

UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE

UNITED STATES OF AMERICA, )  
)  
Plaintiff, )  
)  
v. ) Civil No. 10-435-JAW  
)  
GLENN A. BAXTER, )  
)  
Defendant. )

**REPLY MEMORANDUM IN SUPPORT OF  
MOTION FOR SUMMARY JUDGMENT**

Plaintiff, the United States of America, by undersigned counsel, submits this Reply Memorandum in support of its motion for summary judgment. Defendant's "Verified Opposition to Government Motion for Summary Judgment" ("Opposition") fails to show any genuine dispute over a material fact. As set forth below, however, we amend our motion to seek only partial summary judgment in the amount of \$14,000.

**DISCUSSION**

Defendant's response to the government's motion consists mostly of legal arguments, not factual ones. <sup># 27</sup> "Matters of law, however, are for the court to resolve." *Blackie v. State of Maine*, 75 F.3d 716, 721 (1<sup>st</sup> Cir. 1996). <sup># 1</sup> To the degree that defendant asserts disputes of fact, he has not produced any evidence in support of his contentions. <sup># 2</sup> Once a moving party has made its showing of the absence of a genuine issue of material fact, the nonmovant must "produce specific facts, in suitable evidentiary form, to establish the presence of a trialworthy issue." *Clifford v. Barnhart*, 449 F.3d 276, 280 (1<sup>st</sup> Cir. 2006) (quoting *Triangle Trading Co. v. Robroy Indus., Inc.*, 200 F.3d 1, 2 (1<sup>st</sup> Cir. 1999)). <sup># 9</sup> The undisputed facts of record compel judgment for the government on three <sup># 2</sup> of defendant's statutory and regulatory violations, totaling \$14,000 in forfeiture assessments.

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Furthermore, defendant does not contest the reasonableness of any of the individual amounts assessed for the violations and therefore has waived any objection to the amount of the forfeiture.

1. Violation of 47 U.S.C. § 308.

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The FCC may "require from [a] ... licensee ... written statements of fact to enable [the agency] to determine whether ... such license [should be] revoked." 47 U.S.C. § 308(b). In response to complaints of interference caused by defendant, a potentially revocable offense, the FCC twice asked defendant to provide information regarding how defendant controlled his station. He failed to provide the requested information. *Forfeiture Order* ¶ 5; *Facts* ¶¶ 5-12.

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In his Opposition, defendant claims that the question was not possible to answer because it was "legally vague and ambiguous." *Opp.* 16. That claim presents no factual dispute. The undisputed facts show that defendant failed to provide the information requested by the FCC. If

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defendant did not understand the question asked of him by the FCC, he could have asked for clarification. His purported confusion does not justify a failure to respond. Defendant also

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claims (*Opp.* 5) that the FCC could not properly inquire about his station control because it had excused him from filing monthly reports about his station. On its face, the letter on which defendant relies does no such thing and has nothing to do with excusing defendant from responding to legitimate FCC inquiries.

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The forfeiture amount for failure to respond to an FCC inquiry is \$3,000. #28

2. Violation of 47 C.F.R. § 97.101(d).

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"No amateur operator shall willfully or maliciously interfere with or cause interference to any radio communications or signal." 47 C.F.R. § 97.101(d). FCC monitoring personnel detected defendant's signal interfering with the signal of other amateur transmitters on November 27, 2004, December 8, 2004, and March 31, 2005. *Forfeiture Order* ¶ 3; *Facts* ¶¶ 14-

# 2 { 16. Defendant provides no evidence of his own that refutes the government's showing of interference; quite to the contrary, his discovery responses directly admit that he caused interference to other operators. See Responses to Requests for Admission Nos. 1-8; 17-22 ("there can ... be and sometimes is incidental interference to ongoing communications" caused by defendant).

