

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY  
CAMDEN VICINAGE  
HONORABLE ROBERT B. KUGLER

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| COMMODITY FUTURES TRADING<br>COMMISSION,<br><br>Plaintiff,<br><br>v.<br><br>EQUITY FINANCIAL GROUP, LLC,<br>et al.,<br><br>Defendants. | Civil No. 04-1512(RBK) |
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**ORDER**

This matter having been brought before the Court upon the motion of two law firms, Menaker & Herrmann, LLP ("Menaker & Herrmann"), and Witman, Stadtmauer & Michaels, P.A., ("Witman Stadtmauer"), counsel for Defendants Equity Financial Group, LLC, Robert W. Shimer and Vincent J. Firth (collectively "the Equity Defendants") for an order permitting the withdrawal of counsel from this action by leave of Court; and the Court having considered the moving papers; and no opposition having been received and the time for filing opposition having expired; and for the reasons set forth below and for good cause shown, the motion is granted in part and denied in part.

In deciding this motion, the Court is guided by Rule 1.16(b) of the Rules of Professional Conduct ("R.P.C."), as well as Local

Civil Rule 102.1.<sup>1</sup> R.P.C. 1.16(b) provides:

[e]xcept as stated in paragraph (c), a lawyer may withdraw from representing a client if: (1) withdrawal can be accomplished without material adverse effect on the interests of the client; (2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent; (3) the client has used the lawyer's services to perpetrate a crime or fraud; (4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement; (5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled; (6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or (7) other good cause for withdrawal exists.

R.P.C. 1.16(b). L.Civ.R. 102.1 further provides that "[u]nless other counsel is substituted, no attorney may withdraw an appearance except by leave of Court. After a case has been first set for trial, substitution and withdrawal shall not be permitted except by leave of Court." L.Civ.R. 102.1. The decision of whether to permit counsel to withdraw is left to the sound discretion of the Court. See Rusinow v. Kamara, 920 F. Supp. 69, 71 (D.N.J. 1996).

R.P.C. 1.16 does not automatically result in withdrawal. Rather, R.P.C. 1.16(c) limits withdrawal under R.P.C. 1.16(a) and (b) and leaves the determination of withdrawal within the purview of the presiding Court. Consequently, a lawyer shall continue

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1. The Rules of the Professional Conduct ("R.P.C.") of the American Bar Association "as revised by the New Jersey Supreme Court shall govern the conduct of the members of the bar admitted to practice in this Court, subject to such modifications as may be required or permitted by Federal statute, regulation, court rule or decision of law." L. Civ. R. 103.1(a).

representation of a client when required to do so by rule or when ordered to do so by a tribunal, "notwithstanding good cause for terminating the representation." R.P.C. 1.16(c); see also Rusinow, 920 F. Supp. at 70. When evaluating a motion to withdraw, the Court may consider four principal criteria: 1) the reasons why withdrawal is sought; 2) the prejudice withdrawal may cause to other litigants; 3) the harm withdrawal might cause to the administration of justice; and 4) the degree to which withdrawal will delay the resolution of a case. Rusinow, 920 F. Supp. at 70; see also Haines v. Liggett Group, Inc., 814 F. Supp. 414, 423 (D.N.J. 1993).

Counsel asserts two reasons for withdrawal from this matter. Counsel contends that the Equity Defendants insist upon taking a litigation approach that counsel considers "imprudent." See Declaration of Samuel F. Abernethy in Support of Motion to Withdraw (hereafter "Abernethy Decl."), at ¶ 3. Counsel further asserts that the Equity Defendants refuse to compensate counsel for the work they have completed and are unwilling to pay for any future work to be performed. Id. Specifically, counsel states that Menaker & Herrmann has devoted over 400 hours to represent the Equity Defendants, who have paid for only a portion of that work and the firm's disbursements. Id. at ¶ 4. In addition, the Equity Defendants allegedly owe over \$100,000 to Menaker & Herrmann and have provided no reasonable assurances of future remittance. Id. Therefore, counsel asserts that continued representation of the Equity Defendants would constitute a financial hardship to Menaker

& Herrmann. Id. In addition, counsel alleges that the Equity Defendants owe \$3,400 in legal fees to the Witman Stadtmuer firm, and since Witman Stadtmuer relies on Menaker & Herrmann for the substantive expertise in commodities litigation, Witman Stadtmuer wishes to join in this motion to withdraw. See id. at ¶ 5. Furthermore, counsel has attached a "Consent to Change Attorney" whereby Mr. Shimer and Mr. Firth, individually and as President of Equity Financial Group, LLC, have consented to Mr. Shimer's representation as the attorney of record on their behalf in the instant litigation. See Exhibit A, attached to Abernethy Decl.

