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**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA**

J & J SPORTS PRODUCTIONS INC.,)	Case No.: 1:16-cv-00485 - DAD - JLT
)	
Plaintiff,)	FINDINGS AND RECOMMENDATIONS
)	GRANTING IN PART PLAINTIFF’S MOTION
v.)	FOR DEFAULT JUDGMENT
)	
JAVIER MENDOZA CERVANTES,)	(Doc. 15)
individually and doing business LA)	
TORMENTA NIGHT CLUB,)	
)	
Defendant.)	

J & J Sports Productions, Inc. seeks the entry of default judgment against Javier Mendoza Cervantes, individually and doing business as La Tormenta Night Club. (Doc. 15) Defendant has not opposed this motion. The Court found the matter suitable for decision without an oral hearing, and the matter was taken under submission pursuant to Local Rule 230(g). (Doc. 16) For the following reasons, the Court recommends that Plaintiff’s motion for default judgment be **GRANTED IN PART**.

I. Procedural History

Plaintiff initiated this action by filing a complaint on April 6, 2016. (Doc. 1) Plaintiff asserts the company possessed the exclusive rights to the nationwide commercial distribution of “*The Fight of the Century*” *Floyd Mayweather, Jr. v. Manny Pacquiao Championship Fight Program*” (“the Program”) televised on May 2, 2015. (Doc. 1 at 4-5, ¶ 14) However, Plaintiff contends Defendant broadcast the Program at La Tormenta Night Club without paying the requisite fee. Defendant was

1 served with the complaint, but failed to respond within the time prescribed by the Federal Rules of
2 Civil Procedure. Upon application of Plaintiff, the Clerk of the Court entered default against Defendant
3 on September 12, 2016. (Docs. 12, 13) Plaintiff filed the application for default judgment now
4 pending before the Court on October 20, 2016. (Doc. 16)

5 **II. Legal Standards Governing Entry of Default Judgment**

6 The Federal Rules of Civil Procedure govern the entry of default judgment. After default is
7 entered because “a party against whom a judgment for relief is sought has failed to plead or otherwise
8 defend,” the party seeking relief may apply to the court for a default judgment. Fed. R. Civ. P. 55(a)-
9 (b). Upon the entry of default, well-pleaded factual allegations regarding liability are taken as true, but
10 allegations regarding the amount of damages must be proven. *Pope v. United States*, 323 U.S. 1, 22
11 (1944); *see also Geddes v. United Financial Group*, 559 F.2d 557, 560 (9th Cir. 1977). In addition,
12 “necessary facts not contained in the pleadings, and claims which are legally insufficient, are not
13 established by default.” *Cripps v. Life Ins. Co. of North Am.*, 980 F.2d 1261, 1267 (9th Cir. 1992)
14 (citing *Danning v. Lavine*, 572 F.2d 1386, 1388 (9th Cir. 1978)).

15 Entry of default judgment is within the discretion of the Court. *Aldabe v. Aldabe*, 616 F.2d
16 1089, 1092 (9th Cir. 1980). The entry of default “does not automatically entitle the plaintiff to a court-
17 ordered judgment. *Pepsico, Inc. v. Cal. Sec. Cans*, 238 F.Supp.2d 1172, 1174 (C.D. Cal 2002), *accord*
18 *Draper v. Coombs*, 792 F.2d 915, 924-25 (9th Cir. 1986). The Ninth Circuit determined:

19 Factors which may be considered by courts in exercising discretion as to the entry of a
20 default judgment include: (1) the possibility of prejudice to the plaintiff, (2) the merits of
21 plaintiff’s substantive claim, (3) the sufficiency of the complaint, (4) the sum of money
22 at stake in the action, (5) the possibility of a dispute concerning material facts, (6)
whether the default was due to excusable neglect, and (7) the strong policy underlying
the Federal Rules of Civil Procedure favoring decisions on the merits.

23 *Eitel v. McCool*, 782 F.2d 1470, 1471-72 (9th Cir. 1986). As a general rule, the issuance of default
24 judgment is disfavored. *Id.* at 1472.

