VERMONT SUPERIOR COURT
STATE OF VERMONT
CIVIL DIVISION
CALEDONIA COUNTY

Katherine Baker and Ming-Lien Linsley, Plaintiffs,	)	
and	)	
Vermont Human Rights Commission, Intervenor-Plaintiff	)	
v.	)	Docket No. 187-7-11 CACV
Wildflower Inn a/k/a DOR Associates LLP, Defendant	)	

Vermont Human Rights Commission's Reply in Support of Its Renewed Motion to Intervene

NOW COMES the Vermont Human Rights Commission ("HRC" or "the Commission"), by and through its attorney, Robert Appel, and respectfully submits the following reply in further support of its Renewed Motion to Intervene, dated February 22, 2012.

The Wildflower Inn admits that it has a "deferral policy" that treats same-sex couples differently than heterosexual ones. The Commission believes that this policy violates Vermont's Fair Housing & Public Accommodations Act ("FHPA"), and the Commission seeks statutory penalties and an injunction in the public interest to ensure that the policy is not used to discriminate against any customers in the future. In light of the Defendant's attempt to argue that the individual plaintiffs lack standing to challenge the "deferral policy," it is imperative that the Commission be granted the ability to intervene as a full party to challenge the "deferral policy" and stop Defendant's discriminatory

practices.[1]

Defendant is mistaken when it asserts that "HRC's interest in the action is identical to the Plaintiffs' interest, namely that the Plaintiff's complaint be remedied." See "Objection to Commission's Renewed Motion to Intervene" ("Opposition") at ¶15.) The Commission does not simply represent the interests of individual litigants. The Commission also has the statutory duty to protect the general public from ongoing violation of Vermont's antidiscrimination laws. 9 V.S.A. § 4552(b) ("The commission shall have jurisdiction to investigate and enforce complaints of unlawful discrimination in violation of [the FHPA]."). To protect that interest, the Commission is granted broader powers to seek statutory penalties and a permanent injunction even when an individual plaintiff lacks standing to do so.[2] Contrary to the Defendant's assertion at ¶¶3-4 of its Opposition, undersigned counsel clearly informed the Court that in deposition, the Defendant's former events and meeting planner identified a number of additional same sex couples who were unlawfully refused the Defendant's "accommodations,

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[1] The Defendant asserts that the Commission's renewed motion to intervene is untimely, but the Commission filed its initial motion to intervene several months ago on October 3, 2011. As noted in the Renewed Motion to Intervene, Defendant opposed that motion and assured the Court that full intervention was unnecessary because the individual plaintiffs could adequately represent the Commission's interests. After making those assurances, Defendant then hired new counsel and opted for a new litigation strategy that attempted to prevent the individual plaintiffs from challenging the "deferral policy" based on standing. In any event because this case is still at the very beginning of discovery, the Defendant has not identified any prejudice it would suffer from granting the Commission's motion to intervene.

[2] Although the Defendant's arguments have prompted the Commission to renew its motion to intervene, the Commission disagrees with Defendant's arguments about standing and thinks that the individual plaintiffs also have standing to challenge the so-called "deferral policy."

advantages, facilities, and privileges of the place of public accommodation."[3] This refusal was solely due to their sexual orientation.

The Commission is seeking intervention as a right pursuant to V.R.C.P. 24(a) and on a permissive basis V.R.C.P. 24(b) as set forth in its Renewed Motion to Intervene at pp. 3-4 and the authorities cited therein including *Disability Advocates, Inc. v. Paterson*, No. 03-cv-3209, 2009 WL 4506301, at *2 (E.D.N.Y. Nov. 23, 2009) ("... courts should `take a hospitable attitude toward allowing a government agency to intervene in cases involving a statute it is required to enforce.'") and 7C Charles Alan Wright, *et al.*, *Federal Practice and Procedure,* § 1912 (3d ed. 2010). ("[T]he whole thrust of the amendment [to F.R.C.P. 24] is in the direction of allowing intervention liberally to governmental agencies and officers seeking to speak for the public interest.")

The Vermont Supreme Court identified these broader remedial powers in *State v. Severance*, 150 Vt. 597 (1988). The individual plaintiff in *Severance* alleged that she was illegally denied the ability to rent an apartment because she had a minor child. *Id.* at 597. The State filed suit to recover damages on behalf of the individual plaintiff and an injunction restraining defendants from refusing to rent apartments to any person with a minor child in the future. *Id.*[4] Even though the individual victim of discrimination no

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3 See Vermont's Public Accommodation Act, 9 V.S.A. §4502(a)

4 At the time the complaint in *Severance* was filed, the FHPA provided that:

> A person aggrieved by a violation of this chapter or the attorney general on behalf of such a person may bring an action for injunctive relief and compensatory and punitive damages in the superior court of the county in which the violation is alleged to have occurred.

