

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division**

DIRECTV, INC.,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 3:03CV355
)	
TONY AMATO,)	
)	
Defendant.)	

**PLAINTIFF’S MEMORANDUM IN
OPPOSITION TO DEFENDANT’S MOTION TO DISMISS**

Plaintiff DIRECTV, Inc. (“DIRECTV”) respectfully submits the following memorandum in opposition to the Motion to Dismiss filed by Defendant Tony Amato (“Defendant”).

I. SUMMARY OF THE ARGUMENT

Defendant has moved for dismissal of Count Three of DIRECTV’s Complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). Defendant’s argument rests on the faulty assertion that no private cause of action exists under 18 U.S.C. § 2512.

18 U.S.C. § 2520, however, specifically provides for a civil cause of action for violations of the Wiretap Act (18 U.S.C. §§ 2510-2521). Indeed, Congress confirmed the right to a private cause of action under all sections of the Wiretap Act with its 1986 amendments. With the amendments, § 2520 authorizes claims by plaintiffs whose electronic communications have been intercepted, disclosed or used, against those who “engaged” in any violation of the Wiretap Act, including § 2512.

Furthermore, the Complaint contains the specific allegations against the Defendant that are required to support a civil cause of action under § 2512. Specifically, DIRECTV has alleged that Defendant purchased and possessed a device that is used for the interception of DIRECTV's satellite broadcasts and that the Defendant intentionally intercepted or endeavored to intercept DIRECTV's satellite transmission of television programming. *See* Complaint, ¶¶ 9, 17, 21 and 23.

For these reasons, the Motion to Dismiss should be denied.

II. STANDARD APPLICABLE TO A RULE 12(b)(6) MOTION TO DISMISS

“Federal ‘notice’ pleading standards require that the complaint be read liberally in favor of the plaintiff.” *Anderson v. Foundation for Advancement, Educ. & Empl. of Am. Indians*, 155 F.3d 500, 505 (4th Cir. 1998). Dismissal of a complaint for failure to state a claim is only appropriate in a limited number of cases where, construing the allegations in the light most favorable to the plaintiff and assuming the facts alleged to be true, it is clear as a matter of law that no relief could be granted. *See Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984); *Adams v. Bain*, 697 F.2d 1213, 1216 (4th Cir. 1982). A case “should not be dismissed unless it appears to a certainty that the plaintiff can prove no facts in support of his claims which would entitle him to relief.” *Lane v. David P. Jacobson & Co.*, 880 F. Supp. 1091, 1095 (E.D. Va. 1995). Rule 12(b)(6) motions are “granted sparingly and with caution in order to make certain that plaintiff is not improperly denied a right to have his claim adjudicated on the merits.” *Concerned Citizens v. Hubbard*, 84 F. Supp. 2d 668, 669-70 (D. Md. 2000) (quoting 5A Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure*, Civil 2d § 1349, at 192-93

(1990)). Application of this standard requires that Defendant's Motion to Dismiss be denied and the case be permitted to proceed for resolution on its merits.

III. ARGUMENT

DIRECTV alleges in its Third Claim that Defendant has "possessed and used" Pirate Access Devices that are primarily useful for the purpose of surreptitious interception of electronic communications, in violation of 18 U.S.C. § 2512. *See* Complaint ¶¶ 21 & 22. Defendant contends that § 2512 does not directly nor indirectly provide for a civil cause of action. Contrary to Defendants assertion, 18 U.S.C. § 2520 expressly confers a private right of action to sue under § 2512.

Section 2512 is contained in Chapter 119 of the federal criminal statutes, entitled Wire and Electronic Communications Interception and Interception of Oral Communications (18 U.S.C. §§ 2510-2521) ("Wiretap Act"). Section 2520 of Chapter 119, 18 U.S.C. § 2520, provides, in relevant part, that "any person whose wire, oral, or electronic communication is intercepted, disclosed or intentionally used in violation of *this chapter may in a civil action recover from the person or entity . . . which engaged in that violation* such relief as may be appropriate." (emphasis added). The civil cause of action provided in § 2520 is not confined to any particular provision of the Wiretap Act. On the contrary, the statute specifically refers to violations of "this chapter."

