

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

DIRECTV, INC.,)
a California Corporation,)
)
Plaintiff,)
)
vs.)
)
JOE HURST, ZACHARY K. McLAIN,)
TOMMY RONIO, JERRY STULTZ,)
and JOHN DOES 1-10,)
)
Defendants.)

Case No. CIV-03-674-F

**DEFENDANT ZACHARY K. McLAIN'S CONSOLIDATED
REPLY TO PLAINTIFF'S RESPONSE TO THE COURT'S SHOW
CAUSE ORDER AND DEFENDANT'S MOTION TO DISMISS**

COMES NOW, the Defendant, Zachary K. McLain, by and through his attorney of record, Walter D. Haskins, of the law firm of Atkinson, Haskins, Nellis, Holeman, Phipps, Brittingham & Gladd, of Tulsa, Oklahoma, and pursuant to the Court's Order of July 9, 2003, hereby submits the following as Defendant Zachary K. McLain's Consolidated Reply to Plaintiff's Response to the Court's Show Cause Order and Defendant's Motion to Dismiss.

INTRODUCTION

The second section of Plaintiff DIRECTV, Inc.'s ("DIRECTV") Response to the Court's Show Cause Order and Defendant's Motion to Dismiss ("Response Brief") proudly boasts that "DIRECTV Has Vigorously Pursued Anti-Piracy Measures Including Raids on Distribution Centers." A title more reflective of DIRECTV's conduct in bringing the instant lawsuit and hundreds like it across the country would be "DIRECTV Has Overzealously Persecuted Innocent Individuals in an Attempt to Appear Tough on Signal Piracy." Before the Defendant addresses arguments relating to the improper joinder of the separate and distinct Defendants in this action, a

brief history of DIRECTV's conduct leading up to this lawsuit is necessary to correct the inaccurate and misleading case background presented in DIRECTV's Response Brief.

DIRECTV'S OVERZEALOUS ATTACK ON SIGNAL PIRACY

Through writs of seizure and voluntary relinquishment of sales records DIRECTV has procured the sales records of various sellers/distributors of smart card technology. Apparently, DIRECTV was able to procure these records because these sellers/distributors in smart card technology advertised that their products *could* be used in conjunction with other technology to intercept DIRECTV's signals.¹ After obtaining the sells records from these distributors, DIRECTV, through its attorneys, sent letters to the individual purchasers of the smart cards and the smart card readers. These letters, one of which was sent to Defendant McLain, essentially attempted to extort money out of the purchasers of the smart card technology in exchange for DIRECTV's promise not to sue. The letter DIRECTV sent to Defendant McLain made the following offer:

DIRECTV is willing to forego a significant portion of available statutory damages and release you from liability of any and all civil claims relating to this matter in exchange for your fulfillment of the following conditions: (1) payment of a negotiated sum in damages; (2) surrender a detailed accounting of your distribution of satellite signal theft devices; (3) agreement to cooperate in DIRECTV's continued investigation of and litigation related to satellite piracy; (4) surrender of all satellite signal theft devices currently in your possession or control; and (5) execution of a declaration that you will not engage in such conduct in the future.

(Letter from Spencer Freeman to Zachary K. McLain, dated August 29, 2002, attached as Exhibit "A").

When Defendant McLain, and other consumers of smart card technology, refused to comply

¹It should also be noted that these sellers/distributors that produced their sales records to DIRECTV sold their smart cards and smart card readers at a very low price compared to other sellers, including Microsoft. Many consumers, including Defendant McLain, chose to purchase smart card readers from these sellers/distributors simply because of the low price. Others randomly selected these sellers/distributors among the many sellers on the Internet without regard to the advertisement concerning interception of DIRECTV's signals.

with DIRECTV's demands, DIRECTV brought suit alleging various violations of federal statutes and state common law causes of action. These lawsuits are based solely on the fact that the Defendants were named as purchasers on the lists gathered from the sellers/distributors. Nothing in DIRECTV's Complaint or its Response Brief indicates DIRECTV has a shred of evidence that Defendant McLain or the other defendants throughout the country actually intercepted or even attempted to intercept DIRECTV signals. DIRECTV's case against Defendant McLain rests solely on the strength of these lists of purchasers from four separate sellers/distributors of smart card technology – Fulfillment Plus, Vector Technologies, Whiteviper Technologies, and USA Card Cleaners, Inc.

