UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES—GENERAL

**Case No. CV 21-8452-MWF (PDx)** **Date: July 7, 2023**
Title: Portia Mason v. Herbarium LLC

Present: The Honorable MICHAEL W. FITZGERALD, U.S. District Judge

| Deputy Clerk: | Court Reporter: |
|---|---|
| Rita Sanchez | Not Reported |
| **Attorneys Present for Plaintiff:** | **Attorneys Present for Defendant:** |
| None Present | None Present |

**Proceedings (In Chambers):** ORDER GRANTING PLAINTIFF'S RENEWED MOTION FOR DEFAULT JUDGMENT [19]

Before the Court is Plaintiff Portia Mason's Renewed Motion for Entry of Default Judgment as to Defendant Herbarium LLC (the "Motion"), filed April 19, 2023. (Docket No. 19). No Opposition was filed.

The Court has read and considered the Motion and held a hearing on **May 30, 2023**. Defendant did not appear at the hearing, despite having received notice.

The Motion is **GRANTED**. Plaintiff has satisfied all procedural and substantive requirements for a default judgment.

Plaintiff's request for injunctive relief and statutory damages is **GRANTED**. Plaintiff's request for attorney's fees and costs is reduced.

## I. BACKGROUND

Plaintiff Portia Mason is legally blind. (Complaint ¶ 1 (Docket No. 1)). Nonetheless, Plaintiff can still access online content with the assistance of screen-reading software. (*Id.* ¶ 25). Plaintiff is a proficient user of screen-reading software such as JAWS and Mac's VoiceOver function. (*Id.*).

Defendant Herbarium LLC offers a public website at https://herbarium.la/ (the "Website"). (*Id.* ¶ 23). Plaintiff claims that, upon numerous visits to the Website, Plaintiff encountered multiple access barriers that denied Plaintiff full and equal access

to the services offered. (*Id*. ¶ 26). For example, Plaintiff claims that the Website lacks alternative text ("alt-text"), which is invisible code embedded beneath an image or graphic on a website that is read aloud to a user using screen-reading software. (*Id*. ¶ 27). Because the missing alt-text prevents screen-reading software from vocalizing a description of an image or graphic on the Website, Plaintiff is allegedly unable to determine what product or promotion is being advertised. (*Id*.). Plaintiff also alleges that the Website contains empty links that contain no text, which obscures the purpose of the link from Plaintiff; and the Website contains redundant links that loop Plaintiff back to the same web address, which causes Plaintiff additional navigation and repetition. (*Id*. ¶ 28).

Based on the foregoing, Plaintiff initiated a class action lawsuit against Defendant on October 26, 2021. Plaintiff asserts two claims for relief: (1) violation of the American's with Disabilities Act ("ADA") 42 U.S.C. § 12181 *et seq*.; and (2) violation of the Unruh Civil Rights Act, California Civil Code § 51 *et seq*. (*Id*. ¶¶ 55–68).

On November 1, 2021, Plaintiff served Defendant's agent for service of process by way of substitute service in accordance with Federal Rule of Civil Procedure 4(e)(1) under California law. (Proof of Service (Docket No. 10)). Defendant, however, never made an appearance in this action. On December 3, 2021, Plaintiff filed a Request for Clerk's Entry of Default, and Default was entered on December 7, 2021. (Docket Nos. 13, 14). Plaintiff filed a motion seeking default judgment on January 21, 2022. (Docket No. 14). On September 28, 2022, the Court issued an Order Denying Plaintiff's Motion for Entry of Default Judgment (the "Prior Order") because the Court had not yet certified Plaintiff's putative class and class members had not been given an opportunity to opt out. (Prior Order (Docket No. 16) at 3). The Court directed Plaintiff to move for class certification or, alternatively, refile her motion and seek default judgment only on behalf of herself. (*Id.* at 4).

On April 19, 2023, Plaintiff filed the Motion on behalf of herself as an individual. (Motion at 1).

