UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN
GREEN BAY DIVISION

SECURITIES AND EXCHANGE COMMISSION, **Plaintiff,** **v.** **WEALTH MANAGEMENT, LLC, JAMES PUTNAM, AND SIMONE FEVOLA,** **Defendants, and** **WML GRYPHON FUND, LLC; WML WATCH STONE PARTNERS, L.P.; WML PANTERA PARTNERS L.P.; WML PALISADE PARTNERS, L.P.; WML L3, LLC; WML QUETZAL PARTNERS, L.P., AND EMPLOYEE SERVICES OF APPLETON, INC.,** **Relief Defendants.**	**CIVIL ACTION No. 09-C-506**

THE LINCOLN NATIONAL INSURANCE COMPANY'S
REPLY BRIEF IN FURTHER SUPPORT OF ITS MOTION TO INTERVENE

Pursuant to Civil L. R. 7(c), The Lincoln National Insurance Company ("Lincoln") submits this Reply Brief in further support of its Motion to Intervene in these proceedings for the purpose of moving to disqualify the Receiver and her Counsel from their continued involvement in the Gryphon Litigation—litigation the Receiver has pursued against Lincoln in the Wisconsin Circuit Court for Outagamie County ("Motion"). (D.E.[1] 470, 471.)

[1] "D.E." refers to docket entries.

I. INTRODUCTION

The arguments presented by the Receiver ("Ms. Feinstein"), Quarles & Brady LLP ("Q&B"), and the U.S. Securities and Exchange Commission ("SEC") (collectively, the "Receiver Team") [2] in their Opposition to the Motion should be rejected. They provide no reasonable basis upon which this Court should deny Lincoln a decision on the merits of its motion to disqualify Ms. Feinstein and Q&B.

Instead, the Opposition makes clear that there are undisputed facts that weigh heavily in favor of permitting intervention. It is undisputed that for over six years, Ms. Feinstein and Q&B pursued claims against Lincoln in the Gryphon Litigation while also representing Lincoln on a number of other matters. It is undisputed that neither Ms. Feinstein nor Q&B obtained informed consent from Lincoln, and that neither Ms. Feinstein nor Q&B have any written evidence to the contrary. It is also undisputed that, rather than sitting on its hands, Lincoln promptly attempted to resolve this issue short of intervention by this Court, raising the issue, in sequence, with Ms. Feinstein, with the general counsel for Q&B, and with the SEC.

Despite their efforts, Ms. Feinstein and Q&B cannot so easily minimize their long-standing confidential relationship with Lincoln to whom they have billed millions of dollars in legal fees. As the Receiver Team would have it, Lincoln's concerns are not material because Lincoln is *now* a former client of Ms. Feinstein and Q&B. But courts reject such facile logic. Lincoln is a former client only because Lincoln terminated its relationship with Ms. Feinstein and Q&B upon learning of the conflict which is the subject of this Motion. The claims and the litigation strategy that Ms. Feinstein and Q&B authorized against Lincoln date back to at least 2012, when Lincoln was undisputedly a current client. Nor can the Receiver Team simply

[2] The remaining capitalized terms in this brief are defined in Lincoln's Motion to Intervene.

dismiss Lincoln as a tardy intervener. The Receiver Team points to nothing in the Gryphon Litigation that will be adversely impacted by the timing of this Motion, instead it relies on conclusory statements. Lincoln attempted to address this important issue in a discrete, confidential, and thoughtful manner before airing this issue with the Court. While the Receiver Team may not respect the attorney-client relationship, it cannot so easily dismiss Lincoln's attempt to resolve this matter out of court.

This Court must accept the non-conclusory allegations in the Motion papers as true (which are supported by sworn affidavits). Lincoln has met the four criteria for intervention under Rule 24(a), and the Receiver Team's opposition has provided no basis to question the allegations in the Motion. Lincoln respectfully requests that the Court grant the Motion, order the Receiver Team to respond to Lincoln's Motion to Disqualify, and resolve the Motion to Disqualify on the merits.

