

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

| | | |
|-----------------|---|-----------------------|
| DIRECTV, INC., |) | |
| |) | |
| Plaintiff, |) | Judge Norgle |
| v. |) | No. 03 C 6289 |
| |) | Magistrate Judge Keys |
| YOUSIF, et al., |) | |
| |) | |
| Defendants. |) | |

**DEFENDANT TABLER'S MEMORANDUM SUPPORTING HIS
MOTION TO DISMISS OR FOR MORE DEFINITE STATEMENT**

NOW COMES one of the Defendant KIRK DOYLE TABLER (“Tabler”) by his attorneys, Patrick Graber and Ethan Preston, and submits this memorandum in support of its motion to dismiss Plaintiff’s complaint, or, in the alternative, for a more definite statement of those claims, for failure to plead those claims with particularity. Tabler argues 1) that Plaintiff has alleged surreptitious interception of its signal, and that such interception would be accomplished by manipulating the electronic communications between the equipment described by Plaintiff’s Complaint, 2) that Plaintiff specifically alleges that Tabler deceived Plaintiff’s equipment by means of an electronic signal in the form of a decryption “key,” 3) and that such a communication (regardless of its form) constitutes a misrepresentation. As such, Plaintiff’s Complaint is subject to Fed. R. Civ. P. 9(b) (2004). Plaintiff’s Complaint does not comport to the standards of particularity required by Rule 9(b).

I. PLAINTIFF ALLEGES FRAUDULENT INTERCEPTION OF ITS SIGNAL

A. PLAINTIFF SPECIFICALLY UNAUTHORIZED DECRYPTION, UNDER FALSE PRETENSES

Plaintiff alleges that it protects its signal by encryption or scrambling.¹ Plaintiff’s complaint clearly uses “scrambling” and “encryption” synonymously. Compl. at ¶ 3.²

¹ “To prevent the unauthorized reception and use of DIRECTV’s broadcasts by individuals who have not paid for DIRECTV’s service, *DIRECTV uses encryption technology to digitally*

According to Plaintiff's Complaint, Plaintiff's encrypted signal is decrypted by the Satellite Receiver, which is in turn instructed and controlled by an Access Card.³ Plaintiff's Complaint also alleges how Plaintiff's legitimate customers use Access Cards to access Plaintiff's signal by selectively decrypting different portions of its signal.⁴

However, Plaintiff alleges (upon information and belief) that the defendants in its suits (including Tabler) used purported "Pirate Access Devices" to manipulate Access Cards to decrypt Plaintiff's encrypted signal without authorization and to conceal the decryption and interception from Plaintiff.⁵ With respect to Tabler, Plaintiff alleges (again, upon information and belief) that Tabler possessed and used a Bootloader/EMU/Net210, which was "designed to allow the surreptitious interception of

scramble the signal making the signal unusable until it is unscrambled." Compl. at ¶ 3 [emphasis added].

² See also U.S. Dep't Justice, *Searching and Seizing Computers and Obtaining Electronic Evidence in Criminal Investigations 210* (2002), available at <http://cybercrime.gov/s&smanual2002.pdf>, a portion of which is attached and incorporated as Exhibit A ("*Encryption refers to the practice of mathematically scrambling computer data as a communications security measure*") [emphasis added].)

³

DIRECTV uses encryption technology to digitally scramble the signal making the signal unusable until it is unscrambled. The Satellite Receiver is the component that makes descrambling possible. Each Satellite Receiver contains a removable access card that manages the opening and closing of television channels offered by DIRECTV (the 'Access Card'). An Access Card . . . applies the information necessary to unscramble the satellite signals being received through the Satellite Dish. When properly operated, Access Cards can be electronically programmed by DIRECTV to close or open channels. . . . Compl. at ¶ 4. "'Decryption' is the process of converting [the encrypted signal] back to into the original, readable information [in this case, the viewable television signal] . . . " Exhibit A, at 210.

⁴ "Once a DIRECTV customer pays a subscription fee, DIRECTV electronically directs the Access Card to unscramble portions of the satellite signal allowing customers to view programs . . ." Compl. at ¶ 3

⁵ "It is . . . the programmable nature of these Access Cards that is the primary basis for this dispute." Compl. at ¶ 3. "Despite the encryption technology used to protect the DIRECT signal, there are many individuals . . . involved in the development of devices and equipment (including the illegal programming of valid Access Cards) used to surreptitiously pirate DIRECTV's signals . . ." Compl. at ¶ 5. "Upon information and belief, DIRECTV alleges that Defendants received the Satellite Programming by . . . maintaining electronic *devices which enable them to receive, unscramble, and exhibit encrypted Satellite Programming transmissions without authorization*". Compl. at ¶ 32 [emphasis supplied].

