

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO**

ELLORA'S CAVE PUBLISHING, INC.,
and
JASMINE-JADE ENTERPRISES, LLC,

Case No: 5:14-cv-02331

Plaintiffs,

v.

DEAR AUTHOR MEDIA NETWORK, LLC,
and
JENNIFER GERRISH-LAMPE,

Defendants.

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DEFENDANTS' BRIEF IN SUPPORT OF MOTION TO INTERVENE

Defendants Dear Author Media Network, LLC and Jennifer Gerrish-Lampe file this Brief in Support of the Motion to Intervene by Ann Josephson. The intervention should be granted as there are common questions of law and fact as to claims by Josephson and the present action.

1.0 Intervenor's claims share common questions of law and fact with the main action.

Plaintiffs argue there are no common issues of fact or law with the present action. However, that simply strains all semblance of logic. The key issue in this case is whether or not Ellora's Cave has been paying its authors or not. Ellora's

claims that it is defamatory to claim that authors have not been paid. The Intervenor is an Ellora's Cave author who is suing for hundreds of thousands of dollars that she claims she has not been paid. It couldn't be more simple and obvious that the facts are entirely concurrent in both sets of claims.

The issues introduced by Intervenor are highly probative to this case and a review of the issues will resolve both sets of claims at the same time. Plaintiffs' claims based on defamation flow from the truth or falsity of Defendants' statements regarding Plaintiffs' contractual agreements with authors including this very Intervenor.

1. Josephson is an author published by Plaintiffs between 2008 and 2013. (See Doc. 40-1, Proposed Intervening Counterclaim at ¶ 1.) Ms. Lampe's blog post at issue, published in September of 2014, deals with prior and ongoing issues between Ellora's Cave and its authors, employees, and independent contractors. (See Doc. 1-1, Complaint at Exhibit A; see also Doc. 46, Defendants' Motion for Summary Judgment ("Defendants' MSJ") at p. 6, as internally numbered.) As an author doing business with Plaintiffs within the time before and after September of 2014, Josephson's issues and evidence regarding her contractual problems with Plaintiffs are relevant to the current action.

2. Intervenor claims that Plaintiffs failed to pay or underpaid her royalties. (See Doc. 40-1 at ¶¶ 14–27.) Plaintiffs allege Defendants falsely stated that Plaintiffs have failed to timely pay its authors. If Intervenor's claims for failure to pay or underpayment are found in the affirmative, then Plaintiffs' assertion at ¶ 12(a) of its complaint (Doc. 1-1) is disproven.

3. Plaintiffs allege Defendants falsely stated, "authors have not received royalty payments in over six months." (See Doc. 1-1 at ¶ 12(b).) Intervenor's Proposed Counterclaim asserts that her contracts did not permit

Plaintiffs to pay her less frequently than every three months. (See Doc. 40-1 at ¶23.) Also, Intervenor provides examples of lengths of time wherein she was not paid. (See Doc. 40-1 at ¶ 25.) Evidence produced by Intervenor's claims go directly to the truth or substantial truth of Defendants' statements regarding failure of Ellora's to pay its authors. In addition to the sources listed in Defendants' MSJ, this would disprove Plaintiffs' claims as to ¶ 12(b) of their complaint. (See Doc. 46 at p. 13.)

4. Information from discovery in Intervenor's Counterclaim could prove or disprove Plaintiff's assertion in addition to the statements provided in Defendants' MSJ. (See Doc. 46 at Exhibits 14, 10, and 44.) For example, though Intervenor's Motion and Proposed Counterclaim do not currently mention Plaintiffs author portal, as an author under contract with Plaintiffs, Josephson may reveal information as to truth of Defendants statements that the portal was temporarily inaccessible. (See Doc. 46 at p. 15; see also Doc. 1-1 at ¶12(e).)

5. Intervenor can also disprove Plaintiffs' assertion that Defendants falsely stated that "[t]he total sum of unpaid royalties, editor fees, cover artist fees is in the several thousands, perhaps approaching six figures." (See Doc. 46 at p. 14; see also Doc.1-1 at Ex. A.) Intervenor's claimed damages alone exceed six figures. (See Doc. 40-1 at ¶ 4.) If Intervenor's contract has been breached by Ellora's in excess of six figures Defendants statement concerning unpaid royalties must be true. Of course, the issues in this statement are also non-defamatory as a matter of law – but in the event that the Court declines to make that decision, the matters of fact will ultimately resolve it in the Defendant's favor.

