

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

-vs-

Case No. 6:07-cv-1815-Orl-22KRS

BEN METZGER,

Defendant.

ORDER

I. INTRODUCTION

This is an action to enforce a \$7,000 administrative fine levied by the Federal Communications Commission (“FCC”) against Ben Metzger for his conduct in offering for sale what the FCC considers to be a non-certified Citizens Band (“CB”) transceiver. Metzger’s position is that the equipment in question was not actually a CB transceiver, but was instead an Amateur Radio Service (“ARS” or “Amateur”) transceiver. The distinction is critical, because CB transceivers must be certified by the FCC, while ARS transceivers need not be.

Metzger seeks summary judgment on the ground that the United States has no evidence to support its contention that the subject equipment is a CB transceiver. The Government counters that Metzger’s argument is foreclosed by the Court’s prior ruling that it did not have jurisdiction to consider Metzger’s challenges to the FCC’s rules and regulations. The United States contends that by virtue of that ruling, Metzger cannot contest that (1) the FCC issued a public notice on May 13, 1996 (Doc. No. 34-7), in which the agency “clarified” its position that ARS transceivers that were designed to “easily be modified by the users” to transmit on CB

frequencies were “intended” to operate on such frequencies, within the meaning of 47 C.F.R. § 95.603(c),¹ and must therefore be certified by the FCC prior to sale; and (2) in 1999 or earlier, the FCC compiled a list of “illegal” ARS transceivers, i.e., those that could be easily modified to transmit on CB (Doc. No. 36-3), and the model radio Metzger sold the undercover agents appears on that list. Based on these circumstances, the Government argues that it, not Metzger, is entitled to judgment as a matter of law.

The United States overemphasizes the Court’s prior ruling and at the same time minimizes its own burden of production. Upon carefully considering the parties’ submissions, the Court determines that the United States does bear the burden of presenting evidence that the radio Metzger sold was intended to transmit on CB frequencies, i.e., that it could be easily modified by users for that purpose. Because the Government has not presented any such evidence, Metzger is entitled to summary judgment.²

II. BACKGROUND

In June of 2006, while working at 1 Stop CB Shop, Metzger sold undercover FCC agents a Connex CX 3300HP radio. (Notice of Apparent Liability for Forfeiture (“NAL”) (Doc. No. 34-6) § II.5.) As manufactured, the CX 3300HP does not transmit on any CB frequencies; instead, it transmits only on ARS bands. (Amended Joint Pretrial Statement (Doc. No. 53) (“PTS”) § 10.7 & .8.) According to the FCC, when the agents asked Metzger whether the CX

¹Section 95.603(c) provides, in pertinent part, that “[e]ach CB transmitter (a transmitter that operates or is intended to operate at a station authorized in the CB) must be certificated.” 47 C.F.R. § 95.603(c).

²This Order also addresses a number of other pending motions.

3300HP could operate on both CB channels and ARS bands, he told them there were “easy directions” on the Internet illustrating how to modify the radio to operate on CB frequencies. (NAL § II.5.) The FCC says Metzger also stated he could easily perform the necessary modification for a small “tune-up” charge. (*Id.*)³ The FCC contends the agents paid Metzger for the radio and the “tune-up.” (*Id.*) Approximately 15-20 minutes later, the agency says, Metzger handed the agents the modified CX 3300HP transceiver and showed them how to switch from the ARS band to CB channels. (*Id.*) As a result of this transaction, in December of 2006 the FCC issued Metzger a Notice of Apparent Liability for Forfeiture.⁴ Therein, the agency found that Metzger had “apparently willfully and repeatedly violated Section 302(b) of the Commissions Act of 1934, as amended (‘Act’), and Section 2.803(a)(1) of the Commission’s Rules (‘Rules’) by offering for sale non-certified Citizens Band (‘CB’) transceivers.” (*Id.* § I.1.) The NAL proposed a fine of \$7,000. (*Id.*) Metzger contested the NAL, but the FCC rejected his challenges and issued a forfeiture order fining him \$7,000.

After Metzger failed to pay the fine, the United States filed the present lawsuit. Metzger responded with a counterclaim. In his counterclaim, Metzger alleged, *inter alia*, that the FCC’s May 13, 1996 public notice was ineffective because it did not comply with the Administrative Procedure Act, that the public notice was impermissibly vague, and that the FCC’s regulations

³“There is no regulation restricting someone from modifying Amateur equipment to work outside of its assigned frequencies.” (PTS § 10.6.)

