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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

OCULUS INNOVATIVE SCIENCES, INC.,

No. C 08-4707 MMC

Plaintiff,

**ORDER DEFERRING RULING ON  
APPLICATION FOR DEFAULT  
JUDGMENT; AFFORDING PLAINTIFF  
OPPORTUNITY TO SUPPLEMENT  
APPLICATION; DENYING REQUEST  
FOR HEARING; CONTINUING CASE  
MANAGEMENT CONFERENCE**

v.

PRODINNV, S.A. DE C.V., and CESAR  
MANGOTICH PACHECO,

Defendants.

Before the Court is plaintiff Oculus Innovative Sciences, Inc.'s ("Oculus") Application for Entry of Default Judgment against defendants Prodinny, S.A. de C.V. and Cesar Mangotich Pacheco ("defendants"), pursuant to Rule 55(b)(2) of the Federal Rules of Civil Procedure, filed June 1, 2010. Although defendants have not appeared in the action, defendants were served with a copy of the motion, (see Attachment to Motion ("Certificate of Service by Mail") at 2), and no opposition has been filed.<sup>1</sup> On September 2, 2010, Oculus filed a Request for Continuance of Case Management Statement and for a Hearing Date on Application for Entry of Default Judgment.

Upon entry of default,<sup>2</sup> "the factual allegations of the complaint, except those relating to the amount of damages, will be taken as true." See Televideo Systems, Inc. v.

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<sup>1</sup> Pursuant to Civil Local Rule 7-3(a), any opposition was to be filed no later than June 18, 2010.

<sup>2</sup>The Clerk entered the default of each defendant on April 28, 2010.

1 Heidenthal, 826 F.2d 915, 917-18 (9th Cir. 1987). In its complaint, Oculus alleges that  
2 defendants misappropriated and wrongfully used, both in the United States and Mexico,  
3 Oculus's confidential information relating to Oculus's Microcyn technology and product.  
4 (See Compl. ¶¶ 11-14, 22-29.) Based thereon, Oculus asserts state law claims for breach  
5 of contract, misappropriation of trade secrets, interference with contract and with  
6 prospective economic advantage, and unfair competition.

7 In its Application, Oculus seeks an award of damages "in the amount of  
8 \$15,078,327," as well as "a permanent injunction against Defendants, prohibiting them from  
9 continued misappropriation of Plaintiff's Confidential Information and continued  
10 infringement of Plaintiff's products." (See Pl.'s Appl., filed June 1, 2010, at 2:23-27.)

#### 11 **I. Calculation of Oculus's Losses**

12 In support of its claim for damages, Oculus offers the declaration of Robert Miller  
13 ("Miller"), who attests therein that "Oculus has suffered damages in the amount of  
14 \$15,078,327, including past historical, future damages and capitalized continuing loss" (see  
15 Miller Decl. ¶ 6); attached to Miller's declaration are spreadsheets purporting to detail  
16 Oculus's losses (see Ex. A. to Miller Decl.). Oculus's showing is deficient in several  
17 respects.

18 First, although Miller states he has personal knowledge of the matters contained in  
19 his declaration, that he has been Oculus's Chief Financial Officer since 2003, and that he  
20 prepared the spreadsheets attached to his declaration (id. at ¶¶ 1-3), he does not establish  
21 a sufficient foundation for how he arrived at the figures therein. See, e.g., KW Plastics v.  
22 U.S. Can Co., 131 F. Supp. 2d 1265, 1274 (M.D. Ala. 2001) (holding, witness testifying as  
23 to lost profits "cannot simply assert conclusions; his testimony must rest upon an  
24 antecedent predicate and foundation"; finding, general manager's "conclusory statements  
25 about [plaintiff's] profit margin, costs of production, equipment and labor costs,  
26 depreciation, total cost, and the like are inadmissible without a better foundation"). Miller's  
27 spreadsheets contain, inter alia, figures for the following line items for fiscal years 2003  
28 through 2010: (1) "Loss of units" each fiscal year, reflecting "units not sold due to

1 competition” (Miller Decl. Ex. A at 1 and n. 6); (2) “Average Price Per Unit” sold each fiscal  
2 year (id. and n. 7); and (3) “Target Price per Unit,” which “refers to the \$25 list price of  
3 [Oculus’s] 5L units Oculus was bidding on and receiving in the past” (id. and n. 8). Miller,  
4 however, does not identify the type of records he reviewed to obtain such figures, nor does  
5 he explain how he calculated the losses claimed.

