

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION**

MARK ANTHONY ORTEGA,
Plaintiff

-vs-

CARLOS HERRERA, FUNDCUBE, INC.
d/b/a FUNDQUBE,
Defendants

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SA-24-CV-00769-XR

ORDER ON MOTION FOR DEFAULT JUDGMENT

On this date, the Court considered *pro se* Plaintiff Mark Anthony Ortega’s Motion for Default Judgment (ECF No. 14). After careful consideration, the Court **GRANTS IN PART** the motion.

BACKGROUND

I. Facts

This case involves alleged violations of the Telephone Consumer Protection Act (“TCPA”) and Section 302.101 of the Texas Business and Commerce Code (“TBCC”). Plaintiff alleges that Defendant FundQube—owned and controlled by Defendant Carlos Herrera (together, “Defendants”)—called his personal cell phone number at least eleven times to try to sell a business loan, despite Plaintiff’s registration of his number on the National Do-Not-Call Registry. ECF No. 4 ¶¶ 16, 22, 26–27, 30.

The first call was on June 20, 2024. *Id.* ¶ 22. Less than thirty minutes after this call, Plaintiff received an email from richard@fundqube.com, which referred to this first call and attempted to collect financial data from Plaintiff. *Id.* ¶ 23. Plaintiff contends that Herrera was carbon copied to

this email as carlos@lnetwrk.io. *Id.* ¶ 24. Plaintiff further alleges that Herrera had access to and used this email and actively directs and oversees FundQube’s day-to-day operations, including its marketing and telemarketing practices. *Id.* ¶¶ 25, 27.

Even though Plaintiff responded to this email that same day informing Defendants that he was not interested in Defendants’ products or services and demanded that Defendants not contact him again, *see id.* ¶ 28 (“Hi, I am not interested. Do not contact me.”), Plaintiff alleges that FundQube, “at the direction of Herrera,” called his number at least ten more times. *Id.* ¶¶ 29–30. These calls began the next day on June 21 and continued through July 12. *Id.* ¶ 30. Specifically, on June 21, 24, 25, 26, 27, and July 12. *Id.* Plaintiff asserts that while the calls originated from various phone numbers, all used the same carrier. *Id.* ¶ 29.

Plaintiff contends that these unauthorized calls harmed him in the form of annoyance, nuisance, and invasion of privacy, occupied his phone line, and disturbed the use and enjoyment of his phone. *Id.* ¶ 31.

II. Procedural History

On July 11, 2024, Plaintiff filed this action. ECF No. 1. Plaintiff filed an amended complaint on July 22, 2024, asserting claims under the TCPA, 47 U.S.C. § 227(c)(5) and 47 C.F.R. § 63.1200(d)(6), and the TBCC, § 302.101. ECF No. 4 ¶¶ 33–49. The Court granted Plaintiff’s motion for substituted service on August 30, 2024, and Plaintiff subsequently filed affidavits of service indicated Defendants were properly served. ECF No. 8.

After Defendants failed to appear, the Court ordered Plaintiff to move for entry of default and default judgment. ECF No. 9. The Clerk entered default on February 7, 2025, ECF No. 13, and this motion followed, ECF No. 14.

ANALYSIS

I. Legal Standard

Under Federal Rule of Civil Procedure 55(a), a default judgment is proper “[w]hen a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend.” FED. R. CIV. P. 55(a). After a default has been entered and the defendant fails to appear or move to set aside the default, the court may, on the plaintiff’s motion, enter a default judgment. FED. R. CIV. P. 55(b)(2). A party is not entitled as a matter of right to default judgment, even where the defendant technically is in default. *Ganther v. Ingle*, 75 F.3d 207, 212 (5th Cir. 1996). Rather, “[d]efault judgments are a drastic remedy, not favored by the Federal Rules and resorted to by courts only in extreme situations.” *Sun Bank of Ocala v. Pelican Homestead & Sav. Ass’n*, 874 F.2d 274, 276 (5th Cir. 1989).

