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

CASE NO. 502012CP004391XXXXNBIH
CP - Probate

IN RE:

ESTATE OF SIMON L. BERNSTEIN,

_____/

TRUSTEE'S WRITTEN CLOSING ARGUMENT

Trustee, Ted S. Bernstein ("Trustee"), submits his written closing argument in connection with the evidentiary hearings held on February 16 and March 2, 2017, on:

> *Motion To Vacate In Part The Court's Ruling On September 7, 2016, and/or Any Subsequent Order, Permitting The Estate Of Simon Bernstein To Retain Alan Rose And Page, Mrachek, Fitzgerald, Rose, Konopka, Thomas & Weiss P.A. As Legal Counsel And Motion for Evidentiary Hearing To Determine Whether Rose And Page, Mrachek Are Disqualified From Representing The Estate Due To An Inherent Conflict Of Interest*, filed October 7, 2010 [DE 496]; and
>
> *Motion to Disqualify* etc., filed November 28, 2016 [DE 508].

Respectfully submitted this 9th day of March, 2017.

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TRUSTEE'S CLOSING ARGUMENT OPPOSING DISQUALIFICATION

Reduced to its essence, the issue before this Court is simple. Do we go backwards into the abyss from whence we came in the summer of 2015, or do we continue toward the finish line? The two-day evidentiary hearings were a reminder of how and why we made so little progress in the beginning stages of these cases (at the time they were assigned to Judge Colin).

Briefly, back then Stansbury was a claimant against both Simon's Estate and Shirley's Trust. Eliot was acting as natural guardian of his children, so he had standing in that capacity and arguably had individual standing in all matters because he *was* a named beneficiary under a *prior testamentary plan* that was overhauled in 2012. Ted Bernstein, as Trustee, wanted to simplify matters by validating (i) Simon's July 25, 2012 Will (in which Simon exercised a power of appointment disinheriting Eliot from Shirley's Trust), and (ii) Simon's Amended Trust (under which Eliot is not a beneficiary), by filing Case, No. 502014CP003698. Stansbury and Eliot opposed (and still oppose) Ted at every turn, seeking his removal as Simon's Trustee. What ensued was the classic chicken-or-egg game of which matter should be heard first – little was accomplished at great expense.

When these matters were all reassigned to Judge Phillips, the Trustee submitted a 13-page *Omnibus Status Report* (Ex. 9) prior to an initial status conference in September 2015. The Trustee detailed the background of what had transpired in the three years since Simon's death, and explained Eliot's actions. While Simon was alive, he controlled Eliot by providing a residence and funding all of Eliot's expenses, as explained in the Status Report. (Ex. 9, p.5, n.6) There were no disputes while Simon was alive – Simon was sole beneficiary of Shirley's estate and trust, and controlled Eliot.

Things changed in the summer of 2012. Simon's close friend Stansbury sued Simon, claiming he was cheated or defrauded out of millions in compensation. The issue of who can defend the Estate in that claim is what is being decided by this Court right now.

Then Simon died on September 2012, and with him went all of Eliot's financial support. Eliot was disinherited, and learned his children would inherit less than $1 million total. Eliot believed his parents had $100 million that mysteriously disappeared. Thus began the three years of tortured litigation detailed in the Status Report. The Trustee did not burden this Court with the same Status Report, but now Stansbury has admitted it into evidence for some reason.[1] The Status Report's central message about Eliot's crusade against fraud and corruption in the court system is unchanged:

> His circus will continue until either (i) the money runs out and all the professionals go home; or (ii) the Court stops him by appointing a guardian ad litem ...[Ex 9, p.4]

Judge Phillips resolved the chicken-egg dilemma by setting a trial on the validity of the testamentary documents, at which the Court entered the Final Judgment dated December 16, 2015, upholding the documents. Thereafter, in a series of follow-on hearings, the Court ruled: (i) Eliot lacks individual standing in Simon's ***Trust*** [DE 443]; (ii) Eliot lacks standing and is barred from participating *at all* in Shirley's Estate or Trust cases [DE 154, Case 50214CP003698][2]; (iii) Diana Lewis is appointed as Guardian Ad Litem because Eliot's actions were "adverse and destructive" to his children's interests [DE 443; DEs 161, 175, Case 502014CP003698]; (iv) Eliot's Petition to Remove Ted is dismissed with prejudice for lack of standing [DE 39, Case 2015CO001162], same as the dismissal of Stansbury's similar Petition to remove Ted as Trustee. [DE 244]

