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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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Marc C. Gordon and Cynthia Callendar
Gordon, dba "Sleep Master™,"

Plaintiffs,

v.

Me & You, Inc., a Colorado corporation;
Dream Essentials, LLC, a North Carolina
limited liability company, Does 1-10,

Defendants.

Case No. 2:12-cv-02183-MMD-GWF

ORDER

(Plfs.' Motion for Default Judgment
– dkt. no. 15)

I. SUMMARY

Before the Court is Plaintiffs Marc C. Gordon and Cynthia Callendar Gordon, dba "Sleep Master™"s Motion for Default Judgment against Defendant Me & You, Inc. ("Motion"). (Dkt. no. 15.) Me & You, Inc. has not responded. For the reasons stated below, the Motion is granted.

II. BACKGROUND

On December 21, 2012, Plaintiffs filed a Complaint against Defendants Me & You, Inc. and Dream Essentials, LLC, as well as doe defendants. (Dkt. no. 1 at 2.) The Complaint alleges the following facts. On November 5, 2002, Plaintiffs were issued Patent Number D 465,234 S ("the Patent") for their Sound Muffling Sleep Mask ("Sleep Master Sleep Mask"). (*Id.*) Plaintiffs did not license or assign any right to the Patent and were the sole manufacturers of the Sleep Master Sleep Mask at all times. (*Id.*) Me &

1 You, Inc. manufactures the Sleep On It Mask sleep mask ("Sleep On It Mask"). (*Id.*) Me
2 & You, Inc., individually or in concert with Dream Essentials, LLC, markets and sells the
3 Sleep On It Mask on www.mysleeponit.com as well as other locations. (*Id.* at 3.)

4 Plaintiffs assert a claim for patent infringement, alleging that the Sleep On It Mask
5 embodies Plaintiffs' patented Sleep Master Sleep Mask and that Defendants are
6 infringing on this patent by manufacturing, selling, and using the Sleep On It Mask. (*Id.*
7 at 5.) Plaintiffs also assert a claim for unfair competition and trade dress infringement
8 and dilution pursuant to 15 U.S.C. §§ 1051 *et seq.* ("Lanham Act"), alleging that, by
9 marketing and selling the Sleep On It Mask, Defendants are confusing customers,
10 deceiving customers as to the source of the product, and diluting and tarnishing the
11 quality of Plaintiffs' trade dress. (*Id.* at 6.) Plaintiffs further assert common law claims for
12 unfair and deceptive trade practices and for misappropriation, alleging that Defendants
13 appropriated the Sleep Master Sleep Mask "design, color, and appearance" without
14 permission from or providing compensation to Plaintiffs. (*Id.*)

15 Me & You, Inc. was served on March 20, 2013. (Dkt. no. 11.) Plaintiffs dismissed
16 all claims against Dream Essential, LLC on February 11, 2013. (Dkt. no. 9.) On July 19,
17 2013, the Clerk of the Court entered default against Me & You, Inc. (Dkt. no. 14.)
18 Plaintiffs now request default judgment against Me & You, Inc. (Dkt. no. 15 at 1.)

19 In the Motion, Plaintiffs request a permanent injunction preventing Me & You, Inc.
20 from further infringing on Plaintiffs' Patent. (Dkt. no. 15, Ex.1.) Plaintiffs also request a
21 permanent injunction restraining Me & You, Inc. from: (1) further infringing on Plaintiffs'
22 trade dress; (2) engaging in any further acts of trade dress dilution and unfair
23 competition; (3) "passing off" the Sleep On It Mask as the Sleep Master Sleep Mask; and
24 (4) use of the Sleep Master Sleep Mask design, color, and appearance. (*Id.*)

25 **III. LEGAL STANDARD**

26 Obtaining a default judgment is a two-step process governed by the Federal
27 Rules of Civil Procedure. *Eitel v. McCool*, 782 F.2d 1470, 1471 (9th Cir. 1986). First,
28 "[w]hen a party against whom a judgment for affirmative relief is sought has failed to

1 plead or otherwise defend, and that failure is shown by affidavit or otherwise, the clerk
2 must enter the party's default." Fed. R. Civ. P. 55(a). Second, after the clerk enters
3 default, a party must seek entry of default judgment under Rule 55(b).

