

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

FAYE B. FEINSTEIN, NOT
INDIVIDUALLY, BUT AS RECEIVER
FOR WML GRYPHON FUND LLC,

Plaintiff,

Case No. 11-CV-00057

v.

DENNIS J. LONG, INDIVIDUALLY AND
IN HIS CAPACITY AS TRUSTEE OF THE
DENNIS J. LONG & PATRICIA S.
MAGNETTE-LONG JOINT REVOCABLE
LIVING TRUST, DATED 5/14/05, AND
PATRICIA S. MAGNETTE-LONG,

Defendants.

**DEFENDANTS' RESPONSE TO NON-PARTY SECURITIES AND
EXCHANGE COMMISSION'S CIVIL L.R. 7(h) AND 7(i) EXPEDITED
NON-DISPOSITIVE MOTION FOR LEAVE TO FILE A BRIEF**

Defendants Dennis J. Long and Patricia S. Magnette-Long (the "Long Family") object to motion of non-party Securities and Exchange Commission ("SEC") requesting leave to file a brief responding to the Long Family's reply brief in support of their motion to dismiss. Because the SEC's motion and appended brief is procedurally improper, the motion should be denied and the SEC's appearance stricken. Moreover, even if the Court were to permit a non-party to file pleadings simply to provide input on a pending motion, the SEC's reasoning in its *amicus* filed in the *Janvey* case applies with greater force in this case, not less.

The SEC's motion is a thinly-veiled "Sur-Reply" to Defendants' Motion to Dismiss that ignores the proper mechanism for government agencies or other non-parties to become involved

in civil proceedings to which they are not parties – intervention pursuant to Fed. R. Civ. P. 24.¹ But the Local Rules of this Court do not provide for the filing of sur-replies. Nor do the Federal Rules of Civil Procedure provide for non-parties to file appearances or pleadings in cases absent a properly supported motion to intervene. The SEC's motion, which ignores these procedural rules, comes on the heels of the Receiver's disturbing attempt to ignore the substantive law governing her claims. Here the SEC does not seek to intervene and become a party to the case, but seeks to "clarify" the SEC's position regarding clawback actions. (ECF No. 14 at ¶ 3.) The SEC's motion should therefore be denied and its appearance stricken.

Even if the Court were to grant the SEC's procedurally improper motion, no "clarification" is needed for the unambiguous position it took in the *Janvey amicus* submitted to the Fifth Circuit Court of Appeals. That brief plainly contradicts this Receiver's subjective view of "equity" that flows through her entire Response brief:

The equity of distributing receivership estate assets pro rata, however, has no bearing on whether the receiver may, under equitable principles, claw back principal payments made to innocent investors in order to increase the assets available for distribution. When funds are not in the receivership estate but have been transferred to investors, markedly different equities are implicated that do not arise in the context of the approval of a distribution plan

(2009 WL 6338943 at *24.) As in *Janvey*, the Long Family was an innocent investor, equally deceived to invest in Gryphon by the misconduct alleged in the SEC's complaint. The Receiver also acknowledges that the complaint alleges no intentional misconduct by the Long Family in the redemption process. The SEC's clarification is also unnecessary because the Long Family

¹ Fed. R. Civ. P. 24(b)(2) permits a government agency to intervene only "if a party's claim or defense is based on: (A) a statute or executive order administered by the officer or agency; or (B) any regulation, order, requirement, or agreement issued or made under the statute or executive order," and the motion to intervene satisfies the criteria set forth in Rule 24(c).

did not suggest, as the SEC asserts in its proposed brief (ECF No. 14-1 at p. 1), that the SEC "uniformly opposes" attempts to claw back principal as well as investment profits – although neither the Receiver nor the SEC has direct this Court's attention to a single case where a court or the SEC has endorsed such a position – only that the Receiver's foundational "equity" argument is diametrically opposed to the SEC's position in *Janvey*.

Next, the SEC attempts to distinguish its position in *Janvey* based on the different facts of that case and this one; however, those distinctions amplify the inequity of this Receiver's case, not detract from it. First, as the SEC notes, *Janvey* involved a Ponzi scheme, where money deposited by later investors is not invested but transferred to earlier investors. In one sense, the earlier investors – the early redeemers in *Janvey* – were the unwitting accomplices of the Ponzi schemer. They directly received money from later investors, which allowed the scheme to continue and expand by providing examples of successful returns. Here, there is no such Ponzi scheme; the actual investments declined in value during one of the worst economic climates since the Great Depression.

The SEC's second "clarification" – that the receiver in *Janvey* did not invoke fraudulent transfer law – is particularly puzzling given the SEC's further position in the *amicus* brief that pleading a fraudulent transfer act claim would have been futile. 2009 WL 6338943 at *11 ("As demonstrated below, the receiver cannot recover the principal repayments innocent investors received from [the investment fund] as fraudulent transfers because the investors received the payments in good faith and for reasonably equivalent value."). The SEC's *amicus* brief contains an entire section – entitled, "The receiver could not recover the principal payments the Investor Defendants received from [the investment fund] under the [fraudulent transfer act] because those investors received the payments for reasonably equivalent value" – that argues that even if the

receiver *had* brought a fraudulent transfer claim, that claim would have failed as a matter of law. *Id.* at *13 ("The receiver cannot recover the transfers of principal to the Investor Defendants under either a [constructive fraud or actual fraud] theory."). Thus, while true that the *Janvey* receiver did not bring a fraudulent transfer claim, that is, at best, a distinction without a difference.

Because the SEC's proposed brief is neither procedurally proper nor helpful to the Court in deciding the motion to dismiss, the Long Family respectfully requests that this Court deny the SEC's motion, and strike its appearance.

s/ Ryan S. Stippich

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