

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Shipyard Associates, L.P.,
Plaintiff,

-versus-

City of Hoboken,
Defendant.

Civil Action No. 14-1145 (CCC)

BRIEF IN SUPPORT OF FUND FOR BETTER WATERFRONT'S
MOTION TO INTERVENE

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PRELIMINARY STATEMENT

Pursuant to Federal Rule of Civil Procedure 24(a), the Fund for Better Waterfront ("FBW") moves to intervene as of right as a defendant. In the alternative, FBW moves to intervene permissively pursuant to Rule 24(b). FBW seeks to intervene to support the validity of two City of Hoboken ("Hoboken") Ordinances, which address flood damage prevention, open space and recreation on the Hudson River waterfront. FBW is a nonprofit public interest advocacy corporation with longstanding interests in enhancing public access to the Hudson River along the City of Hoboken's ("Hoboken") waterfront. FBW has advocated extensively for public open space and recreation along Hoboken's waterfront; and has been able to secure much of the waterfront as a public park with award-winning designs, including a lively streetscape and abundant tree canopy. Over many years, FBW has engaged in the planning process, administrative proceedings, and most recently, state court litigation regarding Shipyard Associates' ("Shipyard" or the "developer") development plans on the waterfront. Furthermore, FBW has engaged in the flood planning process including support of the Hoboken Ordinances challenged in this litigation and in the related flood hazard prevention efforts, which led to the selection of a Hoboken waterfront

project as the winner of the federal Hurricane Rebuild by Design competition. FBW seeks to intervene to protect its interests with respect to Hoboken's waterfront, which may not be adequately protected by the current parties without its involvement. Based on these facts, this Court should permit FBW to intervene in this matter.

STATEMENT OF FACTS

Throughout New Jersey, waterfront communities such as the City of Hoboken ("Hoboken") are debating what can be done to protect their communities from the flooding they saw during Hurricane Sandy. One solution, which was chosen by Hoboken, includes amending its local ordinances to reflect recent model ordinances and updates promulgated by the New Jersey Department of Environmental Protection ("NJDEP") and the latest studies issued by the Federal Emergency Management Agency ("FEMA"). As a result of this process, Hoboken adopted two ordinances to address flood damage prevention, open space and recreation on the Hudson River waterfront: i. An Ordinance Amending Chapter § 104 (Flood Damage Prevention) To Reflect Updates Recommended By The New Jersey Department Of Environmental Protection's Latest Revised Model Ordinance; and, ii. An Ordinance Amending Chapter § 196 (Zoning) Addressing Community Health, Safety And General Welfare Through Flood Hazard

Mitigation Measures And Development Limitations (together "Flood Damage Prevention, Open Space and Recreation Ordinances" or "Ordinances"). The Ordinances seek to protect Hoboken from flood damage and risks to the health and of its residents by promoting the development of open space and recreation, among other water dependent uses along the waterfront.

FBW is a nonprofit organization based in Hoboken founded in 1990 by a group of Hoboken residents to address issues such as open space preservation and recreation along the Hudson River waterfront in Hoboken. (Hine Decl. ¶ 2). Its primary mission is to secure a public waterfront park along New Jersey's Hudson River; (*Id.* at ¶ 7), and for many years, it has been an active advocate for enhancing public access to the Hudson River within Hoboken. (*Id.* at ¶ 6).

In 1990, FBW hired a professional architect and planner to develop a plan for the Hoboken waterfront, the centerpiece of which being a continuous, public park along the water's edge, uninterrupted by private development. (*Id.* at ¶ 8). Over the past two decades, FBW has helped to secure nearly 80% of Hoboken's waterfront for use as public open space and recreation space. (*Id.* at ¶ 9). FBW believes that if the success of Hoboken's South Waterfront - with its award-winning park, pedestrian-friendly streets,

lively streetscape and abundant tree canopy - were extended, Hoboken would secure its reputation and become a national prototype for urban waterfront planning. *Id.*

