IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SIMON BERNSTEIN IRREVOCABLE INSURANCE TRUST DTD 6/21/95,

Plaintiff,

v.

HERITAGE UNION LIFE INSURANCE COMPANY,

Defendant,

HERITAGE UNION LIFE INSURANCE COMPANY

Counter-Plaintiff

v.

SIMON BERNSTEIN IRREVOCABLE INSURANCE TRUST DTD 6/21/95

Counter-Defendant

and,

FIRST ARLINGTON NATIONAL BANK as Trustee of S.B. Lexington, Inc. Employee Death Benefit Trust, UNITED BANK OF ILLINOIS, BANK OF AMERICA, Successor in interest to LaSalle National Trust, N.A., SIMON BERNSTEIN TRUST, N.A., TED BERNSTEIN, individually and as purported Trustee of the Simon Bernstein Irrevocable Insurance Trust Dtd 6/21/95, and ELIOT BERNSTEIN

Case No. 13 cv 3643
Honorable John Robert Blakey
Magistrate Mary M. Rowland

Filers: Simon Bernstein Irrevocable Insurance Trust Dated 6/21/95, Ted Bernstein, as Trustee and Individually, Pamela B. Simon, Adam M. Simon, David B. Simon, The Simon Law Firm, STP Enterprises, Inc. ("Movants").

MOVANTS' MOTION FOR SUMMARY JUDGMENT AS TO ELIOT BERNSTEIN'S COUNTERCLAIMS, CROSS-CLAIMS AND THIRD-PARTY CLAIMS ("ELIOT'S CLAIMS")

Third-Party Defendants.

ELIOT IVAN BERNSTEIN,

Cross-Plaintiff

v.

TED BERNSTEIN, individually and as alleged Trustee of the Simon Bernstein Irrevocable Insurance Trust Dtd, 6/21/95

Cross-Defendant

and,

PAMELA B. SIMON, DAVID B.SIMON, both Professionally and Personally ADAM SIMON, both Professionally and Personally, THE SIMON LAW FIRM, TESCHER & SPALLINA, P.A., DONALD TESCHER, both Professionally and Personally, ROBERT SPALLINA, both Professionally and Personally, LISA FRIEDSTEIN, JILL IANTONI S.B. LEXINGTON, INC. EMPLOYEE DEATH BENEFIT TRUST, S.T.P. ENTERPRISES, INC. S.B. LEXINGTON, INC., NATIONAL SERVICE ASSOCIATION (OF FLORIDA), NATIONAL SERVICE ASSOCIATION (OF ILLINOIS) AND JOHN AND JANE DOES

Third-Party Defendants.

NOW COMES the above-named Counterdefendants, Cross-defendants and Third-party defendants ("Movants"), by and through their undersigned counsel, and pursuant to Fed. R. Civ. P. 56(a) and Local Rule 56.1, move the Court for summary judgment as to each and every one of Eliot's counterclaims, cross-claims and third-party claims. In support thereof Movants state as follows:

1. The undisputed facts and evidence supporting this motion are set forth more fully in the accompanying Statement of Material Undisputed Facts Pursuant to Local Rule 56.1(a); the Appendix of Exhibits; and referenced in the Memorandum of Law in Support of Movant's Motion for Summary Judgment.

2. This action was originally filed by the Simon Bernstein Irrevocable Insurance Trust dated 6/21/95 against Heritage Union Life Insurance Company (the "Insurer") in the Circuit Court of Cook County. The Action related to Plaintiff's claim to certain death benefit proceeds ("Policy Proceeds") payable under a life insurance policy (the "Policy") insuring the life of Simon Bernstein who passed away in September of 2012.

3. The Insurer removed this Action from Cook County to the Northern District, and filed an Interpleader Action.

4. The Insurer did not dispute its liability under the Policy. Instead, the Insurer sought to interplead conflicting claimants to the Policy Proceeds, and deposit the Policy Proceeds with the Registry of the Court. The Insurer accomplished this and after depositing the Policy Proceeds, the Insurer was dismissed from the litigation.

5. The remaining parties have had access to the Policy records and all documents produced in this litigation, and have had ample time to conduct discovery. The fact discovery deadline set by Judge St. Eve passed on January 9, 2015. **[Dkt. #123]**

6. Movants have established in their memorandum of law that there is no triable issue of fact and all Movants are entitled to summary judgment as to Eliot's Claims as a matter of law. This motion shall be dispositive as to all of Eliot's Claims and will significantly narrow the focus of these proceedings to where it belongs – determining the beneficiary of the Policy Proceeds that remain on deposit with the Registry of the Court.

WHEREFORE, for the foregoing reasons, Plaintiffs respectfully request that the Court and enter an Order as follows:

a) granting Movants' motion for summary judgment in its entirety as to all of Eliot's Claims;

b) entering summary judgment for each Movant as to Eliot's Claims, and terminating Movants on the docket, *but solely* in their capacities as counterdefendants, cross-defendants, or third party defendants to Eliot's Claims;

c) terminating Eliot Bernstein as a party to these proceedings in all capacities in which he appears on the docket;

d) granting Movants such further relief as this court may deem just and proper.

Respectfully Submitted,

/s/ *Adam M. Simon*
Adam M. Simon (#6205304)
303 E. Wacker Drive, Suite 2725
Chicago, IL 60601
Phone: 313-819-0730
Fax: 312-819-0773
E-Mail: asimon@chicagolaw.com
Attorney for Movants

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MOVANTS' STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

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Third-Party Defendants.

Movants, pursuant to Rule 56 and Local Rule 56.1, submit the following statement of uncontested material facts, including an appendix of exhibits hereto, in support of their motion for summary judgment as to Eliot's counterclaims, cross-claims and third-party claims ("Eliot's Claims").

I. THE PARTIES

The following is a review of the Parties (and entities named as potential parties) listed on the civil docket for this matter:

1. Simon Bernstein Irrevocable Insurance Trust Dated 6/21/95 (the "Bernstein Trust"), is an irrevocable life insurance trust formed in Illinois as further described below. The Bernstein Trust is the original Plaintiff that first filed this action in the Circuit Court of Cook County. The Insurer then filed a notice of removal to the Northern District of Illinois. The Bernstein Trust has also been named as a Counterdefendant to Eliot's Claims. The Bernstein Trust is represented by counsel, Adam M. Simon. **(Ex. 1, Aff. of Ted Bernstein, ¶21)**

2. Bank of America, N.A. ("Bank of America"), was named a party to Heritage's counterclaim for Interpleader. Bank of America was terminated as a co-Plaintiff on January 13, 2014, and the Insurer voluntarily dismissed Bank of America as a Third-Party Defendant on February 14, 2014. **(Dkt. #97**; **Ex. 1, Aff. of Ted Bernstein, ¶22)**

3. Eliot Bernstein ("Eliot") was named a Party by virtue of Heritage's counterclaim for Interpleader, and Eliot filed third-party claims against several Parties described herein making Eliot a Third-Party Plaintiff as well ("Eliot's Claims"). Eliot is the third adult child of Simon Bernstein. Eliot is representing himself, and/or his children, pro se in this matter. **(Ex. 1, Aff. of Ted Bernstein, ¶23)**

4. United Bank of Illinois, now known as PNC Bank, was named as a third-party defendant in Heritage's counterclaim for Interpleader. PNC Bank was served on August 5, 2013, and has never filed an appearance or answer. **(Dkt. #25; Ex. 1, Aff. of Ted Bernstein, ¶24)**

5. "Simon Bernstein Trust. N.A." was named a Party to Heritage's counterclaim for interpleader. "Simon Bernstein Trust, N.A.". There are no Policy records produced by the Insurer indicating that a policy owner ever submitted a beneficiary designation naming Simon Bernstein Trust, N.A. as a beneficiary of the Policy. No one has submitted a claim to the Policy Proceeds with the Insurer on behalf of an entity named "Simon Bernstein Trust, N.A.". **(Ex. 2, Aff. of Don Sanders, ¶69 and ¶78)**

6. Ted Bernstein, as Trustee, of the Bernstein Trust retained Plaintiff's counsel and initiated the filing of this Action. Ted Bernstein, is also a co-Plaintiff, individually, and has been named as a Counter-defendant and Third-Party Defendant to Eliot's Claims. Ted Bernstein is the eldest of the five adult children of Simon Bernstein. Ted Bernstein is represented by counsel, Adam M. Simon. **(Ex. 1, Aff. of Ted Bernstein, ¶25)**

7. First Arlington National Bank was named as a Third-Party Defendant by virtue of Heritage's counterclaim for Interpleader. First Arlington National Bank was never served by Heritage, and instead Heritage served JP Morgan Chase Bank as First Arlington Bank's alleged successor and JPMorgan Chase Bank was substituted as a party in place of First Arlington National Bank on 10/16/2013. **(Dkt. #44;** *see also* **JP Morgan Chase Bank at Par. 12 below; Ex. 1, Aff. of Ted Bernstein, ¶26)**

8. Lisa Sue Friedstein is a co-Plaintiff and has been named as a third-party defendant to Eliot's Claims. Lisa Sue Friedstein is the fifth adult child of Simon Bernstein. Lisa Sue

Friedstein is now appearing pro se, and was formerly represented by counsel, Adam M. Simon. **(Ex. 3, Aff. of Lisa Friedstein, ¶2, ¶3, ¶6 and ¶23)**

9. Jill Marla Iantoni is a co-Plaintiff and has been named as a third-party defendant to Eliot's Claims. Jill Marla Iantoni is the fourth adult child of Simon Bernstein. Jill Marla Iantoni is appearing pro-se and was formerly represented by counsel, Adam M. Simon. **(Ex. 4, Aff. of Jill Iantoni, ¶2, ¶3, ¶6 and ¶23)**

10. Pamela Beth Simon is a co-Plaintiff and has been named as a third-party defendant to Eliot's Claims. Pamela Beth Simon is the second adult child of Simon Bernstein. Pamela Beth Simon and is represented by counsel, Adam M. Simon. **(Ex. 5, Aff. of Pam Simon, ¶2, ¶3, ¶6 and ¶38.)**

11. Heritage is the successor life insurer to the original insurer, Capitol Banker Life, that originally issued the Policy in 1982. Heritage was terminated as a party on February 18, 2014 when the court granted Heritage's motion to dismiss itself from the Interpleader litigation after having deposited the Policy Proceeds with the Registry of the Court pursuant to an Agreed Order. The amount of the Policy Proceeds (plus interest) on deposit with the Registry exceeds $1.7 million. **(Dkt. #101 and Ex. 1, Aff. of Ted Bernstein, ¶30)**

12. J.P. Morgan Chase Bank, N.A., ("J.P. Morgan") was named as a third-party Defendant by virtue of Heritage's counterclaim for Interpleader. In its claim for Interpleader, Heritage named J.P. Morgan, as a successor to First Arlington National Bank (described above). J.P. Morgan filed an appearance and answer to Heritage's counterclaim for Interpleader in which it disclaimed any interest in the Policy Proceeds. J.P. Morgan then filed a motion for judgment

on the pleadings to have itself dismissed from the litigation, and the court granted the motion. As a result, J.P. Morgan was terminated as a party on March 12, 2014. **(Dkt. #105; Ex. 1, Aff. of Ted Bernstein, ¶31)**

13. William Stansbury filed a motion to intervene in this action, but his motion to intervene was denied, and he was terminated as a non-party intervenor on January 14, 2014. **(Dkt. #74; Ex. 1, Aff. of Ted Bernstein, ¶32)**

14. Adam M. Simon is counsel himself, and for the Bernstein Trust, Ted Bernstein (individually and as trustee), Pamela B. Simon, David B. Simon, The Simon Law Firm, and STP Enterprises, Inc. four of the five adult children of Simon Bernstein. Adam M. Simon was named a third-party defendant to Eliot's Claims. Adam M. Simon is the brother-in-law of Pamela B. Simon, and the brother of David B. Simon. **(Ex. 1, Aff. of Ted Bernstein, ¶33)**

15. National Service Association, Inc. (of Illinois) was a corporation owned by the decedent, Simon Bernstein. According to the public records of the Secretary of State of Illinois, National Service Association, Inc. (of Illinois) was dissolved in October of 2006. There is no record of Eliot having obtained service of process upon National Service Association, Inc. because it is dissolved and has been for over 7 years. (**Ex. 1, Aff. of Ted Bernstein, ¶34**)

16. Donald R. Tescher, Esq. was named a Third-Party Defendant to Eliot's Claims. Donald R. Tescher is a partner of in the firm of Tescher & Spallina. Donald R. Tescher was terminated as a party to this matter when the court granted his motion to dismiss as to Eliot's claims on March 17, 2014. **(Dkt. #106; Ex. 1, Aff. of Ted Bernstein, ¶35)**

17. Tescher and Spallina, P.A. was a law firm whose principal offices were formerly in Palm Beach County, FL. Tescher and Spallina, P.A. was named a Third-Party Defendant to Eliot's Claims. Tescher & Spallina, P.A. Donald R. Tescher was terminated as a party to this

matter when the court granted his motion to dismiss as to the Eliot's Claims. **(Dkt. #106; Ex. 1, Aff. of Ted Bernstein, ¶36)**

18. The Simon Law Firm was named a Third-Party Defendant to Eliot's Claims. The Simon Law Firm is being represented by counsel, Adam M. Simon.

19. David B. Simon is the husband of Pam Simon, and the brother of counsel, Adam M. Simon and was named a Third-Party Defendant to Eliot's Claims. David B. Simon is being represented by counsel, Adam M. Simon. **(Ex. 6, Aff. of David Simon, ¶20 and ¶29)**

20. S.B. Lexington, Inc. was a corporation formed by Simon Bernstein. According to the records of the Secretary of State of Illinois, S.B. Lexington, Inc. was dissolved on April 3, 1998. **(Ex. 1, Aff. of Ted Bernstein ¶39, Dep. of David Simon, p. 51:13-18)**

21. S.B. Lexington, Inc. Employee Death Benefit Trust (the "VEBA Trust") was named a Third-Party Defendant by virtue of Eliot's Claims, and was a Trust formed by Simon Bernstein in his role as principal of S.B. Lexington, Inc. The VEBA Trust was formed pursuant to I.R.S. Code Sec. 501(c)(9) as a qualified Employee Benefit Plan designed to provide a death benefit to certain key employees of S.B. Lexington, Inc. The VEBA was dissolved in 1998 concurrently with the dissolution of S.B. Lexington, Inc. **(Ex. 7, Dep. of David Simon, p. 51:13-18; Ex. 30, Aff. of Ted Bernstein, ¶40)**

22. Robert Spallina, Esq. was named a Third-Party Defendant to Eliot's Claims. Robert Spallina is a partner of in the firm of Tescher & Spallina, P.A. Robert Spallina was terminated as a party to this matter when the court granted his motion to dismiss as to Eliot's Claims on March 17, 2014. **(Dkt. #106; Ex. 1, Aff. of Ted Bernstein, ¶41)**

23. S.T.P. Enterprises, Inc. was named a Third-Party Defendant to Eliot's Claims. S.T.P. Enterprises, Inc. has filed an appearance and responsive pleading and is represented by counsel, Adam M. Simon. **(Dkt. #47; Ex. 5, Aff. of Pam Simon, ¶25)**

24. According to the records of the Secretary of State of Florida, National Service Association, Inc. (Florida) was a Florida corporation formed by Simon L. Bernstein. National Service Association, Inc. (Florida) was named a Third-Party Defendant in Eliot's Claims. According to the records of the Secretary of State of Florida, National Service Association, Inc. (Florida) dissolved in 2012. **(Ex. 1, Aff. of Ted Bernstein, ¶42).**

25. Benjamin Brown as Curator of The Estate of Simon Bernstein filed a motion to intervene in this litigation. The court granted the motion to intervene on July 28, 2014, and as a result the Estate became a third-party claimant in the litigation. **(Dkt. #121).** Subsequently, Brian O'Connell as successor Curator and *Administrator Ad Litem* of the Estate of Simon Bernstein filed a motion to substitute for Benjamin Brown, and the court granted the motion November 3, 2014. For purposes of this motion, Movants refer to this party as the "Estate of Simon Bernstein" or the "Estate". The Estate is represented by the law firm of Stamos & Trucco in this matter. **(Dkt. #126; Ex. 1, Aff. of Ted Bernstein ¶43-¶44)**

II. THE POLICY AND POLICY PROCEEDS

26. In 1982, Simon Bernstein, as Insured, applied for the purchase of a life insurance policy from Capitol Bankers Life Insurance Company, issued as Policy No. 1009208 (the "Policy"). A specimen policy and a copy of the Schedule Page of the Policy are included in Movant's Appendix to the Statement of Facts. (**Ex. 2, Aff. of Don Sanders at ¶38, ¶39, ¶48, ¶52**; *See* **Ex. 14).** The amount of the Policy Proceeds (plus interest) on deposit with the Registry

of the Court exceeds $1.7 million. **(Dkt. #101 and Ex. 1, Aff. of Ted Bernstein, ¶30).** The Policy defines "Beneficiary" as follows:

> A Beneficiary is any person *named on our* [the Insurer's] *records* to receive proceeds of this policy after the insured dies. There may be different classes of Beneficiaries, such as primary and contingent. These classes set the order of payment. There may be more than one beneficiary in a class. Unless you provide otherwise, any death benefit that becomes payable under this policy will be paid in equal shares to the Beneficiaries living at the death of the Insured. Payments will be made successively in the following order: (emphasis added)
>
> a. Primary Beneficiaries.
> b. Contingent Beneficiaries, if any, provided no primary Beneficiary is living at the death of the Insured.
> c. The Owner or the Owner's executor or administrator, provided no Primary or Contingent Beneficiary is living at the death of the Insured.
>
> Any Beneficiary may be named an Irrevocable Beneficiary. An irrevocable beneficiary is one whose consent is needed to change that Beneficiary. Also, this Beneficiary must consent to the exercise of certain other rights by the Owner. We discuss ownership in part 2. **(SoF, ¶26; Ex. 7 at bates no. JCK00101)**

III. MOVANTS' CLAIMS TO THE POLICY PROCEEDS

27. Plaintiff's claims to the Policy Proceeds are based on their allegations that the five adult children of decedent, INCLUDING ELIOT, are the beneficiaries of The Simon Bernstein Irrevocable Insurance Trust Dtd 6/21/95, and that this same Trust is the named beneficiary of the Policy Proceeds at issue (the "Stake"). **(Ex. 8, Plaintiff's First Amended Complaint**).

IV. ELIOT'S NON-EXISTENT CLAIM TO THE POLICY PROCEEDS

28. Eliot Bernstein filed counterclaims, third-party claims and cross-claims in this litigation ("Eliot's Claims"). **(Ex. 9, Eliot's Claims)**.

29. The pleading setting forth Eliot's Claims—not including exhibits—is seventy-two pages long and consists of one hundred and sixty-three separate paragraphs. Eliot's Claims are devoid

of any allegation or supporting facts to show that either Eliot or his children were ever named a beneficiary of the Policy Proceeds. **(Ex. 9, Eliot's Claims)**.

30. This is confirmed by the 30(b)(6) witness designated by the Insurer affirming that no Owner of the Policy ever submitted any change of beneficiary forms which were received by the Insurer that designated Eliot, or any of Eliot's children as a beneficiary of the Policy. **(Ex. 2, Aff. of Don Sanders, ¶65-¶68).**

V. ELIOT'S STATUS VIS-À-VIS THE ESTATE OF SIMON BERNSTEIN

31. The case styled as In Re Estate of Simon L. Bernstein, has been pending in the Probate Division of the Palm Beach County Circuit Court in Florida since 2012. In Re Estate of Simon L. Bernstein, No. 502012CP004391XXXNBIH.

32. A related case styled as Ted Bernstein, as Trustee of the Shirley Bernstein Trust Agreement dtd 5/20/2008 v. Alexandra Bernstein, et. al., has been pending in the same court before the same judges since 2014 involving matters related to a testamentary trust formed by Shirley Bernstein – Simon Bernstein's spouse -- prior to her death. Ted Bernstein, as Trustee of the Shirley Bernstein Trust Agreement dtd 5/20/2008 v. Alexandra Bernstein, et. al, No. 502014CP003698XXXXNBIJ. For purposes of this motion, the actions pending in Palm Beach County are referred to as the "Probate Action(s)".

33. On December 15, 2015, after a trial was held in the Probate Actions, where Eliot Bernstein appeared and represented himself *pro se*, Judge John L. Phillips entered an Order including the following:

a. This was a "Final Judgment" on Count II of the Amended Complaint;

b. A trial was held on December 15, 2015 pursuant to the Court's Order setting trial on Amended Complaint Count II;

c. The Court received evidence in the form of documents and testimony of witnesses;

d. The Court heard argument from counsel and pro se parties who wished to argue;

e. The Court found that five testamentary documents, including the Will of Simon Bernstein and a Simon Bernstein Amended and Restated Trust Agreement dated July 25, 2012 are "genuine and authentic, and are valid and enforceable according to their terms."

f. That based on evidence presented, "Ted S. Bernstein, Trustee, was not involved in the preparation or creation of the Testamentary Documents…Ted S. Bernstein played no role in any questioned activities of the law firm of Tescher & Spallina, P.A., who represented Simon and Shirley when they were alive. There is no evidence to support the assertion of Eliot Bernstein that Ted Bernstein forged or fabricated any of the Testamentary Documents, or aided or abetted others in forging or fabricating documents. The evidence shows Ted Bernstein played no role in the preparation of any improper documents, the presentation of any improper documents to the Court, or any other improper act, contrary to the allegations of Eliot Bernstein.

g. This ruling is intended to be a Final Judgment under Rule 9.170 of the Florida Rules of Appellate Procedure..." (**Ex. 10, Probate Order of 12/15/15, *Ted Bernstein, as Trustee of Shirley Bernstein Trust Agreement v. Alexandra Bernstein…Eliot Bernstein, et. al. No. 502014CP003698.) (ADD TRANSCRIPT SHOWING ELIOT ATTENDED?).*"**

34. On April 8, 2016, Hon. John. L Phillips entered another Probate Order including the following findings:

a. "This court determined after a trial held on December 15, 2015 that the beneficiaries of The Simon L. Bernstein Amended and Restated Trust Agreement dated 7/25/12 (the "Trust") are Simon Bernstein's 'then living grandchildren'. Under that ruling, Simon's children -- including Eliot – are not beneficiaries of the Trust." (insert footnote explaining that the Trust is beneficiary of the Will").

b. The Court has already determined in the related matter of the Shirley Bernstein Trust that Eliot Bernstein should not be permitted to continue representing the interests of his minor children, because his actions have been adverse and destructive to his children's interest resulting in appointment of a guardian ad litem.

c. Accordingly, the Court appoints Diana Lewis to act as Guardian ad Litem to advance and protect the interests of Jo.B, Ja.B and D.B. as the guardian sees fit. The Guardian ad Litem will have full power and autonomy to represent the interests of the Children of Eliot Bernstein, subject to the jurisdiction and review of the court." (Ex. 11, Order entered 4/8/16, *Eliot Bernstein, et. al v. Theodore Stuart Bernstein, et al., No. 502015CP001162*)." **(Ex. 11, Probate Order entered 4/8/16)**

35. In this same Probate Order, Judge Philips admonished Eliot that the court intended to use its "*full measure of its coercive powers*" to ensure Eliot's, and anyone acting in concert with Eliot, non-interference with the guardian ad litem appointed for Eliot's children. (emphasis added). **(Ex. 11, Probate Order entered 4/8/16).** For purposes of this motion, the two orders attached as Ex. 10 and Ex. 11 are referred to as the "Probate Orders".

VI. THE ESTATE'S INTEREVENOR COMPLAINT

36. In its intervenor complaint, the Estate of Simon Bernstein, asserts that it has an interest in the policy because "Plaintiff cannot prove the existence of a Trust document; cannot prove that a trust was ever created; thus, cannot prove the existence of the Trust nor its status as purported beneficiary of the Policy. In the absence of a valid Trust and designated beneficiary, the Policy Proceeds are payable to the Petitioner [Estate]…..". **(Ex. 12 at ¶12, Estate's Intervenor Complaint).**

VII. THE INSURER'S INTERPLEADER ACTION

37. A copy of the Insurer's Interpleader Action is included in Movant's Appendix to its Statement of Undisputed Facts as **(Ex. 13, Insurer's Interpleader Action).** In its Interpleader Action, the Insurer alleges that it failed to pay the Bernstein Trust's death claim because the claimants could not produce an original or copy of an executed trust agreement, and because the Insurer received a letter from Eliot setting forth a potentially conflicting claim. **(Ex. 13 at ¶22).**

Respectfully submitted,

/s/ Adam Simon

Adam Simon, Esq.
#6205304
303 East Wacker Drive
Suite 2725
Chicago, Illinois 60601
(312) 819-0730
Attorney for Plaintiffs-Movants

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APPENDIX TO PLAINTIFFS', COUNTERDEFENDANTS AND THIRD PARTY DEFENDANTS STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

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Third-Party Defendants.

Movants, pursuant to Local Rule 56.1, submit the following appendix to their statement of uncontested material facts in support of their motion for summary judgment:

EXHIBIT #	DESCRIPTION
1	Affidavit of Ted Bernstein
2	Affidavit of Don Sanders
3	Affidavit of Lisa Friedstein
4	Affidavit of Jill Iantoni
5	Affidavit of Pam Simon
6	Affidavit of David Simon
7	Deposition of David Simon
8	Plaintiff's First Amended Complaint
9	Eliot Bernstein's Answer, Counterclaims, Cross-claims, and Third-party claims
10	Probate Order entered 12/15/15 by Hon. John L. Phillips
11	Probate Order entered 4/08/16 by Hon. John L. Phillips
12	Estate Intervenor Complaint
13	Insurer's Interpleader Complaint
14	Specimen Life Insurance Policy

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Cross-Defendant

and,

PAMELA B. SIMON, DAVID B.SIMON, both Professionally and Personally ADAM SIMON, both Professionally and Personally, THE SIMON LAW FIRM, TESCHER & SPALLINA, P.A., DONALD TESCHER, both Professionally and Personally, ROBERT SPALLINA, both Professionally and Personally, LISA FRIEDSTEIN, JILL IANTONI S.B. LEXINGTON, INC. EMPLOYEE DEATH BENEFIT TRUST, S.T.P. ENTERPRISES, INC. S.B. LEXINGTON, INC., NATIONAL SERVICE ASSOCIATION (OF FLORIDA), NATIONAL SERVICE ASSOCIATION (OF ILLINOIS) AND JOHN AND JANE DOES

Third-Party Defendants.

NOW COMES, the above-referenced, Counter-defendants, Cross-defendants, and Third-party defendants by and through their counsel Adam M. Simon, (collectively referred to as "Movants"), and respectfully submit this memorandum of law in support of their motion for summary judgment as to each and every one of Eliot Bernstein's counterclaims, cross-claims and third-party claims (collectively referred to as "Eliot's Claims").

I. INTRODUCTION

Movants shall demonstrate that all of Eliot's Claims fail as a matter of law for several related reasons. First, Eliot has not pled a claim to the Policy Proceeds as beneficiary, because he cannot. He was never named a beneficiary of the Policy Proceeds on the records of the Insurer and neither were his children. Next, Eliot's Claims are indirect relying instead on the propositions that the Estate of Simon Bernstein (the "Estate") is the beneficiary of the Policy Proceeds by default and that Eliot is a beneficiary of the Estate or a Simon Bernstein Testamentary Trust at issue in the Probate Actions. But, as Movants will show neither proposition is true, and as a result Eliot cannot plead a viable cause of action against Movants.

After sixty-one pages of allegations – violating both the rules of civil procedure and local rules requiring concise and plain statements of fact – Eliot finally sets forth seven counts styled as fraud, civil conspiracy, negligence, legal malpractice, abuse of process, breach of fiduciary duty and conversion. But, Eliot's Claims also share a fatal flaw, and that is he has not and cannot plead damages because he merely alludes to purported beneficial interests without providing any allegation of facts, or supporting documentation that show he is a beneficiary of either the Estate of Simon Bernstein, or the Simon Bernstein testamentary trust at issue in the Probate Actions. To the contrary, Eliot has lost standing to participate in the Probate Actions on his own behalf after it was determined that the testamentary documents at issue in the Probate Actions are in fact valid, genuine and enforceable. Judge John L. Philips also determined that Simon Bernstein's grandchildren are the beneficiaries of his Estate, and none of his children are beneficiaries, including Eliot. Eliot also lacks standing to participate in the Probate Actions on behalf of his children as the court appointed a guardian ad litem to act on their behalf after finding Eliot's actions in Florida to be "adverse and destructive" to his children's interests.

A separate basis for granting third-party defendants' motion for summary judgment was articulated by Judge St. Eve in her Order dismissing former third-party defendants, Tescher & Spallina. Judge St. Eve found that since Eliot faces no potential liability in the instant action, Rule 14 did not authorize Eliot to file third-party claims against any third-party defendant. So, this same reasoning also applies to the remaining third-party defendants. And with regard to the sole issue raised by the Insurer's interpleader action in the Northern District, Eliot has failed to produce any coherent set of facts, documentation or other evidence that Eliot or his children have ever been named a beneficiary of the Policy Proceeds on the records of the Insurer.

II. BACKGROUND

A. SIMON AND SHIRLEY BERNSTEIN AND THEIR ESTATES

Simon Bernstein, the insured and decedent in this matter, had a long career as a life insurance agent including owning and operating several insurance brokerages. Simon Bernstein was married to his spouse, Shirley, for fifty-two years prior to Shirley's death in 2010. Simon and Shirley Bernstein had five children, whose names in order of age are as follows: Ted Bernstein, Pamela Simon, Eliot Bernstein, Jill Iantoni, and Lisa Friedstein. All five of Simon Bernstein's children are now adults with children of their own. Simon and Shirley Bernstein had ten grandchildren from their five children. **(SoF ¶3, ¶6, ¶8, ¶9, ¶10)**. Simon Bernstein was the Insured under the Policy. On the day Simon Bernstein passed away in 2012, Heritage was the successor insurer to the insurance company that issued the Policy. **(SoF ¶11, ¶26).**

Initially, the Bernstein Trust filed an action for breach of contract against Heritage in the Circuit Court of Cook County. Heritage removed the action from Cook County Court to the Northern District of Illinois. Heritage then filed a counterclaim for interpleader, and named the Bernstein Trust, Eliot Bernstein, and certain banks named in the caption above as potential

competing claimants to the Policy Proceeds. With leave of court, Heritage deposited the Policy Proceeds with the Registry of the Court and was subsequently dismissed from the case. **(SoF ¶11, ¶37).** After being served, Eliot Bernstein appeared pro se and filed cross-claims, counter-claims, and third-party claims ("Eliot's Claims") naming the existing parties and many new third-parties. **(SoF ¶3, ¶25).** The Estate of Simon Bernstein was granted leave to intervene in August of 2014. The Estate's intervenor complaint alleges that if no other claimant can prove up their claim, then the Estate should take the Policy Proceeds by default. **(SoF ¶3, ¶25).**

B. THE PARTIES

Please see **SoF ¶1-¶25** for a review of the identity and status of the parties. [1]

C. THE POLICY AND POLICY PROVISIONS

The Policy was originally purchased from Capitol Bankers by the VEBA in December of 1982 to insure the life of Simon Bernstein and was issued as Policy No. 1009208. **(SoF ¶26).** The Policy provisions which set forth both the definitions of a beneficiary under the Policy, and the requirements for naming or changing a beneficiary of the Policy are the controlling factors in making the determination as to whom is the beneficiary of the Policy Proceeds. *Bank of Lyons v. Schultz*, 22 Ill.App.3d 410, 415, 318 N.E.2d 52, 57 (1st Dist. 1974) *citing* 2 Appelman, Insurance Law and Practice §921 (1966).

The Policy includes the Insurer's requirements for the Policy Owner to effectuate a change of beneficiary. With regard to changing the beneficiary, the Policy provides as follows:

> The Owner or any Beneficiary may be changed during the Insured's lifetime. We do not limit the number of changes that may be made. *To make a change, a written request, satisfactory to us, must be received at our Business Office.* The change will take effect as of the date the request was signed, even if the Insured dies before we receive it. Each

[1] Pursuant to Local Rule 56.1, Movants are concurrently filing their Statement of Uncontested Material Facts ("SoF") and Appendix of Exhibits thereto.

> change will be subject to any payment we made or other action we took before receiving the request. **(Ex. 14 at bates #JCK00103).** (emphasis added).

D. THE INSURED AND INSURER

Simon Bernstein was the Insured under the Policy. **(SoF, ¶26).** The Insurer of the Policy changed over the life of the Policy from time to time through succession. The Insurer has been previously dismissed from this case after having deposited the Policy Proceeds with the Registry of the Court. Prior to its dismissal, the Insurer did not dispute either the existence of the Policy or its liability for the Policy Proceeds following the death of the Insured. **(SoF ¶11, ¶37)**

E. THE POLICY PROCEEDS (THE "STAKE")

In the Insurer's Complaint for Interpleader, the Insurer represented that the net death benefit payable under the Policy was $1,689,070 (less an outstanding policy loan). **(Ex. 13, at ¶17).** No objections were made by any Party to this litigation regarding the amount of the Policy Proceeds that the Insurer deposited with the Registry of the Court. In short, the amount of the Policy Proceeds is undisputed. **(SoF ¶11).**

III. ARGUMENT

A. STANDARDS ON SUMMARY JUDGMENT

Summary judgment is appropriate when "there is no genuine issue as to any material fact" and the movant "is entitled to judgment as a matter of law." *Simon Bernstein Irrevocable Trust Dtd 6/21/95 v. Heritage Union Life Insurance Co., et al.* No. 13 C 3643 **(Dkt. #220)** citing *Spurling v. C & M Fine Pack, Inc.*, 739 F.3D 1055, 1060 (7TH Cir. 2014). The party seeking summary judgment has the burden of establishing that there is no genuine dispute as to any material fact. *Id* citing *Celotex Corp. v. Catrett*, 477 *U.S.* 317, 323 (1986). Only disputes "that might affect the outcome of the suit…will properly preclude the entry of summary judgment." "When the material facts are not in dispute….the sole question is whether the moving party is

entitled to judgment as a matter of law." *ANR Advance Transp. V. Int'l Bhd. Of Teamsters Local 710,* 153 F.3d 774, 777 (7th Cir. 1998). If full summary judgment is not warranted, the court may grant partial summary judgment. Fed R. Civ. P. 56(a). But, summary judgment is not warranted "if the evidence is such that a reasonable jury could return a verdict for the non-moving party," and the Court must "construe all facts and reasonable inferences in the light most favorable to the non-moving party. *Simon Bernstein Irrevocable Trust Dtd 6/21/95*, No. 13 cv 3643 citing *Liberty Lobby,* 477 U.S. 242, 255 (1986), *Carter v. City of Milwaukee*, 743 F.3d 540, 543 (7th Cir. 2014).

B. ELIOT DOES NOT PLEAD A CLAIM TO THE POLICY PROCEEDS, AND INSTEAD IS SHOPPING FOR AN ALTERNATIVE FORUM TO SEEK RELIEF HE HAS BEEN UNABLE TO OBTAIN IN THE PROBATE ACTIONS.

This motion for summary judgment does not seek a final determination that the Bernstein Trust exists and is entitled to the Policy Proceeds as beneficiary. Instead, this motion is confined to exposing the deficiencies with Eliot's Claims that entitle Movants to summary judgment as to those claims. Eliot's Claims fail to set forth any facts or documents in support of his spurious allegations that either he or his children were named beneficiaries of the Policy. Eliot's Claims relate almost exclusively to matters occurring in the Probate Actions and are devoted to seeking relief here that he was denied in Florida. Instead of pleading a claim to the Policy Proceeds at issue in the instant litigation, Eliot pleads claims sounding in fraud, negligence, breach of fiduciary duty, conversion, abuse of legal process, legal malpractice and civil conspiracy relating primarily to the Probate Actions. Eliot's Claims and his efforts to amend those claims are nothing more than blatant -- but futile -- forum-shopping.

None of the prayers for relief made for each of Eliot's Claims seek the Policy Proceeds. Instead, in section "(i)" of his prayer for relief, Eliot asks the court to seize all records regarding

the Policies. But, Eliot has all Parties' Rule 26 production of documents including the *Insurer's records*. And, Eliot had well over a year to conduct discovery. In short, this first prayer for relief is now moot because Eliot has had both access to the documents and records, and ample time to conduct discovery. **(Ex. 9, pg.68).**

In section "(ii)", Eliot asks for court costs to be paid by the Parties not the Policy Owners. This prayer for relief does not seek the Policy Proceeds. In section "(iii)", Eliot states that he has asked the Probate Court in Florida to remove Ted Bernstein, Pam Simon, Donald Tescher and Robert Spallina from acting in any fiduciary capacity regarding the Estates of Simon or Shirley and Eliot asks this court for the identical relief. First, Donald Tescher and Robert Spallina are no longer parties to this action as their motion to dismiss Eliot's claims was granted. **(SoF, ¶16, ¶17, and ¶22)** Second, this Court has no jurisdiction over the Estates of Simon and Shirley Bernstein as those matters are being administered and litigated in Palm Beach County, Florida. *Dragen v. Miller*, 679 F.2d 712 (7th Cir. 1982). Third, as shown herein, Eliot has no standing in the Estate matters. Fourth, Ted Bernstein was cleared of any wrongdoing and his role as Trustee was confirmed in the Probate Actions. (cite). But more to the point, once again Eliot's third prayer for relief does not seek the Policy Proceeds. **(Ex. 9, pg. 68).**

In section "(iv)" Eliot complains of parties abusing their fiduciary duty and demands that such parties be required to retain non-conflicted counsel. Although this prayer is vague, it appears to be an attempt to have counsel for Movants disqualified. This prayer for relief was previously denied by Judge Amy St. Eve when she denied Eliot's motion to disqualify counsel **(Dkt. #91).** And again, this prayer for relief also makes no mention of the Policy Proceeds. **(Ex. 9, pg.69).**

In section "(v)" Eliot asks the court to take judicial notice of the crimes alleged in his complaint and to use its court powers to "prevent any further crimes." This prayer for relief is so vague on its face that it would be impossible for this court to grant or enforce the relief sought. No specific redress is requested, and more to the point no demand is made for the Policy Proceeds. **(Ex. 9, pg.70).** In section "(vi)" Eliot asks for permission to obtain ECF access. Movants have been receiving Eliot's pleadings via ECF, and the ECF timestamps on Eliot's pleadings indicate he has access. In section (vii) Eliot asks for leave to amend his claims. None of these prayers for relief seek the Policy Proceeds. **(Ex. 9, pg.70).**

In section (viii), Eliot seeks $8 million, plus punitive damages, attorneys' fees and costs. Eliot's Claims contains no allegations of fact regarding the damages alleged that have any reasonable relation to the $8 million plus punitive damages award he seeks. And the amount he seeks certainly bears no relation to the amount of Policy Proceeds on deposit which is approximately $1.7 million. So Eliot's final prayer for relief seeking money damages does not request either a determination that Eliot or his children are beneficiaries of the Policy Proceeds, nor does it make a demand for an award of the Policy Proceeds. **(Ex. 9, ¶70).**

Eliot's Claims are also based in part on his erroneous assumption that the determination of the beneficiary of the Policy proceeds must be made in Florida by the Probate Court, instead of the Northern District of Illinois where the Insurer filed its Interpleader and deposited the Policy Proceeds. Eliot misapprehends the fact that the Policy Proceeds are not part of the Probate Actions because they are non-probate assets whose beneficiary is determined according to the life insurance contract, the Policy. The Policy Proceeds vested in the beneficiary of the Policy immediately upon the death of the insured. *Bank of Lyons v. Schultz,* 22 Ill.App.3d 410, 318 N.E.2d 52 (1st Dist. 1974). Further, this Court has exercised its jurisdiction from the outset

of this matter and it was left unchallenged by the Insurer or any other party. In fact, it was the Insurer that removed the action to the Northern District from the Circuit Court of Cook County, and in so doing, the Insurer alleged and invoked this court's jurisdiction over this matter pursuant to 28 U.S.C. §1335. **(SoF ¶40, and Ex. 12).** In addition, the matters and issued raised by Eliot all in involve the Probate Action in Florida, and the Federal Probate Exception precludes this court's jurisdiction over such matters. *Storm v. Storm,* 328 F.3d 941 (7th Cir. 2003). What is also conspicuously absent from Eliot's Claims is any set of facts or references to documentation in the Insurer's records that support a claim to the Policy Proceeds on Eliot's own behalf or that of his children. **(SoF ¶28-¶31).** In short, Eliot has not pled a conflicting claim to the Policy Proceeds such that this court could find that he or his children were named beneficiaries of the Policy on the records of the Insurer.

C. THE ESTATE OF SIMON BERNSTEIN HAS INTERVENED AND IS ADEQUATELY REPRESENTED.

Eliot's Claims make reference to the fact that the Estate of Simon Bernstein may be entitled to the Policy Proceeds. But as determined by the Probate Court, Eliot is not a beneficiary and has no standing to act on behalf of the Estate or participate at all in the Probate litigation in Florida. **(SoF, ¶33-¶34).** The Estate is already adequately represented in the instant litigation by its personal representative and local counsel. **(SoF, ¶25).** Also, the interests of Eliot's children in the Estate are now being represented solely by the guardian ad litem. **(SoF, ¶33-¶34)**.

D. THE RECENT ORDERS ENTERED IN THE PROBATE ACTIONS, BARRING ELIOT FROM THE ESTATE PROCEEDINGS AND STRIKING HIS PLEADINGS, ALSO EFFECT TO BAR ELIOT'S PRESENCE IN THE INSTANT LITIGATION ACCORDING TO THE DOCTRINE OF COLLATERAL ESTOPPEL.

Judge John L. Phillips in the Probate Actions entered the December, 2015 Order and the April, 2016 Orders which determined that the testamentary documents at issue in Probate Actions were valid and genuine. **(SoF, ¶33-¶34)**. The Probate Orders bar Eliot from the Probate Actions to represent his own interests, and appoint a guardian ad litem to represent the interests of Eliot's children in their parents' stead. Eliot has filed separate appeals of the Probate Orders. Despite Eliot's pending appeals, the doctrine of collateral estoppel applies, and acts to settle material issues in the instant litigation. The Probate Orders entered after trial include findings that (i) Eliot is not beneficiary of the Estate of Simon Bernstein; (ii) appoint a guardian ad litem for Eliot's children; and (iii) Eliot has no standing in the Probate Actions on behalf of himself, the Estate or his children.

In *Innkeepers Telemanagement v. Hummert*, the court set forth the four elements that must be satisfied before collateral estoppel may be applied: (i) the issue sought to be precluded must the same as that involved in the prior action, (ii) the issue must have been actually litigated, (iii) the determination of the issue must have been essential to the final judgment, and iv) the party against whom estoppel is invoked must be fully represented in the prior action. *Innkeepers Telemanagement v. Hummert Management Group*, 841 F.Supp. 241 (N.D.Ill., 1993).

Here, all four elements apply. First, the issue Movants seek resolve by the application of collateral estoppel pertains to Eliot's standing vis-à-vis the Estate of Simon Bernstein. Plaintiffs' seek to have this court declare that Eliot is collaterally estopped from (i) asserting any claims here based on his now debunked theory that Eliot is a beneficiary of the Estate or a Simon

Bernstein testamentary trust at issue in the Probate Actions; (ii) asserting claims on behalf of the Estate for the same reasons; and (iii) asserting any claims on behalf of his children as they are now represented by a guardian ad litem in the Estate matters. Both Probate Orders on their face note that the determinations were made following a trial on the issues. Eliot appeared at the trial and chose to represent himself pro se'. The trial leading to the Probate Orders is sufficient to satisfy both the "actually litigated" and "fully represented" elements required to apply the doctrine of collateral estoppel. *Id* at pg. 246.

Collateral estoppel is also appropriate in situations such as here where not all the parties asserting estoppel were parties in the previous action, so long as the party to be estopped was a party to that action. Here, Eliot is the party to be estopped and Eliot was a party and appeared pro se' in the Probate Actions including at the trial leading to the final orders. *Id* at p. 246 citing Blonder-Tongue Lab., Inc. v. Univ. of Ill. Found., 402 U.S. 313, 349-350, 91 S.Ct. 1434, 1453, 28 L.E.2d 788 (1971). The fact that these final orders are on appeal does not prevent the application of collateral estoppel. *Innkeepers Telemanagement*, 841 F.Supp. at p.246 citing *Cohen v. Bucci*, 103 B.R. 927, (N.D.Ill. 1989), aff'd 905 F.2d 1111 (7th Cir. 1990). See also, the following string of citations from *Hazel v. Curtis-Wright Corp.*, 1992 WL 436236 (S.D. Ind., 1992):

> The overwhelming majority rule in the federal courts is that a judgment may be given res judicata effect during the pendency of an appeal. See, e.g., *Erebia v. Chrysler Plastic Products Corp.*, 891 F.2d 1212, 1215 n. 1 (6th Cir.1989); *Robi v. Five Platters, Inc.*, 838 F.2d 318, 327 (9th Cir.1988); *Blinder, Robinson & Co. v. Securities and Exchange Commission*, 837 F.2d 1099, 1104 n. 6 (D.C.Cir.1988), cert. denied, 488 U.S. 869 (1988); *Wagner v. Taylor*, 836 F.2d 596, 598 (D.C.Cir.1987); *Taunton Gardens Co. v. Hills*, 557 F.2d 877, 879 n. 2 (1st Cir.1977); *Lee v. Criterion Insurance Co.*, 659 F.Supp. 813, 819–20 (S.D.Ga.1987); *Cohen v. Bucci*, 103 B.R. 927, 931 (N.D.Ill.1989), aff'd, 905 F.2d 1111 (7th Cir.1990); see also *18 C. WRIGHT, A. MILLER, E. COOPER, FEDERAL PRACTICE AND PROCEDURE §* 4433 AT 308 (West 1981) ("established rule in the

federal courts is that a final judgment retains all of its res judicata consequences pending decision of the appeal").

Moreover, the Seventh Circuit has previously subscribed to the majority rule that res judicata can operate despite a pending appeal. See *Kurek v. Pleasure Driveway & Park District*, 557 F.2d 580, 595 (7th Cir.1977), vacated on other grounds, 435 U.S. 992 (1978); see also *Grantham v. McGraw–Edison Co.*,444 F.2d 210, 217 (7th Cir.1971) ("[t]he pendency of the ... late filed appeal.... did not detract from the conclusive effect of ... judgment"). In *Kurek* the court recited that, the federal rule is that the pendency of an appeal does not suspend the operation of an otherwise final judgment as ... collateral estoppel, unless the appeal removes the entire case to the appellate court and constitutes a proceeding de novo. I*d*. at 596 (quoting 1B MOORE'S FEDERAL PRACTICE ¶ 0.416[3] at 2254 (2d ed. 1974).

E. Movants' motion as to all Third-Party Defendants added to this litigation by Eliot's Claims, should also be granted for the reasons set forth by Judge Ste. Eve in her Order dismissing Tescher & Spallina.

. The upshot of Judge St. Eve's Order dismissing Eliot's Claims as to Tescher & Spallina was that Eliot was not an original defendant to Plaintiff's First Amended Complaint, but instead was brought into this litigation by virtue of his appearance in response to the Insurer's interpleader action. As such, Judge St. Eve noted, Eliot faces no liability in this action. And "Rule 14 limits a defendant to joining third-parties that share or supersede the defendant's liability to the plaintiff." (**SoF 16. Dkt. #106,at p.3,** March 17, 2014 Order citing *Metlife Investors USA Ins. Co. v. Ziedman*, 734 F.Supp2d 304, 310 (E.D.N.Y. 2010).

Judge St. Eve dismissed Tescher & Spallina pursuant to Rule 14, finding Eliot was not authorized to bring his third-party claims against Tescher & Spallina in the instant litigation. The causes of action brought against Tescher & Spallina are identical to the ones brought against the remaining third-party defendants. Thus, all of the third-party defendants are in the same posture as Tescher & Spallina were prior to their dismissal, and are entitled to summary judgment for the same reasons set forth by Judge St. Eve.

F. Eliot's Claims must fail he has failed to allege sufficient facts to prove damages, a necessary element to all of Eliot's Claims.

Because Eliot's prayers for relief do not seek the Policy Proceeds, Eliot has pled no claim to the Policy Proceeds. It has recently been determined by the Probate Orders that Eliot has no beneficial interest in the Estate, and has no standing in the Probate Actions involving the Estate. It follows that Eliot lacks standing to pursue claims on the behalf of the Estate in the instant litigation as well. And, Eliot has no standing to represent the interests of his children in the Estate since a guardian ad litem has now been appointed to act on their behalf. Each of Eliot's seven causes of action requires proof of the element of damages. Because Eliot cannot show that he sustained damages or that he has standing to assert damages on behalf of his children or the Estate, all of Eliot's Claims fail.

Plaintiff's claims for fraud dismissed for failing to show fraud caused damages. *U.S for use of Ascher Brothers Co. v. American Home Assurance Co.*, 2013 WL 1338020 (N.D.ILL, 2003). Plaintiff's claim for legal malpractice dismissed for failing to show damages. *Northern Illinois Emergency Physicians v. Landau et. al., 216 Ill.2d 294, 837 N.E.2d 99, 297 Ill.Dec. 319* (Ill. 2005). Plaintiff's claim for breach of fiduciary duty dismissed for failing to show damages. *Sadler v. Retail Properties of America, Inc.*, 2014 WL 2598804 (not reported in F. Supp.2d), citing *Erica P. John Fund, Inc. v. Halliburton Co.*, —— U.S. ——, 131 S.Ct. 2179, 2183 (2011), *Lutkauskas v. Ricker*, 998 N.E.2d 549, 560 (1st Dist., 2013).

Plaintiff's claim for legal malpractice dismissed for failing to show damages. *Northern Illinois Emergency Physicians v. Landau et. al.*, 216 Ill.2d 294, 837 N.E.2d 99, 297 Ill.Dec. 319 (Ill. 2005). And, like legal malpractice claims, common law negligence claims require proof of breach of a duty of reasonable care, and damages caused by that breach. A complainant must have suffered an injury or damages in order to sustain a cause of action for negligence. *Browning*

v. Eckland Consultants, Inc., 2004 WL 2687961 (1st Dist. 2004), *Chandler v. Illinois Central Railroad. Co.*, 207 Ill.2d 331, 798 N.E.2d 724, 278 Ill.Dec. 340 (Ill. 2003).

Eliot's cause of action for conversion fails for a similar reason in that one essential element to sustain a claim of conversion is to show an immediate unfettered right to the property allegedly converted. *Edwards v. City of Chicago*, 389 Ill. App. 3d 350, 353, 905 N.E.2d 897, 900, 329 Ill.Dec. 59, 62 (1st Dist. 2009). Eliot's conversion claim does not even contain an allegation of a specific asset or piece of property that was converted much less show an unfettered right of ownership to such property.

Eliot's Claim for abuse of process likewise fails. The Orders entered in the Probate Action have conclusively determined that Eliot had no property rights in the Estate or the testamentary trusts, and that the testamentary documents that Ted Bernstein submitted to the court were genuine, valid and binding. Unfortunately, the administration of those estates has been mired in litigation for the last three to four years. But, the elements for a claim of abuse of legal process is that (i) the allegedly abusive proceedings must have been instituted for an improper purpose, and (ii) there must have been an improper act in the prosecution of the proceedings. *Kumar v. Bornstein*, 354, Ill.App.3d, 159, 820 N.E.2d, 1167, 290 Ill.Dec. 100 (1st Dist. 1972), *Holiday Magic, Inc. v. Scott*, 4 Ill.App.3d 962, 282 N.E.2d 452 (1st Dist. 1972).

The purpose behind the Probate Actions instituted by Ted Bernstein and Teshcer & Spallina in Florida was to submit the testamentary documents of Simon and Shirley Bernstein to probate in Florida and to administer their estates and trusts. Here, the proceedings were filed by the named beneficiary of a life insurance policy to pursue a death claim against a life insurer for the Policy Proceeds. Additionally, after trial in the Probate Actions, Ted Bernstein was cleared of any wrong-doing, and none of the other remaining third-party defendants were present at the

trial or mentioned in the Probate Orders. So, Eliot's abuse of legal process claims fail for similar reasons in that Eliot has not and cannot show an improper purpose for the filing of the proceedings alleged in Eliot's Claim for abuse of process. Also, under Illinois law, elements for abuse of process are strictly construed because the tort is disfavored. *Id.*

Eliot's final cause of action for civil conspiracy fails to adequately identify what the underlying tort or wrongful act of the conspirators was exactly. Presumably, Eliot is alleging a conspiracy involving two or more persons committing one of the other counts pled by Eliot. Since Movants have shown that none of those underlying counts can survive summary judgment, the conspiracy count must likewise fail.

To sum up, Eliot's Claims set forth no direct claims on his own behalf or on behalf of his children to the Policy Proceeds. Eliot has no standing to make a claim on behalf of the Estate. It has been determined in the Probate Action that Eliot is not a beneficiary of the Estate. The allegations of loss by Eliot – as convoluted as they are – all rely on the supposition that Eliot has a beneficial interest in the Estate and that the actions of those Eliot has sued somehow deprived him of the property he would have inherited. So, the fatal problem for Eliot is that it has been determined that he is not a beneficiary of the Estate in the first place. In other words, Eliot has no viable claim against Movants because he has not and cannot show that Movants have deprived Eliot of anything.

G. A SEPARATE AND DISTINCT REASON EXISTS FOR GRANTING SUMMARY JUDGMENT IN FAVOR OF STP ENTERPRISES, INC. AS TO ELIOT'S CLAIMS, AND THAT IS ELIOT HAS MADE NO ALLEGATIONS OF WRONGDOING, -- OR RIGHT-DOING FOR THAT MATTER – PERTAINING TO STP. STP IS SIMPLY ABSENT.

Eliot's Claims were filed on September 22, 2013, over two and one-half years ago. Eliot had over a year to conduct discovery, and discovery has been closed for over one year. Yet, Eliot's Claims only reference STP in a preliminary identifying, and jurisdictional paragraphs.

The first 136 paragraphs of Eliot's Claims contain the allegations of fact that purportedly support his Claims which are then set out in conclusory fashion and simply lump all counterdefendants, cross-defendants, and third-party defendants together without delineating which parties are the proper party to each specific claim. For example, Eliot's Claims as written name all third-party defendants as being liable for his Legal Malpractice Claim, yet several of these same parties are not even attorneys or law firms, much less Eliot's attorney. Eliot does not allege that STP is an attorney or law firm yet it is named a third-party defendant to his legal malpractice claim. In fact, STP appears nowhere in the 136 paragraphs of factual allegations, Eliot has failed to set forth any facts at all attributable to STP. Thus, summary judgment is certainly warranted in favor of STP.

CONCLUSION

For all of the foregoing reasons, Movants' motion for summary judgment as to each and every one of Eliot's Claims should be granted in its entirety.

Respectfully Submitted,

/s *Adam M. Simon*

Adam M. Simon (#6205304)
303 E. Wacker Drive, Suite 2725
Chicago, IL 60601
Phone: 312-819-0730
Fax: 312-819-0773
E-Mail: asimon@chicagolaw.com
Attorney for Movants

EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SIMON BERNSTEIN IRREVOCABLE INSURANCE TRUST DTD 6/21/95, by Ted S. Bernstein, its Trustee, Ted S. Bernstein, an individual, Pamela B. Simon, an individual, Jill Iantoni, an individual and Lisa S. Friedstein, an individual.

Plaintiff,

v.

HERITAGE UNION LIFE INSURANCE COMPANY,

Defendant,

HERITAGE UNION LIFE INSURANCE COMPANY

Counter-Plaintiff

v.

SIMON BERNSTEIN IRREVOCABLE TRUST DTD 6/21/95

Counter-Defendant

and,

FIRST ARLINGTON NATIONAL BANK as Trustee of S.B. Lexington, Inc. Employee Death Benefit Trust, UNITED BANK OF ILLINOIS, BANK OF AMERICA, Successor in interest to LaSalle National Trust, N.A., SIMON BERNSTEIN TRUST, N.A., TED BERNSTEIN, individually and as purported Trustee of the Simon Bernstein

Case No. 13 cv 3643
Honorable John Robert Blakey
Magistrate Mary M. Rowland

Irrevocable Insurance Trust Dtd 6/21/95, and ELIOT BERNSTEIN

Third-Party Defendants.

ELIOT IVAN BERNSTEIN,

Cross-Plaintiff

v.

TED BERNSTEIN, individually and as alleged Trustee of the Simon Bernstein Irrevocable Insurance Trust Dtd, 6/21/95

Cross-Defendant

and,

PAMELA B. SIMON, DAVID B.SIMON, both Professionally and Personally ADAM SIMON, both Professionally and Personally, THE SIMON LAW FIRM, TESCHER & SPALLINA, P.A., DONALD TESCHER, both Professionally and Personally, ROBERT SPALLINA, both Professionally and Personally, LISA FRIEDSTEIN, JILL IANTONI S.B. LEXINGTON, INC. EMPLOYEE DEATH BENEFIT TRUST, S.T.P. ENTERPRISES, INC. S.B. LEXINGTON, INC., NATIONAL SERVICE ASSOCIATION (OF FLORIDA), NATIONAL SERVICE ASSOCIATION (OF ILLINOIS) AND JOHN AND JANE DOES

Third-Party Defendants.

AFFIDAVIT OF TED BERNSTEIN

I, Ted Bernstein, being duly sworn under oath, deposes and states as follows:

1. I am a resident of the City of Boca Raton, County of Palm Beach, State of Florida and am over the age of 18. If I were called and sworn as a witness in the above-captioned matter I could competently and voluntarily testify to the facts set forth in this Affidavit based upon my personal knowledge.

2. My legal name is Ted Stuart Bernstein. I most often go by the name Ted Bernstein. I am also known as Ted S. Bernstein. I have also been referred to by the nickname "Theo" by friends and family.

3. I have been employed in the life insurance industry since 1980. I have been a licensed life insurance agent in Illinois since at least 1980, and in Florida since 2000.

4. When I use the term "Affidavit of Don Sanders" I mean that certain affidavit executed by Don Sanders, Assistant Vice President of Operations for Jackson National Life Insurance Company on April 8, 2014.

5. When I use the term "Capitol Bankers", I mean Capitol Bankers Life Insurance Company.

6. When I use the term "Consenting Children", I mean collectively four of the five adult children of Simon Bernstein, whom are Ted Bernstein, Pamela Simon, Jill Iantoni, and Lisa Friedstein.

7. When I use the term "Heritage", I mean Heritage Union Life Insurance Company.

8. When I use the term "Jackson", I mean Jackson National Life Insurance Company.

9. When I use the term "Insurer", I mean the life insurance company that was the insurer on the risk for the Policy, which started as Capitol Bankers but changed through succession from time to time.

10. When I use the term "Policy", I mean Capitol Bankers Life Insurance Policy No. 1009208 insuring the life of Simon Bernstein.

11. When I use the term "Insured", I mean Simon Bernstein.

12. When I use the term "Owner", I mean the owner of the Policy as reflected on the Insurers' records from time to time.

13. When I use the term "Policy Proceeds", I mean the amount that was payable by the Insurer under the Policy upon the death of the insured.

14. When I use the term "Proceeds on Deposit", I mean the amount that was actually deposited by the Insurer with the Registry of the Court pursuant to the Insurers' Complaint for Interpleader.

15. When I use the term "Policy Records", I mean the records of the Insurer relating to the Policy as produced by the Insurer during the Litigation.

16. When I use the term "Litigation", I mean the above-captioned litigation.

17. When I use the term "VEBA", I am referring to the S.B. Lexington Employee Death Benefit Trust.

18. I am currently employed as President of Life Insurance Concepts, Inc. ("LIC"), a life insurance brokerage based in Boca Raton, FL.

19. I have been employed by LIC (or its predecessor) for the past 15 years, and have been employed in the life insurance industry for approximately 30 years.

20. From 2001 to 2012, my father, Simon Bernstein and I worked together at LIC, and shared office space in Boca Raton, FL.

21. Simon Bernstein Irrevocable Insurance Trust Dtd 6/21/95 ("Bernstein Trust"), is an irrevocable life insurance trust formed in Illinois as further described below. The Bernstein Trust is the original Plaintiff that first filed this action in the Circuit Court of Cook County. The Insurer then filed a notice of removal to the Northern District of Illinois. The Bernstein Trust has also been named as a Counter-defendant to the EB Claims. The Bernstein Trust is represented by counsel, Adam M. Simon.

22. Bank of America, N.A. ("Bank of America"), was named a party by virtue of Heritage's counterclaim for Interpleader. Bank of America was terminated as a co-Plaintiff on January 13, 2014, and the Insurer voluntarily dismissed Bank of America as a Third-Party Defendant on February 14, 2014.

23. Eliot Bernstein ("Eliot") was named a Party by virtue of Heritage's counterclaim for Interpleader, and Eliot filed third-party claims against several Parties described herein making Eliot a Third-Party Plaintiff as well. Eliot is the third adult child of Simon Bernstein. Eliot is representing himself, and/or his children, pro se in this matter.

24. United Bank of Illinois, was named as a Third-Party Defendant in Heritage's counterclaim for Interpleader. United Bank of Illinois has never filed an appearance or answer.

25. I, Ted Bernstein, as Trustee, of the Bernstein Trust retained Plaintiff's counsel and initiated the filing of this Action. I am is also a co-Plaintiff, individually, and has been named as a Third-Party Defendant to the Eliot's Claims. I am the eldest of the five adult children of Simon Bernstein. I am represented by counsel, Adam M. Simon.

26. First Arlington National Bank was named as a Third-Party Defendant by virtue of Heritage's counterclaim for Interpleader. First Arlington National Bank was never served by Heritage, and instead Heritage served JP Morgan Chase Bank as First Arlington Bank's alleged successor and JPMorgan Chase Bank was substituted as a party in place of First Arlington National Bank on 10/16/2013. **(*See* ¶31 below).**

27. Lisa Sue Friedstein is a co-Plaintiff and has been named as a Third-Party Defendant to the Eliot's Claims. Lisa Sue Friedstein is the fifth adult child of Simon Bernstein. Lisa Sue Friedstein is represented by counsel, Adam M. Simon.

28. Jill Marla Iantoni is a co-Plaintiff and has been named as a Third-Party Defendant to Eliot's Claims. Jill Marla Iantoni is the fourth adult child of Simon Bernstein. Jill Marla Iantoni is represented by counsel, Adam M. Simon.

29. Pamela Beth Simon is a co-Plaintiff and has been named as a Third-Party Defendant to the EB Claims. Pamela Beth Simon is the second adult child of Simon Bernstein. Pamela Beth Simon is represented by counsel, Adam M. Simon.

30. Heritage is an Insurer as defined above. Heritage was terminated as a party on 2/18/2014 when the court granted Heritage's motion to dismiss itself from the Interpleader litigation after having deposited the Policy Proceeds with the Registry of the Court.

31. J.P. Morgan Chase Bank, N.A., ("J.P. Morgan") was named as a Third-Party Defendant by virtue of Heritage's counterclaim for Interpleader. In its claim for Interpleader, Heritage named J.P. Morgan Chase Bank, N.A., as a successor to First Arlington National Bank (described above). J.P. Morgan Chase Bank, N.A. filed an answer to Heritage's counterclaim for Interpleader in which it disclaimed any interest in the Policy Proceeds. J.P. Morgan then filed a motion for judgment on the pleadings to have itself dismissed from the litigation as party and the court granted the motion. As a result, J.P. Morgan was terminated as a party on March 12, 2014.

32. William Stansbury filed a motion to intervene in this action, but his Motion to Intervene was denied and he was terminated as a non-party intervenor on January 14, 2014.

33. Adam M. Simon is counsel for the Bernstein Trust and the Consenting Children as defined below. Adam M. Simon is not counsel for Eliot Bernstein whom has chosen to represent himself Pro Se in this matter. Adam M. Simon was named a Third-Party Defendant to Eliot's Claims, and represents himself with regard to Eliot's claims. Adam M. Simon is the brother-in-law of Pamela Beth Simon, and the brother of David B. Simon.

34. National Service Association, Inc. (of Illinois) was a corporation owned by the decedent, Simon Bernstein and was named a Third-Party Defendant to Eliot's Claims. According to the public records of the Secretary of State of Illinois, National Service Association, Inc. (of Illinois) was dissolved in October of 2006. **(*See* Ex. 21)**

35. Donald R. Tescher, Esq. was named a Third-Party Defendant by virtue of the EB Claims. Donald R. Tescher is a partner of in the firm of Tescher & Spallina, P.A. Donald R. Tescher was terminated as a party to this matter when the court granted his motion to dismiss as to Eliot's Claims on March 17, 2014.

36. Tescher and Spallina, P.A. is a law firm whose principal offices are in Palm Beach County, FL. Tescher and Spallina, P.A. was named a Third-Party Defendant to Eliot's Claims. Tescher & Spallina, P.A. Donald R. Tescher was terminated as a party to this matter when the court granted his motion to dismiss as to the Eliot's Claims on March 17, 2014.

37. The Simon Law Firm was named a Third-Party Defendant to Eliot's Claims. The Simon Law Firm is being represented by counsel, Adam M. Simon.

38. David B. Simon is the husband of Pamela Beth Simon, and the brother of counsel, Adam M. Simon and was named a Third-Party Defendant to Eliot's Claims. David B. Simon is being represented by counsel, Adam M. Simon.

39. S.B. Lexington, Inc. was a corporation formed by Simon Bernstein. According to the records of the Secretary of State of Illinois, S.B. Lexington, Inc. was voluntarily dissolved on April 3, 1998. **(*See* Ex. 9).**

40. S.B. Lexington, Inc. Employee Death Benefit Trust (the "VEBA Trust") was named a Third-Party Defendant to Eliot's Claims, and was a Trust formed by Simon Bernstein in his role as principal of S.B. Lexington, Inc. The VEBA Trust was formed pursuant to I.R.S. Code Sec. 501(c)(9) as a qualified Employee Benefit Plan designed to provide a death benefit to certain key employees of S.B. Lexington, Inc. The VEBA was dissolved in 1998 upon dissolution of S.B. Lexington, Inc.

41. Robert Spallina, Esq. was named a Third-Party Defendant to Eliot's Claims. Robert Spallina is a partner of in the firm of Tescher & Spallina, P.A. Robert Spallina was terminated as a party to this matter when the court granted his motion to dismiss as to Eliot's Claims on March 17, 2014.

42. National Service Association, Inc. (Florida) was named a Third-Party Defendant to Eliot's Claims. According to the records of the Secretary of State of Florida, National Service Association, Inc. (Florida) was a Florida corporation and was dissolved in 2012. **(***See* **Ex. 22)**

43. Benjamin Brown as Curator of The Estate of Simon Bernstein filed a motion to intervene in this litigation. The court granted the motion to intervene on July 28, 2014, and as a result the Estate became a third-party claimant in the litigation.

44. Subsequently, Brian O'Connell as successor Curator and Administrator Ad Litem of the Estate of Simon Bernstein filed a motion to substitute for Benjamin Brown, and the court granted the motion November 3, 2014.

45. According to the Policy Records, the Policy was issued by Capitol Bankers in 1982. I have reviewed and made myself familiar with the Policy Records which start with bates no. JCK000001 and end at bates no. JCK001324.

46. I have also reviewed and made myself familiar with Plaintiff's document production made pursuant to Fed. R. Civ. P. 26. A true, accurate and complete set of copies of those documents were served upon the other parties to this Litigation and were stamped with bates no. BT000001-BT000112.

47. Following the death of Simon Bernstein, I participated in and conducted diligent searches of Simon Bernstein's home, office and condominium all located in Palm Beach County, Florida. All of the records I located pertaining to the Policy and/or Bernstein Trust were turned over to Simon Bernstein's attorneys, whose names are Robert Spallina and Donald Tescher.

48. I am aware that the documents produced by Plaintiffs in this matter also contain documents located by David Simon and Pamela Simon in their offices in Chicago, Illinois.

49. As of the date of this Affidavit, no documents that I am aware of have been located and/or produced in this Litigation by any Party that appear to be the original Policy contract.

50. As of the date of this Affidavit, no documents that I am aware of have been produced in this Litigation by any Party that appear to be executed originals or executed copies of:

(a) the "S.B. Lexington Employee Death Benefit Trust"; or
(b) the "Simon Bernstein Irrevocable Insurance Trust dated June 21, 1995", or
(c) any purported trust named the "Simon Bernstein Trust, N.A.".

51. From my review of the records, on the date of issuance the sum insured (or death benefit) of the Policy was $2 million. **(***See* **Ex. 5 at Schedule Page, bates no. JCK001021).**

52. The Insurer produced a document that is titled "Financial Activity from Issue" and references the Policy number. **(***See* **Ex. 1.)**

53. The financial activity report produced by Insurer indicates that the amount of the Policy Proceeds at the time of the Insured's death was $1,689,070.00. **(**See **Ex. 1, at bates no. JCK0010201).**

54. Plaintiffs have submitted a copy of the receipt from the Registry of the Court for the Northern District of Illinois (the "Registry") which reflects a deposit of the Policy Proceeds, a total of $1,703,567.09 deposited by the Insurer on June 26, 2013. **(***See* **Ex. 2).**

55. According to the receipt, this deposit represented the Policy Proceeds of $1,689,070.00, less a deduction for a policy loan, plus interest paid from the date of Simon Bernstein's death until the date of deposit with the Registry. I concur with the calculation of the Policy Proceeds and that the amount reflected on the receipt evidences the Insurers payment of the Policy proceeds pursuant to its Interpleader Action. **(***See* **Ex. 2)**

56. According to the Part I of the application for the Policy, the Policy Owner at issuance was "First Arlington National Bank, Trustee of S.B. Lexington Employee Death Benefit Trust". **(***See* **Ex. 3)**

57. According to Part I of the application, the beneficiary at issuance was designated as follows: "First Arlington National Bank, Trustee of S.B. Lexington Employee Death Benefit Trust". **(***See* **Ex. 3)**

58. According to Part I of the application, Simon Bernstein's employer at the time of issuance was S.B. Lexington, Inc. and his title was listed as Chairman of the Board. **(***See* **Ex. 3)**

59. During the application process, the Insurer conducted a routine underwriting investigation of Simon Bernstein prior to approving his policy. Part of that investigation was conducted by a company called Equifax, which is a company widely used in the insurance industry for underwriting investigations. In the Equifax report, the purpose of the insurance being provided by the Policy was stated as follows: "The beneficiary of this policy is the First Arlington National Bank, trustee of the S.B. Lexington, Inc. employee death benefit trust. The insurance will be paid to the trust, and the trust will determine the manner in which the benefits are to be paid and to whom it will be paid. Normally, benefits are paid to family members." **(***See* **Ex. 20)**

60. In 1982, the year the Policy was issued, I shared office space with Simon Bernstein in Chicago, IL and can confirm that at that time, Simon Bernstein was employed by S.B. Lexington, Inc., which was a life insurance brokerage located in Chicago, IL.

61. In the early 1980's, while I was sharing office space with Simon Bernstein and S.B. Lexington, Inc., I was a licensed insurance agent and participated in the marketing of qualified employee benefit plans for closely held corporations. The plans were qualified as Voluntary Employee Benefit Associations under I.R.S. Code Sec. 501(c)(9). The S.B. Lexington VEBA was designed to insure the lives of S.B. Lexington employees and the ultimate beneficiaries of the death benefit was each insured employee's designated beneficiary.

62. Simon Bernstein whom was also a licensed insurance agent also marketed the VEBA Plans on behalf of S.B. Lexington, Inc.

63. In my experience as an insurance agent, and more specifically in my experience with the sales of life insurance policies issued through a Voluntary Employee Benefit Association, the original of the life insurance policy would be delivered by the insurer to the insurance agent whom would then deliver it to the policy to the owner of the policy as listed on the application. On the application, the initial owner was listed as First Arlington National Bank as Trustee for the S.B. Lexington Employee Death Benefit Trust.

64. In late 1982, First Arlington National Bank was located in Arlington Heights, Illinois. First Arlington National Bank was the Trustee of the VEBA and was thus acting on behalf of the VEBA as Owner of the Policy. In my experience the insurer would have delivered the original Policy to the agent whom would then deliver the Policy to the original Owner. The agent whom signed the application for the Policy was my father Simon Bernstein whose offices were located in Chicago, Illinois. The delivery of the Policy to the Owner would have occurred in Arlington Heights, Illinois.

65. A document produced by Plaintiffs is a copy of a form entitled S.B. Lexington, Inc. Employee Death Benefit Plan and Trust Beneficiary Designation for plan member, Simon Bernstein (the "VEBA Beneficiary Designation"). (*See* **Ex. 4**)

66. Having worked for my father and with my father for many years, I have seen his signature on a multitude of occasions and am very familiar with it. I recognize the two signatures on **Ex. 4** as the signatures of my father, Simon Bernstein.

67. The VEBA Beneficiary Designation form is dated "8-26-95", and in it Simon Bernstein designates the "Simon Bernstein Irrevocable Insurance Trust" as his beneficiary to receive the death benefit under the VEBA. (*See* **Ex. 4**)

68. A document bearing bates no. JCK1098-JCK1117 produced by the Insurer is a specimen policy form for the Policy. On page JCK001099, the specimen policy includes the product name "CURRENT VALUE LIFE". A document produced by the Insurer bearing bates no. JCK001021 is a copy of the Schedule Page that was included with the Policy. The Schedule Page indicates the Policy was a "Current Value Life" plan issued on December 27, 1982, insuring the life of Simon Bernstein with a "sum insured" of $2 million. (*See* **Ex. 5**).

69. A document produced by the Insurer bearing bates no. JCK001023 through JCK001024 is a copy of a Current Value Life, Statement of Policy Cost and Benefit Information which is an illustration of projected values and benefits of the Policy. This Statement of Policy Cost and Benefit Information indicates on its face that it was produced on the issue date of the Policy, December 27, 1982. (*See* **Ex. 6**).

70. On or about June 5, 1992, a letter was submitted on behalf of the Policy Owner informing the Insurer that LaSalle National Trust was being appointed as successor trustee. On June 17, 1992, the Insurer acknowledged the change of ownership and designated the Policy Owner on its records as LaSalle National Trust, N.A., as Successor Trustee. (*See* **Ex. 7**).

71. The Policy records indicate that on or about November 27, 1995, Capitol Bankers received a "Request Letter" signed by LaSalle National Trust, N.A. in their capacity as Trustee, as Policy Owner, and the Request Letter contained the following requested changes to the Policy:

(a) LaSalle National Trust, N.A. as Trustee was designated as the primary beneficiary of the Policy; and
(b) The Simon Bernstein Irrevocable Insurance Trust Dated June 21, 1995 was designated as the contingent beneficiary. (*See* **Ex. 8**)

72. Though the name of the Trust on the Request Letter was set forth as stated in Par. 69(b) above, it was apparently abbreviated upon input into the Insurer's systems as Simon Bernstein Ins. Trust Dated 6/21/95. **(*See* Ex. 8)**

73. On November 27, 1995, Capitol Bankers sent correspondence to LaSalle National Trust N.A., as Successor Trustee acknowledging the changes in beneficiaries. **(*See* Ex. 8)**

74. On April 3, 1998, S.B. Lexington was voluntarily dissolved. **(*See* Ex. 9)**

75. Upon the dissolution of S.B. Lexington, Inc., the VEBA was also dissolved and the ownership of the Policy was changed in April of 1998. According to the Policy Records and the Aff. of Don Sanders, in April of 1998, LaSalle National Trust, as successor Trustee submitted a change of owner which designated Simon Bernstein as the Owner of the Policy. **(*See* Aff. of Don Sanders at ¶61 and Ex. 10)**

76. After reviewing the Policy Records, and the Affidavit of Don Sanders, I concur with Don Sanders that on the date of death of Simon Bernstein, the Owner of the Policy was Simon Bernstein, the primary beneficiary was designated as LaSalle National Trust, N.A. as Successor Trustee, and the Contingent Beneficiary was designated as Simon Bernstein Irrevocable Insurance Trust dated June 21, 1995. **(*See* Ex. 8 and Aff. of Don Sanders, ¶56)**

77. According to the Insurer's pleading of its Interpleader Action, following the death of Simon Bernstein, the Insurer received conflicting claims to the death benefit proceeds. The Insurer received claims on behalf of the Simon Bernstein Irrevocable Insurance Trust dated June 21, 1995 and a conflicting claim in the form of a letter from Eliot Bernstein. **(*See* Ex. 25 at p. 3)**

78. Eliot Bernstein's wife is named Candice Bernstein, and they have three children named Joshua Bernstein, Jacob Bernstein, and Daniel Bernstein.

79. According to the Policy Records and Aff. of Don Sanders, no one named Eliot Bernstein was ever designated as a primary or contingent beneficiary of the Policy. **(Aff. of Don Sanders at ¶65)**

80. According to the Policy Records and Aff. of Don Sanders, no one named Joshua Bernstein was ever designated as a primary or contingent beneficiary of the Policy. **(Aff. of Don Sanders at ¶66)**

81. According to the Policy Records and Aff. of Don Sanders, no one named Jacob Bernstein was ever designated as a primary or contingent beneficiary of the Policy. **(Aff. of Don Sanders at ¶67)**

82. According to the Policy Records and Aff. of Don Sanders, no one named Daniel Bernstein was ever designated as a primary or contingent beneficiary of the Policy. **(Aff. of Don Sanders at ¶68)**

83. According to the Policy Records and Aff. of Don Sanders, no Owner of the Policy ever submitted a beneficiary designation which designated Simon Bernstein Trust, N.A. as a beneficiary of the Policy. **(Aff. of Don Sanders at ¶69).**

84. According to the Policy Records, no Owner of the Policy ever submitted a beneficiary designation which designated "Simon Bernstein's estate", "the Estate of Simon Bernstein" or "the Estate" as beneficiary.

85. The last beneficiary designation submitted by the Policy Owner and acknowledged by the Insurer prior to the death of the Insured is Bates No. JCK000370. The primary beneficiary designation is "LaSalle National Trust, N.A., Trustee", and the contingent beneficiary is "Simon Bernstein Irrevocable Insurance Trust dated June 21, 1995". **(*See* Aff. of Don Sanders at ¶72 and Ex. 8 all 4 pages).**

86. According to the Policy Records, the last change of Owner submitted on the Policy prior to the death of the insured was on or about April 3, 1998. **(*See* Aff. of Don Sanders and Ex. 11).**

87. According to the Policy Records and the Aff. of Don Sanders, the Insurer received no notices of claims from any of the following individuals or entities:

a) The VEBA;
b) Any of the Bank Trustees of the VEBA;
c) Adam Simon;
d) David Simon;
e) The Simon Law Firm ; or
f) STP Enterprises, Inc.

(See Aff. of Don Sanders at ¶77).

88. In 1995, I was sharing office space with Simon Bernstein in Chicago, IL. My sister, Pam Simon, and brother-in-law, David Simon also shared office space with us. In the summer of 1995, Simon Bernstein discussed with me that he was forming a life insurance trust for the Policy, and that I would be named one of the trustees for the life insurance trust. He also indicated that my mother, Shirley Bernstein would be named the initial trustee.

89. Prior to Shirley Bernstein's passing on December 8, 2010, I had never been asked to exercise any powers on behalf of the Bernstein Trust as Trustee, and I believed that Shirley Bernstein was then acting as Trustee.

90. My father, Simon Bernstein, passed away less than two years after my mother, and during that time prior to Simon Bernstein's passing, I was not asked or required to exercise any powers as Trustee of the Bernstein Trust.

91. A copy of the Death Certificate of Simon Bernstein is attached hereto. **(***See* **Ex. 12).**

92. In 2011, the Policy lapsed due to a missed premium payment.

93. In 2011, I assisted my father with completing the necessary paperwork and underwriting required by the Insurer to reinstate the Policy. **(***See* **Ex. 13).**

94. Approximately one year before his death, my father took the necessary administrative steps and paid the required premium, and the Policy was reinstated by the Insurer. **(***See* **Ex. 14).**

95. During the reinstatement process in 2011, my father reinstated the Policy without making any changes to the Owner and Beneficiary of the Policy.

96. On or about July 25, 2012, my father executed his last Will which has been filed and is being administered in Probate Court in Palm Beach County, Florida. A true and accurate copy of the Will as filed with the Clerk of the Court in Palm Beach County is included in Movant's Appendix to its Statement of Undisputed Facts. In his Will at ¶9, Simon Bernstein expressly reaffirmed his beneficiary designations made under any insurance contract. **(***See* **Ex. 24 at ¶9).**

97. Following the death of my father, my sister, Pamela Simon, and brother-in-law, David Simon conducted searches of their office files and records, and David Simon located two unexecuted drafts of the Bernstein Trust in their offices. One of the unexecuted drafts was found on David Simon's computer database which dates back to 1990's when David Simon, Pamela Simon, and Simon Bernstein shared office space in Chicago, Illinois. **Ex. 15** includes a printout of metadata from the computer file for this draft of the Bernstein Trust indicating it was last modified on June 21, 1995. **(***See* **Ex. 15 and Aff. of D. Simon),**

98. A second draft of the Bernstein Trust was located as a hard copy inside a file folder within the stored files of David Simon. **(***See* **Ex. 16 and Aff. of D. Simon).**

99. According to the drafts of the Bernstein Trust, and the facts surrounding the execution of the Bernstein Trust by Simon Bernstein, as told to me by David Simon, I was appointed as successor trustee of the Bernstein Trust. (*See* **Ex. 15**, and **Ex. 16, and Aff. of D. Simon**.)

100. I am willing and competent and have been acting as Trustee of the Bernstein Trust in accordance with the intent of the Grantor, Simon Bernstein and with the authorization and consent of the Consenting Children.

101. Both drafts of the Bernstein Trust at Article Seven have virtually identical provisions regarding the distribution of the Policy Proceeds upon the death of Simon Bernstein. Both drafts of the Bernstein Trust provide as follows: "Upon my death, the Trustee shall divide the property of the Trust into as many separate Trusts as there are children of mine who survive me and children of mine who predecease me leaving descendants who survive me. These trusts shall be designated respectively by the names of my children." One of the drafts goes on to identify the five children by name. (*See* **Ex. 15 and Ex. 16 at Article Seven)**

102. Simon Bernstein had five children, and all of them survived him. The five adult children of Simon Bernstein are Ted Bernstein, Pamela Simon, Eliot Bernstein, Jill Iantoni and Lisa Friedstein.

103. The Five Children had a total of ten children, and as a result Simon Bernstein had ten grandchildren whose names, year of birth, and parent are as follows:

		D.O.B.	**PARENT**
i)	Alexandra Bernstein	1988	Ted
ii)	Eric Bernstein	1989	Ted
iii)	Molly Simon	1990	Pam
iv)	Michael Bernstein	1992	Ted
v)	Max Friedstein	1996	Lisa
vi)	Joshua Bernstein	1997	Eliot
vii)	Carly Friedstein	1998	Lisa
viii)	Jacob Bernstein	1999	Eliot
ix)	Julia Iantoni	2001	Jill
x)	Daniel Bernstein	2002	Eliot

104. In the draft of the Bernstein Trust attached hereto as **Ex. 15**, at Article Eight, the Five Children are each identified by name. None of the ten grandchildren's names appear in the document.

105. I have attached a diagram that illustrates Simon Bernstein's intention and plan to ensure that the Policy Proceeds were ultimately for the benefit of the Bernstein Trust. The diagram **(Ex. 17)** illustrates that in **Option A** had the Primary Beneficiary continued to exist at the time of Simon Bernstein's death, then by virtue of the VEBA Beneficiary Designation Simon Bernstein executed which named the Bernstein Trust as beneficiary of the VEBA Trust (**Ex. 4**), the Policy proceeds would have been paid from the Insurer to the VEBA Trust and distributed by the VEBA Trustee to the Bernstein Trust. **(***See* **Ex. 17)**

106. In this case, as explained in ¶71 and ¶72 above, the VEBA ceased to exist in 1998, long before Simon Bernstein passed away. As a result there was no primary beneficiary in existence at the time the Insured's death. At the time of Simon Bernstein's death, the contingent beneficiary of the Policy was the Bernstein Trust. By naming the Bernstein Trust as Contingent Beneficiary, Simon Bernstein ensured that the Policy Proceeds would be paid to the Bernstein Trust whether or not the VEBA continued to exist. (*See* **Option B on Ex. 17**).

107. In addition to records relating to the Policy at issue, my sister Pamela Simon, located records relating to another life insurance policy issued by Lincoln Benefit Life on the life of Simon Bernstein in 1994 (the "Lincoln Policy"). This Policy was purchased through a life insurance brokerage known as STP Enterprises, Inc. which in the 1990's was co-owned by Simon Bernstein, Pamela Simon and David Simon.

108. This second policy was issued by Lincoln Benefit Life as policy no. U0204204 in June of 1994 with Simon Bernstein as the initial owner and insured (the "Lincoln Policy"). In August of 1995, the ownership of the Lincoln Policy was changed by Simon Bernstein to the Bernstein Trust. The Lincoln Benefit Life policy lapsed several years prior to Simon Bernstein's death. The transfer of ownership form contained the name of the Bernstein Trust and its tax identification number, identified Shirley Bernstein as trustee, and also contains the *witnessed signature* of Simon Bernstein. The Lincoln Policy lapsed in 2006 for non-payment of premium approximately six years prior to my father's passing.

109. The Consenting Children are all in agreement regarding the following facts, and the intent of our father, Simon Bernstein, with regard to the Policy and Policy proceeds:

a) At the time of Simon Bernstein's death, Simon Bernstein was the owner of the Policy;

b) In June of 1995, Simon Bernstein formed the Simon Bernstein Irrevocable Insurance Trust Dated June 21, 1995;

c) In November of 1995, the VEBA as Owner submitted a Request to the Insurer designating the VEBA as primary beneficiary, and the Bernstein Trust as second or contingent beneficiary.

d) In 1998: (i) S.B. Lexington, Inc. was voluntarily dissolved; (ii) the VEBA was terminated and (iii) the VEBA as Owner submitted a change of Owner to the Insurer designating Simon Bernstein as Owner of the Policy.

e) On the date of Simon Bernstein's death, Simon Bernstein was the Owner of the Policy and the sole surviving beneficiary of the Policy was the contingent beneficiary, the Bernstein Trust;

f) Following the death of my mother, Shirley Bernstein, and according to the drafts of the Bernstein Trust and the intent of Simon Bernstein, Ted Bernstein was appointed to act as successor Trustee;

g) Each of the Consenting Children have signified their consent to a court appointment affirming Ted Bernstein's role as Trustee.

h) The beneficiary of the Policy Proceeds is the Bernstein Trust;

i) The beneficiaries of the Bernstein Trust are the five adult children--Ted, Pam, Eliot, Jill and Lisa--to share equally, twenty percent each;

j) The sole asset of the Bernstein Trust is the Policy Proceeds, and the distribution of such proceeds to the five children of Simon Bernstein and any administrative matters related to the termination of the Trust are the only remaining acts required of the Trustee;

k) The four consenting children of Simon Bernstein agree that upon entry of a judgment in favor of the Plaintiffs declaring that the Bernstein Trust is beneficiary of the Policy Proceeds, counsel for Bernstein Trust, Adam M. Simon, shall be authorized to present the judgment to the Registry and have the Registry distribute the Policy Proceeds in a check payable as follows:

"The Simon Law Firm Client Trust f/b/o Simon Bernstein Irrevocable Insurance Trust Dated June 21, 1995";

l) The Policy Proceeds shall then be deposited to The Simon Law Firm Client Trust Account and shall be disbursed as follows:

i) First to the payment of attorney Adam M. Simon's fees and costs;

ii) Retention of $5,000.00 in the Simon Law Client Trust Account for the benefit of the Bernstein Trust in order to pay for any professional

expenses, i.e. accounting or legal, related to the final distribution of the Trust Assets and termination of trust. Any remaining balance after payment of such expenses shall be distributed to the five adult children in equal shares;

iii) The balance to be split equally among the five adult children of Simon Bernstein;

iv) Each Beneficiary that receives a share of the Policy proceeds shall execute and deliver to the Trustee (or Adam M. Simon) a receipt for such payment received; and

v) Along with the distributions, the Trustee shall provide each beneficiary with a final accounting of the distributions made from the Policy Proceeds.

110. Plaintiffs, the Bernstein Trust, Ted Bernstein as Trustee and the Consenting Children submit the following evidence of the existence and terms of the trust:

a) The SS-4 Form containing the name of the Bernstein Trust, the tax identification number of the Bernstein Trust, and the signature of the initial trustee, Shirley Bernstein. **(***See* **Ex. 19);**

b) The VEBA Beneficiary designation form containing the name of the Bernstein Trust and the signature of the grantor, Simon Bernstein. **(***See* **Ex. 4);**

c) The Policy beneficiary designation form designating the Bernstein Trust as the contingent beneficiary. **(***See* **Ex. 8);**

d) A copy of two unexecuted drafts of the Bernstein Trust Agreement (*See* **Ex. 15 and Ex. 16**).

e) My Affidavit and the Affidavits of David Simon, and each of the four consenting children.

f) The Affidavit provided by the Insurer, of Don Sanders, also references Policy records that confirm the designation of the Bernstein Trust as contingent beneficiary of the Policy.

g) The Lincoln Benefit Life change of ownership form for the second policy transferring the ownership of the Lincoln Benefit Life policy from Simon Bernstein to the Bernstein Trust. This form contains the name of the Bernstein Trust, identifies Shirley Bernstein as Trustee, and has a *witnessed signature* of Simon Bernstein. **(***See* **Ex. 18).**

h) The Equifax investigation report from 1982 which indicates that at the time of issuance the benefits of the insurance policy would be paid to the VEBA, and then as stated in the inspection report, "normally those benefits are paid to family members." **(***See* **Ex. 20).**

111. Plaintiffs submit the following evidence of the terms of the Bernstein Trust, including its designated beneficiaries and trustees:

a) The two unexecuted copies (one of which contains contemporaneous handwritten notes) of the Bernstein Trust Agreement;

b) The Lincoln Benefit Life change of ownership form for the second policy transferring the ownership of the Lincoln Benefit Life policy from Simon Bernstein to the Bernstein Trust. This form contains the name of the Bernstein Trust, identifies Shirley Bernstein as Trustee, and has a *witnessed signature* of Simon Bernstein. **(***See* **Ex. 18).**

c) The SS-4 Form containing the name of the Bernstein Trust, the tax identification number of the Bernstein Trust, and identifying the initial trustee, Shirley Bernstein. **(***See* **Ex. 19);**

d) Declarations or Affidavits of Ted Bernstein, David Simon, Pam Simon, Jill Iantoni, and Lisa Friedstein.

e) The Equifax investigation report from 1982 which indicates that at the time of issuance the benefits of the insurance policy would be paid to the VEBA, and then as stated in the inspection report of Simon Bernstein, "normally those benefits are paid to family members." **(***See* **Ex. 20).**

112. I agree to waive and do not claim any compensation for acting as Trustee of the Bernstein Trust, but I do reserve the right to claim reimbursement for anly costs I incur such as legal, or accounting fees in connection with the final distribution.

FURTHER AFFIANT SAYETH NAUGHT.

Dated: February 27th, 2015

Ted Bernstein

SUBSCRIBED AND SWORN TO BEFORE ME
THIS 27 DAY OF FEBRUARY, 2015.

NOTARY PUBLIC
County of Palm Beach, FL

ANTONIO M. LASI
Notary Public - State of Florida
My Comm. Expires May 9, 2016
Commission # EE 197155

EXHIBIT 2

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SIMON BERNSTEIN IRREVOCABLE INSURANCE TRUST DTD 6/21/95, by Ted S. Bernstein, its Trustee, Ted S. Bernstein, an individual, Pamela B. Simon, an individual, Jill Iantoni, an individual and Lisa S. Friedstein, an individual.

Plaintiff,

v.

HERITAGE UNION LIFE INSURANCE COMPANY,

Defendant,

HERITAGE UNION LIFE INSURANCE COMPANY

Counter-Plaintiff

v.

SIMON BERNSTEIN IRREVOCABLE TRUST DTD 6/21/95

Counter-Defendant

and,

FIRST ARLINGTON NATIONAL BANK as Trustee of S.B. Lexington, Inc. Employee Death Benefit Trust, UNITED BANK OF ILLINOIS, BANK OF AMERICA, Successor in interest to LaSalle National

Case No. 13 cv 3643
Honorable Amy J. St. Eve
Magistrate Mary M. Rowland

Trust, N.A., SIMON BERNSTEIN TRUST, N.A., TED BERNSTEIN, individually and as purported Trustee of the Simon Bernstein Irrevocable Insurance Trust Dtd 6/21/95, and ELIOT BERNSTEIN

Third-Party Defendants.

ELIOT IVAN BERNSTEIN,

Cross-Plaintiff

v.

TED BERNSTEIN, individually and as alleged Trustee of the Simon Bernstein Irrevocable Insurance Trust Dtd, 6/21/95

Cross-Defendant

and,

PAMELA B. SIMON, DAVID B.SIMON, both Professionally and Personally ADAM SIMON, both Professionally and Personally, THE SIMON LAW FIRM, TESCHER & SPALLINA, P.A., DONALD TESCHER, both Professionally and Personally, ROBERT SPALLINA, both Professionally and Personally, LISA FRIEDSTEIN, JILL IANTONI S.B. LEXINGTON, INC. EMPLOYEE DEATH BENEFIT TRUST, S.T.P. ENTERPRISES, INC. S.B. LEXINGTON, INC., NATIONAL SERVICE ASSOCIATION (OF FLORIDA), NATIONAL SERVICE ASSOCIATION (OF ILLINOIS) AND JOHN AND JANE DOES

Third-Party Defendants.

AFFIDAVIT OF DON SANDERS

1. I, Don Sanders, am a resident of the City of Mansfield, County of Tarrant, State of Texas and am over the age of 18. If I were called and sworn as a witness in this matter I could competently and voluntarily testify to the facts set forth in this Affidavit.

2. When I use the term Capitol Bankers, I mean Capitol Bankers Life Insurance Company.

3. When I use the term "Heritage", I mean Heritage Union Life Insurance Company.

4. When I use the term "Jackson" I mean Jackson National Life Insurance Company.

5. When I use the term "Insurer", I mean the life insurance company that was the insurer of the risk for the Policy, which started as Capitol Bankers but changed through succession from time to time.

6. When I use the term "Policy" herein, I mean Capitol Bankers Life Insurance Policy No. 1009208 insuring the life of Simon Bernstein.

7. When I use the term "Insured", I mean Simon Bernstein.

8. When I use the term "Owner", I mean the owner of the Policy as reflected on the Insurers' records from time to time.

9. When I use the term "Policy Proceeds", I mean either the amount that was payable by the Insurer under the Policy upon the death of the insured and/or the amount that was actually paid by the Insurer to the Registry of the Court pursuant to the Insurers' Complaint for Interpleader.

10. When I use the term "Policy records", I mean the records of the Insurer relating to the Policy as produced by Jackson during the Litigation.

11. When I use the term "Litigation", I mean the above-captioned litigation.

12. When I use the term "VEBA", I am referring to the S.B. Lexington Employee Death Benefit Trust.

13. I am currently employed as Assistant Vice-President of Operations for Jackson.

14. I have been employed in Jackson's operations department for the past 11 years, and have been employed in the life insurance industry for approximately 32 years.

15. In my role as Assistant Vice President of Operations with Jackson, I have personal knowledge regarding the policy administration and death claim practices and procedures Jackson utilizes with regard to the Capitol Bankers Life Insurance Policy at issue.

16. I am aware that I am being presented as a witness pursuant to Fed. R. Civ. P. 30(b)(6), on behalf of Jackson in response to a Subpoena for Deposition served upon Jackson by the Plaintiffs in the above-captioned matter.

17. I am aware that pursuant to Rule 30(b)(6) my statements and this Affidavit shall be relied upon as the statements of Jackson, itself.

18. I have had access to counsel for Jackson with regard to my testimony and affidavit prior to having signed this Affidavit.

19. I understand that since Heritage paid the Policy Proceeds to the Registry of the Court, Heritage has been dismissed and is no longer a party to the Litigation.

20. I have no personal or business interest in the outcome of the Litigation including no interest in the determination by the court of the beneficiary(ies) of the Policy Proceeds.

21. No one from Jackson has any interest in the outcome of this Litigation including determination by the court of the beneficiary(ies) of the Policy Proceeds.

22. I have received no compensation from any party to the Litigation in exchange for my testimony.

23. The Policy was issued by Capitol Bankers in 1982.

24. In June 1998, Capitol Bankers was acquired by Swiss Re Life & Health America, Inc.

25. In May of 2000, Capitol Bankers entered into a one hundred percent Coinsurance/Administrative Reinsurance Agreement with Reassure America Life Insurance Company.

26. In May 2000, one hundred percent of stock of the Capitol Bankers was sold to Annuity & Life Reassurance.

27. In December of 2000, Capitol Bankers changed its name to Annuity & Life Reassurance America, Inc.

28. In August 2005, Annuity & Life Reassurance America, Inc. was acquired by Wilton Re Group.

29. In August 2008, Annuity & Life Reassurance America, Inc. changed its name to Heritage Union Life Insurance Company.

30. In 2012, Jackson acquired and merged Reassure America Life Insurance Company into Jackson, and as a result, Jackson became administrator and reinsurer of the Policy.

31. Since at least 2000, Jackson (and/or its predecessor Reassure America Life Insurance Company) has been in possession of the Policy records.

32. I have personal knowledge regarding the record-keeping procedures and practices utilized by Jackson with regard to its administration of the Policy and others like it.

33. I have reviewed and made myself familiar with the Policy records.

34. The Policy records start with bates no. JCK000001 and end at bates no. JCK001275. I have reviewed these bate-stamped records, and can attest that the bate-stamped records are a true, accurate and complete set of the Policy records in Jackson's possession pertaining to the Policy.

35. The Policy records do not contain an original or executed duplicate of the Policy, which was issued in 1982.

36. The Policy records do include a specimen policy form, a copy of the Insured's application, and copies of the schedule pages that were included with the original Policy.

37. Also, the Policy records do not include:
    (a) an original or copy of the "S.B. Lexington Employee Death Benefit Trust"; or
    (b) the "Simon Bernstein Irrevocable Insurance Trust dated June 21, 1995", or
    (c) any purported trust named the "Simon Bernstein Trust, N.A.".

38. Bates no. JCK001099 to JCK001117 is a Capitol Bankers Life Insurance Company specimen policy form of the Capitol Bankers whole life insurance product referred to as "Current Value Life". This specimen policy is a sample of the policy form issued on the life of Simon Bernstein as Policy No. 1009208 (the "Policy").

39. This specimen policy form contains the same policy language that is contained in Policy No. 1009208. The only pages that are different are pages that relate to the variable policy

specifications that pertain primarily to Simon Bernstein's age, underwriting classification, sum insured and statement of policy costs and benefits.

40. From my review of the records, on the date of issuance the sum insured (or death benefit) of the Policy was $2 million.

41. The Policy is a whole life, flexible premium, life insurance contract, which is a type of policy that builds cash value as premium payments are made.

42. The Insurer will deduct the monthly cost of insurance charges from any existing cash value in the Policy, but when the cash value is insufficient to cover the cost of insurance, then the Policy will go into a grace period and eventually lapse if no premium payment is made. A brief summary description of these features of the Policy are contained in a letter from the Insurer dated November 9, 2010, to the Owner. (Bates No. JCK000131).

43. If premium payments are not made according to schedule, or Policy loans are taken against the cash value, this reduces the cash value which negatively impacts the Policy's performance and eventually results in a reduction in the Policy proceeds.

44. The Policy records indicate that premiums were not made according to schedule, and Policy loans occurred with regard to the Policy such that at the time of the Insured's death, the net death benefit payable by the Insurer was $1,689.070.00 (the "Policy Proceeds").

45. Bate stamp no. JCK001252-JCK001258 is a financial history report that is titled "Financial Activity from Issue."

46. On page JCK001258, the financial history report indicates that the amount of the Policy Proceeds at the time of the Insured's death was $1,689.070.00.

47. I have reviewed the receipt from the Registry of the Court for the Northern District of Illinois (the "Registry"), and according to the receipt the Policy Proceeds, a total of $1,703,567.09, was deposited by the Insurer to the Registry on June 26, 2013. This deposit represented the Policy Proceeds of $1,689,070.00, less a deduction for a policy loan, plus interest paid from the date of Simon Bernstein's death until the date of deposit with the Registry. (Bates No. BT000106)

48. Part I of the Policy application is contained in the Policy records as Bates No. JCK000419. The owner and beneficiary sections of Part I set forth the initial policy owner and beneficiary(ies) of the Policy.

49. According to Part I of the application, the Policy Owner at issuance was "First Arlington National Bank, Trustee of S.B. Lexington Employee Death Benefit Trust".

50. Also according to Part I of the application, the beneficiary was designated as follows: "First Arlington National Bank, Trustee of S.B. Lexington Employee Death Benefit Trust".

51. According to Part I of the application, Simon Bernstein's employer at the time of issuance was S.B. Lexington, Inc. and his title was listed as Chairman of the Board. (JCK000419).

52. Bates no. JCK001021 is a copy of the Schedule Page that was included with the Policy. The Schedule Page indicates the Policy No. 1009208 was a "Current Value Life" plan issued on December 27, 1982, insuring the life of Simon Bernstein with a "sum insured" of $2 million.

53. Bates no. JCK001023 through JCK001024 is a copy of a Current Value Life, Statement of Policy Cost and Benefit Information which is an illustration of projected values and benefits of the Policy. This Statement of Policy Cost and Benefit Information indicates on its face that it was produced on the issue date of the Policy, December 27, 1982.

54. On or about November 7, 1989 the Insurer acknowledged a change of ownership designating United Bank of Illinois as trustee. (JCK000811). This first change of trustee likely occurred as early as July 6, 1983, because the Insurer received and recorded a Request Letter making this same change in trustee. (JCK000935)

55. On or about June 5, 1992, a letter submitted on behalf of the Policy Owner informing the Insurer that LaSalle National Trust was being appointed as successor trustee. On June 17, 1992, the Insurer acknowledged the change of ownership and designated the Policy Owner on its records as LaSalle National Trust, N.A., as Successor Trustee. (Bates No. JCK000365).

56. On or about November 27, 1995, Capitol Bankers received a "Request Letter" signed by LaSalle National Trust, N.A. in their capacity as Trustee, as Policy Owner, and the Request Letter contained the following requested changes to the Policy:
    (a) LaSalle National Trust, N.A. as Trustee was designated as the primary beneficiary of the Policy; and
    (b) The Simon Bernstein Irrevocable Insurance Trust Dated June 21, 1995 was designated as the contingent beneficiary.

57. Though the name of the Trust on the Request Letter was set forth as stated in Par. 30(b) above, it was apparently abbreviated upon input into the Insurer's systems as Simon Bernstein Ins. Trust Dated 6/21/95. (Bates No.JCK000370, JCK000372, JCK000514, JCK000554, 599, 601).

58. As a matter of standard policy and procedures at Jackson and as set forth in the Policy itself, the designation of the Owner and Beneficiary is governed by the Request Letter or Direction of the Owner and not by how the name of the owner or beneficiary is input by employees into the Insurer's systems as part of policy administration.

59. In my experience in operations, Insurers' systems require employees to abbreviate names of owners and/or beneficiaries at times when the names contain too many characters for the Insurer's systems capabilities.

60. On November 27, 1995 Capitol Bankers sent correspondence to LaSalle National Trust N.A., as Successor Trustee acknowledging the changes in beneficiaries as referenced in Par. 56 above.

61. In April of 1998, LaSalle National Trust, as successor Trustee submitted a change of owner which designated Simon Bernstein as the Owner of the Policy. (Bates No. JCK000560).

62. After reviewing Jackson's records on the Policy, I can confirm on behalf of Jackson that on the date of death of Simon Bernstein, the Owner of the Policy was Simon Bernstein, the primary beneficiary was designated as LaSalle National Trust, N.A. as Successor Trustee, and the Contingent Beneficiary was designated as Simon Bernstein Irrevocable Insurance Trust dated June 21, 1995. (Bates No. JCK000370).

63. Capitol Bankers Life Insurance Company acknowledged receipt of the "executed beneficiary change" in its correspondence to the Owner of the Policy dated November 27, 1995. (JCK000372).

64. According to Jackson's records, following the death of Simon Bernstein, Heritage or Jackson received competing claims to the death benefit proceeds. Jackson or Heritage received claims on behalf of the Simon Bernstein Irrevocable Insurance Trust dated June 21, 1995 and a competing claim in the form of a letter from Eliot Bernstein either on his own behalf or on behalf of his children.

65. According to Jackson's records on the Policy, no one named Eliot Bernstein was ever designated as a primary or contingent beneficiary of the Policy.

66. According to Jackson's records on the Policy, no one named Joshua Bernstein was ever designated as a primary or contingent beneficiary of the Policy.

67. According to Jackson's records on the Policy, no one named Jacob Bernstein was ever designated as a primary or contingent beneficiary of the Policy.

68. According to Jackson's records on the Policy, no one named Daniel Bernstein was ever designated as a primary or contingent beneficiary of the Policy.

69. According to Jackson's records on the Policy, no Owner of the Policy ever submitted a beneficiary designation which designated Simon Bernstein Trust, N.A. as a beneficiary of the Policy.

70. According to Jackson's records, no Owner of the Policy ever submitted a beneficiary designation which designated "Simon Bernstein's estate" or "the Estate" as beneficiary.

71. From my review of the records, and my experience in the industry and with Insurer database systems, it is evident that the name Simon Bernstein Trust, N.A. was either entered by an employee of the Insurer either as an abbreviation for the actual contingent beneficiary or in error. In any case, the document that contains the Owner's actual last beneficiary designation prior to the death of the insured is Bates No. JCK000601. In this document, the Owner designates Simon Bernstein Irrevocable Insurance Trust dated June 21, 1995 as the contingent (or successor) beneficiary.

72. The last beneficiary designation submitted by the Policy Owner and acknowledged by the Insurer prior to the death of the Insured is Bates No. JCK000370. The primary beneficiary designation is "LaSalle National Trust, N.A., Trustee", and the contingent beneficiary is "Simon Bernstein Irrevocable Insurance Trust dated June 21, 1995". (See Bates No. JCK000370 and JCK000372).

73. According to Jackson's records, the last change of Owner submitted on the Policy prior to the death of the insured was on or about April 3, 1998. (JCK000563 and 566).

74. According to Jackson's records, a company named Equifax conducted an interview in connection with the application and underwriting for the Policy. The Equifax report indicates that Simon Bernstein was interviewed on March 25, 1982. The report says on

its face that it was prepared for Life Insurance Underwriting purposes only. (JCK001074).

75. Contained in the Equifax Report from Simon Bernstein's interview is the following description of the intended purpose of the insurance: "BENEFICIARY-PURPOSE OF INSURANCE: The beneficiary of this policy is First Arlington National Bank, S.B. Lexington, Inc. employee death benefit trust. The insurance will be paid to the trust, and the trust will determine the manner in which the benefits are to be paid and to whom it will be paid. Normally, benefits are paid to family members." (JCK001084).

76. Since the death of Simon Bernstein, Jackson (and "Heritage") has received notices of potential claims from the Simon Bernstein Irrevocable Insurance Trust dtd 6/21/95, and from Eliot Bernstein, purportedly on his own behalf and on behalf of his children. I am aware that a person named William Stansbury filed a petition to intervene in the above-captioned litigation but that his petition to intervene was denied by the court. I am aware that in Plaintiff's First Amended Complaint, that Ted Bernstein, Pamela Simon, Jill Iantoni and Lisa Friedstein have filed claims seeking imposition of a Resulting Trust and as such First Amended Complaint does represent additional potential claims to the Policy Proceeds.

77. The Policy records do not include any notices of claims from any of the following individuals or entities:
    a) The VEBA;
    b) Any Bank Trustee of the VEBA;
    c) Adam Simon;
    d) David Simon;
    e) The Simon Law Firm ; or
    f) STP Enterprises, Inc.

78. I am unaware of any claims having been received by Jackson or Heritage as to the Policy proceeds from any persons or entities, other than those described in Par. 76 above.

FURTHER AFFIANT SAYETH NAUGHT.

Dated: April 8, 2014

Don Sanders, Assistant Vice-President
Jackson National Life Insurance Company

SUBSCRIBED AND SWORN TO BEFORE ME
THIS 8th DAY OF APRIL, 2014.

NOTARY PUBLIC
County of Dallas, TX

EXHIBIT 3

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SIMON BERNSTEIN IRREVOCABLE INSURANCE TRUST DTD 6/21/95, by Ted S. Bernstein, its Trustee, Ted S. Bernstein, an individual, Pamela B. Simon, an individual, Jill Iantoni, an individual and Lisa S. Friedstein, an individual.

Plaintiff,

v.

HERITAGE UNION LIFE INSURANCE COMPANY,

Defendant,

HERITAGE UNION LIFE INSURANCE COMPANY

Counter-Plaintiff

v.

SIMON BERNSTEIN IRREVOCABLE TRUST DTD 6/21/95

Counter-Defendant

and,

FIRST ARLINGTON NATIONAL BANK as Trustee of S.B. Lexington, Inc. Employee Death Benefit Trust, UNITED BANK OF ILLINOIS, BANK OF AMERICA, Successor in interest to LaSalle National

Case No. 13 cv 3643
Honorable John Robert Blakey
Magistrate Mary M. Rowland

Trust, N.A., SIMON BERNSTEIN TRUST, N.A., TED BERNSTEIN, individually and as purported Trustee of the Simon Bernstein Irrevocable Insurance Trust Dtd 6/21/95, and ELIOT BERNSTEIN

Third-Party Defendants.

ELIOT IVAN BERNSTEIN,

Cross-Plaintiff

v.

TED BERNSTEIN, individually and as alleged Trustee of the Simon Bernstein Irrevocable Insurance Trust Dtd, 6/21/95

Cross-Defendant

and,

PAMELA B. SIMON, DAVID B.SIMON, both Professionally and Personally ADAM SIMON, both Professionally and Personally, THE SIMON LAW FIRM, TESCHER & SPALLINA, P.A., DONALD TESCHER, both Professionally and Personally, ROBERT SPALLINA, both Professionally and Personally, LISA FRIEDSTEIN, JILL IANTONI S.B. LEXINGTON, INC. EMPLOYEE DEATH BENEFIT TRUST, S.T.P. ENTERPRISES, INC. S.B. LEXINGTON, INC., NATIONAL SERVICE ASSOCIATION (OF FLORIDA), NATIONAL SERVICE ASSOCIATION (OF ILLINOIS) AND JOHN AND JANE DOES

Third-Party Defendants.

AFFIDAVIT OF LISA FRIEDSTEIN

I, Lisa Friedstein, being duly sworn under oath, deposes and states as follows:

1. I am a resident of the City of Highland Park, County of Lake, State of Illinois and am over the age of 18. If I were called and sworn as a witness in the above-captioned matter I could competently and voluntarily testify to the facts set forth in this Affidavit based upon my personal knowledge.

2. My maiden name is Lisa Bernstein. My married name is Lisa Friedstein.

3. I am one of five adult children of Simon Bernstein.

4. When I use the term "Affidavit of Don Sanders" I mean a certain affidavit executed by Don Sanders, Assistant Vice President of Operations for Jackson National Life Insurance Company on April 8, 2014.

5. When I use the term "Capitol Bankers", I mean Capitol Bankers Life Insurance Company.

6. When I use the term "Consenting Children", I mean collectively four of the five adult children of Simon Bernstein, whom are Ted Bernstein, Pamela Simon, Jill Iantoni, and Lisa Friedstein.

7. When I use the term "Heritage", I mean Heritage Union Life Insurance Company.

8. When I use the term "Jackson", I mean Jackson National Life Insurance Company.

9. When I use the term "Insurer", I mean the life insurance company that was the insurer on the risk for the Policy, which started as Capitol Bankers but changed through succession from time to time.

10. When I use the term "Policy", I mean Capitol Bankers Life Insurance Policy No. 1009208 insuring the life of Simon Bernstein.

11. When I use the term "Insured", I mean Simon Bernstein.

12. When I use the term "Owner", I mean the owner of the Policy as reflected on the Insurers' records from time to time.

13. When I use the term "Policy Proceeds", I mean the amount that was payable by the Insurer under the Policy upon the death of the insured.

14. When I use the term "Proceeds on Deposit", I mean the amount that was actually deposited by the Insurer with the Registry of the Court pursuant to the Insurers' Complaint for Interpleader.

15. When I use the term "Policy Records", I mean the records of the Insurer relating to the Policy as produced by the Insurer during the Litigation.

16. When I use the term "Litigation", I mean the above-captioned litigation.

17. When I use the term "VEBA", I am referring to the S.B. Lexington Employee Death Benefit Trust.

18. I have had an opportunity to consult with my attorney, and review the documents produced by all parties in the above-referenced litigation.

19. I have also reviewed the Affidavit of Don Sanders.

20. I have reviewed the Insurer's records regarding the amount of the death benefit, and have reviewed the receipt for the deposit of the Policy Proceeds with the Registry of the Court in the amount of $1,703,567.09. I have no dispute or objection to the amount deposited as the Policy Proceeds.

21. I concur with the statements of Don Sanders in his Affidavit that the last beneficiary designation submitted by the Policy Owner and acknowledged by the Insurer prior to the death of the Insured marked as Bates No. JCK000370. The primary beneficiary designation is "LaSalle National Trust, N.A., Trustee", and the contingent beneficiary is "Simon Bernstein Irrevocable Insurance Trust dated June 21, 1995".

22. I concur with Ted Bernstein and the documentation submitted by Plaintiffs in support of our motion for summary judgment with regard to the existence and terms of the Bernstein Trust, and Ted Bernstein's role as trustee.

23. Based on the foregoing, I am in agreement regarding the following facts, and the intent of our father, Simon Bernstein, with regard to the Policy proceeds:

a) At the time of Simon Bernstein's death, Simon Bernstein was the owner of the Policy;

b) In June of 1995, Simon Bernstein formed the Simon Bernstein Irrevocable Insurance Trust Dated June 21, 1995;

c) In November of 1995, the VEBA as Owner submitted a Request to the Insurer designating the VEBA as primary beneficiary, and the Bernstein Trust as second or contingent beneficiary.

d) In 1998: (i) S.B. Lexington, Inc. was voluntarily dissolved; (ii) the VEBA was terminated and (iii) the VEBA as Owner submitted a change of Owner to the Insurer designating Simon Bernstein as Owner of the Policy.

e) On the date of Simon Bernstein's death, Simon Bernstein was the Owner of the Policy and the sole surviving beneficiary of the Policy was the contingent beneficiary, the Bernstein Trust;

f) Following the death of my mother, Shirley Bernstein, and according to the drafts of the Bernstein Trust and the intent of Simon Bernstein, Ted Bernstein was appointed to act as successor Trustee;

g) Each of the Consenting Children have signified their consent to a court appointment of Ted Bernstein as Trustee.

h) The beneficiary of the Policy Proceeds is the Bernstein Trust;

i) The beneficiaries of the Bernstein Trust are the five adult children (including Eliot, the non-consenting child) to share equally, twenty percent each;

j) The sole asset of the Bernstein Trust is the Policy Proceeds, and the distribution of such proceeds to the five children of Simon Bernstein and any administrative matters related to the termination of the Trust are the only remaining acts required of the Trustee.

k) The four consenting children of Simon Bernstein agree that upon entry of a judgment in favor of the Plaintiffs declaring that the Bernstein Trust is beneficiary of the Policy Proceeds, counsel for Bernstein Trust, Adam M. Simon, shall be authorized to present the judgment to the Registry and have the Registry distribute the Policy Proceeds in a check payable as follows:

"The Simon Law Firm Client Trust f/b/o Simon Bernstein Irrevocable Insurance Trust Dated June 21, 1995".

l) The Policy Proceeds shall then be deposited to The Simon Law Firm Client Trust Account and shall be disbursed as follows:

i) First to the payment of attorney Adam M. Simon's fees and costs;

ii) Retention of $5,000.00 in the Simon Law Client Trust Account for the benefit of the Bernstein Trust in order to pay for any professional expenses, i.e. accounting or legal, related to the final distribution of the Trust Assets and termination of trust. Any remaining balance after payment of such expenses shall be distributed to the five adult children in equal shares.

iii) The balance to be split equally among the five adult children of Simon Bernstein.

iv) Each Beneficiary that receives a share of the Policy proceeds shall execute and deliver to the Trustee (or Adam M. Simon) a receipt for such payment received.

v) Along with the distributions, the Trustee shall provide each beneficiary with a final accounting of the distributions made from the Policy Proceeds.

FURTHER AFFIANT SAYETH NAUGHT.

Dated: FEBRUARY 5, 2015

LISA FRIEDSTEIN

SUBSCRIBED AND SWORN TO BEFORE ME
THIS 5 DAY OF FEBRUARY, 2015.

NOTARY PUBLIC
County of Lake, IL

OFFICIAL SEAL
SONJA PATRICK
Notary Public - State of Illinois
My Commission Expires Oct 28, 2018

AUS-5960583-2

EXHIBIT 4

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SIMON BERNSTEIN IRREVOCABLE INSURANCE TRUST DTD 6/21/95, by Ted S. Bernstein, its Trustee, Ted S. Bernstein, an individual, Pamela B. Simon, an individual, Jill Iantoni, an individual and Lisa S. Friedstein, an individual.

Plaintiff,

v.

HERITAGE UNION LIFE INSURANCE COMPANY,

Defendant,

HERITAGE UNION LIFE INSURANCE COMPANY

Counter-Plaintiff

v.

SIMON BERNSTEIN IRREVOCABLE TRUST DTD 6/21/95

Counter-Defendant

and,

FIRST ARLINGTON NATIONAL BANK as Trustee of S.B. Lexington, Inc. Employee Death Benefit Trust, UNITED BANK OF ILLINOIS, BANK OF AMERICA, Successor in interest to LaSalle National

Case No. 13 cv 3643
Honorable John Robert Blakey
Magistrate Mary M. Rowland

Trust, N.A., SIMON BERNSTEIN TRUST, N.A., TED BERNSTEIN, individually and as purported Trustee of the Simon Bernstein Irrevocable Insurance Trust Dtd 6/21/95, and ELIOT BERNSTEIN

Third-Party Defendants.

ELIOT IVAN BERNSTEIN,

Cross-Plaintiff

v.

TED BERNSTEIN, individually and as alleged Trustee of the Simon Bernstein Irrevocable Insurance Trust Dtd, 6/21/95

Cross-Defendant

and,

PAMELA B. SIMON, DAVID B.SIMON, both Professionally and Personally ADAM SIMON, both Professionally and Personally, THE SIMON LAW FIRM, TESCHER & SPALLINA, P.A., DONALD TESCHER, both Professionally and Personally, ROBERT SPALLINA, both Professionally and Personally, LISA FRIEDSTEIN, JILL IANTONI S.B. LEXINGTON, INC. EMPLOYEE DEATH BENEFIT TRUST, S.T.P. ENTERPRISES, INC. S.B. LEXINGTON, INC., NATIONAL SERVICE ASSOCIATION (OF FLORIDA), NATIONAL SERVICE ASSOCIATION (OF ILLINOIS) AND JOHN AND JANE DOES

Third-Party Defendants.

AFFIDAVIT OF JILL IANTONI

I, Jill Iantoni, being duly sworn under oath, deposes and states as follows:

1. I am a resident of the City of Highland Park, County of Lake, State of Illinois and am over the age of 18. If I were called and sworn as a witness in the above-captioned matter I could competently and voluntarily testify to the facts set forth in this Affidavit based upon my personal knowledge.

2. My maiden name is Jill Bernstein. My married name is Jill Iantoni.

3. I am one of five adult children of Simon Bernstein.

4. When I use the term "Affidavit of Don Sanders" I mean a certain affidavit executed by Don Sanders, Assistant Vice President of Operations for Jackson National Life Insurance Company on April 8, 2014.

5. When I use the term "Capitol Bankers", I mean Capitol Bankers Life Insurance Company.

6. When I use the term "Consenting Children", I mean collectively four of the five adult children of Simon Bernstein, whom are Ted Bernstein, Pamela Simon, Jill Iantoni, and Lisa Friedstein.

7. When I use the term "Heritage", I mean Heritage Union Life Insurance Company.

8. When I use the term "Jackson", I mean Jackson National Life Insurance Company.

9. When I use the term "Insurer", I mean the life insurance company that was the insurer on the risk for the Policy, which started as Capitol Bankers but changed through succession from time to time.

10. When I use the term "Policy", I mean Capitol Bankers Life Insurance Policy No. 1009208 insuring the life of Simon Bernstein.

11. When I use the term "Insured", I mean Simon Bernstein.

12. When I use the term "Owner", I mean the owner of the Policy as reflected on the Insurers' records from time to time.

13. When I use the term "Policy Proceeds", I mean the amount that was payable by the Insurer under the Policy upon the death of the insured.

14. When I use the term "Proceeds on Deposit", I mean the amount that was actually deposited by the Insurer with the Registry of the Court pursuant to the Insurers' Complaint for Interpleader.

15. When I use the term "Policy Records", I mean the records of the Insurer relating to the Policy as produced by the Insurer during the Litigation.

16. When I use the term "Litigation", I mean the above-captioned litigation.

17. When I use the term "VEBA", I am referring to the S.B. Lexington Employee Death Benefit Trust.

18. I have had an opportunity to consult with my attorney, and review the documents produced by all parties in the above-referenced litigation.

19. I have also reviewed the Affidavit of Don Sanders.

20. I have reviewed the Insurer's records regarding the amount of the death benefit, and have reviewed the receipt for the deposit of the Policy Proceeds with the Registry of the Court in the amount of $1,703,567.09. I have no dispute or objection to the amount deposited as the Policy Proceeds.

21. I concur with the statements of Don Sanders in his Affidavit that the last beneficiary designation submitted by the Policy Owner and acknowledged by the Insurer prior to the death of the Insured marked as Bates No. JCK000370. The primary beneficiary designation is "LaSalle National Trust, N.A., Trustee", and the contingent beneficiary is "Simon Bernstein Irrevocable Insurance Trust dated June 21, 1995".

22. I concur with Ted Bernstein and the documentation submitted by Plaintiffs in support of our motion for summary judgment with regard to the existence and terms of the Bernstein Trust, and Ted Bernstein's role as trustee.

23. Based on the foregoing, I am in agreement regarding the following facts, and the intent of our father, Simon Bernstein, with regard to the Policy proceeds:

a) At the time of Simon Bernstein's death, Simon Bernstein was the owner of the Policy;

b) In June of 1995, Simon Bernstein formed the Simon Bernstein Irrevocable Insurance Trust Dated June 21, 1995;

c) In November of 1995, the VEBA as Owner submitted a Request to the Insurer designating the VEBA as primary beneficiary, and the Bernstein Trust as second or contingent beneficiary.

d) In 1998: (i) S.B. Lexington, Inc. was voluntarily dissolved; (ii) the VEBA was terminated and (iii) the VEBA as Owner submitted a change of Owner to the Insurer designating Simon Bernstein as Owner of the Policy.

e) On the date of Simon Bernstein's death, Simon Bernstein was the Owner of the Policy and the sole surviving beneficiary of the Policy was the contingent beneficiary, the Bernstein Trust;

f) Following the death of my mother, Shirley Bernstein, and according to the drafts of the Bernstein Trust and the intent of Simon Bernstein, Ted Bernstein was appointed to act as successor Trustee;

g) Each of the Consenting Children have signified their consent to a court appointment of Ted Bernstein as Trustee.

h) The beneficiary of the Policy Proceeds is the Bernstein Trust;

i) The beneficiaries of the Bernstein Trust are the five adult children (including Eliot, the non-consenting child) to share equally, twenty percent each;

j) The sole asset of the Bernstein Trust is the Policy Proceeds, and the distribution of such proceeds to the five children of Simon Bernstein and any administrative matters related to the termination of the Trust are the only remaining acts required of the Trustee.

k) The four consenting children of Simon Bernstein agree that upon entry of a judgment in favor of the Plaintiffs declaring that the Bernstein Trust is beneficiary of the Policy Proceeds, counsel for Bernstein Trust, Adam M. Simon, shall be authorized to present the judgment to the Registry and have the Registry distribute the Policy Proceeds in a check payable as follows:

"The Simon Law Firm Client Trust f/b/o Simon Bernstein Irrevocable Insurance Trust Dated June 21, 1995".

l) The Policy Proceeds shall then be deposited to The Simon Law Firm Client Trust Account and shall be disbursed as follows:

i) First to the payment of attorney Adam M. Simon's fees and costs;

ii) Retention of $5,000.00 in the Simon Law Client Trust Account for the benefit of the Bernstein Trust in order to pay for any professional expenses, i.e. accounting or legal, related to the final distribution of the Trust Assets and termination of trust. Any remaining balance after payment of such expenses shall be distributed to the five adult children in equal shares.

iii) The balance to be split equally among the five adult children of Simon Bernstein.

iv) Each Beneficiary that receives a share of the Policy proceeds shall execute and deliver to the Trustee (or Adam M. Simon) a receipt for such payment received.

v) Along with the distributions, the Trustee shall provide each beneficiary with a final accounting of the distributions made from the Policy Proceeds.

FURTHER AFFIANT SAYETH NAUGHT.

Dated: FEBRUARY 5, 2015

JILL IANTONI

SUBSCRIBED AND SWORN TO BEFORE ME
THIS 5 DAY OF FEBRUARY, 2015.

NOTARY PUBLIC
County of Lake, IL

OFFICIAL SEAL
SONJA PATRICK
Notary Public - State of Illinois
My Commission Expires Oct 28, 2018

AUS-5960583-2

EXHIBIT 5

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SIMON BERNSTEIN IRREVOCABLE INSURANCE TRUST DTD 6/21/95, by Ted S. Bernstein, its Trustee, Ted S. Bernstein, an individual, Pamela B. Simon, an individual, Jill Iantoni, an individual and Lisa S. Friedstein, an individual.

Plaintiff,

v.

HERITAGE UNION LIFE INSURANCE COMPANY,

Defendant,

HERITAGE UNION LIFE INSURANCE COMPANY

Counter-Plaintiff

v.

SIMON BERNSTEIN IRREVOCABLE TRUST DTD 6/21/95

Counter-Defendant

and,

FIRST ARLINGTON NATIONAL BANK as Trustee of S.B. Lexington, Inc. Employee Death Benefit Trust, UNITED BANK OF ILLINOIS, BANK OF AMERICA, Successor in interest to LaSalle National Trust, N.A., SIMON BERNSTEIN TRUST, N.A., TED BERNSTEIN, individually and as purported Trustee of the Simon Bernstein

Case No. 13 cv 3643
Honorable John Robert Blakey
Magistrate Mary M. Rowland

Irrevocable Insurance Trust Dtd 6/21/95, and ELIOT BERNSTEIN

Third-Party Defendants.

ELIOT IVAN BERNSTEIN,

Cross-Plaintiff

v.

TED BERNSTEIN, individually and as alleged Trustee of the Simon Bernstein Irrevocable Insurance Trust Dtd, 6/21/95

Cross-Defendant

and,

PAMELA B. SIMON, DAVID B.SIMON, both Professionally and Personally ADAM SIMON, both Professionally and Personally, THE SIMON LAW FIRM, TESCHER & SPALLINA, P.A., DONALD TESCHER, both Professionally and Personally, ROBERT SPALLINA, both Professionally and Personally, LISA FRIEDSTEIN, JILL IANTONI S.B. LEXINGTON, INC. EMPLOYEE DEATH BENEFIT TRUST, S.T.P. ENTERPRISES, INC. S.B. LEXINGTON, INC., NATIONAL SERVICE ASSOCIATION (OF FLORIDA), NATIONAL SERVICE ASSOCIATION (OF ILLINOIS) AND JOHN AND JANE DOES

Third-Party Defendants.

AFFIDAVIT OF PAM SIMON

I, Pam Simon, being duly sworn under oath, deposes and states as follows:

1. I am a resident of the City of Chicago, County of Cook, State of Illinois and am over the age of 18. If I were called and sworn as a witness in the above-captioned matter I could competently and voluntarily testify to the facts set forth in this Affidavit based upon my personal knowledge.

2. My maiden name is Pamela Beth Bernstein. My married name is Pamela Beth Simon or Pam Simon.

3. I am one of five adult children of Simon Bernstein.

4. When I use the term "Affidavit of Don Sanders" I mean a certain affidavit executed by Don Sanders, Assistant Vice President of Operations for Jackson National Life Insurance Company on April 8, 2014.

5. When I use the term "Capitol Bankers", I mean Capitol Bankers Life Insurance Company.

6. When I use the term "Consenting Children", I mean collectively four of the five adult children of Simon Bernstein, whom are Ted Bernstein, Pamela Simon, Jill Iantoni, and Lisa Friedstein.

7. When I use the term "Heritage", I mean Heritage Union Life Insurance Company.

8. When I use the term "Jackson", I mean Jackson National Life Insurance Company.

9. When I use the term "Insurer", I mean the life insurance company that was the insurer on the risk for the Policy, which started as Capitol Bankers but changed through succession from time to time.

10. When I use the term "Policy", I mean Capitol Bankers Life Insurance Policy No. 1009208 insuring the life of Simon Bernstein.

11. When I use the term "Insured", I mean Simon Bernstein.

12. When I use the term "Owner", I mean the owner of the Policy as reflected on the Insurers' records from time to time.

13. When I use the term "Policy Proceeds", I mean the amount that was payable by the Insurer under the Policy upon the death of the insured.

14. When I use the term "Proceeds on Deposit", I mean the amount that was actually deposited by the Insurer with the Registry of the Court pursuant to the Insurers' Complaint for Interpleader.

15. When I use the term "Policy Records", I mean the records of the Insurer relating to the Policy as produced by the Insurer during the Litigation.

16. When I use the term "Litigation", I mean the above-captioned litigation.

17. When I use the term "VEBA", I am referring to the S.B. Lexington Employee Death Benefit Trust.

18. I have had an opportunity to consult with my attorney, and review the documents produced by all parties in the above-referenced litigation.

19. I have reviewed the Affidavit of Don Sanders.

20. I have been a licensed insurance agent in the State of Illinois for at least 35 years. In the 1980's and early 1990's, I was located in the same business office as my father, Simon Bernstein.

21. In the early 1980's, I along with my father, Simon Bernstein and brother, Ted Bernstein, marketed and sold VEBA Death Benefit Plans wherein corporate benefit plans would purchase life insurance on employees, and the employees would name the ultimate beneficiary of their death benefit by completing a Plan and Trust Beneficiary Designation Form.

22. In my experience as an insurance agent, and more specifically in my experience with the sales of life insurance policies issued through a Voluntary Employee Benefit Association, the original of the life insurance policy would be delivered by the insurer of the policy to the owner of the policy as listed on the application. On the application, the initial owner was listed as First Arlington National Bank as Trustee for the S.B. Lexington Employee Death Benefit Trust.

23. In late 1982, First Arlington National Bank was located in Arlington Heights, Illinois. First Arlington National Bank was the Trustee of the VEBA and was thus acting on behalf of the VEBA as Owner of the Policy. In my experience the insurer would have delivered the original Policy to the agent whom would then deliver the Policy to the original Owner. The agent whom signed the application for the Policy was my father Simon Bernstein whose offices were located in Chicago, Illinois. The delivery of the Policy to the Owner would have occurred in Arlington Heights, Illinois.

24. In late December of 1982 at the time of Policy issuance and delivery, Simon Bernstein, the insured, resided and was domiciled in Glencoe, Illinois.

25. In the late 1980's my father, Simon Bernstein, my husband, David Simon and myself, co-owned a life insurance brokerage named STP Enterprises, Inc. ("STP") that was located in offices in Chicago, Illinois. I am currently the president of STP. STP was named a third-party defendant to Eliot's claims. STP is represented by counsel, Adam M. Simon.

26. One of the life insurance companies, STP represented was Lincoln Benefit Life Insurance Company. In the 1990's my father, Simon Bernstein applied for and purchased a life insurance policy issued by Lincoln Benefit Life. During a search of records located at our Chicago offices following the death of my father, Simon Bernstein, we located a file containing documents relating to the Lincoln Benefit Life Policy and Plaintiff has produced those documents in this litigation. **(*See* Ex. 18).**

27. **Ex. 18** is Lincoln Benefit Life Request for Service form for Lincoln Policy #U0204204 (the "Lincoln Policy"). This form indicates that the insured and owner was Simon Bernstein and that ownership of the Lincoln Policy was being transferred to the "Simon Bernstein Irrevocable Insurance Trust dtd 6/21/95", and includes the Tax ID for the trust, and the name of Shirley Bernstein as trustee. The document also contains the signature of my father, Simon Bernstein. I recognize my father's signature and have seen it on many occasions. Also, his signature was witnessed by former STP employee, Debbie Marsh, whose signature I also recognize. The document indicates it was received at Lincoln's Home Office and recorded on August 8, 1995. The Lincoln Policy lapsed for non-payment of premium in 2006, six years prior to Simon Bernstein's passing.

28. According to the Policy Records, the Policy was issued by Capitol Bankers in 1982. I have reviewed and made myself familiar with the Policy Records which start with bates no. JCK000001 and end at bates no. JCK001324.

29. I have also reviewed and made myself familiar with Plaintiff's document production made pursuant to Fed. R. Civ. P. 26. A true, accurate and complete set of copies of those documents were served upon the other parties to this Litigation and were stamped with bates no. BT000001-BT000112.

30. I have reviewed the Insurer's records regarding the amount of the death benefit, and have reviewed the receipt for the deposit of the Policy Proceeds with the Registry of the Court in the amount of $1,703,567.09. I have no dispute or objection to the amount deposited as the Policy Proceeds.

31. On June 5, 1992, Sandy Kapsa (an employee of S.B. Lexington and an affiliated company, National Service Association, Inc.) submitted a letter to Capitol Bankers Life Insurance Company informing them that LaSalle National Trust was being appointed successor trustee of the VEBA. On June 17, 1992, the Insurer acknowledged the change of ownership listing the owner as LaSalle National Trust, N.A., as Successor Trustee. **(***See* **Ex. 7)**

32. I concur with the statement of Don Sanders in his Affidavit that the last beneficiary designation submitted by the Policy Owner and acknowledged by the Insurer prior to the death of the Insured marked as Bates No. JCK000370. The primary beneficiary designation is "LaSalle National Trust, N.A., Trustee", and the contingent beneficiary is "Simon Bernstein Irrevocable Insurance Trust dated June 21, 1995".

33. In 1995, David B. Simon, Ted S. Bernstein, Pam Simon, and Simon L. Bernstein all shared common office space at 600 West Jackson Blvd., Ste. 800, Chicago, IL 60606.

34. In 1995, my husband, David Simon and I created irrevocable insurance trusts with the assistance of attorneys from the firm of Hopkins and Sutter.

35. On August 26, 1995, Simon L. Bernstein, as a Member of the VEBA, named the Bernstein Trust as the "person(s) to receive at my death the Death Benefit stipulated in the S.B. Lexington, Inc. Employee Death Benefit and Trust and Adoption Form adopted by my Employer." I recognize the signature on the VEBA Beneficiary Designation form as that of my father, Simon Bernstein. **(***See* **Ex. 4).**

36. On April 3, 1998, S.B. Lexington, Inc. was voluntarily dissolved by its shareholder(s), and the VEBA was likewise terminated at this time. As a part of the dissolution, ownership of the Policy was changed from the VEBA to Simon Bernstein, Individually **(***See* **Ex. 9).**

37. After the death of Simon Bernstein, David Simon and I, with the assistance of our employees, conducted a search of my offices and business records in Chicago, Illinois. We located two unexecuted drafts of the Bernstein Trust were located. We were unable to locate an executed original or copy of the Bernstein Trust. **(***See* **Ex. 15 and Ex. 16).**

38. Based on the foregoing, I am in agreement regarding the following facts, and the intent of my father, Simon Bernstein, with regard to the Policy proceeds:

a) At the time of Simon Bernstein's death, Simon Bernstein was the owner of the Policy;

b) In June of 1995, Simon Bernstein formed the Simon Bernstein Irrevocable Insurance Trust Dated June 21, 1995;

c) In November of 1995, the VEBA as Owner submitted a Request to the Insurer designating the VEBA as primary beneficiary, and the Bernstein Trust as second or contingent beneficiary.

d) In 1998: (i) S.B. Lexington, Inc. was voluntarily dissolved; (ii) the VEBA was terminated and (iii) the VEBA as Owner submitted a change of Owner to the Insurer designating Simon Bernstein as Owner of the Policy.

e) On the date of Simon Bernstein's death, Simon Bernstein was the Owner of the Policy and the sole surviving beneficiary of the Policy was the contingent beneficiary, the Bernstein Trust;

f) Following the death of my mother, Shirley Bernstein, and according to the drafts of the Bernstein Trust and the intent of Simon Bernstein, Ted Bernstein was appointed to act as successor Trustee;

g) Each of the Consenting Children have signified their consent to a court appointment of Ted Bernstein as Trustee.

h) The beneficiary of the Policy Proceeds is the Bernstein Trust;

i) The beneficiaries of the Bernstein Trust are the five adult children (including Eliot, the non-consenting child) to share equally, twenty percent each;

j) The sole asset of the Bernstein Trust is the Policy Proceeds, and the distribution of such proceeds to the five children of Simon Bernstein and any administrative matters related to the termination of the Trust are the only remaining acts required of the Trustee;

k) The four consenting children of Simon Bernstein agree that upon entry of a judgment in favor of the Plaintiffs declaring that the Bernstein Trust is beneficiary of the Policy Proceeds, counsel for Bernstein Trust, Adam M. Simon, shall be authorized to present the judgment to the Registry and have the Registry distribute the Policy Proceeds in a check payable as follows:

"The Simon Law Firm Client Trust f/b/o Simon Bernstein Irrevocable Insurance Trust Dated June 21, 1995".

l) The Policy Proceeds shall then be deposited to The Simon Law Firm Client Trust Account and shall be disbursed as follows:

i) First to the payment of attorney Adam M. Simon's fees and costs;

ii) Retention of $5,000.00 in the Simon Law Client Trust Account for the benefit of the Bernstein Trust in order to pay for any professional expenses, i.e. accounting or legal, related to the final distribution of the Trust Assets and termination of trust. Any remaining balance after payment of such expenses shall be distributed to the five adult children in equal shares.

iii) The balance to be split equally among the five adult children of Simon Bernstein.

iv) Each Beneficiary that receives a share of the Policy proceeds shall execute and deliver to the Trustee (or Adam M. Simon) a receipt for such payment received.

v) Along with the distributions, the Trustee shall provide each beneficiary with a final accounting of the distributions made from the Policy Proceeds.

FURTHER AFFIANT SAYETH NAUGHT.

Dated: FEBRUARY 24TH, 2015

PAMELA SIMON

SUBSCRIBED AND SWORN TO BEFORE ME
THIS 24th DAY OF FEBRUARY, 2015.

NOTARY PUBLIC
County of Lake, IL

CHERYL MARIE SYCHOWSKI
OFFICIAL SEAL
Notary Public, State of Illinois
My Commission Expires
August 08, 2016

EXHIBIT 6

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SIMON BERNSTEIN IRREVOCABLE INSURANCE TRUST DTD 6/21/95, by Ted S. Bernstein, its Trustee, Ted S. Bernstein, an individual, Pamela B. Simon, an individual, Jill Iantoni, an individual and Lisa S. Friedstein, an individual.

Plaintiff,

v.

HERITAGE UNION LIFE INSURANCE COMPANY,

Defendant,

HERITAGE UNION LIFE INSURANCE COMPANY

Counter-Plaintiff

v.

SIMON BERNSTEIN IRREVOCABLE TRUST DTD 6/21/95

Counter-Defendant

and,

FIRST ARLINGTON NATIONAL BANK as Trustee of S.B. Lexington, Inc. Employee Death Benefit Trust, UNITED BANK OF ILLINOIS, BANK OF AMERICA, Successor in interest to LaSalle National Trust, N.A., SIMON BERNSTEIN TRUST, N.A., TED BERNSTEIN, individually and as purported Trustee of the Simon Bernstein

Case No. 13 cv 3643
Honorable John Robert Blakey
Magistrate Mary M. Rowland

Irrevocable Insurance Trust Dtd 6/21/95, and ELIOT BERNSTEIN

Third-Party Defendants.

ELIOT IVAN BERNSTEIN,

Cross-Plaintiff

v.

TED BERNSTEIN, individually and as alleged Trustee of the Simon Bernstein Irrevocable Insurance Trust Dtd, 6/21/95

Cross-Defendant

and,

PAMELA B. SIMON, DAVID B.SIMON, both Professionally and Personally ADAM SIMON, both Professionally and Personally, THE SIMON LAW FIRM, TESCHER & SPALLINA, P.A., DONALD TESCHER, both Professionally and Personally, ROBERT SPALLINA, both Professionally and Personally, LISA FRIEDSTEIN, JILL IANTONI S.B. LEXINGTON, INC. EMPLOYEE DEATH BENEFIT TRUST, S.T.P. ENTERPRISES, INC. S.B. LEXINGTON, INC., NATIONAL SERVICE ASSOCIATION (OF FLORIDA), NATIONAL SERVICE ASSOCIATION (OF ILLINOIS) AND JOHN AND JANE DOES

Third-Party Defendants.

AFFIDAVIT OF DAVID SIMON

I, David Simon, being duly sworn under oath, deposes and states as follows:

1. I am a resident of the City of Chicago, County of Cook, State of Illinois and am over the age of 18. If I were called and sworn as a witness in the above-captioned matter I could competently and voluntarily testify to the facts set forth in this Affidavit based upon my personal knowledge.

2. My name is David B. Simon. I am also known by the nickname "Scooter". I am married to Pamela Simon and am the brother of Adam Simon. I am also the owner of The Simon Law Firm and a Co-Owner of STP Enterprises, Inc. I am represented by Adam Simon as is my wife, Pam Simon, The Simon Law Firm and STP Enterprises, Inc.

3. When I use the term "Affidavit of Don Sanders" I mean a certain affidavit executed by Don Sanders, Assistant Vice President of Operations for Jackson National Life Insurance Company on April 8, 2014.

4. When I use the term "Capitol Bankers", I mean Capitol Bankers Life Insurance Company.

5. When I use the term "Consenting Children", I mean collectively four of the five adult children of Simon Bernstein, whom are Ted Bernstein, Pamela Simon, Jill Iantoni, and Lisa Friedstein.

6. When I use the term "Heritage", I mean Heritage Union Life Insurance Company.

7. When I use the term "Jackson", I mean Jackson National Life Insurance Company.

8. When I use the term "Insurer", I mean the life insurance company that was the insurer on the risk for the Policy, which started as Capitol Bankers but changed through succession from time to time.

9. When I use the term "Policy", I mean Capitol Bankers Life Insurance Policy No. 1009208 insuring the life of Simon Bernstein.

10. When I use the term "Insured", I mean Simon Bernstein.

11. When I use the term "Owner", I mean the owner of the Policy as reflected on the Insurers' records from time to time.

12. When I use the term "Policy Proceeds", I mean the amount that was payable by the Insurer under the Policy upon the death of the insured.

13. When I use the term "Proceeds on Deposit", I mean the amount that was actually deposited by the Insurer with the Registry of the Court pursuant to the Insurers' Complaint for Interpleader.

14. When I use the term "Policy Records", I mean the records of the Insurer relating to the Policy as produced by the Insurer during the Litigation.

15. When I use the term "Litigation", I mean the above-captioned litigation.

16. When I use the term "VEBA", I am referring to the S.B. Lexington Employee Death Benefit Trust.

17. I have had an opportunity to consult with my attorney, and review the documents produced by all parties in the above-referenced litigation.

18. I have also reviewed the Affidavit of Don Sanders.

19. I am an attorney licensed to practice in the States of California and Illinois. I have been a licensed insurance agent in the State of Illinois for over 25 years. In the late 1980's and early 1990's, I was located in the same business office as my father-in-law, Simon Bernstein.

20. In the late 1980's my father-in-law, Simon Bernstein, my wife, Pam Simon and myself, co-owned a life insurance brokerage named STP Enterprises, Inc. ("STP") that was located in offices in Chicago, Illinois.

21. One of the life insurance companies, STP represented was Lincoln Benefit Life Insurance Company. In the 1990's my father-in-law, Simon Bernstein applied for and purchased a life insurance policy issued by Lincoln Benefit Life. During a search of records located at our Chicago offices following the death of my father-in-law, Simon Bernstein, we located a file containing documents relating to the Lincoln Benefit Life Policy and Plaintiff has produced those documents in this litigation. (*See* **Ex. 18**).

22. **Ex. 18** is a Lincoln Benefit Life Request for Service form for Lincoln Policy #U0204204 (the "Lincoln Policy"). This form indicates that the insured and owner was Simon Bernstein and that ownership of the Policy was being transferred to the "Simon Bernstein Irrevocable Insurance Trust dtd 6/21/95", and includes the Tax ID for the trust, and the name of Shirley Bernstein as trustee. The document also contains the signature of my father-in-law, Simon Bernstein. I recognize my father in-law's signature and have seen it on many occasions. Also, his signature was witnessed by former STP employee, Debbie Marsh, whose signature I also recognize. The document indicates it was received at Lincoln's Home Office and recorded on August 8, 1995. (*See* **Ex. 18**)

23. In 1994, my wife and I retained an attorney at the law firm of Hopkins and Sutter in Chicago to help us prepare and execute an irrevocable insurance trust for our own estate planning purposes.

24. In 1995, Simon Bernstein came to me and expressed an interest in creating a life insurance trust for himself.

25. I created a sample insurance trust for Simon Bernstein and reviewed it with him. We agreed that Simon Bernstein should also use Hopkins and Sutter to finalize and execute his insurance trust. We also discussed that the insurance trust was for the benefit of his wife, and then his five children, and that he wanted to name his wife, Shirley as Trustee, and then either me, Ted or Pam as Successor Trustee. I suggested that he appoint Ted as the next trustee.

26. Simon Bernstein took a copy of the draft of the trust I provided and went to Hopkins and Sutter to execute his insurance trust.

27. I met again with Simon Bernstein after he had signed the trust, and I reviewed the executed Bernstein Trust Agreement and saw that he had removed me as a Successor Trustee. I also assisted Simon Bernstein with preparing forms for Lincoln Benefit Life to put ownership of the Lincoln Policy in the name of the Bernstein Trust.

28. After the death of Simon Bernstein, I conducted a search of my offices and records in Chicago, Illinois. I was able to locate a hard copy draft of the Simon Bernstein Irrevocable Insurance Trust in one folder, and this document contains some of my handwritten notes from one of my conversations with Simon Bernstein referenced above. (*See* **Ex. 16).**

29. With the help of my brother, Adam Simon, we also located a file on our computer database entitled "SITRUST". We were able to print this draft and the metadata of the file. The metadata indicated was last modified on June 21, 1995. The metadata also includes a "date created" date of September of 2004, but I know that the September of 2004 date relates to the creation of our new database when my offices updated our database servers. The SITRUST file was a pre-2004 file that was uploaded to our new database servers when we purchased and installed them in September of 2004. (*See* **Ex. 15).**

30. Once Simon Bernstein formed and executed the Simon Bernstein Insurance Trust Agreement, I assisted him and his wife, Shirley with obtaining a tax identification number for the Bernstein Trust. During the process of obtaining the tax identification number I prepared an IRS SS-4 form, which contains the name of the trust, the name of the trustee, the tax identification number, and the signature of Shirley Bernstein. (*See* **Ex. 19).**

31. To the best of my knowledge and belief, Simon Bernstein took the original Bernstein Trust Agreement with him at the time he moved his offices from Chicago to Florida.

FURTHER AFFIANT SAYETH NAUGHT.

Dated: FEBRUARY 25, 2015

DAVID SIMON

SUBSCRIBED AND SWORN TO BEFORE ME
THIS 25TH DAY OF FEBRUARY, 2015.

NOTARY PUBLIC
County of Cook, State of Illinois

CHERYL MARIE SYCHOWSKI
OFFICIAL SEAL
Notary Public, State of Illinois
My Commission Expires
August 08, 2016

EXHIBIT 7

THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SIMON BERNSTEIN)
IRREVOCABLE INSURANCE)
TRUST DTD 6/21/95, by)
Ted S. Bernstein, its)
Trustee, Ted S.)
Bernstein, an)
individual, Pamela B.)
Simon, an individual,)
Jill Iantoni, an)
individual, and Lisa S.)
Friedstein, an)
individual,)
)
Plaintiff,)
)
vs.) No. 13 CV 3643
)
HERITAGE UNION LIFE)
INSURANCE COMPANY,)
)
Defendant.)

The deposition of DAVID SIMON, called for examination pursuant to the Rules of Civil Procedure for the United States District Courts pertaining to the taking of depositions, taken before Vicki L. D'Antonio, a certified shorthand reporter of the State of Illinois, at One East Wacker Drive, Chicago, Illinois, on the 5th day of January, 2015, at the hour of 2:18 p.m.

Reported by: Vicki L. D'Antonio, CSR, RPR
License No. 084-004344

APPEARANCES:

STAMOS & TRUCCO, LLP, by
MR. JAMES J. STAMOS
MR. KEVIN P. HORAN
One East Wacker Drive
Third Floor
Chicago, Illinois 60601
(312) 630-7979
jstamos@stamostrucco.com
khoran@stamostrucco.com

Representing the Plaintiff;

THE SIMON LAW FIRM, by
MR. ADAM M. SIMON
203 East Wacker Drive
Suite 2725
Chicago, Illinois 60601
(312) 819-0730
asimon21@att.net

Representing the Defendant.

ALSO PRESENT VIA TELEPHONE:
Ms. Joielle Foglietta
Mr. Bill Stansbury
Mr. Eliot Bernstein
Honorable Amy J. St. Eve

INDEX

EXHIBITS

NOTE: Exhibits retained by Mr. Adam Simon.

(Whereupon, the witness was duly sworn.)

DAVID SIMON,

having been first duly sworn, was examined and testified as follows:

EXAMINATION

BY MR. STAMOS:

Q. Will you state your name, please.

A. David Bruce Simon.

Q. Have you been deposed before?

A. I have.

Q. And how many times?

A. I believe one or two.

Q. The first one that comes to mind -- the first one that -- bringing to mind the first deposition you can remember, what was it -- what did it involve?

A. I think I was deposed in a case revolving around a suit for disparagement in Kentucky.

Q. What was the name of the case?

A. Ernie -- David Simon and S.T.P. Enterprises versus Ernie Sampson and Kentucky Financial, I think, is the -- something like

that.

Q. What year was that?

A. I want to say the late '80s, early '90s.

Q. Someone had said something unpleasant about you and you sued them?

A. Not about me, no.

Q. About the company?

A. About the program.

Q. Was that litigation resolved?

A. It was.

Q. And how was it resolved?

A. Well, we lost at summary judgment, we appealed, we lost, and then we entered into an agreement with the individual to correct his misassumptions about the program.

Q. Okay. When you said the program, what are you referring to?

A. The Arbitrage Life Payment System.

Q. Is that something that still continues?

A. It does.

Q. And how -- who is it administered or offered by?

A. S.T.P. Enterprises, Inc.

Q. There was a second deposition, was there?

A. ING -- Security Life of Denver.

Q. There was a lawsuit involving Security Life of Denver?

A. Correct.

Q. Who was the plaintiff and who was the defendant?

A. Life Plans, Inc. is the plaintiff. Security Life of Denver is the defendant.

Q. Is it a pending litigation?

A. It is.

Q. Where is it pending?

A. Northern District of Illinois.

Q. What is the nature of that case?

A. Breach of contract and tortious interference.

Q. Who is the plaintiff?

A. Life Plans.

Q. How are you related to Life Plans?

A. I'm on their board.

Q. And you're a party or you're just a member -- as a person with knowledge, you were deposed?

A. I'm also the general counsel. I don't own any of the company, though.

Q. Where are you currently employed?

A. S.T.P. Enterprises, Inc.

Q. Who owns that?

A. Fifty percent of it is owned by a trust that I control. Fifty percent of it is owned by a trust that Pam Simon controls.

Q. Pam Simon is who?

A. My wife.

Q. How long have you had that interest, the 50 percent interest that you control in S.T.P.?

A. I believe 2000.

Q. All right. And how did you come to possess that interest?

A. Bought it.

Q. From whom?

A. Which part?

Q. You tell me.

A. The first part was bought in from Dov Kahana, and the second part was bought from Simon Bernstein.

Q. 25 percent each part? I want to

know -- I'll back up.

The 50 percent that you control, was that -- was that obtained at the same time that Pam control -- obtained her 50 percent?

A. Yes.

Q. And each of you obtained what portion of your 50 percent from which of those people?

A. Half of it from Dov Kahana, half of it from Simon Bernstein.

Q. And what was the compensation paid for it?

A. For Dov Kahana?

Q. Okay.

MR. SIMON: I'm going to object as relevance.

THE WITNESS: I don't know the exact numbers, but it was six figures and release from any debts and obligations.

BY MR. STAMOS:

Q. How about to Mr. Bernstein?

MR. SIMON: Same objection.

THE WITNESS: Several million dollars.

BY MR. STAMOS:

Q. All right. When did you first start working with Mr. Bernstein?

A. In what capacity? Do you mean with --

Q. Any. Any capacity.

Okay. So did you -- at one point, were you in business with Simon Bernstein in any capacity?

A. Yes.

Q. When was the first time you were in any way associated with him?

A. Well, associated with him the first time was -- I don't know what you mean by associated, but the first time I was associated with him was that his daughter sold my father life insurance in, I believe, 1978. I was --

Q. His daughter Pam?

A. Yes.

Q. Okay.

A. When she updated the life insurance plan, that's the first time I met Simon Bernstein.

Q. Were you employed elsewhere at that time?

A. I was.

Q. Where were you employed?

A. I was employed at that -- I was

self-employed.

Q. Doing what?

A. Law.

Q. When did you graduate law school?

A. 1984.

Q. And what did you do following graduation from law school?

A. Law.

Q. Where did you law [sic]?

A. First in California, and then within about six months, Illinois.

Q. All right. When you came to work as a lawyer in Illinois, where did you work?

A. For myself.

Q. What kind of law did you practice?

A. General corporate, mostly litigation.

Q. And have you ever been associated as a lawyer with other lawyers?

A. When I first started in California, yes.

Q. Other than that, have you always been on your own?

A. I've had other lawyers work with me and for me, but yes.

Q. Do you continue to practice law today?
A. I do.
Q. What kind of law do you practice?
A. Mostly, I would say I -- my practice is structured finance. However, I also service a handful of clients in whatever their needs are. I will maybe find another attorney to partner with if their expertise is needed or will handle it in-house.
Q. Are you on any boards of directors?
A. Yes.
Q. What boards of directors are you on?
A. For-profit companies?
Q. Any boards.
A. S.T.P. Enterprises, Life Plans, Inc., Intervivos Foundation, Institutional Longevity Assets.
Q. What's that?
A. It's a limited liability company.
And Institutional Pooled Benefits.
Q. The last one, what does that company do?
A. That owns a patent that pools death benefit.

Q. The entity you named before, that -- the LLC, what does that company do?

A. That's the asset that promotes that pooling.

Q. And the company that was in litigation that you were on the board of, which one was it?

A. Life Plans?

Q. That's the last one you mentioned? Had you mentioned that in the list of boards? I didn't -- I didn't catch it. Okay.

A. Yes.

Q. What is its business, Life Plans?

A. Insurance agency.

Q. How much of your time do you currently spend practicing law as opposed to the other ventures in which you're involved?

A. The Simon Law Firm, I probably spend now probably 25 percent of my time.

Q. Did there come a time when you became professionally associated with Simon Bernstein?

A. As his attorney? Yes.

Q. I don't -- I don't -- I'm not sure what you're intending to leave out, but in any capacity, when is the first time you became

associated professionally with Simon Bernstein in any way?

A. 1986.

Q. And what was -- in what capacity was that?

A. Attorney.

Q. And how long did you serve as his attorney?

A. About ten years.

Q. So that would be about to '96?

A. Yes.

Q. At some point, did you become involved with him in the insurance business?

A. Yes.

Q. When was that?

A. 1987.

Q. In what capacity did you become involved with him in the insurance business in 1987?

A. I wrote a documentation for a life insurance sales concept that had been originated by his brother.

Q. Who was his brother?

A. Norman Bernstein.

Q. Were they in business together at the time?

A. I believe they did share one common business.

Q. At some point, I take it you married his daughter?

A. I did.

Q. When was that?

A. July 3, 1988.

MR. STAMOS: Let's go off the record for a second.

(Whereupon, a discussion was had off the record.)

BY MR. STAMOS:

Q. All right. We were talking about his brother Norman, I guess, when he was -- you -- you assisted him in preparing a document that defined a product he was going to offer? Is that what that was?

A. I prepared some transactional documents for a unique program to sell life insurance and a manner to pay for it.

Q. And did there come a time when you became involved in the actual life insurance or

insurance business as opposed to simply serving as a lawyer for his business?

A. Yes.

Q. When was that?

A. 1988.

Q. In what -- in what capacity did you -- did you participate?

A. Owner of S.T.P. Enterprises.

Q. Right. What does that do? What do you do as the owner of S.T.P.?

A. Promote the Arbitrage Life Payment System as well as general life insurance brokerage.

Q. Can you describe for me this Arbitrage program you're talking about?

MR. SIMON: Object, relevance and --

BY MR. STAMOS:

Q. I don't need a long explanation. I just want to -- when you say it, I want to know what you're talking about.

A. It's a way to pay for life insurance using leverage.

Q. Okay. For example?

A. Borrow from a bank to pay the premiums.

Q. I see.

A. Although the individual doesn't borrow and there's some nuances to the program that are unique compared to standard premium finance.

Q. Now, in the course of your association with Mr. Bernstein, I know we're here talking about this life insurance policy. I want to designate it correctly so we don't get ourselves confused.

The Capitol -- was originally the Capitol Bankers Life policy, you know what I'm -- you know what policy I'm talking about, correct?

A. I do.

Q. Are you aware of any other insurance policies that ever existed that insured the life of Simon Bernstein or his wife?

A. I am.

Q. Okay. Tell me what other policies you're aware of.

A. Lincoln Benefit Life, Inter-Ocean Life.

Q. And were benefits paid on those two policies after his death?

A. Not to my knowledge.

Q. Were they in force at the time of his death?

A. Not to my knowledge.

Q. And how are you aware that they existed?

A. The Lincoln Benefit Life was paid for through the Arbitrage Life Payment System, so I participated in the closing of that policy.

Q. What was the benefit on that?

A. I believe $200,000.

Q. And the Ocean, Inter-Ocean Life policy, how were you aware of its existence?

A. From Simon.

Q. He told you it existed?

A. Yes.

Q. What was the -- what was the benefit on that policy?

A. I'm not a hundred percent sure, but it is my belief that it was a million dollars.

Q. And what years -- what year was it initiated?

A. I don't know. Sometime in the '70s or early '80s, I believe.

Q. Was it a term policy?

A. I don't know.
Q. How did you come to learn about it?
A. Discussing with him his life insurance.
Q. When did you first become aware of the Capitol life policy?
MR. SIMON: Objection just to form. I think we need to --
BY MR. STAMOS:
Q. Capitol Bankers Life policy. I'm sorry.
I'll restate the question.
When did you first become aware of the Capitol Bankers Life policy?
A. I believe sometime in the mid '80s.
Q. Do you know what year it was initiated?
A. The policy?
Q. Yeah.
A. I know only from looking at records.
Q. And so what do you know from looking at records?
A. 1982.
Q. Okay. What -- when was the first time you ever discussed that policy with Simon?
A. I don't know if a first time I remember

discussing it with Simon is so much as learning about the VEBA, because one of the things that was done was file the 5500s for the death benefit VEBA at S.B. Lexington, and so sometime in the mid '80s, I became aware of the 5500, and that it had to do with the policy, I believe I learned through Richard Klink, who was Simon Bernstein's partner in S.B. Lexington.

Q. Tell me what the 5500 is.

A. It's a form, tax filing form.

Q. And that's filed in order to obtain the tax benefits that relate to the VEBA?

A. It's a -- yes, in part.

Q. What is it --

A. It's some -- it's a -- you know, just like any benefit plan. You file a 5500.

Q. I'm not asking very good questions.

What was your role in dealing with that is, I guess, what I'm trying to get at. Why did you -- why did you become aware of it?

A. Mr. Klink showed it to me, told me about the process he went through to file the form. My father's company also had to do the same thing for his policy.

Q. Was your father's company in any way related to Mr. Bernstein's companies?

A. Not at all.

Q. What did you learn about the policy at that time when you first learned its existence when Mr. Klink showed you the 5500?

A. It was a policy on Simon's life, owned by the VEBA, and the beneficiary was the VEBA.

Q. What's the next thing you -- strike that.

After being told about its existence by Mr. Klink, what's the next time you ever conversed with anyone about it?

A. Well, probably conversed annually about the policy because we would get annual statements.

Q. What was the face policy -- I'm sorry.

What was the face amount of the policy?

A. When originally applied for?

Q. Yeah.

A. I believe $2 million.

Q. Did it ever change?

A. There was borrowings against the policy, so the death benefit was reduced.

Q. Did the face amount ever -- ever change?

A. Face amount changes.

(Whereupon, a discussion was had off the record.)

THE COURT: Let's go on the record, then, so this is clear.

So Mr. Simon, what is the basis of your objection to having Mr. Stansbury present? Is he physically present or listening in?

MR. SIMON: This is Adam Simon. Our objection is he's a nonparty to this case and he's a potential witness, and I believe under the witness exclusion rules, I think it's 615, he should not be permitted to listen in on this deposition, much less participate.

THE COURT: And is he physically there or listening in on the phone?

MR. STAMOS: Listening in, Judge.

THE COURT: Okay.

MR. STAMOS: Yeah. Actually, what we -- what we did was we asked him if we could exclude him, pending your call, which we've done, so he hasn't -- he hasn't heard any of the deposition.

THE COURT: Okay.

MR. STAMOS: And he -- if I may say, Judge, he became involved because he asked the -- my client, the estate, if he could attend, and they were willing to have him attend, and I don't think that witness exclusion rules would apply to a -- to a deposition, which, of course, he could read when it's done anyway, so I don't -- I don't think that there are any rules that would prevent him from listening, and he certainly may not participate. We don't -- we don't -- he won't be allowed to participate.

THE COURT: And Mr. Simon, what's the prejudice of having him present?

THE WITNESS: I just don't believe he's entitled to be present, and from my quick reading online, the witness exclusion rules do apply to depositions, and I don't want his testimony to be tainted by listening in or possibly, you know, participating with counsel's questioning of our witness.

THE COURT: If that's the basis of your objection, that is overruled because the witness exclusion under Rule 615 does not apply to

depositions. Rule 30C specifically says that. It provides that deposition testimony should proceed as if at trial, and the Federal Rules of Evidence apply except for Rules 103 and 615, so Rule 615 does not apply.

Your objection is overruled and he may be present. He, of course, may not participate. I will accept your representation with that, but he may be present, listening in on the deposition.

MR. SIMON: Okay.

THE COURT: So you should proceed forward and he can listen in.

MR. SIMON: Thank you, your Honor.

MR. STAMOS: Thanks, your Honor.

THE COURT: Thank you.

MR. STAMOS: Appreciate it.

THE COURT: Bye.

(Whereupon, a discussion was had off the record.)

BY MR. STAMOS:

Q. What I'm asking is the -- I understand that the -- maybe I'm not using the terminology correctly.

Was there ever a time that the stated benefit of the policy was other than $2 million? I understand that the amount to be paid would have varied based upon loans, but was there ever a time that it was other than $2 million or greater than $2 million?

A. I don't think I can answer the question.

Q. Why not?

A. Because I don't understand what you're saying.

Q. Okay. I buy an insurance policy. It says a million dollars on it, a million dollars of life insurance. I understand that there are instances in which the payment of a million upon someone's death might be reduced due to intervening events, but the million -- piece of paper still says a million on it, right?

Okay. Now, my question is: With regard to the policy of '82, which is policy No. 1009208, I think we can all agree that's what it is, was there ever a time that the face amount of that policy was ever greater than 2 million?

A. Not to my knowledge.

Q. All right. Are you aware at any point at which an application was made to increase the benefit amount from 2 million to 3 million?

A. Not to my knowledge.

Q. All right. So back to the -- you said that there would be a discussion, likely annually, about the -- about the policy. I take it that would be because you'd have to file an annual 5500?

A. Yes.

Q. All right. Other than that, when is the next time you recall a -- strike that.

When was the first time you talked to Simon Bernstein about the existence of that policy, other than Mr. Klink?

A. 1987.

Q. All right. Who was present for that conversation?

A. Dov Kahana, myself, and Mr. Bernstein.

Q. And Dov Kahana was Mr. Bernstein's business partner?

A. In one of his businesses, yes.

Q. Okay. In which business?

A. Cambridge Associates.
Q. What was the business of Cambridge Associates?
A. General insurance brokerage, I believe.
Q. Okay. What was the occasion for discussing the 1982 policy?
A. Simon Bernstein was significantly in debt and did not have the money to pay the premium.
Q. Okay. What was the premium? Do you recall?
A. No.
Q. And who said what to who in that conversation about that topic?
A. Simon said to Dov we have to pay the premium.
Q. Anyone else say anything in that conversation?
A. I'm sure, but that was the gist of the conversation.
Q. All right. What -- what came from that?
A. I believe either the premium was paid or they started to borrow against the cash value

to pay the premium.

MR. STAMOS: Bill, is that you?

MR. STANSBURY: I'm here.

MR. STAMOS: Got it.

MR. STANSBURY: Thank you.

BY MR. STAMOS:

Q. And at that time when you first spoke to him -- Mr. Bernstein about it, were you aware of who the beneficiary was? Was it still the VEBA as far as you knew?