4 Upon entry of default, the court takes the factual allegations in the non-defaulting
5 party's complaint as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th
6 Cir. 1987) (citation omitted). Nonetheless, although entry of default by the clerk is a
7 prerequisite to an entry of default judgment, "a plaintiff who obtains an entry of default is
8 not entitled to default judgment as a matter of right." *Warner Bros. Entm't Inc. v. Caridi*,
9 346 F. Supp. 2d 1068, 1071 (C.D. Cal. 2004) (citation omitted). Instead, whether a court
10 will grant a default judgment is in the court's discretion. *Id.*

11 The Ninth Circuit has identified the following factors as relevant to the exercise of
12 the court's discretion in determining whether to grant default judgment: (1) the possibility
13 of prejudice to the plaintiff; (2) the merits of the plaintiff's substantive claims; (3) the
14 sufficiency of the complaint; (4) the sum of money at stake in the action; (5) the
15 possibility of a dispute concerning material facts; (6) whether the default was due to the
16 excusable neglect; and (7) the strong policy underlying the Federal Rules of Civil
17 Procedure favoring decisions on the merits. *Eitel*, 782 F.2d at 1471-72.

18 **IV. DISCUSSION**

19 **A. Procedural Requirements**

20 Plaintiff has satisfied the procedural requirements for default judgment pursuant to
21 Fed. R. Civ. P. 55(b). The Clerk properly entered a default against Me & You, Inc.
22 pursuant to Fed. R. Civ. P. 55(a). (Dkt. no. 14.) Me & You, Inc. is not an infant or
23 incompetent person and, insofar as Me & You, Inc. has not answered or otherwise
24 responded to the Complaint, the notice requirement of Rule 55(b)(2) is not implicated.
25 See Fed. R. Civ. P. 55(b)(2); *Produce Alliance, LLC v. Lombardo Imps., Inc.*, No. 2:12-
26 cv-00433, 2013 WL 129428, at *2 (D. Nev. Jan. 9, 2013). Thus, there is no procedural
27 impediment to entering a default judgment.

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B. Eitel Factors

1. Possibility of Prejudice

The first *Eitel* factor considers whether a plaintiff will suffer prejudice if default judgment is not entered. See *PepsiCo, Inc. v. Cal. Sec. Cans*, 238 F. Supp. 2d 1172, 1177 (S.D. Cal. 2002); see also *BMW of N. Am., LLC v. Quality Star Benz, LLC*, No. 2:12-cv-00889, 2013 WL 1338233, at *2 (D. Nev. Mar. 29, 2013). Here, Me & You, Inc. has not answered, made an appearance, or otherwise responded to the Complaint. Due to Me & You, Inc.'s refusal to appear in this action, the possibility of prejudice to Plaintiffs in the absence of default judgment is great.

If Plaintiffs' motion for default judgment is not granted, Plaintiffs will likely be without other recourse for recovery. See *PepsiCo*, 238 F. Supp. 2d at 1177; see also *BMW of N. Am., LLC*, 2013 WL 1338233, at *2. Thus, this *Eitel* factor weighs in favor of entering default judgment.

2. Substantive Merits and Sufficiency of the Complaint

The second and third *Eitel* factors favor a default judgment where a complaint sufficiently states a claim for relief under the "liberal pleading standards embodied in Rule 8" of the Federal Rules of Civil Procedure. *Danning v. Lavine*, 572 F.2d 1386, 1389 (9th Cir. 1978). Fed. R. Civ. P. 8(a)(2) requires that "[a] pleading . . . contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief" In order to satisfy the Rule 8 requirement, the pleading must contain sufficient factual allegations "to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 667–678 (2009) (citation omitted).

In the instant action, Plaintiffs assert the following claims: (1) patent infringement; (2) trade dress infringement and dilution, and unfair competition; (3) unfair and deceptive trade practices; and (4) misappropriation.

a. Patent Infringement

Determining whether a patent has been infringed is a two-step process. *Halo Elecs., Inc. v. Pulse Eng'g*, 810 F. Supp. 2d 1173, 1183 (D. Nev. 2011). First, the court

1 must interpret the meaning and scope of the patent claim. *Id.* Second, the alleged
2 infringing device must be compared to the claim. *Id.*

3 Plaintiffs have provided a copy of the Patent (dkt. no 1-1), alleged that the Sleep
4 On It Mask embodies the patented Sleep Master Sleep Mask and alleged that Me &
5 You, Inc. continues to infringe on Plaintiffs' Patent. (Dkt. no. 1 at 5.) Therefore, Plaintiff
6 has alleged sufficient facts to support a default judgment on its patent infringement
7 claim. See, e.g., *Robert Bosch LLC v. Juijiang Yada Traffic Equip. Co.*, No. 2:10-cv-
8 1926, 2011 WL 1322534, at *3 (D. Nev. Apr. 4, 2011); see also *LG Elecs., Inc. v.*
9 *Advanced Creative Computer Corp.*, 212 F. Supp. 2d 1171, 1176 (N.D. Cal. 2002).

