IIN THE CIRCUIT COURT OF THE 15TH JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA

CASE NO. 502012CP004391XXXXNB (IH)

IN RE: ESTATE OF SIMON L. BERNSTEIN,

Deceased.

_____/

WRITTEN FINAL ARGUMENT IN SUPPORT OF WILLIAM STANSBURY'S MOTION TO DISQUALIFY ALAN ROSE AND THE LAW FIRM OF MRACHEK FITZGERALD ROSE KONOPKA THOMAS WEISS FROM REPRESENTING THE ESTATE OF SIMON BERNSTEIN (THE "ESTATE") AND MOTION TO VACATE IN PART THE COURT'S RULING ON SEPTEMBER 1, 2016

In opening statement by Mr. Rose, the Court heard numerous misstatements of fact and unsubstantiated assertions which are contradicted by the evidence and not supported by the record.

Standing

The statement was made by Mr. Rose that Judge Colin ruled that William Stansbury "was not a creditor and denied his [Stansbury's] previous motion to remove and disqualify Ted Bernstein as trustee." [Trans. p. 24, ln. 22-24] Actually, there was no ruling on the merits of Stansbury's Motion to Remove and Disqualify Ted Bernstein as Trustee. The denial was based on Judge Colin's determination that, since William Stansbury was not a named beneficiary of Simon Bernstein's Pourover Trust (the "Trust"), he lacked standing to seek removal of Ted Bernstein as Trustee. This is completely distinguishable from whether Stansbury has standing in this Estate as an Interested Person to bring his Motion to Disqualify and to Vacate Judge Philips' previous Order allowing the appointment of Alan Rose and his law firm to represent the Estate.

William Stansbury has standing because he is an "interested person" which under §731.201(23) means "any person who may reasonably be expected to be affected by the outcome of the particular proceeding involved." As the Estate's largest claimant, Stansbury will be affected by the decision on Alan Rose's disqualification as it has ramifications on the potential size of the Estate's assets available to pay his claim. Additionally, and just as importantly, Stansbury has paid tens of thousands of dollars in legal fees to counsel in Chicago for representing the Estate of Simon Bernstein in connection with the Illinois insurance litigation where the Estate has intervened (at the behest and request of William Stansbury), and where Ted Bernstein and Alan Rose are adverse.

Mr. Rose then falsely stated that Mr. Stansbury "has been trying to remove me and Mr. Bernstein for like almost three or four years now." [Trans. P. 25, Ln. 7-9] This is another patently false statement. There have been no previous motions by William Stansbury attempting to "remove" Alan Rose and his law firm because Alan Rose and his law firm only became counsel for the Estate relatively recently (September, 2016).

Then, Mr. Rose stated "everybody that's a beneficiary of this Estate coming together and signing a written agreement ..." [Trans. P. 25, ln. 20-22] Mr. Rose also stated to this Court, "Every single person who is a beneficiary of this Estate wants my firm to handle this for the reasons I'm about to tell you. And I don't think there's any dispute about it." [Trans. p. 27, ln. 19-23] Both of these statements to the Court are false. As testified by Mr. Rose when he was on the stand, he knew that Eliot Bernstein (Mr. Eliot) was a beneficiary of the Estate of Simon Bernstein, yet he continues his false narrative that all beneficiaries are in agreement with his retention by the Estate of Simon Bernstein. They are not.

Also, in his opening statement, Mr. Rose asserts that the former Curator, Ben Brown, "filed papers" where "he states that he wanted to stay the litigation [Stansbury's] but he states that I (Alan Rose) have "been doing a great job representing him ..." [Trans. P. 27, ln. 9-12] Mr. Rose never represented Ben Brown and no such statement was ever made in Mr. Brown's Motion to Stay or in any other court filing by Mr. Brown.

At page 29, line 8, Mr. Rose also misrepresented to the Court, "So they said the beneficiaries with Mr. O'Connell's consent, want Mr. Rose to become the lawyer and we want Mr. Ted Bernstein to become the administrator ad litem." [Trans. p. 29, ln. 8-11] There is no unanimous consent among the beneficiaries for the retention of Mr. Rose and the appointment of Ted Bernstein as AAL.

Mr. Rose further misstated the historical record of this case when he stated that "Mr. Feaman and Mr. Stansbury filed a motion to require Mr. Brown to intervene in the (Chicago Litigation) case." This is not true. The record reflects that Mr. Stansbury, through counsel, filed a motion requesting the Court to appoint an Administrator ad Litem to intervene, and supplemented his motion by recommending that Mr. Stansbury serve as Administrator ad Litem. The Court instead appointed Mr. Brown. And it is worth noting that Alan Rose, on behalf of Ted Bernstein, opposed the Estate's intervention and now seeks to represent that same Estate which stands to benefit, in the amount of $1.7 million, as a result of the very intervention that Rose opposed.

As discussed further below, Mr. Rose cannot have it both ways. He cannot take a position adverse to the Estate in the pending Chicago action and, at the same time, represent the Estate in another action related to the administration of the Estate.

