IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BLAKE J. ROBBINS, et al., Plaintiffs, v. **LOWER MERION SCHOOL DISTRICT, et al.,** Defendants.	CIVIL ACTION NO. 2:10-CV-00665JD

MEMORANDUM OF LAW IN SUPPORT OF MOTION OF COLLEEN AND KENNETH WORTLEY, FRANCES AND DAVID MCCOMB, AND CHRISTOPHER AND LORENA CHAMBERS FOR INTERVENTION

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I. Introduction

Plaintiff-Intervenors, Colleen and Kenneth Wortley, Frances and David McComb, and Christopher and Lorena Chambers ("Intervenors"), respectfully submit this motion for intervention of right pursuant to Fed. R. Civ. P. 24(a)(2) and, in the alternative, for permissive intervention pursuant to Fed. R. Civ. P. 24(b)(1)(B) ("Intervention Motion").

Intervenors are members of a class that Plaintiffs Blake Robbins, Michael Robbins and Holly Robbins ("Robbins") allege in this case. Both the Robbins' complaint and the Complaint in Intervention, attached to the motion in intervention, are based upon the Lower Merion School District's ("LMSD") activation of cameras installed in laptop computers ("webcams") it issued to high school students in the district.

Intervenors, however, stand in a position different from that of the Robbins, with regard to both the relevant facts and the parties' respective demands for relief. Unlike Blake Robbins, none of Intervenors' children -- or, to Intervenors' knowledge -- any other students, were confronted by a LMSD or school official with pictures taken from a LMSD-issued laptop. In fact, there are no allegations in the *Robbins* complaint that any other student was treated in the same or even a remotely similar manner as Blake Robbins.[1] More importantly, Intervenors, unlike Robbins, do not seek monetary or punitive damages, attorneys' fees or class certification under Rule 23(b)(3). Such relief is more harmful than helpful to the members of the putative class. Intervenors seek only equitable relief and have retained highly experienced counsel to represent them on a *pro bono* basis.

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[1] Nor could Robbins reasonably make such allegations, inasmuch as the "LMSD and plaintiffs' counsel are [only now] seeking to ascertain . . . (i) the extent to which the laptop tracking software application was used and (ii) to what extent there exists evidence of the use of the laptop tracking software application (such as webcam photographs)." Order of March 10, 2010.

These and other critical differences distinguish Robbins from Intervenors with regard to the goals of this litigation such that Robbins cannot adequately represent Intervenors. Many hundreds of parents of LMSD high school students have made clear their opposition to the Robbins class action, because of its potential to cause Defendants to incur substantial liability, thereby potentially leading to the cutting of educational programs. It is not enough to simply wait to see whether the putative class is certified and then opt out. By that time, LMSD will likely have already run up substantial legal fees and costs.

Intervenors have no interest in sweeping LMSD wrongdoing under the rug. They are as interested in a full accounting as are all other parents, determining the extent of that wrongdoing, establishing the appropriate consequences, and securing appropriate injunctive relief to ensure that it does not reoccur.[2]

Nor, however, will Intervenors and many hundreds of their fellow parents of LMSD high school students allow anyone who effectively seeks to undermine LMSD's educational mission

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[2] In fact, Intervenors' Complaint in Intervention seeks, as relief, an order requiring that:

A. Defendants permanently disable any technology that allows for the remote activation by Defendants of webcams on student-issued laptops, or anyone related to Defendants, and refrain from purchasing or using any such technology at any time in the future;

B. LMSD implement a cost-effective alternative technology to track, for security purposes only, lost, stolen, missing or misappropriated student-issued computers, in a manner that does not compromise the privacy rights of LMSD students and their families;

C. With the advice and consent of the Intervenors, LMSD select, engage and appoint a public advocate to: (i) review, with expert forensic assistance as needed, any and all paper and electronic documents and images in any way related to the Defendants' remote activation of webcams on student-issued laptops; (ii) freely conduct interviews of any and all of Defendants' representatives, employees and agents regarding same; and (iii) report to the LMSD public regarding these events and the activities and performance of LMSD, its representatives, employees and agents related thereto, and including appropriate recommendations for the future;