II. ARGUMENT

A. Lincoln's Motion Alleges a Legally Protected Interest to Support Its Right to Intervene in this Litigation

Recognizing that it cannot survive scrutiny under Rule of Professional Conduct 1.7, the Receiver Team attempts to jam the ethical lapse into the more lenient standards for analyzing conflicts with former clients under Rule 1.9. But Lincoln has not asserted a conflict under Rule 1.9. Rather, the conflict asserted by Lincoln dates back to December 2012, when the Receiver authorized a lawsuit against Lincoln while Lincoln was a current client of Ms. Feinstein and Q&B. The Receiver Team ignores that this disabling conflict existed for nearly six years until Lincoln uncovered the conflict after its own investigation. These are classic Rule 1.7 conflicts. The Receiver Team cannot convert the conflict into one arising under Rule 1.9 simply because

Lincoln terminated Q&B and Ms. Feinstein from all legal engagements as a result of the very conflicts that form the basis for this Motion.[3]

As noted in its Motion, Lincoln's termination of Ms. Feinstein and Q&B was essential to protect itself from its attorneys' ongoing breach of their ethical obligations. Lincoln's Motion to Disqualify them from further action in the Gryphon Litigation was the necessary next step to ensure that Lincoln's confidences are not improperly used by its former attorneys. Yet that same counsel now argues that Lincoln's severing of its relationship with Q&B and Ms. Feinstein somehow weakens the case for disqualification. If the Court were to accept the Receiver Teams' logic, Lincoln would have been forced to maintain an attorney-client relationship with a conflicted firm and lawyer in order to bring Ms. Feinstein's and Q&B's unethical conduct to the Court's attention. The law compels no such thing.

Courts have held that an attorney may not rely on the "mere fortuity" of a representation or a condition created by the attorney herself to take advantage of the more favorable treatment of conflicts under Rule 1.9. *See Bd. of Managers v. Wabash Loftominium, L.L.C.*, 876 N.E.2d 65, 77 (Ill. App. 2007) ("[T]he mere fortuity that the client did not require more extensive or frequent services than he did cannot be the escape hatch the law firm would have it be."). Courts will reject a conflicted attorney's efforts to minimize the nature of an attorney-client relationship.

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[3] This Court should reject any argument that the conflict of interest rules do not apply to Ms. Feinstein as Receiver. The Opposition brief cites to no authority to absolve Ms. Feinstein from her obligations under Rule 1.7. Even if there were some exception here, courts have recognized "that there may be situations that may arise in the conduct of the receivership which would cause concern with respect to the confidences [the Receiver] may have received from his or, through imputation, a member of his firm's prior or present representation of another client that may be some how intertwined with the receivership entities or creditors." *SEC v. Nadel*, No. 8:09-cv-87-T-26TBM, 2012 U.S. Dist. LEXIS 189560, at *25 (M.D. Fla. Apr. 25, 2012). This is just such a case. Moreover, this argument has absolutely no application to Q&B.

Id. (rejecting an attorney's characterization of breached attorney-client relationship as limited when invoicing revealed that attorney continuously represented the client for seven years). Courts also will analyze a conflict under Rule 1.7 even though the continuation of the attorney client relationship is left unclear. *Munoz v. Mc3d, Inc*., 1998 U.S. LEXIS18728 at * 7; 1998 WL 831806 (N.D. Ill. 1998) (analyzing conflict under Rule 1.7 when firm represented client for the purpose of responding to subpoena but did not advise client that representation would be limited to discovery and did not advised client that representation had terminated). Indeed, courts, in addressing conflicts in similar scenarios, have developed "The Hot Potato Doctrine." This doctrine provides that "[w]hen a lawyer or law firm suddenly finds itself in a situation of simultaneously representing clients who either are presently adverse or are on the verge of becoming adverse, it may not simply drop one client 'like a hot potato' in order to treat it as though it were a former client for the purpose of resolving a conflict of interest dispute." *ValuePart, Inc. v. Clements*, 2006 U.S. Dist. LEXIS 98167, * 4 -5; 2006 WL 225254 (N.D. Ill Aug. 2, 2006) (analyzing a conflict under Rule 1.7 when attorney terminated client eight days before filing suit against client on behalf of another entity). Ms. Feinstein did not even do the Lincoln the courtesy of dropping her representation before authorizing suit against Lincoln.

