IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

CITY OF EAST ST. LOUIS, Individually and on behalf of all others similarly situated,	)	
Plaintiff,	)	**Case No. 3:21-CV-561-MAB[1]**
vs.	)	
NETFLIX, INC., DISNEY PLATFORM DISTRIBUTION, INC., APPLE, INC., HULU, INC., WARNERMEDIA DIRECT, LLC, AMAZON.COM SERVICES, LLC, CBS INTERACTIVE, INC., YOUTUBE, LLC, CURIOSITYSTREAM, INC., PEACOCK TV, LLC, DIRECTV, LLC, and DISH NETWORK, LLC,	)	
Defendants.	)	

MEMORANDUM AND ORDER

BEATTY, Magistrate Judge:

This matter is currently before the Court on the Motions to Dismiss filed by each of the Defendants (Docs. 172, 173, 174, 176, 178). Plaintiff filed an omnibus response in opposition to the motions to dismiss (Doc. 184), and each Defendant filed a reply brief (Docs. 187, 188, 189, 190, 191). Defendants also requested leave to file supplemental authority in support of their motions to dismiss (Docs. 197, 200), which the Court granted

[1] This case was assigned to the undersigned for final disposition upon consent of the parties pursuant to 28 U.S.C. §636(c) (*see* Doc.150).

over Plaintiff's opposition (Doc. 205; *see also* Doc. 199, 204).

Although Defendants requested oral argument on the motions to dismiss, the Court has reviewed the papers submitted and determined that oral argument is not necessary. For the reasons that follow, Defendants' motions to dismiss are granted.

BACKGROUND

In Illinois, all persons or entities "seeking to provide cable service or video service" are required to obtain authorization from the government to provide their services. *E.g.*, 220 ILL. COMP. STAT. 5/21-301(a). Such authorization is commonly referred to as a "franchise." In the past, providers had to obtain authorization from each individual municipality. *See* Illinois Senate Bill 678, Bill for an Act Concerning Telecommunications, 95th General Assembly, House Proceedings, May 31, 2007, at 234 (statement of Rep. Brosnahan).[2] But since 2007, when Illinois enacted the Cable and Video Competition Law (220 ILL. COMP. STAT. 5/21-100, *et. seq*) (the "CVCL"), providers can now obtain a single state-wide authorization from the Illinois Commerce Commission. 220 ILL. COMP. STAT. 5/21-301(a).[3]

The CVCL defines "video service" to include "video programming . . . that is provided through wireline facilities located at least in part in the public rights-of-way

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[2] Available on Westlaw at IL H.R. Tran. 2007 Reg. Sess. No. 65.

[3] Providers also still have the option of obtaining a cable television franchise from each individual municipality and/or county. *E.g.*, 220 ILL. COMP. STAT. 5/21-301(a) (citing Illinois Municipal Code, 65 ILL. COMP. STAT. 5/11-42-11, and Counties Code, 55 ILL. COMP. STAT. 5/5-1095). *See also* 220 ILL. COMP. STAT. 5/21-401(a)(2) ("Nothing in this Section shall prohibit a local unit of government from granting a permit to a person or entity for the use of the public rights-of-way to install or construct facilities to provide cable service or video service, at its sole discretion.").

without regard to delivery technology, including internet protocol technology. 220 ILL. COMP. STAT. 5/21-201(v). But it expressly excludes from the "video service" definition "video programming provided by a commercial mobile service provider . . . or any video programming provided solely as part of, and via, service that enables users to access content, information, electronic mail, or other services offered over the public internet." *Id.* If an entity's services fall within the definition, it must obtain a State-issued authorization from the Illinois Commerce Commission before it can "use the public rights-of-way for the installation or construction of facilities for the provision of cable service or video service or offer cable service or video service . . . ." *Id.* at 401(a), (b).

The CVCL imposes numerous requirements on "holders," that is entities who are granted state-wide authorizations to offer or provide cable or video service. *See* 220 ILL. COMP. STAT. 5/21-601, 701, 801, 901, 1001, 1101. *See also id.* at 201(k) (defining "holder). Most notably, holders are required to pay a service provider fee to all local units of government within whose boundaries the holders offer cable or video service. *Id.* at 801(b).[4] To that end, before offering cable service or video service within the jurisdiction of a local unit of government, a holder is required to notify the local unit of government. *Id.* at 801(a). The local unit of government is then required to adopt an ordinance imposing the service provider fee. *Id.* at 801(b).