The parties have made great progress from the Status Report to Judge Phillips' retirement. After the GAL was appointed, all disputes among the Trust beneficiaries were resolved, as well as a claim against Simon's former lawyers. The Trustee and beneficiaries agreed with the PR on the

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[1] While on the witness stand, the undersigned was criticized for writing Eliot "<u>is not named as a beneficiary of anything</u>."[Ex. 9, p.1] That statement was clarified later: "**Eliot will not inherit any money, and his kids will not inherit enough to sustain his lifestyle.**" [Ex 9, p.13, emphasis in original]

[2] "DE" refers to docket entries in Simon's Estate, Case 502012CP004391, unless otherwise noted.

plan to retain Mrachek and appoint Ted as Administrator to resolve Stansbury's independent action against Simon's Estate. Both the PR and Trustee believe the pending plan – appointment of Ted as Administrator and retention of Mrachek – is in the best interests of the Trusts and everyone involved.

So there is no confusion, and even though Eliot cannot see it that way, ***the Trustee absolutely has been acting in the best interests of his troubled brother Eliot, trying to protect Eliot from himself***. The Trustee also has been trying to protect Eliot's children from Eliot's "destructive" actions, which is why the Trustee sought a GAL in the first place. The matters now before this Court fit into that same goal – preserve as much of the Estate's assets as possible for the beneficiaries.

Only two people – Simon's disgruntled business "partner" Stansbury; and Simon's disgruntled, disinherited son Eliot – are in way of progress. They oppose whatever the Trustee or PR believe is in the best interests of the Estate, despite the obvious cost savings testified to by the PR. Eliot supports Stansbury objections, regardless of what might be in the best interests of his children and regardless of the cost. By September 2015, Eliot already had caused more than $225,000 to be wasted. [Status Report, Ex. 9, p.1] By now, that number is probably close to $1 million.

Where do we go from here? The Court needs to rule on the disqualification issue, and then decide a multitude of simple and straightforward issues. These matters can easily be resolved once the Court decides whether the professionals or the disgruntled claimants are going to run these estates and trusts. Stansbury, a mere claimant at this time, and Eliot, who holds only a tiny beneficial interest,[3] should not dictate the course of these proceedings – who the PR can hire as counsel; whether to settle litigation; etc. The only two people seeking money from the Estate don't care how much is spent, or if it all is spent. Their views should be disregarded or given little weight.

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[3] Eliot is only a *contingent* beneficiary of 1/5 of the TPP. Given the TPP was appraised at $100,000, Eliot's best case is around $20,000, ***if*** Simon's Estate ends up solvent after paying administrative expenses and creditors. That amount is monetarily insignificant and disproportionate to what Eliot is costing the Estate.

On the other hand, the Court should give deference to the business judgment and legal acumen of the PR and the Guardian. The PR is a very senior and experienced attorney, appointed by this Court *at the request of Stansbury and Eliot*. The Guardian is a former circuit judge, with considerable experience in probate, and brings her legal and her common sense to this role.

The PR seeks approval to take reasonable actions which the PR believes are in the best interest of the Estate as a whole, as O'Connell testified:

> A. ... I want to state my position precisely ... Ted Bernstein should be the administrator ad litem to defend that litigation. And then if he chooses, which I expect he would, employ Mr. Rose, and Mr. Rose would operate as his counsel....
>
> Here's why, yes, because of events. You have an apple and an orange with respect to Illinois. Mr. Rose and Ted Bernstein is not going to have any - - doesn't have any involvement in the prosecution by the estate of its position to those insurance proceeds. That's not on the table.
>
> COURT: Say it again, Ted has no involvement?
>
> A. Ted Bernstein and Mr. Rose have no involvement in connection with the estate's position in the Illinois litigation, Your Honor. I am not seeking that. If someone asked me that, I would say absolutely no.

