

IN THE DISTRICT COURT OF BOURBON COUNTY, KANSAS

CITY OF FORT SCOTT, KANSAS, )  
Individually and on behalf of all others )  
similarly situated, )

Plaintiff, )

Case No. \_\_\_\_\_

vs. )

NETFLIX, INC. and HULU, LLC, )

Defendants. )

**PLAINTIFF’S PETITION FOR CLASS ACTION**

(Pursuant to Chapter 60)

COMES NOW Plaintiff, City of Fort Scott, Kansas, individually and on behalf of all others similarly situated (the “Class,” as more fully defined below), and files this Class Action Petition against Defendants Netflix, Inc. and Hulu, Inc. LLC (Collectively “Defendants”), alleging as follows:

**PARTIES**

1. The Plaintiff, Fort Scott, Kansas, is a lawfully existing municipal government located in Bourbon County, Kansas.

2. Defendant Netflix, Inc. (“Netflix”) is a Delaware corporation, headquartered in Los Gatos, California. Netflix’s primary businesses are its video services, which offers online streaming of a library of films and television programs, as well as the distribution and production of original films and television series. Netflix does business in Fort Scott, Kansas, and has done so at all times relevant to this action.

3. Defendant Hulu, LLC (“Hulu”) is a Delaware limited liability company, headquartered in Santa Monica, California. Hulu’s primary businesses are its video service, which offers online streaming of live video programming and a library of films and television

programs, as well as the distribution and production of original films and television series. Hulu does business in Fort Scott, Kansas, and has done so at all times relevant tot his action.

### **JURISDICTION AND VENUE**

4. This Court has jurisdiction over this matter because the Plaintiff is a municipal corporation within the State of Kansas. Further, the Defendants are subject to the jurisdiction of this Court by virtue of providing video services in Kansas and have regular and systematic contacts with the State of Kansas and does business in the forum.

5. This Court has venue over the subject matter of the litigation in accordance with K.S.A. 60-604(2) and (3).

### **FACTUAL ALLEGATIONS**

6. Defendants provide video service to their subscribers to view television shows, movies, documentaries, and other programming.<sup>1</sup> They compete with other video service providers,<sup>2</sup> offering video programming<sup>3</sup> that is comparable to that provided by cable companies and television-broadcast stations.

7. Customers view Netflix's and Hulu's video programming - such as television shows, movies, and documentaries - using an Internet-connected device. Internet-connected devices are electronic devices that have software enabling them to stream Defendants' video programming, including smart televisions, streaming media players like Roku and Apple TV,

---

<sup>1</sup> "Video Service" means video programming services through wireline facilities located at least in part in the public rights-of-way without regard to deliver technology, including internet protocol technology. This definition does not include any video programming provided by a commercial mobile service provider defined by 47 U.S.C. § 332(d). *See* K.S.A. 12-2022(h).

<sup>2</sup> "Video service provider" means a cable operator or a competitive video service provider. *See* K.S.A. 12-2022(j).

<sup>3</sup> "Video programming" means programming provided by, or generally considered comparable to programming provided by, a television broadcast station, as set forth in 47 U.S.C. § 522(20). *See* K.S.A. 12-2022(g)

smartphones, tablets, video game consoles, set-top boxes from cable and satellite providers, Blu-ray players, and personal computers.

8. When a subscriber wants to watch Netflix or Hulu, he or she uses an Internet-connected device to send a request to the Internet-service provider. The Internet-service provider then forwards that request to Netflix's and Hulu's dedicated Internet servers, which, in turn, provide a response. This response is then relayed back to the subscriber's device, and Netflix and Hulu deliver the video programming via Internet protocol technology (*i.e.* broadband wireline facilities located at least in part in public rights-of-way).

9. During the relevant time periods, Netflix has used a content delivery network called Netflix Open Connect to deliver 100% of its video traffic to its subscribers. When a Netflix subscriber wants to view Netflix programming, the subscriber's Internet service provider will connect the subscriber to the closest Netflix Open Connect server offering the fastest speeds and best video quality.

10. According to Netflix, that means that most of its subscribers receive Netflix's video programming from servers either inside of, or directly connected to, the subscriber's Internet service provider's network within their local region. Netflix has "end-to-end" control of its entire Open Connect system, including any servers located in Fort Scott and other Kansas municipalities.

11. Like Netflix, when a Hulu subscriber wants to view Hulu, the subscriber's Internet service provider will connect the subscriber to the Hulu server. Hulu receives the directive and checks the subscriber's entitlement, the location, and the content availability. It then delivers the program through the Internet to the subscriber's Internet-connected device.

12. Defendants' subscribers typically use a broadband Internet connection, such as

DSL or fiber optic cable, to receive Defendants' programming. These broadband Internet connections rely upon wireline facilities located in whole or in part in the public right(s)-of-way to deliver Internet service to subscribers. That means that Defendants operate and provide their video service to Defendants' subscribers through wireline facilities located at least in part in the public right-of-way.

