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**UNITED STATES DISTRICT COURT**

EASTERN DISTRICT OF CALIFORNIA

JESUS SOSA,

Plaintiff,

v.

GIL RUBIO, dba CARNICERIA &  
TAQUERIA MEXICO; HARPREET KAUR,

Defendants.

) 1:10-cv-01446 LJO GSA

) **FINDINGS AND RECOMMENDATIONS**  
) **REGARDING PLAINTIFF’S MOTION**  
) **FOR DEFAULT JUDGMENT AND**  
) **DEFENDANTS’ MOTION TO SET**  
) **ASIDE THE CLERK’S ENTRY OF**  
) **DEFAULT**

) (Docket Numbers 14 & 17)

**FACTUAL AND PROCEDURAL BACKGROUND**

On August 12, 2010, Plaintiff Jesus Sosa filed a Complaint against Defendants GIL RUBIO dba CARNICERIA & TAQUERIA MEXICO and HARPREET KAUR. The Complaint seeks damages and injunctive relief pursuant to the Americans with Disabilities Act, California Civil Code sections 51, 54 and 54.1, and the California Health and Safety Code. Plaintiff, a disabled wheelchair user, alleged that Defendants operate a store and restaurant located in Madera, California. According to Plaintiff, when he visited the store and restaurant he encountered barriers that interfered with his ability to use and enjoy the goods, services,

1 privileges and accommodations offered. Plaintiff seeks an injunction, statutory damages, and  
2 attorney's fees and costs. (See Doc. 2.)

3 According to the Complaint, on an unidentified date, Plaintiff went to the Carniceria &  
4 Taqueria Mexico and encountered barriers associated with parking spaces, ramps, signs,  
5 doormats, toilet facilities, seating and access. The Complaint identifies approximately forty-  
6 seven separate "barriers." Further, Plaintiff alleges that he is deterred from visiting the store and  
7 restaurant as a result. He contends that the barriers complained of are easy to remove, but  
8 Defendants have intentionally refrained from making the necessary alternations to comply with  
9 accessibility standards. (Doc. 2.)

10 On September 17, 2010, Plaintiff filed a proof of service indicating that Defendant Rubio  
11 was served by substituted service at the Carniceria & Taqueria Mexico, located at 222 Gateway  
12 Drive in Madera, California, on September 2, 2010, at 9:30 a.m. The process server left the  
13 summons and related papers with Martha Falcon, the person apparently in charge.<sup>1</sup> (Doc. 8.)  
14 That same date, Plaintiff also filed a proof of service indicating that Defendant Kaur was  
15 personally served on September 9, 2010. (Doc. 7.)

16 On November 16, 2010, the Clerk of the Court entered default as to Defendants Rubio  
17 and Kaur. (Docs. 11-12.)

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<sup>1</sup>Subdivision (h)(1) of Rule 4 of the Federal Rules of Civil Procedure, provides as  
follows:

21 Unless federal law provides otherwise or the defendant's waiver has been filed, a  
22 domestic or foreign corporation, or a partnership or other unincorporated  
association that is subject to suit under a common name, must be served:

23 (1) in a judicial district of the United States:

(A) in the manner prescribed by Rule 4(e)(1) for servicing an individual;

24 or

25 (B) be delivering a copy of the summons and of the complaint to an  
26 officer, a managing or general agent, or any other agent authorized by  
27 appointment or by law to receive service of process and - if the agent is one  
authorized by statute and the statute so requires - by also mailing a copy of each to  
the defendant . . .

1 On December 6, 2010, Plaintiff filed a Motion for Default Judgment, setting the matter  
2 for hearing on January 7, 2011. (Doc. 14; *see also* Docs. 15-16.)

3 On January 4, 2011, Defendants filed a Motion to Set Aside the Clerk's Default. (Doc.  
4 17.)

5 On January 6, 2011, the Court adopted the Stipulation of the parties wherein the motions  
6 were rescheduled to be heard on the same date, or February 25, 2011, and the scheduling  
7 conference was reset for March 14, 2011. (Doc. 19.)

8 On February 1, 2011, Plaintiff filed his Opposition to Defendants' motion. (Doc. 20.)

9 On February 23, 2011, this Court determined the matter was suitable for decision without  
10 oral argument pursuant to Local Rule 230(g).<sup>2</sup> The hearing scheduled for February 25, 2011, was  
11 vacated and the matter was deemed submitted for written findings. (Doc. 21.)

## 12 DISCUSSION

13 The district court has "especially broad" discretion in deciding whether to set aside an  
14 entry of default. *United States v. Brady*, 211 F.3d 499, 504 (9th Cir. 2000). Rule 55(c) of the  
15 Federal Rules of Civil Procedure provides that a court may set aside default for "good cause  
16 shown." The "good cause" standard that governs vacating an entry of default under Rule 55(c) is  
17 the same standard that governs vacating a default judgment under Rule 60(b). *Franchise*  
18  *Holding II, LLC v. Huntington Restaurants Group, Inc.*, 375 F.3d 922, 925-926 (9th Cir. 2004);  
19 *TCI Group Life Ins. Plan v. Knoebber*, 244 F.3d 691, 696 (9th Cir. 2001). The good cause  
20 analysis considers three factors: (1) whether Defendants engaged in culpable conduct that led to  
21 the default; (2) whether Defendants have a meritorious defense; or (3) whether reopening the  
22 default judgment would prejudice Plaintiff. *Franchise Holding II, LLC*, 375 F.3d at 926. The  
23 court may deny the motion if any one of these factors exists. *Id.*

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26 <sup>2</sup> The Court carefully reviewed and considered all of the pleadings, including arguments,  
27 points and authorities, declarations, and exhibits. Any omission of a reference to an argument or  
28 pleading is not to be construed that this Court did not consider the argument or pleading.

