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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

J&J SPORTS PRODUCTIONS, INC.,

Plaintiff,

v.

RUBEN CONTRERAS MACHUCA &  
SILVIA OCHOA GOMEZ,

Defendants.

No. 2:16-cv-715-TLN-KJN

ORDER AND FINDINGS AND  
RECOMMENDATIONS

Presently before the court is plaintiff J&J Sports Productions, Inc.’s (“plaintiff”) motion for entry of default judgment against defendants Ruben Contreras Machuca and Silvia Ochoa Gomez, both individually and doing business as Centennial Ranch Sports Bar and Grill (collectively “defendants”).<sup>1</sup> (ECF No. 11.) After defendants failed to file an opposition to the motion in accordance with Local Rule 230(c), the October 6, 2016 hearing was vacated, and the motion was submitted on the record and written briefing pursuant to Local Rule 230(g). (ECF No. 13.)

For the reasons stated below, the court recommends that plaintiff’s motion for default judgment be granted in part, that judgment be entered in plaintiff’s favor, and that plaintiff be

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<sup>1</sup> This motion was referred to the undersigned pursuant to E.D. Cal. L.R. 302(c)(19).

1 awarded a total judgment of \$9,000.00.

2 BACKGROUND

3 Plaintiff initiated this action on April 6, 2016, alleging claims under 47 U.S.C. § 605; 47  
4 U.S.C. § 553; and Cal. Bus. & Prof. Code §§ 17200 *et seq.*, in addition to a state law tort claim  
5 for conversion. (See generally Complaint, ECF No. 1 [“Compl.”].) Defendants are the owners,  
6 operators, licensees, permittees, persons in charge, and/or persons with control of the commercial  
7 establishment doing business as Centennial Ranch Sports Bar and Grill (“Centennial Bar”), which is  
8 located at 10408 Franklin Boulevard, in Elk Grove, California. (Compl. ¶¶ 7-10.) Plaintiff was  
9 granted by contract “the exclusive nationwide commercial distribution (closed-circuit) rights to  
10 ‘*The Fight of the Century*’ *Floyd Mayweather, Jr. v. Manny Pacquiao Championship Fight*  
11 *Program* , telecast nationwide on Saturday, May 2, 2015” (“Plaintiff’s Program”), which included  
12 the distribution rights to “all under-card bouts and fight commentary encompassed in the  
13 television broadcast of the event.” (Id. ¶ 18.)

14 Plaintiff alleges that on May 2, 2015, defendants either specifically directed the  
15 employees of Centennial Bar “to unlawfully intercept and broadcast Plaintiff’s Program” at  
16 Centennial Bar, or that the actions of Centennial Bar employees are directly imputable to defendants  
17 “by virtue of their acknowledged responsibility for the actions of [Centennial Bar].” (Compl. ¶  
18 15.) Plaintiff further alleges that “the unlawful broadcast of Plaintiff’s Program, as supervised  
19 and/or authorized by Defendants . . . resulted in increased profits for [Centennial Bar].” (Id. ¶ 16.)

20 In its complaint, plaintiff requested statutory damages of \$110,000 for defendants’  
21 violation of 47 U.S.C. § 605, as well as recovery of all costs and reasonable attorneys’ fees.  
22 (Compl. at 10.) The complaint further sought statutory damages of \$60,000 for defendants’  
23 violation of 47 U.S.C. § 553, as well as recovery of all costs and reasonable attorneys’ fees. (Id.)  
24 The complaint also sought compensatory, exemplary, and punitive damages; reasonable  
25 attorneys’ fees; and costs of suit for defendants’ tortious conversion of Plaintiff’s Program. (Id.)  
26 Finally, the complaint requested restitution, declaratory relief, injunctive relief, attorneys’ fees,  
27 and costs of suit for defendants’ violation of sections 17200 *et seq.* of the California Business and  
28 Professions Code. (Id. at 11.)

