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**UNITED STATES DISTRICT COURT**

EASTERN DISTRICT OF CALIFORNIA

J & J SPORTS PRODUCTIONS, INC.,	)	1:10-cv-02104 LJO GSA
	)	
Plaintiff,	)	<b>FINDINGS AND RECOMMENDATIONS</b>
	)	<b>ON PLAINTIFF’S APPLICATION FOR</b>
v.	)	<b>DEFAULT JUDGMENT BY THE COURT</b>
	)	
	)	(Document 11)
	)	
ALVARO L. LUPIAN, aka ALVARO L.	)	
LUA, d/b/a EL PROGRESSO 4 BAR,	)	
	)	
Defendant.	)	

On March 1, 2011, Plaintiff J & J Sports Productions, Inc. (“Plaintiff”) filed the present Application for Default Judgment by the Court against Defendant Alvaro L. Lupian, also known as Alvaro L. Lua, individually and doing business as El Progreso 4 Bar. (Doc. 11.) A hearing was held on April 8, 2011, before the Honorable Gary S. Austin. Thomas P. Riley, Jr. appeared telephonically on behalf of Plaintiff. No appearance was made by or on behalf of Defendant.

**BACKGROUND**

Plaintiff filed the instant action on November 10, 2010. (Doc. 1.) Defendant was served with the summons and complaint on December 30, 2010. (Docs. 5.) The complaint alleges violations of Title 47 of the United States Code sections 605 and 553. Plaintiff also alleges a state law claim of conversion and a violation of California Business and Professions Code section 17200, *et seq.*

1 Defendant has not answered the complaint or otherwise appeared in this action. (Doc.  
2 11-1 at 2 & 11-2, ¶ 1.) On February 4, 2011, the Clerk of the Court entered default against  
3 Defendant Alvaro L. Lupian. (Doc. 7.)

4 Plaintiff filed the instant application for default judgment on March 1, 2011. Plaintiff  
5 requests that the Court enter default judgment against Defendant in the amount of \$112,200.00.  
6 Despite being served with the application by United States Mail, Defendant has not responded to  
7 the application.

### 8 **Legal Standard**

9 Federal Rule of Civil Procedure 55(b)(2) provides that judgment may be entered:

10 By the Court. In all other cases, the party must apply to the court for a  
11 default judgment. A default judgment may be entered against a minor or  
12 competent person only if represented by a general guardian, conservator, or other  
13 like fiduciary who has appeared. If the party against whom a default judgment is  
14 sought has appeared personally or by a representative, that party or its  
representative must be served with written notice of the application at least 3 days  
before the hearing. The court may conduct hearings or make referrals--preserving  
any federal statutory right to a jury trial--when, to enter or effectuate judgment, it  
needs to:

- 15 (A) conduct an accounting;
- 16 (B) determine the amount of damages;
- (C) establish the truth of any allegation by evidence; or
- (D) investigate any other matter.

17 “Upon default, the well-pleaded allegations of the complaint relating to liability are taken as  
18 true.” *Dundee Cement Co. v. Highway Pipe and Concrete Products*, 722 F.2d 1319, 1323 (7th  
19 Cir. 1983); *TeleVideo Systems, Inc. v. Heidenthal*, 826 F.2d 915, 917-918 (9th Cir. 1987).

20 Factors which may be considered by courts in exercising discretion as to the entry of a  
21 default judgment include: (1) the possibility of prejudice to the plaintiff; (2) the merits of  
22 plaintiff’s substantive claim; (3) the sufficiency of the complaint; (4) the sum of money at stake  
23 in the action; (5) the possibility of a dispute concerning material facts; (6) whether the default  
24 was due to excusable neglect; and (7) the strong policy underlying the Federal Rules of Civil  
25 Procedure favoring decisions on the merits. *Eitel v. McCool*, 782 F.2d 1470, 1471-1472 (9th Cir.  
26 1986).

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1 **DISCUSSION**

2 Service of summons and complaint in this action was made on Defendant Alvaro L.  
3 Lupian on December 30, 2010. A true and correct copy of the Proof of Service was filed with  
4 this Court on January 18, 2011. (Doc. 5). Defendant failed to respond to the complaint or  
5 otherwise appear in this action. The Clerk of the Court entered default against Defendant on  
6 February 4, 2011. (Doc. 7.) Defendant is not an infant or incompetent person, and is not in the  
7 military service or otherwise exempted under the Soldiers’ and Sailors’ Civil Relief Act of 1940.  
8 (See Doc. 11 at ¶ 1 & 11-2 at ¶ 3.)

9 Plaintiff seeks judgment pursuant to Title 47 of the United States Code section 605  
10 against Defendant for unlawfully intercepting, receiving and exhibiting the “Firepower”: *Manny*  
11 *Pacquiao v. Miguel Cotto, WBO Welterweight Championship Program* on November 14, 2009,  
12 at his establishment in Cutler, California. Plaintiff requests enhanced statutory damages in the  
13 amount of \$110,000.00 and \$2,200.00 for state law conversion.

