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NOT FOR PUBLICATION

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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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9 J & J Sports Productions Incorporated,

No. CV-16-01111-PHX-JJT

10 Plaintiff,

ORDER

11 v.

12 Jose O Rubio, *et al.*,

13 Defendants.

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15 At issue is Plaintiff J & J Sports Productions Incorporated's Motion for Summary
16 Judgment (Doc. 36, Mot.¹), to which Defendants Grullo's Fine Mexican Food LLC and
17 Jose O. Rubio filed a Response (Doc. 41, Resp.), and in support of which Plaintiff filed a
18 Reply (Doc. 43, Reply). The Court finds these matters appropriate for resolution without
19 oral argument. *See* LRCiv 7.2(f).

20 **I. BACKGROUND**

21 Plaintiff, an international closed-circuit distributor of sports and entertainment
22 programming, purchased the exclusive United States commercial distribution rights to
23 broadcast "*The Fight of the Century*": *Floyd Mayweather, Jr. v. Manny Pacquiao*
24 *Championship Fight Program*. Plaintiff entered into sub-licensing agreements with
25 commercial establishments that permitted public exhibition of the broadcast. Plaintiff did
26 not enter into such an agreement with Defendants, an LLC and individual who own and

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¹ In citing to Plaintiff's Motion, the Court refers to the memorandum in support, attached as Attachment 1 to its Motion.

1 operate the restaurant Tacos El Grullo. When the program aired—May 2, 2015—two of
2 Plaintiff’s independent investigators entered Tacos El Grullo at 8:19 p.m. and 8:55 p.m.,
3 respectively. Each investigator reported that the program was aired live inside Tacos El
4 Grullo. The first investigator, Jenny Helton, noted that there were six televisions inside
5 the establishment, four of which were airing the event, that the capacity of the
6 establishment was 70, and that she personally counted the number of patrons three times,
7 totaling 60. The second investigator, Valerie Combs, noted that all six televisions were
8 airing the event, estimated the capacity at 175 people, and counted 89, 90, and 92 patrons
9 during her time at Tacos El Grullo. The investigators also noted a Sky Television satellite
10 dish on the roof of the restaurant and that the broadcast was in Spanish. Defendants did
11 not advertise the program, nor did they alter food or drink prices or otherwise promote
12 the event. On April 18, 2016, Plaintiff filed its Complaint (Doc. 1) alleging violations of
13 the Communications Act, 47 U.S.C. §§ 605 (Count 1) and 553 (Count 2).

14 **II. LEGAL STANDARD**

15 **A. Summary Judgment**

16 Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is
17 appropriate when: (1) the movant shows that there is no genuine dispute as to any
18 material fact; and (2) after viewing the evidence most favorably to the non-moving party,
19 the movant is entitled to prevail as a matter of law. Fed. R. Civ. P. 56; *Celotex Corp. v.*
20 *Catrett*, 477 U.S. 317, 322-23 (1986); *Eisenberg v. Ins. Co. of N. Am.*, 815 F.2d 1285,
21 1288-89 (9th Cir. 1987). Under this standard, “[o]nly disputes over facts that might affect
22 the outcome of the suit under governing [substantive] law will properly preclude the
23 entry of summary judgment.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).
24 A “genuine issue” of material fact arises only “if the evidence is such that a reasonable
25 jury could return a verdict for the nonmoving party.” *Id.*

26 In considering a motion for summary judgment, the court must regard as true the
27 non-moving party’s evidence, if it is supported by affidavits or other evidentiary material.
28 *Celotex*, 477 U.S. at 324; *Eisenberg*, 815 F.2d at 1289. However, the non-moving party

1 may not merely rest on its pleadings; it must produce some significant probative evidence
2 tending to contradict the moving party’s allegations, thereby creating a material question
3 of fact. *Anderson*, 477 U.S. at 256-57 (holding that the plaintiff must present affirmative
4 evidence in order to defeat a properly supported motion for summary judgment); *First*
5 *Nat’l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 289 (1968).