1 After defendants were properly served with process and failed to appear in the action, the  
2 Clerk of Court, upon plaintiff's request, entered defendants' default. (ECF Nos. 6-9.) The instant  
3 motion for entry of default judgment followed. (ECF No. 11.)

#### 4 LEGAL STANDARD

5 Pursuant to Federal Rule of Civil Procedure 55, default may be entered against a party  
6 against whom a judgment for affirmative relief is sought who fails to plead or otherwise defend  
7 against the action. See Fed. R. Civ. P. 55(a). However, "[a] defendant's default does not  
8 automatically entitle the plaintiff to a court-ordered judgment." PepsiCo, Inc. v. Cal. Sec. Cans,  
9 238 F. Supp. 2d 1172, 1174 (C.D. Cal. 2002) (citing Draper v. Coombs, 792 F.2d 915, 924-25  
10 (9th Cir. 1986)). Instead, the decision to grant or deny an application for default judgment lies  
11 within the district court's sound discretion. Aldabe v. Aldabe, 616 F.2d 1089, 1092 (9th Cir.  
12 1980). In making this determination, the court considers the following factors:

13 (1) the possibility of prejudice to the plaintiff, (2) the merits of  
14 plaintiff's substantive claim, (3) the sufficiency of the complaint,  
15 (4) the sum of money at stake in the action[,] (5) the possibility of a  
16 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.

17 Eitel v. McCool, 782 F.2d 1470, 1471-72 (9th Cir. 1986).

18 As a general rule, once default is entered, well-pled factual allegations in the operative  
19 complaint are taken as true, except for those allegations relating to damages. TeleVideo Sys., Inc.  
20 v. Heidenthal, 826 F.2d 915, 917-18 (9th Cir. 1987) (per curiam) (citing Geddes v. United Fin.  
21 Group, 559 F.2d 557, 560 (9th Cir. 1977) (per curiam)); accord Fair Housing of Marin v. Combs,  
22 285 F.3d 899, 906 (9th Cir. 2002). In addition, although well-pled allegations in the complaint  
23 are admitted by a defendant's failure to respond, "necessary facts not contained in the pleadings,  
24 and claims which are legally insufficient, are not established by default." Cripps v. Life Ins. Co.  
25 of N. Am., 980 F.2d 1261, 1267 (9th Cir. 1992) (citing Danning v. Lavine, 572 F.2d 1386, 1388  
26 (9th Cir. 1978)); accord DIRECTV, Inc. v. Hoa Huynh, 503 F.3d 847, 854 (9th Cir. 2007) (stating  
27 that a defendant does not admit facts that are not well-pled or conclusions of law); Abney v.  
28 Alameida, 334 F. Supp. 2d 1221, 1235 (S.D. Cal. 2004) ("[A] default judgment may not be

1 entered on a legally insufficient claim”). A party’s default does not establish the amount of  
2 damages. Geddes, 559 F.2d at 560.

### 3 DISCUSSION

#### 4 Appropriateness of the Entry of Default Judgment Under the Eitel Factors

##### 5 1. Factor One: Possibility of Prejudice to Plaintiff

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

##### 12 2. Factors Two and Three: The Merits of Plaintiff’s Substantive Claims 13 and the Sufficiency of the Complaint

14 The court considers the merits of plaintiff’s substantive claims and the sufficiency of the  
15 complaint together because of the relatedness of the two inquiries. The court must consider  
16 whether the allegations in the complaint are sufficient to state a claim on which plaintiff may  
17 recover. See Danning, 572 F.2d at 1388; PepsiCo, Inc., 238 F. Supp. 2d at 1175.

18 In its motion for default judgment, plaintiff only seeks relief on two of its claims – its  
19 claim for violation of 47 U.S.C. § 605 and its conversion claim. (ECF No. 11-1.) Accordingly,  
20 the court only addresses those claims and declines to consider whether plaintiff’s remaining  
21 claims are sufficiently pled and have merit.

