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8	IN THE UNITED STATES DISTRICT COURT
9	FOR THE NORTHERN DISTRICT OF CALIFORNIA
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11	J & J SPORTS PRODUCTIONS, INC., No. C 10-05092 WHA
12	Plaintiff,
13	V.
14 15	VICTORIA ESTRELLA CONCEPCION and WILLIAM HENRY CONCEPCION, doing business as Henry's,ORDER GRANTING DEFAULT JUDGMENT
16	Defendants.
17	/
18	INTRODUCTION
19	Plaintiff brings this action against defendants for unlawfully intercepting and broadcasting
20	a boxing match for which plaintiff owned the exclusive television distribution rights. Default has
21	been entered against defendants, and plaintiff now moves for default judgment. For the following
22	reasons, the motion is GRANTED .
23	STATEMENT
24	Plaintiff J & J Sports Productions, Inc., is a California company, which owned the
25	exclusive nationwide television distribution rights to "Firepower": Manny Pacquiao v. Miguel
26	Cotto, WBO Welterweight Championship Fight Program, telecasted nationwide on November 14,
27	2009 (Br. 1).
28	Defendants Victoria Estrella Concepcion and William Henry Concepcion are the owners
	and operators of Henry's commercial establishment in South San Francisco (Compl. ¶ 7). They

United States District Court For the Northern District of California

did not enter into a subleasing agreement with plaintiff in order to broadcast the program. 1 2 The interstate transmission of the program was encrypted and was only made available to 3 plaintiff's customers who had paid the licensing fees (Compl. ¶ 11).

The complaint alleges that on the date of the nationwide telecast of the program, defendants, with willful knowledge that the program was not to be intercepted by an unauthorized 6 entity, intercepted and displayed the program at Henry's (Compl. ¶ 13).

7 On the date of that telecast, investigator Jeff Kaplan observed the alleged unlawful 8 exhibition of the program at Henry's. Kaplan observed three televisions and noted that Henry's 9 had a 60-person capacity. Kaplan's affidavit reports "50+" people after three separate head 10 counts, without providing any further clarification as to the range implied by the plus sign. He also noted that there was no required cover charge (Br. 6; Kaplan Aff. 1). Plaintiff did not submit 12 any evidence as to how defendants intercepted the program, whether they advertised, or whether 13 they marked up food prices during the program.

14 Plaintiff commenced this action on November 10, 2010. The complaint was served on 15 defendants on January 14 (Dkt. Nos. 11-12). They failed to answer the complaint by the required 16 deadline and have not subsequently appeared (Riley Decl. ¶ 2). The Clerk entered default against 17 defendants on March 3. Plaintiff now moves for default judgment and seeks to recover damages 18 under 47 U.S.C. 605 and for conversion. Plaintiff's motion for default judgment also asserts the 19 right to recover costs and attorney's fees pursuant to Section 605 (Br. 3). Oral argument was held 20 on May 12, and Attorney Thomas Riley appeared for plaintiff. Neither defendants nor any 21 representatives for defendants appeared.

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ANALYSIS

DEFAULT JUDGMENT A.

24 FRCP 55(b)(2) permits a court, following an entry of default, to enter default judgment 25 against a defendant. "The district court's decision whether to enter a default judgment is a discretionary one." Aldabe v. Aldabe, 616 F.2d 1089, 1092 (9th Cir. 1980). The scope of relief 26 27 allowed through default judgment is limited by FRCP 54(c), which states that "[a] default 28 judgment must not differ in kind from, or exceed in amount, what is demanded in the pleadings." The court of appeals considers several factors in exercising its discretion to award default

2 judgment:

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(1) the possibility of prejudice to the plaintiff, (2) the merits of plaintiff's substantive claim, (3) the sufficiency of the complaint, (4) the sum of money 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. Eitel v. McCool, 782 F.2d 1470, 1471–72 (9th Cir. 1986). After entry of default, well-pled allegations in the complaint regarding liability are taken as true, except as to amount of damages. Fair Hous. of Marin v. Combs, 285 F.3d 899, 906 (9th Cir. 2002). Consequently, Eitel factors two, three, and five weigh in favor of the entry of default judgment. For the following reasons, each of the remaining factors also favor entry of default judgment.