In considering any motion for default judgment, a court must examine jurisdiction, liability, and damages. *Rabin v. McClain*, 881 F. Supp. 2d 758, 763 (W.D. Tex. 2012); *see also D’Costa v. Abacus FoodMart Inc.*, 4:21-CV-4031, 2023 WL 1094019, at *2 (S.D. Tex. Jan. 26, 2023), *report and recommendation adopted*, 2023 WL 2088424 (S.D. Tex. Feb. 13, 2023) (“The appropriateness of default judgment depends on ‘(1) whether a default judgment is procedurally warranted; (2) whether Plaintiffs’ complaint sets forth facts sufficient to establish that they are entitled to relief; and (3) what form of relief, if any, Plaintiffs should receive.’” (citation omitted)).

II. Analysis

A. Jurisdiction

“[W]hen entry of default is sought against a party who has failed to plead or otherwise defend, the district court has an affirmative duty to look into jurisdiction both over the subject

matter and the parties.” *Sys. Pipe & Supply, Inc. v. M/V Viktor Turnakovskiy*, 242 F.3d 322, 324 (5th Cir. 2001) (citation omitted).

Subject Matter Jurisdiction. Because Plaintiff asserts a claim under the TCPA, he invokes the Court’s federal question jurisdiction under 28 U.S.C. § 1331. The Court assumes supplemental jurisdiction over his TBCC claim under 28 U.S.C. § 1367(a).

Service. Absent proper service of process, a court lacks personal jurisdiction over a defendant, and any default judgment against the defendant would be void. *Rogers v. Hartford Life & Accident Ins.*, 167 F.3d 933, 940 (5th Cir. 1999). Here, service was proper. After the Court granted Plaintiff’s motion for substituted service on August 15, 2024, ECF No. 6, Plaintiff filed affidavits of service indicating Defendants were properly served. ECF No. 7.

Personal Jurisdiction. Accepting Plaintiff’s allegations as true, the Court has specific personal jurisdiction over FundQube, given its numerous calls to Plaintiff—a Texas resident with a San Antonio area code. ECF No. 4 ¶¶ 10, 17. Courts in the Fifth Circuit routinely find this sufficient. *See, e.g., Thomas v. Life Protect 24/7 Inc.*, 559 F. Supp. 3d 554, 566–68 (S.D. Tex. 2021) (finding allegations in TCPA case that the plaintiff resided in Texas and that the line at issue was her “residential and personal cellular telephone number” sufficient to establish specific personal jurisdiction; “[w]here a business is alleged to engage in intentional practices assuredly designed to manifest results across the country in contravention of a federal statute, the act of reaching out in that prohibited manner is purposeful availment of ‘the privilege of causing a consequence’ in whatever state that call reaches.” (quoting *Wein Air Alaska, Inc. v. Brandt*, 195 F. 3d 208, 213 (5th Cir. 1999) (en banc)); *Rogers v. National Car Cure, LLC*, 636 F. Supp. 3d 762, 769 (S.D. Tex. 2022) (noting that “[m]ost courts to address the question have held that calls to a cell phone can serve as minimum contacts with the state containing the phone’s area code when

the calls are received there”); *cf. Ingram v. Money Map Press*, No. 23-CV-5802-CRB, 2024 WL 3540993, at *4 (N.D. Cal. July 24, 2024) (“In TCPA actions, courts consistently decline to find personal jurisdiction where the cellphone number at issue has an out-of-state area code and no other relevant evidence suggests that the defendant purposefully directed conduct at the forum state”).

The Court likewise has specific personal jurisdiction over Herrera. “Agency relationships . . . may be relevant to the existence of specific jurisdiction,” *Daimler AG v. Bauman*, 571 U.S. 117, 135 n.13 (2014). In the TCPA context, “[i]f an agency relationship exists, then the callers’ contacts can be attributable to the principal [for the establishment of personal jurisdiction].” *Heller v. Marriott Vacations Worldwide Corp.*, No. EP-22-CV-398-FM-MAT, 2023 WL 6702696, at *4 (W.D. Tex. Oct. 11, 2023). Plaintiff sufficiently alleges an agency relationship between FundQube and Herrera. Plaintiff alleges that “Herrera owns and controls FundQube” and “actively directs and oversees FundQube’s day-to-day operations, including its marketing and telemarketing practices.” ECF No. 4 ¶¶ 26–27. These are enough to establish that Herrera is FundQube’s principal, and so FundQube’s actions can be imputed to Herrera for the purposes of specific jurisdiction. *See Guardian v. United Tax Def. LLC*, No. 23-CV-349-KC, 2024 WL 140249, at *3 (W.D. Tex. Jan. 12, 2024); *Callier v. SunPath Ltd.*, No. EP-20-CV-00106-FM, 2020 WL 10285659, at *3 (W.D. Tex. Aug. 10, 2020) (“[T]he authorized actions of an agent may be imputed to that agent's principal.”).¹

