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

SCOTT N. JOHNSON,

Plaintiff,

No. 2:11-cv-01340 KJM KJN

v.

GURMINDER PARMAR, Individually
and d/b/a Tokay Liquors; FRASIER
CORP, a Nevada Corporation,

Defendants.

FINDINGS AND RECOMMENDATIONS

Presently before the court is plaintiff's motion for default judgment against defendant Gurminder Parmar, who is the only remaining named defendant in this action.¹ (Mot. for Default J., Dkt. No. 11; see also Order, July 13, 2011 (dismissing defendant Frasier Corp from the action without prejudice), Dkt. No. 10.) The court heard plaintiff's motion for default judgment on its law and motion calendar on October 20, 2011. Plaintiff Scott N. Johnson, an attorney, appeared at the hearing and represented himself. No appearance was made by or on behalf of Mr. Parmar. For the reasons stated below, the undersigned recommends that plaintiff's motion for default judgment be granted, that judgment be entered in plaintiff's favor, and that

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

1 plaintiff be awarded the requested damages and injunctive relief.

2 I. BACKGROUND

3 Plaintiff initiated this action on May 18, 2011, alleging violations of the
4 Americans with Disabilities Act of 1990 (“ADA”), 42 U.S.C. §§ 12101 et seq., and California’s
5 Unruh Civil Rights Act, Cal. Civ. Code §§ 51 et seq. (See generally Compl., Dkt. No. 1.)
6 Plaintiff, who is affected by quadriplegia and uses a wheelchair and a specially configured van,
7 alleges that Mr. Parmar owns, operates, manages, or leases a convenience store called Tokay
8 Liquors, which is located at 8 East Lockeford Street, in Lodi, California. (Compl. ¶¶ 1-3.)
9 Plaintiff alleges that Mr. Parmar is liable under the ADA and Unruh Civil Rights Act because of
10 architectural barriers to access at the business that plaintiff actually encountered, which consist of
11 a lack of: “the correct number and type of properly configured disabled parking space(s)
12 including the lack of a van accessible disabled parking space (no disabled parking exists) . . . ,
13 [an] accessible route . . . , [an] accessible entrance . . . , [an] accessible entrance, and accessibility
14 signage and striping.” (Id. ¶ 4.) Plaintiff alleges that the removal of these architectural barriers is
15 readily achievable. (Id.) Plaintiff seeks injunctive relief and statutorily authorized money
16 damages in an amount of \$8,000 pursuant to the Unruh Civil Rights Act. (See id. at 20-21; see
17 also Mot. for Default J. at 4.)

18 An affidavit of service filed by plaintiff reflects that on June 9, 2011, plaintiff,
19 through a process server, effectuated service of process on Mr. Parmar at the address provided
20 for Tokay Liquors. Plaintiff’s process server made three attempts to personally serve Mr. Parmar
21 and, on June 9, 2011, left the summons, complaint, and other documents with plaintiff’s wife,
22 Satman Parmar. (See Aff. of Serv., Dkt. No. 5; see also Req. for Entry of Default, Ex. A, Dkt.
23 No. 7, Doc. No. 7-1.) Plaintiff’s process server also mailed a copy of the summons, complaint,
24 and other documents to the address provided for Tokay Liquors. (See Aff. of Serv. at 2.)

25 On July 11, 2011, plaintiff requested that the Clerk of Court enter default against
26 Mr. Parmar. (Req. for Entry of Default at 1-2.) That same day, plaintiff dismissed Frasier

1 Corporation, alleged by plaintiff to be the property owner, without prejudice (Dkt. Nos. 8, 10).
2 On July 12, 2011, the Clerk of Court entered the default of Mr. Parmar. (Clerks Cert. of Entry of
3 Default, Dkt. No. 9.) In entering default, the Clerk of Court stated that it appeared from the
4 record and papers on file in the action that Mr. Parmar was duly served with process, but failed to
5 appear, plead, or answer plaintiff's complaint within the time allowed by law. (See id.)

