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No. 17-5650

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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DEBORAH S. HUNT, Clerk

TERRI KIRSCH, **Plaintiff-Appellee,** v. ROBERT DEAN, **Defendant,** ZFX, INC., **Proposed Intervenor-Appellant.**	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY **OPINION**

Before: MOORE, CLAY, and KETHLEDGE, Circuit Judges.

KAREN NELSON MOORE, Circuit Judge. In this dispute between two fifty-percent shareholders of a corporation, we have been asked to decide whether the corporation may intervene, at the behest of one of the shareholders, for the sole purpose of moving to disqualify counsel for the other shareholder based on a purported violation of the attorney-client relationship. The district court denied the motion to intervene. Because the corporation's motion to intervene was untimely and thus failed to satisfy the requirements for either absolute or permissive intervention, and because the corporation is incorrect to argue that it may intervene without satisfying those basic requirements, we **AFFIRM**.

I. BACKGROUND

In 2004, Terri Kirsch and Robert Dean became 50% shareholders in ZFX, Inc. ("ZFX"), a "flying effects service provider" incorporated and organized under Nevada laws. R. 1 (Compl.

¶¶ 7, 11–12) (Page ID #3). ZFX operates out of a warehouse facility in Louisville, Kentucky, owned by ZFX Property, which Kirsch and Dean also allegedly co-own. *Id.* ¶¶ 15, 17, 39 (Page ID #3–4, 7). By August 2015, Kirsch and Dean were negotiating a potential sale of Kirsch's interests in ZFX and ZFX Property to Dean. R. 5 (Verified Counterclaim ¶ 40) (Page ID #42). In February 2016, Kirsch executed agreements to effectuate the sale. R. 1 (Compl. ¶ 28–29) (Page ID #5). A week after he received the executed documents, but before taking any action on them, Dean removed Kirsch's access to ZFX's computer system, email system, and financial and banking records. *Id.* ¶ 32 (Page ID #6). Dean then emailed Kirsch to say that he had discovered "a number of financial irregularities that [had] occurred 'on [her] watch,'" and to inform her that he would not "execute the draft agreements or consummate the proposed transaction until the financial irregularities had been fully remedied." *Id.* ¶ 33 (Page ID #6) (alteration in original). Soon thereafter, ZFX's General Manager cut off Kirsch's salary and benefits. *Id.* ¶ 34 (Page ID #6).

Invoking diversity jurisdiction, Kirsch sued Dean in federal district court in May 2016, seeking a declaration that she is a 50% owner, director, and President of ZFX and a 50% owner and member of ZFX Property. *Id.* ¶ 39 (Page ID #7). She also alleged that Dean breached his fiduciary and common-law duties by freezing her out of the businesses and "rendering her shares and units worthless." *Id.* ¶¶ 46, 48–50 (Page ID #8). Dean, for his part, filed counterclaims against Kirsch, in which he alleged that Kirsch had breached her fiduciary duties, wasted corporate assets, and aided and abetted another employee's misuse of corporate funds. R. 5 (Verified Counterclaim ¶¶ 78, 88, 93) (Page ID #46–49). In addition to damages, Dean sought a declaratory judgment that he is ZFX's President with authority to determine who should and

should not serve as an employee of ZFX. *Id.* ¶¶ 98,105 (Page ID #49–50). In a separate filing, Dean moved to partially dismiss Kirsch's complaint, which the district court mostly denied. R. 10 (Mem. Op. at 11) (Page ID #109).

After the district court decided Dean's motion to dismiss, Dean answered Kirsch's complaint and submitted verified amended counterclaims, in which, inter alia, Dean claimed that Kirsch had breached a "Stock Restriction Agreement" ("SRA") that Dean and Kirsch had signed in 2012. R. 13 (Am. Verified Counterclaim ¶¶ 122–36) (Page ID #138–41). According to Dean, the SRA—which Dean attached to his amended counterclaims—contemplated a buy-out procedure in the event a shareholder's employment with ZFX was terminated and required all disputes related to the agreement to be arbitrated in Jefferson County, Kentucky. *Id.* ¶¶ 124–27 (Page ID #138–39). Dean asserted that Kirsch's claims regarding her status as a 50% owner, director, and President of ZFX and Dean's freezing her out of the company without buying her shares implicate the SRA's buy-out provisions, and are therefore governed by the SRA's arbitration provision. *Id.* ¶¶ 130–34 (Page ID #140). As a result, Dean counterclaimed against Kirsch for materially breaching the SRA's arbitration clause by pursuing these claims in federal court. *Id.* ¶ 135 (Page ID #140).

A week later, Dean, citing the SRA's arbitration clause, moved to compel arbitration of Kirsch's claims related to ZFX and to stay further proceedings pending completion of the arbitration. R. 14–1 (Def. Mem. re Mot. to Compel Arb. at 3) (Page ID #164). Kirsch objected to Dean's attempts to compel arbitration and, in a separate filing, moved to dismiss Dean's breach-of-contract claim under Federal Rule of Civil Procedure 12(b)(6). R. 18 (Pl. Resp. to Mot. to Compel Arb. at 8, 13–17) (Page ID #243, 248–52; R. 17-1 (Pl. Mem. re Mot. to Dismiss)

(Page ID #181–99). The district court denied Kirsch's partial motion to dismiss in December 2016. R. 50 (Mem. Op. at 1) (Page ID #941).

