

TABLE OF CONTENTS

Contents	Page
INTRODUCTION	1
BACKGROUND	1
ARGUMENT	3
I. Legal Standard.....	3
II. This Court Should Permit MPHJ To Intervene As Of Right.....	4
A. MPHJ Has A Cognizable Interest In This Action.....	5
B. MPHJ’s Interest May Be Impaired If It Is Not Permitted To Intervene	6
C. MPHJ’s Interests Are Not Adequately Represented By The Current Parties.....	7
D. MPHJ’s Motion To Intervene Is Timely.....	7
III. In The Alternative, This Court Should Permit MPHJ To Permissively Intervene	8
CONCLUSION.....	9

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Chiglo v. City of Preston</i> , 104 F.3d 185 (8th Cir. 1997)	3
<i>Kansas Public Employees Retirement System v. Remier & Kroger Associates, Inc.</i> , 60 F.3d 1304 (8th Cir. 1995)	6
<i>Mille Lacs Band of Chippewa Indians v. State of Minnesota</i> , 989 F.2d 994 (8th Cir. 1993)	7, 8
<i>NAACP v. New York</i> , 413 U.S. 345 (1973).....	7
<i>Nevilles v. EEOC</i> , 511 F.2d 303 (8th Cir. 1975)	7
<i>United States v. Pitney Bowes, Inc.</i> , 25 F.3d 66 (2d Cir. Conn. 1994).....	9
<i>Sierra Club v. Robertson</i> , 960 F.2d 83 (8th Cir. 1992)	3, 7
<i>South Dakota v. United States Dept. of Interior</i> , 317 F.3d 783 (8th Cir. 2003)	4, 9
<i>Trbovich v. United Mine Workers</i> , 404 U.S. 528 (1972).....	7
<i>United States v. Pitney Bowes, Inc.</i> , 25 F.3d 66 (2d Cir. 1994)	4
<i>United States v. Union Elec. Co.</i> , 64 F.3d 1152 (8th Cir. 1995)	7
Statutes	
42 U.S.C. § 1983.....	1, 2
Other Authorities	
7C Wright, Miller & Kane, Federal Practice and Procedure, §1913, at 379	4, 9
First Amendment	1, 9
FED. R. CIV. P. 11	5, 6
FED. R. CIV. P. 24(a)(2).....	1, 3

FED. R. CIV. P. 24(b)(1)(B)	1, 3, 4, 8
FED. R. CIV. P. 24(b)(2)	4, 8
FED. R. CIV. P. 24	3
FED. R. CIV. P. 24(b)	4
FED. R. CIV. P. 26(f)	5

INTRODUCTION

Intervenor MPHJ Technology Investments, LLC (“MPHJ”) respectfully submits this Memorandum in Support of its Motion to Intervene in the above-captioned proceeding as a Party Plaintiff pursuant to FED. R. CIV. P. 24(a)(2) or, in the alternative, FED. R. CIV. P. 24(b)(1)(B). This lawsuit involves, *inter alia*, a dispute between Activision TV, Inc. (“Activision”) and Defendants Jon Bruning, David Cookson and David Lopez (collectively “the Nebraska AG” or “the AG Defendants”). Activision, in its First Amended Complaint, alleges that the sending of a Cease and Desist Order to Farney Daniels by the Nebraska AG injures Activision’s constitutional rights – including its First Amendment right to counsel in licensing and enforcing Activision’s patents. Dkt. No. 7. Because the Cease and Desist Order was directed to Farney Daniels, and MPHJ is also a client of Farney Daniels, and further, because the Nebraska AG, in its Response to Activision’s Motion for a Preliminary Injunction repeatedly asserts that its Cease and Desist Order was also directed towards patent-related letters sent by Farney Daniels on behalf of MPHJ (Dkt. No. 22), MPHJ can satisfy the requirements of FED. R. CIV. P. 24(a)(2). In addition, or in the alternative, MPHJ can certainly satisfy the requirements of FED. R. CIV. P. 24(b)(1)(B). Accordingly, MPHJ respectfully requests that this Court permit it to intervene in this matter.¹

BACKGROUND

On August 19, 2013, Plaintiff Activision Amended its Original Complaint for Patent Infringement (Count I) to file a First Amended Complaint which added a claim for a Declaratory Judgment of No Violation of Nebraska Law in the sending of its patent-related letters to

¹ MPHJ’s Complaint in Intervention is attached hereto as Exhibit A. Concurrently with the filing of this Motion, MPHJ has also filed a Motion for a Preliminary Injunction and a Motion for Expedited Consideration of its injunction motion.

