UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

RESIDENTIAL FUNDING COMPANY, LLC, CIV. NO. 14-1737 (MJD/JSM)

Plaintiff, ORDER

v.

DECISION ONE MORTGAGE COMPANY, LLC, and
HSBC FINANCE CORPORATION,

Defendants.

The above matter came before the undersigned on plaintiff's Motion to Disqualify Mayer Brown LLP as Counsel for Defendant HSBC Finance Corporation and for Discovery of Defendants' Other Counsel. [Docket No. 61]. Jeffrey A. Lipps, Esq., Jennifer A.L. Battle, Esq. and Jessica J. Nelson, Esq. appeared on plaintiff's behalf. Elizabeth V. Kniffen, Esq. appeared on behalf of defendant Decision One Mortgage Company, LLC. Michael O. Ware, Esq. and Todd A. Wind, Esq. appeared on behalf of defendant HSBC Finance Corporation.

The Court, being duly advised in the premises, upon all the files, records and proceedings herein, and for the reasons described in the memorandum below now makes and enters the following Order:

IT IS HEREBY ORDERED THAT:

Plaintiff's Motion to Disqualify Mayer Brown LLP as Counsel for Defendant HSBC Finance Corporation and for Discovery of Defendants' Other Counsel [Docket No. 61] is **GRANTED** in part and **DENIED** in part.

January 23, 2015

Janie S. Mayeron
JANIE S. MAYERON
United States Magistrate Judge

MEMORANDUM

I. BACKGROUND

A. Mayer Brown's Prior Representation of RFC

Plaintiff Residential Funding Company, LLC ("RFC") sued defendants Decision One Mortgage Company, LLC ("Decision One") and HSBC Finance Corporation ("HSBC") in state court alleging that defendants sold defective residential mortgage loans to RFC, resulting in billions of dollars in liabilities and losses to RFC and RFC's eventual Chapter 11 bankruptcy. Amended Complaint, ¶1. [Docket No. 19]. Through the instant lawsuit, and many other similar cases it has filed in this District, RFC is seeking damages from the defendants that sold RFC allegedly defective mortgages. Id., ¶¶96-109. The allegedly defective loans were sold by Decision One, which was acquired by Household International, Inc. in 1999. Id., ¶86. HSBC acquired Household in 2003. Id. In 2004, HSBC merged Household into Household Finance Corporation and renamed the surviving corporation "HSBC Finance Corporation." Id., ¶87.

Beginning in 2008 and continuing until RFC filed for Chapter 11 protection in May 2012, RFC was the defendant in dozens of lawsuits stemming from the allegedly defective loans, which had been included in RFC-sponsored residential mortgage-backed securities ("RMBS") trusts.[1] Amended Complaint, ¶¶3, 57, 58.

[1] On December 11, 2013, the United States Bankruptcy Court for the Southern District of New York approved a global settlement of RFC's RMBS-related liabilities and

The state court summons and complaint in this case were signed on December 15, 2013 by Donald Heeman and Ryan Olson of the Felhaber Larson law firm, Minneapolis. [Docket No. 1-1]. Jeffrey Lipps and Jennifer Battle of the Carpenter, Lipps & Leland law firm of Columbus, Ohio, were listed as "of counsel" on the Complaint. Id. The lawsuit was filed with the state district court, but not served until sometime between May and June, 2014.[2] See Declaration of Michael O. Ware in Opposition to Motion to Disqualify ("Ware Decl."), ¶¶6, 7 [Docket No. 83].

Attorney Jeffrey Lipps has represented RFC and certain of its affiliates since 2010, and has represented RFC in connection with suits brought against RFC by securities investors who invested in the RMBS. Declaration of Jeffrey A. Lipps ("Lipps Decl."), ¶¶4, 5 [Docket No. 64]. These lawsuits centered on the quality of RFC's loans and the inclusion of the allegedly defective loans into the RMBS trusts. Id., ¶5.

Beginning in April, 2011, non-party Ally Financial, Inc. retained Mayer Brown to handle litigation regarding the RMBS trusts issued by RFC and other subsidiaries of Residential Capital Company, LLC ("ResCap"). Ware Decl., ¶2. The clients varied from matter to matter; included Ally, ResCap and other members of the ResCap Group such as RFC, and non-ResCap subsidiaries of Ally; and involved actions by RMBS purchasers alleging that the RMBS offering materials inaccurately described the collateral in violation of securities law or the common law. Id.

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confirmed a joint Chapter 11 plan proposed by RFC and an official committee of unsecured creditors. Amended Complaint, ¶¶1, 10. Pursuant to the plan, the ResCap Liquidating Trust succeeded to RFC's rights and interests. Id., ¶13.

[2] With some exceptions not relevant here, a civil lawsuit in Minnesota is commenced upon the service, not the filing, of a copy of the summons and complaint. Minn. R. Civ. P. 3.01.

In addition, RFC retained Mayer Brown in April 2011 to represent it with a pre-bankruptcy petition lawsuit entitled Federal Housing Finance Authority v. Ally Financial, Inc., 11-cv-7010 (S.D.N.Y.) ("FHFA Litigation"). Lipps Decl., ¶8. Many of the Decision One loans at issue in the FHFA litigation are at issue in the instant litigation. Id., ¶9. RFC also retained Mayer Brown to represent it in a RMBS lawsuit brought by Federal Home Loan Bank of Chicago. Id., ¶11.

From April 2011 through April 2012, Ally and RFC shared a legal department and defended the RMBS suits jointly. Id., ¶12. Throughout 2011 and the beginning of 2012, Mayer Brown attorneys routinely communicated with Lipps and other attorneys at his firm, as well as in-house counsel for RFC and Ally, on many legal and factual issues regarding the RMBS cases. Id., ¶14. Mayer Brown participated in numerous attorney-client privileged phone calls, meetings, and other communications with Lipps and his firm, and representatives of RFC and Ally relating to the RMBS cases. Id. According to Lipps, "Mayer Brown was directly involved in discussions, coordination of defenses, and the gathering and sharing of legal and factual information with RFC and its other outside counsel across all of RFC's pre-petition RMBS litigation matters. . . ." Id., ¶15 (emphasis in original). For example, in August, 2011, on behalf of Ally and RFC, Mayer Brown hosted a two-day conference of outside counsel involved in the RMBS litigation, at which time counsel shared privileged and confidential information regarding a variety of issues concerning the claims and defenses in the RMBS suits. Id., ¶16.

Ally and RFC began to separate their legal departments in March and April, 2012 but continued to jointly defend against the RMBS litigation. Id., ¶19; see also Ware Decl., ¶3 ("In February 2012, Mayer Brown received instructions that it would no longer

serve as counsel to members of the ResCap Group but would instead serve only Ally and non-ResCap subsidiaries of Ally. By mid-March 2012 Mayer Brown had been relieved wherever it had appeared as counsel for a ResCap Group member, with separate counsel (sometimes the Carpenter Lipps firm) assuming the representation of the former Mayer Brown clients, including RFC. Mayer Brown would continue as one of Ally's principal RMBS defense counsel through the resolution of the last of the private litigation in early 2014.").

