
UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. SACV 16-160-JLS (JCGx)

Date: June 9, 2016

Title: Oakley, Inc. v. Moda Collection, LLC

Present: **Honorable JOSEPHINE L. STATON, UNITED STATES DISTRICT JUDGE**

Terry Guerrero
Deputy Clerk

N/A
Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFF: ATTORNEYS PRESENT FOR DEFENDANTS:

Not Present

Not Present

**PROCEEDINGS: (IN CHAMBERS) ORDER GRANTING IN PART AND
DENYING IN PART PLAINTIFF’S MOTION FOR DEFAULT
JUDGMENT (Doc. 16)**

Before the Court is Plaintiff Oakley, Inc.’s unopposed Motion for Default Judgment against Defendant MODA Collection, LLC d/b/a Moda Sunglass. (Mot., Doc. 16.) The Court finds this matter appropriate for decision without oral argument. Fed. R. Civ. P. 78(b); C.D. Cal. R. 7-15. Accordingly, the hearing set for June 10, 2016, at 2:30 p.m., is VACATED. For the following reasons, the Court GRANTS IN PART and DENIES IN PART Oakley’s Motion.

I. BACKGROUND¹

Plaintiff Oakley, Inc. has been actively engaged in the manufacture and sale of high quality eyewear since 1985. (Compl. ¶ 8, Doc. 1.) Oakley alleges that its brand is widely recognized for its innovative technology and distinctive designs. (*Id.* ¶ 7.) Oakley owns the rights, titles, and interests in the following U.S. Design Patents: D692,047 (the “D047 Patent”), D700,933 (the “D933 Patent”), D610,603 (the “D603 Patent”), D615,580 (the “D580 Patent”), D573,172 (the “D172 Patent”), D565,088 (the

¹ The following factual background section is based on the allegations set forth in Plaintiff’s Complaint.

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“D088 Patent”), D564,572 (the “D572 Patent”), D652,442 (the “D442 Patent”), D547,793 (the “D793 Patent”), D469,458 (the “D458 Patent”), D462,375 (the “D375 Patent”), D564,571 (the “D571 Patent”), D648,771 (the “D771 Patent”), (collectively the “Asserted Patents”). (*Id.* ¶¶ 9-21.)

Oakley is informed and believes that Defendant MODA Collection, LLC d/b/a Moda Sunglass (“Moda”) manufactures or sells sunglasses that are substantially similar to Oakley’s Asserted Patents. (*Id.* ¶¶ 5, 22, 41, 43, 45, 47, 49, 51, 53, 55, 57, 59, 61, 63, 65.) Specifically, Oakley alleges that the following Moda sunglass models infringe on the Asserted Patents: MD3072-RV, MD3046, MD3046-RV, OV5453K, OV5457K, OU004KK, MD3017, OV21K, OV5454K, OV5001PK, RAA08PB, 5423, 5425, OH22407K, PG4816. (*Id.*) Side-by-side images of the allegedly infringing products and Plaintiff’s Asserted Patents are depicted in the Complaint. (*Id.*) Oakley alleges that Moda has received gains, profits, and advantages as a direct and proximate result of this alleged infringement. (*Id.* ¶ 67.)

Oakley also owns federal trademark registrations for Trademark Reg. Nos. 2,146,295 and 1,984,501, which are depicted below:



(collectively, the “Oakley Marks”). (*Id.* ¶¶ 24-26; Exs. 14-15, Docs. 1-14, 1-15.) The trademark registrations are associated with protective and/or anti-glare eyewear that includes sunglasses, goggles, spectacles, and their parts and accessories. (*Id.* ¶¶ 25-26.)

Oakley is also informed and believes that long after the federal registration of the Oakley marks, without permission or consent from Oakley, Moda has sold, distributed, or marketed eyewear bearing the following mark:

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Infringing Mark

(*Id.* ¶ 27.) Oakley alleges that the above mark is confusingly similar to the Oakley Marks. (*Id.* ¶ 75.) Oakley also alleges that Moda’s OV5489K model sunglasses use marks that are confusingly similar to the Oakley marks. (*Id.* ¶ 75.) By using the infringing marks in commerce, Moda allegedly intends to unfairly compete with and trade upon Oakley’s reputation and good will. (*Id.* ¶¶ 76-78.) Oakley is informed and believes that Moda has derived, received, and will continue to receive gains, profits, and advantages from the unauthorized use of the Oakley Marks. (*Id.* ¶ 80-81.)

