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16 **UNITED STATES DISTRICT COURT FOR THE**
17 **CENTRAL DISTRICT OF CALIFORNIA**

18 DECKERS OUTDOOR)
19 CORPORATION)
20 a Delaware Corporation,)

21 Plaintiff,)

22 vs.)

23 J. C. PENNEY COMPANY, INC., a)
24 Delaware Corporation;)
25 and DOES 1-10, inclusive,)

26 Defendants.)

) Civil Action No. 14-cv-02565-
) ODW(MANx)
)
) Judge: Honorable Otis D. Wright
)
) **REPLY IN SUPPORT OF J. C.**
) **PENNEY COMPANY, INC.'S**
) **MOTION TO DISMISS AMENDED**
) **COMPLAINT**
)
) **Date: September 22, 2014**
) **Time: 1:30 p.m.**
) **Ctrm; 11**

27 Amended Complaint Filed: July 2, 2014
28 Hearing Date: September 22, 2014

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Deckers Outdoor Corporation (“Deckers”) does not dispute that the purpose of this case (and the many others it has filed) is to stifle market competition. The arguments Deckers does present in an effort to save its claims against J. C. Penney Company, Inc. (“JCPenney”) fail to refute the straightforward arguments JCPenney made in its Motion to Dismiss the Amended Complaint. Indeed, the theme of Deckers’ Opposition is that this Court should discard the rules of pleading and instead accept Deckers’ legal conclusions as actionable facts sufficient to satisfy its pleading obligations. The law demands otherwise, and this Court should reject Deckers’ arguments for multiple, independent reasons.

First, Deckers has not stated a cognizable claim for false designation of origin under the Lanham Act. JCPenney originated the Accused Boots at issue, and whether Deckers presents a “passing off” claim or “reverse passing off” claim is irrelevant to the meaning of “origin of goods” within the Lanham Act. Further, Deckers has not pleaded facts sufficient to state a plausible claim of false designation of origin or trade dress infringement. Second, Deckers fails to assert a plausible claim of design patent infringement under the D616,189 (the ’189 patent) because the Accused Boots are short boots with a single toggle, and the ’189 patent claims a tall boot upper with three button closures. Third, Deckers fails to identify any pleaded facts that, if true, would suggest JCPenney had prior knowledge of Deckers’ patent claims and its alleged infringement of them. Finally, Deckers fails to show that it has pleaded the “extra element” necessary to save its state-law claims from preemption.¹

¹ JCPenney notes that in its Opposition, Deckers references claims based on “California state and common law”. [Dkt. 27] at 1. The First Amended Complaint pleads only California common law unfair competition claims—not claims under California’s unfair competition statute.

1 Accordingly, JCPenney respectfully requests that the Court dismiss with
2 prejudice Deckers' claims for (1) trade dress infringement; (2) false designation of
3 origin/false description; (3) federal unfair competition; (4) infringement of the '189
4 patent; and (5) unfair competition under California common law.

5 **II. THE COURT SHOULD DISMISS DECKERS' FALSE DESIGNATION**
6 **OF ORIGIN/FALSE DESCRIPTION CLAIM WITH PREJUDICE**

7
8 Deckers' false designation of origin claim is not cognizable because JCPenney
9 sourced the Accused Boots at issue in this case, and accurately identified itself as the
10 source of those goods. *See Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539
11 U.S. 23, 36-37, 123 S. Ct. 2041 (2003) ("We think the most natural understanding of
12 the 'origin' of 'goods'—the source of wares—is the producer of the tangible product
13 sold in the marketplace."). In light of this simple, but conclusive, argument, Deckers
14 presents a confused mishmash of arguments (some of which are wholly beside the
15 point) in an effort to avoid dismissal.

16 In *Dastar*, the Supreme Court of the United States held that "origin of goods"
17 means only the *tangible product* sold in the marketplace, and is therefore "incapable
18 of connoting the person or entity that originated the ideas or communications that
19 'goods' embody or contain." *Dastar*, 539 U.S. at 32. This distinction is important
20 because Deckers seeks to convolute this simple premise by claiming that this concept
21 applies only in cases of "reverse passing off."² *See* [Dkt. 27] at 4. Contrary to
22 Deckers' argument, the phrase "origin of goods" in the Lanham Act remains the
23 same regardless of whether the underlying allegation is based on a theory of passing
24 off or reverse passing off. *See Optimum Techs., Inc. v. Henkel Consumer Adhesives*,

25
26 _____
27 ² "Passing off . . . occurs when a producer misrepresents his own goods or service as someone
28 else's. Reverse passing off, as its name implies, is the opposite: The producer misrepresents
someone else's goods or services as his own." *Dastar*, 539 U.S. at 27 n.1 (citations and quotations
omitted).

