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12 Attorneys for Plaintiff
MONSTER ENERGY COMPANY
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16 IN THE UNITED STATES DISTRICT COURT
17 FOR THE CENTRAL DISTRICT OF CALIFORNIA
18

19 MONSTER ENERGY COMPANY,
a Delaware corporation,

20 Plaintiff,

21 v.

22 INTEGRATED SUPPLY
23 NETWORK, LLC, a Florida limited
liability company,

24 Defendant.
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27
28

Case No. 5:17-CV-00548-CBM-RAO

**MONSTER ENERGY
COMPANY'S NOTICE OF
APPEAL TO THE UNITED
STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

Hon. Consuelo B. Marshall

1 TO THE COURT, ALL PARTIES, AND THEIR COUNSEL:

2 PLEASE TAKE NOTICE THAT Plaintiff Monster Energy Company
3 (“Plaintiff” or “Monster”) hereby appeals to the United States Court of Appeals
4 for the Ninth Circuit from the (a) “Order Re: Plaintiff’s Motion for Permanent
5 Injunction” [ECF No. 538] and (b) “Order Re: Defendant’s Rule 50(A) Motion
6 For Judgment As A Matter Of Law, Rule 50(B) Renewed Motion For Judgment
7 As A Matter Of Law, Or Alternative Rule 59 Motion For Remittitur Of
8 Damages, Or A New Trial; And Plaintiff’s Motion For A New Trial On
9 Damages And Willfulness, And A Conditional New Trial On Its Rights In The
10 Unregistered Mark ‘Monster’” [ECF No. 539], both entered in the above-
11 captioned action by the United States District Court for the Central District of
12 California. Copies of the Orders are attached hereto as Exhibits A and B,
13 respectively.

14
15 Respectfully submitted,
16 KNOBBE, MARTENS, OLSON & BEAR, LLP
17

18 Dated: July 3, 2019

By: /s/ Joseph R. Re

19 Joseph R. Re
20 Lynda J. Zadra-Symes
21 Brian C. Horne
22 Marko R. Zoretic
Jason A. Champion

23 Attorneys for Plaintiff,
24 MONSTER ENERGY COMPANY
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CIRCUIT RULE 3-2 REPRESENTATION STATEMENT

Pursuant to Rule 12(b) of the Federal Rules of Appellate Procedure and Circuit Rule 3-2(b), Plaintiff Monster Energy Company hereby submits its Representation Statement.

Plaintiff Monster Energy Company is represented by the following counsel:

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11 Dated: July 3, 2019

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15 Attorneys for Plaintiff,
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8 **UNITED STATES DISTRICT COURT**
9 **CENTRAL DISTRICT OF CALIFORNIA**
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11 MONSTER ENERGY COMPANY,

12 Plaintiff,

13 v.

14 INTEGRATED SUPPLY NETWORK,
15 LLC,

16 Defendant.

Case No.: ED CV 17-548-CBM-RAOx

**ORDER RE: PLAINTIFF'S
MOTION FOR PERMANENT
INJUNCTION**

17 The matter before the Court is Plaintiff's Motion for Permanent Injunction.
18 (Dkt. No. 457.)

19 **I. BACKGROUND**

20 On March 22, 2017, Plaintiff Monster Energy Company filed a complaint
21 against Defendant asserting the following four causes of action: (1) trademark
22 infringement, trade dress infringement, and false designation of origin under 15
23 U.S.C. § 1125(a); (2) trademark infringement pursuant to 15 U.S.C. § 1114; (3)
24 Unfair Competition under Cal. Bus. & Prof. Code §§ 17200 *et seq.*; and (4)
25 California Common law unfair competition. Following a nine-day trial, a jury
26 reached a verdict in favor of Plaintiff on its infringement claim as to its federally
27 registered trademarks that include the word "Monster" and its trade dress, awarded
28 zero dollars in damages to Plaintiff caused by Defendant's infringement, and

1 awarded \$5,000,000 in punitive damages to Plaintiff upon finding Plaintiff proved
2 by clear and convincing evidence that Defendant acted with malice, oppression, or
3 fraud. (Dkt. No. 446.) The jury found in favor of Defendant on Plaintiff's
4 infringement claim as to its unregistered mark "Monster" and federally registered
5 trademarks that include the word "Beast," and found that Plaintiff did not prove by
6 a preponderance of the evidence that Defendant's infringement was willful. (*Id.*)

7 **II. STATEMENT OF THE LAW**

8 Plaintiff seeks a permanent injunction under the Lanham Act and
9 California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17203.

10 **A. Injunctive Relief Under the Lanham Act**

11 15 U.S.C. § 1116(a) of the Lanham Act vests the district court with the
12 "power to grant injunctions, according to the principles of equity and upon such
13 terms as the court may deem reasonable, to prevent the violation of any right of
14 the registrant of a mark registered in the Patent and Trademark Office or to
15 prevent a violation under subsection (a), (c), or (d) of section 1125 of this title."
16 District courts must apply "'traditional equitable principles" in deciding whether
17 to grant permanent injunctive relief,' and the decision is 'an act of equitable
18 discretion by the district court, reviewable on appeal for abuse of discretion.'"
19 *Reno Air Racing Ass'n., Inc. v. McCord*, 452 F.3d 1126, 1137–38 (9th Cir. 2006)
20 (quoting *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006)).
21 "According to these equitable principles, a plaintiff seeking a permanent
22 injunction must demonstrate: (1) that it has suffered an irreparable injury; (2) that
23 remedies available at law, such as monetary damages, are inadequate to
24 compensate for that injury; (3) that, considering the balance of hardships between
25 the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public
26 interest would not be disserved by a permanent injunction." *Id.* at 1138 (citing
27 *ebay*, 547 U.S. at 391). The court must conduct "a fair weighing of the factors
28 listed above, taking into account the unique circumstances of each case," and

“consider the totality of circumstances bearing on whether a permanent injunction is appropriate equitable relief.” *La Quinta Worldwide LLC v. Q.R.T.M., S.A. de C.V.*, 762 F.3d 867, 880 (9th Cir. 2014).

B. Injunctive Relief Under the UCL

California Business & Professions Code § 17203 provides:

Any person who engages, has engaged, or proposes to engage in unfair competition may be enjoined in any court of competent jurisdiction. The court *may* make such orders or judgments, including the appointment of a receiver, *as may be necessary to prevent the use* or employment by any person *of any practice which constitutes unfair competition*

(Emphasis added.) “Section 17203 does not mandate . . . injunctive relief when an unfair business practice has been shown. Rather, it provides that the court” with “a grant of broad equitable power.” *Cortez v. Purolator Air Filtration Prod. Co.*, 23 Cal. 4th 163, 180 (2000); *see also Zhang v. Super. Ct.*, 57 Cal. 4th 364, 371 (Cal. 2013) (“[T]he equitable remedies of the UCL are subject to the broad discretion of the trial court.”).

III. DISCUSSION

A. Defendant’s Motion to Strike

Defendant filed a “Motion to Strike Material Outside the Trial Record” in response to the Motion, wherein Defendant requests that the Court “strike the following documents from the record”:

1. Trial Exhibit 1827 – a record of prior criminal convictions of Defendant’s Senior Vice President of Marketing Scott Pilkenton;
2. Trial Exhibit 1090A – December 29, 2010 – August 31, 2018 ISN Monster Mobile Product Sales by Year Per ISN0074727
3. Excerpts of Matthew Rivera’s Deposition Transcript (Dkt. 459-1);
4. Excerpts of Kimberly Stoneman’s Deposition Transcript (Dkt. 459-2); and
5. Video of 2017 Expo (Dkt. 459-3).

1 (Dkt. No. 465.)¹

2 The final pretrial conference order provides that the issue of “[w]hether to
3 permanently enjoin [Defendant] from infringing” Plaintiff’s marks and trade dress
4 were issues to be tried by the Court. (Dkt. No. 322 at 29-30.) Rule 26(a)(3)
5 requires parties to identify each document or other exhibit it may present at trial
6 other than solely for impeachment purposes. Therefore, the fact that any of the
7 above materials were not offered as evidence to the jury at trial does not preclude
8 the Court from considering the materials for purposes of the instant Motion if they
9 were included on the parties’ joint exhibit list and are otherwise admissible.

10 Defense counsel declares Plaintiff’s counsel “indicated that its citation to
11 Exhibit 1827 was in error” during the meet and confer re: Defendant’s Motion to
12 Strike. (Merrick Dec. ¶ 5.) Accordingly, Defendant’s Motion to Strike Trial
13 Exhibit 1827 is **GRANTED**.

