

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

GENERAL CONFERENCE CORPORATION OF
SEVENTH-DAY ADVENTISTS, a District of
Columbia Corporation,

Plaintiff,

v.

JOE GRESHAM, STERLING TRICE, LINDA
TRICE, BILL MATHIS, GAY MATHIS, FORT
WORTH NW FREE SEVENTH-DAY ADVENTIST
CHURCH, BEREAN CHURCH OF FREE
SEVENTH-DAY ADVENTISTS, INC. d/b/a
INTERNATIONAL ASSOCIATION OF FREE
SEVENTH-DAY ADVENTISTS, and JOHN DOES
1-20,

Defendants.

Case No. 4:22-cv-00395-P

**MOTION OF ADVENTIST RISK MANAGEMENT, INC. FOR LEAVE
TO INTERVENE TO SEEK DISQUALIFICATION
WITH BRIEF IN SUPPORT**

Pursuant to Rule 24(a)(2), Federal Rules of Civil Procedure, non-party Adventist Risk Management, Inc. (“ARM”) seeks leave to intervene for the purpose of seeking disqualification of counsel for Berean Church of Free Seventh-Day Adventists, Inc., d/b/a International Association of Free Seventh-day Adventists (“IAFSDA”), specifically the law firm of Foley & Lardner LLP (“Foley”) and all individual counsel employed thereby, due to a conflict of interest based on concurrent representation and breach of contract, showing as follows:

1. Movant ARM is a Maryland corporation with its principal place of business in Silver Spring, Maryland. Its purpose is to support the mission of the Seventh-day Adventist Church by providing risk management, financial and insurance services to that denomination’s entities and

related activities. *See* Appendix Exhibit B (Articles of Restatement of ARM), Article III (Appx at 6).

2. ARM is wholly owned by the General Conference Corporation of Seventh-day Adventists (“GCC”), the Plaintiff in this case, and GCC is its sole member (*See id.*, Article IV) (Appx at 7). GCC is in turn wholly owned by General Conference of Seventh-day Adventists (“GC”) (Appx at 7).

3. ARM is the owner of a registered trademark, ADVENTIST RISK MANAGEMENT, registered as US Reg No 2062417 (“ARM Mark”). *See* Declaration of Robert H. Burrow, General Counsel of ARM, Appendix Exhibit A (“Burrow Decl.”), ¶ 7 (Appx at 2).

4. Foley is outside counsel for ARM, handling multiple matters on ARM’s behalf. Burrow Decl., ¶ 8 (Appx at 2). *See* Appendix Exhibit C (August 16, 2017 Foley Engagement Letter Agreement with ARM) (“Foley Engagement Agreement”) (Appx at 11). Particularly, The North American Division (NAD) is one of 13 divisions of the GC and is the owner of the Health Insurance Plan (Plan) that is managed by ARM. Burrow Decl., ¶ 8 (Appx at 2). Foley advises ARM as to the Plan. Burrow Decl., ¶ 8 (Appx at 2). In 2022 alone, Foley billed ARM in excess of \$400,000 for legal services. Burrow Decl., ¶ 8 (Appx at 2).

5. Recently Foley has filed on behalf of IAFSDA in this case a First Amended Answer and Defenses to Plaintiff’s First Amended Complaint and Original Counterclaims (“Amended Answer and Counterclaims”) (ECF No. 59). The First Counterclaim is: “Cancellation of Trademark Registration Due to Genericness.” *Id.*, page 25. Specifically, IAFSDA claims: “the word ‘ADVENTIST’ is a generic dictionary term.” *Id.*, ¶ 45.

6. ARM has recently been made aware of the representation by Foley of IAFSDA through discussions between General Counsel for GCC, Todd McFarland, and Burrow, just prior

to depositions in this case about two-three months ago. Burrow Decl., ¶ 10 (Appx at 3). Further, it was not until Foley attorneys conveyed the proposed Amended Answer and Counterclaims to counsel for GCC and this was shared with ARM through counsel that ARM became aware that IAFSDA, through Foley, was attempting to have the ADVENTIST mark's registration *cancelled* as being generic. *Id.*, ¶ 10 (Appx at 3).