6 “A summary judgment motion cannot be defeated by relying solely on conclusory
7 allegations unsupported by factual data.” *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir.
8 1989). “Summary judgment must be entered ‘against a party who fails to make a showing
9 sufficient to establish the existence of an element essential to that party’s case, and on
10 which that party will bear the burden of proof at trial.’” *United States v. Carter*, 906 F.2d
11 1375, 1376 (9th Cir. 1990) (quoting *Celotex*, 477 U.S. at 322).

12 **B. The Communications Act**

13 The Communications Act provides that “no person receiving [or] assisting in
14 receiving . . . any interstate or foreign communication by wire or radio shall divulge or
15 publish the existence, contents, substance, purport, effect, or meaning thereof, except
16 through authorized channels of transmission or reception, (1) to any person other than the
17 addressee, his agent, or attorney” 47 U.S.C. § 605(a).² “[A]ny person aggrieved by
18 any violation of subsection (a) of this section or paragraph (4) of this subsection may
19 bring a civil action in a United States district court or in any other court of competent
20 jurisdiction.” 47 U.S.C. § 605(e)(3)(A).

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25 ² The Court notes, as Plaintiff does, that there is a split of authority among courts
26 as to whether violations such as those alleged here implicate 47 U.S.C. § 553 as well.
27 (Mot. at 4 (collecting cases).) Plaintiff, though, requests that liability be found pursuant to
28 § 605. In recognition of *Directv, Inc. v. Webb*, 545 F.3d 837, 844 (9th Cir. 2008), as well
as Plaintiff’s request, the Court will analyze Plaintiff’s Motion under § 605 and treat
Count II of Plaintiff’s Complaint, brought under § 553, as surrendered. *See Kingvision
Pay-Per-View, Ltd. v. Body Shop*, No. 00 CIV 1089 LTS KNF, 2002 WL 393091, at *4
(S.D.N.Y. Mar. 13, 2002) (“it is well-established that, when a defendant’s conduct
violates both Sections 553 and 605, Plaintiff may only recover damages pursuant to one
of them”).

1 **III. ANALYSIS**

2 **A. Liability**

3 Plaintiff argues that because it did not authorize Defendants to intercept, receive,
4 exhibit, or otherwise broadcast the program shown at Tacos El Grullo, Defendants *per se*
5 violated the Act. (Mot. at 5-11.) Defendants respond that they legally obtained the signal
6 from their satellite provider, Sky Television, that Plaintiff’s distribution agreement is
7 invalid and/or nonexclusive, that Plaintiff’s investigators lack credibility, and that
8 Plaintiff has failed to meet its burden that the program was shown live at the
9 establishment. (Resp. at 7-12.)

10 To establish liability under 47 U.S.C. § 605, Plaintiff must prove that the
11 Defendants unlawfully intercepted, received, published, or divulged Plaintiff’s privileged
12 communication. 47 U.S.C. § 605(a). Here, Plaintiff has not provided specific evidence of
13 interception. However, as the exclusive licensee, it is the sole entity that could have
14 permitted or provided Defendants with access to the program, which it did not.
15 Defendants at no point deny that the program was broadcast inside Tacos El Grullo but
16 maintain that they did not violate § 605(a) because they were permitted to by way of their
17 Sky Television subscription. The argument is without merit. The fact that Defendants
18 may have somehow legally purchased a Sky Television subscription—a fact that is far
19 from established—does not immunize them from liability for broadcasting the event to
20 the Tacos El Grullo patrons without obtaining authorization from Plaintiff, the exclusive
21 licensee. *See Garden City Boxing Club, Inc. v. Vinson*, No. 3-03-CV-0700-BD(P), 2003
22 WL 22077958, at *2 (N.D. Tex. Sept. 3, 2003) (collecting cases). Indeed, the “absence of
23 an ‘interception’ does not get [Defendants] off the hook of § 605.” *Nat’l Satellite Sports,*
24 *Inc. v. Eliadis, Inc.*, 253 F.3d 900 (6th Cir. 2001). As another court has stated:

