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7 UNITED STATES DISTRICT COURT
8 EASTERN DISTRICT OF CALIFORNIA
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10 J & J SPORTS PRODUCTIONS, INC., CASE NO. 1:11-cv-01563-AWI-MJS
11 Plaintiff, FINDINGS AND RECOMMENDATIONS
12 v. ON PLAINTIFF'S MOTION FOR DEFAULT
13 RAMON LOPEZ FRANCO, (ECF No. 15) JUDGMENT
14 Defendant. OBJECTIONS DUE WITHIN 15 DAYS
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18 **I. INTRODUCTION**

19 On February 1, 2012, summons was returned showing that service of the summons
20 and Complaint on Defendant was effected January 24, 2012. (ECF No. 9.) Defendant has
21 never filed a response to the Complaint.
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23 On March 1, 2012, Plaintiff requested default be entered against Defendant, and
24 on March 1, 2012, the Clerk entered said default. (ECF Nos. 12 & 13.) On April 24, 2012,
25 Plaintiff filed the present motion for default judgment.. Defendant filed no opposition to the
26 motion. However, he did, on May 22, 2012, file a motion to set aside the clerk's entry of
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1 default. (ECF No 20.) The Court on August 1, 2012, issued its findings and
2 recommendation to deny that motion on August 1, 2012 (ECF No. 25). Those findings and
3 recommendations were adopted by the District Judge on January 22, 2013 (ECF No. 26).
4 Accordingly, Plaintiff's motion for default judgement is now before the Court for ruling.

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6 Specifically, Plaintiff J & J Sports Productions, Inc. ("Plaintiff"), moves for default
7 judgment against Defendant Ramon Lopez Franco, individually and doing business as El
8 Jaliciense Bar ("Defendant"). (Mot. for Default, ECF No. 15.) The motion was referred to
9 this Court pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302. The Court, finding the
10 matter suitable for decision without a hearing, VACATED the hearing thereon and deemed
11 the motion submitted upon the record in accordance with Local Rule 230(g).

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13 For the reasons set forth below, the Court RECOMMENDS that Plaintiff's motion for
14 default judgment be GRANTED.

15 **II. FACTUAL BACKGROUND**

16 Plaintiff filed this civil action on September 15, 2011. (Compl., ECF No. 1.) The
17 Complaint alleges Defendant violated the Communications Act of 1934 (47 U.S.C. § 605,
18 et seq.) and the Cable & Television Consumer Protection and Competition Act of 1992 (47
19 U.S.C. § 553, et seq.). It also asserts causes of action for conversion and for violation of
20 California Business and Professions Code section 17200, et. seq. The suit is based on
21 Defendant's alleged unlawful interception, receipt, and exhibition of "*200 Celebrate and*
22 *Dominate*": *Shane Mosley v. Sergio Mora* (including all under-card bouts, televised replay
23 and color commentary encompassed therein) telecast nationwide on September 18, 2010
24 (the "Program"). According to the Complaint, Plaintiff was the exclusive commercial
25 distributor of closed-circuit rights to the Program. Since Defendant operates El Jaliciense
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1 Bar, a commercial establishment, and exhibited the Program there, Defendant could not
2 have lawfully obtained the Program without contracting with Plaintiff. Defendant did not so
3 contract, and thus necessarily must have wrongfully intercepted, received, and
4 broadcasted the Program.

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6 Count I of the complaint asserts a violation of 47 U.S.C. § 605 (Unauthorized
7 Publication or Use of Communications) alleging that Defendant knowingly intercepted,
8 received, and exhibited the Program for purposes of direct or indirect commercial
9 advantage or private financial gain. Plaintiff prays for \$110,000 in statutory damages as
10 well as attorney's fees and costs on this Count. Count II alleges a violation of 47 U.S.C.
11 § 553 (Unauthorized Reception of Cable Services) based upon the same allegations for
12 which Plaintiff requests \$60,000 in statutory damages and costs of Count. Count III
13 alleges Defendant tortuously obtained possession of the Program and wrongfully converted
14 it for their own benefit. Plaintiff requests an award of compensatory, exemplary and
15 punitive damages for the alleged conversion. Count IV sets forth a claim of violation of
16 California Business & Professions Code § 17200, *et seq.*, for which Plaintiff seeks
17 restitution, declaratory relief, and injunctive relief. For all four claims Plaintiff seeks
18 attorney's fees and costs.
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21 **III. DISCUSSION**