10 **b. Trade Dress Infringement and Dilution; Unfair**
11 **Competition**

12 In order to state a claim of trade dress infringement under the Lanham Act, "a
13 plaintiff must demonstrate that (1) the trade dress is nonfunctional, (2) the trade dress
14 has acquired secondary meaning, and (3) there is a substantial likelihood of confusion
15 between the plaintiff's and the defendant's products." *Art Attacks Ink, LLC v. MGA Entm't*
16 *Inc.*, 581 F. 3d 1138, 1145 (9th Cir. 2009).

17 The Complaint sufficiently alleges these factors. The Complaint states that the
18 trade dress, including the color, is nonfunctional. (Dkt. no.1 at 7.) The Complaint alleges
19 that the "Sleep MasterTM" brand signifies quality and has a reputation as the top selling
20 sound muffling sleep mask. (*Id.* at 6.) The Complaint further alleges that the Sleep On It
21 Mask, manufactured by Me & You, Inc., is confusingly similar to the Plaintiffs' Sleep
22 Master Sleep Mask. (*Id.*) Furthermore, the Complaint alleges that Me & You, Inc.'s
23 product is confusing, and is likely to continue to confuse customers and deceive the
24 public regarding its source. (*Id.*) Thus, the Court finds that Plaintiffs' Complaint contained
25 sufficient factual allegations to state a claim of trade dress infringement.

26 In order to state a claim of trade dress dilution, Plaintiffs must allege sufficient
27 facts to demonstrate that: "(1) the mark is famous; (2) the defendant is making a
28 commercial use of the mark in commerce; (3) the defendant's use began after the mark

1 became famous; and (4) the defendant's use of the mark dilutes the quality of the mark
2 by diminishing the capacity of the mark to distinguish goods and services." *General*
3 *Motors Corp. v. Let's Make a Deal*, 223 F. Supp. 2d 1183, 1190-91 (D. Nev. 2002)
4 (citation omitted).

5 Again, Plaintiffs have demonstrated these factors. The Complaint states that, due
6 to continued use of the Sleep Master Sleep Mask trade dress, the trade dress has
7 become famous and enjoys wide public recognition and association with Plaintiffs. (Dkt.
8 no. 1 at 7.) The Complaint states that Me & You, Inc. has manufactured, distributed, and
9 sold into interstate commerce a confusingly similar product and done so after Plaintiffs
10 had established protectable rights in the Sleep Master Sleep Mask trade dress. (*Id.* at 8.)
11 Finally, the Complaint states that Me & You, Inc. has diluted the Sleep Master Sleep
12 Mask trade dress by causing confusion as to the source of the Sleep On It Mask. (*Id.*)
13 Thus, the Court finds that Plaintiffs' Complaint alleges sufficient facts to state a claim of
14 trade dress dilution.

15 **c. Unfair and Deceptive Trade Practices**

16 In order to state a claim of deceptive trade practices, Plaintiffs must sufficiently
17 allege that Me & You, Inc. violated Nevada law prohibiting specific types of business
18 practices. Under Nevada law:

19 "[a] person engages in a 'deceptive trade practice' if, in the course of his or
20 her business or occupation, he or she:

- 21 1. Knowingly passes off goods . . . for sale . . . as those of another person.
- 22 2. Knowingly makes a false representation as to the source, sponsorship,
approval or certification of goods or services for sale or lease.
- 23 3. Knowingly makes a false representation as to affiliation, connection,
association with or certification by another person. . . ."

24 NRS § 598.0915. Here, the Complaint alleges that Me & You, Inc. knowingly and
25 intentionally trades on the goodwill of the "Sleep MasterTM" trade dress, and has been
26 passing off its goods as those of Plaintiffs'. (Dkt. no. 1 at 9, 10.) The Court finds that
27 Plaintiffs' Complaint contains sufficient factual allegations to state a claim of deceptive
trade practice.