The 1986 amendments to the Wiretap Act, The Electronic Communication Privacy Act of 1986, expanded the Wiretap Act's reach to encompass electronic communication as well as wire and oral. Following this amendment, courts have recognized that satellite television transmissions are electronic communications and that the sale of illegally modified satellite television descramblers is a violation of the chapter.

See United States v. McNutt, 908 F.2d 561 (10th Cir. 1990). The only question, therefore, is whether a plaintiff may bring a civil action against a user and possessor of devices under 18 U.S.C. §§ 2511 and 2512, or whether such individuals can only be pursued criminally.

Four courts that have considered this specific question after the 1986 amendments to the Wiretap Act answered in the affirmative, denying defendants' Rule 12(b)(6) motions to dismiss. *See Oceanic Cablevision, Inc. v. M.D. Elec.*, 771 F. Supp. 1019 (D. Neb. 1991); *DIRECTV, Inc. v. EQ Stuff, Inc.*, 207 F. Supp. 1077 (C.D. CA 2002); *DIRECTV, Inc. v. Calamanco*, No. C 02-4102-MWB (N.D. Iowa Jan. 21, 2003) (Attachment 1); and *DIRECTV, Inc. v. Garcia*, Case No. 03-20452-CIV-LENARD/SIMONTON (S.D. Fla. May 21, 2003) (Attachment 2).

In *Oceanic Cablevision*, plaintiff, a cable television provider, sued defendants under § 2512 for selling equipment used to gain unauthorized access to plaintiff's programming. 771 F. Supp. at 1022. Defendants moved to dismiss on grounds that there is no private right of action under § 2512. *Id.* at 1026. The court disagreed, holding that § 2520 "confers a private cause of action upon persons when the action is brought against parties that have violated the provisions of §§ 2510-2521." *Id.* at 1027. The court in *E.Q. Stuff* relied upon § 2520 and *Oceanic Cablevision* to conclude that DIRECTV could bring a private cause of action for violations of § 2512. 207 F. Supp. at 1084. Most recently, the *Calamanco* and *Garcia* courts relied upon both *Oceanic Cablevision* and *E.Q. Stuff* in holding that DIRECTV may assert a private cause of action for violations of § 2512. *See Calamanco*, No. C 02-4102-MWB (N.D. Iowa Jan. 21, 2003) ("The court finds that, as DIRECTV asserts, 18 U.S.C. § 2520 authorizes a private cause of action for

violations of 18 U.S.C. § 2512 . . .”); *Garcia*, Case No. 03-20452-CIV-LENARD/SIMONTON (S.D. Fla. May 21, 2003) (“Based on the plain language of 18 U.S.C. § 2520, the Court concludes that Plaintiff may assert a private cause of action for violations of 18 U.S.C. §§ 2511 & 2512.”).

Defendant relies upon the decision in *Flowers v. Tandy Corp.*, 773 F.2d 585 (4th Cir. 1985) where the Fourth Circuit held that there was no private right of action under §2512. This decision, however, was decided under an earlier version of § 2520, which has no application here. Prior to the 1986 amendment, § 2520 provided that:

Any person whose wire and oral communication is intercepted, disclosed or used in violation of this chapter shall (1) have a civil cause of action against any person who intercepts, discloses, or uses, or procures any other person to intercept, disclose, or use such communications, and (2) be entitled to recover from any such person.

18 U.S.C. § 2520 (as amended Pub. L. 91-358, Title II, § 211(c), July 29, 1970). In *Flowers*, the Fourth Circuit concluded that the pre-1986 version of § 2520 “expressly limit[ed] those against whom the private action lies to the person who ‘intercepts, discloses, or uses, or procures any other person to intercept, disclose, or use such communications.’” 773 F.2d at 588. The court held that the pre-1986 § 2520 did not confer a private cause of action against a defendant who manufactured or sold a device in violation of § 2512, because such manufacture or sale did not constitute interception, disclosure or use, or procuring another to intercept, disclose or use, as required to state a violation of § 2520. *Id.* at 588-89.

