UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN
GREEN BAY DIVISION

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v. Civil Action No: 09-C-506

WEALTH MANAGEMENT, LLC,
JAMES PUTMAN, 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.

THE RECEIVER AND QUARLES & BRADY LLP'S OPPOSITION TO THE LINCOLN NATIONAL LIFE INSURANCE COMPANY'S MOTION TO INTERVENE

INTRODUCTION

Lincoln National Life Insurance Company seeks to intervene in this action so it can file a motion to disqualify Faye B. Feinstein, as Receiver, and Quarles & Brady LLP, as counsel to Receiver, from any prospective involvement in *WML Gryphon Fund, LLC et al. v. Wood, Hat & Silver, LLC et al.*, Case No. 12-CV-1704 in the Circuit Court for Outagamie County, Wisconsin (the "Outagamie County action"). Lincoln's motion to intervene should be denied. Lincoln is a former, not current, client of Quarles and the Receiver. It claims that its interest in privileged information gained by Quarles and the Receiver during their prior representations of Lincoln entitles it to intervene in this action so it can bring its motion to disqualify. "A colorable claim of privilege could constitute a legally protectable interest sufficiently significant to warrant

intervention as of right"—but only if Rule 24(a)(2)'s four elements are satisfied. *United States v. BDO Seidman*, 337 F.3d 802, 808 (7th Cir. 2003). Even taking Lincoln's allegations on their face, three of Rule 24(a)(2)'s four elements are not satisfied here.

Lincoln has no right to intervene because it fails to make a colorable claim that any privileged information it shared with Quarles or the Receiver is "relat[ed] to the subject matter of th[is] action," or that Lincoln's interest in such information may be "impair[ed], as a practical matter . . . by the disposition of th[is] action." *Reich v. ABC/York-Estes Corp.*, 64 F.3d 316, 321 (7th Cir. 1995) (listing the mandatory elements of intervention under Rule 24(a)(2)). Neither this action nor the Outagamie County action is related to any previous matter where Quarles represented Lincoln. Quarles gained no information in its prior representations of Lincoln that relates to the subject matter of this action or the Outagamie County action. Instead, Lincoln claims only that Quarles gained knowledge about Lincoln's supposed "policies and procedures," information far too generalized to warrant any right of intervention in this specific action.

Still less can Lincoln claim a right to intervene *for the purpose moving to disqualify its former counsel*. When a former client moves to disqualify its former attorney, it must show that "the subject matter of the representation of [the former client] . . . is 'substantially related' to the present litigation." *Freeman v. Chicago Musical Instrument Co.*, 689 F.2d 715, 722 (7th Cir. 1982). Further, "in cases involving an organizational client . . . general knowledge of the client's policies and practices ordinarily will not preclude a subsequent representation." *Walker v. Trans Union, LLC*, 869 F.3d 514, 522 (7th Cir. 2017) (holding that an attorney's "repeated representations of Trans Union in FCRA violation cases [did] not preclude him from representing [the plaintiff] in a factually distinct [FCRA] suit [against Trans Union] even if his new representation is adverse to his former client"). Lincoln does not even claim that this action

(or the Outagamie County action) is "substantially related" to any matter where Quarles was Lincoln's counsel, or that Quarles has something beyond "general knowledge" of Lincoln's "policies and practices." This is fatal to Lincoln's claimed right to intervene, even setting aside that neither Quarles nor the Receiver are counsel to any party in the Outagamie County litigation, and that the Receiver is not acting as an attorney in this SEC action.

Independently, Lincoln's motion must be denied for untimeliness. By its own account, Lincoln has known of the basis of its motion since no later than July 11, 2018. Lincoln waited eight months before moving to intervene in this action, and its delay has caused corresponding delays in the Outagamie County litigation that would not have been necessary had Lincoln moved promptly. Lincoln thus fails to meet the "timely application" element of Rule 24(a)(2). *Id.*

In the alternative, if leave is granted, the scope of Lincoln's intervention at a minimum should be limited to adjudicating whether Lincoln's *claimed interest in its privileged information* entitles it to the disqualification remedy that it seeks. Lincoln should not be granted leave to intervene for the distinct purpose of litigating its claim that Quarles and the Receiver breached Rule 1.7 of the Rules of Professional Conduct *in the past*. Adjudicating that claim in this forum could not possibly help Lincoln protect any interest that "relat[es] to the subject matter of th[is] action" and may be "impair[ed] . . . by the disposition of thi[s] action." *Reich*, 64 F.3d at 321. Lincoln and Quarles will litigate Lincoln's Rule 1.7 claims in the appropriate forum if Lincoln files the lawsuit it is threatening; there is no need for them to do so here. Nor should Lincoln be granted leave to intervene in order to argue that disqualification would benefit *other* parties, such as investors in the funds that are suing Lincoln in the Outagamie County action. The interests of third parties cannot confer upon *Lincoln* the right to intervene in this action under Rule 24(a)(2).

BACKGROUND

A. This Action and the Receivership

Almost ten years ago, on May 20, 2009, the Securities and Exchange Commission ("SEC") filed this action against defendants Wealth Management LLC ("Wealth Management"), James Putman, and Simone Fevola, and against six "relief defendant" funds: WML Gryphon Fund LLC, WML Watch Stone Partners LP, WML Pantera Partners LP, WML Palisade Partners LP, WML L3 LLC, and WML Quetzal Partners LP (the "WML Funds"). Dkt. 1. That same day, this Court entered an order appointing Faye B. Feinstein as Receiver for Wealth Management LLC, the WML Funds, and Employee Services of Appleton, Inc. Dkt. 8. Six days later, it entered the First Modified Order Appointing Receiver, which is still operative. Dkt. 14.