Conversely, FBW believes that commercial or residential development on the piers and platforms located along the Hudson River waterfront is hazardous due to the risk of floods, and would effectively prevent that portion of the waterfront from being used for open space and recreation and as a continuous public waterfront park. (*Id.* at ¶ 15). If Shipyard were to prevail in invalidating the Ordinances as applied to the pier that Shipyard seeks to develop for residential towers, FBW's 23-year old mission would be seriously compromised. (*Id.* at ¶¶ 14, 16). FBW has successfully advocated against such development proposals in the past, including a 33-story office complex on Hoboken's Pier A, 500,000 square feet of residential development on Pier C, and townhouses on the Maxwell Place piers. (*Id.* at ¶ 11). The locations of these proposed developments are now public waterfront parks. *Id.*

In 1996, Shipyard originally applied to the Hoboken Planning Board for preliminary site plan approvals for an 1160-unit Shipyard project, which included recreation improvements on Hoboken's North Pier. (*Id.* at ¶ 18). On or about August 5, 1997, the Hoboken Planning Board

approved Shipyard's application, with a condition that Shipyard enter an agreement with the City of Hoboken to rebuild the North Pier as open space, including tennis courts, a tennis pavilion and a public walkway (the "Developer's Agreement"), therefore precluding residential development on the pier. (*Id.* at ¶¶ 18-19). In the time since 1997 when the Hoboken Planning Board approved Shipyard's application, construction of the approved development has been completed, with the exception of the recreational improvements on the North Pier as provided in the Developer's Agreement. (*Id.* at ¶ 21).

On or about August 25, 2011, Shipyard submitted an application to the Hoboken Planning Board to build two high-rise towers on the North Pier (a project known as "the Monarch"), in place of the recreation improvements previously approved and stipulated in the Developer's Agreement. (*Id.* at ¶ 22). During 2011, Shipyard further submitted an application to the New Jersey Department of Environmental Protection ("NJDEP") for a Waterfront Development Permit and Water Quality Certificate ("Waterfront Permit") for the Monarch project. (*Id.* at ¶ 23). On or about December 2, 2011, NJDEP granted that permit. (*Id.* at ¶ 24).

On or about January 9, 2012, FBW challenged the NJDEP's

approval by requesting an administrative hearing, joining a similar action filed by Hoboken and the Hudson Tea Building Condo Association, a group of residents from a nearby building. (*Id.* at ¶ 25). FBW's legal challenge urged the NJDEP to void the Waterfront Permit due to the project's failure to comply with fundamental sections of the State's Coastal Zone Management regulations including requirements for public open space, construction on structurally sound pilings, and against the blocking of views to the Hudson River enjoyed from the Weehawken Cove. (*Id.* at ¶ 26). FBW's appeal also points out that the original Waterfront Permit granted on August 5, 1997 for the 1160-unit Shipyard project stipulates that Shipyard would construct open space and recreation on the North Pier. *Id.* On or about March 7, 2012, the City of Hoboken filed a lawsuit in New Jersey Superior Court seeking to enforce the terms of the 1997 Developer's Agreement and preserve the pier as open public space. (*Id.* at ¶ 27). FBW filed a motion to intervene in that suit, in support of the City's effort, which the state court granted on December 14, 2012. *Id.*

On July 10, 2012, the Hoboken Planning Board voted to deny Shipyard's application, without prejudice, pending resolution of the litigation filed by the City of Hoboken against Shipyard. (*Id.* at ¶ 28). Shipyard then filed suit

against the Hoboken Planning Board to challenge the denial, and on February 4, 2014, Hon. Nesle A. Rodriguez, J.S.C. granted approval of Shipyard's application before the Hoboken Planning Board, for which the City of Hoboken moved for reconsideration and awaits a decision. *Id.* On May 13, 2014, the NJDEP denied FBW's request for an adjudicatory hearing with respect to the Waterfront Permit. (*Id.* at ¶ 29).

