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NO JS-6

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Z PRODUX, INC.,)	Case No. CV 13-00734 DDP (RZx)
)	
Plaintiff,)	ORDER GRANTING DEFENDANT'S MOTION
)	FOR SUMMARY JUDGMENT
v.)	
)	[DKT No. 35]
MAKE-UP ART COSMETICS, INC.,)	
)	
Defendant.)	
_____)	

Before the court is Make-Up Art Cosmetic, Inc.'s ("MAC") Motion for Summary Judgment. The motion is fully briefed.¹ Having considered the parties' submissions and heard oral argument, the court now adopts the follow order.

I. Background

Z Produx, Inc. ("Z Produx") and MAC are competitors in the arena of cosmetics accessories. This case centers on MAC's alleged infringement of a design patent held by Z Produx for a makeup palette.

¹ The court allowed Z Produx, Inc. to file a surreply.

1 Zena Shteysel, the president of Z Produx, is the named
2 inventor of U.S. Patent No. 642,743 ("the '743 patent"), a design
3 patent for a cosmetics holder. (See Declaration of Thomas Mahlum in
4 Support of Motion, Ex. A.) Shteysel applied for the design patent
5 on April 14, 2010 and it was issued August 2, 2011. (Id.) Shteysel
6 subsequently assigned the patent to Z Produx on May 17, 2012. (Id.,
7 Ex. B.) The patent includes a single claim for "[t]he ornamental
8 design for the cosmetic holder, as shown and described." (Id., Ex.
9 A at 6.) The patent includes 14 figures depicting, from various
10 perspectives, a cosmetic holder with a clear top and an empty base.
11 (Id. at 6-12) As discussed further below, the design depicted has a
12 "book-like" appearance, with a flat spine and sides that extend
13 slightly beyond the middle part of the device. (Id.) It has a
14 relatively wide rim framing the window to the compartment. (Id.)

15 Z Produx markets the "Z Palette," a cosmetics palette that
16 resembles the '743 design patent and includes the text "Pat.
17 D642,743" on the bottom of the device. (See Id., Ex. 10, 73; Ex.
18 Z.) The products sold by Z Produx consist only of the Z Palette and
19 two types of related accessories (metal pans and metal stickers).
20 (Id., Ex. C (Deposition of Zena Shteysel at 8:17-10:23).)

21 On April 14, 2010, the same day on which Shteysel applied for
22 the design patent, Shteysel also applied for a utility patent for a
23 cosmetics holder. (Id., Ex. K. at 180, Patent Application No. 12-
24 760029.) The application claimed, among other things, a cosmetics
25 holder including a metal base made of magnetized metal, a recess
26 for receiving metal makeup containers, and a top frame "defin[ing]
27 a window for viewing the makeup containers that are supported on
28 the magnetic base, when the cover assembly is closed." (Id. at

1 188.) Each of the application's five claims were rejected by the
2 U.S. Patent and Trademark Office as anticipated by existing
3 patents. (Id. at 222-226.) The claim asserting a framed window for
4 viewing makeup containers while the cover assembly is closed was
5 rejected as obvious in view of the Liden patent, U.S. Patent No.
6 D597256, which has been assigned to Defendant MAC. (Id. at 224; MSJ
7 at 8.)

8 MAC markets, among other products, a cosmetic palette called
9 the MAC Pro Palette Large/Single ("MAC Palette"). (Complaint, DKT.
10 No. 1 ¶ 11.) Like the Z Palette, the MAC Palette consists of an
11 empty base container with clear window top. (See Mahlum Decl. Ex.
12 AA.) However, as discussed below, unlike the Z Palette, the MAC
13 Palette has edges that are flush with one another, a triangle-
14 shaped hinge, and a relatively narrow rim framing the window. (See
15 Id., Exs. M, N, and AA.)

16 Z Produx alleges that MAC's sale of the MAC Palette infringes
17 its '743 design patent in violation of 35 U.S.C. § 271(a).
18

19 **II. Legal Standard**

20 Summary judgment is appropriate where the pleadings,
21 depositions, answers to interrogatories, and admissions on file,
22 together with the affidavits, if any, show "that there is no
23 genuine dispute as to any material fact and the movant is entitled
24 to judgment as a matter of law." Fed. R. Civ. P. 56(a). A party
25 seeking summary judgment bears the initial burden of informing the
26 court of the basis for its motion and of identifying those portions
27 of the pleadings and discovery responses that demonstrate the
28 absence of a genuine issue of material fact. See Celotex Corp. v.

