

1
2
3
4
5
6
7
8 **UNITED STATES DISTRICT COURT**
9 **DISTRICT OF NEVADA**

10
11 ON DEMAND DIRECT RESPONSE, LLC,
et al.,

Case No.: 2:15-cv-01576-MMD-NJK

12 Plaintiff(s),

Order

13 v.

[Docket No. 380]

14 SHANA LEE MCCART-POLLAK,

15 Defendant(s).

16 The matter of calculating damages for default judgment has been referred to the
17 undersigned. See Docket No. 361. The undersigned previously rejected Ms. McCart-Pollak's
18 request for punitive damages as not sufficiently supported. See Docket No. 374. Ms. McCart-
19 Pollak has now filed a renewed motion to calculate damages that excludes punitive damages.
20 Docket No. 380.¹ The Court held a prove-up hearing on October 16, 2018.

21 A party must prove the amount of damages to be awarded through default judgment. See,
22 e.g., Philip Morris USA, Inc. v. Castworld Prods., Inc., 219 F.R.D. 494, 498 (C.D. Cal. 2003).
23 The Court has wide discretion in determining the amount of damages to award in default judgment.
24 E.g., HTS, Inc. v. Boley, 954 F. Supp. 2d 927, 947 (D. Ariz. 2013). In determining damages for
25 default judgment, the Court may rely on the declaration submitted by the movant or may order a
26 full evidentiary hearing. See Fed. R. Civ. P. 55(b)(2). The movant's burden with respect to

27
28 ¹ Ms. McCart-Pollak is proceeding pro se, and the Court construes her papers liberally.
Erickson v. Pardus, 551 U.S. 89, 94 (2007).

1 proving up her damages is “relatively lenient.” Philip Morris, 219 F.R.D. at 498. Nonetheless,
2 lost profits and other compensatory damages must be proven with “reasonable certainty.” See
3 Rubicon Global Ventures, Inc. v. Chongqing Zongshen Grp. Import/Export Corp., 226 F. Supp.
4 3d 1141, 1149 (D. Ore. 2016) (citing, inter alia, Jones v. Zimmer, 2016 WL 1122852, at *2 (D.
5 Nev. Mar. 22, 2016)).

6 “[D]isgorgement is a remedy intended to prevent a wrongdoer from unjust enrichment.”
7 Eckard Brandes, Inc. v. Riley, 338 F.3d 1082, 1088 (9th Cir. 2003). It has long been recognized
8 in intellectual property cases that the opposing party’s profits is an appropriate remedy. See, e.g.,
9 Nintendo of Am., Inc. v. Dragon Pac. Int’l, 40 F.3d 1007, 1011 (9th Cir. 1994) (finding that “the
10 profits made by the infringer” is an appropriate measure for actual damages under both the
11 Copyright Act and the Lanham Act).

12 The affidavit filed to prove-up On Demand’s profits in this case relies on several
13 assumptions. It provides evidence as to Spiral Toys’ profits for 2015. See, e.g., Docket No. 380-
14 1 at 34. From there, however, the affidavit assumes that 30% of that revenue went to On Demand
15 and assumes a profit margin for On Demand of 25%. Docket No. 380 at ¶¶ 26, 28. The affidavit
16 indicates that the sales figures are unknown for 2016 to the present, but assumes consistent sales
17 numbers for those years. See id. at ¶ 33. The affidavit concludes by seeking \$1,564,500 in
18 compensatory damages. Id. at ¶ 34.

19 At the prove-up hearing, Ms. McCart-Pollak presented additional exhibits and analysis that
20 were not included in the affidavit. Ms. McCart-Pollak also alluded to an attempt to obtain
21 discovery from Spiral Toys.² While it appears some discovery was obtained, it is not clear from
22 the hearing what scope of documents were requested in that subpoena or whether Spiral Toys
23 properly complied with its obligations in responding to the subpoena.

24 Given the circumstances, the Court rules as follows:

- 25 • The Court **DENIES** without prejudice the renewed motion to calculate damages for
26 default judgment (Docket No. 380).

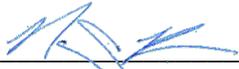
27
28

² Efforts to obtain discovery from On Demand itself were unsuccessful.

- 1 • Ms. McCart-Pollak may seek additional documents from Spiral Toys and/or seek
2 compliance with the subpoena previously served, and the discovery period is
3 **REOPENED** for that purpose only through December 17, 2018.
- 4 • A second renewed motion to calculate damages shall be filed by December 17, 2018,
5 and must show with reasonable certainty On Demand's profits.³
- 6 • To the extent the second renewed motion to calculate damages relies on settlement
7 communications, Ms. McCart-Pollak must provide meaningful discussion as to why it
8 is proper for the Court to consider such communications. Cf. Fed. R. Evid. 408.
- 9 • To the extent the second renewed motion to calculate damages seeks the inclusion of
10 punitive damages, Ms. McCart-Pollak must (1) provide meaningful discussion as to
11 why punitive damages may be awarded based on the prayer for relief made in the
12 counterclaim⁴ and (2) provide an evidentiary basis for showing On Demand's conduct
13 is sufficiently egregious to justify an award of punitive damages.⁵ See Docket No. 374.

14 IT IS SO ORDERED.

15 Dated: October 16, 2018

16 
17 _____
18 Nancy J. Koppe
19 United States Magistrate Judge
20
21

22 ³ It is not clear whether a further prove-up hearing will be held, so the filing must include
23 all evidence that Ms. McCart-Pollak wishes to present as to damages from On Demand.

24 ⁴ At the hearing, Ms. McCart-Pollak argued that her prayer for relief must be construed
25 liberally and that punitive damages are included within the demand for "damages as permitted by
26 law." Docket No. 51 at 70. Case law on this issue has noted, however, that "the demand for relief
27 must be specific." Philip Morris, 219 F.R.D. at 499.

28 ⁵ At the prove up hearing, Ms. McCart-Pollak relied on litigation misconduct in seeking
punitive damages. It does not appear that such conduct can form the basis of a punitive damages
award. E.g., Bosack v. Soward, 586 F.3d 1096, 1105 (9th Cir. 2009) (under California law, finding
that "a defendant's trial tactics and litigation conduct may not be used to impose punitive damages
in a tort action").