RFC filed for bankruptcy in May 2012, at which time the Carpenter Lipps firm was retained as special litigation and discovery counsel in RFC's bankruptcy cases. Lipps Decl., ¶20. In June 2012, Ally and RFC entered into a joint defense agreement ("JDA") pursuant to which Ally and RFC agreed to share confidential information to allow Ally to prepare its defense in the RMBS litigation in conjunction with RFC's defense against parallel proofs of claim filed against it in its bankruptcy case. Id., ¶21. After the JDA was signed, Mayer Brown asked Lipps and his firm to facilitate confidential meetings with certain RFC witnesses to assist Mayer Brown in gathering information for Ally's defense in the RMBS litigation. Id., ¶22. RFC agreed to help Mayer Brown and allowed Mayer Brown to interview Lipps, his partner Jennifer Battles, and several RFC witnesses on a privileged and confidential basis regarding RFC's business practices in securitizing loans it had acquired from lenders such as Decision One. Id., ¶23. In turn, Mayer Brown advised RFC on potential claims to be asserted by institutional investors and indenture trustees for the RMBS offerings. Id., ¶24.

Michael Ware of Mayer Brown has represented HSBC for nearly twenty years. Ware Decl., ¶4. When the state court complaint was filed in this matter, dozens of

similar suits were filed at the same time, and HSBC asked about Mayer Brown's availability to serve as defense counsel. Id., ¶5. According to Ware "we concluded provisionally that this set of originator-facing litigation was not substantially related to the investor-facing work we had done for ResCap and Ally. Although not technically conflicted, Mayer Brown nevertheless declined the proposed engagements on prudential grounds." Id.; see also Lipps Decl., ¶¶31, 32 ("Over the course of my conversations with Mr. Ware, Mr. Ware advised me that several correspondent defendants in these cases, including HSBC, had previously approached him to request that Mayer Brown represent them in defending against RFC's claims in these lawsuits. Mr. Ware advised that Mayer Brown had declined the representation when these requests were initially made due to the 'appearance' of impropriety.").

In May 2014, after the summons and complaint in the state court case had been served, HSBC re-approached Mayer Brown about representing it. Ware Decl., ¶7. HSBC proposed that Mayer Brown represent it in connection with RFC's allegation that HSBC is the alter ego of Decision One Mortgage and, therefore, vicariously liable to RFC for Decision One's obligations to RFC. Id.; Complaint, ¶14 [Docket No. 1-1]. Mayer Brown was familiar with the alter ego issues from previous engagements. Ware Decl., ¶7. The merits defense of the instant action was to be led by Decision One and its counsel Williams & Connolly. Id. Ware stated that Mayer Brown would represent HSBC on three conditions: (1) there would be no objection from RFC; (2) there would be no objection from Ally; and (3) HSBC would agree that Mayer Brown would not be involved in, and would not even discuss, issues concerning ResCap's sourcing, acquisition and due diligence of mortgage loans. Id.

On May 19, 2014, at 11:26 a.m. (EDT), Ware called Lipps and left a voicemail message. Ware stated:

> Hi Jeff, Mike Ware calling you about 11:30 on the morning of Monday the 19th. Hope you're well. I'm calling about a case that I think is still your case, but it's the ResCap Liquidating Trust against Decision One and HSBC Finance. And when the case was first filed, I told HSBC I couldn't do it; they've come back and asked me to do the alter ego piece, which is something I've done for them in a bunch of cases. And I think it's okay, but I wanted your reaction, if, if only informally, and so that's why I called. Anyway, if you have a minute, I'd be grateful to hear from you. It's 212-506-2593. Thanks.

Second Declaration of Jeffrey Lipps ("Lipps Second Decl."), ¶6 [Docket No. 88].[3]

Two days later, after not hearing back from Lipps, Ware had a telephone call with HSBC's co-counsel Todd Wind of Fredrickson & Byron and RFC's local counsel in

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[3] In his Declaration, Ware described the message he left for Lipps as follows:

> On May 19, 2014 – at 11:26 A.M. E.D.T., according to Mayer Brown phone records – I called Jeff Lipps, of the Carpenter Lipps firm in Columbus. The call went to voicemail, and I left a detailed message: Mayer Brown, after initially rebuffing prospective clients, had been re-approached by HSBC Finance and had decided to take the alter ego case. I also stated that, out of an abundance of caution, Mayer Brown had secured HSBC Finance's agreement that Mayer Brown would not be involved in, and would not even discuss, issues concerning ResCap's sourcing, acquisition and due diligencing of mortgage loans. At that point I had known Mr. Lipps for more than two years and held him in high regard, and was broadly familiar with the role Mayer Brown had played with ResCap and Ally. I concluded my message by emphasizing my respect for him and his judgment and asking that he let me know if the proposed engagement raised questions or concerns.

Ware Decl., ¶8. Lipps' firm was able to retrieve Ware's voice mail and RFC submitted a transcription of the message.

Minneapolis, Donald Heeman at the Felhaber firm, to seek an extension of time to respond to the state court complaint and to encourage RFC to amend its alter ego claims, which Ware thought were "extremely thin." Ware Decl., ¶9. On May 21, 2014, Ware sent Heeman an email stating: "[a]s Todd Wind and I said during the call, his firm and mine will represent HSBC in this case. Decision One will have Williams & Connolly and Zelle Hoffman," and seeking an extension to answer the complaint. Ware Decl., Ex. E. Heeman sent an email back confirming the extension. Id.. Lipps was not copied on either email. Id.

Lipps never answered Ware's voicemail. Ware Decl., ¶9; Lipps Second Decl, ¶10.[4] Nor did Ware ever follow up with Lipps or others at his firm, and Lipps was unaware of Ware's call or email with Heeman. Lipps Second Decl., ¶¶7, 11. Lipps stated that he did not "give any further thought to the likelihood that Mayer Brown would decide to take on representation" because in light of their "extensive knowledge of RFC's confidential and privileged information," he assumed that Mayer Brown would conclude that it had a conflict. Id., ¶10.

On June 2, 2014, RFC removed the matter to Federal District Court and served Zelle Hoffman, Williams & Connolly, Fredrikson & Byron, and Mayer Brown with its Notice of Removal. Notice of Removal [Docket No. 1]; Certificate of Service [Docket No. 3]; Ware Decl., Exs. B, C. The Notice of Removal was signed by Heeman of the Felhaber firm. Ware Decl., Ex. B. Lipps and Carpenter Lipps are listed on the Notice of

[4] Lipps explained that on May 19, 2014, he was involved in multiple emergency court hearings in connection with a preliminary injunction scheduled for hearing on May 21, 2014. That hearing was rescheduled to May 29, 2014. Lipps Second Decl., ¶8.