7. In the Foley Engagement Agreement, Foley agreed, *inter alia*, as follows:

However, as a large law firm, Foley may be asked during the course of our representation of the Company [ARM] to represent another client or new client in a future matter that involves the Company. Or, conversely, you may in the future ask us to handle a matter involving another new or existing client of the Firm [Foley]. In either instance, **if the other client's interests and the Company's interests in the matter are directly adverse, the Firm may not handle the matter without your consent.**

Appendix Exhibit C, pages 1-2 (emphasis added) (Appx at 11-12).

8. Foley taking the position that ADVENTIST is a generic mark *and seeking its cancellation on that basis* is "directly adverse" to the "interests" of ARM, since ARM has the ARM trademark encompassing ADVENTIST. Burrow Decl., ¶ 12 (Appx at 3).

9. ARM does not consent to Foley bringing a counterclaim seeking to declare ADVENTIST to be a generic mark. Burrow Decl., ¶ 13 (Appx at 3).

10. ARM dialogued with Foley seeking to have Foley withdraw from representing IAFSDA in this suit due to the adverse position, and **Foley agreed to withdraw**. Burrow Decl., ¶ 14 (Appx at 3). *See* Appendix Exhibit E (email chain where Foley agreed to withdraw) (Appx at 19). Nonetheless, Foley has now declared it will *not* voluntarily withdraw, even though requested to do so by ARM. Declaration of Richard L. Schwartz (Appendix Exhibit D), ¶ 5 (Appx at 18).

11. District courts in this Circuit have held that a client who is not a party may intervene in pending litigation for the purpose of obtaining disqualification of a party's counsel due to a

conflict caused by the firm concurrently representing that party adverse to the interests of the non-party client, and granted disqualification. *See Rembrandt Techs., LP v. Comcast Corp.*, No. 2:05CV443, 2007 WL 470631, 2007 U.S. Dist. LEXIS 9027, *5-6, 12-14 (E.D. Tex. Feb. 8, 2007); *Ledwig v. Cuprum S.A.*, No. SA-03-CA-542, 2004 WL 573650, 2004 U.S. Dist. LEXIS 4482, *2, 8-11 (W.D. Tex. Jan. 28, 2004). Other federal courts have ruled the same. *Celgard, LLC v. LG Chem, Ltd.*, 594 Fed. Appx. 669, 671-72 (Fed. Cir. 2014); *Stiletto TV, Inc. v. Hastings, Clayton & Tucker, Inc.*, No. CV 18-3911, 2019 U.S. Dist. LEXIS 136635, *4-5, 7-8 (C.D. Cal. May 21, 2019); *cf. Cole Mech. Corp. v. Nat'l Grange Mut. Ins. Co.*, No. 06 Civ. 2875, 2007 WL 2593000, 2007 U.S. Dist. LEXIS 66584, *1, 4-5, 15 (S.D.N.Y. Sept. 7, 2007).

12. Additional cases have also allowed for intervention for the purpose of obtaining disqualification, even though not granting disqualification based on their specific facts (distinguishable from the clear conflict in this case). *See Med. Diagnostic Imaging, PLLC v. CareCore Nat'l, LLC*, 542 F. Supp. 2d 296, 305 (S.D.N.Y. 2008) (“the Court concludes that Movants should be permitted to intervene for the limited purpose of reaching the merits of their motion to disqualify.”); *Enzo Biochem, Inc. v. Applera Corp.*, 468 F. Supp. 2d 359, 360 (D. Conn. 2007) (“the Court grants GE’s motion to intervene pursuant to Fed. R. Civ. P. 24(a) in order to consider its motion to disqualify.”) (citations omitted).

13. Allowing such interventions is consistent with longstanding Fifth Circuit precedent governing interventions as a general matter. *See*:

Rule 24 allows certain parties to intervene by right. FED. R. CIV. P. 24(a). If the right to intervene is not granted by some other federal statute, *see id.* R. 24(a)(1), a party can still intervene if it satisfies the four elements of Rule 24(a)(2):

- (1) the application for intervention must be timely;
- (2) the applicant must have an interest relating to the property or transaction which is the subject of the action;

(3) the applicant must be so situated that the disposition of the action may, as a practical matter, impair or impede his ability to protect that interest; [and]

(4) the applicant's interest must be inadequately represented by the existing parties to the suit.