The Court should follow these cases and reject the Receiver Team's ploy here. The Receivership conflict was caused by the actions of Ms. Feinstein and Q&B. Neither Ms. Feinstein nor any Q&B attorney disclosed the conflict and never withdrew from their representation of Lincoln. When Lincoln discovered the conflict on its own, it had no choice but to terminate its relationship with Ms. Feinstein and Q&B. Nonetheless, the Receiver Team insists that Lincoln's decision to find new counsel erases six years of conflicting representations. Lincoln's termination of its relationship with Ms. Feinstein and Q&B "cannot be the escape

hatch which [the Receiver team] would have it be." *Wabash Loftominium, L.L.C.*, 876 N.E.2d at 77.

The cases cited by the Receiver Team are inapposite. In *Watkins v. TransUnion, LLC,* TransUnion moved to disqualify the attorney, Mr. Cento, who represented plaintiffs. 869 F.3d 514, 517 (7th Cir. 2017). Mr. Cento represented TransUnion between 2001 and 2005 as an associate at two different firms. *Id*. Mr. Cento started his own firm in 2013 and filed the *Watkins* complaint in May 2014. *Id.* Trans Union moved to disqualify Mr. Cento on the basis of his representation of TransUnion nine years earlier. *Id*. In affirming the district court's denial of the motion to disqualify, the Seventh Circuit was persuaded that "the passage of time had removed any substantial risk that any confidential information from years ago might advance Watkins's litigation." *Id.* at 523. The same is not true here. Q&B represented Jefferson Pilot, Lincoln's predecessor in interest, during the time period when the events giving rise to the Gryphon Litigation took place. Moreover, Q&B's and Ms. Feinstein's representation of Lincoln and Jefferson Pilot continued from the relevant period up until last summer. This is not a case where the passage of time attenuates the risk that the Ms. Feinstein and Q&B will improperly use Lincoln's confidences.

Nor does *Freeman v. Chicago Musical Instrument Co*. provide support for the Receiver Team. In that case, the plaintiff moved to disqualify defense counsel because an associate employed by defense counsel's firm had been previously employed by plaintiff's counsel. 689 F.2d 715 (7th Cir. 1982). Defense counsel maintained that the associate had not worked on or had any knowledge of the subject matter of the litigation. *Id.* at 718. The Seventh Circuit reversed the order disqualifying defense counsel because the district court did not adequately consider whether the associate had knowledge of the plaintiff's confidences and secrets. *Id* at

723. Unlike in *Freeman*, it is undisputed that Q&B represented Lincoln, and its predecessor in interest Jefferson Pilot, from 2001 until 2018. Schott Affidavit (D.E. 480) at ¶ 14. Nor is it disputed that Ms. Feinstein was directly involved in the Lincoln representations as late as July 2018. Q&B and Ms. Feinstein cannot deny that it had access to Lincoln's secrets and confidences.

In any event, were the Court to apply Rule 1.9 regarding conflicts with former clients, Lincoln has adequately alleged that the representations are substantially similar to satisfy Rule 1.9's prohibitions as well. "Substantiality is present if the factual contexts of the two representations are similar or related." *Berg v. Marine Tr. Co., N.A*, 416 N.W.2d 643, 648 (Wis. Ct. App. 1987). Courts will only find that there is no substantial relationship when they "can **clearly discern** that the issues involved in [the] current case do not relate to matters in which the attorney formerly represented the adverse party…." *Id*. (citing *Westinghouse Elec. Corp. v. Gulf Oil Corp*., 588 F.2d 221, 224 (7th Cir. 1978)) (emphasis supplied). "Doubts as to the existence of an asserted conflict of interest should be resolved in favor of disqualification." *Id*.

