No. 12-55464

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HARTFORD LIFE AND ANNUITY INSURANCE COMPANY,

Plaintiff-Appellant,

vs.

DORIS BARNES FAMILY 2008 IRREVOCABLE TRUST, and DIANE GRIMMIG as Trustee of the Doris Barnes 2008 Irrevocable Trust,

Defendants-Appellees.

On Appeal From The United States District Court
For The Central District Of California
Honorable Philip S. Gutierrez
Civil Case No. 2:10-cv-07560- PSG

BRIEF OF AMICUS CURIAE INSTITUTIONAL LIFE MARKETS ASSOCIATION IN SUPPORT OF DEFENDANTS-APPELLEES AND URGING AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Amicus curiae Institutional Life Markets Association is not a publicly traded corporation. There is no parent corporation or other publicly held corporation that owns 10% or more of the amicus.

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Institutional Life Markets Association ("ILMA") is a not-for-profit trade association focused on the secondary market for life insurance. ILMA members seek to educate consumers that their life insurance is a valuable asset, expand consumer choice in life insurance, and support the responsible growth and regulation of the life settlement industry.

No person or entity, other than amicus curiae, and its members, made any monetary contribution to the preparation or submission of this brief. No counsel for a party authored this brief in whole or in part. All parties have consented to the filing of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

A month before plaintiff and appellant Hartford Life Insurance & Annuity Company ("Hartford") filed its opening brief, this Court issued a decision in *Wells Fargo Bank, N.A. v. Am. Nat'l Ins. Co*., 2012 WL 3245403, at *1 (9th Cir. Aug. 10, 2012) ("Cabal") which is fatal to Hartford's appeal. ILMA also appeared as an amicus in that case and submitted a brief regarding the important public policy concerns at stake. The Court agreed with the position urged by ILMA. Now, in this appeal, Hartford seeks to undo *Cabal* and undermine the significant benefits of that decision to California insurance consumers.

In *Cabal*, this Court held that, under California's insurable interest law in effect prior to a 2009 amendment[1], a life insurance policy has an insurable interest and is valid when the policy is issued to an insurance trust settled by the insured and whose beneficiary is the insured's spouse, and that whether the insured and his spouse intended to sell the policy or the trust from the outset was *irrelevant*. This Court unequivocally rejected the argument made by the insurer American National Insurance Company ("ANICO") – represented by the same counsel as Hartford – that the policy lacked an insurable interest, or was an illegal wagering contract, because the insured and his wife had planned from the outset to sell the beneficial interest in the trust to a specific investor. It explained: "[U]nder California law, after a policy takes effect, no insurable interest is required and the policy may therefore be transferred to any other person", and, therefore "it ma[kes] no difference that the [insured and his family] always intended to transfer [the trust interest to the investor]." *Am. Nat'l Ins. Co.*, 2012 WL 3245403, at *1.

In this case, as in *Cabal*, the Policy was issued to a trust settled by the insured and whose beneficiary was the insured's spouse. The Policy is therefore indisputably valid under California law, and it is irrelevant whether the insured, Ms. Barnes, or her husband planned from the outset to sell their

[1] The current case also involves a transaction prior to the 2009 amendment.

interest in the Barnes Trust to an investor. Thus, this Court's *Cabal* decision – which correctly applied the plain language of California's Insurance Code[2] – is dispositive of Hartford's appeal.

Hartford is smart enough to know that directly asking the Court to reconsider its recent *Cabal* decision would be a fools-errand. Therefore, although the *Cabal* decision is directly on point and defeats its appeal, Hartford has the audacity to relegate the decision to a passing footnote in its brief and pretend that its appeal is somehow raising new and distinct issues. Specifically, Hartford argues that: (1) even if there was an insurable interest, the policy can still be a prohibited "wagering" contract; (2) because Ms. Barnes was not as wealthy as stated in the application, there was no insurable interest; (3) even if there was an insurable interest, the trust itself is invalid; and (4) even though the actual sale took place after the policy was issued, there is an issue of fact as to when the "agreement" was reached. Hartford claims that these are new arguments, which this Court has not previously considered. That is not true.

Most of these arguments were made by Hartford's attorneys in the *Cabal*

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[2] A California state appellate court (also in a case argued by Hartford's counsel) has likewise rejected an insurer's argument that a policy violates California's insurable interest law if the insured procured the policy as part of a plan to sell the policy to an investor. *Lincoln Life & Annuity Co. of N.Y. v. Berck*, 2011 WL 1878855, at *7 (Cal. Ct. App. May 17, 2011) ("Berck").

case, *and were rejected*. The others have been previously rejected in other Ninth Circuit cases. None are new. Hartford's brief simply repackages the same arguments that were rejected in *Cabal*, as well as in other Ninth Circuit cases, hoping that if it asks the same question enough times, with as many clever re-phrasings and variations, it will eventually get the answer it wants. The Court should not be fooled. Hartford's attempts to get a second bite at the insurable interest apple (and third, fourth, and fifth bites) by re-characterizing its arguments fails.

In its appeal, Hartford is after a much bigger target than the single policy at issue in this case. Rather, Hartford is seeking to undermine the stability the *Cabal* decision has provided to the secondary market for life insurance in California and reverse the pro-consumer benefits of that decision to California's citizens.

The multi-billion dollar secondary market provides consumers with valuable options to maximize the value of life insurance policies they no longer need or want or can no longer afford. Thanks to the secondary market, but much to Hartford's chagrin, insurance consumers can sell their unwanted policies on the secondary market and receive substantial and fair market value for their property, instead of being forced to lapse or surrender their unwanted policies to the insurers for little or no cash surrender value.

Because of the bright-line standard provided in the *Cabal* decision – that a policy is valid as long as an insurable interest existed on day one – this market can continue to operate efficiently. Potential buyers know that a policy is valid as long as it was initially issued to the insured or a family member, and that the policy cannot be challenged based on the insured's intentions or plan. This stability, in turn, increases the demand for policies and provides consumers with greater options.