DIRECTV Satellite Programming, providing [Tabler] access to DIRECTV programming without payment.”⁶

B. PLAINTIFF’S CLAIMS ARE PREDICATED ON OR INCORPORATE SURREPTITIOUS INTERCEPTION BY FRAUDULENT ELECTRONIC SIGNALS

Counts I (violation of 47 U.S.C. § 605(e)(3)(C)) and II (violation of 18 U.S.C. § 2511) both allege the interception of Plaintiff’s signal through the use of the “Pirate Access Devices” described above to decrypt the signal.⁷ Likewise, Count V (state law conversion claim) references all the conduct alleged in the complaint, including decryption by means of the “electronic devices” discussed above.⁸ Moreover, all of Plaintiff’s claims rely on and incorporate the allegations of unauthorized and surreptitious decryption, which describe *how* Plaintiff’s signal was allegedly intercepted and converted. Compl. at ¶¶ 36, 42, 46, 50, 54 (incorporating by reference the “foregoing paragraphs” of the Complaint, which in turn allege unauthorized decryption). In fact, the only method of interception and conversion the Complaint specifically identifies is the use of alleged Pirate Access Devices to reprogram Access Cards to decrypt Plaintiff’s signal. *See id.* at ¶¶ 3, 5, 32; *cf. id.* at ¶¶ 32, 37 (alleging, in the alternative, other means of satellite reception “which are unknown to DIRECTV and known only to Defendants”).⁹ The factual evidence Plaintiff has presented in related litigation (*see DirecTV, Inc. v. Karpinsky*, 269 F. Supp.2d 918, *rev’d*, 274 F. Supp.2d 918 (E.D. Mich. 2003)) purports to present proof of decryption. In a deposition for the *Karpinsky* case, the

⁶ Compl. at ¶ 24.

⁷ “Defendants effected unauthorized interception and receipt of Satellite Programming through [the] use of illegal satellite *decoding* devices . . . ” Compl. at ¶ 37 [emphasis added]. “Defendants intentionally intercepted, endeavored to intercept, or procured other persons to intercept electronic communications from DIRECTV.” Compl. at ¶ 43.

⁸ “By virtue of the conduct set forth above, Defendants have unlawfully converted DIRECTV’s property for their own use and benefit.” Compl. at ¶ 55

⁹ *See also* U.S. Dep’t Justice, *Operation Decrypt Leads to Charges Against 17 For Developing Technology Used to Steal Millions of Dollars Worth of Satellite TV*, available at http://www.usdoj.gov/criminal/cybercrime/OPdecrypt_walterPlea.htm (Feb. 11, 2003), attached and incorporated as Exhibit B (press release describing indictments against defendants involved in manufacture of decryption devices for circumventing the “encryption and conditional access technology” Plaintiff used to protect its signal); *U.S. v. Shriver*, 989 F.2d 898 (7th Cir. 1992) (describing devices used to “descramble” encrypted cable and satellite television programming).

sworn testimony of Larry Rissler, Plaintiff's Vice President for Signal Integrity, attached and incorporated as Exhibit C, describes the Plaintiff's current program for suing individuals it suspected of intercepting signals. Exhibit C, at 24-33. Rissler describes how Plaintiff seized records of businesses selling "devices that are designed to *overcome encryption technologies* that are in place to protect copyrighted material," and those records "identified individuals who had purchased devices primarily designed to intercept our signal." Exhibit C, at 27, 28. Both the *Karpinsky* case and this case revolve around essentially the same allegations of receipt and use of purported Pirate Access Devices to reprogram Access Cards and manipulate Plaintiff's

Boiled down, Plaintiff's Complaint alleges that Tabler constructed equipment to surreptitiously misappropriate Plaintiff's programming, and used that equipment to transmit an electronic signal to a Satellite Receiver which induced the Receiver into surreptitiously intercepting Plaintiff's signal. *Plaintiff's claims against Tabler are explicitly and implicitly based on Tabler's manipulation and transmission of electronic signals through the purported Pirate Access Devices to the Satellite Receiver to decrypt and intercept Plaintiff's unencrypted signal.*

