

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
NORTHWEST DIVISION

Lacy Laducer,)	
)	Civil No. 4:09-cv-00052
Plaintiff,)	
)	
vs.)	BRIAN LADUCER'S REPLY TO DISH
)	NETWORK'S RESPONSE TO MOTION
)	TO DISMISS THIRD-PARTY
DISH Network, L.L.C.,)	COMPLAINT
)	
Defendant and)	
Third-Party Plaintiff,)	
)	
vs.)	
)	
Brian Laducer,)	
)	
Third-Party Defendant.)	

Brian Laducer submits this Reply Brief in support of his Motion to Dismiss the Third-Party Complaint.

DISH Network's Third-Party Complaint against Brian Laducer should be dismissed for the following reasons:

- (1) The Motion for Remand should be granted and the Third Party Complaint dismissed.
- (2) The Third-Party Complaint should be dismissed for failure to exhaust tribal remedies;
- (3) This Court should decline to exercise its "supplemental jurisdiction" over the Third-Party Complaint; and
- (4) Each claim in the Third-Party Complaint should be dismissed for failure to state a claim upon which relief can be granted.
- (5) DISH Network is not entitled to a default judgment on the Third-Party Complaint; and

- (6) The Third-Party Complaint is a "SLAPP" lawsuit and the Court should consider Fed. R. Civ. P. Rule 11 sanctions and attorneys fees.

INTRODUCTION

Amongst its many misstatements of law and fact, the most egregious is DISH Network's repeated allegations of its status as a "victim" in this matter. Interestingly enough, 46 out of 50 state Attorneys General have made identical allegations against DISH Network.

The Attorneys General assert that DISH Network has committed unfair and deceptive trade practices in violation of the Consumer Protection Acts in connection with the offer, sale and leasing of Dish Network Goods and Dish Network Services by failing to adequately disclose material terms and conditions, including, but not limited to, the terms of their Agreements, the limitations on the availability of programming, limitations on the uses of satellite receivers, and limitations on the availability of rebates, credits and free offers.

In re Dish Network L.L.C., Civil No. 09-C-1635, CPAT 972845.019, ¶1.9 (N.D. filed July 16, 2009).¹

The Attorneys General assert that DISH network has committed unfair and deceptive trade practices in violation of the Consumer Protection Acts by electronically debiting Consumers' bank accounts and credit cards without providing Consumers with adequate notice and without first obtaining adequate authorization from Consumers. Id. at ¶1.12.

This case is definitely not DISH Network's first rodeo. DISH Network has a long history of deceptive practices. According to the *Better Business Bureau*, of over 4,000 complaints filed in the last 36 months, over 1,000 of them are for **unauthorized debits and unauthorized credit card charges**. Over 1,100 have been for failure to correct billing errors. <http://www.bbb.org/denver/business-reviews/television-cable-catv-and->

¹ This public document is not available online. It is attached as Exhibit A. The submission of these public documents does not change the F. R. Civ. P. 12(b) Motion to Dismiss into a F. R. Civ. P. 56 motion for Summary Judgment.

satellite/dish-network-in-englewood-co-6370, (the Better Business Bureau website, last visited February 10, 2010).

In July of 2009, the 46 Attorneys General (including North Dakota) settled with DISH Network for nearly \$6 million. The settlement requires DISH Network to:

- Give at least ten (10) days notice prior to any electronic withdrawal or debit and full and complete description of the withdrawal.
- If requiring a credit card or debit card to secure the initial installation of services, DISH Network now has to clearly and conspicuously disclose that the card may be charged if the equipment is not returned.
- DISH Network is mandated to obtain written authorization to automatically charge a card and do so in a "clear and conspicuous manner. This clause must clearly, conspicuously and more prominently be set apart from all other clauses in the agreement.

In re Dish Network L.L.C., Civil No. 09-C-1635, CPAT 972845.019, at ¶4.43 (A)-(H).

Most importantly, DISH may no longer charge a card that belongs to someone other than the customer on the account. Id. at ¶ 4.44. DISH Network has clearly been engaging in deceptive and unfair business practices most of its corporate history.

LAW AND ARGUMENT

I. The Third-Party Complaint should be dismissed for failure to exhaust tribal remedies.

In Auto Owners Insurance Company v. Azure et al., No. 2:08-cv-117, 2009 WL 5202001 (D.N.D. 2009), Mr. Azure sued Ken Davis and Jeremy Laducer in tribal court. Auto Owners filed a declaratory judgment action against Davis, Laducer, and Azure in federal court. Davis then filed a third-party complaint against Auto-Owners in tribal court. Davis then filed a motion to dismiss the federal declaratory judgment action. The motion was granted.

