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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

ANTON A. EWING,

Plaintiff,

v.

CSOLAR, a California corporation,

Defendant.

Case No.: 22-cv-0720-WQH-JLB

ORDER

HAYES, Judge:

The matter before the Court is the Motion for Default Judgment filed by Plaintiff Anton A. Ewing. (ECF No. 5).

I. PROCEDURAL BACKGROUND

On May 19, 2022, Plaintiff filed a Complaint against Defendant CSOLAR, arising from Defendant’s alleged unlawful telephone solicitation practices. (ECF No. 1). On May 31, 2022, Plaintiff filed proof of service as to Defendant. (ECF No. 3). On June 21, 2022, Plaintiff filed a Request for Entry of Clerk Default as to Defendant (ECF No. 4), and the Clerk of the Court entered default (ECF No. 6). On June 27, 2022, Plaintiff filed a Motion for Default Judgment. (ECF No. 5).

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1 **II. ALLEGATIONS IN THE COMPLAINT**

2 Defendant is a California corporation and “solar panel installation broker” that
3 “conducts telemarketing campaigns” to “sell its services to consumers throughout southern
4 California.” (ECF No. 1 ¶¶ 33, 35). Plaintiff resides in San Diego, California and is “the
5 owner and sole user of ... cellular phone number 619-719-9640.” (*Id.* ¶ 1).

6 Plaintiff “registered his cell phone number on the [national do-not-call registry] on
7 February 16, 2012, for the express purpose that he would not receive unsolicited calls or
8 text messages.” (*Id.* ¶ 51). Plaintiff’s cellular phone number “is not associated with a
9 business and is used for personal, private residential use only.” (*Id.* ¶ 52).

10 Defendant “called or texted Plaintiff” from various numbers eleven times between
11 April 27, 2022, and May 18, 2022, “to sell its solar panel installation services.” (*Id.* ¶¶ 47-
12 48). On “each and every call,” Plaintiff “heard a very clear ‘bubble popping’ type sound
13 followed by a rather long pause before the artificial-voice prerecorded message began to
14 play.” (*Id.* ¶ 38). Plaintiff “was required to hit ‘1’ to be transferred to a live operator.” (*Id.*).
15 “Replying ‘STOP’ did not work,” and Defendant continued “calling and texting” despite
16 Plaintiff “making very clear” that he did not want to be called. (*Id.* ¶ 48).

17 “The distinct bubble-popping sound and the long silent pause were ... clear
18 indication[s] that an [Automatic Telephone Dialing System (‘ATDS’)] robo-dialer was
19 used by Defendant for the calls.” (*Id.* ¶ 40). “The text messages were generic which
20 indicates an ATDS was used by Defendant” to send “[a]ll of the text messages.” (*Id.* ¶ 41-
21 42). An employee of Defendant “stated that [Defendant] uses Nation Energy Services ...
22 to obtain [its] telemarketing calling list to upload into [an] autodialer software” and
23 “admitted that they were using an “auto dialing computer to make the calls and send out
24 the text messages in order to get California residents to buy their solar programs.” (*Id.* ¶¶
25 44, 50).

26 Plaintiff and Defendant “do not have a pre-existing business relationship.” (*Id.* ¶ 39).
27 Plaintiff “never provided his phone number or his consent to Defendant [] to receive any
28 solicitation from them or on their behalf.” (*Id.* ¶ 58). Defendant has caused Plaintiff harm

1 in the form of “aggravation, nuisance, and invasions of privacy, ... the wear and tear on
2 [Plaintiff’s] phone, interference with the use of [Plaintiff’s] phone, consumption of battery
3 life, loss of value for monies [Plaintiff] paid to his AT&T carrier for the receipt of such
4 messages, and the diminished use, enjoyment, value, and utility of [Plaintiff’s] telephone
5 plan.” (*Id.* ¶ 45).

6 Plaintiff brings the following claims against Defendant: (1) negligent and willful or
7 knowing violations of the Telephone Consumer Protection Act (“TCPA”), 47 U.S.C. §
8 227; (2) violations of the California Invasion of Privacy Act (“CIPA”), Cal. Penal Code
9 Sections 630 *et seq.*; and (3) violations of the California Consumer Legal Remedies Act
10 (“CLRA”), Cal. Civ. Code Sections 1750 *et seq.* The Complaint requests damages,
11 declaratory and injunctive relief, and costs.

