its oral agreement with the Lloyd Group could not have been a license because the parties did not agree on provisions for royalty payments. See, e.g., SHC Br., 41. The law is clear that the existence of a license agreement does not depend on whether there is a royalty provision. See, e.g., Bunn-O-Matic Corp. v. Bunn Coffee Serv., Inc., 88 F. Supp. 2d 914, 921, 54 U.S.P.Q.2d 1012 (C.D. Ill. 2000) (royalty-free written license); Univ. Book Store v. Univ. of Wisc., 33 U.S.P.Q.2d 1385, 1401-02 (T.T.A.B. 1994) (royalty-free oral license); John Anthony, Inc. v. Fashions by John Anthony, Inc., 209 U.S.P.Q. 517 (T.T.A.B. 1980) (royalty-free oral license); Council of Better Bus. Bureaus, Inc. v. Better Bus. Bureau of S. Florida, Inc., 200 U.S.P.Q. 282 (T.T.A.B. 1978) (royalty-free oral license); Pneutek, Inc. v. Scherr, 211 U.S.P.Q. 824, 830 (T.T.A.B. 1981) (written license agreement with nominal royalty fee of $1); Basic Inc. v. Rex, 167 U.S.P.Q. 696 (T.T.A.B. 1970) (royalty-free oral license).

Likewise unavailing is Soaring Helmet's attempt to link the 12.5% commission that the Lloyd Group charged its clothing and boot manufacturers to the absence of royalty payments. SHC Br., 36-37, 41. According to Soaring Helmet's flawed logic, the existence of a "secretive" 12.5% commission somehow evidences the lack of a license agreement, SHC Br., 41. The existence of the commission does not lead to the conclusion that there was no license agreement. Indeed, the commissions were simply a business arrangement between the Lloyd Group and its manufacturers, and there is nothing sinister about keeping such commissions confidential, as the Lloyd Group did not want unauthorized persons, such as other suppliers or its own staff, to find out about such sensitive business terms. Lloyd Tr., 236-39.

5. Soaring Helmet's claim that the Lloyd Group disavowed ownership of the Nitro Marks makes no business sense.

Soaring Helmet's claim that the Lloyd Group "disavowed" any interest in the Nitro Marks in the United States in exchange for being allowed to use Soaring Helmet's proprietary helmet designs and graphics (because the Lloyd Group was "caught" using those designs and graphics at MHR) makes little sense and is in fact refuted by record evidence. As an initial matter, this claim of "disavowal" is directly

contradicted by Mr. Lloyd's testimony, see Lloyd Op. Br., 13, as well as by the documentary evidence. See, e.g., Exh. 14 (email from Lloyd Group to Soaring Helmet, stating that "[w]e have a customer who is interested in our Nitro helmets for the US and so I am passing his details to you" (emphasis added). As set forth below, the record contradicts each of Soaring Helmet's factual assertions offered in support of the improbable claim that the Lloyd Group surrendered ownership of the Nitro Marks essentially for free, including its claims that: (i) Soaring Helmet had an exclusive manufacturing arrangement with MHR, SHC Br., 13; (ii) Soaring Helmet "owned the molds for its helmet designs", id.; and (iii) the Lloyd Group "secretly" manufactured Nitro helmets at MHR using Soaring Helmet's "proprietary Vega helmet designs and graphics", id., 14.

a. There was never any exclusive manufacturing arrangement between Soaring Helmet and MHR.

Soaring Helmet claims it had an exclusive manufacturing arrangement with MHR, whereby MHR agreed to manufacture helmets exclusively for Soaring Helmet. See SHC Br., 13. There is absolutely no documentary evidence supporting this claim. Not only did Soaring Helmet not produce such an agreement,[6] it failed to produce a single item of correspondence between the parties or from Soaring Helmet that mentions this supposed exclusivity agreement. To the contrary, Soaring Helmet's contemporary correspondence admits that Soaring Helmet hoped for, but did not possess, an exclusive arrangement with MHR:

> "As both of our businesses grow, and our brands become more established, we hope that the factory will see the wisdom of focusing exclusively on their major customers....." Exh. 7 (ellipses in original; emphasis added).

