IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 02-M-1662 (MJW)

ROBERT HUNTSMAN and CLEAN FLICKS
OF COLORADO, L.L.C.,

Plaintiffs,

v.

STEVEN SODERBERGH, ROBERT ALTMAN, MICHAEL APTED, TAYLOR HACKFORD, CURTIS HANSON, NORMAN JEWISON, JOHN LANDIS, MICHAEL MANN, PHILLIP NOYCE, BRAD SILBERLING, BETTY THOMAS, IRWIN WINKLER, MARTIN SCORSESE, STEVEN SPIELBERG, ROBERT REDFORD and SYDNEY POLLACK,

Defendants.

DIRECTORS GUILD OF AMERICA'S MOTION FOR LEAVE TO INTERVENE

Pursuant to Rule 24 of the Federal Rules of Civil Procedure, Proposed Defendant-In-Intervention and Counterclaimant-In-Intervention The Directors Guild of America (the "DGA") hereby moves the Court as follows: (1) for leave to intervene in this action as a Defendant-In-Intervention; (2) to permit the amendment of the Answer to reflect the addition of the DGA as a Defendant-In-Intervention; and (3) to permit the filing of the proposed amended Counterclaim (attached hereto as Exhibit A) to include the DGA as a Counterclaimant-In-Intervention.[1]

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[1] That proposed Amended Counterclaim is also contingent on the Court's granting of the concurrently filed Motion For Leave to Join Third Parties as Counterdefendants.

The DGA seeks leave to intervene in this action in order to protect the interests of more than 1,000 of the DGA's members who direct feature films, and whose rights are infringed by the commercial distribution of altered versions of their works.

I.

INTRODUCTION AND FACTUAL BACKGROUND

This action arises out of the unauthorized alteration and distribution of motion pictures directed by sixteen prominent motion picture directors (named as defendants) and other director members of the DGA. Each of the Plaintiffs and Proposed Counterdefendants[2] in this action is engaged in the commercial rental, sale or distribution of edited versions of motion pictures, or technology which enables the creation of unauthorized edited versions. Apparently, certain images or dialogue in the motion pictures are not to the Plaintiffs' and Proposed Counterdefendants' liking, and they have edited these films to remove such "objectionable" material. In doing so, the Plaintiffs and Proposed Counterdefendants create and commercially distribute unauthorized altered versions of motion pictures, without regard for the Director Counterclaimants' vision, storytelling, and artistry.

Plaintiffs filed a complaint seeking declaratory judgment that, *inter alia*, their conduct does not violate the Lanham Act. Defendants and the DGA strenuously disagree with

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[2] Proposed Counterdefendants Video II, Glen Dickman, J.W.D. Management Corporation, Trilogy Studios Inc., CleanFlicks, MyCleanFlicks, Family Shield Technologies, LLC, ClearPlay Inc., Clean Cut Cinemas, Family Safe Media, EditMyMovies, Family Flix, U.S.A L.L.C. and Play It Clean Video are collectively referred to herein as the "Proposed Counterdefendants," and the Plaintiffs and Proposed Counterdefendants are collectively referred to as the "Counterdefendants." The Defendant Directors have concurrently filed a motion for leave to join the Proposed Counterdefendants in this litigation. The DGA will join that motion if permitted to intervene in this action.

Plaintiffs' position. The Defendants and other DGA members are inextricably associated by the public with the films they direct. As such, Counterdefendants' unauthorized conduct violates the Lanham Act, and state law, by wrongly associating the Defendants and other DGA members with altered versions of their films.

The DGA is the exclusive collective bargaining representative for more than 12,000 members of the entertainment industry, and among the DGA's members are more than 1,000 feature film directors. Indeed, while the Counterdefendants' conduct affects the intellectual property rights of the sixteen Defendants, their conduct has far-reaching effects on all of the DGA's other director members. For that reason, Defendants and the DGA are, concurrent with this motion, seeking leave to bring before the Court thirteen other parties engaged in the same conduct on a variety of counterclaims, and the DGA hereby seeks leave to intervene to protect and vindicate the interests of all of its members whose rights are affected by the conduct at issue in this case.