6 On August 8, 2011, plaintiff filed a motion for default judgment against Mr.
7 Parmar and served a copy of the motion on Mr. Parmar by U.S. mail. (Cert. of Serv., Aug. 8,
8 2011, Dkt. No. 11.) A review of the court's docket reveals that Mr. Parmar has not appeared in
9 this action or filed a response to the motion for default judgment.²

10 Plaintiff's motion for default judgment seeks statutory damages pursuant to the
11 Unruh Civil Rights Act in the amount of \$8,000, which consists of minimum statutory damages
12 of \$4,000 for each of two actual visits to the premises in question that resulted in discriminatory
13 events.³ (See Mot. for Default J. at 4.) Plaintiff also seeks injunctive relief in the form of readily
14 achievable property alterations that consist of providing the correct number and type of properly
15 configured van-accessible disabled parking spaces, an accessible route to an accessible entrance,
16 and accessibility signage and striping, all in accordance with the ADA and the Americans With
17 Disabilities Act Accessibility Guidelines contained in 28 C.F.R. Part 36. (See id. at 4-5.)

18 II. LEGAL STANDARDS

19 Pursuant to Federal Rule of Civil Procedure 55, default may be entered against a
20 party against whom a judgment for affirmative relief is sought who fails to plead or otherwise
21 defend against the action. See Fed. R. Civ. P. 55(a). However, "[a] defendant's default does not
22 automatically entitle the plaintiff to a court-ordered judgment." PepsiCo, Inc. v. Cal. Sec. Cans,

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24 ² Plaintiff's motion represents that at some point he "was contacted by Frasier
25 Corporation who is the property owners but no resolution to this action was reached." (Mot. for
26 Default J. at 4.)

³ Plaintiff is not seeking damages for two alleged instances of forgone visits to the
accommodation over the past year. (See Mot. for Default J. at 4; Compl. ¶ 4.)

1 238 F. Supp. 2d 1172, 1174 (C.D. Cal. 2002) (citing Draper v. Coombs, 792 F.2d 915, 924-25
2 (9th Cir. 1986)). Instead, the decision to grant or deny an application for default judgment lies
3 within the district court’s sound discretion. Aldabe v. Aldabe, 616 F.2d 1089, 1092 (9th Cir.
4 1980). In making this determination, the court considers the following factors:

5 (1) the possibility of prejudice to the plaintiff, (2) the merits of
6 plaintiff’s substantive claim, (3) the sufficiency of the complaint,
7 (4) the sum of money at stake in the action[,] (5) the possibility of
8 a dispute concerning material facts[,] (6) whether the default was
9 due to excusable neglect, and (7) the strong policy underlying the
10 Federal Rules of Civil Procedure favoring decisions on the merits.

11 Eitel v. McCool, 782 F.2d 1470, 1471-72 (9th Cir. 1986). Default judgments are ordinarily
12 disfavored. Id. at 1472.

13 As a general rule, once default is entered, well-pleaded factual allegations in the
14 operative complaint are taken as true, except for those allegations relating to damages.
15 TeleVideo Sys., Inc. v. Heidenthal, 826 F.2d 915, 917-18 (9th Cir. 1987) (per curiam) (citing
16 Geddes v. United Fin. Group, 559 F.2d 557, 560 (9th Cir. 1977) (per curiam)); accord Fair
17 Housing of Marin v. Combs, 285 F.3d 899, 906 (9th Cir. 2002). In addition, although well-
18 pleaded allegations in the complaint are admitted by a defendant’s failure to respond, “necessary
19 facts not contained in the pleadings, and claims which are legally insufficient, are not established
20 by default.” Cripps v. Life Ins. Co. of N. Am., 980 F.2d 1261, 1267 (9th Cir. 1992) (citing
21 Danning v. Lavine, 572 F.2d 1386, 1388 (9th Cir. 1978)); accord DIRECTV, Inc. v. Hoa Huynh,
22 503 F.3d 847, 854 (9th Cir. 2007) (stating that a defendant does not admit facts that are not well-
23 pled or conclusions of law); Abney v. Alameida, 334 F. Supp. 2d 1221, 1235 (S.D. Cal. 2004)
24 (“[A] default judgment may not be entered on a legally insufficient claim.”). A party’s default
25 conclusively establishes that party’s liability, but it does not establish the amount of damages.
26 Geddes, 559 F.2d at 560.

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1 III. DISCUSSION

2 A. Appropriateness of the Entry of Default Judgment Under the Eitel Factors

3 1. Factor One: Possibility of Prejudice to Plaintiff

4 The first Eitel factor considers whether the plaintiff would suffer prejudice if
5 default judgment is not entered, and such potential prejudice to the plaintiff militates in favor of
6 granting a default judgment. See PepsiCo, Inc., 238 F. Supp. 2d at 1177. Here, plaintiff would
7 potentially face prejudice if the court did not enter a default judgment. Absent entry of a default
8 judgment, plaintiff would be without another recourse for recovery. Accordingly, the first Eitel
9 factor favors the entry of a default judgment.

