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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**

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9 Joe Hand Promotions Incorporated,

10 Plaintiff,

11 v.

12 Robert Sizemore and Sleepy Dog Saloon
13 and Brewery LLC,

14 Defendants.

Case No. 2:15-cv-00695-DLR

ORDER

15
16 Before the Court is Plaintiff's Motion for Summary Judgment. (Doc. 41.) The
17 motion is fully briefed. For the following reasons, the motion is granted.

18 **BACKGROUND**

19 Plaintiff is Joe Hand Promotions, Inc., a closed circuit distributor of sports and
20 entertainment programming. (Doc. 41-2, ¶ 2.) Defendants are Sleepy Dog Saloon &
21 Brewery LLC and Robert Sizemore, its sole shareholder, managing member, and the
22 individual identified on its liquor license. (*Id.*, ¶¶ 3-5.) Defendants operate Sleepy Dog
23 Brewery, a small beer tasting establishment in Tempe, Arizona. (*Id.*, ¶ 3.) On April 26,
24 2014, Defendants ordered "Ultimate Fighting Championship 172: Jon Jones v. Glover
25 Teixeira Championship Fight Program" (the Program) from DirecTV and displayed it at
26 Sleepy Dog Brewery with patrons present. (*Id.*, ¶¶ 1, 6, 9-11; Doc. 46, ¶¶ 15-16.)
27 Plaintiff, however, held the exclusive commercial distribution rights to the Program and
28 did not authorize Defendants to broadcast it commercially. (Doc. 41-2, ¶¶ 2, 7; Doc. 47-

1 2, ¶¶ 15-18.) Accordingly, Plaintiff filed this lawsuit, alleging that Defendants
2 unlawfully intercepted and displayed the Program without authorization in violation of
3 the Cable & Television Consumer Protection and Competition Act, 47 U.S.C. § 553, and
4 the Federal Communications Act, 47 U.S.C. § 605. (Doc. 1.) Plaintiff now moves for
5 summary judgment. (Doc. 41.)

6 **LEGAL STANDARD**

7 Summary judgment is appropriate when, viewing the facts in a light most
8 favorable to the nonmoving party, “there is no genuine dispute as to any material fact and
9 the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). Summary
10 judgment may also be entered “against a party who fails to make a showing sufficient to
11 establish the existence of an element essential to that party’s case, and on which that
12 party will bear the burden of proof at trial.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322
13 (1986). The party seeking summary judgment “bears the initial responsibility of
14 informing the district court of the basis for its motion, and identifying those portions of
15 [the record] which it believes demonstrate the absence of a genuine issue of material
16 fact.” *Id.* at 323. The burden then shifts to the non-movant to establish the existence of a
17 material fact. *Id.* at 324. The non-movant “must do more than simply show that there is
18 some metaphysical doubt as to the material facts,” and instead “come forward with
19 ‘specific facts showing that there is a genuine issue for trial.’” *Matsushita Elec. Indus.*
20 *Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986) (quoting Fed. R. Civ. P. 56(e)
21 (1963)). A dispute about a fact is “genuine” if the evidence is such that a reasonable jury
22 could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477
23 U.S. 242, 248 (1986). Conclusory allegations, unsupported by factual material, are
24 insufficient to defeat summary judgment. *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir.
25 1989).

26 **DISCUSSION**

27 Although Plaintiff alleges claims under 47 U.S.C. §§ 553 and 605, it requests that
28 liability be found under § 605 only. (Doc. 41-1 at 8.) Section 605(a) states, in relevant

1 part:

2 No person not being authorized by the sender shall intercept any radio
3 communication and divulge or publish the existence, contents, substance,
4 purport, effect, or meaning of such intercepted communication to any
5 person. No person not being entitled thereto shall receive or assist in
6 receiving any interstate or foreign communication by radio and use such
7 communication (or any information therein contained) for his own benefit
8 or for the benefit of another not entitled thereto.