Soaring Helmet's claim of exclusivity is also contradicted by Mr. Lloyd's testimony about the MHR factory. In his first meeting with MHR's principal, Mr. Lloyd toured the factory to assess and determine MHR's capacity, capability and quality. See Lloyd Op. Br., 7-8. On that tour, Mr. Lloyd was struck by the number and variety of helmets manufactured by MHR and displayed in its showroom. Lloyd Tr., 80-83. There were "maybe 80, 100" helmets displayed in MHR's showroom, exhibiting "eight

[6] As Mr. Xu admitted, this purported exclusive arrangement was never reduced to writing. Xu Tr., 49.

or ten different brand names". Id., 81. The brands included, among others, "Nova" (owned by a Greek company), "Kenny" (owned by a French company), "Barik" (owned by an Italian company) and "Vega" (Soaring Helmet's mark). Id., 82-83; see also Exh. 17 (Mr. Xu stating that "MHR is continue [sic] making helmet for Kenny, and is developing helmets for Givi"). Moreover, Mr. Liao (MHR's principal) never told Mr. Lloyd that there was an exclusive agreement between MHR and Soaring Helmet. Id., 83. In fact, Mr. Liao specifically told Mr. Lloyd that MHR could manufacture helmets for the Lloyd Group. Id., 84. Finally, Mr. Xu himself never told Mr. Lloyd that Soaring Helmet had an exclusive arrangement with MHR. Id., 106.

Indeed, if there was such an exclusive agreement, Soaring Helmet should have sought compensation from MHR, not from the Lloyd Group. See Xu Tr., 74 ("I have nothing to -- against him [Mr. Lloyd]. You know, factory [MHR] give to him."). Moreover, in Soaring Helmet's version of events, the Lloyd Group initially offered Nitro clothing and boots to Soaring Helmet (in exchange for the Vega helmet designs and graphics), and then volunteered to include Nitro helmets as well in a subsequent call. SHC Br., 16. This story makes little sense because (1) clothing and boots were purportedly offered first (and helmets later) when the alleged violation concerned helmets; and (2) if the Lloyd Group's objective was to mollify Soaring Helmet, there would have been no reason for the Lloyd Group to volunteer anything additional on a later call. Rather, the reasonable inference from record evidence is that the Lloyd Group was trying to start a new business relationship (i.e., a licensing arrangement with Soaring Helmet), not to compensate or mollify Soaring Helmet. See also, e.g., Exh. 5 (email from Ms. DeMund referring to "Nitro helmets" as Soaring Helmet's "sister brand"); Exh. 15 (email from Ms. DeMund referring to the "Lloyd Lifestyle team").

b. Soaring Helmet did not own the molds for helmets manufactured by MHR.

Soaring Helmet also fails to establish that Mr. Lloyd needed to work out an arrangement with Mr. Xu because the Lloyd Group was misappropriating Soaring Helmet's helmet designs and graphics. A fiberglass motorcycle helmet is made from a standard mold, in which raw material is formed to the

desired shape, function, specifications and style of the particular helmet being manufactured. Lloyd Op. Br., 8. Soaring Helmet claims that it "owned the molds for its helmet designs". SHC Br., 13. This assertion is without foundation, as Mr. Xu in fact did not testify that Soaring Helmet owned the molds. See Xu Tr., 66-68. Rather, Mr. Xu admitted that he did not in fact pay MHR for the molds. Id., 66-67. While Mr. Xu also testified that the cost of the molds was built into the price of the helmets that he purchased from MHR, that is not the same thing as saying that Soaring Helmet "owned the molds". Indeed, Mr. Liao of MHR, when he gave Mr. Lloyd the tour of MHR's factory, offered to manufacture similar types of helmets ("full face" and "motocross" models) for the Lloyd Group, and Mr. Liao did not say that these models were based on molds developed by or owned by others. Lloyd Tr., 84-87.