Oakley has also used and adopted the HOLBROOK and FLAK JACKET® Trade Dresses in its eyewear designs, (*id.* ¶¶ 84-87), and it provides one image of an Oakley product bearing each of the above trade dresses, (*id.* Exs. 16-17). Oakley alleges that Moda has developed, imported, and/or sold products that use a trade dress confusingly similar to the above trade dresses. (*Id.* ¶¶ 84, 86.) For example, Oakley alleges that Moda’s CF1869, MD3033, MD3062-RV, MD3031-RV, RAB89282B, and OY92849K model sunglasses are confusingly similar to Oakley’s HOLBROOK and FLAK JACKET® Trade Dress such that they are likely to cause confusion as to the affiliation, connection, or association between Moda and Oakley. (*Id.* ¶¶ 84-87.)

On January 29, 2016, Oakley filed a Complaint that alleges the following claims against Moda: (1) patent infringement, 35 U.S.C. § 271 (*id.* ¶¶ 39-72), (2) trademark infringement, 15 U.S.C. § 1114 (*id.* ¶¶ 73-81), (3) federal trade dress infringement, 15 U.S.C. § 1125(a) (*id.* ¶¶ 82-91), (4) unfair competition and false designation of origin, 15 U.S.C. § 1125(a) (*id.* ¶¶ 92-103), (5) federal trademark dilution, 15 U.S.C. § 1125(c) (*id.* ¶¶ 104-111), (6) California common law trademark infringement (*id.* ¶¶ 112-117), and (7) unfair competition under California common law and California Business and Professions Code § 17200, *et seq.* (*id.* ¶¶ 118-122).

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Oakley served Moda with the Complaint by personal service. (Doc. 10.) Moda did not appear in or otherwise defend the action, and the clerk entered default against it. (Doc. 14.) Oakley now moves for default judgment as to all claims, and it requests a permanent injunction, an award of total profits, permission to conduct limited damages discovery, and an award of attorneys' fees. (*See Mem.*, Doc. 17.)

II. LEGAL STANDARD

Under Rule 55 of the Federal Rules of Civil Procedure, entering a default judgment is a two-step process. *See Fed. R. Civ. P. 55*; *see also Eitel v. McCool*, 782 F.2d 1470, 1471 (9th Cir. 1986). Prior to entry of a default judgment, there must be an entry of a default. *See Fed. R. Civ. P. 55*. Upon entry of a default, the factual allegations of the complaint, save for those concerning damages, are deemed to have been admitted by the defaulting party. Fed. R. Civ. P. 8(b)(6); *see Geddes v. United Fin. Grp.*, 559 F.2d 557, 560 (9th Cir. 1977). “On the other hand, a defendant is not held to admit facts that are not well-pleaded or to admit conclusions of law.” *United States v. Cathcart*, No. C 07-4762 PJH (JCS), 2010 WL 1048829, *4 (N.D. Cal. Feb. 12, 2010). “[I]t follows from this that facts . . . not established by the pleadings of the prevailing party, or claims . . . not well-pleaded, are not binding and cannot support the judgment.” *Danning v. Lavine*, 572 F.2d 1386, 1388 (9th Cir. 1978).

A district court has discretion to grant or deny a motion for default judgment. *Aldabe v. Aldabe*, 616 F.2d 1089, 1092 (9th Cir. 1980). The Ninth Circuit has set forth seven factors to be considered by courts in reviewing a motion for default judgment: “(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*, 782 F.2d at 1471-72.

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III. DISCUSSION

A. Plaintiff Has Satisfied Local Rule 55-1

Oakley’s Motion satisfies Local Rule 55-1. *See* C.D. Cal. R. 55-1. Oakley accompanies its Motion with a sworn declaration stating that (1) the Clerk of Court entered default against the above named Defendant, (2) Defendant is not an infant or incompetent person, and (3) the Servicemembers Civil Relief Act does not apply. (Katzenellenbogen Decl. ¶¶ 6-8, Doc. 18.) Because Moda has not appeared in this case, service of the Motion is not required. C.D. Cal. R. 55-1. Oakley nevertheless served the Motion on Moda by First Class U.S. Mail on April 11, 2016. (Doc. 19.) The Court therefore finds that the requirements of Local Rule 55-1 have been satisfied.

