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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

J&J SPORTS PRODUCTIONS, INC.,

Plaintiff,

v.

ALI AYUB AL-ARSHAD d/b/a TAXI'S
HAMBURGER RESTAURANT,

Defendant.

Case No. 1:14-cv-01574-AWI-SKO

**FINDINGS AND
RECOMMENDATIONS THAT
PLAINTIFF'S MOTION FOR
DEFAULT JUDGMENT BE
GRANTED**

(Doc. No. 12)

OBJECTIONS DUE: 21 DAYS

I. INTRODUCTION

On June 9, 2015, Plaintiff J&J Sports Productions, Inc. ("Plaintiff") filed a motion for default judgment against Defendant Ali Ayub Al-Arshad d/b/a Taxi's Hamburger Restaurant ("Defendant"). No opposition to Plaintiff's motion was filed. The Court has reviewed the motion and supporting documentation and determined that the matter is suitable for decision without oral argument pursuant to Local Rule 230(g); as such, the hearing on the motion is vacated.

For the reasons set forth below, the Court RECOMMENDS that Plaintiff's motion for default judgment be GRANTED against the Defendant in the amount of \$4,200.

1 **II. FACTUAL BACKGROUND**

2 On October 7, 2014, Plaintiff filed a complaint pursuant to Title 47 U.S.C.
3 §§ 605(e)(3)(B)(iii) and (c)(ii), 47 U.S.C. § 503 *et seq.*, and Cal. Bus. & Prac. (Doc. 1
4 (“Complaint”).) The complaint seeks an award of statutory damages, costs of suit, attorneys’ fees,
5 restitution, punitive damages, and prospective injunctive relief. (Compl.)

6 As alleged in the Complaint and as sworn to by Affiant Joseph M. Gagliardi, President of
7 J&J Sports Productions, Inc., Plaintiff is an international distributor of sports and entertainment
8 programming, and secured the domestic commercial exhibition rights to broadcast the *Timothy*
9 *Bradley v. Juan Manuel Marquez WBO Welterweight Championship Fight Program* (the
10 “Program”) telecast nationwide on Saturday, October 12, 2013. (Compl., ¶ 14; Doc. 12-4,
11 ¶ (“Gagliardi Affidavit”).) Plaintiff entered into sublicensing agreements granting public
12 exhibition rights to various commercial entities throughout the United States and its territories,
13 and within the State of California. (Compl., ¶ 15; Gagliardi Aff., ¶ 5.) In California, the Program
14 was legally available to commercial establishments only through an agreement with Plaintiff.
15 (Gagliardi Aff., ¶ 6.) Plaintiff expended substantial monies marketing, advertising, promoting,
16 administering, and transmitting the Program to these commercial entities. (Compl., ¶ 16;
17 Gagliardi Aff.)

18 On Saturday, October 12, 2013, Gerald R. Andrews, Jr. (“Andrews”), entered Defendant’s
19 establishment, Taxi’s Hamburgers Restaurant (the “Restaurant”), in Modesto, California, at
20 approximately 7:54 p.m. (Doc. 12-3 (“Andrews Declaration”), p. 2.) He noted that the Restaurant
21 had three sections, with one apparently closed to customers, and a total of five television sets
22 showing the Program. (Andrews Decl., p. 2.) Plaintiff alleges that Defendant intercepted the
23 Program unlawfully, and intentionally exhibited it for the purpose of direct or indirect commercial
24 advantage.

25 Andrews counted approximately 15 patrons watching the event during most of his stay at
26 the Restaurant; shortly before he left, an additional 6 patrons entered the Restaurant and looked at
27 the menu posted above the cash registers. (Andrews Decl., p. 2.) Defendants did not charge a
28 cover to enter the Restaurant while the Program was shown. (Andrews Decl., p. 2.) Also, while

1 Andrews purchased a beer for a total of \$4.29, the Restaurant did not require patrons to purchase
2 food or drink. (*See* Andrews Decl., pp. 2-3.)