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# 14 { Defendant wrongly claims that his interference was permissible. First, he asserts that 47 C.F.R. § 97.113(d) (2005)<sup>1</sup> and 47 C.F.R. § 97.111(b)(6) allow interference as long as a schedule of intended transmission is published 30 days in advance. Opp. 2-3, 14, 20, 22, 26. Section 97.113(d) governs when the operator of a "club station" – not an individual operator like defendant – may accept compensation. Declaration of William T. Cross, Ex. 1, ¶ 4 ("Cross Dec."). It has nothing to do with permitting interference, which is flatly barred under section 97.101(d). Cross Dec. ¶¶ 5-6. Section 97.111(b)(6) authorizes the transmission of one-way "information bulletins" (which are defined in 47 C.F.R. § 97.3(a)(26)), but likewise does not authorize interference. Cross Dec., Ex. 1, ¶ 4. # 2 # 14

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# 15 { Defendant also argues that the American Radio Relay League (ARRL) transmits information bulletins that interfere with other operators' signals and that it is unfair to punish him and not ARRL. Opp. 4, 9, 12. Defendant cites no part of the factual record of this case to support his assertions, and the claim fails on that ground alone. The Cross Declaration # 2 # 32 demonstrates that, in fact, ARRL has never been cited for interference, nor has the FCC received complaints of interference caused by ARRL. See Cross Dec. Ex., 1, ¶ 3. Defendant, by contrast, has been the subject of numerous interference complaints, including complaints that he interfered

<sup>1</sup> That provision is currently codified at 47 C.F.R. § 113(a)(3)(iv) (2010).

#2 } with Salvation Army disaster support transmissions. See *Forfeiture Order* ¶ 2; *Notice of*  
#21 } *Apparent Liability* ¶ 3; Cross Dec., Ex. 1, ¶ 2.

#2 } Finally, defendant claims that in a 1989 letter the FCC authorized him to interfere with  
#11 } other amateur operators. Opp. 15, 18, Ex. 2. In fact, although that letter was prompted by a  
complaint of interference, the letter says only that defendant's transmissions (the nature of  
which, 20 years ago, are not described in the letter) constitute "information bulletins" that are  
authorized under FCC Rule 97.111(b)(6) and does not address interference. As noted above, that  
rule does not permit interference, which is flatly barred by Rule 97.101(d). See Cross Dec., Ex.  
1, ¶ 4. Nothing in the letter can be read to provide defendant with an exemption from the rules  
prohibiting interference or from any other requirement imposed by FCC rule or statute.

#28 } The forfeiture amount for intentional interference is \$7,000.

3. Violation of 47 C.F.R. § 97.113(a)(3).

#2 } The FCC's rules state that "no amateur station shall transmit ... communications in  
#22 } which the station licensee or control operator has a pecuniary interest." 47 C.F.R.  
§ 97.113(a)(3). First Amd. Complaint ¶ 7. The *Forfeiture Order* specified three instances of  
communications aired by defendant in which he had a pecuniary interest. Two of those instances  
support judgment in favor of the government. As explained below, we no longer rely on the  
third transmission for the purposes of this motion.

#2 } On November 25, 2004, and March 30, 2005, defendant transmitted "information  
#22 } regarding his website, which offers various products for sale." *Forfeiture Order* ¶ 4.  
Specifically, defendant transmitted the website address and urged listeners to visit the site. Once  
there, visitors to the site would see offers for credit cards, newsletter subscriptions, and other  
material of a commercial nature. See *Forfeiture Order* ¶¶ 4, 15; *Notice of Apparent Liability*

¶ 14. #2 #21

#1 { Defendant concedes in his Opposition that he transmitted his website's address, Opp. 10, but claims that there is a factual dispute over whether the transmission was pecuniary because defendant referred to his website only "in connection with looking for volunteers," in connection with an award nomination, and in connection with "checking the ... publishing of K1MAN's transmitting schedule," and not for pecuniary purposes, Opp. 19-20.

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#33 { Any such dispute is not one of fact, but one of law. The legal question is whether references to a website that contains commercial inducements are pecuniary even if the references are made outside of a commercial context. The FCC reasonably concluded that they are. Businesses often take action, such as sponsoring charity events, that is not in itself pecuniary, but is intended to bolster the success of the business. In the same way, defendant's referring listeners to his website was intended to increase traffic to that site, which would inevitably have exposed more visitors to the pecuniary material on the site, such as credit card offers and subscriptions to defendant's newsletter. If defendant had entirely non-commercial motives, he could have established a website without the pecuniary material.

