UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 2:20-CV-14051-ROSENBERG/MAYNARD

ZUFFA, LLC d/b/a Ultimate Fighting Championship,

Plaintiff,

v.

MYLINH NGUYEN, MLN LLC d/b/a MISS SAIGON RESTAURANT,

Defendants.
_____/

ORDER GRANTING IN PART AND DENYING IN PART
PLAINTIFF'S MOTION FOR DEFAULT JUDGMENT

THIS CAUSE is before the Court on Plaintiff Zuffa, LLC d/b/a Ultimate Fighting Championship's Motion for Default Judgment ("Motion"). DE 23. Plaintiff served Defendants MLN LLC d/b/a Miss Saigon Restaurant and Mylinh Nguyen with the Complaint on February 24, 2020. DE 5. Defendants have failed to respond or otherwise appear in this action.[1]

A Clerk's Default was entered against Defendants on April 14, 2020. DE 16, 18. Plaintiff subsequently filed the instant Motion. The Court has carefully considered the Motion and the record and is otherwise fully advised in the premises. For the following reasons, the Motion for Default Judgment is granted in part and denied in part.

[1] Magistrate Judge Shaniek M. Maynard additionally set a telephonic status conference to occur on April 7, 2020. DE 10. The Court mailed notice of the status conference to each of the addresses on file for Defendants, and neither Defendant joined the status conference. DE 14. Further, counsel for Plaintiff represented at the status conference that he was not able to contact either Defendant. *Id.*

I. FACTUAL ALLEGATIONS

Plaintiff owns the broadcast and distribution rights to Ultimate Fighting Championship ("UFC"), a mixed martial arts event. The UFC 239 Broadcast aired on July 6, 2019 and was transmitted by encrypted satellite signal and then retransmitted to cable systems and satellite companies (the "Broadcast"). ¶¶ 17, 18.[2] For a licensing fee, Plaintiff allowed businesses to exhibit the Broadcast to its patrons by authorizing and enabling them to unscramble and receive the satellite signal. ¶ 19. The Broadcast was also available on a pay-per-view basis for non-commercial, private viewing. ¶ 20. The Broadcast's terms of service provide that pay-per-view access is limited to non-commercial, personal use. ¶ 21.

Defendant MLN LLC d/b/a Miss Saigon Restaurant (the "Restaurant") is located in Vero Beach, Florida. ¶¶ 8, 9. Mylinh Nguyen is the officer, director, shareholder, and/or principal of MLN LLC and has supervisory capacity and control over the activities occurring at the Restaurant. *Id.* The Restaurant exhibited the Broadcast to its patrons on July 6, 2019 by ordering it on a pay-per-view basis as a residential user or by some other method of signal interception. ¶ 23. Potential methods of interception include redirecting a coaxial cable from an adjacent property, improperly registering a business as a residence with a cable or satellite provider, or taking a cable or satellite box from a residence into a business, among other emergent methods of interception. ¶ 24. Plaintiff cannot determine which method the Restaurant used to exhibit the Broadcast but alleges that the Restaurant knowingly exhibited the Broadcast without authorization and for the purpose of commercial advantage. ¶¶ 24, 31.

[2] All paragraph citations in this section are to the Complaint (DE 1).

II. LEGAL STANDARD

This Court is authorized to enter default final judgment against a party who has failed to respond to a complaint. *See* Fed. R. Civ. P. 55(b)(2). By defaulting, a defendant admits all of the well-pled factual allegations in the complaint. *Eagle Hosp. Physicians, LLC v. SRG Consulting, Inc.*, 561 F.3d 1298, 1307 (11th Cir. 2009). The defendant is not, however, held to have admitted facts that are not well-pled or conclusions of law. *Surtain v. Hamlin Terrace Found.*, 789 F.3d 1239, 1245 (11th Cir. 2015). Entry of default judgment is warranted only when there is a sufficient basis in the pleadings for judgment to be entered. *Id.* This standard is akin to that necessary to survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6) for failure to state a claim. *Id.* (explaining that "a motion for default judgment is like a reverse motion to dismiss for failure to state a claim"); *see also Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1370 n.41 (11th Cir. 1997) (stating that "a default judgment cannot stand on a complaint that fails to state a claim").