1 Catrett, 477 U.S. 317, 323 (1986). All reasonable inferences from
2 the evidence must be drawn in favor of the nonmoving party. See
3 Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 242 (1986). If the
4 moving party does not bear the burden of proof at trial, it is
5 entitled to summary judgment if it can demonstrate that "there is
6 an absence of evidence to support the nonmoving party's case."
7 Celotex, 477 U.S. at 323.

8 Once the moving party meets its burden, the burden shifts to
9 the nonmoving party opposing the motion, who must "set forth
10 specific facts showing that there is a genuine issue for trial."
11 Anderson, 477 U.S. at 256. Summary judgment is warranted if a party
12 "fails to make a showing sufficient to establish the existence of
13 an element essential to that party's case, and on which that party
14 will bear the burden of proof at trial." Celotex, 477 U.S. at 322.
15 A genuine issue exists if "the evidence is such that a reasonable
16 jury could return a verdict for the nonmoving party," and material
17 facts are those "that might affect the outcome of the suit under
18 the governing law." Anderson, 477 U.S. at 248. There is no genuine
19 issue of fact "[w]here the record taken as a whole could not lead a
20 rational trier of fact to find for the nonmoving party." Matsushita
21 Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

22 It is not the court's task "to scour the record in search of a
23 genuine issue of triable fact." Keenan v. Allan, 91 F.3d 1275, 1278
24 (9th Cir.1996). Counsel has an obligation to lay out their support
25 clearly. Carmen v. San Francisco Sch. Dist., 237 F.3d 1026, 1031
26 (9th Cir.2001). The court "need not examine the entire file for
27 evidence establishing a genuine issue of fact, where the evidence
28

1 is not set forth in the opposition papers with adequate references
2 so that it could conveniently be found." Id.

3

4 **III. Discussion and Analysis**

5 **A. Validity of Patent**

6 "A patent is presumed to be valid, and this presumption can
7 only be overcome by clear and convincing evidence to the contrary."
8 Bristol-Myers Squibb Co. v. Ben Venue Labs., Inc., 246 F.3d 1368,
9 1374 (Fed. Cir. 2001) (citations omitted). One basis on which a
10 patent may be proved invalid is evidence that the invention was "in
11 public use" more than one year prior to the date of filing an
12 application. 35 U.S.C. 102(b)(2010). Prior public use may serve to
13 invalidate a design patent. In re Mann, 861 F.2d 1581, 1581-82
14 (Fed. Cir. 1988).

15 MAC argues that the '743 patent is invalid because the Z
16 Palette design was in public use more than a year before the '743
17 patent application was filed. (MSJ at 24.) MAC alleges that the
18 '743 design was depicted in a photograph of the Z Palette that was
19 included in a trademark application filed by Z Produx on February
20 12, 2009, more than a year before Shteyssel filed an application for
21 the '743 design patent on April 14, 2010. (Id.; Mahlum Decl., Ex
22 A.) MAC alleges that the photograph was posted on the United States
23 Patent and Trademark Office website on February 12, 2009 and was
24 made available to the public upon request in print form. (MSJ at
25 24, citing Mahlum Decl., Ex G.) MAC asserts that these alleged
26 facts demonstrate that the patent is invalid.

27 Having considered the evidence before it, the court finds that
28 there is no basis for finding the '743 patent invalid. Even

1 assuming the photograph was publicly available on the date MAC
2 asserts, a contention Z Produx disputes, (Z Produx's Surreply at 1-
3 3), the disclosure was not sufficient to anticipate and thereby
4 invalidate the '743 patent.

5 For a prior art disclosure to be anticipatory, it must be
6 "'enabling' - i.e., it must be sufficient to permit a person having
7 ordinary skill in the art to practice the invention." SmithKline
8 Beecham Corp. v. Apotex Corp., 403 F.3d 1331, 1342 (Fed. Cir.
9 2005). "Pictures and drawings may be sufficiently enabling to put
10 the public in the possession of the article pictured. Therefore,
11 such an enabling picture may be used to reject claims to the
12 article. However, the picture must show all the claimed structural
13 features and how they are put together.' U.S. Patent and Trademark
14 Office, Manual of Patent Examining Procedure, § 2102.04 (citing
15 Jockmus v. Leviton, 28 F.2d 812 (2d Cir. 1928)).