D. LMSD create and implement student-issued laptop policies and practices that include explaining to and obtaining the consent of parents, guardians and students, the precise activities LMSD can perform with the laptops, including without limitation reviewing websites searched on the laptops and reviewing documents stored on laptops.

purport to speak for them in demanding any amount of monetary (including punitive) damages from the district. Intervenors and their many supporters are not interested in receiving money damages at the expense of educational programs in their schools.

There would be no prejudice to the existing parties if Intervenors' motion is granted, as Intervenors have filed the motion during the earliest stages of the litigation. Not only have Intevenors promptly filed their motion, they have done so at a critical juncture in the litigation because the parties are apparently contemplating settlement. *See* March 10, 2010 Order ¶ B. Allowing intervention by experienced complex litigation attorneys on behalf of persons who have divergent goals from those of the named plaintiffs will ensure that, if a settlement is reached, it will not only be expeditious and cost-effective but will also be fair, reasonable, adequate and in the best interests of the parties and LMSD students, parents and other taxpayers.

As set forth below, by intervening, Intervenors seek to protect both their individual interests, improve and strengthen the representation of the class, and play a role in fairly, efficiently and expeditiously resolving this litigation.

II. Factual Background

The Robbins Complaint. Robbins filed their complaint on February 16, 2010. Among other things, the complaint alleges, "[u]nbeknownst to Plaintiffs and the members of the Class ... Defendants have been spying on the activities of Plaintiffs and Class members by Defendants' indiscriminant [sic] use" of the webcams in the LMSD-issued laptops. Robbins complaint ¶ 2. The only allegation in support of this claim is the incident involving Blake Robbins. The complaint does not contain a single fact in support of the claim that Defendants' conduct was indiscriminate, *i.e.*, that they randomly monitored students, nor does it contain a single factual statement that Defendants' conduct affected every class member, although that is what the

complaint baldly alleges. *See, e.g., id.* ¶ 14.

The complaint alleges that "Plaintiffs *and the Class* bring this action" pursuant to six federal and state statutes, the Fourth Amendment of the United States Constitution and Pennsylvania common law. *Id.* ¶ 3 (emphasis added). That is incorrect. Only Plaintiffs brought these claims, and not the absent class members, almost 25 percent of whom have publicly expressed their opposition to the class action, as shown below.

The complaint states that the action was brought as a class action "under Rules 23(a), 23 (b)(1), 23(b)(2) and 23(b)(3)." *Id.* ¶ 12. However, it includes no allegations that even address, let alone support, the requirements necessary to certify a Rule 23(b)(1) or 23(b)(2) class. The only class action allegations are those that address the requirements of Rule 23(b)(3), *i.e.*, the rule relating to monetary damages. *See id.* ¶¶ 13-19. Further, the complaint alleges that the class is sufficiently numerous because there are 1,800 [sic (there are 2,300)] LMSD high school students. *Id.* ¶ 13. Again, however, there is not a single allegation in the complaint that every student with a webcam was monitored. The complaint alleges typicality "as Plaintiffs *and all other members were injured in exactly the same way -- by the unauthorized...remote activation of*" the students' webcams. *Id.* ¶ 14 (emphasis added). There is not a single allegation in support of this alarming charge.[3]

Stage of the Proceedings. The parties have not yet exchanged their Rule 26(a)(1) initial disclosures. Defendants have not yet filed a responsive pleading to the complaint. No discovery has been served or produced. In short, the action is at its incipient but an important stage because on March 10, 2010, the Court entered an Order extending the deadline for Defendants to respond to the Robbins' complaint for thirty days so the parties could make an investigation in

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[3] The allegations concerning adequacy of representation and Plaintiffs having no conflict of interest with the rest of the class (*Id.* ¶¶ 15-16) are addressed below.

the hopes of resolving this matter.