14 Defendant argues the parties agreed Plaintiff could use Exhibit 1090A for
15 demonstrative purposes during the jury trial, and that exhibit was not admitted into
16 evidence at trial. However, Exhibit 1090A was listed on the parties’ joint exhibit
17 list (Dkt. No. 406 at p.38) and Defendant does not raise any objections as to the
18 inadmissibility of Exhibit 1090A. Therefore, Defendant’s Motion to Strike
19 Exhibit 1090A is **DENIED**.

20 Defendant argues the excerpts from Rivera’s deposition were neither
21 designated by the parties for use at trial nor played for the jury at trial. Defendant
22 does not raise any objections as to the inadmissibility of these deposition excerpts.
23 Therefore, Defendant’s Motion to Strike the excerpts from Rivera’s deposition is
24 **DENIED**.

25 Defendant argues no excerpts from Stoneman’s deposition transcript were
26 admitted into evidence at trial because Stoneman testified live at trial and both
27

28 ¹ Plaintiff did not file a response to Defendant’s Motion to Strike.

1 parties examined her at trial. The fact that Stoneman testified at trial, however, is
2 irrelevant to whether Stoneman's deposition testimony is admissible for purposes
3 of the instant Motion, and Defendant does not raise any objections as to the
4 inadmissibility of such deposition testimony. Accordingly, Defendant's Motion
5 Strike the excerpts from Stoneman's deposition is **DENIED**.

6 Defendant argues the video of the 2017 Expo was excluded by the Court at
7 trial. The video was not listed on the parties' exhibit list, and the Court excluded
8 the video on that basis during trial. (Trial Transcript at 1660:23–1661:4.)
9 Accordingly, the Court **GRANTS** Defendant's Motion to Strike as to the Video of
10 2017 Expo.

11 **B. Injunctive Relief Under the Lanham Act**

12 **(1) Irreparable Harm**

13 “[A]ctual irreparable harm must be demonstrated to obtain a permanent
14 injunction in a trademark infringement action.” *Herb Reed Enters., LLC v. Fla.*
15 *Entm’t Mgmt., Inc.*, 736 F.3d 1239, 1249 (9th Cir. 2013); *see also San Miguel*
16 *Pure Foods Co. v. Ramar Int’l Corp.*, 625 F. App’x 322, 327 (9th Cir. 2015)
17 (“Irreparable harm may not be based on speculative injury.”) (citing *Solidus*
18 *Networks, Inc. v. Excel Innovations, Inc. (In re Excel Innovations, Inc.)*, 502 F.3d
19 1086, 1098 (9th Cir. 2007)).

20 Here, Plaintiff argues it has demonstrated irreparable harm through
21 evidence that it “expends tremendous effort to control its business reputation and
22 build goodwill” by “market[ing] its brand through specific and controlled
23 avenues,” has “earned significant attention” through its marketing efforts, and
24 “carefully controls the supply of licensed products in the marketplace.”² Plaintiff
25 argues Defendant's infringement undermines Plaintiff's efforts to control its

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27 ² See Trial Transcript at 218-19, 278, 291, 299-305, 312, 316-18, 320-21, 322,
28 323-24, 327-28, 335, 336, 346, 347-48, 349, 350-52, 355, 356, 410, 597, 599, 602-
03, 605, 607, 614, 617-18, 618-19, 624, 627, 628, 671, 677, 739-42, 747-48, 752,
760, 761; Exs. 1256, 1767.

1 business reputation and goodwill, as evidenced by Plaintiff's survey expert Dr.
2 Isaacson who testified that at least 24.5% of surveyed customers believed
3 Defendant's tools come from or are affiliated with Plaintiff,³ testimony by three
4 mechanics who testified they believed Defendant's products were affiliated with
5 Plaintiff,⁴ and comments by visitors of Defendant's social media accounts who
6 believed Defendant's "Monster" tools were affiliated with Plaintiff.⁵ Plaintiff also
7 argues the evidence demonstrates Defendant's tools are "inferior goods."⁶

8 "Evidence of loss of control over business reputation and damage to
9 goodwill" or loss of prospective customers "could constitute irreparable harm."
10 *Herb Reed*, 736 F.3d at 1250; *Stuhlbarg Intern. Sales Co., Inc. v. John D. Brush &*
11 *Co., Inc.*, 240 F.3d 832, 841 (9th Cir. 2001). However, Plaintiff does not offer
12 evidence demonstrating it has actually lost control over its business reputation,
13 that its good will has actually been harmed, or that it has lost any prospective
14 customers as a result of Defendant's infringement. *See San Miguel Pure Foods*,
15 625 F. App'x at 327 (reversing permanent injunction issued by district court,
16 reasoning "[t]he district court's finding of irreparable harm was based on the
17 speculation that 'Ramar would effectively lose control over the Magnolia brand,'
18 not that it actually had. To support its conclusion, the district court cited to
19 evidence that Ramar had expanded its business operations to 2,000 stores and non-
20 Asian retailers. However, this evidence of Ramar's growth did not show that San
21 Miguel's infringement caused irreparable harm to Ramar."); *id.* at 327 ("None of
22 Ramar's evidence of actual confusion indicated that San Miguel's use of the
23 Magnolia mark had damaged Ramar's goodwill or that Ramar had lost control
24 over its business reputation. All comments about both Ramar and San Miguel's
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26 ³ See Trial Transcript at 1023.

27 ⁴ See Trial Transcript at 966, 974-75, 982-83.

28 ⁵ See Exs. 307, 322.

⁶ See Ex. 1, Rivera Depo. at 145-46; Trial Transcript at 964, 966, 983-84, 1879.

1 products were positive; none indicated that Ramar lost customers or goodwill
2 because of San Miguel's use of the mark on BMC goods."); *Active Sports Lifestyle*
3 *USA, LLC v. Old Navy, LLC*, 2014 WL 1246497, at *2 & n.1 (C.D. Cal. Mar. 21,
4 2014) ("Active has failed to present evidence beyond speculation that it will face a
5 loss of goodwill in the future, or that its inability to fully control the use of marks
6 substantially similar to its own will result in harm. . . . Active's strong reputation
7 and the goodwill associated with its brand is not evidence of actual irreparable
8 harm to Active's reputation or goodwill, and Active's plans to expand its business
9 combined with speculation that Old Navy's infringement might harm that effort is
10 not evidence of actual harm to Active's efforts.").⁷

11 Moreover, evidence regarding consumer confusion does not demonstrate
12 irreparable harm. *See Herb Reed*, 736 F.3d at 1250-51 ("Gone are the days when
13 '[o]nce the plaintiff in an infringement action has established a likelihood of
14 confusion, it is ordinarily presumed that the plaintiff will suffer irreparable harm if
15 injunctive relief does not issue.") (citations omitted); *San Miguel Pure Foods*,
16 625 F. App'x at 327 ("[T]o establish irreparable injury, a trademark owner must

17 ⁷ *CFE Racing Prod., Inc. v. BMF Wheels, Inc.*, 793 F.3d 571 (6th Cir. 2015),
18 relied on by Plaintiff, is distinguishable because unlike in that case, here, Plaintiff
19 fails to demonstrate it has lost control over its reputation. *Cf. id.* at 595-96 (the
20 district court abused its discretion in issuing an injunction that permitted the
21 defendants to continue using the letters "BMF" in connection with their products,
22 reasoning "[t]he reality of this harm is not negated by the absence of damages"
23 and "[f]or the purpose of an injunction, '[i]rreparable harm exists in a trademark
24 case when the party seeking the injunction ***shows that it will lose control over the***
25 ***reputation of its trademark*** ... because loss of control over one's reputation is
26 neither calculable nor precisely compensable.") (Emphasis added.). *adidas Am.,*
27 *Inc. v. Skechers USA, Inc.*, 890 F.3d 747 (9th Cir. 2018), also relied on by
28 Plaintiff, is distinguishable because that case involved a preliminary injunction
wherein the applicable showing is a likelihood of irreparable harm, whereas a
permanent injunction requires the plaintiff to demonstrate actual irreparable harm.
Cf. id. at 756-57 (finding for purposes of a preliminary injunction that "[t]he
extensive and targeted advertising and unsolicited media, along with tight control
of the supply of Stan Smiths, demonstrate that adidas has built a specific
reputation around the Stan Smith with 'intangible benefits.' And, the customer
surveys demonstrate that those intangible benefits will be harmed if the Onix stays
on the market because consumers will be confused about the source of the shoes.
We find that the district court's finding of irreparable harm is not clearly
erroneous.").