While his motion to compel arbitration was fully briefed and pending before the district court, Dean moved to disqualify Kirsch's counsel. In support of his motion, Dean attached email exchanges between Kirsch and an attorney at Middleton Reutlinger—the firm representing Kirsch in this action—in which Kirsch asked the attorney to review and provide legal advice on the SRA after Kirsch and Dean had revised the document in 2012, and the Middleton Reutlinger attorney agreed "to look at your revised agreement today and let you know of any suggestions I might have." R. 20-3 (Ex. 1) (Page ID #282–99); R. 20-4 (Ex. 2) (Page ID #300–02); R. 20-5 (Ex. 3) (Page ID #303–05); R. 22 (Ex. 4) (Page ID #347–48). The attached emails included a later email from the Middleton Reutlinger attorney to Kirsch outlining her eight "observations about the agreement." R. 22 (Ex. 4) (Page ID #348). Though Dean was copied on the original emails between Kirsch and the Middleton Reutlinger attorney, he explained that he remembered Middleton's representation regarding the SRA only after he reviewed the 2012 email chain in late September 2016. R. 20-1 (Def. Mem. re Mot. to Disqualify Pl.'s Counsel at 4 n.3) (Page ID #266); R. 20-6 (Dean's Aff. ¶¶ 5–6) (Page ID #307). In fact, he swore that he had not even remembered that the SRA itself existed until September 1, 2016. R. 20-6 (Dean's Aff. ¶ 4) (Page ID #307).

According to Dean, Middleton represented Kirsch, Dean, and ZFX when it reviewed and provided advice on the SRA in 2012, and therefore Middleton could not legally represent Kirsch in her current efforts "to circumvent [the] contract" by objecting to Dean's motion to compel arbitration under the SRA. R. 20-1 (Def. Mem. re Mot. to Disqualify Pl.'s Counsel at 14) (Page

ID #276). Holding otherwise, Dean argued, would allow Middleton Reutlinger to violate the Kentucky Rules of Professional Conduct, which prohibit lawyers from representing a current client "in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client." *Id.* at 5 (Page ID #267) (quoting KY. S. CT. R. 3.130(1.9(a)). Dean alternatively argued, in a footnote, that he should be able to assert Middleton Reutlinger's conflict with ZFX even if only the company (and not Dean) were considered Middleton Reutlinger's former client. *Id.* at 5 n.6. Citing a host of non-binding, out-of-circuit cases, Dean argued that non-clients may sometimes "assert [a] former client's conflict as against an opposing party's counsel" and insisted that requiring ZFX to "file a separate motion to protest Middleton's conflict" would "exalt form over substance" because "Dean is ZFX's President and, when the Stock Restriction Agreement is enforced, will be ZFX's sole shareholder." *Id.* Accordingly, Dean asked the district court to disqualify Middleton Reutlinger as Kirsch's counsel and to "strike the filings that Middleton has made on Kirsch's behalf, including but not limited to Kirsch's Complaint, Kirsch's response to Dean's motion for partial dismissal, Kirsch's motion to dismiss, and Kirsch's response to Dean's motion to compel arbitration and to stay further proceedings." *Id.* at 15 (Page ID #277) (internal citations omitted).

In response, Kirsch argued that Middleton Reutlinger represented only ZFX in connection with its review of the SRA—not Dean or Kirsch in their individual capacities. R. 31 (Pl. Resp. to Def. Mot. to Disqualify at 2) (Page ID #465). As a result, Dean was not a "former client" and was not "entitled to even assert an objection." *Id.* Kirsch further argued that Dean's delay in objecting to Middleton Reutlinger's involvement in the case amounted to waiver; Middleton's prior representation was not "substantially related" to the current case; Dean did not

previously provide Middleton Reutlinger with confidential information that could be materially adverse to his current interests; Dean failed to identify a "specific impropriety" associated with Middleton's conduct; and Dean's own attorneys had also previously represented ZFX in other matters, and therefore his "arguments for Middleton Reutlinger's disqualification warrant the disqualification of his own attorneys." *Id.* at 2–3 (Page ID #465–66).

The district court agreed with Kirsch. In an opinion issued on December 7, 2016, the district court denied Dean's motion to disqualify Middleton Reutlinger because Dean was not Middleton Reutlinger's former client and thus had no grounds to pursue disqualification. R. 46 (Mem. Op. at 7) (Page ID #891). In addition, the district court determined that "[t]he available evidence fails to indicate that the revisions to the Stock Restriction Agreement suggested by Middleton Reutlinger relate to any dispute in this litigation," nor does it "show that Middleton Reutlinger acquired any confidential information from Dean when it reviewed the document." *Id.* The district court also rejected Dean's contention that he could assert Middleton Reutlinger's conflict of interest on behalf of ZFX. As the district court explained,

> Middleton Reutlinger may have a conflict of interest in representing Kirsch and ZFX. But ZFX is not a named party to this litigation and has not yet moved to intervene. Moreover, the issue whether Dean is ZFX's sole shareholder has not yet been determined. Thus, whether Middleton Reutlinger has a conflict of interest necessitating disqualification because of its representation of ZFX regarding the Stock Restriction Agreement is irrelevant at this time to the present motion.