The First Modified Order Appointing Receiver authorized and directed the Receiver to, among other things, (i) administer and manage the business affairs, funds, assets, causes in action and other property of Wealth Management and the WML Funds; (ii) engage in an independent inquiry concerning the finances and operations of Wealth Management and the WML Funds, including by identifying and locating all assets held or under management; and (iii) prepare an independent accounting of Wealth Management and the WML Funds' assets. Dkt. 14 p. 3.

This Court is aware of the mountain of work the Receiver has undertaken to preserve the assets of the WML Funds and reduce the assets of the receivership estate to cash, so as to return to investors some portion of the more than $100 million invested in the WML Funds. However, for the Court's convenience, the Receiver will summarize the tasks she has engaged in and the results achieved over the last ten years.

The Receiver was charged with administering eight separate, though related, estates: Wealth Management, which was an operating business at the time of the Receiver's

appointment; Employee Services of Appleton, Inc., which had been established to pay Wealth Management's employees and had set up a 401(k) plan for those employees; and each of the six alternative investment funds (the WML Funds) that Wealth Management established. Decl. of Faye B. Feinstein dated April 12, 2019 ("Feinstein Decl.") ¶ 2. When the SEC filed this action, Wealth Management claimed to have 447 advisory clients with $131 million under management, of which approximately $102 million consisted of client funds. *Id.* ¶ 3.

The Receiver's work has consisted of four main categories:

1. Winding down Wealth Management's operating business (a task made more difficult because virtually no employees remained) and dealing with administrative matters such as disposing of the assets at Wealth Management's leased location, which involved moving and preserving the massive number of investor account and WML Fund documents; preserving and taking control of the cash in the multiple WML Fund accounts; addressing payroll and benefits; retaining accounting firms to prepare K-1s for investors and file tax returns for Wealth Management and each of the WML Funds; and addressing potential insurance coverage claims arising under investment advisor and fund professional liability insurance policies issued by Houston Casualty Insurance Company, general liability policies issued by Society Insurance, a Mutual Company, and an ERISA compliance bond issued by Travelers Casualty and Surety Company of America.

2. Investigation of (i) the status of the investments made by the WML Funds in various sub-funds; (ii) the nature of the investments made by each of those sub-funds; and (iii) the likelihood of receiving further distributions from each of the sub-funds. This involved issuing subpoenas to each of the sub-fund managers and reviewing documentation produced in response.

3. Researching, considering, proposing and confirming a plan for the distribution of funds to investors (the "Plan"), including defending the plan confirmation order on appeal to the Seventh Circuit (which affirmed confirmation of the Receiver's plan), paying creditors under the Plan, and making periodic distributions to investors under the Plan (distributions that currently total about $14.2 in the aggregate).

4. Considering other mechanisms for mitigating the tens of millions of dollars in losses sustained by investors, including researching the costs and benefits of investigating and potentially pursuing actions against the former managers of the WML Funds (James Putman and Simone Fevola), actions against investors who

> received preferential returns, claims against one or more of the sub-funds, and claims against third parties.

Id. ¶ 3a-d.

The Court's First Modified Order Appointing Receiver authorized the Receiver "to engage and employ persons in her discretion to assist her in carrying out her duties and responsibilities . . . including, but not limited to, lawyers, accountants, and investment advisers." Dkt. 14 p. 4. For her counsel in this action, the Receiver retained Quarles. Both the Receiver and Quarles apply to this Court on an annual basis to review and approve the compensation for their respective services. *See, e.g.*, Dkt. 464. The SEC also reviews the Receiver's and Quarles' billing rates and fee applications before they are submitted to the Court. *See, e.g.*, *id.* ¶¶ 37, 44.

B. The Receiver's Court-Approved Retention of Special Litigation Counsel

The six WML Funds had invested their client funds in a total of 22 alternative investment sub-funds (the "Sub-Funds"). *Id.* ¶ 5. Virtually none of the investments made by the Sub-Funds were liquid. *Id.* ¶ 6. Nor was there a procedural mechanism by which the WML Funds could demand a cancellation, liquidation or sale of their interests in the Sub-Funds. *Id.* ¶ 6.

The WML Funds' investments in two Sub-Funds—The Baetis Fund, L.P. ("Baetis") and The Brown Investment Fund, L.P. ("Brown")—together were among the largest Sub-Fund investments. Feinstein Decl. ¶ 7. Investments in Baetis totaled $32.2 million, and investments in Brown totaled $16.2 million. *Id.* ¶ 8. The general partner of both Brown and Baetis is Wood, Hat & Silver, L.L.C. ("WH&S"), which controlled the investments made by Baetis and Brown. *Id.* ¶ 9. Baetis and Brown's investments focused exclusively on non-recourse life insurance premium financing which involved loaning premiums to elderly insureds who would pledge the policies (death benefits ranged from $1 million to $15 million) as collateral for the loans. *Id.* ¶ 10.

When the non-recourse premium finance loans terminated, policy owners could pay off the loan and retain the policy or Baetis and Brown, by WH&S, could sell the policies to buyers on the secondary market for life insurance. *Id.* ¶ 11. However, by 2008, WH&S was unable to sell policies, or to sell them for more than the amount of the monies loaned to the insureds to pay the initial premiums on the policies. *Id.* ¶ 12. Thus, Baetis and Brown began to accumulate significant losses. *Id.* ¶ 12.