Under the tribal exhaustion doctrine, principles of comity require a federal court to stay an action until the parties exhaust the available remedies in tribal court. “[W]hen a colorable claim of tribal court jurisdiction has been asserted, a federal court may (and ordinarily should) give the tribal court precedence and afford it a full and fair opportunity to determine the extent of its own jurisdiction over a particular claim or set of claims.” Id. at 2, quoting Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth., 207 F.3d 21, 31(1st Cir. 2000).

Because an Abuse of Process claim cannot arise until a party has actually committed abuse of process, tribal court jurisdiction did not exist until DISH Network filed this malicious third-party complaint. At that point, Mr. Laducer asserted tribal court jurisdiction and filed his Abuse of Process claim. The same situation arose in Auto Owners, where the wrongful refusal to indemnify did not occur until the Auto Owners filed for declaratory relief. After that occurred, Ken Davis filed his Third-Party Complaint against Auto Owners in tribal court.

II. This Court should decline to exercise its “supplemental jurisdiction” over the Third-Party Complaint.

To implead a Third-Party defendant into federal court via supplemental jurisdiction, there must be subject matter jurisdiction over the original claim. 28 U.S.C. § 1367 (c)(3). As stated in Lacy Laducer’s Motion to Remand, this case lacks original jurisdiction. A few weeks ago, the 8th Circuit reiterated its strong position in favor of remand. In re: Prempro Products Liability Litigation, No. 09-1205 (8th Cir. 2010) the 8th Circuit held:

[t]he case should be remanded if it appears that the district courts lacks subject matter jurisdiction. 28 U.S.C. § 1447(c). The defendant bears the burden of establishing federal jurisdiction by a preponderance of the evidence. **All doubts about federal jurisdiction should be resolved in favor of remand to state court.** [emphasis added].

The District Court for the District of North Dakota has also announced a strong policy in favor of remand:

"Although not required to do so, Lohtowe has not offered to stipulate that his recoverable damages are less than \$75,000 which would unquestionably result in a remand of this action to state court. Lohtowe v. State Farm, 470 F. Supp.2d 1033, ¶ 5 (D.N.D. 2007).

In its Third-Party Complaint, DISH Network has alleged that Brian Laducer used Lacy Laducer's credit card in a fraudulent matter. (See Third-Party Complaint, Claim No. 3, Fraud). Assuming that allegation to be true, Lacy Laducer now has a claim against Brian Laducer. The following is what DISH Network has told the Turtle Mountain Tribal Court:

"If Mr. Laducer's daughter, Lacy, was wronged by her father's use of the subject credit card account, her proper remedy is to sue her father for any unauthorized use of the credit card. (See Exhibit B at 10)."

However, there is no "supplemental jurisdiction in federal court for that claim.

In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure . . . when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332. See 28 U.S.C. § 1367 (b).

DISH Network is basing its purported federal jurisdiction under 28 U.S.C. § 1332; diversity of citizenship. The Third-Party Complaint was issued pursuant to Fed. R. Civ. P. 14. This is why the subject matter jurisdiction of federal courts is limited.

The doctrine of judicial estoppel applies to prohibit a party from assuming positions inconsistent or contradictory with its position in a prior proceeding. See BTA

Oil Producers v. MDU Resources Group, 2002 ND 55, ¶ 14, 642 N.W.2d 873. See Id.

The North Dakota Supreme Court has stated:

Judicial estoppel doctrine is equitable and is intended to protect the courts from being manipulated by chameleonic litigants who seek to prevail, twice, on opposite theories. The purpose of the doctrine of judicial estoppel is to reduce fraud in the legal process by forcing a modicum of consistency on the repeating litigant. Id.

In its Notice of Removal, DISH Network invoked subject matter jurisdiction upon the most tenuous of grounds. It now seeks to ask a federal court to exercise its discretion to hear a third-party complaint pursuant to 28 U.S.C. § 1367. DISH Network asks the federal court to exercise its discretion to hear the Third-Party complaint at the same time they are seeking to dismiss the Tribal Court Abuse of Process claim on the ground that Lacy's claim is actually against Brian. (See Exhibit B). A claim which, by law, Lacy cannot bring in federal court.²

III. The Third-Party Complaint should be dismissed for failure to state a claim upon which relief can be granted.

a. Iqbal/Twombly clearly establishes a heightened standard of review.

