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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

MARILYN DILLARD, et al.,

Plaintiffs,

No. 2:08-cv-01339 KJM¹ KJN PS

v.

VICTORIA M. MORTON
ENTERPRISES, INC., et al.,

Defendants.

RUTH GALTIERI-CARLSON, et al.,

Plaintiffs,

No. 2:08-cv-01777 KJM KJN PS

v.

VICTORIA M. MORTON
ENTERPRISES, INC., et al.,

Defendants.

FINDINGS AND RECOMMENDATIONS

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¹ United States District Judge Kimberly J. Mueller was recently assigned as the district judge presiding over these related actions. (See Order of Reassignment, Feb. 3, 2011, Dillard, et al. v. Victoria M. Morton Enterprises, Inc., et al., No. 2:08-cv-1339 KJM KJN PS, Dkt. No. 63; Order of Reassignment, Jan. 21, 2011, Galtieri-Carlson, et al. v. Victoria M. Morton Enterprises, Inc., et al., No. 2:08-cv-1777 KJM KJN PS, Dkt. No. 49.)

1 Presently before the court is a “Motion to Strike Defendants’ Answer and
2 Continued Application for Default Judgment,” which was filed by plaintiffs in both above-
3 captioned actions.² (Dillard, et al. v. Victoria M. Morton Enterprises, Inc., et al., No. 2:08-cv-
4 1339 KJM KJN PS (“Dillard”), Dkt. No. 54; Galtieri-Carlson, et al. v. Victoria M. Morton
5 Enterprises, Inc., et al., No. 2:08-cv-1777 KJM KJN PS (“Galtieri-Carlson”), Dkt. No. 40.) As
6 discussed below, the undersigned previously denied applications for default judgment in both
7 cases because of deficiencies largely related to the damages sought, but the denials were without
8 prejudice. (Order, Apr. 23, 2010, Dillard, Dkt. No. 51; Order, Apr. 23, 2010, Galtieri-Carlson,
9 Dkt. No. 36.) The plaintiffs’ respective continued applications for default judgment remain
10 before the court, and are the subject of these proposed findings and recommendations.³ At this
11 point in the proceedings, each set of plaintiffs seeks a default judgment against the same set of
12 defendants—defendants Victoria M. Morton Enterprises, Inc., Suddenly Slender, and Suddenly
13 Slender International—and seeks an award of \$2 million dollars as to each named plaintiff in
14 each action.⁴

15
16 ² These actions are related, but not consolidated.

17 ³ The undersigned resolved plaintiffs’ motions to strike in a previously entered order.
18 (Order, Aug. 26, 2010, Dillard, Dkt. No. 59; Order, Aug. 26, 2010, Galtieri-Carlson, Dkt.
19 No. 45.)

20 ⁴ Victoria M. Morton, who was previously named as an individual defendant in both
21 actions, was dismissed from both actions without prejudice. (Order, June 29, 2010, Dillard, Dkt.
22 No. 56; Order, June 29, 2010, Galtieri-Carlson, Dkt. No. 42.) Morton is not the subject of the
23 continued applications for default judgment. In regards to the Galtieri-Carlson matter, the only
24 remaining defendants are those identified above. As to the Dillard matter, the following,
25 remaining defendants were previously dismissed by stipulation of the parties: Personal Beauty
26 Unlimited, Inc., Research Foundation for Biochemistry and Nutrition Corp., and Hot Ticket
Enterprises, Inc. (Order, Aug. 12, 2008, Dkt. No. 10.) Additionally, the Dillard plaintiffs have
clarified that they do not intend to proceed against defendant Pyramid Consulting and Investment
Co., and are not seeking a default judgment against that defendant. (See Aff. of R. Parker White
in Supp. of Application for Default J. ¶ 3, Dillard, Dkt. No. 54, Doc. No. 54-2 (“Defendant
PYRAMID CONSULTING AND INVESTMENT CO., is no longer included as a defendant in
this matter. They [*sic*] were included in the initial moving papers due to a clerical oversight.
Accordingly, Plaintiffs do not request default judgment against Defendant PYRAMID
CONSULTING AND INVESTMENT CO.”).)

1 On September 29, 2010, the undersigned conducted a “prove-up” hearing in both
2 cases regarding the plaintiffs’ respective claims for damages. Attorneys R. Parker White, Jeffrey
3 D. Fulton, and William L. Brelsford, Jr. appeared on behalf of all of the plaintiffs. None of the
4 defendants or their representatives appeared at the prove-up hearing.

5 In regards to the Dillard matter, plaintiffs Marilyn Dillard and Stephen Dillard
6 testified at the prove-up hearing, and Marilyn Dillard also testified on behalf of two minor
7 plaintiffs, Ciera and Ariel Dillard, who are the children of Marilyn and Stephen Dillard.⁵ As to
8 the Galtieri-Carlson matter, plaintiffs Ruth Galtieri-Carlson and Deana Galtieri testified, and
9 Deana Galtieri also testified on behalf of minor plaintiff Christian Galtieri-Brown, who is Deana
10 Galtieri’s son.⁶ Although given repeated opportunities to submit documentary evidence in
11 support of their claims for damages, none of the plaintiffs did so and, instead, plaintiffs in both
12 actions seek only general damages in reliance on the testimony provided at the prove-up hearing
13 and the previously filed declarations of the plaintiffs.

