

1 allegation of the complaint and the evidence submitted by plaintiff, plaintiff is entitled to a default
2 judgment. As stated in the court's order, the plaintiff's most recent motion for default judgment
3 included factual allegation, which if contained in the complaint might have supported the granting
4 of the motion, but that a default judgment may only be based on the facts alleged in the
5 complaint. ECF No 31. Accordingly, the court again denied plaintiff's motion but granted
6 plaintiff leave to amend his complaint to include the missing factual assertions. Plaintiff now
7 seeks reconsideration of that order by a district judge. ECF No. 32. For the reasons that follow,
8 the motion must be denied.

9 As an initial matter, plaintiff previously consented to have a magistrate judge conduct all
10 proceedings and enter judgment under 28 U.S.C. § 636(c). ECF No. 5. Therefore, his request for
11 reconsideration must be presented to the assigned magistrate judge. *Gil v. Office of the Dist.*
12 *Atty.*, No. 2:13-cv-2609 KJN P, 2014 U.S. Dist. LEXIS 27691, at *1-2 (E.D. Cal. Feb. 24, 2014).
13 Accordingly, plaintiff's motion will be construed as a request for reconsideration by the
14 undersigned.

15 As to the merits, plaintiff's motion must be denied. He contends that the June 23rd order
16 denying his motion for default judgment is inconsistent with the court's prior order of September
17 30, 2013 (ECF No. 27). That order stated that plaintiff was entitled to a "determination" of
18 defendant Hirshler's liability based on his failure to appear. ECF No. 27 at 4. The fact that a
19 defendant is in default permits the court to assume as true the well pleaded facts of the complaint,
20 but it in no way eliminated the requirement that the factual allegations be sufficient to support the
21 entry of a judgment on the claim asserted. As the court noted in the June 23rd order, a
22 determination of whether defendant may be held liable must be premised on the facts plaintiff
23 pleaded in the complaint. The court has found that plaintiff's complaint failed to plead facts
24 showing that defendant Hirshler "had the requisite 'deliberately indifferent' mindset upon which
25 Eighth Amendment liability may be imposed." ECF No. 22 at 4. While plaintiff has alleged in
26 his motion (as opposed to the complaint) facts showing deliberate indifference, these facts must
27 be contained in the complaint itself to support entry of a default judgment. This was explained in
28 the most recent order denying plaintiff's motion. ECF No. 31 at 4-5.

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The court finds no justification for changing its order denying plaintiff's motion for default judgment. *See Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 880 (9th Cir. 2009) (noting that reconsideration should not be granted absent newly discovered evidence, clear error, or intervening change in the law).

The July 9, 2014 motion for reconsideration is therefore DENIED. If plaintiff wishes to file an amended complaint as discussed in the order of June 23, 2014, he shall do so within 21 days of the service of this order.

So ordered.

Dated: September 4, 2014.


EDMUND F. BRENNAN
UNITED STATES MAGISTRATE JUDGE