

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

ELLORA’S CAVE PUBLISHING, INC.,	:	Case No. 5:14-cv-2331
et al.	:	
	:	Judge John R. Adams
Plaintiffs,	:	
	:	REPLY IN SUPPORT OF MOTION
v.	:	TO INTERVENE AS
	:	COUNTERCLAIM DEFENDANT
DEAR AUTHOR MEDIA NETWORK,	:	
LLC, et al.	:	
	:	
Defendants.	:	

The motion to intervene should be granted. The principal questions presented by permissive intervention are commonality of issues and a lack of prejudice or delay. The plaintiffs’ assertion that the proposed intervening counterclaim lacks common questions with the main action is contradicted by the plaintiffs’ own pleadings and of-record discovery responses, to say nothing of common sense. And allowing intervention would not unduly delay or prejudice any party and in fact would benefit the parties to the main action by giving all parties—the plaintiffs, the defendants, and the intervenor—the opportunity to resolve these common questions in a single proceeding rather than in multiple proceedings.

Common questions abound

The commonality of issues between the main action and the intervening counterclaim is self-evident upon even a cursory reading of the pleadings. Both the main action and the intervening counterclaim turn in large part on the question of whether or not plaintiff Ellora’s Cave failed to properly pay royalties earned by authors like intervenor Ann Josephson.

The intervening counterclaim alleges (among other things): that Ellora’s Cave improperly calculated the amount of royalties owed to Josephson under the publishing agreements and underpaid her by as much as about \$193,000 (*see* Intervening Counterclaim, dkt. 40-1, PAGEID

356-359, at ¶4, 14-20); that Ellora's Cave attempted to unilaterally change how royalties were calculated for not only Josephson but other authors as well, in order to underpay the authors (*see* Intervening Counterclaim, dkt. 40-1, PAGEID # 359, at ¶21-22); that Ellora's Cave slowed down the payment of royalties so that royalties were paid, if at all, many months after the applicable works were sold (*see* Intervening Counterclaim, dkt. 40-1, PAGEID # 359-360, at ¶23-25); and that Ellora's Cave would either write royalty checks to authors but hold them before mailing them, or backdate checks to make them appear that they were prepared much earlier than they actually were (*see* Intervening Counterclaim, dkt. 40-1, PAGEID # 360, at ¶26). In other words, whether it was from not being paid the right amount, not being paid on time, or both, some of the most fundamental allegations of the intervening counterclaim are that Josephson (and other authors) simply were not being paid what they were owed.

One of the central issues in the main action, meanwhile, is the plaintiffs' contention that the defendants falsely stated that authors were not being paid. That is not the intervenor's interpretation or paraphrasing of the plaintiffs' claim—that issue is expressly raised in both the complaint itself, and the plaintiffs' own (sworn?¹) interrogatory responses. For example, the Complaint alleges that the defendants “made false and defamatory statements” about the plaintiffs and that “such false statements include: . . . That unpaid royalties . . . amount to several thousands of dollars perhaps approaching six figures . . .” *See* Complaint, dkt. 1-1, PAGEID # 8, at ¶12(c). Similarly, when asked by the defendants in Interrogatory #9 to identify false statements of material fact made by the defendants, the plaintiffs answered in part that the defendants had made a “false statement” when they wrote that “authors [were] going unpaid.” In

¹ The plaintiffs' discovery responses in the record at dkt. 46-10 are signed by the plaintiffs' counsel, but are not signed by the plaintiffs as required by Fed. R. Civ. P. 33(b)(3). The intervenor does not know whether a verification was served but not filed, or omitted by agreement of counsel to the parties to the main action, or whether some other circumstance prevailed.

response to the same interrogatory's instruction to provide the actual truth of the matter, the plaintiffs stated simply "Author [sic] were not going unpaid." See Exhibit 10 to Defendants' MSJ, dkt. 46-10, PAGEID # 785-786 (plaintiffs' response to defendants' interrogatory #9).

The same essential factual question therefore undergirds both the complaint and the intervening counterclaim—namely, was plaintiff Ellora's Cave properly paying authors like intervenor Ann Josephson? Or were authors like Josephson going unpaid for money they had earned? If a finder of fact concludes that the latter is correct, then the plaintiffs' defamation claim (or at least that aspect of it) fails as a matter of law, and the intervening counterclaim succeeds as a matter of law. This common factual question weighs heavily in favor of allowing intervention.

There are other related common questions as well. For example, the plaintiffs' complaint alleges that the defendants' publication falsely created the impression of instability at or mismanagement of Ellora's Cave. See Complaint, dkt. 1-1, PAGEID # 8-9, at ¶13-14. While the intervenor would not need to prove instability or mismanagement in order to prevail on her claims, if she prevails on her claims, then any of the defendants' statements about instability or mismanagement would be substantially true, and therefore not defamatory. This is so for all of the intervenor's claims, but perhaps especially so for the claims relating to Ellora's Cave's alleged cut-and-hold practice for royalty checks. If true, either Ellora's Cave is mismanaging its authors' royalty payments by delaying the mailing of already-prepared checks for several weeks, or Ellora's Cave is cash-flowing so poorly that it is afraid to send out royalty checks promptly for fear that they will bounce. Either way, there would be substantial truth in any statements of the defendants that there is instability in either Ellora's Cave's financial or business affairs or status.

