

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

MARK KOKOSZKI, individually and
on behalf of all others similarly situated,

Plaintiff,

Case No. 19-cv-10302

vs.

Hon. Bernard A. Friedman

PLAYBOY ENTERPRISES, INC.,

Defendant.

**PLAYBOY ENTERPRISES, INC.'S MOTION
TO FILE THIRD PARTY COMPLAINT**

CONCISE STATEMENT OF ISSUES PRESENTED

1. Should the Court grant Defendant Playboy Enterprises, Inc.'s Motion to File a Third Party Complaint pursuant to Federal Rule of Civil Procedure 14(a) where Playboy has plausibly demonstrated that its contracts with putative Third Party Defendants SMS and PubWorx require those entities to indemnify Playboy for the settlement, costs, and attorneys' fees incurred in defending and settling Plaintiff's claims?

Playboy's Answer: Yes

Plaintiff Mark Kokoszki's Answer: No

CONTROLLING AND MOST APPROPRIATE AUTHORITY

A. Rule 14(a) Permits a Defendant to File a Third Party Complaint against Parties Liable for Claims in the Original Action

1. Fed. R. Civ. P. 14(a)(1)
2. *American Zurich Ins. Co. v. Cooper Tire & Rubber Co.*, 512 F.3d 800 (6th Cir. 2008)
3. *CSX Transportation, Inc. v. Fiber Techs. Networks*, No. 2:15-CV-10976, 2015 WL 13039535, at *1 (E.D. Mich. July 1, 2015)

B. PubWorx and SMS Should Be Joined in this Suit as Third Party Defendants

1. *American Zurich Ins. Co. v. Cooper Tire & Rubber Co.*, 512 F.3d 800, 805 (6th Cir. 2008)
2. *Young v. Dolgencorp, LLC*, No. 17-CV-10172, 2017 WL 3777145, at *1 (E.D. Mich. Aug. 31, 2017)
3. *T. Lemkau & Assoc., Ltd. v. Sowa Tool & Mach. Co.*, No. 11-10039, 2011 WL 13217853, at *1 (E.D. Mich. Sept. 22, 2011)
4. *Ford Motor Co. v. Michigan Consol. Gas Co.*, No. 08-CV-13503-DT, 2011 WL 1743735, at *6 (E.D. Mich. May 5, 2011)
5. *Marathon Petroleum Co. LP v. Future Fuels of Am., LLC*, No. 10-14068, 2011 WL 13160930, at *1 (E.D. Mich. May 11, 2011)

Pursuant to Federal Rule of Civil Procedure 14(a), Defendant Playboy Enterprises, Inc. (“Playboy”), by its attorneys Honigman LLP and Quinn Emanuel Urquhart & Sullivan, LLP hereby requests that the Court grant it permission to file a Third-Party Complaint attached as **Exhibit 1**. In support of this Motion, Playboy states as follows:

INTRODUCTION

In a putative class action pending in this Court, Plaintiff and a putative class of *Playboy* magazine subscribers sued Playboy for disclosing information about his and others’ magazine subscription to third parties in violation of the Michigan Preservation of Personal Privacy Act (the “PPPA”). Although it does not concede liability for Plaintiff’s claims, Playboy has agreed in principle to settle the class claims against it in order to avoid the risk of potentially catastrophic statutory damages. Playboy now seeks to assert third-party claims against the companies that provided it with subscription and list management services because they owe Playboy indemnification for its fees, costs, and other damages incurred in defending and settling this putative class action.

In their contracts with Playboy, both of the prospective third party defendants promised to indemnify Playboy for claims arising against it as a result of their performance. Nonetheless, after Playboy informed both of these parties about its intention to settle the action against it, both of the third party defendants repeatedly

refused to comply with their indemnification obligations. For months, Playboy has been attempting to recover all or part of its anticipated settlement costs from its indemnitors. After multiple rounds of demand letters, phone conferences, and requests to mediate their dispute, it has become clear that these third parties will not budge. Accordingly, Playboy seeks leave of the Court to implead Defendants Specialist Marketing Services, Inc. (“SMS”) and PubWorx, LLC/ProCirc (“PubWorx”) into this case, as they are both liable to Playboy for its costs, fees, and other damages related to defending and settling this action.