1 do more than merely demonstrate that a trademark has been infringed or that
2 consumers have been confused. . . . Evidence of infringement or likelihood of
3 confusion alone may not give rise to a presumption of irreparable harm.”) (citing
4 *Herb Reed*, 736 F.3d at 1250).⁸

5 Plaintiff also argues Defendant’s continued infringement (after Plaintiff
6 notified Defendant of its infringement, after Plaintiff sent Defendant a cease-and-
7 desist letter, after Plaintiff filed the Complaint in this case, and even after the
8 jury’s verdict in this case) and introduction of new Monster-branded products
9 identical to or closely related to the goods sold by Plaintiff constitute irreparable
10 harm. Even assuming it is true Defendant has not ceased its infringing activity
11 and has expanded to sell products closer to the goods sold by Plaintiff, Plaintiff
12 must still demonstrate actual irreparable harm for a permanent injunction, which
13 Plaintiff has failed to do. *See Active Sports Lifestyle USA*, 2014 WL 1246497, at
14 *2 (“While Old Navy has not ceased its infringing activity, and is almost certain to
15 continue, that does absolve Active of its burden to demonstrate actual irreparable
16 harm.”).

17 Accordingly, Plaintiff fails to demonstrate actual irreparable harm required
18 for a permanent injunction under federal law.⁹

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20 ⁸ *See also Puma SE v. Forever 21, Inc.*, 2017 WL 4771003, at *4 (C.D. Cal. June
21 2, 2017) (evidence that “‘simply underscores customer confusion’ is not enough to
22 prove irreparable harm”) (citation omitted); *VMR Prods., LLC v. V2H ApS*, 2016
23 WL 7669497, at *14 (C.D. Cal. Dec. 29, 2016) (“Even if the Court were to
24 conclude that there exists a likelihood of confusion between the [parties’ marks],
25 [plaintiff] would not be entitled to the injunctive relief it seeks because they
26 provide no evidence that it has suffered an irreparable injury.”) (citations omitted).

27 ⁹ The jury’s award of \$0 in compensatory damages in this case indicates
28 Defendant’s infringement was not damaging to Plaintiff’s business reputation or
goodwill. *See Active Sports Lifestyle USA*, 2014 WL 1246497, at *3 (“[T]hough
the jury may have found Old Navy liable for infringement, its decision to award
no damages at all indicates that the infringement is not what was driving sales of
Old Navy’s products, nor damaging Active’s sales or the goodwill associated with
Active’s mark. Because no monetary damage resulted from the pre-trial
infringement and no other harm beyond speculation has been demonstrated, the
Court finds that no actual irreparable harm flowing from infringing activity
subsequent to the trial has been shown.”).

1 **(2) No Adequate Remedy at Law**

2 To obtain a permanent injunction, Plaintiff must show “remedies available
3 at law, such as monetary damages, are inadequate to compensate for the injury.”
4 *eBay*, 547 U.S. at 391. Here, Plaintiff argues the irreparable harm to Plaintiff’s
5 goodwill and reputation cannot be adequately remedied by money damages. As
6 discussed above, Plaintiff fails to demonstrate it has suffered irreparable harm.¹⁰

7 Plaintiff also argues the disruption repeated litigation would cause to
8 Plaintiff’s business operations would also be irreparable and it would be forced to
9 sue Defendant repeatedly absent an injunction. Plaintiff, however, has proffered
10 no evidence of harm to its business operations as a result of litigation. *See also*
11 *Active Sports*, 2014 WL 1246497, at *3 (“While it is true that cases decided before
12 *Herb Reed* held that a plaintiff’s being made to repeatedly sue to halt infringing
13 activity constituted an inadequacy of legal remedies, in the wake of *eBay* and
14 *Herb Reed*, it is difficult to cabin those holdings such that they would not apply to
15 any infringement verdict.”).

16 Accordingly, Plaintiff fails to show an inadequate remedy at law exists.

17 **(3) Balance of Hardships**

18 Plaintiff argues it “will continue to suffer without an injunction.” As
19 discussed above, Plaintiff has failed to offer evidence demonstrating any
20 irreparable harm caused by Defendant’s infringement. Therefore, Plaintiff fails to
21 demonstrate any undue hardship if an injunction is not issued.

22 Defendant offers evidence of the dollar amount of infringing products in
23 stock, in development or being produced, and the cost of “disposing of current and
24 on-order inventory,” and Defendant’s CEO declares Defendant “would be out of

25 _____
26 ¹⁰ The Court finds unpersuasive Plaintiff’s contention that the jury’s award of \$0
27 in damages caused by Defendant’s infringement confirms the inadequacy of
28 monetary relief in this case. *See, e.g., Active Sports*, 2014 WL 1246497, at *3
29 (“[T]he Court finds unpersuasive Active’s argument at the hearing that the jury’s
30 decision not to award damages actually strengthens the case for an equitable
31 remedy.”).

1 business in this brand for six to twelve months” if it was required to “immediately
2 cease selling or producing any Monster Mobile products.” (Weber Decl. ¶¶ 3-7.)
3 However, “where the only hardship that the defendant will suffer is lost profits
4 from an activity which has been shown likely to be infringing, such an argument
5 in defense merits little equitable consideration.” *BMW of N. Am., LLC v. Arion*
6 *Euthenia, LLC*, 2018 WL 1407036, at *6 (C.D. Cal. Jan. 23, 2018) (quoting *Dr.*
7 *Seuss Enters., L.P. v. Penguin Books USA, Inc.*, 924 F.Supp. 1559, 1574 (S.D.
8 Cal. 1996), *aff’d*, 109 F.3d 1394 (9th Cir. 1997)); *see also Active Sports*, 2014 WL
9 1246497, at *4 (“[T]he Court must . . . discount much of the inconvenience Old
10 Navy would face in complying with the Lanham Act’s requirements.”).
11 Moreover, Plaintiff offers evidence demonstrating the revenue from Defendant’s
12 infringing products is only a small portion of Defendant’s total revenue (i.e.,
13 approximately 2.5%).¹¹ Therefore, Defendant also fails to demonstrate any undue
14 hardship if an injunction were issued.

15 Accordingly, the balance of hardships factor does not favor either party.

16 **(4) Public Interest in the Issuance of an Injunction**

17 The public interest weighs in favor of granting a permanent injunction. *See*
18 *Internet Specialties W., Inc. v. Milon-DiGiorgio Enters., Inc.*, 559 F.3d 985, 993 n.
19 5 (9th Cir. 2009) (“The public has an interest in avoiding confusion between two
20 companies’ products.”); *Brookfield Commc’ns, Inc. v. West Coast Entm’t Corp.*,
21 174 F.3d 1036, 1066 (9th Cir. 1999) (injunctive relief may be appropriate “to
22 promote the public interest in protecting trademarks generally”); *State of Idaho*
23 *Potato Comm’n v. G & T Terminal Packaging, Inc.*, 425 F.3d 708, 715 (9th Cir.
24 2005) (“Trademarks protect the public from confusion by accurately indicating the
25 source of a product.”); *Active Sports*, 2014 WL 1246497, at *4 (“The public
26 interest . . . favors granting an injunction to avoid continuing violation of the
27

28 ¹¹ *See* Trial Transcript at 1107-08, 1410, 1612; Ex. 1090A.

1 Lanham Act.”).

2 * * *

3 Accordingly, because Plaintiff fails to demonstrate it has suffered an
4 irreparable injury and there is no adequate remedy available at law, the Court
5 declines to issue a permanent injunction under the Lanham Act.

6 **C. Injunctive Relief Under California’s UCL**

7 Section 17204 of the UCL provides: “Actions for relief pursuant to this
8 chapter shall be prosecuted exclusively in a court of competent jurisdiction . . . by
9 a person who has suffered injury in fact and *has lost money or property as a*
10 *result of the unfair competition.*” Cal. Bus. & Prof. Code § 17204 (emphasis
11 added). Therefore, to demonstrate standing under the UCL, a plaintiff must show
12 (1) injury in fact; (2) lost money or property; and (3) lost money or property “as a
13 result of” the unfair competition. *Kwikset Corp. v. Super. Ct.*, 51 Cal. 4th 310,
14 326 (Cal. 2011); *Troyk v. Farmers Grp., Inc.*, 171 Cal. App. 4th 1305, 1349 (Cal.
15 Ct. App. 2009).¹² The California Supreme Court has therefore held that to bring a
16 UCL action, a private plaintiff “must be able to show economic injury caused by
17 unfair competition.” *Zhang*, 57 Cal. 4th at 372 (emphasis added).¹³ Standing
18 must exist at all times up until entry of judgment. *See Troyk*, 171 Cal. App. 4th at
19 1345 (“[F]or a [UCL] lawsuit to be allowed to continue, standing must exist at all
20 times until judgment is entered and not just on the date the complaint is filed.
21 Because standing goes to the existence of a cause of action, lack of standing may
22 be raised . . . at any time in the proceeding, including at trial or in an appeal.”).

23
24 ¹² Section 17204 was amended to include these three elements for standing under
25 the UCL pursuant to the passage of Proposition 64 in 2004. *Troyk*, 171 Cal. App.
4th at 1345.

