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28UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

J & J SPORTS PRODUCTIONS, INC.,

No. C 10-5122 PJH

Plaintiff,

v.

**ORDER GRANTING MOTION FOR
DEFAULT JUDGMENT**

CARMINA BASTO, et al.,

Defendants.

Before the court is the motion of plaintiff J & J Sports Productions, Inc. for default judgment against defendants Carmina Basto, individually and doing business as Manila Garden Restaurant, and J & C Basto Co., Inc., an unknown business entity doing business as Manila Garden Restaurant. Plaintiff alleges that defendants unlawfully intercepted and broadcasted a boxing match, for which plaintiff owned the commercial exhibition rights, in violation of 47 U.S.C. §§ 605(a) and 553. Plaintiff now moves for default judgment against defendants.

BACKGROUND

Plaintiff J & J Sports Productions, Inc. contracted for the exclusive nationwide commercial distribution rights to broadcast the "Firepower": Manny Pacquiao v. Miguel Cotto Championship Fight Program telecast nationwide on Saturday, November 14, 2009 (the "Program"). Complaint ¶ 10. The Program included the main event (between Manny Pacquiao and Miguel Cotto), under-card (preliminary) bouts and fight commentary. *Id.*

Plaintiff thereafter entered into sublicensing agreements with commercial entities throughout the United States by which plaintiff granted limited public exhibition rights to

1 these entities within their respective establishments (e.g., hotels, racetracks, casinos,
2 taverns, bars, restaurants, social clubs, etc.). Id. ¶ 11.

3 Defendants Basto and J & C Basto Co., Inc. are each an owner, operator, and/or
4 individual with control over Manila Garden Restaurant, a commercial establishment doing
5 business in Hayward, California. Id. ¶¶ 7-8. Plaintiff alleges that defendants and/or their
6 agents or employees illegally intercepted and/or exhibited the Program for commercial
7 advantage and/or private financial gain. Id. ¶¶ 13-14. On November 14, 2009, an
8 investigator hired by plaintiff visited Manila Garden Restaurant and observed the unlawful
9 exhibition of the Program there on a 42-inch LCD television. Doc. nos. 13-3 at 2
10 (Declaration of Affiant) and 13-5 ¶ 7 (Plaintiff's Affidavit) (representing that the part of the
11 program observed by the investigator was the under-card bout between Santos and
12 Foreman). The investigator counted 79 and 87 people at defendants' establishment at two
13 different times and approximated the capacity at 150 people. Doc. no. 13-3 at 2. The
14 license fee to exhibit the Program in a commercial establishment of that size would have
15 been \$4,200.00. Doc. no. 13-5 ¶ 8.

16 On November 12, 2010, plaintiff filed this action against defendants Carmina Basto,
17 individually and d/b/a Manila Garden Restaurant; and J & C Basto Co., Inc., an unknown
18 business entity d/b/a Manila Garden Restaurant. The complaint asserts four causes of
19 action: violation of the Federal Communications Act of 1934, 47 U.S.C. § 605; violation of
20 the Cable Television Consumer Protection and Competition Act of 1992, 47 U.S.C. § 553;
21 common-law claim of conversion; and violation of California Business and Professions
22 Code section 17200. The complaint seeks statutory and enhanced damages of \$110,000
23 for violation of section 605 and \$60,000 for violation of section 553, compensatory
24 damages for conversion, and attorneys' fees and costs.

25 Plaintiff served the complaint on defendants on January 5, 2011. Doc. nos. 4 and 5.
26 Neither defendant filed an answer or any other responsive pleading to plaintiff's duly served
27 complaint. Accordingly, on February 3, 2011, upon plaintiff's request, the clerk of the court
28 entered default against defendants in this action. Doc. no. 7. On March 1, 2011, plaintiff

1 filed the instant motion for default judgment and served the notice of motion on defendants
2 by mail. Doc. no. 13. Neither defendant has filed an opposition to the motion for default
3 judgment.

4 Plaintiff's motion seeks the maximum statutory damages and enhanced damages for
5 willful violations of 47 U.S.C. § 605. Doc. no. 13-1 at 11, 14-15. See 47 U.S.C.
6 §§ 605(e)(3)(C)(i)(II) and 605(e)(3)(C)(ii). Plaintiff also seeks damages for conversion in
7 the amount of \$4,200, equivalent to the sublicense fee that defendants would have been
8 required to pay. Doc. no. 13-1 at 20.

9 The court referred the motion for default judgment for a report and recommendation,
10 which was issued on May 16, 2011. The court has reviewed the report and
11 recommendation and declines to adopt it. The court rules on the motion for default
12 judgment de novo as follows.

13 **DISCUSSION**

14 **I. Jurisdiction**

15 Before entering default judgment, a court must determine whether it has subject
16 matter jurisdiction over the action and personal jurisdiction over the defendant. In re Tuli,
17 172 F.3d 707, 712 (9th Cir. 1999).