Removal as "Of Counsel." Id. The service letter is signed by David Hashmall of the Felhaber firm. Id.

On July 7, 2014, RFC and HSBC stipulated to a deadline of August 25, 2014, for filing an Amended Complaint. Ware Decl, Ex. D. Wind signed the Stipulation on HSBC's behalf; neither Mayer Brown nor Carpenter Lipps were listed on the Stipulation. Id. The Amended Complaint was filed and served on August 25, 2014. [Docket No. 19]. Lipps and Carpenter Lipps are listed as counsel for RFC.[5] Id. On October 1, 2014, RFC and HSBC stipulated to an extension of time to October 29, 2014, for HSBC to respond to the Amended Complaint. [Docket No. 20]. Wind signed the stipulation as HSBC's counsel; neither Mayer Brown nor Lipps Carpenter were listed on the Stipulation. Stipulation dated October 1, 2014 [Docket No. 20]. This Court entered an Order based on this stipulation on October 2, 2014. [Docket No. 22].

On October 27, 2014, Ware moved for admission pro hac vice, which was granted on October 28, 2014. [Docket Nos. 24, 28]. On October 29, 2014, HSBC and Decision One filed motions to dismiss the Amended Complaint in lieu of answering. [Docket Nos. 35, 40].

Lipps stated that he was unaware of Ware's representation of HSBC until Ware noticed his appearance on October 28, 2014. Lipps Decl., ¶27. Similarly, Heeman was not aware of Mayer Brown's prior representation of RFC until October 28, 2014. Declaration of Donald Heeman ("Heeman Decl."), ¶8 [Docket No. 85].

Lipps called Ware on November 10, 2014, to advise him of RFC's concerns regarding a conflict of interest, and on November 19, 2014, Lipps wrote to Ware on

[5] Lipps' Motion for Pro Hac Vice was filed on June 20, 2014. [Docket No. 13].

RFC's behalf to object to Ware's representation. Lipps Decl., ¶¶28, 29, Ex. C. Lipps stated in this letter that "in our November 10 call, you advised that you had the opportunity to review, prior to filing, the merit-based motion brief submitted by HSBC's predecessor-in-interest, Decision One Mortgage Company, LLC, in support of its motion to dismiss. You also acknowledged participating in communications among the defense group relation to coordination of briefing and possibly other issues in the District of Minnesota cases." Lipps Decl., Ex. C.

Ware and Lipps continued to discuss the conflict of interest issues in early December 2014, without any resolution. Id., ¶30. Lipps noted that the parties in this and other RFC cases had been meeting and conferring on issues such as the identification of loan breaches and losses or damages resulting from those breaches and the use of statistical sampling. Id., ¶35. According to Lipps, those topics were frequently discussed among counsel for RFC, including Mayer Brown, during the pre-bankruptcy petition RMBS litigation. Id. On December 3, 2014, Williams & Connolly filed a letter arguing against statistical sampling. See Letter dated December 3, 2014 from Matthew Johnson, counsel for Decision One to Chief Judge Michael Davis [Docket No. 58]. Johnson stated that he was writing "on behalf of separately-represented defendant HSBC Finance Corp." Id., p. 1. Williams & Connolly refused to tell Lipps if Mayer Brown had any involvement in the letter.

On December 8, 2014, RFC filed the motion to disqualify.

Ware has represented to this Court the following:

> At no time has any information been communicated from Mayer Brown, directly or indirectly, verbally, in writing or otherwise, to Fredrikson & Byron, to Williams & Connolly, or to anyone else involved in the coordinated RFC cases, on

> the subjects of (a) plaintiff's sourcing, acquisition and due-diligencing of mortgage loans; plaintiff's document management systems; (c) plaintiff's business processes; or, (d) the evaluation of plaintiff's witnesses.
>
> I have not, nor the best of my knowledge has anyone else at Mayer Brown expressed to anyone involved in the RFC cases any views, hints or suggestions of the means by which the defendants in this action and the dozens of related cases should approach offensive merits discovery.

Ware Decl., ¶¶10, 11.

B. RFC's Motion to Disqualify Mayer Brown and Mayer Brown's Response

RFC moved to disqualify Mayer Brown and to seek discovery from Fredrikson & Byron and Williams & Connolly under the theory that Mayer Brown may have shared RFC's confidential information with those firms. Plaintiff's Memorandum in Support of Motion to Disqualify ("Pl.'s Mem."), p. 9. [Docket No. 63]. RFC argued that Mayer Brown had to be disqualified pursuant to Minnesota Rule of Professional Conduct 1.9 because Mayer Brown was representing HSBC against its former client RFC on a substantially related matter in which HSBC's interests were materially adverse to RFCs and RFC had not given informed consent, confirmed in writing. Id., p. 11.[6] According to

[6] Rule 1.9 provides in relevant part:

> (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 unless the former client gives informed consent, confirmed in writing.
>
> ***
>
> (c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

RFC, it was undisputed that Mayer Brown had a previous attorney-client relationship and that HSBC's interests are materially adverse to RFC's in the instant litigation. Id., p. 12. As a result, the only issues were whether the instant suit was "substantially related" to the matters on which Mayer Brown previously represented RFC and whether Mayer Brown possessed confidential information not disclosed to the public, which is relevant to the instant suit. Id.

RFC submitted that Mayer Brown's prior involvement in RFC's pre-bankruptcy petition litigation concerned many of the same issues for which RFC now seeks indemnification from HSBC and are, therefore, substantially related to the issues in this litigation. Id., p. 14. For example, one of the central issues in this case is the circumstances under which the quality of the loans RFC acquired from Decision One and others was discovered. Id. What RFC knew when it acquired the loans and RFC's quality controls and repurchase processes will likely be subjects of discovery. Id. RFC submitted that these factual and legal issues were not just "substantially related" to those presented in pre-bankruptcy petition RMBS litigation in which Mayer Brown represented RFC, they are identical. Id.

> (1) use information relating to the representation to the disadvantage of the former client except as these rules would permit or require with respect to a client, or when the information has become generally known; or
>
> (2) reveal information relating to the representation except as these rules would permit or require with respect to a client.

