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28United States District Court  
For the Northern District of CaliforniaIN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

OCULUS INNOVATIVE SCIENCES, INC.,

No. C-08-04707 MMC

Plaintiff,

v.

**ORDER GRANTING IN PART AND  
DENYING IN PART PLAINTIFF'S  
MOTION FOR DEFAULT JUDGMENT**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 ("Application") against defendants Prodinny, S.A. de C.V. and Cesar Mangotich Pacheco (collectively "defendants"), filed June 1, 2010, pursuant to Rule 55(b)(2) of the Federal Rules of Civil Procedure. On October 8, 2010, Oculus, with leave of Court, filed a supplemental memorandum and supplemental declarations in support of the Application. Defendants were served with a copy of the Application, (see Proof of Service by Fedex 2, Doc. No. 58) and with a copies of the supplemental memorandum and declarations (see Proof of Service by Fedex 2, Doc. No. 75), and no opposition has been filed.<sup>1</sup> Having considered the papers filed in support of the Application, the Court deems the matter suitable for decision thereon and rules as follows.

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<sup>1</sup> The Application was noticed for hearing on July 9, 2010. Accordingly, any opposition was to be filed no later than June 18, 2010. See Civil L.R. 7-3(a). By Clerk's Notice filed July 7, 2010, the hearing was vacated.

1 **BACKGROUND**

2 Oculus filed the instant action on October 10, 2008. Oculus alleges that defendants  
3 misappropriated and wrongfully used, both in the United States and Mexico, Oculus’s  
4 confidential information relating to Oculus’s Microcyn technology and product. (See Compl.  
5 ¶¶ 11-14, 22-29.) Specifically, Oculus alleges that, during the time it employed defendant  
6 Cesar Mangotich Pacheco (“Mangotich”), Mangotich had access to Oculus’s confidential  
7 information (see id. at ¶¶15, 20; see also Alimi Decl. ¶¶ 7, 9, June 1, 2010); that as part of  
8 his employment, Mangotich had signed an Employment, Confidential Information, Invention  
9 Assignment and Arbitration Agreement (“ECIAA Agreement”) prohibiting Mangotich from  
10 disclosing confidential information or competing with Oculus (see Compl. ¶ 18; see also  
11 Alimi Decl. ¶ 10); and that Mangotich, while still employed at Oculus and without Oculus’s  
12 knowledge, formed Prodinno, S.A. de C.V. (“Prodinno”), a Mexican company, to compete  
13 with Oculus and manufacture and sell products, namely Esterilife, Varul, and Qx, which  
14 products were essentially identical to Oculus’s Microcyn product, and that Mangotich used  
15 Oculus’s confidential information to do so (see Compl. ¶¶ 22-26; see also Alimi Decl. ¶¶ 11-  
16 13). Oculus further alleges that defendants continue to manufacture those products and to  
17 sell them to Oculus’s customers. (See Compl. ¶¶ 27-28; see also Alimi Decl. ¶ 14.) Based  
18 thereon, Oculus asserts state law claims for breach of contract, misappropriation of trade  
19 secrets, interference with contract and with prospective economic advantage, and unfair  
20 competition. (See Compl. ¶¶ 31-58.)

21 A summons attaching Oculus’s complaint was served on defendants on January 8,  
22 2009. (See Doc. No. 3.) Defendants did not file an answer, but instead submitted a letter,  
23 which was written in Spanish. (See Doc. No. 22.) On November 24, 2009, defendants  
24 were ordered to file, on or before December 21, 2009, a responsive pleading in English.<sup>2</sup>  
25 (See Doc. No. 20; see also Proof of Service (attachment to Doc. No. 20).) Further,  
26 defendants were reminded that Prodinno, a corporate entity, must be represented by

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<sup>2</sup> On February 11, 2010, defendants’ letter was ordered stricken.

1 counsel, and were informed that a failure to retain counsel would result in entry of default  
2 as to such corporate party. (See Doc No. 20.) On February 11, 2010, the Court extended  
3 defendants' time to respond to Oculus's complaint to March 12, 2010. To date, defendants  
4 have not filed an answer to the complaint, refiled their letter in English, or made any other  
5 appearance.

## 6 LEGAL STANDARD

7 After entry of a default, a court may grant a default judgment on the merits of the  
8 case. See Fed. R. Civ. P. 55(b). "The district court's decision whether to enter a default  
9 judgment is a discretionary one." Aldabe v. Aldabe, 616 F.2d 1089, 1092 (9th Cir. 1980).