25 Even assuming, as these defendants contend, that there was
26 no “interception” here because [the bar] was “authorized” by
27 [the residential distributor] to receive the Event on a pay-per-
28 view basis, defendants still have violated the Act because
they clearly were not authorized to then broadcast the Event
to the patrons of the commercial establishment such as [the
bar] The first and third sentences of [§ 605] do not . . .
require an “interception” of cable transmission and clearly

1 proscribe the unauthorized divulgence or use of
2 communications which have been “received” legally for
3 certain purposes.

4 *That’s Ent., Inc. v. J.P.T., Inc.*, 843 F. Supp. 2d 995, 999 (D. Md. 1993) (cited and quoted
5 with approval by *Nat’l Satellite Sports*, 253 F.3d 900). Further, § 605 is a strict liability
6 statute and questions of knowledge and willfulness go only to damages, rather than
7 liability. *See Doherty v. Wireless Broad. Systems of Sacramento, Inc.*, 151 F.3d 1129,
8 1131 (9th Cir. 1998) (The statutes “take into consideration the degree of the violator’s
9 culpability and provide for reduced damages in those instances where the violator was
10 unaware of the violation.”).

11 Defendants provide no evidence whatsoever that they had a legal or valid Sky
12 television subscription or, more importantly, that such a subscription would allow them to
13 broadcast the event—live or otherwise. While Rubio states via affidavit that he had a
14 satellite subscription to Sky, this self-serving, conclusory affidavit is unsupported by any
15 evidence of the agreement or the rights it confers. *See Villiarimo v. Aloha Island Air, Inc.*,
16 281 F.3d 1054, 1061 (9th Cir. 2002) (refusing to find a “genuine issue” of fact where “the
17 only evidence presented is ‘uncorroborated and self-serving’ testimony”) (citation
18 omitted); *J & J Sports Prods., Inc. v. Brewster “2” Cafe, LLC*, No. 4:11-CV-00690-
19 SWW, 2014 WL 4956501, at *3 (E.D. Ark. Oct. 2, 2014) (“[Defendant] cannot credibly
20 claim it was authorized by Comcast to exhibit the Program and then claim, without
21 supporting evidence, that it had no knowledge of Comcast’s Terms and Conditions as
22 applicable to its account.”).

23 While Defendants also dispute that Plaintiff had proprietary ownership over the
24 program, their argument is perfunctory, only pointing to one allegedly missing
25 signature—not to any controverting fact or evidence. (Resp. at 8-9.) While this might
26 raise a question of fact as to whether or not Plaintiff was the exclusive licensee, it does
27 not—as Defendants argue—establish Plaintiff was not the exclusive licensee. Regardless,
28 Plaintiff provides evidence of that signature in and attached to its Reply and no genuine
 dispute exists as to Plaintiff’s rights. (Reply at Ex. 2.) Similarly, Defendants’ argument

1 that Plaintiff's exhibition rights are based on an unknown occupancy capacity is also
2 unavailing. (*See Reply* at 4.)

3 Defendants next argue that Plaintiff's investigators lack credibility and that the
4 Court must allow a fact-finder to weigh this credibility in evaluating their statements.
5 (*Resp.* at 8, 11.) However, the only discrepancies Defendants cite are the amount of
6 patrons and the number of televisions showing the program. Not only could these
7 inconsistencies be explained by the temporal difference in the investigators' visits, but
8 they do not—in any event—eviscerate the entirety of their affidavits. Instead, such
9 discrepancies are addressed in determining damages, rather than liability, as no party
10 disputes that the program was broadcast.