The Court first notes counsel's contention that the Equity Defendants insist upon taking a litigation approach that counsel considers "imprudent." However, counsel has not averred in its moving papers specific information for the Court to make a finding that good cause exists for withdrawal under Rule 1.16(b). With respect to counsel's claim regarding attorney's fees, the failure to pay legal fees is recognized as a justifiable reason for an attorney's withdrawal from a case. Jacobs v. Pendel, 98 N.J. Super. 252, 256, 236 A.2d 888 (App. Div. 1967). Although the District Court noted in Haines that "[f]ederal law does not expressly permit withdrawal by an attorney on the ground of financial hardship," 814 F. Supp. at 423, R.P.C. 1.16(b)(6) expressly provides that a lawyer may withdraw if "the representation will result in an unreasonable financial burden on the lawyer. . . [.]" Here, counsel states in his Declaration that the outstanding invoices are alleged to total \$100,000 and there

are no assurances that payment is forthcoming. In this regard, the Court finds that counsel has asserted good cause for withdrawal.

However, the Court finds that other equitable considerations weigh against withdrawal as to Mr. Firth and Equity Financial Group, LLC. In so ruling, the Court notes that the present motion is unopposed and no party has articulated prejudice resulting from counsel's withdrawal. In addition, withdrawal will not delay resolution of this case, as discovery is ongoing and the Court has neither entered a Final Pretrial Order nor set a trial date. See United States ex rel. Cherry Hill Convalescent Center, Inc. v. Healthcare Rehab Systems, Inc., 994 F. Supp. 244, 253 (D.N.J. 1997). These factors weigh in favor of granting the motion. However, withdrawal of counsel may interfere with the clients' right to representation. See Rusinow, 920 F. Supp. at 72. Although counsel has indicated that substitute counsel is available as all three defendants have consented to the withdrawal of counsel and to representation by Mr. Shimer, nothing in the record indicates that Mr. Shimer is authorized by law to represent these Defendants in this matter. Local Civil Rule 101.1(b) provides that only an attorney licensed to practice in the State of New Jersey may be admitted to practice in federal court. L.Civ.R. 101.1(b). Moreover, "[a]ny member in good standing of the bar of any court of the United States or of the highest court of any state . . . may in the discretion of the Court, on motion, be admitted to appear [pro hac vice] and participate in a particular case." L.Civ.R. 101.1(c)(1). The Court finds no showing that Mr. Shimer is

admitted to the New Jersey Bar. Consequently, while Mr. Shimer may represent himself pro se, he may not represent other parties absent local counsel. Further, Equity Financial Group, LLC cannot represent itself pro se in federal court, as domestic corporations must be represented by licensed counsel. See United States v. Cocivera, 104 F.3d 566, 572 (3d Cir. 1996), cert. denied 520 U.S. 1248 (1997) ("the Supreme Court has stated, '[i]t has been the law for the better part of two centuries . . . that a corporation may appear in the federal courts only through licensed counsel.'") (quoting Rowland v. California Men's Colony, 506 U.S. 194, 201-02, 113 S. Ct. 716, 721, 121 L. Ed. 2d 656 (1993)); see also Simbraw, Inc. v. United States, 367 F.2d 373, 374-75 (3d Cir. 1966) ("'a corporation can do no act except through its agents and . . . such agents representing the corporation in Court must be attorneys at law[.]'" (quoting MacNeil v. Hearst Corporation, 160 F. Supp. 157 (D. Del. 1958)); see also Poore v. Fox Hollow Enterprises, No. C.A. 93A-09-005, 1994 WL 150872, at \*2 (Del. Super. Ct. Mar. 29, 1994) (in deciding whether an LLC more closely resembles a partnership that may represent itself or a corporation requiring representation by counsel, Court determined that nature of LLC for liability purposes is more analogous to a corporation and thus held that the "underlying purpose of the rule prohibiting the appearance of a corporation by anyone other than [licensed counsel] also applies to the representation of Limited Liability Companies."); see also Order dated January 31, 2005 (denying Gusrae, Kaplan & Bruno's motion to withdraw from representing the

Tech Traders Entities). With respect to Mr. Firth, the Court notes that his consent only extends to being represented by Mr. Shimer, not to proceeding pro se. The moving papers do not indicate whether Mr. Firth is willing to represent himself and whether he is able to adequately represent himself in a timely fashion, a significant consideration weighing against withdrawal of counsel. Finally, as the Court noted in Rusinow, "[o]nce an attorney agrees to undertake the representation of a client, he or she is under an obligation to see the work through to completion." Rusinow, 920 F. Supp. at 72 (citing Streetman v. Lynaugh, 674 F. Supp. 229, 234 (E.D. Tex. 1987)).

CONSEQUENTLY,

IT IS on this 22nd day of March 2005, hereby,

**ORDERED** that the motion of Menaker & Herrmann, LLP and Witman, Stadtmuer & Michaels, P.A., to withdraw as counsel for Defendants Vincent J. Firth and Equity Financial Group shall be, and hereby is, **DENIED without prejudice**; and it is further

**ORDERED** that the motion of Menaker & Herrmann, LLP and Witman, Stadtmuer & Michaels, P.A., to withdraw as counsel for Defendant Robert W. Shimer shall be, and hereby is, **GRANTED**.

s/ Ann Marie Donio  
ANN MARIE DONIO  
UNITED STATES MAGISTRATE JUDGE

cc: Honorable Robert B. Kugler