If the insurer had prevailed in *Cabal*, and life insurance policies could be challenged by insurers based on a retrospective examination of the insured's subjective intentions in procuring the policy, the property rights of California consumers would have been substantially diminished, and the secondary market for life insurance policies in California would have been subjected to significant uncertainty. This Court avoided these serious public policy concerns by correctly applying California's Insurance Code and rejecting the insurer's arguments in *Cabal*. The Court should do the same here.

BACKGROUND REGARDING THE SECONDARY MARKET FOR LIFE INSURANCE

Hartford is not only seeking to have this Court reject its own prior decisions and a decision by a California appellate court, but it is asking it do so in a vacuum, without information about the market which would be harmed by such a ruling. In contrast, ILMA believes that a historical perspective regarding the secondary market will be helpful to the Court in addressing the arguments made by Hartford, and therefore provides the following brief summary of the market.

The secondary market for life insurance or "the life settlement market" is a multi-billion dollar industry. Indeed, in a single year, as much as $9 billion to $12 billion in policies are sold by their owners to investors. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-775, LIFE INSURANCE SETTLEMENTS: REGULATORY INCONSISTENCIES MAY POSE A NUMBER OF CHALLENGES (July 2010) (the "GAO Report") at Introduction, "What GAO Found."

The modern secondary market developed as a response to the imbalance of power between insurers and policy owners. Historically, a policy owner who no longer wished to continue paying premiums on a policy had few options because life insurance carriers "wielded monopsony power" over the repurchase of their own policies. Neil A. Doherty & Hal J. Singer, *The Benefits of a Secondary Market For Life Insurance Policies*, Wharton Fin. Insts. Ctr., Oct. 14, 2002; ("Doherty & Singer"); Ron Panko, *A Matter of Trust: Financial Planning: Insurance Market*, A.M. BestWire, Dec. 1, 2002, at 22.

This meant that a policyholder who no longer wished to pay premiums for their policy had only two choices: (1) allow the policy to lapse and receive nothing or (2) surrender their policy for a nominal cash surrender value from the insurer (who had no competitors to compete with on this price). Insurers profited tremendously from their monopsony position as they would never have to pay out a death benefit on lapsed or surrendered policies, despite having collected substantial premiums for them. *See Geoff Chaplin et al., Life Settlements and Longevity Structures: Pricing and Risk Management* at 13-14 (John Wiley & Sons 2009).

The secondary market corrects this imbalance of power by providing buyers for unwanted policies as an alternative to compete with insurers and thus provide policy owners with a fair market value for their unwanted policies. (GAO Report, at Briefing to Congressional Staff, 17).

Investors, in turn, often choose life settlements to diversify their portfolios because they view life settlement returns as not being correlated with returns on equities and other traditional investments. (GAO Report, at Briefing to Congressional Staff, 38). This has made life settlements an especially attractive investment to pension funds and retirees looking to stabilize their portfolios and protect their savings against major upheavals in the stock market.

The development of the secondary market has been of great benefit to consumers as policy owners receive significantly more money from a life settlement than they would receive from insurers for the surrender value of the policy. Indeed, policy owners generally receive eight to ten times the cash surrender value of the policies they sell. (GAO Report, at Appendix III, page 112). For all of their rhetoric regarding the life settlement market, insurers cannot deny that their policyholders are far better off with the life settlement market in existence.

This background regarding life settlements helps explain why insurance companies are proving to be so unwilling to accept the decisions by this Court and the California appellate court, which have protected policyholders' property rights and ensured that the California life settlement market will continue to operate efficiently. An efficient and consumer-friendly market is the last thing they want.

ARGUMENT

A. Hartford's Appeal Is Defeated By the *Cabal* Decision

1. The *Cabal* Decision Is On All Fours With The Issues In This Case

Although Hartford tries mightily to pretend otherwise, in the *Cabal* case, this Court was faced with the *same* relevant factual scenario and *same* legal question presented here, and issued a decision fatal to Hartford's appeal.

In *Cabal*, a life insurance policy was issued to a trust settled by the insured, Mr. Cabal, whose wife was the beneficiary of the trust. *Am. Nat'l Ins.*

Co., 2012 WL 3245403, at *1. Shortly after the policy was issued, Mr. Cabal and his wife sold the beneficial interest in the trust to an investor. *Id.*

ANICO argued that the policy in that case lacked an insurable interest and was an illegal wagering contract, and that the trust was a "sham", under California law because the insured and his wife planned to sell their interest in the trust to the investor from the outset. *See* Appellant's Opening Brief in *Wells Fargo Bank, N.A. v. Am. Nat'l Ins. Co.*, Ninth Circuit Case Nos. 11-55366, 11-55665 (Nov. 18, 2011) (Docket # 14-1) ("ANICO's Brief").[3]

This Court squarely rejected ANICO's (now Hartford's) arguments as being contrary to California law. *Am. Nat'l Ins. Co*., 2012 WL 3245403, at *1 ("it ma[kes] no difference that the [insured and his family] always intended to transfer [the trust interest to the investor].").

This Court's decision in *Cabal* applied the relevant statutes' plain meaning. At the relevant time, Cal Ins. Code § 10110.1(e) (now subsection g) provided that a policy is valid where "the person applying for the insurance has an insurable interest in the individual insured at the time of the application." Cal. Ins. Code § 286 provides: "an interest in the life or health of a person insured must exist when the insurance takes effect, but need not exist thereafter

[3] ILMA respectfully requests that the Court take judicial notice of the brief ANICO filed before this Court.

or when the loss occurs." Accordingly, Cal. Ins. Code § 10130, in turn, provides that a policy is freely alienable and may "pass by transfer, will or succession to any person, whether or not the transferee has an insurable interest." Thus, as this Court found, an insurable interest need only exist at policy inception, not thereafter.

