

**IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
LUFKIN DIVISION**

PERSONAL AUDIO, LLC,

Plaintiff,

v.

XM SATELLITE RADIO, INC.

Defendant.

CASE NO. 9:10-CV-00035-RC

JURY TRIAL DEMANDED

XM SATELLITE RADIO INC.'S
MOTION TO DISMISS PURSUANT TO FED. R. CIV. P. 12(b)(6)

I. Introduction

On April 16, 2010, Plaintiff Personal Audio, LLC (“Personal Audio”) filed the instant action against XM Satellite Radio Inc. (“XM”). This lawsuit sets forth patent infringement allegations similar to the allegations asserted by Personal Audio against Sirius XM Radio Inc. (“Sirius”) in Civil Action No. 9:09-CV-111 (hereinafter the “Sirius Action”) pending before Judge Clark. Sirius is the parent corporation of its wholly owned subsidiary XM, which is a distinct legal entity. For reasons set forth in detail in Sirius’ opposition to Personal Audio’s motion to add XM to the Sirius Action or, alternatively, to consolidate the instant action with the Sirius Action, this separate action against XM should be dismissed for failure to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6) because it is barred due to Personal Audio’s failure to add XM in the Sirius Action.¹

II. Argument

Personal Audio’s efforts to bring XM into the Sirius Action or to consolidate this case with the Sirius Action have been briefed to the Court and reference is made to those papers so as to not burden the Court with repetition of the same facts. Exhs. A-C. In short, Personal Audio raised the issue of alleged infringement by XM on February 1, 2010, but admittedly failed to add XM by the March 1, 2010 deadline for joinder of additional parties in the Sirius Action. *Id.* This happened despite publicly available information of the parent-subsiary relationship of Sirius and XM and repeated written notification from Sirius that XM needed to be added as a party in order to pursue claims against XM. Exh. B (*see, e.g.*, Sirius’ brief at pp. 2-8). In light of Personal Audio’s failure to meet the additional party joinder deadline in the Sirius Action

¹ The relevant papers filed in the Sirius Action are attached as Exhibits A-C to the Declaration of Benu Mehra filed concurrently herewith. Specifically, Exhibits A-C correspond to Docket Nos. 105, 116 and 119 of the Sirius Action, respectively. Sirius intends to file a sur-reply in response to Personal Audio’s reply at Exhibit C, at which time this issue will have been fully briefed in the Sirius Action. Additionally, as Exhibit B contains confidential information, Sirius will seek leave to file the exhibits under seal tomorrow.

without any good cause, Personal Audio's separate lawsuit against XM is nothing more than an impermissible end run around the Scheduling Order in the Sirius Action. *See, e.g., Orion IP, LLC v. Home Depot USA Inc.*, No. 2:05-cv-306, Dkt. 42 (E.D. Tex. Oct. 7, 2005); Exhibit B (*see, e.g.,* Sirius' brief at pp. 14-15). Accordingly, Personal Audio's Complaint against XM should be dismissed for failure to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6).

III. Conclusion

For the reasons set forth herein and in Sirius' submissions in the Sirius Action, the Complaint should be dismissed with prejudice.

Dated: May 10, 2010

Respectfully Submitted,

By: /s/ Elizabeth L. DeRieux
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing document has been served on all counsel of record who are deemed to have consented to electronic service via the Court's CM/ECF system per Local Rule CV-5(a)(3).

/s/ Elizabeth L. DeRieux