14 The relevant provisions of Title 47 of the United States Code section 605, which address  
15 unauthorized publication or use of wire or radio communications, state:

16 (a) . . . no person receiving, assisting in receiving, transmitting, or assisting  
17 in transmitting, any interstate or foreign communication by wire or radio shall  
18 divulge or publish the existence, contents, substance, purport, effect, or meaning  
19 thereof, except through authorized channels of transmission or reception, (1) to  
20 any person other than the addressee, his agent, or attorney. . . . No person not being  
21 authorized by the sender shall intercept any radio communication and divulge or  
22 publish the existence, contents, substance, purport, effect, or meaning of such  
23 intercepted communication to any person. No person not being entitled thereto  
24 shall receive or assist in receiving any interstate or foreign communication by  
25 radio and use such communication (or any information therein contained) for his  
26 own benefit or for the benefit of another not entitled thereto. No person having  
27 received any intercepted radio communication or having become acquainted with  
28 the contents, substance, purport, effect, or meaning of such communication (or  
any part thereof) knowing that such communication was intercepted, shall divulge  
or publish the existence, contents, substance, purport, effect, or meaning of such  
communication (or any part thereof) or use such communication (or any  
information therein contained) for his own benefit or for the benefit of another not  
entitled thereto.

26 Additionally, the aggrieved party is authorized to obtain statutory damages of “not less than  
27 \$1,000 or more than \$10,000, as the court considers just” for each violation. 47 U.S.C. §  
28 605(e)(3)(C)(i)(II). The court may award enhanced damages up to \$100,000 for each violation if

1 it finds the violation was willfully committed for commercial advantage or private financial gain.  
2 47 U.S.C. § 605 (e)(3)(C)(ii).

3 Plaintiff attests that it is a closed-circuit distributor of sports and entertainment  
4 programming that purchased and retained the commercial exhibition licensing rights to the  
5 program at issue. Plaintiff marketed the sub-licensing (commercial exhibition) rights in the  
6 program to its commercial customers. (Doc. 11-4 at ¶ 3.) Plaintiff contends that persistent signal  
7 piracy of its programming costs the company, its customers and the community millions of  
8 dollars annually. (Doc. 11-4 at ¶ 11.) Plaintiff believes this results in part from the perceived  
9 lack of significant consequences (including nominal or minimal damage awards by the Courts  
10 who hear its cases) for such unlawful interception and exhibition by the commercial signal  
11 pirates. (Doc. 11-4 at ¶ 12.) As such, Plaintiff requests the maximum allowance for statutory  
12 violations, totaling \$110,000.00. (Doc. 11-4 at ¶ 13.)

13 Here, the summons and complaint were served upon Defendant Alvaro L. Lupian by  
14 substitute service on December 30, 2010. The service was effected pursuant to subdivision  
15 (h)(1) of Rule 4 of the Federal Rules of Civil Procedure, which provides as follows:

16 Unless federal law provides otherwise or the defendant's waiver has been filed, a  
17 domestic or foreign corporation, or a partnership or other unincorporated  
association that is subject to suit under a common name, must be served:

18 (1) in a judicial district of the United States:

(A) in the manner prescribed by Rule 4(e)(1) for servicing an individual;

19 or

(B) be delivering a copy of the summons and of the complaint to an  
20 officer, a managing or general agent, or any other agent authorized by  
appointment or by law to receive service of process and - if the agent is one  
21 authorized by statute and the statute so requires - by also mailing a copy of each to  
the defendant . . .

22 More particularly, the summons and complaint was served upon Luccero Gama, the person in  
23 charge at the El Progreso 4 Bar, at 40594 Lincoln Road, Suite B, in Cutler at 9:00 p.m. on  
24 December 30, 2010. (See Doc. 5.) Thus, it appears that Defendant's default was properly  
25 entered, and the complaint is sufficiently well-pled. By his default, Defendant has admitted to  
26 willfully violating the referenced statutes for purposes of commercial advantage.

27 Although deterrence of future violations is an important objective of the statutes, the facts  
28 before the Court indicate that Defendant's establishment is a medium sized bar serving primarily

1 Spanish speaking clientele, with a maximum capacity of approximately seventy to eighty patrons.  
2 Mitch Gerking, Plaintiff's investigator, noted El Progreso 4 Bar is located in "the rural  
3 unincorporated community of Cutler" in Tulare County and primarily caters to a clientele of  
4 Spanish speaking laborers.<sup>1</sup> The bar contained a twenty-five to twenty-seven inch color  
5 television mounted near the ceiling in the northeast corner, as well as a nineteen inch color  
6 television sitting on a shelf behind the bar. Gerking conducted three head counts while he was in  
7 the bar for a total of about seven minutes, between 7:38 and 7:45 p.m., on November 14, 2009.  
8 Each of the three counts revealed that "80+" persons were present. A cover charge was not  
9 required, however, the entrance to the bar was manned by a security guard. (Doc. 11-3 at 2-3.)  
10 Photographs of the establishment depict an aging building, the bar sharing space with a modest  
11 supermarket. (Doc. 11-3 at 5-9.)