B. Eitel Factors

1. Prejudice to the Plaintiff

“The first *Eitel* factor considers whether a plaintiff will suffer prejudice if a default judgment is not entered.” *Landstar Ranger, Inc. v. Parth Enters., Inc.*, 725 F. Supp. 2d 916, 920 (C.D. Cal. 2010). Prejudice can be shown if denying default judgment would leave a plaintiff without a remedy. *Id.* Absent entry of default judgment, Oakley will not be able to obtain the relief to which it is entitled. Thus, this factor weighs in favor of entering default judgment.

2. Merits of Claims and Sufficiency of Complaint

These two factors look at the plaintiff’s likelihood of success on the merits, requiring the plaintiff to “state a claim on which [it] may recover.” *PepsiCo, Inc. v. Cal. Sec. Cans*, 238 F. Supp. 2d 1172, 1175-76 (C.D. Cal. 2002) (internal citation omitted). “In considering the sufficiency of the complaint and the merits of the plaintiff’s substantive claims, facts alleged in the complaint not relating to damages are deemed to be true upon default.” *Bd. of Trs. of Sheet Metal Workers v. Moak*, No. C 11-4620 CW,

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2012 WL 5379565, at *2 (N.D. Cal. Oct. 31, 2012) (citing *Geddes v. United Fin. Grp.*, 559 F.2d 557, 560 (9th Cir.1977); Fed. R. Civ. P. 8(d)).

Here, Oakley moves for default judgment on the following claims against Moda: (1) patent infringement, (2) trademark infringement, (3) unfair competition and false designation of origin, (4) California common law trademark infringement, (5) trade dress infringement, and (6) unfair competition under California Business and Professions Code and California common law.² (*See Mem. at 1-8.*) The Court analyzes each claim in turn.

i. Design Patent Infringement

Oakley first asserts a claim for patent infringement under the Patent Act. A design patent is infringed if the defendant, “without license of the owner, . . . applies the patented design, or any colorable imitation thereof, to any article of manufacture for the purpose of sale, or . . . sells or exposes for sale any article of manufacture to which such design or colorable imitation has been applied.” 35 U.S.C. § 289. To adequately plead a design patent infringement claim, the plaintiff must allege “that an ordinary observer familiar with the patented product[s] would be deceived into believing that the accused product[s are] the same as the patented design.” *Amini Innovation Corp. v. KTY Int’l Mktg.*, 768 F. Supp. 2d 1049, 1055 (C.D. Cal. 2011) (citing *Egyptian Goddess, Inc. v. Swisa, Inc.*, 543 F.3d 665, 681 (Fed. Cir. 2008)).

Here, Oakley has alleged sufficient facts to state a claim for design patent infringement. Oakley alleges it owns the rights, titles, and interest in the thirteen design patents at issue, and it attaches the relevant patent copies to the Complaint. (Compl. ¶¶ 9-21; Exs. 1-13, Doc. 1.) Oakley also provides side-by-side images of specific, allegedly infringing eyewear models that depict “nearly identical copies” or “blatant knock-offs” of Plaintiff’s well-known designs. (*Id.* ¶¶ 42, 44, 46, 48, 50, 52, 54, 56, 58, 60, 62, 64, 66.) Oakley pleads that these infringing products, which were allegedly sold and/or offered for sale on Moda’s website, “appear to an ordinary observer to be substantially similar”

² Although Oakley alleges a claim for trademark dilution in the Complaint, (Compl. ¶¶ 104-111), it does not move for default judgment on this claim in its Motion.

