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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

J & J SPORTS PRODUCTIONS, INC.,

Plaintiff,

No. 2:11-cv-2439 JAM AC

vs.

DULCE TORRES, dba
EL MALECON BAR & GRILL,

Defendant.

FINDINGS & RECOMMENDATIONS

_____ /
Pending before the court is plaintiff's motion for default judgment against defendant Dulce Torres, doing business as El Malecon Bar & Grill, located at 2518 East Fremont Street, Stockton, California 95205. Upon review of the motion and the supporting documents, and good cause appearing, THE COURT FINDS AS FOLLOWS:

FACTUAL AND PROCEDURAL BACKGROUND

On September 15, 2011, plaintiff, an international distributor of sports and entertainment programming, filed a complaint against defendant alleging that the latter unlawfully intercepted and exhibited a live broadcast of a prizefight program entitled "200: Celebrate and Dominate: Shane Mosley v. Sergio Mora" ("the Program") in the establishment for commercial advantage without obtaining a sublicense from plaintiff for its use, in violation of

1 the Communications Act, 47 U.S.C. § 605, the Cable Communications Policy Act, 47 U.S.C. §
2 553, and state law. The complaint alleges defendant exhibited the Program on September 18,
3 2010.¹

4 Plaintiff brings the following claims: (1) a violation of 47 U.S.C. § 605
5 (Unauthorized Publication or Use of Communications) alleging that defendant knowingly
6 intercepted, received, and exhibited the Program for purposes of direct or indirect commercial
7 advantage or private financial gain; (2) a violation of 47 U.S.C. § 553 (Unauthorized Reception
8 of Cable Services) based upon the same allegations; (3) a claim for conversion alleging that
9 defendant tortiously obtained possession of the Program and wrongfully converted it for his own
10 benefit; and (4) a violation of the California Business & Professions Code § 17200, *et. seq.*

11 In the complaint, plaintiff seeks \$110,000 in statutory damages as well as
12 attorneys' fees and costs for Count I; \$60,000 in statutory damages, as well as attorneys' fees
13 and costs for Count II; compensatory, exemplary, and punitive damages, as well as attorneys'
14 fees and costs for Count III; and restitution, declaratory relief, injunctive relief, and attorneys'
15 fees for Count IV.

16 The summons and complaint were served on defendant by substituted service on
17 January 8, 2012 (an "Amelio Doe" accepted service at defendant's place of business). See Doc.
18 No. 5; Fed. R. Civ. P. 4(e)(2); Pacific Atlantic Trading Co. v. M/V Main Express, 758 F.2d
19 1325, 1331 (9th Cir. 1985) (default judgment void without personal jurisdiction). Defendant has

20
21 ¹ Further details are provided in the affidavit of plaintiff's corporate president, submitted
22 in support of the motion, and its attached exhibits. See Doc. No. 11. Plaintiff owned the
23 commercial exhibition licensing rights to the Program pursuant to contract with Golden Boy
24 Promotions, Inc. Under the contract Golden Boy retained exclusive rights to license live cable
25 and satellite television exhibition of the Program on a residential pay-per-view basis, and sold to
26 plaintiff the exclusive right to exhibit or sublicense exhibition of the telecast at commercial
closed-circuit exhibition outlets. Plaintiff then marketed the commercial exhibition rights to its
commercial customers (i.e., casinos, racetracks, bars, restaurants and nightclubs). Electronic
transmission of the live telecast was encrypted to ensure distribution only to licensed exhibitors,
who paid fees to plaintiff under sublicensing agreements. Id. Plaintiff also submitted the
affidavit of an investigator who observed the Program being televised at the defendant
establishment on the date of the live telecast. See Doc. No. 9-3.

1 failed to file an answer or otherwise appear in this action. The clerk entered default against
2 defendant on February 13, 2012.

3 Request for entry of default and the instant motion for default judgment and
4 supporting papers were served by mail on defendant at defendant's last known address. Doc.
5 Nos. 7, 9. Defendant did not file an opposition to the motion for entry of default judgment.
6 Plaintiff seeks an entry of default judgment in the amount of \$111,600 (\$10,000 for statutory
7 damages pursuant to 47 U.S.C. § 605(e)(3)(C)(i)(II); \$100,000 for enhanced damages pursuant
8 to 47 U.S.C. § 605(e)(3)(C)(ii); and \$1,600 for conversion).²