Id. at 8 (Page ID #892). The district court therefore denied Dean's motion to disqualify Kirsch's counsel and strike its filings.

Viewing the district court's discussion of Middleton Reutlinger's prior relationship with ZFX as "essentially invit[ing] a motion to intervene from ZFX," ZFX moved on December 14, 2016 to intervene in the case "for the purpose of asserting [Middleton's] conflict of interest."

R. 49-1 (Proposed Intervenor's Mem. re Mot. to Intervene at 1) (Page ID #905). In June 2017, the district court denied ZFX's motion to intervene and motion to disqualify Kirsch's counsel, explaining that it did not "'invite[]' ZFX, Inc. to intervene to assert Middleton Reutlinger's 'disqualifying conflict of interest,'" but instead "merely suggested that a conflict of interest could arise if ZFX, Inc. were made a party to the current litigation." R. 85 (Mem. Op. at 12) (Page ID #1310). "In moving to intervene solely to assert an alleged conflict of interest involving Middleton Reutlinger after Dean failed to successfully do so," the district court held, "ZFX, Inc. has not asserted a claim against Kirsch that is justiciable or a direct interest that is protectable under Rule 24." *Id.* The district court further observed that allowing ZFX to intervene could raise the "ethical question" of whether ZFX's counsel could continue to represent Dean and ZFX given that "Kirsch purportedly still owns 50% of ZFX, Inc.," and therefore Dean and ZFX's counsel "would possibly be representing the half interest Kirsch would have in such a claim while opposing Kirsch otherwise." *Id.* Citing its refusal to allow ZFX to intervene in the litigation, the district court also denied ZFX's motion to disqualify Kirsch's counsel. *Id.*

Dean and ZFX then appealed the district court's denial of Dean's and ZFX's motions to disqualify Kirsch's counsel and its denial of ZFX's motion to intervene. R. 87 (Notice of Appeal at 1) (Page ID #1313). We issued an order directing Dean and ZFX to show cause why their interlocutory appeals should not be dismissed for lack of appellate jurisdiction. D.E. 8 at 2. In response, Dean and ZFX argued that binding case law treats denials of motions to intervene as immediately appealable. D.E. 20 at 5. Dean and ZFX further insisted that we could exercise pendent appellate jurisdiction over Dean's and ZFX's motions to disqualify Kirsch's trial counsel because they planned to move to disqualify Middleton Reutlinger as Kirsch's appellate

counsel, and "[i]t follows that where a motion to disqualify appellate counsel mirrors a previously filed motion to disqualify trial counsel, the Court's resolution of the former motion 'necessarily and unavoidably' decides the latter motion.'" *Id.* at 9. As promised, Dean and ZFX then filed a motion to disqualify Kirsch's appellate counsel in this court. D.E. 22.

On October 25, 2017, we withdrew the show cause order as to ZFX's appeal of the district court's denial of its motion to intervene, reasoning that "ZFX may have raised a colorable issue over which we can exercise jurisdiction." D.E. 29 at 2. We declined, however, to exercise pendent appellate jurisdiction over the district court's denial of Dean's and ZFX's motions to disqualify Kirsch's counsel "because the correctness of those rulings is not determinative of ZFX's absolute right to intervene." *Id.* We also denied Dean and ZFX's joint motion to disqualify Kirsch's appellate counsel because "there is no evidence that confidential information was exchanged in Middleton's prior work with Kirsch and ZFX," and therefore "disqualification is not appropriate." *Id.* at 3. The appeal of the district court's denial of ZFX's motion to intervene thus began.

Previously, the district court granted Dean's motion to compel arbitration of Kirsch's claims related to ZFX and to stay further proceedings in district court as to those claims, all of which "arose from Dean's failure to purchase her ZFX, Inc. shares, an event that implicated the arbitration provision found in the Stock Restriction Agreement." R. 85 (Mem. Op. at 3) (Page ID #1301); *see also* R. 54 (Mem. Op. at 10) (Page ID #972). The district court subsequently stayed litigation of all other claims and counterclaims pending resolution of arbitration, including Dean's counterclaim that Kirsch breached the SRA by filing suit in district court. R. 85 (Mem. Op. at 13) (Page ID #1311); R. 82 (Order at 6) (Page ID #1266).

Kirsch's claims related to ZFX proceeded through arbitration, and on February 9, 2018, the arbitrator issued an interim award in Dean's and ZFX's favor on those claims. R. 92-1 (Interim Award) (Page ID #1333–43). Dean filed notice of the Interim Award in the district court, R. 92 (Notice of Submission of Arb. Award) (Page ID #1330), and ZFX cited and attached a copy of the Interim Award as "Exhibit A" to its reply brief in this appeal, Reply Br. at 3, 6, Ex. A. Kirsch then moved to strike the reply brief or, in the alternative, "to strike Exhibit A to the Reply and all arguments based upon it." D.E. 38 at 1. ZFX responded to Kirsch's motion and simultaneously moved to supplement the record with the Interim Award. D.E. 39. Kirsch replied. D.E. 40; D.E. 41. Since then, the arbitrator has issued a Final Award in Dean's and ZFX's favor, which ZFX attached as an exhibit to its reply brief on its motion to supplement the record. D.E. 42. Dean also moved to confirm the Final Award in district court. R. 96 (Mot. to Confirm Arb. Award) (Page ID #1359). Kirsch's motion to strike ZFX's appellate reply brief, in whole or in part, and ZFX's motion to supplement the appellate record with the Interim Award remain pending before this court.

