

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

STREET ADDRESS: 220 West Broadway
MAILING ADDRESS: 220 West Broadway
CITY AND ZIP CODE: San Diego, CA 92101

SMALL CLAIMS CASE NO: 37-2009-00001965-SC-SC-CTL

NOTICE TO ALL PLAINTIFFS AND DEFENDANTS:

Your small claims case has been decided. If you lost the case, and the court ordered you to pay money, your wages, money, and property may be taken without further warning from the court. Read the back of this sheet for important information about your rights.

AVISO A TODOS LOS DEMANDANTES Y DEMANDADOS:

Su caso ha sido resuelto por la corte para reclamos judiciales menores. Si la corte ha decidido en su contra y ha ordenado que usted pague dinero, le pueden quitar su salario, su dinero, y otras cosas de su propiedad, sin aviso adicional por parte de esta corte. Lea el reverso de este formulario para obtener informacion de importancia acerca de sus derechos.

PLAINTIFF/DEMANDANTE (Name, street address, and telephone number of each):

James M Kinder
8480 Via Sonoma #20
La Jolla, CA 92037
Telephone No: (858) 412-4792

DEFENDANT/DEMANDADO* (Name, street address, and telephone number of each):

Merchants' Credit Guide Company DBA Merchants' Cre
223 W. Jackson Blvd
Chicago, IL 60606
Telephone No: (888) 249-4134

See attached sheet for additional plaintiffs and defendants:

NOTICE OF ENTRY OF JUDGMENT

Judgment was entered as checked below on (date): 05/15/2009

- 1. Defendant (name, if more than one) : shall pay plaintiff (name, if more than one) : principal and: costs on plaintiff's claim.
2. X Defendant does not owe plaintiff any money on plaintiff's claim.
3. Plaintiff (name, if more than one) : shall pay defendant (name, if more than one) : principal and: costs on defendant's claim.
4. Plaintiff does not owe defendant any money on defendant's claim.
5. Possession of the following property is awarded to plaintiff (describe property) :
6. Payments are to be made at the rate of : \$: per (specify period) : , beginning on (date) : and on the (specify day) : may become due immediately . day of each month thereafter until paid in full. If any payment is missed , the entire balance
7. Dismissed in court with prejudice without prejudice.
8. Attorney-Client Fee Dispute (Attachment to Notice of Entry of Judgment) (form SC-132) is attached.
9. X Other (specify) : See attached Memorandum Of Small Claims Decision.
10. This judgment results from a motor vehicle accident on a California highway and was caused by the judgment debtor's operation of a motor vehicle. If the judgment is not paid , the judgment creditor may apply to have the judgment debtor's driver's license suspended.
11. Enforcement of the judgment is automatically postponed for 30 days or, if an appeal is filed, until the appeal is decided.
12. This notice was personally delivered to (insert name and date) :
13. CLERK'S CERTIFICATE OF MAILING - I certify that I am not a party to this action. This Notice of Entry of Judgment was mailed first class, postage prepaid, in a sealed envelope to the parties at the addresses shown above. The mailing and this certification occurred at the place and on the date shown below .

Place of mailing : San Diego , California

Date of mailing : 05/19/2009

Clerk, by G. Teles, Deputy

The county provides Small Claims Advisor services free of charge. Read the information sheet on the reverse.--

INFORMATION AFTER JUDGMENT	INFORMACION DESPUES DEL FALLO DE LA CORTE
<p>Your small claims case has been decided. The judgment or decision of the court appears on the front of this sheet. The court may have ordered one party to pay money to the other party. The person (or business) who won the case and who can collect the money is called the judgment creditor. The person (or business) who lost the case and who owes the money is called the judgment debtor.</p> <p>Enforcement of the judgment is postponed until the time for appeal ends or until the appeal is decided. This means that the judgment creditor cannot collect any money or take any action until this period is over. Generally, both parties may be represented by lawyers after judgment.</p>	

IF YOU LOST THE CASE . . .