The Receiver considered mechanisms for supporting WH&S's efforts to sell policies, as well as other ways to recoup the significant dollars lost by investors. *Id.* ¶ 13. Following approval of her Plan, the Receiver entered into negotiations with the law firm of Melnick & Melnick, S.C. ("Melnick") to act as special litigation counsel to (a) investigate the potential liability of numerous entities, including, without limitation, insurance companies, agents, brokers and WH&S, for the losses sustained by investors in the Brown and Baetis funds; and (b) consider the pursuit of such claims. *Id.* ¶ 14. Following such negotiations, and upon the Receiver's motion, this Court authorized the Receiver in February 2011 to execute an engagement letter and retain Melnick. Dkts. 331, 352. The engagement letter provided that Melnick, in its discretion, would determine whether there were any "appropriate" causes of action stemming from the investments made by the WML Funds in Baetis and Brown, which Melnick then would pursue on behalf of the WML Funds.[1]

C. The Outagamie County Action

In furtherance of her obligations under the Melnick engagement letter, the Receiver provided Melnick with certain documents which she had received from Wealth Management, the

[1] Pursuant to the Court's order entered on September 17, 2012 (Dkt. 417), the Receiver's motion to retain Melnick, including the engagement letter, have been sealed. The Receiver will provide a copy to the Court if the Court so requests.

WML Funds, and WH&S. *Id.* ¶ 16. Following Melnick's investigation and consideration of the viability of potential causes of action, and in accordance with their engagement letter, Melnick informed the Receiver in 2012 that they were prepared to pursue litigation in Wisconsin state court. *Id.* ¶ 17. Melnick filed the Outagamie County action on December 11, 2012. Decl. of Stephanie L. Melnick dated April 12, 2019 ("Melnick Decl.") ¶ 2, Ex. A (Outagamie County Complaint).

The Outagamie County action was brought by six plaintiffs. *Id.* Four of the six plaintiffs are among the WML Funds: WML Gryphon Fund, WML Watch Stone Partners, WML Pantera Partners, and WML Palisade Partners. *Id.* The remaining two are individuals, John and Julie Leschke. *Id.* The Leschkes invested directly in one of the Sub-Funds (Brown), and have no role in the WML Funds or this action.

All the Outagamie County plaintiffs are represented exclusively by Melnick. *Id.* Quarles represents the Receiver in this action, but it was never in the mix to pursue claims on behalf of the WML Funds. *See* Dkt. 352. The Outagamie County action is being pursued by Melnick, the special litigation counsel whom the Receiver retained with this Court's approval.

The initial complaint in the Outagamie County action named 23 individuals and entities as defendants. Melnick Decl. Ex. A. Lincoln, along with six other life insurance companies, was among them. *Id.* At this point following multiple settlements, four insurance company defendants, five agents, and WH&S remain defendants in the Outagamie County action. Feinstein Decl. ¶ 20.

Currently, two claims remain pending against Lincoln in the Outagamie County action. Melnick Decl. ¶ 4. The Leschkes and the plaintiff WML Funds allege unjust enrichment as well as a Wisconsin antitrust violations related to Lincoln's sale of life insurance policies that Baetis

or Brown financed with non-recourse premium finance loans and sales of same on the secondary market for life insurance. Melnick Decl. ¶ 4 & Ex. B (Outagamie County Am. Compl. ¶¶ 932-938, 960-969).

D. Lincoln's Conflict Allegations

Quarles and Ms. Feinstein have represented Lincoln in the past. Lincoln's affiants assert that "[f]rom 2001 until 2009, Quarles . . . represented Lincoln in thirteen matters relating to its group protection business"; that Lincoln retained Quarles and Ms. Feinstein in connection with five bankruptcy or foreclosure matters in 2010, 2011, 2013, and 2015; and that in 2014, Lincoln also engaged Quarles and Ms. Feinstein in a single matter relating to alleged building code violations.[2] Dkt. 474 ¶¶ 3-10; Dkt. 474-1 ¶ 4; Dkt. 474-2 ¶¶ 3-8.

Two of Lincoln's affiants, both in-house attorneys, acknowledge remembering that Ms. Feinstein discussed her role as Receiver with them. Lincoln's Mary Jo Potter remembers Ms. Feinstein, either in 2013 or 2015, telling her that she had been appointed as the Receiver and did not believe the Receivership posed a conflict to Lincoln. Dkt. 474-2 ¶¶ 7-10. Lincoln's Eric Deskins also recalls Ms. Feinstein discussing the Receivership, approximately in 2014. Dkt. 474 ¶¶ 5-6.

Lincoln claims that on July 11, 2018, several years after the Receiver's discussions with Ms. Potter and Mr. Deskins, it identified a purported conflict arising from Ms. Feinstein's role as Receiver. Dkt. 474 ¶¶ 13-14; Dkt. 474-1 ¶¶ 5-7. According to one of its affiants, Lincoln then immediately "terminated Ms. Feinstein and [Quarles] from all active engagements." Dkt. 474-1 ¶ 16.

[2] As noted below, the Court "must accept as true the non-conclusory allegations" of Lincoln's motion to intervene. *Reich*, 64 F.3d at 321. Thus, Quarles and the Receiver accept the statements by Lincoln's affidavits for purposes of this brief, although they contest many of these statements in fact.

LEGAL STANDARDS

I. General Intervention Procedure

"Pursuant to Rule 24(a)(2), a petitioner must meet four criteria to intervene as of right: (1) timely application; (2) an interest relating to the subject matter of the action; (3) potential impairment, as a practical matter, of that interest by the disposition of the action; and (4) lack of adequate representation of the interest by the existing parties to the action." *Reich*, 64 F.3d at 321 (7th Cir. 1995). "The burden is on the party seeking to intervene of right to show that all four criteria are met." *Reid L. v. Illinois State Bd. of Educ.*, 289 F.3d 1009, 1017 (7th Cir. 2002). "The failure to meet any one factor dictates denial of the petition." *Reich*, 64 F.3d at 321.

"[D]eterminations of fact based on extrinsic evidence are not appropriate at the stage of a motion to intervene." *Lake Investors Dev. Group, Inc. v. Egidi Dev. Group*, 715 F.2d 1256, 1260 (7th Cir. 1983). The Court "must accept as true the non-conclusory allegations of the motion." *Reich*, 64 F.3d at 321.