18 **A. Subject Matter Jurisdiction**

19 The court has subject matter jurisdiction over this action because plaintiff's claims
20 arise under the Federal Communications Act of 1934, 47 U.S.C. § 605, and the Cable
21 Television Consumer Protection and Competition Act of 1992, 47 U.S.C. § 553.

22 **B. Personal Jurisdiction**

23 Defendants Basto and J & C Basto Co., Inc. own and operate a business known as
24 Manila Garden Restaurant in Hayward, California. Complaint ¶¶ 7-8. The court has
25 personal jurisdiction over defendants.

26 **II. Default Judgment**

27 Federal Rule of Civil Procedure 55(b)(2) authorizes the court to enter judgment
28 against a defendant against whom a default has been entered. Generally, default

1 judgments are disfavored because “[c]ases should be decided upon their merits whenever
2 reasonably possible.” Eitel v. McCool, 782 F.2d 1470, 1472 (9th Cir. 1986).

3 "The general rule of law is that upon default the factual allegations of the complaint,
4 except those relating to the amount of damages, will be taken as true." Geddes v. United
5 Financial Group, 559 F.2d 557, 560 (9th Cir. 1977) (citing Pope v. United States, 323 U.S.
6 1, 12 (1944)). In exercising its discretion to grant default judgment, the court may consider
7 the following factors: (1) the possibility of prejudice to the plaintiff; (2) the merits of plaintiff's
8 substantive claims; (3) the sufficiency of the complaint; (4) the sum of money at stake in the
9 action; (5) the possibility of a dispute concerning material facts; (6) whether the default was
10 due to excusable neglect; and (7) the strong policy underlying the Federal Rules of Civil
11 Procedure favoring decisions on the merits. Eitel, 782 F.2d at 1471-72. Upon entry of
12 default, the factual allegations of the complaint are taken as true, except for those relating
13 to damages. See Televideo Systems, Inc. v. Heidenthal, 826 F.2d 915, 917 (9th Cir.1987).

14 **A. Merits and Sufficiency of Complaint**

15 In its motion for default judgment, plaintiff seeks judgment only on its claims for
16 violation of 47 U.S.C. § 605(a) and conversion. The Federal Communications Act prohibits
17 the unauthorized interception of radio and satellite (rather than cable) transmissions. 47
18 U.S.C. § 605(a). Section 553(a) prohibits the unauthorized interception of cable signals.
19 47 U.S.C. § 553(a)(1). See J & J Sports Productions, Inc. v. Manzano, 2008 WL 4542962
20 *2 (N.D. Cal. September 29, 2008) (“A signal pirate violates section 553 if he intercepts a
21 cable signal, he violates section 605 if he intercepts a satellite broadcast.”). To state a
22 claim for conversion, the allegations must show “ownership or right to possession of
23 property, wrongful disposition of the property right and damages.” G.S. Rasmussen &
24 Associates, Inc. v. Kalitta Flying Service, Inc., 958 F.2d 896, 906 (9th Cir.1992).

25 With respect to the alleged section 605 violation, plaintiff was not able to ascertain
26 the precise means that defendants used to intercept the Program. Doc. no. 13-1 at 8. The
27 inspector noted that neither a cable box nor a satellite dish was visible. Doc. no. 13-3 at 2.
28 As another judge of this court has noted, if plaintiff wanted to prove that defendants

1 intercepted radio or satellite signals in violation of section 605(a), plaintiff “could have filed
2 a third party subpoena or requested an order for inspection.” J & J Sports Productions, Inc.
3 v. Ro, 2010 WL 668065 *3 (N.D. Cal. Feb. 19, 2010). Because neither a cable box nor
4 satellite dish was visible at defendants’ establishment, the court follows the reasoning of
5 other judges in this district who have entered judgment and awarded damages under
6 section 553 rather than section 605 based on the understanding that cable boxes are more
7 easily hidden than satellite dishes and more likely to be the source of transmission. J & J
8 Sports Productions, Inc. v. Juanillo, 2010 WL 5059539 *2 (N.D. Cal. Dec. 6, 2010); J & J
9 Sports Productions, Inc. v. Guzman, 2010 WL 4055934 *2 (N.D. Cal. Oct. 14, 2010).
10 Although plaintiff seeks liability pursuant to section 605 in its motion for default judgment,
11 the court determines that the allegations of the complaint are sufficient to establish
12 defendants’ liability under section 553(a)(1).

13 To satisfy the second and third Eitel factors, plaintiff’s substantive claims for violation
14 of section 553 and for conversion appear to have merit and the allegations of the complaint
15 are well-pleaded and sufficient to state those claims. The complaint alleges that plaintiff
16 had purchased exclusive distribution rights to the Program and that defendants intercepted
17 transmission of the Program without authorization. The allegations against defendants are
18 deemed admitted by virtue of defendants’ default and the court is not required to make
19 detailed findings of fact. See Fair Housing of Marin v. Combs, 285 F.3d 899, 906 (9th Cir.
20 2002).

