IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

ACTIVISION TV, INC., **Plaintiff,** **v.** **PINNACLE BANCORP, INC.,** **and** **JON BRUNING, Attorney General of Nebraska (in his official capacity); DAVID D. COOKSON, Chief Deputy Attorney General of Nebraska (in his official capacity); DAVID A. LOPEZ, Assistant Attorney General of Nebraska (in his official capacity),** **Defendants.**	**Case No. 8:13CV00215**

DEFENDANTS' BRIEF IN OPPOSITION TO MPHJ TECHNOLOGY INVESTMENTS, LLC'S MOTION TO INTERVENE

MPHJ Technology Investments LLC ("MPHJ") filed a motion to intervene on October 8, 2013. Filing 50. That motion and supporting memorandum (Filing 51) argue that MPHJ should be able to intervene as of right, or, alternatively, the Court should permit them to intervene. Defendants Jon Bruning, David Cookson, and Dave Lopez (hereinafter collectively "Attorney General") submit this brief in Opposition to the Motion for Intervention.

INTRODUCTION

Despite insisting to this Court that this case was about Activision, MPHJ—at the behest of the same attorneys who appeared on behalf of Activision—is now clambering for the Court to allow it to intervene. This case started as a patent infringement lawsuit by Activision against Pinnacle Bancorp, and continued after Activision brought claims against the Attorney General. But MPHJ has no interest in Activision's patents, or its claims against the Attorney General. MPHJ's effort to intervene here is broadening this case beyond reasonable bounds of the controversies at issue, and risks abusing the Court's docket and blurring the actual issues in this case.

MPHJ has been written about frequently online as a "patent troll" and "scanner troll."[1] Before this Court, it presents a distinct patent licensing scheme, despite involving the same attorneys as Activision. Unlike Activision, it is a non-practicing entity. Filing 54, p. 7. Through dozens and dozens of subsidiaries,[2] it has sent hundreds—and perhaps thousands—of letters to small businesses, consumers, and nonprofits all over the country, alleging a violation of patents for scanning and emailing documents. Filing 59, p. 11, Filing 23-6, Exhibit A. It has been sued by the State of Vermont. Filing 23-6. It has agreed to discontinue its activities in the State of Minnesota. Exhibit A.[3] And, perhaps most illuminating, it has *never* sued a single entity for patent infringement. Filing 23-1. It simply does not belong in this lawsuit.

As set forth in more detail below, the Court should find that MPHJ does not have the right of intervention under Rule 24(a)(2), and should likewise refuse to permit MPHJ from intervening in this matter under Rule 24(b)(1)(b).

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[1] See http://arstechnica.com/series/attack-of-the-scanner-patents/

[2] Including, but not limited to: AbsMea,LLC; AccNum,LLC; AdzPro,LLC; BarMas,LLC; BetNam,LLC; BriPol,LLC; BruSed,LLC; BunVic,LLC; CalLad,LLC; CalNeb,LLC; CapMat,LLC; Capac,LLC; CraVar,LLC; DayMas,LLC; DesNot,LLC; DreOcc,LLC; DucPla,LLC; ElaMon,LLC; EntNil,LLC; EquiVas,LLC; FanPar,LLC; FasLan,LLC; FolNer,LLC; FraMor,LLC; GimVea,LLC; GosNel,LLC; GraMet,LLC; HadOpp,LLC; HanMea,LLC; HarNol,LLC; HeaPle,LLC; InaNur,LLC; InkSen,LLC; IntPar,LLC; IsaMai,LLC; JamVor,LLC; JitNom,LLC; JonMor,LLC; JudPur,LLC; JusLem,LLC.

