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UNITED STATES DISTRICT COURT

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FOR THE EASTERN DISTRICT OF CALIFORNIA

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GEORGE AVALOS, an individual,

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Plaintiff,

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v.

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BILL NILSSON, an individual;
ANTHONY LAMBETECCHIO, an
individual; and DOES 1-10, inclusive,

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Defendants.

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Case No. 1:20-cv-01743-NONE-BAM

FINDINGS AND RECOMMENDATIONS
REGARDING PLAINTIFF'S APPLICATION
FOR DEFAULT JUDGMENT

(Doc. 18)

FOURTEEN (14) DAY DEADLINE

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On June 11, 2021, Plaintiff George Avalos ("Plaintiff") filed an application for default judgment against Defendant Anthony Lambetecchio.¹ ("Defendant"). (Doc. 18.) No opposition was filed. The motion was referred to the undersigned pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302. The Court deemed the matter suitable for decision without oral argument pursuant to Local Rule 230(g) and vacated the hearing set for July 16, 2021. (Doc. 20.)

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Having considered the moving papers and the record in this action, the Court
RECOMMENDS that Plaintiff's motion for default judgment be DENIED WITHOUT

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¹ Plaintiff voluntarily dismissed Defendant Bill Nilsson pursuant to Federal Rule of Civil Procedure 41. (See Docs. 8, 10.) Defendant Anthony Lambetecchio is the only remaining defendant in this action.

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1 PREJUDICE and that entry of default against Defendant Anthony Lambetecchio be SET ASIDE.

2 **I. FACTUAL BACKGROUND**

3 On December 10, 2020, Plaintiff filed this action pursuant to the Americans with
4 Disabilities Act of 1990 (“ADA”), 42 U.S.C. § 12181 *et seq.*, and California’s Unruh Civil
5 Rights Act, California Civil Code § 51, alleging violations at property owned by Defendant
6 located at 2686 N. Clovis Ave, Fresno, CA 93727 (“Property”), and upon which A Better Bed
7 Mattress Factory & Showroom (“Business”) is located. (Doc. 1, Compl.) Bill Nilsson, a former
8 defendant in this action, reportedly owned and operated A Better Bed Mattress Factory &
9 Showroom. (*Id.* at ¶ 4.)

10 Plaintiff alleges that he is substantially limited in performing one or more major life
11 activities, he relies upon mobility devices to ambulate and he suffers from a qualified disability
12 under the ADA. (*Id.* at ¶ 1.) Plaintiff asserts that the Property at issue presents architectural
13 barriers that denied his right to enjoy full accessibility and the goods and services offered at the
14 Business. (*Id.* at ¶¶ 19, 22.) Plaintiff’s complaint seeks damages, attorneys’ fees and costs, and
15 injunctive relief. (*Id.* at pp. 8-9.)

16 As noted, Plaintiff voluntarily dismissed Bill Nilsson from this action on January 13,
17 2021. (Docs. 8, 10.) On January 27, 2021, according to the proof of service, Plaintiff served
18 Defendant with the summons and complaint by substituted service at Defendant’s office or usual
19 place of business located at 1521 W. Nielsen, Fresno, CA 93706. (Doc. 11.) Defendant did not
20 respond to the complaint, and the Clerk of Court entered default against him on March 2, 2021.
21 (Doc. 14.) Plaintiff filed the instant motion against Defendant on June 11, 2021, seeking default
22 judgment in the total sum of \$8,269.25 for statutory damages and attorneys’ fees and costs,
23 along with injunctive relief. (Doc. 18.)

24 **II. DISCUSSION**

25 **A. Default Judgment**

26 In deciding whether to grant or deny a default judgment, a court should assess the
27 adequacy of the service of process on the party against whom default is requested. *See, e.g.,*
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1 *Farmers Auto. Ins. Ass'n v. Long*, No. 1:13-cv-01236 AWI BAM, 2014 WL 12773792, at *1
2 (E.D. Cal. Mar. 13, 2014); *Coach, Inc. v. Diva Shoes & Accessories*, No. 10-5151 SC, 2011 WL
3 1483436, at *2 (N.D. Cal. Apr. 19, 2011); *Katzakian v. Check Resolution Service, Inc.*, No. 1:10-
4 cv-00716 AWI GSA, 2010 WL 5200912 at *2 (E.D. Cal. Dec. 15, 2010).

5 Federal Rule of Civil Procedure 4 sets forth the requirements for serving an individual
6 within a judicial district of the United States. An individual may be served by:

7 (1) following state law for serving a summons in an action brought in courts of
8 general jurisdiction in the state where the district court is located or where service
is made; or

9 (2) doing any of the following:

10 (A) delivering a copy of the summons and of the complaint to the
11 individual personally;

12 (B) leaving a copy of each at the individual's dwelling or usual place of
abode with someone of suitable age and discretion who resides there; or

13 (C) delivering a copy of each to an agent authorized by appointment or by
14 law to receive service of process.

15 Fed. R. Civ. P. 4(e).

16 California law, in turn, permits substituted service upon an individual if a copy of the
17 summons and complaint cannot with reasonable diligence be personally delivered by:

18 leaving a copy of the summons and complaint at the person's . . . usual place of
19 business . . . in the presence of . . . a person apparently in charge of his or her . . .
20 place of business...at least 18 years of age, who shall be informed of the contents
21 thereof, and by thereafter mailing a copy of the summons and of the complaint by
first-class mail, postage prepaid to the person to be served at the place where a copy
of the summons and complaint were left.

