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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

J & J SPORTS PRODUCTIONS, INC.,
Plaintiff,
v.
HUMBERTO LEON SANCHEZ, JR.,
Defendant.

No. 2:11-cv-2440 GEB AC

ORDER AND
FINDINGS & RECOMMENDATIONS

Pending before the Court is plaintiff’s renewed motion for default judgment against defendant Humberto Leon Sanchez, Jr., individually and d/b/a Discoteca Sanchez, located at 1 South Wilson Way, Stockton, California 95205 (“the establishment”). The Court has determined that this matter shall be submitted on the papers and accordingly the date for hearing shall be vacated. E.D. Local Rule 230. Upon review of the motion and the supporting documents, and good cause appearing, THE COURT FINDS AS FOLLOWS:

FACTUAL AND PROCEDURAL BACKGROUND

The procedural history of this case differs from that typically seen by this Court on similar matters. On September 15, 2011, an international distributor of sports and entertainment programming filed a complaint against defendant¹, identified as “an owner, and/or operator,

¹ Two other individuals—Rafik Algazali and Khalid Salim—were initially named but later voluntarily dismissed by plaintiff. See ECF No. 12.

1 and/or licensee, and/or permittee, and/or person in charge, and/or an individual with dominion,
2 control, oversight and management of the establishment,” alleging that the latter unlawfully
3 intercepted and exhibited a live broadcast of a prizefight program entitled “‘200 Celebrate and
4 Dominate’: Shane Mosley v. Sergio Mora” (“the Program”) in the establishment for commercial
5 advantage without obtaining a sublicense from plaintiff for its use, in violation of the
6 Communications Act, 47 U.S.C. § 605, the Cable Communications Policy Act, 47 U.S.C. § 553,
7 and state law. The First Amended Complaint, the operative pleading in this case, alleges
8 defendant exhibited the Program on September 18, 2010. ECF No. 6.

9 Plaintiff brings the following claims: (1) a violation of 47 U.S.C. § 605 (Unauthorized
10 Publication or Use of Communications) alleging that defendant knowingly intercepted, received,
11 and exhibited the Program for purposes of direct or indirect commercial advantage or private
12 financial gain; (2) a violation of 47 U.S.C. § 553 (Unauthorized Reception of Cable Services)
13 based upon the same allegations; (3) a claim for conversion alleging that defendant tortiously
14 obtained possession of the Program and wrongfully converted it for his own benefit; and (4) a
15 violation of the California Business & Professions Code § 17200, et. seq.

16 In the amended pleading, plaintiff seeks \$110,000 in statutory damages as well as
17 attorneys’ fees and costs for Count I; \$60,000 in statutory damages, as well as attorneys’ fees and
18 costs for Count II; compensatory, exemplary, and punitive damages, as well as attorneys’ fees and
19 costs for Count III; and restitution, declaratory relief, injunctive relief, and attorneys’ fees for
20 Count IV.

21 The summons and complaint were served on defendant by personal service on February
22 24, 2012. ECF No. 17; Fed. R. Civ. P. 4(e)(2); Pacific Atlantic Trading Co. v. M/V Main
23 Express, 758 F.2d 1325, 1331 (9th Cir. 1985) (default judgment void without personal
24 jurisdiction). Defendant, appearing through counsel, filed an Answer on April 4, 2012. ECF No.
25 18. Defendant then attempted to settle this matter several times, but his settlement offer was
26 ultimately rejected by plaintiff. See David S. White Decl. ¶¶ 4-6, ECF No. 25 at 6-7. Due to
27 plaintiff’s rejection of the settlement offer, counsel for defendant filed a motion to withdraw due
28 to defendant’s inability to continue to pay attorneys’ fees. See Mot. to Withdraw as Counsel at 4,

1 ECF No. 25. This motion was granted by the Honorable Garland E. Burrell, Jr., on October 1,
2 2012, and this matter was referred to the then-assigned magistrate judge pursuant to Local Rule
3 302(c)(21). ECF No. 26.

