

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. 1:18-CV-02074-WYD

MASTERPIECE CAKESHOP INCORPORATION, a Colorado corporation, et al.
Plaintiffs

v.

AUBREY ELENIS, Director of the Colorado Civil Rights Division, in her official capacity, et al.,
Defendants.

**NON-PARTY AUTUMN SCARDINA’S
REPLY IN SUPPORT OF HER MOTION TO INTERVENE**

INTRODUCTION

The Tenth Circuit takes a “liberal approach to intervention and thus favors the granting of motions to intervene.” *W. Energy All. v. Zinke*, 877 F.3d 1157, 1164 (10th Cir. 2017). As set forth in her motion to intervene, Ms. Scardina satisfies all of the standards for either intervention of right or permissive intervention under Rule 24. Masterpiece Cakeshop’s arguments to the contrary are wholly without merit.

The State Civil Rights Proceeding seeks to secure remedies for Ms. Scardina in light of Masterpiece Cakeshop’s violation of CADA. Contrary to Masterpiece Cakeshop’s claims, Ms. Scardina need not be the primary beneficiary of CADA in order to have legally protectable interest under Rule 24. Masterpiece Cakeshop’s arguments cannot survive any scrutiny of the Tenth Circuit precedent which recognizes much more attenuated interests as sufficient under Rule 24. Similarly, Ms. Scardina’s motion was timely. The question is not whether Ms. Scardina could have sought intervention earlier, but whether the timing creates prejudice to any party. Masterpiece Cakeshop has failed to identify any cognizable prejudice. Indeed, its claim that it

would be prejudiced by having to seek discovery from Ms. Scardina is directly contradicted by its decision to seek such discovery independent of intervention. Nor, under Tenth Circuit precedent, can the State appropriately represent Ms. Scardina's interests where, as here, it must address multiple competing interests. Finally, because Masterpiece Cakeshop's arguments regarding timeliness and prejudice fail, so too does its opposition to permissive intervention.

ARGUMENT

I. Ms. Scardina Has a Right to Intervene

A. Ms. Scardina Unquestionably Has an Interest in the Proceeding

The State Civil Rights Proceedings seeks, among other things, to secure remedies for Ms. Scardina related to Masterpiece Cakeshop's violation of CADA. These remedies include:

- “That Masterpiece and Phillips be ordered to allow [Ms.] Scardina ... to seek goods and services from the bakery[.]”
- “That Masterpiece and Phillips be ordered to adopt a corrective policy which will allow [Ms.] Scardina ... the full and equal enjoyment of the goods, services, facilities, privileges, advantages or accommodations provided by the bakery[.]”
- “That Masterpiece and Phillips be ordered not to retaliate against [Ms.] Scardina in any way.”
- “That Masterpiece and Phillips be ordered to provide any other relief which *may be available to [Ms.] Scardina[.]*”

ECF No. 51-2 at 3-4.¹

Masterpiece Cakeshop does not appear to dispute that Ms. Scardina has an interest in this proceeding. Instead, Masterpiece Cakeshop contends her interest is not “direct or strong” enough to warrant intervention. ECF No. 123 at 6-7. Masterpiece Cakeshop's argument, however, appears to rest on a misunderstanding of the meaning of the word “incidental” and the cases Masterpiece Cakeshop cites. “Incidental” means secondary or “subordinate.” Black's Law

¹ Unless otherwise indicated, all emphasis is added.

