

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Honorable Marcia S. Krieger**

Civil Action No. 09-cv-00309-MSK-KMT

SUZANNE SHELL,

Plaintiff,

v.

BRENDA SWALLOW,

Defendant.

ORDER SETTING HEARING

THIS MATTER comes before the Court *sua sponte*, following the issuance of the 10th Circuit's Mandate (# 1266) on August 31, 2015.

The Court has previously found Ms. Swallow in default. Thus, the Court will hold a hearing pursuant to Fed. R. Civ. P. 55(b)(2)(B) and (C), to determine the sufficiency of Mr. Shell's substantive claims¹ against Ms. Swallow and to determine the appropriate amount of damages to award to Ms. Shell on any claims that are found to be sufficient. Ms. Shell shall be prepared to put on such testimony and offer such exhibits as may be necessary for her to establish the pertinent facts.²

¹ Pursuant to the Pretrial Order, those claims are: (i) direct copyright infringement under 17 U.S.C. § 501; (ii) misappropriation of trade secrets under Colorado law; and (iii) breach of contract.

² Consistent with having defaulted on the merits, Ms. Swallow is deemed to have conceded any well-pled facts (*c.f.* conclusions) pled in Ms. Shell's complaint. However, Ms. Swallow does not concede the right to assert that Ms. Shell's facts are insufficient to state a claim as a matter of law, nor does Ms. Swallow concede the amount of damages claimed by Ms. Shell.

Ms. Swallow has previously raised the affirmative defense of *res judicata*, noting that Ms. Shell had previously sued Ms. Swallow on similar claims in state court in Florida. Although, arguably, Ms. Swallow has forfeited the right to assert that defense by defaulting – a conclusion the Court does not necessarily reach – the Court advises Ms. Shell that it does not intend to issue a new judgment on any claim that Ms. Shell actually litigated to judgment in a prior proceeding. *See generally Arizona v. California*, 530 U.S. 392 (2000) (“policies underlying *res judicata* [are] also based on the avoidance of unnecessary judicial waste” and thus, courts may invoke preclusion concerns *sua sponte* if the matter at issue has been actually decided in a prior action). Accordingly, Ms. Shell shall also be prepared to present a copy of the operative Complaint and final Judgment issued in the Florida action, along with any motion papers or other documents necessary to reveal the nature and contents of the claims actually litigated and resolved in that action.

The Court will conduct the hearing at **9:00 a.m. on Wednesday, December 9, 2015.**

Dated this 6th day of November, 2015.

BY THE COURT:

A handwritten signature in black ink, reading "Marcia S. Krieger". The signature is written in a cursive, flowing style. Below the signature is a horizontal line.

Marcia S. Krieger
Chief United States District Judge

Thus, Ms. Swallow is free to appear in person at the scheduled hearing should she wish to be heard on these matters.