DISH Networks' interpretation of Bala v. Stenehjem, 2009 WL 4250083 (D.N.D. 2009) is misplaced. In Bala, this Court granted the motion to dismiss. See Bala 2009 WL 4250083 at 4-7. Secondly, DISH Network omits the most significant parts of the opinion on this issue:

A pleading that offers "labels and conclusions" or a "formulaic recitation of the elements of a cause of action will not do." Nor does a complaint suffice if it tenders "naked assertion[s]" devoid of "further factual enhancement." Bala, at 4 quoting Twombly, 129 S.Ct. at 1949.

²Dish Networks reliance on Owens Equipment & Erection Co. v. Kroger, 437 U.S. 365, 98 S.Ct. 2396 (1978) is misplaced. Owens Equipment has been superseded by 28 U.S.C. §1367.

Where a complaint pleads facts that are “merely consistent with” a defendants liability, it “stops short of the line between possibility and plausibility of ‘entitlement to relief.’ ” Bala, at 4 quoting Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (U.S., 2009).

b. The Third-Party Complaint fails to state a claim in Conversion.

DISH Network has alleged four separate claims for relief against Brian Laducer: Breach of Contract, Fraud, Conversion, and Implied Indemnification. These claims as a matter of law must be grounded in North Dakota substantive law. DISH Network cannot cite one North Dakota case to support its spurious claim of conversion; not one. Instead, DISH Network relies upon its “Digital Home Advantage Promotion Agreement” as the legal basis for its spurious claims. (See Third-Party Complaint ¶ 5); an “agreement” which 46 out of 50 Attorney Generals found to be deceptive and unfair.

The North Dakota Supreme Court has defined conversion as:

Conversion is a tort having its origin in the old common law action of trover. The intent required is not necessarily a matter of conscious wrongdoing but rather the intent to exercise control or interference of such a degree as to require a forced sale of the plaintiff's interest in the goods to the defendant. Prosser, Torts 15, 4th ed. (1971). The tort is generally committed by an unauthorized transfer or disposal of possession of goods to one who is not entitled to them. Also, conversion may occur by way of refusal to surrender possession of the property to one who is entitled to it. Where there has been no wrongful taking or disposal of the goods, but rather the defendant rightfully came into possession, demand **and** refusal to return are usually necessary to the existence of the tort. Prosser, supra. Dairy Department of North Dakota v. Harvey Cheese, Inc., 278 N.W.2d 137 (N.D. 1979).

The point of Iqbal/Twombly is that conclusory name-calling is not enough to state a claim for relief. A party must set forth “facts” which must be supported by the “law” to survive a Motion to Dismiss. DISH Network repeatedly cites its “adhesion contract” to

support its spurious claim for conversion; however, it cites no North Dakota law to support this claim. That is because there is no supporting law.

c. The Third-Party Complaint fails to state a claim for Implied Indemnification.

DISH Network cites Mann v. Zabolotny, 2000 ND 160, 615 N.W.2d 526, 529 in support of its claim for Implied Indemnification. However, "implied indemnification" was not an issue on appeal in that case.

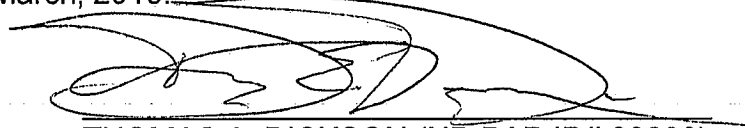
In this case, the trial court rejected application of indemnity. On appeal, Mueller has not raised an issue challenging the trial court's refusal to award indemnity. We therefore need not address the application of implied indemnity to this case. Id. at [¶9].

DISH Network has also failed to cite any case law supporting its claims for Fraud and Breach of Contract.

CONCLUSION

Throughout these proceedings, DISH Network has somehow portrayed itself as a "defenseless victim" prayed upon by an ungrateful customer or his daughter. In its filing in this Court, DISH Network has brandished its "contract" as both a shield against Lacy and as a sword against Brian Laducer. A "contract" which is so notoriously deceptive and unfair that it somehow managed to find its way to the desktop of 46 out of 50 state Attorney Generals. In re Dish Network L.L.C., Civil No. 09-C-1635, CPAT 972845.019. In this age of heightened and even vicious partisanship, having 46 state Attorneys General agree on anything is nothing short of miraculous.

Dated this 2nd day of March, 2010.



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