Class Member Reaction to the Complaint. The filing of the *Robbins* complaint, and the Robbins' participation in news stories, set off a firestorm of local, national and international publicity. Declaration of Michael J. Boni ("Boni Decl.") ¶ 2 and Ex. A. Parents of LMSD children, while alarmed by the substantive allegations against LMSD, were also outraged by the filing of a class action seeking monetary, even punitive damages. Four fathers of LMSD high school students promptly established a website, www.lmsdparents.org, on which parents included in the putative class definition were asked to sign a petition in support of the following statement:

> We are parents or guardians with one or more high school children at Harriton or Lower Merion High School who have been issued a laptop equipped with a webcam. We are aware of the lawsuit *Robbins v. Lower Merion School District*. We seek a resolution of the webcam issue that is in the best interests of our children and the Lower Merion School District, one that does not involve the class action lawsuit.

Id. ¶ 3. *See also* www.lmsdparents.org. The four founders of the site and some of their friends sent emails to their friends and asked those emails to be passed along to other members of the alleged class. As a result of the email having spread like wildfire, within one week after the website was established, **460 parents of over 500-600 LMSD school students signed the petition**. *Id.* ¶ 4.

On March 2, 2010, the founders of lmsdparents.org held a meeting for parents included in the putative class. The agenda included a group discussion concerning the class action, the charges against the school district, and initiatives going forward, which include a grassroots

effort to add signatures to the petition and the filing of this intervention motion. More than 150 parents attended, and all supported both initiatives. *Id.* ¶ 5.[4]

In addition, three other parents of LMSD students established a separate petition at www.ipetitions.com/petition/parentsforlmsd. That petition has garnered almost 800 signatures from Lower Merion residents opposing the class action. *Id.* ¶ 6.[5]

In contrast to Plaintiffs, Intervenors seek an alternative resolution of the webcam issue. Three separate investigations are underway, one by the Unites States Attorney, one by the Montgomery County District Attorney, and one commissioned by the LMSD. As reflected in the Complaint in Intervention that accompanies this motion, Intervenors believe that those investigations should proceed unhampered by the class action, and that the consequences of any wrongdoing should be in the best interests of LMSD students and families, and the Lower Merion community. The damages sought in the class action are contrary to those interests, and will only result in educational programs being cut and further undermining LMSD's deservedly excellent reputation for educating its students.

III. Argument

Intervenors seek to intervene as of right under Fed. R. Civ. P. 24(a)(2) and, in the alternative, to intervene with the Court's permission under Rule 24(b)(1)(B). Intervention is justified under either rule.

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[4] One person railed against all litigation as so much ineffective "theater." *Id.*

[5] Intervenors and the signers of the lmsdparents.org petition are putative class members who are unwilling participants in Plaintiffs' class action. The signers of www.ipetitions.com/petition/parentsforlmsd are Lower Merion residents, who themselves have an interest in opposing the class action, as taxpayers and as parents of middle and elementary school children.

A. Intervenors Satisfy the Standards for Intervention As of Right Under Fed. R. Civ. P. 24(a)(2).

To intervene as of right under Fed. R. Civ. P. 24(a)(2), prospective intervenors must demonstrate that "(1) the application for intervention is timely; (2) the applicant has a sufficient interest in the litigation; (3) the interest may be affected or impaired, as a practical matter, by the disposition of the action; and (4) the interest is not adequately represented by an existing party in the litigation." *In re Community Bank of N. Vir.*, 418 F.3d 277, 314 (3d Cir. 2005) (quoting *Harris v. Pernsley,* 820 F.2d 592, 596 (3d Cir. 1987). Intervenors here meet each of these requirements. "In the class action context, the second and third prongs of the Rule 24(a)(2) inquiry are satisfied by the very nature of Rule 23 representative litigation. Therefore, when absent class members seek intervention as a matter of right, the gravamen of a court's analysis must be on [A] the timeliness of the motion to intervene and on [B] the adequacy of representation." *Id.*