## II. DISCUSSION

Federal Rule of Civil Procedure 55(b) permits a court-ordered default judgment following the entry of default by the clerk under Rule 55(a).

As stated in the Prior Order, the decision of whether to enter default judgment is within the sole discretion of the trial court. *See Aldabe v. Aldabe*, 616 F.2d 1089, 1092 (9th Cir. 1980) ("The district court's decision whether to enter a default judgment is a discretionary one"). To determine whether a default judgment is appropriate, courts assess whether a plaintiff has met both procedural and substantive requirements.

### A. Procedural Requirements

Federal Rule of Civil Procedure 55(b) permits a court-ordered default judgment following the entry of default by the clerk under Rule 55(a). Having reviewed the filings in this action, the Court determines that all four procedural requirements of Local Rule 55-1 are met: (1) the Clerk entered default against Defendant on December 7, 2022 (Docket No. 12); (2) Defendant failed to respond to the Complaint; (3) Defendant is not an infant nor an incompetent person; and (4) Defendant is not serving in the military and thus the Service Members Civil Relief Act does not apply.

Plaintiff served Defendant with the original Summons and Complaint on November 1, 2021. (Docket. No. 10). Plaintiff's Request for Entry of Default was served on December 3, 2021, and Default was entered on December 7, 2021. (*See* Docket Nos. 11-5 and 12).

As a matter of discretion, the Court also requires that a plaintiff serve an application for default judgment on the relevant defendant. The Court does not require service under Rule 4 but does require that the service is reasonably likely to provide notice to the defendant. Plaintiff included a "Proof of Service" with his Motion certifying that the Motion and supporting declarations were mailed to Defendant's counsel. (Supplemental Proof of Service (Docket No. 19-4) at 10). On April 19, 2023, Plaintiff caused a copy of the Motion to be mailed to Defendant's agent, Shlomo Meiri, at 979 N. La Brea Ave., West Hollywood, CA 90038. (*Id.*).

Accordingly, Plaintiff has met the procedural requirements for obtaining a default judgment.

**B. Substantive Requirements**

With respect to the substantive requirements, the Ninth Circuit directs courts to consider seven discretionary factors before rendering a decision on a motion for default judgment. *See Eitel v. McCool*, 782 F.2d 1470, 1471–72 (9th Cir. 1986). The seven factors are: (1) the possibility of prejudice to the plaintiff; (2) the merits of the plaintiff's substantive claim; (3) the sufficiency of the Complaint; (4) the sum of money at stake in the action; (5) the possibility of a dispute concerning material facts; (6) whether the default was due to excusable neglect; and (7) the strong policy underlying the Federal Rules of Civil Procedure favoring a decision on the merits. *See id.*

**1. Possibility of prejudice**

The first factor asks the Court to consider if prejudice to the Plaintiff would occur without the default judgment, e.g., where there is no "recourse for recovery" other than default judgment. *Philip Morris USA, Inc. v. Castworld Prods., Inc.*, 219 F.R.D. 494, 499 (C.D. Cal. 2003). Because Defendant's failure to answer the Complaint constitutes an admission as to the allegations contained in the FAC, the Court must accept these allegations as true. *See id.* at 500. Plaintiff will be without recourse and will likely suffer prejudice without judgment due to Defendant's actions.

**2. Merits and sufficiency**

The second and third *Eitel* factors, which turn on the merits of Plaintiff's substantive claims and the legal sufficiency of the operative complaint, merit further analysis. *See Eitel*, 782 F.2d at 1471-72. Courts typically evaluate these factors together, looking to whether the plaintiff has "state[d] a claim on which the [plaintiff] may recover." *PepsiCo*, 238 F. Supp. 2d at 1175. "[C]ourts often treat these as the [two] most important [*Eitel*] factors." *Mnatsakanyan v. Goldsmith & Hull APC*, No. CV 12-4358 MMM (PLAx), 2013 WL 10155707, at *10 (C.D. Cal. May 14, 2013).

