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

DUANE H. SCEPER,

No. CIV S-10-3341-KJM-CMK

Plaintiff,

vs.

FINDINGS AND RECOMMENDATIONS

THAI CAFÉ, et al.,

Defendants.

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Plaintiff, who is proceeding with retained counsel, brings this civil action.

Defendants' defaults were properly entered by the Clerk of the Court on January 27, 2011. Now pending before the court is plaintiff's motion for a default judgment (Doc. 15).

Whether to grant or deny default judgment is within the discretion of the court.

See Aldabe v. Aldabe, 616 F.2d 1089, 1092 (9th Cir. 1980). In exercising this discretion, the court considers the following factors: (1) the possibility of prejudice to the plaintiff if relief is denied; (2) the substantive merits of plaintiff's claims; (3) the sufficiency of the claims raised in the complaint; (4) the sum of money at stake; (5) the possibility of a dispute concerning material facts; (6) whether the default was due to excusable neglect; and (7) the strong policy favoring decisions on the merits when reasonably possible. See Eitel v. McCool, 782 F.2d 1470, 1471-72

1 (9th Cir 1986). Regarding the last factor, a decisions on the merits is impractical, if not
2 impossible, where defendants refuse to defend. See Pepsico, Inc. v. Cal. Sec. Cans, 238 F. Supp.
3 2d 1172, 1177 (C.D. Cal. 2002).

4 Where a defendant has failed to respond to the complaint, the court presumes that
5 all well-pleaded factual allegations relating to liability are true. See Geddes v. United Financial
6 Group, 559 F.2d 557, 560 (9th Cir. 1977) (per curiam); Danning v. Lavine, 572 F.2d 1386 (9th
7 Cir. 1978); Televideo Systems, Inc. v. Heidenthal, 826 F.2d 915, 917-18 (9th Cir. 1987) (per
8 curiam); see also Discovery Communications, Inc. v. Animal Planet, Inc., 172 F. Supp. 2d 1282,
9 1288 (C.D. Cal. 2001). Therefore, when determining liability, a defendant's default functions as
10 an admission of the plaintiff's well-pleaded allegations of fact. See Panning v. Lavine, 572 F.2d
11 1386 (9th Cir. 1978). However, the court has the responsibility of determining whether the facts
12 alleged in the complaint state a claim which can support the judgment. See Danning v. Lavine,
13 572 F.2d 1386, 1388 (9th Cir. 1978). For this reason, the district court does not abuse its
14 discretion in denying default judgment where the factual allegations as to liability lack merit.
15 See Aldabe, 616 F.2d at 1092-93.

16 While factual allegations concerning liability are deemed admitted upon a
17 defendant's default, the court does not presume that any factual allegations relating to the amount
18 of damages suffered are true. See Geddes, 559 F.2d at 560. The court must ensure that the
19 amount of damages awarded is reasonable and demonstrated by the evidence. See id. In
20 discharging its responsibilities, the court may conduct such hearings and make such orders as it
21 deems necessary. See Fed. R. Civ. P. 55(b)(2). In assessing damages, the court must review the
22 facts of record, requesting more information if necessary, to establish the amount to which
23 plaintiff is lawfully entitled. See Pope v. United States, 323 U.S. 1 (1944).

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1 In this case, plaintiff claims that defendants violated the Americans with
2 Disabilities Act and related California statutes. Plaintiff seeks statutory damages, attorney’s fees,
3 and costs, as well as injunctive relief directing defendants to remedy any and all violations. The
4 factual allegations regarding defendants’ liability are deemed admitted by way of defendants’
5 default. Therefore, it is established that defendants violated the Americans with Disabilities Act.
6 Under California Civil Code § 51(f), any violation of the Americans with Disabilities Act also
7 constitutes a violation of California’s Unruh Civil Rights Act. Under California Civil Code
8 § 52(a), a plaintiff is entitled to treble actual damages but no less than \$4,000.00 in statutory
9 damages for each violation. In this case, defendants violated the Americans with Disabilities Act
10 on four occasions, as alleged in the complaint. Rather than actual damages, plaintiff seeks
11 statutory damages totaling \$16,000.00, which the court finds to be appropriate.

