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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAI'I

TIMOTHY GUNTER AND MAUI EARTH COMPOST, INC., Plaintiffs, vs. LAURENT GOSSIAUX, JOHN DOES 1-10, JANE DOES 1-10, DOE CORPORATIONS 1-10, DOE PARTNERSHIPS 1-10, AND DOE ENTITIES 1-10, Defendants.	CIVIL NO.: CV 08-00559JMS-BMK (Contract) ORGANIC REDUCTION, INC.'S MEMORANDUM IN SUPPORT OF MOTION Hon. J. Michael Seabright Hon. Barry M. Kurren
LAURENT GOSSIAUX, Counterclaimant, vs. TIMOTHY GUNTER AND MAUI EARTH COMPOST, INC., JOHN DOES 1-10; JANE DOES 1-10; DOE PARTNERSHIPS 1-10; DOE CORPORATIONS 1-10; DOE ENTITIES 1-10; AND DOE GOVERNMENTAL UNITS 1-10, Counterclaim Defendants.	

Table of Contents

Table of Authorities

Cases

Statutes

Rules

ORGANIC REDUCTION INC.'S
MEMORANDUM IN SUPPORT OF MOTION

I. INTRODUCTION

ORGANIC REDUCTION INC. ("ORI") moves to intervene in this case as of right as a defendant pursuant to Fed. R. Civ. P. Rules 19,[1] and 24 (a)(2). ORI's proposed complaint and joinder is attached at Exhibit B.

This case is a commercial dispute filed by Plaintiffs TIM GUNTER ("Gunter") and MAUI EARTH COMPOST, INC. ("MEC"), of which Gunter is the "principal" shareholder, against LAURENT GOSSIAUX ("Gossiaux") on November 19, 2008 in state court. (Exhibit A: Gunter and MEC's Complaint ("Compl.") ¶ ¶ 1-3) Gunter and MEC hold licenses to receive and process green waste at two sites on Maui, in Kihei and Puunene, where they received "tipping fees" of about $25/ton from Maui County, commercial users, and the public to deposit green waste. (Verified Counterclaim ("Countercl.") filed by Gossiaux ¶ ¶ 7-9, 46, 62) As required by Hawaii regulations, the green waste is to be ground into mulch. MEC sold the by-products as mulch or, after further processing, compost. (Countercl. ¶ 7)

[1]Hereafter, "Rule" refers to a rule of Fed. R. Civ. P. , unless otherwise specified.

In 2007, Gunter and MEC had substantial unground green waste at both sites, and were in need of an effective grinder. (Id. at ¶¶ 10-11) Gossiaux was willing and able to invest $150,000 in cash toward purchase of a $300,000 grinder, in support of his E-2 visa application. (Id. at ¶¶ 18-19, 25, 44-46) Gunter and Gossiaux entered into a "Rental Agreement" dated 6/22/07 and an "Agreement" dated 7/30/07 that imposed rights and obligations on themselves personally and on MEC and ORI. (Id. at ¶¶ 16-18)

As to Gossiaux, the agreement provided "Gossiaux will invest 150.000$ to buy a grinder," "Gossiaux will receive all net sales of the grinder for 3 years," and "Gossiaux reserves the right to terminate this agreement at any time if expectations are not met." (Id. at ¶¶ 18-19)

As to ORI, the agreements provided, inter alia, that Gunter and Gossiaux would form ORI with Gossiaux as the 51% shareholder, that "Organic Reduction Inc. will not pay rent, water and/or any other charges to Maui Earth Compost for the use of its facilities and/or equipments in both Puunene and Kihei sites" and "Part of the mulch produced by Organic Reduction Inc. will be bought by Maui Earth Compost." (Id.)