Nebraska businesses (Count II), and a claim for Section 1983 Violations (Count III) against the Nebraska AG. Dkt. No. 7. The added Counts to the Amended Complaint were based upon the Nebraska AG's sending of a Cease and Desist Order to Farney Daniels on July 18, 2013, requiring the Firm to "immediately cease and desist the initiation of any and all new patent infringement enforcement efforts within the State of Nebraska" pending the outcome of the Nebraska AG's civil investigation of Farney Daniels. Dkt. No. 7-11; Exhibit E. Activision, who has retained Farney Daniels for over a year to assist it in connection with Activision's licensing and patent enforcement activities (Dkt. No. 10-1), believes that that the issuance of the Cease and Desist Order by the Nebraska AG injures and impairs its constitutional rights, including its right to retain Farney Daniels to represent it in the pending case, as well as in all of Activision's patent enforcement efforts in the future. Dkt. No. 7. As a result, Activision claimed it was entitled to redress under 42 U.S.C. § 1983. Also, because the Order was based upon the allegation that the patent-related letters sent on behalf of Activision somehow violated Nebraska law, Activision sought a declaratory judgment that its conduct, and the conduct on its behalf by Farney Daniels, did not violate any Nebraska law.

In order to stop the enforcement of the Nebraska AG's Cease and Desist Order to ensure that Farney Daniels could resume its representation of Activision in all of its enforcement efforts, Activision moved for a preliminary injunction against the enforcement of the Cease and Desist Order. Dkt. Nos. 8, 9. The Nebraska AG, on September 10, 2013 filed its Brief in Opposition to Activision's Motion for a Preliminary Injunction. Dkt. No. 22. In its Opposition, the Nebraska AG repeatedly insists that its Cease and Desist Order was also issued in response to the activities of Farney Daniels on behalf of MPHJ. *See id.* at pp. 1-2; 20-21; 24 and 37. On September 30, 2013, this Court issued its Order granting the Preliminary Injunction Motion, finding that:

[D]efendants Bruning, Cookson and Lopez are enjoined from taking any steps to enforce the cease and desist order issued to Farney Daniels on July 18, 2013, in any manner that would prevent or impede the Farney Daniels firm from representing Activision in connection with licensing and litigation of U.S. patents owned by Activision with respect to companies based in, or having operations in, Nebraska.

Dkt. No. 41, p. 16. In light of the Court's September 30 Order and the AG Defendants' Cease and Desist Order, MPHJ seeks the same relief that Activision seeks by its First Amended Complaint – a judgment, and such preliminary relief as may be shown to be appropriate, that MPHJ may retain Farney Daniels to represent it in its patent enforcement activities with respect to companies based in, or having operations in, Nebraska. Thus, as the Cease and Desist Order was issued to Farney Daniels with respect to the Firm's patent enforcement activities on behalf of its clients – including Activision and MPHJ, MPHJ asserts that it too has an interest in this matter, and thus, should be permitted to intervene pursuant to Rule 24(a)(2) and/or Rule 24(b)(1)(B).

ARGUMENT

I. Legal Standard

Rule 24(a)(2) of the Federal Rules of Civil Procedure entitles an applicant to intervention as of right when “(1) it has a cognizable interest in the subject matter of the litigation; (2) the interest may be impaired as a result of the litigation; and (3) the interest is not adequately represented by existing parties to the litigation.” FED. R. CIV. P. 24(a)(2); *see also Chiglo v. City of Preston*, 104 F.3d 185, 187 (8th Cir. 1997). There is no fixed deadline for intervention; the Motion to Intervene needs merely be “timely.” *Chiglo*, 104 F.3d at 187. An intervention motion is to be construed liberally, and all “doubts regarding the propriety of permitting intervention should be resolved in favor of allowing it.” *Sierra Club v. Robertson*, 960 F.2d 83, 86 (8th Cir.

