

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. SACV 14-878-JLS (JCGx)

Date: November 12, 2014

Title: Aymen Jayyusi v. Cali Grown Collective

Present: **Honorable JOSEPHINE L. STATON, UNITED STATES DISTRICT JUDGE**

Terry Guerrero
Deputy Clerk

N/A
Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFF: ATTORNEYS PRESENT FOR DEFENDANTS:

Not Present

Not Present

**PROCEEDINGS: (IN CHAMBERS) ORDER GRANTING PLAINTIFF’S
MOTION FOR DEFAULT JUDGMENT (Doc. 15)**

Before the Court is an unopposed Motion for Default Judgment filed by Plaintiff Aymen Jayyusi against Defendant Cali Grown Collective. (Mot., Doc. 15.) The Court finds this matter appropriate for decision without oral argument. Fed. R. Civ. P. 78(b); C.D. Cal. R. 7-15. Accordingly, the hearing on the Motion, set for November 14, 2014, at 2:30 p.m., is VACATED. For the following reasons, the Court GRANTS the Motion.

I. BACKGROUND

Plaintiff Aymen Jayyusi is an individual residing in Orange County, California (Compl., Doc. 1, ¶ 8.). Defendant Cali Grown Collective is a medical marijuana dispensary located in Riverside, California. (Id. ¶ 9.) In December 2013, Defendant began sending unsolicited text messages to Jayyusi’s cellphone advertising its marijuana. (Id. ¶¶ 12, 16, 17.) Jayyusi alleges that Defendant sent the text messages using an “automatic telephone dialing system” (“ATDS”), which can be used to automatically send text messages to a list of recipients. (Id. ¶¶ 20-22.)

At the time Jayyusi filed the Complaint, Defendant had sent him 141 unsolicited text messages. (Id. ¶ 13.) On numerous occasions, Jayyusi replied “STOP” in an attempt to stem the flow of text messages, but Defendant continued to send them. (Id. ¶ 18.) Jayyusi also emailed Defendant asking that it stop sending the text messages. (Id. ¶

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19.) Jayyusi never consented to receive the text messages and never had any business relationship with Defendant. (Id. ¶¶ 15, 25.)

On June 7, 2014, Jayyusi filed a Complaint in this Court alleging Defendant violated the federal Telephone Consumer Protection Act (“TCPA”) by sending the unsolicited text messages. (Doc. 1.) Jayyusi served Defendant with the Complaint on June 25, 2014. (Doc. 9.) Defendant did not appear or otherwise defend the action, and the clerk entered default against it on August 21, 2014. (Doc. 14.) Jayyusi filed the instant Motion for Default Judgment on September 30, 2014, and seeks an award of statutory damages under the TCPA. (Doc. 15.)

II. LEGAL STANDARD

Under Rule 55 of the Federal Rules of Civil Procedure, entering a default judgment is a two-step process. *See* Fed. R. Civ. P. 55; *see also Eitel v. McCool*, 782 F.2d 1470, 1471 (9th Cir. 1986). Prior to entry of a default judgment, there must be an entry of a default. *See* Fed. R. Civ. P. 55. Upon entry of a default, the factual allegations of the complaint, save for those concerning damages, are deemed to have been admitted by the defaulting party. Fed. R. Civ. P. 8(b)(6); *see Geddes v. United Financial Group*, 559 F.2d 557, 560 (9th Cir. 1977). “On the other hand, a defendant is not held to admit facts that are not well-pleaded or to admit conclusions of law.” *United States v. Cathcart*, No. C 07-4762 PJH, 2010 WL 1048829, *4 (N.D. Cal. Feb. 12, 2010). “[I]t follows from this that facts . . . not established by the pleadings of the prevailing party, or claims . . . not well-pleaded, are not binding and cannot support the judgment.” *Danning v. Lavine*, 572 F.2d 1386, 1388 (9th Cir. 1978).

A district court has discretion to grant or deny a motion for default judgment. *Aldabe v. Aldabe*, 616 F.2d 1089, 1092 (9th Cir. 1980). The Ninth Circuit has set forth seven factors to be considered by courts in reviewing a motion for default judgment: “(1) the possibility of prejudice to the plaintiff, (2) the merits of 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

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excusable neglect, and (7) the strong policy underlying the Federal Rules of Civil Procedure favoring decisions on the merits.” *Eitel*, 782 F.2d at 1471-72.

III. DISCUSSION

A. Plaintiff Has Satisfied Local Rule 55-1

Jayyusi’s Motion satisfies Local Rule 55-1. Jayyusi accompanied this Motion with a sworn declaration stating that (1) on August 21, 2014, the Clerk of Court entered default against Defendant, (2) Defendant is not an infant or incompetent person, and (3) the Servicemembers Civil Relief Act does not apply. (Decl. of Jared Hartman, Doc. 15-2, ¶¶ 4-5.)