In 2007, Gunter and Gossiaux formed ORI, and Gossiaux made his $150,000 cash investment toward purchase of a grinder. (Id. at ¶¶ 14, 22) Gunter signed a lease for the balance, which he now claims satisfied the 7/30/07

Agreement. On August 27, 2007, Gossiaux learned that Gunter had signed a bill of sale identifying MEC as buyer. (Id. at ¶ 30) (It later turned out, Gunter even doctored the ORI check for $150,000 to appear that it was drawn against MEC's account. (Id. at ¶ 26) Contemporaneously, indeed, also on August 27, 2007, Gossiaux received a directive from the Dept. of Homeland Security that he quit the United States to process his E-2 visa application from abroad, prompting his departure on September 11, 2007. (Id. at ¶¶ 30, 38) With Gossiaux in Europe, Gunter took possession and control of the grinder and had signature authority over ORI's checking account. (Id. at ¶ 39)

In the six months of Gossiaux's involuntary absence from the United States, from September 2007 to March 2008, Gunter used the ORI checking account to pay his personal bills and MEC bills (id. at ¶ ¶41, 53, 72). He immediately defaulted on IRS 941 taxes for the employees he placed on ORI's payroll (id. at ¶ 43), provided no workers' compensation insurance (id. at ¶42), defaulted on his commitment to make capital contributions to ORI, and negligently fed metal into the grinder, disabling it for several weeks. (Id. ¶68)

After Gossiaux's return to Hawaii in March 2008, Gunter refused inter alia to support a drug policy and drug testing program (Declaration of Laurent Gossiaux) ("Gossiaux Decl."), refused to allow installation of a gasoline meter (ORI was paying extraordinary amounts for gas) (id.), failed to rectify his

accounting mishaps (id. at ¶ 62), and yet again fed metal into the grinder, disabling it this time for months. (Id. at ¶¶ 69-70) Gunter and MEC shut ORI out of the Puunene and Kihei sites, contrary to the terms of Gunter's written agreements. (Id. at ¶¶ 55, 17-18)

Meanwhile, Gunter left the disabled grinder exposed to fire hazard. (Id. at ¶ 71) Gossiaux removed the grinder from MEC's facilities to protect ORI's principal asset from fire hazard and further negligence by Gunter and/or MEC. (Id.) This memorandum sets out:

(a) ORI may intervene as of right pursuant to Rule 24(a);
(b) When the complaint was filed, ORI was a "necessary" party under Rule 19(a), but not an "indispensable" party under Rule 19(b); and
(c) Neither 28 U.S.C. §§ 1447(e) nor 1367(b) apply to this case to obviate diversity jurisdiction.

II. STATEMENT OF FACTS

Parties in state court. On November 19, 2008, Plaintiffs Gunter and MEC filed the complaint in this case in the Second Circuit Court, State of Hawai'i, Timothy Gunter and Maui Earth Compost, Inc. vs. Laurent Gossiaux, et alia, Civ. No. 08-1-0661(1), pleading four counts: (1) breach of contract, (2) breach of contract-third party beneficiary, (3) breach of fiduciary duties, and (4) punitive damages. (Id. at ¶¶ 35-53)

Notice of removal. Gunter is a resident of Maui, Hawaii, and MEC is a for

profit corporation organized under Hawaii law. (Id. at ¶¶ 1-2) They sued Gossiaux, a citizen of Belgium, currently on Maui as a non-immigrant treaty investor ("E2") under 22 CFR 41.51, as the only non-Doe defendant. (Countercl. at ¶ 2)

On December 10, 2008, Gossiaux filed a notice to federal court of removal of a civil action from state court, based on diversity of citizenship pursuant to 28 U.S.C. section 1332(a). He alleged by a preponderance of evidence that plaintiffs' recovery would exceed $75,000 "assuming the failure of all the Defendant's affirmative defenses." Garza v. Bettcher Indus., 752 F. Supp. 753, 763 (E.D. Mich. 1990), cited in Hulihee v. Kaiser Found. Health Plan, Inc., 2008 U.S. Dist. LEXIS 71510, 2-3 (D. Haw. Sept. 18, 2008). (28 U.S.C. §§ 1332, 1441(a) and 1446(b)).

On December 17, 2008, Gossiaux filed an answer and a counterclaim against Gunter and MEC (the "Counterclaim").

Venue is proper in this Court pursuant to 28 U.S.C. §§ 91, 1391 and 1446.