25 **III. Plaintiff’s Factual Allegations**

26 The Court accepts Plaintiff’s factual assertions as true because default has been entered against
27 Defendant. *See Pope*, 323 U.S. at 22. Plaintiff alleges that by contract, it was granted exclusive
28 domestic commercial distribution rights to the Program and, pursuant to that contract, “entered into

1 subsequent sublicensing agreements with various commercial entities throughout North America” to
2 broadcast the Program within their establishments. (Doc. 1 at 5, ¶¶ 15-16)

3 Plaintiff asserts Defendant was “an owner, and/or operator, and/or licensee, and/or permittee,
4 and/or person in charge, and/or an individual with dominion, control, oversight and management of the
5 commercial establishment doing business as Ajua Cocina Mexicana.” (Doc. 1 at 3, ¶ 7) Plaintiff
6 alleges Defendant broadcast the Program at La Tormenta Night Club without purchasing a proper
7 sublicense from Plaintiff. (*Id.* at 5, ¶ 17)

8 For this act, Plaintiff alleged violations of 47 U.S.C. §§ 553 and 605, conversion, and a
9 violation of the California Business and Professions Code. (*See generally* Doc. 1 at 4-11) In the
10 application for default judgment, Plaintiff requests damages for the violation of 47 U.S.C. § 605 and
11 conversion. (*See* Doc. 15-1) Therefore, the Court will address only these claims.

12 **IV. Discussion and Analysis**

13 Applying the factors articulated by the Ninth Circuit in *Eitel*, the Court finds the factors weigh
14 in favor of granting Plaintiff’s motion for default judgment.

15 **A. Prejudice to Plaintiff**

16 The first factor considers whether the plaintiff would suffer prejudice if default judgment is not
17 entered, and potential prejudice to the plaintiff weighs in favor of granting a default judgment. *See*
18 *Pepsico, Inc.*, 238 F. Supp. 2d at 1177. Generally, where default has been entered against a defendant,
19 a plaintiff has no other means by which to recover damages. *Id.*; *Moroccanoil, Inc. v. Allstate Beauty*
20 *Prods.*, 847 F. Supp. 2d 1197, 1200-01 (C.D. Cal. 2012). Therefore, the Court finds Plaintiff would be
21 prejudiced if default judgment is not granted.

22 **B. Merits of Plaintiff’s claims and the sufficiency of the complaint**

23 Given the kinship of these factors, the Court considers the merits of Plaintiff’s substantive
24 claims and the sufficiency of the complaint together. *See Premier Pool Mgmt. Corp. v. Lusk*, 2012 U.S.
25 Dist. LEXIS 63350, at *13 (E.D. Cal. May 4, 2012). The Ninth Circuit has suggested that, when
26 combined, the factors require a plaintiff to “state a claim on which the plaintiff may recover.” *Pepsico,*
27 *Inc.*, 238 F. Supp. 2d at 1175.

28 ///

1 1. Claim arising under 47 U.S.C. § 605

2 The Federal Communications Act of 1934 (“Communications Act”) “prohibits the unauthorized
3 receipt and use of radio communications for one’s ‘own benefit or for the benefit of another not entitled
4 thereto.” *DirecTV, Inc. v. Webb*, 545 F.3d 837, 844 (9th Cir. 2008) (citing 47 U.S.C. § 605(a)). In
5 pertinent part, the Communications Act provides, “No person not being authorized by the sender shall
6 intercept any radio communication and divulge or publish the ... contents ... of such intercepted
7 communication to any person.” 47 U.S.C. § 605(a). Thus, Plaintiff must establish it was the party
8 aggrieved by Defendant’s actions. 47 U.S.C. § 605(e)(3)(A). Plaintiff must also show Defendant
9 intercepted a wire or radio program and published it without permission. 47 U.S.C. § 605(a).

10 a. *Party aggrieved*

11 Under the Communications Act, a “person aggrieved” includes a party “with proprietary rights
12 in the intercepted communication by wire or radio, including wholesale or retail distributors of satellite
13 cable programming.” 47 U.S.C. § 605(d)(6). In the Complaint, Plaintiff asserted that J & J Sports
14 Productions was granted the exclusive, nationwide commercial distribution rights to the Program.
15 (Doc. 1 at 5) In support of this assertion, Joseph Gagliardi, President of J & J Sports Productions
16 produced the Closed Circuit Television License Agreement between Mayweather Promotions and
17 Plaintiff, granting Plaintiff “the exclusive license to exhibit . . . [the] live telecast” of the Program.
18 (Doc. 16-4 at 10; *see also id.* at 10-16) Accordingly, the Court finds Plaintiff was the party aggrieved
19 within the meaning of Section 605.

