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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

KING VISION PAY-PER-VIEW, LTD.,

Plaintiff,

No. CIV S-08-1038 FCD DAD

v.

ALEX JOHN LAVORICO, et al.,

ORDER AND

Defendants.

FINDINGS & RECOMMENDATIONS

_____ /

This matter came before the court on July 17, 2009, for hearing of plaintiff's motion for default judgment against defendants Ted Villanueva, individually and doing business as Club Coyote, and Club Coyote, LLC.¹ (Doc. No. 18). Thomas P. Riley, Esq. appeared telephonically on behalf of plaintiff. No appearance was made by or for the defendants.

Upon hearing argument, the court took plaintiff's motion under submission. For the reasons set forth below, the undersigned recommends that the motion be granted and that default judgment be entered against the defaulted defendants.

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¹ By stipulation and order filed January 5, 2009, plaintiff's complaint against defendant Alex John Lavorico, individually and doing business as Club Coyote, was dismissed. (Doc. No. 13.) Defendants Ted Villanueva, individually and doing business as Club Coyote, and Club Coyote, LLC are therefore the sole remaining defendants in this action.

1 BACKGROUND

2 Plaintiff King Vision Pay-Per-View, Ltd. is an international distributor of sports
3 and entertainment programming. Defendants Ted Villanueva and Club Coyote, LLC operate a
4 food-and-drink establishment called “Club Coyote” in Woodland, California. By contract,
5 plaintiff paid for and was granted exclusive nationwide television distribution rights to the “Felix
6 ‘Tito’ Trinidad v. Ronald ‘Winky’ Wright Championship Fight Program,” which was telecast
7 nationwide on Saturday, May 14, 2005, via closed-circuit television. Defendants intercepted and
8 exhibited the program in Club Coyote without plaintiff’s authorization.

9 Although service of process was effected on defendants Villanueva and Club
10 Coyote, LLC, each of these defendants failed to appear in this action. On April 8, 2009, plaintiff
11 requested entry of default as to defendant Ted Villanueva, individually and doing business as
12 Club Coyote, and defendant Club Coyote, LLC. (Doc. No. 16.) The Clerk entered default
13 against both defendants on April 9, 2009. (Doc. No. 17.) On June 4, 2009, plaintiff filed its
14 notice of motion and motion for default judgment with a proof of service reflecting service of the
15 motion on the defaulted defendants.

16 LEGAL STANDARDS

17 Federal Rule of Civil Procedure 55(b)(2) governs applications to the court for
18 entry of default judgment. Upon entry of default, the complaint’s factual allegations regarding
19 liability are taken as true, while allegations regarding the amount of damages must be proven.
20 Dundee Cement Co. v. Howard Pipe & Concrete Prods., 722 F.2d 1319, 1323 (7th Cir. 1983)
21 (citing Pope v. United States, 323 U.S. 1 (1944); Geddes v. United Fin. Group, 559 F.2d 557 (9th
22 Cir. 1977)); see also DirectTV v. Huynh, 503 F.3d 847, 851 (9th Cir. 2007); TeleVideo Sys., Inc.
23 v. Heidenthal, 826 F.2d 915, 917-18 (9th Cir. 1987).

24 Where damages are liquidated, i.e., capable of ascertainment from definite figures
25 contained in documentary evidence or in detailed affidavits, judgment by default may be entered
26 without a damages hearing. Dundee, 722 F.2d at 1323; see also Rule 55(b)(2). Unliquidated and

1 punitive damages, however, require “proving up” at an evidentiary hearing or through other
2 means. Dundee, 722 F.2d at 1323-24; see also James v. Frame, 6 F.3d 307, 310-11 (5th Cir.
3 1993).