Movant. ORI was organized under Hawai'i law, with Gossiaux as its president, Gunter its vice-president and Gossiaux's wife its secretary. (Countercl. ¶ 14)

Gossiaux owns 51% of ORI's shares and Gunter allegedly the balance. (Id. at ¶ 18) ORI's stated purpose is to "RECEIVE AND GRINDE [sic] GREEN

WASTE / MULCH SALES."

(http://hbe.ehawaii.gov/documents/business.html?fileNumber=219554D1&view=filings, last visited December 13, 2008) (Id. at ¶ 14).

ORI's main tangible asset is a Morbark 7600 wood hog grinder purchased in 2007 for about $300,000. (Id. at Exh. D)

Gunter as an officer and director of ORI breached his fiduciary duty to ORI by among other things, failing to pay taxes when due (including IRS 941 employment taxes) (id. at ¶ 43), transferring MEC employees to ORI's payroll to continue the same work and hours they performed for MEC, now for more pay (id. at ¶41), failing to secure worker's compensation insurance for said employees (id. at ¶42), misappropriating funds (id. at ¶¶ 53, 72), usurping business opportunities (id. at ¶40), failing to keep proper accounts and failing to pay funds including tipping fees and mulch fees due ORI (id. at ¶¶ 56, 58, 60, 62, 80), allowing the grinder to be negligently operated and damaged (id. at ¶¶ 68-70), and discounting use of the grinder to MEC, and Chamberlain Excavation, LLC. (Id. at ¶ 78)

Granting the relief requested by Gunter and MEC could jeopardize the main asset of ORI.

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III. ARGUMENT

A. ORI IS ENTITLED TO INTERVENE AS OF RIGHT UNDER RULE 24(A)(2).

By this motion, ORI respectfully requests that the Court enter an order allowing ORI to intervene in this case pursuant to Rule 24 (a)(2), which provides in part:

> (a) **Intervention of Right.** On timely motion, the court must permit anyone to intervene who:
>
> ***
>
> (2) 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.

To intervene pursuant to Rule 24(a), ORI must show:

> "(1) the intervention application is timely; (2) the applicant has a significant protectable interest relating to the property or transaction that is the subject of the action; (3) the disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect its interest; and (4) the existing parties may not adequately represent the applicant's interest.

Schmidt v. Fid. Nat'l Title Ins. Co., 2007 U.S. Dist. LEXIS 91469, 10-11 (D. Haw. Dec. 12, 2007).

1. ORI's motion to intervene (filed before plaintiffs answered the counterclaim) is timely under Rule 24.

This motion is timely pursuant to Rule 24, filed before plaintiffs have

answered the counterclaim. Timeliness turns on (1) the stage of the proceedings; (2) the prejudice to other parties; and (3) the reason for and length of the delay. League of United Latin American Citizens v. Wilson, 131 F.3d 1297, 1302 (9th Cir. 1997) (denying intervention 27 months after complaints were filed and four other groups successfully intervened). Where intervention is sought as of right, the timeliness requirement is treated more leniently than for permissive intervention because of the likelihood of more serious harm if intervention is not permitted. Thus, in United States v. State of Oregon, 745 F.2d 550, 552 (9th Cir. 1984), the Ninth Circuit reversed the trial court's denial of Idaho's motion to intervene ten years after litigation began, the existing parties "do not suggest that their problems are materially different now than they would have been" a decade before. Id.

Gunter and MEC filed their Complaint on November 19, 2008, about two months ago. They have not yet answered the counterclaim, or satisfied the requirements of LR 16. Their problems are not "materially different now than they would have been" when Gossiaux timely answered and counterclaimed on December 17, 2008, two weeks ago. Oregon, supra.

2. ORI claims an "interest relating to the property * that is the subject of the action," because plaintiffs seek "a constructive trust on all funds of Organic Reductions."**

Regarding the second element, the Ninth Circuit only requires that the applicant has an interest "protected under some law" and that the interest have a

"relationship" to the claims at issue. Forest Conservation Council v. United States Forest Service, 66 F.3d 1489, 1494 (9th Cir. 1995). Gunter and MEC pray at Compl. page 9, ¶ B, "[t]hat the Court impose a constructive trust on all funds of Organic Reductions." ORI has a significant interest in "all funds of Organic Reductions," which interest is "protected under some law," and plaintiffs seek to sequester those funds in a constructive trust.

