

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

DIRECTV, INC.,)
a California Corporation,)
)
Plaintiff,)

vs.)

Case No. CIV-03-674-F

JOE HURST, ZACHARY K. McLAIN,)
TOMMY RONIO, JERRY STULTZ,)
and JOHN DOES 1-10,)
)
Defendants.)

**DEFENDANT JOE HURST'S
MOTION TO DISMISS AND BRIEF IN SUPPORT**

COMES NOW the Defendant, Joe Hurst, by and through his attorney of record, Walter D. Haskins, of the law firm of Atkinson, Haskins, Nellis, Holeman, Phipps, Brittingham & Gladd, Tulsa, Oklahoma, and submits his motion to dismiss, pursuant to Fed. R. Civ. P. 12(b), Fed. R. Civ. P. 20 and 21 and 28 U.S.C. § 1391(b), on the grounds that Defendant has been improperly joined in this action and where venue is improper. Plaintiff has improperly joined Mr. Hurst in this action, where Plaintiff has alleged no nexus in fact, occurrence or transaction between Mr. Hurst and the other named defendants. Further, venue in this action is contrived and improper. Three of the four named defendants are residents of the Northern District. Venue in this district is based only upon the fact that Mr. McLain, Mr. Hurst, and Mr. Stultz have been improperly joined in this action with Tommy Ronio, allegedly a resident of Lawton, Oklahoma. The Defendant should not be forced to

litigate this action outside of the Northern District based only on Plaintiff's misjoinder. Therefore, this action should be dismissed.

INTRODUCTION

This action was filed by the Plaintiff, DirecTV, a California corporation, against Defendants Joe Hurst, Zachary MacLain, Tommy Ronio, Jerry Stultz, and unidentified John Does 1 through 10, for alleged "signal pirating". Put simply, Plaintiff alleges that the Defendants engaged in the manufacture, distribution, and/or sale of equipment which would permit the purchasers to view DirecTV programs without payment to DirecTV. Though Plaintiff has brought suit against four identified and ten unidentified Defendants in this action, only one of whom allegedly is a resident of the Western District of Oklahoma, Plaintiff has not alleged any similar nexus of fact or circumstance between these parties, or that these individuals were acting in concert or as a group, which would justify their joinder in this single action.

Plaintiff claims it obtained the identity of the Defendants from records obtained during a writ of seizure on several California distribution centers. However, Plaintiff has not revealed that it has literally filed thousands of similar suits in federal courts across the country based on these same documents, often against multiple defendants in the same action, even when there is no rationale for joining those parties in a single action. As one judge from the Northern District of Ohio noted, when dismissing a similar DirecTV suit against multiple defendants, the Plaintiff's only apparent motivation for filing such actions against multiple parties is to avoid paying multiple filing fees.

Like its numerous other suits across the country, Plaintiff has indicated no clear reason why the named Defendants, including Mr. Hurst, should be joined in the same action. From Plaintiff's own complaint, if taken as true, the Defendants did not all purchase the "illegal signal theft devices" from the same distributor, or even on the same dates and or at the same time. Plaintiff has not alleged that the Defendants were acting in concert and has presented no allegations in its complaint from which it could be inferred that the alleged illegal acts of the individual Defendants were somehow related. Plaintiff has clearly misjoined the Defendant, Mr. Hurst. Further, requiring Mr. Hurst to defend an action in this District will impose a significant burden on Mr. Hurst, which he lacks the resources to bear, simply because Plaintiff prefers to litigate this action in the Western District and has contrived a way to do so by improperly joining unrelated parties. Therefore, the Defendant respectfully requests the Court grant his Motion to Dismiss.

STATEMENT OF FACTS

1. The instant action against Mr. McLain, Mr. Hurst, Mr. Stultz, and Mr. Ronio was filed in this Court on May 19, 2003. This action is one of nineteen similar and currently pending actions in the Western District against multiple defendants filed between May 19, 2003 and May 23, 2003. (See Case Selection Page, attached as Exhibit "A").

2. Plaintiff filed twelve similar actions in the Northern District between May 20, 2003 and May 22, 2003. (See Case Selection Page, attached as Exhibit "B").