III. ANALYSIS

Plaintiff sues Defendants for the unauthorized interception of a radio transmission and cable service under the Communications Act of 1934, 47 U.S.C. §§ 553, 605, and for copyright infringement under 17 U.S.C. § 501. Plaintiff seeks a total of $40,000 in damages for the unauthorized interception, $40,000 in damages for copyright infringement, $612 in attorney's fees, and $800 in costs.

a. Communications Act

Plaintiff sues under two provisions of the Communications Act of 1934, as amended. Under 47 U.S.C. § 605(a), "[n]o person not being entitled thereto shall receive or assist in receiving any interstate or foreign 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." (emphasis added). And under section 553(a), it is unlawful to "intercept or receive or assist in intercepting or receiving any communications service offered over a **cable system**, unless specifically authorized to do so by a cable operator or as may otherwise be specifically authorized by law." (emphasis added).

There is a circuit split on the question of whether Defendants can legally be liable under both sections. The Second Circuit has held that liability under both sections is possible when a satellite signal is subsequently retransmitted by cable. *See Int'l Cablevision, Inc. v. Sykes*, 75 F.3d 123, 132 (2d Cir. 1996). However, other circuits have taken the opposite view. *See J&J Sports Prods., Inc. v. Mandell Family Ventures, LLC*, 751 F.3d 346, 351 (5th Cir. 2014) ("We now join the majority of circuits in holding that section 605 does not encompass . . . the receipt or interception of communications by wire from a cable system."); *TKR Cable Co. v. Cable City Corp.*, 267 F.3d 196, 207 (3d Cir. 2001) ("Once a satellite transmission reaches a cable system's wire distribution phase, it is subject to section 553 and is no longer within the purview of section 605."); *United States v. Norris*, 88 F.3d 462, 469 (7th Cir. 1996) (holding that the unlawful interception of cable television programming "must be prosecuted under section 553(a) and not section 605"). The Eleventh Circuit has not addressed the issue.

The Court finds the majority view more persuasive and concludes that section 605 does not cover the interception of a cable transmission. Accordingly, the Court construes Counts I and II of the Complaint as alternative theories of liability. *See* Fed. R. Civ. P. 8(d)(3) ("A party may state as many claims or defenses as it has, regardless of consistency.").

To establish liability under section 605(a), Plaintiff must show "(1) interception of a satellite transmission; (2) lack of authorization; and (3) publication to any person." *J&J Sports Prods., Inc. v. Brady*, 672 Fed. App'x 798, 801 (10th Cir. 2016) (citing *Cal. Satellite Sys. v. Seimon*, 767 F.2d 1364, 1366 (9th Cir. 1985)).

Here, the Complaint alleges that the Broadcast was transmitted via satellite, cable, and the internet, and that Restaurant "intercepted, received and/or de-scrambled Plaintiff's satellite signal." DE 1 at 5 ¶ 22. Plaintiff owned the rights to the Broadcast, and Plaintiff submitted a list of commercial venues in Florida that had purchased a license to exhibit the Broadcast. DE 22-3 at 8–19. The Restaurant did not obtain a license. Finally, Plaintiff submitted a video recording captured by an auditor it hired to monitor unauthorized exhibitions of the Broadcast. *See* link at DE 25. The recording depicts a post made on Defendants' Facebook page on July 6, showing "Miss Saigon Restaurant was live" above a video clip with the caption "UFC PPV." In the clip, a handful of patrons in the Restaurant's dining room are shown watching a large television displaying what appears to be a live event.

It is possible that Defendants exhibited the Broadcast in a manner that, although unauthorized, did not amount to an "interception" within the meaning of section 605(a). However, one of the consequences of Defendants defaulting in this action is admitting the allegations of the Complaint and losing the opportunity to tell their side of the story. And as Plaintiff notes, learning the exact means used to access the Broadcast would require discovery, which has been rendered unavailable due to the default. The admitted allegations of the Complaint and the proffered video establish the Restaurant's liability under section 605(a).

The Court further finds that the Restaurant's violation of section 605(a) was willful. *See Cable/Home Commc'n Corp. v. Network Prods., Inc.*, 902 F.2d 829, 851 (11th Cir. 1990) (defining willfulness under section 605(a) as "disregard for the governing statute and an indifference to its requirements") (citation omitted). The Complaint alleges that the Restaurant intercepted the Broadcast "willfully and for purposes of direct or indirect commercial advantage or private financial gain." DE 1 at 5 ¶ 22. The proffered video additionally supports a finding of willfulness, as the Restaurant posted about the "UFC PPV" match on Facebook Live, presumably to advertise to potential customers that the Broadcast was being exhibited. This conduct suggests that the interception and exhibition of the Broadcast was willful rather than inadvertent.