C. PLAINTIFF'S ALLEGATIONS ARE EQUIVALENT TO ALLEGATIONS OF MISREPRESENTATION

Plaintiff has alleged that the interception and conversion of its signal are accomplished by decrypting the signal. For instance, Plaintiff's customers use Access Cards to selectively decrypt different portions of its signal for paying customers, while Plaintiff alleges, in part, that Tabler and others used purported "Pirate Access Devices" to decrypt the signal without authorization. Compl. at ¶¶ 3, 5, 32. Decryption typically requires a code or password, known as a "key." "The word, number, or other value used to encrypt/decrypt a message is known as a 'key.'" Exhibit A, at 210. The alleged use of a decryption key under false pretense constitutes fraud just as much as a more traditional claim. Plaintiff alleges, in the alternative, that Tabler employed some unknown electronic signal to intercept Plaintiff's programming.

In either situation, Plaintiff's entire Complaint is based on allegations that Tabler used electronic signals (potentially a decryption key) to obtain Plaintiff's programming. Rissler's testimony makes clear that this method of obtaining programming is based on

electronic signals and communication between the Satellite Receiver and the Access Card:

Q: . . . [I]s the access card in a sense like a key that unlocks the signal?

A: . . . I believe what happens when a subscriber turns to one of the DirecTV channels, the IRD communicates with the access card and . . . asks the question am I allowed to watch – to unscramble this channel. And the card then responds whether that’s a channel that’s been subscribed to or not or whether there’s been a pay-per-view event ordered on that channel. So there is a communication . . . between the receiver, the IRD, and the access card to verify that the channel that the receiver has been tuned to can be watched.

Exhibit C, at 19-20. Even where electronic signals have a functional aspect, such as computer code, they are still expressive enough to receive First Amendment protection. *See Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 445-49 (2d Cir. 2001). And even though computer code has a functional component, its expressive quality can nonetheless be fraudulent. *Four Seasons Hotels and Resorts B.V. v. Consorcio Barr, S.A.*, 267 F. Supp.2d 1268, 1298, 1305, 1322 (S.D. Fla. 2003) (transmission of “spoofed” data packets with falsified Internet Protocol addresses, was “analogous to forgery,” impaired the integrity of plaintiff’s computer systems, and violated the Computer Fraud and Abuse Act). The gravamen of Plaintiff’s allegations is the deception of Plaintiff’s encryption system through the manipulation of the electronic communications between Satellite Receiver and Access Card. *Plaintiff’s explicit and implicit allegations that Tabler transmitted fraudulent electronic signals (including decryption keys) are tantamount to allegations of misrepresentation.*

D. REGARDLESS OF WHETHER PLAINTIFF HAS ALLEGED DECRYPTION OF ITS SIGNAL BY DEFENDANT, PLAINTIFFS COMPLAINT SOUNDS IN FRAUD

Even outside of the allegations of manipulation and transmission of electronic signals under false pretenses. Plaintiff’s Complaint otherwise alleges fraudulent conduct by Tabler. Compl. at ¶ 5 (Pirate Access Devices permit “surreptitious[]” interception of signal), ¶ 24 (specific devices involved permit “surreptitious interception” of unencrypted signal), ¶ 32 (users of Pirate Access Devices decrypt Plaintiff’s signal “without authorization”). Again, all the Counts incorporate by reference these allegations. *Id.* at ¶¶ 36, 42, 46, 50, 54. As Plaintiff chose to incorporate the word “surreptitious” into all its

claims against Tabler, it cannot now deny that the same claims *sound in fraud*. Black’s Law Dictionary 1007 (6th abridged ed. 1991) (defining “surreptitious” as “stealthily or *fraudulently* done”) [emphasis supplied]; Black’s Law Dictionary 1445 (6th deluxe ed. 1990) (same).

II. PLAINTIFF’S COMPLAINT VIOLATES FED. R. CIV. P. 9(b)

A. FED. R. CIV. P. 9(b) APPLIES TO ALL CLAIMS OF FRAUD AND MISREPRESENTATION, NOTWITHSTANDING THAT THE PLAINTIFF DID NOT PLEAD A CLAIM OF FRAUD *PER SE*

