

**IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
TWELVTH DIVISION**

**NEW CINGULAR WIRELESS PCS LLC AND
AT&T MOBILITY WIRELESS OPERATIONS
HOLDINGS INC. SUCCESSOR TO PINE
BLUFF CELLULAR, INC.**

PLAINTIFFS

V.

NO. 60CV-14-1722

**RICHARD A. WEISS, in his Official Capacity
DIRECTOR, ARKANSAS DEPARTMENT
OF FINANCE AND ADMINISTRATION**

DEFENDANT

**MOTION TO DISMISS FIRST AMENDED COMPLAINT
TO RECOVER OVERPAYMENT OF ARKANSAS
GROSS RECEIPTS TAXES**

Defendant, Richard Weiss, Director of the Arkansas Department of Finance and Administration, by and through his attorney, Joel DiPippa, in addition to the contemporaneously filed Brief in Support, for his Motion to Dismiss Plaintiffs' First Amended Complaint To Recover Overpayment of Arkansas Gross Receipts Taxes ("Amended Complaint") states:

1. An Amended Complaint supersedes the previous Complaint and all pleadings filed in relation thereto when the Amended Complaint does not adopt and incorporate the original Complaint, *see James v. Williams*, 372 Ark. 82, 270 S.W.3d 855 (2008), therefore the Defendant will now address only the averments and allegations contained in the First Amended Complaint.

2. The Amended Complaint does not comply with the requirements of the Arkansas Rules of Civil Procedure ("ARCP") concerning the proper commencement of a civil action in circuit court.

3. Plaintiffs' Amended Complaint purports to establish a claim for payment on a refund request for allegedly overpaid state gross receipts taxes but fails to comply with the procedural requirements to receive such a refund. Specifically, Plaintiffs' claim includes periods outside the statute of limitations for a request for refund, fails to establish compliance with the requirements of the Arkansas Tax Procedure Act, and seeks to bind the State of Arkansas with a court ruling to which the Department of Finance and Administration was not a party. In various ways, Plaintiffs' Amended Complaint does not establish subject matter jurisdiction or plead facts necessary to support a claim for a refund under Ark. Code Ann. § 26-18-507 and should be dismissed pursuant to ARCP (b)(1) and (b)(6).

4. To the extent that Plaintiffs' Claim for a Refund includes periods paid more than three years prior to the filing of a request for refund, Plaintiffs have failed to demonstrate subject-matter jurisdiction because there is no statutory authority to request a refund of those periods under Ark. Code Ann. § 26-18-306(i)(1)(A). This court should dismiss the claim to the extent it covers periods older than three years with prejudice under ARCP 12(b)(1) for failure to establish subject matter jurisdiction.

5. Plaintiffs have failed to plead facts to demonstrate compliance with the Tax Procedure Act, Ark. Code Ann, § 26-18-101 through -1006, to meet the requirements of ARCP 12(b)(6). A claim under the Tax Procedure Act requires that the Plaintiffs meet the procedural necessities of Ark. Code Ann. § 26-18-507. In the absence of such procedural compliance, the Plaintiffs claims fail to plead sufficient facts on which relief may be granted and should be dismissed under Ark. R. Civ. Pro. 12(b)(6).

6. Plaintiffs have failed to plead facts that establish compliance with the requirements of the Arkansas Tax Procedure Act and the Arkansas Gross Receipts Tax Rules by

failing to repay the affected consumers prior to requesting a refund of taxes paid. *See Pl.s' Amend. Compl. ¶ 29* (“ . . .refunds (or credits) of tax issued to Plaintiffs shall either be paid directly to the Escrow Account by the taxing authority or, if issued to Plaintiffs, shall be paid by Plaintiffs to the Escrow Account.”). Accordingly, Plaintiffs have failed to plead facts on which relief can be granted under Ark. Code Ann. § 26-18-507 and the claim should be dismissed pursuant to ARCP 12(b)(6).

7. Plaintiffs have failed to plead express consent of the consumers who paid the tax to allow Plaintiffs to receive the refund and deduct escrow and attorney’s fees when the consumers are entitled to the entirety of the allegedly overpaid tax under Arkansas law. Accordingly, the Plaintiffs have failed to plead facts on which relief may be granted under Ark. Code Ann. § 26-18-507 and the claim should be dismissed pursuant to ARCP12(b)(6).

8. Reliance on a settlement agreement in a civil case where the State of Arkansas was not a defendant does not, and cannot, bind the Department to accept Plaintiffs’ claims for refund in the absence of meeting the procedural requirements outlined in paragraphs 4-6 of this motion to dismiss. Plaintiffs attempt to characterize the provisions of this settlement agreement to which the Department was not a party as compliance with the Tax Procedure Act. *See Pl.s' Amend. Compl. ¶ 27* (“The Settlement Agreement provides that Plaintiffs’ customers included in the settlement class consented to Plaintiffs’ filing of the Refund Claims. . .”). Accordingly, there is no pleaded factual support for the claim to move forward and the Plaintiffs have failed to plead facts on which relief may be granted under Ark. Code Ann. § 26-18-507 and the claim should be dismissed pursuant to ARCP 12(b)(6).

9. Plaintiffs have failed to plead facts that demonstrate compliance with the Tax Procedure Act through reference to the Settlement Agreement. The Federal District Court

expressly stated that the Settlement Agreement “does not purport to dictate to any state or local authority the makeup of its applicable law.” *In re AT & T Mobility Wireless Data Services Sales Tax Litig.*, 789 F. Supp.2d 935, 983 (N.D. Ill. 2011). Accordingly, Plaintiffs have not pleaded facts sufficient to demonstrate meeting the requirements of the Arkansas Tax Procedure Act and the claim should be dismissed pursuant to ARCP 12(b)(6).

10. Plaintiffs have failed to plead sufficient facts to demonstrate entitlement to the tax moratorium contained in the Internet Tax Freedom Act, 47 U.S.C. § 151, note (1998) (as amended), by neglecting to plead the existence of the required filtering and monitoring provisions of internet access. Accordingly, Plaintiffs’ Complaint with regard to the Internet Tax Freedom Act should be dismissed pursuant to ARCP 12(b)(6) for failure to state facts on which relief may be granted.

11. The Defendant incorporates all arguments and explanations more fully developed in the accompanying Brief in Support.

WHEREFORE, Defendant prays that this Court grant Defendant’s motion to dismiss Plaintiffs’ Complaint under ARCP 12(b)(1) and (6); and for all other relief to which the Defendant may be entitled.

Respectfully Submitted,

RICHARD WEISS, DIRECTOR
ARKANSAS DEPARTMENT OF
FINANCE AND ADMINISTRATION



By: _____

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CERTIFICATE OF SERVICE

I, Joel DiPippa, do hereby certify that I have served a true and correct copy of the above and foregoing Defendant's Motion to Dismiss Complaint to Recover Overpayment of Gross Receipts Taxes upon Plaintiffs herein by electronic mail and by depositing same in the United States Mail, postage prepaid, or by hand delivery this 29th day of July, 2014, addressed to their attorneys of record:

Michael O. Parker
Michael G. Smith
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Joel DiPippa
Attorney for Defendant