9 LEGAL STANDARD

10 Pursuant to Federal Rule of Civil Procedure 55, default may be entered against a
11 party against whom a judgment for affirmative relief is sought who fails to plead or otherwise
12 defend against the action. See Fed. R. Civ. P. 55(a). However, “[a] defendant’s default does not
13 automatically entitle the plaintiff to a court-ordered judgment.” PepsiCo, Inc. v. Cal. Sec. Cans,
14 238 F. Supp. 2d 1172, 1174 (C.D. Cal. 2002) (citing Draper v. Coombs, 792 F.2d 915, 924-25
15 (9th Cir. 1986)); see Fed. R. Civ. P. 55(b) (governing the entry of default judgments). Instead,
16 the decision to grant or deny an application for default judgment lies within the district court’s
17 sound discretion. Aldabe v. Aldabe, 616 F.2d 1089, 1092 (9th Cir. 1980). In making this
18 determination, the court may consider the following factors:

19 (1) the possibility of prejudice to the plaintiff; (2) the merits of plaintiff’s
20 substantive claim; (3) the sufficiency of the complaint; (4) the sum of money at
21 stake in the action; (5) the possibility of a dispute concerning material 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.

22 Eitel v. McCool, 782 F.2d 1470, 1471-72 (9th Cir. 1986). Default judgments are ordinarily
23 disfavored. Id. at 1472.

25 ² Plaintiff does not seek default judgment on its claims brought pursuant to 47 U.S.C.
26 Section 553 and the California Business & Professions Code § 17200, *et. seq.* See Riley Decl.
¶¶ 6-7.

1 2. Factors Two and Three: The Merits of Plaintiff's Substantive Claims and the
2 Sufficiency of the Complaint

3 The undersigned considers the merits of plaintiff's substantive claims and the
4 sufficiency of the complaint together because of the relatedness of the two inquiries. The
5 undersigned must consider whether the allegations in the complaint are sufficient to state a claim
6 that supports the relief sought. See Danning, 572 F.2d at 1388; PepsiCo, Inc., 238 F. Supp. 2d at
7 1175.

8 Plaintiff seeks entry of default judgment on its claim brought pursuant to 47
9 U.S.C. § 605(a).³ Plaintiff's inability to allege the precise nature of the intercepted transmission
10 in this case, which is largely due to defendant's failure to appear or defend itself in the action,
11 raises a question regarding the scope of 47 U.S.C. § 605(a) and the sufficiency of plaintiff's
12 claim under that provision. The Federal Communications Act prohibits, among other things,
13 commercial establishments from intercepting and broadcasting radio communications to its
14 patrons. See 47 U.S.C. § 605(a). In relevant part, 47 U.S.C. § 605(a) states:

15 No person not being authorized by the sender shall intercept any radio
16 communication and divulge or publish the existence, contents, substance, purport,
17 effect, or meaning of such intercepted communication to any person. No person
18 not being entitled thereto shall receive or assist in receiving any interstate or
19 foreign communication by radio and use such communication (or any information
20 therein contained) for his own benefit or for the benefit of another not entitled
21 thereto. No person having received any intercepted radio communication or
22 having become acquainted with the contents, substance, purport, effect, or
23 meaning of such communication (or any part thereof) knowing that such
24 communication was intercepted, shall divulge or publish the existence, contents,
25 substance, purport, effect, or meaning of such communication (or any part
26 thereof) or use such communication (or any information therein contained) for his
own benefit or for the benefit of another not entitled thereto.

22 The Ninth Circuit Court of Appeals has determined that satellite television signals are covered

24 ³ The undersigned does not address the merits of, or sufficiency of the allegations in
25 support of, plaintiff's state law claim for conversion. As discussed more fully below, the
26 undersigned need not reach plaintiff's conversion claim because the recommended statutory
damages will sufficiently compensate plaintiff such that an award for conversion damages would
be duplicative.

1 communications under 47 U.S.C. § 605(a). DIRECTV, Inc. v. Webb, 545 F.3d 837, 844 (9th
2 Cir. 2008).

3 The scope of section 605(a) is less clear with respect to transmissions intercepted
4 from a cable system, which are expressly covered under 47 U.S.C. § 553(a). Section 553(a)
5 states, in relevant part: “No person shall intercept or receive or assist in intercepting or receiving
6 any communications service offered over a cable system, unless specifically authorized to do so
7 by a cable operator or as may otherwise be specifically authorized by law.” 47 U.S.C.
8 § 553(a)(1).⁴

