

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

THE MARSHALL COUNTY COAL
COMPANY, THE MARION COUNTY
COAL COMPANY, THE
MONONGALIA COUNTY COAL
COMPANY, THE HARRISON
COUNTY COAL COMPANY, THE
OHIO COUNTY COAL COMPANY,
MURRAY ENERGY CORPORATION,
and ROBERT E. MURRAY,

Plaintiffs,

v.

JOHN OLIVER, CHARLES WILSON,
PARTIALLY IMPORTANT
PRODUCTIONS, LLC; HOME BOX
OFFICE, INC.; TIME WARNER INC.
and DOES 1 through 10,

Defendants.

Civil Action No. 5:17-CV-99

Judge John Preston Bailey

Marshall County Circuit Court

Civil Action No.: 17-C-124

Judge Cramer

**MOTION AND MEMORANDUM IN SUPPORT TO FILE SEPARATE MOTIONS
UNDER FEDERAL RULE OF CIVIL PROCEDURE 12 OR, ALTERNATIVELY, FOR
LEAVE TO EXCEED THE PAGE LIMITATION OF TWENTY-FIVE PAGES**

COME NOW the Defendants, Home Box Office, Inc.; Time Warner Inc.; and Partially Important Productions, LLC (hereinafter "Movants"), by and through their counsel, and hereby respectfully move that they be permitted to file separate motions under Federal Rule of Civil Procedure 12 or, alternatively, that they be granted leave to exceed the page limitation of twenty-five (25) pages if they file a consolidated Fed. R. Civ. P. 12(b) motion.

Rule 12(g)(2) of the Federal Rules of Civil Procedure requires litigants to consolidate certain dismissal arguments in a single motion, but it also contains some important exceptions. Specifically, Fed. R. Civ. P. 12(g)(2) states in pertinent part: "Except as provided in Rule 12(h)(2) ... a party that makes a motion under this rule must not make another motion under this

rule raising a defense or objection that was available to the party but omitted from its earlier motion." Fed. R. Civ. P. 12(h)(2) also provides in relevant part: "Failure to state a claim upon which relief can be granted ... may be raised in any pleading allowed or ordered under Rule 7(a), by a motion under Rule 12(c), or at trial." Importantly, at least one Circuit Court has held that "Rule 12(h)(2) specifically excepts failure-to-state-a-claim defenses (Rule 12(b)(6) from the Rule 12(g) consolidation requirement." *Ennenga v. Starns*, 677 F.3d 766, 773 (7th Cir. 2012).¹

Here, one or more of the Movants intend on filing *contemporaneous* motions to dismiss for lack of personal jurisdiction pursuant to Fed. R. Civ. P. 12(b)(2) and for failure to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6). The facts and issues raised in each motion are unique and specific to that motion. So that each motion is presented in the most clear and efficient manner, and for the convenience of the Court, Movants desire to file two separate motions, as opposed to joining both unrelated arguments in one pleading. However, if two separate motions are filed, it is anticipated that Plaintiffs may argue that Movants waived the right to file whichever motion was time-stamped filed later. Plaintiffs' anticipated arguments necessitated the filing of this motion so that Movants' defenses are preserved and neither of Movants' motions are deemed barred or waived under Rule 12(g).

Movants believe that the granting of this motion will permit the full and proper briefing of each motion. No prejudice will be suffered by Plaintiffs if the Court grants this motion as the motions are being filed together and Plaintiffs will be permitted to separately respond to each motion. Moreover, since Movants will be filing their motions contemporaneously, the purpose of

¹ Movants acknowledge that other courts have disagreed with the 7th Circuit's holding in *Ennenga*, *supra*. See, e.g., *Leyse v. Bank of Am. Nat. Ass'n*, 804 F.3d 316, 321 (3d Cir. 2015). Movants were unable to find an opinion addressing the matter from the 4th Circuit or the Northern District Court of West Virginia.

Rule 12(g) will not be undermined. The policy behind Rule 12(g) is to prevent piecemeal litigation in which a defendant moves to dismiss on one ground, loses, then files a second motion on another ground. *Ennenga*, 677 F.3d at 773 (7th Cir. 2012) (citing *Pilgrim Badge & Label Corp. v. Barrios*, 857 F.2d 1, 3 (1st Cir.1988)).

If the Court is inclined to deny this Motion, Movants request that they be permitted to exceed the page limitation of twenty-five pages if they file a 12(b) consolidated motion. This case presents important and complex issues regarding free speech and jurisdiction. Due to the number of these issues, and their importance, and because one or more Movants will be filing a consolidated pleading addressing two separate and distinct issues, Movants hereby request permission to exceed the page limitation of twenty five pages. Movants anticipate that any consolidated brief will be approximately 45 pages.

WHEREFORE, your Movants, Home Box Office, Inc.; Time Warner Inc.; and Partially Important Productions, LLC, request that they be granted permission to file separate motions and memorandums for each motion filed pursuant to Federal Rule of Civil Procedure 12 or, alternatively, if required to file a consolidated motion, that your Movants be granted permission to exceed the page limitation on memorandums by twenty (20) additional pages. A proposed Order is attached.

Respectfully Submitted,

**PARTIALLY IMPORTANT
PRODUCTIONS, LLC; HOME BOX
OFFICE, INC.; TIME WARNER INC.,
*Defendants,***

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CERTIFICATE OF SERVICE

I hereby certify that on August 4, 2017, a true copy of the foregoing *Motion and Memorandum in Support to File Separate Motions Under Federal Rule of Civil Procedure 12 or, Alternatively, for Leave to Exceed the Page Limitation of Twenty-Five Pages* was electronically filed with the Clerk of this Court using CM/ECF system, who shall provide electronic notice of such filing to the following counsel:

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Respectfully Submitted,

**PARTIALLY IMPORTANT
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*Defendants,***

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