II. Limited-Purpose Intervention Without an Accompanying Pleading

Ordinarily, a proposed intervenor moves to become a full party to the case so that it can assert claims or defenses as a plaintiff or defendant. Thus, under Rule 24, a motion to intervene generally "must . . . be accompanied by a *pleading* that sets out the claim or defense for which intervention is sought." Fed. R. Civ. P. 24(c) (emphasis added); *see also Shevlin v. Schewe*, 809 F.2d 447, 450 (7th Cir. 1987); Fed. R. Civ. P. 7 (distinguishing "pleadings" from "motions").

Lincoln, however, has moved to intervene—not to file a pleading—but for the "limited purpose" of asserting a purported interest in "privileged information Q&B and Ms. Feinstein gained during their [prior] representation of Lincoln." Dkt. 471 p. 1; *see also id.* pp. 6-7. Notwithstanding Rule 24(c)'s text, the Seventh Circuit has previously entertained a motion to

intervene where the movant seeks to assert a privilege without filing any pleading. *See BDO Seidman*, 337 F.3d at 806 (unsuccessful movants "sought to intervene to assert a confidentiality privilege regarding certain documents that [a party] intended to produce"). Other courts have done so too. *See Swoboda v. Manders*, 665 Fed. Appx. 312, 313 (5th Cir. 2016) (unpublished) (movant "sought to intervene for the limited purpose of filing a Motion for Protective Order . . . alleg[ing] that [documents] were . . . privileged work product"); *Barker v. Loc. 150, Intern. Union of Operating Engineers, AFL-CIO*, No. 08 C 50015, 2010 WL 934068, at *2 (N.D. Ill. Mar. 11, 2010) (movant sought to intervene "for the limited purpose of moving to quash subpoenas"); *Nelson v. Greenspoon*, 103 F.R.D. 118, 119-20 (S.D.N.Y. 1984) (movant sought to intervene "to preserve its claims to a purported attorney-client privilege surrounding various documents" and to "prohibit[] [a party] from producing or disseminating those documents").

III. Applicable Ethical Rules

Lincoln's motion to intervene accuses the Receiver and Quarles of violating the Rules of Professional Conduct for Attorneys. Dkt. 470 p. 3. Specifically, Lincoln alleges a violation of Rule 1.7 of the Wisconsin Rules of Professional Conduct. (*Id.*)

As counsel to the Receiver in this action, Quarles is governed by Wisconsin's Rules of Professional Conduct. *See* E.D. Wis. L.R. 83(d)(1) ("Attorneys practicing before this Court are subject to the Wisconsin Rules of Professional Conduct for Attorneys . . . ."); *see also Watkins v. Trans Union, LLC*, 869 F.3d 514, 519 (7th Cir. 2017) ("Lawyers representing clients in federal courts must follow federal rules, but most federal courts use the ethical rules of the states in which they sit." (internal quotation marks omitted)).

The Receiver, however, is not practicing as an attorney in this action. "While a receiver may also be an attorney, the receiver does not act as an attorney in the course of fulfilling the

duties of the receiver." *SEC v. Nadel*, 8:09-CV-87-T-26TBM, 2012 WL 12910270, at *5 (M.D. Fla. Apr. 25, 2012); *see also* Dkt. 473 pp. 15-17, 19, 23, 25-26 (citing *Nadel* in support of Lincoln's proposed motion to disqualify). "'The receiver is a neutral court officer appointed by the court.'" *Nadel*, 2012 WL 12910270, at *5 (quoting *Sterling v. Stewart*, 158 F.3d 1199, 1201 n.2 (11th Cir. 1998)). She "does not function as an attorney in the receivership" and "does not maintain an attorney-client relationship in the receivership other than the position of client." *Id.*

The Receiver is an attorney licensed in Illinois, and generally is subject to the Rules of Professional Conduct of Illinois. In Illinois, as in Wisconsin, the Rules of Professional Conduct apply differently—and only partially—to a lawyer acting in a nonrepresentational capacity, such as receiver:

> [2] As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others. As an evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others.
>
> [3] In addition to these representational functions, a lawyer may serve as a third-party neutral, a nonrepresentational role helping the parties to resolve a dispute or other matter. Some of these Rules apply directly to lawyers who are or have served as third-party neutrals. See, e.g., Rules 1.12 and 2.4. In addition, there are Rules that apply to lawyers who are not active in the practice of law or to practicing lawyers even when they are acting in a nonprofessional capacity. For example, a lawyer who commits fraud in the conduct of a business is subject to discipline for engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. See Rule 8.4.

Ill. RPC, Preamble; *see also* Wis. SCR 20, Preamble [2]-[3] (same); *Nadel*, 2012 WL 12910270, at *5 & n.52 (citing and quoting identical language in the Preamble to Florida's Rules). For example, Rule 1.7—the only rule of professional conduct cited in Lincoln's motion to intervene—applies only when a lawyer's "*representation* of one client will be directly adverse to another client" or when "there is a significant risk that the *representation* of one or more clients

will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer." Ill. RPC 1.7(a) (emphasis added); *see also* Wis. SCR 20:1.7(a) (same).

Lincoln's intervention brief also discusses prior matters in which Quarles represented Lincoln (or other entities with some relationship to Lincoln). Dkt. 471 pp. 2-4. Which state's ethical rules applied to Quarles in the course of those representations would depend on where the representations occurred and which state's lawyers were involved.

Rule 1.7 of the Rules of Professional Conduct pertains solely to "concurrent" conflicts of interest. Wis. SCR 20:1.7; Ill. RPC 1.7; *see also* Wis. SCR 20:1.7 cmt. [1] ("For former client conflicts of interest, see Rule 1.9."); Ill. RPC 1.7 cmt. [1] (same). Lincoln agrees that Quarles has not represented Lincoln—by Lincoln's own choice—since July 2018. Dkt. 471 at 1; Dkt. 474 at 3, ¶16; Dkt. 474-2 at 2, ¶15. Therefore, Lincoln is not a current Quarles client.