11 Finally, to the degree that Defendants argue they escape liability because the
12 program was tape delayed, or that it was delayed simply by transmission, receipt, and
13 return transmission to and from Mexico (*Resp.* at 8-9), this too fails. First, their argument
14 is essentially not that the program was tape delayed, but only that it may have been.
15 Defendants have offered no evidence that the event was not shown live. This does not
16 create a genuine issue of material fact. Instead, the only evidence before the Court is that
17 of the investigator-affiants who declared that the fight was broadcast live. Second, courts
18 in this district have held that such a tape-delayed broadcast would nonetheless violate the
19 Act, were it unauthorized. *See, e.g., J & J Sports Prods. Inc. v. Mosqueda*, No. CV-12-
20 0523 PHX DGC, 2013 WL 2558516, at *3 (D. Ariz. June 11, 2013).

21 Defendants also argue that Plaintiff has failed to establish personal liability against
22 Rubio. (*Resp.* at 12-15.) Specifically, Defendants argue that Plaintiff has failed to provide
23 evidence that Rubio had an obvious and direct financial interest in the activities. (*Resp.* at
24 13.)

25 To hold an individual liable in his or her individual capacity, Plaintiff must
26 demonstrate that Rubio had “a right and ability to supervise the violations and that he had
27 a strong financial interest in such activities.” *G & G Closed Circuit Events, LLC v.*
28 *Miranda*, No. 2:13-CV-2436-HRH, 2014 WL 956235, at *1 (D. Ariz. Mar. 12, 2014).

1 Plaintiff presents evidence that Rubio was the sole manager and member of Grullo's Fine
2 Mexican Food, LLC. While Defendants argue that genuine disputes of fact exist as to the
3 ownership and control over the restaurant and the LLC,³ they present no controverting
4 evidence refuting Plaintiff's showing that Rubio was the sole owner and operator of the
5 LLC and therefore was ultimately responsible for the restaurant's operations. Again,
6 Defendants' argument is not that Rubio did not have dominion over the LLC, or that the
7 LLC did not own and operate Grullo's, but simply that they might not have. And again,
8 this does not create a genuine issue of fact, even when drawing all inferences in favor of
9 Defendants as the non-movants. Plaintiff must present some probative evidence.
10 *Anderson*, 477 U.S. at 256-57.

11 While Defendants also cite to *J & J Sports Prods., Inc. v. Martinez*, No. CIV.A.
12 13-6885, 2014 WL 5410199, at *1 (E.D. Pa. Oct. 23, 2014), and others, for the
13 proposition that more than general ownership is necessary for personal liability based on
14 ability to supervise (Resp. at 12), those cases each featured distinguishable facts. For
15 example, in *Martinez*, the defendants presented evidence that they lived in a different
16 state, were not managing the location at the time the event was shown, denied authorizing
17 the interception, and denied even being present on the night in question. *Id.* at *6. Here,
18 Defendants have not averred any similar facts. The Court's finding is thus consistent with
19 Plaintiff's presented persuasive authority.

20 Defendants are correct that several courts have found that ownership alone does
21 not satisfy the direct or strong financial interest portion of the analysis. (Resp. at 12-15.)
22 Courts consider a direct financial benefit to be present when the infringing conduct acts
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24 ³ Defendants spend a large portion of their Response arguing that Grullo's Fine
25 Mexican Food, LLC does not do business as Tacos El Grullo or Grullo's Fine Mexican
26 Food and that Rubio previously organized Tacos El Grullo, LLC but that it is now
27 defunct. However, the entities sued are Jose O. Rubio and Grullo's Fine Mexican Food,
28 LLC. Plaintiff presents evidence that Rubio was the sole manager and member of
Grullo's Fine Mexican Food, LLC, is identified as the business owner in local records,
and is the only individual identified as affiliated with the LLC. Defendants make no
allegation and present no evidence that Grullo's Fine Mexican Food is not owned and
operated by Rubio and the LLC and there is no genuine dispute as to Defendants'
involvement and ownership of the LLC and the restaurant in question.