[3] Exhibit A contains the complete Assurance of Discontinuance between Minnesota and MPHJ. Also, see http://arstechnica.com/tech-policy/2013/08/scanner-trolls-kicked-out-of-minnesota/

ARGUMENT

Rule 24 of the Federal Rules of Civil Procedure allows an applicant intervention in a pending suit. That applicant must, however, show (1) an interest relating to the property or transaction that is the subject of the action ("cognizable interest"); (2) that it is so situated that disposing of the action may, as a practical matter, impair or impede the applicant's ability to protect that interest; and (3) that existing parties to the pending suit do not adequately represent that interest. Fed. R. Civ. P. 24(a)(2). The intervenor must satisfy all three parts of the test. *Chiglo v. City of Preston*, 104 F.3d 185, 187 (8th Cir. 1997). Intervention must also be timely. *Id.* Failure to satisfy any one of these requirements is fatal to the application for intervention. *Worlds v. Dep't of Health & Rehab Servs.*, 929 F.2d 591, 595 (11th Cir. 1991). In the Eighth Circuit, besides meeting the Rule 24 test, the intervenor must also possess standing to have a right of intervention. *Mausolf v. Babbit*, 85 F.3d 1295, 1300 (8th Cir. 1996); *Planned Parenthood v. Ehlmann*, 137 F.3d 573, 577 (8th Cir. 1998).

Alternatively, this Court may permit anyone to intervene in a pending action if intervention is timely and if that proposed intervenor "has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(b).

MPHJ has failed to establish that it can meet the test required by Rule 24(a)(2). For the same reasons, as delineated below, this Court should not permit it to intervene.

I. MPHJ HAS NOT SHOWN THAT IT MAY INTERVENE AS OF RIGHT, PURSUANT TO RULE 24(a)(2).

MPHJ has failed to establish that its can intervene as of right because it cannot show that it has a cognizable interest in this litigation, and because it cannot show that disposing of the action

would impair or impede its ability to protect that interest. As well, it does not possess sufficient standing.[4]

a. MPHJ has failed to show it has a cognizable interest in this proceeding because its claimed interest is not "direct, substantial, and legally protectable."

An interest is cognizable under Rule 24(a)(2) *only* where it is "direct, substantial, and legally protectable." *United States v. Union Elec. Co.*, 64 F.3d 1152, 1161 (8th Cir. 1995). "Direct" is "as opposed to tangential or collateral." *Id.,* at 1161. That interest must also be "recognized," i.e., both "substantial" and "legally protectable." *See SEC v. Flight Transp. Corp.*, 699 F.2d 943, 949 (8th Cir. 1983) (interest asserted must be "'significantly protectable interest' in the primary litigation" (internal citations omitted)).

MPHJ has failed to meet this standard. In short, MPHJ's interest, though similar to Activision—effectuating a patent solicitation campaign and collecting license fees—is wholly separate from the primary litigation. Ostensibly, this interest is in pursuing its own patent licensing schemes in Nebraska. But that interest is not "direct," because it is not connected to the interests of Activision. At best, it is *similar*, but that does not make a "cognizable interest" under Rule 24.

Statements made by Farney Daniels seem to indicate, as well, that any interest MPHJ has is "speculative." *Union Elec. Co.*, *supra*, 64 F.3d at 1162 (an "intervenor cannot rely on an interest that is wholly remote and speculative"). The July 15, 2013 letter to the Attorney General's Office from Farney Daniels (Filing 29) notes that "Thus, at present, MPHJ has no licensing activity in Nebraska, and no open matters in Nebraska, nor any present intention of resuming its licensing activity in Nebraska pending further review." Filing 29-5, p. 6. The declaration of Bryan Farney ("Farney")

[4] Because MPHJ and Activision involve distinct patent infringement campaigns, Defendants do not contend the third prong of the Rule 24 test—that the current parties would provide inadequate representation—despite the fact that it appears the exact same attorneys seek to represent both entities. Defendants also do not contest that intervention was timely.

notes that at the time of conversations with the Attorney General's Office—again, July 2013—"MPHJ had no open matters pending with any company in Nebraska, and would not initiate any activity in Nebraska without first informing" the Attorney General's Office. Filing 29-1, ¶ 62. This is consistent with the fact that MPHJ has not filed suit for patent infringement against anyone, ever.