21 **B. Remaining Eitel Factors**

22 The remaining Eitel factors, on balance, weigh in favor of granting default judgment.
23 First, if the motion for default judgment were denied, plaintiff would likely be without a
24 remedy. See Pepsico, Inc. v. Cal. Sec. Cans, 238 F. Supp. 2d 1172, 1177 (C.D. Cal.
25 2002). Second, because defendants did not file an answer or otherwise respond to the
26 complaint, there is little to suggest that there is a possibility of a dispute concerning material
27 facts. The factual issues whether defendants broadcast the Program without authorization
28 or sublicense from plaintiff are straightforward and easily ascertainable. Third, there is no

1 evidence in the record that would tend to show that defendants' default was due to
2 excusable neglect. Fourth, although policy favors judgment on the merits, should a
3 defendant fail to answer or appear, a decision on the merits is "impractical, if not
4 impossible." Elektra Entertainment Group, Inc. v. Crawford, 226 F.R.D. 388, 393 (C.D. Cal.
5 2005). This factor, though it weighs against a default judgment, does not preclude such a
6 judgment.

7 Finally, a large sum of money at stake would disfavor default judgment. Eitel, 782
8 F.2d at 1472. As discussed below, however, the court declines to award the full amount of
9 damages requested by plaintiff, \$114,200.00, and determines an amount of damages that
10 is not completely disproportionate or unreasonable. This factor therefore does not weigh
11 against default judgment.

12 Given defendants' failure to appear and the significant risk of prejudice to plaintiff by
13 unauthorized interception of closed-circuit broadcasts, the sufficiency of plaintiff's
14 complaint, the apparent merit of plaintiff's substantive claims, and the lack of disputed
15 issues of fact, the court determines that default judgment against Carmina Basto and J & C
16 Basto Co., Inc. is appropriate.

17 **C. Damages**

18 Plaintiff seeks the maximum statutory damages under section 605, which provides
19 that a court may award statutory damages of "not less than \$1,000 or more than \$10,000"
20 for a violation of section 605(a) and may award enhanced damages of up to \$100,000 if the
21 "violation was committed willfully and for purposes of direct or indirect commercial
22 advantage or private financial gain." 47 U.S.C. § 605(e)(3)(C)(i)(II), (e)(3)(C)(ii). As
23 discussed above, the court determines that the complaint supports liability under section
24 553, which provides for statutory damages of "not less than \$250 or more than \$10,000" for
25 a violation of section 553(a) and enhanced damages up to \$50,000 for a willful violation.
26 47 U.S.C. § 553(c)(3)(A)(ii), (B).

27 The court takes judicial notice of other cases identified by plaintiff in which these
28 same defendants were held liable for similar violations of commercial signal piracy. In J & J

1 Sports Prod. v. Basto, et al., C09-1023 MMC, the parties settled the action which the court
2 dismissed on January 29, 2010. In J & J Sports Prod. v. Basto, et al., C10-1803 SI, the
3 court entered default judgment against defendants in the amount of \$5,800.00 on February
4 14, 2011. In J & J Sports Prod. v. Basto, et al., C10-5455 CRB, the court entered default
5 against defendants and plaintiff has filed a motion for default judgment. Plaintiff has
6 demonstrated that defendants are not first-time offenders but have illegally intercepted
7 several different transmissions. Because the interception challenged in this action occurred
8 before dismissal or judgment was entered in the other lawsuits, plaintiff has not
9 demonstrated that the adverse outcome of its other enforcement actions have failed to
10 deter defendants from further illegal activity so as to warrant the maximum award of
11 damages.

12 Plaintiff's inspector's affidavit demonstrates that defendants did not require a cover
13 charge on the evening of the illegal interception and the number of patrons averaged 83.
14 Doc. no. 13-3 at 2. The court determines that statutory damages in the amount of \$5,000
15 for violation of section 553(a) are appropriate here to serve as a deterrent from future
16 piracy. The court further determines that plaintiff has demonstrated repeated and willful
17 conduct by defendants for purposes of commercial advantage to support enhanced
18 damages of \$2,000. See doc. no. 13-5 ¶¶ 9, 13.

19 Plaintiff also seeks \$4,200 in compensatory damages for conversion. Pursuant to
20 Cal. Civ. Code § 3336, defendants are liable for the value of the property at the time of the
21 conversion. Plaintiff has shown that the commercial sublicense fee for defendants to
22 broadcast the Program legally would have been \$4,200. Doc. no. 13-5 ¶ 8 and Ex. 1.
23 Accordingly, the court awards damages for conversion in the amount of \$4,200.

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CONCLUSION

For the foregoing reasons, the court GRANTS plaintiff's motion for default judgment against Carmina Basto and J & C Basto Co., Inc. The court awards \$11,200 in damages to plaintiff.

IT IS SO ORDERED.

Dated: June 6, 2011



PHYLLIS J. HAMILTON
United States District Judge