1 as a draw for customers. *Martinez*, 2014 WL 5410199 at *6 (citing *Ellison v. Robertson*,
2 357 F.3d 1072, 1078 (9th Cir. 2004).) Although the draw for customers based on the
3 infringing materials “need not be substantial,” *Ellison*, 357 at 1078, Plaintiff has provided
4 no evidence that the event was a draw for *any* patrons. Before the Court is no evidence of
5 advertising, no statement from a patron that they attended to view the event, and no
6 averment that more patrons were present on the night of the event than on standard nights
7 without Plaintiff’s content being broadcast. Thus, because Plaintiff’s evidence fails to
8 prove a direct or substantial financial interest, the Court will deny summary judgment as
9 to the individual liability of Rubio and will instead grant Rubio summary judgment.
10 Although Rubio curiously did not move for summary judgment in his Response, that does
11 not preclude the Court from granting such relief. *See O’Keefe v. Van Boening*, 82 F.3d
12 322, 324 (9th Cir. 1982) (holding that the district court may *sua sponte* grant summary
13 judgment to the nonmoving party where it determines that “there is no genuine dispute
14 respecting a material fact essential to the proof of movant’s case”); *Kassbaum v.*
15 *Steppenwolf Prods., Inc.*, 236 F. 3d 487, 494 (9th Cir. 2000) (“It is generally recognized
16 that a court has the power *sua sponte* to grant summary judgment to a non-movant when
17 there has been a motion but no cross-motion.”). Plaintiffs had full and complete
18 opportunity to litigate the issue, cultivate discovery as to this element, and present such
19 evidence here. Plaintiffs having failed to do so, Rubio is entitled to summary judgment.
20 *See, e.g., Gospel Missions of Am. v. City of Los Angeles*, 328 F.3d 548, 553 (9th Cir.
21 2003) (allowing district court to enter judgment against any party that has had a “full and
22 fair opportunity to ventilate the issues involved in the matter”).

23 **B. Damages**

24 Plaintiff argues for enhanced damages under the Act, contending that Defendants’
25 violation was willful and such damages are necessary for general and specific deterrence.
26 (Mot. at 12-16.)

27 As exclusive licensee of live closed-circuit distribution rights to the *Mayweather-*
28 *Pacquiao* program in America, Plaintiff is an “aggrieved person” under the statute and

1 can bring a private right of action for either actual damages, including any profits of the
2 violator that are attributable to the violation, or statutory damages “in a sum of not less
3 than \$1,000 or more than \$10,000” for each violation. 47 U.S.C. §§ 605(a), (d)(6),
4 (e)(3)(C)(i). Courts may increase the damage award by an amount not to exceed
5 \$100,000 for each willful violation of the statute. *Id.* at § 605(e)(3)(C)(ii).

6 Plaintiff requests \$9,000 in statutory damages, as well as \$30,000 in enhanced
7 damages pursuant to 47 U.S.C. §605(e)(3)(C)(ii). (Mot. at 12.) Defendants respond that if
8 any damages are warranted, the Court should reduce the award of damages to a sum of
9 not more than \$250 because Defendants were unaware of any violation. (Resp. at 8.)
10 Courts have employed a variety of formulas in determining discretionary enhanced
11 awards. *See, e.g., J & J Prods., Inc. v. Twiss*, No. 11-CV-01559-WJM-KLM, 2012 WL
12 1060047 (D. Colo. Mar. 29, 2012); *Kingvision Pay-Per-View, Ltd.*, No. 00 CIV 1089
13 LTS KNF, 2002 WL 393091, at *4 (S.D.N.Y. Mar. 13, 2002). Specifically, courts have
14 considered the licensing fee, the amount of televisions and patrons, advertising, and the
15 estimated profits gleaned from the unauthorized broadcast. *Id.*