RFC further argued that Mayer Brown's representation of RFC was not limited to matters such as the FHFA and Federal Home Loan Bank of Chicago lawsuits where Mayer Brown entered a formal notice of appearance, but extended to all of RFC's pre-bankruptcy petition RMBS litigation matters. Id., p. 16 (citing Lipps Decl., ¶15). Mayer Brown also advised RFC on representation and warranty claims that would be asserted by institutional investors. Id. (citing Lipps Decl. ¶24). RFC claimed that through this previous representation, Mayer Brown had particularized knowledge regarding RFC's loans, documents, and witnesses, which would provide HSBC with an unfair advantage in the negotiating the parameters of discovery in this case. Id., p. 17. If Decision One's motion to dismiss was denied, the issues that would be litigated are those that fell within the scope of Mayer Brown's prior role as RFC's counsel, such as the scope and enforceability of RFC's repurchase rights against others; RFC's sale of loans acquired from Decision One to RMBS trusts or third parties; the scope of RMBS-related liabilities and losses incurred by RFC because of loans for which HSBC and Decision One are contractually responsible; and the interpretation of the RFC Client Guide. Id., p. 18; Lipps Decl., ¶25.

Lastly, RFC argued that discovery on Mayer Brown's communications with other defense counsel, Fredrikson & Byron and Williams & Connolly, was necessary to determine if Mayer Brown had shared any of RFC's privileged and confidential information with those firms. Id., pp. 19-20. For example, RFC was concerned that Mayer Brown had opined on the issue of statistical sampling – the subject of HSBC and Decision One's December 3, 2014 letter to the District Court. Id., p. 20. RFC did not describe in any detail how it would conduct this discovery, if the discovery was allowed.

In opposition, HSBC argued summarily that the matters on which Mayer Brown previously represented RFC involved the defense of investor RMBS claims, not the pursuit of affirmative claims against loan sellers (i.e. claims RFC is asserting in the instant litigation) and "thus the matters are not related on their face." HSBC's Memorandum in Opposition to Motion to Disqualify, p. 8 ("Def.'s Mem"). Even so, HSBC urged that the Court had no reason to reach the merits of RFC's arguments on this topic, "because the waiver case is so clear." Id. In short, HSBC defended its decision to retain Mayer Brown on the ground that RFC waived its right to seek Mayer Brown's disqualification.[7] Id., p. 6.

[7] At the motion hearing, Ware attempted to distinguish the subject matter of Mayer Brown's earlier representation from the instant law suit. For example, Ware noted that Mayer Brown's earlier representation involved issues regarding the accuracy of RFC's SEC filings – which is not an issue in this matter. However, Ware conceded that HSBC had not submitted any evidence in support of this argument. Ware also contended that ResCap (i.e. RFC post-bankruptcy) was not the same company and that any information that he and others at Mayer Brown had gleaned from representing RFC was now stale and obsolete. But again, there is no evidence before this Court in support of that argument.

In reviewing the evidence submitted by RFC and considering HSBC's written submission and argument at the hearing, this Court had no doubt that Mayer Brown's pre-bankruptcy petition representation of RFC concerned many of the issues that are present in the instant case and thus are "substantially related" to this litigation. One of the key issues in the instant litigation is the quality of the loans Decision One sold to RFC and that RFC securitized into its RMBS offerings. This same issue was presented in the pre-bankruptcy petition litigation, specifically in the FHFA and Federal Home Loan Bank of Chicago litigation in which Mayer Brown defended RFC. Additionally, RFC submitted evidence, which HSBC did not rebut, that apart from these matters on which Mayer Brown entered a formal Notice of Appearance, Mayer Brown was also consulting with RFC on all of RFC's pre-bankruptcy petition litigation on issues relating to discovery, sampling of defective loans, RFC's loan acquisition process and its securitization process. Lipps Decl., ¶¶15-17, 21-23. Mayer Brown even interviewed Lipps and his partner Battle and other RFC witnesses, on a confidential basis, regarding RFC's business practices in securitizing the loans it had acquired from lenders such as Decision One. Id., ¶23. As to Ware's assertion at the hearing that the information that Mayer Brown acquired from RFC was now stale, the Court has only Ware's statements

According to HSBC, Ware unambiguously told Lipps in his voicemail message that Mayer Brown "would in fact become involved unless RFC and Mr. Lipps wanted to discuss it." Lipps' failure to respond to the message, coupled with RFC's failure to move to disqualify Mayer Brown immediately, constituted waiver of RFC's right to seek disqualification. Id., p. 9 (citing State ex. rel. Swanson v. 3M Co., 845 N.W.2d 808, 819 (Minn. 2014) ("3M")). In short, Mayer Brown asked RFC if it objected to its representation and "received no objection." Id. RFC's lawyers then "welcomed" Mayer Brown to the case. Id.

HSBC contended that the factors described in 3M regarding whether there has been an intentional waiver weighed in favor of finding a waiver in this case. Id., p. 9. First, the court looks at the length of delay in moving to disqualify. Id. Here, HSBC submitted that RFC waited six months to object and did not explain its delay – although HSBC opined that it was likely that Lipps listened to Ware's voicemail message and "decided that the proposed representation was unobjectionable." Id.

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at the hearing that he probably no longer knows any of the RFC employees. The Court has no way to gauge the accuracy of that statement or to determine if Mayer Brown's information regarding RFC is obsolete.

HSBC also suggested in its opposition brief that RFC's motion to disqualify was based on tactical considerations relating to the HSBC's motion to dismiss. Def.'s Mem., p. 2. The Court scrutinized RFC's motion for evidence of this sort of litigation abuse, Olson v. Snap Prods., Inc., 183 F.R.D. 539, 541–42 (D. Minn. 1998), but concluded that the evidence compelling disqualification was strong and the evidence that the motion was undertaken for abusive tactical reasons was non-existent.

In sum, RFC presented extensive evidence that the matters on which Mayer Brown previously represented RFC were substantially related to the instant litigation and, as a result, Mayer Brown was precluded from representing HSBC against RFC, absent its consent or waiver of its right to seek disqualification.

Second, the court looks at whether the movant was represented by counsel during the delay and here, RFC was represented during the delay – specifically by Lipps, the lawyer Ware apprised and asked if his representation would be objectionable. Id. Lastly, RFC had not explained its delay in seeking qualification, likely because Lipps listened to Ware's voicemail message and decided that the representation was not objectionable. Id.

HSBC objected to RFC's request for discovery of Fredrikson & Byron and Williams & Connolly. Id., p. 10. HSBC contended that there was no legal or factual basis for the request, and argued that Mayer Brown had not communicated with those firms "on the subjects of (a) plaintiff's sourcing, acquisition and due-diligence of mortgage loans; (b) plaintiff's document management systems; (c) plaintiff's business processes; or (d) the evaluation of plaintiff's witnesses. Id.; Ware Decl., ¶10. Matthew V. Johnson, a Williams & Connolly partner, and Todd Wind, a shareholder at Fredrikson & Byron, submitted declarations affirming Ware's statements. Declaration of Matthew V. Johnson [Docket No. 84]; Declaration of Todd Wind [Docket No. 85].