⁴A few months before the June 2006 incident, the FCC issued Metzger a citation for marketing allegedly non-certified CB transceivers, including the CX 3300HP. The June 2006 visit by the undercover agents occurred after the FCC learned Metzger was continuing to sell the CX 3300HP.

violated due process and were being enforced in an arbitrary and capricious manner. (*See, generally*, Doc. No. 11.) Metzger sought the following relief:

- A. [A declaration] that the fine assessed against the Defendant, need not be paid;
- B. [A declaration] that the transceivers which are the subject matter of the Notice of Apparent Liability are legal to sell;
- C. [A declaration] that the transceivers which are the subject of the Notice of Apparent Liability are Amateur transceivers governed by 47 CFR Part 97 and not by 47 CFR Part 95;
- D. [A declaration] that the transceivers which are the subject matter of the Notice of Apparent Liability do not require certification under 47 CFR Part 95[;]
- E. [A declaration] that even if the transceivers in question are “easy to modify” to work out of band, the FCC’s regulations do no[t] require certification of the transceivers;
- F. [S]uch other and further relief as this Court may deem just and proper.

(*Id.* at 12.)

III. PRIOR JURISDICTION RULING

The United States moved to dismiss Metzger’s counterclaim on the asserted basis that it constituted a challenge to agency action that was reviewable only by the court of appeals. (*See, generally*, Doc. No. 29.)⁵ The Court was persuaded by this argument, at least as to some aspects of the counterclaim. The Court determined that the courts of appeals have exclusive jurisdiction over challenges to the FCC’s final orders, rules and regulations. (Doc. No. 31 at

⁵The Government also sought dismissal on the asserted basis that Metzger had not exhausted his administrative remedies. Given its ruling regarding subject matter jurisdiction, the Court did not reach the exhaustion argument. (Doc. No. 31 at 5.)

4.) Accordingly, the Court ruled that it did not have jurisdiction to consider those aspects of Metzger's counterclaim that challenged the validity of the forfeiture order or any regulation upon which it was based. (*Id.*) However, the Court made clear that its ruling did "not preclude this Court from considering any factual or legal arguments that Defendant may raise against the forfeiture claim which do not challenge the FCC's rules and regulations." (*Id.*)⁶ Accordingly, the Court granted the United States' motion to dismiss the counterclaim "insofar as it seeks dismissal of those aspects of the Counterclaim that challenge the validity or constitutionality of the FCC's rules and regulations." (*Id.* at 5.) The Court reiterated that "this does not preclude Defendant from raising factual or legal arguments which do not challenge the validity or constitutionality of the FCC's rules and regulations." (*Id.*)

IV. THE PARTIES' SUMMARY JUDGMENT ARGUMENTS

Metzger seeks summary judgment on the basis that the CX 3300HP he sold the undercover agents is an ARS transceiver that does not require certification prior to sale. More specifically, Metzger maintains that, as manufactured, the CX 3300HP does not transmit on CB frequencies, the transceiver is not intended to operate on such frequencies, and it is not easy to modify to transmit on such frequencies.⁷ To support these contentions, Metzger has filed his

⁶The Court also rejected the Government's argument that the "first two parts" of the counterclaim failed to state a claim for relief, stating: "These parts of the Counterclaim adequately state claims for relief, subject to the foregoing jurisdictional limitation. In other words, Defendant may not challenge the FCC's rules and regulations under the guise of the first two parts of the Counterclaim." (Doc. No. 31 at 5.)

⁷Metzger continues to argue that the May 13, 1996 public notice is ineffective because it did not comply with the Administrative Procedure Act. (Doc. No. 34 at 9th scanned page.) However, consistent with its prior ruling, this Court reiterates that it does not have jurisdiction to consider that challenge. Instead, for present analytical purposes, the Court will assume that the public notice is

own declaration, as well as the declarations of Yu-Fu Fan, the engineer who designed the CX 3300HP, and Michael Violette, an engineer who is an officer of an FCC-approved facility that tests and certifies radio equipment.

Fan testified that the CX 3300HP “as designed transmits only on Amateur radio frequencies,” and that when he designed the radio, he “intended that it be used as a high frequency Amateur transceiver.” (Fan Decl. (Doc. No. 34-2) ¶2.) He also noted that “[a]lmost all HF Amateur transceivers are capable of being modified to work out of band,” and “[it] is impossible to design a high frequency Amateur transceiver that cannot be modified because in modern day transceivers the transmission frequency is synthesized by electronic components.”