C. *Eitel* Factors

1. Prejudice to the Plaintiff

“The first *Eitel* factor considers whether a plaintiff will suffer prejudice if a default judgment is not entered.” *Landstar Ranger, Inc. v. Parth Enters., Inc.*, 725 F. Supp. 2d 916, 920 (C.D. Cal. 2010). Prejudice can be shown if denying default judgment would leave a plaintiff without a remedy. *Id.* Absent entry of default judgment, Jayyusi will not be able to recover the statutory damages to which he is entitled under 47 U.S.C. § 227(b)(3). Therefore, this factor weighs in favor of entering default judgment.

2. Merits of Claims and Sufficiency of Complaint

These two factors look at the Plaintiff’s likelihood of success on the merits, requiring Plaintiff to “state a claim upon which [it] may recover.” *PepsiCo, Inc. v. Cal. Sec. Cans*, 238 F. Supp. 2d 1172, 1176 (C.D. Cal. 2002) (internal citation omitted).

Here, Jayyusi seeks default judgment that Defendant’s conduct violated Section 227 of the TCPA, which prohibits (1) any person (2) from making a call (3) using an ATDS (4) to a cellphone. 47 U.S.C. § 227(b)(1)(A). Calls made for emergency purposes

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or with the prior consent of the party receiving the call are not actionable. 47 U.S.C. § 227(b)(1)(B). The Court analyzes each element in turn.

i. Defendant Is a “Person”

Jayyusi alleges Defendant is a business licensed in the state of California with a principal place of business in Riverside. (Compl. ¶ 9.) Defendant therefore appears to be a person under the TCPA. *See* 47 U.S.C. § 153(30) (defining “person” as “an individual, partnership, association, joint-stock company, trust, or corporation.”).

ii. Text Messages Are “Calls” Under the TCPA

Jayyusi alleges Defendant sent 141 text messages to him at the time the Complaint was filed. (Compl. ¶ 13.) The Ninth Circuit has held text messages are “calls” for purposes of TCPA actions. *See Gomez v. Campbell-Ewald Co.*, 768 F.3d 871, 874 (9th Cir. 2014) (applying the TCPA to advertisements sent via text messages); *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d. 946, 954 (9th Cir. 2009) (“[We] hold that a text message is a ‘call’ within the meaning of the TCPA.”).

iii. Defendant Used an ATDS

Jayyusi explicitly alleges that Defendant used an ATDS to send the text messages. (Compl. ¶¶ 20-22.) This fact is deemed admitted by Defendant’s failure to respond.

vi. The Text Messages Were Sent to Jayyusi’s Cellphone

The TCPA applies to on calls made using an ATDS to “to any telephone number assigned to a . . . cellular telephone service . . . for which the called party is charged for the call.” 47 U.S.C. § 227(b)(1)(A)(iii). Jayyusi alleges that Defendant sent unsolicited

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marketing text messages to his cellphone, the number of which ends in “0172”. (Compl. ¶ 12.) Jayyusi also alleges that he incurred a charge for each incoming text message. (Id. ¶ 23.)

v. The Text Messages Were Not Sent for Emergency Purposes of

Calls made for emergency purposes are not actionable under the TCPA. 47 U.S.C. § 227(b)(1)(A). The Complaint alleges the text messages were not sent for emergency purposes. (Id. ¶ 24.) This assertion is supported by the inclusion of a representative text message in the Complaint, which reads:

FRM:DTLAC@GMAIL.COM
SUBJ:CALIGROWN COLLECTIVE
MSG:\$10 DOLLAR THURSDAYS ALL GRAMS \$10 ALL STRAINS!!!
@ CALIGROWN-5547 MISSION BLVD RIVERSIDE, CA 92509

(Id. ¶ 17.) The Court finds these allegations sufficient to establish that the text messages were not sent for emergency purposes.

vi. Jayyusi Did Not Give “Prior Express Consent”

Calls made by a defendant with the recipient’s prior express consent are not actionable under the TCPA. 47 U.S.C. § 227(b)(1)(A). The Complaint alleges Jayyusi never gave Defendant consent, express or otherwise, to receive the text messages. (Compl. ¶ 25.) The Complaint further states that Jayyusi never had a business relationship with Defendant. (Id. ¶ 15.) Moreover, the Complaint details Jayyusi’s efforts to stop the text messages by replying “STOP” and emailing Defendant. (Id. ¶¶ 18-19.) The Court finds these allegations, taken as true, are sufficient to establish Jayyusi’s lack of express consent to the receipt of Defendant’s text messages.

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Because each element required to show Defendant’s violation of the TCPA is met, the Court finds that the *Eitel* factors weigh in favor of default judgment.

3. Amount of Money at Issue

Under the fourth *Eitel* factor, “the court must consider the amount of money at stake in relation to the seriousness of Defendant’s conduct.” *PepsiCo, Inc. v. Cal. Sec. Cans*, 238 F. Supp. 2d 1172, 1176 (C.D. Cal. 2002). Jayyusi seeks an award of \$500 for each of Defendant’s 501 violations of the TCPA for a total of \$250,500. While this is a significant sum, it is not unreasonable given Defendant’s continued sending of unsolicited text messages despite Jayyusi’s attempts to stop them. Moreover, Congress expressly enacted the TCPA to combat “intrusive, nuisance calls” like those at issue here. TCPA, Pub. L. 102-243, § 2(6) (1991). Therefore, this factor weighs in favor of entering default judgment.