3. The disposition of this action "may, as a practical matter, impair or impede ORI's ability to protect its interest" because plaintiffs seek an injunction that ORI's grinder work for Gunter and MEC.

Gunter and MEC pray not only that "the Court impose a constructive trust on all funds of Organic Reductions" (Compl. p. 9, ¶ B), but also that "the Court by way of mandatory injunction order that the grinder continue its operations at MEC's facilities" (Compl. page 10, ¶ D) Its funds would be placed in a constructive trust, and its principal asset commandeered by Gunter at MEC facilities. Worse, if past is prologue, Gunter is a liability to ORI's money and the machine, having abused his access to the ORI check book (counterclm. ¶¶ 72-73), failed to provide workers' compensation insurance for the employees he placed on ORI's payroll (id. ¶ 42), refusing to support drug testing (Gossiaux Decl.), feeding metal into the grinder repeatedly (counterclm. ¶¶ 67-69), and exposing it to fire hazard in storage. (Id. at ¶83)

4. The existing parties may not adequately represent ORI's interest.

At the outset, Gunter and MEC are plainly hostile to ORI's interest, and their adversity is at the core of Gossiaux's counterclaim. It was ORI's counter check for $150,000 (supported by Gossiaux's cash) (Countercl. ¶ 25) that was mailed to Morbark as down payment on a $300,000 grinder. But Gunter doctored the check to look like it was drawn against MEC's account (id. at ¶ 26), and signed a bill of sale for MEC to take title and possession, at least initially. (Id. ¶ 24, Countercl. Exh. D: Bill of sale dated 6/21/07, signed by Gunter dated 7/10/07) Gunter failed to "make a loan under his company (Maui Earth Compost) for the remaining 150.000$," failed to invest in ORI "40.000$ by any other means within the first year of operation," and has renegged on his commitment to contribute cash into ORI. (Id. at ¶¶ 49-50)

The more subtle issue is whether Gossiaux may adequately represent ORI's interest. As ORI's 51% shareholder, has claims that overlap ORI's claims, but he does not make all of ORI's corporate claims, thus meeting the liberal standard for establishing inadequate representation. The burden of showing inadequacy of representation is **minimal** and "is satisfied if the applicant shows that representation of its interests **'may be'** inadequate . . . ." Prete v. Bradbury, 438 F.3d 949, 956 (9th Cir. 2006) (emphasis added) The Court generally interprets the requirements broadly in favor of intervention. Donnelly v. Glickman, 159 F.3d

405, 409 (9th Cir. 1998) See generally, Moore's Federal Practice, § 24.03[4][a][i] ("the applicant's burden on this matter should be viewed as minimal").

The court considers several factors, including whether a present party "will undoubtedly make all of the intervenor's arguments" and "is capable of and willing to make such arguments," and whether the intervenor "offers a necessary element to the proceedings that would be neglected." Prete, supra.

Gossiaux, even as a 51% shareholder, does not stand in the identical shoes of the corporation. It was ORI's commercial credit, reputation and business opportunity that were usurped by Gunter and MEC.

ORI will plead that Gunter breached the fiduciary duties he owed ORI as an officer. Gossiaux pleaded a defense of offset, but some of the offsets may well belong to ORI. By terms of the 7/30/07 Agreement, "Organic Reduction Inc. will have full access to Maui Earth facilities and/or equipments at no charge." "Part of the mulch produced by Organic Reduction Inc. will be bought by Maui Earth Compost." ORI owns the grinder. ORI, after all, was due mulch and tipping fees. ORI will plead Gunter's breach of the agreements to provide ORI free access to facilities and equipment. As a direct and proximate result of Gunter and/or MEC's actions, ORI sustained damages in lost revenue, repair costs, and exposure to fines.

In sum, because ORI is a closed corporation with only two shareholders, Gossiaux claims overlap with some of ORI's claims. But he does not make all

claims, and even the ones he pleaded directly may well be disallowed as belonging to the corporation. Under the standard that "[t]he applicant's burden on this matter should be viewed as minimal," (Moore, supra). ORI's interest would not be adequately represented by the existing parties to this lawsuit.