First, if the motion were denied, plaintiff would be without a remedy. Failure to enter a 12 default judgment would therefore result in prejudice to plaintiff.

13 Second, the sum of money at stake is moderate. In general, the fact that a large sum of 14 money is at stake is a factor disfavoring default judgment. See Eitel, 782 F.2d at 1472 (the fact 15 that \$2,900,000 was at stake, when considered in light of the parties' dispute as to material facts, 16 supported the Court's decision not to enter judgment by default). In the present action, plaintiff 17 has asked for a \$2,200 relief on the conversion claim plus damages up to the \$110,000 maximum 18 allowed cumulatively under 47 U.S.C. 605(e)(3)(C)(i)(II) and (e)(3)(C)(ii) (Br. 6, 9). Although a 19 substantial amount, this is a far cry from the \$2,900,000 sum contemplated in *Eitel*. This factor 20 weighs in favor of entering default judgment.

21 Third, it is unlikely that default was the result of excusable neglect. This action was filed 22 back in November 2010, and defendants were properly served. Defendants are presumably aware 23 of the payment obligations for which they are responsible and were put on notice of this action 24 against them.

25 *Fourth*, although federal policy favors decisions on the merits, Rule 55(b)(2) permits entry 26 of default judgment in situations such as this where defendants refuse to litigate. After careful 27 consideration of all of the *Eitel* factors, this order finds that the entry of default judgment is 28 warranted.

B. SCOPE OF RELIEF

2 Plaintiff's complaint sought relief for conversion and violations of 47 U.S.C. 605, 553, and 3 California Business and Professions Code 17200. In the application for default judgment, plaintiff claims conversion and violation of 47 U.S.C. 605 and 553, but in its memorandum in support, by 4 5 contrast, plaintiff only requests conversion damages and damages assessed under 47 U.S.C. 605, including costs and attorney's fees pursuant to that code section (Dkt. No. 22; Br. 6, 9). A 6 7 conversion requires "ownership or right to possession of property, wrongful disposition of the 8 property right and damages." G.S. Rassmussen & Assocs., Inc. v. Kalitta Flying Serv., Inc., 958 9 F.2d 896, 906 (9th Cir. 1992). A claim under Section 605 can be established when defendants 10 engage in unlawful interception of "radio communication," whereas a Section 553 claim concerns 11 interception "over a cable system." Section 605 allows for damages to be enhanced above conversion damages and costs and attorney's fees up to \$110,000, while Section 553 allows for up 12 13 to \$60,000. 47 U.S.C. 605(e)(3)(C)(i-ii) and 553(c)(3)(A-B). Reasonable attorney's fees *shall* be 14 awarded under Section 605 and may be awarded under Section 553. 47 U.S.C. 605(e)(3)(B)(iii) 15 and 553(c)(2)(C).

1. CONVERSION

As plaintiff's factual allegations are taken as true, they support all three elements of a
conversion claim. Plaintiff has purchased licensing rights to the program at issue. Given that the
defendants' establishment had a capacity of 60 people, they would have been required to pay
\$2,200 for a subleasing agreement with plaintiff (Gagliardi Aff. ¶ 8). As defendants did not enter
into an agreement and pay the fee, plaintiff is entitled to \$2,200 in conversion damages.
Accordingly, this order awards \$2,200 for the conversion claim.

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2. DAMAGES UNDER SECTIONS 605 AND 553

i. Consistency of Treatment

As background, plaintiff J & J Sports Productions, Inc., and Attorney Riley are not
strangers to this court or this district. In fact, Attorney Riley appears to be counsel of record in 96
open cases in our district. At the hearing on the instant motion, Attorney Riley represented that

the assigned judge, by not awarding greater total damages in cases like this one, was out of step
 with other district court judges.¹

While courts that have awarded similar types of damages refer to the damages in different
ways, this order will refer to all similar damages under either Sections 605 or 553 as enhanced
damages, excluding costs and attorney's fees under those code sections and also excluding
damages for the conversion claim. Total damages will refer to enhanced damages and conversion
damages.