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to the patented products. (*Id.* ¶¶ 41, 43, 45, 47, 49, 51, 53, 55, 57, 59, 61, 63, 65.) Given the “similar, if not identical ornamental designs” of the eyewear frames and shapes, the images sufficiently support the allegation that an ordinary observer familiar with the eyewear industry would mistake Moda’s products for Oakley’s patented products. *See Deckers v. Outdoor Corp. v. Ozwear Connection Pty Ltd.*, No. CV 14-2307 RSWL (FFMx), 2014 WL 4679001, at *10 (C.D. Cal. Sept. 18, 2014) (citing *Egyptian Goddess, Inc. v. Swisa, Inc.*, 543 F.3d 665, 681 (Fed. Cir. 2008)).

Accordingly, the Court concludes that Oakley has adequately alleged a claim for patent infringement. Oakley is therefore entitled to default judgment on this claim.

ii. Trademark Infringement, False Designation of Origin, and California Common Law Trademark Infringement

Oakley also asserts claims for trademark infringement under 15 U.S.C. § 1114 and § 1125(a) of the Lanham Act and under California common law. (Compl. ¶¶ 73-91.) To assert a claim for trademark infringement under § 1114, the plaintiff must plead: (1) ownership of a trademark, (2) the defendant has used in commerce, without authorization, a copy, reproduction, counterfeit or colorable imitation of the plaintiffs’ mark in connection with the sale, distribution, or advertising of goods and services, and (3) the defendant’s use of the mark is likely to cause confusion or to cause mistake or to deceive. 15 U.S.C. § 1114(1)(a); *Century 21 Real Estate Corp. v. Sandlin*, 846 F.2d 1175, 1178 (9th Cir. 1988). “Under 15 U.S.C. 1127, ‘a mark is “used in commerce” when (1) the mark has been placed on the goods or their containers, labels or the documents associated with the goods or their sale, and (2) the goods are sold or transported in commerce.’” *Herman Miller Inc. v. Alphaville Design Inc.*, No. C 08-03437 WHA, 2009 WL 3429739, at *6 (N.D. Cal. Oct. 22, 2009). To assert a claim for unfair competition and false designation of origin under § 1125(a), the plaintiff must allege that “the defendant’s use of its mark is likely to cause confusion, deception or mistake as to ‘the affiliation, connection, or association of such person with another

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person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person.” *See Craigslist, Inc. v. Naturemarket, Inc.*, 694 F. Supp. 2d 1039, 1058 (N.D. Cal. 2010) (quoting 15 U.S.C. § 1125(a)(1)(A)). Because “[t]he tests for infringement of a federally registered mark under . . . § 1114(1), infringement of a common law trademark, [and] unfair competition under . . . § 1125(a) . . . are the same,” *Kythera Biopharmaceuticals, Inc.*, 998 F. Supp. 2d 890, 897 (C.D. Cal. 2014) (quoting *Grey v. Campbell Soup Co.*, 650 F. Supp. 1166, 1173 (C.D. Cal. 1986)), we will discuss all three claims together in this order.

Although Oakley adequately alleges ownership of the Oakley Marks at issue (Compl. ¶¶ 24-26; Exs. 14-15, Docs. 1-14, 1-15), it fails to allege sufficient facts to satisfy the remaining elements of a claim for trademark infringement. Specifically, Oakley fails to adequately allege that Moda used any infringing mark in commerce. Oakley provides an example of eyewear that contains an allegedly infringing mark, but Oakley fails to allege where or how this eyewear was allegedly “offer[ed] for sale, distribut[ed], market[ed], or s[old]” by Moda, nor does it provide a model number or any other facts supporting the allegation that this eyewear was used in commerce. (Compl. ¶ 27.) Oakley later alleges that, “[f]or example, Defendant’s OV5489K model sunglasses use marks that are confusingly similar to the Oakley Marks,” but it neither describes the allegedly infringing marks, provides a picture of the OV5489K model with the mark, nor alleges that this eyewear is related in any way to the eyewear picture identified in paragraph 27. (*Id.* ¶ 75.) Oakley also fails to allege where or how this eyewear was sold, distributed, or marketed by Moda. The Rule 8 pleading standard “does not require detailed factual allegations,” but it does require more than “labels and conclusions or a formulaic recitation of the elements of a cause of action.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Oakley fails to meet this standard as to these claims.