Fed. R. Civ. P. 9(b) (2004) requires that, in all pleadings of fraud or mistake, “the circumstances constituting fraud or mistake shall be stated with particularity.” In the Seventh Circuit, Rule 9(b) applies whenever a pleading alleges fraud, notwithstanding whether the pleading actually uses the word “fraud.” *Kennedy v. Venrock Assocs.*, 348 F.3d 584, 594 (7th Cir. 2003) (upholding rule of law that “the word ‘fraud’ need not appear in the complaint in order to trigger Rule 9(b)”); *see also Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1108 (9th Cir. 2003) (“Although Vess nowhere uses the word ‘fraud’ in these allegations, the pleading requirements of Rule 9(b) cannot be evaded simply by avoiding the use of that magic word”). Even though Plaintiff’s claims do not require proof of fraud, to the extent that they rest on allegations of fraud, Plaintiff must comply with Rule 9(b). *Kennedy*, 348 F.3d at 593 (citing *Vess*, 317 F.3d at 1103-05). *Vess* articulates the scope of Rule 9(b) with respect to claims that need not allege fraud, but do nevertheless:

In cases where fraud is not a necessary element of a claim, a plaintiff may choose nonetheless to allege in the complaint that the defendant has engaged in fraudulent conduct. In some cases, the plaintiff may allege a unified course of fraudulent conduct and rely entirely on that course of conduct as the basis of a claim. In that event, the claim is said to be “grounded in fraud” or to “sound in fraud,” and the pleading of that claim as a whole must satisfy the particularity requirement of Rule 9(b).

Vess, 317 F.3d at 1103-04 (citing, e.g., *Shaw v. Digital Equip. Corp.*, 82 F.3d 1194, 1223 (1st Cir. 1996); *Melder v. Morris*, 27 F.3d 1097, 1100 n. 6 (5th Cir. 1994); *Shapiro v. UJB Fin. Corp.*, 964 F.2d 272, 288 (3d Cir. 1992)).

For instance, even where the plaintiffs’ claim under section 14(a) of the Securities Exchange Act of 1934 did not require an allegation of fraud in the proxy statement at

issue, where the plaintiff's nevertheless asserted fraud, *Kennedy* held they were subject to Rule 9(b) (and had failed to comply). *Kennedy*, 348 F.3d at 594. Likewise, *Montgomery Wards, L.L.C. v. Mease*, No. 99 C 5697. 2000 WL 556758, at *5 (N.D. Ill. May 1, 2000) found that, even though a bare conversion claim would not be subject to Rule 9(b), the plaintiff's conversion claim was subject to Rule 9(b) "because plaintiff incorporate[d] the allegations supporting the RICO and common law fraud claim in its common law conversion claim." *See also Securities Investor Protection Corp. v. Stratton Oakmont, Inc.*, 234 B.R. 293, 311 (Bankr. S.D.N.Y. 1999) ("where the complaint incorporates by reference prior allegations of fraud into other claims traditionally not perceived to be grounded in fraud, those claims must then be pleaded according to F.R.C.P. 9(b)"). Under the same logic, all the Counts in Plaintiff's Complaint are subject to Rule 9(b) as the Complaint alleges fraudulent decryption and surreptitious interception. *Cf.* Compl. at ¶¶ 36, 42, 46, 50, 54 (incorporating by reference the "foregoing paragraphs" of the Complaint, which allege surreptitious decryption).

Courts in the Seventh Circuit have applied Rule 9(b) in any number of claims or defenses beyond fraud *per se* – there is no reason not to apply it to Plaintiff's claims. In *General Elec. Capital Corp. v. Lease Resolution Corp.*, 128 F.3d 1074 (7th Cir. 1997), the Seventh Circuit applied Rule 9(b) to a constructive fraud claim under the Illinois Uniform Fraudulent Transfer Act:

Because this statute creates a cause of action for constructive fraud that requires neither evidence of actual intent to defraud nor a specific misrepresentation by the defendant, we will evaluate whether GE Capital has plead the circumstances surrounding the elements of this statutory cause of action with sufficient particularity to satisfy Rule 9(b).

Id. at 1079 (finding accord with Fed. R. Bankr. P. 7009, which applies Fed. R. Civ. P. 9(b) in adversarial bankruptcy proceedings). Likewise, patent defenses based on misrepresentations to the Patent Office are also subject to Rule 9(b). *See, e.g., Energy Absorption Systems, Inc. v. Roadway Safety Service, Inc.*, No. 93 C 2147, 1993 WL 248008 (N.D. Ill. July 2, 1993); *Sun-Flex Co. v. Softview Computer Products Corp.*, 750 F. Supp. 962, 963-64 (N.D. Ill. 1990). Courts from other Circuits have not limited Rule 9(b) application to *per se* claims of fraud, but extended Rule 9(b) ambit to any claim which incorporates allegations of fraud. *See, e.g., Ellison v. American Image Motor Co.*,