14 The undersigned has considered the briefs, oral arguments of counsel, testimony
15 provided at the prove-up hearing, and the record in this case and, for the reasons stated below,
16 recommends that plaintiffs’ applications for default judgment in both the Dillard and Galtieri-
17 Carlson matters be granted. The undersigned recommends an award of general damages to each
18 plaintiff as discussed below.

19 I. BACKGROUND

20 Both of these products liability actions involve, as a general matter, personal
21 injuries allegedly suffered by plaintiffs as a result of their exposure to the same “body wrap”
22 products designed, manufactured, distributed, and/or licensed by defendants in each action. In a
23 previously entered, 30-page order denying the initial application for default judgment filed by

24 ⁵ Elaine Garcia is the guardian ad litem for minor plaintiffs Ciera and Ariel Dillard.
25 Neither Ms. Garcia nor the minor plaintiffs were present in the courtroom.

26 ⁶ Deana Galtieri is the guardian ad litem for Christian Galtieri-Brown.

1 plaintiffs, the undersigned recounted in detail the allegations in the operative complaints in each
2 action and the procedural histories of these cases. For the sake of brevity, that April 23, 2010
3 order is incorporated here by reference. (See Order, Apr. 23, 2010, Dillard, Dkt. No. 51; Order,
4 Apr. 23, 2010, Galtieri-Carlson, Dkt. No. 36.)

5 Briefly stated, plaintiffs in the above-captioned actions, which are related but
6 unconsolidated, jointly applied for entry of default judgment against various defendants who at
7 one point in the litigation appeared but ceased defending themselves in the litigation. On
8 April 23, 2010, the undersigned denied plaintiffs' joint application due to several deficiencies
9 contained therein. (Order, Apr. 23, 2010, Dillard, Dkt. No. 51; Order, Apr. 23, 2010, Galtieri-
10 Carlson, Dkt. No. 36.) Although the undersigned concluded that the entry of default judgments
11 in both cases was likely warranted under the relevant legal standards, plaintiffs' imprecise and
12 expedient application for default judgment was deficient in several respects, mostly related to the
13 legal and factual basis for the damages award sought.⁷ The undersigned denied plaintiffs' joint
14 application for default judgment without prejudice and provided plaintiffs in both actions 60 days
15 to, among other things, "file supplemental materials, including supplemental declarations and a
16 memorandum of points and authorities, legally and factually substantiating a precise request for
17 damages on behalf of each of the plaintiffs . . . and addressing the court's substantive concerns."
18 (See Order, Apr. 23, 2010, at 29, Dillard, Dkt. No. 51; accord Order, Apr. 23, 2010, at 30,
19 Galtieri-Carlson, Dkt. No. 36.)

20 In response to the court's April 23, 2010 order, plaintiffs in both actions filed the
21 identical pending "Continued Application for Default Judgment" and a related declaration of R.
22 Parker White in support ("White Declaration"). Rather than address the court's detailed
23

24 ⁷ Although plaintiffs initially sought a collective award of \$2 million dollars on behalf of
25 all plaintiffs in *both* actions, *each* plaintiff in *each* case now seeks \$2 million dollars in general
26 damages. (Compare Application for Default J. By Court ¶ 4, Dillard, Dkt. No. 44, with Aff. of
R. Parker White in Supp. of Application for Default J. ¶ 2, Dillard, Dkt. No. 54, Doc. No. 54-2,
and Galtieri-Carlson, Dkt. No. 40, Doc. No. 40-2.)

1 concerns regarding, among others, the legal and factual basis for plaintiffs’ respective requests
2 for damages in each case, the White Declaration simply states, in relevant part:

3 2. In response to the Court’s order dated April 23, 2010, Plaintiffs request
4 a default judgment in the amount of \$2,000,000.00 each, based on the
5 papers already submitted before the Court. Additionally, Plaintiffs request
6 a prove-up hearing and will submit to examination before the Court and
7 *will submit medical records* already obtained on behalf of Plaintiffs. At
8 this stage of the litigation, because Defendants have failed to participate in
9 discovery, Plaintiffs cannot justify the expense of submitting experts
10 before the Court in support of Plaintiffs request for default judgments
11 against Defendants.

12 (White Decl. ¶ 2, Dillard, Dkt. No. 54, Doc. No. 54-2, and Galtieri-Carlson, Dkt. No. 40, Doc.
13 No. 40-2) (emphasis added.)⁸

14 The undersigned granted plaintiffs’ request for a “prove-up hearing” in each case,
15 and subsequently conducted that hearing on September 29, 2010. In granting the prove-up
16 hearing, the undersigned stated:

17 The undersigned will grant plaintiffs’ request for a “prove-up
18 hearing” in each case, and will specially set that hearing. However, the
19 undersigned notes that plaintiffs’ counsel’s generalized one-paragraph
20 response to the court’s 30-page order, which highlighted serious and
21 specific concerns about the viability of plaintiffs’ entitlement to damages
22 in each case, is troubling. It illustrates plaintiffs’ counsel’s unwillingness
23 to invest the time and effort required to legally and factually substantiate
24 plaintiffs’ collective claim for . . . damages. For example, a prove-up
25 hearing, as opposed to an organized and detailed memorandum of points
26 and authorities supported by declarations and documentary evidence, will
not provide the court with plaintiffs’ precise request for damages and the
legal basis for the award of specific categories or types of damages. It
appears plaintiffs’ counsel would prefer to simply submit testimony and
evidence to the court and leave it to the court to determine the legal basis
for the damages sought and the amount of damages. Plaintiffs are entitled
to take their chances with this less-than-ideal approach, which is the same
approach that led to the court’s initial denial of plaintiffs’ deficient
application for default judgment. Nevertheless, although the court will
grant plaintiffs in both cases their requested prove-up hearing, it will
permit plaintiffs in each case to submit memoranda points and authorities
and supporting declarations, as discussed in the court’s April 23, 2010
orders, prior to the prove-up hearing.

⁸ As noted below, however, both before and at the evidentiary hearing the plaintiff declined to submit any of plaintiffs’ medical records or documentation.

1 (Order, July 27, 2010, at 3-4 (footnote omitted), Dillard, Dkt. No. 57; Order, July 21, 2010, at 3-4
2 (footnote omitted), Galtieri-Carlson, Dkt. No. 43.) Although the court provided plaintiffs with
3 repeated opportunities to file memoranda of points and authorities in support of their damages
4 requests and to submit medical records in advance of the prove-up hearing, none of the plaintiffs
5 submitted memoranda or documentary evidence substantiating the damages sought, except for
6 redundant declarations of plaintiffs that the undersigned already found to be of only limited
7 assistance as to damages.

8 At the prove-up hearing, the undersigned raised an additional concern regarding
9 whether plaintiffs had adequately established through their pleadings that plaintiffs' exposure to
10 the body wrap products caused the injuries allegedly suffered by plaintiffs. The undersigned
11 provided plaintiffs with an opportunity to submit supplemental briefs as to this issue, and
12 plaintiffs in both cases did so. (Suppl. Br. In Supp. of Pls.' Application for Default J. By Court,
13 Dillard, Dkt. No. 62; Suppl. Br. In Supp. of Pls.' Application for Default J. By Court, Galtieri-
14 Carlson, Dkt. No. 48.) Plaintiffs' counsel made clear at the prove-up hearing and in the most-
15 recent supplemental briefing that "[e]ach plaintiff's individual request for judgment in the
16 amount of \$2,000,000 is based on general damages as a result of the physical and emotional
17 harms each Plaintiff has suffered due to exposure to [defendants'] products." (Id.)

18 II. LEGAL STANDARDS

19 Pursuant to Federal Rule of Civil Procedure 55, default may be entered against a
20 party against whom a judgment for affirmative relief is sought who fails to plead or otherwise
21 defend against the action. See Fed. R. Civ. P. 55(a). However, "[a] defendant's default does not
22 automatically entitle the plaintiff to a court-ordered judgment." PepsiCo, Inc. v. Cal. Sec. Cans,
23 238 F. Supp. 2d 1172, 1174 (C.D. Cal. 2002) (citing Draper v. Coombs, 792 F.2d 915, 924-25
24 (9th Cir. 1986)). Instead, the decision to grant or deny an application for default judgment lies
25 within the district court's sound discretion. Aldabe v. Aldabe, 616 F.2d 1089, 1092 (9th Cir.
26 1980). In making this determination, the court considers the following factors:

1 (1) the possibility of prejudice to the plaintiff, (2) the merits of
2 plaintiff's substantive claim, (3) the sufficiency of the complaint,
3 (4) the sum of money at stake in the action; (5) the possibility of a
4 dispute concerning material facts; (6) whether the default was due
5 to excusable neglect, and (7) the strong policy underlying the
6 Federal Rules of Civil Procedure favoring decisions on the merits.

7 Eitel v. McCool, 782 F.2d 1470, 1471-72 (9th Cir. 1986). Default judgments are ordinarily
8 disfavored. Id. at 1472.

9 As a general rule, once default is entered, well-pleaded factual allegations in the
10 operative complaint are taken as true, except for those allegations relating to damages.

11 TeleVideo Sys., Inc. v. Heidenthal, 826 F.2d 915, 917-18 (9th Cir. 1987) (per curiam) (citing
12 Geddes v. United Fin. Group, 559 F.2d 557, 560 (9th Cir. 1977) (per curiam)); accord Fair
13 Housing of Marin v. Combs, 285 F.3d 899, 906 (9th Cir. 2002). In addition, although well-
14 pleaded allegations in the complaint are admitted by a defendant's failure to respond, "necessary
15 facts not contained in the pleadings, and claims which are legally insufficient, are not established
16 by default." Cripps v. Life Ins. Co. of N. Am., 980 F.2d 1261, 1267 (9th Cir. 1992) (citing
17 Danning v. Lavine, 572 F.2d 1386, 1388 (9th Cir. 1978)); accord DIRECTV, Inc. v. Hoa Huynh,
18 503 F.3d 847, 854 (9th Cir. 2007) (stating that a defendant does not admit facts that are not well-
19 pled or conclusions of law); Abney v. Alameida, 334 F. Supp. 2d 1221, 1235 (S.D. Cal. 2004)
20 ("[A] default judgment may not be entered on a legally insufficient claim."). A party's default
21 conclusively establishes that party's liability, although it does not establish the amount of
22 damages. Geddes, 559 F.2d at 560 (stating that although a default established liability, it did not
23 establish the extent of the damages); cf. Adriana Int'l Corp. v. Thoeren, 913 F.2d 1406, 1414 (9th
24 Cir. 1990) (stating in the context of a default entered pursuant to Federal Rule of Civil Procedure
25 37 that the default conclusively established the liability of the defaulting party).