6. Intervenor's claims related to any of Plaintiffs actions, including failure to pay its authors in, after Ms. Lampe posted her blog are additionally relevant. Plaintiffs claim Ms. Lampe's blog "heightens the false impression of

financial instability . . . by stating that Ellora's will close by the end of the year or is likely to undergo bankruptcy." (See Doc. 1-1 at ¶ 13.) Intervenor's information regarding Ellora's financial issues, following Ms. Lampe's post, supports assertions about Ellora's financial problems or likelihood of filing for bankruptcy. Thus even facts relevant to Intervenor's claims following the 2014 posting remain relevant and common to the main case.

Issues introduced under the Intervention would be highly probative to the main issues of fact and law in Plaintiffs claims. Notably, Intervenor's claims go directly to the truth or falsity of Defendants' statements and thus to the root of Plaintiffs' defamation action.

2.0 Intervenor's claims share common questions of law and fact as to Plaintiffs ability to prove their case.

Aside from rebutting Plaintiffs' major claims concerning the allegedly defamatory statements, Intervenor's Proposed Counterclaim further relates to the legal and factual issues at hand where proof of Intervenor's allegations would defeat additional elements required to prove Plaintiffs' case.

First, Intervenor states that her rights were not appropriately reverted and were actually improperly extended by Ellora's Cave. (See Doc. 40-1 at ¶28.) Defendants have asserted protection under the Common Interest Privilege. (See Doc. 46 at p. 18.) Under that Privilege, Defendants are protected where they believed other persons had a common interest and were entitled to know information regarding that interest. (See *Hahn v. Kotten*, 43 Ohio St.2d 237, 331 (1975).) Defendants have argued in previous motions that authors and other readers of Ms. Lampe's blog have an interest in knowing about potential issues relating to their monetary and intellectual property interest. If Intervenor's statements concerning Ellora's Cave's failure to appropriately revert Intervenor's

intellectual property rights to her, failure to pay her, and decision to further delay and attempt to alter their contractual arrangements are proved, Defendants can also prove, or at a minimum further and even more substantially support, their right to protection under the Common Interest Privilege.

Second, proof regarding Intervenor's claims would crush Ellora's Cave's already scarce chances of proving actual malice. (See Doc. 46 at p. 19.) For actual malice, Plaintiffs must prove Defendants knew the statements were false or recklessly disregarded the potential for their falsity. (See *Lothschuetz v. Carpenter*, 898 F.2d 1200, 1206 (6th Cir. 1990).) If Intervenor's claims concerning Plaintiffs' failure to make appropriate payments prevail, Plaintiffs will have an even more difficult time proving actual malice. Defendants cannot likely have been reckless in making their statements, yet luckily have fallen into the situation where those statements were later proven true.

Finally, Intervenor's claims may have the tendency to reveal issues related to Plaintiffs' reputation before and after Ms. Lampe's post. (See Doc. 46 at p. 21.) If Intervenor notified anyone of Ellora's alleged failure to comply with their contract or spoke to any other authors, such information will be relevant to Plaintiffs' ability to prove the damages element of their claim.

3.0 Conclusion

For the foregoing reasons the court should permit intervention by Ann Josephson. There are common questions of law and fact between the two actions and related issues will resolve both sets of claims. Intervention is therefore appropriate under Fed. R. Civ. P. 24(b).

Dated September 4, 2015.

Respectfully Submitted,

/s/ Marc J. Randazza

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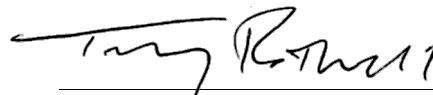
ATTORNEYS FOR DEFENDANTS

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 4, 2015, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that a true and correct copy of the foregoing document is being served upon counsel for Plaintiff, via transmission of Notices of Electronic Filing generated by CM/ECF.

Respectfully Submitted,



Employee,
Randazza Legal Group