20 b. *Interception and publication of the Program*

21 Plaintiff acknowledges it cannot be certain of the method of interception used to receive the
22 Program. (Doc. 15-1 at 8) Similarly, in *Joe Hand Prod. v. Behari*, 2013 U.S. Dist. LEXIS 37277 (E.D.
23 Cal. Mar. 18, 2013), the plaintiff was unable to identify the nature of the transmission. This Court
24 observed: “Plaintiff’s inability to allege the precise nature of the intercepted transmission in this case
25 ...raises a question regarding the scope of 47 U.S.C. § 605(a) and the sufficiency of plaintiff’s claim
26 under that provision.” *Id.*, 2013 U.S. Dist. LEXIS 37277 at *7. Nevertheless, Plaintiff provided
27 evidence that Defendant broadcast the Program in his establishment, because an investigator witnessed
28 the Program broadcast at La Tormenta Night Club. (Doc. 15-3)

1 Because Plaintiff was a party aggrieved, and Defendant intercepted the Program and published
2 it without permission, Plaintiff has established the elements of a claim under the Communications Act.

3 2. Conversion

4 As recognized by the Ninth Circuit, conversion has three elements under California Law:
5 “ownership or right to possession of property, wrongful disposition of the property right and damages.”
6 *G.S. Rasmussen & Assoc., Inc. v. Kalitta Flying Services, Inc.*, 958 F.2d 896, 906 (9th Cir. 1992); *see*
7 *also Greka Integrated, Inc. v. Lowrey*, 133 Cal.App.4th 1572, 1581 (2005) (“elements of a conversion
8 are the plaintiff’s ownership or right to possession of the property at the time of the conversion; the
9 defendant’s conversion by a wrongful act or disposition of property rights; and damages”). Previously,
10 this Court determined the possession of “a right to distribute programming” constitutes ownership of
11 property for purposes of conversion. *DIRECTV, Inc. v. Pahnke*, 405 F. Supp. 2d 1182, 1189-90 (E.D.
12 Cal. 2005) (citing *Don King Prods./ Kingsvision v. Lovato*, 911 F.Supp. 429, 423 (N.D. Cal. 1995)).
13 Therefore, to state a claim for conversion, Plaintiff is required to possess the exclusive ownership of, or
14 the exclusive right to license, the broadcasting of the Program.

15 Given that Plaintiff established it held the distribution rights, the company held a “right to
16 possession of property.” Further, Plaintiff alleged facts sufficient to support a finding that Defendant
17 engaged in signal piracy by broadcasting the Program without a sublicense. The investigator estimated
18 the capacity of La Tormenta Night Club was “approximately 49 persons.” (Doc. 15-3 at 2) The rate
19 sheet indicates a sublicense cost \$3,000.00 for an establishment with the capacity up to 100 persons.
20 (Doc. 15-4 at 18) Consequently, Plaintiff has established damages in the amount of \$3,000.00, and
21 states a claim for conversion against Defendant.

22 **C. Sum of money at stake**

23 In considering this factor, the Court “must consider the amount of money at stake in relation to
24 the seriousness of Defendant’s conduct.” *Pepsico, Inc.*, 238 F.Supp.2d at 1176. Here, Plaintiff seeks
25 compensatory damages for Defendant’s tortious conversion of Plaintiff’s property. Also, Plaintiff
26 requests statutory damages totaling \$110,000 for the violation of 47 U.S.C. § 605. This amount
27 represents the maximum amount Plaintiff would be permitted to recover under the statute, including
28 enhanced damages. (Doc. 15-1 at 8-16) Plaintiff asserts Defendant should pay the statutory maximum

1 because nominal damages have proven insufficient to combat piracy. (*Id.* at 19) Therefore, Plaintiff
2 appears to concede that amount requested is not proportional to Defendant’s conduct.

