

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT IN AND FOR
PALM BEACH COUNTY, FLORIDA

IN RE:

Case No. 50 2012 CP 004391 NB

ESTATE OF SIMON
BERNSTEIN,
Deceased.

**SUPPLEMENTAL MEMORANDUM IN SUPPORT OF
MOTION TO DISQUALIFY ALAN ROSE AND PAGE, MRACHEK, FITZGERALD,
ROSE, KONOPKA, THOMAS & WEISS, P.A. AS LEGAL COUNSEL FOR THE
ESTATE OF SIMON BERNSTEIN DUE TO AN INHERENT CONFLICT OF
INTEREST**

COMES NOW claimant and Interested Person WILLIAM STANSBURY (“Stansbury”), and for his Supplemental Memorandum in Support of his Motion to Disqualify Alan Rose (“Rose”) and Page, Mrachek, Fitzgerald, Rose, Konopka, Thomas & Weiss, P.A. (“Page Mrachek”), states, in addition to the arguments raised in the primary Motion to Disqualify, as follows:

--- Standing ---

I. As an Interested Person Stansbury has standing under Florida law to challenge the Personal Representative’s decision to waive, and thereby to oppose, the conflict of interest created by the Estate’s retention of Alan Rose and the Page Mrachek firm to represent it in Stansbury’s claim against the Estate.

1. In order to clarify what may be some confusion regarding Stansbury’s position in this Motion, Stansbury has never asserted, and does not now assert, that Rose and Page Mrachek have a conflict of interest because they currently or in the past have represented Stansbury. Rather, Stansbury’s point is that Rose and Page Mrachek have an inherent conflict of interest because:

a. Rose has stated on the record in the Life Insurance litigation filed in Chicago, Illinois that he represents and is personal counsel to Ted Bernstein (“Ted”), who is a named Plaintiff in that Chicago lawsuit. The suit seeks to declare that approximately \$1.7 million in life insurance proceeds should be made payable to the children of Simon Bernstein (“Simon”) through an alleged trust that has no documentation supporting its existence. If the proceeds are not payable to Simon’s children through the trust because the trust does not exist, the proceeds will be paid to the Estate of Simon Bernstein (the “Estate”).

b. This Estate has intervened in the Chicago insurance litigation and is aligned as a party Defendant and Counterclaimant. Thus, Ted Bernstein and his counsel, Rose, **are adverse** to the interests of the Estate in that litigation, meaning they are actively working to deprive the Estate of substantial funds that would otherwise be available to pay interested persons, such as Stansbury.

c. More recently Rose has been retained to represent the Estate in Stansbury’s case currently pending against the Estate. Stansbury sued Simon (along with Ted and various business entities who have since settled) prior to his death over employment and other issues arising out of a business venture Stansbury and Simon were involved in. Rose represented Ted and the company defendants.

d. Rose obviously has a conflict of interest: on one hand, he represents Ted as personal counsel in the Chicago insurance litigation in a matter in which their position is clearly adverse to the interests of Estate. On the other hand, Rose now represents the Estate in defending Stansbury’s lawsuit against it.

e. Apparently Brian O’Connell, Personal Representative, has attempted to waive the conflict of interest and is permitting Rose to proceed to represent the Estate against Stansbury.

2. As an Interested Person under Florida law, Stansbury has a right to contest and object to this waiver, and to raise the conflict of interest as a ground to seek Rose and his law firm's disqualification from representation of the Estate in Stansbury's lawsuit.

3. Florida Statutes as are relevant here provide the following:

Part VI. Duties and Powers of Personal Representative

733.602. General Duties

(1) A personal representative is a fiduciary who shall observe the standards of care applicable to trustees. A personal representative is under a duty to settle and distribute the estate of the decedent in accordance with the terms of the decedent's will and this code as expeditiously and efficiently as is consistent with the best interests of the estate. A personal representative shall use the authority conferred by this code, the authority in the will, if any, and the authority of any order of the court, for the best interests of interested persons, including creditors.

Stansbury is a creditor and therefore an interested person of the Estate.