Accordingly, the DGA seeks to intervene in this action to protect its interests, and the interests of its members, and the DGA requests that the Court permit intervention as a matter of right pursuant to Rule 24(a)(2). Alternatively, the DGA requests that this Court use its discretion to allow the DGA to intervene pursuant to Rule 24(b).

II.

INTERVENTION BY THE DGA IN THIS MATTER IS APPROPRIATE

In the Tenth Circuit, Rule 24 traditionally has received a liberal construction in favor of applicants for intervention. See Utahns for Better Transp. v. U.S. Dept. of Transp., 295 F.3d 1111, 1115 (10th Cir. 2002) ("[o]ur court has tended to follow a somewhat liberal line in

allowing intervention."); Utah Ass'n of Counties v. Clinton, 255 F.3d 1246, 1249 (10th Cir. 2001) ("This circuit follows 'a somewhat liberal line in allowing intervention.'"). As set forth below, the DGA and its members have protectable interests that would be significantly impacted by the disposition of this case. Thus, intervention by the DGA in this litigation as a matter of right is warranted. Alternatively, the DGA respectfully submits that intervention is well within the Court's discretion under Rule 24(b), and requests that the Court exercise its discretion to permit intervention by the DGA.

A. INTERVENTION BY THE DGA AS A MATTER OF RIGHT IS WARRANTED.

Courts in the Tenth Circuit employ a four-part test for intervention as a matter of right under Rule 24(a). The DGA satisfies this four-part test:

- The DGA's application is "timely";
- The DGA "claims an interest relating to the property or transaction which is the subject of the action";
- The DGA's interest "may as a practical matter" be "impair[ed] or impede[d]"; and
- The DGA's interest "is [not] adequately represented by existing parties."

Utahns for Better Transp., 295 F.3d at 1115 (citing Utah Ass'n, 255 F.3d at 1249; and Coalition of Arizona/New Mexico Counties for Stable Econ. Growth v. Dep't of Interior, 100 F.3d 837, 840 (10th Cir. 1996)); see also Fed. R. Civ. P. 24(a)(2).

1. THE DGA'S APPLICATION TO INTERVENE IS TIMELY.

Because this litigation is in its infancy, the DGA's request to intervene is manifestly timely, and no party can claim cognizable prejudice from permitting the DGA to

intervene at the outset of this case. See Utah Ass'n, 255 F.3d at 1250 (finding that the district court abused its discretion in finding intervention untimely in light of "the relatively early stage of the litigation and the lack of prejudice to plaintiffs flowing from the length of time between the initiation of the proceedings and the motion to intervene"); Sanguine, Ltd. v. United States Dep't of Interior, 736 F.2d 1416, 1418 (10th Cir. 1984) ("The timeliness of a motion to intervene is assessed 'in light of all the circumstances, including the length of time since the applicant knew of his interest in the case, prejudice to the existing parties, prejudice to the applicant, and the existence of any unusual circumstances.'").

2. THE DGA HAS A PROTECTABLE INTEREST RELATING TO THE SUBJECT OF THIS LITIGATION.

The protectable interest test is "primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." Utahns for Better Transp., 295 F.3d at 1115 (citing Utah Ass'n, 255 F.3d at 1251-52; Coalition, 100 F.3d at 841). The DGA has a significant protectable interest in this action.