4 Since proceeding in pro per, defendant has failed to participate in this case, including
5 failing to appear at a status conference before the then-assigned magistrate judge, see ECF No.
6 33; failing to follow the magistrate judge's order to "provide to plaintiff's counsel a phone
7 number at which defendant can be reached so that settlement discussions may be facilitated," see
8 ECF No. 34; failing to file a Pretrial Conference Statement, see ECF No. 39; and failing to
9 respond to Judge Burrell's Order to Show Cause why sanctions should not be imposed, ECF Nos.
10 39-40. On December 5, 2013, Judge Burrell sanctioned defendant for these failures, ordering that
11 defendant's Answer be stricken and default be entered by the Clerk of the Court. ECF No. 40.
12 Default was entered on the same day.

13 On April 24, 2014, plaintiff filed an application for default judgment. ECF No. 43. That
14 application was denied without prejudice on June 30, 2014 due to plaintiff's failure to provide
15 supporting documentation consistent with the allegations made in the first amended complaint.
16 See ECF No. 49.

17 The instant renewed motion for default judgment and supporting papers were served by
18 mail on defendant. ECF No. 50-2 at 3. Defendant did not file an opposition to the renewed
19 motion for entry of default judgment. Plaintiff seeks an entry of default judgment in the amount
20 of \$111,600 (\$10,000 for statutory damages pursuant to 47 U.S.C. § 605(e)(3)(C)(i)(II); \$100,000
21 for enhanced damages pursuant to 47 U.S.C. § 605(e)(3)(C)(ii); and \$1,600 for conversion).

22 LEGAL STANDARD

23 Pursuant to Federal Rule of Civil Procedure 55, default may be entered against a party
24 against whom a judgment for affirmative relief is sought who fails to plead or otherwise defend
25 against the action. See Fed. R. Civ. P. 55(a). However, "[a] defendant's default does not
26 automatically entitle the plaintiff to a court-ordered judgment." PepsiCo, Inc. v. Cal. Sec. Cans,
27 238 F. Supp. 2d 1172, 1174 (C.D. Cal. 2002) (citing Draper v. Coombs, 792 F.2d 915, 924-25
28 (9th Cir. 1986)); see Fed. R. Civ. P. 55(b) (governing the entry of default judgments). Instead,

1 the decision to grant or deny an application for default judgment lies within the district court's
2 sound discretion. Aldabe v. Aldabe, 616 F.2d 1089, 1092 (9th Cir. 1980). In making this
3 determination, the court may consider the following factors:

- 4 (1) the possibility of prejudice to the plaintiff; (2) the merits of
5 plaintiff's substantive claim; (3) the sufficiency of the complaint;
6 (4) the sum of money at stake in the action; (5) the possibility of a
7 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.

8 Eitel v. McCool, 782 F.2d 1470, 1471-72 (9th Cir. 1986). Default judgments are ordinarily
9 disfavored. Id. at 1472.

10 As a general rule, once default is entered, well-pleaded factual allegations in the operative
11 complaint are taken as true, except for those allegations relating to damages. TeleVideo Sys., Inc.
12 v. Heidenthal, 826 F.2d 915, 917-18 (9th Cir. 1987) (per curiam) (citing Geddes v. United Fin.
13 Group, 559 F.2d 557, 560 (9th Cir. 1977) (per curiam)); see also Fair Housing of Marin v.
14 Combs, 285 F.3d 899, 906 (9th Cir. 2002). Although well-pleaded allegations in the complaint
15 are admitted by a defendant's failure to respond, "necessary facts not contained in the pleadings,
16 and claims which are legally insufficient, are not established by default." Cripps v. Life Ins. Co.
17 of N. Am., 980 F.2d 1261, 1267 (9th Cir. 1992) (citing Danning v. Lavine, 572 F.2d 1386, 1388
18 (9th Cir. 1978)); accord DIRECTV, Inc. v. Huynh, 503 F.3d 847, 854 (9th Cir. 2007) ("[A]
19 defendant is not held to admit facts that are not well-pleaded or to admit conclusions of law"
20 (citation and quotation marks omitted).); Abney v. Alameida, 334 F. Supp. 2d 1221, 1235 (S.D.
21 Cal. 2004) ("[A] default judgment may not be entered on a legally insufficient claim."). A party's
22 default conclusively establishes that party's liability, although it does not establish the amount of
23 damages. Geddes, 559 F.2d at 560; cf. Adriana Int'l Corp. v. Thoeren, 913 F.2d 1406, 1414 (9th
24 Cir. 1990) (stating in the context of a default entered pursuant to Federal Rule of Civil Procedure
25 37 that the default conclusively established the liability of the defaulting party).