A. Yes.

Q. Did you become aware at any point of a change in beneficiary?

A. Yes.

Q. When was that?

A. Sometime around 1995.

Q. And from whom and to whom was the beneficiary changed?

A. Beneficiary was still the VEBA and a contingent beneficiary was named as the irrevocable life insurance trust.

Q. How did you become aware of that in 1995?

A. Saw the change of beneficiary forms,

helped Mr. Bernstein design the trust, and signed off on the change of forms.

Q. Do you do trust work? Do you prepare trusts?

A. I have. I don't regularly, no.

Q. All right. You're aware that there was a -- that the claim here is that a 1995 trust existed, correct?

A. I know a 1995 trust existed.

Q. Did Mr. -- prior to the -- to 1995 or prior to the date designated as the date of the reported trust of '95, did Mr. Bernstein ever have another trust, prior trust?

A. Yes.

Q. Okay. What year was that trust?

A. The VEBA trust was, I believe, in the early '80s.

Q. Did he ever have any other trusts that you're aware of?

A. Subsequent to that or prior?

Q. Prior to 1995.

A. Not that I'm aware of.

Q. Tell me the first time you ever had a conversation with Mr. Bernstein about a trust in

1995.

A. We discussed his making application for additional death benefit. My wife and I had just completed our own irrevocable life insurance trusts and made applications to Lincoln Benefit. He wished to get more insurance. That was the first time.

Q. Okay. And when you say more insurance, what insurance are you talking about? Are you talking about adding the Lincoln Benefit policy?

A. More death benefit.

Q. On the Capitol Bank -- Bankers policy?

A. No. No, a new policy. More death benefit for himself --

Q. Okay.

A. -- for -- on his life.

Q. All right. Did he do that?

A. Yes.

Q. And what company did he obtain that insurance from?

A. Lincoln Benefit Life.

Q. Okay. That's the one you told me about earlier?

A. Yes.

Q. Okay. And that's -- when you say he owned another policy, you're saying that's a policy that he -- that he initiated in 1995?

A. I believe that's the date.

Q. All right. And that's the policy that you believed was not in force at the time of his death?

A. I believe that's correct.

Q. And you think he added $200,000 to the death benefit?

A. I think the policy had a face amount of $200,000.

Q. Okay. Why did he want -- if he had a policy that paid 2 million, why did he -- why did he want 10 percent more?

MR. SIMON: Objection for speculation.

BY MR. STAMOS:

Q. Why?

A. I know he was trying to get as much death benefit as he could. He was uninsurable up until that point, and I believe this was a highly rated policy also.

Q. All right. So tell me the first time you and Mr. Bernstein had a conversation about

the trust. What did you say to him and what did he say to you?

MR. SIMON: Can I just make a general point?

MR. STAMOS: Yeah.

MR. SIMON: There's -- there's so many Mr. Bernsteins here that I think it's best if you --

MR. STAMOS: That's fine.

MR. SIMON: Yeah.

MR. STAMOS: I have no problem.

BY MR. STAMOS:

Q. With regard to the 1995 trust that is referred to in the complaint, in your complaint, when was the first time you ever had a conversation with Simon Bernstein about that?

A. 1995.

Q. And what did you say to him and what did he say to you in the course of that conversation?

A. It's privileged. I was acting as his attorney at that time.

Q. So you were acting as his attorney with regard to the trust?

A. In the first conversation, yes.

Q. Now, wait a minute.
A. Subsequently, I do not, but --
Q. Now, wait a minute. Let's get organized here.
There's a complaint that's filed describing your interactions with Mr. Bernstein about that trust, which I assume you plan to testify about?
A. Absolutely.
Q. But you're going to not testify about the start of those conversation -- the first of those conversations?
A. You know, in general, you asked me very specific questions about what did he say and what did I say.
Q. Right.
A. So in the first conversation, yes, he came to me as an attorney, so I -- it's privileged conversation.
Q. When did it stop being privileged?
A. Right after the first conversation.
Q. What made it stop being privileged?
A. I said I wouldn't act as his attorney regarding the trust.

Q. Isn't what you told me just now privileged?
A. No.
Q. Why not?
A. Because I said it after we discussed it.
Q. Who else was present for this conversation?
A. Just himself and I.
Q. Well, I take it you're going to refuse to answer questions with regard to that conversation, based upon privilege?
A. The first conversation.
Q. I'm sorry, I don't mean to be clever, but explain to me again how that remains privileged and -- and --
A. It's where I'm not acting as an attorney for him, it's not privilege. It's his privilege to assert.
Q. Does it -- does it survive his death?
A. As far as I understand, it does.
Q. And it can be waived by the estate?
A. Don't know.
MR. STAMOS: Does the estate have an

objection to Mr. Simon testifying about that conversation?

MS. FOGLIETTA: Can you repeat that? It's a little hard to hear.

MR. STAMOS: Yes. I've asked Mr. Simon about the first conversation he had with Simon Bernstein about the trust alleged to exist in the complaint, and Mr. Simon has asserted a privilege based upon -- an attorney-client privilege with Mr. Bernstein regarding that first conversation.

I don't frankly remember the law on whether that privilege survives his death, but assuming that it does, I believe the estate can waive it, the estate controls it, so I asked whether the estate has an objection to his testimony about that first conversation.

MS. FOGLIETTA: No, no objection.

MR. SIMON: I will sus- -- or reassert the objection, based on privilege. It's my understanding that privilege does survive when it is involved with an individual but not a corporation. I don't think the estate has the right to waive that privilege. I think

Mr. Simon has a duty to assert the privilege up to the point where he was no longer acting as the attorney with regard to the trust, and from a practical standpoint -- well, I'll just leave it at that.

MR. STAMOS: But who does control the privilege if not the estate?

MR. SIMON: It just survives.

MR. STAMOS: Well, but I mean, it can't be waived by anybody?

MR. SIMON: I don't believe it can.

MR. STAMOS: Well, I certainly think it can, and the estate -- if the estate doesn't control it, nobody controls it. It's not a -- it doesn't -- I know --

MS. FOGLIETTA: I agree, and the estate controls it.

MR. STAMOS: Yeah. So based upon the estate having waived the privilege with regard to that answer, I ask you to answer the question.

MR. SIMON: Could we go off the record for a moment?

MR. STAMOS: Sure.

(Whereupon, a discussion was had off the record.)

MR. STAMOS: Back on the record.

So we'll certify the question, deal with it at a later time.

BY MR. STAMOS:

Q. Let's move on to the -- so following this conversation with Mr. Bernstein that you don't contend was privileged, what's the next conversation or the continuation of that interaction about the trust?

A. So I showed him the trust that I received from Hopkins & Sutter. We discussed how he would want that trust changed for him. I mocked one up. I gave it to him and told him he had to go to Hopkins & Sutter to have it executed.

Q. All right. So when you say you showed him the ones from -- the one from Hopkins & Sutter, is that the one Hopkins & Sutter had prepared for you?

A. Yes.

Q. And when you say you mocked it up, how was that not practicing law for him?

A. I was not doing it as his attorney. I was filling it in almost as a secretary for him to change some of the names.

Q. Who was the lawyer at Hopkins & Sutter?

A. Jim Hammond, I believe.

Q. Say what?

A. James Hammond.

Q. James Hammond?

A. Yeah.

Q. Is he still -- I know Hop- -- I know Hopkins is no longer in existence, but is he still practicing?

A. No, he does not.

Q. How do you know?

A. He died.

Q. All right. Who is the lawyer at Hopkins & Sutter -- strike that.

Did you -- did -- to your knowledge, did Simon then -- Mr. Bernstein then interact with Hopkins & Sutter?

A. I believe so.

Q. With whom?

A. I don't know.

Q. Was it Mr. Hammond?

A. I don't know.
Q. To your knowledge, was Hopkins & Sutter involved in the execution of his trust?
A. I believe so.
Q. What makes you believe that?
A. Si said that Hopkins & Sutter or an attorney at Hopkins & Sutter helped him execute the will -- I mean the trust.
Q. Well, we'll get to that conversation in a second, okay, and -- but you never learned who it was there?
A. No.
Q. Did you ever tell Mr. Hammond I'm sending over my father-in-law to do for him what you did for me?
A. I did not. Simon had his own relationships at Hopkins & Sutter.
Q. And with whom did he have relationships?
A. Several folks.
Q. Who?
A. Henry Lawrie.
Q. Is Henry still alive?
A. I believe so.

Q. Okay. Who else?
A. Brad Ferguson.
Q. Okay. Who else?
A. I don't know.
Q. And of that -- of those two, do you believe either of them participated with him in creating this trust you talked about?
A. Be pure speculation.
MR. STAMOS: Off the record for a second.
(Whereupon, a discussion was had off the record and a short break was taken.)
MR. STAMOS: All right. We're back on.
BY MR. STAMOS:
Q. Well, in the declaratory judgment portion of your complaint, it states that -- Paragraph 29: On or about June 21, 1995, David Simon -- that's you, right? -- an attorney, and Simon Bernstein's son-in-law met with Simon Bernstein before Simon Bernstein went to the law offices of Hopkins & Sutter in Chicago, Illinois to finalize and execute the Bernstein trust agreement.
You're familiar with that allegation?

A. I am.

Q. All right. Tell me what the facts are surrounding the allegations in that Paragraph 29.

A. Gave him a draft of the document to go to Hopkins & Sutter to have it finalized and executed.

Q. All right. And this is a document that you had taken, the one that had been prepared for you, and changed it to give effect to what Simon -- for Simon. That's your testimony?

A. Yes.

Q. And was it in final form?

A. No.

Q. In what form was it?

A. Near final form.

Q. All right. And tell me what you and Simon said to each other on the 21st before he went to this meeting.

A. I believe I spoke to him the day before and said I would make changes. I took notes on another draft of the document and then utilized those notes to have the document modified to reflect those additional desires, and I handed

it to him.

Q. What was it that Mr. Simon told you what he wanted the trust to do?

MR. SIMON: Strike -- objection on form.

MR. STAMOS: I'm sorry. You're right.

BY MR. STAMOS:

Q. What was it that Mr. Bernstein told you he wanted the trust to do in that conversation the day before the 21st?

A. Take care of his wife and children.

Q. And did you draft terms that would do that, to the best of your ability?

A. Yes.

Q. Any other conversation you had with Mr. Bernstein?

A. Yes.

Q. What did you say to him and what did he say to you?

A. He asked me to be the trustee after Shirley, and at first, I said yes, but at that night, I thought about it and asked him to remove me as trustee, and instead, replace it sequentially with his children.

Q. And did you make changes to the form of

it at that point to give effect to that change?

A. No.

Q. What happened about that?

A. He took the draft that I had given him and left.

Q. And then in Paragraph 30, it says after the meeting, you reviewed the final version.

You recall those -- that allegation? I'm paraphrasing, but that's what it says, correct?

A. Yes.

Q. Was it that day?

A. I believe the day I reviewed it was the day of the 21st, but it could have been the 22nd.

Q. All right. What did you say to him and what did he say to you after that -- after that meeting? Did you have -- strike that.

Did you have a conversation with him after the meeting took place, whenever you first had occasion to converse with, him about the trust?

A. Thank you, and thank you for removing me and replacing me with Ted, sign these forms

here and this form here and this form here.

Q. So when he brought it back to you, it was not yet signed?

A. His was signed. I'm talking about the change of owner -- I mean the change of beneficiary forms that we would submit, as well as the change of beneficiary forms for Lincoln Benefit as -- and any other form that would need to be submitted to the insurance carriers.

Q. So if we got the records of Lincoln Benefit, we would see a beneficiary form indicating that funds from that policy were to be paid to a 1995 trust?

MR. SIMON: Objection, assumes facts not in evidence, form.

THE WITNESS: I believe so.

BY MR. STAMOS:

Q. Have you ever tried to do that? Has anyone on behalf of your family ever undertaken to do that, to investigate the records of Lincoln?

A. I know we called and asked to see if they had a copy of the trust, but that's all that I'm -- believe we've done.

Q. Did they have a copy of the trust?
A. Not to my knowledge.
Q. Now, what other documents -- strike that.
He had already -- so when he came back from Hopkins & Sutter, he had a signed document, correct?
A. Correct.
Q. And he'd obviously left a copy with Hopkins & Sutter, correct?
A. No idea.
Q. Now, we're both lawyers. We've both been in the business a long time. I've never, ever, ever heard of a -- of a firm that drafts a trust and doesn't keep a copy, in the word processor, if no place else, but executed copy.
Did you call Hopkins & Sutter to see whether there's a -- there's a document -- a copy of this document in their files?
A. Well, Hopkins & Sutter no longer exists, but we did follow up with their successor firm, as well as some of the attorneys who broke away from Hopkins & Sutter and started their own firm.

Q. Okay. And what did you find?
A. Neither had a copy of the executed trust.
Q. Who did you talk to? And who did the talking for you if not you?
A. Yeah, I don't know.
Q. You don't know who you talked to -- I'm sorry.
You don't know who was spoken to at -- for those lawyers?
A. Right.
Q. Who made the contact with them?
A. I'm not sure. I'd have to look.
Q. What are the -- what are the choices?
A. Anybody in our offices.
Q. Well, probably not anybody in your office.
I mean, who do you think are the likely candidates to have done the investigation to determine whether the trust existed?
MR. SIMON: Objection, asked and answered.
THE WITNESS: Could be anyone that's in our office that was just assigned to make the phone call. I mean, I don't know.

BY MR. STAMOS:

Q. Who asked them to do it?

A. Might have been Pam, might have been me, might have been Adam.

Q. So when the complaint says -- refers to the -- let me see if I can pull up the correct page here.

MR. SIMON: Can we get a copy of the complaint?

MR. STAMOS: I don't know if we have a copy here. I don't -- I don't intend to make it an exhibit, but I could make you a copy if you need to.

BY MR. STAMOS:

Q. So where the complaint says in Paragraph 35, as diligent searches were made of Ted Bernstein and the other Bernstein family members; of Simon Bernstein's home and business; the law offices of Tescher & Spallina; the offices of Foley & Lardner, successor to Hopkins & Sutter; and the office of the Simon Law Firm, who -- who is it who investigated, first of all, with respect to the offices of Foley & Lardner?

A. I don't know the person's name off the top of my head. I'd have to look.

Q. I don't mean to be clever, but that sounds like an awful important issue for this whole litigation. I find it kind of astonishing that it could have been a secretary that called and gave -- came up with the answer. I mean, is that really what might have happened?

A. I don't find it astonishing. We work in the business, so it's not a big deal to make a phone call, so it's very possible.

Q. Okay. But you don't know who was spoken to at the -- at Foley & Lardner?

MR. SIMON: Objection, asked and answered.

THE WITNESS: Not as I sit here today.

BY MR. STAMOS:

Q. Okay. Who made the -- who investigated the -- in the offices of the Simon Law Firm to see whether a copy existed?

A. Myself, Adam Simon, and Cheryl Sychowski.

Q. And the law offices of Tescher & Spallina, who investigated there?

A. I don't know.

Q. And how about Ted Bernstein -- about Ted Bernstein and Simon Bernstein's home and business office?

A. I don't know.

Q. Who would I -- whose deposition would I take to find out about that, to find out the answers to those questions?

A. I don't know.

Q. So nobody might know?

A. Well, I would -- I would assume that in Tescher & Spallina, you would ask Tescher & Spallina --

Q. That's the easy way.

A. -- and Ted Bernstein, you would ask Ted Bernstein, and for Simon Bernstein, you would probably ask Tescher & Spallina.

Q. All right. And after you have this conversation with Mr. -- with Simon Bernstein when he came back from the office, what's the next time you had a conversation with him about his -- about that trust?

A. After we changed the beneficiaries, I don't believe I had a subsequent conversation until he mentioned it in 2012.

Q. Okay.
A. Actually, he didn't mention the trust. He mentioned the insurance policy.
Q. All right. We'll get to that in just a second.
At the time that -- in 1995, were you and he working in the same office, physically?
A. He had an office there. He seldom came to Chicago. He was living in Florida.
Q. Okay. Was there a time when he stopped coming to Chicago?
A. He no longer had an office in Chicago in 1996, but he has family here.
Q. You've seen this 2000 trust, correct?
MR. SIMON: Objection. You're referring to some other trust. We'd like to see it.
MR. STAMOS: Do you have a copy?
MS. FOGLIETTA: It's a little hard to hear. Would you mind speaking up a little?
MR. STAMOS: Yeah, I will.
BY MR. STAMOS:
Q. Well, before I show that to him, let -- let me ask you this: Did you have any conver- -- when's the next -- after 1995,

this -- the June 1995 event we've been discussing, what's the next time you had a conversation with Simon Bernstein about any trust?

A. Well, I don't know how long it took to complete the change of beneficiary forms and have them come back, but after that process?

Q. Yes.

A. I don't believe I spoke to him about the trust again.

Q. Okay.

A. Until the 2012, and again, the reference was more to the policy and not the trust.

Q. Okay. So let's talk about that, then. So if we're thinking about two -- two concepts, the existence of the insurance policy that we're all litigating about and the existence of the trust, what you're telling me is, after whatever took place in this -- 1995 took place with regard to a new beneficiary and so forth, you never had a conversation with him about either thing until 2012, and at that time, you had a conversation about the insurance policy?

A. Did have a conversation with him about the policy, yes.

Q. Okay. And when in 2012?

A. No, no. In 1998.

Q. Oh.

A. But I didn't have another conversation about...

Q. All right. '98's a new year for us, so let's talk about that.

What -- who was present for the conversation in 1998?

A. Myself and Mr. Bernstein.

Q. And what did you say to him and what did he say to you?

A. Let's voluntarily dissolve the S.B. Lexington VEBA and S.B. Lexington Corporation.

Q. Okay.

A. And I voluntarily dissolved them.

Q. All right. Was there a discussion about the wisdom of that or why do it? Why do it?

A. There was a discussion about the wisdom of that.

Q. Okay. I'd like you to tell me what you

said to him and what he said to you in that conversation.

A. I said let's dissolve S.B. Lexington and you've got a lot of tax issues that you need to bury, and the quicker we do it, the better.

Q. Okay. Did he agree to that?

A. Yes.

Q. All right. What did he say to you in that conversation?

A. Dissolve the corporation.

Q. Did you perform the work necessary to achieve that?

A. I did.

Q. And other than discussing the dissolution of the VEBA, what other conversation was there, if any, about the insurance policy?

A. That the death benefit would now go to the contingent beneficiary, which is the 1995 irrevocable life insurance trust.

Q. And was there any other discussion at that time?

A. No.

Q. Was there ever another discussion about the insurance policy before he died?

A. 2012.
Q. All right. And where did that conversation take place?
A. I was on the telephone.
Q. And did you call him or did he call you?
A. I believe he arranged a conference call. I don't remember if everyone was called or we called in to a number, but there was a conference call amongst the children, some of the spouses, Mr. Spallina, and Simon Bernstein.
Q. Okay. And what -- who said what to whom in that conference call?
I'm sorry. Let me interrupt myself for a second.
What was the date of that call, the best you can recall?
A. A few months before he died. I don't know.
Q. All right. And he was in Florida at that time?
A. I wasn't there, but I believe he was in Florida.
Q. Okay.

A. He was on the phone, so I can't tell you really where he was.

Q. Okay. And tell me what everybody said in that conversation to the best you can recall.

A. The gist of it was that Simon was going to change his will and estate to leave his estate and trust to the ten grandchildren, that the life insurance policy proceeds would go to the five children, and that he hoped this would end some of the acrimony within the family.

Mr. Spallina introduced Simon and introduced the reason for the call, then each of the children were asked to agree, and each of the children agreed, even though, in my mind, they didn't have to agree anyway.

Q. When you say that he was referring to disputes in the family, what was that about?

A. He felt that there was a lot of acrimony within the family.

Q. About what?

A. A whole number of things, as far as I know. His girlfriend, his treatment of some of the children and grandchildren.

Q. In what way treatment? Financially?

MR. SIMON: Object, relevance.

THE WITNESS: You're asking my opinion? I would say emotionally, but financially, if, you know, if you mean two of the children had a clause inside of a trust that if in certain instances, they would be disinherited, and that translated down to the lineal descendants of the two.

BY MR. STAMOS:

Q. And who were the children who would have been disinherited?

A. In this narrow exception, it would have been Pam and Ted and their children.

Q. And what would have -- what was the narrow exception?

A. All for distributions made under a trust.

Q. Was there any further discussion in that conversation about the insurance policy beyond what you've described?

A. Just that it was left to the five children.

Q. At the time that you were involved in that conversation, were you aware of whatever

trusts existed at that time?

A. I was aware of the 1995 trust. I was not aware of any other trusts.

Q. When did you become --

A. Other than -- you're talking about Simon's life in- -- are you talking about life insurance trusts?

Q. No, no. Just trusts.

A. I was aware -- I was aware of Shirley's trust.

Q. You've since learned of a series of trusts that Simon Bernstein executed, correct?

A. Some. I don't know if I'd call it a series, but --

Q. Well, you're aware that he -- that after 19 -- that after the year 1995, his signature appears on trusts in a number of successive -- succeeding years, not in -- not years in a row, but a number of years -- start again.

After the year 1995, you're aware that -- you are now aware that there are trusts dated in various years between 2000 and 2012, right?

MR. SIMON: Object, speculation.

THE WITNESS: I'm aware of one other trust, yes.

BY MR. STAMOS:

Q. Which other trust are you aware of?

A. I saw it in the litigation. I think it was drafted by somebody at Proskauer Rose.

Q. And what year was that trust?

A. I'd have to see it. If you showed it to me, I would --

Q. Okay. I guess what I'm asking is: Are you currently aware, beyond the trust that was drafted by the Proskauer firm, are you aware today of any other trusts that Mr. -- that Simon Bernstein executed prior to his death?

A. Yes. There is the Simon Bernstein Trust that has to do with his, you know, last will and trust.

Q. All right. Are you aware of any intervening trusts before then -- between 1995 and before the trust that you believe you're aware of?

A. And the 2000 one I spoke about?

Q. Right. Any others?

A. No.

Q. All right. What's your understanding of the significance of the -- of the trust the Proskauer firm prepared?

MR. SIMON: Objection, calls for speculation.

THE WITNESS: I'm not aware of any significance.

BY MR. STAMOS:

Q. Have you ever made any analysis of its relevance to this litigation or to your position or your family's position in this litigation?

A. No.

Q. Am I correct, if you're successful in this litigation, your wife will receive roughly a -- a fifth of whatever the proceeds are that are -- have been paid into court, correct?

A. Yes.

Q. What does that calculate out to about, 350,000, 300,000, something like that?

MR. SIMON: Object, speculation.

MR. STAMOS: Well, it's math. It's arithmetic.

BY MR. STAMOS:

Q. Have you ever done the math? I've got 334,000. Does that sound about right?

A. It could be correct, yes.

Q. All right. That's all I'm asking.

But that's how much she would receive, correct?

MR. SIMON: Object to speculation.

THE WITNESS: Pre-fees, yes, I believe so.

BY MR. STAMOS:

Q. Okay. All right. Now, have you ever had conversations with -- well, strike that.

When did you first become -- when was the first attempt made to locate the 1995 trust document?

A. I believe some times in the winter of 2012, 2013.

Q. And what was the first steps taken to locate it?

A. I don't believe I took the first steps. I believe --

Q. Who did?

A. Whoever had Si's documents and materials. Somebody in Florida.

Q. Who?
A. I don't know, but I -- you know, I would guess Donald Tescher and Robert Spallina.
Q. Okay. And do you recall being advised that they were unable to locate such a document?
A. Yes.
Q. When did Spallina first become aware that there was a -- that there was purportedly a 1995 document?
A. I don't know.
Q. He must have -- according to your testimony, he must have been aware of that prior to the conversation or certainly during the conversation, the conference call you described, correct?
A. I assume, but I don't know when that happened. He may have become aware of it in 2005 or 2000 --
Q. Truly.
A. I have no idea.
Q. Truly. But certainly no later -- when that conversation started, it wasn't your impression that as Simon Bernstein was describing the policy that that was the first

time Spallina ever heard about it, correct?

A. I was unaware if it was under that trust or any other trust during that conversation.

Q. I see. So at that point, that conversation, you would have been unaware whether the trust that Simon Bernstein was referring to as being the beneficiary for the policy would have been a 1995 trust or some other trust?

MR. SIMON: Objection. It's facts not in evidence.

MR. STAMOS: That's a speaking objection. There aren't facts in evidence because we're talking -- we're getting the evidence now here, so --

THE WITNESS: But I don't believe I said what you said. I --

BY MR. STAMOS:

Q. I misunderstood you, then.

A. Yeah. I don't think he referred to a trust in the phone conversation. I think he referred to the proceeds of the policy.

Q. Okay. And when is -- to your

knowledge, when is the first time that Mr. Spallina would have become aware that there was a purported 1995 trust?

MR. SIMON: Objection, speculation.

THE WITNESS: No idea.

BY MR. STAMOS:

Q. Who was the principal contact with Mr. Spallina after Simon Bernstein died, on behalf of the family?

A. I assume Ted Bernstein, but I don't know for sure.

Q. Did you have any conversations with Mr. Spallina?

A. Right after his death, no. Have I had conversations with Mr. Spallina, yes.

Q. And did Mr. Spallina ever -- did you ever have conversations with him about the trust itself?

A. Yes.

Q. And about its creation?

A. I believe so.

Q. When was the first time you had such a conversation?

A. Be the winter of '12-'13.

Q. Was there ever a discussion with him about this trust that was executed in 2000 --

MR. STAMOS: What's the date of that trust?

MR. HORAN: August 15th.

MR. STAMOS: Of what year?

MR. HORAN: 2000.

BY MR. STAMOS:

Q. Did you ever have a conversation with Mr. Spallina about a trust that was executed by Mr. Simon Bernstein in August of 2000 -- August 15th of 2000?

A. I'm not sure.

Q. When did you first become aware that such a document might exist?

A. During the course of the litigation.

Q. And did you have any conversations with Mr. Spallina once you learned of its existence?

A. I'm not sure it was Mr. Spallina.

Q. Who did you talk to?

A. I believe it was Alan Rose.

Q. Who's Alan Rose?

A. He's an attorney.

Q. With who?

A. I don't remember the firm.

Q. Why Mr. Rose?

A. Oh, he was representing Ted Bernstein, and during the course of the conversation, Eliot Bernstein had brought up the 2000 trust in one of his pleadings, and Mr. Rose said it was unfunded, and it's very possible Mr. Spallina echoed that sentiment.

Q. Unfunded in what sense?

A. That there's no res in the trust.

Q. Were there any -- was there ever any discussion of the fact that that trust had indicated that one of its assets was a -- the 1982 insurance policy?

A. I think that was the conversation I just referred to.

Q. Right. And did anyone -- I mean, it wasn't funded, but did anyone discuss the significance or the relevance of the relationship of that trust to the proceeds of the '82 policy?

A. Just that it was to be ignored.

Q. Because -- because it had never been made a beneficiary of the -- of the policy?

A. Because it was unfunded.

Q. I don't know what that means.
A. No race.
Q. I know that. That wasn't my question, though.
There would be a race if the proceeds of the policy were paid into it, correct?
MR. SIMON: Objection, facts not in evidence.
THE WITNESS: Not necessarily. Probably it would have been held in constructive trust for the beneficiary, but because it was never named a beneficiary of the policy, it was --
BY MR. STAMOS:
Q. That's what I'm getting at. All I'm trying to -- I'm not trying to be tricky. All I'm -- my only point is your understanding was the 2000 trust was not relevant here because it had never been made a beneficiary of the policy from '82?
A. And that Simon didn't wish it to be.
Q. How did you conclude that?
A. That's what I was told.
Q. By whom?
A. I believe either Mr. Rose or Mr. Spallina.

Q. They told you that Mr. Simon had told them something about the -- about the -- his desires about the 2000 trust?

A. Correct.

Q. Had he told them that he had intended it to be paid to the '95 trust?

A. To the five children.

Q. So just so we're clear, at no point -- I think this is what you're telling me: At no point did Mr. Spallina say Simon Bernstein told me that the proceeds of the '82 policy would be paid to a '95 trust. He never said that, correct?

A. I don't know.

Q. Well, you don't -- you don't remember him saying that, do you?

A. I remember him saying something like that he talked about Mr. Bernstein contemplating changing the beneficiary to his girlfriend at the time, and that instead, he decided to leave it as the five children through the trust, but I don't know that he used the word 1995 at that point.

Q. All right. Because if Mr. Bernstein --

if Mr. Spallina had been aware of the existence of a 1995 trust, you would agree with me a prudent attorney would have asked to obtain a copy of that trust, correct?

A. I believe he did.

Q. He asked Mr. Bernstein for that?

A. It's my understanding.

Q. And what -- and what became of that?

A. I don't know.

Q. He never received it, though, did he?

A. I assume not, but I don't know because he didn't produce it.

Q. Who are you aware heard Mr. Spallina say anything that referred to the existence of a 1995 trust?

A. All of the children.

Q. In what conversation?

A. Discussing how to have the proceeds of the trust paid to the --

Q. This was after death?

A. Pardon me?

Q. Was this after Simon's death?

A. Yes.

Q. Okay. Go on. I'm sorry. I wasn't --

A. That's the winter of '12-'13.
Q. Right. But --
A. He died in September, so all the conversations I'm talking about --
Q. Are all after death.
A. -- are all during that period.
Q. But just to revisit it, prior to Simon Bernstein's death -- I don't usually get -- sound so formal, Simon Bernstein, but just to keep it clear, I'm going to do that.
Prior to Simon Bernstein's death, you are unaware of any conversation in which Mr. Spallina reported or said anything that implied that he was aware that a 1995 trust existed; am I correct?
A. Just the conversation that I referred to in the preceding months.
Q. Okay. But I don't think -- but I think -- I thought I understood you to say in that conversation you don't remember him saying the word "trust"?
A. Correct.
Q. All right. Now, you're aware, I take it, that the 2000 trust, the terms of that

trust, if it were given effect, would have excluded your wife, correct?

A. I have not read the trust.

Q. Why not?

A. No reason to read it.

Q. Why not?

A. There's just no reason to read it.

Q. Okay. Let's go to a different topic.

Do you know Don Sanders?

A. Don Sanders?

Q. Yes.

A. No, I do not.

Q. Okay. And how -- do you know how it came to be his affidavit was prepared?

A. I do know, yes.

Q. How?

A. Attorney representing the trust sought to seek the deposition of someone from the servicer for the insurance company and served a notice of deposition and that in the course of negotiating that deposition, they agreed to provide an affidavit.

Q. Who drafted the affidavit?

A. I don't know.

Q. Who do you think drafted the affidavit?
MR. SIMON: Objection, speculation.
BY MR. STAMOS:
Q. I'm not asking you to speculate, but do you have a -- you have a -- did you ever talk to find out any --
MR. SIMON: He said he didn't know -- and he said he didn't know, and then you said who do you think. You're definitely asking him to speculate. He doesn't know.
MR. STAMOS: No. There are all sorts of things I think things about that aren't speculation, but I also don't know. I mean, there are gradations to knowledge.
THE WITNESS: I would be guessing, but there's --
MR. SIMON: Don't guess.
BY MR. STAMOS:
Q. Okay. Let's see. Aside from discussions regarding a trust in 1995, did you do any other -- did you assist Simon Bernstein in any other way in his personal affairs from 1995 forward?
A. Yes.

Q. Like what?
A. Bill paying, litigation, day-to-day operation of his companies, and occasionally purchasing gifts for some of his family members, and tickets for himself.
Q. Did you practice law for him after 1995? Obviously litigation. I assume that would be practicing law for him.
A. Yes.
Q. What kind of litigation would you help him with?
A. Depends what came up. Litigation mostly with 1995 would be ex-business partner.
Q. Who was that?
A. Joseph Flanagan.
Q. Was that just litigation over payouts from the business or was there some other issue involved? Money out of the business?
A. Yes.
Q. Were you aware of the handwritten will that Simon Bernstein prepared?
A. No.
Q. You're not aware of that now?
A. Nope.

Q. Have you had occasion to review the records of that -- that were produced by the insurance company in this case? Have you seen any of them?

A. I might have.

Q. Do you think you did?

A. I think so.

Q. Did you ever assist -- other than 1995 as you've described, was there ever another occasion in which you were aware of another beneficiary designation form being sent to or from the insurance company regarding the 1982 policy?

MR. SIMON: Objection as to form.

THE WITNESS: I'm not sure I understand what you asked just now.

BY MR. STAMOS:

Q. Well, if a policy is going to have a beneficiary change, there's usually a form that has to be filled out, correct?

A. Correct.

Q. And where someone requests to change a beneficiary, the insurance company might send out the form to them to fill out, correct? To

prepare?

A. Sure. I guess.

Q. And likewise, if someone wants to effect a change of beneficiary and they have the form, they fill it out and send it to the insurance company. That's one of the things they could do, correct?

A. Sure.

Q. All right. Are you aware of any such communications between the insurance company and Mr. Bernstein about the 1982 policy following 1995?

A. Other than the 1998 dissolution of the VEBA trust, I'm not aware of any other forms.

Q. And I take it that you -- were you aware that there were a number of instances in which the policy lapsed and had to be revived, so to speak, reinstated?

A. I'm aware of one.

Q. Did you participate in any of the documentation with regard to any instance of reinstatement?

A. I did not.

Q. Who did?

A. I don't know. I assume Mr. Bernstein, Simon Bernstein.

Q. When -- which reinstatement were you aware of?

A. I don't know. I didn't know there was multiple. I'm only aware of one, so I can't tell you --

Q. Well, but I mean, which -- what year was that?

A. Oh, I don't know when it was. I just knew that it had lapsed once, then needed to be reinstated.

Q. Do you know where the insurance company would send forms or communications regarding the policy -- well, strike that.

To your knowledge, would the -- would the insurance company send communications about the insurance policy to your office at any time?

A. Up until 1996, I believe so.

Q. Okay. How about after that?

A. Probably not.

Q. If a communication were sent by the insurance company to your office, that would come to your attention, wouldn't it?

A. Not necessarily, no.
Q. Whose attention would it go to?
A. Depends if it -- who it was addressed to. If it was addressed to him, it may have just been -- come to our office and forwarded from our offices. If it was addressed to something more general, then it probably would have been opened by Pam Simon.
Q. Okay. It's fair to say, though, that if you had come into possession of communications that could bear on the continuing existence of the policy, you would want to make sure that was dealt with, correct? You wouldn't want the policy to lapse because, as far as you were concerned, your wife was a one-fifth -- one-fifth indirect beneficiary of that policy, correct?
A. Not correct.
Q. Why not? What's not correct about that?
A. I would be indifferent as to whether the policy lapsed, just as I was when the policy lapsed.
Q. When did you first learn it lapsed?

A. I want to say after he passed away.
Q. So you weren't -- so during his lifetime, you were unaware of it having lapsed?
A. Correct.
Q. Oh, okay. So when you say it was -- you were indifferent to it, you never had the occasion to be indifferent to it when there was still something to be done about it, right?
A. Well, I know I was indifferent about it because it was a discussion about how to pay for it during the time and he had no other assets, and so this was the way he wanted to take care of his wife, and at that time, I was not indifferent to it.
Q. I see. I'm not following. So --
A. Well, I thought with no other assets, that his wife needed to be taken care of, and that should be a priority, along with repaying his debt.
Q. Okay. Two things. When you say repaying his debt, to whom was the debt?
A. Several people.
Q. Who?
A. Exchange Bank, Harris Bank Glencoe,

Boulevard Bank, Capitol Bankers Life, Fidelity Union, and there were a couple of others that I -- I'm not -- off the top of my head but I believe had to do with condominiums owed that were under water, and I can't tell you the exact names.

Q. I think I might have missed -- I might have -- might be misunderstanding what you said.

Were you aware during his lifetime that the policy had lapsed?

A. No.

Q. Okay.

A. While he was alive was I --

Q. Yes.

A. No.

Q. All right. But you're saying that after he died, you learned that it had lapsed and it had to be paid?

A. No.

Q. So what could all of that have to do with taking care of his wife? She was dead by then, right?

A. Yeah. You asked me if I was ever indifferent, and during the early '90s, I was

not indifferent.

Q. Oh, I'm sorry. I thought -- I meant you were indifferent to it at having lapsed. That's what I was referring to. I'm sorry. I confused myself.

A. Okay. I was speaking of decades before.

Q. Got it, got it.

MR. STAMOS: Let me step outside just for a second with Kevin.

(Whereupon, a discussion was had off the record and a short break was taken.)

MR. STAMOS: All right. We're going to go back on. We just have a few more questions.

BY MR. STAMOS:

Q. When -- to your knowledge, what -- who made the first approach to the insurance company with regard to the policy?

A. Simon Bernstein.

Q. No, no. I'm sorry.

After Simon's death, who's the -- who was the person who made the first communication to the insurance company with regard to

obtaining payment of the proceeds?

A. I don't know.

Q. Do you recall being part of any conversations or becoming aware of any conversations that took place prior to that approach being made?

MR. SIMON: Objection, facts not in --

THE WITNESS: I don't know if it was prior to or subsequent to the first approach.

BY MR. STAMOS:

Q. And when was the first approach -- I'm sorry. Mr. Bernstein died in September of 2012?

A. Simon Bernstein?

Q. Yes.

A. September of 2012.

Q. And when was the first approach made to the insurance company?

A. I don't know.

Q. When was the first conversation you had with anyone after Simon Bernstein's death about making an approach to the insurance company?

A. I believe in the winter of '12-'13. December, January, right in there.

Q. And why then, not more proximate to the

time of his death?

A. That's the first conversation I had. I don't know. That's why I said it's very possible that a prior approach had been made.

Q. And with whom did you have the first conversation about it?

A. I don't know who. It was all on the phone, but Robert Spallina for sure was on the phone. Ted Bernstein. I believe Lisa Friedstein.

Q. Okay.

A. Jill Iantoni. Eliot might have been on the phone. I don't know.

Q. Okay. And who said what to whom in that conversation?

A. Does anybody have a copy of the insurance policy.

Q. All right. And --

A. And does anybody have a copy of the life insurance trust.

Q. And who initiated that call?

A. I don't know.

Q. Do you know, when the first submission was made to the insurance company, do you know

who made it as trustee? Who was identified as the trustee of the trust of that communication?

A. I don't know if anyone was identified as trustee on the first submission.

Q. Have you ever seen the first submission of the document?

A. I don't know if it was the first submission. I don't know what -- I -- I can't tell what would be the first submission.

Q. Right, right. Have you seen a document that -- that you believe to have been the first submission?

A. I would have no belief of whether it was the first or second or third submission.

Q. Have you seen any documents that you understand to have been a submission?

A. Yes.

Q. And who was identified -- did you see one or more than one?

A. I've seen more than one.

Q. And in those, who was identified as trustee?

A. In one, I don't know that anyone was identified as trustee, and in the other one, I

believe Robert Spallina identified himself as trustee.

Q. Okay. And was he the trustee?

A. No.

Q. Then why did he identify himself as trustee?

MR. SIMON: Objection, speculation.

THE WITNESS: Ask Robert Spallina.

BY MR. STAMOS:

Q. Were you surprised to see him identified as trustee when you -- when you read it?

A. Yes.

Q. And did you discuss that with anyone? Did you discuss the fact that he was identified as the trustee when you knew that, to your knowledge, he would not have been the trustee?

A. I discussed it before filing this litigation, yes.

Q. With whom?

A. Adam Simon.

Q. Okay. And what did you --

A. Ted Bernstein.

Q. And what did you say to Adam and what

did he say to you?

MR. SIMON: Objection, attorney-client.

BY MR. STAMOS:

Q. You're not a party to this litigation, are you?

A. No.

MR. SIMON: Yes, he is.

THE WITNESS: It's true. I am. Eliot sued me.

BY MR. STAMOS:

Q. Well, at the time that the suit was filed -- prior to the time the suit was filed, you were not to be a party, correct? How could you be a party? You never understood yourself to be a beneficiary of either the trust or the -- or the policy, correct?

A. That's correct.

Q. So when the suit was brought in order to obtain proceeds of the policy and presumably proceeds of the trust, you couldn't have been suing on your own behalf, right?

A. I was not.

Q. So he wasn't representing you?

A. No.

Q. So what did he say to you and what did you say to him?

A. I said that Spallina is not the trustee. Ted is.

Q. Okay.

A. I saw the trust. I know Ted's the trustee because that was one of the things that needed to be changed in the draft, and I wasn't positive that that was changed.

Q. Okay. Now, tell me this: You -- what are the terms of the trust that you saw with your own eyes?

A. I'd have to see a draft of the trust to give you all the terms.

Q. All right. Did you ever have a conversation with Mr. Spallina in which he -- in which you asked him or he explained why it was he identified himself as the trustee?

A. I may have. I don't recall.

Q. What did you say to him and what did he say to you?

A. I just have a general remembrance of a discussion about us filing the litigation.

Q. And what's your general remembrance of

how he explained that he identified himself as the trustee?

A. I'm not sure that that specifically was talked about.

MR. STAMOS: All right. I think that's all I have. Anybody else have anything?

MR. SIMON: I do.

MR. STAMOS: Guys on the phone?

MS. FOGLIETTA: Not me.

MR. STAMOS: Okay. Eliot? Eliot, are you there?

MR. SIMON: I take that as a no.

MR. BERSTEIN: I said I'm okay.

MR. STAMOS: Okay. I'm sorry. We didn't hear you. Thank you. All right.

MR. SIMON: I do have questions.

MR. STAMOS: Yeah, of course.

MR. SIMON: I have some questions.

Just for the record, this is Adam Simon questioning David Simon.

EXAMINATION

BY MR. SIMON:

Q. David, during the entire deposition, you have not been presented with any marked

exhibits by Mr. Stamos; is that correct?

A. Yes.

Q. You've been asked to testify solely by recollection; is that true?

A. Yes.

Q. Okay. I just would like to show you some documents that may be relevant to some of your testimony.

MR. SIMON: Can we mark this as David Simon Deposition Exhibit No. 1.

(Whereupon, D. Simon Deposition Exhibit No. 1 was marked for identification.)

BY MR. STAMOS:

Q. David, I am showing you what's been marked as David Simon Deposition Exhibit No. 1 that's got a Bates stamp BT 000031, and at the top of the page, it says S.B. Lexington, Inc., Employer.

Have you ever seen that document before?

A. Yes, I have.

Q. And can you describe what that document is?

A. Under the VEBA, the individual insured or member fills out a beneficiary designation form. This is Si Bernstein's membership -- Si Bernstein as member, filling out his beneficiary designation.

Q. And at the top of the page, can you read that, the very heading?

A. S.B. Lexington, Inc., Employer/Employee Death Benefit Plan and Trust, Plan and Trust Beneficiary Designation, Simon L. Bernstein.

Q. And then can you read -- actually, can you read the entire form into the record?

A. Sure.

I hereby designate in accordance with the terms of said plan and trust as it may be amended that the name of the beneficiary should be Simon Bernstein irrevocable insurance trust and is signed then by Simon Bernstein as the person to receive at my death the death benefit stipulated in the S.B. Lexington, Inc. employee death benefit and trust in the adoption form adopted by my employer.

It is then signed again by Simon and dated.

Q. What is the date?
A. 8/26/95.
Q. And do you recognize those signatures?
A. I do.
Q. And what are -- whose signatures are those?
A. Simon Bernstein.
Q. Okay. I have no further questions on that.
I'd like to show you --
MR. STAMOS: Can you mark this as David Simon Deposition Exhibit No. 2.
(Whereupon, D. Simon Deposition Exhibit No. 2 was marked for identification.)
BY MR. SIMON:
Q. David, I'm showing you what's been marked David Simon Deposition Exhibit No. 2. It's got a Bates stamp of BT 000104. It's entitled SS-4, Application for Employer Identification Number.
Have you ever seen that form before?
A. Yes, I have.
Q. And can you describe what that is?

A. This is an application for a tax ID number on behalf of the irrevocable insurance trust, and I filled it out.

Q. And can you tell me what appears on Line 1 under Name of Applicant?

A. Simon Bernstein Irrevocable Insurance Trust.

Q. And on Line No. 3 as trustee or executor?

A. Shirley Bernstein.

Q. And in the upper-right corner, can you identify what number that is?

A. The tax ID number given to the insurance trust.

Q. And that -- can you read that number into the record?

A. 65-6178916, signed by Shirley Bernstein as trustee, June 21, 1995.

Q. And do you recognize that signature?

A. I do.

Q. And whose signature is that?

A. Shirley Bernstein.

MR. SIMON: Can we mark this as David Simon Exhibit 3.

(Whereupon, D. Simon Deposition Exhibit No. 3 was marked for identification.)

BY MR. SIMON:

Q. David, I'm showing you what's been marked as David Simon Deposition Exhibit No. 3. It's Bates stamped BT 000002 through BT 000012, and I'm going to ask you if you recognize this exhibit?

A. I do.

Q. And can you tell me -- can you describe what's contained on the page stamped BT 000002?

A. It is a screenshot of a page from our database.

Q. And can you tell us what it says at the top of the page of that screenshot?

A. It is Si Trust and the properties of Si Trust, and then it says when it was modified, which was the day it was put in, June 21, 1995, and the date that we accessed it, September 30, 2013, and then it has a created date, which was when we modified our database to the new database, which is September 3, 2004, so it was reentered.

Q. Can you describe that further about the new database?

A. We switched over and had to enter into -- some old records into a new database.

Q. And do you recall how this document was found?

A. Myself or Cheryl conducted a search and found this print of the screen and then the attached draft of the irrevocable trust agreement.

Q. And can you describe what the remainder of the exhibit is?

A. It's a draft of the irrevocable life insurance trust that I gave to Si.

Q. And this was in June of 1995?

A. Yes.

Q. Showing you --

MR. SIMON: Can you mark this as Exhibit 4, please.

(Whereupon, D. Simon Deposition Exhibit No. 4 was marked for identification.)

BY MR. SIMON:

Q. Showing you what has been marked as

David Simon Deposition Exhibit No. 4. It's Bates stamped BT 000013 through 000021.

Have you ever seen that document before?

A. Yes, I have, and it has my writing on it.

Q. So you see some handwriting in the blanks on the first page?

A. I do.

Q. And what does that say?

A. The handwriting says Si, then Shirley, then Si.

Q. And it's got Shirley -- Shirley's name and then the words -- what words follow Shirley's name?

A. As trustee. This is an earlier draft of the same document.

Q. Okay. Now, I'd like to direct your attention to Article 7 of Exhibit 4, and can you read that Article 7 into the record?

A. Upon my death, the trustee shall divide the property of this trust into as many separate trusts as there are children of mine who survive me and children of mine who predecease me

leaving descendants who survive me. These trusts shall be designated respectively by the name of my children. Each trust shall be administered and distributed in the following manner.

And there's an A, B, and C.

Q. And then Article 8, let's look at the last paragraph. Right before Article 9, can you read that sentence?

A. As of the date of this agreement, I currently have blank children living; namely, colon.

Q. And now I'd like you to look back at Exhibit No. 3 and read to me Article 7.

A. Upon my death, the trustee shall divide the property of the trust into as many separate trusts as there are children of mine that survive me and children of mine who predecease me, living descendants who survive me. These trusts shall be designated respectively by the names of my children. Each trust shall be administered and distributed in the following manner.

And there's an A, B, and C.

Q. And directing you to the end of Article 8 of that draft, which is, again, Exhibit 3, can you read the last same sentence?

A. Sure.

As of the date of this agreement, I currently have five children living; namely, Ted S. Bernstein, Pamela B. Simon, Jill Bernstein, Lisa Bernstein Friedstein, and Eliot Bernstein.

MR. SIMON: I have nothing further.

MR. STAMOS: Couple follow-ups.

FURTHER EXAMINATION

BY MR. STAMOS:

Q. When you look at Exhibit No. 4, where -- where was this document located?

A. My file.

Q. And when you say your files, what does that mean? I mean, did you have a file that --

A. File, yes, my --

Q. Was it lying on a -- laying on a desk?

A. Oh, no. In storage --

Q. I mean, how was it maintained? I mean, how did you -- how did you locate it?

A. Went to storage, got the manila folder out that said File on it, opened the file.

Q. And what did that file -- what did that file -- how was that file designated?

A. I -- I don't know off the top of my head. I'd have to check.

Q. How did you -- were there other materials in it aside from this document, this blank?

A. No.

Q. So I take it the document that we have marked as Exhibit No. 3 was not in that file, because this -- this, you had to go in the computer to find, correct?

A. Correct.

Q. And so how did -- where did this -- when you look at Exhibit No. 4, where did this originally come from? Was this originally -- was this at some point in your word processor and you -- with these lines in it that were to be filled out?

A. Yes.

Q. Did you locate that? This, meaning Exhibit 4, right, just so we know what we're talking about.

A. Did I locate that on the word

processor?

Q. Yeah, no, I wasn't clear.

Looking at Exhibit No. 4, I take it this is at -- this was at one point on your word processor and it was printed out and then filled out and then --

A. Not -- not the exhibit, no. It has my handwriting on it, so what I think I did is, is I wrote this in and gave it to my assistant who then made the modifications which you see is Exhibit 3.

Q. But my question to you is: Before you wrote in, this was obviously printed out from a printer, correct?

A. Correct.

Q. This must have been on your word processor to be printed out on a printer, correct? Exhibit 4.

A. I believe so.

Q. Did you find Exhibit 4 in your -- in your computer?

A. Changed to look like Exhibit 3, yes.

Q. And then I take it -- hang on for a second.

Were any subsequent drafts made on your computer after -- after Exhibit No. 3?

A. No.

Q. Did you give a copy of Exhibit No. 3 to Simon Bernstein?

A. Yes.

Q. And what did he do with it?

A. I don't know for sure because I wasn't there, but I believe he went to Hopkins & Sutter to have it changed one last time and executed.

Q. And did you share your draft with Hopkins & Sutter? What's in your computer, was it ever transmitted to Hopkins & Sutter so they could mark it up?

A. It originated at Hopkins & Sutter because it was Hopkins & Sutter that did my irrevocable life insurance trust.

Q. No, no, I know that, but -- but you created the document called Si Trust that you've talked about, Exhibit No. 3, correct?

A. Actually, it was created at -- most of it by Hopkins & Sutter when they did the work for me.

Q. Okay.

A. I modified what you're seeing.

Q. I understand that. So you modified a document that had been your document from Hopkins & Sutter, right? That's what you're telling us?

A. Yes.

Q. And then -- and you made modifications, including you being identified as the trustee, correct?

A. Yes.

Q. On No. 3, Exhibit No. 3?

A. Yes.

Q. And you gave that to Simon Bernstein, correct?

A. Yes.

Q. Okay. What I'm asking is: Did you also transmit to Hopkins & Sutter electronically what we have before us as Exhibit No. 3 so that they could make modifications to it pursuant to what Mr. Bernstein wanted?

A. I personally did not.

Q. Did somebody else do that?

A. It's very possible.

Q. And who would have done that?

A. My assistant.
Q. Who?
A. Debbie.
Q. Is she still with you?
A. She's not.
Q. Is she still available?
A. Don't know.
Q. Would she have done that without your instruction?
A. She would -- if Si would have told her, she would have, yes.
Q. Do you think that happened?
A. I don't know.
Q. When Mr. Bernstein -- did you -- did you keep a copy of what you gave Mr. Bernstein to take to Hopkins & Sutter?
A. No, I did not.
Q. Why not?
A. No reason.
Q. Why'd you keep a draft?
A. I didn't realize I did, but obviously at the time, Debbie must have filed it.
Q. When he returned to you after his meetings at Hopkins & Sutter, did you keep a

copy of that document?

A. The executed trust?

Q. Yeah.

A. I believe we did have it for a period of time till we moved offices.

Q. Okay. And I take it you would have stored it in the same file as the draft, right? You wouldn't put it in another place --

A. I didn't store it.

Q. Who --

A. Mr. Bernstein would have stored it, Simon Bernstein.

Q. He did? Did you see him put it in the file?

A. Did I see him? No. I don't watch --

Q. Did you ever see it again after that day?

A. We do a thing called the document review board, so depending on the exact date that it was funded, I'd have to go back. I probably would have seen it at that point, too, so on every time there's an A.L.P.S. funding, there's a series of documents.

Q. Every time there's a what funding?

A. A.L.P.S.

Q. Yeah?

A. Arbitrage Life Payment System.

So at the time of the funding of the policy, there would have been a document review board, and that would have been reviewed again at that time.

Q. Why do you care who the beneficiary is?

A. He was also the owner.

Q. What does that matter at that the point?

A. Because in the Arbitrage Life Payment System, there's reps and warrantees made by the owner that are essential to the payment plan.

Q. Is it your testimony that you saw the -- the trust at a later date in your office?

A. I would have to see what date it was funded, but I would say yes, I saw it on the date that it was funded also.

Q. Do you remember doing that? Do you remember seeing it?

A. I remember seeing it when he came back. I do not have an independent recollection of that, but it was our habit and custom to do that

on each and every trust and each and every owner.

Q. Okay. And that's something that would have been maintained by your company because you were participating in this A.L.P.S. program, correct?

I'm probably not talking about it properly, but -- but the exercise you said you went through --

A. Yes.

Q. -- was something that -- this review you would have done would have been done as the company. The company would have been required to do that as part of this A.L.P.S. payment?

A. S.T.P. would have done it. It's not required to, but it's one of the ways that --

Q. All right. And it would have been in your records, the document would have been in your records to facilitate your doing that, correct?

A. No.

Q. Whose records would it have been in?

A. Simon Bernstein's.

Q. And all the -- do you have other people

who have purchased insurance pursuant to the A.L.P.S. program?

A. Yes.

Q. Do you do the same review for all of them?

A. Yes.

Q. Do you have them bring their records in to look at or do you look at the records you maintain for them?

A. No, I would look at the records. And if it wasn't other than Simon Bernstein or myself or the employees are there, then we probably would have kept a copy of that individual's trust, but maybe not the whole trust. Usually what happens is we get a trust certification from the attorney, so there's a front two pages, and then a back signature page. That's the standard practice for us.

Q. I see. I see.

And your testimony is that at some point, he just took that with him and it was no longer available to you?

A. 1996 or when we moved offices, he took all of his furniture, books, records.

Q. And when did -- when did -- at some point, did he -- did it cease being funded through the A.L.P.S. program?

A. The Lincoln Benefit policy?

Q. No. The -- the --

A. Capitol Bankers policy was never funded through the A.L.P.S. program.

Q. Did the Lincoln benefits policy have the '95 trust you've talked about as the beneficiary?

A. And owner.

Q. Well, you said that earlier.

MR. STAMOS: Okay. That's all I got. Thanks.

Reserve?

MR. SIMON: Yes.

(Whereupon, the deposition concluded at 4:25 p.m.)

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SIMON BERNSTEIN IRREVOCABLE INSURANCE TRUST DTD 6/21/95, by Ted S. Bernstein, its Trustee, Ted S. Bernstein, an individual, Pamela B. Simon, an individual, Jill Iantoni, an individual, and Lisa S. Friedstein, an individual,

Plaintiff,

vs.) No. 13 CV 3643

HERITAGE UNION LIFE INSURANCE COMPANY,

Defendant.

This is to certify that I have read the transcript of my deposition taken in the above-entitled cause by Vicki L. D'Antonio, Certified Shorthand Reporter, on January 5, 2015, and that the foregoing transcript accurately states the questions asked and the answers given by me as they now appear.

_____
DAVID SIMON

SUBSCRIBED AND SWORN TO before me this _____ day of _____, 2015.

_____
Notary Public

STATE OF ILLINOIS)
) SS:
COUNTY OF C O O K)

I, VICKI L. D'ANTONIO, a Notary Public within and for the County of Cook and State of Illinois, do hereby certify that heretofore, to-wit, on the 5th day of January, 2015, personally appeared before me, DAVID SIMON, a witness in a certain cause now pending and undetermined in the United States District Court, Northern District of Illinois, Eastern Division, wherein SIMON BERNSTEIN IRREVOCABLE INSURANCE TRUST DTD 6/21/95 is the Plaintiff and HERITAGE UNION LIFE INSURANCE COMPANY is the Defendant.

I further certify that the said DAVID SIMON was by me first duly sworn to testify the truth, the whole truth, and nothing but the truth in the cause aforesaid; that the testimony then given by said witness was reported stenographically by me in the presence of said witness and afterwards reduced to typewriting by Computer-Aided Transcription, and the foregoing

is a true and correct transcript of the testimony so given by said witness as aforesaid.

I further certify that the signature to the foregoing deposition was reserved by counsel for the respective parties.

I further certify that the taking of this deposition was pursuant to notice and that there were present at the deposition the attorneys hereinbefore mentioned.

I further certify that I am not counsel for nor in any way related to the parties to this suit, nor am I in any way interested in the outcome thereof.

IN TESTIMONY WHEREOF: I have hereunto set my hand and affixed my notarial seal this 9th day of January, 2015.

NOTARY PUBLIC, COOK COUNTY, ILLINOIS

CSR LIC. NO. 84-004344

McCorkle Litigation Services, Inc.
200 N. LaSalle Street, Suite 2900
Chicago, Illinois 60601-1014

January 9, 2015

The Simon Law Firm
Mr. Adam M. Simon
203 East Wacker Drive, Suite 2725
Chicago, Illinois 60601

IN RE: Bernstein v. Heritage
COURT NUMBER: 13 CV 3643
DATE TAKEN: January 5, 2015
DEPONENT: Mr. David Simon

Dear Mr. Simon:

Enclosed is the deposition transcript for the aforementioned deponent in the above-entitled cause. Also enclosed are additional signature pages, if applicable, and errata sheets.

Per your agreement to secure signature, please submit the transcript to the deponent for review and signature. All changes or corrections must be made on the errata sheets, not on the transcript itself. All errata sheets should be signed and all signature pages need to be signed and notarized. After the deponent has completed the above, please return all signature pages and errata sheets to me at the above address, and I will handle distribution to the respective parties.

If you have any questions, please call me at the phone number below.

Sincerely,

Margaret Setina
Signature Department

Court Reporter Present:
Vicki L. D'Antonio

cc: Mr. James Stamos

EXHIBIT 8

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SIMON BERNSTEIN IRREVOCABLE INSURANCE TRUST DTD 6/21/95, by Ted S. Bernstein, its Trustee, Ted Bernstein, an individual, Pamela B. Simon, an individual, Jill Iantoni, an individual and Lisa S. Friedstein, an individual.

Plaintiff,

v.

HERITAGE UNION LIFE INSURANCE COMPANY,

Defendant,

HERITAGE UNION LIFE INSURANCE COMPANY

Counter-Plaintiff

v.

SIMON BERNSTEIN IRREVOCABLE TRUST DTD 6/21/95

Counter-Defendant

and,

FIRST ARLINGTON NATIONAL BANK as Trustee of S.B. Lexington, Inc. Employee Death Benefit Trust, UNITED BANK OF ILLINOIS, BANK OF AMERICA, Successor in interest to LaSalle National Trust, N.A., SIMON BERNSTEIN TRUST, N.A., TED BERNSTEIN, individually and as purported Trustee of the Simon Bernstein

Case No. 13 cv 3643
Honorable Amy J. St. Eve
Magistrate Mary M. Rowland

Irrevocable Insurance Trust Dtd 6/21/95, and ELIOT BERNSTEIN

Third-Party Defendants.

ELIOT IVAN BERNSTEIN,

Cross-Plaintiff

v.

TED BERNSTEIN, individually and as alleged Trustee of the Simon Bernstein Irrevocable Insurance Trust Dtd, 6/21/95

Cross-Defendant

and,

PAMELA B. SIMON, DAVID B.SIMON, both Professionally and Personally ADAM SIMON, both Professionally and Personally, THE SIMON LAW FIRM, TESCHER & SPALLINA, P.A., DONALD TESCHER, both Professionally and Personally, ROBERT SPALLINA, both Professionally and Personally, LISA FRIEDSTEIN, JILL IANTONI S.B. LEXINGTON, INC. EMPLOYEE DEATH BENEFIT TRUST, S.T.P. ENTERPRISES, INC. S.B. LEXINGTON, INC., NATIONAL SERVICE ASSOCIATION (OF FLORIDA), NATIONAL SERVICE ASSOCIATION (OF ILLINOIS) AND JOHN AND JANE DOES

Third-Party Defendants.

PLAINTIFFS' FIRST AMENDED COMPLAINT

NOW COMES Plaintiffs, SIMON BERNSTEIN IRREVOCABLE INSURANCE TRUST dtd 6/21/95, and TED BERNSTEIN, as Trustee, (collectively referred to as "BERNSTEIN TRUST"), TED BERNSTEIN, individually, PAMELA B. SIMON, individually, JILL IANTONI, individually, and LISA FRIEDSTEIN, individually, by their attorney, Adam M. Simon, and complaining of Defendant, HERITAGE UNION LIFE INSURANCE COMPANY, ("HERITAGE") states as follows:

BACKGROUND

1. At all relevant times, the BERNSTEIN TRUST was a common law irrevocable life insurance trust established in Chicago, Illinois, by the settlor, Simon L. Bernstein, ("Simon Bernstein" or "insured") and was formed pursuant to the laws of the state of Illinois.

2. At all relevant times, the BERNSTEIN TRUST was a beneficiary of a life insurance policy insuring the life of Simon Bernstein, and issued by Capitol Bankers Life Insurance Company as policy number 1009208 (the "Policy").

3. Simon Bernstein's spouse, Shirley Bernstein, was named as the initial Trustee of the BERNSTEIN TRUST. Shirley Bernstein passed away on December 8, 2010, predeceasing Simon Bernstein.

4. The successor trustee, as set forth in the BERNSTEIN TRUST agreement is Ted Bernstein.

5. The beneficiaries of the BERNSTEIN TRUST as named in the BERNSTEIN TRUST Agreement are the children of Simon Bernstein.

6. Simon Bernstein passed away on September 13, 2012, and is survived by five adult children whose names are Ted Bernstein, Pamela Simon, Eliot Bernstein, Jill Iantoni, and Lisa Friedstein. By this amendment, Ted Bernstein, Pamela Simon, Jill Iantoni and Lisa Friedstein are being added as co-Plaintiffs in their individual capacities.

7. Four out five of the adult children of Simon Bernstein, whom hold eighty percent of the beneficial interest of the BERNSTEIN TRUST have consented to having Ted Bernstein, as Trustee of the BERNSTEIN TRUST, prosecute the claims of the BERNSTEIN TRUST as to the Policy proceeds at issue.

8. Eliot Bernstein, the sole non-consenting adult child of Simon Bernstein, holds the remaining twenty percent of the beneficial interest in the BERNSTEIN TRUST, and is representing his own interests and has chosen to pursue his own purported claims, pro se, in this matter.

9. The Policy was originally purchased by the S.B. Lexington, Inc. 501(c)(9) VEBA Trust (the "VEBA") from Capitol Bankers Life Insurance Company ("CBLIC") and was delivered to the original owner in Chicago, Illinois on or about December 27, 1982.

10. At the time of the purchase of the Policy, S.B. Lexington, Inc., was an Illinois corporation owned, in whole or part, and controlled by Simon Bernstein.

11. At the time of purchase of the Policy, S.B. Lexington, Inc. was an insurance brokerage licensed in the state of Illinois, and Simon Bernstein was both a principal and an employee of S.B. Lexington, Inc.

12. At the time of issuance and delivery of the Policy, CBLIC was an insurance company licensed and doing business in the State of Illinois.

13. HERITAGE subsequently assumed the Policy from CBLIC and thus became the successor to CBLIC as "Insurer" under the Policy and remained the insurer including at the time of Simon Bernstein's death.

14. In 1995, the VEBA, by and through LaSalle National Trust, N.A., as Trustee of the VEBA, executed a beneficiary change form naming LaSalle National Trust, N.A., as Trustee, as primary beneficiary of the Policy, and the BERNSTEIN TRUST as the contingent beneficiary.

15. On or about August 26, 1995, Simon Bernstein, in his capacity as member or auxiliary member of the VEBA, signed a VEBA Plan and Trust Beneficiary Designation form designating the BERNSTEIN TRUST as the "person(s) to receive at my death the Death Benefit stipulated in the S.B. Lexington, Inc. Employee Death Benefit and Trust and the Adoption Form adopted by the Employer".

16. The August 26, 1995 VEBA Plan and Trust Beneficiary Designation form signed by Simon Bernstein evidenced Simon Bernstein's intent that the beneficiary of the Policy proceeds was to be the BERNSTEIN TRUST.

17. S.B. Lexington, Inc. and the VEBA were voluntarily dissolved on or about April 3, 1998.

18. On or about the time of the dissolution of the VEBA in 1998, the Policy ownership was assigned and transferred from the VEBA to Simon Bernstein, individually.

19. From the time of Simon Bernstein's designation of the BERNSTEIN TRUST as the intended beneficiary of the Policy proceeds on August 26, 1995, no document was submitted by Simon Bernstein (or any other Policy owner) to the Insurer which evidenced any change in his intent that the BERNSTEIN TRUST was to receive the Policy proceeds upon his death.

20. At the time of his death, Simon Bernstein was the owner of the Policy, and the BERNSTEIN TRUST was the sole surviving beneficiary of the Policy.

21. The insured under the Policy, Simon Bernstein, passed away on September 13, 2012, and on that date the Policy remained in force.

22. Following Simon Bernstein's death, the BERNSTEIN TRUST, by and through its counsel in Palm Beach County, FL, submitted a death claim to HERITAGE under the Policy including the insured's death certificate and other documentation.

COUNT I

BREACH OF CONTRACT

23. Plaintiff, the BERNSTEIN TRUST, restates and realleges the allegations contained in ¶1-¶22 as if fully set forth as ¶23 of Count I.

24. The Policy, by its terms, obligates HERITAGE to pay the death benefits to the beneficiary of the Policy upon HERITAGE'S receipt of due proof of the insured's death.

25. HERITAGE breached its obligations under the Policy by refusing and failing to pay the Policy proceeds to the BERNSTEIN TRUST as beneficiary of the Policy despite HERITAGE'S receipt of due proof of the insured's death.

26. Despite the BERNSTEIN TRUST'S repeated demands and its initiation of a breach of contract claim, HERITAGE did not pay out the death benefits on the Policy to the BERNSTEIN TRUST instead it filed an action in interpleader and deposited the Policy proceeds with the Registry of the Court.

27. As a direct result of HERITAGE's refusal and failure to pay the Policy proceeds to the BERNSTEIN TRUST pursuant to the Policy, Plaintiff has been damaged in an amount equal to the death benefits of the Policy plus interest, an amount which exceeds $1,000,000.00.

WHEREFORE, PLAINTIFF, the BERNSTEIN TRUST prays for a judgment to be entered in its favor and against Defendant, HERITAGE, for the amount of the Policy proceeds on deposit with the Registry of the Court (an amount in excess of $1,000,000.00) plus costs and reasonable attorneys' fees together with such further relief as this court may deem just and proper.

COUNT II

DECLARATORY JUDGMENT

28. Plaintiff, the BERNSTEIN TRUST, restates and realleges the allegations contained in ¶1-¶27 above as ¶28 of Count II and pleads in the alternative for a Declaratory Judgment.

29. On or about June 21, 1995, David Simon, an attorney and Simon Bernstein's son-in-law, met with Simon Bernstein before Simon Bernstein went to the law offices of Hopkins and Sutter in Chicago, Illinois to finalize and execute the BERNSTEIN TRUST Agreement.

30. After the meeting at Hopkins and Sutter, David B. Simon reviewed the final version of the BERNSTEIN TRUST Agreement and personally saw the final version of the BERNSTEIN TRUST Agreement containing Simon Bernstein's signature.

31. The final version of the BERNSTEIN TRUST Agreement named the children of Simon Bernstein as beneficiaries of the BERNSTEIN TRUST, and unsigned drafts of the BERNSTEIN TRUST Agreement confirm the same.

32. The final version of the BERNSTEIN TRUST Agreement named Shirley Bernstein, as Trustee, and named Ted Bernstein as, successor Trustee.

33. As set forth above, at the time of death of Simon Bernstein, the BERNSTEIN TRUST was the sole surviving beneficiary of the Policy.

34. Following the death of Simon Bernstein, neither an executed original of the BERNSTEIN TRUST Agreement nor an executed copy could be located by Simon Bernstein's family members.

35. Neither an executed original nor an executed copy of the BERNSTEIN TRUST Agreement has been located after diligent searches conducted as follows:

i) Ted Bernstein and other Bernstein family members of Simon Bernstein's home and business office;

ii) the law offices of Tescher and Spallina, Simon Bernstein's counsel in Palm Beach County, Florida,

iii) the offices of Foley and Lardner (successor to Hopkins and Sutter) in Chicago, IL; and

iv) the offices of The Simon Law Firm.

36. As set forth above, Plaintiffs have provided HERITAGE with due proof of the death of Simon Bernstein which occurred on September 13, 2012.

WHEREFORE, PLAINTIFF, the BERNSTEIN TRUST prays for an Order entering a declaratory judgment as follows:

a) declaring that the original BERNSTEIN TRUST was lost and after a diligent search cannot be located;

b) declaring that the BERNSTEIN TRUST Agreement was executed and established by Simon Bernstein on or about June 21, 1995;

c) declaring that the beneficiaries of the BERNSTEIN TRUST are the five children of Simon Bernstein;

d) declaring that Ted Bernstein, is authorized to act as Trustee of the BERNSTEIN TRUST because the initial trustee, Shirley Bernstein, predeceased Simon Bernstein;

e) declaring that the BERNSTEIN TRUST is the sole surviving beneficiary of the Policy;

f) declaring that the BERNSTEIN TRUST is entitled to the proceeds placed on deposit by HERITAGE with the Registry of the Court;

g) ordering the Registry of the Court to release all of the proceeds on deposit to the BERNSTEIN TRUST; and

h) for such other relief as this court may deem just and proper.

COUNT III

RESULTING TRUST

37. Plaintiffs restate and reallege the allegations contained in ¶1-¶36 of Count II as ¶37 of Count III and plead, in the alternative, for imposition of a Resulting Trust.

38. Pleading in the alternative, the executed original of the BERNSTEIN TRUST Agreement has been lost and after a diligent search as detailed above by the executors, trustee and attorneys of Simon Bernstein's estate and by Ted Bernstein, and others, its whereabouts remain unknown.

39. Plaintiffs have presented HERITAGE with due proof of Simon Bernstein's death, and Plaintiff has provided unexecuted drafts of the BERNSTEIN TRUST Agreement to HERITAGE.

40. Plaintiffs have also provided HERITAGE with other evidence of the BERNSTEIN TRUST'S existence including a document signed by Simon Bernstein that designated the BERNSTEIN TRUST as the ultimate beneficiary of the Policy proceeds upon his death.

41. At all relevant times and beginning on or about June 21, 1995, Simon Bernstein expressed his intent that (i) the BERNSTEIN TRUST was to be the ultimate beneficiary of the life insurance proceeds; and (ii) the beneficiaries of the BERNSTEIN TRUST were to be the children of Simon Bernstein.

42. Upon the death of Simon Bernstein, the right to the Policy proceeds immediately vested in the beneficiary of the Policy.

43. At the time of Simon Bernstein's death, the beneficiary of the Policy was the BERNSTEIN TRUST.

44. If an express trust cannot be established, then this court must enforce Simon Bernstein's intent that the BERNSTEIN TRUST be the beneficiary of the Policy; and therefore upon the death of Simon Bernstein the rights to the Policy proceeds immediately vested in a resulting trust in favor of the five children of Simon Bernstein.

45. Upon information and belief, Bank of America, N.A., as successor Trustee of the VEBA to LaSalle National Trust, N.A., has disclaimed any interest in the Policy.

46. In any case, the VEBA terminated in 1998 simultaneously with the dissolution of S.B. Lexington, Inc.

47. The primary beneficiary of the Policy named at the time of Simon Bernstein's death was LaSalle National Trust, N.A. as "Trustee" of the VEBA.

48. LaSalle National Trust, N.A., was the last acting Trustee of the VEBA and was named beneficiary of the Policy in its capacity as Trustee of the VEBA.

49. As set forth above, the VEBA no longer exists, and the ex-Trustee of the dissolved trust, and upon information and belief, Bank Of America, N.A., as successor to LaSalle National Trust, N.A. has disclaimed any interest in the Policy.

50. As set forth herein, Plaintiff has established that it is immediately entitled to the life insurance proceeds HERITAGE deposited with the Registry of the Court.

51. Alternatively, by virtue of the facts alleged herein, HERITAGE held the Policy proceeds in a resulting trust for the benefit of the children of Simon Bernstein and since HERITAGE deposited the Policy proceeds the Registry, the Registry now holds the Policy proceeds in a resulting trust for the benefit of the children of Simon Bernstein.

WHEREFORE, PLAINTIFFS pray for an Order as follows:

a) finding that the Registry of the Court holds the Policy Proceeds in a Resulting Trust for the benefit of the five children of Simon Bernstein, Ted Bernstein, Pamela Simon, Eliot Ivan Bernstein, Jill Iantoni and Lisa Friedstein; and

b) ordering the Registry of the Court to release all the proceeds on deposit to the Bernstein Trust or alternatively as follows: 1) twenty percent to Ted Bernstein; 2) twenty percent to Pam Simon; 3) twenty percent to Eliot Ivan Bernstein; 4) twenty percent to Jill Iantoni; 5) twenty percent to Lisa Friedstein

c) and for such other relief as this court may deem just and proper.

By: s/*Adam M. Simon*
Adam M. Simon (#6205304)
303 E. Wacker Drive, Suite 210
Chicago, IL 60601
Phone: 313-819-0730
Fax: 312-819-0773
E-Mail: asimon@chicagolaw.com
Attorneys for Plaintiffs and Third-Party Defendants
Simon L. Bernstein Irrevocable Insurance Trust Dtd 6/21/95; Ted Bernstein as Trustee, and individually, Pamela Simon, Lisa Friedstein and Jill Iantoni

EXHIBIT 9

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT COURT ILLINOIS
EASTERN DIVISION

SIMON BERNSTEIN IRREVOCABLE INSURANCE TRUST DTD 6/21/95, **Plaintiff,** **v.** **HERITAGE UNION LIFE INSURANCE COMPANY,** **Defendant.** --- **HERITAGE UNION LIFE INSURANCE COMPANY,** **Counter-Plaintiff,** **v.** **SIMON BERNSTEIN IRREVOCABLE INSURANCE TRUST DTD 6/21/95,** **Counter-Defendant,** **and,** **FIRST ARLINGTON NATIONAL BANK, as Trustee of S.B. Lexington, Inc. Employee Death Benefit Trust, UNITED BANK OF ILLINOI S, BANK OF AMERICA, successor in interest to LaSalle National Trust, N.A., SIMON BERNSTEIN TRUST, N. A., TED BERNSTEIN, individually and as alleged Trustee of the Simon Bernstein Irrevocable Insurance Trust Dtd. 6/21/95, and ELIOT BERNSTEIN,** **Third-Party Defendants.** ---	**Case No. 13-cv-03643** **Honorable Amy J. St. Eve** **Magistrate Mary M. Rowland**

ELIOT IVAN BERNSTEIN,

Cross-Plaintiff,

v.

TED BERNSTEIN individually and as alleged Trustee of the Simon Berustein Irrevocable Insurance Trust Dtd. 6/21/95

Cross-Defendant

and

PAMELA B. SIMON, DAVID B. SIMON both Professionally and Personally, ADAM SIMON both Professionally and Personally, THE SIMON LAW FIRM, TESCHER & SPALLINA, P.A., DONALD TESCHER both Professionally and Personally, ROBERT SPALLINA both Professionally and Personally, LISA FRIEDSTEIN, JILL IANTONI, S.B. LEXINGTON, INC. EMPLOYEE DEATH BENEFIT TRUST, S.T.P. ENTERPRISES, INC., S.B. LEXINGTON, INC., NATIONAL SERVICE ASSOCIATION, INC. (OF FLORIDA) NATIONAL SERVICE ASSOCIATION, INC. (OF ILLINOIS) AND JOHN AND JANE DOE'S

Third Party Defendants.

ELIOT IVAN BERNSTEIN ("ELIOT") (1) ANSWER TO JACKSON NATIONAL LIFE INSURANCE COMPANY ("JACKSON") ANSWER AND COUNTER-CLAIM AND THIRD-PARTY COMPLAINT FOR INTERPLEADER AND (2) CROSS CLAIM

ELIOT a third party defendant and an alleged beneficiary of a life insurance policy Number 1009208 on the life of Simon L. Bernstein ("Policy(ies)"), a "Simon Bernstein Irrevocable Insurance Trust dtd. 6/21/95" and a "Simon Bernstein Trust, N.A." that are at dispute in the Lawsuit, makes the following (1) Response to Jackson's Answer and Counterclaim and (2) Cross claim.

I, Eliot Ivan Bernstein, make the following statements and allegations to the best of my knowledge and on information and belief and as a Pro Se Litigant[1]:

ANSWER TO JACKSON'S COUNTER-CLAIM AND THIRD PARTY COMPLAINT FOR INTERPLEADER

1. Jackson National Life Insurance Company ("Jackson") brings this counter-claim and third-party complaint for Interpleader pursuant to 28 U.S.C. § 1335(a) and Federal Rule of Civil Procedure 14, as it seeks a declaration of rights under a life insurance policy for which it is responsible to administer. The proceeds from the policy (the "Death Benefit Proceeds") have been tendered to this Court.

[1] Pleadings in this case are being filed by Plaintiff In Propria Persona, wherein pleadings are to be considered without regard to technicalities. Propria, pleadings are not to be held to the same high standards of perfection as practicing lawyers. See Haines v. Kerner 92 Sct 594, also See Power 914 F2d 1459 (11th Cir1990), also See Hulsey v. Ownes 63 F3d 354 (5th Cir 1995). also See In Re: HALL v. BELLMON 935 F.2d 1106 (10th Cir. 1991)."
In Puckett v. Cox, it was held that a pro-se pleading requires less stringent reading than one drafted by a lawyer (456 F2d 233 (1972 Sixth Circuit USCA). Justice Black in Conley v. Gibson, 355 U.S. 41 at 48 (1957)"The Federal Rules rejects the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." According to Rule 8(f) FRCP and the State Court rule which holds that all pleadings shall be construed to do substantial justice.

ELIOT ANSWER: To the extent Par. 1 of Jackson's counter-claim/third-party complaint contain conclusions of law, no response is required. However, ELIOT denies that Jackson has tendered the death benefit to the court, as when ELIOT contacted Jackson's counsel Alexander David Marks ("MARKS") he stated at that time, after Jackson's Answer was filed, that the death benefit had not been paid to this Court.

2. Jackson, successor in interest to Reassure America Life Insurance Company ("Reassure"), successor in interest to Heritage Union Life Insurance Company ("Heritage"), is a corporation organized and existing under the laws of the State of Michigan, with its principal place of business located in Lansing, Michigan. Jackson did not originate or administer the subject life insurance policy, Policy Number 1009208 (the "Policy"), but inherited the Policy and the Policy records from its predecessors.

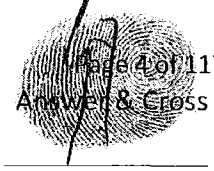
ELIOT ANSWER: ELIOT lacks sufficient information and knowledge to form a belief as to the truth of the allegations of this paragraph and therefore denies the same.

3. The Simon Bernstein Irrevocable Insurance Trust Dtd 6/21/95 (the "Bernstein Trust") is alleged in the underlying suit to be a "common law trust established in Chicago, Illinois by the settlor, Simon L. Bernstein, and was formed pursuant to the laws of the state of Illinois."

ELIOT ANSWER: ELIOT lacks sufficient information and knowledge to form a belief as to the truth of the allegations of this paragraph and therefore denies the same.

4. Ted S. Bernstein is a resident and citizen of Florida. He is alleged in the underlying suit to be the "trustee" of the Bernstein Trust. Ted Bernstein is further, individually, upon information and belief, a beneficiary of the Bernstein Trust (as Simon Bernstein's son).

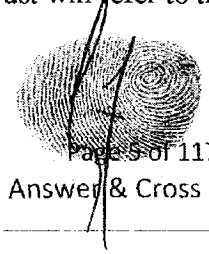
ELIOT ANSWER: ELIOT admits that Ted S. Bernstein ("TED") is a resident of Florida. ELIOT lacks sufficient information and knowledge to form a belief as to the truth of the



remainder of the allegations of this paragraph and therefore denies the same. That ELIOT claims that TED makes his claims in this Lawsuit acting as alleged "trustee" of the "Simon Bernstein Irrevocable Insurance Trust Dtd 6/21/95" but also TED alleges this trust and any executed copies cannot be located. Therefore, it would be almost impossible for TED to make assertions to who the true and proper trustees and beneficiaries of such lost trust are. ELIOT claims that the "Simon Bernstein Irrevocable Insurance Trust Dtd 6/21/95" was not the final beneficiary of the Policy(ies). On information and belief the beneficiary of the Policy(ies) at the time of Simon L. Bernstein ("SIMON") death, as according to Jackson's Counter Claim the beneficiary at the time of death was the "Simon Bernstein Trust, N.A." and thus the "Simon Bernstein Irrevocable Insurance Trust Dtd 6/21/95" may have no valid claim as a prior beneficiary.

5. Eliot Bernstein is a resident and citizen of Florida. He has asserted that he and/or his children are potential beneficiaries under the Policy(ies) as Simon Bernstein's son, presumably under the Bernstein Trust.

ELIOT ANSWER: ELIOT admits residency and citizenry of Florida and that he has asserted that he and/or his children are potential beneficiaries as SIMON's son and grandchildren. ELIOT denies his claims were made under the Bernstein Trust, which according to TED's response to Jackson's Counter Claim, "Ted Bernstein and the Bernstein Trust admit that to its knowledge no one has been able to locate an executed original or an executed copy of the Bernstein Trust, but denies that no one has located a copy of the Bernstein Trust." In other words the executed "Bernstein Trust" is lost and no one has a copy and herein the term "lost" trust will refer to the "Bernstein Trust" and any other names it is referenced as.



6. First Arlington National Bank is, upon information and belief, a bank in Illinois that was, at one point, and the alleged trustee for the "S.B. Lexington, Inc. Employee Death Benefit Trust" (the "Lexington Trust"). The Lexington Trust was, upon information and belief, created to provide employee benefits to certain employees of S.B. Lexington, Inc., an insurance agency, including Simon Bernstein, but it is unclear if such trust was properly established.

ELIOT ANSWER: ELIOT lacks sufficient information and knowledge to form a belief as to the truth of the allegations of this paragraph and therefore denies the same.

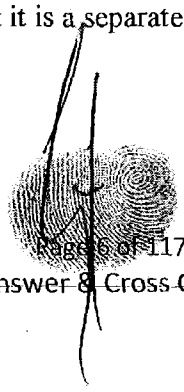
7. United Bank of Illinois is, upon information and belief, a bank in Illinois that was, at one point, a named beneficiary of the Policy. To date, Jackson has not determined the current existence of this bank.

ELIOT ANSWER: ELIOT lacks sufficient information and knowledge to form a belief as to the truth of the allegations of this paragraph and therefore denies the same.

8. Bank of America, N.A., is a national banking association with its principal place of business in Charlotte, North Carolina. Bank of America, N.A. is the successor in interest to LaSalle National Trust, N.A., which was a named beneficiary of the Policy.

ELIOT ANSWER: ELIOT lacks sufficient information and knowledge to form a belief as to the truth of the allegations of this paragraph and therefore denies the same.

9. The "Simon Bernstein Trust" is, upon information and belief, the Bernstein Trust listed in paragraph 3, above, and was a named contingent beneficiary of the Policy. However, based on the variance in title, to the extent it is a separate trust from the Bernstein Trust referenced above, it is named separately.



ELIOT ANSWER: ELIOT lacks sufficient information and knowledge to form a belief as to the truth of the allegations of this paragraph and therefore denies the same.

10. Subject matter jurisdiction is proper in accordance with 28 U.S.C. § 1335(a).

ELIOT ANSWER: ELIOT lacks sufficient information and knowledge to form a belief as to the truth of the allegations of this paragraph and therefore denies the same.

11. Personal jurisdiction is proper over Ted Bernstein because he, allegedly as Trustee of the Bernstein Trust, caused this underlying suit to be filed in this venue.

ELIOT ANSWER: ELIOT lacks sufficient information and knowledge to form a belief as to the truth of the allegations of this paragraph and therefore denies the same. ELIOT claims that TED cannot assert with any proof or contract or trust that he is the trustee of the "Simon Bernstein Irrevocable Insurance Trust Dtd 6/21/95" aka "Bernstein Trust" as TED claims the trust is lost and no executed copies exist.

12. Personal jurisdiction is proper over First Arlington National Bank, United Bank of Illinois, and Bank of America in accordance with 735 ILCS 5/2-209(a)(l) because each, upon information and belief, transacts business in Illinois.

ELIOT ANSWER: ELIOT lacks sufficient information and knowledge to form a belief as to the truth of the allegations of this paragraph and therefore denies the same.

13. Personal jurisdiction is proper over Ted and Eliot Bernstein in accordance with 735 ILCS 5/2-209(a)(l3) as each are believed to have an ownership interest in the Bernstein Trust, which is alleged in the underlying complaint to exist underneath laws of and to be administered within this State.

ELIOT ANSWER: ELIOT lacks sufficient information and knowledge to form a belief as to the truth of the allegations of this paragraph regarding personal jurisdiction and therefore

denies the same. ELIOT denies that TED or ELIOT can assert an ownership or beneficial interest in the lost "Simon Bernstein Irrevocable Insurance Trust Dtd 6/21/95" aka "Bernstein Trust," as if the trust is lost they cannot prove through contract anyone's interests or rights.

14. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b) in that a substantial part of the events giving rise to this interpleader action occurred in this District.

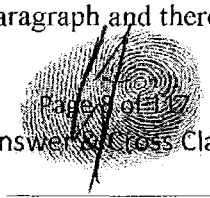
ELIOT ANSWER: ELIOT lacks sufficient information and knowledge to form a belief as to the truth of the allegations of this paragraph and therefore denies the same.

15. On December 27, 1982, upon information and belief, Capitol Bankers Life Insurance Company issued the Policy, with Simon L. Bernstein as the alleged insured (the "Insured").

ELIOT ANSWER: ELIOT lacks sufficient information and knowledge to form a belief as to the truth of the allegations of this paragraph and therefore denies the same. The Court should note that after repeated attempts by ELIOT to secure copies of the underlying policies and trusts pertinent to this Lawsuit from the parties, he has been denied and refused all such suppressed and denied information and documents to form any opinion on the validity of the claims.

16. Over the years, the Policy's owner(s), beneficiary(ies), contingent beneficiary(ies) and issuer changed. Among the parties listed as Policy beneficiaries (either primary or contingent) include: "Simon Bernstein"; "First Arlington National Bank, as Trustee of S.B. Lexington, Inc. Employee Death Benefit Trust"; "United Bank of Illinois"; "LaSalle National Trust, N.A., Trustee"; "LaSalle National Trust, N.A."; "Simon Bernstein Insurance Trust dated 6/21/1995, Trust"; and "Simon Bernstein Trust, N.A."

ELIOT ANSWER: ELIOT lacks sufficient information and knowledge to form a belief as to the truth of the allegations of this paragraph and therefore denies the same. The Court should



note that after repeated attempts by ELIOT to secure copies of the underlying policies and trusts pertinent to this Lawsuit from the parties, he has been denied and refused all such suppressed and denied requested information and documents to form any opinion on the validity of the claims.

17. At the time of the Insured's death, it appears "LaSalle National Trust, N.A." was the named primary beneficiary of the Policy, and the "Simon Bernstein Trust, N.A." was the contingent beneficiary of the Policy. The Policy's Death Benefit Proceeds are $1,689,070.00, less an outstanding loan.

ELIOT ANSWER: ELIOT lacks sufficient information and knowledge to form a belief as to the truth of the allegations regarding the beneficiaries of the Policy(ies) and therefore denies the same. ELIOT denies that the Policy(ies) Death Benefit Proceeds are $1,689,070.00, as it was initially represented by TED, Robert Spallina, Esq. ("SPALLINA") and others that the death benefit was $2,000,000.00 less outstanding loans. When ELIOT asked TED and SPALLINA and others for copies of the policies loans or any other Policy(ies) information it was denied and suppressed. After repeated attempts by ELIOT to secure copies of the underlying policies, trusts and carrier information pertinent to this Lawsuit from the parties, he has been denied and refused all such requested information and documents to form any opinion on the validity of the claims.

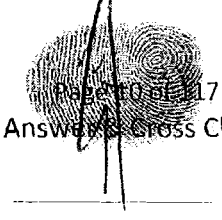
18. Subsequent to the Insured's death, Ted Bernstein, through his Florida counsel **(who later claimed Bernstein did not have authority to file the instant suit in Illinois on behalf of the Bernstein Trust and withdrew representation)**, [emphasis added] submitted a claim to Heritage seeking payment of the Death Benefit Proceeds, allegedly as the trustee of the Bernstein Trust. Ted Bernstein claimed that the Lexington Trust was voluntarily dissolved in

1998, leaving the Bernstein Trust as the alleged sole surviving Policy beneficiary at the time of the Decedent's death.

ELIOT ANSWER: ELIOT lacks sufficient information and knowledge to form a belief as to the truth of the allegations of this paragraph and therefore denies the same. ELIOT claims, on information and belief that TED's counsel that withdrew from representation after advising TED that he **did not have "authority" to file this Lawsnit** is believed to be Robert Spallina, Esq. ("SPALLINA") and Donald Tescher, Esq. ("TESCHER") of Tescher & Spallina, P.A. ("TSPA"), who are acting as estate counsel for SIMON's estate and as alleged Personal Representatives for the estate of SIMON.

That ELIOT does not have the necessary files from this Court's records to determine whom the original counsel who drafted and filed this Lawsuit were and if withdrawal of counsel papers were filed after the filing of the suit or withdrawal was prior to filing. That ELIOT believes that any claims of any fiduciary capacities claimed by TED on behalf of any party that is a litigant in this Lawsuit are allegedly fraudulently acquired and are part of a larger **insurance fraud and fraud on the beneficiaries of the estate**. The alleged criminal acts are more fully defined in the Petitions and Motions listed below with URL hyperlinks to the filings, whereby the documents contained at the hyperlinks are hereby incorporated in entirety by reference herein with all exhibits therein, and where the Petitions and Motions were filed in the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida / Probate ("Probate Court") case # 502012CP004391XXXXSB for the estate of Simon L. Bernstein, as follows:

i. May 6, 2013 ELIOT filed Docket #23 an "EMERGENCY PETITION TO: FREEZE ESTATE ASSETS, APPOINT NEW PERSONAL



REPRESENTATIVES, INVESTIGATE FORGED AND FRAUDULENT DOCUMENTS SUBMITTED TO THIS COURT AND OTHER INTERESTED PARTIES, RESCIND SIGNATURE OF ELIOT BERNSTEIN IN ESTATE OF SHIRLEY BERNSTEIN AND MORE" ("Petition 1").

a. www.iviewit.tv/20130506PetitionFreezeEstates.pdf 15th Judicial Florida Probate Court and

b. www.iviewit.tv/20130512MotionRehearReopenObstruction.pdf US District Court Pages 156-582

ii. May 29, 2013, ELIOT filed Docket #28 "RENEWED EMERGENCY PETITION" ("Petition 2")

a. www.iviewit.tv/20130529RenewedEmergencyPetitionSIMON.pdf

iii. June 26, 2013, ELIOT filed Docket #31 "MOTION TO: CONSIDER IN ORDINARY COURSE THE EMERGENCY PETITION TO FREEZE ESTATE ASSETS, APPOINT NEW PERSONAL REPRESENTATIVES, INVESTIGATE FORGED AND FRAUDULENT DOCUMENTS SUBMITTED TO THIS COURT AND OTHER INTERESTED PARTIES, RESCIND SIGNATURE OF ELIOT BERNSTEIN IN ESTATE OF SHIRLEY BERNSTEIN AND MORE FILED BY PETITIONER" ("Petition 3")

a. www.iviewit.tv/20130626MotionReconsiderOrdinaryCourseSIMON.pdf

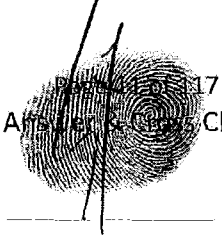
iv. July 15, 2013, ELIOT filed Docket #32 "MOTION TO RESPOND TO THE PETITIONS BY THE RESPONDENTS" ("Petition 4")

a. www.iviewit.tv/20130714MotionRespondPetitionSIMON.pdf

v. July 24, 2013, ELIOT filed Docket #33 "MOTION TO REMOVE PERSONAL REPRESENTATIVES" **for insurance fraud and more**. ("Petition 5")

a. www.iviewit.tv/20130724SIMONMotionRemovePR.pdf

vi. August 28, 2013, ELIOT filed Docket #TBD "NOTICE OF MOTION FOR: INTERIM DISTRIBUTION FOR BENEFICIARIES NECESSARY LIVING EXPENSES, FAMILY ALLOWANCE, LEGAL COUNSEL EXPENSES TO BE PAID BY PERSONAL REPRESENTATIVES AND REIMBURSEMENT TO BENEFICIARIES SCHOOL TRUST FUNDS" ("Petition 6")



Page 11 of 117
Amended & Restated Complaint Claim

a. www.iviewit.tv/20130828MotionFamilyAllowanceSHIRLEY.pdf

vii. September 04, 2013, ELIOT filed Docket #TBD "NOTICE OF EMERGENCY MOTION TO FREEZE ESTATES OF SIMON BERNSTEIN DUE TO ADMITTED AND ACKNOWLEDGED NOTARY PUBLIC FORGERY, FRAUD AND MORE BY THE LAW FIRM OF TESCHER & SPALLINA, P.A., ROBERT SPALLINA AND DONALD TESCHER ACTING AS ALLEGED PERSONAL REPRESENTATIVES AND THEIR LEGAL ASSISTANT AND NOTARY PUBLIC, KIMBERLY MORAN: MOTION FOR INTERIM DISTRIBUTION DUE TO EXTORTION BY ALLEGED PERSONAL REPRESENTATIVES AND OTHERS; MOTION TO STRIKE THE MOTION OF SPALLINA TO REOPEN THE ESTATE OF SHIRLEY; CONTINUED MOTION FOR REMOVAL OF ALLEGED PERSONAL REPRESENTATIVES AND ALLEGED SUCCESSOR TRUSTEE. ("Petition 7")

a. www.iviewit.tv/20130904MotionFreezeEstatesSHIRLEYDueToAdmittedNotaryFraud.pdf

19. However, Ted Bernstein could not locate (nor could anyone else) a copy of the Bernstein Trust. Accordingly, on January 8, 2013, Reassure, successor to Heritage, responded to Ted Bernstein's counsel stating:

> In as much as the above policy provides a large death benefit in excess of $1.6 million dollars and the fact that the trust document cannot be located, **we respectfully request a court order to enable us to process this claim**. [Emphasis Added]

ELIOT ANSWER: ELIOT lacks sufficient information and knowledge to form a belief as to the truth of the allegations of this paragraph and therefore denies the same. ELIOT claims that the counsel referred to here as "Ted Bernstein's counsel" is believed to be SPALLINA and TESCHER and the law firm of TSPA, as the Heritage Union Life Insurance Company's letter referenced in Jackson's response demands a "court order" to approve of the TSPA,

SPALLINA, TESCHER, TED and Pamela Beth Simon ("P. SIMON") insurance trust and beneficiary scheme they presented in their death benefit claim. Other correspondences were sent to TSPA, SPALLINA and TESCHER directly by the carrier(s) in their capacity as counsel representing the estate of SIMON and as alleged Personal Representatives of the estate of SIMON.

However, instead of complying with the carriers request to obtain a "court order" to determine the beneficiaries, the instant Lawsuit was instead filed to try and reap the benefits through this Breach of Contract suit and without first obtaining a court order approving the beneficiaries as demanded by the carrier. The initial insurance and trust scheme prepared by TSPA is fully described, defined and exhibited in Petition 1, Section VII - "Insurance Distribution Scheme" Pages 30-37 and Pages 170-175, exhibit 7 - "Settlement Agreement and Mutual Release" ("SAMR"). The trust that would have been created under the SAMR to replace the lost "Bernstein Trust" aka "Simon Bernstein Irrevocable Insurance Trust Dtd 6/21/95" is termed herein as the SAMR TRUST ("SAMR TRUST"). The SAMR TRUST was to act as the proposed trust instrument by which the alleged conversion of proceeds was to be used funneled to allegedly intentionally post mortem elected wrong beneficiaries, as defined more fully in Petition 1, Pages 142-168 and 258-259, exhibits 5, 6 and 25.

That TSPA, SPALLINA and TESCHER are SIMON's estate counsel and alleged Personal Representatives of SIMON's estate, and yet, also appear in this Lawsuit to have acted in apparent conflict with the estate beneficiaries, acting as TED's counsel in this Lawsuit.

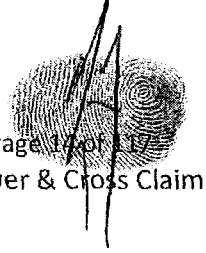
ELIOT claims these conflicts enable part of an alleged larger fraud against the estates of SIMON and SHIRLEY as further evidenced and exhibited in the Petitions 1-7 and Petition 1,

Section XIX. CONFLICTS OF INTEREST BY PERSONAL REPRESENTATIVES, ESTATE COUNSEL AND TRUSTEES DISCOVERED, Pages 88-90.

The documents giving TSPA, SPALLINA, TESCHER and TED fiduciary powers in the estates of SIMON and SHIRLEY are also currently under investigations and questioned as to their validity in complaints filed by ELIOT with the Governor of Florida Notary Public Division, the Palm Beach County Sheriff's Office, Fifteenth Judicial Circuit in and for Palm Beach County, Florida / Probate and have been simultaneously been tendered to the US District Court of New York Southern District.

In the Notary Public investigation at the Florida Governor's Office, the Licensed Notary Public, who is an employee of TSPA, **ADMITTED** TO ILLEGALLY NOTARIZING documents and it is alleged that she forged documents after he was deceased and also improperly Notarized documents, including a Will and Amended Trust of SIMON and documents that allegedly grant Simon's estate counsel, TSPA, SPALLINA and TESCHER their fiduciary capacities as alleged Personal Representatives of the estates of SIMON.

That the Licensed Notary Public Kimberly MORAN ("MORAN"), admitted to committing six instances of Fraud by falsely Notarizing documents and allegedly Forged documents in the estate of SHIRLEY. The alleged forgeries included a document ILLEGALLY NOTARIZED in SIMON's name and with a fraudulent signature affixed, done two months after SIMON's passing and submitted to the Probate Court and others as part of official records in the estates. These acts are illegal felony crimes. The Notary Public MORAN's Response to the complaints filed against her with the Governor of Florida's office in an ongoing investigation, including her Admission to the allegations, the Response filed by



ELIOT to MORAN's Response and the original Notary Public original complaint, all can be found as exhibits in Petition 7, exhibits 1,2 &3.

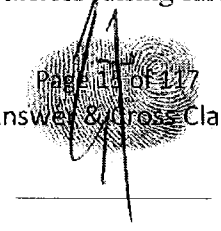
20. Presently, the Bernstein Trust still has not been located. **Accordingly, Jackson is not aware whether the Bernstein Trust even exists**, [EMPHASIS ADDED] and if it does whether its title is the "Simon Bernstein Insurance Trust dated 6/21/1995, Trust," as captioned herein, or the "Simon Bernstein Trust, N.A." as listed as the Policy's contingent beneficiary (or otherwise), **and/or if Ted Bernstein is in fact its trustee**. [Emphasis Added] In conjunction, Jackson has received conflicting claims as to whether Ted Bernstein had authority to file the instant suit on behalf of the Bernstein Trust.

ELIOT ANSWER: ELIOT lacks sufficient information and knowledge to form a belief as to the truth of the allegations of this paragraph and therefore denies the same. ELIOT admits that the "Bernstein Trust" is unknown if it exists. ELIOT admits that TED is questionably the trustee of the "Bernstein Trust" and believes TED has no basis or authority to file this Lawsuit or a death benefit claim with the carrier.

21. In addition, it is not known whether "LaSalle National Trust, N.A." was intended to be named as the primary beneficiary in the role of a trustee (of the Lexington and/or Bernstein Trust), or otherwise. Jackson also has no evidence of the exact status of the Lexington Trust, which was allegedly dissolved."

ELIOT ANSWER: ELIOT lacks sufficient information and knowledge to form a belief as to the truth of the allegations of this paragraph and therefore denies the same.

22. Further, Jackson has received correspondence from Eliot Bernstein, attached as Exhibit 1, asserting that he and/or his children are potential beneficiaries under the Policy, (presumably under the Bernstein Trust, but nonetheless raising further questions as to the proper



beneficiaries of the Policy), and requesting that no distributions of the Death Benefit proceeds be made.

ELIOT ANSWER: ELIOT admits in part and denies in part and lacks sufficient information and knowledge in part to form a belief as to the truth of the remainder of the allegations of this paragraph and therefore denies the same. ELIOT admits that he and/or his children are the beneficiaries. ELIOT denies sending correspondence to Jackson but instead sending such correspondence to Reassure America Life Insurance Company ("RALIC") after failing to reach Heritage after several attempts. RALIC may have tendered the correspondence to Jackson without ELIOT authorization or knowledge. ELIOT admits stating that NO DISTRIBUTION OF DEATH BENEFITS BE MADE and further until both CIVIL AND CRIMINAL REMEDIES ARE NOW RESOLVED, regarding the Policy(ies).

23. This is an action of interpleader brought under Title 28 of the United States Code, Section 1335.

ELIOT ANSWER: ELIOT lacks sufficient information and knowledge to form a belief as to the truth of the allegations of this paragraph and therefore denies the same. ELIOT makes no answer to the allegations in Par. 23 as they are conclusions of law.

24. Jackson does not dispute the existence of the Policy or its obligation to pay the contractually required payment Death Benefit Proceeds under the Policy, which it has tendered into the registry of this Court.

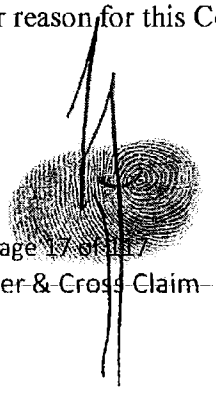
ELIOT ANSWER: ELIOT lacks sufficient information and knowledge to form a belief as to the truth of the allegations of this paragraph and therefore denies the same. ELIOT claims that Jackson has not tendered the Policy(ies) Proceeds to the registry of this Court after

conversations with Jackson's Attorney at Law, MARKS, who denied benefits have been paid into the registry of this Court at that time.

25. Due to: (a) the inability of any party to locate the Bernstein Trust and uncertainty associated thereunder; (b) the uncertainty surrounding the existence and status of "LaSalle National Trust, N.A." (the primary beneficiary under the Policy) and the Lexington Trust; and (c) the potential conflicting claims under the Policy, Jackson is presently unable to discharge its admitted liability under the Policy.

ELIOT ANSWER: ELIOT lacks sufficient information and knowledge to form a belief as to the truth of the allegations of this paragraph and therefore denies the same. ELIOT admits that "Jackson is presently unable to discharge its admitted liability under the Policy(ies)."

26. Jackson is indifferent among the defendant parties, and has no interest in the benefits payable under the Policy as asserted in this interpleader other than to pay its admitted liability pursuant to the terms of the Policy(ies), which Jackson has been unable to do by reason of uncertainty and potential competing claims. ELIOT claims the death benefit amount is unknown with conflicting claims as to the amount due to the to be determined beneficiaries and therefore cannot determine how much the admitted liability is. Until ELIOT receives all Policy(ies) records and information ELIOT denies that Jackson has no interest in the benefits payable under the Policy(ies) and thus should not be released from this Lawsuit at this time. There may also be other liabilities that are unknown at this time regarding record keeping of beneficiaries and more and these liabilities may be due to any of the parties of this Lawsuit and is yet still unknown, leaving further reason for this Court to leave Jackson a party to the Lawsuit.



ELIOT ANSWER: ELIOT lacks sufficient information and knowledge to form a belief as to the truth of the allegations of this paragraph and therefore denies the same.

27. Justice and equity dictate that Jackson should not be subject to disputes between the defendant parties and competing claims when it has received a non-substantiated claim for entitlement to the Death Benefit Proceeds by a trust that has yet to be located, nor a copy of which produced.

ELIOT ANSWER: ELIOT lacks sufficient information and knowledge to form a belief as to the truth of the allegations of this paragraph and therefore denies the same.

ELIOT shall not be liable to Jackson for any fees or any type of damages.

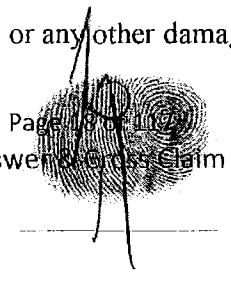
RELIEF

WHEREFORE, ELIOT prays that:

i. Even if this court comes to the conclusion that Jackson should be paid attorney fees, then these fees should be paid by TSPA, TESCHER, SPALLINA, TED, Simon Law Firm ("SLF"), David Simon ("D. SIMON"), Pamela Beth Simon ("P. SIMON") and Adam Simon ("A. SIMON") directly, as all these costs have resulted from the allegedly fraudulent and illegal acts of TSPA, SPALLINA, TESCHER, TED, P. SIMON, SLF D. SIMON and A. SIMON, in attempting to convert the Policy(ies) proceeds through an alleged Fraud on this Court and fraud on the true and proper beneficiaries of the Policy(ies).

ii. ELIOT and his children be paid their legal share of the Policy(ies) proceeds as beneficiaries after a "court order" determining the beneficiaries is made.

iii. under no circumstances should ELIOT or other beneficiaries or interested parties be made liable for attorney fees or any other damages to Jackson or any other party.



iv. bonding be required if this Court finds that Abuse of Process has occurred in the filing of this Lawsuit.

v. Jackson should not pay the Policy(ies) proceeds to this Court registry at this time until all beneficiary disputes are wholly resolved by a court of law.

vi. this Court should not release Jackson from the remainder of the proceedings, as their interest in Heritage makes them a party to this suit and any damages, which may result from their actions or those of Heritage's are still unknown, and so it would be prudent to leave them in at the present time.

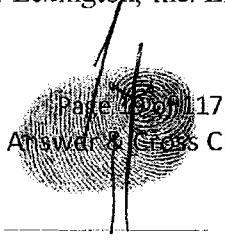
vii. this Court demand all parties release all insurance policy(ies) records, trust documents and any other information regarding the Policy(ies) or any other insurance or other contracts held to ELIOT immediately so that he may better prepare pleadings for this Lawsuit as he has been denied all such records and information to this point, and,

viii. leave to amend this Answer.

CROSS CLAIM / COUNTER CLAIM

INTRODUCTION

1. ELIOT brings this cross claim under FRC Rule 13(g) against the Cross Defendant Ted Stuart Bernstein ("TED") and requests this court under FRC Rule 19 to add Pamela B. Simon ("P. SIMON"), David B. Simon ("D. SIMON"), Adam Simon ("A. SIMON"), The Simon Law Firm ("SLF"), Tescher & Spallina P.A. ("TSPA"), Donald Tescher ("TESCHER"), Robert Spallina ("SPALLINA"), Jill Iantoni ("IANTONI"), Lisa Friedstein ("FRIEDSTEIN"), S.T.P. Enterprises ("STP"), S.B. Lexington, Inc. Employee Death Benefit Trust ("SBI"), SB



Lexington, Inc. ("SBL"), National Service Association, Inc. (of Florida) ("NSA"), National Service Association, Inc. (of Illinois) ("NSA2") and John and Jane Doe's to this case as additional Third Party Defendants and further requests this Court to:

i. To seize all records and demand that all records of all parties concerning either Shirley Bernstein ("SHIRLEY") or Simon Bernstein ("SIMON") held by all parties be turned over to ELIOT, as NO documents have been tendered to him regarding these Policies;

ii. Award Court Costs not from the Policy(ies) but from alleged conspirators and force bonding for these unnecessary legal and other costs by those parties that have caused this baseless Lawsuit in efforts to perpetrate a fraud;

iii. ELIOT has requested the Probate Court to remove TSPA, SPALLINA, TESCHER, TED and P. SIMON of any fiduciary capacities regarding the estates of SIMON and SHIRLEY on multiple legal grounds stated in said Petitions and Motion 1-7 and hereby requests this Court remove them as well from acting in any conflicting capacities or self-representations based on the Prima Facie evidence of Forgery, Fraud, Fraud on the Probate Court and Mail and Wire Fraud, already evidenced in Petition 7. **That in hearings held on SHIRLEY's estate on Friday, September 13, 2013 in the Probate Court, Honorable Judge Martin H. Colin told TED, SPALLINA, TESCHER and their counsel, Mark Manceri, that he [Hon. Jndge Colin] should read them all their Miranda Rights right at that moment, after hearing how SIMON had notarized docnments to close SHIRLEY's estate two months after he was deceased and how there was a fraud upon his court and**

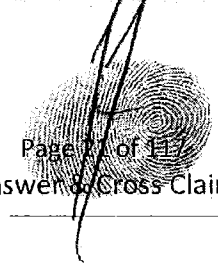
himself personally as he closed the estate with the fraudulent documents and TSPA, TESCHER and SPALLINA did not think it important to note the Court of what they were doing. Hon. Colin's issued this stark Miranda Warning after hearing of the admitted criminal misconduct before his Court, twice in fact.

iv. That the alleged insurance fraud taking place through the instant Lawsuit in this Court as further defined herein is allegedly being committed by similar parties of the alleged estate frauds, again misusing their fiduciary and professional powers and they should be removed from further representing any parties, sanctioned and all Cross Defendants and Third Party Defendants forced to retain non conflicted counsel further in these proceedings.

v. ELIOT requests this Court take Judicial Notice of the alleged and admitted crimes herein and in Petitions 1-7 and Hon. Colin's warning and act on its own motions to prevent any further possible criminal activities and damages to others being incurred until these alleged criminal matters are fully resolved.

vi. Allow ELIOT to ECF in this case due to health problems and expenses. In US District Court Scheindlin has ordered ELIOT access to ECF filing.

vii. Allow leave to amend this Cross Claim as it was served while ELIOT was recovering from a traumatic brain injury with bleeding on the brain, a fractured rib and bruised collar bone and in ICU for 3 days in Del Ray Beach, FL hospital and the recovery was almost two months during the time for response and therefore ELIOT would like an opportunity to perfect it. The Court granted several extensions during this time period and ELIOT thanks Your Honor for the additional extensions in light of these medical maladies.



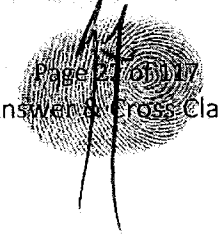
viii. Award damages sustained to date and continuing in excess of at least EIGHT MILLION DOLLARS ($8,000,000.00) as well as punitive damages, costs and attorney's fees.

JURISDICTION

2. Personal jurisdiction is proper over Ted S. Bernstein because he, allegedly claims to be Trustee of the Bernstein Trust, caused this underlying suit to be filed in this venue.
3. Personal jurisdiction is proper over Pamela B. Simon, David. B. Simon, Adam Simon, Lisa S. Friedstein and Jill M. Iantoni to this case under 735 ILCS 5/2-209(a)(1 3), as each are believed to have a beneficial interest in the Bernstein Trust, which is alleged in the underlying complaint to exist underneath laws of and to be administered within this State. Tescher & Spallina, P.A., Donald Tescher and Robert Spallina, as each are Personal Representatives, Trustees and estate counsel of the estate of SIMON.
4. Personal jurisdiction is proper over The Simon Law Firm, , S.T.P. Enterprises, S.B. Lexington, Inc. Employee Death Benefit Trust, SB Lexington, Inc., National Service Association, Inc. , of Florida, National Service Association, Inc. Illinois, and John and Jane Doe's to this case under 735 ILCS 5/2-209(a)(1 3), as each are believed to have business in this State.

PARTIES AND VENUES

5. Eliot Ivan Bernstein ("ELIOT") is a resident and citizen of Florida. ELIOT and/or his children are beneficiaries of the Policy(ies).
6. Theodore Stuart Bernstein is a resident and citizen of Florida. He is claiming to be Successor Trustee of the lost "Simon Bernstein Irrevocable Insurance Trust Dtd 6/21/95" aka



"Bernstein Trust" and alleging he is a beneficiary of the "Simon Bernstein Irrevocable Insurance Trust Dtd 6/21/95"regarding Heritage Policy #1009208 ("Policy(ies"). He is the son of SIMON and SHIRLEY.

3. David B. Simon, Esq. is a resident and citizen of Illinois and an Attorney at Law. He is a partner in The Simon Law Firm and married to P. SIMON , daughter of SIMON and SHIRLEY.

4. Adam Simon, Esq. is a resident and citizen of Illinois and an Attorney at Law. He is a partner in the SLF law firm and is brother to D. SIMON.

5. The Simon Law Firm is believed to be a law firm licensed in Illinois.

6. Pamela Beth Simon is a resident of Illinois and citizen of Illinois. She is daughter to SIMON and SHIRLEY and married to D. SIMON and sister-in-law to A. SIMON.

7. Tescher & Spallina, P. A. is believed to be a Florida law firm.

8. Robert L. Spallina, Esq. is a resident of Florida and citizen of Florida and an Attorney at Law.

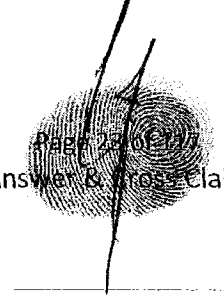
9. Donald R. Tescher is a resident of Florida and citizen of Florida and an Attorney at Law.

10. Jill Marla Iantoni is a resident and citizen of Illinois. She is daughter to SIMON and SHIRLEY.

11. Lisa Sue Friedstein is a resident and citizen of Illinois. She is daughter to SIMON and SHIRLEY.

12. S.T.P. Enterprises Inc. is believed to be an Illinois insurance agency believed to be owned by P. SIMON as President and D. SIMON as VP.

13. S.B. Lexington, Inc. Employee Death Benefit Trust, is a trust alleged to be managed by P. SIMON and D. SIMON.



14. S.B. Lexington, Inc. is an Illinois insurance agency managed by D. SIMON and P. SIMON.

15. National Service Association, Inc. is a Florida insurance consulting firm believed to be managed by SIMON prior to his death.

16. National Service Association, Inc. is an Illinois insurance consulting firm believed to be managed by P. SIMON and D. SIMON.

FACTS

I, Eliot Ivan Bernstein, make the following statements and allegations to the best of my knowledge and on information and belief and as a Pro Se Litigant:

17. That the alleged criminal acts defined herein are more fully defined in the Petitions and Motions listed below with URL hyperlinks to the filings, whereby the documents contained at the hyperlinks are hereby incorporated in entirety by reference herein with all exhibits therein, and where the Petitions and Motions were filed in the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida / Probate ("Probate Court") case # 502012CP004391XXXXSB for the estate of Simon L. Bernstein, as follows:

    i. May 6, 2013 ELIOT filed Docket #23 an "EMERGENCY PETITION TO: FREEZE ESTATE ASSETS, APPOINT NEW PERSONAL REPRESENTATIVES, INVESTIGATE FORGED AND FRAUDULENT DOCUMENTS SUBMITTED TO THIS COURT AND OTHER INTERESTED PARTIES, RESCIND SIGNATURE OF ELIOT BERNSTEIN IN ESTATE OF SHIRLEY BERNSTEIN AND MORE" ("Petition 1").

b. www.iviewit.tv/20130506PetitionFreezeEstates.pdf 15th Judicial Florida Probate Court and

c. www.iviewit.tv/20130512MotionRehearReopenObstruction.pdf US District Court Pages 156-582

ii. May 29, 2013, ELIOT filed Docket #28 "RENEWED EMERGENCY PETITION" ("Petition 2")

d. www.iviewit.tv/20130529RenewedEmergencyPetitionSIMON.pdf

iii. June 26, 2013, ELIOT filed Docket #31 "MOTION TO: CONSIDER IN ORDINARY COURSE THE EMERGENCY PETITION TO FREEZE ESTATE ASSETS, APPOINT NEW PERSONAL REPRESENTATIVES, INVESTIGATE FORGED AND FRAUDULENT DOCUMENTS SUBMITTED TO THIS COURT AND OTHER INTERESTED PARTIES, RESCIND SIGNATURE OF ELIOT BERNSTEIN IN ESTATE OF SHIRLEY BERNSTEIN AND MORE FILED BY PETITIONER" ("Petition 3")

e. www.iviewit.tv/20130626MotionReconsiderOrdinaryCourseSIMON.pdf

iv. July 15, 2013, ELIOT filed Docket #32 "MOTION TO RESPOND TO THE PETITIONS BY THE RESPONDENTS" ("Petition 4")

f. www.iviewit.tv/20130714MotionRespondPetitionSIMON.pdf

v. July 24, 2013, ELIOT filed Docket #33 "MOTION TO REMOVE PERSONAL REPRESENTATIVES" **for insurance fraud and more**. ("Petition 5")

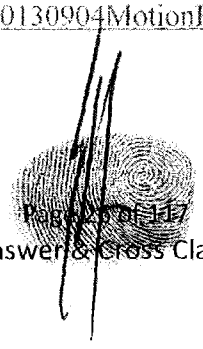
g. www.iviewit.tv/20130724SIMONMotionRemovePR.pdf

vi. August 28, 2013, ELIOT filed Docket #TBD "NOTICE OF MOTION FOR: INTERIM DISTRIBUTION FOR BENEFICIARIES NECESSARY LIVING EXPENSES, FAMILY ALLOWANCE, LEGAL COUNSEL EXPENSES TO BE PAID BY PERSONAL REPRESENTATIVES AND REIMBURSEMENT TO BENEFICIARIES SCHOOL TRUST FUNDS" ("Petition 6")

h. www.iviewit.tv/20130828MotionFamilyAllowanceSHIRLEY.pdf

vii. September 04, 2013, ELIOT filed Docket #TBD "NOTICE OF EMERGENCY MOTION TO FREEZE ESTATES OF SIMON BERNSTEIN DUE TO ADMITTED AND ACKNOWLEDGED NOTARY PUBLIC FORGERY, FRAUD AND MORE BY THE LAW FIRM OF TESCHER & SPALLINA, P.A., ROBERT SPALLINA AND DONALD TESCHER ACTING AS ALLEGED PERSONAL REPRESENTATIVES AND THEIR LEGAL ASSISTANT AND NOTARY PUBLIC, KIMBERLY MORAN: MOTION FOR INTERIM DISTRIBUTION DUE TO EXTORTION BY ALLEGED PERSONAL REPRESENTATIVES AND OTHERS; MOTION TO STRIKE THE MOTION OF SPALLINA TO REOPEN THE ESTATE OF SHIRLEY; CONTINUED MOTION FOR REMOVAL OF ALLEGED PERSONAL REPRESENTATIVES AND ALLEGED SUCCESSOR TRUSTEE. ("Petition 7")

i. www.iviewit.tv/20130904MotionFreezeEstatesSHIRLEYDueToAdmittedNotaryFraud.pdf



18. That in hearings held on SHIRLEY's estate on Friday, September 13, 2013 in the Probate Court, Honorable Judge Martin H. Colin ("Hon. Colin") told TED, SPALLINA, TESCHER and their counsel, Mark Manceri ("MANCERI"), that he should read them all their Miranda Rights after hearing their explanation how SIMON had notarized documents to close SHIRLEY's estate two months after he was deceased, Hon. Colin stated this fact twice in the hearings.

19. That further upsetting Hon. Colin in the hearing to the reopen the estate of SHIRLEY, which was ordered reopened, was that at no time after SIMON had passed had the court been notified by estate counsel of SIMON's death and that documents were being submitted to the Court after SIMON was deceased as if he was alive. The documents in SHIRLEY's ESTATE now admittedly fraudulently crafted by a TSPA contracted Legal Assistant/Notary Public and alleged forged after SIMON's death, were then filed with his Court and used to close the estate as if SIMON were alive at the time. Hon. Colin realized they had committed a fraud upon his court and him personally as he signed off to close the estate using these bogus documents.

20. From an excerpt from that hearing transcript, see attached, Exhibit 1 on September 13, 2013,

9 MR. SPALLINA: Yeah, it was after his date
10 of death.
11 THE COURT: Well, how could that happen
12 legally? How could Simon --
13 MR. MANCERI: Who signed that?
14 THE COURT: -- ask to close and not serve
15 a petition after he's dead?

MR. MANCERI: Your Honor, what happened was is the documents were submitted with the waivers originally, and this goes to Mr. Bernstein's fraud allegation. As you know, your Honor, you have a rule that you have to have your waivers notarized. And the original waivers that were submitted were not notarized, so they were kicked back by the clerk. They were then notarized by a staff person from Tescher and Spallina admittedly in error. They should not have been notarized in the absentia of the people who allegedly signed them. And I'll give you the names of the other siblings, that would be Pamela, Lisa, Jill, and Ted Bernstein.

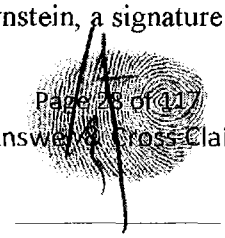
THE COURT: So let me tell you because I'm going to stop all of you folks because I think you need to be read your Miranda warnings.

MR. MANCERI: I need to be read my Miranda warnings?

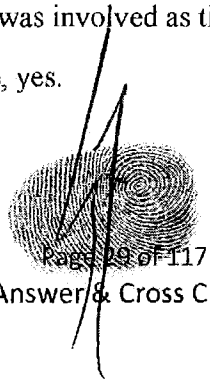
THE COURT: Everyone of you [referring to TED, SPALLINA, TESCHER an MANCERI] might have to be.

MR. MANCERI: Okay.

THE COURT: Because I'm looking at a formal document filed here April 9, 2012, signed by Simon Bernstein, a signature for him.



17 MR. MANCERI: April 9th, right.
18 THE COURT: April 9th, signed by him, and
19 notarized on that same date by Kimberly. It's
20 a waiver and it's not filed with The Court
21 until November 19th, so the filing of it, and
22 it says to The Court on November 19th, the
23 undersigned, Simon Bernstein, does this, this,
24 and this. Signed and notarized on April 9,
25 2012. The notary said that she witnessed Simon
1 sign it then, and then for some reason it's not
2 filed with The Court until after his date of
3 death with no notice that he was dead at the
4 time that this was filed.
5 MR. MANCERI: Okay.
6 THE COURT: All right, so stop, that's
7 enough to give you Miranda warnings. Not you
8 personally --
9 MR. MANCERI: Okay.
10 THE COURT: Are you involved? Just tell
11 me yes or no.
12 MR. SPALLINA: I'm sorry?
13 THE COURT: Are you involved in the
14 transaction?
15 MR. SPALLINA: I was involved as the
16 lawyer for the estate, yes.



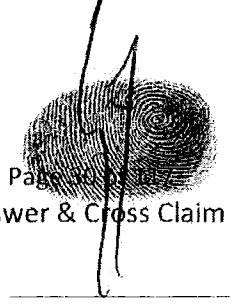
21. That the alleged insurance fraud taking place through the instant Breach of Contract Lawsuit in this Court is allegedly being committed by similar parties of the alleged estate frauds described herein and in Petitions 1-7, again misusing their fiduciary and professional powers to convert estate assets and TED, A. SIMON, the SLF should all be removed from further representing any parties in this Lawsuit, sanctioned and forced to retain non conflicted counsel in these proceedings.

22. ELIOT requests this Court take Judicial Notice of the alleged and admitted crimes herein and in Petitions 1-7 and on the Hon. Colin's warning and act on its own motions to prevent any further possible criminal activities and damages to others being incurred, until these alleged criminal and civil matters are fully resolved by this Court, the Probate Court, the Palm Beach County Sheriff and Florida Governor Notary Public Division.

FIRST ATTEMPT TO FRAUDULENTLY CONVERT THE DEATH BENEFIT

23. That the first attempt to convert the life insurance Policy #1009208 ("Policy(ies)) proceeds on SIMON's life by TSPA, TESCHER, SPALLINA, TED and P. SIMON took place on or about January 2013 when a death benefit claim was made according to Jackson National Insurance Company's ("Jackson") Counter Complaint for the Policy(ies) proceeds to be paid to a beneficial designations unknown by ELIOT.

24. That ELIOT and his children's former counsel after repeated requests have no records of the death benefit claim filed or any other records requested including the Policy(ies) and have been denied the information upon request by TSPA, TESCHER, SPALLINA, TED, P.



SIMON, Heritage Union Life Insurance Company ("Heritage") and Reassure America Life Insurance Company ("RALIC").

25. That Heritage refused to pay the Policy(ies) proceeds based on the death benefit claim filed, claiming it was legally deficient and they would therefore need a "court order" to determine if the beneficiary claimed was the legal beneficiary and thus the first attempt to claim the benefits failed.

SECOND ATTEMPT TO FRAUDULENTLY CONVERT THE DEATH BENEFIT – THE SAMR & SAMR TRUST

26. That the SAMR and SAMR TRUST is fully described, defined and exhibited in Petition 1, Section VII - "Insurance Distribution Scheme" Pages 30-37 and Pages 170-175, exhibit 7 - "Settlement Agreement and Mutual Release" ("SAMR"). The post mortem trust that would have been created under the SAMR to replace the lost "Bernstein Trust" aka "Simon Bernstein Irrevocable Insurance Trust Dtd 6/21/95" is termed herein as the SAMR TRUST ("SAMR TRUST").

27. That once the death benefit claim was denied and a "court order" was necessary to pay the Policy(ies) proceeds, the SAMR and SAMR TRUST insurance trust and beneficiary fraud scheme, as further defined herein, was then proposed to ELIOT by TSPA, TESCHER, SPALLINA, TED, P. SIMON and D. SIMON.

28. That the SAMR & SAMR TRUST was proposed as a post mortem trust replacement created to remedy for an allegedly lost trust created by SIMON that is claimed to be the alleged

beneficiary of the Policy(ies), the "Simon Bernstein Irrevocable Insurance Trust Dtd 6/21/95."

29. That the SAMR TRUST was proposed by TSPA, SPALLINA, TESCHER, TED and P. SIMON as a means to convert the insurance proceeds from going to the estate of SIMON due to an alleged lost trust and where the proceeds under the SAMR TRUST they claimed would not go to the estate and would instead flow into the newly created post mortem SAMR TRUST, where a newly elected post mortem "trustee" TED, would then divvy it up to newly elected by TED beneficiaries of the SAMR TRUST.

30. That in this Court proceeding, in a response filed by A. SIMON, we learn who is divvying up the proceeds when he claims ("4/5") of SIMON's children, TED, P. SIMON, IANTONI and FRIEDSTEIN agree with the beneficiary designation that was filed in this Lawsuit.

31. That TSPA, TESCHER, SPALLINA, TED and P. SIMON further claimed that the SAMR TRUST was necessary to keep the proceeds estate tax free and free from creditors of the estate, despite that this would be a new post mortem trust designating new trustees and beneficiaries who were not elected by SIMON while he was alive.

32. That this post mortem SAMR TRUST was to be created without SIMON's knowledge, consent or keeping with his wishes he documented while alive, as it was done post mortem and thus ELIOT claims that it could not then be used to escape estate taxes or creditors legally and would be construed as an artifice to defraud.

33. That ELIOT sent letters to TSPA, SPALLINA, TESCHER, TED and P. SIMON and claimed that the SAMR TRUST appeared to be a sham trust and beneficiary scheme that was

potentially illegally attempting to circumvent SIMON's estate creditor liabilities and federal and state estate taxes.

34. That ELIOT refused to participate in the SAMR or SAMR TRUST and sent TSPA, SPALLINA, TESCHER, TED and P. SIMON a letter telling them to cease and desist any attempt at collection of the death benefit until ELIOT and his children could seek independent counsel to review the legality of the SAMR and SAMR TRUST.

35. That after ELIOT had the plan reviewed by legal counsel and was advised to not sign the SAMR or SAMR TRUST, as evidenced in Petition 1, and ELIOT sent letters to TSPA, SPALLINA, TESCHER, TED, P. SIMON and other potential beneficiaries notifying them of his findings that the SAMR and SAMR TRUST appeared a sham that could be construed as insurance fraud, tax evasion, creditor fraud and more.

36. That further ELIOT noticed them that no one appeared to be representing the grandchildren's alleged beneficial interests in the estate in the SAMR and SAMR TRUST, which was in conflict now with TED, P. SIMON, IANTONI and FRIEDSTEIN's interests beneficial interest to be gained in the Policy(ies) through the SAMR TRUST, as newly named trustees and beneficiaries in the SAMR TRUST.

37. That if the monies flowed to the estate and were paid to the estate beneficiaries, TED, P. SIMON, IANTONI and FRIEDSTEIN would not receive monies directly and only manage the money of their children as trustees for them and therefore since they would not be beneficiaries they were not in conflict but the SAMR TRUST or any scheme that inures Policy(ies) proceeds to them directly does put them in direct conflict and no one seemed to

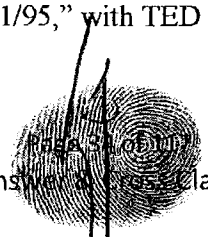
be looking out for their own children, in fact, blindly looking the other way while attempting to convert the monies to themselves. This is an abomination of fiduciary duties and trust as trustees for their alleged children beneficiaries.

38. That IANTONI asked SPALLINA if she needed to get counsel for herself and her children due to conflicts created in the SAMR and SAMR TRUST, as ELIOT had stated her beneficial interests conflicted with her daughters beneficial interests, especially where the payout is substantially different depending on if her daughter received the benefit through the estate (1/10 share) or if she received it directly under the SAMR TRUST (1/5 share). The conflict here is significant and where IANTONI would favor the SAMR TRUST scheme versus a "court order," which would favor her daughter.

39. That IANTONI further asked SPALLINA if her daughter could later sue her for taking the proceeds directly under the SAMR TRUST and SPALLINA stated that "only if she finds out" or words to that effect.

40. That SIMON's daughter, P. SIMON, her husband D. SIMON and his brother A. SIMON through the SLF, believed to be A. SIMON and D. SIMON's law firm that works out of P. SIMON's offices at STP, worked with TSPA, SPALLINA, TESCHER, TED and P. SIMON in attempts to get the life insurance benefits of the Policy(ies) paid to the newly created post mortem SAMR TRUST created after SIMON's death and go against the beneficial wishes and desires and estate contracts of SIMON and SHIRLEY, as designated in their estate plans.

41. That initially, the SAMR TRUST was proposed to replace an allegedly lost "Simon Bernstein Irrevocable Insurance Trust Dtd 6/21/95," with TED acting as the Trustee of the newly

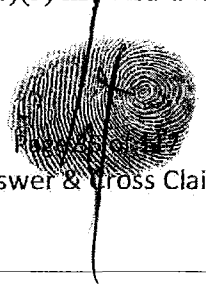


created post mortem SAMR TRUST, as evidenced in the SAMR, by claiming he was the "trustee" of the lost trust that allegedly no executed copies exist for and therefore he was the "trustee" of the newly created SAMR TRUST with all the unknown fiduciary powers granted in the alleged lost trust, of which again, no executed copies or originals exist as claimed in TED's response to Jackson's Counter Claim.

42. That TED, TSPA, TESCHER, SPALLINA and P. SIMON all claimed that "Simon Bernstein Irrevocable Insurance Trust Dtd 6/21/95" was "lost" and that through TED, as the self-elected "trustee" of the new post mortem SAMR TRUST, they would then designate new beneficiaries that would replace the unknown ones in the lost trust. New beneficiaries designated by TED based on his belief that TED, P. SIMON, IANTONI and FRIEDSTEIN and possibly, without ELIOT's knowledge or consent, ELIOT, were beneficiaries under the lost trust.

43. That TSPA, SPALLINA, TESCHER, TED and P. SIMON have various alleged fiduciary capacities as estate counsel, personal representatives and trustees responsible for keeping and maintaining records of the Policy(ies) and the "Simon Bernstein Irrevocable Insurance Trust Dtd 6/21/95" that SPALLINA, TESCHER, TED, P. SIMON, D. SIMON and A. SIMON claimed was the last known beneficiary on the Policy(ies).

44. That P. SIMON over the years since the Policy(ies) was issued acted as a fiduciary of several of the trusts that controlled the Policy(ies) and the distribution of proceeds for beneficiaries who are elected as contingent beneficiaries by employees in a Voluntary Employee Beneficiary Association VEBA 501(c)(9) life insurance trust she controls, that held



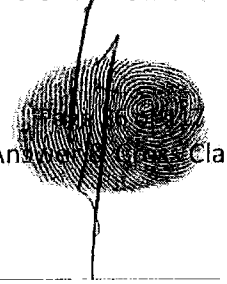
SIMON's Policy(ies) and many other thousands of policies, through several companies owned and operated by SIMON and then P. SIMON and D. SIMON.

45. That TSPA, SPALLINA and TESCHER have various alleged fiduciary capacities regarding the Policy(ies) and the "Simon Bernstein Irrevocable Insurance Trust Dtd 6/21/95" as they did the estate planning work concerning the Policy(ies) and trusts and failed to properly protect the beneficiaries of the "Simon Bernstein Irrevocable Insurance Trust Dtd 6/21/95" and the estate beneficiaries by properly documenting the beneficiaries in the alleged Wills and Trusts of SIMON.

46. That by failing to properly document the beneficiaries of the lost trust, failing to maintain records of the Policy(ies) and trusts and failing to clearly define the beneficiaries, TSPA, SPALLINA and TESCHER have caused liabilities by damaging all of the beneficiaries of the estate and Policy(ies).

47. That TED has various alleged fiduciary capacities as the self-appointed alleged "trustee" of the "Simon Bernstein Irrevocable Insurance Trust Dtd 6/21/95," including the alleged power to file suit on its behalf and yet TED has no documented evidence to support this claim according to Jackson. TED is misusing alleged fiduciary powers to convert Policy(ies) proceeds to himself, P. SIMON, IANTONI & FRIEDSTEIN, secreted from ELIOT and his counsel and to the disadvantage of ELIOT and his children.

48. That TED and P. SIMON both claim to have once upon a time been in possession of the "Simon Bernstein Irrevocable Insurance Trust Dtd 6/21/95" and have claimed to have witnessed the language contained therein. From their recollections they claim recalling that

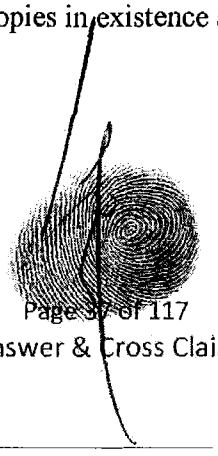


TED was "trustee" of the lost trust and they were named "beneficiaries." These legally insufficient claims are also made by two people who stand to gain individually from their recollections putting them in conflict with other potential beneficiaries, including their own children.

49. That these alleged fiduciary roles of TED for the lost trust now are being asserted in attempts to process a death benefit claim without any signed or executed copy of the lost trust. From Jackson's Counter Claim there appears to be insufficient evidence to pay a claim to this insurance trust and beneficiary fraud scheme.

50. That after claiming to have lost the Policy(ies) and trust and assigning TED alleged fiduciary responsibilities, TED and P. SIMON then attempt to redirect and convert benefits by naming themselves as newly elected post mortem designated beneficiaries of the Policy(ies). That ELIOT alleges that this misleading information in the death benefit claim may constitute a basis for insurance fraud and more.

51. That Bernstein family insurance agencies founded by SIMON allegedly sold the Policy(ies) and administered the trusts concerning the Policy(ies). Suddenly, when SIMON, a meticulous record keeper, passes away, all those with control of the Policy(ies) and who have fiduciary responsibilities and liabilities regarding the Policy(ies) and trusts involved in this Lawsuit, now claim that the "Simon Bernstein Irrevocable Insurance Trust Dtd 6/21/95" is missing and lost with no executed copies in existence and that it was the last known beneficiary.



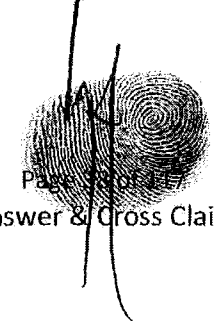
52. That all parties with fiduciary responsibilities for the Policy(ies) and the trusts named in this Lawsuit are alleged to have fiduciary liabilities and in certain instances with the Attorneys at Law, professional liabilities, from the damages to the true and proper beneficiaries for their actions or inactions and for the damages caused by their breaches of fiduciary and professional responsibilities and alleged violations of law.

53. That ELIOT claims that TSPA, SPALLINA, TESCHER, TED and P. SIMON have allegedly instead **suppressed and denied** the "Simon Bernstein Irrevocable Insurance Trust Dtd 6/21/95" and have not "lost" it or found it to be "missing" as they claim and this was done with intent to commit fraud upon the true and proper beneficiaries of the Policy(ies), this Court and the estate beneficiaries.

54. That ELIOT states that TED and P. SIMON were excluded as beneficiaries of the Policy(ies) and trusts, as TED and P. SIMON were wholly excluded and disinherited from the estates of both SIMON and SHIRLEY and therefore allegedly excluded in all insurance contracts and policies thereunder.

55. That if the estate received the Policy(ies) proceeds and then determined the beneficiaries, there is very little likelihood that TED and P. SIMON would be entitled to any Policy(ies) proceeds in their name if they flowed into the estate to the estate beneficiaries, as they have been wholly excluded from the estates of both SIMON and SHIRLEY.

56. That it should be noted by this Court that TED and P. SIMON are alleged in Petition 1 to be the cause of attempting to force SIMON to allegedly change the beneficiaries in his estate



plan, in near deathbed changes allegedly made weeks before his death and while under extreme physical and emotional duress at the time.

57. That it is now unclear due to the Notary Public ADMITTED Fraud and alleged Forgery in the estate of SHIRLEY and the alleged Fraudulent and Legally Defective estate documents in SIMON, if SIMON actually signed any changes to his estate plan prior to his death or if the documents were signed and notarized for him after he died, in efforts to change SIMON's estate disposition and wants.

58. That prior to the alleged near deathbed changes made by SIMON, under duress, TED, P. SIMON and their children were wholly disinherited from the estates of both SIMON and SHIRLEY.

59. From the alleged May 20, 2008 "Shirley Bernstein Trust Agreement[2]" the language regarding beneficiaries is as follows,

> 1. Children, Lineal Descendants. The terms "child," "children" and "lineal descendant" mean only persons whose relationship to the ancestor designated is created entirely by or through (a) legitimate births occurring during the marriage of the joint biological parents to each other, (b) children and their lineal descendants arising from surrogate births and/or third party donors when (i) the child is raised from or near the time of birth by a married couple (other than a same sex married couple) through the pendency of such marriage, (ii) one of such couple is the designated ancestor, and (iii) to the best knowledge of the Trustee both members of such couple participated in the decision to have such child, and (c) lawful adoptions of minors under the age of twelve years. No such child or lineal descendant loses his or her status as such through adoption by another person. Notwithstanding the foregoing, as I have adequately provided for them during my lifetime, for purposes of the dispositions made under this Trust, my

[2] That Shirley's May 20, 2008 trust language was used here, as the May 20, 2008 "Simon Bernstein Trust Agreement" has been suppressed and denied to ELIOT by TSPA, TESCHER and SPALLINA for over a year now. They have refused to release the SIMON original trust despite repeated oral and written requests from ELIOT and his children's former counsel, Christine Yates at Tripp Scott law firm in Fort Lauderdale, FL. The language is presumed to be the same although cannot be verified at this time.

children, **TED S. BERNSTEIN ("TED") and P. SIMONELA B. SIMON ("P. SIMON"), and their respective lineal descendants shall be deemed to have predeceased the survivor of my spouse and me, provided[emphasis added]**, however, if my children, ELIOT BERNSTEIN, JILL IANTONI and LISA S. FRIEDSTEIN, and their lineal descendants all predecease the survivor of my spouse and me, then TED and P. SIMON, and their respective lineal descendants shall not be deemed to have predeceased me and shall be eligible beneficiaries for purposes of the dispositions made hereunder."

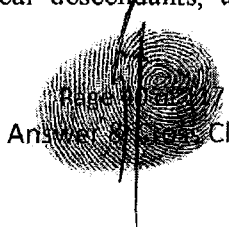
60. From the alleged November 18, 2008 "First Amendment to Shirley Bernstein Trust Agreement" the language is as follows,

"Notwithstanding the foregoing, as my spouse and I have adequately provided for them during our lifetimes, for purposes of the dispositions made under this Trust, my children, **TED S. BERNSTEIN ("TED") and P. SIMONELA B. SIMON ("P. SIMON"), shall be deemed to have predeceased the survivor of my spouse and me [emphasis added],** provided, however, if my children, ELIOT BERNSTEIN, JILL IANTONI and LISA S. FRIEDSTEIN, and their respective lineal descendants all predecease the survivor of my spouse and me, then TED and P. SIMON shall not be deemed to have predeceased the survivor of my spouse and me and shall become eligible beneficiaries for purposes of the dispositions made hereunder."

61. That even after the near deathbed changes allegedly made by SIMON under duress or perhaps made post mortem, as now TSPA's Notary Public Kimberly Moran has admitted to notarizing documents in his name, months after his death, TED and P. SIMON where again wholly disinherited from the estates of SIMON and SHIRLEY and only their adult children are alleged beneficiaries.

62. That from the alleged July 25, 2012 "Simon L. Bernstein Amended and Restated Trust Agreement" the language is as follows,

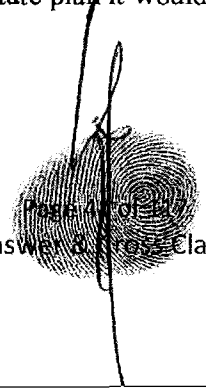
"Children Lineal Descendants. The terms "child," "children," "grandchild," "grandchildren" and "lineal descendant" mean only persons whose relationship to the ancestor designated is created entirely by or through (a) legitimate births occurring during the marriage of the joint biological parents to each other, (b) children born of female lineal descendants, and (c) children and their lineal



descendants arising from surrogate births and/or third party donors when (i) the child is raised from or near the time of birth by a married couple (other than a same sex married couple) through the pendency of such marriage, (ii) one of such couple is the designated ancestor, and (iii) to the best knowledge of the Trustee both members of such couple participated in the decision to have such child. No such child or lineal descendant loses his or her status as such through adoption by another person. **Notwithstanding the foregoing, for all purposes of this Trust and the dispositions made hereunder, my children, TED S. BERNSTEIN, P. SIMONELA B. SIMON, ELIOT BERNSTEIN, JILL IANTONI and LISA S. FRIEDSTEIN, shall be deemed to have predeceased me as I have adequately provided for them during my lifetime [emphasis added].**

63. That the alleged Personal Representatives to the estates, TSPA, TESCHER and SPALLINA, have since SIMON's passing worked and shared information almost exclusively with TED and P. SIMON, the two children who were both wholly excluded from benefits of the estates of SIMON and SHIRLEY in any Will or Trust established. Both TED and P. SIMON are alleged to have been on bad terms with SIMON and SHIRLEY at the time of their deaths due to their exclusion from further benefits in the estates, as they already had been compensated while living as they inherited family businesses worth fortunes and ELIOT, IANTONI and FRIEDSTEIN did not.

64. That after SHIRLEY passed until the day of SIMON's death almost twenty two month, TED and P. SIMON led an assault on SIMON and recruited IANTONI and FRIEDSTEIN and together the four of them banned and precluded their seven children from seeing SIMON, their grandfather, claiming it was over his relationship with his companion, as fully defined in Petition 1. That this is why SIMON considered altering he and SHIRLEY's long established estate plans in May 10, 2012 and sought agreement from his children that if he chose to make any changes to his estate plan it would put an end to these disputes and torture of his soul.

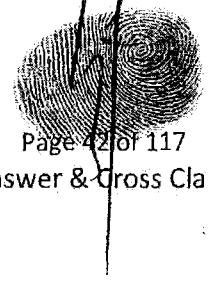


65. That in a May 10, 2012 conference call with TSPA, TESCHER, SPALLINA, TED, P. SIMON, ELIOT, IANTONI and FRIEDSTEIN, SIMON sought and received verbal agreement from his children to have ELIOT, IANTONI and FRIEDSTEIN give up their inheritances and divide it to the grandchildren equally to resolve any duress and disputes that were causing him pain and suffering.

66. That the disputes and banning of themselves and all their children of SIMON however did not stop after the May 10, 2012 meeting as agreed and SIMON appears to have had a change of mind and never made the changes to his or SHIRLEY's estate plans and the changes appear to have been done post mortem, as essential documents to the alleged changes are all Legally Defective and therefore NULL and VOID.

67. That despite repeated requests, TSPA, TESCHER, SPALLINA, TED and P. SIMON have shut out ELIOT and his children's counsel from virtually ALL estate information, documents and assets, including but not limited to, accountings, inventories, Policy(ies) information, insurance contracts, corporate accountings, asset liquidation details, accountings and legal documents, various trusts information and all assets of the SIMON and SHIRLEY estates.

68. That for over a year, with the aid of TSPA, TESCHER, SPALLINA, TED, P. SIMON and others have rushed to liquidate assets and looted the estate in a variety of schemes behind the backs of ELIOT and his children's former counsel and if it were not for Jackson's adding ELIOT as Defendant in the Lawsuit, ELIOT would never have known about this alleged fraudulent Lawsuit and the insurance policy and trust scheme being attempted to convert the Policy(ies) proceeds.



69. That this suppression and denial of virtually all information and documents in the estates from certain beneficiaries to the advantage of others, including this Lawsuit, which was filed without certain beneficiaries knowledge and consent , has gone on for almost three years in SHIRLEY's estate and over a year in SIMON's estate.

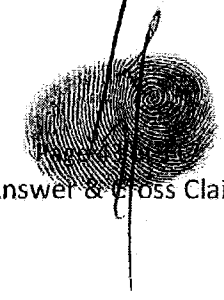
70. That it is alleged that these acts of suppression and denial of information and more are intended to hide criminal activities taking place to loot the estates through a variety of alleged financial and other crimes, as fully set forth in Petitions 1-7.

71. That the SAMR and SAMR TRUST that was proposed to ELIOT by TSPA, SPALLINA, TESCHER, TED and P. SIMON was never signed by ELIOT. ELIOT noticed all parties involved that he rejected such SAMR and SAMR TRUST as a scheme to reassign beneficiaries with post mortem designated beneficiaries through suppression and denial of trust documents that allegedly would constitute, Insurance Fraud, Conversion and more.

72. That ELIOT noticed all parties that he rejected such plan as an to attempt to improperly avoid Estate Taxes through a sham trust that was created post mortem and therefore how could SIMON have made it irrevocable or anything at all.

73. That ELIOT noticed all parties that he rejected such plan as an attempt to improperly attempt to hide assets from creditors of the estate using a post mortem trust to convert assets with known creditors to the estate.

74. That without ELIOT or his children's counsel approval of the SAMR and SAMR TRUST scheme and while ELIOT was led by TSPA, TESCHER, SPALLINA, TED, P. SIMON,



IANTONI and FRIEDSTEIN to believe that they were seeking a "court order" to approve their SAMR scheme and new and secreted plan was hatched.

THIRD ATTEMPT TO FRAUDULENTLY CONVERT THE DEATH BENEFIT – THE JACKSON LAWSUIT FOR BREACH OF CONTRACT

75. That without ELIOT and his children's counsel knowledge or consent the third failed attempt to convert the Policy(ies) proceeds was hatched by TSPA, TESCHER, SPALLINA, TED, P. SIMON, D. SIMON, A. SIMON, IANTONI and FRIEDSTEIN working together and secreted from ELIOT and his children's counsel with scienter.

76. That this third attempt to convert the Policy(ies) proceeds began with the filing of this frivolous "breach of contract" Lawsuit to attempt to convert the benefits against the wishes of SIMON's beneficiary designation, in order to profit for themselves at the detriment of the true and proper beneficiaries, including allegedly their own children.

77. That once the SAMR and SAMR TRUST failed to get ELIOT or his children's counsel approval, without notice and knowledge of ELIOT and other beneficiaries, TED, instead of seeking the demanded "court order" to determine the beneficiaries as requested by RALIC, claimed to be the "trustee" and a "beneficiary" of the "lost" trust, the "Simon Bernstein Irrevocable Insurance Trust Dtd 6/21/95" and instead filed this Lawsuit with TED acting in a self-professed and self-appointed fiduciary capacity for the "lost" trust and Policy(ies) and designating himself and others as newly elected beneficiaries.

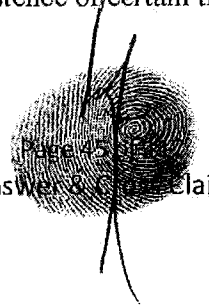
78. That since claiming "Simon Bernstein Irrevocable Insurance Trust Dtd 6/21/95" is "lost" and "missing" and then unable to get the SAMR TRUST approved by all parties and the Probate

Court to be the beneficiary, TED represented by A. SIMON instead filed this Lawsuit demanding that Jackson now pay the death benefits based on a breach of contract suit for Jackson's refusal to pay the death benefit claim based on the legally deficient death benefit claim initially submitted, as indicated in Jackson's Counter Claim for damages.

79. That through this Lawsuit, TSPA, TESCHER, SPALLINA, TED and P. SIMON are now attempting to avoid having to obtain a court order as requested by RALIC, to first determine who the beneficiary(ies) is and instead are attempting to convert the Policy(ies) proceeds through this baseless breach of contract action that TED was advised by counsel he had no "authority" to file according to Jackson.

80. That ELIOT alleges that this Lawsuit is an attempt to have this Court pay the Policy(ies) proceeds to a newly created post mortem trust similar to the SAMR TRUST or other improper beneficiaries, through a smoke and mirrors illusion, mired in a "Name Game" further defined herein, using alleged former Policy(ies) beneficiaries names, including but not limited to the "lost" "Simon Bernstein Irrevocable Insurance Trust Dtd 6/21/95" in order to replace the allegedly unknown beneficiaries of the "lost" trust with newly elected beneficiaries, possibly in a new post mortem trust attempting to be inserted into this Lawsuit in the confusion created with the variety of names being asserted as beneficiary.

81. That Jackson claims in their Answer that they are unclear if TED has the alleged fiduciary capacities in the trusts and Policy(ies) he claims necessary to institute the Lawsuit or the death benefit claim and they are unclear of the names asserted in the complaint as they are confusing and even question the existence of certain trusts entirely.



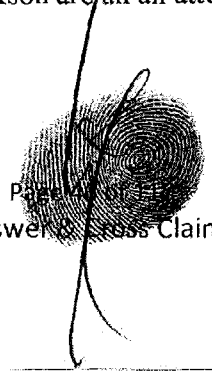
82. That TED and P. SIMON are attempting to designate new beneficiaries after SIMON has passed, claiming that they "believe" they were beneficiaries of the "lost" trust and therefore they would be beneficiaries of two fifths of the Policy(ies) proceeds but providing no evidence or proof of such claims other than their beliefs.

83. That TED, P. SIMON, D. SIMON and A. SIMON are all career life insurance professionals with extensive trust knowledge and legal knowledge.

84. That TED is allegedly misusing his "alleged" fiduciary powers in the estates of SHIRLEY and SIMON, fully described in the Petitions 1-7 and in this Lawsuit where his fiduciary claims are imagined and undocumented.

85. That TED now makes efforts in this Lawsuit to assume fiduciary powers in handling assets of SIMON's estate, based on his belief that he was "trustee" of the lost trust and on his own belief a "beneficiary" and where TED has no fiduciary capacities whatsoever in the estate of SIMON or through any trusts of SIMON that are **not** "lost." That supporting TED's beliefs and the actions taken based on those beliefs in effort to convert the Policy(ies) proceeds are P. SIMON, IANTONI and FRIEDSTEIN, all who stand to gain from such insurance beneficiary and trust scheme.

86. That TED's filing of this Lawsuit as an imagined fiduciary of a "lost" trust is an attempt to convert benefits of the Policy(ies) for the benefit of TED and P. SIMON, by deceiving the beneficiaries of the Policy(ies), the beneficiaries of the estate of SIMON, deceiving insurance companies Heritage, RALIC and Jackson are all an attempt to perpetrate a fraud on, this



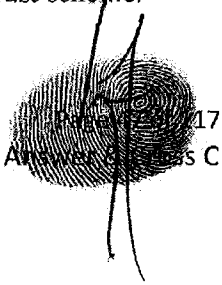
Court, the Probate Court, the true and proper beneficiaries of the estate of SIMON, the beneficiaries of the Policy(ies) and the beneficiaries of the trusts of SIMON.

87. That TSPA, SPALLINA, TESCHER, SLF, P. SIMON, D. SIMON, A. SIMON and TED have filed this Lawsuit without proper notice to all of the potential beneficiaries and on information and belief have worked together, with IANTONI and FRIEDSTEIN, to secret this Lawsuit from ELIOT and his children's former counsel.

88. That IANTONI and FRIEDSTEIN are also alleged in TED's Answer to Jackson's Counter Complaint to be part of "4/5" of SIMON's children (TED, P. SIMON, IANTONI & FRIEDSTEIN) who are in agreement with the payout to the proposed beneficiary of this Lawsuit and have conspired together to convert the Policy(ies) proceeds.

89. That the "4/5" of SIMON's children in agreement of the beneficiaries of the Policy(ies) includes themselves personally and is to the detriment of their own children who are alleged beneficiaries of the estate, where they are trustees to their children who would allegedly be entitled to the Policy(ies) proceeds if the estate where determined to be the beneficiary.

90. That TED has numerous conflicts of interest in acting in legal and fiduciary capacities in this Lawsuit with various parties. TED would be getting benefits directly to himself while acting as the "alleged" Trustee of the missing "Simon Bernstein Irrevocable Insurance Trust Dtd 6/21/95" and electing himself as a beneficiary to convert the funds, while also simultaneously acting as a trustee for his children beneficiaries of the estate of Simon and Shirley, where the children would get the Policy(ies) proceeds if they flowed through to the estate versus the insurance fraud beneficiary and trust scheme.



91. That P. SIMON and D. SIMON would get benefits paid directly to their family from the efforts of D. SIMON's SLF law firm, as SLF represents TED in this Lawsuit and if they are successful in converting the benefits to the proposed insurance fraud beneficiary and trust scheme, SLF, P. SIMON and D. SIMON would benefit directly by splitting part of the loot, which poses conflicts in SLF and A. SIMON's representation of TED and the lost trust.

92. That additionally, P. SIMON and D. SIMON would be doing this conversion of benefits directly to themselves while acting as trustee for their child beneficiary of the estate of Simon and Shirley, where their child would get the Policy(ies) proceeds if they flowed through to the estate versus the insurance fraud beneficiary and trust scheme.

93. That neither TED nor P. SIMON would gain any benefits of the Policy(ies) without their attempted beneficiary and trust scheme because if the Policy(ies) benefits were paid instead to the estate, due to the missing and "lost" trust, the benefits would then distributed to either three of five of SIMON and SHIRLEY's children, ELIOT, IANTONI and FRIEDSTEIN or to SIMON or SHIRLEY's ten grandchildren in equal shares, again either way TED and P. SIMON are wholly excluded.

94. That ELIOT states on information and belief that a policy with a missing beneficiary(ies) would legally be paid to the estate and the Probate court would then rule on whom the final beneficiaries of the insurance proceeds would be.

95. That Jackson and Heritage and RILAC have found flaws in the death benefit claim filed for the Policy(ies) and have refused to pay claims based on fundamental deficiencies.

96. That this alleged shell "Name Game[3]" being played in this Lawsuit uses the names of trusts and beneficiaries and then attempts to confuse the names by renaming them in a confusing manner, in order to have the "lost" trust renamed under a variety of confusing names, as evidenced in Jackson's Answer and then have the Court pay out an improper beneficiary(ies).

97. That the alleged intentional confusion and misdirection involving these names is what has caused the denial of payment of the proceeds in part by the carrier and ELIOT claims this insurance trust and beneficiary fraud naming scheme is being perpetrated in this Court with scienter, in efforts to mislead this Court and Jackson so that they may pay the wrong beneficiary(ies) the Policy(ies) proceeds and convert the Policy(ies) proceeds.

98. That this "Name Game" being attempted in this Lawsuit to confuse the parties through this trust and beneficiary insurance fraud naming scheme is also in efforts to have the Policy(ies) proceeds circumvent the Probate Court and the estate beneficiaries and get the Policy(ies) benefits instead paid through this Court to improper beneficiaries in substitution for the lost trust alleged beneficiaries and to evade seeking a "court order."

99. That only if the Cross Defendants and Third Party Cross Defendants can confuse this Court to now payout the death benefit according to their insurance trust and beneficiary fraud scheme can they derive benefits from the Policy(ies), as their attempt to pull the wool over the insurance companies' eyes and have the benefits paid to their alleged fraudulent death benefit claim and the designated new beneficiaries thereunder has failed and led to this baseless Lawsuit.

[3] http://www.youtube.com/watch?v=GOgNkrQBrdU "Name Game" performed by Jessica Lange for the television show "American Horror Story"

100. That in Petition 1, Pages 34-41 under Section "VII. INSURANCE PROCEED DISTRIBUTION SCHEME", the proposed "Settlement Agreement and Mutual Release" agreement that would create the new SAMR TRUST to replace the lost trust is contained in Petition 1 on Pages 173-179 and titled "Settlement Agreement and Mutual Release", as exhibit 7 and ELIOT claims that the SAMR TRUST is being secreted into this Lawsuit in a confusing name with a prior beneficiary as a "lost" trust cannot be the beneficiary and therefore they must substitute a new trust identical or similar to the proposed SAMR TRUST or wholly new beneficiary designations that ELIOT is unaware of having not seen the death benefit claim submitted.

101. That the SAMR was drafted on or about December 06, 2012 by an unknown Attorney at Law and law firm, as no law firm markings are on any of the pages, however, on information and belief, the unknown law firm is believed to be TSPA and Attorneys at Law TESCHER and SPALLINA.

102. That the SAMR was distributed by TSPA, SPALLINA and TED to various parties through mail and wire.

103. That the names for the trusts in the "Name Game" being played in this Lawsuit as part of the alleged insurance and trust fraud scheme and their aliases are believed to be as follows:

a. "Simon Bernstein Irrevocable Insurance Trust Dated 6/21/95" alleged "lost" with no original executed document or copies of or as ELIOT claims, suppressed and denied. TED claims to be "Trustee" and a "Beneficiary" however, he cannot apparently prove these claims as the "Simon Bernstein Irrevocable Insurance Trust Dated 6/21/95" is

"lost" or suppressed and denied and therefore these claims to interests in the "lost" trust are merely conjecture. "Simon Bernstein Irrevocable Insurance Trust Dated 6/21/95" is used interchangeably with the following trust names in this Lawsuit thus far,

1. "Bernstein Trust" abbreviated by TED in the initial complaint and

2. "Simon Bernstein Trust" according to Jackson's response this trust MAY also be called "Simon Bernstein Irrevocable Insurance Trust Dated 6/21/95"see item 9 of their response.

3. "Simon Bernstein Insurance Trust dated 6/21/1995, Trust" (note the addition of the word Trust inside the quotations) is from Jackson Answer in 20 and is stated to be a former named beneficiary on the Policy(ies) and may refer to "Simon Bernstein Irrevocable Insurance Trust Dated 6/21/95." That it is believed that this may be a variance in the name "Simon Bernstein Irrevocable Insurance Trust Dated 6/21/95", however due to the variance in names it has been listed as a separate trust herein.

4. "The Bernstein Trust" with a capitalized T in the "The" within the quotations. This trust is never defined in the pleadings but is used in TED's response to Jackson's Counter Claim frequently and apparently interchangeably with the "Bernstein Trust." This trust is almost identical in name to the "Bernstein Trust" and yet, perhaps they too are different as will be advanced further herein. However, due to the slight variance in titles it has been listed as a separate trust herein until properly defined.

5. "Simon Bernstein Trust" according to Jackson in 9 of their response, "is, upon information and belief, the Bernstein Trust listed in paragraph 3, [listed as the

"Simon Bernstein Irrevocable Insurance Trust Dated 6/21/95 " in paragraph 3] above, and was a named contingent beneficiary of the Policy. However, based on the variance in title, to the extent it is a separate trust from the Bernstein Trust referenced above, it is named separately." That ELIOT is uncertain at this time where Jackson pulled this reference to a "Simon Bernstein Trust" from, as it is undefined in any pleadings and suddenly falls from the sky in their response. What is this "Simon Bernstein Trust" and the Court should demand copies of any records relating to this trust be provided to all parties of the Lawsuit and have it properly defined in the pleadings.

b. "Simon Bernstein Trust, N.A." according to Jackson IS **the "Contingent Beneficiary" named at the time of SIMON's death!**[5] However, in TED's response to Jackson's Counter Complaint, TED claims that the "lost" the "Simon Bernstein Irrevocable Insurance Trust Dated 6/21/95" was the "**sole**" Beneficiary at the time of SIMON's death and according to Jackson's records this is wholly untrue. This difference in beneficiaries at time of death is a major and significant discrepancy in who the actual beneficiaries are alleged to be by the parties to this Lawsuit.

That if Jackson is correct on the Policy(ies) primary and contingent beneficiaries at SIMON's death, then the claim in TED's response to Jackson, in the original complaint filed and further stated in written and oral statements by TSPA, TESCHER, SPALLINA, TED, P. SIMON, D. SIMON and A. SIMON, that the "sole" beneficiary was "Simon

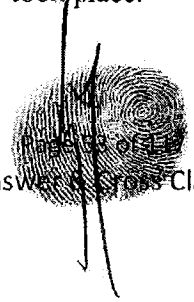
[5] "LaSalle National Trust, N.A." was according to Jackson the "primary beneficiary," which they appear unclear if it was acting as trustee to the "SIMON Bernstein Trust, N.A."

Bernstein Irrevocable Insurance Trust Dated 6/21/95" becomes a false and misleading statement as to the true and proper beneficiaries at the time of SIMON's death.

That if the final primary beneficiary was "LaSalle National Trust, N.A." and the final contingent beneficiary listed on the Policy(ies) is the "Simon Bernstein Trust, N.A." the questions then are where are copies of the "Simon Bernstein Trust, N.A.," who drafted and executed this trust and who are the trustees and beneficiaries of this trust and why has this information been suppressed and false and misleading information proposed instead?

That it therefore appears that the final Policy(ies) beneficiary(ies) must first be determined to be either "Simon Bernstein Trust, N.A." or "Simon Bernstein Irrevocable Insurance Trust Dated 6/21/95, Trust" or "Simon Bernstein Insurance Trust dated 6/21/1995" or other unknown. If the contingent beneficiary at the time of death is determined to be according to Jackson's account "Simon Bernstein Trust, N.A.," then "Simon Bernstein Irrevocable Insurance Trust Dated 6/21/95" and any variation of its title or any earlier beneficial interests become moot and this Lawsuit further becomes baseless and an Abuse of Process, other than as evidence of, an attempted insurance fraud on the "Simon Bernstein Trust N.A." beneficiaries, Insurance Fraud on the insurance carriers, Fraud on this Court, Fraud on the Probate Court, Fraud on the estate beneficiaries of SIMON's estate and more.

c. "SAMR TRUST" – is the Settlement & Mutual Release Trust as exhibited in Petition 1 in a draft of the post mortem trust proposed to replace the "lost" trust and to present to a judge for a court order that never took place.



That ELIOT alleges that the SAMR TRUST or some variation of it, is being referred to in these pleading as "The Bernstein Trust" or the "Simon Bernstein Trust" or any of the UNDEFINED trusts referenced herein and in Jackson's Answer, so as to cause confusion and hope no one notices that these undefined trusts actually reference the proposed SAMR TRUST or some similar trust and beneficiary scheme, with alleged new beneficiaries and trustees designated after SIMON's passing by a "alleged trustee" of a "lost" trust.

That ELIOT refused to sign the SAMR as further defined herein and the undefined trusts attempting to claim benefits through this Lawsuit may be trusts done without his knowledge or consent and used in this Lawsuit to attempt to circumvent the true and proper beneficiaries on record with the insurance carriers through a cleverly crafted name game.

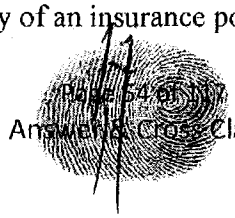
d. "S.B. Lexington, Inc. Employee Death Benefit Trust" used interchangeably with the "Lexington Trust" by Jackson in their response.

i. "LaSalle National Trust, N.A." the "primary beneficiary" according to Jackson's Counter Complaint at the time of SIMON's death.

e. "S.B. Lexington, Inc. 501(c)(9) VEBA Trust"

104. That the named beneficiaries of the Policy(ies) according to Jackson's Counter Complaint are as follows,

a. "Simon Bernstein " – This appears impossible however, as it would be impossible for one to name oneself as beneficiary of an insurance policy.



b. "First Arlington National Bank, as Trustee of S.B. Lexington, Inc. Employee Death Benefit Trust"

c. "United Bank of Illinois"

d. "LaSalle National Trust, N.A."

e. "LaSalle National Trust. N.A., Trustee of the VEBA trust"

f. "Simon Bernstein Insurance Trust dated 6/21/1995, Trust"

g. "Simon Bernstein Trust, N.A." the final "contingent beneficiary" according to Jackson that is listed on the Policy(ies) at the time of SIMON's death.

105. That according to Jackson at the time of SIMON's death the Primary Beneficiary is "LaSalle National Trust, N.A." and the Contingent Beneficiary is the "Simon Bernstein Trust, N.A.[6]" Paragraph 15-16 of their response.

106. That TED claims to this Court that the lost "Simon Bernstein Irrevocable Insurance Trust Dated 6/21/95" aka "Bernstein Trust" was the "sole" beneficiary of the Policy(ies) at the time of SIMON's death to this Court.