First, the DGA is a non-profit organization representing the interests of more than 1,000 directors, each of whom is at risk of false association with versions of films that have been edited by one or more of the Counterdefendants. As a result, the DGA is the only entity with standing to pursue Lanham Act claims on behalf of all of these directors. See, e.g., Gilliam v. American Broad. Co., 538 F.2d 14, 24 (2d Cir. 1976) (Lanham Act "properly vindicate[s] the author's personal right to prevent the presentation of his work to the public in a distorted form."). Although the DGA may not have been directly injured itself, its members' rights have been infringed. See, e.g., Mutation Mink Breeders Ass'n v. Lou Nierenberg Corp., 23 F.R.D. 155

(S.D.N.Y. 1959) (association of mink growers had standing to challenge mark "Normink" for artificial mink coats).

Plaintiffs have selected only sixteen motion picture directors whose rights are impaired by their conduct; the remaining 1,000 director members of the DGA are similarly situated, but unrepresented in this action. Indeed, the DGA arguably represents the interests of every major movie director who has been, or stands to be, affected by Plaintiffs' wrongful acts. Because the DGA represents the interests of those other numerous directors, it has a protectable interest in the subject matter of this action. Indeed, rather than face the logistical nightmare of trying to join 1,000 individual directors as defendants to advance arguments on their own behalf in this case, the DGA should be permitted to intervene as the representative body best able to speak on behalf of these directors with respect to the injuries raised by the Counterdefendants' conduct. As a result, the DGA has an interest in protecting the rights of its members, and the second prong of the intervention as of right test is satisfied.

3. THE DGA'S INTERESTS WILL BE SIGNIFICANTLY IMPAIRED BY THE DISPOSITION OF THIS CASE.

If the Court disposes of the instant matter without permitting the DGA to intervene, the DGA's ability to protect its interests, and the interests of its members, will be substantially impaired. Such impairment of interests is another compelling reason justifying intervention, particularly given the minimal showing required to satisfy this prong of the intervention standard. See Utahns for Better Transp., 295 F.3d at 1115.

In Utahns for Better Transp., the Tenth Circuit held that intervention is appropriate when an action may impair or impede another party's ability to protect its interests. See id. (citing Natural Res. Def. Council v. United States Nuclear Regulatory Comm'n, 578 F.2d

1341, 1346 (10th Cir. 1978) ("[t]here is some value in having the parties before the court so that they will be bound by the result.")). Indeed, "the question of impairment is not separate from the question of existence of an interest." Natural Res. Def. Council, 578 F.2d at 1345. "To satisfy this element of the intervention test, a would-be intervenor must show *only* that impairment of its substantial legal interest is *possible* if intervention is denied. This burden is *minimal*." Utah Ass'n, 255 F.3d at 1254 (citations omitted) (emphasis added).

Here, the declaratory relief sought by Plaintiffs, and the Defendants' proposed counterclaims, will significantly implicate, and possibly impair, the ability of the DGA to protect the interests of its members. The legal questions at issue in this case directly relate to the interests of the DGA and its members in preventing consumer confusion regarding unauthorized versions of directors' works. As a result, the DGA should be permitted to intervene in this case to establish that Plaintiffs' conduct is violative of the Lanham Act. The Court's adjudication of this case may have a preclusive effect and will have, at a minimum, strong precedential effect on the DGA's interests in protecting its members from wrongful association with unauthorized, altered versions of their films. Therefore, the third prong of the intervention as of right analysis is also satisfied.

4. THE DGA'S INTERESTS ARE NOT ADEQUATELY REPRESENTED.

There is ample indication that the DGA's interests are not adequately represented in this case. The United States Supreme Court has held that the requirement of inadequate representation is satisfied, if the representation of a named party *may be* inadequate. See Trbovich v. United Mine Workers, 404 U.S. 528, 538 n.10 (1972). The Tenth Circuit has explicitly noted that the burden of showing that a party's interests are not adequately protected is

minimal. Utahns, 295 F.3d at 1117 (citing Utah Ass'n, 255 F.3d at 1254; and Sanguine, 736 F.2d at 1419). Consequently, the DGA has a very low standard to satisfy in this regard. Indeed, "[t]he possibility that the interests of the applicant and the parties may diverge 'need not be great' in order to satisfy this minimal burden." Utah Ass'n, 255 F.3d at 1254 (citing Natural Res. Def. Council, 578 F.2d at 1346).

