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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

LORETTA LOWERY
Plaintiff,
v.
ACCOUNT OUTSOURCING GROUP,
LLC,
Defendant.

No. 2:16-cv-3007-KJM-KJN

FINDINGS AND RECOMMENDATIONS

INTRODUCTION

Presently pending before the court is plaintiff Loretta Lowery’s motion for entry of default judgment against defendant Account Outsourcing Group, LLC (“Account Outsourcing”), a Delaware limited liability company. (ECF No. 12.)¹ On June 13, 2017, after defendant failed to oppose plaintiff’s motion in accordance with Local Rule 230, the court vacated the hearing on the motion and gave defendant one final opportunity to oppose the motion by June 29, 2017. (ECF No. 13.) After defendants again failed to oppose plaintiff’s motion, plaintiff’s motion was taken under submission on the court’s own motion pursuant to Local Rule 230(g). (Id.)

After carefully considering the written briefing, the court’s record, and the applicable law, the court RECOMMENDS that plaintiff’s motion be GRANTED IN PART.

¹ This motion for default judgment proceeds before the assigned magistrate judge pursuant to Local Rule 302(c)(19).

1 BACKGROUND

2 Plaintiff Loretta Lowery alleges that defendant unlawfully and abusively attempted to
3 collect on a debt allegedly owed by plaintiff on September 14, 2016. (ECF No. 1 at 5:10-12.) On
4 that date, an unidentified agent of Account Outsourcing called plaintiff at her home at
5 approximately 6:26 a.m., and attempted to collect on plaintiff’s alleged debt. (Id.)² Plaintiff
6 informed the agent that the timing of the call was unacceptable and asked to speak with the
7 agent’s supervisor. Plaintiff was then transferred to Charlisa Cole, another agent of Account
8 Outsourcing. (Id. at 5:12-15.) Plaintiff requested Ms. Cole to identify the company seeking to
9 collect the alleged debt, but Ms. Cole refused to disclose the name of the company without
10 plaintiff first verifying confidential and personal information. (Id. at 5:14-17.)

11 After completing the 6:26 a.m. phone call, plaintiff received another call at 6:33 a.m. from
12 an unidentified agent of Account Outsourcing attempting to collect on plaintiff’s alleged debt.
13 (ECF No. 1 at 6:10-12.) Plaintiff then received a third call from the same number at 6:55 a.m.,
14 wherein an unidentified agent again attempted to collect on the alleged debt. (Id. at 6:20-22.)

15 Based on the above, plaintiff commenced this action against defendant on December 23,
16 2016, alleging: (1) violations of the Fair Debt Collection Practices Act under 15 U.S.C. §§ 1692
17 et seq. (“FDCPA”) and (2) violations of the Rosenthal Fair Debt Collection Practices Act under
18 California Civil Code §§ 1788 et seq. (“RFDCPA”). (ECF No. 1.) Plaintiff’s complaint seeks
19 actual and statutory damages, attorneys’ fees, and costs. (Id.) After defendant was properly
20 served with process and failed to appear in the action, the Clerk of Court entered defendant’s
21 default upon plaintiff’s request. (ECF Nos. 6-8.) The instant motion for default judgment
22 followed. (ECF No. 12.)

23 LEGAL STANDARD

24 Pursuant to Federal Rule of Civil Procedure 55, default may be entered against a party
25 against whom a judgment for affirmative relief is sought who fails to plead or otherwise defend
26 against the action. See Fed. R. Civ. P. 55(a). However, “[a] defendant’s default does not

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28 ² All phone calls on September 14, 2016, were placed from (XXX) XXX-2260 and received by
plaintiff at (XXX) XXX-0755.