Section 10110.1(b) of the Insurance Code provides that: "An individual has an unlimited insurable interest in his or her own life, health, and bodily safety and may lawfully take out a policy of insurance on his or her own life, health, or bodily safety and have the policy made payable to whomsoever he or she pleases, regardless of whether the beneficiary designated has an insurable interest." Applying this unambiguous statutory language, this Court determined that the policy at issue in *Cabal* was supported by a valid insurable interest because it had been issued to a trust settled by the insured and whose initial beneficiary was the insured's spouse, and that the insured's plan to later sell the trust interest to the investor was legally irrelevant.

As this Court noted in *Cabal*, the one state appellate court to consider the issue reached the same conclusion as this Court – the fact that the insured plans to sell the policy to an investor is irrelevant and does not mean the policy lacks an insurable interest. *See Berck*, 2011 WL 1878855, at *7.

The District Court's decision in this case is wholly in accord with the decisions in *Cabal* and *Berck*. Because the Policy was issued to a trust settled by Ms. Barnes, and whose beneficiary was her husband, the Policy indisputably complied with California's insurable interest law. That Ms. Barnes and her husband intended to sell the trust interest to an investor was, as the District Court correctly found, irrelevant.

2. The *Cabal* Decision Was Supported By Strong Public Policy, Which Hartford Now Seeks to Undermine

This Court correctly interpreted California's insurable interest statute as creating a bright line test. On day one, was there an insurable interest? No other factors need to be considered. By removing the parties' "intent" from the equation, and refusing to accept insurers' invitation to "look behind the transaction," the Court gave the relevant statutes their plan meaning and ensured that the insurable interest standard would be easy for courts to apply and for consumers to understand. This interpretation benefits consumers. In contrast, the standard argued for by ANICO in that case, and by Hartford here – that policies can be struck down based on the parties' intention – would harm consumers, damage the secondary market, and encourage insurer misconduct.

The Cabal Decision Provides Certainty and Stability to the Market

Like all markets, the life settlement market depends on clarity and certainty in order to function efficiently. The bright line standard applied in

Cabal provides such certainty. If an investor purchased a policy from an insured or the insured's family member, or a policy which was originally purchased by the insured or the insured's family member (but thereafter sold to a different investor), the investor knows that the policy is enforceable and can accurately assess its value. This allows the secondary market for policies to function efficiently and lends certainty to secondary market transactions.

In contrast, the intent-based rule argued for by ANICO and now again by Hartford (though in various different guises) would wreak havoc in the secondary market. Subjecting life settlements to challenge based on the insured's intentions in initially procuring the policy would create an unclear standard and preclude investors from having certainty regarding their assets. A standard based on the insured's "intent" would also be unfair to investors because insurers often raise insurable interest challenges only at the time a claim is made (*i.e.*, after the insured is dead), which would force the investor to defend the insured's intent without the best evidence of the insured's intent.

The Cabal Decision Protects Consumer Rights

Perhaps most importantly, the *Cabal* decision protects the interest of the very persons insurable interest laws are supposed to protect in the first place – insureds – while the rule argued for by the insurers harms them. The Supreme Court recognized a century ago that one of the most important aspects of a life insurance policy is the right to sell it for consideration. *See Grigsby v. Russell*, 222 U.S. 149, 156 (1911) ("To deny the right to sell except to persons having [an insurable interest] is to diminish appreciably the value of the contract in the owner's hands."). The *Cabal* decision protects this significant property right, whereas an intent-based standard turns insureds into wrongdoers for intending to exercise one of their basic policy rights.

Making matters worse, any intent-based standard distinguishes one consumer from another on completely arbitrary grounds. Even insurers acknowledge that a person who already owns a policy can sell it if he or she forms the intent to sell after the policy was issued. It makes no sense, then, for a policy purchased by the same insured to be invalid simply because the insured formed the intent to sell it before the policy was issued, rather than after the policy was issued.

Take the following example:

> A wife purchases a life insurance policy on her life and designates her husband as the beneficiary. A few days after purchasing the policy, the husband is diagnosed with cancer. The wife decides to sell the policy and uses the proceeds for the husband's medical care.

Even the insurers concede this policy is valid. Now take the same scenario, with one difference:

> The husband is diagnosed with cancer before the wife purchased the policy. The wife is concerned that the medical expenses will

deplete the family's savings but learns that she can obtain a life insurance policy and then sell it to help pay for the expenses.

In *Cabal*, ANICO argued that such a policy would be invalid because the insured planned to sell it from the beginning. However, the *Cabal* decision appropriately recognized that this policy, like the first hypothetical, is also valid. That decision protects consumer rights and recognizes that an arbitrary rule, which artificially distinguishes between these two types of consumers, would serve no purpose except to unjustly enrich insurers.

An intent-based rule would not only limit the rights of insureds who wish to procure policies with the hope of selling them in the secondary market, but would harm *all* insureds by severely limiting their options after they purchase a policy. If a policy could be rescinded based on an insured's intent to sell the policy, insurable interest challenges would significantly increase. This state of affairs would decrease the demand for, and value of, policies on the secondary market, as investors would have to take into account the increased risk of legal challenges in determining whether to purchase, and how much to pay for, policies. Ultimately, insureds who need to sell their policies for liquidity, to pay medical bills, or for any other number of important reasons, are the ones who would suffer the most, as they would have fewer options for selling policies and would receive less value for their policies.

<u>The Cabal Decision Protects Against Insurer Misconduct</u>

In contrast to consumers, and buyers of policies on the secondary market, insurers would benefit greatly under a regime in which policies could be challenged based on the insured's intent in procuring the policy.

An intent-based standard would create an incentive for insurers to issue policies of questionable validity and then decide later, after collecting premiums for many years, to deny coverage and attempt to confiscate the premiums paid for the policy. They refer to this as the "Insurable Interest Two Step." "First, sell your customer an insurance contract with as much willful indifference to insurable interest requirements as doctrinal ambiguity will allow. Second, if the insured event comes to pass, claim that the contract had no insurable interest after all and escape obligation for payment." Jacob Loshin, *Insurance Law's Hapless Busybody: A Case Against The Insurable Interest Requirement*, 117 Yale L.J. 474 (Dec. 2007). Further, insurers would have every incentive to ultimately challenge policies for lack of insurable interest. If they win, they avoid having to pay the death benefit, and if they lose, they simply have to honor their contractual obligation. Challenging a policy is thus a no risk proposition. And, even when insurers "lose," they still win in another respect. With every challenge to a policy, uncertainty is increased and the insurers cause the value of policies on the secondary market to decrease.

