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INTRODUCTION

Intervenor MPHJ Technology Investments, LLC (“MPHJ”) respectfully submits this Reply 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, alternatively, Rule 24(b)(1)(B).

The Opposition submitted by Defendants Bruning, Cookson and Lopez (“the AG Defendants”) comes as something of a surprise. At issue in Counts II and III of the present suit is the July 18 Order they issued with respect to Farney Daniels PC. As has been previously established, the AG Defendants issued their Order because of Farney Daniels’ representation of Activision and MPHJ. This Court has already found Activision has a likelihood of success in showing the July 18 Order is an unconstitutional restraint on its right to choice of counsel for patent enforcement, and has granted preliminary relief to that effect. *See* Filing 41. Now, the only other party on whose conduct the Order was based, MPHJ, seeks to intervene to have its same interests addressed, and to seek the same relief sought by Activision. That the AG Defendants’ desire to avoid having MPHJ bring the same claims, to protect the same interest in preserving choice of counsel for patent enforcement, and to seek the same or similar preliminary relief, is plainly without basis. As shown herein, the Court should permit MPHJ to intervene as of right under Rule 24(a)(2).

In the alternative, MPHJ moved for intervention by permission, and the AG Defendants make no argument for why permissive intervention should not be granted, beyond their arguments for why intervention as of right should be denied. But intervention under Rule 24(b)(1)(B) is a concept distinct from Rule 24(a)(2). MPHJ explains in this Reply that the arguments presented by the AG Defendants would separately not warrant denial of permission to intervene on that basis.

ARGUMENT

Setting aside the AG Defendants' pejorative and false comments about MPHJ that are not relevant here, the AG Defendants' Opposition that MPHJ may not intervene "as of right" under Rule 24(a)(2) is based upon the following arguments: (1) that MPHJ does not have a cognizable interest; (2) that MPHJ has not demonstrated its interests might be impaired if not allowed to intervene; and (3) MPHJ does not have standing. Each point is shown below to be without merit. Then, separately, MPHJ demonstrates that even if intervention as of right was not clear (which it is), that permissive intervention should be granted. Finally, MPHJ briefly responds to some of the pejorative statements made by the AG Defendants so that those misrepresentations are not left unrebutted.

I. MPHJ HAS A RIGHT TO INTERVENTION UNDER RULE 24(A)(2)

As an initial matter, the parties agree that MPHJ should be permitted to intervene as of right if it shows: (1) an interest relating to the property or transaction that is the subject of the action ("cognizable interest"); (2) that is so situated that disposing of the action may, as a practical matter, impair or impede MPHJ's ability to protect that interest; and (3) that existing parties to the pending suit do not adequately represent MPHJ's interest. Rule 24(a)(2); Filing 70, p. 3; Filing 51, p. 3. The AG Defendants concede the third prong is met (Filing 70, p. 4 n.4), and that the motion was timely (*Id.*). They challenge only the "cognizable interest" and "impairment" prongs of this test.

A. MPHJ's "Interest" In The Transaction At Issue In Counts II & III Is Cognizable

Both parties agree that to have an interest cognizable under Rule 24(a)(2), MPHJ's interest must be "direct, substantial, and legally protectable." The AG Defendants contend MPHJ fails this test because they argue MPHJ's only "interest" is in conducting its own patent

enforcement activity, and they argue that this interest is only “similar” to the interests of Activision. *Id.* at p. 4. The AG Defendants claim that MPHJ does not have an interest in this action because MPHJ does not have a financial stake in Activision’s patents or Activision’s licensing scheme. *Id.* at p. 6. The error the AG Defendants make is in their misapprehending Rule 24(a)(2) and the nature of MPHJ’s cognizable interest.¹

1. MPHJ Has An Interest In The Same “Property Or Transaction” At Issue In Count III – The Right To Choose Particular Counsel For Patent Enforcement

Under Rule 24(a)(2), MPHJ’s interest must relate to the “property or transaction” that is the subject of the action. The error made by the AG Defendants is in assuming that MPHJ’s “interest” at issue here is its interest in enforcing its patents, an interest the AG Defendants characterize as “similar” to Activision’s, but not the same. To the contrary, the “property or transaction” that is the subject of Count III of the main action relates to the AG Defendants’ July 18 Order, and its impairment on Activision’s right to choice of counsel.