As explained in detail in the Opening Brief, the Lloyd Group worked closely with MHR to design, develop and modify MHR's standard mold to conform to the specifications required by the Lloyd Group. Lloyd Op. Br., 8-9. In other words, the Lloyd Group developed its own helmet designs.

In any event, Mr. Xu admitted that he did not know whether the Lloyd Group used different molds for Nitro helmets. Xu Tr., 110. This admission contradicts Soaring Helmet's assertion that the Lloyd Group secretly used Soaring Helmet's molds.

c. The Lloyd Group did not manufacture helmets using Vega helmet designs and graphics, secretly or otherwise.

Soaring Helmet claims that the Lloyd Group "secretly" manufactured Nitro helmets at MHR, improperly using Soaring Helmet's "proprietary Vega helmet designs and graphics". SHC Br., 14. In fact, the Lloyd Group manufactured Nitro helmets at MHR, it did so openly, and it did not misappropriate any Soaring Helmet's helmet designs or graphics. See below.

First, the Lloyd Group could not have "secretly" manufactured anything at MHR, because it would have been impossible to hide production of helmets in the factory. See Lloyd Tr., 101-05. Manufacturing a helmet from the beginning to the end takes about one month, so it cannot be done in one day. Id., 102, 104. Thus, Mr. Xu's testimony that the Lloyd Group was secretly making helmets "in night, in midnight" (see, e.g., Xu Tr., 47) is ridiculous and simply not credible. Moreover, during the

one-month manufacturing process, anyone visiting the factory could see the type or brand name of helmets being manufactured. Lloyd Tr., 102-04. From the shape of the helmet's shell, the written instructions in Chinese (Mr. Xu's native language, see Xu Tr. 11) given to workers (which include information concerning the "order number, the quantities, the color, the customer, the brand name, sizing" of the helmets), the inside lining of the helmet (which includes "many labels" showing brand name), the paper hang tags, the boxes, and the cartons, one could easily tell the type and brand of helmets being manufactured and the customer for whom they are manufactured. Lloyd Tr., 102-04. Indeed, Mr. Xu conceded that the Lloyd Group was ordering "at least 10,000" helmets a month from MHR – a quantity of helmets which would have been impossible to hide, given that it amounted to one-third of Soaring Helmet's own, purportedly exclusive, production of 30,000 helmets per month. Xu Tr., 54-55; see also Lloyd Tr., 105-06 (in 2002, the Lloyd Group purchased fifty 40-foot containers of Nitro helmets from MHR, amounting to 100,000 helmets).

Second, the Lloyd Group did not use Soaring Helmet's helmet designs and graphics. As described above, Soaring Helmet did not own the molds for its helmet designs and, in any event, the Lloyd Group developed its own helmet designs. Similarly, with respect to the helmet graphics, the Lloyd Group developed its own graphics through in-house or outside designers, Lloyd Op. Br., 9-10, and did not use Soaring Helmet's graphics. Lloyd Tr., 145-49. Soaring Helmet admitted as much when it sent the Lloyd Group an email asking, "What graphic design program did you use to send your box design to the factory and hang tags/logos to the jacket factory?" Exh. 10 (emphasis added). In the one instance where the Lloyd Group suspected certain graphics might have been Soaring Helmet's, the Lloyd Group obtained written authorization from Soaring Helmet to use that graphic. Lloyd Tr., 145-59; see also Exh. 48.

Soaring Helmet's allegation that the Lloyd Group used the Vega helmet designs and graphics is also directly contradicted by Ms. DeMund's testimony. Ms. DeMund admitted that none of the Nitro helmets purchased from MHR by Soaring Helmet and sold in the United States was the same as the Vega helmet that Soaring Helmet was already selling in the United States. DeMund Tr., 57-58. Ms. DeMund further admitted that the graphics on these Nitro helmets were "Lloyd Lifestyle graphics". Id., 59. Ms.