10 2. Factors Two and Three: The Merits of Plaintiff’s Substantive Claims and
11 the Sufficiency of the Complaint

12 The undersigned considers the merits of plaintiff’s substantive claims and the
13 sufficiency of the complaint together below because of the relatedness of the two inquiries. The
14 undersigned must consider whether the allegations in the complaint are sufficient to state a claim
15 that supports the relief sought. See Danning, 572 F.2d at 1388; PepsiCo, Inc., 238 F. Supp. 2d
16 at 1175.

17 a. Americans with Disabilities Act

18 Title III of the ADA provides that “[n]o individual shall be discriminated against
19 on the basis of disability in the full and equal enjoyment of the goods, services, facilities,
20 privileges, advantages, or accommodations of any place of public accommodation by any person
21 who owns, leases (or leases to), or operates a place of public accommodation.” 42 U.S.C.
22 § 12182(a). Discrimination includes “a failure to remove architectural barriers . . . in existing
23 facilities . . . where such removal is readily achievable.” Id. § 12182(b)(2)(A)(iv); see also
24 Chapman v. Pier 1 Imports (U.S.) Inc., 631 F.3d 939, 945 (9th Cir. 2011) (en banc).⁴ The ADA

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26 ⁴ In Chapman, the en banc panel majority reiterated that “[t]he concept of
‘discrimination’ under the ADA does not extend only to obviously exclusionary conduct—such

1 defines the term “readily achievable” as “easily accomplishable and able to be carried out
2 without much difficulty or expense.” 42 U.S.C. § 12181(9).⁵

3 “To prevail on a Title III discrimination claim, the plaintiff must show that (1) [he
4 or she] is disabled within the meaning of the ADA; (2) the defendant is a private entity that owns,
5 leases, or operates a place of public accommodation; and (3) the plaintiff was denied public
6 accommodations by the defendant because of her [or his] disability.” Molski v. M.J. Cable, Inc.,
7 481 F.3d 724, 730 (9th Cir. 2007). Furthermore, “[t]o succeed on a ADA claim of discrimination
8 on account of one’s disability due to an architectural barrier, the plaintiff must also prove that:
9 (1) the existing facility at the defendant’s place of business presents an architectural barrier
10 prohibited under the ADA, and (2) the removal of the barrier is readily achievable.” Parr v.
11 L & L Drive-Inn Rest., 96 F. Supp. 2d 1065, 1085 (D. Haw. 2000); accord Hubbard v. 7-Eleven,
12 Inc., 433 F. Supp. 2d 1134, 1138 (S.D. Cal. 2006).

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15 as a sign stating that persons with disabilities are unwelcome or an obstacle course leading to a
16 store’s entrance. Rather, the ADA proscribes more subtle forms of discrimination—such as
17 difficult-to-navigate restrooms and hard-to-open doors—that interfere with disabled individuals’
18 ‘full and equal enjoyment’ of places of public accommodation.” Chapman, 631 F.3d at 945.

19 ⁵ Section 12181(9) lists several factors to be considered in determining whether an action
20 is readily achievable:

21 (A) the nature and cost of the action needed under this chapter;

22 (B) the overall financial resources of the facility or facilities involved in
23 the action; the number of persons employed at such facility; the effect on
24 expenses and resources, or the impact otherwise of such action upon the
25 operation of the facility;

26 (C) the overall financial resources of the covered entity; the overall size of
the business of a covered entity with respect to the number of its
employees; the number, type, and location of its facilities; and

(D) the type of operation or operations of the covered entity, including the
composition, structure, and functions of the workforce of such entity; the
geographic separateness, administrative or fiscal relationship of the facility
or facilities in question to the covered entity.

42 U.S.C. § 12181(9)(A)-(D).

1 Here, plaintiff alleges that: (1) he is disabled (see Compl. ¶ 1); (2) Mr. Parmar’s
2 retail business, Tokay Liquors, is a place of public accommodation (id. ¶¶ 2-3); (3) plaintiff was
3 denied access to Tokay Liquors because of plaintiff’s disability (id. ¶ 4); (4) Tokay Liquors
4 contains specified architectural barriers (id.); and (5) the removal of these architectural barriers is
5 readily achievable (id.). Because plaintiff’s allegations are taken as true following the entry of
6 default, the undersigned concludes that plaintiff has met his burden to state a prima facie Title III
7 discrimination claim.