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1 DISCUSSION

2 A. The Eitel Factors

3 1. Factor One: Possibility of Prejudice to Plaintiff

4 The first Eitel factor considers whether the plaintiff would suffer prejudice if default
5 judgment is not entered, and such potential prejudice to the plaintiff militates in favor of granting
6 a default judgment. See PepsiCo, Inc., 238 F. Supp. 2d at 1177. Here, plaintiff would potentially
7 face prejudice if the court did not enter a default judgment. Absent entry of a default judgment,
8 plaintiff would be without another recourse for recovery. Accordingly, the first Eitel factor
9 favors the entry of default judgment.

10 2. Factors Two and Three: The Merits of Plaintiff's Substantive Claims and the
11 Sufficiency of the Complaint

12 The undersigned considers the merits of plaintiff's substantive claims and the sufficiency
13 of the complaint together because of the relatedness of the two inquiries. The undersigned must
14 consider whether the allegations in the complaint are sufficient to state a claim that supports the
15 relief sought. See Danning, 572 F.2d at 1388; PepsiCo, Inc., 238 F. Supp. 2d at 1175.

16 Plaintiff seeks entry of default judgment on its claim brought pursuant to 47 U.S.C. §
17 605(a). Plaintiff's inability to allege the precise nature of the intercepted transmission in this
18 case, which is largely due to defendants' failure to defend themselves in the action, raises a
19 question regarding the scope of 47 U.S.C. § 605(a) and the sufficiency of plaintiff's claim under
20 that provision. The Federal Communications Act prohibits, among other things, commercial
21 establishments from intercepting and broadcasting radio communications to its patrons. See 47
22 U.S.C. § 605(a). In relevant part, 47 U.S.C. § 605(a) states:

23 No person not being authorized by the sender shall intercept any
24 radio communication and divulge or publish the existence, contents,
25 substance, purport, effect, or meaning of such intercepted
26 communication to any person. No person not being entitled thereto
27 shall receive or assist in receiving any interstate or foreign
28 communication by radio and use such communication (or any
information therein contained) for his own benefit or for the benefit
of another not entitled thereto. No person having received any
intercepted radio communication or having become acquainted with
the contents, substance, purport, effect, or meaning of such
communication (or any part thereof) knowing that such

1 communication was intercepted, shall divulge or publish the
2 existence, contents, substance, purport, effect, or meaning of such
3 communication (or any part thereof) or use such communication (or
any information therein contained) for his own benefit or for the
benefit of another not entitled thereto.

4 The Ninth Circuit Court of Appeals has determined that satellite television signals are covered
5 communications under 47 U.S.C. § 605(a). DIRECTV, Inc. v. Webb, 545 F.3d 837, 844 (9th Cir.
6 2008). The scope of section 605(a) is less clear with respect to transmissions intercepted from a
7 cable system, which are expressly covered under 47 U.S.C. § 553(a). Section 553(a) states, in
8 relevant part: “No person shall intercept or receive or assist in intercepting or receiving any
9 communications service offered over a cable system, unless specifically authorized to do so by a
10 cable operator or as may otherwise be specifically authorized by law.” 47 U.S.C. § 553(a)(1).