Mayer Brown acknowledged commenting on the draft letter to the Court regarding sampling, but maintained that sampling is a common litigation device, and there was nothing special about the sampling at issue here that should permit discovery of the lawyer's communications. Def.'s Mem., p. 11. Furthermore, the samples at issue in the cases in which Mayer Brown represented RFC were larger and being used for a different purpose than the sample at issue in the instant litigation. Id.

In reply, RFC rebuffed HSBC's waiver argument, contending that RFC timely sought disqualification within six weeks of Mayer Brown's Notice of Appearance,

following Lipps' call and letter to Ware expressing RFC's objections to Mayer Brown's representation of HSBC. Plaintiff's Reply ("Pl.'s Reply), pp. 1-2 [Docket No. 86] (citing Lipps Decl., ¶¶28, 29, Ex. C). Pursuant to 3M, "mere inaction" is insufficient to establish waiver; thus to the extent HSBC was arguing in favor of a waiver based on the RFC's failure to formally object earlier than it did, that alone was insufficient to establish waiver. Id., p. 4.

RFC further argued that HSBC mischaracterized Ware's voicemail message to Lipps as an "unambiguous statement" that Mayer Brown would accept the engagement. Id., p. 6. Instead, according to RFC, it was at best a "rumination on possible involvement" and, at any rate, Ware never followed up with Lipps, RFC's in-house counsel, business representatives, or Quinn Emanuel, RFC's lead counsel in this matter. Id. As to HSBC's argument that Heeman's interactions with Ware constituted a waiver, RFC noted that there was no evidence that Heeman was aware of Mayer Brown's previous representation of RFC. Id., p. 7; Heeman Decl., ¶¶6-9 [Docket No. 86].

RFC also rejected HSBC's attempt to minimize Mayer Brown's role as counsel only on alter ego issues, noting that defense counsel had collectively opposed statistical sampling and then refused to indicate Mayer Brown's role in that issue; Mayer Brown substantively reviewed Decision One's brief in support of its motion to dismiss; listened to defense strategy calls relating to discovery; Ware appeared at the December 12, 2014 case management conference; and HSBC's counsel Wind had emailed Heeman on December 22, 2014, suggesting that Mayer Brown help HSBC in responding to RFC's first set of discovery requests. Heeman Decl., Ex. 1 (email dated December 22,

2014 from Todd Wind to Donald Heeman). RFC continued to express concern that Mayer Brown had passed along RFC's privileged and confidential information and asserted that it was entitled to test the representations made by Wind and Johnson. Id., p. 11.

At the hearing on the motion, the Court asked Ware whether HBSC and his firm were part a joint defense arrangement with other defendants in this case, which would permit the sharing of information among clients and counsel regarding defense of the suit. Ware responded that HSBC had a joint defense agreement with Decision One, but it was informal and not in writing. Ware also stated that the other defendants (including Mayer Brown and HSBC) had a written joint defense agreement and agreed that its purpose was to facilitate the free flow of information among defendants to mutually benefit the defendants. Ware stated that Mayer Brown had not contributed substantively to discussions among parties to the joint defense agreement.

C. The Parties' Post-Hearing Submissions on Discovery

At the conclusion of the motion hearing, this Court ordered RFC to describe in detail the discovery it sought from Fredrikson & Byron and Williams & Connolly through a supplemental submission.[8] The Court provided HSBC with the opportunity to respond.

[8] Decision One objected at the motion hearing to the discovery RFC sought on the ground that the declarations that had been submitted were sufficient and RFC had not alleged that Williams &Connolly had any confidential or privileged information regarding RFC. RFC's supplemental submission indicated that it was seeking discovery from Ware, Mayer Brown, Wind or Fredrikson & Byron, but that if the discovery led RFC to conclude that additional follow-up was necessary, RFC would approach counsel for Decision One and HSBC on that issue and request leave of the Court to bring any issues that could not be resolved to the Court through a motion. Pl.'s Discovery Submission, p. 1.

RFC proposed written discovery (interrogatories and document requests) directed to Mayer Brown on the following topics: (1) how Mayer Brown safeguarded RFC's confidential and privileged information was safeguarded; (2) information regarding the Joint Defense Agreement that Ware described at the motion hearing; (3) communications by Mayer Brown with defense counsel in this action; and (4) Mayer Brown's involvement in the defense group's discovery demands to RFC. Plaintiff's Supplemental Submission on Discovery to Defendant's Counsel ("Pl.'s Discovery Submission"), pp. 1-6 [Docket No. 93].

RFC sought written discovery (interrogatories and document requests) directed to Fredrikson & Byron on the following topics: (1) documents in Fredrikson & Byron's possession, custody or control obtained in the course of its representation of Ally Securities, Inc.; (2) copies of written communications from Fredrikson & Byron to the Joint Defense Group regarding RFC's "business practices (including as to acquisition, securitization and diligencing of residential mortgage loans), RFC's counsel, RFC's other litigation relating to RMBS, RFC's litigation strategy (either before, during or after its bankruptcy proceeding), RFC's non-public analyses or assessments of RMBS securitization performance, RFC's views, strategy or approach on any sampling issues, or any issues relating to RFC's RMBS or mortgage loans that Fredrikson & Byron, P.A. previously learned from its representation of Ally Securities, Inc., or its discussions with Mayer Brown"; (3) identification of any other representation undertaken by Fredriksen & Byron of Ally Securities, Inc., Ally Financial, Inc. or any other current or former affiliates of RFC relating to RMBS or residential mortgage loans; and (4) documents showing the dates and times since December 17, 2013, that Fredrikson & Byron lawyers or

employees accessed RFC documents in the firm's possession that were obtained during its representation of Ally Securities, Inc. and a description of why the documents were accessed. Id., pp. 6-7.

HSBC opposed RFC's proposed discovery and submitted an additional declaration from Ware to support its positon that Mayer Brown had not shared any of RFC's privileged or confidential information with HSBC. Defendant HSBC Finance Corporation's Response to Plaintiff's Supplemental Submission on Discovery of Defendant's Counsel ("Def.'s Response"), pp. 1-9 [Docket No. 100]; Declaration of Michael O. Ware in Response to Plaintiff's Proposed Discovery ("Second Ware Decl.") [Docket No. 101].

Ware stated that all members of the Mayer Brown team knew that they could not use confidential and privileged RFC information in the instant litigation and they had not done so, and in particular, that "All members of the Mayer Brown team know that they may not discuss with anyone ResCap's sourcing, acquisition and due-diligencing of mortgage loans, and they have not done so; Mayer Brown did not communicate with the Joint Defense Group on any of the topics RFC described in its proposed discovery;[9] Mayer Brown had previously engaged in high-level sampling discussions with other RFC counsel, including Lipps, but had never litigated the issue; since mid-December 2014, Mayer Brown has isolated itself from other defense counsel and has done no substantive work other than work on the disqualification motion and briefing of HSBC's

[9] According to Ware, "suffice it here to say that (like most agreements of its type) [the Joint Defense Agreement] facilitates information sharing but does not require it; participants contribute only what they decide to contribute." Second Ware Decl. ¶3.

alter ego motion; and Mayer Brown had no role in preparing the defendants' omnibus requests to defendants. Second Ware Decl., ¶¶2-14.