The main purpose of Rule 24(b) is to permit actions to be tried together where they have significantly overlapping factual or legal questions. *See, e.g., TPI Corp. v. Merchandise Mart of S. Carolina, Inc.*, 61 F.R.D. 684, 690 (D. S.C. 1974) (“in applying Rule 24, its purpose to prevent multiplicity of suits involving common questions of law or fact should not be ignored”). This case plainly fits the bill, and allowing intervention would indeed prevent a multiplicity of suits involving common questions like the ones identified above.

This economy applies in multiple ways. The most obvious way is the efficiency of the fact-finding process. Because the factual questions discussed above aren’t just overlapping but in fact are nearly identical, the testimony, documents, and other evidence and evidentiary factors (such as the credibility of witnesses, if material facts are disputed) will be the same or substantially the same for each claim. The interrogatories will be the same, the same issues will be requested to be admitted, the same documents will be requested to be produced, the same witnesses (including potentially non-parties) will be called to give testimony on the same issues, and so it makes sense to try the actions together.

There is also potentially significant economy for the court system not only in avoiding two trials over the same issues, but in potentially avoiding two types of collateral litigation. First, if the cases are tried separately and Ellora’s Cave prevails in the first action to be tried (whichever case that may be), then Ellora’s Cave will all but certainly attempt to give its favorable judgment preclusive effect in the second case to be tried, thus throwing the remaining parties into a quagmire of claim preclusion or issue preclusion litigation that would be avoided if the cases were tried together. Second, even after the inevitable claim/issue preclusion matters are decided, if Ellora’s Cave prevails in one separately tried case and loses the other (and again, the order does not matter), that will all but surely set off a tangle of new motions and litigation

under Rule 60(b) or similar devices. All of that could be avoided if intervention is allowed. Intervention thus benefits not only the parties but also the court system in general.

The fact that there is an arbitration clause in the publishing agreements does not weigh against allowing intervention, because the scope of arbitration is quite limited. The publishing agreement in Exhibit 1 to the intervening counterclaim, *see* dkt. 40-1, PAGEID # 370, at §26, provides generally for arbitration, and then states, “Notwithstanding the foregoing, the parties shall have the right to conduct discovery and the right to seek injunctive relief in any court in the State of Ohio.” In other words, Ellora’s Cave specifically bargained for—indeed, specifically *drafted* for—the right and obligation to conduct discovery and litigate equitable remedies before this Court. Nothing about the arbitration provision weighs against intervention, because the parties to the arbitration clause specifically agreed that the conduct of discovery and pursuit of equitable remedies may take place in this forum. The intervening counterclaim does indeed seek equitable remedies in the form of a declaratory judgment and specific performance. *See, e.g., Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 300 (1943) (declaratory judgment “is essentially an equitable cause of action”). Permitting exactly that cannot possibly be prejudicial to the plaintiffs.

The motion is not untimely

The main thrust of the plaintiffs’ opposition to the motion to intervene is their argument that the motion is untimely because discovery has concluded, and allowing intervention would require the reopening of discovery. This argument is a red herring.

First, it was (and is) the intervenor’s understanding from the Court’s docket that discovery has not in fact closed. The Court’s case management plan, dkt. 29, PAGEID # 284, established a “*preliminary*” discovery cutoff date of July 15, 2015, and no subsequent order has

apparently established any final discovery cutoff date. The defendants are evidently in agreement; they have indicated in two recent filings that the discovery plan was to conduct limited discovery relevant to summary judgment issues prior to July 15, and to conduct additional discovery later if necessary.

Second, the plaintiffs' opposition misses the point that the discovery can and will be conducted regardless of whether intervention is allowed. Denying intervention would not eliminate the intervenor's ability to conduct the discovery or Ellora's Cave's obligation to respond to it. Instead, denying intervention would merely push that discovery into a different forum. But for all of the reasons discussed above, the most sensible forum to conduct that discovery is this one—the overwhelming overlap between the main action and the intervening counterclaim weighs so heavily in favor of allowing intervention that intervention would be appropriate even if it meant altering the discovery schedule (which again, is not necessarily the case here).

The motion to intervene is also not untimely when viewed in the context of the claims presented. As stated in the intervening counterclaim, dkt. 40-1, PAGEID # 360, and motion to intervene, dkt. 40, PAGEID # 354, the conduct complained of has stretched over a period of years, up to just a few weeks before the motion to intervene was filed. While it may have been possible to file somewhat earlier, the motion was filed within a reasonable time after the filing of the main action and within a reasonable time of the conduct giving rise to the claim for relief. Filing earlier would have led to the filing of claims addressing less than all of Ellora's Cave's actionable conduct.

Conclusion

Allowing permissive intervention under Rule 24(b) would permit all parties one forum in

which to litigate common questions relating to whether Ellora's Cave has properly paid its authors. Intervention would not prejudice any party, and in fact would significantly reduce duplication of effort for both the parties and the court system. Denying intervention, meanwhile, would do nothing more than force the parties—including plaintiff Ellora's Cave, which purports to oppose the motion—to endure two sets of discovery and trial on substantially the same issues.

For the foregoing reasons, intervenor Ann Josephson respectfully requests that the Court grant her motion to intervene as a counterclaim defendant, and issue an order deeming the proposed intervening counterclaim (dkt. 40-1) to be filed instant.

Respectfully submitted,

/s/ Jeffrey M. Nye
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CERTIFICATE OF SERVICE

The undersigned does hereby certify that a copy of the foregoing was served upon counsel for all parties through the court's CM/ECF system on September 14, 2015.

/s/ Jeffrey M. Nye
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