3 Plaintiff further alleges that Defendant knowingly and unlawfully intercepted, received,
4 published, divulged, displayed, and/or exhibited the Program at the time of its transmission at the
5 commercial establishment owned and operated by Plaintiff. (Compl., ¶ 17.) Plaintiff alleges
6 Defendant did so willfully and for purposes of direct and/or indirect commercial advantage and/or
7 private financial gain, in violation of 47 U.S.C. § 605, *et seq.* (Compl., ¶¶ 19-21.) Plaintiff seeks
8 statutory damages for each violation in the amount of \$10,000 pursuant to 47 U.S.C.
9 § 605(e)(3)(C)(i)(II), statutory damages for each willful violation in the amount of \$100,000
10 pursuant to 47 U.S.C. § 605(e)(3)(B)(iii), and attorneys’ fees and costs pursuant to 47 U.S.C.
11 § 605(e)(3)(B)(iii). (Comp., ¶ 22.)

12 Defendant was served with the Complaint by substituted service at his place of business on
13 January 21, 2015, but did not file a responsive pleading. (Doc. 4 (served on “Connie Sawyer”).)
14 Plaintiff requested the Clerk of Court to enter default against Defendant on March 31, 2015, and
15 the Clerk entered default against Defendant on April 1, 2015. (Docs. 7; 10.)

16 On June 9, 2015, Plaintiff filed a motion for default judgment against Defendant, which is
17 currently pending before the Court. (Doc. 12.)

18 **III. LEGAL STANDARD**

19 Federal Rule of Civil Procedure 55(b) permits a court-ordered default judgment following
20 the entry of default by the clerk of the court under Rule 55(a). It is within the sole discretion of
21 the court as to whether default judgment should be entered. *See Aldabe v. Aldabe*, 616 F.2d 1089,
22 1092 (9th Cir. 1980). A defendant’s default by itself does not entitle a plaintiff to a court-ordered
23 judgment. *See id.* Instead, the Ninth Circuit has determined a court should consider seven
24 discretionary factors, often referred to as the “*Eitel* factors,” before rendering a decision on default
25 judgment. *See Eitel v. McCool*, 782 F.2d 1470, 1471-72 (9th Cir. 1986). The *Eitel* factors include
26 (1) the possibility of prejudice to the plaintiff, (2) the merits of the plaintiff’s substantive claim,
27 (3) the sufficiency of the complaint, (4) the sum of money at stake in the action (5) the possibility
28 of a dispute concerning material facts, (6) whether the default was due to excusable neglect, and

1 (7) the strong policy underlying the Federal Rules of Civil Procedure favoring decisions on the
2 merits. *See id.*

3 A plaintiff is required to prove all damages sought in the complaint. *See Televideo Sys.,*
4 *Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1992). In addition, any relief sought may not be
5 different in kind from, or exceed in amount, what is demanded in the complaint. Fed. R. Civ. P.
6 54(c). If the facts necessary to determine the damages are not contained in the complaint, or are
7 legally insufficient, they will not be established by default. *See Cripps v. Life Ins. Co. of N. Am.*,
8 980 F.2d 1261, 1267 (9th Cir. 1992).

9 Finally, once the court clerk enters a default, the well-pleaded factual allegations of the
10 complaint are taken as true, except for those allegations relating to damages. *See Televideo Sys.,*
11 *Inc.*, 826 F.2d at 917.

12 IV. DISCUSSION

13 A. The *Eitel* Factors Favor Entry of Default Judgment

14 Many of the *Eitel* factors favor entry of default judgment in this case. Considering the first
15 factor, if Plaintiff's application for default judgment were to be denied, it would leave Plaintiff
16 without a remedy because Defendant has refused to litigate this action. Therefore, Plaintiff would
17 be prejudiced if the Court were to deny its application for default judgment. This factor weighs in
18 favor of default judgment. *See J & J Sports Prods, Inc. v. Concepcion*, No. C-10-CV-05092
19 WHA, 2011 WL 2220101 at *2 (N.D. Cal. June 7, 2011).