10 Factors a court may consider in exercising that discretion include:

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

17 Eitel v. McCool, 782 F.2d 1470, 1471-72 (9th Cir. 1986). As noted in the Court's previous  
18 order deferring ruling on Oculus's application for default judgment, upon entry of default,<sup>3</sup>  
19 "the factual allegations of the complaint, except those relating to the amount of damages,  
20 will be taken as true." See Televideo Sys., Inc. v. Heidenthal, 826 F.2d 915, 917-18 (9th  
21 Cir. 1987).

## 22 DISCUSSION

### 23 I. Jurisdiction

24 As alleged in the complaint, Oculus is a resident of California and Delaware (see  
25 Compl. ¶ 2), defendants are residents of Mexico (see id. at ¶ 3, 4), and the amount in  
26 controversy exceeds \$75,000 (see id. at ¶ 34 (claiming \$6.3 million in damages)). The  
27 Court therefore has jurisdiction over this matter pursuant to 28 U.S.C. § 1332.

### 28 II. Default Judgment

As noted, default has already been entered by the Clerk; consequently, this Court

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<sup>3</sup> The Clerk entered the default of each defendant on April 28, 2010.

1 has discretion regarding whether to enter judgment against defendants. See Aldabe, 616  
2 F.2d at 1092. Considering the factors set forth above, the Court finds default judgment is  
3 warranted. First, Oculus will be prejudiced unless default judgment is entered; defendants'  
4 refusal to respond to the complaint or to court orders demonstrates such judgment is  
5 Oculus's sole avenue of relief. Second, the allegations in the complaint, taken as true,  
6 demonstrate the merits of Oculus's claim against defendants. Oculus has alleged a  
7 contract between itself and Mangotich and breach by Mangotich, as well as interference  
8 with Oculus's contractual relations with customers and misappropriation of trade secrets,  
9 namely the Microcyn technology, and unfair competition by both defendants, all with  
10 resulting injury. Third, Oculus's complaint provides sufficient notice under Rule 8(a) of the  
11 Federal Rules of Civil Procedure. Fourth, Oculus alleges a substantial loss as a result of  
12 defendants' conduct, as to which defendants have raised no dispute. Fifth, defendants  
13 have raised no dispute as to any other material fact. Sixth, defendants have provided the  
14 Court with no excuse for their failure to respond to the complaint. Seventh, and lastly, while  
15 the Court is mindful of "the general rule that default judgments are ordinarily disfavored"  
16 and that "[c]ases should be decided upon their merits whenever reasonably possible," Eitel,  
17 782 F.2d at 1472, defendants' utter failure to respond to the complaint has effectively  
18 precluded resolution on the merits.

### 19 **III. Damages**

20 In its supplemental memorandum, Oculus seeks an award of damages in the total  
21 amount of \$3,304,794 (Supp. Mem. 1:15), as well as a permanent injunction (1) prohibiting  
22 defendants from "using or disclosing Oculus'[s] confidential, proprietary information,  
23 including Trade Secrets as defined in Cal. Civ. Code. sec. 3426, et seq."; (2) prohibiting  
24 defendants from "manufacturing the 'Infringing Products' marketed and sold under the  
25 brand names Esterilife, Varul and Qx"; and (3) requiring defendants (a) to "return to Oculus  
26 any documents or materials which contain, discuss or reflect Oculus'[s] Confidential  
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1 Information, (as defined in the ECIIAA Agreement)<sup>[4]</sup> including Trade Secrets as defined in  
2 Cal. Civ. Code sec. 3426, including without limitation all Confidential Information and  
3 Specifications, Customer lists and other documents provided to [d]efendants in connection  
4 with the employment contracts at issue in this action,” (b) to “provide Oculus with an  
5 accounting of profits from their manufacture and sale of the ‘Infringing Products’ to third  
6 parties,” and (c) to “disgorge all such profits to Oculus” (see Proposed Order at 2:4-17, Doc  
7 No. 74).

8 **A. Calculation of Oculus’s Losses**

9 The Court, in its September 8, 2010 order deferring ruling on Oculus’s Application  
10 (“Order”), found the Application, as initially filed, suffered from a number of deficiencies  
11 related to the calculation of damages. Specifically, the Court noted that Oculus sought  
12 recovery for future losses while at the same time seeking injunctive relief, the declaration  
13 submitted by Oculus’s Chief Financial Officer, Robert Miller (“Miller), in support of its  
14 damages calculation failed to “establish a sufficient foundation for how he arrived at the  
15 figures,” and the spreadsheet attached to said declaration contained mathematical errors.  
16 (See Order 2:18-3:26.)