12 **III. DEFAULT JUDGMENT**

13 Rule 55(a) of the Federal Rules of Civil Procedure requires that the Clerk of the
14 Court enter default “[w]hen a party against whom a judgment for affirmative relief is
15 sought has failed to plead or otherwise defend, and that failure is shown by affidavit or
16 otherwise.” Fed. R. Civ. P. 55(a). Rule 55(b)(2) provides that the court may grant default
17 judgment after default has been entered. *See* Fed. R. Civ. P. 55(b)(2). “The general rule of
18 law is that upon default the factual allegations of the complaint, except those relating to the
19 amount of damages, will be taken as true.” *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d
20 915, 917-18 (9th Cir. 1987) (quoting *Geddes v. United Fin. Grp.*, 559 F.2d 557, 560 (9th
21 Cir. 1977)). “Factors which may be considered by courts” in determining whether default
22 judgment should be granted include:

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

27 *Eitel v. McCool*, 782 F.2d 1470, 1471-72 (9th Cir. 1986) (citing 6 MOORE’S FEDERAL
28 PRACTICE ¶ 55-05[2], at 55-24 to 55-26).

1 Plaintiff has demonstrated that Defendant was served with the summons and
2 Complaint and the Clerk of the Court has entered default against Defendant. Default
3 judgment is likely Plaintiff's only recourse for recovery and the possibility of a dispute
4 concerning material facts or that Defendant's default was due to excusable neglect is low.
5 The first, fifth, and sixth *Eitel* factors weigh in favor of default judgment. Further, although
6 there is a "strong policy ... favoring decision on the merits," *Eitel*, 782 F.2d at 1472,
7 Defendant's failure to answer the Complaint makes a decision on the merits impractical, if
8 not impossible.

9 The second and third *Eitel* factors favor default judgment where the plaintiff "state[s]
10 a claim on which the [plaintiff] may recover." *Danning v. Lavine*, 572 F.2d 1386, 1388
11 (9th Cir. 1978). In the Complaint, Plaintiff brings claims against Defendant for violations
12 of two subsections of the TCPA, as well as state law claims under the CIPA and the CLRA.¹

13 **A. TCPA § 227(b)**

14 The TCPA makes it "unlawful for any person ... to make any call (other than a call
15 made for emergency purposes or made with the prior express consent of the called party)
16 using any [ATDS] or an artificial or prerecorded voice ... to any telephone number assigned
17 to a ... cellular telephone service." 47 U.S.C. § 227(b)(1)(A)(iii). To bring an action under
18 § 227(b)(1)(A)(iii), a plaintiff must show: "(1) the defendant called a cellular telephone
19 number; (2) using an [ATDS]; (3) without the recipient's prior express consent." *Meyer v.*
20 *Portfolio Recovery Assocs., LLC*, 707 F.3d 1036, 1043 (9th Cir. 2012). The TCPA defines
21 an ATDS as "equipment which has the capacity—(A) to store or produce telephone
22 numbers to be called, using a random or sequential number generator; and (B) to dial such
23 numbers." 47 U.S.C. § 227(a)(1).

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27 ¹ Plaintiff further requests default judgment for violations of Cal. Bus. & Profs. Code Section 17200.
28 This request is denied because the Complaint does not contain a cause of action for violation of Section
17200. *See* Fed. R. Civ. P. 54(c) ("A default judgment must not differ in kind from, or exceed in
amount, what is demanded in the pleadings.")

1 The Complaint alleges that Plaintiff is “the owner and sole user of ... cellular phone
2 number 619-719-9640.” (ECF No. 1 ¶ 1). The Complaint alleges that Defendant “called or
3 texted Plaintiff” from various numbers eleven times between April 27, 2022, and May 18,
4 2022, “to sell its solar panel installation services.” (*Id.* ¶¶ 47-48). The Court concludes that
5 the Complaint alleges sufficient facts to show that Defendant called Plaintiff’s cellular
6 telephone number eleven times. *See Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946,
7 952 (9th Cir. 2009) (“[A] text message is a ‘call’ within the meaning of the TCPA.”).

