UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

GRYPHON MOBILE ELECTRONICS, LLC, a California limited liability company; and SPACEKEY (USA), INC., California corporation, **Plaintiffs,** **v.** **VOLITIGER POWER, INC., a California corporation; and DOES 1 through 10, inclusive,** **Defendants.**	**Case No.: SACV 15-02080-CJC(DFMx)** **ORDER GRANTING PLAINTIFF'S APPLICATION FOR DEFAULT JUDGMENT**

I. INTRODUCTION & BACKGROUND

Plaintiffs Gryphon Mobile Electronics, LLC and Spacekey (USA), Inc. bring this renewed application for default judgment against defendant Volitiger Power, Inc., after Volitiger failed to appear in this action.

Spacekey is the owner of U.S. Patent No. D711,318S, (the "Patent"), which pertains to the design of a mobile charging device. (Dkt. 1, Compl. ¶ 10.) Spacekey assigned the patent to Gryphon, (*Id.* ¶ 1), and Gryphon imports and distributes a mobile charging device (the "PowerAll Charger") that embodies the design of the Patent under Gryphon's federally registered "PowerAll" trademark. (*Id.*)

In or around October 2015, Gryphon learned that Volitiger was marketing and selling mobile charging devices (the "Volitiger Devices") on Amazon.com that appeared to infringe on the Patent and strongly resemble Gryphon's PowerAll Charger. (*Id.* ¶ 11.) Gryphon's counsel sent a cease-and-desist letter to Volitiger. (Dkt. 28-2, Ko Decl. ¶ 3.) Thereafter, a person named Oliver contacted Gryphon's counsel on behalf of Volitiger and asked to see a copy of Spacekey's patent, which counsel provided. (Dkt. 28-1, Tai Decl. ¶ 7.) After attempts to obtain sales information from Volitiger proved unsuccessful, Spacekey and Gryphon (collectively "Plaintiffs") initiated this action. (*Id.* ¶ 8.)

Volitiger was served with the Complaint on December 24, 2015, (Dkt. 10), but has not appeared in this action and has taken no action to defend against the Complaint. The Clerk entered default against Volitiger on January 22, 2016. (Dkt. 13.)

On or about February 16, 2016, Plaintiffs' counsel was contacted by attorney Khuong Nguyen, who purported to represent Volitiger and asked for a "number" to further settlement discussions. (Tai Decl. ¶ 9.) Plaintiffs' counsel asked Mr. Nguyen to provide pertinent Volitiger sales information, but was unable to get a clear answer about whether that information would be provided. (Tai. Decl. ¶ 10.)

In the meantime, Plaintiffs obtained from Amazon.com, Inc. information concerning Volitiger's sale of infringing products on its website. (Dkt. 28-5, Vairo Decl.

¶¶ 1-3.) Specifically, Amazon established that Volitiger had sold a total of 3,756 units of the Volitiger Devices on Amazon's website, for a total revenue of $137,592.44. (*Id.* ¶ 3.) Based on this information, Plaintiffs determined that Volitiger made a profit of at least $45,570.44, using $24.50 as the cost per unit. (Ko Decl. ¶ 10.) The cost per unit figure was determined based on a representation by a factory in China that it would sell a counterfeit version of the PowerAll charger similar to the Volitiger Devices for $24.50 to $27. (Ko Decl. ¶¶ 7-8.)

In about March 2016, Plaintiffs' counsel had another telephone conversation with Mr. Nguyen, in which Mr. Nguyen asked counsel to issue a demand for settlement. (Tai. Decl. ¶ 12.) Counsel sent Mr. Nguyen a demand based on the information Amazon provided, but Mr. Nguyen did not respond. (*Id.*)

For the following reasons, Plaintiffs' application for default judgment against Volitiger is GRANTED IN SUBSTANTIAL PART with respect to the claim for patent infringement. Plaintiffs are awarded damages in the amount of $45,570.44, but are not awarded the $3,3334.23 in attorneys' fees that they seek. [1]

II. ANALYSIS

Rule 55(b)(2) of the Federal Rules of Civil Procedure and this Court's Local Rule 55-1 "require that applications for default judgment set forth the following information: (1) when and against which party default was entered; (2) the identification of the pleadings to which default was entered; (3) whether the defaulting party is an infant or incompetent person, and if so, whether the person is adequately represented;

[1] Having read and considered the papers presented by Plaintiffs, the Court finds this matter appropriate for disposition without a hearing. *See* Fed. R. Civ. P. 78; Local Rule 7-15. Accordingly, the hearing set for July 11, 2016 at 1:30 p.m. is hereby vacated and off calendar.

