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IN THE
SUPREME COURT OF THE UNITED STATES

FREDERICK J. GREDE, NOT INDIVIDUALLY BUT AS LIQUIDATION TRUSTEE
OF THE SENTINEL LIQUIDATION TRUST,

Applicant,

v.

FCSTONE, LLC,

Respondent.

APPLICATION FOR AN EXTENSION OF TIME
TO FILE A PETITION FOR A WRIT OF CERTIORARI

CATHERINE STEEGE
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December 19, 2017

To the Honorable Elena Kagan, Associate Justice of the United States Supreme Court and Circuit Justice for the Seventh Circuit:

Pursuant to this Court's Rules 13.5, 22, and 30.3, Frederick J. Grede, not individually but as Liquidation Trustee of the Sentinel Liquidation Trust ("Applicant") respectfully requests a thirty-day extension of time—to and including February 1, 2018—in which to file a petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Seventh Circuit reversing the judgment entered against FCStone, LLC ("Respondent") and holding that this Court's seminal decision in *Cunningham v. Brown*, 265 U.S. 1 (1924) did not apply to provide for pro rata distribution of commingled funds among similarly situated trust claimants. Pursuant to Rule 13.5, this application is being filed at least ten days before the current due date of January 2, 2018.

In support of his application, Applicant states as follows:

1. On January 4, 2013, the United States District Court for the Northern District of Illinois entered a final judgment on all counts of the Trustee's Second Amended Complaint, holding, in relevant part, that all assets of the bankrupt Debtor, Sentinel Management Group, Inc. ("Sentinel") had been commingled and treated as a single, undifferentiated pool and that the two sets of Sentinel customers—one set of customers protected by a trust under the Commodity Exchange Act and the other set protected by the Investment Advisors Act—were similarly situated and thus, all assets should be distributed pro rata among the customers pursuant to *Cunningham v. Brown*, 265 U.S. 1 (1924). *Grede v. FCStone, LLC*, 485 B.R. 854, 867-880 (N.D. Ill. 2013).

In addition, the District Court also held that 11 U.S.C. §546(e) did not bar the Trustee's claim brought under 11 U.S.C. §547(b), but held that 11 U.S.C. §546(e) pre-empted the Trustee's unjust enrichment claims. A copy of the District Court's opinion is attached hereto at Ex. A.

2. Both the Trustee and the Respondent appealed the District Court's order to the United States Court of Appeals for the Seventh Circuit. On March 19, 2014, the Court of Appeals reversed and remanded. The Court of Appeals held that the Trustee's §547(b) claim was barred by §546(e). It also rejected the Trustee's cross-appeal and affirmed the District Court's decision that the Trustee's unjust enrichment claim was pre-empted by §546(e). The Court of Appeals did not directly address Count III—the claim on which the District Court had granted a declaration that Respondent could not assert a trust against certain funds that the Trustee holds. Although the Seventh Circuit did not address Count III in its decision, it stated that the case “presented two equal pools of statutory trust claimants battling over an insufficient pool of commingled funds,” “agree[d] with the district court that there is no legal basis for placing one trust ahead of the other” and noted that “the district court had the better answer that *Cunningham* and its progeny provide useful insight for resolving the competing trust claims in this case.” *Grede v. FCStone, LLC*, 746 F.3d 244, 259 (7th Cir. 2014). A copy of the opinion of the Court of Appeals is attached hereto at Ex. B.

3. On remand, the District Court again applied *Cunningham* and ruled in favor of the Trustee on Count III, holding that the funds at issue were property of the estate to be distributed pro rata because “equity prevent[ed] [the court] from favoring

one statutory trust claim over another.” *Grede v. FCStone, LLC*, 556 B.R. 357, 363-66 (N.D. Ill. 2016). A copy of the District Court’s opinion is attached hereto at Ex. C. The District Court also entered judgment consistent with the Seventh Circuit’s decision on the Trustee’s other claims.

4. Both the Trustee and the Respondent again appealed the District Court’s decision. On August 14, 2017, the Court of Appeals reversed the District Court’s judgment on Count III and remanded with instructions to enter judgment for Respondent consistent with its opinion. In this second appeal, the Court of Appeals reversed its view that “there is no legal basis for placing one trust ahead of the other.” Instead, it held that *Cunningham* did not apply because those Sentinel customers who are protected by the Investment Advisors Act had as a matter of law waived their rights to a statutory trust by failing to assert the same trust claims as Respondent and given that alleged waiver, the Court of Appeals concluded that *Cunningham* did not apply. Although the Court of Appeals noted that Sentinel had depleted the accounts held for the benefit of customers protected by the Investment Advisors Act and thus there were minimal funds against which to assert such a trust claim, the Court of Appeals nonetheless held that this meaningless act was required for the rule this Court established in *Cunningham v. Brown* to apply. *Grede v. FCStone, LLC*, 867 F.3d 767 (7th Cir. 2017). A copy of the opinion of the Court of Appeals is attached hereto at Ex. D.