ARGUMENT

I. Intervention Should Be Denied Because Lincoln's Stated Interest in Privileged Information Does Not Relate to the Subject Matter of This Action and Will Not Be Impaired by the Disposition of this Action.

"A colorable claim of privilege could constitute a legally protectable interest sufficiently significant to warrant intervention as of right"—but only if Rule 24(a)(2)'s elements are satisfied. *BDO Seidman*, 337 F.3d at 808. To satisfy these elements, Lincoln carries "the burden of establishing" that its interest in privileged information "relate[s] to the subject matter of" this action. *Id.* And even if it could meet that burden, Lincoln still could claim no right of intervention unless "the three remaining factors [of Rule 24(a)(2) were] also satisfied." *Id.* This would mean establishing, among other things, that "disposition of th[is] action threatens to impair [Lincoln's] interest." *Id.* But Lincoln fails to show that its interest in privileged

information relates to the subject matter of this action *or* that disposition of the action threatens to impair such interest. Thus, Rule 24(a)(2)'s second and third elements each are not met.

Lincoln does not claim that any privileged information may be *disclosed* in this proceeding. Thus, this case is distinguishable from the *Swoboda*, *Barker*, or *Nelson* cases cited in Lincoln's intervention brief. *See* Dkt. 471 pp. 6-7. The movants in those cases sought intervention in order to prevent parties or third parties from disclosing allegedly privileged information in response to discovery requests or subpoenas. *See Swoboda*, 665 Fed. Appx. at 313; *Barker*, 2010 WL 934068, at *2; *Nelson v. Greenspoon*, 103 F.R.D. at 119-20. By contrast, Lincoln seeks to intervene solely to pursue the remedy of disqualification.

Nor does Lincoln show that this action (or the Outagamie County action) is related to any matter where Quarles was formerly its counsel. Although this Court must "accept as true the non-conclusory allegations" of Lincoln's motion to intervene, *Reich*, 64 F.3d at 321, Lincoln does not make a *non-conclusory* allegation that such a relationship exists. *See* Dkt. 471; Dkt. 473; Dkt. 474; Dkt. 474-1; Dkt. 474-2; Dkt. 474-3. Two of Lincoln's affiants state that between 2010 and 2015, Lincoln retained Quarles and Ms. Feinstein in connection with five bankruptcy or foreclosure matters, as well as for a single matter relating to alleged building code violations. Dkt. 474 ¶¶ 3-10; Dkt. 474-2 ¶¶ 308. But there is no suggestion that any of these matters—none of which were even insurance related—had any connection to this action or the Outagamie County action. Another affiant states that "[f]rom 2001 until 2009, Quarles . . . represented Lincoln in thirteen matters relating to its group protection business," including six "disputes involving group life insurance policies." Dkt. 474-1 ¶ 4. But again, Lincoln offers no explanation as to what these "disputes involving group life insurance policies" could possibly have to do with anything happening in the Outagamie County action.

In fact, the "thirteen matters" from "2001 until 2009" that Lincoln references are completely unrelated to this action or the Outagamie County action. Lincoln did not even mention these matters in the October 19, 2018 letter that purportedly explained the basis of its conflict claim. *See* Dkt. 474-14 pp. 1-2 & Ex. 1. The thirteen matters arose from Quarles' relationship with Jefferson Pilot Financial Insurance Company ("Jefferson Pilot"), a former Quarles' client that merged with Lincoln in April 2006. Decl. of Donald K. Schott dated April 12, 2019 ("Schott Decl.") ¶¶ 12-13.[3] Quarles' records show that between 2001 and 2009, it opened thirteen matters under Jefferson Pilot's client number that appear to have been insurance-related. The matter descriptions for these matters suggest that they were either interpleader actions, discrete disputes involving group disability, or what Lincoln describes as "disputes involving group life insurance policies." *Id.* ¶ 14-15; Dkt. 474-1 ¶ 4. None of the matter descriptions suggest any relationship with the subject matter of the action against Lincoln in Outagamie County, which alleges unjust enrichment and an antitrust claim related to Lincoln's sale of life insurance policies that were financed with non-recourse premium finance loans and sales of same on the secondary market for life insurance. *Id.* ¶ 16; Melnick Decl. Ex. B (Outagamie County Am. Compl. ¶¶ 932-938, 960-969).

The unrelated nature of Quarles' former representations of Lincoln (or Jefferson Pilot) is especially dispositive given that Lincoln wants to intervene for the specific purpose of filing a motion to disqualify. When deciding a former client's motion to disqualify, a court's "first step" must be to "ascertain whether the subject matter of the representation [of the former client] . . . is 'substantially related' to the present litigation.'" *Freeman*, 689 F.2d at 722 (7th Cir. 1982). "*If the subject matter of the former representation is not substantially related to the subject matter*

[3] *See also* https://www.investmentnews.com/article/20060403/REG/604030744/done-deal-lincoln-and-jefferson-pilot-merge; https://www.lfg.com/public/aboutus/companyoverview/historyandtimeline.

of the present representation, obviously no ethical problem exists." *Id.* (emphasis added).[4] *See also* Wis. SCR 20:1.9(a) ("A lawyer who has formerly represented a client in a matter "shall not thereafter represent another person in *the same or a substantially related matter* in which that person's interests are materially adverse to the interests of the former client." (emphasis added); Ill. RPC 1.9(a) (same); Wis. SCR 20:1.9 cmt [3] ("Matters are 'substantially related' for purposes of [Rule 1.9] if they involve *the same transaction or legal dispute* or if there otherwise is *a substantial risk* that *confidential factual information* as would normally have been obtained in the prior representation would materially advance the client's positon in the subsequent matter." (emphasis added)); Ill. RPC 1.9 cmt [3] (same).