At the hearing on this motion, Attorney Riley represented that other judges often award
enhanced damages closer to the maximum of \$110,000 under Section 605.² He claimed that the
proposed total award was "literally a tenth of probably the average award that we see on a
nonegregious violation . . . on an event of this caliber" (Tr. 5).

Upon a search of decisions, however, involving J & J as plaintiff and Attorney Riley as counsel, where plaintiff moved for default judgment pursuant to Section 605, here are the actual results. Of 16 awards based on Section 605 that were found in our district, the average enhanced damages was \$8,413, and the average total damages was \$10,336.

The undersigned has granted default judgment awards to Riley and J & J in three cases
prior to this one, and all under Section 553.³ For these, the average enhanced damages was \$667,
and the average total damages was \$3,700. Comparing these awards against the 11 total awards
based on Section 553 that were found in our district, the average enhanced damages was \$11,462,
and the average total damages was \$13,053.⁴

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- ¹ Although at the hearing the judge had proposed \$500 in enhanced damages and \$2,200 in conversion damages, for a total of \$2,700, this order settles instead on \$1,000 in enhanced damages and \$2,200 in conversion damages, for a total of \$3,200.
- ² The maximum damages under 47 U.S.C. 605(e)(3)(C)(i)(II) is \$10,000, and the maximum under (e)(3)(C)(ii) is \$100,000, for a total of \$110,00 under the code section.

³ The undersigned judge has had other Riley-J & J cases, but not that resulted in default judgment.

⁴ Docket-by-docket research was done to obtain these numbers in our district.

State-wide, outside of our district, district court decisions award damages often under both Sections 605 and 553, and the average enhanced damages was \$28,533, and the average total damages was \$29,124.⁵

Although it seems correct that the assigned judge has been less generous than other judges, Attorney Riley is incorrect in suggesting that most judges award the maximum or close thereto.

ii. Whether to Apply Section 605 or 553

Plaintiff requests damages under Section 605, which prohibits "radio" or satellite
interception, but has not provided evidence that transmission was by satellite. As satellite is
different from cable, this order shall examine whether application of either or both Sections 605
and 553 is appropriate. In assessing which scenario is more likely given the facts of this specific
incident, where plaintiff did not report seeing a satellite dish after inspecting the premises,
damages are more appropriately analyzed under Section 553. *See J & J Sports Prods., Inc. v. Juanillo*, No. C 10-01801 WHA, 2010 WL 5059539, at *2 (N.D. Cal. Dec. 6, 2010).

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iii. Factors Used to Determine Amount of Damages

15 Applying Section 553 as the relevant statute, enhanced damages may be awarded up to a 16 \$60,000 maximum. 47 U.S.C. 553(c)(3)(A)(ii) and (c)(3)(B). The court of appeals has not set 17 forth specific factors to use in determining the appropriate amount of such enhancements. District 18 courts have thus considered different factors to determine culpability and to achieve proper 19 compensation and deterrence. These include: use of cover charge, increase in food price during 20 programming, presence of advertisement, number of patrons, number of televisions used, and impact of the offender's conduct on the claimant. Repeated violations may also justify enhanced 21 damages.6 22

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⁵ All of the cases supporting the figures cited above can be found in an appendix to this order.

⁶ Two representative cases are: *J & J Sports Prods., Inc. v. Herrera*, No.
1:10-cv-02090-AWI-SKO, 2011 WL 643413, at *4 (E.D. Cal. Feb. 17, 2011) (assessing damages based on use of cover charge, increase in food price, presence of advertisements, number of patrons, number of televisions used, impact of offender's conduct on claimant, and whether or not offender was engaged in a repeated offense); and *J & J Sports Prods., Inc. v. Paniagua*, No. 10–CV–05141–LHK, 2011 WL 996257, at *2 (N.D. Cal. Mar. 21, 2011) (using multiple violations as a factor in increasing damages from \$2,200 to \$4,400).

Considering these factors, the extent of enhanced damages in the present action should be 1 2 limited because defendants are apparently first-time offenders, and plaintiff has provided no 3 evidence of promotional activities or extensive exploitation of the intercepted programming. Although defendants had "50+" patrons and used three televisions, these two factors alone have 4 5 not justified maximum total damages in any prior district court decisions involving plaintiff. A 6 larger establishment may normally have more patrons and televisions, so those numbers do not 7 necessarily justify greater damages. Awarding the maximum would leave no room to differentiate 8 defendants from more culpable offenders who commit multiple offenses or who actively promote 9 and exploit their illegal acts.