Wind submitted a declaration in opposition to the proposed discovery, stating that while his firm, as counsel for Ally, has documents in its possession from the suit Allstate Ins. Co. v. GMAC Mortgage LLC, he never reviewed these documents; his firm has never reviewed any RFC documents; and Fredrikson & Byron did not have documents responsive to RFC's proposed document requests. Declaration of Todd Wind, ¶¶1-10 ("Second Wind Decl.") [Docket No. 102].

HSBC noted that the only authority to support the discovery RFC proposed was Gifford v. Target Corp., 723 F.Supp.2d 1110 (D. Minn. 2010). Def's Response, p. 1. There, the district court disqualified a law firm and then considered whether co-counsel should be disqualified. Id., (citing Gifford, 723 F.Supp.2d at 1122). Co-counsel was directed to submit an affidavit, which he did. Id., (citing Second Wind Decl., Ex. A). Plaintiff's counsel then asked for an additional affidavit, which Judge Montgomery denied and then declined to disqualify co-counsel. Id., (citing Second Wind Decl., Exs. B, C). According to HSBC, the same result should be reached here because HSBC submitted unequivocal declarations that Mayer Brown had not shared any of RFC's confidential or privileged information with Fredrikson & Byron. Id., p. 2.

II. DISCUSSION

A. Legal Standard

Attorney disqualification is committed to the discretion of the court. Jenkins v. State of Missouri, 931 F.2d 470, 484 (8th Cir. 1991). "Disqualification is an ethical, not a legal matter, and is in the public's, as well as the client's, interest." In re Potash

Antitrust Litig., Civ. No. 3–93–197, 1993 WL 543013, at *16 (D. Minn. Dec. 8, 1993), amended 1994 WL 2255 (D. Minn. Jan.4, 1994). "Disqualification is appropriate where an attorney's conduct threatens to work a continuing taint on the litigation and trial." Arnold v. Cargill, Inc., Civ. No. 01–2086 (DFW/AJB), 2004 WL 2203410, at *5 (D. Minn. Sept. 24, 2004).

Among the factors considered in determining disqualification are "the court's duty to maintain public confidence in the legal profession and its duty to insure the integrity of the judicial proceedings." Potash, 1993 WL 543013, at *16 (citing United States v. Agosto, 675 F.2d 965, 969 (8th Cir. 1982)). Additionally, a party has an "interest in a trial free from even the risk that confidential information has been unfairly used against it." Id. (emphasis in original) (citation omitted). "Of course, the counterbalance to this concern is the recognition that disqualification motions are often brought for purely strategic reasons having little connection to a party's concern for ethical behavior." Id., at *19, n. 39 (citations omitted). Motions to disqualify are "subjected to particularly strict scrutiny" because of their potential for this type of abuse. Olson, 183 F.R.D. at 541-42. However, "any legitimate doubts . . . must be resolved in favor of disqualification." Id. at 542 (citing Coffelt v. Shell, 577 F.2d 30, 32 (8th Cir.1978)).

The conduct of attorneys practicing in the District of Minnesota is governed by the Minnesota Rules of Professional Conduct. D. Minn. L.R. 83.6(d). Rule 1.9 provides:

> 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 writing.

Minn. R. Prof. Conduct 1.9.

A party seeking disqualification under Rule 1.9 must establish that (1) the moving party and opposing counsel had a prior attorney-client relationship; (2) the interests of opposing counsel's current client are materially adverse to the interests of the moving party; and (3) the present lawsuit is substantially related to a matter in which opposing counsel previously represented the moving party. Minn. R. Prof. Conduct 1.9(a); 3M, 845 N.W.2d at 816. "Matters are "substantially related" within the meaning of Rule 1.9(a) '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.'" 3M, 845 N.W.2d at 816 (quoting Minn. R. Prof. Conduct 1.9 cmt. 3.).

"To assess whether two matters are substantially related, [the court] analyze[s] the extent to which the factual and legal issues in the two representations overlap and examine any other relevant circumstances." Id. (citation omitted). "Two factors in addition to the relationship between the factual and legal issues are germane to the analysis—whether confidential information provided to the attorney in the prior representation subsequently has been disclosed to the public and whether that information has been rendered obsolete by the passage of time." Id. (citing Minn. R. Prof. Conduct 1.9 cmt. 3).

In 3M, the Minnesota Supreme Court concluded for the first time that a party can waive its right to seek disqualification of opposing counsel if certain factors are present. Id. "Waiver requires both knowledge of the right and intent to waive the right." Id.

(citing Valspar Refinish, Inc. v. Gaylord's Inc., 764 N.W.2d 359, 367 (Minn. 2009)). "[K]nowledge may be actual or constructive and the intent to waive may be inferred from conduct." Valspar Refinish, Inc., 764 N.W.2d at 367 (citation omitted) (internal quotation marks omitted). The intent to waive, however, cannot be implied from mere inaction. 3M, 845 N.W.2d at 819 (citation omitted). Rather, the party asserting waiver must show that the waiving party knew of the right and intended to waive it. Id. (citation omitted). "Whether a party possessed an intent to waive is generally a question of fact that rarely should be inferred as a matter of law." Id. (citing White v. City of Elk River, 840 N.W.2d 43, 51 (Minn. 2013)).

Circumstantial evidence of an intent to waive the right to seek disqualification of opposing counsel may include: (1) the length of the delay in bringing the motion to disqualify; (2) whether the movant was represented by counsel during the delay; and (3) the reason for the delay. Id. (citations omitted).

As the party asserting that RFC waived its right to seek Mayer Brown's disqualification, HSBC has the burden of establishing that RFC knew of its right and intended to waive it. Id. (the party asserting waiver has the burden of establishing waiver). When analyzing whether waiver has occurred, the court must "focus on the party to whom the right belongs." Id.. Because RFC is the party with the right to object to Mayer Brown's representation, "the legally relevant point in time for determining the length of the delay in asserting the right to disqualification is when [RFC] is deemed to have learned of the conflict." Id. "[A] corporation is charged with constructive knowledge . . . of all material facts of which its officer or agent . . . acquires knowledge

while acting in the course of employment within the scope of his or her authority." Id. at 820 (internal quotation and citation omitted).

B. RFC Did Not Waive Its Right to Seek Mayer Brown's Disqualification

In its opposition to RFC's motion to disqualify, HBSC is not contending that RFC was not Mayer Brown's former client; it is not asserting that the instant suit is not substantially related to Mayer Brown's former representation of RFC and Ally; and it is not claiming that RFC consented to Mayer Brown's representation of HSBC in this case. Rather, the only basis for Mayer Brown's opposition to the motion to disqualify is that by waiting six months to bring this motion, RFC waived its right seek disqualification.