4 Granting or denying default judgment is within the court’s sound discretion.
5 Draper v. Coombs, 792 F.2d 915, 924-25 (9th Cir. 1986); Aldabe v. Aldabe, 616 F.2d. 1089,
6 1092 (9th Cir. 1980). The court is free to consider a variety of factors in exercising its discretion.
7 Eitel v. McCool, 782 F.2d 1470, 1471-72 (9th Cir. 1986). Among the factors that may be
8 considered by the court are

9 (1) the possibility of prejudice to the plaintiff, (2) the merits of
10 plaintiff’s substantive claim, (3) the sufficiency of the complaint,
11 (4) the sum of money at stake in the action; (5) the possibility of a
12 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.

13 Eitel, 782 F.2d at 1471-72 (citing 6 Moore’s Federal Practice ¶ 55-05[2], at 55-24 to 55-26).

14 ANALYSIS

15 I. Whether Default Judgment Should Be Entered

16 The factual allegations of plaintiff’s complaint, taken as true pursuant to the entry
17 of defaults against defendants Villanueva and Club Coyote, LLC, establish the following
18 circumstances: (1) defendant Ted Villanueva is an owner, operator, licensee, permittee, person in
19 charge, or person with control over a commercial establishment doing business as Club Coyote in
20 Woodland, California; (2) defendant Club Coyote, LLC is also an owner, operator, licensee,
21 permittee, person in charge, or person with control over the commercial establishment doing
22 business as Club Coyote; (3) by contract, plaintiff paid for and was granted exclusive nationwide
23 television distribution rights to the “Felix ‘Tito’ Trinidad v. Ronald ‘Winky’ Wright
24 Championship Fight Program” that took place on May 14, 2005; (4) pursuant to the contract,
25 plaintiff entered into sublicensing agreements with various commercial entities throughout North
26 America by which it granted those entities limited sublicensing rights to exhibit the Trinidad v.

1 Wright championship fight to their patrons within their establishments; (5) as a commercial
2 distributor of sporting events, plaintiff expended substantial monies marketing, advertising,
3 promoting, administering, and transmitting the program to its customers; (6) with full knowledge
4 that the program was not to be intercepted, received, and exhibited by unauthorized entities,
5 defendants exhibited the Trinidad v. Wright fight at the time of its transmission and did so
6 willfully and for purposes of commercial or private gain; (7) each defendant violated 47 U.S.C. §
7 605, et seq., which prohibits the unauthorized publication or use of communications; (8) each
8 defendant violated 47 U.S.C. § 553, et seq., which prohibits the unauthorized exhibition,
9 publication, and divulgence of programs; (9) by reason of defendants' violations of §§ 553 and
10 605, plaintiff has a private right of action against them pursuant to both statutes; (10) defendants
11 also tortiously obtained possession of plaintiff's program and wrongfully converted it to their
12 own use and benefit; and (11) by reason of defendants' tortious conversion, plaintiff is entitled to
13 compensatory and punitive damages. (Doc. No. 1 at 2-6.)

14 In its complaint, plaintiff prays for statutory damages of \$100,000.00 for each
15 willful violation of 47 U.S.C. § 605 and for recovery of all costs and reasonable attorney's fees.
16 In addition, plaintiff prays for statutory damages of \$50,000.00 for each willful violation of 47
17 U.S.C. § 553 and for recovery of all costs and reasonable attorney's fees. Plaintiff seeks
18 compensatory damages, reasonable attorney fees, and costs of suit for defendants' tortious
19 conversion of plaintiff's sports program. (Doc. No. 1 at 7-8.)

20 Plaintiff's complaint and summons were served upon defendant Club Coyote,
21 LLC on March 5, 2009, by substitute service after multiple attempts to effect personal service.
22 The documents were left with a competent member of the household at the residence of Ted
23 Villanueva, the registered agent for service for defendant Club Coyote, LLC. (Doc. No. 14.)
24 Plaintiff's complaint and summons were also served on defendant Ted Villanueva, individually
25 and doing business as Club Coyote, on that same date by the same means. (Doc. No. 15.) The
26 undersigned finds that the defendants were properly served with the complaint and that the Clerk

1 of the Court properly entered the default of these defendants on April 9, 2009. (Doc. No. 17.)
2 Defendants were also served with plaintiff's request for entry of default and plaintiff's
3 application for default judgment by the court. (Docs. No. 16 and 18.). Despite being served with
4 process and with all papers filed in connection with plaintiff's request for entry of default and
5 motion for default judgment, defendants have failed to respond to plaintiff's complaint, to
6 plaintiff's request for entry of default, or to plaintiff's motion for default judgment. Nor did any
7 defendant appear at the hearing on plaintiff's motion for default judgment. Rather, the
8 defendants have failed to participate in this action in any way.