II. ANALYSIS

ZFX argues that the district court erred in three ways in denying its motion to intervene: First, the district court purportedly failed to recognize that ZFX had an absolute right to intervene under Rule 24(a) of the Federal Rules of Civil Procedure. Second, the district court allegedly abused its discretion in denying ZFX's motion for permissive intervention under Rule 24(b). And last, the district court supposedly should have granted ZFX's motion to intervene even if it could not satisfy Rule 24's requirements because intervention by former clients seeking to raise

an attorney's conflict of interest should be authorized as a matter of course. We reject these arguments and **AFFIRM** the district court's denial of ZFX's motion to intervene.

A. Jurisdiction and Standard of Review

"The Supreme Court has held that an order completely denying intervention is immediately reviewable by way of an interlocutory appeal." *Sales v. Marshall*, 873 F.2d 115, 120 (6th Cir. 1989). We generally review de novo the denial of a motion to intervene as of right. *Purnell v. City of Akron*, 925 F.2d 941, 945 (6th Cir. 1991). "The denial of permissive intervention," by contrast, "should be reversed only for clear abuse of discretion by the trial judge." *Id.* at 951. To conclude that the district court abused its discretion, we must be "left with the definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors or where the trial court improperly applies the law or uses an erroneous legal standard." *Coal. to Defend Affirmative Action v. Granholm*, 501 F.3d 775, 779 (6th Cir. 2007) (quoting *Paschal v. Flagstar Bank*, 295 F.3d 565, 576 (6th Cir. 2002)).

B. Intervention as of Right

To intervene as a matter of right in a lawsuit under Federal Rule of Civil Procedure 24(a), a proposed party must establish that:

> (1) the motion to intervene is timely; (2) the proposed intervenor has a substantial legal interest in the subject matter of the case; (3) the proposed intervenor's ability to protect that interest may be impaired in the absence of intervention; and (4) the parties already before the court may not adequately represent the proposed intervenor's interest.

United States v. Michigan, 424 F.3d 438, 443 (6th Cir. 2005). Generally, we review a district court's denial of a motion to intervene de novo, except that we review a district court's determination of timeliness for an abuse of discretion. *United States v. Tennessee*, 260 F.3d 587,

592 (6th Cir. 2001). Where, as here, the district court failed to make findings regarding timeliness, the timeliness of the motion is also reviewed de novo. *Blount-Hill v. Zelman*, 636 F.3d 278, 283 (6th Cir. 2011); *Johnson v. City of Memphis*, 73 F. App'x 123, 131 (6th Cir. 2003). Although "Rule 24 should be 'broadly construed in favor of potential intervenors,'" *Granholm*, 501 F.3d at 779 (quoting *Purnell*, 925 F.2d at 950), a motion to intervene must be denied if the intervenor cannot satisfy all four requirements above, *Grubbs v. Norris*, 870 F.2d 343, 345 (6th Cir. 1989).

Although the district court did not address the issue, "our consideration of timeliness in the first instance is consistent with the Supreme Court's admonition that the 'court where the action is pending must *first* be satisfied as to timeliness' under Rule 24." *Blount-Hill*, 636 F.3d at 284 (quoting *NAACP v. New York*, 413 U.S. 345, 365 (1973)). We evaluate timeliness "in the context of all relevant circumstances" and consider the following five factors:

> (1) the point to which the suit has progressed; (2) the purpose for which intervention is sought; (3) the length of time preceding the application during which the proposed intervenors knew or should have known of their interest in the case; (4) the prejudice to the original parties due to the proposed intervenors' failure to promptly intervene after they knew or reasonably should have known of their interest in the case; and (5) the existence of unusual circumstances militating against or in favor of intervention.

Jansen v. City of Cincinnati, 904 F.2d 336, 340 (6th Cir. 1990).

Here, the first factor weighs slightly in favor of Kirsch. We agree with ZFX that "[t]he absolute measure of time between the filing of the complaint and the motion to intervene" is less important to assessing timeliness than "what steps occurred along the litigation continuum *during* this period of time." *Stupak-Thrall v. Glickman*, 226 F.3d 467, 475 (6th Cir. 2000). We disagree, however, with ZFX's claim that "this case was in its infancy" when the motion to intervene was filed. Appellant Br. at 14. By the time ZFX moved to intervene, the district court

