UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
LUFKIN DIVISION

Personal Audio, LLC,	)	
Plaintiff,	)	
v.	)	Case 9:10-CV-00035-RC
XM Satellite Radio, Inc.,	)	
Defendant.	)	

PERSONAL AUDIO, LLC'S SUR-REPLY TO DEFENDANT'S MOTION TO DISMISS AND REPLY ON PLAINTIFF'S CROSS-MOTION TO CONSOLIDATE

INTRODUCTION

XM seeks to have this Court fashion a new and entirely unprecedented rule of law: that a plaintiff's failure to join a third party to an existing lawsuit should preclude it from ever suing that third party under a similar cause of action at any time, in any court. XM has not pointed to a single statute, rule of law, or case in which such a result has ever occurred. XM's reading of the law is incorrect. Because XM was never a party to the Sirius action, this lawsuit is not precluded by the doctrine of claim splitting. Finally, other circuit courts that have addressed this issue have rejected arguments like XM's. XM's motion to dismiss should be denied, and Personal Audio's motion to consolidate should be granted.

ARGUMENT

I. THERE IS NO BASIS FOR DISMISSING THIS ACTION BECAUSE XM WAS NOT A PARTY TO THE SIRIUS LAWSUIT

A. Claim splitting only precludes a second action if the defendant is the same as in the first action.

XM relies entirely on a single case to support its argument that the present suit should be dismissed: *Orion*. XM quotes at length from that opinion in the attempt to show the "strikingly similar facts" between that action and this one. But XM glosses over that opinion's key passage: "[t]he Court agrees with Toyota that the allegations in the second action are barred by the doctrine of claim splitting." *See Orion IP, LLC v. Home Depot USA, Inc.*, No. 2:05-CV-306 (Dkt. 42), at 1 (E.D. Tex. Oct. 7, 2005). XM characterizes the *Orion* court's reliance on the doctrine of claim splitting as a "distinction without a difference." *See* Reply, at 3. But as the above quote indicates, the *Orion* court's entire analysis is based on the doctrine of claim splitting. And the doctrine of claim splitting does not apply to a second suit against a separate defendant. *See Ameritox, Ltd. v. Aegis Scis. Corp.*, No. 3:08-CV-1168-D, 2009 U.S. Dist. LEXIS

13305, at *16 (N.D. Tex. Feb. 9, 2009); *In re Super Van*, 92 F.3d 366, 371 (5th Cir. 1996). Therefore this action does not present "exactly the situation in *Orion*," as XM argues. *Orion* involved, as do all claim splitting cases, two lawsuits against the same defendant. Despite XM's attempts to shade the issues, the simple fact of the matter is that Sirius and XM are separate legal entities, and XM was never a party to the Sirius action. Thus, claim splitting cannot justify the dismissal of the present action.

Essentially, XM wants this Court to fashion an entirely new and unprecedented rule of claim preclusion: that a plaintiff's failure to add a third party by the deadline in the scheduling order should preclude that plaintiff from suing that third party on similar facts in any court at any time. *See* Response, Morton Decl. Exh. B ("[B]ecause XM was made an issue and it was identified to Personal Audio, they should not be allowed to go forward whether it's a suit in this district or in Washington or in any other district court. That's our position, and that's what we're briefing.") XM has not identified, nor has Personal Audio found, a single case in which a court reached such a drastic result. In contrast, numerous courts have found that dismissal of a second action is inappropriate in just such a situation.

B. Arguments like XM's have been rejected.

Numerous times in its original motion and its reply, XM urges that allowing this action and subsequent consolidation would constitute an impermissible "end run" around the scheduling order. This argument has been rejected by several circuit courts. In *Twaddle v. Diem*, 200 Fed. Appx. 435 (6th Cir. 2006), the defendants sought to dismiss a suit against them because it was brought after the deadline to add parties had passed in a similar action against a separate defendant. The district court initially dismissed the later action, characterizing it as an "end run

around the expired deadline." *Id.* at 436. The Sixth Circuit reversed on appeal, holding that the dismissal of the second suit constituted an abuse of discretion:

> It is an abuse of discretion . . . to prevent a party from proceeding in a suit that is not truly duplicative. Here, *Twaddle I* and *Twaddle II* were filed in the same court, arise out of the same facts, employ the same legal theories, and seek to recover for the same lost wages. The actions are not identical, however, because they were brought against different defendants.

Id. at 438-39 (emphasis added). The Second and Tenth Circuits have reached the same conclusion in similar cases. *See Northern Assurance Co. of America v. Square D Co.*, 201 F.3d 84, 90 (2d Cir. 2000) (rejecting the argument that allowing a second suit against a separate defendant would "ignore the magistrate judge's ruling" to deny leave to amend in an earlier suit); *Hartsel Spring Ranch of Colo., Inc. v. Bluegreen Corp.*, 296 F.3d 982, 990 (10th Cir. 2002) ("the motion to amend and the second complaint were both attempts to bring MEC's claims into court; as noted above, HSR's unsuccessful selection of the former method cannot, standing alone, foreclose the availability of the latter.").

XM also argues that the denial of leave to amend in the Sirius action should preclude consolidation of this case with that action. This is incorrect. A motion for leave to amend and a motion to consolidate are two different procedural avenues, each requiring a different showing from the movant. The denial of one motion does not foreclose the granting of the other. *See Northern Assurance*, 201 F.3d at 90 ("If this case is consolidated with *Northern I*, it will be via a procedural route different from the method foreclosed by the magistrate's denial of the motion for leave to amend the complaint in *Northern I*. Thus, dismissal is not warranted . . . ."). The courts in *Twaddle* and *Hartsel* also advocated consolidation in similar circumstances. *See Twaddle*, 200 Fed. Appx. at 438 ("Further, the potential burdens of dual litigation would be

addressed by the proposed consolidation."); *Hartsel*, 296 F.3d at 989 (discussing "the likely consolidation of the suits").

Personal Audio has not received a decision on the merits of its claims against XM. The outright dismissal of those claims would therefore be a drastic and unwarranted expansion of the law. It is a well-established legal principle that the failure to join a third party as a defendant before the deadline in a scheduling order does not preclude a second lawsuit against that third party. XM has not pointed to a single case or legal authority to the contrary. XM's motion to dismiss this action should therefore be denied.

II. THIS CASE SHOULD BE CONSOLIDATED WITH THE SIRIUS ACTION UNDER THE SAME SCHEDULING ORDER.

It is undisputed that this Court will be required to decide numerous common issues of law and fact in both this action and the Sirius action, and consolidation would serve the interests of judicial efficiency. This Court has already ruled that the existing deadlines of the Sirius action provide XM an adequate period of time for additional discovery and preparation. *See* Sirius Action, Dkt. 127 at 7. XM protests that collecting, reviewing, and producing documents would subject it to additional expense and burden. However, XM would be required to undertake these actions regardless of whether this case is consolidated for purposes of discovery and trial. Because it would be a waste of time and resources to try the two cases separately, consolidation is appropriate.

CONCLUSION

For the reasons above, XM's motion to dismiss should be denied and this case should be consolidated with the Sirius action on the same schedule.

Dated: June 9, 2010 Respectively submitted,