With respect to the second and third factors, Plaintiff has established that Defendant violated the ADA in failing providing accessible website in conformance with ADA standards. (*See* FAC ¶¶ 26–29). Taking the allegations in the Complaint as true, and considering Plaintiff's supplemental evidence, the second and third *Eitel* factors favor default judgment.

Title III of the ADA provides that "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation." 42 U.S.C. § 12182(a). "To prevail on a Title III discrimination claim, the plaintiff must show that (1) she is disabled within the meaning of the ADA; (2) the defendant is a private entity that owns, leases, or operates a place of public accommodation; and (3) the plaintiff was denied public accommodations by the defendant because of her disability." *Molski v. M.J. Cable, Inc.*, 481 F.3d 724, 730 (9th Cir. 2007).

"On their own, websites are not places of public accommodation" under the ADA. *Langer v. Pep Boys Manny Moe & Jack of Cal.*, No. 20-cv-06015-DMR, 2021 WL 148237, at * 5 (N.D. Cal. Jan. 15, 2021) (citing *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1114 (9th Cir. 2000) (holding that the ADA covers "actual, physical places where goods or services are open to the public, and places where the public gets those goods or services")). But "[t]he requirement that a place of public accommodation refer to a physical place . . . does not preclude a plaintiff from challenging a business' online offerings," *Reed v. CVS Pharmacy, Inc.*, No. 17-CV-3877-MWF (SKx), 2017 WL 4457508, at *3 (C.D. Cal. Oct. 3, 2017), and "the ADA mandates that places of public accommodation . . . provide auxiliary aids and services to make visual materials available to individuals who are blind," *Robles v. Domino's Pizza, LLC*, 913 F.3d 898, 904 (9th Cir. 2019). Thus, the Ninth Circuit held in *Robles* that websites are covered by the ADA as long as there is a "nexus" between the website and the physical location. 913 F.3d at 905. The requisite nexus exists when the challenged website "facilitate[s] access to" or otherwise "connect[s] customers to the goods and services of" a place of public accommodation. *Id.* at 905-06.

Here, Plaintiff has sufficiently alleged a violation of Title III of the ADA. Plaintiff has pleaded that she is disabled because she is legally blind (Complaint ¶ 1) and that she was denied public accommodations by the lack of screen-reading software and other accessibility barriers present on Defendant's website. (*Id.* ¶¶ 26-29). Plaintiff has also sufficiently alleged the "public accommodation" element of an ADA claim by pleading that the access barriers on Defendant's website rendered her "unable to find the locations and hours of operation of Defendant's stores . . ., preventing [her] from visiting the locations to view and purchase products and/or services." (*Id.* ¶ 31). This is sufficient to establish the requisite nexus between Defendant's website and its physical locations. *See, e.g.*, *Robles*, 913 F.3d at 905 (finding a nexus between the defendant's website and physical restaurants where "[c]ustomers use the website ... to locate a nearby Domino's restaurant and order pizzas for at-home delivery or in-store pickup"); *see also Haggar v. Ashley Furniture Indus., Inc.*, No. LA CV 19-01266-PA (Jcx), 2019 WL 8886026, at *3 (C.D. Cal. Dec. 12, 2019) (alleging that the plaintiffs tried to use the defendant's website "to locate physical stores, and order furniture and other products available at [d]efendant's physical locations" was sufficient to show nexus); *Farr v. Hobby Lobby Stores, Inc.*, No. CV 19-5949-DMG (ASx), 2020 WL 3978078, at *3 (C.D. Cal. Apr. 29, 2020) (denying motion to dismiss where the plaintiff alleged that the defendant's web-based barriers rendered him "unable to locate information about store locations and hours").

Plaintiff has satisfactorily pleaded a violation of the ADA. Plaintiff has also stated a claim under the Unruh Act because "[a]ny violation of the ADA necessarily constitutes a violation of the Unruh Act." *Molski*, 481 F.3d at 731; *see also* Cal. Civ. Code § 51(f). Because Plaintiff has pleaded meritorious claims for violations of the only two causes of action in her complaint, the second and third *Eitel* factors favor default judgment.