Superstorm Sandy hit Hoboken in October 2012; as a result, the City experienced massive flooding. (*Id.* at ¶¶ 31, 37). Floodwater completely surrounded residential developments on the Hoboken and adjacent community waterfront, cutting off residents from emergency personnel. (*Id.* at ¶ 37). An elderly woman residing at the Riva Pointe apartments in Weehawken suffered a heart attack and had to be rescued by emergency workers through four feet of water so the woman could be taken to the hospital. *Id.*

In light of Hoboken's and nearby communities experience during Hurricane Sandy, it is FBW's position that constructing residential or commercial structures in FEMA's Coastal High Hazard Zone (which includes all piers along the Hudson River waterfront) should be avoided at all costs. (*Id.* at ¶ 39). FEMA designates this area with the highest risk of flooding because there is a high

probability of breaking waves and a destructive combination of tidal and wind-induced storm surge in the event of a tropical system like Sandy. *Id.*

Since Sandy, FBW has expanded its activities to meet its core mission of preserving the waterfront for public access by establishing long-term preventative measures that could be implemented to protect Hoboken from future storms. (*Id.* at ¶ 31). To that end, FBW has been involved in research on flooding and storm related issues, and has participated in a series of conferences that address such issues. (*Id.* at ¶¶ 33, 44). In November 2013, FBW issued a "12-Point Plan In Preparation For The Next Sandy" and FBW has written more than twenty articles pertaining to flooding that have been posted on its website and distributed to its mailing list via a monthly e-newsletter. (*Id.* at ¶ 43). During 2013, FBW put together a team of professionals and submitted a proposal for the federal Hurricane Sandy Rebuilding Task Force's Rebuild by Design competition. (*Id.* at ¶ 40). On June 10, 2013, FBW lobbied and testified against a proposed New Jersey bill that would provide an exemption from the NJDEP Coastal Zone Management Rule prohibiting multi-family residential development, including hotels and motels in the Coastal High Hazard Zone. (*Id.* at ¶ 35).

In December 2013, Hoboken adopted the two Ordinances. (*Id.* at ¶ 12). These Ordinances were a direct response to Hoboken's vulnerabilities exposed by Sandy. *Id.* The Ordinances provide specific guidelines for elevation, construction, design standards, open space and recreation to help promote the public health, safety, and general welfare, and minimize public and private losses due to flood conditions in areas of special flood hazard. (*Id.* at ¶ 45).

FBW has generally been supportive of all the efforts undertaken by the City of Hoboken to respond to the flooding issues, including passage of the Ordinances. (*Id.* at ¶ 47). The Ordinances go to the heart of FBW's mission to advocate for public access to open space and recreation along the waterfront. (*Id.* at ¶¶ 13, 45).

FBW's opposition to the Monarch project predates the enactment of the Ordinances at issue in this litigation. (*Id.* at ¶ 17). Throughout this process, FBW has supported the City's positions at times, but ultimately the organization has different objectives than the City of Hoboken, the municipal defendant. (*Id.* at ¶ 50). Hoboken is unusually situated in this case because it represents both the entity with the police power to protect the residents from storm hazards and the entity responsible for

managing and interacting with the municipal planning, zoning, construction and economic development interests along the waterfront. *Id.* Thus the same municipal authority that is defending the Ordinances implemented for flood protection, open space and recreation, is managing the economic development that has contributed to construction on the waterfront in the past. *Id.* In fact, as the history surrounding the development of the Hoboken waterfront demonstrates, Hoboken has sometimes been unwilling to implement the necessary restrictions on development to prevent flood hazards and provide for publically accessible open space and recreation on the waterfront, as FBW has advocated. (*Id.* at ¶ 51). Indeed, defense of the Ordinances herein challenged depends on the willingness of the Mayor and Council to fund the City's participation in this litigation. (*Id.* at ¶ 49). Future elections may alter the political makeup of the Council and Mayor's office and could also change the commitment to defend this case in court. Currently, the Hoboken City Council is sharply divided politically, with opponents of the Mayor vigorously criticizing the City's efforts. *Id.* FBW, on the other hand, is committed for the long term to a defense of the Ordinances and the concept of a public waterfront. *Id.*

For the aforementioned reasons, and in order to promote the public's interest at the waterfront as the group has done for over 20 years, FBW is now seeking to intervene in this action. (*Id.* at ¶ 48).

PROCEDURAL HISTORY

This matter was initiated by Shipyard against the City of Hoboken by the filing of a complaint on February 26, 2014. The City filed its Answer on March 18, 2014, and subsequently a scheduling conference was held. A scheduling order was issued on May 30, 2014, and to date, no discovery has taken place. However, Fed. R. Civ. P. 26 disclosures are to be exchanged on or before June 13, 2014.

