

UNPUBLISHED

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION**

DIRECTV, INC.,)	
)	
Plaintiff,)	Case No. 1:03CV00064
)	
v.)	OPINION AND ORDER
)	
TOLBERT P. ADKINS, ET AL.,)	By: James P. Jones
)	United States District Judge
Defendants.)	

John H. Jamnback, Yarmuth Wilsdon Calfo PLLC, Seattle, Washington, and Benjamin J. Lambiotte, Garvey Schubert Barer, Washington, D.C., for Plaintiff; Carl E. McAfee, McAfee Law Firm, P.C., for Defendants Tolbert P. Adkins, Darrell Coleman, and Elwood Dykes.

For the reasons set forth in this opinion, I will set aside defaults against certain of the defendants in this civil action.

The plaintiff DIRECTV, Inc. (“DIRECTV”) operates a television satellite broadcast system. This lawsuit is one of many it has recently filed against individuals across the country in an attempt to deter the unauthorized reception and decryption of its subscription and pay-per-view programming.¹ Eight named defendants have been sued in the present action and it is alleged that each of them purchased

¹ See Peter Shinkle, *DIRECTV Adopts Scorched-Earth Policy to Stop Pirates from Stealing Signal: Company Engineers Raids, Demands Money, Files Suits*, St. Louis Post-Dispatch, June 23, 2003, at A1 (reporting that about 8700 defendants have been sued).

numerous “signal theft devices” with the intent to distribute them to others. (Compl. ¶ 34.) The causes of action are alleged to arise under the Federal Communications Act, 47 U.S.C.A. §§ 605(a), 605(e)(4) (West 2001) (Counts One and Two); the Digital Millennium Copyright Act, 17 U.S.C.A. §§ 1201(a)(2), 1201(b)(1) (West 1996 & Supp. 2003) (Counts Three and Four); the Electronic Communication Privacy Act, 18 U.S.C.A. §§ 2511(1)(a), 2512(1)(b) (West 2000) (Counts Five and Six); unjust enrichment (Count Seven); tortious interference (Counts Eight and Nine); and unfair competition (Count Ten).

The action was filed May 23, 2003. Defendants Adkins, Coleman, and Dykes were served on May 26. On June 24, the clerk entered a default against them pursuant to Federal Rule of Civil Procedure 55(a). On June 27, Adkins and Coleman each filed by counsel a Motion for Leave to File Responsive Pleadings. On July 2, Dykes filed a similar motion by the same lawyer. On July 16, the three defendants tendered a joint Answer. DIRECTV objected to the motions and on August 4, each defendant filed a Motion to Set Aside Entry of Default, accompanied by a memorandum and affidavit. DIRECTV has responded and all of the motions are now ripe for decision.²

² I will dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not significantly aid the decisional process.

Rule 55(c) authorizes the court to set aside entry of default “[f]or good cause shown.” Fed. R. Civ. P. 55(c). The Fourth Circuit has held that entry of default ought to be set aside where the moving party alleges a meritorious defense and acts with reasonable promptness. *See Consol. Masonry & Fireproofing, Inc. v. Wagman Constr. Corp.*, 383 F.2d 249, 251 (4th Cir. 1967). The court should also consider other factors, such as the personal responsibility of the defaulting party and any prejudice to the non-movant. *See Lolatchy v. Arthur Murray, Inc.*, 816 F.2d 951, 953 (4th Cir. 1987). The personal responsibility of the moving party for the default, as contrasted to any fault of counsel, is of particular importance. *See id.*

Here the defaulting defendants have each sworn by affidavit that they “met with and employed” their present counsel “prior to June 16, 2003.” Monday, June 16, 2003, was the deadline for each of the defendants to file responsive pleadings. *See* Fed. R. Civ. P. 12(a)(1)(A) (providing that answer must be served within twenty days after being served with the summons and complaint). They have also denied liability in their affidavits, although in differing language. Adkins denies having “purchased anything involved in this matter” or ever distributing illegal satellite signal theft devices; Coleman denies ever distributing such devices and surmises that someone else may have used his internet service and credit card to purchase such devices,

unknown by him; Dykes also denies distributing such devices and denies ever utilizing them.

While DIRECTV argues that the defendants' affidavits lack factual detail, in order to establish a meritorious defense under Rule 55(c) all that is necessary is to proffer evidence, which if believed, would permit a finding for the defaulting party. The central conduct alleged against the defendants in this action is that they purchased the signal theft devices with the intent to distribute them to others. The sworn statements of the defendants, although not detailed, are sufficient to raise a meritorious defense.

Moreover, under the circumstances, I find that the defendants acted with reasonable promptness. While the defendants' initial motions for leave to file responsive pleadings were not specifically directed to Rule 55(c), the motions presented their "desire to correct the default" and thus were equivalent to Rule 55(c) motions. 10A Charles Alan Wright et al., *Federal Practice and Procedure* § 2692, at 85 (3d ed. 1998). Those motions were filed within days of the entry of default and there is no evidence of any intervening prejudice to DIRECTV.

Finally, while I do not know the exact reasons for the failure to file timely answers, it is plainly alleged that the defendants' present attorney was retained prior to the due date and it is a fair inference that the defaults were thus his responsibility.

Defaults are not favored and determination of lawsuits ought to depend on their merits. *See Reizakis v. Loy*, 490 F.2d 1132, 1135 (4th Cir. 1974). In this case, it is appropriate to exercise my discretion to excuse the defendants' failure to timely file their answer. Accordingly, for the reasons stated, it is **ORDERED** as follows:

1. The Motions to Set Aside Entry of Default (Doc. Nos. 21, 23, 25) are granted and the defaults are set aside;
2. The Motions for Leave to File Responsive Pleadings (Doc. Nos. 11, 12, 14) are granted and the clerk is directed to file the Answer tendered on July 16, 2003; and
3. This case is set for jury trial in Abingdon at 9:00 A.M. on January 21, 2004, and the Scheduling Order previously entered on June 24, 2003, shall be deemed to apply to the three defendants who are the subject of this opinion and order.

ENTER: October 3, 2003

United States District Judge