Exacerbating this problem, the ambiguity of any intent-based rule places all the costs of a potentially invalid policy on the consumer. If a policyholder wants any chance to collect on the policy, it must continue to pay premiums until the insured dies, only then to find out if the insurer will honor the policy. Until the insured dies, the insurer, in contrast, receives all the monetary benefit under the policy. Only after the insured dies is the insurer forced to decide whether to honor the policy. Making matters worse, insurers typically argue that they are not obligated to return premiums when a policy is void for lack of insurable interest, thus heightening the risk to the policyholder.

Insurers are the only ones who would benefit from a standard under which policies can be challenged based on the insured's intention or plan, as they can be expected to use the uncertainty of such a standard to more freely deny claims and challenge policies. Because insurable interest laws are not created to protect insurers, an insurable interest standard that benefits only them should be viewed with great skepticism to say the least.

The *Cabal* decision protects consumer interests and property rights, ensures certainty and efficiency in the secondary market, and discourages misconduct by insurers. Reconsidering or limiting that well-reasoned decision, as Hartford seeks to have done here, would have the exact opposite result.

B. Hartford's Efforts to Avoid the *Cabal* Decision All Fail

Rather than admit that it is asking the Court to reconsider the *Cabal* decision – which is fatal to Hartford's appeal – Hartford attempts to portray its appeal as raising a host of new issues that have not been considered previously. However, the "new" arguments raised by Hartford have been raised before (often by the same attorneys representing Hartford) and have been *rejected*. They should be rejected once again.

1. Hartford Misinterprets ***Section 252's*** Prohibition Against "Wagering"

Hartford first argues that the District Court performed an "incomplete and faulty assessment of California's Insurance Code" by purportedly failing to give effect to Section 252 of the Insurance Code, which prohibits "a policy executed by way of gaming or wagering." (Hartford Br. at 24-25). In short, Hartford argues that even if a policy complies with California's insurable interest requirement (as the Policy did), the policy can nevertheless still be an illegal wagering contract under Section 252.

However, this Court has already rejected that exact argument, explaining that whether a policy is a prohibited wagering contract depends entirely on whether an insurable interest existed at policy inception. As this Court explained in *Paul Revere Life Ins. Co. v. Fima*:

> [The insurer] argues that [the policy] is void because it is a gaming or wagering contract. In order for this argument to succeed, [the insured] must lack an insurable interest in his life and health. Because [the insured] has an insurable interest as a matter of law under section 10110, the policy was not void.
>
> 105 F.3d 490, 493 (9th Cir. 1997).

Ignoring this Court's decision in *Paul Revere Life Ins. Co.*, the insurer in *Cabal* – represented by Hartford's counsel – also relied heavily on Section 252 in arguing that the District Court had erred in finding an insurable interest. (*See* ANICO's Brief at 19-20.) Once again, this Court rejected this argument and correctly found that if an insurable interest exists at policy inception, then the policy is not void as a "wagering" contract.

As this Court recognized in *Cabal* and *Paul Revere Ins. Co.*, determining whether a policy is a prohibited "wagering" contract does not, as Hartford suggests, require the court to make an abstract determination of whether the policy could somehow be characterized as "wagering". Instead, in order to determine if a policy runs afoul of Section 252, the court simply needs to determine if the policy complies with California's insurable interest test.

Hartford's heated rhetoric regarding "wagering" not only misses the point – it also proves too much. Under Hartford's proposed definition, any contract in which one party stands to benefit from the insured's early death is a "wagering" contract. The problem is that this definition – which Hartford proposes without any statutory authority in its support – would render invalid countless indisputably permissible transactions.

To begin with, all life insurance is a "wager" in the colloquial sense. *See, e.g.*, Roy Kreitner, *Speculations of Contract, or How Contract Law Stopped Worrying and Learned to Love Risk*, 100 Colum. L. Rev. 1096, 1113-14 (May 2000). The price of a life insurance policy is set based on the insured's life expectancy. If an insured outlives his or her life expectancy, the insurer "wins" the bet.

Even more problematic for Hartford's definition of a prohibited "wager" is the other primary product sold by life insurance companies: namely, annuities. In an annuity, the insurer and the insured make the opposite "bet" as they do in a life insurance policy. The insured pays a sum of money up-front, and, in exchange, the insurer pays a fixed periodic income for the remainder of the insured's life. If the insured outlives his or her life expectancy, they "win." For the insurer to "win," the insured must die sooner than his or her life expectancy. When an insurer issues an annuity, they are thus quite literally betting that the insured will die sooner than the insured believes. Despite the fact that life insurers have "bet" billions of dollars on insureds' early deaths – through annuities – no life insurance company would contend that an annuity is a prohibited wagering contract under Section 252. And they are right.

Along with outlawing annuities, Hartford's definition of a "wagering" contract would also outlaw *all* life settlements, even though many insurers have purchased life settlements and all acknowledge that life settlements are legal. Regardless of when a policy is purchased on the secondary market – the day it is issued, a week later, a month later, a year later or ten years later – and regardless of when the insured formed the intention to sell or reached an agreement to sell the policy – the same economic motive is at play for the buyer. The buyer is paying the insured a sum of money for the policy, and the buyer's profit, if any, will be determined by whether the insured deceases before his or her life expectancy. The life settlement buyer is thus making the same "bet" the insurer makes when it sells an annuity. And, like annuities, life settlements are indisputably permissible under California law.

