SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION

In re INFINITY Q DIVERSIFIED ALPHA FUND SECURITIES LITIGATION	Index No. 651295/2021 Part 53: Justice Andrew S. Borrok

NOTICE OF MOTION TO INTERVENE

PLEASE TAKE NOTICE that upon the Affirmation of Aaron T. Morris, sworn to on August 21, 2022, the accompanying memorandum of law, and all other pleadings and submissions herein, proposed intervenor Charles Sherck will move this Court at the Motions Submissions Part, 60 Centre Street, New York, New York, on September 1, 2022, at 9:30 a.m., or as soon thereafter as the Court permits counsel to be heard, for an order pursuant to CPLR § 1012 and CPLR § 1013 granting Mr. Sherck's motion to intervene in this case for the purpose of opposing the proposed class settlement solely with respect to U.S. Bancorp Fund Services, LLC.

Pursuant to CPLR 2214(b), answering papers, if any, are due no later than seven days prior to the return date.

Dated: August 21, 2022
New York, New York

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MEMORANDUM OF LAW IN SUPPORT OF
CHARLES SHERCK'S MOTION TO INTERVENE

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Proposed intervenor Charles Sherck respectfully submits this memorandum of law in support of his motion pursuant to CPLR § 1012 and § 1013 to intervene in this action for the purpose of opposing the proposed class settlement solely with respect to U.S. Bancorp Fund Services, LLC ("U.S. Bancorp").

PRELIMINARY STATEMENT

This is the largest securities misvaluation case ever. The sole entity with contractual responsibility for valuing the securities at issue not only colossally botched the job—securities purportedly worth *half a billion dollars* were revealed in early 2021 to be nearly worthless—but also lied to investors for years about the process that it was supposedly using to do the valuations. That entity is U.S. Bancorp, and it is *not a named party to this lawsuit.* Nonetheless, with no fact discovery whatsoever and without even an operative complaint as to U.S. Bancorp, the plaintiffs in this action have apparently cobbled together a proposed settlement that will let U.S. Bancorp off the hook for *hundreds of millions of dollars of liability* caused by years of transactions at inflated prices in exchange for a payment $250,000—*i.e.*, less than 1% of exposure under any plausible damages calculation.

Mr. Sherck has been diligently pursuing his *first-filed* securities class action against U.S. Bancorp in its home state of Wisconsin, and he now moves to intervene in this action to oppose preliminary approval of the settlement in favor of the Wisconsin case. Mr. Sherck respectfully requests that the Court grant his motion pursuant to CPLR § 1012 and § 1013 in order to protect his interests as well as those of the class of investors he represents in the Wisconsin action.

BACKGROUND[1]

The Infinity Q Diversified Alpha Fund (the "Fund") was a mutual fund offered to the public by U.S. Bancorp through the Trust for Advised Portfolio, a trust consisting of multiple mutual funds all operated by U.S. Bancorp. The Fund's portfolio was managed by an outside manager, Infinity Q Capital Management, LLC ("Infinity Q"), but U.S. Bancorp was responsible for all other operations, including serving as the Fund's administrator and fund accountant.

Under agreements with the Fund, U.S. Bancorp assumed direct contractual responsibility for accurately valuing the Fund's securities, preparing its financial reports and filings with the SEC, and reporting the Fund's net asset value ("NAV") to investors. U.S. Bancorp provided its own employees to execute these day-to-day operations and its own senior personnel to serve as the Fund's officers. To oversee the Fund's valuation of securities, it formed a "valuation committee" consisting solely of its own employees. The Fund had no personnel of its own other than those employed by U.S. Bancorp.

From at least February 2017 through February 2021—*i.e.*, for every trading day for four years or more—U.S. Bancorp caused the Fund to overstate the value of its portfolio by *hundreds of millions of dollars* using prices that were based on manipulated financial data from Infinity Q and its Chief Investment Officer, James Velissaris. U.S. Bancorp was the *sole service provider contractually responsible* for valuing the Fund's securities, and it represented to investors in the Fund's SEC filings—which it prepared—that it was implementing operating procedures to independently verify and accurately value the Fund's securities, oversee Infinity Q's role in the pricing process, and protect against pricing manipulation. Those representations turned out to be largely false.