9 This section applies to the unauthorized interception of satellite television signals.
10 *DirecTV v. Webb*, 545 F.3d 837, 844 (9th Cir. 2008); *Joe Hand Promotions Inc. v. Spain*,
11 No. CV-15-00152-PHX-SMM, 2016 WL 4158802, at *3 (D. Ariz. Aug. 5, 2016)
12 (“District courts in the Ninth Circuit have . . . held that . . . section 605 applies to satellite
13 signals.”). Section 605 is a strict liability statute. *J & J Sports Prods., Inc. v.*
14 *Greathouse*, No. CV-13-00922-PHX-GMS, 2015 WL 717907, at *2 (D. Ariz. Feb. 19,
15 2015). “To be held liable for a violation of section 605, a defendant must be shown to
16 have (1) intercepted or aided the interception of, and (2) divulged or published, or aided
17 the divulging or publishing of, a communication transmitted by the plaintiff.” *Nat’l*
18 *Subscription Television v. S & H TV*, 644 F.2d 820, 826 (9th Cir. 1981). These elements
19 may be established by circumstantial evidence. *Webb*, 545 F.3d at 844 (“Circumstantial
20 evidence may be sufficiently persuasive. Signal piracy is by its nature a surreptitious
21 venture and direct evidence of actual interception may understandably be hard to come
22 by.”).

23 It is undisputed that Defendants intercepted the Program via DirecTV and
24 displayed it at Sleepy Dog Brewery. Plaintiff provided an affidavit from Michael
25 Conrad, a private investigator, who states that he saw the Program being displayed at
26 Sleepy Dog Brewery on April 26, 2014. (Doc. 41-2, ¶ 9; Doc. 41-4.) It also is
27 undisputed that Plaintiff did not authorize Defendants to display the Program for
28 commercial purposes. According to Joe Hand Jr., President of Joe Hand Promotions,
Inc., Plaintiff’s programming is encrypted and can be broadcast only after Plaintiff
authorizes a commercial activation. (Doc. 42, ¶ 9.) At no time did Plaintiff authorize a
commercial activation for Defendants. (Doc. 41-2, ¶ 7.)

1 Defendants attempt to create a dispute of fact by submitting a declaration from
2 Sizemore, who states that he does not believe the Program was displayed. (Doc. 46-1.)
3 He also speculates that, if the Program was displayed, it was purchased from DirecTV
4 and, therefore, authorized. (*Id.*) Sizemore, however, is not competent to testify on these
5 matters. “An affidavit or declaration used to support or oppose a motion must be made
6 on personal knowledge, set out facts that would be admissible in evidence, and show that
7 the affiant or declarant is competent to testify on the matters stated.” Fed. R. Civ. P.
8 56(c)(4). Sizemore admits that he was not present at Sleepy Dog Brewery on April 26,
9 2014 and “has no personal knowledge that any employees or agents of Sleepy Dog
10 broadcast or caused to be broadcast the Program.” (Doc. 46-1, ¶ 5.) Consequently, his
11 declaration cannot rebut Plaintiffs’ evidence and does not create a genuine issue of
12 material fact.

13 Moreover, Defendants cannot escape liability simply by noting that they ordered
14 the Program through DirecTV. The DirecTV Commercial Viewing Agreement (Viewing
15 Agreement)¹ warns: “Certain programming Services we transmit may be blacked out or
16 otherwise unavailable to commercial customers in your local reception area due to legal,
17 contractual, or other restrictions. If you circumvent or attempt to circumvent any of these
18 blackouts or programming restrictions, you may be subject to legal action.” (Doc. 47-3 at
19 5.) The Viewing Agreement also states that DirecTV customers “must execute and abide
20 by any and all agreements required by programming provider(s) in connection with [the]
21 use and/or DIRECTV’s provision of such Services.” (*Id.*) Here, the only competent
22 evidence shows that Defendants intercepted the Program from DirecTV and displayed it

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24 ¹ The Court may take judicial notice of the Viewing Agreement pursuant to Fed.
25 R. Evid. 201(b)(2) because Defendants have put DirecTV’s terms and conditions at issue
26 by arguing that they lawfully obtained the Program from DirecTV, it is “capable of
27 accurate and ready determination by resort to sources whose accuracy cannot be
28 reasonably questioned,” and Defendants do not object to Plaintiff’s request for judicial
notice. *See J & J Sports Prods. v. Coyne*, 857 F. Supp. 2d 909, 916 (N.D. Cal. 2012)
(taking judicial notice of Comcast Terms and Conditions Agreement on summary
judgment because defendant neglected to provide it despite arguing he had lawfully
intercepted the program in question from Comcast).