16 Here, Plaintiff has provided no evidence that Defendants are repeated illegal
17 broadcasters of programming or that Plaintiff has incurred substantial damage from
18 Defendants’ violation. Nor does Plaintiff present evidence that Defendants advertised the
19 event, raised drink or food prices, charged an entry fee to view the program, or otherwise
20 promoted their broadcast. The broadcast was confined to a small geographic area and
21 Defendants’ restaurant is relatively meager in size. Although there is an implied
22 willfulness in Defendants’ conduct, Plaintiff has not shown how the signal was acquired,
23 whether signals were in fact descrambled or intercepted in an effort to circumvent
24 encryption, or that Defendants in fact knew that showing Sky Television satellite
25 services—or this event in particular—in the establishment was illegal. Moreover, the
26 investigators’ reports and affidavits differ both as to the number of patrons and the
27 amount of television screens broadcasting the program. Lacking such evidence and
28 recognizing the lack of certainty regarding the specifics relevant to an enhanced damages

1 calculus, the Court does not find enhanced damages appropriate. On the other hand,
2 without any evidence of any agreement with Sky Television, or what that agreement
3 entails, it is impossible for the Court to ascertain Defendant LLC's state of mind
4 regarding its violation and is therefore unable to reduce the statutory damages as
5 Defendants request. Thus, the Court finds the statutory damages sufficient for both
6 general and specific deterrence and that they adequately compensate Plaintiff for damage
7 suffered.

8 C. Attorneys' Fees and Costs

9 Plaintiff requests costs and attorneys' fees pursuant to 47 U.S.C.
10 § 605(e)(3)(B)(iii). Because the Court will grant Plaintiff's Motion for Summary
11 Judgment as to LLC's liability, Plaintiff is indeed entitled to seek reasonable attorneys'
12 fees and costs.

13 IV. CONCLUSION

14 There is no genuine dispute as to the material facts: Plaintiff was the exclusive
15 licensee of the at issue broadcast; Defendants did not agree to a sublicense agreement
16 with Plaintiff; and Defendants broadcast the program at this commercial establishment.
17 Thus, Plaintiff is entitled to summary judgment and to statutory damages but has failed to
18 present evidence sufficient for the Court to grant its request for enhanced statutory
19 damages or to find Rubio liable in his individual capacity as a matter of law.

20 **IT IS THEREFORE ORDERED** granting in part Plaintiff J & J Sports
21 Productions Incorporated's Motion for Summary Judgment (Doc. 36) as to liability
22 against Defendant Grullo's Fine Mexican Food LLC.

23 **IT IS FURTHER ORDERED** denying Plaintiff's Motion for Summary
24 Judgment (Doc. 36) as to liability against Defendant Jose O. Rubio in his individual
25 capacity.

26 **IT IS FURTHER ORDERED** *sua sponte* granting Defendant Jose O. Rubio
27 summary judgment in his individual capacity.

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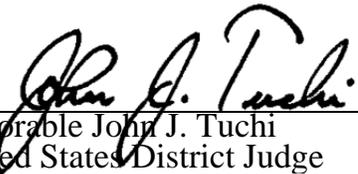
IT IS FURTHER ORDERED granting Plaintiff's request for \$9,000 in statutory damages and denying Plaintiff's request for enhanced statutory damages.

IT IS FURTHER ORDERED denying Plaintiff's request for sanctions, which Defendants construed as a separate motion and filed a response (Doc. 44).

IT IS FURTHER ORDERED that Plaintiff shall file its application for attorneys' fees and costs no later than August 16, 2017. The Court will decide what attorneys' fees and costs will be awarded upon review of the parties' briefing and enter final judgment thereafter.

IT IS FURTHER ORDERED directing the Clerk to close this case.

Dated this 31st day of July, 2017.



Honorable John J. Tuchi
United States District Judge