3. Plaintiff is currently pursuing thousands of similar actions across the United States. (See Excerpts from Civil Search Results, attached as Exhibit "C"). Plaintiff has made it a habit, in a

number of jurisdictions, to file a single cause of action for “signal pirating” against numerous defendants who have no nexus in fact, occurrence, or transaction. For example, in the Northern District of Ohio, the Plaintiff filed approximately forty-four civil cases in that district in one year, naming up to twenty-three defendants in a single action. These forty-four actions actually comprised 320 different suits. Plaintiff made no allegations that the named defendants acted in concert or as a group. Therefore, the Court dismissed all but the first named defendant in each case, and required the Plaintiff to refile the actions separately and pay filing fees for each. (*See* Order No. 2003-23, In Re: Cases Filed by DirecTV, Inc. (N.D. Ohio June 3, 2003), attached as Exhibit “D”). Plaintiff has received similar orders from the District of Colorado and the Northern and Central Districts of Illinois. (*See* Order of the United States District Court for the District of Colorado, Case No. 03-CV-935, dated June 6, 2003, attached as Exhibit “E”; Order of the United States District Court for the Northern District of Illinois, Case No. 03-CV-3456, dated June 3, 2003, attached as Exhibit “F”; Order of the United States District Court for the Central District of Illinois, Case No. 03-CV-1174, dated May 27, 2003, attached as Exhibit “G”).

4. Of the four named Defendants in this action, only Tommy Ronio allegedly resides in the Western District. Mr. McLain, Mr. Hurst, and Mr. Stultz, who have no connection with Mr. Ronio, are residents of the Northern District of Oklahoma. The only basis for venue in this jurisdiction is Mr. Ronio’s alleged residence in Lawton.

ARGUMENTS AND AUTHORITIES

A. UNDER FEDERAL RULES OF CIVIL PROCEDURE 20 AND 21, THE DEFENDANT HAS BEEN MISJOINED AND SHOULD BE DISMISSED FROM THIS ACTION

The Defendant has been misjoined in this action, where Plaintiff's claims against him do not arise out of the same transaction or occurrence as Plaintiff's claims against the remainder of Defendants in this case, and therefore do not fall within the rule of permissive joinder under the Federal Rules of Civil Procedure. Fed. R. Civ. P. 20(a) states, in pertinent part, that:

. . . All persons . . . may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising 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.

If defendants are improperly joined in a single action where they have no transaction or occurrence in common, Fed. R. Civ. P. 21, the rule of "misjoinder":

. . . is a mechanism for correcting either the misjoinder or nonjoinder of parties or claims . . . misjoinder of parties arises when they fail to satisfy any of the conditions of permissive joinder under Rule 20(a). Thus, Rule 21 applies when the claims asserted do not arise out of the same transaction or occurrence or do not present some central question of law or fact.

American Fidelity Fire. Ins. Co. v. Construcciones Werl, Inc., 407 F. Supp. 164, 190 (D. V. I. 1975).

While Fed. R. Civ. P. 21 recognizes that misjoinder alone is not grounds for dismissal of an action,

Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately.

The appropriate remedy for a party who has been misjoined is to be dropped from the case. Hanley v. First Investors Corp., 151 F.R.D 76, 77 (E.D. Tex. 1993). Therefore, where a defendant in an

action does not satisfy the transaction or occurrence test set out in Rule 20, it is appropriate for the Court to drop that party from the action “on terms that are just.” Aaberg v. AcandS, Inc., 152 F.R.D. 498, 500-01 (D. Md. 1994).

The District of Connecticut’s decision in Tele-Media Co. of W. Conn. v. Antidormi, 179 F.R.D. 75 (D. Conn 1998) is analogous. Similar to the instant matter, in Tele-Media Co., a cable television company brought suit against 104 individuals, claiming that the defendants had each used an altered converter for unauthorized viewing of pay-per-view programs, in violation of federal law. Id. at 76. The plaintiff brought suit against these individuals in a single action, though they made no allegation that the defendants conspired or acted jointly. Id. Though the plaintiff argued that a single action would be more economical to the parties, the court determined the same transaction test of Rule 20 could not be ignored. Further, the court considered a single action containing multiple defendants to be more burdensome to the court, due to such considerations as notice mailings and copying. Id. The court recognized that the appropriate remedy for misjoinder would be to dismiss the improper parties. However, because the case had already proceeded long enough for the plaintiff to reach settlement with a many of the 104 defendants, the Court found it would be fair to give the plaintiff an opportunity to serve a memorandum on how to correct the misjoinder, rather than immediately drop the misjoined defendants. Id. at 77. See also Aaberg v. AcandS, Inc., 152 F.R.D. 498, 500-01 (D. Md. 1994) (where multiple defendants failed to meet the “same transaction” test, court appropriately dropped from the action all but the first-named defendant).