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#34 { Defendant's claim that he did not profit from the credit card offers advertised on his website is irrelevant. Opp. 23. "Pecuniary" means "of or relating to money." American Heritage Dictionary of the English Language at 1333 (third ed. 1992). Credit card offers and publication subscriptions relate to money, and the definition of pecuniary does not require profitability. Indeed, the amateur radio service was established as a "noncommercial communication service," 47 C.F.R. § 97.1, and the definition of "pecuniary" therefore should be read broadly to fulfill the noncommercial policies behind the service.

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#27 { The *Forfeiture Order* also held that defendant had engaged in a pecuniary transmission on December 1, 2004. *Forfeiture Order* ¶ 4, *see* Motion at 3, Complaint ¶ 16, Fact 15. In his

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Opposition, defendant claims that the recording of the transmission on which the government relies was not in fact made by the FCC, but by another amateur radio licensee. The FCC's investigation of that claim has revealed that FCC personnel did not in fact record the December 1 transmission, but received two tapes of the program from two different amateur licensees.<sup>2</sup>

Although we believe the tapes to be accurate depictions of defendant's transmission on that day, we no longer view the December 1, 2004, transmission as an appropriate basis for summary judgment. We therefore do not move for summary judgment on the basis of the December 1, 2004, transmission. Summary judgment on the question of pecuniary transmission, however, remains appropriate in light of the November 25, 2004, and March 30, 2005, transmissions.

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The forfeiture amount for pecuniary transmissions is \$4,000. *See Forfeiture Order* n.20; *Notice of Apparent Liability* ¶ 18.

4. Violation of 47 C.F.R. § 97.113(b).

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FCC rules prohibit amateur radio licensees from engaging in either "broadcasting" or "one-way communications." 47 C.F.R. § 97.113(b). Because the *Forfeiture Order* and the government's complaint in this case relied on the December 1, 2004, transmission as the basis for defendant's violation of that rule, we have determined not to pursue summary judgment on the question of one-way communication for the reasons described above. There is some ambiguity in the *Notice of Apparent Liability* ("NAL") and the *Forfeiture Order* over whether the Commission imposed a specific forfeiture amount for the one-way communication violation. The NAL proposed a forfeiture of \$4,000 for the violation, NAL ¶ 18, but the *Forfeiture Order*

<sup>2</sup> In support of our Motion for Summary Judgment, we submitted declarations indicating that FCC personnel had recorded the December 1, 2004, transmission. *See* Declaration of Sharon Webber ¶ 3; Declaration of David Larrabee ¶¶ 20-22. In light of our subsequent investigation, those statements are not accurate. We are submitting with this motion amended declarations from those two individuals as Exhibits 2 and 3.

# } does not mention the violation, appearing instead to impose two separate \$4,000 forfeitures for  
#22 } two pecuniary interest violations, *Forfeiture Order* n.20.

#2 } At this point, we do not seek judgment on \$4,000 of the assessed forfeiture. The total  
#28 } amount on which we seek judgment is \$14,000 – \$3,000 for failure to respond, \$7,000 for  
interference, and \$4,000 for one count of pecuniary transmission.

### CONCLUSION

For the foregoing reasons, and those set forth in our motion, the Court should grant partial summary judgment for the government and order defendant to pay \$14,000 as a forfeiture for his violations.

Respectfully submitted,

Richard W. Murphy  
Attorney for the United States  
Under Authority Conferred by  
28 U.S.C. § 515

Dated: June 23, 2011

/s/ Evan J. Roth, AUSA  
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**Certificate of Service**

I, Evan J. Roth, AUSA, hereby certify that on June 23, 2011, I caused a copy of the foregoing to be mailed, postage prepaid, to:

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Belgrade Lakes, ME 04918

/s/ Evan J. Roth, AUSA