733.609. Improper exercise of power; breach of fiduciary duty

(1) A personal representative's fiduciary duty is the same as the fiduciary duty of a trustee of an express trust, and a personal representative is liable to interested persons for damage or loss resulting from the breach of this duty.

4. It is clear from the language of these statutory provisions that the personal representative has the obligation to exercise his powers for the "best interest of interested persons, including creditors," and to act "reasonably for the benefit of the interested persons" in the employment of attorneys to represent the Estate. Therefore Stansbury, as an "Interested Person," has standing to challenge whether the personal representative acted reasonably under the statutes when he waived Rose's blatant conflict of interest and nonetheless retained Rose to represent the Estate in Stansbury's case against it. It stands to reason that, to expose this conflict of interest and the unreasonableness of any purported waiver, Stansbury has standing to pursue the disqualification of Rose and Page Mrachek. *See, Bedoya v. Aventura Limousine & Transportation Service, Inc.*, No. 11-24432-CIV, 2012 WL 1534488, at *4 (S.D. Fla. Apr. 30,

2012); *Milton Carpter Center v. Cincinatti Ins. Co.*, Case No. 3:13cv624/MCR/CJK, 2014 WL 12482616 (N.D. Fla. May 5, 2014).

Stansbury does not seek to dictate to the personal representative what attorney or law firm it should or should not retain to defend it in Stansbury's case. Rather, Stansbury, as an Interested Person, seeks only to ensure that the personal representative does not unreasonably select counsel that is inherently conflicted with the best interests of the Estate and all interested persons.

5. In addition, a Court, on its own, is obligated to disqualify counsel when a clear conflict of interest presents itself. *See, Kolb v. Levy*, 104 So.2d 874 (Fla. 3rd DCA 1958).

--- The conflict is not waivable ---

II. As Alan Rose represents antagonistic interests, i.e. a party seeking to deprive the Estate of considerable life insurance proceeds, while at the same time representing the Estate itself in Stansbury's lawsuit, the conflict of interest is nonconsentable and unwaivable.

6. In *Anheuser-Busch Companies et al v. Staples*, 125 So.3d 309 (Fla. 1st DCA 2013), a worker, Staples ("Staples"), injured on the job collected workers compensation from his employer but then sued Anheuser-Busch ("AB") in a tort action for the injuries sustained on its premises. Attorney Fernandez entered an appearance on behalf of AB in the tort action, but Fernandez also filed a claim of lien under the workers compensation statute on behalf of the employer to recover compensation and medical benefits paid to the employee from AB, the alleged tortfeasor. Staples sought to disqualify Fernandez due to the obvious conflict of interest.

7. The trial court found an unwaivable conflict of interest:

It [the trial court] also determined under Rule 4-1.7 of the Florida Rules of Professional Conduct that the conflict could not be waived because it was unreasonable for the firm to believe that it would be able to provide competent and diligent representation to each affected client and because the representation

of Petitioners [AB] involved the assertion of a position adverse to Respondent's [Staples'] employer. Staples, at 310. (emphasis added)

The appellate court determined that the petitioner had not demonstrated that the trial court had departed from the essential requirement of the law and denied certiorari.

8. In a concurring opinion, the court cited with approval the following provision from the Third Restatement of the Law Governing Lawyers, in support of its concurrence with the majority:

Conflicts between adversaries in litigation. When clients are aligned directly against each other in the same litigation, institutional interest in vigorous development of each client's position renders the conflict nonconsentable. . . . The rule applies even if the parties themselves believe that the common interests are more significant in the matter than the interests dividing them. While the parties might give informed consent to joint representation for purposes of negotiating their differences . . . the joint representation may not continue if the parties become opposed to each other in litigation. *Staples*, at 314. (emphasis added)

9. In this case, it seems undeniable that Rose and Page Mrachek have an inherent, adverse conflict of interest that is not waivable by the personal representative of the Estate. The administration of the Estate of Simon Bernstein is, for all practical purposes, a single "proceeding" with two significant components: first, the Estate's participation in the Chicago insurance litigation as a party defendant with the purpose of securing \$1.7 million for the Estate; and, second, the Estate's defense of the lawsuit file by Stansbury which seeks to preserve Estate assets, to the extent possible.