9 After weighing the Eitel factors, the undersigned finds that the material
10 allegations of the complaint for the most part support plaintiff's claims.² Plaintiff will be
11 prejudiced if default judgment is denied as to these defendants because plaintiff has already
12 litigated claims against defendant Lavorico and entered into a settlement agreement with him.
13 Plaintiff has no other recourse for recovery of the damages suffered due to the failure of the two
14 remaining defendants to pay for the right to exhibit the Trinidad v. Wright championship fight to
15 the patrons within Club Coyote.

16 In light of the entry of default against the two defendants, there is no apparent
17 possibility of a dispute concerning the material facts underlying the action. Nor is there any
18 indication that either defendant's default resulted from excusable neglect, as each defendant was
19 properly served with plaintiff's pleadings as well as with plaintiff's request for entry of default
20 and motion for default judgment. Defendants had ample notice of plaintiff's intent to pursue

21
22 ² Some courts have held that a defendant cannot be held liable under both 47 U.S.C. §
23 605(a) and 47 U.S.C. § 553. Kingvision Pay Per View, Ltd., v. Williams, 1 F. Supp. 2d 1481,
24 1484 (S.D. Ga. 1998); J & J Sports Productions, Inc. v. Ro, No. C 09-02860 WHA, 2010 WL
25 668065, at *3 (N.D. Cal. Feb. 19, 2010); J & J Sports Productions, Inc. v. Prado, No. 2:07-cv-
26 02104 GEB DAD, 2008 WL 822159, at *3 (E.D. Cal. Mar. 27, 2008). However, the court need
not reach the issue in this case, since the overwhelming majority of courts have concluded that
where, as here, the defendants have defaulted damages are to be awarded only under § 605.
Kingvision Pay Per View, Ltd., v. Backman, 102 F. Supp. 2d 1196, 1197, n. 1 (N.D. Cal. 2000)
(and cases cited therein). See also J & J Sports Productions, Inc. v. Betancourt, No. 08cv937 JLS
(POR), 2009 WL 3416431, at *2 (S.D. Cal. Oct. 20, 2009).

1 judgment against them.

2 Although public policy generally favors the resolution of a case on its merits, each
3 defendant's failure to appear and defend against plaintiff's claims has made a decision on the
4 merits impossible in this case. Because most of the Eitel factors weigh in plaintiff's favor, the
5 undersigned, while recognizing the public policy favoring decisions on the merits, will
6 recommend that default judgment be entered against the two defaulted defendants, Ted
7 Villanueva, individually and doing business as Club Coyote, and Club Coyote, LLC.

8 II. Terms of Judgments to Be Entered - Damages

9 After determining that entry of default judgment is warranted, the court must next
10 determine the terms of the judgment. Upon consideration of all of plaintiff's briefing in support
11 of the motion for default judgment, the undersigned will recommend that damages be awarded
12 only with respect to the violation of 47 U.S.C. § 605 and not in the amount requested by plaintiff
13 with respect to the violation of that statute.