The issue presented by Count III in the Activision suit is not the right of Activision to enforce its patent *per se*. Indeed, the AG Defendants insist Activision is free to do so with any counsel other than Farney Daniels. *See* Filing 41, p. 5. Instead, the interest at issue in Count III is Activision’s ability to exercise its constitutional right to choice of counsel in enforcing its

¹ *See, e.g., United States v. S. Fla. Water Mgmt. Dist.*, 922 F.2d 704, 707 (11th Cir. 1991) (explaining that “[a] nonparty may have a sufficient interest for some issues in a case but not others, and the court may limit intervention accordingly”). This conclusion is in concert with the well-settled policy considerations underlying Rule 24(a). *See, e.g., United States v. Union Elec. Co.*, 64 F.3d 1152, 1162 (8th Cir. 1995) citing *Nuesse v. Camp*, 385 F.2d 694, 700 (D.C. Cir. 1967) (“We think a more instructive approach is to let our construction be guided by the policies behind the ‘interest’ requirement. We know from the recent amendments to the civil rules that in the intervention area the ‘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.”).

patents.² In short, as this Court has found, Activision has a First Amendment right to communicate regarding its patents, and it has a First Amendment right to choose its counsel to represent it in making those communications. *See id.* at p. 12. It is the impairment of that right to choose Farney Daniels that is the subject of the main action.

The only two clients the AG Defendants have ever identified as being the basis of its Order are Activision, and MPHJ. *See, e.g.*, Filing 22, pp. 18-20 (explaining how letters sent by Farney Daniels on behalf of Activision and MPHJ allegedly violated the VCPA). MPHJ has the exact same interest as Activision in the impairment of constitutional rights presented by the July 18 Order. MPHJ also was using Farney Daniels to communicate about its patents, and wishes to choose to continue doing so, and to use that firm to bring suits. Thus, MPHJ's First Amendment right to choose its counsel to represent it in patent enforcement efforts is impaired identically as is presented in Activision's Count III. Even though the two parties' patents are different, and neither has any financial interest in the other, they each have the same interest in choosing the same counsel in enforcing those different patents. That interest in preserving the right to choice of counsel, which is the subject of Activision's suit now, is identical to the interest on which MPHJ seeks to intervene.

MPHJ's interest may be considered to be in the "property" or the "transaction" that is the subject of the Count III action, or both. The "transaction" at issue in Count III may be considered to be either the issuance of the July 18 Order itself, or the interference that Order presents with the right to choose counsel. Under either view, MPHJ's interest in that "transaction" is identical to that of Activision's. The July 18 Order applied to the law firm being

² Note that MPHJ focuses its argument on Count III of the main action, but believes these same arguments would apply to Count II.

used by each of them to enforce their patents. The July 18 Order interferes with the right of each to choose, and continue using, the Farney Daniels firm in their patent enforcement efforts.

One might additionally consider the right to choice of counsel that is impaired by the July 18 Order to be a form of property right. As the right to bring suit for patent infringement, and to notify others of patent infringement, is protected by the First Amendment, and the right to choice of counsel is an extension of, and a corollary to, that right, then the right to choose counsel to enforce your patents may itself be considered a form of “property.” In this sense, at least, it may not only be said that MPHJ’s interest lies in the same “transaction” that is the subject of Activision’s Count III, but also to be in the same “property” right as Activision’s – the right to choose Farney Daniels to handle patent enforcement activity.

Thus, the issue of whether the same “transaction” or “property” is involved is not, as the AG Defendants contend, the question of whether MPHJ has a financial or ownership interest in Activision’s patents. Activision’s patents, and their enforcement, is not directly the issue of Count III. It is instead Activision’s right to choose a particular counsel, and MPHJ shares this same interest in this same right.

2. Even If MPHJ’s Interest Was Not Identical To Activision’s, It’s Interest Is Sufficiently Cognizable Under The Doctrine Of “Negative Stare Decisis”

Even if one did view MPHJ’s interest in choosing Farney Daniels to represent it in patent enforcement activity, and the July 18 Order’s impairment of that right, to not be the same “property or transaction,” MPHJ would still have sufficient interest under the doctrine of “negative stare decisis.” Prior to 1966, intervention as of right required the intervenor to show that a ruling on the matter would act as res judicata to that party. *Atlantis Dev. Corp. v. United States*, 379 F.2d 818, 822-24 (5th Cir. 1967). This strict rule was specifically overturned by amendments to the rule in 1966. *Id.* Thereafter, a doctrine of “negative stare decisis” arose,

which recognized that where a ruling in the main action could create an unfavorable stare decisis effect on the intervenor in later bringing a related action, this potential adverse effect was sufficient interest to be cognizable. *Id.* at 828-29. Thus, in *Atlantis Dev. Corp. v. United States*, 379 F.2d 818, 829 (5th Cir. 1967), the court permitted intervention because “stare decisis . . . suppl[ied] that practical disadvantage which warrants intervention of right.” Other courts have agreed. *See, e.g., Stone v. First Union Corp.*, 371 F.3d 1305 (11th Cir. 2004) (the effects of an unfavorable district court’s decision supported intervention because that decision “would have significant persuasive effects”); *Doe #1 v. Glickman*, 256 F.3d 371 (5th Cir. 2001) (finding the intervenor would be prejudiced if not permitted to intervene because it would not be heard in a lawsuit that would have a stare decisis effect on the intervenor’s future lawsuit).