1 *Inc.*, 496 F.3d 1231, 1248 (11th Cir. 2007) (“The Supreme Court has made clear that,
2 in the context of a ‘passing off’/‘false designation of origin’ claim under section
3 43(a), the use of the word ‘origin’ refers to a false or misleading suggestion as to the
4 producer of the tangible goods that are offered for sale. In other words, a passing off
5 claim requires a showing that the defendant falsely represented that the plaintiff was
6 the ‘source’ of the goods when it was not, that is, that it falsely suggested that the
7 plaintiff was ‘the producer of the tangible product sold in the marketplace.’”) (citation
8 and quotation omitted). Because JCPenney sourced the Accused Boots it sold, i.e. it
9 was the origin of the goods, Deckers’ false designation is not cognizable under the
10 Lanham Act and should be dismissed.

11 Even if a false designation claim were cognizable in this case, which it is not,
12 Deckers has not pleaded facts sufficient to make such a claim plausible. Deckers
13 does not dispute that:

- 14 • the basis of its false designation of origin claim against JCPenney is that
15 JCPenney sold boots that Deckers alleges look like its Bailey Button
16 boot design;
- 17 • JCPenney originated the Accused Boots;
- 18 • the Accused Boots are branded The Original Arizona Jean Co.[®]; and
- 19 • neither Deckers nor UGGs is mentioned anywhere on the website pages
20 Deckers attached to the Amended Complaint.

21 Further, Deckers does not dispute its failure to allege JCPenney falsely stated
22 that the Accused Boots were Bailey Button boots or otherwise falsely misrepresented
23 the origin of the Accused Boots. Instead of pointing to pleaded facts that support the
24 elements of its claim, Deckers relies on its rote recitation of claim elements set forth
25 in paragraph 41 of the Amended Complaint. *See* [Dkt. 27] at 4. Those conclusions
26 should be disregarded, and the mere repetition of them does not transform them into
27 facts. *See Ashcroft v. Iqbal*, 556 U.S. 662, 681, 129 S. Ct. 1937 (2009) (conclusory
28 allegations not entitled to assumption of truth on Motion to Dismiss).

1 Finally, Deckers fails to address the omission of pleaded facts sufficient to
 2 make a claim of customer confusion plausible. *See* [Dkt. 25-1] at 6-8. Deckers
 3 attempts to sidestep this argument by claiming that whether there is a likelihood of
 4 confusion is a decision for a trier of fact and that Deckers is not required to prove
 5 confusion at the pleading stage. *See* [Dkt. 27] at 6-7. But that ignores JCPenney’s
 6 argument that Deckers has failed to plead enough facts to state a claim to relief that
 7 is plausible on its face as required under *Bell Atlantic Corp. v. Twombly*, 550 U.S.
 8 544, 127 S. Ct. 1955 (2007). The authority Deckers cites does not contradict this
 9 basic proposition of law.³ Because no facts support the essential elements of
 10 Deckers’ false designation of origin/false description claim, it should be dismissed.⁴

11 **III. DECKERS HAS FAILED TO PLEAD A PLAUSIBLE CLAIM OF**
 12 **INFRINGEMENT BASED ON THE D616,189 PATENT**

13
 14 JCPenney moved to dismiss all patent infringement claims based on the
 15 D616,189 patent because they are implausible and thus subject to dismissal under
 16 federal law. *See* [Dkt. 25-1] at 8-10; *see also K-Tech Telecomms., Inc. v. Time*