12 While it appears the establishment was full to its capacity, in light of the clientele served  
13 and the rather humble nature of the business itself, the Court finds that the amount of requested  
14 damages should be reduced and will recommend a reduction accordingly.

15 Additionally, Plaintiff seeks \$2,200.00 in conversion damages, the value of the properly  
16 at the time of the conversion. (Doc. 11-1 at 20.) Under California law, "[c]onversion is the  
17 wrongful exercise of dominion over the property of another. The elements of a conversion are  
18 (1) the plaintiff's ownership or right to possession of the property at the time of the conversion;  
19 (2) the defendant's conversion by a wrongful act or disposition of property rights; and (3)  
20 damages." *Greka Integrated, Inc. v. Lowrey*, 133 Cal.App.4th 1572, 1581, 35 Cal.Rptr.3d 684  
21 (2005) (internal quotation marks omitted); *see also G.S. Rasmussen & Assocs., Inc. v. Kalitta*  
22 *Flying Serv., Inc.*, 958 F.2d 896, 906 (9th Cir.1992). "Because conversion is a strict liability tort,  
23 questions of the defendant's good faith, lack of knowledge, motive, or intent are not relevant."  
24 *Gilman v. Dalby*, 176 Cal.App.4th 606, 615 n.1, 98 Cal.Rptr.3d 231 (2009). Exclusive right to  
25 distribute a broadcast signal to commercial establishments constitutes a "right to possession of  
26 property" for purposes of conversion. *See Don King Prods./Kingvision v. Lovato*, 911 F.Supp.  
27 419, 423 (N.D. Cal. 1995); *see also DIRECTV, Inc. v. Pahnke*, 405 F.Supp.2d 1182, 1189 (E.D.  
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<sup>1</sup>Mr. Gerking described the establishment as a "medium sized Mexican bar in poor condition."

1 Cal. 2005) (concluding that the "right to distribute programming via satellite" constituted a "right  
2 to possession of personal property" for purposes of a conversion claim under California law).

3 Here, Plaintiff was granted the exclusive domestic commercial exhibition licensing rights  
4 to the program at issue, and thus had the right to possession of the property at the time of the  
5 conversion. (Doc. 11-4, ¶ 3.) Next, because Defendant did not legally purchase the pay-per-  
6 view programming, the exhibition of the fight in El Progreso 4 Bar on November 14, 2009,  
7 constituted Defendant's conversion by a wrongful act or disposition of property rights. (Doc. 11-  
8 4, ¶¶ 6-7.) Finally, the rate card for the "Fire Power" welterweight championship fight between  
9 Manny Pacquiao and Miguel Cotto, for an establishment with "a maximum fire code occupancy"  
10 of eighty (80) persons, similar in size to Defendant's establishment, indicates the sub-license fee  
11 for the program would have been \$2,200.00. (Doc. 11-4, ¶ 8 & Ex. 1.) Thus, Plaintiff is entitled  
12 to damages for conversion in the amount of \$2,200.00.

### 13 **RECOMMENDATIONS**

14 Based on consideration of the declarations, pleadings and exhibits to the present  
15 application, the Court RECOMMENDS as follows:

- 16 1. Plaintiff's application for default judgment be GRANTED;
- 17 2. Judgment be entered in this action against Defendant Alvaro L. Lupian; and
- 18 3. Damages in the total amount of \$10,220.00 be awarded as follows:
  - 19 a. For the violation of 47 U.S.C. § 605(e)(3)(i)(II), the sum of \$4,000.00;
  - 20 b. For the violation of 47 U.S.C. § 605 (e)(3)(C)(ii), the sum of \$4,000.00;
  - 21 and
  - 22 c. For the conversion of Plaintiff's property, the sum of \$2,200.00.

23  
24 These findings and recommendations are submitted to the district judge assigned to this  
25 action, pursuant to Title 28 of the United States Code section 636(b)(1)(B) and this Court's Local  
26 Rule 304. Within fifteen (15) days of service of this recommendation, any party may file written  
27 objections to these findings and recommendations with the Court and serve a copy on all parties.  
28 Such a document should be captioned "Objections to Magistrate Judge's Findings and

1 Recommendations.” The district judge will review the magistrate judge’s findings and  
2 recommendations pursuant to Title 28 of the United States Code section 636(b)(1)(C). The  
3 parties are advised that failure to file objections within the specified time may waive the right to  
4 appeal the district judge’s order. *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

5 IT IS SO ORDERED.

6 **Dated: April 14, 2011**

**/s/ Gary S. Austin**  
UNITED STATES MAGISTRATE JUDGE

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