Rose's Appearance in the Chicago Litigation

When discussing Mr. Rose's appearance in the Chicago litigation, he, again incorrectly, states that all he did at the deposition was "on four occasions, I objected, on what grounds? Privilege." [Trans. p. 39, ln. 18-19] The record shows that Mr. Rose objected or interrupted seven times and also objected to the form of a question and instructed the witness not to answer questions, placing himself directly adverse to the Estate while representing his client, Ted Bernstein, who in the Chicago litigation is suing the Estate of Simon Bernstein. And now, Mr. Rose wants to represent the Estate he opposed. This is unquestionably a clear and obvious conflict of interest.

Duty of Loyalty

The most striking or telling portion of Mr. Rose's opening statement is when he candidly admitted to the Court: **"Now I am rooting like crazy that the Estate loses this case in one sense, because that is what everybody that is a beneficiary of my Trust wants. But I could care less how that turns out, you know, from a legal standpoint."** [Trans. p. 40, ln. 7-11] His statement to the Court is revealing on multiple levels. First, Rose is rooting against the client that he now seeks to represent, or at least could "care less" whether the client prevails or not. The Florida Bar rules for representation of clients clearly require a duty of loyalty to a client, and when an attorney is conflicted by his duty of loyalty to a client, he should not be permitted to represent that client, in this case, the Estate of Simon Bernstein.

Also note that he said, "that's what everybody that is a beneficiary of 'my' Trust wants." Would he be referring to the Trust that is the Plaintiff in the Chicago litigation? Or is he referring to the Trust that is the pourover beneficiary of the Estate of Simon Bernstein? That shows a definite conflict of interest right there because the beneficiaries of the Trust are the

grandchildren of Simon Bernstein. It is implausible that the grandchildren would not want $1.7 million dollars to come into the Estate of which they are the ultimate beneficiaries. The only person that does not want that to happen would be Ted Bernstein and the other adult children of Simon Bernstein, because if Ted and his siblings prevail in Chicago, that $1.7 million will go to Ted Bernstein and his siblings and not to the grandchildren. There is no greater example of a conflict that can be presented before this Court.

The Facts

1. The Chicago litigation. It is undisputed that Ted Bernstein, individually, is a plaintiff in the case of *Simon Bernstein Irrevocable Insurance Trust Dtd 6/21/95 v. Heritage Union Life Insurance Company, et al.*, Case No. 13 CV 3643, U.S. District Court for the Northern District of Illinois (see **Exhibit 1**).

2. It is undisputed that the Estate filed a Motion to Intervene and, in fact, was allowed to intervene and is now a party Defendant in the Chicago litigation and an Intervenor Plaintiff (see **Exhibits 2 through 4**).

3. It is undisputed that Ted Bernstein, individually, is adverse to the Estate of Simon Bernstein in the Chicago litigation because he is a Plaintiff there (**Exhibit 5**). O'Connell confirmed this in his testimony [Trans. p. 73, ln. 23-24; p. 74, ln. 7-12, 19-20, 23-25]

4. It is undisputed that Alan Rose appeared on behalf of Ted Bernstein in the Chicago litigation at Ted Bernstein's deposition (see **Exhibit 6**), and, in his representation of Ted Bernstein, made objections on the record that were adverse to the interests of the Estate of Simon Bernstein (**Exhibit 6**).

Therefore, the question here is not whether there is a conflict, which there clearly is, but whether the conflict can properly be waived by the Estate and still have the representation comply with the Rules of Professional Conduct regulating the members of the Florida bar.

Case Law and Rule Commentary

Florida Bar v. Scott, 39 So.3d 309 (Fla. 2010) is directly on point. There, the Florida Bar held that an attorney violated the Rules of Professional Conduct regarding conflicts of interest by representing multiple clients who all had claims to the same limited funds in a frozen account. **This was a violation even though the client signed a conflict waiver** because the conflicts were directly adverse to the client's interest and could not be waived (citing Florida Bar Rules 4-1.7(a), 4-1.9(a) and 4-1.16(a)(1)).

Here, Alan Rose represents Ted Bernstein in the Chicago litigation, a case in which the Estate of Simon Bernstein is an adverse party, and now seeks to represent the Estate of Simon Bernstein, both of whom have claims to the same limited funds being held in the registry of the court in the Northern District of Illinois. The fact that Mr. Rose seeks to represent the Estate in a separate but related matter does not make the conflict waivable because a lawyer cannot act as an advocate against a client that the lawyer represents in some other matter, even if it is totally unrelated. See, comment to Florida Bar Rule 4-1.7 under the heading "Loyalty to a Client" where it says: "Thus, a lawyer ordinarily may not act as advocate against a person the lawyer represents in some other matter, even if it is wholly unrelated." As applied to this case, where Rose has acted as an advocate against the Estate (the Chicago Litigation), he cannot represent the Estate on some other matter (here, the Stansbury litigation) even if the Stansbury litigation were wholly unrelated, which it is not. Even if the conflict is waivable, this does not change the lawyer's duty of loyalty. In this case, Rose has a duty of loyalty to Ted Bernstein who is a

plaintiff in the Chicago litigation, but now also has a duty of loyalty to the Estate, a competing claimant against Ted Bernstein in the Chicago litigation. The same comment under 4-1.7 states:

> Loyalty to a client is also impaired when a lawyer cannot consider, recommend, or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests.

