

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION**

WACHOVIA BANK, N.A.	§	
	§	
V.	§	Civil No. 1:09CV222-HSO-JMR
	§	
STEPHEN R. COLSON, et al.	§	DEFENDANTS

**MEMORANDUM OPINION AND ORDER GRANTING
SANDION'S MOTION TO INTERVENE**

Before the Court is the Motion to Intervene filed by Sandion d/b/a Coldwell Banker United, Realtors [“Sandion”], on April 8, 2009 [43-1]. Sandion contends that it is entitled to intervene as of right, pursuant to Federal Rule of Civil Procedure 24(a), or alternatively, that it should be permitted to intervene under Federal Rule of Civil Procedure 24(b). *See* Sandion’s Mem. in Supp. of Mot. [44-1], at pp. 4-8.

Defendants Fidelity National Financial, Inc., Lawyers Title Insurance Corporation, and Fidelity National Title Group, Inc., and Defendants Prestige Insurance Agency, Inc., Stephen R. Colson, Colson & Waller, PLLC, SJS Development, LLC, TCG Telcom, Inc., and Prestige Sports Management, Inc., have filed Responses [53-1], [58-1] to Sandion’s Motion. None of these responding Defendants object to Sandion’s intervention. Nor have any of the other parties filed any such objections. Having considered the record as a whole, along with Sandion’s Motion, Defendants’ Responses, and the relevant legal authority, the Court is of the opinion that Sandion’s Motion to Intervene should be granted.

I. STANDARD

Federal Rule of Civil Procedure 24 reads, in relevant part, as follows:

- (a) Intervention of Right.
On timely motion, the court must permit anyone to intervene who:
 - (1) is given an unconditional right to intervene by a federal statute; or
 - (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.
- (b) Permissive Intervention.
 - (1) In General.
On timely motion, the court may permit anyone to intervene who:
 - (A) is given a conditional right to intervene by a federal statute; or
 - (B) has a claim or defense that shares with the main action a common question of law or fact.
 - * * *
 - (3) Delay or Prejudice.
In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.

FED. R. CIV. P. 24(a)-(b).

The Fifth Circuit has characterized the Rule as follows:

A nonparty seeking to intervene, and thereby obtain the rights and privileges of a party to the lawsuit, has available two avenues under the Rule. Section (a) provides for mandatory intervention. Alternatively, section (b) affords a nonparty without an interest in the litigation sufficient to mandate intervention to join the proceedings through the exercise of the trial court's discretion.

Edwards v. City of Houston, 78 F.3d 983, 999 (5th Cir. 1996) (en banc).

A. Intervention as of Right

Sandion does not contend that any statute of the United States affords it an

unconditional right to intervene. The Court must therefore focus its inquiry on subsection (a)(2) of Rule 24. *See Edwards*, 78 F.3d at 999. To intervene of right under subsection (a)(2), an applicant must meet the following requirements:

(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; (4) the applicant's interest must be inadequately represented by the existing parties to the suit.... Failure to satisfy any one requirement precludes intervention of right.

Id. (internal citations omitted); *see also Haspel & Davis Milling & Planting Co. v. Board of Levee Commissioners of the Orleans Levee District*, 493 F.3d 570, 578 (5th Cir. 2007).

B. Permissive Intervention

“The decision to permit intervention under Rule 24(b)(2) requires a threshold determination that the ‘applicant's claim or defense and the main action have a question of law or fact in common.’” *Newby v. Enron Corp.*, 443 F.3d 416, 421 (5th Cir. 2006) (*quoting Howse v. S/V “Canada Goose I”*, 641 F.2d 317, 322 (5th Cir. 1981)). The Fifth Circuit has stated that “[t]he determination is not discretionary; it is a question of law.” *Id.* (*quoting Howse*, 641 F.2d at 317).

II. DISCUSSION

A. Sandion’s Intervention

Sandion maintains that it is entitled to intervene as of right, pursuant to Rule 24(a), or alternatively, that it should be permitted to intervene under Rule 24(b). *See Sandion’s Mem. in Supp. of Mot.* [44-1], at pp. 4-8. After reviewing the record as a whole, as well as Sandion’s Motion, supporting Memorandum, and its

proposed Answer to Complaint for Interpleader and Claim Against Funds, which is attached as Exhibit “1” to its Motion, the Court is of the opinion that (1) the application for intervention was timely; (2) Sandion has an interest relating to the property or transaction which is the subject of this interpleader action; (3) Sandion is so situated that the disposition of the action may, as a practical matter, impair or impede its ability to protect that interest; and (4) Sandion’s interest is inadequately represented by the existing parties to the suit. *See Edwards*, 78 F.3d at 999. The Court therefore finds that, as a matter of law, Sandion’s Motion to Intervene as of right pursuant to Federal Rule of Civil Procedure 24(a)(2) should be granted. *See FED. R. CIV. P. 24(a)(2); Edwards*, 78 F.3d at 999. The Court is further of the view that the Motion should also be granted as unopposed.