Here, consideration of the doctrine is plainly on point. Count III challenges the constitutionality of the July 18 Order in impairing the right to choice of counsel. The AG Defendants have invoked the same standing defenses as to both Activision and MPHJ. They have, in fact, defended their Order more in reference to MPHJ’s alleged conduct than that of Activision’s. *See* Filing 22, *passim*. A final judgment on whether that Order is constitutional will include decisions on standing, whether such an Order had lawful basis, and whether the rights impaired by that Order are protectable. All would be part of a challenge MPHJ would bring. A decision adverse to Activision on Count III could impair MPHJ’s rights to bring the same claim, even if it did not constitute *res judicata* with respect to MPHJ. On these grounds as well, MPHJ has an interest that is cognizable under Rule 24(a)(2).

3. MPHJ Also Has A Cognizable Interest In The Action Because Actions Taken On Its Behalf Will Be Litigated, And Possibly Analyzed As Part Of Count III

Depending upon how broadly one interprets the term “transaction” in Rule 24(a)(2), one can also see that MPHJ has an interest in the same “transaction” because the AG Defendants

defend their Order, in part, on the basis of actions taken by MPHJ, and Farney Daniels on behalf of MPHJ. The AG Defendants insisted in their Opposition to Activision's Motion for Preliminary Injunction that their Order was issued solely because, or at least primarily because, of actions taken by MPHJ and counsel on its behalf. *See, e.g.*, Filing 22, pp. 1-2; 20-21; 24 and 37. Given that the actions of MPHJ and its counsel appear to figure prominently in the defense to be presented by the AG Defendants, MPHJ has a direct and substantial interest in intervening to ensure that any of its conduct, or its counsel's conduct, is properly presented and defended. This, too, is a sufficiently cognizable interest. *See, e.g., Stone v. First Union Corp.*, 371 F.3d 1305, 1310 (11th Cir. 2004) (permitting other employees of a bank to intervene in an action challenging the bank's employment plan as discriminatory, because disposition of that action might lead to a negative stare decisis effect, and the ruling would be issued without analyzing each employee's specific injuries stemming from the plan and the manner in which each were discriminated against).

4. Even If The AG Defendants Were Correct That MPHJ's Interest Is Only In Its Own Patent Enforcement, The Law Is That This Would Be A Sufficiently Cognizable Interest

Even if the AG Defendants were correct that MPHJ's interest is only in its own patent enforcement, the law is that this would be a sufficiently cognizable interest. If the July 18 Order challenged by Count III were upheld, this would then impair MPHJ's right to retain Farney Daniels to enforce its patent rights as well. In addition to this being an impairment of a constitutional right of MPHJ, it would present a practical cognizable financial impairment as well. MPHJ would be forced to find substitute counsel, which would entail losing the benefit of Farney Daniels' knowledge of the case and technology, experience in the patents and the unique legal issues they present, and the like. The Eighth Circuit has held, in a related context, that it is

a sufficient interest for intervention under Rule 24(a)(2) if a ruling in the main case related to one property, could, as a practical matter, affect the value of the intervenor's property.

Thus, in *Planned Parenthood of Minnesota, Inc. v. Citizens for Community Action, et al.*, 558 F.2d 861 (8th Cir. 1977), the main action involved a challenge by Planned Parenthood to zoning restrictions on property where they proposed to build an abortion center. The intervenors sought to intervene, in part, on grounds that they owned property near the proposed center, and that a ruling in favor of Planned Parenthood would adversely impact their property values. The Eighth Circuit held this was a sufficiently cognizable interest under Rule 24(a)(2) to permit intervention as of right. Here, a ruling in favor of the AG Defendants would impact MPHJ's property interest – impairing its patent enforcement efforts at least to the extent of losing some or all of the benefit of Farney Daniels' counsel. This interest is sufficient to be cognizable under Rule 24(a)(2).

5. The AG Defendants' Other Arguments That MPHJ's Interest Is Not Cognizable Lack Merit

The AG Defendants have also made some peripheral arguments as to why MPHJ's interest in the present litigation should not be considered cognizable. They argue that MPHJ does not have an interest because (a) their Order does not prevent MPHJ from filing suits; (b) MPHJ is not prepared to bring suit against Nebraska infringers; and (c) if MPHJ were permitted to intervene, every client of Farney Daniels could presumably intervene. MPHJ addresses each of these arguments against intervention below.