In 1986, Congress amended § 2520 to provide that “any person whose . . . electronic communication is intercepted, disclosed, or intentionally used in violation of” Chapter 119 has a private cause of action against the “person or entity . . . which

engaged in that violation.” 18 U.S.C. § 2520(a). Thus, § 2520 is no longer limited to claims against a defendant who intercepted, disclosed or used an electronic communication, but has instead been expanded to permit any plaintiff whose electronic communication has been intercepted, disclosed or used, to sue those who “engaged” in any violation of Chapter 119, including § 2512. *See Oceanic Cablevision*, 771 F. Supp. at 1026-27 (holding that the amendments to § 2520 broadened the statute to confer a private cause of action for violation of all of Chapter 119 (§§ 2510-2521)); *see also E.Q. Stuff*, 207 F. Supp. at 1084 n.8 (finding *Flowers* unpersuasive under the current version of § 2520). Accordingly, the *Flowers* holding applies only to the pre-1986 amendment § 2520 and has no application to determine whether DIRECTV has a private cause of action for violation of § 2512.

Furthermore, the *Flowers* decision actually supports the existence of a valid cause of action in this case. DIRECTV has alleged that Defendant knowingly possessed a device, the design of which made it primarily useful for the purpose of the surreptitious interception of satellite communications. *See* Complaint ¶¶ 21 & 22. DIRECTV has also alleged, however, that the “Defendant *used* this illegal device to decrypt and view DIRECTV’s satellite transmissions . . . with intent to avoid payment of the lawful charges by . . . use of a device or decoder and other fraudulent means, without authority from DIRECTV, in violation of 18 U.S.C. § 2512 (1)(b).” *Id.* at ¶ 23. Furthermore, DIRECTV has alleged that “[u]pon information and belief, Defendant used the Pirate Access Device to intercept DIRECTV’s signal” and that “Defendant intentionally intercepted or endeavored to intercept DIRECTV’s satellite transmission of television

programming, in violation of § 2511(1)(a) and (d).” *Id.* at ¶¶ 9 & 17 (which are re-alleged in Count Three).

The absence of similar allegations in *Flowers* was the cause of dismissal. *See Flowers*, 773 F.2d at 589 (“[T]he express language of § 2520 is therefore not susceptible to a construction which would provide a cause of action against one who manufactures or sells a device in violation of § 2512 but does not engage in conduct violative of § 2511.”); *Ages Group, L.P. v. Raytheon Aircraft Co.*, 22 F. Supp. 2d 1310, 1315 (M.D. Ala. 1998) (“[E]ven if . . . [defendant] . . . possessed equipment which it knew or reasonably should have known was designed primarily for surreptitious acquisition of communications under § 2512, [the plaintiff] must also create a question of fact as to whether communications were intercepted, disclosed or intentionally used.”). DIRECTV has created a question of fact as to whether the devices possessed by the Defendant were also used for the purpose of intercepting satellite communications and thus, DIRECTV can state a cause of action under § 2512. *See Garcia*, Case No. 03-20452-CIV-LENARD/SIMONTON (S.D. Fla. May 21, 2003) (holding that DIRECTV’s allegations that the defendant had purchased and used private access devices was sufficient to assert a private cause of action under §§ 2511 and 2512). Moreover, DIRECTV has specifically alleged that Defendant intercepted and intentionally used the electronic communications of DIRECTV as the court in *DIRECTV, Inc. v. Thacker, et al.*, Case No. 6:03-cv-239-Orl-28DAB (M.D. Fla. Apr. 15, 2003), determined was required to support a civil cause of action under 18 U.S.C. § 2512. *See* Complaint ¶¶ 9, 17, 21 and 23.

Because 18 U.S.C. § 2520 provides a civil cause of action for any entity whose communications were intercepted by virtue of conduct that violates the Wiretap Act, and

because DIRECTV has alleged that its communications were improperly intercepted by the devices possessed and used by the Defendant, Defendant's Motion to Dismiss Count Three of the Complaint should be denied.

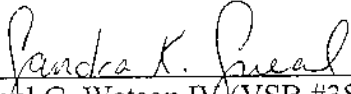
III. CONCLUSION

For these reasons, DIRECTV requests that the Court deny Defendant's Motion to Dismiss and grant whatever other relief the Court deems appropriate.

Respectfully submitted,

DIRECTV, Inc.