26 III. DISCUSSION

A. The Entry of Default Judgment is Appropriate In Both Cases

In the order entered April 23, 2010, the undersigned evaluated plaintiffs'

1 applications for default judgment under the factors set forth in Eitel. (See Order, Apr. 23, 2010,
2 at 13-27, Dillard, Dkt. No. 51; Order, Apr. 23, 2010, at 13-27, Galtieri-Carlson, Dkt. No. 36.)
3 The undersigned concluded that plaintiffs in each case were entitled to a default judgment, but
4 that issues pertaining to damages and other procedural issues were so poorly presented in the
5 moving papers that default judgments could not be entered at that time. Insofar as the Eitel
6 factors are concerned, the undersigned concluded that all but one of the factors favored the entry
7 of default judgments. However, the undersigned raised two points of concern as to the Eitel
8 factors that are further addressed below.

9 First, as to the fourth Eitel factor, which considers the amount of money at stake
10 in relation to the seriousness of defendants' conduct, the undersigned concluded that the lack of
11 clarity in regards to plaintiffs' request for damages precluded proper evaluation of the fourth
12 factor. (See Order, Apr. 23, 2010, at 23-24, Dillard, Dkt. No. 51; Order, Apr. 23, 2010, at 23-24,
13 Galtieri-Carlson, Dkt. No. 36.) However, since the entry of that order, plaintiffs have clarified
14 that each plaintiff seeks two million dollars in general damages. Given the seriousness of the
15 conduct alleged by plaintiffs, the undersigned concludes that the fourth Eitel factor favors the
16 grant of default judgments in both cases. Whether each plaintiff is entitled to \$2 million dollars
17 in general damages is an entirely different question, which is addressed below.

18 Second, the undersigned expressed concern in the April 23, 2010 order in regards
19 to the fifth Eitel factor, which inquires into the possibility of a dispute concerning material facts,
20 because the defaulting defendants had filed answers in both actions prior to having a clerk's
21 default entered against them.⁹ (See Order, Apr. 23, 2010, at 24-25, Dillard, Dkt. No. 51; Order,
22 Apr. 23, 2010, at 24-25, Galtieri-Carlson, Dkt. No. 36.) This peculiar circumstance arose
23 because the defaulting corporate defendants initially appeared in this action and filed an answer
24 through counsel, but later defaulted after their counsel withdrew from the representation and left

25 _____
26 ⁹ Nevertheless, the undersigned concluded in that order that the fifth Eitel factor still
favored entering default judgments for the reasons stated therein.

1 the corporate defendants unable to appear in this court. In any event, the undersigned's concerns
2 regarding potentially disputed materials facts have been alleviated because, on August 26, 2010,
3 the court granted plaintiffs' motions to strike the answers at issue. (Order, Aug. 26, 2010,
4 Dillard, Dkt. No. 59; Order, Aug. 26, 2010, Galtieri-Carlson, Dkt. No. 45.) Accordingly, the
5 fifth Eitel factor favors entering default judgments in both cases.

6 As noted above, the undersigned raised an additional concern at the prove-up
7 hearing regarding whether plaintiffs had adequately established that plaintiffs' exposure to
8 defendants' products proximately caused each plaintiff's extensive list of alleged ailments. In
9 this case, the operative complaints and declarations submitted on each plaintiff's behalf allege
10 that exposure to defendants' products caused plaintiffs injuries ranging from memory loss, to a
11 miscarriage, and numerous other physical and emotional maladies. Yet, plaintiffs have provided
12 no evidence of a direct link between the products at issue and the symptoms allegedly experience
13 by plaintiffs—indeed, plaintiff were unable to testify at the prove-up hearing that any medical
14 professional opined that any or all of the alleged injuries were necessarily caused by exposure to
15 defendants' products and were not caused by some other source.¹⁰

16 Although many of plaintiffs' allegations of injury seem inherently implausible
17 and, to say the least, give the undersigned pause, plaintiffs properly refer the court to the Second
18 Circuit Court of Appeals's decision in Greyhound ExhibitGroup, Inc. v. E.L.U.L. Realty Group,
19 973 F.2d 155 (2d Cir. 1992), cert. denied, 506 U.S. 1080 (1993) ("Greyhound"), which addresses
20 the causation issue at hand.