Rather than claim that this action or the Outagamie County action are substantially related to any of Quarles' former representations, Lincoln merely asserts an interest in generalized information that cannot support a motion to disqualify. Lincoln argues that the Receiver and Quarles obtained "privileged and proprietary information regarding Lincoln's policies and procedures for the distribution of life insurance proceeds." Dkt. 471 p. 2. Yet, "in cases involving an organizational client . . . 'general knowledge of the client's policies and practices ordinarily will not preclude a subsequent representation.'" *Walker*, 869 F.3d at 522 (quoting Ind. RPC 1.9, cmt. 3)); *see also* SCR 20:1.9 cmt. 3 (same); *see also* Ill. RPC 1.9 cmt. 3 (same).

Lincoln's claim that the Receiver "gained direct insight into Lincoln's litigation and settlement practices" is immaterial for similar reasons. Dkt. 471 p. 2. "The general knowledge and experience" that counsel "gained while defending [a corporate client] is *not the type of*

[4] *See also id.* at 721 (holding that disqualification is "a drastic measure which courts should hesitate to impose except when absolutely necessary"); *id.* at 722 (noting that although "there obviously are situations where [motions to disqualify counsel] are both legitimate and necessary . . . such motions should be viewed with extreme caution for they can be misused as techniques of harassment").

confidential information with which Rule 1.9 is concerned." *Walker*, 869 F.3d at 522 (emphasis added). Thus, in *Walker*, the Seventh Circuit held that an attorney's "repeated representations of Trans Union in FCRA violation cases [did] not preclude him from representing [the plaintiff] in a factually distinct [FCRA] suit [against Trans Union] even if his new representation is adverse to his former client." *Id.* Furthermore, Lincoln does not show how any "insight" previously gained into Lincoln's "litigation and settlement practices" could even be relevant here. Experience representing Lincoln in completely unrelated matters—bankruptcy and foreclosure cases, building code violation cases, and group insurance policy disputes—could not reveal anything significant about how Lincoln might choose to litigate the case that Melnick has filed in Outagamie County. *Contrast Walker*, 869 F.3d at 522 (prior representations and current adverse representations all were in FCRA violation cases). Most of the thirteen matters that Quarles opened for Jefferson Pilot also concluded before Jefferson Pilot even merged with Lincoln, and those matters would have given no "insight" into *Lincoln's* practices at all. For seven of the thirteen matters, Quarles' records show that the matter ended and Quarles issued its final bill before the April 2006 merger. Schott Decl. ¶ 17. And for two of the remaining six, the "last bill" dates are in April 2006 and May 2006—immediately after the merger. *Id.* ¶ 18.

Even accepting its allegations as true, Lincoln lacks any colorable claim that its interest in privileged information sufficiently relates to this action, or may be impaired if the Court does not entertain Lincoln's motion to disqualify. Intervention must be denied.

II. Intervention Also Should Be Denied Because Lincoln's Motion Is Untimely.

Lincoln's failure to meet the second and third elements of Rule 24(a)(2) dictates denial of Lincoln's motion. *Reich*, 64 F.3d at 321. But Lincoln also fails to meet the first element,

requiring a "timely application." *Id.* Its motion must be denied on this independent basis as well.

An intervenor must "act with dispatch" upon learning that its interests may be adversely affected by the outcome of litigation. *See Atlantic Mutual Ins. Co. v. Northwest Airlines, Inc.*, 24 F.3d 958, 960 (7th Cir. 1994). "As soon as a prospective intervenor knows or has reason to know that his interests might be adversely affected by the outcome of the litigation he must move promptly to intervene." *United States v. South Bend Community School Corp.*, 710 F.2d 394, 396 (1983). The purpose of the timeliness requirement is to prevent "tardy intervenor[s] from derailing a lawsuit within sight of the terminal." *Id.*

Lincoln is a "tardy intervenor." *South Bend*, 710 F.2d at 396. To the extent Lincoln suggests that Ms. Feinstein's role as Receiver somehow was hidden, the fact is that two of Lincoln's own in-house attorneys concede that Ms. Feinstein raised her position as Receiver with them four to six years ago. Dkt. 474 ¶¶ 5-6; Dkt. 474-2 ¶¶ 7-10. Lincoln also received this information early on within the Outagamie County litigation. *See* Melnick Decl. Ex. C, ¶ 3 & Ex. 1 (October 14, 2013 affidavit in the Outagamie County action attaching this Court's May 20, 2009 Order Appointing Receiver); *id.* Ex. D, ¶ 5 & Ex. C (October 5, 2015 affidavit in the Outagamie County action attaching the same order); *id.* Ex. E, ¶ 6 (October 13, 2015 motion in the Outagamie County action identifying Ms. Feinstein as the Receiver). Moreover, Lincoln agrees that it identified the "concerns" underpinning its motion in July 2018—eight months before it moved to intervene. Dkt. 471 p. 5; *Compare South Bend*, 710 F.2d at 396 (holding that a period of four and a half months to file the motion was untimely).

Lincoln failed to "act with dispatch" between July 2018 and its March 2019 motion to intervene. This lack of dispatch has caused delays in the Outagamie County action, which will

only be exacerbated if Lincoln's belated motion is granted. The timeline of relevant events between July 2018 and March 2019 is as follows:

- July 11: Lincoln purportedly identifies a conflict arising from Faye Feinstein's role as Receiver, then exchanges emails with Ms. Feinstein about her role in the Receivership and the Outagamie County action. Dkt. 474 ¶¶ 13-14; Dkt. 474-1 ¶ 7; Dkt. 474-13.

- July 12: According to one of its affidavits, Lincoln tells Ms. Feinstein that it believes she has a conflict of interest and immediately terminates Quarles from all active engagements. Dkt. 474 ¶¶ 14, 16.