16 The Z Produx trademark application included one picture of the
17 Z Palette photographed from above. (See Mahlum Decl., Ex G.) The
18 device's sides, edges, and contours are not visible. (Id.) The
19 photograph does not reveal numerous elements of the design which
20 were later reflected in the figures included in the '743 design
21 patent. Indeed, with the exception of the width of the palette's
22 rims, none of the elements included in the construction of the '743
23 patent proposed by MAC are apparent in the photograph. (See Reply
24 at 3, citing MSJ, Ex. A; Mahlum Decl., Ex. Y.) These elements
25 include a "lip" extending past the edged of the cosmetic holder and
26 the flat spine along the back of the case. (Id.) (MAC's proposed
27 construction is discussed further in the following subsection.)
28 Because the photograph does not contain sufficient detail to

1 constitute invalidating prior art for the '743 design patent, the
2 court must reject MAC's contention that the patent is invalid.

3 **B. Patent Infringement**

4 **i. Claim Construction**

5 To determine whether a design patent is infringed, the court
6 must first construe the claim to the design, where appropriate, and
7 then compare it to the design of the accused device. OddzOn
8 Products, Inc. v. Just Toys, Inc., 122 F.3d 1396, 1404-05 (Fed.
9 Cir. 1997) (citing Elmer v. ICC Fabricating, Inc., 67 F.3d 1571,
10 1577 (Fed. Cir. 1995)).

11 "A design patent protects only the novel, ornamental features
12 of the patented design," not its functional elements. Id.; see also
13 Lee v. Dayton-Hudson Corp., 838 F.2d 1186, 1188-91 (Fed. Cir. 1988)
14 ("[I]t is the non-functional, design aspects that are pertinent to
15 determinations of infringements. ... A device that copies the
16 utilitarian or functional features of a patented design is not an
17 infringement. ... [While] infringement can be found for designs
18 that are not identical to the patented design, such designs must be
19 equivalent in their ornamental, not functional, aspects."); L.A.
20 Gear, Inc. v. Thom McAn Shoe Co., 988 F.2d 1117, 1123
21 (Fed.Cir.1993) ("The elements of the design may indeed serve a
22 utilitarian purpose, but it is the ornamental aspect that is the
23 basis of the design patent.") Where a design is found to include
24 both functional and ornamental features, the court must "factor[]
25 out" the functional aspects of the design for the purposes of claim
26 construction. Richardson v. Stanley Works, Inc., 597 F.3d 1288,
27 1293 (Fed. Cir. 2010).

28

1 Critical to the instant case is whether two aspects of the
2 palette depicted in the '743 patent--the clear top and empty
3 compartment--are ornamental and therefore protected or, instead,
4 functional and therefore unprotected. (See MJS at 20-24; Opp. at 8-
5 11.) As discussed further below, it is these elements that are the
6 subject of Z Produx's infringement action. A design is deemed to be
7 functional "when the appearance of the claimed design is dictated
8 by the use or purpose of the article." L.A. Gear, 988 F.2d at 1117
9 (internal citation and question marks omitted).

10 MAC asserts that the clear top and empty base are analogous to
11 design elements found functional in OddzOn. There, the Federal
12 Circuit construed a design patent covering a foam football with a
13 tail and fin structure. 122 F.3d at 1405. The court found that the
14 tail and fin structure was functional rather than ornamental, and
15 therefore unprotected, because those features served the purpose of
16 enabling the football to be thrown further than a traditional foam
17 football. Id. MAC argues that, like the tail and fin structure, the
18 clear top and empty compartment depicted in the '743 patent are
19 designed to serve specific purposes, namely allowing a user to see
20 the contents of her palette without opening it and to customize the
21 palette's contents. (MSJ at 23.) The court agrees that the analogy
22 to OddzOn is apt.

23 Z Produx argues that the clear top and empty compartment are
24 not dictated by design on the grounds that MAC "had plenty of
25 options when it came to alternative designs." (Opp. at 9.) It
26 argues that the palette merely "serves the purpose of holding
27 cosmetics" and points to various other cosmetic palettes that also
28

1 hold cosmetics but do not include the same clear window and empty
2 base features. (Id. at 9-10.)