13. As video service providers, Defendants were required to file an application with the Kansas Corporation Commission for a state-issued video service authorization prior to providing video service. *See* K.S.A. 12-2023.

14. Defendants failed to apply for and obtain an authorization, and are, therefore, providing video service throughout Kansas without authorization in contravention of Kansas law.

15. An authorization would have permitted video service providers such as Defendants to use public rights-of-way, as long as said video service provider makes a franchise payment to each city in which it provides service. The required franchise payment must be equal to 5% of gross revenues received by the franchise holder from the provision of services in that city. *See* K.S.A. 12-2024(c).

16. Defendants were required to obtain an authorization before providing video service in Fort Scott, and the other Kansas municipalities in which it provides they provide their video services. Defendants' failure to obtain an authorization, however, did not relieve Defendants of the obligation to pay a franchise fee of 5% of their gross revenues, as derived from providing such video service in those municipalities. *See* K.S.A. 12-2024.

17. Defendants have failed to comply with Kansas law because they have failed to pay Plaintiff and the other Class members the required franchise fee of 5% of gross revenues.

18. Plaintiff Fort Scott, individually and on behalf of other Kansas municipalities, seeks to require Defendants to abide by Kansas law, and pay what they owe to these municipalities. “Gross revenues” are limited to amounts billed to and collected from video service subscribers for the following:

- (1) Recurring charges for video service;
- (2) Event-based charges for video service, including, but not limited to, pay-per-view and video-on-demand charges;
- (3) rental of set top boxes and other video service equipment;
- (4) services charges related to the provision of video service, including, but not limited to, activation, installation, repair and maintenance charges; and
- (5) administrative charges related to the provision of video service, including, but not limited to, service order and service termination charges. *See* K.S.A. 12-2024.

#### CLASS ACTION ALLEGATIONS

19. Plaintiff brings this action as a class action pursuant to K.S.A. 60-223(a) and 223(b)(2) on behalf of a class defined as: **All Kansas municipalities in which one or more of the Defendants has provided video service and failed to pay the franchise fee (the “Class”).**

20. Excluded from the Class are Defendants and any of their members, affiliates, parents, subsidiaries, officers, directors, employees, successors, or assigns; and the Court staff assigned to this case and their immediate family members. Plaintiff reserves the right to modify or amend the Class definition, as appropriate, during the course of this litigation.

21. This action has been brought and may properly be maintained on behalf of the Class proposed herein under the criteria of K.S.A. 60-223 of the Kansas Rules of Civil Procedure.

22. **Numerosity – K.S.A. 60-223(a)(1).** The proposed Class is sufficiently numerous that individual joinder of all Class members is impracticable. Indeed, the Class size is believed to

be in excess of two hundred municipalities. Class members may be notified of the pendency of this action by recognized, Court-approved notice dissemination methods, which may include U.S. Mail, electronic mail, Internet postings, and/or published notice.

23. **Commonality and Predominance—K.S.A. 60-223(a)(2) and 60-223(b)(3).** This action involves common questions of law and fact, which predominate over any questions affecting only individual Class members, including, without limitation:

a. Whether Defendants provide video service, as defined by K.S.A. 12-2022, within Plaintiff's and the other Class members' geographic areas;

b. Whether Defendants are video service providers, as defined by K.S.A. 12-2022.

c. Whether Defendants were required to file an application with the Kansas Corporation Commission for a state-issued video service authorization;

d. Whether Defendants have failed to pay franchise fees pursuant to K.S.A. 12-2024;

e. The appropriate measure of damages to award Plaintiff and the other Class members; and

f. The appropriate declaratory relief to which Plaintiff and the other Class members are entitled.

24. **Typicality—K.S.A. 60-223(a)(3).** Plaintiff's claims are typical of the other Class members' claims because Plaintiff and each of the other Class members is entitled to franchise fee payments from Defendants pursuant to Kansas law and Defendants have failed to pay Plaintiff and each of the other Class members those franchise fees. Plaintiff is asserting the same claims and legal theories individually and on behalf of the other Class members.

25. **Adequacy of Representation – K.S.A. 60-223(a)(4).** Plaintiff is an adequate Class representative because its interests do not conflict with the interests of the other Class members who it seeks to represent, Plaintiff has retained counsel competent and experienced in complex class action litigation, including successfully litigating class action cases similar to this one, where defendants breached statutory obligations, and Plaintiff intends to prosecute this action vigorously. Class members' interests will be fairly and adequately protected by Plaintiff and its counsel.

26. **Declaratory and Injunctive Relief – K.S.A. 60-223(b)(2).** Defendants acted or refused to act on grounds generally applicable to Plaintiff and the other Class members, thereby making appropriate final injunctive relief and/or declaratory relief, as described below, with respect to the Class members.