Finally, the Court finds that joint and several liability is appropriate under a theory of vicarious liability. To establish vicarious liability under section 605(a), the plaintiff must show that "an individual had the right and ability to supervise the wrongful conduct and had a direct financial interest in the activities undertaken." *Joe Hand Promotions, Inc. v. Goldshtein*, No. 18-cv-60522, 2018 WL 7080029, at *3 (S.D. Fla. June 18, 2018) (citation omitted). Plaintiff has done so by alleging that Ms. Nguyen was an "officer, director, shareholder and/or principal" of the Restaurant, had "supervisory capacity and control over the activities occurring" at the Restaurant, and "received a financial benefit from the operations of" the Restaurant. DE 1 at 3 ¶¶ 8–10. These allegations, together with the video evidence that the exhibition was advertised on the Restaurant's Facebook page, establish a financial benefit from the violation.

b. Copyright Act Liability

To make out a claim of copyright infringement under 17 U.S.C. § 501(a), Plaintiff must show that it owned a copyright and that Defendants violated an exclusive right of the copyright

owner. *See* 17 U.S.C. § 106(5) ("[T]he owner of copyright under this title has the exclusive rights to do and authorize . . . display[ing] the copyrighted work publicly."). Plaintiff is the copyright owner of the Broadcast, DE 1 at 9 ¶ 37, and has established that the Restaurant exhibited the copyright without authorization. Further, courts generally apply an identical standard for vicarious liability as to copyright infringement as for a violation of 47 U.S.C. § 605(a). *See, e.g., Joe Hand Promotions, Inc. v. Creative Entm't, LLC*, 978 F. Supp. 2d 1236, 1241 (M.D. Fla. 2013). Finally, Plaintiff has established the Restaurant's willful copyright violation and vicarious liability as to Ms. Nguyen for the same reasons as discussed above.

c. Damages

The Court has "wide latitude" in awarding statutory damages. *Cable/Home*, 902 F.2d at 852. An appropriate statutory award is one that "deters but does not destroy." *Kingvision Pay-Per-View Ltd. v. Lake Alice Bar*, 168 F.3d 347, 350 (9th Cir. 1999). Plaintiff seeks $10,000 in statutory damages and $30,000 in enhanced damages under the Communications Act and the same amounts for copyright infringement, for a total of $80,000. The Court concludes that such an award would be excessive. Plaintiff appears to base the $10,000 figure on a methodology that involves assessing $50 in statutory damages per patron. However, there is no evidentiary support for Plaintiff's contention that 200 patrons were in the Restaurant at the time of the Broadcast.[3]

[3] Plaintiff asserts that it "has proven on uncontroverted evidence based on the affidavit of investigator [sic] that approximately 200 patrons were in the establishment at the time of the violation." DE 23-2 at 18.

The affidavit cited says no such thing. Attached as Exhibit C to Plaintiff's Affidavit, the investigator's affidavit states only that he was engaged by Plaintiff to monitor unauthorized exhibitions of the Broadcast, that he identified the live exhibition of the Broadcast "by observing it on Facebook and posted by Miss Saigon Restaurant online via Facebook," and that he subsequently verified the identity of the Restaurant "by review of public records, official filings and visual premise verification and attach them as part of this Affidavit."[3] DE 23-3 at 20. The investigator does not state that he was physically in the Restaurant at the time of the Broadcast or that he observed any particular number of patrons on the Facebook Live video.

The Court exercises its discretion to assess statutory damages for each count equal to the licensing fee the Restaurant would have paid to legally exhibit the Broadcast. *See, e.g., Joe Hand Promotions, Inc. v. McBroom*, No. 5:09-cv-276, 2009 WL 5031580, at *4 (M.D. Ga. Dec. 15, 2009) (awarding statutory damages equal to the license fee). The Complaint alleges that the Restaurant had a capacity for 51–100 people. DE 1 at 3 ¶ 13. Based on Plaintiff's fee scale, which was submitted with Plaintiff's Motion, the Restaurant would have had to pay $1,095 to exhibit the Broadcast (assuming an occupancy of 76–100). This amounts to $2,190 in statutory damages for the two counts.

In light of its finding that the copyright and Communications Act violations were willful, the Court will award enhanced damages. 17 U.S.C. § 504(c)(2); 47 U.S.C. § 605(e)(3)(C)(ii). Courts sometimes award enhanced damages for willful violations as a multiple of the statutory damage award, typically treble damages, although this approach is not compelled by statute. *See McBroom*, 2009 WL 5031580, at *5 (awarding treble damages). Other times, courts award a flat fee. *See Joe Hand Promotions, Inc. v. Maupin*, 2:15-cv-06355, 2018 WL 2417840, at *9 (E.D.N.Y. May 25, 2018) (awarding a flat amount as statutory damages and doubling the amount for willful violations).

