

1 *See State Indus., Inc. v. Mor-Flo Indus., Inc.*, 948 F.2d 1573, 1576 (Fed. Cir. 1991); *see also Jurgens*,
2 80 F.3d at 1571 (a finding of bad faith litigation conduct standing alone is not sufficient to award
3 enhanced damages, but may be used as a factor in determining whether or how much to increase
4 damages once willful infringement is found).

5 Viewing the record and in light of the totality of the circumstances, the Court agrees with
6 Plaintiff that an award of treble damages is proper in this case based on, *inter alia*, (1) the entry of
7 default judgment against Defendant on a claim for willful infringement, *see* Docket No. 671; *see also*
8 Docket No. 44 at ¶ 38, (2) the imposition of case-dispositive sanctions for Defendant’s willful failure
9 to comply with the Court’s orders and to obtain counsel, Docket No. 650; *see also* Docket No. 671
10 (adopting report and recommendation), and (3) the order finding Defendant in contempt of the
11 preliminary injunction order, *see* Docket Nos. 65, 132. *Cf. TruSeal Techs., Inc. v. Beijing Hulali*
12 *Architecture Decoration Co.*, 2010 WL 5387585, *2 (D. Nev. Dec. 21, 2010) (awarding treble damages
13 in context of a defaulting defendant based on allegations of willful infringement and bad faith litigation
14 conduct). Accordingly, the undersigned **RECOMMENDS** that Plaintiff be awarded treble damages
15 pursuant to 35 U.S.C. § 284.

16 **II. Attorney Fees**

17 Plaintiff next requests an award of attorney fees pursuant to 35 U.S.C. § 285. Although the Court
18 could grant the request for attorney fees as unopposed, *see* Local Rule 54-16(e), the undersigned has
19 reviewed the motion and record. Section 285 permits the awarding of reasonable attorney fees in
20 “exceptional cases.” Courts determine whether a case is “exceptional” based on the totality of the
21 circumstances. *Octane Fitness, LLC v. Icon Health & Fitness, Inc.*, ___ U.S. ___, 134 S.Ct. 1749,
22 1756 (2014). An exceptional case is one that “stands out from others.” *Id.* In making that
23 determination, the Court may look to whether the case was litigated in an unreasonable manner. *Id.*
24 Furthermore, “a case presenting either subjective bad faith or exceptionally meritless claims may be
25 sufficient” to be deemed exceptional. *Id.* at 1757.

26 The Court agrees with Plaintiff that this case qualifies as “exceptional” for purposes of Section
27 285 based on, *inter alia*, (1) the entry of default judgment against Defendant on a claim for willful
28 infringement, *see* Docket No. 671; *see also* Docket No. 44 at ¶ 38, (2) the imposition of case-dispositive

1 sanctions for Defendant's willful failure to comply with the Court's orders and to obtain counsel, Docket
2 No. 650; *see also* Docket No. 671 (adopting report and recommendation), and (3) the order finding
3 Defendant in contempt of the preliminary injunction order, *see* Docket Nos. 65, 132. Considering the
4 totality of the circumstances, a finding that this is an exceptional case is appropriate. Accordingly, the
5 undersigned **RECOMMENDS** that Plaintiff be found to be entitled to an award of attorney fees
6 pursuant to 35 U.S.C. § 285.

7 As to the amount of attorney fees to be awarded, Plaintiff submitted evidence of its counsel's
8 time spent and hourly rates. *See* Docket Nos. 684-690. Defendant failed to object to any of the time
9 claimed or rates sought. Accordingly, the undersigned hereby **RECOMMENDS** that Plaintiff be
10 awarded \$2,491,004.25 in attorney fees as requested. *See* Local Rule 54-16(e).

11 **III. Costs**

12 The pending motion seeks an award of \$589,805.98 in costs pursuant to Fed. R. Civ. P. 54(d).
13 *See* Docket No. 679 at 14-15. Plaintiff submitted a bill of costs and evidence supporting the costs
14 sought. Docket Nos. 680-683. Defendant failed to object to either Plaintiff's entitlement to costs or to
15 the amount or types of costs claimed. Accordingly, the undersigned hereby **RECOMMENDS** that
16 Plaintiff be awarded \$589,805.98 in attorney fees as requested. *See* Local Rule 54-13(b).

17 **IV. Conclusion**

18 For the reasons discussed more fully above, the undersigned **RECOMMENDS** that Plaintiff's
19 motion for treble damages, for attorney fees, and for costs be **GRANTED**.

20 IT IS SO ORDERED

21 DATED: April 20, 2015

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23 _____
24 NANCY J. KOPPE
United States Magistrate Judge

25 **NOTICE**

26 Pursuant to Local Rule IB 3-2 **any objection to this Report and Recommendation must be**
27 **in writing and filed with the Clerk of the Court within 14 days of service of this document.** The
28 Supreme Court has held that the courts of appeal may determine that an appeal has been waived due to

1 the failure to file objections within the specified time. *Thomas v. Arn*, 474 U.S. 140, 142 (1985). This
2 circuit has also held that (1) failure to file objections within the specified time and (2) failure to properly
3 address and brief the objectionable issues waives the right to appeal the District Court's order and/or
4 appeal factual issues from the order of the District Court. *Martinez v. Ylst*, 951 F.2d 1153, 1157 (9th
5 Cir. 1991); *Britt v. Simi Valley United Sch. Dist.*, 708 F.2d 452, 454 (9th Cir. 1983).

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