As members of the putative class alleged by Robbins, Intervenors would be bound by a judgment in this action should the Court ultimately certify the class. This is especially so given that the Robbins seek class certification under Rules 23(b)(1) and (b)(2) as well as Rule 23(b)(3), and given that class members generally may not opt out of Rule 23(b)(1) or 23(b)(2) classes.[6] Therefore, assuming the Robbins complaint states a viable legal interest, Intervenors would meet the sufficiency of legal interest and impairment of interest prongs of 24(a)(2) even if the court does not presume that these elements are satisfied in the class action context.

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[6] See, 5 Newberg on Class Actions §16:7 (4th ed.) ("intervention in Rule 23(b)(2) actions by class members may be significant to protect their interest because they cannot opt out of the suit even if they are inadequately represented. Thus intervention avoids subsequent collateral attacks on the due process preclusive effect of a judgment. . . .") (quoting *Woolen v. Surtran Taxicabs*, Inc. 684 F.2d 324, 332 (5th Cir. 1982).

1. Intervenors' Motion Is Timely Because It Was Filed In the Earliest Stages of the Robbins Litigation.

"Factors to consider in making the timeliness determination include "(1) [h]ow far the proceedings have gone when the movant seeks to intervene, (2) the prejudice which resultant delay might cause to other parties, and (3) the reason for the delay." *Pereira v. Footlocker, Inc,.* 2009 WL 1214240, No. 07-cv-2157, at *2 (E.D. Pa. April 27, 2009) The present motion is timely. Just five weeks have passed since the Robbins filed their complaint, Defendants will not file a substantive response for at least another month, initial disclosures have not been exchanged, discovery has not begun, no motion for class certification has been filed and no trial date has been set.

Intervenors filed this motion five weeks after learning of the pending risk to their rights. *See Mountain Top Condo. Assoc. v. Stabbert Master Builder, Inc.,* 72 F.3d 361, 369 (3d Cir.1995) ("The length of time that the movant waits before seeking to intervene is measured from the point at which the movant knew, or should have known, of the risk to its rights."). In *Pereira*, the court found that the Intervenors did not unduly delay filing their motion to intervene even though the complaint in the case in which they sought to intervene was filed on May 25, 2007 and they filed their intervention motion on December 23, 2008. *See Pereira*, 2007 WL 1214240 at *1-*2. Intervenors' motion is timely and will not prejudice the Robbins or Defendants.

2. Intervenors' Interests Are Not Adequately Represented.

Representation is considered inadequate when, "although the applicant's interests are similar to those of a party, they diverge sufficiently that the existing party cannot devote proper

attention to the applicant's interests." *Brody v. Spang,* 957 F.2d 1108, 1123 (3d Cir. 1992).[7] Intervenors' burden of proving inadequate representation is minimal. *Id.* at 1123. The Supreme Court has made clear that the inadequacy of representation test sets a low bar, which "is satisfied if the applicant shows that representation of his interest *'may be'* inadequate; [] *the burden of making that showing should be treated as minimal." Trbovich v. United Mine Workers of America,* 404 U.S. 528, 538 n.10 (1972) (emphases added); *see also Hoots v. Pennsylvania,* 672 F.2d 1133, 1135 (3d Cir. 1982) (same).