Impleading PubWorx and SMS into the present litigation as third-party defendants is the most efficient means of resolving all of the parties’ claims. Playboy’s claims against PubWorx and SMS are straightforward: PubWorx and SMS are obligated to indemnify Playboy for any claims—including the *Kokoszki* lawsuit—arising out of their actions in managing and renting Playboy’s subscriber lists. The class settlement is in the approval process, and PubWorx and SMS can most efficiently raise any arguments about their liability to Playboy or the settlement to this Court, which is familiar with the underlying facts has already guided this case to a tentative settlement. Impleading PubWorx and SMS into the instant litigation will also avoid the need to file a separate lawsuit to resolve issues already pending in this Court.

Accordingly, pursuant to Rule 14(a)(1), Playboy should be granted leave to file the proposed third party complaint attached to this motion.

FACTUAL BACKGROUND

The Kokoszki Suit. On January 30, 2019, Mark Kokoszki filed a putative class action against Playboy. (Dkt. 1.) Kokoszki alleged that Playboy violated the PPPA by renting, exchanging, or disclosing his personal information—including the fact that he subscribed to *Playboy*—in violation of the PPPA. (Dkt. 1 at ¶ 1.) In his complaint, Plaintiff alleged that Playboy subscriber information was offered for sale by a list broker, Specialists Marketing Services, as well as other “data aggregators, data appenders, [and] data cooperatives . . . among others.” (Dkt. 1 at ¶¶ 1-2.)

The Indemnity Agreements. As described in the complaint, Playboy works with sub-contractors to handle subscription and circulation services. In addition to SMS, Playboy also hired ProCirc (now known as PubWorx) to provide circulation services, such as maintaining Playboy’s subscriber list, processing subscription orders and payments, and marketing. (See Ex. A to Third-Party Compl.) The ProCirc contract includes an indemnification clause, wherein ProCirc agreed to “indemnify [Playboy] from all Claims incurred by [Playboy] arising from [] any alleged breach” of the Agreement, including ProCirc’s representation that it would “comply with all applicable . . . state and local laws.” (**Exhibit 2**, ProCirc Contract at ¶¶ 11-13.) Likewise, Playboy’s contract with SMS contains a similar

indemnification clause, wherein SMS agrees to “indemnify, defend and hold harmless” Playboy for any claims, lawsuits, or proceedings “arising out of or resulting from” SMS’s performance under the contract. (**Exhibit 3**, SMS Contract at ¶ 17.)

The claims alleged against Playboy in *Kokoszki* directly implicate ProCirc and SMS’s actions under their respective contracts. ProCirc collected personal information about *Playboy* subscribers, and shared the subscriber data with SMS, who rented the data to advertisers. (*See* Ex. 1, ProCirc Contract.) Both ProCirc and SMS disclosed information about Michigan subscribers in their datasets. In *Kokoszki*, Plaintiff alleged that sharing this information violated the PPPA. Nevertheless, even though ProCirc and SMS participated in these activities, only Playboy was named as a defendant in *Kokoszki*.

Playboy filed an Answer to the Complaint on April 1, 2019. (Dkt. 7.) Two days later, Playboy sent a demand letter to ProCirc¹ requesting that it honor its indemnification obligations under its contract. (**Exhibit 4**, 4/3/2019 Playboy Ltr. to ProCirc.) On June 18, 2019, Playboy sent a similar indemnification demand letter

¹ In 2017 PubWorx merged with ProCirc LLC, and now markets itself as “PubWorx ProCirc.” Playboy signed circulation services contracts with both ProCirc and PubWorx. ProCirc now operates as an unincorporated division of PubWorx, making PubWorx the successor-in-interest to ProCirc.

to SMS. (**Exhibit 5**, 6/18/2019 Playboy Ltr. to SMS.) Both parties asserted that they were not liable for any indemnification claims.