4. The Possibility of a Dispute Concerning Material Facts

“The fifth *Eitel* factor examines the likelihood of dispute between the parties regarding the material facts surrounding the case.” *Craigslist, Inc. v. Naturemarket, Inc.*, 694 F. Supp. 2d 1039, 1060 (N.D. Cal. 2010). “Where a plaintiff has filed a well-pleaded complaint, the possibility of dispute concerning material facts is remote.” *Wecosign, Inc.*, 845 F. Supp. 2d 1070, 1082 (C.D. Cal. 2012) (citing *Landstar Ranger*, 725 F. Supp. 2d at 921-22). As discussed above, Jayyusi’s Complaint is well pleaded and supported by evidence. Therefore, a dispute concerning material facts is unlikely, and this factor weighs in favor of entering default judgment.

5. The Possibility of Excusable Neglect

“The sixth *Eitel* factor considers whether defendant’s default may have been the product of excusable neglect.” *Landstar Ranger*, 725 F. Supp. 2d at 922. This factor favors a default judgment when the defendant has been properly served or the plaintiff

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demonstrates that the defendant is aware of the lawsuit. *Id.* (concluding that this factor favored default judgment and the “possibility of excusable neglect is remote” where defendant had been properly served); *Craigslist*, 694 F. Supp. 2d at 1061 (“Plaintiff has proffered evidence showing Defendants were clearly aware of the pending litigation.”). Cali Grown Collective was served with the summons and complaint on June 25, 2014 (Doc. 9), but has not answered or otherwise defended this action. The possibility of excusable neglect is therefore unlikely. This factor therefore weighs in favor of entering default judgment.

6. Policy Favoring Decisions on the Merits

“The final *Eitel* factor examines whether the strong policy favoring deciding cases on the merits prevents a court from entering default judgment.” *Craigslist*, 694 F. Supp. 2d at 1061. Although “[c]ases should be decided upon their merits whenever reasonably possible,” *Eitel*, 782 F.2d at 1472, “Rule 55(a) allows a court to decide a case before the merits are heard if defendant fails to appear and defend.” *Landstar Ranger*, 725 F. Supp. 2d at 922. Notwithstanding the strong policy presumption in favor of a decision on the merits, where a defendant fails to appear and respond, a decision on the merits is impossible and default judgment is appropriate. *See Craigslist*, 694 F. Supp. 2d at 1061. In this case, Cali Grown Collective has failed to appear and respond. This factor therefore weighs in favor of entering default judgment.

7. Conclusion

All of the *Eitel* factors weigh in favor of the entry of default judgment. Accordingly, the Court GRANTS Jayyusi’s Motion for Default Judgment against Cali Grown Collective for violation of the TCPA.

IV. REMEDIES

The TCPA provides for statutory damages of \$500 per call where a plaintiff does not allege actual damages. *See* 47 U.S.C. § 227(b)(3)(B) (permitting a plaintiff “to

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recover for actual monetary loss from such a violation, or to receive \$500 in damages for each such violation, *whichever is greater*”) (emphasis added).

In the Motion, Jayyusi asserts that Defendant sent 501 unwanted text messages and accordingly asks the Court to award \$250,500 in statutory damages. (Mem. at 2; Decl. of Aymen Jayyusi, Doc. 15-3, ¶ 16.) A damage award ordinarily may not exceed what is sought in the pleadings, and here the Complaint alleges only 141 unwanted text messages, which would lead to a far lower statutory damages award. (Compl. ¶ 13.) *See* Fed. R. Civ. P. 54 (“A default judgment must not differ in kind from, or exceed in amount, what is demanded in the pleadings.”); *see also* 10 CHARLES ALAN WRIGHT ET AL., FED. PRAC. & PROC. CIV. § 2663 (3d ed. 2014). That rule does not apply, however, when damages continue to accrue during the pendency of an action *and* the complaint places a defendant on notice of such accrual. *See, e.g., Finkel v. Triple A Grp., Inc.*, 708 F. Supp. 2d 277, 282 (E.D.N.Y. 2010). Here, the Complaint alleges that “Defendant continues to send unsolicited text messages to Plaintiff on nearly a daily basis.” (Compl. ¶ 14.) Thus, Defendant was on notice that Jayyusi might seek statutory damages for text messages sent after the Complaint was filed.

Accordingly, the Court calculates Jayyusi’s damages based on the 501 unwanted text messages claimed in the Motion. (Mem. at 2; Decl. of Aymen Jayyusi, Doc. 15-3, ¶ 16; *id.*, Ex. B.) Because each violation of the TCPA carries a penalty of \$500, the Court finds Jayyusi is entitled to an award of statutory damages in the amount of **\$250,500**.

V. CONCLUSION

For the foregoing reasons, Jayyusi’s Motion for Default Judgment is GRANTED. Jayyusi is entitled to an award of \$250,500 in statutory damages.

Jayyusi shall submit a proposed judgment within 14 days of this Order.

Initials of Preparer: tg