Several nonexclusive factors bear on enhanced damages, including "(1) the number of violations; (2) defendant's unlawful monetary gains; (3) plaintiff's significant actual damages; (4) whether defendant advertised for the event; and (5) whether defendant collected a cover charge."

The video submitted appears to show approximately six patrons in the dining room, although this portion of the video may have been taken after the peak crowd. Nonetheless, after review of the video the Court is doubtful that 200 patrons could comfortably fit in the dining room within view of the television. There is no evidence to support an award of $10,000 using Plaintiff's preferred methodology.

McBroom, 2009 WL 5031580, at *5 (citation omitted). Of these factors, only the fourth weighs in favor of enhanced damages here—the Restaurant posted about the Broadcast on its Facebook page. On the other hand, this was a one-time violation, plaintiff's actual damages are remedied by the statutory award, and there is no evidence regarding the Restaurant's unlawful gains or whether there was a cover charge.

Ultimately, enhanced damages should be considered "with an eye toward imposing an award that is substantial enough to discourage future lawless conduct, but not so severe that it seriously impairs the viability of the defendant's business." *Id.* (citation omitted). It is impossible to ignore the impact of the Covid-19 pandemic in applying this standard. Restaurants remain in significant economic distress,[4] with restrictions on indoor dining capacity still in effect.[5] An award that might otherwise amount to a strong deterrent could be catastrophic. Accordingly, the Court will award $1,000 in enhanced damages, for total damages of $3,190.

d. Attorney's Fees & Costs

Finally, Plaintiff seeks $800 in costs and $612 in attorney's fees pursuant to 47 U.S.C. § 605(e)(3)(B)(iii) (requiring courts to "direct the recover of full costs, including awarding reasonable attorneys' fees to an aggrieved party who prevails"). To calculate reasonable attorney's fees, a court multiplies the number of hours reasonably expended on the litigation by a reasonable hourly rate. *Hollis v. Roberts*, 984 F.2d 1159, 1161 (11th Cir. 1993). Plaintiff's request is based on 2.27 hours of work at a rate of $270 per hour. The Court has considered counsel's experience and the rates deemed reasonable in analogous cases and concludes that $270 is a reasonable hourly

[4] *Restaurant Sales Hit a Pandemic High in June, But Were Far Below Normal*, NAT'L REST. ASS'N (July 16, 2020), https://restaurant.org/articles/news/restaurant-sales-hit-a-pandemic-high-in-june (noting that "[t]he total shortfall in restaurant and foodservice sales reached an estimated $145 billion during the first four months of the pandemic").
[5] *See* Fla. Exec. Order No. 20-139 (June 3, 2020).

rate. The Court further finds that 2.27 hours is a reasonable amount of time to spend on a case of this nature. Finally, the Court directs the recovery of $800 in costs, which includes $400 in filing fees and $400 for private service of process.[6]

IV. CONCLUSION

Based on the foregoing, it is **ORDERED AND ADJUDGED**:

1. Plaintiff Zuffa, LLC d/b/a Ultimate Fighting Championship's Motion for Default Judgment [DE 23] is **GRANTED IN PART AND DENIED IN PART**.

2. The Court finds Defendant MLN LLC d/b/a Miss Saigon Restaurant liable under 47 U.S.C. §605(a) and 17 U.S.C. § 504(a).

3. Defendants MLN LLC d/b/a Miss Saigon Restaurant and Mylinh Nguyen are liable to Plaintiff in the amount of **$4,602**, jointly and severally.

4. Plaintiff shall promptly submit a revised proposed Final Judgment consistent with this Order in Word format to rosenberg@flsd.uscourts.gov.

DONE and ORDERED in Chambers, West Palm Beach, Florida, this 27th day of July, 2020.

ROBIN L. ROSENBERG
UNITED STATES DISTRICT JUDGE

Copies furnished to Counsel of Record

[6] Courts have held that the term "full costs" as used in section 605 includes a broader category of costs than are generally taxable in civil cases pursuant to 28 U.S.C. § 1920. *See, e.g., Joe Hand Promotions, Inc. v. SNP Hookah Lounge & Grill LLC*, No. 4:18-01666, 2019 WL 3500854, at *5 (S.D. Tex. July 31, 2019). Accordingly, the Court will award the $400 service fees even though a lesser amount would be compensable under 28 U.S.C. § 1920. *EEOC v. W&O, Inc.*, 213 F.3d 600, 624 (11th Cir. 2000) (holding that private service fees are compensable under section 1920 but should not exceed the marshal's fee); *see also* 28 C.F.R. § 0.114(a)(3) (setting rate of $65 per hour for each item served by Marshals).