[DE 547:71-73; T. 14:22-15:5, and 15:14-16:1]

The PR confirmed that notwithstanding Ted's involvement in Illinois as the Trustee of a 1995 insurance trust, the PR still believes "it's in the best interests of the estate as a whole" to have Ted as Administrator and Mrachek as counsel:

> A. It's based on maybe three things. It's the prior knowledge and involvement that you had, the amount of money, limited amount of funds that are available in the estate to defend the action, and then a number of the beneficiaries, or call them contingent beneficiaries because they are trust beneficiaries, have requested that we consent to what we have just outlined, ad litem and your representation, those items.

[DE 547:79-80;T.22-23] The PR also confirmed, ***unlike Ted***, he would bill for his time and has no personal knowledge of the relationship between Ted, Simon and Stansbury. [DE 547:84;T. 27:2-14]

Without oversimplifying where we are, the Court's decision is simple and binary – allow the court-appointed professionals to do what they believe is in the best interests of the Estates, or "let the inmates run the asylum.[4] The PR's and the GAL's views, based on legal experienced and objectivity, should be accorded far more weight than destructive voices of Stansbury and Eliot.

STANSBURY'S BASES FOR DISQUALIFICATION ARE MERITLESS

Turning to the law of disqualification, the Trustee has fully briefed the legal issues and cases, in a detailed Response [DE 507]; Supplemental Submission [DE 530]; a detailed proposed Order delivered to the Court in Word format by email on February 23, 2017; and an Amended Motion for Sanctions under section 57.105. [DE 526]

Without repeating that extensive legal briefing, upon which the Trustee continues to rely heavily, the Trustee reminds the Court of what the Bar Rules say: "Resolving questions of conflict of interest is primarily the responsibility of the lawyer undertaking the representation . . . . Where the conflict is such as clearly to call in question ***the fair or efficient administration of justice***, opposing counsel may properly raise the question. Such an objection should be viewed with caution, however, for it can be misused as a technique of harassment." The Preamble to the Rules addresses their scope: "***The rules are designed to provide guidance to lawyers*** and to provide a structure for regulating conduct through disciplinary agencies . . . . ***Furthermore, the purpose of the rules can be subverted when they are invoked by opposing parties as procedural weapons.***"

These rules are important for several reasons. ***First***, the Court should view skeptically Stansbury's true motivation for seeking the disqualification of the Mrachek Firm. ***Second***, it is the undersigned responsibility to resolve conflict questions. The undersigned does not reasonably

[4] This idiom is described as: "the people least capable of running a group or organization are now in charge. Said especially when the result is total chaos or calamity." http://idioms.thefreedictionary.com/the+inmates+are+running+the+asylum.

believe, in the exercise of professional judgment, the representation of Simon's Estate is "directly adverse" to another client, or that there is any risk, let alone a "substantial risk," that the representation of Simon's Estate will be "materially limited" by the undersigned "lawyer's responsibilities" to anyone else or himself.

Third, disqualification of a party's chosen counsel is an extraordinary remedy and should only be resorted to sparingly. *Singer Island, Ltd. v. Budget Constr. Co.*, 714 So. 2d 651, 652 (Fla. 4th DCA 1998). Such a motion should be filed only when there are facts clearly calling into question the lawyer's conflicting duty or loyalty; it is not to be a hope followed by a fishing expedition.

Fourth, Mrachek's retention was approved by the Court, on motion [DE 471, filed August 5, 2016] and notice. In fact, Stansbury's counsel attended the hearing on September 7th, and stated Stansbury could not take a position on "who the estate wants to pick as counsel to defend them in that lawsuit," to which the Court responded: "I agree with you." [DE 535:13-4; T.9-10] An Order [DE 496] was entered. Likewise, Eliot did not object to the retention of Mrachek. The retention motion was filed in Simon's Estate, where Eliot has limited standing; yet he was silent.

Stansbury now moves to vacate the Retention Order on the basis of (i) a deposition in the Illinois case on May 6, 2015, attended by Stansbury and Eliot [Ex. 6]; (ii) various hypothetical concerns about settlement and other issues; and (iii) Eliot's suggestion the Estate should seek contribution from Ted. Eliot did not file any motion to vacate; he's just helping Stansbury.