22 Cal. Code Civ. P. § 415.20(b).

23 According to the proof of service on file, personal service of Defendant was attempted on
24 three different dates at three different times at Defendant's office or usual place of business
25 located at the following address: 1521 W. Nielsen, Fresno, California 93706. (Doc. 11.) On the
26 third attempt, Defendant was served by leaving copies of the summons and complaint at
27 Defendant's office or usual place of business identified as, with Jack Smith, a person at least 18
28 years of age apparently in charge. Mr. Smith was informed of the general nature of the papers.

1 Thereafter, copies of the summons and complaint were mailed to Defendant at the same business
2 address by first-class mail, postage paid. (Doc. 11.)

3 The office or business address used for service of the summons and complaint does not
4 match records submitted to the Court in support of the application for default judgment.
5 According to the application and supporting declaration of Plaintiff's counsel, counsel's law firm
6 conducted a public records search in order to ascertain the owners of the Property. Counsel
7 submitted true and correct copies of those records as Exhibit 4 to the Declaration of Joseph R.
8 Manning, Jr. (Doc. 18-3; Manning Decl. at ¶ 3, Ex. 4.) Exhibit 4 includes a "GRANT DEED"
9 recorded in Fresno County on May 17, 2010, and a "Property Profile" as of October 30, 2020.
10 (Doc. 18-6.) These documents identify Defendant's proper address as "1521 E. Nielsen." (*Id.*
11 (emphasis added).) However, this "E. Nielson" address is not the same street address used for
12 substituted service. Substitute service was stated to be effectuated at "1521 W. Nielsen." (Doc.
13 11.)

14 Given the discrepancy between the addresses, the Court cannot find that Plaintiff properly
15 served Defendant pursuant to Federal Rule of Civil Procedure 4(e)(1).

16 **B. Entry of Default**

17 The address discrepancy also implicates the entry of default against Defendant
18 Lambetecchio. Rule 55(c) gives a district court the discretion to set aside entry of default upon a
19 showing of good cause. Fed. R. Civ. P. 55(c). A district court has the authority to set aside an
20 entry of default sua sponte for good cause. *See, e.g., Sarieddine v. Area 51 Pharms, LLC*, No.
21 2:19-cv-10715-ODW (MRWx), 2020 WL 4539024, at *5 (C.D. Cal. Aug. 6, 2020) (noting court
22 can set aside entries of default sua sponte); *New Milani Grp., Inc. v. Aslani*, No. 17-cv-02791 SJO
23 (PJWx), 2017 WL 8220225, at *1 (C.D. Cal. June 9, 2017) (same); *Investcorp Retirement*
24 *Specialist, Inc. v. Ohno*, Civ. No. 07-1304, 2007 WL 2462122, at *2 (N.D. Cal. Aug. 28, 2007)
25 ("The court may set aside entries of default *sua sponte*."). The "good cause" analysis considers
26 three factors: "(1) whether [defendant] engaged in culpable conduct that led to the default; (2)
27 whether [defendant] had a meritorious defense; or (3) whether reopening the [action] would
28 prejudice [plaintiff]." *Franchise Holding II, LLC v. Huntington Restaurants Group, Inc.*, 375

1 F.3d 922, 926 (9th Cir. 2004); *see also United States v. Signed Pers. Check No. 730 of Yubran S.*
2 *Mesle*, 615 F.3d 1085, 1091 (9th Cir. 2010).

3 Here, consideration of the relevant factors weighs in favor of setting aside the default
4 entered against Defendant Lambetecchio. First, there is no indication that Defendant engaged in
5 any culpable conduct that led to the default. Instead, it appears that service was not proper under
6 Federal Rule of Civil Procedure 4. The record lacks any suggestion that Defendant received
7 notice of the action and failed to answer.

8 Second, there is no indication that Defendant lacks a meritorious defense or that he would
9 be unable to allege sufficient facts, if true, that would constitute a defense.

10 Third, and finally, there is no indication that setting aside default would prejudice Plaintiff
11 or cause a needless or unwarranted delay in this action. This action has been pending only since
12 December 2020, service on Defendant was not attempted until late January 2021, and default was
13 not entered until March 2, 2021, less than four months ago.

14 Based on these factors, the Court finds good cause to set aside the entry of default and
15 therefore will recommend that default against Defendant Lambetecchio be set aside.

16 **III. CONCLUSION AND RECOMMENDATION**

17 Based on the foregoing analysis, IT IS HEREBY RECOMMENDED as follows:

- 18 1. Plaintiff's motion for default judgment against Defendant Anthony Lambetecchio
19 (Doc. 18) be denied without prejudice; and
- 20 2. The Clerk's entry of default against Defendant Anthony Lambetecchio be set aside for
21 good cause.

22 These Findings and Recommendations will be submitted to the United States District
23 Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within
24 **fourteen (14) days** after being served with these Findings and Recommendations, the parties may
25 file written objections with the Court. The document should be captioned "Objections to
26 Magistrate Judge's Findings and Recommendations." The parties are advised that failure to file

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1 objections within the specified time may result in the waiver of the “right to challenge the
2 magistrate’s factual findings” on appeal. *Wilkerson v. Wheeler*, 772 F.3d 834, 839 (9th Cir. 2014)
3 (citing *Baxter v. Sullivan*, 923 F.2d 1391, 1394 (9th Cir. 1991)).

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IT IS SO ORDERED.

Dated: July 22, 2021

/s/ Barbara A. McAuliffe
UNITED STATES MAGISTRATE JUDGE