These examples highlight why Hartford's suggestion that the Court can strike down a transaction under Section 252 through abstract consideration of whether the transaction involves a "wager" – rather than consideration of whether the Insurance Code permits the transaction – fails. Under Hartford's test, annuities, life settlements, and even life insurance itself, would be impermissible. This is why Section 252 cannot be read in isolation, and why this Court has now held on two occasions that a life insurance policy is not a prohibited "wager" under Section 252, so long as the policy complied with California's insurable interest law.

2. Hartford Misinterprets Section 250 In Arguing Ms. Barnes Was Not Insurable

Relying on an erroneous interpretation of Section 250 of the Insurance Code, Hartford also argues that the Policy lacked an insurable interest or was a prohibited wagering contract because Ms. Barnes was not worth as much money as stated in the application. Thus, Hartford claims her family would not have suffered an economic loss at her death and that she was therefore not insurable for the full amount of coverage provided in the Policy. This argument is contrary to California law and has previously been rejected.

In *Paul Revere Life Ins. Co.*, the insured had misrepresented his income in an application for a disability policy, claiming an income of $105,000 when his actual income was $21,603. 105 F.3d at 491-92. However, like here, the insurer's fraud claim was barred by the two-year contestability period required by California law. Hoping to get around this bar, the insurer, as Hartford tries to do here, argued that there was no insurable interest or that the policy was an illegal wagering contract because the policy provided coverage far in excess of any potential loss actually suffered by the insured. This Court squarely rejected that argument as contrary to California law.

It explained:

> This argument requires the court to reject the clear statutory language providing that the extent of an insured's insurable interest in a life and disability insurance policy is determined by the terms of the insurance contract itself. *See* Cal. Ins. Code §§ 10110, 10110.1 & 10111[4] (West 1993 & Supp. 1996). [The insured] had an insurable interest to the extent provided by the 1988 policy.

Id. at 493.

As this Court recognized in *Paul Revere Life Ins. Co.*, Hartford's argument fundamentally misunderstands the nature of life insurance, as compared to property insurance, and the Insurance Code's differing provisions governing the two types of insurance. Unlike many other types of insurance, life insurance "is not a contract of indemnity, but is a contract to pay to the beneficiary a certain sum of money in the event of death." *Keckley v. Coshocton Glass Co.*, 99 N.E. 299, 300 (Ohio 1912).

This critical distinction between life insurance and many other types of insurance is why the Insurance Code (1) explicitly states that an insured can procure a life insurance policy for the benefit of "whomsoever he or she pleases, regardless of whether the beneficiary designated has an insurable interest" (Cal. Ins. Code § 10110.1); (2) specifies in no uncertain terms that an

[4] "In life or disability insurance, the only measure of liability and damage is the sum or sums payable in the manner and at the times as provided in the policy to the person entitled thereto." Cal Ins. Code § 10111.

insured has an *unlimited* insurable interest in his or her own life (*id.*); and (3) provides that the measure of insurable interest in a life or disability policy is the amount of coverage provided in the policy (Cal. Ins. Code § 10111).

If Hartford's argument were correct, and life insurance policies were only valid if they indemnified the beneficiary for an economic loss (equal to the value of the policy), these explicit statutory provisions would be rendered meaningless. An insured would *not* be entitled to name whomever he or she pleases as a beneficiary but rather would only be permitted to name beneficiaries who would suffer an economic loss at the insured's death. The insured would *not* have an "unlimited" insurable interest in his or her own life but would only have an insurable interest commensurate with their financial status.

Under Hartford's test, insureds would be unable to (1) name a charity as the beneficiary of a policy, as the charity suffers no loss if the insured dies or (2) name an adult child as a beneficiary unless the child was financially dependent on the insured. Further, it would encourage insurer misconduct by allowing insurers to issue large sums of insurance on a person's life (and thus earn larger premiums) only to later, when a claim is submitted, argue that the insured was not really insurable for that large an amount. California's clear statutory scheme, as applied in *Paul Revere Life Ins. Co.*, flatly rejects

Hartford's "indemnity" requirement in the context of life insurance, and thus avoids these public policy concerns.

3. Just As in *Cabal*, Hartford Seeks to Have the Court Ignore The Actual Transaction

Even though, as Defendants demonstrate, the actual sale of the beneficial interest in the Barnes Trust took place *after* the Policy was issued, Hartford argues that the Court should have nevertheless allowed it to try to convince a jury that the sale "really" took place earlier (*i.e.*, that the eventual sale was a formality because the parties planned from the beginning that Ms. Barnes would later sell). Hartford's suggestion that the Court can disregard when the sale actually took place – when a binding contract was entered – and find an insurable interest violation based on the parties' intent or plan to later enter into an agreement is precisely the argument this Court rejected in *Cabal*. *Am. Nat'l Ins. Co*., 2012 WL 3245403, at *1 ("it made no difference that the Cabals always intended to transfer Thelma Cabal's interest to Accumulation Trust.")

As this Court recognized in *Cabal*, Hartford's argument fails because it ignores the economic reality of the transaction. It is undisputed that if Ms. Barnes had died the day the Policy was issued, her family, not an investor, would have been entitled to the Policy proceeds. Thus, an insurable interest existed at policy inception, which is all California law requires. Hartford's argument ignores this economic reality and asks the Court to treat the transaction as something other than what actually occurred. That it cannot do. *See, e.g., Lincoln Nat'l Life Ins. Co. v. Gordon R.A. Fishman Irrevocable Life Trust,* 638 F. Supp. 2d 1170, 1178-79 (C.D. Cal. 2009) (finding court *cannot* "look behind the terms and other formalities of an insurance agreement(s) and basically re-write it to reflect what was really going on between the various parties thereto insofar as determining the existence (or lack thereof) of an insurable interest...").

Allowing for the sort of inquiry suggested by Hartford is not only contrary to the plain statutory language, but would invite all of the public policy concerns inevitable in any "intent" standard. When an investor buys a policy in the tertiary market, it rightfully relies on the prior sale documents (between the insured and previous buyer) in establishing when the policy was sold and that the insured or the insured's family owned the policy at inception. Allowing insurers to second-guess the actual sale documents, and claim that an (undocumented) arrangement was in place prior to that would create havoc in the secondary market by precluding investors from relying on the actual sale contracts.