ARGUMENT

The Federal Rules recognize two kinds of intervention, intervention as of right and permissive intervention. The first "restricts the district court's discretion by providing that an applicant shall be permitted to intervene if he or she satisfies the requirements of the Rule." The second is discretionary. *Harris v. Parnsley*, 820 F.2d 592, 597 (3d Cir. 1987) (omitting internal quotation). Notwithstanding this difference, FBW's motion should be granted under both Rules.

I. FBW IS ENTITLED TO INTERVENE AS A MATTER OF RIGHT.

Federal Rule of Civil Procedure 24(a)(2) states in pertinent 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 existing parties adequately represent that interest. (Emphasis added.)

This rule has been judicially translated into a four-prong test. Under this test, there must be

first, a timely application for leave to intervene; second, a sufficient interest in the litigation; third, a threat that the interest will be impaired or affected, as a practical matter, by the disposition of the action; and fourth, inadequate representation of the prospective intervenor's interest by existing parties to the litigation.

Kleissler v. U.S. Forest Serv., 157 F.3d 964, 969 (3d Cir. 1998).

FBW meets each of the elements for intervention as of right.

A. FBW's Motion For Intervention Is Timely.

To assess timeliness, courts look to: (1) the stage of the litigation, (2) the prejudice to other parties, and (3) the reason for any delay. *Com. of Pa. v. Rizzo*, 530

F.2d 501, 506 (3d Cir. 1976). "[T]he critical inquiry is: what proceedings of substance on the merits have occurred?" *Am. Farm Bureau Fed'n v. U.S. E.P.A.*, 278 F.R.D. 98, 104 (M.D. Pa. 2011) (quoting *Mountain Top Condo. Ass'n. v. Dave Stabbert Master Builder Inc.*, 72 F.3d 361, 369 (3d Cir.1995)). In the present case, FBW filed this motion less than three months after Hoboken filed its Answer (March 18, 2013), less than four months after Shipyard filed its Complaint (February 25, 2014), and within two weeks of the first scheduling conference. There have been no exchange of discovery requests at this time nor have there been any dispositive motions. Thus, intervention poses no delay or prejudice to the existing parties. The motion is therefore timely. See *Am. Farm Bureau Fed'n*, 278 F.R.D. at 104 (finding motion timely when filed less than three months after an amended complaint and the administrative record had not yet been produced to the court); see also *Mountain Top Condo. Ass'n*, supra., 72 F.3d at 370 (finding motion timely after four years period where there was some discovery and settlement discussions but no depositions, dispositive motions or decrees).

B. FBW Has A Sufficient Interest In the Litigation.

The second prong of the intervention test, the "sufficient interest" requirement, is also satisfied. Rule

24(a) requires that an applicant for intervention possess an interest relating to the property or transaction that is the subject matter of the litigation. This is a factual inquiry:

[T]he polestar for evaluating a claim for intervention is always whether the proposed intervenor's interest is direct or remote. Due regard for efficient conduct of the litigation requires that intervenors should have an interest that is specific to them is capable of definition, and will be directly affected in a substantial concrete fashion by the relief sought. The interest may not be remote or attenuated. The facts assume overwhelming importance in each decision.

Am. Farm Bureau Fed'n v. U.S. E.P.A., 278 F.R.D. 98, 104 (M.D. Pa. 2011) (quoting *Kleissler* 157 F.3d at 972). Any movant for intervention of right must assert that the outcome of existing litigation may present a "tangible threat to a legally cognizable interest." *Am. Farm Bureau Fed'n* at 104 (quoting *Mountain Top Condo. Ass'n* at 366). A "mere general interest in the subject matter of the litigation" is not enough to constitute a legally cognizable interest as required by the Third Circuit; a "protectable interest" must be at stake in the existing litigation. *Mountain Top Condo. Ass'n* at 366.

There is little doubt that FBW satisfies this prong. As Ron Hine presents in his declaration, FBW is a nonprofit corporation that has been active in Hoboken for over two

decades. . It has approximately 200 supporters, most of whom live in Hoboken and most of whom will be impacted by the Ordinances and the waterfront. As residents of Hoboken, FBW and its supporters have a direct interest in the litigation.