26 ¹³ *See also Kwikset*, 51 Cal. 4th at 323, 325 (“The plain import of this [“lost
27 money or property] requirement] is that a plaintiff now must demonstrate some
28 form of economic injury. . . . Proposition 64 requires that a plaintiff’s economic
injury come ‘as a result of’ the unfair competition. The phrase ‘as a result of’ in
its plain and ordinary sense means ‘caused by’ and requires a showing of a causal
connection or reliance on the alleged misrepresentation.”).

1 Here, the jury awarded Plaintiff \$0 in damages caused by Defendant's
2 infringement. Moreover, Plaintiff fails to offer evidence demonstrating it has
3 suffered economic injury or actual injury to its good will or reputation caused by
4 Defendant.

5 Therefore, the Court finds Plaintiff lacks standing under the UCL.¹⁴

6 **IV. CONCLUSION**

7 Accordingly, the Court **DENIES** Plaintiff's Motion for Permanent
8 Injunction.

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10 **IT IS SO ORDERED.**

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12 DATED: July 2, 2019.



13 CONSUELO B. MARSHALL
14 UNITED STATES DISTRICT JUDGE
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26 ¹⁴ See, e.g., *Akkerman v. Mecta Corp.*, 152 Cal. App. 4th 1094, 1098-1102 (Cal.
27 Ct. App. 2007); *Wiseman v. Ikon Office Sols., Inc.*, 2008 WL 2756472, at *10
28 (Cal. Ct. App. July 16, 2008); *Paz v. Sanders Oldsmobile-Cadillac, Inc.*, 2007 WL
49657, at *5-*6 (Cal. Ct. App. Jan. 9, 2007); *Hall v. Time Inc.*, 158 Cal. App. 4th
847, 855 (Cal. Ct. App. 2008).

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8 **UNITED STATES DISTRICT COURT**
9 **CENTRAL DISTRICT OF CALIFORNIA**
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11 **MONSTER ENERGY COMPANY,**

12 **Plaintiff,**

13 **v.**

14 **INTEGRATED SUPPLY NETWORK,**
15 **LLC,**

16 **Defendant.**
17
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21

Case No.: ED CV 17-548-CBM-RAO

ORDER RE: DEFENDANT’S RULE 50(A) MOTION FOR JUDGMENT AS A MATTER OF LAW, RULE 50(B) RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW, OR ALTERNATIVE RULE 59 MOTION FOR REMITTITUR OF DAMAGES, OR A NEW TRIAL; AND PLAINTIFF’S MOTION FOR A NEW TRIAL ON DAMAGES AND WILLFULNESS, AND A CONDITIONAL NEW TRIAL ON ITS RIGHTS IN THE UNREGISTERED MARK “MONSTER”

22 The matters before the Court are: (1) Defendant’s Rule 50(a) Motion for
23 Judgment as a Matter of Law, Rule 50(b) Renewed Motion for Judgment as a
24 Matter of Law, or Alternative Rule 59 Motion for Remittitur of Damages, or a
25 New Trial (Dkt. No. 473); (2) Plaintiff’s Motion For a New Trial on Damages and
26 Willfulness, and a Conditional New Trial on its Rights in the Unregistered Mark
27 “Monster” (Dkt. No. 469); and (3) Defendant’s Second and Third Motion to Strike
28 Material Outside the Trial Record (Dkt. Nos. 494, 501).

I. BACKGROUND

On March 22, 2017, Plaintiff Monster Energy Company filed a complaint against Defendant Integrated Supply Network (“Defendant” or “ISN”) asserting four causes of action: (1) trademark infringement, trade dress infringement, and false designation of origin under 15 U.S.C. § 1125(a); (2) trademark infringement under 15 U.S.C. § 1114; (3) Unfair Competition, Cal. Bus. & Prof. Code §§ 17200 *et seq.* (the “UCL”); and (4) California common law unfair competition.

Following a nine-day trial, a jury reached a verdict in favor of Plaintiff on its infringement claim as to its federally registered trademarks that include the word “Monster” and its trade dress, awarded zero dollars in compensatory damages to Plaintiff, and awarded \$5,000,000 in punitive damages to Plaintiff upon finding Plaintiff proved by clear and convincing evidence that Defendant acted with malice, oppression, or fraud. (Dkt. No. 446.) The jury found in favor of Defendant on Plaintiff’s infringement claim as to its unregistered mark “Monster” and federally registered trademarks that include the word “Beast,” and found Plaintiff did not prove by a preponderance of the evidence that Defendant’s infringement was willful. (*Id.*)

II. STATEMENT OF THE LAW

A. Rule 50

Federal Rule of Procedure 50(a) provides:

If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may:

(A) resolve the issue against the party; and

(B) grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue.

Fed. R. Civ. P. 50(a). “The standard for judgment as a matter of law under Rule

1 50(a) mirrors the summary judgment standard.” *Reed v. Lieurance*, 863 F.3d
2 1196, 1204 (9th Cir. 2017) (citation omitted). “[T]he trial evidence” must be
3 viewed “in the light most favorable to the non-moving party, and [i]f conflicting
4 inferences may be drawn from the facts [presented at trial], the case must go to the
5 jury.” *Id.* (citation omitted).

6 Rule 50(b) provides:

7 If the court does not grant a motion for judgment as a matter of law
8 made under Rule 50(a), the court is considered to have submitted the
9 action to the jury subject to the court’s later deciding the legal
10 questions raised by the motion. . . . [T]he movant may file a renewed
11 motion for judgment as a matter of law and may include an
12 alternative or joint request for a new trial under Rule 59. In ruling on
13 the renewed motion, the court may:

- 14 (1) allow judgment on the verdict, if the jury returned a verdict;
15 (2) order a new trial; or
16 (3) direct the entry of judgment as a matter of law.

17 Fed. R. Civ. P. 50(b).

18 “A Rule 50(b) motion for judgment as a matter of law is not a freestanding
19 motion[,] . . . [r]ather, it is a renewed Rule 50(a) motion.” *E.E.O.C. v. Go Daddy*
20 *Software, Inc.*, 581 F.3d 951, 961 (9th Cir. 2009). Therefore, “a party cannot
21 properly “raise arguments in its post-trial motion for judgment as a matter of law
22 under Rule 50(b) that it did not raise in its preverdict Rule 50(a) motion.” *Id.* The
23 Court must review the “jury’s verdict for substantial evidence in ruling on a
24 properly made motion under Rule 50(b).” *Id.* “In considering a Rule 50(b)(3)
25 motion for judgment as a matter of law, the district court must uphold the jury’s
26 award if there was any legally sufficient basis to support it.” *Experience Hendrix*
27 *L.L.C. v. Hendrixlicensing.com Ltd*, 762 F.3d 829, 842 (9th Cir. 2014). The court
28 must “consider[] all of the evidence in the record, drawing all reasonable
inferences in favor of the nonmoving party,” and “may not make any credibility
determinations or reweigh the evidence.” *Id.*

1 Rule 50(c) provides:

2 If the court grants a renewed motion for judgment as a matter of law,
3 it must also conditionally rule on any motion for a new trial by
4 determining whether a new trial should be granted if the judgment is
5 later vacated or reversed. The court must state the grounds for
6 conditionally granting or denying the motion for a new trial.

7 . . . Conditionally granting the motion for a new trial does not affect
8 the judgment's finality; if the judgment is reversed, the new trial must
9 proceed unless the appellate court orders otherwise. If the motion for
10 a new trial is conditionally denied, the appellee may assert error in
11 that denial; if the judgment is reversed, the case must proceed as the
12 appellate court orders.

13 Fed. R. Civ. P. 50(c).

14 **B. Rule 59**

15 Federal Rule of Civil Procedure 59 provides that "[t]he court may, on
16 motion, grant a new trial on all or some of the issues--and to any party-- . . . after a
17 jury trial, for any reason for which a new trial has heretofore been granted in an
18 action at law in federal court." Fed. R. Civ. P. 59(a)(1). Rule 59 further provides
19 that "the court, on its own, may order a new trial for any reason that would justify
20 granting one on a party's motion. After giving the parties notice and an
21 opportunity to be heard, the court may grant a timely motion for a new trial for a
22 reason not stated in the motion. In either event, the court must specify the reasons
23 in its order." Fed. R. Civ. P. 59(d). "Unlike with a Rule 50 determination, the
24 district court, in considering a Rule 59 motion for new trial, is not required to view
25 the trial evidence in the light most favorable to the verdict. Instead, the district
26 court can weigh the evidence and assess the credibility of the witnesses."
27 *Experience Hendrix*, 762 F.3d at 842 (citation omitted).