20 In contrast, Plaintiff's request for maximum statutory damages weighs against granting an
21 entry of default judgment, particularly because the amount requested appears disproportionate to
22 the harm alleged. *See Eitel*, 782 F.2d at 1472. However, given that the Court may address the
23 reasonableness of Plaintiff's request when deciding the question of damages, the Court need not
24 deny default judgment on this factor alone. *See Joe Hand Promotions, Inc. v. Mujadidi*, No. C-11-
25 CV-5570 EMC, 2012 WL 3537036, at *3 (N.D. Cal. Aug. 14, 2012) (noting that a request for
26 maximum possible statutory damages "is not enough on its own to bar a default judgment . . . as it
27 may be addressed by the Court in deciding what damages should be awarded, assuming that a
28 default judgment is otherwise appropriate").

1 As to the second and third *Eitel* factors, Plaintiff's substantive claims appear meritorious
2 and its complaint is sufficiently plead. Plaintiff has alleged that Defendant violated two sections
3 of Title 47 and the alleged activities of Defendant appear to have violated one or both of those
4 sections. Plaintiff has also set forth the applicable laws pursuant to which the court may provide
5 relief. These factors weigh in favor of default judgment.

6 As to the fourth factor, the damages in this case cannot exceed the amounts specified in
7 47 U.S.C. § 605 (for reasons more fully explained below), and the maximum amount allowable for
8 the tort of conversion. Accordingly, statutory damages cannot exceed \$10,000 and enhanced
9 damages may not exceed \$100,000. *See* 47 U.S.C. §§ 605(e)(3)(C)(i)(II) and 605(e)(3)(C)(ii).
10 Plaintiff is seeking \$110,000 in statutory and enhanced damages and \$1,600 in damages for
11 conversion, or the amount Defendant would have been required to pay for the license. Though
12 Plaintiff seeks the maximum statutory damages amount possible, the relatively small sum of
13 money at stake and the Court's discretion in awarding enhanced damages weigh in favor of
14 granting default judgment.

15 As to the fifth factor, there is no dispute of material fact. Indications that there is a dispute
16 of material fact can weigh against entry of default judgment. *See Eitel*, 782 F.2d at 1471-72. Here,
17 Defendant has not disputed any of Plaintiff's contentions since Defendant failed to respond to
18 either the Complaint or this motion, and all material facts pled in the Complaint are supported or
19 explained by a declaration.

20 Considering the sixth factor, it is unlikely that default was the result of excusable neglect.
21 This action was filed over eight months ago and the docket reveals that Defendant was properly
22 noticed of this action by substitute service. (*See* Docs. 1; 4.) In addition, Defendant was served
23 with a copy of the motion for default judgment. (*See* Doc. 12-14, p. 22.) Defendant failed to
24 respond despite these notifications. This factor weighs in favor of default judgment.

25 Finally, the seventh factor supports a default judgment because "although federal policy
26 favors decisions on the merits, Rule 55(b)(2) permits entry of default judgment in situations such
27 as this where defendants refuse to litigate." *J & J Sports Prods., Inc. v. Concepcion*, 2011 U.S.
28 Dist. LEXIS 60607, at *5 (N.D. Cal. June 7, 2011). Therefore, this general policy is outweighed

1 by the more specific considerations, and the motion to enter default judgment will be granted.

2 Accordingly, the Court RECOMMENDS that Plaintiff's Motion for Default Judgment be
3 GRANTED.

4 **B. Calculation of Damages**

5 Plaintiff requests \$10,000 in statutory damages for violation of 47 U.S.C. §
6 605(e)(3)(C)(i)(II), and \$100,000 in enhanced damages for willful violation of 47 U.S.C. §
7 605(e)(3)(C)(ii). (*See* Doc. 12-1, pp. 11-19.) Plaintiff also seeks \$1,600 in conversion damages,
8 the minimum amount Defendant allegedly would have been required to pay had Defendant
9 licensed the Program from Plaintiff. (Doc. 12-1, p. 20.)