On July 10, 2019 Playboy and Plaintiff Kokoszki participated in a court-ordered mediation and negotiated a tentative settlement over the next several months. (Dkt. 13.) Because both SMS and PubWorx refused to commit to paying their contractually-obligated indemnification, Playboy sent additional demand letters to SMS and PubWorx on November 13, 2019, informing the parties of the tentative settlement and requesting indemnification. PubWorx replied and asserted it was not obligated to indemnify Playboy for the *Kokoszki* litigation, but stated that it remained open to discussing the matter to avoid the time and expense of an indemnification lawsuit. SMS replied similarly. Over the next four months, Playboy's counsel exchanged multiple rounds of letters with counsel for PubWorx and SMS, discussed the matter on numerous conference calls, and requested that the parties voluntarily mediate their dispute. All of these efforts have been unsuccessful: the parties are at an impasse and both PubWorx and SMS insist that they should not be required to indemnify Playboy for any settlement of the *Kokoszki* class action, and further assert that the proposed settlement in this case is unreasonable. (**Exhibit 6**, 2/28/2020 PubWorx Ltr.; **Exhibit 7**, 3/2/2020 SMS Email.)²

² On March 13, 2020 Administrative Order 20-AO-021 was issued, which postponed a variety of civil and criminal deadlines in this District due to COVID-19 concerns.

ARGUMENT

I. PLAYBOY’S PROPOSED THIRD PARTY COMPLAINT SEEKS INDEMNIFICATION FOR ACTIVITY BY THIRD PARTIES DIRECTLY IMPLICATED BY THE KOKOSZKI ACTION

With its third party complaint, Playboy seeks to have SMS and PubWorx indemnify it for all or part of its liability to the class of Michigan Plaintiffs. As alleged in Playboy’s third party complaint, both SMS and PubWorx signed contracts agreeing to indemnify and hold Playboy harmless for certain claims arising from their handling of Playboy’s subscriber information. (Ex. 1, Third Party Compl. ¶¶ 19-40.) Playboy has informed SMS and PubWorx that it plans to seek indemnification from them for all or part of the settlement in this case. To date, both SMS and PubWorx have asserted that they are not liable, refused to mediate this dispute out of court, and objected to the proposed settlement.

A. Rule 14 Permits a Defendant to File a Third Party Complaint against Parties Liable For Claims in the Original Action

The Rules of Civil Procedure permit a defendant to “serve a summons and complaint on a nonparty who is or may be liable to it for all or part of the claim against it.” Fed. R. Civ. P. 14. This permits “additional parties whose rights may be affected by the decision in the original action to be joined so as to expedite the final determination of the rights and liabilities of all the interested parties in one suit.” *American Zurich Ins. Co. v. Cooper Tire & Rubber Co.*, 512 F.3d 800, 805 (6th Cir. 2008). “Third-party pleading is appropriate only where the third-party

defendant's liability to the third-party plaintiff is dependent on the outcome of the main claim . . . [a] defendant attempting to transfer the liability asserted against him by the original plaintiff to the third-party defendant is therefore the essential criterion of a third-party claim." *Id.* If more than fourteen days have passed from a defendant filing their answer, a defendant may serve a third-party complaint "with leave from the court." Fed. R. Civ. P. 14(a)(1).

The decision to grant a motion for leave to file a third-party complaint under Rule 14 is committed to the discretion of the trial court. *CSX Transportation, Inc. v. Fiber Techs. Networks*, No. 2:15-CV-10976, 2015 WL 13039535, at *1 (E.D. Mich. July 1, 2015). This Rule "encourages efficiency by permitting related claims to be tried in one action and therefore should be liberally construed." *Id.* (internal citations omitted). In deciding whether to grant a motion under Rule 14, the Court "should consider "the needs to avoid duplicative litigation and ensuring that the parties already before the Court receive reasonably expeditious adjudication." *Id.* (internal citations omitted).