[1] The facts set forth in this section are derived from the allegations in the amended complaint filed in the *Sherck* action, which is attached as Exhibit B to the Affirmation of Aaron T. Morris.

U.S. Bancorp and its personnel all but abandoned the valuation process that investors thought they were performing, leaving Infinity Q unsupervised to select and manipulate the prices for the Fund's derivative holdings at will. Spot-checking even a few valuations of the Fund's holdings would have revealed that they had been extensively manipulated, but U.S. Bancorp *was not independently calculating or verifying any prices*. Instead, it was merely downloading prices created and manipulated by Infinity Q using a pricing software and rubberstamping them.

By early 2020, the differences between the Fund's prices and those reported for the same securities by the Fund's counterparties—and even Infinity Q itself with respect to other accounts—began to diverge by tens of millions of dollars. Infinity Q even began to report prices that were mathematically incapable of being accurate, and routinely permitted securities to expire as worthless despite having reported significant value for those securities only days earlier.

U.S. Bancorp ignored these obvious irregularities, but they eventually drew the attention of the SEC, which launched an inquiry in May 2020 into the Fund's valuation practices. By November 2020, the investigation had expanded to include U.S. Bancorp, but U.S. Bancorp continued to allow the Fund's shares to be purchased and redeemed at knowingly incorrect and inflated prices. In December 2020 the Fund finally announced that it would no longer accept new investments, but U.S. Bancorp continued to conceal the Fund's ongoing valuation problems and continued to permit *tens of millions of dollars in additional redemptions* at inflated prices.

On February 22, 2021, the Fund revealed for the first time that it was unable to calculate an accurate NAV, its prior NAVs were likely significantly overstated, and the SEC was requiring it liquidate immediately. After liquidating its portfolio, the Fund held cash with a value of *nearly $500 million less* than the last NAV calculated by U.S. Bancorp. While these valuation errors caused investors to overpay for their shares by hundreds of millions of dollars throughout the

preceding four-year period, U.S. Bancorp actually profited through the asset-based fees it collected, which were inflated by the pricing errors.

On February 24, 2021—*i.e.*, only *two days* after the Fund revealed its valuation issues and the forthcoming liquidation—Andrea Hunter and her attorneys at Scott+Scott commenced this action. *See Hunter v. Infinity Q Diversified Alpha Fund*, Index No. 651295/2021. The *Hunter* case hastily named as defendants Infinity Q, the Fund's officers and directors, the Fund's auditor, EisnerAmper LLP, and a variety of other ancillary defendants (some with tenuous if any connections to the Fund's operations), but failed to name—or even realize the critical importance of—the sole entity contractually responsible for valuing the Fund's securities: U.S. Bancorp. In April 2021, the *Hunter* case was consolidated with *Rosenstein v. Trust for Advised Portfolios*, Index No. 651302/2021 (N.Y. Sup. Ct.), but the parties declined again at that time to name U.S. Bancorp as a defendant.

On February 9, 2022—following an extensive investigation of the facts and circumstances of the Fund's collapse—Mr. Sherck and his counsel at Morris Kandinov LLP filed the *first* securities class action to name U.S. Bancorp as a defendant. *See Sherck v. U.S. Bancorp Fund Services, LLC*, Case No. 2022CV000846 (Wis. Cir. Ct.) The *Sherck* case asserts claims against U.S. Bancorp for violations of Sections 11 and 15 of the Securities Act of 1933.