107. That TED, TSPA, SPALLINA, TESCHER and P. SIMON have similarly given this allegedly misleading information regarding the beneficiary at the time of death to the beneficiaries of the estate and counsel for certain beneficiaries, while suppressing, denying and secreting the

[6] On information and belief, ELIOT claims that ELIOT and his wife Candice Bernstein and their three children were the named beneficiaries at the time of SIMON's death under whatever trusts where in existence at the time or directly, including but not limited to, the "SIMON Bernstein Trust, N.A." and that SIMON may have also added Maritza Puccio for a share of the benefits prior to his death.

legal named beneficiary "Simon Bernstein Trust, N.A." and thereby secreting from the designated beneficiaries thereunder their interests.

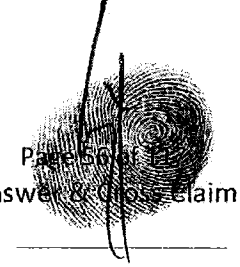
108. That Jackson claims in Paragraph 18,

> "Subsequent to the Insured's death, TED Bernstein, through his Florida counsel **(who later claimed Bernstein did not have authority to file the instant suit in Illiuois on behalf of the Bernstein Trust and withdrew representation)** [emphasis added], submitted a claim to Heritage seeking payment of the Death Benefit Proceeds, allegedly as the trustee of the "Bernstein Trust."

That ELIOT alleges that this Lawsuit was still filed after being advised by counsel of the legal defects but now with new conflicted counsel, SLF and A. SIMON, knowing of the lack of authority TED was advised by counsel of and this represents Abuse of Process.

109. That Jackson claims in Paragraph 19 that neither TED, nor anyone else, could locate the "Bernstein Trust" that TED claims is the beneficiary of the Policy(ies).

110. That instead of seeking the Probate Court determination and getting a "court order" as to who the beneficiaries would be in the event of a missing beneficiary designation and "lost" trust, this suit was instead filed in apparent effort to evade the determination of the Probate Court and secretly convert the Policy(ies) proceeds before ELIOT was alerted and despite his protestations that no distributions be made until he and his children's counsel could review



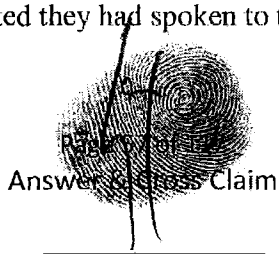
their alleged insurance trust and beneficiary fraud scheme and approve of it with a "court order."

111. That an old beneficiary designation of a "lost" trust is now being used to make claims for the Policy(ies) proceeds in this Lawsuit, instead of the beneficial designation with the insurance carriers at SIMON's death, namely the "Simon Bernstein Trust, N.A."

112. That therefore, despite whether the "Simon Bernstein Irrevocable Insurance Trust Dated 6/21/95" aka "Bernstein Trust" is "lost" or not or what it is called, **it was not the Beneficiary at the time of SIMON's death according to Jackson** and therefore, would not be entitled to make a claim for the Policy(ies) proceeds. Perhaps this is why all of the records of the Policy(ies) and trusts have been secreted from certain estate beneficiaries and their counsel by TSPA, TESCHER, SPALLINA and TED, so as to hide from them whom the beneficiaries under the "Simon Bernstein Trust, N.A." trust are to the advantages of some and disadvantage of others and mislead everyone by misrepresenting the real beneficiary(ies) and converting the Policy(ies) proceeds.

113. That ELIOT claims that Jackson, Heritage and RALIC should have copies of the "Simon Bernstein Trust, N.A.," as well as, TSPA, SPALLINA and TESCHER and possibly P. SIMON and others named in the Lawsuit.

114. That ELIOT and others were misinformed, allegedly with intent, by TSPA, TESCHER, SPALLINA, TED and P. SIMON, that the beneficiary of the Policy(ies) was "Simon Bernstein Irrevocable Insurance Trust Dated 6/21/95" aka "Bernstein Trust" at the time of SIMON's death. Where they stated they had spoken to the carriers and were "friendly" with



them and received the beneficiary designations directly from the insurance carriers and at first claimed to have copies of the Policy(ies) and only later, when ELIOT began demanding to see the Policy(ies), did they then claim to have "lost" their copies or not possess them at all, similar to the "lost" trust claims.

115. That ELIOT alleges the copies of the Policy(ies) are instead suppressed and denied to the beneficiaries, in order to perfect their insurance and trust fraud scheme and deny the true and proper beneficiaries of the "Simon Bernstein Trust, N.A." of the Policy(ies) proceeds and convert them to themselves and others.

116. That Jackson further asserts in Paragraph 20, "**Jackson is not aware whether the Bernstein Trust even exists,** and if it does whether its title is the 'Simon Bernstein Insurance Trust dated 6/21/1995, Trust' as captioned herein, or the 'Simon Bernstein Trust, N.A.', as listed as the Policy's contingent beneficiary **(or otherwise)**, and/or if Ted Bernstein is in fact its trustee." [emphasis added].

117. That the "otherwise" referenced by Jackson above, may be the SAMR TRUST or some variation of it, that is being allegedly secreted into this Lawsuit and again this may also be the undefined trusts or misnamed trusts referenced in pleadings by TED and causing Jackson to deny the claim and file a counter complain to this breach of contract Lawsuit.

118. That in TED's August 30, 2013 Answer to Jackson's Counter Complaint TED and A. SIMON start off the "Name Game" in the caption by using an abbreviated naming of the "Simon Bernstein Irrevocable Insurance Trust Dated 6/21/95" naming it the "Bernstein Trust." However, in their caption in their answer to Jackson, which is all capitalized and

reads, **THE BERNSTEIN TRUST,** it is impossible to tell whether this reference in the caption is the undefined "The Bernstein Trust" or if it is the "Bernstein Trust" due to the use of capitalization in the caption. Yet, if it is not the same, this changes everything in the pleading to read wholly different and who the beneficiaries are and who is making representations in the pleadings.

119. That TED then claims through his brother-in-law counsel that TED is the "trustee" of the "Bernstein Trust" and therefore trustee of the "Simon Bernstein Irrevocable Insurance Trust Dated 6/21/95." Let this Court read their response without renaming the alleged "lost" "Simon Bernstein Insurance Trust dated 6/21/1995" as the renamed "Bernstein Trust" or any other abbreviation given, in order to clarify the matters and it then becomes apparent that a "lost" trust with no executed copies is attempting to make a claim for the Policy(ies), and where the lost trust was not even the beneficiary on the Policy(ies) at the time of SIMON's death.

120. That this Court should note that no matter the name of the trust, if the trust is "lost" as alleged, how can anyone claim to be the "trustee" or be a "beneficiary" or know what the terms of the trust are with any certainty and why it is believed a "court order" was requested by the life insurance company HERITAGE.

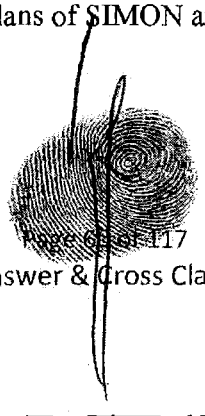
121. That in their Answer to Jackson, in response to Jackson's assertion 1, TED claims, "Ted Bernstein and "The Bernstein Trust" [emphasis added and note that The is within the quotations] admit that Jackson has tendered the death benefit to the court." ELIOT states the "The Bernstein Trust" cannot make any claims or assertions in the pleadings when it has not been defined in the pleadings and thus does not exist.

122. That even if this"The Bernstein Trust" is a grammatical error in name used in the pleadings and it refers to the allegedly lost "Simon Bernstein Irrevocable Insurance Trust Dated 6/21/95" defined as "Bernstein Trust" not "The Bernstein Trust" it would be unable to assert anything on anyone's behalf, as there are no apparent records of it and just best guesses as to who the trustees and beneficiaries are and where it is not even the final beneficiary according to Jackson.

123. That with all these confusing names and baseless claims asserted in this Lawsuit, Jackson did not just pay the claim on demand for breach of contract but instead filed a counter complaint and thus the third attempt to convert the Policy(ies) proceeds to the wrong beneficiaries has hit another "bump in the road."

124. That both D. SIMON and A. SIMON and the SLF law firm are conflicted from handling this Lawsuit and pleading in these matters, as D. SIMON would directly benefit from this scheme through conversion of the Policy(ies) proceeds to his wife and family directly, therefore neither his law firm or his brother, for similar conflicts, would be able to legally file this Lawsuit and thus may represent a knowing Abuse of Process.

125. That the failure to properly know whom the beneficiaries of the Policy(ies) are is primarily a result of TSPA, TESCHER and SPALLINA's failure to legally document the beneficiaries of the Policy(ies) and maintaining copies of the trusts and Policy(ies) or other necessary documents to prove the beneficial interests in lieu of not possessing the key documents when preparing and executing the estate plans of SIMON and SHIRLEY.



126. That in an investigation with the Florida Governor's Office Notary Complaint Division pertaining to the documents that give TSPA, TESCHER, SPALLINA and TED alleged fiduciary powers in the estates of SIMON and SHIRLEY, the Licensed Notary Public who Notarized certain of the estates documents has now ADMITTED AND ACKNOWLEDGED that she has committed Fraud by ILLEGALLY NOTARIZING certain documents, including Fraudulently Notarizing SIMON's signature on a document and allegedly forging the signature months after he was deceased.

127. That these acts are illegal and the documents that give TSPA, TESCHER, SPALLINA and TED fiduciary powers in the estates of SIMON and SHIRLEY may have been illegally obtained after death of SIMON. ELIOT has produced the Response of the Notary Public, ELIOT's Response to the Notary and the original complaint filed against the Notary, in exhibits contained in Petition 7, exhibit No. 1, 2 & 3.

128. That it is alleged that the Cross Defendant and Third Party Defendants have committed Civil Conspiracy, Professional Malpractice, Insurance Fraud, Mail and Wire Fraud, Abuse of Legal Process, Fraud on Beneficiaries and Interested Parties and Fraud on the courts[7] in attempts to convert the Policy(ies) proceeds to themselves, against the wishes and desires and beneficiary designations made by SIMON prior to his death.

COUNT I

FRAUD

[7] Rule 11 of the Federal Rules of Civil Procedure prohibits the filing of lawsuits that are clearly frivolous or filed simply to harass someone. If the Court determines that you have filed a lawsuit for an improper or unnecessary reason, it may impose sanctions against you, including ordering you to pay any legal fees of the party that you sued.

FRAUD ON BENEFICIARIES, JACKSON, HERITAGE AND COURTS

129. That this is an action for Fraud within the jurisdiction of this Court. This is also a supplemental action for other civil claims of Fraud pursuant to the state laws of Illinois and Federal law.

130. That Cross Plaintiff, ELIOT, repeats and realleges each and every allegation contained in paragraph "1" through "129", as though fully set forth herein.

131. That Cross Defendants and Third Party Defendants filed this case without the knowledge and information of ELIOT, certain beneficiaries and interested parties of the estate of SIMON, with the intention allegedly to fraudulently convert ELIOT and other beneficiaries Policy(ies) proceeds.

132. That Cross Defendant and Third Party Defendants created a post mortem trust, assigning new post mortem beneficiaries or other unverifiable beneficiaries, allegedly fraudulently, to make illegal gains from the Policy(ies).

133. That the Cross Defendant and Third Party Defendants committed fraud on Cross Petitioner, ELIOT, by participating in fraud to deprive the beneficial rights of Cross Petitioner, his children, even their own adult and minor children and other rightful beneficiaries of the Policy(ies).

134. That as a direct and proximate result of such conduct on the part of Cross Defendant and Third Party Defendants, Cross Plaintiff, ELIOT, has been damaged by the alleged fraud and more committed by the conspiratorial actions of Cross Defendant and Third Party Defendants.

135. That this alleged Fraud was committed through an alleged Fraudulent legal proceeding before this Court, constituting not only an alleged Abuse of Process but an alleged Insurance Fraud and this should make this Court take Judicial Notice of the alleged crimes herein and in Petitions 1-7 and take immediate actions to notify all authorities, state and federal, of these alleged crimes, on its own motions.

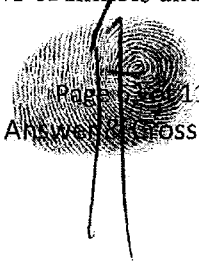
136. That as a result of the acts of Cross Defendant and Third Party Defendants, Cross Plaintiff now suffers from delays in distribution of the Policy(ies) proceeds to the true and proper beneficiaries and he and his family will continue to suffer irreparable injury and monetary damages, and that Cross Plaintiff is entitled to damages sustained to date and continuing in excess of at least EIGHT MILLION DOLLARS ($8,000,000.00) as well as punitive damages, costs and attorney's fees.

COUNT II

BREACH OF FIDUCIARY & PROFESSIONAL DUTIES AS TRUSTEES, LEGAL COUNSEL & PERSONAL REPRESENTATIVES OF ESTATE OF SIMON

137. That Cross Plaintiff repeats and realleges each and every allegation contained in paragraph "1" through "136", as though fully set forth herein.

138. That this is a supplemental action for breach of fiduciary duties and professional responsibilities by Cross Defendant and Third Party Defendants, the law firm TSPA and Attorneys at Law, TESCHER and SPALLINA, acting as TED's Personal Counsel in this Lawsuit, as SIMON's estate counsel and tax attorney and as Personal Representatives of the SIMON estate, as per the state laws of Illinois and Federal law.



139. That this is a supplemental action for breach of fiduciary duties and professional responsibilities by Cross Defendant and Third Party Defendants, the law firm SLF and Attorneys at Law, D. SIMON and A. SIMON as counsel in this Lawsuit in conflict and representing TED as Trustee of the Bernstein Trust as per the state laws of Illinois and Federal law.

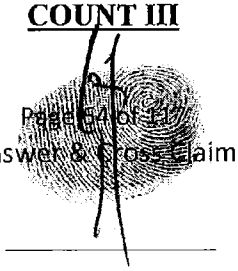
140. That this is a supplemental action for breach of fiduciary duties and professional responsibilities by Cross Defendant and Third Party Defendants per the state laws of Illinois and Federal law.

141. That the Cross Defendant and Third Party Defendants have conspired and filed this case breaching their fiduciary and professional duties to defraud the Cross Plaintiff, ELIOT, and take away his and others rights to the benefits of the Policy(ies).

142. That Cross Plaintiff alleges through the conspiratorial actions of Cross Defendant and certain Third Party Defendants, through Abuse of Legal Process, Fraud on this Court, Violations of State and Federal Law, Breaches of Fiduciary Duties and Violations of Attorney Conduct Codes attempted to perpetrate an insurance fraud and more to defraud Cross Plaintiff.

143. As a result of Cross Defendant and Third Party Defendants acts, Cross Plaintiff now suffers and will continue to suffer irreparable injury and monetary damages, and that Cross Plaintiff is entitled to damages sustained to date and continuing in excess of at least EIGHT MILLION DOLLARS ($8,000,000.00), as well as, punitive damages, costs and attorney's fees.

COUNT III



LEGAL MALPRACTICE

144. That Cross Plaintiff, ELIOT, repeats and realleges each and every allegation contained in paragraph "1" through "143", as though fully set forth herein.

145. That this is a supplemental action for other civil claims for legal malpractice by Cross Defendant and Third Party Defendants, TSPA, TESCHER, SPALLINA, SLF, D. SIMON and A. SIMON pursuant to the state laws of Illinois and Federal law.

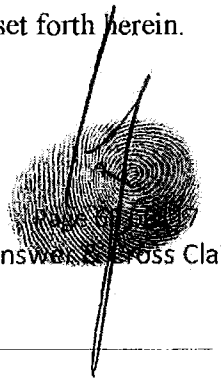
146. That the conspiratorial actions of the Third Party Defendants that are licensed to practice law and acted as Attorneys at Law or law firms in bringing this suit, whether withdrawn or admitted, or any other Attorney at Law that aided and abetted this alleged insurance fraud scheme and more in any way, have through the alleged crimes claimed already herein caused liabilities to Cross Plaintiff and others.

147. That as a result of the defendants acts, Cross Plaintiff now suffers and will continue to suffer irreparable injury and monetary damages, and that Cross Plaintiff is entitled to damages sustained to date and continuing in excess of at least EIGHT MILLION DOLLARS ($8,000,000.00) as well as punitive damages, costs and attorney's fees.

COUNT IV

ABUSE OF LEGAL PROCESS

148. That Cross Plaintiff repeats and realleges each and every allegation contained in paragraph "1" through "147", as though fully set forth herein.



149. That this is a supplemental action for other civil claims for abuse of legal process by Cross Defendant and Third Party Defendants pursuant to the state laws of Illinois and Federal law.

150. That Cross Defendant and Third Party Defendants have abused legal process to defraud Cross Plaintiff by misleading this court and others and filing this case without knowledge of Cross Plaintiff and against the advice of counsel and with knowledge of a different beneficiary designation than that they filed a death benefit claim for.

151. That as a result of the Cross Defendant and Third Party Defendants acts to Abuse Legal Process in order to perpetrate an alleged insurance fraud, Cross Plaintiff now suffer and will continue to suffer irreparable injury and monetary damages, and that Cross Plaintiff is entitled to damages sustained to date and continuing in excess of at least EIGHT MILLION DOLLARS ($8,000,000.00) as well as punitive damages, costs and attorney's fees.

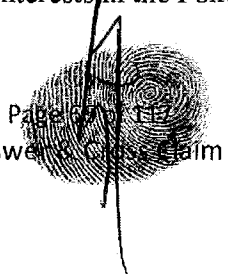
COUNT V

CIVIL CONSPIRACY

152. That Cross Plaintiff repeats and realleges each and every allegation contained in paragraph "1" through "151", as though fully set forth herein.

153. That this is a supplemental action for other civil claims for civil conspiracy by Cross Defendant and Third Party Defendants pursuant to the state laws of Illinois and Federal law.

154. That Cross Defendant and Third Party Defendants have conspired together to defraud Cross Plaintiff by misleading this court and others regarding the beneficiary(ies) of the Policy(ies) , who they knew had direct beneficial interests in the Policy(ies)and filing this case without



knowledge of Cross Plaintiff and his children's counsel in attempts to convert the Policy(ies) Proceeds.

155. That as a result of the defendants' acts, Cross Plaintiff now suffers and will continue to suffer irreparable injury and monetary damages, and that Cross Plaintiff is entitled to damages sustained to date and continuing in excess of at least EIGHT MILLION DOLLARS ($8,000,000.00) as well as punitive damages, costs and attorney's fees.

COUNT VI

CONVERSION OF PROPERTY

156. That Cross Plaintiff repeats and realleges each and every allegation contained in paragraph "1" through "155", as though fully set forth herein.

157. That this is a supplemental action for Conversion of Property by Cross Defendant and Third Party Defendants pursuant to the state laws of Illinois and Federal law.

158. That Cross Defendant and Third Party Defendants have conspired together to deprive Cross Plaintiff of his right to Estate as a beneficiary by their fraudulent acts ad creating false documents.

159. That as a result of the defendants' acts, Cross Plaintiff now suffers and will continue to suffer irreparable injury and monetary damages, and that Cross Plaintiff is entitled to damages sustained to date and continuing in excess of at least EIGHT MILLION DOLLARS ($8,000,000.00) as well as punitive damages, costs and attorney's fees.

COUNT VII

NEGLIGENCE

160. That Cross Plaintiff repeats and realleges each and every allegation contained in paragraph "1" through "159", as though fully set forth herein.

161. At all times relevant herein, the Cross Defendant and Third Party Defendants, acting as trustees and representatives of Trusts and Insurance policies, had a duty to exercise reasonable care and skill to maintain the estate and to discharge and fulfill the other incidents attendant to the maintenance, accounting and servicing of the state on behalf of SIMON and the beneficiaries.

162. In taking the actions alleged above, and in failing to take the actions as alleged above, the Cross Defendant and Third Party Defendants breached their duty of care and skill towards maintenance of the estate. Cross Defendant and Third Party Defendants have mismanaged the estate of SIMON and fraudulently created documents and allegedly forged them without having the legal authority and/or proper documentation to do so.

163. As a direct and proximate result of the negligence and carelessness of the Cross Defendant and Third Party Defendants as set forth above, Cross Plaintiff suffered general and special damages in an amount to be determined by this Court or at trial.

RELIEF

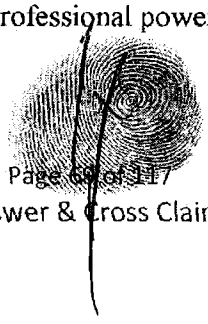
WHEREFORE, Cross Plaintiff ELIOT prays to this Court:

i. To seize all records and demand that all records of all parties concerning either SHIRLEY or SIMON held by all parties be turned over to ELIOT, as NO documents have been tendered to him regarding these Policies;

ii. Award Court Costs not from the Policy(ies) but from alleged conspirators and force bonding for these unnecessary legal and other costs by those parties that have caused this baseless Lawsuit in efforts to perpetrate a fraud;

iii. ELIOT has requested the Probate Court to remove TSPA, SPALLINA, TESCHER, TED and P. SIMON of any fiduciary capacities regarding the estates of SIMON and SHIRLEY on multiple legal grounds stated in said Petitions and Motion 1-7 and hereby requests this Court remove them as well from acting in any conflicting capacities or self-representations based on the Prima Facie evidence of Forgery, Fraud, Fraud on the Probate Court and Mail and Wire Fraud, already evidenced in Petition 7. **That in hearings held on SHIRLEY's estate on Friday, September 13, 2013 in the Probate Court, Honorable Judge Martin H. Colin told TED, SPALLINA, TESCHER and their counsel, Mark Manceri, that he [Hon. Judge Colin] should read them all their Miranda Rights right at that moment, after hearing how SIMON had notarized docnments to close SHIRLEY's estate two months after he was deceased and how there was a fraud upon his court and himself personally as he closed the estate with the fraudulent docnments and TSPA, TESCHER and SPALLINA did not think it important to note the Court of what they were doing. Hon. Colin's issued this stark Miranda Warning after hearing the criminal misconduct admitted to in his Court, twice in fact.**

iv. That the alleged insurance fraud taking place through the instant Lawsuit in this Court is allegedly being committed by similar parties of the alleged estate frauds, again misusing their fiduciary and professional powers and they should be removed from



further representing any parties, sanctioned and forced to retain non conflicted counsel further in these proceedings.

v. ELIOT requests this Court take Judicial Notice of the alleged and admitted crimes herein and in Petitions 1-7 and act on its own motions to prevent any further possible criminal activities and damages to others being incurred until these alleged criminal matters are fully resolved.

vi. Allow ELIOT to ECF in this case due to health problems and expenses. In US District Court Scheindlin has ordered ELIOT access to ECF filing.

vii. Allow leave to amend this Cross Claim as it was served while ELIOT was recovering from a traumatic brain injury with bleeding on the brain, a fractured rib and bruised collar bone and in ICU for 3 days in Del Ray Beach, FL hospital and the recovery was almost two months during the time for response and therefore ELIOT would like an opportunity to perfect it. The Court granted several extensions and ELIOT thanks Your Honor for the additional extensions in light of this medical incident.

viii. Award damages sustained to date and continuing in excess of at least EIGHT MILLION DOLLARS ($8,000,000.00) as well as punitive damages, costs and attorney's fees.

Respectfully submitted,

/s/ Eliot Ivan Bernstein

Eliot I. Bernstein
2753 NW 34th St.
Boca Raton, FL 33434
(561) 245-8588

Dated: , 2013

Certificate of Service

The undersigned certifies that a copy of the foregoing Answer and Cross Claim was served by ECF, US Mail and by E-mail on September 21 2013 to the following parties:

US Mail and Email

Robert L. Spallina, Esq. and
Tescher & Spallina, P.A.
Boca Village Corporate Center I
4855 Technology Way
Suite 720
Boca Raton, FL 33431
rspallina@tescherspallina.com

Donald Tescher, Esq. and
Tescher & Spallina, P.A.
Boca Village Corporate Center I
4855 Technology Way
Suite 720
Boca Raton, FL 33431
dtescher@tescherspallina.com

Theodore Stuart Bernstein and
National Service Association, Inc. (of Florida) ("NSA")
950 Peninsula Corporate Circle, Suite 3010
Boca Raton, Florida 33487
tbernstein@lifeinsuranceconcepts.com

Lisa Sue Friedstein
2142 Churchill Lane
Highland Park IL 60035
Lisa@friedsteins.com
lisa.friedstein@gmail.com

Jill Marla Iantoni
2101 Magnolia Lane
Highland Park, IL 60035
jilliantoni@gmail.com
Iantoni_jill@ne.bah.com

Pamela Beth Simon and
S.T.P. Enterprises,

S.B. Lexington, Inc. Employee Death Benefit Trust,
SB Lexington, Inc.,
National Service Association, Inc. (of Illinois)
303 East Wacker Drive
Suite 210
Chicago IL 60601-5210
psimon@stpcorp.com

David B. Simon and
The Simon Law Firm
303 East Wacker Drive
Suite 210
Chicago IL 60601-5210
dsimon@stpcorp.com

Adam Simon and
The Simon Law Firm
General Counsel STP
303 East Wacker Drive
Suite 210
Chicago IL 60601-5210
asimon@stpcorp.com

/s/ Eliot Ivan Bernstein

Eliot Ivan Bernstein
2753 NW 34th St.
Boca Raton, FL 33434
(561) 245-8588

EXHIBIT 10

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA

TED BERNSTEIN, as Trustee of the Shirley Bernstein Trust Agreement dated May 20, 2008, as amended,

Plaintiff,

v.

ALEXANDRA BERNSTEIN; ERIC BERNSTEIN; MICHAEL BERNSTEIN; MOLLY SIMON; PAMELA B. SIMON, Individually and as Trustee f/b/o Molly Simon under the Simon L. Bernstein Trust Dtd 9/13/12; ELIOT BERNSTEIN, individually, as Trustee f/b/o D.B., Ja. B. and Jo. B. under the Simon L. Bernstein Trust Dtd 9/13/12, and on behalf of his minor children D.B., Ja. B. and Jo. B.; JILL IANTONI, Individually, as Trustee f/b/o J.I. under the Simon L. Bernstein Trust Dtd 9/13/12, and on behalf of her Minor child J.I.; MAX FRIEDSTEIN; LISA FRIEDSTEIN, Individually, as Trustee f/b/o Max Friedstein and C.F., under the Simon L. Bernstein Trust Dtd 9/13/12, and on behalf of her minor child, C.F.,

Defendants.
_____/

Probate Division
Case No.: 502014CP003698XXXXNBIJ

FINAL JUDGMENT ON COUNT II OF THE AMENDED COMPLAINT

This cause came before the Court for trial on December 15, 2015, pursuant to the Court's *ORDER SETTING TRIAL on AMENDED COMPLAINT (DE 26) COUNT II* dated September 24, 2015. The Court, having received evidence in the form of documents and testimony of witnesses,

having heard argument of counsel and *pro se* parties who wished to argue, and being otherwise fully advised of the premises, hereby enters a Final Judgment as to Count II of the Amended Complaint:

1. This is an action for declaratory judgment to determine the validity, authenticity and enforceability of certain wills and trusts executed by Simon Bernstein and Shirley Bernstein, as follows:

A. Shirley Bernstein Trust Agreement dated May 20, 2008 ("Shirley Trust", attached to the Amended Complaint as Exhibit A, EX. P2 AT TRIAL)

B. First Amendment to Shirley Bernstein Trust Agreement dated November 18, 2008 ("Shirley First Amendment", attached to the Amended Complaint as Exhibit B, EX. P3 AT TRIAL)

C. Will of Simon L. Bernstein dated July 25, 2012 ("Simon Will", attached to the Amended Complaint as Exhibit C, EX. P4 AT TRIAL)

D. Simon L. Bernstein Amended and Restated Trust Agreement dated July 25, 2012 ("Simon Trust", attached to the Amended Complaint as Exhibit D ~~and~~, EX. P5 AT TRIAL), Amended

E. Will of Shirley Bernstein dated May 20, 2008 ("Shirley Will", attached to the Amended Complaint as Exhibit E, EX. P1 AT TRIAL)

(collectively, the "Testamentary Documents").

2. Based upon the evidence presented during the trial, the Court finds that the Testamentary Documents, as offered in evidence by Plaintiff, are genuine and authentic, and are valid and enforceable according to their terms.

3. The Court finds that Simon's Testamentary Documents were signed by Simon and Shirley's Testamentary Documents were signed by Shirley, in the presence of two attesting witnesses who signed in the presence of the testator and in the presence of each other. § 732.502, Fla. Stat.; § 736.0403(2)(b), Fla. Stat.

4. The Court finds the Testamentary Documents meet the requirements for self-proof, as specified in §732.503, Fla. Stat. Alternatively, the Testamentary Documents were properly admitted based upon the testimony of at least one of the attesting witnesses, which occurred. §733.201, Fla. Stat.

5. Based on the evidence presented, the Court finds that Plaintiff, Ted S. Bernstein, Trustee, was not involved in the preparation or creation of the Testamentary Documents. ~~Indeed,~~ Ted S. Bernstein had never seen the documents before his father's death. ~~Moreover,~~ Ted S. Bernstein played no role in any questioned activities of the law firm Tescher & Spallina, PA, who represented Simon and Shirley while they were alive. There is no evidence to support the assertions of ELIOT BERNSTEIN that Ted Bernstein forged or fabricated any of the Testamentary Documents, or aided and abetted others in forging or fabricating documents. The evidence shows ~~Thus,~~ Ted Bernstein played no role in the preparation of any improper documents; the presentation of any improper documents to the Court; or any other improper act, contrary to the allegations of Eliot Bernstein ~~made in the pleadings in this case or in various blogs and websites in which Eliot Bernstein has attacked the actions of Ted Bernstein.~~

6. Based on the evidence presented, the Court finds that an unauthorized version of the First Amendment to Shirley Bernstein Trust Agreement was prepared sometime after Simon died. This document (Pl. Ex. 6) was not signed by Shirley Bernstein and, therefore, is not an operative document.

7. This ruling is intended to be a Final Judgment under Rule 9.170 of the Florida Rules of Appellate Procedure, determining the validity of Testamentary Documents, denying any objection to the probate of Shirley's and Simon's Wills or the validity of the Trust Agreements, and determining which persons are entitled to receive distributions from these trusts and estates.

8. Based upon the rulings made by the Court in this trial of Count II, the Court reserves jurisdiction to determine the remaining issues in this action.

DONE AND ORDERED in Chambers, in Palm Beach County, Florida, this 16 day of December, 2015.

John L. Phillips
CIRCUIT COURT JUDGE

cc: All parties on the attached service list

SERVICE LIST Case No.: 502014CP003698XXXXNBIJ

Eliot Bernstein, individually
and Eliot and Candice Bernstein,
as Parents and Natural Guardians of
D.B., Ja. B. and Jo. B, Minors
2753 NW 34th Street
Boca Raton, FL 33434
(561) 245-8588 - Telephone
(561) 886-7628 - Cell
(561) 245-8644 - Facsimile
Email: Eliot I. Bernstein (iviewit@iviewit.tv)

John P. Morrissey, Esq.
330 Clematis Street, Suite 213
West Palm Beach, FL 33401
(561) 833-0866 - Telephone
(561) 833-0867 - Facsimile
Email: John P. Morrissey
(john@jmorrisseylaw.com)
Counsel for Molly Simon, Alexandra Bernstein,
Eric Bernstein, Michael Bernstein

Lisa Friedstein, individually and as trustee for her
children, and as natural guardian for M.F. and
C.F., Minors; and Max Friedstein
lisa.friedstein@gmail.com

Jill Iantoni, individually and as trustee for her
children, and as natural guardian for J.I. a minor
jilliantoni@gmail.com

Alan Rose, Esq.
Mrachek Fitzgerald Rose
Konopka Thomas & Weiss, P.A.
505 S Flagler Drive, Suite 600
West Palm Beach, FL 33401
(561) 655-2250 - Telephone
(561) 655-5537 - Facsimile
Email: arose@mrachek-law.com

Pamela Beth Simon
303 E. Wacker Drive, Suite 2725
Chicago, IL 60601
Email: psimon@stpcorp.com

Brian M. O'Connell, Esq.
Joielle A. Foglietta, Esq.
Ciklin Lubitz Martens & O'Connell
515 N. Flagler Dr., 20th Floor
West Palm Beach, FL 33401
561-832-5900 - Telephone
561-833-4209 - Facsimile
Email: boconnell@ciklinlubitz.com;
jfoglietta@ciklinlubitz.com;
service@ciklinlubitz.com;
slobdell@ciklinlubitz.com

EXHIBIT 11

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

IN RE: CASE NO. 502012CP004391XXXXNBIH

ESTATE OF SIMON L. BERNSTEIN,

_____/

ORDER APPOINTING GUARDIAN AD LITEM TO
REPRESENT THE INTERESTS OF ELIOT BERNSTEIN'S CHILDREN

THIS CAUSE came before the Court for hearing on April 8, 2016, on Successor Trustee's *Motion for Appointment of a Guardian Ad Litem to Represent Interests of Eliot Bernstein's Children in this Estate (*"the Motion"). The Court, having reviewed the Motion and the record, having heard argument of counsel and/or the parties, and being otherwise fully advised in the premises, hereby ORDERS AND ADJUDGES:

1. This Court determined after a trial held on December 15, 2015 that the beneficiaries of The Simon L. Bernstein Amended and Restated Trust Agreement dated 7/25/12 (the "Trust") are Simon Bernstein's "then living grandchildren." Under that ruling, Simon's children – including Eliot Bernstein – are not beneficiaries of the Trust.

2. The Court already has determined in the related matter of the Shirley Bernstein Trust that Eliot Bernstein should not be permitted to continue representing the interests of his minor children, because his actions have been adverse and destructive to his children's interest, resulting in appointment of a guardian ad litem.

3. Accordingly, the Court appoints DIANA LEWIS to act as Guardian ad Litem to advance and protect the interests of Jo.B, Ja.B and D.B. as the guardian sees fit. The Guardian Ad Litem will have full power and autonomy to represent the interests of the

children of Eliot Bernstein, subject to the jurisdiction and review of this Court. The Guardian Ad Litem will be entitled to petition the Court for an award of attorneys' fees to be paid out of the gross proceeds of any recovery, distributions or inheritance to be received by Ja.B, Jo.B, and/or D.B.

4. To protect the integrity and independence of the guardian, Eliot Bernstein and all persons acting in concert with him: (a) shall not contact, email or otherwise communicate with the Guardian Ad Litem except at the request of the Guardian Ad Litem; (b) shall not in any way threaten or harass the guardian. This Court alone shall supervise the Guardian. Any violation of this order may subject the violator to severe sanctions for contempt of court. The Court will use the full measure of its coercive powers to ensure compliance with this Order.

5. The Court reserves jurisdiction to enforce all terms of this Order, and to oversee the service of the guardian ad litem appointed.

DONE AND ORDERED in Chambers, North County Courthouse on 4-8, 2016.

HONORABLE JOHN L. PHILLIPS

cc: All parties on the attached service list

SERVICE LIST Case No.: 502012CP004391XXXXNBIH

Eliot Bernstein, individually
and Eliot and Candice Bernstein,
as Parents and Natural Guardians of
D.B., Ja. B. and Jo. B, Minors
2753 NW 34th Street
Boca Raton, FL 33434
(561) 245-8588 - Telephone
Email: Eliot I. Bernstein (iviewit@iviewit.tv)

John P. Morrissey, Esq.
330 Clematis Street, Suite 213
West Palm Beach, FL 33401
(561) 833-0766 - Telephone
(561) 833-0867 - Facsimile
Email: John P. Morrissey
(john@jmorrisseylaw.com)
Counsel for Molly Simon, Alexandra Bernstein,
Eric Bernstein, Michael Bernstein

Lisa Friedstein
2142 Churchill Lane
Highland Park, IL 60035
lisa@friedsteins.com
Individually and as trustee for her children, and
as natural guardian for M.F. and C.F., Minors

Alan Rose, Esq.
Mrachek Fitzgerald Rose
Konopka Thomas & Weiss, P.A.
505 S Flagler Drive, Suite 600
West Palm Beach, FL 33401
(561) 655-2250 - Telephone
Email: arose@mrachek-law.com

Jill Iantoni
2101 Magnolia Lane
Highland Park, IL 60035
jilliantoni@gmail.com
Individually and as trustee for her children, and
as natural guardian for J.I. a minor

Peter M. Feaman, Esq.
Peter M. Feaman, P.A.
3695 West Boynton Beach Blvd., Suite 9
Boynton Beach, FL 33436
(561) 734-5552 - Telephone
Email: service@feamanlaw.com;
mkoskey@feamanlaw.com
Counsel for William Stansbury

Gary R. Shendell, Esq.
Kenneth S. Pollock, Esq.
Matthew A. Tornincasa, Esq.
Shendell & Pollock, P.L.
2700 N. Military Trail, Suite 150
Boca Raton, FL 33431
(561) 241-2323 - Telephone
Email: gary@shendellpollock.com
ken@shendellpollock.com
matt@shendellpollock.com
estella@shendellpollock.com
britt@shendellpollock.com
grs@shendellpollock.com
robyne@shendellpollock.com

Robert Spallina, Esq.
Donald Tescher, Esq.
Tescher & Spallina
925 South Federal Hwy., Suite 500
Boca Raton, Florida 33432

Brian M. O'Connell, Esq.
Joielle A. Foglietta, Esq.
Ciklin Lubitz Martens & O'Connell
515 N. Flagler Dr., 20th Floor
West Palm Beach, FL 33401
561-832-5900 - Telephone
Email: boconnell@ciklinlubitz.com;
jfoglietta@ciklinlubitz.com;
service@ciklinlubitz.com;
slobdell@ciklinlubitz.com

EXHIBIT 12

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SIMON BERNSTEIN IRREVOCABLE INSURANCE TRUST DTD 6/21/95

Plaintiff,

v.

HERITAGE UNION LIFE INSURANCE COMPANY,

Defendant,

HERITAGE UNION LIFE INSURANCE COMPANY,

Counter-Plaintiff,

v.

SIMON BERNSTEIN IRREVOCABLE INSURANCE TRUST DTD 6/21/95

Counter-Defendant

and,

FIRST ARLINGTON NATIONAL BANK, as Trustee of S.B. Lexington, Inc. Employee Death Benefit Trust, UNITED BANK OF ILLINOIS, BANK OF AMERICA, successor in interest to "LaSalle National Trust, N.A., TED BERSTEIN, individually and as alleged Trustee of the Simon Bernstein Irrevocable Insurance Trust Dtd. 6/21/95 and ELIOT BERNSTEIN,

Third Party Defendants

Case No. 13 cv 3643

Honorable Amy J. St. Eve
Magistrate Mary M. Rowland

INTERVENOR COMPLAINT FOR DECLARATORY JUDGMENT BY INTERESTED PARTY BENJAMIN P. BROWN, CURATOR AND ADMINISTRATOR AD LITEM OF THE ESTATE OF SIMON L. BERNSTEIN

ELIOT IVAN BERNSTEIN,

Cross-Plaintiff

v.

TED BERNSTEIN, individually and as alleged Trustee of the Simon Bernstein Irrevocable Insurance Trust Dtd. 6/21/95

Cross-Defendant

and

PAMELA B. SIMON, DAVID B. SIMON both Professionally and Personally, ADAM SIMON both Professionally and Personally, THE SIMON LAW FIRM, TESCHER & SPALLINA, P.A., DONALD TESCHER both Professionally and Personally, ROBERT SPALLINA both Professionally and Personally, LISA FRIEDSTEIN, JILL IANTONI, S.B. LEXINGTON, INC., EMPLOYEE DEATH BENEFIT TRUST, S.T.P ENTERPRISES, INC., S.B. LEXINGTON, INC., EMPLOYEE DEATH BENEFIT TRUST, S.T.P. ENTERPRISES, INC., S.B. LEXINGTON, INC., NATIONAL SERVICE ASSOCIATION, INC. (OF FLORIDA) NATIONAL SERVICE ASSOCIATION, INC, (OF ILLINOIS) AND JOHN AND JANE DOE'S

Third Party Defendants

BENJAMIN P. BROWN, as Curator and Administrator Ad Litem of the Estate of Simon L. Bernstein,

Intervenor.

INTERVENOR COMPLAINT FOR DECLARATORY JUDGMENT BY INTERESTED PARTY BENJAMIN P. BROWN, CURATOR AND ADMINISTRATOR AD LITEM OF THE ESTATE OF SIMON L. BERNSTEIN

NOW COMES Benjamin P. Brown, as Curator and *Administrator Ad Litem* of the Estate of Simon L. Bernstein ("Brown"), by and through his undersigned counsel, and states as follows for his Complaint for Declaratory Judgment pursuant to Fed. R. Civ. P. 57 against the purported Simon Bernstein Irrevocable Trust DTD 6/21/95 (the "Trust") and Heritage Union Life Insurance Company:

INTRODUCTION

1. This declaratory judgment action is filed pursuant to Fed. R. Civ. P. 57 and seeks a declaration that there exists no designated beneficiary of the life insurance policy proceeds at issue in the instant action and that the proceeds of the policy must be paid to the Estate of Simon Bernstein, currently pending in the Circuit Court of Palm Beach County, Florida.

PARTIES AND JURISDICTION

2. Benjamin P. Brown is an Intervening Party pursuant to Fed. R. Civ. P. 24 and is a resident of Palm Beach County, Florida.

3. The purported Simon Bernstein Irrevocable Insurance Trust is alleged in Plaintiff's original Complaint to have been established in Chicago, Illinois.

4. Heritage Union Life Insurance Company, a Minnesota corporation, is the successor corporation to the insurer that issued the life insurance policy (the "Policy") at issue in the instant litigation.

5. The death benefit payable under the Policy exceeds $1 million dollars.

6. This Court has jurisdiction over this matter in that it is a civil action wherein the parties are all citizens of different states and the amount in controversy exceeds $75,000.00. 28 U.S.C. §1332(a).

BACKGROUND

7. Simon L. Bernstein, a resident of Florida, died in September of 2012. His estate was admitted to probate in Palm Beach County, Florida on October 2, 2012. Letters of Curatorship in favor of Benjamin Brown were issued on March 11, 2014. (A copy of the Letters of Curatorship filed in the Probate Court is attached hereto as Exhibit A).

8. At the time of Simon Bernstein's death, there was in effect a life insurance policy issued by Capitol Bankers Life Insurance Company as policy number 1009208 (the "Policy"). The Policy's current proceeds are $1,689,070.00, less an outstanding loan. (*See* Dkt. No. 17 at ¶17).

9. After Mr. Bernstein's death, several of his children filed a Complaint in the Circuit Court of Cook County claiming a right to the proceeds of the Policy as alleged beneficiaries under a purported trust they describe as the "Simon Bernstein Irrevocable Insurance Trust" (the "Trust"). The Bernstein children acknowledge that they have been unable to produce an executed Trust document under which they assert their rights. (*See* letter of Third Party Defendant Robert Spallina, Esq. to Defendant Heritage Union Life Insurance Company, attached as Exhibit B).

10. Defendant, Heritage Union Life Insurance Company, as successor to Capitol Bankers Life Insurance Company, removed the case to this Court on June 26, 2013 and filed an Interpleader action pursuant to 28 U.S.C. § 1335(a), in conjunction with its Answer to Plaintiff's Complaint. (*See* Dkt. No. 17). In its Complaint for Interpleader, Heritage asserts the following:

> "Presently the Bernstein Trust has not been located. Accordingly [Defendant] is not aware whether the Bernstein Trust even exists, and if it does whether its title is the "Simon Bernstein Trust, N.A.," as listed as the Policy's contingent beneficiary (or otherwise), and/or if Ted Bernstein is in fact its trustee. In conjunction, [Defendant] has received conflicting claims as to whether Ted Bernstein had authority to file the instant suit on behalf of the Bernstein Trust."

(Dkt. No. 17 at ¶20).

11. On May 23, 2014, Mr. Brown was appointed *Administrator Ad Litem* to act on behalf of the Estate of Simon L. Bernstein (the "Estate") and, more specifically, directed by the Probate Court in Palm Beach County "to assert the interests of the Estate in the Illinois Litigation involving life insurance proceeds on the Decedent's life." (A copy of the Order Appointing Administrator Ad Litem is attached hereto as Exhibit C).

12. Plaintiff cannot prove the existence of a Trust document; cannot prove that a trust was ever created; thus, cannot prove the existence of the Trust nor its status as purported beneficiary of the Policy. In the absence of a valid Trust and designated beneficiary, the Policy proceeds are payable to Petitioner, the Estate of Simon Bernstein, as a matter of both Illinois and Florida law. *See New York Life Ins. Co. v. RAK*, 180 N.E. 2d 470 (Ill. 1962) (where beneficiary no longer existed, proceeds of life insurance policy passed to the decedent's estate); *Harris v. Byard*, 501 So.2d 730 (Fla. Dist. Ct. App. 1987) (in the absence of a named beneficiary, no basis in law for directing payment of insurance policy proceeds to anyone other than decedent's estate for administration and distribution).

13. Intervenor Benjamin P. Brown seeks a judgment from this Court declaring that no valid beneficiary is named under the Policy and that the proceeds of the Policy must therefore be paid to the Estate.

WHEREFORE, Intervenor, Benjamin P. Brown, as Curator and *Administrator Ad Litem* on behalf of the Estate of Simon L. Bernstein, requests this Court to enter judgment as follows:

A. Declare that there is no valid beneficiary designated under the Policy;

B. Declare that the proceeds of the Policy are payable to the Estate of Simon Bernstein;

C. For Intervenor's costs and expenses incurred herein, including reasonable attorneys' fees, and such other and further relief as this Court deems just and proper.

Dated: June 5, 2014

Respectfully submitted,

/s/ James J. Stamos

One of the attorneys for Proposed Intervenor, Benjamin P. Brown, Curator and Administrator Ad Litem on behalf of the Estate of Simon L. Bernstein

James J. Stamos (ARDC 03128244)
Kevin P. Horan (ARDC 06310581)
STAMOS & TRUCCO LLP
One East Wacker Drive, Third Floor
Chicago, IL 60601
Telephone: (312) 630-7979
Facsimile: (312) 630-1183

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 5, 2014, I electronically filed the foregoing with the Clerk of the Court using CM/ECF. I also certify that the foregoing is being served this day on all counsel of record identified below via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner.

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

PROBATE DIV.
CASE NO.: 50 2012 CP 004391 XXXX SB

IN RE: ESTATE OF SIMON L. BERNSTEIN,
Deceased.
_____/

LETTERS OF CURATORSHIP IN FAVOR OF BENJAMIN BROWN

WHEREAS, Co-Personal Representatives of the Estate of Simon L. Bernstein were permitted to resign by Order of this Court on February 18, 2014. A copy of the Order is attached hereto as Exhibit "A"; and

WHEREAS, this Court found it necessary for the appointment of a Curator and appointed Benjamin Brown, Esq. as Curator of this Estate on February 25, 2014. A copy of the Order is attached hereto as Exhibit "B"; and

WHEREAS Benjamin Brown as Curator appointed by Order of this Court has performed all acts prerequisite to the issuance of Letters of Curatorship as a legally qualified Curator of the Estate of Simon L. Bernstein;

NOW, THEREFORE, I the undersigned Circuit Judge do grant Benjamin Brown (hereinafter Curator), the Curatorship of the Estate of Simon L. Bernstein with the following powers:

(a) To collect and preserve assets of the Estate;

(b) To administer the assets of the Estate;

(c) To evaluate all discovery requests related to the Decedent for the purposes of asserting objections and privileges on behalf of the Estate, if necessary;

(d) To appear on behalf of the Estate in the following two cases: Case No. 502012CA013933 (Circuit Court, Palm Beach County, FL) and Case No. 13CV3643 (U.S. Dist. Ct. Northern Dist.,

EXHIBIT
A

Illinois),

Further, pursuant to Fla. Stat. §733.603, Curator shall proceed expeditiously with the duties described herein and except as otherwise specified by the Florida Probate Code, or ordered by the Court, shall do so without adjudication, Order or direction of the Court. The Curator may invoke the jurisdiction of this Court to resolve questions concerning the Estate or its administration.

DONE AND ORDERED in Chambers at Delray Beach, Palm Beach County, Florida, this _____ day of March, 2014.

SIGNED & DATED

Martin Colin, Circuit Judge

JUDGE MARTIN H. COLIN

Copies furnished to:

Alan Rose, Esq., PAGE, MRACHEK, 505 So. Flagler Drive, Suite 600, West Palm Beach, FL 33401, arose@pm-law.com and mchandler@pm-law.com;

John Pankauski, Esq., PANKAUSKI LAW FIRM, 120 So. Olive Avenue, Suite 701, West Palm Beach, FL 33401, courtfilings@pankauskilawfirm.com;

Peter M. Feaman, Esq., PETER M. FEAMAN, P.A., 3615 W. Boynton Beach Blvd., Boynton Beach, FL 33436, service@feamanlaw.com;

Eliot Bernstein, 2753 NW 34th Street, Boca Raton, FL 33434, *iviewit@iviewit.tv;*

William H. Glasko, Esq., Golden Cowan, P.A., Palmetto Bay Law Center, 17345 S. Dixie Highway, Palmetto Bay, FL 33157, bill@palmettobaylaw.com.

IN THE CIRCUIT COURT FOR PALM BEACH COUNTY, FL

IN RE: ESTATE OF SIMON L. BERNSTEIN,

Deceased.

PROBATE DIVISION

CASE NO. 502012CP004391XXXXSB

DIVISION: IY (COLIN)

ELIOT IVAN BERNSTEIN, PRO SE

Petitioner

vs.

TESCHER & SPALLINA, P.A., (and all parties, associates and of counsel); ROBERT L. SPALLINA (both personally and professionally); DONALD R. TESCHER (both personally and professionally); THEODORE STUART BERNSTEIN (as alleged personal representative, trustee, successor trustee) (both personally and professionally); et. al.

Respondents.

ORDER ON PETITION FOR RESIGNATION AND DISCHARGE

This cause was heard by the Court on the co-Personal Representatives' Petition for Resignation and Discharge on February 18, 2014, and the Court, having heard arguments of counsel, and otherwise being fully advised in the premises, ORDERS AND ADJUDGES AS FOLLOWS:

1. The Petitioners' request to accept their resignation is ACCEPTED. The co-Personal Representatives' Letters of Administration are hereby revoked.

2. ~~Within ten (10) days from the later of the date of this order or the appointment of a successor fiduciary,~~ BY MARCH 4, 2014 the resigning co-Personal Representatives shall deliver to the successor fiduciary all property of the Estate, real, personal, tangible or intangible, all of the documents and records of the Estate and all records associated with any property of the Estate, regardless of whether such property has been previously distributed, transferred, abandoned or otherwise disposed of.

EXHIBIT "A"

3. The Petitioners' request to reserve ruling on their discharge is ACCEPTED.

4. The resigning co-Personal Representatives shall file an accounting and a Renewed Petition for Discharge within sixty (60) days after the date hereof, which Renewed Petition for Discharge shall be verified and recite that the letters of administration have been revoked, the resigning co-Personal Representatives have surrendered all undistributed Estate assets, records, documents, papers and other property of or concerning the Estate to the successor fiduciary as set forth above, and the amount of compensation paid or to be paid by the resigning co-Personal Representatives pursuant to Probate Rule 5.430(g). Such accounting shall include cash and transactions from the commencement of administration of the Estate and ending as of the date the accounting is submitted.

5. The resigning co-Personal Representatives shall serve notice of filing and a copy of the accounting and Renewed Petition for Discharge on all interested parties and the notice shall state that the objection to the Renewed Petition for Discharge must be filed within thirty days after the later of service of the petition or service of the accounting on that interested person pursuant to Probate Rule 5.430(i).

6. The successor Personal Representative or Curator is authorized to pay a $_____ retainer to the accountant whom the Successor Personal Representative or Curator selects to provided the accounting which this Order requires. The accountant's hourly rate and compensation shall be subject to court approval.

DONE AND ORDERED in Delray Beach, Florida, this 18 day of Feb, 2014.

Circuit Judge

cc: Parties on attached service list

SERVICE LIST

Theodore Stuart Bernstein (e-mail)
Life Insurance Concepts
950 Peninsula Corporate Circle, Suite 3010
Boca Raton, Florida 33487

Alan B. Rose, Esq. (E-mail)
Page Mrachek Fitzgerald Rose Konopka & Dow PA
505 S Flagler Dr Ste 600
West Palm Beach, Florida 33401

Eliot Bernstein (U.S. Mail)
2753 NW 34th Street
Boca Raton, Florida 33434

Lisa Sue Friedstein (U.S. Mail)
2142 Churchill Lane
Highland Park, Illinois 60035

Pamela Beth Simon (U.S. Mail)
950 North Michigan Avenue, Suite 2603
Chicago, Illinois 60611

Jill Iantoni (U.S. Mail)
2101 Magnolia Lane
Highland Park, Illinois 60035

Donald R. Tescher (E-mail)
4855 Technology Way, Suite 720
Boca Raton, Florida 33431

Mark R. Manceri, Esq. (E-mail)
Mark. R. Manceri, P.A.
2929 East Commercial Boulevard, Ste. 702
Fort Lauderdale, Florida 33308

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

PROBATE DIV.

CASE NO.: 50 2012 CP 004391 XXXX SB

IN RE: ESTATE OF SIMON L. BERNSTEIN,
Deceased.
_____/

ORDER ON "INTERESTED PERSON" WILLIAM STANSBURY'S MOTION FOR THE APPOINTMENT OF A CURATOR OR SUCCESSOR PERSONAL REPRESENTATIVE

THIS CAUSE came on to be heard by this Honorable Court on Wednesday, February 19, 2014, on the Motion of William Stansbury, as an "Interested Person" in the Estate, For the Appointment of a Curator or Successor Personal Representative, and the Court having received evidence, reviewed the file, heard argument of counsel, and being otherwise duly advised in the premises, it is

ORDERED and ADJUDGED:

1. The Motion of William Stansbury is hereby granted.

2. The Court hereby appoints Benjamin Brown, Esq., Matwiczyk & Brown, LLP, 625 No. Flagler Drive, Suite 401, West Palm Beach, FL 33401 as Curator of this Estate pursuant to §733.501 Fla. Stat. (2013) and Florida Probate Rule 5.122(a).

3. Reasonable fees for the Curator are capped at $350.00 per hour.

EXHIBIT "B"

2/25/14

4. Fee payments will be made in $5,000.00 increments. Any fee requests in excess of that amount for any given period will require a court hearing.

5. In accordance with §733.501(2) Fla. Stat. (2013), bond is hereby set in the amount of $ none.

DONE and ORDERED in West Palm Beach, Palm Beach County, Florida on this ___ day of February, 2014.

SIGNED & DATED
FEB 25 2014
JUDGE MARTIN H. COLIN

MARTIN COLIN
Circuit Court Judge

Copies to:

Alan Rose, Esq., PAGE, MRACHEK, 505 So. Flagler Drive, Suite 600, West Palm Beach, FL 33401, arose@pm-law.com and mchandler@pm-law.com;

John Pankauski, Esq., PANKAUSKI LAW FIRM, 120 So. Olive Avenue, Suite 701, West Palm Beach, FL 33401, courtfilings@pankauskilawfirm.com;

Peter M. Feaman, Esq., PETER M. FEAMAN, P.A., 3615 W. Boynton Beach Blvd., Boynton Beach, FL 33436, service@feamanlaw.com;

Eliot Bernstein, 2753 NW 34th Street, Boca Raton, FL 33434, *iviewit@iviewit.tv*;

William H. Glasko, Esq., Golden Cowan, P.A., Palmetto Bay Law Center, 17345 S. Dixie Highway, Palmetto Bay, FL 33157, bill@palmettobaylaw.com.

LAW OFFICES
TESCHER & SPALLINA, P.A.

BOCA VILLAGE CORPORATE CENTER I
4855 TECHNOLOGY WAY, SUITE 720
BOCA RATON, FLORIDA 33431

ATTORNEYS
DONALD R. TESCHER
ROBERT L. SPALLINA
LAUREN A. GALVANI

TEL 561-997-7008
FAX: 561-997-7308
TOLL FREE: 888-997-7008
WWW.TESCHERSPALLINA.COM

SUPPORT STAFF
DIANE DUSTIN
KIMBERLY MORAN
SUANN TESCHER

December 6, 2012

VIA FACSIMILE: 803-333-4936
Attn: Bree
Claims Department
Heritage Union Life Insurance Company
1275 Sandusky Road
Jacksonville, IL 62651

Re: **Insured: Simon L. Bernstein**
Contract No.: 1009208

Dear Bree:

As per our earlier telephone conversation:

- We are unable to locate the Simon Bernstein Irrevocable Insurance Trust dated June 1, 1995, which we have spent much time searching for.
- Mrs. Shirley Bernstein was the initial beneficiary of the 1995 trust, but predeceased Mr. Bernstein.
- The Bernstein children are the secondary beneficiaries of the 1995 trust.
- We are submitting the Letters of Administration for the Estate of Simon Bernstein showing that we are the named Personal Representatives of the Estate.
- We would like to have the proceeds from the Heritage policy released to our firm's trust account so that we can make distributions amongst the five Bernstein children.
- If necessary, we will prepare for Heritage an Agreement and Mutual Release amongst all the children.
- We are enclosing the SS4 signed by Mr. Bernstein in 1995 to obtain the EIN number for the 1995 trust.

If you have any questions with regard to the foregoing, please do not hesitate to contact me.

Sincerely,

Robert L. Spallina/km

ROBERT L. SPALLINA

RLS/km

Enclosures

EXHIBIT
B

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

IN RE:

ESTATE OF SIMON L. BERNSTEIN,
Deceased.

CASE NO.: 50 2012 CP 004391 XXXX SB
PROBATE DIV.

ORDER APPOINTING ADMINISTRATOR AD LITEM TO ACT ON BEHALF OF THE ESTATE OF SIMON L. BERNSTEIN TO ASSERT THE INTERESTS OF THE ESTATE IN THE ILLINOIS LITIGATION (CASE NO. 13CV3643, N.D. ILL. E. DIV.) INVOLVING LIFE INSURANCE PROCEEDS ON THE DECEDENT'S LIFE

THIS CAUSE came before this Honorable Court on May 23, 2014 upon the Curator's Amended Motion for Instructions/Determination regarding Estate Entitlement to Life Insurance Proceeds and upon the Petition for Appointment of Administrator Ad Litem filed by William Stansbury, in the U.S. District Court case styled *Simon Bernstein Irrevocable Insurance Trust DTD 6/21/95 v. Heritage Union Life Insurance*, Case No. 13-cv-03643, currently pending in the United States District Court for the Northern District Court of Illinois, and the Court having heard argument of counsel and being otherwise duly advised in the premises, it is

ORDERED and ADJUDGED that

1. The Court appoints Benjamin P. Brown, Esq., who is currently serving as Curator, as the Administrator Ad Litem on behalf of the Estate of Simon L. Bernstein to assert the interests of the Estate in the Illinois Litigation involving life insurance proceeds on the Decedent's life in the U.S. District Court case styled *Simon Bernstein Irrevocable Insurance Trust DTD 6/21/95 v. Heritage Union Life Insurance*, Case No. 13-cv-03643, pending in the United States District Court for the Northern District Court of Illinois.

EXHIBIT C

2. For the reasons and subject to the conditions stated on the record during the hearing, all fees and costs incurred, including for the Curator in connection with his work as Administrator Ad Litem and any counsel retained by the Administrator Ad Litem, will initially be borne by William Stansbury.

3. The Court will consider any subsequent Petition for Fees and Costs by William Stansbury as appropriate under Florida law.

DONE AND ORDERED in Palm Beach County, Florida this 23 day of May, 2014.

MARTIN COLIN
Circuit Court Judge

Copies to:
Alan Rose, Esq., PAGE, MRACHEK, 505 So. Flagler Drive, Suite 600, West Palm Beach, FL 33401, arose@pm-law.com and mchandler@pm-law.com
John Pankauski, Esq., PANKAUSKI LAW FIRM, 120 So. Olive Avenue, Suite 701, West Palm Beach, FL 33401, courtfilings@pankauskilawfirm.com;
Peter M. Feaman, Esq., PETER M. FEAMAN, P.A., 3615 W. Boynton Beach Blvd., Boynton Beach, Fl. 33436, service@feamanlaw.com;
Eliot Bernstein, 2753 NW 34th Street, Boca Raton, FL 33434, iviewit@iviewit.tv
William H. Glasko, Esq., Golden Cowan, P.A., Palmetto Bay Law Center, 17345 S. Dixie Highway, Palmetto Bay, FL 33157, bill@palmettobaylaw.com;
John P. Morrissey, Esq., 330 Clematis St., Suite 213, West Palm Beach, FL 33401, john@jmorrisseylaw.com;
Benjamin P. Brown, Esq., Matwiczyk & Brown, LLP, 625 No. Flagler Drive, Suite 401, West Palm Beach, FL 33401, bbrown@mbhlaw.com

EXHIBIT 13

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SIMON BERNSTEIN IRREVOCABLE INSURANCE TRUST DTD 6/21/95, Plaintiff, v. HERITAGE UNION LIFE INSURANCE COMPANY, Defendant. --- HERITAGE UNION LIFE INSURANCE COMPANY, Counter-Plaintiff, v. SIMON BERNSTEIN IRREVOCABLE INSURANCE TRUST DTD 6/21/95, Counter-Defendant, and, FIRST ARLINGTON NATIONAL BANK, as Trustee of S.B. Lexington, Inc. Employee Death Benefit Trust, UNITED BANK OF ILLINOIS, BANK OF AMERICA, successor in interest to LaSalle National Trust, N.A., SIMON BERNSTEIN TRUST, N.A., TED BERNSTEIN, individually and as purported Trustee of the Simon Bernstein Irrevocable Insurance Trust Dtd. 6/21/95, and ELIOT BERNSTEIN, Third-Party Defendants.	Case No. 13 cv 3643 Honorable Amy J. St. Eve Magistrate Mary M. Rowland

JACKSON'S (1) ANSWER TO COMPLAINT AND (2) COUNTERCLAIM AND THIRD-PARTY COMPLAINT FOR INTERPLEADER

Defendant, Jackson National Life Insurance Company ("Jackson"), as successor in interest to Reassure America Life Insurance Company, successor in interest to Heritage Union

Life Insurance Company, makes the following (1) answer to Plaintiff's complaint and (2) counterclaim and third-party complaint for interpleader:

ANSWER

1. At all relevant times, the Bernstein Trust was a common law trust established in Chicago, Illinois by the settlor, Simon L. Bernstein, and was formed pursuant to the laws of the State of Illinois.

ANSWER: Jackson lacks sufficient information and knowledge to form a belief as to the truth of the allegations of this paragraph and therefore denies the same.

2. Ted S. Bernstein is the Trustee of the Bernstein Trust.

ANSWER: Jackson lacks sufficient information and knowledge to form a belief as to the truth of the allegations of this paragraph and therefore denies the same.

3. At all relevant times, the Bernstein Trust was a beneficiary of a life insurance policy insuring the life of Simon L. Bernstein, and issued as policy number 1009208 (the "Policy").

ANSWER: Jackson lacks sufficient information and knowledge to form a belief as to the truth of the allegations of this paragraph and therefore denies the same.

4. The Policy was originally purchased by the S.B. Lexington, Inc. 501(c)(9) VEBA Trust (the "VEBA") from Capital Bankers Life Insurance Company ("CBLIC") and was delivered to the original owner in Chicago, Illinois on or about December 27, 1982.

ANSWER: Jackson lacks sufficient information and knowledge to form a belief as to the truth of the allegations of this paragraph and therefore denies the same.

5. At the time of issuance and delivery of the Policy in 1982, CBLIC was an insurance company licensed and doing business in the State of Illinois, and the insured, Simon L. Bernstein, was a resident of the state of Illinois.

ANSWER: Jackson lacks sufficient information and knowledge to form a belief as to the truth of the allegations of this paragraph and therefore denies the same.

6. Heritage subsequently assumed the Policy from Capital Bankers and thus became the successor to CBLIC as "Insurer" under the Policy.

ANSWER: Jackson lacks sufficient information and knowledge to form a belief as to the truth of the allegations of this paragraph and therefore denies the same.

7. In 1995, the VEBA, as owner of the Policy, executed a beneficiary change form naming LaSalle National Trust, N.A., as Trustee of the VEBA, as primary beneficiary of the Policy, and the Bernstein Trust as the contingent beneficiary.

ANSWER: Jackson lacks sufficient information and knowledge to form a belief as to the truth of the allegations of this paragraph and therefore denies the same.

8. S.B. Lexington, Inc. and the VEBA were voluntarily dissolved on or about April 3, 1998.

ANSWER: Jackson lacks sufficient information and knowledge to form a belief as to the truth of the allegations of this paragraph and therefore denies the same.

9. Upon the dissolution of the VEBA in 1998, the Policy ownership was assigned and transferred from the VEBA to Simon L. Bernstein, individually.

ANSWER: Jackson lacks sufficient information and knowledge to form a belief as to the truth of the allegations of this paragraph and therefore denies the same.

10. At the time of his death, Simon L. Bernstein was the owner of the Policy, and the Bernstein Trust was the sole surviving beneficiary under the Policy.

ANSWER: Jackson lacks sufficient information and knowledge to form a belief as to the truth of the allegations of this paragraph and therefore denies the same.

11. The insured under the Policy, Simon L. Bernstein, passed away on September 13, 2012, and on that date the Policy remained in force.

ANSWER: Jackson admits the allegation of this paragraph.

12. Following Simon L. Bernstein's death, the Bernstein Trust, by and through its counsel in Palm Beach County, FL, submitted a death claim to Heritage under the Policy including Simon L. Bernstein's death certificate and other documentation.

ANSWER: Jackson admits the allegation of this paragraph.

13. The Policy, by its terms, obligates Heritage to pay the death benefits to the beneficiary of the Policy upon Heritage's receipt of the due proof of the insured's death.

ANSWER: Jackson admits it, as a successor to Heritage, is obligated to pay the death benefits to the beneficiary(ies) of the Policy, but denies that the remainder of paragraph 13 accurately and fully states the obligations of a beneficiary in submitting a claim under the Policy, and/or when the obligation for Jackson to make such payment becomes due and therefore denies the same.

14. Heritage has breached its obligations under the Policy by refusing and failing to pay the Policy's death benefits to the Bernstein Trust as beneficiary of the Policy despite Heritage's receipt of due proof of the Insured's death.

ANSWER: Jackson lacks sufficient information and knowledge to form a belief as to the true beneficiary of the Policy, resulting in it tendering the death benefit funds to the Court and filing its interpleader counterclaim and third-party complaint, and thus it denies the allegation of this paragraph.

15. Despite the Bernstein Trust's demands Heritage has not paid out the death benefits on the policy to the Bernstein Trust.

ANSWER: Jackson lacks sufficient information and knowledge to form a belief as to the true beneficiary of the Policy, resulting in it tendering the death benefit funds to the Court and filing its interpleader counterclaim and third-party complaint, and thus it denies the allegation of this paragraph.

16. As a direct result of Heritage's refusal and failure to pay the death benefits to the Bernstein Trust pursuant to the Policy, Plaintiff has been damaged in an amount equal to the death benefits of the Policy plus interest, an amount which exceeds $1,000,000.

ANSWER: Jackson denies the allegation of this paragraph.

WHEREFORE, Defendant, Jackson National Life Insurance Company, as successor in interest to Reassure America Life Insurance Company, successor in interest to Heritage Union Life Insurance Company, respectfully requests that it be dismissed from this lawsuit, and requests such other and further relief as the Court deems just and proper.

COUNTER-CLAIM AND THIRD-PARTY COMPLAINT FOR INTERPLEADER

INTRODUCTION

1. Jackson National Life Insurance Company ("Jackson") brings this counter-claim and third-party complaint for Interpleader pursuant to 28 U.S.C. § 1335(a) and Federal Rule of Civil Procedure 14, as it seeks a declaration of rights under a life insurance policy for which it is responsible to administer. The proceeds from the policy (the "Death Benefit Proceeds") have been tendered to this Court.

PARTIES AND VENUE

2. Jackson, successor in interest to Reassure America Life Insurance Company ("Reassure"), successor in interest to Heritage Union Life Insurance Company ("Heritage"), is a corporation organized and existing under the laws of the State of Michigan, with its principal place of business located in Lansing, Michigan. Jackson did not originate or administer the

subject life insurance policy, Policy Number 1009208 (the "Policy"), but inherited the Policy and the Policy records from its predecessors.

3. The Simon Bernstein Irrevocable Insurance Trust Dtd 6/21/95 (the "Bernstein Trust") is alleged in the underlying suit to be a "common law trust established in Chicago, Illinois by the settlor, Simon L. Bernstein, and was formed pursuant to the laws of the state of Illinois."

4. Ted S. Bernstein is a resident and citizen of Florida. He is alleged in the underlying suit to be the "trustee" of the Bernstein Trust. Ted Bernstein is further, individually, upon information and belief, a beneficiary of the Bernstein Trust (as Simon Bernstein's son).

5. Eliot Bernstein is a resident and citizen of Florida. He has asserted that he and/or his children are potential beneficiaries under the Policy as Simon Bernstein's son, presumably under the Bernstein Trust.

6. First Arlington National Bank is, upon information and belief, a bank in Illinois that was, at one point, and the purported trustee for the "S.B. Lexington, Inc. Employee Death Benefit Trust" (the "Lexington Trust"). The Lexington Trust was, upon information and belief, created to provide employee benefits to certain employees of S.B. Lexington, Inc., an insurance agency, including Simon Bernstein, but it is unclear if such trust was properly established.

7. United Bank of Illinois is, upon information and belief, a bank in Illinois that was, at one point, a named beneficiary of the Policy. To date, Jackson has not determined the current existence of this bank.

8. Bank of America, N.A., is a national banking association with its principal place of business in Charlotte, North Carolina. Bank of America, N.A. is the successor in interest to LaSalle National Trust, N.A., which was a named beneficiary of the Policy.

9. The "Simon Bernstein Trust" is, upon information and belief, the Bernstein Trust listed in paragraph 3, above, and was a named contingent beneficiary of the Policy. However, based on the variance in title, to the extent it is a separate trust from the Bernstein Trust referenced above, it is named separately.

10. Subject matter jurisdiction is proper in accordance with 28 U.S.C. § 1335(a).

11. Personal jurisdiction is proper over Ted Bernstein because he, purportedly as Trustee of the Bernstein Trust, caused this underlying suit to be filed in this venue.

12. Personal jurisdiction is proper over First Arlington National Bank, United Bank of Illinois, and Bank of America in accordance with 735 ILCS 5/2-209(a)(1) because each, upon information and belief, transacts business in Illinois.

13. Personal jurisdiction is proper over Ted and Eliot Bernstein in accordance with 735 ILCS 5/2-209(a)(13) as each are believed to have an ownership interest in the Bernstein Trust, which is alleged in the underlying complaint to exist underneath laws of and to be administered within this State.

14. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b) in that a substantial part of the events giving rise to this interpleader action occurred in this District.

FACTS

15. On December 27, 1982, upon information and belief, Capitol Bankers Life Insurance Company issued the Policy, with Simon L. Bernstein as the purported insured (the "Insured").

16. Over the years, the Policy's owner(s), beneficiary(ies), contingent beneficiary(ies) and issuer changed. Among the parties listed as Policy beneficiaries (either primary or contingent) include: "Simon Bernstein"; "First Arlington National Bank, as Trustee of S.B. Lexington, Inc. Employee Death Benefit Trust"; "United Bank of Illinois"; "LaSalle National

Trust, N.A., Trustee"; "LaSalle National Trust, N.A."; "Simon Bernstein Insurance Trust dated 6/21/1995, Trust"; and "Simon Bernstein Trust, N.A."

17. At the time of the Insured's death, it appears "LaSalle National Trust, N.A." was the named primary beneficiary of the Policy, and the "Simon Bernstein Trust, N.A." was the contingent beneficiary of the Policy. The Policy's Death Benefit Proceeds are $1,689,070.00, less an outstanding loan.

18. Subsequent to the Insured's death, Ted Bernstein, through his Florida counsel (who later claimed Bernstein did not have authority to file the instant suit in Illinois on behalf of the Bernstein Trust and withdrew representation), submitted a claim to Heritage seeking payment of the Death Benefit Proceeds, purportedly as the trustee of the Bernstein Trust. Ted Bernstein claimed that the Lexington Trust was voluntarily dissolved in 1998, leaving the Bernstein Trust as the purported sole surviving Policy beneficiary at the time of the Decedent's death.

19. However, Ted Bernstein could not locate (nor could anyone else) a copy of the Bernstein Trust. Accordingly, on January 8, 2013, Reassure, successor to Heritage, responded to Ted Bernstein's counsel stating:

> In as much as the above policy provides a large death benefit in excess of $1.6 million dollars and the fact that the trust document cannot be located, we respectfully request a court order to enable us to process this claim.

20. Presently, the Bernstein Trust still has not been located. Accordingly, Jackson is not aware whether the Bernstein Trust even exists, and if it does whether its title is the "Simon Bernstein Insurance Trust dated 6/21/1995, Trust," as captioned herein, or the "Simon Bernstein Trust, N.A.", as listed as the Policy's contingent beneficiary (or otherwise), and/or if Ted Bernstein is in fact its trustee. In conjunction, Jackson has received conflicting claims as to whether Ted Bernstein had authority to file the instant suit on behalf of the Bernstein Trust.

21. In addition, it is not known whether "LaSalle National Trust, N.A." was intended to be named as the primary beneficiary in the role of a trustee (of the Lexington and/or Bernstein Trust), or otherwise. Jackson also has no evidence of the exact status of the Lexington Trust, which was allegedly dissolved.

22. Further, Jackson has received correspondence from Eliot Bernstein, attached as *Exhibit 1*, asserting that he and/or his children are potential beneficiaries under the Policy, (presumably under the Bernstein Trust, but nonetheless raising further questions as to the proper beneficiaries of the Policy), and requesting that no distributions of the Death Benefit Proceeds be made.

COUNT I- INTERPLEADER

23. This is an action of interpleader brought under Title 28 of the United States Code, Section 1335.

24. Jackson does not dispute the existence of the Policy or its obligation to pay the contractually required payment Death Benefit Proceeds under the Policy, which it has tendered into the registry of this Court.

25. Due to: (a) the inability of any party to locate the Bernstein Trust and uncertainty associated thereunder; (b) the uncertainty surrounding the existence and status of "LaSalle National Trust, N.A." (the primary beneficiary under the Policy) and the Lexington Trust; and (c) the potential conflicting claims under the Policy, Jackson is presently unable to discharge its admitted liability under the Policy.

26. Jackson is indifferent among the defendant parties, and has no interest in the benefits payable under the Policy as asserted in this interpleader other than to pay its admitted liability pursuant to the terms of the Policy, which Jackson has been unable to do by reason of uncertainty and potential competing claims.

27. Justice and equity dictate that Jackson should not be subject to disputes between the defendant parties and competing claims when it has received a non-substantiated claim for entitlement to the Death Benefit Proceeds by a trust that has yet to be located, nor a copy of which produced.

WHEREFORE, counter- and third-party plaintiff Jackson National Life Insurance Company respectfully requests pursuant to 28 U.S.C. 1335 that this Court enter an Order:

a. That counter-defendants be temporarily enjoined during the pendency of this suit and thereafter permanently and perpetually enjoined from commencing any proceedings or prosecuting any claim against Jackson in any state or federal court or other forum with respect to the Policy;

b. That judgment be entered in favor of Jackson on the Complaint in Interpleader;

c. That upon determination that the proper parties have been made subject to this suit, Jackson be excused from further attendance upon this case, be dismissed from this case with an express finding of finality pursuant to Rule 54(b) of the Federal Rules of Civil Procedure;

d. That Jackson be awarded actual court costs and reasonable attorneys' fees incurred in connection with this interpleader action to be paid out of the admitted liability deposited by it with the Clerk of the Court; and

e. That Jackson be granted such other and further relief as this Court deems just and appropriate.

JACKSON NATIONAL LIFE INSURANCE COMPANY,
By: /s/ Alexander D. Marks
One of Its Attorneys

Frederic A. Mendelsohn (ARDC No. 6193281)
Alexander D. Marks (ARDC No. 6283455)
Burke, Warren, MacKay & Serritella, P.C.
330 N. Wabash Ave., 22nd Floor
Chicago, Illinois 60611
312-840-7000
312-840-7900 (facsimile)

CERTIFICATE OF SERVICE

The undersigned, an attorney, states that on June 26, 2013 he caused a copy of the foregoing Answer to Complaint and Counter-Claim and Third-Party Complaint for Interpleader to be filed electronically with the Northern District of Illinois electronic filing system, and electronically served upon the following:

Adam M. Simon
The Simon Law Firm
303 E. Wacker Drive, Suite 210
Chicago, IL 60601

/s/ Alexander D. Marks

1434759.1

EXHIBIT 14

Policy Number
1009208

Specimen Policy

Capitol Bankers Life

CAPITOL BANKERS LIFE INSURANCE COMPANY
A Stock Company
Home Office: Minneapolis, Minnesota
Business Office: Milwaukee, Wisconsin

C6

Policy Number
Insured
Plan

Sum Insured
Age & Sex
Policy Date

Dear Policy Owner:

This policy has been written in readable language to help you understand its terms. As you read through the policy, remember the words "we", and "our" refer to Capitol Bankers Life Insurance Company. Similarly, the words "you" and "your" refer to you, the Owner of this policy.

We will, subject to the terms of this policy, pay the death benefit to the Beneficiary when due proof of the Insured's death is received at our Business Office. The terms of this policy are contained on this and the following pages.

A Policy Summary is on the other side of this page. A Table of Contents is inside the back cover.

For service or information on this policy, contact the agent who sold the policy, any of our agency offices or our Business Office.

YOU HAVE A RIGHT TO RETURN THIS POLICY. If you decide not to keep this policy, return it within ten days after you receive it. It may be returned by delivering or mailing it to our Business Office or to any of our authorized agents. Upon return, the policy will be as though it had never been issued. We will promptly refund any premium paid for it.

Signed for Capitol Bankers Life Insurance Company at Milwaukee, Wisconsin.

Sincerely yours,

Richard E. Brightbill
President

Richard D Wintamun
Vice President

CURRENT VALUE LIFE

Whole Life Insurance for an Initial Term - Renewable Annually during Life of Insured - Cash Surrender Values - Options to Change Premiums and Sum Insured - Premiums Payable during Life of Insured - Nonparticipating

Premiums, benefits and policy values may vary from those illustrated on the Issue Date. See Part 4. "Renewal Options" and Part 10. "Basis of Our Computations."

POLICY SUMMARY

About this Summary

This summary briefly highlights some of the major policy provisions. Since this is a summary, only the detailed provisions of the policy will control. See those provisions for full information and any limits or restrictions that apply. To locate this policy's provisions, use the Table of Contents on the inside of the back cover. Your policy is a legal contract between you and us. You should, therefore, READ YOUR POLICY CAREFULLY.

The Type of Policy

This policy may be continued in force until the Insured dies. It is issued for an initial term of one year, but you have the right to renew it. The benefits and premiums may be changed at the end of each Policy Year. We will pay a death benefit if the Insured dies while the policy is in force.

Guaranteed and Current Rates

We guarantee a rate basis for calculating premiums for the benefits under this policy. If our current rate basis is lower, we will charge lower premiums for the same benefits. We may change our current rate basis at the end of any Policy Year. If we increase our current rate basis, your premium will be higher, but never more than the premium on the guaranteed basis.

Lifetime Benefits

There are other rights available while the Insured is living. These include:

* The right to assign this policy.
* The right to change the Owner or any Beneficiary.
* The right to surrender this policy for its value.
* The right to make loans.

Payment Options

The policy also includes a number of Payment Options. These provide alternate ways to pay the death benefit or the amount payable upon surrender of the policy.

Exclusions

Payment of benefits may be affected by other provisions in this policy. For example, see the provisions in Part 1 about suicide, contestability and misstatement of age or sex.

Premium Payments and Grace Period

Premiums are payable in advance during the lifetime of the Insured. We allow a 31-day grace period for payment of each premium after the first one. If a premium is not paid by the end of the grace period, the policy will lapse as of the due date of that premium. Even if the policy lapses, some benefits may be available as described in Part 5. In any event, you will have the right to reinstate this policy, subject to the requirements stated in Part 5.

Riders

This policy may contain riders which include added benefits or

Part 1. Definitions and Basic Provisions

The Parties Involved—Insured, Owner, Beneficiary, Irrevocable Beneficiary

The Insured is the person whose life this policy insures. The Insured may be the Owner of this policy, or someone else may be the Owner.

The Owner is the person named as Owner of this policy in the application, unless later changed as provided in this policy. The Insured will be the Owner if no other person is named as Owner. If more than one person is named as Owner, they must act jointly unless they and we agree otherwise. Whenever the words "you" and "your" are used, they refer to the Owner.

A Beneficiary is any person named on our records to receive proceeds of this policy after the Insured dies. There may be different classes of Beneficiaries, such as Primary and Contingent. These classes set the order of payment. There may be more than one Beneficiary in a class.

Unless you provide otherwise, any death benefit that becomes payable under this policy will be paid in equal shares to the Beneficiaries living at the death of the Insured. Payments will be made successively in the following order:

a. Primary Beneficiaries.

b. Contingent Beneficiaries, if any, provided no Primary Beneficiary is living at the death of the Insured.

c. The Owner, or the Owner's executor or administrator, provided no Primary or Contingent Beneficiary is living at the death of the Insured.

Any Beneficiary may be named an Irrevocable Beneficiary. An Irrevocable Beneficiary is one whose consent is needed to change that Beneficiary. Also, this Beneficiary must consent to the exercise of certain other rights by the Owner. We discuss ownership in Part 2.

Policy Date, Issue Date, Renewal Date, and Policy Year

Two important dates (shown on the Schedule Page) are the Policy Date and the Issue Date. Usually they are the same date.

The Policy Date is the starting point for determining premium due dates, Renewal Dates and Policy Years. The first Renewal Date is one year after the Policy Date. The period from the Policy Date to the first Renewal Date, or from one Renewal Date to the next, is called a Policy Year. A Policy Year does not include the Renewal Date at the end of the year.

This policy is issued for an initial term of one Policy Year. It may be renewed for additional terms of one Policy Year while the Insured is alive. We discuss renewal in Part 4.

The Issue Date is used to determine the start of the suicide and contestability periods. We discuss contestability and suicide below. The Issue Date will be earlier than the Policy Date only if this policy includes a rider which provides temporary term life insurance for a period before the Policy Date.

Policy a Legal Contract

This policy is a legal contract between you and us. The entire contract consists of the application and the policy, which includes any attached riders. We have issued this policy in return for the application and the payment of premiums. Any change or waiver of its terms must be in writing and signed by our President, a Vice President, our Secretary or an Assistant Secretary to be effective.

Limits on Our Right to Contest This Policy

We rely on all statements made by or for the Insured in the written application. These statements are considered to be representations and not warranties. We can contest the validity of this policy for any material misrepresentation of a fact. To do so, however, the misrepresentation must be contained in the written application and a copy of the application must be attached to this policy when it is issued.

We cannot contest the validity of this policy, except for failure to pay premiums, after it has been in force during the lifetime of the Insured for two years from its Issue Date.

Suicide Exclusion

If within two years from the Issue Date the Insured dies by suicide, whether sane or insane, the amount we pay will be limited to the premiums paid less any policy debt.

Misstatement of Age or Sex

If the date of birth or the sex of the Insured has been misstated in the application, we will adjust the benefits under this policy. If the benefits purchased by the premiums paid would have been lower at the correct age and sex, we will recalculate the benefits so that the Endowment Benefit for each Policy Year is not changed. If the benefits purchased by the premiums paid would have been higher at the correct age and sex, we will recalculate the benefits so that the amount at risk for each Policy Year is not changed. (Endowment Benefit and amount at risk are defined in Part 4.)

Meaning of In Full Force, Lapse and In Force

This policy will be "in full force" from the Issue Date, provided the first premium due is paid while the Insured is alive. It will continue "in full force" as long as all premiums are paid when due. We discuss premium due dates in Part 3. It also continues in full force for 31 days after the due date of an unpaid premium. If the unpaid premium is not paid by then, this policy will "lapse" as of that due date. Then, it will no longer be in full force.

Lapse is not necessarily the same as termination. When a policy lapses, the insurance may terminate or it may continue for a limited time or amount. If insurance continues after lapse, we say that the policy remains "in force", but no longer in full force. We discuss lapse in Part 5.

Home Office and Business Office

We are chartered by the State of Minnesota and have a legal office, known as our Home Office, in Minneapolis, Minnesota. Our operations are conducted at our Business Office, 735 N. Water Street, Milwaukee, Wisconsin. Our mail address is P.O. Box 2016, Milwaukee, Wisconsin 53201.

Part 2. Ownership

Rights of Owner

While the Insured is living, you may exercise all rights given by this policy or allowed by us. These rights include assigning this policy,

changing Beneficiaries, changing ownership, enjoying all policy benefits and exercising all policy options.

The consent of any Irrevocable Beneficiary is needed to exercise any policy right except the right to:

- Change the frequency of premium payments.
- Change between regular premiums and alternate premium plans.
- Change the renewal option.
- Borrow on this policy to pay a premium on this policy.
- Reinstate this policy after lapse.

Assigning This Policy

This policy may be assigned. But for any assignment to be binding on us, we must receive a signed copy of it at our Business Office. We will not be responsible for the validity of any assignment.

Once we receive a signed copy, your rights and the interest of any Beneficiary or any other person will be subject to the assignment. An assignment is subject to any policy debt. We discuss policy debt in Part 7.

Changing the Owner or Beneficiary

The Owner or any Beneficiary may be changed during the Insured's lifetime. We do not limit the number of changes that may be made. To make a change, a written request, satisfactory to us, must be received at our Business Office. The change will take effect as of the date the request is signed, even if the Insured dies before we receive it. Each change will be subject to any payment we made or other action we took before receiving the request.

Part 3. Premium Payments

When Premiums Are Due

Premiums are the payments needed to keep this policy in full force. Premiums for each Policy Year are payable in advance during the Insured's lifetime until the end of the Policy Year. The first premium is due on the Policy Date. The first premium for a renewal Policy Year is due on the Renewal Date. Each subsequent premium is due when the period covered by the preceding premium ends. Each premium is due on the same day of the month as the day shown in the Policy Date.

Regular Premium Payments

Regular premiums may be paid annually, semiannually, quarterly or monthly. The frequency of payments may be changed by giving us advance written notice. A change may also be made as of any premium due date, without notice, by paying the regular premium for the frequency wanted. However, no premium may be paid for a period beyond the next Renewal Date. Our consent is needed if any change will result in a regular premium of less than $20.

A semiannual premium is $0.22 plus 51.5% of the annual premium. A quarterly premium is $0.52 plus 26.5% of the annual premium. A monthly premium is $0.70 plus 9% of the annual premium.

Alternate Premium Plans

We provide a number of alternate premium plans. These include a pre-authorized check payment plan. These plans are governed by the rules and rates we set. Our consent is needed to participate in any available plan.

If an alternate premium plan is terminated, regular monthly premiums will then be payable.

Grace Period

After the first premium has been paid for any Policy Year, we allow a 31 day grace period to pay each following premium. This means that each premium after the first can be paid within 31 days after its due date. During this grace period the policy remains in full force. If a premium is not paid by the end of this grace period, the policy will lapse as of the premium due date. We discuss lapse in Part 5.

Premiums for Renewal Policy Years

Premiums for the first Policy Year are shown on the Schedule Page. The premiums for a renewal Policy Year may differ from the premiums for the prior Policy Year. We discuss your Renewal Options in Part 4. The way we compute renewal premiums for the policy, excluding any attached rider, is described in Part 10. The premium for continuing any rider is shown on the Schedule Page. We will notify you of the renewal premiums before each Renewal Date.

Where to Pay Premiums

Each premium after the first one is payable at our Business Office. A receipt for premium payments signed by one of our officers will be given upon request.

Part 4. Renewal Options

Right to Renew

If this policy is in full force on a Renewal Date, it may be renewed for an additional Policy Year by paying a renewal premium. Payment must be made within 31 days of the Renewal Date. If the Insured dies within that 31 day period, this policy will be renewed automatically, but a renewal premium at the regular monthly frequency will be deducted from the death benefit.

The benefits and premiums for a renewal Policy Year may change from those in the prior term. They will depend on the Renewal Option selected. Renewal Options are discussed below. Also, we may use a rate basis which is more favorable to you than the rate basis we guarantee in this policy. Rate bases, and the way we compute renewal benefits and premiums, are discussed in Part 10.

Endowment Benefit

An Endowment Benefit will be payable at the end of the Policy Year. If the policy is not renewed, the Endowment Benefit, less any policy debt, will be paid in one sum to the Owner.

If the policy is renewed, the Endowment Benefit will not be paid, but a new Endowment Benefit will be payable at the end of the new Policy Year. The Endowment Benefit for the first Policy Year is shown on the Schedule Page. Our procedure for computing the Endowment Benefit for renewal Policy Years is discussed in Part 10. We will notify you of the renewal Endowment Benefit before each Renewal Date.

Electing a Renewal Option

You may choose a Renewal Option by notifying us in writing while the insured is alive and not later than 31 days after the Renewal Date. Any option you choose will apply until another option is elected. If no option has been chosen, Option B will apply.

Amount at Risk

In discussing Options D, E and F, we use the phrase "amount at risk." The amount at risk for a Policy Year is the Sum Insured less the Endowment Benefit.

Option A

Minimum Premium Option. The Sum Insured for the new Policy Year will be the prior Sum Insured less any policy debt repaid from the Endowment Benefit. However, the new Sum Insured will not be less than the Endowment Benefit at the end of the new Policy Year. The premium for the new Policy Year will be the smallest level premium which would permit the policy to be renewed for the new Sum Insured for the life of the Insured. In computing this premium, we will assume that the rate basis used for the renewal Policy Year will also be used for future renewal Policy Years.

Option B

Guaranteed Premium Option. The Sum Insured for the new Policy Year will be the prior Sum Insured less any policy debt repaid from the Endowment Benefit. However, the new Sum Insured will not be less than the Endowment Benefit at the end of the new Policy Year. The premium for the new Policy Year will be the smallest level premium which would permit the policy to be renewed for the new Sum Insured for the life of the Insured. In computing this premium, we will assume that the guaranteed rate basis will be used for future renewal Policy Years.

Option C

Specified Premium Option. The premium for the new Policy Year may be any amount you select, but not less than the premium required under Option A. The Sum Insured for the new Policy Year will be the prior Sum Insured less any policy debt repaid from the Endowment Benefit. The new Sum Insured will not be less than the Endowment Benefit at the end of the new Policy Year, however.

Option D

Increasing Benefit Option. The Sum Insured for the new Policy Year will be changed so that the amount at risk for the new Policy Year will be the amount at risk for the prior Policy Year. The premium for the new Policy Year will be the smallest level premium which would permit the policy to be renewed for the new Sum Insured for the life of the Insured. In computing this premium, we will assume that the rate basis used for the renewal Policy Year will also be used for future renewal Policy Years.

Option E

Extra Premium Option. The premium for the new Policy Year may be any amount you select, but not less than the premium required under Option D. The Sum Insured for the new Policy Year will be changed so that the amount at risk for the new Policy Year will be the amount at risk for the prior Policy Year.

Option F

Change in Benefit Option. The Sum Insured may be changed to any amount you select. The premium for the new Policy Year may be any amount you select, but not less than the premium required under Option A for the new Sum Insured. When this option is chosen, you may also specify changes to be made on later Renewal Dates. Any change which would increase the amount at risk may be made only with our consent, however. We may require a written application, giving evidence of insurability of the Insured, to increase the amount at risk. If an application is required, we will have the same rights to contest the validity of the in-

crease, or to limit the amount of the increase we will pay in the event of suicide, as if we had issued a separate policy for the increase in the amount at risk.

Annual Report

Before each Renewal Date while this policy is in full force, we will give you an Annual Report for this policy. This report will show the following items:

- The Sum Insured, Endowment Benefit and premium for the current Policy Year.
- The Renewal Option in effect and the Sum Insured, Endowment Benefit and premium for the next Policy Year under this option.
- Any policy debt as of the date the report is prepared.
- The minimum level renewal premium under our current rate basis (Option A) and under the guaranteed rate basis (Option B).
- Any change in our current rate basis for the next Policy Year, and its effect on values for the next Policy Year.

Illustrations

This policy includes a Table of Illustrative Values. The Table follows the Schedule Page. It is based on the Renewal Option in effect when this policy was issued. The Table shows values which would apply if the guaranteed rate basis were used for all renewal Policy Years. If you pay the premiums shown in this Table and do not change the Sum Insured, then the actual policy values will be at least as large as those shown in the Table. If you choose to pay smaller premiums, however, then the policy values may be smaller than those illustrated.

Upon request, we will provide an illustration as of the next Renewal Date of future premiums, Sums Insured and Endowment Benefits under any Renewal Option.

Part 5. Lapse and Reinstatement

What Happens If This Policy Lapses

If any premium is not paid within 31 days after its due date, this policy will lapse as of the due date of that premium. We call this premium due date the date of lapse.

Several things can occur when this policy lapses. First, this policy is no longer "in full force." If there is no cash surrender value as of the date of lapse, the insurance will terminate. But if there is a cash surrender value, it will automatically be used as a net single premium at the attained age of the Insured to provide either extended term insurance or paid-up life insurance and the policy will continue "in force."

These two types of insurance are explained below. Either will begin as of the date of lapse.

Extended Term Insurance

This is a level amount of insurance for a limited period of time. The amount of insurance is the Sum Insured on the date of lapse less any policy debt. The cash surrender value on the date of lapse determines the period of time that extended term insurance will be provided. The insurance terminates at the end of this period.

Paid-Up Life Insurance

This is a level amount of insurance for the lifetime of the Insured. The cash surrender value on the date of lapse determines the amount of paid-up life insurance that will be provided. The amount of paid-up life insurance may not exceed the Sum Insured on the date of lapse less any policy debt, however. If the cash surrender value is larger than the value of the maximum paid-up life insurance, then the paid-up insurance will be endowment insurance for the maximum amount.

Which Type of Insurance Applies

We automatically provide extended term insurance. But in the following situations, we provide paid-up life insurance instead:

- The amount of paid-up life insurance equals or is more than the amount of extended term insurance that would be provided, or
- The amount of paid-up life insurance is at least $1,000 and a written request for paid-up life insurance is received at our Business Office before the end of 62 days after the date of lapse, or
- This policy is in a special premium class. The policy is in a special premium class only if shown on the Schedule Page.

If paid-up life insurance is requested and the Insured dies within 62 days after the date of lapse, we will provide extended term insurance if it provides a larger death benefit on the date of death. But, this will happen only if the extended term insurance could have been elected on the date of lapse.

Riders Not Included

Extended term insurance and paid-up life insurance benefits do not apply to any rider attached to this policy, unless specifically provided in that rider.

Policy Rights After Lapse

While this policy is in force as extended term insurance or paid-up life insurance, all the rights granted by it are still available, unless this policy states otherwise.

Reinstatement

After this policy has lapsed, it may be reinstated -- that is, put back in full force. However, the policy cannot be reinstated if it has been surrendered for its cash surrender value. Reinstatement must be made within five years after the date of lapse and during the Insured's lifetime. Also, all policy debt must be repaid or reinstated with interest, from the date of lapse to the date of reinstatement. Interest will be at the rate used for policy loans. Further requirements depend on when this policy is reinstated.

Prompt Reinstatement -- This is reinstatement within 62 days after the date of lapse. Evidence of insurability is not required. All overdue premiums must be paid.

Later Reinstatement -- This is reinstatement more than 62 days after the date of lapse. Evidence of insurability satisfactory to us is required. All overdue premiums must be paid with interest from their due dates to the date of reinstatement. Interest will be at the rate used for policy loans.

Part 6. Policy Loans

Right to Make Loans

After the first Policy Year, loans can be made on this policy at any time while it is in full force. Loans can also be made if it is in force after lapse as paid-up insurance. However, the policy must be properly assigned to us before any loan is made. No other collateral is needed. We may delay granting any loan for up to six months, except for a loan to pay premiums on this policy or any other policy we issue. We refer to all outstanding loans less unearned interest as "policy debt."

Maximum Loan Available

The maximum policy loan is an amount equal to the cash surrender value on the next Renewal Date less any premiums due before then. Any amount due us on the date of the loan will be subtracted from the loan. Interest due on the loan will also be subtracted. We will pay the balance.

Interest

The interest rate for loans is stated on the Schedule Page. Interest to the next Renewal Date is due in advance when a loan is made. If interest is not paid when due, it will be added to the policy debt and will bear interest at the same rate.

If any policy debt is repaid, any unearned interest on the amount repaid will be credited to the loan amount. Any unearned interest will be added to the death benefit if the Insured dies. It will be added to the cash surrender value if the policy is surrendered or lapses.

Repayment

Policy debt may be repaid anytime while this policy is in force. It may not be repaid after the Insured dies. If there is any policy debt on a Renewal Date, it will be repaid out of the Endowment Benefit. In lieu of this automatic repayment, any policy debt outstanding on a Renewal Date may be repaid in cash within 31 days after the Renewal Date, but interest must be paid to the date of repayment. If this is done, we will calculate the benefits and premiums for the next Policy Year as if repayment had been made on the Renewal Date.

Policy Debt Limit

Policy debt may not equal or exceed the policy value. If this limit is reached, we can terminate this policy. To terminate for this reason we must mail written notice to the Owner and any assignee shown on our records at their last known addresses. This notice will state an amount that will bring the policy debt back within the limit. If we do not receive payment within 31 days after the date we mailed the notice, this policy will terminate at the end of those 31 days.

Part 7. Cash Surrender

Right to Surrender

This policy may be surrendered for its cash surrender value any time before the Insured dies. Surrender will be effective on the date we receive this policy and a written surrender request, satisfactory to us, at our Business Office. A later effective date may be elected in the surrender request.

Policy Value

The policy value on any Renewal Date is the Endowment Benefit if the policy is in full force. The policy value on the first Renewal Date is shown

on the Schedule Page. The policy value on any later Renewal Date will depend on the renewal option elected. This is discussed in Part 4.

The policy value can be computed at any time during a Policy Year. In that case allowance will be made for the period of time since the last Renewal Date and for any premiums paid for any part of that Policy Year.

If this policy is in force after lapse, the policy value at any time is the reserve for the insurance provided. See "Part 10. Basis of Computations."

Cash Surrender Value

The cash surrender value is the policy value less any policy debt.

We compute all the amounts that go into the cash surrender value as of the effective date of surrender. However, in two situations the policy value is computed as of an earlier date. First, if this policy is surrendered within 62 days after the due date of an unpaid premium, the value will not be less than it was on that due date. Second, if the policy is surrendered within 30 days after a Renewal Date while extended term insurance or paid-up life insurance is in effect, the value will not be less than it was on that Renewal Date. We use these earlier dates only if a higher cash surrender value results.

How We Pay

The cash surrender value may be paid in one sum, or it may be applied under any payment option elected. See "Part 9. Payment of Policy Proceeds." We may delay paying the cash surrender value for up to six months from the date the request and this policy are received at our Business Office. If payment is delayed for 30 days or more, we will add interest to it. The amount of interest will be the same as would be paid under Option 4 of the payment options for that period of time.

Part 8. The Death Benefit

Amount of the Death Benefit

The death benefit is the amount of money we will pay when due proof of the Insured's death is received at our Business Office. The amount of the death benefit will be determined as of the date of death. Any amounts paid to us after that date will be refunded. Any payments made by us after that date will be deducted from the death benefit.

If the Insured dies while this policy is in full force, the basic death benefit is the Sum Insured for the Policy Year in which death occurred. If the Insured dies while this policy is in force after lapse, the basic death benefit will be the amount of extended term insurance or paid-up life insurance. The death benefit is the basic death benefit with certain additions and deductions. We add the part of any premium paid for a period beyond the Policy Month of death. We deduct any policy debt. We also deduct a premium on the regular monthly frequency, if death occurs within 31 days of the due date of an unpaid premium.

Interest on the Death Benefit

If the death benefit is paid in one sum, we will add interest from the date of death to the date of payment. The amount of interest will be the same as would be paid under Option 4 of the payment options for that period of time. See "Part 9. Payment of Policy Proceeds" for a description of Option 4.

If the death benefit is applied under a payment option, interest will be paid from the date of death to the effective date of that option. It will be paid in one sum to the Beneficiary living on that effective date. The amount of interest will be the same as would be paid under Option 4 for that period of time.

Part 9. Payment of Policy Proceeds

Availability of Options

The proceeds of this policy will be paid in one sum unless otherwise provided. As an alternative to payment in one sum, all or part of the proceeds may be applied under a payment option. However, our consent is required for the election of a payment option by a fiduciary or any entity other than a natural person. If this policy is assigned, any amount due to the assignee will be paid in one sum. The balance, if any, may be applied under any payment option.

Electing a Payment Option

To elect any option, we require that a written request, satisfactory to us, be received at our Business Office. You may elect an option during the Insured's lifetime. If the death benefit is payable in one sum when the Insured dies, the Beneficiary may elect an option. The Beneficiary must make this choice before we have paid the proceeds and within three months after we receive due proof of the Insured's death.

Unless we agree otherwise when the option is elected, all payments under any option chosen will be made to the designated payee or to his or her executor or administrator. We may require proof of age of any person or persons on whose life payments depend as well as proof of the continued survival of any such person(s).

Minimum Amounts

If the amount to be applied under any option for any payee is less than $5,000, we may pay that amount in one sum instead. If the payments to any person under any option come to less than $50 each, we have the right to make payments at less frequent intervals.

Description of Options

This section provides a brief description of the various payment options that are available. Any other payment option agreed to by us may be elected. The payment options are described in terms of monthly payments. Annual, semiannual, or quarterly payments may be requested instead. The amount of these payments will be determined in a way which is consistent with monthly payments and will be quoted on request.

At the end of this Part you will find tables illustrating the guaranteed monthly payment provided by several of the options described in this section. The amounts shown for Option 1, Option 2 and Option 5 are the minimum monthly payments for each $1,000 applied. The actual payments will be based on the monthly payment rates we are using when the first payment is due. They will not be less than those shown in the tables.

Option 1

Fixed Time Payment Option. Equal monthly payments will be made for

any period selected, up to 30 years. The amount of each payment depends on the total amount applied, the period selected and the monthly payment rates we are using when the first payment is due. The rate of any payment will not be less than shown in Payment Option Table 1.

Option 2

Lifetime Payment Option. Equal monthly payments are based on the life of a named person. Payments will continue for the lifetime of that person. The variations are:

Payments guaranteed for 10 or 20 years. Payments stop at the end of the selected guaranteed period or when the named person dies, whichever is later.

Payments guaranteed for amount applied. Payments stop when they equal the amount applied or when the named person dies, whichever is later.

The amount of each payment depends on the total amount applied, the variation selected, the age and sex of the named person and the monthly payment rates we are using when the first payment is due. The rate of any payment will not be less than shown in Payment Option Table 2.

Option 3

Fixed Amount Payment Option. Each monthly payment will be for an agreed fixed amount. The amount of each payment may not be less than $15 for each $1,000 applied. Interest will be credited each month on the unpaid balance and added to it. This interest will be at a rate determined by us, but not less than the equivalent of 4% per year. We may change the rate from time to time, but not more than once per year. Payments continue until the amount we hold runs out. The last payment will be for the balance only.

Option 4

Interest Payment Option. We will hold any amount applied under this option. Interest on the unpaid balance will be paid each month at a rate determined by us. This rate will be not less than the equivalent of 4% per year. We may change the rate from time to time, but not more than once per year. Upon death of the payee, we will pay the amount held by us along with any accrued and unpaid interest.

Option 5

Joint Lifetime Payment Option With Reduced Payments. Monthly payments are based on the lives of two named persons. Payments will continue while both are living. When one dies, payments are reduced by one-third and will continue for the lifetime of the other. Payments stop when both persons have died.

The amount of each payment depends on the total amount applied, the ages and sexes of the named persons and the monthly payment rates we are using when the first payment is due. The rate of any payment will not be less than shown in Payment Option Table 3.

Option 6

Single Premium Life Annuity Purchase Option. Any single premium immediate life annuity being issued by us on the effective date of the option may be purchased at a reduced premium rate. The premium rate for the annuity will be 4% less than our then published premium rate.

Effective Date and Payment Dates

The effective date of an option is the date the amount is applied under that option. For a death benefit, this is the date that due proof of the Insured's death is received at our Business Office. For the cash surrender value, it is the effective date of surrender.

The first payment is due on the effective date, except the first payment under Option 4 is due one month later. A later date for the first payment may be requested in the payment option election. All payment dates will fall on the same date of the month as the first one. No payment will become due until a payment date. No part payment will be made for any period shorter than the time between payment dates.

Withdrawals and Changes

If provided in the payment option election, all or part of the unpaid balance under Option 3 or 4 may be withdrawn or applied under any other option. If the cash surrender value is applied under either option, we may delay payment of any withdrawal for up to six months after the date of surrender. Interest at the rate in effect for Option 4 during this period will be paid on the amount withdrawn.

Payments under Options 1, 2 and 5 may not be anticipated, withdrawn before due, or applied under any other option.

Income Protection

To the extent permitted by law, each option payment and any withdrawal shall be free from legal process and the claim of any creditor of the person entitled to it. No option payment and no amount held under an option can be taken or assigned in advance of its payment date, unless the Owner's written consent is given before the Insured dies. This consent must be received at our Business Office.

Supplementary Contract

We will issue to the payee a supplementary contract stating the terms of settlement under the payment option elected.

PAYMENT OPTION TABLES – Minimum Monthly Income Guaranteed Per $1,000 of Proceeds

TABLE 1
INSTALLMENT PAYMENTS FOR A SPECIFIED PERIOD OF TIME

No. of Years	Monthly Payments	No. of Years	Monthly Payments
1	84.84	15	7.00
2	43.25	17	6.71
3	29.49	18	6.44
4	22.47	19	6.21
5	18.22	20	6.00
6	15.38	21	5.81
7	13.69	22	5.64
8	12.12	23	5.49
9	10.97	24	5.35
10	10.06	25	5.22
11	9.31	26	5.10
12	8.69	27	5.00
13	8.17	28	4.90
14	7.72	29	4.80
15	7.34	30	4.72

Annual Payment is 11.287 times the monthly income.

Quarterly Payment is 2.990 times the monthly payment

TABLE 2
LIFE INCOME PAYMENTS WITH INSTALLMENT PAYMENTS FOR A SPECIFIED PERIOD OF TIME
The amount of income is based on the sex and age last birthday of the payee on the due date of the first payment

Age of Payee	PAYMENTS GUARANTEED FOR 10 Years Male	10 Years Female	20 Years Male	20 Years Female	Amt. Applied Male	Amt. Applied Female
0,6	3.54	3.47	3.53	3.47	3.51	3.46
7	3.55	3.48	3.54	3.48	3.52	3.47
8	3.55	3.49	3.54	3.48	3.54	3.48
9	3.57	3.50	3.57	3.50	3.56	3.49
10	3.58	3.51	3.58	3.51	3.57	3.51
11	3.60	3.52	3.59	3.52	3.58	3.52
12	3.61	3.53	3.60	3.53	3.59	3.53
13	3.62	3.54	3.62	3.54	3.61	3.54
14	3.64	3.55	3.63	3.55	3.62	3.55
15	3.65	3.57	3.65	3.56	3.64	3.56
16	3.67	3.58	3.66	3.58	3.65	3.58
17	3.69	3.59	3.68	3.59	3.67	3.59
18	3.71	3.61	3.70	3.60	3.69	3.60
19	3.72	3.62	3.71	3.62	3.70	3.62
20	3.74	3.64	3.73	3.63	3.72	3.63
21	3.76	3.65	3.75	3.65	3.74	3.65
22	3.78	3.67	3.77	3.66	3.76	3.66
23	3.81	3.68	3.79	3.68	3.78	3.68
24	3.83	3.70	3.81	3.70	3.81	3.70
25	3.85	3.72	3.84	3.71	3.83	3.71
26	3.88	3.74	3.86	3.73	3.86	3.73
27	3.91	3.76	3.89	3.75	3.89	3.74
28	3.93	3.78	3.91	3.77	3.91	3.76
29	3.96	3.81	3.94	3.79	3.94	3.78
30	3.99	3.83	3.97	3.82	3.97	3.81
31	4.03	3.85	4.00	3.84	4.00	3.83
32	4.06	3.88	4.03	3.87	4.03	3.86
33	4.10	3.91	4.06	3.89	4.06	3.88
34	4.13	3.94	4.10	3.92	4.10	3.91
35	4.17	3.97	4.13	3.95	4.13	3.94

Age of Payee	PAYMENTS GUARANTEED FOR 10 Years Male	10 Years Female	20 Years Male	20 Years Female	Amt. Applied Male	Amt. Applied Female
36	4.22	4.00	4.12	3.98	4.17	3.97
37	4.26	4.03	4.20	4.01	4.21	4.00
38	4.31	4.07	4.24	4.04	4.25	4.03
39	4.35	4.10	4.28	4.07	4.29	4.06
40	4.40	4.14	4.32	4.11	4.33	4.10
41	4.46	4.18	4.37	4.14	4.38	4.13
42	4.51	4.22	4.41	4.18	4.43	4.17
43	4.57	4.27	4.46	4.22	4.48	4.21
44	4.63	4.32	4.50	4.26	4.53	4.26
45	4.69	4.38	4.55	4.31	4.58	4.31
46	4.76	4.42	4.60	4.35	4.64	4.35
47	4.83	4.47	4.65	4.40	4.70	4.40
48	4.90	4.53	4.70	4.44	4.75	4.44
49	4.97	4.59	4.75	4.49	4.81	4.50
50	5.05	4.65	4.81	4.55	4.86	4.56
51	5.12	4.72	4.86	4.60	4.96	4.63
52	5.21	4.79	4.92	4.65	5.03	4.70
53	5.29	4.87	4.98	4.72	5.09	4.78
54	5.38	4.94	5.03	4.78	5.16	4.83
55	5.48	5.02	5.08	4.84	5.27	4.91
56	5.58	5.11	5.15	4.90	5.35	4.99
57	5.68	5.20	5.21	4.97	5.42	5.07
58	5.78	5.30	5.27	5.03	5.54	5.16
59	5.90	5.40	5.33	5.10	5.66	5.25
60	6.02	5.51	5.39	5.17	5.78	5.33
61	6.14	5.62	5.45	5.24	6.90	5.44
62	6.27	5.74	5.50	5.31	6.02	5.55
63	6.41	5.86	5.56	5.38	6.14	5.67
64	6.55	6.00	5.61	5.44	6.27	5.78
65	6.70	6.14	5.65	5.51	6.42	5.93
66	6.85	6.29	5.71	5.57	6.57	6.07
67	7.01	6.45	5.75	5.63	6.73	6.22
68	7.17	6.62	5.79	5.69	6.90	6.39
69	7.34	6.80	5.83	5.74	7.08	6.56
70	7.51	6.98	5.87	5.78	7.27	6.76
71	7.69	7.18	5.89	5.82	7.48	6.94
72	7.87	7.37	5.92	5.86	7.70	7.15
73	8.05	7.58	5.94	5.89	7.93	7.37
74	8.23	7.78	5.96	5.91	8.18	7.61
75	8.41	7.99	5.97	5.93	8.44	7.86
76	8.58	8.20	5.98	5.95	8.72	8.13
77	8.76	8.40	5.99	5.96	9.02	8.43
78	8.92	8.59	5.99	5.97	9.35	8.73
79	9.08	8.78	5.99	5.98	9.70	9.07
80	9.23	8.96	6.00	5.99	10.06	9.42
81	9.37	9.12			10.47	9.78
82	9.50	9.26			10.89	10.18
83	9.62	9.39			11.36	10.60
84	9.72	9.50			11.88	11.08
85	9.80	9.60			12.42	11.48

TABLE 3
JOINT AND TWO THIRDS TO THE SURVIVOR LIFE PAYMENT
The amount of income is based on the sex and age last birthday of each of the payees on the due date of the first payment

Age of Male Payee	AGE OF FEMALE PAYEE 50	55	60	65	70	75	80	85
45	4.53	4.70	4.88	5.09	5.33	5.60	5.89	6.16
46	4.56	4.74	4.92	5.14	5.38	5.66	5.96	6.24
47	4.60	4.77	4.97	5.18	5.44	5.73	6.03	6.32
48	4.63	4.81	5.01	5.23	5.50	5.80	6.11	6.41
49	4.66	4.85	5.05	5.29	5.56	5.87	6.19	6.50
50	4.69	4.88	5.10	5.34	5.62	5.94	6.27	6.59
51	4.72	4.92	5.14	5.39	5.68	6.01	6.36	6.68
52	4.76	4.96	5.19	5.45	5.75	6.08	6.45	6.79
53	4.79	5.00	5.24	5.50	5.82	6.17	6.54	6.89
54	4.83	5.04	5.29	5.56	5.89	6.25	6.63	7.00
55	4.88	5.08	5.34	5.62	5.96	6.34	6.74	7.12
56	4.89	5.13	5.39	5.68	6.03	6.43	6.84	7.24

Age of Male Payee	AGE OF FEMALE PAYEE 50	55	60	65	70	75	80	85
57	4.93	5.17	5.44	5.75	6.11	6.52	6.95	7.36
58	4.97	5.21	5.49	5.81	6.19	6.61	7.06	7.49
59	5.00	5.26	5.54	5.88	6.27	6.71	7.18	7.63
60	5.04	5.30	5.60	5.94	6.35	6.81	7.30	7.77
61	5.08	5.35	5.66	6.01	6.44	6.92	7.43	7.93
62	5.12	5.39	5.71	6.00	6.53	7.03	7.57	8.09
63	5.16	5.44	5.77	6.16	6.62	7.15	7.71	8.26
64	5.20	5.49	5.83	6.23	6.72	7.27	7.85	8.42
65	5.24	5.54	5.89	6.31	6.81	7.39	8.02	8.62
66	5.29	5.59	5.95	6.38	6.91	7.52	8.18	8.82
67	5.33	5.64	6.01	8.46	7.02	7.66	8.35	9.03
68	5.37	5.69	6.08	6.54	7.12	7.80	8.53	9.25

Age of Male Payee	AGE OF FEMALE PAYEE 50	55	60	65	70	75	80	85
69	5.42	5.76	6.14	6.63	7.23	7.96	8.71	9.48
70	5.46	5.80	6.21	6.71	7.34	8.09	8.91	9.72
71	5.51	5.85	6.27	6.79	7.45	8.24	9.11	9.98
72	5.56	5.91	6.34	6.88	7.58	8.39	9.32	10.24
73	5.60	5.98	6.41	6.96	7.68	8.55	9.53	10.52
74	5.66	6.02	6.48	7.05	7.80	8.71	9.75	10.81
75	5.70	6.08	6.54	7.14	7.91	8.88	9.96	11.12
76	5.75	6.13	6.61	7.22	8.03	9.04	10.21	11.43
77	5.80	6.19	6.68	7.31	8.15	9.21	10.45	11.76
78	5.85	6.25	6.75	7.40	8.27	9.38	10.70	12.10
79	5.90	6.31	6.82	7.49	8.39	9.55	10.95	12.45
80	5.94	6.36	6.89	7.57	8.51	9.72	11.20	12.81

Payments for other combinations of age and sex will be furnished on request.

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Part 10. Basis of Our Computations

Guaranteed and Current Rate Basis

You determine both the Sum Insured and the premium for each renewal Policy Year when you choose the Renewal Option. (See Part 4.) From these, we calculate the Endowment Benefit for the new Policy Year. (See "Amount of Endowment Benefit" below). We call the combination of the mortality table, the interest rate and the expense charges used in this calculation our "rate basis." Our "guaranteed rate basis" consists of the actuarial assumptions set out below and an expense charge equal to the factor times the annual mode premium. This expense charge factor is stated on the Schedule Page. This rate basis cannot be changed.

Our "current rate basis" is a different combination of mortality table, interest rate and expense charges which we use for policies of this class. We may change our current rate basis from time to time. Any change will take effect on the next Renewal Date. We will change our current rate basis only to reflect changes in expected future mortality experience, interest return and level of expenses for policies of this class. We will not change our current rate basis to reflect past profits or losses. Our current rate basis will not be affected by any adverse change in the risk class of the insured.

When this policy is renewed, we will use our current rate basis to calculate the Endowment Benefit for the new Policy Year if this will give you a larger Endowment Benefit. In this case, the larger Endowment Benefit will be guaranteed for the new Policy Year and all calculations of the policy values during the year will be based on that Endowment Benefit. If our current rate basis is used to compute the Endowment Benefit for a Policy Year, we will also use this basis to compute the minimum premium needed to renew the policy. (See "Minimum Renewal Premium" below.)

Actuarial Assumptions

This section discusses the mortality and interest rates we use to compute benefits, premiums and reserves for this policy. Except as otherwise stated above, we use the Commissioners 1958 Standard Ordinary Mortality Table, an interest rate of 4½% per year and curtate functions. For extended term insurance calculations we use the Commissioners 1958 Extended Term Mortality Table. If the Insured is female, the mortality rates for ages 18 and older are the rates for a male 6 years younger. For females ages 12 through 17, we use the male mortality rate for age 12. Below age 12, the female mortality rates are the same as the male rates.

Special Premium Class

This policy is in a special premium class only if shown on the Schedule Page. While this policy is in a special premium class, we will increase the mortality rates used in calculating the Endowment Benefits and the minimum premiums for renewal Policy Years. These increases in the mortality rates are guaranteed from the Issue Date and may not be increased thereafter. Upon request, we will furnish you with a copy of any special premium class mortality rate increases used for this policy.

Amount of Endowment Benefit

The Endowment Benefit for the first Policy Year is shown on the Schedule Page.

The Endowment Benefit for any renewal Policy Year is calculated as follows. We take the annual mode premium elected for the new Policy Year. We deduct the expense charge from this premium. We add the Endowment Benefit for the prior Policy Year. We deduct any portion of the prior Endowment Benefit used to repay policy debt on the Renewal Date. We deduct the one year term net single premium for the new Sum Insured. We divide the result by the net single premium for a one year pure endowment of one. The quotient is the Endowment Benefit at the end of the new Policy Year.

Minimum Renewal

We take the present value at the attained age of the Insured for an amount of whole life insurance equal to the Sum Insured for the new Policy Year. We subtract the Endowment Benefit at the end of the prior Policy Year. We add any policy debt repaid from that Endowment Benefit. We divide by the present value at the attained age of the Insured of a life annuity due of one minus the expense charge factor per year. The minimum renewal premium is the quotient, but not less than zero.

Reserves and Policy Values

The reserve is the amount of money which, according to our assumptions, must be held and invested to provide future benefits guaranteed under this policy. The policy value is the cash surrender value if there is no policy debt. Reserves and policy values are always computed using the assumptions stated under "Actuarial Assumptions" above.

We have filed a detailed statement of the method we use to calculate reserves, policy values and paid-up insurance benefits with the state where this policy is delivered. All these values and benefits are not less than those required by the laws of that state.

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Nonparticipating

Capitol Bankers Life

CAPITOL BANKERS LIFE INSURANCE COMPANY
Home Office: Minneapolis, Minnesota
Business Office: Milwaukee, Wisconsin

Please read your policy and the copy of your application which is attached. If there is any feature of the policy you do not understand, you should ask the agent who sold the policy or write us. Should you find any error or omission in your application, we urge you to write us, so that we may give immediate consideration to the error or omission.

When writing to our Business Office, please use the number of your policy.

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S C H E D U L E P A G E

THIS PAGE SHOWS SPECIFIC INFORMATION ABOUT THIS POLICY AND IS REFERRED TO THROUGHOUT THE POLICY.

POLICY NUMBER:	1009208	$2,000,000	SUM INSURED
INSURED:	SIMON BERNSTEIN	47 MALE	AGE AND SEX
PLAN:	CURRENT VALUE LIFE	DEC 27, 1982	POLICY DATE

THE OWNER AND BENEFICIARY ARE AS STATED IN THE APPLICATION UNLESS LATER CHANGED. THIS POLICY IS IN A PREFERRED PREMIUM CLASS.
THE ISSUE DATE OF THIS POLICY IS DEC 27, 1982.

EXPENSE CHARGE FACTOR FOR GUARANTEED RATE BASIS (SEE PART 10): 0.15258
POLICY LOAN INTEREST RATE (SEE PART 6): 7.40% PER YEAR (IN ADVANCE).

- -

THE CHARGE FOR ANY ADDITIONAL BENEFITS WHICH ARE PROVIDED BY RIDER IS SHOWN BELOW. ONLY A BRIEF DESCRIPTION IS GIVEN. THE COMPLETE PROVISIONS ARE INCLUDED IN THE RIDER.

RIDER NUMBER	BENEFITS PROVIDED	ANNUAL PREMIUM
**********	**********	**********
	-NONE-	NO CHARGE

- -

ENDOWMENT BENEFIT AT END OF FIRST POLICY YEAR: NONE

TOTAL PREMIUMS FOR FIRST POLICY YEAR, INCLUDING ANY RIDER PREMIUMS:

ANNUAL	SEMIANNUAL	QUARTERLY	MONTHLY
$24,235.00	$12,481.24	$6,422.79	$2,181.85

PREMIUMS FOR RENEWAL YEARS MAY DIFFER, SEE PART 4 - RENEWAL OPTIONS.
YOU WILL BE NOTIFIED OF RENEWAL PREMIUMS BEFORE EACH RENEWAL DATE.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SIMON BERNSTEIN IRREVOCABLE INSURANCE TRUST DTD 6/21/95, Plaintiff, v. HERITAGE UNION LIFE INSURANCE COMPANY, Defendant, HERITAGE UNION LIFE INSURANCE COMPANY Counter-Plaintiff v. SIMON BERNSTEIN IRREVOCABLE INSURANCE TRUST DTD 6/21/95 Counter-Defendant and, FIRST ARLINGTON NATIONAL BANK as Trustee of S.B. Lexington, Inc. Employee Death Benefit Trust, UNITED BANK OF ILLINOIS, BANK OF AMERICA, Successor in interest to LaSalle National Trust, N.A., SIMON BERNSTEIN TRUST, N.A., TED BERNSTEIN, individually and as purported Trustee of the Simon Bernstein Irrevocable Insurance Trust Dtd 6/21/95, and ELIOT BERNSTEIN Third-Party Defendants.	**Case No. 13 cv 3643** **Honorable John Robert Blakey** **Magistrate Mary M. Rowland** **Filers: Simon Bernstein Irrevocable Insurance Trust Dated 6/21/95, Ted Bernstein, as Trustee and Individually, Pamela B. Simon, Adam M. Simon, David B. Simon, The Simon Law Firm, STP Enterprises, Inc. ("Movants").**

ELIOT IVAN BERNSTEIN,

Cross-Plaintiff

v.

TED BERNSTEIN, individually and as alleged Trustee of the Simon Bernstein Irrevocable Insurance Trust Dtd, 6/21/95

Cross-Defendant

and,

PAMELA B. SIMON, DAVID B.SIMON, both Professionally and Personally ADAM SIMON, both Professionally and Personally, THE SIMON LAW FIRM, TESCHER & SPALLINA, P.A., DONALD TESCHER, both Professionally and Personally, ROBERT SPALLINA, both Professionally and Personally, LISA FRIEDSTEIN, JILL IANTONI S.B. LEXINGTON, INC. EMPLOYEE DEATH BENEFIT TRUST, S.T.P. ENTERPRISES, INC. S.B. LEXINGTON, INC., NATIONAL SERVICE ASSOCIATION (OF FLORIDA), NATIONAL SERVICE ASSOCIATION (OF ILLINOIS) AND JOHN AND JANE DOES

Third-Party Defendants.

NOTICE TO PRO SE LITIGANT
REGARDING SUMMARY JUDGMENT

To: Eliot Ivan Bernstein
2753 NW 34 St.
Boca Raton, FL 33434
Pro Se Litigant

The Movants listed above have moved for summary judgment against you. This means that Movants are telling the judge that there is no disagreement about the important facts of your claims. The plaintiffs are also claiming that there is no need for a trial of your claims and is asking the judge to decide that your claims should be dismissed based on its written argument about what the law is.

In order to defeat the Movants' request, you need to do one of two things: you need to show that there is a dispute about important facts and a trial is needed to decide what the actual facts are or you need to explain why the Movants are wrong about what the law is.

Your response must comply with Rule 56(e) of the Federal Rules of Civil Procedure and Local Rule 56.1 of this court. These rules are available at any law library. Your Rule 56.1 statement needs to have numbered paragraphs responding to each paragraph in the Movant's statement of facts. If you disagree with any fact offered by Movants you need to explain how and why you disagree with Movants. You also need to explain how the documents or declarations that you are submitting support your version of the facts. If you think some of the facts offered by Movants are immaterial or irrelevant you need to explain why you believe those facts should not be considered.

In your response, you must also describe and include copies of documents which show why you disagree with Movants about the facts of the case. You may rely on your own declaration or the declaration of other witnesses. A declaration is a signed statement of a witness. The declaration must end with the following phrase:

"I declare under the penalty of perjury under the laws of the United States that the foregoing is true and correct", and must be dated.

If you do not provide the Court with evidence that shows that there is a dispute about the facts, the judge will be required to assume that Movants' factual contentions are true, and if Movants are also correct about the law, Movants motion for summary judgment as to your claims will be granted.

If you choose to do so, you may offer the Court a list of facts that you believe are in dispute and require a trial to decide. Your list of disputed facts should be supported by your documents or declarations that support your position. If you do not do so, the judge will be forced to assume you do not dispute the facts which you have not responded to.

Finally, you should explain why you think the Movants are wrong about what the law is.

Dated: May 21, 2016

/s/ Adam Simon
Adam Simon, Esq.
#6205304
303 East Wacker Drive,
Suite 2725
Chicago, Illinois 60601
(312) 819-0730
Attorney for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SIMON BERNSTEIN IRREVOCABLE INSURANCE TRUST DTD 6/21/95,

Plaintiff,

v.

HERITAGE UNION LIFE INSURANCE COMPANY,

Defendant,

HERITAGE UNION LIFE INSURANCE COMPANY

Counter-Plaintiff

v.

SIMON BERNSTEIN IRREVOCABLE INSURANCE TRUST DTD 6/21/95

Counter-Defendant

and,

FIRST ARLINGTON NATIONAL BANK as Trustee of S.B. Lexington, Inc. Employee Death Benefit Trust, UNITED BANK OF ILLINOIS, BANK OF AMERICA, Successor in interest to LaSalle National Trust, N.A., SIMON BERNSTEIN TRUST, N.A., TED BERNSTEIN, individually and as purported Trustee of the Simon Bernstein Irrevocable Insurance Trust Dtd 6/21/95, and ELIOT BERNSTEIN

Third-Party Defendants.

ELIOT IVAN BERNSTEIN,

Cross-Plaintiff

v.

TED BERNSTEIN, individually and as alleged Trustee of the Simon Bernstein Irrevocable Insurance Trust Dtd, 6/21/95

Cross-Defendant

Case No. 13 cv 3643
Honorable John Robert Blakey
Magistrate Mary M. Rowland

Filers: Simon Bernstein Irrevocable Insurance Trust Dated 6/21/95, Ted Bernstein, as Trustee and Individually, Pamela B. Simon, Adam M. Simon, David B. Simon, The Simon Law Firm, STP Enterprises, Inc. ("Movants").

and,	)
	)
PAMELA B. SIMON, DAVID B.SIMON, both Professionally and Personally ADAM SIMON, both Professionally and Personally, THE SIMON LAW FIRM, TESCHER & SPALLINA, P.A., DONALD TESCHER, both Professionally and Personally, ROBERT SPALLINA, both Professionally and Personally, LISA FRIEDSTEIN, JILL IANTONI S.B. LEXINGTON, INC. EMPLOYEE DEATH BENEFIT TRUST, S.T.P. ENTERPRISES, INC. S.B. LEXINGTON, INC., NATIONAL SERVICE ASSOCIATION (OF FLORIDA), NATIONAL SERVICE ASSOCIATION (OF ILLINOIS) AND JOHN AND JANE DOES	)
	)
Third-Party Defendants.	)
_____	)

NOTICE OF FILING

To: SEE CERTIFICATE OF SERVICE ATTACHED

PLEASE TAKE NOTICE that the following document, a copy of which is attached, was electronically filed with the Clerk of the Court on the date indicated in the time stamp above:

- MOVANTS' MOTION FOR SUMMARY JUDGMENT
- MOVANTS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT
- MOVANTS' STATEMENT OF UNDISPUTED MATERIAL FACTS
- APPENDIX OF EXHIBITS AND EXHIBITS 1-14 TO STATEMENT OF UNDISPUTED MATERIAL FACTS
- NOTICE TO PRO SE LITIGANT REGARDING SUMMARY JUDGMENT

DATED: MAY 21, 2016

RESPECTFULLY
SUBMITTED,

/s/Adam Simon
Adam M. Simon
#6205304
303 E. Wacker Drive
Ste. 2725
Chicago, IL 60601
(312) 819-0730

CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that he caused a copy of the documents set forth below to be filed and served via ECF with the Clerk of the Court, and via U.S. mail if indicated, proper postage prepaid to the following on May 21, 2016:

ELIOT IVAN BERNSTEIN
2753 NW 34 St.
Boca Raton, FL 33434
Appearing Pro Se
(By U.S. Mail)

Lisa Friedstein
2142 Churchill Lane
Highland Park, IL 60035
(By U.S. Mail)

Jill Iantoni
2101 Magnolia Lane
Highland Park, IL 60035
(By U.S. Mail)

James J. Stamos
Kevin Horan
STAMOS & TRUCCO LLP
One East Wacker Drive, Third Floor
Chicago, IL 60601
Attorney for Intervenor,
Estate of Simon Bernstein

/s/ Adam M. Simon
Adam Simon, Esq.
#6205304
303 East Wacker Drive, Suite 2725
Chicago, Illinois 60601
Attorney for Movants
(312) 819-0730

22 Ill. App.3d 410 (1974)
318 N.E.2d 52

BANK OF LYONS, Plaintiff-Appellant,
v.
ALVIN A. SCHULTZ et al., Defendants — (MARY SCHULTZ, Defendant-Appellee.)

No. 59189.

Illinois Appellate Court — First District (4th Division).

September 11, 1974.

412 *411 *412 Hoffman & Davis, of Chicago, for appellant.

Edward J. Barrett, of Chicago, for appellee.

Orders affirmed.

Mr. JUSTICE BURMAN delivered the opinion of the court:

This action was begun by the **Bank** of **Lyons** on April 13, 1962, as a creditor's suit to enforce a judgment against Alvin **Schultz** for $61,038.94. Named as defendants were Alvin **Schultz**, Mary **Schultz**, his former wife and the present appellee, several insurance companies that had issued policies on the life of Alvin **Schultz**, and others not related to this appeal. Alvin **Schultz** died during the pendency of the action. On July 19, 1963, the plaintiff was given leave to amend its complaint by adding a second count. This alleged that Alvin **Schultz** and Mary **Schultz** had conspired to defraud the plaintiff of $240,301.87 and sought, among other relief, a decree enjoining the insurance companies from paying the death benefits under any of the policies. The court granted the injunction and ordered the companies to file interpleader actions and to deposit the proceeds of the policies with the clerk of the circuit court. Pursuant to this decree, three companies filed interpleader actions and deposited a total of $61,525.77 with the court.
413 Mary **Schultz** moved for summary *413 judgment, and on September 24, 1965, the court entered an order granting her motion. In the same order, the court found that the injunction had been wrongfully issued, and granted Mary **Schultz** leave to file a suggestion of damages. It also directed the clerk to deliver to Mary **Schultz** all of the funds on deposit with him in excess of $30,000.

In a second order entered on September 24, 1965, the court granted the plaintiff leave to

amend its complaint a second time by adding a third count in which it sought to recover $24,387.06 from Mary **Schultz**. This sum represented the losses allegedly due to a personal check drawn by Mary **Schultz** and credited to her account with the plaintiff, but returned by the drawee **bank** uncollected ($10,200) and various cashier's checks issued by the plaintiff to Mary **Schultz** without consideration. This portion of the complaint was referred to a master in chancery. In the proceeding before the master, Mary **Schultz** moved for judgment at the close of the plaintiff's case, and the master recommended in his report that her motion be granted. On September 18, 1969, the court entered a decree approving the master's report and granting the motion of Mary **Schultz** for judgment. The plaintiff appealed from this decree, and this court affirmed the judgment in favor of Mary **Schultz** as to the personal check on the ground that the plaintiff had not met its burden of proving that Mary **Schultz** had not suffered a loss as a result of its failure to provide timely notice that the check had been dishonored, but reversed and remanded the judgment as to the cashier's checks for further proceedings on the ground that the trial court had not made sufficient findings of fact to sustain its conclusion that Mary **Schultz** was a holder in due course of the checks. See ***Bank** of **Lyons** v. **Schultz*** (1971), 1 Ill. App.3d 495, 275 N.E.2d 277.

On February 16, 1972, which was after the remand, Mary **Schultz** filed a petition seeking release of the $30,000 that remained on deposit with the clerk of the circuit court. The plaintiff filed a cross petition seeking the same funds and requesting that the court vacate its finding that the injunction was wrongfully issued and withdraw the leave given Mary **Schultz** to file a suggestion of damages. On June 21, 1972, the court entered an order granting the petition of Mary **Schultz** and denying the cross petition of the plaintiff.

On August 1, 1972, Mary **Schultz** filed her suggestion of damages, claiming $17,442.38 interest, $5,236.25 attorney's fees, $1,184.61 court costs and court reporter's charges, and $1,278.62 reimbursement for fees paid to the master who originally heard evidence on count III of the complaint. The court heard evidence on the suggestion of damages and on March 6, 1973, entered an order awarding Mary **Schultz** $17,442.38 interest,
414 $4,967.50 attorney's fees, $415.02 court costs, and $1,278.62 reimbursement *414 for the master's fees. The court entered judgment against the plaintiff for the total amount of the award. In the same hearing the court also heard evidence on the remanded portion of count III of the complaint (concerning the cashier's checks) and at its conclusion entered judgment in favor of Mary **Schultz**.

The plaintiff instituted the present appeal on April 4, 1973. It appealed from the following orders: (1) the order finding that the injunction was wrongfully issued, directing payment of part of the funds on deposit with the clerk of the court to Mary **Schultz**, and granting Mary **Schultz** leave to file a suggestion of damages; (2) the order granting Mary **Schultz's** petition for the release of the balance of the funds and denying the plaintiff's cross petition; (3) an order, entered September 29, 1972, striking plaintiff's interrogatories to Mary **Schultz** concerning whether she had suffered any loss as a result of the plaintiff's failure to give her timely notice that the $10,200 check had been dishonored; (4) an order, entered September 29, 1972, denying the plaintiff's motion for leave to reopen its proof with respect to the $10,200 check; (5) the order awarding Mary

Schultz judgment on her suggestion of damages and denying the plaintiff's motion for judgment at the close of the proof on the suggestion of damages; and (6) the order granting Mary **Schultz** judgment on the remanded portion of count III of the complaint. On appeal the plaintiff contends that (1) it was entitled to the proceeds of the insurance on the life of Alvin **Schultz**; (2) the injunction of July 19, 1963, was not wrongfully issued; (3) Mary **Schultz** is not entitled to recover anything on her suggestion of damages; (4) Mary **Schultz** did not succeed in establishing that she was a holder in due course of the cashier's checks issued by the plaintiff because she did not establish that she took them for value; and (5) that the court had the authority to permit the plaintiff to reopen its discovery and proof relating to the $10,200 check.

We first consider the plaintiff's contention that it was entitled to the proceeds of the insurance on the life of Alvin **Schultz**. Although the notice of appeal states that the plaintiff seeks reversal of both the order of September 24, 1965, directing payment to Mary **Schultz** of all the proceeds in excess of $30,000 and the order of June 21, 1972, granting Mary **Schultz's** petition for release of the balance, the plaintiff's argument concerns only its entitlement to the $30,000 that remained on deposit after entry of the order of September 24, 1965. It argues that these funds were impressed with an equitable lien in its favor and therefore that the trial court erred in decreeing that Mary **Schultz** had a vested interest in them and was their sole owner and that, in addition, they were exempt from execution, attachment, garnishment or other process by virtue of section 238 of the Insurance Code (Ill. Rev. Stat. 1973, ch. 73, par. 850).

415 *415 • 1 The present action was begun as a creditor's suit. Such a suit creates an equitable lien upon all the property owned by the debtor at the time that it is commenced. (*First National* ***Bank*** *v. Gage* (1879), 93 Ill. 172.) The equitable lien so created survives the subsequent death of the debtor and is superior to interests in the property that arise upon, and by reason of, his death, the theory being that, once having attached, the lien follows the property into the hands of the debtor's heirs or devisees. (*Thomas v. Richards* (1958), 13 Ill.2d 311, 148 N.E.2d 740.) We agree, then, with the plaintiff's conclusion that upon the filing of its suit, all of Alvin **Schultz's** assets were subjected to an equitable lien in favor of the plaintiff, which was not extinguished by Alvin **Schultz's** death.

• 2 It does not follow, however, that this lien attached to the proceeds of the insurance on Alvin **Schultz's** life. It is recognized, both in Illinois and elsewhere, that the proceeds of life insurance are not an asset of the insured and that, in fact, they do not come into existence until after his death. (*Vieth v. Chicago Title & Trust Co.* (1940), 307 Ill. App. 99, 30 N.E.2d 126; 2A Appleman, Insurance Law and Practice § 1341 (1966).) Thus it seems clear that no lien could have attached to the proceeds of the policies at the time that the plaintiff commenced its suit because they were neither in existence nor an asset of the debtor. (See *First National* ***Bank*** *v. Gage* (1879), 93 Ill. 172, wherein the court held that the lien of a creditor's bill attached only to property owned by the debtor at the time that the bill was filed.)

• 3 Furthermore, the rule is that immediately upon the death of the insured, the beneficiary named in the policy obtains a vested and absolute right to the proceeds,

which is subject only to contrary provisions in the policy. (*Myers v. Modern Woodmen of America* (1917), 205 Ill. App. 45; *Hodalski v. Hodalski* (1913), 181 Ill. App. 158; 2 Appleman, Insurance Law and Practice § 921 (1966).) Therefore Mary **Schultz**, who was the named beneficiary in the present policies, obtained an absolute right to receive the proceeds immediately upon the death of Alvin **Schultz**. Based upon this, it is our conclusion that the trial court was correct in finding that the proceeds were not subject to any lien in favor of the plaintiff and were the sole property of Mary **Schultz**.

• 4 We have examined the cases cited to us on this point by the plaintiff and find that they are inapplicable to the present case in that, while all concern creditor's bills generally, none concerns the proceeds of insurance on the life of the debtor. Because the foregoing reasoning is sufficient to sustain the trial court's findings, we deem it unnecessary to consider the plaintiff's contention that the court erred in finding that the
416 proceeds were exempt from process under section 238 of the Insurance *416 Code (Ill. Rev. Stat. 1973, ch. 73, par. 850). That portion of the order of September 24, 1965, directing the clerk of the circuit court to pay Mary **Schultz** the funds on deposit in excess of $30,000 and that portion of the order of June 21, 1972, directing the clerk of the circuit court to pay Mary **Schultz** the remaining $30,000 and denying the cross petition of the plaintiff for the same funds are affirmed.

• 5 We next consider whether the injunction of July 19, 1963, was wrongfully issued. It is the position of Mary **Schultz** that the plaintiff is barred from appealing this point because it did not appeal within 30 days after entry of the order of September 24, 1965, which specifically found that the injunction had been wrongfully issued. In our view this argument is without merit because the present case is one involving multiple issues, only one of which was resolved by the order of September 24, 1965. Since the order did not contain an express finding by the trial court that there was no just reason for delaying an appeal, it was not appealable until all of the issues in the case had been finally adjudicated. (Ill. Rev. Stat. 1973, ch. 110A, par. 304(a).) This occurred on March 6, 1973. We hold, therefore, that the plaintiff is not barred from raising this issue in the present appeal.

• 6 Concerning the injunction itself, the plaintiff argues simply that it was properly issued because section 49 of the Chancery Act (Ill. Rev. Stat. 1973, ch. 22, par. 49) expressly provides for the issuance of injunctions in creditor's suits to prevent the transfer of property belonging to the debtor, because our courts have recognized that the issuance of a temporary injunction is proper in such cases in order to maintain the status quo, and because it was necessary to protect the plaintiff's equitable lien in the insurance proceeds. We have already held that the plaintiff had no equitable lien in the insurance proceeds, and the mere fact that the issuance of an injunction has been held proper in certain appropriate cases does not lead to the conclusion that the injunction was properly issued in the present case. The record establishes that the court held a hearing at which it considered the affidavits of the parties with respect to count II of the complaint and heard the arguments of counsel. Following this, it made a specific finding that the injunction had been wrongfully issued and should be dissolved. The record does not disclose the precise reasons for this finding, but we can only assume that it was because the trial court determined from the information presented at the hearing that the plaintiff

had not succeeded in establishing the alleged reasons for the issuance of the injunction. We have reviewed the record and are in accord. We hold, therefore, that the trial court correctly found that the injunction had been wrongfully issued, and we affirm that portion
417 of the order of September 24, 1965, that so finds, and that portion *417 of the order of June 21, 1972, that denies the plaintiff's cross petition for modification of the order of September 24, 1965.

We next consider the contention that Mary **Schultz** was not entitled to recover anything upon her suggestion of damages. Section 12 of the Injunctions Act (Ill. Rev. Stat. 1973, ch. 69, par. 12) provides that "[i]n all cases where an injunction is dissolved * * * the court, after dissolving such injunction, and before finally disposing of the suit, upon the party claiming damages by reason of such injunction suggesting, in writing, the nature and amount thereof, shall hear evidence and assess such damages as the nature of the case may require * * *." As stated in *Schien v. City of Virden* (1955), 5 Ill.2d 494, 126 N.E.2d 201, the purpose of this provision is to provide a summary means of assessing damages for the wrongful issuance of a temporary injunction which is dissolved prior to the entry of final judgment.

• 7 The plaintiff argues first that Mary **Schultz** is not entitled to damages because the injunction was not wrongfully issued. We have discussed this contention previously and need not discuss it further. Second, the plaintiff argues that Mary **Schultz** is not entitled to recover damages under section 12 of the Injunctions Act because the injunction was not dissolved prior to a final judgment being rendered in the case. This argument is premised upon the fact that the order finding that the injunction had been wrongfully issued and granting Mary **Schultz** leave to file a suggestion of damages was contained in the same order that granted Mary **Schultz** summary judgment on count II of the complaint. It is the plaintiff's position that the summary judgment on count II constituted a final judgment on the merits. This argument is untenable. On the same day that the court entered its order finding that the injunction had been wrongfully issued, it entered an order allowing the plaintiff to amend its complaint to add a third count, and the cause continued to be litigated for some 8 more years while count III was tried, appealed, and retried upon remand. Moreover, the order of September 24, 1965, only required the clerk to turn over the insurance proceeds in excess of $30,000, necessitating the further petitions of both Mary **Schultz** and the plaintiff seeking the balance of the funds. In view of this and in view of our previous discussion concerning the applicability of Supreme Court Rule 304(a) to the present case, it is our opinion that final judgment was rendered on March 6, 1973, and we so hold.

• 8 Third, the plaintiff argues that Mary **Schultz** was not entitled to recover any attorney's fees upon her suggestion of damages because all of the expenses that she incurred prior to the dissolution of the injunction were incurred in the general defense of count II of the complaint, and the expenses incurred after dissolution are not recoverable. It cites
418 *418 *Landis v. Wolf* (1903), 206 Ill. 392, 69 N.E. 103, and *Cromwell Paper Co. v. Wellman* (1959), 23 Ill. App.2d 263, 162 N.E.2d 500, as authority for this position. In our view, however, these cases turn on the failure of the defendant to distinguish between expenses incurred in the general defense of the suit and those incurred in the dissolution of the injunction. The rule, as stated in *Landis,* is that where counsel fees are necessarily

incurred in procuring the dissolution of an injunction they may be allowed as damages, but where dissolution of the injunction is only incidental to the defense of the action, and the counsel fees are incurred in defending the action, they cannot be assessed as damages.

In the present case, the only evidence concerning the attorney's fees sought by Mary **Schultz** was provided by her own counsel, who testified as an expert witness that the services rendered prior to September 24, 1965, were absolutely necessary to obtain dissolution of the injunction and that the services rendered after September 24, 1965, were necessary to obtain the release of the funds that remained on deposit with the clerk of the circuit court. This testimony is uncontradicted, and we cannot say that the court's award is against the manifest weight of the evidence.

• 9 Fourth, the plaintiff contends that, assuming Mary **Schultz** is entitled to damages, she is entitled to interest on the insurance proceeds only from the date that the injunction was issued to the date on which the insurance companies deposited the proceeds with the clerk of the court pursuant to the orders entered on their bills of interpleader. The plaintiff offers no authority for this proposition, and indeed, we are aware of none. We are of the opinion that the order of the trial court awarding interest from the date of Alvin **Schultz's** death (May 20, 1963) to the date that the clerk of the circuit court paid the last of the funds on deposit with him to Mary **Schultz** (June 26, 1972) was proper.

Finally, the plaintiff states that there has been a final judicial determination that Mary **Schultz** should in equity pay 25 percent of the master's fees. The order entered September 18, 1969, provided, among other things, that the clerk of the circuit court should turn over to Mary **Schultz**, the balance of the funds on deposit with him, less $1,278.62, which represented Mary **Schultz's** liability for her share of the master's fees. Thus, the plaintiff argues, the court erred in awarding Mary **Schultz** reimbursement of this amount on her suggestion of damages. This argument overlooks the fact that the hearing on the suggestion of damages was an entirely separate proceeding and that section 12 of the Injunctions Act allows for the award of all damages occasioned by the wrongful entry of the injunction. We find the reimbursement for master's fees to have been proper.

419 *419 We next consider the plaintiff's contention that the trial court erred in entering judgment for Mary **Schultz** on the remanded portion of count III of the complaint. As we have noted above, this court held in ***Bank** of **Lyons** v. **Schultz*** (1971), 1 Ill. App.3d 495, 275 N.E.2d 277, that Marty **Schultz's** testimony was not sufficient to sustain the finding that she was a holder in due course of the cashier's checks under section 52 of the Negotiable Instruments Act (Ill. Rev. Stat. 1955, ch. 98, par. 72), which was in effect at the time of the transactions in question, but that, inasmuch as all of her testimony was given while testifying as an adverse witness under section 60 of the Civil Practice Act (Ill. Rev. Stat. 1973, ch. 110, par. 60), the cause should be remanded and she given an opportunity to develop her own evidence on the point. Section 52 provides that, in order to qualify as a holder in due course, a holder must take an instrument in good faith, for value, and without notice of an infirmity or defect in the title of the person negotiating it. In the present appeal the plaintiff apparently concedes that Mary **Schultz** established

that she took the checks from Alvin **Schultz** in good faith and without knowledge of any defects in his title. It argues, however, that she did not succeed in establishing that she gave full value for them. After reviewing the record, we conclude that the trial court's findings are adequately supported.

The substance of Mary **Schultz's** testimony was that from time to time she made loans totalling $10,292.55, in the form of checks drawn on her personal account, to or for the use of the Knox Steel and Wire Company, of which she and Alvin **Schultz** were the sole stockholders. She made these loans at Alvin **Schultz's** request and upon the promise that she would be repaid in full.

• 10 From 1956 through 1959 she received cashier's checks, drawn by the plaintiff, totalling $9,187.06, from Alvin **Schultz** in partial payment of the loans. She testified that she did not keep a running account of her loans to Knox Steel and Wire and could not tell how much was owed to her at any one time. However, the record establishes that by August 7, 1956, the date of the first cashier's check which was for $1150, she had advanced $4,787.55. By February 25, 1958, the date of the next cashier's check, which was for $1,800, she had advanced a total of $7,477.55, and by June 19, 1958, the date that she received all but the last of the checks, she had advanced a total of $10,292.55. Although she was unable to state precisely how much was owed her on the date of each cashier's check, we believe that the foregoing is sufficient to sustain the conclusion that the balance due her at any given time exceeded the value of the cashier's checks that she received. Therefore the trial court could have found that the cashier's checks were
420 given in repayment of *420 the loan and hence were given for full value. (See *Manning v. McClure* (1865), 36 Ill. 490; Ill. Rev. Stat. 1955, ch. 98, par. 45.) As we have often said, the trial court, which hears and observes the witnesses, is in the best position to sift the evidence and determine questions of fact, and unless its findings are against the manifest weight of the evidence, they will not be disturbed by this court. (*Elliott v. Nordlof* (1967), 83 Ill. App.2d 279, 227 N.E.2d 547.) The judgment in favor of Mary **Schultz** on count III of the complaint is therefore affirmed.

Finally we consider the plaintiff's contention that the trial court erred in refusing to allow it to reopen its proof and discovery concerning the $10,200 personal check. In ***Bank of Lyons v. Schultz*** (1971), 1 Ill. App.3d 495, 275 N.E.2d 277, this court stated simply that the judgment in favor of Mary **Schultz** on the claim concerning the $10,200 check was affirmed. In our view this ended the litigation on the matter, and the trial court was without authority to reopen it. We find no error, therefore, in the order striking the plaintiff's interrogatories as to the check and denying its motion for leave to reopen its proof.

For the foregoing reasons, the orders appealed from are affirmed.

Affirmed.

ADESKO, P.J., and DIERINGER, J., concur.

739 F.3d 1055 (2014)

Kimberly SPURLING, Plaintiff-Appellant,
v.
C & M FINE PACK, INC., Defendant-Appellee.

No. 13-1708.

United States Court of Appeals, Seventh Circuit.

Argued September 23, 2013.
Decided January 13, 2014.

1057 *1057 Lori W. Jansen, Rockwell & Jansen, Fort Wayne, IN, for Plaintiff-Appellant.

Dinita L. James, Michael Mishlove, Alejandro Valle, Gonzalez Saggio & Harlan LLP, Indianapolis, IN, for Defendant-Appellee.

Before BAUER, KANNE, and HAMILTON, Circuit Judges.

KANNE, Circuit Judge.

This appeal follows the district court's entry of summary judgment in favor of **C** & **M Fine**
1058 **Pack**, **Inc**., ("**C** & **M**") regarding its termination of Kimberly **Spurling**. *1058 **Spurling** alleged that **C** & **M** discriminated against her in violation of the Americans with Disabilities Act, as amended ("ADA"), as well as the Family and Medical Leave Act of 1993 ("FMLA"). For the reasons set forth below, we affirm in part, reverse in part, and remand for further proceedings.

I. BACKGROUND

A. Spurling's Employment at C & M

Spurling began working for **C** & **M** in February 2004 as a Forming Inspector/Packer assigned to the third/night shift. In 2009, she began to exhibit a pattern of decreased consciousness and alertness, for which she received several disciplinary warnings. **Spurling** received a Final Warning/Suspension on February 15, 2010. On that date, **Spurling** left her work site to use the restroom and did not return for over twenty minutes. **Spurling** was later found sleeping in the restroom by a coworker.

Following her suspension, **Spurling** met with plant manager Darrin Claussen and three of her supervisors. Claussen's meeting notes reflect that **Spurling** indicated that her sleep issues were caused by medication that her doctor had prescribed. She produced a note to the same effect, which stated, "Pt was recently asked to discontinue medicine related to her passing out — please excuse symptoms [at] work."

Spurling continued to experience difficulty remaining conscious while at work. On April 12, 2010, Jim Cardenas, **Spurling's** shift supervisor, reported her for being completely asleep while packing parts. He expressed concern for **Spurling's** safety and the lack of improvement in her wakefulness.

As a result of the continuing problem, **Spurling** attended a meeting with management personnel, who issued her a Final Warning/Suspension on April 15. The Final Warning/Suspension note stated:

> On 4/12/10 you were observed ... with your head down at you[r] inspection station. To get your attention they had to yell your name at which time you snapped to and responded. This occurred several times during the shift ... A review of your personnel file shows that in the last twelve months you have received three write-ups for performance and the last one a final warning with suspension for sleeping during your shift. Per our progressive discipline practice you have been suspended pending determination of the level of discipline you will receive for this latest incident. You were informed that you could face termination of employment per our progressive disciplinary practice. You were informed that I would be in touch no later than Monday, April 19[,] with [**C** & **M**]'s decision. You were also informed that if you had further information that was relevant to our deliberation, you needed to contact me prior to Monday.

Paul Bellant, the Human Resources Manager at **C** & **M**, testified that it was typical for **C** & **M** to wait almost two weeks for new information to be produced for consideration in whether to terminate an employee. On April 16, **Spurling** informed Bellant that her performance issues might be related to a medical condition. Bellant met with **Spurling** to provide her with a letter regarding the ADA and documentation for **Spurling's** physician to complete. The paperwork stated that it should be returned no later than April 30.

After **Spurling** received the paperwork, she alleges that she requested time off to determine the extent of her medical issues. Bellant denies that **Spurling** ever requested
1059 time off, and insists that she was not eligible for FMLA leave as she was facing *1059
suspension pending termination of employment.

That same day, April 16, after giving the ADA paperwork to **Spurling**, Bellant emailed **C** & **M's** Vice President of Human Resources, Jeffrey Swoyer, concerning the action that **C** & **M** wanted to pursue regarding **Spurling**. Bellant's email recommended that **C** & **M** terminate **Spurling**, but conceded that in order to do so, Swoyer's authorization was required. The email acknowledges Bellant's communication with **Spurling** and states, "I have ADA paperwork that she will have her doctor fill out to begin the interactive process regarding her ability to perform ... her job safely. I will put her on [leave of absence] until

process is completed."

Spurling met with her physician, Dr. James Beitzel, on April 21. He filled out the ADA paperwork and marked "yes" by the box asking if the patient had a mental or physical disability covered under the ADA. Dr. Beitzel wrote that **Spurling** exhibited excessive drowsiness that affected her job performance and recommended periods of scheduled rest. Finally, he wrote "add'n medical work up in progress" at the bottom of the form.

Directly after her medical examination, **Spurling** took the paperwork to Bellant, who told her that he and Claussen would review the material and then send it to the corporate office for further review. **Spurling** alleges, and **C** & **M** disputes, that Bellant indicated that **C** & **M** would have an interactive meeting with her on April 26 to discuss her request for reasonable accommodations. No meeting occurred.

Regarding the import of Dr. Beitzel's examination, Bellant testified that the notation stating **Spurling** was suffering from a condition covered by the ADA was insufficient to establish that she had a disability. Likewise, Swoyer testified during his deposition, "I don't believe that the doctor is in a position to make that determination. It is his opinion." Instead of seeking clarification from Dr. Beitzel regarding **Spurling's** medical evaluation, **C** & **M** chose to proceed with her termination.

On April 28, Bellant emailed Swoyer his recommendation to terminate **Spurling**. He stated, "[W]e recommend the aggressive approach. Upon review of all the facts presented we feel that we did the interactive process during the progressive disciplinary process." Bellant acknowledged that while "there is an element of risk ... we feel we did everything during the discipline process."

C & **M** proceeded with the termination of **Spurling** and informed her of its decision on April 28, 2010. On May 27, 2010, **Spurling** received a definitive diagnosis for narcolepsy, which in her case is manageable with proper medication.

B. District Court Proceedings

Spurling brought suit and made three claims under the ADA: disability discrimination, failure of the interactive process, and failure to provide reasonable accommodations.[1] She also claimed that **C** & **M** interfered with her rights under the FMLA.

1060 *1060 The district court granted summary judgment in favor of **C** & **M** on both claims, holding that an employer could not be held accountable for discrimination under the ADA when both the employer and employee are unaware that a condition exists. The court stated that the central issue was one of causation; that is, whether **Spurling** suffered an adverse employment action as a result of her disability. It found that the termination took place on April 15, when Bellant's initial termination recommendation was made. The court found that **C** & **M** could not have discriminated against **Spurling**, as it had terminated her prior to having any knowledge of her condition.

For the same reason, **Spurling's** FMLA claim failed. The district court held that, since **C** & **M** was unaware of **Spurling's** qualifying condition, it could not be held liable for firing

her because of that condition. The FMLA requires employer knowledge of the qualifying condition, which **C** & **M** did not have when it terminated **Spurling** on April 15.

II. ANALYSIS

Spurling challenges the district court's decision to grant **C** & **M** summary judgment on both her ADA and FMLA claims. **Spurling** argues that the district court erred in finding that April 15 was the effective date of her termination. She alleges that she was not actually fired until April 28, at which time **C** & **M** knew that she suffered from a disability covered under the ADA.

We review a grant of summary judgment *de novo,* and examine the record and all reasonable inferences in the light most favorable to the non-moving party. *Pagel v. TIN **Inc**.*, 695 F.3d 622, 624 (7th Cir.2012). Summary judgment is proper if the moving party "shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a). We will reverse a grant of summary judgment if a material issue of fact exists that would allow a reasonable jury to find in favor of the non-moving party. *Adeyeye v. Heartland Sweeteners, LLC,* 721 F.3d 444, 449 (7th Cir.2013).

A. ADA Claim

To establish a *prima facie* ADA claim, **Spurling** must show that: "(1) she is disabled within the meaning of the ADA, (2) she is qualified to perform the essential functions of her job either with or without reasonable accommodation, and (3) she has suffered from an adverse employment decision because of her disability." *Dvorak v. Mostardi Platt Assoc., **Inc**.*, 289 F.3d 479, 483 (7th Cir.2002).

1. Termination Date

The district court relied on our holding in *Hedberg v. Indiana Bell Tel. Co., **Inc**.*, 47 F.3d 928, 932-33 (7th Cir. 1995), to find that **C** & **M** did not have the requisite knowledge to fire **Spurling** "because of" her disability. Citing that case, the district court reasoned that an employer who fires an employee without knowledge of her disability relies on other, non-disability related, grounds. It determined that **C** & **M** fired **Spurling** on April 15 and found that **C** & **M's** lack of knowledge regarding **Spurling's** disability obviated the need to decide whether she was actually disabled.

The district court's reliance on *Hedberg* as analogous to this case is misplaced. *Hedberg* involved a restructuring of a company, in which layoffs and firings were inevitable and based on a neutral score given to employees. Hedberg received a poor score, which he attributed to his disability, but Hedberg's employers had no knowledge of his disability
1061 when they made their final decision to terminate his *1061 employment. *Hedberg* stands for the well-established principle that an employee cannot hold an employer liable under the ADA if the employer has no knowledge of the employee's disability. 29 C.F.R. app. §

1630.9 ("[A]n employer would not be expected to accommodate disabilities of which it is unaware."); *see also* *James v. Hyatt Regency Chi.*, 707 F.3d 775, 783 (7th Cir.2013); *Beck v. Univ. of Wis. Bd. of Regents*, 75 F.3d 1130, 1134 (7th Cir.1996); *Hedberg*, 47 F.3d at 932. But that is not the case here.

The actual issue in this case is whether Bellant's April 15 email sufficed to terminate **Spurling**. If it did, she was terminated before **C** & **M** knew of her disability. But if it did not, **C** & **M** did not fire her until after learning of it. We have adopted an "unequivocal notice of termination" test to determine the date that an employee has been terminated. *Dvorak*, 289 F.3d at 486. It states that "termination occurs when the employer shows, by acts or words, clear intention to dispense with the employee's services." *Id.* There are two prongs to the test, both of which must be satisfied to fix the date of termination. "First, there must be a final, ultimate, nontentative decision to terminate the employee.... Second, the employer must give the employee `unequivocal' notice of its final termination decision." *Flannery v. Recording Indus. Ass'n of Am.*, 354 F.3d 632, 637 (7th Cir.2004).

C & **M's** April 15 email may have begun the investigation into terminating **Spurling**, but it certainly did not manifest a clear intention to dispense with her services. Nor was the decision to terminate her ever communicated to her prior to April 28. **Spurling** was technically suspended pending a termination decision on April 15, not terminated outright. Indeed, Bellant informed **Spurling** that she could present new information that may be `relevant to our deliberation,' which she did. After **Spurling** informed **C** & **M** that she might have a medical condition affecting her work, Bellant gave her ADA paperwork to be filled out by her doctor; it would seem as though **C** & **M** began to engage in the interactive process with **Spurling**. When **C** & **M** learned of her disability, however, it chose to take the "aggressive approach" and terminate her. This occurred on April 28, which is the date that her actual termination took place and when she received her unequivocal notice. Thus, **Spurling** was fired *after* **C** & **M** knew that she had a medical condition covered under the ADA.

2. Failure to Accommodate

Having determined that **Spurling's** termination was on April 28, we next turn to whether **C** & **M** properly accommodated **Spurling** after she notified them of her condition. We conclude that it did not. An employee begins the accommodation process by notifying her employer of her disability; "at that point, an employer's liability is triggered for failure to provide accommodations." *Hendricks-Robinson v. Excel Corp.*, 154 F.3d 685, 693 (7th Cir. 1998) (internal quotation marks omitted). After an employee has disclosed that she has a disability, the ADA requires an employer to "engage with the employee in an `interactive process' to determine the appropriate accommodation under the circumstances." *E.E.O.C. v. Sears, Roebuck & Co.*, 417 F.3d 789, 805 (7th Cir.2005) (quoting *Gile v. United Airlines, **Inc**.*, 213 F.3d 365, 373 (7th Cir.2000)).

Rather than collaborate with **Spurling** or her doctor to find a reasonable accommodation, **C** & **M** chose to turn a blind eye and terminate her. It did not seek further clarification from either **Spurling** or her doctor and disregarded the medical

1062 evaluation altogether. This is hardly engaging with **Spurling** to determine *1062 if a reasonable accommodation could be made. *See* *Bultemeyer v. Fort Wayne Comm. Sch.*, 100 F.3d 1281, 1286 (7th Cir. 1996) (employer should have sought an explanation from the doctor if it had concerns with the employee's medical diagnosis). And while an employer's failure to engage in the interactive process alone is not an independent basis for liability, it is actionable "if it prevents identification of an appropriate accommodation for a qualified individual." *Basden v. Prof'l Transp., **Inc**.*, 714 F.3d 1034, 1039 (7th Cir.2013). Accordingly, **Spurling** must show that a reasonable accommodation could be made that would enable her to carry out the essential functions of her job. *Id.* The evidence suggests that a reasonable accommodation was readily available; **Spurling** simply needed further medical testing and a prescription to control her narcolepsy.

Once **C** & **M** received notice of **Spurling's** disability on April 21, it was incumbent upon them to determine, by engaging in an interactive process with **Spurling**, whether a reasonable accommodation could be made. *See* *Hedberg*, 47 F.3d at 934 ("[I]f an employee tells his employer that he has a disability, the employer then knows of the disability, and the ADA's further requirements bind the employer."). This process entails working with the disabled individual to produce a reasonable solution if one is available. 29 C.F.R. app. § 1630.9 ("Once an individual with a disability has requested provision of a reasonable accommodation, the employer must make a reasonable effort to determine the appropriate accommodation. The appropriate reasonable accommodation is best determined through a flexible, interactive process that involves both the employer and the individual with a disability.").

C & **M** never engaged in an interactive attempt to find a reasonable accommodation as claimed in the April 28 email from Bellant to Swoyer ("we feel that we did the interactive process during the progressive disciplinary process."). **Spurling** returned with **C** & **M's** ADA form, on which Dr. Beitzel indicated that she had a condition covered under the ADA. Despite this notation, **C** & **M** never contacted Dr. Beitzel to determine the severity of **Spurling's** ADA claim or how it might be able to provide a reasonable accommodation. Following a series of emails, it decided to terminate her, despite the "element of risk." And, while it is true that **Spurling** presented the information to **C** & **M** after receiving her Suspension Pending Termination, she did so at **C** & **M's** behest. **C** & **M** properly began the interactive process as envisioned by the ADA, but failed to carry it through.

B. FMLA Claim

To establish her FMLA claim, **Spurling** must show: (1) she was eligible for FMLA protection; (2) **C** & **M** is covered by the FMLA; (3) she was entitled to take leave under the FMLA; (4) she provided sufficient notice of her intent to take leave to **C** & **M**; and (5) **C** & **M** denied her FMLA benefits to which she was entitled. *Goelzer v. Sheboygan Cnty., Wis.*, 604 F.3d 987, 993 (7th Cir.2010). For the purposes of this case, we are only concerned with the fourth element: whether **Spurling** provided sufficient notice to **C** & **M** regarding her "serious health condition." 29 C.F.R. § 825.100. If she did not, then **C** & **M** had no duty to grant her leave.

We first note that a "serious health condition entitling an employee to FMLA leave means an illness, injury, impairment or physical or mental condition that involves inpatient care ... or continuing treatment by a health care provider[.]" 29 C.F.R. § 825.113(a). The latter phrase would likely qualify **Spurling** under the FMLA, so long as she alerted her
1063 employer to the seriousness of her health condition. *1063 *Nicholson v. Pulte Homes Corp.*, 690 F.3d 819, 826 (7th Cir.2012).