10 **1. Statutory Damages**

11 Plaintiff requests \$10,000 in statutory damages as a result of the alleged violation of
12 47 U.S.C. § 605(e)(3)(C)(i)(II), which prohibits any person from receiving or transmitting “wire or
13 radio” signals except through authorized channels. (Doc. 12-1, p. 11.) More specifically, the
14 statute “prohibits commercial establishments from intercepting and broadcasting to its patrons
15 satellite cable programming.” *J & J Sports Prods., Inc. v. Ro*, No. 09-CV-02860, 2010 WL
16 668065 at *3 (N.D. Cal. Feb. 19, 2010) (quoting *J & J Sports Prods., Inc. v. Guzman*, No. 08-CV-
17 05469, 2009 WL 1034218 at *2 (N.D. Cal. Apr. 16, 2009)). The statute provides statutory
18 damages ranging from \$1,000 to \$10,000 for each violation. 47 U.S.C. § 605(e)(3)(C)(i)(II).

19 Plaintiff states that Defendant violated Section 605 because “[w]ith full knowledge that the
20 *Program* was not to be intercepted, received, published, divulged, displayed, and/or exhibited by
21 commercial entities unauthorized to do so, . . . Defendant . . . did unlawfully intercept, received,
22 publish, divulge, display, and/or exhibit the *Program* at the time of its transmission at their
23 commercial establishment....” (Compl. ¶ 17 (*italics in original*)). However, Plaintiff fails to state
24 the actual means of signal transmission used, which is necessary to determine whether a Plaintiff
25 should be awarded maximum statutory damages pursuant to Section 605. (*See* Doc. 12-1, p. 8)
26 (stating “Plaintiff cannot determine the precise means that the Defendant used to receive the
27 *Program* unlawfully”). *See also J & J Sports Prods., Inc. v. Deleon*, No. 5:13-CV-02030-EJD,
28 2014 WL 121711 at *3 (N.D. Cal. Jan. 13, 2014). Indeed, the declaration of Plaintiff’s affiant,

1 Gerald Andrewes, does not state whether the establishment has a satellite dish or whether a cable
2 box was affirmatively visible. (*See* Andrews Decl., pp. 2-3.) Plaintiff contends the court has
3 discretion to award significant damages “[e]ven in . . . cases of commercial signal piracy where
4 there has been no egregious circumstances noted[.]” (Doc. 12-1, p. 11.)

5 It is undisputed Defendant did not charge a cover for patrons to enter the Restaurant to
6 watch the Program, nor did Defendant increase prices, or require food and drink purchases. There
7 were also very few patrons in the bar and only five televisions broadcasting the Program. (*See*
8 Andrews Decl, p. 2.) Plaintiff also presents no evidence Defendant is a repeat offender. Given
9 these facts, the Court in its discretion finds the minimum statutory damage amount to be
10 appropriate.

11 Accordingly, the Court RECOMMENDS that Plaintiff be awarded the minimum statutory
12 damages allowed, \$1,000.

13 **2. Enhanced Damages**

14 Plaintiff also requests enhanced damages pursuant to Section 605(e)(3)(C)(ii). (Doc. 12-1,
15 pp. 14-19.) This section authorizes the Court to award up to \$100,000, in its discretion, upon
16 finding 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).