By Counsel

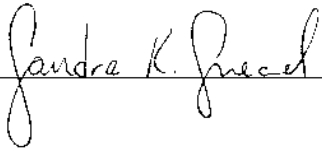


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CERTIFICATE OF SERVICE

I certify that I mailed a copy of the foregoing this 28th day of May 2003 by first-class mail to Michael J. Kelly, Esq., Kelly & Kelly, PLC, 7400 Beaufont Springs Drive, Suite 300, Boulders II, Richmond, Virginia 23225, counsel for Defendant Tony Amato.



ATTACHMENT 1

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

FILED
U.S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA
2003 JAN 21 AM 8:09
WESTERN DIV. OFFICE
BY: 

DIRECTV, INC., a California
corporation,

Plaintiff,

vs.

MANUEL CALAMANCO, KEVIN
CONOLLY, BRIAN SCHWINT, DOUG
WALLER, and DARBY WESTPHAL,

Defendants.

No. C 02-4102-MWB

MEMORANDUM OPINION AND
ORDER REGARDING DEFENDANT
MANUEL CALAMANCO'S
"MOTION UNDER FRCP 12"

In this action, filed on October 31, 2002, plaintiff DIRECTV, a direct broadcast satellite television system, asserts various causes of action against the defendants arising, *inter alia*, from their alleged purchase by mail and possession and/or use of equipment capable of receiving and decrypting DIRECTV's satellite broadcast signal without permission from or payment to DIRECTV. On December 5, 2002, defendant Calamanco filed a motion to dismiss pursuant to Rule 12 of the Federal Rules of Civil Procedure seeking dismissal of Count III of DIRECTV's Complaint. Somewhat more specifically, Calamanco asserts that there is no private right of action under 18 U.S.C. § 2512(1)(b), a criminal statute the violation of which is the sole basis for Count III, and that Count III is repetitious of the causes of action stated under other counts of DIRECTV's Complaint. Calamanco contends that Count III thus fails to state a claim upon which relief can be granted and should be dismissed—apparently pursuant to Rule 12(b)(6), although Calamanco does not identify the authority for this portion of the relief he requests—or, in

the alternative, that Count III should be stricken as "repetitious" pursuant to Rule 12(f).¹ DIRECTV resisted Calamanco's motion on December 18, 2002. DIRECTV contends that a private cause of action for violations of 18 U.S.C. § 2512(1)(b) is expressly authorized by 18 U.S.C. § 2520, and that Count III otherwise properly pleads an alternative theory for relief not pleaded in the other counts of DIRECTV's Complaint.

After realleging all prior paragraphs of DIRECTV's Complaint, Count III alleges the following:

25. Defendants have used Pirate Access Devices [as defined in ¶ 4 of the Complaint] to decrypt and view DIRECTV's satellite transmissions of television programming, with intent to avoid payment of the lawful charges therefor, by trick, artifice, deception, use of a device or decoder, and other fraudulent means, without authority from DIRECTV, in violation of 18 U.S.C. § 2512(1)(b).

26. Defendants have possessed and used Pirate Access Devices that are designed in whole or in part to receive subscription television services offered for sale by DIRECTV, without authority of DIRECTV, in violation of 18 U.S.C. § 2512(1)(b). Defendants' intent in possessing such devices was to avoid payment to DIRECTV of the lawful charges for its programming.

27. Defendants' violations have injured and will continue to injure DIRECTV by depriving DIRECTV of subscription and pay-per-view revenues and other valuable consideration, compromising DIRECTV's security and accounting systems, infringing DIRECTV's trade secrets and proprietary information, and interfering with DIRECTV's

¹ Although Calamanco's motion to dismiss is not accompanied by a brief as required by N.D. IA. L.R. 7.1(d), the court finds that little purpose would be served, under the circumstances presented here, in requiring Calamanco to refile the motion in proper form. Defendant Calamanco is, however, cautioned that, in the future, compliance with the local rules of this district will be *required*.

contractual and prospective business relations.

28. Defendants knew or should have known that possessing Pirate Access Devices was and is illegal and prohibited. Unless restrained by this Court, Defendants will continue to violate 18 U.S.C. § 2512(1)(b), causing DIRECTV irreparable harm for which DIRECTV has no adequate remedy at law.

Complaint, Count III, ¶¶ 25-28. Thus, Count III is, as Calamanco contends, premised entirely on violations of a criminal statute, 18 U.S.C. § 2512(1)(b).