- August 27: More than six weeks after Lincoln claims it decided that Quarles was conflicted, Lincoln's Mary Jo Potter contacts Ms. Feinstein. Ms. Potter alleges that Lincoln believes Ms. Feinstein and Quarles have a conflict of interest in connection with Ms. Feinstein's appointment as Receiver. Feinstein Decl. ¶ 18. When Ms. Potter asks Ms. Feinstein what her and Quarles' perspective is with respect to her conflict allegation, Ms. Feinstein refers Ms. Potter to Quarles' General Counsel, Don Schott. Feinstein Decl. ¶ 19;

- August 29: Don Schott emails Ms. Potter, asking to set up a call. Schott Decl. ¶ 2 & Ex. A.

- August 30: Mr. Schott and Ms. Potter speak. Schott Decl. ¶ 3. Mr. Schott tells Ms. Potter that Quarles is not sure what Lincoln sees as a conflict, and that it cannot respond to Lincoln's inquiry regarding what Quarles is going to do until it knows what Lincoln believes the problem is. *Id.* ¶ 3. Ms. Potter tells Mr. Schott that she is not able to respond to his questions, but that she will discuss the situation with the head of her litigation section, and that either she or he will get back to him. *Id.* ¶ 3.

- September 5: Mr. Schott sends Ms. Potter a follow-up email:

  > I just wanted to follow-up on our call from last Thursday. As I recall, the way we left things was that you were going to discuss the situation with the head of your litigation section and either you or he would get back to me. Please advise where that stands, or if you have a different recollection of where we left things.

  Schott Decl. Ex. B.

- October 18: Melnick serves a Notice of Deposition of Lincoln in the Outagamie County action. Melnick Decl. Ex. F (October 31, 2018 affidavit in the Outagamie County action) ¶ 6 & Ex. A.

- October 19: More than seven weeks after Mr. Schott and Ms. Potter's August 30 phone call, Lincoln's Jeffrey Davis sends Mr. Schott and Ms. Feinstein a brief "Confidential Settlement Communication." Dkt. 474-14; Schott Decl. ¶ 5 & Ex. C. The Confidential

Settlement Communication demands that Ms. Feinstein resign as Receiver, that Quarles withdraw as the Receiver's counsel, and that Quarles disgorge $2.4 million to Lincoln. Dkt. 474-14; Schott Decl. ¶ 5 & Ex. C.

- October 24:

    - In the Outagamie County action, Lincoln informs Melnick that no witness will be produced in response to the Outagamie County plaintiffs' Notice of Deposition of Lincoln until Lincoln's dispute with the Receiver is resolved. Melnick Decl. Ex. F (October 31, 2018 affidavit in the Outagamie County action) ¶ 10.[5]

    - Mr. Schott responds to Mr. Davis's October 19 letter. Among other things, he notes that although Mr. Davis' letter asserts that both Ms. Feinstein and Quarles have conflicts, it provides no factual or legal analysis supporting that assertion. Mr. Schott also notes that the letter fails to address: (1) the advance waivers Lincoln had provided Quarles more than a year before the litigation against Lincoln was commenced, (2) the fact that Lincoln was informed of the situation at the time the complaint was filed and did not object, and (3) the fact that Lincoln retained Quarles for new matters after the litigation against Lincoln National was commenced. Mr. Schott concludes his letter by suggesting that it might make sense to discuss this matter in person or by phone. Dkt. 474-15; Schott Decl. ¶ 6 & Ex. D.

- October 29: Mr. Davis sends a short letter to Mr. Schott agreeing that they should talk by phone, and also asking that Mr. Schott provide copies of the advance waivers given to Quarles by Lincoln. Schott Decl. ¶ 7 & Ex. E. Mr. Schott sends the waivers shortly thereafter, and arranges to speak by telephone with Mr. Davis on November 14, 2018. *Id*. ¶ 8

- October 31: Melnick moves the Outagamie County court to modify its scheduling order in order to give Lincoln an opportunity to resolve its conflict allegation against the Receiver. Melnick Decl. Ex. G. The deadline to complete mediation, which previously had been scheduled for November 29, 2018, is delayed to February 15, 2019. *Id.* ¶¶ 11-13.

- November 13: Lincoln responds to Melnick's motion to modify the Outagamie County scheduling order. Melnick Decl. Ex. H. In this filing, which refers to Lincoln as Quarles' "now former" counsel, Lincoln agrees that the schedule must be pushed back, but details—for the first time—the basis of its allegation that the Receiver is conflicted. *Id.* The filing includes far more information about Lincoln's "conflict of interest" claim than Lincoln has previously provided to Mr. Schott through his phone calls with Ms. Potter or the letters he received from Mr. Davis. Schott Decl. ¶ 9.

[5] Although in January 2019, Lincoln expressed willingness to produce a witness in response to Plaintiffs' notice, the deposition has not yet occurred or been scheduled.

- November 14: Mr. Schott and Mr. Davis speak by phone. Schott Decl. ¶ 10. Mr. Schott tells Mr. Davis that he has reviewed Lincoln's November 13 filing, and explains why Quarles does not agree with Lincoln's conflict claim. *Id.* Among other things, he points out that Quarles has never represented the plaintiff funds in the litigation, and that Ms. Feinstein was acting as a receiver, not as an attorney. *Id.* He also points out that since Lincoln acknowledged in its November 13 brief that it was a former (not current) client, there is no basis to remove Ms. Feinstein as Receiver even if Lincoln's analysis of the conflict issue were correct. *Id.* Mr. Davis is very polite and thanks Mr. Schott for explaining Quarles' position. However, Mr. Davis does not respond to any of the positions Mr. Schott makes in the conversation. *Id.* Instead, Mr. Davis tells Mr. Schott that his instructions had been to simply determine Quarles' position and report it to others more senior than himself. *Id.* He promises that he will report up the chain and that someone will get back to Mr. Schott. *Id.*

- November 19: Melnick files a reply to Lincoln's November 13 submission in Outagamie County. Melnick Decl. Ex. I. Among other things, Melnick states that, "should Lincoln wish to pursue its conflict allegations further, the ball is squarely in its court to take prompt, affirmative action to address and resolve its allegations against Ms. Feinstein and Q&B . . . in order to avoid further delay." *Id.* ¶ 4.

