

**IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA**

DIRECTV, INC.,)
a California corporation,)
)
Plaintiff,)
)
v.)
)
WILLIAM J. DELCAMBRE, GEORGE)
EICK, MARK GARDNER, EDDIE)
GREER, and WES HARDIN,)
)
Defendants.)

Case No. 03-CV-349-C

**DEFENDANT MARK GARDNER’S REPLY TO THE
PLAINTIFF’S RESPONSE TO MOTION TO DISMISS**

COMES NOW the Defendant, Mark Gardner, by and through his counsel of record, Walter D. Haskins, of the law firm of Atkinson, Haskins, Nellis, Holeman, Phipps, Brittingham & Gladd, hereby submits the following as Defendant Mark Gardner’s Reply to the Plaintiff’s Response to Motion to Dismiss.

**The Plaintiff’s Causes of Action Against the Defendants Did Not Arise
Out of the Same Transaction, Occurrence, or Series of Transactions or Occurrences**

Other than quoting case law that sets out the standard for proper joinder under Fed. R. Civ. P. 20(a), Plaintiff DIRECTV’s Response to Defendant Mark Gardner’s Motion to Dismiss adds nothing to DIRECTV’s position that the five separate and distinct Defendants should remain joined in this lawsuit. Rule 20(a) clearly states that defendants may be joined in one lawsuit only if a right to relief asserted against the defendants “arises out of the same transaction, occurrence, or series of transactions or occurrences *and* if any question of law or fact common to all defendants will arise in the action.” Fed. R. Civ. P. 20(a)(emphasis added). Thus, it is not enough that DIRECTV has asserted the same causes of action against all of the named Defendants. DIRECTV must also show

that the allegations arise out of the same series of transactions or occurrences. Unquestionably, DIRECTV cannot make that showing.

DIRECTV's Complaint acknowledges that the devices at issue were purchased at different times and in different quantities. In fact, the Complaint also admits that the Defendants purchased different devices. For instance, DIRECTV alleges in its Complaint that Defendant Willard Delcambre purchased a "Terminator Boot Loader Board." (Complaint, ¶ 15(a)). However, as a basis for suit against Defendant Gardner, DIRECTV alleges that Mark Gardner purchased a "Vector UL PRO With SU2 Code Enclosed Unloader." (Complaint, ¶17(a)). When this case goes to trial, it is quite possible that the Defendants will have to present different expert testimony on the legal uses of these separate and distinct devices. In addition to the expense to all the Defendants, all of the separate expert testimony on the different devices would have a tendency to confuse or mislead the jury. Further, if one Defendant did, indeed, steal Plaintiff's programming, the prejudicial effect on the remaining Defendant(s) is obvious.

In support of its claim that the allegations against these Defendants arise out of the same series of transactions or occurrences, DIRECTV argues that it would present the same testimony and the same witnesses against each of the Defendants. This argument, however, incorrectly assumes that the Defendants either will have no defense or will all have the same defense. Since each and every one of the Defendants purchased the devices at different times, in different quantities, and for different purposes, each of the Defendants will put forth different witnesses and evidence supporting their claim that these devices were purchased and used for legal purposes. This separate and distinct evidence that will be presented at the trial of this case will confuse the jury and make for an

extremely long trial. For this reason alone, Defendant Mark Gardner should be dismissed from this case.

If Plaintiff's position was correct, it would have been proper to join John Dillinger and Pretty Boy Floyd in the same lawsuit filed by the Federal Reserve System simply because they both used Thompson submachine guns purchased from the same manufacturer (Colts' Patent Firearms) to commit separate and discrete bank robberies (presuming the Federal Reserve chose to use the same expert criminologist against both). The absurdity of DIRECTV's position becomes readily apparent when taken to its logical conclusion. It is not proper to joint defendants allegedly causing separate and distinct injury simply because Plaintiff's evidence may in some unknown part be duplicative.

This Court has broad discretion to dismiss a party when the party was improperly joined in the lawsuit. Fed. R. Civ. P. 21; Letherer v. Alger Group, L.L.C., 328 F.3d 262, 266-67 (6th Cir. 2003). A district court's decision to dismiss a party for improper joinder will only be overturned for an abuse of discretion. K-B Trucking Co. v. Riss Int'l Corp., 763 F.2d 1148, 1153 (10th Cir. 1985). As demonstrated in great detail in Defendant Mark Gardner's Motion to Dismiss and in the instant Reply, DIRECTV's allegations against these Defendants did not arise out of the same transaction or occurrences or the same series of transactions or occurrences. Trying Mark Gardner with the other Defendants in this case would materially prejudice Mr. Gardner. The multitude of different evidence in the case would tend to confuse the jury and if one of the other Defendants did in fact commit the acts of signal piracy alleged by DIRECTV, it is possible that the jury may impute the other Defendant's conduct upon Mr. Gardner. Therefore, Mr. Gardner should be dismissed from this lawsuit and DIRECTV should be forced to proceed against Mr. Gardner, individually.