5. On September 11, 2017, Applicant timely filed their Petition for Rehearing and Rehearing En Banc. On October 2, 2017, the Court of Appeals denied the petition. A copy of the order denying Applicant's petition is attached hereto at Ex. E.

6. This Court has jurisdiction to review, by writ of certiorari, the decision of the Court of Appeals under 28 U.S.C. §1254(1).

7. As Applicant will demonstrate in his petition for a writ of certiorari, this case raises important questions of the intersection of statutory trusts and bankruptcy law. In addition, the opinion of the Court of Appeals has the practical effect of undermining the ability of bankruptcy courts to fairly resolve cases involving massive financial fraud and discouraging plan settlements. By ruling that the case did not involve competing statutory trusts and rejecting the application of this Court's long-established precedent in *Cunningham*, the opinion in effect subverts the statutory trust bestowed on investors by the Investment Advisors Act for the sole benefit of the statutory trust bestowed on investors by the Commodity Exchange Act.

8. In addition, this case presents the same preemption issue as *Deutsche Bank Trust Company Americas v. Robert R. McCormick Foundation*, Supreme Court Case No. 16-317, where this Court has held the petition seeking review.

9. Applicant and his counsel respectfully submit that the requested extension of time is justified for the following reasons.

10. Applicant's appellate counsel and counsel of record here, Catherine Steege, as described in her attached Declaration has and continues to have other professional commitments that interfere with her ability to complete the petition before

the current due date. In addition, the upcoming holidays also limit the availability of Ms. Steege, Mr. Levenstam, and their colleagues involved with the petition to complete the petition before the current due date of January 2, 2018.

11. Ms. Steege and Mr. Levenstam's colleagues have been working diligently to complete the petition, but neither Ms. Steege nor Mr. Levenstam will have the opportunity to review and finalize the petition, which involves complicated issues involving statutory trusts and bankruptcy law and the efficient administration of bankruptcy cases, until after January 1, 2018.

WHEREFORE, for the reasons set forth above, Applicant respectfully requests that Your Honor grant this Application and extend the time in which to petition for a writ of certiorari to and including February 1, 2018.

Dated: December 19, 2017

Respectfully submitted,


Catherine Steege

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FCSTONE, LLC,
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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

DECLARATION OF CATHERINE STEEGE IN SUPPORT OF
APPLICATION FOR AN EXTENSION OF TIME
TO FILE A PETITION FOR A WRIT OF CERTIORARI

I, Catherine Steege, declare as follows:

1. I am a partner at Jenner & Block LLP, and am counsel of record for Applicant Frederick J. Grede, not individually but as Liquidation Trustee of the Sentinel Liquidation Trust ("Applicant") in this matter. I am submitting this Declaration in Support of Applicant's Application to extend the time in which to petition for a writ of certiorari to and including February 1, 2018.

2. I served as lead appellate counsel for Applicant in connection with his September 11, 2017 Petition for Rehearing and Rehearing En Banc that was filed with

the United States Court of Appeals for the Seventh Circuit, having briefed and argued the matter twice before that Court. I will be responsible for the final petition for writ of certiorari in this matter.

3 I respectfully submit that the requested extension of time is justified for the following reasons.

4. I have had competing professional commitments that have interfered with my ability to complete the petition before the current due date. In particular, I serve as counsel to the Official Committee of Retired Employees of the Commonwealth of Puerto Rico in the Title III cases pending before the United States District Court for the District of Puerto Rico, *In re the Commonwealth of Puerto Rico, et al*, Case. No. 17-3283. This representation involves many pressing matters and deadlines on an extremely accelerated schedule.

6. Although my colleagues have been working to prepare a draft of the petition for certiorari, because of my schedule I have not yet had an opportunity to review their work or otherwise devote any substantial time to Applicant's petition. Further, the upcoming holidays also will limit my ability to do so until after January 1, 2018.

Pursuant to 28 U.S.C. §1746, I declare under penalty of perjury that the foregoing is true and correct.

Dated: December 19, 2017


Catherine Steege