(*Id.* ¶ 3.) Of principal significance to the present case, Fan further stated:

I became aware that the FCC contended, in or about 1999, that the Connex 3300HP was too easy to modify to transmit out of the Amateur band. I redesigned the Connex 3300HP to make it more difficult to modify. As of 2001, all Connex 3300HP transceivers manufactured by RANGER incorporate the new design.

(*Id.*)

Consistent with Fan’s testimony, Metzger testified that the CX 3300HP, as manufactured, transmits only on Amateur frequencies; as sold, the radio is intended as an Amateur transceiver; and “[a]lmost all high frequency Amateur transceivers, no matter which model or manufacturer, can be modified to work out of band.” (Metzger Decl. (Doc. No. 34-3)

valid and has the force of law, i.e., that the FCC had the power to determine by public notice that a transceiver is “intended” to operate on CB frequencies if it can be easily modified by the user to do so. As attractive as Metzger’s criticisms of the agency’s “capability equals intent” position may be, this Court lacks the power to reach those arguments.

¶¶ 3 & 4.) With regard to the ease by which the CX 3300HP can be modified to transmit on CB frequencies, Metzger stated: “The Connex 3300HP cannot be modified to work out of band without removing the cover and using a soldering iron to remove multiple components.” (*Id.* ¶ 4.)

Violette testified that his laboratory tested a sample CX 3300HP, and that such testing showed that the transceiver “transmits solely on Amateur frequencies and is in compliance with the regulations found at Part 97 of the FCC’s regulations.” (Violette Decl. (Doc. No. 34-5) ¶ 4.) In Violette’s opinion, the CX 3300HP “is an Amateur transceiver and is not a Citizen Band transceiver,” and it “does not . . . need to be certified as in compliance with Part 95 of the FCC’s regulations before being sold in the United States.” (*Id.*) Regarding the FCC’s public notice addressing “easily alterable” transceivers, Violette opined, like Fan and Metzger, that “most high frequency transceivers can be modified to work out of band.” (*Id.* ¶ 5.) However, building on Metzger’s testimony regarding the steps necessary to modify the CX 3300HP, Violette stated: “I would not consider a transceiver to be easily alterable where the modification requires that the user remove the cover of the transceiver and use tools, such as a soldering iron, to remove or add components.” (*Id.* ¶ 5.)

Metzger points out that the United States has not designated any expert witnesses in this case, and it thus cannot present any expert testimony that the CX 3300HP is easy to modify to transmit on CB frequencies. Similarly, Metzger represents that none of the Government’s witnesses have ever modified a CX 3300HP transceiver and none have personal knowledge regarding how to do so. Metzger thus argues that the United States has no “evidentiary support

for its contention that the transceivers are easy to modify,” and therefore “cannot prove its case.” (Doc. No. 34 at 10th scanned page.)

In response, the United States argues that all of Metzger’s summary judgment arguments constitute challenges to the FCC’s rules and regulations, and are therefore foreclosed by the Court’s prior ruling regarding subject matter jurisdiction. The Government points to the May 13, 1996 public notice; the list of “illegal” radios - including the CX 3300HP - the FCC compiled in 1999 or earlier; and a letter the FCC’s general counsel wrote to the Treasury Department in 1999, suggesting that ARS radios that could “easily be altered” to transmit on CB, “such as by moving or removing a jumper plug or cutting a single wire,” were intended for use on CB frequencies. (Doc. No. 36 at 2-3.) The United States maintains that these agency determinations - including the conclusion that the CX 3300HP can be easily modified to transmit on CB frequencies - are not subject to challenge by Metzger in this lawsuit. The Government asserts that Metzger’s “extensive technical argument about the operation of the radio” is “foreclosed by the Court’s order.” (*Id.* at 10.) Responding to Metzger’s assertion that the United States has failed to present any evidence regarding the ease-of-modification issue, the Government states, in a footnote:

Defendant points out that Plaintiff did not designate expert witnesses in this case. That was by design; as in other cases the Commission has litigated involving impermissible challenges to Commission regulations or rulings, the United States cannot make technical arguments through expert testimony defending the accuracy of Commission regulations. The jurisdictional statute prohibits those arguments from being made in district court, and specifically reserves those arguments for the court of appeals. Whatever the merit of Defendant’s expert witness arguments, and Plaintiff urges that there is none, it cannot force

this Court to exercise jurisdiction where the statute divests it of that power.

