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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

DECKERS OUTDOOR CORPORATION,
a Delaware Corporation,

Plaintiff,

v.

SHOESCANDAL.COM, LLC, a Nevada
Limited Liability Company; and DOES 1–
10, inclusive,

Defendants.

Case No. CV 12-7382 ODW (SHx)

**ORDER GRANTING PLAINTIFF'S
REQUEST FOR AWARD OF
DAMAGES IN DEFAULT
JUDGMENT [28]**

I. INTRODUCTION

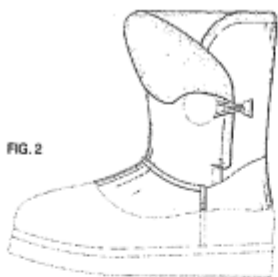
On August 7, 2013, the Court entered default judgment as to liability against Defendant ShoeScandal.com, LLC. (ECF No. 27.) The Court denied the initial request for damages because Deckers Outdoor Corporation's submitted evidence of ShoeScandal's profits was too speculative. (*Id.*) Deckers filed a renewed request for an award of damages under 35 U.S.C. § 289 August 23, 2013 (ECF No. 28.) In light of Deckers's supplemental evidence regarding typical industry profits, the Court **GRANTS** Deckers's Request for Damages.¹

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¹ The Court deems this matter appropriate for decision without oral argument. Fed. R. Civ. P. 78; C.D. Cal. L.R. 7-15.

1 **II. FACTUAL BACKGROUND**

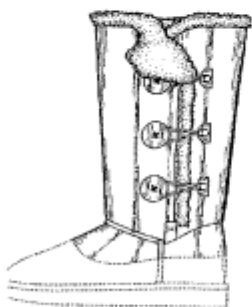
2 On August 28, 2012, Deckers sued ShoeScandal for patent infringement and
3 unfair competition regarding the purchase and sale of goods with designs nearly
4 identical to Deckers's federally-registered design patents. (ECF No. 1.) Deckers
5 holds multiple design patents for its famous UGG® Australia line of footwear.
6 Defendant ShoeScandal.com advertises, offers for sale, and sells shoes through its
7 online store www.shoescandal.com. (Compl. ¶ 13.) An image comparison is
8 provided below. (See Compl. ¶ 14.)



14 **Ugg Design Patent No. D599,999**



15 **Defendant's Infringing Product**



21 **Ugg Design Patent No. D616,189**



22 **Defendant's Infringing Product**

23 On October 15, 2012, the Clerk of Court entered default against ShoeScandal
24 under Federal Rule of Civil Procedure 55(a). (ECF No. 13.) Following entry of
25 default, Deckers filed an Application for Default Judgment seeking injunctive relief
26 and an award of \$500,000.00, in addition to costs and post-judgment interest. (ECF
27 No. 25.) On August 7, 2013, the Court granted Deckers's Application with respect to
28

1 liability, costs, and injunctive relief, but denied Deckers’s request for damages without
2 prejudice. (ECF No. 27.)

3 The Court denied the damages request because Deckers failed to adequately
4 prove its damages. (*Id.*) Rather than seek damages in the form of a reasonable-
5 royalty under § 284, Deckers sought ShoeScandal’s profits from the sale of the
6 infringing products under § 289. (ECF No. 25.) But because ShoeScandal failed to
7 appear in this action, Deckers sought to prove ShoeScandal’s profits through an
8 invoice produced by Ollie’s Bargain Outlet—a retailer to whom ShoeScandal
9 allegedly sold the infringing boots in an unrelated action pending in the Southern
10 District of New York. (*Id.*; Chan Decl. ¶ 7.) Deckers improperly equated
11 ShoeScandal’s total “earned revenue” with its total profits in its request.

12 On August 23, 2013, Deckers renewed its request for damages. (ECF No. 33.)
13 Deckers sought \$230,000.00 in damages, again based on ShoeScandal’s sales of the
14 infringing boots to Ollie’s Bargain Outlet. (*Id.*) Deckers noted that Ollie’s Bargain
15 Outlet’s invoice reflected that ShoeScandal sold at least 39,780 units of the infringing
16 boots and earned revenues in the amount of \$238,282.20. (*Id.*) But although Deckers
17 decreased the requested damages amount, Deckers did not provide the Court with any
18 evidence of ShoeScandal’s profits. Instead, Deckers requested 50 percent of
19 ShoeScandal’s gross revenues. (*Id.*) The Court issued an Order for supplemental
20 briefing on September 26, 2013, requesting that Deckers provide some evidence of
21 ShoeScandal’s profits. (ECF No. 37.) On October 25, 2013, Deckers responded to
22 the Court’s Order by filing a declaration from Nellie Poole, Deckers’s Vice President
23 of Supply Chain. (ECF No. 38.)

