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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

J & J SPORTS PRODUCTIONS, INC.,
Plaintiff,
v.
EMMA TONA MEDINA,
Defendant.

Case No. 1:13-cv-01443-AWI-MJS
FINDINGS AND RECOMMENDATIONS ON
PLAINTIFF'S APPLICATION FOR DEFAULT
JUDGMENT
(ECF No. 12)
OBJECTIONS DUE WITHIN 15 DAYS

I. INTRODUCTION

On February 11, 2014, Plaintiff J & J Sports Productions, Inc. ("Plaintiff"), filed a motion for default judgment against Emma Tona Medina, individually and doing business as La Cabana Restaurant ("Defendant"). The motion was referred to this Court pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302. The Court, finding the matter suitable for decision without a hearing, VACATED the April 4, 2014, hearing and deemed the motion submitted upon the record in accordance with Local Rule 230(g).

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

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1 **II. FACTUAL BACKGROUND**

2 Plaintiff filed this civil action on September 9, 2013. The Complaint alleges
3 Defendant violated the Communications Act of 1934 (47 U.S.C. § 605, et seq.) and the
4 Cable & Television Consumer Protection and Competition Act of 1992 (47 U.S.C. §
5 553, et seq.). It also asserts causes of action for conversion and for violation of
6 California Business and Professions Code section 17200, et. seq. The suit is based on
7 Defendant’s alleged unlawful interception, receipt, and exhibition of the “Julio Cesar
8 Chavez, Jr. v. Sergio Martinez, WBC Middleweight Championship Fight Program”
9 telecast nationwide on Saturday, September 15, 2012 (the "Program"). According to
10 the Complaint, Plaintiff was the exclusive commercial distributor of closed-circuit rights
11 to the Program. Since Defendant operates a commercial establishment and exhibited
12 the Program there, she could not have lawfully obtained the Program without
13 contracting with Plaintiff. Defendant did not so contract, and thus necessarily must have
14 wrongfully intercepted, received, and broadcasted the Program.

15 Plaintiff, in its application for default, only requests relief as to claims one
16 (violation of the Communications Act) and three (conversion) of the complaint. Count
17 one of the Complaint asserts a violation of 47 U.S.C. § 605 (Unauthorized
18 Publication or Use of Communications) alleging that Defendant knowingly
19 intercepted, received, and exhibited the Program for purposes of direct or indirect
20 commercial advantage or private financial gain. Plaintiff prays for \$110,000 in statutory
21 damages. Count three alleges Defendant tortuously obtained possession of the Program
22 and wrongfully converted it for its own benefit. Plaintiff requests an award of \$1,600 in
23 compensatory damages for the alleged conversion.

24 On November 15, 2013, the summons was returned showing that service of
25 the summons and complaint was effected on Defendant on November 12, 2013.
26 Defendant has not filed any response to the Complaint. On January 17, 2014, Plaintiff
27 requested default be entered against Defendant, and on January 23, 2014, the Clerk
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1 entered said default. On February 11, 2014, Plaintiff filed the present motion for default
2 judgment against Defendant. Defendant has filed no opposition to the motion or
3 otherwise sought to appear in the case.

4 **III. DISCUSSION**

5 **A. Legal Standard**

6 Federal Rule of Civil Procedure 55(b)(2) provides that judgment may be entered
7 by the Court on a party's motion for default judgment and authorizes the Court to:
8 conduct hearings or make referrals - preserving any federal statutory right
9 to a jury trial - when, to enter or effectuate judgment, it needs to:

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

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

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

24 **B. Analysis**

25 1. Default Judgment

26 Service of the summons and Complaint in this action was effected on November
27 12, 2013. A copy of the Proof of Service was filed with this Court on November 15,
28 2013. Defendant has not responded to the Complaint or to this Motion (of which he was
given notice) or otherwise appeared in the action. The Clerk of the Court entered default
against Defendant on January 23, 2014. According to the Affidavit of Plaintiff's counsel

1 filed in support of Plaintiff's Request to Enter Default, Defendant is not an infant,
2 incompetent, in the military service, or otherwise exempted under the Servicemembers Civil
3 Relief Act of 2003.

