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,	:	**Judge William C. Griesbach**
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; and WML QUETZAL PARTNERS, L.P.,	:	
Relief Defendants.	:	

PLAINTIFF UNITED STATES SECURITIES AND EXCHANGE COMMISSION'S BRIEF IN OPPOSITION TO THE LINCOLN NATIONAL LIFE INSURANCE COMPANY'S MOTION TO INTERVENE

Plaintiff, the United States Securities and Exchange Commission ("SEC"), respectfully submits this response in opposition to Lincoln National Life Insurance Company's ("Lincoln") Motion to Intervene ("Motion").

Background Facts

This case is nearly ten years old. The SEC filed this case as an emergency action in May 2009. (*See* Docket No. 1). In the SEC's Complaint, the SEC alleged misconduct by Wealth

Management, LLC ("Wealth Management"), a financial planning firm in Appleton; its CEO, James Putman ("Putman"); and its President, Simone Fevola ("Fevola"). (*Id.)* The SEC alleged that Putman and Fevola engaged in a kickback scheme in which they accepted undisclosed payments derived from investments made by six unregistered investment pools (the "WM Funds") that Wealth Management operated. (*Id.)* The SEC also alleged that Wealth Management, Putman, and Fevola had misrepresented the safety and stability of the two largest WM Funds and had placed Wealth Management's clients into unsuitable investments through the WM Funds. (*Id.*) The SEC sought, among other things, the imposition of a receivership over Wealth Management and the WM Funds to preserve Wealth Management client assets and to ensure the equitable distribution of those remaining assets to the investors in the WM Funds. (*Id.)* The SEC alleged that many of the investors in the WM Funds were retirees who depended on their investments made through Wealth Management for their retirement income. (*Id.)*

The Court appointed Faye Feinstein, an attorney at the Quarles & Brady law firm, as the Receiver ("Receiver") on May 20, 2009. (*See* Docket No. 7) Since the Court's appointment, the Receiver has made interim distributions of receivership assets to investors in the WM Funds totaling almost $13 million. (*See* Docket No. 464 at ¶30). The Receiver's efforts on behalf of the receivership estate have included, among other things, communicating with Wealth Management's clients, reporting to the Court on the status of the receivership, liquidating the various sub-fund investments made by the WM Funds, and authorizing causes of action arising from certain sub-funds' investments in life insurance premium financing vehicles, including the action involving Lincoln. (*See* Docket No. 464)

Argument

Under Fed. R. Civ. P. 24(a)(2), a party seeking to intervene as of right must satisfy four tests: "(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 v. ABC/York-Estes Corp.*, 64 F.3d 316, 321 (7th Cir. 1995). The would-be intervenor has the burden to demonstrate that all four of these criteria are met. *Reid L. v. Illinois State Bd. of Educ.*, 289 F.3d 1009, 1017 (7th Cir. 2002); *Reich*, 64 F.3d at 321.

In this case, Lincoln fails to meet at least two of the requirements. First, Lincoln has failed to demonstrate that its rights will be impaired if intervention is denied. Lincoln claims that its status as a former Quarles & Brady client, standing alone, gives it a "legally protected interest" that will be impaired if it is not permitted to intervene. But it has failed to substantiate that claim, and, therefore, its claim is deficient under the relevant legal standard. Second, investors would be prejudiced by the delay that would likely result if Lincoln were allowed to intervene, and investors would be severely prejudiced if Lincoln were to achieve its ultimate goal of disqualifying the Receiver at this late stage in the litigation of this case.

According to Lincoln, Quarles & Brady and the Receiver represented Lincoln in a number of matters beginning in 2010. (*See* Docket No. 473 at p. 5). According to Lincoln, it terminated its relationship with Quarles & Brady and the Receiver in 2018. (*Id.* at p. 14). Thus, according to Lincoln, there is no current attorney-client relationship between Lincoln and Quarles and Brady. (*Id.)* It is only as a former client (not as a current client) that Lincoln can claim a right to have Quarles & Brady disqualified.

Lincoln has failed to establish that its status as a former client of Quarles & Brady gives it a legally protected right that will be impaired absent intervention. Former clients do not have an unqualified right to have their former lawyers disqualified from representing another client in a matter that is adverse to the former client. In federal courts, the issue of whether a lawyer should be disqualified from representing a client based on the lawyer's ethical obligations to a former client is often determined under the standard set forth in the relevant version of Rule 1.9 ("Duties to Former Clients") of the ABA Model Rules of Professional Conduct. *See Watkins v. Trans Union, LLC*, 869 F.3d 514, 519 (7th Cir. 2017) (applying the standard set forth in Indiana Rule 1.9 to a former client's disqualification motion). Because this court has adopted the Wisconsin Rules of Professional Conduct, *see* E.D. Wisc., Local Rule 83(d)(1), Wisconsin SCR 20:1.9 ("Wisconsin Rule 1.9") provides the relevant standard. .

Wisconsin Rule 1.9(a) states:

> 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 unless the former client gives informed consent, confirmed in a writing signed by the client.

The Rule does not prohibit a lawyer from representing a client in every matter that is adverse to a former client. *See* cmt [2] to Wisconsin Rule 1.9 ("[A] lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a factually distinct problem of that type even though the subsequent representation involves a position adverse to the prior client. Rather, the prohibition applies only to matters that are the same as or substantially related to the matter in which the former client was represented.")