HSBC's position is premised on the assumption that RFC understood as of May 19, 2014, or shortly thereafter, that Mayer Brown had undertaken representation of HSBC. However, the evidence before this Court establishes that neither RFC much less its outside counsel, had any understanding that (a) Mayer Brown was representing HBSC in this suit, and that (b) Mayer Brown had previously represented HSBC in substantially related litigation so as to require consent by RFC to permit Mayer Brown to represent HSBC in this case.

For starters, contrary to HSBC's assertion, Ware's voicemail message to Lipps did not unambiguously state that Mayer Brown was signing on as HSBC's counsel unless Ware heard from Lipps. Ware only said that he "thought it would be ok" to represent HSBC for the limited purpose of addressing the alter ego claim, and that he wanted Lipps' reaction, "if only informally." Def.'s Reply, p. 6 (citing Lipps' Second Decl., ¶6). Ware's voicemail did not place Lipps on notice that if Lipps did not call him back, he was accepting the engagement regardless of the conflict of interest. While

HSBC construed Lipps' failure to return the call as some sort of evidence of consent by RFC, in light of the obvious conflict of interest, the Court found Lipps' explanation – that he did not return the call because the conflicts were so obvious that he believed that Mayer Brown would simply conclude that it could not accept the engagement – to be credible. Lipps' Second Decl., ¶11. In any event, Lipps' failure to return Ware's call does not lead this Court to conclude that RFC's inaction until November 2014, establishes that it intended to waive its right to seek disqualification. Indeed, that Ware waited only 48 hours after leaving the message for Lipps (without, apparently, knowing whether the message was actually received by him, much less RFC) before initiating a call with Wind to Heeman, (Ware Decl., ¶9), strongly suggests that Ware was more concerned about moving forward with his representation of HSBC than he was about obtaining RFC's consent to Mayer Brown's representation.

Second, to the extent that HSBC relied on Heeman's communications with Ware at the end of May 2014 and service of the Notice of Removal on Mayer Brown in early June 2014, as evidence that RFC was aware of Mayer Brown's representation of HBSC, the Court rejects that argument as well. While it apparent that the Felhaber firm was aware of Mayer Brown's representation of HBSC as early as May 21, 2014, (Ware Decl., Exs. B, C, E), there is no evidence that the Felhaber firm knew of the basis for a potential conflict of interest – i.e. Mayer Brown's previous representation of RFC. See Heeman Decl., ¶8. Stated otherwise, even if Heeman may have "welcomed" Mayer Brown into the case, as HSBC asserts, he did so without any understanding of Mayer Brown's previous representation of RFC. Thus, Heeman and the Felhaber firm had no knowledge of RFC's right to seek disqualification of Mayer Brown and their unknowing

conduct cannot support finding knowledge or an intentional waiver by RFC. See 3M, 845 N.W.2d at 816. In fact, HSBC's assertion that "Jeff Lipps was the right person to call," (Def.'s Mem., p. 5), is an acknowledgment that it was Lipps, not Heeman, who was aware of Mayer Brown's previous relationship with RFC.

Third, prior to Ware's Notice of Appearance on October 28, 2014, there is no evidence that anyone at RFC with knowledge of Mayer Brown's prior representation of HBSC in the pre-bankruptcy petition RMBS litigation, knew of Mayer Brown's representation of HSBC in the instant suit. To the contrary, the evidence presented to this Court indicates that only upon Ware and Mayer Brown's filing of their Notice of Appearance in the case, did RFC become aware of Mayer Brown's representation. Lipps, on behalf of RFC, then immediately raised the conflict of interest with Ware, and informed him in writing on November 19, 2014, that Mayer Brown's representation of HSBC in the suit was a conflict of interest, and RFC was not waiving the conflict or consenting to Mayer Brown's continuing involvement in the case. Lipps. Decl., Ex. C. When discussions to resolve the conflict bore no fruit, RFC filed the instant motion on December 8, 2014. Lipps Decl., ¶30. RFC moved quickly to assert its rights to disqualify Mayer Brown, and the Court finds no substantive delay between the time RFC discovered Mayer Brown's role and its motion to disqualify. Thus, while delay in bringing a motion to disqualify may point towards a waiver, in this case the Court finds that the motion was timely brought, and without any delay, much less undue delay.

3M teaches that the party asserting waiver, HBSC, must show that the waiving party, RFC, knew of the right and intended to waive it. 3M also teaches that when analyzing whether waiver has occurred, the court must "focus on the party to whom the

right belongs [RFC];" "the legally relevant point in time for determining the length of the delay in asserting the right to disqualification is when [RFC] is deemed to have learned of the conflict;" and "[a] corporation is charged with constructive knowledge . . . of all material facts of which its officer or agent . . . acquires knowledge while acting in the course of employment within the scope of his or her authority." 845 N.W.2d at 819-20 (citations omitted).

The circumstantial evidence presented by the parties bearing on HBSC's claim that RFC has waived its right to seek disqualification is follows:

- On December 13, 2013, RFC filed its Complaint in state court against HBSC and Decision One. [Docket No. 1]. This Complaint identified Jeff Lipps and Carpenter Lipps as "of counsel." Id.

- On May 19, 2014, Ware left a voicemail for Lipps indicating that after previously rejecting HBSC's request that he represent it in this suit, HBSC had come back and asked him to do the alter ego piece. Lipps Second Decl., ¶6. Ware stated it he thought "it's okay, but I wanted your reaction, if, if only informally," and asked Ware to call him. Id.

- Lipps never called Ware back.

- On May 21, 2014, Ware and Wind, on behalf of HBSC, spoke to Heeman, local counsel for RFC, informed Heeman that they represented HBSC, and requested an extension to answer the Complaint. Heeman Decl., ¶9; Ware Decl., Ex. E. Lipps was not copied on the email exchange between Ware and Heeman. Ware Decl., Ex. E.

- On June 2, 2014, RFC removed the case to federal court and served Ware at Mayer Brown, among others. Ware Decl., Exs. B, C; Docket No. 3. The Notice of Removal was signed by Heeman of the Felhaber firm. Ware Decl., Ex. B. Lipps and Carpenter Lipps were listed on the Notice of Removal as "Of Counsel." Id. The service letter was signed by David Hashmall of the Felhaber firm. Id.

- Lipps formally entered an appearance in this case on June 20, 2014. [Docket Nos. 11, 15].