27. **Superiority – K.S.A. 60-223(b)(3).** A class action is superior to any other available means for the fair and efficient adjudication of this controversy, and no unusual difficulties are likely be encountered in the management of this class action. Individualized litigation creates a potential for inconsistent or contradictory judgments and increases the delay and expense to all parties and the court system. By contrast, the class action device presents far fewer management difficulties, and provides the benefits of single adjudication, economy of scale, and comprehensive supervision by a single court.

**COUNT I**  
**VIOLATION OF K.S.A 12-2023 AND 12-2024**

28. Plaintiff repeats, realleges, and incorporates by reference Paragraphs 1-27, as if fully set forth herein.

29. Defendants provide video service, and are video service providers, in Fort Scott, Kansas and each municipality comprising the Class. Defendants derive gross revenues from providing these video services.

30. Defendants are thus required, by statute, to pay each municipality in which they provide video service, a franchise fee of 5% of their gross revenues derived from their operations in that municipality. *See* K.S.A. 12-2024(c). Failure to obtain the required state issued certificate of franchise authority does not excuse Defendants' obligation to make these payments.

31. Defendants have failed to comply with K.S.A. 12-2024(c) because they have failed to pay Plaintiff and the other Class members the required 5% of gross revenues.

32. Plaintiff and the other Class members are, therefore, entitled to damages as a result of Defendants' violations of, along with pre- and post-judgment interest, in an amount to be determined at trial.

## **COUNT II** **DECLARATORY JUDGMENT ACT**

33. Plaintiff repeats, realleges, and incorporates by reference the preceding paragraphs of this Petition as if fully set forth herein, and further alleges, in addition and/or in the alternative, as follows.

34. This case involves an actual controversy of sufficient immediacy, which is substantial and concrete, touches upon the legal relations of parties with adverse interests and is subject to specific relief through a decree of conclusive character.

35. Pursuant to K.S.A. 60-1701, et. seq., Plaintiff seeks a declaration, and resulting order, from the Court that:

- a. Each Defendant provides "video service," as that term is defined in K.S.A. 12-2022(j).

b. Each Defendant is a “video service provider,” as that term is defined in K.S.A. 60-1022(l);

c. Defendants provide video service, and are video service providers, in Fort Scott and each municipality in the Class;

d. Defendants were required to file an application with the Kansas Corporation Commission for a state-issued video service authorization (“SIVSA”);

e. Defendants are required to pay Plaintiff and each of the other Class members a franchise fee of 5% of their gross revenues derived from their operations in each such municipality, K.S.A. 12-2024(c); and

f. Defendants have failed to comply with K.S.A. 12-2024(c), because they have each failed to pay to Plaintiff and each of the other Class members the required 5% of gross revenues.

**COUNT III**  
**UNJUST ENRICHMENT**

36. Plaintiff repeats, realleges, and incorporates by reference the preceding paragraphs of this Petition as if fully set forth herein, and further alleges, in addition and/or in the alternative, as follows.

37. Defendants have operated as video-service operators in the geographic areas of Plaintiff and other class members.

38. By not remitting video-service-provider fees, Netflix and Hulu have received the benefit of doing business in the geographic areas of Plaintiff and other class members without paying required fees, been aware that they were doing business without paying required fees, and accepted and retained this benefit under circumstances that are inequitable or unjust, i.e., by

depriving Plaintiff and other class members of monies due under the statutes, codes, and ordinances that Defendants refuse to honor.

**REQUEST FOR RELIEF**

WHEREFORE, Plaintiff, individually and on behalf of the other Class members, respectfully requests that the Court enter judgment in its favor and against Defendant as follows:

- a. Enter an Order certifying the above-defined Class and designating Plaintiff as Class Representative, and Plaintiff's counsel as Class Counsel;
- b. Award all monetary relief to which Plaintiff and the other Class members are entitled, including as set forth in Count I above;
- c. Grant declaratory relief as set forth in Count II above, including ordering Defendants to cure their noncompliance with K.S.A. 12-2024(c);
- d. Award all monetary relief to which Plaintiff and the other Class members are entitled, including as set forth in Count III above;
- e. Award pre- and post-judgment interest;
- f. Award reasonable attorneys' fees and costs to Plaintiff's counsel; and
- g. Grant such further and other relief as this Court deems appropriate.

Respectfully Submitted,

Michael J. Fleming

Michael J. Fleming                      KS Bar# 20291

**KAPKE & WILLERTH, LLC**

3304 NE Ralph Powell Road

Lee's Summit, Missouri 64064

(816) 461-3800 - Telephone

(816) 254-8014 - Fax

[Mike@kapkewillertth.com](mailto:Mike@kapkewillertth.com)

**ATTORNEY FOR FORT SCOTT, KANSAS**