36 F. Supp.2d 628, 639 (S.D.N.Y. 1999); *A.I.A. Holdings, S.A. v. Lehman Bros., Inc.*, No. 97 CIV. 4978(LMM), 1998 WL 159059, at *8 (S.D.N.Y. Apr. 1, 1998) (breach of fiduciary duty claims which “primarily rel[ied] upon allegations of fraudulent conduct” were “subject to the particularity requirements of Rule 9(b)”); *Schoenhaut v. American Sensors, Inc.*, 986 F. Supp. 785, 795 (S.D.N.Y. 1997); (although fraud is not an element of a claim under sections 11 or 12(a)(2) of the Securities Act of 1933, “plaintiffs nonetheless have alleged fraudulent intent . . . it seems only fair that if plaintiffs have plead fraud, they must comply with the requirements of Rule 9(b)”; *Morin v. Trupin*, 711 F.Supp. 97, 112 (S.D.N.Y. 1989).

B. PARTICULARITY HAS BEEN REQUIRED OF VERY SIMILAR CLAIMS

Specifically, two cases addressing closely analogously claims (involving wiretapping and surreptitious cable theft) have subjected those claims to Rule 9(b).

The allegations in *Carter Machinery Co., Inc. v. Gonzalez*, No. Civ.A. 97-0332-R, 1998 WL 1281295 (W.D. Va. Mar. 27, 1998) concerned violations of 18 U.S.C. § 2511 through the undisclosed recording of a telephone conversation. Finding that the wiretapping claim was necessarily premised on underlying torts including fraud or constructive fraud, *Carter Machinery Co.* dismissed the wiretapping claim, in part because the underlying fraud allegations did not comply with Rule 9(b). More closely, in *In re DeMarco*, 240 B.R. 282 (Bankr. N.D. Ill. 1999), a creditor pay-per-view company objected to the discharge of its 47 U.S.C. § 605 claim against the debtor (a bar proprietor and her corporation) which arose from the debtor’s exhibition of the creditor’s televised boxing bout. In order to prevent the discharge, the creditor alleged several theories of fraudulent conduct, including an allegation that the debtor “possessed an illegal ‘black box’ which she used to decode the transmission.” The court found that the creditor did not plead fraud with particularity and dismissed the plaintiff’s objection to the discharge for failure to comply with Rule 9(b), notwithstanding the creditor’s argument that “the knowledge of how this fraud took place [was] particularly within the knowledge of the Defendant.” *Id.* at 286-87.

Carter Machinery Co. and *In re DeMarco* make clear that Rule 9(b) applies to Plaintiff's claims, especially where Plaintiff has chosen to incorporate and apply the word "surreptitious" to every claim in the Complaint.

C. PLAINTIFF'S COMPLAINT FAILS TO COMPLY WITH RULE 9(b)

Fed. R. Civ. P. 9(b) (2004) requires fraud to be pled with "particularity." "In other words, the who, what, when, where and how of the alleged fraud must be plead in detail." *Stavros v. Exelon Corp.*, 266 F. Supp.2d 833, (N.D. Ill. 2003) (citing *DiLeo v. Ernst & Young*, 901 F.2d 624, 627 (7th Cir.1990)).

Although Plaintiff's Complaint implies that Tabler had the capability to surreptitiously decrypt its signal after Tabler acquired the electronic devices in April 2001, the Complaint fails to specifically allege when the decryption occurred. (Plaintiff additionally fails to specify where the decryption occurred and which Satellite Programming Tabler supposedly decrypted. *Cf. In re DeMarco*, 240 B.R. at 286-87 (where plaintiff at least identified the specific boxing bout)).

Rule 9(b) does not permit Plaintiff to plead the time (or other particulars) of the surreptitious decryption so casually. In *Fidelity National Title Ins. Co. of New York v. Intercounty National Title Ins. Co.*, 161 F. Supp.2d 876, 886 (N.D. Ill. 2001), the court found that allegations of fraud "on numerous occasions between 1996 and 1999" insufficiently particular. "Simply saying that conduct occurred before or after a specified date is not enough." *Id.* Thus, as Plaintiff's allegations do no more than fix a time when any alleged fraudulent decryption would have begun, *Plaintiff's Complaint fails to allege the time of the fraudulent decryption with the particularity required by Rule 9(b).*