21 In Greyhound, a commercial tenant of a warehouse property suffered financial
22 injury as a result of a warehouse fire and sued its landlord for negligent maintenance of the
23 warehouse's fire sprinkler system. Briefly stated, the landlord defaulted, and the district court

24 ¹⁰ Similarly, at the evidentiary hearing, plaintiffs' counsel indicated that they had some
25 information that the defendants' products consisted primarily of epsom salts or magnesium
26 which allegedly can cause symptoms similar to those experienced by plaintiffs, but counsel
declined to provide any of that information or documentation to the court.

1 subsequently conducted a hearing on the question of damages. At a hearing regarding damages,
2 the landlord sought to introduce evidence of the tenant’s comparative fault and a resulting set-off
3 of damages, but the district court denied that request. The Court of Appeals affirmed the district
4 court’s decision. On appeal, the landlord argued that the tenant was obligated to show that the
5 landlord’s actions were the proximate cause of the damages claimed by the tenant. Albeit over
6 one judge’s vigorous dissent, the panel rejected the landlord’s argument insofar as the issue of
7 liability was concerned because requiring the tenant to prove proximate cause would undermine
8 the principal pertaining to default judgments that well-pled allegations are taken as true except as
9 they pertain to the amount of damages. The Court of Appeals reasoned:

10 There is a categorical distinction between the element “proximate cause,”
11 as it pertains to the assignment of liability in the first instance, and
12 “proximate cause” as it relates to the ministerial calculation of damages in
13 the context of a default judgment. With regard to liability, the concept of
14 proximate cause supplies the legal nexus between act and injury, and
15 provides a necessary basis for awarding compensation. Where it is
16 properly alleged in a complaint, proximate cause—going to liability—is
17 completely and irrefutably established upon the defendant's default.

18 Id. at 159. Although it does not appear that the Ninth Circuit Court of Appeals has expressly
19 addressed the issue presented in Greyhound, several district courts in California have cited
20 Greyhound for the proposition that where proximate cause is properly alleged in the complaint,
21 proximate cause is established for the purpose of evaluating liability, and a plaintiff must only
22 prove that the compensation sought relates to the damages that naturally flow from the injuries
23 pled. See, e.g., Philip Morris USA, Inc. v. Castworld Prods., Inc., 219 F.R.D. 494, 498 (C.D.
24 Cal. 2003) (“If proximate cause is properly alleged in the complaint, it is admitted upon default.
25 Injury is established and plaintiff need prove only that the compensation sought relates to the
26 *damages that naturally flow from the injuries pled.*”) (citation omitted, emphasis added); accord
Lehman Brothers Hldgs., Inc. v. Home Capital Funding, No. 09cv859 WQH (BLM), 2010 WL
1904871, at *2 (S.D. Cal. May 12, 2010) (unpublished) (same); Elektra Entmt. Group, Inc. v.
Bryant, No. CV 03-6381GAF(JTLX), 2004 WL 783123, at *2 (C.D. Cal. Feb. 13, 2004)

1 (unpublished) (same). On the basis of these cases, the undersigned concludes that plaintiffs’
2 respective operative complaints adequately establish proximate cause with respect to liability.
3 The extent of damages that plaintiffs are entitled to, which depends on the evidence submitted by
4 plaintiffs, is a separate question addressed below.

5 For the reasons stated above and in the April 23, 2010 order, the undersigned
6 recommends that default judgments be entered in the Dillard and Galtieri-Carlson actions,
7 respectively, jointly and severally against defendants Victoria M. Morton Enterprises, Inc.,
8 Suddenly Slender, and Suddenly Slender International. The undersigned next addresses the
9 amount of the judgment to be awarded.

10 B. The Measure of General Damages

11 In connection with their continued applications for default judgments, plaintiffs
12 seek an award of “general damages” in the amount of \$2 million dollars as to each plaintiff in
13 each case. As noted above, plaintiffs rely only on their previously submitted declarations and the
14 testimony of some of the plaintiffs at the prove-up hearing as support for the damages sought.
15 Plaintiffs declined to present any documentation that might inform the extent of the alleged
16 injuries suffered, such as medical records or billing statements, and offered no expert testimony
17 or testimony of treating physicians in support of their estimate of damages. Moreover, plaintiffs
18 have filed no memoranda of points and authorities justifying an award of “general damages” or
19 identifying categories of damages that inform the calculation of such general damages.
20 Similarly, plaintiffs offer no justification for seeking the same amount of general damages on
21 behalf of every single plaintiff, despite the fact that the degree of injury alleged by each plaintiff
22 varies widely. In short, plaintiffs appear to have selected the damages figure of \$2 million
23 dollars per plaintiff out of thin air.