The Motion Is Untimely and Improper

Stansbury waived any right to seek disqualification by failing to object at the hearing by which time he had learned the facts leading to the alleged conflict. *See Zayas-Bazan v. Marcelin*, 40 So. 3d 870, 872–73 (Fla. 3d DCA 2010); *Rahman v. Jackson*, 992 So.2d 390, 390-91 (Fla. 1st DCA 2008). Stansbury also is not entitled to vacate the Retention Order under Rule 1.540 because the

deposition transcript is ***NOT*** newly discovered evidence *which by due diligence could not have been discovered in time to move for . . . rehearing*. Stansbury knew all of the facts before the September 7th hearing. After all, Stansbury himself was at the deposition, and he signed the release of Ted.

The Motion Is Governed by Rule 4-1.9, and Fails Miserably Under That Rule

The only conflict claimed in the Motions is based upon the Illinois deposition.[5] That deposition occurred on May 6, 2015. [Ex. 6] The evidence shows Mrachek never appeared in the Illinois case , is not counsel of record for any party, and is not on the service list on any of the Illinois court filings in evidence. Regardless of whether Mrachek was involved in the deposition, that involvement was over for 16 months by the time of the hearing and the entry of the Retention Order.

Under Rule 4-1.9, governing conflicts with former clients, Mrachek only be prohibited from representing the Estate if it was *in the same or a substantially related matter*, or if the second matter involved Mrachek using information to the disadvantage of the former client, Ted. Neither of those prohibitions is implicated here. Indeed, the PR testified neither Ted nor Mrachek have any involvement with the estate's position in the Illinois litigation. [DE 547:73; T. 15:14-16:1]

Moreover, the matters are not the same subject matter nor a substantially related matter. *Waldrep v. Waldrep,* 985 So. 2d 700, 702 (Fla. 4th DCA 2008); *Campbell v. Am. Pioneer Sav. Bank,* 565 So. 2d 417, 417 (Fla. 4th DCA 1990). The comments state: "Matters are 'substantially related' for purposes of this rule if they involve the same transaction or legal dispute, or if the current matter would involve the lawyer attacking work that the lawyer performed for the former client." This alleged conflict does not fit that definition.

[5] Importantly, Mrachek's participation at Ted's deposition in the Illinois case is the only "conflict" raised in the Motion to Vacate [DE 496] or the substantially identical Motion to Disqualify. [DE 508]

The Motion Also Fails Miserably Under Rule 4-1.7

To the extent there is any issue of concurrently representing two existing clients with conflicting claims or issues, that would be governed by Rule 4-1.7, which only prohibits representation that is "directly adverse to another client" or "will be materially limited by the lawyer's responsibilities to another client." The PR confirmed there is no direct adversity (see PRs testimony, including on page 4 above; Trustee Ex. 1). Ted and Mrachek play no role in representing the Estate in Illinois. Ted's sole involvement is as Trustee of a 1995 Trust, which Simon allowed in Art. IV.J on page 18 of his 2012 Florida Trust. In what Mrachek would be handling vis-a-vis Stansbury, Ted's interests are fully aligned with the Estate – defeat Stansbury's claims and recover the Estate's legal fees from Stansbury.

The original claimed conflict based on the Illinois deposition.

The assertion that defending a deposition makes counsel adverse to everyone else in that case is absurd. The deposition was being taken not only by Estate's Illinois counsel, but also Eliot. At that time, on May 6, 2015, there were numerous pending motions to remove Ted or object to his actions as Trustee in this. Ted had the right, if not a duty to the beneficiaries of the Simon Trust, to have counsel at this deposition to protect Ted as Trustee and the Trust itself. Moreover, all Mrachek did at the deposition was object on four occasions, primarily with respect to privileged matters. (Ex. 6: pages 63-64, 70, 73, 87) The highlighted part of the transcript shows there was no interference with the deposition and or adversity/hostility toward the Estate's position. Mrachek simply acted to protect Ted's privilege with his former lawyer, which was proper and critical at the time given the issues remaining to be tried in this Court. No one complained about the objections during the deposition; and there is no suggestion the federal judge in Illinois was asked to overrule any of the objections.

Stansbury's pivot during the hearing.