Texas v. United States, 805 F.3d 653, 657 (5th Cir. 2015) (quoting *New Orleans Pub. Serv., Inc. v. United Gas Pipe Line Co.* (“*NOPSI*”), 732 F.2d 452, 463 (5th Cir. 1984)). It is the movant's burden to establish the right to intervene, but “Rule 24 is to be liberally construed.” *Brumfield v. Dodd*, 749 F.3d 339, 341 (5th Cir. 2014). “Federal courts should allow intervention ‘where no one would be hurt and the greater justice could be attained.’” *Sierra Club v. Espy*, 18 F.3d 1202, 1205 (5th Cir. 1994) (quoting *McDonald v. E.J. Lavino Co.*, 430 F.2d 1065, 1074 (5th Cir. 1970)); see *Miller v. Fed'n of S. Coops.*, No. 21-11271, 2022 U.S. App. LEXIS 7563, 2022 WL 851782, at *4 (5th Cir. Mar. 22, 2022) (noting “our broad policy favoring intervention” and the intervenor's “minimal burden” (internal quotes and citation omitted)). At this stage, the court takes the movant's factual allegations as true. See *Mendenhall v. M/V Toyota Maru No. 11*, 551 F.2d 55, 56 n.2 (5th Cir. 1977).

La Union del Pueblo Entero v. Abbott, 29 F.4th 299, 304-305 (5th Cir. 2022). *Accord*:

Putative Intervenors have shown that (1) their intervention application is timely; (2) they have an interest relating to the property or transaction that is the subject of the action; (3) they are situated so that disposition may, as a practical matter, impair or impede their ability to protect that interest; and (4) their interest is inadequately represented by the existing parties. *Haspel & Davis*, 493 F.3d at 578. Accordingly, the Court **GRANTS** their motion to intervene as of right.

Franciscan Alliance, Inc. v. Azar, 414 F. Supp. 3d 928, 939-40 (N.D. Tex. 2019) (O'Connor, J.).

14. As this precedent is applied here: (a) as far as timeliness, IAFSDA has only now brought a counterclaim for cancellation based on alleged genericness of ADVENTIST; also, as shown by the email chain and the Declarations, *supra*, ARM has been attempting to have Foley withdraw from representation voluntarily, which it initially stated it would do, but has now reneged, and this intervention is being brought shortly thereafter; (b) ARM has an interest in maintaining its ADVENTIST ARM Mark consistent with that of Plaintiff GCC, and further has an interest in maintaining the loyalty of its counsel to its interests; and (c) without allowing

intervention to seek disqualification, ARM's interest in its ARM Mark and the maintenance of loyalty would be impaired.

15. With respect to the final factor of its interest being inadequately represented, Foley represents **ARM** as distinct from GCC, so it is ARM's interest in its own counsel not concurrently representing an interest adverse to its interests which is at stake. Defendants are not likely to advance this interest, and Fifth Circuit precedent holds that GCC does not have standing to do so; in fact, such precedent holds that such a conflict should be advanced by the firm's client. *See In re Yarn Processing Patent Validity Litig.*, 530 F.2d 83, 88 (5th Cir. 1976) ("As a general rule, courts do not disqualify an attorney on the grounds of conflict of interest unless the former client moves for disqualification.") (citations omitted).