Here, the DGA represents the interests of more than 1,000 directors of feature films. None of the films created by these directors are identical. Indeed, each feature film has varying degrees of content that Plaintiffs and Proposed Counterdefendants could potentially construe as "objectionable." Nevertheless, each DGA member who directs a feature film could be potentially affected by the disposition of this case. Consequently, Plaintiffs' and Proposed Counterdefendants' conduct causes injury to far more than the sixteen individual directors named as defendants in this action. Similarly, the disposition of this case has implications that will touch parties and individuals far beyond those currently named in this action. Thus, because the requested declaratory relief by Plaintiffs—coupled with the counterclaims and injunctive relief sought by the Counterclaimants—will impact *all* DGA director members, not only the sixteen directors named in Plaintiffs' Amended Complaint, the DGA has an interest in this litigation distinct from that of the Defendants.

Moreover, although each of the Defendants strenuously objects to the Plaintiffs' and Counterdefendants' conduct, those Defendants lack standing to argue the impropriety of the alteration of any films directed by other DGA members. Conversely, as noted above, non-profit organizations such as the DGA do have standing to sue on behalf of their members. See, e.g., Mutation Mink Breeders Ass'n, 23 F.R.D. at 155. The legal and commercial interests of the

individually named directors in this case are only a subset of the DGA's. Accordingly, the Defendants' representation of their own individual interests will not adequately represent those of the DGA. Thus, the final prong of the intervention as of right analysis also weighs in favor of intervention by the DGA.

Because all four elements of the intervention as of right analysis support intervention by the DGA, the Court should permit the DGA to intervene as a matter of right pursuant to Rule 24(a)(2).

B. PERMISSIVE INTERVENTION OF THE DGA IN THIS CASE IS JUSTIFIED.

In the event the Court does not permit intervention as a matter of right, the DGA submits that permissive intervention pursuant Rule 24(b) is warranted. Rule 24(b) provides for permissive intervention "(1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common." Battle v. Fields, 172 F.3d 878 (10th Cir. 1999) (unpublished opinion, copy attached hereto as Exhibit B per D.C.COLO.LCivR 7.1.D) (citing Fed. R. Civ. P. 24(b)). Permissive intervention is a matter within the district court's discretion. See Kaimachi R.R. Co. v. Nat'l Mediation Bd., 986 F.2d 1341, 1345 (10th Cir. 1993).

On the first element, because subject matter jurisdiction in this case is based on federal question and not diversity jurisdiction under 28 U.S.C. Section 1338(a), the DGA satisfies the first prong. See Amended Complaint, ¶ 1. Regarding the second element, virtually all questions of law and fact in this case will be common to the Defendants and the DGA. As previously noted, the conduct of the Plaintiffs and Proposed Counterdefendants violates the artistic and intellectual property rights of both the Defendants and other DGA members. See

Gilliam, 538 F.2d at 24. Accordingly, the DGA respectfully requests that the Court exercise its discretion to permit the DGA to intervene in the action as a party-defendant and counterclaimant.

III.

CONCLUSION

WHEREFORE, for the reasons stated above, the DGA respectfully requests that the Court grant this Motion and permit the DGA to intervene pursuant to Rule 24.

CERTIFICATE OF COMPLIANCE WITH D.C.COLO.LCivR 7.1.A

Pursuant to District of Colorado Local Rule 7.1.A, the DGA's undersigned counsel hereby certifies that it has conferred with Scott J. Mikulecky, Esq. of Sherman & Howard L.L.C., counsel for Plaintiffs, who stated that Plaintiffs have no objection to the relief sought in this Motion.

Dated this ___ day of September, 2002.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of September, 2002, I served the foregoing DIRECTORS GUILD OF AMERICA'S MOTION FOR LEAVE TO INTERVENE to the following addressed as follows:

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