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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA
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9 J & J Sports Productions Incorporated,

No. CV-15-00383-PHX-NVW

10 Plaintiff,

ORDER

11 v.

12 Francisca A. Gonzalez-Arvizu, et al.,

13 Defendants.
14

15 Before the court are Plaintiff's Application for Default Judgment (Doc. 16) and
16 the supporting Memorandum of Points and Authorities (Doc. 16-1). The Application will
17 be denied.

18 Plaintiff contracted to obtain the exclusive nationwide distribution rights to a
19 March 8, 2014 light middleweight bout between Saul Alvarez and Alfredo Angulo (the
20 "Program"). (Doc. 1 at 4.) Through a series of sublicensing agreements, Plaintiff
21 granted the right to exhibit the Program to various hotels, bars, restaurants, and clubs
22 across North America. (*Id.* at 5.) Plaintiff alleges that without obtaining a sublicense,
23 Defendant Taco Mich & Bar and its "managing member," Defendant Francisca A.
24 Gonzalez-Arvizu, "did unlawfully intercept, receive, publish, divulge, display, and/or
25 exhibit the *Program* at the time of its transmission at their commercial establishment in
26 Phoenix." (*Id.* at 3, 5.)

27 Plaintiff filed suit on March 3, 2015, seeking damages on two causes of action.
28 The first alleges a violation of 47 U.S.C. § 605, the relevant portions of which provide:

1 Except as authorized by chapter 119, title 18, United States Code, no
2 person receiving, assisting in receiving, transmitting, or assisting in
3 transmitting, any interstate or foreign communication by wire or radio shall
4 divulge or publish the existence, contents, substance, purport, effect, or
5 meaning thereof, except through authorized channels of transmission or
6 reception, (1) to any person other than the addressee, his agent, or attorney,
7 (2) to a person employed or authorized to forward such communication to
8 its destination, (3) to proper accounting or distributing officers of the
9 various communicating centers over which the communication may be
10 passed, (4) to the master of a ship under whom he is serving, (5) in
11 response to a subpoena issued by a court of competent jurisdiction, or (6) on
12 demand of other lawful authority. No person not being authorized by the
13 sender shall intercept any radio communication and divulge or publish the
14 existence, contents, substance, purport, effect, or meaning of such
15 intercepted communication to any person. No person not being entitled
16 thereto shall receive or assist in receiving any interstate or foreign
17 communication by radio and use such communication (or any information
18 therein contained) for his own benefit or for the benefit of another not
19 entitled thereto. No person having received any intercepted radio
20 communication or having become acquainted with the contents, substance,
21 purport, effect, or meaning of such communication (or any part thereof)
22 knowing that such communication was intercepted, shall divulge or publish
23 the existence, contents, substance, purport, effect, or meaning of such
24 communication (or any part thereof) or use such communication (or any
25 information therein contained) for his own benefit or for the benefit of
26 another not entitled thereto.

18 47 U.S.C. § 605(a). The second cause of action claims Defendants violated 47 U.S.C.
19 § 553. That provision forbids any person to “intercept or receive or assist in intercepting
20 or receiving any communications service offered over a cable system, unless specifically
21 authorized to do so by a cable operator or as may otherwise be specifically authorized by
22 law.” 47 U.S.C. § 553(a)(1).

23 Defendants were served with process in April 2015 (Doc. 10, 11) but did not
24 appear. On May 11, 2015, Plaintiff filed a Request to Enter Default (Doc. 12), which the
25 Clerk granted ten days later (Doc. 15). Plaintiff now moves, pursuant to Federal Rule of
26 Civil Procedure 55(b)(2), for entry of a default judgment.

27 “Entry of default judgment ... is not a matter of right. Entry of a default judgment
28 is entirely within the court’s discretion and may be refused where the court determines no

1 justifiable claim has been alleged or that a default judgment is inappropriate for other
2 reasons.” *SuperMedia LLC v. Law Offices of Malkin & Assocs. P.L.L.C.*, No. CV-12-
3 2491-PHX-LOA, 2013 U.S. Dist. LEXIS 18105, at *4-5 (D. Ariz. Feb. 11, 2013)
4 (citations and internal quotation marks omitted). “Factors which may be considered by
5 courts in exercising discretion as to the entry of a default judgment include: (1) the
6 possibility of prejudice to the plaintiff, (2) the merits of plaintiff’s substantive claim, (3)
7 the sufficiency of the complaint, (4) the sum of money at stake in the action; (5) the
8 possibility of a dispute concerning material facts; (6) whether the default was due to
9 excusable neglect, and (7) the strong policy underlying the Federal Rules of Civil
10 Procedure favoring decisions on the merits.” *Eitel v. McCool*, 782 F.2d 1470, 1471-72
11 (9th Cir. 1986) (citation omitted).