14 By its motion, plaintiff seeks a judgment in the total amount of \$100,400.00
15 against the two defaulted defendants. That sum consists of \$50,000.00 in enhanced statutory
16 damages sought by plaintiff for one violation of 47 U.S.C. § 605(e)(3)(B)(iii) and (c)(ii);
17 \$50,000.00 in enhanced statutory damages sought for one violation of 47 U.S.C. § 553(b)(2) and
18 (c)(2)(e)³; and \$400.00 sought for the tort of conversion. (Doc. No. 18, Decl. of Thomas P. Riley
19 at 2.) The undersigned is mindful that the defendants were served with plaintiff's motion for
20 default judgment and were placed on notice of the amount in damages sought by plaintiff.
21 However, granting or denying default judgment is within the court's sound discretion, and one of
22 the factors the court is free to consider in exercising its discretion is the sum of money at stake.
23 See J & J Sports Productions, Inc. v. Betancourt, No. 08cv937 JLS (POR), 2009 WL 3416431, at
24 *3 (S.D. Cal. Oct. 20, 2009).

25 ³ As noted above, the court will not recommend that damages be awarded with respect to
26 a violation of 47 U.S.C. § 553

1 Under the Federal Communications Act, a plaintiff may elect to seek either actual
2 or statutory damages. 47 U.S.C. § 605(e)(3)(C)(i)(I & II). Here, plaintiff seeks \$50,000.00 in
3 enhanced statutory damages. The statute provides for statutory damages for each violation of not
4 less than \$1,000 and not more than \$10,000, as the court considers just. 47 U.S.C. §
5 605(e)(3)(C)(i) (II). Moreover, the statute authorizes enhanced damages of not more than
6 \$100,000 if the court finds the violation was “committed willfully and for purpose of direct or
7 indirect commercial advantage or private financial gain.” 47 U.S.C. § 605(e)(3)(C)(ii). While
8 acknowledging that the amount of enhanced statutory damages it seeks here is “unconventional, ”
9 plaintiff argues that the requested amount is justified primarily because of the need to deter
10 broadcast piracy in light of the harm done to plaintiff’s business as a result of such activities.
11 The court finds plaintiff’s argument in this regard to be unpersuasive and not supported by the
12 weight of authority in this area.

13 In this case, plaintiff’s investigator stated that while the establishment in question
14 had a seating capacity of approximately one hundred, during the Trinidad/Wright fight broadcast,
15 she observed only between twelve and twenty-six patrons inside the bar during the investigator’s
16 three separate head counts. The investigator also reported that there was no cover charge for
17 entry on the night in question. There is no evidence before the court of any promotion by
18 defendants that the fight would be shown at the establishment nor that a special premium on food
19 and drink was being charged on the night of the fight. While it appears that the establishment in
20 question was a sports bar and grill with ten televisions of various sizes, there is no evidence that
21 it was doing any greater level of business on the night the fight was shown than at any other time.
22 Finally, plaintiff has presented no evidence to the court suggesting that the defendants were
23 repeat broadcast piracy offenders.

24 In light of this record, the court will recommend that judgment be entered against
25 the defaulted defendants and that plaintiff be awarded \$1,000 in statutory damages plus \$5,000 in
26 enhanced statutory damages for a total of \$6,000 in damages pursuant to 47 U.S.C. §