18 The Ninth Circuit has not set forth controlling factors for the determination of when
19 enhanced damages are appropriate in this context, but various factors specific to this unique line of
20 cases have been considered by district courts. These include the “use of cover charge, increase in
21 food price during programming, presence of advertisement, number of patrons, number of
22 televisions used, and impact of the offender’s conduct on the claimant.” *Concepcion*, 2011 U.S.
23 Dist. LEXIS 60607, at * 10. Enhanced damages have also been awarded when the defendant has
24 violated Section 605 on previous occasions. *See J & J Sports Prods., Inc. v. Paniagua*, 2011 WL
25 996257, at *2 (N.D. Cal. Mar 21, 2011).

26 The Court does not find that an award of maximum damages under Section 605 is
27 appropriate here. There is no evidence of significant “commercial advantage or private financial
28 gain” in the instant case. Plaintiff has presented evidence that Defendant had five television sets

1 in his commercial establishment that displayed the Program, and the affiant asserts that there were
2 between 15 to 25 patrons present during its investigation. (*See* Andrews Decl., p. 2.) However, as
3 already discussed, there is no evidence that Defendants assessed a cover charge, required a
4 minimum purchase from patrons, or had a special premium on food and drinks on the night of the
5 fight. *See Kingvision Pay-PerView, Ltd. v. Backman*, 102 F. Supp. 2d 1196, 1198 n.2 (N.D. Cal.
6 2000) (stating that “[a]n establishment that does not promote itself by advertising the Program,
7 does not assess a cover charge, and does not charge a special premium for food and drinks hardly
8 seems like the willful perpetrators envisioned by the statute’s framers.”). Plaintiff has also failed
9 to present evidence that Defendant has violated Section 605 on prior occasions.

10 In light of the above mentioned facts, the Court does not agree that the maximum enhanced
11 damages award is warranted. Although Plaintiff cites to several out-of-district cases to support its
12 request for maximum enhanced damages possible (*see* Doc. 12, pp14-19), Plaintiff has not cited
13 any binding precedent or identified any specific circumstances that justify such a high award here.
14 Accordingly, the Court concludes that an award of \$1,600 – the value of the commercial license to
15 air the program – is more than adequate and just to compensate Plaintiff for lost profits and to
16 deter Defendant’s future infringement.

17 Therefore, the Court RECOMMENDS that Plaintiff be awarded \$1,600 in enhanced
18 damages.

19 3. Conversion

20 Plaintiff also seeks \$1,600 in damages for conversion under California Civil Code § 3336.
21 (Doc. 12, p. 20.) Damages for conversion are based on the value of the property at the time of
22 conversion. *See Tyrone Pac. Intern., Inc. v. MV Eurychili*, 658 F.2d 664, 666 (9th Cir. 1981).
23 Here, Plaintiff has shown that it owns the right to distribute the boxing match at issue and has
24 properly alleged the misappropriation of that right to distribute the program. As to damages, the
25 “value of the property” was the minimum commercial license fee for the Program, or \$1,600.

26 Accordingly, the Court RECOMMENDS that Plaintiff be awarded \$1,600 in damages for
27 conversion.

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IV. Conclusion

Based on the foregoing, IT IS HEREBY RECOMMENDED that Plaintiff’s application for default judgment (Doc. 12) be GRANTED and judgment entered be entered in favor of Plaintiff and against Defendant in the amount of \$4,200 in total damages.

These findings and recommendations are submitted to the district judge assigned to this action, pursuant to 28 U.S.C. § 636(b)(1)(B) and this Court's Local Rule 304. Within twenty-one (21) days of service of this recommendation, any party may file written objections to these findings and recommendations with the Court and serve a copy on all parties. Such a document should be captioned “Objections to Magistrate Judge’s Findings and Recommendations.” The district judge will review the magistrate judge’s findings and recommendations pursuant to 28 U.S.C. § 636(b)(1)(C). The parties are advised that failure to file objections within the specified time may waive the right to appeal the district judge’s order. *Wilkerson v. Wheeler*, 772 F.3d 834, 839 (9th Cir. 2014).

IT IS SO ORDERED.

Dated: June 26, 2015

/s/ Sheila K. Oberto
UNITED STATES MAGISTRATE JUDGE