Section 2412 of Title 18 of the United States Code provides, in pertinent part, as follows:

§ 2512. Manufacture, distribution, possession, and advertising of wire, oral, or electronic communication intercepting devices prohibited

(1) Except as otherwise specifically provided in this chapter, any person who intentionally--

* * *

(b) manufactures, assembles, possesses, or sells any electronic, mechanical, or other device, knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire, oral, or electronic communications, and that such device or any component thereof has been or will be sent through the mail or transported in interstate or foreign commerce. . . .

shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. § 2512(1)(b). The court finds that Count III alleges violations of this provision of the criminal code. The question is, is a private cause of action by an injured party authorized against persons who violate 18 U.S.C. § 2512(1)(b)?

The answer is, yes. The court finds that, as DIRECTV asserts, 18 U.S.C. § 2520 authorizes a private cause of action for violations of 18 U.S.C. § 2512, and other provisions of chapter 119 of Title 18 of the United States Code concerning "Wire and Electronic Communications Interception and Interception of Oral Communications," of which § 2512 is a part. In pertinent part, § 2520 provides as follows:

§ 2520. Recovery of civil damages authorized

(a) In general.—Except as provided in section 2511(2)(a)(ii), any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter may in a civil action recover from the person or entity, other than the United States, which engaged in that violation such relief as may be appropriate.

28 U.S.C. § 2520(a). Another subsection of § 2520 specifies that the "appropriate relief" in the civil action authorized by § 2520(a) includes "preliminary and other equitable or declaratory relief," "damages" as provided by the statute, "punitive damages in appropriate cases," and "attorney's fees and other litigation costs reasonably incurred." 18 U.S.C. § 2520(b). Other pertinent subsections of the statute specify the manner in which damages are to be computed, *see id.* § 2520(c); a "good faith reliance" defense, *see id.* at § 2520(d); and a two-year statute of limitations for the civil action. *See id.* at U.S.C. § 2520(e).

Thus, far from failing to state a claim upon which relief can be granted, Count III of DIRECTV's Complaint asserts a private cause of action that is expressly authorized by statute, 18 U.S.C. § 2520(a), for violations of 18 U.S.C. § 2512(1)(b).² Accord

²Nothing in the record at this time suggests that defendant Calamanco could avail himself of the exception to the private cause of action authorized in 18 U.S.C. § 2520(a) (continued...)

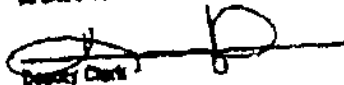
Automatic Equipment Manufacturing Company, 23 F. Supp. 2d 974 (N.D. Iowa 1998), after a survey of precedents, this court concluded "that mere duplicative remedies do not necessarily make claims 'redundant' within the meaning of Rule 12(f), if the claims otherwise require proof of different elements; however, a claim that merely recasts the same elements under the guise of a different theory may be stricken as redundant pursuant to Rule 12(f)." *Dethmers*, 23 F. Supp. 2d at 1009. Calamanco has made no showing that Count III merely recasts the same elements as the other claims in DIRECTV's Complaint in the guise of a different theory. Instead, DIRECTV appears to have alleged in each Count distinct, albeit alternative, claims, whatever overlap there may be in available relief.

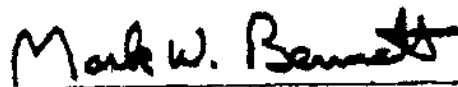
THEREFORE, defendant Manuel Calamanco's December 5, 2002, "Motion Under FRCVP 12" is denied in its entirety.

IT IS SO ORDERED.

DATED this 20th day of January, 2003.

Copies mailed on
to counsel of record or prior parties
as shown on the docket sheet.


Deputy Clerk



MARK W. BENNETT
CHIEF JUDGE, U. S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA

ATTACHMENT 2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 03-20452-CIV-LENARD/SIMONTON

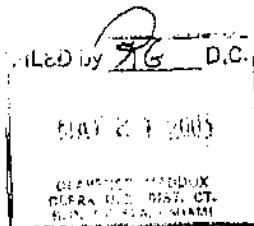
DIRECTV, INC., a California
corporation,

Plaintiff,

vs.