(4) that the Soldiers' and Sailors' Civil Relief Act of 1940 does not apply; and (5) that notice of the application has been served on the defaulting party, if required." *Philip Morris USA Mc. v. Castworld Products, Inc.*, 219 F.R.D. 494, 498 (C.D. Cal. 2003).

Here, Plaintiffs have set forth the required information: (1) the clerk entered default against Volitiger on January 22, 2016, (Dkt. 12), (2) the default was entered as to the Complaint; (3) Volitiger is not an infant or incompetent person, (4) the Soldiers' and Sailors' Relief Act of 1940 does not apply, and (5) notice of Plaintiffs' motion has been served upon Volitiger. (Tai Decl. ¶¶ 3, 14; Dkt. 29, Proof of Service.) The procedural requirements for the entry of default judgment are satisfied.

A. Merits of the Motion for Default Judgment

After entry of default, a court may grant a default judgment on the merits of the case. Fed. R. Civ. P. 55(a)-(b). "The district court's decision whether to enter a default judgment is a discretionary one." *Aldabe v. Aldabe*, 616 F.2d 1089, 1092 (9th Cir. 1980). A court may consider the following factors in exercising such discretion:

> (1) the possibility of prejudice to the plaintiff, (2) the merits of plaintiff's substantive claim, (3) the sufficiency of the complaint, (4) the sum of money at stake in the action, (5) the possibility of a dispute concerning material facts, (6) whether the default was due to excusable neglect, and (7) the strong policy underlying the Federal Rules of Civil Procedure favoring decisions on the merits.

Eitel v. McCool, 782 F.2d 1470, 1471-72 (9th Cir.1986). Because default has been entered in this case, the Court must construe as true all of "the factual allegations of the complaint, except those relating to the amount of damages." *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987). Here, the *Eitel* factors support the entry of a default judgment against Volitiger. Each is considered in turn below.

1. Possibility of Prejudice to the Plaintiff

In the instant action, if default judgment is not entered, Plaintiffs "would be denied the right to judicial resolution of the claims presented" against Volitiger. *Elektra Entertainment Group, Inc. v. Crawford*, 226 F.R.D. 388, 392 (C.D. Cal. 2005). Volitiger, by choosing to default rather than appear and defend, is "deemed to have admitted the truth of Plaintiff s' averments," *Philip Morris USA, Inc. v. Castworld Prods.*, 219 F.R.D. 494, 499 C.D. Cal. 2003), thereby establishing its liability for patent infringement. Absent the entry of default judgment against Volitiger, Plaintiffs would be prejudiced, as they would be left without the ability to seek relief to which they are entitled.

2 & 3. The Merits of the Claim and the Sufficiency of the Complaint

The second and third *Eitel* factors, taken together, "require that a plaintiff state a claim on which the [plaintiff] may recover." *Phillip Morris USA*, 219 F.R.D. at 499. Under federal law, "whoever without authority makes, uses, offers to sell, or sells any patented invention, within the United States or imports into the United States any patented invention during the term of the patent therefore, infringes the patent." 35 U.S.C. ¶ 271. Here, Plaintiffs' Complaint sufficiently alleges that the Volitiger Devices embody the design of Spacekey's Patent, and that Volitiger had not been licensed under the Patent. (Compl. ¶¶ 11-12.) Volitiger has not responded to the Complaint, and its default is therefore deemed an admission of all well-pled facts in the Complaint. *Elektra Entertainment*, 226 F.R.D. at 392. Accordingly, the second and third *Eitel* factors weigh in favor of entry of default judgment.