The *Am. Farm Bureau Fed'n* Court approved intervention for public interest groups and environmental advocacy organizations in order to challenge the level of allowable discharges into the Chesapeake Bay. These groups based their motion on their history of environmental advocacy, education, restoration and preservation work, generally and relating to the Chesapeake Bay in particular. They asserted their previous legal efforts to protect and restore the bay. Furthermore their members used the bay for recreational and purposes. The court found that these groups sufficiently demonstrated that they were stakeholders with a legally cognizable interest, reasoning that the bay was a "property" interest at stake and the EPA's allowance of discharge into the bay constituted a "transaction." *Id.* at 106.

FBW has interests in the subject of this action, including a specific interest to support the Ordinances that protect Hoboken from flood hazards from the Hudson River; and, promote public access, open space and

recreation along the Hoboken waterfront. FBW is a public interest nonprofit organization with longstanding commitments to protecting the Hoboken waterfront, and the organization has focused its efforts on providing public access to the Hoboken waterfront - including efforts aimed at using the waterfront for flood protection and avoiding flood hazards to the public. FBW has been heavily involved in advocating for a public waterfront park in Hoboken as well advocating against new construction on the piers along the Hudson River to avoid the risks inherent building in flood hazard zones. (Hine Decl. ¶¶ 7-9, 15 & 20). FBW has provided input to the legislative hearings involved in flood protection investigations as well as supporting and providing input to Hoboken who is involved in this litigation. (*Id.* at ¶¶ 32, 35 & 47). Likewise, FBW has intervened in State Court litigation regarding property involved in this litigation. (Hine Decl. ¶ 27). FBW has undertaken architectural and planning efforts on the Hudson waterfront affected by this litigation. (*Id.* at ¶¶ 8, 9). Moreover, FBW's interest here is furthered by the Hoboken Ordinances that the Plaintiff seeks to overturn. See, e.g. *Am. Farm Bureau Fed'n* at 107-108 (court found that groups' "interest in protecting public lands and assuring their continued integrity was sufficient to warrant intervention

as of right" and allowed intervention because the groups' members utilize the Bay for recreational and aesthetic purposes, but also because such efforts go to their core mission).

Further, courts in other circuits have found a public interest group's support of the measure being challenged to be strong evidence of an interest sufficient for intervention. *e.g.*, *Prete v. Bradbury*, 438 F.3d 949, 954 (9th Cir. 2006) (affirming rule that "a public interest group [is] entitled as a matter of right to intervene in an action challenging the legality of a measure which it had supported"). In this case, the FBW has been involved in the flood hazard efforts that are at the heart of the adoption of the Ordinances challenged in this litigation, including attending meetings of, and testifying before, the New Jersey Assembly in opposition to a bill that would have allowed new construction on piers along the Hudson River and taking part in the process leading to award of multi-hundred million dollar award to address flood protection in and around Hoboken. (Hine Decl. ¶¶ 35-42).

Accordingly, FBW demonstrates a sufficient interest in this matter justifying intervention.

C. An Adverse Decision Would Impair FBW's Interest In Hoboken's Waterfront.

Rule 24(a) requires that an applicant for intervention as a matter of right be "so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest." Fed. R. Civ. P. 24(a). Rule 24(a) does not require that an intervenors' interests would be legally impaired; it is enough that the applicant's ability to protect its interests may be impaired as a practical matter. See *Am. Farm Bureau Fed'n* at 107 (quoting *Mountain Top* at 368). Furthermore, it is only necessary for a would-be intervenor to show that a "substantial legal interest is possible if intervention is denied. This burden is minimal." Id. at 108 (citations omitted).

FBW satisfies the burden of showing that their interests may be impaired or jeopardized by the practical consequences of an adverse outcome of the litigation, since any decision that nullifies Hoboken's Ordinances would directly threaten FBW's efforts to preserve and expand the Hoboken waterfront with public access to open space and recreation as well as avoiding flood risks.