The inquiry urged by Hartford would harm consumers. Whenever a sale happened soon after a policy was issued, insurers would argue that the quick sale was evidence that a deal must have been in place prior to the policy being issued. Ultimately, allowing insurers to engage in the type of second-guessing urged by Hartford would lead to a decreased demand for policies on the secondary market, thus depriving consumers of valuable property rights.

4. Hartford's Erroneous Attack On The Barnes Trust's Validity

Hartford also argues that even if the Policy is valid, the Barnes Trust itself was nevertheless invalid for public policy reasons or because Ms. Barnes did not validly form the Barnes Trust. Neither argument has merit.

Hartford's argument that the Barnes Trust is invalid because "it was an artifice to conceal an illegal wagering contract" depends on circular reasoning. If the Barnes Trust had an insurable interest in Ms. Barnes' life – as the District Court properly found – then, by definition, the Barnes Trust was formed *for a legitimate purpose* and is not "illegal" or void.

Thus, Hartford's challenge to the Barnes Trust's validity is simply another effort to reargue its insurable interest claim. Hartford's attorneys attempted this same gambit in the *Cabal* case. (*See* ANICO's Brief at 22: arguing that "[a] reasonable fact finder could have concluded that the Cabal Trust was a sham."). This Court disagreed, finding that the trust had an insurable interest in the insured's life, and rejecting the argument that the trust was invalid. *Am. Nat'l Ins. Co*., 2012 WL 3245403, at *1.

As to Hartford's argument that Ms. Barnes did not validly form the

Barnes Trust, Defendants' brief demonstrates that the District Court correctly resolved this issue in their favor. Additionally, Hartford offers no explanation as to why it would even have standing to challenge whether Ms. Barnes validly formed the Trust. Hartford was not the settlor of the Barnes Trust, the trustee of the Trust, or a beneficiary of the Trust. Since it was not a party to the trust agreement, Hartford therefore lacks standing under California law to challenge whether the agreement was validly executed. *See, e.g., Wilson v. JPMorgan Chase Bank, N.A.,* 2010 WL 2574032, at *6 (E.D. Cal. June 25, 2010) (plaintiff had no standing to seek rescission of loan agreement because her deceased husband was sole borrower under loan and she was not party to loan agreement); *see also Junger v. Bank of Am. N.A.,* 2012 WL 603262, at *3 (C.D. Cal. Feb. 24, 2012) (plaintiff lacked standing to challenge process by which his mortgage was securitized because he was "not a party to the PSA").

Consistent with this California authority, when considering a similar challenge brought by an insurer, a Florida federal judge explained in a well-reasoned opinion that the mere fact that the insurer entered into a contract with the trust did not provide the insurer with standing to challenge whether the settlor validly formed the trust. The court explained:

> [I]f the policies are rescinded, [the insurer] has no interest in whether or not the trusts remain in existence. Similarly, if the policies remain in force, and [the insurer] eventually has to pay out, [the insurer] need not be concerned with who ultimately has a

> claim to the proceeds of the policy. Entering into a contract with a trust is not enough to give [the insurer] the ability to challenge the validity of the trust itself.

See Ex. 1: Order at 4, *West Coast Life Ins. Co. v. Life Brokerage Partners LLC*, Case No.: 08-CV-80897-Ryskamp/Vitunac (S.D. Fla. May 21, 2010).

As was astutely noted in the *West Coast Life* decision, whether a trust was validly formed should be of no concern to the insurer. Rather, the insurer should pay out its contractual obligation to the entity with which it entered into the insurance contract. If the individuals who *are* parties to the trust agreement dispute its validity, they can then fight amongst themselves over the trust's validity and the proper allocation of the insurance proceeds. The insurer, who is not a party to the trust, should not be permitted to raise the trust's validity in an attempt to escape its contractual obligations.

5. Hartford's Fraud Allegations Are Irrelevant

In a last-ditch effort to avoid this Court's *Cabal* decision, Hartford fills its brief with inflammatory statements regarding misrepresentations in the application process. Fraud is a serious matter, but it is *irrelevant* to the sole issue before this Court – whether the Policy complied with California's insurable interest law. It did.

Hartford initially brought claims not only based on insurable interest but also based on fraudulent misrepresentations made by the insured or insurance agents in connection with the application for the Policy. The District Court dismissed Hartford's fraud claim as being barred by the Policy's two-year contestability provision, which is required by California law. *Hartford Life & Annuity Ins. Co. v. Doris Barnes Family 2008 Irrevocable Trust*, 2012 WL 688817, at *6 (C.D. Cal. Feb. 3, 2012).[5] Hartford *did not appeal* this aspect of the District Court's decision.

Despite the fact that its fraud claim has been dismissed from the case, Hartford spends a significant amount of its brief recounting various misrepresentations (*i.e.*, "[t]he insurance application is filled with lies"). (*See, e.g.*, Hartford Br. at 7-11). But, as Hartford admitted by not appealing the District Court's fraud ruling, this is not a fraud case.

Hartford's motive for devoting such substantial energy towards detailing the alleged fraud – in an appeal that has nothing to do with fraud – is transparent. Having lost the insurable interest issue repeatedly under California law, Hartford's attorneys are now resorting to a "bad facts make bad law" strategy. The Court should reject this desperate tactic.

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[5] This prohibition serves important public policy purposes. *See, e.g.*, W. Lee Shield, *A New Look at the Incontestable Clause*, 11 Ass'n of Life Ins. Council Proceedings 23, 28-35 (1952) (explaining that incontestability provisions were developed to protect against greed and misconduct of insurers and force them to promptly investigate fraud). Hartford sought to undermine that public policy in bringing fraud claims in the District Court, and continues to do so by injecting its allegations of fraud into this appeal.