Because Lincoln does not claim to have been represented by Quarles & Brady and the Receiver in this case, the threshold issue for this Court under Wisconsin Rule 1.9 is whether Quarles & Brady and the Receiver formerly represented Lincoln in a matter that is substantially

related to this case. Matters are "substantially related" within the meaning of Wisconsin 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 position in the subsequent matter." Cmt [3] to Wisconsin Rule 1.9. As examples illustrating the substantial relationship test, the comment points out that a lawyer who formerly represented a client in obtaining environmental permits for a construction project would be precluded from later representing a different client in a suit challenging that project based on issues related to those permits, but the lawyer could later represent a tenant of the project who faced eviction for nonpayment of rent. *Id.* In other words, to succeed in having a lawyer disqualified under Rule 1.9, the former client must show that the factual or legal relationship of the cases at issue creates a substantial risk that the former client's confidential information will be used against it. *See Watkins*, 869 F.3d at 520 -523 (relying on the substantial relationship test to discern whether there was a substantial risk that the former client's confidential information would be used against it in the cases at issue).

Lincoln has fallen far short of demonstrating that the cases in which it was formerly represented by Quarles & Brady and the Receiver are substantially related to this action under the Wisconsin Rule 1.9 standard. Lincoln simply stands on the general propositions that Quarles & Brady and the Receiver would have learned privileged information while previously representing it, and that such privileged information is "a legally protected interest" that "will be impaired" within the meaning of Rule 24(a)(2) if the Receiver is not disqualified. Lincoln has made no showing that the facts and issues of the prior representations overlap with the facts and issues in this SEC enforcement action or the so-called Outagamie County Action, and, consequently, it has failed to establish any risk that its privilege information will even be relevant

to these actions. More is required to establish that Lincoln has a legally protected right under Wisconsin Rule 1.9 to have the Receiver disqualified from continuing on this case. *See, e.g., Blumenthal Power Co. v. Browning-Ferris, Inc.*, 903 F. Supp. 901, 902 (D. Md. 1995) (concluding that a "generalized assertion that confidences were shared" with the former lawyer was insufficient to warrant the lawyer's disqualification under Maryland Rule 1.9). In failing to show that it has a right, under Wisconsin Rule 1.9, to seek the Receiver's disqualification in this action, Lincoln has also failed to carry its burden under Rule 24(a)(2) of showing that it has a "direct, significant, legally protectable" interest that will be impaired if it is not permitted to intervene in this action. *See United States v. BDO Seidman*, 337 F.3d 802, 808 (7th Cir. 2003) (quoting. *Sec. Ins. Co. of Hartford v. Schipporeit*, 69 F.3d 1377, 1380 (7th Cir.1995)).

In addition to its failure to show that its interests will be impaired absent intervention, Lincoln also has failed to show that it has acted in a timely manner. Even under the facts as advanced by Lincoln, it became aware of the purported conflict involving Quarles & Brady in July 2018, eight months before the instant motion was filed. That delay renders the motion untimely. *See Atlantic Mutual Ins. Co. v. Northwest Airlines, Inc.*, 24 F.3d 958, 960 (7th Cir. 1994); *United States v. South Bend Community School Corp*., 710 F.2d 394, 396 (1983).

The SEC believes that investors would be harmed by Lincoln's intervention at this late stage. Through the SEC's dealings with the Receiver over a nearly ten-year period, the SEC is aware that as a result of her longstanding involvement with the receivership estate, the Receiver has acquired extensive knowledge of the facts and circumstances surrounding Wealth Management, its clients, the WM Funds' investments in various sub-funds, and certain of those sub-funds' investments in life insurance premium financing vehicles. Among other efforts on behalf of the receivership estate, the Receiver retained the law firm of Melnick & Melnick, S.C.

("Melnick") to pursue causes of action against Lincoln and others. The SEC had no involvement in Melnick's retention. At this late stage of the Receivership, it would create great hardship on investors to replace the Receiver, in the context of her dealings with Melnick or otherwise, if the Court were to disqualify her. The SEC believes that a disqualification of the Receiver would harm investors by depriving the receivership estate of the lone individual with the knowledge necessary to make informed judgments about appropriate decisions for the receivership estate, including any decisions relating to the litigation being prosecuted by Melnick against Lincoln.

If the Court grants intervention, the resolution of the receivership will likely be delayed. If the Receiver were to be disqualified at this late date, the ultimate resolution of the case would be delayed even further, and investors would be harmed by the resulting delay. Lincoln's tardiness in bringing the Motion has only compounded that prejudice. *See United States v. South Bend Community School Corp*., 710 F.2d 394, 396 (7th Cir. 1983). Because Lincoln fails to satisfy the requirements for intervention, and because intervention would harm investors, the SEC requests that the Court deny the Motion.

WHEREFORE, for the foregoing reasons, the SEC respectfully requests that the Court deny Lincoln National Life Insurance Company's Motion to Intervene and award such other and further relief as this Court deems just.

Dated: April 12, 2019

Respectfully submitted,

/s/ Eric M. Phillips

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