¹ True, Texas recognizes the “fiduciary shield doctrine,” under which “a nonresident officer or employee may not be subject to personal jurisdiction when all of his contacts with the forum state were made on behalf of his corporation or employer.” *Lucas v. Ryan*, No. 02-18-00053-CV, 2019 WL 2635561, at *9 (Tex. App.—Fort Worth June 27, 2019, no pet.) (quoting *Ren v. ANU Res., LLC*, 502 S.W.3d 840, 849 (Tex. App.—Houston [14th Dist.] 2016, no pet.); *cf. Savoie v. Pritchard*, 122 F.4th 185, 191 (5th Cir. 2024) (holding that the shield, which “if applicable, prevents the exercise of personal jurisdiction based solely on acts undertaken in a defendant’s corporate capacity,” exists only to the extent state law recognizes it”).

B. Liability

1. Default is Procedurally Proper

Six factors inform whether default is procedurally warranted: “[(1)] whether material issues of fact are at issue, [(2)] whether there has been substantial prejudice, [(3)] whether the grounds for default are clearly established, [(4)] whether the default was caused by a good-faith mistake or excusable neglect, [(5)] the harshness of a default judgment, and [(6)] whether the court would think itself obliged to set aside the default upon the defendant’s motion.” *Lindsey v. Prive Corp.*, 161 F.3d 886, 893 (5th Cir. 1998) (numeration added). Here, a default judgment against Defendants is procedurally proper.

First, there are no disputed issues of material fact. Plaintiff’s allegations are deemed admitted because there is no operative “responsive pleading.” *See* Fed. R. Civ. P. 8(b)(6) (“An allegation ... is admitted if a responsive pleading is required and the allegation is not denied.”).

Second, Defendants’ failure to appear in this matter has caused substantial prejudice to Plaintiff’s ability to prosecute his case and “has ground the adversary process to a halt.” *Joe Hand Promotions, Inc. v. Fusion Hookah, LLC*, No. 1:19-CV-618-RP, 2020 WL 6876208, at *2 (W.D. Tex. Nov. 23, 2020).

Third, the grounds for default are clearly established, as Defendants were properly served, failed to respond at any stage of the litigation, and the Clerk of the Court entered default. These circumstances foreclose any basis for claiming that their default resulted from a good-faith mistake or excusable neglect, or that the entry of default judgment would be unduly harsh, the fourth and

But Plaintiff alleges Herrera engaged in “tortious conduct for which he may be held liable,” *Lucas*, 2019 LW 2635561, at *9, namely violations of the TCPA and TBCC. *See* ECF No. 4 ¶ 29 (“Defendant FundQube at the direction of Defendant Herrera, continued to call Plaintiff’s number”) (emphasis added). This makes the doctrine inapplicable.

fifth factors. Nor is the Court aware of any facts that give rise to “good cause” to set aside default if challenged by these defendants.

1. The Complaint Provides a Sufficient Basis for Default

The Court now looks to the substantive merits of Plaintiff’s claims.