III. PURPOSES OF RULE 9(b) SERVED BY APPLYING RULE 9(b) TO PLAINTIFF'S COMPLAINT

A. TABLER SHOULD BE PROTECTED FROM "PRIVILEGED LIBEL," NOTWITHSTANDING THE TECHNOLOGICAL CONTEXT OF PLAINTIFF'S CLAIMS

The underlying rationales for Rule 9(b) are particularly applicable to Plaintiff's litigation. "A principal purpose of requiring that fraud be pleaded with particularity is, by establishing this rather slight obstacle to loose charges of fraud, to protect individuals and

businesses from privileged libel (privileged because it is contained in a pleading).” *Kennedy*, 348 F.3d at 594 (citing *Ackerman v. Northwestern Mutual Life Ins. Co.*, 172 F.3d 467, 469-70 (7th Cir. 1999)). Certainly, Plaintiff’s accusation that Tabler fraudulently decrypted Plaintiff’s signal and stole TV programming involves no less moral turpitude than a more typical accusation of fraud.

Moreover, the high-technology context of the alleged misrepresentation should not strip Tabler of Rule 9(b)’s procedural protections. Courts have continued to adapt citizen’s legal protections and rights to new contexts to keep pace with the ever-advancing state of technology in our society. *See, e.g., Reno v. American Civil Liberties Union*, 521 U.S. 844, 868-70 (1997) (First Amendment applies equally to Internet); *Katz v. United States*, 389 U.S. 347, 351 (1967) (Fourth Amendment applies to phone booth, not just home and office); *Trulock v. Freeh*, 275 F.3d 391, 403 (4th Cir. 2001) (roommate’s consent to search did not vitiate plaintiff’s Fourth Amendment right against search of password-protected portion of the hard drive on the shared computer); *Universal City Studios, Inc.*, 273 F.3d at 445-49 (binary computer code is sufficiently expressive for First Amendment protection, even though it is incomprehensible to all but a few people, and has a strong functional element in controlling computers).

Katz articulated this principle well: *Katz* suppressed incriminating recordings of the defendant made by the government in the course of investigating the defendant for interstate gambling. *Katz* rejected both the arguments of the appellant and the government that the phone booth was or was not a “constitutionally protected place.” Rather, *Katz* centered its analysis on whether the individual had a reasonable expectation of privacy, and found that to deprive the defendant of Fourth Amendment rights in the phone booth would “ignore the vital role that the public telephone has come to play in private communication.” *Katz*, 389 U.S. at 351. *Katz* recognized that, as our society’s technology changes, the law needs to adapt to protect the same interests. There is no doubt Rule 9(b) applies to an allegation of misrepresentation via the phone or even via the Internet; there should be no reason it should not apply to an allegation of misrepresentation via access card and satellite receiver.

B. PLAINTIFF SHOULD BEAR THE COST OF INVESTIGATING ITS CLAIMS, NOT INNOCENT DEFENDANTS

As a corollary to the protection from libel, Rule 9(b) also

force[s] the plaintiff to do more than the usual investigation before filing his complaint. *Greater precomplaint investigation is warranted in fraud cases . . . because fraud is frequently charged irresponsibly by people who have suffered a loss and want to find someone to blame for it . . .* By requiring the plaintiff to allege the who, what, where, and when of the alleged fraud, *the rule requires the plaintiff to conduct a precomplaint investigation in sufficient depth to assure that the charge of fraud is responsible and supported, rather than defamatory and extortionate.*

Ackerman v. Northwestern Mutual Life Ins. Co., 172 F.3d at 469 [emphasis added].

Plaintiff claims it has lost substantial sums from piracy of its signal. In hopes of recouping these losses and deterring further losses, it has pursued a two-pronged litigation strategy. First, Plaintiff has sued and apparently shut down the proprietors of websites Plaintiff has determined marketed devices for the decryption of its signal. Second, Plaintiff has pursued litigation against every customer of these websites that it could find – approximately eighteen thousand persons, nationwide. *See, e.g.,* Ammeet Sachdev, DirecTV in hot 'pirate' pursuit, *Satellite firm threatens, sues, seeks penalties*, CHI. TRIB., Nov. 26, 2003, available at 2003 WL 68335553, attached and incorporated as Exhibit D.