24 Under California law, which applies in this diversity jurisdiction case, the
25 measure of damages in a tort action is “the amount which will compensate for all the detriment
26 proximately caused thereby, whether it could have been anticipated or not.” Cal. Civ. Code

1 § 3333. General damages may be generally categorized as “those losses which naturally flow
2 from the injury and which are not quantifiable by reference to bills or receipts.” See Beeman v.
3 Burling, 216 Cal. App. 3d 1586, 1600, 265 Cal. Rptr. 719, 727 (Ct. App. 1990). General
4 damages generally consist damages for, among other things, emotional distress or mental
5 anguish, pain and suffering, and loss of earning power. See id. (stating that “damages for pain,
6 suffering and emotional distress are paradigmatic examples of general damages.”); Connoly v.
7 Pre-Mixed Concrete Co., 49 Cal.2d 483, 489, 319 P.2d 343, 346 (Cal. 1957) (“Loss of earning
8 power is an element of general damages which can be inferred from the nature of the injury,
9 without proof of actual earnings or income either before or after the injury.”). As noted by one
10 district judge in the context of a bench trial, the amount of general damages awarded for items
11 such as pain and suffering “depends to a great extent on the trial court’s observation of the
12 plaintiff and its subjective determination of the amount needed to achieve full compensation.”
13 See KDME, Inc. v. Bucci, No. 05CV199 IEG (AJB), 2008 WL 205261, at *7 (S.D. Cal. Jan. 24,
14 2008) (unpublished) (citing Hyde v. Chevron U.S.A., Inc., 697 F.2d 614, 632 (5th Cir. 1983)).

15 The undersigned heard several hours of testimony at the prove-up hearing. As
16 noted above, in the Dillard matter, plaintiffs Marilyn Dillard and Stephen Dillard testified, and
17 Marilyn Dillard also testified on behalf of the minor plaintiffs, Ciera and Ariel Dillard. In the
18 Galtieri-Carlson matter, plaintiffs Ruth Galtieri-Carlson and Deana Galtieri testified, and Deana
19 Galtieri also testified on behalf of minor plaintiff Christian Galtieri-Brown.

20 After considering these plaintiffs’ testimony in the respective actions, the
21 undersigned concludes that none of the plaintiffs is entitled to an unsupported demand for \$2
22 million dollars in general damages. The testimony and declarations provided simply do not
23 establish each plaintiff’s entitlement to an award of \$2 million dollars in general damages.
24 However, the undersigned concludes that plaintiffs are entitled to some measure of general
25 damages—the only type of damages sought by plaintiffs—as a result of the injuries about which
26 they testified. Therefore, although plaintiffs have not established through expert testimony or

1 medical records that exposure to the defendants' products caused all of their symptoms, they
2 have established that they suffered emotional distress and anguish which entitles them to general
3 damages.

4 1. Marilyn Dillard

5 Of the Dillard plaintiffs, Marilyn Dillard testified to the greatest exposure to
6 defendants' products and the most severe symptoms or injuries resulting from exposure.
7 Marilyn Dillard, who was previously a school teacher, became a home business licensee of
8 defendants and sold and applied defendants' products; she was exposed to defendants' products
9 in or around July 2004. (See Marilyn Dillard Decl. ¶¶ 6-7, Dillard, Dkt. No. 44, Doc. No. 44-3.)
10 She mixed the solutions used in applying the body wraps at issue and even drank a product
11 solution based on a representation of Victoria Morton, a now-dismissed individual defendant,
12 that defendants' product solutions were safe enough to drink. After performing three body
13 wraps, Marilyn Dillard developed flu-like symptoms. Marilyn Dillard testified that she
14 subsequently suffered myriad health problems including bronchitis, chronic vaginal yeast
15 infections, joint pain, and a miscarriage in November 2004. Marilyn Dillard alleges that most of
16 her conditions have not responded to normal courses of treatment and that she continues to suffer
17 from intermittent extreme flu-like symptoms that often last for extended periods of time, extreme
18 chronic yeast infections, menstrual irregularities, and has been diagnosed with chronic fatigue
19 syndrome. All of which medical professionals have been unable to successfully treat.

20 Marilyn Dillard has provided no medical records substantiating causation between
21 her exposure to the products and her symptoms, or substantiating the degree of her symptoms.
22 Nevertheless, the undersigned can assess and recommend an award of general damages. Taking
23 Marilyn Dillard's declaration and testimony into account, the undersigned recommends that
24 Marilyn Dillard be awarded general damages in the amount of \$200,000.

25 2. Stephen Dillard

26 Plaintiff Stephen Dillard's testimony reflects that Stephen Dillard was exposed to

1 defendants' products after Marilyn Dillard started her body-wrapping business in the family
2 home, for a period of between six months and two years. Stephen Dillard was exposed to the
3 products when he would come home from work and assist Marilyn Dillard in mixing the
4 solutions used in the body wrapping process. Insofar as the symptoms resulting from exposure to
5 defendants' products, Stephen Dillard's declaration and testimony represent that Stephen Dillard
6 has a reduced activity level since exposure, now suffers from Attention Deficit Disorder, that his
7 "head feels cloudy," that he suffers from an inability to focus, concentrate, and remember
8 information, recently suffers from dizziness and balance problems, and that he suffers from
9 chronic and acute flu-like symptoms, chronic skin lesions and sores on his head, and
10 "hypersensitivity." (See Stephen Dillard Decl. ¶¶ 6, 8, 10, Dillard, Dkt. No. 44, Doc. No. 44-4.)
11 Although unsubstantiated by any medical evidence, Stephen Dillard testified that these symptoms
12 were caused by his exposure to defendants' products, persist today, and have not been effectively
13 treated by health professionals. On the basis of Stephen Dillard's declaration and testimony, the
14 undersigned recommends that Stephen Dillard be awarded general damages in the amount of
15 \$50,000.

