

IN THE SUPREME COURT OF OHIO

United Telephone Credit Union, Inc.,

Appellant,

v.

Kenneth A. Roberts, in his official Capacity as  
Acting Deputy Superintendent for Credit  
Unions, Ohio Department of Commerce,  
Division of Financial Institutions, and  
American Mutual Share Insurance Corp.,

Appellees.

Ohio Supreme Court

Case No. 2006-1174

On Appeal from the  
Franklin County Court of Appeals  
Tenth Appellate District

Court of Appeals

Case Nos. 05AP-827 and 05AP-870

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**RESPONSE IN OPPOSITION TO MOTION OF PROPOSED  
INTERVENOR THE LAW OFFICES OF SQUIRE & PIERRE-LOUIS, LLC  
FOR LEAVE TO INTERVENE**

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FILED

MAR 29 2007

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*Counsel for Defendant-Appellee Kenneth A. Roberts*

## **I. INTRODUCTION**

Squire & Pierre-Louis, LLC (S&P) is looking for a short cut. The firm no doubt genuinely believes that it is entitled to recover its accrued attorney fees from someone, but expresses numerous times in its Motion for Leave to Intervene (“S&P Motion”) a reluctance to pursue an appropriate procedural path because it will lead to “more years of litigation.” S&P Motion at 6, 8; *see also id.* at 10. So, S&P seeks to “intervene” in a fully briefed appeal to this Court by commencing an original action (apparently within this appeal) seeking relief on collateral claims that have no part here. And, for authority, S&P states that it can find no rule to prohibit it from doing so.

The absence of a rule of court in this instance cannot be deemed to be positive authority. What S&P attempts here is not “intervention” in any rational or accepted legal sense, and the claims it seeks to pursue through its intervention are wholly unrelated to the issues as to which this Court exercised its discretionary jurisdiction. S&P’s Motion is creative, but procedurally and substantively improper, and it must be denied.

## **II. ARGUMENT**

### **A. S&P Has No Right To Intervene In This Appeal.**

#### **1. Rule 10 does not authorize S&P to intervene.**

Simply put, this Court’s rules do not provide any basis for this motion. S&P claims that it may bring this motion to intervene based on Rule 10 of the Supreme Court Practice Rules. Rule 10 governs the manner in which original actions should be brought and litigated in this Court. This matter, *United Telephone Credit Union v. Roberts*, Case No. 2006-1174, is not an original action. It is a discretionary appeal as to which this Court accepted jurisdiction on October 4, 2006. *See* 10/4/2006 Case Announcements, 2006-Ohio-5083. As a result, Rule 10

does not provide any procedural basis for S&P to intervene in this appeal, and this motion should be summarily denied on this basis alone.

**2. S&P cannot satisfy the standard for intervention.**

Even if there were a procedural mechanism to allow for intervention here, S&P fails the legal test that would apply. To intervene in a case as a matter of right, the party seeking intervention must prove that it has an interest relating to the property or transaction which is the subject of the action, that the disposition of the action will impair this interest, and that the existing parties do not adequately represent this interest. Ohio Civ. R. 24(A)(2); *see also Jamestown Vill. Cond. Owners Ass'n v. Market Media Research, Inc.* (1994), 96 Ohio App. 3d 678, 694. S&P cannot satisfy these requirements because it has no interest in the subject matter of this appeal.

S&P describes “its interests in this litigation” as “its rights to recover 2 ½ years worth of reasonable attorney fees from UTCU for its work in the underlying litigation.” S&P Motion at 3. A claim to legal fees does not give S&P any right to intervene in this appeal. An interest in legal fees is generally not an appropriate basis to intervene in any action, let alone in a fully briefed appeal before this Court. Ohio’s courts have repeatedly refused to allow an attorney to intervene to protect his right to legal fees, unless that attorney has a right to the property that is the subject matter of the action before the court. *Compare Dean v. Harshaw/Filtrol Partnership* (1988), 55 Ohio App. 3d 67, 68 (refusing to let an attorney intervene in the action “in order to protect his claim for unpaid professional fees for this or related litigation”) and *Petty v. Kroger Food & Pharmacy* (2005), 165 Ohio App. 3d 16, 21 (holding that an attorney “has no interest in the subject matter of the litigation, and intervention is inappropriate” where he is claiming an equitable interest in the proceeds of the action) *with Jamestown Vill. Cond. Owners Ass'n*, 96 Ohio App. 3d at 694 (allowing an attorney to intervene in a foreclosure action where the attorney

had a security interest in the subject property for his legal fees). This appeal does not involve any transaction or property, nor will it result in any judgment for monetary relief in which S&P could claim any interest.