1. If you lost the case on your own claim and the court did not award you any money, the court's decision on your claim is **FINAL**. You may not appeal your own claim.
2. If you lost the case and the court ordered you to pay money, your money and property may be taken to pay the claim unless you do one of the following things:
 - a. **PAY THE JUDGMENT**
The law requires you to pay the amount of the judgment. You may pay the judgment creditor directly, or pay the judgment to the court for an additional fee. You may also ask the court to order monthly payments you can afford. Ask the clerk for information about these procedures.
 - b. **APPEAL**
If you disagree with the court's decision, you may appeal the decision on *the other party's claim*. You may not appeal the decision on your own claim. However, if any party appeals, there will be a new trial on *all* the claims. If you appeared at the trial, you *must* begin your appeal by filing a form called a *Notice of Appeal* (form SC-140) and pay the required fees within 30 days after the date this *Notice of Entry of Judgment* was mailed or handed to you. Your appeal will be in the Superior Court. You will have a **new trial** and you must present your evidence again. You may be represented by a lawyer.
 - c. **VACATE OR CANCEL THE JUDGMENT**
If you did not go to the trial, you may ask the court to vacate or cancel the judgment. To make this request, you must file a *Motion to Vacate the Judgment* (form SC-135) and pay the required fee *within 30 days* after the date this *Notice of Entry of Judgment* was mailed. If your request is denied, you then have **10 days** from the date the notice of denial was mailed to file an appeal. The period to file the *Motion to Vacate the Judgment* is 180 days if you were *not properly served* with the claim. The 180-day period begins on the date you found out or should have found out about the judgment against you.

IF YOU WON THE CASE . . .

1. If you were sued by the other party and you won the case, then the other party may not appeal the court's decision.
2. If you won the case and the court awarded you money, here are some steps you may take to collect your money or get possession of your property:
 - a. **COLLECTING FEES AND INTEREST**
Sometimes fees are charged for filing court papers or for serving the judgment debtor. These extra costs can become part of your original judgment. To claim these fees and interest, ask the clerk for a *Memorandum of Costs*.

b. VOLUNTARY PAYMENT

Ask the judgment debtor to pay the money. If your claim was for possession of property, ask the judgment debtor to return the property to you. **THE COURT WILL NOT COLLECT THE MONEY OR ENFORCE THE JUDGMENT FOR YOU.**

c. STATEMENT OF ASSETS

If the judgment debtor does not pay the money, the law requires the debtor to fill out a form called the *Judgment Debtor's Statement of Assets* (form SC-133). This form will tell you what property the judgment debtor has that may be available to pay your claim. If the judgment debtor willfully fails to send you the completed form, you may file an *Application and Order to Produce Statement of Assets and to Appear for Examination* (form SC-134) and ask the court to give you your attorney's fees and expenses and other appropriate relief, after proper notice, under Code of Civil Procedure section 708.170.

d. ORDER OF EXAMINATION

You may also make the debtor come to court to answer questions about income and property. To do this, ask the clerk for an *Application and Order for Appearance and Examination (Enforcement of Judgment)* (form EJ-125) and pay the required fee. There is a fee if a law officer serves the order on the judgment debtor. You may also obtain the judgment debtors financial records. Ask the clerk for the *Small Claims Subpoena and Declaration* (form SC-107) or *Civil Subpoena Duces Tecum* (form 982(a)(15.1)).

e. WRIT OF EXECUTION

After you find out about the judgment debtor's property, you may ask the court for a *Writ of Execution* (form EJ-130) and pay the required fee. A writ of execution is a court paper that tells a law officer to take property of the judgment debtor to pay your claim. Here are some examples of the kinds of property the officer may be able to take: **wages, bank account, automobile, business property, or rental income**. For some kinds of property, you may need to file other forms. See the law officer for information.

f. ABSTRACT OF JUDGMENT

The judgment debtor may own land or a house or other buildings. You may want to put a lien on the property so that you will be paid if the property is sold. You can get a lien by filing an *Abstract of Judgment* (form EJ-001) with the county recorder in the county where the property is located. The recorder will charge a fee for the *Abstract of Judgment*.

NOTICE TO THE PARTY WHO WON : As soon as you have been paid in full, you must *fill* out the form below and mail it to the court *immediately* or you may be fined. If an *Abstract of Judgment* has been recorded, you must use another form; see the clerk for the proper form.