12 Plaintiff also seeks attorney’s fees in the amount of \$5,845.00 for 16.7 hours of
13 work, as set forth in plaintiff’s counsel’s declaration. Plaintiff is entitled to reasonable attorney’s
14 fees as determined by the court. See id. Counsel states in his declaration that he is a 1988
15 graduate of Western State University School of Law in San Diego, California. He also states that
16 he was been practicing ADA and disability access law for “nearly ten years.” Counsel adds that,
17 over that period, he defended “approximately two hundred fifty (250) ADA claim” He also
18 states that he travels throughout California “providing workshops, seminars, lectures and other
19 presentations to business groups regarding compliance with the ADA and associated disability
20 access regulations and law.” Given this background, the court finds that counsel’s hourly rate of
21 \$250 is consistent with the rate awarded to experiences counsel in other ADA cases, and is
22 therefore reasonable.

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1 The court finds, however, that some of the time plaintiff’s counsel spent on the
2 case is excessive, especially in light of counsel’s extensive experience, the straightforward nature
3 of the case, and the lack of any unique legal or factual issues in the case. Specifically, the court
4 finds:

5 • Counsel states he spent .5 hours to “[r]eview photos of parking lot; cross check
6 for parking lot violations, ADAAG & CBC.” He spent an additional 1.5 hours to “[r]esearch
7 applicable ADAAG & CBC sections in re parking specs.” and additional .2 hours to “[r]esearch
8 CA VC § 22511.10 in re application to ADA claim.” In light of counsel’s extensive ADA
9 experience and obvious familiarity with the applicable laws and regulations, the court finds that
10 spending a total of 2.2 hours on these tasks is unreasonable and recommends reducing this time
11 by 1.5 hours to allow .7 hours on these tasks.

12 • Counsel states that he spent another .4 hours to “review photos from client
13 depicting non-compliant parking conditions” This work is duplicative of work described
14 above to review photos, and is therefor unreasonable. The court recommends disallowing this
15 amount entirely.

16 • Counsel states that he spent 1.9 hours drafting the complaint and another .7
17 hours to “[f]inalize and Efile ADA complaint.” The court finds that spending a total of 2.6 hours
18 to draft and file what is obviously a form complaint is unreasonable and recommends reducing
19 this amount by 1.6 hours to allow 1 hour on these tasks.

20 • Counsel states that he spent .7 hours to “[a]rrange for service of Summons and
21 Complaint” with his attorney service. The court finds it hard to imagine how this task could have
22 taken nearly an hour to complete, especially given that ADA litigation is the focus of counsel’s
23 practice and, therefore, both his office and attorney service should be familiar enough with this
24 task to accomplish them with little to no requirement for counsel to “arrange” anything. The
25 court recommend allowing .2 hours on this task.

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1 • Counsel states that he spent 5.8 hours preparing and filing the instant motion for
2 default judgment. Again, given counsel’s experience and the number of his prior cases which
3 were resolved by way of default judgment, the court finds that this amount is unreasonable to
4 prepare what is obviously a form motion. The court recommends reducing this amount by 2.8
5 hours to allow 3 hours for these tasks.

6 In summary, the court recommends that plaintiff recover attorneys fees in the
7 amount of \$2,475.00.

8 Plaintiff seeks costs totaling \$477.25. The court finds that such costs are
9 permitted under 42 U.S.C. §§ 12188(a)(1) and 2000a-3(a) and that the costs requested are
10 reasonable.

11 Finally, plaintiff seeks injunctive relief pursuant to 42 U.S.C. § 12188(a)(2),
12 which mandates injunctive relief for violations of the Americans with Disabilities Act that “shall
13 include an order to alter facilities to make such facilities readily accessible to and usable to
14 individuals with disabilities to the extent required by this subchapter.” The court finds that such
15 injunctive relief is appropriate in this case.

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1 Based on the foregoing, the undersigned recommends that:

- 2 1. Plaintiff's motion for default judgment (Doc. 15) be granted;
 - 3 2. Plaintiff be awarded monetary damages of \$18,952.25; and
 - 4 3. An injunction issue consistent with law directing defendants' compliance
- 5 with the Americans with Disabilities Act.

6 These findings and recommendations are submitted to the United States District
7 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within 14 days
8 after being served with these findings and recommendations, any party may file written
9 objections with the court. Responses to objections shall be filed within 14 days after service of
10 objections. Failure to file objections within the specified time may waive the right to appeal.
11 See Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

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13 DATED: November 2, 2011

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15 **CRAIG M. KELLISON**
16 UNITED STATES MAGISTRATE JUDGE