17 ³ In *Vulcan Golf, LLC v. Google Inc.*, 552 F. Supp. 2d 752, 769 (N. D. Ill. 2008), the Northern
 18 District emphasized that the plaintiff must plead facts sufficient to show a plausible claim. *Id.*
 19 (“The plaintiffs need not prove their case at this point in time, **they need only adequately plead**
 20 **sufficient facts such that their claim is ‘plausible’ . . .**”). Deckers’ other cited authority does not
 21 permit an implausible claim from being dismissed: *Visual Changes Skin Care Int’l, Inc. v. Neways,*
 22 *Inc.*, Case No CV F 08-0959 LJO DLB, 2008 U.S. Dist. LEXIS 111554 (E.D. Cal. Oct. 24, 2008)
 23 (Court denying motion to dismiss because defendant sought “consideration of improper extrinsic
 24 evidence as to but one factor to address likelihood of confusion”); *Stanislaus Custodial Deputy*
 25 *Sheriff’s Ass’n v. Deputy Sheriff’s Ass’n of Stanislaus Cnty.*, Case No. CV F 09-1988 LJO SMS,
 26 2010 U.S. Dist. LEXIS 59177, at *32-33 (E.D. Cal. June 1, 2010) (plaintiff pleaded plausible claim
 27 by alleging sufficient facts pursuant to the factors set forth in *AMF Inc. v. Sleekcraft Boats*, 599
 28 F.2d 341 (9th Cir. 1979)); *Church & Dwight Co. v. Mayer Labs., Inc.*, No. C-10-4429 EMC, 2011
 U.S. Dist. LEXIS 35969, at *66 (N.D. Cal. April 1, 2011) (denying motion to dismiss because
 plaintiff pleaded facts sufficient to show that “the term ‘microthin’ is plausibly alleged to be a
 protectable mark” associated with plaintiff); *Gov’t Emps. Ins. Co. v. Google, Inc.*, 330 F. Supp. 2d
 700, 704 (E. D. Va. 2004) (denying motion to dismiss because plaintiff had pleaded sufficient facts
 to state plausible claim).

⁴ Because Deckers has failed to plead facts sufficient to show customer confusion is plausible, its
 trade dress and “federal unfair competition” claims also should be dismissed for failure to state a
 claim. *See* 15 U.S.C. § 1125(a); *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 776 112 S.
 Ct. 2753 (1992) (citations omitted).

1 Warner Cable, Inc., 714 F.3d 1277, 1284 (Fed. Cir. 2013) (“[W]e think it clear that
2 an implausible claim for patent infringement rightly should be dismissed.”).⁵

3 In the Amended Complaint, Deckers accuses The Original Arizona Jean Co.[®]
4 Crescent and Carmen boots (depicted below) of infringement. See [Dkt. 18] at Ex. 2.

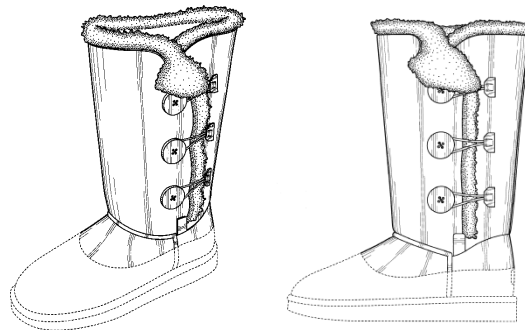


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9 The Original Arizona Jean Co.[®]
10 Carmen Girls Boot



11 The Original Arizona Jean Co.[®]
12 Crescent Girls Boot

13 But Figures 1 and 2 of the '189 patent claim a *tall* boot with *three button closures* on
14 the lateral side of the boot shaft:



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19 *Id.* ¶ 16 & Ex. 1.

20 Deckers does not dispute these facts. Nor does Deckers present any argument
21 or identify any pleaded facts sufficient to explain how the Accused Boots plausibly
22 infringe the '189 patent. Instead, Deckers seeks to dodge these problems by
23 responding that it has properly pleaded its claim because it has identified exemplars
24 of the Accused Boots. [Dkt. 27] at 7-8. That argument is beside the point, because
25 the issue is not whether Deckers provided notice of its claim under the '189 patent,

26 ⁵ Deckers' argument (and the cases it cites) simply focuses on what level of detail is necessary to
27 state a claim. See [Dkt. 27] at 7-8. The issue before the Court is not only whether the Amended
28 Complaint sufficiently pleaded a claim of direct infringement of the '189 patent, but whether the
claim pleaded is plausible.

1 but rather whether the patent infringement claim Deckers pleaded is plausible. As
2 JCPenney has explained, it is not and this Court should dismiss it. *Ashcroft*, 556
3 U.S. at 678 (quoting *Bell Atl. Corp.*, 550 U.S. at 570); *K-Tech Telecomms.*, 714 F.3d
4 at 1284.