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ACKNOWLEDGMENT OF SATISFACTION OF JUDGMENT
(Do not use this form if an Abstract of Judgment has been recorded.)

To the Clerk of the Court:

I am the judgment creditor assignee of record.
I agree that the judgment in this action has been paid in full or otherwise satisfied.

Date: _____

(TYPE OR PRINT NAME)

(SIGNATURE)



**SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN DIEGO**

CENTRAL SMALL CLAIMS DIVISION
8950 CLAIREMONT MESA BLVD.
SAN DIEGO, CA 92123

SMALL CLAIMS Case Number: 37-2009-00001965-SC-SC-CTL

Date of Decision: May 15, 2009
Date of Trial: May 4, 2009
Plaintiff: James Kinder
vs.
Defendant: Merchant's Credit Guide Company

MEMORANDUM OF SMALL CLAIMS DECISION

Defendant placed five separate telephone calls to Plaintiff at various times in 2005 and 2006. Plaintiff contends that each call is a separate violation under 47 USC § 227(b)(3), and as such, is entitled to \$2500 in damages.

The Court is mindful that the TCPA is a federal statute with damages of \$500 per violation, as set forth in the express language of the statute. A private right of action exists under the TCPA in state court when permitted by the laws of the state. The Court also recognizes that courts in other states have found that plaintiffs have no duty to mitigate in TCPA cases. (*See, e.g., The State Ex Rel Charvat v. Frye* (2007) 114 Ohio St. 3d 76.)

This Court finds, however, that Plaintiff is precluded by application of the assumption of the risk doctrine from recovering damages under the TCPA. Plaintiff has a "designer phone number" that he procured and has maintained for over a decade. Plaintiff contends that the number is a pager number, which specifically places him into the TCPA statutory scheme for recovery of damages. Plaintiff also contends that he intentionally obtained this number for a legitimate business purpose, and that he would utilize it for this purpose if he were able to do so. He states that the constant receipt of these unwanted calls has rendered that goal impossible. However, this Court finds that by keeping this unique number under such circumstances for a number of years, Plaintiff has knowingly and continuously subjected himself to these calls.

Although traditionally a tort defense, assumption of the risk has been found to be a "policy driven" doctrine in California. (*Childs v. County of Santa Barbara* (2004) 115 Cal.App.4th 64.) It arises when the plaintiff voluntarily undertakes to encounter a specific known risk imposed by defendant's conduct. As set forth above, Plaintiff has done just that. He has a designer phone

number that over the course of years has continuously received calls that, on their face, appear to violate the TCPA. Plaintiff admits that the constant receipt of these calls presently renders his designer telephone number incapable of use for a legitimate business purpose. Thus, his primary and present use of the number is to record the calls received and file TCPA litigation as a result. The Court finds that the continued use of this number in this manner falls squarely within the assumption of the risk doctrine as these actions violate both public policy and the intent of the TCPA. Thus, Plaintiff is barred from recovering damages.

In addition, Defendant argues that Plaintiff is further barred from recovery under the doctrine of collateral estoppel. Collateral estoppel precludes relitigation of issues argued and decided in prior proceedings. (*Pacific Lumber Co. v. State Water Resources Control Bd.* (2006) 37 Cal. 4th 921.) The party asserting collateral estoppel has the burden of proving the following: (1) the issue sought to be precluded from relitigation must be identical to that decided in a former proceeding; (2) the issue must have been actually litigated in the former proceeding; (3) it must have been necessarily decided in the former proceeding; (4) the decision in the former proceeding must be final and on the merits; and (5) the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding. (*Id.* at 943-44.) Even if all threshold requirements are satisfied, the court must further look to the public policies underlying the doctrine before concluding that collateral estoppel should be applied in a particular setting. (*Id.* at 944.)

Here, all of the above elements have been met. Further, public policy dictates that collateral estoppel be applied under this "particular setting" for the reasons set forth above.

Judgment for Defendant. As the prevailing party, Defendant is entitled to costs, if any. (CCP 116.620(g).)

DARLENE DORNAN, Commissioner
SAN DIEGO SUPERIOR COURT