Having met the four elements of Rule 24(a), ORI may intervene as of right.

B. WHEN THE COMPLAINT WAS FILED, ORI WAS A "REQUIRED" PARTY UNDER RULE 19(A), BUT NOT "INDISPENSABLE" UNDER RULE 19(B), AND THUS ITS NONDIVERSITY DOES NOT DEPRIVE THIS COURT OF JURISDICTION.

ORI, opposing the relief requested by Gunter and MEC, seeks to intervene as a defendant. Even if ORI is a nondiverse party because ORI shares the same citizenship as Gunter and MEC, its intervention as of right does not deprive this court of jurisdiction.

> "If the nondiverse party comes into the case by intervening in it, his presence will not deprive the court of jurisdiction unless the intervenor was an indispensable party when the complaint was filed. Federal jurisdiction is determined by the facts as they exist when the case is filed, and not by what happens later. * * * So the fact that a resident of the plaintiff's state intervenes will not require the plaintiff to abandon his suit unless the resident was an indispensable party at the time the suit was filed. * * * "

Mattel, Inc. v. Bryant, 441 F. Supp. 2d 1081, 1096 (C.D. Cal. 2005), aff'd, 446 F.3d 1011(9th Cir. 2006) (internal citations omitted). Mattel applied the predecessor Rule 19, but the 2007 amendments to the rule are "stylistic only." Philippines v. Pimentel, 2008 U.S. Lexis 4889, 128 S. Ct. 2180, 2184 (2008).

Mattel applied long-established precedent:

> "Under the general rule, when the court's jurisdictional requirements are met with regard to the original parties, a party who subsequently intervenes `as of right' pursuant to Rule 24(a)(2) of the Federal Rules of Civil Procedure need not have an independent ground of federal jurisdiction, and will not destroy diversity regardless of its citizenship. See Moore's Federal Practice, vol. 3-B para. 24.18(1)."

Mutual Fire, Marine & Inland Ins. Co. v. Adler, 726 F. Supp. 478, 481 (S.D.N.Y. 1989), cited in Mattel, supra

In the celebrated Bratz doll case, Mattel had sued its former employee, Bryant, who was ultimately alleged to have misappropriated the rights to the Bratz doll for his successor employer, MGA. Bryant removed to federal court on grounds of both federal question and diversity. MGA sought to intervene as a non-diverse but not indispensable party, thus preserving diversity. Mattel, supra.

As set out in Mattel, supra, "An absent party is **`necessary' if he meets the requirements of Rule 19(a)**. He is **`indispensable' if he meets the requirements of Rule 19(b)** and the court determines, in equity and good conscience, that the case should be dismissed rather than proceed without him." Id. at 1095 (emphasis added)

ORI is a "necessary" party because it meets the requirements of Rule 19(a)(1)(B), which provides:

> (1) Required Party. A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be

joined as a party if:
***
(B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:
(i) as a practical matter impair or impede the person's ability to protect the interest; or
(ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

ORI may satisfy either prong of Rule 19(a)(1)(B) to establish that it is a necessary party.

1. Under Rule 19(a)(1)(B), which parallels Rule 24, ORI "claims an interest relating to the subject of the action."

The predicate for Rule 19(a)(1), that ORI "claims an interest relating to the subject of the action" is parallel to Rule 24, that ORI "claims an interest relating to the property *** that is the subject of the action," and ORI incorporates by reference pursuant to Rule 10(c) its arguments in this regard. Further, Gunter and MEC admit ORI's entitlement to the tipping fees from both sites, alleging at their complaint ¶ 12:

"12. The parties agreed that OR would receive all tipping fees from persons dropping off green waste, and would receive all proceeds from the sale of mulch."

Gunter and MEC further admit, alleging in their complaint ¶ 14:

"14. Pursuant to the Agreement, OR would not pay for any rent, water, or other charges for the use of MEC's facilities and/or equipment at MEC's sites."

ORI's assets and revenues are at issue in this complaint, even though neither Gunter nor MEC have sought to prosecute any claims against ORI.