DeMund also stated that the reason Soaring Helmet wanted to sell Nitro helmets was to expand its product range and to "differentiate" its products, so as to increase overall sales. Id., 60-61. In other words, the Nitro helmets manufactured by MHR were different from Vega helmet designs and graphics. Indeed, it would have made no sense for Soaring Helmet to sell Nitro helmets if they were essentially the same product as Vega helmets that Soaring Helmet was already selling.[7]

C. The License Agreement Between the Parties was a Controlled License.

Just as the record is clear that what the Lloyd Group granted Soaring Helmet was a license for use of the Nitro Marks in the United States, the record is similarly clear that the license was a controlled one. Soaring Helmet contends that if there was a license between the parties, it was a "naked" one without any restrictions whatsoever. SHC Br., 46-50. This argument fails for two reasons. First, Soaring Helmet is precluded by the doctrine of licensee estoppel from challenging the Lloyd Group's ownership of the Nitro Marks. Second, Soaring Helmet has in any event failed to meet the heavy burden of proof required to cause a forfeiture of the Lloyd Group's ownership interest on the basis of naked licensing.

1. The doctrine of licensee estoppel precludes Soaring Helmet's challenge to the Lloyd Group's ownership of the Nitro Marks.

Under the well-established doctrine of licensee estoppel, a licensee is "estopped from claiming any rights against the licensor which are inconsistent with the terms of the license". Westco Group, Inc. v. K.B. & Assoc., Inc., 128 F. Supp. 2d 1082, 1086, 58 U.S.P.Q.2d 1068 (N.D. Ohio, 2001); see also Pac. Supply Coop. v. Farmers Union Cent. Exch. Inc., 318 F.2d 894, 908, 137 U.S.P.Q. 835 (9th Cir. 1963) ("long settled principle of law" that licensee of trademark may not "set up any adverse claim in it as against its licensor"). Estoppel applies because, by virtue of the license agreement, the licensee has recognized the licensor's ownership. Prof'l Golfers Assoc. v. Bankers Life & Cas. Co., 514 F.2d 665,

[7] In addition, Soaring Helmet stated in its answers to interrogatories that it "first learned of" the Lloyd Group's use of the Nitro Marks "at a tradeshow in February 2003". See Soaring Helmet's Answer to First Interrogatory #6, Supplementary Answer to First Interrogatory #6, and Answer to Second Interrogatory #6. If Soaring Helmet's allegations were true, one would have expected the interrogatory answers to include references to Soaring Helmet's "discovery" of the Lloyd Group's "secret" manufacturing of Nitro helmets at MHR. Nowhere in Soaring Helmet's interrogatory answers was there any reference to its purported exclusivity agreement with MHR, or to the Lloyd Group's "secret" manufacturing of Nitro helmets using Soaring Helmet's proprietary helmet designs and graphics.

671, 186 U.S.P.Q. 447 (5th Cir. 1975); see also E. F. Prichard v. Consumers Brewing Co., 136 F.2d 512, 522, 58 U.S.P.Q. 362 (6th Cir. 1943) (licensee estopped from challenging licensor's ownership of mark because it is "the party who has agreed that the other shall be the owner of the trademark"). Thus, a licensee is estopped from challenging a licensor's ownership of the mark. See, e.g., Seven-Up Bottling Co. v. Seven-Up Co., 561 F.2d 1275 (8th Cir. 1977); see also Westco, 128 F. Supp. 2d at 1086.