3 Z Produx's argument is unavailing because it mistakenly
4 assumes that it is the functionality of the device as a whole,
5 rather than the functionality of the elements at issue, that
6 matters for the construction of a design patent. Indeed, in the
7 course of finding that the tail and fin structure on the foam
8 football in OddzOn were functional, the Federal Circuit
9 specifically rejected the approach Z Produx now asks the court to
10 adopt:

11 OddzOn argues that the shape of a football with an arrow-like
12 tail is an ornamental feature because "it is not required for
13 a tossing ball." While OddzOn correctly states that there are
14 many ways of designing "tossing balls," it is undisputed that
15 the ball in question is specifically designed to be thrown
16 like a football, yet travel farther than a traditional foam
17 football. It is the football shape combined with fins on a
18 tail that give the design these functional qualities. The tail
19 and fins on OddzOn's design add stability in the same manner
20 as do the tail and fins found on darts or rockets. They are no
21 less functional simply because "tossing balls" can be designed
22 without them.

23 122 F.3d 1406. The court went on to explain that the functional
24 characteristics limit the scope of the protected subject matter.
25 Id. The reasoning in OddzOn is controlling for the instant case.
26 Just as a tail and fins are not necessary to design a "tossing
27 ball," a clear cover and empty base are not necessary to design a
28 cosmetics palette. Yet in both cases the additional elements bring

1 added functionality to the product, rendering them functional,
2 rather than ornamental, features.

3 Indeed, Z Produx has itself emphasized the functionality of
4 the features at issue. In explaining why consumers like the Z
5 Palette, Shteyssel pointed to the functionality of the clear cover
6 and empty base, stating: "[Customers] like the window and that you
7 can see through it. They like that you can customize it anyway you
8 want so you can fit any size product, any brand, all in one
9 palette, interchangeable." (Deposition of Zena Shteyssel in Support
10 of Opposition at 94.)² (See also Shteyssel Dep. at 103, 105, 109,
11 110.)

12 Moreover, the clear cover and empty base appear to be
13 essential for the functionality that these elements offer. As MAC
14 points out, there appears to be no other way to enable a user to
15 view the contents of her palette without opening it but to make the
16 cover see-through or to enable the customization of the palette's
17 contents without leaving the compartment empty. (Reply at 10.)
18 These considerations support a finding that the clear top and empty
19 base are "dictated by the use or purpose of the article," 988 F.2d
20 at 1117, and are therefore functional rather than ornamental.

21

22

23 ²The court gives little weight to subsequent assertions, made
24 by Ms. Shteyssel in a declaration without assertions of factual
25 support, that the clear cover and empty compartment serve
26 aesthetic functions of making the palette look "more visually
27 appealing" and "uncluttered." (DKT No. 38, Ex. 12, at ¶¶ 9-10. "A
28 conclusory, self-serving affidavit, lacking detailed facts and any
supporting evidence, is insufficient to create a genuine issue of
material fact." Fed. Trade Comm'n v. Publ'g Clearing House,
Inc., 104 F.3d 1168, 1171 (9th Cir. 1997) (citing Fed. Trade Comm'n
v. Publ'g Clearing House, Inc., 104 F.3d 1168, 1171 (9th Cir.
1997)).

1 The finding that the clear window and empty base are
2 functional rather than ornamental is further supported by the fact
3 these features appear to be protected by existing utility patents.
4 As discussed above, at the time that Shteysel applied for what
5 became the '743 design patent, she filed an unsuccessful
6 application for a utility patent. The application claimed a
7 cosmetic holder with, among other elements, a "frame in order to
8 define a window for viewing the makeup containers." (Mahlum Decl.,
9 Ex. K at 188.) The patent office rejected the window claim as
10 obvious in view of the Liden utility patent (Patent No. D597256),
11 which claimed a top frame with "a window for viewing the makeup
12 containers when the cover is in a closed position." (Id. at 224-
13 25.) As noted, the Liden utility patent, which looks very similar
14 to the '743 design patent, has been assigned to MAC. (MSJ at 8.)
15 The patent office likewise rejected the other four claims in
16 Shteysel's utility patent application, which described a cosmetic
17 holder with a magnetic base with a recess for receiving metal
18 makeup containers, in light of the Jimbo patent (Patent No.
19 5005697). (Id. at 222-24.) The existence of these prior utility
20 patents covering the elements at issue further indicate that the
21 clear top and empty base elements are functional.