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

18 Accordingly, the Court recommends that default judgment be entered against the
19 Defendant.

20 2. Statutory and Enhanced Damages

21 In its motion, Plaintiff seeks default judgment and an award of damages
22 pursuant to 47 U.S.C. § 605(e)(3)(C)(i)(II) (statutory damages) and 47 U.S.C. §
23 605(e)(3)(C)(ii) (enhanced statutory damages) in the amount of \$110,000 against
24 Defendant for unlawfully intercepting, receiving, and exhibiting the Program and
25 \$2,000 damages for conversion.

26 Section 605(a) provides that "no person receiving, assisting in receiving,
27 transmitting, or assisting in transmitting, any interstate or foreign communication by
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1 wire or radio shall divulge or publish the existence, contents, substance, purport,
2 effect, or meaning thereof, except through authorized channels of transmission of
3 reception" Those who violate this Section are subject to the following civil penalty:

4 [T]he party aggrieved may recover an award of statutory damages for
5 each violation of subsection (a) of this section involved in the action in a
6 sum of not less than \$1,000 or more than \$10,000, as the court considers
7 just, and for each violation of paragraph (4) of this subsection involved in
8 the action an aggrieved party may recover statutory damages in a sum
9 not less than \$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
10 entertainment programming that purchased and retained the exclusive commercial
11 exhibition licensing rights to the Program. Plaintiff marketed the sub-licensing
12 (commercial exhibition) rights in the Program to its commercial customers. Plaintiff
13 seeks substantial damages as a deterrent to Defendant and others continuing to
14 pirate and commercially exhibit such broadcasts. Plaintiff contends that persistent
15 signal piracy of Plaintiff's programming costs the company, its customers, and the
16 community millions of dollars annually. Plaintiff asserts that continued signal piracy is
17 caused, in part, by the perceived lack of consequences as reflected in part by nominal
18 or minimal damage awards by courts, for such unlawful interception and exhibition. As
19 such, Plaintiff requests that it be awarded the maximum, \$10,000 allowance for statutory
20 violations.

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

4 Here, the summons and the complaint were properly served upon Defendant, its
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. (Affidavit of Gary Gravelyn, ECF No. 12-3.) There was one
10 approximately 42 inch flat screen television displaying the Program on September 15,
11 2012. Three head-counts revealed nine people in the facility at the time. (Id.) No
12 evidence was presented that a cover charge was required to enter the establishment.
13 (Id.)

14 The amount of damages awarded should be in an amount that is adequate to deter
15 Defendant and others from committing similar acts in the future. Therefore, the Court
16 recommends that the maximum allowable statutory damages be awarded pursuant to
17 47 U.S.C. § 605(e)(3)(C)(i)(II) in the amount of \$5000.

18 Some factors weigh against a substantial award of enhanced statutory damages
19 in this case. There is no evidence that Defendant (1) advertised the broadcast of the
20 Program to entice a larger crowd, (2) charged a premium for food and drinks on the
21 night the broadcast was shown, or (3) had a mandatory minimum cover charge. It is
22 noted that Defendant had relatively few patrons at the business during the Program.

23 Defendant's conduct, whether particularly profitable for Defendant or not, has
24 an adverse impact on Plaintiff and the industry. Plaintiff stresses the significant adverse
25 effect piracy has had on its industry, the need for deterrence and the perception that the
26 courts have placed undue weight on whether Defendants promote the program. Plaintiff
27 argues that pirates often refrain from advertising their intent to exhibit such
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1 programming, to increase the price of food and drinks, or to charge a cover charge,
2 all in the hope of undercutting competitors who do sub-license and broadcast the
3 program lawfully.