Dictionary “Incidental” (10th ed. 2014). It is the antonym of “primary,” not the antonym of “direct,” “strong” or “substantial.” *See Angello v. Adolph Coors Co.*, 689 P.2d 1162, 1165 (Colo. App. 1984) (distinguishing between the “primary” purpose and “incidental” benefits of CADA). Further, Masterpiece Cakeshop cites exclusively to cases that concern “an older, less expansive version of CADA.” *Gatuma v. Encore Elec., Inc.*, 2012 WL 5354932, at *4 (Oct. 30, 2012) (noting that *Brooke* was decided before CADA’s private remedies provisions were greatly expanded in 1999). In the end, though, Masterpiece Cakeshop’s apparent belief that an intervenor must be a *primary* beneficiary of a statutory scheme to have sufficient interest cannot survive any serious review of Tenth Circuit precedent it cites. *See Utah Ass’n of Cntys. v. Clinton*, 255 F.3d 1246, 1251-52 (10th Cir. 2001) (advocates for the creation of a monument had sufficient interest to intervene in action challenging the creation of the monument); *see also Coalition of Ariz./N.M. Cntys. for Stable Econ. Growth v. Dept. of Interior*, 100 F.3d 837, 841 (10th Cir. 1996) (intervenor’s “involvement with the Owl in the wild and his persistent record of advocacy for its protection amounts to a direct and substantial interest in the listing of the Owl” under the Endangered Species Act). Limiting intervention to those individuals who are the “primary” beneficiaries of a statutory scheme would all but eliminate intervention.

B. Intervention Was Timely Filed in Response to Masterpiece Cakeshop’s Motion for Preliminary Injunction and Masterpiece Cakeshop Has Failed to Identify any Cognizable Prejudice

Under Tenth Circuit precedent, the question of timeliness is directly tied to the question of prejudice. *Utah Ass’n of Cntys.*, 255 F.3d at 1250 (the timeliness requirement functions to “guard against prejudicing the original parties by failing to apply sooner”). Thus the question is not whether intervention could have been sought earlier, but rather if the timing prejudices any party. *Id.*; *see also* Wright & Miller, Fed. Prac. & Proc. § 1916, at 425-426 (“[T]he mere lapse of time by itself does not make an application untimely.”). Indeed, the Tenth Circuit *discourages*

premature motions to intervene, specifically where, as here, a pending motion to dismiss may have negated any need to intervene. *Utah Ass'n of Cnty's.*, 255 F.3d at 1251 n.2. Tellingly, Masterpiece Cakeshop entirely ignores that standard. Thus Masterpiece Cakeshop's primary argument, that the motion is not timely because Ms. Scardina could have sought to intervene earlier, is without merit and, not surprisingly, unsupported by a single citation to any authority denying intervention simply because it could have been sought earlier. ECF No. 123 at 10-11.

Similarly, Masterpiece Cakeshop's attempt to identify prejudice fails. Ms. Scardina does not intend to call any witnesses not already disclosed by the parties and does not intend to seek written discovery from the parties. *See* ECF No. 123 at 11 (claiming that Ms. Scardina's intervention would cause prejudice because she may call undisclosed witnesses or seek expedited discovery). Further, Masterpiece Cakeshop's claim that it would be prejudiced because it may need to seek discovery *from* Ms. Scardina cannot survive any scrutiny. Masterpiece Cakeshop fails to inform this Court, in alleging such prejudice, that Ms. Scardina was disclosed as a witness by Defendants and received a notice of deposition and a subpoena *duces tecum* prior to Masterpiece Cakeshop filing its response. Contrary to its claim of prejudice, Masterpiece Cakeshop intends to participate in the existing scheduled deposition of Ms. Scardina. Ex. G (relevant portions highlighted). Masterpiece Cakeshop thus appears to be taking one position in its brief while doing the opposite in discovery.

Further, since Masterpiece Cakeshop claims that Ms. Scardina does not have any relevant information (despite its repeated references to her in its complaint and motion for preliminary injunction), it cannot be prejudiced because it would not seek discovery from her with or without intervention. *See* ECF No. 123 at 11; 13 (claiming that "any information [Ms.] Scardina seeks to

add ... will distract from the core question” of the proceeding); Ex. G (“We do not believe Autumn Scardina’s testimony is relevant.”).

Masterpiece Cakeshop’s claim that Ms. Scardina has no relevant information, though, beggars belief. Masterpiece Cakeshop’s own motion for preliminary injunction relies heavily on Mr. Phillips’ recitation of the events concerning Ms. Scardina’s request for a birthday cake. *See* ECF No. 104 at 5. It appears that Masterpiece Cakeshop wishes to introduce only its view of the evidence and believes that any evidence from Ms. Scardina would only “distract” the Court. ECF No. 123 at 13. Just as Masterpiece Cakeshop does not get to unilaterally declare by which laws it must abide, *Employment Div. Dept. of Human Resources v. Smith*, 494 U.S. 872, 885 (1990), it also does not get to unilaterally declare that only it can introduce evidence on a topic at the preliminary injunction hearing.

