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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, Inc.,
10 Plaintiff,

No. CV-17-1026-PHX-DGC
CV-17-1321-PHX-DGC
(Consolidated)

11 v.

ORDER

12 Arturo Rubio, an individual; J.R.R.
13 Restaurant, LLC, d/b/a Filiberto's Mexican
Food,

14 Defendants.
15

16 Plaintiff J & J Sports Productions, Inc. filed a complaint against Defendants Arturo
17 Rubio and J.R.R. Restaurant, LLC, d/b/a Filiberto's Mexican Food, for violations of the
18 Television Consumer Protection and Competition Act of 1992 and the Federal
19 Communications Act of 1934, 47 U.S.C. §§ 553, 605 *et seq.* Doc. 1. Defendants move for
20 summary judgment on all claims against Rubio and on Plaintiff's claim for enhanced
21 statutory damages against J.R.R. Doc. 31. Plaintiff cross-moves on all claims. Doc. 32.
22 The motions are fully briefed, and no party requests oral argument. Docs. 33, 34, 35, 38,
23 40. For the following reasons, the Court will deny Defendants' motion and grant Plaintiff's
24 motion in part.

25 **I. Background.**

26 Two championship sports fights were broadcasted nationwide on April 9 and May 7,
27 2016: the former between Manny Pacquiao and Timothy Bradley, Jr., and the latter
28

1 between Saul Alvarez and Amir Khan (“the programs”). Doc. 35-1 at 1-2. Plaintiff had
2 the exclusive commercial distribution rights to the programs. *Id.* at 2.

3 On both dates, J.R.R. owned Filiberto’s Mexican Food, LLC, in Phoenix, Arizona.
4 Rubio was an employee of the restaurant, and he was and remains the sole member and
5 owner of J.R.R. *Id.* Defendants ordered the programs through a satellite television service
6 and broadcasted them at Filiberto’s without paying a commercial licensing fee to Plaintiff.
7 *Id.* For J.R.R.’s establishment, the commercial licensing fee was \$2,000 for the April 9
8 program and \$2,200 for the May 7 program. *Id.* at 3.

9 **II. Summary Judgment Standard.**

10 A party seeking summary judgment “bears the initial responsibility of informing the
11 district court of the basis for its motion, and identifying those portions of [the record] which
12 it believes demonstrate the absence of a genuine issue of material fact.” *Celotex Corp. v.*
13 *Catrett*, 477 U.S. 317, 323 (1986). Summary judgment is appropriate if the evidence,
14 viewed in the light most favorable to the nonmoving party, shows “that there is no genuine
15 dispute as to any material fact and the movant is entitled to judgment as a matter of law.”
16 Fed. R. Civ. P. 56(a). Summary judgment is also appropriate against a party who “fails to
17 make a showing sufficient to establish the existence of an element essential to that party’s
18 case, and on which that party will bear the burden of proof at trial.” *Celotex*, 477 U.S.
19 at 322. Only disputes over facts that might affect the outcome of the suit will preclude
20 summary judgment, and the disputed evidence must be “such that a reasonable jury could
21 return a verdict for the nonmoving party.” *Anderson v. Liberty Lobby, Inc.*, 477
22 U.S. 242, 248 (1986).

23 **III. Discussion.**

24 Counts 1 and 2 allege violations of 47 U.S.C. § 605 and § 553, respectively. Doc. 1.
25 Plaintiff asks the Court to find Defendants liable only under § 605, noting that many courts
26 have held that § 553 applies only to cable broadcasts and that the statutes are mutually
27 exclusive. Doc. 32-1 at 9; *see J&J Sports Prods. Inc. v. Mosqueda*, No. CV-12-0523 PHX
28 DGC, 2013 WL 2558516, at *1-*2 (D. Ariz. June 11, 2013) (“Even where both [§ 533 and

1 § 605] are applicable, damages typically are awarded only under § 605.”); *Kingvision Pay*
2 *Per View, Ltd. v. Guzman*, No. CV-07-0963-PHX-PGR, 2008 WL 1924988, at *1 (D. Ariz.
3 April 30, 2008) (noting same); *see also Joe Hand Promotions Inc. v. Spain*, No.
4 CV-15-00152-PHX-SMM, 2016 WL 4158802, at *3 (D. Ariz. Aug. 5, 2016) (“The Ninth
5 Circuit has not opined on the distinction of signals received via cable and satellite[.]
6 District courts in the Ninth Circuit have, however, held that section 553 applies only to
7 cable signals, and section 605 applies to satellite signals. A majority of the circuit courts
8 of appeals . . . interpret sections 605 and 553 to be mutually exclusive.”).