22 **A. Legal Standard**

23 Federal Rule of Civil Procedure 55(b)(2) provides that judgment may be entered by
24 the Court on a party's motion for default judgment and authorizes the Court to:

25 ...conduct hearings or make referrals—preserving any federal statutory right
26 to a jury trial—when, to enter or effectuate judgment, it needs to:

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

5 Upon default, the well-pleaded allegations of liability in the complaint are taken as
6 true. TeleVideo Sys., Inc. v. Heidenthal, 826 F.2d 915, 917-18 (9th Cir. 1987); Dundee
7 Cement Co. v. Highway Pipe & Concrete Prods., Inc., 722 F.2d 1319, 1323 (7th Cir. 1983).

8 “Factors which may be considered by courts in exercising discretion as to the entry
9 of a default judgment include: (1) the possibility of prejudice to the plaintiff, (2) the merits
10 of plaintiff’s substantive claim, (3) the sufficiency of the complaint, (4) the sum of money
11 at stake in the action; (5) the possibility of a dispute concerning material facts; (6) whether
12 the default was due to excusable neglect, and (7) the strong policy underlying the Federal
13 Rules of Civil Procedure favoring decisions on the merits.” Eitel v. McCool, 782 F.2d 1470,
14 1471-72 (9th Cir. 1986).

15 **B. Analysis**

16 1. Default Judgment

17 Service of the summons and Complaint in this action was effected on January 24,
18 2012. A copy of the Proof of Service was filed with this Court on February 1, 2012.
19 Defendant has not responded to the Complaint or to this Motion (of which he was given
20 notice) or otherwise appeared in the action. The Clerk of the Court entered default against
21 Defendant on March 1, 2012. According to the Affidavit of Plaintiff’s counsel filed in
22 support of Plaintiff’s Request to Enter Default, Defendant is not an infant, incompetent, in
23 the military service, or otherwise exempted under the Soldiers’ and Sailors’ Civil Relief Act
24 of 1940.
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27 The Court finds that Plaintiff’s Complaint properly and credibly alleges all material

1 facts and elements necessary to the claims asserted and to the relief sought and that it
2 reflects a meritorious substantive claim. Defendant has chosen not to respond to or
3 contest the action or this motion. There is no basis to conclude that Plaintiff will be
4 prejudiced by this case proceeding via default judgment rather than trial. Inasmuch as
5 default serves as an admission of Plaintiff's well-pled allegations of fact (Danning v. Lavine,
6 572 F.2d 1386, 1388 (9th Cir. 1978)), it must be concluded that there is no dispute as to
7 any material fact. It appears that Defendant simply elected to allow this matter to proceed
8 through default; default was not caused by excusable neglect. Although the Court favors
9 resolving cases on the merits after adversarial proceedings, it cannot force Defendant to
10 participate. Thus, the only factor weighing against default judgment in this case is the
11 relatively large amount of money Plaintiff seeks in damages. However, as discussed
12 below, the actual award made by the Court is not such as to militate against proceeding
13 by default judgment.

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15 Accordingly, the Court recommends that default judgment be entered against the
16 Defendant.
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18 2. Statutory and Enhanced Damages

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20 In its motion, Plaintiff seeks default judgment and an award of damages pursuant
21 to 47 U.S.C. § 605(e)(3)(C)(i)(II) (statutory damages) and 47 U.S.C. § 605(e)(3)(C)(ii)
22 (enhanced statutory damages) in the amount of \$110,000 against Defendant for unlawfully
23 intercepting, receiving, and exhibiting the Program and \$1,600 in damages for conversion.

24 Section 605(a) provides that “no person receiving, assisting in receiving,
25 transmitting, or assisting in transmitting, any interstate or foreign communication by wire
26 or radio shall divulge or publish the existence, contents, substance, purport, effect, or
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1 meaning thereof, except through authorized channels of transmission of reception. . . .”

2 Those who violate this Section are subject to the following civil penalty:

3 [T]he party aggrieved may recover an award of statutory damages for each
4 violation of subsection (a) of this section involved in the action in a sum of
5 not less than \$1,000 or more than \$10,000, as the court considers just, and
6 for each violation of paragraph (4) of this subsection involved in the action
7 an aggrieved party may recover statutory damages in a sum not less than
8 \$10,000, or more than \$100,000, as the court considers just.