3 Given the substantial amount of money at stake, this factor could weigh against the entry of
4 default judgment. *See, e.g., Joe Hand Promotions v. Streshly*, 655 F. Supp. 2d 1136 (S.D. Cal. 2009)
5 (proposed award amount of \$100,975 was “manifestly excessive under existing law”); *J & J Sports*
6 *Productions. v. Montes*, 2013 U.S. Dist. LEXIS 9282, at * 5 (N.D. Cal. Jan. 22, 2013) (“the large
7 amount of money that Plaintiff is requesting—maximum statutory damages—weighs against granting
8 an entry of default judgment, particularly because the amount requested appears disproportionate to the
9 harm alleged”); *Moore v. Cisneros*, 2012 U.S. Dist. LEXIS 177044, at *5 (E.D. Cal. Dec. 12, 2023)
10 (“[d]efault judgment is disfavored when a large sum of money is involved”); *but see G & G Closed*
11 *Events, LLC v. Shahen*, 2012 U.S. Dist. LEXIS 58723, at *18 (E.D. Cal. Apr. 26, 2012) (“the statutes
12 involved contemplate such an award under certain circumstances,” and the factor did not weigh against
13 default judgment). However, the factor does not weigh against Plaintiff’s request for default judgment
14 because the Court declines to enter judgment in the amount requested.

15 **D. Possibility of dispute concerning material facts**

16 There is little possibility of dispute concerning material facts because (1) based on the entry of
17 default, the Court accepts allegations in Plaintiff’s Complaint as true and (2) though properly served,
18 Defendant failed to appear. *See PepsiCo, Inc.*, 238 F.Supp.2d at 1177; *see also Elektra Entm’t Group,*
19 *Inc. v. Crawford*, 226 F.R.D. 388, 393 (C.D. Cal. 2005) (“Because all allegations in a well-pleaded
20 complaint are taken as true after the court clerk enters default judgment, there is no likelihood that any
21 genuine issue of material fact exists”). Therefore, this factor does not weigh against default judgment.

22 **E. Whether default was due to excusable neglect**

23 Generally, the Court will consider whether Defendant’s failure to answer is due to excusable
24 neglect. *See Eitel*, 782 F.2d at 1472. Here, Defendant was served with the Summons and Complaint,
25 as well as the motion for default judgment. (*See* Doc. 15-1 at 23) Given these facts, it is unlikely that
26 Defendant’s actions were the result of excusable neglect. *Shanghai Automation Instrument Co., Ltd. v.*
27 *Kuei*, 194 F.Supp.2d 995, 1005 (N.D. Cal. 2001) (finding no excusable neglect because the defendants
28 “were properly served with the Complaint, the notice of entry of default, as well as the papers in

1 support of the instant motion”). Accordingly, this factor does not weigh against default judgment.

2 **F. Policy disfavoring default judgment**

3 As noted above, default judgments are disfavored because “[c]ases should be decided on their
4 merits whenever reasonably possible.” *Eitel*, 782 F.2d at 1472. Here, however, the policy underlying
5 the Federal Rules of Civil Procedure favoring decisions on the merits does not weigh against default
6 judgment because Defendant’s failure to appear before the Court and defend in this action makes a
7 decision on the merits impractical.

8 **V. Damages**

9 Under the Communications Act, a party aggrieved may recover actual damages or statutory
10 damages “not less than \$1,000 or more than \$10,000, as the court considers just.” 47 U.S.C. § 605(e)
11 (3)(C)(i)(II). When the Court determines a violation was “committed willfully and for the purposes of
12 direct or indirect commercial advantage or private financial gain,” a court may award enhanced
13 damages by increasing the awarded damages up to \$100,000.00 for each violation. 47 U.S.C. §
14 605(e)(3)(C)(ii). The Court has “wide discretion” to determine the proper amount of damages to be
15 awarded. *DirecTV Inc. v. Le*, 267 Fed. App’x 636 (9th Cir. 2008) (citation omitted).

16 The Court may consider a number of factors in its determination of the amount of damages,
17 including any promotional advertising by the defendant, the capacity of the establishment, the number
18 of patrons present at the time of the broadcast, the imposition of a cover charge, the number and size of
19 the televisions used for the broadcast, and whether a premium was charged on food or drink. *J & J*
20 *Sports Productions v. Sorondo*, 2011 U.S. Dist. LEXIS 99951, at * 10-11 (E.D. Cal. Sept. 6, 2011)
21 (citing *Kingvision Pay-Per-View, Ltd. v. Backman*, 102 F.Supp.2d 1196, 1198 (N.D. Cal. 2000)).