A central allegation in the Gryphon Litigation is that Lincoln and other life insurers conspired to use the death benefit payment process, including the investigation and denial of claims, to destroy the secondary market for life insurance policies and plaintiffs' investments in same. Am. Compl, attached to the Melnick Affidavit as Exhibit B (D.E. 478 – 2), ¶¶ 501 – 589. In its Motion to Disqualify, Lincoln has alleged that Q&B represented Lincoln involving the payment of group life insurance policies. Mot. to Disqualify (D.E. 473) at 27. Q&B's representation of Lincoln in these matters occurred during the same period when the life insurance policies at issue in the Gryphon Litigation were placed into force. Lincoln maintains that through these representations, "Q&B gained insight into Lincoln's practices and procedures

regarding the distribution of life insurance benefits, a component of the Plaintiff Funds' claims against Lincoln." *Id.* Therefore, even under Rule 1.9 Lincoln's Motion should be granted.

B. Lincoln's Motion Is Timely

Contrary to the Receiver Team's argument, Rule 24(a)(2) does not provide a bright line rule as to when a Motion to Intervene must be filed. *United States v. S. Bend Cmty. Sch. Corp*., 710 F.2d 394, 396 (7th Cir. 1983) ("Rule 24(a)(2) requires that the motion to intervene be 'timely,' although it does not attempt to define the term or specify rigid time limits."). Once the intervenor learns that their interest might be impaired, the intervenor "needs to act reasonably promptly." *Reich v. ABC/York-Estes Corp*., 64 F.3d 316, 321 (7th Cir. 1995). "The purpose of the requirement is to prevent a tardy intervenor from derailing a lawsuit **within sight of the terminal**." *S. Bend Cmty. Sch. Corp*., 710 F.2d at 396 (emphasis added).

Here, *Bd. of Managers v. Wabash Loftominium*, in which the court held that a Motion to Intervene was timely filed seven months after the conflict at issue was discovered, is instructive. 876 N.E.2d at 76 -77 (analyzing the Illinois corollary to Rule 24). The court determined that the conflict was raised promptly with the parties and was a topic of discussion while counsel drafted a motion to disqualify. *Id.* The court also recognized that the motion to disqualify was thoroughly investigated and researched justifying the length of time it took to draft and file the motion. *Id*.

The same is true here. Lincoln learned of the Receiver's conflict in July 2018. In the ensuing time period, Lincoln diligently worked to investigate their claims and draft the Motion to Disqualify. Lincoln is fully aware of the seriousness of the allegations it has made against Ms. Feinstein and Q&B and did not wish to make such damaging claims public without nailing down the facts and circumstances of the conflict. At the same time, Lincoln successively reached out to Ms. Feinstein, Q&B, and the SEC in an effort to resolve this dispute without the need for

judicial intervention. Thus, all parties were aware of Lincoln's concerns early on and continued to communicate with Lincoln while Lincoln analyzed its claims. Lincoln filed its motion when it became clear that its efforts to resolve the conflict outside of court would not be successful. Under the circumstances, Lincoln acted with reasonable promptness in filing the Motion.

The Receiver Team's reliance on *United States v. South Bend Community School Corporation* is misplaced. 710 F.2d 394 (7th Cir. 1983). In *South Bend*, a group of parents attempted to intervene in a desegregation action brought by the Department of Justice against an Indiana School District. *Id.* at 395. While the district court entered a consent decree on April 17, 1981, the class of parents did not move to intervene until September 8, 1981 – the first day of the school year when the consent decree was to go into effect. *Id*. The Seventh Circuit affirmed the denial of the motion to intervene finding that "if the motion had been granted the implementation of the decree would have been delayed." *Id*. at 396. Here, unlike the *South Bend* intervenors, the timing of Lincoln's Motion will not interfere with the implementation of a judgment. To the contrary, discovery is ongoing and trial is scheduled to commence in April 2020.