The instant case involves the CVCL's application to the twelve Defendants, who are all "over the top" video service providers that charge subscribers a fee to access and

[4] A "local unit of government" is defined by the CVCL as "a city, village, incorporated town, or county." 220 ILL. COMP. STAT. 5/21-201(o).

stream their programming over the Internet (Doc. 167, ¶¶5–17, 30, 33; Doc. 184, p. 16 n.1). To watch Defendants' video content, subscribers use their own internet-connected device (such as smart televisions, streaming media players like Roku or Apple TV, tablets, smartphones, personal computers, etc.) (Doc. 167, ¶37). And subscribers connect to the internet through the internet service provider ("ISP") of their choice (*Id.* at ¶52). Defendants' subscribers typically use a broadband internet connection, such as DSL or fiber optic cable, to view Defendants' video content (*Id.* at ¶48). A broadband connection relies on the ISPs' wireline facilities located in whole or in part in the public right(s)-of-way (*Id.* at ¶¶36, 50). In other words, Defendants' video content is delivered from their servers to subscribers' devices through third-party ISPs' wireline facilities located in the public rights-of-way. Defendants do not provide internet access, nor do they own, control, or operate wireline facilities in any Illinois public right-of-way (*Id.* at ¶¶52, 60).

The City of East St. Louis, Illinois ("Plaintiff") brought this putative class action against Defendants on behalf of all Illinois cities, villages, incorporated towns, and counties in which one or more of the Defendants provide video service (Doc. 1, Doc. 167). Plaintiff alleges that Defendants have all engaged in ongoing violations of the Illinois CVCL by providing video service using the public rights-of-way without first obtaining authorization from the Illinois Commerce Commission and without paying the requisite fees to municipalities (Counts 1 and 2). Plaintiff also asserts claims for trespass (Count 3),

unjust enrichment (Count 4), and violation of East St. Louis Municipal Ordinance §82-19 (Count 5) (Doc. 167).[5]

LEGAL STANDARD

A motion to dismiss under Rule 12(b)(6) addresses the legal sufficiency of the plaintiff's claim for relief, not the merits of the case or whether the plaintiff will ultimately prevail. *Camasta v. Jos. A. Bank Clothiers, Inc.*, 761 F.3d 732, 736 (7th Cir. 2014); *Gibson v. City of Chicago*, 910 F.2d 1510, 1520 (7th Cir. 1990). To survive a motion to dismiss, a complaint must contain sufficient factual matter to plausibly suggest that the plaintiff has a right to relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A complaint need not allege specific facts, but it may not rest entirely on conclusory statements or empty recitations of the elements of the cause of action. *Iqbal*, 556 U.S. at 678. *See also Dix v. Edelman Fin. Servs., LLC*, 978 F.3d 507, 512–13 (7th Cir. 2020) ("[L]egal conclusions and conclusory allegations . . . are not entitled

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[5] This Court also presided over a substantially similar putative class action filed by the Village of Shiloh, Illinois. *See Village of Shiloh v. Netflix, Inc., et. al.*, SDIL Case No. 21-cv-807-MAB. That case was removed here from the Circuit Court of St. Clair County, Illinois; it was originally filed five days after East St. Louis filed the instant case. The Village of Shiloh timely moved to remand its case, claiming that under comity principles, the case should be decided by an Illinois state court. *See id.* at Docs. 45, 46; *City of Fishers, Indiana v. DIRECTV*, 5 F.4th 750, 752–53 (7th Cir. 2021). In other words, the Village of Shiloh contended a state court, not a federal court, needed to answer the same questions that East St. Louis chose to submit to a federal forum. Ultimately, the Court chose to rule on the comity issue in *Village of Shiloh* rather than consider options for managing duplicative cases (*e.g.*, consolidation, stay, or dismissal) because comity abstention was the *only* issue formally before the Court—neither side had filed a motion regarding the management of the two cases nor provided any authority indicating that case management decisions should trump comity abstention principles—and the case was remanded. SDIL Case No 21-cv-807-MAB, Doc. 68, pp. 12–15. The Court recognized, however, the remand created an unusual and non-ideal situation in which duplicative lawsuits were proceeding in state and federal court and thus suggested any party could ask for a stay in either case. *Id.* No party asked the Court to stay the instant case, but they did ask for and were granted a stay in state court in *Village of Shiloh*, thus volleying the issues back to federal court. *See* SDIL Case No. 21-cv-807-MAB, Doc. 77. Accordingly, the undersigned is now tasked with determining whether Plaintiff has stated a claim for relief under Illinois law.

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