22 In sum, the facts in evidence clearly demonstrate that the
23 clear cover and empty base are functional, not ornamental, and thus
24 are not protected under the '743 design patent and may not form the
25 basis for an infringement action. Having reached this conclusion,
26 the court must "factor out" the clear window and empty base
27 elements for the purposes of claim construction. See Richardson,
28 597 F.3d at 1293.

1 The court next must examine what remaining relevant design
2 features are ornamental and construe the claimed design
3 accordingly. MAC proposes the following construction of the '743
4 patent design for the purposes of its motion:

5 The '743 claims the ornamental features of a cosmetic holder
6 design that includes a "lip" extending past the edge of the
7 cosmetic holder, with a flat or flushed spine or hinge along
8 the back of the case, and with the overall proportions
9 depicted in its drawings.

10 (Reply at 3, citing MSJ, Ex. A; Mahlum Decl., Ex Y.)

11 Z Produx urges the court to refrain from providing any
12 description of the elements of the claimed design. Borrowing
13 language from the '743 design patent (which contains no verbal
14 description of the patented design), it asks the court to adopt the
15 construction: "an ornamental design for a cosmetics palette as
16 shown in Figure 1." (Opp. at 8.) In advancing this position, Z
17 Produx relies on Federal Circuit authority cautioning trial courts
18 to avoid excessive reliance on a detailed verbal description of a
19 patent infringement. Id. (citing Egyptian Goddess, Inc. v. Swisa,
20 Inc., 543 F.3d 665, 679 (Fed. Cir. 2008)). However, neither
21 Egyptian Goddess nor any other case of which this court is aware
22 has articulated the position that courts must refrain from any
23 verbal description of the elements whatsoever. Indeed, the Federal
24 Circuit specifically rejected this position in Richardson, raising
25 the question of "how a court could effectively construe design
26 claims, where necessary, in a way other than by describing the
27 features showing the drawings." 597 F.3d at 1293.

28 As discussed further below, the court takes the figures

1 included in the '743 design patent as its touchstones for its
2 infringement analysis. With that in mind, however, the court finds
3 it necessary to provide a brief verbal description of the relevant
4 claimed ornamental elements of the '743 design. It further finds,
5 based on its own careful review of the '743 patent, that MAC's
6 proposed characterization of the design is fair and accurate. It
7 therefore adopts that description for the purposes of its
8 infringement analysis.

9

10 **ii. Infringement**

11 Having construed the scope and relevant meaning of the '743
12 claim, the court must now compare the claim to the accused design
13 to determine whether there has been any infringement. See Elmer v.
14 ICC Fabricating, 67 F.3d 1571, 1577 (Fed. Cir. 1995). A design
15 patent is infringed if the patented design, or any colorable
16 imitation thereof, is applied without authorization to any article
17 of manufacture for the purposes of sale. 35 U.S.C. § 289; Goodyear
18 Tire & Rubber Co. v. Hercules Tire & Rubber Co., 162 F.3d 1113,
19 1116-17 (Fed. Cir. 1998). To determine if an infringement has
20 occurred, the court applies the "ordinary observer test," whereby
21 the court must determine "whether an ordinary observer, familiar
22 with the prior art and designs, would be deceived into believing
23 that the accused product is the same as the patented design."
24 Crocs, 598 F.3d 1303. The focus of the analysis is the "overall
25 impression of the claimed ornamental features" rather than "small
26 differences in isolation." Id. at 1303-04.

27 In the present case, the court finds that there is no triable
28 question as to whether the MAC Palette infringes the claimable

1 ornamental elements of the '743 design. Z Produx has pointed to
2 only two elements of the '743 design which it alleges are infringed
3 by the MAC Palette: (1) the clear cover and (2) the empty base.
4 See, e.g. (Mahlum Decl., Ex. S at Interrog. Resp. No. 10
5 (describing the claimed ornamental features in MAC accused products
6 as "contain[ing] a clear window and also featur[ing] an open empty
7 base design, just like the Z Palette") and Nos. 3 and 4 (describing
8 ornamental design elements of the '743 patent as "a clear window,
9 empty base, and ... rectangular and square designs"); Shteyssel Decl.
10 (testifying that that MAC Palette "looks like mine, and it has the
11 same features, clear window, empty base"). However, as discussed in
12 the preceding section, because these features are functional, they
13 are not entitled to protection under the '743 design patent and
14 must be factored out for the purposes of infringement analysis.
15 Thus, Z Produx has failed to point to any claimable design aspects
16 of '743 that are infringed by the MAC Palette.