Before addressing these, MPHJ first briefly notes the AG Defendants' odd citation to testimony from the September 19 hearing in which counsel for Activision (and MPHJ), Mr. Farney, informed the Court in the hearing that MPHJ was "not a part" of the litigation. How this

would be relevant to the Opposition is a mystery. It is certainly correct that at the time of the hearing MPHJ was not a “party.” Indeed, that is the entire point of their seeking to intervene.

a. That The July 18 Order Enjoins Patent-Related Communications, Apart From Patent Suits, Is Alone Sufficient To Give MPHJ A Cognizable “Interest” Under Rule 24(a)(2)

The AG Defendants argue MPHJ’s Motion to Intervene should be denied because their Order does not prevent MPHJ from filing suits. But not only is this disputed, and contradicted by the AG Defendants’ own actions, it is also an incomplete reason to deny intervention. MPHJ’s complaint in intervention also seeks an injunction against the Order preventing MPHJ from using Farney Daniels to send patent-related correspondence, such as Rule 11 patent infringement inquiry letters, and the like. Even the AG Defendants agree their Order does, and that they intend it to, prevent MPHJ from using Farney Daniels for this purpose. Thus, independent of any argument the AG Defendants have about whether the Order extends to suits, or whether MPHJ presently intends to file suits, MPHJ has sufficient interest in intervention alone from the impact of the Order on its ability to use Farney Daniels in sending patent-related correspondence. Filing 41 (“The inability of Farney Daniels to submit such letters to businesses in Nebraska clearly infringes on the First Amendment rights of Activision to be represented by the counsel of their choice”). *See also* Subsection (c) iii, *infra*.

Because the July 18 Order acts as a prior restraint on MPHJ’s constitutional free speech, there is a presumption of immediate harm without the need to identify a particular potential infringer in Nebraska. *See, e.g., Brownsburg Area Patrons Affecting Change v. Baldwin*, 943 F. Supp. 975, 983-84 (S.D. Ind. 1996) (finding standing and ripeness where plaintiff sought an injunction against enforcement of a statute against them by county and state election officials. Although the defendants in *Brownsburg* had yet to initiate any formal enforcement action against

the plaintiffs (and had no present intention to do so), this did not deprive plaintiffs of standing and ripeness because nothing prevented the defendants “from enforcing the law at any time.”).

Further, it is clear that “[i]n a free speech case asserting a pre-enforcement challenge . . . a plaintiff whose speech has been chilled has already suffered a direct injury, further supporting a finding that the case is ripe for review.” *Id.* at 984 (also citing *Parenthood Ass’n of Chicago Area v. Kempiners*, 700 F.2d 1115, 1122 (7th Cir. 1983) (separate opinion of Cudahy, J.) (“Requirements of ripeness are less strictly construed in the first amendment context due to the chilling effect on protected expression which delay might produce.”)). *See also Novell, Inc. v. Gribben*, 1999 U.S. App. LEXIS 1590 (9th Cir. Feb. 4, 1999) (in a § 1983 and declaratory judgment action seeking adjudication that defendant’s threats to seek action for violations of Nevada state laws violated plaintiff’s constitutional rights, the appellate court found the action was ripe because, although the defendant had not taken any formal action, the “plaintiff did not have to await the consummation of threatened injury to obtain preventative relief” because the “defendant’s threats chilled the plaintiff’s licensing program, which caused injury.”).

This Court has already concluded the Order is a “prior restraint” and it is clear that MPHJ has an imminent cognizable interest here. *See* Filing 41, p. 12 (“The court is deeply concerned about the ability of the Attorney General to issue cease and desist orders, prior to the conclusion of the investigation, prior to any negative findings, prior to any hearings, and prior to permitting submission of documents and evidence by the Farney Daniels law firm . . . The court finds the cease and desist order in this case is akin to a prior restraint.”). MPHJ has a constitutional right that is impaired by the July 18 Order, and on this basis alone has sufficient right to intervene.

b. The July 18 Order On Its Face Prevents MPHJ From Using Farney Daniels To File Suits Of The Type Set Forth In Its Pending Motion For Preliminary Injunction (Filing 53)

Turning to the AG Defendants' arguments that their Order does not extend to preventing MPHJ from using Farney Daniels to file suits in federal court, this is plainly not the case. First and foremost, the AG Defendants contradict their position by their own actions. Even though they claim in their Opposition that the July 18 Order does not prevent Farney Daniels from representing any party, including Activision, in federal litigation, they have appealed the Order of this Court that granted preliminary relief on that very point. Filing 65. This alone is sufficient to give MPHJ reasonable apprehension that the "prior restraint" intended by the Order extends to federal litigation, including the litigation MPHJ seeks to file by its Motion for Preliminary Injunction in Filing 53.

Even if their appeal was overlooked, the Order on its face prohibits suits, with the only question being the scope of the prohibition. The language of the Order required Farney Daniels 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 this office's investigation." Filing 7-1 (emphasis added). Certainly the plain meaning of the term "enforcement efforts" could be interpreted to include filing an infringement suit. Thus, on its face, the actual language of the Order includes litigation. While the AG Defendants deny it was intended to cover litigation, they have never rescinded or amended the Order.

Secondly, the reference to "efforts within the State of Nebraska" in the Order is at best ambiguous. While it might be read to refer to any enforcement effort having an impact in Nebraska, it might also mean to refer only to actions taken that actually occur in Nebraska. Given that the Order constitutes a "prior restraint" on free speech, its very ambiguity in this

regard supports that it can be challenged. However, here, it is the AG Defendants' own actions that have made it clear that they originally intended the former interpretation.