These lists of purchasers cannot provide a basis for a lawsuit against Defendant McLain or the other defendants in DIRECTV's suits because the mere *possession* of these smart cards and smart card readers is not illegal.² The devices that Plaintiff DIRECTV refers to as “illegal signal theft devices” are nothing more than smart cards and smart card readers. These so-called “illegal signal theft devices” are extremely common and have a great variety of legal uses. Smart card technology is everywhere on the Internet. In fact, counsel for Defendant McLain has attached as Exhibit “C” four separate web sites instructing, regarding, or selling virtually the same “illegal signal theft devices” that the Plaintiff alleges Defendant McLain purchased. One of these web sites is owned by Microsoft. Another web site is for the federal government. Under the Plaintiff's idea

² Of the federal statutory causes of action asserted by the Plaintiff, only the Electronic Communications Privacy Act, 18 U.S.C. §§ 2510-2521, even mentions “possession” of certain devices as a basis for any type of liability. However, in Flowers v. Tandy Corp., 773 F.2d 585 (4th Cir. 1985), the Fourth Circuit held that although 18 U.S.C. § 2520 creates a private right of action for criminal violations of 18 U.S.C. § 2511, it does not do the same for violations of 18 U.S.C. § 2512. While 18 U.S.C. § 2512 does make it criminal to possess certain illegal signal theft devices, the Flowers court expressly held that a civil right of action only exists when a wire communication is actually “intercepted, disclosed, or intentionally used.” Flowers, 773 F.2d at 589-91; see also DirectTV v. Amato, Civil No. 3:03cv355 (E.D. Va. June 20, 2003) (Memorandum Opinion and Order, attached as Exhibit “B”).

of “illegal signal theft devices,” Bill Gates and President Bush would be subject to suit for selling “illegal signal theft devices.”

The absurdity of DIRECTV’s suit against Defendant McLain and other consumers of smart card technology is further evidenced by an identical case from the United States District Court for the Eastern District of Michigan, Southern Division. In this case, styled DIRECTV v. Karpinsky, Case No. 02-CV-73929 (E.D. Mich. 2003), attached as Exhibit “D”, the court granted summary judgment in favor of the defendant because DIRECTV failed to present any evidence that the defendant actually intercepted signals. In Karpinsky, DIRECTV relied solely on the defendant’s name on a sales list from USA Cardcleaners to support its statutory and common law causes of action for alleged signal piracy.³ The Karpinsky court held that mere evidence that a defendant has purchased a smart card recovery system from USA Cardcleaners or other sellers/distributors whose sells records have been turned over to DIRECTV is insufficient to sustain any cause of action for signal piracy. See also DIRECTV v. Thacker, et al., Case No. 6:03-cv-239-Orl-28DAB (M.D. FL. April 15, 2003) (dismissing claim under 18 U.S.C. §§ 2512(1) and 2520 because DIRECTV did not allege that the defendant actually “intercepted, disclosed, or intentionally used” its electronic communications), attached as Exhibit “E”.

**IMPROPER JOINDER OF UNRELATED PARTIES IN ONE
LAWSUIT IS PART OF DIRECTV’S PLAN TO MAKE MONEY
FROM INNOCENT CONSUMERS OF SMART CARD TECHNOLOGY**

The joinder of multiple improper parties in a single lawsuit is just the final step in DIRECTV’S attempt to extort money from innocent computer programers or hobbyists. DIRECTV

³ In Karpinsky, DIRECTV alleged unauthorized reception of satellite signals in violation of 47 U.S.C. § 605(a); unauthorized interception of satellite communications in violation of 18 U.S.C. § 2511(1)(a); and possession of pirate access devices in violation of 18 U.S.C. § 2511(1)(b); and conversion. (Exhibit “D”).

realizes the utter frivolity of its lawsuits and understands that almost all of these cases will be dismissed on summary judgment motions. DIRECTV hopes 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. This scam by DIRECTV is the epitome of extortion through legal process.

**THE CLAIMS AGAINST THE DEFENDANTS DID NOT ARISE
OUT OF THE SAME TRANSACTION OR SERIES OF TRANSACTIONS**

In its Response Brief, DIRECTV acknowledges that these separate Defendants purchased the so-called "signal theft devices" at different times and from different sellers/distributors. Other than recite the law relating to joinder of parties under Fed. R. Civ. P. 20, DIRECTV's Response Brief really only makes one argument in support of its position that the allegations against the Defendants arise out of the same transaction or series of transactions. DIRECTV argues that it would present the same testimony and the same witnesses against each of the Defendants.⁴ 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

⁴ The only evidence DIRECTV cites to for this proposition is the self-serving affidavit of its own counsel, Gurjit Pandher. While it certainly is easy for the Plaintiff to at this point in the litigation state that it will limit its presentation of evidence to the evidence described in its Response Brief, the Defendant suspects that DIRECTV would be unwilling to stipulate that at the trial of this case, it will limit its presentation of evidence to that evidence described in the Response Brief.

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. Allowing this case to proceed to trial with separate and unrelated parties joined would not provide trial convenience. On the contrary, it would create havoc at the trial of this case.

Another problem arises if one of the other Defendants is in fact guilty of signal piracy. By presenting all of this separate evidence against possibly fourteen defendants (assuming DIRECTV identifies John Does 1-10), there is a serious possibility that if one of the other Defendants is in fact guilty, the jury would consider that evidence against Defendant McLain. This possibility of prejudice against Defendant McLain alone justifies dismissing him from this action.

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.