Accordingly, the Court concludes that Oakley has failed to adequately plead trademark infringement, unfair competition, and false designation of origin. Oakley is therefore not entitled to default judgment on these claims.

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iii. Trade Dress Infringement

The Court then turns to Plaintiff’s claim for trade dress infringement. To state a claim, a plaintiff must sufficiently allege “that (1) the trade dress is nonfunctional, (2) the trade dress has acquired a secondary meaning, and (3) there is a substantial likelihood of confusion between the plaintiff’s and defendant’s products.” *Art Attacks Ink, LLC v. MGA Entm’t Inc.*, 581 F.3d 1138, 1145 (9th Cir. 2009). *See also Aurora World, Inc. v. TY Inc.*, 719 F. Supp. 2d 1115, 1141 (C.D. Cal. 2009) (“Where...the trade dress for which protection is sought is the design of the product itself, plaintiff ‘bears the burden of establishing...that the features sought to be protected are *not* functional, but were selected arbitrarily or for purely aesthetic reasons.’” (emphasis in original) (quoting *Glob. Mfg. Grp., LLC v. Gadget Universe.Com*, 417 F. Supp. 2d 1161, 1167 (S.D. Cal. 2006))). In determining functionality, factors to be considered include: “(1) whether a particular design yields a utilitarian advantage; (2) whether alternative designs are available in order to avoid hindering competition; and (3) whether the design achieves economies in manufacture or use.” *Int’l Jensen, Inc. v. Metrosound U.S.A., Inc.*, 4 F.3d 819, 823 (9th Cir. 1993) (citing *In re Owens-Corning Fiberglas Corp.*, 774 F.2d 1116, 1121 (Fed. Cir. 1985)). “No one factor is dispositive; all should be weighed collectively.” *Id.*

Here, Oakley asserts that it “manufactures and sells sunglasses under the mark HALF HOLBROOK” that bears a distinctive trade dress.³ (Compl. ¶ 35.) Oakley attaches to the Complaint an example of an Oakley product bearing the HOLBROOK trade dress:



³ Plaintiff’s Complaint alleges trade dress infringement of Oakley’s FLAK JACKET® and HALF HOLBROOK marks. (See Compl. ¶¶ 33-36.) However, Plaintiff moves for default judgment only as to the HOLBROOK trade dress. (See Mot. at 7-8, Doc. 17.)

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(Compl. Ex. 16-17, Doc. 1-17.) However, Oakley fails to provide any allegation that the above trade dress is nonfunctional, nor does it provide any factual allegations supporting this conclusion. Oakley also fails to adequately allege a substantial likelihood of confusion between the Plaintiff’s and Defendant’s products. In the Complaint, Oakley pleads that “Defendant’s CF1869, MD3033, MD3062-RV, MD3031-RV, RAB89282B, and OY92849K model sunglasses use trade dress that is confusingly similar to Oakley’s HOLBROOK Trade Dress.” (Compl. ¶ 84.) However, Oakley has not attached any images of the listed models, nor does it describe how the above models are likely to cause confusion. It relies solely on the conclusory assertion that the above models “use trade dress that is confusingly similar to Oakley’s HOLBROOK trade dress,” which is insufficient to satisfy the pleading standard set forth in *Twombly* and *Iqbal*.

Accordingly, the Court concludes that Oakley fails to adequately plead a claim for federal trade dress infringement. Oakley is therefore not entitled to default judgment as to this claim.

iv. California Unfair Competition

Finally, we turn to Oakley’s claim for unfair competition under California Business & Professions Code § 17200 and California common law. Oakley alleges that “Defendant’s acts of trademark infringement, trade dress infringement, [and] false designation of origin . . . complained of herein constitute unfair competition with Oakley[.]” (Compl. ¶ 120.) For reasons explained earlier in this Order, Oakley fails to adequately allege the above claims. Accordingly, its claim for unfair competition similarly fails. *See Japan Telecom, Inc. v. Japan Telecom Am., Inc.*, 287 F.3d 866, 875 (9th Cir. 2002) (plaintiff’s unfair competition claim under state law “fails because its related Lanham Act claims fail”). Oakley is therefore not entitled to default judgment as to this claim.