Plaintiff's litigation is structured under the assumption that the purchase and possession of the devices sold from the websites described in is a *per se* indication of signal fraud. However, counsel attests that Plaintiff has dedicated personnel to evaluating website customers' proffered legitimate use of the devices at issue and indeed has an established process for evaluating website customers' defenses. Rissler's sworn testimony is that *Plaintiff has conceded that at least some of the purported "Pirate Access Devices" are, in fact, used for legitimate purposes.*¹⁰ Indeed, Rissler's testimony

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Typically if an individual claimed that he was using the device lawfully or for some other purpose than stealing our signals, in the discussions between that individual and DirecTV you would ask him for his business plan, technical data, possibly schematics, an internet site possibly that he had. And then that information would be furnished to an engineer at DirecTV who would then evaluate the information supplied by the individual who received the letter. And that individual -- that engineer then would attempt to conclude whether the information provided by the potential defendant was persuasive that the device was being used for some purpose other than stealing DirecTV programming.

indicates that it is not the capabilities of the devices being sold that triggers Plaintiff's litigation, but the manner of their marketing. Exhibit C, at 76-80. (Indeed, Tabler's defense is that he purchased a smartcard programmer intending to use it legitimately.)

Counsel also attests and outside evidence exists that Plaintiff initially offers to settle with website customers for \$3,500 to \$4,500 – effectively preventing most innocent customers, like Tabler, from defending DirecTV's suit economically. *See* Exhibit D.

More importantly, Plaintiff has selectively sued under statutes that provide attorneys' fees to a prevailing plaintiff, *see* 18 U.S.C. § 2520(a), (b) (limiting "appropriate relief," including attorneys fees, to person whose communications are intercepted); 47 U.S.C. § 605(e)(3)(B)(iii) (provides for "reasonable attorneys' fees to an aggrieved party who prevails"), to the exclusion of other statutes and claims that would have provided attorneys' fees for a prevailing defendant. *See* 17 U.S.C. § 506 (in copyright infringement suit, court can order "a reasonable attorney's fee to the prevailing party"); *see* 17 U.S.C. § 1203 (for violation of section 1201, circumvention of technical measures protecting access to copyrighted works, court can fix penalties including "in its discretion . . . reasonable attorney's fees to the prevailing party"). In particular, 17 U.S.C. § 1201 was intended to address Plaintiff's claims.¹¹

Naturally, Plaintiff is free to sue on claims and offer settlement terms of its choice, but those choices should be evaluated in the light of Plaintiff's evident knowledge

Exhibit C, at 36-37. Rissler goes on to state that there are at least 20 cases where Plaintiff "accepted the explanation" of a person claiming a legitimate use. Exhibit C, at 130.

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[The treaties prompting the passage of the DMCA] include substantively identical provisions on technological measures of protection (also commonly referred to as the "black box" or "anticircumvention" provisions). These provisions require contracting parties to provide "adequate legal protection and effective legal remedies against the circumvention of effective technological measures [that protect copyright owners from infringement.]
H.R. Rep. No. 105-796, at 63-64 (1998).

[T]he Committee also recognizes that the digital environment poses a unique threat to the rights of copyright owners, and as such, necessitates protection against devices that undermine copyright interests. . . . As technology advances, so must our laws. The Committee thus seeks to protect the interests of copyright owners in the digital environment . . .
H.R. Rep. No. 105-551, pt. 2, at 25(1998).

that some of persons who purchased devices from the relevant websites sued are innocent. In light of Plaintiff's knowledge that its net of litigation catches innocent defendants, it must be conceded that Plaintiff's settlement strategy and choice of claims have the effect of preventing innocent defendants from economically defending themselves or recouping attorneys' fees. Plaintiff's settlement strategy and choice of claims can be characterized as precautions to prevent innocent defendants from effectively disrupting litigation, thereby permitting Plaintiff to execute an *in terrorem* campaign of litigation *without having to investigate whether particular individuals actually committed the violations and torts in Plaintiff's Complaint*. Plaintiff has structured this litigation to shift the cost of investigating whether the individual purchase of a smartcard programmer is legitimate from the Plaintiff onto the website customers in the form of either settlements (which are nevertheless quite hefty) or an uneconomic defense. Rule 9(b) permits the Court to shift that cost back onto the Plaintiff, so it can pursue meritorious claims.

IV. THE REMEDIES TO PLAINTIFF'S VIOLATION OF FED. R. CIV. P. 9(b) ARE DISMISSAL OR, IN THE ALTERNATIVE, A MORE DEFINITE STATEMENT

Plaintiff's Complaint does not comply with Rule 9(b). While the Federal Rule of Civil Procedure 9(b) does not provide an explicit method of enforcement, 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1300 (2d ed. 1990 & Supp. 2003) discusses the alternate methods federal courts use to enforce Rule 9(b):

[Some] courts have used the motion for a more definite statement as a device for policing compliance with Rule 9(b) and grant the motion whenever the pleading does not set forth the circumstances surrounding the alleged fraud or mistake with sufficient particularity, even though the pleading can be reasonably answered by the movant. . . . [Other] courts have attempted to enforce Rule 9(b) by dismissing or striking deficient allegations.