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d. Misappropriation

In order to state a claim of misappropriation, Plaintiffs must allege: (1) that the misappropriation was of a valuable trade secret; (2) there was misappropriation of the trade secret through the use, disclosure, or nondisclosure of the trade secret; and (3) that the misappropriation was made by a party with a duty not to disclose. *Frantz v. Johnson*, 999 P.2d 351, 466 (Nev. 2000). Nevada law defines a “trade secret” to mean “information” that

- (a) Derives independent economic value . . . from not being generally known . . . and
- (b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.”

NRS § 600A.030. Here, Plaintiffs do not allege that this claimed misappropriated information — the design, color and appearance of the Sleep Master Sleep Mask — constitutes a valuable trade secret, nor do Plaintiffs allege that the misappropriation was made by a party with a duty not to disclose. Thus, the Court finds that Plaintiffs’ Complaint fails to state a claim of misappropriation.

In conclusion, Plaintiff has sufficiently pled three of four claims for relief — (1) patent infringement, (2) trade dress infringement and dilution, and (3) unfair and deceptive trade practices. Since the sufficiency of the Complaint favors granting default judgment as to each of these claims, the second and third *Eitel* factors favor granting default judgment.

3. Sum of Money at Stake

Under the fourth *Eitel* factor, the Court considers “the amount of money at stake in relation to the seriousness of Defendants’ conduct.” *PepsiCo*, 238 F. Supp. 2d at 1176; *BMW of No. Am., LLC*, 2013 WL 1338233, at *4. “This requires that the court assess whether the recovery sought is proportional to the harm caused by defendant’s conduct.” *Landstar Ranger, Inc. v. Parth Enter., Inc.*, 725 F. Supp. 2d 916, 921 (N.D. Cal. 2010). Here, the Motion does not seek judgment for monetary damages. The Motion seeks only a permanent injunction restricting Me & You, Inc. from infringing on the Plaintiffs’

1 protectable rights. Therefore, the fourth *Eitel* factor weighs in favor of entry of default
2 judgment.

3 **4. Possible Dispute**

4 The fifth *Eitel* factor considers the possibility of dispute as to any material fact in
5 the case. *PepsiCo, Inc.*, 238 F. Supp. 2d at 1177; *BMW of No. Am., LLC*, 2013 WL
6 1338233, at *4. "Upon entry of default, all well-pleaded facts in the complaint are taken
7 as true, except those relating to damages." *PepsiCo, Inc.*, 238 F. Supp. 2d at 1177.
8 Accordingly, no genuine dispute of material facts would preclude granting Plaintiff's
9 motion.

10 **5. Excusable Neglect**

11 The sixth *Eitel* factor considers the possibility that the default resulted from
12 excusable neglect. *PepsiCo, Inc.*, 238 F. Supp. 2d at 1177; *BMW of No. Am., LLC*, 2013
13 WL 1338233, at *5. The evidence shows that Linda Oswald served Me & You, Inc. at its
14 principle place of business with the Summons and Complaint on March 20, 2013,
15 pursuant to Fed. R. Civ. P. 4(e). (Dkt. no. 11.) Defendant received service of the
16 Summons and Complaint four (4) months prior to the Clerk's Entry of Default on July 19,
17 2013. (Dkt. no. 14.) Thus, given the extended period of time during which Me & You, Inc.
18 had notice of the Complaint and in which it failed to answer or otherwise respond to the
19 Complaint, it is unlikely that Me & You, Inc.'s failure to respond and subsequent default
20 resulted from excusable neglect.

21 **6. Decision on the Merits**


22 The seventh *Eitel* factor provides that "[c]ases should be decided upon their
23 merits whenever reasonably possible." *Eitel*, 782 F.2d at 1472. However, the "mere
24 existence of [Rule 55(b)] demonstrates that this 'preference, standing alone, is not
25 dispositive.'" *PepsiCo, Inc.*, 238 F. Supp. 2d at 1177 (citation omitted); See *BMW of No.*
26 *Am., LLC*, 2013 WL 1338233, at *5. Moreover, Me & You, Inc.'s failure to answer
27 Plaintiffs' Complaint makes a decision on the merits impractical, if not impossible. Thus,
28 the Court is not precluded from entering default judgment against Me & You, Inc.

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V. CONCLUSION

It is therefore ordered that Plaintiff's Motion for Default Judgment (dkt. no. 15) is granted. The Court will enter the proposed order for a permanent injunction against Defendant Me & You, Inc.

DATED THIS 18th day of June 2014.


MIRANDA M. DU
UNITED STATES DISTRICT JUDGE