As the Court is aware, the AG Defendants have admitted that after they issued their Order, they called CenturyLink to inform them about the Order. Filing 49, pp. 48-50. The AG Defendants now argue that CenturyLink's counsel misconstrued the communication, or that Activision has misunderstood it, but the key is that they admit the communication occurred, and that they initiated it. *Id.* The relevance of CenturyLink is not limited to what the AG Defendants may have told CenturyLink about the Order, though that may become relevant during the suit. Instead, the relevance here is that the AG Defendants called CenturyLink at all.

This is significant because there is no dispute that, at that time, CenturyLink's only connection was that they had been sued by Activision in the Eastern District of Texas, and that CenturyLink (a Louisiana corporation with principle place of business in Louisiana) had some operations in Nebraska. The undeniable fact is that, on these circumstances, the AG Defendants felt the Order was sufficiently relevant to CenturyLink to call and tell them about the Order.

Certainly if the AG Defendants believe it has that effect, other third parties can take that position as well. For this reason, this Court rightly issued the preliminary injunction of Filing 38. Without that Order, Farney Daniels could not know for certain whether filing suit on behalf of Activision or MPHJ might violate the Order. And, just as significant, some defendant of a MPHJ suit, like CenturyLink, who had some operations in Nebraska, might make that argument, raising litigation issues MPHJ should not have to spend time and money addressing, and the forum court should not need to spend time considering.

Thus regardless of the agreement that the AG Defendants now make, that they may have verbally conceded their Order is overbroad as it relates to preventing conduct in litigation, or

even if one accepts their position that they have verbally amended the Order, a justiciable controversy exists sufficient for MPHJ to be entitled to seek, and to obtain, the same relief for itself as was obtained by Activision in Filing 38.

c. MPHJ's Interest In Intervention Is Not Speculative -- It Has Filed A Pending Request To File Suit

Contrary to the AG Defendants' assertion in their Opposition, the interest MPHJ has in challenging the July 18 Order is neither theoretical nor speculative. To begin with, MPHJ notes that the AG Defendants' assumption that MPHJ needs an identifiable imminent need to violate the Order, so as to have the right to intervene, is wrong as a matter of law. That the Order constitutes a "prior restraint" self-evidently establishes "harm," "standing," and "interest." *See infra*, subsection (a). But, separately, MPHJ shows it also has an immediate non-speculative interest in filing suits that independently refutes Defendants' position that MPHJ's interest is merely speculative.

(i) *Contrary To The Specious Assertion That MPHJ Does Not Intend To File Suits, MPHJ Has Filed A Motion For Preliminary Injunction To Permit It To Do Just That*

The relief MPHJ seeks is not theoretical. MPHJ has sought, in Filing 53, a preliminary injunction seeking the exact same relief as that granted in Filing 38. The AG Defendants only argument for why the need to file this suit is "speculative" is that MPHJ filed the Complaint in redacted form in connection with Filing 53. But MPHJ's legitimate interest in confidentiality with respect to a contemplated suit is no basis for arguing that the intended suit is speculative. Indeed, that MPHJ went to the effort to prepare and submit Filing 53 demonstrates its intent to file the suit. **Moreover, if the Court considers it significant to review in advance the**

unredacted complaint, MPHJ is perfectly willing to provide it to the Court for *in camera* review, and/or to file it under seal for the Court's review.³

In addition, since Filing 53 was submitted to the Court, MPHJ's counsel has been able to identify and prepare complaints against three additional companies who may be sued without the need to first send a Rule 11 pre-suit investigation letter. Redacted copies of each of these complaints are provided with this Reply. *See* Exhibits A-C. **As with the first complaint noted above, MPHJ will promptly provide these complaints in unredacted form to the Court for *in camera* review, and/or under seal if the Court so requests.⁴** These companies are each Delaware corporations, and MPHJ intends to sue them in Delaware. Unfortunately, all of them have at least some operations in Nebraska and therefore are currently subject to the July 18 Order. MPHJ's interest in intervention is thus further highlighted by its interest in promptly filing these suits as well.

(ii) ***That MPHJ Has A Cognizable Interest In Challenging The July 18 Order Is Not Contradicted By Its July 15 Letter To The Nebraska AG***

The AG Defendants also claim MPHJ's interests are speculative because of a letter written to them by MPHJ's counsel prior to issuance of the July 18 Order. Filing 70, p. 4. That letter, written on July 15, responded to the AG Defendants' inquiry regarding letters sent by MPHJ's subsidiaries to certain companies in Nebraska. It explained that the most recent letter sent to those entities had indicated that Canon customers were now covered by an agreement with Canon, that MPHJ was reviewing the significance of two recent petitions for review filed with respect to two of its patents, and that those entities could consider the licensing matter

³ MPHJ would also be willing to provide a copy to counsel for the AG Defendants subject to a suitable protective order and confidentiality agreement.