5 **IV. BECAUSE DECKERS PLEADS ONLY CONCLUSORY**

6 **ALLEGATIONS—NOT FACTS—ITS WILLFUL INFRINGEMENT**

7 **CLAIM SHOULD BE DISMISSED**

8
9 In its Motion, JCPenney explained that the First Amended Complaint failed to
10 plead facts sufficient to support a claim for willful patent infringement.⁶ Deckers
11 attempts to salvage its pleading by alleging that it need plead only the barest factual
12 assertion of knowledge of an asserted patent. The case Deckers relies on for this
13 proposition, *Robert Bosch Healthcare Sys. v. Express MD Solutions, LLC*, No. C 12-
14 00068 JW, 2012 U.S. Dist. LEXIS 98641 (N.D. Cal. July 10, 2012), supports
15 JCPenney’s argument that Deckers’ allegations of willful infringement are
16 inadequate and should be dismissed.

17 In *Robert Bosch*, the plaintiff asserted willful infringement based on
18 allegations that “[p]rior to the filing of this suit, [Plaintiff] had informed [Defendant]
19 of the patents-in-suit and [Defendant’s] infringement of those patents” and that
20 “[Defendant’s] infringement of the patents-in-suit is willful and deliberate.” *Id.* at
21 *8. The Northern District held that these allegations failed “to make out even the
22 ‘barest factual assertion’ that Defendant knew of the patents-in-suit, but instead has
23

24
25 ⁶ In its Opposition, Deckers argues “JCP’s motion is completely devoid of any discussion regarding
26 the adequacy of the willfulness allegations with respect to the trade dress claims.” [Dkt. 27] at 10.
27 Deckers’ argument is disingenuous. Deckers did not plead that JCPenney’s alleged trade dress
28 infringement was willful. See [Dkt. 18] ¶¶ 27-36. JCPenney, therefore, had no notice of such an
allegation. Deckers’ attempt to introduce an unpleaded claim through its Opposition to JCPenney’s
Motion is improper and highlights the importance of a cogent pleading that properly defines the
claims at issue in this case.

1 made a mere allegation, without more, that Defendant had actual knowledge of those
2 patents.” *Id.*

3 Deckers also relies on *Avocet Sports Technology, Inc. v. Garmin International,*
4 *Inc.*, No. C. 11-04049 JW, 2012 U.S. Dist. LEXIS 51650 (N.D. Cal. Mar. 22, 2012),
5 but again, that case supports dismissal of the willfulness claims here. In *Avocet*, the
6 Court held that plaintiff’s allegation that “the infringement by [Defendants was
7 willful, intentional and with conscious knowing disregard of [P]laintiffs’ [sic] patent
8 rights” failed to allege any facts to suggest that the defendant had actual knowledge
9 of the patent prior to the filing of the complaint in that case. *Id.* at *13. Indeed, the
10 court found such allegations were not facts but simply conclusory allegations. *Id.*
11 As a result, the Court dismissed plaintiff’s claim for willful infringement.⁷

12 Deckers makes the same kind of conclusory allegations here. Deckers simply
13 claims that JCPenney was “aware” of the patents based on the popularity of its boot
14 and the patent notice⁸ provided on them and that JCPenney continued selling the
15 Accused Boots “since being put on notice of Deckers’ rights to the Bailey Button
16

17 ⁷ The other cases Deckers cites are inapposite. For example, *Sony Corp. v. LG Elecs. U.S.A., Inc.*,
18 768 F. Supp. 2d 1058 (C.D. Cal. 2011); *Advanced Analogic Techs., Inc. v. Kinetic Techs., Inc.*, No.
19 C-09-1360, 2009 U.S. Dist. LEXIS 57953 (N.D. Cal. July 8, 2009); and *Milwaukee Elec. Tool*
20 *Corp. v. Hitachi Koki Co.*, Case No. 09-C-948, 2011 U.S. Dist. LEXIS 15504 (E.D. Wis. Feb. 14,
21 2011) all stand for the proposition that a plaintiff need not allege facts that establish “objective
22 reasonableness” under *Seagate*. In at least two of these cases, *Sony* and *Milwaukee Electric*, the
23 court notes that plaintiff pleaded that the defendant had actual notice of the patents at issue. In
24 *Oakley, Inc. v. 5.11, Inc.*, Case No. 11cv2173, 2012 U.S. Dist. LEXIS 154994 (S.D. Cal. Oct. 29,
25 2012); *Jardin v. Datallegro, Inc.*, Case No. 08cv1462, 2009 U.S. Dist. LEXIS 3339 (S. D. Cal. Jan.
26 20, 2009); and *Rambus, Inc. v. NVIDIA Corp.*, No C. 08-3343 SI, 2008 U.S. Dist. LEXIS 95168
27 (N.D. Cal. Nov. 13, 2008) the plaintiffs alleged (respectively) that the defendant had written notice
28 of the issued patents prior to the filing of the lawsuit; that the defendant had actual or constructive
knowledge of the patent; and that the defendant acted in deliberate disregard of the patents.
Deckers’ citation to *Sentry Prot. Prods. v. Eagle Mfg. Co.*, 400 F.3d 910 (Fed. Cir. 2005), an
appeal from a summary judgment ruling, does not relate to any of the issues presented by
JCPenney. Indeed, the language Deckers cites goes to the issue of whether Sentry waived its
marking argument by failing to plead notice. *Id.* at 918.