The doctrine forbids challenging a licensee's ownership based on a claim of "naked licensing". Westco, 128 F. Supp. 2d at 1089; see also Garri Publ'n Assoc. v. Debora Inc., 10 U.S.P.Q.2d 1694 (T.T.A.B. 1988) (petitioner-licensee's naked licensing claim denied based on licensee estoppel); Estate of Biro v. Bic Corp., 18 U.S.P.Q.2d 1382 (T.T.A.B. 1991) (applicant estopped from challenging validity of license agreement on basis of lack of quality control). Indeed, as Westco explains, the rationale for applying licensee estoppel is especially "compelling" in the context of a naked licensing claim, because:

> a licensee claiming that its own license is a naked license essentially seeks to benefit from its own misfeasance. By asserting a naked licensing defense, the licensee contends that the licensed trademark or trade name has lost its significance as a source of origin because the licensor has failed to police the licensee's operations. Thus, by relying on its own ability to offer inferior or nonuniform goods and services under the trademark or trade name, the licensee seeks to free itself of the constraints imposed by the licensor's ownership of the trademark or trade name. Not surprisingly, the Restatement (Third) of Unfair Competition observes that the case for applying licensee estoppel is strongest in such a case. Westco, 128 F. Supp. 2d at 1089 (citation omitted).

The doctrine has been applied by the Board in the context of a cancellation proceeding, see Garri, supra, and an opposition proceeding. See Estate of Biro, supra.[8]

The cases cited by Soaring Helmet in support of its naked licensing claim are inapposite because they arose in circumstances where licensee estoppel was facially inapplicable. The licensee estoppel doctrine did not apply in these cases because all but one of the cases involve a non-licensee challenging a

[8] Some courts have held that licensee estoppel applies only when the licensee's challenge is based on facts arising before termination of the license. See, e.g., Prof'l Golfers Assoc., 514 F.2d at 671. In other words, if the licensee's challenge is based on facts arising after termination of the license, the licensee is not estopped. This issue does not arise here, however, because Soaring Helmet has based its challenge to the Lloyd Group's ownership of the Nitro Marks entirely on facts arising during the parties' licensing relationship. See SHC Br., 46-50. Indeed, Soaring Helmet is not claiming that the Lloyd Group's actions after the termination of the parties' license agreement (e.g., vis-à-vis other licensees) amount to a naked license. Instead, Soaring Helmet is claiming that the Lloyd Group's actions during the parties' license agreement amounted to a naked license.

licensor's ownership of its mark on the basis of naked licensing.[9] The only case involving a licensee challenger was Stanfield v. Osborne Indus., 52 F.3d 867, 34 U.S.P.Q.2d 1456 (10th Cir. 1995). However, that case is also irrelevant, since Stanfield specifically declined to consider the licensee estoppel argument because the licensor failed to present that argument in the court below, and thus failed to preserve it for appeal. Id., at 872.

2. Even assuming, *arguendo*, that Soaring Helmet's naked license defense is not estopped, Soaring Helmet still cannot satisfy the heavy burden of proving that the parties' license agreement was a naked license.

Since a finding of a naked license results in a forfeiture of the licensor's trademark rights, courts have uniformly imposed a heavy burden of proof on the party asserting it.[10] Even assuming, *arguendo*, that Soaring Helmet's argument is not barred by licensee estoppel, Soaring Helmet still failed to satisfy the heavy burden of proof required for a claim of naked licensing.

The Lloyd Group maintained quality control by requiring Soaring Helmet to obtain Nitro Products only from the Lloyd Group's authorized suppliers (which products were tested for quality by both the Lloyd Group and the factories) and to obtain prior approval from the Lloyd Group before sourcing products from any other supplier or using the Nitro Marks on other products.[11] Lloyd Op. Br., 13, 38. Further, it is undisputed that Soaring Helmet purchased Nitro Products from the Lloyd Group's