##### 22 a. Liability under 47 U.S.C. § 605

23 In its motion for default judgment, plaintiff seeks statutory damages pursuant to its claim  
24 under 47 U.S.C. § 605. That statute prohibits the unauthorized interception, reception,  
25 publication, or divulgence of interstate radio communications. See 47 U.S.C. § 605(a).  
26 Specifically, it provides, in pertinent part, that:

27 No person not being authorized by the sender shall intercept any  
28 radio communication and divulge or publish the existence, contents,  
substance, purport, effect, or meaning of such intercepted

1 communication to any person. No person not being entitled thereto  
2 shall receive or assist in receiving any interstate or foreign  
3 communication by radio and use such communication (or any  
4 information therein contained) for his own benefit or for the benefit  
5 of another not entitled thereto. No person having received any  
6 intercepted radio communication or having become acquainted with  
7 the contents, substance, purport, effect, or meaning of such  
8 communication (or any part thereof) knowing that such  
9 communication was intercepted, shall divulge or publish the  
10 existence, contents, substance, purport, effect, or meaning of such  
11 communication (or any part thereof) or use such communication (or  
12 any information therein contained) for his own benefit or for the  
13 benefit of another not entitled thereto.

14 47 U.S.C. § 605(a).

15 The Ninth Circuit Court of Appeals has determined that satellite television signals are  
16 covered communications under 47 U.S.C. § 605(a). DIRECTV, Inc. v. Webb, 545 F.3d 837, 844  
17 (9th Cir. 2008). The scope of section 605(a) is less clear with respect to transmissions intercepted  
18 from a cable system, which are expressly covered under 47 U.S.C. § 553(a). Section 553(a)  
19 states, in relevant part: “No person shall intercept or receive or assist in intercepting or receiving  
20 any communications service offered over a cable system, unless specifically authorized to do so  
21 by a cable operator or as may otherwise be specifically authorized by law.” 47 U.S.C. §  
22 553(a)(1).

23 Here, plaintiff has not alleged whether defendants intercepted Plaintiff’s Program in the  
24 course of transmission over a cable system or by satellite television signal. A split of authority  
25 has developed as to whether the unlawful interception of a broadcast in the course of transmission  
26 over a cable system is covered by both sections 553(a) and 605(a) , or whether it is only covered  
27 by section 553(a). Compare United States v. Norris, 88 F.3d 462, 466-69 (7th Cir. 1996) and  
28 TKR Cable Co. v. Cable City Corp., 267 F.3d 196, 204-07 (3d Cir. 2001) (only covered by  
section 553(a)) with Int’l Cablevision, Inc. v. Sykes, 75 F.3d 123, 132-33 (2d Cir. 1996) (covered  
by both sections 553(a) and 605(a)).

At a minimum, plaintiff’s complaint and evidence support a conclusion that defendants  
intercepted, without authorization, a transmission of Plaintiff’s Program and broadcasted it to  
their patrons. Plaintiff has supplied proof of defendants’ violation through an affidavit of a  
private investigator who entered defendants’ establishment on May 2, 2015, and viewed



1 Plaintiff's Program in their establishment. (Compl. ¶¶ 18-20, 32-35.) Therefore, plaintiff's  
2 conversion claim is sufficiently pled and has merit.

3 Accordingly, the second and third Eitel factors favor the entry of a default judgment.

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

5 Under the fourth factor cited in Eitel, "the court must consider the amount of money at  
6 stake in relation to the seriousness of Defendant's conduct." PepsiCo, Inc., 238 F. Supp. 2d at  
7 1176-77; see also Philip Morris USA, Inc. v. Castworld Prods., Inc., 219 F.R.D. 494, 500 (C.D.  
8 Cal. 2003). By its motion for default judgment, plaintiff seeks a judgment in the total amount of  
9 \$113,000.00 against defendants, consisting of \$110,000.00 for violation of 47 U.S.C. § 605 and  
10 \$3,000.00 for the tort of conversion.

