UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS

VILLAGE OF SHILOH, Plaintiff, v. NETFLIX, INC., *et al.*, Defendants.	Case No. 3:21-cv-00807-SMY

DEFENDANTS' JOINT RESPONSE TO ORDER TO SHOW CAUSE REGARDING REMAND OF THIS ACTION

Defendants DISH Network Corporation, DISH Network L.L.C., Netflix, Inc., Hulu, LLC, DIRECTV, LLC, and Disney DTC LLC (collectively, "Defendants") submit this response to the Court's order to show cause why this case should not be remanded to the Circuit Court for the Twentieth Judicial Circuit, St. Clair County, Illinois ("State Court"). Dkt. 34. Defendants respectfully suggest that the case should not be remanded for two reasons. First, this case is a copycat litigation derived from an earlier-filed case in this District styled *City of East St. Louis v. Netflix, Inc., et al.*, No. 3:21-cv-00561-MAB (the "*East St. Louis Case*"), which the plaintiff directly filed in federal court. It asserts the same claims under the same statute on behalf of the same putative class seeking the same relief against five of the same Defendants named in this action (*i.e.*, Netflix, Hulu, Disney, DISH, and DIRECTV). It thus triggers the duty to avoid duplicative litigation.

Second, the Seventh Circuit's decision in *City of Fishers* does not require remand under these circumstances. The Seventh Circuit upheld the district court's application of equitable comity as set forth in *Levin* and did not speak to the outcome of this fact-intensive inquiry under

the different circumstances of this case. The precedence of the *East St. Louis Case* make these circumstances dramatically different. Among other things, *City of Fishers* did not implicate the duty of federal courts to avoid duplicative litigation, either by staying or consolidating the second-filed action. Moreover, the comity analysis in *City of Fishers* was driven primarily by the view that remand would avoid the need for a federal court to rule on the state revenue-generating scheme at issue. Not so here because plaintiff in the *East St. Louis Case* has already chosen to litigate in federal court on behalf of itself and all other local government units in Illinois. Whatever discretion comity may afford to remand this case is outweighed by the duty to avoid duplicative litigation of actions, like these actions, that are properly before the federal court. Even *City of Fishers* recognized that "abstention from the exercise of federal jurisdiction is the exception, not the rule." *City of Fishers, Indiana v. DIRECTV*, No. 20-3478, 2021 WL 3073368, at *2 (7th Cir. July 21, 2021) (citation and quotation omitted).

Since the Court's show cause order makes clear the Court is considering remand, Defendants point out that this Court retains the flexibility to manage its docket and that this Court's discretion to do so is not abrogated by *City of Fishers*. As explained in more detail below, Defendants respectfully request that this Court permit full briefing on the merits of remand in this case or, alternatively, temporarily stay consideration of remand to allow the parties in the *East St. Louis Case* a chance to address these issues.

I. Background

The City of East St. Louis filed its complaint on June 9, 2021. *See East St. Louis Case*, Dkt. 1. The complaint alleges that Defendants provide "video service in Illinois cities, villages, incorporated towns, and counties" (*id.* ¶ 2) and that Defendants therefore must pay video service provider fees allegedly due under the Illinois Cable and Video Competition Law of 2007 (the "Act"). The complaint asserts these claims on behalf of a putative class of "[a]ll Illinois cities,

villages, incorporated towns, and counties in which one or more of the Defendants provided video service" (*id.* ¶ 59).

One week later, on June 16, 2021, the Village of Shiloh filed this copycat case in the State Court, asserting the same claims on behalf of the same putative class. The allegations in this case confirm that it substantially, if not completely, overlaps with the earlier-filed *East St. Louis Case*. In both cases, the plaintiffs seek video service provider fees on behalf of themselves and local government units in Illinois. Both complaints allege that those fees are required by the Act. And both complaints allege that Defendants do not use the public internet, which is exempted from video service provider fees. Also, all five Defendants in this case (Netflix, Hulu, Disney, DISH, and DIRECTV) are named Defendants in the *East St. Louis Case*.

On July 15, 2021, Defendants timely removed this case. *See Village of Shiloh v. Netflix, Inc., et al.*, No. 3:21-cv-00807-SMY, Dkt. 1 (Jul. 15, 2021). Thereafter, on July 28, this Court issued an order to show cause why this case should not be remanded in light of the Seventh Circuit's July 21 decision in *City of Fishers*, in which the Court of Appeals upheld a district court order remanding the plaintiffs' claims to Indiana state court on the basis of the discretionary doctrine of comity.