Moreover, S&P's claim for legal fees bears no relation to the questions before this Court.<sup>1</sup> Permissive intervention requires that the "applicant's claim or defense and the main action have a question of law or fact in common." Ohio Civ. R. 24(B)(2). Even where a common question exists, permissive intervention should be denied where the intervention would interject extraneous and irrelevant issues into the matter. *Fisher Foods, Inc. v. Ohio Dep't of Liquor Control* (N.D. Ohio 1982), 555 F. Supp. 641, 651 (denying permissive intervention because it would interject extraneous issues having no relevance to the questions before the court).

S&P's claims would only interject irrelevant and extraneous issues into this fully briefed appeal. Before this Court are two discrete issues: whether a credit union can bring a challenge under R.C. 1733.361 through its sole remaining director, or a former director and member; and whether the court of appeals' construction of R.C. 1733.361 violates due process. *See* 10/4/2006

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<sup>1</sup> S&P's assertion that the "primary pleading for this appeal . . . included a prayer for S&P's rights to attorney fees," S&P Motion at 4, is wrong. The Amended Complaint's only reference to attorney fees is in UTCU's prayer for relief *against DFI*. Amended Complaint at 5 ("WHEREFORE, UTCU prays for the following relief: . . . e. Attorneys fees . . ."). The Amended Complaint contains no claim to attorney fees from UTCU by S&P. As S&P's Proposed Intervenor Complaint makes clear, it is trying to initiate a new action, against its former client, for payment of fees. S&P Motion, Ex. 9 at 5. That has nothing to do with the issues before this Court and is not part of this case. It should be also noted that S&P's description at pages 9 and 13 of its efforts to seek "the trial court's intervention" to award fees occurred in *United Telephone Credit Union v. O'Donnell*, Case No. 05 CVH 09-10728, not in this lawsuit. *See* Notice of Filing and Service of: (1) Motion to Withdraw Without Prejudice The Motion of Plaintiff United Telephone Credit Union For An Interim Order Compelling Payment of Legal Fees and Costs by Credit Union; (2) Motion to Strike Lloyd Pierre-Louis From The List Of Counsel For Plaintiff United Telephone Credit Union; and (3) Notice Of Termination Of Lloyd Pierre-Louis As Counsel For Plaintiff United Telephone Credit Union, attached herewith as Exhibit A.

Case Announcements, 2006-Ohio-5083 (granting jurisdiction on Propositions of Law 1 and 2). Whether S&P is entitled to legal fees and how those should be paid play no part in the Court's determination of these questions.

**3. S&P's motion is not timely.**

Furthermore, a prerequisite to any motion to intervene is that it be timely. *ICSC Partners, L.P. v. Kenwood Plaza L.P.* (1996), 116 Ohio App. 3d 278, 282. The timeliness of a motion to intervene is determined within the context of the current proceedings, including the point to which the suit has progressed. *State ex rel. First New Shiloh Baptist Church* (1998), 82 Ohio St. 3d 501, 502. The Court accepted jurisdiction of this appeal on October 4, 2006. The parties have fully briefed the matter, and it is scheduled for oral argument in less than two months. Yet S&P has waited until now to file this purported motion to intervene. Any intervention at this point is untimely. For all of these reasons, S&P has failed to establish any basis to intervene in this matter.

**B. S&P's Claims Cannot Invoke This Court's Original Jurisdiction.**

S&P has no jurisdictional basis to initiate the original action that it seeks to bring under the guise of this motion to intervene. S&P bases its motion to intervene on this Court's original jurisdiction in any "cause on review as may be necessary to its complete determination." S&P Motion at 7 (citing Ohio Const. art. IV, § 2(B)(1)(f)). The issues raised by S&P, however, bear no relation to the questions before this Court, nor are they necessary to a complete determination of this matter. *Compare State v. Steffen* (1994), 70 Ohio St. 3d 399, 407 (accepting jurisdiction under subsection (f) noting that the "relief requested by the state is unprecedented and extraordinary. The reasons to grant the relief are compelling."). To the contrary, as discussed previously, S&P seeks to interject unrelated and collateral issues into this appeal. The Court

need not resolve any of the issues raised in S&P's proposed complaint to make a "complete determination" of the questions in this appeal.