24 **III. LEGAL STANDARD**

25 Federal Rule of Civil Procedure 55(b) authorizes a district court to grant default
26 judgment after the Clerk enters default under Rule 55(a). Local Rule 55-1 requires
27 that the movant submit a declaration establishing (1) when and against which party
28 default was entered; (2) identification of the pleading to which default was entered;

1 (3) whether the defaulting party is a minor, incompetent person, or active
2 servicemember; and (4) that the defaulting party was properly served with notice.

3 A district court has discretion whether to enter a default judgment. *Aldabe v.*
4 *Aldabe*, 616 F.2d 1089, 1092 (9th Cir. 1980). Upon default, the defendant’s liability
5 generally is conclusively established, and the well-pleaded factual allegations in the
6 complaint are accepted as true. *Televideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917–
7 19 (9th Cir. 1987) (per curiam) (citing *Geddes v. United Fin. Grp.*, 559 F.2d 557, 560
8 (9th Cir. 1977)).

9 But a Plaintiff must prove all damages sought in the complaint. *Phillip Morris*
10 *USA, Inc. v. Castworld Prods.*, 219 F.R.D. 494, 498 (C.D. Cal. 2003). If the facts
11 necessary to determine damages are not contained in the complaint, or are legally
12 insufficient, they will not be established by default. *Cripps v. Life Ins. Co. of N.*
13 *America*, 980 F.2d 1261, 1267 (9th Cir. 1992). Fundamental fairness, required by due
14 process of law, limits the scope of relief. U.S. Const. amend. XIV.

15 IV. DISCUSSION

16 In the Renewed Request for Award of Damage in Default Judgment, Deckers
17 seeks judgment in the sum of \$258,270.05 in statutory damages, reasonable attorneys’
18 fees in accordance with Local Rule 55-3, and prejudgment interest, as well as costs
19 and postjudgment interest. (ECF No. 33.) The Court considers each in turn.

20 A. Statutory Damages

21 Deckers first seeks a statutory-damages award of \$119,141.10—which reflects
22 a presumed 50 percent profit by ShoeScandal on its \$238,282.20 sales to Ollie’s
23 Bargain Outlet. This presumed profit is based upon the typical profit margin for
24 footwear distributors of 40–50 percent. (Poole Decl. ¶¶ 5–6.) Under 35 U.S.C. § 284,
25 a design-patent patentee may recover compensatory damages from the infringer, but in
26 no event less than a reasonable royalty. Alternatively, the patentee may elect to
27 recover the infringer’s total profits (but no less than \$250) under 35 U.S.C. § 289.
28 And when only a design patent is at issue, a patentee may not recover both infringer

1 profits under § 289 and additional damages, such as a reasonable royalty, under § 284.
2 *Catalina Lighting, Inc. v. Lamps Plus, Inc.*, 295 F.3d 1277, 1291 (Fed Cir. 2002).

3 Rather than seek damages under § 284, Deckers seeks ShoeScandal’s profits
4 from the sale of the infringing products under § 289. (Mot. 3.) Under normal
5 circumstances, it is the infringer who bears the burden of “offering a fair and
6 acceptable formula for allocating a given portion of overhead to the particular
7 infringing items in issue.” *Sunbeam Prods., Inc. v. Wing Shing Prods. (BVI) Ltd.*, 311
8 B.R. 378, 401 (S.D.N.Y. 2004) *aff’d*, 153 F. App’x 703 (Fed. Cir. 2005). But if the
9 infringer has failed to produce any evidence—as in the default action at hand—the
10 Court must determine the costs to be subtracted from revenue based on the evidence it
11 has to determine profits. *See Nike, Inc. v. Wal-Mart Stores, Inc.*, 138 F.3d 1437, 1447
12 (Fed. Cir. 1998).

13 ShoeScandal has not responded to, nor produced any discovery in, this action,
14 so Deckers has limited information regarding ShoeScandal’s sales and profits. The
15 invoice produced by Ollie’s Bargain Outlet shows that ShoeScandal has sold at least
16 39,780 units of the infringing products, resulting in \$238,282.20 in sales to Ollie’s
17 alone. (Poole Decl. ¶ 6.) But ShoeScandal’s total *sales* are not its total *profits*. In
18 arriving at ShoeScandal’s total-profit figure under § 289, Deckers cannot look solely
19 to ShoeScandal’s gross sales figures. Rather, it must subtract from the gross sales all
20 of ShoeScandal’s direct and indirect expenses. *See Nike*, 138 F.3d at 1447.