16 3. Ariel and Ciera Dillard

17 The declaration submitted by Marilyn Dillard on behalf of minor plaintiff Ariel
18 Dillard represents that Ariel Dillard was exposed to defendants' products beginning at age six,
19 when Marilyn Dillard started her body-wrapping business in the family home in 2004. (See
20 Decl. of Marilyn Dillard on Behalf of Ariel Dillard (A Minor) ¶ 2, Dillard, Dkt. No. 44, Doc. No.
21 44-1.) That declaration and Marilyn Dillard's testimony on Ariel Dillard's behalf aver that Ariel
22 Dillard has suffered symptoms from her exposure to defendants' products that include chronic
23 and acute flu-like symptoms, memory problems, reduced dexterity, motor skill problems, fatigue,
24 and "hypersensitivity." (See id. ¶¶ 3-8.) Of course, plaintiffs have submitted no medical
25 evidence substantiating these symptoms. Nevertheless, on the basis of the declaration submitted
26 by plaintiffs and Marilyn Dillard's testimony on Ariel Dillard's behalf, the undersigned

1 recommends that Ariel Dillard be awarded general damages in the amount of \$50,000.

2 The declaration submitted by Marilyn Dillard on behalf of minor plaintiff Ciera
3 Dillard represents that Ciera Dillard was directly exposed to defendants' products, beginning at
4 age three, when she would assist Marilyn Dillard in preparing the solutions used in connection
5 with the body wraps applied to customers. (See Decl. of Marilyn Dillard on Behalf of Ciera
6 Dillard (A Minor) ¶ 2, Dillard, Dkt. No. 44, Doc. No. 44-2.) Marilyn Dillard testified that Ciera
7 Dillard drank some of the defendants' product. That declaration and Marilyn Dillard's testimony
8 on Ciera Dillard's behalf assert that Ciera Dillard suffered extreme flu-like symptoms, including
9 pneumonia, which ultimately led to an operation on one of Ciera Dillard's lungs. (See id. ¶¶ 4-
10 6.) Ciera Dillard presently suffers from breathing difficulties that Marilyn Dillard attributes to
11 early exposure to defendants' products, as well as self-esteem problems arising from scarring
12 suffered as a result of the lung operation. (Id. ¶¶ 7-8.) Again, plaintiffs have submitted no
13 medical evidence substantiating these symptoms. However, in light of the declaration submitted
14 by plaintiffs and Marilyn Dillard's testimony on Ciera Dillard's behalf, the undersigned
15 recommends that Ciera Dillard be awarded general damages in the amount of \$100,000.

16 4. Ruth Galtieri-Carlson

17 As with the Dillard plaintiffs, the Galtieri-Carlson plaintiffs also testified to
18 having suffered myriad adverse medical reactions to defendants' products. As reflected in the
19 declarations filed by plaintiffs in the Galtieri-Carlson matter and plaintiffs' testimony, plaintiffs
20 Ruth Galtieri-Carlson and Deana Galtieri-Carlson were exposed to defendants' products through
21 their salon business, where they administered defendants' body wrap products as licensees. (See
22 Decl. of Deana Galtieri ¶¶ 2-3 ("Galtieri Decl."), filed in Dillard, Dkt. No. 44, Doc. No. 44-5;
23 Decl. of Ruth Galtieri-Carlson ¶¶ 2-3 ("Galtieri-Carlson Decl."), filed in Dillard, Dkt. No. 44,
24 Doc. No. 44-7.)

25 Ruth Galtieri-Carlson's declaration and testimony at the prove-up hearing reflect
26 that since her exposure to defendants' products, she has experienced maladies that are too

1 voluminous to recount here. These conditions include flu-like symptoms, chronic fatigue,
2 respiratory issues, severe vertigo resulting in blackouts, Herpes Simplex (I and II), fungal
3 infections, muscle spasms and weakness, rectal burning and itching, anxiety, dizziness, mood
4 disorders, and various other conditions, all of which medical professionals have been unable to
5 treat. (See Galtieri-Carlson Decl. ¶¶ 5-6.)

6 As with the Dillard plaintiffs, the Galtieri-Carlson plaintiffs have provided no
7 medical records substantiating causation between their exposure to the products and their
8 symptoms, or substantiating the degree of their symptoms. Nevertheless, the undersigned can
9 assess and recommend an award of general damages. Taking Ruth Galtieri-Carlson's declaration
10 and testimony into account, the undersigned recommends that Ruth Galtieri-Carlson be awarded
11 general damages in the amount of \$125,000.