27 ⁸ Notably, Deckers does not plead that it complied with the marking requirements of 35 U.S.C. §
28 287

1 Boot Trade Dress and Bailey Button Design Patents”. [Dkt. 27] at 9-10. But
2 Deckers pleads *no facts* supporting its *conclusion* that JCPenney had actual
3 knowledge of the patents prior to the filing of this lawsuit.

4 Willful infringement is an extraordinary claim that gives rise to treble
5 damages, and the law consequently limits its application to circumstances where the
6 plaintiff pleads actual facts supporting an inference that the defendant willfully
7 infringed the asserted patents prior to the initiation of litigation. *See* 35 U.S.C. §
8 284; *Aro Mfg. Co. v. Convertible Top Replacement Co.*, 377 U.S. 476, 508, 84 S. Ct.
9 1526 (1964). Here, Deckers has failed to plead a single fact to show that prior to the
10 filing of this lawsuit JCPenney had knowledge of the patents-in-suit and its alleged
11 infringement of such patents. Accordingly, this Court should dismiss Deckers’ claim
12 of willful infringement with prejudice.

13 **V. PLAINTIFF’S UNFAIR COMPETITION CLAIMS SHOULD BE**
14 **DISMISSED**

15
16 Deckers contends that the Court should not dismiss its common law unfair
17 competition count because the Amended Complaint alleges JCPenney’s purported
18 infringement of the Bailey Button Boot was willful and in bad faith, and was done in
19 an effort to exploit the goodwill associated with Deckers’ product. Deckers claims
20 such generic allegations constitute sufficient “extra elements” to distinguish this
21 claim from the Lanham Act counts and preclude preemption. But Deckers’ argument
22 misstates the law and ignores the content of the Amended Complaint.

23 JCPenney explained that, in the context of a preemption analysis, the law
24 requires the plaintiff to allege “an element not shared by the federal law; an element
25 which changes the nature of the action so that it is *qualitatively* different from” the
26 underlying Federal claims. *See* [Dkt. 25-1] at 11-12; *Summit Mach. Tool Mfg. Corp.*
27 *v. Victor CNC Sys.*, 7 F.3d 1434, 1440 (9th Cir. 1993). This dichotomy is one of
28 substance, not form, requiring the “extra element” to articulate wrongdoing beyond

1 the mere act of infringement. *See, e.g., Salim v. Lee*, 202 F. Supp. 2d 1122, 1127
2 (C.D. Cal. 2002) (in copyright infringement claim, plaintiff’s allegations of unjust
3 enrichment under state law preempted because no additional wrongdoing alleged
4 beyond act of infringement). Thus, where the state claim for relief involves
5 essentially “equivalent rights” to those implicated by its federal counterpart,
6 preemption is necessary. *Id.*

7 That is precisely the circumstance here, where the alleged misconduct in
8 Deckers’ unfair competition claim is substantively identical to its four Lanham Act
9 claims. In fact, paragraphs 69-71 of the Amended Complaint assert respectively that
10 JCPenney’s “infringement of the Bailey Button Boot Trade Dress,” its “infringing
11 acts in appropriating” the same trade dress, and its “unauthorized use of” this trade
12 dress are the acts constituting unfair competition in violation of California common
13 law. There are no other additional underlying acts of wrongdoing alleged. In other
14 words, Deckers contends that it is the purported infringement, and nothing else, that
15 comprises JCPenney’s unfairly competitive conduct. The unfair competition claim is
16 therefore preempted.