11 Here, plaintiff has not alleged whether the transmission that defendant intercepted was
12 from a cable system or a satellite television signal. At a minimum, plaintiff’s first amended
13 complaint and evidence support a conclusion that defendant intercepted, without authorization, a
14 transmission of the Program and broadcast it to its patrons. Plaintiff essentially concedes that its
15 amended complaint and the record contain no allegations or evidence substantiating the nature of
16 the transmission that was intercepted by defendant. Plaintiff argues, however, that although it
17 was unable to allege the precise means of transmission in this case (i.e., transmission over a cable
18 system or satellite broadcast), it “should not be prejudiced” given defendant’s failure to appear or
19 defend himself in this action. Pl.’s Memo. of P. & A. in Supp. of Renewed Motion for Default J.
20 at 8. The undersigned agrees with plaintiff that under the circumstances of this case, where
21 plaintiff was deprived of the opportunity to conduct discovery regarding the transmission at issue
22 because of defendant’s failure to appear or defend itself in this action, plaintiff should not suffer
23 the resulting prejudice. Thus, insofar as the merits of plaintiff’s statutory claims and the
24 sufficiency of its pleadings under the Eitel factors are concerned, the amended complaint and
25 record before the undersigned favor entry of default judgment.

26 3. Factor Four: The Sum of Money at Stake in the Action

27 Under the fourth factor cited in Eitel, “the court must consider the amount of money at
28 stake in relation to the seriousness of Defendant’s conduct.” PepsiCo, Inc., 238 F. Supp. 2d at

1 1177; see also Philip Morris USA, Inc. v. Castworld Prods., Inc., 219 F.R.D. 494, 500 (C.D. Cal.
2 2003). Here, plaintiff seeks statutory damages of \$110,000 for the willful violation of 47 U.S.C.
3 § 605. This amount represents the maximum amount plaintiff would be permitted to recover
4 under the statute, including enhanced damages. In addition, plaintiff seeks compensatory and
5 punitive damages for defendant's tortuous conversion of plaintiff's property. Plaintiff notes
6 defendant would have been required to pay only \$1,600 to broadcast the Program at the
7 establishment, but plaintiff asserts nominal damages have proven insufficient to combat piracy
8 and that defendant therefore should be required to pay the statutory maximum. Thus, plaintiff
9 seems to concede that amount of damages requested is not proportional to defendant's conduct.

10 Given the substantial amount of money at stake, this factor could weigh against the entry
11 of default judgment. See, e.g., Joe Hand Promotions v. Streshly, 655 F. Supp. 2d 1136 (S.D. Cal.
12 2009) (proposed award amount of \$100,975 was "manifestly excessive under existing law"); J &
13 J Sports Productions. v. Cardoze, 2010 WL 2757106, at *5 (N.D. Cal. July 9, 2010) ("a large sum
14 of money at stake would disfavor default damages," such as damages totaling \$114,200); see also
15 Board of Trustees of the Sheet Metal Workers v. Vigil, 2007 WL 3239281, at *2 (N.D. Cal. Nov.
16 1, 2007) ("default judgment is disfavored if there were a large sum of money involved"); but see J
17 & J Sports Productions v. Hernandez, 2010 WL 1980186, at *4 ("the statutes involved
18 contemplate such an award under certain circumstances," and the factor did not weigh against
19 default judgment). As discussed below, however, the Court declines to recommend judgment in
20 the amount requested. Consequently, the factor does not weigh against plaintiff.