28 The district court's grant of a new trial under Rule 59 is reviewed for an
abuse of discretion, meaning a district court's decision to grant a new trial will be
overturned "only when the district court reaches a result that is illogical,
implausible, or without support in the inferences that may be drawn from the
record." *Id.* "The district court's denial of a motion for a new trial" under Rule

59 “is reversible only if the record contains no evidence in support of the verdict or if the district court made a mistake of law.” *Go Daddy Software, Inc.*, 581 F.3d at 962 (internal quotations omitted).

III. DISCUSSION

A. Defendant’s Motion for Judgment as a Matter of Law

(1) Injury and Causation

Defendant contends all of Plaintiff’s claims fail as a matter of law because Plaintiff was required to show it suffered an injury and that Defendant caused that injury “[t]o prove each of its claims,” but failed to do so.¹ Defendant contends the jury’s verdict, wherein the jury awarded \$0 in damages caused by Defendant’s infringement, shows Plaintiff failed to prove injury and causation.

To prevail on a claim for trademark infringement under the Lanham Act, a plaintiff to prove (1) that “it has a valid, protectable trademark” and (2) that “the defendant’s use of the mark is likely to cause confusion.” *Gordon v. Drape Creative, Inc.*, 909 F.3d 257, 264 (9th Cir. 2018). To prevail on a trade dress infringement claim under the Lanham Act, a plaintiff must prove (1) nonfunctionality; (2) distinctiveness; and (3) likelihood of confusion. *Talking Rain Beverage Co. Inc. v. South Beach Beverage Co.*, 349 F.3d 601, 603 (9th Cir. 2003).

The Ninth Circuit’s Model Instructions do not list injury and causation as an element for a trademark or trade dress infringement claim. (*See* 9th Cir. Model Instruction Nos. 15.6 & 15.7 (listing elements and burden of proof for trademark and trade dress infringement claims).) Moreover, the comments to these Ninth Circuit Model Instructions state: “It is not necessary for plaintiff in a trademark or unfair competition case to prove any past or present actual damages since one of

¹ The Court refused Defendant’s proposed jury instruction which stated: “For all of its claims, Monster Energy must prove by a preponderance of the evidence that it has suffered an injury in this case, and that Monster Mobile caused that injury.” (Dkt. No. 431 at 13, Defendant’s proposed Jury Instruction No. 5.)

1 the major benefits of injunctive relief is that it can be obtained prior to actual
2 damage so as to prevent that damage from occurring.” (9th Cir. Model instruction
3 Nos. 15.6 & 15.7 Comments (citing 5 THOMAS MCCARTHY, TRADEMARKS
4 AND UNFAIR COMPETITION § 30:2 (4th ed. 2015).)

5 Accordingly, the Court denies Defendant’s motion for judgment as a matter
6 of law based on Plaintiff’s purported failure to prove injury and causation.

7 **(2) Statutory Standing Under the Lanham Act**

8 Defendant argues the Court should extend the Supreme Court’s holding in
9 *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014), to all
10 Lanham Act claims, and dismiss Plaintiffs’ claims for lack of statutory standing as
11 a matter of law because “the jury has found that [Plaintiff] failed to establish any
12 harm to a commercial interest in sales, goodwill, or business reputation
13 proximately caused by [Defendant’s] conduct.”

14 In *Lexmark*, the Supreme Court analyzed the requirements for statutory
15 standing with respect to false advertising claims brought under § 1125(a) of the
16 Lanham Act, and held “[t]o invoke the Lanham Act’s cause of action *for false*
17 *advertising*, a plaintiff must plead (*and ultimately prove*) an injury to a
18 commercial interest in sales or business reputation proximately caused by the
19 defendant’s misrepresentations.” *Id.* at 140 (emphasis added).² *Lexmark*
20 expressly dealt with false advertising claims under the Lanham Act, and therefore
21 this Court declines to extend *Lexmark* to trademark and trade dress infringement
22 claims under the Lanham Act.³

23
24 ² See also *Lexmark*, 572 U.S. at 131-33 (noting a statutory cause of action is
25 presumed to extend only to plaintiffs whose interests “fall within the zone of
26 interests protected by the law involved, and concluding “to come within the zone
27 of interests in a suit for *false advertising* under § 1125(a), a plaintiff must allege
28 an injury to a commercial interest in reputation or sales,” “a plaintiff suing under §
1125(a) ordinarily must show economic or reputational injury flowing directly
from the deception wrought by the defendant’s *advertising*; and that occurs when
deception of consumers causes them to withhold trade from the plaintiff.”)
(emphasis added).

³ Defendant does not cite to, and the Court did not find, any Supreme Court or

1 Here, Plaintiff alleged commercial injury as a result of Defendant's
2 infringement. (*See* Compl. ¶ 50.) Accordingly, the Court finds Plaintiff has
3 statutory standing for its trademark and trade dress infringement claims under the
4 Lanham Act. *See Barrus v. Sylvania*, 55 F.3d 468, 469-70 (9th Cir. 1995) (“[I]n
5 order to satisfy standing” for false association claims under the Lanham Act, “the
6 plaintiff need only allege commercial injury based upon the deceptive use of its
7 trademark or its functional equivalent.”) (Emphasis added.) Accordingly, the
8 Court denies Defendant's motion for judgment as a matter of law based on
9 standing under the Lanham Act.

10 **(3) Statutory Standing Under the UCL**

11 Defendant contends Plaintiff lacks standing under the UCL because “[t]he
12 jury’s finding of no injury . . . bars any remedy for [Plaintiff] under the UCL.”
13 For the reasons set forth in the Court’s Order re Plaintiff’s Motion for a Permanent
14 Injunction, Plaintiff lacks statutory standing under the UCL. Accordingly,
15 Plaintiff’s UCL claim is dismissed with prejudice.⁴

16 **(4) Likelihood of Confusion**

17 Defendant argues all of Plaintiff’s claims fail because Plaintiff did not prove
18 any likelihood of confusion.

19 The Ninth Circuit applies the eight-factor test from *AMF, Inc. v. Sleekcraft*
20 *Boats*, 599 F.2d 341 (9th Cir. 1979), in determining whether there is a likelihood
21 of confusion. Each *Sleekcraft* factor must be considered based on the “totality of
22

23 Ninth Circuit cases applying *Lexmark* to false association claims under the
Lanham Act.

24 ⁴ While Defendant raises the issue of statutory standing as a basis for its motion
25 for judgment as a matter of law, the Court does not enter judgment on Plaintiff’s
26 UCL claim, and instead dismisses the UCL claim with prejudice for lack of
27 statutory standing. *See Maya v. Centex Corp.*, 658 F.3d 1060, 1067 (9th Cir.
28 2011) (“lack of *statutory* standing requires dismissal for failure to state a claim”);
Lake Washington Sch. Dist. No. 414 v. Office of Superintendent of Pub.
Instruction, 634 F.3d 1065, 1069 (9th Cir. 2011) (“The district court correctly
dismissed [plaintiff’s] complaint with prejudice” based on lack of statutory
standing.)

1 facts in a given case,” and no factor is dispositive on the issue of likelihood of
2 confusion. *Entrepreneur Media, Inc. v. Smith*, 279 F.3d 1135, 1141 (9th Cir.
3 2002).

4 Here, the jury was instructed as to each *Sleekcraft* factor, and necessarily
5 found a likelihood of confusion when it found Defendant infringed on Plaintiff’s
6 registered “Monster” trademarks and trade dress. Although Defendant addresses
7 each of the *Sleekcraft* factors and argues the evidence does not support a finding
8 of a likelihood of confusion, Plaintiff identifies the evidence it offered at trial as to
9 each *Sleekcraft* factor. The Court cannot reweigh the evidence or make any
10 credibility determinations in ruling on a motion for judgment as a matter of law
11 under Rule 50. *See Experience Hendrix L.L.C.*, 762 F.3d at 842.

12 Accordingly, the Court denies Defendant’s motion for judgment as a matter
13 of law based on Plaintiff’s purported failure to prove a likelihood of confusion.

14 **(5) Plaintiff’s Trade Dress**

15 Defendant also argues the Court should dismiss Plaintiff’s trade dress
16 infringement claim as a matter of law, or alternatively order a new trial, because
17 Plaintiff changed their defined trade dress after summary judgment. Defendant
18 contends Plaintiff’s trade dress as defined in the jury instructions⁵ was different
19 from the trade dress defined in the Complaint and the Pretrial Conference Order,
20 and did not include the primary component (i.e., the “M-Claw”) of Plaintiff’s
21 trade dress.⁶ Contrary to Defendant’s contention, Plaintiff’s trade dress as alleged
22 in the Complaint and Pretrial Conference Order is not limited to the “M-Claw.”
23 (See Compl. ¶ 13 (“Monster has consistently used a distinctive trade dress for its
24 packaging and promotional materials, including a stylized font for the mark

25 ⁵ The trade dress was defined in the jury instructions as follows: “Monster Energy
26 is asserting trade dress rights in the way it presents its products using the
27 combination of the colors green and black with the word ‘Monster.’” (Court
Instruction No. 12.)