Courts can grant a motion to intervene of right when the plaintiffs may not stand in the exact same position as the intervenors. *See, e.g., Hartman v. Duffy,* 158 F.R.D. 525, 531-36 (D.D.C. 1994) (granting intervention of right to female foreign service job applicants in gender discrimination case; existing lead plaintiffs were female civil-service job applicants, but class definition encompassed female applicants to both civil-service and foreign-service positions). Courts also permit intervention where intervenors are pursuing relief and goals different from those of the named plaintiff. *See Pereira* 2007 WL1214240 AT * 5 ("Thus in litigating, the FLSA claims and New York state claims together, the New York Plaintiffs' substantive goal may be different. . . [.] We recognize the substantive differences in possible relief. Thus we cannot find that the Pereira plaintiffs adequately represent the interests of the Cortes plaintiffs, when the Cortes have a distinct goal that could be fractured by a disposition in this case."); *see also, Brody*, 957 at 1124 (finding the divergence of interest argument a "strong one" where the

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[7] There are three alternate grounds upon which the Court can rule that representation is inadequate: "(1) that although the applicant's interests are similar to those of a party, they diverge sufficiently that the existing party cannot devote proper attention to the applicant's interests; (2) that there is collusion between the representative party and the opposing party; or (3) that the representative party is not diligently prosecuting the suit." *Brody,* 957 F.2d at 1123. At this time, Intervenors' motion is based only on the first of those grounds.

intervenors and the plaintiffs were divided over the proper remedies in the case).

a. Robbins' and Intervenors' Complaints Arise from Divergent Facts.

Because the factual circumstances upon which their claim is based diverge from the Robbins', Intervenors are limiting the relief they seek only to declaratory and injunctive relief, and do not even seek attorneys' fees or reimbursement of costs. Unlike Robbins, Intervenors do not allege that they were confronted by LMSD officials with pictures taken remotely from their children's (or any other Lower Merion high school student's) laptops. In addition, Intervenors' children – like the overwhelming majority of LMSD high school students -- do not possess laptops that were reported lost or stolen, nor did they borrow a laptop, improperly remove it from the school, or fail to pay the insurance. Boni Decl. ¶ 7.

More significantly, Plaintiffs' Rule 23(b)(3) monetary damages class claims are antithetical to the interests of the putative class, to the extent that Intervenors' opting out of any such class would be insufficient to protect their interests. Substantial damage in legal fees and costs to LMSD would already have risen to substantial levels by that time. Worse, if a jury were to award substantial compensatory and punitive damages, Intervenors' children and all other Lower Merion public school children could suffer mightily from cuts in educational programs. That is because Lower Merion's school taxes are at the maximum and can not be raised, thereby requiring cuts in educational programs. Boni Decl. ¶ 8.

Thus, Plaintiffs do not stand in the exact same position as Intervenors, and Intervenors are pursuing relief and goals that are in conflict with those of Plaintiffs.

b. Given Such Material Factual Divergence of Claims and Relief Sought, Robbins Can Not Adequately Represent Intervenors' Interests.

Intervenors have limited the relief they seek in the hopes that the litigation can be resolved without undue expense to the LMSD. Robbins' interests in classwide compensatory and punitive damages places them in conflict with Intervenors' interests in minimizing the costs to resolve the underlying webcam issues, without sacrificing the need for a full accounting and appropriate, permanent injunctive relief.[8]

When an intervenor's and the class representative's interests are contrary to each other, courts find that the intervenors' interests are not adequately represented. *See Brody*, 957 F.2d at 1125 ("Since Fitzgerald group's claims pit the interests of students . . . directly against those of school officials . . . we cannot expect school officials to be vigorous in defending applicant's legal interests."). Given that they have different goals and divergent interests, Robbins can not adequately protect Intervenors' interests.

As Intervenors meet all of the requirements for intervention as of right under Rule 24(a)(2), Intervenors' motion should be granted.

B. Alternatively, Intervenors Meet All the Elements for Permissive Intervention Under Fed Rule Civ. P. 24(b)(1)(B).

If the Court should deny Intervenors' motion to intervene as of right, Intervenors alternatively move for permissive intervention pursuant to Fed. R. Civ. P. 24(b)(1)(B). "Generally under Fed. R. Civ. P. 24(b), upon timely application, anyone may be permitted to intervene in an action when the applicants' claim or defenses in the main action have a question of law or fact in common." *E.E.O.C. v. Northwestern Human Services*, 2005 WL 2649324, No.