1 automatically entitle the plaintiff to a court-ordered judgment.” PepsiCo, Inc. v. Cal. Sec. Cans,
2 238 F. Supp. 2d 1172, 1174 (C.D. Cal. 2002) (citing Draper v. Coombs, 792 F.2d 915, 924-25
3 (9th Cir. 1986)). Instead, the decision to grant or deny an application for default judgment lies
4 within the district court’s sound discretion. Aldabe v. Aldabe, 616 F.2d 1089, 1092 (9th Cir.
5 1980). In making this determination, the court considers the following factors:

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

13 Eitel v. McCool, 782 F.2d 1470, 1471-72 (9th Cir. 1986).

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

27 DISCUSSION

28 Appropriateness of the Entry of Default Judgment under the Eitel Factors

1. *Factor One: Possibility of Prejudice to Plaintiff*

The first Eitel factor considers whether the plaintiff would suffer prejudice if default

1 judgment is not entered, and such potential prejudice to the plaintiff militates in favor of granting
2 a default judgment. See PepsiCo, Inc., 238 F. Supp. 2d at 1177. Here, plaintiff would face
3 prejudice if the court did not enter a default judgment, because plaintiff would be without another
4 recourse against defendant. As such, the first Eitel factor favors the entry of a default judgment.

5 2. *Factors Two and Three: The Merits of Plaintiff's Substantive Claim and*
6 *the Sufficiency of the Complaint*

7 The court considers the merits of plaintiff's substantive claim and the sufficiency of the
8 complaint together below because of the relatedness of the two inquiries. The court must
9 consider whether the allegations in the complaint are sufficient to state a claim on which plaintiff
10 may recover. See Danning, 572 F.2d at 1388; PepsiCo, Inc., 238 F. Supp. 2d at 1175.

11 Here, plaintiff has adequately alleged that defendant violated 15 U.S.C. § 1692c(a)(1)
12 (prohibiting calls prior to 8:00 a.m. and after 9:00 p.m.), as well as 15 U.S.C. § 1692d(6)
13 (requiring debt collectors to meaningfully identify themselves on the phone). Moreover, because
14 a violation of those provisions is also a violation of the California Rosenthal Fair Debt Collection
15 Practices Act, see Cal. Civ. Code § 1788.17, plaintiff has also adequately alleged a violation of
16 that state statute. As such, plaintiff's claims have merit.

17 Therefore, the second and third Eitel factors favor the entry of default judgment.

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

19 Under the fourth factor cited in Eitel, "the court must consider the amount of money at
20 stake in relation to the seriousness of Defendant's conduct." PepsiCo, Inc., 238 F. Supp. 2d at
21 1176-77; see also Philip Morris USA, Inc. v. Castworld Prods., Inc., 219 F.R.D. 494, 500 (C.D.
22 Cal. 2003). In this case, plaintiff does not seek an especially large sum: \$2000.00. Furthermore,
23 as discussed below, the court actually recommends the award of a slightly lesser amount of
24 statutory damages. Therefore, the sum of money at stake does not preclude the entry of a default
25 judgment.

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

27 The court may assume the truth of well-pled facts in the complaint (except as to damages)
28 following the clerk's entry of default, and defendant has not appeared to dispute any such facts.

1 Thus, there is no likelihood that any genuine issue of material fact exists. See, e.g., Elektra
2 Entm't Group Inc. v. Crawford, 226 F.R.D. 388, 393 (C.D. Cal. 2005) (“Because all allegations in
3 a well-pleaded complaint are taken as true after the court clerk enters default judgment, there is
4 no likelihood that any genuine issue of material fact exists”); accord Philip Morris USA, Inc., 219
5 F.R.D. at 500; PepsiCo, Inc., 238 F. Supp. 2d at 1177. Accordingly, the fifth Eitel factor favors
6 the entry of default judgment.

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

8 In this case, there is no indication in the record that defendant’s default was due to
9 excusable neglect. Indeed, despite having been provided with multiple opportunities to appear
10 and defend its interests, defendant apparently declined to do so. Accordingly, the sixth Eitel
11 factor favors the entry of a default judgment.