8 b. Unruh Civil Rights Act

9 The Unruh Civil Rights Act provides: “All persons within the jurisdiction of this
10 state are free and equal, and no matter what their sex, race, color, religion, ancestry, national
11 origin, disability, medical condition, marital status, or sexual orientation are entitled to the full
12 and equal accommodations, advantages, facilities, privileges, or services in all business
13 establishments of every kind whatsoever.” Cal. Civ. Code § 51(b). Generally, to prevail on his
14 disability discrimination claim under the Unruh Civil Rights Act, plaintiff must establish that:
15 (1) he was denied the full and equal accommodations, advantages, facilities, privileges, or
16 services in a business establishment; (2) his disability was a motivating factor for the denial;
17 (3) the defendant denied plaintiff the full and equal accommodations, advantages, facilities,
18 privileges, or services; and (4) the defendant’s wrongful conduct caused plaintiff to suffer injury,
19 damage, loss, or harm. See Cal. Civil Jury Instructions (BAJI), No. 7.92 (Spring 2011 ed.). As
20 provided by statute, a violation of the ADA also constitutes a violation of the Unruh Civil Rights
21 Act. Cal. Civ. Code § 51(f); see also Munson v. Del Taco, Inc., 46 Cal. 4th 661, 664, 208 P.3d
22 623, 624 (2009).

23 Here, because plaintiff’s complaint properly alleges a prima facie claim under the
24 ADA, plaintiff has also properly alleged facts establishing the necessary elements for his Unruh
25 Civil Rights Act claim. Accordingly, the second and third Eitel factors favor the entry of a
26 default judgment.

1 3. Factor Four: The Sum of Money at Stake in the Action

2 Under the fourth factor cited in Eitel, “the court must consider the amount of
3 money at stake in relation to the seriousness of Defendant’s conduct.” PepsiCo, Inc., 238 F.
4 Supp. 2d at 1177; see also Philip Morris USA, Inc. v. Castworld Prods., Inc., 219 F.R.D. 494,
5 500 (C.D. Cal. 2003). Here, plaintiff seeks only the statutory minimum damages under the
6 Unruh Civil Rights Act for two acts of discrimination, i.e., \$8,000. Plaintiff’s request for
7 statutory damages is tailored to Mr. Parmar’s specific wrongful conduct, and the statutes
8 involved contemplate such an award.⁶ Under these circumstances, the undersigned concludes
9 that this factor favors the entry of a default judgment.

10 4. Factor Five: The Possibility of a Dispute Concerning Material Facts

11 The facts of this case are relatively straightforward, and plaintiff has provided the
12 court with well-pleaded allegations and documentation supporting his claims. Here, the court
13 may assume the truth of well-pleaded facts in the complaint (except as to damages) following the
14 clerk’s entry of default and, thus, there is no likelihood that any genuine issue of material fact
15 exists. See, e.g., Elektra Entm’t Group Inc. v. Crawford, 226 F.R.D. 388, 393 (C.D. Cal. 2005)
16 (“Because all allegations in a well-pleaded complaint are taken as true after the court clerk enters
17 default judgment, there is no likelihood that any genuine issue of material fact exists.”); accord
18 Philip Morris USA, Inc., 219 F.R.D. at 500; PepsiCo, Inc., 238 F. Supp. 2d at 1177.

19 The undersigned has some pause regarding the possibility of a dispute concerning
20 material facts because the now-dismissed co-defendant, Frasier Corporation, apparently
21 contacted plaintiff at some point during the litigation. (Mot. for Default J. at 4.) However, in
22 light of Mr. Parmar’s failure to oppose the pending motion or appear at the hearing on plaintiff’s
23 motion for default judgment, the undersigned concludes that the fifth factor nonetheless favors a
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25 ⁶ Indeed, according to his motion for default judgment, plaintiff could also seek actual
26 damages, attorney’s fees, and statutory damages for additional acts of discrimination, but has
chosen only to seek \$8,000 in minimum statutory damages and injunctive relief.

1 default judgment.

2 5. Factor Six: Whether the Default Was Due to Excusable Neglect

3 Upon review of the record before the court, the undersigned finds that the default
4 was not the result of excusable neglect. See PepsiCo, Inc., 238 F. Supp. 2d at 1177. Mr. Parmar
5 has had ample notice of this lawsuit. Plaintiff properly served Mr. Parmar with process and also
6 served Mr. Parmar by mail with the motion for default judgment. Despite ample notice of this
7 lawsuit and plaintiff’s intention to move for the entry of a default judgment, Mr. Parmar has not
8 appeared in this action to date and has done nothing to defend himself. Thus, the record suggests
9 that Mr. Parmar has chosen not to defend himself in this action, and not that the default resulted
10 from any excusable neglect. Accordingly, this Eitel factor favors the entry of a default judgment.