8 The Complaint alleges that on “each and every call,” Plaintiff “heard a very clear
9 ‘bubble popping’ type sound followed by a rather long pause before the artificial-voice
10 prerecorded message began to play.” (ECF No. 1 ¶ 38). The Complaint alleges that Plaintiff
11 “was required to hit ‘1’ to be transferred to a live operator.” (*Id.*). The Complaint alleges
12 that “[t]he text messages were generic which indicates an ATDS was used by Defendant”
13 to send “[a]ll of the text messages.” (*Id.* ¶¶ 41-42). The Complaint alleges that an employee
14 of Defendant “stated that [Defendant] uses Nation Energy Services ... to obtain [its]
15 telemarketing calling list to upload into [an] autodialer software” and “admitted that they
16 were using an “auto dialing computer to make the calls and send out the text messages in
17 order to get California residents to buy their solar programs.” (*Id.* ¶¶ 44, 50). The Court
18 concludes that the Complaint alleges sufficient facts to show that Defendant used an ATDS
19 to place each of the eleven calls received by Plaintiff.

20 The Complaint alleges that Plaintiff “never provided his phone number or his
21 consent to Defendant [] to receive any solicitation from them or on their behalf.” (*Id.* ¶
22 58). The Complaint alleges that Defendant continued “calling and texting” despite Plaintiff
23 “making very clear” that he did not want to be called. (*Id.* ¶ 48). The Court concludes that
24 the Complaint alleges sufficient facts to show that Plaintiff did not consent to the calls.
25 Plaintiff states a claim for relief under § 227(b)(1)(A)(iii) of the TCPA.

26 **B. TCPA § 227(c)**

27 Section 227(c) of the TCPA further instructs the Federal Communications
28 Commission (“FCC”) to “initiate a rulemaking proceeding concerning the need to protect

1 residential telephone subscribers’ privacy rights to avoid receiving telephone solicitations
2 to which they object.” 47 U.S.C. § 227(c)(1). Pursuant to this directive, the implementing
3 regulation of the TCPA provides that “[n]o person or entity shall initiate any telephone
4 solicitation to: ... [a] residential telephone subscriber who has registered his or her
5 telephone number on the national do-not-call registry of persons who do not wish to receive
6 telephone solicitations that is maintained by the Federal Government.” 47 C.F.R. §
7 64.1200(c). A telephone solicitation is:

8 the initiation of a telephone call or message for the purpose of encouraging
9 the purchase or rental of, or investment in, property, goods, or services, which
is transmitted to any person, but such term does not include a call or message:

- 10 (i) To any person with that person’s prior express invitation or
11 permission;
12 (ii) To any person with whom the caller has an established business
13 relationship; or
(iii) By or on behalf of a tax-exempt nonprofit organization.

14 *Id.* § 64.1200(f)(15). Personal cellular telephones can be considered “residential
15 telephones.” *See In re Rules and Regulations Implementing the Telephone Consumer*
16 *Protection Act of 1991*, 18 F.C.C.R. 14014, 14039 (2003). The TCPA establishes a private
17 right of action for “[a] person who has received more than one telephone call within any
18 12-month period by or on behalf of the same entity” in violation of this regulation. 47
19 U.S.C. § 227(c)(5).

20 The Complaint alleges that Plaintiff “registered his cell phone number on the
21 [national do-not-call registry] on February 16, 2012, for the express purpose that he would
22 not receive unsolicited calls or text messages.” (ECF No. 1 ¶ 51). The Complaint alleges
23 that Plaintiff’s cellular phone number “is not associated with a business and is used for
24 personal, private residential use only.” (*Id.* ¶ 52). The Complaint alleges Defendant “called
25 or texted Plaintiff” from various numbers eleven times between April 27, 2022, and May
26 18, 2022, “to sell its solar panel installation services.” (*Id.* ¶¶ 47-48). The Complaint alleges
27 that an employee of Defendant “admitted” that they were calling and texting “in order to
28 get California residents to buy [Defendant’s] solar programs.” (*Id.* ¶¶ 44, 50). The

1 Complaint alleges that Plaintiff and Defendant “do not have a pre-existing business
2 relationship,” and that Plaintiff “never provided his phone number or his consent to
3 Defendant [] to receive any solicitation from them or on their behalf.” (*Id.* ¶¶ 39, 58). The
4 Court concludes that Plaintiff alleges sufficient facts to show that Defendant initiated
5 eleven telephone solicitations to Plaintiff—a residential telephone subscriber who has
6 registered his telephone number on the national do-not-call registry—in violation of §
7 227(c)(5) of the TCPA.