Additionally, this Court has held that the claims and type of relief that S&P seeks are not a basis for exercising this Court's original jurisdiction. Attached to S&P's motion to intervene is its proposed complaint, which raises four claims: Declaratory Judgment, Breach of Contract, Unjust Enrichment, and Writ of Prohibition. In its prayer for relief, S&P seeks various forms of declaratory and monetary relief. Basically, S&P is asking this Court for a declaratory judgment that it was properly retained by UTCU and for monetary relief based on an alleged oral contract for legal fees. This Court has previously determined, however, that neither declaratory judgment relief nor contractual claims are proper subjects for the exercise of this Court's original jurisdiction.

This Court has explicitly rejected any original jurisdiction over declaratory judgment relief. *State ex rel. Police Officers for Equal Rights v. Lashutka* (1995), 72 Ohio St. 3d 185, 187. In *Lashutka*, the relators sought, under the guise of a writ of prohibition, an order instructing the police department on how to maintain its records. *Id.* This Court determined that "[s]uch an action is in the nature of declaratory judgment and/or injunction. This court has no original jurisdiction over either type of action as original relief." *Id.* Here, S&P seeks declaratory relief, both explicitly and under the guise of a writ of prohibition. As this Court has already held that it has no original jurisdiction over declaratory judgment claims or requests for relief, S&P cannot invoke this Court's original jurisdiction in order to address these claims.

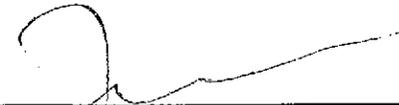
Similarly, this Court has previously determined that it should not "resolve contractual disputes in the guise of applications for extraordinary writs." *State ex rel. Buian v. Kadlec* (1978), 53 Ohio St. 2d 239, 240. S&P proposes to have this Court sort out its contractual claims of entitlement to attorney fees. But such claims are not appropriate matters for the exercise of

this Court's original jurisdiction. Consequently, S&P cannot invoke this Court's original jurisdiction on any basis.

### III. CONCLUSION

For the foregoing reasons, this Court should deny S&P's motion to intervene in this matter.

Respectfully submitted,

By: 

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing Response in Opposition to Motion of Proposed Intervenor The Law Offices of Squire & Pierre-Louis, LLC for Leave to Intervene was served via ordinary U.S. mail, postage prepaid, upon the following on this 29th day of March, 2007:

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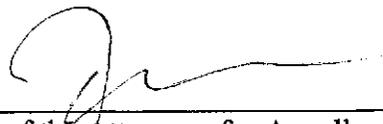
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By: \_\_\_\_\_

  
One of the Attorneys for Appellant  
United Telephone Credit Union, Inc.

# Exhibit A

**IN THE COURT OF COMMON PLEAS  
FRANKLIN COUNTY, OHIO**

<b>UNITED TELEPHONE CREDIT UNION, INC.,</b>	)	
	)	
<b>Plaintiff,</b>	)	
	)	
v.	)	<b>Case No. 05 CVH 09-10728</b>
	)	
<b>F. SCOTT O'DONNELL,</b>	)	<b>Judge Reece</b>
	)	
<b>Defendant.</b>	)	

**NOTICE OF FILING AND SERVICE**

Plaintiff United Telephone Credit Union ("UTCU") hereby notifies the Court, defendant F. Scott O'Donnell, and his counsel of record that on January 30, 2006, UTCU caused the following attached motions and notices to be filed with the Franklin County Clerk of Court, 39 South High Street, 3<sup>rd</sup> Floor, Columbus, Ohio 43215.