Accordingly, these factors weigh in favor of granting default judgment.

**3. Amount in dispute**

The Court is required to consider the amount in dispute as compared against Defendant's conduct. *See Philip Morris*, 219 F.R.D. at 500 (citing *PepsiCo Inc. v. Cal. Sec. Cans.*, 238 F. Supp. 2d 1172, 1176 (C.D. Cal. 2002), *Eitel*, 782 F.2d at 1471–72). Here, Plaintiff seeks $12,750 in statutory damages and attorneys' fees and costs. (*See* Motion at 8). The amount sought by Plaintiff is based on Defendant's alleged violation of the ADA. Plaintiff's allegations provide a basis for such an award, favoring default judgment.

**4. Possibility of factual dispute**

On the fifth factor, possibility of dispute, Defendant has shown no intent to participate in the action, Plaintiff has demonstrated facts necessary to support her claims, and default has been entered; it seems unlikely a genuine issue may exist. (*See id.*). Defendant has also not opposed the Motion. This factor favors default judgment.

**5. Excusable neglect**

There is no indication of excusable neglect here. Defendant was served via substituted service with the Complaint and via mail with the Motion. Accordingly, the likelihood that default as to Defendant is the result of excusable neglect is remote. This factor favors default judgment. *See Philip Morris*, 219 F.R.D. at 501.

**6. Policy favoring decision on merits**

The Court determines that, with the exception of the strong policy favoring a decision on the merits, which is not dispositive, the *Eitel* factors weigh in favor of granting the Application as against Defendant.

**C. Remedies**

Having determined that entry of default is appropriate, the Court next must consider remedies. Plaintiff seeks four forms of relief: (1) injunctive relief; (2) $4,000

in statutory damages under the Unruh Act; and (3) $8,750 in attorney's fees and costs. (*See* Motion at 12–14). These requests in principle are proper because they do not "differ in kind from, or exceed in amount, what is demanded in the pleadings." *Craigslist, Inc. v. Naturemarket, Inc.*, 694 F. Supp. 2d 1039, 1051 (N.D. Cal. 2010) (quoting Fed. R. Civ. P. 54(c)).

**1. Injunctive Relief**

Plaintiff requests the Court enter a permanent injunction requiring Defendant to conform its website to comply with Web Content Accessibility Guidelines ("WCAG"). (Motion at 12). Specifically, Plaintiff asks the Court to order Defendant to: (1) modify the website to achieve substantial conformance with WCAG 2.1 within 24 months of the entry of judgment in this case; and (2) adopt and implement a "website accessibility policy" within 180 days of entry of judgment whereby "any changes or additions to the [w]ebsite will substantially conform with WCAG 2.1." (*Id.* at 12). The Ninth Circuit confirmed in *Robles* that "district court[s] can order compliance with WCAG 2.0 as an equitable remedy." 913 F.3d at 907. District courts have since issued injunctions ordering defendants to conform their websites with WCAG 2.1, the latest version of the guidelines. *See, e.g.*, *Payan v. L.A. Comm. Coll. Dist.*, No. 2:17-cv-01697-SVW-SK, 2020 WL 5289845, at *2 (C.D. Cal. May 29, 2020).

Accordingly, the Court determines the injunctive relief sought by Plaintiff is appropriate.

**2. Statutory Damages**

Plaintiff seeks an award of $4,000 under pursuant to the Unruh Act. (Motion at 13). The Unruh Act provides as follows:

> Whoever denies, aids or incites a denial, or makes any discrimination or distinction contrary to Section 51 , 51.5 , or 51.6 , is liable for each and every offense for the actual damages, and any amount that may be determined by a jury, or a court sitting without a jury, up to a maximum

> of three times the amount of actual damage but in no case less than four thousand dollars ($4,000), and any attorney's fees that may be determined by the court in addition thereto, suffered by any person denied the rights provided in Section 51 , 51.5 , or 51.6.

