

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

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

J&J SPORTS PRODUCTIONS, INC.,

Plaintiff,

No. CIV S-10-1046 LKK GGH

vs.

CLARITA RAFAEL,
d/b/a Clarita's Oriental Store,

ORDER AND
FINDINGS AND RECOMMENDATIONS

Defendant.
_____ /

Presently before the court is plaintiff's application for entry of default judgment against defendant Clarita Rafael, d/b/a Clarita's Oriental Store, filed August 26, 2010.¹ Upon review of the motion and the supporting documents, and good cause appearing, the court issues the following order and findings and recommendations.

BACKGROUND

On April 29, 2010, plaintiff filed the underlying complaint in this action against defendant Rafael, alleging defendant unlawfully intercepted and exhibited a broadcast of a

¹ The matter was originally scheduled for hearing on October 7, 2010; however, it was vacated after the court determined that a hearing was not necessary. (Order, filed September 30, 2010.)

1 program featuring a lightweight championship fight between Manny Pacquiao and Ricky Hatton
2 (“Program”) in her establishment for commercial advantage without obtaining a sublicense from
3 plaintiff for its use, in violation of the Communications Act, 47 U.S.C. § 605, the Cable
4 Communications Policy Act, 47 U.S.C. § 553, and state law. The complaint alleges defendant
5 exhibited the first round of the under-card portion of the Program, which was a bout between
6 Humberto Soto and Benoit Gaudet, on May 2, 2009. The summons and complaint were served
7 on defendant Rafael by personal service on July 5, 2010. Fed. R. Civ. P. 4(e)(2). Pacific
8 Atlantic Trading Co. v. M/V Main Express, 758 F.2d 1325, 1331 (9th Cir. 1985) (default
9 judgment void without personal jurisdiction). Defendant Rafael has failed to file an answer or
10 otherwise appear in this action. The clerk entered default against defendant Rafael on July 29,
11 2010.

12 Request for entry of default and the instant motion for default judgment and
13 supporting papers were served by mail on defendant Rafael at her last known address. Defendant
14 Rafael did not file an opposition to the motion for entry of default judgment. Plaintiff seeks an
15 entry of default judgment in the amount of \$112,000 against defendant Rafael.

16 DISCUSSION

17 Entry of default effects an admission of all well-pleaded allegations of the
18 complaint by the defaulted party. Geddes v. United Financial Group, 559 F.2d 557 (9th Cir.
19 1977). The court finds the well pleaded allegations of the complaint state claims for which relief
20 can be granted. Anderson v. Air West, 542 F.2d 1090, 1093 (9th Cir. 1976).

21 The complaint requests, in the event of default, an award of damages pursuant to
22 47 U.S.C. § 605 *et seq.* (The Communications Act) and 47 U.S.C. § 553, *et seq.* (The Cable
23 Communications Policy Act), as well as compensatory and punitive damages for conversion, and
24 restitution for violation of Cal. Bus. & Prof. Code § 17200, *et seq.* The instant motion for default
25 judgment requests damages pursuant to 47 U.S.C. § 605 in the amount of \$10,000 in statutory
26 damages, up to \$100,000 in enhanced statutory damages for willful acts for the purpose of

1 financial gain, and \$2,000 in compensatory damages for conversion.² Section 605 prohibits the
2 unauthorized publication or use of communications such as the Program. Section 605(e)(3)(A)
3 also provides for a private civil action for a violation of 605(a). National Subscription Television
4 v. S&H TV, 644 F.2d 820, 821 n. 1 (9th Cir. 1981).

5 The court deems defaulting defendant, by her failure to appear or defend this
6 action, to have waived any objections to the statutory source of the damages prayed for in the
7 instant motion. The memorandum of points and authorities and affidavits filed in support of the
8 motion for entry of default judgment support the finding that plaintiff is entitled to the relief
9 requested. There are no policy considerations which preclude the entry of default judgment of
10 the type requested. See Eitel v. McCool, 782 F.2d 1470, 1471-1472 (9th Cir. 1986).

11 One of the factors the court is free to consider in exercising its discretion to grant
12 or deny default judgment is the sum of money at stake. See J & J Sports Productions, Inc. v.
13 Betancourt, No. 08cv937 JLS (POR), 2009 WL 3416431, at *3 (S.D. Cal. Oct. 20, 2009).

14 Under section 605, statutory damages may be awarded between \$1,000 and
15 \$10,000 for violation of the Federal Communications Act and up to \$100,000 when the violation
16 “was committed willfully and for purposes of direct or indirect commercial advantage or
17 financial gain.” 47 U.S.C. § 605(e)(3)(C)(i)-(ii). The fact of unauthorized display of such
18 programs has been held to be willful based on the technical skill required to de-scramble signals
19 and connect televisions to the cable distribution systems. Plaintiff has proposed a means of
20 calculating enhanced damages based on the number of people viewing the program and the
21 amount of the cover charge, citing Joe Hand Promotions, Inc. v. Cat’s Bar, Inc., 2009 WL
22 700125, *2 (C.D. Ill. 2009). Here, there is evidence that the Program was shown on one
23 television set, to an audience of 17 to 19 people in a relatively urban city with a population in
24 excess of 100,000. There was a cover charge of \$5.00, indicating that the showing of the

25 ² Because plaintiff has eliminated her request for damages under § 553 and for restitution
26 under state law, these damages will not be addressed.

1 Program was intended to increase business. (Yamot Aff., dkt. #7-3.)³ Based on this evidence, an
2 enhanced award of \$100,000 is not warranted but rather a calculation based on the number of
3 viewers, exhibition of the Program on only one television set, and the imposition of a minimal
4 cover charge as cited by plaintiff, relying on Joe Hand Promotions, Inc. v. Cat's Bar, Inc., 2009
5 WL 700125, *2 (C.D. Ill. 2009), appears reasonable. This court therefore will recommend
6 statutory damages under section 605 in the amount of \$10,000 and enhanced statutory damages
7 in the amount of \$36,000. Inasmuch as an award of \$46,000 in statutory damages will be
8 permitted, plaintiff's request for damages for conversion should be denied.

9 Insofar as the application for default judgment seeks attorneys' fees and costs but
10 the memorandum in support does not contain argument in support of this request, and there is no
11 declaration supporting this request, it is denied without prejudice to its renewal at a later time.

12 CONCLUSION

13 IT IS ORDERED that the Clerk of the Court shall serve these findings and
14 recommendations on the defaulting defendant at the address indicated on plaintiff's proof of
15 service of the instant motion.

16 In view of the foregoing findings, IT IS RECOMMENDED that plaintiff's motion
17 for entry of default judgment, (dkt. # 7), be GRANTED in part. Judgment should be rendered in
18 the amount of \$10,000 in statutory damages and \$36,000 in enhanced statutory damages for a
19 total award of \$46,000.

20 These findings and recommendations are submitted to the United States District
21 Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within
22 fourteen (14) days after being served with these findings and recommendations, any party may
23 file written objections with the court and serve a copy on all parties. Such a document should be
24 captioned "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the

25
26 ³ The briefing in support of the application mistakenly states that there was no cover charge. (Dkt. #7-1 at 11.)

1 objections shall be served and filed within fourteen (14) days after service of the objections. The
2 parties are advised that failure to file objections within the specified time may waive the right to
3 appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

4 DATED: 02/07/2011

5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

/s/ Gregory G. Hollows

GREGORY G. HOLLOWS
UNITED STATES MAGISTRATE JUDGE

GGH:076/J&JSports1046.def.wpd