16. In the interest of full disclosure on this issue, there is actually a difference of opinion among the federal district courts whether a party which is not the client, or even counsel, may seek disqualification on the grounds of such a conflict. *Compare, e.g., Waneck v. CSX Corp.*, No. 1:17-cv-106, 2017 WL 11695758, 2017 U.S. Dist. LEXIS 237371, *14-15 (S.D. Miss. Aug. 25, 2017) (Non-client party can raise concurrent representation conflict); *Sentry Select Ins. Co. v. Meyer*, No. 2:07-cv-01049, 2011 WL 1103333, 2011 U.S. Dist. LEXIS 36290, *21-24 (D. Nev. Mar. 23, 2011) (same), citing, at *22, "*Brown & Williamson Tobacco Corp. v. Daniel International Corp.*, 563 F.2d 671, 673 (5th Cir. 1977)('Appellant has standing to seek disqualification even though it is not an aggrieved client because its attorneys are authorized to report any ethical violations in the case.');

In re Gopman, 531 F.2d 262, 265 (5th Cir. 1976)('When an attorney discovers a possible ethical violation concerning a matter before a court, he is not only authorized but is in fact obligated to bring the problem to that court's attention.').", with *Xcentric Ventures, LLC v. Stanley*, No. CV-07-00954, 2007 WL 2177323, 2007 U.S. Dist. LEXIS 55459, *7-11 (D. Ariz. July 27, 2007) (no

standing), citing, at *9, *Yarn Processing; Dawson v. City of Bartlesville*, 901 F. Supp. 314, 315-16 (N.D. Okla. 1995) (same); *see generally Santander Secs. LLC v. Gamache*, Civ. No. 17-317, 2017 WL 1208066, 2017 U.S. Dist. LEXIS 50189, *7-14 (E.D. Pa. Apr. 3, 2017) (discussing competing precedent and commentary, including, at *11, *Standing of Person, Other or Former Client, to Seek Disqualification of Attorney in Civil Action*, 72 A.L.R.6th 563 (2012)). However, two sister Districts in this State follow *Yarn Processing* in holding no non-client standing. *See Domain Protection, LLC v. Sea Wasp, LLC*, No. 4:18-cv-792, 2019 WL 6700955, 2019 U.S. Dist. LEXIS 121164, *1-5 (E.D. Tex. July 22, 2019), citing *Yarn Processing* and, at *4-5, this Circuit's rule of orderliness); *Clemens v. McNamee*, No. 4:08-CV-00471, 2008 WL 1969315, 2008 U.S. Dist. LEXIS 36916, *4-8 and *passim* (S.D. Tex. May 6, 2008) (same). Consequently, it is at least open to doubt that GCC can advance this conflict, thereby supporting allowing intervention of ARM to raise the conflict under this Circuit's fourth requirement for intervention, *supra*.

WHEREFORE, proposed Intervenor ARM moves the Court to allow it to intervene for the purpose of moving to disqualify Foley and its counsel from representing IAFSDA or any other Defendant in this case, due to concurrent representation conflict and breach of the Foley Engagement Agreement. (Pursuant to Rule 24(c), Federal Rules of Civil Procedure, accompanying this Motion is ARM's Motion to Disqualify.)

Dated: April 12, 2023

Respectfully submitted,

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*Counsel for Plaintiff General Conference
Corporation of the Seventh-day Adventists
and for Proposed Intervenor,
Adventist Risk Management, Inc.*

CERTIFICATE OF CONFERENCE

I communicated the contents of this Motion to Defendants' Counsel on April 7, 2023. On April 10, 2023 I had follow up communications with Defendants' Counsel. On late afternoon of April 10, I spoke with Steven Lockhart, Counsel for IAFSDA. This Motion is opposed by Defendants.

/s/ Richard L. Schwartz
Richard L. Schwartz

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 12, 2023, I filed this Motion pursuant to this Court's efilings protocol and thereby served all counsel of record.

/s/ Richard L. Schwartz
Richard L. Schwartz

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ORDER

This case was considered on the Motion of Adventist Risk Management, Inc., for Leave to Intervene to Seek Disqualification. Having considered the motion and any response, and being advised in the premises, the Court concludes the motion is well-taken and should be, and is hereby **ORDERED GRANTED**. Therefore, Adventist Risk Management, Inc., is hereby granted leave to intervene in this case for the purpose of seeking to Disqualify the firm of Foley & Lardner LLP and the attorneys from that firm from representing Defendant Berean Church of Free Seventh-day Adventists, d/b/a International Association of Free Seventh-day Adventists.

SO ORDERED on this ____ day of _____, 2023.

MARK T. PITTMAN
UNITED STATES DISTRICT JUDGE