11 6. Factor Seven: The Strong Policy Underlying the Federal Rules of Civil
12 Procedure Favoring Decisions on the Merits

13 “Cases should be decided upon their merits whenever reasonably possible.” Eitel,
14 782 F.2d at 1472. However, district courts have concluded with regularity that this policy,
15 standing alone, is not dispositive, especially where a defendant fails to appear or defend itself in
16 an action. PepsiCo, Inc., 238 F. Supp. 2d at 1177; see also Craigslist, Inc. v. Naturemarket, Inc.,
17 694 F. Supp. 2d 1039, 1061 (N.D. Cal. 2010); ACS Recovery Servs., Inc. v. Kaplan, No. C 09-
18 01304, 2010 WL 144816, at *7 (N.D. Cal. Jan. 11, 2010) (unpublished); Hartung v. J.D. Byrider,
19 Inc., No. 1:08-cv-00960 AWI GSA, 2009 WL 1876690, at *5 (E.D. Cal. June 26, 2009)
20 (unpublished). Accordingly, although the undersigned is cognizant of the policy in favor of
21 decisions on the merits—and consistent with existing policy would prefer that this case be
22 resolved on the merits—that policy does not, by itself, preclude the entry of default judgment.

23 Upon consideration of the Eitel factors, the undersigned concludes that plaintiff is
24 entitled to the entry of default judgment against Mr. Parmar, individually and doing business as
25 Tokay Liquors, and recommends that a such a default judgment be entered. All that remains is
26 the determination of the relief to which plaintiff is entitled.

1 B. Terms of the Judgment to Be Entered

2 After determining that a party is entitled to entry of default judgment, the court
3 must determine the terms of the judgment to be entered. Considering plaintiff's briefing and the
4 record in this case, the undersigned concludes that plaintiff is entitled to an award of statutory
5 damages in the amount of \$8,000. The Unruh Civil Rights Act provides for, among other things,
6 a minimum statutory damage amount of \$4,000 per violation. Cal. Civ. Code § 52(a). Plaintiff
7 seeks \$8,000 in damages for violation of the Unruh Civil Rights Act based on two actual visits to
8 Tokay Liquors. (Mot. for Default J. at 4.) The court recommends that plaintiff be awarded those
9 statutory damages. In addition, because plaintiff satisfactorily alleged his ADA claim, the
10 undersigned recommends that the plaintiff be granted injunctive relief, as described below, to
11 remedy the identified architectural barriers to the extent the remediation is readily achievable.

12 IV. CONCLUSION

13 For the foregoing reasons, IT IS HEREBY RECOMMENDED that:


- 14 1. Plaintiff's motion for default judgment (Dkt. No. 11) be granted.
- 15 2. Judgment be entered in plaintiff's favor and against the following
16 defendant: Gurminder Parmar, individually and doing business as Tokay Liquors.
- 17 3. Plaintiff be awarded statutory damages in the amount of \$8,000.00.
- 18 4. Plaintiff be granted an injunction requiring defendant Parmar to provide
19 readily achievable property alterations that consist of: the correct number and type of properly
20 configured, van-accessible disabled parking spaces, an accessible route to an accessible entrance,
21 and accessibility signage and striping signage, all in accordance with the Americans With
22 Disabilities Act of 1990 and the Americans With Disabilities Act Accessibility Guidelines
23 contained in 28 C.F.R. Part 36.
- 24 5. The Clerk of Court be directed to close this case.

25 These findings and recommendations are submitted to the United States District
26 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen

1 days after being served with these findings and recommendations, any party may file written
2 objections with the court and serve a copy on all parties. Id.; see also E. Dist. Local Rule 304(b).
3 Such a document should be captioned “Objections to Magistrate Judge’s Findings and
4 Recommendations.” Any response to the objections shall be filed with the court and served on
5 all parties within fourteen days after service of the objections. E. Dist. Local Rule 304(d).
6 Failure to file objections within the specified time may waive the right to appeal the District
7 Court’s order. Turner v. Duncan, 158 F.3d 449, 455 (9th Cir. 1998); Martinez v. Ylst, 951 F.2d
8 1153, 1156-57 (9th Cir. 1991).

9 IT IS SO RECOMMENDED.

10 DATED: October 20, 2011

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14 KENDALL J. NEWMAN
15 UNITED STATES MAGISTRATE JUDGE
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