B. PubWorx and SMS Should Be Joined In This Suit as Third Party Defendants

Pursuant to Rule 14(a)(1), the Court should grant Playboy's motion to file its third party complaint. Because Playboy is seeking indemnity for any liability to Kokozski and other class members, SMS and PubWorx will be impacted by any judgment or settlement approved in this case.

Moreover, impleading SMS and PubWorx into this suit serves the purpose of Rule 14. Impleader here promotes judicial efficiency and permitting SMS and PubWorx to directly challenge the settlement or dispute their liability for the underlying claims in a single, consolidated action. *See Am. Zurich Ins. Co.*, 512 F.3d at 805 (“The underlying principle behind impleader is to promote judicial efficiency by permitting the adjudication of several claims in a single action, and thus to eliminate circuitous, duplicative actions.”) (internal citation omitted).

Moreover, leave to file a third-party complaint “is freely granted where justice so requires.” In fact, in this District, numerous courts have granted motions to file third-party complaint months or even years after the initial complaint was filed. *See, e.g., Young v. Dolgencorp, LLC*, No. 17-CV-10172, 2017 WL 3777145, at *1 (E.D. Mich. Aug. 31, 2017) (granting a motion to file a third-party complaint five months after the case was removed to federal court); *T. Lemkau & Assoc., Ltd. v. Sowa Tool & Mach. Co.*, No. 11-10039, 2011 WL 13217853, at *1 (E.D. Mich. Sept. 22, 2011) (granting a motion to file a third-party complaint nine months after the complaint was filed); *Ford Motor Co. v. Michigan Consol. Gas Co.*, No. 08-CV-13503-DT, 2011 WL 1743735, at *6 (E.D. Mich. May 5, 2011) (granting a motion to file a third-party complaint two years after the complaint was filed); *Marathon Petroleum Co. LP v. Future Fuels of Am., LLC*, No. 10-14068, 2011 WL 13160930, at *1 (E.D.

Mich. May 11, 2011) (granting a motion for leave to file a third-party complaint six months after the complaint was filed).

Conversely, leave should be denied if the motion “is brought in bad faith or for dilatory purposes, results in undue delay or prejudice to the opposing party, or would be futile.” *T. Lemkau & Assoc., Ltd.*, 2011 WL 13217853, at *1. Here, Playboy is not filing a third party complaint to delay resolution of this case. And there is no prejudice to Plaintiff or the putative class since Playboy and the putative class have entered an agreement to settle their claims.

Likewise, there is no prejudice to SMS and PubWorx in allowing the filing of a third-party complaint where the Court is best apprised of the underlying facts of the action. *See McDonald v. Blue Jeans Corp.*, 183 F. Supp. 149, 150 (S.D.N.Y. 1960) (permitting the filing of a third-party complaint after a settlement had been entered with the original defendant). To demonstrate prejudice, SMS and PubWorx would have to show that they would incur greater expense or be at a greater disadvantage in defending a third-party claim than in defending an independent suit. *See Too, Inc. v. Kohl’s Dep’t Stores, Inc.*, 213 F.R.D. 138, 142 (S.D.N.Y. 2003) (rejecting an argument that third party defendants would be prejudiced by the cost of joining litigation, since they would have to incur similar expenses if they were named as defendants in a separate suit); *In re Enron Corp.*, No. CIV.A. H-01-3624, 2006 WL 1371089, at *3 (S.D. Tex. May 17, 2006) (“The fact that third-party

defendants may need to review discovery already taken by parties to the original action or that the third-party defendants may need to conduct their own investigations, does not prevent impleader . . . the trying of claims directly related to those in the original complaint will avoid unnecessary duplication and waste.”).

So it is here. The Court should grant Playboy’s motion for leave to file a third-party complaint.

CONCLUSION

For these reasons, Playboy respectfully requests that the Court grant its Motion for Leave to File a Third Party Complaint.

Dated: April 21, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on April 21, 2020, a copy of the foregoing was electronically filed with the Clerk of the Court using the ECF system which will send notification to all counsel of record.

Dated: April 21, 2020

Respectfully submitted,

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