11 Given the substantial amount of money at stake, this factor could weigh against the entry  
12 of default judgment. See, e.g., Joe Hand Promotions v. Streshly, 655 F. Supp. 2d 1136, 1136  
13 (S.D. Cal. 2009) (proposed award amount of \$100,875.00 was "manifestly excessive under  
14 existing law"); J & J Sports Productions. v. Cardoze, 2010 WL 2757106, at \*5 (N.D. Cal. July 9,  
15 2010) ("a large sum of money at stake would disfavor default judgment," such as damages  
16 totaling \$114,200.00); see also Board of Trustees of the Sheet Metal Workers v. Vigil, 2007 WL  
17 3239281, at \*2 (N.D. Cal. Nov. 1, 2007) ("[D]efault judgment is disfavored if there were a large  
18 sum of money involved."). However, the court declines to recommend judgment in the large  
19 amount requested. Consequently, when the judgment amount is appropriately reduced, as  
20 explained below, the fourth Eitel factor also weighs in favor of the entry of default judgment.

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

22 The court may assume the truth of well-pled facts in the complaint (except as to damages)  
23 following the clerk's entry of default, and defendants have not appeared to dispute any such facts.  
24 Thus, there is no likelihood that any genuine issue of material fact exists. See, e.g., Elektra  
25 Entm't Group Inc. v. Crawford, 226 F.R.D. 388, 393 (C.D. Cal. 2005) ("Because all allegations in  
26 a well-pleaded complaint are taken as true after the court clerk enters default judgment, there is  
27 no likelihood that any genuine issue of material fact exists"); accord Philip Morris USA, Inc., 219  
28 F.R.D. at 500; PepsiCo, Inc., 238 F. Supp. 2d at 1177. Accordingly, the fifth Eitel factor favors

1 the entry of default judgment.

2 5. Factor Six: Whether Default was Due to Excusable Neglect

3 In this case, there is no indication in the record that defendants' default was due to  
4 excusable neglect. Defendants were not only served with the complaint, but also the request for  
5 entry of default and the motion for default judgment. (ECF Nos. 8, 11.) Indeed, despite having  
6 been provided with multiple opportunities to appear and defend their interests, defendants  
7 apparently declined to do so. Accordingly, the sixth Eitel factor favors the entry of a default  
8 judgment.

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

11 “Cases should be decided upon their merits whenever reasonably possible.” Eitel, 782  
12 F.2d at 1472. However, district courts have concluded with regularity that this policy, standing  
13 alone, is not dispositive, especially where a defendant fails to appear or defend itself in an action.  
14 PepsiCo, Inc., 238 F. Supp. 2d at 1177; see also Craigslist, Inc. v. Naturemarket, Inc., 694 F.  
15 Supp. 2d 1039, 1061 (N.D. Cal. 2010). Accordingly, although the court is cognizant of the policy  
16 in favor of decisions on the merits—and consistent with existing policy would prefer that this  
17 case be resolved on the merits—that policy does not, by itself, preclude the entry of default  
18 judgment.

19 In sum, upon careful consideration of all the Eitel factors, the court concludes that  
20 plaintiff is entitled to a default judgment against defendants. All that remains is a determination  
21 of the specific relief to which plaintiff is entitled.

22 Terms of the Judgment to be Entered

23 After determining that a party is entitled to the entry of default judgment, the court must  
24 determine the terms of the judgment to be entered. As stated above, plaintiff requests judgment  
25 in the total amount of \$113,000.00 against defendants, consisting of \$110,000.00 for violation of  
26 47 U.S.C. § 605 and \$3,000.00 for the tort of conversion. Although defendants failed to object to  
27 the amount requested, one of the factors the court is free to consider in exercising its discretion in  
28 granting default judgment is the sum of money to be awarded. See J & J Sports Prods., Inc. v.

1 Jurado, 2011 WL 6153605, at \*3 (E.D. Cal. Dec. 12, 2011). Considering plaintiff’s briefing and  
2 the record in this case, the court recommends that damages be awarded, but not in the amount  
3 requested.