21 The Court finds evidence of the typical profit margin in the footwear industry
22 sufficient for an award of damages on default. The ascertainment of the amount of
23 damages is not certain, but it would be fundamentally unfair to deny all relief to
24 Deckers. “The wrongdoer is not entitled to complain that [the damages] cannot be
25 measured with the exactness and precision that would be possible if the case, which he
26 alone is responsible for making, were otherwise.” However, the Court declines to
27 grant the statutory damages as requested. The Court must balance the concern of
28 fairness to an absent party against the risk that minimizing damages would motivate

1 infringing parties to simply ignore infringement complaints. Instead the Court finds a
2 statutory award of **\$107,226.99**—based on a 45 percent profit margin—reasonable in
3 this case. A profit margin of 45 percent represents an average of the 40–50 percent
4 profit margin typical in the industry and adequately balances fairness and deterrence.
5 (Poole Decl. ¶¶ 5–6.)

6 **B. Attorney’s Fees and Costs**

7 Deckers also requests an award of reasonable attorneys’ fees under § 285.
8 Under § 285, the Court must first determine that a case is “exceptional” and then it
9 may exercise its discretion to award fees to the prevailing party. The standard for
10 determining whether a case is exceptional under § 285 is set forth in *Brooks Furniture*
11 *Manufacturing, Inc. v. Dutailier International Inc.*, 393 F.3d 1378 (Fed. Cir. 2005).
12 There, the Federal Circuit held that an award of attorneys’ fees is permissible “when
13 there has been some material inappropriate conduct related to the matter in litigation,
14 such as willful infringement, fraud or inequitable conduct in procuring the patent,
15 misconduct during litigation, vexatious or unjustified litigation, conduct that violates
16 Fed. R. Civ. P. 11, or like infractions.” *Brooks*, 393 F.3d at 1381. Indeed, the Federal
17 Circuit has stated that attorneys’ fees should be awarded “only when it would be
18 unjust not to make such an award.” *Rohm & Haas Co. v. Crystal Chem. Co.*, 736 F.2d
19 688, 692 (Fed. Cir. 1984). Thus, a court must predicate an attorneys’-fees award on
20 something beyond the mere fact that the patentee has prevailed.

21 Here, Deckers alleged that ShoeScandal sold and offered for sale the infringing
22 shoes “knowingly and intentionally,” and that this conduct “constitute[d] willful acts
23 and intentional infringement.” (Compl. ¶¶ 19, 23.) Deckers further asserts that, by
24 failing to respond to its Complaint, ShoeScandal is deemed to have admitted that it
25 willfully infringed Deckers’s design patent. But the fact that a default judgment was
26 entered against ShoeScandal does not alone make this case exceptional—despite the
27 default finding of willfulness. *Accord Telequip Corp. v. The Change Exch.*, No. 5:01-
28 CV-1748, 2007 WL 655734, at *2 (N.D.N.Y. Feb. 26, 2007) (denying patentee’s

1 motion for attorneys' fees and noting that "neither willful infringement nor defaults
2 are unusual in patent-infringement cases."); *Cequent Trailer Prods., Inc. v. Intradin*
3 *(Shanghai) Mach. Co., Ltd.*, No. 1:05-CV-2566, 2007 WL 438140, at *11 (N.D. Ohio
4 Feb. 7, 2007) (awarding treble damages for willful infringement but refusing to award
5 attorneys' fees on default).

6 Courts have awarded attorneys' fees under 35 U.S.C. § 285 for willful
7 infringement. *Nat'l Gypsum Co. v. Steel Sys. Int'l, Inc.*, 696 F. Supp. 1379 (D. Or.
8 1988); *Chaparral Indus., Inc. v. Boman Indus., Inc.*, 697 F. Supp. 1113 (C.D. Cal.
9 1988). And such an award has been upheld by the Federal Circuit. *Spindelfabrik*
10 *Suessen-Schurr, Stahlecker & Grill GmbH v. Schubert & Salzer Maschinenfabrik*
11 *Aktiengesellschaft*, 829 F.2d 1075 (Fed. Cir. 1987). But although a finding of willful
12 infringement is a sufficient basis for finding a case exceptional, it does not compel
13 such a finding. *Tate Access Floors, Inc. v. Maxcess Techs., Inc.*, 222 F.3d 958, 972
14 (Fed. Cir. 2000); *Jurgens v. CBK, Ltd.*, 80 F.3d 1566, 1572 (Fed. Cir. 1996); *Avia*
15 *Group Intern., Inc. v. L.A. Gear Cal., Inc.*, 853 F.2d 1557, 1567 (Fed. Cir. 1988)..