Yet, curiously, MPHJ now contends that it "is prepared to file suits against entities which, on information and belief, have operations in Nebraska." Filing 54, p 2. It has included an "example" complaint that is "redacted for confidentiality." *Id.* The Court should parse MPHJ's words carefully here: they do *not* evince an intention to resume licensing activity in Nebraska, but rather just show intent to continue licensing activity in *other* states that may have some tangential connection with Nebraska by having "operations" in the state. The attached complaint's being redacted allegedly for "confidentiality" also serves the purpose of obscuring whether MPHJ really intends to bring any enforcement actions in Nebraska—especially given their prior statements to the Attorney General that it had no intention of any new licensing activity. In fact, the forum selected for the suit is apparently to be filed in U.S. District Court in Delaware—not Nebraska. Filing 55-1. As previously indicated to this Court, Defendants have acknowledged that their cease and desist order could not prevent the filing of a lawsuit—nor any licensing activity whatsoever—outside the State of Nebraska. Thus, the attached complaint and MPHJ's claims in its filings are not relevant or dispositive of whether MPHJ has a cognizable interest in this litigation, and indicate that their claims to be "prepared" are actually speculative.

Furthermore, *even if* MPHJ actually had intention to start a new patent solicitation scheme in Nebraska, that would require several things to happen: a potential infringer to be identified (if any actual process is done to identify them); notice by MPHJ to be sent to that potential infringer; an inability to reach a licensing agreement between the potential infringer and MPHJ, despite negotiations; a complaint to eventually be filed; and MPHJ to ultimately enlist Farney Daniels as its

counsel in the matter. In other words, the interest seems to be contingent upon several things happening. But an interest that is "contingent upon the occurrence of a sequence of events before it becomes colorable" is not sufficient to satisfy Rule 24(a)(2). *Standard Heating & Air Conditioning Co. v. City of Minneapolis*, 137 F.3d 567, 571 (8th Cir. 1998), *quoting Washington Elec. v. Mass. Mun. Wholesale Elec.*, 922 F.2d 92, 97 (2d Cir. 1990).[5]

Neither could MPHJ claim that its property interest in its patents gives it a "cognizable interest" for the purposes of intervention. "Interests in property are the most elementary type of right that Rule 24(a) is designed to protect." *Diaz v. Southern Drilling Corp.*, 427 F.2d 1118, 1124 (5th Cir. 1970); *Planned Parenthood of Minnesota, Inc. v. Citizens for Community Action*, 558 F.2d 861, 869 (8th Cir. 1977). Here, however, there is no property interest. Presumably, MPHJ has no financial stake at all in Activision's patents or its patent licensing scheme. As well, the issues regarding the validity of the MPHJ—or for that matter, Activision—patents are *not* an actual issue in Counts II or III, and would not be with MPHJ as intervenor. The issue with Farney Daniels is their campaign of misleading, false, and deceptive tactics used to obtain licenses from Nebraska small businesses, consumers, and nonprofits, despite having no intention to file suits for patent infringement. While MPHJ could conceivably argue that ultimately their economic interests of enforcing their patents—and making money off deceiving small businesses, consumers, and nonprofits—could be affected by this litigation, an economic interest in the outcome of the litigation is not itself sufficient to warrant mandatory intervention. *Curry v. Regents of the Univ.*, 167 F.3d 420, 422-23 (8th Cir. 1999) ("The Movants merely have asserted an economic interest, maintaining the quantum of their funding, in the outcome of this litigation…[this] simply does not rise to the level of a legally protectable interest

[5] Defendants note this argument also applies to whether the interest was "impaired" under the second prong of this test. "Questions of the adequacy of an interest and its potential for impairment may overlap in cases in which the interest is in some way 'contingent.'" *Union Elec. Co.*, *supra*, at 1162.

necessary for mandatory intervention"). Thus, MPHJ does not have any kind of property interest in this litigation, and cannot claim that that either gives it a cognizable interest under Rule 24.

MPHJ instead contends that it "undoubtedly" possesses a cognizable interest because "[t]he Nebraska AG apparently agrees." Filing # 51, p. 5. Putting aside the fact that any supposed agreement would not vest MPHJ in a right of intervention under Rule 24, this statement is disingenuous. The Attorney General has never agreed to such a contention—and, as evidenced by this brief, contends that MPHJ has no such right. If the Court allowed MPHJ to intervene, and finds that they have some "cognizable interest" in this litigation, it is difficult to see how every single client of Farney Daniels—perhaps any one or all of MPHJ's subsidiary LLCs—could seek to intervene.

b. MPHJ has failed to demonstrate that its interest may be impaired if it is not permitted to intervene.