- On July 7, 2014, RFC and HSBC stipulated to a deadline of August 25, 2014, for filing an Amended Complaint. Ware Decl, Ex. D. Wind signed the Stipulation on HSBC's behalf; neither Mayer Brown nor Carpenter Lipps were listed as counsel

for HSBC on the Stipulation. Id. Similarly, on October 1, 2014, RFC and HSBC stipulated to a deadline of October 29, 2014, for filing a response to the Amended Complaint. [Docket No. 20]. Wind signed the Stipulation on HSBC's behalf; neither Mayer Brown nor Carpenter Lipps were listed as counsel for HSBC on the Stipulation. Id.

- On October 27, 2014, Ware and his colleague formally entered an appearance in this case, which was granted on October 28, 2014. [Docket Nos. 24, 28].

- Heeman was not aware of Mayer Brown's prior representation of RFC until October 28, 2014. Heeman Decl., ¶6-9.

- Lipps was not aware of Mayer Brown's prior representation of RFC until Ware and another attorney from Mayer Brown were admitted to this case on October 28, 2014. Lipps Decl., ¶27.

- On November 10, 2104, Lipps called Ware to advise him of RFC's concerns regarding a conflict of interest, and on November 19, 2014, Lipps wrote to Ware on RFC's behalf to object to Ware's representation. Lipps Decl., ¶¶28, 29, Ex. C.

- On December 8, 2014, RFC filed the motion to disqualify.

In 3M, the State of Minnesota retained Covington & Burlington, LLP ("Covington") to represent it in a suit against 3M involving the manufacture and disposal of chemicals. 3M, 845 N.W.2d at 811. Covington first appeared on behalf of the State in January 2011. Id. At the end of March 2012, outside counsel for 3M sent a letter to Covington advising it of its previous representation of 3M concerning "legal and regulatory issues associated with its fluorochemical business," and then subsequently, 3M demanded that Covington withdraw. Id. at 813. Between the dates of Covington attorneys' first appearance in the case (January 2011) and 3M's demand for Covington's withdrawal (March 26, 2012), 3M's General Counsel had indicated in communications with Covington attorneys on April 8, 2011, and November 16, 2011, that he was aware that Covington may have a conflict of interest in the case. Id. On April 30, 2012, 3M moved to disqualify Covington as counsel for the State. Id.

In discussing the facts bearing on the issue as to whether 3M had waived its right to seek disqualification of Covington, the Minnesota Supreme Court stated:

> The district court did not conduct an implied-waiver analysis, but in rejecting the State's waiver argument, the district court discussed the dispute regarding when 3M became aware of the extent of Covington's prior representation of 3M. The district court's findings regarding the timing focus on the personal knowledge of then–3M General Counsel Smith. The district court found that Smith lacked actual knowledge of the potential conflict when the NRD case was filed. The district court also found that 3M's outside counsel, William Brewer, did not learn of the potential conflict until March 2012 and promptly sought Covington's disqualification thereafter. This analysis, however, is incomplete.
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> ***
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> Here, in addition to whether and when Smith and Brewer acquired actual knowledge of the potential conflict, the inquiry must consider whether other 3M employees or agents, such as other 3M in-house counsel, already held knowledge that is relevant to determining when 3M learned of the potential conflict.

Id. at 819-20. The court then remanded the case back to the district court to make the necessary factual findings to determine whether 3M impliedly waived the right to seek disqualification. Id. at 820.

Unlike 3M, where the evidence indicated that 3M's General Counsel was aware for more than 14 months of Covington's potential conflict of interest before 3M filed its motion to disqualify (and the trial court still found the General Counsel lacked actual knowledge of the potential conflict), here, there is no evidence that RFC had any knowledge of Mayer Brown's representation of HSBC until Mayer Brown entered its appearance in this suit at the end of October 2014. Further, in remanding the case back to the trial court, the Minnesota Supreme Court instructed that the evidence to be

garnered should focus when other 3M employees, including 3M-inhouse counsel, gained knowledge about the potential conflict. The point is that in 3M there was evidence that 3M had knowledge of Covington's current representation of the State and prior representation of 3M, yet this evidence was not deemed adequate to make a finding that 3M had intentionally waived its right to seek disqualification. But in the instant case, the circumstantial evidence presented to this Court shows no knowledge by RFC of Mayer Brown's representation of HBSC in this case until it entered its appearance at the end of October.

At best, the evidence shows that Mayer Brown made the Felhaber law firm aware of its representation of HBSC in May 2014, but the Felhaber firm did not become aware of Mayer Brown's prior representation of RFC and its potential conflict until the end of October 2014. None of this evidence shows that RFC knew of Mayer Brown's involvement in the case. Even if this Court were to go so far as to play Monday-morning quarterback (or the "could've, should've or would've known" game) and conclude that it is fair to impute Felhaber's knowledge of Mayer Brown's representation of HBSC in late May or early June to Carpenter Lipps (which clearly knew of Mayer Brown's prior representation of RFC), or that the Felhaber firm should have told Carpenter Lipps of Mayer Brown's representation of HBSC in late May or early June, or that Carpenter Liopps should have studied the letter of service and the Certificate of Service for the Notice of Removal to see who was representing HBSC in early June, these various scenarios do not show that RFC had constructive knowledge of Mayer Brown's involvement and conflict in the case as early as late May or early June 2014.

In sum, the facts before this Court do not support a finding that RFC sat on its right to move for disqualification. Therefore, the Court finds that HSBC has not established that RFC waived its right to seek Mayer Brown's disqualification and Mayer Brown is disqualified from representing HSBC in this case.

B. Discovery of Fredrikson & Byron

"Where knowledge gained by counsel through disclosures of protected information will lead to an improper benefit, disqualification is required to protect the judicial process and the interests of the former client." Gifford, 723 F.Supp.2d at 1122. However, where there is no evidence that counsel has had access to divulged protected information or improperly disclosed materials, disqualification would be improper. Id. After disqualifying plaintiff's counsel in Gifford, the District Court considered defendant's argument that co-counsel should also be disqualified. Id. The District Court observed that there was no evidence that co-counsel had accessed privileged and confidential information, but it was at least conceivable that it had. Id. As a result, the District Court required co-counsel to file an affidavit describing its contact with the disqualified firm on issues relating to the disclosure of defendant's privileged information. Id. After reviewing the affidavit, the District Court declined to disqualify co-counsel. See Second Wind Decl., Ex. C (Order dated August 17, 2010 in Gifford v. Target, Civ. No. 10-1194 (ADM/RLE) denying defendant's motion to disqualify co-counsel on the ground that the affidavit submitted by counsel stated that co-counsel had no exposure to improperly disclosed confidential or privileged information).

Based on the First and Second Ware Declarations and the First and Second Wind Declarations, this Court has concluded that discovery on Fredrikson & Byron and

Williams & Connolly has been answered satisfactorily and no further discovery is necessary. These declarations established to the Court's satisfaction that Mayer Brown has not divulged RFC's confidential and privileged information to these firms and that the lawyers can continue to litigate the instant case without any taint of the litigation. See Arnold, 2004 WL 2203410, at *5.

J.S.M.