9 The Court accordingly will rule only on Plaintiff’s § 605 claim and will dismiss the
10 § 553 claim as moot. *See Mosqueda*, 2013 WL 2558516, at *3.

11 **A. J.R.R.’s Liability Under § 605.**

12 Section 605 prohibits the unauthorized reception, interception, and publication of
13 certain communications, including satellite-delivered television programming. 47 U.S.C.
14 § 605; *DirecTV, Inc. v. Webb*, 545 F.3d 837, 843 (9th Cir. 2008). “[T]o be held liable for
15 a violation of section 605, a defendant must be shown to have (1) intercepted or aided the
16 interception of, and (2) divulged or published, or aided the divulging or publishing of, a
17 communication transmitted by plaintiff.” *Nat’l Subscription Television v. S & H TV*, 644
18 F.2d 820, 826 (9th Cir. 1981). The statute provides a private right of action to those
19 aggrieved by violations. § 605(e)(3)(A).

20 J.R.R. concedes that it is liable for the alleged conduct and that the Court should
21 enter judgment in Plaintiff’s favor. Doc. 35 at 2-3, 7. The Court will grant Plaintiff’s
22 motion on its § 605 claim against J.R.R. *See Joe Hand Promotions Inc., v. Sizemore*, No.
23 2:15-cv-00695-DLR, 2016 WL 6143042, at *2 (D. Ariz. Oct. 21, 2016) (granting summary
24 judgment against defendant only under § 605 at plaintiff’s request where plaintiff had also
25 alleged a claim under § 553).

26 **B. Rubio’s Liability Under § 605.**

27 To hold a member of an LLC individually liable under § 605, a plaintiff must show
28 that: “(1) the [defendant] had a right and ability to supervise the infringing activities and

1 (2) had an obvious and direct financial interest in those activities.” *G&G Closed Circuit*
2 *Events, LLC v. Miranda*, No. 2:13-cv-2436-HRH, 2014 WL 956235, at *4 (D. Ariz.
3 March 12, 2014); *see also J&J Sports Prods. Inc., v. Rubio*, No. CV-16-01111-PHX-JJT,
4 2017 WL 3234939, at *4 (D. Ariz. July 31, 2017); *J&J Sports Prods. Inc., v. Walia*, No.
5 10-5136 SC, 2011 WL 902245, at *3 (N.D. Cal. March 14, 2011).¹

6 **1. Defendant Rubio’s Motion.**

7 Rubio argues that he is not personally liable for J.R.R.’s conduct because he does
8 not own and operate Filiberto’s in his individual capacity and he did not “knowingly do
9 anything wrong.” Doc. 31 at 3-4. But knowingly engaging in a § 605 violation is not an
10 element of Plaintiff’s prima facie case for individual liability. *See Miranda*, 2014 WL
11 956235, at *4; *J&J Sports Prods., Inc. v. Mendoza-Govan*, No. C 10-05123 WHA, 2011
12 WL 1544886, at *6 (N.D. Cal. April 25, 2011) (“[I]f it is later found that defendant acted
13 unknowingly, damages under . . . Section 605 may be reduced. This point is irrelevant,
14 however, for determining liability.” (citations omitted)). Indeed, Rubio later acknowledges
15 that § 605 is a strict-liability statute. Doc. 35 at 3.

16 Rubio cites four of Plaintiff’s interrogatory responses and asserts that Plaintiff
17 cannot establish his individual liability. *Id.* at 7. The interrogatories sought Plaintiff’s
18 evidence that Rubio: (16) “had any personal involvement in the alleged signal piracy”;
19 (23) “had direct control over the television(s) at Filiberto’s” at the time; (24) “authorized
20 the alleged television signal piracy violation”; and (25) “derived any benefit from the
21 alleged signal piracy.” Doc. 31-2 at 13-17. Plaintiff’s responses informed Rubio that
22 discovery was not yet complete and directed him to exhibits and previous disclosures. *Id.*

23 Rubio does not explain why Plaintiff’s answers entitle him to summary judgment,
24 and he identifies no other portions of the record showing that Plaintiff fails to meet its

25
26 ¹ The parties do not cite, and the Court has not identified, a Ninth Circuit Court of
27 Appeals decision adopting a test for determining when an LLC member may be
28 individually liable under § 605. The *G&G Closed Circuit* test appears to be the prevailing
standard among courts in this district and others in this circuit. Rubio’s proposed test from
Joe Hand Promotions, Inc. v. Alvarado, No. CV F 10-0907 LJO JLT, 2011 WL 1740536,
at *7 (E.D. Cal. May 4, 2011), cites a party’s argument and mischaracterizes the court’s
discussion. The court in *Joe Hand* restated the two-prong test cited above. *Id.*

