IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

3M COMPANY, Plaintiff, - v - HARVEY BOULTER, PORTON CAPITAL TECHNOLOGY FUNDS, PORTON CAPITAL, INC., LANNY DAVIS, LANNY J. DAVIS & ASSOCIATES, PLLC, and DAVIS-BLOCK LLC Defendants.	:	Civil Action No. 1:11-cv-01527-RLW Judge Robert L. Wilkins

CONSENT MOTION OF THE DISTRICT OF COLUMBIA TO INTERVENE FOR THE LIMITED PURPOSE OF DEFENDING THE VALIDITY OF A STATUTE ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA

Pursuant to Fed. R. Civ. P. 24, the District of Columbia ("the District") respectfully moves the Court for leave to intervene in this action. In this case, Plaintiff has asserted that the District of Columbia Anti-SLAPP Act of 2010, D.C. Law 18-351, *codified at* D.C. Official Code §§ 16-5501 *et seq.*, violates the Home Rule Act. *See* 3M Company's Motion to Strike Defendants' Special Motion To Dismiss And Cross-Motion For Discovery And Continuance, at 21–25 (Doc. No. 16) (October 31, 2011). The District seeks to intervene solely for the limited purpose of presenting argument to defend the validity of the Anti-SLAPP Act, a statute enacted by the unanimous vote of the DC Council and signed by Mayor Gray that sat before Congress for the required period of review and took legal effect earlier this year, and to assert its applicability in federal court. The District takes no position on the merits of any parties' claims or defenses in the underlying lawsuit, does not intend to burden the Court or parties with pleadings other than this motion and any memoranda and oral argument concerning the Anti-SLAPP Act's validity,

and does not intend to serve discovery on any party. As set forth in the attached memorandum, the Plaintiff's Motion to Strike Defendants' Special Motion To Dismiss, as well as the text of Fed. R. Civ. P. 24, make clear that the District has a right to intervene here because the validity of a District law affecting the public interest has been drawn into question.

Pursuant to LCvR 7(m), the undersigned discussed this motion with counsel for the parties, who consent to the relief sought herein, and to the suggested briefing schedule set forth in the proposed order attached hereto.

DATE: November 4, 2011

Respectfully submitted,

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DISTRICT OF COLUMBIA'S MEMORANDUM
IN SUPPORT OF ITS CONSENT MOTION TO INTERVENE

Pursuant to Fed. R. Civ. P. 24, the District of Columbia seeks leave to intervene in this action, with the consent of the parties, for the limited purpose of defending the validity of its legislation, a provision of which has been drawn into question in this matter, and the applicability of its legislation in federal court. The District takes no position on the merits of any parties' claims or defenses in the underlying lawsuit, does not intend to burden the Court or parties with pleadings or its participation in hearings other than this motion and any memoranda and oral argument concerning the Anti-SLAPP Act's validity, and does not intend to serve discovery on any party. The District is entitled to intervene in this action as of right. The motion should be granted.

Background

On October 6, 2011, Defendants filed a Special Motion to Dismiss the Complaint, pursuant to D.C. Official Code § 16-5502 *et seq.* ("the Anti-SLAPP Act"). On October 31, 2011,

Plaintiff filed a Motion to Strike Defendants' Special Motion to Dismiss, asserting that the Anti-SLAPP Act, D.C. Law 18-351, *codified at* D.C. Official Code §§ 16-5501 *et seq*., is invalid under the Home Rule Act because it is legislation "with respect to" Title 11 of the District of Columbia Code.[1] *See* 3M Company's Motion to Strike Defendants' Special Motion To Dismiss And Cross-Motion For Discovery And Continuance, at 21–25. Further, Plaintiff claims that the protections of the Anti-SLAPP Act are inapplicable in federal court. *Id*. at 27–31.

The District's Motion to Intervene Should be Granted

Under Fed. R. Civ. P. 24(a), the District has a right to intervene in this case for the limited purpose of defending the validity of the Anti-SLAPP Act and its applicability in federal court. Rule 24(a) provides, in relevant part:

> On timely motion, the court must permit anyone to intervene who... claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest unless the applicant's interest is adequately represented by existing parties.

Fed. R. Civ. P. 24(a).

The D.C. Circuit has set forth four elements that must be met to qualify for an intervention as of right: "(1) the timeliness of the motion; (2) whether applicant 'claims an interest relating to the property or transaction which is the subject of the action'; (3) whether 'the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest'; and (4) whether 'the applicant's interest is

[1] The District of Columbia Self-Government and Government Reorganization Act of 1973 is also known as the "Home Rule Act." *See, e.g., Heller v. District of Columbia*, ___ F.3d ___, 2011 WL 4551558, *3–*4 (D.C. Cir. Oct. 4, 2011).

adequately represented by existing parties.'" *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 732 (D.C. Cir. 2003).[2] All four elements support intervention here.