- 1) **Motion to Withdraw Without Prejudice The Motion of Plaintiff United Telephone Credit Union For An Interim Order Compelling Payment of Legal Fees and Costs by Credit Union;**
- 2) **Motion to Strike Lloyd Pierre-Louis From The List Of Counsel For Plaintiff United Telephone Credit Union; and**
- 3) **Notice Of Termination Of Lloyd Pierre-Louis As Counsel For Plaintiff United Telephone Credit Union.**

Respectfully submitted,

By: 

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**CERTIFICATE OF SERVICE**

I, Eric S. Pruitt, an attorney, hereby certify that a true and correct copy of this notice and the filings referenced therein were served this 30th day of January, 2006 via email upon the following:

Kathleen Trafford, Esq. (0021753)  
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*Special Counsel for Defendant Ohio Department of Commerce, Division of Financial Institutions.*



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Eric S. Pruitt

IN THE COURT OF COMMON PLEAS  
FRANKLIN COUNTY, OHIO

UNITED TELEPHONE CREDIT UNION, )  
INC., )

Plaintiff, )

v. )

F. SCOTT O'DONNELL, )  
in his official capacity )  
as Superintendent of Credit Unions, )  
Ohio Department of Commerce, )  
Division of Financial Institutions, )

Defendant. )

Case No. 05 CVH 09-10728

Judge Reece

**MOTION TO WITHDRAW WITHOUT PREJUDICE THE MOTION OF PLAINTIFF  
UNITED TELEPHONE CREDIT UNION FOR AN INTERIM ORDER COMPELLING  
PAYMENT OF LEGAL FEES AND COSTS BY CREDIT UNION**

NOW COMES Plaintiff United Telephone Credit Union ("UTCU"), by its counsel Scott Mendeloff and Gabriel Aizenberg, of Sidley Austin LLP, and hereby moves this Honorable Court to grant the instant Motion to Withdraw Without Prejudice the Motion of Plaintiff United Telephone Credit Union for an Interim Order Compelling Payment of Legal Fees and Costs by Credit Union. In support of this motion, UTCU states as follows:

1. On January 26, 2006, at approximately 5:00 pm, plaintiff first became aware that a motion had been filed on behalf of UTCU on January 13, 2006, seeking an interim order compelling payment of legal fees and costs. UTCU's motion was erroneously filed as a result of a miscommunication between UTCU's local counsel, Percy Squire, and its lead counsel, Scott Mendeloff and Gabriel Aizenberg of Sidley Austin LLP. Accordingly, UTCU hereby moves to withdraw the Motion of Plaintiff United Telephone Credit Union for Interim Order Compelling Payment of Legal Fees and Costs by Credit Union.

2. By withdrawing the motion, UTCU does not waive or intend to waive its right and ability to seek the recovery of attorneys' fees and costs from the credit union in the future.

WHEREFORE, for the foregoing reasons, Plaintiff UTCU urges this Honorable Court to grant UTCU's Motion to Withdraw Without Prejudice the Motion of Plaintiff United Telephone Credit Union for an Interim Order Compelling Payment of Legal Fees and Costs by Credit Union.

Respectfully submitted,

By:   
One of the Attorneys for Plaintiff,  
UNITED TELEPHONE CREDIT UNION, INC.

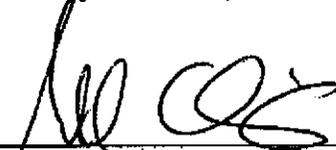
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WHEREFORE, for the foregoing reasons, Plaintiff UTCU urges this Honorable Court to grant its Motion to Strike Lloyd Pierre-Louis from the List of Counsel for Plaintiff United Telephone Credit Union.

Respectfully submitted,

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IN THE COURT OF COMMON PLEAS  
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UNITED TELEPHONE CREDIT UNION, INC., )

Plaintiff, )

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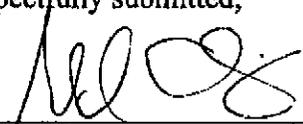
) Case No. 05 CVH 09-10728

) Judge Reece

**NOTICE OF TERMINATION OF LLOYD PIERRE-LOUIS AS COUNSEL FOR  
PLAINTIFF UNITED TELEPHONE CREDIT UNION**

Plaintiff United Telephone Credit Union's ("UTCU") hereby notifies the Court and counsel in this case that Lloyd Pierre-Louis has been terminated as UTCU's counsel in this case.

Respectfully submitted,

By: 

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