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

14 “Cases should be decided upon their merits whenever reasonably possible.” Eitel, 782
15 F.2d at 1472. However, district courts have concluded with regularity that this policy, standing
16 alone, is not dispositive, especially where a defendant fails to appear or defend itself in an action.
17 PepsiCo, Inc., 238 F. Supp. 2d at 1177; see also Craigslist, Inc. v. Naturemarket, Inc., 694 F.
18 Supp. 2d 1039, 1061 (N.D. Cal. 2010). Accordingly, although the court is cognizant of the policy
19 in favor of decisions on the merits—and consistent with existing policy would prefer that this
20 case be resolved on the merits—that policy does not, by itself, preclude entry of default judgment.

21 In sum, upon consideration of all the Eitel factors, the court concludes that plaintiff is
22 entitled to a default judgment against defendant.

23 Terms of the Judgment to Be Entered

24 After determining that a party is entitled to the entry of default judgment, the court must
25 determine the terms of the judgment to be entered. Plaintiff’s motion for default judgment seeks
26 an award of statutory damages, which were also requested in the complaint.³ More specifically,

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28 ³ Although plaintiff’s complaint also sought an award of attorneys’ fees and costs, such relief is
not requested in plaintiff’s motion for default judgment. As such, the court does not evaluate

1 plaintiff seeks a total of \$2,000.00 in statutory damages.

2 In a claim for violation of the FDCPA, a plaintiff may elect to seek statutory damages not
3 exceeding \$1,000. See 15 U.S.C. § 1692k(a)(2)(A). In determining the amount of statutory
4 damages, “the court shall consider, among other relevant factors – (1) in any individual action
5 under subsection (a)(2)(A), the frequency and persistence of noncompliance by the debt collector,
6 the nature of such noncompliance, and the extent to which such noncompliance was intentional.”
7 Id. § 1692k(b)(1). Additionally, a plaintiff may elect to seek between \$100 and \$1,000 in
8 statutory damages for a violation of the RFDCPA. See Cal. Civ. Code § 1788.30(b).

9 In this case, defendant’s representatives called plaintiff three times in one day, each time
10 well before 8:00 a.m. in the morning. Defendant’s representatives also refused to identify the
11 company that was collecting the debt. Therefore, there can be little doubt that defendant’s
12 conduct was intentional and in bad faith. That said, the conduct alleged concerns a total of 3
13 telephone calls, and plaintiff does not allege continuing conduct spanning multiple days or weeks.
14 As such, the court is not persuaded that the maximum amount of statutory damages is warranted.
15 Instead, the court finds it appropriate to award \$500.00 in statutory damages for violation of the
16 FDCPA, and \$500.00 in statutory damages for violation of the RFDCPA, for a total amount of
17 \$1000.00 in statutory damages.

18 CONCLUSION

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

- 20 1. Plaintiff’s motion for default judgment (ECF No. 12) be GRANTED IN PART on the
21 following terms.
22 2. Judgment be entered in plaintiff’s favor and against defendant.
23 3. Plaintiff be awarded statutory damages in the amount of \$1,000.00.
24 4. The Clerk of Court be directed to close this case.

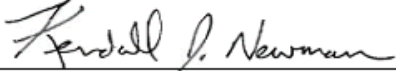
25 These findings and recommendations are submitted to the United States District Judge
26 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen (14)

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28 whether any attorneys’ fees and costs should be awarded.

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. Such a document should be captioned
3 “Objections to Magistrate Judge’s Findings and Recommendations.” Any reply to the objections
4 shall be served on all parties and filed with the court within fourteen (14) days after service of the
5 objections. The parties are advised that failure to file objections within the specified time may
6 waive the right to appeal the District Court’s order. Turner v. Duncan, 158 F.3d 449, 455 (9th
7 Cir. 1998); Martinez v. Ylst, 951 F.2d 1153, 1156-57 (9th Cir. 1991).

8 IT IS SO RECOMMENDED.

9 Dated: July 27, 2017

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12 KENDALL J. NEWMAN
13 UNITED STATES MAGISTRATE JUDGE
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