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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 J & J Sports Productions Incorporated,

10 Plaintiff,

11 v.

12 Abelardo Hurtado Vazquez, et al.,

13 Defendants.
14

No. CV-17-01025-PHX-JAT

ORDER

15 Pending before the Court is Plaintiff's motion for default judgment. (Doc. 19).
16 The Clerk of the Court entered default against Defendant Ringside Pub and Grill LLC on
17 July 3, 2017 and against Defendant Abelardo Hurtado Vazquez on August 15, 2017.
18 (Docs. 14 and 18).

19 **I. Background**

20 This case arises from Defendants showing a pay-per-view fight in Defendants'
21 commercial establishment without paying for the fight. (Doc. 19 at 2-3). Plaintiff owned
22 the rights to the fight in question. (Doc. 19 at 2).

23 **II. Governing Law**

24 Another Court in this District has analyzed a motion for default in another case
25 filed by this same Plaintiff as follows:

26 Once a party's default has been entered, the district court has
27 discretion to grant default judgment against that party. *See* Fed. R. Civ. P.
28 55(b)(2); *Aldabe v. Aldabe*, 616 F.2d 1089, 1092 (9th Cir.1980). Factors the
court may consider in deciding whether to grant default judgment include
(1) the possibility of prejudice to the plaintiff, (2) the merits of the claim,

1 (3) the sufficiency of the complaint, (4) the amount of money at stake, (5)
2 the possibility of a dispute concerning material facts, (6) whether default
3 was due to excusable neglect, and (7) the policy favoring a decision on the
4 merits. *Eitel v. McCool*, 782 F.2d 1470, 1471-72. In applying the *Eitel*
5 factors, “the factual allegations of the complaint, except those relating to
6 the amount of damages, will be taken as true.” *Geddes v. United Fin.*
7 *Grp.*, 559 F.2d 557, 560 (9th Cir.1977).

8 **A. Possible Prejudice to Plaintiff.**

9 The first *Eitel* factor weighs in favor of granting Plaintiff’s motion. Plaintiff
10 served process on Defendants on April 14, 2015. Docs. 13, 14. Defendants
11 have not answered the complaint or otherwise appeared in this action. If
12 Plaintiff’s motion for default judgment is not granted, Plaintiff “will likely
13 be without other recourse for recovery.” *PepsiCo, Inc. v. Cal. Security*
14 *Cans*, 238 F.Supp.2d 1172, 1177 (C.D. Cal. 2002).

15 **B. The Merits of Plaintiff’s Claims and the Sufficiency of the
16 Complaint.**

17 The second and third *Eitel* factors favor a default judgment where the
18 complaint sufficiently states a claim for relief. *See PepsiCo, Inc.*, 238
19 F.Supp.2d at 1175. Plaintiff seeks relief under 47 U.S.C. § 605.¹ “[T]o be
20 held liable for a violation of section 605, a defendant must be shown to
21 have (1) intercepted or aided the interception of, and (2) divulged or
22 published, or aided the divulging or publishing of, a communication
23 transmitted by the plaintiff.” *Nat’l Subscription Television v. S & H TV*, 644
24 F.2d 820, 826 (9th Cir.1981). Section 605 applies to satellite television
25 signals. *DirectTV, Inc. v. Webb*, 545 F.3d 837, 844 (9th Cir. 2008). Plaintiff
26 has alleged that Defendants willfully intercepted and displayed the licensed
27 program on March 8, 2014. Doc. 1, ¶¶ 15–21. Plaintiff’s allegations are
28 supported by the affidavits of two investigators who visited La Rubia y La
Morena and saw the program being displayed on television screens. Doc.
18–3. One of these investigators noted that approximately forty patrons
were watching the program on four television screens. *Id.* at 7. Plaintiff has
stated a claim for a willful violation of section 605. [footnote omitted] The
second and third factors favor a default judgment.