28 ⁶ The Court previously overruled Defendant’s objections to the definition of
Plaintiff’s trade dress during the settling of jury instructions.

1 MONSTER on a dark background, a bright contrasting accent color, including
2 bright green, and an overall aggressive, edgy theme.”); Pretrial Conference Order,
3 Dkt. No. 322 (incorporating the definition of Plaintiff’s trade dress set forth in
4 Dkt. No. 276 at 1 as “a distinctive trade dress for [Plaintiff’s] packaging and
5 promotional materials, including the colors green and black, as shown below,”
6 followed by various photos of Plaintiff’s trade dress).

7 Accordingly, the Court denies Defendant’s motion for judgment as a matter
8 of law and motion for a new trial based on the definition of Plaintiff’s trade dress
9 given to the jury.

10 **(6) Laches**

11 Defendant argues Plaintiff’s claims are barred by laches. For the reasons
12 set forth in the Court’s Order re: Defendant’s Motion for Application of Laches,
13 the Court declines to apply laches here. Accordingly, the Court denies
14 Defendant’s motion for judgment as a matter of law on the basis of laches.

15 **B. Defendant’s Motion for Remittitur of Damages or New Trial**

16 Defendant also requests that the Court: (1) vacate the jury’s \$5,000,000
17 punitive damages award; (2) remit the jury’s punitive damages award to \$0; or (3)
18 order a new trial in light of the jury’s punitive damages award.

19 **(1) Punitive Damages Where No Actual Damages Are Awarded**

20 Defendant argues punitive damages are not available if a jury awards no
21 compensatory damages.

22 Plaintiff’s claim for punitive damages was brought under California Civil
23 Code § 3294(a) in connection with Plaintiff’s common law unfair competition
24 claim. California Civil Code § 3294(a) provides: “[W]here it is proven by clear
25 and convincing evidence that the defendant has been guilty of oppression, fraud,
26 or malice, the plaintiff, *in addition to the actual damages*, may recover damages
27 for the sake of example and by way of punishing the defendant.” (Emphasis
28 added.) In *California v. Altus Fin. S.A.*, a case relied on by Defendant, the Ninth

1 Circuit stated: “California courts have long interpreted Section 3294 to require an
2 award of compensatory damages, *even if nominal*, to recover punitive damages.”
3 540 F.3d 992, 1000 (9th Cir. 2008). (emphasis added).⁷

4 Here, the jury awarded Plaintiff \$0 in damages caused by Defendant’s
5 infringement. However, no nominal damages instruction was requested nor given
6 to the jury. Accordingly, the Court awards nominal damages of \$1.00 to Plaintiff
7 for Defendant’s infringement. *See, e.g., Lesperance v. City of Spokane*, 8 F.
8 App’x 745, 746 (9th Cir. 2001) (noting “[t]he district court awarded Lesperance
9 nominal damages of \$100.00” after jury found Lesperance “prevailed on his state
10 retaliation claim” but “awarded him zero dollars in compensatory damages”).⁸
11 Having awarded nominal damages, the Court denies Defendant’s motion to vacate
12 and motion for remittitur of the jury’s punitive damages award, and denies
13 Defendant’s motion for new trial, based on the jury’s award of \$0 in damages
14 caused by Defendant’s infringement.

15 **(2) Limit To Punitive Damages Award under the Lanham Act**

16 Defendant contends should the Court find punitive damages may be
17 awarded in this case, the Court must limit the punitive damages award to three
18 times compensatory damages as required under 15 U.S.C. § 1117(a), and thus
19 award Plaintiff \$0 in punitive damages. Section 1117(a), however, applies to
20 damages under the Lanham Act. Here, punitive damages were awarded for
21 Plaintiff’s California common law unfair competition claim under California Civil
22

23 ⁷ *See also Sole Energy Co. v. Petrominerals Corp.*, 128 Cal. App. 4th 212, 238
24 (Cal. Ct. App. 2005) (“An award of actual damages, *even if nominal*, is required
to recover punitive damages” under § 3294(a).) (Emphasis added.).

25 ⁸ *See also Pogrebnoy v. Russian Newspaper Distribution, Inc.*, 289 F. Supp. 3d
26 1061 (C.D. Cal. 2017) (declining to award actual damages or profits to plaintiff,
but awarding nominal damages following a bench trial in a trademark and trade
27 dress infringement action); *Bare v. Lake Shastina Cmty. Servs. Dist.*, 2008 WL
28 224879, at *1 (Cal. Ct. App. Jan. 29, 2008) (noting trial court awarded nominal
damages of \$1.00 each against two defendants for which the jury found liability
but no damages as to plaintiff’s § 1983 claim).

1 Code § 3294(a).⁹ Therefore, the Lanham Act’s restrictions to damage awards set
2 forth in 15 U.S.C. § 1117(a) does not apply to the jury’s punitive damages award
3 pursuant to California Civil Code § 3294(a).

4 **(3) Due Process**

5 Defendant also argues the jury’s \$5,000,000 punitive damages award should
6 be vacated because it is “grossly excessive,” and therefore violates due process.

7 Courts analyze the following three factors in determining whether a
8 punitive damages award violates due process: “(1) the degree of reprehensibility
9 of the defendant’s misconduct; (2) the disparity between the actual or potential
10 harm suffered by the plaintiff and the punitive damages award; and (3) the
11 difference between the punitive damages awarded by the jury and the civil
12 penalties authorized or imposed in comparable cases.” *State Farm Mutual*
13 *Automobile Insurance Co. v. Campbell*, 538 U.S. 408, 418 (2003). “[T]he most
14 important indicium of the reasonableness of a punitive damages award is the
15 degree of reprehensibility of the defendant’s conduct.” *BMW of N. Am., Inc. v.*
16 *Gore*, 517 U.S. 559, 575 (1996).

17 Applying these factors, the Court finds the jury’s punitive damages award
18 does not violate due process. As to the first and most important factor, Plaintiff
19 offered evidence at trial that Defendant’s executive stated in response to the
20 announcement of Plaintiff’s sponsorship of NASCAR that it “could be good for
21 [Defendant’s] Monster brand,” and that it “certainly creates awareness!” (Ex.
22 237.) With respect to the second factor, although the jury awarded \$0 in damages
23 caused by Defendant’s infringement, the Supreme Court has emphasized “we have
24 consistently rejected the notion that the constitutional line is marked by a simple

25 _____
26 ⁹ “[P]unitive damages are not available under the Lanham Act.” *Duncan v.*
27 *Stuetzle*, 76 F.3d 1480, 1490 (9th Cir. 1996). Moreover, punitive damages are not
28 available under the UCL, Cal. Bus. & Prof. Code § 17200. *See In re Tobacco II*
Cases, 46 Cal. 4th 298, 312 (Cal. 2009); *Steinberg Moorad & Dunn Inc., a*
California Corp. v. Dunn, 136 F. App’x 6, 9 (9th Cir. 2005); *Am. Computech, Inc.*
v. Nat’l Med. Care, Inc., 959 F.2d 239 (9th Cir. 1992).

1 mathematical formula, even one that compares actual *and potential* damages to the
2 punitive award.” *Gore*, 517 U.S. at 582. The last factor re: civil penalties does
3 not apply here because there are no civil penalties for trademark or trade dress
4 infringement.¹⁰

5 Accordingly, the Court denies Defendant’s motion to vacate the jury’s
6 punitive damages award on due process grounds.

7 **(4) Jury’s Willfulness Finding**

8 Defendant also contends the Court should vacate or remit the jury’s punitive
9 damages award to \$0 or order a new trial because the jury’s award of punitive
10 damages is inconsistent with the jury’s finding of no willfulness.

11 “[A] trial court has a duty to attempt to harmonize seemingly inconsistent
12 answers to special verdict interrogatories, if it is possible under a fair reading of
13 them.” *Duk*, 320 F.3d at 1058-59 (citing *Gallick v. Baltimore & Ohio R.R. Co.*,
14 372 U.S. 108, 119 (1963)). “A court may not disregard a jury’s verdict and order
15 a new trial until it attempt[s] to reconcile the jury’s findings, by exegesis if
16 necessary.” *Id.* “Where there is a view of the case that makes the jury’s answers
17 to special interrogatories consistent, they must be resolved that way.” *Id.* (quoting
18 *Atl. & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, 364, 82 S.Ct.
19 780, 7 L.Ed.2d 798 (1962)). To do otherwise “results in a collision with the
20 Seventh Amendment.” *Id.*

21 Here, separate instructions were given to the jury defining willfulness and
22 malice, oppression, and fraud, and the parties did not propose any jury instructions
23 addressing whether the definitions were necessarily coextensive. The jury’s
24 finding regarding malice, oppression, or fraud pertains to Plaintiff’s common law
25 unfair competition claim, not Plaintiff’s Lanham Act claim; and the jury’s finding
26 of no willfulness pertains to Plaintiff’s Lanham Act claims. Therefore, the jury’s

27
28 ¹⁰ See, e.g., *adidas Am., Inc. v. Payless Shoesource, Inc.*, 2008 WL 4279812, at
*16 (D. Or. Sept. 12, 2008).