“The defendant, by his default, admits the plaintiff’s well-pleaded allegations of fact [and] is concluded on those facts by the judgment” *Jackson v. FIE Corp.*, 302 F.3d 515, 524 (5th Cir. 2002) (quoting *Nishimatsu Constr. Co. v. Hous. Nat’l Bank*, 515 F.2d 1200, 1206 (5th Cir. 1975)). Although the Court must accept the plaintiff’s well-pleaded facts as true, the Court then asks whether there is a “sufficient basis in the pleadings for the judgment entered.” *Nishimatsu Constr.*, 515 F.2d at 1206; *see also* 10A Wright, Miller et al., FED. PRAC. & PROC. CIV. § 2688 (3d ed. 2002) (“Even after default, however, it remains for the court to consider whether the unchallenged facts constitute a legitimate cause of action, since a party in default does not admit mere conclusions of law.”).

In other words, “whether the factual allegations in the complaint—apart from those about damages—if taken as true, would state a claim upon which relief can be granted.” *D’Costa*, 2023 WL 1094019, at *3. This threshold is lower than the standard for surviving a motion to dismiss under Rule 12(b)(6). *See Wooten v. McDonald Transit Assocs., Inc.*, 788 F. 3d 490, 499-500 (5th Cir. 2015) (holding that the allegations need only provide fair notice of the claim under Rule 8, particularly when the defaulting defendant chose to forgo moving for dismissal or for a more definite statement under Rule 12(b)(6) or 12(e)); FED. R. CIV. P. 8(a)(2) (requiring a pleading to contain “a short and plain statement of the claim showing that the pleader is entitled to relief”).

TCPA Claim. Under Section 272(c), the TCPA delegates authority to the Federal Communications Commission (“FCC”) to promulgate regulations “to protect residential telephone

subscribers’ privacy rights to avoid receiving telephone solicitations to which they object.” 47 U.S.C. § 227(c). Pursuant to this directive, the FCC created the National Do Not Call Registry and promulgated regulations that state, as applicable here, that “[n]o person or entity shall initiate any telephone solicitation to . . . [a] residential telephone subscriber who has registered his or her telephone number on the national do-not-call registry of persons who do not wish to receive telephone solicitations that is maintained by the Federal Government.” 47 C.F.R. § 64.1200(c)(2).

The FCC also promulgated regulations that set forth “minimum standards” that telemarketers must meet, 47 C.F.R. § 64.1200(d), including honoring a person’s “do-not-call” request “within a reasonable time . . . not [to] exceed 30 days from the date of such request,” § 64.1200(d)(3),² and maintaining a list of such do-not-call requests for five years, § 64.1200(d)(6). But the § 64.1200(d) regulations “do not prohibit ‘actually calling an individual after the individual has requested placement on a do-not-call list . . . nor do the regulations specifically proscribe failing to record an individual’s request to be placed on a do-not-call list.” *Simmons v. Charter Commc’ns*, 222 F. Supp. 3d 121, 139 (D. Conn. Mar. 30, 2016) (quoting *Charvat v. DFS Servs. LLC*, 781 F. Supp. 2d 588, 592 (S.D. Ohio 2011)). Instead, “the plaintiff must establish that the calls he or she received were initiated prior to the implementation of proper procedures.” *Simmons*, 222 F. Supp. 3d at 139.

In addition to providing for enforcement by state attorneys general, 47 U.S.C. § 227(g), Section 227(c)(5) creates a private right of action that allows individuals to sue for damages if they

² The Fifth Circuit has not addressed what constitutes a “reasonable” period under 47 C.F.R. § 64.1200(d)(3), and courts are split on this issue. See *Ortega v. Sienna Marketing & Consulting Inc.*, No. SA-CV-487-OG, 2025 WL 899970, at *6 (W.D. Tex. Mar. 4, 2025), *report and recommendation adopted*, 2025 WL 900069 (W.D. Tex. Mar. 21, 2025) (concluding that “[w]ithin a reasonable time not to exceed thirty days is *not* the same as giving entities thirty days to comply”); *Barr v. Macy’s.com, LLC*, No. 22-CV-7867-ALC, 2023 WL 6393480, at *5 (S.D.N.Y. Sept. 29, 2023) (concluding that the “failure to comply with Plaintiff’s DNC request within one business day” was not unreasonable and noting that some courts have construed the thirty-day provision to mean “defendants have a thirty-day period to comply with the request,” while “[o]ther courts have declined to determine the reasonableness of contacting plaintiff during the thirty-day period”).

receive “more than one telephone call within any 12-month period by or on behalf of the same entity in violation of the regulations prescribed under [§ 227(c)].” 47 U.S.C. § 227(c)(5); *Mims v. Aarow Fin. Servs. LLC*, 565 U.S. 368, 372 (2012).