10 Plaintiff asserts that awarding damages closer to the maximum would more effectively 11 deter future offenses, reduce the amount of its investigative work, and appease bar owners whose 12 businesses were allegedly affected by competition from defendants. Plaintiff cites several decisions awarding \$250 to \$15,000 in enhanced damages and asserts that such cases were a 13 14 "major reason" for continued piracy (Br. 15). However, plaintiff provided no evidence to support 15 this assertion and no evidence that any particular amount of damages would be necessary to 16 increase deterrence. Nor has plaintiff submitted declarations from bar owners miffed because they 17 did subscribe lawfully, as claimed at the hearing.

18 In light of the given facts, this order awards \$1,000 more than what defendants would have 19 had to pay for a proper license, \$2,200, for a total award of \$3,200. That amount is a reasonable 20 one in the instant case, excluding costs and attorney's fees and damages for conversion, especially 21 for first-time offenders for whom plaintiff provided no evidence of advertising, cover charge, or 22 increased food price. This amount will deter first-time offenders while compensating plaintiff. 23 The undersigned declines to award further damages under Sections 553(c)(3)(A)(ii) and (c)(3)(B)24 because plaintiff has not demonstrated that any additional amount is warranted. If, however, the 25 same defendants (or an alter ego) do it again later on, the enhanced damages should be 26 substantially increased for that offense.

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iv. Costs and Attorney's Fees

2 Plaintiff's motion requests costs and attorney's fees under Section 605. As reviewed 3 above, Section 553 is the properly applicable code section. Under Section 605, an award is mandatory, but under Section 553, it is not. Obviously, the Court is not required to grant the 4 5 award under either code section if plaintiff does not provide any supporting evidence, as 6 reasonable costs and attorney's fees cannot be determined. In the instant motion, plaintiff did not 7 ask for a specific amount of costs and attorney's fees in either the application for default judgment 8 or the memorandum in support (Dkt. No. 22; Br. 3). Neither did plaintiff provide supporting 9 documents of expenses or rates. Given the lack of a sworn record, this order denies an award of 10 costs or attorney's fees, without prejudice to any post-judgment request if the law allows it.

CONCLUSION

Plaintiff's motion for default judgment is GRANTED. For the reasons stated, plaintiff shall
be awarded \$2,200 in conversion damages and \$1,000 in enhanced damages under Section 553.
Judgment will be entered separately in favor of plaintiff and against defendants in the amount of
\$3,200.

IT IS SO ORDERED.

Dated: June 7, 2011.

WILLIAM ALSUP UNITED STATES DISTRICT JUDGE

United States District Court For the Northern District of California 1

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APPENDIX

					Costs and Attorney's
	Dunnuges	(605)	(553)	0	Fees
J & J Sports Prods., Inc. v.	2000	0	500	2500	0
Juanillo					
NO. C 10-01801 WHA, 2010					
WL 5059539					
(order signed Dec. 6, 2010).					
J & J Sports Prods., Inc. v.	4200	0	1250	5750	1500
Cardoze					
NO. C 09-05683 WHA,					
2010 WL 2757106					
(order signed July 9, 2010).					
J & J Sports Prods., Inc. v.	2600	0	250	2850	1500
Ro					
NO. C 09-02860 WHA, 2010					
WL 668065					
(order signed Feb. 19, 2010).					

OTHER N.D. CAL. DECISIONS INVOLVING ATTORNEY RILEY AND J & J SPORTS

	Judge		Enhanced			Costs and
		Damages	Damages	0	0	Attorney'
	A	2200	× /	(553)		s Fees
J & J Sports Prods., Inc. v.	Armstrong	2200	6000	0	8200	2825
Delatorre						
4:10-cv-04168-SBA						
(order signed Apr. 28, 2011).						
J & J Sports Prods., Inc. v.	Armstrong	1600	10000	0	11600	0
Dailey						
No. 4:10-cv-01874-SBA						
(order signed Apr. 19, 2011).						
J & J Sports Prods., Inc. v.	Breyer	1800	15000	0	16800	0
Dailey						
No. 3:09-cv-04904-CRB						
(order signed July 23, 2010).						
J & J Sports Prods., Inc. v.	Conti	2800	2000	0	4800	0
Cardoze						
3:10-cv-01875-SC						
(order signed Mar. 9, 2011).						