ILMA and its members condemn insurance application fraud in the strongest terms. However, the way to deal with such fraud is *not* to rewrite California's insurable interest law or create a special exception for Hartford, but rather to enforce laws against fraud. Insurers have two years after a policy is issued to bring actions based on fraud. They can therefore do their part to prevent fraud by timely investigating and bringing actions for fraud. This is particularly important because, as is the case here, most instances of application fraud are alleged to have been committed by the insurer's own agents.

Even if insurers fail to take timely action in investigating fraud (like Hartford), fraudsters are not "off the hook" as Hartford leads the Court to believe. Rather, those who commit application fraud are still subject to potential actions by state insurance departments and prosecutorial authorities. There is no need to judicially rewrite (or make exceptions to) California's insurable interest statute, in a way that benefits insurers but harms consumers and the secondary market, to deal with the separate issue of fraud.

CONCLUSION

This Court should affirm the judgment below.

Dated: October 24, 2012

PROSKAUER ROSE LLP
LARY ALAN RAPPAPORT

s/ Lary Alan Rappaport
Attorneys for Amicus Curiae
Institutional Life Markets Association

CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to Rules 29 and 32(a)(7)(B) of the Federal Rules of Appellate Procedure and Circuit Rule 32-1 that the foregoing brief is proportionally spaced, has a typeface of 14 points Times New Roman, and contains 6,994 words, excluding those sections exempted from the type-volume limitation by Rule 32(a)(7)(B)(iii).

Dated: October 24, 2012

PROSKAUER ROSE LLP
LARY ALAN RAPPAPORT

s/ Lary Alan Rappaport

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 24, 2012.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: October 24, 2012

PROSKAUER ROSE LLP
LARY ALAN RAPPAPORT

s/ Lary Alan Rappaport

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

Case No.: 08-CV-80897-RYSKAMP/VITUNAC

WEST COAST LIFE
INSURANCE COMPANY,

Plaintiff,

v.

LIFE BROKERAGE
PARTNERS LLC, et al.,

Defendants.
_______________________________/

ORDER ADOPTING REPORT AND RECOMMENDATION

THIS CAUSE comes before the Court on the report and recommendation of United States Magistrate Judge Ann E. Vitunac **[DE 600]**. Pending before Judge Vitunac was the Texas Trust defendants'[1] motion to dismiss **[DE 183]**. After considering the motion, briefs, record, and applicable law, Judge Vitunac recommended that the Texas Trust defendants' motion to dismiss be denied as to counts I and III, granted in part and denied in part as to count IV, and granted as to counts II, IX, X, XI, and XII. Plaintiff West Coast Life Insurance Company filed its objections **[DE 605]** on April 16, 2010. The Texas Trust defendants filed a response **[DE 607]** to West Coast's objections on April 30, 2010. The Texas Trust defendants also filed objections **[DE 606]** on April 16, 2010. West Coast filed a response **[DE 608]** to those objections on May 3, 2010. This matter is ripe for adjudication.

[1] The Texas Trust defendants are the Ilene Halpern 2007-1 Insurance Trust, the Norman Grossman 2007-1 Insurance Trust, the Robert Horowitz 2007-1 Insurance Trust, the Rosalie Chilow 2007-1 Insurance Trust, the Barbara Hass 2007-1 Insurance Trust, the Eileen Toorock 2007-1 Insurance Trusts, and Wells Fargo Bank, N.A. as the trustee

Pursuant to 28 U.S.C. § 636(b)(1) and Federal Rule of Civil Procedure 72(b)(3), the Court must conduct a *de novo* review of those portions of the magistrate judge's report and recommendation to which objections have been made. No objections have been filed regarding Judge Vitunac's recommendations regarding counts I, II, IX, XI, and XII and after reviewing the report, adopts Judge Vitunac's findings and recommendation as to those counts. The Court has also conducted a *de novo* review of those portions of Judge Vitunac's report and recommendation to which the parties have lodged specific objections. The Court addresses the parties' objections regarding counts II, III, and X below.

I. West Coast's Objections

West Coast objects to Judge Vitunac's recommendation that the Court dismiss counts II and X of the amended complaint. West Coast also objects to portions of Judge Vitunac's discussion of Count III. Because the Texas Trust defendants also object to Judge Vitunac's discussion and recommendation regarding Count III, the Court will discuss Count III after it considers the parties' other objections.

A. Count II

In an effort to preserve its appellate rights as to this issue and for the same reasons it previously articulated in its papers filed in response to the Delaware defendant's motion to dismiss, West Coast objects to Judge Vitunac's recommendation that Count II be dismissed. *See* **[DE 227, 506, 565]**. For the reasons previously stated, the Court agrees with Judge Vitunac's finding that the insurable interest count fails as a matter of law. Therefore, West Coast's objection is **OVERRULED**.

B. Count X

West Coast objects to Judge Vitunac's recommendation that the Court dismiss count X of the amended complaint. Judge Vitunac found that West Coast, as an insurer of the life insurance policies in question, does not have standing to challenge the validity of the trust themselves. Judge Vitunac reasoned that neither the arbitration provisions nor Florida Statute § 736.0201(2) provide West Coast with standing to challenge the validity of the trusts in question. Judge Vitunac explained that whether the trusts remain valid is of no concern to West Coast; rather, West Coast's only interest is in whether or not it will ultimately have to pay out on the policies. "If the policies are rescinded, West Coast does not—or should not—care if the trusts remain in existence. And, if the policies are not rescinded, West Coast has to pay out, and should be indifferent to whom the proceeds ultimately go." **[DE 600]** at 9.

West Coast argues that without West Coast, there would be no trusts because the purpose of the trusts was to procure life insurance policies and the trusts themselves have no other assets. Based on this fact alone—but, without citation to authority—West Coast contends that it has standing to challenge the validity of the trust. West Coast also argues that Judge Vitunac erred by failing to fully appreciate the importance of the arbitration provisions in the trust agreements, which designate West Coast as an interested party. Additionally, West Coast asserts that it has standing to challenge the validity of the trusts under Florida law. *See* Fla. Stat. § 736.0201(23) (defining an interested party to be "any person who may reasonably be expected to be affected by the outcome of the particular proceeding involved."). Finally, West Coast points to an order issued by Judge Dimitrouleas denying a motion to dismiss a similar claim in another case, and argues that Judge Vitunac erred in recommending dismissal, despite the arbitration provision and Florida law's apparent inclusion of an insurer as an interested party. *See West Coast Life Ins.*

Co. v. The Ruth Secaul 2007-1 Insurance Trust, et al., No. 09-CV-81049-DIMITROULEAS/SNOW (S.D. Fla. Jan. 8, 2010) at **[DE 54]**.