⁴ MPHJ would also be willing to provide copies of these complaints subject to the conditions of the preceding footnote.

closed unless it heard back from MPHJ or its licensing entity in the future. On this basis, the July 15 letter to Mr. Walklin then accurately stated that “MPHJ has no licensing activity in Nebraska, and no open matters in Nebraska.” Filing 29-5.

But the AG Defendants gloss over the important qualifier included in that representation, which ended with the following: “nor any present intention of resuming its licensing activity in Nebraska pending further review.” *Id.* at p. 6 (emphasis added). MPHJ and its counsel have been conducting that review,⁵ and are prepared to attempt to seek redress for infringement as appropriate. And, contrary to the AG Defendants’ representation, nothing in the July 15 letter prevents them from doing so.⁶

(iii) *MPHJ’s Cognizable Interest In Challenging The July 18 Order’s Impairment On Patent Communications Also Is Not Theoretical*

Finally, MPHJ briefly addresses the State’s argument that MPHJ’s interest is “theoretical” because “several things” would need to happen before MPHJ would need counsel for its patent enforcement efforts. Filing 50, pp. 5-6. Here, the AG Defendants fail to recognize that a pre-suit letter is not required for all patent infringement suits. The suits MPHJ now seeks to file are such that Rule 11 can be satisfied without the need to send a pre-suit investigation letter. Thus for these suits, the AG Defendants hypothetical “multi-stage” pre-suit scenario

⁵ Part of that review included seeing if the Patent Office would issue an expected new patent, one that further confirms the validity of the Klein Patents. That did happen, coincidentally, on July 18, 2013, when U.S. Patent No. 8,848,173 was issued. That patent, which includes more detail in its claims than the other Klein Patents, then took some time to investigate. Further, finding information regarding the relatively few companies for whom infringement can be ascertained without sending a letter took some time. But that work has been completed for four companies, all of which are now before the Court with this submission, and are relevant to the pending Motion for Preliminary Injunction. *See* Filing 53.

⁶ Moreover, in citing to the July 15 letter, the AG Defendants apparently forgot their agreement, reflected in that letter that they agreed that no “statement or disclosure provided in [the] letter” shall “constitute[] a waiver of any otherwise applicable privilege or immunity.” Even if the letter were otherwise read to be some waiver of MPHJ’s First Amendment right to sue, which of course it is not, the AG Defendants have already agreed to not cite the letter for such a purpose. Filing 29-5, p.1 n.1.

simply is wrong. *See e.g., W.L. Gore & Assocs. v. Medtronic, Inc.*, 778 F. Supp. 2d 667, 676-77 (E.D. Va. 2011) (patent suit may be filed without first providing notice to defendant or seeking license).

Moreover, even for those potential infringers for whom MPHJ needs to first send a pre-suit inquiry to satisfy Rule 11, nothing prevents MPHJ from choosing to have its counsel send that initial letter on its behalf. Thus, the AG Defendants' assumption that MPHJ itself would first need to send a letter before choosing counsel again misunderstands the options that are available to MPHJ for properly conducting its patent enforcement activity. In this respect, the AG Defendants also assume that MPHJ must also file a complaint before it needs to choose Farney Daniels to represent it. But as shown by Filing 53, MPHJ may choose to have Farney Daniels file the suit in the first instance (assuming of course, they are appropriately admitted for doing so in the particular court).

In short, nothing in the hypothetical sequence of events that the AG Defendants presuppose in order to contend that MPHJ's need to intervene is merely theoretical are steps that are required of MPHJ, or are steps for which MPHJ does not have a right to choose counsel to assist it in exercising that step. Obviously, MPHJ's interest is not "contingent upon several things happening," as MPHJ is prepared to file suit (and has a Rule 11 basis for doing so) immediately after this Court enters a Preliminary Injunction permitting it to do so (consistent with the Order already issued in Filing 38). *See* Filing 53.

B. MPHJ's Interest Will Be Impaired If It Is Not Permitted To Intervene

Given that MPHJ has a cognizable interest within the meaning of Rule 24(a)(2), it is plain that interest will be impaired if MPHJ is not allowed to intervene. MPHJ has a direct interest in its own right to choose Farney Daniels as counsel to both send patent-related communications, and to file suits. Further, the issues raised by Count II and Count III will involve conduct by

MPHJ and by counsel on its behalf, and rulings or proceedings in the main action in that regard could also impair MPHJ's interests if it were not allowed to intervene.