8 **C. CIPA**

9 The CIPA provides a private right of action against any person who, “without the
10 consent of all parties to a communication, intercepts or receives and intentionally records
11 ... a communication transmitted between” a cellular telephone and another cellular
12 telephone, a landline, or a cordless telephone. Cal. Pen. Code § 632.7; *see id.* § 637.2. The
13 Complaint does not allege any facts from which the Court can infer that the alleged calls
14 at issue were recorded. The Complaint does not state a claim for a violation of the CIPA.

15 **D. CLRA**

16 The CLRA prohibits

17 [d]isseminating an unsolicited prerecorded message by telephone without an
18 unrecorded, natural voice first informing the person answering the telephone
19 of the name of the caller or the organization being represented, and either the
20 address or the telephone number of the caller, and without obtaining the
consent of that person to listen to the prerecorded message.

21 Cal. Civ. Code § 1770(a)(22)(A); *see id.* § 1780. The CLRA’s prohibition on disseminating
22 unsolicited prerecorded messages only applies to calls “intended to result or that results in
23 the sale or lease of goods or services to any consumer,” and excludes certain calls made in
24 the course of an established relationship. *Id.* § 1770(a).

25 The Complaint alleges that Defendant “called or texted Plaintiff” from various
26 numbers eleven times between April 27, 2022, and May 18, 2022, “to sell its solar panel
27 installation services.” (ECF No. 1 ¶¶ 47-48). The Complaint alleges that on “each and every
28 call,” Plaintiff “heard a very clear ‘bubble popping’ type sound followed by a rather long

1 pause before the artificial-voice prerecorded message began to play.” (*Id.* ¶ 38). Plaintiff
2 “was required to hit ‘1’ to be transferred to a live operator.” (*Id.*). The Complaint alleges
3 that Plaintiff and Defendant “do not have a pre-existing business relationship,” and that
4 Plaintiff “never provided his phone number or his consent to Defendant [] to receive any
5 solicitation from them or on their behalf.” (*Id.* ¶¶ 39, 58). Defendant has caused Plaintiff
6 harm in the form of “aggravation, nuisance, and invasions of privacy, ... the wear and tear
7 on [Plaintiff’s] phone, interference with the use of [Plaintiff’s] phone, consumption of
8 battery life, loss of value for monies [Plaintiff] paid to his AT&T carrier for the receipt of
9 such messages, and the diminished use, enjoyment, value, and utility of [Plaintiff’s]
10 telephone plan.” (*Id.* ¶ 45). The Court concludes that Plaintiff states a claim for relief under
11 Section 1770(a)(22)(A) of the CLRA.

12 Plaintiff states a claim for relief for Defendant’s violations of the TCPA and the
13 CLRA. The second and third *Eitel* factors weigh in favor of default judgment. The Court
14 has considered the factors articulated in *Eitel* and concludes that Plaintiff is entitled to
15 default judgment against Defendant on his TCPA and CLRA claims.

16 **IV. REMEDIES**

17 Plaintiff requests \$1,000 in statutory damages under the TCPA for each of the eleven
18 calls and texts Defendant allegedly made to Plaintiff—\$500 for each violation of §
19 227(b)(1)(A)(iii) and \$500 for each violation of § 227(c)(5). Plaintiff requests that the
20 Court find that Defendant’s violations of the TCPA were willful or knowing and grant
21 treble damages for a total of \$33,000 in statutory damages under the TCPA. Plaintiff
22 requests a permanent injunction to prohibit Defendant from violating the TCPA in the
23 future. Plaintiff further requests \$5,000 for each violation of the CIPA and \$2,500 for each
24 violation of the CLRA.²

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28 ² Plaintiff is not entitled to damages on his CIPA claim because the Complaint fails to state a claim for relief under the CIPA.

1 The Court has determined that the Complaint alleges sufficient facts to show that
2 each of Defendant’s eleven calls or texts violated § 227(b)(1)(A)(iii) and § 227(c)(5)—a
3 total of 22 TCPA violations. Courts considering the issue have allowed separate recoveries
4 when the same call results in violations of both § 227(b) and § 227(c). *See, e.g., Stark v.*
5 *Bridgepoint Benefits, LLC*, 3:19-cv-01740-AJB-AGS, 2021 WL 347695, at *1 (S.D. Cal.
6 Feb. 2, 2021); *Roylance v. ALG Real Estate Servs., Inc.*, No. 5:14-cv-2445-PSG, 2015 WL
7 1522244, at *10 (N.D. Cal. Mar. 16, 2015); *Charvat v. NMP, LLC*, 656 F.3d 440, 448 (6th
8 Cir. 2011) (“The fact that the statute includes separate provisions for statutory damages in
9 subsections (b) and (c) suggests that a plaintiff could recover under both.”). The TCPA
10 provides for \$500 in statutory damages for each violation. *See* 47 U.S.C. §§ 227(b)(3)(B),
11 227(c)(5)(B). Plaintiff is entitled to a total of \$11,000 in statutory damages for Defendant’s
12 twenty-two violations of the TCPA.

