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

SCOTT JOHNSON,

Plaintiff,

No. CIV S-08-2799 GEB EFB

vs.

MARK D. GRANITE, and
DAVID SEUNG KIM,

Defendants.

FINDINGS AND RECOMMENDATIONS

On May 6, 2009, this court heard plaintiff's motion for default judgment, pursuant to Fed. R. Civ. P. 55(b), against defendant David Seung Kim.¹ Plaintiff Scott Johnson, an attorney, appeared at the hearing and represented himself. No appearance was made on behalf of defendant David Seung Kim (hereafter, "Kim").

The only other defendant, Mark D. Granite, doing business as Original Granites restaurant, was dismissed from this action on January 8, 2009. *See* Dckt. No. 5 and further docket entry dated January 8, 2009. Defendant Kim is the owner of the subject property. *See* Compl., Exh. 1.

¹ This case was referred to the undersigned pursuant to Local Rule 72-302(c)(19) and 28 U.S.C. § 636(b)(1).

1 Upon review of the motion, supporting documents, plaintiff’s oral argument, and good
2 cause appearing, the court makes the following findings, and recommends that plaintiff’s motion
3 be granted.

4 BACKGROUND

5 The complaint, made pursuant to the Americans with Disabilities Act, 42 U.S.C.
6 §§ 12101 *et seq.*, was filed on November 20, 2008. A certificate of service, filed February 10,
7 2009, demonstrates that the summons and complaint were personally served on defendant Kim,
8 on January 21, 2009. Dckt. No. 7.

9 On February 18, 2009, pursuant to plaintiff’s request, the Clerk of Court entered the
10 default of defendant Kim. Dckt. Nos. 8, 10. Plaintiff’s request for entry of default provides that
11 defendant “has failed to appear, plead, defend, reply, or otherwise respond to the Complaint.”
12 Dckt. No. 8. While defendant was not served with plaintiff’s request for entry of default or the
13 Clerk’s entry of default, these omissions come within the exception for service upon a defaulting
14 party. *See*, Fed. R. Civ. P. 5(a)(2) (“No service is required on a party who is in default for failing
15 to appear”).

16 Plaintiff filed the instant motion for default judgment on March 17, 2009, Dckt. No. 12,
17 which was served by mail on the same day upon defendant Kim. Dckt. No. 12, at p. 5.

18 DISCUSSION

19 Process has been served upon defendant Kim, who has not appeared in this action. *See*
20 *Pacific Atlantic Trading Co. v. M/V Main Express*, 758 F.2d 1325, 1331 (9th Cir. 1985) (default
21 judgment void without personal jurisdiction).

22 Entry of default pursuant to Fed. R. Civ. P. 55(a) effects defendant’s admission of the
23 well-pled factual allegations of the complaint, except those relating to the amount of damages.
24 *See* Fed. R. Civ. P. 8(b)(6) (“An allegation—other than one relating to the amount of damages— is
25 admitted if a responsive pleading is required and the allegation is not denied”); *Geddes v. United*
26 *Financial Group*, 559 F.2d 557, 560 (9th Cir. 1977), *Anderson v. Air West*, 542 F.2d 1090, 1093

1 (9th Cir. 1976).

2 Pursuant to the default of defendant Kim, the court finds that the complaint states the
3 following claims for which relief can be granted, specifically:

4 1. Plaintiff is a “person with a disability” and “physically handicapped person,”
5 pursuant to 42 U.S.C. § 12102(2)(A), and 28 C.F.R. § 36.104. Compl., at ¶ 1.

6 2. Defendant David Seung Kim is the owner of the subject property, a restaurant with a
7 parking lot, located at 6749 Rio Linda Blvd, Rio Linda, California, which is a public
8 accommodation as defined by 42 U.S.C. § 12181(7), and 28 C.F.R. § 36.104. Compl., at ¶ 2.

9 3. In August 2008, plaintiff visited the subject property to dine at the restaurant but, due
10 to the architectural barriers of “properly configured disabled parking space(s) including the lack
11 of a van accessible disabled parking space [no disabled parking at all], accessible route,
12 accessible restrooms, accessible dining area, accessibility signage, striping, and accessible
13 cashier/service counter,” plaintiff was prevented from enjoying full and equal access to the
14 restaurant. Compl., at ¶ 3.

15 4. In a letter dated August 19, 2008, mailed on the same date, plaintiff informed
16 defendant about the lack of accessibility and requested that the property be brought into
17 conformity within 90 days. Defendant did not respond. *Id.*

18 5. From August 2008 to November 2008, plaintiff returned to the subject property two
19 additional times and again encountered the architectural barriers.² *Id.*

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23 ² Plaintiff also alleges that he had five foregone visits to the subject property. However,
24 as explained at the hearing, the court finds that plaintiff’s general allegation of foregone visits is
25 inadequate to sustain statutory damages, and recommends that the instant damages award be
26 limited to plaintiff’s actual visits. *Cf. Lentini v. Cal. Center for the Arts*, 370 F.3d 837, 846-47
(9th Cir. 2004) (allegation of foregone visits supported by plaintiff’s evidence that she had
season tickets to the theater); *accord Munson v. Del Taco, Inc.*, __ Cal.Rptr.3d __, 2009 WL
1619783, *10 (2009) (statutory damages based on claims filed on or after January 1, 2009, shall
be limited to actual visits).

1 6. Plaintiff seeks an award of statutory damages pursuant to Cal. Civ. Code § 52, and
2 injunctive relief requiring the removal of all architectural barriers, and implementation of any
3 necessary alterations, to provide plaintiff and others similarly situated access to the services
4 offered by the subject property, to the same extent such services are made available to the
5 non-disabled public. *Id.*, at pp. 17-18.

6 The memorandum of points and authorities and affidavits filed in support of the motion
7 for entry of default judgment, pursuant to Fed. R. Civ. P. 55(b), support the finding that plaintiff
8 is entitled to the relief requested. There are no policy considerations that preclude the entry of
9 default judgment of the type requested. *See Eitel v. McCool*, 782 F.2d 1470, 1471-1472 (9th Cir.
10 1986).

11 CONCLUSION

12 In view of the foregoing findings, IT IS HEREBY RECOMMENDED that:

13 1. Plaintiff's motion for default judgment as to defendant David Seung Kim, be
14 GRANTED;


15 2. Statutory damages pursuant to Cal. Civ. Code § 52 be awarded for each of plaintiff's
16 three actual visits to the subject property, in the total amount of \$12,000; and

17 3. Injunctive relief be granted against defendant David Seung Kim requiring that the
18 subject property provide a properly configured van-accessible disabled parking space with an
19 accessible route to accessible cashier service counter and compliant men's restroom, in
20 conformity with the Americans with Disabilities Act Accessibility Guidelines, as set forth in 28
21 C.F.R. Part 36.

22 These findings and recommendations are submitted to the United States District Judge
23 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within ten days after
24 being served with these findings and recommendations, any party may file written objections
25 with the court and serve a copy on all parties. Such a document should be captioned "Objections
26 to Magistrate Judge's Findings and Recommendations." Failure to file objections within the

1 specified time may waive the right to appeal the District Court's order. *Turner v. Duncan*, 158
2 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

3 DATED: July 8, 2009.

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5 EDMUND F. BRENNAN
6 UNITED STATES MAGISTRATE JUDGE
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