The AG Defendants assert that MPHJ may simply wait until the final disposition in this case is entered, and use that ruling as "persuasive" in another forum where MPHJ would seek the *exact* same relief against the *exact* same Defendants. Filing 70, p. 7. Of course, under the AG Defendants' scheme, MPHJ would presumably be required to wait years, until this case is fully litigated, to then get relief from the AG Defendants' unconstitutional Cease and Desist Order, and thereafter be permitted to file lawsuits against Nebraska businesses. Plainly, as patents are time-limited assets, such a suggested solution would hinder MPHJ's interests and not serve judicial economy. This controversy is live, here and now, and MPHJ should be permitted to intervene and protect its own interests (and not have to wait years to protect its interests merely because the AG Defendants oppose MPHJ's intervention).

Further, contrary to the State's assertions, there are scenarios in which an order by this Court would impair MPHJ's interests. For example, this Court could, in this case, make judgments about the scope of the Order, or about MPHJ's activity, that could impair MPHJ's interests. If MPHJ were not a party to this action, its voice could not be heard and the specific impact the Order has on MPHJ's constitutional and property rights would not be evaluated prior to such a holding by the Court. Further any precedential effect of this Court's decision would act as an impediment to the protection of MPHJ's constitutional rights. For at least these reasons, it is clear MPHJ's interest would be impaired if it is not permitted to intervene.

C. MPHJ Has Standing In This Case For The Same Reasons Activision Has Standing

The AG Defendants next argue that MPHJ lacks standing to intervene in this case for the same reasons it asserted Activision lacked standing – because, the AG Defendants argue, the

Cease and Desist Order only applies to Farney Daniels. Filing 70, pp. 8-9. Of course, this Court has already rejected the AG Defendants' arguments with respect to standing. *See* Filing 41.

Also, for the reasons discussed above, MPHJ has suffered a concrete, imminent and cognizable injury that is directly traceable to the Cease and Desist Order, and will be redressed by a favorable ruling by this Court. *See Monsato v. Geerston Seed Farms*, 130 S. Ct. 2743, 2752 (2010). Accordingly, MPHJ has standing to intervene in this case.

D. Because The AG Defendants Chose To Enjoin A Law Firm, Rather Than A Particular Company, They Cannot Now Complain If More Than One Client Is Affected By The Unconstitutional Order

The AG Defendants also argue intervention by MPHJ should be denied because "every single client of Farney Daniels . . . could seek to intervene" here. Filing 70, p. 7. But this theoretical possibility only highlights the breathtaking unconstitutionality of the AG Defendants' Order.⁷ The argument does not present any reason why MPHJ, a client with an immediate and direct impairment from that Order, should not have a right to intervene. Moreover, MPHJ is not just "any client." MPHJ's name and activities are scattered all over the AG Defendants' pleadings in this case as supporting the issuance of its Cease and Desist Order. Clearly that evidences, at a minimum, MPHJ's cognizable interest here. *See, e.g.*, Filing 22, pp. 1-2; 20-21; 24 and 37. Indeed, the only two parties on whom the AG Defendants purported to base their Order was Activision and MPHJ. Logic, efficiency, and simple fairness, suggest that they be allowed to challenge that baseless and unconstitutional Order in the same proceeding.

In sum, MPHJ has established it has interests which satisfy the requirements of Rule 24(a)(2), and it should be permitted to intervene as of right. Importantly, "Rule 24 is to be

⁷ Indeed, the Order is so broad it would prevent Farney Daniels from representing in the future a Nebraska patent owner against a Nebraska infringer. However, at the same time, not every client of Farney Daniels is a potential intervenor here. Farney Daniels represents companies who are defendants in patent infringement suits. It also represents patent owners whose patents are infringed by companies having no operations in Nebraska.

construed liberally, and doubts resolved in favor of the proposed intervenor.” *Turn Key Gaming, Inc. v. Oglala Sioux Tribe*, 164 F.3d 1080, 1081 (8th Cir. 1999). The Court should do so here.

II. IN THE ALTERNATIVE, MPHJ SHOULD BE PERMITTED TO INTERVENE IN THIS CASE PURSUANT TO RULE 24(B)(1)(B)

If this Court finds that MPHJ may not intervene as of right pursuant to Rule 24(a)(2), it should nevertheless allow it to permissively intervene pursuant to Rule 24(b)(1)(B). Rule 24(b)(1)(B) allows a court to permit anyone to intervene who “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). Here, MPHJ clearly has a claim that it shares with Counts II and III of Activision’s Amended Complaint that includes both common questions of law and facts – the unconstitutional Cease and Desist Order.

Moreover, in defending the July 18 Order as it relates to Activision, the AG Defendants heavily rely upon conduct of MPHJ and of Farney Daniels on behalf of MPHJ. *See, e.g.*, Filing 22, pp. 1-2; 20-21; 24 and 37. These questions of fact are plainly in common. Also, as with Activision, the failure of the AG Defendants to have any lawful basis for their Order as it impacted MPHJ will raise many of the same questions of law as are raised by the main action – including the right to choice or counsel, the First Amendment right to send patent notice letters, the lack of authority of a State Attorney General to interfere with federal litigation, and the like.