The Plaintiff Has Mislead This Court By Relying On DIRECTV v. Truesdale

The Plaintiff relies on five unpublished opinions from various district courts in support of its argument that joinder of the Defendants is appropriate in this case. However, in citing an order from the case of DIRECTV, Inc. v. Truesdale, et al, No. 03-PT-0082-E (N.D. Al., Mar. 17, 2003), the Plaintiff has neglected its duty of candor to this Court. While the court in Truesdale did initially deny the defendants' motions to sever, the court then transferred the case from the Northern District, Eastern Division, to the Northern District, Southern Division. Once the case was transferred to the Southern Division, the court reconsidered the prior order denying the defendants' motions to sever that was cited and attached by DIRECTV in this case. (Pacer Docket Sheet from the Northern District of Alabama, attached as Exhibit "A"); (Order Transferring Case to Southern Division, attached as Exhibit "B"). On reconsideration, the Southern Division granted the defendants' motions to sever and at the same time instructed the plaintiff to pay filing fees for each of the individual defendants. (Order Granting Reconsideration of the Motion to Sever and Granting the Motion to Sever on Reconsideration, attached as Exhibit "C").

The court in Truesdale, a case relied upon by the Defendant, finally came to the correct conclusion that DIRECTV cannot lump these separate and distinct Defendants into one lawsuit simply to save money. In the other cases cited by the Plaintiff, the memorandum orders are not specific as to the precise facts of the case and the separateness of the defendants to determine whether the cases are even instructive on this issue. Nevertheless, the cases are not binding on this Court and should not be followed, as they do not represent proper application of Fed. R. Civ. P. 20 and 21.

**Dismissal of Defendant Mark Gardner From This
Lawsuit is the Appropriate Remedy for Misjoinder in This Case**

Dismissal of Defendant Mark Gardner is the appropriate remedy in this case because of DIRECTV's willful violation of the rule of joinder. As explained in detail in Defendant Mark Gardner's Motion to Dismiss, other district courts have rejected DIRECTV's attempts to save money on filing fees by improperly joining separate and distinct defendants in one action. Yet, DIRECTV has persisted in its attempt to save money by violating the Federal Rules of Civil Procedure.

If DIRECTV really believes it has a valid lawsuits against these Defendants and the thousands of other defendants throughout the country, why is DIRECTV so unwilling to pay the nominal filing fee for each individual defendant? The Plaintiff posits that this is because DIRECTV realizes the utter frivolity of its lawsuits and understands that almost all of these cases will be dismissed on summary judgment motions. What DIRECTV is counting on is that some defendants will opt to settle the case rather than go to trial, and the money from these settlements will be more than the cost of filing fees and attorneys' fees in those cases that are dismissed on summary judgment. This cost benefit analysis only works, however, if DIRECTV does not have to file individual lawsuits against each defendant. By filing lawsuits in "bulk," DIRECTV saves money on filing fees, pleadings, and discovery, and makes more money off the settlements from those defendants that are scared to challenge the DIRECTV corporate empire.¹ This scam by DIRECTV is the epitome of extortion through legal process

¹ Defendant Gardner refers to Plaintiff DIRECTV as the corporate empire because the ultimate parent corporation of DIRECTV in General Motors. Apparently, it is now being purchased by Rupert Murdoch of Australia.

As demonstrated in the Defendant Gardner's Motion to Dismiss, there are thousands of legal uses for the devices that DIRECTV refers to as "illegal signal theft devices." The so-called "illegal signal theft devices" are nothing more than smart cards and smart card readers. Smart card technology is everywhere on the Internet. In fact, counsel for Defendant Gardner has attached as Exhibit "D" four separate web sites selling virtually the same "illegal signal theft devices" that the Plaintiff alleges that Defendants purchased. One of these web sites is owned by Microsoft. Another web site is for the federal government. The Government Accounting Office is, according to Plaintiff's theory, engaging in "signal piracy" (and using Plaintiff's theories of joinder, perhaps a proper Defendant herein). Under the Plaintiff's idea of "illegal signal theft devices," Bill Gates and President Bush would be subject to suit for selling "illegal signal theft devices."

DIRECTV's entire lawsuit is premised on the possession of smart card technology that has tons of legal uses.² DIRECTV's entire case hinges on a list of purchasers from certain vendors who sold these devices to the Defendants. These allegations do not support a cause of action under any of the statutes or common law causes of action listed in DIRECTV's Complaint. While the Defendant realizes that all of this information is summary judgment material, the Defendant wants the Court to understand that DIRECTV has neither filed this lawsuit nor joined these five Defendants in good faith. This lawsuit is based on nothing more than a large corporation making a cost/benefit analysis and determining that the benefits of filing multiple frivolous lawsuits will outweigh the possible costs. For these reasons, and the reasons in Defendant Mark Gardner's

² One of the legal uses for these smart cards are security systems for home or business computers. A computer equipped with a smart card reader can be programmed to require the properly encoded smart card to be inserted into the smart card reader before the user can gain access to the computer.

Motion to Dismiss, the appropriate remedy for misjoinder in this case is to dismiss Defendant Mark Gardner from the action and require DIRECTV to refile an action against Mr. Gardner and pay the filing fee if it chooses to further pursue this action.

Respectfully submitted,

**ATKINSON, HASKINS, NELLIS, HOLEMAN,
PHIPPS, BRITTINGHAM & GLADD**

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CERTIFICATE OF MAILING

I hereby certify that on the _____ day of July, 2003, a true, correct and complete copy of the above and foregoing instrument was deposited in the U.S. mail, with proper postage affixed thereon, to the following:

G. David Ross
B. Gore Gaines
LYTLE SOULÉ & CURLEE
1200 Robinson Renaissance
119 North Robinson
Oklahoma City, Oklahoma 73102

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