17 Deckers ignores these well settled legal standards, and instead argues
18 (erroneously) that under *Dioptics Medical Products, Inc. v. Idea Village Products*
19 *Corp.*, 2010 WL 4393876 (N.D. Cal. 2010), the unfair competition claim is properly
20 pleaded because: (1) an allegation of “palming off” is considered a sufficient “extra
21 element” under *Dioptics*; and (2) the Amended Complaint asserts that JCPenney
22 infringed Deckers’ trade dress and design patent with the intent to “pass them off” as
23 originating from or associated with Deckers. This contention is meritless.

24 *Dioptics* did not hold that a “palming off” allegation necessarily constitutes a
25 sufficient “extra element.” Instead, the court found that *if* the purported palming off
26 entailed qualitatively different elements than those supporting patent infringement
27 claims (the underlying federal count in *Dioptics*), *then* preemption would be avoided.
28 *Dioptics, supra*, 2010 WL 4393876 at *4. Thus, in that case, the plaintiff alleged

1 facts substantially beyond mere patent infringement, contending, for example, that
2 the defendants advertised using photos of the plaintiff's products. *Id.* Those
3 allegations differed from the facts underpinning the infringement counts, and
4 therefore satisfied the "qualitatively different" standard found in *Summit*.

5 That stands in stark contrast to Deckers' Amended Complaint, in which
6 Deckers' unfair competition claim contains no such additional allegations. Deckers
7 alleges that JCPenney infringed with the intent to "pass off" its goods as associated
8 with those of Deckers. But that contention is embodied within and indistinguishable
9 from the alleged infringement, further confirming the application of preemption.

10 The same basic problem torpedoed Deckers' argument that its allegations of
11 bad faith save this claim. Deckers miscites *Dimension One Spas, Inc. v. Coverplay,*
12 *Inc.*, Civil No. 03cv1099-L(CAB), 2008 U.S. Dist. LEXIS 69526 (S.D. Cal. 2008),
13 *BriteSmile, Inc. v. Discuss Dental, Inc.*, No. C 02-03220, 2005 U.S. Dist. LEXIS
14 30855 (N.D. Cal. 2005) and *Zenith Electronics Corp. v. Exzec, Inc.*, 182 F.3d 1340
15 (Fed. Cir. 1999) for the proposition that allegations of bad faith shelter state claims
16 from preemption. To the contrary, these cases all involved defendants that made
17 allegedly false statements in the marketplace knowing those statements to be false
18 and with the intent to compete unfairly with the plaintiffs. *See Dimension One*, 2008
19 WL 4165034 at *17 (allegations that defendant made false statements concerning
20 defendant's infringement of its patent constitutes bad faith marketplace conduct),
21 *BriteSmile* 2005 WL at *5 (defendant sent letters to twelve parties threatening a
22 patent infringement claim in an effort to prevent recipients from using plaintiff's
23 products, despite allegations that defendant's patent was either unenforceable or not
24 infringed), and *Zenith*, 182 F.3d at 1343, 1355 (tortious interference with prospective
25 economic advantage claim not preempted where plaintiff alleged defendant made
26 marketplace statements that defendant's that patent was infringed and infringer could
27 not design around it). In short, all three decisions are inapposite here, because each
28 rested on independent marketplace misconduct that was easily and apparently

1 distinguishable from the Federal infringement claims. Deckers alleges no such
2 independent conduct in its unfair competition claim, and the claim fails as a
3 consequence.⁹

4 **VI. CONCLUSION**

5 For these reasons, and those set forth in JCPenney’s Memorandum of Points
6 and Authorities in Support of its Motion to Dismiss Amended Complaint, JCPenney
7 respectfully moves the Court to dismiss Deckers’ claims for (1) trade dress
8 infringement; (2) false designation of origin/false description; (3) federal unfair
9 competition; (4) infringement of the ’189 patent; and (5) unfair competition under
10 California common law.

11 Dated: September 8, 2014

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14
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23
24 ⁹ Citing *Transgo, Inc. v. Ajac Transmission Parts Corp.*, 768 F.2d 1001 (9th Cir. 1985) and
25 *Keebler Co v. Rovira Biscuit Corp.*, 624 F.2d 366 (5th Cir. 1980), Deckers asserts that the inclusion
26 of additional remedies under the “state and common law” prevent preemption. *See* [Dkt. 27] at 13.
27 Neither case has anything to do with preemption, and consequently those decisions are
28 inapplicable. The mere presence of additional remedies under state law is immaterial, because the
standard under preemption is whether the “extra element” qualitatively departs from the Federal
claims. *See Summit, supra*, 7 F.3d at 1440. Where the requisite additional allegations are absent,
as here, the state claims fail irrespective of any differences in the remedies available.