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[8] That the Robbins also purport to seek certification under 23(b)(2) militates in favor of granting intervention because generally class members can not opt out of a 23(b)(2) class action. *See* Newberg, supra note 5, at § 16:7.

Civ. A. 04-CV-4531 (E.D. Pa. Oct. 15, 2005) (internal quotations and citations omitted). The court has discretion whether to grant permissive intervention and should consider "whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." *Pereira,* 2009 WL 1214240 at * 6 (quoting Fed. R. Civ. P. 24(b)). *See also*, *Gatter v. Cleland,* 87 F.R.D. 66, 71 (E.D. Pa. 1980). Permissive intervention under Rule 24(b)(1)(B) does not require a showing of inadequate representation. *Groves v. Insurance Co. of North America*, 433 F. Supp. 877, 888 (E.D. Pa. 1977). Instead, "[t]he question under 24(b)[(1)(B)] should be whether the proposed intervention will improve or strengthen the representation of the class." *Id.* at 888.

1. The Motion for Permissive Intervention is Timely.

As discussed above in Part III.A.1, Intervenors' motion is timely.

2. Common Questions of Law and Fact Exist.

As noted above, both Robbins' and Intervenors' complaints are based upon similar allegations with respect to the remote activation feature of the webcams in the high school-issued laptops. Intervenors' and Robbins' respective complaints both raise common issues of law and fact, including whether LMSD remotely activated webcams on school issued laptops and, if so, whether having done so violated federal or state invasion of privacy laws.

3. Granting the Motion to Intervene Will Not Cause Undue Delay or Prejudice.

As discussed above, this case is in its incipient stages, particularly in light of the Court's Order of March 10, 2010. Numerous courts have held that a motion to intervene should be granted on this ground alone. *See, e.g., Groves,* 433 F. Supp. at 888 (granting intervention even though "it [was] doubtful that [applicant's] intervention" would strengthen or improve the class representation, because defendants had failed to "show any way in which it will be prejudiced by

allowing" intervention); *Eisenberg v. Gagnon,* Civ. A. No. 82-5051, 1986 WL 8127, at *7-8 (E.D. Pa. July 16, 1986) (permitting class members to intervene as name plaintiffs even though applicants' claims and requested relief were identical to those of original plaintiffs, because other parties were not prejudiced by intervention).

4. Representation of Intervenors By Experienced Complex Litigation Attorneys Working *Pro Bono* Will Improve and Strengthen the Representation of Intervenors and the Class.

Intervenors' counsel include highly experienced complex litigators who reside in Lower Merion Township, who have children at Lower Merion High School or Harriton High School, and who are representing the Intervenors *pro bono*. Their expertise and knowledge will significantly improve the efficiency of this litigation and ultimately redound to the class's benefit after intervention. *See* Boni Decl. ¶ 9 and firm biographies at Exhs. B-D.

Intervention is exigent now that the parties have advised the Court they are contemplating settlement. Intervenors – and many hundreds of other LMSD high school families that support the Intervenors' efforts -- believe that monetary damages are inimical to their interests, and have a rational concern that plaintiffs' patent focus on monetary terms[9] could come at the expense of necessary and appropriate injunctive relief, including a full accounting to the families of LMSD high school students, a permanent halt to the remote activation of the webcams, and full disclosure and transparency going forward with respect to LMSD's laptop initiative. Id. ¶ 10.

IV. CONCLUSION

For the reasons stated herein, Intervenors respectfully request that the Court grant their

[9] See, e.g., the class allegations in the Robbins complaint (¶¶ 12-19), which, notwithstanding a statement that Plaintiffs are bringing the action under Rules 23(b)(1) and (b)(2) as well as (b)(3), exclusively focus on the (b)(3) requirements and ignore completely the requirements necessary to plead (b)(1) and (b)(2) classes.

motion for intervention.

Dated: March 18, 2010

Respectfully Submitted,

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