IN THE CIRCUIT COURT OF THE

FIFTEENTH JUDICIAL CIRCUIT

IN AND FOR PALM BEACH COUNTY, FLORIDA

PROBATE DIV. CASE NO. 502012CP004391XXXXNB (IH)

IN RE: ESTATE OF SIMON L. BERNSTEIN,

Deceased.

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**ORDER ON MOTION TO DISQUALIFY ATTORNEY ALAN ROSE AND LAW FIRM**

**AND RELATED MOTIONS**

THIS MATTER having come before this Honorable Court on February 16, 2017, upon Motion of Creditor, William E. Stansbury (“Stansbury”), to Disqualify Alan Rose (“Rose”) and the law firm of Mrachek, Fitzgerald, Rose, Konopka, Thomas & Weiss, P.A. (“Mrachek Fitzgerald”) from representing the Personal Representative of the Estate of Simon L. Bernstein, and the Court, having heard argument of counsel, considered the evidence and reviewed the pertinent Court files,

IT IS ORDERED AND ADJUDGED as follows:

1. This Motion is governed by Rule 4-1.7 of the Rules Regulating the Florida Bar, and prevailing Florida law.
2. There are currently two related legal proceedings arising out of the Estate of Simon Bernstein:

A*. William E. Stansbury v. the Estate of Simon Bernstein, et al.,* Case No. 50 2012 CA 013933 MB AA (Circuit Court, Palm Beach County, Florida);

B. *Simon Bernstein Irrevocable Trust Dtd. 6/21/95, Ted Bernstein, et al. v. Heritage Union Life Insurance Company, et al.,* Case No. 13 CV 3643, United States District Court for the Northern District of Illinois (the “Insurance Litigation”).

**Findings of Fact**

**Pending Florida lawsuit against the Estate of Simon Bernstein**

3. In the case styled *William E. Stansbury v. Estate of Simon Bernstein, et al.,* Case No. 50 2012 CA 013933 MB AA (Circuit Court, Palm Beach County, Florida), Stansbury is seeking to recover money damages against the Estate of Simon Bernstein arising out of a business relationship between Stansbury, Simon Bernstein, Ted Bernstein and others. The damages Stansbury claims are in excess of $2.5 million. This action was pending at the time of Simon Bernstein’s death. Thereafter, the Personal Representative of the Estate of Simon Bernstein was substituted as the real party in interest, and the case is pending.

**Pending Illinois lawsuit against the Estate of Simon Bernstein (the “Insurance Litigation”)**

4. The case styled *Simon Bernstein Irrevocable Insurance Trust Dtd. 6/21/95, Ted Bernstein, et al. v. Heritage Union Life Insurance Company, et al.,* Case No. 13 CV 3643, United States District Court for the Northern District of Illinois (the “Insurance Litigation”), was commenced after Simon Bernstein’s death and seeks to have the Court determine who are the rightful owners of Simon Bernstein’s $1.7 Million Dollar life insurance death benefit proceeds.

5. Ted Bernstein, individually, and as an alleged Trustee of a purported lost trust document, and others, as Plaintiffs, seek to recover the $1.7 Million Dollar life insurance proceeds for the ultimate benefit of Simon Bernstein’s adult children.

6. The Estate of Simon Bernstein has intervened in the Insurance Litigation and seeks to recover the same $1.7 Million Dollar life insurance proceeds. Simon Bernstein’s adult children are not monetary beneficiaries of the Estate.

7. In the Insurance Litigation, Ted Bernstein takes the position that a 1995 Insurance Trust existed, that the beneficiaries of that alleged Insurance Trust are Ted Bernstein and his siblings, Lisa Sue Friedstein, Pamela Beth Simon, Jill Iantoni and Eliot Bernstein (the “Bernstein Children”).

8. In the Insurance Litigation, the Estate of Simon Bernstein, through Brian O’Connell, also seeks to recover the insurance proceeds for the Estate of Simon Bernstein on the grounds that no insurance trust exists, no trust document has been produced, and that the Estate of Simon Bernstein is the rightful beneficiary of the insurance proceeds.

9.This probate matter will remain pending, at least until the two above-mentioned Florida and Illinois cases are resolved.

**Conclusions of Law**

**Alan Rose and the Mrachek Fitzgerald law firm represent Ted Bernstein, individually and in other capacities. Such representation by Rose and the Mrachek Fitzgerald law firm is in direct conflict with the interests of the Estate of Simon Bernstein.**

10. Alan Rose and the Mrachek Fitzgerald law firm represent Ted Bernstein as Trustee of the Simon Trust, the sole residuary beneficiary of the Estate of Simon Bernstein. Additionally, Alan Rose also represents Ted Bernstein as his personal counsel in the Insurance Litigation in Illinois. He made an appearance on behalf of Ted Bernstein at the deposition of Mr. Bernstein taken on May 6, 2015, and made objections of record. Therefore, Alan Rose is representing a Party directly adverse to the Estate of Simon Bernstein.

11. Rule 4-1.7 of the Florida Rules of Professional Conduct governs conflicts of interest involving current clients. Currently, Rose and his law firm represent:

1. Ted Bernstein, individually, in the Insurance Litigation;
2. Ted Bernstein as Trustee of the Simon Bernstein Trust; and
3. The Personal Representative of the Estate of Simon Bernstein.

12. It is clear by the evidence in the record that under Rule 4-1.7(a), a lawyer must not represent a client, in this case the Estate of Simon Bernstein, if the representation of that client will be directly adverse to another client, in this case Ted Bernstein, in the Insurance Litigation. The allegations of the Illinois complaint and other pleadings there and the testimony of Brian O’Connell, Personal Representative of the Estate of Simon L. Bernstein, clearly put Ted Bernstein adverse to the Estate of Simon Bernstein. Therefore, Ted Bernstein’s lawyers are disqualified from representing the Estate of Simon Bernstein under Rule 4-1.7.

**Rose and his law firm’s conflict of interest cannot be waived.**

13. The conflict of interest between Alan Rose and his law firm and their representation of Ted Bernstein, and simultaneously, the interests of the Estate of Simon Bernstein cannot be waived. It is unreasonable for Rose and his firm to believe that they can provide the Estate of Simon Bernstein with competent and diligent representation while they are maintaining a position directly adverse to the Estate in the Illinois proceeding. *See, Anheuser-Busch Companies, Inc. v. Staples,* 125 So. 3d 309, 311 (Fla. 1st DCA 2013); *See also*, *Florida Bar v. Scott*, 39 So. 3d 309 (Fla. 2010).

**Stansbury has standing and the Court has inherent authority to disqualify counsel.**

14. Stansbury is an interested party as he is a creditor of the Estate. Even if Stansbury lacked standing, this Court is obligated to disqualify counsel when a clear conflict of interest presents itself. *See, Kolb v. Levy*, 104 So. 2d 874 (Fla. 3d DCA 1958).

IT IS THEREFORE ORDERED AND ADJUDGED that for all of the foregoing reasons, Stanbury’s Motion to Disqualify is hereby GRANTED. Alan Rose and the law firm of Mrachek, Fitzgerald, Rose, Konopka, Thomas & Weiss, P.A. are hereby disqualified from further representation of the Estate of Simon Bernstein in the case styled *William E. Stansbury v. Ted Bernstein, et al,* Case. No. 50 2012 CA 013933 MB AA, Palm Beach County, Florida, or in any matter involving representation of the Estate.

DONE AND ORDERED in Palm Beach Gardens, Palm Beach County, Florida this \_\_\_ day of \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, 2017.

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ROSEMARIE SCHER, Probate Judge

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