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4. The Sum of Money at Stake

The fourth *Eitel* factor requires the Court to "consider the amount of money at stake in relation to the seriousness of Defendant's conduct." *PepsiCo, Inc. v. Cal. Security Cans*, 238 F. Supp. 2d 1172, 1176 (C.D. Cal. 2002); *see also Eitel*, 782 F.2d at 1471-72. Here, Volitiger has infringed on the Patent and under 35 U.S.C. § 289, the patent owner is entitled to recover all profits from Volitiger's infringing conduct. Furthermore, the damages are based solely on Amazon's data concerning Defendant's sales and a reasonable estimate of Volitiger's per-unit profit. Plaintiffs do not seek any relief that is not warranted under the applicable patent laws or stated in the Complaint. Accordingly, this factor supports default judgment.

5 & 6. The Possibility of a Dispute Concerning Material Facts and Whether the Default was Due to Excusable Neglect

The fifth and sixth *Eitel* factors require the Court to determine whether it is likely that there would be a dispute as to material facts and whether Defendant's failure to litigate is due to excusable neglect. Nothing in this litigation indicates that there is a dispute about Volitiger's infringement. Volitiger has received notice of the Complaint and has decided not to mount a defense. It also does not appear that Volitiger's failure to respond was due to excusable neglect. Here, Volitiger was properly served with the Complaint and with Plaintiffs' filings concerning default, and has discussed the case with Plaintiffs several times through counsel, yet has not taken any steps to defend itself in court.

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7. The Public Policy Favoring Decisions on the Merits

Because public policy dictates that courts prefer to rule on the merits, this factor will always weigh against granting a motion for default judgment. Nonetheless, Defendant's choice not to defend itself renders a decision on the merits "impractical, if not impossible." *PepsiCo Inc.*, 238 F. Supp. 2d at 1177. Because the *Eitel* factors weigh in favor of granting default judgment here, the Court will exercise its discretion to grant Plaintiffs' motion for default judgment.

B. Damages

Once a court concludes that default judgment is appropriate, it must determine what damages or other relief is warranted. Plaintiffs carry the burden of proving up their damages and requests for other relief. *Bd. of Trustees of the Boilermaker Vacation Trust v. Skelly, Inc.*, 389 F. Supp. 2d 1222, 1226 (N.D. Cal. 2005). Damages may be determined at the default judgment stage without a hearing if "the amount claimed is a liquidated sum or capable of mathematical calculation." *Davis v. Fendler*, 650 F.2d 1154, 1161 (9th Cir. 1981).

In the case of design patent infringement, the patentee has the option of seeking damages under 35 U.S.C. § 289, which allows the patentee to recover defendant's "total profit" from the infringement. Here, Volitiger's total revenue—at least from sales on Amazon.com—is $137,592.44 based on Amazon's sales information. Plaintiffs have submitted evidence indicating that Volitiger would have been able to purchase the Volitiger Devices wholesale for $24.50 to $27 per unit. It is possible that Volitiger could have obtained a lower cost from a different vendor or by manufacturing the device itself. Plaintiffs are seeking damages in the amount of $45,570.44, based on the $24.50 per unit cost and Amazon's statement that 3,756 units were sold for a total revenue of

$137,592.44.[2] Because Volitiger's damages are capable of mathematical calculation based on suitable evidence, the Court will award them here without an evidentiary hearing.

Plaintiffs further note that the Court may award reasonable attorneys' fees to the prevailing party in "exceptional cases" of patent infringement, *see* 35 U.S.C. § 285, and seeks fees in the amount of $3,334.23, as provided for under Local Rule 55-3. Plaintiffs contend that this case is "exceptional" because Volitiger had knowledge of its infringement and refused to turn over documents concerning its infringing activity. Plaintiffs have not, however, submitted any legal support for the argument that Volitiger's failure to appear to defend itself renders this case exceptional. Absent such legal support, and because this case appears of its face to involve run-of-the-mill allegations of infringement, the Court will not award attorneys' fees to Plaintiffs.

III. CONCLUSION

Plaintiffs' application for default judgment against Volitiger is GRANTED IN SUBSTANTIAL PART with respect to the claim for patent infringement. Plaintiffs are awarded damages in the amount of $45,570.44, but are not awarded the $3,3334.23 in attorneys' fees that they seek.

DATED: July 6, 2016

CORMAC J. CARNEY
UNITED STATES DISTRICT JUDGE

[2] $137,592.44-($24.50*3,756)=$45,570.44