First, the District's motion is timely. Timeliness is measured from the time when the prospective intervenor "knew or should have known that any of its rights would be directly affected by the litigation." *Nat'l Wildlife Fed'n v. Burford*, 878 F.2d 422, 433–34 (D.C. Cir. 1989), *rev'd on other grounds sub nom. Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871 (1990). In this case, the Plaintiff filed its motion challenging the validity of the Anti-SLAPP Act on October 31, and the District is filing this motion less than a week later; this is plainly sufficient to meet the timeliness standards set forth by the D.C. Circuit. *See, e.g., Roeder*, 333 F.3d at 233 (holding that the United States' motion to intervene was timely because the United States moved to intervene less than thirty days after learning of a potential conflict with an executive agreement).

Second, the District has an interest in the transaction that is the subject matter of the suit because it has a statutory duty to defend the Plaintiff's challenge to the validity of a provision of District law. *See* D.C. Official Code § 1-204.22 ("[T]he Mayor shall be responsible for the proper execution of all laws relating to the District, and for the proper administration of the affairs of the District coming under his jurisdiction or control . . . ."); *see also id.*, at § 1-301.81(a)(1) ("The Attorney General for the District of Columbia . . . shall have charge and conduct of all law business of the said District and . . . shall be responsible for upholding the public interest. The Attorney General shall have the power to control litigation and appeals, as well as the power to intervene in legal proceedings on behalf of this public interest."). Indeed,

[2] While there is generally an Article III standing requirement for those seeking to intervene, the D.C. Circuit has held that "any person who satisfies Rule 24(a) will also meet Article III's standing requirement." *Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 233 (D.C. Cir. 2003) (citing *Sokaogon Chippewa Cmty. v. Babbit*, 214 F.3d 941, 976 (7th Cir. 2000)).

the Superior Court of the District of Columbia has recently recognized this interest in granting the District's motion to intervene in a similar case regarding a Home Rule Act challenge to the validity of the Anti-SLAPP Act. *See* Order Granting District of Columbia's Motion to Intervene, *Snyder v. Creative Loafing, Inc.*, Case No. 2011 CA 003168 B (Super. Ct. of D.C. Sept. 1, 2011).

Third, the resolution of Plaintiff's challenge to the validity of the statute could impair the District's ability to protect its interests. "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." *HSBC Bank USA, N.A. v. Mendoza*, 11 A.3d 229, 235 (D.C. 2010) (citations omitted). It is clearly possible that, if the Court rules in favor of Plaintiff's assertions regarding the Anti-SLAPP Act, it would cast grave doubt on the validity of that legislation or its applicability in federal court, and could have a profound impact on the rights of political participants in the District of Columbia who would otherwise seek to invoke the protections of the Anti-SLAPP statute. Such possibility, alone, is sufficient to satisfy this element of the test for mandatory intervention. *See Akiachak Native Community v. U.S. Dept. of Interior*, 584 F.Supp.2d 1, 7 (D.D.C. 2008) ("[T]he prejudice caused by an unfavorable judgment in the present case would sufficiently impair Alaska's interests for the purpose of satisfying Rule 24(a) intervention as of right.").

The final factor under Rule 24(a) intervention imposes a minimal burden on the District. "[T]he standard for measuring inadequacy is low . . . ." *Fund for Animals*, 322 F.3d at 736 n.7. While the Defendants may defend the validity of the Anti-SLAPP and assert its applicability in federal court, their articulated views, even if they substantially overlap with the District's, are not equivalent to the position of the sovereign on important public-interest legislation. This factor, too, weighs in favor of mandatory intervention. *See HSBC Bank*, 11 A.3d at 236 (putative

intervenor need only show "'that representation of his interest 'may be' inadequate . . . .' This is true even if there is a significant overlap between the would-be intervenor's interest and that of a party . . . .") (quoting *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n. 10 (1972)); *Atlantic Sea Island Group LLC v. Connaughton*, 592 F.Supp.2d 1, 7 (D.D.C. 2008) (holding that the State of New Jersey could intervene as of right; the existing defendants "cannot be expected to protect New Jersey's interest to its full extent.").

Further, and in the alternative, the District should also be permitted to intervene under Rule 24(b). Rule 24(b)(2)(A) states:

> On timely motion, the court may permit a federal or state governmental officer or agency to intervene if a party's claim or defense is based on . . . a statute or executive order administered by the officer or agency.

Courts have found that "[w]hile a public official may not intrude in a purely private controversy, permissive intervention is available when sought because an aspect of the public interest with which he is officially concerned is involved in the litigation." *In re First Databank Antitrust Litigation*, 205 F.R.D. 408, 414 (D.D.C. 2002) (quoting *Nuesse v. Camp*, 385 F.2d 694, 706 (D.C. Cir. 1967)). As noted above, the Office of the Attorney General of the District of Columbia is charged with conducting all legal business of the District of Columbia in the public interest, which includes the defense of laws designed to benefit its citizens. *See* D.C. Official Code § 1-301.81(a)(1). Thus, the permissive-intervention standard of Rule 24(b) is likewise satisfied here.

Conclusion

The District's motion to intervene should be granted, and the District should be permitted to intervene in this case for the limited purpose of defending the validity of the Anti-SLAPP Act and its applicability in federal court.

DATE: November 4, 2011

Respectfully submitted,

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