See Severance, 150 Vt. at 599. In 1988, the statute was amended to substitute

longer wished to rent the apartment and could not obtain an injunction on her own behalf, the Supreme Court held that the State could still be entitled to broader relief to prevent discrimination against future victims. For the same reasons that the State had standing to pursue broader remedies in *Severance*, the Commission also has standing to pursue broader remedies here.

As explained in the Commission's motion, it would be more efficient for the Commission to intervene in this case than for the Commission to file a new lawsuit and litigate the same factual issues in a parallel proceeding. Defendant mistakenly argues that the Commission cannot initiate such litigation without receiving an administrative complaint from an individual complainant, but the law clearly authorizes HRC to initiate its own litigation in the public interest without waiting for an individual complaint of discrimination. HRC's regulations specifically provide that "[t]he Commission may also initiate litigation in other cases in its sole discretion." HRC Rule 20.[5] The power to initiate litigation is also reflected in the text of the FHPA, which provides that the HRC "may bring an action in the name of the commission to enforce the provisions of this chapter" and "[t]he initiation or completion of an investigation by the human rights

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"Human Rights Commission" in place of "Attorney General." *Id.* In 1989, the statute was again amended to add subsections (c) and (d) in their current forms. *See* 9 V.S.A. § 4506 (1989). These changes transferred enforcement authority to the Commission but did not restrict the scope of the Commission's remedial powers.

5 See also HRC Rule 22, "Either before or after a final determination, if at least three commissioners determine that immediate judicial relief is warranted in a case, they may authorization the Executive Director to commence an action in superior court." The Commission followed this procedure by discussing the situation involving the Wildflower Inn at its meeting on July 28, 2011 and voting 5-0 in favor a motion directing undersigned counsel to bring suit against the Defendant.

commission shall not be a condition precedent to the filing of any lawsuit for violation of this chapter." 9 V.S.A. § 4506(c)-(d). See also 9 V.S.A. §4553(a)(6)(A) which authorizes the Commission to "enforce ... prohibitions against discrimination by bringing an action in the name of the commission."

Defendant is therefore mistaken when it asserts that the Commission "lost its right to file suit" because it did not act within six months of receiving a charge of discrimination. (Opposition at ¶ 27(e)). The provision cited by Defendant relates solely to the Commission's time frame for investigating an administrative charge of discrimination. That provision has no application when HRC exercises its statutory right to initiate litigation on its own in the public interest. The Commission retains its statutory authority and discretion to file a new action against this Defendant. However, doing so would neither be in the interests of judicial economy nor containing potential litigation costs incurred by the Defendant. Since discovery has not been completed nor dispositive motions filed and decided, there is no prejudice to be suffered by the Defendant should the Court grant the Commission's Renewed Motion to Intervene.

The Defendant makes a similar mistake in arguing that by moving to intervene the Commission has violated the statutory requirement that it not "favor any party in its handling of the complaint." (Opposition at ¶¶ 27(f), 31.) Those provisions relate solely to the Commission's role as an investigator of administrative charges of discrimination. Here, the Commission is not investigating an administrative charge of discrimination. It is filing its own litigation on behalf of the public interest as permitted by 9 V.S.A. § 4506(c).

Finally, the Defendant asserts that the Commission's participation is improper because its Executive Director, undersigned counsel, sits on the Board of Directors for the ACLU of Vermont. In order to avoid such a conflict, counsel recused himself as an ACLU-VT board member from any discussion or action on this matter by the ACLU of Vermont from its inception. Further, he has not taken part in the ACLU-VT's review of the case or representation of Ms. Baker and Ms. Ling-Lien Linsley.

WHEREFORE, based upon the authorities and arguments presented above as well as in its Renewed Motion to Intervene the Plaintiff-Intervenor respectfully requests that the Court GRANT its motion for full participation in the litigation and direct the clerk to docket its complaint pursuant to V.R.C.P. 24(c).

Dated at Montpelier, Vermont this 21st day of March, 2012.

VERMONT HUMAN RIGHTS COMMISION

By: _____

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