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3. Amount of Money at Issue

Under the fourth *Eitel* factor, “the court must consider the amount of money at stake in relation to the seriousness of Defendant’s conduct.” *PepsiCo*, 238 F. Supp. 2d at 1176. Oakley requests a permanent injunction, total profits pursuant to 35 U.S.C. § 289, and attorneys’ fees. (Mem. at 8-12.) However, Oakley fails to set forth a monetary value of the total profits sought and instead seeks limited discovery to determine Moda’s total profits. Without an estimated number, the Court is unable to balance the amount of money at stake with the seriousness of Defendant’s conduct. Accordingly, this factor does not weigh in favor of default judgment.

4. The Possibility of a Dispute Concerning Material Facts

“The fifth *Eitel* factor examines the likelihood of dispute between the parties regarding the material facts surrounding the case.” *Craigslist, Inc.*, 694 F. Supp. 2d at 1060. “Where a plaintiff has filed a well-pleaded complaint, the possibility of dispute concerning material facts is remote.” *Wecosign, Inc. v. IFG Holdings, Inc.*, 845 F. Supp. 2d 1072, 1082 (C.D. Cal. 2012) (citing *Landstar Ranger*, 725 F. Supp. 2d at 921-22). As discussed above, Oakley’s claim for patent infringement is well pleaded. Thus, a dispute concerning material facts as to this claim is unlikely, and this factor weighs in favor of entering default judgment as to this claim.

5. The Possibility of Excusable Neglect

“The sixth *Eitel* factor considers whether defendant’s default may have been the product of excusable neglect.” *Landstar Ranger, Inc. v. Parth Enters. Inc.*, 725 F. Supp. 2d 916, 921-22 (C.D. Cal. 2010). This factor favors a default judgment when the defendant has been properly served or the plaintiff demonstrates that the defendant is aware of the lawsuit. *Id.* (concluding that this factor favored default judgment and the “possibility of excusable neglect is remote” where defendant had been properly served); *Craigslist*, 694 F. Supp. 2d at 1061 (“Plaintiff has proffered evidence showing Defendants were clearly aware of the pending litigation.”). Moda was served with the

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summons and complaint on February 3, 2016, (Doc. 10), but it has not answered or otherwise defended this action. The possibility of excusable neglect is therefore unlikely. Thus, this factor weighs in favor of entering default judgment.

6. Policy Favoring Decisions on the Merits

“The final *Eitel* factor examines whether the strong policy favoring deciding cases on the merits prevents a court from entering default judgment.” *Craigslist*, 694 F. Supp. 2d at 1061. Although “[c]ases should be decided upon their merits whenever reasonably possible,” *Eitel*, 782 F.2d at 1472, “Rule 55(a) allows a court to decide a case before the merits are heard if defendant fails to appear and defend,” *Landstar Ranger*, 725 F. Supp. 2d at 922. Notwithstanding the strong policy presumption in favor of a decision on the merits, where a defendant fails to appear and respond, a decision on the merits is impossible and default judgment is appropriate. *See Craigslist*, 694 F. Supp. 2d at 1061. In this case, Moda has failed to appear and respond. This factor therefore does not weigh against entering default judgment.

7. Conclusion as to the Eitel Factors

In sum, the *Eitel* factors weigh in favor of the entry of default judgment only as to Oakley’s claim for patent infringement. Accordingly, for the reasons stated above, the court GRANTS Oakley’s Motion as to liability against Moda for the patent infringement claim. The Court DENIES Plaintiff’s Motion as to the remaining claims.

IV. REMEDIES

Having found that Oakley is entitled to the entry of default judgment for its patent infringement claim, the Court addresses Oakley’s request for remedies regarding this claim.