22 Robert Sutton, Plaintiff’s investigator, did not indicate there were any advertisements for the
23 Program at La Tormenta Night Club, and did not report a cover charge was required to enter. (*See* Doc.
24 15-3 at 2) Mr. Sutton noted the venue had screens, including a 19” inch television and an “80’ +
25 screen” upon which a projection was displayed. (*Id.*) Mr. Sutton estimated the capacity was
26 “approximately 49 patrons,” and he reports that he counted “48, 47, and 48 [people]” at separate times
27 during the broadcast. (*Id.*) He rated the establishment as “poor” quality. (*Id.*) Given these factors, the
28 Court finds an award of \$8,000— which is less than three times the cost of a proper sublicense —is

1 appropriate.¹

2 Although Plaintiff asserts a right to enhanced damages, allegations regarding the amount of
3 damages must be well-plead and supported by factual allegations. *See Pope*, 323 U.S. at 22; *Geddes*,
4 559 F.2d at 560. “The mere assertion that Defendant acted willfully is insufficient to justify enhanced
5 damages.” *Sorondo*, 2011 U.S. Dist. LEXIS 99951, at *10 (quoting *Kingvision Pay-Per-View, Ltd. v.*
6 *Backman*, 102 F.Supp.2d 1196, 1198 (N.D. Cal. 2000)). Here, Plaintiff alleged: “Said unauthorized
7 interception, reception, publication, exhibition, divulgence, display, and/or exhibition by the each of the
8 Defendant was done willfully and for purposes of direct and/or indirect commercial advantage and/or
9 private financial gain.” (Doc. 1 at 6, ¶ 18) Importantly, there are no factual allegations in the
10 complaint to support the legal conclusion that Defendant’s actions were willful or for the purpose of
11 financial gain. Previously, the Court explained:

12 To adequately state a claim against a defendant, a plaintiff must set forth the legal and
13 factual basis for his or her claim. Detailed factual allegations are not required, but
14 “[t]hreadbare recitals of the elements of the cause of action, supported by mere
15 conclusory statements, do not suffice.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678, (2009),
16 citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). While factual
17 allegations are accepted as true, legal conclusions are not. *Iqbal*, 556 U.S. at 678. A
18 plaintiff must set forth “the grounds of his entitlement to relief,” which “requires more
19 than labels and conclusions, and a formulaic recitation of the elements of a cause of
20 action.” *Twombly*, 550 U.S. at 555-56 (internal quotation marks and citations omitted).
21 In its complaint, Plaintiff simply alleged a legal conclusion: “Said unauthorized
22 interception, reception, publication, exhibition, divulgence, display, and/or exhibition by
23 each of the Defendant [sic] was done willfully and for purposes of direct and/or indirect
24 commercial advantage and/or private financial gain.”

19 *Joe Hand Promotions, Inc. v. Hathcock*, 2012 U.S. Dist. LEXIS 101208, at *2-3 (E.D Cal. July 20,
20 2012). Consequently, the Court found Plaintiff “failed to allege facts establishing the grounds of
21 entitlement to enhanced damages.” *Id.* at *3.

22 Here, as noted above, the evidence submitted indicates does not indicate that there were
23 advertisements for the fight, or that a cover charge was imposed to enter La Tormenta Night Club.

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25 ¹ Courts in this district have found that the statutory maximum is not an appropriate award for a first-time offender
26 and in the absence of aggravating factors. *See, e.g., J & J Sprots Prod. v. Corona*, 2013 U.S. Dist. LEXIS 96462 (E.D. Cal.
27 July 10, 2013) (awarding \$7,000 in damages where the defendant broadcast the program on two televisions, there was no
28 premium for food or drink); *Joe Hand Promotions v. Brown*, 2010 U.S. Dist. LEXIS 119435 (E.D. Cal. Oct. 27, 2010)
(awarding \$4,000 in damages where the program was broadcast on six 60-inch televisions, and there was no premium for
food or drink); *J & J Sports Productions, Inc. v. Morales*, 2012 U.S. Dist. LEXIS 30942 (E.D. Cal. March 8, 2012)
(awarding \$4,400 in statutory damages where the sublicense cost \$2,200 for the broadcast that the defendants displayed on
three televisions, ranging in size up to 54”); *J & J Sports Productions v. Sorondo*, 2011 U.S. Dist. LEXIS 99951 (E.D. Cal.
Sept. 6, 2011) (awarding \$3,600 in statutory damages, an amount two times the cost of a sublicense).