17 In its supplemental memorandum, Oculus no longer seeks damages for future  
18 losses. Further, Oculus has submitted a revised declaration from Miller as support for its  
19 damages calculation, along with a revised spreadsheet. Miller now states that “[i]n  
20 preparing this spreadsheet, [he] reviewed data contained in the company’s financial and  
21 accounting records, including data provided to [him] by Everado Garibay, Director of  
22 Finance and Administration, Oculus, Mexico.” (See Miller Supp. Decl. ¶ 4.) Miller attests to  
23 the accuracy of the data contained in those documents, states that he receives such  
24 reports monthly, and notes that it is the same data used by Oculus to prepare filings with  
25 the Securities and Exchange Commission and in “disseminating information to financial  
26 analysts and the investing public.” (See id.) Miller’s supplemental declaration provides a

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28 <sup>4</sup> The ECIIAA Agreement is attached as an exhibit to Oculus’s complaint.

1 sufficient foundation for Oculus's submission of a damages calculation. See U.S. v.  
2 Shumway, 199 F.3d 1093, 1104 (9th Cir. 1999) (finding where "personal knowledge and  
3 competence is established by the affidavit," such affidavit should be admitted by the court).  
4 Lastly, Miller has cured the mathematical errors contained in his previous declaration.  
5 Oculus's damages calculation nonetheless continues to suffer from a number of  
6 deficiencies, and thus fails to support its claim for \$3,304,794.

7 First, \$2,456,519 of the amount claimed is attributed by Oculus to losses resulting  
8 from the sale of units at a discount due to the need to compete with defendants' infringing  
9 products. (See Compl. ¶ 26; Miller. Supp. Decl. Ex. A.) To calculate that loss, Oculus  
10 subtracted the average price per unit (calculated by dividing total sales proceeds for a  
11 given period by the total number of units sold in that period) from \$25, the price "Oculus  
12 was targeting in the several years prior to the onset of [d]efendants' conduct." (See Miller  
13 Supp. Decl. ¶¶ 6-7 (emphasis added).) The relevant price, however, is not the price  
14 Oculus sought, but the price Oculus likely would have received but for defendants' conduct.  
15 See St. Paul Fire and Marine Ins. v. Am. Dynasty Surplus Lines Ins. Co., 101 Cal. App. 4th  
16 1038, 1061 (Cal. Ct. App. 2002) (noting, "the breaching party is only liable to place the non-  
17 breaching party in the same position as if the specific breach had not occurred"); see also  
18 23 Cal. Jur. Damages § 39 ("Damages that are speculative, remote, imaginary, contingent,  
19 or merely possible cannot serve as a legal basis for recovery."). Here, Miller states that  
20 "Oculus sold the product at \$22.00 to \$25.00 per unit prior to" defendants' unlawful  
21 conduct. (Miller Supp. Decl. ¶ 7; see also Garibay Decl. ¶ 8.) Oculus provides no evidence  
22 from which the Court can determine the number of units that were sold at the high end, the  
23 low end, or somewhere in the middle of that range. The Court thus finds Oculus has  
24 provided evidence sufficient to demonstrate a sale price of no more than \$22 per unit.  
25 Based on a price of \$22 per unit and the sales data submitted by Miller, Oculus has  
26 demonstrated it is entitled to \$1,597,289 in lost profits.

27 Second, \$848,275 of the total amount claimed is attributed by Oculus to lost sales  
28 resulting from its public sector customers' substitution of defendants' products for Oculus's

1 products. (See Miller Supp. Decl. ¶ 10.) Oculus arrived at this figure by looking to actual  
2 sales from public hospitals and privately owned hospitals, and then attributing to  
3 defendants' unlawful conduct the reduction in sales to public hospitals. (See *id.* ¶¶ 9, 10.)  
4 In so doing, Oculus "assumed that sales in the public sector should have been equal to  
5 those in the private sector." (*Id.* ¶. 10.) Oculus, however, has provided no historical sales  
6 data suggesting sales in the two markets were roughly equivalent prior to defendants'  
7 unlawful conduct, or that the two markets tend to trend in parallel fashion. Without  
8 evidence establishing the relevance of the comparison, the Court is unwilling to adopt  
9 Miller's assumption.<sup>5</sup> Consequently, the Court finds Oculus has failed to prove damages  
10 based on the sale of fewer units.