(*Id.* at 7 n.1.)

V. SUMMARY JUDGMENT STANDARD

A motion for summary judgment should be granted if “the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c). “The party seeking summary judgment bears the initial burden of identifying for the district court those portions of the record ‘which it believes demonstrate the absence of a genuine issue of material fact.’” *Cohen v. United Am. Bank of Cent. Fla.*, 83 F.3d 1347, 1349 (11th Cir. 1996) (quoting *Cox v. Adm’r U. S. Steel & Carnegie*, 17 F.3d 1386, 1396, *modified on other grounds*, 30 F.3d 1347 (11th Cir. 1994)). “There is no genuine issue for trial unless the non-moving party establishes, through the record presented to the court, that it is able to prove evidence sufficient for a jury to return a verdict in its favor.” *Cohen*, 83 F.3d at 1349. The Court considers the evidence and all inferences drawn therefrom in the light most favorable to the non-moving party. *See Hairston v. Gainesville Sun Pub. Co.*, 9 F.3d 913, 918 (11th Cir. 1993).

VI. ANALYSIS

In a forfeiture recovery suit such as this, the defendant is entitled to a trial de novo. 47 U.S.C. § 504(a). The parties have agreed that the United States bears the burden of proof. (PTS § 10.17.) So, what must the Government prove? In this particular case, the United States must establish that Metzger willfully and repeatedly offered for sale non-certified CB

transceivers. Accepting for analytical purposes the validity of the FCC's May 13, 1996 public notice, this means, at the very least, that the Government must prove that the radio Metzger sold could be easily modified to transmit on CB frequencies.

The United States argues that because the CX 3300HP appeared on a list of illegal radios that was generated in 1999 or earlier, the issue of whether the CX 3300HP can be easily modified is essentially an established fact for purposes of this litigation. However, this reasoning suffers from a fatal flaw: it ignores Metzger's evidence that the CX 3300HP variant the FCC tested in 1999 or earlier is not the same radio Metzger sold in 2006. As previously stated, the radio's designer, Yu-Fu Fan, testified by affidavit that, in response to the FCC's criticisms, he redesigned the radio in 2001 to make it more difficult to modify. This evidence is unrebutted. Hence, Metzger is not actually challenging the FCC's determination regarding the illegality of the particular radio he sold the undercover agents; based on his unrebutted evidence, the agency's prior determination concerned a different version of the CX 3300HP. Consequently, Metzger's evidence *regarding the characteristics of the transceiver he sold* is not barred by the Court's prior ruling regarding subject matter jurisdiction. Introduction of such evidence is entirely consistent with the Court's pronouncement that Metzger would be permitted to raise factual or legal arguments which do not challenge the validity or constitutionality of the FCC's rules and regulations.

The FCC has issued various statements regarding the characteristics that make certain ARS transceivers easily modifiable, and therefore illegal to sell without certification: "they have built-in design features which facilitate their operation on CB frequencies by the exercise of simple, end-user accessible modifications to the devices" (NAL ¶ 3); "some radio transmitters

that transmit in a portion of the 10-meter band of the ARS . . . are equipped with rotary, toggle, or pushbutton switches mounted externally on the unit, which allow operation in the CB bands after completion of minor and trivial internal modifications to the equipment” (*Id.* ¶ 8); listed “illegal” ARS transceivers “are intended for use on the CB frequencies . . . because they have built-in capability to operate on CB frequencies[;] . . . [t]his capability can be readily activated by moving or removing a jumper plug, cutting or splicing a wire, plugging in a connector, or other simple means” (FCC’s “Illegal CB Transceiver List”). However, Metzger has presented evidence that “[t]he Connex 3300HP cannot be modified to work out of band without removing the cover and using a soldering iron to remove multiple components.” (Metzger Decl. ¶ 4.) Additionally, he has presented expert testimony that modifications of that nature cannot be considered “easy.” (Violette Decl. ¶ 5.)

