

January 24, 2020

VIA ECF AND EMAIL

Honorable Katherine Polk Failla
US District Court
Southern District of New York
40 Foley Square, Room 2103
New York, NY 10007
Failla_NYSDChambers@nysd.uscourts.gov

**Re: *Polaris Images Corp. v. ENTtech Media Group, LLC*, Case No. 1:19-cv-08208,
Pre-Motion Conference**

Honorable Judge Failla:

I represent Defendant Enttech Media Group, LLC, in connection with this matter. Defendant intends to move to dismiss the First Amended Complaint filed by Rachel Dolezal (the “Dolezal Complaint”). I write to respectfully request a pre-motion conference seeking leave to file a motion to dismiss under Rule 12(b)(6) of all claims against Enttech, and to file a motion to strike Non-Party Nkechi Diallo aka Rachel Dolezal’s Amended Complaint.

At the December 19, 2019 pre-motion conference regarding Plaintiff’s motion to dismiss Polaris’ original Complaint (the “Polaris Complaint”), the Court granted leave to Polaris to amend its Complaint. However, Polaris did not amend its Complaint. Instead, Polaris removed itself as plaintiff and added non-party Dolezal as the Plaintiff, alleging new facts that contradict the Polaris Complaint and the representations of counsel at the December 19, 2019 pre-motion conference, namely that Dolezal, not Polaris, has standing to sue. For the following reasons, Defendant seeks to file a motion to dismiss the Amended Complaint and a motion to strike non-party Dolezal’s Amended Complaint.

A. Dolezal Lacks Standing to Sue For Copyright Infringement of the Subject Image.

The Polaris Complaint alleged that Polaris was the “exclusive licensee” of the Dolezal and the Subject Image. By virtue of the exclusive license, Polaris is the only entity with standing to sue for infringement. *Fathers & Daughters Nevada, LLC v. Lingfu Zhang*, 284 F. Supp. 3d 1160, 1167 (D. Or. 2018), *mot. for relief from judgment denied*, No. 3:16-CV-1443-SI, 2018 WL 1855943 (D. Or. Apr. 18, 2018), *appeal dismissed*, No. 18-35430, 2018 WL 6131856 (9th Cir. Sept. 6, 2018)(citing *Righthaven LLC v. Hoehn*, 716 F.3d 1166, 1170 (9th Cir. 2013)) (“[I]f a copyright owner grants an exclusive license of particular rights, only the exclusive licensee and not the original owner can sue for infringement of those rights.”). “An exclusive license serves to

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transfer “ownership” of a copyright during the term of the license.” *Righthaven LLC v. Hoehn*, 716 F.3d 1166, 1170 (9th Cir. 2013)(quoting 17 U.S.C. § 101). Since Polaris was the owner of the copyright because of its exclusive license, Dolezal lacks standing.

As Plaintiff’s counsel made clear at the December 19th hearing, “Polaris and Ms. Dolezal entered into an exclusive licensing agreement on December 15th of 2017, and pursuant to that agreement any photographs that Ms. Dolezal provides to Polaris are subject to an exclusive license. So, what that means is that Polaris has the exclusive right to distribute or display those images to third parties.” (Transcript, p. 3 (Exhibit A)). Polaris’ counsel further articulated his knowledge of the law at the December 19th hearing, stating “if we [Polaris] have an exclusive license, we have standing to sue. That’s the statute.” (Transcript, Ex. A, p. 12). Despite the foregoing, the Amended Complaint not only abandons Polaris’ theory of the case, it abandons Polaris altogether.

B. The Amended Complaint Should Be Stricken as an Improper Attempt by Non-Party Dolezal to Amend a Pleading.

A party may move to strike an untimely or improper pleading, such as an amended complaint that improperly attempts to join additional parties. *See Cobell v. Norton*, 213 F.R.D. 42 (D.D.C. 2003); *Spencer v. Dixon*, 290 F. Supp. 531, 536 (D.C. La. 1968). The Dolezal Complaint should be stricken because it improperly adds a new party, replacing Polaris with Dolezal, without leave of Court, running afoul of various rules.

First, the Dolezal Complaint runs afoul of FRCP 15 which provides that only a party may amend a pleading. Thus, Dolezal did not have the right to amend the Polaris Complaint. Second, the Dolezal Complaint violates FRCP 21 requiring leave of Court. *See Spencer v. Dixon*, 290 F. Supp. 531, 535 (W.D. La. 1968)(“Attempt to add additional parties fails where Amended Complaint contains no request for any order to add additional parties because Rule 21 of the Federal Rules of Civil Procedure requires that additional parties may be added or dropped from an action only on motion of any party and order of the court.”). Third, a non-party may not participate in an action without filing a formal motion to intervene. *See Spangler v. Pasadena City Bd. Of Ed.*, 552 F.2d 1326, 1329 (9th Cir. 1977). *See Recht v. Metro Goldwyn Mayer Studio, Inc.*, No. CV 0806612 RGKMANX, 2008 WL 11409588, at *2 (C.D. Cal. Nov. 17, 2008)(Striking amended complaint as an improper attempt by a non-party to intervene in the action where a non-party amended a pleading.). Finally, Polaris failed to dismiss its case prior to filing the Dolezal Complaint. Dolezal should have filed a new case when Polaris dismissed itself as the sole Plaintiff.

For the foregoing reasons, Enttech respectfully requests a conference to set a briefing schedule for Enttech’s motion to dismiss and motion to strike.

Respectfully submitted,

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Robert Tauler, Esq.