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

MICHAEL J. DEVELDER

Plaintiff,

No. 2:09-cv-1803 EFB P

vs.

J. HIRSHLER, et al.,

Defendants.

ORDER

Plaintiff is a state prisoner proceeding without counsel in an action brought under 42 U.S.C. § 1983. Currently pending before the court is plaintiff’s motion for entry of default judgment against defendant Hirshler. Dckt. No. 21. This case is before the undersigned pursuant to plaintiff’s consent. See 28 U.S.C. § 636; see also E.D. Cal. Local Rules, Appx. A, at (k)(1)-(4). For the reasons that follow, the court will deny the motion.

**I. Background**

This action proceeds on the amended complaint filed April 12, 2010. Dckt. No. 9. In that pleading, plaintiff alleges, of relevance here, that he suffered from bladder stones while incarcerated at Deuel Vocational Institution (“DVI”) in 2006. *Id.* at 8.<sup>1</sup> He was scheduled for

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<sup>1</sup>Page numbers cited herein refer to those assigned by the court’s electronic docketing system.

1 surgery to remove the stones on October 3, 2006, but was transferred to California State Prison,  
2 Sacramento (“CSP-Sac”) on September 28, 2006, and so did not undergo the surgery on the  
3 scheduled date. *Id.* Plaintiff alleges that defendant Hirshler was the Chief Medical Officer at  
4 DVI and failed to communicate plaintiff’s need for the surgery to custody staff at DVI and CSP-  
5 Sac. *Id.* Plaintiff continued to suffer pain from the bladder stones for many months until they  
6 were surgically removed. *Id.* at 8-10. Plaintiff seeks \$100,000 general damages, \$100,000  
7 special damages, and \$100,000 punitive damages against defendant Hirshler. *Id.* at 3.

## 8 **II. Default and Default Judgment**

9 In order to obtain a default judgment against a party, the Federal Rules of Civil Procedure  
10 first require that the party seeking the judgment ask the court clerk to enter the defendant’s  
11 default under Federal Rule of Civil Procedure 55(a). *Eitel v. McCool*, 782 F.2d 1470, 1471 (9th  
12 Cir. 1986). That rule provides: “When a party against whom a judgment for affirmative relief is  
13 sought has failed to plead or otherwise defend, and that failure is shown by affidavit or  
14 otherwise, the clerk must enter the party’s default.” On March 9, 2011, the Clerk of Court  
15 entered defendant Hirshler’s default after defendant Hirshler, having been personally served,  
16 failed to respond to the complaint. Dckt. No. 17. As defendant Hirshler is in default, the court  
17 must determine whether a default judgment against defendant Hirshler is appropriate.

18 Federal Rule of Civil Procedure 55(b)(1) provides that, where the plaintiff seeks “a sum  
19 certain or a sum that can be made certain by computation” and provides an affidavit showing the  
20 amount due, the clerk must enter judgment for that amount and costs against a defendant who  
21 has been defaulted. However, “[i]n all other cases, the party must apply to the court for a default  
22 judgment.” Fed. R. Civ. P. 55(b)(2). “The court may conduct hearings or make referrals . . .  
23 when, to enter or effectuate judgment, it needs to: (A) conduct an accounting; (B) determine the  
24 amount of damages; (C) establish the truth of any allegation by evidence; or (C) investigate any  
25 other matter.” *Id.*

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1            “[A] claim is not a sum certain unless no doubt remains as to the amount to which a  
2 plaintiff is entitled as a result of the defendant’s default.” *Franchise Holding II, LLC v.*  
3 *Huntington Rests. Group, Inc.*, 375 F.3d 922, 928-29 (9th Cir. 2004) (following the First  
4 Circuit’s definition of “sum certain” as set out in *KPS & Assocs., Inc. v. Designs by FMC, Inc.*,  
5 318 F.3d 1, 17-21 (1st Cir. 2003)). Plaintiff alleges that defendant Hirshler’s failure to  
6 communicate plaintiff’s need for surgery subjected plaintiff to unnecessary months of pain. The  
7 amount of compensation due for such an injury, and the amount of punitive damages appropriate  
8 for the alleged misconduct are subject to considerable doubt and thus the damages sought herein  
9 are not of a “sum certain” under Federal Rule of Civil Procedure 55(b)(1).

10            Accordingly, the court has discretion as to whether to enter a default judgment against  
11 defendant Hirshler.

12            Factors which may be considered by courts in exercising discretion as to the entry  
13 of default judgment include (1) the possibility of prejudice to the plaintiff, (2) the  
14 merits of plaintiff’s substantive claim, (3) the sufficiency of the complaint, (4) the  
15 sum of money at stake in the action, (5) the possibility of a dispute concerning  
16 material facts, (6) whether the default was due to excusable neglect, and (7) the  
17 strong policy underlying the Federal Rules of Civil Procedure favoring decisions  
18 on the merits.