Finally, Ms. Scardina will undoubtedly be prejudiced if a preliminary injunction is granted. As noted above, the State Civil Rights Proceeding seeks to secure remedies for her. These are remedies secured for Ms. Scardina by Colorado law and delaying her right to those remedies prejudices her. Masterpiece Cakeshop has not challenged that Ms. Scardina’s interests would be impeded or impaired by a preliminary injunction. *See* ECF No. 117 at 6.

C. The State Cannot Adequately Represent Ms. Scardina and the Public

The Tenth Circuit has previously “held that the government cannot adequately represent the interests of a private intervenor *and* the interests of the public.” *W. Energy All.*, 877 F.3d at 1168 (emphasis in original); *Nat’l Farm Lines v. Interstate Commerce Comm’n*, 564 F.2d 381, 384 (10th Cir. 1977) (“an agency seeking to protect both the public interest and the interest of a private intervenor undertakes a task which is on its face impossible”). Masterpiece Cakeshop entirely ignores these authorities and cites to inapposite authorities where there was no identified possible divergence between the objectives of the party and the intervenor. ECF No. 123 at 8-10.

As an initial matter, Masterpiece Cakeshop’s reliance on Judge Hartz’s opinion in *San Juan County* is meritless. While Judge Hartz’s opinion commanded a majority of seven judges for certain sections, the specific section relied upon by Masterpiece Cakeshop only garnered the votes of 3 total judges from the en banc panel of 13. *See Kane County, Utah v. U.S.*, 597 F.3d 1129, 1134 (10th Cir. 2010) (Judge Hartz’s “opinion in *San Juan County* concluded, in a section garnering the votes of only three of those seven members, that a presumption of adequate representation applied In contrast, four of the seven members concluded that ‘[the intervenor] had satisfied its minimal burden of showing that the government might not adequately represent [the intervenor’s] interests in the litigation.’”) (quoting *San Juan County*, 503 F.3d 1163, 1227 (10th Cir. 2007) (en banc) (Ebel, J. concurring in part and dissenting in part) (alterations in original omitted). Thus the Tenth Circuit does not apply a presumption of adequate representation.²

Masterpiece Cakeshop undermines its own argument by also arguing that Ms. Scardina’s interest under CADA is “incidental” to the public interest which the State is bound to represent. ECF No. 123 at 6-7. *Western Energy* and similar Tenth Circuit precedent rely precisely on the government’s need to place other interests before the interests of the intervenor in finding that the government cannot adequately represent the interests of individual intervenors. *Supra*. Masterpiece Cakeshop’s recognition that the State must place other interests before Ms. Scardina’s interests negates any claim that the State may adequately represent Ms. Scardina. Because the “possibility of divergence of interest need not be great in order to satisfy the burden”

² Masterpiece Cakeshop’s reliance on *Kane Cty.* and *City of Stillwell* are also unavailing. In *Kane Cty.*, the Tenth Circuit noted that the intervenor had failed to identify how its interest diverged from the United States’ interest. 597 F.3d at 1134-35. The intervenor also failed to make that showing in *City of Stillwell* which involved the question of whether a private party could adequately represent a private party not whether a government agency could. *City of Stillwell v. Ozarks Rural Elec. Coop. Corp.*, 79 F.3d 1038, 1042-43 (10th Cir. 1996).

of showing inadequate representation, Ms. Scardina has met that “minimal” burden. *W. Energy All.*, 877 F.3d at 1168; *see* ECF No. 117 at 6-7.