D. FBW's Interest May Not Be Adequately Represented by the City of Hoboken.

FBW satisfies the final element for intervention because

the City of Hoboken may not adequately represent its interest. To assess this element courts consider whether representation by existing parties "may be inadequate, not that it is inadequate." *Kleissler* at 974 citing *Conservation Law Foundation v. Mosbacher*, 966 F.2d 39, 44 (1st Cir.1992) (italics added). This is a fact sensitive inquiry, and the "burden of establishing inadequacy of representation by existing parties varies with each case." *Am. Farm Bureau Fed'n* at 109. Courts have found that arguments for intervention are persuasive where a non-profit environmental advocacy organization petitions to intervene because it is not adequately protected by EPA's presence in the suit. The court held that EPA is subject to political pressures that *might* not align with intervenor's interests, and the EPA *might* not appeal a decision that may be adverse or harmful to intervenor's interests. *Id.* at 110. Furthermore "the Third Circuit acknowledge[s] that a government agency must represent 'numerous complex and conflicting interests' and 'interests asserted by intervenors [...] may become lost in the thicket of sometimes inconsistent governmental policies.'" *Am. Farm Bureau Fed'n* at 110 (quoting *Kleissler*).

FBW has different interests and different ultimate objectives than Hoboken, the municipal defendant. Hoboken

is unusually situated in this case because it represents both the entity with the police power to protect the residents from storm hazards and the entity responsible for managing and interacting with the municipal planning, zoning, construction and economic development interests. (Hine Decl. ¶¶ 49-51). Indeed, Hoboken, who passed the Ordinances in this litigation, is also ultimately responsible for approving development along the waterfront. *Id.* Thus the same municipal authority that is defending the Ordinances implemented for flood protection, open space and recreation, is managing the economic development that has contributed to construction on the waterfront in the past. In fact, as the history surrounding the development of the Hoboken waterfront demonstrates, Hoboken has sometimes been unwilling to implement the necessary restrictions on development to prevent flood hazards and provide for publically accessible open space and recreation on the waterfront. (*Id.* at ¶ 51).

FBW does not share the municipal defendant's dual, sometimes conflicting responsibilities and, instead has as its sole ultimate objective in this litigation the protection from flood hazards, public access to open space and recreation along the waterfront. FBW's focus is sufficient for differentiating it from Hoboken's dual

responsibility to warrant intervention of right. The distinction also suggests that Hoboken might not be likely or willing to present arguments to this court that FBW will present. For example, in defending the need for the Ordinances, FBW is free to highlight its belief that the danger from flooding is actually graver than acknowledged by the Ordinances.

FBW's interests - flood hazard protection, open space and recreation along the waterfront - are central to this case and are not identical to Hoboken's interests. Therefore, FBW should be allowed to intervene to raise arguments supporting this important focus and perspective.

II. IN THE ALTERNATIVE, FBW SHOULD BE PERMITTED TO INTERVENE PERMISSIVELY.

Where intervention of right is not permitted, an applicant may also obtain permission to intervene under Fed.R.Civ.P. 24(b).

Rule 24(b) allows permissive intervention where an applicant's claim or defense, in addition to being timely, possesses questions of law or fact in common with the existing action. In deciding whether to permit intervention under Rule 24(b), a district court must exercise its discretion to require only that the intervenor share a "question of law or fact in common" with one of the

original parties. "In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." McKay v. Heyison, 614 F.2d 899, 906 (3d Cir. 1980) (emphasis added) (quoting Rule 24(b)).

The threshold legal requirements for permissive intervention are clearly met here. As noted above, this motion is timely and allowing FBW to intervene will not delay the litigation. See *supra* pp. 12 & 13. Further, questions of law or fact are shared with the main parties: FBW seeks to intervene to address the legal questions raised by Shipyard, and the organizations' intervention will revolve around the same factual background presented by the City of Hoboken, including the flood hazards, open space, and recreation. FBW's intervention as defendant, sharing many of Hoboken's affirmative defenses, would neither delay the litigation nor alter the factual background around which the claims revolve. The organization therefore meets the requirements for permissive intervention.

FBW will represent interests in this litigation that may not otherwise be represented, and their participation will contribute to the equitable resolution of this conflict. Accordingly, FBW requests permissive intervention.

CONCLUSION

For the reasons described above, FBW respectfully requests that the Court grant its motion to intervene as defendants as a matter of right pursuant to Rule 24(a), or, in the alternative, permissively pursuant to Rule 24(b).

Respectfully submitted,

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