Spurling's statement to Bellant on April 16 (and prior to her medical evaluation), was simply that she needed time off to figure out why she was falling asleep.[2] Given the circumstances of this case, this can hardly be deemed as notifying **C** & **M** of a "serious health condition." An employee must provide her employer with sufficient information to notify them that she has a serious health condition that requires FMLA protection. *See Stevenson v. Hyre Elec. Co.*, 505 F.3d 720, 725 (7th Cir.2012). We cannot hold that the employer must divine or investigate whether an employee has a condition covered under the FMLA at any minor request for leave. We have explicitly rejected that position, as the majority of leaves requested by employees do not give rise to FMLA protections. *Aubuchon v. Knauf Fiberglass GmbH*, 359 F.3d 950, 953 (7th Cir.2004). To hold otherwise would "place a substantial and largely wasted investigative burden on employers." *Id.* Therefore, "unless the employer already knows that the employee has an FMLA-authorized ground for leave, ... the employee must communicate the ground to him; he cannot just demand leave." *Id.*

Spurling's remark to Bellant fails to meet this threshold. She did not inform him that she had a "serious health condition" nor did she have any personal knowledge of her own illness that would allow her to put forth such information. **Spurling** worked the night shift at **C** & **M** and many employees exhibited sleeping issues during that shift, as **Spurling** conceded witnessing while at work. Furthermore, **Spurling** had problems remaining awake in the past and had previously attributed the behavior to medication. Thus, **Spurling's** sleep issues were not something novel that would automatically alert an employer that something was amiss; sleeping on the job was a difficulty that many night shift employees endured and one that **Spurling** had already been disciplined for. *Cf. Byrne v. Avon Products, **Inc**.*, 328 F.3d 379, 380 (7th Cir.2003) (drastic change in behavior of a model employee could suffice as proper notice of a serious medical condition under the FMLA). **Spurling's** vague assertion that she needed time off to determine why she was falling asleep was not sufficient to put **C** & **M** on notice that she had a serious medical condition that required FMLA leave.

III. CONCLUSION

Spurling established disputed issues of material facts as to whether **C** & **M** failed to properly engage in the interactive process as required by the ADA, but did not provide sufficient notice to establish a claim under the FMLA. Accordingly, we AFFIRM the entry of summary judgment for **C** & **M** on the FMLA claim, REVERSE the entry of summary judgment in favor of **C** & **M** on **Spurling's** ADA claim and REMAND for further proceedings consistent with this opinion.

[1] Failure of the interactive process is not an independent basis for liability under the ADA. *Ozlowski v. Henderson*, 237 F.3d 837, 840 (7th Cir.2001). An employee must still show that she is a "qualified individual with a disability" and that a reasonable accommodation would have allowed her to perform the essential functions of her job. *Bombard v. Fort Wayne Newspapers, **Inc**.*, 92 F.3d 560, 563 (7th Cir.1996). Thus, "a plaintiff must allege that the employer's failure to engage in an interactive process resulted in a failure to identify an appropriate accommodation for the qualified individual." *Rehling v. City of Chi.*, 207 F.3d 1009, 1016 (7th Cir.2000).

[2] While the parties dispute that **Spurling** made a statement regarding leave from work, for the purposes of summary judgment we view the record in the light most favorable to the non-movant. *Foley v. City of Lafayette*, 359 F.3d 925, 928 (7th Cir.2004). Therefore, we accept **Spurling's** account of the April 16 discussion.

477 U.S. 317 (1986)

CELOTEX CORP.
v.
CATRETT, ADMINISTRATRIX OF THE ESTATE OF CATRETT

No. 85-198.

Supreme Court of United States.

Argued April 1, 1986
Decided June 25, 1986

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

318 *318 *Leland S. Van Koten* argued the cause for petitioner. With him on the briefs were *H. Emslie Parks* and *Drake C. Zaharris.*

Paul March Smith argued the cause for respondent. With him on the brief were *Joseph N. Onek, Joel I. Klein, James F. Green,* and *Peter T. Enslein.*[*]

319 *319 JUSTICE REHNQUIST delivered the opinion of the Court.

The United States District Court for the District of Columbia granted the motion of petitioner **Celotex** Corporation for summary judgment against respondent **Catrett** because the latter was unable to produce evidence in support of her allegation in her wrongful-death complaint that the decedent had been exposed to petitioner's asbestos products. A divided panel of the Court of Appeals for the District of Columbia Circuit reversed, however, holding that petitioner's failure to support its motion with evidence tending to *negate* such exposure precluded the entry of summary judgment in its favor. ***Catrett*** v. *Johns-Manville Sales* ***Corp.***, 244 U. S. App. D. C. 160, 756 F. 2d 181 (1985). This view conflicted with that of the Third Circuit in *In re Japanese Electronic Products,* 723 F. 2d 238(1983), rev'd on other grounds *sub nom. Matsushita Electric Industrial Co.* v. *Zenith Radio* ***Corp.***, 475 U. S. 574 (1986).[1] We granted certiorari to resolve the conflict, 474 U. S. 944 (1985), and now reverse the decision of the District of Columbia Circuit.

Respondent commenced this lawsuit in September 1980, alleging that the death in 1979 of her husband, Louis H. **Catrett**, resulted from his exposure to products containing asbestos manufactured or distributed by 15 named corporations. Respondent's complaint sounded in negligence, breach of warranty, and strict liability. Two of the

defendants filed motions challenging the District Court's *in personam* jurisdiction, and the remaining 13, including petitioner, filed motions for summary judgment. Petitioner's motion, which was first filed in September 1981, argued that summary judgment was proper because respondent had "failed to produce evidence that any [**Celotex**] product . . . was the proximate cause of the injuries alleged within the jurisdictional *320 limits of [the District] Court." In particular, petitioner noted that respondent had failed to identify, in answering interrogatories specifically requesting such information, any witnesses who could testify about the decedent's exposure to petitioner's asbestos products. In response to petitioner's summary judgment motion, respondent then produced three documents which she claimed "demonstrate that there is a genuine material factual dispute" as to whether the decedent had ever been exposed to petitioner's asbestos products. The three documents included a transcript of a deposition of the decedent, a letter from an official of one of the decedent's former employers whom petitioner planned to call as a trial witness, and a letter from an insurance company to respondent's attorney, all tending to establish that the decedent had been exposed to petitioner's asbestos products in Chicago during 1970-1971. Petitioner, in turn, argued that the three documents were inadmissible hearsay and thus could not be considered in opposition to the summary judgment motion.

In July 1982, almost two years after the commencement of the lawsuit, the District Court granted all of the motions filed by the various defendants. The court explained that it was granting petitioner's summary judgment motion because "there [was] no showing that the plaintiff was exposed to the defendant **Celotex's** product in the District of Columbia or elsewhere within the statutory period." App. 217.[2] Respondent *321 appealed only the grant of summary judgment in favor of petitioner, and a divided panel of the District of Columbia Circuit reversed. The majority of the Court of Appeals held that petitioner's summary judgment motion was rendered "fatally defective" by the fact that petitioner "made no effort to adduce *any* evidence, in the form of affidavits or otherwise, to support its motion." 244 U. S. App. D. C., at 163, 756 F. 2d, at 184 (emphasis in original). According to the majority, Rule 56(e) of the Federal Rules of Civil Procedure,[3] and this Court's decision in *Adickes* v. *S. H. Kress & Co.*, 398 U. S. 144, 159 (1970), establish that "the party opposing the motion for summary judgment bears the burden of responding *only after* the moving party has met its burden of coming forward with proof of the absence of any genuine issues of material fact." 244 U. S. App. D. C., at 163, 756 *322 F. 2d, at 184 (emphasis in original; footnote omitted). The majority therefore declined to consider petitioner's argument that none of the evidence produced by respondent in opposition to the motion for summary judgment would have been admissible at trial. *Ibid.* The dissenting judge argued that "[t]he majority errs in supposing that a party seeking summary judgment must always make an affirmative evidentiary showing, even in cases where there is not a triable, factual dispute." *Id.,* at 167, 756 F. 2d, at 188 (Bork, J., dissenting). According to the dissenting judge, the majority's decision "undermines the traditional authority of trial judges to grant summary judgment in meritless cases." *Id.,* at 166, 756 F. 2d, at 187.

We think that the position taken by the majority of the Court of Appeals is inconsistent with the standard for summary judgment set forth in Rule 56(c) of the Federal Rules of

Civil Procedure.[4] Under Rule 56(c), summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that
323 party will bear the burden of proof at trial. In such a situation, *323 there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled to a judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof. "[T]h[e] standard [for granting summary judgment] mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a) . . . ." *Anderson* v. *Liberty Lobby, Inc., ante,* at 250.

Of course, a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact. But unlike the Court of Appeals, we find no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or other similar materials *negating* the opponent's claim. On the contrary, Rule 56(c), which refers to "the affidavits, *if any*" (emphasis added), suggests the absence of such a requirement. And if there were any doubt about the meaning of Rule 56(c) in this regard, such doubt is clearly removed by Rules 56(a) and (b), which provide that claimants and defendants, respectively, may move for summary judgment *"with or without supporting affidavits"* (emphasis added). The import of these subsections is that, regardless of whether the moving party accompanies its summary judgment motion with affidavits, the motion may, and should, be granted so long as whatever is before the district court demonstrates that the standard for the entry of summary judgment, as set forth in Rule 56(c), is satisfied. One of the principal purposes of the summary judgment rule is to
324 isolate and dispose of factually unsupported *324 claims or defenses, and we think it should be interpreted in a way that allows it to accomplish this purpose.[5]

Respondent argues, however, that Rule 56(e), by its terms, places on the nonmoving party the burden of coming forward with rebuttal affidavits, or other specified kinds of materials, only in response to a motion for summary judgment "made and supported as provided in this rule." According to respondent's argument, since petitioner did not "support" its motion with affidavits, summary judgment was improper in this case. But as we have already explained, a motion for summary judgment may be made pursuant to Rule 56 "with or without supporting affidavits." In cases like the instant one, where the nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary judgment motion may properly be made in reliance solely on the "pleadings, depositions, answers to interrogatories, and admissions on file." Such a motion, whether or not accompanied by affidavits, will be "made and supported as provided in this rule," and

Rule 56(e) therefore requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the "depositions, answers to interrogatories, and admissions on file," designate "specific facts showing that there is a genuine issue for trial."

We do not mean that the nonmoving party must produce evidence in a form that would be admissible at trial in order to avoid summary judgment. Obviously, Rule 56 does not require the nonmoving party to depose her own witnesses. Rule 56(e) permits a proper summary judgment motion to be opposed by any of the kinds of evidentiary materials listed in Rule 56(c), except the mere pleadings themselves, and it is from this list that one would normally expect the nonmoving party to make the showing to which we have referred.

325 *325 The Court of Appeals in this case felt itself constrained, however, by language in our decision in *Adickes* v. *S. H. Kress & Co.,* 398 U. S. 144 (1970). There we held that summary judgment had been improperly entered in favor of the defendant restaurant in an action brought under 42 U. S. C. § 1983. In the course of its opinion, the *Adickes* Court said that "both the commentary on and the background of the 1963 amendment conclusively show that it was not intended to modify the burden of the moving party . . . to show initially the absence of a genuine issue concerning any material fact." *Id.,* at 159. We think that this statement is accurate in a literal sense, since we fully agree with the *Adickes* Court that the 1963 amendment to Rule 56(e) was not designed to modify the burden of making the showing generally required by Rule 56(c). It also appears to us that, on the basis of the showing before the Court in *Adickes,* the motion for summary judgment in that case should have been denied. But we do not think the *Adickes* language quoted above should be construed to mean that the burden is on the party moving for summary judgment to produce evidence showing the absence of a genuine issue of material fact, even with respect to an issue on which the nonmoving party bears the burden of proof. Instead, as we have explained, the burden on the moving party may be discharged by "showing" — that is, pointing out to the district court — that there is an absence of evidence to support the nonmoving party's case.

The last two sentences of Rule 56(e) were added, as this Court indicated in *Adickes,* to disapprove a line of cases allowing a party opposing summary judgment to resist a properly made motion by reference only to its pleadings. While the *Adickes* Court was undoubtedly correct in concluding that these two sentences were not intended to *reduce* the burden of the moving party, it is also obvious that they were not adopted to *add to* that burden. Yet that is exactly the result which the reasoning of the Court of Appeals
326 would produce; in effect, an amendment to Rule 56(e) designed to *326 *facilitate* the granting of motions for summary judgment would be interpreted to make it *more difficult* to grant such motions. Nothing in the two sentences themselves requires this result, for the reasons we have previously indicated, and we now put to rest any inference that they do so.

Our conclusion is bolstered by the fact that district courts are widely acknowledged to possess the power to enter summary judgments *sua sponte,* so long as the losing party was on notice that she had to come forward with all of her evidence. See 244 U. S. App. D. C., at 167-168, 756 F. 2d, at 189 (Bork, J., dissenting); 10A C. Wright, A. Miller, & M.

Kane, Federal Practice and Procedure § 2720, pp. 28-29 (1983). It would surely defy common sense to hold that the District Court could have entered summary judgment *sua sponte* in favor of petitioner in the instant case, but that petitioner's filing of a motion requesting such a disposition precluded the District Court from ordering it.

Respondent commenced this action in September 1980, and petitioner's motion was filed in September 1981. The parties had conducted discovery, and no serious claim can be made that respondent was in any sense "railroaded" by a premature motion for summary judgment. Any potential problem with such premature motions can be adequately dealt with under Rule 56(f),[6] which allows a summary judgment motion to be denied, or the hearing on the motion to be continued, if the nonmoving party has not had an opportunity to make full discovery.

In this Court, respondent's brief and oral argument have been devoted as much to the proposition that an adequate showing of exposure to petitioner's asbestos products was
327 *327 made as to the proposition that no such showing should have been required. But the Court of Appeals declined to address either the adequacy of the showing made by respondent in opposition to petitioner's motion for summary judgment, or the question whether such a showing, if reduced to admissible evidence, would be sufficient to carry respondent's burden of proof at trial. We think the Court of Appeals with its superior knowledge of local law is better suited than we are to make these determinations in the first instance.

The Federal Rules of Civil Procedure have for almost 50 years authorized motions for summary judgment upon proper showings of the lack of a genuine, triable issue of material fact. Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed "to secure the just, speedy and inexpensive determination of every action." Fed. Rule Civ. Proc. 1; see Schwarzer, Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact, 99 F. R. D. 465, 467 (1984). Before the shift to "notice pleading" accomplished by the Federal Rules, motions to dismiss a complaint or to strike a defense were the principal tools by which factually insufficient claims or defenses could be isolated and prevented from going to trial with the attendant unwarranted consumption of public and private resources. But with the advent of "notice pleading," the motion to dismiss seldom fulfills this function any more, and its place has been taken by the motion for summary judgment. Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis.

328 *328 The judgment of the Court of Appeals is accordingly reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE WHITE, concurring.

I agree that the Court of Appeals was wrong in holding that the moving defendant must always support his motion with evidence or affidavits showing the absence of a genuine dispute about a material fact. I also agree that the movant may rely on depositions, answers to interrogatories, and the like, to demonstrate that the plaintiff has no evidence to prove his case and hence that there can be no factual dispute. But the movant must discharge the burden the Rules place upon him: It is not enough to move for summary judgment without supporting the motion in any way or with a conclusory assertion that the plaintiff has no evidence to prove his case.

A plaintiff need not initiate any discovery or reveal his witnesses or evidence unless required to do so under the discovery Rules or by court order. Of course, he must respond if required to do so; but he need not also depose his witnesses or obtain their affidavits to defeat a summary judgment motion asserting only that he has failed to produce any support for his case. It is the defendant's task to negate, if he can, the claimed basis for the suit.

Petitioner **Celotex** does not dispute that if respondent has named a witness to support her claim, summary judgment should not be granted without **Celotex** somehow showing that the named witness' possible testimony raises no genuine issue of material fact. Tr. of Oral Arg. 43, 45. It asserts, however, that respondent has failed on request to produce any basis for her case. Respondent, on the other hand, does not contend that she was not obligated to reveal her witnesses and evidence but insists that she has revealed enough to defeat the motion for summary judgment. Because the Court of Appeals
329 found it unnecessary to address this aspect *329 of the case, I agree that the case should be remanded for further proceedings.

JUSTICE BRENNAN, with whom THE CHIEF JUSTICE and JUSTICE BLACKMUN join, dissenting.

This case requires the Court to determine whether **Celotex** satisfied its initial burden of production in moving for summary judgment on the ground that the plaintiff lacked evidence to establish an essential element of her case at trial. I do not disagree with the Court's legal analysis. The Court clearly rejects the ruling of the Court of Appeals that the defendant must provide affirmative evidence disproving the plaintiff's case. Beyond this, however, the Court has not clearly explained what is required of a moving party seeking summary judgment on the ground that the nonmoving party cannot prove its case.[1] This lack of clarity is unfortunate: district courts must routinely decide summary judgment motions, and the Court's opinion will very likely create confusion. For this reason, even if I agreed with the Court's result, I would have written separately to explain more clearly the law in this area. However, because I believe that **Celotex** did not meet its burden of production under Federal Rule of Civil Procedure 56, I respectfully dissent from the Court's judgment.

330 *330 I

Summary judgment is appropriate where the court is satisfied "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a

matter of law." Fed. Rule Civ. Proc. 56(c). The burden of establishing the nonexistence of a "genuine issue" is on the party moving for summary judgment. 10A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2727, p. 121 (2d ed. 1983) (hereinafter Wright) (citing cases); 6 J. Moore, W. Taggart & J. Wicker, Moore's Federal Practice ¶ 56.15[3] (2d ed. 1985) (hereinafter Moore) (citing cases). See also, *ante,* at 323; *ante,* at 328 (WHITE, J., concurring). This burden has two distinct components: an initial burden of production, which shifts to the nonmoving party if satisfied by the moving party; and an ultimate burden of persuasion, which always remains on the moving party. See 10A Wright § 2727. The court need not decide whether the moving party has satisfied its ultimate burden of persuasion[2] unless and until the court finds that the
331 moving party has discharged its initial *331 burden of production. *Adickes* v. *S. H. Kress & Co.,* 398 U. S. 144, 157-161 (1970); 1963 Advisory Committee's Notes on Fed. Rule Civ. Proc. 56(e), 28 U. S. C. App., p. 626.

The burden of production imposed by Rule 56 requires the moving party to make a prima facie showing that it is entitled to summary judgment. 10A Wright § 2727. The manner in which this showing can be made depends upon which party will bear the burden of persuasion on the challenged claim at trial. If the *moving* party will bear the burden of persuasion at trial, that party must support its motion with credible evidence — using any of the materials specified in Rule 56(c) — that would entitle it to a directed verdict if not controverted at trial. *Ibid.* Such an affirmative showing shifts the burden of production to the party opposing the motion and requires that party either to produce evidentiary materials that demonstrate the existence of a "genuine issue" for trial or to submit an affidavit requesting additional time for discovery. *Ibid.;* Fed. Rules Civ. Proc. 56(e), (f).

If the burden of persuasion at trial would be on the *nonmoving* party, the party moving for summary judgment may satisfy Rule 56's burden of production in either of two ways. First, the moving party may submit affirmative evidence that negates an essential element of the nonmoving party's claim. Second, the moving party may demonstrate to the court that the nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's claim. See 10A Wright § 2727, pp. 130-131; Louis, Federal Summary Judgment Doctrine: A Critical Analysis, 83 Yale L. J. 745, 750 (1974) (hereinafter Louis). If the nonmoving party cannot muster sufficient evidence to make out its claim, a trial would be useless and the moving party is entitled to summary judgment as a matter of law. *Anderson* v. *Liberty Lobby, Inc., ante,* at 249.

Where the moving party adopts this second option and seeks summary judgment on the ground that the nonmoving party — who will bear the burden of persuasion at trial — has
332 *332 no evidence, the mechanics of discharging Rule 56's burden of production are somewhat trickier. Plainly, a conclusory assertion that the nonmoving party has no evidence is insufficient. See *ante,* at 328 (WHITE, J., concurring). Such a "burden" of production is no burden at all and would simply permit summary judgment procedure to be converted into a tool for harassment. See Louis 750-751. Rather, as the Court confirms, a party who moves for summary judgment on the ground that the nonmoving party has no evidence must affirmatively show the absence of evidence in the record. *Ante,* at 323. This may require the moving party to depose the nonmoving party's

witnesses or to establish the inadequacy of documentary evidence. If there is literally no evidence in the record, the moving party may demonstrate this by reviewing for the court the admissions, interrogatories, and other exchanges between the parties that are in the record. Either way, however, the moving party must affirmatively demonstrate that there is no evidence in the record to support a judgment for the nonmoving party.

If the moving party has not fully discharged this initial burden of production, its motion for summary judgment must be denied, and the court need not consider whether the moving party has met its ultimate burden of persuasion. Accordingly, the nonmoving party may defeat a motion for summary judgment that asserts that the nonmoving party has no evidence by calling the court's attention to supporting evidence already in the record that was overlooked or ignored by the moving party. In that event, the moving party must respond by making an attempt to demonstrate the inadequacy of this evidence, for it is only by attacking all the record evidence allegedly supporting the nonmoving party that a party seeking summary judgment satisfies Rule 56's burden of production.[3] Thus, if the
333 record disclosed that the moving *333 party had overlooked a witness who would provide relevant testimony for the nonmoving party at trial, the court could not find that the moving party had discharged its initial burden of production unless the moving party sought to demonstrate the inadequacy of this witness' testimony. Absent such a demonstration, summary judgment would have to be denied on the ground that the moving party had failed to meet its burden of production under Rule 56.

The result in *Adickes* v. *S. H. Kress & Co., supra,* is fully consistent with these principles. In that case, petitioner was refused service in respondent's lunchroom and then was arrested for vagrancy by a local policeman as she left. Petitioner brought an action under 42 U. S. C. § 1983 claiming that the refusal of service and subsequent arrest were the product of a conspiracy between respondent and the police; as proof of this conspiracy, petitioner's complaint alleged that the arresting officer was in respondent's store at the time service was refused. Respondent subsequently moved for summary judgment on the ground that there was no actual evidence in the record from which a jury could draw an inference of conspiracy. In response, petitioner pointed to a statement from her own deposition and an unsworn statement by a Kress employee, both already in the record and both ignored by respondent, that the policeman who arrested petitioner was in the store at the time she was refused service. We agreed that "[i]f a policeman were present,
334 . . . it would be open to a jury, in light of the sequence that followed, *334 to infer from the circumstances that the policeman and Kress employee had a `meeting of the minds' and thus reached an understanding that petitioner should be refused service." 398 U. S., at 158. Consequently, we held that it was error to grant summary judgment "on the basis of this record" because respondent had "failed to fulfill its initial burden" of demonstrating that there was no evidence that there was a policeman in the store. *Id.,* at 157-158.

The opinion in *Adickes* has sometimes been read to hold that summary judgment was inappropriate because the respondent had not submitted affirmative evidence to negate the possibility that there was a policeman in the store. See Brief for Respondent 20, n. 30 (citing cases). The Court of Appeals apparently read *Adickes* this way and therefore required **Celotex** to submit evidence establishing that plaintiff's decedent had not been exposed to **Celotex** asbestos. I agree with the Court that this reading of *Adickes* was

erroneous and that **Celotex** could seek summary judgment on the ground that plaintiff could not prove exposure to **Celotex** asbestos at trial. However, **Celotex** was still required to satisfy its initial burden of production.

II

I do not read the Court's opinion to say anything inconsistent with or different than the preceding discussion. My disagreement with the Court concerns the application of these principles to the facts of this case.

Defendant **Celotex** sought summary judgment on the ground that plaintiff had "failed to produce" any evidence that her decedent had ever been exposed to **Celotex**
335 asbestos.[4] App. 170. **Celotex** supported this motion with a *335 two-page "Statement of Material Facts as to Which There is No Genuine Issue" and a three-page "Memorandum of Points and Authorities" which asserted that the plaintiff had failed to identify any evidence in responding to two sets of interrogatories propounded by **Celotex** and that therefore the record was "totally devoid" of evidence to support plaintiff's claim. See *id.,* at 171-176.

Approximately three months earlier, **Celotex** had filed an essentially identical motion. Plaintiff responded to this earlier motion by producing three pieces of evidence which she claimed "[a]t the very least . . . demonstrate that there is a genuine factual dispute for trial," *id.,* at 143: (1) a letter from an insurance representative of another defendant describing asbestos products to which plaintiff's decedent had been exposed, *id.,* at 160; (2) a letter from T. R. Hoff, a former supervisor of decedent, describing asbestos products to which decedent had been exposed, *id.,* at 162; and (3) a copy of decedent's deposition from earlier workmen's compensation proceedings, *id.,* at 164. Plaintiff also
336 apparently indicated *336 at that time that she intended to call Mr. Hoff as a witness at trial. Tr. of Oral Arg. 6-7, 27-29.

Celotex subsequently withdrew its first motion for summary judgment. See App. 167.[5] However, as a result of this motion, when **Celotex** filed its second summary judgment motion, the record *did* contain evidence — including at least one witness — supporting plaintiff's claim. Indeed, counsel for **Celotex** admitted to this Court at oral argument that **Celotex** was aware of this evidence and of plaintiff's intention to call Mr. Hoff as a witness at trial when the second summary judgment motion was filed. Tr. of Oral Arg. 5-7. Moreover, plaintiff's response to **Celotex**' second motion pointed to this evidence — noting that it had already been provided to counsel for **Celotex** in connection with the first motion — and argued that **Celotex** had failed to "meet its burden of proving that there is no genuine factual dispute for trial." App. 188.

On these facts, there is simply no question that **Celotex** failed to discharge its initial burden of production. Having chosen to base its motion on the argument that there was no evidence in the record to support plaintiff's claim, **Celotex** was not free to ignore supporting evidence that the record clearly contained. Rather, **Celotex** was required, as an initial matter, to attack the adequacy of this evidence. **Celotex**' failure to fulfill this simple requirement constituted a failure to discharge its initial burden of production

under Rule 56, and thereby rendered summary judgment improper.[6]

337 *337 This case is indistinguishable from *Adickes.* Here, as there, the defendant moved for summary judgment on the ground that the record contained no evidence to support an essential element of the plaintiff's claim. Here, as there, the plaintiff responded by drawing the court's attention to evidence that was already in the record and that had been ignored by the moving party. Consequently, here, as there, summary judgment should be denied on the ground that the moving party failed to satisfy its initial burden of production.[7]

JUSTICE STEVENS, dissenting.

As the Court points out, *ante,* at 319-320, petitioner's motion for summary judgment was based on the proposition that respondent could not prevail unless she proved that her deceased husband had been exposed to petitioner's products "within the jurisdictional
338 limits" of the District of Columbia.[1] *338 Respondent made an adequate showing — albeit possibly not in admissible form[2] — that her husband had been exposed to petitioner's product in Illinois.[3] Although the basis of the motion and the argument had been the lack of exposure *in the District of Columbia,* the District Court stated at the end of the argument: "The Court will grant the defendant **Celotex's** motion for summary judgment there being no showing that the plaintiff was exposed to the defendant **Celotex's** product in the District of Columbia *or elsewhere* within the statutory period." App. 217 (emphasis added). The District Court offered no additional explanation and no written opinion. The Court of Appeals reversed on the basis that **Celotex** had not met its burden; the court noted the incongruity of the District Court's opinion in the context of the motion and argument, but did not rest on that basis because of the "or elsewhere" language.[4]

Taken in the context of the motion for summary judgment on the basis of no exposure in
339 the District of Columbia, the *339 District Court's decision to grant summary judgment was palpably erroneous. The court's bench reference to "or elsewhere" neither validated that decision nor raised the complex question addressed by this Court today. In light of the District Court's plain error, therefore, it is perfectly clear that, even after this Court's abstract exercise in Rule construction, we should nonetheless affirm the reversal of summary judgment on that narrow ground.[5]

I respectfully dissent.

[*] *Stephen M. Shapiro, Robert L. Stern, William H. Crabtree, Edward P. Good,* and *Paul M. Bator* filed a brief for the Motor Vehicle Manufacturers Association et al. as *amici curiae* urging reversal.

[1] Since our grant of certiorari in this case, the Fifth Circuit has rendered a decision squarely rejecting the position adopted here by the District of Columbia Circuit. See *Fontenot* v. *Upjohn Co.,* 780 F. 2d 1190 (1986).

[2] JUSTICE STEVENS, in dissent, argues that the District Court granted summary judgment only because respondent presented no evidence that the decedent was exposed to **Celotex** asbestos products *in the District of Columbia.* See *post,* at 338-339. According to JUSTICE STEVENS, we should affirm the decision of the Court of Appeals, reversing the District Court, on the "narrower ground" that respondent "made an adequate showing" that the decedent was exposed to **Celotex** asbestos products in Chicago during 1970-1971. See *ibid.*

JUSTICE STEVENS' position is factually incorrect. The District Court expressly stated that respondent had made no showing of exposure to **Celotex** asbestos products "in the District of Columbia *or elsewhere.*" App. 217 (emphasis added). Unlike JUSTICE STEVENS, we assume that the District Court meant what it said. The majority of the Court of Appeals addressed the very issue raised by JUSTICE STEVENS, and decided that "[t]he District Court's grant of summary judgment must therefore have been based on its conclusion that there was `no showing that the plaintiff was exposed to defendant **Celotex's** product in the District of Columbia *or elsewhere* within the statutory period.' " ***Catrett*** v. *Johns-Manville Sales* ***Corp.***, 244 U. S. App. D. C. 160, 162, n. 3, 756 F. 2d 181, 183, n. 3 (1985) (emphasis in original). In other words, no judge involved in this case to date shares JUSTICE STEVENS' view of the District Court's decision.

[3] Rule 56(e) provides:

"Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

[4] Rule 56(c) provides:

"The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages."

[5] See Louis, Federal Summary Judgment Doctrine: A Critical Analysis, 83 Yale L. J. 745, 752 (1974); Currie, Thoughts on Directed Verdicts and Summary Judgments, 45 U. Chi. L. Rev. 72, 79 (1977).

[6] Rule 56(f) provides:

"Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just."

[1] It is also unclear what the Court of Appeals is supposed to do in this case on remand. JUSTICE WHITE — who has provided the Court's fifth vote — plainly believes that the Court of Appeals should reevaluate whether the defendant met its initial burden of production. However, the decision to reverse rather than to vacate the judgment below implies that the Court of Appeals should assume that **Celotex** has met its initial burden of production and ask only whether the plaintiff responded adequately, and, if so, whether the defendant has met its ultimate burden of persuasion that no genuine issue exists for trial. Absent some clearer expression from the Court to the contrary, JUSTICE WHITE'S understanding would seem to be controlling. Cf. *Marks* v. *United States*, 430 U. S. 188, 193 (1977).

[2] The burden of persuasion imposed on a moving party by Rule 56 is a stringent one. 6 Moore ¶ 56.15[3], p. 56-466; 10A Wright § 2727, p. 124. Summary judgment should not be granted unless it is clear that a trial is unnecessary, *Anderson* v. *Liberty Lobby, Inc., ante,* at 255, and any doubt as to the existence of a genuine issue for trial should be resolved against the moving party, *Adickes* v. *S. H. Kress & Co.*, 398 U. S. 144, 158-159 (1970). In determining whether a moving party has met its burden of persuasion, the court is obliged to take account of the entire setting of the case and must consider all papers of record as well as any materials prepared for the motion. 10A Wright § 2721, p. 44; see, *e. g., Stepanischen* v. *Merchants Despatch Transportation* ***Corp.***, 722 F. 2d 922, 930 (CA1 1983); *Higgenbotham* v. *Ochsner Foundation Hospital*, 607 F. 2d 653, 656 (CA5 1979). As explained by the Court of Appeals for the Third Circuit in *In re Japanese Electronic Products Antitrust Litigation*, 723 F. 2d 238 (1983), rev'd on other grounds *sub nom. Matsushita Electric Industrial Co.* v. *Zenith Radio* ***Corp.***, 475 U. S. 574 (1986), "[i]f . . . there is any evidence in the record from any source from which a reasonable inference in the [nonmoving party's] favor may be drawn, the moving party simply cannot obtain a summary judgment . . . ." 723 F. 2d, at 258.

[3] Once the moving party has attacked whatever record evidence — if any — the nonmoving party purports to rely upon, the burden of production shifts to the nonmoving party, who must either (1) rehabilitate the evidence attacked in the moving party's papers, (2) produce additional evidence showing the existence of a genuine issue for trial as provided in Rule 56(e), or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f). See 10A Wright § 2727, pp. 138-143. Summary judgment should be granted if the nonmoving party fails to respond in one or more of these ways, or if, after the nonmoving party responds, the court determines that the moving party has met its ultimate burden of persuading the court that there is no genuine issue of material fact for trial. See, *e. g.,* *First National Bank of Arizona* v. *Cities Service Co.,* 391 U. S. 253, 289 (1968).

[4] JUSTICE STEVENS asserts that the District Court granted summary judgment on the ground that the plaintiff had failed to show exposure in the District of Columbia. He contends that the judgment of the Court of Appeals reversing the District Court's judgment should be affirmed on the "narrow ground" that it was "palpably erroneous" to grant summary judgment on this basis. *Post,* at 339 (dissenting). The Court replies that what the District Court said was that plaintiff had failed to show exposure in the District of Columbia "or elsewhere." *Ante,* at 320, n. 2. In my view, it does not really matter which reading is correct in this case. For, contrary to JUSTICE STEVENS' claim, deciding this case on the ground that **Celotex** failed to meet its burden of production under Rule 56 does not involve an "abstract exercise in Rule construction." *Post,* at 339 (STEVENS, J., dissenting). To the contrary, the principles governing a movant's burden of proof are straightforward and well established, and deciding the case on this basis does not require a new construction of Rule 56 at all; it simply entails applying established law to the particular facts of this case. The choice to reverse because of "palpable erro[r]" with respect to the burden of a moving party under Rule 56 is thus no more "abstract" than the choice to reverse because of such error with respect to the elements of a tort claim. Indeed, given that the issue of the moving party's burden under Rule 56 was the basis of the Court of Appeals' decision, the question upon which certiorari was granted, and the issue briefed by the parties and argued to the Court, it would seem to be the preferable ground for deciding the case.

[5] **Celotex** apparently withdrew this motion because, contrary to the assertion made in the first summary judgment motion, its second set of interrogatories had not been served on the plaintiff.

[6] If the plaintiff had answered **Celotex**' second set of interrogatories with the evidence in her response to the first summary judgment motion, and **Celotex** had ignored those interrogatories and based its second summary judgment motion on the first set of interrogatories only, **Celotex** obviously could not claim to have discharged its Rule 56 burden of production. This result should not be different simply because the evidence plaintiff relied upon to support her claim was acquired by **Celotex** other than in plaintiff's answers to interrogatories.

[7] Although JUSTICE WHITE agrees that "if [plaintiff] has named a witness to support her claim, summary judgment should not be granted without **Celotex** somehow showing that the named witness' possible testimony raises no genuine issue of material fact," he would remand "[b]ecause the Court of Appeals found it unnecessary to address this aspect of the case." *Ante,* at 328-329 (concurring). However, **Celotex** has admitted that plaintiff had disclosed her intent to call Mr. Hoff as a witness at trial before **Celotex** filed its second motion for summary judgment. Tr. of Oral Arg. 6-7. Under the circumstances, then, remanding is a waste of time.

[1] See Motion of Defendant **Celotex** Corporation for Summary Judgment, App. 170 ("Defendant **Celotex** Corporation, pursuant to Rule 56 (b) of the Federal Rules of Civil Procedure moves this Court for an Order granting Summary Judgment on the ground that plaintiff has failed to produce evidence that any product designed, manufactured or distributed by **Celotex** Corporation was the proximate cause of the injuries alleged *within the jurisdictional limits of this Court*") (emphasis added); Memorandum of Points and Authorities in Support of Motion of Defendant **Celotex** Corporation for Summary Judgment, *id.,* at 175 (Plaintiff "must demonstrate some link between a **Celotex** Corporation product claimed to be the cause of the decedent's illness and the decedent himself. The record is totally devoid of any such evidence *within the jurisdictional confines of this Court*") (emphasis added); Transcript of Argument in Support of Motion of Defendant **Celotex** Corporation for Summary Judgment, *id.,* at 211 ("Our position is . . . there has been no product identification of any **Celotex** products . . . that have been used *in the District of Columbia* to which the decedent was exposed") (emphasis added).

[2] But cf. *ante,* at 324 ("We do not mean that the nonmoving party must produce evidence in a form that would be admissible at trial in order to avoid summary judgment").

[3] See App. 160 (letter from Aetna Life Insurance Co.) (referring to the "asbestos that Mr. **Catrett** came into contact with while working for Anning-Johnson Company" and noting that the "manufacturer of this product" was purchased by **Celotex**); *id.,* at 162 (letter from Anning-Johnson Co.) (confirming that **Catrett** worked for the company and supervised the installation of asbestos produced by the company that **Celotex** ultimately

purchased); *id.,* at 164, 164c (deposition of **Catrett**) (description of his work with asbestos "in Chicago").

[4] See ***Catrett*** v. *Johns-Manville Sales* ***Corp.***, 756 F. 2d 181, 185, n. 14 (1985) ("[T]he discussion at the time the motion was granted actually spoke to venue. It was only the phrase `or elsewhere,' appearing with no prior discussion, in the judge's oral ruling at the close of argument that made the grant of summary judgment even conceivably proper").

[5] Cf. n. 2, *supra.* The Court's statement that the case should be remanded because the Court of Appeals has a "superior knowledge of local law," *ante,* at 327, is bewildering because there is no question of local law to be decided. Cf. *Bishop* v. *Wood,* 426 U. S. 341, 345-347 (1976).

The Court's decision to remand when a sufficient ground for affirmance is available does reveal, however, the Court's increasing tendency to adopt a presumption of reversal. See, *e. g., New York* v. *P. J. Video, Inc.,* 475 U. S. 868, 884 (1986) (MARSHALL, J., dissenting); *Icicle Seafoods, Inc.* v. *Worthington,* 475 U. S. 709, 715 (1986) (STEVENS, J., dissenting); *City of Los Angeles* v. *Heller,* 475 U. S. 796, 800 (1986) (STEVENS, J., dissenting); *Pennsylvania* v. *Goldhammer,* 474 U. S. 28, 31 (1985) (STEVENS, J., dissenting). As a matter of efficient judicial administration and of respect for the state and federal courts, I believe the presumption should be precisely the opposite.

153 F.3d 774 (1998)

ANR ADVANCE TRANSPORTATION COMPANY, Plaintiff-Appellant,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 710, Defendant-Appellee.

No. 97-4075.

United States Court of Appeals, Seventh Circuit.

Argued May 29, 1998.
Decided August 26, 1998.
Rehearing and Suggestion for Rehearing Denied October 7, 1998.

775 *775 Jeffrey L. Madoff (argued), Matkov, Salzman, Madoff & Gunn, Chicago, IL, for Plaintiff-Appellant.

Marvin Gittler (argued), Susan Brannigan, Asher, Gittler, Greenfield, Cohen & D'Alba, Chicago, IL, for Defendant-Appellee.

Before CUMMINGS, RIPPLE and EVANS, Circuit Judges.

Rehearing and Suggestion for Rehearing En Banc Denied October 7, 1998.

RIPPLE, Circuit Judge.

ANR Advance Transportation Company, Inc., brought this action under § 301(a) of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185(a). It sought vacation of an arbitrator's decision that had resolved a postmerger wage level dispute against **ANR Advance** and in favor of the International Brotherhood of Teamsters, Local No. 710 (the "Union"). **ANR Advance** later moved for summary judgment; the district court denied that motion and instead granted summary judgment, sua sponte, to the Union. **ANR Advance** now appeals. For the reasons that follow, we affirm the judgment of the district court.

I

BACKGROUND

A. Facts

ANR Advance Transportation Company, Inc. ("**ANR Advance**") is a trucking company that was formed on November 5, 1995, upon the merger of two separate trucking companies. Specifically, **Advance Transportation** Company ("**Advance**") was absorbed by **ANR** Freight System, Inc. ("**ANR** Freight"), and the company was renamed **ANR Advance** to reflect the transaction.

Prior to the merger, both **Advance** and **ANR** Freight employed office and dock workers. In each company, both groups were represented by the Union. Moreover, in each company, there was a separate collective bargaining agreement ("CBA") with the Union for each of these two job classifications. These four CBAs had several similarities. Each was in effect from April 1, 1994, through March 31, 1998; each contained an Article 10 that governed the effect of a merger on the compensation of workers employed by the merging company. In pertinent part, that article provided:

> If the minimum wage, hour and working conditions in the company absorbed differ from those minimums set forth in this Agreement, the higher of the two shall *776 remain in effect for the members so absorbed.

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R.1-1, Ex. A at 22.[1] This case involves the arbitrator's interpretation of this provision and the resulting wage levels to be paid to employees after the merger.

Although the CBAs had some similar provisions, they also had significant differences with respect to compensation and benefits. Although the minimum wage rates for both office and dock employees were the same, employees at **ANR** Freight were participants in a Wage Reduction-Job Security Plan ("**ANR** Freight Plan"). This Plan provided for a reduction of 15% in the wage rates contained in the CBAs. According to **ANR Advance**, this reduction in wages in the **ANR** Freight Plan was a quid pro quo for certain benefits pertaining to job security. The other premerger company, **Advance**, had in place Addenda to its CBAs which provided for rates of pay 10% lower than those provided in the CBAs. The parties dispute whether this 10% wage reduction in the Addenda, like the **ANR** Freight Plan, was in exchange for benefits. In any event, the effect of these provisions was that, before the merger, there was a 5% differential between the hourly wages paid to **Advance** employees and **ANR** Freight employees; **Advance** employees received the higher comparative hourly wage rates.

Following the merger, **ANR Advance** determined that it would pay all of its office and dock employees in accordance with the CBAs between **ANR** Freight (the surviving company) and the Union. Consequently, **ANR Advance** paid the former **Advance** employees 5% less than they had been receiving. However, these employees, although now receiving a lower hourly wage, became eligible for the benefits provided under the Wage Reduction-Job Security Plan. Nevertheless, the former **Advance** employees filed grievances and asserted that their pay had been reduced in contravention of Article 10 of their CBAs.

This dispute went to arbitration. The arbitrator determined that **ANR Advance** had breached the CBAs by paying the former **Advance** employees hourly wages less than

they had been receiving prior to the merger. Article 10 required a comparison of "wage, hour and working conditions." In the arbitrator's view, the hourly rates to be compared were not the "unreduced" wages contained in the CBAs, but the wage rates in effect because of the **ANR** Freight Plan and the Addenda that modified the CBAs' wage terms. See R.1-1, Ex. G at 28, 32.[2] The arbitrator therefore determined that the **Advance** employees' premerger wages had been higher than those paid to the **ANR** Freight employees. Accordingly, he held that the **Advance** employees were entitled to their premerger wages because the CBA provisions stated that "the higher of the two shall remain in effect for the members ... absorbed." **ANR Advance** was ordered to pay the former **Advance** employees the difference between their current and former wages from the time of merger to the time of the arbitration award; it was further ordered to pay the premerger wages to those employees for the remainder of the contract.

B. Proceedings in the District Court

ANR Advance then filed this action to vacate the arbitrator's award. In due course, it filed a motion for summary judgment. The district court reviewed the arbitrator's decision and determined that, in making his decision, the arbitrator had interpreted the CBAs' language and that the decision therefore drew its essence from the CBAs. Although the court believed that **ANR Advance's** position with regard to the proper interpretation of the CBAs and to the consequent treatment of the wage comparison was rational, the court also determined that the *777 arbitrator's position was rational and not in excess of his authority. The district court also concluded that the arbitrator was entitled to disregard the decision of another arbitrator that had indicated that the 15% wage reduction would apply to all employees of the merged company, **ANR Advance**. The decision in that case, noted the court, applied to different contracts and, because it was sparse in its reasoning, "did not give any insight into the rationale for the decision or the specific provisions on which the decision was based." R.24 at 9.

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The district court therefore denied **ANR Advance's** motion for summary judgment and instead granted, sua sponte, summary judgment to the Union.

II

DISCUSSION

A.

ANR Advance now challenges the district court's decision to grant summary judgment in favor of the Union. We review the district court's grant of summary judgment de novo, applying the same standard to evaluate the arbitrator's decision as that employed by the district court. *See* *Amax Coal Co. v. United Mine Workers of Am., Int'l Union*, 92 F.3d 571, 574 (7th Cir.1996); *Jasper Cabinet Co. v. United Steelworkers of Am., AFL-CIO-CLC, Upholstery & Allied Div.*, 77 F.3d 1025, 1026 (7th Cir.1996). In that review, we

construe the facts of record and all inferences that may be drawn from them in the light most favorable to **ANR Advance**. *See* *Jasper Cabinet Co.*, 77 F.3d at 1026. Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). "When the material facts are not in dispute, as in this case, the sole question is whether the moving party [the Union] is entitled to judgment as a matter of law." *Cozzie v. Metropolitan Life Ins. Co.*, 140 F.3d 1104, 1107 (7th Cir.1998) (internal quotations omitted).

Litigants attempting to overturn an arbitrator's award face a daunting challenge. *See* *Amax Coal Co.*, 92 F.3d at 575 ("It is well established that judicial review of arbitration awards under collective bargaining agreements is extremely narrow." (citing cases)). The Supreme Court has explained that when "[c]ollective-bargaining agreements ... provide grievance procedures to settle disputes between union and employer with respect to the interpretation and application of the agreement and require binding arbitration for unsettled grievances," the "courts are not authorized to reconsider the merits of an award even though the parties may allege that the award rests on errors of fact or on misinterpretation of the contract." *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 36, 108 S.Ct. 364, 98 L.Ed.2d 286 (1987). The Supreme Court went on to state that:

> [T]he arbitrator's award settling a dispute ... must draw its essence from the contract and cannot simply reflect the arbitrator's own notions of industrial justice. But as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision.

Id. at 38, 108 S.Ct. 364. Since the Court's reconfirmation[3] of this standard in *Misco,* we have elaborated further on its application. We have explained that "`[i]t is only when the arbitrator must have based his award on some body of thought, or feeling, or policy, or law that is outside the contract' that the award can be said not to draw its essence from the [CBA]." *Jasper Cabinet Co.*, 77 F.3d at 1028 (quoting *Ethyl Corp. v. United Steelworkers of Am.*, 768 F.2d 180, 184-85 (7th Cir.1985), *cert. denied,* 475 U.S. 1010, 778 *778 106 S.Ct. 1184, 89 L.Ed.2d 300 (1986)). Therefore, in this context, our role is not to substitute our judgment for the arbitrator or even to determine that the arbitration was legally or factually in error; instead, we must limit our inquiry to whether the arbitrator reached his decision through an interpretation of the CBAs. If the arbitrator attempted to give meaning to the terms of the contract, then the award drew its essence from the CBAs and we shall not disturb it. Moreover, "[w]e resolve any reasonable doubt about whether an award draws its essence from the collective bargaining agreement in favor of enforcing the award." *Polk Bros., Inc. v. Chicago Truck Drivers, Helpers & Warehouse Workers Union (Independent)*, 973 F.2d 593, 597 (7th Cir.1992).

B.

ANR Advance acknowledges, as it must, the difficult nature of its challenge. Nevertheless, it endeavors to establish that the arbitrator effectively ignored the language of the CBAs and therefore that his decision does not draw its essence from the CBAs. **ANR Advance** states simply the arbitrator's task: He was required, under Article 10, to compare the "minimum wage, hour and working conditions" at **Advance** to the minimums set forth in **ANR** Freight's agreement with the Union, to determine if those minimums differed; if there was a difference, he was to apply the higher of the two to the absorbed employees — the former **Advance** employees. In **ANR Advance's** view, the arbitrator grossly erred in this analysis; he simplistically compared only the wage rates and did not consider the "hour and working conditions" to determine whether the **Advance** employees were actually paid more than the **ANR** Freight employees during the premerger period. By relying only on the hourly wage rate, and ignoring the value of the extra benefits that had been negotiated through the various modifications of the CBAs, the arbitrator concluded that the **Advance** employees were being paid 5% higher wages than **ANR** Freight employees.

ANR Advance suggests two alternative lines of reasoning that the arbitrator could have employed in fulfilling his task. In its view, either would have been justified under the language of the CBAs. First, **ANR Advance** submits that the arbitrator should have realized that the "wage, hour and working conditions" at **ANR** Freight were actually higher than those at **Advance** because the **ANR** Freight employees' wages had been reduced by 15% in exchange for benefits contained in the Wage Reduction-Job Security Plan. If the arbitrator had considered these benefits along with the wage rates, reasons **ANR Advance**, he would have concluded that **ANR** Freight employees were paid 10% more than the **Advance** employees. This argument assumes that the **Advance** Addenda to the CBAs providing for wages 10% lower than those set forth in the CBAs were not negotiated to effectuate the same trade-off as the one that had motivated the **ANR** Freight reduction. Indeed, **ANR Advance** maintains that the **Advance** employees simply were paid 10% less and that there was no reduction in the base wage rate in exchange for provisions favorable to the employees contained in the Addenda. Therefore, it reasons, although the **Advance** employees' hourly wages were 5% higher than **ANR** Freight's on a straight comparison, the value of the Wage Reduction-Job Security Plan was 15% of the **ANR** Freight employees' wages. Therefore, in its view, the **ANR** Freight total compensation package was 10% greater than that paid by **Advance**.

In the alternative, **ANR Advance** submits that, even if the Addenda in the **Advance** CBAs were put on the same footing as the **ANR** Freight Plan, the arbitrator's result cannot be justified. In that case, the value of the Addenda was the 10% reduction in **Advance** wages from the base wages. The **Advance** hourly wages plus the value of the Addenda must then be compared to the **ANR** Freight wages plus the value of the **ANR** Freight Plan. Under this comparison, the employees at each company actually were receiving the same levels of "wage, hour and working conditions." Because the arbitrator did not account for the values of the quid pro quos, asserts **ANR Advance**, as required under the language of Article 10, it cannot be said that the arbitrator's award draws its essence from the CBAs.

We, like the district court, acknowledge that **ANR Advance's** suggested analyses are

779 *779 not illogical ones. However, at the same time, we cannot say that the arbitrator's decision does not draw its essence from the CBAs. The arbitrator thoroughly reviewed the various CBAs, the **Advance** Addenda and the **ANR** Freight Wage Reduction-Job Security Plan in his decision. The arbitrator fully addressed the contentions of the parties, and then turned to the language of Article 10 of the CBAs to determine how to resolve the dispute. As an initial, and expressly crucial point, the arbitrator determined that he would not simply compare the unreduced wage rates set forth in the CBAs in his comparison of the "minimum wage" that was paid by each company. Instead, the arbitrator interpreted that language in Article 10 to mean that he had to consider, in his comparison of the "minimum wage, hour and working conditions" the actual wages that were being paid to the **ANR** Freight and **Advance** employees in light of the Addenda and the **ANR** Freight Plan that had modified the base wage rates in the CBAs. Moreover, the arbitrator, in his review of the documents, was not persuaded that the **ANR** Freight Plan was on a different footing than the **Advance** Addenda. Therefore, he refused to follow **ANR Advance's** suggestion that the value of the quid pro quos of the **ANR** Freight Plan was appropriate to consider in addition to the **ANR** Freight hourly wage rates, but that the **Advance** Addenda provisions reducing the **Advance** employees' wages by 10% were not.

In the arbitrator's view, then, the appropriate comparison of wages was to take place between the hourly wages at **Advance** reduced by 10% per the Addenda and the wages at **ANR** Freight reduced by 15% per the Wage Reduction-Job Security Plan. Accordingly, he found that the **Advance** wages were 5% higher and that, under Article 10 of the CBAs, the parties had contemplated that the **Advance** employees would be entitled to those wages postmerger. The arbitrator recognized that his finding would still entitle the former **Advance** employees to the benefits under the **ANR** Freight Plan, but disagreed with **ANR Advance** that this was an incongruous result.[4] Instead, he found that the parties contemplated that such a result could occur in light of Article 10 of the CBAs as well as the "Maintenance of Standards" provisions.[5]

We believe that it is clear that the arbitrator's decision and award draws its essence from the CBAs. Although we may not have reached the same conclusions as the arbitrator, it is evident that he specifically addressed the contentions of the parties and interpreted the terms of the CBAs as he believed was required by principles of contract interpretation. He determined that the appropriate wage comparison for purposes of Article 10 of the CBAs was between the wages as reduced by the Addenda and the **ANR** Freight Plan that modified the terms of the CBAs. This interpretation of the contract language was within his authority as an arbitrator. We therefore cannot say that the arbitrator failed to interpret the CBAs in reaching his conclusion. He clearly based his holding on his interpretation of the language at issue; that is all that needs to be determined in this setting.

We also do not think that the remedy the arbitrator chose can be characterized as punitive. The remedy that the arbitrator fashioned comports with his interpretation of the CBAs. Nor do we believe that the arbitrator's decision must be vacated on the ground that it disregarded a different arbitrator's decision that, according to **ANR Advance**, would have mandated a different conclusion. That other arbitration decision resolved a

780 *780 dispute regarding whether the 10% wage reduction provided in the **Advance** Addenda or the 15% wage reduction provided in the **ANR** Freight Plan would apply at the merged company, **ANR Advance**. That arbitrator, William Hobgood, determined that the "fifteen (15) percent wage reduction/profit sharing program currently in place at **ANR** shall be the plan in place at the newly merged company." R.10, Ex. 8. **ANR Advance** maintains that the arbitrator in this case should have given deference to the Hobgood decision on the ground that the CBAs in place at **Advance** and **ANR** Freight incorporate decisions made under the National Master Freight Agreement, a contract apparently governing the working conditions nationwide between **Advance** and **ANR** Freight and their employees (except those employees subject to the separate CBAs at issue here).

The arbitrator refused to defer to the Hobgood decision on the ground that the issue before him was different than that decided by Hobgood, that different parties were involved in this case and that the Hobgood decision lacked any statements regarding the reason for the conclusion it reached or even what provisions of the CBAs it considered in reaching its conclusion. After reviewing the summary disposition of the two-paragraph Hobgood decision, we agree that the arbitrator in this case was not bound to give deference to that decision. It simply is not clear from that decision what the precise issue being arbitrated was or what the rationale for its outcome might be. We do not think, therefore, it can be said that the arbitrator's decision in this case fails to draw its essence from the CBAs because it disregarded an arbitrator award resolving a dispute between different parties involving unascertained language in other CBAs.

Conclusion

The arbitrator's award in this case derives directly from its interpretation of the CBAs at issue. Therefore, we agree with the district court that the arbitration decision draws its essence from the CBAs and affirm its decision to grant summary judgment in favor of the Union.

AFFIRMED.

[1] The CBAs covering the office employees for both **Advance** and **ANR** Freight have this identical language. *See* R.1-1, Ex. A at 22 & Ex. C at 22. The provisions in the CBAs pertaining to the dock employees for both **Advance** and **ANR** Freight are identical to each other, but differ from the quoted language to the extent that the term "members" is substituted with "men." *See* R.1-1, Ex. B at 19 & Ex. D at 19.

[2] In this regard, the arbitrator expressly found that "[t]he clear meaning of `minimum wages' [sic] in Article 10, Section 17, quoted above, is the wages paid, not the `paper rates' contained in [the CBAs] before the Addenda." R.1-1, Ex. G at 29.

[3] The Court's statement derives from its earlier decision in *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960). In that case, the Court stated: "[A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement." *Id.* at 597, 80 S.Ct. 1358.

[4] **ANR Advance** submits that this result allows the former **Advance** employees essentially to obtain 105% of the pie. The **Advance** employees still get their prior wages, but are entitled to the benefits that the **ANR** Freight

employees had to give up 15% of their wages to obtain. This, claims **ANR Advance**, is inequitable and is punitive in nature. The district court, however, found that this result was the logical result of the arbitrator's interpretation of the CBAs.

[5] The CBAs contain a provision that appears to correlate to the wage preservation clause in Article 10. *See, e.g.,* R.1-1, Ex. A at 24, under the heading "Maintenance of Standards":

Section 1. The Employer agrees that all conditions of employment in his individual operation relating to wages, hours of work, overtime differentials and general working conditions shall be maintained at not less than the highest standards in effect at the time of the signing of this Agreement, and the conditions of Employment shall be improved wherever specific provisions for improvement are made elsewhere in this Agreement....

Anderson v. Liberty Lobby, Inc.
477 U.S. 242 (1986)

Syllabus | Case

U.S. Supreme Court

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986)

Anderson v. Liberty Lobby, Inc.

No. 84-1602

Argued December 3, 1985

Decided June 25, 1986

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CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR

THE DISTRICT OF COLUMBIA CIRCUIT

Syllabus

In *New York Times Co. v. Sullivan,* 376 U. S. 254, it was held that, in a libel suit brought by a public official (extended by later cases to public figures), the First Amendment requires the plaintiff to show that, in publishing the alleged defamatory statement, the defendant acted with actual malice. It was further held that such actual malice must be shown with "convincing clarity." Respondents, a nonprofit corporation described as a "citizens' lobby" and its founder, filed a libel action in Federal District Court against

petitioners, alleging that certain statements in a magazine published by petitioners were false and derogatory. Following discovery, petitioners moved for summary judgment pursuant to Federal Rule of Civil Procedure 56, asserting that, because respondents were public figures, they were required to prove their case under the *New York Times standards,* and that summary judgment was proper because actual malice was absent as a matter of law in view of an affidavit by the author of the articles in question that they had been thoroughly researched and that the facts were obtained from numerous sources. Opposing the motion, respondents claimed that an issue of actual malice was presented because the author had relied on patently unreliable sources in preparing the articles. After holding that *New York Times* applied because respondents were limited-purpose public figures, the District Court entered summary judgment for petitioners on the ground that the author's investigation and research and his reliance on numerous sources precluded a finding of actual malice. Reversing as to certain of the allegedly defamatory statements, the Court of Appeals held that the requirement that actual malice be proved by clear and convincing evidence need not be considered at the summary judgment stage, and that, with respect to those statements, summary judgment had been improperly granted, because a jury could reasonably have concluded that the allegations were defamatory, false, and made with actual malice.

Held: The Court of Appeals did not apply the correct standard in reviewing the District Court's grant of summary judgment. Pp. 477 U. S. 247-257.

(a) Summary judgment will not lie if the dispute about a material fact is "genuine," that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. At the summary judgment stage, the trial judge's function is not himself to weigh the evidence and

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determine the truth of the matter, but to determine whether there is a genuine issue for trial. There is no such issue unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. In essence, the inquiry is whether the evidence presents a sufficient disagreement to require submission to a jury, or whether it is so one-sided that one party must prevail as a matter of law. Pp. 477 U. S. 247-252.

(b) A trial court ruling on a motion for summary judgment in a case such as this must be guided by the *New York Times* "clear and convincing" evidentiary standard in determining whether a genuine issue of actual malice exists, that is, whether the evidence is such that a reasonable jury might find that actual malice had been shown with convincing clarity. Pp. 477 U. S. 252-256.

(c) A plaintiff may not defeat a defendant's properly supported motion for summary judgment in a libel case such as this one without offering any concrete evidence from which a reasonable jury could return a verdict in his favor, and by merely asserting that the jury might disbelieve the defendant's denial of actual malice. The movant has the burden of showing that there is no genuine issue of fact, but the plaintiff is not thereby relieved of his own burden of producing in turn evidence that would support a jury verdict. Pp. 477 U. S. 256-257.

241 U.S.App.D.C. 246, 746 F.2d 1563, vacated and remanded.

WHITE, J., delivered the opinion of the Court, in which MARSHALL, BLACKMUN, POWELL, STEVENS, and O'CONNOR, JJ., joined. BRENNAN, J., filed a dissenting opinion, *post,* p. 477 U. S. 257. REHNQUIST, J., filed a dissenting opinion, in which BURGER, C.J., joined, *post,* p. 477 U. S. 268.

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JUSTICE WHITE delivered the opinion of the Court.

In *New York Times Co. v. Sullivan,* 376 U. S. 254, 376 U. S. 279-280 (1964), we held that, in a libel suit brought by a public official, the First Amendment requires the plaintiff to show that, in publishing the defamatory statement, the defendant acted with actual malice -- "with knowledge that it was false, or with reckless disregard of whether it was false or not." We held further that such actual malice must be shown with "convincing clarity." *Id.* at 376 U. S. 285-286. *See also Gertz v. Robert Welch, Inc.,* 418 U. S. 323, 418 U. S. 342 (1974). These *New York Times* requirements we have since extended to libel suits brought by public figures as well. *See, e.g., Curtis Publishing Co. v. Butts,* 388 U. S. 130 (1967).

This case presents the question whether the clear-and-convincing-evidence requirement must be considered by a court ruling on a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure in a case to which *New York Times* applies. The United States Court of Appeals for the District of Columbia Circuit held that that requirement need not be considered at the summary judgment stage. 241 U.S.App.D.C. 246, 746 F.2d 1563 (1984). We granted certiorari, 471 U.S. 1134 (1985), because that holding was in conflict with decisions of several other Courts of Appeals, which had held that the *New York Times* requirement of clear and convincing evidence must be considered on a motion for summary judgment. [Footnote 1] We now reverse.

I

Respondent Liberty Lobby, Inc., is a not-for-profit corporation and self-described "citizens' lobby." Respondent Willis Carto is its founder and treasurer. In October, 1981,

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The Investigator magazine published two articles: "The Private World of Willis Carto" and "Yockey: Profile of an American Hitler." These articles were introduced by a third, shorter article entitled "America's Neo-Nazi Underground: Did Mein Kampf Spawn Yockey's Imperium, a Book Revived by Carto's Liberty Lobby?" These articles portrayed respondents as neo-Nazi, anti-Semitic, racist, and Fascist.

Respondents filed this diversity libel action in the United States District Court for the District of Columbia, alleging that some 28 statements and 2 illustrations in the 3 articles were false and derogatory. Named as defendants in the action were petitioner Jack Anderson, the publisher of The Investigator, petitioner Bill Adkins, president and chief executive officer of the Investigator Publishing Co., and petitioner Investigator

Publishing Co. itself.

Following discovery, petitioners moved for summary judgment pursuant to Rule 56. In their motion, petitioners asserted that, because respondents are public figures, they were required to prove their case under the standards set forth in *New York Times.* Petitioners also asserted that summary judgment was proper because actual malice was absent as a matter of law. In support of this latter assertion, petitioners submitted the affidavit of Charles Bermant, an employee of petitioners and the author of the two longer articles. [Footnote 2] In this affidavit, Bermant stated that he had spent a substantial amount of time researching and writing the articles, and that his facts were obtained from a wide variety of sources. He also stated that he had at all times believed, and still believed, that the facts contained in the articles were truthful and accurate. Attached to this affidavit was an appendix in which Bermant detailed the sources for each of the statements alleged by respondents to be libelous.

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Respondents opposed the motion for summary judgment, asserting that there were numerous inaccuracies in the articles and claiming that an issue of actual malice was presented by virtue of the fact that, in preparing the articles, Bermant had relied on several sources that respondents asserted were patently unreliable. Generally, respondents charged that petitioners had failed adequately to verify their information before publishing. Respondents also presented evidence that William McGaw, an editor of The Investigator, had told petitioner Adkins before publication that the articles were "terrible" and "ridiculous."

In ruling on the motion for summary judgment, the District Court first held that respondents were limited-purpose public figures, and that *New York Times* therefore applied. [Footnote 3] The District Court then held that Bermant's thorough investigation and research and his reliance on numerous sources precluded a finding of actual malice. Thus, the District Court granted the motion and entered judgment in favor of petitioners.

On appeal, the Court of Appeals affirmed as to 21 and reversed as to 9 of the allegedly defamatory statements. Although it noted that respondents did not challenge the District Court's ruling that they were limited-purpose public

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figures, and that they were thus required to prove their case under *New York Times,* the Court of Appeals nevertheless held that, for the purposes of summary judgment, the requirement that actual malice be proved by clear and convincing evidence, rather than by a preponderance of the evidence, was irrelevant: to defeat summary judgment, respondents did not have to show that a jury could find actual malice with "convincing clarity." The court based this conclusion on a perception that to impose the greater evidentiary burden at summary judgment

"would change the threshold summary judgment inquiry from a search for a minimum of facts supporting

the plaintiff's case to an evaluation of the weight of those facts and (it would seem) of the weight of at least the defendant's uncontroverted facts as well."

241 U.S.App.D.C. at 253, 746 F.2d at 1570. The court then held, with respect to nine of the statements, that summary judgment had been improperly granted because "a jury could reasonably conclude that the . . . allegations were defamatory, false, and made with actual malice." *Id.* at 260, 746 F.2d at 1577.

II

A

Our inquiry is whether the Court of Appeals erred in holding that the heightened evidentiary requirements that apply to proof of actual malice in this *New York Times* case need not be considered for the purposes of a motion for summary judgment. Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment

"shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

By its very terms, this standard provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported

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motion for summary judgment; the requirement is that there be no genuine issue of material fact.

As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted. *See generally* 10A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2725, pp. 93-95 (1983). This materiality inquiry is independent of and separate from the question of the incorporation of the evidentiary standard into the summary judgment determination. That is, while the materiality determination rests on the substantive law, it is the substantive law's identification of which facts are critical and which facts are irrelevant that governs. Any proof or evidentiary requirements imposed by the substantive law are not germane to this inquiry, since materiality is only a criterion for categorizing factual disputes in their relation to the legal elements of the claim, and not a criterion for evaluating the evidentiary underpinnings of those disputes.

More important for present purposes, summary judgment will not lie if the dispute about a material fact is "genuine," that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. In *First National Bank of Arizona v. Cities Service Co.,* 391 U. S. 253 (1968), we affirmed a grant of summary judgment for an antitrust defendant where the issue was whether there was a genuine factual

dispute as to the existence of a conspiracy. We noted Rule 56(e)'s provision that a party opposing a properly supported motion for summary judgment

"may not rest upon the mere allegations or denials of his pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial."

We observed further that

"[i]t is true that the issue of material fact required by Rule 56(c) to be present to entitle a party to proceed to

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trial is not required to be resolved conclusively in favor of the party asserting its existence; rather, all that is required is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial."

391 U.S. at 391 U. S. 288-289. We went on to hold that, in the face of the defendant's properly supported motion for summary judgment, the plaintiff could not rest on his allegations of a conspiracy to get to a jury without "any significant probative evidence tending to support the complaint." *Id.* at 391 U. S. 290.

Again, in *Adickes v. S. H. Kress & Co.,* 398 U. S. 144 (1970), the Court emphasized that the availability of summary judgment turned on whether a proper jury question was presented. There, one of the issues was whether there was a conspiracy between private persons and law enforcement officers. The District Court granted summary judgment for the defendants, stating that there was no evidence from which reasonably minded jurors might draw an inference of conspiracy. We reversed, pointing out that the moving parties' submissions had not foreclosed the possibility of the existence of certain facts from which "it would be open to a jury . . . to infer from the circumstances" that there had been a meeting of the minds. *Id.* at 398 U. S. 158-159.

Our prior decisions may not have uniformly recited the same language in describing genuine factual issues under Rule 56, but it is clear enough from our recent cases that at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial. As *Adickes, supra,* and *Cities Service, supra,* indicate, there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. *Cities Service, supra,* at 391 U. S. 288-289. If the evidence is merely colorable, *Dombrowski v. Eastland,* 387 U. S. 82 (1967) (per curiam), or is not significantly probative,

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Cities Service, supra, at 391 U. S. 290, summary judgment may be granted.

That this is the proper focus of the inquiry is strongly suggested by the Rule itself. Rule 56(e) provides that, when a properly supported motion for summary judgment is made, [Footnote 4] the adverse party

"must set forth specific facts showing that there is a genuine issue for trial." [Footnote 5] And, as we noted above, Rule 56(c) provides that the trial judge shall then grant summary judgment if there is no genuine issue as to any material fact and if the moving party is entitled to judgment as a matter of law. There is no requirement that the trial judge make findings of fact. [Footnote 6] The inquiry performed is the threshold inquiry of determining whether there is the need for a trial -- whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.

Petitioners suggest, and we agree, that this standard mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a), which is that the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict. *Brady v. Southern R. Co.,* 320 U. S. 476, 320 U. S. 479-480 (1943). If reasonable minds could differ as to the import of the evidence, however,

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a verdict should not be directed. *Wilkerson v. McCarthy,* 336 U. S. 53, 336 U. S. 62 (1949). As the Court long ago said in *Improvement Co. v. Munson,* 14 Wall. 442, 81 U. S. 448 (1872), and has several times repeated:

"Nor are judges any longer required to submit a question to a jury merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character that it would warrant the jury in finding a verdict in favor of that party. Formerly it was held that, if there was what is called a *scintilla* of evidence in support of a case, the judge was bound to leave it to the jury, but recent decisions of high authority have established a more reasonable rule, that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury could properly proceed to find a verdict for the party producing it, upon whom the *onus* of proof is imposed."

(Footnotes omitted.) *See also 89 U. S. Fant,* 22 Wall. 116, 89 U. S. 120-121 (1875); *Coughran v. Bigelow,* 164 U. S. 301, 164 U. S. 307 (1896); *Pennsylvania R. Co. v. Chamberlain,* 288 U. S. 333, 288 U. S. 343 (1933).

The Court has said that summary judgment should be granted where the evidence is such that it "would require a directed verdict for the moving party." *Sartor v. Arkansas Gas Corp.,* 321 U. S. 620, 321 U. S. 624 (1944). And we have noted that the "genuine issue" summary judgment standard is "very close" to the "reasonable jury" directed verdict standard:

"The primary difference between the two motions is procedural; summary judgment motions are usually made before trial and decided on documentary evidence, while directed verdict motions are made at trial and decided on the evidence that has been admitted."

Bill Johnson's Restaurants, Inc. v. NLRB, 461 U. S. 731, 461 U. S. 745, n. 11 (1983). In essence, though,

the inquiry under each is the same: whether the evidence presents a sufficient disagreement to require submission

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to a jury, or whether it is so one-sided that one party must prevail as a matter of law.

B

Progressing to the specific issue in this case, we are convinced that the inquiry involved in a ruling on a motion for summary judgment or for a directed verdict necessarily implicates the substantive evidentiary standard of proof that would apply at the trial on the merits. If the defendant in a run-of-the-mill civil case moves for summary judgment or for a directed verdict based on the lack of proof of a material fact, the judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other, but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented. The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff. The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict --

"whether there is [evidence] upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the *onus* of proof is imposed."

Munson, supra, at 81 U. S. 448.

In terms of the nature of the inquiry, this is no different from the consideration of a motion for acquittal in a criminal case, where the beyond-a-reasonable-doubt standard applies and where the trial judge asks whether a reasonable jury could find guilt beyond a reasonable doubt. *See Jackson v. Virginia,* 443 U. S. 307, 443 U. S. 318-319 (1979). Similarly, where the First Amendment mandates a "clear and convincing" standard, the trial judge, in disposing of a directed verdict motion, should consider whether a reasonable factfinder could conclude, for example, that the plaintiff had shown actual malice with convincing clarity.

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The case for the proposition that a higher burden of proof should have a corresponding effect on the judge when deciding whether to send the case to the jury was well made by the Court of Appeals for the Second Circuit in *United States v. Taylor,* 464 F.2d 240 (1972), which overruled *United States v. Feinberg,* 140 F.2d 592 (1944), a case holding that the standard of evidence necessary for a judge to send a case to the jury is the same in both civil and criminal cases, even though the standard that the jury must apply in a criminal case is more demanding than in civil proceedings. Speaking through Judge Friendly, the Second Circuit said:

"It would seem at first blush -- and we think also at second -- that more 'facts in evidence' are needed for the judge to allow [reasonable jurors to pass on a claim] when the proponent is required to establish [the

claim] not merely by a preponderance of the evidence but . . . beyond a reasonable doubt."

464 F.2d at 242. The court could not find a

"satisfying explanation in the *Feinberg* opinion why the judge should not place this higher burden on the prosecution in criminal proceedings before sending the case to the jury."

Ibid. The *Taylor* court also pointed out that almost all the Circuits had adopted something like Judge Prettyman's formulation in *Curley v. United States,* 160 F.2d 229, 232-233 (1947):

"The true rule, therefore, is that a trial judge, in passing upon a motion for directed verdict of acquittal, must determine whether, upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt. If he concludes that, upon the evidence, there must be such a doubt in a reasonable mind, he must grant the motion; or, to state it another way, if there is no evidence upon which a reasonable mind might fairly conclude guilt beyond reasonable doubt, the motion must be granted. If he concludes that either of the

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two results, a reasonable doubt or no reasonable doubt, is fairly possible, he must let the jury decide the matter."

This view is equally applicable to a civil case to which the "clear and convincing" standard applies. Indeed, the *Taylor* court thought that it was implicit in this Court's adoption of the clear-and-convincing-evidence standard for certain kinds of cases that there was a "concomitant duty on the judge to consider the applicable burden when deciding whether to send a case to the jury." 464 F.2d at 243. Although the court thought that this higher standard would not produce different results in many cases, it could not say that it would never do so.

Just as the "convincing clarity" requirement is relevant in ruling on a motion for directed verdict, it is relevant in ruling on a motion for summary judgment. When determining if a genuine factual issue as to actual malice exists in a libel suit brought by a public figure, a trial judge must bear in mind the actual quantum and quality of proof necessary to support liability under *New York Times.* For example, there is no genuine issue if the evidence presented in the opposing affidavits is of insufficient caliber or quantity to allow a rational finder of fact to find actual malice by clear and convincing evidence.

Thus, in ruling on a motion for summary judgment, the judge must view the evidence presented through the prism of the substantive evidentiary burden. This conclusion is mandated by the nature of this determination. The question here is whether a jury could reasonably find *either* that the plaintiff proved his case by the quality and quantity of evidence required by the governing law *or* that he did not. Whether a jury could reasonably find for either party, however, cannot be defined except by the criteria governing what evidence would enable the jury to find for either the plaintiff or the defendant: it makes no sense to

say that a jury could reasonably find for either party without some

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benchmark as to what standards govern its deliberations and within what boundaries its ultimate decision must fall, and these standards and boundaries are in fact provided by the applicable evidentiary standards.

Our holding that the clear-and-convincing standard of proof should be taken into account in ruling on summary judgment motions does not denigrate the role of the jury. It by no means authorizes trial on affidavits. Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor. *Adickes,* 398 U.S. at 398 U. S. 158-159. Neither do we suggest that the trial courts should act other than with caution in granting summary judgment, or that the trial court may not deny summary judgment in a case where there is reason to believe that the better course would be to proceed to a full trial. *Kennedy v. Silas Mason Co.,* 334 U. S. 249 (1948).

In sum, we conclude that the determination of whether a given factual dispute requires submission to a jury must be guided by the substantive evidentiary standards that apply to the case. This is true at both the directed verdict and summary judgment stages. Consequently, where the *New York Times* "clear and convincing" evidence requirement applies, the trial judge's summary judgment inquiry as to whether a genuine issue exists will be whether the evidence presented is such that a jury applying that evidentiary standard could reasonably find for either the plaintiff or the defendant. Thus, where the factual dispute concerns actual malice, clearly a material issue in a *New York Times* case, the appropriate summary judgment question will be whether the evidence in the record could support a reasonable jury finding

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either that the plaintiff has shown actual malice by clear and convincing evidence or that the plaintiff has not. [Footnote 7]

III

Respondents argue, however, that, whatever may be true of the applicability of the "clear and convincing" standard at the summary judgment or directed verdict stage, the defendant should seldom, if ever, be granted summary judgment where his state of mind is at issue and the jury might disbelieve him or his witnesses as to this issue. They rely on *Poller v. Columbia Broadcasting Co.,* 368 U. S. 464 (1962), for this proposition. We do not understand *Poller,* however, to hold that a plaintiff may defeat a defendant's properly supported motion for summary judgment in a conspiracy or libel case, for example, without offering any concrete evidence from which a reasonable juror could return a verdict in his favor, and by merely asserting that the jury might, and legally could, disbelieve the defendant's denial of a conspiracy or of legal malice. The movant has the burden of showing that there is no genuine issue of fact, but the

plaintiff is not thereby relieved of his own burden of producing, in turn, evidence that would support a jury verdict. Rule 56(e) itself provides that a party opposing a properly supported motion for summary judgment may not rest upon mere allegation or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial. Based on that Rule, *Cities Service,* 391 U.S. at 391 U. S. 290, held that the plaintiff could not defeat the properly supported summary judgment motion of a defendant charged with a conspiracy without offering "any significant probative evidence tending to support the complaint." As we have recently said, "discredited testimony

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is not [normally] considered a sufficient basis for drawing a contrary conclusion." *Bose Corp. v. Consumers Union of United States, Inc.,* 466 U. S. 485, 466 U. S. 512 (1984). Instead, the plaintiff must present affirmative evidence in order to defeat a properly supported motion for summary judgment. This is true even where the evidence is likely to be within the possession of the defendant, as long as the plaintiff has had a full opportunity to conduct discovery. We repeat, however, that the plaintiff, to survive the defendant's motion, need only present evidence from which a jury might return a verdict in his favor. If he does so, there is a genuine issue of fact that requires a trial.

IV

In sum, a court ruling on a motion for summary judgment must be guided by the *New York Times* "clear and convincing" evidentiary standard in determining whether a genuine issue of actual malice exists -- that is, whether the evidence presented is such that a reasonable jury might find that actual malice had been shown with convincing clarity. Because the Court of Appeals did not apply the correct standard in reviewing the District Court's grant of summary judgment, we vacate its decision and remand the case for further proceedings consistent with this opinion.

It is so ordered.

[Footnote 1]

See, e.g., Rebozo v. Washington Post Co., 637 F.2d 375, 381 (CA5), *cert. denied,* 454 U.S. 964 (1981); *Yiamouyiannis v. Consumers Union of United States, Inc.,* 619 F.2d 932, 940 (CA2), *cert. denied,* 449 U.S. 839 (1980); *Carson v. Allied News Co.,* 529 F.2d 206, 210 (CA7 1976).

[Footnote 2]

The short, introductory article was written by petitioner Anderson, and relied exclusively on the information obtained by Bermant.

[Footnote 3]

In *Gertz v. Robert Welch, Inc.,* 418 U. S. 323, 418 U. S. 351 (1974), this Court summarized who will be considered to be a public figure to whom the *New York Times* standards will apply:

"[The public figure] designation may rest on either of two alternative bases. In some instances, an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy, and thereby becomes a public figure for a limited range of issues. In either case, such persons assume special prominence in the resolution of public questions."

The District Court found that respondents, as political lobbyists, are the second type of political figure described by the *Gertz* court -- a limited-purpose public figure. *See also Waldbaum v. Fairchild Publications Inc.,* 201 U.S.App.D.C. 301, 306, 627 F.2d 1287, 1292, *cert. denied.* 449 U.S. 898 (1980).

[Footnote 4]

Our analysis here does not address the question of the initial burden of production of evidence, placed by Rule 56 on the party moving for summary judgment. *See Celotex Corp. v. Catrett, post,* p. 477 U. S. 317. Respondents have not raised this issue here, and, for the purposes of our discussion, we assume that the moving party has met initially the requisite evidentiary burden.

[Footnote 5]

This requirement in turn is qualified by Rule 56(f)'s provision that summary judgment be refused where the nonmoving party has not had the opportunity to discover information that is essential to his opposition. In our analysis here, we assume that both parties have had ample opportunity for discovery.

[Footnote 6]

In many cases, however, findings are extremely helpful to a reviewing court.

[Footnote 7]

Our statement in *Hutchinson v. Proxmire,* 443 U. S. 111, 443 U. S. 120, n. 9 (1979), that proof of actual malice "does not readily lend itself to summary disposition" was simply an acknowledgment of our general reluctance

"to grant special procedural protections to defendants in libel and defamation actions in addition to the constitutional protections embodied in the substantive laws."

Calder v. Jones, 465 U. S. 783, 465 U. S. 790-791 (1984).

JUSTICE BRENNAN, dissenting.

The Court today holds that

"whether a given factual dispute requires submission to a jury must be guided by the substantive evidentiary standards that apply to the case,"

ante at 477 U. S. 255. [Footnote 2/1] In my view, the Court's analysis is deeply flawed,

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and rests on a shaky foundation of unconnected and unsupported observations, assertions, and conclusions. Moreover, I am unable to divine from the Court's opinion how these evidentiary standards are to be considered, or what a trial judge is actually supposed to do in ruling on a motion for summary judgment. Accordingly, I respectfully dissent.

To support its holding that, in ruling on a motion for summary judgment, a trial court must consider substantive evidentiary burdens, the Court appropriately begins with the language of Rule 56(c), which states that summary judgment shall be granted if it appears that there is "no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The Court then purports to restate this Rule, and asserts that

"summary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party."

Ante at 477 U. S. 248. No direct authority is cited for the proposition that, in order to determine whether a dispute is "genuine" for Rule 56 purposes, a judge must ask if a "reasonable" jury could find for the nonmoving party. Instead, the Court quotes from *First National Bank of Arizona v. Cities Service Co.,* 391 U.S.

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253, 391 U. S. 288-289 (1968), to the effect that a summary judgment motion will be defeated if

"sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial,"

ante at 477 U. S. 249, and that a plaintiff may not, in defending against a motion for summary judgment, rest on mere allegations or denials of his pleadings. After citing *Adickes v. S. H. Kress & Co.,* 398 U. S. 144 (1970), for the unstartling proposition that "the availability of summary judgment turn[s] on whether a proper jury question [is] presented," *ante* at 477 U. S. 249, the Court then reasserts, again with no direct authority, that, in determining whether a jury question is presented, the inquiry is whether there are factual issues "that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Ante* at 477 U. S. 250. The Court maintains that this summary judgment inquiry "mirrors" that which applies in the context of a motion for directed verdict under Federal Rule of Civil Procedure 50(a):

"whether the evidence presents a sufficient disagreement to require submission to a jury, or whether it is so one-sided that one party must prevail as a matter of law."

Ante at 477 U. S. 251-252.

Having thus decided that a "genuine" dispute is one which is not "one-sided," and one which could "reasonably" be resolved by a "fair-minded" jury in favor of either party, *ibid.,* the Court then concludes:

"Whether a jury could reasonably find for either party, however, cannot be defined except by the criteria governing what evidence would enable the jury to find for either the plaintiff or the defendant: it makes no sense to say that a jury could reasonably find for either party without some benchmark as to what standards govern its deliberations and within what boundaries its ultimate decision must fall, and these standards and boundaries are, in fact, provided by the applicable evidentiary standards."

Ante at 477 U. S. 254-255.

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As far as I can discern, this conclusion, which is at the heart of the case, has been reached without the benefit of any support in the case law. Although, as noted above, the Court cites *Adickes* and *Cities Service,* those cases simply do not stand for the proposition that, in ruling on a summary judgment motion, the trial court is to inquire into the "one-sidedness" of the evidence presented by the parties. *Cities Service* involved the propriety of a grant of summary judgment in favor of a defendant alleged to have conspired to violate the antitrust laws. The issue in the case was whether, on the basis of the facts in the record, a jury could *infer* that the defendant had entered into a conspiracy to boycott. No direct evidence of the conspiracy was produced. In agreeing with the lower courts that the *circumstantial* evidence presented by the plaintiff was insufficient to take the case to the jury, we observed that there was "one fact" that petitioner had produced to support the existence of the illegal agreement, and that that single fact could not support petitioner's theory of liability. Critically, we observed that

"[t]he case at hand presents peculiar difficulties because the issue of fact crucial to petitioner's case is also an issue of law, namely the existence of a conspiracy."

391 U.S. at 391 U. S. 289. In other words, *Cities Service* is, at heart, about whether certain facts can support inferences that are, as a matter of antitrust law, sufficient to support a particular theory of liability under the Sherman Act. Just this Term, in discussing summary judgment in the context of suits brought under the antitrust laws, we characterized both *Cities Service* and *Monsanto Co. v. Spray-Rite Service Corp.,* 465 U. S. 752 (1984), as cases in which "*antitrust law* limit[ed] the range of permissible inferences from ambiguous evidence. . . ." *Matsushita Electric Industrial Co. v. Zenith Radio Corp.,* 475 U. S. 574, 475 U. S. 588 (1986) (emphasis added). *Cities Service* thus provides no authority for the conclusion that Rule 56 requires a trial court to consider whether direct evidence produced by the parties is "one-sided." To the contrary, in *Matsushita,* the most recent

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case to cite and discuss *Cities Service,* we stated that the requirement that a dispute be "genuine" means simply that there must be more than "some metaphysical doubt as to the material facts." 475 U.S. at 475

U. S. 586. [Footnote 2/2]

Nor does *Adickes,* also relied on by the Court, suggest in any way that the appropriate summary judgment inquiry is whether the evidence overwhelmingly supports one party. *Adickes,* like *Cities Service,* presented the question of whether a grant of summary judgment in favor of a defendant on a conspiracy count was appropriate. The plaintiff, a

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white schoolteacher, maintained that employees of defendant Kress conspired with the police to deny her rights protected by the Fourteenth Amendment by refusing to serve her in one of its lunchrooms simply because she was white and accompanied by a number of black schoolchildren. She maintained, among other things, that Kress arranged with the police to have her arrested for vagrancy when she left the defendant's premises. In support of its motion for summary judgment, Kress submitted statements from a deposition of one of its employees asserting that he had not communicated or agreed with the police to deny plaintiff service or to have her arrested, and explaining that the store had taken the challenged action not because of the race of the plaintiff, but because it was fearful of the reaction of some of its customers if it served a racially mixed group. Kress also submitted affidavits from the Chief of Police and the arresting officers denying that the store manager had requested that petitioner be arrested, and noted that, in the plaintiff's own deposition, she conceded that she had no knowledge of any communication between the police and any Kress employee, and was relying on circumstantial evidence to support her allegations. In opposing defendant's motion for summary judgment, plaintiff stated that defendant, in its moving papers, failed to dispute an allegation in the complaint, a statement at her deposition, and an unsworn statement by a Kress employee, all to the effect that there was a policeman in the store at the time of the refusal to serve, and that it was this policeman who subsequently made the arrest. Plaintiff argued that this sequence of events "created a substantial enough possibility of a conspiracy to allow her to proceed to trial. . . ." 398 U.S. at 398 U. S. 157.

We agreed, and therefore reversed the lower courts, reasoning that Kress

"did not carry its burden because of its failure to foreclose the possibility that there was a policeman in the Kress store while petitioner was awaiting service, and that this policeman reached an understanding with some

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Kress employee that petitioner not be served."

Ibid. Despite the fact that *none of the materials relied on by plaintiff* met the requirements of Rule 56(e), we stated nonetheless that Kress failed to meet its initial burden of showing that there was no genuine dispute of a material fact. Specifically, we held that, because Kress failed to negate plaintiff's materials suggesting that a policeman was in fact in the store at the time of the refusal to serve,

"it would be open to a jury . . . to infer from the circumstances that the policeman and a Kress employee had a 'meeting of the minds,' and thus reached an understanding that petitioner should be refused service."

Id. at 398 U. S. 158.

In *Adickes,* we held that a jury might permissibly infer a conspiracy from the mere presence of a policeman in a restaurant. We never reached, and did not consider, whether the evidence was "one-sided," and, had we done so, we clearly would have had to affirm, rather than reverse, the lower courts, since, in that case, there was no admissible evidence submitted by petitioner, and a significant amount of evidence presented by the defendant tending to rebut the existence of a conspiracy. The question we did reach was simply whether, as a matter of conspiracy law, a jury would be entitled, again, as a matter of law, to infer from the presence of a policeman in a restaurant the making of an agreement between that policeman and an employee. Because we held that a jury was entitled so to infer, and because the defendant had not carried its initial burden of production of demonstrating that there was no evidence that there was not a policeman in the lunchroom, we concluded that summary judgment was inappropriate.

Accordingly, it is surprising to find the case cited by the majority for the proposition that "there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Ante* at 477 U. S. 249. There was, of course, *no* admissible evidence in *Adickes* favoring the nonmoving plaintiff; there was only an

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unrebutted assertion that a Kress employee and a policeman were in the same room at the time of the alleged constitutional violation. Like *Cities Service, Adickes* suggests that, on a defendant's motion for summary judgment, a trial court must consider whether, as a matter of the substantive law of the plaintiff's cause of action, a jury will be permitted to draw inferences supporting the plaintiff's legal theory. In *Cities Service,* we found, in effect, that the plaintiff had failed to make out a *prima facie* case; in *Adickes,* we held that the moving defendant had failed to rebut the plaintiff's *prima facie* case. In neither case is there any intimation that a trial court should inquire whether plaintiff's evidence is "significantly probative," as opposed to "merely colorable," or, again, "one-sided." Nor is there in either case any suggestion that, once a nonmoving plaintiff has made out a *prima facie* case based on evidence satisfying Rule 56(e) that there is any showing that a defendant can make to prevail on a motion for summary judgment. Yet this is what the Court appears to hold, relying, in part, on these two cases. [Footnote 2/3]

As explained above, and as explained also by JUSTICE REHNQUIST in his dissent, *see post* at 477 U. S. 271, I cannot agree that the authority cited by the Court supports its position. In my view, the Court's result is the product of an exercise

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akin to the child's game of "telephone," in which a message is repeated from one person to another and

then another; after some time, the message bears little resemblance to what was originally spoken. In the present case, the Court purports to restate the summary judgment test, but, with each repetition, the original understanding is increasingly distorted.

But my concern is not only that the Court's decision is unsupported; after all, unsupported views may nonetheless be supportable. I am more troubled by the fact that the Court's opinion sends conflicting signals to trial courts and reviewing courts which must deal with summary judgment motions on a day-to-day basis. This case is about a trial court's responsibility when considering a motion for summary judgment, but in my view, the Court, while instructing the trial judge to "consider" heightened evidentiary standards, fails to explain what that means. In other words, how does a judge assess how one-sided evidence is, or what a "fair-minded" jury could "reasonably" decide? The Court provides conflicting clues to these mysteries, which I fear can lead only to increased confusion in the district and appellate courts.

The Court's opinion is replete with boilerplate language to the effect that trial courts are not to weigh evidence when deciding summary judgment motions:

"[I]t is clear enough from our recent cases that, at the summary judgment stage, the judge's function is not himself to weigh the evidence and determine the truth of the matter. . . ."

Ante at 477 U. S. 249.

"Our holding . . . does not denigrate the role of the jury. . . . Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor."

Ante at 477 U. S. 255.

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But the Court's opinion is also full of language which could surely be understood as an invitation -- if not an instruction -- to trial courts to assess and weigh evidence much as a juror would:

"When determining if a genuine factual issue . . . exists . . a trial judge must *bear in mind the actual quantum and quality* of proof necessary to support liability. . . . For example, *there is no genuine issue if the evidence presented in the opposing affidavits is of insufficient caliber or quantity* to allow a rational finder of fact to find actual malice by clear and convincing evidence."

Ante at 477 U. S. 254 (emphasis added).

"[T]he inquiry . . . [is] whether the evidence presents a *sufficient* disagreement to require submission to a jury, or whether *it is so one-sided* that one party must prevail as a matter of law."

Ante at 477 U. S. 251-252 (emphasis added).

"[T]he judge must ask himself . . . whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented. The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff."

Ante at 477 U. S. 252.

I simply cannot square the direction that the judge "is not himself to weigh the evidence" with the direction that the judge also bear in mind the "quantum" of proof required and consider whether the evidence is of sufficient "caliber or quantity" to meet that "quantum." I would have thought that a determination of the "caliber and quantity," *i.e.,* the importance and value, of the evidence in light of the "quantum," *i.e.,* amount "required," could *only* be performed by weighing the evidence.

If, in fact, this is what the Court would, under today's decision, require of district courts, then I am fearful that this new rule -- for this surely would be a brand new procedure -- will transform what is meant to provide an expedited "summary"

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procedure into a full-blown paper trial on the merits. It is hard for me to imagine that a responsible counsel, aware that the judge will be assessing the "quantum" of the evidence he is presenting, will risk either moving for or responding to a summary judgment motion without coming forth with all of the evidence he can muster in support of his client's case. Moreover, if the judge on motion for summary judgment really is to weigh the evidence, then, in my view, grave concerns are raised concerning the constitutional right of civil litigants to a jury trial.

It may well be, as JUSTICE REHNQUIST suggests, *see post* at 477 U. S. 270-271, that the Court's decision today will be of little practical effect. I, for one, cannot imagine a case in which a judge might plausibly hold that the evidence on motion for summary judgment was sufficient to enable a plaintiff bearing a mere preponderance burden to get to the jury -- *i.e.,* that a *prima facie* case had been made out -- but insufficient for a plaintiff bearing a clear-and-convincing burden to withstand a defendant's summary judgment motion. Imagine a suit for breach of contract. If, for example, the defendant moves for summary judgment and produces one purported eyewitness who states that he was present at the time the parties discussed the possibility of an agreement, and unequivocally denies that the parties ever agreed to enter into a contract, while the plaintiff produces one purported eyewitness who asserts that the parties did in fact come to terms, presumably that case would go to the jury. But if the defendant produced not one, but 100 eyewitnesses, while the plaintiff stuck with his single witness, would that case, under the Court's holding, still go to the jury? After all, although the plaintiff's burden in this hypothetical contract action is to prove his case by a mere preponderance of the evidence, the judge, so the Court tells us, is to "ask himself . . . whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented." *Ante* at 477 U. S. 252. Is there, in this hypothetical example, "a sufficient disagreement to require submission

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to a jury," or is the evidence "so one-sided that one party must prevail as a matter of law"? *Ante* at 477 U. S. 251-252. Would the result change if the plaintiff's one witness were now shown to be a convicted perjurer? Would the result change if, instead of a garden variety contract claim, the plaintiff sued on a fraud theory, thus requiring him to prove his case by clear and convincing evidence?

It seems to me that the Court's decision today unpersuasively answers the question presented, and in doing so raises a host of difficult and troubling questions for which there may well be no adequate solutions. What is particularly unfair is that the mess we make is not, at least in the first instance, our own to deal with; it is the district courts and courts of appeals that must struggle to clean up after us.

In my view, if a plaintiff presents evidence which either directly or by permissible inference (and these inferences are a product of the substantive law of the underlying claim) supports all of the elements he needs to prove in order to prevail on his legal claim, the plaintiff has made out a *prima facie* case, and a defendant's motion for summary judgment must fail, regardless of the burden of proof that the plaintiff must meet. In other words, whether evidence is "clear and convincing," or proves a point by a mere preponderance, is for the factfinder to determine. As I read the case law, this is how it has been, and because of my concern that today's decision may erode the constitutionally enshrined role of the jury, and also undermine the usefulness of summary judgment procedure, this is how I believe it should remain.

[Footnote 2/1]

The Court's holding today is not, of course, confined in its application to First Amendment cases. Although this case arises in the context of litigation involving libel and the press, the Court's holding is that,

"in ruling on a motion for summary judgment, the judge must view the evidence presented through the prism of the substantive evidentiary burden."

Ante at 477 U. S. 254. Accordingly, I simply do not understand why JUSTICE REHNQUIST, dissenting, feels it appropriate to cite *Calder v. Jones,* 465 U. S. 783 (1984), and to remind the Court that we have consistently refused to extend special procedural protections to defendants in libel and defamation suits. The Court today does nothing of the kind. It changes summary judgment procedure for all litigants, regardless of the substantive nature of the underlying litigation.

Moreover, the Court's holding is not limited to those cases in which the evidentiary standard is "heightened," *i.e.,* those in which a plaintiff must prove his case by more than a mere preponderance of the evidence. Presumably, if a district court ruling on a motion for summary judgment in a libel case is to consider the "quantum and quality" of proof necessary to support liability under *New York Times, ante* at 477 U. S. 254, and then ask whether the evidence presented is of "sufficient caliber or quantity" to support that quantum and quality, the court must ask the same questions in a garden variety action where the plaintiff need prevail only by a mere preponderance of the evidence. In other words, today's decision, by its terms, applies to *all* summary judgment motions, irrespective of the burden of proof required and

the subject matter of the suit.

[Footnote 2/2]

Writing in dissent in *Matsushita,* JUSTICE WHITE stated that he agreed with the summary judgment test employed by the Court, namely, that

"[w]here the record, taken as a whole, could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'"

475 U.S. at 475 U. S. 599. Whether the shift, announced today, from looking to a "reasonable," rather than a "rational," jury is intended to be of any significance, there are other aspects of the *Matsushita* dissent which I find difficult to square with the Court's holding in the present case. The *Matsushita* dissenters argued:

". . . [T]he Court summarizes *Monsanto Co. v. Spray-Rite Service Corp., supra,* as holding that 'courts should not permit factfinders to infer conspiracies when such inferences are implausible. . . .'"

Ante at 477 U. S. 593. Such language suggests that a judge hearing a defendant's motion for summary judgment in an antitrust case should go beyond the traditional summary judgment inquiry and decide for himself whether the weight of the evidence favors the plaintiff. *Cities Service* and *Monsanto* do not stand for any such proposition. Each of those cases simply held that a particular piece of evidence, standing alone, was insufficiently probative to justify sending a case to the jury. These holdings in no way undermine the doctrine that all evidence must be construed in the light most favorable to the party opposing summary judgment.

"If the Court intends to give every judge hearing a motion for summary judgment in an antitrust case the job of determining if the evidence makes the inference of conspiracy more probable than not, it is overturning settled law. If the Court does not intend such a pronouncement, it should refrain from using unnecessarily broad and confusing language."

Id. at 475 U. S. 600-601 (footnote omitted). In my view, these words are as applicable and relevant to the Court's opinion today as they were to the opinion of the Court in *Matsushita.*

[Footnote 2/3]

I am also baffled by the other cases cited by the majority to support its holding. For example, the Court asserts that

"[i]f . . . evidence is merely colorable, *Dombrowski v. Eastland,* 387 U. S. 82 (1967) (per curiam), . . . summary judgment may be granted."

Ante at 477 U. S. 249-250. In *Dombrowski,* we reversed a judgment granting summary judgment to the counsel to the Internal Security Subcommittee of the Judiciary Committee of the United States Senate

because there was "controverted evidence in the record . . . which affords more than merely colorable substance" to the petitioners' allegations. 387 U.S. at 387 U. S. 84. *Dombrowski* simply cannot be read to mean that summary judgment may be *granted* if evidence is merely colorable; what the case actually says is that summary judgment will be *denied* if evidence is "*controverted,*" because when evidence is controverted, assertions become colorable for purposes of motions for summary judgment law.

JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE joins, dissenting.

The Court, apparently moved by concerns for intellectual tidiness, mistakenly decides that the "clear and convincing evidence" standard governing finders of fact in libel cases must be applied by trial courts in deciding a motion for summary judgment in such a case. The Court refers to this as a "substantive standard," but I think is is actually a procedural

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requirement engrafted onto Rule 56, contrary to our statement in *Calder v. Jones,* 465 U. S. 783 (1984), that

"[w]e have already declined in other contexts to grant special procedural protections to defendants in libel and defamation actions in addition to the constitutional protections embodied in the substantive laws."

Id. at 465 U. S. 790-791. The Court, I believe, makes an even greater mistake in failing to apply its newly announced rule to the facts of this case. Instead of thus illustrating how the rule works, it contents itself with abstractions and paraphrases of abstractions, so that its opinion sounds much like a treatise about cooking by someone who has never cooked before, and has no intention of starting now.

There is a large class of cases in which the higher standard imposed by the Court today would seem to have no effect at all. Suppose, for example, on motion for summary judgment in a hypothetical libel case, the plaintiff concedes that his only proof of malice is the testimony of witness A. Witness A testifies at his deposition that the reporter who wrote the story in question told him that she, the reporter, had done absolutely no checking on the story, and had real doubts about whether or not it was correct as to the plaintiff. The defendant's examination of witness A brings out that he has a prior conviction for perjury.

May the Court grant the defendant's motion for summary judgment on the ground that the plaintiff has failed to produce sufficient proof of malice? Surely not, if the Court means what it says when it states:

"Credibility determinations . . . are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor."

Ante at 477 U. S. 255.

The case proceeds to trial, and, at the close of the plaintiff's evidence, the defendant moves for a directed verdict on the

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ground that the plaintiff has failed to produce sufficient evidence of malice. The only evidence of malice produced by the plaintiff is the same testimony of witness A, who is duly impeached by the defendant for the prior perjury conviction. In addition, the trial judge has now had an opportunity to observe the demeanor of witness A, and has noticed that he fidgets when answering critical questions, his eyes shift from the floor to the ceiling, and he manifests all other indicia traditionally attributed to perjurers.

May the trial court, at this stage, grant a directed verdict? Again, surely not; we are still dealing with "credibility determinations. "

The defendant now puts on its testimony, and produces three witnesses who were present at the time when witness A alleges that the reporter said she had not checked the story and had grave doubts about its accuracy as to plaintiff. Witness A concedes that these three people were present at the meeting, and that the statement of the reporter took place in the presence of all these witnesses. Each witness categorically denies that the reporter made the claimed statement to witness A.

May the trial court now grant a directed verdict at the close of all the evidence? Certainly the plaintiff's case is appreciably weakened by the testimony of three disinterested witnesses, and one would hope that a properly charged jury would quickly return a verdict for the defendant. But as long as credibility is exclusively for the jury, it seems the Court's analysis would still require this case to be decided by that body.

Thus, in the case that I have posed, it would seem to make no difference whether the standard of proof which the plaintiff had to meet in order to prevail was the preponderance of the evidence, clear and convincing evidence, or proof beyond a reasonable doubt. But if the application of the standards makes no difference in the case that I hypothesize, one may fairly ask in what sort of case *does* the difference in standards

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make a difference in outcome? Cases may be posed dealing with evidence that is essentially documentary, rather than testimonial; but the Court has held in a related context involving Federal Rule of Civil Procedure 52(a) that inferences from documentary evidence are as much the prerogative of the finder of fact as inferences as to the credibility of witnesses. *Anderson v. Bessemer City,* 470 U. S. 564, 470 U. S. 574 (1985). The Court affords the lower courts no guidance whatsoever as to what, if any, difference the abstract standards that it propounds would make in a particular case.

There may be more merit than the Court is willing to admit to Judge Learned Hand's observation in *United States v. Feinberg,* 140 F.2d 592, 594 (CA2), *cert. denied,* 322 U.S. 726 (1944), that "[w]hile at times it may be practicable" to

"distinguish between the evidence which should satisfy reasonable men and the evidence which should

satisfy reasonable men beyond a reasonable doubt[,] . . . in the long run, the line between them is too thin for day-to-day use."

The Court apparently approves the overruling of the *Feinberg* case in the Court of Appeals by Judge Friendly's opinion in *United States v. Taylor,* 464 F.2d 240 (1972). But even if the Court is entirely correct in its judgment on this point, Judge Hand's statement seems applicable to this case, because the criminal case differs from the libel case in that the standard in the former is proof "beyond a reasonable doubt," which is presumably easier to distinguish from the normal "preponderance of the evidence" standard than is the intermediate standard of "clear and convincing evidence."

More important for purposes of analyzing the present case, there is no exact analog in the criminal process to the motion for summary judgment in a civil case. Perhaps the closest comparable device for screening out unmeritorious cases in the criminal area is the grand jury proceeding, though the comparison is obviously not on all fours. The standard for allowing a criminal case to proceed to trial is not whether the government has produced *prima facie* evidence of guilt beyond

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a reasonable doubt for every element of the offense, but only whether it has established probable cause. *See United States v. Mechanik,* 475 U. S. 66, 475 U. S. 70 (1986). Thus, in a criminal case, the standard used prior to trial is much more lenient than the "clear beyond a reasonable doubt" standard which must be employed by the finder of fact.

The three differentiated burdens of proof in civil and criminal cases, vague and impressionistic though they necessarily are, probably do make some difference when considered by the finder of fact, whether it be a jury or a judge in a bench trial. Yet it is not a logical or analytical message that the terms convey, but instead almost a state of mind; we have previously said:

"Candor suggests that, to a degree, efforts to analyze what lay jurors understand concerning the differences among these three tests . . . may well be largely an academic exercise. . . . Indeed, the ultimate truth as to how the standards of proof affect decisionmaking may well be *unknowable,* given that factfinding is a process shared by countless thousands of individuals throughout the country. We probably can assume no more than that the difference between a preponderance of the evidence and proof beyond a reasonable doubt probably is better understood than either of them in relation to the intermediate standard of clear and convincing evidence."

Addington v. Texas, 441 U. S. 418, 441 U. S. 424-425 (1979) (emphasis added).

The Court's decision to engraft the standard of proof applicable to a factfinder onto the law governing the procedural motion for a summary judgment (a motion that has always been regarded as raising a question of law, rather than a question of fact, *see, e.g., La Riviere v. EEOC,* 682 F.2d 1275, 1277-1278 (CA9 1982) (Wallace, J.)), will do great mischief, with little corresponding benefit. The primary effect of the Court's opinion today will likely be to cause the decisions of trial judges on summary judgment motions in

libel cases to be

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more erratic and inconsistent than before. This is largely because the Court has created a standard that is different from the standard traditionally applied in summary judgment motions without even hinting as to how its new standard will be applied to particular cases.

743 F.3d 540 (2014)

Montell CARTER, Michael Lopez, and Milwaukee Police Association, Plaintiffs-Appellants,

v.

CITY OF MILWAUKEE and Keith Eccher, Defendants-Appellees.

No. 13-2187.

United States Court of Appeals, Seventh Circuit.

Argued November 8, 2013.
Decided February 19, 2014.

541 *541 Brendan P. Matthews, Cermele & Associates, **Milwaukee**, WI, for Plaintiff-Appellant.

Jan A. Smokowicz, **Milwaukee City** Attorney's Office, **Milwaukee**, WI, for Defendant-Appellee.

Before POSNER, ROVNER, and WILLIAMS, Circuit Judges.

WILLIAMS, Circuit Judge.

While police officers were executing a search warrant in a **Milwaukee** apartment, the apartment's resident accused the police of taking around $1750 of his cash. The commanding officer then ordered all officers to remain on the scene while they awaited further direction. This order did not come at a good time for Officer Montell **Carter**, who had taken a colon cleansing product outside the apartment and now needed to use the restroom, badly. Not wanting to use the apartment's bathroom, **Carter** told then-Lieutenant Keith Eccher he needed to leave to use the restroom. The lieutenant put his hand up and responded that he needed to search **Carter** first. The lieutenant then patted **Carter** down and searched his jacket, boots, and the items he was carrying. The dramatic ending to these events is, in fact, not dramatic at all. The lieutenant did not find the allegedly missing cash or any contraband on **Carter**, and **Carter** returned to the police station and used the restroom there. **Carter** filed this lawsuit maintaining he was the subject of an unconstitutional seizure and search. Because no reasonable officer in **Carter's** position would have feared arrest or detention if he did not comply with the search request, we conclude he was not seized. As a result, we affirm the district court's grant of summary judgment in the defendants' favor.

I. BACKGROUND

When he was called to the scene of a search warrant execution the afternoon of February 26, 2009, Montell **Carter** had been a police officer with the **Milwaukee** Police Department for nearly thirteen years. On that day, Officer **Carter** and other officers were stationed outside a residence while Tactical Enforcement Unit team members went inside to ensure there was no threat to the officers who would perform the search. **Carter** was outside for about twenty to thirty minutes before the tactical unit announced that all was clear.

542 *542 Officer **Carter** had been taking Colonix, a nonprescription supplement to clean his colon, for about two weeks in an effort to lose weight. He did not, however, take the supplement at his normal time before leaving home for his shift that day because he had been running late. Thinking he would not be needed in the residence right away, **Carter** returned to his squad car after the tactical unit gave the all clear, mixed the Colonix with water, and drank it. He did so knowing that taking Colonix made him need to more frequently use the restroom.

Officer **Carter** and other officers entered the residence dressed in police uniform to search for drugs and currency. Tactical enforcement officers were still leaving the residence while the officers entered. **Carter** and his partner, Officer Michael Lopez, helped search the northwest bedroom. At some point, the apartment's resident, Mr. Mitchell (his first name is not clear from the record), told Officer Jose Viera that $1750 or $1800 in cash was missing from his bedroom. Mitchell said he had been sitting in his bedroom counting his money when the "guys with helmets" entered. Mitchell said he then threw the money on the floor next to him.

Following Mitchell's allegation, Officer Viera contacted a supervisor by telephone, who told Viera to "freeze everything" until representatives from the Police Department's Professional Performance Division ("PPD") or other supervisors arrived. As a result, the officers on the scene were informed they were not free to leave.

About thirty to forty-five minutes later, a sergeant arrived. Lieutenant Keith Eccher, who had run the command post at the scene but left after the tactical squad secured the residence, also returned to the apartment. Eccher was the highest ranking officer at the site. A sergeant informed Eccher of the resident's allegation and told him there was an opportunity for all the tactical squad or search team members to have taken the money. Eccher contacted the PPD, and he informed the officers on site that PPD was on its way.

Feeling the effects of the supplement he had taken and sweating profusely, Officer **Carter** approached Lieutenant Eccher in the kitchen of the residence and told him he needed to leave as he needed to use the bathroom very badly. **Carter** maintains he did not want to use the bathroom in the residence because of its very dirty condition. He also asserts that even in a clean house, he would not feel comfortable using someone else's restroom. (The parties do not point to any Department policy on point.)

Lieutenant Eccher put his hand up, with his palm straight out, and said in a firm voice to Officer **Carter**, "You can't leave until I search you." Eccher did not come into any contact

with **Carter** when he put his hand up. Eccher directed **Carter** to take off his police coat, outer vest carrier, and duty belt, which held his firearm. Eccher patted down **Carter**; in doing so, he did not pat down **Carter's** genital area but did pat down his back pockets. Eccher searched **Carter's** jacket, including its pockets, looked in **Carter's** wallet and police memo book, and searched his duty belt. Eccher also had **Carter** remove his boots and searched those.

Lieutenant Eccher did not take Officer **Carter's** badge or police identification. Nothing out of the ordinary was found on **Carter**, and his duty belt and firearm were returned to him. Officer Lopez told Eccher he wished to leave also, and Eccher responded, "Well, I gotta search you, too." Lopez told Eccher that he was not going to take his boots off, and Eccher did not make him do so. Eccher then patted down Lopez, finding nothing. The searches took place inside the kitchen, where Eccher, a sergeant, **Carter**, and Lopez
543 *543 were present at the time. Apartment residents could see the search as well, with Eccher explaining the search took place in plain view in front of the residents to remove any suspicion.

With no protocol specific to searching officers in an officer-involved allegation, Lieutenant Eccher explained that he searched Officers **Carter** and Lopez after they asked to leave the scene because they had "means and access to the missing money," stated they needed to leave to go to the bathroom as soon as they learned that PPD Criminal was coming, and to remove them from suspicion. After they were searched, **Carter** and Lopez left the residence together and returned to the district police station, where **Carter** used the restroom. Later, after PPD Criminal arrived, another officer, Officer Rachel Goldbeck, was allowed to leave the scene to use the restroom without being searched.

Officers **Carter** and Lopez filed a lawsuit pursuant to 42 U.S.C. § 1983 alleging that Eccher and the **City** of **Milwaukee** violated the Fourth Amendment by illegally seizing and searching them. The district court granted the defendants' motion for summary judgment.

II. ANALYSIS

Officer **Carter** contends he was the subject of an unconstitutional seizure and search. He maintains that he was seized when Lieutenant Eccher held his hand out and told him that he had to be searched if he wished to leave the premises. We review the district court's grant of summary judgment de novo, viewing evidence in the record in the light most favorable to the non-moving party, plaintiff Officer **Carter**, and giving him the benefit of all reasonable inferences. *See* *Swetlik v. Crawford,* 738 F.3d 818, 821 (7th Cir.2013).

The Constitution forbids not all searches and seizures, but only "unreasonable searches and seizures." U.S. Const. amend. IV; *Terry v. Ohio,* 392 U.S. 1, 9, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). A "seizure" within the meaning of the Fourth Amendment occurs when a person's "freedom of movement is restrained" either "by means of physical force or show of authority." *United States v. Mendenhall,* 446 U.S. 544, 552, 100 S.Ct. 1870,

64 L.Ed.2d 497 (1980). "If a reasonable person would feel free to terminate the encounter, then he or she has not been seized." *United States v. Drayton,* 536 U.S. 194, 201, 122 S.Ct. 2105, 153 L.Ed.2d 242 (2002). In considering whether there was a seizure, we "consider all the circumstances surrounding the encounter to determine whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter." *Florida v. Bostick,* 501 U.S. 429, 439, 111 S.Ct. 2382, 115 L.Ed.2d 389 (1991).

It is true that the Fourth Amendment protects police officers, not just ordinary citizens. *Garrity v. New Jersey,* 385 U.S. 493, 500, 87 S.Ct. 616, 17 L.Ed.2d 562 (1967). "This does not mean, however, that every order a police officer feels compelled to obey amounts to a seizure." *Gwynn v. City of Phila.,* 719 F.3d 295, 300 (3d Cir.2013). Nothing in the Fourth Amendment gives public employees, including police officers, greater workplace rights than private sector employees. *Driebel v. City of Milwaukee,* 298 F.3d 622, 637 (7th Cir.2002). As in the private sector, public employees must often comply with their supervisors' orders and can suffer consequences at work for failure to comply. *Id.* at 639. The requirement of complying with supervisors' directives has particular
544 meaning for police officers, who *544 are part of a "paramilitary organization that must maintain the highest degree of discipline, confidentiality, efficiency, and [esprit] de corps among its officers, who are the first line of defense against lawlessness," and who agree to obey lawful orders from higher-ranking officers. *Id.* at 638-39.

In this spirit, we have distinguished "between a police department's actions in its capacity as an employer and its actions as the law enforcement arm of the state." *Id.* at 642. The Fourth Amendment does not protect against the threat of job loss. *See id.; see also Fournier v. Reardon,* 160 F.3d 754, 757 (1st Cir.1998) (finding officer not seized when handcuffed during training exercise even though there could have been negative employment consequences had he refused). So while an officer in **Carter's** position may have feared job-related consequences if he were to leave the residence without being patted down and searched, the potential for work-related discipline is not sufficient to succeed on a Fourth Amendment claim.

Rather, "the relevant constitutional inquiry must focus on whether reasonable people in the position of the subordinate officers would have feared *seizure or detention* if they had refused to obey the commands given by their superior officers." *Driebel,* 298 F.3d at 642 (emphasis in original). In this regard, it is not enough that **Carter's** employer restricted his movement; indeed, he does not maintain that the "freeze the scene" order meant he or other officers were seized. *See I.N.S. v. Delgado,* 466 U.S. 210, 104 S.Ct. 1758, 80 L.Ed.2d 247 (1984). Illustrative of this principle is the Supreme Court's decision in *Delgado,* where it considered the Immigration and Naturalization Service's practice of entering factories and questioning employees about their citizenship while INS agents were stationed near door exits. The Court recognized that the employees may not have been free to leave, but it said that was not enough to violate the Fourth Amendment: "[o]rdinarily, when people are at work their freedom to move about has been meaningfully restricted, not by the actions of law enforcement officials, but by the workers' voluntary obligations to their employers." *Id.* at 218, 104 S.Ct. 1758. The Court concluded the

employees were not seized because even though they were not free to leave the building without being questioned, the agents' conduct "should have given [the employees] no reason to believe that they would be detained if they gave truthful answers put to them or if they simply refused to answer." *Id.* The defendants contend that Officer **Carter** similarly had no reason to believe he would be detained had he stated he did not want to be searched.

This is not the first time we have considered an officer's claim that he was seized while on the job; we considered several claims of unlawful seizure by officers in our *Driebel* decision. For example, when an officer was ordered to work overtime and "stand by" for three and a half hours in a police garage without being placed under formal arrest and while he retained possession of his police-issued equipment, we found he was not seized. 298 F.3d at 642-43. We explained that the officer "must have been aware that no officer was permitted to use force or any show of authority to prevent him from departing the garage if he so chose." *Id.* at 643; *see also Pennington v. Metro. Gov't of Nashville and Davidson Cnty.*, 511 F.3d 647, 652 (6th Cir.2008) (concluding that an off-duty officer who submitted to a breathalyzer test at his superiors' order was not seized when he was not handcuffed, not placed in the back seat of a police car, not read his rights, and was
545 allowed to return *545 home without filing a report). But when the officer was advised of his rights, taken into custody, and removed of his police equipment, we ruled that he had been seized. *Id.; cf. Cerrone v. Brown*, 246 F.3d 194, 198 (2d Cir.2001) (noting concession by defendants that officer seized when stopped by investigative team, placed in back of unmarked police car, read *Miranda* rights, and informed he was the target of a criminal investigation).

The Third Circuit's decision in *Gwynn* contains circumstances similar to this case. There, a man whom two police officers had frisked accused them of stealing money from him. *Gwynn*, 719 F.3d at 297. When the officers returned to headquarters, their superior officer ordered them into an office, where they were told a complaint had been made about them to the Internal Affairs Bureau. They were then ordered to report to the captain's office and to stay there until officers from Internal Affairs arrived, and they were not allowed to use their cell phones. The officers were questioned about the missing money, asked to remove their jackets, told to pull down their socks, directed to open their wallets, and told that cooperation would be in their "best interest." They did as they were told the whole time because the orders came from their superiors, and also because they feared discipline and possible loss of employment. *Id.* at 298. When the officers were allowed to leave and returned to their lockers, it appeared that their lockers had been searched. *Id.*

The Third Circuit concluded that the officers had not been seized. *Id.* at 302. It reasoned that to the extent the officers felt compelled to obey their superiors' commands, that compulsion was the result of their employment relationship, not the fear of arrest or detention. *Id.* The court found no suggestion that the officers were under a criminal investigation, and it pointed out that the officers were asked to wait to speak to Internal Affairs representatives. Under the circumstances, the court found the officers did not reasonably fear detention and were not seized. *Id.*

Similarly here, no seizure occurred. Although **Carter** contends he was under criminal investigation, the record does not support him. **Carter** asserts that Eccher admitted in his deposition that **Carter** was under criminal investigation. But a full read of the deposition transcript reflects otherwise. When asked whether **Carter** was under internal or administrative investigation, Eccher initially stated that it was a criminal investigation as far as he was concerned. But Eccher then qualified his statement, stating, "Well, there [were] criminal allegations being made." When he was next explicitly asked to say that "yes," **Carter** was under criminal investigation, Eccher replied that he could not answer "yes" or "no." He later explained, "Again, I guess I'm walking a fine line here. I don't think this was an investigation as much as it was— as—I was trying to remove them from suspicion." Eccher did not, therefore, testify in his deposition that **Carter** was under criminal investigation. Nor is there any other suggestion in the record to support that position. Eccher did not read **Carter** his rights or inform him he was under criminal investigation. Eccher did not perform other activities consistent with a criminal investigation such as interviewing witnesses. Instead, at the time, Eccher was in a holding pattern, waiting for PPD to arrive.

While **Carter** is not maintaining that he feared only job consequences, the bottom line is that a reasonable person in **Carter's** position would not have feared arrest or detention if
546 he had declined to be patted down or searched. *Cf. Feirson v. District* *546 *of Columbia,* 506 F.3d 1063, 1067 (D.C.Cir. 2007) ("The relevant inquiry is whether a reasonable person would have believed he would be detained if he disobeyed his supervisor's order —not whether he feared negative consequences for his job."). As we discussed, Eccher did not tell **Carter** he was the subject of a criminal investigation, nor is there any indication that he was. He did not read **Carter** his rights. He did not threaten arrest if **Carter** refused to be searched. He did not touch **Carter** to stop him from leaving. (He only came into contact with **Carter** during the pat-down.) There is also no evidence to support a finding that had **Carter** asked him to stop, the lieutenant would not have done so. In fact, when Officer Lopez told Lieutenant Eccher he would not take his boots off, the lieutenant did not make him do so.

Carter was a thirteen-year veteran of the police force and certainly knew his constitutional rights. *Cf. Driebel,* 298 F.3d at 647 ("Officer Huston was not some naïve, awestruck individual confronting the police for the first time. Rather, he was a sworn, highly trained law enforcement officer, who, we believe, was well aware of his constitutional and workplace rights."). **Carter** and Lopez agreed to be searched so that **Carter** could return to the police station to use the restroom there. And Lieutenant Eccher agreed to let them leave despite the freeze order, so long as they were searched first. Although **Carter** may have felt it necessary to agree to the search because he needed to use the restroom badly, that does not mean he was seized by Eccher. A reasonable officer in **Carter's** position would not have feared arrest or detention had he not complied. Therefore, we agree with the district court that **Carter** was not seized.

Carter's only argument that the search was unlawful is that because his seizure was unlawful, the search was presumptively unlawful too. Because we have rejected the premise of this position in finding that **Carter** was not seized, we do not need to go further. We uphold the grant of summary judgment in the defendants' favor.[1] We note

that Officer Lopez was a plaintiff in this lawsuit, and his name appears on the appellate brief. But no argument was raised regarding him on appeal, so any argument on his behalf is waived. *See* *Carroll v. Lynch,* 698 F.3d 561, 568 (7th Cir.2012). In any event, he would lose for the same reasons as Officer **Carter**.

III. CONCLUSION

The judgment of the district court is AFFIRMED.

[1] We note that the defendants maintain that conducting the pat-down and search of the items in Officer **Carter's** possession before letting **Carter** leave was reasonable. In light of the resident's allegation that an officer had taken his money and **Carter's** request to leave during the freeze order, Eccher explained that he searched Officers **Carter** and Lopez for several reasons, including to remove them from suspicion. He also explained that they had means and access to the money. **Carter** and Lopez had searched the northwest bedroom, the same room from which Mitchell alleged his money had been taken, and they had performed the search without a supervisor present. **Carter** emphasizes that the resident alleged that a white male officer with a helmet stole his money. **Carter**, unlike the tactical enforcement officers, was not wearing a helmet, and **Carter** is African American. But **Carter** crossed paths with the tactical enforcement officers on his way into the residence, so there was an opportunity for a tactical enforcement officer to pass money on to one or more officers involved in the search. Eccher also stated that **Carter** and Lopez did not say they needed to leave to use the restroom until they learned that PPD Criminal was coming.

679 F.2d 712 (1982)

Nicolae DRAGAN, et al., Plaintiffs-Appellants,
v.
John and Sylvia MILLER, Defendants-Appellees.

No. 81-1903.

United States Court of Appeals, Seventh Circuit.

Submitted April 20, 1982.
Decided June 4, 1982.

John R. Vintilla, Cleveland, Ohio, for plaintiffs-appellants.

Luke R. Morin, Dixon, Ill., for defendants-appellees.

Before WOOD, ESCHBACH and POSNER, Circuit Judges.

713 *713 POSNER, Circuit Judge.

The complaint in this diversity case, filed in September 1980, alleges that the plaintiffs are residents of Rumania and the nieces and nephews — and heirs by intestacy — of Walter Dragan; that Dragan died in Illinois in June 1979 at the age of 87, leaving a will that bequeathed his entire property to the defendants; and that the defendants, who are not related to Dragan, had improperly influenced him when he was "ill and enfeebled" to will his property away from the plaintiffs. The complaint asks that the defendants be declared constructive trustees of Dragan's estate for the plaintiffs' benefit. The district court dismissed the complaint on the ground that it was within the probate exception to federal diversity jurisdiction.

The probate exception is one of the most mysterious and esoteric branches of the law of federal jurisdiction. The usual account given of it is historical. The Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 78, conferred on the federal courts, in diversity cases, concurrent jurisdiction over "all suits of a civil nature at common law or in equity." The counterpart language in the current grant of diversity jurisdiction to the federal courts, "all civil actions," 28 U.S.C. § 1332(a), may seem broader, but it was intended to be synonymous with the language quoted above from the Judiciary Act of 1789. See Reviser's Note to 28 U.S.C. § 1332 (1976). Now "suits of a civil nature at common law or in equity" meant in eighteenth-century England suits brought in either the common law courts or the chancery court; and it is argued that since the probate of wills and the administration of

intestate estates were within the exclusive jurisdiction of the ecclesiastical court, they were not included in the Judiciary Act's grant of jurisdiction to the federal courts. See, e.g., *Markham v. Allen,* 326 U.S. 490, 494, 66 S.Ct. 296, 298, 90 L.Ed. 256 (1946). One does not have to be an expert historian to spot the flaws in this reasoning. First, there was no ecclesiastical court in America, and it is not obvious why the language of the Judiciary Act of 1789 should be taken to refer exclusively to English rather than American courts. Someone should investigate the jurisdiction of American equity courts in the eighteenth century relative to that of any specialized probate courts that might have corresponded to the ecclesiastical court in England; no one has. Second, the scope of the exclusive jurisdiction of the ecclesiastical court is very uncertain. In particular, it appears not to have extended beyond personal property; apparently the court of chancery had extensive jurisdiction over the inheritance of land. See, e.g., *Barnesly v. Powel,* 1 Ves.Sen. 284, 286-87, 27 Eng.Rep. 1034, 1036 (Ch. 1749). The complaint in this case alleges that Dragan's estate included a valuable piece of land.

But however shoddy the historical underpinnings of the probate exception, it is too well established a feature of our federal system to be lightly discarded, and by an inferior court at that, even if we were to reject as artificial the proposition that Congress's failure to repeal the exception when reenacting from time to time the grant of diversity jurisdiction to the federal courts indicates congressional acquiescence. So we accept, as settled law that we have no wish to disturb no matter how dubious its historical pedigree, the statement of the Supreme Court in the *Markham* case that "a federal court has no jurisdiction to probate a will or administer an estate ...." 326 U.S. at 494, 66 S.Ct. at 298. But this is not what the court below was asked to do. Dragan's will was admitted to probate in an Illinois court; the court directed the distribution of his estate in accordance with the terms of the will; the estate was distributed to the people who are the defendants in this action; and with that the probate proceeding ended. The plaintiffs do not want to enjoin or reopen that probate proceeding or reach property in the hands of the state court. There is no such property. The defendants have it, and the plaintiffs want to get it out of their hands. So not only does this lawsuit not ask the federal court to probate a will or administer an estate, but it does not seek to "interfere with the probate proceedings or assume general jurisdiction of the probate or control of the property in the custody of the state court." *714 *Markham, supra,* 326 U.S. at 494, 66 S.Ct. at 298. In *Markham,* the Alien Property Custodian had succeeded to the interests of German nationals to whom the decedent had willed his property, but a state court had disregarded the will and given the decedent's property to his heirs on the basis of a California statute that forbade the devise of property to certain aliens. The Alien Property Custodian brought suit against the heirs to recover the decedent's property on the ground that the will was valid notwithstanding the California statute. The Supreme Court held that the federal district court had jurisdiction over the suit. Superficially, at least, the present case is similar.

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But before we conclude that *Markham* controls we ought to consider the purposes that the probate exception to federal diversity jurisdiction might be thought to serve. Even if the framers of the Judiciary Act of 1789 intended to deny to the federal courts jurisdiction over the sorts of cases that in England were heard in the ecclesiastical court, they presumably had some reason for doing this besides the name of the court. And the

exception probably would not have persisted as long as it has without a better reason than that it may have been implicit in the first judiciary act or that the framers of Article III of the Constitution may have intended to limit the jurisdiction of the federal courts to the types of cases adjudicated in the English common law and chancery courts. Rigidly historicist interpretations of the Constitution have not been much in vogue for generations.

Several practical reasons for the probate exception, of varying weight, occur to us. One is the promotion of legal certainty. If an issue may end up being litigated in either a state or a federal court, its resolution is less certain, less predictable, than if it can be litigated in one or the other forum only, even if the same substantive law is applied. Certainty is desirable in every area of the law but has been thought especially so with regard to the transfer of property at death. See, e.g., Restatement (Second) of Conflict of Laws, § 11, comment *c* (1971). There are obstacles enough to effectuating testamentary intentions; legal uncertainty ought not to be one of them. This is an argument for exclusive state jurisdiction, since the federal courts cannot exercise jurisdiction in relation to decedents' estates except in diversity cases. But it does not strike us as a very powerful argument. If there is diversity of citizenship among the claimants to an estate, the possible bias that a state court might have in favor of citizens of its own state might frustrate the decedent's intentions; it is just such bias, of course, that the diversity jurisdiction of the federal courts was intended to counteract. It is worth noting that the plaintiffs in this case are nonresidents, and the defendants residents, of Illinois, in whose courts this case would have been tried had the plaintiffs not invoked federal jurisdiction.

A more compelling reason for the probate exception is judicial economy. When a person dies, his will has to be admitted to probate somewhere, or if he dies intestate the control of his property has to be vested in some court initially, and it is hard to imagine in either case how the initial jurisdiction over the decedent's estate could be elsewhere than in a state court. Only as the probate proceeding unfolds will the prerequisites of diversity jurisdiction — the diverse citizenship of the contestants and the minimum required amount in controversy — appear. If the probate proceeding thus must begin in state court, the interest in judicial economy argues for keeping it there until it is concluded. (A similar argument could of course be made against removal of cases from state to federal court other than immediately after the state-court action began, but the argument has been rejected by Congress. See 28 U.S.C. § 1446(b).) But this begs the question, when is the probate proceeding concluded? The practical answer, which we elaborate below, is, when there is no longer any substantial judicial diseconomy from conducting further litigation relating to the decedent's estate in a different court from the one where the will was admitted to probate or the intestate estate administered.

If for the above reasons, especially the second (judicial economy), the state courts are
715 going to have a measure of exclusive jurisdiction in probate matters, federal *715 courts will not have much experience in adjudicating certain issues — those characteristic of though not necessarily limited to probate proceedings, in particular issues of testamentary capacity. If so, there is an argument — call it the argument from relative expertness — for confining the adjudication of probate-type issues to state court even when they arise in proceedings that otherwise might not be clearly classifiable as

probate proceedings. But this argument like the first seems something of a make-weight. With the explosion in recent years of "will substitutes" such as life insurance and joint savings accounts, the federal courts in diversity cases presumably have acquired at least modest experience with issues of testamentary capacity of the kind that arise in probate cases.

Although the foregoing considerations are general in nature, they do not compel the conclusion that federal jurisdiction in relation to decedents' estates should have the identical scope in every state. The force of the considerations will vary from state to state depending on particular judgments made by each state and incorporated in its probate laws. If a state creates a specialized cadre of judges to administer its probate jurisdiction, this will be a reason for interpreting the probate exception to the federal diversity jurisdiction broadly in that state; the argument from relative expertness will have greater force in such a state than in one where authority in probate matters is exercised by courts of general jurisdiction. Or if a state has decided that a certain issue may be raised only in the original probate proceeding, this will strengthen the argument from judicial economy by indicating that the state believes that bifurcated consideration of probate-related issues would produce judicial diseconomy. Hence our judgment in the present case may depend to a significant extent on how Illinois has decided to configure its probate jurisdiction.

The practical approach we propose to take in this case is in accord with leading precedents, notably *O'Callaghan v. O'Brien,* 199 U.S. 89, 25 S.Ct. 727, 50 L.Ed. 101 (1905), a case that, as we shall see, bears a strong factual resemblance to the present case. After noting that "matters of pure probate, in the strict sense of the words, are not within the jurisdiction of courts of the United States," the Supreme Court went on to hold that even if a state allowed suits in law or equity to set aside a will, the federal courts could not entertain such a suit "when the remedy to set aside afforded by the state law is a mere continuation of the probate proceeding; that is to say, merely a method of procedure ancillary to the original probate, allowed by the state law for the purpose of giving to the probate its ultimate and final effect." *Id.* at 110, 25 S.Ct. at 734. The concept of "ancillarity," in this as in other areas of the law, see, e.g., Bork, The Antitrust Paradox: A Policy at War with Itself 26-30 (1978) (discussing the concept of "ancillary" restraints of trade), is an invitation to apply a concept — here the concept of probate — pragmatically.

The suit by the plaintiffs in this case is not a pure matter of probate. Historically in Illinois a probate court did not have jurisdiction to set aside a will on the ground of undue influence, which is what the plaintiffs are in effect asking here; a person who wanted to challenge a will on that ground had to bring a separate action in a court of general jurisdiction. See, e.g., *Shepherd v. Yokum,* 323 Ill. 328, 334-35, 154 N.E. 156, 159 (1926); *Berndtson v. Heuberger,* 21 Ill.2d 557, 562-63, 173 N.E.2d 460, 463 (1961). Although Illinois has now abolished separate probate courts, as we had occasion to note just the other day in *Hamilton v. Nielsen,* 678 F.2d 709, 710 (7th Cir. 1982), the scope of the probate jurisdiction remains unchanged, see *Ruffing v. Glissendorf,* 41 Ill.2d 412, 416-17, 243 N.E.2d 236, 238-39 (1969), much as the merger of law and equity left unchanged the scope of equity jurisdiction for such purposes as deciding whether a

party has a right to a jury trial.

We must therefore consider whether this suit is "ancillary" to probate in the practical sense that allowing it to be maintained in federal court would impair the policies served by the probate exception to federal *716 diversity jurisdiction. With respect to legal certainty, it is significant that what the plaintiffs want is a declaration that Dragan's will was invalid and that his estate should pass to them under the Illinois intestacy statute; this is not the form of the action but would be its practical effect if it succeeded. If such a suit can be maintained in federal court, testators whose heirs or legatees can satisfy the diverse-citizenship and amount-in-controversy requirements of federal diversity jurisdiction will not know whether the validity of their wills will be decided by a state or by a federal court. This was true to some extent in *Markham* as well, but the only issue regarding the validity of the will in that case was a pure question of law relating to the California statute; and it can be argued that there is a greater probability that this issue would be decided the same way whether by a state court or by a federal court than that a federal court would decide a factual question, such as whether there was undue influence over a testator, the same way that a state court, with its different procedures, would decide it. But we do not place much weight on this factor. As mentioned earlier, against it must be set the fact that the plaintiffs are nonresidents suing residents: the possibility of state-court bias, the conventional though perhaps archaic foundation of the diversity jurisdiction, cannot be entirely excluded.

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The interest in judicial economy, however, argues very strongly for confining this lawsuit to state court. The Illinois Probate Act of 1975, Ill.Rev.Stat., ch. 110½, § 8-1, establishes a procedure for will contests that is the exclusive procedure by which a will contest can be litigated in an Illinois court. See, e.g., *Blyman v. Shelby Loan & Trust Co.,* 382 Ill. 415, 421, 47 N.E.2d 706, 709 (1973). A will contest is initiated by filing a petition within six months of the admission to probate of the will to be contested. The petition must be filed in the proceeding to probate the will and the effect of the filing is to extend the probate proceeding until the will contest is completed. See *Estate of Lynch,* 103 Ill.App.3d 506, 507-09, 59 Ill.Dec. 233, 235-236, 431 N.E.2d 734, 736-37 (1982). Behind this procedure lies, it would seem, a judgment that all issues relating to the validity of a will ought to be decided as part of the initial probate proceeding, before the same judge, and before his recollection of the will has faded. If the plaintiffs in this case are free to contest the will in a different court, that will undermine what is not merely a hypothetical interest in judicial economy but almost certainly the interest that actually moved the Illinois legislature to give its will-contest procedure the form it did and to make that procedure exclusive. When the Supreme Court in *O'Callaghan* held that will-contest actions under Washington state law were ancillary to probate proceedings and so could not be brought in federal court under the diversity jurisdiction, one of the factors it relied on was that under state law such an action could be brought only in the court where the will had been admitted to probate. See 199 U.S. at 114, 25 S.Ct. at 735; see also *Sutton v. English,* 246 U.S. 199, 207-08, 38 S.Ct. 254, 257, 62 L.Ed. 664 (1918).

Finally, the issue that the plaintiffs are asking the federal court to decide in this case — the issue of undue influence over the testator — is one that state judges have greater experience with than federal judges. From this standpoint whether the issue is litigated in

a "pure" probate proceeding or, as in Illinois, in an ancillary proceeding is immaterial. Therefore, if there is some residual uncertainty that this case would be functionally a probate proceeding if brought in state court under section 8-1 of the Illinois Probate Act, the nature of the substantive issue in the case should dispel it.

We would have no doubt that this suit was within the probate exception to the diversity jurisdiction were it not for the labels that the plaintiffs have attached to their complaint. Instead of just claiming that the will is invalid and therefore the estate should pass to them, the heirs, by intestacy — a claim that could be litigated only in a will contest under section 8-1 — they claim that the defendants have committed *717 a tort against them by using undue influence to procure the will that was admitted to probate and as a result have deprived them of the inheritance they would have had if Dragan had died intestate. If we are correct in using a practical approach to defining the scope of the probate exception, labels would not alter our result. Whatever the plaintiffs call their action it is in effect one to declare Dragan's will invalid because of undue influence and to have his property pass to them under the Illinois intestacy statute; and while such an action cannot interfere with the Illinois probate proceeding now that it has ended, if it were brought in federal court it would frustrate the objectives that we have said lie behind the probate exception and that, we surmise, explain its remarkable persistence.

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But if Illinois allows the labels that a plaintiff puts on his suit to determine whether it must be brought under section 8-1, then the case for exclusive state jurisdiction is weakened. The argument from judicial economy would collapse because if the state allows an action challenging the validity of a will to be brought as a separate tort action before a different judge from the one who probated the will, it is hard to see why that different judge may not be a federal judge if the prerequisites of diversity jurisdiction are satisfied. The arguments from legal certainty and relative expertness would survive, but in an attenuated form, and they are not powerful arguments to begin with. True, with Illinois having abolished separate probate courts, a state tort action would at least be brought before the same kind of judge who had admitted the will to probate, though not necessarily the same individual; on the other hand, that abolition also reduces any argument for greater expertness based on specialization.

But we do not have to decide whether in these circumstances the probate exception would still be applicable. Like most states, Illinois recognizes a tort of wrongful interference with an expectancy in a decedent's estate; but where, as in this case, the interference consists of having procured a will that disinherits the plaintiff, it appears that the tort action must be brought as an ancillary proceeding, under section 8-1 of the Illinois Probate Act, to the original proceeding. *Lowe Foundation v. Northern Trust Co.,* 342 Ill.App. 379, 96 N.E.2d 831 (1951), the leading case in Illinois on the wrongful-interference tort, was so brought. See also *Jarmuth's Estate,* 329 Ill.App. 619, 70 N.E.2d 336 (1946); *Estate of Nelson,* 132 Ill.App.2d 544, 270 N.E.2d 65 (1971). *Nemeth v. Benhalmi,* 99 Ill.App.3d 493, 55 Ill.Dec. 14, 425 N.E.2d 1187 (1981), was not; but since in that case no will had been admitted to probate, an ancillary proceeding was not possible. In the present case, of course, it was.

True, the Illinois courts have not *said* that an action for tortious interference based on the

alleged invalidity of a will may be brought only in the section 8-1 format. But they have had no occasion to say this, since the only reported case, *Lowe Foundation, supra*, was brought as one. We have to guess whether the Illinois courts would allow section 8-1 to be circumvented by calling a will contest an action in tort. The Illinois courts have rejected all other attempts that have been made to get around the exclusivity of section 8-1 by relabeling. See *Blyman, supra*, which was brought as an action for the partition of real estate; *Ruffing, supra*, brought as an action for relief from a probate judgment; and *Estate of Moerschel*, 86 Ill.App.3d 482, 41 Ill.Dec. 633, 407 N.E.2d 1131 (1980), brought as a declaratory-judgment proceeding. We think they would reject this one as well.

AFFIRMED.

328 F.3d 941 (2003)

Brion M. STORM, Plaintiff-Appellant,
v.
Robert Z. STORM, Defendant-Appellee.

No. 02-3078.

United States Court of Appeals, Seventh Circuit.

Argued February 27, 2003.
Decided May 13, 2003.

942 *942 David Stevens (argued), Heller, Holmes & Associates, Mattoon, IL, for plaintiff-appellant.

Stephen M. Terrell (argued), Landman & Beatty, Indianapolis, IN, for defendant-appellee.

Before KANNE, DIANE P. WOOD and EVANS, Circuit Judges.

KANNE, Circuit Judge.

The facts of this family inheritance dispute center around the role Robert Z. **Storm** had, if any, in persuading his mother Evelyn **Storm**, to change the terms of her will and revocable trust. In 1993, Evelyn executed a revocable trust agreement, creating the Evelyn F. **Storm** Trust, into which she transferred a significant amount of her property. At that time, the terms of the trust provided in part that her son Robert would receive $20,000 from her estate upon her death, while her grandson Brion M. **Storm** would receive various items of personal property as well as one-half of the residue of her estate. Despite various amendments to the original trust agreement, until January 2000 Brion continued to be listed as a beneficiary entitled to one-half of the residue.

In late 1999, Evelyn suffered a serious stroke, and in December of that year, Robert moved her from Illinois to his home in Indianapolis, Indiana. After the move, Evelyn made several changes to her testamentary documents: on January 18, 2000, approximately six weeks after she was moved to Indianapolis, Evelyn executed a new will and a new trust agreement, which no longer included Brion as a beneficiary. On October 31, 2000, Evelyn once again executed a new will and an amendment to the trust, naming Robert as the sole beneficiary of her estate. Evelyn died on March 14, 2001.

On February 7, 2002, Brion filed this complaint as a diversity action under 28 U.S.C. § 1332. He alleged that before December 1999, he had a significant inheritance expectancy under the terms of Evelyn's trust. He further contended that sometime in 2000, Robert exerted undue influence on his mother Evelyn, causing her to execute a new will and a new trust naming Robert the sole beneficiary of her estate, thus tortiously interfering with Brion's inheritance expectancy.

Robert moved to dismiss Brion's complaint under Federal Rule of Civil Procedure 12(b)(1), arguing that the district court lacked subject matter jurisdiction over the claim, as this was essentially a probate matter. The district court granted Robert's motion to dismiss, finding that Brion's lawsuit "is so closely related to a probate proceeding as to fall within the probate exception" to federal jurisdiction. ***Storm*** *v.* ***Storm****,* No. IP 02-219-C H/K,
943 2002 U.S. Dist. LEXIS 14732, at *2 *943 (S.D.Ind. July 15, 2002). We agree that jurisdiction here is lacking, and affirm the dismissal of Brion's claims.

ANALYSIS

We review a district court's decision to dismiss a complaint for lack of subject matter jurisdiction *de novo.*[1] *Iddir v. INS,* 301 F.3d 492, 496 (7th Cir. 2002). For purposes of our review, we accept as true the well-pleaded factual allegations in the plaintiff's complaint, drawing all reasonable inferences in favor of the plaintiff. *Id.*

We begin with the well-established rule that "a federal court has no jurisdiction to probate a will or administer an estate." *Markham v. Allen,* 326 U.S. 490, 494, 66 S.Ct. 296, 90 L.Ed. 256 (1946); *see also Dragan v. Miller,* 679 F.2d 712, 713 (7th Cir.1982). Under the so-called "probate exception," even when the requirements of diversity jurisdiction have been met — the parties are diverse and the amount in controversy exceeds the jurisdictional threshold, *see* 28 U.S.C. § 1332(a)(1) (2003) — a federal court nonetheless lacks jurisdiction over cases involving probate matters. This jurisdictional exception, entirely the creation of the courts, was originally justified on historical grounds. *See Dragan,* 679 F.2d at 713; *Rice v. Rice Found.,* 610 F.2d 471, 475 & n. 6 (1979). Since its earliest invocations in the courts of this country, *see Farrell v. O'Brien,* 199 U.S. 89, 101-10, 25 S.Ct. 727, 50 L.Ed. 101 (1905) (discussing several early cases to have considered the question of federal jurisdiction over probate matters), the exception has become an established feature of our federal judicial system.

This Court has noted that the precise contours of the probate exception have not been — nor really can be — clearly defined. *See Georges v. Glick,* 856 F.2d 971, 973 (7th Cir.1988); *Loyd v. Loyd,* 731 F.2d 393, 397 (7th Cir.1984). The exception is rather easily applied to "pure" probate matters — *i.e.,* those involving the administration of an estate or the actual probate of a will. *Rice,* 610 F.2d at 475. Where difficulties arise is in determining whether certain matters beyond "pure" probate issues are nonetheless "ancillary" to the core probate activities to such a degree that they too fall within the exception. *See Dragan,* 679 F.2d at 715; *see also Farrell,* 199 U.S. at 110, 25 S.Ct. 727
944 (finding that a federal court lacked jurisdiction over a suit *944 to set aside the probate of a will "when the remedy to set aside afforded by the state law is a mere continuation of

the probate proceeding, that is to say, merely a method of procedure *ancillary to the original probate,* allowed by the state law for the purpose of giving to the probate its ultimate and final effect" (emphasis added)).

Thus, as we stated in *Dragan,* the process of determining whether a state-law action should fall within the probate exception involves the concept of "ancillarity," which itself "is an invitation to apply a concept — here the concept of probate — pragmatically." *Dragan,* 679 F.2d at 715. This means that "labels" should not be a dispositive factor in our analysis. *Id.* at 716-17. Rather, in *Dragan,* we adopted a "practical approach" to determining the boundaries of the probate exception. *Id.* at 715. We directed courts to consider the policy goals underlying the exception to determine whether the court had jurisdiction over a particular case — that is, a suit is considered ancillary to a probate proceeding, and thus within the exception, if "allowing it to be maintained in federal court would impair the policies served by the [exception]." *Id.* at 715-716. We have also cautioned that the probate exception, as a judicially created exception to the statutory grant of diversity jurisdiction, should be construed narrowly. *See Georges,* 856 F.2d at 973 (citing *Rice,* 610 F.2d at 475).

In *Dragan* and subsequent cases, we identified several practical bases for the exception. One practical reason for excluding probate matters from federal jurisdiction, albeit not the strongest one, is to encourage legal certainty — that is, to ensure that the outcomes of probate disputes will be consistent by limiting their litigation to one court system, rather than providing disputants the choice between two. *Dragan,* 679 F.2d at 714. A second goal is to promote judicial economy. *Id.* The process of determining and effectuating a decedent's testamentary wishes will generally begin in a state court. "If the probate proceeding thus must begin in state court, the interest in judicial economy argues for keeping it there until it is concluded." *Id.* "By restricting probate matters and will contests to state courts, questions as to a will's validity can be resolved concurrently with the task of estate administration." *Georges,* 856 F.2d at 974. This serves to preserve the resources of both the federal and state judicial systems and avoids the piecemeal or haphazard resolution of all matters surrounding the disposition of the decedent's wishes.

We have referred to "relative expertness" as another practical reason for the exception. *Dragan,* 679 F.2d at 715. Because state courts have nearly exclusive jurisdiction over probate matters, state judges vested with probate jurisdiction develop a greater familiarity with such legal issues. A final practical reason for having an exception is to avoid unnecessary interference with the state system of probate law. *Georges,* 856 F.2d at 974. This reason is actually a consequence of the other rationales: if state courts have the exclusive task of probating a will, and thus develop the relative expertise to do so (including the expertise to deal with all matters ancillary to probate), then federal court resolution of such matters is unlikely to be more than an unnecessary interference with the state system.

This case does not involve the administration of an estate, the probate of a will, or any other "pure" probate matter. The question for this Court then is whether the action brought by Brion should be considered ancillary to a probate proceeding, thus depriving

the federal courts of jurisdiction. The district court found that this lawsuit was in
945 "substance and effect" a will contest, and as such was ancillary to a *945 probate proceeding and covered by the probate exception. ***Storm***, 2002 U.S. Dist. LEXIS 14732, at *10, *19-20. Brion essentially raises two arguments as to why the exception is nevertheless inapplicable. First, he contends that this is a tort action rather than a will contest. Second, he argues that this case involves the terms of a trust rather than a will.

At bottom, the first issue Brion faces is whether his complaint, though framed in terms of the state law tort of interference with an inheritance expectancy, is in substance a will contest, and thus properly considered an action ancillary to pure probate proceedings. Wrongful interference with an inheritance expectancy is a recognized tort in Indiana; such an action may be brought in a court of general jurisdiction, provided a will contest is unavailable to supply an adequate remedy. *Minton v. Sackett*, 671 N.E.2d 160, 162-63 (Ind.Ct.App.1996); *see also* RESTATEMENT (SECOND) OF TORTS § 774B (1979). But as we have just observed, mere labels — whether an action is styled as a tort action or will contest — are not decisive in our probate-exception analysis.

We note that what Brion seeks is a legal determination that the terms of Evelyn's final will and trust, executed in October 2000, are invalid because they were allegedly procured through the exertion of undue influence by Robert. Brion claims that the change in the terms of the will and trust worked to his detriment by frustrating his established inheritance expectancy. He therefore seeks damages, presumably to be measured in part by what he would have received had Evelyn's actual testamentary wishes, as expressed in the previous will and trust, governed the disposition of her assets (he also seeks exemplary or punitive damages). While Brion phrases his action as one involving tortious interference with his inheritance expectancy, the practical effect of his lawsuit would be similar to that of a successful will contest: the terms of the final, allegedly invalid testamentary instruments would essentially be bypassed, while Brion would receive, as damages, the assets he would have otherwise been entitled to under what he says are Evelyn's actual will and trust. *Cf.* *Dragan*, 679 F.2d at 716 (noting that a lawsuit seeking the imposition of a constructive trust would, if successful, cause an estate to pass through the intestacy statute — thus, "this is not the form of the action but would be its practical effect if it succeeded" (emphasis added)).

An examination of the practical reasons for having a probate exception demonstrate that Brion's tort action is simply an attempt to "call[] a will contest an action in tort." *Id.* at 717. As such, we agree with the district court that this case belongs in state court.

Granted, the fact that no will has yet been admitted to probate and thus no state-court probate proceedings have been initiated[2] weighs against dismissal in order to conserve judicial resources or avoid interference with ongoing proceedings. But dismissal is nonetheless appropriate here because Indiana law would require that Brion's tort claim be heard in the probate division of the Marion Superior Court, a state court which hears
946 testamentary disputes *946 more often than any federal court. *See* ***Storm***, 2002 U.S. Dist. LEXIS 14732, at *16-17.[3] The district court noted that this case would "present precisely the sorts of issues that would arise in a will contest." *Id.* at *14. Given that federal courts rarely, if ever, deal with such matters, and that the Indiana state courts are

vastly more familiar with the factual and legal issues involved, dismissal in this case is consistent with the policy behind the probate exception.

Brion argues that Indiana does not have a state policy of channeling probate or probate-like cases into specialized courts, as the State has vested jurisdiction over probate matters in the state courts of general jurisdiction. He acknowledges that Marion County, Indiana has a Probate Division as part of the superior court system, but he suggests that this Court has said that such internal divisions of a court of general jurisdiction should have no bearing on our analysis:

> [The State of Illinois] has abolished separate probate courts and vested the probate jurisdiction in its courts of general jurisdiction, the circuit courts. The Cook County circuit court has subdivided itself into divisions, one of which is the probate division; but this organizational refinement has no jurisdictional significance. "Since both the probate division and the law division are ... simply divisions of the same constitutional court of general jurisdiction, it follows necessarily that both of these tribunals could have had equal and concurrent subject matter jurisdiction over the [matter at issue]."
>
> ... [R]etention of federal diversity jurisdiction over such cases will not interfere with the state policy of channeling all probate matters to specialized courts.

Hamilton v. Nielsen, 678 F.2d 709, 710 (7th Cir.1982) (citations omitted) (quoting *Alfaro v. Meagher,* 27 Ill.App.3d 292, 326 N.E.2d 545, 548-49 (1975)). Brion cites another case in which we affirmed federal jurisdiction, where we noted that the district court "was impressed that probate matters in Indiana are relegated to courts of general jurisdiction rather than to a specialized probate court." *Loyd,* 731 F.2d at 397.

Brion suggests that this language indicates that the district court was wrong to find that this factor weighed in favor of dismissal, because even if his case would be referred to the probate division of the Marion Superior Court, that is merely an internal division of a court of general jurisdiction. We think Brion misreads our emphasis in *Hamilton.* In that case, we affirmed federal court jurisdiction over a lawsuit in which a will beneficiary
947 sought *947 an award of money damages from the executors of the will for alleged negligence in the management of the estate. *Hamilton,* 678 F.2d at 710. Important to our analysis in that case was the fact that probate of the will in state court had essentially concluded and the federal suit did "not involve the validity or construction of the will or seek to change the distribution of the assets of the estate decreed by the circuit court." *Id.* In determining whether the case came within the probate exception, we emphasized that no probate-like issues were involved — those issues had previously been determined by the Illinois state court and were not challenged in the federal suit. Given that, the fact that Illinois no longer had legislatively mandated, specialized probate courts had "no jurisdictional significance" to our analysis. We continue to believe that the organizational divisions of courts of general jurisdiction (like that of the Marion Superior Court) have "no jurisdictional significance" for federal courts when no probate-like issues are involved.

When probate-like matters *are* at issue in a dispute, however, we reiterate that it is significant to our analysis that state courts vested with probate jurisdiction are much more familiar than are federal courts with the factual and legal issues involved. Indeed, in *Hamilton,* this Court went on to assert that, "This is not to say, of course, that federal courts can now probate wills in Illinois because the state has abolished its specialized probate courts. Probate remains a peculiarly local function which federal courts are ill equipped to perform." *Id.* This tort action is, for practical purposes, closely related to a will contest, and thus ancillary to a pure probate case. Because this case raises probate-like issues, it falls within the probate exception despite its characterization as a tort suit.

Brion also argues that the probate exception is inapplicable to this case because the dispute involves an *inter vivos* trust, which includes specific provisions for the disposition of the trust *res* upon Evelyn's death, rather than a will. As the district court noted, had Brion alleged that Robert exerted undue influence on Evelyn that caused her to modify the terms of her *will,* rather than the terms of her *trust,* dismissal would have been the clear result. ***Storm***, 2002 U.S. Dist. LEXIS 14732, at *10-11. But that is not the case here — and we must determine whether the use of a trust to convey testamentary wishes, rather than a will, requires a different result.

This Court has previously refused to adopt a *per se* rule making the probate exception inapplicable when the testamentary instrument at issue is a trust rather than a will. *Georges,* 856 F.2d at 974 n. 2. In *Georges,* we said that "[t]he inter vivos trust [at issue in the case] is clearly a will substitute. However, the fact that this case does involve a will substitute does not automatically render the probate exception applicable." *Id.* (citing *Dragan,* 679 F.2d at 715). Instead, we turn again to our practical approach, looking to the policies underlying the probate exception, to determine if Brion's lawsuit belongs in state court. For the same reasons that the exception applies to this suit despite its characterization as a tort action, we believe the exception applies despite this being a dispute over the terms of an *inter vivos* trust rather than a traditional will.

Given the growth in recent years of various "will substitutes," we are loath to throw open the doors of the federal courts to disputes over testamentary intent simply because a decedent chose to use a will substitute rather than a traditional will to dispose of his or her estate. We believe that our practical approach to determining whether the probate
948 exception to diversity jurisdiction applies is an appropriate *948 means by which to judge whether disputes surrounding such will substitutes should be within the jurisdiction of the federal courts.

CONCLUSION

Because we agree with the district court that "[a]s a practical matter, this case is indistinguishable from a will contest," ***Storm***, 2002 U.S. Dist. LEXIS 14732, at *14, we find that the probate exception applies despite the characterization of this case as a tort action and despite the use of an *inter vivos* trust rather than a traditional will. Dismissal of the action for lack of subject matter jurisdiction is therefore AFFIRMED.

[1] The parties dispute the appropriate standard of review. Robert argues that our review is only for an abuse of discretion by the district court, citing language from our decision in *Loyd v. Loyd*, 731 F.2d 393, 397 (7th Cir.1984) ("[W]e will treat the case on the basis of the particular facts here as involving an exercise of discretion and hold that there was no abuse of that discretion. In candor, if the district court had found originally that the probate exception was applicable, we doubt we would have faulted him.") and *Rice v. Rice Found.*, 610 F.2d 471, 477 (7th Cir.1979) ("Even where a particular probate-like case is found to be outside the scope of the probate exception, the district court may, in its discretion, decline to exercise its jurisdiction.").

In this case, the district court found that it was without jurisdiction to hear this lawsuit — that is a conclusion quite different from finding jurisdiction exists but declining to exercise it (an abstention case like that referred to in *Rice*). Review of abstention decisions presents a different matter from the review of determinations that subject matter jurisdiction does not exist at all. To the extent that *Loyd* speaks of discretion, we believe that language is best characterized as expressing a certain deference to the district court's greater familiarity with a particular State's probate law and court system, as well as an acknowledgment that the probate exception is not clearly delineated nor "a hard and fast jurisdictional rule." *Loyd*, 731 F.2d at 397. Because the existence of subject matter jurisdiction goes to the ultimate question of whether the federal courts have the power to entertain and decide a case, we emphasize that our review in such situations is *de novo.*

[2] In addition to the trust, Evelyn left a will, but it is unclear whether or when that will would be submitted for probate in the Indiana courts. The district court noted that it had no information as to the future disposition of the will or estate. ***Storm***, 2002 U.S. Dist. LEXIS 14732, at *5. We simply note that if this will is admitted to probate at some future time, the claim raised by Brion in this lawsuit would more appropriately be included as part of those proceedings, thus implicating both the judicial economy and the unnecessary interference policy rationales.

[3] The district court determined that:

In the state courts, Brion's claim would be heard by the Probate Division of the Marion Superior Court, which has both general and specialized jurisdiction. *See* Ind.Code §§ 33-5.1-2-4 and -2-9. The Superior Court is a court of general jurisdiction, including probate matters, Ind.Code § 33-5.1-2-4(2), but Indiana statutes plainly establish a specialized jurisdiction for the Superior Court's Probate Division. The legislature instructed the Marion Superior Court to adopt rules of the court dividing the work of the court among divisions, including a Probate Division. Ind.Code § 33-5.1-2-9(c). Indiana statutes give the Probate Division jurisdiction over issues of trusts as well as wills. Ind Code § 30-4-6-1 ("Jurisdiction in this state for all matters arising under this article [Trust Code] shall be with the court exercising probate jurisdiction."). That probate jurisdiction includes the power to rescind or reform a trust. Ind.Code § 30-4-3-25. Thus, Indiana law would assign Brion's claims to the Probate Division of the Marion Superior Court.

Storm, 2002 U.S. Dist. LEXIS 14732, at *16-17.

841 F.Supp. 241 (1993)

INNKEEPERS' TELEMANAGEMENT AND EQUIPMENT CORPORATION, Plaintiff,

v.

HUMMERT MANAGEMENT GROUP, INC., et al., Defendants.

No. 92 C 8416.

United States District Court, N.D. Illinois, E.D.

December 20, 1993.

242 *242 Michael Alan Kraft, Siegan, Barbakoff, Gomberg & Kane, Ltd., Chicago, IL, for plaintiff **Innkeepers**' **Telemanagement** and Equipment Corp.

Keith M. Kanter, Siegan & Weisman, Ltd., Chicago, IL, for defendants **Hummert** Management Group, Inc., Midway Hospitality Corp., Midway of Delta, a gen. partnership, Midway Motor Lodge of Brookfield, gen. partnership, Mitchell Associates, a general partnership, Midway Motor Lodge, Inc., of Green Bay, WI, a WI corp., Midway Motor Lodge, Inc. of Madison, WI, a WI corp., Midway Motor Lodge of Wausau, WI, a gen. partnership, Midway Motor Lodge of Appleton, WI, a gen. partnership, Midway Motor Lodge of Eau Claire, WI, Midway Motor Lodge of Grand Rapids, a gen. partnership and Midway Motor Lodge of LaCrosse, WI, a gen. partnership.

MEMORANDUM OPINION AND ORDER

ASPEN, District Judge:

Plaintiff Innkeeper's **Telemanagement** and Equipment Corporation brings this five count complaint, asserting conversion, breach of contract, and the creation of a constructive trust, and seeking a declaratory judgment and an accounting. Presently before us is defendants' motion for partial summary judgment. For the reasons set forth below, defendants' motion is granted in part and denied in part.

I. Summary Judgment Standard

Under the Federal Rules of Civil Procedure, summary judgment is appropriate if "there is no genuine issue as to any material fact and ... the moving party is entitled to judgment

as a matter of law." Fed.R.Civ.P. 56(c). This standard places the initial burden on the moving party to identify "those portions of `the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986) (quoting *243 Rule 56(c)). Once the moving party has done this, the non-moving party "must set forth specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e). In deciding a motion for summary judgment, the court must read all facts in the light most favorable to the non-moving party. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 254, 106 S.Ct. 2505, 2513, 91 L.Ed.2d 202 (1986); *Griffin v. Thomas,* 929 F.2d 1210, 1212 (7th Cir.1991).

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II. Background

A. Parties and Proceedings in the Current Lawsuit

Plaintiff Innkeeper's **Telemanagement** and Equipment Corporation ("ITEC") is a Delaware corporation which provides telecommunications services to the hotel industry. Its principal place of business is located in Northbrook, Illinois. Defendants **Hummert** Management Group, Inc. and Midway Hospitality Corporation are Wisconsin corporations which provide management services for various hotels, including those involved in this action. The remaining defendants are partnerships and corporations which own hotels in Wisconsin or Michigan operating under the "Midway" or "Best Western" name.[1] Between November, 1987 and February, 1988, ITEC[2] entered into contracts with each of the defendant hotels, in which ITEC agreed to provide telecommunications services for the hotels.[3] Specifically, the agreements, which were essentially identical, stated that ITEC would lease telephone equipment to the hotel, provide local and long distance telephone service, and maintain and update the equipment. In return, the hotels each agreed to pay ITEC a fee based in part upon the revenues received by the hotel for guest use of the telephone services.

In March, 1990, the parties amended their contracts. These so-called "0+" Amendments provided that ITEC would install credit card processing equipment in the hotels. ITEC also agreed to pay the hotels a commission in the form of a monthly credit based upon the additional revenues ITEC received from credit card calls. In the "0+ Amendments," ITEC reserved the right to "renegotiate or even eliminate these credits in the events these charges are reduced, changed, or deemed not in compliance with federal or state regulation(s)."

The parties disagreed from the start about virtually every element of their contracts, including the calculation of revenues the hotels owed ITEC, the life of the agreements, ITEC's maintenance and upgrade obligations, and the rebates owed under the "0+" Amendments. Following fruitless negotiations, counsel for the hotels sent ITEC a letter asserting that ITEC was in default of its obligations under the agreements. Continued discussions aimed at resolving the parties' differences were unavailing. As a result, in May, 1992, hotels began to withhold the estimated amount of the "0+" rebates from the

revenues otherwise payable to ITEC. In response, in the fall of 1992, ITEC stopped paying local long distance carriers for service to the hotels.[4] In addition, on November 18, 1992, ITEC sent the management companies' attorney, who had been representing the interests of the hotels, a notice of termination of all its Midway contracts.

On December 2, 1992, ITEC filed a lawsuit against the two management companies in
244 *244 the Chancery Division of the Circuit Court of Cook County. That lawsuit was subsequently removed to this court, and ITEC amended its complaint to name the various hotels. Pursuant to a report and recommendation by Magistrate Judge Pallmeyer, the hotels replaced their individual telecommunications systems, and permitted ITEC to remove its equipment. In September, 1993, ITEC informed defendants, and later confirmed in its submissions to this court, that it would not be proceeding on Counts I through IV of its complaint. Accordingly, the only live count remaining is Count V (breach of contract).

B. Midway Motor Lodge-Elk Grove

Like the defendant hotels in the present lawsuit, Midway Motor Lodge-Elk Grove ("Elk Grove") had a contract with ITEC, whereby ITEC provided Elk-Grove with telephone service. Unlike the other hotels, however, Elk Grove filed for Chapter 11 bankruptcy protection in April, 1992, and is therefore not a party to this action. Because the developments in the bankruptcy proceedings directly impact our consideration of the current summary judgment motion, we will relate them in some detail.

ITEC filed its Notice of Claim in the United States Bankruptcy Court for the Eastern District of Wisconsin, where the Elk Grove bankruptcy was pending, on March 1, 1993. Two weeks later, the debtor-in-possession filed and served its objections to ITEC's claim. On March 31, 1993, the court held a pretrial conference, in which it scheduled a hearing for April 29, 1993. The day before the hearing, Elk Grove requested that the bankruptcy court abstain from estimating ITEC's claim and allow this Court to resolve ITEC's claims against the other Midway hotels. ITEC objected, asserting that it lacked information about Elk Grove's partners' ability to satisfy ITEC's claims, and thus could not rely upon them to do so. The bankruptcy court denied the motion and proceeded with the scheduled hearing.

The court proceedings consisted of both a § 502(c) estimation hearing and a trial on Elk Grove's objections to ITEC's claim.[5] The proceedings began on April 29, 1993, and concluded on April 30, 1993. In its findings of fact and conclusions of law issued from the bench, the court concluded that ITEC had breached its contract. Specifically, it found that ITEC failed to update the telephone systems and provide state of the art equipment, misled Elk Grove on the "0+" commissions, breached with respect to its billing procedures, and was guilty of bad faith with respect to a number of issues. In addition, the court found that ITEC failed to cure any of its defaults, which the court considered to be a material breach. Finally the bankruptcy court concluded that there was no significant default by Elk Grove. Accordingly, the court both estimated and allowed ITEC's claim as follows: a general unsecured prepetition nonpriority claim in the amount

of $2,956.81 and a postpetition administrative claim in the amount of $2,272.97.[6] The bankruptcy court's ruling was appealed to the United States District Court for the Eastern District of Wisconsin, and that appeal is currently pending.

III. Discussion

A. Counts I-IV

ITEC informed this court that it no longer intends to proceed on Counts I-IV. Defendants' summary judgment motion with respect to those counts is therefore moot, and accordingly, is denied.

B. Count V (Breach of Contract)

Defendants first assert that ITEC has failed to state a claim against the management companies, and that they should *245 therefore be dismissed. It is undisputed that the managements companies, **Hummert** Management Group, Inc., and Midway Hospitality Corporation, had no contracts with ITEC; rather, all of the contracts at issue were entered into between ITEC and the individual hotels. Accordingly, any breach of contract claim, at least to the extent it is directed against **Hummert** and Midway, must rest upon some other ground than the existence of a contract between ITEC and the management companies.

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ITEC asserts that each management company and the hotels that it represents are actually a "single enterprise" under *NLRB v. Deena Artware, Inc.*, 361 U.S. 398, 80 S.Ct. 441, 4 L.Ed.2d 400 (1960). In support, they argue that the principal officers of the management companies are also part owners of the defendant hotels, and that Midway itself is a part owner of one of the hotels. They further assert that "**Hummert** and Midway have represented themselves to ITEC as the entities responsible for operations of the hotels which are the subjects of the agreements, and have initiated virtually all of the correspondence to ITEC relating to the agreements...." Finally, they note that William Krause, one of Midway's officers, was the individual who instructed the hotels to disconnect ITEC's maintenance modems, such that ITEC was unable to access its equipment from off-site.