On May 2, 2022, the plaintiffs in this action filed a consolidated complaint, but *again chose not to name U.S. Bancorp as a defendant*, despite having the opportunity to review both the first-filed securities action against U.S. Bancorp brought by Mr. Sherck as well as an extensive derivative complaint against U.S. Bancorp and others filed in the Delaware Court of Chancery. *See Rowen v. Infinity Q Capital Management,* C.A. No. 2022-0176-MTZ (Del. Ch.). The *Rowen* case, like the *Sherck* case, was based on an extensive year-long investigation, but the *Rowan*

plaintiff had the additional benefit of non-public documents obtained through an inspection demand to the Fund as well as the findings of the SEC's investigation revealed through multiple complaints filed by the SEC, U.S. Department of Justice, and Commodity Futures Trading Commission against Infinity Q's portfolio manager, Mr. Velissaris.

On August 17, 2022, the plaintiffs in this action—without having proceeded past the pleading stage or conducted any fact discovery or other investigation whatsoever—announced that they had orchestrated a purported class-wide settlement that would release all securities claims, including expressly those asserted in the *Sherck* action, against a slew of potentially responsible parties, including U.S. Bancorp—a non-party *not even named in this lawsuit*.

Under the proposed deal, U.S. Bancorp would pay only $250,000 in exchange for a release of liability of *hundreds of millions of dollars* caused by thousands of trades in the Fund's shares over the course of every trading day for four years, which were executed at inflated NAVs that were, in each instance, calculated and published by U.S. Bancorp.

ARGUMENT

I. LEAVE TO INTERVENE AS OF RIGHT SHOULD BE GRANTED UNDER CPLR § 1012

CPLR § 1012 provides that "any person shall be permitted to intervene in any action when" *inter alia*, "the representation of the person's interest by the parties is or may be inadequate and the person is or may be bound by the judgment." "It is axiomatic that the potentially binding nature of the judgment on the proposed intervenor is the most heavily weighted factor in determining whether to permit intervention." *Yuppie Puppy Pet Prod., Inc. v. St. Smart Realty, LLC*, 906 N.Y.S.2d 231, 236 (1st Dep't 2010); *see also Bay State Heating & Air Conditioning Co. v. Am. Ins. Co.*, 78 A.D.2d 147, 149 (4th Dep't 1980) (holding that CPLR § 1012 and § 1013 "should be liberally construed").

Intervention as of right should be permitted here because the facially inadequate settlement proposed by the parties to this litigation is potentially binding on Mr. Sherck, and thus he should be permitted to intervene in order to protect his own financial interests and those of the class of investors he seeks to represent in the Wisconsin case. In *Renren, Inc. Derivative Litigation*, this Court allowed an investor to "intervene to protect [his] interest in any settlement proceeds" where the proposed settlement was "so unfair on its face to preclude judicial approval." No. 653594/2018, 2022 WL 900394, at *1 (N.Y. Sup. Ct. Mar. 28, 2022) (Borrok, J.). This Court found that the inadequacy of current counsel's representation of the intervener's interest was "firmly established by the current plaintiffs' attempt to settle this action and to allocate the settlement proceeds to themselves." *Id.*; *see also Metropolitan Partners Fund IIIA, LP v. Encore Park Fund 1, LLC,* No. 656327/2020, 2022 WL 263994, at *1 (N.Y. Sup. Ct. Jan. 25, 2022) (Borrok, J.) (granting intervention as of right where intervener had valid claims against the parties in the action).

In this case, the proposed settlement is so inadequate as to appear collusive, and by its express terms it seeks to bind Mr. Sherck with respect to the Wisconsin litigation. The Stipulation of Settlement, Section 1.16, defines the "Milwaukee Class Action" to mean "*Sherck v. U.S. Bancorp Fund Services, LLC*, Case No. 2022CV000846 (Wis. Cir. Ct.)," and Section 1.26 provides that the "Released Claims" in the settlement will include "the claims alleged or that could have been alleged . . . in the Milwaukee Class Action." Further, Section 10.1 states that the parties will "cooperat[e] to ensure that . . . the Judgment is afforded its full preclusive effect in the Milwaukee Class Action."