1           **1.       Culpable Conduct**

2           Defense counsel declares that the failure of Defendants to file a timely answer to  
3 Plaintiff’s complaint following service of same was “based upon defendants’ counsel’s mistake”  
4 in believing that Plaintiff would be “amending his complaint and re-serving it . . .” (Doc. 17-1  
5 at 1.) In his declaration, Steven A. Geringer<sup>3</sup> indicated that after being retained by Defendants he  
6 was advised that Defendant Kaur was not the true property owner; rather, the property was  
7 owned solely by Defendant Kaur’s husband “as his sole and separate property.” (Doc. 17-2, ¶ 3-  
8 4.) Therefore, Mr. Geringer contacted Plaintiff’s counsel and informed her of this “error” and  
9 provided Plaintiff’s counsel with the name of the proper owner. Mr. Geringer also agreed to  
10 accept service of the amended complaint. (Doc. 17-2, ¶ 6.) Counsel declares that he “understood  
11 that the complaint . . . would be amended to properly assert the claims . . .” (Doc. 17-2, ¶ 8.)

12           These circumstances constitute mistake or good cause, as there is no evidence that  
13 Defendants' conduct was "willful, deliberate, or evidence[d] . . . bad faith." *TCI Group Life Ins.*  
14 *Plan*, 244 F.3d at 696-697 (defendant's conduct is culpable if the defendant receives actual or  
15 constructive notice of the filing of the action and intentionally failed to file an answer). Taken on  
16 its face, counsel’s understanding, even if mistaken, that the complaint would be amended and re-  
17 served, does not amount to willful or deliberate conduct, nor does it evidence bad faith.

18           **2.       Meritorious Defense**

19           A defendant seeking to set aside an entry of default must present specific facts that would  
20 constitute a defense. *Knoebber*, 244 F.3d at 696. However, this burden is not "extraordinarily  
21 heavy," as a movant need only demonstrate law or facts showing that a sufficient defense is  
22 assertable. *Id.* at 700.

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26           <sup>3</sup>The Court acknowledges that Mr. Geringer apparently represents other defendants in  
27 other actions filed by Plaintiff now pending before this Court. *See* case numbers 10-cv-1454, 10-  
28 cv-1494, and 10-cv-1577. Those matters are assigned to Magistrate Judges Oberto and Seng, and  
thus will be decided accordingly.

1 Here, Defendants contend that they have a meritorious defense to the complaint. (*See*  
2 Doc. 17 at 2.) As to Defendant Kaur specifically, she is purportedly not the owner of the subject  
3 property as identified in the complaint. Apparently, Defendant Kaur's husband is the sole and  
4 separate owner of the property. (Doc. 17-1 at 2.) In any event, the Court finds that Defendants  
5 have demonstrated a meritorious defense to Plaintiff's complaint.

### 6 **3. Prejudice to Plaintiff**

7 Finally, the Court must consider whether Plaintiff will suffer any prejudice if the entries  
8 of default are set aside. *Knoebber*, 244 F.3d at 696. To be prejudicial, the setting aside of the  
9 default "must result in greater harm than simply delaying the resolution of the case. Rather, the  
10 standard is whether the plaintiff's ability to pursue his claim will be hindered." *Id.* at 701, citing  
11 *Falk v. Allen*, 739 F.2d 461, 463 (9th Cir. 1994).

12 Plaintiff's pleadings do not establish or assert a greater harm than delay in the resolution  
13 of this matter. In fact, Plaintiff failed to discuss the issue of prejudice. While the Court may  
14 agree with Plaintiff that counsel for Defendants delayed even further after his clients' defaults  
15 were entered by the Clerk of the Court, counsel's behavior does not amount to a greater harm  
16 than simple delay of the resolution of this matter.

### 17 **CONCLUSION AND RECOMMENDATIONS**

18 The Court finds that the above factors weigh in favor of setting aside the Clerk's entries of  
19 default against Defendants Rubio and Kaur. Generally, there is a presumption to try cases on  
20 their merits, and the instant case does not warrant a departure from this presumption. *See In re*  
21 *Hammer*, 940 F.2d 524, 525 (9th Cir. 1991). Accordingly, Defendants' motion to set aside entry  
22 of default should be GRANTED. Relatedly, Plaintiff's motion for default judgment should be  
23 DENIED.

24 These findings and recommendations are submitted to the district judge assigned to this  
25 action, pursuant to Title 28 of the United States Code section 636(b)(1)(B) and this Court's Local  
26 Rule 304. Within fifteen (15) days of service of this recommendation, any party may file written  
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1 objections to these findings and recommendations with the Court and serve a copy on all parties.  
2 Such a document should be captioned “Objections to Magistrate Judge’s Findings and  
3 Recommendations.” The district judge will review the magistrate judge’s findings and  
4 recommendations pursuant to Title 28 of the United States Code section 636(b)(1)(C). The  
5 parties are advised that failure to file objections within the specified time may waive the right to  
6 appeal the district judge’s order. *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

7 IT IS SO ORDERED.

8 **Dated: February 24, 2011**

/s/ Gary S. Austin  
UNITED STATES MAGISTRATE JUDGE

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