We first observe that the "single enterprise" doctrine cited by ITEC is a test employed by the National Labor Relations Board, and its application has therefore been limited to the labor relations arena. *See* *Esmark, Inc. v. NLRB*, 887 F.2d 739, 753 (7th Cir.1989). ITEC provides no other authority, and thus no relevant authority, for holding the management companies liable for the alleged contract breaches of the defendant hotels. This failure alone is sufficient reason for rejecting ITEC's arguments.

Furthermore, ITEC's failure in this regard is likely due to the absence of any authority, under any theory, for retaining the management companies as parties in this action. Under Illinois law, "[i]t is a well-established principle that a corporation is separate and

distinct as a legal entity from its shareholders, directors and officers, and, generally, from other corporations with which it may be affiliated." *Main Bank of Chicago v. Baker,* 86 Ill.2d 188, 56 Ill.Dec. 14, 21, 427 N.E.2d 94, 101 (1981). As a result, "before the separate corporate identity of one corporation will be disregarded and treated as the alter ego of another, it must be shown that it is so controlled and its affairs so conducted that it is a mere instrumentality of another, *and it must further appear* that observance of the fiction of separate existence would, under the circumstances, sanction a fraud or promote injustice." *Main Bank of Chicago,* 56 Ill.Dec. at 21, 427 N.E.2d at 101 (emphasis added). ITEC has not even approached such a showing here, and it would therefore be wholly inappropriate to pierce the management companies' corporate veils.

Rather, the facts asserted by ITEC simply demonstrate that the management companies were essentially acting as agents for the hotels, which was, of course, their intended role. It is well established that, where the principal (the hotels) is disclosed, as is the case here, the agent is not liable for the principal's alleged breach of contract. *See* Restatement (Second) of Agency § 320 (1957). Accordingly, there is no basis for including the management companies as a party in this suit. We therefore grant the defendants' motion to dismiss **Hummert** Management Group, Inc. and Midway Hospitality Corporation.

Defendants also argue that, based upon the outcome of the Elk Grove bankruptcy trial, ITEC is collaterally estopped from denying that it breached the contracts with the hotels or from denying that its breach excused the hotels from further performance. They therefore seek summary judgment on those issues.[7]

Four elements must be met before collateral estoppel will apply:

246 *246 1) the issue sought to be precluded must be the same as that involved in the prior action, 2) the issue must have been actually litigated, 3) the determination of the issue must have been essential to the final judgment, and 4) the party against whom estoppel is invoked must be fully represented in the prior action.

Klingman v. Levinson, 831 F.2d 1292, 1295 (7th Cir.1987) (citations omitted).[8] Defendants assert that the proceedings in the bankruptcy court meet the above test, and argue that ITEC is therefore estopped from challenging the bankruptcy court's rulings in this action. It is clear that bankruptcy court rulings which fall within the above parameters have preclusive effect. *See, e.g., Klingman,* 831 F.2d at 1296. Furthermore, the fact that such a ruling is on appeal does not alter this result. *See Cohen v. Bucci,* 103 B.R. 927 (N.D.Ill.1989), *aff'd,* 905 F.2d 1111 (7th Cir.1990). Finally, collateral estoppel is appropriate even where the party asserting estoppel was not a party in the previous action, as long as party to be estopped was a party in that action. *See Blonder-Tongue Lab., Inc. v. Univ. of Ill. Found.,* 402 U.S. 313, 349-50, 91 S.Ct. 1434, 1453, 28 L.Ed.2d 788 (1971).

ITEC does not challenge the above statements of law, but instead asserts that the bankruptcy trial at issue here does not meet the test for collateral estoppel. Specifically, ITEC suggests that the bankruptcy court's rulings should not have preclusive effect

because they were part of an estimation hearing, and "the estimation of claims in bankruptcy does not establish a binding legal determination of the ultimate validity of a claim nor a binding determination of any issues." *In re Bicoastal Corp.*, 122 B.R. 771, 775 (Bankr.M.D.Fla.1990). While we do not take issue with ITEC's assertion regarding the preclusive effect of estimation hearings, it is clear that the proceedings in the bankruptcy court were much more than that. In fact, the bankruptcy judge consolidated the estimation hearing *and* the actual trial on the merits of Elk Grove's objections to and the allowability of ITEC's claim. As a result, it is readily apparent that the trial on the objections constituted "actual litigation" of the issues raised therein.

ITEC also asserts, however, that even the trial on the objections was insufficient to satisfy the requirements for collateral estoppel. Among other things, ITEC asserts that it was unable to complete all of the discovery it wished to take, given the accelerated time frame, and that the bankruptcy judge strictly limited the amount of time allowed for the trial, and thus the number of witnesses that ITEC could call. ITEC therefore argues that it did not have a full and fair opportunity to litigate the merits of its claim. We first observe that, "[i]n determining whether an issue has been litigated in an earlier case, a full trial on the merits in the earlier action is not an absolute prerequisite." *La Preferida, Inc. v. Cerveceria Modelo, S.A. de C.V.*, 914 F.2d 900 (7th Cir. 1990). As the Seventh Circuit has stated:

> The requirement of collateral estoppel that the issue be "actually litigated" does not require that the issue be thoroughly litigated.... This requirement is generally satisfied if the parties to the original action disputed the issue and the trier of fact resolved it.

Continental Can Co. v. Marshall, 603 F.2d 590, 596 (7th Cir.1979) (citations omitted).[9]
247 Here there is no question but that the trial in *247 the bankruptcy court included live witnesses, direct and cross examination, and evidentiary objections regarding the disputed issues. It is also undisputed that the judge resolved those issues, stating his findings of fact and conclusions of law from the bench. It therefore appears that, at least for the purposes of collateral estoppel, the relevant issues were "actually litigated."

We further observe that the objections that ITEC raises to the propriety of the trial in the bankruptcy court, including the combining of the estimation hearing and the actual trial on the objections, ITEC's alleged lack of notice that the trial would be combined with the estimation hearing, and the time limitations placed on the parties, have all been raised by ITEC in its appeal of the bankruptcy court's ruling. It is clear that the Eastern District of Wisconsin is a far better forum for raising those objections than this court, and we will therefore refrain from attempting to resolve them here. Nonetheless, we are mindful that collateral estoppel is an equitable doctrine, and is thus "subject to limitations where fairness and justice require." *Stevenson v. City of Chicago*, 638 F.Supp. 136, 149 (N.D.Ill.1986). Accordingly, if ITEC wishes to file a Motion to Reconsider this ruling, we will withhold our ruling on such motion, pending the outcome of the Elk Grove bankruptcy appeal.[10] For the present, however, we conclude that ITEC is collaterally estopped from denying that it breached its contracts with the hotels, and from denying that its breach excused the hotels from further performance. Accordingly, defendants are

entitled to summary judgment on these issues.

IV. Conclusion

For the reasons set forth above, we deny defendants' motion for summary judgment on Counts I-IV, and grant defendants' motion for partial summary judgment on Count V. We further dismiss **Hummert** Management Group, Inc. and Midway Hospitality Corporation from this action. It is so ordered.

[1] The hotels are: (i) Best Western Midway or Midway Motor Lodge-Lansing; (ii) Best Western Midway or Midway Motor Lodge-Brookfield; (iii) Midway Motor Lodge-Airport; (iv) Midway Motor Lodge-Green Bay; (v) Best Western Midway Motor Lodge-Milwaukee Hwy 100 or Midway Motor Lodge-Milwaukee Hwy 100; (vi) Midway Motor Lodge-Wausau; (vii) Midway Motor Lodge-Appleton; (viii) Midway Motor Lodge-Eau Claire; (ix) Best Western Midway Motor Lodge or Midway Motor Lodge-Grand Rapids; (x) Midway Motor Lodge-LaCrosse.

[2] The agreements at issue were actually entered into by ITEC's predecessor in interest. For the sake of clarity and simplicity, however, we shall simply refer to both ITEC and its predecessor in interest as "ITEC".

[3] However, ITEC acknowledges that it never entered into a contract with the two management companies.

[4] Around this time, two of the hotels, Midway Motor Lodge-Grand Rapids and Midway Motor Lodge-Lansing, temporarily lost telephone service.

[5] The parties strenuously disagree as to whether ITEC was aware that this hearing was to be both an estimation hearing, pursuant to 11 U.S.C. § 502(c), *and* a trial on the debtor's objections to ITEC's claim, as opposed to simply an estimation hearing, and each points to statements of the bankruptcy court which allegedly support its position. We will more fully consider this issue in the text of our discussion.

[6] ITEC originally filed a claim in the amount of $424,420.55. It subsequently amended its claim, asserting that $237,554 was due. Although it filed objections to ITEC's claim, Elk Grove had admitted that at least $2,272.97 of the claim was legitimate.

[7] Although state substantive law will determine the parties' rights and liabilities in this diversity action, we will apply federal principles of preclusion. *See* *La Preferida, Inc. v. Cerveceria Modelo, S.A. de C.V.*, 914 F.2d 900, 905 n. 6 (7th Cir. 1990) (citations omitted).

[8] ITEC does not challenge the existence of elements one, three, and four. Accordingly, we shall limit our discussion to whether the issues were "actually litigated."

[9] *Continental Can Co.* involved a party who, for tactical reasons, failed to present as much evidence as he might have with respect to the relevant issue. The court concluded that the failure to introduce evidence, whether by design or by inadvertence, could not be allowed to act as a bar to the application of collateral estoppel. *Continental Can Co.*, 603 F.2d at 596. Although ITEC asserts that it wanted more time to prepare, and would have submitted additional evidence if the length of trial were not restricted, we note that ITEC failed to object to the format selected by the judge before, during, or even immediately after the trial, when the judge reiterated that the proceedings constituted both an estimation hearing and a trial on the merits of the debtor's objections to ITEC's claim. Accordingly, the present case clearly falls within the general principles set forth in *Continental Can Co.*

[10] We, of course, intimate no view as to the effect that a ruling in ITEC's favor in the bankruptcy appeal might have in the present case.

402 U.S. 313 (1971)

BLONDER-TONGUE LABORATORIES, INC.
v.
UNIVERSITY OF ILLINOIS FOUNDATION ET AL.

No. 338.

Supreme Court of United States.

Argued January 14, 1971
Decided May 3, 1971

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Robert H. Rines argued the cause for petitioner. With him on the brief were *Richard S. Phillips, Paul J. Foley,* and *Nelson H. Shapiro.*

William A. Marshall argued the cause for respondent University of Illinois Foundation. With him on the brief were *Charles J. Merriam* and *Basil P. Mann. Sidney G. Faber* argued the cause for respondent JFD Electronics Corp. With him on the brief were *Jerome M. Berliner, Robert C. Faber,* and *Myron C. Cass.*

Assistant Attorney General McLaren argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Griswold, Assistant Attorney General Gray, Peter L. Strauss, Howard E. Shapiro,* and *Walter H. Fleischer.*

314 *314 Briefs of *amici curiae* were filed by *Donald R. Dunner, James B. Gambrell,* and *W. Brown Morton, Jr.,* for the American Patent Law Association; by *Theodore W. Anderson* for the Automatic Electric Co.; by *Harold F. McNenny, John F. Pearne,* and *Walther E. Wyss* for the Finney Co.; and by *Joseph B. Brennan* and *Richard D. Mason* for the Kawneer Co., **Inc**.

MR. JUSTICE WHITE delivered the opinion of the Court.

Respondent University of Illinois Foundation (hereafter Foundation) is the owner by assignment of U. S. Patent No. 3,210,767, issued to Dwight E. Isbell on October 5, 1965. The patent is for "Frequency Independent Unidirectional Antennas," and Isbell first filed his application May 3, 1960. The antennas covered are designed for transmission and reception of electromagnetic radio frequency signals used in many types of communications, including the broadcasting of radio and television signals.

The patent has been much litigated since it was granted, primarily because it claims a high quality television antenna for color reception.[1] One of the first infringement suits brought by the Foundation was filed in the Southern District of Iowa against the Winegard Co., an antenna manufacturer.[2] Trial was to the court, and after pursuing the inquiry mandated by *Graham* v. *John Deere Co.*, 383 U. S. 1, 17-18 (1966), Chief Judge Stephenson held the patent invalid since "it would have been obvious to one ordinarily
315 skilled in the art and wishing to design a frequency independent unidirectional *315 antenna to combine these three old elements, all suggested by the prior art references previously discussed." *University of Illinois Foundation* v. *Winegard Co.*, 271 F. Supp. 412, 419 (SD Iowa 1967) (footnote omitted).[3] Accordingly, he entered judgment for the alleged infringer and against the patentee. On appeal, the Court of Appeals for the Eighth Circuit unanimously affirmed Judge Stephenson. 402 F. 2d 125 (1968). We denied the patentee's petition for certiorari. 394 U. S. 917 (1969).

In March 1966, well before Judge Stephenson had ruled in the *Winegard* case, the Foundation also filed suit in the Northern District of Illinois charging a Chicago customer of petitioner, **Blonder-Tongue** Laboratories, **Inc**. (hereafter B-T), with infringing two patents it owned by assignment: the Isbell patent and U. S. Patent No. Re. 25,740, reissued March 9, 1965, to P. E. Mayes et al. The Mayes patent was entitled "Log Periodic Backward Wave Antenna Array," and was, as indicated, a reissue of No. 3,108,280, applied for on September 30, 1960. B-T chose to subject itself to the
316 jurisdiction of the court to *316 defend its customer, and it filed an answer and counterclaim against the Foundation and its licensee, respondent JFD Electronics Corp., charging: (1) that both the Isbell and Mayes patents were invalid; (2) that if those patents were valid, the B-T antennas did not infringe either of them; (3) that the Foundation and JFD were guilty of unfair competition; (4) that the Foundation and JFD had violated the "anti-trust laws of the United States, including the Sherman and Clayton Acts, as amended"; and (5) that certain JFD antenna models infringed B-T's patent No. 3,259,904, "Antenna Having Combined Support and Lead-In," issued July 5, 1966.

Trial was again to the court, and on June 27, 1968, Judge Hoffman held that the Foundation's patents were valid and infringed, dismissed the unfair competition and antitrust charges, and **found** claim 5 of the B-T patent obvious and invalid. Before discussing the Isbell patent in detail, Judge Hoffman noted that it had been held invalid as obvious by Judge Stephenson in the *Winegard* litigation. He stated:

> "This court is, of course, free to decide the case at bar on the basis of the evidence before it. *Triplett* v. *Lowell*, 297 U. S. 638, 642 (1936). Although a patent has been adjudged invalid in another patent infringement action against other defendants, patent owners cannot be deprived `of the right to show, if they can, that, as against defendants who have not previously been in court, the patent is valid and infringed.' *Aghnides* v. *Holden*, 22[6] F. 2d 949, 951 (7th Cir. 1955). On the basis of the evidence before it, this court disagrees with the conclusion reached in the *Winegard* case and finds both the Isbell patent and the Mayes et al. patent valid and enforceable patents." App. 73.

317 *317 B-T appealed, and the Court of Appeals for the Seventh Circuit affirmed: (1) the findings that the Isbell patent was both valid and infringed by B-T's products; (2) the dismissal of B-T's unfair competition and antitrust counterclaims; and (3) the finding that claim 5 of the B-T patent was obvious. However, the Court of Appeals reversed the judgment insofar as Judge Hoffman had **found** the Mayes patent valid and enforceable, enjoined infringement thereof, and provided damages for such infringement. 422 F. 2d 769 (1970).

B-T sought certiorari, assigning the conflict between the Courts of Appeals for the Seventh and Eighth Circuits as to the validity of the Isbell patent as a primary reason for granting the writ.[4] We granted certiorari, 400 U. S. 864 (1970), and subsequently requested the parties to discuss the following additional issues not raised in the petition for review:

> "1. Should the holding of *Triplett* v. *Lowell,* 297 U. S. 638, that a determination of patent invalidity is not res judicata as against the patentee in subsequent litigation against a different defendant, be adhered to?
>
> "2. If not, does the determination of invalidity in the *Winegard* litigation bind the respondents in this case?"

I

In *Triplett* v. *Lowell,* 297 U. S. 638 (1936), this Court held:

> "Neither reason nor authority supports the contention that an adjudication adverse to any or all the claims of a patent precludes another suit upon the
318 same claims against a different defendant. While *318 the earlier decision may by comity be given great weight in a later litigation and thus persuade the court to render a like decree, it is not *res adjudicata* and may not be pleaded as a defense." 297 U. S., at 642.

The holding in *Triplett* has been at least gently criticized by some judges. In its opinion in the instant case, the Court of Appeals for the Seventh Circuit recognized the *Triplett* rule but nevertheless remarked that it "would seem sound judicial policy that the adjudication of [the question of the Isbell patent's validity] against the Foundation in one action where it was a party would provide a defense in any other action by the Foundation for infringement of the same patent." 422 F. 2d, at 772.[5]

319 *319 In its brief here, the Foundation urges that the rule of *Triplett* be maintained. Petitioner B-T's brief took the same position, stating that "[t]hough petitioners stand to gain by any such result, we cannot urge the destruction of a long-accepted safeguard for patentees merely for the expediency of victory." Brief for Petitioner 12. The Government, however, appearing as *amicus curiae,* urges that *Triplett* was based on uncritical acceptance of the doctrine of mutuality of estoppel, since limited significantly, and that the time has come to modify *Triplett* so that "claims of estoppel in patent cases [are] considered on a case by case basis, giving due weight to any factors which would point

to an unfair or anomalous result from their allowance." Brief for the United States 7. The Government's position was spelled out in a brief filed more than a month after petitioner B-T filed its brief.

At oral argument the following colloquy occurred between the Court and counsel for B-T:

> "Q. You're not asking for Triplett to be overruled?
>
> "A. No, I'm not. I maintain that my brother here did have a right if there was a genuine new issue or some other interpretation of the [patent] claim or some interpretation of law in another circuit that's different than this Circuit, he had a right to try, under Triplett below, in another circuit.
>
> "In this particular case, where we're stuck with substantially the same documentary evidence, where we were not able to produce [in the Seventh Circuit] even that modicum of expert testimony that existed in the Eighth Circuit, we think there may be as suggested by the Solicitor General, some reason for modification of that document [*sic*] in a case such as this." Tr. of Oral Arg. 7-8.

320 *320 In light of this change of attitude from the time petitioner's brief was filed, we consider that the question of modifying *Triplett* is properly before us.[6]

II

Triplett v. *Lowell* exemplified the judge-made doctrine of mutuality of estoppel, ordaining that unless both parties (or their privies) in a second action are bound by a judgment in a previous case, neither party (nor his privy) in the second action may use the prior
321 judgment as determinative *321 of an issue in the second action. *Triplett* was decided in 1936. The opinion stated that "the rules of the common law applicable to successive litigations concerning the same subject matter" did not preclude "relitigation of the validity of a patent claim previously held invalid in a suit against a different defendant." 297 U. S., at 644. In *Bigelow* v. *Old Dominion Copper Co.*, 225 U. S. 111, 127 (1912), the Court had stated that it was "a principle of general elementary law that the estoppel
322 of a judgment must be mutual."[7] The same *322 rule was reflected in the Restatement of Judgments. Restatement of Judgments § 93 (1942).[8]

But even at the time *Triplett* was decided, and certainly by the time the Restatement was published, the mutuality rule had been under fire. Courts had discarded the requirement of mutuality and held that only the party against whom the plea of estoppel was asserted had to have been in privity with a party in the prior action.[9] As Judge Friendly has
323 noted, Bentham had attacked *323 the doctrine "as destitute of any semblance of reason, and as `a maxim which one would suppose to have **found** its way from the gaming-table to the bench' . . . ." *Zdanok* v. *Glidden Co.*, 327 F. 2d 944, 954 (CA2 1964), cert. denied, 377 U. S. 934 (1964) (quoting 3 J. Bentham, Rationale of Judicial Evidence 579 (1827), reprinted in 7 Works of Jeremy Bentham 171 (J. Bowring ed. 1843)). There was also ferment in scholarly quarters.[10]

Building upon the authority cited above, the California Supreme Court, in *Bernhard* v. *Bank of America Nat. Trust & Savings Assn.*, 19 Cal. 2d 807, 122 P. 2d 892 (1942), unanimously rejected the doctrine of mutuality, stating that there was "no compelling reason . . . for requiring that the party asserting the plea of res judicata must have been a party, or in privity with a party, to the earlier litigation." *Id.,* at 812, 122 P. 2d, at 894. Justice Traynor's opinion, handed down the same year the Restatement was published, listed criteria since employed by many courts in many contexts:

> "In determining the validity of a plea of res judicata three questions are pertinent: Was the issue decided in the prior adjudication identical with the one presented in the action in question? Was there a final judgment on the
> 324 merits? Was the party against whom the plea is asserted a party or in *324 privity with a party to the prior adjudication?" 19 Cal. 2d, at 813, 122 P. 2d, at 895.

Although the force of the mutuality rule had been diminished by exceptions and *Bernhard* itself might easily have been brought within one of the established exceptions, "Justice Traynor chose instead to extirpate the mutuality requirement and put it to the torch." Currie, Civil Procedure: The Tempest Brews, 53 Calif. L. Rev. 25, 26 (1965).

Bernhard had significant impact. Many state and federal courts rejected the mutuality requirement, especially where the prior judgment was invoked defensively in a second action against a plaintiff bringing suit on an issue he litigated and lost as plaintiff in a prior action.[11] The trend has been apparent in federal-question cases.[12] The federal courts **found** *Bernhard* persuasive. As Judge Hastie stated more than 20 years ago:

> "This second effort to prove negligence is comprehended by the generally accepted precept that a party who has had one fair and full opportunity to prove a claim and has failed in that effort, should not be permitted to go to trial on the merits of that claim a second time. Both orderliness and
> 325 reasonable time saving in judicial administration require that *325 this be so unless some overriding consideration of fairness to a litigant dictates a different result in the circumstances of a particular case.
>
> "The countervailing consideration urged here is lack of mutuality of estoppel. In the present suit [the plaintiff] would not have been permitted to take advantage of an earlier affirmative finding of negligence, had such finding been made in [his first suit against a different defendant]. For that reason he argues that he should not be bound by a contrary finding in that case. But a finding of negligence in the [plaintiff's first suit] would not have been binding against the [defendant in a second suit] because [that defendant] had no opportunity to contest the issue there. The finding of no negligence on the other hand was made after full opportunity to [plaintiff] on his own election to prove the very matter which he now urges a second time. Thus, no unfairness results here from estoppel which is not mutual. In reality the argument of [plaintiff] is merely that the application of *res judicata* in this case makes the law asymmetrical. But the achievement of

> substantial justice rather than symmetry is the measure of the fairness of the rules of *res judicata.*" *Bruszewski* v. *United States,* 181 F. 2d 419, 421 (CA3 1950), cert. denied, 340 U. S. 865 (1950).

Many federal courts, exercising both federal question and diversity jurisdiction, are in accord unless in a diversity case bound to apply a conflicting state rule requiring mutuality.[13]

326 *326 Of course, transformation of estoppel law was neither instantaneous nor universal. As late as 1961, eminent authority stated that "[m]ost state courts recognize and apply the doctrine of mutuality, subject to certain exceptions. . . . And the same is true of federal courts, when free to apply their own doctrine." Moore & Currier, Mutuality and Conclusiveness of Judgments, 35 Tul. L. Rev. 301, 304 (1961) (footnotes omitted); see also, 1B J. Moore, Federal Practice ¶ 0.412 [1], pp. 1803-1804 (1965). However, in 1970 Professor Moore noted that "the trend in the federal courts is away from the rigid requirements of mutuality advocated herein." *Id.,* Supp. 1970, at 53. The same trend is evident in the state courts.[14]

327 *327 Undeniably, the court-produced doctrine of mutuality of estoppel is undergoing fundamental change in the common-law tradition. In its pristine formulation, an increasing number of courts have rejected the principle as unsound. Nor is it irrelevant that the abrogation of mutuality has been accompanied by other developments —such as expansion of the definition of "claim" in bar and merger contexts[15] and expansion of the preclusive effects afforded criminal judgments in civil litigation[16]— which enhance the capabilities of the courts to deal with some issues swiftly but fairly.

Obviously, these mutations in estoppel doctrine are not before us for wholesale approval or rejection. But at the very least they counsel us to re-examine whether mutuality of estoppel is a viable rule where a patentee seeks to relitigate the validity of a patent once a federal court has declared it to be invalid.[17]

328 *328 **III**

The cases and authorities discussed above connect erosion of the mutuality requirement to the goal of limiting relitigation of issues where that can be achieved without compromising fairness in particular cases. The courts have often discarded the rule while commenting on crowded dockets and long delays preceding trial. Authorities differ on whether the public interest in efficient judicial administration is a sufficient ground in and of itself for abandoning mutuality,[18] but it is clear that more than crowded dockets is involved. The broader question is whether it is any longer tenable to afford a litigant more than one full and fair opportunity for judicial resolution of the same issue. The question in these terms includes as part of the calculus the effect on judicial administration, but it also encompasses the concern exemplified by Bentham's reference
329 to the gaming table in his attack on the principle of mutuality of estoppel. *329 In any lawsuit where a defendant, because of the mutuality principle, is forced to present a complete defense on the merits to a claim which the plaintiff has fully litigated and lost in

a prior action, there is an arguable misallocation of resources. To the extent the defendant in the second suit may not win by asserting, without contradiction, that the plaintiff had fully and fairly, but unsuccessfully, litigated the same claim in the prior suit, the defendant's time and money are diverted from alternative uses—productive or otherwise—to relitigation of a decided issue. And, still assuming that the issue was resolved correctly in the first suit, there is reason to be concerned about the plaintiff's allocation of resources. Permitting repeated litigation of the same issue as long as the supply of unrelated defendants holds out reflects either the aura of the gaming table or "a lack of discipline and of disinterestedness on the part of the lower courts, hardly a worthy or wise basis for fashioning rules of procedure." *Kerotest Mfg. Co.* v. *C-O-Two Co.*, 342 U. S. 180, 185 (1952). Although neither judges, the parties, nor the adversary system performs perfectly in all cases, the requirement of determining whether the party against whom an estoppel is asserted had a full and fair opportunity to litigate is a most significant safeguard.

Some litigants—those who never appeared in a prior action—may not be collaterally estopped without litigating the issue. They have never had a chance to present their evidence and arguments on the claim. Due process prohibits estopping them despite one or more existing adjudications of the identical issue which stand squarely against their position. See *Hansberry* v. *Lee,* 311 U. S. 32, 40 (1940); *Bernhard,* 19 Cal. 2d, at 811, 122 P. 2d, at 894. Also, the authorities have been more willing to permit a defendant in a second suit to invoke an estoppel against a plaintiff who lost on the same
330 claim in an earlier suit than they have been to allow a plaintiff *330 in the second suit to use offensively a judgment obtained by a different plaintiff in a prior suit against the same defendant.[19] But the case before us involves neither due process nor "offensive use" questions. Rather, it depends on the considerations weighing for and against permitting a patent holder to sue on his patent after it has once been held invalid following opportunity for full and fair trial.

There are several components of the problem. First, we analyze the proposed abrogation or modification of the *Triplett* rule in terms of those considerations relevant to the patent system. Second, we deal broadly with the economic costs of continued adherence to *Triplett.* Finally, we explore the nature of the burden, if any, that permitting patentees to relitigate patents once held invalid imposes on the federal courts.

A

Starting with the premise that the statutes creating the patent system, expressly sanctioned by the Constitution,[20] represent an affirmative policy choice by Congress to reward inventors, respondents extrapolate a special public interest in sustaining "good" patents and characterize patent litigation as so technical and difficult as to present unusual potential for unsound adjudications. Although *Triplett* made no such argument in
331 support of its holding, that rule, offering the unrestricted right to *331 relitigate patent validity, is thus deemed an essential safeguard against improvident judgments of invalidity.[21]

We fully accept congressional judgment to reward inventors through the patent system. We are also aware that some courts have frankly stated that patent litigation can present issues so complex that legal minds, without appropriate grounding in science and technology, may have difficulty in reaching decision.[22] On the other hand, this Court has observed that issues of nonobviousness under 35 U. S. C. § 103 present difficulties "comparable to those encountered daily by the courts in such frames of reference as negligence and scienter, and should be amenable to a case-by-case development." *Graham* v. *John Deere Co.*, 383 U. S., at 18. But assuming a patent case so difficult as to provoke a frank admission of judicial uncertainty, one might ask what reason there is
332 to expect that a second district judge or court of *332 appeals would be able to decide the issue more accurately. Moreover, as *Graham* also indicates, Congress has from the outset chosen to impose broad criteria of patentability while lodging in the federal courts final authority to decide that question. 383 U. S., at 10. In any event it cannot be sensibly contended that all issues concerning patent validity are so complex and unyielding. Nonobviousness itself is not always difficult to perceive and decide and other questions on which patentability depends are more often than not no more difficult than those encountered in the usual nonpatent case.[23]

Even conceding the extreme intricacy of some patent cases, we should keep firmly in mind that we are considering the situation where the patentee was plaintiff in the prior suit and chose to litigate at that time and place. Presumably he was prepared to litigate and to litigate to the finish against the defendant there involved. Patent litigation characteristically proceeds with some deliberation and, with the avenues for discovery available under the present rules of procedure, there is no reason to suppose that plaintiff patentees would face either surprise or unusual difficulties in getting all relevant and probative evidence before the court in the first litigation.

Moreover, we do not suggest, without legislative guidance, that a plea of estoppel by an
333 infringement or *333 royalty suit defendant must automatically be accepted once the defendant in support of his plea identifies the issue in suit as the identical question finally decided against the patentee or one of his privies in previous litigation.[24] Rather, the patentee-plaintiff must be permitted to demonstrate, if he can, that he did not have "a fair opportunity procedurally, substantively and evidentially to pursue his claim the first time." *Eisel* v. *Columbia Packing Co.*, 181 F. Supp. 298, 301 (Mass. 1960). This element in the estoppel decision will comprehend, we believe, the important concerns about the complexity of patent litigation and the posited hazard that the prior proceedings were seriously defective.

Determining whether a patentee has had a full and fair chance to litigate the validity of his patent in an earlier case is of necessity not a simple matter. In addition to the considerations of choice of forum and incentive to litigate mentioned above,[25] certain other factors immediately emerge. For example, if the issue is nonobviousness, appropriate inquiries would be whether the first validity determination purported to employ the standards announced in *Graham* v. *John Deere Co., supra*; whether the opinions filed by the District Court and the reviewing court, if any, indicate that the prior case was one of those relatively rare instances where the courts wholly failed to grasp the technical subject matter and issues in suit; and whether without fault of his own the

patentee was deprived of crucial evidence or witness in the first litigation.[26] But as so often is the case, no one *334 set of facts, no one collection of words or phrases, will provide an automatic formula for proper rulings on estoppel pleas. In the end, decision will necessarily rest on the trial courts' sense of justice and equity.

We are not persuaded, therefore, that the *Triplett* rule, as it was formulated, is essential to effectuate the purposes of the patent system or is an indispensable or even an effective safeguard against faulty trials and judgments. Whatever legitimate concern there may be about the intricacies of some patent suits, it is insufficient in and of itself to justify patentees relitigating validity issues as long as new defendants are available. This is especially true if the court in the second litigation must decide in a principled way whether or not it is just and equitable to allow the plea of estoppel in the case before it.

B

An examination of the economic consequences of continued adherence to *Triplett* has two branches. Both, however, begin with the acknowledged fact that patent litigation is a very costly process. Judge Frank observed in 1942 that "the expense of defending a patent suit is often staggering to the small businessman." *Picard* v. *United Aircraft Corp.*, 128 F. 2d 632, 641 (CA2 1942) (concurring opinion). In *Lear, Inc.* v. *Adkins*, 395 U. S. 653, 669 (1969), we noted that one of the benefits accruing to a businessman accepting a license from a patentee who was threatening him with a suit was avoiding "the necessity of defending an expensive infringement action during the period when he may be least able to afford one." Similarly, in replying to claims by alleged *335 infringers that they have been guilty of laches in suing on their patents, patentees have claimed that the expense of litigating forced them to postpone bringing legal action. See, *e. g.*, *Baker Mfg. Co.* v. *Whitewater Mfg. Co.*, 430 F. 2d 1008, 1014-1015 (CA7 1970). In recent congressional hearings on revision of the patent laws, a lawyer-businessman discussing a proposal of the American Society of Inventors for government-sponsored insurance to provide funds for litigation to individual inventors holding nonassigned patents stated: "We are advised that the average cost for litigating a patent is about $50,000."[27]

This statement, and arguments such as the one made in *Baker Mfg., supra*, must be assessed in light of the fact that they are advanced by patentees contemplating action as plaintiffs, and patentees are heavily favored as a class of litigants by the patent statute. Section 282 of the Patent Code provides, in pertinent part:

> "A patent shall be presumed valid. The burden of establishing invalidity of a patent shall rest on a party asserting it."

If a patentee's expense is high though he enjoys the benefits of the presumption of validity, the defendant in an infringement suit will have even higher costs as he both introduces proof to overcome the presumption and attempts to rebut whatever proof the patentee offers to bolster the claims. In testimony before the Senate subcommittee considering patent law revision in 1967, a member of the President's Commission on the Patent *336 System discussed the financial burden looming before one charged as a

defendant in a complex infringement action in terms of amounts that sometimes run to "hundreds of thousands of dollars."[28]

Statistics tend to bear this out. Patent suits constitute between 1% and 2% of the total number of civil cases filed each year in the District Courts.[29] Despite this relatively small figure, and notwithstanding the overwhelming tendency to try these suits without
337 juries,[30] *337 patent cases that go to trial seem to take an inordinate amount of trial time.[31] While in 1961 a Senate staff report stated that the "typical patent trial, without a jury, was completed in 3 days or less,"[32] recent figures indicate that this description of
338 the time required is today *338 inaccurate.[33] And time—particularly trial time—is unquestionably expensive.

As stated at the outset of this section, the expense of patent litigation has two principal consequences if the *Triplett* rule is maintained. First, assuming that a perfectly sound judgment of invalidity has been rendered in an earlier suit involving the patentee, a second infringement action raising the same issue and involving much of the same proof has a high cost to the individual parties. The patentee is expending funds on litigation to protect a patent which is by hypothesis invalid. These moneys could be put to better use, such as further research and development. The alleged infringer—operating as he must against the presumption of validity—is forced to divert substantial funds to litigation that is wasteful.

The second major economic consideration is far more significant. Under *Triplett,* only the comity restraints flowing from an adverse prior judgment operate to limit the patentee's right to sue different defendants on the same patent. In each successive suit the patentee enjoys the statutory presumption of validity, and so may easily put the alleged infringer to his expensive proof. As a consequence, prospective defendants will often decide that paying royalties under a license or other settlement is preferable to the costly burden of challenging the patent.

339 *339 The problem has surfaced and drawn comment before. See, *e. g., Nickerson* v. *Kutschera,* 419 F. 2d 983, 988 n. 4 (CA3 1969) (dissenting opinion); *Picard* v. *United Aircraft Corp.,* 128 F. 2d, at 641-642 (concurring opinion). In 1961, the Senate Judiciary Subcommittee on Patents, Trademarks, and Copyrights published a staff study of infringement and declaratory judgment actions terminated in the district courts and courts of appeals during 1949-1958; the report showed 62 actions commenced after an earlier determination that the patent in suit was not valid. It also noted that the "vast majority" of such suits were terminated without a second adjudication of validity. 1961 Staff Report 19. It is apparent that termination without a second adjudication of validity was the result of a licensing agreement or some other settlement between the parties to the second suit. It is also important to recognize that this study covered only cases *filed* and terminated; there were undoubtedly more suits that were threatened but not filed, because the threat alone was sufficient to forestall a challenge to the patent.

This is borne out by the observations of the President's Commission on the Patent System and recent testimony on proposals for changes in the patent laws. Motivated by the economic consequences of repetitious patent litigation, the Commission proposed:

> "A final federal judicial determination declaring a patent claim invalid shall be *in rem,* and the cancellation of such claim shall be indicated on all patent copies subsequently distributed by the Patent Office." Recommendation XXIII, Commission Report 38.

The Commission stressed the competitive disadvantage imposed on an alleged infringer who is unable or unwilling to defend a suit on the patent, stating also that a "patentee,
340 having been afforded the opportunity to *340 exhaust his remedy of appeal from a holding of invalidity, has had his `day in court' and should not be allowed to harass others on the basis of an invalid claim. There are few, if any, logical grounds for permitting him to clutter crowded court dockets and to subject others to costly litigation." *Id.,* at 39. The report provoked the introduction of several bills to effect broad changes in the patent system. Some bills contained provisions imposing an inflexible rule of *in rem* invalidity operating against a patentee regardless of the character of the litigation in which his patent was first declared invalid. See S. 1042, 90th Cong., 1st Sess., § 294
341 (1967), and H. R. 5924, 90th Cong., 1st Sess., § 294 (1967);[34] cf. *341 S. 3892, 90th Cong., 2d Sess., § 294 (1968).[35] Hearings were held in both Houses on these and other patent revision bills.[36]

342 *342 In the Senate hearings, a member of the President's Commission remarked:

> "The businessman can be subjected to considerable harassment as an alleged infringer. Even in cases where he feels strongly that the patent would ultimately be held invalid, when he considers the hundreds of thousands of dollars in complex cases that could be involved in defending a suit, he may conclude that the best course of action is to settle for less to get rid of the problem. These nuisance settlements, although distasteful, are often, under the present system, justified on pure economics.
>
> .....
>
> "In many instances the very survival of the small businessman may be at stake. His cost of fully litigating a claim against him can seriously impair his ability to stay in business." 1967 Senate Hearings 103.[37]

The tendency of *Triplett* to multiply the opportunities for holders of invalid patents to
343 exact licensing agreements or other settlements from alleged infringers must *343 be considered in the context of other decisions of this Court. Although recognizing the patent system's desirable stimulus to invention, we have also viewed the patent as a monopoly which, although sanctioned by law, has the economic consequences attending other monopolies.[38] A patent yielding returns for a device that fails to meet the congressionally imposed criteria of patentability is anomalous.[39] This Court has observed:

> "A patent by its very nature is affected with a public interest. . . . [It] is an exception to the general rule against monopolies and to the right to access to a free and open market. The far-reaching social and economic

> consequences of a patent, therefore, give the public a paramount interest in seeing that patent monopolies spring from backgrounds free from fraud or other inequitable conduct and that such monopolies are kept within their legitimate scope." *Precision Instrument Mfg. Co.* v. *Automotive Maintenance Machinery Co.,* 324 U. S. 806, 816 (1945).

One obvious manifestation of this principle has been the series of decisions in which the Court has condemned attempts to broaden the physical or temporal scope of the patent monopoly. As stated in *Mercoid* v. *MidContinent Investment Co.,* 320 U. S. 661, 666 (1944):

> "The necessities or convenience of the patentee do not justify any use of
344 the monopoly of the patent *344 to create another monopoly. The fact that the patentee has the power to refuse a license does not enable him to enlarge the monopoly of the patent by the expedient of attaching conditions to its use. *United States* v. *Masonite Corp.,* [316 U. S. 265,] 277 [(1942)]. The method by which the monopoly is sought to be extended is immaterial. *United States* v. *Univis Lens Co.,* [316 U. S. 241,] 251-252 [(1942)]. The patent is a privilege. But it is a privilege which is conditioned by a public purpose. It results from invention and is limited to the invention which it defines."[40]

A second group of authorities encourage authoritative testing of patent validity. In 1952, the Court indicated that a manufacturer of a device need not await the filing of an infringement action in order to test the validity of a competitor's patent, but may institute his own suit under the Declaratory Judgment Act. *Kerotest Mfg. Co.* v. *C-O-Two Co.,*
345 342 U. S., at 185-186.[41] Other *345 decisions of this type involved removal of restrictions on those who would challenge the validity of patents.[42]

Two Terms ago in *Lear, Inc.* v. *Adkins,* 395 U. S. 653 (1969), we relied on both lines of authority to abrogate the doctrine that in a contract action for unpaid patent royalties the licensee of a patent is estopped from proving "that his licensor was demanding royalties for the use of an idea which was in reality a part of the public domain." 395 U. S., at 656. The principle that "federal law requires that all ideas in general circulation be dedicated to the common good unless they are protected by a valid patent," 395 U. S., at 668, **found** support in *Sears* and *Compco* and the first line of cases discussed above.[43] The holding that licensee estoppel was no longer tenable was rooted in the second line of cases eliminating obstacles to suit by those disposed to challenge the validity of a patent. 395 U. S., at 663-668. Moreover, as indicated earlier, we relied on practical considerations that patent licensees "may often be the only individuals with enough economic incentive to challenge the patentability of an inventor's discovery." 395 U. S., at 670.

To be sure, *Lear* obviates to some extent the concern that *Triplett* prompts alleged infringers to pay royalties on patents previously declared invalid rather than to engage in
346 costly litigation when infringement suits are *346 threatened. *Lear* permits an accused infringer to accept a license, pay royalties for a time, and cease paying when financially

able to litigate validity, secure in the knowledge that invalidity may be urged when the patentee-licensor sues for unpaid royalties. Nevertheless, if the claims are in fact invalid and are identical to those invalidated in a previous suit against another party, any royalties actually paid are an unjust increment to the alleged infringer's costs. Those payments put him at a competitive disadvantage *vis-à-vis* other alleged infringers who can afford to litigate or have successfully litigated the patent's validity.

This has several economic consequences. First, the alleged infringer who cannot afford to defend may absorb the royalty costs in order to compete with other manufacturers who have secured holdings that the patent is invalid, cutting the profitability of his business and perhaps assuring that he will never be in a financial position to challenge the patent in court. On the other hand, the manufacturer who has secured a judicial holding that the patent is invalid may be able to increase his market share substantially, and he may do so without coming close to the price levels that would prevail in a competitive market. Because he is free of royalty payments, the manufacturer with a judgment against the patent may price his products higher than competitive levels absent the invalid patent, yet just below the levels set by those manufacturers who must pay royalties. Third, consumers will pay higher prices for goods covered by the invalid patent than would be true had the initial ruling of invalidity had at least the potential for broader effect. And even if the alleged infringer can escape royalty obligations under *Lear* when he is able to bear the cost of litigation, any royalty payments passed on to consumers are as a practical matter unrecoverable by those who in fact paid them.
347 Beyond all of this, the *347 rule of *Triplett* may permit invalid patents to serve almost as effectively as would valid patents as barriers to the entry of new firms—particularly small firms.

Economic consequences like these, to the extent that they can be avoided, weigh in favor of modification of the *Triplett* mutuality principle. Arguably, however, the availability of estoppel to one charged with infringement of a patent previously held invalid will merely shift the focus of litigation from the merits of the dispute to the question whether the party to be estopped had a full and fair opportunity to litigate his claim in the first action. Moore & Currier, *supra,* n. 7, at 309-310. It would seem sufficient answer to note that once it is determined that the issue in both actions was identical, it will be easier to decide whether there was a full opportunity to determine that issue in the first action than it would be to relitigate completely the question of validity. And, this does not in fact seem to have been a problem in other contexts, where strict mutuality of estoppel has been abandoned.

It has also been suggested that 35 U. S. C. § 285, which allows a court to award reasonable attorney's fees to a prevailing party "in exceptional cases,"[44] and 35 U. S. C. § 288, under which a patentee forfeits his right to recover costs even as to the valid claims of his patent if he does not disclaim invalid claims before bringing suit, work to inhibit repetitious suits on invalid patents. But neither of these provisions can operate until after litigation has occurred, and the outlay required to try a lawsuit presenting validity issues is the factor which undoubtedly forces many alleged infringers into
348 accepting *348 licenses rather than litigating. If concern about such license agreements is proper, as our cases indicate that it is, the accused infringer should have available an

estoppel defense that can be pleaded affirmatively and determined on a pretrial motion for judgment on the pleadings or summary judgment. Fed. Rules Civ. Proc. 8 (c), 12 (c), and 56.

C

As the preceding discussion indicates, although patent trials are only a small portion of the total amount of litigation in the federal courts, they tend to be of disproportionate length.[45] Despite this, respondents urge that the burden on the federal courts from relitigation of patents once held invalid is *de minimis.* They rely on the figures presented in the 1961 Staff Report: during the period 1948-1959, 62 federal suits were terminated which involved relitigation of a patent previously held invalid, a figure constituting about 1% of the patent suits commenced during the same period. The same figures show that these 62 suits involved 27 patents, indicating that some patentees sue more than once after their patent has been invalidated. Respondents also urge that most of these 62 suits were settled without litigation. 1961 Staff Report 19. But, as we have suggested, this fact cuts both ways.

Even accepting respondents' characterization of these figures as *de minimis,* it is clear that abrogation of *Triplett* will save *some* judicial time if even a few relatively lengthy patent suits may be fairly disposed of on pleas of estoppel. More fundamentally, while the cases do discuss reduction in dockets as an effect of elimination of the mutuality requirement, they do not purport to hold that predictions about the actual amount of
349 judicial time that will be saved under such a holding control decision *349 of that question. Of course, we have no comparable figures for the past decade concerning suits begun after one declaration of invalidity, although a number of recent, significant examples of repeated litigation of the same patent have come to our attention.[46] Regardless of the magnitude of the figures, the economic consequences of continued adherence to *Triplett* are serious and any reduction of litigation in this context is by comparison an incidental matter in considering whether to abrogate the mutuality requirement.

D

It is clear that judicial decisions have tended to depart from the rigid requirements of mutuality. In accordance with this trend, there has been a corresponding development of the lower courts' ability and facility in dealing with questions of when it is appropriate and fair to impose an estoppel against a party who has already litigated an issue once and lost. As one commentator has stated:

> "Under the tests of time and subsequent developments, the *Bernhard* decision has proved its merit and the mettle of its author. The abrasive action of new factual configurations and of actual human controversies, disposed of in the common-law tradition by competent courts, far more than the commentaries of academicians, leaves the decision revealed for what it is, as it was written: a shining landmark of progress in justice and law

administration." Currie, 53 Calif. L. Rev., at 37.

When these judicial developments are considered in the light of our consistent view—last presented in *Lear, Inc. v. Adkins*—that the holder of a patent should not be insulated from the assertion of defenses and thus allowed 350 *350 to exact royalties for the use of an idea that is not in fact patentable or that is beyond the scope of the patent monopoly granted, it is apparent that the uncritical acceptance of the principle of mutuality of estoppel expressed in *Triplett v. Lowell* is today out of place. Thus, we conclude that *Triplett* should be overruled to the extent it forecloses a plea of estoppel by one facing a charge of infringement of a patent that has once been declared invalid.

IV

Res judicata and collateral estoppel are affirmative defenses that must be pleaded. Fed. Rule Civ. Proc. 8 (c). The purpose of such pleading is to give the opposing party notice of the plea of estoppel and a chance to argue, if he can, why the imposition of an estoppel would be inappropriate. Because of *Triplett v. Lowell,* petitioner did not plead estoppel and respondents never had an opportunity to challenge the appropriateness of such a plea on the grounds set forth in Part III-A of this opinion. Therefore, given the partial overruling of *Triplett,* we remand the case. Petitioner should be allowed to amend its pleadings in the District Court to assert a plea of estoppel. Respondents must then be permitted to amend their pleadings, and to supplement the record with any evidence showing why an estoppel should not be imposed in this case. If necessary, petitioner may also supplement the record. In taking this action, we intimate no views on the other issues presented in this case. The judgment of the Court of Appeals is vacated and the cause is remanded to the District Court for further proceedings consistent with this opinion.

[1] The Foundation has filed six infringement actions based on the Isbell patent. Foundation's Brief 22.

[2] The Foundation claimed that all of the Isbell patent's 15 claims except numbers 6, 7, and 8 were infringed by one or more of Winegard's 22 antenna models designed for receiving television signals.

[3] The District Judge held:

"Those skilled in the art [of antenna design] at the time of the Isbell application knew (1) the log periodic method of designing frequency independent antennas, (2) that antenna arrays consisting of straight dipoles with progressively varied lengths and spacings exhibit greater broad band characteristics than those consisting of dipoles of equal length and spacing and, (3) that a dipole array type antenna having elements spaced less than 1/2 wavelength apart could be made unidirectional in radiation pattern by transposing the feeder line between elements and feeding the array at the end of the smallest element.

"It is the opinion of the Court that it would have been obvious to one ordinarily skilled in the art and wishing to design a frequency independent unidirectional antenna to combine these three old elements, all suggested by the prior art references previously discussed." 271 F. Supp., at 418-419.

[4] See Petition for Certiorari 13. The grant of certiorari was not limited to the validity *vel non* of the Isbell patent.

[5] See also *Nickerson v. Kutschera,* 419 F. 2d 983, 984 (CA3 1969); *id.,* at 984-988 (Hastie, C. J., dissenting); *Nickerson v. Kutschera,* 390 F. 2d 812 (CA3 1968); *Tidewater Patent Development Co. v. Kitchen,* 371 F. 2d 1004, 1006 (CA4 1966); *Aghnides v. Holden,* 226 F. 2d 949, 951 (CA7 1955) (Schnackenberg, J., concurring); *Technograph Printed Circuits, Ltd. v. Packard Bell Electronics Corp.,* 290 F. Supp. 308, 317-319 (CD Cal. 1968)

(holding that *Triplett* did not bar an infringement suit defendant's motion for summary judgment on *res judicata* grounds because (1) the statements as to mutuality of estoppel were dicta, and (2) the *Triplett* rule conflicted not only with more recent precedent in the estoppel area but also with the spirit of certain provisions of the Federal Rules of Civil Procedure, adopted six years after *Triplett* was decided); *Nickerson* v. *Pep Boys—Manny, Moe & Jack,* 247 F. Supp. 221 (Del. 1965). In the latter case, Judge Steel imposed an estoppel on facts somewhat similar to those before us. He analyzed the cases relied on in *Triplett, id.,* at 221-222, and concluded: "[f]rom the standpoint of the precedents [it cities], . . . Triplett v. Lowell does not rest upon too solid a foundation." *Id.,* at 222. Cf. *Technograph Printed Circuits, Ltd.* v. *United States,* 178 Ct. Cl. 543, 372 F. 2d 969 (1967); *Agrashell, Inc.* v. *Bernard Sirotta Co.,* 281 F. Supp. 704, 707-708 (EDNY 1968).

[6] In rebuttal, counsel for petitioner made it clear that he was urging a "modification" of *Triplett.*

"Q. Well, has Petitioner finally decided to forego any request for reconsidering Triplett, entirely, or in any part? I understood you previously to say you would welcome a modification of it to some extent.

"A. Well, Your Honor, I think that is correct. The question . . . that was asked of us in our brief by this Court was should Triplett be overruled. That we answered no.

"Now the question is should there be modification. I think in all of law, when somebody is abusing it, . . . there are exceptions, and I think the Solicitor [General] is very close to [using] the idea that if in fact this were the same trial and they had the opportunity to present their witnesses before, and they didn't do it, that it seriously ought to be considered whether there ought to be an estoppel in a situation such as this." Tr. of Oral Arg. 64-65.

Rule 23 (1) (c) of the Rules of this Court states that "[o]nly the questions set forth in the petition or fairly comprised therein will be considered by the court." While this rule reflects many decisions stating that the Court is not required to decide questions not raised in a petition for certiorari, it does not limit our power to decide important questions not raised by the parties. The rule has certain well-recognized exceptions, particularly in cases arising in the federal courts. See R. Robertson & F. Kirkham, Jurisdiction of the Supreme Court of the United States § 418 (R. Wolfson & P. Kurland ed. 1951); R. Stern & E. Gressman, Supreme Court Practice § 6.37 (4th ed. 1969).

The instant case is not one where the parties have not briefed or argued a question that the Court nevertheless finds controlling under its authority to notice plain error. See Rule 40 (1) (d) (2), Rules of the Supreme Court of the United States; *Silber* v. *United States,* 370 U. S. 717 (1962). Rather, given what transpired at oral argument, the case is like *Moragne* v. *States Marine Lines, Inc.*, 398 U. S. 375 (1970). There, after granting certiorari, we asked the parties to brief and argue the continued validity of *The Harrisburg,* 119 U. S. 199 (1886). The petitioner, who would have stood to gain if *The Harrisburg* perished, argued that that decision should be overruled, but strongly maintained that it was unnecessary to do so in order to afford her relief. Respondent, of course, argued that *The Harrisburg* should be left intact. The United States, appearing as *amicus curiae,* urged the Court to overrule *The Harrisburg,* and that was the result.

Moreover, in a landmark decision involving an important question of judicial administration in the federal courts, this Court overruled a prior decision of many years' standing although the parties did not urge such a holding in their briefs. *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, 66, 68-69 (1938). See also R. Jackson, The Struggle for Judicial Supremacy 281-282 (1949). While the question here is hardly of comparable importance, it is a significant one, in the same general field, and it has been fully briefed and argued by the parties and *amici.* See *Moragne,* 398 U. S., at 378-380, n. 1; cf. *NLRB* v. *Pittsburgh S. S. Co.,* 337 U. S. 656, 661-662 (1949).

[7] See also 225 U. S., at 130-131; *Stone* v. *Farmers' Bank,* 174 U. S. 409 (1899); *Keokuk & W. R. Co.* v. *Missouri,* 152 U. S. 301, 317 (1894); *Litchfield* v. *Goodnow,* 123 U. S. 549, 552 (1887). *Bigelow* also spent some time discussing one of the many exceptions to the mutuality requirement, 225 U. S., at 127-128. These "exceptions" are described in Moore & Currier, Mutuality and Conclusiveness of Judgments, 35 Tul. L. Rev. 301, 311-329 (1961), and Note, 35 Geo. Wash. L. Rev. 1010, 1015-1017 (1967).

[8] Under the topic head "persons not Parties or Privies," § 93 provides:

"General Rule. Except as stated in §§ 94-111, a person who is not a party or privy to a party to an action in which a valid judgment other than a judgment in rem is rendered (a) cannot directly or collaterally attack the judgment, and (b) is not bound by or entitled to claim the benefits of an adjudication upon any matter decided in the action."

Illustration 10 of the Restatement stated the essentials of the *Triplett* rule:

"A brings an action against B for infringement of a patent. B defends on the ground that the alleged patent was void and obtains judgment. A brings an action for infringement of the same patent against C who seeks to

interpose the judgment in favor of B as res judicata, but setting up no relation with B. On demurrer, judgment should be for A."

[9] *Atkinson* v. *White,* 60 Me. 396, 398 (1872); *Jenkins* v. *Atlantic Coast Line R. Co.,* 89 S. C. 408, 71 S. E. 1010 (1911); *United States* v. *Wexler,* 8 F. 2d 880 (EDNY 1925); *Brobston* v. *Darby Borough,* 290 Pa. 331, 138 A. 849 (1927); *Eagle, Star & British Dominions Ins. Co.* v. *Heller,* 149 Va. 82, 140 S. E. 314 (1927); *Liberty Mutual Ins. Co.* v. *George Colon & Co.,* 260 N. Y. 305, 183 N. E. 506 (1932); *Coca Cola Co.* v. *Pepsi-Cola Co.,* 36 Del. 124, 172 A. 260 (Super. Ct. 1934); see also *Good Health Dairy Products Corp.* v. *Emery,* 275 N. Y. 14, 19, 9 N. E. 2d 758, 760 (1937). In the latter case, the New York Court of Appeals stated:

"It is true that [the owner of the automobile], not being a party to the earlier actions, and not having had a chance to litigate her rights and liabilities, is not bound by the judgments entered therein, but, on the other hand, that is not a valid ground for allowing the plaintiffs to litigate anew the precise questions which were decided against them in a case in which they were parties."

[10] The principle was attacked in Cox, Res Adjudicata: Who Entitled to Plead, 9 Va. L. Rev. (n. s.) 241, 245-247 (1923); Comment, 35 Yale L. J. 607, 610 (1926); Comment, 29 **Ill**. L. Rev. 93, 94 (1934); Note, 18 N. Y. U. L. Q. Rev. 565, 570-573 (1941); Recent Decisions, 27 Va. L. Rev. 955 (1941); Recent Cases, 15 U. Cin. L. Rev. 349 (1941). Cf. Von Moschzisker, Res Judicata, 38 Yale L. J. 299, 303 (1929); Comment, 23 Ore. L. Rev. 273 (1944); Recent Cases, 54 Harv. L. Rev. 889 (1941).

[11] For discussion of the "offensive-defensive" distinction, see generally Vestal, Preclusion/Res Judicata Variables: Parties, 50 Iowa L. Rev. 27, 43-76 (1964); Note, 35 Geo. Wash. L. Rev. 1010 (1967). See also Currie, Mutuality of Collateral Estoppel: Limits of the *Bernhard* Doctrine, 9 Stan. L. Rev. 281 (1957); Note, 68 Col. L. Rev. 1590 (1968); Note, 52 Cornell L. Q. 724 (1967).

[12] In federal-question cases, the law applied is federal law. This Court has noted, "It has been held in non-diversity cases, since *Erie R. Co.* v. *Tompkins,* that the federal courts will apply their own rule of *res judicata.*" *Heiser* v. *Woodruff,* 327 U. S. 726, 733 (1946). See also Vestal, Res Judicata/Preclusion by Judgment: The Law Applied in Federal Courts, 66 Mich. L. Rev. 1723, 1739, 1745 (1968); *id.,* cases cited at 1739-1740, nn. 62-64.

[13] See, *e. g., Lober* v. *Moore,* 135 U. S. App. D. C. 146, 417 F. 2d 714 (1969); *Provident Tradesmens Bank & Trust Co.* v. *Lumbermens Mutual Cas. Co.,* 411 F. 2d 88, 92-95 (CA3 1969); *Seguros Tepeyac, S. A., Compania Mexicana* v. *Jernigan,* 410 F. 2d 718, 726-728 (CA5 1969), cert. denied, 396 U. S. 905 (1969); *Cauefield* v. *Fidelity & Cas. Co. of New York,* 378 F. 2d 876, 878-879 (CA5), cert. denied, 389 U. S. 1009 (1967); *Graves* v. *Associated Transport, **Inc**.,* 344 F. 2d 894 (CA4 1965); *Kurlan* v. *Commissioner,* 343 F. 2d 625, 628-629 (CA2 1965); *United States* v. *United Air Lines,* 216 F. Supp. 709, 725-730 (ED Wash., Nev. 1962), aff'd as to *res judicata, sub nom. United Air Lines* v. *Wiener,* 335 F. 2d 379, 404-405 (CA9 1964); *Zdanok* v. *Glidden Co., supra,* at 954-956; *Davis* v. *McKinnon & Mooney,* 266 F. 2d 870, 872-873 (CA6 1959); *People* v. *Ohio Cas. Ins. Co.,* 232 F. 2d 474, 477 (CA10 1956); *Adriaanse* v. *United States,* 184 F. 2d 968 (CA2 1950), cert. denied, 340 U. S. 932 (1951); *Maryland* v. *Capital Airlines, **Inc**.,* 267 F. Supp. 298, 302-305 (Md. 1967); *Mathews* v. *New York Racing Assn., **Inc**.,* 193 F. Supp. 293 (SDNY 1961); *Eisel* v. *Columbia Packing Co.,* 181 F. Supp. 298 (Mass. 1960).

[14] See cases cited n. 9, *supra.* A most recent canvass of cases is presented in Note, 35 Geo. Wash. L. Rev. 1010 (1967).

The Supreme Court of Oregon was the most recent state court to adopt *Bernhard. Bahler* v. *Fletcher,* 257 Ore. 1, 474 P. 2d 329 (1970); see also *Pennington* v. *Snow,* 471 P. 2d 370, 376-377 (Alaska 1970); *Ellis* v. *Crockett,* 51 Haw. 45, 56, 451 P. 2d 814, 822 (1969); *Pat Perusse Realty Co.* v. *Lingo,* 249 Md. 33, 238 A. 2d 100 (1968); *Sanderson* v. *Balfour,* 109 N. H. 213, 247 A. 2d 185 (1968); *Home Owners Fed. Savings & Loan Assn.* v. *Northwestern Fire & Marine Ins. Co.,* 354 Mass. 448, 451-455, 238 N. E. 2d 55, 57-59 (1968) (approving use of *Bernhard* by a defendant against a previously losing plaintiff); *DeWitt, **Inc**.* v. *Hall,* 19 N. Y. 2d 141, 225 N. E. 2d 195 (1967); *Lustik* v. *Rankila,* 269 Minn. 515, 131 N. W. 2d 741 (1964); *Lucas* v. *Velikanje,* 2 Wash. App. 888, 471 P. 2d 103 (1970) (lower state appellate court held that State Supreme Court would follow *Bernhard* in an appropriate case); *Howell* v. *Vito's Trucking & Excavating Co.,* 20 Mich. App. 140, 173 N. W. 2d 777 (1969); *Desmond* v. *Kramer,* 96 N. J. Super. 96, 232 A. 2d 470 (1967); *Lynch* v. *Chicago Transit Authority,* 62 **Ill**. App. 2d 220, 210 N. E. 2d 792 (1965).

[15] See F. James, Civil Procedure 552-573 (1965); Vestal, Res Judicata/Preclusion by Judgment: The Law Applied in Federal Courts, 66 Mich. L. Rev. 1723, 1724 (1968).

[16] See *Moore* v. *United States,* 360 F. 2d 353 (CA4 1965); *Teitelbaum Furs, **Inc**.* v. *Dominion Ins. Co., Ltd.,* 58 Cal. 2d 601, 375 P. 2d 439 (1962); *Eagle, Star & British Dominions Ins. Co.* v. *Heller,* 149 Va. 82, 140 S. E. 314

(1927); Vestal, *supra,* n. 15, at 1724; Vestal & Coughenour, Preclusion/Res Judicata Variables: Criminal Prosecutions, 19 Vand. L. Rev. 683 (1966).

[17] We agree with the Government that Congress has not approved the *Triplett* rule, either by its failure to modify that rule over the years, see *Boys Markets, Inc. v. Retail Clerks Union,* 398 U. S. 235, 241-242 (1970); *Girouard v. United States,* 328 U. S. 61, 69-70 (1946); *Helvering v. Hallock,* 309 U. S. 106, 119-120 (1940); by anything that transpired during the preparation for and accomplishment of the 1952 revision of the Patent Code; or because *in rem* invalidity provisions, see n. 34, *infra,* have disappeared from recent proposals for reform of the patent statute.

[18] Professors Moore and Currier point out that one of the underpinnings of the general concept of *res judicata* is the prevention of harassment of some litigants by the repeated assertion of the same or different claims against them by others, and that this problem is simply not present where the person asserting an estoppel was not a party (or privy to a party) in the earlier suit. They then argue that "the doctrine of judicial finality is not a catchpenny contrivance to dispose of cases merely for the sake of disposition and clear up dockets in that manner." Moore & Currier, *supra,* n. 7, at 308. On the other hand, Professor Vestal argues that "[j]udges, overwhelmed by docket loads, are looking for devices to expedite their work. Preclusion offers an opportunity to eliminate litigation which is not necessary or desirable." Vestal, *supra,* n. 15, at 1724.

[19] But see *United States v. United Air Lines, supra; Zdanok v. Glidden Co., supra;* Currie, Civil Procedure: The Tempest Brews, 53 Calif. L. Rev. 25, 28-37 (1965); Vestal, 50 Iowa L. Rev., at 55-59; cf. Semmel, Collateral Estoppel, Mutuality and Joinder of Parties, 68 Col. L. Rev. 1457 (1968); Weinstein, Revision of Procedure: Some Problems in Class Actions, 9 Buffalo L. Rev. 433, 448-454 (1960); Note, 35 Geo. Wash. L. Rev. 1010 (1967).

[20] U. S. Const., Art. I, § 8, cl. 8.

[21] The Court of Claims has stated:

"For patent litigation there is a special reason why relitigation is not automatically banned as needless or redundant, and why error should not be perpetuated without inquiry. Patent validity raises issues significant to the public as well as to the named parties. *Sinclair & Carroll Co. v. Interchemical Corp.,* 325 U. S. 327, 330 (1945). It is just as important that a good patent be ultimately upheld as that a bad one be definitively stricken. At the same time it must be remembered that the issue of patent validity is often `as fugitive, impalpable, wayward, and vague a phantom as exists in the whole paraphernalia of legal concepts. . . . If there be an issue more troublesome, or more apt for litigation than this, we are not aware of it.' *Harries v. Air King Products Co., supra,* 183 F. 2d at 162 (per L. Hand, C. J.). Because of the intrinsic nature of the subject, the first decision can be quite wrong, or derived from an insufficient record or presentation." *Technograph Printed Circuits,* 178 Ct. Cl., at 556, 372 F. 2d, at 977-978.

[22] See *Nyyssonen v. Bendix Corp.,* 342 F. 2d 531, 532 (CA1 1965); *Harries v. Air King Products Co.,* 183 F. 2d 158, 164 (CA2 1950); *Parke-Davis & Co. v. H. K. Mulford Co.,* 189 F. 95, 115 (SDNY 1911).

[23] The *Triplett* rule apparently operates to defeat a plea of estoppel where a patent has been declared invalid under provisions other than 35 U. S. C. § 103, the section defining nonobviousness of the subject matter as a prerequisite to patentability and giving rise to many technical issues which it is claimed courts are poorly equipped to judge. Under §§ 101 and 102 of the 1952 Act, patentability is also conditioned on novelty and utility. Some subsections of § 102—each of which can result in the loss of a patent—involve completely nontechnical issues. Yet the breadth of *Triplett* would force defendants in repetitious suits on a patent invalidated on one of these grounds to repeat proof that may be simple of understanding yet expensive to produce.

[24] See nn. 34-35, *infra.*

[25] See *Zdanok v. Glidden Co.,* 327 F. 2d, at 956; *Teitelbaum Furs, Inc.,* 58 Cal. 2d, at 606-607, 375 P. 2d, at 441; cf. *Berner v. British Commonwealth Pacific Airlines, Ltd.,* 346 F. 2d 532, 540-541 (CA2 1965).

[26] It has been argued that one factor to be considered in deciding whether to allow a plea of estoppel in a second action is the possibility that the judgment in the first action was a compromise verdict by a jury. This problem has not, however, been deemed sufficient to preclude abrogation of the mutuality principle in other contexts. Nor would it appear to be a significant consideration in deciding when to sustain a plea of estoppel in patent litigation, since most patent cases are tried to the court. See n. 30, *infra.*

[27] Hearings on Patent Law Revision before the Subcommittee on Patents, Trademarks, and Copyrights of the Senate Committee on the Judiciary, 90th Cong., 2d Sess., 616 (1968) (statement of Henry J. Cappello, President, Space Recovery Research Center, Inc., and consultant on patent policy for the National Small

Business Association) (hereafter 1968 Senate Hearings).

[28] Hearings on Patent Law Revision before the Subcommittee on Patents, Trademarks, and Copyrights of the Senate Committee on the Judiciary, 90th Cong., 1st Sess., 103 (1967) (statement of James W. Birkenstock, Vice President, I. B. M. Corp.) (hereafter 1967 Senate Hearings).

It is significant that the President's Commission identified as one of its primary objectives "reduc[ing] the expense of obtaining and litigating a patent." "To Promote the Progress of . . . Useful Arts" In an Age of Exploding Technology, Report of the President's Commission on the Patent System 4 (1966) (hereafter Commission Report). Judge Rich of the Court of Customs and Patent Appeals, whose public reaction to the Commission Report was mixed, did agree that "[l]itigation being as expensive as it is, no one embarks upon it lightly." Rich, The Proposed Patent Legislation: Some Comments, 35 Geo. Wash. L. Rev. 641, 644 (1967).

[29] In fiscal 1968, 71,449 civil actions were filed in the federal district courts, 857 of which were patent suits. In fiscal 1969, 77,193 civil suits were filed; 889 involved patents. In fiscal 1970, 87,321 civil suits were initiated, 1,023 of which involved patents. Annual Report of the Director of the Administrative Office of the United States Courts for the Fiscal Year Ended June 30, 1968, Table C-2 (1969); Annual Report of the Director of the Administrative Office of the United States Courts for the Fiscal Year Ended June 30, 1969, Table C-2 (1970); Annual Report of the Director of the Administrative Office of the United States Courts for the Fiscal Year Ended June 30, 1970, Table C-2 (temp. ed. 1971) (hereafter Annual Report 1968, etc.).

[30] Most patent cases are tried to the court. In fiscal 1968, 1969, and 1970, the total number of patent cases going to trial and the number of patent cases going to juries were, respectively: 1968— 131, 2; 1969—132, 8; and 1970—119, 3. Annual Reports 1968-1970, Table C-8.

[31] The table below compares patent cases tried to the court during fiscal 1968, 1969, and 1970 with all nonjury civil cases tried during the same years. It reveals several facts: (1) something over 90% of all civil litigation is concluded within three full trial days, but less than half the patent cases are concluded in such a period of time; (2) whereas between 1.2% and 1.7% of civil nonjury trials in general require 10 or more trial days, between 14.7% and 19% of the patent cases tried to the court require 10 or more days to conclude; and (3), while the three-year trend in the district courts appears to be toward more expeditious handling of civil cases tried without a jury in terms of an annual increase in the percentage of cases concluded in three trial days or less and an overall decrease in the percentage of cases requiring 10 or more days, the trends in patent litigation are exactly contrary.

	Fiscal 1968	*Fiscal 1969*	*Fiscal 1970*
Total civil non-jury trials. . . .	5,478	5,619	6,078
Total patent non-jury trials. .	129	124	116
Approx. % of non-jury civil cases concluded in 3 trial days or less.	92.2	92.8	93.1
Approx. % of non-jury patent cases concluded in 3 trial day or less.	49.6	46.8	44.0
Approx. % of non-jury civil trials taking 10 or more trial days to conclude.	1.7	1.2	1.3
Approx. % of non-jury patent trials taking 10 or more trial days to conclude.	14.7	15.3	19

Source: Annual Reports 1968-1970, Table C-8.

[32] An Analysis of Patent Litigation Statistics, Staff Report of the Subcommittee on Patents, Trademarks, and Copyrights of the Senate Committee on the Judiciary, 86th Cong., 2d Sess., 2 (1961) (Committee Print) (hereafter 1961 Staff Report).

[33] See n. 31, *supra.* The 1961 Staff Report also noted that during the "fiscal years 1954-58 . . . nine [patent] trials consumed 20 or more days." *Id.,* at 2. Further examination of recent figures from the Administrative Office of the United States Courts indicates that this statement would also be of questionable validity today. In fiscal 1968, 38 civil trials that took 20 days or more to try were terminated. Of these, five, or about 13%, were patent cases. The comparable figures for fiscal 1969 are 28 civil trials requiring 20 or more days concluded, seven (25%) of which were patent cases. In fiscal 1970, 32 such civil cases were terminated; seven, or about 22%, of these suits were patent cases. Annual Reports, 1968-1970, Table C-9.

[34] "Estoppel and cancellation

"(a) In any action in a Federal court in which the issue of the validity or scope of a claim of a patent is properly before the court, and the owner of the patent as shown by the records of the Patent Office is a party or has been given notice as provided in subsection (c) of this section, a final adjudication, from which no appeal has been or can be taken, limiting the scope of the claim or holding it to be invalid, shall constitute an estoppel against the patentee, and those in privity with him, in any subsequent Federal action, and may constitute an estoppel in such other Federal actions as the latter court may determine, involving such patent. Within thirty days of such adjudication the clerk of the court shall transmit notice thereof to the Commissioner, who shall place the same in the public records of the Patent Office pertaining to such patent, and endorse notice on all copies of the patent thereafter distributed by the Patent Office that the patent is subject to such adjudication.

"(b) In any action as set forth in subsection (a) of this section, upon a final adjudication from which no appeal has been or can be taken that a claim of the patent is invalid, the court may order cancellation of such claim from the patent. Such order shall be included in the notice to the Commissioner specified in subsection (a) of this section, and the notice of cancellation of a claim shall be published by the Commissioner and endorsed on all copies of the patent thereafter distributed by the Patent Office.

"(c) In any action in a Federal court in which the validity or scope of a claim of a patent is drawn into question, the owner of the patent, as shown by the records of the Patent Office, shall have the unconditional right to intervene to defend the validity or scope of such claim. The party challenging the validity or scope of the claim shall serve upon the patent owner a copy of the earliest pleadings asserting such invalidity. If such owner cannot be served with such pleadings, after reasonable diligence is exercised, service may be made as provided for in the Federal Rules of Civil Procedure and, in addition, notice shall be transmitted to the Patent Office and shall be published in the Official Gazette."

[35] "Cancellation by court

"(a) In any action in a Federal court in which the issue of the validity of a claim of a patent is drawn into question, and the owner of the patent is shown by the records of the Patent Office is a party or has been given notice as provided in subsection (b) of this section, the court may, upon final adjudication, from which no appeal has been or can be taken, holding the claim to be invalid after such claim has previously been held invalid on the same ground by a court of competent jurisdiction from which no appeal has been or can be taken, order cancellation of such claim from the patent. Within thirty days of such order the clerk of the court shall transmit notice thereof to the Commissioner, who shall place the same in the public records of the Patent Office pertaining to such patent, and notice of cancellation of the claim shall be published by the Commissioner and endorsed on all copies of the patent thereafter distributed by the Patent Office.

"(b) In any action in a Federal court in which the validity of a claim of a patent is drawn into question, the owner of the patent, as shown by the records of the Patent Office, shall have the unconditional right to intervene to defend the validity of such claim. The party challenging the validity of the claim shall serve upon the patent owner a copy of the earliest pleadings asserting such invalidity. If such owner cannot be served with such pleadings, after reasonable diligence is exercised, service may be made as provided for in the Federal Rules of Civil Procedure and, in addition, notice shall be transmitted to the Patent Office and shall be published in the Official Gazette."

[36] See, *e. g.,* Hearings on General Revision of the Patent Laws before Subcommittee No. 3 of the House Committee on the Judiciary, 90th Cong., 1st and 2d Sess. (1967-1968); 1967 Senate Hearings, *supra,* n. 28. In House Hearings, testimony on *in rem* invalidity provisions covered the full spectrum of opinion. The Patent Section of the American Bar Association was opposed. House Hearings 464-465. The Department of Justice favored it. *Id.,* at 622. The Judicial Conference of the United States approved the provision in principle. Report of the Proceedings of the Judicial Conference of the United States, Feb. and Sept. 1968, p. 81. Testimony in the Senate Hearings was also varied.

[37] Although these bills died in committee, it is noteworthy that by ascribing binding effect to the first federal

declaration of invalidity, some of the proposed provisions went beyond mere abrogation of *Triplett*'s mutuality principle. Had the statutes been enacted as proposed, see nn. 34-35, *supra,* the question of whether the patentee had a full and fair opportunity to litigate the validity of his patent in the first suit would apparently have been irrelevant once it was shown that the patentee had received notice that the validity of his patent was in issue.

[38] See generally *Sears, Roebuck & Co.* v. *Stiffel Co.*, 376 U. S. 225, 229-230 (1964); *Compco Corp.* v. *Day-Brite Lighting,* 376 U. S. 234 (1964); Kennedy, Patent and Antitrust Policy: The Search for a Unitary Theory, 35 Geo. Wash. L. Rev. 512 (1967).

[39] *United States* v. *Bell Telephone Co.*, 128 U. S. 315, 357, 370 (1888); see also *Katzinger Co.* v. *Chicago Mfg. Co.*, 329 U. S. 394, 400-401 (1947); *Cuno Corp.* v. *Automatic Devices Corp.*, 314 U. S. 84, 92 (1941); *A. & P. Tea Co.* v. *Supermarket Corp.*, 340 U. S. 147, 154-155 (1950) (concurring opinion).

[40] See also *Brulotte* v. *Thys Co.*, 379 U. S. 29 (1964); *International Salt Co.* v. *United States,* 332 U. S. 392 (1947); *United States* v. *Gypsum Co.*, 333 U. S. 364, 389 (1948); *Scott Paper Co.* v. *Marcalus Co.*, 326 U. S. 249 (1945); *Morton Salt Co.* v. *Suppiger Co.*, 314 U. S. 488, 491-492 (1942); *Ethyl Gasoline Corp.* v. *United States,* 309 U. S. 436, 455-459 (1940); *International Business Machines Corp.* v. *United States,* 298 U. S. 131 (1936); *Carbice Corp.* v. *American Patents Corp.*, 283 U. S. 27 (1931); *Motion Picture Patents Co.* v. *Universal Film Co.*, 243 U. S. 502 (1917).

[41] In *Walker Process Equipment, **Inc**.* v. *Food Machinery & Chemical Corp.*, 382 U. S. 172 (1965), the defendant in an infringement action was permitted to counterclaim for treble damages under § 4 of the Clayton Act by asserting that the patent was invalid because procured or enforced with knowledge of fraud practiced on the Patent Office, "provided the other elements necessary to a [monopolization case under § 2 of the Sherman Act] are present." *Id.,* at 174.

[42] See *MacGregor* v. *Westinghouse Electric & Mfg. Co.*, 329 U. S. 402, 407 (1947); *Katzinger Co.* v. *Chicago Mfg. Co.*, 329 U. S., at 398-401; *Scott Paper Co.* v. *Marcalus Co., supra; Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U. S. 173 (1942); *Westinghouse Electric & Mfg. Co.* v. *Formica Insulation Co.*, 266 U. S. 342 (1924); *Pope Mfg. Co.* v. *Gormully,* 144 U. S. 224, 234 (1892).

[43] See *Sears,* 376 U. S., at 229-231; see also *Beckman Instruments, **Inc**.* v. *Technical Development Corp.*, 433 F. 2d 55, 58-59 (CA7 1970); *Kraly* v. *National Distillers & Chemical Corp.*, 319 F. Supp. 1349 (ND **Ill**. 1970).

[44] Including, apparently, a suit on a patent previously held invalid and as to which the second court can find no reasonable argument for validity. See *Tidewater Patent Development Co.* v. *Kitchen,* 371 F. 2d 1004, 1013 (CA4 1966); *Dole Valve Co.* v. *Perfection Bar Equipment, **Inc**.*, 318 F. Supp. 122 (ND **Ill**. 1970).

[45] See nn. 31-33, *supra,* and accompanying text.

[46] See, *e. g.,* cases cited n. 5, *supra;* Brief for Petitioner B-T 13-14; Brief for the United States as *amicus curiae* 28 and 32 n. 12.

891 F.2d 1212 (1989)

Federico EREBIA, Plaintiff-Appellant,

v.

CHRYSLER PLASTIC PRODUCTS CORPORATION; Chester R. Ferguson, Defendants-Appellees.

No. 88-4192.

United States Court of Appeals, Sixth Circuit.

Argued September 19, 1989.
Decided December 15, 1989.

1213 *1213 Dennis E. Murray, Sr., Dennis E. Murray, Jr. (Argued), Kirk J. Delli Bovi, Murray & Murray, Sandusky, Ohio, for plaintiff-appellant.

Stephen J. Stanford, Mary Ann Whipple (argued), Fuller & Henry, Toledo, Ohio, for defendants-appellees.

Before MERRITT, Chief Judge; KRUPANSKY, Circuit Judge; and SIMPSON, District Judge.[*]

KRUPANSKY, Circuit Judge.

Plaintiff-appellant, Federico **Erebia** (**Erebia**), has appealed from the district court's order granting summary judgment in favor of the defendants-appellees, **Chrysler Plastic Products** Corporation (**Chrysler**), and Chester R. Ferguson, Jr. (Ferguson), concluding that **Erebia's** instant action was barred by the doctrines of res judicata and/or collateral estoppel. **Erebia** charged, pursuant to 42 U.S.C. § 1981, that **Chrysler's** refusal to rehire him was an act of retaliation resulting from his prior successful prosecution of two civil rights actions against **Chrysler**. **Erebia** has additionally asserted that Chester R. Ferguson (Ferguson), **Chrysler's** personnel manager, had tortiously interfered with his beneficial and contractual relationship with **Chrysler**.

Erebia, a Mexican-American, was initially employed by **Chrysler** in 1965 at its Sandusky, Ohio manufacturing plant and had, over the years, advanced to the position of supervisor. In 1983, **Erebia** initiated legal action against **Chrysler** pursuant to 42 U.S.C. § 1981, wherein he charged that two of his subordinates had racially abused him and that **Chrysler** had refused to affirmatively respond to his complaints. A jury verdict was returned in January 1984 wherein it was concluded that **Chrysler** had condoned

and exposed **Erebia** to a hostile work environment and awarded him $10,000 in compensatory damages and $30,000 in punitive damages. On June 7, 1985, the Sixth Circuit affirmed the award of punitive damages and remanded the case to the trial court with instructions to reduce the compensatory damages to a nominal award. ***Erebia** v. **Chrysler**,* 772 F.2d 1250 (6th Cir.1984), *cert. denied,* 475 U.S. 1015, 106 S.Ct. 1197, 89 L.Ed.2d 311 (1986) (***Erebia** I*).

In August of 1984, eight months after the final judgment in ***Erebia** I,* **Chrysler** discharged **Erebia** from his employment as a supervisor at the Sandusky plant. In November of 1984, **Erebia** initiated a second lawsuit, ***Erebia** v. **Chrysler**,* No. C84-7896, Slip op. (N.D.Ohio Dec. 24, 1986) (***Erebia** II*), against **Chrysler** charging retaliatory discharge pursuant to Title VII and 42 U.S.C. § 1981. The 1981 claim was tried to a jury and resulted in an award in favor of **Erebia** of $75,000 in compensatory damages and $55,000 in punitive damages. The Title VII action was tried before the District Judge Walinski who made the following factual findings pertinent to the instant action.

> Based on the record, the court finds **Erebia** has waived the right to demand
> 1214 reinstatement. **Erebia** never made *1214 **Chrysler** aware he sought this remedy until near the end of the trial. While it is true that **Erebia** was presumptively entitled to reinstatement, **Erebia** waived his right to demand reinstatement when he requested front pay. Inasmuch as front pay is an equitable remedy in lieu of reinstatement, *Shore v. Federal Express,* [777 F.2d 1155, 1159-60 (6th Cir.1985)], **Chrysler** was led to believe that reinstatement was not an issue before the Court. Further, to permit **Erebia** to seek reinstatement at this stage of the litigation would prejudice **Chrysler** who, by **Erebia's** own arguments, bears the burden of proving that **Erebia** is not entitled to reinstatement. **Chrysler**, therefore, was deprived of the opportunity to demonstrate the inappropriateness of **Erebia's** reinstatement including evidence that the position is filled by another employee.
>
> Even assuming *arguendo* **Erebia** could request reinstatement at this late date, the court finds that reinstatement is inappropriate because of the hostile relationship between the parties. During the course of trial the hostility between **Chrysler** and **Erebia** was evident. Thus, he contended **Chrysler's** activities were willful, malicious and intentional. **Erebia** now states that "[t]here really was no significant animosity exhibited between the parties." ... The court disagrees. Sufficient evidence exists to find a high degree of hostility between the parties. More importantly, the women harassed by **Erebia** were under his direct supervision. **Erebia's** reinstatement would make the women's employment relationship intolerable. These employees should not be subjected to such employment conditions. In light of the foregoing discussion, the court finds **Erebia** could not function effectively as a member of **Chrysler's** management team.

Erebia** v. **Chrysler**,* No. C84-7896, Slip op. at 8 (N.D. Ohio Dec. 24, 1986) (Erebia** II*).

Both **Chrysler** and **Erebia** appealed the district court's judgment in ***Erebia** II* to this

circuit which affirmed the jury's verdict and the district court's disposition concluding that **Chrysler** discharged **Erebia** as retaliation for previously prosecuting his successful lawsuit against **Chrysler**. This circuit further concluded that the district court's decision granting a nominal award of $1 in front pay was appropriate because of **Erebia's** misconduct. However, this circuit reversed the district court's refusal to reinstate **Erebia** to his supervisory position of employment and remanded the case with instructions to the trial court to determine "whether there is another equivalent position for **Erebia** at **Chrysler** for prompt reinstatement which would not involve the same potentiality of sexual harassment." ***Erebia*** *v.* ***Chrysler****,* Nos. 87-3297/3298, Slip op. at 7 (863 F.2d 47 Table) (6th Cir. Nov. 25, 1988) (unpublished per curiam), *cert. denied,* 490 U.S. 1021, 109 S.Ct. 1747, 104 L.Ed.2d 184 (1989). **Erebia** thereafter appealed the Sixth Circuit's opinion to the Supreme Court which denied certiorari on April 17, 1989. The case is currently pending in the district court awaiting disposition of the reinstatement issue.

While ***Erebia*** *II* was on appeal, **Erebia** initiated the instant third legal action on October 15, 1987 styled, ***Erebia*** *v.* ***Chrysler****,* C87-7675 (N.D. Ohio, Nov. 30, 1988) (***Erebia*** *III*), subsequent to **Chrysler's** refusal to rehire him as an employee charging **Chrysler** with violating 42 U.S.C. § 1981, unspecified section of the United States Constitution, Article I, Sections 1 and 19 of the Ohio Constitution, and various state common law claims all of which charges were anchored in **Chrysler's** alleged acts of retaliation against him for successfully prosecuting ***Erebia*** *I* and ***Erebia*** *II.* In addition, the complaints alleged that Ferguson had tortiously interfered with **Erebia's** prospective contract with **Chrysler**. On November 30, 1988, the district court, after denying **Erebia's** motion to dismiss his claims under the constitution of the state of Ohio, Article, I, Sections 1 and 19, the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.* (RICO) and the state claim under the Ohio Pattern of Corrupt Activity Act, O.R.C. § 2923.31 (PACO), granted summary judgment in favor of **Chrysler** dismissing **Erebia's** complaint in its entirety. In *1215 disposing of **Erebia's** § 1981 retaliatory refusal of employment action, the district court stated:

1215

> [**Erebia**] alleges a new act of retaliation occurred when he was not hired after he submitted his various letters to defendant requesting employment. Such a theory would cause Title VII and 1981 cases to go on ad infinitum. Judge Walinski either determined that jury award included future damages — front pay or it was not warranted. In either case, the issue was litigated.
>
> It is not for this court to review Judge Walinski's decision. If [**Erebia**] has a meritorious claim for relief, it can still be granted upon remand, pursuant to the direction of the Court of Appeals. If not, plaintiff has had his day in court. Res judicata and collateral estoppel preclude this redundant litigation.

Erebia *v.* ***Chrysler****,* C87-7675, Slip op. at 6 (N.D. Ohio Nov. 30, 1988) (***Erebia*** *III*).

The record in the instant case discloses that this circuit entered its decision reversing and remanding ***Erebia*** *II* to the district court for reconsideration of the reinstatement issue on November 25, 1988, five days before the trial court's decision dismissing the instant case pursuant to the doctrines of res judicata and/or collateral estoppel.

It is well established that "[w]hen a judgment has been subjected to appellate review, the appellate court's disposition of the judgment generally provides the key to its continued force as res judicata and collateral estoppel. A judgment that has been vacated, reversed, or set aside on appeal is thereby deprived of all conclusive effect, both as res judicata and as collateral estoppel." *Jaffree v. Wallace,* 837 F.2d 1461, 1466 (11th Cir.1988) (quoting 1B *Moore's Federal Practice* Para. 0.416[2], at 517 (1984)). Where the prior judgment, or any part thereof, relied upon by a subsequent court has been reversed, the defense of collateral estoppel evaporates.[1] *Butler v. Eaton,* 141 U.S. 240, 244, 11 S.Ct. 985, 987, 35 L.Ed. 713 (1891); *Ornellas v. Oakley,* 618 F.2d 1351, 1356 (9th Cir.1980) ("A reversed or dismissed judgment cannot serve as the basis for a disposition on the ground of res judicata or collateral estoppel."); *Di Gaetano v. Texas Co.,* 300 F.2d 895, 897 (3d Cir.1962); *see generally* 18 Wright, Miller & Cooper, *Federal Practice and Procedure,* § 4433, at 311 (1981).

In the case at bar, the Sixth Circuit, in ***Erebia*** *II,* entered its decision reversing and remanding the issue of reinstatement on November 25, 1988. The district court did not enter its decision in the instant case, ***Erebia*** *III,* until November 30, 1988 by which date that part of the district court's decision in ***Erebia*** *II* addressing the issue of reinstatement had been stripped of its preclusive effect. Consequently, since the court of appeals in ***Erebia*** *II* had reversed and remanded the issue of reinstatement to the district court in that case, the reliance upon the doctrine of res judicata and/or collateral estoppel in disposing of the instant case was improper and of no legal force or effect. Accordingly, the case is REVERSED and REMANDED to the district court with instructions to consolidate this case with ***Erebia*** *v.* ***Chrysler****,* Nos. 87-3297/3298, Slip op. (6th Cir. Nov. 25, 1988) (unpublished per curiam), *cert. denied,* 490 U.S. 1021, 109 S.Ct. 1747, 104 L.Ed.2d 184 (1989) (***Erebia*** *II*) for further proceedings not inconsistent with this decision.

On appeal, **Erebia** also argued that the district court erred in granting summary judgment in favor of Ferguson. **Erebia** charged that Ferguson, a personnel manager at **Chrysler**, who responded to **Erebia's** letters requesting employment, had tortiously
1216 *1216 interfered with his prospective employment with **Chrysler**.

Erebia's assertion is misconceived because Ferguson is not a third party who interfered in **Erebia's** prospective employment with **Chrysler**.

> The cases hold that claims by former employees against officers or other supervisory agents of former employers must fail because there is no *third party* who induced the breach. The agents are considered the same as the actual employer. This principle may be viewed as a matter of common sense: a corporate officer acting within the scope of his authority, would not thereby be guilty of tortious interference with plaintiff's contract with the corporation.

Avins v. Moll, 610 F.Supp. 308, 318 (D.Pa.1984), *aff'd,* 774 F.2d 1150 (3d Cir.1985) (citations omitted).

Accordingly, the trial court's disposition of the causes of action alleged against Ferguson is AFFIRMED.

SIMPSON, District Judge, dissenting.

In ***Erebia*** *II,* the district court declined to order reinstatement. Instead, it awarded front pay, compensating **Erebia** for future nonemployment by **Chrysler** due to its discriminatory treatment of him.

This court reversed on the issue of reinstatement. However, the award of front pay was specifically affirmed.[1] The sufficiency of the award is therefore not in issue.

Erebia has thus fully litigated his claim of compensation for not having post-judgment employment at **Chrysler**. He has received a judgment on that claim with the imprimatur of this court. He should not be permitted to continue to litigate entitlement to employment after having been compensated for lack of same by the award of front pay. As the district court below aptly noted, "[s]uch a theory would cause Title VII and § 1981 cases to go on ad infinitum."

In my view, **Erebia** is precluded, in this action, from again seeking compensation for not being employed by **Chrysler**.

The majority focuses on the non-finality of the reinstatement issue in reversing the district court, but I perceive the finality of the front pay award as being determinative. Had front pay not been awarded or had its award been reversed by this court in ***Erebia*** *II,* I would join the majority opinion.

For these reasons, I would affirm the district court and must respectfully dissent.

[*] The Honorable Charles R. Simpson, III, District Judge for the Western District of Kentucky, sitting by designation.

[1] It should be noted that the established rule in the federal courts is that a final judgment retains all of its preclusive effect pending appeal. *See* *SSIH Equipment S.A. v. United States Int'l Trade Comm'n,* 718 F.2d 365, 370 (Fed Cir.1983) (final judgment retains all of its res judicata consequences pending decision of the appeal); *McLendon v. Continental Group, Inc.,* 660 F.Supp. 1553 (D.N.J.1987); 18 Wright, Miller & Cooper, *Federal Practice and Procedure,* § 4433, at 308 (1981). However, in the case at bar, the appeal pending before the Sixth Circuit in ***Erebia*** *II* was decided 5 days prior to the district court's decision in the instant action.

[1] "We accordingly affirm the district court's action here as to front end pay because the remedy reflects both the misconduct of the employer and employee in this case." ***Erebia*** *v.* ***Chrysler Plastic Products*** *Corporation,* Nos. 87-3297/3298, (Table), 863 F.2d 47 (6th Cir.1988). **Erebia's** misconduct consisted of making unwanted sexual advances toward three female subordinates, and pressing them for sexual favors and money.

838 F.2d 318 (1988)

Paul ROBI, Plaintiff-Appellee,
v.
FIVE PLATTERS, INC., Defendant-Appellant.
FIVE PLATTERS, INC., Plaintiff-Appellant,
v.
Paul ROBI, Americana Hotel Corp., Gino Tonetti and Howard Wolfe, Defendants-Appellees.
Tony WILLIAMS, Plaintiff-Appellee,
v.
The FIVE PLATTERS, INC., Defendant-Appellant.

Nos. 85-6061, 85-6062, 87-5514.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted September 8, 1987.
Decided January 27, 1988.

319 *319 Cheri S. O'Laverty, Law Offices of Cheri S. O'Laverty, Los Angeles, Cal., for defendant-appellant.

Allen Hyman, Law Offices of Sam Perlmutter, Los Angeles, Cal., for plaintiff-appellee **Robi**.

Richard E. Bennett, New York City, for plaintiff-appellee Williams.

320 *320 Before HALL, NOONAN and THOMPSON, Circuit Judges.

DAVID R. THOMPSON, Circuit Judge:

These consolidated appeals present competing claims to the name THE **PLATTERS** based upon prior conflicting judgments which the parties, selectively, assert as *res judicata.* Appellant The **Five Platters**, **Inc**. (the "Corporation") contends that the district court should have given preclusive effect to a 1975 decision by the Court of Customs and Patent Appeals and to a 1982 New York judgment. The Corporation claims these judgments establish its exclusive right to the name THE **PLATTERS** for use in connection with a musical entertainment service.

Appellees Paul **Robi** and Tony Williams are two of the original musical entertainers who

were known as THE **PLATTERS**. Appellee **Robi** contends the district court was correct when it decided to give preclusive effect, not to the judgments relied upon by the Corporation, but to a 1974 California Superior Court judgment in **Robi's** favor and against the Corporation. Appellee Williams presents this same argument. As to Williams, however, there is the added circumstance that the district court decided his case a few months after it decided the **Robi** cases. Thus, at the time Williams' case was decided there was yet another judgment to consider — the district court's own judgment in the recently decided **Robi** cases.

We affirm in the two **Robi** cases (No. 85-6061 and No. 85-6062), and reverse in the Williams case (No. 87-5514).

I

FACTS AND PROCEEDINGS

In 1953, a singing group named The **Platters** was formed and struggled to gain recognition. By 1954, the group consisted of **five** performers we refer to as the "original" **Platters**. These performers appeared together on television and in concert from 1954 to 1960. They sold twelve "gold records," that is, records which sold over one million copies.

In January 1956, when the group began to achieve worldwide popularity, its manager and musical director, Buck Ram, suggested that a corporation be formed. He selected an attorney for this purpose, and the Corporation was incorporated under the name "The **Five Platters**, **Inc**." The original **Platters**, who included appellees **Robi** and Williams, executed employment contracts with the Corporation. They assigned to the Corporation their rights in the name THE **PLATTERS** in exchange for the issuance to them of shares of stock in the Corporation. Later, in the 1960s, all of the original **Platters** sold their shares of stock to Buck Ram or to a corporation he controlled.

By 1972, appellee **Robi** had left the original group, and was performing with other artists. That year, the Corporation sued **Robi** in a state court action in California. It sought to prevent him from presenting his group as THE **PLATTERS**. The Corporation claimed it owned the exclusive right to the name THE **PLATTERS** based upon the assignments it had received from **Robi** and the other original **Platters**. The California Superior Court (the "California Court") granted judgment in 1974 in favor of **Robi**. The California Court determined that the Corporation "was a sham used by Mr. Ram to obtain ownership of the name `**Platters**'"; that Ram benefited from an unequal bargaining position between the parties and was guilty of laches and unclean hands; and that the Corporation's issuance of stock to the original **Platters** was "illegal and void" because the stock was issued in violation of California's corporate securities law. The Corporation appealed, but later dismissed the appeal.

While the California action was pending, and before that court entered its judgment, appellee Tony Williams also became involved in litigation with the Corporation. He

petitioned the Trademark Trial and Appeal Board to cancel the Corporation's registration of the service mark, THE **PLATTERS**. The Board rejected Williams' petition when he
321 failed to respond to the Corporation's *321 motion for summary judgment. He moved to vacate that decision on the ground that he had failed to respond due to "inadvertence, accident or mistake." The Board denied Williams' motion, and its denial was upheld on appeal. *See Williams v. **Five Platters**, **Inc**.*, 181 U.S.P.Q. (BNA) 409, 409-10 (Feb. 26, 1974), *aff'd,* 510 F.2d 963 (C.C.P.A.1975).

Several years later, the Corporation filed an action against Williams in the Supreme Court of the State of New York for New York County (the "New York Court"). The New York Court determined that Williams had breached a 1967 contract, pursuant to which he had sold all of his stock in the Corporation and had received approximately $15,000. In this contract, Williams had covenanted to refrain from using the name THE **PLATTERS**. The contract also contained the following provision:

> Having previously by employment contract dated July 5, 1956 acknowledged that the name "The **Platters**" is owned exclusively by the corporation **Five Platters**, **Inc**., it is hereby expressly acknowledged again by WILLIAMS that the name "The **Platters**" is now owned exclusively by a corporation known as The **Five Platters**, **Inc**.

The New York Court permanently enjoined Williams from using the name THE **PLATTERS** except to refer to his previous membership in the group. The court also concluded that Williams was "barred by res judicata from challenging [the Corporation's] Federal registration of THE **PLATTERS** mark ... by reason of" the decision of the Court of Customs and Patent Appeals in *Williams v. **Five Platters**, **Inc**.*, 510 F.2d 963 (C.C.P.A.1975).[1]

These three judgments, the 1974 California Court judgment in which **Robi** prevailed against the Corporation; the 1975 decision by the Court of Customs and Patent Appeals in favor of the Corporation and against Williams; and the 1982 New York judgment in which the Corporation prevailed against Williams, were three of the judgments for which varying effects of *res judicata* were argued by the parties in the district court.

II

APPLICABLE LEGAL PRINCIPLES

A. *Standard of Review*

We review de novo a district court's ruling on the availability of *res judicata* both as to claim preclusion and as to issue preclusion. *Blasi v. Williams*, 775 F.2d 1017, 1018 (9th Cir.1985) (claim preclusion); *Davis & Cox v. Summa Corp.*, 751 F.2d 1507, 1519 (9th Cir.1985) (issue preclusion). The preclusive effect of a judgment in a prior case presents a mixed question of law and fact in which the legal issues predominate. *Blasi*, 775 F.2d at 1018. As to issue preclusion, "[o]nce we determine that [it] is available, the actual

decision to apply it is left to the district court's discretion." *Davis & Cox,* 751 F.2d at 1519.

B. *Res Judicata*

Generally, the preclusive effect of a former adjudication is referred to as *"res judicata."* The doctrine of *res judicata* includes two distinct types of preclusion, claim preclusion and issue preclusion.[2] Claim preclusion "treats a judgment, once rendered, as the full measure of relief to be accorded between the same parties on the same `claim' or `cause of action.'" *Kaspar Wire Works, **Inc**. v. Leco Eng'g & Mach., **Inc**.,* 575 F.2d 530, 535 (5th Cir.1978); *see also McClain v. Apodaca,* 793 F.2d 1031, *322 1033 (9th Cir.1986). Claim preclusion "prevents litigation of all grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding." *Brown v. Felsen,* 442 U.S. 127, 131, 99 S.Ct. 2205, 2209, 60 L.Ed.2d 767 (1979), *quoted in Americana Fabrics, **Inc**. v. L & L Textiles, **Inc**.,* 754 F.2d 1524, 1529 (9th Cir.1985).

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The doctrine of issue preclusion prevents relitigation of all "issues of fact or law that were actually litigated and necessarily decided" in a prior proceeding. *Segal v. American Tel. & Tel. Co.,* 606 F.2d 842, 845 (9th Cir.1979), *quoted in Americana,* 754 F.2d at 1529. "In both the offensive and defensive use situations the party against whom estoppel [issue preclusion] is asserted has litigated and lost in an earlier action." *Parklane Hosiery Co. v. Shore,* 439 U.S. 322, 329, 99 S.Ct. 645, 650, 58 L.Ed.2d 552 (1979). The issue must have been "actually decided" after a "full and fair opportunity" for litigation. 18 C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure: Jurisdiction* § 4416, at 138 (1981) [hereinafter 18 Wright].

Under the Full Faith and Credit Act, federal courts must give state judicial proceedings "the same full faith and credit ... as they have by law or usage in the courts of [the] State ... from which they are taken." 28 U.S.C. § 1738; *see Parsons Steel, **Inc**. v. First Alabama Bank,* 474 U.S. 518, 519, 106 S.Ct. 768, 770, 88 L.Ed.2d 877 (1986). This Act requires federal courts to apply the *res judicata* rules of a particular state to judgments issued by courts of that state. *Id.* at 523, 106 S.Ct. at 771. Accordingly, we apply California law of *res judicata* to the California judgment, New York law to the New York judgment, and federal law to the federal judgments.

C. *Inconsistent Judgments*

Courts are not required to apply *res judicata sua sponte.* Thus, if a second court to face a claim or issue is not presented with *res judicata* arguments, or rejects these arguments, an inconsistent judgment may arise. If two or more courts render inconsistent judgments on the same claim or issue, a subsequent court is normally bound to follow the most recent determination that satisfies the requirements of *res judicata. See Americana,* 754 F.2d at 1529-30; *see also Treinies v. Sunshine Mining Co.,* 308 U.S. 66, 75-78, 60 S.Ct. 44, 49-51, 84 L.Ed. 85 (1939); *Porter v. Wilson,* 419 F.2d 254, 259 (9th Cir.1969), *cert. denied,* 397 U.S. 1020, 90 S.Ct. 1260, 25 L.Ed.2d

531 (1970). Restatement (Second) of Judgments § 15 (1982).[3] This is referred to as the "last in time" rule. *Americana,* 754 F.2d at 1526.

In *Americana* we applied the last in time rule to resolve conflicting judgments rendered by a California Superior Court and a United States District Court for the Southern District of New York ("SDNY"). A contract dispute arose between Americana Fabrics and L & L Textiles. Americana sought to compel arbitration as provided by the contract. The California Court issued an order staying arbitration. Approximately one month later, the SDNY found the contract's arbitration clause enforceable and ordered arbitration. *Id.* at 1527. A federal district court in California was then asked to enforce the SDNY judgment. It refused to do so. We reversed, holding that the SDNY judgment — right or wrong — was binding because it was the last in time. *Id.* at 1530.

When two inconsistent judgments exist, it is tempting for a court to reexamine the merits of the litigants' dispute and choose the result it likes best. There are important reasons to
323 avoid this temptation. First, if one party could have raised *res* *323 *judicata,* but did not, that litigant must bear the cost of its tactic or inadvertence. *See* 18 Wright § 4404 at 26-27. Second, the most recent court to decide the matter may have considered and rejected the operation of the prior judgment as *res judicata,* and *its* decision should be treated as *res judicata* on the preclusive effect of the prior judgment. *See Americana,* 754 F.2d at 1530. Finally, the last in time rule is supported by the rationale that it "`end[s] the chain of relitigation ... by stopping it where it [stands]' after entry of the [most recent] court's judgment, and thereby discourages relitigation in [yet another] court." *Id.* (quoting *Porter v. Wilson,* 419 F.2d 254, 259 (9th Cir.1969), *cert. denied,* 397 U.S. 1020, 90 S.Ct. 1260, 25 L.Ed.2d 531 (1970)). Therefore, even when we think that the most recent judgment might be wrong, we still give it *res judicata* effect so that finality is achieved and the parties are encouraged to appeal an inconsistent judgment directly rather than attack it collaterally before another court. *See id.*

III

THE ROBI CASES

In the two **Robi** cases now before us, the district court granted **Robi's** motion for preliminary injunction (No. 85-6061), and dismissed the Corporation's complaint against **Robi** for alleged trademark infringement and unfair competition (No. 85-6062). In both of these cases, the district court gave claim preclusive *res judicata* effect to the 1974 California Superior Court judgment.

A. *The California Judgment*

In its suit against **Robi** in California, the Corporation described the essence of its complaint in its trial brief: "Plaintiff seeks to establish, once and for all, that the only entity entitled to use the name `The **Platters**' is plaintiff itself." The Corporation argued that the employment contracts it had negotiated with **Robi** and the other original **Platters**

transferred to it whatever personal rights those performers might have had in the name THE **PLATTERS**. The Corporation entered into evidence its federal service mark registration of THE **PLATTERS** and it advanced legal theories of trademark ownership to support its claim to the name. After a full trial on the merits, the California Superior Court denied the Corporation any injunctive relief or damages. Judgment in favor of **Robi** was entered.

B. *The Present Robi Cases*

In the first **Robi** case in these consolidated appeals, No. 85-6061, **Robi** sued the Corporation. He asked the district court to declare the rights of the parties to the name, THE **PLATTERS**, and to enjoin the Corporation from interfering with his use of that name. The district court granted **Robi's** application for a preliminary injunction against the Corporation. The district found that **Robi** was likely to succeed on the merits of his case "due to the collateral estoppel effect of the 1974 Superior Court judgment." ***Robi** v. The **Five Platters**, **Inc**.,* No. CV-84-3326-CBM (C.D. Cal. May 22, 1985). **Robi** also established the possibility of irreparable injury if injunctive relief were denied. *Id.*

In the other **Robi** case, No. 85-6062, the Corporation sued **Robi** and others for trademark infringement and unfair competition. The district court granted **Robi's** motion to dismiss the Corporation's complaint. The district court referred to principles of *res judicata* (in the sense of claim preclusion) and collateral estoppel, again based on the 1974 California Court judgment. It decided that these principles precluded the Corporation from relitigating its claim that, as against **Robi**, it had the exclusive right to use the name THE **PLATTERS**.

C. *The Res Judicata Effect of the 1974 California Judgment in the Robi Cases*

We look to California law to determine the *res judicata* effect of a California judgment. Because the doctrine of claim preclusion disposes of the two **Robi** cases on appeal, we
324 do not consider the possible application of issue preclusion to his cases. *324 We also reject the Corporation's estoppel and statute of limitations arguments. These arguments do not defeat the claim preclusive effect of the 1974 California judgment.

The application of claim preclusion in California focuses on three questions: (1) was the previous adjudication on the merits, (2) was it final, and (3) does the current dispute involve the same "claim" or "cause of action"? *See* *Slater v. Blackwood*, 15 Cal.3d 791, 795, 543 P.2d 593, 594, 126 Cal.Rptr. 225, 226 (1975). The California Superior Court judgment was on the merits and final. *See* *Palma v. United States Industrial Fasteners, **Inc**.*, 36 Cal.3d 171, 182, 681 P.2d 893, 900, 203 Cal.Rptr. 626, 633 (1984). The Corporation does not challenge the 1974 judgment on either of these grounds. Instead, it argues that the dispute resolved by the district court in the two **Robi** cases does not involve the same claim or cause of action which was before the California Superior Court. The Corporation argues that the claim that was before the California Court

involved the interpretation of the contract between **Robi** and the Corporation by which **Robi** allegedly transferred to the Corporation all of his rights in the name THE **PLATTERS**. The claims that were before the district court in the two **Robi** cases, the Corporation argues, involve the Corporation's trademark rights; and these trademark rights, it contends, are separate and distinct from the Corporation's contract rights.

We disagree. The Corporation is asserting in the present **Robi** cases the same right it asserted in the California case, that is, its claim to the exclusive use of the name THE **PLATTERS** as against **Robi**. The Corporation also presents the same legal theories in the current **Robi** cases as it did in the California case. Even if it were now asserting trademark and unfair competition theories, and only had asserted a contract theory before the California Court, the right which it now seeks to protect is the same right it sought to protect in California. "California has consistently applied the `primary rights' theory, under which the invasion of one primary right gives rise to a single cause of action." *Slater,* 15 Cal.3d at 795, 543 P.2d at 594, 126 Cal.Rptr. at 226. As we recently observed, California's "primary rights" theory "does not mean that different causes of action are involved just because relief may be obtained under ... either of two legal theories." *Los Angeles Branch NAACP v. Los Angeles Unified School Dist.,* 750 F.2d 731, 737 (9th Cir.1984) (en banc), *cert. denied,* 474 U.S. 919, 106 S.Ct. 247, 88 L.Ed. 2d 256 (1985).

The present **Robi** cases involve the same cause of action decided by the California Court in 1974. The claim preclusive effect of the 1974 California judgment precludes the Corporation from challenging **Robi's** use of the name THE **PLATTERS**. *"Res judicata* [claim preclusion] prevents litigation of all grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding." *State Bd. of Equalization v. Superior Court,* 39 Cal.3d 633, 641, 703 P.2d 1131, 1136, 217 Cal.Rptr. 238, 242, (1985) (quoting *Brown v. Felsen,* 442 U.S. 127, 131, 99 S.Ct. 2205, 2209, 60 L.Ed.2d 767 (1979)).

We conclude that the district court did not err in giving the 1974 California judgment claim preclusive effect in the **Robi** cases. It correctly granted **Robi's** motion for a preliminary injunction and dismissed the Corporation's complaint.

IV

THE WILLIAMS CASE

Like Paul **Robi**, Tony Williams has been engaged in a long battle with the Corporation over the name THE **PLATTERS**. Williams began his attack by challenging the Corporation's federal service mark registration. That challenge proved to be unsuccessful when Williams, perhaps due to inadvertence, did not oppose the Corporation's motion for summary judgment. *Williams v. **Five Platters, Inc.***, 510 F.2d 963 (C.C.P.A.1975). When the Corporation later sued Williams in New York, the New
325 York Court did not permit Williams to challenge the Corporation's service mark *325 registration. The New York Court gave *res judicata* effect (presumably claim preclusion)

to the 1975 Court of Customs and Patent Appeals' decision. It rejected Williams' argument that **Robi's** 1974 California judgment should be given *"res judicata"* or "collateral estoppel" effect against the Corporation in Williams' case. The New York court noted that Williams had been "dilatory and unsuccessful [in providing the New York court with] an admissible transcript of the California lawsuit." It found that the claimed defects in the Corporation's issuance of stock in California were "technical"; that Williams had realized substantial benefits from his ownership of the shares and from his employment by the Corporation; and that there was "no evidence of unclean hands on the part of [the Corporation]."

The district court rejected the New York judgment and the decision of the Court of Customs and Patent Appeals on which the New York Court relied. The district court concluded that the New York Court had failed to give full faith and credit to the 1974 California judgment. Giving the California judgment the faith and credit the district court felt it deserved, the district court permitted Williams to use offensive issue preclusion (sometimes referred to as "offensive collateral estoppel") from the California judgment to defeat any claim preclusive effect of the New York judgment.

A trial court has broad discretion to apply offensive issue preclusion. *Parklane Hosiery Co. v. Shore,* 439 U.S. 322, 331, 99 S.Ct. 645, 651, 58 L.Ed.2d 552 (1979). Whether the district court abused this discretion is the issue we confront. To answer this question, we must first consider the *claim* preclusive effect of the New York judgment against Williams.

A. *Claim Preclusion and the New York Judgment*

We look to New York law to determine the *res judicata* effect of the New York judgment against Williams. *See* 28 U.S.C. § 1738. Under New York law, a valid final judgment bars any future action between the same parties on the same cause of action. *See Reilly v. Reid,* 45 N.Y.2d 24, 27, 379 N.E.2d 172, 174, 407 N.Y.S.2d 645, 647 (1978). Whether claim preclusion applies in a particular New York case depends on the definition of a "cause of action." If the current Williams dispute involves the same cause of action as the New York case, which was concluded with a final judgment, then claim preclusion prevents any recovery in the current action. *Id.* New York courts generally require a plaintiff to include all possible theories of recovery for one transaction in one lawsuit, "`regardless of the number of substantive theories or variant forms of relief ... available to the plaintiff.'" *Smith v. Russell Sage College,* 54 N.Y.2d 185, 192, 429 N.E.2d 746, 749, 445 N.Y.S.2d 68, 71 (1981) (quoting Restatement (Second) of Judgments § 61 comment a (Tent. Draft No. 4, 1978)).

New York law, however, apparently departs from the Restatement formulation of claim preclusion. In New York, "two or more different and distinct claims or causes of action may often arise out of a course of dealing between the same parties, even though it is not, except in refined legal analysis, easy to say that a different gravamen is factually involved." *Reilly,* 45 N.Y.2d at 28, 379 N.E.2d at 175, 407 N.Y.S.2d at 648. One New York court applied *Reilly* to find three separate "causes of action" arising from a single transaction. *See Lukowsky v. Shalit,* 110 A.D.2d 563, 566-67, 487 N.Y.S.2d 781, 784

(1985). There the court held that a prior action for nonpayment of rent under a sublease agreement was not claim preclusive in a second action for fraud that challenged the validity of the same sublease agreement. This was true even though fraud was presented as a defense in the first action. The court reasoned that "the second [action] may not be barred if the requisite elements of proof and evidence necessary to sustain recovery vary materially" from the earlier action. *Id.* at 566, 487 N.Y.S.2d at 784. We are thus required to examine the earlier New York action and compare it to the present Williams action.

326 *326 Long ago, Judge Cardozo, writing as the chief judge of the Court of Appeals of New York, stated that claim preclusion applies "when the two causes of action have such a measure of identity that a different judgment in the second would destroy or impair rights or interests established by the first." *Schuylkill Fuel Corp. v. B. & C. Nieberg Realty Corp.*, 250 N.Y. 304, 306-07, 165 N.E. 456, 457 (1929). Relitigation of Williams' claims in the district court in this case would have necessarily impaired the Corporation's rights established by the New York judgment. Identical issues and indeed identical legal theories were presented in both cases: ownership of THE **PLATTERS** as determined by trademark law, the legal effect of the 1956 and 1967 contracts, and the *res judicata* effect of the 1974 California judgment. New York law protects the Corporation from being "vexed by further litigation" with Williams. *See* *Reilly*, 45 N.Y.2d at 28, 379 N.E.2d at 175, 407 N.Y.S.2d at 647.[4]

The dispute between Williams and the Corporation over the name THE **PLATTERS** is a single cause of action for purposes of claim preclusion under New York law. Both cases require a determination of whether the Corporation can prevent Williams from using the name THE **PLATTERS**. The cases certainly draw upon the same "congeries of facts." *See* *Smith v. Russell Sage College*, 54 N.Y.2d 185, 192, 429 N.E.2d 746, 749, 445 N.Y.S.2d 68, 71 (1981). "[W]here the same foundation facts serve as a predicate for each proceeding, differences in legal theory and consequent remedy do not create a separate cause of action." *Reilly*, 45 N.Y.2d at 30, 379 N.E.2d at 176, 407 N.Y.S.2d at 649. Accordingly, the New York judgment is claim preclusive against Williams. We now consider the effect this claim preclusion has on Williams' offensive use of issue preclusion.

B. *The District Court's Application of Issue Preclusion*

At the time the district court granted summary judgment in favor of Williams, there were three cases in which ***Robi*** had prevailed against the Corporation on substantially the same set of facts involved in the present Williams case. One of the cases which had been decided in **Robi's** favor was the California action in which judgment had been entered in 1974. The other two were the two **Robi** cases which the district court had decided approximately seven months before it decided the Williams case. Under the doctrine of issue preclusion, "once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action." *Shapley v. Nevada Bd. of State Prison Commissioners*, 766 F.2d 404, 408 (9th Cir.1985). The issue in the prior action must be

identical to the issue for which preclusion is sought. *Id.*[5] Only a final judgment that is "sufficiently firm" can be issue preclusive. *See* *Luben Indus. v. United States*, 707 F.2d 1037, 1040 (9th Cir.1983). The party against whom issue preclusion is asserted must have litigated that issue in an earlier action and lost. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 329, 99 S.Ct. 645, 650, 58 L.Ed.2d 552 (1979).[6]

327 *327 Both the 1974 California judgment and the district court's earlier decision in the two **Robi** cases were final for purposes of issue preclusion. A final judgment "includes any prior adjudication of an issue in another action that is determined to be sufficiently firm to be accorded conclusive effect." Restatement (Second) of Judgments § 13 (1982). The California judgment clearly was sufficiently firm to be accorded conclusive effect. So was the district court's judgment in the two **Robi** cases. The following factors, which we draw from the Restatement, were present in the **Robi** cases the district court decided: the parties were fully heard, the district court supported its decision with a reasoned opinion, and that opinion is the proper subject of appellate review. *See* Restatement (Second) of Judgments § 13 comment g (1982), *quoted in* *Luben Indus. v. United States*, 707 F.2d 1037, 1040 (9th Cir.1983).

The present appeals in no way affect the "firmness" of the **Robi** decisions in the district court for purposes of issue preclusion. *See* *United States v. Abatti*, 463 F.Supp. 596, 598-99 (S.D.Cal.1978) (Thompson, J.) (reasoning that "a decision rendered by a court of competent jurisdiction is presumptively correct"); Restatement (Second) of Judgments § 13 comment f (1982); 18 Wright § 4433, at 305 ("in federal courts ... the preclusive effects of a lower court judgment cannot be suspended simply by taking an appeal that remains undecided"). This conclusion is all the more reasonable in these consolidated appeals because we affirm the district court judgment in the **Robi** cases.

We conclude that the district court's decision in the **Robi** cases, as well as the California Court's decision in the 1974 **Robi** case, generated issue preclusion against the Corporation. We now return to the question we posed earlier: Did the district court abuse its discretion in applying offensive issue preclusion from these decisions to defeat the claim preclusive effect of the New York judgment?

1. *The California Judgment*

As we have previously noted, the California **Robi** judgment preceded the New York Williams judgment. Because the New York judgment is later in time, and because it is claim preclusive against Williams, the district court could not apply any issue preclusive effect from the California judgment to defeat the claim preclusive effect of the later New York judgment. *Americana Fabrics, **Inc**. v. L & L Textiles, **Inc**.*, 754 F.2d 1524, 1530 (9th Cir.1985).

2. *The District Court's Judgment in the **Robi** Cases*

Two conceptually distinct theories support application of offensive issue preclusion from the district court's decision in the **Robi** cases. First, it may be argued that the district

court's decision in the **Robi** cases should prevail over the New York judgment as *res judicata* simply because the district court's judgment is the last judgment in time in a sequence of inconsistent judgments involving the right to the name THE **PLATTERS**.[7] *See id.* Second, as we have noted, the district court has broad discretion to decide whether to permit offensive issue preclusion to trump the claim preclusive effect of a prior judgment. *See* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 331, 99 S.Ct. 645, 651, 58 L.Ed.2d 552 (1979).

(a) *The Last in Time Rule*

In *Americana,* we stated the general rule that when two courts face the same claim or issue, the second court to reach judgment should apply *res judicata* and therefore resolve the same claim or issue consistently with the first court. *Americana,* 754 F.2d at 1529. Sometimes, however, the second court reaches a different conclusion either because *res judicata* is not asserted by the parties in the second court or because the second court decides, rightly or wrongly, that *res judicata* does not apply. *Id.* If a third court is then presented with *328 the same claim or issue, it faces conflicting judgments from the first two courts. The general rule under these circumstances is that the third court "should give *res judicata* effect to the *last* previous judgment entered." *Id.* at 1530; *see also* Restatement (Second) of Judgments § 15 (1982). Likewise, if a fourth court faces three inconsistent judgments it should treat the third judgment (*i.e.,* the last in time) as *res judicata. Americana,* 754 F.2d at 1530 n. 2.

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When the district court considered the present Williams action seeking declaratory relief, there were four relevant prior judgments for purposes of the last in time rule:

> (1) the California Court's 1974 judgment against the Corporation and in favor of **Robi** (issue preclusion),
>
> (2) the Court of Customs and Patent Appeals' 1975 judgment against Williams and in favor of the Corporation,
>
> (3) the New York Court's 1982 judgment in favor of the Corporation against Williams (claim preclusion), and
>
> (4) the district court's own simultaneous rulings in favor of **Robi** against the Corporation (issue preclusion).

Americana explained that one rationale underlying the last in time rule is "the implicit or explicit decision of the second court, to the effect that the first court's judgment is not *res judicata,* is itself *res judicata* and therefore binding on the third court." *Id.* at 1530 (citing *Porter v. Wilson,* 419 F.2d 254, 259 (9th Cir.1969)). Another rationale behind the last in time rule is the finality that it offers to the litigants. The rule finds support in the societal interest in "`end[ing] the chain of relitigation ... by stopping it where it [stands].'" *Americana,* 754 F.2d at 1530 (quoting *Porter v. Wilson,* 419 F.2d at 259). As Judge Sneed stated, the most recent decision "is not binding because it is correct; it is binding because it is last." *Id.* This concept of finality is central to the entire body of *res judicata* doctrine. *See* 18 Wright § 4403, at 15.

The rationale that a subsequent court's consideration of prior judgments is itself *res judicata* assumes that the subsequent court could have or did consider the *res judicata* effect of earlier cases. *See* *Americana*, 754 F.2d at 1530; Restatement (Second) of Judgments § 15 comment b (1982). The district court, however, could not have considered either the claim preclusive or issue preclusive effect of the New York judgment against Williams when it decided the two **Robi** cases. **Robi** was not a party to the New York litigation between the Corporation and Williams. And the Corporation won that case. Therefore, so far as **Robi** was concerned, the New York judgment had no *res judicata* effect, either as to claim preclusion or issue preclusion, in **Robi's** cases. *See* *Lawlor v. National Screen Serv. Corp.*, 349 U.S. 322, 326, 75 S.Ct. 865, 867, 99 L.Ed. 1122 (1955). There was no issue, express or implied, in the two **Robi** cases concerning whether the New York judgment had any *res judicata* effect. *See* *Americana*, 754 F.2d at 1530. The first rationale for the last in time rule which we articulated in *Americana* is absent.

The second rationale of *Americana* underpinning the last in time rule, that of ending the chain of litigation by following the judgment which is last in time, would be better served in Williams' case by giving *res judicata* effect to the New York judgment, not to the district court's **Robi** judgments. The New York judgment is the last in time in which both Williams and the Corporation were parties. We can think of no rational reason to permit Williams to avoid the claim preclusive effect of the New York judgment by trying to draw issue preclusion from a subsequent case in which he was not involved. Williams participated in the New York case and let the judgment in that case become final without appealing it. "If an aggrieved party believes that the second court [New York] erred in not giving *res judicata* effect to the first court's [California's] judgment, then the proper avenue of redress is appeal of the second court's judgment, not collateral attack in a third court." *Americana*, 754 F.2d at 1530.

(b) *Discretion to Apply Offensive Issue Preclusion*

329 In *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 99 S.Ct. 645, 58 L.Ed.2d 552 *329 (1979), the Supreme Court outlined some potential hazards that could arise if offensive issue preclusion were applied under inappropriate circumstances.[8] Nonetheless, the Court concluded that the advantages of avoiding burdensome relitigation on identical issues and promoting judicial economy warranted permitting the use of offensive issue preclusion at the discretion of the trial court: "[T]he preferable approach for dealing with [the tension between issue preclusion's advantages and disadvantages] in the federal courts is not to preclude the use of offensive collateral estoppel, but to grant trial courts broad discretion to determine when it should be applied." *Id.* at 331, 99 S.Ct. at 651. In the present Williams case, the district court exercised its discretion and applied offensive issue preclusion against the Corporation. We will not disturb a district court's exercise of discretion unless we have "`a definite and firm conviction that the court ... committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors.'" *Fjelstad v. American Honda Motor Co.*, 762 F.2d 1334, 1337 (9th Cir.1985) (citations omitted).

In outlining guidelines for district courts to consider when determining whether to apply offensive issue preclusion, the Court described two basic purposes for issue preclusion: "protecting litigants from the burden of relitigating an identical issue with the same party or his privy and ... promoting judicial economy by preventing needless litigation." *Parklane,* 439 U.S. at 326, 99 S.Ct. at 649. The Court recognized that these purposes might be disserved by the application of offensive issue preclusion in some circumstances. Indeed, offensive issue preclusion was expected to "increase rather than decrease the total amount of litigation." *Id.* at 330, 99 S.Ct. at 651. The Court encouraged district courts, however, to apply offensive issue preclusion in such a way that the incentives to increase rather than decrease the total amount of litigation would be minimized. *See id.* at 331, 99 S.Ct. at 651. The Court observed that offensive issue preclusion allows potential plaintiffs to benefit by waiting on the sidelines rather than joining in the first litigation. This is true because an interested observer will be able to rely on a judgment favorable to his interests against the defendant and yet not be bound by that judgment if the defendant wins. *Id.* at 330, 99 S.Ct. at 651. The potential for this abuse exists in a case such as the present one.

The *Parklane* Court also cautioned that use of offensive issue preclusion may be unfair to some defendants. *Id.* It identified one example of such possible unfairness as the application of offensive issue preclusion in the presence of inconsistent judgments. "Allowing offensive collateral estoppel may also be unfair to a defendant if the judgment relied upon as a basis for the estoppel is itself inconsistent with one or more previous judgments in favor of the defendant." *Id.* Williams' appeal presents this circumstance. The district court applied offensive issue preclusion in the presence of the inconsistent New York judgment in favor of the Corporation.[9]

The Court in *Parklane* looked to the Restatement (Second) of Judgments to explain why offensive issue preclusion should not be applied to inconsistent judgments. *See id.* at 330-31 nn. 14-16, 99 S.Ct. at 651 nn. 14-16 (discussing the Restatement (Second) of Judgments § 88 (Tent.Draft No. 2, Apr. 15, 1975), the precursor to current § 29). The
330 Restatement states that one *330 purpose of issue preclusion is to promote confidence in the accuracy of judicial determinations. One way this can be achieved is to stop a second court from rendering an inconsistent judgment by applying the doctrine of issue preclusion. *See* Restatement (Second) of Judgments § 29 comment f (1982). The District of Columbia Circuit has interpreted *Parklane* to prohibit the application of offensive issue preclusion "where the judgment relied on is inconsistent with other decisions." *Jack Faucett Assocs. v. American Tel. and Tel. Co.,* 744 F.2d 118, 125-26 (D.C.Cir.1984), *cert. denied,* 469 U.S. 1196, 105 S.Ct. 980, 83 L.Ed.2d 982 (1985). We do not read *Parklane* to be this restrictive. We prefer to read *Parklane* as providing guidance to the district courts for the appropriate exercise of discretion as to when to apply offensive issue preclusion in the presence of inconsistent judgments. In our case, however, it is not just the presence of inconsistent judgments which renders unfair the application against the Corporation of issue preclusion generated by the district court's **Robi** judgments. The unfairness to the Corporation is magnified enormously when, as in the present case, the judgment which generates issue preclusion (the district court's **Robi** judgment) is itself inconsistent with a judgment (the New York judgment) which the

Corporation has obtained against the very plaintiff, Williams, on whose behalf issue preclusion is asserted. This is different from the scenario in *Parklane.* There the party against whom issue preclusion was asserted had experienced inconsistent judgments in litigation with parties other than the present party opponent. *Parklane,* 439 U.S. at 324, 329, 99 S.Ct. at 650, *see also* Restatement (Second) of Judgments § 29 comment f (1982).

We conclude that the district court erred in applying offensive issue preclusion against the Corporation in Williams' case in the face of the claim preclusive effect of the New York judgment against Williams.

V

CONCLUSION

We affirm the district court's grant of the preliminary injunction in favor of **Robi** in appeal No. 85-6061. We affirm the district court's dismissal of the Corporation's complaint against **Robi** in appeal No. 85-6062. We reverse the district court's grant of summary judgment in favor of appellee Williams and against the Corporation in appeal No. 87-5514, and remand that case to the district court with instructions to vacate the summary judgment in favor of Williams and enter summary judgment in favor of the Corporation, The **Five Platters**, **Inc**.

Appellee **Robi** shall recover his costs on appeal in appeals No. 85-6061 and No. 85-6062. The Corporation shall recover its costs on appeal in appeal No. 87-5514.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

[1] The Corporation also has litigated its claim to the exclusive rights to THE **PLATTERS** against other members of the original group, *see The* ***Five Platters***, ***Inc****. v. Taylor,* No. C-5249 (D.Colo., Feb. 1, 1974), and against other entities which were not connected with the original **Platters**. *See The* ***Five Platters***, ***Inc****. v. Purdie,* 419 F.Supp. 372, 377 (D.Md.1976) ("Since 1967, plaintiff has been in a constant battle to stem the tide of proliferating imitators [of The **Platters**].").

[2] We prefer to use these terms rather than "merger," "bar," and "collateral estoppel." *See Americana Fabrics,* ***Inc****. v. L & L Textiles,* ***Inc****.,* 754 F.2d 1524, 1529 (9th Cir.1985). The Supreme Court has encouraged the use of claim preclusion and issue preclusion rather than *res judicata* (as merger or bar) and collateral estoppel, respectively. *See Migra v. Warren City School Dist. Bd. of Educ.,* 465 U.S. 75, 77 n. 1, 104 S.Ct. 892, 894 n. 1, 79 L.Ed.2d 56 (1984).

[3] The Restatement suggests that a court might justifiably part with the last in time doctrine when the second of two conflicting judgments results from an error in the application of "full faith and credit to the judgment of a sister state and the losing party was denied review in the Supreme Court of the United States." Restatement (Second) of Judgments § 15 comment e (1982) (citing Restatement (Second) Conflict of Laws § 114 comment b (1971)). This issue is not presented by these consolidated appeals.

[4] We also note that Williams' present claim against the Corporation does not satisfy the "separate cause of action" exception under the New York rule of *Lukowsky v. Shalit.* In the litigation between Williams and the Corporation in New York, the New York Court considered precisely the same elements of proof and evidence that are relevant to proof of Williams' claim in his present case. The possibility that Williams did not fully pursue *res judicata* arguments available to him when presenting his case in New York does not alter this result.

[5] The Corporation does not claim that issue preclusion is unfair because it did not have a sufficient incentive to litigate the district court cases involving **Robi** and the 1974 California case. *See* *Parklane Hosiery Co. v. Shore,* 439 U.S. 322, 330, 99 S.Ct. 645, 651, 58 L.Ed.2d 552 (1979).

[6] The requirement that issue preclusion can only be asserted against a party that already enjoyed one opportunity to litigate the issue prevents the Corporation from asserting in these consolidated appeals other decisions in its favor that do not involve Williams or **Robi**, such as *The* ***Five Platters***, ***Inc****. v. Purdie,* 419 F.Supp. 372 (D.Md.1976).

[7] The district court's simultaneous decisions in the **Robi** cases are so similar that we treat them as one decision in our analysis of the last in time rule.

[8] The Court defined offensive issue preclusion, then described as offensive collateral estoppel, as occurring when "the plaintiff seeks to foreclose the defendant from litigating an issue the defendant has previously litigated unsuccessfully in an action with another party." *Parklane,* 439 U.S. at 326 n. 4, 99 S.Ct. at 649 n. 4.

[9] As an illustration of the unfairness which could result from the application of offensive issue preclusion in the face of inconsistent judgments, the Court in *Parklane* referred to Professor Currie's example of a railroad collision injuring 50 passengers all of whom bring separate actions against the railroad. After the railroad wins the first 25 suits, a plaintiff wins in suit 26. Professor Currie argues that offensive issue preclusion should not be applied so as to allow plaintiffs 27 through 50 automatically to recover. *Parklane,* 439 U.S. at 330 n. 14, 99 S.Ct. at 65 n. 14, *citing* Currie, *Mutuality of Estoppel: Limits of the Bernhard Doctrine,* 9 Stan.L.Rev. 281, 304 (1957).

837 F.2d 1099 (1988)

BLINDER, ROBINSON & CO., INC., Petitioner,
v.
SECURITIES & EXCHANGE COMMISSION, Respondent.
Meyer BLINDER, Petitioner,
v.
SECURITIES & EXCHANGE COMMISSION, Respondent.

Nos. 87-1080, 87-1086.

United States Court of Appeals, District of Columbia Circuit.

Argued November 3, 1987.
Decided January 15, 1988.

1100 *1100 Arthur F. Mathews, with whom David M. Becker, Andrew B. Weissman, David D. Rosskam and Karen A. Getman, Washington, D.C., were on the brief, for petitioner **Blinder**, **Robinson** & **Co**., Inc.

Nathan Lewin, with whom Jonathan B. Sallet and Mary L. Lyons, Washington, D.C., were on the brief, for petitioner Meyer **Blinder**.

Jacob H. Stillman, Associate General Counsel, and Rosalind C. Cohen, Asst. General Counsel, S.E.C., with whom Daniel L. Goelzer, General Counsel, Paul Gonson, Sol., and Thomas L. Riesenberg, Senior Special Counsel, S.E.C., Washington, D.C., were on the brief, for respondent.

Before RUTH BADER GINSBURG and STARR, Circuit Judges, and GESELL,[*] District Judge, United States District Court for the District of Columbia.

Opinion for the Court filed by Circuit Judge STARR.

Concurring opinion filed by Circuit Judge RUTH BADER GINSBURG.

STARR, Circuit Judge:

These petitions for review challenge an order by the **Securities** and **Exchange Commission** imposing sanctions on a registered broker-dealer and its president and principal shareholder. The petitioners advance a number of contentions, both constitutional and nonconstitutional in nature. For the reasons that follow, we vacate the

Commission's order and remand the case for further proceedings.

1101 *1101

This litigation pits the SEC against **Blinder**, **Robinson** & **Co**. (and its principal), a leading broker-dealer in the genre of **securities** known as "penny stocks." The action arose out of an investigation into the actions of **Blinder**, **Robinson** and its president, Meyer **Blinder**, in underwriting an initial public offering of **securities** of American Leisure Corporation between December 1979 and March 1980. The purpose of the offering was to provide start-up funds for American Leisure's proposed casino project in Atlantic City. In the course of the offering, **Blinder**, **Robinson** took a variety of steps destined to be challenged by the SEC. In particular, the **Commission** assailed **Blinder**, **Robinson's** undisclosed purchase for its own account of almost 1 million units of the 12-million unit offering;[1] a host of other violations were alleged as well, including violations of the antifraud provisions of both the **Securities** Act of 1933 and the **Securities Exchange** Act of 1934.

Based on these allegations, the **Commission** brought a civil enforcement action pursuant to its statutory authority under section 20(b) of the 1933 Act, 15 U.S.C. § 77t(b) (1982), and section 21(d) of the 1934 Act, 15 U.S.C. § 78u(d), against both **Blinder**, **Robinson** and Meyer **Blinder** in the United States District Court for the District of Colorado. After a full trial, the district court entered findings of fact and conclusions of law, which are reported at 542 F.Supp. 468 (D.Colo.1982). The comprehensiveness of the district court's thorough and careful opinion renders it unnecessary for us to recanvass the underlying facts. It suffices for present purposes to observe that the district court in Colorado found that (1) both **Blinder**, **Robinson** and Meyer **Blinder** had violated the antifraud provisions of the **securities** laws, 15 U.S.C. 77q(a), 78j(b), 78*o*(c) and various rules promulgated thereunder, including Rule 10b-5; (2) the defendants had failed to establish a claimed defense of good-faith reliance on counsel and that, to the contrary, the firm had refused to follow the advice of counsel; and (3) comprehensive injunctive relief was appropriate, as articulated in nine specific subparagraphs set forth in 542 F.Supp. at 481-82.

Blinder, **Robinson** and Meyer **Blinder** took an appeal to the Tenth Circuit, which in due course affirmed entirely the district court's judgment. *SEC v. **Blinder**, **Robinson** & **Co**., et al.* [1983-1984 Transfer Binder] Fed.Sec.L.Rep. (CCH) ¶ 99,491 (10th Cir.1983). The Supreme Court thereafter denied certiorari. 469 U.S. 1108, 105 S.Ct. 783, 83 L.Ed.2d 777 (1985).

As the foregoing litigation was proceeding through the appellate process, the SEC instituted an *administrative* proceeding against **Blinder**, **Robinson** and its president pursuant to section 15(b)(4) of the 1934 Act, 15 U.S.C. 78*o*(b)(4). That provision authorizes the **Commission** to impose sanctions on broker-dealers if, after notice and hearing, it determines that sanctions are in "the public interest." The stated purpose of the proceeding was to determine what sanctions, if any, to impose on petitioners by virtue of their conduct during the American Leisure underwriting.[2] *See* Order for Public

Proceedings and Notice of Hearing (June 27, 1984), *reprinted in* Joint Appendix (J.A.) at 30.

In due course, a hearing ensued before an Administrative Law Judge. At the outset, the
1102 ALJ determined that petitioners could not, under principles of issue and *1102 claim preclusion, introduce evidence as to any matters addressed in the district court's opinion. **Blinder**, **Robinson** describes its fruitless efforts in this respect as follows:

> First, petitioners sought to elicit testimony from Meyer **Blinder** concerning his reliance on counsel. Second, petitioners sought to introduce oral testimony from one of the principal attorneys concerning the advice to Meyer **Blinder**. When these requests were denied, petitioners sought to introduce into the record all evidence concerning reliance on counsel that had been before the District Court in the injunctive proceeding. This request, too, was denied.

Brief for Petitioner **Blinder**, **Robinson** & **Co**. at 7-8 (footnotes omitted.)

Largely rejecting petitioners' claims that the firm had undertaken "substantial rehabilitative efforts to ensure that the American Leisure events would not be repeated," *id.* at 9, the ALJ concluded that sanctions should be imposed. Specifically, the ALJ ordered that **Blinder**, **Robinson's** registration be suspended for 45 days and that a two-year ban be imposed on **Blinder**, **Robinson's** underwriting activities; as to Meyer **Blinder**, the ALJ concluded that he should be suspended from association with any broker or dealer for a period of 90 days. The ALJ put it this way:

> In light of the egregiousness of the antifraud and antimanipulation violations found in the *American Leisure* injunction opinion ... coupled with the failures of Respondents to establish in the main their claims to fullsome rehabilatative [sic] actions and to a new and genuine dedication to compliance.... it is concluded that substantial sanctions ... are ... in the public interest, but that sanctions of the severity recommended by the [Enforcement] Division are not required in light of the mitigative factors found herein, including the remedial steps actually taken....

Initial Decision (Aug. 30, 1985), J.A. at 517-L.

Neither petitioners nor the SEC staff were enamored of the ALJ's decision. Both sides therefore appealed to the full **Commission**. In the order from which review is now sought, the SEC upheld the ALJ's decision and choice of sanctions as to **Blinder**, **Robinson**, but increased the sanctions imposed on Meyer **Blinder** individually, determining that he should be barred permanently from association with any broker or dealer (with the proviso that he could apply for reinstatement after two years). *See* Opinion of the **Commission** (Dec. 19, 1984), J.A. at 536. In a detailed opinion, the SEC made the following points, among others: (1) petitioners' claims of rehabilitation and reformation were unpersuasive, as evidenced by "wholly misleading" sales presentations and techniques still employed by the firm, J.A. at 547-48; (2) the firm's much vaunted personnel changes since the American Leisure imbroglio were entitled to "little weight,"

in view of key employees having been beguiled away from **Blinder**, **Robinson** by the enticing bid of a competing firm, as well as the tell-tale continuing presence of three high-ranking officers with disciplinary records, and, most importantly, of the firm's continued dominance by Meyer **Blinder** himself, *id.* at 549; and (3) the sanctions imposed by the **Commission**, while stringent, were necessary to guard against "any repetition of the blatant misconduct in which respondents engaged." *Id.* at 550.

The **Commission** expressly recognized the gravity of its decision:

> We recognize the serious effect of the sanctions we are imposing. But we are convinced that lesser sanctions will not suffice. Our action is designed to protect the public interest not only by restricting respondents' future activity in the **securities** business but also by deterring them from any repetition of their violative practices. The sanctions are a clear message to registrant, and to **Blinder** if and when he returns to the **securities** business, that any recurrence of misconduct will be dealt with severely. At the same time, the sanctions serve the important purpose of general deterrence, and should operate as a warning to any other participant in the
> 1103 **securities** industry *1103 who might be tempted to engage in similar misconduct.

Id. at 550 (citation omitted.)[3]

On New Year's Eve 1986, the **Commission** entered a stay with respect to the sanctions imposed on **Blinder**, **Robinson**. J.A. at 553-56. Applying the criteria articulated by this court, *see, e.g.,* *Wisconsin Gas **Co**. v. FERC*, 758 F.2d 669, 673-74 (D.C.Cir.1985); *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C.Cir.1977), the **Commission** denied Meyer **Blinder's** request for stay. On March 26, 1987, this court, over the opposition of the SEC, entered an order staying the entry of sanctions against Meyer **Blinder**. *See* Brief for Petitioner **Blinder**, **Robinson** & **Co**. at 10 n. 28.

II

Petitioners assert a variety of grounds for overturning the SEC's order. For ease of discussion, their contentions can be divided into two categories, those arising under the Constitution, and other, nonconstitutional, claims.

A

1. *Separation of Powers*

In their broadest line of attack, petitioners contend that the SEC lacked power under the Constitution to seek in federal district court the injunction that provided the foundation for the set of administrative sanctions that the **Commission** ultimately fashioned. In petitioners' view, an independent agency whose members are secure from removal at

the President's will is constitutionally disabled from bringing law enforcement actions, a function entrusted to the Executive under Article II of the Constitution. We decline to entertain this aspect of petitioners' challenge, however, by virtue of the fact that petitioners have previously litigated (and lost) this very issue in the federal district court in Colorado, the appeal of which is currently pending in the Tenth Circuit.

The well-established policies underlying preclusion of relitigation are especially applicable here. The waste of judicial resources would be particularly stark were we to allow petitioners to have another day in court on this question. Two separate Courts of Appeals are being asked to resolve the very same issue, presented by the very same parties, on a single set of facts. We therefore defer to our colleagues in the Tenth Circuit, inasmuch as the issue was first presented, and has been initially resolved, in that circuit. *See* *Durfee v. Duke,* 375 U.S. 106, 84 S.Ct. 242, 11 L.Ed.2d 186 (1963) (when first court's jurisdiction is actually litigated, a subsequent court must give the first court's resolution preclusive effect); *Stoll v. Gottlieb,* 305 U.S. 165, 59 S.Ct. 134, 83 L.Ed. 104 (1938) (same).[4]

Petitioners suggest that relitigation is appropriate where, as here, the prior court's jurisdiction is at issue. Under those circumstances, petitioners argue, the court's resolution of the issue is open to collateral challenge, citing *Kalb v. Feuerstein,* 308 U.S. 433, 60 S.Ct. 343, 84 L.Ed. 370 (1940), and *United States v. U.S. Fidelity* ***Co.***, 309 U.S. 506, 60 S.Ct. 653, 84 L.Ed. 894 (1940), in support of their position. We *1104 disagree. Properly read, both *Kalb* and *U.S. Fidelity* stand narrowly for the propositions that collateral attack is permitted only when the first court's proceeding "substantially infringe[d] the authority of another tribunal or agency of government," Restatement (Second) of Judgments § 12(2) (1982), or when it improperly trenched on sovereign immunity.[5] The present case is, in our view, unexceptional; having fully litigated (and lost) in Colorado, petitioners, have no persuasive claim to a second try.[6]

1104

For the foregoing reasons, we conclude that precedent supports, and sound policies informing the orderly administration of justice demand, our not entertaining petitioners' constitutional challenge to the SEC's civil enforcement power.

2. *Due Process*

In addition to petitioners' jointly advanced separation-of-powers argument, Meyer **Blinder** argues, separately, that the procedures employed by the SEC and its staff in this dispute run afoul of the Fifth Amendment's Due Process Clause. As Mr. **Blinder** sees it, the SEC's repairing first to federal court, vigorously litigating against him in that forum, and thereafter imposing **Commission**-spawned administrative sanctions on him cannot stand in the face of the bedrock constitutional requirement of procedural fairness. Here is the way Mr. **Blinder** summarizes his claim:

> Having prevailed on its contested lawsuit, the SEC now is seeking to exercise quasi-judicial discretion to decide how severely Mr. **Blinder** should be sanctioned for the conduct that was the subject of the lawsuit. If the **Commission's** proposed course is permitted, a plaintiff will have become a

> judge of its own claim.

Brief for Petitioner Meyer **Blinder** at 13.

Invoking a line of cases illustrated by the Supreme Court's decision in *In re Murchison,* 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942 (1955), which we shall discuss presently, Mr. **Blinder** maintains that the Constitution "does not permit ... a transformation of litigation roles" so as to permit a litigant to become a judge in its own case. Brief for Petitioner Meyer **Blinder** at 13. The infirmity in the SEC's procedures in this instance, **Blinder** complains, is exacerbated by three additional factors: first, the SEC chose in the first instance to eschew administrative procedures and to resort initially to federal district court, a forum which granted substantial relief to the **Commission** and which remains available for any agency request for further relief; second, the prejudice wreaked by the SEC's "doffing its litigator's hat" and "donning judicial robes" is especially "acute when the agency, as litigant, has considered and rejected a settlement offer," *id.* at 14; and third, the likelihood of injustice (and its appearance) is "aggravated when the agency continues to engage in active litigation with the party whom it is judging." *Id.*

We disagree with Mr. **Blinder's** analysis. In our view, his approach represents, upon reflection, not merely a narrow attack on the specific procedures employed in his case. Rather, Mr. **Blinder's** challenge, fairly viewed, represents nothing less than an assault on the constitutionality of a principal feature of the Administrative Procedure Act itself. That familiar statute, enacted by Congress over forty years ago, represents a comprehensive charter for the conduct and operation of modern administrative agencies. Among other things, the APA prohibits agency staff from combining prosecutorial and adjudicative functions in the same case. 5 U.S.C. § 554(d) (1982). *But it expressly exempts agency members from this prohibition of combined functions. Id.*

1105 *1105 The permissibility of the APA-sanctioned regime under the Constitution has been strongly suggested (if indeed not settled) by the Supreme Court in the case of *Withrow v. Larkin,* 421 U.S. 35, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975). There, in recognizing the substantiality of arguments challenging the combination of functions or purposes in a single individual or body, the Court observed that "legislators and [commentators] have given much attention to whether and to what extent distinctive administrative functions should be performed by the same persons. No single answer has been reached. Indeed, the growth, variety, and complexity of the administrative process have made any one solution highly unlikely." *Id.* at 51, 95 S.Ct. at 1466. With this recognition of the problem, the Court, speaking through Justice White, went on to state:

> Congress has addressed the issue in several different ways, providing for varying degrees of separation from complete separation of functions to virtually none at all. For the generality of agencies, *Congress has been content with section 5 of the [APA], which provides that no employee [may combine functions], but which also expressly exempts from this prohibition "the agency or a member or members of the body comprising the agency."*

Id. at 51-52, 95 S.Ct. at 1467 (citations and footnotes omitted) (emphasis added).

In its discussion of applicable precedent, the *Withrow* Court carefully distinguished Mr. **Blinder's** featured case, *In re Murchison.* At issue in *Murchison* was the constitutionality of a Michigan law authorizing a judge of any court of record in the State to act as a one-man grand jury. Faced with this unusual statute, the Supreme Court found a due process violation in Murchison's conviction before a judge who tried him for contempt arising out of his, Murchison's, testimony before the same judge acting as a one-man grand jury. The basic teaching of *Murchison* was this:

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome.

349 U.S. at 136, 75 S.Ct. at 625.

Interpreting this broad statement, the Court in *Withrow* expressly distinguished the situation of administrative agencies from the prototypical situation of a judge performing combined functions. "*Murchison* has not been understood," the *Withrow* Court stated, "to stand for the broad rule that the members of an administrative agency may not investigate the facts, institute proceedings, and then make the necessary adjudications." 421 U.S. at 53, 95 S.Ct. at 1467. Indeed, Justice White continued, "[t]he [*Murchison*] Court did not purport to question ... the Administrative Procedure Act." *Id.*

Withrow's qualification of *Murchison's* broad teaching is further illustrated by the Court's treatment of one factual twist in *Withrow* itself. The facts of *Withrow,* briefly stated, were these: one Dr. Larkin had obtained a license to practice medicine in Wisconsin from a state-created Examining Board, composed of practicing physicians. In due course, the Examining Board sent Dr. Larkin a notice that it would hold an investigative hearing, as authorized under state law, to determine whether he had engaged in certain proscribed acts. In the notice, the Board indicated that, based on the evidence to be presented at the investigative hearing, the Board would then decide what action to take, including possibly referring the matter for criminal prosecution or instituting license revocation proceedings.

Dr. Larkin promptly filed an action in federal district court challenging the Board's procedures as violative of the Due Process Clause under the *Murchison* line of authority. In the course of that litigation, the Board was enjoined by the trial court from going forward with its proposed hearing. Faced with that order, the Board went forward, albeit
1106 without a hearing, and *1106 issued formal findings of fact and conclusions of law that probable cause existed to believe Dr. Larkin had violated state law. The findings were then forwarded to the state prosecutor for possible prosecution.

In addressing this aspect of the Board's course of action, the *Withrow* Court flatly rejected the contention that this particular tack showed bias or prejudice on the part of the Board. The Court once again invoked the administrative agency model in language that bears directly on the question Mr. **Blinder** brings before us:

> It is also very typical for the members of administrative agencies to receive the results of investigations, to approve the filing of charges or formal complaints instituting enforcement proceedings, and then to participate in the ensuing hearings. *This mode of procedure does not violate the Administrative Procedure Act, and it does not violate due process of law.*

Id. at 56, 95 S.Ct. at 1469 (footnote omitted) (emphasis added).

Withrow v. Larkin thus stands as a formidable (if not insurmountable) barrier to Mr. **Blinder's** due process attack. Undaunted, Mr. **Blinder** seeks to avoid *Withrow's* pronouncements by suggesting its inapplicability where, as here, the agency chooses first to litigate in federal court, rather than instituting administrative proceedings. We are at a loss to discern a meaningful distinction in the suggested difference. Whether the adversarial proceeding is before an agency-designated ALJ or a federal district court judge, the relationship obviously remains one of adversariness between agency and opponent. Indeed, if anything the difference cuts against Mr. **Blinder's** position, because he was afforded the not insubstantial advantage of the neutral forum provided by an Article III court, with its attendant procedures and protections (including the rules of evidence and procedure) that may not obtain in an agency adjudication.[7]

Nor does the fact that the **Commission** considered and rejected Mr. **Blinder's** offer of settlement alter our analysis. Offers of settlement are in the very nature of the litigation process; common experience tells us that neither consideration nor rejection of an offer of settlement contains within it the inherent likelihood of bias and prejudice. Settlement offers are rejected day in and day out for a multitude of reasons; but rejection of a settlement offer does not suggest prejudgment, much less bias, on the part of an administrative agency. If in *Withrow v. Larkin* the Examining Board's issuance of formal findings of fact and conclusions of law did not suffice to establish bias, then the SEC's rejection here of a settlement offer is even farther away from constitutionally forbidden territory.

Our conclusion in this respect is reinforced by (but by no means conditioned on) the fact that, as Mr. **Blinder** describes it, only one Commissioner who participated in the order imposing sanctions had participated in the earlier consideration and rejection of the settlement offer. It would be a strange rule indeed that inferred bias on such a tenuous basis, and then presumed that the bias spread contagion-like to infect Commissioners who were not even called upon to consider the settlement offer. To do so would manifest profound disrespect for Congress' deliberately structuring agencies as (typically) multi-member bodies, with staggered terms and with requirements that the President appoint a certain number of members from the political party other than his own. To give credence to Mr. **Blinder's** dark suspicion of bias notwithstanding this carefully crafted structure would flout what Justice White, in writing for the Court in *Withrow,* called "a
1107 *1107 presumption of honesty and integrity" on the part of those who serve in office. *Id.* at 47, 95 S.Ct. at 1464.[8]

In short, we believe that Mr. **Blinder** has failed to heed *Withrow*'s message that a due process challenge directed broadly to combinations of purposes or functions in the

modern administrative state "assumes too much." *Id.* at 49, 95 S.Ct. at 1465. As in *Withrow* itself, acceptance of Mr. **Blinder's** broad due process attack would transmogrify the sensible holding of *Murchison,*[9] and in the process accede precisely to what the Supreme Court has twice warned against, namely a sweeping due process challenge that "`would bring down too many procedures designed, and working well, for a governmental structure of great and growing complexity.'" *Id.* at 49-50, 95 S.Ct. at 1465-1466, *quoting* *Richardson v. Perales,* 402 U.S. 389, 410, 91 S.Ct. 1420, 1432, 28 L.Ed.2d 842 (1971).

Mr. **Blinder** argues, finally, that the district court in Colorado remains open for the SEC to seek any relief in addition to that which it previously sought and secured in that forum. This is, upon analysis, a policy argument, not one sounding in due process. This is particularly true in the circumstances of this case, where the SEC did not seek to obtain specific sanctions (save for injunctive relief) in district court against Mr. **Blinder** and his firm. The subsequent administrative proceeding therefore does not, fairly viewed, constitute a second bite at the apple for an agency that had failed to convince an Article III judge of the merits of a particular remedy. Instead, based upon the district court's judgment, the SEC subsequently initiated procedures expressly ordained by Congress in section 15(b)(4). This, we are satisfied, does not run afoul of any values of fundamental fairness embodied in the Due Process Clause. Indeed, to accept petitioners' broadside would do violence to the core value of flexibility (coupled with appropriate procedural protections) that has been the hallmark of the modern administrative process.

Indeed, a moment's reflection suggests that acceptance of Mr. **Blinder's** claim under the Due Process Clause would do considerable violence to Congress' purposes in establishing a specialized agency to regulate in the difficult and challenging world of financial markets and **securities** regulation. Ironically, the wisdom of Congress' handiwork is suggested by the brief of Mr. **Blinder's** own firm, whose words, we believe, aptly capture the considerations informing Congress' policy choice in this respect:

> While courts are best equipped to adjudicate whether statutory violations occurred, Congress believed the SEC's particular expertise would best enable it to choose among available administrative disciplinary sanctions and to discern the interests of the investing public.

Blinder, **Robinson** Brief at 43 (footnote omitted).

In sum, to accept Mr. **Blinder's** argument would be to work a revolution in administrative (not to mention constitutional) law, in the face of repeated cautionary signals from the Supreme Court. We decline the invitation to storm the barricades and, instead, content ourselves with following what seems to us the clear teaching of the Supreme Court that
1108 a fundamental aspect of the modern administrative state is not *1108 founded upon a violation of the Due Process Clause.

3. *Fourth Amendment*

Blinder, **Robinson** devotes a few pages of its brief to the proposition that the SEC's

disciplinary sanctions are infected with an underlying Fourth Amendment violation and thus cannot stand. As we understand the point, **Blinder**, **Robinson** maintains that the Formal Order of Investigation which led to the initial district court proceeding was unconstitutionally broad. This order, employed by the staff over 17 months after its issuance as the basis for investigating the American Leisure offering, "constituted a broad warrant supposedly authorizing the SEC staff to undertake an investigation, with administrative subpoena power, of a virtually unlimited range of conduct by **Blinder**, **Robinson** over an open-ended period of time." **Blinder**, **Robinson** Brief at 35. **Blinder**, **Robinson** condemns the investigative order as a general grant of surveillance power over the entirety of the firm's activities for an indefinite period of time. This, **Blinder**, **Robinson** complains, cannot be countenanced under the Fourth Amendment.

So framed, the argument appears to be an attack on the validity of the Colorado district court injunctive proceeding. And indeed, so it is. As such, it is doomed to fail, for even if the 1978 Formal Order could be viewed somehow as constituting an intrusion for purposes of Fourth Amendment analysis, a proposition which we need not address and with which the **Commission** emphatically disagrees, we will not entertain this untimely collateral attack on the Colorado proceedings. Those proceedings provided the time and the place for advancing any such claims of illegality; it is simply too late in the day to litigate issues that could have been adjudicated in the courts of the Tenth Circuit. Indeed, the record in this hydra-headed litigation reflects that the issue was in fact litigated by **Blinder**, **Robinson** in a separate action brought against the **Commission** and its staff, seeking injunctive and other relief on account of asserted Fourth Amendment violations. That action, the procedural history of which is described in one of the Tenth Circuit's opinions in this litigation, ***Blinder*, *Robinson* & *Co.*, *Inc. v. SEC*,** 748 F.2d 1415, 1417-18 (10th Cir.1984), indicates that twelve days before the SEC filed its complaint in federal district court in Denver, **Blinder**, **Robinson** and Mr. **Blinder** repaired to the same court in an attempted preemptive strike. That litigation ultimately ended with a whimper, namely an appellate determination of mootness, *see id.* at 1418-19. But in the process of resolving that branch of the litigation, the Tenth Circuit squarely rejected petitioners' efforts to litigate the question of the legality of evidence secured pursuant to subpoenas issued under authority of the 1978 Formal Order. The Tenth Circuit put it this way:

> At the trial [of the enforcement action] counsel for **Blinder**, **Robinson** did not object to the introduction of evidence obtained through the investigatory order. ...
>
> Even assuming that **Blinder**, **Robinson's** attorney's failure to object to the allegedly improper evidence was due solely to the negligence of their counsel rather than to deliberative litigation strategy, this would not constitute a sufficient showing to warrant the extraordinary relief sought.

Id. at 1420.

Those words were penned by our colleagues in the Tenth Circuit almost four years ago. In view of the passage of time, the attack before us is even more tenuous. Stubbornly, **Blinder**, **Robinson** maintains (1) that the disciplinary order under challenge in this case

is rooted in the decision of the district court in Colorado, and (2) that the latter decision is illegitimately grounded in Fourth Amendment violations. But the foundation of the argument obviously rests on sand, for the Tenth Circuit has, as we have seen, upheld the district court's injunctive order and ruled that **Blinder**, **Robinson** can no longer litigate the question of the legality *vel non* of the evidence (or the lawfulness of the 1978 Formal Order itself). We scarcely need remind counsel that this issue litigated fully in the
1109 Rockies cannot now be raised on the Eastern Seaboard, *1109 and indeed that it was utterly inappropriate even to suggest as much.

B

1. *Issue Preclusion*

In addition to the previously discussed constitutional claims, petitioners contend that the **Commission** erred in upholding the ALJ's exclusion of evidence proffered by the broker-dealer with respect to the firm's reliance (through Meyer **Blinder**) on counsel. Specifically, as we alluded to in the factual narrative above, **Blinder**, **Robinson** sought in the administrative proceeding to adduce the following evidence before the ALJ: (1) testimony of Meyer **Blinder** concerning the advice given to him by counsel; (2) testimony from one of the principal attorneys concerning the advice given to Mr. **Blinder**; and (3) when those requests were denied, the introduction of all evidence concerning reliance on counsel that had been before the district court in the Colorado injunctive proceeding.

The requests were denied by the ALJ on grounds of issue preclusion, inasmuch as the issue concerning good faith reliance on counsel had been litigated in the federal district court and resolved adversely to petitioners. The SEC agreed with the ALJ's determination in this respect, stating that "[t]o allow the introduction of such evidence would permit the very relitigation that the doctrine of collateral estoppel is designed to prevent." J.A. at 541.

The SEC is wrong. The issue before the district court in Colorado was manifestly not the question before the SEC in the administrative proceeding. As is readily apparent, the SEC litigated in federal court the question of petitioners' *liability vel non* under the **securities** laws. Armed with the findings of fact (and the entry of broad injunctive relief) of the district court, the SEC then instituted an entirely different sort of proceeding, namely an administrative proceeding under section 15(b) of the 1934 Act. That proceeding was aimed at reaching a completely different determination than resolving the issue of liability, including the question of "good-faith reliance" on counsel. The precise question in the SEC proceeding was whether sanctions should be imposed "in the public interest." **Blinder**, **Robinson** makes the argument well:

> This "public interest" determination is separate from and in addition to the SEC's determination as to the existence of the disqualifying conditions necessary for the imposition of any sanctions. As to sanctions, the *extent* to which petitioners sought the advice of counsel, the *clarity* of the advice, and petitioners' reasons for following or disregarding it, in whole or in part, are

> highly relevant, *even though the reliance on counsel may not have been sufficient to discharge petitioners from the underlying liability for statutory violations.*

Blinder, **Robinson** Brief at 39-40 (footnote omitted) (emphasis added).

It is important in this respect to draw a clear distinction between the issue before the district court in Colorado — whether Meyer **Blinder** relied on counsel so as to establish a good-faith defense to liability — and the obviously related, but nonetheless analytically distinct, matter of the circumstances surrounding the lawyer-client relationship. We are in no way suggesting that Meyer **Blinder** (and, through him, **Blinder**, **Robinson**) is at liberty to relitigate the factual question as to whether there was reliance on counsel. That issue has been conclusively decided against him. As the district court expressly found, counsel advised Mr. **Blinder** to sticker the prospectus, and he chose to reject that advice.

But saying that, and nothing more, is not to state the whole of what is germane to the SEC in exercising its judgment as to the nature and scope of sanctions that are appropriate in the public interest. Unless the SEC is to adopt a sanctioning regime whereby specific offenses call for certain specific sanctions, it seems inescapable that evidence relevant to a party's *degree* of culpability must be considered in deciding that issue. After all, that was the precise issue in the SEC's section 15(b)(4) proceeding: how
1110 culpable was Mr. **Blinder**? In the district court, the issue was quite different. *1110 The finding that Mr. **Blinder** did not rely on counsel's advice does not tell us about the circumstances surrounding the advice given and Meyer **Blinder's** rejection of it. Indeed, the district court's opinion did not even address the question in great detail.

In the SEC's administrative proceeding, however, questions of degree were singularly relevant. Mr. **Blinder's** proffer of evidence in that proceeding was not, and could not have been, directed to litigating the issue of reliance on counsel as relevant to establishing a good-faith defense; rather, it related to the wholly different matter of the entirety of the relationship with counsel (including, for example, why the advice was rejected; which attorney's advice was rejected; the precise nature of the various advice given, *e.g.,* was it absolute and unequivocal, or somewhat flexible in nature, or something else).[10] These latter points go to the question of possible mitigation, notwithstanding the definitively resolved issue of liability and the specific factual determination that Mr. **Blinder** did not rely on counsel's advice.[11]

Indeed, the strength of petitioners' core argument, that the nature of the administrative proceeding required the SEC to consider evidence relating to Mr. **Blinder's** degree of culpability, is implicitly conceded by the **Commission** counsel. As the **Commission** indicates to us:

> **Blinder**, **Robinson** is correct that the district court's judgment is not preclusive as to the issue of what sanctions are required in the public interest.

SEC Brief at 28 n. 38 (citation omitted). Yet that is, in effect, precisely what the

Commission held. It approved the ALJ's refusal even to consider evidence concerning the relationship(s) with counsel on the theory that to do so would permit relitigation of issues adjudicated in Denver.

That error is not cured, as the SEC lamely suggests, by permitting petitioners to introduce evidence going to other points, such as "their asserted reformation and cessation of deceptive sales techniques." *Id.* The logical fallacy of the SEC's argument is apparent. Admitting evidence on issues a, b and c obviously does not cure a tribunal's refusal to consider evidence on issue d, unless of course issue d is irrelevant to the question to be resolved. But in this instance that cannot be. The "public interest" standard is obviously very broad, requiring that the **Commission** consider the full range of factors bearing on the *judgment* about sanctions that the expert agency ultimately must render. In reaching that judgment, questions such as the precise nature and details of counsel's advice, and indeed, the totality of the circumstances surrounding the lawyer-client relationships in question, are undoubtedly relevant. 1111 *1111 **Blinder**, **Robinson** captures the point admirably:

> Precluding petitioners in administrative disciplinary proceedings from presenting all evidence relevant to the issue of sanctions — whether or not previously presented to a District Court — would do violence to the considered allocations of adjudicatory responsibilities.... The statutory obligation placed on the SEC to exercise *its* judgment is not satisfied simply by having the SEC adopt the findings of the District Court.

Blinder, **Robinson** Brief at 43-44.

We agree. To uphold the SEC's decision here would not only blink at its fundamental error in the treatment of petitioners' attempt to introduce evidence relating to the relationship with counsel, but would also do violence to Congress' intent that the SEC exercise its own judgment in these circumstances. In short, the SEC cannot turn a deaf ear to evidence that should, in reason, bear upon the judgment that the **Commission** is called upon to render.[12]

2. *APA Challenge*

Both petitioners devote considerable energy to attacking the sanctions imposed by the SEC as arbitrarily severe. We have been provided with the following arguments in particular: (1) the SEC subjects over-the-counter firms to disproportionately unfavorable treatment in comparison to Big Board-member firms that similarly run afoul of statutory or regulatory rules and requirements; (2) the SEC, in violation of fundamental requirements of administrative law, failed sufficiently to justify the harsh sanctions visited on petitioners; and (3) the two-year suspension of the firm from all underwriting and private placement activities exceeds the maximum period of suspension authorized under section 15(b)(4) of the 1934 Act. Impressive decisional authority is summoned to buttress the first two points, including an opinion by the late Judge Friendly in *Arthur Lipper Corp. v. SEC,* 547 F.2d 171 (2d Cir.1976), *cert. denied,* 434 U.S. 1009, 98 S.Ct. 719, 54 L.Ed.2d 752 (1978), where the Second Circuit set forth a variety of factors to

employ in evaluating sanctions imposed by the SEC, and an opinion by our colleagues in the Fifth Circuit in *Steadman v. SEC,* 603 F.2d 1126 (5th Cir.1979), *aff'd* 450 U.S. 91, 101 S.Ct. 999, 67 L.Ed.2d 69 (1981), where the court erected a daunting standard to justify permanent exclusion from the **securities** industry. ("[P]ermanent exclusion from the industry is `without justification in fact' unless the **Commission** specifically articulates compelling reasons for such a sanction." *Id.* at 1140 (footnote omitted)).

The SEC invokes, in response, similarly impressive authority supporting the unquestioned proposition that the crafting of an appropriate remedy is peculiarly within the province of an expert agency, and can appropriately be judicially disturbed only where the remedy is "unwarranted in law or ... without justification in fact...." SEC Brief at 11, *quoting Butz v. Glover Livestock Comm'n **Co**.*, 411 U.S. 182, 185-86, 93 S.Ct. 1455, 1458, 36 L.Ed.2d 142 (1973). **Commission** counsel points to the detailed reasons articulated by the SEC in visiting such substantial sanctions on petitioners. The SEC summarizes its position this way:

> Given the district court's findings that petitioners engaged in an on-going series of deliberately fraudulent transactions that included a deceptive sales campaign, arranging non bona fide transactions to give the appearance that the [American Leisure] offering was sold out, misleading their own counsel and then ignoring counsel's advice, violating the escrow agreement, failing to return investors' money as required, and engaging in prohibited trading in the putative aftermarket, *1112 this conclusion [as to sanctions] should need no further explanation.