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[9] See Barcamerica Int'l USA Trust v. Tyfield Imp. Inc., 289 F.3d 589, 62 U.S.P.Q.2d 1673 (9th Cir. 2002); First Interstate Bancorp v. Stenquist, 16 U.S.P.Q.2d 1704 (N.D. Cal. 1990); Dawn Donut Co. v. Hart's Food Stores, Inc., 267 F.2d 358, 368, 121 U.S.P.Q. 430 (2d Cir. 1959); Sweetheart Plastics, Inc. v. Detroit Forming, Inc., 743 F.2d 1039, 223 U.S.P.Q. 1291 (4th Cir. 1984); Ditri v. Coldwell Banker Res. Aff., Inc., 954 F.2d 869, 21 U.S.P.Q.2d 1530 (3d Cir. 1992); Carpenteri v. Marini, 2006 WL 2349586 (D. Conn. 2006); Halo Mgmt., LLC v. Interland, Inc., 308 F. Supp. 2d 1019 (N.D. Cal. 2003); Yamamoto & Co. v. Victor United, Inc., 210 U.S.P.Q. 968 (C.D. Cal. 1982).

[10] See, e.g., Kentucky Fried Chicken Corp. v. Diversified Packaging Corp., 549 F.2d 368, 387, 193 U.S.P.Q. 649 (5th Cir. 1977) ("heavy burden" on party seeking to establish forfeiture); Edwin K. Williams & Co. v. Edwin K. Williams & Co., 542 F.2d 1053, 1059, 191 U.S.P.Q. 563 (9th Cir. 1976) ("high burden of proof" required); Winnebago Indus., Inc. v. Oliver & Winston, Inc., 207 U.S.P.Q. 335, 340 (T.T.A.B. 1980) ("clear and convincing" proof needed).

[11] Soaring Helmet repeatedly asserts in its brief that it, rather than the Lloyd Group, was the manufacturer of the Nitro Products. See, e.g., SHC Br., 35. As explained in the Opening Brief (at 30, n.18), and as further explained below, the Lloyd Group exercises close control and supervision over its contract manufacturers with respect to all Nitro Products. If, according to Soaring Helmet, the Lloyd Group has no control whatsoever over its suppliers, Mr. Xu would not have needed to discuss anything at all with Mr. Lloyd and could have simply purchased whatever he wanted from these suppliers.

authorized manufacturers in China (helmets from MHR, and clothing and boots from the Lloyd Group's authorized suppliers). Id., 13-14; see also SHC Br., 35; Xu Tr., 179-80; DeMund Tr., 56-57, 65. In fact, Soaring Helmet admits it never purchased Nitro clothing and boots from suppliers other than the original two suppliers initially authorized by Mr. Lloyd.[12] Xu Tr., 180. Moreover, there is no evidence, and Soaring Helmet does not assert to the contrary, that the quality of Nitro Products sold by Soaring Helmet ever declined or deviated from the Lloyd Group's standards. See TMT North Am. v. Magic Touch GmbH, 124 F.3d 876, 886, 43 U.S.P.Q.2d 1912 (7th Cir. 1997) ("Absent a significant deviation from the licensor's quality standards, a licensor does not forfeit its trademark rights"); Taco Cabana Int'l, Inc. v. Two Pesos, Inc., 932 F.2d 1113, 1121, 19 U.S.P.Q.2d 1253 (5th Cir. 1991) (sufficient quality control where "no actual decline in quality standards is demonstrated"). Under such circumstances, the Lloyd Group's quality control is sufficient, and Soaring Helmet has failed to meet its heavy burden of proof. See Transgo, Inc. v. AJAC Trans. Parts Corp., 768 F.2d 1001, 1017, 227 U.S.P.Q. 598 (9th Cir. 1985) (adequate quality control found where "at least 90%" of products sold by licensee were manufactured by licensor and licensor used its own quality control procedures at its plant); TMT North Am., 124 F.3d at 879 (no abandonment of mark by naked licensing where licensor manufactured the basic product which licensee merely repacked and distributed).