8 47 U.S.C. § 605(e)(3)(C)(i)(II).

9 Plaintiff attests that it is a closed-circuit distributor of sports and entertainment
10 programming that purchased and retained the exclusive commercial exhibition licensing
11 rights to the Program. Plaintiff marketed the sub-licensing (commercial exhibition) rights
12 in the Program to its commercial customers. Plaintiff seeks substantial damages as a
13 deterrent to Defendant and others continuing to pirate and commercially exhibit such
14 broadcasts. Plaintiff contends that persistent signal piracy of Plaintiff's programming costs
15 Plaintiff, its customers, and the community millions of dollars annually. Plaintiff asserts that
16 continued signal piracy is caused, in part, by the perceived lack of consequences, as
17 reflected in part by nominal or minimal damage awards by courts, for such unlawful
18 interception and exhibition. As such, Plaintiff requests that it be awarded the maximum,
19 \$10,000 allowance for statutory violations.

22 Plaintiff also seeks an award of significant enhanced statutory damages under
23 Section 605(e)(3)(C)(ii) because Defendant's action in this case was willful and done for
24 commercial advantage. Section 605(e)(3)(C)(ii) provides that where “the court finds that
25 the violation was committed willfully and for purposes of direct or indirect commercial
26 advantage or private financial gain, the court in its discretion may increase the award of
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1 damages, whether actual or statutory, by an amount of not more than \$100,000 for each
2 violation of subsection (a).” Emphasizing the need for deterrence as to this Defendant and
3 others, Plaintiff requests that it be awarded \$100,000 in enhanced statutory damages.

4 Here, the summons and the Complaint were properly served upon Defendant, his
5 default was properly entered, and the Complaint is sufficiently well-pled. See Eitel, 782
6 F.2d at 1471-72. By default, Defendant admitted to willfully violating Section 605 for the
7 purposes of commercial advantage. See TeleVideo Sys., Inc., 826 F.2d at 917-18. The
8 facts before the Court indicate that Defendant’s establishment had an approximate
9 capacity of 75 people. (ECF No. 15-3.) There were four 32-inch flat screen television sets
10 in the establishment on the night the Program was broadcast. (Id.) The televisions were
11 located above the bar. (Id.) Three head-counts revealed eight people in the restaurant
12 each time. (Id.)

13 The amount of damages awarded should be in an amount that is adequate to deter
14 Defendant and others from committing similar acts in the future.

15 Therefore, the Court recommends that the maximum allowable statutory damages
16 be awarded pursuant to 47 U.S.C. § 605(e)(3)(C)(i)(II) in the amount of \$10,000.

17 Several factors weigh against a substantial award of enhanced statutory damages
18 in this case. There is no evidence that Defendant (1) advertised the broadcast of the
19 Program to entice a larger crowd, (2) charged a cover to enter the establishment, or (3)
20 charged a premium for food and drinks on the night the broadcast was shown. There is
21 no evidence that Defendant’s income or resources are such as to warrant an award of
22 enhanced damages to deter future violations.

23 Defendant’s conduct, whether particularly profitable for Defendant or not, has an
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1 adverse impact on Plaintiff and the industry. Plaintiff stresses the significant adverse effect
2 piracy has had on its industry, the need for deterrence and the perception that the courts
3 have placed undue weight on whether Defendants promote the program. Plaintiff argues
4 that pirates often refrain from advertising their intent to exhibit such programming, to
5 increase the price of food and drinks, or to charge a cover charge, all in the hope of
6 undercutting competitors who do sub-license and broadcast the program lawfully.
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8 The Court is also mindful that minimal damage awards may result in a perceived
9 lack of consequences for signal piracy. Moreover, there is a suggestion here that
10 Defendant may be a repeat offender insofar as he is being sued for other acts of piracy
11 in a separate case filed in the Eastern District. See *J & J Sports Productions, Inc. v.*
12 *Franco*, 1:10-cv-1704-LJO-DLB (“Franco”). In *Franco*, 1:10-cv-1704-LJO-DLB, Defendant
13 was sued for wrongful exhibition of “*Number One: The Floyd Mayweather, Jr. v. Juan*
14 *Manuel Marquez Championship Fight Program*, telecast on September 19, 2009. *Franco*,
15 1:10-cv-1704-LJO-DLB at ECF No. 1, ¶ 9. The parties in that case entered into a
16 settlement agreement and the case was dismissed. *Franco*, 1:10-cv-1704-LJO-DLB at
17 ECF No. 28.
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20 Weighing all of these factors, the Court recommends that enhanced statutory
21 damages in the amount of \$3,000 be awarded under Section 605(e)(3)(C)(ii). This is an
22 amount which should serve as a significant disincentive to Defendant and others to try to
23 profit directly or indirectly from the pirating, but also recognizes the absence of evidence
24 that Defendant actively sought to profit directly or did actually profit from the pirating.
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26 3. Damages for Conversion