CINDY GARCIA, JOSE GARRIDO,
HATHAN OLKEN, JUAN OTEY, and
KAUSHI PAREKH,

Defendants.



ORDER DENYING DEFENDANT GARRIDO'S MOTION TO DISMISS

THIS CAUSE is before the Court on Defendant Jose Garrido's Motion to Dismiss, filed April 1, 2003. (D.E. 10.) Plaintiff DIRECTV, INC. filed a Response on April 14, 2003. No reply has been filed. Having considered the Motion, the Response and the record, the Court finds as follows.

I. Introduction

The Complaint filed by Plaintiff DIRECTV, INC. on February 28, 2003 alleges that Defendant Jose Garrido, on two separate occasions in August, 2000, purchased "pirate access devices" to gain illegal access to Plaintiff's satellite television programming, and that such devices were shipped through interstate commerce to Defendant's address in Miami, Florida. Plaintiff alleges three causes of action against Defendant Garrido: (1) unauthorized reception of satellite signals, in violation of 47 U.S.C. § 605(a); (2) unauthorized interception

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of electronic communications, in violation of 18 U.S.C. § 2511(1)(a); and (3) possession of pirate access devices, in violation of 18 U.S.C. § 2512(1)(b).

In response to the Complaint, Defendant Garrido filed the instant Motion to Dismiss on April 1, 2003.¹

II. Parties' Arguments

Defendant Garrido argues that Counts II and III cannot arise under the Electronic Communications Privacy Act ("Federal Wiretap Laws"), 18 U.S.C. §§ 2511(1)(a) and 2512(1)(b), based on United States v. Herring, 933 F.2d 932 (11th Cir. 1991). In addition, Defendant Garrido contends that Count I fails to state a claim because Plaintiff merely alleges that Defendant purchased access devices and not that Defendant received or transmitted unauthorized satellite signals for his personal or commercial advantage or otherwise, and, therefore, 47 U.S.C. § 605(a) does not prohibit the exact actions of which Defendant has been accused, under United States v. Herring, 993 F.2d 932 (11th Cir. 1991).

In response, Plaintiff points out that United States v. Herring, 993 F.2d 932 (11th Cir. 1991), was vacated and reconsidered *en banc*, and that the appellate court ultimately affirmed the district court's order, in United States v. Herring, 993 F.2d 784 (11th Cir. 1993). In addition, Plaintiff maintains that a private cause of action exists under 18 U.S.C. § 2512, and

¹ Defendant Garrido did not file an accompanying memorandum of law, as required by Rule 7.1(A) of the Local Rules of the Southern District of Florida. Plaintiff has not objected on this ground, but Defendant Garrido is hereby warned that future failure to abide by the Local Rules will not be tolerated by this Court.

that the Complaint meets the pleading requirements of 47 U.S.C. § 605(a).

III. Standard of Review

Pursuant to Federal Rule of Civil Procedure 12(b)(6), a defendant may move for dismissal of a claim that fails to state a claim upon which relief can be granted. The Eleventh Circuit has clearly articulated the standard of review for a Rule 12(b)(6) motion to dismiss:

“The standard of review for a motion to dismiss is the same for the appellate court as it is for the trial court.” Stephens v. Dep’t of Health & Human Servs., 901 F.2d 1571, 1573 (11th Cir. 1990). A motion to dismiss is only granted when the movant demonstrates “beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

Harper v. Blockbuster Entm’t Corp., 139 F.3d 1385, 1387 (11th Cir.), cert. denied, 525 U.S. 1000 (1998). “On a motion to dismiss, the facts stated in appellant’s complaint and all reasonable inferences therefrom are taken as true.” Stephens, 901 F.2d at 1573.

IV. Analysis

Initially, the Court notes that the only case cited by Defendant Garrido in support of his Motion to Dismiss, United States v. Herring, 933 F.2d 932 (11th Cir. 1991), was vacated by a majority of the Eleventh Circuit, United States v. Herring, 977 F.2d 1435 (11th Cir. 1992), and reconsidered *en banc*, United States v. Herring, 933 F.2d 784 (11th Cir. 1993). The *en banc* court reached the opposite conclusion of the three-judge panel, and affirmed the district court’s conclusion that the defendant had violated the plain language of 18 U.S.C. § 2512(1)(b). Defendant Garrido should not have cited the panel decision to this Court in

the first place, but when this error was pointed out by Plaintiff in its Response, Defendant Garrido should have withdrawn his Motion to Dismiss.