**IN IDENTICAL CASES FILED BY DIRECTV,
FEDERAL COURTS THROUGHOUT THE COUNTRY HAVE
DETERMINED THAT DIRECTV IMPROPERLY JOINED
SEPARATE AND DISTINCT DEFENDANTS**

Defendant McLain's Motion to Dismiss cites to several identical cases filed by DIRECTV where the district court determined that DIRECTV improperly joined multiple defendants and dismissed all but the first named defendant. See e.g. In Re: Cases Filed by DirecTV, Inc., Order No.

2003-33 (N.D. Ohio June 3, 2003) (attached as Exhibit “D” to Defendant McLain’s Motion to Dismiss). Since the filing of Defendant McLain’s Motion to Dismiss, counsel for the Defendant has found two similar orders from the United States District Court for the Northern District of Illinois. (Minute Order from DirecTV, Inc. v. Mark Garbott, et al., Case No. 03-C-3499 (N.D. Ill. June 3, 2003) (dismissing complaint for improper joinder of unrelated parties, or in the alternative giving the plaintiff an opportunity to file a brief explaining why it believes joinder of the unrelated parties is appropriate), attached as Exhibit “F”; (Minute Order from DirecTV, Inc. v. Sal Montos, et al., Case No. 03-C-3463 (N.D. Ill. June 4, 2003) (dismissing complaint for improper joinder of unrelated parties, or in the alternative giving the plaintiff an opportunity to file a brief explaining why it believes joinder of the unrelated parties is appropriate), attached as Exhibit “G”. DIRECTV’s Response Brief does not even attempt to address these opinions from various district courts.

As the Court can hopefully see, other federal district courts from around the country have prevented DIRECTV from joining clearly unrelated parties in a single lawsuit. While the Defendant realizes that this Court is not bound by these decisions, the Defendant posits that these decisions represent a trend in the country against allowing DIRECTV to proceed against multiple unrelated parties in a single lawsuit.

**DISMISSAL OF DEFENDANT MCLAIN FROM THIS LAWSUIT
IS THE APPROPRIATE REMEDY FOR MISJOINER IN THIS CASE**

Dismissal of Defendant McLain is the appropriate remedy in this case because of DIRECTV’s willful violation of the rule of joinder. As explained in detail in Defendant McLain’s Motion to Dismiss and in the preceding section of this Reply, 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. Especially in this case, where DIRECTV has joined improper parties in an attempt to contrive venue against three Defendants, a dismissal of Defendant McLain is appropriate.

Further, as demonstrated above, DIRECTV pursuit of this case against Mr. McLain is absolutely frivolous. DIRECTV has premised hundreds of lawsuits (each against multiple unrelated parties) on nothing more than an individual's name on a list obtained from sellers/distributors of smart card technology. As the court in Karpinsky recognized, this list alone is insufficient to create liability under any of the statutory or common law causes of action asserted by DIRECTV. In light of this opinion, and likely others that counsel for the Defendant has not yet been able to locate, DIRECTV has continued to pursue actions against innocent consumers of smart card technology with nothing more than this insufficient list of names as evidence. Again, filing this frivolous lawsuit is ample support for a dismissal of improperly joined parties.

Defendant cites to Fed. R. Civ. P. 21 and case law for the proposition that improper joinder is not grounds for a dismissal of an action. However, the Defendant has not asked for a dismissal of the entire action. The Defendant has merely asked for a dismissal of the improperly joined parties, who this Court does not have proper venue over. 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). A dismissal of the parties that do not reside within the venue of this Court would leave Defendant Tommy Ronio, who resides within this Court's venue, as the sole Defendant in this action. This would leave DIRECTV with the option of

refiling against these other Defendants, in the proper venue, if it so chooses.

The improper venue over Defendant McLain and other Defendants in this case also necessitates a dismissal of the parties rather than a severance. Even if the Court severs the case, there will also have to be a transfer of Defendant McLain and the other Defendants that reside outside the venue of the Western District. Simply dismissing all the parties except Defendant Ronio would be the least complicated option for the Court.

Finally, this Court should not consider any prejudice that the Plaintiff alleges it will suffer in deciding whether to dismiss the improperly joined parties or to sever the case. As stated above, many other federal district courts across the country have rejected DIRECTV's attempts to join separate and distinct defendants to save money in filing fees and discovery. Yet, DIRECTV has consciously decided to openly violate the Federal Rules of Civil Procedure by continuing to join separate parties in these frivolous suits. Based on DIRECTV's willful violation of the rules of joinder and pursuit of clearly frivolous lawsuits, the Court should not take into consideration any prejudice that DIRECTV alleges it will suffer (including its vague claim that there may be a statute of limitations problem if the Court dismisses rather than severs), and dismiss Defendant McLain as an improperly joined party.

CONCLUSION

As demonstrated in great detail in Defendant McLain'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 Zachary K. McLain with the other Defendants in this case would materially prejudice Mr. McLain. 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. McLain. For these reasons, and the reasons contained in Defendant McLain's Motion to Dismiss, Defendant Zachary K. McLain respectfully requests an order of this Court dismissing him from this action, and any other relief the Court deems appropriate.

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:

Richard C. Ford
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Oklahoma City, Oklahoma 73102