1112

SEC Brief at 12.

In the course of recounting petitioners' manifold sins, **Commission** counsel suggests that the factors on which the *Lipper* court relied are not present here. Among those are the following:

> Unlike Mr. Lipper, petitioners [in this case] did not seek counsel's advice as to the totality of the conduct held to violate the **securities** laws; and, on the only issue that they did seek advice, their purchase of [American Leisure] **securities**, they rejected the advice they received.

Id. at 14 (citation omitted). By their own words, then, **Commission** counsel have indicated the relevance of petitioners' relationship with counsel. Petitioners have been weighed in the balance and found wanting, in part because of their disdain for (or failure to secure) counsel's advice. That failure, as the **Commission** sees it, plainly related to the conclusion that the American Leisure offering was "permeated with deliberate fraud." *Id.* at 12 (quoting J.A. at 546). But the obvious problem with the SEC's conclusions relating to Mr. **Blinder's** relationship with counsel is that they assume the **Commission** had before it the full record germane to determining whether factors such as those emphasized by the *Lipper* court were present. That assumption, for reasons already stated, is ill-founded by virtue of the refusal even to consider potentially relevant evidence.

In brief, we are persuaded that the fundamental principle of administrative law that an agency act in a non-arbitrary, non-capricious fashion is necessarily implicated by the SEC's refusal to permit evidence with respect to a salient factor. That is, in meting out sanctions, the **Commission** cannot adequately weigh the factors that it concedes should be considered without having before it the full set of facts necessary for reasoned consideration.

Thus, our analysis in this section of the opinion is inevitably affected by the **Commission's** error, discussed in the preceding section, in refusing to consider evidence relating to the relationship with counsel on grounds of issue preclusion. We will therefore not extend further the length of this opinion, which is obviously but another (albeit important) chapter in this long-lived litigation. Instead, we will put down our pen and remand the case to the **Commission** for further action consistent with this opinion. On remand, the SEC will, of course, be obliged to satisfy the strictures of the APA by articulating an adequate rationale for whatever decision it may reach.

In this regard, we would be less than candid if we did not flag for the **Commission** our concern that petitioners have mounted a non-frivolous claim that they have been singled out for disproportionately harsh treatment. Petitioners list a series of instances which, they contend, demonstrate that the SEC's hand comes down more heavily on smaller, newer firms than it does on old-line, or at least more established, houses with the "right sort" of **exchange** memberships. The allegation is thus not simply that penalties have differed from case to case. As the colloquies at oral argument suggested, each case in **securities** regulation, as elsewhere, is different. Those inevitable differences and gradations in fact can best be discerned and articulated by the Commissioners whose job it is to come to just these sorts of judgments.

But it does not exceed our appropriate function to indicate that we have seen warning signs. What is alleged here are not mere disparities, *see Butz v. Glover Livestock Comm'n **Co**.*, 411 U.S. 182, 187, 93 S.Ct. 1455, 1458, 36 L.Ed.2d 142 (1973), but rather an asserted *systemic pattern of disparate treatment,* resulting in predictably, disproportionately harsh sanctions being visited upon firms such as **Blinder**, **Robinson**. If the **Commission** believes that the alarms are false, then it should say so and explain why what might appear to be troubling systemic variances are in fact not such variances
1113 at all, or, alternatively, variances justified by the circumstances of this *1113 case.[13] Finally, we emphasize in this respect that the **Commission's** broad discretion in fashioning sanctions in the public interest cannot be strictly cabined according to some mechanical formula. Nothing that we say suggests in the slightest that the **Commission** does not enjoy wide latitude in fashioning appropriate sanctions; such latitude is inherent in the **Commission's** broad grant of power from Congress, and is confirmed by such teachings as the Supreme Court's decision in *Butz.*

*** * * * * ***

A closing observation is in order: Nothing that we have said today should suggest any intent on our part to intrude into the domain of the previous litigation between these

parties in the Tenth Circuit. Petitioners stand condemned for serious violations of the **securities** laws, and we have held today that it is entirely appropriate and lawful for the SEC to carry out its statutory responsibilities in crafting a suitable and appropriate sanction in response to those violations.

But the **Commission** must do more than say, in effect, petitioners are bad and must be punished. Petitioners do not stand alone; they are, alas, only two in a long line of enterprises and individuals who have seen fit to conduct themselves in violation of the law of the land. It is because of the SEC's experience in dealing with such unhappy matters that it has the sensitive function, ordained by Congress, of deciding petitioners' fate. In this setting, the **Commission** is not simply rendering a policy judgment; nor is it simply regulating the **securities** markets; it is, rather, singling out and directly affecting the livelihood of one commercial enterprise and terminating (possibly forever) the professional career of the firm's founder. Faced with a task of such gravity, the **Commission** must craft with care.[14]

III

For the foregoing reasons, the order of the **Commission** is vacated and the case is
1114 *1114 remanded for further proceedings consistent with this opinion.

It is so ordered.

RUTH BADER GINSBURG, Circuit Judge, concurring:

I join most of the court's fine opinion, but write separately to express some misgivings about the last step my colleagues take. I question the propriety of any remand, particularly one missing well-defined "metes and bounds." *See* court's opinion at 1111 n. 12.

The distinction my colleagues draw between "reliance on counsel" and "relationship with counsel," *see* court's opinion at 1110, slips from my grasp. True, different *claims* were at stake in the Colorado district court and before the SEC, so no claim preclusion operates here. I agree too that a degree of reliance sufficient to count as a mitigating factor in an administrative sanctions determination may be insufficient to constitute a good-faith defense in an injunction proceeding.[1] But degree of reliance never enters into the calculus when there was no reliance at all. Every counsel consulted, the Colorado district court found as a matter of fact, advised against the course of action ultimately chosen by petitioners. *See* court's opinion at 1110 n. 11, citing the Colorado district court's fact finding reported in 542 F.Supp. at 472.[2] As the Colorado district court reiterated, petitioners directly received "the advice of the involved attorneys," and then, with "knowledge of the materiality of their conduct, and its potential consequences, they ignored counsel's advice." 542 F.Supp. at 476-77. *See also id.* at 481.

If Meyer **Blinder** is not at liberty to urge again that he relied at all on the advice of counsel, then it is difficult for me to comprehend how a "relationship with counsel" can aid his cause. *Arthur Lipper Corp. v. SEC,* 547 F.2d 171 (2d Cir.1976), *cert. denied,* 434

U.S. 1009, 98 S.Ct. 719, 54 L.Ed.2d 752 (1978), is indeed "[i]mpressive decisional authority," *see* court's opinion at 1111, but that case seems to me critically different from the one at hand. Judge Friendly held in *Arthur Lipper* that when **securities** law violators "act under the supervision of experienced ... counsel," 574 F.2d at 184, SEC sanctions should be mitigated. One who received and "specifically declined to follow" advice of counsel, however, as the Colorado court found **Blinder** did, 542 F.Supp. at 481, is not largely assisted by precedent sympathetic to a party who acted on counsel's advice. Seeking and then rejecting advice logically should aggravate, not mitigate, blameworthiness.

I note, further, that my colleagues appear to have entrusted to the **Commission** a comparative analysis obligation heavier than any that has gone before. *See, Butz v. Glover Livestock Comm'n **Co**.*, 411 U.S. 182, 187, 93 S.Ct. 1455, 1459, 36 L.Ed.2d 142 (1973) ("employment of a sanction within the authority of an administrative agency is ... not rendered invalid in a particular case because it is more severe than sanctions imposed in other cases").

In sum, before returning a case to an agency, I believe a reviewing court has an
1115 obligation to specify with great care and *1115 precision the "metes and bounds" for the remand. My colleagues say they do not mean to "forc[e] the SEC to engage in an open-ended inquiry." Court's opinion at 1111 n. 12. I am uneasy, however, about the less than tight instructions the court's opinion contains concerning 1) the limitations now placed on what petitioners and their able counsel may open up or delve into on remand, and 2) what the **Commission** must do to justify its sanctions. I fear the court's opinion may be read by petitioners to present not limitations as intended, but an opening to introduce anything and everything arguably "relating to the[ir] relationship with counsel." *See* court's opinion at 1110.

There is in the remand course ordered some risk of confusion,[3] and an opportunity to protract. I take it to be the view of all members of the panel that the **Commission**, while instructed to "craft with care," court's opinion at 1113, is also to be vigilant to guard against undue protraction and deferral of the final disposition of this case.

[*] Sitting by designation pursuant to 28 U.S.C. § 292(a).

[1] The American Leisure offering was on "all or none" terms. "All or none" transactions are ones in which funds paid for stocks by buyers are placed in escrow until a certain date; if the entire offering is not sold out by that date, the deal is cancelled, and the escrowed monies returned. The SEC thus viewed the company's buying for its own account as highly misleading, as it gave the impression that the offering was progressing successfully when it in fact was not.

[2] The order provided in pertinent part:

[T]he **Commission** deems it necessary and appropriate in the public interest and for the protection of investors, that public proceedings be instituted to determine:

. . . . .

B. What, if any, remedial action is appropriate in the public interest pursuant to Sections 15(b) and 19(h) of the **Exchange** Act.

J.A. at 34.

[3] The reference to Mr. **Blinder's** possible return to the **securities** business took into account the **Commission's** proviso that he could apply for reassociation after two years.

[4] *Chicot County Drainage Comm'n v. Baxter State Bank*, 308 U.S. 371, 60 S.Ct. 317, 84 L.Ed. 329 (1940), cited by the SEC as support for applying the normal rules of preclusion in this case, is in our view a more difficult case than the present one. In *Chicot County,* the Supreme Court gave preclusive effect to a prior judgment, notwithstanding the fact that the prior court's jurisdiction had been based upon a statute later found to be unconstitutional. The case dealt with a bondholder's suit to recover the value of his defaulted bonds, even though in a prior bankruptcy proceeding a court had effected a reorganization plan (to which the party had notice) which disposed of the issuer's obligations; the constitutionality of the bankruptcy act, and therefore the court's jurisdiction, were not questioned in the first proceeding. The statute on which the bankruptcy proceeding had been founded was later found, in an unrelated case, to be unconstitutional. By contrast to *Chicot County,* in the present case, as in *Durfee v. Duke* and *Stoll v. Gottlieb,* the first court's jurisdictional power was contested and actually decided.

[5] In *Kalb,* a state court had exercised jurisdiction over a foreclosure action, even though federal bankruptcy law vested exclusive jurisdiction in the federal courts. In *U.S. Fidelity,* a federal court had issued a judgment requiring certain Indian Nations to pay monies on disputed bonds, in contravention of their sovereign immunity. In both cases, the Supreme Court refused to give the judgments preclusive effect in subsequent suits.

[6] We note that the fact that a judgment is pending on appeal ordinarily does not detract from its finality (and therefore its preclusive effect) for purposes of subsequent litigation. *See* *Martin v. Malhoyt*, 830 F.2d 237, 265 (D.C.Cir.1987), and authorities cited therein.

[7] Mr. **Blinder** suggests that when the SEC engages in highly publicized litigation of the sort that ensued in Colorado, the resultant placing of "institutional prestige" on the line impermissibly adds to the appearance, if not actuality, of injustice. We reject this argument as well. The concept of "institutional prestige" relied on by petitioners is in severe tension with fundamental premises of the administrative state. One of those premises is that *institutions* may competently perform diverse functions. At the agency level, our law assumes integrity in individual members, and requires direct evidence of bias, or some other personal interest, to overcome that assumption.

[8] **Blinder's** argument that the SEC must be biased as it continues in litigation with him is but another chapter of the same book. The foundation of his argument is flawed for the reasons already given in the text; the mere fact that litigation goes on hardly suggests that the Commissioners, with their broad ranging areas of responsibility over the wide world of **securities** markets, have succumbed to bias and prejudice against a single firm and its president.

[9] We set aside as inapplicable those cases involving a possible financial interest on the part of a decisionmaker. *See, e.g.,* *Gibson v. Berryhill*, 411 U.S. 564, 93 S.Ct. 1689, 36 L.Ed.2d 488 (1973) (which expressly reserved the issue subsequently addressed in *Withrow v. Larkin*). Indeed, the great English case cited by Mr. **Blinder**, *Dr. Bonham's Case,* 8 Eng.Rep. 114a (Com.Pl.1610), involved just such a financial interest. There, in a memorable opinion by Lord Coke, the Royal College of Physicians was prevented from disciplining a doctor if the College had the right to receive any part of the fine. While edifying, *Dr. Bonham's* case and its progeny have no bearing on the issue before us.

[10] That is to say, counsel might, hypothetically, provide the following sort of advice: "Course `x' is beyond question permissible under the **securities** laws and applicable regulations; no other course is 100 percent clearly permitted. To be completely safe, you should follow Course `x.'" On the other hand, counsel might advise as follows: "It's not overpowering, but a straight-faced argument can be made that Course `z' is permissible under the **securities** laws and applicable regulations. I can't imagine that anyone would go to jail for it, but it's likely to be dicey. You're on much surer and safer ground with Course `x.' I therefore strongly recommend Course `x.' Why take chances?"

The foregoing are, of course, only two variations on the same theme. In both hypotheticals, counsel advised in favor of Course x, but each hypothetical carries with it its own peculiar set of nuances. Other themes, and manifold variations on each, are readily conceivable. These matters, it seems to us, can only be adequately appreciated and addressed by the expert agency if it has the full set of facts before it.

[11] That possibly mitigating evidence exists is manifest. In determining that counsel's ultimate advice was to sticker the American Leisure prospectus, the district court stated, "[w]hile the evidence is conflicting, the more probable and credible testimony is" that counsel advised against the course of action ultimately chosen by petitioners. *See* 542 F.Supp. at 472. Even conceding that this establishes that Mr. **Blinder** was not presented

with *conflicting* advice as to the proper course of conduct, it tells us nothing about the nature of the advice he did receive, and the circumstances surrounding its rejection. These are matters relating to possible mitigation, which cannot be foreclosed solely because the district court found that Mr. **Blinder** rejected counsel's advice. Mr. **Blinder's** conduct, his attitude, indeed, all of the relevant circumstances present in the rejection of counsel's advice, bear on the degree of sanctions that the SEC, as the expert agency, would reasonably deem to be in the public interest.

[12] Our holding in this respect should by no means be interpreted as forcing the SEC to engage in an open-ended inquiry without metes and bounds. It has not been argued to us, and we fail to see how it reasonably could be, that the matter of **Blinder**, **Robinson's** relationship with counsel was irrelevant to the choice of sanctions imposed under the **securities** laws. Be that as it may, nothing that we say should be taken to cabin the broad discretion that agencies such as the SEC enjoy in determining what evidence is germane to the determination of the "public interest."

[13] For example, at oral argument, counsel for the **Commission** chose not to rely merely upon salutary principles of broad agency discretion. To the contrary, counsel stated that in typical cases involving larger, more established firms, such firms ordinarily took prompt, remedial action so as to remove offending officials or employees from the firm. That sort of admirable internal housecleaning, counsel suggested, is a far cry from this case, where, as we previously indicated, various key officials, not the least of whom is Mr. **Blinder** himself, continue to be involved in the operation of the firm.

Needless to say, we do not pass judgment on this contention, or other possible explanations for the sanction imposed here. It is obviously too late in the day to accept the *post hoc* explanations of counsel, especially where, as here, the **Commission** was content to rely on mere boilerplate as to the undoubted breadth of its discretion. *See* Opinion of the **Commission** at 16 n. 36, J.A. at 551.

[14] It will be apparent to the discerning reader that we have not treated heretofore **Blinder**, **Robinson's** contention that the SEC ran afoul of the specific terms of section 15(b)(4) of the 1934 Act, 15 U.S.C. § 78*o*(b)(4), in imposing on **Blinder**, **Robinson** a suspension for a period of longer than one year.

The point need not long detain us. Section 15(b)(4) of the **Securities Exchange** Act, 15 U.S.C. § 78*o*(b)(4), authorizes the SEC to "censure, place limitations on the activities, functions or operations of, suspend for a period not exceeding twelve months, or revoke the registration of any broker or dealer." **Blinder**, **Robinson** argues that it is "clear ... on the face of the statute" that this list of sanctions is in "ascending order of severity," Brief for **Blinder**, **Robinson** at 21 & n. 50, so that no "limitations" placed on a broker-dealer's activities may exceed twelve months. In support of a one-year maximum, **Blinder**, **Robinson** urges that the order of sanctions was changed in a late draft of the 1934 Act, moving the "place limitations" sanction up from the end of the list to its current position. *Id.*

We disagree. The statute itself indicates that Congress full well knows how to express a time restriction: the **Commission**, when it suspends the registration of a broker-dealer, may not do so for a "period exceeding twelve months." An analogous section of the 1934 Act, 15 U.S.C. § 78s(h)(1), which provides for disciplinary action against industry self-regulatory organizations, contains virtually the same sanctions as section 15(b)(4) in different order: twelve-month suspension, revocation, censure, imposition of limitations. We also observe that the SEC has consistently interpreted section 15(b)(4) to allow limitations of more than one year's duration. *See, e.g.,* Bruce Zimmerman, 46 S.E.C. 509, 513 (1976) (reversing imposition of indefinite limitations on nonstatutory grounds); Joseph H. Gasperini, 32 S.E.C. Dkt. 1842, 1844-45 (1985) (indefinite limitations).

[1] This is the sole force of the SEC's remark quoted in the court's opinion:

Blinder, **Robinson** is correct that the district court's judgment is not preclusive as to the issue of what sanctions are required in the public interest.

Court's opinion at 1110, quoting SEC Brief at 28 n. 38.

[2] The Colorado district court specifically found as fact, after evaluating conflicting evidence, that each counsel had advised **Blinder**, **Robinson** it was required by law to sticker the American Leisure prospectus so as to inform investors **Blinder**, **Robinson** was itself purchasing the **securities** it was underwriting. *See* 542 F.Supp. at 472. My colleagues' hypotheticals therefore strike me as inapposite. *See* court's opinion at 1110 n. 10. This was not an instance of counsel advising a client that certain conduct was permissible but dicey; it was a situation in which counsel advised **Blinder**, **Robinson** that stickering was *required, i.e.,* that not stickering the prospectus was *im* permissible. **Blinder**, **Robinson** did not reject advice that stickering was the better course of conduct; it rejected advice that stickering was the only permissible course of conduct. In that respect, the "precise nature of [each counsel's] advice," court's opinion at 1110, has already been litigated and determined; issue preclusive

effect is therefore warranted.

[3] It should be recalled that petitioners' "fruitless efforts" before the ALJ were, according to petitioners' own description, to introduce evidence concerning Meyer **Blinder's** "reliance on counsel." *See* court's opinion at 1102 (quoting from Brief for Petitioner **Blinder**, **Robinson** & **Co**. at 7-8). I therefore underscore the court's definitive ruling that the issue whether there was reliance on counsel "has been conclusively decided against [Meyer **Blinder**]." *See* court's opinion at 1109.

836 F.2d 596 (1987)

Charles E. WAGNER, Appellant,

v.

Reese H. TAYLOR, Jr., Chairman, Interstate Commerce Commission.

No. 84-5865.

United States Court of Appeals, District of Columbia Circuit.

December 24, 1987.

597 *597 Charles E. **Wagner**, pro se.

Joseph E. diGenova, U.S. Atty., and Royce C. Lamberth, R. Craig Lawrence and Patricia J. Kenney, Asst. U.S. Attys., were on the brief, for appellee.

Before WALD, Chief Judge, ROBINSON and EDWARDS, Circuit Judges.

Opinion for the Court filed by Circuit Judge ROBINSON.

SPOTTSWOOD W. ROBINSON, III, Circuit Judge:

This is Charles E. **Wagner's** third appeal in his ongoing controversy with his employer, the Interstate Commerce Commission (ICC). The nature of the dispute is fully detailed in the two other appeals which we decide today.[1] **Wagner's** earliest appeal is from an adverse judgment in ***Wagner*** *I,* in which he sought an injunction restraining ICC from retaliating against him while he pressed complaints of employment discrimination through administrative and judicial channels.[2] The second appeal emanates from ***Wagner*** *II,* a suit following the conclusion of administrative proceedings, in which the District Court denied a preliminary injunction against alleged discriminatory acts by ICC and refused to certify the class **Wagner** wishes to represent.[3]

The case at bar, ***Wagner*** *III,* was initiated as a bid for a declaratory order and an injunction addressing the same acts of reprisal that were alleged in ***Wagner*** *I.* The essential difference between the two cases is that ***Wagner*** *I* seeks injunctive relief against reprisals pending administrative investigation and judicial review of the original discrimination claims, whereas ***Wagner*** *III* features the retaliatory acts averred in ***Wagner*** *I* as the basis for a separate discrimination charge and seeks a permanent injunction against their repetition.[4]

In the instant case, ICC moved the District Court to consolidate ***Wagner*** *III* with ***Wagner*** *II* on the ground that the facts and legal issues in the two cases were "identical."[5] ICC pointed out that the complaint in ***Wagner*** *II* had alleged reprisals as part of the justification for injunctive relief.[6] Although **Wagner**, on the appeal of ***Wagner*** *II,* beseeched us to consider his reprisal claims as elements of that case,[7] he now argues before us that those claims supply *598 the foundation for a separate action.[8] We do not reach this contention, however, for any merit in **Wagner's** thesis that ***Wagner*** *III* should be permitted to continue on its own is overwhelmed by the manner in which the District Court was forced to dispose of the case.

598

Wagner, proceeding *pro se,* appeared at a hearing on ICC's motion to consolidate ***Wagner*** *III* with ***Wagner*** *II.* The District Court, attempting to sort out the three cases instituted by **Wagner**, asked him to explain the difference between ***Wagner*** *III* and ***Wagner*** *I.* The following colloquy ensued:

> MR. **WAGNER**: [**Wagner** III is] no different from the claim that was presented to Your Honor in 1981 [***Wagner*** *I*]. In fact, that is our position.
>
> THE COURT: Well, if that's so then it seems to me the complaint should just be stricken and we should wait for the Court of Appeals to act. They've heard argument, as I understand it,.... And I refused the kind of injunction you asked for and you were saying I erred, which you have every right to do, and the matter is up there being considered by the Court of Appeals, so if this case just duplicates that it's a non-case.
>
> MR. **WAGNER**: It does, Your Honor.
>
> THE COURT: You say it duplicates that?
>
> MR. **WAGNER**: In fact, Your Honor, it was intended to duplicate the other case.
>
> THE COURT: Then it seems to me it ought to be dismissed and I will dismiss it.
>
> * * * * * *
>
> MR. **WAGNER**: Well, Your Honor, if I might be heard. If I might offer the court an alternative suggestion.
>
> THE COURT: I'll hear you, Mr. **Wagner**[,].... but I thought it was clear after you said it was the same case, the case is on appeal, it would seem to me that's the end of the matter.
>
> MR. **WAGNER**: Your Honor, I agree with the court, almost one hundred percent except that, Your Honor, if you might, I would ask that the court certify this case to the Court of Appeals and let the Court of Appeals decide the issues. Inasmuch as the issues are the same the court can under —
>
> THE COURT: Well, you could appeal my order of dismissal and ask to have

it joined in the appeal up there.

MR. **WAGNER**: Yes, Your Honor, I could do that except that I guess — well, yes, Your Honor, I could do that.

THE COURT: I think I wouldn't certify it. I think that would be the way you'd have to go.

MR. **WAGNER**: All right. Fine. Thank you.[9]

On the same day, an order issued reciting that at the hearing **Wagner** had "represented that the instant action raises claims identical to [***Wagner*** *I*], which has been argued in the Court of Appeals ... and awaits decision there," and declaring that "[u]nder these circumstances, the pending motion in this matter is mooted and the complaint must be and hereby is dismissed."[10]

We perceive no basis for upsetting the District Court's disposition. If the claims in ***Wagner*** *I* and ***Wagner*** *III* were the same, as **Wagner** alleged, the court's judgment in ***Wagner*** *I* clearly barred relitigation of any such claim in ***Wagner*** *III*,[11] even though
599 **Wagner's** appeal from that judgment was still pending.[12] And even if *599 the claims in the two cases truly differed,[13] the result would not change one whit. It has long been settled that on appeal a litigant cannot avail himself of an error that he induced the court under review to commit.[14] **Wagner** insisted in the District Court that ***Wagner*** *III* merely duplicated ***Wagner*** *I*,[15] and the court, accepting that as its dispositional premise, ordered the dismissal of which **Wagner** now complains. A starker instance of invited error, if indeed any error was committed, could hardly be imagined.

The order appealed from is accordingly

Affirmed.[16]

[1] ***Wagner*** *v.* ***Taylor*** *(****Wagner*** *I),* 836 F.2d 566 (D.C.Cir.1987); ***Wagner*** *v.* ***Taylor*** *(****Wagner*** *II),* 836 F.2d 578 (D.C.Cir.1987).

[2] ***Wagner*** *v.* ***Taylor*** *(****Wagner*** *I),* Civ. No. 81-2695 (D.D.C. Dec. 23, 1981).

[3] ***Wagner*** *v.* ***Taylor*** *(****Wagner*** *II),* Civ. No. 82-0444 (D.D.C. Nov. 8, 1983).

[4] Verified Complaint for Declaratory Order and Permanent Injunction ¶¶ 50, 51, ***Wagner*** *v.* ***Taylor*** *(****Wagner*** *III),* Civ. No. 84-1509 (D.D.C.) (filed May 14, 1984), Appendix for Appellant (A.App.) 10-11.

[5] Motion to Consolidate, ***Wagner*** *v.* ***Taylor*** *(****Wagner*** *III),* Civ. No. 84-1509 (D.D.C.) (filed Aug. 16, 1984), Appendix B for Appellee (Ae.App.) (B) 19.

[6] See Class Action Complaint for Declaratory and Injunctive Relief ¶ 26, ***Wagner*** *v.* ***Taylor*** *(****Wagner*** *II),* Civ. No. 82-0444 (D.D.C.) (filed Feb. 17, 1982):

In addition, commencing on or about October 1, 1981, and continuing thereafter up to and including the date of this Complaint, defendant has engaged in adverse disparate treatment of named plaintiff soley [*sic*] as reprisal for prosecuting this class action complaint.

See also Reply to Defendant's Response to Motion to Certify the Class Action at 5, 11-12, ***Wagner*** *v.* ***Taylor*** *(****Wagner*** *II),* Civ. No. 82-0444 (D.D.C.) (filed Aug. 9, 1982); Plaintiff's Reply to Defendant's Opposition to

Supplemental Motion for Class Certification at 13-14, ***Wagner*** *v.* ***Taylor*** *(****Wagner*** *II),* Civ. No. 82-0444 (D.D.C.) (filed Apr. 4, 1983).

[7] See Brief for Appellant at 21-22, 35-38, ***Wagner*** *v.* ***Taylor*** *(****Wagner*** *II),* 836 F.2d 578 (D.C.Cir.1987); Reply Brief for Appellant at 15, ***Wagner*** *v.* ***Taylor*** *(****Wagner*** *II),* 836 F.2d 578 (D.C.Cir.1987).

[8] Brief for Appellant at 20-24.

[9] Transcript of Hearing, Nov. 29, 1984, at 14-16, ***Wagner*** *v.* ***Taylor*** *(****Wagner*** *III),* Civ. No. 84-1509 (D.D.C.), Ae.App. (B) 16-18.

[10] ***Wagner*** *v.* ***Taylor*** *(****Wagner*** *III),* Civ. No. 84-1509 (D.D.C. Nov. 29, 1984) (order), Ae.App. (B) 2.

[11] E.g., *Allen v. McCurry,* 449 U.S. 90, 94, 101 S.Ct. 411, 414, 66 L.Ed.2d 308, 313 (1980); *Commissioner v. Sunnen,* 333 U.S. 591, 597, 68 S.Ct. 715, 719, 92 L.Ed. 898, 905-906 (1948).

[12] *Nixon v. Richey,* 168 U.S.App.D.C. 172, 180 n. 75, 513 F.2d 430, 438 n. 75 (1975); *Kurek v. Pleasure Driveway & Park Dist.,* 557 F.2d 580, 595 (7th Cir.1977), *cert. denied,* 439 U.S. 1090, 99 S.Ct. 873, 59 L.Ed.2d 57 (1979); *SSIH Equip. S.A. v. United States Int'l Trade Comm'n,* 718 F.2d 365, 370 (Fed.Cir.1983).

[13] We express no view in this regard.

[14] See, e.g., *Orenstein v. United States,* 191 F.2d 184, 193 (1st Cir.1951); *Overhead Door Corp. v. Newcourt, Inc.,* 611 F.2d 989, 990 (5th Cir.1980); *All Am. Life & Cas. Co. v. Oceanic Trade Alliance Counsel Int'l, Inc.,* 756 F.2d 474, 479-480 (6th Cir.), *cert. denied,* 474 U.S. 819, 106 S.Ct. 67, 88 L.Ed.2d 55 (1985); *DeLand v. Old Republic Life Ins. Co.,* 758 F.2d 1331, 1336-1337 (9th Cir.1985).

[15] **Wagner** also characterized the present case as "identical" to ***Wagner*** *I* in his Response to Notice of Related Case, at 1, 2, ***Wagner*** *v.* ***Taylor*** *(****Wagner*** *III),* Civ. No. 84-1509 (D.D.C.) (filed Aug. 27, 1984), Record 14.

[16] This disposition, of course, moots the request that we consolidate the appeals of ***Wagner*** *I* and ***Wagner*** *III.* See Motion to Consolidate, ***Wagner*** *v.* ***Taylor*** *(****Wagner*** *III),* No. 84-5865 (D.C.Cir.) (filed Feb. 26, 1985). It also moots ICC's motion for summary affirmance. See Motion for Summary Affirmance, ***Wagner*** *v.* ***Taylor*** *(****Wagner*** *III)* No. 84-5865 (D.C.Cir.) (filed Apr. 29, 1985).

557 F.2d 877 (1977)

TAUNTON GARDENS COMPANY, Plaintiffs, Appellants,

v.

Carla HILLS et al., Defendants, Appellees.

No. 76-1558.

United States Court of Appeals, First Circuit.

Argued March 2, 1977.
Decided May 31, 1977.

Edward T. Dangel, III, Boston, Mass., with whom Dangel & Smith, P.C., Boston, Mass., was on brief, for appellant.

Richard D. Glovsky, Asst. U.S. Atty., Boston, Mass., with whom James N. Gabriel, U.S. Atty., Boston, Mass., was on brief, for appellees.

878 *878 Before COFFIN, Chief Judge, and MOORE[*] and CAMPBELL, Circuit Judges.

COFFIN, Chief Judge.

This is an appeal from the district court's order staying further proceedings pending "entry of a final judgment" in *Underwood v. **Hills***, 414 F.Supp. 526 (D.D.C. 1976), and denying a preliminary injunction.

As to the denial of a preliminary injunction, we see no abuse of discretion in the court's conclusion that injunctive relief would be "inconsistent" with its decision to stay. It was entirely proper for the court to defer, as several other district courts have done, to the message implicit in the Supreme Court's stay of judgment in *Underwood:* i.e., that court-ordered payment of operating subsidies should be halted until the Secretary's duty under the law is clarified. Plaintiff argues that it is unfair to deny it relief while other individual claimants around the country are drawing on the limited reserve fund under preliminary or permanent court orders. HUD counters that it would be unfair to allow plaintiff to draw on this fund while the national class in *Underwood* must wait. We would be surprised if HUD's counsel were not moving to vacate the injunctions now in effect, *see, e.g., Dussault v. **Hills***, Civ. No. 76-147, Order of January 3, 1977 (D.N.H.), but in any event, the balancing of the equities was for the district court. *See Automatic Radio Mfg. Corp. v. Ford Motor **Co**.*, 390 F.2d 113 (1st Cir. 1968).

While a stay of the type presented here is generally not an appealable final order, *see* 9 Moore's Federal Practice ¶ 110.20[4.-2] at 250, a limited review of the stay order is appropriate to determine whether it so exceeds the bounds of discretion that relief by mandamus may be justified, *see* *Dellinger v. Mitchell,* 143 U.S.App.D.C. 60, 442 F.2d 782, 789 (1971), and whether the preliminary injunction, premised on the stay, is infected with a clear error of law. *Automatic Radio Mfg. Corp. v. Ford Motor Co., supra,* 390 F.2d at 115.

In its memorandum the district court expressed the view that "final judgment on the merits when entered in *Underwood* will be *res judicata* as to plaintiffs herein." However it was not persuaded by the defendant's argument that the case should therefore be dismissed without prejudice and instead ruled that "the interest of justice would be served in a more appropriate fashion" by staying the proceedings pending decision of the appeal in *Underwood.*[1]

Whether *Underwood* is res judicata of the present case by virtue of the landlord's "concurrent relationship to the same right" asserted by its tenants, *see* 1B Moore's Federal Practice ¶ 0.411[1] at 1255, is, we think, a difficult question. *Underwood* did not certify landlords as part of the class, but it is well settled that the court that certifies a class action "cannot predetermine the *res judicata* effect of the judgment", which can "be tested only in a subsequent action". Committee Note of 1966 to Rule 23 as Revised in 1966, 3B Moore's Federal Practice ¶ 23.01[11.-3] at 23.34. This rule has apparently only been applied, however, to narrow the scope of a class judgment if, e.g., notice or representation of class interests was inadequate. *See* Note, *Collateral Attack on the Binding Effect of Class Action Judgments,* 87 Harv.L.Rev. 589 (1974). The present case poses the novel question whether the concurrent interest theory of res judicata should operate to extend the effect of a Rule 23(b)(2) class judgment beyond the bounds of the certification order.

We need not, however, pass on this interesting question, since we are persuaded that the district court's order was based not on the conclusion that *Underwood* was res judicata of the present action, but rather on 879 its inherent discretionary power to control its own docket. *See* *Landis v. North American Co.,* 299 U.S. 248, 57 S.Ct. 163, 81 L.Ed. 153 (1936). While the court expressed its view that *Underwood* "will be" res judicata as to the plaintiffs in this case,[2] its decision to stay rather than dismiss, and its determination that "the interest of justice" would best be served by a stay, indicate that it was exercising its discretionary power to stay.

Landis established that, as a question of power, the district court had discretion to stay this suit pending resolution of another which, "even if it should not dispose of all the questions involved, would certainly narrow the issues in the pending cas[e] and assist in the determination of the questions of law involved." 299 U.S. at 253-54, 57 S.Ct. at 165. While there is a heavy burden on the party requesting a stay to justify requiring "a litigant in one cause . . . to stand aside while a litigant in another settles the rule of law that will define the rights of both", there is also considerable discretion in the district court to weigh the competing interests. *Id.* at 255, 57 S.Ct. at 166. We think it was within the court's discretion to conclude that the government had carried its burden in this case.

Like *Landis* this case presents issues of "public moment". It involves the administration of a major federal program and the disbursement of a significant amount of federal money. Finally, HUD has been called upon to litigate the same issue in more than ten district courts, and has suffered injunctions mandating payment in most of the cases, yet the one order requiring implementation of the entire program has been stayed by the Supreme Court. Under these circumstances it was within the district court's discretion to find that the public interest, the court's interest in efficient procedures, and "the interest of justice" would best be served by allowing HUD a reasonable opportunity to resolve its obligations in the national class action. We also think that the duration of the stay is adequately circumscribed by reference to the determination of the appeal presently pending. *See* n. 1, *supra. Compare* *Landis, supra,* 299 U.S. at 257, 57 S.Ct. 163; *Dellinger v. Mitchell, supra,* 143 U.S.App.D.C. 60, 442 F.2d at 786-87.

Affirmed.

[*] Of the Second Circuit, sitting by designation.

[1] The district court's memorandum states that an order will be entered staying the suit "until after determination of the appeal pending before the Court of Appeals for the District of Columbia" in *Underwood.* While the order itself does not limit the stay to the pendency of the appeal, we assume the memorandum reflects the district court's meaning.

[2] The court's use of the future tense puzzles us. At the time of its order a final judgment had been entered by the district court in *Underwood,* and it is well settled that in the federal courts the pendency of an appeal does not destroy the res judicata effect of a judgment even if it has been stayed pending appeal. 1B Moore's Federal Practice ¶ 0.416[3] at 2252-53.

659 F.Supp. 813 (1987)

Jannette S. LEE, formerly known as Jannette S. Williamson, Individually and On Behalf of All Other Similarly Situated Persons, Plaintiff,

v.

CRITERION INSURANCE COMPANY, Defendant.

No. CV486-314.

United States District Court, S.D. Georgia, Savannah Division.

May 5, 1987.

814 *814 W. Douglas Adams, Brunswick, Ga., for plaintiff.

John E. Bumgartner, Brunswick, Ga., for defendant.

ORDER

EDENFIELD, District Judge.

The case at bar, the third in a series of lawsuits brought by plaintiff Jannette S. **Lee** against defendant **Criterion**, involves the alleged breach of an **insurance** contract. Defendant, contending that the action is barred on the ground of *res judicata,* has filed a motion for summary judgment; defendant also has requested that sanctions be imposed pursuant to *Fed.R. Civ.P.* 11. For reasons only slightly different from those advanced by defendant, the Court finds the motion for summary judgment to be meritorious and the request for sanctions well-founded.

I. FACTS

A. *Prior Litigation*

On September 5, 1982, plaintiff was involved in an automobile accident, as a result of which she allegedly sustained disabling injuries and incurred medical expenses. Plaintiff was insured by the defendant **insurance** company. Because defendant allegedly failed to pay in a timely fashion certain medical bills submitted to it by plaintiff during the early months of 1983, plaintiff brought suit, on March 16, 1983, in the Superior Court of Glynn County, Georgia. In her complaint, plaintiff contended that defendant's acts violated §

33-34-6 of the Official Code of Georgia, which mandates payment of no-fault benefits "within 30 days after the insurer receives reasonable proof of the fact and the amount of loss sustained...." The same code section provides that an insured may bring suit against its **insurance** carrier for violation of the statute. In any such action, if it is shown that an **insurance** company has failed to pay benefits within thirty days after proof of loss, and if the carrier does not raise or cannot prove the affirmative defense of good faith, the defendant company may be held liable to the insured for certain specified penalties and attorney's fees. O.C.G.A. § 33-34-6 provides additionally that where benefits are not paid within *sixty* days after proof of loss, **insurance** companies may be held liable for punitive damages. Pursuant to the statute, plaintiff sought to recover penalties, attorney's fees and punitive damages from the defendant.

815 *815 Just prior to trial, the state court ruled on an objection that had been lodged by the defendant. According to the defendant, the Georgia Court of Appeals decision in *Falagian v. Leader Nat'l* ***Insurance Co***., 167 Ga.App. 800, 307 S.E.2d 698 (1983), mandated that the scope of the litigation should be strictly limited, such that the only determination to be made by the jury would be whether defendant had failed to pay claims with respect to which proof of loss had been provided to the defendant more than thirty days prior to the filing of the action. The court ruled in defendant's favor, and limited the scope of the proceedings accordingly. As a result of the court's ruling, plaintiff was precluded from litigating the question whether defendant had wrongfully delayed in paying benefits the proof of loss as to which was provided to defendant after the cut-off date thirty days prior to trial. The ruling also precluded resolution of questions concerning plaintiff's alleged disability.

The jury found that plaintiff was entitled to additional benefits of $927.36, for payment of a hospital bill that had been submitted to the defendant more than thirty days prior to trial. The jury found, however, that defendant had acted in good faith, and that therefore no penalties or attorney's fees should be awarded. The Superior Court entered judgment on the jury verdict on November 19, 1985.

On October 28, 1985, plaintiff filed suit, in connection with the same September 1982 automobile accident, in the Brunswick Division of the United States District Court for the Southern District of Georgia. The case was assigned to Judge Alaimo.

Plaintiff alleged in her federal-court complaint that the accident had rendered her totally disabled. Plaintiff further contended that, while defendant recently had made certain payments to her, it had refused to pay additional benefits for the stated reason its disbursements to date had actually exceeded the limit of plaintiff's coverage. Defendant claimed the coverage limit to be $5,000; plaintiff contended that she was in fact entitled to coverage up to $50,000, by virtue of alleged deficiencies in the application for the **insurance** policy. In addition to the disability benefits allegedly due her, plaintiff sought, as she had in state court, penalties, attorney's fees, and punitive damages under O.C.G.A. § 33-34-6 on the basis of defendant's alleged bad faith refusal to tender timely payments.

In contrast to her state-court complaint, plaintiff's federal-court complaint included class action allegations, and did not include a jury trial request. Defendant moved to dismiss

the class action allegations; that motion was granted by Judge Alaimo on December 26, 1985, on the ground that the requirements of *Fed.R.Civ.P.* 23 had not been met. Apparently, the omission of a jury request from plaintiff's complaint was not intentional, for plaintiff made an out-of-time motion for jury trial. That motion was denied on January 21, 1986. Ultimately, however, the Court impanelled an advisory jury pursuant to *Fed.R.Civ.P.* 39. The case went to trial before Judge Alaimo and the advisory jury in July, 1986.

It should be noted that during the trial before the Brunswick Division Court plaintiff testified, in response to a question from defense counsel, that she had been rendered totally disabled as a result of the September 1982 automobile accident from March 23, 1983 (the date on which plaintiff quit her job as a toll booth attendant) up to and through the date of trial. Plaintiff's proposed findings of fact, however, indicate that plaintiff sought to establish only that she had been disabled from March 23, 1983 "through thirty days prior to the filing of [the Brunswick Division] action." This limitation was included in plaintiff's proposed findings in accordance with the holding of the *Falagian* case, *see supra.*

On July 17, 1986 the advisory jury found in favor of the plaintiff and proposed an award of $5,500 in additional benefits, and a total of $21,500 in penalties, attorney's fees, and punitive damages.

Shortly thereafter, on August 6, 1986, plaintiff filed suit in the Superior Court of Liberty County, Georgia. Plaintiff once again alleged that she had been rendered totally disabled
816 as a result of the September 1982 automobile accident. In her complaint, *816 however, plaintiff stated the period of her disability as running from October 28, 1985 (the date of filing of the Brunswick Division federal-court complaint) through the date of filing in the Liberty County Superior Court. Plaintiff's complaint included class action allegations.

On September 3, 1986, Judge Alaimo entered his findings of fact and conclusions of law in the Brunswick Division case. Notwithstanding that Judge Alaimo agreed that plaintiff's coverage limit was $50,000, he otherwise rejected the findings of the advisory jury and found, *inter alia:* that plaintiff's testimony was not credible; that the injuries, if any, sustained by plaintiff in the September 1982 automobile accident were relatively minor; that plaintiff had quit her job as a toll booth attendant in March, 1983 for reasons unrelated to any disabling physical condition; that plaintiff had been paid all sums due her under the **insurance** policy issued by the defendant, and; that plaintiff had fully and permanently recovered from any injury she might have suffered as a result of the mentioned accident.

On the day following the entrance of Judge Alaimo's findings, September 4, 1986, defendant removed the instant action from the Liberty County Superior Court to the Savannah Division of this Court. On September 11, 1986 defendant moved for summary judgment on the ground of *res judicata.*

B. *CV 486-314*

Upon removal, this case was initially assigned to Judge Alaimo; it was reassigned to this Court, however, on October 20, 1986, and came up on the calendar for mandatory status conference on March 20, 1987.

A review of the pleadings prior to the conference raised serious doubts in the Court's mind as to the merits of and motives behind the case *sub judice.* Accordingly, at the status conference, the Court warned plaintiff's counsel in no uncertain terms that defendant's motion for summary judgment appeared meritorious, and that plaintiff might well be facing the imposition of sanctions under *Fed.R.Civ.P.* 11. However, because the facts surrounding the two previous lawsuits brought in connection with the September 1982 automobile accident appeared complex, the Court invited the parties to submit a detailed chronology of the litigation, and briefs dealing further with the merits of the case (as well as with the appropriateness of Rule 11 sanctions). The parties accepted the invitation.

Defendant's position, in essence, is as follows: 1) plaintiff's testimony at trial in the Brunswick Division conclusively establishes that the matters litigated in that prior action encompassed plaintiff's claim of disability *up to and including the date of trial* (July 17, 1986), and therefore the instant action (in which benefits are claimed for a period running from October 28, 1985 forward) is barred by *res judicata* principles regardless of the date suit was filed; 2) even assuming that plaintiff had some arguable justification for bringing this action on August 6, 1986 (after the advisory jury had "found" in favor of plaintiff in the Brunswick Division), plaintiff should not have persisted in pressing her claim after September 3, 1986 (the date on which Judge Alaimo ruled adversely to plaintiff), because Judge Alaimo's ultimate findings (that plaintiff had suffered no disabling injury in the automobile accident, that she had been paid all sums due her under the **insurance** policy, and that she had fully and permanently recovered as of the date of trial in July, 1986 from any injuries she might have sustained) have *res judicata* effect, barring all subsequent claims arising out of the incident in question, and; 3) Judge Alaimo's January, 1986 dismissal of plaintiff's class action allegations for failure to meet the prerequisites of *Fed.R.Civ.P.* 23 similarly has *res judicata* effect, and therefore plaintiff was barred from including class action allegations in a subsequent complaint. Defendant seeks Rule 11 sanctions in connection with all of the enumerated allegations.

Plaintiff argues, essentially, that: 1) the instant action is not barred by principles of *res judicata* because it involves a claim 817 *817 separate from that litigated in the Brunswick case, i.e., because the period of disability alleged in each action is different (in this regard, plaintiff emphasizes that she has been forced to bring repetitive actions by virtue of defendant's insistence that the *Falagian* case bars consideration by a court, in an action brought under O.C.G.A. § 33-34-6, of claims relating to benefits the proof of loss as to which is submitted after a date thirty days prior to the filing of an action); 2) Judge Alaimo's findings (that plaintiff had been paid all sums due her under the **insurance** policy and had fully and completely recovered from any injuries she might have received in the September 1982 automobile accident) were unnecessary and irrelevant to the disposition of the matters before him, and therefore have no preclusive effect with respect to a subsequent claim for benefits arising after the filing of the Brunswick action (in this connection, plaintiff also points out as significant the fact that Judge Alaimo's

ruling is on appeal to the Eleventh Circuit Court of Appeals), and; 3) the Georgia class action statute, O.C.G.A. § 9-11-23, is different from and less stringent than *Fed. R.Civ.P.* 23 and, because the instant action was initiated in state court, plaintiff was not barred from including class action allegations in her complaint by Judge Alaimo's earlier denial of class certification in the Brunswick Division federal action.

Since the date of the status conference in March, 1987, the parties have exchanged several rounds of briefs and responses, and have been afforded an adequate opportunity to present their respective arguments in detail. It should be noted that plaintiff, somewhat reluctantly, has moved to amend her complaint to delete the class action allegations included therein; plaintiff's brief in support of her motion to amend indicates that the decision to abandon the class action allegations was prompted by signals transmitted by the Court with respect to the possible imposition of sanctions. This Order moots plaintiff's motion. All remaining matters currently before the Court are ripe for resolution.

II. ANALYSIS

A. *Summary Judgment*

Setting to one side for the time being the matter of sanctions, the Court must first address defendant's motion for summary judgment. The dispositive question is this: What is the preclusive effect of Judge Alaimo's findings — that defendant has paid plaintiff all sums due her under the subject **insurance** policy, and that plaintiff suffered no permanently disabling injury as a result of (and has fully and permanently recovered from) her September 1982 automobile accident?

Defendant, as noted, contends that the matter is simply resolved by reference to *res judicata* (claim preclusion) principles.[1] Plaintiff, on the other hand, maintaining that the cause of action here is different from that pursued in the Brunswick Division, refers to the rules governing collateral estoppel (issue preclusion), for the proposition that Judge Alaimo's ruling was unnecessary and irrelevant and therefore should be accorded no preclusive effect.[2]

Defendant stridently maintains that plaintiff's affirmative response to defense counsel's question as to whether plaintiff was claiming disability up to and including the date of trial in the Brunswick Division case conclusively establishes that the claim brought before
818 Judge Alaimo is the same as that sought to be litigated in the instant *818 action. The Court cannot agree. As plaintiff has pointed out, defendant persistently sought to limit the scope of the litigation between the parties to resolution of claims the proof of loss as to which was submitted at least thirty days prior to the filing of the action. *See* *Falagian, supra,* 167 Ga.App. at 802, 307 S.E.2d 698. Plaintiff accordingly sought to litigate within the parameters imposed on her by defendant, as is indicated by plaintiff's proposed findings of fact and conclusions of law submitted in the Brunswick Division case, wherein plaintiff sought only those benefits arising out of disabilities suffered up to a date thirty days prior to the filing of that lawsuit. Plaintiff has also pointed out that a separate cause

of action can, and must, be stated for the recovery of disability benefits "coming due subsequently to any that could have been sued for" in the initial action. *Hartford Accident & Indemnity Co. v. Grant,* 116 Ga.App. 661, 158 S.E.2d 703 (1967); *Falagian, supra*. Had plaintiff prevailed in the Brunswick Division action in the manner that she anticipated, repetitive lawsuits on different "causes of action" would have been allowed. Thus, without assessing the merits of the case *sub judice,* the Court finds, first, that defense counsel's elicitation of an arguably inconsistent statement from plaintiff cannot support a finding that the *claim* litigated in the Brunswick action was plaintiff's disability through the date of trial and, second, that, the claim brought by plaintiff in this case being at least theoretically different from that litigated in the prior action, collateral estoppel principles must guide the Court in resolving the matters at hand. Whether this determination as to the relevant rules makes any different whatsoever with respect to the outcome of the case at bar, however, is a separate matter.

Collateral estoppel applies where the issue litigated in a subsequent proceeding is identical to that involved in the prior action, the issue was actually litigated, and the determination of the issue was "necessary" in the prior action. *Cotton States Mutual Insurance Co. v. Anderson, supra,* note 2, 749 F.2d 663. Analyzing the facts of the instant case in light of these principles, it becomes apparent that plaintiff's arguments against the preclusive effect of the prior judgment are without merit.

Contrary to the plaintiff's assertions, the dispositive "issue" has nothing to do with whether plaintiff was disabled from date A until date B or from date A through date C; such questions relate to plaintiff's ultimate *claims.* Rather, the crucial issue is *whether plaintiff suffered a disabling injury,* as a result of the September 1983 automobile accident, that would bind defendant to pay her benefits. A finding that a plaintiff in a case such as this sustained no injuries whatsoever in an accident as to which a defendant carrier provided coverage clearly would preclude relitigation of the question of disability. In other words, while it may be that repetitive actions are allowed or required under O.C.G.A. § 33-34-6 where benefits come due after initiation of a prior lawsuit, no benefits *can* come due after the filing of the first lawsuit, and no subsequent suit is permitted, if it is determined in the prior action that the plaintiff simply was not injured as a result of the covered accident; collateral estoppel would apply with full force.[3]

Looking again to the prerequisites for application of collateral estoppel, it is clear, first, that the basic issue, already addressed in the Brunswick Division, as to whether plaintiff was injured in the accident in question such that she would be entitled to *any* disability
819 benefits is necessarily "identical" to the issue of disability *819 that would have to be litigated in the instant case; a finding of a disabling injury is obviously a prerequisite to recovery of disability benefits. Second, the issue was most definitely "litigated" in the prior action, as the record indicates that a substantial quantity of medical evidence was introduced in the prior action bearing directly on this issue (almost all of which reflected that plaintiff had a medical history of back problems not related to the automobile accident in question, and that she was not "disabled" in any event). Thus, the first two of the three collateral estoppel "prongs" are satisfied.

The remaining question is whether the Brunswick Division Court's findings on this issue

were "necessary." Clearly, in order for the Brunswick Division Court to find that defendant was under no obligation to pay disability benefits to the plaintiff for the period under consideration in that case (March 23, 1983 through thirty days prior to the filing of the Brunswick Division action), it was necessary for the Court to find, as it did, that plaintiff was not disabled during that period. Plaintiff argues, however, that it was unnecessary for the Court to rule, as it also did, that plaintiff was not disabled by the accident at any time after the period sued for and that plaintiff had fully and permanently recovered from any injuries she might have suffered.

In determining whether the Brunswick Court's findings were "necessary," the "appropriate question ... is whether the issue was actually recognized by the parties as important and by the trier as necessary to the first judgment." Restatement (Second) of Judgments § 27, comment j & Illustrations 17 & 18. *See generally* *In re Westgate-California Corp.*, 642 F.2d 1174, 1177 (9th Cir.1981); *Bethesda Ford, Inc. v. Ford Motor Co.*, 572 F.Supp. 623, 632 (D.Md. 1983).[4] Clearly, it was important to plaintiff to prove that she was suffering a disability, and that the disability was related to the automobile accident. It was equally important to the defendant to prove that plaintiff was not suffering from a disability, or that any disability was unrelated to the accident in question. The trier of fact viewed its finding, that plaintiff simply was suffering from *no* disability that would preclude her from working and no disability resulting from the car accident that would mandate the payment of any additional disability benefits, as necessary for resolution of the matter.

The Brunswick Division Court totally discredited plaintiff's testimony, found adversely to plaintiff, and laid the "issue" of disability arising out of the accident to rest once and for all. The issue was "necessarily" resolved, *see generally* *Parks v. Poindexter*, 723 F.2d 840, 842-43 (11th Cir. 1984), and collateral estoppel precluded its relitigation. Therefore, summary judgment in favor of the defendant in the case at bar is appropriate.

Lest it be thought that the excessive length of the foregoing discussion is reflective of the complexity of the issues involved, the Court notes that the above represents merely a step by step analysis of what is for all intents and purposes a matter of common sense. The Brunswick Division Court ruled that plaintiff was not disabled as a result of the accident with respect to which coverage was afforded. That ruling settled the matter, and subsequent actions were precluded; legal analysis merely bears out what the average first-year law student would expect.

Plaintiff places great emphasis on the fact that the Brunswick Division case is now on appeal. Apparently, plaintiff believes that this fact has some bearing on the preclusive effect of the prior judgment. Plaintiff has argued that, at the very least, the pendency of the appeal militates in favor of withholding judgment. However, "[t]he established rule in the federal courts is that a final judgment retains all of its *res judicata* [or collateral estoppel] consequences pending decision of the appeal...." 18 Wright, Miller & Cooper,
820 *820 *Federal Practice and Procedure* § 4433, p. 308; *see* *Hunt v. Liberty Lobby, Inc.*, 707 F.2d 1493 (D.C.Cir.1983); *Fidelity Standard Life Insurance Co. v. First Nat'l Bank & Trust Co.*, 510 F.2d 272, 273 (5th Cir.1975).

Plaintiff has indicated that the ground for appeal of the prior action is her contention that

she was denied the right to trial by jury. It is true that if the prior action is reversed, and if a new trial before a jury results in a judgment favorable to the plaintiff, the prior action will no longer have preclusive effect with respect to the issue here sought to be litigated. But until the described hypothetical events occur the prior judgment is binding. It is also true that under certain circumstances, a court may exercise its discretion to withhold judgment. However, there are no considerations present in the instant case that would incline the Court to do so. *Cf.* *Prager v. El Paso National Bank*, 417 F.2d 1111, 1112 (5th Cir.1969) (where statute of limitations might pose bar to relitigation of subsequent action, district court directed to hold case pending outcome of appeal in prior action).

Accordingly, defendant's motion for summary judgment is GRANTED. This ruling is without prejudice to plaintiff's right to bring another action based on the claim advanced in the case *sub judice* should the prior action be retried and resolved in plaintiff's favor.

B. *Sanctions*

Prior to delving into the matter of sanctions, it is appropriate briefly to review the elements of defendant's argument in favor of invoking *Fed.R.Civ.P.* 11. Defendant claims first that the instant action was barred *ab initio* on the ground of *res judicata,* and that therefore sanctions are appropriate with respect to plaintiff's decision to file suit in the first instance. Defendant claims, alternatively, that at the very least the failure of plaintiff's counsel to dismiss the action after the entrance of Judge Alaimo's findings in the Brunswick Division case warrants imposition of sanctions. Finally, defendant claims that sanctions should be imposed because of plaintiff's inclusion of class action allegations in her complaint. In this regard, plaintiff argues that relitigation of the class issue was barred by Judge Alaimo's finding that the prerequisites of *Fed.R.Civ.P.* 23(a) had not been met.

1. *Initiation of the Lawsuit*

The Court's discussion, *supra,* concerning the state of the law surrounding actions brought under O.C.G.A. § 33-34-6 renders unnecessary a lengthy discussion of the reasons why the initiation of this lawsuit does not *ipso facto* call for imposition of sanctions. Suffice it to say that the Court does believe that plaintiff sought to recover benefits in the Brunswick Division action only for a period up to and including thirty days prior to the initiation of that lawsuit, and that the Brunswick Division Court's rulings would not necessarily have precluded all subsequent litigation. Had plaintiff prevailed in that proceeding, she would have been within her rights in bringing the instant action.

On the other hand, plaintiff's counsel should have thought twice before "jumping the gun," as he did, by filing suit prior to finalization of judgment by Judge Alaimo; prudence would have dictated caution. However, taking into consideration that "[a] complaint initially filed in ... state court and removed by the defendant to ... federal court should not be subjected to scrutiny under Rule 11 because it was not governed by the Rule when filed and signed," *Kendrick v. Zanides*, 609 F.Supp. 1162, 1170 (N.D.Cal.1985), the Court reluctantly concludes that plaintiff's decision to proceed prior to entrance of Judge

Alaimo's final judgment, while unwise, does not warrant Rule 11 sanctions.

2. *Failure to Dismiss*

Plaintiff's counsel was under an obligation to abandon this suit after final judgment was rendered by the Brunswick Division Court. Even if it assumed, *arguendo,* that plaintiff's claim was "well grounded in law and fact" prior to Judge Alaimo's ruling, the action was both factually *821 and legally untenable after the date of that final judgment.

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In determining the appropriateness of imposing sanctions on plaintiff's counsel,[5] the Court does not look to the original complaint; as noted, the applicability of Rule 11 with respect to a complaint filed in state court is questionable. Rather, the Court assesses those pleadings filed by plaintiff's counsel in this Court after removal of the case from the Superior Court of Liberty County. These pleadings include plaintiff's brief in opposition to defendant's motion for summary judgment, filed on October 1, 1986.

The legal arguments advanced in support of plaintiff's claim have already been discussed in detail, and have been found to be without merit. Advancing arguments that are ultimately found to be lacking in merit does not, of course, necessarily warrant imposition of sanctions. The question to be addressed is whether plaintiff's counsel could have believed, after a reasonable inquiry, that the pleadings he filed were well grounded in both fact and law. The standard is an objective one. *Fed.R.Civ.P.* 11; *see generally* *Eastway Construction Corp. v. City of New York,* 762 F.2d 243, 253-54 (2d Cir.1985).

Plaintiff's counsel's pleadings fall far short of the mark. The Court finds that: 1) reasonable inquiry — and common sense — would have revealed that, after judgment was rendered by the Brunswick Division Court, there remained no legal basis on which this action could proceed, *see supra* § II.A. of this Order; and 2) reasonable inquiry would have revealed that the pendency of an appeal does nothing to lessen the preclusive effect of a prior federal judgment. *See, id.*

Counsel believes, obviously, that Judge Alaimo's findings are wrong. A party who has not prevailed in an action, however, always has the option to appeal the adverse ruling. In this case, that option has been exercised. And, unless and until the Brunswick Division Court's judgment is reversed, there can be no collateral attack in this Court on Judge Alaimo's ultimate finding of fact that plaintiff suffered no injury that would preclude her from working at any time after March 23, 1983.[6]

"Sanctions are especially appropriate in situations where the doctrines of *res judicata* and collateral estoppel plainly preclude relitigation of the suit." *McLaughlin v. Bradlee,* 602 F.Supp. 1412, 1417 (D.D.C.1985); *see also* *Robinson v. National Cash Register* ***Co***., 808 F.2d 1119, 1131 (5th Cir.1987). The federal courts can ill afford the time required to dispose of such frivolous suits, and parties naturally have a right to be free from vexatious litigation over matters that have been conclusively settled in prior litigation. *See* *Thiel v. First Federal Savings & Loan Ass'n,* 646 F.Supp. 592, 597 (N.D.Ind.1986); *Columbus v. United Pacific* ***Insurance Co***., 641 F.Supp. 707 (S.D.Miss.1986). In this connection, the appropriateness of sanctions in the case at bar

is not diminished by the fact that there may have been some basis in law and fact for initiation of the suit. "Counsel have a continuing obligation to reevaluate their position as the case develops." *Robinson, supra,* 808 F.2d at 1127.

> Upon discovering that a good faith basis no longer exists, it is incumbent upon the appropriate counsel and party to take necessary steps to ensure that the proceedings do not continue without a reasonable basis in law and
> 822 fact.... The actions that need to be taken when [it *822 appears that an action is no longer well grounded in law or fact] necessarily depend on the circumstances of each case.

Id., & n. 17. In the instant case, plaintiff would have been well-advised to move for voluntary dismissal of the action, pursuant to *Fed.R.Civ.P.* 41, pending appeal of the Brunswick Division judgment.

Counsel's decision to persist with this action, and the entirely baseless arguments he has advanced in several pleadings submitted in opposition to motions filed by the defendant, have convinced the Court that counsel has not satisfied the objective good faith standards of Rule 11. Even if the Court were to give counsel the benefit of the doubt, and were to assume that counsel simply failed to understand the very basic legal point of preclusion that bars this action, it must be borne in mind that "[a]n empty head but a pure heart is no defense." *Thornton v. Wahl,* 787 F.2d 1151 (7th Cir.1986). However, the Court does not question counsel's intelligence, and therefore does not give him the benefit of the doubt.

The Court deems the appropriate sanction under *Fed.R.Civ.P.* 11 to be payment of all reasonable attorney's fees incurred by the defendant after the filing, on October 1, 1986, of plaintiff's brief in opposition to defendant's motion for summary judgment. Defense counsel's affidavit indicates that 40.2 hours were spent by him in defending this case after the mentioned date. In addition, $447.72 in costs are properly attributable to defense of the action during the period under consideration.[7] Taking into account defense counsel's credentials and experience, and looking to prevailing fees charged by attorneys practicing in this jurisdiction, the Court finds $85.00 to be a reasonable hourly fee. Accordingly, plaintiff's counsel shall be ordered to pay to the defendant the sum of $3,854.72, representing all attorney's fees and costs incurred by defendant in connection with this litigation after October 1, 1986.

3. *Class Action Allegations*

As indicated, *supra,* the Court's ruling with respect to defendant's second argument renders moot the question whether sanctions should be imposed on plaintiff's counsel for his inclusion of class action allegations in plaintiff's complaint in this case. The Court takes this opportunity, however, to note that, in all likelihood, plaintiff was collaterally estopped from claiming the existence of a class by Judge Alaimo's determination that the prerequisites for class certification under Fed.R. Civ.P. 23(a) had not been met.

Plaintiff's counsel stresses that the instant suit was filed in state court, and that the

requirements of the Georgia class action statute, O.C.G.A. § 9-11-23, are less stringent than are those of *Fed.R.Civ.P.* 23. Thus, counsel reasons, the class action "issue" decided by Judge Alaimo was different from that advanced in plaintiff's complaint in this action.[8]

The Court does not believe that the apparent difference in phraseology between *Fed.R.Civ.P.* 23 and O.C.G.A. § 9-11-23 is reflective of any significant divergence in substance or purpose between the two statutes. *See* *Sta-Power Industries v. Avant*, 134 Ga.App. 952, 216 S.E.2d 897 (1975) ("[W]e look to federal cases to aid us" in determining whether a class action may proceed (under statutory predecessor of O.C.G.A. § 9-11-23)). Moreover, plaintiff's contentions that there are "no prerequisites" to the establishment of a class under Georgia law, and that the provisions of *823 Georgia statute are more flexible than those of the federal rule, are open to serious question. *See* *Ford Motor Credit Co. v. London*, 175 Ga.App. 33, 37-38, 332 S.E.2d 345 (1985).

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In any event, federal law governs the collateral estoppel effect of a prior federal court judgment. *Precision Air Parts, Inc. v. Avco Corp.*, 736 F.2d 1499, 1503 (11th Cir.1984). *Silcox v. United Trucking Service, Inc.*, 687 F.2d 848, 852 (6th Cir.1982); *Hardy v. Johns-Manville Sales Corp.*, 681 F.2d 334 (5th Cir.1982); *Johnson v. United States*, 576 F.2d 606, 613 (5th Cir.1978); 17 Wright, Miller & Cooper, *Federal Practice and Procedure* § 4226 p. 344 (1978).[9] As to the state of federal law in this area, notwithstanding that class certification is in a sense procedural in nature, "[t]he denial of class certification stands as an adjudication of one of the issues litigated." *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326, 336, 100 S.Ct. 1166, 1173, 63 L.Ed.2d 427 (1980). This statement of the Supreme Court, read with reference to the public policy against subjecting parties to repetitive litigation over an issue that has once been resolved by a court of competent jurisdiction, would seem to settle the matter. This Court believes that a party cannot avoid the preclusive effect of a denial of class certification rendered by a federal court in this jurisdiction by filing suit against the same party in Georgia state court and pointing to largely illusory differences between statutes that are designed for essentially identical purposes.

While the precise question here under consideration has not often been before the courts (quite possibly because this sort of "end-run" is not often attempted), it appears that, where litigation is between the same parties, state courts will give collateral estoppel effect to federal court denials of class certification, and that federal courts will do the same with respect to denials of certification rendered by state courts; semantic differences between state and federal statutes have not been considered. *See generally Fins v. Utilities & Industries Corp.,* Fed.Sec.L.Rep. (CCH) P91,533 (S.D.N.Y.1984) [Available on WESTLAW, DCT database]; *Bartlett v. Miller and Schroeder Municipals, Inc.*, 355 N.W.2d 435 (Minn.App.1984).

In light of the foregoing, it appears clear that, regardless of whether a favorable judgment in the prior Brunswick Division suit would have allowed plaintiff to proceed with an action in her own behalf, she was barred from alleging the existence of a class. Even if the case had remained in state court, it is most likely that plaintiff's class action

allegations would have been subject to dismissal on collateral estoppel grounds. The only effect, therefore, of the removal of the case to federal court, and of counsel's subsequent federal-court briefs in favor of the class action allegations, is to subject counsel's conduct to Rule 11 scrutiny. At any rate, because sanctions have been awarded in full in connection with plaintiff's failure to abandon the lawsuit *in toto,* the Court need not consider further the appropriateness of sanctions in connection with the class action issue.

III. CONCLUSION

For the reasons stated, defendant's motion for summary judgment is GRANTED. Defendant's request for imposition of sanctions pursuant to *Fed.R.Civ.P.* 11, in addition, is GRANTED. Accordingly, plaintiff's counsel is hereby ORDERED to tender to the defendant the sum of $3,854.72. This dollar figure represents an appropriate sanction for the filing of patently frivolous pleadings.

It is hoped that this Order shall serve as a warning to plaintiff's counsel, and to all attorneys who practice in the United States District Court for the Southern District of Georgia. In order both to combat frivolous and vexatious litigation and to protect the integrity of the judicial system, this Court will not hesitate in the future to impose appropriate sanctions on errant attorneys pursuant to Rule 11 of the Federal Rules of Civil Procedure.

824 *824 The Clerk will enter judgment against W. Douglas Adams as attorney for the plaintiff, Jannette S. **Lee**, in the amount of $3,854.72.

[1] In order for *res judicata* to bar a second action, "four elements must be present: (1) a final judgment on the merits, (2) rendered by a court of competent jurisdiction, (3) the parties, or those in privity with them, must be identical in both suits, and (4) the same cause of action must be involved in both cases." *Hart v. Yamaha-Parts Distributors, Inc.*, 787 F.2d 1468, 1470 (11th Cir.1986). *See also Kaspar Wire Works, Inc. v. Leco Engineering & Machine, Inc.*, 575 F.2d 530, 535-37 (5th Cir.1978).

[2] "Collateral estoppel is properly invoked `if the issue in the subsequent proceeding is identical to the one involved in the prior action, the issue was actually litigated, and the determination of the issue was necessary in the prior action.'" *Cotton States Mutual **Insurance Co**. v. Anderson*, 749 F.2d 663, 666 (11th Cir.1984), quoting *Williams v. Bennett*, 689 F.2d 1370, 1381 (11th Cir.1982).

[3] Plaintiff cites two cases, *Driggers v. Business Men's Assurance **Co**. of America*, 219 F.2d 292 (5th Cir.1955), and *Whitley Construction **Co**. v. Whitley*, 134 Ga.App. 245, 213 S.E.2d 909, and refers also to the *Grant* case, *supra,* 116 Ga.App. 661, 158 S.E.2d 703, for the proposition that this action is permitted by Georgia law. The Court notes, once again, that while these cases may allow for repetitive suits on "separable" contracts or on separable disability claims, none of these cases supports an argument that a party found not to be disabled by one court may file suit over and over and over again until the party finds a more sympathetic trier of fact.

[4] "One of the most important considerations is whether, at the time of the earlier action, the parties could foresee that facts subject to estoppel could be important in future litigation." *Johnson v. United States*, 576 F.2d 606, 615 (5th Cir.1978).

[5] The Court will not, in this instance, impose sanctions against plaintiff herself. *Cf. Cannon v. Loyola University of Chicago*, 784 F.2d 777, 782 (7th Cir.1986). The Court's decision in this regard should not be read as a condonation of plaintiff's conduct; however, it is plaintiff's counsel who signed the pleadings in this case, and it is plaintiff's counsel who was in the position and under the obligation to advise his client that Judge Alaimo's ruling

precluded further litigation.

[6] As the Seventh Circuit has stated:

It is human nature to crave vindication of a passionately held position even if the position lacks an objectively reasonable basis in the law. But the amended Rule 11 makes clear that he who seeks vindication in such circumstances and fails to get it must pay his opponent's reasonable attorney's fees.

Dreis & Krump Mfg. v. International Ass'n of Machinists, 802 F.2d 247 (7th Cir.1986).

[7] This figure represents $557.72 in total disbursements, less $110 paid for removal bond and federal filing fee. It is not possible to determine from defense counsel's affidavit the dollar amount of costs incurred prior to October 1, 1986, and that incurred on or after the mentioned date. Nevertheless, because defense counsel has expended time, which is not reflected in his affidavit dated March 25, 1987 and for which no attorney's fees shall be awarded, in defending this action and in responding to several pleadings filed by the plaintiff during the past month, the Court deems the expedient of awarding all costs to the defendant as appropriate.

[8] That the "claim" sued on by plaintiff in this suit is different from that litigated in the Brunswick Division is plainly irrelevant. Restatement (Second) Judgments § 27.

[9] There are certain limitations on this rule, *see generally* *Answering Service, Inc. v. Egan*, 728 F.2d 1500, 1505-06 (D.C.Cir.1984), none of which need be considered here.

103 B.R. 927 (1989)

Joseph E. COHEN, Trustee, Plaintiff-Appellee,

v.

Joseph BUCCI, Debtor, Defendant-Appellant.

No. 89 C 3610, Bankruptcy No. 85 B 14214, Adv. No. 86 A 1029.

United States District Court, N.D. Illinois, E.D.

August 11, 1989.

Gary E. Dienstag, Springer, Casey, Dienstag & Devitt, P.C., Chicago, Ill., for plaintiff-appellee.

Joel A. Brodsky, Brodsky and Hohxa, Chicago, Ill., for defendant-appellant.

MEMORANDUM OPINION AND ORDER

CONLON, District Judge.

928 Debtor-appellant Joseph **Bucci** ("**Bucci**") appeals from a judgment of the United *928 States Bankruptcy Court for the Northern District of Illinois, 97 B.R. 954, denying him a discharge under Section 727(a)(2)(A) of the Bankruptcy Code. 11 U.S.C. § 727(a)(2)(A). The court has jurisdiction over this appeal under 28 U.S.C. § 158(a) and Bankruptcy Rule 8001(a). Fed.R. Bankr.P. 8001(a).

BACKGROUND

The relevant facts are not in dispute. On October 22, 1985, **Bucci** filed a petition for bankruptcy under Chapter Seven of the Bankruptcy Code. 11 U.S.C. § 701 *et seq.* **Bucci's** petition listed unsecured debts of $620,193.24 and secured debts of $257,086.72. **Cohen** Ex. 4. The petition did not list any non-exempt assets. *Id.* The trustee in **Bucci's** bankruptcy and the plaintiff-appellee in this action, Joseph **Cohen** ("**Cohen**"), promptly filed an adversary action to set aside and avoid pre-bankruptcy transfers of property under 11 U.S.C. § 548(a)(1) and (2). **Cohen** alleged that **Bucci** illegally conveyed property to his son and ex-wife pursuant to a divorce decree entered in the Circuit Court of DuPage County, Illinois. **Cohen** Ex. 2. That property consisted of the following: (1) one-half interest in residential property located in Addison, Illinois; (2)

an interest as the sole contract purchaser of the County-Aire Motel in Addison, Illinois, including personal property located in the motel; (3) one-half interest in real property located in Chicago, Illinois; and (4) a 1979 Cadillac automobile. **Cohen** Ex. 1.

Bucci, represented by counsel, contested the allegations. **Cohen** Ex. 3. The bankruptcy court found that **Bucci** engaged in a fraudulent conveyance of property within one year prior to the filing of his bankruptcy petition with the actual intent to hinder, delay or defraud his creditors. **Cohen** Ex. B. The court found that **Bucci** violated Section 548(a)(1) and authorized **Cohen** to reclaim the property. *Id.* **Bucci** did not appeal.

After prevailing on his Section 548 claim, **Cohen** filed a separate action, No. 86 A 1029, to deny **Bucci's** discharge from bankruptcy. The adversary complaint alleged four grounds for denying the discharge, including a claim under Section 727(a)(2)(A) that **Bucci** transferred his property with the actual intent to hinder, delay or defraud his creditors. **Cohen** Brief Ex. A at 1-2. The bankruptcy court found that **Bucci** illegally conveyed his property in violation of Section 727(a)(2)(A) and denied the discharge. The court based its decision in part on collateral estoppel grounds, holding that its prior order in the Section 548 proceeding precluded **Bucci** from relitigating the issue of fraudulent intent in the Section 727 proceeding. **Bucci** appeals the decision. He contends that the bankruptcy court erred in applying the doctrine of collateral estoppel.

DISCUSSION

This court's authority to review a decision of the bankruptcy court is governed by Bankruptcy Rule 8013. Fed.R.Bankr.P. 8013. *Matter of Evanston Motor Co., Inc.*, 735 F.2d 1029, 1030-1 (7th Cir.1984). Rule 8013 provides district courts with the power to affirm, reverse or modify a bankruptcy order, or to remand for further proceedings. *Id.* The bankruptcy court's findings of fact are accepted as true unless they are clearly erroneous. *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 574, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985); *In re Ebbler Furniture and Appliances, Inc.*, 804 F.2d 87, 89 (7th Cir.1986); *In re Pearson Bros.*, 787 F.2d 1157, 1161 (7th Cir.1986). Where the issues on appeal involve questions of law or the legal significance accorded to facts, this court is authorized to conduct a *de novo* review of the record and reach an independent conclusion. *In re Ebbler Furniture and Appliances, Inc.*, 804 F.2d at 89; *In re Kimzey*, 761 F.2d 421, 423 (7th Cir.1985); *Matter of Evanston Motor Co., Inc.*, 735 F.2d 1029, 1031 (7th Cir.1984); *Matter of Supreme Plastics, Inc.*, 8 B.R. 730, 734 (N.D.Ill. 1980).

This case involves two closely related sections of the bankruptcy code often invoked by trustees when it is apparent a debtor engaged in pre-bankruptcy transfers of property.
929 Section 548(a)(1) permits *929 the trustee to avoid any transfer of property or obligation incurred by the debtor within one year of the bankruptcy petition if the debtor

> (1) made such transfer or incurred such obligation with actual intent to hinder, delay or defraud any entity to which the debtor was or became, on or after the date that such transfer occurred or such obligation was incurred, indebted. . . .

11 U.S.C. § 548(a)(1). Section 727(a)(2)(A) parallels Section 548. It provides for the bankruptcy court to grant the debtor a discharge from bankruptcy unless

> (2) the debtor, with the intent to hinder, delay or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed —
>
> (A) property of the debtor within one year before the date of the filing of the petition. . . .

11 U.S.C. § 727(a)(2)(A). The gravamen of both Section 548(a)(1) and Section 727(a)(2)(A) is "intent to hinder, delay or defraud." 11 U.S.C. §§ 548(a)(1), 727(a)(2)(A). The bankruptcy judge applied the doctrine of collateral estoppel to preclude **Bucci** from relitigating the issue of fraudulent intent. **Cohen** Brief Ex. A. The court reasoned that because **Bucci** transferred property with the intent to hinder, delay or defraud his creditors in violation of Section 548(a)(1), he acted with the intent required by Section 727(a)(2)(A). *Id.* at 5-13.

There is no dispute that collateral estoppel applies in bankruptcy discharge proceedings. *Brown v. Felsen,* 442 U.S. 127, 139 n. 10, 99 S.Ct. 2205, 2213 n. 10, 60 L.Ed.2d 767 (1979); *Combs v. Richardson,* 838 F.2d 112, 115 (4th Cir.1988); *Klingman v. Levinson,* 831 F.2d 1292, 1294-96 (7th Cir.1987). For collateral estoppel to apply, four requirements must be met: (1) the party against whom estoppel is asserted must have been a party to the prior adjudication and actively participated in the litigation; (2) the issue that forms the basis for estoppel must have been actually litigated and determined on the merits; (3) the determination of the particular issue must have been necessary or essential to the court's judgment; and (4) the issue to be precluded is identical to the issue in the former action. *Klingman,* 831 F.2d 1292, 1295 (7th Cir.1987); *Gilldorn Savings Ass'n v. Commerce Savings Ass'n,* 804 F.2d 390, 392 (7th Cir.1986); *Garza v. Henderson,* 779 F.2d 390, 393 (7th Cir. 1985). The purpose of collateral estoppel is to prevent duplicative litigation. *Gilldorn Savings Ass'n,* 804 F.2d at 392, citing *Bowen v. United States,* 570 F.2d 1311, 1322 (7th Cir.1978). The party asserting estoppel has the burden of establishing which factual or legal issues were actually litigated and determined in a prior action. *Gilldorn Savings Ass'n,* 804 F.2d at 393; *Frye v. United Steelworkers of America,* 767 F.2d 1216, 1220 (7th Cir.1985).

The bankruptcy judge properly applied the doctrine of collateral estoppel to **Bucci's** case. First, the adversaries in both proceedings are the same. In each case, **Cohen** sued **Bucci**. **Cohen** Brief Ex. A and B. In each proceeding, **Bucci** was represented by counsel and actively participated in the litigation. *Id.*

The second element of collateral estoppel is also present. The bankruptcy judge properly found that the issue of fraudulent intent was actively litigated and determined on the merits in the Section 548 proceeding. **Cohen** Ex. A at 9-10. The court in the Section 548 proceeding uncovered several badges of fraud, including (1) **Bucci's** failure to disclose during his divorce proceedings that he was a party-defendant in several lawsuits; (2) the lack or inadequacy of consideration underlying the transfers; (3) a

familial relationship among the parties to the transfer; (4) **Bucci's** retention of possession, benefit and use of the transferred property; and (5) the general chronology of events. **Cohen** Brief Ex. B at 18-24. The findings of fact entered by the bankruptcy court are thorough, uncontroverted and unquestionably probative of fraudulent intent.
930 The issue of **Bucci's** intent was actively litigated and *930 determined on the merits in the Section 548(a)(1) litigation. *See* **Cohen** Ex. A at 9-10.

The finding of fraudulent intent was necessary and essential to the bankruptcy court's judgment. Actual intent is an element of the trustee's cause of action under Section 548(a)(1). *In re Parameswaran,* 50 B.R. 780, 785 (S.D.N.Y.1985); *In re Garcia,* 88 B.R. 695, 700 n. 11 (Bankr. E.D.Pa. 1988) citing *Phillips v. Wier,* 328 F.2d 368, 371 (5th Cir.1964) and *Springmann v. Gary State Bank,* 124 F.2d 678, 681 (7th Cir.1941). Without a finding of fraudulent intent supported by clear and convincing evidence, the bankruptcy court could not have entered its judgment. *Id.*

And finally, the bankruptcy court properly found that the issue of intent under Section 727(a)(2)(A) is identical to the issue of intent under Section 548(a)(1). The statutory sections are identically worded; each requires proof of intent to hinder, delay or defraud. Significantly, courts faced with issue preclusion in the context of a bankruptcy discharge proceeding and a divorce decree have uniformly concluded that a finding of fraudulent intent in a prior Section 548(a)(1) action is controlling for purposes of Section 727(a)(2)(A):

> Having determined that the debtor's transfer of his interest in the property owned by the entirety to his wife was made with actual intent to hinder, delay or defraud his creditors, it follows that such conveyance may be set aside by the debtor's trustee in bankruptcy pursuant to 11 U.S.C. § 548(a)(1) and the debtor's discharge *must* be denied under 11 U.S.C. § 727(a)(2)(A).

In re Parameswaran, 50 B.R. at 784-85 (emphasis added). *See also In re Clausen,* 44 B.R. 41, 43-44 (Bankr.D.Minn.1984); *In re Matter of Loeber,* 12 B.R. 669, 675 (Bankr.D.N.J.1981).

Bucci raises several arguments in opposition to the application of collateral estoppel to this case. None are persuasive. First, **Bucci** argues that there can be no identity of issues between Section 548(a)(1) and Section 727(a)(2)(A) because these sections require different burdens of proof. A shift in the burdens of proof or persuasion is sufficient to defeat issue preclusion. *Frye,* 767 F.2d at 1221; *Guenther v. Holmgreen,* 738 F.2d 879, 888 (7th Cir.1984). However, the burden of proof in Sections 548(a)(1) and 727(a)(2)(A) are identical. *In re Parameswaran,* 50 B.R. at 784-85; *In re Matter of Loeber,* 12 B.R. at 675. Both sections require clear and convincing evidence of intent. *Id.; see also In re Garcia,* 88 B.R. at 700 n. 11.

Alternatively, **Bucci** argues that he did not have a full and fair opportunity to actually litigate the issue of fraudulent intent in the Section 548 proceeding. This argument is based on **Bucci's** contention that the Section 548 proceeding involved a dispute between his ex-wife in her capacity as a judgment creditor, and **Cohen** acting as trustee

on behalf of all other creditors. **Bucci** maintains that he was not a necessary party to this dispute and he had no incentive to litigate the fraudulent intent issue because the court had to award the property either to his ex-wife or to **Cohen**, but not to him.

This argument is without merit. **Cohen's** adversary complaint in the Section 548 proceeding named **Bucci** as a party-defendant. Because **Bucci** was an adversary party, his argument that he lacked incentive to litigate the intent issue is entitled to little weight. *Klingman,* 831 F.2d at 1296; *Otherson v. Dep't of Justice,* 711 F.2d 267, 277 (D.C.Cir.1983). **Bucci's** incentive to litigate the intent issue in the Section 548 proceeding is established in the first instance by the reasonable foreseeability of the preclusive effect of the litigation. *Klingman,* 831 F.2d at 1296. Aside from this reason, **Bucci** had tangible economic incentives to litigate the intent issue and prevail in the Section 548 litigation. For example, **Bucci** justified the transfer of property to his ex-wife and son as part of his obligation to provide support under the divorce decree. **Bucci** Ex. 2 at 5. Loss of the Section 548 proceeding meant that **Bucci** might be vulnerable to new support claims by his ex-wife and son. Even assuming that **Bucci** had no further
931 obligations under the divorce decree, he still *931 stood to lose from an adverse ruling in the bankruptcy court. This is because **Bucci** continued to receive income from the property at issue in the Section 548 proceeding even though he no longer held title. **Cohen** motion for summary judgment App. A at 12-13. Consequently, loss of these properties to the trustee meant loss of income.

Next, **Bucci** contends that a finding that he transferred property with the intent to hinder, delay or defraud his creditors was not necessary to the court's judgment. **Bucci** contends that the bankruptcy court made its Section 548(a)(1) finding only after first concluding that he violated Section 548(a)(2). Essentially, **Bucci** argues that alternative reasons for a judgment are not necessary and essential for purposes of collateral estoppel. There is no merit to this argument. All alternative, independent grounds upon which a court may base its decision qualify as "necessary" to the court's judgment. *Winters v. Lavine,* 574 F.2d 46, 66-69 (2d Cir.1978); *Williams v. Ward,* 556 F.2d 1143, 1154 (2d Cir.1977); *General Dynamics Corp. v. AT & T,* 650 F.Supp. 1274, 1285 (N.D. Ill.1986). An exception to this rule occurs when a court's judgment order could be based upon one of several alternative grounds that are not expressly relied upon or enumerated in the court's opinion. *Gilldorn,* 804 F.2d at 395; *Frye,* 767 F.2d at 1220. This exception is not applicable to this case because the bankruptcy court's opinion in the Section 548 proceeding expressly sets forth all available grounds for avoiding the transfer. *Id.*

Alternatively, **Bucci** argues that even assuming the necessity of intent to the court's judgment, collateral estoppel is not appropriate because the bankruptcy court never entered a final judgment order. **Bucci** claims that the bankruptcy judge's Section 548 order never became final because his ex-wife appealed the judgment. This argument is unavailing. The pendency of an appeal does not suspend the finality of a judgment for purposes of collateral estoppel. *Webb v. Voirol,* 773 F.2d 208, 211 (8th Cir.1985); *Hunt v. Liberty Lobby, Inc.,* 707 F.2d 1493, 1497-98 (D.C.Cir.1983); *Kurek v. Pleasure Driveway & Park District,* 557 F.2d 580, 595 (7th Cir.1977), *vacated and remanded on other grounds,* 435 U.S. 992, 98 S.Ct. 1642, 56 L.Ed.2d 81 (1978). Although a final

judgment order is essential before a claim or cause of action has preclusive effect, the need for a final judgment is not as compelling when deciding whether to preclude relitigation of an issue in a later action between the same parties on a different claim. *Gilldorn Savings Ass'n,* 804 F.2d at 393-94; *Miller Brewing Co. v. Jos. Schlitz Brewing Co.,* 605 F.2d 990, 996 (7th Cir.1979), *cert. denied,* 444 U.S. 1102, 100 S.Ct. 1067, 62 L.Ed.2d 787 (1980); *Dunlap v. City of Chicago,* 435 F.Supp. 1295, 1299 (N.D.Ill.1977). Finality for purposes of issue preclusion requires only that the court's determination not be avowedly tentative. *Id.* A final judgment in the case as a whole is not necessary. *Id.* All that is required is that the court reach a definitive resolution of the issue. *Id.*

The bankruptcy judge in the Section 548 proceeding unquestionably reached a definitive resolution of the fraudulent intent issue. Both parties submitted briefs and had an opportunity to be heard. The bankruptcy judge considered all the relevant evidence. Under the circumstances, he made a reasoned decision on the issue of intent. *Id.* There being no unresolved evidentiary matters, his decision is conclusive for purposes of collateral estoppel. *Id.*

Even assuming a doubt as to the conclusiveness of the bankruptcy court's findings in the Section 548 proceeding, the record demonstrates that there was no appeal pending when the same judge entered the order in the Section 727 proceeding. The uncontroverted evidence shows that **Bucci's** wife failed to perfect her appeal. **Cohen** Ex. 1A at 6. The appeal was eventually dismissed pursuant to a settlement agreement. **Bucci** motion for summary judgment App. 1. **Bucci** himself failed to appeal the court's order in the Section 548 proceeding and he did not present any evidence on the issue of his intent in the Section 727 proceeding. **Cohen** Ex. 1A. He cannot use this opportunity
932 to claim the *932 absence of a final judgment order to bar the application of collateral estoppel.

Bucci's last argument is that application of collateral estoppel to his case is simply unfair. Considerations of fairness may make application of collateral estoppel principles inappropriate. *Frye,* 767 F.2d at 1221. When all factors required for collateral estoppel are present, the party opposing estoppel must demonstrate that application of estoppel will result in particularized unfairness. *Id.* The decision to bar collateral estoppel because of unfairness is within the court's discretion. *Garza,* 779 F.2d at 393 citing *Parklane Hosiery Co. v. Shore,* 439 U.S. 322, 331, 99 S.Ct. 645, 651, 58 L.Ed.2d 552 (1979); *Frye,* 767 F.2d at 1221.

Bucci fails to demonstrate particularized unfairness. **Bucci's** claim is based on the argument that he and his attorney only participated in a small part of the litigation, and had no reason to believe that his discharge was in jeopardy. His unsupported and conclusory assertion of unfairness lacks merit. **Bucci** had ample opportunity to present new evidence on the issue of his intent in the Section 727 proceeding. He failed to take advantage of the opportunity. Accordingly, the court will not disturb the bankruptcy court's decision for lack of fairness. *Id.*

CONCLUSION

The decision of the bankruptcy court in ***Cohen*** *v.* ***Bucci***, 97 B.R. 954 (Bankr.N.D. Ill.1989) is affirmed.

905 F.2d 1111 (1990)

Joseph COHEN, Plaintiff-Appellee,
v.
Joseph BUCCI, Debtor-Appellant.

No. 89-2766.

United States Court of Appeals, Seventh Circuit.

Argued June 8, 1990.
Decided June 28, 1990.
Rehearing Denied July 30, 1990.

Gary E. Dienstag, Springer, Casey, Dienstag & Devitt, Chicago, Ill., for plaintiff-appellee.

Joel A. Brodsky, Brodsky & Hoxha, Chicago, Ill., for debtor-appellant.

Before CUDAHY and EASTERBROOK, Circuit Judges, and FAIRCHILD, Senior Circuit Judge.

1112 *1112 EASTERBROOK, Circuit Judge.

In October 1985 Joseph **Bucci** filed a bankruptcy petition stating that he had substantial debts and no non-exempt assets. The trustee promptly commenced an adversary proceeding against **Bucci**, his former wife Bruna, and his son Bruno, contending that **Bucci** fraudulently transferred assets to Bruna and Bruno in a property settlement approved by the state court presiding over divorce proceedings. **Bucci** transferred to them his entire interest in the family's principal residence, a 24-unit apartment building, and a motel, plus two cars. In 1986 the bankruptcy judge concluded that the transfer was avoidable, see 11 U.S.C. § 548(a)(1), because **Bucci** acted with intent to hinder or frustrate his creditors and did not receive equivalent value for the property. **Bucci** did not tell the state court about his debts, leading the state judge to believe that **Bucci** had large equity interests in the home, apartment building, and motel, which could be transferred to his wife and child in lieu of support. In fact **Bucci** had no net interest; his debts exceeded the value of the property. **Bucci** did not appeal to the district court from the order avoiding the transfer; Bruna's appeal was not prosecuted.

Later the trustee asked the bankruptcy judge to deny **Bucci** a discharge, a step 11 U.S.C. § 727(a)(2)(A) authorizes in the event of fraudulent pre-bankruptcy transfers. The trustee argued that the disposition of the earlier proceeding is conclusive; **Bucci**

demanded an opportunity to relitigate. Finding that the result in the action to avoid the transfer met all the requirements for issue preclusion, the bankruptcy judge denied **Bucci** a discharge. 97 B.R. 954 (Bankr.N.D.Ill.1989), affirmed, 103 B.R. 927 (N.D.Ill.1989). **Bucci** asks us to hold that he is entitled to a second trial because, he says, he lacked the incentive to litigate vigorously in the proceeding seeking to avoid the transfer. The property would go either to his ex-wife and son or to his creditors, **Bucci** insists, making it rational to loiter on the sidelines of that litigation. Now that the result hurts him personally, he wants a fresh opportunity.

It is not clear to us that the case presents questions about issue preclusion (collateral estoppel) rather than law of the case. Adversary proceedings in bankruptcy are not distinct pieces of litigation; they are components of a single bankruptcy case, and it is debatable whether **Bucci** could have appealed to us in 1986 a conclusion that his creditors rather than his wife would obtain his former interest in the motel. See *In re Kilgus,* 811 F.2d 1112 (7th Cir.1987). If law of the case is the right way to characterize the bankruptcy court's decision in 1986, then the bankruptcy judge was right to follow the decision in 1989, but this would not block the district judge (or this court) from examining the merits. Law of the case does not block a superior court from examining the correctness of the earlier decision. **Bucci** does not ask us to employ principles of law of the case rather than preclusion, however. In civil litigation we accept the issues framed by the parties. So we shall examine the bankruptcy court's 1986 decision through the lens of issue preclusion, without deciding that this is the proper approach.

Issue preclusion applies to a question that has been "actually litigated and determined by a valid and final judgment, [if] the determination is essential to the judgment." *Restatement (Second) of Judgments* § 27 (1982). See *Teamsters Local 282 Pension Trust v. Angelos,* 815 F.2d 452 (7th Cir.1987); *Garza v. Henderson,* 779 F.2d 390, 392 (7th Cir.1985); *Crowder v. Lash,* 687 F.2d 996, 1009 (7th Cir.1982). Whether **Bucci's** transfer was a fraud on his creditors was actually, and necessarily, determined by the bankruptcy judge in 1986, in a proceeding to which **Bucci** was a party.

Bucci insists that this is insufficient because he had no reason to contest the trustee's motion to avoid the transfer: no matter the disposition, he would not get the assets. Inadequate incentive to litigate is an exception to non-mutual estoppel, see *Parklane Hosiery Co. v. Shore,* 439 U.S. 322, 330, 99 S.Ct. 645, 651, 58 L.Ed.2d 552 (1979).
1113 Someone sued for a nominal *1113 amount will not put up the full defense justified in big-stakes cases, and it may be hard to anticipate that an issue in a pip-squeak of a case will have grave consequences later. Issues resolved after half-hearted efforts may be relitigated, when circumstances conduce to more accurate decisions. This principle does not carry over unalloyed to cases of *mutual* estoppel, however, because a party will be aware of other disputes with the same adversary. *Restatement* § 28(5)(b) and (c) describes exceptions to mutual issue preclusion when "it was not sufficiently foreseeable at the time of the initial action that the issue would arise in the context of a subsequent action" or "the party sought to be precluded, as a result of the conduct of his adversary or other special circumstances, did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action". Neither helps **Bucci**.

Bucci (or his lawyer) could not help knowing that a finding of fraudulent transfer in the avoidance action would affect the availability of a discharge. A desire to preserve eligibility for discharge was more than ample incentive to resist the trustee's motion to avoid the transfer. **Bucci** does not identify any unjust or surprising "conduct of his adversary", and there are no "special" circumstances. This is a perfectly ordinary sequence in bankruptcy litigation: first avoid the transfer, then invoke the reasons for the avoidance to show that the debtor is not entitled to a discharge. **Bucci** would have had reasons to resist the trustee's motion even apart from the effect of the decision on his discharge. The property transferred to wife and child was in lieu of support obligations. If they had to give up the property, it was predictable that they would seek support. Obligations to support one's family are not dischargeable. 11 U.S.C. § 523(a)(5). **Bucci** responds that the decree entered by the state court extinguishes their right to maintenance and support, but a state judge could and probably would set aside such a clause when the consideration for it (the properties) is snatched back. **Bucci's** interests were at stake in 1986, and he had ample reasons to defend — if he had any defenses that his wife did not offer. (The action was hotly contested, and **Bucci** does not tell us what he could have done to defend that his wife and son did not do anyway.)

According to **Bucci**, all of this is beside the point because findings concerning fraudulent transfers are *never* preclusive in discharge proceedings. For this proposition **Bucci** cites only *Lovell v. Mixon,* 719 F.2d 1373 (8th Cir.1983), but he misunderstands the case. Mixon, the trustee, first obtained an order avoiding a transfer under § 548(a)(2), which deals with constructive fraud, and later objected to the discharge because, he asserted, the debtor had committed actual fraud. The debtor insisted that the trustee, having bypassed an opportunity to show actual fraud as a reason to avoid the transfers, was precluded from showing actual fraud in order to block the discharge. The eighth circuit sensibly replied that *issue* preclusion (the question in our case) did not apply because actual fraud had been neither litigated nor decided in the avoidance action; the trustee did not suffer an adverse decision on the issue and could hardly be precluded. Claim preclusion (a subject not involved here) applies only to the same claim involved in the first case. Avoiding a fraudulent transfer and blocking a discharge are not the "same claim". It would be counterproductive to require trustees to make demands concerning discharges at the same time as they seek to avoid fraudulent transfers. Although both the avoidance question and the discharge question must be resolved in one bankruptcy case, the discharge question need not be resolved at the same time (or in the same adversary proceeding) as the avoidance question, on pain of forfeiture. None of these principles assists **Bucci**. The bankruptcy judge decided in the avoidance proceeding that **Bucci** made a fraudulent transfer. It is wholly appropriate for a trustee to follow up such a conclusion with an application to deny a discharge.

AFFIRMED.

557 F.2d 580 (1977)

William KUREK, Walter Durdle, Robert Togikawa, Edwin Jones, and Richard Hoadley, Plaintiffs-Appellants,

v.

PLEASURE DRIVEWAY AND PARK DISTRICT OF PEORIA, ILLINOIS, an Illinois political subdivision, George L. Luthy, John R. Canterbury, James A. Cummings, Bonnie W. Noble, Clyde West, Harold A. (Pete) Vonachen, Jr., Individually and as President and Members of the Pleasure Driveway and Park District of Peoria, Rhodell E. Owens, Individually and as Director of Parks and Recreation, Jack M. Fuller, Individually and as Administrative Assistant, Daniel B. Ohlemiller, Individually and as Business Administrator, Frank D. Borror, Individually and as Superintendent of Maintenance, William McD. Frederick, Individually and as Attorney of Pleasure Driveway and Park District of Peoria, Golf Shop Management, Inc., an Illinois corporation, and Gordon A. Ramsey, Defendants-Appellees.

No. 76-1791.

United States Court of Appeals, Seventh Circuit.

Argued January 20, 1977.
Decided May 26, 1977.
Rehearing and Rehearing Denied August 11, 1977.

584 *581 *582 *583 *584 John E. Cassidy, Jr., Peoria, Ill., for plaintiffs-appellants.

Daniel W. Hardy, Gary S. Clem, Peoria, Ill., William V. Altenberger, Wm. McD. Frederick, Peoria, Ill., for defendants-appellees.

Before FAIRCHILD, Chief Judge, PELL, Circuit Judge, and FOREMAN, **District** Judge.[*]

Rehearing and Rehearing En Banc Denied August 11, 1977.

PELL, Circuit Judge.

The **district** court dismissed Count I of plaintiffs' complaint (alleging federal antitrust

violations and invoking 15 U.S.C. §§ 1, 2, 15 and 26) on the authority of *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943); and *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 81 (1961), and their progeny.[1] Count II of the complaint (alleging deprivations of federal rights under color of state law and invoking 42 U.S.C. § 1983 and 28 U.S.C. §§ 1331(a) and 1343) was dismissed on the grounds that one defendant was not a "person" within the meaning of 42 U.S.C. § 1983 and that the remaining defendants were protected by a previous state court adjudication. This appeal followed.

I

We assume, of course, the truth of the well-pleaded facts alleged in plaintiffs' complaint, which are, in material part, as follows: Plaintiffs are five golf professionals, accredited as such by the Professional Golfers' Association. Defendant **Pleasure Driveway** and **Park District** of Peoria (the *585 **Park District**) is a unit of local government within the meaning of Article VII, § 1 of the Illinois Constitution, deriving its powers from various Illinois statutes which will be referred to hereinafter. The **Park District** owns and operates five municipal golf courses in Peoria, Illinois. Plaintiffs were, for varying periods aggregating 83 years, employed by the **Park District** to perform combined duties as golf course managers, greenskeepers, and golf professionals at the **Park District's** courses. Each plaintiff, while so employed, was granted a concession to operate a proprietary retail business (pro shop) selling golfing equipment at his golf course. In this proprietary function each plaintiff competed with each of the others, and between them they constituted the entire public market in Peoria for high quality "pro line" equipment. Eleven individual defendants are and at pertinent times were the President and members of the **Park District's** Board of Trustees, the Board Attorney, and administrative staff members of the **Park District**. Also defendants are Golf Shop Management, Inc., the current concessionaire of the pro shops at all five courses, and Gordon Ramsey, the concessionaire's sole incorporator. For present purposes, these last two defendants may be treated together (GSM).

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On January 19, 1974, the **Park District** terminated plaintiffs' concession rights, and on February 20 of that year the **Park District** terminated plaintiffs' employment. On January 23, 1974, GSM was awarded pro shop concession rights at all of the **Park District's** five golf courses. The reasons for these events, and the manner in which they came about, are at the heart of this lawsuit.

The 1970 Illinois Constitution, Article IX, § 5, provided for the abolition of personal property taxes and authorized the Illinois General Assembly to provide replacement revenue sources for local government units. The General Assembly has not exercised its power to create substitute revenues for local **park** districts. These facts, which we may and do judicially notice, apparently led the **Park District** in 1973 to consider the possibilities of obtaining greater revenues from its golf course pro shop concessions.

Plaintiffs had, for some time, been paying small concession fees; each paid only $600 yearly, except for one who was assigned only a nine-hole golf course and who paid only

$300. In the late summer and fall of 1973, the terms of the concession agreements for that calendar year were revised in a confusing and apparently less than harmonious series of negotiations, with the result that plaintiffs agreed to pay 1 1/2% of their gross receipts as a fee.

Also during the fall of 1973, GSM and members of the **Park District** Board and Staff agreed that GSM would make an economically unrealistic "sham" proposal, which would not be performed, to pay $90,000 a year for concession rights at the five golf courses.[2] Public bidding specifications tailored exclusively for GSM's "sham" proposal were designed and advertised, and on December 17, 1973, GSM formalized its $90,000 proposal as a bid. A **Park District** Board meeting scheduled for December 19 for the purpose of acting on received bids was never held.

Instead, in the language of the complaint,

> [f]rom, and after, December 17, 1973, GSM's $90,000 per year proposal . . was coercively laced with the threat of non-renewal of plaintiffs' 1973 "leases" and summary termination of their proprietary business rights and used to induce them to raise, fix and maintain their retail, rental and service prices and pay a 5% of gross concession or "lease" fee to the **PARK DISTRICT**.
>
> [The **Park District** defendants] used the GSM proposal, with GSM agreement, to *586 coerce plaintiffs into a 5% sales taxing and price raising/fixing scheme.
>
> . . . . .
>
> On January 16, 1974 the **PARK** BOARD declared that unless plaintiffs agreed to raise their resale, rental and service prices and pay 5% of the gross receipts before 8 a. m., Saturday, January 19, 1974, their proprietary concession rights would be awarded to GSM, Inc.
>
> . . . . .
>
> The plaintiffs and each of them were not summarily terminated from their proprietary business and local governmental employment rights because of the expiration of their 1973 "leases" but because, on January 19, 1974, they refused to be coercively induced into levying unlawful 5% sales tax levies on their business consumers and because they refused to contract, combine or conspire with the effect of raising, fixing and maintaining their proprietary resale, rental and service prices contrary to Illinois and Federal antitrust laws.

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The complaint also alleges that plaintiffs, even after their proprietary terminations, remained in possession of the pro shops, that they litigated the **Park District's** state court forcible entry and detainer suit, and that this assertion of their "rights" was the cause of their employment terminations. The Illinois Appellate Court determined that plaintiffs' defenses in that suit were not germane to the narrow question of their right to

possess the pro shops and that plaintiffs' rights of possession ended at the expiration of their concession agreements on December 31, 1973. ***Pleasure Driveway** and **Park District** of Peoria v. **Kurek***, 27 Ill.App.3d 60, 325 N.E.2d 650 (1975). The Illinois Supreme Court denied leave to appeal. A subsequent state court damages action by the **Park District** sought redress for plaintiffs' allegedly wrongful holding over of possession of the pro shops, and a judgment in the **Park District's** favor in the amount of $127,605 is apparently pending on appeal.

As a result of the defendants' wrongful conduct, the golfing public of Peoria is alleged to have lost the benefits of competition, suffered increased prices and all of the evils of monopolistic practices without any corresponding governmental or other benefits. Substantial injury to plaintiffs is claimed. Count I (antitrust) seeks declaratory and injunctive relief against all defendants and treble damages from all defendants except the **Park District**. Count II (civil rights) seeks damages from all defendants except GSM.

II

We turn to the question of whether Count I of the complaint fails to allege a cause of action under the antitrust laws. The standard we must apply is settled beyond dispute: "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957). This rule has particular force in this case, where plaintiffs' motion to amend their complaint by adding a third count, which refined their antitrust theories and made some additional factual allegations, was denied by the **district** judge in a short decision and order.[3]

Before considering the difficult questions which this case requires us to answer, we note briefly several background matters. First, of course, we intimate no views whatsoever on the likelihood that plaintiffs will be able to prove the allegations of the complaint.[4] Also,
587 the **district** court's judgment *587 rests solely on the conclusion that the involvement of governmental action takes the case outside the scope of the antitrust laws. Without the benefit of a factual record, the **district** court's views, or briefing by the parties, we decline to address any broader question than that upon which the **district** court rested its decision.

Moreover, this case does not present the question of whether a public agency may grant a monopolistic concession license without violating the antitrust laws, where no more is alleged or proved. Nor does the case simply involve a public agency's attempt to increase operating revenues by increasing concession fees uniformly to its competing concession licensees. The case does involve both of these elements, the defendants urge us to decide the case as if it involved no more, and the **district** court, in dismissing the case, apparently accepted this characterization of the issues raised. But more than this is alleged by the complaint, which charges that the threat of a monopolistic license to GSM and the demand for uniformly increased fees were used by the defendants as means in a broader conspiracy to coerce plaintiffs into raising and fixing their retail

prices and that the award of the GSM license was made to punish plaintiffs for refusing so to be coerced. Acts which may be legal and innocent in themselves, standing alone, lose that character when incorporated into a conspiracy to restrain trade. *See* *Simpson v. Union Oil Co. of California,* 377 U.S. 13, 84 S.Ct. 1051, 12 L.Ed.2d 98 (1964); *Poller v. Columbia Broadcasting System, Inc., supra,* 368 U.S. at 468-69, 82 S.Ct. 486.

III

We must initially determine whether the **district** court correctly stated the law to be that the activities of the **Park District** are outside the scope of the Sherman Act, either as a general matter or, at least, in the circumstances of this case. The **district** court based its conclusion on the "so-called state-action exemption,"[5] *Goldfarb v. Virginia State Bar,* 421 U.S. 773, 788, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975), which was articulated in *Parker v. Brown, supra,* and its progeny.

In *Parker,* the state of California's program for prorating the state's raisin crop so as to reduce excess supply and stabilize prices, which program was found to be consistent with federal agricultural regulations and policy, was questioned as to its validity under the Sherman Act, 15 U.S.C. § 1 et seq. The defendants were some of those charged by law with operating the program. The Supreme Court, assuming that the program would violate the Act if it were implemented by private persons, concluded nonetheless that the Act was not intended to prohibit the prorate program, which

> derived its authority and its efficacy from the legislative command of the state and was not intended to operate or become effective without that command. We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.
>
> The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state.

317 U.S. at 350-51, 63 S.Ct. at 313. The anticompetitive effects of California's pro-rate
588 *588 program derived from "the state['s] command"; the state adopted, organized, and enforced the program "in the execution of a governmental policy." *Id.* at 352, 63 S.Ct. at 314. This fact was repeatedly emphasized by the Court in its brief discussion of the antitrust issue, and in its conclusion: "The state . . ., as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit." *Id.*

Goldfarb v. Virginia State Bar, supra, presented the question "whether a minimum fee schedule for lawyers published by the Fairfax County [Virginia] Bar Association and enforced by the Virginia State Bar," 421 U.S. at 775, 95 S.Ct. at 2007, violated § 1 of the

Sherman Act, 15 U.S.C. § 1. Because the Virginia State Bar was "a state agency by law," *id.* at 790, 95 S.Ct. 2004, (footnote omitted), the Supreme Court addressed the State Bar's claim, based on *Parker,* that the Sherman Act did not apply to it, and rejected the claim, without dissent. The Virginia legislature had empowered the Supreme Court of Virginia to regulate the practice of law and had authorized a role for the State Bar in that regulation as an administrative agency of the Supreme Court. The state Supreme Court had developed ethical rules for lawyers, and the State Bar was empowered to issue ethical opinions on the application of the rules. Two such opinions were an important part of the State Bar's role in enforcing minimum fee schedules.

An expansive reading of some of the language in *Parker* would have suggested that the Sherman Act could not be applied to the State Bar in these circumstances, but the Supreme Court took a closer look. Because no Virginia statute referred to lawyers' fees and the Supreme Court of Virginia had taken no action requiring the use of and adherence to minimum fee schedules, it could not be said that the anticompetitive effects of minimum fees were "compelled by direction of the State acting as a sovereign." *Id.* at 791, 95 S.Ct. at 2015. The State Bar, although it acted within the scope of its general powers, had "voluntarily joined in what [was] essentially a private anticompetitive activity," *id.* at 792, 95 S.Ct. at 2015, and was not executing the mandate of the state. The Court stated that the existence of sovereign compulsion was "[t]he threshold inquiry in determining if an anticompetitive activity is state action of the type the Sherman Act was not meant to proscribe" and there was, thus, no reason to take the matter any further. *Id.* at 790, 95 S.Ct. at 2015.

After the **district** court dismissed the present lawsuit, the Supreme Court decided *Cantor v. Detroit Edison Co.,* 428 U.S. 579, 96 S.Ct. 3110, 49 L.Ed.2d 1141 (1976), which also bears upon the issues in this case. In *Cantor,* an electric utility, regulated by the state of Michigan, operated a program which provided "free" light bulbs to electricity customers, the costs of the program being covered by the utility's general electricity rates. An independent seller of light bulbs charged antitrust violations, and the utility defended on the theory, based on *Parker,* that the light bulb program was included in its rate tariff filed with and approved by the state Public Service Commission and that state law required it to follow the terms of the tariff as long as it was in effect. Six Justices agreed that summary judgment for the utility, based on *Parker,* had been improperly entered.[6]

Cantor, of course, did not present the precise question addressed in *Parker* and at issue here, for in *Parker* state officials executing a state program were the defendants while in *Cantor* a private party sought to rely on state law to insulate its conduct from antitrust liability. The considerations applicable to each case are necessarily less than identical. While the Court did not develop a single opinion expressing the views of a majority of its members, *see* note 6 *supra,* a majority did agree that analysis of a private party's state law defense requires *589 consideration of whether it would be fair to subject a party to antitrust liability when he may have been caught between inconsistent commands of his state and federal sovereigns, and of factors akin to those used to determine whether federal agency regulation of a business produces an implied antitrust immunity.

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In deciding *Cantor,* the Court majority emphasized the facts that no Michigan statutes purported to regulate the light bulb industry, that neither the Michigan legislature nor the Public Service Commission had ever specifically looked into the question of the desirability of a "free" light bulb program, and that other utilities regulated by the Commission did not have such a program. The Court majority concluded therefrom that the Commission's approval of the utility's program did not "implement any statewide program relating to light bulbs" and that "the State's policy is neutral on the question whether a utility should, or should not, have such a program." 428 U.S. at 585, 96 S.Ct. at 3114. That conclusion was central to the Court's disposition of the case.

Because a private actor's state law defense is at least related to a governmental body's assertion of a "state action" defense, we think the *Cantor* Court's emphasis on the lack in that case of a "statewide program" or a state policy sheds some light on the present case. We also think that *Cantor,* read with *Goldfarb,* provides important general guidance on the question of what it means to find governmental action involved in the facts of an antitrust suit.

Cantor and *Goldfarb* demonstrate beyond serious questioning that the Supreme Court is not inclined any longer, if it ever was, to accept superficial and mechanical application of a *Parker*-based "rule" that antitrust inquiry ends upon such a finding of governmental actions or laws being involved. In the years after *Parker* and before *Goldfarb* and *Cantor,* there was a tendency in many of the reported decisions to apply *Parker* broadly and to use rather general language in so doing. For example, addressing the distinct question of whether persons may join together attempting to induce governmental action with anticompetitive effects, *see* part V of this opinion, *infra,* the Supreme Court stated as a building-block proposition that "where a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action, no violation of the [Sherman] Act can be made out." *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., supra,* 365 U.S. at 136, 81 S.Ct. at 529. In the same context, this court's opinion in *Metro Cable Co. v. CATV of Rockford, Inc.,* 516 F.2d 220, 227 (7th Cir. 1975), used similarly broad language. Neither case involved a claim of governmental action violative of the Sherman Act, the facts of both cases were meaningfully different than those presented here, and we have, thus, no occasion to question whether the language used accurately stated the law as applied to those cases. We point out, however, that *Goldfarb* and *Cantor* undercut the validity of any such simple one-sentence "rule" as a general proposition.

We turn, then, to the instant complaint, and conclude that *Parker* and its progeny do not support the **district** court's dismissal thereof. The fact that the governmental body sued here is a **park district**, with substantially less than statewide jurisdiction, has significance. First, it is clear that subordinate units of government — notwithstanding that they derive their powers from a state — are not entitled to all of the federalistic deference that the state would receive. *See, e. g.,* in the area of the Eleventh Amendment to the Constitution, *Edelman v. Jordan,* 415 U.S. 651, 667 n.12, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974). More specifically, where there are numerous subordinate units of government of a given type, each of the same status under state law, it is more difficult to say that the actions of any one of them are undertaken pursuant to "the

state['s] command," *Parker, supra,* 317 U.S. at 352, 63 S.Ct. 307, or that "[t]he state . . ., as sovereign" imposed any anticompetitive restraints resulting from such actions. *Id.*
590 *Goldfarb* established that Sherman Act suits against *590 state agencies may be maintained unless the conduct challenged is "compelled by direction of the State acting as a sovereign," 421 U.S. at 791, 95 S.Ct. at 2015, and the numerosity and potential variety of practices of subordinate units of government may often suggest that "the State's policy is neutral" on any given practice and that there is no "statewide program" which would require the sort of comity-based respect evident in *Parker. See Cantor, supra,* 428 U.S. at 585, 96 S.Ct. 3110.

We surely do not wish to be understood as saying that **park** districts and other subordinate governmental units may no longer avail themselves of a *Parker* defense to antitrust suits. Rather, we advert to the fact that a subordinate governmental unit's *Parker* claim is less obviously justified than is the same claim made by a state government, and we conclude that antitrust "immunity" in the former case cannot be automatic. Both the Third and the Fifth Circuits have recently so held. *City of Lafayette, Louisiana v. Louisiana Power & Light Company,* 532 F.2d 431 (5th Cir. 1976), *cert. granted,* 430 U.S. 944, 97 S.Ct. 1577, 51 L.Ed.2d 791 (1977) (two cities); *Duke & Company Inc. v. Foerster,* 521 F.2d 1277 (3d Cir. 1975) (three municipal corporations and a county commissioner); and *cf. Hecht v. Pro-Football, Inc.,* 144 U.S.App.D.C. 56, 444 F.2d 931 (1971), *cert. denied,* 404 U.S. 1047, 92 S.Ct. 701, 30 L.Ed.2d 736 (1972) (unincorporated instrumentality of the **District** of Columbia).

We realize that in the case of *State of New Mexico v. American Petrofina, Inc.,* 501 F.2d 363, 370 n.15 (9th Cir. 1974), involving antitrust counterclaims against a state and some of its political subdivisions, the Ninth Circuit has held to the contrary. *State of New Mexico* was, however, decided before *Goldfarb* and *Cantor* and we do not believe its holding as to subordinate units of government survives the test of their analysis. We simply see little sense in automatically treating as state mandates the activities of local governmental units when these activities may vary substantially from unit to unit and may be wholly lacking in any express or implied state authorization or command.

We agree with the Third and Fifth Circuits that an adequate state mandate for anticompetitive activities of subordinate governmental units "may be demonstrated by explicit language in state statutes, or may be inferred from the nature of the powers and duties given to a particular government entity." *Duke & Company Inc., supra,* 521 F.2d at 1280; *accord, City of LaFayette, supra,* 532 F.2d at 434-35. The latter case properly notes that "all evidence which might show the scope of legislative intent" should be considered. *Id.* at 435 (footnote omitted).

Nothing in the Illinois statutory provisions governing **park** districts even remotely suggests that Illinois has authorized, let alone compelled, **park** districts to attempt to enrich themselves by coercing horizontal retail competitors operating under concession licenses to fix retail prices in what would otherwise be plain violation of the Sherman Act. **Park** districts are, of course, empowered to "construct, equip and maintain . . . golf . . . courses," Ill.Rev.Stat.1975, ch. 105, § 8-10, as well as "necessary facilities pertinent thereto . . . ." *Id.,* § 9.1-1. Power is also given for **park** districts "to contract in furtherance

of any of [their] corporate purposes," *id.,* § 8-1(a), and "to lease real estate," *id.,* § 8-16. We think these provisions fully authorize the **Park District** to operate pro shops at its golf courses or to make contracts or leases allowing outside parties to operate such shops. If the complaint in this lawsuit alleged no more than that the **Park District** had substantially reduced relevant competition by operating the shops itself, foreclosing others,[7] or by determining that the "corporate purposes" of the **District** would be best served by contracting with a single concessionaire for *591 the operation of the shops,[8] the case for a *Parker* defense would be stronger than it is here. That the **Park District's** conduct concerned its golf courses and involved its statutory powers to contract and/or to lease surely does not convert Illinois' grant of such powers into state authorization or mandate to use them to force private competitors to violate the antitrust laws.

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This conclusion is strengthened by the complaint's allegations that the **Park District**, in demanding 5% of gross sales as a concession fee and requiring as a condition of concession renewal that plaintiffs raise and fix their prices, presumably to cover the 5% fee, was effectively attempting to impose on the Peoria golfing public a 5% hidden sales tax that is illegal under Illinois law. We note that the **Park District's** revenue powers are limited to the levying of various property taxes, Ill.Rev.Stat.1975, ch. 105, § 6-1 et seq., and the charging of fees for the use of **District** facilities, *id.,* § 8-1(h), and we are aware of no authority that would authorize the **Park District** effectively to double the sales taxes currently in force in Illinois. If it can be proven that the concession fee's intended incidence would have operated as an illegal sales tax, it would be extremely difficult, if not impossible, to find a state mandate underlying the **Park District's** alleged conduct.[9] For this reason and the others indicated, we believe the **district** court improperly dismissed the antitrust claim against the **Park District**.

IV

The analysis set out in part III of this opinion applies directly only to the **Park District**. In *Parker, supra,* and in some cases applying it, however, officials of governmental units were sued, as is the case here, and it has generally and sensibly been held that where the activities of a governmental unit are outside the scope of the antitrust laws, the officials charged with performing those activities enjoy the same protections. *See Parker, supra,* 317 U.S. at 350-51, 63 S.Ct. 307; *E. W. Wiggins Airways, Inc., supra,* 362 F.2d at 56; *Murdock v. City of Jacksonville, Florida, supra,* 361 F.Supp. at 1093-94. Even in such cases, however, it has sometimes been recognized that an official's actions ultra vires or in bad faith might present a different question. *Id.*

Neither in the **district** court nor in this court have the individual defendants associated with the **Park District** made any argument that they should be entitled to protection from antitrust liability even if the **District** was not. We see no *a priori* reason to determine, at this stage in the litigation, that such additional protection would or would not be justified. *See Duke & Company Inc., supra,* where the Third Circuit reversed a dismissal in favor of three municipal corporations *and* a county commissioner after determining that *Parker* did not protect the governmental unit defendants. Accordingly, we reverse the **district** court's judgment in favor of the individual **Park District** defendants. We do not mean to

imply thereby that some or all of these defendants may not be able to establish some sort of good faith defense, for neither facts nor legal argument in support of such a defense are before us. Nor do we suggest, even if some sort of good faith defense might be cognizable in appropriate cases, that proof in support of the complaint's allegations of bad faith and official actions illegal under state law might not operate to vitiate the defense in this case.

592 *592 **V**

We turn to GSM's contention, accepted by the **district** court, that its involvement with the facts of this case was limited to seeking the award of a governmental contract and accepting its benefits and obligations once awarded, and that the doctrine of *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., supra,* and its progeny, protects GSM from antitrust liability. In *Noerr,* the Supreme Court held that "no violation of the [Sherman] Act can be predicated upon mere attempts to influence the passage or enforcement of laws." 365 U.S. at 135, 81 S.Ct. at 528. Three reasons for this rule were articulated. First, the Court found no Congressional purpose to regulate "political activity," and noted that an "essential dissimilarity between an agreement jointly to seek legislation or law enforcement and the agreements traditionally condemned by § 1 of the Act" counseled against construing the Act to apply to the former case. *Id.,* at 136-37, 81 S.Ct. at 529. Second, antitrust liability in such a case could reduce the flow of information on which governments depend and could, thus, impair their ability to take actions that operate to restrain competition, which ability was recognized in *Parker, supra. Id.* at 137, 81 S.Ct. 523. Third, "such a construction of the Sherman Act would raise important constitutional questions" because it would impute to Congress an intent to invade the First Amendment right of petition. *Id.* at 138, 81 S.Ct. at 530. The Court recognized that Sherman Act liability might be justified where conduct "ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor . . . ." *Id.* at 144, 81 S.Ct. at 533. Because the *Noerr* defendants were "making a genuine effort to influence legislation and law enforcement practices," *id.,* no such argument was possible in that case.

Noerr was followed in *United Mine Workers of America v. Pennington,* 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965), where joint labor-management inducements to the Secretary of Labor and the Tennessee Valley Authority to take action injurious to small coal operators were involved. The Court stated that

> [j]oint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act.

Id. at 670, 85 S.Ct. at 1593.

In *California Motor Transport Co. v. Trucking Unlimited,* 404 U.S. 508, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972), the Court extended the *Noerr-Pennington* rule to attempts to

influence administrative agencies and judicial proceedings. Because, however, the motor carrier defendants used universal resistance to competitors' applications for new operating authority to achieve their primary purpose of deterring the making of such applications, thereby injuring competitors not through governmental action but directly, the case was held to fall within Noerr's "sham" exception.

The **district** court accepted GSM's argument that its role in the case was solely that of the successful bidder for the **Park District's** pro shop concessions. We may assume arguendo that if the complaint alleged no more, GSM could not be found liable under the antitrust laws. We are inclined to the view that nonliability in such a case would flow from the fact that successful bidding does not violate the antitrust laws substantively, *cf.* *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*, 508 F.2d 547 (1st Cir. 1974), *cert. denied,* 421 U.S. 1004, 95 S.Ct. 2407, 44 L.Ed.2d 673 (1975), rather than from the principles of *Noerr,* which seem to address a different question.[10] Perhaps more to the
593 *593 point would be the decision of this court in *Metro Cable Co. v. CATV of Rockford, Inc., supra*, substantially relied upon by GSM, where defendant obtained the first granted cable television license in a city and successfully induced the city council not to license a potential competitor; this court found that *Noerr* and its progeny foreclosed antitrust liability.

Neither the successful bidder hypothetical nor *Metro Cable,* however, involve what is alleged here. The complaint asserts that GSM made an economically unrealistic "sham" proposal, not actually to be put into effect, in concert with at least some **Park District** officials, knowing that the proposal would not be acted upon as indicated in the bid invitation but would, instead, be used by the **Park District** to coerce plaintiffs into conduct violative of the antitrust laws. If these allegations can be proved, and we must assume at this point that they can, the *Noerr* doctrine would provide no defense. This is so for several reasons.

First, except for the fact that GSM's agreement and conduct were in conjunction with governmental officials it cannot be said that there is an "essential dissimilarity" of the sort that troubled the Court in *Noerr,* 365 U.S. at 136-37, 81 S.Ct. 523, between GSM's conduct and activities traditionally held violative of the Sherman Act. *Albrecht v. Herald Co.*, 390 U.S. 145, 88 S.Ct. 869, 19 L.Ed.2d 998 (1968), is illustrative.

In *Albrecht,* the defendant newspaper publisher had attempted to coerce plaintiff, one of its independent home delivery carriers, into compliance with a resale price fixing scheme violative of the Sherman Act. Defendant had argued, *inter alia,* that its actions, which included termination of the carrier, were wholly unilateral and did not establish any conspiracy or combination within the meaning of the Act. The Supreme Court disagreed, and overturned a jury verdict in defendant's favor because it was "clear that a combination in restraint of trade existed." *Id.* at 154, 88 S.Ct. at 874. The only combination presented by the record and considered by the Court is quite like that which, as pertinent to GSM, is alleged here. Specifically, to put pressure on the plaintiff carrier, the defendant hired a subscription solicitation company to seek customers from plaintiff's delivery route for a new route. Twenty-five percent of plaintiff's customers agreed to switch carriers. The defendant then gave these customers to another carrier

who knew that he would have to follow defendant's resale price policies and that he might have to return the customers to plaintiff if plaintiff acceded to the policies. The defendant's combination with the solicitation company and the new carrier who lent their business efforts to defendant's attempts to coerce the plaintiff into an antitrust violation supported Sherman Act liability.[11] The parallel to this case is obvious, as is the conclusion that GSM's alleged conduct is not essentially dissimilar to activities the Sherman Act was meant to proscribe.

Nor is the fact that GSM combined or conspired with governmental officials dispositive, for both of *Noerr*'s premises with respect to that point are undercut by the factual setting of this case. Our determination that the **Park District** and its officials had no state mandate or authority to engage in the activities attacked here necessarily reduces the applicability of the reasoning of *Noerr* to the degree it is based on the need of governmental units for citizen input in making decisions that *Parker* holds to be outside the scope of the Sherman Act. *See Duke & Company Inc., supra,* 521 F.2d at 1282. The
594 *Noerr* decision also rests on a refusal to impute to Congress an intent to *594 invade the constitutional "right of the people . . . to petition the Government *for a redress of grievances.*" U.S.Const., Amendment I (emphasis added). We have some difficulty understanding how a contract proposal to a governmental unit falls within the ambit of that right, *see* note 10 *supra,* but even if it does, we think it clear that agreement with government officials to pressure others into an antitrust violation does not.

Alternatively, another basis for finding *Noerr* protections inapplicable at this stage of the proceedings is that facts provable under the complaint could well establish that GSM's concession proposal was a "mere sham" within the meaning of that decision. 365 U.S. at 144, 81 S.Ct. 523. We are not prepared to say that this conclusion would inexorably follow upon the sole proof that the proposal was economically unrealistic, *see Noerr, supra,* 365 U.S. at 140-42, 81 S.Ct. 523; *Metro Cable, supra,* 516 F.2d at 231; *but see Woods Exploration & Producing Company, Inc. v. Aluminum Company of America,* 438 F.2d 1286, 1296-98 (5th Cir. 1971), *cert. denied,* 404 U.S. 1047, 92 S.Ct. 701, 30 L.Ed.2d 736 (1972), but the economically unrealistic nature of the proposal, alleged to have been known to **Park District** officials, might support an inference that GSM was not "making a genuine effort," *Noerr, supra,* 365 U.S. at 144, 81 S.Ct. 523, to obtain the concession rights but was instead lending its support to the **Park District's** attempted coercion of plaintiffs' pricing policies. The complaint is somewhat inconsistent in this regard, alleging as it does both that GSM's purpose was to obtain monopolistic concession rights and that GSM knowingly made its proposal to pressure plaintiffs into agreements which, if made, would have foreclosed the concession rights to GSM. Proof of the latter assertion, however, could establish a sham and take the case out of the *Noerr* doctrine even if that doctrine applied, which we have decided it does not.[12]

VI

Count II of the complaint alleges deprivations of the plaintiffs' civil rights under color of state law and is based on 42 U.S.C. § 1983. The **district** court dismissed Count II because, in its view, previous state court decisions based on the same operative facts

had resolved dispositive facts adversely to plaintiffs. On appeal, plaintiffs attack this dismissal only with respect to the complaint's charge that plaintiffs were summarily terminated from their public employment positions because they asserted their rights of petition and to due process by litigating their defenses to the **Park District's** forcible entry and detainer action. Moreover, plaintiffs agree that the **Park District** was properly dismissed out as a defendant even as to this charge. Accordingly, we affirm the **district** court's judgment insofar as it dismisses the other allegations in Count II and dismisses the **Park District** as a Count II defendant.

With regard to the employment termination claim against the President, trustees, attorney, and staff of the **Park District**, we must reverse. The **district** court based its dismissal of this claim on the following finding of Illinois Circuit Court Judge Iben in the **Park District's** damages lawsuit against the golf professionals:

> [T]he reason for their termination clearly appears to have been the Defendant's [sic] [plaintiffs herein] insistence on remaining in the golf shop premises. There is abundant evidence that they stubbornly and intractably insisted through litigation, and other ways, on this claim, spurning other avenues. They can have no doubt about the reason for their discharge, i. e., their refusal to give up the premises.

Pleasure Driveway *and* ***Park District*** *of Peoria v.* ***Kurek*** *et al.,* No. 75 L 2893 (10th
595 *595 Judicial Circuit, Peoria County, Nov. 14, 1975). This finding was made with reference to the golf professionals' counterclaim allegation that their employments were summarily and unlawfully terminated.

We have no quarrel with the proposition that if Judge Iben's finding had disposed of the claim made here or had determined adversely to plaintiffs a fact critical to success on this claim, relitigation in the federal courts would be barred. *See* *Reich v. City of Freeport,* 527 F.2d 666 (7th Cir. 1975); *Phillips v. Shannon,* 445 F.2d 460 (7th Cir. 1971). The fact that the remaining defendants under Count II were not parties or privies in the state court suit would, of course, make the doctrine of res judicata inapplicable, but it would not preclude defendants' defensive reliance on collateral estoppel. *See* *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation,* 402 U.S. 313, 91 S.Ct. 1434, 28 L.Ed.2d 788 (1971).

Nor would it matter that Judge Iben's decision has apparently been appealed,[13] for

> the federal rule is that the pendency of an appeal does not suspend the operation of an otherwise final judgment as . . collateral estoppel, unless the appeal removes the entire case to the appellate court and constitutes a proceeding de novo.

1B Moore's Federal Practice ¶ 0.416[3], at 2254 (2d ed. 1974); *Grantham v. McGraw-Edison Company,* 444 F.2d 210, 217 (7th Cir. 1971). Illinois follows the same rule. *Sixty-Third & Halsted Realty Co. v. Goldblatt Bros.,* 342 Ill.App. 389, 96 N.E.2d 838 (1951), *aff'd,* 410 Ill. 468, 102 N.E.2d 749.

We do not agree with the **district** court, however, that Judge Iben's finding disposed of

plaintiffs' claim herein or of critical facts pertinent to it. Illinois' Forcible Entry and Detainer Act, Ill.Rev.Stat.1975, ch. 57, § 1 et seq., plainly gives a tenant the right to remain in possession of property while litigating the question of his possessory rights. Judge Iben's determination that plaintiffs were terminated in their employments because they insisted on remaining in possession of the pro shops implies, to some extent at least, that the employment terminations occurred because plaintiffs chose to litigate their rights to possession. In fact, the finding expressly refers to plaintiffs' insistence "through litigation, and other ways" on asserting their claims to possession. Nothing in this state court judgment supports the **district** court's conclusion that it had been previously adjudicated that "the exercise of the right to litigate issues" was not the reason for plaintiffs' employment discharges. No other issues pertinent to Count II of the complaint were decided below or asserted in this court, so we reverse the **district** court's judgment of dismissal insofar as it concerns the employment discharge claim against the individual **Park District** defendants.

For the reasons stated herein, the judgment of the **district** court is affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. Plaintiffs have requested that the provisions of Circuit Rule 18 be applied on remand. We believe that the interests of justice would best be served, in the circumstances of this case, by granting that request. It is so ordered.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

[*] **District** Judge James L. Foreman of the Eastern **District** of Illinois is sitting by designation.

[1] In its decision and order dismissing the complaint, the **district** court also denied plaintiffs' motion for partial summary judgment. The court's determination that no cause of action was alleged *a fortiori* precluded independent consideration of this motion. Although we reach a different conclusion on the sufficiency of plaintiffs' complaint, we see no reason to disturb the **district** court's denial of partial summary judgment. Plaintiffs did in their briefs cite freely to materials tendered in support of their summary judgment motion and requested reversal of the **district** court's denial of the motion, but they made no contention at oral argument that they were entitled to summary judgment on this record. Moreover, "summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. . . . Trial by affidavit is no substitute for trial by jury . . . ." *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473, 82 S.Ct. 486, 491, 7 L.Ed.2d 458 (1962) (footnote omitted). We do not foreclose the possibility that summary judgment against or in favor of some or all of the defendants may eventually be justified, but we may say with confidence that the present record does not establish that all of the facts material to plaintiffs' complaint are uncontested.

[2] The plaintiffs do not explicitly allege an agreement or an understanding that GSM would not in fact pay an annual fee of $90,000. However, it is alleged that GSM would suffer net operating losses of at least $50,000 if it paid $90,000 yearly concession fees as promised. Also, the characterization of the proposal as being a "sham" would seem to imply a lack of bona fides insofar as an intent to carry out the terms and conditions of the proposal was concerned.

[3] The **district** judge characterized plaintiffs' motion as an attempt to relitigate "antitrust and constitutional violations which simply do not exist" and dismissed the possibility that a conspiracy existed as "pure fancy," although a conspiracy is plainly alleged both in the complaint he dismissed and in the amended complaint he denied leave to file.

[4] Nor do we consider the question of which, if any, of the asserted components of plaintiffs' damages will prove to be recoverable under the Supreme Court's recent decision in *Brunswick Corporation v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 97 S.Ct. 690, 50 L.Ed.2d 701 (1977).

[5] As the opinions of the Supreme Court, considered herein, have recognized, *Parker* announced no rule of antitrust *exemption* or *immunity*; rather, it determined that the Sherman Act was not intended to apply in the first place to the type of state-mandated activities there at issue. Other courts nevertheless have utilized the single-word shorthand references of "exemption" or "immunity."

[6] Mr. Justice Stevens delivered the Court's opinion, joined in whole by Justices Brennan, White, and Marshall, and in substantial part by the Chief Justice. *Id.* at 603, 96 S.Ct. 3110; Mr. Justice Blackmun concurred in the result. *Id.* at 605, 96 S.Ct. 3110.

[7] *Ladue Local Lines, Inc. v. Bi-State Development Agency of the Missouri-Illinois Metropolitan* ***District***, 433 F.2d 131 (8th Cir. 1970); and *Continental Bus System, Inc. v. City of Dallas*, 386 F.Supp. 359 (N.D.Tex.1974), both relied upon by defendants, are cases of this type.

[8] *E. W. Wiggins Airways, Inc. v. Massachusetts Port Authority*, 362 F.2d 52 (1st Cir. 1966), *cert. denied,* 385 U.S. 947, 87 S.Ct. 320, 17 L.Ed.2d 226, and *Murdock v. City of Jacksonville, Florida*, 361 F.Supp. 1083 (M.D.Fla.1973), fall into this category, and *Metro Cable Co., supra,* while distinguishable, is analogous. Although these cases and those cited in n. 7 *supra* were all decided before *Goldfarb* and *Cantor,* we may assume without deciding that the Sherman Act does not apply to these types of less-than-statewide governmental action.

[9] Such proof, of course, would add nothing directly to the merits of plaintiffs' antitrust claims and would be germane only to the question of state mandate.

[10] *See Hecht v. Pro-Football, Inc., supra*, 444 F.2d at 940-42; and *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*, 424 F.2d 25, 32-34 (1st Cir. 1970), *cert. denied,* 400 U.S. 850, 91 S.Ct. 54, 27 L.Ed.2d 88, both of which take the position that the rationale of *Noerr* and progeny is directed to attempts to influence some significant governmental policy determination and not a government's actions as a commercial entity.

[11] Of course, only the newspaper publisher was sued in *Albrecht,* and it is at least possible that had the solicitation company and the new carrier been sued a defense based on their "insubstantial . . . connection with the restraint" might have been established. *See Goldfarb, supra*, 421 U.S. at 791 n. 21, 95 S.Ct. 2004. On the present complaint, there is no occasion for us to decide if such a defense might be developed in subsequent proceedings here.

[12] Defendants' suggestion that the "sham" exception operates only in a judicial setting is specious. The Supreme Court articulated the exception in the context of the *Noerr* facts, which in no way involved judicial settings. Nor does this court's determination in *Metro Cable, supra*, 516 F.2d at 228, that the existence of a judicial setting authorizes a somewhat broader inquiry into the "sham" issue even remotely support such a proposition.

[13] Our record does not reflect the pendency of an appeal in the state court case, but the brief of the defendants who seek to rely on the state judgment represents this to be the case, and we take that representation as a judicial admission of the fact.

444 F.2d 210 (1971)

Paulette GRANTHAM, Fred Grantham, Charles R. Grantham, Individuals, Plaintiffs-Appellants,

v.

McGRAW-EDISON COMPANY, Essick Investment Co., "Automatic" Sprinkler Corporation of America, Corporations Defendants-Appellees.

No. 18394.

United States Court of Appeals, Seventh Circuit.

May 7, 1971.
Rehearing Denied June 10, 1971.

211 *211 Albert Langeluttig, Chicago, Ill., Robert A. Felsman, Fort Worth, Tex., Paul H. Gallagher, Chicago, Ill., Wofford & Felsman, Fort Worth, Tex., Simon & Simon, Henry W. Simon, Sr., Fort Worth, Tex., for appellants.

James Van Santen, Hill, Sherman, Meroni, Gross & Simpson, Chicago, Ill., for McGraw-Edison Co.; Charles A. Prudell, Elgin, Ill., of counsel.

Before SWYGERT, Chief Judge, FAIRCHILD, Circuit Judge, and GORDON, District Judge.[*]

SWYGERT, Chief Judge.

The principal question in this appeal is whether suit for infringement of a patent may be brought by a patent owner who has granted to another the sole and exclusive license to practice his invention but has reserved the right to receive royalties and to protect his royalty interest by suing infringers if his licensee fails to do so.

Paulette, Fred, and Charles R. Grantham appeal from a district court order denying their motion to reinstate their complaint. The suit, charging McGraw-Edison Company with patent infringement and seeking legal and equitable relief, had been dismissed (with leave to reinstate) on the ground that the Granthams, though they held legal title, had assigned all their substantial rights under the patents allegedly infringed and therefore lacked capacity to sue.

The patents in question, No. 2,604,313, dated July 22, 1952, and No. 2,643,463, dated June 30, 1953, issued to Frederick W. Grantham who assigned his interest in them to

his wife, JoAnn E. **Grantham**. On Mrs. **Grantham's** death, her rights in the patents descended to her children, who are the plaintiffs in this action. On March 21, 1956, JoAnn E. **Grantham**, at a time when she owned the patents, granted what was termed an "exclusive license" to the T. L. Smith **Co**. of Milwaukee, Wisconsin. As the result of a subsequent merger, T. L. Smith became a division of a company then known as Smith-Essick, Inc., a California corporation, which succeeded to T. L. Smith's rights under the licensing agreement.

On May 1, 1967, Smith-Essick transferred substantially all of its personal property to "Automatic" Sprinkler Corporation of America, an Ohio corporation. Smith-Essick then changed its name to Essick Investment **Co**. and continues to carry on business under that name. By reason of this sale of assets, Automatic succeeded to Essick's rights under the "exclusive license" agreement and performed its obligations under that agreement throughout the life of the two patents, both of which expired during the pendency of this litigation.

The Granthams' original complaint named Essick as a party-plaintiff. (It should be noted at this point that Essick is not subject to service of process in Illinois and has never formally appeared in this action.) **McGraw**-**Edison** sought dismissal of the complaint on the ground that the then exclusive licensee, that is, Automatic, was an indispensable party and had not been joined in the suit. Thereafter, the Granthams amended their complaint by naming Automatic as a defendant and changing Essick from a party-plaintiff to a defendant. After Automatic had appeared and filed answer,
212 **McGraw**-**Edison** requested that Essick and Automatic be realigned as *212 plaintiffs. Automatic objected to the request and waived all damages for infringement, stating that it had no dispute with **McGraw**-**Edison**.

McGraw-**Edison** then moved that the complaint be dismissed on the grounds that: (1) the Granthams lacked capacity to sue in their own name; and (2) there was no case or controversy in light of Automatic's waiver of damages. On July 24, 1968, the district court entered a memorandum and an order dismissing the case on the ground that the "exclusive license" agreement which JoAnn **Grantham** had granted to the predecessor of Automatic, that is, T. L. Smith, was in effect an assignment of all substantial rights under the patents and that only the assignees were entitled to sue for infringement. The court ruled that since Automatic refused to become a party-plaintiff the Granthams lacked standing to sue for infringement; this disposition made ruling on the "case or controversy" issue unnecessary.

On October 25, 1968, the district court vacated its dismissal order of July 24 and reinstated the case; but on February 27, 1969, the suit was again dismissed with leave to reinstate within ninety days. The leave was granted to permit the plaintiffs time within which to bring Essick into the case or to abandon its claim for damages for the period during which Essick was the exclusive licensee. On June 11, 1969, the district court denied the motion to reinstate the complaint for the period prior to May 1, 1967, on which date Smith-Essick transferred its assets to Automatic. The court deferred ruling on the remainder of the complaint. Plaintiffs obtained a thirty-day extension of the period within which they were required to file their appeal from this June 11 order; and they did file

their notice of appeal on August 11, 1969. On September 18, 1969, the district court denied the motion to reinstate the complaint for the period after May 1, 1967. Plaintiffs filed a notice of appeal from this order on October 16, 1969.

I

McGraw-**Edison** challenges our appellate jurisdiction to consider the merits of the question of the Granthams' capacity to sue for the alleged infringement. **McGraw**-**Edison** contends that no appeal from the dismissal order of February 27, 1969, was filed within the time prescribed by Rule 4 of the Federal Rules of Appellate Procedure. It argues that the orders of June 11 and September 18, denying plaintiffs' motions to reinstate, were in effect denials of requests to vacate the February 27 order. Motions for rehearing or to vacate a final order and like motions are addressed to the discretion of the trial court; and the denial of such an order is not itself appealable. Bass v. Baltimore & O. Terminal R. R., 142 F.2d 779 (7th Cir.), cert. denied, 323 U.S. 775, 65 S.Ct. 135, 89 L.Ed. 619 (1944). But the *Bass* case is not applicable to the situation before us. The district court's February 27 order dismissing with leave to reinstate did not terminate the litigation on the merits, *see* Asher v. Ruppa, 173 F.2d 10, 11 (7th Cir. 1949); it gave the plaintiffs the opportunity to amend their complaint. A dismissal with leave to amend is not a final order. *See* Jung v. K. & D. Mining **Co**., 356 U.S. 335, 78 S.Ct. 764, 2 L.Ed.2d 806 (1958); Western Electric **Co**. v. Pacent Reproducer Corp., 37 F.2d 14 (2d Cir. 1930); and 9 J. Moore, Federal Practice ¶ 110.08[1] (2d ed. 1970).

After the dismissal order and during the reinstatement period, plaintiffs elected to stand on their complaint and moved that it be reinstated without amendment. It was not until this motion was denied that the plaintiffs were unequivocally denied the relief they requested. Since plaintiffs filed notices of appeal from both the June 11 and the September 18 orders within the time limits allowed by Rule 4 of the Federal Rules of Appellate Procedure, defendant's contention that there is no appealable order properly before us is without merit.

213 *213 **II**

McGraw-**Edison** contends that the Granthams are collaterally estopped from recovering in this action by an adverse judgment in a related infringement suit. They refer to **Grantham** v. Morgan Linen Service, Inc., No. 68 C 252 (N.D.Ill., July 28, 1969), appeal dismissed, 426 F.2d 237 (7th Cir. 1970), a suit raising the same issues, where it was held that the Granthams lacked capacity to sue for infringement of the patents involved here. **McGraw**-**Edison** argues that that judgment precludes the Granthams from relitigating the same issues.

The established rule of res judicata and the related doctrine of collateral estoppel is that "the estoppel of a judgment must be mutual." Bigelow v. Old Dominion Copper Mining & Smelting **Co**., 225 U.S. 111, 127, 32 S.Ct. 641, 642, 56 L.Ed. 1009 (1912). As the result of Triplett v. Lowell, 297 U.S. 638, 56 S.Ct. 645, 80 L.Ed. 949 (1936), the requirement of mutuality is particularly strong in patent litigation. Technograph Printed Circuits, Ltd. v.

United States, 178 Ct.Cl. 543, 372 F.2d 969 (1967); Nickerson v. Kutschera, 419 F. 2d 983 (3d Cir. 1969). The rule in this circuit is that the mutuality requirement prevents a litigant from invoking the collateral estoppel effect of a prior judgment rendered in an action to which he was not a party. McVeigh v. McGurren, 117 F.2d 672, 677-678 (7th Cir. 1940), cert. denied, 313 U.S. 573, 61 S.Ct. 960, 85 L.Ed. 1531 (1941); Aghnides v. Holden, 226 F.2d 949 (7th Cir. 1955); Technograph Printed Circuits, Ltd. v. Methode Electronics, Inc., 356 F.2d 442 (7th Cir.), cert. denied, 384 U.S. 950, 1002, 86 S.Ct. 1570, 16 L.Ed.2d 547 (1966). Since **McGraw-Edison** was not a party to the *Morgan Linen Service* litigation, mutuality is lacking and the decision in that case cannot estop the Granthams in this case.

Of course, regardless of collateral estoppel, a prior judgment which disposes of the same issues as those raised in a later suit, may be given weight in the later suit either as precedent or as the result of comity. *See* Technograph Printed Circuits, Ltd. v. Methode Electronics, Inc., *supra* at 449. Indeed, that is what occurred in the instant case when the district judge adopted the opinion which had been announced in **Grantham** v. Morgan Linen Service, Inc., *supra.* There is nothing in the record to indicate that he invoked the collateral estoppel doctrine in reaching his decision; but even if he had done so, its invocation would have been erroneous.

III

The principal issue raised in this appeal concerns the Granthams' capacity to sue for infringement. The Granthams rely primarily on paragraph eleven of the **Grantham**-Smith license agreement which provides that the licensee may sue infringers, but if it elects not to bring suit, the Granthams shall have the "right * * * to bring suit for * * * infringement and to join [the licensee][1] as a party plaintiff."[2] **McGraw-Edison**, *214 on the other hand, contends that the license agreement conveyed such extensive rights under the patents that the agreement constituted an "assignment" and that, as a consequence, title to the patents was vested in the licensee who became the sole party entitled to sue for infringement. The district court agreed with **McGraw-Edison** and held that paragraph eleven of the license agreement was an impermissible attempt to divide the monopoly of the patents.

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The patents cover improvements in laundry driers. The license agreement gave T. L. Smith the "sole and exclusive right and license * * * solely to make or have made for it, and to use and sell Driers * * * embodying the invention." The name "**Grantham**" was required to be displayed on all driers manufactured under the agreement. Mrs. **Grantham** reserved the right to receive royalties based on the sales of licensed driers and to terminate the agreement under certain conditions. T. L. Smith had the absolute right to terminate on sixty days' notice, but was required to make every reasonable effort to promote the sale of the licensed driers while the agreement remained in effect. As already noted, Mrs. **Grantham** retained the right to sue for infringement and to join the licensee as a plaintiff in the event the latter elected not to sue. T. L. Smith was not given the right to grant sublicenses and could only assign its rights under the agreement to a "successor in business."

The foregoing provisions of the **Grantham**-Smith agreement show that Mrs. **Grantham** did not intend to grant to T. L. Smith several important incidents of ownership in the patents, namely: the exclusive right to exclude others from practicing the invention (manifested by Mrs. **Grantham's** reservation of the right to sue infringers in order to protect her royalty interest); the right to license others; and the right to refuse to exploit the invention. The question before us is whether the **Grantham**-Smith agreement, despite these limitations, was an assignment of the patents to T. L. Smith, thus depriving the plaintiffs, as successors of the "assignor," of the capacity to sue infringers. Our answer turns on whether the limitations on the title granted to T. L. Smith constituted an impermissible attempt to divide the patent monopoly.

The district court interpreted the decision in Waterman v. Mackenzie, 138 U.S. 252, 11 S.Ct. 334, 34 L.Ed. 923 (1891), to require a holding that the **Grantham**-Smith agreement was a conveyance of the entire title to the patents thus vesting in T. L. Smith and its successors the sole right to sue infringers. Although that case clearly holds that a patent monopoly "is one entire thing, and cannot be divided into parts," 138 U.S. at 255, 11 S.Ct. at 335, we find nothing in that decision which would prevent a patent owner who has granted another the exclusive right to practice his invention conditioned on payment
215 of certain royalties from protecting his *215 royalties by reserving the right to sue infringers. So long as infringers are not subjected to multiple suits for the same infringement a patent owner and his exclusive licensee may partition as they see fit all the rights flowing from the patent grant.

Neither Crown Die & Tool **Co**. v. Nye Tool & Machine Works, 261 U.S. 24, 43 S.Ct. 254, 67 L.Ed. 516 (1923), nor Green v. Le Clair, 24 F.2d 74 (7th Cir. 1928), conflict with this view. In *Crown Die & Tool **Co**.*, a patent owner, while retaining the right to practice his invention, assigned his right to sue a particular infringer. The Supreme Court held the assignment invalid, stating that the right to exclude infringers is an incident of patent ownership "which can only pass by assignment when attached to the right to make, use and vend." 261 U.S. at 36, 43 S.Ct. at 256. The bare assignment of the right to sue an infringer is clearly distinguishable from the retention by the patent owner of the right to sue infringers if his exclusive licensee elects not to sue.

In Green v. Le Clair, *supra*, the patentee Le Clair granted an exclusive license to one Sauerman. Sauerman, in turn, licensed Le Clair to make and sell the patented article in five specified states for use only in those states. Le Clair sued Green for infringement without joining Sauerman. The district court found that Sauerman was a "mere licensee" and therefore not an indispensable party. We reversed. After referring to *Crown Die & Tool **Co**., supra,* and Gayler v. Wilder, 10 How. 477, 51 U.S. 477, 13 L.Ed. 504 (1850), for the proposition that the "right to sue for future infringements is not separable from the monopoly conferred by a patent, but is merely an incident of that monopoly," we said: "There is no question but that the instrument executed by Le Clair and Sauerman * * * conferred on Sauerman an unqualified monopoly in the patent throughout the forty-three states not named in the agreement, and therefore Le Clair was without capacity to bring this suit in his own name." 24 F.2d at 77. The license agreement in that case purported to give both Le Clair and Sauerman the right to sue independently if they would not agree to join in a single suit. To avoid the possibility that an infringer would be subjected

to successive suits in violation of the principle established by Gayler v. Wilder, *supra*, we held that the license agreement did not give Le Clair the right to maintain the suit *"in his own name."* Implicitly, we held that he was required to join Sauerman. There is no indication in *Green* that if Sauerman had been joined as an involuntary party according to the procedure authorized by Independent Wireless Telegraph **Co**. v. Radio Corp. of America, 269 U.S. 459, 46 S.Ct. 166, 70 L.Ed. 357 (1926), the suit might not have been maintained.

In *Independent Wireless, supra*, the Supreme Court held that a licensee holding the exclusive right throughout the United States to use and sell certain patented devices for specified purposes had the right to maintain an infringement action upon joining the patent owner as party-plaintiff. The Court stated the question for its consideration thus: "Can the Radio Company make the De Forest Company a coplaintiff against its will under the circumstances of the case?" 269 U.S. at 464, 46 S.Ct. at 168. The Court, answering in the affirmative, said, "if the owner of a patent, being within the jurisdiction refuses or is unable to join an exclusive licensee as coplaintiff, the licensee may make him a party defendant by process * * * [and] if there is no other way of securing justice to the exclusive licensee, the latter may make the owner without the jurisdiction a coplaintiff without his consent. * * *" 269 U. S. at 468, 472, 46 S.Ct. at 169, 171.

We hold that Mrs. **Grantham's** reservation of the right to sue infringers does not violate the policy against a division of the patent monopoly. Nothing in Waterman v. Mackenzie, Crown Die & Tool **Co**. v. Nye, or Green v. Le Clair requires us to rule that paragraph
216 eleven of the **Grantham**-Smith agreement *216 is invalid. Since paragraph eleven is valid, it prevents the agreement from being deemed an assignment and effectively reserves to the Granthams the right to sue for infringement. Any different conclusion would leave a patentee who grants an exclusive license but reserves a royalty interest in his invention at the mercy of his licensee. He would be left without an effective remedy if his licensee failed to prosecute infringers.

There is no possibility that **McGraw**-**Edison** will be subjected to successive suits. It is clear from the record that both Essick and Automatic had notice of the Granthams' intention to sue and had been requested to join in the suit. Both were ultimately named as defendants. Automatic was served with process and appeared in the action. Although Essick was not served, *Independent Wireless* teaches that it could be made a **co**-plaintiff even against its will.

While this suit was pending in the trial court, Essick assigned to the Granthams any rights which it retained in the patents, including any rights to recover for infringement occurring while it was licensee. Shortly before this appeal was heard Automatic exercised its right to terminate the license agreement and assigned back to the Granthams all its rights under the agreement including the right to sue for infringement. The plaintiffs argue that even if we were to agree with **McGraw**-**Edison's** position that paragraph eleven of the license agreement is invalid and therefore that the agreement must be deemed an assignment rather than a license, we should permit them to sue as assignees of Essick's and Automatic's claims. Though we choose not to rely on this argument, the facts on which it is based doubly show that there is no possibility of

multiple suits against **McGraw**-**Edison** for infringement of these patents.

Since Essick and Automatic are no longer licensees, have assigned whatever rights they possessed to recover for infringement, and have disclaimed any interest in the outcome of this suit, they should be permitted to drop out of this litigation. **McGraw**-**Edison's** contention that the presence of Essick and Automatic is necessary to its ability to raise certain unspecified defenses or counterclaims has no merit. Any defenses it has may be asserted against the plaintiffs; whatever counterclaims it has against Essick or Automatic may be asserted in independent actions.

The order of the district court dismissing the complaint is reversed and the cause is remanded for further proceedings consistent with this opinion.

Memorandum on Petition for Rehearing

PER CURIAM.

In our analysis of collateral estoppel at part II of our opinion, 444 F.2d 213, we relied on Triplett v. Lowell, 297 U.S. 638, 56 S.Ct. 645, 80 L.Ed. 949 (1936), and related cases for the proposition that mutuality of estoppel is a strict requirement in patent litigation. Since *Triplett* has been overruled by Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313, 91 S.Ct. 1434, 28 L.Ed.2d 788 (1971), **McGraw**-**Edison** argues that we must reverse our initial decision and affirm the judgment of the district court. We disagree.

An initial problem posed by **McGraw**-**Edison's** argument is whether the assertion of their estoppel defense was timely. The decision on which **McGraw**-**Edison** bases its defense of estoppel, **Grantham** v. Morgan Linen Service, Inc., No. 68 C 252 (N.D.Ill., July 28, 1969), appeal dismissed, 426 F.2d 237 (7th Cir. 1970), was filed over seven weeks before the Granthams' claims in this suit were finally dismissed in full. While the district judge hearing the instant suit had knowledge of the termination of the *Morgan Linen Service* litigation, the record does not show where he obtained that knowledge; and as we pointed out in our decision, the judge did not purport to apply the doctrine of estoppel. No motion setting up the *Morgan Linen Service* judgment as a bar to the
217 Granthams' *217 claims was filed in the district court. The pendency of the Granthams' late filed appeal from the *Morgan Linen Service* judgment did not detract from the conclusive effect of that judgment. Prager v. El Paso National Bank, 417 F.2d 1111 (5th Cir. 1969). *See also* 1B J. Moore, Federal Practice ¶ 0.416 [3] (2d ed. 1965). **McGraw**-**Edison** did not assert the *Morgan Linen Service* judgment as a bar until March 9, 1970 when it filed its motion to dismiss the Granthams' appeal in the instant case. A party normally may not rely on an estoppel which was available to him in the trial court but which was not raised prior to appeal. *See* West Virginia N. R. R. v. United States, 391 F.2d 627, 636 (Ct.Cl. 1968).

We need not rely solely on **McGraw**-**Edison's** late assertion of its estoppel defense, for the *Blonder-Tongue* decision was not intended to constitute a wholesale rejection of the mutuality requirement. The holding of *Blonder-Tongue* was that "*Triplett* should be

overruled to the extent it forecloses a plea of estoppel by one facing a charge of infringement of a patent that has once been declared invalid." That holding does not reach this case where there has never been a determination of the validity of the Granthams' patents; and we do not believe that this is a proper case for the extension of *Blonder-Tongue's* abrogation of the mutuality requirement to situations where there has not been a prior determination of patent invalidity.

After thorough consideration, we have concluded that the district court made a clear error of law in dismissing the Granthams' complaint. We are not precluded from correcting that error because a similar error in the *Morgan Linen Service* litigation went uncorrected. Had the Granthams been aware of the impending partial abrogation of the mutuality requirement and the possibility that the judgment adverse to them in the *Morgan Linen Service* litigation might be asserted against them by other alleged infringers not parties to that action, they would undoubtedly have been more diligent in prosecuting their appeal from that judgment.

On the record before us, we believe that the application of the doctrine of collateral estoppel to bar the Granthams from presenting their claims would result in manifest injustice. Accordingly, we should not be obliged to apply the doctrine of estoppel even if the mutuality requirement had been met. *See* Restatement of Judgments § 70 (1942).

The petition for rehearing is denied.

[*] Judge Myron L. Gordon is sitting by designation from the United States District Court for the Eastern District of Wisconsin.

[1] For convenience, we will continue to refer to T. L. Smith and its successors in interest under the license agreement as "licensees" even though they would properly be designated "assignees" under the district court's interpretation of the agreement.

[2] Paragraph 11 of the license agreement reads in its entirety:

In the event of infringement of the aforesaid patents, or either of them, Smith Company shall be privileged but not required to bring suit and to control the conduct thereof against the infringer, and to join **Grantham** as a party plaintiff in such suit. In the event Smith Company exercises the privileges here conferred, it shall have the right to first reimburse itself out of any sums recovered in such suit or in settlement thereof for all costs and expenses of every kind and character, including reasonable attorney's fees, necessarily involved in the prosecution of any such suit, and if after such reimbursement, any funds shall remain from said recovery, it shall be divided one-half to **Grantham** and one-half to Smith Company. In the event **Grantham** receives notice of infringement, she shall promptly notify Smith Company in writing of such infringement, and if Smith Company does not bring suit against said infringer, as herein provided, within 90 days after receipt of such notice, **Grantham** shall have the right, but shall not be obligated to bring suit for such infringement and to join Smith Company as a party plaintiff, in which event **Grantham** shall hold Smith Company free, clear and harmless from any and all costs and expenses of such litigation, including attorney's fees, but in such event any sums recovered in any such suit or in settlement thereof shall belong to **Grantham**. However, any such sums received by **Grantham**, after deduction of the costs and expenses of litigation, including attorney's fees paid, shall be considered as royalty payments for the sole purpose of determining the minimum annual royalty provided for in Paragraph 5 above. Each party shall always have the right to be represented by counsel of its own selection and at its own expense in any suit instituted by the other for infringement, under the terms hereof.

734 F.Supp.2d 304 (2010)

METLIFE INVESTORS USA INSURANCE COMPANY, Plaintiff,

v.

Daniel ZEIDMAN as Trustee for Esther Zeidman Trust and Lavell S. Pratt as Personal Representative of the Estate of Sherry Pratt, Defendants.

No. 09-cv-2596 (ADS)(ETB).

United States District Court, E.D. New York.

August 31, 2010.

307 *307 Unger, Stokes, Acree, Gilbert, Tressler & Tacktill, PL, by: Christopher C. Gilbert, Esq., of Counsel, Orlando, FL, for Plaintiff.

McElroy, Deutsch & Mulvaney, LLP, by: Joseph P. Lasala, Esq., of Counsel, New York, NY, for Defendant Daniel Zeidman as Trustee of the Esther Zeidman Trust.

Adrienne R. Klein, Esq., Nyack, NY, for Defendant Lavell S. Pratt as Personal Representative of the Estate of Sherry Pratt.

Cline, King & King, P.C., Columbus, IN, by: Peter Campbell King, Esq., of Counsel, for Defendant Lavell S. Pratt as Personal Representative of the Estate of Sherry Pratt.

MEMORANDUM OF DECISION AND ORDER

SPATT, District Judge.

Plaintiff **MetLife Investors USA** Insurance Company ("**MetLife**") filed this interpleader action requesting that the Court determine the disposition of $975,000 that **MetLife** had received in payment for a now-rescinded annuity contract. Each of the named defendants, Daniel Zeidman as Trustee of the Esther Zeidman Trust (the "Zeidman Trust") and Lavell S. Pratt as Personal Representative of the Estate of Sherry Pratt (the "Pratt Estate") claims the $975,000. In addition, the Pratt Estate has asserted a counterclaim against **MetLife** and a cross-claim against the Zeidman Trust for violations of the Illinois Right to Publicity Act.

Presently before the Court are (1) a motion by the Pratt Estate to amend its counterclaim and cross-claim, (2) a motion by **MetLife** to dismiss the Pratt Estate's counterclaim; to be discharged of liability in connection with the interpleaded funds; and to be dismissed

from this case, (3) a motion by the Zeidman Trust to dismiss the Pratt Estate's cross-claim and for judgment on the pleadings, (4) a motion by the Pratt Estate to lift a stay of discovery. For the reasons set forth below, the Court denies the Pratt Estate's motions in their entirety, and grants the motions by **MetLife** and the Zeidman Trust in their entirety.

I. BACKGROUND

On February 11, 2008, the Zeidman Trust, through its Florida-based trustee Daniel Zeidman, purchased a "variable annuity" from **MetLife** for $975,000 (the "Annuity"). Pursuant to the resulting contract, **MetLife** agreed to aggressively invest the $975,000 Annuity purchase price (minus certain fees) on behalf of the Zeidman Trust, and to then make payments to the Zeidman Trust based on the performance of the investment.

As with any annuity, the Annuity here was tied to the life of a natural person. The natural person that measured the Annuity was one Sherry Pratt, a 38-year old terminally-ill woman living in a nursing home in Chicago, Illinois. Sherry Pratt's role in the Annuity was strictly auxiliary: the fact of her being alive or deceased determined the Zeidman Trust's rights under the Annuity, but she herself had no rights under the contract. Why was Sherry Pratt named as the measuring life for the Annuity? Strangely, she was not related to either Daniel or Esther Zeidman, and in fact does not appear to have even met them. Rather, Sherry Pratt appears 308 *308 to have been chosen because of her poor health.

To understand why Sherry Pratt's health was relevant, it is first necessary to understand that the Annuity provided two different kinds of payouts. First, it provided the kind of payout most commonly associated with annuities, whereby, starting on a date not more than ten years after the purchase of the annuity, **MetLife** would make regular payments to the Zeidman Trust for as long as Sherry Pratt lived. Second, and more importantly, if Sherry Pratt died before the regular payments began, the Annuity provided a "death benefit."

The death benefit agreed to in the Annuity provided that when Sherry Pratt died, the Zeidman Trust would be paid at least $975,000. In light of the fact that **MetLife** was aggressively investing the $975,000 that the Zeidman Trust paid for the Annuity, this would protect the Zeidman Trust from losing money if the investment had decreased in value. However, the annuity contract also provided that, if the $975,000 investment had grown in worth by the time Sherry Pratt died, **MetLife** would pay the Zeidman Trust the full value of the investment. In addition, **MetLife** would also then pay the Zeidman Trust a further forty cents for every dollar that the investment was valued above $975,000. In other words, the Zeidman Trust was guaranteed all the upside of **MetLife's** aggressive investment of the $975,000 — plus a 40% bonus on any gains — without taking on any downside risk.

Of course, no payout would be made until Sherry Pratt died. Moreover, if Sherry Pratt lived beyond the ten year anniversary date of the purchase of the Annuity, the death benefit would expire, and the regular annuity payments would begin. Thus, the strategy depended on measuring the annuity by the life of a person who was likely to die within a short time. *Compare* *Western Reserve Life Assur. **Co**. of Ohio v. Conreal LLC,* 715

F.Supp.2d 270, 272-74 (D.R.I.2010) (describing a similar scheme).

On February 23, 2008, just twelve days after the Zeidman Trust purchased the Annuity, Sherry Pratt died. The Zeidman Trust then made a demand for the death benefit under the Annuity, and **MetLife** in turn commenced a routine investigation into the Annuity's formation. **MetLife** alleges that approximately nine months later, it received a letter from a lawyer for the Pratt Estate, claiming that Sherry Pratt had never consented to be used as the measuring life for the Annuity. Rather, the attorney contended that Sherry Pratt did not even have the physical ability to sign the relevant consent documents. Shortly after it sent that letter, the Pratt Estate demanded payment to it of the full $975,000 Annuity purchase price.

On January 9, 2009, **MetLife** rescinded the Annuity, stating that the Zeidman Trust had made material misrepresentations in connection with its purchase of the Annuity. The Zeidman Trust denied making any such misrepresentations, but it did not contest the rescission of the annuity contract. Rather, it sought only the return of the $975,000 purchase price. Four days later, on January 13, 2009, **MetLife** filed the present interpleader case in the United States District Court for the Southern District of Florida. At that time **MetLife** deposited the $975,000 Annuity purchase price with the clerk of the court, citing competing demands for the $975,000 from the Zeidman Trust and the Pratt Estate.

On February 27, 2009, the Zeidman Trust answered **MetLife's** complaint, and cross-
309 claimed against the Pratt Estate to recover the interpleaded funds. The Zeidman *309
Trust asserted that, as a result of the rescission of the contract, it was entitled to a return of the purchase price. On March 20, 2009, the Pratt Estate also answered the complaint, and cross-claimed for the interpleaded funds on the ground that the Zeidman Trust had violated the Illinois Right of Publicity Act by using Sherry Pratt's identity without her permission. In addition, the Pratt Estate asserted a counterclaim against **MetLife**, alleging a similar violation of the Illinois Right of Publicity Act, and demanding unspecified damages.