4 The Court is also mindful that minimal damage awards may result in a
5 perceived lack of consequences for signal piracy.

6 Weighing all of these factors, the Court recommends that enhanced
7 statutory damages in the amount of \$1,500 be awarded under Section 605(e)(3)(C)(ii).
8 This is an amount which should serve as a significant disincentive to defendant and
9 others to try to profit directly or indirectly from the pirating, but also recognizes the
10 absence of evidence that Defendant actively sought to profit directly or did actually profit
11 from the pirating.

12 3. Damages for Conversion

13 Plaintiff seeks recovery of \$1,600 as the value of the property at the time of
14 the conversion.

15 Under California law, conversion is the wrongful exercise of dominion over
16 the property of another. "The elements of a conversion are the plaintiff's ownership or
17 right to possession of the property at the time of the conversion; the defendant's
18 conversion by a wrongful act or disposition of property rights; and damages." Greka
19 Integrated, Inc. v. Lowrey, 133 Cal. App. 4th 1572, 1581 (2005) (internal quotation and
20 citation omitted); see also G.S. Rasmussen & Assocs., Inc. v. Kalitta Flying Serv., Inc.,
21 958 F.2d 896, 906 (9th Cir. 1992). "Because conversion is a strict liability tort,
22 questions of the defendant's good faith, lack of knowledge, motive, or intent are not
23 relevant." Gilman v. Dalby, 176 Cal. App. 4th 606, 615 n.1 (2009). Exclusive right to
24 distribute a broadcast signal to commercial establishments constitutes a "right to
25 possession of property" for purposes of conversion. See Don King Prods./Kingvision v.
26 Lovato, 911 F.Supp. 419, 423 (N.D. Cal. 1995) (misappropriation of intangible
27 property without authority from owner is conversion); see also DIRECTV, Inc. v.
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1 Pahnke, 405 F. Supp. 2d 1182, 1189 (E.D. Cal. 2005) (concluding that the right to
2 distribute programming via satellite constituted a right to possession of personal
3 property for purposes of a conversion claim under California law.)

4 Here, Plaintiff was granted the exclusive domestic commercial exhibition
5 licensing rights to the Program. As such, Plaintiff had the right to possess the property
6 at the time of the conversion. Because Defendant did not legally purchase the Program,
7 the exhibition of the Program constituted conversion by a wrongful act or disposition of
8 property rights. The rate for the Program at an establishment such as Defendant's
9 establishment was \$1,600. Thus, Plaintiff is entitled to damages for conversion in the
10 amount of \$1,600.

11 **IV. RECOMMENDATIONS**

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

- 14 1. Plaintiff's motion for default judgment be GRANTED;
- 15 2. Judgment be entered in this action against Defendant Joe Anthony
16 Gonzales as follows:
 - 17 a. \$5,000 statutory damages for violation of 47 U.S.C. § 605;
 - 18 b. \$1,500 enhanced statutory damages for violation of 47 U.S.C. § 605;
 - 19 and
 - 20 c. \$1,600 damages for the tort of conversion.

21 These findings and recommendations are submitted to the district judge
22 assigned to this action, pursuant to 28 U.S.C. § 636(b)(1)(B) and this Court's Local Rule
23 304. Within fifteen (15) days of service of this recommendation, any party may file
24 written objections to these findings and recommendations with the Court and serve a
25 copy on all parties. Such a document should be captioned "Objections to Magistrate
26 Judge's Findings and Recommendations." The district judge will review the
27 magistrate judge's findings and recommendations pursuant to 28 U.S.C. §
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1 636(b)(1)(C). The parties are advised that failure to file objections within the specified
2 time may waive the right to appeal the district judge's order. Martinez v. Ylst, 951 F.2d
3 1153, 1156 (9th Cir 1991).

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5 IT IS SO ORDERED.

6 Dated: February 16, 2014

/s/ Michael J. Seng
7 UNITED STATES MAGISTRATE JUDGE

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