9 Here, plaintiff has not alleged whether the transmission that defendant intercepted
10 was from a cable system or a satellite television signal. A split of authority has developed
11 regarding the scope of section 605(a) in that numerous courts have concluded that section 605(a)
12 applies exclusively to broadcasts obtained by way of a satellite television signal, as opposed to
13 transmissions over a cable system, and that section 553 applies exclusively to transmission over
14 a cable system. Compare United States v. Norris, 88 F.3d 462, 466-69 (7th Cir. 1996) (holding
15 that sections 553(a) and 605(a) are not “overlapping statutes” and are thus mutually exclusive),
16 with Int’l Cablevision, Inc. v. Sykes, 75 F.3d 123, 132-33 (2d Cir. 1996) (holding that section
17 605 and section 553 are not completely overlapping); see also TKR Cable Co. v. Cable City
18 Corp., 267 F.3d 196, 204-07 (3d Cir. 2001) (recognizing the disagreement between the holdings
19 in Norris and Sykes, and holding “that § 605 encompasses the interception of satellite
20 transmissions to the extent reception or interception occurs prior to or not in connection with,
21 distribution of the service over a cable system, and no more” (internal quotation marks
22

23 ⁴ Section 553 carries lower minimum statutory damages and lower enhanced damages
24 than section 605. Compare 47 U.S.C. §§ 605(e)(3)(C)(i)(II) and 605(e)(3)(C)(ii) (providing for
25 the award of statutory damages of not less than \$1,000 and no more than \$10,000, and under
26 certain circumstances enhanced damages of up to \$100,000 per violation), with 47 U.S.C.
§ 553(c)(3)(A)(ii) (providing for the award of statutory damages of not less than \$250 and not
more than \$10,000, and under certain circumstances enhanced damages of up to \$50,000 per
violation).

1 omitted).).

2 At a minimum, plaintiff's complaint and evidence support a conclusion that
3 defendant intercepted, without authorization, a transmission of the Program and broadcast it to
4 its patrons. Plaintiff essentially concedes that its complaint and the record contain no allegations
5 or evidence substantiating the nature of the transmission that was intercepted by defendant.
6 Plaintiff argues, however, that although it was unable to allege the precise means of transmission
7 in this case (i.e., transmission over a cable system or satellite broadcast), it "should not be
8 prejudiced" given defendant's failure to appear or defend itself in this action. Pl.'s Memo. of P.
9 & A. in Supp. of Motion for Default J. at 8. The undersigned agrees with plaintiff that under the
10 circumstances of this case, where plaintiff was deprived of the opportunity to conduct discovery
11 regarding the transmission at issue because of defendant's failure to appear or defend itself in
12 this action, plaintiff should not suffer the resulting prejudice. In any event, the split of authority
13 presented above has little practical impact in this case because the undersigned will recommend
14 the entry of a judgment in the total amount of \$5,000, which is the middle range of the non-
15 enhanced statutory damages available under both 47 U.S.C. § 553(c)(3)(A)(ii) and 47 U.S.C.
16 § 605(e)(3)(C)(i)(II). Thus, insofar as the merits of plaintiff's statutory claims and the
17 sufficiency of its pleadings under the Eitel factors are concerned, the complaint and record
18 before the undersigned favor entry of default judgment.

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

20 Under the fourth factor cited in Eitel, "the court must consider the amount of
21 money at stake in relation to the seriousness of Defendant's conduct." PepsiCo, Inc., 238 F.
22 Supp. 2d at 1177; see also Philip Morris USA, Inc. v. Castworld Prods., Inc., 219 F.R.D. 494,
23 500 (C.D. Cal. 2003). Here, plaintiff seeks statutory damages of \$110,000 for the willful
24 violation of 47 U.S.C. § 605. This amount represents the maximum amount plaintiff would be
25 permitted to recover under the statute, including enhanced damages. In addition, plaintiff seeks
26 compensatory and punitive damages for defendant's tortious conversion of plaintiff's property.

1 Plaintiff notes defendant would have been required to pay only \$1,600 to broadcast the Program
2 at the bar and grill, but plaintiff asserts nominal damages have proven insufficient to combat
3 piracy and that defendant therefore should be required to pay the statutory maximum. Thus,
4 plaintiff seems to concede that amount of damages requested is not proportional to defendant's
5 conduct.

6 Given the substantial amount of money at stake, this factor could weigh against
7 the entry of default judgment. See, e.g., Joe Hand Promotions v. Streshly, 655 F. Supp. 2d 1136
8 (S.D. Cal. 2009) (proposed award amount of \$100,975 was “manifestly excessive under existing
9 law”); J & J Sports Productions. v. Cardoze, 2010 WL 2757106, at *5 (N.D. Cal. July 9, 2010)
10 (“a large sum of money at stake would disfavor default damages,” such as damages totaling
11 \$114,200); see also Board of Trustees of the Sheet Metal Workers v. Vigil, 2007 WL 3239281,
12 at *2 (N.D. Cal. Nov. 1, 2007) (“default judgment is disfavored if there were a large sum of
13 money involved”); but see J & J Sports Productions v. Hernandez, 2010 WL 1980186, at *4
14 (“the statutes involved contemplate such an award under certain circumstances,” and the factor
15 did not weigh against default judgment). As discussed below, however, the court declines to
16 enter judgment in the amount requested. Consequently, the factor does not weigh against
17 plaintiff.