Cal. Civ. Code § 52(a). Plaintiff's request for the statutory minimum damages for a violation is reasonable.

Accordingly, the Court awards $4,000 in damages.

**3. Attorney's Fees and Costs**

Plaintiff seeks an award of attorney's fees and costs in the amount of $8,750. (Motion at 13–14).

The ADA and the Unruh Act authorizes district courts to award attorneys' fees to the prevailing party. *See* 42 U.S.C. § 12205; Cal. Civ. § 52(a). Although the Local Rules provide an attorney fee schedule in conjunction with entry of default judgment, a plaintiff may request a fee in excess of the amount provided for in the schedule. *See* L.R. 55-3. Where a plaintiff makes such a request, the Court must consider the fee under the usual lodestar calculation method without relying on the fee schedule. *See Machowski v. 333 N. Placentia Prop., LLC*, 38 F.4th 837, 841–42 (9th Cir. 2022) (citing *Vogel v. Harbor Plaza Ctr., LLC*, 893 F.3d 1152, 1159–60 (9th Cir. 2018)).

Here, Plaintiff's counsel, Carolin Shining, states that she and her colleagues expended fourteen hours on the case, resulting in a total of $8,750 in attorney fees and costs. (Declaration of Carolin Shining ("Shining Decl.") ¶ 6).

The Court cannot determine which attorneys performed what tasks and at what rates based on the information provided. Attorney's fees should be "documented by contemporaneously created time records that specify, for each attorney, the date, the hours expended, and the nature of the work done." *Ferrara v. CMR Contracting LLC*, 848 F.Supp.2d 304, 313 (E.D. NY 2012) (internal quotes omitted).

Moreover, the Court finds the stated time on Plaintiff's case to be unreasonable. Reasonable hours expended on a case are hours that are not "excessive, redundant, or otherwise unnecessary." *McCown v. City of Fontana*, 565 F.3d 1097, 1102 (9th Cir. 2009). Because counsel's declaration "does not provide a detailed breakdown of the time spent on each task in this case," the Court is unable to fully determine whether the time spent by Ms. Shining and her colleagues on this case was reasonable. *Kwon v. Sung-Eun Corp.*, No. SACV 20-01834-CJC (KESx), 2021 WL 3193225, at *4 (C.D. Cal. Feb. 9, 2021). Billing fourteen hours in this case appears "unreasonable given the boilerplate nature of the [c]omplaint and motion for default judgment as well as the fact that there was no opposition." *Id.*; *see also Mason v. Aldea Design, Inc.*, No. 2:21-CV-07823-SB-PVC, 2022 WL 2189615, at *5 (C.D. Cal. Jan. 6, 2022) (imposing a 50% hour reduction after determining that eight hours expended on Plaintiff's nearly identical action against a different defendant which ended in default judgment was unreasonable).

The Court will therefore similarly impose a 50% reduction on hours expended and apply the hourly rate Plaintiff's counsel charged Plaintiff in her similar action filed one month before the present action, $500 per hour. *See Mason*, 2022 WL 2189615, at *5. After this reduction, Plaintiff is left with seven hours at a rate of $500, for a total award of $3,500 in attorneys' fees. Plaintiff's counsel does not separate out costs from attorney's fees, so the Court in unable to determine any reasonable costs.

## III. CONCLUSION

The Motion is **GRANTED**. Plaintiff has satisfied the *Eitel* factors, counseling in favor of granting default judgment. Judgement shall be separately entered as follows:

- Defendant is **ORDERED** to (1) modify its website to achieve substantial conformance with WCAG 2.1 within 24 months of the entry of judgment in this case; and (2) adopt and implement a website accessibility policy within 180 days of entry of judgment whereby any changes or additions to the website will substantially conform with WCAG 2.1.

- Plaintiff is **AWARDED** $4,000 in statutory damages;
- Plaintiff is **AWARDED** $3,500 in attorneys' fees and costs.

A separate judgment shall issue.

IT IS SO ORDERED.