2. Under Rule 19(a)(1)(B)(i), like Rule 24, ORI's absence may "as a practical matter impair or impede" its ability to protect the interest."

Both Rule 19(a) and Rule 24(a) require that the movant demonstrate that its absence "may as a practical matter impair or impede the person's ability to protect the interest." ORI incorporates by references its arguments under the identical prong of Rule 24.

3. Under Rule 19(a)(1)(B)(ii), ORI's absence may "leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest."

A number of the Gunter/MEC claims may leave Gunter "subject to a substantial risk of incurring double, multiple or inconsistent obligations because of the interest." Gunter and MEC for example, allege that Gossiaux "failed to adequately maintain OR's books and records, failed to properly bill customers for work done by OR, and failed to pay certain liabilities of OR, including its Federal employee taxes." (Complaint ¶ 29) Assuming arguendo Gunter and MEC lose the counterclaim filed against them, then are sued by ORI, Gunter and MEC risk double or inconsistent obligations.

4. Under Rule 19(b), when the complaint was filed, ORI was not an "indispensable" party.

The Gunter/ MEC complaint neither named ORI as a party nor pleaded claims against ORI in their four counts. Even though "required" under Rule 19(a), ORI is not "indispensable" under Rule 19(b). Analyzing Rule 19, the U.S. Supreme Court explained, "Required persons may turn out not to be required for the action to proceed after all." Philippines, supra, 128 S.Ct. at 2189. Under the Rule 19(b) standards for "indispensability," ORI was not indispensable when the complaint was filed. Rule 19(b) provides:

> (b) When Joinder Is Not Feasible. If a person who is required to be joined if feasible cannot be joined, the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed. The factors for the court to consider include:
> (1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;
> (2) the extent to which any prejudice could be lessened or avoided by:
> (A) protective provisions in the judgment;
> (B) shaping the relief; or
> (C) other measures;
> (3) whether a judgment rendered in the person's absence would be adequate; and
> (4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

The four counts pleaded by Gunter and MEC seek no relief against ORI:

- Count 1 for "Breach of Contract" (Compl. ¶ ¶ 35-39) alleges breach of the 7/30/07 Agreement signed by Gunter and Gossiaux, to which

ORI was not a signatory.

- Likewise, count 2 for "Breach of Contract- Third Party Beneficiary" (id. at ¶¶ 40-46) alleges breach of the same Gunter-Gossiaux 7/30/97 Agreement.

- Count 3 "Breach of Fiduciary Duties" (id. at ¶¶ 47-50) alleges that Gossiaux breached his duties as a majority shareholder to a minority shareholder, a right Gunter may seek to prosecute as an individual plaintiff against an individual shareholder. Mroz v. Hoaloha Na Eha, Inc., 410 F. Supp. 2d 919, 935 (D. Haw. 2005)

- Count 4 "Punitive Damages" (id. at ¶¶ 51-53) is a generalized claim for punitive damages, and pleads no cause of action at all.

As pleaded, assuming arguendo that Gunter and MEC prevail, "a judgment rendered in [ORI's] absence would be adequate." (Rule 19(b)(3))

Mattel, supra, held that while intervenor MGA was "necessary" under Rule 19(a), it was not "indispensable" under Rule 19(b), as "Mattel chose to characterize it in its Complaint" because MGA's absence from the suit would not compel dismissal. Mattel, supra, 441 F. Supp. 2d at 1096. Citing Moore's Federal Practice, the court explained:

> "Although the factors in *Rule 19(b)* `overlap' with those in *Rule 19(a)*, `[o]verlap . . . should not be equated with redundancy.' Moore et al., supra § 19.05[1][a]. "While the necessary party analysis under *Rule 19(a)* and the indispensability analysis under *Rule 19(b)* look at similar issues, each has a different thrust which reflects its different purpose.' Id. `Under the former, the court is more or less concerned with whether nonjoinder *could* have one of the adverse effects addressed by that Rule.' Id. (emphasis in original). `Under the indispensability analysis, the court . . . must determine whether nonjoinder *actually will* result in . . . prejudice. . . .'" Id. (emphasis in original)."