had already partially granted and partially denied Dean's motion to dismiss, R. 10 (Mem. Op.) (Page ID #99–109), denied Dean's motion to disqualify Kirsch's counsel, R. 46 (Mem. Op.) (Page ID #885–92), and resolved several additional non-dispositive motions, R. 16 (Order) (Page ID #178); R. 26 (Order) (Page ID #401–02); R. 27 (Mem. Op. & Order) (Page ID #403–08); R. 36 (Order) (Page ID #596); R. 45 (Order) (Page ID #871–73). Other fully briefed motions pending before the district court included Kirsch's motion to partially dismiss Dean's counterclaims, R. 17 (Pl. Mot. for Partial Dismissal of Am. Verified Counterclaim) (Page ID #179–80), Dean's motion to compel arbitration and to stay further proceedings in the district court, R. 14 (Def. Mot. to Compel Arb.) (Page ID #160), and Kirsch's motion to stay AAA Arbitration proceedings pending the court's ruling on Dean's motion to compel arbitration and stay further proceedings, R. 35 (Pl. Mot. to Stay AAA Arbitration) (Page ID #537). Although discovery had not yet started—a marker that we have previously considered relevant in assessing the timeliness of a motion to intervene, *see Stupak-Thrall*, 226 F.3d at 475—the district court had already been asked to decide dispositive motions as to several of the parties' claims and counterclaims and to determine whether a significant portion of the case ought to proceed in a different forum. This case is therefore unlike *Mountain Top Condominium Association v. Dave Stabbert Master Builder, Inc.*, 72 F.3d 361 (3rd Cir. 1995), which we previously cited with approval and which authorized intervention as of right, even though "four years had passed between the filing of the complaint and the motion to intervene," because there had been "no depositions taken, dispositive motions filed, or decrees entered during the four year period in question.'" *Stupak-Thrall*, 226 F.3d at 475 (second quote quoting *Mountain Top Condo. Ass'n*,

72 F.3d at 370)). Ultimately, while this first factor does not pull strongly in either direction, it tilts slightly in Kirsch's favor.

The second factor—the "purpose for which intervention is sought"—also favors Kirsch. We have been somewhat inconsistent in our approach to this second inquiry, at times focusing on whether "the movants have asserted a legitimate purpose for intervention," *Linton ex rel. Arnold v. Comm'r of Health & Env't*, 973 F.2d 1311, 1318 (6th Cir. 1992), and at other times asking whether the motion to intervene was timely in light of the stated purpose for intervening, *see Clarke v. Baptist Mem'l Healthcare Corp.*, 641 F. App'x 520, 527 (6th Cir. 2016) (holding proposed intervenors' motion to intervene was timely because they "sought intervention for the limited purpose of appealing the denial of class certification," while another proposed intervenor's motion to intervene was untimely—even though it was filed earlier in the case—because she "attempted to intervene to participate as a class representative in her own right"); *see also Stupak-Thrall*, 226 F.3d at 481 n.1 (Moore, J., dissenting) ("[T]he point of looking to the purposes of intervention as a factor in the timeliness analysis is to determine whether the proposed intervenors acted promptly in light of the purposes for which intervention was sought."). Under either framework, this factor works against ZFX's cause.

ZFX's purpose for intervening is "to disqualify Middleton as Terri Kirsch's counsel." R. 49-1 (Mem. re Mot. to Intervene at 1) (Page ID #905). Other circuits have stated or suggested that "[c]olorable claims of attorney-client and work product privilege qualify as sufficient interests to ground intervention as of right," and they very well may be right. *In re Grand Jury Subpoena*, 274 F.3d 563, 570 (1st Cir. 2001); *see also Celanese Corp. v. Leesona Corp. (In re Yarn Processing Patent Validity Litig.)*, 530 F.2d 83, 86–88 (5th Cir. 1976) (noting that an

outside party "could have intervened as of right under Rule 24(a) of the Federal Rules of Civil Procedure, and it could have pressed for the disqualification of [its former attorney]" if it believed that its former attorney was acting against its interest by representing a new client seeking to challenge the validity of a patent belonging to the outside party, given that the attorney had previously advised the outside party on how to protect the patent's validity). Given ZFX's litigation strategy in this case, however, it is far from clear that it has a "colorable claim" of a disqualifying attorney-client relationship with Middleton Reutlinger.

In urging this court to exercise pendent jurisdiction over the district court's denial of its motion to disqualify Middleton Reutlinger as Kirsch's trial counsel, ZFX argued that its anticipated motion to disqualify Middleton Reutlinger as Kirsch's appellate counsel would effectively decide its trial-level motion to disqualify because its "motion to disqualify appellate counsel [would] mirror[] [its] previously filed motion to disqualify trial counsel." D.E. 20 at 9. Unfortunately for ZFX, we concluded that disqualification of Middleton Reutlinger on appeal was "not appropriate." D.E. 29 at 3. As we have already denied ZFX's motion to disqualify Middleton Reutlinger for the purposes of appeal—a motion that, in ZFX's own words, "mirror[ed]" its earlier motion to disqualify Middleton Reutlinger for the purposes of trial, D.E. 20 at 9—it is difficult to see how the district court could later grant ZFX's nearly identical motion to disqualify Middleton Reutlinger at trial without running afoul of our earlier order. After all, although our earlier order is unpublished and therefore not binding on future panels, *see Crump v. Lafler*, 657 F.3d 393, 405 (6th Cir. 2011), it is binding on the district court as law of the case, *see United States v. Todd*, 920 F.2d 399, 403 (6th Cir. 1990) ("Under the doctrine of the law of the case, a decision on an issue made by a court at one stage of a case should be given

effect in successive stages of the same litigation."). Given the seemingly insurmountable challenges that ZFX would face in achieving its desired result, the "purpose" factor cuts against allowing intervention. *See Stupak-Thrall*, 226 F.3d at 476–77 (criticizing proposed intervenor for attempting to intervene based on an "unrealistic" and "highly unlikely" purpose).