In the instant action, dismissal of Plaintiff's claims against Mr. Hurst would be just and proper, where Plaintiff does not even allege that Mr. Hurst has connection with the other named Defendants in this action, and where Plaintiff is already on notice from a number of jurisdictions that its method of filing such actions is inappropriate. The Defendants in the instant action do not meet the "same transaction" test set forth in Rule 20. Plaintiff has alleged nowhere in its complaint that Mr. Hurst acted in concert with Defendants McLain, Stultz, or Ronio. Plaintiff merely alleges that Defendants Mr. Hurst, McLain, Ronio and Stultz have conspired "with others", such as John Does 1-10 named in this action, curiously unidentified. (See Complaint, ¶ 11 and 29). Plaintiff has not even alleged that the devices allegedly purchased by the Defendants were all bought from the same distributor. Further, the alleged illegal activities of the Defendants do not occur at the same time or on the same day. Plaintiff claims that Mr. Hurst began his alleged purchase of signal theft devices on April 18, 2001, while Mr. McLain's purchases supposedly began on November 10, 2000 to February 26, 2001. Mr. Ronio is purported to have purchased the devices between March 5 and August 5, 2001. Mr. Stultz is alleged to have begun purchasing the devices on July 18, 2000 until March 21, 2001. Plaintiff has alleged no facts to indicate that these alleged purchases were part of a larger scheme or series of transactions devised by the Defendants. Clearly, where Plaintiff has not alleged that Mr. Hurst was acting in concert with the other named Defendants, and where nothing in the alleged facts supports any inference that the Defendants were acting in concert with one another, the Defendant Mr. Hurst has been misjoined in this action.

As discussed, Plaintiff has been put on notice by other jurisdictions that improperly joining numerous unrelated Defendants within a single action is unacceptable and will result in dismissal of those parties from the case. As of this filing, Plaintiff has filed no less than nineteen (19) actions of this type in the Western District alone, each against multiple defendants, all filed between May 19, 2003 and May 23, 2003 (See Exhibit “A”). Plaintiff has another eleven such actions in the Northern District, also filed on those days, not including the previously dismissed action against Mr. Hurst. (See Exhibit “B”). It appears that in many cases, Plaintiff has simply joined defendants based on an alphabetic proximity of the first letter of their last names. The selection and grouping of defendants into separate suits appears to be completely arbitrary. Plaintiff appears to have no other motivation in joining Mr. Hurst in this action than to simplify its pursuit of its many thousands of court actions and reduce the significant costs of filing its thousands of lawsuits by combining numerous unrelated defendants into a single action. Plaintiff is undoubtedly aware that such conduct is improper, and yet Plaintiff continues to pursue such actions nationwide. Further, in this instance, Plaintiff’s arbitrary grouping of Mr. Hurst, as well as Mr. McLain, and Mr. Stultz, all residents of the Northern District, with Mr. Ronio, will burden Mr. Hurst with the greater cost and inconvenience of defending this action in the Western District, even though he has no connection with this District other than Plaintiff’s spurious grouping of Mr. Hurst in a suit with Mr. Ronio. Plaintiff should not be permitted to sidestep the Federal Rules of Civil Procedure to cut expenses and reduce its workload by misjoining parties. Therefore, where Plaintiff is undoubtedly aware that

its actions are inappropriate and yet has joined Mr. Hurst in this action, dismissal of this action against Mr. Hurst is proper.

B. VENUE IN THIS MATTER IS CONTRIVED AND IMPROPER AND IMPOSES AN OPPRESSIVE BURDEN ON THE DEFENDANT

As stated, there is no logical nexus between Mr. Hurst and the other Defendants in this matter. Particularly, there is absolutely no relationship alleged between Mr. Hurst and Tommy Ronio, the only Defendant named in this action who allegedly resides within the Western District. Mr. McLain, Mr. Hurst and Mr. Stultz, reside in the Northern District. Plaintiff has not alleged that Mr. McLain, Mr. Stultz, or Mr. Hurst conducted any of their alleged activities within the Western District, and have not alleged they acted in concert with Mr. Ronio or anyone else residing in the Western District. The only way Plaintiff is able to justify filing its action against Mr. Hurst in the Western District, rather than the Northern District, is by spuriously joining Mr. Hurst in an action against Mr. Ronio, with whom he has absolutely no connection. But for Plaintiff's misuse of the rules of permissive joinder, venue in this action against Mr. Hurst would be improper.

Pursuant to 28 U.S.C. § 1391(b), venue is proper in an action not based solely on diversity of citizenship in

(1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which any defendant may be found, if there is no district in which the action may be otherwise brought.