B. Jurisdiction

The Court is duty bound to address its continuing subject matter jurisdiction over this case *sua sponte*. Because this case does not involve statutory interpleader, but instead Rule 22, or equitable, interpleader, complete diversity is required. *See Hussain v. Boston Old Colony Ins. Co.*, 311 F.3d 623, 635 n.46 (5th Cir. 2002) (noting that “[s]ection 1332 jurisdiction under Rule 22 (rule interpleader) requires: (1) complete diversity of citizenship, which is met when the stakeholder is diverse from all the claimants, even if citizenship of the claimants is not diverse; and (2) an amount-in-controversy that exceeds \$75,000 exclusive of interest and costs.”) (*citing* 4 Moore's Federal Practice § 22.04[2][a]); *see also Lindsay v. Ford Motor Co.*, 41 F.3d 664, 1994 WL 684970 (5th Cir. Nov. 22, 1994) (*citing* 28 U.S.C. § 1335;

Strawbridge v. Curtiss, 3 Cranch 267, 2 L.Ed. 435 (U.S. 1806)). Plaintiff Wachovia is a North Carolina citizen, while Sandion, a Texas general partnership, d/b/a Coldwell Banker United, Realtors, is likewise a North Carolina citizen. See Notice of Removal, at p. 2; Aff. of William O'Connor, at p. 1, attached as Ex. "C" to Sandion's Declaration of Citizenship [66].¹

The general rule is that diversity is determined at the commencement of the lawsuit, and that subsequent occurrences will not normally divest the court of subject matter jurisdiction. See *Carlton v. Baww, Inc.*, 751 F.2d 781, 785 (5th Cir. 1985)(internal citations omitted). There are exceptions which require that the existence of jurisdiction be reassessed, such as where an amendment to the pleadings alters the nature of the action or adds a party without whom the case cannot continue. See *id.* In light of the intervention of non-diverse Defendant Sandion in this case, the Court questions whether it has been divested of subject matter jurisdiction. See, *i.e.*, *Carlton*, 751 F.2d at 786 (stating that "[i]f jurisdiction is based on diversity..., joinder of an indispensable party of non-diverse citizenship deprives the federal court of power to hear the case."); *In re Olympic Mills Corp.*, 477 F.3d 1, 8 (1st Cir. 2007); *Mattel, Inc. v. Bryant*, 446 F.3d 1011, 1013 (9th Cir.

¹ Because Sandion is a general partnership, the Court must look to the citizenship of its partners to determine whether there is complete diversity. See *Carden v. Arkoma Associates*, 494 U.S. 185, 195-96 (1990) (holding that federal court must look to citizenship of partnership's limited, as well as its general, partners to determine whether there is complete diversity). Pursuant to the Declarations filed in this case, Sandion is a citizen of Texas, Florida, and North Carolina. See *id.*; Decls. of Richard A. Smith, Denis McKinnon, and William O'Connor, attached as Exs. "A," "B," and "C" to Sandion's Decl. of Citizenship [66].

2006); *see also* 28 U.S.C. § 1367(b); *Cobb v. Delta Exports, Inc.*, 186 F.3d 675 (5th Cir. 1999).

In determining whether this Court is divested of subject matter jurisdiction, it must look to Federal Rule of Civil Procedure 19(b) to determine whether the non-diverse party is necessary and indispensable to the case. *See In re Olympic Mills Corp.*, 477 F.3d at 8-9.

Under Federal Rule of Civil Procedure 19(b), a party is regarded as “indispensable” if a court cannot proceed without the party “in equity and good conscience.” Fed. R. Civ. P. 19(b). Rule 19(b) offers four factors that a court can consider in determining whether a party is indispensable: (1) to what extent a judgment rendered in the party's absence might be prejudicial to that party or others in the lawsuit; (2) the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; (3) whether a judgment rendered in the party's absence will be adequate; and (4) whether the plaintiff will have an adequate remedy if the party cannot be joined. *Id.* These factors are not rigid tests, but rather are guides to the overarching “equity and good conscience” determination. *Wichita and Affiliated Tribes of Oklahoma v. Hodel*, 788 F.2d 765, 774 (D.C. Cir. 1986). “Pragmatic and equitable considerations control the Rule 19(b) analysis.” *Lone Star Indus., Inc. v. Redwine*, 757 F.2d 1544, 1552 (5th Cir. 1985).

Whalen v. Carter, 954 F.2d 1087, 1096 (5th Cir. 1992).

Due to the nature of this interpleader action, the Court is of the view that any judgment rendered in Sandion’s absence might prejudice Sandion as well as Wachovia, in that a judgment rendered in Sandion’s absence would not provide adequate relief to Wachovia. This prejudice cannot be lessened or avoided by protective provisions in the judgment, shaping of relief, or other measures. *See* FED. R. CIV. P. 19(b). Wachovia would not be prejudiced if this case were remanded

to state court because it could proceed with the interpleader action there. Indeed, Wachovia originally commenced this action in state court. As such, after balancing the rights of all concerned, *see AT&T Communications v. BellSouth Telecommunications, Inc.*, 238 F.3d 636, 659 (5th Cir. 2001), the Court is of the opinion that Sandion is a necessary and indispensable party to this action.

Because the Court has determined that non-diverse Defendant Sandion is a necessary and indispensable party to this action, the Court questions whether it must remand this case for lack of subject matter jurisdiction. Accordingly, the Court will afford the parties the opportunity to file appropriate briefs or otherwise show cause on or before June 3, 2009, as to why this case should not be remanded to state court for lack of subject matter jurisdiction.

III. CONCLUSION

For the reasons stated herein, the Court is of the opinion that the Motion to Intervene of Sandion must be granted. Accordingly,

IT IS, THEREFORE, ORDERED AND ADJUDGED that, the Motion to Intervene filed by Sandion d/b/a Coldwell Banker United, Realtors, on April 8, 2009 [43-1], should be and is hereby **GRANTED**.

IT IS, FURTHER, ORDERED AND ADJUDGED that, the parties must **SHOW CAUSE** on or before June 3, 2009, as to why this case should not be remanded to the Harrison County Chancery Court for lack of subject matter

jurisdiction, due to the intervention of right of a non-diverse Defendant.

SO ORDERED AND ADJUDGED, this the 19th day of May, 2009.

s/ Halil Suleyman Ozerden

HALIL SULEYMAN OZERDEN
UNITED STATES DISTRICT JUDGE