A. Private Cause of Action Under 18 U.S.C. §§ 2511 & 2512

Under 18 U.S.C. § 2511(1)(a), a person who “intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication” may be fined and/or imprisoned up to five years. Under 18 U.S.C. § 2512(1)(b), any person who “manufactures, assembles, possesses, or sells any electronic, mechanical, or other device . . .” may be fined and/or imprisoned up to five years. In the instant case, Plaintiff claims a private right of action for the violation of sections 2511(1)(a) and 2512(1)(b) by virtue of 18 U.S.C. § 2520, which provides, in relevant part that “any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter may in a civil action recover from the person or entity which engaged in that violation.” 18 U.S.C. § 2520. The question presented is whether 18 U.S.C. § 2520 provides a private cause of action for alleged violations of 18 U.S.C. §§ 2511(1)(a) & 2512(1)(b).

Two district courts have held that section 2520 provides a private cause of action for alleged violations of section 2511 and 2512. Directv, Inc. v. EQ Stuff, Inc., 207 F. Supp. 2d 1077, 1084 (C.D. Cal. 2002); Oceanic Cablevision, Inc. v. M.D. Elecs., 771 F. Supp. 1019, 1025-29 (D. Neb. 1991). The Court finds the rationale of those cases persuasive, and

Defendant Garrido has presented no argument to the contrary. Based on the plain language of 18 U.S.C. § 2520, the Court concludes that Plaintiff may assert a private cause of action for violations of 18 U.S.C. §§ 2511 & 2512. Plaintiff has alleged not only that Defendant Garrido purchased illegally modified pirate access devices, but also that he used such devices. (Compl. ¶¶ 18, 20.) Therefore, the Court finds that Plaintiff has alleged sufficient facts to assert a private cause of action. Contrast Flowers v. Tandy Corp., 773 F.2d 585, 589 (4th Cir. 1985) (“[T]he express language of § 2520 is . . . not susceptible to a construction which would provide a cause of action against one who manufactures or sells a device in violation of § 2512 but does not engage in conduct violative of § 2511.”); Ages Group, L.P. v. Raytheon Aircraft Co., 22 F. Supp. 2d 1310, 1315 (M.D. Ala. 1998) (“[E]ven if Defendant possessed equipment which it knew or reasonably should have known was designed primarily for surreptitious acquisition of communications under § 2512, [the plaintiff] must also create a question of fact as to whether communications were intercepted, disclosed, or intentionally used.”). As Defendant Garrido has not provided any binding authority to the contrary, the Court finds that Plaintiff has stated a claim in Counts II and III.

B. Allegation of Receipt of Unauthorized Signal

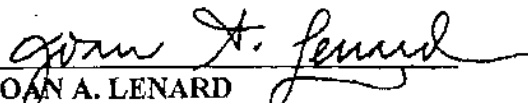
Defendant Garrido asserts that Count I should be dismissed because the Complaint merely alleges that he purchased access devices and not that he received or transmitted unauthorized satellite signals for his personal or commercial advantage or otherwise.

Plaintiff points out, to the contrary, that paragraph 29 of the Complaint alleges that all Defendants "have received and/or assisted others in receiving DIRECTV's satellite transmissions of television programming without authorization, in violation of 47 U.S.C. § 605(a)." (Compl. ¶ 29.) Based on this allegation and the Eleventh Circuit's vacatur of the Herring decision upon which Defendant Garrido relies, the Court finds no grounds for the dismissal of Count I.

Accordingly, it is

ORDERED AND ADJUDGED that Defendant Jose Garrido's Motion to Dismiss, filed April 1, 2003 (D.E. 10), is **DENIED**.

DONE AND ORDERED in Chambers at Miami, Florida this 21 day of May, 2003.


JOAN A. LENARD
UNITED STATES DISTRICT JUDGE

Cc: U.S. Magistrate Judge Andrea M. Simonton
All counsel of record
03-20452-CIV-LENARD/SIMONTON