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A. Permanent Injunctive Relief and Damages

Oakley seeks a permanent injunction under the Patent Act, which allows the courts to “grant injunctions in accordance with the principles of equity to prevent the violation of any right secured by patent, on such terms as the court deems reasonable.” 35 U.S.C. § 283. Oakley also seeks “Defendant’s total profits or, at its election, statutory damages as a result of Defendant’s sales of products that infringe any of Oakley’s design patents-in-suit.” (Mem. at 9.) Under the Patent Act, defendants found liable for design patent infringement “shall be liable to the [patent] owner to the extent of his total profit, but not less than \$250[.]” 35 U.S.C. § 289. However, Oakley fails to submit *any* evidence to support its request for either form of relief. Oakley concedes it “has not been able to obtain evidence concerning Defendant’s profits from the sales of its Accused Patent Products,” and it therefore “requests that the Court allow Oakley to conduct limited discovery to determine the amount of Defendant’s total profits.” (Mem. at 10.) However, Oakley asks the Court to first grant its request for a permanent injunction and damages and indicates it will, “within 180 days of entry of Judgment by this Court, . . . submit a declaration . . . setting forth a calculation of . . . total profits.” (Mem. at 12 n.1).

It is well-established that a plaintiff must independently “prove-up” the amount of damages sought in the complaint. *Geddes*, 559 F.2d at 560. A plaintiff must also independently “prove-up” her entitlement to other forms of relief, including permanent injunctive relief. *See Sprint Nextel Corp. v. Welch*, No. 1:13-cv-01174-AWI-SAB, 2014 WL 68957, at *9 (E.D. Cal. Jan. 8, 2014) (declining to grant permanent injunctive relief because plaintiffs “have not submitted evidence that supports their request for a permanent injunction.”), *report and recommendation adopted*, No. 1:13-CV-01174-AWI, 2014 WL 2106683 (E.D. Cal. May 20, 2014); *Western Supreme Buddha Ass’n Inc. v. Oasis World Peace & Health Found.*, No. 08-cv-1374 (TJM/DRH), 2010 WL 3488134, at *3 (N.D.N.Y. Aug. 30, 2010) (“[T]he plaintiff is required to prove independently that it is entitled to the relief it requests,” including an injunction). Given the complete absence of any evidence supporting injunctive relief or an award of total profits, we decline to

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grant the Motion as to these requested remedies. However, for the following reasons, we GRANT leave to conduct limited discovery.

Federal Rule of Civil Procedure 26 governs the scope and timing of discovery. Pursuant to Rule 26(d)(1), a party “may not seek discovery from any source before the parties have conferred as required by Rule 26(f) . . . [unless] authorized by these rules, by stipulation, or by court order.” Fed. R. Civ. P. 26. Federal Rule of Civil Procedure 55(b)(2) also provides that “[t]he court may conduct hearings or make referrals . . . when, to enter or effectuate judgment, it needs to: . . . (B) determine the amount of damages; . . . or (D) investigate any other matter.” Fed. R. Civ. P. 55(b)(2). It appears that, pursuant to the authority vested in Rule 26(d)(1) and Rule 55(b)(2), courts have allowed discovery on the issue of damages after the entry of default. *See Alstom Power, Inc. v. Graham*, No. 3:15-cv-174, 2016 WL 354754, at *3 (E.D. Va. Jan. 27, 2016) (collecting cases and allowing the plaintiff to “engage in discovery limited to ascertaining the existence and amount of damages for its three causes of action.”); *Tristrata Tech., Inc. v. Medical Skin Therapy Research, Inc.*, 270 F.R.D. 161, 163 (D. Del. 2010) (noting that the plaintiff was “granted leave to conduct discovery on the issue of damages” after the entry of default against the defendant); *DIRECTV, Inc. v. Guzzi*, 308 F. Supp. 2d 788,790-91 (E.D. Mich. 2004) (granting motion for default judgment as to liability only and ordering limited discovery “with respect to the amount of damages and attorney fees to be assessed” against defendants in default).

As noted above, Oakley was granted default judgment as to liability for its claim of patent infringement. We therefore grant leave for Oakley to engage in discovery, *for its patent infringement claim only*, to support its request for permanent injunctive relief and to ascertain the existence and amount of damages. Oakley’s requests for relief are hereby DENIED WITHOUT PREJUDICE so Oakley may make a renewed request upon conducting this limited discovery.