That is why Stansbury's **Exhibits 7 and 8** are so important to display how and why there is a conflict. **Exhibits 7 and 8** are emails from Chicago Estate counsel to Brian O'Connell, Mr. Stansbury and Stansbury's counsel, Peter Feaman, soliciting comments about the court's ruling and soliciting discussions concerning settlement. With Mr. Rose representing Ted Bernstein in that same action where he is adverse to the Estate, and in numerous other capacities, and now with Mr. Rose representing the Estate, there is clearly the appearance of impropriety where Rose's duty of loyalty is compromised. Mr. O'Connell must tread a very tricky and thin line concerning what to communicate to Mr. Rose in Stansbury's case relating to litigation strategy, and what to communicate to Mr. Stamos in the Chicago litigation relating to strategy and potential settlement. These actions are not separate and distinct. Stansbury's willingness to settle his case for some lesser amount before trial is directly affected by how much money will ultimately be available in the Estate to pay claims. With Ted Bernstein and his "personal counsel" Alan Rose involved, directly or indirectly, in the settlement negotiations in the Chicago litigation, which will determine the amount of money that will eventually fund the Estate, and at the same time his attorney, Alan Rose, is simultaneously representing the Estate in a related matter, the conflict is blatant and mandates disqualification of Alan Rose and his firm.

In the case of *United States v. Culp*, 934 F.Supp. 394 (U.S.D.C.M.D. Fla., 1996), the court stated that:

> Successive representation of clients may give rise to an actual conflict although attorney's simultaneous representation of clients with adverse

> interests is the most egregious form of conflict of interest. (emphasis added)
>
> Citing *ABA Rule of Professional Conduct, Rule 1, comment.*

For Rose to argue that there is no conflict because "he does not appear on the docket sheet" or did not make a formal appearance in the Chicago Litigation, ignores the "elephant in the room." The "elephant in the room" is that Alan Rose represented Ted Bernstein in the Chicago litigation where Ted Bernstein is adverse to the Estate, fighting over $1.7 million dollars. Rose still represents Ted Bernstein in numerous other capacities.

In the case of *Anheuser Busch Companies v. Staples*, 125 So.3d 309 (Fla. 1st DCA, 2013) the plaintiff in a personal injury case sought to disqualify the attorney who represented both the defendant tortfeasor and the plaintiff's employer who had asserted a worker's compensation lien in the case. In upholding disqualification the court held that:

> Under Rule 4-1.7 of the Florida Rules of Professional Conduct...the conduct 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 involved the assertion of a position adverse to respondent's employer.

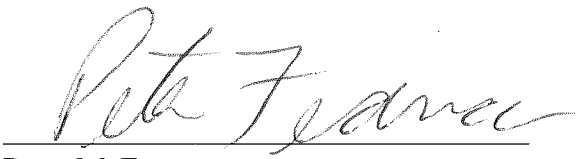
First, it is significant to note that, as in Staples, William Stansbury, the Plaintiff in his case, is seeking to disqualify Alan Rose, defense counsel for the Estate of Simon Bernstein. In *Staples*, Plaintiff was also seeking to disqualify defense counsel. Additionally, Alan Rose's representation of Ted Bernstein in the Chicago litigation has involved the assertion of a position adverse to the Estate of Simon Bernstein. It is unreasonable to believe that that same lawyer and law firm could provide competent and diligent representation to the Estate after giving advice to another client directly adverse to the Estate while both actions are pending.

The Purported Written Waiver by O'Connell is Legally Insufficient

The Personal Representative's statement of waiver by Brian O'Connell is legally insufficient. In the 2nd page in the 3rd paragraph, Mr. O'Connell states that he has "been advised ..." that there is no conflict. Yet, there is no statement that any independent investigation or review was conducted by him to evaluate the existence of a conflict of interest. In fact, there is not even a mention of the Chicago litigation, which is the very litigation that gives rise to the conflict. It is conspicuous by its absence and is completely ignored.

The witness presented no written consents of any of the Trust beneficiaries. Most importantly, the direct beneficiary who normally would give the consent, Ted Bernstein as Successor Trustee to the Simon Bernstein revocable trust, is hopelessly conflicted himself. There is no way that Ted Bernstein can give consent to anything pertaining to the Estate because he is the Plaintiff suing the very Estate which his attorney seeks to represent. Therefore, any consent from the primary beneficiary would be null and void.

It is therefore respectfully requested that the Motion of William Stansbury to Disqualify be granted and that this Court enter an Order disqualifying Alan Rose and the law firm of Mrachek, Fitzgerald, Rose, Konopka, Thomas & Weiss from representing the Estate of Simon Bernstein in the Stansbury action, or in any matter.



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 those listed on the attached service list, on this 7th day of March, 2017.

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