12 5. Deana Galtieri

13 Plaintiff Deana Galtieri alleges that as a result of her prolonged exposure to
14 defendants' products at her salon business, she has suffered various conditions, including
15 reduced activity, vertigo, suicidal ideation, chronic vaginal bacterial and yeast infections, extreme
16 flu-like symptoms, throbbing joint pain throughout her body, gastrointestinal issues, lethargy and
17 chronic fatigue, abnormal pap smears, severe cramping and menstrual pain, and various other
18 conditions, including she has been diagnosed with fibromyalgia, epstein-barr, and chronic fatigue
19 syndrome, all of which medical professionals have been unable to treat. (See Galtieri Decl. ¶¶ 5-
20 6, 9-10.) Deana Galtieri has submitted no medical records substantiating causation between her
21 exposure to the products and their symptoms, or substantiating the degree of her symptoms.
22 Nevertheless, the undersigned can assess and recommend an award of general damages. Taking
23 Deana Galtieri's declaration and testimony into account, the undersigned recommends that Deana
24 Galtieri be awarded general damages in the amount of \$200,000.

25 6. Christian Galtieri-Brown

26 The declaration submitted by Deana Galtieri on behalf of her minor son, plaintiff

1 Christian Galtieri-Brown, reflects that Christian Galtieri-Brown was exposed to defendants'
2 products as a result of his involvement in the daily activities at Ruth Galtieri-Carlson and Deana
3 Galtieri's salon business. (See Decl. of Deana Galtieri as Guardian Ad Litem for Christian
4 Galtieri-Brown ¶¶ 7-8, filed in Dillard, Dkt. No. 44, Doc. No. 44-6.) He was present during the
5 mixture of solutions for the body wraps and even drank some of the solutions based on a
6 representation agents of defendants that defendants' product solutions were safe enough to drink.
7 (See id. ¶¶ 5-6.) Deana Galtieri's declaration and testimony on behalf of Christian Galtieri-
8 Brown aver that as a result of Christian Galtieri-Brown's exposure to defendants' products, he
9 allegedly suffers from myriad symptoms including, among others, prolonged fevers, bacterial
10 infections, fungal infections, acute respiratory conditions including pneumonia and bronchitis,
11 cognitive impairment, speech problems, memory problems, unexplained rashes, an inability to
12 control his bowels and bladder, and anxiety, all of which medical professionals have been unable
13 to treat. (See id. ¶¶ 10-15.) Again, plaintiffs have submitted no medical evidence substantiating
14 these symptoms or the severity of these symptoms. However, in light of the declaration and
15 testimony provided by Deana Galtieri on Christian Galtieri-Brown's behalf, the undersigned
16 recommends that Christian Galtieri-Brown be awarded general damages in the amount of
17 \$75,000.

18 IV. CONCLUSION

19 For the foregoing reasons, IT IS HEREBY RECOMMENDED that:

20 1. The application for default judgment filed by plaintiffs in Dillard, et al. v.
21 Victoria M. Morton Enterprises, Inc., et al., No. 2:08-cv-1339 KJM KJN PS (Dkt. Nos. 44, 54)
22 be granted, and that default judgment, imposing joint and several liability, be entered in that case
23 against the following defendants in that matter: Victoria M. Morton Enterprises, Inc., Suddenly
24 Slender, and Suddenly Slender International.

25 2. That general damages in the amount of \$200,000 be awarded to plaintiff
26 Marilyn Dillard.

1 3. That general damages in the amount of \$50,000 be awarded to plaintiff
2 Stephen Dillard.

3 4. That general damages in the amount of \$50,000 be awarded to plaintiff
4 Ariel Dillard.

5 5. That general damages in the amount of \$100,000 be awarded to plaintiff
6 Ciera Dillard.

7 6. The application for default judgment filed by plaintiffs in Galtieri-Carlson,
8 et al. v. Victoria M. Morton Enterprises, Inc., et al., No. 2:08-cv-1777 KJM KJN PS (Dkt.
9 Nos. 34, 40) be granted, and that default judgment, imposing joint and several liability, be
10 entered in that case against the following defendants in that matter: Victoria M. Morton
11 Enterprises, Inc., Suddenly Slender, and Suddenly Slender International.

12 7. That general damages in the amount of \$125,000 be awarded to plaintiff
13 Ruth Galtieri-Carlson.

14 8. That general damages in the amount of \$200,000 be awarded to plaintiff
15 Deana Galtieri.

16 9. That general damages in the amount of \$75,000 be awarded to plaintiff
17 Christian Galtieri-Brown.

18 10. The Clerk of Court be directed to close this case.

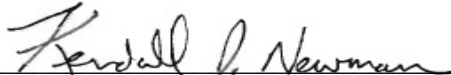
19 These findings and recommendations are submitted to the United States District
20 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen
21 days after being served with these findings and recommendations, any party may file written
22 objections with the court and serve a copy on all parties. Id.; see also E. Dist. Local Rule 304(b).
23 Such a document should be captioned “Objections to Magistrate Judge’s Findings and
24 Recommendations.” Any response to the objections shall be filed with the court and served on
25 all parties within fourteen days after service of the objections. E. Dist. Local Rule 304(d).
26 Failure to file objections within the specified time may waive the right to appeal the District

1 Court's order. Turner v. Duncan, 158 F.3d 449, 455 (9th Cir. 1998); Martinez v. Ylst, 951 F.2d
2 1153, 1156-57 (9th Cir. 1991).

3 IT IS SO RECOMMENDED.

4 DATED: February 3, 2011

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KENDALL J. NEWMAN
UNITED STATES MAGISTRATE JUDGE