19 **C. The Amount of Money at Stake.**

20 Under the fourth *Eitel* factor, the Court considers the amount of money at
21 stake in relation to the seriousness of the defendants’ conduct. Plaintiff
22 seeks damages of \$[60,000]. [citation omitted]

23 **D. Possible Dispute Concerning Material Facts.**

24 Given the sufficiency of the complaint and Defendant’s default, “no
25 genuine dispute of material facts would preclude granting [Plaintiff’s]
26 motion.” *PepsiCo, Inc.*, 238 F.Supp.2d at 1177.

27 **E. Whether Default Was Due to Excusable Neglect.**

28 Plaintiff properly served Defendants with the summons and complaint.
Docs. 13, 14. It therefore is “unlikely that [Defendants’] failure to answer
and the resulting default [were] the result of excusable neglect.” *Gemmel v.*
Systemhouse, Inc., No. CIV 04–187–TUC–CKJ, 2008 WL 65604, at *5 (D.
Ariz. Jan. 3, 2008).

F. The Policy Favoring a Decision on the Merits.

“Cases should be decided upon their merits whenever reasonably
possible.” *Eitel*, 782 F.2d at 1472. But the mere existence of Rule 55(b)
“indicates that this preference, standing alone, is not dispositive.” *PepsiCo*,

1 *Inc.*, 238 F.Supp.2d at 1177 (quotation marks and citation omitted).
2 Moreover, Defendants’ failure to answer or otherwise respond to the
3 complaint “makes a decision on the merits impractical, if not
impossible.” *Id.* The Court therefore is not precluded from entering default
judgment against Defendants. *See id.*; *Gemmel*, 2008 WL 65604, at *5.

4 **G. Conclusion**

5 Six of the seven *Eitel* factors favor default judgment, and one factor is
neutral. The Court concludes that default judgment is appropriate.

6 *J & J Sports Prods., Inc. v. Molina*, No. CV15-0380 PHX DGC, 2015 WL 4396476, at
7 *1–2 (D. Ariz. July 17, 2015).

8 In this case, this Court find the application of the *Eitel* factors to be identical to the
9 case quoted above, and the Court adopts that reasoning as its own for this case.

10 **III. Damages**

11 Plaintiff seeks statutory damages in the amount of \$10,000 and enhanced damages
12 in the amount of \$50,000. (Doc. 19-1 at 7).

13 **A. Statutory Damages**

14 Statutory damages are appropriate when actual damages cannot be easily proven. *J*
15 *& J Sports Prods., Inc. v. Canedo*, No. C 09–01488 PJH, 2009 WL 4572740, *5 (N.D.
16 Cal. 2009). “An award of damages should deter future conduct but not destroy the
17 business.” *Kingvision Pay—Per—View v. Lake Alice Bar*, 168 F.3d 347, 360 (9th Cir.
18 2009).

19 As this Court has previously stated,

20 “[T]o be held liable for a violation of [47 U.S.C. § 605], a defendant must
21 be shown to have (1) intercepted or aided the interception of, and (2)
22 divulged or published, or aided the divulging or publishing of, a
23 communication transmitted by the plaintiff.” *Nat’l Subscription Television*
24 *v. S & H TV*, 644 F.2d 820, 826 (9th Cir.1981). Section 605 applies to
25 satellite television signals. [footnote omitted]. *DirectTV, Inc. v. Webb*, 545
26 F.3d 837, 844 (9th Cir.2008). The statute states that “the party aggrieved
27 may recover an award of statutory damages for each violation of subsection
28 (a) of this section involved in the action in a sum of not less than \$1,000 or
more than \$10,000, as the court considers just.” 47 U.S.C. §
605(e)(3)(C)(i)(II). The statute further provides that for any violation that
“was committed willfully and for purposes of direct or indirect commercial
advantage or private financial gain, the court in its discretion may increase
the award of damages, whether actual or statutory, by an amount of not
more than \$100,000 for each violation.” 47 U.S.C. § 605(e)(3)(C)(ii).

1 *J & J Sports Prods., Inc. v. Barrio Fiesta of Manila Rest. LLC*, No. CV 11-2216-PHX-
2 JAT, 2012 WL 2919599, at *1 (D. Ariz. July 17, 2012).