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

19 The facts of this case are relatively straightforward, and plaintiff has provided the
20 court with well-pleaded allegations supporting its statutory claims and affidavits in support of its
21 allegations. Here, the court may assume the truth of well-pleaded facts in the complaint (except
22 as to damages) following the clerk's entry of default and, thus, there is no likelihood that any
23 genuine issue of material fact exists.⁵ See, e.g., Elektra Entm't Group Inc. v. Crawford, 226
24

25 ⁵ Defendant's failure to file an answer in this case or a response to the instant default
26 application further supports the conclusion that the possibility of a dispute as to material facts is
minimal.

1 F.R.D. 388, 393 (C.D. Cal. 2005) (“Because all allegations in a well-pleaded complaint are taken
2 as true after the court clerk enters default judgment, there is no likelihood that any genuine issue
3 of material fact exists.”); accord Philip Morris USA, Inc., 219 F.R.D. at 500; PepsiCo, Inc., 238
4 F. Supp. 2d at 1177.

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

6 Upon review of the record before the court, the undersigned finds that the default
7 was not the result of excusable neglect. See PepsiCo, Inc., 238 F. Supp. 2d at 1177. Plaintiff
8 served the defendant with the summons and complaint. Moreover, plaintiff served defendant by
9 mail with notice of its application for default judgment. Despite ample notice of this lawsuit and
10 plaintiff’s intention to seek a default judgment, defendant has not appeared in this action to date.
11 Thus, the record suggests that defendant has chosen not to defend this action, and not that the
12 default resulted from any excusable neglect. Accordingly, this Eitel factor favors the entry of a
13 default judgment.

14 6. Factor Seven: The Strong Policy Underlying the Federal Rules of Civil Procedure
15 Favoring Decisions on the Merits

16 “Cases should be decided upon their merits whenever reasonably possible.” Eitel,
17 782 F.2d at 1472. However, district courts have concluded with regularity that this policy,
18 standing alone, is not dispositive, especially where a defendant fails to appear or defend itself in
19 an action. PepsiCo, Inc., 238 F. Supp. 2d at 1177; see also Craigslis, Inc. v. Naturemarket, Inc.,
20 694 F. Supp. 2d 1039, 1061 (N.D. Cal. Mar. 5, 2010); ACS Recovery Servs., Inc. v. Kaplan,
21 2010 WL 144816, at *7 (N.D. Cal. Jan. 11, 2010) (unpublished); Hartung v. J.D. Byrider, Inc.,
22 2009 WL 1876690, at *5 (E.D. Cal. June 26, 2009) (unpublished). Accordingly, although the
23 undersigned is cognizant of the policy in favor of decisions on the merits—and consistent with
24 existing policy would prefer that this case be resolved on the merits—that policy does not, by
25 itself, preclude the entry of default judgment.

26 Upon consideration of the Eitel factors, the undersigned concludes that plaintiff is

1 entitled to the entry of default judgment against defendant and will make a recommendation to
2 that effect. What remains is the determination of the amount of damages to which plaintiff is
3 entitled.

4 B. Terms of Judgment

5 After determining that a party is entitled to entry of default judgment, the court
6 must determine the terms of the judgment to be entered. Considering plaintiff's briefing and the
7 record in this case, including the affidavits and declarations submitted by plaintiff, the
8 undersigned concludes that plaintiff is entitled to an award of statutory damages in the amount of
9 \$5,000 as a result of defendant's unlawful interception and broadcast of the Program, and will
10 recommend the same.

11 Pursuant to section 605, a court may award statutory damages of "not less than
12 \$1,000 or more than \$10,000" for violation of the Federal Communications Act, and may also
13 award enhanced damages of up to \$100,000 if the "violation was committed willfully and for
14 purposes of direct or indirect commercial advantage or private financial gain." 47 U.S.C.
15 § 605(e)(3)(C)(i)(II), (e)(3)(C)(ii).

16 Here, plaintiff seeks a judgment in the amount of \$111,600. Plaintiff's
17 application for default judgment and proposed order indicate that this sum consists of \$110,000
18 for a violation of 47 U.S.C. § 605(e)(3)(B)(iii) and (e)(3)(C)(ii), and \$1,600 as compensatory
19 damages arising from defendant's act of conversion.