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I & I Smanta Duada Ina u	Koh	2200	6600	0	0000	0
J & J Sports Prods., Inc. v.	KON	2200	6600	0	8800	0
Paniagua NO. 10-CV-05141-LHK,						
2011 WL 996257						
(order signed Mar. 21, 2011).						
J & J Sports Prods., Inc. v.	Koh	1600	11600	0	13200	0
Ho	KOII	1000	11000	0	13200	0
NO. 10-CV-01883-LHK,						
2010 WL 3912179						
(order signed Oct. 5, 2010).						
J & J Sports Prods., Inc. v.	Patel	2000	0	2000	4000	0
Guzman						
NO. C 08-05469 MHP, 2009						
WL 1034218						
(order signed Apr. 16, 2009).						
J & J Sports Prods., Inc. v.	Walker	2600	40000	0	42600	0
Guzman						
3:09-cv-02866-VRW						
(order filed Sept. 10, 2010).						
J & J Sports Prods., Inc. v.	Ware	1600	1000	0	2600	2506
Cardoze						
5:09-cv-04204-JW						
(order signed Apr. 7, 2010).						
J & J Sports Prods., Inc. v.	Ware	1000	5000	0	6000	3811
Dailey						
No. 5:09-cv-04205-JW						
(order signed Apr. 7, 2010).						
J & J Sports Prods., Inc, v.	White	3750	15000	0	18750	0
Montecinos						
NO. C 09-02604 JSW, 2010						
WL 144817						
(order signed Jan. 11, 2010).			0	2500	2.500	0
J & J Sports Prods., Inc. v.	Whyte	0	0	2500	2500	0
Doan						
NO. C-08-00324 RMW,						
2008 WL 4911223						
(order signed Nov. 13, 2008).			0	250	250	0
J & J Sports Prods., Inc. v.	Whyte	0	0	250	250	0
Manzano						
NO. C-08-01872 RMW,						
2008 WL 4542962 (order signed Sept. 20, 2008)						
(order signed Sept. 29, 2008)	•					

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J & J Sports Prods., Inc. v.	Wilkin	1200	6000	0	7200	0
Huezo						
NO. C 09-4906 CW, 2011						
WL 1134265						
(order signed July 2, 2010).						
J & J Sports Prods., Inc. v.	Wilkin	2200	0	5000	7200	2611
Mosley						
NO. C-10-5126 CW EMC,						
2011 WL 2066713						
(order signed May 25, 2011).						

OUT-OF-DISTRICT DECISIONS INVOLVING ATTORNEY RILEY AND J & J SPORTS

	Judge	Actual	Enhanced	Total	Costs and
	_	Damages	Damages	Damages	Attorney's
			(605 and 553)		Fees
J & J Sports Productions, Inc.	Brennan	0	25000	25000	0
v. Torres					
No. CIV S-10-3012 JAM EFB					
(TEMP), 2011 WL 999199					
(E.D. Cal.)					
(order signed Mar. 17, 2011).					
J & J Sports Productions, Inc.	Burrell	0	10000	10000	0
v. Hernandez					
No. CIV. S-09-3389-GEB-KJN,					
2010 WL 2650526 (E.D. Cal.)					
(order signed July 1, 2010).					
J & J Sports Productions, Inc.	Hollows	0	40000	40000	0
v. Pollard					
Civ. No. S-10-3047 KJM GGH,					
2011 WL 777931 (E.D. Cal.)					
(order signed Feb. 28, 2011).					
J & J Sports Productions, Inc.	Hollows	0	23328	23328	0
v. Rodriguez					
No. S-10-1044 KJM GGH,					
2011 WL 778201 (E.D. Cal.)					
(order signed Feb. 28, 2011).					
J & J Sports Productions, Inc.	Hollows	0	46000	46000	0
v. Rafael					
No. CIV S-10-1046 LKK GGH,					
2011 WL 445803 (E.D. Cal.)					
(order signed Feb. 8, 2011).					