Knowing his claims of conflict were frivolous, Stansbury seized on an even more frivolous issue raised by Eliot – that the Estate should sue Ted for "shared liability" or "apportionment of liability" under Florida law. Eliot was mistaken on the law, but Stansbury still seized on these questions and proceeded to advance Eliot's argument. Stansbury did so despite knowing he had released Ted and had no negligence claim.[6] As a matter of law, contribution is not available for claims for intentional torts, or for breach of contract/quasi-contract (unjust enrichment).

THE PR WAIVED ANY CONFLICT, REAL OR IMAGINED

Both Rules 4-1.9 and 4-1.7 permit the Estate to waive any conflict. Here, the PR, Brian O'Connell, has consented to Mrachek's representation in the Stansbury case. (Trustee's Exhibit "1") Each element of Rule 4-1.7(b) is met: (1) the undersigned reasonably believes he can provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; (3) the representation does not involve the asserting adverse position in the same proceeding; and (4) each affected client has given informed consent.

Assuming a waiver even was needed, which it was not, Stansbury has only seemingly challenged the requirement that representation not be prohibited by law, sometimes referred to as having a non-waiveable conflict. Non-waiveable conflicts are rare and based upon extreme facts not present here: counsel simultaneously representing two different parties with directly adverse interests; counsel in a second proceeding forced to take positions antagonistic or adverse to positions taken in the first litigation; substantial discrepancy in the parties' testimony or incompatibility in their positions. *See, e.g.*, notes to Rule 4-1.7.

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[6] Stansbury's counsel acknowledged during the evidentiary hearing Stansbury gave a general release to Ted. Florida Statutes section 768.31(2) and (5)(b) prohibit contribution claims *by* an intentional tortfeasor or *against* a joint tortfeasor who has settled and been given a general release.

None of the few Stansbury cases has cited are anywhere close to the facts here.[7] Moreover, the notes to Rule 4-1.7 expressly acknowledge "circumstances in which a lawyer may act as advocate against a client ... in an ***unrelated matter*** if doing so will ***not adversely affect the lawyer's relationship with the enterprise or conduct of the suit*** and if ***both clients consent upon consultation***." That clearly would apply here.

The PR testified there are no conflicts, and that he believed waiving any such potential conflict would be in the best interests of the Estate. A waiver improves the chances of prevailing in the Stansbury litigation while reducing the Estate's expenses. Mrachek's representation would not impermissibly conflict with the Trustee, who is the Estate's sole beneficiary. Both PR and Trustee have the same goals as to Stansbury – minimize the Estate's expenses and exposure. Both have the consent of the indirect Trust beneficiaries and the GAL. Stansbury and his lawyer, who are far from disinterested, have the opposite goals.

CONCLUSION

The Court should deny Stansbury's Motion to Vacate and his Motion to Disqualify. Both Motions were extremely weak and lacked any merit, even less so after the PR's formal written Waiver was provided to Stansbury, who refused to reconsider. At a later hearing, the Court will be asked to award attorneys' fees as a sanctions against Stansbury and his counsel [DE 526], so the grandchildren's trust do not end up the big losers here as a result of Stansbury's litigation tactics.

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[7] *E.g., Anheuser-Busch Companies, Inc. v. Staples*, 125 So. 3d 309 (Fla. 1st DCA 2013)(lawyer appeared in one case for two different clients, and would be taking two different positions – arguing on behalf of defendant there was no negligence, and on behalf of lienor that there was negligence. In a 2-1 decision, the court ruled this was a nonwaivable and disqualifying conflict); *Bedoya v. Aventura Limousine & Transportation Service, Inc.*, No. 11-24432-CIV, 2012 WL 1534488 (S.D. Fla. Apr. 30, 2012)(lawyer would use former clients' confidential information and attack his previous work.); *Milton Carpter Center, Inc. v. Cincinnati Ins. Co.*, Case No. 3:13cv624/MCR/CJK, 2014 WL 12482616 (N.D. Fla. May 5, 2014)(party's counsel could not simultaneously serve as neutral appraiser for both parties).

CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing has been furnished to parties listed on attached Service List by: ☐ Facsimile **and** U.S. Mail; ☐ U.S. Mail; ■ E-mail Electronic Transmission; ☐ FedEx; ☐ Hand Delivery this 9th day of March, 2017.

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