21 4. Factor Five: The Possibility of a Dispute Concerning Material Facts

22 The facts of this case are relatively straightforward, and plaintiff has provided the court
23 with well-pleaded allegations supporting its statutory claims and affidavits in support of its
24 allegations. Here, the Court may assume the truth of well-pleaded facts in the amended complaint
25 (except as to damages) following the clerk's entry of default and, thus, there is no likelihood that
26 any genuine issue of material fact exists. See, e.g., Elektra Entm't Group Inc. v. Crawford, 226
27 F.R.D. 388, 393 (C.D. Cal. 2005) ("Because all allegations in a well-pleaded complaint are taken
28 as true after the court clerk enters default judgment, there is no likelihood that any genuine issue

1 of material fact exists.”); accord Philip Morris USA, Inc., 219 F.R.D. at 500; PepsiCo, Inc., 238
2 F. Supp. 2d at 1177.

3 5. Factor Six: Whether the Default Was Due to Excusable Neglect

4 Upon review of the record before the Court, the undersigned finds that the default was not
5 the result of excusable neglect. See PepsiCo, Inc., 238 F. Supp. 2d at 1177. Plaintiff personally
6 served the defendant with the summons and amended complaint. Moreover, plaintiff served
7 defendant by mail with notice of its renewed application for default judgment. Despite ample
8 notice of this lawsuit and plaintiff’s intention to seek a default judgment, defendant has failed to
9 participate in this action. Thus, the record suggests that defendant has chosen not to defend this
10 action, and not that the default resulted from any excusable neglect. Accordingly, this Eitel factor
11 favors the entry of a default judgment.

12 6. Factor Seven: The Strong Policy Underlying the Federal Rules of Civil Procedure
13 Favoring Decisions on the Merits

14 “Cases should be decided upon their merits whenever reasonably possible.” Eitel, 782
15 F.2d at 1472. However, district courts have concluded with regularity that this policy, standing
16 alone, is not dispositive, especially where a defendant fails to appear or defend itself in an action.
17 PepsiCo, Inc., 238 F. Supp. 2d at 1177; see also Craigslist, Inc. v. Naturemarket, Inc., 694 F.
18 Supp. 2d 1039, 1061 (N.D. Cal. Mar. 5, 2010); ACS Recovery Servs., Inc. v. Kaplan, 2010 WL
19 144816, at *7 (N.D. Cal. Jan. 11, 2010) (unpublished); Hartung v. J.D. Byrider, Inc., 2009 WL
20 1876690, at *5 (E.D. Cal. June 26, 2009) (unpublished). Accordingly, although the undersigned
21 is cognizant of the policy in favor of decisions on the merits—and consistent with existing policy
22 would prefer that this case be resolved on the merits—that policy does not, by itself, preclude the
23 entry of default judgment.

24 Upon consideration of the Eitel factors, the undersigned concludes that plaintiff is entitled
25 to the entry of default judgment against defendant and will make a recommendation to that effect.
26 What remains is the determination of the amount of damages to which plaintiff is entitled.

27 B. Terms of Judgment

28 After determining that a party is entitled to entry of default judgment, the court must

1 determine the terms of the judgment to be entered. Considering plaintiff's briefing and the record
2 in this case, including the affidavits and declarations submitted by plaintiff, the undersigned
3 concludes that plaintiff is entitled to an award of statutory damages in the amount of \$5,000 as a
4 result of defendant's unlawful interception and broadcast of the Program, and will recommend the
5 same.

6 Pursuant to section 605, a court may award statutory damages of "not less than \$1,000 or
7 more than \$10,000" for violation of the Federal Communications Act, and may also award
8 enhanced damages of up to \$100,000 if the "violation was committed willfully and for purposes
9 of direct or indirect commercial advantage or private financial gain." 47 U.S.C. §
10 605(e)(3)(C)(i)(II), (e)(3)(C)(ii).

11 Here, plaintiff seeks a judgment in the amount of \$111,600. Plaintiff's application for
12 default judgment and proposed order indicate that this sum consists of \$110,000 for a violation of
13 47 U.S.C. § 605(e)(3)(B)(iii) and (e)(3)(C)(ii), and \$1,600 as compensatory damages arising from
14 defendant's act of conversion.