- March 11:

    - The parties in the Outagamie County action stipulate to extend the case schedule once more. Melnick Decl. ¶ 13 & Ex. J. The deadline to complete mediation is moved to April 30, 2019. *Id.* The dispositive motion deadline has been moved from July 8, 2019, to October 7, 2019. *Id.*

    - Nearly four months after Mr. Schott and Mr. Davis's November 14 phone call, and eight months after Lincoln purportedly determined there was conflict, Lincoln files its motion to intervene in this action. Dkt. 470. This is the first Quarles has heard from Lincoln on the conflict issue since Mr. Schott and Mr. Davis spoke in November. Schott Decl. ¶ 11.

Delays in the Outagamie County action also have continued since Lincoln's March 11 motion in this Court. On March 27, one of Lincoln's co-defendants moved to stay all deadlines and proceedings in the Outagamie County action pending resolution of Lincoln's motions in this Court. Melnick Decl. Ex. K. Lincoln joined in the motion. *Id.* ¶ 14. On April 10, the Outagamie County court orally denied the movants' request for a general stay, but agreed to stay only the court-ordered mediation, as well as the Receiver's deposition, pending a status conference scheduled for September 10, 2019. *Id.* ¶ 15.

Had Lincoln moved to intervene promptly after July 2018, it could have minimized the delays resulting to the Outagamie County litigation. But it did not do so—and if intervention were granted at this point, these delays would only be exacerbated. The Outagamie County litigation should not be held up further because Lincoln belatedly filed a motion to intervene that it could have filed months ago.

III. In the Alternative, In the Event Leave Is Granted, the Court Should Limit the Scope of Lincoln's Intervention to Adjudicating Whether Lincoln's Claimed Interest in Its Privileged Information Entitles It to Disqualification.

Courts may confine the scope of intervention to matters that are "forum-appropriate" when granting a motion to intervene. *United States v. City of Detroit*, 712 F.3d 925, 932-33 (6th Cir. 2013). "Given the district court's greater familiarity with this case and interest in managing its own docket, the district court retains broad discretion in setting the precise scope of intervention." *Id.* at 933.

Even assuming that Lincoln's stated interest in privileged information sufficiently relates to the subject matter of this action and may be impaired by the disposition of this action, any grant of intervention should be limited accordingly. If intervention is granted, it should be confined to the question whether Lincoln's asserted interest in privileged information entitles it to the disqualification remedy it seeks.

Lincoln should not be granted leave to intervene for the purpose of litigating its allegations about *prior* Rule 1.7 violations—allegations that, to be clear, Quarles denies unequivocally. By its own choice, Lincoln is a *former* client of Quarles. Dkt. 471 p. 1; Dkt. 474 p. 3, ¶ 16; Dkt. 474-2 p. 2, ¶ 15. Rule 1.7 ("Conflicts of Interest: Current Clients") thus has no application now, since it applies solely to conflicts with current clients. *See* Wis. SCR 20:1.7 cmt. [1] ("For former client conflicts of interest, see Rule 1.9."); Ill. RPC 1.7 cmt. [1] (same).

Lincoln is threatening to sue Quarles based on its allegation of past Rule 1.7 violations, and if it does so, the parties can appropriately litigate those claims in the resulting action. But Lincoln's claims about past Rule 1.7 violations cannot support a right to intervene in this action, because adjudicating them here could not help Lincoln protect any interest that "relat[es] to the subject matter of th[is] action" and that may be "impair[ed] . . . by the disposition of thi[s] action." *Reich*, 64 F.3d at 321. Nor, for that matter, are the allegations material to whether the *prospective* remedy of disqualification is needed to protect Lincoln's interest in any privileged information purportedly relating to this proceeding.

Lincoln also should not be granted leave to intervene for the purpose of asserting the interests of *other* parties, such as investors in the WML Funds that are suing Lincoln in the Outagamie County action. Lincoln asserts that, "[g]iven [the Receiver's] prior relationship with Lincoln," investors in those WML Funds, as well as Lincoln' co-defendants, may "question [the Receiver's] impartial resolution of claims and the execution of her duty to preserve the assets available to investors." Dkt. 471 p. 6. In other words, Lincoln claims, implausibly, to be worried that the Receiver might be treating it too *well*, to the detriment of Lincoln's *opponents* in the Outagamie County action. Lincoln has no standing to pursue this claim. The Receiver is not the WML Funds' counsel—Melnick is—but, just as "a stranger to an attorney-client relationship" generally "lacks standing to complain of a conflict of interest in that relationship," *Morgan v. N. Coast Cable Co.*, 586 N.E.2d 88, 90-91 (Ohio 1992), Lincoln has no standing to complain of an alleged conflict between the Receiver and any of the WML Funds. The interests of third parties cannot support a right by *Lincoln* to intervene under Rule 24(a)(2).

CONCLUSION

The Receiver and Quarles respectfully request that Lincoln's Motion to Intervene (Dkt. 470) be denied.

Date: April 12, 2019

By: *s/ Matthew J. Splitek*

Donald K. Schott
Matthew J. Splitek
QUARLES & BRADY LLP
33 East Main Street, Suite 900
Madison, WI 53703
(608) 283-2426
don.schott@quarles.com
matthew.splitek@quarles.com

Christopher Combest
QUARLES & BRADY LLP
300 North LaSalle Street, Suite 4000
Chicago, IL 60654
Phone: (312) 715-5000

Attorneys for the Receiver and Quarles & Brady LLP