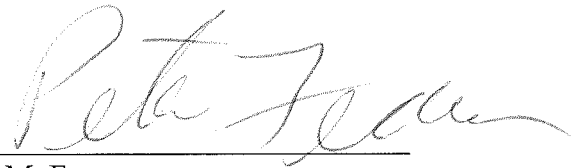
10. The Estate obtained approval to intervene in the Chicago litigation to pursue the \$1.7 million life insurance proceeds by order of this Court per Judge Martin Colin. *See* Order of Judge Colin, **Exhibit "1,"** attached.¹

¹ In Judge Colin's order it was established the William Stansbury would "initially" pay fees and costs to fund the Chicago litigation, and Stansbury continues to bear those fees and costs to this day. This further bolsters Stansbury's claim to standing in this matter.

11. One can hardly conceive of a more blatant, obvious and unwaivable conflict than that which is presented in this case. While Alan Rose and his firm have been retained as defense counsel with the obvious mission of preserving, to the extent possible, the assets of the Estate, Stansbury's claim exceeds \$250,000, which means there are at present insufficient assets in the Estate to pay Stansbury should he prevail in all respects. The Personal Representative and Rose have the concurrent duty to act reasonably for the benefit of interested persons, of which Stansbury is one, including marshalling all potential assets of the Estate.

12. While serving as the Estate's counsel, however, Rose at the same time represents Ted Bernstein. Ted Bernstein, in the Chicago insurance litigation, is seeking to deprive the Estate of \$1.7 million in life insurance proceeds. In that action the Estate is an adverse party, and such an action is directly adverse to the interests of the very Estate which Rose, as counsel to the Estate, has a duty to protect.

WHEREFORE, Interested Person William Stansbury respectfully requests that this court GRANT the Motion to Disqualify Alan Rose and Page, Mrachek, Fitzgerald, Rose, Konopka, Thomas & Weiss, P.A. from further representation of the Estate in Stansbury's lawsuit against the Estate, and as to any matter involving the Estate, together with an award of reasonable attorneys' fees for conferring a benefit upon the Estate.



Peter M. Feaman


CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been forwarded via e-mail service through the Florida E-portal system to: Alan Rose, Esq., Mrachek,

Fitzgerald Rose, 505 So. Flagler Drive, Suite 600, West Palm Beach, FL 33401, arose@pm-law.com and mchandler@pm-law.com; Eliot Bernstein, 2753 NW 34th Street, Boca Raton, FL 33434, iviewit@iviewit.tv; Brian O'Connell, Esq., Ciklin Lubitz Martens & O'Connell, 515 North Flagler Drive, 20th Floor, West Palm Beach, FL 33401, boconnell@ciklinlubitz.com; John P. Morrissey, Esq., 330 Clematis Street, Suite 213, West Palm Beach, FL 33401, john@jmorrisseylaw.com; Lisa Friedstein, lisa@friedsteins.com, 2142 Churchill Lane, Highland Park, IL 60035; Jill Iantoni, jilliantoni@gmail.com, 2101 Magnolia Lane, Highland Park, IL 60035, on this 9th day of February, 2017.

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IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

IN RE:

CASE NO.: 50 2012 CP 004391 XXXX SB
PROBATE DIV.

ESTATE OF SIMON L. BERNSTEIN,
Deceased.

**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

I. 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

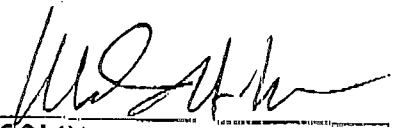
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2. For the reasons and subject to the conditions stated on the record during the hearing, all fees and costs incurred, including for the Curator in connection with his work as Administrator Ad Litem and any counsel retained by the Administrator Ad 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, MRACIIEK, 505 So. Flagler Drive, Suite 600, West Palm Beach, FL 33401, arosec@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, iviewill@vlewit.com;
 - 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;
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