1992). This liberal application of Rule 24 “serves the judicial system’s interest in resolving all related controversies in a single action.” *Id.*

Pursuant to Rule 24(b)(1)(B), a movant may permissively intervene when its intervention is “timely” and its “claim or defense and the main action have a question of law or fact in common.” FED. R. CIV. P. 24(b)(2). In discussing the standard for permissive intervention, the United States Court of Appeals for the Eighth Circuit has stated that the “principal consideration in ruling on a Rule 24(b) motion is whether the proposed intervention would unduly delay or prejudice the adjudication of the parties’ rights.” *South Dakota v. United States Dept. of Interior*, 317 F.3d 783, 787 (8th Cir. 2003) (citing *United States v. Pitney Bowes, Inc.*, 25 F.3d 66, 73 (2d Cir. 1994); 7C Wright, Miller & Kane, Federal Practice and Procedure, § 1913, at 379).

Here, MPHJ moves the Court to find that MPHJ may intervene as of right. However, if the Court determines instead that MPHJ’s intervention into this case is more appropriate under Rule 24(b)(1)(B), such a finding should also be permitted as MPHJ’s intervention is timely and its claims and/or defenses and the main action directly have common questions of law and fact.

II. This Court Should Permit MPHJ to Intervene As of Right

This Court should permit MPHJ to intervene in this action because MPHJ, as insisted repeatedly by the Nebraska AG, has a cognizable interest in this litigation because it is also a client of Farney Daniels, the recipient of the Cease and Desist Order issued by the Nebraska AG, and a party against whom the Order is directly intended to be enforced. Further, the Nebraska AG, in its opposition to Activision’s Motion for Preliminary Injunction, repeatedly referred to the activities of MPHJ as being partly the basis for the sending of its Cease and Desist Order to Farney Daniels. *See* Dkt. No. 22, pp. 1-2; 20-21; 24 and 37 (“given the Attorney General’s concerns about the deceptive patent license assertions and solicitations made by Farney Daniels – both those on behalf of Plaintiff [Activision] and on behalf of MPHJ . . .”) (emphasis added).

Additionally, MPHJ's interests may be impaired if it is not permitted to intervene, as a judgment enjoining the Cease and Desist Order with respect to Activision does not afford MPHJ relief against the Nebraska AG's enforcement of its unconstitutional Order with respect to Farney Daniels' patent enforcement activities on MPHJ's behalf. This Court's September 30 Order was only limited to relief for Activision. Dkt. No. 41. Thus, MPHJ is not adequately represented by the existing parties because only Activision has received preliminary relief against the enforcement of the Cease and Desist Order with respect to its patent enforcement efforts, leaving MPHJ and the Firm's other clients subject to the mercy of the Nebraska AG. Further, where letters sent by and on behalf of MPHJ had as an additional purpose towards the satisfaction of pre-suit investigation obligations under FED. R. CIV. P. 11, MPHJ has contentions to present regarding the AG's Order that are not addressed by Activision. Finally, MPHJ's motion to intervene is timely because this litigation has only just begun and no party would be prejudiced by MPHJ's entry into the case. The AG Defendants have not yet filed an answer, and have received an Order from the Magistrate delaying any Rule 26(f) conference until after any answer is filed.

A. MPHJ Has a Cognizable Interest in this Action

MPHJ clearly has a strong interest in the subject matter of this litigation. The Cease and Desist Order was sent to Farney Daniels, and directed Farney Daniels to halt *any and all* patent enforcement efforts on behalf of *all* of its clients, including MPHJ, pending the Nebraska AG's investigation. Dkt. No. 7-11. As the order underlying the entirety of Counts II and III of Activision's Amended Complaint is the Cease and Desist Order issued to Farney Daniels to stop enforcement efforts on behalf of all of its clients, MPHJ undoubtedly has a cognizable interest in this action as well. The Nebraska AG apparently agrees based upon its positions already taken in this case.