While a proposed intervenor need only demonstrate that its interest "may," as a practical matter, impair or impede the intervenor's ability to protect its interests, *Kansas Public Employee Retirement System v. Remier & Kroger Associations, Inc.*, 60 F.3d 1304, 1307 (8th Cir. 1995), MPHJ is incapable of such a showing. MPHJ cannot change the fact that a ruling from this Court would not impair its interests whatsoever. *See Edmondson v. Nebraska*, 383 F.2d 123, 126 (8th Cir. 1967) (denying intervention when intervenor "has absolutely no connection with this portion of the primary litigation and would in no way be bound by the court's decree on the subject").

MPHJ even seems to acknowledge this fact in its filings on this issue: "[I]f the Court were to grant Activision the permanent relief it seeks here…any order issued by this Court would be limited to Activision." Filing 51, p. 10. At best, given that any ruling would be limited to Activision, such a ruling could only be persuasive to other another forum looking at MPHJ's entirely separate scheme. But the mere fact that a ruling in the underlying litigation "might have a persuasive effect on later

actions" is "insufficient to supply the necessary practical impediment" to intervene as of right. *Fox v. Tyson Foods, Inc.*, 519 F.3d 1298, 1304 (11th Cir. 2008).

Although both MPHJ's actions and Activision's actions share similar individuals (the attorneys at Farney Daniels) they are separate campaigns. MPHJ notes as much: "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." Filing 51, p. 10. As well, at the hearing on September 19, 2013, Bryan Farney had the following exchange with the Court:

> MR. FARNEY: The—I think the letter you're talking about where there's a lot of infringers is that MPHJ scanner client which is separate from Activision, and they're not really a party here or—or—
>
> THE COURT: They're not part of this litigation.
>
> MR. FARNEY: They're not part of this.

Filing 49, 19:10-15.

There is simply no way MPHJ can show that an order of this Court in this pending litigation, whatever the type or outcome, would, in any way, impair any interest it could articulate. As MPHJ could, if it so chose, seek other avenues to vindicate its alleged interest, intervention is not appropriate here. *See United States v. Metro. St. Louis Sewer Dist.*, 569 F.3d 829, 841 (8th Cir. 2009) *citing United States v. City of New York*, 198 F.3d 360, 367 (2d Cir. N.Y. 1999) (denial of intervention would not foreclose the appellants' opportunities to vindicate their interests in other settings).

c. MPHJ does not possess standing in this case.

In the Eighth Circuit, an intervenor must satisfy both the requirements of Rule 24 *and* possess standing. *Mausolf v. Babbit*, *supra*; *Planned Parenthood v. Ehlmann*, 137 F.3d 573, 577 (8th Cir. 1998). MPHJ lacks standing for the same reasons—previously articulated to this Court—that Activision lacks it: the cease and desist order issued by the Attorney General applies to Farney

Daniels, not MPHJ (or Activision). As Defendants have already articulated their standing arguments in multiple filings before the Court, we will withhold reiterating those arguments here. *See* Filings 22 and 59.

II. THIS COURT SHOULD NOT PERMIT MPHJ TO INTERVENE PURSUANT TO RULE 24(b).

For the same reasons as articulated in (I) above, the Court should not permit MPHJ to intervene under Rule 24(b).

CONCLUSION

For the foregoing reasons, Defendants respectfully request this Court deny MPHJ's motion to intervene as of right under Rule 24(a)(2), and likewise refuse to permit its intervention under Rule 24(b).

Submitted this 25th day of October, 2013.

JON BRUNING, DAVID D. COOKSON, DAVID A. LOPEZ, Defendants.

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CERTIFICATE OF SERVICE

I hereby certify that on October 25, 2013, I electronically filed the foregoing document with the Clerk of the United States District Court for the District of Nebraska, using the CM/ECF system, causing notice of such filing to be served upon all parties' counsel of record.

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