Despite the preclusive effect of the proposed settlement, neither the interests of Mr. Sherck nor those of other investors are being adequately represented with respect to U.S. Bancorp, which has not even been named as a defendant in this case. No thought whatsoever has been given to the

proper scope of its liability, and plaintiffs' counsel in this case have conducted no fact discovery and otherwise have no access to documents or other investigatory materials that would assist them in reaching a reasonable settlement. The terms of the proposed settlement are, on their face, a disaster and would deprive investors of any semblance of a material recovery from the primary service provider responsible for their losses. The recovery of $250,000 (before settlement expenses and attorneys' fees) does not even approach a reasonable settlement range given U.S. Bancorp's extensive involvement in, and responsibility for, the valuation errors, and its yearslong misrepresentation of the oversight that it was supposedly conducting over Infinity Q, all of which caused hundreds of millions of damages to investors.

Mr. Sherck should be permitted to intervene as of right in order to protect his interests in this action and preserve his ability to fully litigate the first-filed Wisconsin case—the only plausible legal avenue for investors to make a material recovery against U.S. Bancorp.

II. LEAVE TO INTERVENE SHOULD BE OTHERWISE GRANTED UNDER CPLR § 1013

If the Court does not grant intervention as of right under CPLR § 1012, it should still do so under CPLR § 1013. Upon a timely motion pursuant to CPLR § 1013, "a court may exercise its discretion to permit intervention in an action when the person's claim or defense and the main action have a common question of law or fact." *All Island Credit Corp. v. Popular Brokerage Corp.*, No. 653145/2019, 2019 WL 5579685, at *1 (N.Y. Sup. Ct. Oct. 24, 2019) (Borrok, J.) (permitting intervention). "The court must also consider if the intervention will unduly delay the action or prejudice the substantial rights of any party." *Id.* "Intervention should be allowed where the intervenor has a real and substantial interest in the outcome of the proceeding." *Id.*

First, this motion is timely because it was submitted less than three business days after disclosure of the proposed settlement, which was made through filings in this action on August 17,

2022 (at 11:39 p.m.). *See Yang v. Knights Genesis Group*, No. 651118/2021, 2021 WL 3928748, at *1 (N.Y. Sup. Ct. Aug. 30, 2021) (Borrok, J.) (holding that motion to intervene was timely because "the litigating parties have not all settled" yet and litigation was active); *Yuppie Puppy*, 906 N.Y.S.2d at 235 (holding that it "cannot be said the motion was untimely motion" where it was filed "a mere two weeks after the negotiations to obviate the motion to intervene ended"); *Moon v. Moon*, 776 N.Y.S.2d 324, 326 (2004) (holding that motion was timely because five-month delay did not cause prejudice).

Second, Mr. Sherck has a direct financial interest in the resolution of claims against U.S. Bancorp that arise from facts common to this action. The parties to this action have already stated in the Stipulation of Settlement, on page 4, that "Charles Sherck filed a putative class action complaint, the allegations of which are factually related to the complaints in *Hunter* and *Yang*." Mr. Sherck is entitled to intervene in this action to protect his "substantial interest in the outcome of the proceeding." *All Island Credit Corp.*, 2019 WL 5579685 at *1; *see also Renren*, 2022 WL 900394 at *1 (permitting intervention where investor's "claims share common questions of law and fact with this action [and] the current plaintiffs in this action inadequately represent his interests"); *All Island Credit Corp.*, 2019 WL 5579685, at *1 (permitting intervention where party sought "leave to intervene and make its own claims to the very monies" at issue in the case).

Finally, no party will be prejudiced by intervention in this case, and resolution of this action will *not be delayed*. Given that U.S. Bancorp is not even a party to this case, the proposed settlement may proceed as planned with respect to all existing parties.[2] However, in the interim,

[2] Mr. Sherck takes no position at this time with respect to the merits of the proposed settlements with parties other than U.S. Bancorp and reserves the right to object and/or opt-out of the settlement with respect to those parties in due course.

Mr. Sherck should be permitted to intervene in order to prevent the collusive and meritless settlement proposed in this action with respect to U.S. Bancorp.

CONCLUSION

For the reasons set forth above, the Court should grant Mr. Sherck's motion and permit intervention.

Dated: August 21, 2022
New York, New York

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