In the face of this showing, what evidence has the United States presented that the CX 3300HP version Metzger sold could be easily modified (as the FCC defines that concept) to transmit on CB frequencies? None whatsoever. In fact, it has consciously elected not to present any such proof.⁸ By choosing to forego presenting any evidence at all, and to rely instead on purely legal arguments, the United States has effectively placed all of its legal eggs

⁸The United States might have argued that the fact that Metzger was able to accomplish the necessary modifications in 15 or 20 minutes constitutes circumstantial evidence that such modifications were “easy.” However, the Government did not make such an argument and, instead, took the position that it need not - indeed, could not - present any evidence regarding this subject. In any event, the Court does not believe a reasonable fact-finder could conclude that the mere fact that Metzger was able to modify the transceiver in 15 to 20 minutes means that the CX 3300 HP was “easily modifiable,” at least as the FCC defines that concept. This is particularly the case given the specific evidence Metzger presented concerning the steps and tools that were necessary to accomplish the modifications, as well as the fact that the assessment involved in this lawsuit is penal in nature.

in one basket. This was a risky approach; perhaps as risky as basing an enforcement action on a years-old “illegal CB transceiver list.” In the final analysis, this case turns on a failure of proof. Because the United States has failed to present any evidence that the radio Metzger sold was an uncertified CB radio, Metzger is entitled to summary judgment.

VII. CONCLUSION

1. Defendant/Counter-Plaintiff Ben Metzger’s Motion for Summary Judgment (Doc. No. 34), filed on December 1, 2008, is GRANTED.

2. The Clerk shall enter a final judgment providing that the Plaintiff, United States of America, shall take nothing on its claim against the Defendant, Ben Metzger. The judgment shall further provide that the Defendant, Ben Metzger, is awarded the following declaratory relief on his counterclaim against the Plaintiff, United States of America: The Court declares that Defendant Ben Metzger is not liable for the \$7,000 fine recommended in the Notice of Apparent Liability issued by the Federal Communications Commission on December 12, 2006. The judgment shall also provide that the Defendant shall recover his costs of action.

3. Defendant/Counter-Plaintiff Ben Metzger’s Motion to Strike Exhibit “B” and Exhibit “C” to Plaintiff’s Opposition to Defendant’s Motion for Summary Judgment or, Alternatively, Motion for Leave to File Reply Brief (Doc. No. 37), filed on January 6, 2009, is DENIED. Some of Defendant’s arguments are well-taken, particularly the contention that the “illegal CB transceiver list” is irrelevant because it relates to a prior version of the CX 3300HP. Moreover, Plaintiff’s response to the motion is particularly weak. Nevertheless, the Court has discussed the illegal radio list in its summary judgment analysis, and the e-mail of Ray LaForge gives some indication as to when that list was compiled. Accordingly, these exhibits will remain a

part of the summary judgment record. The Court also determines that the Defendant's alternative request to file a reply brief should be denied, inasmuch as the issues presented in this case are adequately briefed.

4. Defendant's Motion for Evidentiary Sanction for Spoliation of Evidence (Doc. No. 41), filed on March 13, 2009, is DENIED. The Defendant has not met the legal requirements for obtaining sanctions under a spoliation theory. In particular, Defendant has not shown that "the evidence existed at one time, that the spoliator breached a duty to preserve the evidence, . . . that the evidence is critical to the moving party's ability to prove [his] prima facie case or defense[.]" or that the spoliator acted in bad faith. *Wilson v. Wal-Mart Stores, Inc.*, No. 5:07-cv-394-Oc-10GRJ, 2008 WL 4642596 *2 (M.D. Fla. Oct. 17, 2008) (footnotes omitted).

5. Defendant's Motion In Limine Regarding Prior Bad Acts (Doc. No. 43), filed on March 13, 2009, is MOOT.

6. Defendant's Motion In Limine to Preclude Plaintiff From Offering Expert Testimony in Any Form (Doc. No. 44), filed on March 13, 2009, is MOOT.

7. Plaintiff's Motion In Limine to Preclude Defendant From Offering Testimony and Exhibits Relevant to Dismissed Issues (Doc. No. 47), filed on March 13, 2009, is MOOT. Even if this motion had not been mooted by the summary judgment ruling, obviating the necessity of a trial at which these witnesses would be called to testify, the testimony of Yu Fu Fan and Michael Violette - and possibly that of the other witnesses discussed in the motion - would not be precluded by the Court's prior ruling regarding subject matter jurisdiction.

8. The Clerk shall close this case.

DONE and **ORDERED** in Chambers, in Orlando, Florida on April 6, 2009.


ANNE C. CONWAY
United States District Judge

Copies furnished to:

Counsel of Record
Unrepresented Party