Soaring Helmet distorts the law by asserting that the Lloyd Group must show that it exercised control "through inspection or supervision". SHC Br., 45. It is telling that the cases cited by Soaring Helmet for that proposition do not in fact require control "through inspection or supervision". See Dawn Donut, 267 F.2d at 368 ("The absence, however, of an express contract right to inspect and supervise a licensee's operations does not mean that the plaintiff's method of licensing failed to comply with the requirements of the Lanham Act"); Barcamerica, 62 U.S.P.Q.2d at 1678 ("The lack of an express contract right to inspect and supervise a licensee's operations is not conclusive evidence of lack of control"); First

[12] The circumstance that Soaring Helmet now manufactures Nitro helmets in a factory owned by Mr. Xu, see SHC Br., 35, does not mean that the Lloyd Group failed to exert adequate control, since Soaring Helmet admitted that it concealed this fact from Mr. Lloyd. Xu Tr., 294. See also footnote 3 above.

Interstate Bancorp, 16 U.S.P.Q.2d at 1706 ("the amount of control a licensor must have over a licensee is limited to that which is necessary to prevent deception"). Indeed, as Taco Cabana explained:

> The purpose of the quality-control requirement is to prevent the public deception that would ensue from variant quality standards under the same mark or dress. Where the particular circumstances of the licensing arrangement persuade us that the public will not be deceived, we need not elevate form over substance and require the same policing rigor appropriate to more formal licensing and franchising transactions.[13] 932 F.2d at 1121.

As stated above, there is no possibility that the public would be deceived in this instance, where there is absolutely no evidence -- and Soaring Helmet does not allege any -- that the Nitro Products obtained by Soaring Helmet from the Lloyd Group's authorized suppliers deviated from the quality standards of the Lloyd Group's own Nitro Products, which the Lloyd Group obtains from the exact same suppliers.

Soaring Helmet also argues that the Lloyd Group did not exercise quality control because "Mr. Lloyd also told Mr. Xu he was free to use any manufacturer" (SHC Br. at 36) and "[t]he Lloyd Group expressly stated that Soaring Helmet could source the products anywhere" (id. at 49). These statements are not only contradicted by Mr. Lloyd's testimony that the agreement required the Lloyd Group's approval for Soaring Helmet to change manufacturers, but they are not even supported by the citations to Mr. Xu's testimony on which they rely. Mr. Xu did not testify that the agreement allowed him "to use any manufacturer", but only that he could seek out and use manufacturers "that can do a better job" (Xu Tr., 159-60; see also id. at 160-61 (admitting that Mr. Lloyd did not say "you could source them from any factory you want"). Even on Mr. Xu's version of the conversation, Mr. Lloyd did not give permission to "use whoever you want", or "use someone cheaper", but only to use a factory that *does a better job*, thus reflecting the Lloyd Group's continuing effort to maintain quality and asserting a right to decide what does and does not constitute a better job. Further, the fact that Mr. Lloyd gave Mr. Xu this limited authorization and Mr. Xu did not object and say "what are you talking about? I own Nitro and can do whatever I want" reflects their mutual understanding (even on Mr. Xu's version of events) that Mr. Lloyd had the right to veto Mr. Xu's choice of factory.

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[13] See also Restatement (Third) of Unfair Competition, § 33, com. c ("As a general matter, courts are reluctant to interfere with the marketing arrangements adopted by trademark owners, and minimal control over the quality of a licensee's goods or services is often sufficient to satisfy the requirement imposed under this Section").

Soaring Helmet refers several times to the portion of Mr. Lloyd's testimony where Mr. Lloyd could not remember on the spot the names of his clothing and boot manufacturers, and concludes that "the relationship between the Lloyd Group and the manufacturers is so distant that the Lloyd Group does not even know the names of the clothing manufacturers it uses". SHC Br., 19-20; see also, e.g., id., 46-47. This "argument" is nothing more than a cheap shot at Mr. Lloyd's memory, since Soaring Helmet's own correspondence admits that it sought access to the Lloyd Group's boot manufacturers:

> "Lou would like to visit your boot manufacturer in the next few days. Could you contact them and introduce Lou, and give us the contact info we will need?" Exh. 7 (emphasis added).