17 Moreover, a comparison of the '743 design with the MAC Palette
18 reveals that, once the clear cover and empty base elements are
19 factored out, the designs bear little resemblance. MAC has pointed
20 to several areas which the court agrees bear consideration.

21 First, the MAC Palette has an overall slimmer look than the
22 '743 patent and its Z Palette embodiment, owing to the designs'
23 differing proportions. MAC notes, and Z Produx does not contest,
24 that the window pane in the '743 design makes up 67% of the square
25 inches of the lid, with the opaque rim making up the remaining 33%.
26 (Oct. 7, 2013 Mahlum Decl. ¶ 3.) Similarly, the window pane of the
27 Z Palette makes up 61% of the square inches of the lid, with 39%
28 made up by the opaque rim. (Mahlum Decl. ¶ 4.) By contrast, the

1 window pane of the MAC Palette makes up a substantially greater 84%
2 of the lid, as compared to 16.2% made up by the rim. (Id. ¶ 5.) The
3 differing proportions make the products clearly distinguishable
4 upon first glance.

5 Second, the '743 patent claims a cosmetic holder with a lip
6 that extends beyond the edge of the cosmetic holder, giving the
7 design a book-like appearance. (See id., Ex. A, Figs. 1, 4, 7, 8,
8 11.) The lip is also present in the Z Palette. (See id., Ex. 9.) By
9 contrast, the MAC Palette has edges that are flush.

10 Third, the '743 patent claims a design with two seams or
11 ridges along each side, in addition to the one where the case
12 separates, contributing further to the design's book-like
13 appearance. (See id., Ex. A, Figs. 1, 4, 7, 8, 11.) The MAC
14 Pallette, contrastingly, has no additional seams.

15 Fourth, the '743 design has a hinge that is flush with the
16 cosmetic case, resembling the binder of a book. (See id., Ex. A,
17 Figs. 4, 5.) By contrast, the MAC Palette has a distinctive
18 triangular raised hinge. (Mahlum Decl., Ex. M.)

19 Z Produx urges that the court not consider such features as
20 the "individual corners, lips, seams, spine, and attributes" of the
21 products. (Opp. at 12.) Z Produx argues that consideration of such
22 elements is impermissible in light of the Federal Circuit's
23 abandonment of the "point of novelty" test. (Opp. at 12.) Under
24 this now discarded test, in order to find infringement, after
25 comparing the items through the eyes of an ordinary observer
26 whereby, the court was required to attribute the similarity to
27 novelty that distinguishes the patented device from prior art. See
28 Egyptian Goddess at 543 F.3d at 676-77. However, the court does not

1 consider such design elements under the "point of novelty" test,
2 but instead refers to these elements solely in the course of
3 explaining that--once unclaimable features are factored out--an
4 ordinary observer could not confuse the two products.

5 Z Produx has submitted quotations from online discussion
6 forums which it asserts show that consumers are confused by the
7 similarity between the Z Palette and the MAC Palette. (See
8 Opposition at 17-18; Declaration of Robert Katz in Support of
9 Opposition, Exs. 7, 6, 7, 8, 9.) However, leaving aside the
10 question of whether the evidence is admissible, the evidence does
11 not create a triable issue because none of the materials presented
12 tend to show that consumers perceived the MAC Palette as similar to
13 the Z Palette because of shared ornamental features that are
14 protected by the '743 design patent, rather than because of the
15 shared clear cover and empty base, which are not protected by the
16 patent. See OdzzOn at 1406 ("Because the accused products are
17 clearly similar to OddzOn's design in terms of their football shape
18 and their tail and fins, it was incumbent on OddzOn to submit
19 evidence establishing that the ornamental aspects of their
20 football-with-tail-and-fin combination accounted for the similarity
21 perceived by the survey participants.")

22 In sum, the evidence before the court does not create a
23 triable question as to whether MAC infringed Z Produx's '743 design
24 patent through its sale of the MAC Palette.

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1 **IV. Conclusion**

2 For the reasons set forth above, the court GRANTS Defendant
3 Make-up Art Cosmetics, Inc.'s motion for summary judgment.

4 IT IS SO ORDERED.
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6 Dated: November 5, 2013


7 DEAN D. PREGERSON
United States District Judge

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