13 The TCPA further provides that the Court may grant treble damages “in its
14 discretion” if the Court finds that the defendant’s violations were “willful[] or knowing[].”
15 47 U.S.C. §§ 227(b)(3)(C), 227(c)(5)(C). District courts in this circuit have typically
16 exercised their discretion to award treble damages in cases where the defendant had a prior
17 judgment against it for violating the TCPA or where statutory damages were trivial. *See*
18 *Ewing v. Senior Life Planning, LLC*, No. 19-cv-1005-BAS-LL, 2019 WL 4573703, at *7
19 (S.D. Cal. Sept. 18, 2019). In this case there is no allegation that Defendant had a prior
20 judgment against it for violating the TCPA and an award of \$11,000 in statutory damages
21 is sufficient to deter Defendant from violating the TCPA in the future. The Court declines
22 to award treble damages.

23 The TCPA provides that a Court may enjoin a defendant from violating §§ 227(b)
24 and 227(c). *See* 47 U.S.C. §§ 227(b)(3)(A), 227(c)(5)(A). However, Plaintiff has not
25 demonstrated irreparable injury or that damages are inadequate. *See eBay Inc. v.*
26 *MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006) (“A plaintiff must demonstrate: (1) that
27 it has suffered an irreparable injury; (2) that remedies available at law, such as monetary
28 damages, are inadequate to compensate for that injury; (3) that, considering the balance of

1 hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that
2 the public interest would not be disserved by a permanent injunction.”); *see also PepsiCo,*
3 *Inc. v. Cal. Sec. Cans*, 238 F. Supp. 2d 1172, 1177 (C.D. Cal. 2002) (stating that a plaintiff
4 that obtains default judgment “is not automatically entitled to an injunction”). Plaintiff’s
5 request for an injunction is denied.

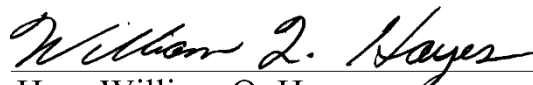
6 Plaintiff requests \$2,500 under the CLRA for each of the eleven calls and texts
7 alleged in the Complaint. However, the CLRA applies to voice calls, not text messages,
8 *see Cal. Civ. Code § 1770(a)(22)(A)*, and the Complaint does not allege how many calls
9 were made to Plaintiff. Further, Plaintiff has not provided any evidence of the amount of
10 damages as a result of Defendant’s violation of the CLRA. *See Cal. Civ. Code § 1780(a)(1)*
11 (providing for the recovery of actual damages, not statutory damages); *see also TeleVideo*
12 *Sys.*, 826 F.2d at 917-18 (“The general rule of law is that upon default the factual
13 allegations of the complaint, except those relating to the amount of damages, will be taken
14 as true.”) (quoting *Geddes*, 559 F.2d at 560). Plaintiff has not demonstrated that he is
15 entitled to damages on his CLRA claim.

16 V. CONCLUSION

17 IT IS HEREBY ORDERED that the Motion for Default Judgment filed by Plaintiff
18 Anton A. Ewing against Defendant CSOLAR (ECF No. 5) is granted in part and denied in
19 part. The motion is granted as to Plaintiff’s claims for violations of §§ 227(b)(1)(A) and
20 (c)(5) of the TCPA and Section 1770(a)(22)(A) of the CLRA, and is otherwise denied.
21 Defendant is liable in the amount of \$11,000.

22 IT IS FURTHER ORDERED that no later than fourteen (14) days from the date of
23 this Order, Plaintiff shall e-mail a proposed judgment in accordance with the ruling in this
24 Order to efile_hayes@casd.uscourts.gov.

25 Dated: September 22, 2022

26 
27 Hon. William Q. Hayes
28 United States District Court