1 burden of proof. *Celotex*, 477 U.S. at 322-23; *Indep. Towers of Wash. v. Washington*, 350
2 F.3d 925, 929-30 (9th Cir. 2003). Moreover, Plaintiff need only show that Rubio had a
3 right and ability to supervise the infringing activity and an obvious and direct financial
4 interest in that activity. Rubio’s interrogatories – seeking evidence that he was personally
5 involved in the alleged piracy on the nights in question, had direct control over the
6 televisions, authorized the violation, or derived a benefit – seem to assume a higher burden
7 than Plaintiff must meet.

8 Rubio admits that he was and is the sole member and owner of J.R.R. and an
9 employee and agent of the LLC. Doc. 35-1, ¶¶ 4-5. He also admits that he intercepted and
10 broadcasted the pirated programs on the nights in question, without paying the required
11 commercial fee. *Id.* ¶¶ 6, 7, 8, 11-13. These admissions are sufficient to satisfy Plaintiff’s
12 burden of proof, as discussed below. Rubio has not shown that Plaintiff “fails to make a
13 showing sufficient to establish the existence of an element essential” to its case. *Celotex*,
14 477 U.S. at 322, 325. The Court will deny Rubio’s motion as to his individual liability.

15 **2. Plaintiff’s Motion.**

16 Plaintiff argues that it is entitled to summary judgment on Rubio’s personal liability
17 because Rubio had a right and ability to supervise the showings of the programs and a
18 financial interest in doing so as an employee and the sole owner and member of J.R.R.
19 Doc. 32-1 at 13-14. In response, Rubio refers the Court to his summary judgment motion
20 and again asserts that no evidence shows his personal wrongdoing. Doc. 35 at 2.

21 The Court agrees with Plaintiff. As the sole member of J.R.R., Rubio had the right
22 and ability to supervise his business and any violations that occurred there, as well as a
23 financial interest in showing the programs to attract customers and increase sales. *See*,
24 *e.g.*, *Sizemore*, 2016 WL 6143042, at *3 n.2 (“As the sole shareholder and managing
25 member of [defendant LLC] and the individual listed on its liquor license, [individual
26 defendant] has the right and ability to supervise its activities and an obvious and direct
27 financial interest in those activities”); *J&J Sports Prods., Inc. v. Mikhael*, No. SA CV 14-
28 01463 WDK-PLA, 2016 WL 2984191, at *2 (C.D. Cal. May 19, 2016) (as members of

1 defendant LLC, individual defendants had right and ability to supervise the violation and
2 strong financial interests therein); *Joe Hand Promotions, Inc. v. Tickle*, No. 4:12-cv-01874,
3 2016 WL 393797, at *13 (M.D. Penn. Feb. 2, 2016) (as corporate officer and registrant on
4 defendant corporation’s liquor license, individual defendant had right and ability to
5 supervise violation under § 553 because “he was responsible for the acts of his agents, . . .
6 [and could be] vicariously liable”); *Joe Hand Promotions, Inc. v. Upstate Recreation*, No.
7 6:13-2467-TMC, 2015 WL 685461, at *7 (D. S.C. Feb. 18, 2015) (sole owner and operator
8 of corporation had right and ability to supervise the corporation and financial interest in
9 violation). *But see Rubio*, 2017 WL 3234939, at *4 (holding that individual defendant’s
10 ownership of defendant LLC was insufficient to establish strong financial interest).

11 Additionally, Plaintiff admits that he broadcasted the pirated programs at the
12 restaurant owned by his LLC without paying the \$4,200 required to purchase commercial
13 licenses from Plaintiff. Doc. 35-1, ¶¶ 3-10. These facts establish that Plaintiff and his LLC
14 stood to benefit financially from the illegal act – obtaining valuable programs to broadcast
15 for customers without incurring the normal costs.

16 The Court will grant Plaintiff’s motion as to Rubio’s individual liability.

17 **C. Damages.**

18 **1. Statutory Damages.**

19 Under § 605, a plaintiff may elect to recover actual damages or statutory damages.
20 47 U.S.C. § 605(e)(3)(C)(i). Plaintiff seeks statutory damages, which may include “a sum
21 of not less than \$1,000 or more than \$10,000” for each violation. § 605(e)(3)(C)(i)(II).
22 Courts consider several factors when awarding statutory damages, including the maximum
23 capacity of the commercial establishment, the number of patrons present at the time of the
24 violation, and the commercial licensing fee that the defendant would have paid. *Mosqueda*,
25 2013 WL 2558516, at *3-*4.