6 Second, the spreadsheets appear to contain mathematical errors. In particular, the  
7 figures given for “Total Sales,” a line item that purportedly “represents the total number of  
8 5L units multiplied by the average price” (see id. and n. 4), appear to be inconsistent with  
9 the product of “Total 5L units” and “Average Price per Unit” as listed on the spreadsheet.  
10 For Fiscal Year 2006, for example, the “Total 5L units” listed is “18,792,” and the “Average  
11 Price per Unit” listed is “7.0,” the product of which is 131,544; the figure for “Total Sales” as  
12 listed on the spreadsheet, however, is “396,569.” (Ex. A at 1.) Similarly, for Fiscal Year  
13 2010, the “Total 5L units” listed is “78,304,” and the “Average Price per Unit” listed is “14.0,”  
14 the product of which is 1,096,256; the figure for “Total Sales” as listed on the spreadsheet,  
15 however, is “1,224,395.” (Id.)<sup>3</sup>

## 16 **II. Propriety of Award of Both Injunctive Relief and Damages for Future Losses**

17 Oculus seeks damages for future “projected losses” and future “continuing losses”  
18 for fiscal years 2011 through 2025 (Miller Decl. ¶¶ 4-6, and Ex. A, 2-4) while at the same  
19 time seeking injunctive relief prohibiting “continued misappropriation of Plaintiff’s  
20 Confidential Information and continued infringement of Plaintiff’s products.” (See Pl.’s  
21 Appl., 2.) Oculus cites to no authority in support of its position that a party may obtain both  
22 injunctive relief and a damages award for future losses stemming from the enjoined  
23 conduct. Indeed, relevant authority would appear to be to the contrary. See Lemat Corp.  
24 v. Barry, 275 Cal. App. 2d 671, 679 (1969) (noting, “[t]he general rule is that a plaintiff in an  
25 injunction suit is entitled to no more than relief consisting of an injunction against future  
26 injury and damages for past injury”). The Court will, however, afford Oculus leave to file

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28 <sup>3</sup>The above examples are provided for illustrative purposes and are not intended to  
set forth all matters requiring further elaboration.

1 supplemental briefing regarding its entitlement, if any, to an award of both such forms of  
2 relief.

3 **III. Form of Permanent Injunction**

4 Oculus has not submitted a proposed permanent injunction. The Court will,  
5 however, afford Oculus leave to file a proposed injunction.

6 **CONCLUSION**


7 For the reasons stated above, the Court hereby DEFERS ruling on Oculus's  
8 application for default judgment, and will afford Oculus an opportunity to supplement its  
9 motion. Specifically, Oculus is hereby afforded leave to file, no later than October 8, 2010,  
10 a supplemental memorandum and one or more supplemental declarations to address the  
11 above-referenced deficiencies. Oculus's request for a hearing is hereby DENIED, and, as  
12 of October 8, 2010, the matter will stand submitted.

13 If Oculus fails to file a timely supplement to its application, the Court will deny  
14 Oculus's application for default judgment in its entirety. If Oculus files a timely supplement  
15 but fails to submit therewith a proposed injunction, the Court will deem such failure an  
16 abandonment of the request for injunctive relief.

17 In light of the above, the Case Management Conference scheduled for September  
18 10, 2010 is CONTINUED to December 10, 2010.

19 **IT IS SO ORDERED.**

20  
21 Dated: September 8, 2010

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23 MAXINE M. CHESNEY  
24 United States District Judge