Plaintiff contends that ten of the eleven calls violated Section 227(c) of the TCPA, and that nine of the eleven calls violated the regulations contained at 47 C.F.R. § 64.1200(d)(6).³ The ten calls consist of all calls after FundQube’s initial call, and the nine calls consist of all calls after Plaintiff’s written request to not be contacted. ECF No. 14 at 6. Plaintiff claims that these violations are *separate* violations, and so seeks damages under the TCPA for nineteen violations. But Plaintiff cannot “cannot recover damages for multiple violations under Section 227(c)(5) for a single call[.]” *Noviello v. Adam Wines Consulting, LLC*, No. 3:22-CV-52-BN, 2023 WL 2776696, at *5 (N.D. Tex. April 4, 2023); *see Charvat v. GVN Michigan, Inc.*, 561 F.3d 623, 631–32 (6th Cir. 2009) (Section 227(c)(5) of the TCPA “allows for statutory damages on only a per-call basis,” not a “per-violation” basis).

So the Court proceeds on the assumption that Plaintiff seeks recovery for ten calls. Plaintiff has alleged sufficient facts to do so. Plaintiff alleged he is on the Do Not Call Registry and that he received multiple messages from FundQube within a two-month period. Plaintiff alleges that FundQube called him on his “cellular phone [which he uses] primarily for personal, residential, and household purposes” and that his phone “is not assigned to a telephone exchange service designated for business use.” ECF No. 4 ¶ 18. This is sufficient to establish Plaintiff’s cell phone is a residential phone for purposes of the TCPA. *See Salaiz v. VSC Operations LLC*, No. 3:23-CV-

³ Plaintiff’s amended complaint alleges violations of 47 C.F.R. § 64.1200(d)(6), which deals with failure to maintain records of a consumer’s request not to receive further calls, *not* § 64.1200(d)(3), which deals with liability for failure to comply with a “do-not-call” request. *See* ECF No. 4 ¶¶ 44–49. The Court treats Plaintiff—proceeding *pro se*—as alleging violations of 47 C.F.R. § 64.1200(d)(3), given they are premised on FundQube’s choice “to ignore Plaintiff’s instructions and proceed to send solicitations to Plaintiff’s Number.” ECF No. 4 ¶ 48; *see id.* (“Plaintiff expressly instructed Defendants, in writing, to cease all telemarketing communications, effectively creating a do-not-call request . . .”).

423-KC, 2024 WL 3405601, at *5 (W.D. Tex. July 10, 2024) (holding that a cell phone can constitute a residential phone for the purposes of the TCPA when a plaintiff “sufficiently allege[s] that [they used their] cell phone for residential purposes” (citation omitted)); *Cacho v. McCarthy & Kelly LLP*, 739 F. Supp. 3d 195, 208 (S.D.N.Y. 2024) (independently interpreting “residential subscriber” in § 227(c) to include a cellphone).

Accordingly, Plaintiff sufficiently alleges violations of the FCC regulations against FundQube, for which he can recover under § 227(c) of the TCPA.

TBCC Claim. Section 302.101 of the TBCC prohibits a seller from “mak[ing] a telephone solicitation from a location in this state or to a purchaser located in this state unless the seller holds a registration certificate from the business location from which the telephone solicitation is made.” TEX. BUS. & COM. CODE § 302.101(a). “Courts have interpreted other provisions of the TBCC as creating a private right of action for violations of the TBCC’s registration certificate requirement.” *Cacho v. Amity One Debt Relief*, No. EP-24-CV-160-KC, 2024 LW 4594177, at *5 (W.D. Tex. Oct. 24, 2024) (citing cases). “Allegations that the Defendant made telephone solicitations without a registration certificate are sufficient to state a claim for relief.” *Busbee v. ServiceToday!*, No. 4:24-CV-364-P, 2024 WL 4428989, at *4 (N.D. Tex. Oct. 4, 2024).