Mattel, supra, 441 F. Supp. 2d at 1095, n.13.

ORI is not "a person who cannot be joined," but even if it were, its absence would not compel dismissal of the complaint. for none of the four counts of the complaint seeks relief against ORI. Damage to ORI could be mitigated by Gossiaux's defenses, even if ORI were absent. Prejudice could be further mitigated in the court's order for relief.

Because ORI was not an indispensable party when the complaint was filed, this Court has supplemental jurisdiction over ORI's claims.

C. NEITHER 28 U.S.C. §§ 1447(E) NOR 1367(B) BAR ORI'S INTERVENTION IN A DIVERSITY CASE.

1. Only joinders attempted by plaintiffs trigger 28 U.S.C. § 1447 (e).

ORI seeks to intervene as a non-diverse defendant, while Section 1447(e) addresses the situation where a plaintiff seeks to join a non-diverse defendant. Therefore as in Mattel, supra, 28 U.S. C. § 1447(e) does not apply to this case. That section states plainly:

> "If after removal the **plaintiff** seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State court." 28 U.S.C. § 1447(e) (emphasis added)

Section 1447(e) addresses situations where a plaintiff, i.e. Gunter or MEC, seeks to join an additional defendant, which is not the case.

2. Only actions by plaintiffs trigger 28 U.S.C. § 1367(b).

Correspondingly, "[t]he supplemental jurisdiction provision, 28 U.S.C. § 1367(b), states congressional intent to prevent original **plaintiffs** - but **not** defendants or **third parties** - from circumventing the requirements of diversity." Grimes v. Mazda N. Am. Operations, 355 F.3d 566, 572 (6th Cir. 2004) (emphasis added); accord, Viacom Int'l, Inc. v. Kearney, 212 F.3d 721, 726-27 (2d Cir. 2000) ("Significantly, § 1367(b) reflects Congress' intent to prevent original plaintiffs - but **not** defendants or **third parties** - from circumventing the requirements of diversity.")

Section 1367(b) provides:

> In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims **by plaintiffs** against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined **as plaintiffs** under Rule 19 of such rules, or seeking to intervene as **plaintiffs** under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

28 U.S.C. § 1367(b) (emphasis added).

Courts have uniformly applied the statute to original plaintiffs. State Nat'l Ins. Co. v. Yates, 391 F.3d 577, 580 (5th Cir. 2004) "Plaintiff" in section 1367(b) refers to the original plaintiff in the action - **not** to a defendant that happens also to

be a counter-plaintiff, cross-plaintiff, or **third-party-plaintiff**) (emphasis added); United Capitol Ins. Co. v. Kapiloff, 155 F.3d 488, 492 (4th Cir. 1998) ("Thus, the limitation of § 1367(b) applies only to plaintiffs' efforts to join nondiverse parties.")

Accordingly, this court should exercise supplemental jurisdiction over the claims that ORI might take on after removal. Mattel, supra, stated,

> "When one turns to removed cases, . . . supplemental jurisdiction should be liberally exercised -- because of the prima facie absence of effort by the plaintiff to circumvent the complete diversity requirement." ***. Because this is a removed case, the court may liberally exercise supplemental jurisdiction over the `claims' MGA might have 'taken on' by intervening after removal. This does `not expand federal jurisdiction beyond the bounds that the [Supreme] Court [has] recognized.' *** Additionally, by exercising supplemental jurisdiction over these claims, the court can `simultaneously adjudicate the original civil action, safeguard the defendant's removal, and allow all of plaintiff's related claims to be heard in one suit.'*** `All this serves fairness and efficiency, without sacrificing enforcement of the jurisdictional requirements of § 1332. . . .'" Mattel, supra, 441 F. Supp. 2d at 1099 (citations omitted).

Neither 28 U.S.C. §§ 1447(e) nor 1367(b) bar ORI's intervention in a diversity case.

CONCLUSION

ORI must be permitted to intervene as a defendant as a matter or right, and this court should exercise supplemental jurisdiction over its claims.

DATED: Wailuku, Maui, Hawaii, December 29, 2008.

Respectfully submitted,

/s/ Joy Yanagida
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