1 commercially without authorization from Plaintiff, the exclusive licensee. *See J & J*
2 *Sports Prods., Inc. v. Carbajal-Armendariz*, No.CV-13-02279-PHX-PGR, 2015 WL
3 3458145, at *2 (D. Ariz. June 1, 2015) (explaining that the defendant’s belief that
4 DirecTV was the plaintiff’s agent or licensee was “not a cognizable defense to section
5 605 liability since that statute is in effect a strict liability statute.”); *J & J Sports Prods.*
6 *Inc. v. Jorkay, LLC*, No. 5:10-CV-542-D, 2013 WL 2629461, at *2 (E.D.N.C. June 11,
7 2013) (“Although defendants purchased the event from DirecTV, they do not avoid
8 liability for broadcasting the event at their establishment without the authorization of the
9 exclusive licensee, J & J.”).²

10 Section 605 authorizes statutory damages for each violation “of not less than
11 \$1,000 or more than \$10,000, as the court considers just[.]” 47 U.S.C.
12 § 605(e)(3)(C)(i)(II). Additionally, the court may award enhanced damages of up to
13 \$100,000 for each violation if it finds that “the violation was committed willfully and for
14 purposes of direct or indirect commercial advantage or private financial gain[.]” 47
15 U.S.C. § 605(e)(3)(C)(ii). In assessing whether enhanced damages should be awarded,
16 courts consider “prior infringements, substantial unlawful monetary gains, significant
17 actual damages to the plaintiff, the defendant’s advertising of the broadcast, and the
18 defendant’s charging a cover charge or premiums for food and drinks during the
19 broadcast.” *Innovative Sports Mgmt., Inc., v. Redzic*, No. CV 13-00722-PHX-PGR, 2014
20 WL 1790943, at *2 (D. Ariz. May 6, 2014).

21 There is no evidence that Defendants charged patrons a cover to enter Sleepy Dog

22 ² Sizemore also is individually liable for Defendants’ violation. An individual
23 shareholder may be held liable for a corporate defendant’s violation if “(1) the individual
24 had a right and ability to supervise the infringing activities and (2) had an obvious and
25 direct financial interest in those activities.” *J & J Sports Prods., Inc. v. Walia*, No. 10-
26 5136 SC, 2011 WL 902245, at *3 (N.D. Cal. March 14, 2011). As the sole shareholder
27 and managing member of Sleepy Dog Saloon & Brewery LLC and the individual listed
28 on its liquor license, Sizemore has the right and ability to supervise its activities and an
obvious and direct financial interest in those activities. *See G & G Closed Circuit Events,*
LLC v. Miranda, No. 2:13-cv-2436-HRH, 2014 WL 956235, at *4-5 (D. Ariz. March 12,
2014). Defendants do not argue otherwise.

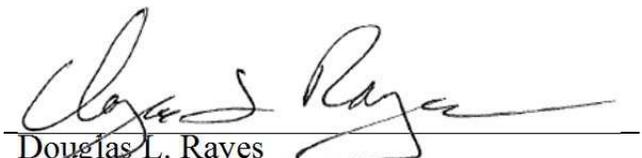
1 Brewery. (Doc. 47-2, ¶ 28.) Between 24 and 39 patrons were present, but there is no
2 indication that the patrons actually were viewing the Program, nor is there evidence that
3 Defendants advertised the Program or charged a premium for food and drinks. (*Id.*, ¶
4 27.) Based on Sleepy Dog Brewery’s occupancy capacity, it would have cost Defendants
5 between \$750 and \$850 to broadcast the Program lawfully. (Doc. 42 at 37.) Given the
6 lack of evidence that Defendants achieved “commercial advantage or private financial
7 gain” from broadcasting the Program, the Court awards Plaintiff \$1,000 in statutory
8 damages and denies its request for enhanced damages. *See Innovative Sports Mgmt.*,
9 2014 WL 1790943, at *3 (awarding statutory minimum and denying enhanced damages
10 because there was no evidence that the defendants displayed the program for commercial
11 advantage or private gain).

12 **IT IS ORDERED** that Plaintiff’s Motion for Summary Judgment, (Doc. 41), is
13 **GRANTED**. Pursuant to § 605(e)(3)(C)(i)(II), Plaintiff is awarded \$1,000 in statutory
14 damages. The Clerk shall enter judgment accordingly.

15 **IT IS FURTHER ORDERED** that, pursuant to § 605(e)(3)(B)(iii), Plaintiff may
16 move for attorney’s fees and costs in accordance with LRCiv 54.1 and 54.2.

17 Dated this 20th day of October, 2016.

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Douglas L. Rayes
United States District Judge