16 The bare default finding of willful infringement is insufficient evidence of
17 exceptional circumstances to warrant an attorneys'-fees award. Attorneys' fees are
18 not awarded as a matter of course, and should not be permitted in the ordinary, typical
19 patent suit. Neither default judgments nor willful infringement are uncommon in
20 patent-infringement cases. The Court is not willing to categorize a default finding of
21 willfulness as exceptional without some additional extraordinary circumstances plead
22 in the complaint. An attorneys'-fees award should be premised upon a finding of
23 unfairness, bad faith, or other equitable consideration of similar force that makes it
24 grossly unjust that the prevailing party be left to bear the burden of its counsel's fees.
25 Deckers's complaint does not allege such circumstances here.

26 This is not to say that the Court condones ShoeScandal's actions—it
27 intentionally failed to participate in this action. But although ShoeScandal is
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1 blameworthy for its failure to file responsive pleadings, this is not sufficiently
2 exceptional to warrant an attorneys’-fees award.

3 Deckers is entitled to recover the costs incurred in litigating this action “upon
4 finding for the claimant.” 35 U.S.C. § 284. Accordingly, the Court **GRANTS**
5 Deckers’s request for costs, subject to proof in an application to tax costs under Local
6 Rule 54-2.1.

7 **C. Pre- and Post-Judgment Interest**

8 It is within the Court’s discretion to award pre-judgment interest in design-
9 patent infringement actions. *See Catalina Lighting*, 295 F.3d at 1292. Under 28
10 U.S.C. § 1961(a), “interest shall be allowed on any money judgment in a civil case
11 recovered in a district court.” Absent substantial evidence that a different pre-
12 judgment interest rate is appropriate, the rate of prejudgment interest is the Treasury
13 Bill rate as defined in 28 U.S.C. § 1961. *U.S. v. Gordon*, 393 F.3d 1044, 1058 n.12
14 (9th Cir. 2004); *see also Blanton v. Anzalone (II)*, 813 F.2d 1574, 1576 (9th
15 Cir.1987); *Cyclone USA, Inc. v. LL & C Dealer Servs., LLC*, CV 03-992 AJW, 2010
16 WL 2132378, at *2 (C.D. Cal. May 24, 2010). The Treasury Bill rate is equal to the
17 weekly average one-year constant maturity Treasury yield for the calendar week
18 preceding the date of the judgment as the appropriate rate for interest. 28 U.S.C. §
19 1961(a). The Court therefore awards Deckers **\$14,913.22** in pre-judgment interest
20 from June 25, 2012, through November 20, 2013.²

21 Deckers is entitled to post-judgment interest on their monetary award under
22 28 U.S.C. § 1961(a). Further, interest is computed daily until the date of payment.
23 *Id.* § 1961(b). The Court therefore awards Deckers post-judgment interest at a rate of
24 9.8 percent from November 21, 2013, until the date of payment.

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² ((((\$107,226.99×.098)÷365)×518) = \$14, 913.22

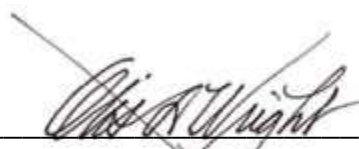
28 The average 52-week Treasury rate for the week preceding judgment is 9.8%. Principal Amount Due is \$107,226.99. The daily interest (((\$107,226.99 × 0.098) ÷ 365) is \$28.79. Interest accrued from June 25, 2012, to November 25, 2013, (\$28.79 × 518 days) is equal to \$14,913.22.

1 **V. CONCLUSION**

2 For the reasons discussed above, the Court **GRANTS** Deckers's Renewed
3 Request for an Award of Damages in Default Judgment and awards Deckers a total
4 amount of **\$122,140.21**. The Court also awards Deckers post-judgment interest at a
5 rate of 9.8 percent from November 26, 2013, until the date of payment. Under Local
6 Rule 54-2.1 Deckers has fourteen days from the date of this order to submit a bill of
7 cost. A default judgment will issue.

8
9 **IT IS SO ORDERED.**

10 November 25, 2013

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12 _____
13 **OTIS D. WRIGHT, II**
14 **UNITED STATES DISTRICT JUDGE**