In its Opposition to Activision TV's Motion for Preliminary Injunction, the Nebraska AG repeatedly explains that its Cease and Desist Order was issued to Farney Daniels because of its activities on behalf of both Activision and MPHJ. *See* Dkt. No. 22, p. 1 ("On or about June 11, 2013, the Nebraska Attorney General's office sent a letter to Farney Daniels requesting information of their practices soliciting patent licensing agreements for MPHJ Technologies"); *see id.* at 2, 20, 21, 24 & 37 (each containing statements by the AG Defendants that the Order pertained at least in part to activities of MPHJ and its counsel). Accordingly, as demonstrated by both MPHJ and the Nebraska AG, MPHJ surely has a cognizable interest in this litigation.

B. MPHJ's Interest May Be Impaired If It Is Not Permitted to Intervene

It is sufficient to meet this factor as long as the disposition of the action *may*, as a practical matter, impair or impede MPHJ's ability to protect its interests, not that those interests would necessarily be impaired. *Kansas Public Employees Retirement System v. Remier & Kroger Associates, Inc.*, 60 F.3d 1304, 1307 (8th Cir. 1995). It is clear that the disposition of this action may, as a practical matter, impair or impede MPHJ's ability to protect its interests. Here, Activision seeks an injunction against the enforcement of the Nebraska AG's Cease and Desist Order only with respect to Activision's interests. Dkt. No. 7. Thus, if this Court were to grant Activision the permanent relief it seeks here, MPHJ's interests with respect to the Cease and Desist Order would be impaired, because any order issued by this Court would be limited to Activision. MPHJ, as the other stated party to whom the Order was directed, should be permitted to intervene and protect its own interests regarding the unconstitutional Cease and Desist Order, including how that Cease and Desist Order is unconstitutional with respect to its effect on MPHJ's patent enforcement activities. As noted above, MPHJ's communications had lawful purposes under federal law under Rule 11 that were in addition to, and different from, the other issues raised by Activision. Those issues with respect to the unlawfulness of the AG

Defendants' Cease and Desist Order can only be properly put before the Court by MPHJ, not Activision.

C. MPHJ's Interests Are Not Adequately Represented By The Current Parties

“Typically, persons seeking interventions need to only carry a minimal burden of showing that their interests are inadequately represented by the existing parties.” *United States v. Union Elec. Co.*, 64 F.3d 1152, 1168 (8th Cir. 1995) (internal quotations and citations omitted). An applicant for intervention need demonstrate only that representation by existing parties “may” be inadequate. *Sierra Club*, 960 F.2d at 85-86; *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972). In determining the adequacy of representation, a court “must compare the interests of proposed interveners with the interests of current parties,” and, where “those interests are different, even though directed at a common legal goal . . . intervention is appropriate.” *Union Elec. Co.*, 64 F.3d at 1169-70 (internal quotations and citations omitted). Adequate representation is not assured even where an intervenor seeks the same relief and bases its request on the same legal grounds. *Sierra Club*, 960 F.2d at 86. Finally, any doubts regarding the adequacy of the representation are to be resolved in favor of the intervening party. *Id.*

Here, this issue is not in dispute, as MPHJ's interests are not fully represented by the current posture of the case, as evidenced by this Court's September 30 Order's application solely to Activision. *See* Dkt. No. 41. Also, as noted, the accused correspondence sent by MPHJ, and on its behalf, had additional lawful bases that were not presented by Activision's claims.

D. MPHJ's Motion To Intervene Is Timely

The timeliness of a Motion to Intervene is determined by reviewing the totality of the circumstances present in each case. *NAACP*, 413 U.S. at 366. These factors include how far the litigation has progressed before the motion to intervene is filed; the movant's delay in filing; and how much prejudice the delay in seeking intervention may cause to other parties if intervention

is allowed. *Mille Lacs Band of Chippewa Indians v. State of Minnesota*, 989 F.2d 994, 998 (8th Cir. 1993); *Union Elec. Co.*, 64 F.3d at 1160; *Nevilles v. EEOC*, 511 F.2d 303, 305 (8th Cir. 1975) (citations omitted). The requirement of a timely intervention is judged by the progression of the ongoing case, not the passage of time. See *Mille Lacs Band of Chippewa Indians*, 989 F.2d at 998-99.