II. Argument

A. Remand is not required by the *City of Fishers* decision.

Because "[f]ederal courts have a virtually unflagging obligation to exercise the jurisdiction given them," comity-based abstention "is the exception, not the rule." *City of Fishers*, 2021 WL 3073368, at *2. This is particularly true where, as here, no one has disputed that this Court has subject matter jurisdiction pursuant to the Class Action Fairness Act ("CAFA"). *See* Notice of Removal, Dkt. 1 ¶ 1. There are good reasons not to abstain here.

First, even *City of Fishers* acknowledges that comity-based remand is discretionary, not mandatory. The Seventh Circuit merely held that the district court in that case did not abuse its discretion in evaluating "the *Levin* confluence of [comity] factors" to decline jurisdiction. *City of Fishers*, 2021 WL 3073368, at *7. Nowhere does the decision state that the discretionary doctrine of comity deprives this Court of subject matter jurisdiction that has been properly asserted under CAFA. So, it continues to be important to consider comity on a case-by-case basis.

Second, the evaluation of the *Levin* factors in this case does not favor remand because, in contrast with the *City of Fishers* case, this case involves potential remand of a second-filed, duplicative litigation. As explained above, this case was filed a week after the *East St. Louis Case* was filed in this District, and it duplicates the same claims, against the same defendants, on behalf of the same class. Because the East St. Louis plaintiff already chose a federal forum for this putative class action, the *City of Fishers'* analysis of the *Levin* factors is inapposite:

- Factor 1—Which party invokes federal court review: it was the East St. Louis plaintiff that first sought federal court intervention on behalf of itself and the putative class.
- Factor 2—Intent of the removing parties: Defendants did not invoke federal court jurisdiction in this case to improve their competitive position, but rather to avoid duplicative litigation.
- Factor 3—Whether the state court is better positioned: the federal court is equally capable of deciding matters of state law when, as here, it has been asked to do so by a local government plaintiff.

See City of Fishers, 2021 WL 3073368, at *4 (applying *Levin* factors). Even *Levin* recognized that "[i]f the State voluntarily chooses to submit to a federal forum, principles of comity do not demand that the federal court force the case back into the State's own system." 560 U.S. at 432 (citation and quotation omitted).

Third, remand of this case would guarantee duplicative litigation in state and federal court, which is contrary to the federal court's duty to avoid duplicative litigation. Under the first-to-file

rule, courts have a "duty … to avoid duplicative litigation in more than one federal court." *Ozinga v. U.S. Dep't of Health & Hum. Servs.*, No. 13-cv-3292, 2013 WL 12212731, at *1 (N.D. Ill. Aug. 14, 2013) (citation and quotation omitted); *see also Trippe Mfg. Co. v. American Power Conversion Corp.*, 46 F.3d 624, 629 (7th Cir. 1995). If deferring to the first-filed case is consistent with "considerations of judicial and litigant economy, and the just and effective disposition of disputes," courts should so defer. *MLR, LLC v. U.S. Robotics Corp.*, No. 02-cv-2898, 2003 WL 685504, at *1 (N.D. Ill. Feb. 26, 2003). Here, there is no doubt that this case is duplicative of the *East St. Louis Case* because it involves the same "claims, parties, and available relief." *Id.* (citation and quotation omitted); *see also Nicholson v. Nationstar Mortg. LLC of Delaware*, No. 17-CV-1373, 2018 WL 3344408 (N.D. Ill. July 6, 2018) (citing *Humphrey v. United Healthcare Servs., Inc.*, No. 14-cv-1157, 2014 WL 3511498, at *2 (N.D. Ill. July 16, 2014)) (applying first-to-file rule where second-filed case substantially overlapped with first case).

This case is analogous to *Guill v. Alliance Resources Partners*, No. 16-cv-0424, 2017 WL 1132613 (S.D. Ill. Mar. 27, 2017). In *Guill*, this Court transferred a second-filed class action to Chief Judge Rosenstengel who was handling a similar, earlier case. *See id.* Dkt. 4 (April 15, 2016, order reassigning case) (citing *Smith v. Check-n-Go of Illinois*, 200 F.3d 511, 513 n.1 (7th Cir. 1999)). Chief Judge Rosenstengel subsequently decided to stay the second case in favor of the first due to the "substantial similarities." *Guill*, 2017 WL 1132613, at *3. Similarly here, Magistrate Judge Beatty is presiding over the earlier-filed *East St. Louis Case* and is well-positioned to evaluate the second-filed case.

Fourth, the comity factors do not outweigh the concern for avoiding duplicative litigation. *See Firth v. Chupp*, No. 09-cv-512, 2010 WL 5439759, at *3 (N.D. Ill. Dec. 27, 2010) (noting that the efficiencies of consolidation can outweigh comity). Defendants recognize that "little attention"

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