B. Attorneys’ Fees and Costs

Finally, Oakley seeks reasonable attorneys’ fees and costs. Under the Patent Act, “[t]he court in exceptional cases may award reasonable attorney fees to the prevailing

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party.” 35 U.S.C. § 285. The Federal Circuit has held that under the Patent Act, the “[c]riteria for declaring a case exceptional include willful infringement, bad faith, litigation misconduct, and unprofessional behavior.” *nCube Corp. v. Seachange Int’l, Inc.*, 436 F.3d 1317, 1319 (Fed. Cir. 2006). In the context of a default judgment, the Ninth Circuit has upheld awards of attorneys’ fees “solely because, by entry of default judgment, the district court determined, as alleged in [plaintiff’s] complaint, that [defendant’s] acts were committed knowingly, maliciously, and oppressively, and with an intent to ... injure [plaintiff].” *Derek Andrew, Inc. v. Poof Apparel Corp.*, 528 F.3d 696, 702 (9th Cir. 2008) (citation and internal quotation marks omitted). “[A] case may [also] be deemed exceptional where the defendant disregards the proceedings and does not appear.” *Allergan Inc. v. Mira Life Grp., Inc.*, No. SACV 04-36 JVS MLGx, 2004 WL 2734822, at *4 (C.D. Cal. June 9, 2004). *See also Philip Morris USA, Inc. v. Castworld Prods., Inc.*, 219 F.R.D. 494, 502 (C.D. Cal. 2003) (“[A] case may be deemed ‘exceptional,’ and merit an award of attorneys’ fees under the Lanham Act, when Defendant disregards the proceedings and does not appear.”); *Taylor Made Golf Co., Inc. v. Carsten Sports Ltd.*, 175 F.R.D. 658, 663 (S.D. Cal. 1997) (finding that the defendant’s failure to appear warranted an award of attorneys’ fees because the defendant’s “lack of cooperation and disrespect for the judicial process constitute[d] exceptional circumstances” under the Lanham Act). Here, Oakley alleges that Moda willfully and intentionally infringed on its patents, (*see* Compl. ¶¶ 42, 44, 46, 48, 50, 52, 54, 56, 58, 60, 62, 64, 66), and Moda failed to appear in this action. Accordingly, the Court concludes that Oakley is entitled to attorneys’ fees.

In its Motion, Oakley fails to request a specific amount of attorneys’ fees. However, Local Rule 55-3 provides that when a default judgment is entered and an applicable statute provides for the recovery of reasonable attorneys’ fees, those fees shall be calculated according to an enumerated schedule based on the amount of judgment. C.D. Cal. R. 55-3. For the reasons stated above, the Court does not determine in this Order the amount of damages to which Oakley is entitled. As a result, Oakley’s request for attorneys’ fees is DENIED WITHOUT PREJUDICE so it may make a renewed request along with its renewed request for damages.

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C. Conclusion as to Remedies

For the reasons stated above, the Court DENIES WITHOUT PREJUDICE Oakley’s requests for permanent injunctive relief, damages, and attorneys’ fees so it may make renewed requests upon conducting limited discovery. “The Ninth Circuit has impliedly endorsed the practice of entering partial default judgment.” *Welch*, 2014 WL 68957, at *2 (citing *Dreith v. Nu Image, Inc.*, 648 F.3d 779, 781 (9th Cir. 2011)). Accordingly, the Court finds it appropriate to enter partial default judgment as to liability while deferring its ruling on damages and attorneys’ fees pending limited discovery and “evidentiary submissions.” *See Dreith*, 648 F.3d at 781.

V. CONCLUSION

For the foregoing reasons, Oakley’s Motion for Default Judgment is GRANTED IN PART and DENIED IN PART. The Court GRANTS the Motion as to liability against Moda for Oakley’s claim of patent infringement. The Court DENIES the Motion as to all remaining claims. The Court GRANTS leave for Oakley to engage in discovery, *for its patent infringement claim only*, to support its request for permanent injunctive relief and to ascertain the existence and amount of damages. Accordingly, Oakley’s requests for permanent injunctive relief, damages, and attorneys’ fees are DENIED WITHOUT PREJUDICE so Oakley may make renewed requests following the above limited discovery.

To the extent Oakley intends to pursue this discovery and renew its requests in accordance with this Order, it must engage in discovery *and* file a renewed motion for relief **within 60 days** of the issuance of this Order. Failure to timely file a renewed motion for relief will result in the administrative closure of this action.

Initials of Preparer: tg