### 11 **B. Injunctive Relief**

12 In addition to damages, Oculus seeks injunctive relief as described above.  
13 Injunctive relief is available under the California Uniform Trade Secrets Act ("UTSA"), Cal.  
14 Civ. Code §§ 3426-3426.11, and California's unfair competition law ("UCL"), Cal. Bus. &  
15 Prof. Code §§ 17200-17209. Under the UTSA, "[a]ctual or threatened misappropriation  
16 may be enjoined." Cal. Civ. Code. § 3426.2. Under the UCL:

17 Any person who engages, has engaged, or proposed to engage in unfair  
18 competition may be enjoined . . . [and] [t]he Court may make such orders  
19 or judgments . . . as may be necessary to prevent the use or employment  
20 by any person of any practice which constitutes unfair competition . . . or  
as may be necessary to restore to any person in interest any money or  
property, real or personal, which may have been acquired by means of  
such unfair competition.

21 Cal. Bus. & Prof. Code. § 17203. "As a general rule, a permanent injunction will be granted  
22 when liability has been established and there is a threat of continuing violations." MAI Sys.  
23 Corp. v. Peak Comp., Inc., 991 F.2d 511, 520 (9th Cir. 1993). As a Clerk's default has  
24 been entered, Oculus has established defendants' liability. Further, as alleged in the  
25 complaint, defendants continue to sell products using Oculus's confidential information, and  
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27 <sup>5</sup>Oculus's calculation is insufficient for two additional reasons. First, it uses the  
28 unsupported sales price of \$25 discussed above. Second, it uses a gross sales price  
rather than a figure representing net profit.

1 thus there is a threat of continuing violations.

2 As noted, Oculus seeks an injunction prohibiting future misappropriation of its trade  
3 secrets and sale of products manufactured as a result of misappropriation, as well as an  
4 injunction mandating the return of confidential information, an accounting, and  
5 disgorgement of profits. Although both of the above-referenced sections expressly  
6 authorize issuance of an injunction to prevent future misappropriation and unfair  
7 competition, and although section 17203 of the UCL additionally provides for return of  
8 money and property, section 3426.2 of the UTSA is silent as to a court's authority to order  
9 disgorgement of profits and such disgorgement has been held not to be available as a  
10 remedy under the UCL. See Korea Supply Co. v. Lockheed Martin Corp., 29 Cal. 4th  
11 1134, 1149, 1152 (2003) (holding sole monetary relief available under section 17203 is  
12 restitution; finding, in suit brought by competitor who lost sale to defendant, disgorgement  
13 of profit from such sale was "not restitutionary because plaintiff [did] not have an ownership  
14 interest in the money it [sought] to recover from defendants"). Moreover, disgorgement of  
15 profits in this instance would be largely duplicative of Oculus's compensatory damages.  
16 See, e.g., id. at 1151 (noting disgorgement would be in "exactly the same amount that  
17 plaintiff [was] seeking to recover as damages for its traditional tort claim of interference with  
18 prospective economic advantage"). Consequently, to the extent Oculus seeks an injunction  
19 requiring disgorgement of profits, or an accounting for the purposes of obtaining such an  
20 order, such injunctive relief will be denied.

## 21 CONCLUSION

22 For the reasons stated above, Oculus's Application for Entry of Default Judgment is  
23 hereby GRANTED in part and DENIED in part, as follows:

24 1. To the extent the Application seeks compensatory damages for lost profits, the  
25 Application is GRANTED, and Oculus shall have judgment against defendants, jointly and  
26 severally, in the amount of \$1,597,289;

27 2. To the extent the Application seeks injunctive relief as set forth below, the  
28 Application is GRANTED:



1 a. Defendants Prodiniv, S.A. de C.V. and Cesar Mangotich Pacheco are  
2 hereby ENJOINED from using or disclosing Oculus's confidential, proprietary information,  
3 including Trade Secrets as defined in California Civil Code Section 3426.1(d);

4 b. Said defendants are hereby ENJOINED from manufacturing the products  
5 marketed and sold under the brand names Esterilife, Varul, and Qx; and

6 c. Said defendants are hereby ORDERED to return to Oculus any documents  
7 or materials that contain, discuss or reflect Oculus's confidential information (as defined in  
8 the ECIIAA Agreement referenced in the complaint) including Trade Secrets as defined in  
9 California Civil Code Section 3426.1(d), including without limitation, all confidential  
10 information and specifications, customer lists and other documents provided to defendants  
11 in connection with defendant Cesar Mangotich Pacheco's employment.

12 3. In all other respects, Oculus's Application is DENIED.

13 **IT IS SO ORDERED.**

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Dated: November 16, 2010

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MAXINE M. CHESNEY  
United States District Judge