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CLERK U.S. DISTRICT COURT
SOUTHERN DISTRICT OF IA

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

AT&T CORP.,	)	
Plaintiff,	)	Civil No. 4-00-CV-10425
vs.	)	
MICHAEL J. HOLSMAN and MIDWEST TELEPHONE SUPPLY, INC.,	)	
Defendants.	)	
MICHAEL J. HOLSMAN and MIDWEST TELEPHONE SUPPLY, INC.,	)	
Third-Party Plaintiffs,	)	
vs.	)	
DAVID McGINNIS and SANYAMA GROUP, INC. d/b/a PAYPHONES DIRECT and/or PAYPHONES USA,	)	ORDER
Third-Party Defendants.	)	

The Court must now determine whether to allow Michael Holsman and his company, Midwest Telephone Supply, Inc. (hereinafter collectively referred to as "MTS"), defendants and third party plaintiffs in this case, a jury trial.

AT&T Corp., plaintiff, filed a complaint in this case on August 14, 2000. AT&T then filed an amended complaint on September 13, the same day it filed a motion for injunctive relief.

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On October 10, the Court held a hearing. On this same day, MTS filed an answer to AT&T's complaint. On October 20 the Court issued an Order granting AT&T a preliminary injunction. The Court later issued an Order on December 5 to clarify the breadth of relief which it afforded AT&T in the preliminary injunction Order.

Then on December 29, MTS was allowed to file a third party complaint against David McGinnis and Sanyama Group, Inc. (hereinafter collectively referred to as "Sanyama"). Thereafter, MTS served the complaint, and Sanyama filed an answer on March 2, 2001. Intermittently, on January 10, 2001, MTS made a jury demand in this case. This request was timely insofar as it concerns MTS's third party complaint against Sanyama.

AT&T filed a motion to strike MTS's jury demand on February 2, 2001. On February 16, MTS resisted this motion and made a separate motion under Federal Rule of Civil Procedure 39(b) for jury trial on all issues raised in AT&T's complaint and their own third-party complaint. AT&T filed a brief in opposition to MTS's rule 39(b) motion on March 5.

The parties are in agreement that if MTS wanted to exercise its right to demand a jury trial in a timely fashion in the case that AT&T had brought against it, Rule 38(b) of the Federal Rules of Civil Procedure dictated that it do so by October 20, 2000. After this point in time, both parties waived their rights to demand a jury trial.

In a case such as this where there has not been a timely filed jury demand, "the court in its discretion upon motion may order a trial by a jury of any or all issues." FEDERAL RULE OF CIVIL PROCEDURE 39(b). The first thing this Court notes in reviewing MTS's request for a jury trial is the reason it did not make a timely demand. MTS has admitted its only reason for not requesting a jury trial in a timely fashion in the complaint brought by AT&T against it is

inadvertence. The Court finds that it is not required to deny MTS's motion because this is the only reason MTS gives for not requesting a jury trial sooner,[1] but does find that such a reason weighs in favor of denying the motion under the current set of circumstances.[2]

"An appropriate review of an untimely jury request requires an analysis based on the totality of the circumstances." *Pennington v. All-State Insturance Co.*, 1996 WL 476006 at *2 (W.D. Mo. 1996). While the court in *Credit Bureau* adopted a five factor test to help the court determine whether it should exercise its discretion under Rule 39(b), this Court is not bound to adhere strictly to those factors.[3] In this case, the Court will deny MTS's motion and request for a jury trial in the case brought by AT&T for three reasons.

First, having heard a full day of testimony and evidence in connection with the preliminary injunction hearing, the Court finds the case between MTS and AT&T is not one that requires a jury to resolve "factual disputes as to the motivations for actions." *Lawyer v. 84 Lumber Co.*, 1997 WL 24748 at *1 (N.D. Ill. 1997). This is not an employment discrimination

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[1] *See Credit Bureau of Council Bluffs, Inc. v. Credit Bureau Data Centers, Inc.*, 143 F.R.D. 206, 210 n.2 and n.3 (S.D.Iowa 1992).

[2] While the court in *Credit Bureau* found that a weak reason such as inadvertence for failing to previously demand a jury trial did not prevent it from granting the movant's request, it had a different set of circumstances before it from those now present in this case. The plaintiff in that case had made a timely request for a jury trial in state court prior to removal to federal court by defendant. The request by plaintiff was deficient under state law, but the court found that its initial request in state court had met the requirements of Rule 38(b) and therefore granted plaintiff's request for a jury trial. *Credit Bureau*, 143 F.R.D. at 214.

Other courts have found that inadvertence as a reason for failing to timely file a jury demand is insufficient. *See, e.g., Farias v. Bexar Cty. Bd. of Trustees*, 925 F.2d 866, 873 (5th Cir. 1991) (cited in *Credit Bureau*, 143 F.R.D. at 210) (finding district court judge did not abuse his discretion in denying a rule 39(b) motion for a jury trial when the record showed no viable reason for not making a timely request other than inadvertence).

[3] *Credit Bureau* based its five factor test on case law from the Fifth and Eleventh circuits.

suit, where legal expertise is not required and the claims "are better tried before a jury composed of a number of people instead of a single judge." *Id.* (citing *Pennigton*, 1996 WL 476007 at *3). The claims brought by AT&T involve complex legal issues of intellectual property law which this Court predicts will overshadow the factual disputes between the parties, even at trial.

Second, as AT&T has pointed out, any evidence which would be admissible at trial in the record created at the preliminary injunction hearing before this Court will be "part of the record at the trial and need not be repeated upon the trial." *See* FEDERAL RULE OF CIVIL PROCEDURE 65(a)(2). While this rule is to "be so construed and applied as to save to the parties any rights they may have to trial by jury," *id.*, MTS waived its right to demand a jury trial when it did not make a demand by October 20, 2000. The current motion is within this Court's discretion, and the Court notes the inefficiency that would result if all of the evidence and testimony that was presented at the October 10, 2000 hearing had to be presented again before a jury.[4]

And as a third reason for its decision, the Court reiterates that MTS simply has not given an adequate justification for its failure to timely request a jury trial.

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[4] The court in *Noddings Investment Group, Inc. v. Kelley*, 881 F.Supp. 335, 337 (N.D. Ill. 1995) denied the defendant's rule 39(b) motion after the court had already conducted a preliminary injunction hearing and plaintiff had failed to timely request a jury trial. The preliminary injunction hearing in that case was more extensive than the one the Court conducted in this case, but the same rationale applies. Further, the court noted a forum shopping concern when it stated, "After having defendants' legal position rejected by both a Magistrate Judge and a District Judge this Court does not believe it is coincidental that the defendants presently are seeking a jury trial." *Id.* This Court notes it does not find the current request by MTS coincidental in light of its ruling in the preliminary injunction hearing.

Therefore, while the Court denies MTS's request for a jury trial in the case brought against it by AT&T for the aforementioned reasons, the Court finds that MTS has a right to a jury trial on its third party claim against Sanyama. Pursuant to Federal Rule of Civil Procedure 42(b), the Court orders that MTS's third party claim will be tried separately from AT&T's claims against it.

IT IS SO ORDERED.

Dated this 12th day of April, 2001.

RONALD E. LONGSTAFF, JUDGE
UNITED STATES DISTRICT COURT