1 (Doc. 16-3 at 2) There is no indication that food or drink prices were increased because of the fight, or
2 that the number of people in the location was unusual or could be attributed to the fight. (*See generally*
3 Doc. 16-3) Moreover, the complaint now before the Court contains the same language as the complaint
4 in *Hathock*, and suffers the same infirmities. Because there is insufficient evidence to demonstrate the
5 piracy was done for purposes of commercial or private gain, enhanced damages are not recommended.

6 Finally, because Plaintiff chose to receive statutory damages rather than actual damages under
7 the Communications Act, damages for conversion are subsumed into the total award of \$8,000. *See,*
8 *e.g., Joe Hand Promotions, Inc. v. Behari*, 2013 U.S. Dist. LEXIS 37277 at *8, n.2 (E.D. Cal. Mar. 18,
9 2013) (explaining damages conversion would not be awarded “because the recommended statutory
10 damages will sufficiently compensate plaintiff such that an award for conversion damages would be
11 duplicative”); *J & J Sports Productions v. Mannor*, 2011 U.S. Dist. LEXIS 32367, at *7 (E.D. Cal. Mar.
12 28, 2011) (declining to award damages for conversion because “plaintiff has been sufficiently
13 compensated through the federal statutory scheme” where the award total was \$3,200 and the cost of
14 the proper license was \$2,200); *J & J Sports Productions v. Bachman*, 2010 U.S. Dist. LEXIS 44884, at
15 *22 (E.D. Cal. May 7, 2010) (declining conversion damages because statutory damages “sufficiently
16 compensate[d]” the plaintiff).

17 **VI. Findings and Recommendations**

18 The *Eitel* factors weigh in favor of granting default judgment, and the entry of default judgment
19 is within the discretion of the Court. *See Aldabe*, 616 F.2d at 1092. However, the damages requested
20 are disproportionate to Defendants’ actions. Importantly, when determining the amount of damages to
21 be awarded for signal piracy, “the principle of proportionality governs.” *Backman*, 102 F.Supp.2d at
22 1198. Under this principle, “distributors should not be overcompensated and statutory awards should
23 be proportional to the violation.” *Id.*

24 Accordingly, the Court recommends the award of \$8,000 for Defendant’s wrongful acts. This
25 amount both compensates Plaintiff for the wrongful act and is a suitable deterrent against future acts of
26 piracy. *See Kingvision Pay-Per-View v. Lake Alice Bar*, 168 F.3d 347, 350 (9th Cir. 1999) (observing
27 that a lower statutory award may deter while not destroying a business).

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Based upon the foregoing, the Court **RECOMMENDS**:

1. Plaintiff’s application for default judgment (Doc. 15) be **GRANTED IN PART AND DENIED IN PART AS FOLLOWS**:
 - A. Plaintiff’s request for statutory damages for the violation of the Communications Act be **GRANTED** in the amount of \$8,000;
 - B. Plaintiff’s request for enhanced damages be **DENIED**;
 - C. Plaintiff’s request for damages for the tort of conversion be **DENIED**;
2. Judgment be entered in favor of Plaintiff J & J Sports Productions, Inc. and against Defendant Javier Mendoza Cervantes, also known as Javier C. Mendoza, individually and doing business as La Tormenta Night Club; and
3. Plaintiff be directed to file any application for attorney’s fees pursuant to 47 U.S.C. § 605 no later than fourteen days from the entry of judgment.

These Findings and Recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B) and Rule 304 of the Local Rules of Practice for the United States District Court, Eastern District of California. Within fourteen days of the date of service of these Findings and Recommendations, any party may file written objections with the court. Such a document should be captioned “Objections to Magistrate Judge’s Findings and Recommendations.” The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court’s order. *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991); *Wilkerson v. Wheeler*, 772 F.3d 834, 834 (9th Cir. 2014).

IT IS SO ORDERED.

Dated: November 28, 2016

/s/ Jennifer L. Thurston
UNITED STATES MAGISTRATE JUDGE