The Nebraska AG's Cease and Desist Order was sent to Farney Daniels on July 18, 2013. Activision did not amend its Complaint to include relief based on the Cease and Desist Order until August 19, 2013 – less than two months ago. The Nebraska AG did not move to dismiss the Amended Complaint and oppose Activision's Motion for Preliminary Injunction until September 10 – less than a month ago. And, the Court's Order preliminarily enjoining the AG Defendants from enforcing the Cease and Desist Order against Farney Daniels with respect only to the Firm's activities on behalf of Activision (not MPHJ) issued just a few days ago.

Included within the Nebraska AG's Opposition, however, as stated *supra*, were allegations that Farney Daniels' activities on behalf of MPHJ sparked the issuance of the Order, and thus, undoubtedly justify MPHJ's interest in this case. Further, the Court's September 30 Order limiting relief from the Cease and Desist Order to Activision, evidences that MPHJ must intervene to protect its own interests. Dkt. No. 41. As this case has not progressed out of its preliminary stages, and none of the parties have yet answered, MPHJ's intervention motion is timely.

III. In The Alternative, This Court Should Permit MPHJ To Permissively Intervene

MPHJ is also entitled to permissive intervention. Pursuant to Rule 24(b)(1)(B) of the Federal Rules of Civil Procedure, a movant may intervene when its intervention is "timely" and its "claim or defense and the main action have a question of law or fact in common." FED. R. Civ. P. 24(b)(2). In discussing the standard for permissive intervention, the United States Court

of Appeals for the Eighth Circuit has stated that the “principal consideration in ruling on a Rule 24(b) motion is whether the proposed intervention would unduly delay or prejudice the adjudication of the parties’ rights.” *South Dakota*, 317 F.3d at 787 (citing *United States*, 25 F.3d at 73; 7C Wright, Miller & Kane, Federal Practice and Procedure, §1913, at 379).

As discussed *supra*, MPHJ’s proposed intervention will not result in any undue delay or prejudice. The parties are in the very early stages of the case. Intervention of MPHJ promotes judicial economy by allowing all interested parties to participate in this dispute in a single action. Here, MPHJ seeks to intervene for purposes of asserting and defending its rights that prompted the Nebraska AG’s issuance of the Cease and Desist Order. As Activision likewise seeks to defend its rights that the unconstitutional Cease and Desist Order violates, it is clear that there are questions of law or fact common to the positions asserted by MPHJ and the existing parties. These positions include, but are not limited to, whether the Cease and Desist Order violates MPHJ’s First Amendment rights to license its patents, and to do so by counsel of its choice. Accordingly, in the alternative to intervene as of right, MPHJ should be permitted to permissively intervene in this action.

CONCLUSION

For the foregoing reasons, MPHJ respectfully requests an order granting its Motion to Intervene.

October 8, 2013

MPHJ TECHNOLOGY INVESTMENTS,
LLC, inclusive of its subsidiaries,
Intervenor-Plaintiff

By: /s/ W. Bryan Farney
W. Bryan Farney (admitted *pro hac vice*)
Farney Daniels PC
800 South Austin Avenue, Ste. 200
Georgetown, Texas 78626
(512) 582-2828
bfarney@farneydaniels.com

M. Brett Johnson (admitted *pro hac vice*)
Farney Daniels PC
8401 N. Central Expressway, Suite 280
Dallas, Texas 75225
(972) 432-5780
bjohnson@farneydaniels.com

Steven E. Achelpohl #10015
Gross & Welch P.C., L.L.O.
1500 Omaha Tower
2120 South 72nd Street
Omaha, Nebraska 68124-2342
(402) 392-1500
sachelpohl@grosswelch.com

CERTIFICATE OF SERVICE

I hereby certify that all counsel of record, who are deemed to have consented to electronic service are being served October 8, 2013, with a copy of this document via the Court's CM/ECF system.

/s/ W. Bryan Farney
W. Bryan Farney