IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
EASTERN DIVISION

David Grober, et al.,

Plaintiffs,

-vs-

Mako Products, Inc., et al.,

Defendants.

Case No. 2:04 CV 8604 JZ (DTBx)

DEFAULT JUDGMENT
IN FAVOR OF PLAINTIFFS

JUDGE JACK ZOUHARY

Pending before this Court is Plaintiffs' Motion for Default Judgment Against Defendant Spectrum Effects, Inc. ("Spectrum") (Docs. 583 & 585). This Court previously entered default against Spectrum pursuant to Federal Civil Rule 55(a) in May 2015 (Doc. 498). Plaintiffs reached a settlement with the remaining Defendants in May 2016 and now seek to put this long-standing litigation to bed by closing the case against Spectrum (Doc. 576).

This Court notes at the outset that Spectrum is no longer in existence. This Court also notes that liability was highly contested during this litigation by all Defendants. This Court views the settlement reached with the remaining Defendants more a result of weariness and fatigue over the many years of litigation, along with the continuing costs of defense, than an admission of liability. A default judgment, like a settlement, is not necessarily an admission of liability. This Court, having reviewed the factors in *Eitel v. McCool*, 782 F.2d 1470, 1471 (9th Cir. 1986), finds that default judgment is appropriate against Spectrum.

The issue now is the appropriate amount of the Judgment. In other words, we are talking dollars. Plaintiffs ask for the following:

1. $136,000 in lost sales profits for infringement of the MakoHead;
2. $157,200 in lost rental profits for the MakoHead or, alternatively, a reasonable royalty;
3. attorney fees; and
4. multiplier for willful infringement.

Each will be addressed in turn.

* * *

1. Plaintiffs claim lost sales profits of $136,000 supported by Exhibits C, D, F, L and M. This amount is approved.

2. Plaintiffs claim lost rental profits of $59,400 for a three-year period (2004–07) representing an estimated 49.5 days of rental. This request, supported by Exhibit C, is approved.

Plaintiffs also seek five additional years of lost rental profits from October 2007 through October 2012 when Mako declared bankruptcy. However, these five years do not have supporting rental documentation, which Plaintiffs attempt to blame on Defendants. This Court finds there has not been an adequate showing of spoliation or intentional destruction of documents. *Cf. United States v. $40,955.00 in U.S. Currency*, 554 F.3d 752, 758 (9th Cir. 2009). Plaintiffs provide no other support that the rentals during those years would be the same as during the years 2004–07. Indeed, the opposite conclusion can be reached due to Mako's bankruptcy. Therefore, this Court denies the request for additional $97,800 for that five-year period.

In light of the above award of lost profits, the alternative remedy of reasonable royalties need not be reached.

3. Plaintiffs' request for attorney fees is denied. Attorney fees in patent cases are awarded to the prevailing party only in "exceptional cases." 35 U.S.C. § 285. This Court does not find that this case falls within that narrow exception. Although this case has gone on for a long time,

that alone does not make it exceptional, at least as defined under statute. Part of the delay was caused by a good-faith appeal to the federal circuit; additional delay was caused by the original judge handling the case retiring; further delays were caused by bankruptcy stays. None of these relate to "the unreasonable manner in which this case was litigated." *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S. Ct. 1749, 1756 (2014). Nor does this Court find that Plaintiffs' claims of discovery abuse by Defendants have been proven.

4. Likewise, this Court does not find adequate support for a finding of willful infringement and awarding additional damages. The sole support for this argument is Exhibit J, a letter dated December 26, 2004 from Plaintiff David Grober to ASL Productions (Doc. 583-2 at 34–35). Neither this letter standing alone, nor this Court's familiarity with the subsequent litigation, supports a claim for willful infringement. *See Halo Elecs., Inc. v. Pulse Elecs., Inc.*, ___ U.S. ___, 136 S. Ct. 1923, 1931–32 (2016) ("Awards of enhanced damages under the Patent Act over the past 180 years establish that they are not to be meted out in a typical infringement case, but are instead designed as a 'punitive' or 'vindictive' sanction for egregious infringement behavior.").

* * *

Plaintiffs are awarded damages in the amount of $136,000 for lost sales profits from the MakoHead sales to Globo and $59,400 for lost rental profits from MakoHead rentals for 2004–2007, making the total award of One Hundred Ninety-Five Thousand, Four Hundred Dollars ($195,400).

IT IS SO ORDERED.

s/ *Jack Zouhary*
JACK ZOUHARY
U. S. DISTRICT JUDGE

August 9, 2016