27 Plaintiff seeks recovery of \$1,600 as the value of the property at the time of the

1 conversion.

2 Under California law, conversion is the wrongful exercise of dominion over the
3 property of another. The elements of conversion are, “the plaintiff's ownership or right to
4 possession of the property at the time of the conversion; the defendant's conversion by
5 a wrongful act or disposition of property rights; and damages.” Greka Integrated, Inc. v.
6 Lowrey, 133 Cal. App. 4th 1572, 1581 (2005); see also G.S. Rasmussen & Assocs., Inc.
7 v. Kalitta Flying Serv., Inc., 958 F.2d 896, 906 (9th Cir. 1992). “Because conversion is a
8 strict liability tort, questions of the defendant's good faith, lack of knowledge, motive, or
9 intent are not relevant.” Gilman v. Dalby, 176 Cal. App. 4th 606, 615 n.1 (2009). Exclusive
10 right to distribute a broadcast signal to commercial establishments constitutes a “right to
11 possession of property” for purposes of conversion. See Don King Prods./Kingvision v.
12 Lovato, 911 F.Supp. 419, 423 (N.D. Cal. 1995) (misappropriation of intangible property
13 without authority from owner is conversion); see also DIRECTV, Inc. v. Pahnke, 405 F.
14 Supp. 2d 1182, 1189 (E.D. Cal. 2005) (concluding that the right to distribute programming
15 via satellite constituted a right to possession of personal property for purposes of a
16 conversion claim under California law.)

17 Here, Plaintiff was granted the exclusive domestic commercial exhibition licensing
18 rights to the Program. As such, Plaintiff had the right to possess the property at the time
19 of the conversion. Because Defendant did not legally purchase the Program, the exhibition
20 of the Program constituted conversion by a wrongful act or disposition of property rights.
21 The rate for the Program at an establishment such as Defendant’s establishment was
22 \$1,600. Thus, Plaintiff is entitled to damages for conversion in the amount of \$1,600.
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1 **IV. RECOMMENDATIONS**

2 Based on a consideration of the declarations, pleadings, and exhibits to the present
3 motion, the Court RECOMMENDS as follows:

- 4 1. Plaintiff's motion for default judgment be GRANTED;
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- 6 2. Judgment be entered in this action against Defendant Ramon Lopez Franco,
7 individually and doing business as El Jaliciense Bar as follows:
- 8 a. \$10,000 statutory damages for violation of 47 U.S.C. § 605;
- 9 b. \$3,000 enhanced statutory damages for violation of 47 U.S.C. § 605; and
- 10 c. \$1,600 damages for the tort of conversion.

11 These findings and recommendations are submitted to the district judge assigned
12 to this action, pursuant to 28 U.S.C. § 636(b)(1)(B) and this Court's Local Rule 304. Within
13 fifteen (15) days of service of this recommendation, any party may file written objections
14 to these findings and recommendations with the Court and serve a copy on all parties.
15 Such a document should be captioned "Objections to Magistrate Judge's Findings and
16 Recommendations." The district judge will review the magistrate judge's findings and
17 recommendations pursuant to 28 U.S.C. § 636(b)(1)(C). The parties are advised that
18 failure to file objections within the specified time may waive the right to appeal the district
19 judge's order. Martinez v. Ylst, 951 F.2d 1153, 1156 (9th Cir 1991).

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24 IT IS SO ORDERED.

25 Dated: February 27, 2013

26 Isl. Michael J. Seng
27 UNITED STATES MAGISTRATE JUDGE