In addition to contriving an arbitrary deadline for filing the Motion to Intervene, the Receiver Team also claims that Lincoln had notice of the concurrent conflict of interest as early as 2013. Instead of producing evidence that Ms. Feinstein or Q&B affirmatively disclosed the nature of the conflict or that Lincoln provided informed consent to the conflict signed in writing, the Receiver Team points to exhibits attached to various affidavits filed in support of motions in the Gryphon Litigation. How these buried exhibits were meant to notify Lincoln of the concurrent conflict is not explained. The Receiver Team also distorts the affidavits of Ms. Potter and Mr. Deskins, relied upon by Lincoln. While Ms. Potter and Mr. Deskins affirmed that Ms. Feinstein had advised she was appointed as receiver to various investment funds, both affiants

swore that Ms. Feinstein never identified the funds for which she served as receiver, never provided the caption or case number of the enforcement action, and never told the affiants that she was directing litigation against Lincoln. Deskins Affidavit (D.E. 474) at ¶¶ 6, 7 and 9; Potter Affidavit (D.E. 474-2) at ¶¶ 10 – 12.

Moreover, Lincoln completely rejects the Receiver Team's argument that the Motion to Disqualify is the cause of any delay in the Gryphon litigation – a seven year old case. The duty to prosecute the Gryphon Litigation falls squarely on the Plaintiff Funds (which are controlled by Ms. Feinstein); yet the Plaintiff Funds were unable to meet the generous October 1, 2018 fact discovery deadline set in that matter. While Lincoln and its co-defendants worked diligently to move discovery forward, as of August 2018, the Plaintiff Funds had not noticed a single deposition, and a discovery extension was granted to accommodate the Plaintiff Funds. The Receiver Team also fails to point to a single concrete example as to how the alleged delay will cause any prejudice to the Gryphon Litigation. The suggestion that Lincoln's Motion to Disqualify is somehow stalling this now seven year old case and will prejudice the investors is utterly meritless.[4]

C. The Court Should Not Limit the Scope of the Intervention

The Court should also reject the proposal of Ms. Feinstein and Q&B that the intervention should be limited to whether Lincoln's interest in privileged information requires their disqualification. The Receiver Team argues that Lincoln's assertion that Ms. Feinstein and Q&B have previously breached Rule 1.7 is irrelevant to its Motion to intervene in this action. This is not the case. Ms. Feinstein's ethical breaches, whether past or current, are directly relevant to

[4] The Circuit Court on March 12, 2019 extended and set the fact discovery end date as July 15, 2019.

her fitness to act as Receiver in this matter. Ms. Feinstein, as Receiver, is an officer of the Court. As Lincoln's Motion to Disqualify argues, Ms. Feinstein's and Q&B's conflict with Lincoln will have significant downstream impacts on the receivership estate. Mot. to Disqualify at 28 – 29. Lincoln's co-defendants will have concerns about being subject to prejudicial treatment, and investors may doubt that Ms. Feinstein and Q&B have pursued the litigation as aggressively as they might have absent the Receiver's relationship with Lincoln. These doubts will taint the integrity of the Gryphon Litigation and impede the closing of the estate. Thus, Ms. Feinstein's and Q&B's conduct towards Lincoln is relevant to the Court's determination as to whether Ms. Feinstein and Q&B are worthy of their position of trust.

III. Conclusion

For foregoing reasons, Lincoln respectfully requests that this Court grant its motion to intervene and resolve its Motion to Disqualify on the merits.

Respectfully submitted,

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