Even if we were to ignore the above obstacles and treat ZFX's stated purpose as legitimate, we nevertheless conclude that ZFX failed to act "promptly in light of the purposes for which intervention was sought." *Id.* at 481 n.1 (Moore, J., dissenting); *see also Clarke*, 641 F. App'x at 527. ZFX's point in intervening—to disqualify Kirsch's counsel and strike all filings present counsel has made on Kirsch's behalf—would significantly alter both the future and past course of this litigation. It would require Kirsch to retain new counsel and would wreak havoc on the current docket, which includes Kirsch's complaint, answer to Dean's counterclaims, and a largely successful response to Dean's motion to dismiss. Plainly, the prejudice and disruption associated with ZFX's requested relief would have been reduced had ZFX moved to intervene before the parties had engaged in such extensive motions practice. Because a party seeking to intervene to rewrite the course of a litigation must intervene sooner than, say, a party seeking to intervene to preserve its interests on appeal, *see Clarke*, 641 F. App'x at 527, this factor points strongly in Kirsch's favor.

Third, we consider the length of time between when ZFX "knew or should have known of [its] interest in the case" and the filing of its motion to intervene—a factor that again weighs decisively against permitting intervention. *See Jansen*, 904 F.2d at 340. ZFX concedes that it "learned of this lawsuit shortly after it was filed" but insists that it was "not aware that its interests with respect to the SRA could be affected until September 28, 2016, when Kirsch

opposed Dean's motion to compel arbitration." Appellant Br. at 16. This argument is unavailing. ZFX was or should have been aware that its interest might be affected by the litigation as soon as it learned of the lawsuit—i.e., roughly seven months before it moved to intervene—because it knew or should have known that Kirsch's counsel in the lawsuit had previously represented ZFX in connection with the SRA.[1] As we have held before, "the seven months preceding the proposed intervenor['s] motion to intervene during which [it] knew or should have known of [its] interest renders [its] motion untimely." *Johnson*, 73 F. App'x at 133; *see also Tennessee*, 260 F.3d at 594 ("An entity that is aware that its interests may be impaired by the outcome of the litigation is obligated to seek intervention as soon as it is reasonably apparent that it is entitled to intervene.").

In an effort to avoid this conclusion, ZFX argues that the third factor cannot weigh against a finding of timeliness unless ZFX was "aware of the risk that [its] interest may be affected by the litigation, *and* that [its] interest may not be fully protected by the existing litigants." Appellant Br. at 16 (quoting *Stotts v. Memphis Fire Dep't*, 679 F.2d 579, 583 (6th Cir. 1982)) (alteration in original) (emphasis added by ZFX). ZFX contends that it was not aware of

[1]Dean knew or should have known about Middleton Reutlinger's representation of ZFX on the SRA from the very start of this litigation. Dean was copied on (1) Kirsch's email to Dana Collins at Middleton Reutlinger in August 2012 asking Collins to "please take a look at our revised Stock Restriction Agreement" and provide "advice" on whether "further changes" are required, and (2) Collins's response saying she would "be happy to look at your revised agreement today and let you know of any suggestions [she] might have." R. 20-3 (Email from T. Kirsch to D. Collins, dated Aug. 10, 2012) (Page ID #283); R. 20-4 (Email from D. Collins to T. Kirsch, dated August 10, 2012) (Page ID #301). Though Dean was not copied on Collins's later email to Kirsch spelling out her observations and recommendations regarding the agreement, Dean was plainly able to access the email during the course of this litigation, as he submitted the email to the district court for in camera review. R. 22 (Email from D. Collins to T. Kirsch, dated Oct. 18, 2012) (Page ID #348). Dean insists that he did not recall these email exchanges or Middleton Reutlinger's representation regarding the SRA until September 28, 2016, R. 20-6 (Dean Aff. ¶¶ 5–6) (Page ID #307), but Kirsch should not be penalized for Dean's faulty memory. Dean's knowledge (even knowledge that he later forgot) of Middleton Reutlinger's involvement in the SRA can be imputed to ZFX because "[a]t all relevant times, Dean has been a 50 percent shareholder in and director of ZFX," R. 5 (Verified Counterclaim ¶ 1) (Page ID #37); *Glenbrook Capital Ltd. P'ship v. Dodds (In re Amerco Derivative Litig.)*, 252 P.3d 681, 694–95 (Nev. 2011), and Dean is directing ZFX's efforts in this case.

the risk that its interests would not be fully protected by Dean until the district court "rejected Dean's attempt to raise ZFX's entitlement to Middleton's disqualification"—a decision that was issued less than one week before ZFX moved to intervene. *Id.* at 16–17. We have previously rebuffed, however, proposed intervenors' attempts to intervene once their initial reliance on another party's "best efforts" to represent their interests proved unsatisfactory. *Cuyahoga Valley Ry. Co. v. Tracy*, 6 F.3d 389, 396 (6th Cir. 1993). "[R]ather than adopting a 'wait-and-see' approach," ZFX should have moved to intervene as soon as Middleton Reutlinger filed a complaint on Kirsch's behalf in purported conflict with an agreement that Middleton Reutlinger had helped ZFX to revise. *See Blount-Hill*, 636 F.3d at 286 (quoting *Tennessee*, 260 F.3d at 594); *see also United States v. City of Detroit*, 712 F.3d 925, 932 (6th Cir. 2013) ("Interested parties should not be able to join at a late stage and re-litigate issues that they watched from the sidelines."). ZFX must now bear the consequences of its chosen path.