Cf. David K. Lindemuth Co. v. Shannon Financial Corp., 637 F. Supp. 991 (N.D. Cal. 1986) (applying Rule 12(e) to deficient fraud claim) with *Kennedy*, 348 F.3d at 594 (dismissing fraud allegations for failure to state a claim under Rule 12(b)(6)).

The Court appears to be able to either dismiss the Complaint or require a more definite statement as a remedy for Plaintiff's violation of Rule 9(b). Tabler urges the

Court to dismiss Plaintiff's Complaint, but if the Court does not dismiss the claim, the Court should require a more definite statement under Rule 12(e).

There are . . . two contexts in which a relatively liberal approach to the granting of Rule 12(e) motions seems appropriate. The first is when the request for a more definite statement is used to enforce the special pleading requirements of Rule 9(b) . . . Rule 9 itself contains no mechanism for enforcing its terms, and the common practice has been to use Rule 12(e) for that purpose.

5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1376 (2d ed. 1990). A motion for a more definite statement under Rule 12(e) is appropriate in cases (such as confused pleadings) where a motion to dismiss is not. *Hoskins v. Poelstra*, 320 F.3d 761, 764-65 (7th Cir. 2003); *Am. Nurses' Ass'n v. Illinois*, 783 F.2d 716, 725 (7th Cir. 1986).

Rule 12(e) provides rationales for a more definite statement beyond a violation of Rule 9(b). Rule 12(e) permits defendants to compel

a more definite statement of matter relating to possible threshold defenses to the claim for relief. . . . [M]any courts have found it expedient to require claimants to state more fully matters relating to possible threshold defenses, even though the claim as originally pleaded was sufficiently definite to enable defendant to respond . . . Plaintiffs thus have been required to . . . state whether the contract they were suing under was written or oral, for the purpose of applying the Statute of Frauds.

5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1376 (2d ed. 1990). A more definite statement should be required under Rule 12(e) when it would help a defendant frame a dispositive defense. *Crawford-El v. Britton*, 523 U.S. 574, 597-598 (1998) (advising that Rule 12(e) can be used to protect government officials from frivolous prisoner's rights litigation by requiring plaintiff to put forward specific, nonconclusory allegations); *Convenient Industries of America, Inc. v. CFM Franchising Co.*, No. 93 C 4028, 1993 WL 387363, at *3 (N.D. Ill. Sept. 24, 1993) (where court could not dismiss claim for discharge in bankruptcy under Rule 12(b)(6), it ordered a more definite statement to under Rule 12(e) “[g]iven the possible assertion of a defense of discharge in bankruptcy that may depend upon the dates on which plaintiff's injury occurred”).

Tabler can prove he was frequently away from his home (where any alleged decryption would have occurred) and on assignment as a member of the U.S. Navy at times during which Plaintiff alleges he could have intercepted its programming. Tabler should be allowed to narrow Plaintiff's specific claims to times during which he can present affirmative proof he was not involved in interception of Plaintiff's signal.

Finally, Rule 12(e) applies when a party "cannot *reasonably* be required to frame a responsive pleading . . ." As discussed in Section III.B., Plaintiff has structured this litigation to shift its investigation costs to defendants (in the form of a settlement or uneconomic defense). Moreover, Plaintiff has sued literally *thousands* of defendants across the country. *See* Exhibit D. The massive scope of Plaintiff's litigation *alone* justifies judicial intervention.

Given the scale and structure of Plaintiff's litigation, Plaintiff should be required to specifically allege *what* Tabler decrypted and *when*. Rule 12(e) provides defendants with an avenue to establish a dispositive defense at the outset of litigation, and provides courts with a method for dealing with the issues Plaintiff's litigation poses. Given the interests of justice raised by this litigation and Tabler's dispositive threshold defenses to at least some of the signals allegedly at issue, Tabler's motion under Fed. R. Civ. P. 12(e) is a modest one.

WHEREFORE, KIRK DOYLE TABLER respectfully moves the Court to dismiss Plaintiff's Complaint for failure to plead fraud with particularity pursuant to Rule 9(b), or in the alternative, to for a more definite statement of Plaintiff's claim either for violation of Rule 9(b), or for independent grounds under Rule 12(e), and for such other relief as the Court deems just under the circumstances.

Respectfully submitted,

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