1 finding of no willfulness, and finding of malice, fraud or oppression, are not
2 inconsistent because the findings apply to different claims under federal vs. state
3 law.¹¹

4 Accordingly, the Court denies Defendant's motion to vacate or remit the
5 jury's punitive damages award to \$0 and motion for new trial motion based on the
6 jury's finding of no willfulness.

7 **C. Plaintiff's Motion for New Trial on Damages and Willfulness**

8 Plaintiff moves for a new trial on actual damages and willfulness.

9 **(1) Damages**

10 The actual damages instruction given to the jury provided in relevant part
11 that "Plaintiff seeks actual damages in the form of a reasonable royalty award,"
12 and the jury should consider injury to Plaintiff's reputation and goodwill, and
13 "[t]he royalties that [Plaintiff] would have earned if [Defendant] had taken a
14 license before it began infringement." (Dkt. No. 440, Court's Instruction No. 27.)
15 The jury entered "\$0 zero" in response to Question No. 8 on the verdict form,
16 which provided: "What amount did [Plaintiff] prove by a preponderance of the
17 evidence that [Defendant] should pay in damages caused by its infringement?"
18 (Dkt. No. 446.)

19 Plaintiff argues no reasonable jury could have found Plaintiff suffered no
20 damages as a result of Defendant's infringement because Plaintiff presented
21 "unrebutted evidence that, if [Defendant] had sought a license rather than infringe,
22 [Plaintiff] would have received at least a 10% royalty from [Defendant]," and
23 there was no evidence demonstrating Plaintiff would have received \$0 in royalties.
24

25 ¹¹ See, e.g., *Brighton Collectibles, Inc. v. Marc Chantal USA, Inc.*, 2009 WL
26 2513984, at *2 (S.D. Cal. Aug. 17, 2009) ("[T]he jury's finding that Defendant
27 engaged in unfair competition with malice, oppression, or fraud is not dispositive
28 on this issue [of whether the Defendant engaged in malicious, fraudulent,
deliberate or willful conduct to deem a case exceptional under the Lanham Act].
That finding related only to Plaintiff's claim under California Business and
Professions Code § 17200, not the Lanham Act.").

1 Plaintiff, not Defendant, had the burden of proving damages beyond a
2 preponderance of the evidence. Therefore, Defendant was not required to provide
3 any rebuttal evidence as to damages. Moreover, Defendant offered evidence at
4 trial demonstrating Plaintiff entered into a settlement agreement with CytoSport (a
5 third party) permitting CytoSport to use the name “CYTOSPORT MONSTER
6 MILK” without any payment to Plaintiff. (Ex. 80.)¹² Plaintiff argues the
7 agreement with CytoSport is irrelevant because it was a settlement agreement, not
8 a royalty agreement, and CytoSport used its “Monster Milk” mark before Plaintiff
9 used its “monster” marks.¹³ The jury, however, could consider the CytoSport
10 settlement agreement as evidence demonstrating Plaintiff would have permitted
11 Defendant to use its “Monster” brand without any payment.

12 A new trial should not be granted “merely because [the court] might have
13 come to a different result from that reached by the jury.” *Kranson v. Fed. Express*
14 *Corp.*, 2013 WL 5807795, at *9 (N.D. Cal. Oct. 28, 2013), *aff’d sub nom.*
15 *Kranson v. Fed. Exp. Corp.*, 645 F. App’x 584 (9th Cir. 2016) (quoting *Wilhelm v.*
16 *Assoc. Container Transp. (Australia) Ltd.*, 648 F.2d 1197, 1198 (9th Cir. 1981)).

17 ¹² Exhibit 80 was admitted for trial pursuant to the parties’ “Joint List of Agreed
18 Upon Exhibits That Can be Admitted Into Evidence.” (See Dkt. No. 372.)

19 ¹³ Defendant filed a request for judicial notice in support of its opposition to
20 Plaintiff’s Motion, requesting that the Court take judicial notice of various records
21 available on the USPTO’s website which reflect CytoSport first used its trademark
22 “Monster Milk” in 2008 and first used its trademark “CytoSport Monster Milk” in
23 2010, in order to show CytoSport’s use of the mark did not predate Plaintiff’s first
24 use of its marks in 2002. (Dkt. No. 493-1.) Plaintiff filed an opposition to
25 Defendant’s request for judicial notice on the ground Defendant cannot offer new
26 evidence not admitted at trial in opposition to Plaintiff’s Motion for a new trial.
27 To consider new evidence for a Rule 59 motion, the party must show the evidence
28 (1) existed at the time of the trial, (2) could not have been discovered through due
diligence, and (3) was “of such magnitude that production of it earlier would have
been likely to change the disposition of the case.” *Jones v. Aero/Chem Corp.*, 921
F.2d 875, 878 (9th Cir. 1990); *see also GuideTech, Inc. v. Brilliant Instruments,*
Inc., 2014 WL 4182340, at *4 n.1 (N.D. Cal. Aug. 22, 2014). The CytoSport
settlement was produced during discovery and used as an exhibit at trial.
Moreover, Plaintiff’s CEO Rodney Sacks testified at trial that CytoSport had
acquired a Monster-inclusive mark for protein powder supplements that predated
Plaintiff’s marks. (Trial Tr. at 406.) Therefore, Defendant could have discovered
these publicly available records from the USPTO’s website during discovery and
trial. Accordingly, the Court denies Defendant’s request for judicial notice.

1 Rather, a new trial should be granted where, after “giv[ing] full respect to the
2 jury’s findings, the judge on the entire evidence is left with the definite and firm
3 conviction that a mistake has been committed” by the jury. *Id.* (quoting *Landes*
4 *Const. Co., Inc. v. Royal Bank of Canada*, 833 F.2d 1365, 1371–72 (9th Cir.
5 1987)). Accordingly, the Court finds the evidence does not leave the Court with a
6 “definite and firm conviction that a mistake has been committed” by the jury in
7 awarding \$0 in damages caused by Defendant’s infringement. *Id.*

8 Plaintiff also argues the evidence at trial regarding actual confusion¹⁴
9 demonstrates Plaintiff was “severely harmed” by consumer confusion because
10 Defendant’s tools are “inferior goods”¹⁵ and “not the premium type of product
11 with which [Plaintiff] asserts itself.” Plaintiff contends it would never have
12 associated itself with Defendant’s inferior goods, and therefore the confusion
13 proven at trial has harmed Plaintiff’s reputation and goodwill.

14 As discussed in the Court’s Order re Plaintiff’s Motion for Permanent
15 Injunction, harm is not automatically presumed based on a likelihood of
16 confusion. Moreover, Plaintiff did not offer evidence demonstrating Plaintiff has
17 actually lost control over its business reputation, Plaintiff’s good will has actually
18 been harmed, or Plaintiff has lost any prospective customers as a result of
19 Defendant’s infringement. Furthermore, Defendant offered several witnesses at
20 trial who testified regarding the awards and nominations Defendant has received
21 for its Monster Mobile products, and the quality of Defendant’s products.¹⁶
22

23 ¹⁴ Plaintiff cites to testimony by Dr. Isaacson regarding his consumer survey (Trial
24 Tr. at 1023, 1027-28), deposition testimony from three mechanics who believed
25 Defendant’s products were affiliated with Plaintiff (*id.* at 966-67, 974, 982-83),
26 and evidence regarding comments from visitors to Defendant’s social media
accounts who believed Defendant’s Monster tools are affiliated with Plaintiff
(Exs. 307, 322; Trial Tr. at 909-10).

27 ¹⁵ Plaintiff offered evidence at trial regarding the inferiority of Defendant’s goods.
See Ex. 1, Rivera Depo. at 145-46; Trial Transcript at 964, 966, 983-84, 1879.

28 ¹⁶ See Trial Tr. 1321:1-12, 1373:1-1375:21, 1423:6-20; 1505:13-23, 1535:7-10,
1817:7–1821:16.