On June 19, 2009, upon motion by the Zeidman Trust in the Southern District of Florida, the case was transferred to this Court. Then, on November 23, 2009, the Zeidman Trust moved for judgment on the pleadings and also moved to dismiss the Pratt Estate's cross-claim. On December 17, 2009, **MetLife** similarly moved to dismiss the Pratt Estate's counterclaim, and also sought to be dismissed from the case and discharged of liability. Then, on January 15, 2010, on motion by the Zeidman Trust, United States Magistrate Judge E. Thomas Boyle stayed all discovery. On March 4, 2010, the Pratt Estate moved to lift the discovery stay.

Before the Court decided any of these pending motions, the Pratt Estate moved to amend its cross-claim and counterclaim and to assert new claims against additional third parties. The Court denied the Pratt Estate's original motion to amend without prejudice for failure to attach a proposed amended complaint, and on July 20, 2010, the Pratt Estate filed the presently-pending renewed motion to amend, this time attaching a proposed amended complaint.

The Pratt Estate's proposed amended complaint ("PAC") asserts new causes of action against the Zeidman Trust and **MetLife** for fraud, conspiracy to commit fraud, and unjust enrichment. It also asserts claims against eight new putative third-party defendants who allegedly helped the Zeidman Trust and **MetLife** to use Sherry Pratt's identity without her permission.

As for new facts alleged in the PAC, the most relevant relate to one Debra Flowers, the third party defendant allegedly given the task of procuring Sherry Pratt's consent for the Annuity. The Pratt Estate alleges that, although Debra Flowers provided what she claimed to be Sherry Pratt's signature on the Annuity paperwork, Debra Flowers never even spoke with Sherry Pratt, let alone met with her. Rather, Debra Flowers contacted Sherry Pratt's aunt, Sharon Pratt, who lived in New Jersey. The Pratt Estate claims that Debra Flowers misrepresented herself to Sharon Pratt as working for "people who `invested in hospice'", (PAC, ¶ 28), and that Debra Flowers told Sharon Pratt that she had some "tax forms", (PAC, ¶ 33), on which she needed Sharon to sign Sherry Pratt's name. These "tax forms" were in fact the consent forms for use of Sherry Pratt's identity for the Annuity. Based on the alleged misrepresentations of Debra Flowers, Sharon Pratt signed Sherry Pratt's name on the forms. There is no allegation that Sharon Pratt ever contacted Sherry Pratt in connection with signing Sherry Pratt's name, or that Sharon Pratt otherwise was an agent of Sherry Pratt.

MetLife and the Zeidman Trust now oppose the Pratt Estate's renewed motion to amend, primarily on grounds that the PAC fails to state any valid claim.

II. DISCUSSION

A. The Pratt Estate's Motion to Amend

The Pratt Estate seeks to amend its counterclaim and cross-claim by adding eight new third party defendants and asserting three new claims against **MetLife** *310 and the Zeidman Trust. The Court will first discuss the addition of the new third party defendants, and then will review the claims against **MetLife** and the Zeidman Trust.

310

1. The Pratt Estate's Claims Against the Proposed Third Party Defendants

The Pratt Estate seeks to assert claims in this case against third party defendants Debra Flowers; Menachem (Mark) Berger; Abraham Gottesmann; Patient Financial Services, LLC; Management Brokers, Inc.; US Planning Group; Woodbury Financial Services, Inc.; and Moishe (Marc) Cohen. The Pratt Estate contends that each of these putative third-party defendants was involved in the alleged misuse of Sherry Pratt's identity, thereby giving rise to causes of action for violation of the Illinois Right of Publicity Act, common law fraud, conspiracy to commit fraud, and unjust enrichment.

Federal Rule of Civil Procedure 14 governs when a defendant seeks to assert claims

against a person who is not yet a named party in the case. Rule 14 provides in pertinent part:

> A defending party may, as third-party plaintiff, serve a summons and complaint on a nonparty who is or may be liable to it for all or part of the claim against it....

Thus, under Rule 14, a defendant may only assert a third party claim against a party that may be liable for the claims asserted against that defendant.

Here, the Pratt Estate has not complied with this rule. First, plaintiff **MetLife** has filed an interpleader claim against the Pratt Estate, and as such, the Pratt Estate is not facing *any* liability as a defendant. Rather, the Pratt Estate merely has the opportunity to seek to be awarded the interpleaded funds, and, under the alleged facts, no third party defendant could be said to be "liable" for the claim asserted against the Pratt Estate.

In addition, even if the Pratt Estate did have potential liability here, that liability would not provide the basis for the Pratt Estate's putative third party claims. Each claim that the Pratt Estate seeks to assert against the putative third party defendants is solely for harm done directly to the Pratt Estate. By contrast, Rule 14 limits a defendant to joining third parties that share or supersede the defendant's liability to the plaintiff.

The Court therefore denies leave to the plaintiff to assert claims against the putative third party defendants. The Court does so without prejudice to the Pratt Estate's right to assert such claims in an appropriate court and proceeding.

2. The Pratt Estate's Claims Against MetLife and the Zeidman Trust

In the PAC, the Pratt Estate seeks to assert four substantive claims against **MetLife** and the Zeidman Trust. Both **MetLife** and the Zeidman Trust contend that all four of these claims are futile, and that the Court should therefore deny the Pratt Estate's motion to amend.

In deciding whether to grant a motion to amend, a Court must consider, among other things, whether the amended complaint fails to state a valid claim for relief. If a proposed amended complaint fails to state a valid claim for relief, then the amendment is futile, and should not be permitted. *See, e.g.,* *Ruotolo v. City of New York,* 514 F.3d 184, 191 (2d Cir.2008).

311 In determining futility of amendment, the Court applies the same standard used to decide a motion to dismiss under Fed. R. Civ. P. 12(b)(6). *Dougherty v. Town of North Hempstead Bd. of Zoning Appeals,* *311 282 F.3d 83, 88 (2d Cir.2002); *Baron v. Complete Management, Inc.,* 260 Fed. Appx. 399, 400-01 (2d Cir.2008) (applying the *Twombly* summary judgment standard in deciding amendment futility). Under the now well-established *Twombly* standard, a complaint amendment would be futile only if the amended complaint would not contain enough allegations of fact to state a claim for

relief that is "plausible on its face." *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 127 S.Ct. 1955, 1974, 167 L.Ed.2d 929 (2007). The Second Circuit has explained that, after *Twombly,* the Court's inquiry under Rule 12(b)(6) is guided by two principles. *Harris v. Mills,* 572 F.3d 66 (2d Cir.2009) (quoting *Ashcroft v. Iqbal,* ___ U.S. ___, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009)).

"First, although `a court must accept as true all of the allegations contained in a complaint,' that `tenet' `is inapplicable to legal conclusions' and `threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.'" *Id.* (quoting *Iqbal,* 129 S.Ct. at 1949). "`Second, only a complaint that states a plausible claim for relief survives a motion to dismiss' and `[d]etermining whether a complaint states a plausible claim for relief will ... be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.'" *Id.* (quoting *Iqbal,* 129 S.Ct. at 1950). Thus, "[w]hen there are well-pleaded factual allegations, a court should assume their veracity and ... determine whether they plausibly give rise to an entitlement of relief." *Iqbal,* 129 S.Ct. at 1950.

a. The Illinois Right of Publicity Act

The Pratt Estate seeks to assert a counterclaim against **MetLife** and a cross-claim against the Zeidman Trust for violation of the Illinois Right of Publicity Act ("IRPA"), based on their use of Sherry Pratt's identity in connection with the Annuity. Both **MetLife** and the Zeidman Trust contend that, even accepting the facts pleaded in the PAC as true, the Pratt Estate has not stated a valid claim under this statute. The Court agrees.

The IRPA prohibits the unauthorized use of a person's identity for commercial purposes. The relevant statutory provision provides in pertinent part:

> A person may not use an individual's identity *for commercial purposes* during the individual's lifetime without having obtained previous written consent from the appropriate person....

765 ILCS 1075/30(a) (emphasis added). "Commercial purposes" is defined in pertinent part by the statute as "the *public* use or holding out of an individual's identity... in connection with the ... sale of a product...." 765 ILCS 1075/5 (emphasis added). As there is no indication to the contrary, the Court assumes that the IRPA employs the term "public" in its common meaning. *See Export-Import Bank of U.S. v. Asia Pulp & Paper **Co**., Ltd.,* 609 F.3d 111, 121 (2d Cir.2010) (citing *Perrin v. United States,* 444 U.S. 37, 42, 100 S.Ct. 311, 62 L.Ed.2d 199 (1979) ("A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.")). In this case, the most relevant definition of "public" appears to be "accessible to or shared by all members of the community," or "exposed to general view." *Webster's Third New International Dictionary: Unabridged* 1836 (1976).

Here, the Pratt Estate alleges that, without obtaining her consent, **MetLife** and the Zeidman trust used Sherry Pratt's identity as the measuring life for the Annuity. This

312 allegation may partly satisfy the statute in the sense that Sherry Pratt's identity could be said to have been used *312 "in connection with the ... sale of a product" — that is, it was used in connection with the sale of the Annuity. 765 ILCS 1075/5. However, this allegation is not sufficient to state a claim under the IRPA, because there are no facts alleged showing that **MetLife** and the Zeidman Trust made "public" use of Sherry Pratt's identity. To the contrary, the alleged facts, as well as the Annuity documents themselves, show that the Annuity was a private contract between **MetLife** and the Zeidman Trust. Except in the context of later litigation, neither the existence of the Annuity nor its underlying documentation was ever allegedly published or otherwise made accessible to the public. In the Court's view, the use of Sherry Pratt's identity was thus quintessentially private, and as such, it cannot form the basis for a claim under the IRPA. *Compare, e.g., Toney v. L'Oreal **USA**, Inc.*, 406 F.3d 905 (7th Cir.2005) (applying the IRPA in the context of the public use of the plaintiff's image on hair product packaging).

In addition, to the extent that the Pratt Estate contends that it also is asserting a common law claim for violation of the right of publicity, any such claim was superseded by the IRPA. *See Blair v. Nevada Landing P'ship*, 369 Ill.App.3d 318, 322-23, 307 Ill.Dec. 511, 859 N.E.2d 1188 (Ill.App.2d Dist.2006) (noting that the IRPA replaced the common law right of publicity). The Court therefore finds that the Pratt Estate's claims against **MetLife** and the Zeidman Trust under the IRPA are futile.

b. Common Law Fraud and Conspiracy to Commit Fraud

The Pratt Estate also seeks to assert common law claims for fraud and conspiracy to commit fraud against **MetLife** and the Zeidman Trust. Both **MetLife** and the Zeidman Trust maintain that the Pratt Estate has not stated valid causes of action under either of these theories.

As a preliminary matter, none of the parties address the choice of law to be applied to these claims. While the Pratt Estate and **MetLife** cite to Illinois law, the Zeidman Trust relies on both Illinois and New York law. Ultimately, however, the Court finds that choice of law is not determinative, and therefore the Court need not resolve the issue.

The elements of common law fraud under Illinois law are:

> (1) a false statement of material fact;
>
> (2) defendant's knowledge that the statement was false;
>
> (3) defendant's intent that the statement induce the plaintiff to act;
>
> (4) plaintiff's reliance upon the truth of the statement; and
>
> (5) plaintiff's damages resulting from reliance on the statement.

Linhart v. Bridgeview Creek Development, Inc., 391 Ill.App.3d 630, 634, 330 Ill.Dec. 843,

909 N.E.2d 865 (Ill.App. 1st Dist.2009) (citing *Connick v. Suzuki Motor Co.*, 174 Ill.2d 482, 496, 221 Ill.Dec. 389, 675 N.E.2d 584 (1996)). Similarly, under New York law, the elements of a fraud claim are:

> (1) a material misrepresentation or omission of fact
>
> (2) made by defendant with knowledge of its falsity
>
> (3) and intent to defraud;
>
> (4) reasonable reliance on the part of the plaintiff; and
>
> (5) resulting damage to the plaintiff.

Crigger v. Fahnestock and Co., Inc., 443 F.3d 230, 234 (2d Cir.2006).

313 Here, the Pratt Estate fails to state a cause of action for fraud because it does not allege that either **MetLife** or the Zeidman *313 Trust made any statements to Sherry Pratt, let alone false statements on which Sherry Pratt relied. In fact, the Pratt Estate does not allege that *any* person made any statement to Sherry Pratt relevant to this case. Rather, the Pratt Estate alleges only that Debra Flowers — whose alleged role as agent for either **MetLife** or the Zeidman Trust is dubious — made false statements to Sherry Pratt's aunt, Sharon Pratt. However, the Pratt Estate does not allege that Sharon Pratt communicated these statements to Sherry Pratt, or that Sharon Pratt had any power of agency to act on Sherry Pratt's behalf. Thus, the Pratt Estate cannot satisfy the element of a fraud claim that requires Sherry Pratt to have relied on a false statement made by **MetLife** or the Zeidman Trust.

In addition, the Pratt Estate has alleged no facts showing damage to Sherry Pratt or her estate. Sherry Pratt is not alleged to have lost any money or to have been otherwise emotionally harmed as a result of the alleged illicit use of her identity. To the extent that the Pratt Estate alleges harm in conclusory terms, (see PAC, ¶ 127) this is insufficient to state a claim for relief. For this additional reason, the Pratt Estate's fraud claim is futile.

The Pratt Estate's claim for conspiracy to commit fraud fails for similar reasons. Under both Illinois and New York law, a conspiracy to commit fraud requires that a party, among other things, agree to commit fraud and then take an overt step in furtherance of that fraud. *See, e.g., Linhart v. Bridgeview Creek Development, Inc.*, 391 Ill.App.3d 630, 634, 330 Ill.Dec. 843, 909 N.E.2d 865 (Ill.App. 1st Dist.2009); *Best Cellars Inc. v. Grape Finds at Dupont, Inc.*, 90 F.Supp.2d 431, 446 (S.D.N.Y.2000). Here, the Pratt Estate alleges no facts showing either an agreement to defraud or any overt acts in furtherance of this by either **MetLife** or the Zeidman Trust. Moreover, the Pratt Estate alleges no damages resulting from the alleged conspiracy. Therefore, the Pratt Estate's claim for conspiracy to commit fraud is also futile.

c. Unjust Enrichment

Finally, the Pratt Estate seeks to assert a claim for unjust enrichment against **MetLife** and the Zeidman Trust. Again, no party addresses the issue of choice of law with regard

to this claim, but both **MetLife** and the Zeidman Trust rely on Illinois law in their challenge to the Pratt Estate's unjust enrichment cause of action. For its part, the Pratt Estate offers no discussion whatsoever of its unjust enrichment claim, let alone any discussion of the appropriate choice of law.

The Court views the application of Illinois law as reasonable, and finds that the Pratt Estate's claim for unjust enrichment would be futile. First, as discussed above, the Pratt Estate has stated no damages arising from the alleged misconduct of **MetLife** and the Zeidman Trust. Second, under Illinois law, unjust enrichment is not "a separate cause of action that, standing alone, would justify an action for recovery." *Mulligan v. QVC, Inc.*, 382 Ill.App.3d 620, 631, 321 Ill.Dec. 257, 888 N.E.2d 1190 (Ill.App. 1st Dist. 2008). Thus, in cases where an underlying fraud claim is without merit, an unjust enrichment claim generally fails as well. *See id.* ("where the underlying claim for fraud is deficient, we have dismissed claims for unjust enrichment"). Finally, the Pratt Estate's failure to address the arguments for futility advanced by **MetLife** and the Zeidman Trust operates as a constructive abandonment of this cause of action. *See, e.g., Lipton v. County of Orange, NY*, 315 F.Supp.2d 434, 446 (S.D.N.Y.2004) ("This Court may, and generally
314 *314 will, deem a claim abandoned when a plaintiff fails to respond to a defendant's arguments that the claim should be dismissed."). The Court therefore finds that the Pratt Estate's cause of action for unjust enrichment is also futile.

Having found all of the claims asserted in the PAC to be futile, the Court finds that amendment of the Pratt Estate's counterclaim and cross-claim is inappropriate. The Pratt Estate's motion to amend is therefore denied in its entirety.

B. MetLife's Motion to Dismiss and for Discharge

MetLife separately moves to dismiss the Pratt Estate's presently pending counterclaim against it for violation of the Illinois Right of Publicity Act, and also seeks to be dismissed from this interpleader action and discharged of liability. The Pratt Estate opposes both of these requests. The Zeidman Trust has taken no position on either request.

1. MetLife's Motion to Dismiss the Pratt Estate's Counterclaim

In its original complaint, the Pratt Estate asserted a counterclaim against **MetLife** under the IRPA. This original counterclaim is materially identical to the PAC's IRPA claim, except that it is based on less alleged factual detail than is contained in the PAC. The Court has already found that the IRPA claim against **MetLife** asserted in the PAC is deficient, and the Court therefore now finds that the IRPA claim asserted against **MetLife** in the present complaint is also invalid, and dismisses that claim. To the extent that the Pratt Estate claims to have also asserted a common law cause of action against **MetLife** for violation of the right of publicity, that cause of action also must fail, as it is preempted by the IRPA. *Blair*, 369 Ill.App.3d at 322-23, 307 Ill.Dec. 511, 859 N.E.2d 1188.

2. MetLife's Motion for Discharge

In addition, **MetLife** asserts that it has satisfied the jurisdictional requirements for an interpleader case, and it now seeks to be dismissed from the action and to be absolved of any liability in connection with the interpleaded funds.

Generally, once an interpleader plaintiff has satisfied the jurisdictional requirements of an interpleader claim, the Court will discharge the plaintiff from liability and dismiss it from the case. *See New York Life Ins. Co. v. Connecticut Development Authority,* 700 F.2d 91, 95 (2d Cir.1983); *Locals 40, 361 & 417 Pension Fund,* 2007 WL 80868 at *3. To determine the jurisdictional elements of an interpleader claim, federal district courts look to 28 U.S.C. § 1335. Under this statute, a plaintiff that commences an interpleader action must first allege that it is in possession of a single fund of value greater than $500. *Bankers Trust Co. v. Manufacturers Nat. Bank of Detroit,* 139 F.R.D. 302 (S.D.N.Y.1991) (citing to *State Farm Fire & Casualty Co. v. Tashire,* 386 U.S. 523, 87 S.Ct. 1199, 18 L.Ed.2d 270 (1967)). Second, the plaintiff must allege "a real and reasonable fear of double liability or vexatious, conflicting claims" *Washington Electric Coop., Inc.,* 985 F.2d at 679, against the single fund, "regardless of the merits of the competing claims." *Fidelity Brokerage Servs., LLC v. Bank of China,* 192 F.Supp.2d 173, 177 (S.D.N.Y.2002); *see also Locals 40, 361 & 417 Pension Fund v. McInerney,* No. 06-cv-5224 (JFK), 2007 WL 80868, *3 (S.D.N.Y. Jan. 9, 2007). Finally, pursuant to the plain language of Section 1335, a plaintiff must state that it has deposited or is depositing the fund with the court.

315 *315 Here, the plaintiff **MetLife** has alleged that it is in possession of a fund of $975,000, for which it has received competing claims from the Zeidman Trust and the Pratt Estate. Having deposited this fund with the Court, **MetLife** is now entitled to be dismissed from the case, and to be absolved of liability in connection with the interpleaded funds. The Court therefore grants **MetLife's** motion for discharge, and dismisses **MetLife** from this case.

C. The Zeidman Trust's Motion to Dismiss the Cross-Claim and for Judgment on the Pleadings

The Zeidman Trust also moves to dismiss the Pratt Estate's cross-claim based on a violation of the Illinois Right of Publicity Act, and in addition moves for a judgment on the pleadings granting it the interpleaded funds. The Pratt Estate opposes both of these requests. **MetLife** take no position on either request.

1. The Zeidman Trust's Motion to Dismiss the Pratt Estate's Cross-Claim

As with **MetLife**, the Pratt Estate had asserted a claim for violation of the IRPA against the Zeidman Trust prior to seeking to amend its complaint. Also, as with **MetLife**, this

previously asserted IRPA claim was materially identical to the claim asserted in the PAC, except for a lack of certain additional alleged facts included in the PAC. Thus, having found that the Pratt Estate did not state a valid IRPA claim against the Zeidman Trust in the PAC, the Court also finds that the IRPA claim against the Zeidman Trust in the present complaint is without merit. The Court therefore dismisses the Pratt Estate's cross-claim against the Zeidman Trust based on violations of the IRPA. Any common law claim based on the right of publicity is similarly dismissed. *See* discussion, supra.; *Blair,* 369 Ill.App.3d at 322-23, 307 Ill.Dec. 511, 859 N.E.2d 1188.

2. The Zeidman Trust's Motion for Judgment on the Pleadings

Finally, the Zeidman Trust requests that, based solely on the pleadings before the Court, the Court award it the interpleaded funds. The Zeidman Trust asserts that it is entitled to these funds as the legal consequence of **MetLife's** rescission of the Annuity, and that the Pratt Estate has stated no valid claim to the interpleaded funds. The Court agrees.

It is the Court's role in an interpleader case to determine which of the named defendants is entitled to all or part of the interpleaded funds. The Court now evaluates this based on the parties' pleadings, taking the facts alleged by the non-moving party, the Pratt Estate, as true.

With respect to the Pratt Estate's claim to the interpleaded funds, the Court has already ruled that the Pratt Estate's sole basis for claiming the interpleaded funds, that the Zeidman Trust violated of the IRPA, is not legally valid. Thus, the Court does not award the Pratt Estate any of the interpleaded funds.

By contrast, the Zeidman Trust originally paid the interpleaded funds to **MetLife** as consideration for the Annuity. **MetLife** has now rescinded the Annuity contract, and the ordinary result of the rescission of a contract is that each party return the other to its pre-contract condition. *See, e.g., Black's Law Dictionary* 1421 (9th ed. 2009) (rescission generally "restore[s] the parties to their precontractual positions"). In this case, that would include **MetLife's** return of the interpleaded funds to the Zeidman Trust. As **MetLife**, the rescinding party, has no objection to this result, there are no disputed issues of fact or law that prevent the Court from effecting that result. Therefore, the
316 Court directs that *316 the interpleaded funds should be returned to the Zeidman Trust, from whence they originally came. The Zeidman Trust's motion for a judgment on the pleadings awarding them the interpleaded funds is therefore granted. The Pratt Estate's motion to lift the stay of discovery is rendered moot.

III. CONCLUSION

For the foregoing reasons, it is hereby

ORDERED that the Pratt Estate's motion to join the third party defendants and to amend its cross-claim and counterclaim is denied in its entirety; and it is further

ORDERED that **MetLife's** motion to dismiss the Pratt Estate's counterclaim, to be discharged from liability in connection with the interpleaded funds, and to be dismissed from this case is granted in its entirety; and it is further

ORDERED that the Zeidman Trust's motion to dismiss the Pratt Estate's crossclaim and for judgment on the pleadings is granted in its entirety and the cross-claim by the Pratt Estate against the Zeidman Trust is dismissed; and it is further

ORDERED that the Pratt Estate's motion to lift the stay of discovery is denied as moot; and it is further

ORDERED that the Clerk of the Court is directed to transfer the interpleaded funds in this case, in the sum of $975,000, plus accrued interest, to the Zeidman Trust; and it is further

ORDERED that the Clerk of the Court is directed to close this case.

SO ORDERED.

837 N.E.2d 99 (2005)
216 Ill.2d 294
297 Ill.Dec. 319

NORTHERN ILLINOIS EMERGENCY PHYSICIANS et al., Appellees, v. LANDAU, OMAHANA & KOPKA, LTD., et al., Appellants.

Nos. 97895, 97899.

Supreme Court of Illinois.

September 22, 2005.

101 *101 Samuel B. Isaacson, Sonya D. Naar, Denise C. Castillo, of DLA Piper Rudnick Gray Cary US, L.L.P., Chicago, for appellants **Landau**, Omahana & Kopka, Ltd., and Robert A. Bower.

Michael C. Bruck, Jean M. Prendergast, Ellen M. Carey, of Crisham & Kubes, Ltd., Chicago, for appellants DiMonte, Schostok & Lizak and Stephen J. Schostok.

Thomas R. Rakowski, Robert A. Egan, Chicago, for appellee **Northern Illinois Emergency Physicians**.

Justice KARMEIER delivered the opinion of the court:

Plaintiff, **Northern Illinois Emergency Physicians** (NIEP), brought an action in the circuit court of Cook County against the law firms of **Landau**, Omahana & Kopka, Ltd., and DiMonte, Schostok & Lizak, and two of the firms' attorneys alleging that the law firms had committed legal malpractice while representing NIEP in connection with a medical malpractice claim. The circuit court granted summary judgment in favor of the law firms and their attorneys and against NIEP on the grounds that NIEP had sustained no damages as a matter of law and therefore could not establish a necessary element for a cause of action for legal malpractice. The appellate court reversed and remanded. No. 1-02-1218 (unpublished order under Supreme Court Rule 23). The law firms and their attorneys then petitioned our court for leave to appeal. 177 Ill.2d R. 315. We granted their petitions and consolidated the cases. For the reasons that follow, the cause
102 of action against attorney Stephen J. Schostok is dismissed. As to *102 all of the remaining attorneys, the judgment of the appellate court is reversed.

The events giving rise to these proceedings began 15 years ago, when Erica Johnson, a

22-month-old child, fell ill and was taken by her parents to the **emergency** room at St. Therese Medical Center in Waukegan. Erica was treated at the hospital by Dr. Bruce Sands, a partner in NIEP. Erica's symptoms included high fever, an elevated respiratory rate, a red rash, and a purple mark on the back of her neck and shoulder. Dr. Sands believed, erroneously, that Erica's symptoms were attributable to an ear infection and child abuse. He did not think the child was in any imminent danger. He therefore discharged her from the hospital and sent her home with her family, a syringe of antibiotics, and a prescription for more antibiotics.

In fact, Erica did not have an ear infection and was not the victim of child abuse. She was actually in shock and suffering from petechiae, purpura, and a bacterial infection known as meningococcemia. Her condition was life threatening, but could have been treated successfully had it been properly diagnosed. Because Dr. Sands failed to recognize her symptoms for what they were, however, Erica did not receive the care she required. Within 11 hours of her discharge from St. Therese, Erica lapsed into a coma. Her parents took her to the **emergency** room of another hospital, but it was too late. Efforts at **emergency** resuscitation failed, and she was pronounced dead.

Erica's parents, as special administrators of Erica's estate, subsequently filed a medical malpractice action in the circuit court of Lake County against Dr. Sands, NIEP, and St. Therese Medical Center. St. Therese, in turn, filed a third-party claim for common law implied indemnity against Dr. Sands and NIEP based on vicarious liability.[1] Following a jury trial, judgment was entered in favor of Erica's parents and against all defendants in the amount of $4 million. On St. Therese's motion, the trial court then directed a verdict against Dr. Sands and NIEP and in favor of St. Therese on the medical center's indemnity claim.

St. Therese, Dr. Sands and NIEP all appealed, arguing that they should not have been held liable, that they were entitled to a new trial based on various errors committed by the trial judge, and that the jury's damage award was not supported by the evidence and was excessive. Dr. Sands further argued that the trial court should not have directed a verdict in favor of St. Therese on its claim for indemnity because that claim was filed beyond a deadline set by the circuit court and was barred by the applicable statutes of limitation and repose. The appellate court rejected these arguments and affirmed. *Johnson v. Sands,* Nos. 2-96-1479, 2-96-1480 cons., 292 Ill.App.3d 1122, 240 Ill.Dec. 512, 717 N.E.2d 861 (1997) (unpublished order under Supreme Court Rule 23).

The appellate court's order affirming the circuit court's judgment was filed November 19, 1997. While that appeal was pending, Erica's parents initiated postjudgment collection proceedings against Sands and all but one of the other partners of NIEP. Sands filed for personal bankruptcy. The other partners named in the proceedings argued that their personal assets could not be reached because they had not been sued individually and
103 the circuit court's *103 judgment named only the partnership, not the individual partners. Although the circuit court rejected these arguments, the appellate court found them to be meritorious. It therefore reversed various orders entered by the circuit court holding NIEP's partners in contempt for failing to cooperate in the proceedings to discover their assets and requiring them to turn over their assets to Erica's parents. See *Johnson v. St.*

Therese Medical Center, 296 Ill.App.3d 341, 230 Ill.Dec. 810, 694 N.E.2d 1088 (1998).

Shortly before the appellate court filed its opinion in the collection case, St. Therese satisfied the judgment by paying Erica's parents the full $4 million awarded to them. Erica's parents acknowledged that payment by executing a release of the judgment as to St. Therese on April 20, 1998. With that payment and the accompanying release, the involvement of Erica's parents in this litigation ended. The litigation itself did not.

When Dr. Sands treated Erica at St. Therese Medical Center, both he and NIEP were covered by professional liability insurance policies issued by Premier Alliance Insurance Company. Premier became insolvent in 1994, while the action filed by Erica's parents was still pending, and its obligations were assumed by the **Illinois** Insurance Guaranty Fund (the Fund) in accordance with section 532 ***et*** *seq.* of the **Illinois** Insurance Code (215 ILCS 5/532 ***et*** *seq.* (West 1994)). After judgment was entered in favor of Erica's parents and against Dr. Sands, NIEP, and St. Therese, the Fund brought a declaratory judgment action in the circuit court of Cook County to obtain a determination as to its statutory obligation to indemnify Dr. Sands and NIEP. The circuit court ultimately determined that the Fund was required to indemnify Dr. Sands and NIEP for $300,000 each, the maximum authorized by the statute, making the Fund's total liability $600,000. That judgment was affirmed on appeal. ***Illinois*** *Insurance Guaranty Fund v. Sands,* Nos. 1-98-2798, 1-98-2803 cons., 309 Ill.App.3d 1071, 261 Ill.Dec. 983, 764 N.E.2d 598 (1999) (unpublished order under Supreme Court Rule 23).

While the Fund was litigating its statutory liability to Sands and NIEP, the partners who comprised NIEP, including Sands, brought a separate action for legal malpractice, individually and on behalf of the partnership, against the lawyers who had represented Sands and NIEP in the underlying medical malpractice case. That action, which gave rise to the present appeal, named as defendants the law firm of **Landau**, Omahana & Kopka, Ltd.; Robert A. Bower, a lawyer then associated with **Landau**, Omahana & Kopka, Ltd.;[2] the law firm of DiMonte, Schostok & Lizak; and Stephen Schostok, an attorney with DiMonte, Schostok & Lizak.[3]

104 *104 According to the complaint, Bower and the firm of **Landau**, Omahana & Kopka, Ltd., were hired by the Fund to represent Sands and NIEP in the medical malpractice case. Sands and NIEP, in turn, hired Schostok and the firm of DiMonte, Schostok & Lizak to represent them as additional counsel in that case. The NIEP partners claimed that they had meritorious defenses to the third-party indemnity action asserted against them by St. Therese Medical Center, specifically, that the indemnity claim was barred by the applicable periods of limitation and repose. According to the NIEP partners, however, the defendant lawyers neither moved for dismissal of the third-party complaint nor raised, as an affirmative defense, that the complaint was time-barred. The NIEP partners asserted that these omissions constituted a failure "to exercise reasonable care, skill and diligence" required by the attorneys' professional obligations and damaged NIEP and its partners by allowing judgment to be entered against them on St. Therese's third-party claim. Accordingly, the NIEP partners sought recovery from the attorneys for $4 million, the full amount of the third-party judgment, plus interest.

NIEP's action for legal malpractice triggered a separate action by **Landau**, Omahana & Kopka, Ltd., against St. Therese Medical Center. In its complaint, as amended, **Landau**, Omahana alleged that St. Therese had asserted its third-party complaint against NIEP and its partners merely to force the Fund, NIEP's insurer, to settle the case for a higher amount. According to **Landau**, Omahana, St. Therese had agreed, orally, that if it were successful in obtaining judgment on its third-party claim, it would not enforce that judgment against NIEP and its partners. **Landau**, Omahana's action sought to hold St. Therese to that oral promise.

Landau, Omahana's amended complaint was ultimately dismissed by the circuit court. The appellate court affirmed, holding that the law firm was neither a party to nor a third-party beneficiary of any agreement that may have been reached between St. Therese and the NIEP partners and therefore had no standing to enforce it. ***Landau**, Omahana & Kopka, Ltd. v. Franciscan Sisters Health Care Corp.*, 323 Ill.App.3d 487, 494, 256 Ill.Dec. 690, 752 N.E.2d 570 (2001). The question of whether an agreement not to enforce the indemnity judgment actually existed was not resolved.

As the **Landau**, Omahana litigation ran its unsuccessful course, the legal malpractice action filed by Sands and the other NIEP partners against **Landau**, Omahana; Robert Bower; DiMonte, Schostok & Lizak; and Stephen Schostok proceeded. The defendants in the malpractice action filed a combined motion to dismiss. That motion was granted as to Sands and the other individual partners of NIEP in May of 1999, leaving only the claims asserted by the NIEP partnership itself.

In July of 2001, more than three years after the legal malpractice lawsuit commenced, two separate motions for summary judgment were filed, one by **Landau**, Omahana and Robert Bower, the second by DiMonte, Schostok & Lizak and Stephen Schostok. The **Landau**, Omahana motion asserted that it and Bower were entitled to judgment because NIEP had improperly assigned its malpractice claim to St. Therese. The motion further asserted that NIEP's malpractice claim could not be sustained, as a matter of law, because the partnership sustained no actual damages.

105 DiMonte, Schostok & Lizak's motion for summary judgment made the same arguments. In addition, it asserted that the firm breached no duty to NIEP or its *105 partners because it did not actually serve as trial counsel for the partnership and played no role in the decision not to challenge St. Therese's indemnification claim as untimely. According to DiMonte, Schostok & Lizak, it was retained simply to negotiate with the Fund on behalf of the partnership and protect the partnership's assets in the underlying medical malpractice action.

Both summary judgment motions were subsequently supplemented by the defendant attorneys. NIEP filed written responses to the motions. **Landau**, Omahana and Robert Bower, in turn, filed their own response to a motion for summary judgment that had been filed by NIEP a year earlier, but which remained pending.

Following a hearing, all of the pending summary judgment motions were denied. The law firms and attorneys moved for reconsideration. Following another hearing, their motions were granted. In an order filed February 13, 2002, the circuit court reversed its position

and entered summary judgment in favor of the law firms and attorneys and against NIEP. That decision was founded on the fact NIEP had never had to pay St. Therese and St. Therese had never attempted to collect the indemnity judgment. Because NIEP had paid nothing to St. Therese, the court reasoned that the attorneys' alleged malpractice could not be said to have caused any actual damage to the partnership. Without such actual damages, the court believed, no action for legal malpractice could lie.

NIEP moved for reconsideration. That motion was denied. NIEP then appealed, and the appellate court reversed and remanded for further proceedings. Rejecting the view taken by the circuit court, the appellate court held that payment of the indemnity judgment was not a prerequisite to NIEP's legal malpractice action. In the appellate court's view, the fact that the indemnity judgment had been entered and remained outstanding "could constitute proof of actual damages as a result of [the lawyers'] alleged negligence, absent any evidence to the contrary" and raised a genuine issue of material fact, precluding summary judgment on the legal malpractice claim. No. 1-02-1218 (unpublished order under Supreme Court Rule 23).

The appellate court further held that NIEP's negligence claim could not be barred on the grounds that it was part of an impermissible scheme to assign a malpractice claim in violation of **Illinois** law. In addition, the court rejected an argument advanced by DiMonte, Schostok & Lizak and Stephen Schostok that NIEP's action is premature. The court likewise found no merit to the lawyers' alternative claim that DiMonte, Schostok & Lizak was not responsible for NIEP's damages, as a matter of law, because NIEP had not retained the firm as trial counsel and it had no authority to control the litigation with respect to St. Therese's indemnity claim. Citing deposition testimony from Dr. Sands that refuted the lawyers' characterization of their role in the case, the appellate court held that there was a genuine issue of material fact regarding the scope of Schostok's responsibility. No. 1-02-1218 (unpublished order under Supreme Court Rule 23).

Landau, Omahana and Robert Bower petitioned for leave to appeal. A separate petition for leave to appeal was filed by DiMonte, Schostok & Lizak and Stephen Schostok. We granted both petitions and, on a joint motion filed by the attorneys, consolidated the cases for briefing, argument and a decision on the merits.

106 On this appeal, the lawyers assert that the appellate court's judgment should be reversed for two reasons: (1) the circuit court correctly held that NIEP had not *106 sustained any actual damages as a result of the attorneys' alleged negligence and therefore could not assert a claim against them for legal malpractice; and (2) if the appellate court's decision is allowed to stand and NIEP subsequently prevails against the lawyers on the merits, any recovery obtained by NIEP would contravene public policy because, if the damage award were retained by NIEP, the partnership would obtain a windfall and be unjustly enriched. Alternatively, if NIEP handed the award over to St. Therese, the partnership would violate the prohibition against the assignment of malpractice claims.

Where, as here, an appeal arises from the reversal of a circuit court's order granting summary judgment, our standard of review is *de novo.* *Home Insurance Co. v. Cincinnati*

Insurance Co., 213 Ill.2d 307, 315, 290 Ill.Dec. 218, 821 N.E.2d 269 (2004). In undertaking such review, our function is to determine whether the court reached the proper result. The reasons given by the court for its decision or the findings on which its decision is based are not material if the judgment is correct. *City of Chicago v. Holland,* 206 Ill.2d 480, 491-92, 276 Ill.Dec. 887, 795 N.E.2d 240 (2003). Accordingly, we may affirm a grant of summary judgment on any basis appearing in the record, regardless of whether the lower courts relied upon that ground. *Home Insurance Co.,* 213 Ill.2d at 315, 290 Ill.Dec. 218, 821 N.E.2d 269.

The standards governing summary judgment motions are well established. The purpose of summary judgment is not to try a question of fact, but to determine whether a genuine issue of material fact exists. *Adams v.* ***Northern Illinois*** *Gas Co.,* 211 Ill.2d 32, 42-43, 284 Ill.Dec. 302, 809 N.E.2d 1248 (2004). Summary judgment is proper where, when viewed in the light most favorable to the nonmoving party, the pleadings, depositions, admissions, and affidavits on file reveal that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *General Casualty Insurance Co. v. Lacey,* 199 Ill.2d 281, 284, 263 Ill.Dec. 816, 769 N.E.2d 18 (2002).

Because summary judgment is a drastic means of disposing of litigation, a court must exercise extraordinary diligence in reviewing the record so as not to preempt a party's right to fully present the factual basis for its claim. See *Sullivan's Wholesale Drug Co. v. Faryl's Pharmacy, Inc.,* 214 Ill.App.3d 1073, 1077, 158 Ill.Dec. 185, 573 N.E.2d 1370 (1991). At the summary judgment stage, plaintiffs are not required to prove their cases. *Allegro Services, Ltd. v. Metropolitan Pier & Exposition Authority,* 172 Ill.2d 243, 256, 216 Ill.Dec. 689, 665 N.E.2d 1246 (1996). Although summary judgment is appropriate if a plaintiff cannot establish an element of his claim (*Morris v. Margulis,* 197 Ill.2d 28, 35, 257 Ill.Dec. 656, 754 N.E.2d 314 (2001)), it should only be granted when the right of the moving party is clear and free from doubt (*Dowd & Dowd, Ltd. v. Gleason,* 181 Ill.2d 460, 483, 230 Ill.Dec. 229, 693 N.E.2d 358 (1998)).

In the matter before us today, NIEP's action against the defendant lawyers alleges legal malpractice. To prevail on a legal malpractice claim, the plaintiff client must plead and prove that the defendant attorneys owed the client a duty of due care arising from the attorney-client relationship, that the defendants breached that duty, and that as a proximate result, the client suffered injury. *Sexton v. Smith,* 112 Ill.2d 187, 193, 97 Ill.Dec. 411, 492 N.E.2d 1284 (1986).

107 The injury in a legal malpractice action is not a personal injury (*Eastman* *107 *v. Messner,* 188 Ill.2d 404, 411, 242 Ill.Dec. 623, 721 N.E.2d 1154 (1999)), nor is it the attorney's negligent act itself (*Palmros v. Barcelona,* 284 Ill.App.3d 642, 646, 220 Ill.Dec. 233, 672 N.E.2d 1245 (1996)). Rather, it is a pecuniary injury to an intangible property interest caused by the lawyer's negligent act or omission. See *Eastman,* 188 Ill.2d at 411, 242 Ill.Dec. 623, 721 N.E.2d 1154; *Palmros v. Barcelona,* 284 Ill.App.3d at 646, 220 Ill.Dec. 233, 672 N.E.2d 1245. For purposes of a legal malpractice action, a client is not considered to be injured unless and until he has suffered a loss for which he may seek monetary damages. See *Griffin v. Goldenhersh,* 323 Ill.App.3d 398, 407, 257 Ill. Dec. 52,

752 N.E.2d 1232 (2001). The fact that the attorney may have breached his duty of care is not, in itself, sufficient to sustain the client's cause of action. Even if negligence on the part of the attorney is established, no action will lie against the attorney unless that negligence proximately caused damage to the client. See *Metrick v. Chatz,* 266 Ill.App.3d 649, 654, 203 Ill.Dec. 159, 639 N.E.2d 198 (1994). The existence of actual damages is therefore essential to a viable cause of action for legal malpractice. See *Palmros v. Barcelona,* 284 Ill.App.3d 642, 646, 220 Ill.Dec. 233, 672 N.E.2d 1245 (1996).

In a legal malpractice action, actual damages are never presumed. See *Griffin,* 323 Ill.App.3d at 404, 257 Ill.Dec. 52, 752 N.E.2d 1232. Such damages must be affirmatively established by the aggrieved client. *Eastman,* 188 Ill.2d at 411, 242 Ill.Dec. 623, 721 N.E.2d 1154. Unless the client can demonstrate that he has sustained a monetary loss as the result of some negligent act on the lawyer's part, his cause of action cannot succeed. See *Farm Credit Bank of St. Louis v. Gamble,* 197 Ill.App.3d 101, 103, 143 Ill.Dec. 844, 554 N.E.2d 779 (1990).

Making that demonstration requires more than supposition or conjecture. Where the mere possibility of harm exists or damages are otherwise speculative, actual damages are absent and no cause of action for malpractice yet exists. See *Lucey v. Law Offices of Pretzel & Stouffer, Chartered,* 301 Ill.App.3d 349, 353, 234 Ill.Dec. 612, 703 N.E.2d 473 (1998). Damages are considered to be speculative, however, only if their existence itself is uncertain, not if the amount is uncertain or yet to be fully determined. *Profit Management Development, Inc. v. Jacobson, Brandvik & Anderson, Ltd.,* 309 Ill.App.3d 289, 309, 242 Ill.Dec. 547, 721 N.E.2d 826 (1999).

Our appellate court has held that where an attorney has been engaged to defend an action and the action is lost through the attorney's negligence, the amount of the judgment suffered by the client is, generally, a proper element of recovery in a malpractice proceeding against the attorney. See *Gruse v. Belline,* 138 Ill.App.3d 689, 698, 93 Ill.Dec. 297, 486 N.E.2d 398 (1985). Based on that precedent, NIEP asserts that the $4 million judgment entered against it on St. Therese's indemnity claim is sufficient to satisfy the damage requirement for its malpractice claim against the defendant lawyers. Although NIEP has never been asked to pay that judgment and St. Therese has never attempted to enforce it, NIEP contends that under *Gruse,* an adverse judgment can constitute evidence of actual damage even when the judgment remains unpaid at the time the malpractice claim is tried. See *Gruse,* 138 Ill.App.3d at 698, 93 Ill.Dec. 297, 486 N.E.2d 398.

The defendant attorneys oppose that position, arguing that the indemnity judgment itself is not sufficient to establish NIEP's damages. In their view, the partnership's damages must be measured by 108 *108 the amount the partnership actually paid toward satisfaction of the judgment. As we have already indicated, that amount is zero. NIEP has paid nothing to St. Therese and St. Therese has never attempted to collect on the judgment. The defendant attorneys argue, moreover, that because NIEP transferred all of its significant assets to a successor partnership and had been reduced to an empty shell by the time the indemnity judgment was entered, any future attempt to enforce that

judgment would have no adverse consequences for the partnership. As a practical matter, it is now judgment proof.

In support of their position, the defendant attorneys look to our appellate court's decision in *Sterling Radio Stations, Inc. v. Weinstine,* 328 Ill.App.3d 58, 262 Ill.Dec. 230, 765 N.E.2d 56 (2002). That case involved a legal malpractice action in which the plaintiff sought damages from attorneys he had hired to defend him in an action seeking payment on a promissory note the plaintiff had guaranteed. After judgment was entered against the plaintiff on the guarantee, plaintiff hired new lawyers to appeal the judgment at a cost of $100,000. The appeal was unsuccessful, but a settlement agreement was ultimately reached under which the plaintiff's liability was extinguished through payments made on his behalf by another party. As a result of that agreement, the plaintiff was not required to pay any part of the judgment out of his own pocket. The $100,000 in attorney fees he incurred in his unsuccessful appeal did, however, remain his responsibility.

The defendant attorneys in the malpractice action moved for summary judgment arguing, among other things, that because the plaintiff had paid nothing himself toward the underlying judgment, he could not be said to have suffered any damages and therefore did not have a legally cognizable claim against the attorneys for malpractice. The circuit court agreed and granted summary judgment in the attorneys' favor. The appellate court reversed in part, holding that the $100,000 in attorney fees paid by plaintiff in his unsuccessful bid, on appeal, to avoid the consequences of the defendant attorneys' actions should be considered damages. With respect to the monies paid in satisfaction of the underlying judgment, however, the appellate court agreed with the circuit court that because those sums had been paid by another party and not the plaintiff personally, the plaintiff could not claim them as damages. To hold otherwise, the appellate court reasoned, would unjustly enrich the plaintiff, permit him to obtain a double recovery, and place him in a better position by bringing the malpractice action than he would have occupied had he prevailed in the underlying action. *Sterling Radio Stations,* 328 Ill.App.3d at 65, 262 Ill.Dec. 230, 765 N.E.2d 56.

In the case before us here, the appellate court found *Sterling Radio Stations* to be inapposite because, unlike *Gruse, Sterling* did not speak to the issue of whether unsatisfied judgments can constitute actual damages in legal malpractice actions. Rather, it addressed the separate question of whether benefits received by an injured party from a source independent of and collateral to the tortfeasor will diminish the damages the injured party could otherwise recover from the tortfeasor. That question is not at issue here, the appellate court held, for no payments have been made toward the judgment by a third party. The $4 million indemnity judgment obtained by St. Therese against NIEP has not been satisfied and remains outstanding. No. 1-02-1218 (unpublished order under Supreme Court Rule 23).

109 The defendant attorneys in this case argue that the appellate court misinterpreted *109 and misapplied both *Sterling Radio Stations* and *Gruse.* They also assert that the appellate court failed to properly apply the standards for summary judgment. Specifically, they contend that because the materials they adduced in support of their motion showed that NIEP had not been compelled to pay the indemnity judgment and

was unlikely to ever actually pay that judgment, the burden should have shifted to NIEP to produce some factual basis to show that it suffered pecuniary injury and was entitled to judgment in its favor. According to the attorneys, that did not happen. The appellate court permitted NIEP's action to proceed based on nothing more than the existence of the adverse indemnity judgment. In the attorneys' view, that was improper.

We agree with the defendant attorneys that the appellate court erred in reversing the circuit court's order granting summary judgment and allowing NIEP's malpractice claim to go forward. In our view, however, the flaw in the appellate court's judgment is not related to shifting burdens of production, nor does it turn on whether the existence of an unsatisfied judgment is sufficient, in and of itself, to withstand a challenge to the damages element of a legal malpractice claim on a motion for summary judgment. The problem with the appellate court's disposition is that it fails to take into account the actual effect of the indemnity judgment under the facts of this case.

St. Therese's third-party indemnity action did not create the $4 million damage claim NIEP is presently facing. NIEP is responsible for those damages because of the medical malpractice committed by Bruce Sands, one of its partners. NIEP became responsible for those damages after the jury found it liable for the acts and omissions by Dr. Sands which resulted in Erica Johnson's death. Pursuant to the jury's verdict, on which the circuit court entered judgment, NIEP was jointly and severally liable for all damages awarded to Erica's parents. Because NIEP was jointly and severally liable, Erica's parents could have sought full satisfaction of the judgment from NIEP alone. See *Prince v. Atchison, Topeka & Santa Fe Ry. Co.*, 76 Ill.App.3d 898, 909, 32 Ill. Dec. 362, 395 N.E.2d 592 (1979). In other words, Erica's parents could have proceeded against NIEP directly for the entire $4 million judgment.

Because NIEP was already liable for the entire $4 million judgment, entry of the indemnity judgment against it on St. Therese's third-party action did not impose any greater burden on the partnership than it already faced. The indemnity judgment's only effect was to change the party to whom the $4 million was owed. When judgment was entered on the underlying medical malpractice action, NIEP was liable to Erica's parents. When judgment was entered on St. Therese's indemnity claim and St. Therese satisfied the malpractice judgment, NIEP's liability shifted to St. Therese. In each case, however, the amount NIEP owed remained exactly the same. The acts or omissions of NIEP's lawyers in defending against the indemnity claim therefore did not place NIEP in any worse position than it was already in. That being so, their alleged negligence cannot be said to have proximately caused any injury to the partnership.

When this was pointed out to NIEP's counsel during oral argument, counsel responded by suggesting that the $4 million judgment in the underlying medical malpractice case could not be considered as harming NIEP because Erica's parents would not have looked to anyone other than St. Therese to collect the judgment. If the medical center
110 had not voluntarily *110 paid the judgment, counsel's theory was that the parents would have attempted to execute the judgment against it (*i.e.,* St. Therese), not the other defendants. For NIEP, the $4 million judgment in the medical malpractice action therefore had no practical effect.

This argument is untenable for several reasons. First, it is not supported by the facts. Contrary to counsel's speculation, St. Therese is not the first and only defendant Erica's parents would have looked towards to enforce the judgment. The record plainly shows that Erica's parents' initial collection efforts were actually directed to the NIEP partners, not St. Therese.

The claim that Erica's parents would never have sought to collect from NIEP is also flawed because it presupposes that proceeding against that entity would have been futile because the partnership had nothing from which the judgment could be satisfied. Clearly, however, St. Therese did not believe that seeking recourse from NIEP was fruitless. That is why it filed and prosecuted an implied indemnity claim. Whatever resources were available to meet St. Therese's claim were equally available to Erica's parents. Accordingly, if St. Therese thought action against NIEP was worthwhile, there is no reason to believe that Erica's parents would not have made the same assumption. Indeed, if Erica's parents had not considered NIEP to be a viable target, they would have had no reason to include it among the parties they named as defendants.

Finally, counsel's argument is inconsistent with the position NIEP is taking with respect to St. Therese's indemnity judgment. If, as NIEP contends, the existence of the indemnity judgment, standing alone, is sufficient to constitute legally cognizable damage even though the judgment has never been enforced against NIEP, it must also be true that the existence of the underlying malpractice judgment, standing alone, was sufficient to constitute legally cognizable damage prior to its satisfaction by St. Therese even though the judgment was not enforced against NIEP. The situations are parallel. The magnitude of the harm was the same. It therefore cannot be said that one judgment was any more onerous than the other. Correspondingly, entry of the indemnity judgment cannot be said to have made NIEP any worse off than it was when the jury returned the $4 million verdict against it on the underlying medical malpractice claim.

It is true that if NIEP's lawyers had mounted a successful challenge to St. Therese's third-party action, St. Therese could not have obtained indemnity from NIEP. The only circumstance under which the absence of the indemnity judgment would benefit NIEP, however, is if St. Therese were willing to voluntarily pay the full amount of the judgment to Erica's parents before Erica's parents initiated collection proceedings against NIEP directly.[4] Under that scenario, NIEP would be relieved of any further financial responsibility to Erica's parents, for the parents, having once obtained full satisfaction of
111 the judgment, could not look elsewhere to *111 collect it again. As a result, NIEP would evade liability completely.

The problem with this scenario is that it suffers from the same impediment as the argument we just discussed: it has no basis in fact. For St. Therese to voluntarily assume the full burden of the judgment without first seeing whether Erica's parents would look elsewhere to satisfy the judgment would be contrary to the medical center's own financial interests and inconsistent with its view of who was ultimately responsible for Erica Johnson's death. St. Therese certainly did nothing like that here. It made no payments until after collection proceedings against the NIEP partners had reached the appellate court. There is nothing in reason or the record to suggest that it would have

acted any differently had its indemnity action against NIEP been successfully challenged. To postulate damages based on this sequence of events would therefore be entirely hypothetical. That is fatal to NIEP's position, for as we noted earlier in this opinion, a cause of action for malpractice cannot be sustained where the mere possibility of harm exists or the damages are otherwise speculative.

Under these circumstances, NIEP has no grounds for claiming that the defendant attorneys' failure to challenge the timeliness of St. Therese's indemnity action had adverse consequences for the partnership. Even if the attorneys had succeeded in defeating the indemnity claim as time-barred, NIEP's situation would be unchanged. It would still have been liable for $4 million in damages. The only difference, as we have already noted, is that it would have owed those damages directly to Erica's parents rather than to St. Therese. A mere change in the identity of the judgment creditor, without more, entails no quantifiable damages. It is therefore insufficient to meet the requirement of actual damages necessary to sustain a cause of action for legal malpractice. Accordingly, the circuit court was correct in granting the motion for summary judgment filed by the defendant attorneys in this case. Its judgment should not have been overturned by the appellate court. In light of this conclusion, we need not reach the attorneys' additional argument that allowing NIEP to recover on its legal malpractice claim would contravene public policy.

For the foregoing reasons, the judgment of the circuit court is affirmed and the judgment of the appellate court is reversed. As to defendant Stephen J. Schostok, who is now deceased, NIEP's cause of action is dismissed.

Circuit court judgment affirmed; appellate court judgment reversed; cause dismissed in part.

[1] For a discussion of the continued viability of implied indemnity claims following enactment of the Joint Tortfeasor Contribution Act (740 ILCS 100/0.01 ***et*** *seq.* (West 1994)), see *American National Bank & Trust Co. v. Columbus-Cuneo-Cabrini Medical Center,* 154 Ill.2d 347, 181 Ill.Dec. 917, 609 N.E.2d 285 (1992).

[2] Public records maintained by the Attorney Registration and Disciplinary Commission (ARDC) show that Bower left **Landau**, Omahana & Kopka and is now a member of the firm Tucker, Bower, Rubin & Merker, LLP.

[3] ARDC records disclose that Stephen J. Schostok is now deceased. Actions for professional malpractice do not abate with the death of a defendant attorney. See *Beastall v. Madson,* 235 Ill.App.3d 95, 99, 175 Ill.Dec. 865, 600 N.E.2d 1323 (1992); *McGill v. Lazzaro,* 62 Ill.App.3d 151, 154, 19 Ill.Dec. 501, 379 N.E.2d 16 (1978). Another party may be substituted for the decedent by order of court upon motion for purposes of defending the action. See 735 ILCS 5/2-1008(b) (West 2004); 155 Ill.2d R. 366(a)(2). The record before us gives no indication that a motion to substitute has ever been filed. The action shall therefore be dismissed as to Schostok. 735 ILCS 5/2-1008(b) (West 2004). It shall proceed with respect to the remaining parties.

[4] Obtaining dismissal of the indemnity claim would yield no benefit to NIEP if St. Therese were unwilling to satisfy the judgment prior to the instigation of collection proceedings against NIEP by Erica's parents because defending against the parents' collection action would entail the same burdens and subject NIEP to the same amount of damages as St. Therese's indemnity action would have. NIEP's position would be unchanged. Again, from NIEP's perspective, the only difference would be the identity of the party pursuing collection of the judgment.

LARRY SADLER, AS TRUSTEE OF THE LARRY R. SADLER IRREVOCABLE TRUST, individually and on behalf of all others similarly situated, Plaintiff,

v.

RETAIL PROPERTIES OF AMERICA, INC., et al., Defendants.

CHARLES BABIN, et al., on behalf of themselves and all others similarly situated, Plaintiff,

v.

RETAIL PROPERTIES OF AMERICA, INC., et al., Defendants.

RON R. SCHNIERSON, individually and on behalf of all others similarly situated, Plaintiff,

v.

RETAIL PROPERTIES OF AMERICA, INC., et al., Defendants.

LOIS A. OLIVE LIVING TRUST DTD 6/25/02, et al., individually and on behalf of all others similarly situated, Plaintiff,

v.

RETAIL PROPERTIES OF AMERICA, INC., et al., Defendants.

FRANK JEFFERS, on his own behalf of and on behalf of all those similarly situated, Plaintiff,

v.

RETAIL PROPERTIES OF AMERICA, INC., et al., Defendants.

Nos. 12 C 5882, 12 C 6433, 12 C 6743, 12 C 8091, 12 C 8522

United States District Court, N.D. Illinois, Eastern Division.

June 10, 2014.

MEMORANDUM OPINION AND ORDER[1]

THOMAS M. DURKIN, District Judge.

This is a securities fraud action consisting of five related, individually-filed putative class actions (***Sadler***, 12 C 5882; *Babin,* 12 C 6433; *Schnierson,* 12 C 6743; *Olive,* 12 C 8091; *Jeffers,* 12 C 8522) against **Retail Properties** of **America**, **Inc**. ("RPAI"), formerly

known as Inland Western Real Estate Trust ("Inland Western");[2] and certain officers and directors of RPAI: Angela M. Aman, Kenneth H. Beard, Frank A. Catalano, Jr., Shane C. Garrison, Paul R. Gauvreau, Gerald M. Gorski, Steven P. Grimes, Brenda G. Gujral, Richard P. Imperiale, James W. Kleifges, Kenneth E. Masick, and Barbara A. Murphy (collectively, the "Individual Defendants").[3] The *Jeffers* case also includes counts against Ameriprise Financial Services, **Inc**. ("Ameriprise"). Each of the cases arises out of the Individual Defendants' management and administration of RPAI, in addition to Ameriprise's role in procuring the sale of RPAI shares to its customers. The Defendants have each filed motions to dismiss. *See* ***Sadler****,* R. 80; *Babin,* R. 33; *Schnierson,* R. 35; *Olive,* R. 27; *Jeffers,* R. 47; R. 48. For the following reasons, the motions are granted, and the cases are dismissed.

BACKGROUND[4]

I. The Parties

RPAI, formerly known as Inland Western, is a Maryland corporation that operates as a real estate investment trust ("REIT"). ***Sadler****,* R.1 ¶¶ 1-2, 12-13. It is one of the largest owners and operators of shopping centers in the United States, which includes stores such as Target, Best Buy, HomeDepot, and Kohl's. *Id.* ¶¶ 2, 12, 28. At all relevant times, RPAI's Board consisted of either eight or nine directors: Beard, Catalano, Gauvreau, Gorski, Grimes, Gujral,[5] Imperiale, Masick, and Murphy. *Babin* R.1 ¶¶ 12-20. Seven members of the Board were independent directors: Beard, Catalano, Gauvreau, Gorski, Imperiale, Masick, and Murphy. *Olive,* R. 1 ¶¶ 20-26.

As an REIT, RPAI combines the capital of many investors to own and operate income-producing real estate locations. ***Sadler****,* R.1 ¶ 13. Prior to the public offering on April 5, 2012, when RPAI became listed on the New York Stock Exchange (the "2012 Offering," discussed below), "Inland Western was a public unlisted REIT, meaning that, (1) it was public because it was registered with the SEC, could sell to the investing public rather than only to `qualified investors,' and was required to file reports with the SEC; and (2) it was unlisted because its securities were not listed on a national stock exchange." *Id.* ¶ 14. These types of shares are referred to as "non-traded REITs." *Jeffers,* R. 21 ¶ 10. Generally, an investor in non-traded REITs will look to hold the shares for a certain term (according to the complaints, for five to seven years), with the expectation that that the shares will eventually be listed on a national securities exchange. *Id.* If the investor seeks to sell the non-traded REITs before the term of investment expires, the person must resell his shares to the REIT's sponsor or through the secondary market which lacks a definite price point. *Id.* ¶ 11.

Ameriprise is a nationwide financial planner, advisor, and broker dealer of securities operating under the regulations of the Financial Industry Regulatory Authority ("FINRA"). *Id.* ¶ 45. It employs financial planners across the country who charge fees for investing the money of its clients. *Id.* ¶¶ 18-19. Jeffers alleges that Inland Western, and later RPAI, paid certain compensation to Ameriprise in return for Ameriprise "pushing"

investors to invest in the Inland Western REIT in 2004 and 2005, as discussed below. *Id.* ¶¶ 14, 26. The *Jeffers* Plaintiffs further allege that Ameriprise's clients have purchased approximately $1.1 billion of Inland Western stock. *Id.* ¶ 71.

The Plaintiffs are shareholders of RPAI who purchased their shares sometime between 2004 and 2012. Some allege that they purchased shares in either 2004, 2005, or both years.[6] *See* ***Sadler****,* R. 1 ¶ 11; *Schnierson,* R. 1 ¶ 11; *Olive,* R. 1 ¶ 12; *Jeffers,* R. 21 ¶ 37. Others contend that they purchased shares through RPAI's Distribution Reinvestment Program ("DRP") sometime before April 5, 2012. *See* ***Sadler****,* R. 1 ¶ 11; *Babin,* R. 4 ¶ 59. This means they received additional shares of the company's stock instead of receiving a distribution. The *Jeffers* Plaintiffs were "advised or counseled by Ameriprise" to purchase shares of the REIT. *Jeffers,* R. 21 ¶ 57.

II. The Factual Allegations

RPAI, through two public offerings (one in 2004, the other in 2005) and a merger in 2007, issued 459,484,000 shares of "common stock" at $10.00 per share. ***Sadler****,* R.1 ¶ 29. This resulted in gross proceeds, including consideration from the merger, of $4,595,193,000. *Id.* As of December 31, 2011, RPAI had also issued shares through its DRP, which included 77,126,000 shares at prices from $6.85 to $10.00 per share resulting in gross proceeds of $719,799,000. *Id.* Additionally, from 2004 to the end of 2011, RPAI repurchased a total of 43,823,000 shares through its Share Repurchase Program ("SRP") at prices ranging from $9.25 to $10.00 per share, for a total cost of $432,487,000. *Id.* According to the Plaintiffs, as of December 31, 2011, RPAI had total shares outstanding of 483,822,000 and had realized total net offering proceeds of $4,882,572,000. *Id.* The Plaintiffs as a whole allege that they purchased Inland Western stock outright sometime in 2004 or 2005, or through the DRP.

Inland Western began having cash problems in 2008 and early 2009, eventually defaulting on six mortgage loans totaling $54,900,000 in May 2009. *Id.* ¶ 32. As a result, the Board voted to suspend the SRP, effective November 19, 2008. *Id.* ¶¶ 29, 31. In March 2009, Inland Western slashed its dividends by 90%. *Id.* ¶ 31. At that point, the only way for shareholders to sell their shares was in an allegedly "extremely thinly traded secondary market" or to accept the "occasional tender offer" from other companies. *Id.* ¶ 33.

On November 29, 2009, Inland Western transferred a portfolio of entities that owned 55 investment **properties** into "IW JV, a wholly-owned subsidiary of Inland Western." *Id.* ¶ 36. Inland Western then sought additional capital of $50 million from Inland Equity, a related party, in connection with a $625 million debt refinancing transaction involving J.P. Morgan Chase Bank. *Id.* ¶ 37. Inland Equity received a 23% non-controlling interest in IW JV from the deal. *Id.*

On December 21, 2009, CMG Acquisition Co., LLC ("CMG"),[7] an unaffiliated third party, submitted a mini-tender offer[8] to Inland Western's stockholders, offering $1.50 per share. *Jeffers,* R. 21 ¶ 65. Inland Western recommended that its stockholders reject the offer because it was "substantially below [its] December 31, 2009 estimated value of

$6.85 per share." *Id.* ¶¶ 66-67. Inland Western confirmed its $6.85 "estimated value" for the shares in its Form 8-K filing with the SEC approximately one month later on January 15, 2010, though it noted that the "estimated value may not reflect the actual market value of [the] shares on any given date." *Id.* ¶ 67; ***Sadler****,* R. 1 ¶ 33.

Inland Western issued an SEC Form DEF 14A proxy statement[9] on December 8, 2010, informing shareholders of a special meeting being held on February 24, 2011, and asking them to "approve an amendment and restatement of the Company's charter in conjunction with the initial listing of the Company's common stock." ***Sadler****,* R. 1 ¶ 41. In an effort to create liquidity for the stock, Inland Western stated that it intended to pursue an "initial listing of [its] existing stock within the next 12 months" and that "an exchange listing [would] better prepare the Company for future growth." *Id.* ¶ 42. The Plaintiffs allege that Inland Western was struggling with its outstanding debt and facing pressure from its creditors and, thus, "looked to the listing as a means to avoid default and multiple foreclosures." *Id.* ¶ 43.

The proxy statement also described what it called the "phased-in liquidity program" and a "Class B stock dividend grant" in which each share existing prior to the 2012 Offering would be split into four shares. *Id.* ¶ 44. The Proxy Statement included the following information:

> Q. How many shares of stock will I own after the implementation of the phased-in liquidity program?
>
> A. The number of shares that you will own will depend on the type of phased-in liquidity program that we implement. As an example, assume that you currently own 100 shares of our common stock. The following diagrams illustrate what would occur if we implemented the phased-in liquidity program that we currently anticipate.

Id. ¶ 44. Shareholders were further informed that the program would have "no effect" on their proportional interest in Inland Western because it would affect all holders in the same manner. *Id.* ¶¶ 44-45.

Inland Western filed another SEC Form DEF 14A proxy supplement with the SEC in January 4, 2011, which discussed the potential of a reverse stock split. *Id.* ¶ 46. This stock split was a part of Inland Western's recapitalization plan (the "Recapitalization"). *Jeffers,* R. 21 ¶ 70. The reverse stock split would be at a 10-to-1 ratio and affect all shareholders equally. *Id.* Its intended purpose was to reduce Inland Western's outstanding shares as of December 1, 2010, from 486,345,479 to 48,634,547.9. ***Sadler****,* R. 1 ¶ 46. Additionally, the supplement stated that the split would have "no effect" on the aggregate value of the shareholder's shares of common stock. *Id.* The supplement included the following illustrative example of the split:

> Q. How many shares of stock would I own after the implementation of a reverse stock split and the phased-in liquidity program?
>
> A. The number of shares that you would own will depend on the size of the

> reverse stock split and the type of phased-in liquidity program that we implement. As an example, assume that you currently own 1,000 shares of our common stock and assume that these shares are worth $6.85 per share. The following diagrams illustrate what would occur if we implemented a 10 to one reverse stock split and the phased-in liquidity program that we currently anticipate.

Id. ¶ 47. According to the Plaintiffs, based on that information, Ameriprise "applied a valuation of $17.375 to [Inland Western's] shares in its communications with clients based on the representations of Inland REIT and the Inland REIT Board." *Jeffers,* R. 21 ¶ 71.

Inland Western filed another Form 8-K with the SEC on February 7, 2011, amending its credit agreements with KeyBank National Association and JPMorgan Chase Bank, N.A., "to provide a senior secured credit facility in the aggregate amount of $585 million." ***Sadler**,* R. 1 ¶ 49. In a Form S-11 Registration Statement (the "Registration Statement") filed a week later on February 14, Inland Western explained that "more than 5% of the net proceeds of [the] offering [were] intended to be used to repay amounts owed" to the underwriters, *id.* ¶ 50, $210 million of the net proceeds of the offering were to pay down its "senior secured revolving line of credit," and the remaining net proceeds would be for "general corporate and working capital purposes." *Id.* ¶ 51. Stockholders approved the amendment and restatement of Inland Western's charter at the meeting on February 24. According to the *Jeffers* complaint, "94.8% of Inland Western's stockholders voted in favor of the Recapitalization and pursuing a public listing of [Inland Western's] shares." *Jeffers,* R. 21 ¶ 71.

On March 1, 2011 the SEC sent a letter to Inland Western requesting more detail regarding the Registration Statement. ***Sadler**,* R. 1 ¶¶ 54-55. In response, Inland Western filed a Form S-11/A on April 29, 2011, in which it again described the Recapitalization and provided additional details regarding its plan to satisfy its debt. *Id.* ¶¶ 54-57.

On May 27, 2011, CMG made a second mini-tender offer of $3.00 per share to Inland Western's shareholders; Inland Western again recommended that its shareholders reject the offer. *Id.* ¶ 58. Inland Western increased the estimated value of its shares from $6.85 to $6.95 (before taking into account the reverse stock split) in another Form 8K filed with the SEC on June 20, 2011, though it noted that "[n]o independent appraisals [of the shares] were obtained." *Id.* ¶ 59. CMG made a third mini-tender offer on October 27, 2011, for $3.50 per share. *Id.* ¶ 60.[10] Inland Western recommended for a third time that its shareholders reject the offer, "pointing out that in the thinly-traded secondary market, trades had been reported in the range of $4.08 and $6.00 per share." *Id.* The letter stated in part:

> We are aware that you may have received an unsolicited mini-tender offer by CMG Partners ("CMG") dated October 27, 2011 to purchase up to 1,000,000 shares of Inland Western **Retail** Real Estate Trust, **Inc**. ("Inland Western") for a price of $3.50 per share, less the amount of any distributions paid to you on or after December 12, 2011. CMG and its offer

> are not affiliated with Inland Western.
>
> The Inland Western Board of Directors has unanimously determined that the offer is not in the best interests of the stockholders, as the Board of Directors believes that the value of Inland Western shares exceeds the offer price. Although each stockholder has his or her individual liquidity needs and must evaluate the offer accordingly, the Board of Directors does not recommend or endorse CMG's mini-tender offer and suggests that stockholders reject the offer and not tender their shares pursuant to the offer. If you wish to reject the offer and retain your shares, no action is necessary.

Schnierson, R. 1 ¶ 39 (emphasis in original).

Inland Western sent another letter to its shareholders on February 28, 2012, explaining that shares could be purchased through the DRP on or after March 31, 2012, for $5.75 per share. ***Sadler****,* R. 1 ¶ 63. On March 6, 2012, Inland Western filed a "presentation" in a Form FWP,[11] entitled "Anticipated NYSE Listing & Concurrent Equity Offering," which explained the 2012 Offering and the results of the reverse stock split:

> In preparation for a potential listing, the Company will effectuate a reverse stock split and a stock dividend to existing shareholders. Rationale:
>
> • The rationale for the reverse stock split is to reduce the amount of shares outstanding and reset the price per share. On a stand-alone basis, the reverse stock split will have no impact on the aggregate value of the Company or any individual shareholder's percentage ownership of the Company's common stock.
>
> • The rationale for the stock dividend is to provide for the Company's phased-in liquidity program, which has been designed to assist in the creation of an orderly and liquid trading market for our shares post-listing.
>
> º All of our shares of common stock will be converted into listed shares within 18 months of the initial listing.
>
> Reverse stock split
>
> A reverse stock split is a combination of all of our outstanding shares of common stock into a fewer number of shares.
>
> This will affect all shareholders in the same manner — on a stand-alone basis, the reverse stock split will have no effect on the aggregate value of the Company, your proportional ownership interest in the Company, your voting rights, your right to receive dividends (if and when declared), the total amount of your dividends (if and when declared), or your rights upon liquidation.
>
> Example:

10 to one reverse stock split = 100,000/10 100,000 shares Common Stock 10,000 shares Common Stock 482MM shares outstanding 48.2MM shares outstanding = .0207% ownership → = .0207% ownership

Id. ¶ 64 (underlining in original). The filing also described the expectation to become a company with "liquidity for its shareholders," "greater potential for access to multiple sources of capital," and "an expanded ability to prudently grow the Company and potentially create additional shareholder value over time." *Id.*

Inland Western changed its name to RPAI two days later on March 8, 2012. *Id.* ¶ 65. On March 20, 2012, RPAI followed through with the 10-to-1 reverse split, paying "a stock dividend of Class B-1 through B-3 common stock" on March 21. *Id.* ¶¶ 66-67. All of this was announced in RPAI's amended Registration Statement filed on March 23, 2012. *Id.* ¶ 68. The statement also revealed that the price per share for the 31,800,000 shares of Class A Common Stock offered in the 2012 Offering would be between $10.00 and $12.00, which was below the $17.125 estimated value that was presented to the shareholders before the February 24, 2011 vote. *Id.* ¶ 69. The shareholders were subsequently informed that 100% of the net proceeds from the 2012 Offering would be used to pay down RPAI's debt and repurchase its full interest in IW JV. *Id.* ¶ 70. On March 29, 2012, RPAI recommended that its shareholders reject another tender offer made by CMG on March 16, 2012, this time for $3.00 per share, a reduction of $0.50 per share from its last mini tender offer on October 27, 2011. *Id.* ¶ 71. The Plaintiffs allege that on March 21, 2012, contrary to the information in the amended Registration Statement from March 23, 2012, RPAI and the Individual Defendants represented to Ameriprise that "`there was no material change in the REIT's financial condition and essentially agreed it was reasonable for Ameriprise to use the $17.375 value" of the shares when presenting the 2012 Offering to its clients. *Jeffers,* R. 21 ¶ 71 (internal quotation marks omitted).

RPAI filed a prospectus with the SEC on April 5, 2012, which included an offering price of $8.00 per share, $2.00 to $4.00 less than what it had listed in its March 23 amended Registration Statement and approximately $9.00 less than the $17.125 price discussed in its January 4, 2011 proxy supplement. ***Sadler****,* R. 1 ¶ 72; *Jeffers,* R. 21 ¶ 73. The Plaintiffs allege that as a result of the $8.00 value in the 2012 Offering, "[t]he combined investments totaling $4,595,193,000 collected by Inland Western through two public offerings . . . and a merger consummated in 2007, were . . . worth only $1,470,461,760 — a loss of over $3 billion." ***Sadler****,* R. 1 ¶ 74. RPAI explained the $8.00 per share public offering price in a Form 8-K filed on April 12, 2012, as follows:

> 9. How was the public offering price of $8.00 per share determined?
>
> The offering was marketed to the investing public. RPAI launched its public offering on March 23, 2012 and met with potential investors across the country to solicit interest for the public offering leading up to the pricing of the public offering on April 4, 2012. In connection with the pricing of the public offering, the underwriters engaged in a book building process, pursuant to which they solicited indications of interest from potential investors. Interested investors provided the underwriters with an indication

> of the number(s) of shares and price(s) at which they would be interested in participating in the offering. The pricing of the public offering was agreed upon by RPAI and the underwriters based on the indications of interest that were received from potential investors. The ultimate offering price represented a price at which RPAI believed it could successfully complete the offering in a manner that achieved its goals in pursuing the concurrent public offering and listing of its Class A Common Stock.
>
> 10. Why did the public offering price differ from the estimated per-share value as of March 31, 2011?
>
> The processes by which the public offering price and the estimated per-share value were determined were significantly different, as noted above. Differences would be expected as a result of the fact that the public offering represented the market's current valuation of the acquisition of a non-controlling interest in a newly listed public company by dispersed investors. Furthermore, as noted at the time the estimated per-share value was first published, this number was "only an estimate and may not reflect the actual value of our shares of common stock or the price that a third party may be willing to pay to acquire our shares." Lastly, the public offering price also reflected the impact of the recent reverse split and stock dividend. The estimated per-share value as of March 31, 2011 had not reflected these transactions.

Id. ¶ 75.

The Plaintiffs allege that as a result of the 2012 Offering, "investors, some of whom had originally bought into the REIT at prices as high as $10 per share saw a decline in value of more than 70% when taking into account that the actual split adjusted value of the stock is less than $3 per share." *Jeffers,* R. 21 ¶ 75. In other words, the Plaintiffs allege that RPAI, "which had been selling pre-split shares to its own shareholders for $6.95 a share as late as February 2012[,] was forced to acknowledge that on the open market its shares could fetch less than half [of] what [it] had been charging for them — a mere $3.20 a share." *Babin,* R. 4 ¶ 53.

On May 8, 2012, RPAI informed its shareholders in a letter that there was a pending SEC investigation.[12] *Schnierson,* R. 1 ¶ 46. The letter said:

> The Company has learned that the SEC is conducting a non-public, formal, fact-finding investigation to determine whether there have been violations of certain provisions of the federal securities laws regarding the business manager fees, property management fees, transactions with affiliates, timing and amount of distributions paid to investors, determination of property impairments, and any decision regarding whether the Company might become a self-administered REIT. The Company has not been accused of any wrongdoing by the SEC.

Id.

III. Procedural Posture

The Plaintiffs filed lawsuits complaining of the losses they allege to have sustained as a result of the events previously described. The ***Sadler*** case was the first case filed, which occurred on July 26, 2012. The *Babin* case was filed on October 14, 2012, the *Schnierson* case on October 22, the *Olive* case on October 10, and the *Jeffers* case on October 23. Judge Joan B. Gottschall determined that the four subsequently-filed cases were related to the ***Sadler*** case, and thus, they were all reassigned to her. ***Sadler***, R. 78 at 3. The cases were later transferred to the undersigned Judge. *Id.,* R. 72. Counsel for RPAI and the Individual Defendants filed a motion to dismiss on April 19, 2013, addressing each of the five cases. *E.g., id.,* R. 80. Counsel for Ameriprise, which is only a defendant in the *Jeffers* case, also filed a motion to dismiss. *Jeffers,* R. 47.

LEGAL STANDARD

A Rule 12(b)(6) motion challenges the sufficiency of the complaint. *See, e.g., Hallinan v. Fraternal Order of Police of Chi. Lodge No. 7,* 570 F.3d 811, 820 (7th Cir. 2009). A complaint must provide "a short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 8(a)(2), sufficient to provide defendant with "fair notice" of the claim and the basis for it. *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555 (2007). This standard "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009). While "detailed factual allegations" are not required, "labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly,* 550 U.S. at 555. The complaint must "contain sufficient factual matter, accepted as true, to `state a claim to relief that is plausible on its face.'" *Ashcroft,* 556 U.S. at 678 (quoting *Twombly,* 550 U.S. at 570). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Mann v. Vogel,* 707 F.3d 872, 877 (7th Cir. 2013) (quoting *Iqbal,* 556 U.S. at 678). In applying this standard, the Court accepts all well-pleaded facts as true and draws all reasonable inferences in favor of the non-moving party. *Mann,* 707 F.3d at 877.

Additionally, claims sounding in fraud are subject to a more stringent pleading requirement. Federal Rule of Civil Procedure 9(b) requires plaintiffs alleging fraud to state "with particularity" the circumstances constituting fraud. *See Tellabs, **Inc**. v. Makor Issues & Rights, Ltd.,* 551 U.S. 308, 313 (2007) (noting that plaintiffs in securities fraud cases must "state with particularity both the facts constituting the alleged violation, and the facts evidencing scienter, i.e., the defendant's intention `to deceive, manipulate, or defraud'" (quoting *Ernst & Ernst v. Hochfelder,* 425 U.S. 185, 193 (1976))). "In other words, Plaintiffs need[] to plead `the identity of the person who made the misrepresentation, the time, place[,] and content of the misrepresentation, and the method by which the misrepresentation was communicated to the [Plaintiffs].'" *Gandhi v. Sitara Capital Mgmt., LLC,* 721 F.3d 865, 870 (7th Cir. 2013) (quoting *Windy City Metal Fabricators & Supply, **Inc**. v. CIT Tech. Fin. Servs., **Inc**.,* 536 F.3d 663, 668 (7th Cir.

2008)) (second and third alternations in *Gandhi*). This encompasses the "`who, what, when, where, and how' of the fraud, although the exact level of particularity that is required will necessarily differ based on the facts of the case." *AnchorBank, FSB v. Hofer,* 649 F.3d 610, 615 (7th Cir. 2011) (quoting *Pirelli Armstrong Tire Corp. Retiree Med. Benefits Trust v. Walgreen Co.,* 631 F.3d 436, 441-42 (7th Cir. 2011)).

ANALYSIS[13]

The five complaints contain a number allegations concerning why the Plaintiffs are entitled to relief. These claims include breach of fiduciary duty, aiding and abetting a breach of fiduciary duty, unjust enrichment, a violation of the Illinois Securities Law of 1953 ("ISL"), violation of certain FINRA regulations, and a request for the imposition of a constructive trust. The Court will address each group of claims in turn. In doing so, the Court will apply Maryland law to the breach of fiduciary duty, aiding and abetting, unjust enrichment, and constructive trust claims against RPAI and the Individual Defendants because RPAI is incorporated and operates in Maryland, and that is essentially where the claims against it allegedly occurred. The Court will apply Illinois law to the claims against Ameriprise for similar reasons. The parties do not dispute these choice of law decisions.

I. Breach of Fiduciary Duty

A. Individual Defendants: ***Sadler*** — Count I; *Babin* — Count I; *Schnierson* — Count I; *Olive* — Count I; *Jeffers* — Count I

Each of the five cases includes a count for breach of fiduciary duty against the Individual Defendants. The complaints include allegations that the Individual Defendants "caus[ed] or allow[ed] [RPAI] to disseminate materially misleading and inaccurate information to its shareholders," *Jeffers,* R. 21 ¶ 96; "failed to exercise due care to prevent the disastrous Recapitalization and 2012 Offering which substantially diluted the value of the pre-2012 Offer holdings," ***Sadler****,* R. 1 ¶ 94; and "set[] the price at which RPAI sold shares to existing shareholders pursuant to the DRP at an inflated level," *Babin,* R. 1 ¶ 69.

Section 2-401(a) of the Maryland Corporations and Associations Article states that "[t]he business and affairs of a corporation shall be managed under the direction of a board of directors." Md. Code Ann., Corps. & Ass'ns § 2-401(a). Section 2-405.1, entitled "Standard of care required of directors," describes the duty of care directors and officers owe when undertaking those managerial decisions. It provides:

> (a) A director shall perform his duties as a director, including his duties as a member of a committee of the board on which he serves:
>
> (1) In good faith;

> (2) In a manner he reasonably believes to be in the best interests of the corporation; and
>
> (3) With the care that an ordinarily prudent person in a like position would use under similar circumstances.

§ 2-405.1(a); *see* Shenker v. Laureate Educ., **Inc**., 983 A.2d 408, 419 (Md. 2009). Additionally, in *Shenker,* the Maryland Supreme Court held for the first time since the codification of § 2-405.1 that corporate directors may owe additional fiduciary duties to shareholders when the directors are acting outside the scope of their managerial duties, including the duties of candor and maximization of shareholder value. 983 A.2d at 419-20. An example of when directors are acting outside the scope of managerial duties is when they are "negotiating the price that shareholders will receive for their shares in a cash-out merger transaction." *Id.* at 414. In that situation, the corporate directors "remain directly liable to the shareholders for *any* breach of fiduciary duty," as opposed to when a claim is brought pursuant to the duties set forth in § 2-405.1(a). *Id* (emphasis added).

Claims that are brought pursuant to the duties codified in § 2-405.1(a) belong to the corporation and may only be brought in a derivative action. *See* § 2-405.1(g) ("Limitation on enforceability. — Nothing in this section creates a duty of any director of a corporation enforceable otherwise than by the corporation or in the right of the corporation."); *Shenker,* 983 A.2d at 424. Thus, only claims based on fiduciary duties *not* codified in § 2-405.1(a), as well as claims that allege harms that are separate and distinct from any to the corporation, may be brought in a direct cause of action against corporate directors. Additionally, if a claim is based on a duty found § 2-405.1(a), then the business judgment rule applies, and corporate directors are afforded a presumption of reasonableness in their actions. *See* 2-405.1(e) ("Presumption of satisfaction. — An act of a director of a corporation is presumed to satisfy the standards of [§ 2-405.1(a)]). On the other hand, if a common law fiduciary duty forms the basis of a shareholder's claim — one *not* codified in § 2-405.1(a) — then the business judgment rule does not apply.

The Individual Defendants describe a number of reasons why the breach of fiduciary duty claims against them should be dismissed, including that they did not owe certain fiduciary duties to the Plaintiffs, the Plaintiffs lack standing, the claims are barred under § 2-405.1(g), and the complaints fail to rebut the presumption that their actions were reasonable under the business judgment rule. Courts have dismissed breach of fiduciary claims under Maryland law for all of these reasons. *See, e.g., Allyn v. CNL Lifestyle Props.,* **Inc**., No. 13-cv-132, 2013 WL 6439383, at *3-6 (M.D. Fla. Nov. 27, 2013) (dismissing the claims because the plaintiff failed to rebut the business judgment rule); *Becker v. Inland Am. Real Estate Trust,* **Inc**., No. 13 C 3128, 2013 WL 6068793, at *4-6 (N.D. Ill. Nov. 18, 2013) (concluding that only the duties in § 2-405.1(a) applied and dismissing the case because the plaintiff failed to rebut the business judgment rule); *Seidl v. Am. Century Cos.,* 713 F. Supp. 2d 249, 261-62 (S.D.N.Y. 2010) (dismissing the claims because the plaintiff lacked standing to bring a direct suit against the corporate directors). The courts' divergent paths are due to the relative recency of *Shenker,* undeniably the seminal case on Maryland breach of fiduciary duty claims. The Court

here will address what fiduciary duties were owed to the Plaintiffs, whether the Plaintiffs have standing to bring the claims, and finally, when applicable, whether the Plaintiffs have set forth sufficient allegations to overcome the business judgment rule as codified in § 2-405.1(e).

1. Fiduciary Duties Owed to the Plaintiffs

Each of the five complaints refers to the duty to "maximize shareholder value" or the duty of "candor." *See* ***Sadler****,* R. 1 ¶ 94; *Babin,* R. 4 ¶¶ 68-69; *Schnierson,* R. 1 ¶ 49; *Olive,* R. 1 ¶ 69: *Jeffers,* R. 21 ¶ 96. Neither of these duties is codified in § 2-405.1(a). *See Shenker,* 983 A.2d at 420-22. The Individual Defendants contend that the transactions at issue here did not implicate these additional duties. There is no debate that the Plaintiffs allegations do not arise from a change of control or cash-out merger transaction, which was the factual event underlying the *Shenker* decision. Indeed, most of the courts that have interpreted *Shenker* have held that the duties outside § 2-405.1(a) *only* arise in a "change of control" transaction. *See Stender v. Caldwell,* No. 07-cv-02503-REB-MJW, 2010 WL 1930260, at *4 (D. Colo. May 12, 2010) (explaining that *Shenker* arises in "a very narrow context — specifically, that of a cash-out merger when the decision to sell the corporation already has been made"); *Consortium Atl. Realty Trust,* ***Inc****. v. Plumbers & Pipefitters Nat'l Pension Fund,* No. 365879-V, 2013 WL 605865, at *6 (Md. Cir. Ct. Feb. 5, 2013) ("*Shenker* is limited, until the Court of Appeals says otherwise, to `a cash-out merger when the decision to sell the corporation has already been made.'" (quoting J. HANKS, MARYLAND CORPORATION LAW § 6.6A at 192 (2012 Supplement)); *In re Nationwide Health Props.,* ***Inc****., S'holder Litig.,* No. 24-C-11-001476, 2011 WL 10603183, at *7 (Md. Cir. Ct. May 27, 2011) ("This Court has found no support in *Shenker,* or in any of the other authorities cited by Plaintiffs, to impose the duty to maximize shareholder value outside of a `cash-out' or change of control situation — that is, a change of control merger that effectively eliminates the shareholders' interests in the target company.").

The court in *Becker* examined the reasoning behind the *Shenker* decision, stating the relevant question was whether the director defendants were "acting in a managerial capacity" when establishing the price per share to be sold. *Becker,* No. 2013 WL 6068793, at *4. If they were acting in a managerial capacity, then only the duties under 2-405.1(a) applied. The court went on to determine that § 2-405.1(a) applied. *See id.* ("The Prospectus made it perfectly clear that the price set by the Board was at best an estimate; that the real value could be higher or lower than the established price. It would appear, therefore, that in setting the share sale price the Board Defendants owed Plaintiffs only the obligations set forth in § 2-405.1.").

The Plaintiffs' rely on *Parish v. Maryland & Virginia Milk Producers Association,* ***Inc****.*, 242 A.2d 512, 539 (Md. 1968), to argue that a duty of disclosure and candor was implicated in the transactions at issue here. But *Parish* was decided long before the codification of § 2-405.1 and before *Shenker* — the standard for breach of fiduciary claims under Maryland law — was decided. As such, the only duties the Individual Defendants owed to the Plaintiffs in circumstances that did not include a "change of control" are those

elucidated in § 2-405.1, i.e., the duties of good faith, loyalty, and care. *See, e.g., Hohenstein v. Behringer Harvard Reit I, **Inc**.,* No. 3:12-CV-4842-G, 2014 WL 1265949, at *5 (N.D. Tex. Mar. 27, 2014) ("To date, *Shenker*'s holding has been limited to its narrow set of circumstances, and courts have not imposed a fiduciary duty of candor in other situations."). The complaints do not allege a change of control situation here, so only the duties set forth in § 405.1(a), which are subject to the business judgment, apply.

2. Standing

The Individual Defendants also maintain that the Plaintiffs lack standing to bring these claims because the duties in § 2-405.1(a) are only enforceable "by the corporation or in the right of the corporation." § 2-405.1(g). They argue that the claims are barred because the Plaintiffs brought this as an individual action, as opposed to a derivative action on behalf of the corporation. Few courts have decided a motion to dismiss on the ground that the claim is barred under § 2-405.1(g), instead choosing to focus on the allegations in light of the presumption of reasonableness afforded to the actions of corporate directors. *Compare* Seidl, 713 F. Supp. 2d at 256-57 (dismissing the breach of fiduciary duty claim because it belonged to the corporation, pursuant to § 2-405.1(g)), *with Allyn,* 2013 WL 6439383, at *3-6 (dismissing the claim because the plaintiff's failed to provide factual allegations rebutting the business judgment rule); *and Becker,* 2013 WL 6068793, at *4-6 (same). In fact, in *Jolly Roger Fund LP v. Sizeler Property Investors, **Inc**.,* No. Civ. RDB 05-841, 2005 WL 2989343, at *4-6 (D. Md. Nov. 3, 2005), a case involving a direct suit against the company and its directors, the court did not even address § 2-405.1(g), only looking to whether the shareholders had suffered a direct injury and then concluding they had not. This was similar to the approach taken in Danielewicz v. Arnold, 769 A.2d 274, 282-83 (Md. Ct. Spec. App. 2001), a case involving a lawsuit brought individually and derivatively, in which the court of special appeals affirmed the trial court's dismissal of the breach of fiduciary duty claims without addressing § 2-405.1 at all — let alone § 2-405.1(g).

The Plaintiffs contend they have standing despite the application of § 2-405.1(g) because shareholders may bring a direct suit when the harm they suffered is separate and distinct from any harm to the corporation. *See* Mona v. Mona Elec. Group, **Inc**., 934 A.2d 450, (Md. Ct. Spec. App. 2007) ("A shareholder may bring a direct action . . . [when] he has suffered `an injury that is separate and distinct from any injury suffered either directly by the corporation or derivatively by the stockholder because of the injury to the corporation.'" (quoting James J. Hanks, Jr., *Maryland Corporation Law* 183 (Aspen 2005)). Their argument is essentially that a "direct injury" claim circumvents the application of § 2-405.1(g). In support, they primarily rely on one particular passage in *Shenker:*

> In contrast to a derivative action, a shareholder may bring a direct action, either individually or as a representative of a class, against alleged corporate wrongdoers when the shareholder suffers the harm directly or a duty is owed directly to the shareholder, though such harm also may be a violation of a duty owing to the corporation.

Shenker, 983 A.2d at 424.

That quote is taken out of context. The *Shenker* court definitively held that § 2-405.1(g) "plainly means that, to the extent § 2-405.1 creates duties on directors such as the duty of care contained in § 2-405.1(a), those duties are enforceable only by the corporation or through a shareholders' derivative action." *Shenker*, 983 A.2d at 426. Put simply, if a suit is based on duties contained in § 2.405.1(a), it does not matter whether the Plaintiffs suffered a direct injury; the claims can only be brought through a derivative suit. The Plaintiffs have not provided this Court with any authority since *Shenker* demonstrating that a direct claim predominates over the application of § 2-405.1(g), and the Court has been unable to find any. Situations may be imagined where a plaintiff suffers a direct injury as a result of a breach of a fiduciary duty codified in § 2-405.1(a). For example, a corporate director who engages in self-dealing — a breach of the duty of loyalty — that results in the dilution of a shareholder's voting power. *See* *Shenker*, 983 A.2d at 424 ("Where the rights attendant to stock ownership are adversely affected, shareholders generally are entitled to sue directly, and any monetary relief granted goes to the shareholder."). But under present Maryland law, the application of § 2-405.1(g) trumps any allegation that a shareholder suffered a direct injury, and a direct action in those circumstances is not proper.[14]

The Court has already determined that the duties of candor and maximization of share value were not owed to the Plaintiffs, so the only fiduciary duty claims remaining were required to be brought by RPAI or derivatively on its behalf. *See* *Seidl*, 713 F. Supp. 2d at 256-57 (citing § 2-405.1(g)). They were not. The Plaintiffs' breach of fiduciary duty claims are therefore dismissed for lack of standing.

3. Business Judgment Rule § 2-405.1(e)

Although the breach of fiduciary claims fail for the reasons stated earlier, the Court will nonetheless address the Individual Defendants' additional argument that the Plaintiffs have not alleged facts to overcome the business judgment rule, as codified in § 2-405.1(e). *See generally* *Stanziale v. Nachtomi*, 416 F.3d 229, 238 (3rd Cir. 2005) (explaining that a plaintiff "must plead around the business judgment rule"). The business judgment rule insulates most business decisions made by corporate directors from judicial review. *Boland v. Boland*, 31 A.3d 529, 548 (Md. 2011). The Delaware Supreme Court has described it as follows:

> It is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith[,] and in the honest belief that the action taken was in the best interests of the company. Absent an abuse of discretion, that judgment will be respected by the courts. The burden is on the party challenging the decision to establish facts rebutting the presumption.

Id. (quoting *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984)); *see generally* *Asarco LLC v. Ams. Mining Corp.*, 396 B.R. 278, 405 (S.D. Tex. 2008) (explaining that the business judgment rule consists of four elements: "(1) a business decision; (2) disinterestedness

and independence; (3) due care; and (4) good faith"). In *Becker* and *Allyn,* the courts dismissed fiduciary duty claims brought against corporate directors because the facts alleged did not overcome the business judgment rule. *See Allyn,* 2013 WL 6439383, at *3-6; *Becker,* 2013 WL 6068793, at *4-6. Those cases involved allegations similar to those alleged here — including, that the directors inflated the share price, knowingly disseminated false information, and improperly managed the company. *See, e.g.,* ***Sadler****,* R. 1 ¶ 94; *Babin,* R. 1 ¶ 69; *Schneirson,* R. 1 ¶ 49; *Olive,* R. 1 ¶ 69; *Jeffers,* R. 21 ¶ 96. Thus, the reasoning those courts employed is applicable.

Just as in *Becker* and *Allyn,* the business judgment rule applies here because the Plaintiffs have alleged a violation of duties protected by § 2-405.1(e). The ***Sadler*** Plaintiffs allege that the Individual Defendants breached their "duties and obligations of ordinary care by, among other things, offering investments in the Inland Western REIT without having obtained a fairness opinion; failing to discontinue the disastrous Recapitalization and 2012 Offering when it became apparent that such an offering would substantially damage the pre-2012 Offering shareholders; and materially diluting the investment value of the pre-2012 Offering shares of the REIT." ***Sadler****,* R. 1 ¶¶ 95-96. The *Babin* Plaintiffs allege that the Individual Defendants breached their fiduciary duties of "due care, loyalty, good faith, and candor" by "making misstatements and omissions of fact concerning the true value of RPAI shares sold to RPAI's existing shareholders pursuant to the DRP, and by setting the price at which RPAI sold shares to existing shareholders pursuant to the DRP at an inflated level. . . ." *Babin,* R. 4 ¶¶ 68-69. Additionally, the *Schnierson, Olive,* and *Jeffers* Plaintiffs allege that the "Individual Defendants violated their fiduciary duties of care, loyalty, and good faith by causing or allowing [RPAI] to disseminate materially misleading and inaccurate information to stockholders through, *inter alia,* SEC filings and other public statements and disclosures. . . ." *Schnierson,* R. 1 ¶ 49; *Olive,* R. 1 ¶ 69; *Jeffers,* R. 21 ¶ 96.[15]

The *Becker* and *Allyn* courts acknowledged the business judgment rule's relevance. "Maryland law presumes that a director of a corporation satisfies the standards of § 2-405.1(a) and immunizes a director who performs his or her duties in accordance with the standards provided in § 2-405.1(a) from liability." *Allyn,* 2013 WL 6439383, at *4 (citing § 2-405.1(c), (e)). "The burden is on the party challenging the decision to establish facts rebutting the presumption that the directors acted reasonably and in the best interests of the corporation." *Bender v. Schwartz,* 917 A.2d 142, 153 (Md. App. 2007) (quoting *Aronson,* 473 A.2d at 812) (internal quotation marks omitted). Neither "mere suspicions" nor "conclusory terms" will suffice. *Bender,* 917 A.2d at 151-53.

Using that standard, the *Becker* court examined "whether the alleged inflation of the share price on the four occasions charged by Plaintiffs would support a finding of a breach of the duty of loyalty and good faith." *Becker,* 2013 WL 6068793, at *5. The court concluded it did not because the board of directors set the price as an estimate, meaning it could be higher or lower, and "repeatedly made all of the disclosures required of it by the Securities Exchange Act of 1934, including quarterly reports . . . contain[ing] complete and detailed financial information." *Id.* This was the same conclusion reached in *Allyn,* which acknowledged that the facts presented were "strikingly similar" to those in *Becker. Allyn,* 2013 WL 6439383, at *5. The same conclusion is required here, as the

shareholders were all cautioned that the shares prices were estimates and all required SEC filings were made.

The Plaintiffs' complaints do not contain factual allegations that are "sufficient to rebut the presumption that the [Individual Defendants] acted in good faith, in a manner they reasonably believed to be in the best interests of the corporation, and with the care that an ordinarily prudent person in a like position would use under similar circumstances." *See Allyn,* 2013 WL 6439383, at *4; *see also Becker,* 2013 WL 6068793, at *4-5. Initially, the *Babin* Plaintiffs find fault with the $6.85 to $10.00 DRP share price, but these are generalized "suspicions" that the price of shares in the DRP was inflated. *See, e.g., Hohenstein,* 2014 WL 1265949, at *6 ("The plaintiffs insist that the DRP pricing was still somehow reckless and misleading, but the court — along with other courts that have considered similar offerings — disagrees. The plaintiffs have alleged nothing more than `mere suspicions.'") (internal citations omitted). They have not provided the Court with allegations sufficient to support a conclusion that this *estimated* price was not in line with what an ordinarily prudent person would have used in a like position and under similar circumstances. The same goes for the ***Sadler*** Plaintiffs' allegations that the 2012 Offering price was too low and that the Recapitalization was not in RPAI's best interests. The *Jeffers, Olive,* and *Schnierson* Plaintiffs contend that certain information was "misleading and inaccurate"; however, the gravamen of this contention is that they now find fault with the Individual Defendants' recommendation that the Plaintiffs reject the mini-tender offers. Again, this is an issue regarding share valuation. Each of these allegations involves an inherent difficulty in ascertaining the true value of unlisted REIT shares. That is why RPAI included numerous disclaimers in all of its correspondence with its shareholders regarding its estimated value, including the following illustrative example taken directly from the *Babin* complaint:

> The *estimated value* was determined by the use of a combination of different indicators and an internal assessment of value utilizing a common means of valuation under the direct capitalization method as of December 31, 2009. No independent appraisals were obtained. As there is no established public trading market for our shares of common stock, this *estimated value* may not reflect the actual market value of your shares on any given date; and there can be no assurances that stockholders would receive $6.85 per share for their shares if any such market did exist, that the estimated value reflects the price or prices at which our common stock would or could trade if it were listed on a national stock exchange or included for quotation on a national system, or that stockholders will be able to receive such amount for their shares at any time in the future.

Babin, R. 1 ¶ 39 (January 27, 2010 letter to the shareholders in a Form 8-K filed with the SEC) (emphasis added).

Numerous courts have expressed criticism of the type of Monday-morning quarterbacking the Plaintiffs engage in—i.e., calculating the value of shares of common stock in an unlisted REIT at a later point in time. The court in *Apple REITS* explained:

> As Defendants note, the nine different metrics by which Plaintiffs claim that

> the REITS' actual value can be ascertained each produce different results, underscoring the impossibility of calculating the REITs' value, or any other investment's value, with empirical certainty.
>
> These realities and inherent difficulties in ascertaining the value of REIT shares necessarily means that investment valuations "can only fairly be characterized as subjective opinions."

In re Apple REITS Litig. ("*Apple REITS*"), No. 11-CV-2919 KAM, 2013 WL 1386202, at *14 (E.D.N.Y. Apr. 3, 2013) (quoting *In re Barclays Bank PLC Sec. Litig.,* No. 09 Civ. 1989, 2011 WL 31548, at *8 (S.D.N.Y. Jan. 5, 2011)). Pointing to a given share's price on a nationally-traded market that differs from an estimated value at an earlier point in time does not by itself demonstrate a violation of a defendant's fiduciary duty. The Plaintiffs must put forth a factual allegation that demonstrates the Individual Defendants' conduct regarding the 2012 Offering, the Recapitalization, the DRP, or the mini-tender offers and the corresponding estimated values assigned to the shares was so intentionally improper or grossly negligent that an ordinary, prudent person in their position would not have in such a manner. *See Miller v. U.S. Foodservice, **Inc**.*, 361 F. Supp. 2d 470, 477 (D. Md. 2005) (explaining that the business judgment rule "can be overcome by allegations of gross negligence"); *see also Werbowsky v. Collomb,* 766 A.2d 123, 144 (Md. 2001) ("[Directors] enjoy the benefit and protection of the business judgment rule, and their control of corporate affairs should not be impinged based on non-specific or speculative allegations of wrongdoing."). Even then, however, "obviously wrong" estimations on value still might not rise to the level of a breach of fiduciary duty. *See Becker,* 2013 WL 6068793, at *5

The Plaintiffs can avoid the business judgment rule by "show[ing] either that the board or committee's investigation or decision was not conducted independently and in good faith, or that it was not within the realm of sound business judgment." *Boland,* 31 A.3d at 549 (quoting *Bender,* 917 A.2d at 152). Yet, the complaints provide no factual allegations demonstrating that the Individual Defendants were not acting in the best interests of the corporation or that they acted on an uninformed basis. For example, the allegations demonstrate the Individual Defendants received the mini-tender offers, considered them, and rejected them based on the "the use of a combination of different indicators and an internal assessment of value utilizing a common means of valuation under the direct capitalization method[.]" *See, e.g., Schnierson,* R. 1 ¶ 37. This was reasonable despite any allegation that an "independent appraisal" was never taken. *See, e.g., id.* The Plaintiffs have not directed the Court to any requirement that RPAI obtain an independent appraisal, and the Form 8-Ks even disclosed that none ever occurred. Even the *Olive* and *Schnierson* Plaintiffs concede in their response that the Individual Defendants "indisputably had all information necessary" to make a valuation of the REIT shares. ***Sadler**,* R. 84 at 11.

Furthermore, there is no plausible allegation that the Individual Defendants personally benefited from an inadequate offering price, a 10-to-1 reverse stock split, or an inflated DRP price. It was in the best interests of everyone—i.e., the company, the Board members, and the shareholders—for the shares to be sold at a higher rate, but not at a

rate that overvalued the company. There are no allegations that demonstrate the Individual Defendants and the Plaintiffs did not have a commonality of interest regarding the value of the shares. Nor do the mini-tender offers themselves establish that the Individual Defendants breached their fiduciary duties of care. *See Allyn,* 2013 WL 6439383, at *4 ("The mere facts that secondary market transactions in CLP shares occurred at prices below $9.50 and that CMG Partners offered CLP shareholders $4.50 and $4.75 per share in two mini-tender offers do not themselves establish that the Director Defendants breached their fiduciary duties of care."). The *Becker* court said it best: "The mere act of a Board, exercising its managerial power to establish a price for its stock, even if obviously wrong, would not amount to a breach of fiduciary duty owed to its shareholders. The Plaintiffs' theory of liability is not only implausible but *non-existent.*" *Becker,* 2013 WL 6068793, at *5 (emphasis added). This Court finds that conclusion applicable here.

Moreover, like in *Becker,* there is no allegation that the Individual Defendants failed to make all of the required disclosures, including those required by the Securities Exchange Act of 1934. *See id.* The five complaints and their attachments make clear that numerous required regulatory filings were made on behalf of RPAI, as well as numerous communications with shareholders. Additionally, all of those documents included a qualifier that the stated values were "estimated values" and that the "estimated value may not reflect the actual market value of [the] shares on any given date." *See, e.g., Jeffers,* R. 21 ¶¶ 66-67. This information cuts directly against the Plaintiffs' fiduciary duty claims because it demonstrates that the Individual Defendants had adequate information to consider and did consider it, the Individual Defendants satisfied their disclosure obligations, and the Plaintiffs easily could have used the information they received to make their own adequate assessment of the stock price. The fact the Plaintiffs regret having bought or held on to their shares in light of the numerous disclosures cannot be the basis for a breach of fiduciary duty claim.

Several of the complaints raise an additional issue, alleging that the Individual Defendants "misrepresented the value of the Inland REIT's shares in tender offers in order to dissuade shareholders from tendering." *See Olive,* R. 1 ¶ 69. It is alleged that, in doing so, they "placed their own individualistic motivations and objectives above their collective duty to act in good faith and with reasonable skill and prudence." *Id.; see* ***Sadler****,* R. 84 at 11 (arguing in their response brief that certain directors had special relationships with the Inland Group or its affiliates). This allegation that touches upon the duty of loyalty, which encompasses two related, albeit separate requirements: (1) corporate directors must decide matters independently when exercising their judgment, and (2) directors are generally not permitted to have a "material personal interest" in a transaction. *Hudson v. Prime* ***Retail****,* ***Inc****.,* No. 24-C-03-5806, 2004 WL 1982383, at *11 (Md. Cir. Ct. Apr. 1, 2004)). The Plaintiffs contend that they have alleged facts sufficient to overcome the business judgment rule because they can show "that a majority of [the] board that approved the transaction in dispute was interested and/or lacked independence." ***Sadler****,* R. 84 at 9 (quoting *Orman v. Cullman,* 794 A.2d 5, 23 (Del. Ch. 2002)).

The Plaintiffs' allegations on this point are insufficient for a number of reasons. First, the

Plaintiffs allege that the Individual Defendants "ha[d] a substantial interest in keeping the Company independent" and recommending that the shareholders reject the mini-tender offers, presumably so they could continue to receive compensation for being corporate officers or directors. *Olive,* R. 1 ¶ 53. Of course, corporate officers and directors are often compensated for their services or role within a corporation, including through director fees and stock options. However, conclusory allegations that a corporate director has an interest in a transaction and is not independent simply because he receives compensation for his board services and might not be retained if there is a change in management are not enough to make a plausible allegation of interest. *Werbowsky,* 766 A.2d at 139 ("[I]nterest or dependence may not be found merely from the fact that directors are paid for their services or on speculative, non-specific allegations that they acted in order to secure their retention as directors.").

The duty of loyalty also focuses on whether the *board* was interested in the outcome of a transaction or lacked the independence to objectively assess the transaction. *See Orman,* 794 A.2d at 22-23. If all shareholders, including the directors who own shares, *equally benefit* from a transaction, there is no prohibited director "interest" in a transaction. *See id.* at 29-30 (stating that "a director is considered interested when he will receive a personal financial benefit from a transaction that is not equally shared by the stockholders"). Accordingly, the allegation that the Individual Defendants could "monetize a large quantity of Company stock" as a result of the 2012 Offering and Recapitalization is likewise insufficient to show a lack of disinterest because *all* shareholders received the same added liquidity for their shares—i.e., everyone now had shares that were listed on the NYSE, an established open market. *See* R. 84 at 3. The benefit to the director shareholders from the 2012 Offering and Recapitalization was the same as that received by all shareholders generally.

RPAI had a relationship with the Inland Group, which the Plaintiffs allege resulted in "certain lucrative transactions" between the parties involving over $15,000,000 between 2009 and 2011 alone. *Olive,* R. 1 ¶ 54. These transactions purportedly included RPAI leasing office space from "an Inland Group affiliate," as well as an "ongoing service arrangement" that includes "an Inland Group affiliate serving as a registered investment advisor[] to [RPAI] in exchange for a monthly fee of up to one percent per annum of the aggregate fair value of [RPAI's] assets invested; an Inland Group affiliate providing loan servicing; and an Inland Group affiliate providing legal services." *Id.* The Plaintiffs further allege that non-parties Daniel Goodwin and Robert D. Parks, and Defendant Brenda Gujral[16] are "significant shareholders and/or principals of the Inland Group or holder of directorships and are executive officers of the Inland Group"; that Goodwin owned 5% of RPAI's shares; and that Parks and Gujral were at one point on RPAI's board. *Id.* But even if Parks and Gujral alone could be considered interested parties or as lacking independence during their time on the board, that conflict does not necessarily translate to the other board members. *See Orman,* 794 A.2d at 27. Furthermore, Parks and Goodwin are not defendants in this case, and the Plaintiffs need to present factual allegations that other members of the board were either (1) "self-dealing" or (2) controlled by or beholden to another party. *Id.* 23-24. They have not done so, as "naked assertions" that parties had a business relationship will not overcome the presumption of a director's independence. *See id.* at 27. This becomes apparent when the allegations

set forth here are compared to the allegations in cases where the court has found either board interest in a transaction or complete lack of independence.

In *Hollinger International, **Inc**. v. Hollinger **Inc**.,* No. 04 C 698, 2005 WL 589000, at *28-29 (N.D. Ill Mar. 11, 2005), the court denied the motion to dismiss because the plaintiff alleged that the controlling shareholders "personally dictated" the corporate director's compensation as a CEO of another company and paid him over $3,100,000 in "incentive payments" even though the other company had lost $68,000,000. In *Seidel v. Byron,* 405 B.R. 277, 290-91 (N.D. Ill. 2009), the defendants were serving as directors of multiple related entities "to whom they owed conflicting fiduciary duties" and were operating one of the entities solely to benefit another. In *Ad Hoc Community of Equity Holders of Tectonic Network, **Inc**. v. Wolford,* 554 F. Supp. 2d 538, 558-59 (Del. 2008), the complaint primarily alleged that the defendant was a majority shareholder in each of the companies involved in the transactions, and therefore, the defendant was on both sides of the deals. In each of these cases, there were detailed allegations that could legitimately support a conclusion that the voting board members were improperly biased in some way. None of these scenarios is present here. So again, even assuming Goodwin, Parks, and Gujral could be considered "interested" (and discounting the fact Goodwin was never a board member), the "particularized facts" alleged do not support a "reasonable inference" that any of the three individuals were controlling shareholders of RPAI who applied wielding pressure to the other board members or that any of the Individual Defendants were beholden to another through a close personal, family, or business relationship such that the board's independence was ever in question.

The Court is mindful that "[t]he totality of the complaint's allegations need only support a *reasonable doubt* of business judgment protection, not a judicial finding that the directors' actions are not protected by the business judgment rule." *Westmoreland Cnty. Emp. Ret. Sys. v. Parkinson,* 727 F.3d 719, 726 (7th Cir. 2013) (quoting *In re Abbott Labs. Derivative S'holders Litig.,* 325 F.3d 795, 809 (7th Cir. 2001)) (alteration in *Westmoreland* and internal quotation marks omitted). Nevertheless, the Plaintiffs' breach of fiduciary duty claims are alternatively dismissed because their factual allegations do not provide enough detail to overcome the presumption of reasonableness afforded to the Individual Defendants' actions under the business judgment rule.

4. *Schnierson* — Counts III & IV

The *Schnierson* complaint contains a count for "Abuse of Control" and another for "Gross Mismanagement" against the Individual Defendants. *Schnierson,* R. 1 ¶¶53-60. The Plaintiffs do not provide any basis for these counts to stand as independent causes of action. Rather, they claim the Individual Defendants "abused their positions of authority" and "breached their duties of due care, diligence, and candor" in their management and administration of RPAI. *Id.* ¶¶ 54, 60. These additional conclusory allegations are unhelpful because they are just another way of describing how the Individual Defendants allegedly breached their fiduciary duties. *See E. Trading Co. v. Refco, **Inc**.,* 229 F.3d 617, 623 (7th Cir. 2000) (explaining that "[t]here is nothing to be gained by multiplying the number of torts" and that "[l]aw should be kept as simple as

possible"). Characterizing Counts III and IV of the *Schnierson* complaint as something other than a breach of fiduciary duty does not change the underlying legal theory. They are therefore dismissed for the same reasons the counts explicitly labeled "breach of fiduciary" are dismissed.

B. Ameriprise: *Jeffers* — Count II

The *Jeffers* Plaintiffs' complaint borrows much of its language for this count against Ameriprise from the breach of fiduciary duty count against the Individual Defendants. *Compare Jeffers,* R. 21 ¶¶ 98-100, *with id.* ¶¶ 95-96. It is difficult to determine exactly what they are alleging, especially considering (1) that the counts are based on different states' laws—the Individual Defendants counts are brought under Maryland common and statutory law; this count under Illinois common law; and (2) that the complaint often conflates what it considers to be a "duty" with what is in actuality a "breach" of the duty.[17] Nevertheless, to state a claim for breach of fiduciary duty under Illinois law, a plaintiff must allege three elements: (1) "that a fiduciary duty exists"; (2) "that the fiduciary duty was breached"; and (3) "that such breach proximately caused the injury of which the plaintiff complaints." *Neade v. Portes,* 739 N.E.2d 496, 502 (Ill. 2000). The Plaintiffs allege that Ameriprise owed the Plaintiffs the duties of care, loyalty, and good faith; that Ameriprise breached those duties by disseminat[ing] materially misleading and inaccurate information," "failing to disclose hidden fees it was earning," and "failing to perform the required due diligence" required; and that as a result, the Plaintiffs were damaged. *Jeffers,* R. 21 ¶¶ 17, 100.

Some of those allegations directly implicate Rule 9, which requires fraud claims to be pled "with particularity." *See Tellabs, Inc.,* 551 U.S. at 313. The Plaintiffs allege that Ameriprise:

> • "conveyed inconsistent and misleading statements regarding the expected investment returns."
>
> • "engaged in further deceit in an attempt to manipulate the value of the shares held by its customers."
>
> • "engaged in Account Statement Identifier Deception (ASID). ASID occurs when an account statement identifier is either added or removed to mislead the investor[.]"
>
> • created a scheme to "deceive a client into believing that they actually began with a lesser amount, thus creating the impression that the losses suffered by REIT were less than what they actually were."
>
> • "engaged in further intentional deception willful ignorance when it allowed Inland Western to recalculate the value of its shares."

Jeffers, R. 21 ¶¶ 23, 85, 86, 91, 92. Thus, Count II is more than just a basic fiduciary duty claim, as it states that Ameriprise "had a duty to disseminate accurate, truthful, and complete information to Plaintiff and the proposed classes," *Jeffers,* R. 21 ¶ 98, which is

in essence a common-law fraud claim. *See* Cohen v. Am. Sec. Ins. Co., 735 F.3d 601, 615 (7th Cir. 2013) ("In Illinois, as elsewhere, the elements of a common-law fraud claim are: `(1) a false statement of material fact; (2) defendant's knowledge that the statement was false; (3) defendant's intent that the statement induce the plaintiff to act; (4) plaintiff's reliance upon the truth of the statement; and (5) plaintiff's damages resulting from reliance on the statement.'" (quoting *Connick v. Suzuki Motor Co.*, 675 N.E.2d 584, 591 (Ill. 1996)). This does not necessarily convert the claim(s) into a *federal* securities fraud claim, however, as Ameriprise contends. *Jeffers,* R. 47-1 at 10; *see Baxi v. Ennis Knupp & Assoc.*, No. 10 C 6364, 2011 WL 3898034, at *5-12 (N.D. Ill. Sept. 2, 2011) (dismissing claims for breach of fiduciary duty and fraudulent inducement under Illinois law, *in addition* to a separate claim for violation of Section 10(b) of the Securities Exchange Act of 1934). It simply means that the allegations containing averments in fraud in Count II of the *Jeffers* complaint must meet the heightened pleading requirements of Rule 9(b). *See Gandhi, LLC,* 689 F. Supp. 2d at 1013.

Ameriprise argues that the count should be dismissed because the allegations do not satisfy the required elements for a breach of fiduciary duty claim. The Court begins its analysis by looking to the first element, the existence of a fiduciary duty. Whether a party owes a fiduciary duty to another depends on the relationship between the parties. A fiduciary relationship is shown when a party establishes "facts showing an antecedent relationship that gives rise to trust and confidence reposed in another." *Khan v. Deutsche Bank AG*, 978 N.E.2d 1020, 1041 (Ill. 2012). Ameriprise contends that it did not owe any fiduciary duties to the Plaintiffs because it could only make investment decisions on the Plaintiffs' behalf with the Plaintiffs' approval, *Jeffers,* R. 47-1 at 4, but this argument ignores the essence of the *Jeffers* complaint. The complaint alleges that the Plaintiffs paid "syndication management" fees for Ameriprise's services, in addition to a 1% non-accountable "due diligence" fee and commissions "ranging from 7% to 9% for selling the [RPAI stock]," and Ameriprise provided various materials to the plaintiffs in order to educate them and "encourage them to invest . . . money in certain financial products." *Jeffers,* R. 21 ¶¶ 17-32, 80-81. Taking these allegations as true and drawing all inferences in favor of the Plaintiffs, the transactions at issue were more than an "ordinary arm's length business transaction" between sophisticated businessmen; a trusting relationship between the parties was arguably formed. *But see Maguire v. Holcomb*, 523 N.E.2d 688, 691 (Ill. App. Ct. 5th Dist. 1988) (concluding that no fiduciary relationship existed between the parties because the defendant did not "accept[] plaintiffs' trust and confidence" and it "was no more than an ordinary arm's-length business transaction"). Ameriprise cites certain cases discussing the "narrow" duty owed to a customer who holds a nondiscretionary account with a broker-dealer. *See Jeffers,* R. 60 at 3 (citing, e.g., *ADM Investor Servs., **Inc**. v. Collins,* No. 05 1823, 2006 WL 224095, at *6-7 (N.D. Ill. Jan. 26, 2006); *Refco, **Inc**. v. Troika Inv. Ltd*, 702 F. Supp. 684, 687 (N.D. Ill. 1988); *First Am. Discount Corp. v. Jacobs*, 756 N.E.2d 273, 284-85 (Ill. App. Ct. 1st Dist. 2001); *Index Futures Grp., **Inc**. v. Ross*, 557 N.E.2d 344, 348 (Ill. App. Ct. 1st Dist. 1990)). The Plaintiffs' allegations nevertheless illustrate that Ameriprise played a significant role in the Plaintiffs' decision to purchase shares of RPAI. Thus, the Plaintiffs have made sufficient factual allegations that could support the existence of a fiduciary relationship between Ameriprise and the Plaintiffs. *See Khan*, 978 N.E.2d at

1041 (describing allegations supporting a conclusion that the "defendants had superior knowledge and influence over [the plaintiff] and that he relied on them to give him sound investment and tax advice").

As to the second element of a breach of fiduciary duty claim, the Plaintiffs have adequately alleged numerous breaches. The allegation that Ameriprise failed to disclose its relationship with RPAI and that it failed to perform due diligence checks on the soundness of investing in RPAI would each qualify as a breach of a fiduciary duty owed to the Plaintiffs.

The third element of a breach of fiduciary claim, i.e., whether the breach alleged proximately caused any damage to the Plaintiffs, is where the complaint is wanting. As the Seventh Circuit has stated, "`Loss causation' is an exotic name— perhaps an unhappy one—for the standard rule of tort law that the plaintiff must allege and prove that, but for the defendant's wrongdoing, the plaintiff would not have incurred the harm of which he complains." *Bastian v. Petren Res. Corp.*, 892 F.2d 680, 685 (7th Cir. 1990) (internal citation omitted). Although "loss causation" is more often applied to statutory fraud claims, it is still relevant to common law tort claims relating to any investment decision. The Plaintiffs have alleged numerous breaches—some sounding in negligence, others in fraud—yet they fail to connect any of the breaches to any damages. *Cf. id.* ("But [the plaintiffs] suggest no reason *why* the investment was wiped out. They have alleged the cause of their entering into the transaction in which they lost money but not the cause of the transaction's turning out to be a losing one."). If Ameriprise failed to disclose a conflict of interest—e.g., that it was earning fees from RPAI (a negligence claim), there still needs to be some allegation building a bridge between the breach and the harm alleged to have occurred. *See Huang v. Brenson*, 7 N.E.2d 729, 739 (Ill. App. Ct. 1st Dist. 2014) ("The existence of an undisclosed conflict of interest only satisfies the breach element, but not the causation element, of a breach of fiduciary duty."). If Ameriprise engaged in Account Statement Identifier Deception ("ASID") to mislead investors (a fraud claim),[18] the question as to whether the plaintiffs were harmed by *that* breach still remains. Furthermore, even if Ameriprise acted negligently by failing to conduct a due diligence check on the viability of RPAI as an investment, which negligently or intentionally led to Ameriprise disseminating materially misleading and inaccurate information, the Plaintiffs must still link that breach to some particular harm to them. *See Erica P. John Fund, **Inc**. v. Halliburton Co.*, ___ U.S. ___, 131 S. Ct. 2179, 2183 (2011) (noting that plaintiffs "must demonstrate [in claims involving securities fraud] that the defendant's deceptive conduct caused their claimed economic loss"); *Lutkauskas v. Ricker*, 998 N.E.2d 549, 560 (Ill. App. Ct. 1st Dist. 2013) (dismissing the case because the Plaintiffs failed to allege damages supporting their negligence claim for breach of fiduciary duty).

Here, the Plaintiffs have not alleged that they would not have bought RPAI shares "but for" the information they received from Ameriprise, nor have they alleged that they refrained from buying stock in another company because of their RPAI investment. In fact, they do not provide any allegations supporting the causation element. *See Jeffers,* R. 21 ¶¶ 97-100. Nowhere in the *Jeffers* complaint do the Plaintiffs make any allegation (1) that their conduct would have been different had Ameriprise's alleged breaches not

occurred; (2) that anything related to the RPAI share price or how many shares they own would be different; or (3) that their financial position would be not be same. Without anything remotely related to those allegations, the proximate cause element cannot be satisfied.

Because the *Jeffers* Plaintiffs have not sufficiently alleged that any breaches by Ameriprise were the proximate cause of any damages they might have suffered, Count II of their complaint is dismissed without prejudice.[19] This ruling does not mean Ameriprise owed the Plaintiffs all of the duties alleged. *See Miller v. Harris,* 985 N.E.2d 671, 679 (Ill. App. Ct. 2d Dist. 2013) (stating that the court does not determine at the motion to dismiss stage whether a fiduciary duty exists, only whether the well-pleaded factual allegations could support that determination). The Court further notes that the breaches sounding in fraud (illustrated above) are required to be pled "with particularity." Those allegations are also insufficiently pled, as further discussed in Section IV.A.

II. Aiding & Abetting (RPAI): *Schnierson* — Count III; *Olive* — Count III; *Jeffers* — Count IV

The Plaintiffs allege a claim against RPAI for aiding and abetting a breach of fiduciary duty by the Individual Defendants. "[A]iding and abetting is a theory for holding the person who aids and abets liable for the tort itself[.]" *Hefferman v. Bass,* 467 F.3d 596, 601 (7th Cir. 2006). The theory is expressly recognized under Maryland law. *Alleco **Inc**. v. Harry & Jeanette Weinberg Found., **Inc**.*, 665 A.2d 1038, 1049 (Md. 1995). RPAI argues that it is a legal impossibility for RPAI to aid and abet a breach of fiduciary duty by directors and officers because a corporation acts *through* its agent and, therefore, cannot "aid" or "abet" itself. ***Sadler**,* R. 81 at 40. One court has explicitly recognized the validity of that argument, at least when the conduct of the corporate officer was within the scope of his employment. *See Tong v. Dunn,* No. 11 CVS 1522, 2012 WL 944581, at *6 (N.C. Super. 2012). The Plaintiffs cite *Wasserman v. Kay,* 14 A.3d 1193, 1221 n.14 (Md. Ct. Spec. App. 2009), in support of their argument that a corporation can aid and abet a tort committed by its officers when the corporate officer has an independent personal stake in achieving the desired illegal objective. *See **Sadler**,* R. 84 at 14. But the Court need not address whether there is an exception to the doctrine regarding aiding and abetting by a corporation, or even whether such an exception would apply here. The law is clear: a claim for aiding and abetting a breach of fiduciary fails as a matter of law where there has been no underlying breach of fiduciary duty. *Apple REIT's,* 2013 WL 1386202, at *19 (citing *Lerner v. Fleet Bank, N.A.*, 459 F.3d 273, 292 (2d Cir. 2006)); *Schandler v. N.Y. Life Ins. Co.*, No. 09 Civ. 10463, 2011 WL 1642574, at *13 (S.D.N.Y. Apr. 26, 2011). The Court dismissed the Plaintiffs' claims for breach of fiduciary duty, so it is required to dismiss their aiding and abetting claims as well.

III. Unjust Enrichment

A. RPAI & Individual Defendants: *Sadler* — Count II;

Babin — Count III; *Schnierson* — Count II; *Olive* — Count II; *Jeffers* — Count III

Each complaint contains a count for unjust enrichment against RPAI and/or the Individual Defendants. Unjust enrichment is a form of restitution, meant to "occup[y] the crucial ground between its much-studied neighbors, tort and contract. Restitution deals with nonbargained benefits; tort law with nonbargained harms; contract law with bargained benefits and harms." *Alternatives Unlimited, **Inc**. v. New Balt. City Bd. of Sch. Comm'rs,* 843 A.2d 252, 274 (Md. Ct. Spec. App. 2004). Its purpose is not to compensate the plaintiff but rather to "forc[e] the defendant to disgorge benefits that it would be unjust for him to keep." *Slick v. Reinecker,* 839 A.2d 784, 797 (Md. Ct. Spec. App. 2003). Under Maryland law, a claim for unjust enrichment consists of three elements: "(1) a benefit conferred upon the defendant by the plaintiff; (2) an appreciation or knowledge by the defendant of the benefit; and (3) the acceptance or retention by the defendant of the benefit under such circumstances as to make it inequitable for the defendant to retain the benefit without the payment of its value." *Hill v. Cross Country Settlements, LLC,* 936 A.2d 343, 351 (Md. 2007) (quoting *Berry & Gold, P.A. v. Berry,* 757 A.2d 113 (Md. 2000)).

The RPAI and the Individual Defendants contend, first, that Maryland law prohibits a claim for unjust enrichment "where the subject matter of the claim is covered by an express contract between the parties." ***Sadler**,* R. 81 at 41 (citing *Cnty. Comm'rs of Caroline Cnty. v. J. Roland Dashiell & Sons, **Inc**.*, 747 A.2d 600, 607 (Md. 2000)). Accordingly, they argue that unjust enrichment is unavailable here because the Plaintiffs signed a subscription agreement, and thus, their claim is governed by a contact. The RPAI and the Individual Defendants also argue that the Plaintiffs have not sufficiently alleged the required elements of a claim for restitution.

Unjust enrichment "is an equitable remedy and is ordinarily unavailable where there is a legal remedy such as breach of contract." *Becker,* 2013 WL 6068793, at *5. Parties may plead alternative theories, but they may not include a count for unjust enrichment when there is an express contract governing the relationship of the parties. *Cohen,* 735 F.3d at 615. At least three courts have addressed unjust enrichment claims where the plaintiffs executed subscription agreements to purchase shares, just as the Plaintiffs must have done here, *see, e.g., Jeffers,* R. 21 ¶¶ 77, 112 ("Ameriprise required Plaintiff and the proposed class . . . to sign uniform subscription agreements. . . .")—otherwise they could not allege to be owners of RPAI shares. Each court dismissed the unjust enrichment claims. *See Allyn,* 2013 WL 6439383, at *6-7; *Becker,* 2013 WL 6068793, at *5; *Apple REITS,* 2013 WL 1386202, at *20. Only *Apple REITS* was decided before the Plaintiffs filed their response (or was included in the Defendant's brief). Nonetheless, the Plaintiffs have made no attempt to distinguish this case from the *Apple REITs* decision on this issue. While the case is not dispositive, none of the Plaintiffs in any of the five response briefs even refer to *Apple REITS* when discussing why their unjust enrichment claims should survive the Defendants' motion. Instead, they either argue that the subscription agreements are not properly before the Court, contend that the subscription agreements are not relevant, or ignore the unjust enrichment claim altogether. *See **Sadler**,* R. 83 at

15; R 84 at 15; R. 85 at 15; *Babin,* R. 36 at 14-15. With no rationale for why the cases were incorrectly decided, the Court finds the *Allyn, Becker,* and *Apple REITS* decisions and their reasoning persuasive, and will follow suit. *See generally* *Gonzalez-Servin v. Ford Motor Co.,* 662 F.3d 931, 934 (7th Cir. 2011) (explaining that parties should not ignore authority that is directly applicable to an issue before a court). The Plaintiffs' unjust enrichment claims against RPAI and the Individual Defendants are therefore dismissed with prejudice.

Even if the Court does not consider the subscription agreements, the unjust enrichment claims would still not survive the Defendants' motions. The Plaintiffs must allege that they conferred a benefit upon the Defendants. *See* *Dolan v. McQuaide,* 79 A.3d 394, 401 (Md. Ct. Spec. App. 2013). They have not done so. The ***Sadler*** Plaintiffs find fault with the reverse stock split and the price the Defendants set for the 2012 Offering. Neither of the situations involved the Plaintiffs conferring a specific benefit upon the Defendants. It is also an open question as to whether *anyone* actually benefitted from the transactions. Similarly, the *Schnierson, Olive,* and *Jeffers* Plaintiffs denounce the Defendants' conduct regarding the mini-tender offers. But again, no benefit was conferred upon the Defendants in that situation. The same goes for the *Babin* Plaintiffs who believe they paid too much for RPAI shares through the DRP. As previously explained, there is no plausible allegation that the price was "too much." And the fact the DRP price affected the company, the Individual Defendants, and the shareholders *equally* belies the Plaintiff's argument that RPAI or the Individual Defendants benefitted at their expense—which is what unjust enrichment is designed to remedy. There is no established rule for what satisfies each element of an unjust enrichment claim or when such enrichment claim will succeed. *Hill,* 936 A.2d at 351 (citing Daniel Friedmann, *Restitution of Benefits Obtained Through the Appropriation of Property or the Commission of a Wrong,* 80 COLUM. L. REV. 504, 504-05 (1980)). But any argument here that the Defendants "reap[ed] significant benefits at Plaintiffs' expense," ***Sadler***, R. 84 at 15, is not supported by the allegations in the complaints. The Plaintiffs' unjust enrichment claims are dismissed with prejudice on this ground as well.

B. Ameriprise: *Jeffers* — Count III

To state an unjust enrichment claim under Illinois law, "a plaintiff must allege that the defendant has unjustly retained a benefit to the plaintiff's detriment, and that defendant's retention of the benefit violates the fundamental principles of justice, equity, and good conscience." *Siegel v. Shell Oil Co.,* 612 F.3d 932, 937 (7th Cir. 2010) (citing *HPI Health Care Serv., **Inc**. v. Mt. Vernon Hosp., **Inc**.,* 545 N.E.2d 672, 679 (Ill. 1989)). The parties dispute whether unjust enrichment is a stand-alone claim, but that is immaterial at this point. In *Clearly v. Philip Morris, **Inc**.,* 656 F.3d 511, 517 (7th Cir. 2011), the Seventh Circuit stated:

> What makes the retention of the benefit unjust is often due to some improper conduct by the defendant. . . . So, if an unjust enrichment claim rests on the same improper conduct alleged in another claim, then the unjust enrichment claim will be tied to this related claim— and, of course,

> unjust enrichment will *stand or fall* will the related claim. (citing *Ass'n Benefit Servs. v. Caremark Rx, **Inc**.*, 493 F.3d 841, 855 (7th Cir. 2007)) (emphasis added).

Here, the Plaintiffs' claim for unjust enrichment against Ameriprise stands or falls with the claim for breach of fiduciary duty in Count II of the *Jeffers* complaint. The Court has already determined that claim is insufficiently pled; thus, the claim for unjust enrichment must fail as well. Count III of the *Jeffers* complaint is dismissed without prejudice, subject to the Plaintiffs' ability to cure the deficiencies identified in Count II.

IV. Constructive Trust (RPAI): *Babin* — Count II

The *Babin* Plaintiffs seek the imposition of a constructive trust against RPAI, alleging that RPAI wrongfully took their funds as a result of selling shares through the DRP at an inflated rate. *Babin,* R. 4 ¶¶ 71-73. This claim fails, however, because a constructive trust is a form of an equitable remedy, not an independent cause of action. *Lyon v. Campbell,* 33 Fed. Appx. 659, 663 (4th Cir. 2002) (applying Maryland law and explaining that "[a] constructive trust is an equitable remedy, not a cause of action in and of itself"). A constructive trust can only be imposed when a defendant has acquired property by "fraud, misrepresentation, or [some] other improper method, or where the circumstances render it inequitable for the party holding the title to retain it." *Wimmer v. Wimmer,* 414 A.2d 1254, 1258 (1980); *accord Porter v. Zuromski,* 6 A.3d 372, 376 (Md. Ct. Spec. App. 2010). As the court in *Washington Suburban Sanitary Commission v. Utilities, **Inc**. of Maryland* explained, "The constructive trust, like its counterpart remedies at law, is a remedy for unjust enrichment. The remedy is no longer limited to misconduct cases; it redresses unjust enrichment, not wrongdoing." 775 A.2d 1178, 1188 (Md. 2001) (quoting DAN B. DOBBS, LAW OF REMEDIES § 4.3(2), at 597 (2d ed. 1993)) (internal quotation marks omitted). Here, the Court has already concluded that the *Babin* Plaintiffs' claims for breach of fiduciary duty and unjust enrichment cannot succeed. Without any claims justifying the need for a constructive trust, any count seeking such an equitable remedy automatically fails. Count II of the *Babin* complaint is dismissed with prejudice.

V. Violation of Illinois Securities Law of 1953

"The purpose of the [ISL] is to protect innocent persons who might be induced to invest their money in speculative enterprises over which they have little control." *Carpenter v. Exelon Enters. Co., LLC,* 927 N.E.2d 768, 772 (Ill. App. Ct. 1st Dist. 2010). Illinois courts have held that the "law is paternalistic and is to be liberally construed to better protect the public from deceit and fraud in the sale of securities." *Carpenter,* 927 N.E.2d at 772. Nonetheless, claims arising out of the ISL that "contain[] averments of fraud" are subject to Rule 9(b)'s heightened pleading requirements. *Gandhi, LLC,* 689 F. Supp. 2d at 1013.

A. Ameriprise: *Jeffers* — Count V

The *Jeffers* Plaintiffs allege that Ameriprise violated the ISL in a number of ways,

including "(1) manipulated documents to disguise the true losses in the REIT shares; (2) failed to perform required due diligence into the value and risks of the REIT shares; and (3) omitted material facts and distributed "[private placement memorandums],[20] offering brochures and other sales materials which contained misrepresentations about the risks and value of the REIT." *Jeffers,* R. 52 at 9; *see* R. 21 ¶¶ 106-25. Ameriprise argues that Count V should be dismissed because the claim is barred by the ISL five-year statute of repose in 815 ILCS 5/13(D)(2); the allegations are insufficient to meet Rule 9(b)'s "particularity" requirement; and the Plaintiffs did not provide adequate notice of the claim, as required by 815 ILCS 5/13(B). *See Jeffers,* R. 47

Looking to Ameriprise's statute of repose argument, the ISL provides:

> No action shall be brought for relief under this Section . . . after 3 years from the date of sale; provided, that if the party bringing the action neither knew nor in the exercise of reasonable diligence should have known of any alleged violation . . ., the 3 year period provided herein shall begin to run upon the earlier of:
>
> (1) the date upon which the party bringing the action has actual knowledge of the alleged violation of this Act; or
>
> (2) the date upon which the party bringing the action has notice of facts which in the exercise of reasonable diligence would lead to actual knowledge of the alleged violation of this Act.

815 ILCS 5/13(D). Counts have held that Section 5/13(D)(2), while not explicitly clear on its face, means that the three year statute of limitations may be tolled an additional two years from "the date the plaintiff knew or should have known of the violation but in no event [shall a suit be filed] more than five years from the date of the sale." *Wanless v. Burke*, 625 N.E.2d 386, 388 (Ill. App. Ct. 3d Dist. 1993) (citing 815 ILCS 5/13(D)). Thus, a party must file an action for a violation of the ISL within five years of when the violation occurred or the action is time-barred, regardless of when the party discovered the violation. S*ee Klein v. George G. Kerasotes Corp.*, 500 F.3d 669, 671 (7th Cir. 2007) ("[T]he total period of repose expires five years after the violation, no matter when it was discovered." (citing 815 ILCS 5/13(D)(2))); *see also Stone v. Doerge,* No. 02 C 1450, 2004 WL 3019173, at *4 (N.D. Ill. Dec. 28, 2004) ("Plaintiff's [claims] . . . are based upon Defendants' allegedly fraudulent sale of securities, thus they are governed by the three year statute of limitations period and a five year statute of repose set forth in the Illinois Securities Act, 815 ILCS 5/13(D)." (citing *Tregenza v. Lehman Bros., **Inc**.*, 678 N.E.2d 14, 14-15 (Ill. App. Ct. 1st Dist. 1997)).

The *Jeffers* complaint alleges that the Plaintiff class purchased shares through Ameriprise at $10.00 per share between March 2004 and September 2005. *Jeffers,* R. 21 ¶ 37. The complaint was not filed until 2012, seven years after the proposed class purchased their shares. To counter this stark fact, the Plaintiffs argue that their complaint contains allegations that Ameriprise solicited and sold shares of the REIT all the way up to 2012, that between 2009 and 2012 Ameriprise engaged in Account Statement Identifier Deception (ASID), and that members of the class continued to reinvest their

dividends to acquire additional shares of the REIT. *Jeffers,* R. 52 at 11. But a careful reading of the complaint demonstrates that the Plaintiff class does not allege that *anyone in the class* purchased stock any time after 2005—i.e., they do not connect *their own* personal investing activity to anything related to Ameriprise after the sales in 2004 and 2005. *Compare Jeffers,* R. 21 ¶ 37 (Plaintiff initially purchased 8,460 interests of [RPAI] at $10.00 per share."), *with id.* ¶ 82 ("Ameriprise *customers* were induced into purchasing . . . shares of the REIT from 2004 to 2012.") (emphasis added). The Plaintiff class even concedes that "any alleged securities law violations relating to the initial stock purchase may be time-barred." ***Sadler**,* R. 83 at 3. Count V is therefore dismissed without prejudice.

Alternatively, Count V must be dismissed because it is insufficiently pled. In response to Ameriprise's particularity argument, the Plaintiffs direct the Court to a number of older cases that were all decided before the Seventh Circuit's mandate that allegations of fraud describe the "who, what, where, when and how." *See Jeffers,* R. 60 at 8-9; *cf. AnchorBank,* 649 F.3d at 615. The Plaintiffs do not, however, explain how or where the allegations in their complaint address the pertinent requirements of a fraud-based claim. The complaint alleges that Ameriprise included "false and omitted statements" in the brochures, private placement memorandums, and company-sponsored information it disseminated, *Jeffers,* R. 21 at 115-121, but it does not state precisely what statements were false, or how or why they were false. Similarly, the complaint alleges that Ameriprise was to perform "due diligence" checks of RPAI—i.e., an evaluation of the company's performance and assets—but it does not explain when they were to occur or how comprehensive they were supposed to be, or even why the failure to do so is fraudulent. Accordingly, these conclusory allegations are insufficient under Rule 9(b).

The ***Sadler*** plaintiffs can refile Count V if they can establish they purchased shares of RPAI through Ameriprise sometime after July 26, 2007—within the previous five years of them filing their complaint. The Plaintiffs will also need to satisfy the particularity deficiencies discussed here.

B. Individual Defendants: *Jeffers* — Count VI

The *Jeffers* Plaintiffs allege that the Individual Defendants violated the ISL through "misrepresentations made in conjunction with the sale of the Inland REIT" and because they "were complicit in the fraud perpetrated by . . . Ameriprise and aided the issuance of fraudulent information both on its own behalf and in assistance to . . . Ameriprise." *Jeffers,* R. 21 ¶¶ 127-28. This count is dismissed because it is time-barred, as discussed above. *See* § V.A. Additionally, these allegations fall well short of what is required under the "with particularity" standard. *See AnchorBank,* 649 F.3d at 615. The Plaintiffs discuss a number of RPAI documents in their complaint. But the Plaintiffs do not put the Individual Defendants on notice of what particular "misrepresentations" they made or "fraudulent information" they disseminated, when it occurred, how it occurred, or where it occurred. The Plaintiffs contend they set forth the "bare bones" of a claim, but without any specific factual allegations detailing the fraud complained of, the Plaintiffs' claim in Count VI cannot stand. It is also dismissed without prejudice but may be refiled in the

event the Plaintiffs are able to provide specific facts supporting their claim.

VI. Violation of FINRA Regulations (Ameriprise): *Jeffers* — Count VII

The Plaintiffs allege that Ameriprise wilfully violated certain FINRA regulations[21] by "misleading investors, falsely representing the product to its registered representatives who in turn falsely represented the product to investors, especially with respect to the risks associated with the highly speculative real estate private placement." *Jeffers,* R. 21 ¶¶ 135-36. They claim that Ameriprise ignored certain FINRA "regulations and rules," including NASD Notice 03-71, FINRA Notice 09-09, and FINRA Notice 10-22. *Id.* ¶¶ 133-34. Ameriprise contends that this claim should be dismissed because there is no private right of action for a violation of FINRA rules or regulations. *Jeffers,* R. 47-1 at 14. In support, it directs the Court to *Richman v. Goldman Sachs Group, **Inc**.*, 868 F. Supp. 2d 261, 275 n.5 (S.D.N.Y. 2012); *Brady v. Calyon Sec.*, 406 F. Supp. 2d 307, 312 (S.D.N.Y. 2005); *Witt v. Merrill Lynch, Pierce, Fenner & Smith, **Inc**.*, 602 F. Supp. 867, 869 (W.D. Pa. 1985); and *Emmons v. Merrill Lynch, Pierce, Fenner & Smith, **Inc**.*, 532 F. Supp. 480, 483 (S.D. Ohio 1982). Each of these cases rejected a private cause of action based on an alleged violation of this type of rule—i.e., one involving the sale of securities.

The Plaintiffs contend these cases are in contrast to *Buttrey v. Merrill Lynch Pierce, Fenner & Smith, **Inc**.*, 410 F.2d 135, 144 (7th Cir. 1969), which held that "parties may be liable for violations of the [Securities] Act and [SEC] Rule 10b-5 as long as they engage in fraudulent activity `in connection with' the sale or purchase of securities or in a fraudulent `course of business.'" *Buttrey* has never been explicitly overruled, so there *could* be a private claim for relief in some circumstances. *See Wehrs v. Benson York Grp.,* No. 07 C 3312, 2008 WL 753916, at *4 n.5 (N.D. Ill. Mar. 18, 2008) ("The Seventh Circuit has found that although not every violation of Exchange rules is per se actionable, a violation of Rule 405 can, in some cases, create a private claim for relief. More recently, however, other courts have found no private right of action under Rule 405.") (internal citations omitted). However, numerous courts have questioned the validity of *Buttrey,* and the more recent trend is against allowing a private right of action. *See, e.g., Spicer v. Chi. Bd. or Options Exch., **Inc**.*, 977 F.2d 255, 264 (7th Cir. 1992) ("Only one discernible line of cases, starting with *Buttrey,* could *possibly* constitute a `routine and consistent' recognition of an implied remedy. . . ." (emphasis in original); *Pyle v. White*, 796 F. Supp. 380, 385 (N.D. Ind. 1992) ("The weight of more recent authority is against implying a cause of action under NASD suitability and NYSE know-your-customer rules."). In addition, *Buttrey* did not address the specific FINRA regulations the Plaintiffs allege that Ameriprise violated here, so its overall application is limited.

The burden is on the Plaintiffs to establish that there is an implied private right of action in the regulations, *see Buttrey*, 410 F.2d at 142; *Sanders v. John Nuveen & Co.*, 554 F.2d 790, 797 (7th Cir. 1977); yet, the most recent case the Plaintiffs cite in support of their argument is *Cook v. Goldman, Sachs & Co.*, 726 F. Supp. 151, 156 (S.D. Tex. 1989)—a twenty-five year old case from a different district interpreting NASD Rule

405(q). In light of this information, the Court is not persuaded that a private right of action flows from a violation of the FINRA regulations and rules at issue here. Count VII of the *Jeffers* complaint is dismissed with prejudice.

CONCLUSION

For the reasons discussed, the Individual Defendants' and RPAI's motions to dismiss are granted. *See* ***Sadler****,* R. 80; *Babin,* R. 33; *Schnierson,* R. 35; *Olive,* R. 27; *Jeffers,* R. 48. Ameriprise's motion to dismiss is also granted. *Jeffers,* R. 47. The ***Sadler****, Babin, Schnierson,* and *Olive* cases are dismissed with prejudice. Counts I, II, IV, and VII of the *Jeffers* complaint are dismissed with prejudice. Counts III, V, and VI of *Jeffers* are dismissed without prejudice. The *Jeffers* Plaintiffs may file an amended complaint as to Counts III, V, and VI by July 10, 2014, should they be able to cure the deficiencies identified above. All motions for class certification are denied as moot.

[1] All citations include the particular case docket that contains the document, the document's record number, and the corresponding page or paragraph — e.g., the ***Sadler*** complaint will be cited as "***Sadler****,* R. 1 ¶ __."

[2] The Court will refer to the company as "Inland Western" for all factual allegations prior to its name change to RPAI on March 8, 2012. The Court will refer to the company as "RPAI" for all factual allegations after that date and all references to the company as a defendant in this case.

[3] The individual defendants listed in each complaint vary. The differences do not affect the Court's analysis, so the Court will collectively refer to the group when referring to each complaint regardless of whether an individual is named in the particular complaint.

[4] The Court may consider RPAI's prospectuses and other relevant SEC and publicly-filed documents in its ruling on the motion to dismiss, even if they are not referred to in the complaints. *See Garden City Emps.' Ret. Sys. v. Anixter Int'l,* ***Inc****.,* No. 09 C 5641, 2011 WL 1303387, at *8 (N.D. Ill. Mar. 31, 2011); *Seidel v. Byron,* 405 B.R. 277, 284-85 (N.D. Ill. 2009); *Abrams v. Van Kampen Funds,* ***Inc****.,* No. 01 C 7538, 2002 WL 1160171, at *2 (N.D. Ill. May 30, 2002); *see also Wigod v. Wells Fargo Bank, N.A.,* 673 F.3d 547, 556 (7th Cir. 2012) (stating that a court may "consider public documents and reports of administrative bodies that are proper subjects for judicial notice, though caution is necessary, of course").

[5] Babin alleges that Gujral resigned as a director, effective May 31, 2012. *Babin,* R. 4 ¶ 18.

[6] Each of the cases includes a motion for class certification. For convenience, the Court will refer to all of the named plaintiffs and the proposed classes as the "Plaintiffs." When it is necessary to distinguish between cases and classes, the Court will refer to those plaintiffs with the case name first — e.g., the ***Sadler*** Plaintiffs.

[7] Any affiliate company of CMG Acquisition — e.g., CMG Partners — will also be referred to as "CMG."

[8] A mini-tender offer is an offer to purchase less than 5% of a company's issued stock directly from current investors.

[9] An SEC Form DEF 14A is a form under Section 14(a) of the Securities Exchange Act of 1934 that that must be filed with the SEC when a shareholder vote on a particular issue is required.

[10] The mini-tender offers from December 21, 2009; May 27, 2011; and October 27, 2011, will be referred to collectively as the "mini-tender offers."

[11] An FWP is a filing under Securities Act Rules 163/433 of Free Writing Prospectuses.

[12] The Court has not been informed of any updates or further developments regarding the SEC investigation.

[13] RPAI and the Individual Defendants divide the cases into three categories: ***Sadler*** — the "Listing Complaint" —; *Babin* — he "DRP Complaint"; and *Olive, Schnierson,* and *Jeffers* — the "Mini-Tender Complaints." When

appropriate, the Court will apply overlapping reasoning from one group to the other.

[14] Even if allegations of a direct injury could circumvent the application of § 2-405.1(g), the Plaintiffs have not sufficiently alleged a direct injury here, so the argument would still fail. *See Danielewiz,* 769 A.2d at 283 ("Generally, . . . a stockholder cannot maintain an action at law against an officer or director of the corporation to recover damages for fraud, embezzlement, or other breach of trust which depreciated the capital stock or rendered it valueless.").

[15] None of the parties explicitly allege what misstatements and omissions of fact were made or what materially misleading and inaccurate information was conveyed, let alone when or under what circumstances this occurred.

[16] For clarity, the Court is specifically addressing the allegations in the *Olive* complaint, yet Gujral is only named as a defendant in the *Babin* case.

[17] The *Jeffers* complaint alleges that Ameriprise had a duty to disseminate accurate, truthful, and complete information; a duty to perform "due diligence," and fiduciary duties of care, loyalty, and good faith. *Jeffers,* R. 23 ¶¶ 98-100. In actuality, the allegations regarding a failure to disseminate information and perform due diligence are how Ameriprise allegedly violated its fiduciary duties of care, loyalty, and good faith—i.e., they are not independent duties upon which a cause of action is based.

[18] The *Jeffers* Plaintiffs allege that "ASID occurs when an account statement identifier is either added or removed to mislead the investor as to the true nature of the valuation of the purchase price of their investments." *Jeffers,* R. 21 ¶ 86; *see id.* ¶¶ 87-89.

[19] The damages alleged also might not be sufficient (for any of the claims). The Court may take judicial notice of RPAI's closing stock price on the New York Stock Exchange, which was $15.18 on June 9, 2014, so it is possible that the Plaintiffs may not have even suffered any losses. *See* ***Retail Properties*** *of* ***America***, ***Inc***., http://www.nasdaq.com/symbol/rpai (last visited June 9, 2014). Ameriprise did not develop this argument, however, so the Court expresses no opinion as to its merits.

[20] A private placement memorandum, also known as a PPM, is a document that contains relevant disclosures about purchasing shares of a company so that the investor can evaluate the risks of a particular investment decision.

[21] FINRA was formerly known as the National Association of Securities Dealers, **Inc**. ("NASD").

131 S.Ct. 2179 (2011)

ERICA P. JOHN FUND, INC., fka Archdiocese of Milwaukee Supporting Fund, Inc., Petitioner,
v.
HALLIBURTON CO. et al.

No. 09-1403.

Supreme Court of the United States.

Argued April 25, 2011.
Decided June 6, 2011.

2182 *2182 David Boies, Armonk, NY, for Petitioner.

Nicole A. Saharsky, for United States as amicus curiae, by special leave of the Court, supporting the Petitioner.

David Sterling, Houston, Texas, for Respondents.

Lewis Kahn, Neil Rothstein, Kahn Swick & Foti, LLC, Madisonville, LA, E. Lawrence Vincent, Plano, TX, David Boies, Boies, Schiller & Flexner, LLP, Armonk, NY, Carl E. Goldfarb, Justin D. Fitzdam, Boies, Schiller & Flexner LLP, Ft. Lauderdale, FL, for Petitioner.

2183 Robb L. Voyles, Jessica B. Pulliam, Susan C. Kennedy, Baker Botts L.L.P., Dallas, Texas, David D. Sterling, Aaron M. *2183 Street, Benjamin A. Geslison, Baker Botts L.L.P., Houston, Texas, for Respondent **Halliburton Co**.

Donald E. Godwin, Godwin Ronquillo P.C., Dallas, Texas, R. Alan York, Godwin Ronquillo P.C., Houston, Texas, for Respondent David Lesar.

Evan A. Young, Baker Botts L.L.P., Austin, Texas, Jeffrey A. Lamken, Martin V. Totaro, Molo Lamken L.L.P., Washington, DC, for Respondents.

Chief Justice ROBERTS delivered the opinion of the Court.

To prevail on the merits in a private securities fraud action, investors must demonstrate that the defendant's deceptive conduct caused their claimed economic loss. This requirement is commonly referred to as "loss causation." The question presented in this case is whether securities fraud plaintiffs must also prove loss causation in order to

obtain class certification. We hold that they need not.

I

Petitioner **Erica P**. **John Fund**, **Inc**. (EPJ **Fund**), is the lead plaintiff in a putative securities fraud class action filed against **Halliburton Co**. and one of its executives (collectively **Halliburton**). The suit was brought on behalf of all investors who purchased **Halliburton** common stock between June 3, 1999, and December 7, 2001.

EPJ **Fund** alleges that **Halliburton** made various misrepresentations designed to inflate its stock price, in violation of § 10(b) of the Securities Exchange Act of 1934 and Securities and Exchange Commission Rule 10b-5. See 48 Stat. 891, 15 U.S.C. § 78j(b); 17 CFR § 240.10b-5 (2010). The complaint asserts that **Halliburton** deliberately made false statements about (1) the scope of its potential liability in asbestos litigation, (2) its expected revenue from certain construction contracts, and (3) the benefits of its merger with another company. EPJ **Fund** contends that **Halliburton** later made a number of corrective disclosures that caused its stock price to drop and, consequently, investors to lose money.

After defeating a motion to dismiss, EPJ **Fund** sought to have its proposed class certified pursuant to Federal Rule of Civil Procedure 23. The parties agreed, and the District Court held, that EPJ **Fund** satisfied the general requirements for class actions set out in Rule 23(a): The class was sufficiently numerous, there were common questions of law or fact, the claims of the representative parties were typical, and the representative parties would fairly and adequately protect the interests of the class. See App. to Pet. for Cert. 3a.

The District Court also found that the action could proceed as a class action under Rule 23(b)(3), but for one problem: Circuit precedent required securities fraud plaintiffs to prove "loss causation" in order to obtain class certification. *Id.,* at 4a, and n. 2 (citing *Oscar Private Equity Invs. v. Allegiance Telecom, **Inc**.*, 487 F.3d 261, 269 (C.A.5 2007)). As the District Court explained, loss causation is the "`causal connection between the material misrepresentation and the [economic] loss'" suffered by investors. App. to Pet. for Cert. 5a, and n. 3 (quoting *Dura Pharmaceuticals, **Inc**. v. Broudo*, 544 U.S. 336, 342, 125 S.Ct. 1627, 161 L.Ed.2d 577 (2005)). After reviewing the alleged misrepresentations
2184 and corrective disclosures, the District Court concluded that it could not certify *2184 the class in this case because EPJ **Fund** had "failed to establish loss causation with respect to any" of its claims. App. to Pet. for Cert. 54a. The court made clear, however, that absent "this stringent loss causation requirement," it would have granted the **Fund's** certification request. *Ibid.*

The Court of Appeals affirmed the denial of class certification. See 597 F.3d 330 (C.A.5 2010). It confirmed that, "[i]n order to obtain class certification on its claims, [EPJ **Fund**] was required to prove loss causation, i.e., that the corrected truth of the former falsehoods actually caused the stock price to fall and resulted in the losses." *Id.,* at 334. Like the District Court, the Court of Appeals concluded that EPJ **Fund** had failed to meet the "requirements for proving loss causation at the class certification stage." *Id.,* at 344.

We granted the **Fund's** petition for certiorari, 562 U.S. ___, 131 S.Ct. 856, 178 L.Ed.2d 622 (2011), to resolve a conflict among the Circuits as to whether securities fraud plaintiffs must prove loss causation in order to obtain class certification. Compare 597 F.3d, at 334 (case below), with *In re Salomon Analyst Metromedia Litigation*, 544 F.3d 474, 483 (C.A.2 2008) (not requiring investors to prove loss causation at class certification stage); *Schleicher v. Wendt*, 618 F.3d 679, 687 (C.A.7 2010) (same); *In re DVI, **Inc**. Securities Litigation*, 639 F.3d 623, 636-637, 2011 WL 1125926, *7 (C.A.3, Mar.29, 2011) (same; decided after certiorari was granted).

II

EPJ **Fund** contends that the Court of Appeals erred by requiring proof of loss causation for class certification. We agree.

A

As noted, the sole dispute here is whether EPJ **Fund** satisfied the prerequisites of Rule 23(b)(3). In order to certify a class under that Rule, a court must find "that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. Rule Civ. Proc. 23(b)(3). Considering whether "questions of law or fact common to class members predominate" begins, of course, with the elements of the underlying cause of action. The elements of a private securities fraud claim based on violations of § 10(b) and Rule 10b-5 are: "`(1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation.'" *Matrixx Initiatives, **Inc**. v. Siracusano*, 563 U.S. ___, ___, 131 S.Ct. 1309, 1317, 179 L.Ed.2d 398 (2011) (quoting *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, **Inc***., 552 U.S. 148, 157, 128 S.Ct. 761, 169 L.Ed.2d 627 (2008)).

Whether common questions of law or fact predominate in a securities fraud action often turns on the element of reliance. The courts below determined that EPJ **Fund** had to prove the separate element of loss causation in order to establish that reliance was capable of resolution on a common, classwide basis.

"Reliance by the plaintiff upon the defendant's deceptive acts is an essential element of the § 10(b) private cause of action." *Stoneridge, supra*, at 159, 128 S.Ct. 761. This is because proof of reliance ensures that there is a proper "connection between a defendant's misrepresentation and a plaintiff's injury." *Basic **Inc**. v. Levinson*, 485 U.S. 224, 243, 108 *2185 S.Ct. 978, 99 L.Ed.2d 194 (1988). The traditional (and most direct) way a plaintiff can demonstrate reliance is by showing that he was aware of a company's statement and engaged in a relevant transaction—*e.g.,* purchasing common stock—based on that specific misrepresentation. In that situation, the plaintiff plainly would have relied on the company's deceptive conduct. A plaintiff unaware of the relevant statement,

2185

on the other hand, could not establish reliance on that basis.

We recognized in *Basic,* however, that limiting proof of reliance in such a way "would place an unnecessarily unrealistic evidentiary burden on the Rule 10b-5 plaintiff who has traded on an impersonal market." *Id.,* at 245, 108 S.Ct. 978. We also observed that "[r]equiring proof of individualized reliance from each member of the proposed plaintiff class effectively would" prevent such plaintiffs "from proceeding with a class action, since individual issues" would "overwhelm[] the common ones." *Id.,* at 242, 108 S.Ct. 978.

The Court in *Basic* sought to alleviate those related concerns by permitting plaintiffs to invoke a rebuttable presumption of reliance based on what is known as the "fraud-on-the-market" theory. According to that theory, "the market price of shares traded on well-developed markets reflects all publicly available information, and, hence, any material misrepresentations." *Id.,* at 246, 108 S.Ct. 978. Because the market "transmits information to the investor in the processed form of a market price," we can assume, the Court explained, that an investor relies on public misstatements whenever he "buys or sells stock at the price set by the market." *Id.,* at 244, 247, 108 S.Ct. 978 (internal quotation marks omitted); see also *Stoneridge, supra,* at 159, 128 S.Ct. 761; *Dura Pharmaceuticals,* 544 U.S., at 341-342, 125 S.Ct. 1627. The Court also made clear that the presumption was just that, and could be rebutted by appropriate evidence. See *Basic, supra,* at 248, 108 S.Ct. 978.

B

It is undisputed that securities fraud plaintiffs must prove certain things in order to invoke *Basic*'s rebuttable presumption of reliance. It is common ground, for example, that plaintiffs must demonstrate that the alleged misrepresentations were publicly known (else how would the market take them into account?), that the stock traded in an efficient market, and that the relevant transaction took place "between the time the misrepresentations were made and the time the truth was revealed." *Basic,* 485 U.S., at 248, n. 27, 108 S.Ct. 978; *id.,* at 241-247, 108 S.Ct. 978; see also *Stoneridge, supra,* at 159, 128 S.Ct. 761.

According to the Court of Appeals, EPJ **Fund** also had to establish loss causation at the certification stage to "trigger the fraud-on-the-market presumption." 597 F.3d, at 335 (internal quotation marks omitted); see *ibid.* (EPJ **Fund** must "establish a causal link between the alleged falsehoods and its losses in order to invoke the fraud-on-the-market presumption"). The court determined that, in order to invoke a rebuttable presumption of reliance, EPJ **Fund** needed to prove that the decline in **Halliburton's** stock was "because of the correction to a prior misleading statement" and "that the subsequent loss could not otherwise be explained by some additional factors revealed then to the market." *Id.,* at 336 (emphasis deleted). This is the loss causation requirement as we have described it. See *Dura Pharmaceuticals, supra,* at 342, 125 S.Ct. 1627; see also 15 U.S.C. § 78u-4(b)(4).

2186 The Court of Appeals' requirement is not justified by *Basic* or its logic. *2186 To begin,

we have never before mentioned loss causation as a precondition for invoking *Basic*'s rebuttable presumption of reliance. The term "loss causation" does not even appear in our *Basic* opinion. And for good reason: Loss causation addresses a matter different from whether an investor relied on a misrepresentation, presumptively or otherwise, when buying or selling a stock.

We have referred to the element of reliance in a private Rule 10b-5 action as "transaction causation," not loss causation. *Dura Pharmaceuticals, supra,* at 341-342, 125 S.Ct. 1627 (citing *Basic, supra,* at 248-249, 108 S.Ct. 978). Consistent with that description, when considering whether a plaintiff has relied on a misrepresentation, we have typically focused on facts surrounding the investor's decision to engage in the transaction. See *Dura Pharmaceuticals, supra,* at 342, 125 S.Ct. 1627. Under *Basic*'s fraud-on-the-market doctrine, an investor presumptively relies on a defendant's misrepresentation if that "information is reflected in [the] market price" of the stock at the time of the relevant transaction. See *Basic,* 485 U.S., at 247, 108 S.Ct. 978.

Loss causation, by contrast, requires a plaintiff to show that a misrepresentation that affected the integrity of the market price *also* caused a subsequent economic loss. As we made clear in *Dura Pharmaceuticals,* the fact that a stock's "price on the date of purchase was inflated because of [a] misrepresentation" does not necessarily mean that the misstatement is the cause of a later decline in value. 544 U.S., at 342, 125 S.Ct. 1627 (emphasis deleted; internal quotation marks omitted). We observed that the drop could instead be the result of other intervening causes, such as "changed economic circumstances, changed investor expectations, new industry-specific or firm-specific facts, conditions, or other events." *Id.,* at 342-343, 125 S.Ct. 1627. If one of those factors were responsible for the loss or part of it, a plaintiff would not be able to prove loss causation to that extent. This is true even if the investor purchased the stock at a distorted price, and thereby presumptively relied on the misrepresentation reflected in that price.

According to the Court of Appeals, however, an inability to prove loss causation would prevent a plaintiff from invoking the rebuttable presumption of reliance. Such a rule contravenes *Basic*'s fundamental premise—that an investor presumptively relies on a misrepresentation so long as it was reflected in the market price at the time of his transaction. The fact that a subsequent loss may have been caused by factors other than the revelation of a misrepresentation has nothing to do with whether an investor relied on the misrepresentation in the first place, either directly or presumptively through the fraud-on-the-market theory. Loss causation has no logical connection to the facts necessary to establish the efficient market predicate to the fraud-on-the-market theory.

The Court of Appeals erred by requiring EPJ **Fund** to show loss causation as a condition of obtaining class certification.

C

Halliburton concedes that securities fraud plaintiffs should not be required to prove loss causation in order to invoke *Basic*'s presumption of reliance or otherwise achieve class

certification. See Tr. of Oral Arg. 26-29. **Halliburton** nonetheless defends the judgment below on the ground that the Court of Appeals did not actually require plaintiffs to prove "loss causation" as we have used that term. See *id.,* at 27 ("it's not loss causation as this
2187 Court knows it in *Dura*"). According to **Halliburton**, "loss causation" was merely *2187 "shorthand" for a different analysis. Brief for Respondents 18. The lower court's actual inquiry, **Halliburton** insists, was whether EPJ **Fund** had demonstrated "price impact"—that is, whether the alleged misrepresentations affected the market price in the first place. See, *e.g., id.,* at 16-19, 24-27, 50-51; see also Tr. of Oral Arg. 27 (stating that the Court of Appeals' "test is simply price impact" and that EPJ **Fund's** "only burden under the Fifth Circuit case law was to show price impact").[*]

"Price impact" simply refers to the effect of a misrepresentation on a stock price. **Halliburton's** theory is that if a misrepresentation does not affect market price, an investor cannot be said to have relied on the misrepresentation merely because he purchased stock at that price. If the price is unaffected by the fraud, the price does not reflect the fraud.

We do not accept **Halliburton's** wishful interpretation of the Court of Appeals' opinion. As we have explained, loss causation is a familiar and distinct concept in securities law; it is not price impact. While the opinion below may include some language consistent with a "price impact" approach, see, *e.g.,* 597 F.3d, at 336, we simply cannot ignore the Court of Appeals' repeated and explicit references to "loss causation," see *id.,* at 334 (three times), 334 n. 2, 335, 335 n. 10 (twice), 335 n. 11, 336, 336 n. 19, 336 n. 20, 337, 338, 341 (twice), 341 n. 46, 342 n. 47, 343, 344 (three times).