Beyond this direct admission that the manufacturers in question were the Lloyd Group's, the obvious flaw in Soaring Helmet's argument is that remembering the names of particular manufacturers used several years ago proves nothing about the issue of quality control. Mr. Xu himself could not remember the names of the clothing and boots manufacturers. Xu Tr., 178. A momentary failure of recollection of specific names is hardly surprising for a businessman like Mr. Lloyd who has engaged in business for over fifty years (Lloyd Tr., 206), has various and complex business interests (e.g., the Lloyd Group itself comprises fifteen different companies, see Lloyd Tr., 209), and has retained numerous contract manufacturers all over the world throughout the years, in countries such as China, Vietnam and Pakistan. Id., 30. In any event, Mr. Lloyd did remember the names of the *agents* of these manufacturers. Id., 285.

Further, as explained in the Opening Brief, there is no question that the Lloyd Group exercises close supervision and control over its suppliers with respect to quality. See Lloyd Op. Br., 7-10. Mr. Lloyd's testimony shows that the Lloyd Group works closely with its manufacturers to design, develop, modify and monitor the Nitro Products, and that quality tests are carried out by both the Lloyd Group in-house and by independent test houses. Id. Soaring Helmet alleges that the Nitro helmets sold in the U.S. are "different in many respects" than the ones sold by the Lloyd Group, and that there is no evidence that the Lloyd Group tested those Nitro helmets sold in the U.S. SHC Br., 48. The Nitro helmets sold by Soaring Helmet and by the Lloyd Group all came from the same manufacturer (MHR), and the Lloyd Group ensured quality by testing the helmets that are manufactured by MHR. Lloyd Op. Br., 7-10.

Soaring Helmet does not cite to any evidence in the record -- because there is none -- supporting its bald claim that the Nitro helmets sold in the U.S. are "different in many respects". Perhaps Soaring Helmet means to say that the helmets it now manufacturers in its own factory, in breach of the license agreement, are different than the MHR helmets manufactured under the agreement. Of course, Soaring Helmet cannot establish a lack of quality control by its own secret breach of the quality control provisions. See also footnote 3, above.

Soaring Helmet also argues that, because it receives "all the goodwill associated with the Nitro brand", that is evidence that the Lloyd Group exercised no quality control. SHC Br., 48. The facts that (i) Soaring Helmet's name appears on the product packaging and advertising materials; (ii) Soaring Helmet pays for advertising costs; and (iii) packaging materials identify Soaring Helmet as the entity for consumer complaint or inquiry, do not establish that the Lloyd Group exercised no control. Indeed, one might expect a licensee to use its name on packaging (as distinguished from the product), to pay its own advertising costs, and to take responsibility for consumer complaints about what it sold. Accordingly, in a licensing situation, it "will frequently be the case" that the licensee's name is identified with the product in some regards. TMT North Am., 124 F.3d, 885 (although consumers now perceive licensee as provider of, and entity responsible for, products, "such consumer identification with the licensee . . . will frequently be the case when trademarks are licensed"). As long as the licensor maintains "reasonable control over product quality", consumers "ultimately do rely upon the licensor's quality control". Id., 886. Indeed, as explained above, where there is no "significant deviation" from the licensor's quality standards (and there is none here), "a licensor does not forfeit its trademark rights through licensing agreements". Id.

V. CONCLUSION

For the foregoing reasons and those set forth in the Lloyd Group's Opening Brief, Soaring Helmet's registration of the "Nitro Racing" mark should be cancelled, and Soaring Helmet's application to register the "Nitro" mark should be denied.

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I, Howard Chen, am an attorney at the law firm of Allegaert Berger & Vogel LLP, counsel for Opposers in the Opposition Proceeding No. 91164265 and for Petitioners in the Cancellation Proceeding No. 92045075. I hereby certify that a true and complete copy of the foregoing Opposers/Petitioners' Reply Brief has been served on November 3, 2006 on Applicant/Respondent Soaring Helmet Corporation by mailing said copy, via First Class Mail, postage prepaid, to:

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