12 “*Eitel* require[s] that a plaintiff state a claim on which the [plaintiff] may recover.”
13 *Twentieth Century Fox Film Corp. v. Streeter*, 438 F. Supp. 2d 1065, 1070 (D. Ariz.
14 2006) (alterations in original) (citation and internal quotation marks omitted). “Where [a]
15 default has been entered, as in this case, the factual allegations of the complaint, except
16 those relating to the amount of damages, [are] taken as true.” *Siemens Med. Solutions*
17 *USA, Inc. v. Sequoia Techs.*, No. CV-05-0529-PHX-FJM (LOA), 2006 U.S. Dist. LEXIS
18 11267, at *41 (D. Ariz. Feb. 6, 2006) (alteration in original) (citation and internal
19 quotation marks omitted).

20 It is undisputed that § 553 prohibits unauthorized interception of cable (or wire)
21 communications and § 605 bars interception of radio (or satellite) communications. *See J*
22 *& J Sports Prods. v. Preciado*, No. CV-14-02232-PHX-NVW, 2015 U.S. Dist. LEXIS
23 29809, at *5-8 (D. Ariz. Mar. 11, 2015); *DirectTV, Inc. v. Webb*, 545 F.3d 837, 844 (9th
24 Cir. 2008) (“[I]t is clear . . . that the ‘communications’ protected by § 605(a) include
25 satellite television signals.”). The weight of authority is that § 605 does not also extend
26 to wire communications. *Preciado*, 2015 U.S. Dist. LEXIS 29809, at *6-7. “Of the five
27 courts of appeals to address the scope of § 605, four have found that it does not apply to
28 wire communications.” *Id.* at *7.

1 Plaintiff's Complaint does not make clear whether Defendants' alleged
2 interception of the Program occurred by cable or by radio. On the majority view of
3 § 605, the Complaint therefore fails to plead the necessary factual predicates of either a
4 § 553 or a § 605 claim. Because Defendants have not appeared, Plaintiff explains that it
5 "cannot conclusively determine the precise method of interception and reception" (Doc.
6 16-1 at 10), and it therefore requests damages only under § 605. Plaintiff, however, fails
7 to plead other information, of which it is aware, that might suggest whether its § 605
8 claim is "plausible" within the meaning of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544
9 (2007), and *Ashcroft v. Iqbal*, 566 U.S. 662 (2009). For example, the Complaint does not
10 explain over what kind(s) of technology Plaintiff transmitted the Program, the most
11 common methods of interception, which devices a restaurant of Defendants' size is likely
12 to possess, or whether there exist methods of interception not covered by either § 553 or
13 § 605. There may well be reason to believe that an allegation of radio, as opposed to
14 cable, interception is plausible. But Plaintiff offers none. Instead, it hides behind
15 ambiguous language—"intercept, receive, publish, divulge, display, and/or exhibit"—that
16 it hopes will permit pleading of two (probably) mutually exclusive causes of action. On a
17 motion for default judgment, such noncommittal pleading is insufficient, especially
18 where a plaintiff has not pled important information within its own knowledge.

19 Plaintiff has not stated a claim. Under *Eitel*, default judgment is not appropriate.

20 IT IS THEREFORE ORDERED that Plaintiff's Application for Default Judgment
21 (Doc. 16) is denied.

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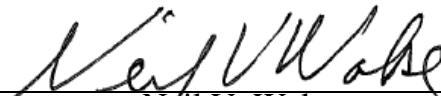
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IT IS FURTHER ORDERED that Plaintiff may file by August 27, 2015, an amended complaint, upon which he may effect service of process. If by that date Plaintiff has not filed an amended complaint, the Clerk shall terminate this case.

Dated this 6th day of August, 2015.



Neil V. Wake
United States District Judge