J & J Sports Productions, Inc.	Ishii	2200	15000	17200	0
v. Herrera					
No. 1:10-cv-02090-AWI-SKO,					
2011 WL 643413 (E.D. Cal.)					
(order signed Mar. 16, 2011).					
J & J Sports Productions, Inc.	Ishii	2600	80000	82600	0
v. Villalobos					
No. 1:09-cv-01130-AWI-DLB					
(E.D. Cal.)					
(order signed Jan. 30, 2010).					
J & J Sports Productions, Inc.	Ishii	0	20000	20000	0
v. George					
No. CV-F-08-0090 AWI DLB					
(E.D. Cal.)					
(order signed Oct. 29, 2008).					
J & J Sports Productions, Inc.	Ishii	0	20000	20000	0
v. George					
No. 1:08-CV-00091-AWI-DLB,	,				
2008 WL 4224616 (E.D. Cal.)					
(order signed Aug. 20, 2008).					
J & J Sports Productions, Inc.	Ishii	0	30000	30000	0
v. Guzman					
No. 1:08-CV-00091-AWI-DLB,	,				
2008 WL 3905972 (E.D. Cal.)					
(order signed Aug. 20, 2008).					
J & J Sports Productions, Inc.	Mendez	0	32400	32400	0
v. Pollard					
No. CIV S-10-1066 JAM GGH,					
2011 WL 356087 (E.D. Cal.)					
(order signed Mar. 3, 2011).					
J & J Sports Productions, Inc.	Mendez	800	5000	5800	0
v. Rodriguez					
No. CIV S-08-1140 JAM DAD,					
2010 WL 796942 (E.D. Cal.)					
(order signed Mar. 26, 2010).					
J & J Sports Productions, Inc.	Mueller	0	100000	100000	0
v. Ferreyra					
No. CIV S-08-128 LKK KJM,					
2008 WL 4104315 (E.D. Cal.)					
(order signed Aug. 28, 2008).					
J & J Sports Productions, Inc.	O'Neill	2200	60000	62200	0
v. Olivares					
No. 1:10-cv-01708-LJO-DLB					
(E.D. Cal.)					
(order signed Apr. 15, 2011).					

J & J Sports Productions, Inc.	O'Neill	2200	8000	10200	0
v. Lupian					-
No. 1:10-cv-02104 LJO GSA					
(E.D. Cal.)					
(order signed Apr. 29, 2011).					
J & J Sports Productions, Inc.	O'Neill	0	20000	20000	0
v. Flores					
No. 1:08cv0483 LJO DLB					
(E.D. Cal.)					
(order signed Aug. 14, 2009).					
J & J Sports Productions, Inc.	O'Neill	0	30000	30000	0
v. Esquivel					
No. 1:08-cv-00392 LJO GSA					
(E.D. Cal.)					
(order signed Nov. 12, 2008).					
J & J Sports Productions, Inc.	Sammartino	0	6000	6000	0
v. Betancourt					
No. 3:08-cv-00937 JLS POR,					
2009 WL 3416431 (S.D. Cal.)					
(order signed Oct. 20, 2009).					
J & J Sports Productions, Inc.	Shubb	0	25000	25000	0
<i>v. Juarez</i> , No. 2:10-1071 WBS					
KJN (TEMP), 2011 WL 221634	L I				
(E.D. Cal.)					
(order signed Feb. 10, 2011).					
J & J Sports Productions, Inc.	Wanger	2200	1000	3200	0
v. Lemus					
No. 1:10-cv-02085 OWW JLT,					
2011 WL 703606 (E.D. Cal.)					
(order signed Feb. 17, 2011).					
J & J Sports Productions, Inc.	Wanger	0	30000	30000	0
v. Lopez					
No. 1:08-cv-00388-OWW-					
TAG, 2008 WL 3889749 (E.D.					
Cal.)					
(order signed Aug. 19, 2008).					
J & J Sports Productions, Inc.	Whelan	800	1000	1800	0
v. Hernandezsilva					
No. 10-CV-0389 W(WVG),					
2010 WL 3702593 (S.D. Cal.)					
(order signed Sept. 15, 2010).					