1 605(e)(3)(C)(i & ii). See J & J Sports Productions, Inc. v. Betancourt, 2009 WL 3416431, at *4
2 (awarding statutory damages of \$2,000 and tripling the base award for a penalty enhancement to
3 a total award of \$6,000 in a default judgment under similar circumstances to those presented
4 here); J & J Sports Productions, Inc. v. Medinarious, et al., No. C 08-0998 JF (RS), 2008 WL
5 4412240, at *3 (N.D. Cal. Sept. 25, 2008) (awarding \$1,000 in statutory damages and \$5,000 in
6 enhanced statutory damages in a default judgment under similar circumstances); Garden City
7 Boxing Club, Inc. v. Zavala, C-07-5925, 2008 WL 3875272, at *1 (N.D. Cal. Aug. 18, 2008)
8 (same); Garden City Boxing Club, Inc. v. Lan Thu Tran, C-05-5017, 2006 WL 2691431, at *2
9 (N.D. Cal. Sept. 20, 2006) (same); see also Kingvision Pay Per View, Ltd., v. Backman, 102 F.
10 Supp. 2d 1196, 1197 n.1 (N.D. Cal. 2000) (awarding statutory damages of \$1,000 with no
11 enhanced damages under circumstances similar to those here); J & J Sports Productions, Inc. v.
12 Ro, No. C 09-02860 WHA, 2010 WL 668065, at *3-4 (N.D. Cal. Feb. 19, 2010) (awarding \$250
13 in statutory damages and denying request for enhanced statutory damages in light of the lack of
14 evidence that the violation was egregious); J & J Sports Productions, Inc. v. Montecinos, No. C
15 09-02604 JSW, 2010 WL 144817, at *5-7 (N.D. Cal. Jan. 11, 2010) (granting \$5,000 in statutory
16 damages and \$10,000 in enhanced statutory damages as part of default judgment where plaintiff
17 presented evidence that defendants were “multiple offenders” who had engaged in “persistent
18 theft” of such pay-per-view broadcasts); J & J Sports Productions, Inc. v. Ferreyra, No. C 08-128
19 LKK KJM, 2008 WL 4104315, at *1 (E.D. Cal. Aug. 28, 2008) (recommending \$100,000 in
20 enhanced statutory damages in light of defendant’s prior acts of commercial signal piracy).

21 In his declaration in support of the motion for default judgment, counsel indicates
22 that plaintiff also seeks the award of \$400 in damages for the state law tort of conversion.
23 Plaintiff would arguably be entitled to such an award. See J & J Sports Productions, Inc. v. Ro,
24 2010 WL 668065, at *4; J & J Sports Productions, Inc. v. Montecinos, 2010 WL 144817, at *7;
25 but see J & J Sports Productions, Inc. v. Ferreyra, 2008 WL 4104315, at *1 (“Inasmuch as
26 plaintiff seeks statutory damages rather than actual damages, plaintiff’s request for damages for

1 conversion should be denied.”). However, in moving for default judgment plaintiff has failed to
2 submit any evidence in this case of the amount damages suffered as a result of defendants’
3 conversion.⁴ Therefore, the court will decline to recommend the award of damages with respect
4 to the tort of conversion.

5 Finally, although the prayer for relief in plaintiff’s complaint seeks costs and
6 attorney fees, the motion for default judgment does not contain such a request. Moreover, no
7 evidence of costs or attorney fees incurred was submitted to the court in connection with the
8 pending motion.

9 CONCLUSION

10 IT IS ORDERED that within five days after these findings and recommendations
11 are filed, plaintiff shall serve a copy of the findings and recommendations on each defaulted
12 defendant by mail at the address where service of process was effected, or at any more recent
13 address known to plaintiff, and shall file a proof of such service forthwith.

14 For the reasons set forth above, IT IS HEREBY RECOMMENDED that:

15 1. Plaintiff’s June 4, 2009 motion for default judgment (Doc. No. 18) against
16 defendants Ted Villanueva, individually and doing business as Club Coyote, and Club Coyote
17 LLC be granted;

18 2. Judgment be entered against the defendants in the sum of \$6,000, consisting of
19 \$1,000 in statutory damages plus \$5,000 in enhanced statutory damages for violating 47 U.S.C. §
20 605; \$0 for violating 47 U.S.C. 553; and \$0 for the tort of conversion; and

21 3. This case be closed.

22 These findings and recommendations will be submitted to the United States
23 District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within
24

25 ⁴ Such damages might be calculated by establishing the amount that defendants would
26 have been required to pay for a proper sublicensing agreement. See J & J Sports Productions,
Inc. v. Ro, 2010 WL 668065, at *4

1 fourteen (14) days after these findings and recommendations are filed, any party may file written
2 objections with the court. A document containing objections should be titled "Objections to
3 Magistrate Judge's Findings and Recommendations." The parties are advised that failure to file
4 objections within the specified time may, under certain circumstances, waive the right to appeal
5 the District Court's order. See Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

6 DATED: March 5, 2010.

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9 _____
DALE A. DROZD
UNITED STATES MAGISTRATE JUDGE

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