Had Plaintiff not misjoined Mr. Hurst in this action with Mr. Ronio, venue for Plaintiff's claims against Mr. Hurst would properly lie in the Northern District of Oklahoma. The purpose of section 1391 is for the convenience of the defendant, not the plaintiff. Jones v. United States, 407 F. Supp. 873, 876 (N.D. Tex. 1976). Plaintiff should not be permitted to force defendants into the court of its choosing based on so clearly a contrived venue claim. Where Plaintiff's claim that venue in this action is proper in the Western District is wholly without merit, this action should be dismissed.

Further, the Court should dismiss, or at the very least, transfer this action to the Northern District based on the doctrine of *forum non conveniens*. Pursuit of this action in the Western District by the Defendant, Mr. Hurst, will result in oppressive expenses for Mr. Hurst, particularly where he has absolutely no connection with the Western District, other than being joined in this suit with Tommy Ronio. Dismissal or transfer for *forum non conveniens* is appropriate when (1) there is an alternate forum with jurisdiction to hear the case; and (2) when the movant establishes that the "oppression" and "vexation" to the defendant is out of proportion to the convenience of the plaintiff, or when the court's own administrative concerns would be better served in a different forum. Piper Aircraft Co. v. Reyno, 454 U.S. 235, 241 (1981). In considering the convenience of litigants, courts will look to "private interests of the litigants," such as access to sources of proof, availability of witnesses, and other factors concerning the expedience of the trial itself. The court will also look to "public factors" such as administrative difficulties, congestion of the court's dockets, the interest of the local forum in keeping local controversies at home, or having issues of

state law decided by courts familiar with that law. Gulf Oil Co. v. Gilbert, 330 U.S. 501, 508 (1947).

In the instant action, three of the four named Defendants reside in the Northern District of Oklahoma. Therefore, the Northern District is available in this action as an alternate forum. The Defendants, particularly Mr. Hurst, are without access to the extensive resources of DirecTV in defending against this action, and they will be significantly burdened by the costs and difficulties associated with defending Plaintiff's action outside of the Northern District. In contrast, Plaintiff is already pursuing eleven other actions of this nature in the Northern District and will not be burdened in the least by pursuing this action in that jurisdiction as well. All evidence and witnesses will be as accessible, if not more so, in the Northern District, as in the Western District. Moreover, both districts are familiar with Oklahoma law, for any pendant state law claims of the Plaintiff in this action. Finally, both districts are almost equally inundated with cases filed by DirecTV.

The only difference of significance between the Northern and Western Districts in the instant action is that trial in the Northern District would significantly decrease the oppressive burden to three of the Defendants in defending this action, all of whom have no other reason for being named in a suit in the Western District other than Plaintiff's creative and arbitrary misjoinder. Therefore, the Defendant respectfully requests the Court dismiss Mr. Hurst as a party to this action, or in the alternative, transfer this action to the Northern District of Oklahoma.

CONCLUSION

Plaintiff has inappropriately joined the Defendant, Mr. Hurst, in this action. Plaintiffs have not alleged that Mr. Hurst was acting in concert with the other three named Defendants, Mr. Stultz, Mr. McLain, or Mr. Ronio. Where these Defendants do not meet the same transaction test of Fed. R. Civ. P. 20 for permissive joinder, Plaintiff's action against Mr. Hurst should be dismissed, as justice requires. Plaintiff is well aware that joining unrelated defendants in a single action to avoid paying multiple filing fees is inappropriate and can result in dismissal of its claims, and yet Plaintiff continues to pursue this course of action in courts across the nation. Where Plaintiff's actions are clearly not inadvertent, a dismissal of Plaintiff's action against Mr. Hurst is absolutely appropriate.

The Court should also dismiss this action for improper venue. Plaintiff's only basis for filing this action in the Western District is that the Defendant, Mr. Ronio, allegedly is a resident of Lawton, Oklahoma. Where Mr. Ronio has no connection with Mr. Hurst, venue in Plaintiff's action against Mr. Hurst is contrived and improper. Moreover, the defense of this action in the Western District will result in an undue burden and expense to Mr. Hurst, a resident of the Northern District. Therefore, the Defendant respectfully requests the Court dismiss this action for *forum non conveniens*, or in the alternative transfer this action to the Northern District of Oklahoma.

WHEREFORE, the Defendant, Joe Hurst, respectfully requests an Order of this Court granting Defendant's Motion to Dismiss, and granting any other relief this Court deems just and proper.

Respectfully submitted,

**ATKINSON, HASKINS, NELLIS, HOLEMAN,
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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:

Richard C. Ford
CROWE & DUNLEVY
20 North Broadway, Suite 1800
Oklahoma City, Oklahoma 73102

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