15 In this case, plaintiff's investigator provided evidence that the establishment, which has a
16 capacity of 100 patrons, was showing the Program on two television sets to 9 people. Affiant
17 Renewed Decl., ECF No. 50-3; Supp. Decl. of Gary Gravelyn ¶¶ 5-6, ECF No. 50-4. Defendant's
18 establishment is not large, and there is no evidence of a repeat violation or additional egregious
19 circumstances. The investigator reported that he did not pay a cover charge for entry on the night
20 in question. There is no evidence before the Court of any promotion by defendant that the fight
21 would be shown at the establishment. There is also no evidence before the Court that a special
22 premium on food and drink was being charged at the establishment on the night of the fight or
23 that the establishment was doing any greater level of business on the night the fight was shown
24 than at any other time. Indeed, the affiant's declaration describes the establishment as a music
25 store with pool tables. Affiant Renewed Decl., ECF No. 50-3. Finally, plaintiff has presented no
26 evidence to the Court suggesting that the defendant is a repeat broadcast piracy offender.

27 Balancing these facts with the widespread problem of piracy and the need for an award sufficient
28 to deter future piracy, the undersigned will recommend an award of statutory damages in the

1 amount of \$5,000. On the record before the Court, the undersigned does not find that this case
2 merits an award of enhanced damages.

3 Plaintiff also seeks actual damages for defendant's alleged tortious act of conversion in
4 the amount of \$1,600, which consists of the fee that the defendant would have had to pay to
5 plaintiff in order to lawfully broadcast the Program through a contractual sublicense. The
6 undersigned will not recommend an award of damages with respect to plaintiff's conversion
7 claim. The statutory damages provisions at issue serve not only a deterrent function, see J & J
8 Sports Prods. v. Orellana, 2010 WL 1576447, at *3 (N.D. Cal. Apr. 19, 2010) (unpublished), but
9 also a compensatory function, which is evidenced by provisions that permit the award of statutory
10 damages or actual damages in a civil action. See 47 U.S.C. § 605(e)(3)(C)(I); 47 U.S.C. §
11 553(c)(3)(A)(i). Here, the recommended award of statutory damages in the amount of \$5,000
12 sufficiently compensates plaintiff, and this case does not present a set of circumstances where an
13 additional award might be warranted. Accordingly, the undersigned will recommend that
14 plaintiff be awarded no damages on its conversion claim.

15 Finally, although the prayer for relief in the amended complaint and the application for
16 default judgment indicate that plaintiff seeks the award of costs and attorneys' fees, the
17 application for default judgment contains no argument or evidence in support of such a request.
18 Accordingly, the undersigned will not recommend the award of costs or attorneys' fees.

19 Accordingly, IT IS HEREBY ORDERED that the August 20, 2014 hearing on plaintiff's
20 motion for default judgment is vacated; and

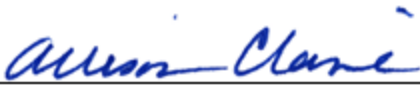
21 IT IS HEREBY RECOMMENDED that:

- 22 1. Plaintiff's renewed motion for default judgment (ECF No. 50) be granted;
- 23 2. The court enter judgment against defendant on plaintiff's claims brought pursuant to
24 47 U.S.C. § 605(a);
- 25 3. The court award statutory damages in an amount of \$5,000.00 to plaintiff; and
- 26 4. This case be closed.

27 These findings and recommendations are submitted to the United States District Judge
28 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days

1 after being served with these findings and recommendations, any party may file written
2 objections with the court and serve a copy on all parties. Such a document should be captioned
3 “Objections to Magistrate Judge’s Findings and Recommendations.” Failure to file objections
4 within the specified time may waive the right to appeal the District Court’s order. Turner v.
5 Duncan, 158 F.3d 449, 455 (9th Cir. 1998); Martinez v. Ylst, 951 F.2d 1153, 1156-57 (9th Cir.
6 1991).

7 DATED: August 14, 2014

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9 ALLISON CLAIRE
10 UNITED STATES MAGISTRATE JUDGE

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