3 By defaulting, Defendants have admitted to the allegations in the complaint.
4 *Danning v. Lavine*, 572 F.2d 1386, 1388 (9th Cir. 1978). However, allegations as to
5 damages must be proven. *Geddes v. United Fin. Group*, 559 F.2d 557, 560 (9th Cir.
6 1977). Plaintiff attaches evidence to the motion indicating the cost to lawfully show the
7 fight would have been \$2,000. (Doc. 19-13 at 20). Plaintiff also argues that in assessing
8 damages, deterrence should be a factor. (Doc. 19-1 at 13-14). The Court finds that
9 awarding damages in the amount of twice what Defendants would have had to pay to for
10 the fight accomplishes the deterrence goal. Thus, the Court will award \$4,000 in
11 statutory damages.

12 **B. Enhanced Damages**

13 “Enhanced damages are awarded upon a showing that defendant acted
14 willfully and for the purpose of direct or indirect commercial advantage or
15 private financial gain. Under § 605(e)(3)(C)(ii), the court may award up to
16 \$100,000....” *Miramontes*, 2011 WL 892350, *2. In deciding whether to
17 award enhanced damages,

18 Courts generally consider factors such as repeat violations,
19 substantial unlawful monetary gains, significant actual
20 damages to plaintiff, advertising, cover charges, or charging
21 premium menu and drink prices. *See Kingvision Pay-Per-View v. Gutierrez*, 544 F.Supp.2d 1179, 1185 (D. Colo.
22 2008). Some courts find the mere unauthorized showing of a
23 program sufficient to award enhanced damages because given
24 the low probability of accidentally showing it, it must have
25 been done willfully and for profit. *See Entertainment By J &
26 J, Inc. v. Al-Waha Enter., Inc.*, 219 F.Supp.2d 769, 776 (S.D.
27 Tex. 2002).

28 *Id.*

J & J Sports Prods., Inc. v. Rubio, No. CV 12-900-PHX-JAT, 2013 WL 950031, at *1-2
(D. Ariz. Mar. 11, 2013).

Here, Plaintiff provided evidence that Defendants charged a cover charge of
\$5/person. (Doc. 19-4 at 1). Plaintiff argues that Defendants committed repeat
violations, but the Court could not locate any evidence to support this argument. (Doc.
19-1 at 17). Plaintiff submitted evidence that there were a maximum of 58 patrons for

1 the main event, and a maximum of 36 patrons for the undercard. (Doc. 19-4 at 2; Doc.
2 19-9 at 2). There is no evidence that Defendants charged premium prices for menu items.
3 Thus, using the highest patron number, Defendants made \$290.00 for showing the fight.

4 The Court finds that Plaintiff has shown that Defendant acted willfully and for
5 commercial advantage entitling Plaintiff to enhanced damages. However, the Court finds
6 Plaintiff's requested \$50,000 to be excessive given that Defendants profited only
7 \$290.00. Here, the Court finds that \$10,000 in enhanced damages seems adequate given
8 how few factors weigh in favor of enhanced damages.

9 **V. Conclusion**

10 Thus, the Court will award \$4,000.00 in statutory damages, and \$10,000.00 in
11 enhanced damages, for a total of \$14,000.00. As Plaintiff requested (Doc. 19-1 at 18),
12 Plaintiff may move for attorney's fees and costs within the time set by the Rules. As a
13 result of the forgoing,

14 **IT IS ORDERED** that the motion for default judgment (Doc. 19) is granted. The
15 Clerk of the Court shall enter judgment in favor of Plaintiff and against the Defendants
16 (Abelardo Hurtado Vazquez and Ringside Pub and Grub LLC, jointly and severally) in
17 the amount of \$14,000.00.¹

18 Dated this 8th day of November, 2017.

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23 **James A. Teilborg**
24 **Senior United States District Judge**

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¹ Although the complaint in this case has two counts, in the motion for default judgment, Plaintiff seeks damages as to only Count I. The award herein disposes of the entire complaint, and Court II is deemed dismissed.