

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
SPRINGFIELD DIVISION

UNITED STATES OF AMERICA,)	
and the STATES OF CALIFORNIA,)	
ILLINOIS, NORTH CAROLINA,)	
and OHIO,)	
)	
Plaintiffs,)	
)	
v.)	No. 09-3073
)	
DISH NETWORK, L.L.C.,)	
)	
Defendant,)	

OPINION

SUE E. MYERSCOUGH, U.S. District Judge.

This cause is before the Court on Defendant Dish Network L.L.C.’s Motion to Strike Plaintiffs’ Improper Second Amended Complaint (d/e 260). The Motion is DENIED.

This Court granted Plaintiffs United States of America and the States of California, Illinois, North Carolina, and Ohio leave to file a Second Amended Complaint. The Second Amended Complaint

Plaintiffs filed on March 12, 2013 was consistent with the proposed Second Amended Complaint Plaintiffs had attached to their Motion for Leave to File Second Amended Complaint and the Complaint filed in Dish II (Case No. 12-3221). Therefore, Defendant is not prejudiced.

I. BACKGROUND

On May 18, 2012, Plaintiffs filed a Motion for Leave to File a Second Amended Complaint (Motion for Leave). See d/e 135. Plaintiffs attached a proposed Second Amended Complaint to their Motion. See d/e 135-1(clean copy), 135-2 (redline/strikeout copy). On June 20, 2012, United States Magistrate Judge Byron G. Cudmore denied Plaintiff's Motion for Leave to Amend. See d/e 155.

On March 5, 2013, this Court held a hearing to address whether to consolidate this case with Case No. 12-3221 and/or grant Plaintiffs leave to amend their complaint to add the new claim identified in their Motion for Leave. At the hearing, the Court granted Plaintiffs leave to file their Second Amended Complaint and gave Plaintiffs seven days to file the amendment.

At 3:27 p.m. on March 12, 2013, Plaintiffs filed a Second Amended Complaint. See d/e 257. At 4:02 p.m., this Court's written Opinion was filed. See d/e 258 . In the written Opinion, the Court directed the Clerk to file the proposed Second Amended Complaint attached to Plaintiffs' Motion for Leave. However, because the Second Amended Complaint had already been filed, the Clerk did not file the proposed Second Amended Complaint attached to Plaintiffs' Motion for Leave. The Second Amended Complaint was deemed filed as of the date Plaintiffs sought leave – May 18, 2012. See Opinion (d/e 258).

II. ANALYSIS

In the Motion to Strike, Defendant asserts that the Second Amended Complaint Plaintiffs filed on March 12, 2013 was materially different from the proposed Second Amended Complaint attached to the Motion for Leave. Specifically, Paragraph 39 of the proposed Second Amended Complaint alleged as follows:

Since on or about October 17, 2003, DISH Network has initiated outbound telephone calls to phone numbers of persons who have stated that

they do not wish to receive an outbound telephone call made by or on behalf of DISH Network.

See d/e 135-1. In contrast, Paragraph 39 of the Second Amended

Complaint that Plaintiffs filed on March 12, 2013 alleges as follows:

Since on or about October 17, 2003, DISH Network has initiated or caused to be initiated outbound telephone calls to phone numbers of persons who have stated that they do not wish to receive any outbound telephone call made by or on behalf of DISH Network. (Emphasis added.)

See d/e 257.

Defendant asserts that Plaintiffs have “surreptitiously added to the [Second Amended Complaint], without this Court’s approval, an entirely new theory of third party liability.” Def. Mem. p. 3 (d/e 261).

According to Defendant, this additional language is significant because Plaintiffs are now seeking to hold Defendant liable for calls allegedly made by third parties to persons who placed their numbers on Defendant’s internal do-not-call list. Defendant asks that the Court either (1) strike Plaintiffs Second Amended Complaint in its entirety or the “or caused to be initiated language” or (2) determine that the date of

filing for the Second Amended Complaint be March 12, 2013, the actual date the Second Amended Complaint was filed, as opposed to May 18, 2012, the date the Motion for Leave was filed.

Plaintiffs respond that the omission of the “cause” language in Paragraph 39 was a scrivener’s error. Plaintiffs note, however, that the “cause” language was contained in the added count (count II, Paragraph 67) in the proposed Second Amended Complaint, as well as in the Complaint filed in Dish II, Case No. 12-3221.

The Court agrees with Plaintiffs. Plaintiffs’ proposed Second Amended Complaint and the Second Amended Complaint Plaintiffs filed both contain the following Paragraph 67:

Count II

(by the United States—Violating the Entity –Specific-Do-Not-Call-Rule)

67. In numerous instances, in connection with telemarketing, DISH Network has engaged in or caused other telemarketers to engage in initiating an outbound telephone call to a person who has previously stated that he or she does not wish to receive such a call made by or on behalf of DISH Network, in violation of the TSR, 16 C.F.R. § 310.4(b)(1)(iii)(A). (Emphasis added.)

This paragraph clearly indicates that Plaintiffs were seeking to hold Defendant liable for the conduct of others, as does the “on behalf of” language contained in Paragraphs 39 and 67 of both the proposed Second Amended Complaint and the Second Amended Complaint actually filed. Moreover, the Complaint in Dish II, Case No. 12-3221, also alleged that Defendant “engaged in or caused other telemarketers to engage in initiating an outbound telephone call to a person who has previously stated that he or she does not wish to receive such a call made by or on behalf of Dish Network.” Complaint, ¶ 33 (Case No. 12-3221) (d/e 1). Consequently, because Plaintiffs clearly identified their theory of liability in both the proposed Second Amended Complaint and the Complaint in Case No. 12-3221, Defendant is not prejudiced by the addition of “or caused to be initiated” in Paragraph 39 of the Second Amended Complaint filed on March 12, 2013.

III. CONCLUSION

For the reasons stated, Defendant’s Motion to Strike Plaintiffs’ Improper Second Amended Complaint (d/e 260) is DENIED.

ENTER: April 11, 2013

FOR THE COURT:

s/Sue E Myerscough
SUE E. MYERSCOUGH
UNITED STATES DISTRICT JUDGE