1 Accordingly, the Court denies Plaintiff's motion for a new trial on damages.

2 (2) Willfulness

3 Plaintiff also moves for a new trial on the issue of "willful infringement,
4 and disgorgement of profits which accompanies a finding of willfulness," on the
5 ground the jury's conclusion that Defendant did not willfully infringe Plaintiff's
6 rights is against the clear weight of the evidence.¹⁷ Plaintiff contends the evidence
7 is undisputed that: (1) Defendant knew of and applauded the consumer confusion
8 it was creating; and (2) when Plaintiff first notified Defendant of its infringement,
9 Defendant responded only by increasing its infringing activities.¹⁸

10 In *San Miguel Pure Foods Co. v. Ramar International Corp.*, the Ninth
11 Circuit affirmed the district court's denial of a motion for judgment as a matter of
12 law on the issue of willfulness, reasoning "[t]he record supports the proposition
13 that San Miguel believed it had established trademark rights with respect to its
14 imported BMC products," and believed BMC butter and cheese products "are
15 different from ice cream." 625 F. App'x 322, 325 (9th Cir. 2015). The Ninth

16 ¹⁷ Plaintiff argues the jury "may have been confused by [Defendant] and thought
17 that willfulness can only occur at the very initial adoption of the trademark or
18 trade dress." The Court, however, cannot speculate as to how the jury reached its
19 verdict so long as the verdict is supported by the evidence. *See McClellan v. I-Flow Corp.*, 776 F.3d 1035, 1041 (9th Cir. 2015) (finding arguments on appeal "lack merit as they speculate regarding how the jury reached its verdict.").

20 ¹⁸ Plaintiff relies on evidence that: (1) Plaintiff wrote to Defendant regarding its
21 concern about Defendant's proposed use of the Monster Mobile mark on February
22 11, 2014 (Ex. 280); Defendant's response to same wherein Defendant wrote:
23 "Virtually all of the products supplied by our client bear the brands of its vendor
24 partners (*there are no "Monster Mobile" products*), and the services offered by
25 ISN are not provided to customers at any retail outlet." (Ex. 281 (emphasis
26 added); and (3) Scott Pilkenton's (Defendant's VP of Marketing) testimony at trial
27 that Defendant had been using the Monster Mobile marks on products for over
28 three years (Trial Tr. 1502-03, 1683-85); (4) Defendant was marketing its Monster
Mobile products using green and black with the word monster in a 2013 catalog
(Ex. 175); (5) Plaintiff sent Defendant a cease and desist letter in October 2014
and February 2016 (Exs. 282, 283); and (6) Defendant continued to sell products
under and expand its Monster Mobile brand after it received Plaintiff's cease and
desist letters and after Plaintiff filed the instant lawsuit (Ex. 268 and Tr. at 1754
(72 SKUs in 2014 catalog); Ex. 176 and Tr. at 1754-56 (231 SKUs in Spring 2015
catalog); Ex. 269 and Tr. at 1758 (259 SKUs in Spring 2016 catalog); Ex. 177 and
Tr. at 1759 (302 SKUs in Summer 2016 catalog); Ex. 270 and Tr. at 1760 (367
SKUs in 2017 catalog); Ex. 1837 and Tr. at 1761 (399 SKUs in 2018 catalog)).

1 Circuit noted “the jury could reasonably infer” that “San Miguel did not willfully
2 infringe by using the mark on BMC products” based on evidence at trial, including
3 testimony by Ramar’s vice president that he “can’t imagine that someone who’s
4 looking for ice cream would be deterred from their ice cream by a butter or a
5 cheese product,” and “Ramar’s products were ‘not competitive’ with San Miguel’s
6 BMC products because Ramar is a frozen food manufacturer.” *Id.*¹⁹

7 Here, Defendant offered evidence at trial demonstrating Defendant
8 primarily sells automotive tools, whereas Plaintiff primarily sells energy drinks,
9 and employees who created/developed Defendant’s Monster Mobile brand did not
10 consider Plaintiff when they were creating the brand.²⁰ Moreover, Defendant’s
11 employees testified at trial that they were surprised by Plaintiff’s lawsuit, did not
12 believe there could be confusion between beverages vs. tools, and did not believe
13 there was any association between the parties.²¹ Therefore, there is substantial

14 ¹⁹ See also *Evergreen Safety Council v. RSA Network Inc.*, 697 F.3d 1221, 1228
15 (9th Cir. 2012); *Highway Cruisers of Cal., Inc. v. Sec. Indus., Inc.*, 374 F.2d 875,
876 (9th Cir. 1967).

16 ²⁰ See Trial Tr. 1368:18–1369:12 (Weber testifying Plaintiff did not come to
17 mind); *id.* 1514:13–1516:12 (Pilkenton testifying his inspiration for Monster
18 Mobile was Frankenstein, the Wicked Witch of the West, the Creature from the
19 Black Lagoon, and that he and Defendant’s graphic designers never discussed
20 Plaintiff when developing the logo); *id.* 1747:17–1748:23 (Pentecost testifying
21 that he did not have Plaintiff in mind when he designed Defendant’s logo, and that
“Monsters are green, you know. The Hulk and -- anybody ever heard of Fin Fang
Foom? These are -- this big crazy Stan Lee monster that is green and wears
underpants. It’s stupid I know, but it’s a fun-like Monster. Those are the kind of
things that were in my mind when it came to designing our Monster logo. Monster
Energy was not in my mind.”).

22 ²¹ See Trial Tr. 1260:2-5 (Darlene Lott, owner of SE Sales, testifying she was a
23 “[l]ittle confused as to why there was a lawsuit” between Plaintiff and Defendant);
24 *id.* 1517:2–8 (Pilkenton testifying about Plaintiff’s opposition to Defendant’s
25 trademark, stating that “it was hard for me to believe that that was something that
26 was going to come up.”); *id.* 1747:7–16 (Pentecost testifying that, when he learned
27 Plaintiff had a problem with the logo he designed, “I was kind of blown away. I
28 didn’t understand how, if you put Monster Energy beside our Monster logo,
especially in tool and equipment, how anybody would be confused.”); *id.* 1518:6–
17 (Pilkenton testifying that he is not aware of anyone contacting Defendant to ask
if they sell Plaintiff’s beverages or asking in the field or at tool expos if Monster
Mobile is affiliated with Plaintiff); *id.* 1798:22-1799:3, 1827:4-20 (Shelstrom
testifying no association between Monster Mobile and Plaintiff); *id.* 1873:20-24,
1891:15-1892:6, 1898:16-1899:6 (Stoneman testifying Monster Energy has
nothing to do with Defendant’s business and no customers ever mentioned

evidence to support the jury's verdict. *See San Miguel Pure Foods*, 625 F. App'x at 325.²²

D. Plaintiff's Motion for Conditional New Trial on Rights in the Unregistered Mark "Monster"

Plaintiff states its Motion for a new trial on the issue of its rights in the unregistered mark "Monster" is conditional in the event the Court grants Defendant's Motion for Judgment as a Matter of Law and the jury's verdict that Defendant infringes Plaintiff's federally registered marks that include the word "monster" is disturbed. Because the Court denies Defendant's motion for judgment as a matter of law, Plaintiff's Motion for a conditional new trial on its rights in the unregistered mark "monster" is denied as moot.

E. Defendant's Motions to Strike Evidence Outside the Trial Record

Defendant filed two motions to strike evidence outside the trial record as to Exhibits 1 and F to the Declaration of Marko Zoretic, which were offered by Plaintiff in connection with its motion for a conditional new trial on the unregistered mark "Monster." Because the Court denies as moot Plaintiff's Motion for a conditional new trial, the Court denies as moot Defendant's motions to strike Exhibits 1 and F to Zoretic's declaration.

IV. CONCLUSION

Accordingly, the Court rules as follows:

- (1) Defendant's Rule 50(a) Motion for Judgment as a Matter of Law, Rule 50(b) Renewed Motion for Judgment as a Matter of law, and alternative Rule 59 Motion for Remittitur of

Plaintiff).

²² Plaintiff also argues the Court should grant a new trial on the issue of willfulness because "the jury found clear and convincing evidence that [Defendant] acted with malice, oppression, or fraud – a higher standard than willfulness – and awarded \$5 million in punitive damages." As discussed above, the jury's finding re malice, oppression and fraud applied to Plaintiff's state law claim, and therefore is not relevant as to willfulness for purposes of Plaintiff's Lanham Act claims.

Damages, or a New Trial are **DENIED**;

(2) Plaintiff's Motion For a New Trial on Damages and Willfulness is **DENIED**;

(3) Plaintiff's Motion for a Conditional New Trial on its Rights in the Unregistered Mark "Monster" is **DENIED AS MOOT**; and

(4) Defendant's Motions to Strike Evidence outside the trial record is **DENIED AS MOOT**.

Plaintiff's unfair competition claim pursuant to Cal. Bus. & Prof. Code §§ 17200 *et seq.* is **DISMISSED WITH PREJUDICE** for lack of statutory standing.

IT IS SO ORDERED.

DATED: July 2, 2019.



HON. CONSUELO B. MARSHALL
UNITED STATES DISTRICT JUDGE