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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

J&J SPORTS PRODUCTIONS,
INC.,

Plaintiff,

v.

SALLY AND HENRY’S
DOGHOUSE BAR & GRILL LLC,

Defendant.

Case No. 13-cv-2924-BAS-KSC
**ORDER GRANTING PLAINTIFF
AND COUNTER-DEFENDANT’S
MOTION TO DISMISS
[ECF No. 109]**

SALLY AND HENRY’S
DOGHOUSE BAR & GRILL LLC,

Counterclaimant,

v.

J&J SPORTS PRODUCTIONS,
INC.,

Counter-Defendant.

I. BACKGROUND

J&J Sports Productions, Inc. (“J&J Sports”) brings this case against Sally and Henry’s Doghouse, LLC, d/b/a Sally and Henry’s Doghouse Bar and Grill (“Doghouse”), claiming Doghouse displayed the “Manny Pacquiao v. Juan Manuel

1 Marquez IV” welterweight fight program (“the fight”) without authorization at its
2 Bar and Grill on December 8, 2012. J&J Sports brings four causes of action against
3 Doghouse for: (1) a violation of 47 U.S.C. §605 (unauthorized publication or use of
4 communications), (2) a violation of 47 U.S.C. §553 (unauthorized reception of cable
5 services), (3) conversion, and (4) a violation of California Business & Professions
6 Code §17200 *et seq.*

7 Doghouse answered denying most of the allegations in the Complaint and, in
8 addition, filed several affirmative defenses. In the second affirmative defense,
9 Doghouse alleges that broadcasting the fight was authorized by Directv, “an
10 authorized channel of transmission and reception under Section 605.” (ECF No. 108
11 at 11-12.) In the seventh affirmative defense, Doghouse alleges that “Section 605 is
12 unconstitutionally vague and ambiguous” because “[i]ts plain language does not
13 invite or allow for the phrase ‘authorized channel of transmission or reception’ to be
14 defined, limited or restricted by the undisclosed terms of a private contract between
15 private parties.” (*Id.* at 14) Additionally, in the seventh affirmative defense,
16 Doghouse alleges that “[i]nterpreting Section 605 to allow for liability where the
17 signal was received from an authorized channel of transmission or reception and yet
18 cause a violation of section 605 and impose liability would make it impossible for a
19 reasonable person to know when and under what circumstances the statute might be
20 violated and when it would not.” (*Id.* at 14-15.) “Accordingly, Section 605 should
21 provide a safe harbor to [Doghouse] as the intended addressee for its reception of
22 the encrypted signal Program through Directv, an authorized channel of
23 transmission or reception, or Section 605 be declared unconstitutionally void for
24 vagueness.” (*Id.* at 15.)

25 Doghouse has also filed a Third Amended Counter-claim (“TACC”) for one
26 count of declarative relief. (ECF No. 108.) In the one count, Doghouse, in essence,
27 asks this Court to declare that the J&J Sports’ complaint is unfounded (TACC ¶30)
28 and that sections 605 and 553 are unconstitutional as applied to Doghouse. (TACC

¶11, 30). Furthermore, Doghouse asks this court to find that a “safe harbor” provision in section 553 “exempt[s] a subscriber from liability under Section [sic] for display of a program received from Directv’s multi-step transmission process . . . regardless of the license rights conveyed to Directv.” (TACC ¶26) Finally, Doghouse contends that “only one of the Sections [605 and 553] can be applicable to Directv’s multi-step transmission process as applied to the Doghouse, and [J&J Sports] contends [in its complaint] that both sections may be applicable.” (TACC ¶32.)

The Court finds this motion suitable for determination on the papers submitted and without oral argument. *See* Civ. L.R. 7.1(d)(1). Because the Counterclaim for Declarative Relief is duplicative of the pleadings already filed by Doghouse (answer and affirmative defenses), the Court **GRANTS** J&J Sports’ Motion to Dismiss (ECF No. 109).

II. DISCUSSION

As a preliminary matter, Doghouse has failed to comply with Civil Local Rule 15.1(c) which requires that “[a]ny amended pleading filed after the granting of a motion to dismiss or motion to strike with leave to amend, must be accompanied by a version of that pleading that shows – through redlining, underlining, strikeouts, or other similarly effective typographic methods – how that pleading differs from the previously dismissed pleading.” Civ. L. R. 15.1(c). Nonetheless, the Court will address the underlying Motion to Dismiss.

As stated in the last Order dismissing Doghouse’s Second Amended Counterclaim (ECF No. 104), “[f]ederal courts do not have a duty to grant declaratory judgment; therefore, it is within a district court’s discretion to dismiss an action for declaratory judgment.” *Leadsinger, Inc. v. BMG Music Publ’g*, 512 F.3d 522, 533 (9th Cir. 2008) (citation omitted); *McGraw-Edison Co. v. Preformed Line Products Co.*, 362 F.2d 339, 342 (9th Cir. 1966) (“[T]he question of whether a district court shall exercise jurisdiction in a declaratory judgment action rests in the sound

1 discretion of that court.”) The purpose of a declaratory judgment action is to allow
2 an individual to request an early adjudication without having to wait until his
3 adversary decides to bring suit. *Id.* Declaratory relief may be refused “where it is
4 being sought merely to determine issues which are involved in a case already
5 pending and can be properly disposed of therein.” *Id.* at 343. The question is
6 whether declaratory relief would serve some useful purpose in clarifying and
7 settling relations between the parties. *Id.* Avoiding multiplicity of litigation is
8 always an important factor for the court to consider. *Id.*

9 Using a declaratory relief cause of action “to anticipate an affirmative defense
10 is not ordinarily proper.” *Veoh Networks, Inc. v. UMG Recordings, Inc.*, 522
11 F.Supp.2d 1265, 1271 (S.D. Cal. 2007). A court may dismiss counterclaims if they
12 are just mirror images of the claims in the complaint or redundant of the affirmative
13 defenses. *Apple Inc. v. Samsung Elec. Co.*, 11-cv-1846-LHK, 2011 WL 4948567, at
14 *9-10 (N.D. Cal. Oct. 18, 2011).

15 Although the Federal Rules of Civil Procedure state leave to amend “shall be
16 freely given when justice so requires,” repeated failure to cure deficiencies by
17 amendments previously allowed and futility of amendment are grounds that support
18 denying leave to amend. *Leadsinger*, 512 F.3d at 532 (quoting Fed. R. Civ. P. and
19 citing *Foman v. Davis*, 371 U.S. 178, 182 (1962)).

20 This court exercises its discretion and dismisses Doghouse’s action for
21 declaratory judgment. The TACC merely asks this Court to determine issues already
22 raised in J&J Sports’ complaint and Doghouse’s affirmative defenses. Hence, ruling
23 on the declaratory relief complaint would not serve any additional purpose in
24 clarifying or settling relations between the parties. Because further amendment
25 would be futile and because this is Doghouse’s fourth attempt to allege an adequate
26 counter-claim, the TACC is dismissed without leave to amend.

27 **III. CONCLUSION**


28 For the foregoing reasons, the Court **GRANTS WITH PREJUDICE** J&J

1 Sports' Motion to Dismiss the TACC (ECF No. 109).

2 **IT IS SO ORDERED.**

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4 **DATED: April 4, 2016**


Hon. Cynthia Bashant
United States District Judge

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