Here, Plaintiff alleged that the calls at issue were made by Defendants who “are not registered as telemarketers in Texas” and lack the “required registration certificate.” ECF No. 4 ¶¶ 41–42. The Court takes judicial notice of the registration database available at direct.sos.state.tx.us/telephone/TelephoneSearch.asp. FundQube does not appear in the database.

Accordingly, Plaintiff sufficiently alleges violations of Section 302.101 of the TBCC.

Liability of Herrera. Plaintiff does not allege that Herrera made any of the ten calls at issue. Instead, he contends that FundQube is owned and controlled by Herrera, who “actively

directs and oversees FundQube’s day-to-day operations, including its marketing and telemarketing practices.” ECF No. 4 ¶¶ 26–27. Thus, Plaintiff seeks to hold Herrera liable for FundQube’s violations under the theory of vicarious liability.

“To support a TCPA claim or a claim under the FCC’s regulations, a plaintiff can allege either direct liability by showing that the defendant initiated the offending telemarketing calls, or vicarious liability by showing that an entity in an agency relationship with the defendant initiated the calls.” *Horton v. MultiPlan Inc.*, No. 3:23-CV-2098, 2024 WL 3380236, at *5 (N.D. Tex. June 7, 2024) (citing *Cunningham v. Lifestyles Dev., LLC*, No. 4:19-CV-6, 2019 WL 4282039, at *3–4 (E.D. Tex. Aug. 8, 2019); *see also Tatum v. DBoss Funding LLC*, No. 6:23-CV-565-JDK-KNK, 2024 WL 5098503, at *3 (E.D. Tex. Nov. 23, 2024) (concluding that, post-*Loper Bright* and without deference to the FCC’s ruling that there is vicarious liability for TCPA violations, Section 227(c)(5)’s language—“by or on behalf of the same entity—“plainly” imposes vicarious liability).

As discussed above, *see* Part II(A), Plaintiff has adequately established an agency relationship to impose vicarious liability on Herrera. *See also Cacho*, 2024 LW 4594177, at *3 (concluding that corporate officer could be held personally liable when he “actively oversaw and directed” “the conduct that violated the TCPA” (quoting *Texas v. Am. Blastfax, Inc.*, 1664 F. Supp. 2d 892, 897 (W.D. Tex. 2001)).

C. Damages and Fees

While Plaintiff has stated a plausible claim for relief under the TCPA and TBCC, a default judgment is a judgment on the merits that conclusively establishes the defendant’s liability. It does not establish the amount of damages. *United States v. Shipco Gen. Inc.*, 814 F.2d 1011, 1014 (5th Cir. 1987).

Damages awarded in a default judgment “must not differ in kind from, or exceed in amount, what is demanded in the pleadings.” FED. R. CIV. P. 54(c). Usually, non-liquidated damages are proven at a hearing. *See James v. Frame*, 6 F.3d 307, 310 (5th Cir. 1993) (explaining the general rule that non-liquidated damages in default judgment are not awarded without an evidentiary hearing). But where a mathematical calculation of unliquidated damages is possible with reference to adequately detailed affidavits, a hearing is unnecessary. *Id.* The plaintiff has the burden to provide an evidentiary basis for the damages it seeks. *Broadcast Music, Inc. v. Bostock Billiards & Bar Assoc.*, No. 3:12-CV-413-B, 2013 WL 12126268, at *3 (N.D. Tex. Jan. 18, 2013).

i. Damages

Plaintiff seeks monetary damages and costs.⁴ In this case, both federal and state law provide for an award of statutory damages. Under the TCPA, a successful plaintiff can recover his “actual monetary losses” or \$500 in damages per unlawful call. 47 U.S.C. § 227(c)(5). TBCC § 302 similarly imposes a civil penalty of \$5,000 per violation of § 302.101(a). TEX. BUS. & COM. CODE § 302.302(a). With ten total violations, Plaintiff is entitled to \$5,000 under the TCPA and \$50,000 under the TBCC.⁵

Plaintiff also requests that the Court exercise its discretion to treble his damages under the TCPA for all ten calls. Section 227(c)(5) of the TCPA provides that the Court may award treble damages if it “finds that the defendant willfully or knowingly violated” the TCPA’s implementing regulations. 47 U.S.C. § 227(c)(5). “A willful or knowing violation does ‘not require[e] bad faith,

⁴ While Plaintiff’s amended complaint sought injunctive relief and attorney’s fees, ECF No. 4 at 9, Plaintiff has abandoned this relief, *see* ECF No. 14 at 7.