II. Permissive Intervention is Appropriate

Masterpiece Cakeshop does not dispute that Ms. Scardina’s claim shares common questions of law and fact with this proceeding. Instead, Masterpiece Cakeshop only argues that Ms. Scardina’s motion was not timely and that Masterpiece Cakeshop will be prejudiced by intervention. ECF No. 123 at 12-13. As noted above, these arguments are meritless. Similarly meritless is the contention that “Ms. Scardina’s presence will not add value to the case.” ECF No. 123 at 13. Ms. Scardina is a percipient witness to the critical factual issue underlying Masterpiece Cakeshop’s first amendment claims.

CONCLUSION

Because Ms. Scardina meets the requirements for intervention as of right and permissive intervention, she respectfully requests the Court grant her motion to intervene.

Dated this 20th day of February, 2019.

s/ John M. McHugh

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EXHIBIT G

From: Ryan Tucker
To: McHugh, John; Grant Sullivan; "Paula Greisen"
Cc: Jon Scruggs; Jake Warner; Jim Campbell; Kristen Waggoner; Jacquelynn Rich Fredericks; Michael McMaster; Vincent Morscher; Leslie Bostwick; "nicollem@comcast.net"; David Cortman; Kate Anderson
Subject: RE: Masterpiece v Elenis - Discovery Schedule
Date: Wednesday, February 20, 2019 1:39:51 PM
Attachments: image001.png
Test25_6799457c-9768-4615-bf46-00d4b82a3503.png

No, we disagree. We do not believe Autumn Scardina's testimony is relevant. But we reserve the right to cross examine any witness in this case if they are called, and that includes in depositions.

From: McHugh, John [mailto:jmchugh@rplaw.com]
Sent: Wednesday, February 20, 2019 1:18 PM
To: Ryan Tucker ; Grant Sullivan ; 'Paula Greisen'
Cc: Jon Scruggs ; Jake Warner ; Jim Campbell ; Kristen Waggoner ; Jacquelynn Rich Fredericks ; Michael McMaster ; Vincent Morscher ; Leslie Bostwick ; 'nicollem@comcast.net' ; David Cortman ; Kate Anderson
Subject: RE: Masterpiece v Elenis - Discovery Schedule

Ryan,

Masterpiece Cakeshop represented to the Court in opposing her motion to intervene that Ms. Scardina does not have information the Court should consider and it would be prejudiced by having to seek discovery from Ms. Scardina. Is your client going to correct that filing in light of its current position that it wishes to ask questions? If not, I cannot see how it can argue one thing before the Court and do the opposite outside of its view.

John

JOHN MCHUGH

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From: Ryan Tucker [mailto:rtucker@adfllegal.org]
Sent: Wednesday, February 20, 2019 1:09 PM
To: Grant Sullivan; McHugh, John; 'Paula Greisen'
Cc: Jon Scruggs; Jake Warner; Jim Campbell; Kristen Waggoner; Jacquelynn Rich Fredericks; Michael McMaster; Vincent Morscher; Leslie Bostwick; 'nicollem@comcast.net'; David Cortman; Kate Anderson
Subject: RE: Masterpiece v Elenis - Discovery Schedule

We too intend to cross examine the witness, but the length is at least in part contingent on what the State Defendants cover as Grant alluded to below. Thanks.



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From: Grant Sullivan [mailto:Grant.Sullivan@coag.gov]

Sent: Wednesday, February 20, 2019 12:13 PM

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Cc: Jon Scruggs ; Jake Warner ; Jim Campbell ; Ryan Tucker ; Kristen Waggoner ; Jacquelynn Rich Fredericks ; Michael McMaster ; Vincent Morscher ; Leslie Bostwick ; 'nicollem@comcast.net' ; David Cortman ; Kate Anderson

Subject: RE: Masterpiece v Elenis - Discovery Schedule

Hi John,

I think that is a reasonable estimate, but it will of course depend on a number of factors, some of which we do not control. We'll do our best to not go any longer than is necessary.

Thanks,

Grant T. Sullivan

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Subject: RE: Masterpiece v Elenis - Discovery Schedule

Thanks Grant.

For planning purposes, I cannot image this deposition would last longer than 3 hours. Please confirm.

John

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Sent: Wednesday, February 20, 2019 10:34 AM

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Subject: RE: Masterpiece v Elenis - Discovery Schedule