20 In this case, plaintiff's investigator provided evidence that the establishment,
21 which has a capacity of 100 patrons, had about between 62 and 68 patrons inside on the day in
22 question and that defendant was unlawfully broadcasting the Program on an unspecified number
23 of televisions.⁶ Affiant Decl., Doc. No. 9-3; Pl.'s Mem. of P. & A. in Supp. of Motion for

24
25 ⁶ While plaintiff asserts in its motion that the Program was broadcast on four televisions
26 inside defendant's establishment, see Pl.'s Mem. of P. & A. in Supp. of Motion for Default J. at
11, the Affiant Declaration provides only that there were four televisions; it does not specify how
many of those televisions were broadcasting the Program. See Affiant Decl., Doc. No. 9-3.

1 Default J. at 16. Defendant's establishment is not large, and there is no evidence of a repeat
2 violation or additional egregious circumstances. The investigator reported that there was no
3 cover charge for entry on the night in question. There is no evidence before the court of any
4 promotion by defendant that the fight would be shown at the establishment. There is also no
5 evidence before the court that a special premium on food and drink was being charged at the
6 establishment on the night of the fight or that the establishment was doing any greater level of
7 business on the night the fight was shown than at any other time. Finally, plaintiff has presented
8 no evidence to the court suggesting that the defendant was a repeat broadcast piracy offender.
9 Balancing these facts with the widespread problem of piracy and the need for an award sufficient
10 to deter future piracy, the undersigned will recommend an award of statutory damages in the
11 amount of \$5,000. On the record before the court, the undersigned does not find that this case
12 merits an award of enhanced damages.

13 Plaintiff also seeks actual damages for defendant's alleged tortious act of
14 conversion in the amount of \$1,600, which consists of the fee that defendant would have had to
15 pay to plaintiff in order to lawfully broadcast the Program through a contractual sublicense.⁷
16 The undersigned will not recommend an award of damages with respect to plaintiff's conversion
17 claim. The statutory damages provisions at issue serve not only a deterrent function, see J & J
18 Sports Prods. v. Orellana, 2010 WL 1576447, at *3 (N.D. Cal. Apr. 19, 2010) (unpublished), but
19 also a compensatory function, which is evidenced by provisions that permit the award of
20 statutory damages or actual damages in a civil action. See 47 U.S.C. § 605(e)(3)(C)(I); 47
21 U.S.C. § 553(c)(3)(A)(i). Here, the recommended award of statutory damages in the amount of
22 \$5,000 sufficiently compensates plaintiff, and this case does not present a set of circumstances
23 where an additional award might be warranted. Accordingly, the undersigned will recommend

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25 ⁷ Damages for conversion are measured, in relevant part, by the value of the property at
26 the time of the conversion. Cal. Civ. Code § 3336; see also Stan Lee Trading, Inc. v. Holtz, 649
F. Supp. 577, 581 (C.D. Cal. 1986); Spates v. Dameron Hosp. Ass'n, 114 Cal. App. 4th 208, 221,
7 Cal. Rptr. 3d 597, 608 (Ct. App. 2003).

1 that plaintiff be awarded no damages on its conversion claim.

2 Finally, although the prayer for relief in the complaint and the application for
3 default judgment indicate that plaintiff seeks the award of costs and attorneys' fees, the
4 application for default judgment contains no argument or evidence in support of such a request.
5 Accordingly, the undersigned will not recommend the award of costs or attorneys' fees.

6 Accordingly, IT IS HEREBY RECOMMENDED that:

- 7 1. Plaintiff's application for default judgment be granted;
- 8 2. The court enter judgment against defendant on plaintiff's claims brought
9 pursuant to 47 U.S.C. § 605(a);
- 10 3. The court award statutory damages in an amount of \$5,000.00 to plaintiff;
11 and
- 12 4. This case be closed.

13 These findings and recommendations are submitted to the United States District
14 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen
15 days after being served with these findings and recommendations, any party may file written
16 objections with the court and serve a copy on all parties. Such a document should be captioned
17 "Objections to Magistrate Judge's Findings and Recommendations." Failure to file objections
18 within the specified time may waive the right to appeal the District Court's order. Turner v.
19 Duncan, 158 F.3d 449, 455 (9th Cir. 1998); Martinez v. Ylst, 951 F.2d 1153, 1156-57 (9th Cir.
20 1991).

21 DATED: December 12, 2012.

22
23 
24 ALLISON CLAIRE
UNITED STATES MAGISTRATE JUDGE

25 /mb;j&j2439.mdj
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