Whatever **Halliburton** thinks the Court of Appeals meant to say, what it said was loss causation: "[EPJ **Fund**] was required to prove loss causation, i.e., that the corrected truth of the former falsehoods actually caused the stock price to fall and resulted in the losses." 597 F.3d, at 334; see *id.,* at 335 ("we require plaintiffs to establish loss causation in order to trigger the fraud-on-the-market presumption" (internal quotation marks omitted)). We take the Court of Appeals at its word. Based on those words, the decision below cannot stand.

*** * ***

Because we conclude the Court of Appeals erred by requiring EPJ **Fund** to prove loss causation at the certification stage, we need not, and do not, address any other question about *Basic,* its presumption, or how and when it may be rebutted. To the extent **Halliburton** has preserved any further arguments against class certification, they may be addressed in the first instance by the Court of Appeals on remand.

The judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

[*] **Halliburton** further concedes that, even if its conception of what the Court of Appeals meant by "loss causation" is correct, the Court of Appeals erred by placing the initial burden on EPJ **Fund**. See Tr. of Oral Arg. 29 ("We agree ... that the Fifth Circuit put the initial burden of production on the plaintiff, and that's contrary to *Basic*"). According to **Halliburton**, a plaintiff must prove price impact only after *Basic*'s presumption has been successfully rebutted by the defendant. Tr. of Oral Arg. 28, 38-40. We express no views on the merits of such a framework.

998 N.E.2d 549 (2013)

Anthony LUTKAUSKAS, Taxpayer for and on behalf of Lemont-Bromberek Combined School District 113A, Plaintiff-Appellant,
v.
Dr. Timothy RICKER, Robert Beckwith, John Wood, Dr. Mary Gricus, Lisa Wright, Kevin Doherty, David Leahy, Gwen O'Malley, Sue Murphy, Al Albrecht, Underwriters at Lloyd's, London, Knutte Associates P.C. and Other Persons whose names are not yet known, Defendants-Appellees.
Laura Reigle, Duane Bradley, Louis Emery, and Janet Hughes, Taxpayers for and on behalf of Lemont Bromberek Combined School District 113A, Plaintiffs-Appellants,
v.
Dr. Timothy Ricker, Robert Beckwith, John Wood, Dr. Mary Gricus, Lisa Wright, Kevin Doherty, David Leahy, Gwen O'Malley, Sue Murphy, Al Albrecht, Underwriters at Lloyd's, London, Knutte Associates P.C. and Other Persons whose names are not yet known, Defendants-Appellees.

Docket No. 1-12-1112.

Appellate Court of Illinois, First District, Fourth Division.

September 30, 2013.
Rehearing Denied November 18, 2013.

551 *551 Natalie Brouwer Potts, of Center for Open Government, Law Offices of IIT Chicago-Kent College of Law, and Clinton A. Krislov, of Krislov & Associates, Ltd., of Chicago, for appellants.

552 *552 Raymond J. Jast and Kimberly E. Blair, both of Wilson, Elser, Moskowitz, Edelman & Dicker LLP, of Chicago, for appellee Certain Underwriters at Lloyd's London.

Thomas F. Falkenberg, Alyssa M. Reiter, and Kirstin B. Ives, all of Williams Montgomery & John Ltd., of Chicago, for appellee Knutte & Associates, P.C.

Edward M. Kay, Paige M. Neel, and Mark J. Sobczak, all of Clausen Miller P.C., for appellee Timothy **Ricker**.

Justino D. Petrarca, Kevin B. Gordon, and James A. Petrungaro, all of Scariano, Himes & Petrarca, Chtrd., of Chicago, for other appellees.

OPINION

Justice EPSTEIN delivered the judgment of the court, with opinion. Justice Fitzgerald Smith concurred in the judgment and opinion. Justice Pucinski dissented, with opinion.

¶ 1 In this consolidated appeal, five taxpayer plaintiffs, acting on behalf of the Lemont Bromberek Combined School District 113A, seek reversal of the circuit court's dismissal of their claims brought against two school district employees, seven school board members, the district's accounting firm, and the district's surety. Plaintiffs alleged that the district employees and board members violated section 20-5 of the School Code (105 ILCS 5/20-5 (West 2010)) when they engaged in or permitted a pattern of spending money from the district's working cash fund without a school board resolution approving the transfer of funds from the working cash fund. For the reasons that follow, we affirm.

¶ 2 BACKGROUND

¶ 3 Article 20 of the School Code

¶ 4 Plaintiffs' complaints center on a violation of article 20 of the School Code, which authorizes certain school districts to create working cash funds. See 105 ILCS 5/20-1 (West 2010). The working cash fund allows a district to "have in its treasury at all time sufficient money to meet demands thereon for expenditures for corporate purposes" before the district receives taxes designated for those purposes. *Id.* In other words, "the purpose of the working cash fund is to provide a reserve upon which school districts may draw in anticipation of tax collections." *In re Application of Walgenbach,* 104 Ill.2d 121, 125, 83 Ill.Dec. 595, 470 N.E.2d 1015 (1984). To fund the working cash fund, the district "may incur an indebtedness and issue bonds as evidence thereof" (105 ILCS 5/20-2 (West 2010)) or may levy taxes (105 ILCS 5/20-3 (West 2010)). Money from the working cash fund "may be used by the school board for any and all school purposes and may be transferred in whole or in part to the general funds or both of the school district and disbursed therefrom in anticipation of the collection of taxes lawfully levied for any or all purposes." 105 ILCS 5/20-4 (West 2010). When the district receives taxes as anticipated, "the fund shall immediately be reimbursed therefrom until the full amount so transferred has been retransferred to the fund." *Id.* Under Section 20-5 of the School Code, the board must pass a resolution directing the transfer of monies from the working cash fund:

> "Moneys in the working cash fund shall be transferred from the working cash fund to another fund of the district only upon the authority of the school board which shall from time to time by separate resolution direct the school treasurer to make transfers of such sums as may be required for the purposes herein authorized." 105 ILCS 5/20-5 (West 2010).

553 *553 Section 20-5 sets forth specific information to be contained within the resolution (*e.g.,* "the taxes in anticipation of which [a] transfer is to be made and from which the working cash fund is to be reimbursed"). See *id.*

¶ 5 Section 20-10 allows a school district to abate the working cash fund at any time, by adoption of a resolution, and "direct the transfer at any time of moneys in that fund to any fund or funds of the district most in need of the money." 105 ILCS 5/20-10 (West 2010). Similarly, section 20-8 allows a district to abolish its working cash fund, by adoption of a resolution, and "direct the transfer of any balance in such fund to the educational fund at the close of the then current school year." 105 ILCS 5/20-8 (West 2010).

¶ 6 Original Taxpayer Complaints

¶ 7 On December 17, 2010, four taxpayer plaintiffs filed two separate, but nearly identical, lawsuits, which were subsequently consolidated into one action. Hughes brought the first complaint and Reigle, Bradley, and Emery brought the second. The lawsuits named as defendants the district superintendent, the district treasurer, and seven school board members (collectively, the district defendants) in their individual capacities.

¶ 8 Plaintiffs alleged that the district defendants violated section 20-5 of the School Code, when they repeatedly transferred (or allowed the transfer of) money from the district's working cash fund without board resolution. Plaintiffs alleged that between 2007 and 2010, the district spent in excess of the amounts allocated to a number of individual funds that provide capital for the district's annual activities. To make up for shortfalls in these funds, the district drew money from the working cash fund. Plaintiffs further alleged that the district defendants never reimbursed the working cash fund, and instead the school board passed resolutions to abate and abolish the working cash fund. On December 2, 2009, members of the board passed a resolution to partially abate the working cashing fund in the amount of $4,849,442, leaving a remainder of $643,500. On April 28, 2010, the board approved a resolution to abolish the working cash fund, with the money to be permanently transferred to the education fund.

¶ 9 Plaintiffs sought relief under section 20-6 of the School Code, which provides:

> "Any member of the school board of any school district to which this Article is applicable, or any other person holding any office, trust, or employment under such school district who wilfully violates any of the provisions of this Article shall be guilty of a business offense and fined not exceeding $10,000, and shall forfeit his right to his office, trust or employment and shall be removed therefrom. Any such member or other person shall be liable for any sum that may be unlawfully diverted from the working cash fund or otherwise used, to be recovered by such school district or by any taxpayer in the name and for the benefit of such school district in an appropriate civil action; provided that the taxpayer shall file a bond for all costs and be liable for all costs taxed against the school district in such suit,

and judgment shall be rendered accordingly. Nothing herein shall bar any other remedies." 105 ILCS 5/20-6 (West 2010).

Under the authority of section 20-6, plaintiffs sought an order declaring the district defendants forfeit their offices and employment with the district, assessing a $10,000 statutory fine against each of the district defendants, and entering judgment against the defendants personally for "an amount sufficient to make [the district] whole and replace the public funds shown by the *554 evidence to have been unlawfully diverted" from the working cash fund.

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¶ 10 Along with these claims, plaintiffs brought a single count for "accountant negligence" against the district's former accountant, Knutte and Associates, alleging that Knutte issued clean audit reports, but knew or should have known of the district defendants' transfer of funds in violation of the School Code. Plaintiffs also brought claims against an entity affiliated with Certain Underwriters at Lloyd's London (Underwriters), the surety that bonded the school treasurer. Plaintiffs alleged that the surety was obligated to pay damages caused to the district by the treasurer's "failure to faithfully discharge the duties of his office according to law."

¶ 11 On July 27, 2011, the circuit court struck the claims against the district defendants with leave to replead. Judge Novak ruled that plaintiffs did not have standing to seek criminal penalties prescribed in section 20-6, and as to any civil recovery, the court ruled that the allegations were insufficient to allege a violation of section 20-5. The court dismissed the claims against Knutte with prejudice, finding that plaintiffs did not have standing to bring the claim. Pursuant to Illinois Supreme Court Rule 304(a) (eff. Jan. 1, 2006), the court ruled that there was no just cause to delay appeal of the claim against Knutte. The surety was apparently not properly named as a defendant, and plaintiffs later voluntarily dismissed their complaints against the improperly named entity.

¶ 12 The First Amended Consolidated Complaint and the Lutkauskas Complaint

¶ 13 On August 29, 2011, plaintiffs filed a first amended consolidated complaint, again alleging that the district defendants violated article 20 of the School Code, but adding a breach of fiduciary duty claim against the district defendants. Plaintiffs restated their claims against the properly named entity for the surety, Underwriters at Lloyds. On October 11, 2011, a fifth taxpayer plaintiff, **Lutkauskas**, filed his complaint, which was later consolidated with the other two taxpayer complaints. The **Lutkauskas** complaint was identical to the first amended consolidated complaint of the other plaintiffs, but added new claims against Knutte for accounting malpractice, negligence, breach of fiduciary duty, and aiding the district defendants in violating the School Code.

¶ 14 Both the amended consolidated complaint and the **Lutkauskas** complaint provided additional detail regarding the alleged illegal transfer of funds. Specifically, plaintiffs alleged "[i]t appears that the District monies, though specifically appropriated to specific funds/purposes, were held in a commingled account. Thus, when money was spent

beyond the legal appropriation for a particular fund, it actually drained or diverted the Working Cash Fund, without the appropriate Board Action and documentation for such dispersions." The complaint also cited email correspondence among the district defendants purporting to show that they were aware that the working cash funds were being used between 2007 and 2010, without board resolutions approving any transfers.

¶ 15 On March 15, 2012, the district defendants and Underwriters at Lloyd's moved to dismiss plaintiffs' first amended consolidated complaint and the **Lutkauskas** complaint. Knutte filed a motion to dismiss the **Lutkauskas** complaint. The trial court granted these motions. While the defendants asserted various bases on which to dismiss the complaints, Judge Martin ruled that plaintiffs' complaint failed to state a claim and the
555 district defendants had legislative immunity. Judge Martin also stated that plaintiffs *555 were "basically arguing a windfall" and that "nothing in the complaint * * * would tell the reader that money was used for some purpose other than for school purposes." As a result, the court ruled that Underwriters at Lloyd's had no liability as surety and dismissed the complaints against it. With respect to Knutte, the circuit court dismissed **Lutkauskas's** claims with prejudice on the basis of *res judicata.* Plaintiffs appealed.

¶ 16 ANALYSIS

¶ 17 Defendants moved to dismiss under sections 2-619 and 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615, 2-619 (West 2010)). A motion to dismiss under section 2-615 of the Code (735 ILCS 5/2-615 (West 2010)) challenges the legal sufficiency of the complaint. *Wakulich v. Mraz,* 203 Ill.2d 223, 228, 271 Ill.Dec. 649, 785 N.E.2d 843 (2003). Section 2-619 of the Code of Civil Procedure allows dismissal where, in pertinent part, plaintiff does not have standing to bring an action. 735 ILCS 5/2-619(2) (West 2010).

¶ 18 We review the circuit court's dismissal of plaintiffs' complaints *de novo. Feltmeier v. Feltmeier,* 207 Ill.2d 263, 266, 278 Ill.Dec. 228, 798 N.E.2d 75 (2003). This court may affirm the circuit court's dismissal for any reason appearing in the record. See *Gunthorp v. Golan,* 184 Ill.2d 432, 438, 235 Ill.Dec. 21, 704 N.E.2d 370 (1998) (the trial court may be affirmed on any basis in the record without regard to whether the trial court relied upon that ground or whether the trial court's rationale was correct); *Geick v. Kay,* 236 Ill. App.3d 868, 873, 177 Ill.Dec. 340, 603 N.E.2d 121 (1992) (although the trial court's order did not specify whether the counts were being dismissed under section 2-615 or section 2-619, the reviewing court may affirm a correct decision for any reason appearing in the record, regardless of the basis relied upon by the trial court); *Mitsias v. I-Flow Corp.,* 2011 IL App (1st) 101126, ¶ 47, 355 Ill.Dec. 66, 959 N.E.2d 94 (appellate court has jurisdiction to consider issue not reached by circuit court on motion to dismiss, where issue was properly raised in the circuit court but court granted motion to dismiss on another basis).

¶ 19 On appeal, defendants raise a host of arguments in support of affirming the district court's dismissal of the taxpayers' complaints. Defendant Timothy **Ricker** filed a brief on his own behalf, arguing that: (1) plaintiffs are not entitled to any relief because the district did not suffer any monetary damages and any recovery would constitute an unjust

windfall; (2) the breach of fiduciary duty claims fail because plaintiffs have not alleged damages; (3) plaintiffs lack standing to seek criminal penalties prescribed in section 20-6; (4) legislative immunity bars any claim against **Ricker**; (5) plaintiffs failed to plead a cause of action under section 20-6 or for breach of fiduciary duty; (6) claims in the **Lutkauskas** complaint are time-barred; (7) plaintiffs lack standing to bring the instant case because they never demanded the district bring the action itself; and (8) plaintiffs' complaints were properly dismissed because they fail to name an indispensable party. The remaining district defendants raise many of the same arguments, but also argue that (1) claims against certain district defendants should be dismissed because none of the allegations in the complaint as to the working cash fund transfers were directed at these individuals; and (2) the claims should be dismissed against the school district defendants in their individual capacities. Defendant Knutte asserts that the trial court properly dismissed all counts against it by **Lutkauskas** based on the doctrine of *res judicata.* Finally, defendant Underwriters at Lloyd's raises several *556 arguments as to why it has no obligation to pay under the treasurer bond, assuming that any of the allegations against defendant Beckwith are not dismissed for other reasons.

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¶ 20 Claims Against the District Defendants

¶ 21 Among the various arguments raised in support of dismissal by the district defendants, we need only address two narrow issues relating to the remedies sought by the taxpayer plaintiffs against the district defendants.

¶ 22 In their complaints, plaintiffs first ask the court to fine each of the defendants and order their removal from office under the first sentence of section 20-6:

> "Any member of the school board of any school district to which this Article is applicable, or any other person holding any office, trust, or employment under such school district who wilfully violates any of the provisions of this Article shall be guilty of a business offense and fined not exceeding $10,000, and shall forfeit his right to his office, trust or employment and shall be removed therefrom." 105 ILCS 5/20-6 (West 2010).

The district defendants argue that the forfeiture of office and fines prescribed in the first sentence of section 20-6 are penalties only the State of Illinois can impose. In its July 27, 2011 ruling dismissing Reigle's and Hughes' original complaints, the circuit court agreed. Judge Novak held that only an appropriate government actor, not taxpayer plaintiffs, would have standing to pursue these remedies under the statute. The **Lutkauskas** complaint, which postdated the July 27, 2011 dismissal decision, also sought forfeiture and fines from defendants. In dismissing the **Lutkauskas** complaint, Judge Martin agreed with Judge Novak's ruling, stating that the School Code "contemplate[s] the State's Attorney or the [Attorney General's] office really being the entity to bring a cause of action and look for penalties or removal from office."

¶ 23 When considering the proper construction of section 20-6, we strive to "ascertain and give effect to the legislature's intent." See, *e.g., Citizens Opposing Pollution v. ExxonMobil Coal U.S.A.,* 2012 IL 111286, ¶ 23, 357 Ill.Dec. 55, 962 N.E.2d 956 (citing *In*

re Donald A. G., 221 Ill.2d 234, 246, 302 Ill.Dec. 735, 850 N.E.2d 172 (2006)). "The best indication of this intent remains the language of the statute itself, which must be given its plain and ordinary meaning." *Id.* We presume that the legislature did not intend absurdity, inconvenience, or injustice. *Id.*

¶ 24 In this case, we agree with the circuit court that the first sentence of section 20-6 sets forth criminal penalties. The first sentence of section 20-6 speaks to a party "guilty of a business offense." 105 ILCS 5/20-6 (West 2010). The term "business offense" is specifically defined in the Unified Code of Corrections. See 730 ILCS 5/5-1-2 (West 2008) ("`Business Offense' means a petty offense for which the fine is in excess of $1,000."). Our supreme court has described the specific penalties imposed in section 20-6 (a "fine" and "forfeit[ure]" of the "right to office") as criminal in nature. See *In re Walgenbach*, 104 Ill.2d 121, 125, 83 Ill.Dec. 595, 470 N.E.2d 1015 (1984) (stating that section 20-6 "provides for criminal sanctions against any member of a school board who wilfully violates the provisions of article 20"). And we have recognized that the General Assembly may seek to enforce compliance with a statute by specifying that a violation constitutes a "business offense," which we described as a "criminal penalty." See *Parra v. Tarasco, Inc.*, 230 Ill.App.3d 819, 823, 172 Ill.Dec. 516, 595 N.E.2d 1186 (1992)
557 (noting that Illinois Choke-Saving *557 Methods Act imposed a "criminal penalty," where it provided that anyone violating it "is guilty of a business offense and shall be fined $500").

¶ 25 In response, plaintiffs claim that they "are asking for—and entitled to— forfeiture of office by the District 113A Defendants still holding office (not **Ricker**, who resigned as Superintendent) and monetary penalties, notably that will go to the District, not Plaintiffs." Beyond this mere assertion, however, plaintiffs provide no authority for why they, as private taxpayers acting on behalf of the school district, have the power to impose criminal penalties for what is a criminal violation. Nor do plaintiffs provide any authority for the proposition that statutory penalties for a "business offense" can be awarded as a remedy in a civil action. Accordingly, we agree with the circuit court that plaintiffs did not have standing to seek forfeiture of office or to impose fines in a civil suit.

¶ 26 While the first sentence of section 20-6 speaks to criminal violations, the second sentence of section 20-6 references "an appropriate civil action" brought by the district or "by any taxpayer in the name and for the benefit of such school district." Private taxpayers may bring suit on behalf of the district to recover "any sum that may be unlawfully diverted from the working cash fund or otherwise used." 105 ILCS 5/20-6 (West 2010).

¶ 27 Plaintiffs seek to recover "an amount sufficient to make District 113 A whole and replace the public funds shown by the evidence to have been unlawfully diverted from the Working Cash Fund." The complaint alleges that at times between 2007 and 2010, the district drew money out of the working cash fund in order to cover shortfalls in other funds. Later in 2009 the board formally approved the fund's abatement, with all money being transferred to some other funds (the complaint does not specify which funds). In 2010, the board formally approved the fund's abolishment, with the remaining money being transferred to the education fund.

¶ 28 The district defendants argue that there are no allegations that they used the funds at issue "for anything other than legitimate District expenses." According to defendants, allowing the taxpayer plaintiffs to recover from defendants in this circumstance "would result in a windfall to the District by reimbursing it for money it never lost." Judge Martin agreed, stating that plaintiffs were "basically arguing a windfall" and that "nothing in the complaint * * * would tell the reader that money was used for some purpose other than for school purposes." Plaintiffs argue that because section 20-5 plainly forbids interfund transfers without board resolution, any money transferred without board resolution should be considered a "sum * * * unlawfully diverted from the working cash fund" recoverable by the taxpayer plaintiffs on behalf of the district. 105 ILCS 5/20-6 (West 2010). According to plaintiffs, defendants are personally liable for $5,492,942.[1]

¶ 29 The parties' dispute about the proper remedy reflects an underlying disagreement about whether the monies at issue were "unlawfully diverted." The School Code does not define "unlawful diversion" or "diversion," and we may consult *558 a dictionary to ascertain the plain and ordinary meaning of those terms. *Gaffney v. Board of Trustees of the Orland Fire Protection District,* 2012 IL 110012, ¶ 60, 360 Ill.Dec. 549, 969 N.E.2d 359. Moreover, "words and phrases having well-defined meanings in the common law are interpreted to have the same meanings when used in statutes dealing with the same or similar subject matter as that with which they were associated at common law." *Scott v. Dreis & Krump Manufacturing Co.,* 26 Ill.App.3d 971, 983, 326 N.E.2d 74 (1975); *People v. Bailey,* 375 Ill.App.3d 1055, 1061, 314 Ill.Dec. 575, 874 N.E.2d 940 (2007). We look to the common law meaning of terms even in statutes dealing with new or different subject matter, to the extent that they appear fitting and absent evidence indicating a contrary meaning. *Advincula v. United Blood Services,* 176 Ill.2d 1, 17, 223 Ill.Dec. 1, 678 N.E.2d 1009 (1996).

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¶ 30 At the time section 20-6's predecessor statute (1933 Ill. Laws 265) was enacted, Black's Law Dictionary defined "diversion" as "[a] turning aside or altering the natural course of a thing," with the term being "chiefly applied to the unauthorized changing the course of a water course to the prejudice of a lower proprietor, or to unauthorized or illegal use of corporate funds." Black's Law Dictionary 600 (3d ed. 1933). In a line of cases considering interfund loans, our supreme court has repeatedly defined the "diversion" of funds or the "unlawful diversion" of funds as use for some improper purpose or some purpose specifically prohibited by statute. As relevant to the issue here, the court explained, "Municipal officers have no right to divert moneys from one fund to another and different fund for which it was not appropriated. But the word `divert' is used in the sense of turning such fund permanently from its purpose or the final appropriation of it to some other use." *Gates v. Sweitzer,* 347 Ill. 353, 359, 179 N.E. 837 (1932); see also *Michaels v. Barrett,* 355 Ill. 175, 185-86, 188 N.E. 921 (1934) (rejecting argument that statute providing for use of part of motor fuel tax to pay interest and principal on emergency relief bonds is an "unlawful diversion" of portion of privilege tax allotted to counties for road purposes, where collected taxes become public money and may be applied to whatever purpose legislature determines).

¶ 31 Building from *Gates* and similar cases, our supreme court has found an improper diversion of funds where funds are used for a different purpose than allowed by statute.

In *People ex rel. Brenza v. Gilbert,* 409 Ill. 29, 97 N.E.2d 793 (1951), for example, the court considered a temporary transfer of funds from a working cash fund for corporation purposes to the county highway fund. The court distinguished those cases finding no "diversion" of funds when monies were loaned from one fund to another: "The present case is different from [those cases] in that there is at least an implied prohibition against using the working cash fund for anything except the purpose of financing the corporate fund of the county." *Brenza,* 409 Ill. at 37, 97 N.E.2d 793. Similarly, in *People ex rel. Redfern v. Penn Central Co.,* 47 Ill.2d 412, 266 N.E.2d 334 (1971), the court considered whether the transfer from the education to the Illinois municipal retirement fund amounted to "an unlawful diversion of monies from one fund to another." *Redfern,* 47 Ill.2d at 416, 266 N.E.2d 334. The court found that the transfer did amount to an unlawful diversion, where the statute at issue did not allow for "loans between the educational fund and the Illinois municipal retirement fund." *Id.* at 418, 266 N.E.2d 334.

559 ¶ 32 In accord with these cases considering the "unlawful diversion" of funds, we *559 conclude that the plaintiffs cannot recover a monetary award from the defendants, for they have not alleged that the money transferred from the working cash fund was put toward some improper purpose forbidden by the statute. Plaintiffs do not allege that defendants violated the School Code by spending monies from the working cash fund on something other than legitimate school expenses. See 105 ILCS 5/20-4 (West 2010) ("Moneys in the fund may be used by the school board for any and all school purposes and may be transferred in whole or in part to the general funds or both of the school district and disbursed therefrom in anticipation of the collection of taxes lawfully levied for any or all purposes * * *."). Rather, plaintiffs allege that the board did not pass any resolution as to the transfer of funds (at least until the board passed resolutions to abate and then abolish the fund, thereby permanently transferring the working cash funds). We acknowledge that article 20 also contemplates that money is to be *temporarily* loaned for tax anticipation purposes, and the working cash fund is to be reimbursed when those taxes are collected. Plaintiffs alleged that defendants were using working cash funds to cover shortfalls due to deficit spending, without ever reimbursing the working cash fund. But here, the school board effected a permanent transfer of the money by passing resolutions to abate and abolish the working cash fund. While plaintiffs contend that the resolutions to abate and then abolish the working cash fund were simply made to "cover up" earlier transfers, they do not allege that the resolutions were improper. Where plaintiffs do not allege that the funds were spent for an improper purpose, and where the defendants have effected a permanent transfer of working cash funds as allowed by article 20, plaintiffs cannot show any loss to the district as a result of defendants' alleged actions.

¶ 33 Although plaintiffs offer no authority for their proposed interpretation of the statute, they suggest that the legislature must have meant to allow recovery in a civil suit under these circumstances to ensure compliance with the statute. Plaintiffs contend that district officials "could evade any accountability for their illegal conduct regarding the Working Cash Fund by, even after the fact, simply abolishing the fund." Our holding is not so broad. We conclude only that plaintiffs here cannot seek to recover personally from district officials under the civil recovery provision of section 20-6. If defendants did willfully violate section 20-5, a party with standing could seek to impose the serious

criminal penalties prescribed in section 20-6. Indeed, the statute provides for criminal penalties for willful violations of "any of the provisions of this Article" and then separately provides for a civil suit to recover funds "unlawfully diverted." As defendants acknowledge, "the statute contains a means to enforce, where appropriate, willful violations of Article 20 where no actual damages result."

¶ 34 Accordingly, we affirm the circuit court's dismissal of plaintiffs' complaints under section 2-619. Under section 20-6, the taxpayer plaintiffs do not have standing to seek the criminal penalties of forfeiture of office or fines. Section 20-6 also does not authorize a civil suit to recover vast sums of money personally from district defendants for the alleged violation of section 20-5, where there are no allegations that monies from the working cash fund was spent on something other than legitimate school expenses. Without those allegations, plaintiffs do not otherwise have standing to recover, on behalf of the district, money transferred without board resolution, notwithstanding the alleged violation of section 20-5.

560 *560 ¶ 35 Plaintiffs' breach of fiduciary duty count fails for a similar reason. Like the alleged section 20-5 violation, the breach of fiduciary duty claim rests on the district defendants' failure to pass a board resolution to approve the withdrawal of money from the working cash fund. As with the School Code violation, plaintiffs seek to recover "an amount sufficient to make [the district] whole and replace the public funds shown by the evidence to have been unlawfully diverted form the Working Cash Fund." As explained above, however, plaintiffs fail to allege any loss to the district resulting from the district defendants' failure to obtain approval for fund transfers. Plaintiffs have thus failed to allege any damages to support their claim for breach of fiduciary duty. See *Bernstein & Grazian, P.C. v. Grazian & Volpe, P.C.*, 402 Ill.App.3d 961, 976, 341 Ill.Dec. 913, 931 N.E.2d 810 (2010) (To prevail on a claim for breach of fiduciary duty, plaintiff must show the existence of a fiduciary duty, the breach of that duty, and damages proximately caused by the breach.).

¶ 36 Plaintiffs respond that the complaint describes the "deleterious effects of overspending and damages caused to the district." Specifically, plaintiffs point to the complaints' allegations that "spending beyond appropriation in one year produces negative balances in cash accounts, which carry over to the next year. Further expenditures beyond appropriations in the years following dig an even deeper fiscal deceit upon the taxpayers, and others, that keeps growing, until the District simply runs out of cash, as it appears to be nearing." On appeal, however, plaintiffs make clear that there is no cause of action based on this alleged budget deficit spending; according to plaintiffs, those allegations only "provide context" for the causes of action. Moreover, as noted above, plaintiffs specifically seek to recover those funds that have been transferred without board approval. We therefore affirm the circuit court's dismissal of the breach of fiduciary duty claim. As both counts against the district defendants were properly dismissed, we also affirm the district court's dismissal of any claims against Underwriters for Lloyds.

¶ 37 Lutkauskas's Claims Against Knutte

¶ 38 The only remaining claims for consideration are **Lutkauskas's** claims against Knutte. The circuit court dismissed **Lutkauskas's** claims on the basis of *res judicata,* finding that the final judgment in favor of Knutte in the previous taxpayer suit barred **Lutkauskas's** claims. On appeal, **Lutkauskas** challenges this ruling and also argues that "[d]ue process considerations were not given appropriate deference" when the circuit court dismissed his claims against Knutte.

¶ 39 The doctrine of *res judicata* provides that "a final judgment on the merits rendered by a court of competent jurisdiction bars any subsequent actions between the same parties or their privies on the same cause of action." *Rein v. David A. Noyes & Co.,* 172 Ill.2d 325, 334, 216 Ill.Dec. 642, 665 N.E.2d 1199 (1996). "*Res judicata* bars not only what was actually decided in the first action but also whatever could have been decided." *Hudson v. City of Chicago,* 228 Ill.2d 462, 467, 321 Ill.Dec. 306, 889 N.E.2d 210 (2008). The doctrine applies if three requirements are met: (1) a final judgment on the merits has been rendered by a court of competent jurisdiction; (2) the parties or their privies are identical in both actions; and (3) an identity of cause of action exists. *Id.* A determination of whether a claim is barred under the doctrine of *res judicata* is a question of law, which is subject to *de novo* review. *Arvia v. Madigan,* 209 Ill.2d 520, 526, 283 Ill.Dec. 895, 809 N.E.2d 88 (2004).

561 *561 ¶ 40 **Lutkauskas** and Knutte agree that the first requirement for *res judicata* is met: where the circuit court dismissed plaintiffs' complaints against Knutte with prejudice on July 27, 2011, there was a final judgment on the merits. As to the second requirement, **Lutkauskas** argues that because "he was not a party in the previous lawsuit and his claims were brought as a separate taxpayer acting in his individual capacity," the parties were not identical or were not in privity.

¶ 41 At the outset, we emphasize that **Lutkauskas** was not "acting in his individual capacity." **Lutkauskas's** complaint leaves no doubt on that point: the complaint is brought "as a taxpayer derivative action in the name and for the benefit of the School Board District 113A." A "taxpayer derivative action," by contrast, is "brought by a taxpayer on behalf of a local governmental unit to enforce a cause of action belonging to the local governmental unit." *Scachitti v. UBS Financial Services,* 215 Ill.2d 484, 494, 294 Ill.Dec. 594, 831 N.E.2d 544 (2005). The claimed injury in such an action "is not personal to the taxpayers, but rather impacts the governmental entity on whose behalf the action is brought.' [Citation.]" *Id.*

¶ 42 We have rejected these same arguments in *Nelson v. Chicago Park District,* 408 Ill.App.3d 53, 348 Ill.Dec. 865, 945 N.E.2d 634 (2011), a taxpayer action.[2] In *Nelson,* three individual Chicago taxpayers and a community organization sued the Latin School, the Chicago Park District, and others, seeking a declaratory judgment as to an agreement between the Chicago Park District and the Latin School regarding funding and construction of a soccer field. The parties settled, and the suit was dismissed with prejudice. Three different taxpayers later filed suit against the same defendants, challenging aspects of the settlement. This court affirmed the dismissal of the suit on the basis of *res judicata.* We held that "[a]lthough the *Latin II* plaintiffs were not parties to the *Latin I* lawsuit, as Chicago taxpayers, they were in privity with the individual *Latin I*

plaintiffs, who were also Chicago taxpayers." *Id.* at 61, 348 Ill.Dec. 865, 945 N.E.2d 634. This court explained that "the relevant inquiry is whether the interests of the *Latin II* plaintiffs were adequately represented in *Latin I*." *Id.* On that question, we concluded that "the interests of the *Latin II* plaintiffs were the same as those represented in *Latin I* because the overriding concern in both cases was an unlawful transfer of public property to a private party." *Id.* at 62, 348 Ill.Dec. 865, 945 N.E.2d 634.

¶ 43 As in *Nelson,* **Lutkauskas** and the other taxpayer plaintiffs here were in privity. The plaintiffs represent the same legal interests, even more so than in *Nelson,* where the *Latin II* plaintiffs were challenging the settlement reached in *Latin I* and where plaintiffs were acting as taxpayers acting for themselves and on behalf of a class. In this case, all plaintiffs filed taxpayer actions "in the name and for the benefit of" the district under the authority of section 20-6 of the School Code. Moreover, **Lutkauskas** and his fellow taxpayers sought recovery from the district defendants on identical grounds, and all their claims against Knutte related to Knutte's complicity in the district defendants' alleged violation of the School Code. We *562 agree with the circuit court that there is an identify of plaintiffs among their taxpayer suits.

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¶ 44 As to the third requirement, **Lutkauskas** somewhat confusingly suggests that it was not met, because he "alleged several new claims against Knutte" and these claims "sufficiently differ from those of the preceding consolidated [c]omplaint." **Lutkauskas** does not further explain his position or cite any authority. As Knutte points out, "separate claims will be considered the same cause of action for purposes of *res judicata* if they arise from a single group of operative facts, regardless of whether they assert different theories of relief." *River Park, Inc. v. City of Highland Park,* 184 Ill.2d 290, 311, 234 Ill.Dec. 783, 703 N.E.2d 883 (1998); *Cooney v. Rossiter,* 2012 IL 113227, ¶ 21, 369 Ill.Dec. 305, 986 N.E.2d 618. Put another way, "assertions of different kinds or theories of relief arising out of a single group of operative facts constitute but a single cause of action." *Cooney,* 2012 IL 113227, ¶ 22, 369 Ill.Dec. 305, 986 N.E.2d 618 (quoting *Torcasso v. Standard Outdoor Sales, Inc.,* 157 Ill.2d 484, 490-91, 193 Ill.Dec. 192, 626 N.E.2d 225 (1993)). Here, the factual allegations relating to Knutte in all three complaints are parallel: each suit alleges that Knutte improperly issued clean audit opinions that failed to disclose the district defendants' alleged misappropriations and thereby concealed the district's losses. **Lutkauskas** offers no argument to the contrary,[3] and we thus conclude that an identify of cause of action exists. As a result, we affirm the court's dismissal of **Lutkauskas's** claims against Knutte.

¶ 45 **Lutkauskas** finally argues that his due process rights were violated when the circuit court denied him a fair opportunity to litigate "his own claims." In *Hansberry v. Lee,* 311 U.S. 32, 61 S.Ct. 115, 85 L.Ed. 22 (1940), the United States Supreme Court held that it would violate the due process clause of the fourteenth amendment to bind litigants to a judgment rendered in an earlier litigation to which they were not parties and in which they were not adequately represented. Yet the court has held that states "are generally free to develop their own rules for protecting against the relitigation of common issues or the piecemeal resolution of disputes." *Richards v. Jefferson County,* 517 U.S. 793, 797, 116 S.Ct. 1761, 135 L.Ed.2d 76 (1996). More specifically, in cases "in which the taxpayer is using that status to entitle him to complain about an alleged misuse of public

funds," the court reasoned that "the States have wide latitude to establish procedures not only to limit the number of judicial proceedings that may be entertained but also to determine whether to accord a taxpayer any standing at all." *Id.* at 803, 116 S.Ct. 1761.

¶ 46 **Lutkauskas** principally relies on three United States Supreme Court cases to support his due process argument. In *Richards v. Jefferson County,* 517 U.S. 793, 116 S.Ct. 1761, 135 L.Ed.2d 76 (1996), three county taxpayers and the director of finance for the city of Birmingham had sued the county challenging the validity of an occupation tax. The tax was upheld in that case (the original suit), and two classes of taxpayers later sought declaratory judgment challenging the constitutionality of the tax. The United States Supreme Court held that the judgment in the original suit did not have *res judicata* effect, *563 reasoning that plaintiffs "did not sue on behalf of a class; their pleadings did not purport to assert any claim against or on behalf of any nonparties; and the judgment they received did not purport to bind any * * * taxpayers who were nonparties." *Id.* at 801, 116 S.Ct. 1761. The *Richards* Court distinguished the case before it from a case (similar to the one here) where "the taxpayer is using that status to entitle him to complain about an alleged misuse of public funds * * * or about other public action that has only an indirect impact on his interest." *Id.* at 803, 116 S.Ct. 1761.

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¶ 47 In *South Central Bell Telephone Co. v. Alabama,* 526 U.S. 160, 119 S.Ct. 1180, 143 L.Ed.2d 258 (1999), the Court confronted similar facts. There, South Central Bell Telephone Company filed a suit challenging an Alabama tax. Prior to South Central Bell's suit, four foreign corporations had challenged the same Alabama tax and lost. The Court held that the earlier judgment against the foreign corporations did not have a *res judicata* effect on the *South Central Bell* suit. Relying on *Richards,* the Court explained that the two relevant cases involved different plaintiffs and different tax years; that neither was a class action; and that no party claimed there was privity or some other special relationship between the two sets of plaintiffs.

¶ 48 In *Taylor v. Sturgell,* 553 U.S. 880, 128 S.Ct. 2161, 171 L.Ed.2d 155 (2008), two individuals, Herrick and Taylor, each brought separate claims under the Freedom of Information Act, seeking the same public records. Addressing a question of federal common law, the Supreme Court rejected the doctrine of preclusion by "virtual representation," holding that the prior judgment against Herrick did not bar Taylor from maintaining his lawsuit because Herrick had not adequately represented Taylor in the prior suit. *Taylor,* 553 U.S. at 885, 128 S.Ct. 2161.

¶ 49 While **Lutkauskas** again characterizes himself as an "individual taxpayer" or an "individual plaintiff" bringing "his own claims," we reiterate that he brought his claims on behalf of the district. That critical fact, repeatedly ignored by **Lutkauskas** on appeal, renders inapposite the cases he relies on to support his due process argument. Unlike all of those cases, here **Lutkauskas** and his fellow taxpayers were representing the interests of the district. They sought recovery from the district defendants on the same grounds, and all their claims against Knutte related to Knutte's concealment of the district defendants' alleged violation of the School Code. We find no merit to **Lutkauskas's** due process argument.

¶ 50 CONCLUSION

¶ 51 For the foregoing reasons, we affirm the circuit court's dismissal of plaintiffs' complaints.

¶ 52 Affirmed.

Justice FITZGERALD SMITH concurred in the judgment and opinion.

Justice PUCINSKI dissented, with opinion.

¶ 53 JUSTICE PUCINSKI'S dissent to be filed later.

¶ 54 JUSTICE PUCINSKI, dissenting.[*]

¶ 55 I respectfully dissent from the decision of the majority. I would reverse and remand with instructions to allow plaintiffs to file amended complaints. This is largely because many of the issues raised in these consolidated cases have so little case law that there
564 is a dearth of direction from *564 any reliable source. More to the point, the trial court should not have granted the section 2-615 and section 2-619 motions to dismiss.

¶ 56 This appeal is the result of various events in three consolidated circuit court of Cook County chancery cases:

> (1) No. 10 CH 53428, a declaratory judgment case filed by Laura Reigle, Duane Bradley and Louis Emery on behalf of Lemont Bromberek Combined School District 113A, plaintiffs, v. Dr. Timothy **Ricker** *et al.,* defendants;
>
> (2) No. 10 CH 53429, a declaratory judgment case filed by Janet Hughes on behalf of Lemont Bromberek Combined School District 113A, plaintiff, v. Dr. Timothy **Ricker** *et al.,* defendants; and
>
> (3) No. 11 CH 35191, a derivative action filed by Anthony **Lutkauskas**, taxpayer for and on behalf of Bromberek Combined School District 113A, plaintiff, v. Dr. Timothy **Ricker** *et al.,* defendants.

¶ 57 These three cases were consolidated in the circuit court and have also been consolidated on appeal; however, the appellate court caption differs slightly.

¶ 58 Plaintiffs are, respectively (at the time the complaints were filed): Laura Reigle, Duane Bradley and Louis Emery, residents of and taxpayers in the school district; Janet Hughes, resident of and taxpayer in the school district; and Anthony **Lutkauskas**, resident of and taxpayer in the school district.

¶ 59 Defendants consistent to all three cases are, respectively: Dr. Timothy **Ricker**, a school district employee, serving as superintendent; Robert Beckwith, formerly school treasurer and business manager for the school district; John Wood, formerly president of the board of education of the school district; Dr. Mary Gricus, assistant superintendent of the school district; Lisa Wright, former president and vice president of the school district; Kevin Doherty, former vice president and current member of the school district; David

Leahy, former member of the school district; Gwen O'Malley, former secretary of the school district; Sue Murphy, former president and current member of the school district; Al Albrecht, former member of the school district; and Knutte Associates, P.C., and other persons whose names are not yet known.

¶ 60 In the two 2010 chancery cases Lloyd's Illinois, Inc., was a named defendant. In the 2011 chancery case, Lloyd's Illinois, Inc., was dropped as a defendant and Underwriters at Lloyd's London was named instead.

¶ 61 The two 2010 cases were consolidated on March 15, 2011, and that consolidated case was consolidated again with the 2011 case on November 14, 2011. All three are consolidated for appeal.

¶ 62 The district defendants' (employees, past employees, present and past school board members and officers) section 2-619 motion to dismiss was granted when the court decided that they enjoyed immunity because their actions were the result of budget making, which is a legislative act and is discretionary. However, the statute in question, section 20-5 of the Illinois School Code, requires a resolution to be passed before any money can be transferred out of the working cash fund. That requirement is mandatory: "Moneys [from] the working cash fund *shall* be transferred from the working cash fund to another fund of the district *only* upon the authority of the school board which *shall* from time to time *by separate resolution* direct the school treasurer to make transfers ***." (Emphases added.) 105 ILCS 5/20-5 (West 2010). Further, even if the *school board members* had some legislative immunity, it is hard to see how that legislative 565 *565 immunity covered two current or former *employees* of the school district.

¶ 63 The legislative source of the permission to make the transfers at all is very clear, through the use of the mandatory terms: *shall, only,* and *by separate resolution.* That language makes the act of *deciding to transfer* the funds discretionary to be sure, but the *way it is to be done* is not discretionary at all; it is mandated or ministerial, which takes it out of the tort immunity argument. "`Discretionary acts are those which are unique to a particular public office, while ministerial acts are those which a person performs on a given state of facts in a prescribed manner, in obedience to the mandate of legal authority, and without reference to the official's discretion as to the propriety of the act.'" (Emphases omitted.) *Van Meter v. Darien Park District,* 207 Ill.2d 359, 371-72, 278 Ill.Dec. 555, 799 N.E.2d 273 (2003) (quoting *Snyder v. Curran Township,* 167 Ill.2d 466, 474, 212 Ill.Dec. 643, 657 N.E.2d 988 (1995)).

¶ 64 I agree with plaintiffs that the core actions—or more specifically, inactions—of the district defendants were not budget making because the actions were not in the budget; they were accomplished by shuffling paper. Beckwith never put the transfers on the agenda. Therefore there was no vote. Therefore there was no legislative action. Therefore there is no legislative immunity. Further, since the mystery money was never appropriated in a line item it was not part of the district defendants' budget process but was, instead, part of a pattern of transferring money without authorization.

¶ 65 The district defendants were also granted dismissal on a section 2-615 motion. However, the pleadings clearly show that these defendants' actions did not conform to

the legislative requirement for separate resolutions each time a transfer was made, the pleadings contained allegations sufficient to demonstrate this fact, and the pleadings, therefore, state a cause of action which is granted by the Illinois School Code.

> "Any member of the school board of any school district to which this Article is applicable, or any other person holding any office, trust, or employment under such school district who wilfully violates any of the provisions of this Article shall be guilty of a business offense and fined not exceeding $10,000, and shall forfeit his right to his office, trust or employment and shall be removed therefrom. Any such member or other person shall be liable for any sum that may be unlawfully diverted from the working cash fund or otherwise used, to be recovered by such school district or by any taxpayer in the name and for the benefit of such school district in an appropriate civil action; provided that the taxpayer shall file a bond for all costs and be liable for all costs taxed against the school district in such suit, and judgment shall be rendered accordingly. Nothing herein shall bar any other remedies." 105 ILCS 5/20-6 (West 2010).

¶ 66 The law itself makes it clear that there is a cause of action and that a taxpayer is a proper person to bring it on behalf of the school district. In these consolidated cases, plaintiff **Lutkauskas** brought a derivative action on behalf of the school district, and as such, he was not in the same position as the plaintiffs in the first two of the three cases, who were found not to have standing. For this reason, the section 2-615 dismissal of the **Lutkauskas** case as to the district defendants was error.

¶ 67 **Lutkauskas**' claims against accountant Knutte were dismissed on the basis of *res judicata.* This presumes that he was in the same position and raised the same *566 claims against Knutte as in the earlier two cases, when in fact **Lutkauskas**' claims included accountant negligence, breach of fiduciary duty and aiding and abetting (illegal) acts. The pleadings demonstrate that the accounting firm, Knutte, was the accountant for the school board of the school district and it repared annual financial reports. Those reports indicated that the working cash fund had more than $5.4 million in it for several years when in fact the actual account balance was $0. Either Knutte was incompetent or it was contriving to assist in hiding the actual balance. To let it escape further scrutiny through procedural sleight of hand is exactly what should not happen. Let this case go to full discovery. Let both sides make their case. That is why we have trial courts.

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¶ 68 In addition, during the course of the earlier two case(s) the accounting firm, Knutte, was granted its motion to dismiss with prejudice and, therefore, those plaintiffs were not allowed to amend their complaint as to the accountant. Allowing amended complaints is well within the discretion of the trial court and would have been appropriate.

¶ 69 The complaint against the insurance company was also dismissed. The issue of Lloyd's being Lloyd's Illinois was never fully resolved. It is a "Lloyd's Illinois" stamp on the bond in question, yet Lloyd's Illinois was dismissed when it claimed that the complaint should have been against Lloyd's (of London).

¶ 70 I have a problem with the wholesale dismissal of these claims. The school board's

own emails confirm that Beckwith did not submit statutorily required resolutions to the board for a vote to transfer funds from the working cash fund to the other appropriated line items.

¶ 71 No one is saying that any of this money was used for exotic vacations or expensive personal items. However, the law is very clear that the board must vote on a resolution to transfer the funds. This is because without that public notice taxpayers would be unaware—as these taxpayers were—that the money in the working cash fund, money which was obtained by the issue of bonds, and at taxpayer expense, was being used in excess of the appropriated amount for some expenses, which, means ultimately that the tax levy for the district would also be wrong or inflated.

¶ 72 For example (using fictitious numbers), if the school board wanted to spend, say, $1 million on books, it should appropriate $1 million for that purpose. That way taxpayers and parents know what the spending looks like. Instead, in essence, this board appropriated $750,000 for books as a line item in its budget, and then without telling anyone, transferred in another $250,000 from the working cash fund to cover an expense that was not in the budget, was not appropriated, was not in any public meeting or public record and was not disclosed by the board or its accountants. That money was obtained by the sale of bonds and is expensive money.

¶ 73 The working cash fund is supposed to be used to cover timing gaps in funding, *i.e.,* in cases where the property tax money does not come in before the bills are due. It is not supposed to be used to add extra to the budgeted line items. That would defeat the whole purpose of the resolution requirement, and in fact defeats the purpose of the working cash fund itself.

¶ 74 In addition, Beckwith's bond for $8 million is for him to "faithfully discharge the duties of his office *according to the law*" which he clearly did not do. (Emphasis added.)

¶ 75 Certainly the School Code itself is complicated and this particular part of the
567 legislation adds to that complication in that *567 it clearly sets up both a criminal and civil action in the same paragraph, but is more specific about the criminal penalties. I believe that a fair reading of the statute could be that the failure to consider and vote on the required resolution creates a civil liability, which appears to be "for any sum that may be unlawfully diverted from the working cash fund or otherwise used." (105 ILCS 5/20-6 (West 2010)). I believe a plain reading of the language in section 20-6 makes it clear that while law enforcement officials have the responsibility for pursuing the criminal sanctions, a taxpayer on behalf of the school district may pursue the civil remedies, and I do not see anything in the statute that makes the second dependent on the first.

¶ 76 I also believe that the accounting firm was dismissed prematurely and that Lloyd's Illinois (see seal on the bond) and Lloyd's London were dismissed without paying enough attention to the bond.

¶ 77 In addition, the defendants in their brief take great pains to separate a school board from a school district. However, in this case the school district is the entity for which the school board is the legislative body. The distinction is important, but could easily and

properly be corrected with amended pleadings, which I believe, is the correct course of action.

¶ 78 The board and Beckwith did not follow the law. The accounting firm knew or should have known it. The bond on Beckwith covered him for his acts. Taxpayers are correct in saying that this finance shell game cost them money because if the board had spent only what was appropriated, there would have been no need to raid the working cash fund to add extras that were not appropriated, so there would have been no need for that amount of bonds to be issued to fund the working cash fund.

¶ 79 I believe that the taxpayers should be allowed to amend their complaints, move forward with discovery, and pursue recovery from the bonding company, Lloyd's, for their losses in an accounting that includes the cost of the obligation bonds and interest and from the accountant, Knutte, for professional negligence.

¶ 80 The Center for Open Government on behalf of the taxpayer plaintiffs was not, in my opinion, given its rightful opportunity to pursue robust discovery and amend its complaints.

¶ 81 I believe this case should be allowed to run its course and not be dismissed on the motions. There is so little case law on section 20-5 and section 20-6 it is, I believe, an important enough set of issues to deserve a full case. Taxpayers have a direct and specific interest in transparency in government. I would reverse and remand.

[1] Plaintiffs actually claim that defendants could be liable for as much as $12 million, but that figure is only used in the complaint with reference to plaintiffs' allegations that Knutte issued improper audits: "The effect of these audits was that the illegal misspending, overspending and illegal transfers described above were concealed, resulting in losses to the district of more than $12 million."

[2] Unlike a taxpayer derivative action, a "taxpayer action" is a suit brought by private persons "*on behalf of themselves* and as representatives of a class of taxpayers similarly situated within a taxing district or area." (Emphasis added and internal quotation marks omitted.) *Scachitti v. UBS Financial Services*, 215 Ill.2d 484, 493, 294 Ill.Dec. 594, 831 N.E.2d 544 (2005).

[3] In fact, **Lutkauskas** apparently concedes the third *res judicata* requirement in his reply brief, though his position again is not set forth with clarity. The reply brief states, without further elaboration: "As to the third requirement, Plaintiff **Lutkauskas** submits that identity of cause of action may be similar with respect to the core operative facts."

[*] Justice Pucinski's dissent filed October 24, 2013.

876 N.E.2d 318 (2004)

Browning

v.

Eckland Consultants, Inc.

No. 1-03-3607.

Appellate Court of Illinois, First District.

August 13, 2004.

Affirmed.

798 N.E.2d 724 (2003)
207 Ill.2d 331
278 Ill.Dec. 340

Paulette CHANDLER, Adm'r of the Estate of Douglas Chandler, Appellee,
v.
ILLINOIS CENTRAL RAILROAD COMPANY, Appellant.

No. 94907.

Supreme Court of Illinois.

October 2, 2003.

725 *725 Kurt E. Reitz and Heath H. Hooks, Belleville (Thompson Coburn, L.L.P., of counsel), for appellant.

Bruce N. Cook, of Cook, Ysursa, Bartholomew, Brauer & Shevlin, Ltd., Belleville, for appellee.

Vincent B. Browne and Kenneth J. Sophie, Jr., of Harrington, Thompson, Acker & Harrington, Ltd., Chicago, for amicus curiae **Illinois** Trial Lawyers Association.

Justice FREEMAN delivered the opinion of the court:

On January 16, 1997, a motor vehicle driven by Douglas **Chandler** collided with a **railroad** train owned and operated by defendant, **Illinois Central Railroad** Company (**Illinois Central**), at the Center Street crossing in Tilden, **Illinois**. **Chandler** sustained fatal injuries in the collision. Plaintiff, Paulette **Chandler**, administrator of decedent's estate, filed an action under the Wrongful Death Act (740 ILCS 180/1 *et seq.* (West 1996)) in which she alleged that **Illinois Central's** negligence was the proximate cause
726 of the death. **Illinois Central** filed a motion to dismiss pursuant to section *726 2-615 and section 2-619 of the Code of Civil Procedure (735 ILCS 5/2-615, 2-619 (West 2000)) and a motion for summary judgment (735 ILCS 5/2-1005 (West 2000)). The circuit court of St. Clair County granted the motion to dismiss. The appellate court reversed and remanded for further proceedings. 333 Ill.App.3d 463, 267 Ill.Dec. 178, 776 N.E.2d 315. We granted **Illinois Central's** petition for leave to appeal pursuant to Supreme Court Rule 315 (177 Ill.2d R. 315). Following briefing and oral arguments in this case, the parties entered into a settlement agreement and subsequently moved this court to dismiss the appeal as moot. However, because the appeal presents "(i) a question of

public interest, (ii) an issue in need of authoritative determination for future guidance, and (iii) a situation likely to recur" (see *Callis v. Norfolk & Western Ry. Co.*, 195 Ill.2d 356, 364, 254 Ill.Dec. 707, 748 N.E.2d 153 (2001)), we address the issues raised by this appeal and now affirm in part and reverse in part the judgment of the appellate court. Owing to the parties' settlement, however, there is no need for this court to remand the cause to the circuit court for further proceedings.

BACKGROUND

In 1962, **Illinois Central** operated a **railroad** line running generally in a northwesterly-southeasterly direction between East St. Louis, **Illinois**, and Carbondale, **Illinois**. Train operations over the **railroad** line were by train order and timetable utilizing two main tracks for directional running. The **railroad** line crossed various streets and highways at grade in Randolph County and St. Clair County, including the crossing at issue in the Village of Tilden. In a petition filed with the **Illinois** Commerce Commission on March 10, 1962, **Illinois Central** proposed to install a centralized traffic control system on one of the main tracks and to retire the other main track. The centralized traffic control system would improve operating efficiency by allowing train movement in both directions on a single track. With the retirement of one main track, various grade crossings on the **railroad** line would change from double main line grade crossings to single main line grade crossings. At crossings where there would be no possibility of two or more trains occupying the crossing at the same time, the existing gate installations would be removed, leaving automatic flashing light signal installations. **Illinois Central** described the proposed grade crossing changes in detail, attaching blueprint drawings to its petition.

Following a hearing, the Commission made the following findings:

> "(6) that due to present operation over two main tracks, the existing crossing protection in the above referred to Villages consists of automatic flashing light signals with short arm gates as is customary for such operation;
>
> (7) that the elimination of one main track and by concentrating through train movements in both directions, on one track, it is impossible for a `two train situation' to exist at any of the crossings at which gates are now installed; that the **railroad** proposes to relocate the existing signals as may be necessary to conform to the single track operating arrangement and to remove the short arm gates at such locations bringing said installations into conformity with standard practice for such conditions; that the re-established signal installation at the various crossings will conform to the requirements of General Order 138 of this Commission, and result in single main line grade crossings protected by automatic flashing light signals and bells;
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> * * *

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*727 (12) that the next southerly crossing is Center Street (IC-41.9-G), Tilden, Randolph County. The northbound main track would be removed, the existing signals to remain as now placed and the short arm gates removed; movements over the house track would be made at slow speed under flagman protection when required."

The Commission ordered that **Illinois Central** "proceed in making the changes in the existing automatic flashing light signal and gate protection at the crossings of * * * Center Street in the Village of Tilden, Randolph County, **Illinois**."

Illinois Central changed the Center Street crossing in conformity with the Commission's order. Thus, on the date of the collision, the crossing was equipped with luminous flashing signals only. Traveling in a southerly direction on Center Street, decedent's vehicle entered the crossing and was struck by a train proceeding in a westerly direction. Plaintiff filed this wrongful death action on behalf of decedent's next of kin.

Plaintiff filed the original complaint in Randolph County on October 6, 1997. On January 11, 1999, plaintiff voluntarily dismissed the complaint. Plaintiff filed a nearly identical complaint in St. Clair County on January 11, 2000. Plaintiff amended the complaint on November 28, 2000. The circuit court dismissed the first amended complaint without prejudice on February 23, 2001. On March 2, 2001, plaintiff filed a pleading entitled "Third Amended Complaint," the pleading at issue in this appeal. Plaintiff has never filed a second amended complaint.

In paragraph five of the third amended complaint, plaintiff alleged that **Illinois Central**:

"a. Negligently and carelessly failed to adequately maintain its flashing warning signals;

b. Negligently and carelessly failed to adequately warn motorists of the approach of the train;

c. Negligently and carelessly placed the flashing signals controlling southbound traffic on Center Street more than 15 feet from the rail, contrary to the **Illinois** Administrative Code Title 92 § 1535.335;

d. Negligently and carelessly placed the flashing signals controlling such southbound traffic on Center Street in a manner that failed to adequately warn southbound motorists of an approaching train;

e. Negligently and carelessly failed to equip the crossing with gates when the defendant knew or should have known the **railroad** crossing was ultra hazardous;

f. Negligently and carelessly failed to keep its right-of-way reasonably clear of brush, shrubbery, trees, weeds and other unnecessary obstructions for a distance of at least 500 feet each way from its grade crossing in violation of 635 ILCS Section 5/18C-7401;

g. Negligently and carelessly failed to keep a proper lookout for vehicles at

or near the crossing;

h. Negligently and carelessly drove its train at a speed that was not reasonable and proper;

i. Negligently and carelessly failed to stop or slow its train in a manner as to avoid the accident;

j. Negligently and carelessly removed gates from the crossing in question when the defendant knew or should have known that such presented a hazard to motors on Center Street;

k. Negligently and carelessly failed to have crossing gates protecting the intersection in question."

728 *728 Plaintiff complained that, as a direct and proximate result of the negligent act or omissions of **Illinois Central**, decedent was not given adequate notice of the approach of the train, and decedent sustained fatal injuries in the ensuing collision.

The circuit court granted **Illinois Central's** motion to dismiss. In so ruling, the court noted, "Plaintiff has conceded that Paragraph 5(h) of her Third Amended Complaint should be dismissed based on federal preemption, and based on that stipulation, the Court orders that Paragraph 5(h) of the Third Amended Complaint is dismissed." The court then found that title 92, section 1535.335, of the **Illinois** Administrative Code (92 Ill. Adm.Code § 1535.335 (1996)) does not impose a duty to place signals within 15 feet of the near rail at a crossing. Accordingly, the court dismissed paragraph 5(c). Next, the court dismissed paragraph 5(i), finding that the allegations did not relate back to plaintiff's original complaint. Citing section 18c-7401(3) of the **Illinois** Commercial Transportation Law (Transportation Law) (625 ILCS 5/18c-7401(3) (West 1996)) and *Espinoza v. Elgin, Joliet & Eastern Ry. Co.*, 165 Ill.2d 107, 208 Ill.Dec. 662, 649 N.E.2d 1323 (1995), the court found a conclusive legal presumption that the warning devices at the crossing were adequate. Consequently, the court dismissed paragraphs 5(d), 5(e), 5(j) and 5(k). The court dismissed the remaining paragraphs for failure to allege a duty owed to decedent by **Illinois Central**.

The appellate court reversed and remanded. The court found no proper basis for dismissal of plaintiff's action, except with regard to paragraph 5(h), which plaintiff conceded should be dismissed based upon federal preemption.[1] 333 Ill.App.3d at 474, 267 Ill.Dec. 178, 776 N.E.2d 315. We allowed **Illinois Central's** petition for leave to appeal. We also allowed the **Illinois** Trial Lawyers Association to file an *amicus curiae* brief in support of plaintiff.

ANALYSIS

A. Adequacy of Warning Devices

Plaintiff alleged that **Illinois Central's** negligent conduct was the proximate cause of

decedent's death. To state a cause of action for negligence, a plaintiff must establish that the defendant owed a duty to the plaintiff, that the defendant breached that duty, and that the plaintiff incurred injuries proximately caused by the breach. *First Springfield Bank & Trust v. Galman,* 188 Ill.2d 252, 256, 242 Ill.Dec. 113, 720 N.E.2d 1068 (1999); *Thompson v. County of Cook,* 154 Ill.2d 374, 382, 181 Ill.Dec. 922, 609 N.E.2d 290 (1993). The existence of a duty is a question of law for the court to decide. *Thompson,* 154 Ill.2d at 382, 181 Ill.Dec. 922, 609 N.E.2d 290; *Wojdyla v. City of Park Ridge,* 148 Ill.2d 417, 421, 170 Ill. Dec. 418, 592 N.E.2d 1098 (1992). Whether the defendant breached its duty to the plaintiff and whether the breach was the proximate cause of the plaintiff's injuries are factual matters for a jury to decide. *Thompson,* 154 Ill.2d at 382, 181 Ill.Dec. 922, 609 N.E.2d 290.

Section 2-619 of the Code of Civil Procedure (735 ILCS 5/2-619 (West 2000)) provides for the involuntary dismissal of a cause of action based on certain defects or defenses. One of the enumerated grounds for a section 2-619 dismissal is that the claim is barred by affirmative matter which avoids the legal effect of or defeats the claim. 735 ILCS 5/2-619(a)(9) (West *729 2000). Affirmative matter "is something in the nature of a defense which negates the cause of action completely or refutes crucial conclusions of law or conclusions of material fact contained in or inferred from the complaint." ***Illinois*** *Graphics Co. v. Nickum,* 159 Ill.2d 469, 486, 203 Ill.Dec. 463, 639 N.E.2d 1282 (1994). Affirmative matter must be supported by affidavit, unless apparent on the face of the pleading attacked. 735 ILCS 5/2-619(a)(9) (West 2000).

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A section 2-619 dismissal is akin to the grant of a motion for summary judgment. *Epstein v. Chicago Board of Education,* 178 Ill.2d 370, 383, 227 Ill.Dec. 560, 687 N.E.2d 1042 (1997). "For that reason, the reviewing court conducts *de novo* review and considers whether `the existence of a genuine issue of material fact should have precluded the dismissal or, absent such an issue of fact, whether dismissal is proper as a matter of law.'" *Epstein,* 178 Ill.2d at 383, 227 Ill.Dec. 560, 687 N.E.2d 1042, quoting *Kedzie & 103rd Currency Exchange, Inc. v. Hodge,* 156 Ill.2d 112, 116-17, 189 Ill.Dec. 31, 619 N.E.2d 732 (1993); see also *Wright v. City of Danville,* 174 Ill.2d 391, 398-99, 221 Ill.Dec. 203, 675 N.E.2d 110 (1996).

In the case at bar, the circuit court dismissed paragraphs 5(d), 5(e), 5(j) and 5(k) of the third amended complaint because it found that section 18c-7401(3) of the Transportation Law (625 ILCS 5/18c-7401(3) (West 1996)) creates a conclusive legal presumption that the warning devices at the crossing were adequate. The circuit court dismissed paragraph 5(c) because it found that the Administrative Code did not impose a duty upon **Illinois Central** to place its signals within 15 feet of the near rail at a crossing. Because these paragraphs, at root, all question the adequacy of the warning devices at the crossing, we review the portions of the circuit court's order dismissing the paragraphs in tandem.

In *Espinoza,* 165 Ill.2d 107, 208 Ill.Dec. 662, 649 N.E.2d 1323, this court considered, and rejected, the plaintiffs' argument that the Elgin, Joliet and Eastern Railway Company (EJ&E) was negligent in failing to install crossing gates at a crossing equipped with flashing light signals, a warning bell, and **railroad** signs and markings. Initially, the court

recognized that a **railroad** has a duty to provide adequate warning devices at its crossings. *Espinoza,* 165 Ill.2d at 120, 208 Ill.Dec. 662, 649 N.E.2d 1323. The court also recognized that the Transportation Law authorizes the Commission to require the installation of warning devices at **railroad** crossings. *Espinoza,* 165 Ill.2d at 121, 208 Ill.Dec. 662, 649 N.E.2d 1323. Since the record showed that the existent warning devices were operating properly at the time of the accident, the court noted that its review would be limited to whether EJ&E owed a duty to provide additional warning devices at the crossing, such as the gates at issue. *Espinoza,* 165 Ill.2d at 120-21, 208 Ill.Dec. 662, 649 N.E.2d 1323.

In considering the adequacy of the existent warning devices and the need for additional warning devices, the court reviewed section 18c-7401(3) of the Transportation Law, the section at issue in this case:

> "The Commission shall have power, upon its own motion, or upon complaint, and after having made proper investigation, to require the installation of adequate and appropriate luminous reflective warning signs, luminous flashing signals, crossing gates illuminated at night or other protective devices in order to promote and safeguard the health and safety of the public. Luminous flashing signal or crossing gate devices installed at grade crossings, which have 730 *730 been approved by the Commission, shall be deemed adequate and appropriate." Ill.Rev.Stat.1989, ch. 95½, par. 18c-7401(3), now 625 ILCS 5/18c-7401(3) (West 1996).

The court interpreted the language as providing that:

> "once the Commission has investigated a crossing and has approved the installation of a luminous flashing signal or crossing gate device, then the installation of that device shall be deemed adequate and appropriate. A conclusive legal presumption is created which prevents plaintiffs from arguing that the **railroad** should have installed other warning devices." *Espinoza,* 165 Ill.2d at 121, 208 Ill.Dec. 662, 649 N.E.2d 1323.

Further, the court noted that the legal presumption of adequacy applies to any Commission investigation and approval, not just those that occurred after the effective date of the Transportation Law. *Espinoza,* 165 Ill.2d at 122, 208 Ill.Dec. 662, 649 N.E.2d 1323.

The record in the case established that the Commission had made the requisite investigation and approval pursuant to the Transportation Law. *Espinoza,* 165 Ill.2d at 123, 208 Ill.Dec. 662, 649 N.E.2d 1323. In 1965, the Commission had entered an order that flashing light signals be installed at the crossing, and, in 1981, Commission staff had inspected the crossing and determined that crossing gates were not necessary. *Espinoza,* 165 Ill.2d at 123-24, 208 Ill.Dec. 662, 649 N.E.2d 1323. Accordingly, the court concluded:

> "Having established that the Commission found the warning devices at the 22nd Street crossing to be adequate and appropriate, this determination is

> legally conclusive pursuant to the Transportation Law. As a result, the plaintiffs are barred from contesting the adequacy and appropriateness of the warning devices at the 22nd Street crossing. EJ&E therefore had no duty to provide additional warnings on the date of the accident. Thus, EJ&E is entitled to summary judgment with respect to the adequacy of the warning devices installed at the 22nd Street crossing." *Espinoza,* 165 Ill.2d at 124, 208 Ill.Dec. 662, 649 N.E.2d 1323.

In the case at bar, as in *Espinoza,* plaintiff questions the adequacy of the warning devices at the Center Street crossing. In particular, plaintiff maintains that **Illinois Central** was negligent in the placement of the flashing signals controlling southbound traffic on Center Street. Plaintiff also maintains that **Illinois Central** was negligent in removing the short arm gates from the crossing in 1962 and in failing to equip the crossing with gates as of the date of the collision. The record reveals, however, that in 1962 the Commission duly investigated the crossing and the adequacy of the warning devices. The Commission examined the documentary evidence submitted by **Illinois Central**, including the blueprints showing the location of the track and flashing signals. The Commission also considered the testimony adduced at the hearing on the matter. The Commission concluded that, in view of the proposed change from a double main line grade crossing to a single main line grade crossing, the flashing signals should remain as placed and the short arm gates removed. As in *Espinoza,* "[h]aving established that the Commission found the warning devices at the * * * crossing to be adequate and appropriate, this determination is legally conclusive pursuant to the Transportation Law." *Espinoza,* 165 Ill.2d at 124, 208 Ill.Dec. 662, 649 N.E.2d 1323. As a result, plaintiff is barred from contesting the adequacy and appropriateness of the
731 warning devices. **Illinois Central** had no duty to provide *731 additional warning devices on the date of the accident.

The appellate court found *Espinoza* to be factually distinguishable in that *Espinoza* concerned the installation of warning devices at a crossing while the case at bar involves the removal of warning devices from a crossing. 333 Ill.App.3d at 469, 267 Ill.Dec. 178, 776 N.E.2d 315. Reflecting the reasoning of the appellate court, plaintiff maintains in this court that the conclusive legal presumption applies only where the Commission has approved the installation of warning devices at a crossing, not where the Commission has approved the removal of some warning devices, albeit the crossing is protected by other devices. Thus, according to plaintiff, the conclusive legal presumption applies where the Commission approves the installation of automatic flashing light signals at a crossing, such that the crossing is protected by the flashing lights and the customary **railroad** signs and markings. The conclusive legal presumption does not apply where the Commission approves the removal of short arm gates from a crossing, such that the crossing is protected by existent automatic flashing light signals and the customary **railroad** signs and markings. Such a distinction is untenable because in each instance the Commission ultimately approves the type of warning device in use at the crossing.

Plaintiff also follows the reasoning of the appellate court in arguing that the conclusive legal presumption only applies where the Commission, *upon its own motion or upon complaint,* approves the installation of the warning devices (see 333 Ill.App.3d at 470,

267 Ill.Dec. 178, 776 N.E.2d 315). Plaintiff notes that **Illinois Central** initiated the proceedings at issue as opposed to the Commission or a private citizen. We reject plaintiff's argument. First, plaintiff assumes that the conclusive legal presumption cannot apply if a **railroad** moves for a change to a **railroad** crossing. Nothing in section 18c-7401(3) so intimates. Moreover, there is no principled reason to distinguish between instances where the Commission approves the warning devices following investigation, whether the proceedings are initiated by the Commission, the **railroad**, a municipality or a private individual. Second, as noted in *Espinoza*, 165 Ill.2d at 122, 208 Ill.Dec. 662, 649 N.E.2d 1323, the conclusive legal presumption applies to "any Commission investigation and approval." It is not limited to instances where the Commission requires the installation of warning devices at a crossing, as opposed to instances where the Commission approves existent warning devices. Again, there is no principled reason for a distinction. The Commission undertakes the same investigation and is motivated by the same safety concerns whether it enters an order in a proceeding initiated by a **railroad** or by another entity, and whether it approves existent warning devices or warning devices which are to be placed at the crossing at a later date. In this regard we note that section 18c-7401(3) provides that "[n]o **railroad** may change or modify the warning device system at a **railroad**-highway grade crossing, including warning systems interconnected with highway traffic control signals, without having first received the approval of the Commission." 625 ILCS 5/18c-7401(3) (West 1996). **Illinois Central** modified the warning device system at the Center Street crossing upon approval of the Commission.

We conclude that the circuit court was correct in finding a conclusive legal presumption that the warning devices at the crossing were adequate. Paragraphs 5(c), 5(d), 5(e), 5(j), and 5(k) of the third amended complaint were properly dismissed.

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B. Relation Back

The circuit court found that paragraph 5(i) of the third amended complaint did not relate back to plaintiff's original complaint. Because the third amended complaint was filed beyond the expiration of the statute of limitations, the circuit court dismissed paragraph 5(i)[2] pursuant to section 2-619 of the Code of Civil Procedure (735 ILCS 5/2-619 (West 2000)). Citing section 2-616(b) of the Code of Civil Procedure (735 ILCS 5/2-616(b) (West 2000)), plaintiff argues that paragraph 5(i) grew out of the same transaction or occurrence set out in the original complaint and should not have been dismissed.

Section 2-616 provides that:

> "At any time before final judgment amendments may be allowed on just and reasonable terms, introducing any party who ought to have been joined as plaintiff or defendant, dismissing any party, changing the cause of action or defense or adding new causes of action or defenses." 735 ILCS 5/2-616(a) (West 2000).

The section further provides:

> "The cause of action, cross claim or defense set up in any amended pleading shall not be barred by lapse of time under any statute or contract prescribing or limiting the time within which an action may be brought or right asserted, if the time prescribed or limited had not expired when the original pleading was filed, and if it shall appear from the original and amended pleadings that the cause of action asserted, or the defense or cross claim interposed in the amended pleading grew out of the same transaction or occurrence set up in the original pleading * * *." 735 ILCS 5/2-616(b) (West 2000).

This court has recognized that a liberal construction of the requirements of section 2-616(b) is necessary "in order to allow the resolution of litigation on the merits and to avoid elevating questions of form over substance." *Boatmen's National Bank of Belleville v. Direct Lines, Inc.*, 167 Ill.2d 88, 102, 212 Ill.Dec. 267, 656 N.E.2d 1101 (1995); *Bryson v. News America Publications, Inc.*, 174 Ill.2d 77, 106-07, 220 Ill. Dec. 195, 672 N.E.2d 1207 (1996).

Illinois Central concedes that plaintiff filed the original complaint within the statute of limitations. Thus, the first requirement of section 2-616(b) is satisfied. The question becomes whether paragraph 5(i) grew out of the same transaction or occurrence set up in the original complaint. We believe that it did. Plaintiff alleged in the original complaint that **Illinois Central** had a duty "to use reasonable care in the operation and movement of its train, and in the maintenance of its right-of-way and to use reasonable care in the evaluation of hazards and protection of the general public at points where its tracks and right-of-way crossed over public intersecting roadways." Plaintiff also alleged that **Illinois Central** breached its duty by failing to give adequate and timely warning of the approach of its train to the Center Street crossing and failing to keep a proper lookout for vehicles at or near the crossing. Plaintiff maintained that, as a result of **Illinois Central's** negligence, decedent was killed when his car was struck by a train at the Center Street crossing. Paragraph 5(i) of the third amended complaint is likewise based on **Illinois Central's** duty to use appropriate care to avoid collisions when operating its trains. In paragraph 5(i), plaintiff alleged that **Illinois Central** failed to stop or slow its train in a manner as to avoid the collision with decedent's car. *733 Paragraph 5(i) is necessarily based upon the same transaction or occurrence set up in the original complaint. We conclude that the second requirement of section 2-616(b) has been met. The circuit court erred in its finding that paragraph 5(i) did not relate back to the original complaint.

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C. Allegation of Duty

The circuit court found that paragraphs 5(a), 5(b), 5(f), and 5(g) of the third amended complaint failed to allege a duty owed by **Illinois Central** to plaintiff's decedent. Consequently, the circuit court granted **Illinois Central's** motion to dismiss pursuant to section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2000)).

A section 2-615 motion to dismiss attacks the legal sufficiency of the complaint. ***Illinois Graphics***, 159 Ill.2d at 484, 203 Ill.Dec. 463, 639 N.E.2d 1282. Such a motion does not raise affirmative factual defenses, but alleges only defects appearing on the face of the

complaint. ***Illinois*** *Graphics,* 159 Ill.2d at 484, 203 Ill.Dec. 463, 639 N.E.2d 1282; *Kolegas v. Heftel Broadcasting Corp.*, 154 Ill.2d 1, 8, 180 Ill.Dec. 307, 607 N.E.2d 201 (1992). "Because **Illinois** is a fact-pleading jurisdiction, a pleading must be both legally and factually sufficient. It must assert a legally recognized cause of action and it must plead facts which bring the particular case within that cause of action." 3 R. Michael, **Illinois** Practice § 23.4 (1989), citing *Teter v. Clemens,* 112 Ill.2d 252, 97 Ill.Dec. 467, 492 N.E.2d 1340 (1986); see also *People ex rel. Fahner v. Carriage Way West, Inc.*, 88 Ill.2d 300, 308, 58 Ill.Dec. 754, 430 N.E.2d 1005 (1981). Thus, the question presented by a section 2-615 motion is whether the allegations of the complaint, when viewed in a light most favorable to the plaintiff, are sufficient to state a cause of action upon which relief can be granted. *Vernon v. Schuster,* 179 Ill.2d 338, 344, 228 Ill.Dec. 195, 688 N.E.2d 1172 (1997); *Bryson,* 174 Ill.2d at 86-87, 220 Ill.Dec. 195, 672 N.E.2d 1207.

Although a complaint is deficient when it fails to allege the facts necessary for recovery, the plaintiff is not required to set out evidence; only the ultimate facts to be proved should be alleged, not the evidentiary facts tending to prove such ultimate facts. *Carriage Way West, Inc.*, 88 Ill.2d at 308, 58 Ill.Dec. 754, 430 N.E.2d 1005, quoting *Board of Education of the Kankakee School District No. 111 v. Kankakee Federation of Teachers Local No. 886,* 46 Ill.2d 439, 446-47, 264 N.E.2d 18 (1970). Allegations of law or conclusions are not required and are, indeed, improper. ***Illinois*** *Graphics,* 159 Ill.2d at 489, 203 Ill. Dec. 463, 639 N.E.2d 1282. The Code of Civil Procedure specifically recognizes that no complaint is bad in substance which reasonably informs the defendant of the nature of the claim that he or she is called upon to meet. See 735 ILCS 5/2-612(b) (West 2000).

In ruling on a section 2-615 motion, a trial court is to consider only the allegations of the pleadings. ***Illinois*** *Graphics,* 159 Ill.2d at 485, 203 Ill.Dec. 463, 639 N.E.2d 1282; *Urbaitis v. Commonwealth Edison,* 143 Ill.2d 458, 475, 159 Ill.Dec. 50, 575 N.E.2d 548 (1991). Further, the trial court should dismiss the cause of action only if it is clearly apparent that no set of facts can be proven which will entitle the plaintiff to recovery. *Bryson,* 174 Ill.2d at 86-87, 220 Ill.Dec. 195, 672 N.E.2d 1207; ***Illinois*** *Graphics,* 159 Ill.2d at 488, 203 Ill.Dec. 463, 639 N.E.2d 1282. A court of review determines *de novo* whether the trial court should have granted dismissal. *Beahringer v. Page,* 204 Ill.2d 363, 369, 273 Ill.Dec. 784, 789 N.E.2d 1216 (2003).

734 *734 In an action for negligence, as in the case at bar, the plaintiff is required to state facts from which a court will raise a duty to the plaintiff, as well as facts showing the defendant's breach of that duty and a resulting injury. *Miller v. S.S. Kresge Co.*, 306 Ill. 104, 106, 137 N.E. 385 (1922); ***Illinois*** *Steel Co. v. Ostrowski,* 194 Ill. 376, 385, 62 N.E. 822 (1902); see also *Gallagher Corp. v. Russ,* 309 Ill.App.3d 192, 197, 242 Ill.Dec. 326, 721 N.E.2d 605 (1999); *Browning v. Heritage Insurance Co.*, 33 Ill.App.3d 943, 338 N.E.2d 912 (1975). The existence of a duty depends upon whether the plaintiff and the defendant stood in such a relationship to each other that the law imposed upon the defendant an obligation of reasonable conduct for the benefit of the plaintiff. *Happel v. Wal-Mart Stores, Inc.*, 199 Ill.2d 179, 186, 262 Ill.Dec. 815, 766 N.E.2d 1118 (2002). As noted above, whether a duty exists is a question of law to be determined by the court. *Happel,* 199 Ill.2d at 186, 262 Ill. Dec. 815, 766 N.E.2d 1118, quoting *Ward v. K mart*

Corp., 136 Ill.2d 132, 140, 143 Ill.Dec. 288, 554 N.E.2d 223 (1990).

Illinois Central maintains that the circuit court's order of dismissal was proper because plaintiff failed to allege that **Illinois Central** owed a duty to plaintiff's decedent. We disagree. We believe the allegations of the third amended complaint are sufficient to raise a duty to plaintiff's decedent. In the third amended complaint, plaintiff alleged that **Illinois Central** owned and operated the train that collided with decedent's vehicle at the Center Street crossing. Plaintiff further alleged that **Illinois Central** operated and maintained the Center Street crossing and the devices to warn of the approach of the trains. In paragraph 5(a), 5(b), 5(f), and 5(g) of the third amended complaint, plaintiff alleged that **Illinois Central** failed to adequately maintain its flashing warning signals at the crossing; failed to adequately warn motorists of the approach of the train; failed to keep a proper lookout for vehicles at or near the crossing; and failed to keep its right of way reasonably clear of brush, shrubbery and trees. Plaintiff then alleged that decedent's death was proximately caused by **Illinois Central's** negligence.

It is established that a **railroad** has a duty to provide adequate warning devices at its crossings. *Espinoza,* 165 Ill.2d at 120, 208 Ill.Dec. 662, 649 N.E.2d 1323; *Churchill v. Norfolk & Western Ry. Co.,* 73 Ill.2d 127, 23 Ill.Dec. 58, 383 N.E.2d 929 (1978); see *Sheahan v. Northeast **Illinois** Regional Commuter R.R. Corp.,* 212 Ill. App.3d 732, 735, 156 Ill.Dec. 816, 571 N.E.2d 796 (1991); *Langston v. Chicago & Northwestern Ry. Co.,* 330 Ill.App. 260, 279, 70 N.E.2d 852 (1946). It is equally well established that a **railroad** has a duty to keep a proper lookout and warn of the approach of a train. *Espinoza,* 165 Ill.2d at 119, 208 Ill.Dec. 662, 649 N.E.2d 1323; see *Magna Bank of McLean County v. Ogilvie,* 235 Ill.App.3d 318, 323, 176 Ill. Dec. 393, 601 N.E.2d 1091 (1992); *Sheahan,* 212 Ill.App.3d at 735, 156 Ill.Dec. 816, 571 N.E.2d 796. Lastly, section 18c-7401(3) of the Transportation Law requires that a **railroad** "remove from its right of way at all grade crossings within the State[] such brush, shrubbery, and trees as is reasonably practical for a distance of not less than 500 feet in either direction from each grade crossing." See 625 ILCS 5/18c-7401(3) (West 1996); see also 92 Ill. Adm.Code § 1535.205 (1996). This court has previously observed that "[i]t was negligence in the [**railroad**] company to permit or suffer weeds, or anything else, to grow upon its right of way to such a height as would materially obstruct the view of the highway. The safety of persons and property
735 alike make it necessary the company should keep its right of *735 way free from obstructions, so that persons approaching the crossing may readily ascertain whether there is danger, and the employees in charge may be enabled to discover whether there is anything on the track." *Indianapolis & St. Louis R.R. Co. v. Smith,* 78 Ill. 112, 114 (1875); see also *Goodrich v. Sprague,* 376 Ill. 80, 89, 32 N.E.2d 897 (1941).

The third amended complaint reasonably informed **Illinois Central** of the nature of the claim which it was called upon to meet. The facts alleged raised a duty owed by **Illinois Central** to decedent. It was not necessary that plaintiff allege in formulaic words that **Illinois Central** had a duty to do or not do a particular thing. See 2 Nichols **Illinois** Civil Practice § 30:109 (rev. 2002). We conclude that the circuit court erred in granting dismissal.

CONCLUSION

The circuit court properly dismissed paragraphs 5(c), 5(d), 5(e), 5(j) and 5(k) of the third amended complaint. Accordingly, we reverse that portion of the appellate court opinion reversing the dismissal of paragraphs 5(c), 5(d), 5(e), 5(j) and 5(k). The circuit court erred, however, in dismissing paragraphs 5(a), 5(b), 5(f), 5(g) and 5(i) of the third amended complaint. Accordingly, we affirm that portion of the appellate court opinion reversing the dismissal of paragraphs 5(a), 5(b), 5(f), 5(g) and 5(i).

Appellate court affirmed in part and reversed in part; circuit court affirmed in part and reversed in part.

Justice RARICK took no part in the consideration or decision of this case.

[1] Plaintiff did not petition this court for leave to appeal from the appellate court's adverse ruling on paragraph 5(h).

[2] Plaintiff included paragraph 5(i) in the first amended complaint. However, that pleading was also filed after the statute of limitations had expired.

905 N.E.2d 897 (2009)

Elmore EDWARDS, Alan Garant, Belinda Johnson, Lizette Lozado, Sandra Mendiola-Kunis, Andre Reyes, Frank Sarabia, Gloria Thompson, and Steven Vrtis, Plaintiffs-Appellants,

v.

The CITY OF CHICAGO, a Municipal Corporation, Defendant-Appellee.

No. 1-07-0741.

Appellate Court of Illinois, First District, Second Division.

March 24, 2009.
Rehearing Denied April 17, 2009.

898 *898 Shawn A. Warner & Associates, Ltd., **Chicago**, for Appellants.

Mara S. Georges, Corporation Counsel of the **City** of **Chicago**, **Chicago** (Benna Ruth Solomon, Myriam Zreczny Kasper, and Robert L. Schultz, of counsel), for Appellee.

Justice CUNNINGHAM delivered the opinion of the court:

This is an interlocutory appeal, pursuant to Supreme Court Rule 304(a) (210 Ill.2d R. 304(a)), from a July 6, 2006 order of the circuit court of Cook County. That order granted partial summary judgment for the defendant-appellee, **City** of **Chicago** (the **City**), on one portion of the complaint by plaintiffs-appellants (certain **Chicago** police officers, as set out below). That part of the complaint alleged that the **City** committed the intentional tort of conversion of their property when, without proper authorization or legal authority, it filed liens to recover line-of-duty medical expenses paid on behalf of plaintiffs-appellants pursuant to municipal ordinances of the **City**.[1] These liens were filed against judgments obtained by the police officer plaintiffs from third parties who had injured them. The named plaintiffs are **Chicago** police officers Elmore **Edwards**, Alan Garant, Belinda Johnson, Lizette Lozada, Sandra Mendiola-Kunis, Andre Reyes, Frank Sarabia, Gloria Thompson, and Steven Vrtis. They are the class representatives for the court-certified class of all current and former **Chicago** police officers who were subject to medical-expense liens, excluding those whose claims concerning medical-expense liens that had already been adjudicated by a court. Following its order granting partial summary
899 judgment for the plaintiffs, the circuit court[2] entered *899 the appropriate Rule 304(a) language and the plaintiffs brought this appeal. The plaintiffs contend that the **City** had no authority to file the liens against them. We affirm and remand for further proceedings.

BACKGROUND

The facts are not in dispute. The named plaintiffs are **Chicago** police officers injured in the line of duty by the wrongdoing of third parties. Since at least 1974, the **City** has filed liens seeking reimbursement of medical expenses which the **City** paid to **Chicago** police officers for line-of-duty injuries. These liens are only filed when the injured officer has recovered damages from a third party. Plaintiffs-appellants Sarabia, Johnson, and Thompson had only wage liens and not medical-expense liens filed against them as of the date this appeal was filed. The **City** has not challenged their status as appellants in this court. Accordingly we will not disturb that designation, but for simplicity will refer to all the plaintiffs-appellants as plaintiffs. Plaintiffs **Edwards**, Garant, Lozada, Mendiola-Kunis, Reyes, and Vrtis have all had money recovered by the **City** from damages due to them from third parties. The **City** recovered the money pursuant to liens which it filed for medical expenses the **City** paid to the plaintiffs. The money recovered by the **City** was paid voluntarily by the plaintiffs or their representatives. Plaintiff Garant's attorney paid the **City** the full lien amount of $1,895.30 in full settlement of that lien on December 2, 1994. Plaintiff **Edwards**' attorney negotiated a reduced payment of $4,752.82 from the **City's** lien of $16,399.57, and the **City** was paid on October 1, 1999. Plaintiff Vrtis' attorney also negotiated a lower payment to the **City** made on September 18, 2000, of $4,833.33 from a lien amount of $9,208.07. Plaintiffs Reyes and Lozado, through their attorney, after unsuccessful attempts to negotiate a lesser amount, on January 10, 2001, paid the **City** the full amount of their liens, $1,301.42 for Reyes and $1,336.20 for Lozado. Plaintiff Mendiola-Kunis' attorney obtained a release of the **City's** claim for reimbursement of medical expenses by paying the full amount requested, $4,519.05, on August 7, 2001.

This action was first filed on February 25, 1998. At issue here is the fourth amended complaint, which was filed on August 27, 2001, and which alleges in pertinent part that the **City** has converted the property of the plaintiffs. The conversion is alleged to have been carried out by issuing liens and collecting funds from the plaintiffs as reimbursement for medical expenses paid by the **City** in instances where the plaintiffs had obtained recoveries from the third parties who injured them. The circuit court granted summary judgment for the **City**, finding that the plaintiffs could not establish the necessary element of absolute, immediate and unconditional right to the property at issue, which they alleged was converted.

ANALYSIS

Summary judgment may be granted only when, upon consideration of all the relevant pleadings, depositions, affidavits, and admissions, the court finds that there is no genuine issue of material fact and that the party seeking the judgment is entitled to it as a matter of law. 735 ILCS 5/2-1005(c) (West 2006); *Siklas v. Ecker Center for Mental Health, Inc.*, 248 Ill. App.3d 124, 129, 187 Ill.Dec. 299, 617 *900 N.E.2d 507, 510 (1993). We review an order of summary judgment *de novo*. *Varela v. St. Elizabeth's Hospital of **Chicago**, Inc.*, 372 Ill.App.3d 714, 722, 310 Ill. Dec. 688, 867 N.E.2d 1, 8 (2006). As we

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have noted, the relevant portion of the complaint sounds in tort and was brought on a theory of conversion. To prove that tort, a plaintiff must prove the following elements: (1) his right to the property; (2) that this right includes the absolute, unconditional right to immediate possession of the property; (3) he has demanded possession of the property; and (4) the defendant took control or claimed ownership of the property wrongfully and without authorization. *Cirrincione v. Johnson*, 184 Ill.2d 109, 114, 234 Ill.Dec. 455, 703 N.E.2d 67, 70 (1998); *Cruthis v. Firstar Bank, N.A.*, 354 Ill.App.3d 1122, 1131, 290 Ill. Dec. 869, 822 N.E.2d 454, 463 (2004).

The circuit court found that the plaintiffs, as a matter of law, could not establish that they had an immediate, absolute and unconditional right to possession of the property, specifically, the reimbursement funds recovered from them by the **City**. Because the plaintiffs could not establish this element of the tort of conversion, the circuit court granted summary judgment for the **City**.

It is undisputed that **Chicago** is a home rule municipality, with the constitutional right to "exercise any power and perform any function pertaining to its government." Ill. Const. 1970, art. VII, § 6(a). Pursuant to this authority, the **Chicago City** Council (the Council) has enacted municipal ordinances providing for immediate payment of the medical costs incurred by **Chicago** police officers injured in the line of duty as well as one method by which the **City** can recover those costs from the third parties who caused the injuries to the police officers. Sections 3-8-190 and 3-8-200 of the **Chicago** Municipal Code (Municipal Code) authorize the Council, as recommended by the committee on finance (the committee), to appropriate money to pay for the medical care and hospital treatment of a police officer injured in the line of duty. **Chicago** Municipal Code § 3-8-190 (amended March 31, 2004); § 3-8-200 (amended June 6, 2001). Specific responsibility to arrange for immediate medical care and to provide the committee with a report on the costs of this care, a recommendation as to payment, and the facts surrounding the injury is delegated to the **Chicago** superintendent of police. **Chicago** Municipal Code § 3-8-210 (2004). This same section requires the **Chicago** police department's chief physician to certify the reasonableness of the expenses and requires the committee to determine if the injury was caused by the negligence of a third party. If the committee so finds, it must notify the corporation counsel of the **City**, who has the duty to seek payment from the third party and to sue that party for recovery if necessary. **Chicago** Municipal Code § 3-8-220 (1999).

There is also an alternative method by which the **City** may obtain reimbursement for medical payments made to injured police officers. By order of the Council, the comptroller may pay the medical expenses of a police officer injured in the line of duty if that officer signs an agreement to reimburse the **City** in the event the officer recovers damages from a third party. This order does not apply if the officer is incapacitated. The existence and implementation of this order were verified in an affidavit by Susan L. Conley, the committee's director of police and fire claims.

The plaintiffs do not dispute the existence of this order, dating back to at least 1974, and the fact that they have all signed the agreement to reimburse the **City** for medical expenses in the event they recover funds from the third party who injured *901 them. But

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the plaintiffs assert that this order is effectively void because it is in contravention of the **City's** ordinances concerning the recovery of such funds. As we have noted, the applicable municipal ordinances only authorize the corporation counsel to seek reimbursement from third parties who caused the injuries. The plaintiffs cite Illinois cases which they contend hold that home rule municipalities do not have the power to violate their own ordinances. They rely heavily on *Palella v. Leyden Family Service & Mental Health Center,* 79 Ill.2d 493, 38 Ill.Dec. 804, 404 N.E.2d 228 (1980), and *Beneficial Development Corp. v. **City** of Highland Park,* 161 Ill.2d 321, 204 Ill.Dec. 211, 641 N.E.2d 435 (1994). *Palella* is far afield from the case at hand, as it merely held that a municipality may not use its home rule powers to instruct the judiciary on how to interpret a law. *Palella,* 79 Ill.2d at 499, 38 Ill.Dec. 804, 404 N.E.2d at 231. But we find that *Beneficial* actually provides strong support for the **City** in this case. In *Beneficial* the home rule municipality had enacted an ordinance establishing procedures for a builder to recapture that portion of the builder's expenses which directly benefited adjoining landowners. At issue in this case was whether the municipality could use an alternative method of recapture by entering into a recapture agreement with a particular builder rather than using the procedures set out in the municipality's recapture ordinance. Our supreme court invalidated as contrary to public policy those portions of the agreement permitting the recapture of expenses which it found had not been used for improvements benefitting adjoining landowners. *Beneficial,* 161 Ill.2d at 330-32, 204 Ill.Dec. 211, 641 N.E.2d at 439-40. But, directly on point to the issue before us, it also held that the municipality was not bound to utilize only the procedures set out in its recapture ordinance to recapture expenses benefitting adjoining landowners, but could utilize a more practical and efficient system such as an agreement made directly with the builder, where that method did not contravene the recapture ordinance. *Beneficial,* 161 Ill.2d at 329-30, 204 Ill.Dec. 211, 641 N.E.2d at 438.

What the *Beneficial* court implicitly found was that an ordinance establishing one method does not automatically invalidate the municipality's utilization of another method for accomplishing the same goal. This is precisely the situation in the case before us. As the **City** notes, obtaining reimbursement directly from a police officer who received third-party payment can mitigate litigation costs which the **City** would incur by intervening in the officer's lawsuit against the third party. Nothing in this substitute method of obtaining reimbursement for the **City's** payments of medical expenses, where the beneficiary obtains compensation from a third party, violates the **City's** ordinance provisions authorizing direct action by the **City** against the third party. Therefore the plaintiffs cannot establish that the **City** has violated its own ordinances. In our review of the elements of the action for conversion upon which the plaintiffs base their claims, it is clear that they cannot prove the element of having an immediate, absolute, and unconditional right to the funds recovered from the third-party tortfeasors and thus their conversion action fails.

We note that in their reply brief filed in this court, the plaintiffs assert for the first time that the reimbursement agreement with the **City**, which they all signed, did not establish a valid lien because it did not use the term "lien." We consider this contention to have been forfeited because it was not raised in the trial court or in plaintiffs' opening brief. Nor would we find this argument persuasive on *902 the merits, for a promise to

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reimburse another party may constitute a lien even in the absence of specifically being called a lien. *Compton v. Country Mutual Insurance Co.*, 382 Ill.App.3d 323, 327, 320 Ill. Dec. 734, 887 N.E.2d 878, 883 (2008) (language of insurance policy asserting the company's interest in funds recovered by its policyholder from third parties was sufficient to create a lien, despite the absence of that term from the provision). In this case all of the named plaintiffs signed a reimbursement agreement with the **City** to reimburse it for medical expenses paid to the plaintiffs if the plaintiffs recovered damages from a third party. This language sufficed to create a lien.

Because of our determination of these issues, we do not reach the **City's** alternative contention that the claims of some of the named plaintiffs are barred by the statute of limitations. That contention would only eliminate some of the plaintiffs; it would not be fatal to the underlying claim. For the reasons set forth above, we affirm the judgment of the circuit court of Cook County and remand this cause for further proceedings.

Affirmed and remanded.

KARNEZIS, P.J., and SOUTH, J., concur.

[1] A second portion of the complaint alleged that from 1997 to 2001 the **City** improperly filed similar liens against **Chicago** police officers for reimbursement of wages paid them by the **City** for lost work time caused by on-duty and off-duty injuries. That portion of the complaint is still pending in the circuit court of Cook County.

[2] Judge Anthony Young presided over these proceedings through his issuance of the order of July 6, 2006, granting partial summary judgment for the **City**. The case was then heard by Judge James R. Epstein who, on February 26, 2007, denied the plaintiffs' motion for reconsideration and entered the Rule 304(a) finding rendering that judgment appealable.

820 N.E.2d 1167 (2004)
354 Ill. App.3d 159
290 Ill.Dec. 100

Shalabh KUMAR, Plaintiff-Appellant,
v.
Deborah H. BORNSTEIN and Gardner Carton and Douglas, Defendants-Appellees.

No. 2-04-0134.

Appellate Court of Illinois, Second District.

December 13, 2004.
Rehearing Denied January 12, 2005.

1169 *1169 David G. Susler, Carol Stream, Robert G. Black, Law Offices of Robert G. Black, Naperville, for Shalabh **Kumar**.

Bart T. Murphy, Daniel J. Peters, Wildman, Harrold, Allen & Dixon LLP, Lisle, for Deborah H. **Bornstein**, Gardner Carton, Douglas Gardner.

Justice BYRNE delivered the opinion of the court:

Plaintiff, Shalabh **Kumar**, appeals the order of the circuit court of Du Page County dismissing his complaint against defendants, Deborah H. **Bornstein** and Gardner Carton and Douglas, attorney and law firm, respectively, pursuant to section 2-615 of the Code of Civil Procedure (the Code) (735 ILCS 5/2-615 (West 2002)). The trial court dismissed plaintiff's complaint for abuse of process because, by failing to allege an actual arrest or seizure of property, he failed to satisfy the second element of the tort of abuse of process. Plaintiff claims that Illinois law does not require that he allege an actual arrest in order to sustain the claim. Plaintiff asserts that the claim requires that he show that process was used to accomplish some result that was collateral to the purview of the process, and he contends specifically that his allegations of the *ex parte* issuance of a body attachment order and the attempt to arrest him were sufficient to state a claim. We agree that arrest is not a required element of the tort. However, we find that the process was not used for any purpose other than that for which it was intended, because the writ of attachment and arrest warrant were issued to obtain compliance with discovery subpoenas after plaintiff's entities failed to obey them. Accordingly, we affirm the trial court's dismissal on this ground.

FACTS

Plaintiff's amended complaint alleged the following relevant facts. Plaintiff is the chief executive officer of a national group of companies, including Viktron Limited Partnership (Viktron). Prior to 1998, Woodward Governor Company (Woodward) ordered certain products from Viktron and failed to pay for them in an amount in excess of $1 million. Viktron sued Woodward to recover the amount due. On October 19, 1998, on behalf of Woodward, defendants filed a breach of contract suit in Colorado against Viktron.

In late 2000, defendants filed an ancillary proceeding in Cook County, Illinois, requesting discovery from various companies owned by plaintiff. Plaintiff alleged that in 2000, he attended a meeting with personnel of Woodward and was told that agents of Woodward would make plaintiff's life miserable if he continued to attempt to have monies collected by Viktron from Woodward. Woodward had previously offered to pay Viktron monies, but not enough, to dismiss Viktron's lawsuit. At *1170 the 2000 meeting, Woodward threatened "to destroy" plaintiff if Viktron continued to sue Woodward.

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On February 14, 2001, defendants filed another ancillary proceeding in Cook County for the alleged purpose of issuing deposition and document subpoenas against three entities owned by plaintiff, Autotech Technologies Limited Partnership, **Kumar** Family Limited Partnership, and Electronic Support Systems Corporation (the **Kumar** Entities). None of the **Kumar** Entities or plaintiff was at that time named as a defendant in the underlying Colorado action. Plaintiff alleged that, when his attorneys demanded that defendant **Bornstein** stop "this harassment disguised as discovery," **Bornstein** agreed to a meeting, wherein she reiterated the threat to destroy plaintiff and his business entities.

On April 5, 2001, defendants filed a motion in the Colorado case for leave to file a second amended complaint and add several new parties as defendants to that action, including plaintiff and the **Kumar** Entities.

On May 3, 2001, defendants filed a petition for a rule to show cause in Illinois against the **Kumar** Entities for failing to produce discovery. Plaintiff alleged that all of the discovery was available in the Colorado case in which Woodward had joined the **Kumar** Entities. We note, however, that the **Kumar** Entities were not joined in the Colorado case until May 9, 2001, when the Colorado court granted the motion to add them and plaintiff.

Plaintiff alleged that by suing him and his business entities in Colorado, defendants forced him to retain Colorado counsel and that defendants sued the same parties in Illinois for the sole purpose of continuing their campaign of harassment against plaintiff and his business entities. Plaintiff alleged that Woodward refused to dismiss the Illinois suit even though it served no legitimate purpose. On May 9, 2001, the Illinois court entered the rule to show cause against the **Kumar** Entities and ordered that it was returnable on May 16, 2001. Plaintiff alleged that the order of contempt was not granted against him personally. Plaintiff further alleged that the defendants in the Colorado case filed a motion for a protective order on May 15, 2001, which created an automatic stay of discovery in the Colorado case. In addition, plaintiff alleged that discovery was not

allowed in the Colorado cases because an answer to the complaint had not been filed nor was an answer yet due.

On May 22, 2001, the court granted the rule to show cause and ordered that a writ of attachment issue for the **Kumar** Entities for failure to appear and failure to comply with the subpoenas *duces tecum* served on them. Plaintiff alleged that defendants proceeded with the writ of attachment in the Illinois case despite having previously added plaintiff and the **Kumar** Entities as defendants in the Colorado case and despite discovery being stayed in that case.

Plaintiff alleged that, on June 6, 2001, defendants appeared *ex parte* before the court and secured the entry of a body attachment order against plaintiff personally and as representative of the **Kumar** Entities. Plaintiff alleged that defendants appeared before the judge in his chambers and not pursuant to any motion or call and that defendants did not show plaintiff's counsel the June 6 order for review, nor did they provide any notice of intent to have it entered or to change the order to hold plaintiff personally in contempt and subject to arrest. Plaintiff alleged that his lawyers learned of the June 6 order only when defendants referred to it in a pleading filed in the Colorado case.

1171 On June 20, 2001, the **Kumar** Entities filed a motion to vacate the May 22, 2001, *1171 contempt order entered against them in the Illinois proceedings. The motion was not filed on behalf of plaintiff because, plaintiff alleged, at that time defendants "kept secret the entry of the June 6, 2001[,] order against him."

On June 28, 2001, defendant **Bornstein** participated in a status hearing before the Colorado court. At that hearing, the court granted the defendants therein, including plaintiff, 30 days to provide written discovery. Plaintiff alleged that, despite the knowledge that discovery was stayed in the Colorado case at least another 30 days, defendants continued to pursue contempt proceedings against him in Illinois with the intent of arresting him.

On July 17, 2001, the Lake County sheriff issued to plaintiff a notice of civil arrest, directing him to surrender to the sheriff. On July 24, 2001, plaintiff alleged that his attorneys discovered for the first time the June 6 order of body attachment against plaintiff personally. After learning of the order, plaintiff requested that defendants voluntarily agree to vacate the writ of attachment. Defendants refused, "forcing" plaintiff to file a motion to vacate the May 22 contempt order and the June 6 attachment order.

Plaintiff was deposed on September 10, 2001, thus purging the contempt. On September 12, 2001, the court vacated the writ of attachment and arrest warrant against plaintiff.

On April 17, 2003, plaintiff sued defendants for abuse of process. Plaintiff alleged that defendants engaged in the above pattern of conduct in an attempt to undermine and discredit his professional reputation and his businesses, to harass and intimidate him, and to cause personal harm to him. Plaintiff alleged that, despite having added plaintiff and the **Kumar** Entities to the Colorado case and despite the discovery stay order entered in the Colorado case, defendants improperly continued to pursue the rule to

show cause by procuring an order of contempt and a writ of attachment against plaintiff in Illinois.

Defendants filed a section 2-615 motion to dismiss the complaint, asserting that plaintiff failed to allege a claim for abuse of process because he failed to allege that he suffered an actual arrest or physical seizure of property as is uniformly required for an abuse of process claim in Illinois. The trial court agreed with defendants. When counsel for plaintiff requested leave to amend, the court specifically asked him if he could plead that plaintiff suffered any actual arrest or physical seizure of his property. Plaintiff's counsel admitted that he could not plead an actual arrest but claimed that there "are additional facts that are not contained in the complaint surrounding the issue of arrest that I think I should have a chance to replead." Accordingly, the trial court dismissed plaintiff's complaint without prejudice.

Thereafter, plaintiff filed an amended complaint. On the issue of arrest, plaintiff alleged that on July 23, 2001, the Lake County deputy sheriff went to plaintiff's house to arrest him but plaintiff was not home. Plaintiff alleged that he was unable to return to his home because of the danger of being arrested.

Defendants filed another section 2-615 motion to dismiss, arguing that plaintiff never alleged that he was actually arrested and, therefore, he failed to cure the fundamental defect found by the court with respect to the original complaint. The court agreed and dismissed the complaint with prejudice. Plaintiff timely appeals, contending that the trial court erred in dismissing his complaint.

ANALYSIS

1172 Before turning to plaintiff's contention, we first observe that the complaint *1172 contains multiple unfounded allegations, which we must ignore. In analyzing whether allegations are sufficient to establish a cause of action for abuse of process, we must ignore conclusions of law or conclusions of fact unsupported by allegations of specific facts upon which such conclusions rest. *Landau v. Schneider*, 154 Ill.App.3d 875, 878, 106 Ill.Dec. 935, 506 N.E.2d 735 (1987). For example, plaintiff alleges that defendants "kept secret" the June 6 body attachment order entered after the May 22 hearing, where the court found that the **Kumar** Entities violated the court's discovery orders, and the court granted the rule to show cause and instructed that an attachment order be entered. The body attachment order was a public document available in the clerk's office. Moreover, the May 22 order is against the **Kumar** Entities, which plaintiff pleaded he controlled. The court properly held plaintiff responsible for the failure of the entities of which he was the chief executive officer, the sole officer, and the sole general partner, respectively. See *People v. Reynolds*, 350 Ill. 11, 16, 182 N.E. 754 (1932). Furthermore, counsel for the **Kumar** Entities were present at the hearing on May 22. Additionally, at the August 2, 2001, hearing on plaintiff's motion to vacate the June 6 order, counsel argued to the judge that the order entered on June 6 was done with no notice and was not presented in open court. The judge responded, in part, that he did not hear matters in chambers and warned counsel to be careful about making such allegations. The judge further stated that he thought it was a typed order and that he held the hearing in open court.

The question presented by a section 2-615 motion to dismiss is whether the allegations of the complaint, when viewed in a light most favorable to the plaintiff, are sufficient to state a cause of action upon which relief can be granted. *Hough v. Kalousek*, 279 Ill.App.3d 855, 862, 216 Ill.Dec. 373, 665 N.E.2d 433 (1996). Illinois is a fact-pleading jurisdiction that requires a plaintiff to present a legally and factually sufficient complaint. *Hough*, 279 Ill.App.3d at 863, 216 Ill.Dec. 373, 665 N.E.2d 433. The plaintiff is not required to prove his or her case, but must allege sufficient facts to state all the elements of the asserted cause of action. *Inland Real Estate Corp. v. Tower Construction Co.*, 174 Ill.App.3d 421, 433, 123 Ill.Dec. 876, 528 N.E.2d 421 (1988).

When ruling on a section 2-615 motion to dismiss, the trial court should admit all well-pleaded facts as true and disregard legal and factual conclusions that are unsupported by allegations of fact. *Neurosurgery & Spine Surgery, S.C. v. Goldman*, 339 Ill.App.3d 177, 182, 274 Ill.Dec. 152, 790 N.E.2d 925 (2003). If, after disregarding any legal and factual conclusions, the complaint does not allege sufficient facts to state a cause of action, the trial court must grant the motion to dismiss. *Lake County Grading Co. of Libertyville, Inc. v. Advance Mechanical Contractors, Inc.*, 275 Ill.App.3d 452, 457, 211 Ill.Dec. 299, 654 N.E.2d 1109 (1995). We may affirm the dismissal of the amended complaint on any ground supported by the record, regardless of the basis for the trial court's decision. *Aboufariss v. City of DeKalb*, 305 Ill.App.3d 1054, 1058, 239 Ill.Dec. 273, 713 N.E.2d 804 (1999). We review *de novo* an order dismissing a complaint under section 2-615. *Cwikla v. Sheir*, 345 Ill.App.3d 23, 29, 280 Ill.Dec. 158, 801 N.E.2d 1103 (2003).

Plaintiff claims that he is not required to allege an actual arrest in order to sustain a claim for abuse of process. Plaintiff asserts that the gravamen of the tort is whether the
1173 process was used to accomplish some result that is beyond the purview *1173 of the process. Plaintiff argues that his allegations of defendants' harassing and surreptitious use of the process to procure the issuance of a body attachment order and an arrest warrant were sufficient to state his claim and, therefore, the trial court erred in dismissing it.

While we have found no Illinois case, and plaintiff cites none, that allows an abuse of process claim in the absence of an arrest or physical seizure of property, we agree with plaintiff that an arrest is not a required element of abuse of process. Abuse of process is defined as the misuse of legal process to accomplish some purpose outside the scope of the process itself. *Bonney v. King*, 201 Ill. 47, 50-51, 66 N.E. 377 (1903). The *only* elements necessary to plead a cause of action for abuse of process are: (1) the existence of an ulterior purpose or motive and (2) some act in the use of legal process not proper in the regular prosecution of the proceedings. *Holiday Magic, Inc. v. Scott*, 4 Ill.App.3d 962, 966, 282 N.E.2d 452 (1972). In order to satisfy the first element, a plaintiff must plead facts that show that the defendant instituted proceedings against him for an improper purpose, such as extortion, intimidation, or embarrassment. In order to satisfy the second element, the plaintiff must show that the process was used to accomplish some result that is beyond the purview of the process. *Neurosurgery*, 339 Ill.App.3d at 183, 274 Ill.Dec. 152, 790 N.E.2d 925. The elements are strictly construed, as the tort of

abuse of process is not favored under Illinois law. *Neurosurgery,* 339 Ill.App.3d at 183, 274 Ill.Dec. 152, 790 N.E.2d 925.

Although our review of the relevant case law *generally* views an actual arrest or seizure of property as a sufficient fact to state a claim for abuse of process, it is not a necessary element. We agree with plaintiff that "generally" does not mean "absolutely." Otherwise, the majority of courts that have analyzed claims for abuse of process would not have determined whether something less than an arrest or seizure of property amounted to an abuse of process.

For example, in *Neurosurgery,* the plaintiff filed a defamation action against the defendant. The defendant counterclaimed for abuse of process, alleging that she read an article in the newspaper about a lawsuit filed by the plaintiff and, although the article did not mention the defendant's name, she guessed she was the defendant referred to in the article. The defendant then called the plaintiff's attorney, and he threatened to publish the defendant's confidential medical and financial records in the newspaper. Thereafter, the defendant was served with a summons and complaint and a letter from the plaintiff's attorney seeking to discuss an early resolution of the case. The defendant again called the plaintiff's attorney, and he repeatedly implied that he would dismiss the case if the defendant would testify favorably for his client regarding another matter, which would require her to testify falsely that she had an affair and that she gave sexual favors in return for drugs.

We did not find that the failure to allege an arrest barred the defendant from claiming abuse of process. Rather, we analyzed whether the defendant's allegations satisfied the two elements of the tort, and we determined that the trial court properly dismissed the claim. No facts were alleged showing a misapplication of process, and the mere issuance of a summons is not an abuse of process. *Neurosurgery,* 339 Ill.App.3d at 183, 274 Ill.Dec. 152, 790 N.E.2d 925. Thus, we reached our holding without considering whether the failure to allege an arrest or property seizure was fatal to the plaintiff's claim.

1174 *1174 However, we noted in *dicta* that "[i]n a proper factual context, a fraudulent and malicious manipulation of service of summons might constitute an abuse of process; however, no such facts were alleged in this case." *Neurosurgery,* 339 Ill.App.3d at 184, 274 Ill.Dec. 152, 790 N.E.2d 925. Thus, we left the door open for service of summons, a process far more benign than an arrest or property seizure, to constitute an abuse of process, given the proper factual context. We further noted in *dicta* that the *Holiday Magic* court stated that a misapplication of process has been found *only* in cases in which a plaintiff has suffered an actual arrest or seizure of property. *Neurosurgery,* 339 Ill.App.3d at 184, 274 Ill.Dec. 152, 790 N.E.2d 925. We did not hold that an arrest or property seizure is required to state a claim for relief. We cited *Holiday Magic* only for the proposition that a proper factual setting without an arrest *may* be sufficient to sustain a claim.

In *Holiday Magic,* as in *Neurosurgery,* the issue of whether the plaintiff was actually arrested was not the focus of the court's inquiry or rationale in dismissing the complaint. There, the plaintiff alleged that the defendants instituted lawsuits against him merely to destroy his business. The plaintiff did not allege or implicate any court-issued process,

only the institution of legal proceedings, which was held to be insufficient to support an abuse of process claim. In reciting its rationale, the *Holiday Magic* court applied the well-established two-pronged test for abuse of process, acknowledging that the second element is the gravamen of the action. *Holiday Magic,* 4 Ill.App.3d at 967, 282 N.E.2d 452. The court concluded that none of the alleged conduct related to abuse or even to the use of the court's process. Defining "process" as "any means used by the court to acquire or to exercise its jurisdiction over a person or over specific property," the court found that the mere filing of pleadings is not "process" because pleadings are created and filed by the litigants, whereas "process" is issued by the court. *Holiday Magic,* 4 Ill.App.3d at 968, 282 N.E.2d 452. The court further stated that publicity associated with filing lawsuits and making statements to news media have no relation to the court's process. *Holiday Magic,* 4 Ill.App.3d at 968, 282 N.E.2d 452. Because the complaint contained no allegation regarding any use of process by the defendants, the court held that it failed to state a cause of action for abuse of process. *Holiday Magic,* 4 Ill.App.3d at 969, 282 N.E.2d 452.

After concluding that the complaint failed to state a claim for abuse of process, the court stated in *dicta:* "We have seen that the mere use of process by itself is not tortious. To constitute an abuse of the process in the legal sense, there must be some act in the use of the process which is not proper in the regular course of the proceedings. This element has been *generally* defined by the courts of Illinois as existing only in instances in which the plaintiff has suffered an actual arrest or a seizure of property." (Emphasis added.) *Holiday Magic,* 4 Ill.App.3d at 969, 282 N.E.2d 452. The court continued that it "may well be that in a proper factual context a fraudulent and malicious manipulation of service of summons could itself constitute abuse of process," but no such facts were alleged in that case. *Holiday Magic,* 4 Ill.App.3d at 969, 282 N.E.2d 452.

To support their argument that an abuse of process requires an arrest or seizure of property, defendants quote the following rule from the case of *John Allan Co. v. Brandow,* 59 Ill.App.2d 328, 335, 207 N.E.2d 339 (1965): "`An action for abuse of
1175 process will not lie unless there has been either an injury to the person or the *1175 property.'" However, an examination of *Brandow* reveals that this quote actually misquotes the case of *Bonney* and does not state the law properly.

In *Bonney,* the court compared the differences between an action for malicious prosecution and an action for abuse of process. The court held that an action for the *malicious prosecution* of a civil suit without probable cause will not lie where the process in the suit so prosecuted is by summons only and is not accompanied by arrest of the person or seizure of the property or other special injury not necessarily resulting in all suits prosecuted to recover for like causes of action. *Bonney,* 201 Ill. at 50, 66 N.E. 377. The court defined *abuse of process* as the existence of an ulterior purpose and an act in the use of the process not proper in the regular prosecution of the proceeding. The court observed that regular and legitimate use of process, though with a bad intention, is not abuse of process. The court then pointed out that the "declaration does not aver either that the plaintiff was arrested or his property seized" and that the mere institution of civil suits does not constitute an abuse of process. *Bonney,* 201 Ill. at 51, 66 N.E. 377. The court further pointed out that abuse of process lies for the improper use of process *after*

it has been issued, not for maliciously causing process to be issued. *Bonney,* 201 Ill. at 50, 66 N.E. 377. It is clear in *Bonney* that neither an arrest nor a seizure of property is required to claim abuse of process; the court simply compared the requirements of the two different causes of action. Moreover, it is also apparent that the *Brandow* court took the holding in *Bonney* regarding malicious prosecution and improperly "grafted" it into the requirements for abuse of process. Accordingly, we refuse to follow *Brandow.*

It is clear that the majority of the courts that have analyzed abuse of process claims have consistently followed the same analytical framework and inquiry, regardless of whether there has been an arrest or seizure of property. The facts of each case are analyzed to determine whether process has been used to accomplish some result beyond the purview of the process or to compel the party against whom it is used to do some collateral thing that he or she could not legally be compelled to do. *Neurosurgery,* 339 Ill.App.3d at 183, 274 Ill.Dec. 152, 790 N.E.2d 925; *Community National Bank in Monmouth v. McCrery,* 156 Ill.App.3d 580, 583, 108 Ill.Dec. 696, 509 N.E.2d 122 (1987). Accordingly, we compare plaintiff's complaint to other cases and determine whether the allegations satisfy the well-established two-pronged test for abuse of process.

In *Shatz v. Paul,* 7 Ill.App.2d 223, 129 N.E.2d 348 (1955), the court found an abuse of process in the defendants' repeated and successive use of the writ of *capias ad respondendum* for the purpose of compelling the plaintiff to borrow money from friends or relatives and pledge their personal credit to pay corporate debts. The defendants knew that the plaintiff had no funds to pay the debts and that the plaintiff was subjected to hardship in securing the monies for such payments. The complaint also alleged that the plaintiff had a good and meritorious defense to all the causes of action brought or threatened by the defendants, in that an accord and satisfaction had been reached by the parties in the underlying suit. There, the plaintiff had been arrested four times and the defendants threatened additional arrests upon six more invoices they held. *Shatz,* 7 Ill.App.2d at 237, 129 N.E.2d 348.

In *Executive Commercial Services, Ltd. v. Daskalakis,* 74 Ill.App.3d 760, 31 Ill.Dec. 58, 393 N.E.2d 1365 (1979), the plaintiff *1176 successfully pleaded abuse of process where the defendant had used a writ of *ne exeat, i.e.,* having the plaintiff arrested, in order to extract money from the codefendants. Most notably, the plaintiff was not involved in the lawsuit between the defendants and was arrested only as a means of forcing the codefendants into a position favorable to the defendant who sought the writ of *ne exeat.*

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In *Dixon v. Smith-Wallace Shoe Co.,* 283 Ill. 234, 119 N.E. 265 (1918), however, the supreme court held that the mere institution of a civil suit, the taking of judgment in the same, and the regular issuance of process for the collection of the judgment, in the usual and ordinary manner, was not an abuse of process. *Dixon,* 283 Ill. at 242, 119 N.E. 265. The court held that, even if the attachment was maliciously issued and levied upon lands and a judgment in attachment and order of sale were obtained without reasonable or probable cause and without actual notice to the defendant, there would not be an abuse of process because the attachment suit was regularly begun and prosecuted to a conclusion for the sole purpose of collecting an amount justly due the defendant. *Dixon,* 283 Ill. at 242, 119 N.E. 265.

Similarly, in *Erlich v. Lopin-Erlich,* 195 Ill.App.3d 537, 142 Ill.Dec. 671, 553 N.E.2d 21 (1990), the court found that the temporary retraining order (TRO) obtained by the plaintiff's wife to block the plaintiff from disposing of marital assets during their divorce proceeding was not an abuse of process. The court held that the use of the process, *i.e.,* obtaining the TRO, was not extraneous to the purpose of the proceeding. Thus, the TRO was obtained in the regular prosecution of the proceeding. *Erlich,* 195 Ill.App.3d at 539, 142 Ill.Dec. 671, 553 N.E.2d 21.

Plaintiff asserts that he pled sufficient facts to show that defendants fraudulently and maliciously manipulated the process, satisfying the second element of the tort. He claims that the abuse of process lies in what defendants did after the court issued the subpoenas and they filed the petition for rule to show cause; that the abuse lies in the *ex parte* procurement of the writ of attachment and the issuance of the arrest warrant at a time when discovery was stayed in Colorado. We disagree.

Here, the original "process" used, the institution of the suit, was intended to obtain discovery to aid defendants in the Colorado action. At the time, none of the **Kumar** Entities was named a defendant in the Colorado action. Thus, it appeared that the discovery subpoenas issued to the **Kumar** Entities were simply proper requests seeking information that might have been relevant to Woodward's claims in the underlying suit against Viktron. However, the mere institution of proceedings, even with a malicious motive, does not in and of itself constitute abuse of process, the second element being the gravamen of the offense. *Neurosurgery,* 339 Ill.App.3d at 183, 274 Ill.Dec. 152, 790 N.E.2d 925.

Furthermore, as is evident from the record, the failure to obey the discovery orders occurred well before the **Kumar** Entities were added as defendants in the Colorado action. The trial court ruled that the Colorado action did not stay the action here, counsel for the **Kumar** Entities knew that an attachment order was issued, and it was not issued *ex parte.* The **Kumar** Entities had plenty of time to comply with discovery orders, bring a motion to quash, or file for a protective order. Instead, they disobeyed the court orders and were ultimately held in contempt of court. Moreover, plaintiff was properly held personally responsible for their failure to comply with the orders. See *Reynolds,* 350 Ill. at 16, 182 N.E. 754. 1177 *1177 Initiating the suit and procuring the writ of attachment and arrest warrant to obtain compliance with the discovery orders were acts that were not extraneous to the purpose of the proceedings, but were proper in the regular course of the suit. As plaintiff's complaint does not allege that the process was abused in order to coerce plaintiff to do some collateral thing or to accomplish some improper ulterior purpose, it is deficient in substance. As such, the complaint fails to state a cause of action for abuse of process and was properly dismissed by the trial court.

The judgment of the circuit court of Du Page County is affirmed.

Affirmed.

KAPALA and GILLERAN JOHNSON, JJ., concur.

4 Ill. App.3d 962 (1972)
282 N.E.2d 452

HOLIDAY MAGIC, INC. et al., Plaintiffs-Appellants,
v.
WILLIAM J. SCOTT et al., Defendants-Appellees.

No. 55792.

Illinois Appellate Court — First District.

February 22, 1972.
Rehearing denied April 26, 1972.

963 *963 Jenner & Block, of Chicago, (Thomas P. Sullivan and Robert C. Keck, Jr., of counsel,) for appellants.

Freeman, Freeman & Salzman, of Chicago, (Lee A. Freeman and Jerrold E. Salzman, of counsel,) for appellees.

Judgment affirmed.

Mr. PRESIDING JUSTICE GOLDBERG delivered the opinion of the court:

Holiday Magic, **Inc**., a California corporation; Masters & Generals Trust No. 101, doing business as Chicagoland Center; Earl Miller, Gene Amado and John Carr, Trustees (plaintiffs) filed an amended complaint for injunctive relief and damages against William J. **Scott**, individually, and as Attorney General of the State of Illinois; Allen A. Freeman, individually, and as Deputy Attorney General of the State of Illinois; and Robert S. Atkins, individually, and as Assistant Attorney General of the State of Illinois (defendants). The trial court sustained a motion by defendants to strike and dismiss the amended complaint and dismissed the suit with prejudice. Plaintiffs appeal.

• 1 The facts appear from the properly pleaded allegations of the amended complaint, admitted by the motion to dismiss. (*Acorn Auto Driving School, **Inc**. v. Board of Education*, 27 Ill.2d 93, 96, 187 N.E.2d 722; *Follett's Illinois Book & Supply Store, **Inc**. v. Isaacs*, 27 Ill.2d 600, 603, 190 N.E.2d 324.) The amended complaint alleged in substance that plaintiffs were engaged in the business of selling and distributing a
964 complete *964 line of cosmetics for both ladies and gentlemen throughout the United States. It alleged that the defendants made a "very brief, incomplete and inadequate" investigation of the business of plaintiffs to determine whether it was being operated in

compliance with the law of Illinois. Plaintiffs alleged that, during the course of this investigation, the defendant Atkins ordered plaintiffs to change their methods of business operation and, "* * * further stated that if plaintiffs refused, he would take legal action on behalf of the Attorney General which would generate sufficient adverse publicity to `kill' [Atkins' word] plaintiffs' business, even though such legal action might be groundless. Atkins stated that he was unsure of the correctness of his position in the threatened legal action and admitted that there was a good chance that he would lose the case."

It was further alleged that defendants then filed action against plaintiffs on August 14, 1969. A copy of this prior complaint is appended as an exhibit to the original complaint filed herein. This former complaint described the general manner in which plaintiffs herein conducted their business in Illinois. It charged plaintiffs in the cause at bar with four offenses against the law of Illinois: (1) conducting an illegal lottery (Ill. Rev. Stat. 1967, ch. 38, par. 28-2); (2) unlawful combination and conspiracy in restraint of trade (Ill. Rev. Stat. 1967, ch. 38, par. 60-3 (1)(a) and 60-3(2)); (3) the use of misleading and fraudulent misrepresentations in operation of their business in violation of the Consumer Fraud Act (Ill. Rev. Stat. 1967, ch. 121 1/2, pars. 261 and following) and the Uniform Deceptive Practices Act (Ill. Rev. Stat. 1967, ch. 121 1/2, pars. 311 and following); and 4) violations of the Illinois Securities Law of 1953 (Ill. Rev. Stat. 1967, ch. 121 1/2, pars. 137.2 and following). This former complaint prayed injunctive and other relief against plaintiffs herein.

The gist or substance of the amended complaint herein appears from paragraph 7. This paragraph contains a series of allegations descriptive of the prior suit which may be summarized or quoted in the order in which they are set forth as follows:

> (a) The prior suit was filed and, "used with an ulterior purpose." This was to punish plaintiffs by "killing" their business through the generation of adverse publicity. Defendants herein knew that the filing of such proceedings by the Attorney General would generate a large amount of adverse publicity which would seriously damage the business of plaintiffs.
>
> (b) "After filing the lawsuit, defendants committed acts in the use of the process not proper in the regular prosecution of the proceeding. Defendants actively and knowingly gave wide publicity to the contents *965 of their complaint. Specifically, defendants caused a series of articles to appear in one of Chicago's major daily newspapers. Further, defendants made statements to members of the news media regarding the lawsuit which further tended to damage plaintiffs' business. Plaintiffs are informed and believe that defendants will continue to use this lawsuit to generate publicity adverse to plaintiffs' business."
>
> (c) "Said lawsuit was brought without probable cause."
>
> (d) "Said lawsuit was instituted by defendants with malice." This was demonstrated by the statement of defendant Atkins that he would file the suit to "kill" plaintiffs' business and punish plaintiffs even though the suit was groundless. In addition malice was demonstrated by the lack of

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> adequate investigation prior to filing suit and by the existence of the ulterior purpose. It is alleged here on information and belief that Mrs. Hattie Atkins had invested in plaintiffs' program and was unable to recoup this investment. It is further alleged on information and belief that "* * * malice arose from Atkins' personal dislike for the people in the plaintiffs' business whom Atkins met prior to the filing * * *" of the previous suit.

The amended complaint also alleged that plaintiffs' business suffered extensive damage and that they were required to incur obligations for costs and attorney's fees. It alleged that the pendency of the previous case caused emotional embarrassment and distress to plaintiffs and their families and required them to expend substantial amounts of time which they would otherwise have devoted to income producing matters. The amended complaint prayed large amounts of damages and punitive damages against defendants, temporary and permanent injunctions restraining defendants from making public or private statements "to the news media" about plaintiffs and restraining defendants from prosecuting the previous suit and also for general relief.

Seven separate grounds are specified in the motion of defendants to strike and dismiss. Under the view we take of this appeal, only the third ground need be considered. This ground is that the amended complaint fails to state a cause of action in that no facts are alleged involving misuse or abuse of process. In addition, this portion of the motion states that the amended complaint fails to state a cause of action for malicious prosecution because the allegations of malice, lack of probable cause and existence of ulterior purpose are only conclusions and not allegations of fact and that the essential allegation that the prior action was terminated in favor of defendants therein is lacking. Ill. Rev. Stat. 1969, ch. 110, par. 45(1) (2).

966 In their briefs filed in this court, plaintiffs contend: 1) The amended complaint states a good cause of action for abuse of process. 2) The *966 amended complaint was actionable even if it does not state such a cause of action. 3) Defendants cannot claim immunity by virtue of their public offices. 4) The injunctive relief prayed in the amended complaint is appropriate. Under the view which we take of this appeal, it is necessary to consider only the first two points.

• 2, 3 In determining the sufficiency of the amended complaint, we will obey the clear statutory mandate that it is to "* * * be liberally construed with a view to doing substantial justice between the parties." (Ill. Rev. Stat. 1969, ch. 110, par. 33(3).) However, to accomplish this purpose, we must determine if the amended complaint contains those "* * * substantial averments of fact necessary to state a cause of action." (See *Fanning v. LeMay,* 38 Ill.2d 209, 211, 230 N.E.2d 182, citing Ill. Rev. Stat. 1965, ch. 110, par. 31.) This determination requires us to examine the definition and nature of the classic tort known as abuse of process.

• 4 This definition is best approached by comparing abuse of process with malicious prosecution. In numerous decisions, the courts of Illinois have stated and defined the requisite elements of malicious prosecution as follows (*Franklin v. Grossinger Motor Sales* ***Inc***., 122 Ill. App.2d 391, 397, 259 N.E.2d 307; also *Freides v. Sani-Mode Manufacturing Co.,* 33 Ill.2d 291, 295, 211 N.E.2d 286):

1. Institution and prosecution of judicial proceedings by the defendant.

2. Lack of probable cause for these proceedings.

3. Malice in instituting the proceedings.

4. Termination of the prior cause in plaintiff's favor.

5. Suffering by plaintiff of damage or injury from the prior proceeding.

Certain of these elements, however, are not requisites of the tort of abuse of process. The requirements that the prior proceeding be terminated in plaintiff's favor, the necessity of proof of lack of probable cause for the former case and the need to allege malice in the complaint are not essential elements of abuse of process. See *Dixon v. Smith-Wallace Shoe Co.,* 283 Ill. 234, 241, 119 N.E. 265 and *Wicker v. Hotchkiss,* 62 Ill. 107, 110. See also *Coplea v. Bybee,* 290 Ill. App. 117, 125, 8 N.E.2d 55.

• 5 Therefore, a statement of the two remaining elements, which alone form the requisites of the tort of abuse of process, is comparatively simple. The elements are:

1. Existence of an ulterior purpose or motive, and

2. Some act in the use of the legal process not proper in the regular prosecution of the proceedings.

967 These elements have been defined and described in many Illinois cases. *967 (*Ammons v. Jet Credit Sales **Inc**.,* 34 Ill. App.2d 456, 462, 181 N.E.2d 601. See also *Alberto-Culver Co. v. Andrea Dumon, **Inc**.,* 295 F. Supp. 1155, 1159.) The Illinois case most frequently cited in this regard is *Bonney v. King,* 201 Ill. 47, 66 N.E. 377.

• 6 The second stated element regarding the need for misuse or misapplication of process is essential to the maintenance of the action. It has been repeatedly held in Illinois that mere institution of proceedings does not in and of itself constitute abuse of process. Some act must be alleged whereby there has been a misuse or perversion of the process of the court. It is the settled law of Illinois that mere institution of a suit or proceeding, even with a malicious intent or motive, does not itself constitute an abuse of process. This appears from the authorities above cited as well as from a number of other decisions. Perhaps the best exposition of the principle is that contained in *Bonney v. King,* 201 Ill. 47, 51, 66 N.E. 377:

> "Two elements are necessary to an action for the malicious abuse of legal process: First, the existence of an ulterior purpose; and second, an act in the use of the process not proper in the regular prosecution of the proceeding. Regular and legitimate use of process, though with a bad intention, is not a malicious abuse of process."

Application of this established principle to the amended complaint is immediately and decisively illustrative of its deficiency. The amended complaint alleged, as a mere conclusion, that the prior suit was filed and used with an ulterior purpose. It alleged that

defendants herein knew that the filing of such suit would cause adverse publicity to the damage of plaintiffs. But, even assuming that these allegations are sufficient properly to allege the existence of an ulterior purpose, there is no allegation regarding any act in the use of process that was not proper in the regular prosecution of the proceedings; and, in fact, no allegation regarding any use of process.

Paragraph 7(b) of the amended complaint alleges that defendants gave wide publicity to the contents of their complaint; that they caused a series of articles to appear in the newspaper and that they made statements to personnel of the news media regarding the lawsuit. None of this alleged conduct relates to abuse, or even to use, of the process of the court. Under no circumstances can these allegations, or any other allegations in the amended complaint, be construed as constituting any improper use, or even any use, of the process of the court. The gist of the tort of abuse of process is contained within its title. An actionable tort does not exist unless there is some improper use of the process of the court. For example, in *Shatz v. Paul,* 7 Ill. App.2d 223, 129 N.E.2d 348, the court
968 found an abuse of process in repeated and successive use *968 by defendant of the writ of *capias ad respondendum* against plaintiff for the purpose of compelling plaintiff to borrow money to pay his debts. (See 7 Ill. App.2d 223 at 238). There, plaintiff had been arrested four times and defendants threatened additional arrests upon six more invoices held by them (see page 227).

• 7 In this regard, it is essential to recall the precise definition of the word "process." This apparently simple term has been the subject of varying definitions from ancient times. See Black's Law Dictionary, Fourth Edition, pages 1370 and following under the heading "Process." Upon careful consideration of the varying elements in the definitions used in other states, we would define process as any means used by the court to acquire or to exercise its jurisdiction over a person or over specific property.

• 8 There is no allegation in the amended complaint regarding any use of summons or other process by these defendants in their prior action. The generation of publicity by the filing of a complaint and the issuance of statements to the news media cannot be construed as having any relation to process of the court. Pleading must be distinguished from process. Pleadings are created and filed by the litigants. Process is issued by the court, under its official seal. The Civil Practice Act and the Rules of the Supreme Court devote entirely separate sections to pleading and to process. Compare Civil Practice Act Article III to Article VI; also Supreme Court Rules Article II Part A to Article II Part B.

The authority primarily relied upon by plaintiffs in support of their rather unique theory that the filing of a complaint plus the generation of unfavorable publicity may constitute abuse of process is *Cardy v. Maxwell,* 169 N.Y. Supp.2d 547. We cannot accept this decision by a lower court of New York as persuasive authority for these reasons:

1. The facts in *Cardy* are diversely different from the case at bar. There, defendants "* * * threatened plaintiff with adverse newspaper publicity unless he paid several million dollars to them to withhold further action by them. * * * The pleading alleges that all the defendants participated in a conspiracy to force plaintiff to pay them money to escape adverse publicity rather than defend the action." (169 N.Y. Supp.2d 547 at pages 549 and 550). As noted by the court, blackmail and extortion were thus alleged.

2. *Cardy* sets out the settled law of New York to the effect that the gist of the tort of abuse of process "* * * is the improper use of the process, *after its issuance,* to achieve a collateral, improper purpose." (169 N.Y. Supp.2d 547 at page 549 citing *Rubenstein v. Rubenstein,* 35 N.Y. Supp.2d 926.) Thus, *Cardy* is actually a legal anomaly.

969 *969 3. The law of the State of New York requires that we affirm dismissal of the amended complaint in the case at bar. In *Williams v. Williams,* 23 N.Y.2d 592, decided by the Court of Appeals of New York in 1969, plaintiff alleged that the prior proceeding "* * * was totally without basis in fact and was begun solely for the purpose of ruining his business reputation by widespread publication of the complaint." (23 N.Y.2d 592 at 596.) The case is decisively similar to the situation at bar. At the same page, we find the following language:

> "We agree with defendant that the complaint does not state a cause of action for abuse of process. `The gist of the action for abuse of process lies in the improper use of process after it is issued. (*Dean v. Kochendorfer,* 237 N.Y. 384, 390; *Hauser v. Bartow,* 273 N.Y. 370.) Process is a `direction or demand that the person to whom it is directed shall perform or refrain from the doing of some prescribed act.' (*Matter of Smith,* 175 Misc. 688, 692-693.) It follows that there must be an unlawful interference with one's person or property under color of process in order that action for abuse of process may lie. We find no such interference in this case."

• 9, 10 It follows from the above that the amended complaint is deficient in substance. It contains no allegation regarding any use of process by defendants. It follows also that this defect cannot be remedied by averments concerning generation of publicity concerning the previous proceedings even if accomplished with improper motives. However, the propriety of the order appealed from rests upon a multiple foundation. It is supported by another cogent and ample principle.

• 11 We have seen that the mere use of process by itself is not tortious. To constitute an abuse of the process in the legal sense, there must be some act in use of the process which is not proper in the regular course of the proceedings. This element has been generally defined by the courts of Illinois as existing only in instances in which plaintiff has suffered an actual arrest or a seizure of property. (See *John Allan Co. v. Brandow,* 59 Ill. App.2d 328, 207 N.E.2d 339; *Alberto-Culver Company v. Andrea Dumon, **Inc**.,* 295 F. Supp. 1155.) We note also the exposition of the identical rule by the Court of Appeals of New York in 1969 in *Williams,* cited above. It appears that the majority of American courts are in accord. (1 Am.Jur.2d Abuse of Process Sec. 4 at pages 253 and 254; 72 C.J.S. Process Sec. 120 at page 1190.) This court also approves the general rule as stated and we hold that it provides another reason complete in itself for affirming the judgment appealed from. It may well be that in a proper factual context a fraudulent and malicious manipulation of service of summons could itself constitute abuse of process; but, of course, no such problem is presented by this record.

970 *970 We conclude that the amended complaint fails to state a cause of action and that it was properly dismissed by the trial court. However, plaintiffs urge that actionable wrongs

which require remedy have been committed against them and they cite and depend upon Article I, Section 12, of the Illinois Constitution of 1970 as a basis for judicial relief. The language of that portion of the Constitution is:

> "Every person shall find a certain remedy in the law for all injuries and wrongs which he receives to his person, privacy, property or reputation."

Defendants properly point out in response that the alleged wrongs described by plaintiffs all took place prior to the effective date of Article I, Section 12, of the Illinois Constitution of 1970. It is correct that Section 2 of the Transition Schedule of the Constitution of 1970 provides that all rights created by Article I shall be prospective and not retroactive. In addition, this same argument advanced and depended upon by plaintiffs has been previously rejected by the courts of review of Illinois. See *Bonney v. King,* 201 Ill. 47, 51, 66 N.E. 377. See also *Bauscher v. City of Freeport,* 103 Ill. App.2d 372, 376, 243 N.E.2d 650 and other authorities there cited.

• 12 However, as a final and complete disposition of this contention, we are obliged to hold that we may not consider this constitutional question upon review because it was not presented to and decided by the trial court. (*Smith v. Glowacki,* 122 Ill. App.2d 336, 340, 258 N.E.2d 591. Also, *Thompson v. Board of Commissioners,* (Ill. App.2d), 268 N.E.2d 570.) The judgment of the trial court dismissing the amended complaint with prejudice is affirmed.

Judgment affirmed.

BURKE and LYONS, JJ., concur.

103 B.R. 927 (1989)

Joseph E. COHEN, Trustee, Plaintiff-Appellee,

v.

Joseph BUCCI, Debtor, Defendant-Appellant.

No. 89 C 3610, Bankruptcy No. 85 B 14214, Adv. No. 86 A 1029.

United States District Court, N.D. Illinois, E.D.

August 11, 1989.

Gary E. Dienstag, Springer, Casey, Dienstag & Devitt, P.C., Chicago, Ill., for plaintiff-appellee.

Joel A. Brodsky, Brodsky and Hohxa, Chicago, Ill., for defendant-appellant.

MEMORANDUM OPINION AND ORDER

CONLON, District Judge.

928 Debtor-appellant Joseph **Bucci** ("**Bucci**") appeals from a judgment of the United *928 States Bankruptcy Court for the Northern District of Illinois, 97 B.R. 954, denying him a discharge under Section 727(a)(2)(A) of the Bankruptcy Code. 11 U.S.C. § 727(a)(2)(A). The court has jurisdiction over this appeal under 28 U.S.C. § 158(a) and Bankruptcy Rule 8001(a). Fed.R. Bankr.P. 8001(a).

BACKGROUND

The relevant facts are not in dispute. On October 22, 1985, **Bucci** filed a petition for bankruptcy under Chapter Seven of the Bankruptcy Code. 11 U.S.C. § 701 *et seq.* **Bucci's** petition listed unsecured debts of $620,193.24 and secured debts of $257,086.72. **Cohen** Ex. 4. The petition did not list any non-exempt assets. *Id.* The trustee in **Bucci's** bankruptcy and the plaintiff-appellee in this action, Joseph **Cohen** ("**Cohen**"), promptly filed an adversary action to set aside and avoid pre-bankruptcy transfers of property under 11 U.S.C. § 548(a)(1) and (2). **Cohen** alleged that **Bucci** illegally conveyed property to his son and ex-wife pursuant to a divorce decree entered in the Circuit Court of DuPage County, Illinois. **Cohen** Ex. 2. That property consisted of the following: (1) one-half interest in residential property located in Addison, Illinois; (2)

an interest as the sole contract purchaser of the County-Aire Motel in Addison, Illinois, including personal property located in the motel; (3) one-half interest in real property located in Chicago, Illinois; and (4) a 1979 Cadillac automobile. **Cohen** Ex. 1.

Bucci, represented by counsel, contested the allegations. **Cohen** Ex. 3. The bankruptcy court found that **Bucci** engaged in a fraudulent conveyance of property within one year prior to the filing of his bankruptcy petition with the actual intent to hinder, delay or defraud his creditors. **Cohen** Ex. B. The court found that **Bucci** violated Section 548(a)(1) and authorized **Cohen** to reclaim the property. *Id.* **Bucci** did not appeal.

After prevailing on his Section 548 claim, **Cohen** filed a separate action, No. 86 A 1029, to deny **Bucci's** discharge from bankruptcy. The adversary complaint alleged four grounds for denying the discharge, including a claim under Section 727(a)(2)(A) that **Bucci** transferred his property with the actual intent to hinder, delay or defraud his creditors. **Cohen** Brief Ex. A at 1-2. The bankruptcy court found that **Bucci** illegally conveyed his property in violation of Section 727(a)(2)(A) and denied the discharge. The court based its decision in part on collateral estoppel grounds, holding that its prior order in the Section 548 proceeding precluded **Bucci** from relitigating the issue of fraudulent intent in the Section 727 proceeding. **Bucci** appeals the decision. He contends that the bankruptcy court erred in applying the doctrine of collateral estoppel.

DISCUSSION

This court's authority to review a decision of the bankruptcy court is governed by Bankruptcy Rule 8013. Fed.R.Bankr.P. 8013. *Matter of Evanston Motor Co., Inc.*, 735 F.2d 1029, 1030-1 (7th Cir.1984). Rule 8013 provides district courts with the power to affirm, reverse or modify a bankruptcy order, or to remand for further proceedings. *Id.* The bankruptcy court's findings of fact are accepted as true unless they are clearly erroneous. *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 574, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985); *In re Ebbler Furniture and Appliances, Inc.*, 804 F.2d 87, 89 (7th Cir.1986); *In re Pearson Bros.*, 787 F.2d 1157, 1161 (7th Cir.1986). Where the issues on appeal involve questions of law or the legal significance accorded to facts, this court is authorized to conduct a *de novo* review of the record and reach an independent conclusion. *In re Ebbler Furniture and Appliances, Inc.*, 804 F.2d at 89; *In re Kimzey*, 761 F.2d 421, 423 (7th Cir.1985); *Matter of Evanston Motor Co., Inc.*, 735 F.2d 1029, 1031 (7th Cir.1984); *Matter of Supreme Plastics, Inc.*, 8 B.R. 730, 734 (N.D.Ill. 1980).

This case involves two closely related sections of the bankruptcy code often invoked by trustees when it is apparent a debtor engaged in pre-bankruptcy transfers of property.
929 Section 548(a)(1) permits *929 the trustee to avoid any transfer of property or obligation incurred by the debtor within one year of the bankruptcy petition if the debtor

> (1) made such transfer or incurred such obligation with actual intent to hinder, delay or defraud any entity to which the debtor was or became, on or after the date that such transfer occurred or such obligation was incurred, indebted. . . .

11 U.S.C. § 548(a)(1). Section 727(a)(2)(A) parallels Section 548. It provides for the bankruptcy court to grant the debtor a discharge from bankruptcy unless

> (2) the debtor, with the intent to hinder, delay or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed —
>
> (A) property of the debtor within one year before the date of the filing of the petition. . . .

11 U.S.C. § 727(a)(2)(A). The gravamen of both Section 548(a)(1) and Section 727(a)(2)(A) is "intent to hinder, delay or defraud." 11 U.S.C. §§ 548(a)(1), 727(a)(2)(A). The bankruptcy judge applied the doctrine of collateral estoppel to preclude **Bucci** from relitigating the issue of fraudulent intent. **Cohen** Brief Ex. A. The court reasoned that because **Bucci** transferred property with the intent to hinder, delay or defraud his creditors in violation of Section 548(a)(1), he acted with the intent required by Section 727(a)(2)(A). *Id.* at 5-13.

There is no dispute that collateral estoppel applies in bankruptcy discharge proceedings. *Brown v. Felsen,* 442 U.S. 127, 139 n. 10, 99 S.Ct. 2205, 2213 n. 10, 60 L.Ed.2d 767 (1979); *Combs v. Richardson,* 838 F.2d 112, 115 (4th Cir.1988); *Klingman v. Levinson,* 831 F.2d 1292, 1294-96 (7th Cir.1987). For collateral estoppel to apply, four requirements must be met: (1) the party against whom estoppel is asserted must have been a party to the prior adjudication and actively participated in the litigation; (2) the issue that forms the basis for estoppel must have been actually litigated and determined on the merits; (3) the determination of the particular issue must have been necessary or essential to the court's judgment; and (4) the issue to be precluded is identical to the issue in the former action. *Klingman,* 831 F.2d 1292, 1295 (7th Cir.1987); *Gilldorn Savings Ass'n v. Commerce Savings Ass'n,* 804 F.2d 390, 392 (7th Cir.1986); *Garza v. Henderson,* 779 F.2d 390, 393 (7th Cir. 1985). The purpose of collateral estoppel is to prevent duplicative litigation. *Gilldorn Savings Ass'n,* 804 F.2d at 392, citing *Bowen v. United States,* 570 F.2d 1311, 1322 (7th Cir.1978). The party asserting estoppel has the burden of establishing which factual or legal issues were actually litigated and determined in a prior action. *Gilldorn Savings Ass'n,* 804 F.2d at 393; *Frye v. United Steelworkers of America,* 767 F.2d 1216, 1220 (7th Cir.1985).

The bankruptcy judge properly applied the doctrine of collateral estoppel to **Bucci's** case. First, the adversaries in both proceedings are the same. In each case, **Cohen** sued **Bucci**. **Cohen** Brief Ex. A and B. In each proceeding, **Bucci** was represented by counsel and actively participated in the litigation. *Id.*

The second element of collateral estoppel is also present. The bankruptcy judge properly found that the issue of fraudulent intent was actively litigated and determined on the merits in the Section 548 proceeding. **Cohen** Ex. A at 9-10. The court in the Section 548 proceeding uncovered several badges of fraud, including (1) **Bucci's** failure to disclose during his divorce proceedings that he was a party-defendant in several lawsuits; (2) the lack or inadequacy of consideration underlying the transfers; (3) a

familial relationship among the parties to the transfer; (4) **Bucci's** retention of possession, benefit and use of the transferred property; and (5) the general chronology of events. **Cohen** Brief Ex. B at 18-24. The findings of fact entered by the bankruptcy court are thorough, uncontroverted and unquestionably probative of fraudulent intent.
930 The issue of **Bucci's** intent was actively litigated and *930 determined on the merits in the Section 548(a)(1) litigation. *See* **Cohen** Ex. A at 9-10.

The finding of fraudulent intent was necessary and essential to the bankruptcy court's judgment. Actual intent is an element of the trustee's cause of action under Section 548(a)(1). *In re Parameswaran,* 50 B.R. 780, 785 (S.D.N.Y.1985); *In re Garcia,* 88 B.R. 695, 700 n. 11 (Bankr. E.D.Pa. 1988) citing *Phillips v. Wier,* 328 F.2d 368, 371 (5th Cir.1964) and *Springmann v. Gary State Bank,* 124 F.2d 678, 681 (7th Cir.1941). Without a finding of fraudulent intent supported by clear and convincing evidence, the bankruptcy court could not have entered its judgment. *Id.*

And finally, the bankruptcy court properly found that the issue of intent under Section 727(a)(2)(A) is identical to the issue of intent under Section 548(a)(1). The statutory sections are identically worded; each requires proof of intent to hinder, delay or defraud. Significantly, courts faced with issue preclusion in the context of a bankruptcy discharge proceeding and a divorce decree have uniformly concluded that a finding of fraudulent intent in a prior Section 548(a)(1) action is controlling for purposes of Section 727(a)(2)(A):

> Having determined that the debtor's transfer of his interest in the property owned by the entirety to his wife was made with actual intent to hinder, delay or defraud his creditors, it follows that such conveyance may be set aside by the debtor's trustee in bankruptcy pursuant to 11 U.S.C. § 548(a)(1) and the debtor's discharge *must* be denied under 11 U.S.C. § 727(a)(2)(A).

In re Parameswaran, 50 B.R. at 784-85 (emphasis added). *See also In re Clausen,* 44 B.R. 41, 43-44 (Bankr.D.Minn.1984); *In re Matter of Loeber,* 12 B.R. 669, 675 (Bankr.D.N.J.1981).

Bucci raises several arguments in opposition to the application of collateral estoppel to this case. None are persuasive. First, **Bucci** argues that there can be no identity of issues between Section 548(a)(1) and Section 727(a)(2)(A) because these sections require different burdens of proof. A shift in the burdens of proof or persuasion is sufficient to defeat issue preclusion. *Frye,* 767 F.2d at 1221; *Guenther v. Holmgreen,* 738 F.2d 879, 888 (7th Cir.1984). However, the burden of proof in Sections 548(a)(1) and 727(a)(2)(A) are identical. *In re Parameswaran,* 50 B.R. at 784-85; *In re Matter of Loeber,* 12 B.R. at 675. Both sections require clear and convincing evidence of intent. *Id.; see also In re Garcia,* 88 B.R. at 700 n. 11.

Alternatively, **Bucci** argues that he did not have a full and fair opportunity to actually litigate the issue of fraudulent intent in the Section 548 proceeding. This argument is based on **Bucci's** contention that the Section 548 proceeding involved a dispute between his ex-wife in her capacity as a judgment creditor, and **Cohen** acting as trustee

on behalf of all other creditors. **Bucci** maintains that he was not a necessary party to this dispute and he had no incentive to litigate the fraudulent intent issue because the court had to award the property either to his ex-wife or to **Cohen**, but not to him.

This argument is without merit. **Cohen's** adversary complaint in the Section 548 proceeding named **Bucci** as a party-defendant. Because **Bucci** was an adversary party, his argument that he lacked incentive to litigate the intent issue is entitled to little weight. *Klingman,* 831 F.2d at 1296; *Otherson v. Dep't of Justice,* 711 F.2d 267, 277 (D.C.Cir.1983). **Bucci's** incentive to litigate the intent issue in the Section 548 proceeding is established in the first instance by the reasonable foreseeability of the preclusive effect of the litigation. *Klingman,* 831 F.2d at 1296. Aside from this reason, **Bucci** had tangible economic incentives to litigate the intent issue and prevail in the Section 548 litigation. For example, **Bucci** justified the transfer of property to his ex-wife and son as part of his obligation to provide support under the divorce decree. **Bucci** Ex. 2 at 5. Loss of the Section 548 proceeding meant that **Bucci** might be vulnerable to new support claims by his ex-wife and son. Even assuming that **Bucci** had no further
931 obligations under the divorce decree, he still *931 stood to lose from an adverse ruling in the bankruptcy court. This is because **Bucci** continued to receive income from the property at issue in the Section 548 proceeding even though he no longer held title. **Cohen** motion for summary judgment App. A at 12-13. Consequently, loss of these properties to the trustee meant loss of income.

Next, **Bucci** contends that a finding that he transferred property with the intent to hinder, delay or defraud his creditors was not necessary to the court's judgment. **Bucci** contends that the bankruptcy court made its Section 548(a)(1) finding only after first concluding that he violated Section 548(a)(2). Essentially, **Bucci** argues that alternative reasons for a judgment are not necessary and essential for purposes of collateral estoppel. There is no merit to this argument. All alternative, independent grounds upon which a court may base its decision qualify as "necessary" to the court's judgment. *Winters v. Lavine,* 574 F.2d 46, 66-69 (2d Cir.1978); *Williams v. Ward,* 556 F.2d 1143, 1154 (2d Cir.1977); *General Dynamics Corp. v. AT & T,* 650 F.Supp. 1274, 1285 (N.D. Ill.1986). An exception to this rule occurs when a court's judgment order could be based upon one of several alternative grounds that are not expressly relied upon or enumerated in the court's opinion. *Gilldorn,* 804 F.2d at 395; *Frye,* 767 F.2d at 1220. This exception is not applicable to this case because the bankruptcy court's opinion in the Section 548 proceeding expressly sets forth all available grounds for avoiding the transfer. *Id.*

Alternatively, **Bucci** argues that even assuming the necessity of intent to the court's judgment, collateral estoppel is not appropriate because the bankruptcy court never entered a final judgment order. **Bucci** claims that the bankruptcy judge's Section 548 order never became final because his ex-wife appealed the judgment. This argument is unavailing. The pendency of an appeal does not suspend the finality of a judgment for purposes of collateral estoppel. *Webb v. Voirol,* 773 F.2d 208, 211 (8th Cir.1985); *Hunt v. Liberty Lobby, Inc.,* 707 F.2d 1493, 1497-98 (D.C.Cir.1983); *Kurek v. Pleasure Driveway & Park District,* 557 F.2d 580, 595 (7th Cir.1977), *vacated and remanded on other grounds,* 435 U.S. 992, 98 S.Ct. 1642, 56 L.Ed.2d 81 (1978). Although a final

judgment order is essential before a claim or cause of action has preclusive effect, the need for a final judgment is not as compelling when deciding whether to preclude relitigation of an issue in a later action between the same parties on a different claim. *Gilldorn Savings Ass'n,* 804 F.2d at 393-94; *Miller Brewing Co. v. Jos. Schlitz Brewing Co.,* 605 F.2d 990, 996 (7th Cir.1979), *cert. denied,* 444 U.S. 1102, 100 S.Ct. 1067, 62 L.Ed.2d 787 (1980); *Dunlap v. City of Chicago,* 435 F.Supp. 1295, 1299 (N.D.Ill.1977). Finality for purposes of issue preclusion requires only that the court's determination not be avowedly tentative. *Id.* A final judgment in the case as a whole is not necessary. *Id.* All that is required is that the court reach a definitive resolution of the issue. *Id.*

The bankruptcy judge in the Section 548 proceeding unquestionably reached a definitive resolution of the fraudulent intent issue. Both parties submitted briefs and had an opportunity to be heard. The bankruptcy judge considered all the relevant evidence. Under the circumstances, he made a reasoned decision on the issue of intent. *Id.* There being no unresolved evidentiary matters, his decision is conclusive for purposes of collateral estoppel. *Id.*

Even assuming a doubt as to the conclusiveness of the bankruptcy court's findings in the Section 548 proceeding, the record demonstrates that there was no appeal pending when the same judge entered the order in the Section 727 proceeding. The uncontroverted evidence shows that **Bucci's** wife failed to perfect her appeal. **Cohen** Ex. 1A at 6. The appeal was eventually dismissed pursuant to a settlement agreement. **Bucci** motion for summary judgment App. 1. **Bucci** himself failed to appeal the court's order in the Section 548 proceeding and he did not present any evidence on the issue of his intent in the Section 727 proceeding. **Cohen** Ex. 1A. He cannot use this opportunity
932 to claim the *932 absence of a final judgment order to bar the application of collateral estoppel.

Bucci's last argument is that application of collateral estoppel to his case is simply unfair. Considerations of fairness may make application of collateral estoppel principles inappropriate. *Frye,* 767 F.2d at 1221. When all factors required for collateral estoppel are present, the party opposing estoppel must demonstrate that application of estoppel will result in particularized unfairness. *Id.* The decision to bar collateral estoppel because of unfairness is within the court's discretion. *Garza,* 779 F.2d at 393 citing *Parklane Hosiery Co. v. Shore,* 439 U.S. 322, 331, 99 S.Ct. 645, 651, 58 L.Ed.2d 552 (1979); *Frye,* 767 F.2d at 1221.

Bucci fails to demonstrate particularized unfairness. **Bucci's** claim is based on the argument that he and his attorney only participated in a small part of the litigation, and had no reason to believe that his discharge was in jeopardy. His unsupported and conclusory assertion of unfairness lacks merit. **Bucci** had ample opportunity to present new evidence on the issue of his intent in the Section 727 proceeding. He failed to take advantage of the opportunity. Accordingly, the court will not disturb the bankruptcy court's decision for lack of fairness. *Id.*

CONCLUSION

The decision of the bankruptcy court in ***Cohen*** *v.* ***Bucci***, 97 B.R. 954 (Bankr.N.D. Ill.1989) is affirmed.

905 F.2d 1111 (1990)

Joseph COHEN, Plaintiff-Appellee,
v.
Joseph BUCCI, Debtor-Appellant.

No. 89-2766.

United States Court of Appeals, Seventh Circuit.

Argued June 8, 1990.
Decided June 28, 1990.
Rehearing Denied July 30, 1990.

Gary E. Dienstag, Springer, Casey, Dienstag & Devitt, Chicago, Ill., for plaintiff-appellee.

Joel A. Brodsky, Brodsky & Hoxha, Chicago, Ill., for debtor-appellant.

Before CUDAHY and EASTERBROOK, Circuit Judges, and FAIRCHILD, Senior Circuit Judge.

1112 *1112 EASTERBROOK, Circuit Judge.

In October 1985 Joseph **Bucci** filed a bankruptcy petition stating that he had substantial debts and no non-exempt assets. The trustee promptly commenced an adversary proceeding against **Bucci**, his former wife Bruna, and his son Bruno, contending that **Bucci** fraudulently transferred assets to Bruna and Bruno in a property settlement approved by the state court presiding over divorce proceedings. **Bucci** transferred to them his entire interest in the family's principal residence, a 24-unit apartment building, and a motel, plus two cars. In 1986 the bankruptcy judge concluded that the transfer was avoidable, see 11 U.S.C. § 548(a)(1), because **Bucci** acted with intent to hinder or frustrate his creditors and did not receive equivalent value for the property. **Bucci** did not tell the state court about his debts, leading the state judge to believe that **Bucci** had large equity interests in the home, apartment building, and motel, which could be transferred to his wife and child in lieu of support. In fact **Bucci** had no net interest; his debts exceeded the value of the property. **Bucci** did not appeal to the district court from the order avoiding the transfer; Bruna's appeal was not prosecuted.

Later the trustee asked the bankruptcy judge to deny **Bucci** a discharge, a step 11 U.S.C. § 727(a)(2)(A) authorizes in the event of fraudulent pre-bankruptcy transfers. The trustee argued that the disposition of the earlier proceeding is conclusive; **Bucci**

demanded an opportunity to relitigate. Finding that the result in the action to avoid the transfer met all the requirements for issue preclusion, the bankruptcy judge denied **Bucci** a discharge. 97 B.R. 954 (Bankr.N.D.Ill.1989), affirmed, 103 B.R. 927 (N.D.Ill.1989). **Bucci** asks us to hold that he is entitled to a second trial because, he says, he lacked the incentive to litigate vigorously in the proceeding seeking to avoid the transfer. The property would go either to his ex-wife and son or to his creditors, **Bucci** insists, making it rational to loiter on the sidelines of that litigation. Now that the result hurts him personally, he wants a fresh opportunity.

It is not clear to us that the case presents questions about issue preclusion (collateral estoppel) rather than law of the case. Adversary proceedings in bankruptcy are not distinct pieces of litigation; they are components of a single bankruptcy case, and it is debatable whether **Bucci** could have appealed to us in 1986 a conclusion that his creditors rather than his wife would obtain his former interest in the motel. See *In re Kilgus,* 811 F.2d 1112 (7th Cir.1987). If law of the case is the right way to characterize the bankruptcy court's decision in 1986, then the bankruptcy judge was right to follow the decision in 1989, but this would not block the district judge (or this court) from examining the merits. Law of the case does not block a superior court from examining the correctness of the earlier decision. **Bucci** does not ask us to employ principles of law of the case rather than preclusion, however. In civil litigation we accept the issues framed by the parties. So we shall examine the bankruptcy court's 1986 decision through the lens of issue preclusion, without deciding that this is the proper approach.

Issue preclusion applies to a question that has been "actually litigated and determined by a valid and final judgment, [if] the determination is essential to the judgment." *Restatement (Second) of Judgments* § 27 (1982). See *Teamsters Local 282 Pension Trust v. Angelos,* 815 F.2d 452 (7th Cir.1987); *Garza v. Henderson,* 779 F.2d 390, 392 (7th Cir.1985); *Crowder v. Lash,* 687 F.2d 996, 1009 (7th Cir.1982). Whether **Bucci's** transfer was a fraud on his creditors was actually, and necessarily, determined by the bankruptcy judge in 1986, in a proceeding to which **Bucci** was a party.

Bucci insists that this is insufficient because he had no reason to contest the trustee's motion to avoid the transfer: no matter the disposition, he would not get the assets. Inadequate incentive to litigate is an exception to non-mutual estoppel, see *Parklane Hosiery Co. v. Shore,* 439 U.S. 322, 330, 99 S.Ct. 645, 651, 58 L.Ed.2d 552 (1979).
1113 Someone sued for a nominal *1113 amount will not put up the full defense justified in big-stakes cases, and it may be hard to anticipate that an issue in a pip-squeak of a case will have grave consequences later. Issues resolved after half-hearted efforts may be relitigated, when circumstances conduce to more accurate decisions. This principle does not carry over unalloyed to cases of *mutual* estoppel, however, because a party will be aware of other disputes with the same adversary. *Restatement* § 28(5)(b) and (c) describes exceptions to mutual issue preclusion when "it was not sufficiently foreseeable at the time of the initial action that the issue would arise in the context of a subsequent action" or "the party sought to be precluded, as a result of the conduct of his adversary or other special circumstances, did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action". Neither helps **Bucci**.

Bucci (or his lawyer) could not help knowing that a finding of fraudulent transfer in the avoidance action would affect the availability of a discharge. A desire to preserve eligibility for discharge was more than ample incentive to resist the trustee's motion to avoid the transfer. **Bucci** does not identify any unjust or surprising "conduct of his adversary", and there are no "special" circumstances. This is a perfectly ordinary sequence in bankruptcy litigation: first avoid the transfer, then invoke the reasons for the avoidance to show that the debtor is not entitled to a discharge. **Bucci** would have had reasons to resist the trustee's motion even apart from the effect of the decision on his discharge. The property transferred to wife and child was in lieu of support obligations. If they had to give up the property, it was predictable that they would seek support. Obligations to support one's family are not dischargeable. 11 U.S.C. § 523(a)(5). **Bucci** responds that the decree entered by the state court extinguishes their right to maintenance and support, but a state judge could and probably would set aside such a clause when the consideration for it (the properties) is snatched back. **Bucci's** interests were at stake in 1986, and he had ample reasons to defend — if he had any defenses that his wife did not offer. (The action was hotly contested, and **Bucci** does not tell us what he could have done to defend that his wife and son did not do anyway.)

According to **Bucci**, all of this is beside the point because findings concerning fraudulent transfers are *never* preclusive in discharge proceedings. For this proposition **Bucci** cites only *Lovell v. Mixon,* 719 F.2d 1373 (8th Cir.1983), but he misunderstands the case. Mixon, the trustee, first obtained an order avoiding a transfer under § 548(a)(2), which deals with constructive fraud, and later objected to the discharge because, he asserted, the debtor had committed actual fraud. The debtor insisted that the trustee, having bypassed an opportunity to show actual fraud as a reason to avoid the transfers, was precluded from showing actual fraud in order to block the discharge. The eighth circuit sensibly replied that *issue* preclusion (the question in our case) did not apply because actual fraud had been neither litigated nor decided in the avoidance action; the trustee did not suffer an adverse decision on the issue and could hardly be precluded. Claim preclusion (a subject not involved here) applies only to the same claim involved in the first case. Avoiding a fraudulent transfer and blocking a discharge are not the "same claim". It would be counterproductive to require trustees to make demands concerning discharges at the same time as they seek to avoid fraudulent transfers. Although both the avoidance question and the discharge question must be resolved in one bankruptcy case, the discharge question need not be resolved at the same time (or in the same adversary proceeding) as the avoidance question, on pain of forfeiture. None of these principles assists **Bucci**. The bankruptcy judge decided in the avoidance proceeding that **Bucci** made a fraudulent transfer. It is wholly appropriate for a trustee to follow up such a conclusion with an application to deny a discharge.

AFFIRMED.