The fourth factor—"the prejudice to the original parties" resulting from ZFX's dilatoriness—also weighs against a finding of timeliness. *See Jansen*, 904 F.2d at 340. As both parties recognize, we must focus our inquiry on the prejudice caused by ZFX's delay, rather than the prejudice caused by the intervention itself. *City of Detroit*, 712 F.3d at 933. As we already discussed above, Kirsch would be prejudiced by ZFX's failure to act more promptly because far fewer of Kirsch's counsel's filings would need to be struck if ZFX had moved more quickly to intervene. By sitting on the sidelines until after Dean and Kirsch had engaged in a months-long motions practice, including several dispositive motions, ZFX increased the disruption associated with its proposed intervention.[2]

[2]We have previously recognized that "the scope of intervention can be limited on a prospective basis," *City of Detroit*, 712 F.3d at 932, which, in this case, means that the district court could allow ZFX to intervene to

Finally, the fifth factor asks us to consider whether any "unusual circumstances militat[e] against or in favor of intervention." *Jansen*, 904 F.2d at 340. Neither party identifies any such circumstances, so we will assume none exist. Because each of the other timeliness factors pushes against allowing intervention, ZFX has failed to satisfy a "threshold" consideration under Rule 24(a), and its motion to intervene as matter of right was properly denied. *See Blount-Hill*, 636 F.3d at 284 (quoting *United States v. Ritchie Special Credit Invs., Ltd.*, 620 F.3d 824, 832 (8th Cir. 2010)).

C. Permissive Intervention

"To intervene permissively [under Rule 24(b)], a proposed intervenor must establish that the motion for intervention is timely and alleges at least one common question of law or fact." *Michigan*, 424 F.3d at 445. "So long as the motion for intervention is timely and there is at least one common question of law or fact, the balancing of undue delay, prejudice to the original parties, and any other relevant factors is reviewed for an abuse of discretion." *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1248 (6th Cir. 1997). Though the district court operates within a "zone of discretion" when deciding whether to allow intervention under Rule 24(b), the district court nevertheless "must, except where the basis for the decision is obvious in light of the

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disqualify Kirsch's counsel but not to strike her counsel's prior filings. So limiting ZFX's intervention would dampen the prejudice associated with ZFX's delay, though it would not eliminate it. Kirsch would still be required to retain a new legal team to argue substantive issues that Middleton Reutlinger previously addressed in its pretrial practice—something that could have been avoided if ZFX had moved to intervene before the parties litigated their respective motions to dismiss and Dean's motion to compel arbitration. Moreover, ZFX expressly argued that "Kirsch's filings must be stricken if the Court concludes that Middleton must be disqualified" because a "potentially conflicted counsel's confidential information could infect the evidence presented to the district court." R. 49-4 (Mem. in Support of Mot. to Disqualify at 15) (Page ID #937) (second quote quoting *Bowers v. Ophthalmology Group*, 733 F.3d 647, 654 (6th Cir. 2013)). If ZFX is correct—a point we need not address here—then the district court could not properly limit ZFX to intervening exclusively to disqualify Kirsch's counsel going forward, and thus the prejudice associated with ZFX's delay would be substantial.

record, provide enough of an explanation for its decision to enable this court to conduct meaningful review." *Id.*

Here, we have already determined that ZFX's motion to intervene was not timely—a finding that dooms ZFX's motion for permissive intervention. *See Blount-Hill*, 636 F.3d at 287. Even setting that aside, ZFX's motion contains no "common question[s] of law or fact" with the case at hand. *See* FED. R. CIV. P. 24(b)(1)(B). ZFX argues otherwise, insisting that a common question of law exists because "ZFX's motion to disqualify overlaps with Dean's disqualification motion in most, if not all, respects," and a common question of fact exists because it "raises questions about the same SRA that is at the heart of the dispute between Kirsch and Dean." Appellant Br. at 24. Both contentions are unavailing. First, we have previously rejected the suggestion that a proposed intervenor seeking to submit a filing that "substantially mirror[s] the positions advanced" by one of the parties has necessarily identified a common question of law or fact. *Bay Mills Indian Cmty. v. Snyder*, No. 17-1362, — F. App'x —, 2018 WL 327452, at *2 (6th Cir. Jan. 9, 2018). "[I]f that were true," we explained, "any party wishing to intervene to support one side of a lawsuit could simply reiterate the [positions] of that side and thus meet the 'common question' requirement. Permissive intervention cannot be interpreted so broadly." *Id.* Second, a common question of fact does not exist simply because the SRA is featured in both ZFX's motion to intervene and Kirsch's and Dean's lawsuit. As Kirsch notes, ZFX "does not seek to enforce or challenge or interpret the SRA." Appellee Br. at 23. Rather, it seeks to disqualify Middleton Reutlinger from representing Kirsch based on the firm's prior involvement with the SRA—an issue that is entirely tangential to the SRA-related questions implicated by Kirsch's and Dean's suit. As we held in *Bay Mills Indian Community*, a proposed intervenor

may not inject itself into a lawsuit under Rule 24(b) where, like here, it has no interest in a factual or legal dispute between the parties, but instead is merely concerned that resolution of the parties' claims might have collateral consequences for the proposed intervenor's independent interests. *See* 2018 WL 327452, at *3. Such orthogonal concerns do not raise common questions of fact or law.