26 The Court has previously found an award of \$2,000 to be appropriate where a
27 program was shown on one television to about 80 people and the licensing fee was \$1,800.
28 *Mosqueda*, 2013 WL 2558516, at *3-*4. Another court in this district awarded \$4,000

1 when a program was broadcasted on five televisions to between 125-130 patrons and the
2 licensing fee was \$4,200. *See J&J Sports Prods., Inc. v. Vargas*, No. CV11-02229-PHX-
3 JAT, 2013 WL 1249206, at *3 (D. Ariz. March 27, 2013).

4 Plaintiff seeks \$6,000 for the April 9 violation and \$6,600 for the May 7 violation.
5 Doc. 32-1 at 15. The undisputed evidence shows that on April 9, ten patrons were present,
6 the maximum capacity of the establishment was about 50, and the commercial licensing
7 fee would have been \$2,000. On May 7, six patrons were present and the licensing fee
8 would have been \$2,200. Docs. 35 at 3; 32-1 at 18. Plaintiff's requested award is too high
9 given the factors the Court is to consider under *Mosqueda* and *Vargas*. Although the
10 programs were shown on two televisions on both dates (Doc. 32-2 at 3, 12), very few
11 people were present in an establishment with a modest maximum capacity. The Court
12 finds that awards of \$2,500 for the April 9 violation and \$2,700 for the May 7 violation are
13 just.

14 **2. Enhanced Damages.**

15 The Court has discretion to increase the award for each violation by up to \$100,000
16 if it "finds that the violation was committed willfully and for purposes of direct or indirect
17 commercial advantage or private financial gain." 47 U.S.C. § 605(e)(3)(C)(ii). Relevant
18 factors courts consider include: repeat violations, substantial unlawful monetary gains,
19 significant actual damages, advertising for the showing, cover charges, or premium prices.
20 *Mosqueda*, 2013 WL 2558516, at *4. Some courts find "the mere unauthorized showing
21 of a program sufficient to award enhanced damages because given the low probability of
22 accidentally showing it, it must have been done willfully and for profit." *Id.*

23 Plaintiff seeks a \$20,000 enhancement for the April 9 violation and a \$25,000
24 enhancement for the May 7 violation. Doc. 32-1 at 15. As evidence of Defendants' willful
25 conduct, Plaintiff notes that the programs were shown on two televisions, ten patrons were
26 present on April 9, and six patrons were present on May 7. Doc. 32-1 at 18. Plaintiff
27 asserts that this evidence establishes a "history of infringing behavior" and proves that
28 Defendants did not inadvertently obtain and display the programs and that they acted

1 willfully for financial gain. *Id.* Defendants dispute that the evidence establishes willful
2 conduct and point to the absence of evidence showing substantial gains, advertising, cover
3 charges, or significant actual damages. Docs. 31 at 9-12; 35 at 5-11.

4 Plaintiff offers no evidence of prior violations for the April 9 broadcast and no
5 evidence of substantial unlawful monetary gains, advertising, cover charges, or premium
6 prices for either night. Nor is there evidence that the few patrons present were drawn to
7 the restaurant by the programs. In the absence of significant aggravating factors, but
8 mindful of the deterrence goals of § 605, the Court finds that enhanced awards of \$500 for
9 the April 9 violation and \$1,000 for the May 7 violation are sufficient.

10 The Court will accordingly order Defendants to pay Plaintiff a total of \$3,000 for
11 the April 9 violation and \$3,700 for the May 7 violation.

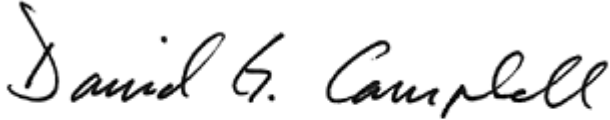
12 **IT IS ORDERED:**

13 1. Defendant Arturo Rubio's motion (Doc. 31) is **denied**. Plaintiff's motion
14 (Docs. 32, 32-1) is **granted in part and denied in part** as explained above. Summary
15 judgment is granted with respect to all claims except Plaintiff's claim under § 553, which
16 is **denied as moot**. The Clerk of Court is directed to **terminate** this matter.

17 2. Defendants are ordered to pay \$6,700 in damages.

18 3. Plaintiff shall submit a request for costs and attorneys' fees pursuant to
19 47 U.S.C. § 605(e)(3)(B)(iii) and Local Rule 54.1 and 54.2 to the Court on or before
20 **January 30, 2019**.

21 Dated this 10th day of January, 2019.

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24 David G. Campbell
25 Senior United States District Judge
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