⁵ There is no double recovery problem, as Section 302.101(a) of the TBCC and §227(c) of the TCPA penalize different conduct, unlike violations of Section 305.053 of the TBCC, which creates a cause of action for a person who receives a communication that violates § 227(c). *Cf. Masters v. Wells Fargo Bank S. Cent., N.A.*, No. A-12-CA-376-SS, 2013 WL 3713492, at *3 (W.D. Tex. July 11, 2013) (“There is no indication in either the TCPA or in Texas’s analogue that either legislative body intended to allow double recovery under both state and federal law for the same TCPA violations.”); *Horton*, 2025 WL 438893 at *8 (citing cases).

but only that the person have reason to know, or should have known, that his conduct would violate the statute.” *Tatum*, 2024 WL 5098503, at *3 (citation omitted).

Here, the record does not support a finding that FundQube or Herrera knew or should have known Plaintiff was registered on the Do Not Call Registry. While Plaintiff informed FundQube that he did not want to be contacted after the first call by email, he did not state that he was on the Do Not Call Registry. *See Graham v. Does 1-25*, 2024 WL 1654576, at *6 (W.D. Tex. April 16, 2024) (declining to award treble damages when plaintiff alleged he told the caller to “stop calling [him] multiple times” but did not allege he informed the defendant his cell phone number was registered on the Do Not Call Registry); *cf. Tatum*, 2024 WL 5098503, at *4 (awarding treble damages for calls after plaintiff “informed the telemarketers that his cell phone is registered on the DNC List,” but not before).

Moreover, even assuming Plaintiff adequately pled violations of 47 C.F.R. § 64.1200(d)(3), eight out of the nine calls that Plaintiff alleges violated the “minimum standards” were made within one week of Plaintiff’s notice to Defendants, and the other was made three weeks later. ECF No. 4 ¶ 30. Given these calls were made within the thirty-day window to implement proper procedures, and absent additional allegations demonstrating willfulness, this demonstrates negligence. So the Court declines to award treble damages for violations of 47 C.F.R. § 64.1200(d)(3).

Accordingly, the Court will award Plaintiff statutory damages in the amount of \$55,000, and Defendants will be jointly and severally liable to pay the total amount.

ii. *Costs*

Plaintiff seeks \$495 in costs: \$405 for the filing fee and \$90 for the cost of service. ECF No. 14-1 at 2. Allowed costs are limited to those categories listed under 28 U.S.C. § 1920. *See*

Gagnon v. United Technisource, Inc., 607 F.3d 1036, 1045 (5th Cir. 2010). The Court reduces the process server fee to \$65 in accordance with the prevailing rate of the United States Marshal service. *See* 28 C.F.R. § 0.114(a)(3). Accordingly, Plaintiff is awarded \$470 in costs.

CONCLUSION

Accordingly, Plaintiff's Motion for Default Judgment (ECF No. 14) is **GRANTED IN PART**. Plaintiff Mark Anthony Ortega is entitled to \$55,000 from Defendants. Plaintiff is awarded \$470 in costs. Plaintiff is also entitled to post-judgment interest. *See* 28 U.S.C. § 1961(a), (b).

Defendants Carlos Herrera and FundCube, Inc. d/b/a FundQube are **JOINTLY AND SEVERALLY** liable for the damages, costs, and post-judgment interest.

A final judgment pursuant to Rule 58 will follow.

The Clerk is **DIRECTED** to close this case.

IT IS SO ORDERED.

SIGNED this 16th day of May, 2025.



XAVIER RODRIGUEZ
UNITED STATES DISTRICT JUDGE