In its final argument on this point, ZFX claims that the district court's purported "failure to even consider whether permissive intervention was warranted," including its alleged "failure to even consider 'whether intervention would result in undue delay or excessive prejudice to the original parties,'" was "clearly an abuse of discretion." Appellant Br. at 25 (second quote quoting *Miller*, 103 F.3d at 1248). Though ZFX is right to note that a district court denying a motion for permissive intervention must explain the basis for its decision unless it "is obvious in light of the record," *Miller*, 103 F.3d at 1248, ZFX is wrong to assert that the district court failed to do so here. In denying ZFX's motion, the district court explained that ZFX's motion to intervene "solely to assert an alleged conflict of interest involving Middleton Reutlinger after Dean failed to successfully do so" did not raise "a claim against Kirsch that is justiciable or a direct interest that is protectable under Rule 24." R. 85 (Mem. Op. at 12) (Page ID #1310). Implicit in this statement is a determination that ZFX's motion did not satisfy either Rule 24(a) or Rule 24(b)'s base requirements. Having so held, the district court was under no obligation to consider nevertheless whether "other relevant factors" militated in favor or against intervention. *See Miller*, 103 F.3d at 1248 (requiring district courts to undertake "the balancing of undue delay, prejudice to the original parties, and any other relevant factors" *only* "[s]o long as the motion for intervention is timely and there is at least one common question of law or fact").

Nevertheless, the district court did so, explaining that allowing ZFX to intervene would "give rise to an ethical question of whether [ZFX's attorneys] could continue to represent Dean and ZFX" in light of Kirsch's alleged half-interest in ZFX. R. 85 (Mem. Op. at 12) (Page ID #1310). The district court thus complied with our directive to "explain[] its decision on the record" and did not abuse its discretion in denying ZFX's motion to intervene. *See Miller*, 103 F.3d at 1248.

D. ZFX's Third Theory of Intervention

ZFX presses as its final theory that a proposed intervenor "seek[ing] to raise an attorney's conflict of interest" may intervene "as a matter of course," regardless of whether the applicant is able to satisfy Rule 24's requirements. Appellant Br. at 9. ZFX has not identified a single circuit that has directly endorsed this broad conception of intervention as a matter of right, and we decline to be the first.

To be fair, at least two circuits and a smattering of district courts have indicated that "[c]olorable claims of attorney-client and work product privilege qualify as sufficient interests to ground intervention as of right," *In re Grand Jury Subpoena*, 274 F.3d at 570; *see also In re Yarn*, 530 F.2d at 86–88—a statement that is somewhat in tension with our usual interpretation of Rule 24(a)'s requirements. We generally require an "applicant for intervention '[to] have a direct and substantial interest in the litigation,' such that it is a 'real party in interest in the transaction which is the subject of the proceeding.'" *Reliastar Life Ins. Co. v. MKP Invs.*, 565 F. App'x 369, 372 (6th Cir. 2014) (first quoting *Grubbs*, 870 F.2d at 346; then quoting *Providence Baptist Church v. Hillandale Comm., Ltd.*, 425 F.3d 309, 317 (6th Cir. 2005)). There is real reason to doubt that an applicant's interest as a former client in disqualifying another party's counsel—an interest that has nothing to do with the merits of the proceeding—is sufficiently

direct under our typical interpretation Rule 24(a). Thus, at least one court has opted to adopt a more generous reading of Rule 24's relatedness requirement, reasoning that "a strict application of the intervention rules" is not warranted when presented with "a colorable assertion that ethical considerations may warrant disqualification of counsel." *Med. Diagnostic Imaging, PLLC v. CareCore Nat'l, LLC*, 542 F. Supp. 2d 296, 305 (S.D.N.Y. 2008). We could, perhaps, do the same.

Adopting an expansive reading of Rule 24's requirements, however, is not the same as bypassing them entirely. We are bound by the Federal Rules of Civil Procedure. *See* FED. R. CIV. P. 1. Rule 24, which dictates when intervention "must" be permitted as of right and when it "may" be permitted as a matter of discretion, requires any motion to intervene to be "timely." FED. R. CIV. P. 24. We cannot simply ignore this timeliness requirement, even if the purpose behind ZFX's motion—i.e., a desire to assert its right to conflict-free representation—strikes us as important. Having already determined that ZFX failed to move to intervene in a timely fashion, we cannot credit ZFX's theory that it nevertheless has a right to intervene in Kirsch's and Dean's lawsuit as a matter of course.

E. Motion to Strike and Motion to Supplement

Because we have resolved this appeal without needing to decide whether to grant Kirsch's motion to strike Exhibit A and the arguments based thereon from ZFX's reply brief[3] or whether to grant ZFX's motion to supplement the record, we **DENY** those motions as moot.

[3]Alternatively, Kirsch requested that we strike the entirety of ZFX's reply brief. Even if we were to conclude that ZFX improperly included citations to and a copy of the Interim Award in its reply brief, we would not strike the entire brief from the record.

III. CONCLUSION

For the reasons set forth above, we **AFFIRM** the district court's denial of ZFX's motion to intervene. ZFX failed to satisfy Rule 24's timeliness requirements and does not otherwise have a right to intervene as a matter of course. We therefore affirm the district court's rejection of ZFX's motion to intervene for the purpose of disqualifying Kirsch's trial counsel.