19 *Eitel*, 782 F.2d at 1471-72.

20            As a general rule, once default is entered, well-pleaded factual allegations in the  
21 operative complaint are taken as true, except for those allegations relating to damages.  
22 *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987) (per curiam) (citing  
23 *Geddes v. United Fin. Group*, 559 F.2d 557, 560 (9th Cir. 1977) (per curiam)); *see also Fair*  
24 *Housing of Marin v. Combs*, 285 F.3d 899, 906 (9th Cir. 2002). Although well-pleaded  
25 allegations in the complaint are admitted by a defendant’s failure to respond, “necessary facts  
26 not contained in the pleadings, and claims which are legally insufficient, are not established by  
27 default.” *Cripps v. Life Ins. Co. of N. Am.*, 980 F.2d 1261, 1267 (9th Cir. 1992) (citing *Danning*  
28 *v. Lavine*, 572 F.2d 1386, 1388 (9th Cir. 1978)); *accord DIRECTV, Inc. v. Huynh*, 503 F.3d 847,  
29 854 (9th Cir. 2007) (“[A] defendant is not held to admit facts that are not well-pleaded or to

1 admit conclusions of law” (citation and quotation marks omitted)); *Abney v. Alameida*, 334 F.  
2 Supp. 2d 1221, 1235 (S.D. Cal. 2004) (“[A] default judgment may not be entered on a legally  
3 insufficient claim.”). Thus, a party’s default conclusively establishes that party’s liability on  
4 sufficiently-pleaded claims, but does not establish the amount of damages. *Geddes*, 559 F.2d at  
5 560; *see also Adriana Int’l Corp. v. Thoeren*, 913 F.2d 1406, 1414 (9th Cir. 1990); *Doe v. Rafael*  
6 *Saravia*, 348 F. Supp. 2d 1112, 1143 (E.D. Cal. 2004). To obtain a default judgment against a  
7 defendant for a claim for uncertain damages, the plaintiff must prove the amount of damages he  
8 seeks. *Shanghai Automation Instrument Co., Ltd. v. KUEI*, 194 F. Supp. 2d 995, 1010 (N.D.  
9 Cal. 2001).

### 10 **III. Analysis**

11 Considering the *Eitel* factors, plaintiff may be prejudiced if the court were to deny a  
12 default judgment, as it may deprive him of compensation for his injury from defendant Hirshler,  
13 who has not appeared. Accepting plaintiff’s allegations as true, plaintiff has established that  
14 defendant Hirshler failed to inform custody staff that plaintiff could not be transferred until after  
15 his surgery or that plaintiff needed surgery soon after his transfer, but plaintiff has not pleaded  
16 sufficient facts to show that defendant Hirshler had the requisite “deliberately indifferent”  
17 mindset upon which Eighth Amendment liability may be imposed. *See Conn v. City of Reno*, 572  
18 F.3d 1047, 1056 (9th Cir. 2009) (stating that an officer has been deliberately indifferent if he was  
19 actually aware of the plaintiff’s serious medical need and did not reasonably respond to the risk).  
20 In addition, in the experience of the court the facts required to make out an Eighth Amendment  
21 claim are often disputed. As defendant Hirshler has not appeared, it is unclear whether his  
22 default was due to excusable neglect. Plaintiff’s request for \$300,000 in damages and the policy  
23 favoring merits-based decisions both weigh in favor of denying default judgment. Taken  
24 together, the *Eitel* factors weigh against entry of default judgment against defendant Hirshler.

25 More importantly, plaintiff has not offered any proof of his claimed damages. While  
26 plaintiff alleges in the complaint that defendant Hirshler’s failure to communicate plaintiff’s

1 need for surgery caused plaintiff to suffer until he received the surgery, plaintiff has not provided  
2 any basis from which the court can determine that plaintiff suffered \$300,000 in damages as a  
3 result. Indeed, according to the amended complaint and attached exhibits, plaintiff was seen by  
4 medical personnel after his transfer to CSP-Sac who did not immediately order the surgery, thus  
5 it is questionable whether damages should be imposed against defendant Hirshler for the time  
6 that medical decision-making authority concerning plaintiff lay elsewhere.

7 Accordingly, the court will deny plaintiff's motion for entry of default judgment against  
8 defendant Hirshler without prejudice to its renewal, supported by argument, and any evidence  
9 plaintiff may choose to offer, concerning the *Eitel* factors and plaintiff's claimed damages.

10 **IV. Order**

11 Accordingly, it hereby ORDERED that plaintiff's March 20, 2012 motion for default  
12 judgment (Docket No. 21) is denied.

13 Dated: September 10, 2012.

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15 EDMUND F. BRENNAN  
16 UNITED STATES MAGISTRATE JUDGE  
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