4 1. Damages Under 47 U.S.C. § 605

5 For purposes of a 47 U.S.C. § 605 claim, a plaintiff may elect to seek either actual or  
6 statutory damages. 47 U.S.C. § 605(e)(3)(C)(i)(I & II). The statute generally provides for  
7 statutory damages for each violation of not less than \$1,000 and not more than \$10,000, as the  
8 court considers just. 47 U.S.C. § 605(e)(3)(C)(i)(II). Plaintiff seeks the maximum award of  
9 \$10,000. The statute also authorizes enhanced statutory damages of not more than \$100,000 if  
10 the court finds the violation was “committed willfully and for purposes of direct or indirect  
11 commercial advantage or private financial gain.” 47 U.S.C. § 605(e)(3)(C)(ii).<sup>2</sup> Here, plaintiff  
12 seeks the maximum of \$100,000 in enhanced statutory damages, for a total of \$110,000 in  
13 statutory damages. In support of its request, plaintiff argues that the requested amount is justified  
14 primarily because of the need to deter broadcast piracy and the significant harm done to plaintiff’s  
15 business as a result of such activities. Although deterrence is certainly an important  
16 consideration, the court finds plaintiff’s requested damages to be grossly excessive and  
17 unsupported by the record here.

18 In this case, plaintiff’s investigator stated that during the roughly 6-minute period he was  
19 present in Centennial Bar, he observed only 10-11 patrons inside the establishment, which had the  
20 capacity to hold “60+ people.” (Nushi Aff.) The investigator noted that Centennial Bar showed  
21 Plaintiff’s Program on two (2) flat screen televisions in the bar area. (Id.) He also reported that  
22 there was no cover charge for entry on the night in question. (Id.) Furthermore, there is no  
23 evidence before the court that defendants promoted the fight’s airing at the establishment, or that  
24 a special premium on food and drink was charged on the night of the fight. Indeed, with only 10-

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25 <sup>2</sup> By comparison, 47 U.S.C. § 553 provides that “the party aggrieved may recover an award of  
26 statutory damages for all violations involved in the action, in a sum of not less than \$250 or more  
27 than \$10,000 as the court considers just.” 47 U.S.C. § 553(c)(3)(A)(ii). Furthermore, “[i]n any  
28 case in which the court finds that the violation was committed willfully and for purposes of  
commercial advantage or private financial gain, the court in its discretion may increase the award  
of damages...by an amount of not more than \$50,000.” 47 U.S.C. § 553(c)(3)(B).

1 11 patrons in the establishment, it appears unlikely that Centennial Bar was doing any greater level  
2 of business on the night that Plaintiff's Program was shown than at any other time. In light of this  
3 record, which lacks evidence of defendants reaping any significant commercial benefit from their  
4 piracy of Plaintiff's Program, the court recommends that plaintiff be awarded \$1,000 in statutory  
5 damages pursuant to 47 U.S.C. § 605(e)(3)(C)(i)(II).

6 However, the court takes judicial notice of the fact that defendants have already violated  
7 47 U.S.C. § 605 on at least *two* prior occasions – in two other actions that were previously filed in  
8 this court, defendants likewise defaulted on a claim pursuant to 47 U.S.C. § 605. See J&J Sports  
9 Productions, Inc. v. Machuca et al., 2:13-cv-1076- JAM-KJN (E.D. Cal.); Joe Hand Promotions  
10 v. Machuca, 2:13-cv-1228-GEB-KJN (E.D. Cal.) Because defendants' repeat violations are more  
11 indicative of willful conduct for purposes of commercial advantage or financial gain, and because  
12 such repeat violations suggest that increased deterrence is necessary, the court recommends that  
13 plaintiff be awarded an additional \$5,000 in enhanced damages pursuant to 47 U.S.C. §  
14 605(e)(3)(C)(ii), for a total of \$6,000 in statutory damages, which the court finds appropriate  
15 under the circumstances here. See J & J Sports Productions, Inc. v. Jurado, 2011 WL 6153605, at  
16 \*4 (E.D. Cal. Dec. 12, 2011) (collecting awards in similar cases; awarding \$1,000 in statutory  
17 damages and \$3,000 in enhanced statutory damages in a default judgment where the defendant  
18 was not a repeat offender, but where the program at issue was broadcast to a larger number of  
19 patrons); Joe Hand Promotions v. Machuca, 2:13-cv-1228-GEB-KJN (E.D. Cal.), ECF Nos. 24,  
20 26 (awarding enhanced damages of \$3,000.00 based on *one* prior violation of 47 U.S.C. § 605).