Judicial efficiency will be served by hearing these same facts and legal issues in the same case. MPHJ’s rights to have these same factual and legal points considered contemporaneously with those issues as raised in the main action will be served by intervention. Accordingly, even if MPHJ had not established that it has a right to intervene, this court should still permit it to intervene in this action pursuant to Rule 24(b)(1)(B). *See Turn Key Gaming*, 164 F.3d at 1081.

III. THE ASPERSIONS CAST BY THE AG DEFENDANTS REGARDING MPHJ ARE BOTH SPECIOUS AND IRRELEVANT

The Opposition of the AG Defendants is particularly inappropriate where they strenuously seek to avoid having their conduct against MPHJ considered by this Court, and, at the same time, repeatedly attack MPHJ as a “patent troll.” It is plain that this assertion has no relevance to the issues presented by MPHJ’s Motion to Intervene. Indeed, federal courts are uniform that patent owners who do acquire patents, and do not have a business covered by those patents, have no less legal rights than any other type of patent owner.⁸

Making such irrelevant characterizations to a patent owner as being a “troll” has been held to be “poorly taken” and to damage the party’s credibility. As has been noted, such comments are made only to evoke an emotional response, and to attempt to prejudice the Court against MPHJ. As such, these comments are wholly improper. *See Chrimar Systems, Inc. v. Foundry Networks, Inc.*, 2013 U.S. Dist. LEXIS 143103, *8 (E.D. Mich. Oct. 3, 2013). Indeed, as they are made with the intent to prejudice the Court, and to harass MPHJ, they are not consistent with the standards of conduct established by the Federal Rules and applicable codes.

⁸ Federal Courts are consistent in holding that the fact that MPHJ is a non-practicing entity simply has no bearing on whether it should be permitted to intervene here, as its legal rights are no different than any other patent holder. *See Cradle IP, LLC v. Tex. Instruments, Inc.*, 2013 U.S. Dist. LEXIS 19245, at *6 (D. Del. Feb. 13, 2013) (“many businesses and academic institutions enforce their patent rights through [non-practicing entities]; such a business strategy is not nefarious. The court declines to treat such non-practicing entities as anything less than holders of constitutionally protected property rights, those rights having been legitimized by the Patent & Trademark Office”); *Advanced Processor Tech, LLC v. Atmel Corp.*, 2013 U.S. Dist. LEXIS 43050, at *20 (E.D. Tex. Mar. 26, 2013) (same); *Parallel Networks, LLC v. Netflix, Inc.*, 2008 U.S. Dist. LEXIS 123563, at *20 (E.D. Tex. Dec. 23, 2008) (plaintiff’s “status as a non-practicing entity has no bearing on whether it will be prejudiced by a stay because every patentee has equal rights under the law to enforce his patent rights.”); *Tex. Data Co., L.L.C. v. Target Brands, Inc.*, 771 F. Supp. 2d 630, 638 (E.D. Tex. 2011) (“the ‘patent troll’ label [is] often ascribed to entities created solely to buy patents and then license them or bring patent infringement suits. But these entities own a legitimate property right—the patent—that they are seeking to enforce. The Court is not aware of any rules that apply differently to them.”).

It is also quite odd that AG Defendants wish to repetitively state the canard that MPHJ, or its counsel, does not intend to file suit. To begin with, MPHJ has filed a Motion for Preliminary Injunction seeking just that right – the right use bring suit on its patents using Farney Daniels. *See* Filing 53. Further, once Activision obtained relief in the main action, Farney Daniels moved to be admitted *pro hac vice* in pending cases, and has also filed several additional suits on behalf of Activision. The allegation is simply false, and the AG Defendants know it to be false.

In addition, the AG Defendants knowingly mischaracterize the agreement MPHJ reached with the Minnesota Attorney General. There, because that Attorney General was also threatening frivolous litigation, MPHJ decided to simply enter into an agreement to avoid needless litigation. But, contrary to the AG Defendants' mischaracterization, MPHJ did not agree to discontinue its activities in Minnesota. Instead, it agreed that for any new patent inquiry letters it wished to send, it would agree to first permit the Minnesota AG the right to review and to consent to such letters. That consent cannot be withheld without valid basis. *See* Filing 71-2, p. 4.

In short, none of the spurious disparaging comments made by the AG Defendants in their Opposition have any relevancy to the question of whether MPHJ should be permitted to intervene.

CONCLUSION

For the foregoing reasons, MPHJ respectfully requests an Order granting its Motion to Intervene pursuant to Rule 24(a)(2), or, in the alternative, pursuant to Rule 24(b)(1)(B).

November 4, 2013

MPHJ TECHNOLOGY INVESTMENTS,
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CERTIFICATE OF SERVICE

I hereby certify that all counsel of record, who are deemed to have consented to electronic service are being served November 4, 2013, with a copy of this document via the Court's CM/ECF system.

/s/ W. Bryan Farney
W. Bryan Farney