## 21 2. Damages for Conversion

22 Plaintiff's motion for default judgment also seeks an award of \$3,000.00 in compensatory  
23 damages for the state law tort of conversion. Damages for conversion are measured by the value  
24 of the property at the time of the conversion. Cal. Civ. Code § 3336; see also Stan Lee Trading,  
25 Inc. v. Holtz, 649 F. Supp. 577, 581 (C.D. Cal. 1986); Spates v. Dameron Hosp. Ass'n, 114 Cal.  
26 App. 4th 208, 221 (2003). In the context of broadcast piracy, damages for conversion have often  
27 been calculated based upon the amount that the defendant would have been required to pay for a  
28 proper sublicensing agreement. See J & J Sports Prods., Inc. v. Jurado, 2011 WL 6153605, at \*5

1 (E.D. Cal. Dec. 12, 2011); J & J Sports Productions, Inc. v. Ro, 2010 WL 668065, at \*4 (N.D.  
2 Cal. Feb. 19, 2010).

3 Here, the affidavit of plaintiff's president, Joseph M. Gagliardi, indicates, by reference to  
4 Exhibit 2 to his affidavit, that defendants' establishment, which has a maximum occupancy of  
5 about 60 people, would have been required to pay a sublicense fee of \$3,000.00 to lawfully air  
6 Plaintiff's Program. (ECF No. 11-4, ¶ 8, Ex. 2.) Accordingly, the court recommends an award of  
7 \$3000.00 on plaintiff's conversion claim.

### 8 CONCLUSION

9 In sum, the court finds that plaintiff is entitled to \$6,000.00 in statutory damages (based  
10 on its claim under 47 U.S.C. § 605) and \$3,000.00 in compensatory damages (based on its claim  
11 of conversion), for a total of \$9,000.00.

12 Accordingly, IT IS HEREBY ORDERED that within three (3) days after these findings  
13 and recommendations are filed, plaintiff shall serve a copy of the findings and recommendations  
14 on defendants by mail at their last known address(es), and shall forthwith file proof of such  
15 service on the court's docket.

16 IT IS ALSO HEREBY RECOMMENDED that:

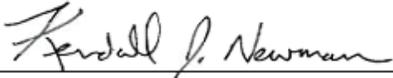
- 17 1. Plaintiff's motion for default judgment (ECF No. 11) be granted in part.
- 18 2. Judgment be entered in plaintiff's favor, and against defendants jointly and severally, in  
19 the amount of \$9,000.00.
- 20 3. The Clerk of Court be directed to close this case.

21 These findings and recommendations are submitted to the United States District Judge  
22 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen (14)  
23 days after being served with these findings and recommendations, any party may file written  
24 objections with the court and serve a copy on all parties. Such a document should be captioned  
25 "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections  
26 shall be served on all parties and filed with the court within fourteen (14) days after service of the  
27 objections. The parties are advised that failure to file objections within the specified time may  
28 waive the right to appeal the District Court's order. Turner v. Duncan, 158 F.3d 449, 455 (9th

1 Cir. 1998); Martinez v. Ylst, 951 F.2d 1153, 1156-57 (9th Cir. 1991).

2 IT IS SO ORDERED AND RECOMMENDED.

3 Dated: October 12, 2016

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6 KENDALL J. NEWMAN  
7 UNITED STATES MAGISTRATE JUDGE  
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