The Court finds that Judge Vitunac properly recommended dismissal of count X. West Coast is not affected by the validity of the trust. As Judge Vitunac correctly pointed out in her report, if the policies are rescinded, West Coast has no interest in whether or not the trusts remain in existence. Similarly, if the policies remain in force, and West Coast eventually has to pay out, West Coast need not be concerned with who ultimately has a claim to the proceeds of the policy. Entering into a contract with a trust is not enough to give West Coast the ability to challenge the validity of the trust itself.

Additionally, the Court rejects West Coast's argument that the trust documents' arbitration provisions provide West Coast standing to challenge the validity of the trusts. The fact that West Coast may be able to invoke the arbitration provision of the trust documents does not suggest that West Coast is an interested party to the trust, giving it the ability to challenge the trust's validity. The Court is unconvinced by West Coast's arguments and agrees with Judge Vitunac's reasoning and conclusion as to Count X.

The Court has conducted a *de novo* review of this portion of the report. For the foregoing reasons, West Coast's objection is **OVERRULED**.

II. Texas Trust Defendants' Objection: Count IV

Judge Vitunac recommended that the Court dismiss Count IV with prejudice, except for the allegations that that the Texas Trust defendants conspired with the individual insureds to misrepresent their net worth and intent on the policy applications. Judge Vitunac recommended that the conspiracy count, based upon those remaining allegations, be examined by the Court through the parties' pending summary judgment filings, even though those allegations were not alleged with sufficient specificity as required under *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

The Texas Trust defendants argue that Judge Vitunac erred by only partially dismissing West Coast's conspiracy claim. In their view, Judge Vitunac should have dismissed Count IV with prejudice and in its entirety now, rather than waiting until ruling on the parties' summary judgment motions because West Coast has failed to plead the elements of a conspiracy claim against them. The defendants assert that the allegations against the Texas Trust defendants are utterly deficient because West Coast has failed to allege facts that would implicate the Texas Trust defendants in a conspiracy with the insureds. The defendants argue that Judge Vitunac should have recommended dismissal with prejudice because any amendment would be futile.

After conducting a *de novo* review of this portion of the report and recommendation, the Court agrees with Judge Vitunac's recommendation. Fully briefed summary judgment papers are pending before Judge Vitunac on this count along with a fully developed summary judgment record. The Texas Trust defendants will suffer little, if any, prejudice due to the Court's consideration of the fully briefed summary judgment motions rather than dismissing Count IV due to pleading deficiencies at this late stage in the case. Therefore, the Court grants the motion to dismiss Count IV with prejudice, except for the allegations that the Texas Trust defendants conspired with the individual insureds to misrepresent their net worth and intent on the policy applications. Those allegations will be examined by the Court when it adjudicates the parties' summary judgment motions. Accordingly, the Texas Trust defendants' objections as to Count IV are **OVERRULED**.

III. Count III

In Count III, West Coast seeks rescission of the policies based on two alleged material misrepresentations in the policy applications. First, West Coast alleges that the insureds represented that they had a higher net worth than they in fact did. Second, West Coast alleges that the insureds represented that the policies were not being procured as part of any kind of subsequent life settlement or for any other second market provider, when, in fact, that was the very arrangement contemplated by the insureds.[2] West Court alleges that, but for these representations, it would not have issued the policies.

Judge Vitunac addressed the two alleged material misrepresentations separately. As to the misrepresentation regarding the insureds' net worth, Judge Vitunac noted that, although the allegations fail under *Twombly* due to West Coast's failure to allege facts suggesting that the insureds' true net worth was different than their claimed net worth, such information might be difficult to acquire prior to discovery. Accordingly, Judge Vitunac recommended that the claim be considered by the Court through the fully briefed summary judgment motions rather than be dismissed based on the pleadings alone.

As to the second alleged misrepresentation regarding Question 10 in the policy application, Judge Vitunac commented that "Question 10 is not as narrow as the parties seem to suggest. It asks whether a party other than an owner may obtain an interest in the policy. The trust beneficiaries, the Delaware trusts, have an interest in the policy on the life of the insured. And they had an interest at the outset. So this question was arguably answered incorrectly."

Both sides object to Judge Vitunac's recommendation regarding alleged misrepresentations by the insureds in response to Question 10. The Texas Trust defendants

[2] Question 10 in the policy applications reads: "Is there an intention that any party, other than the owner, will obtain any right, title, or interest in the policy issued on the life of the proposed insured as a result of this application?"

lodge three specific objections to Judge Vitunac's recommendation that the Court deny the motion to dismiss Count III. First, according to the Texas Trust defendants, Question 10, on its face, asks only whether a party other than the owner will obtain right, title, or interest in the *policy*, not whether a party other than the owner will obtain right, title or interest in the *policy owner*. The Texas Trust defendants argue that Judge Vitunac should have adopted this literal interpretation of Question 10 and recommended the dismissal of this count on that basis. Second, the Texas Trust defendants argue that construing Question 10 in a manner in which the question must be answered "yes" based on the fact that the trust applying for the policy itself has a beneficiary is unreasonable because a trust, by definition, has a beneficiary other than itself. The defendants contend that Judge Vitunac erred by implicitly adopting this position by declining to recommend dismissal of this count. Third, and finally, the Texas Trust defendants assert that because insurance applications must be narrowly construed against the insurer, dismissal of count III is appropriate so long as there is a reasonable interpretation of Question 10 to which "no" is the correct response. The defendants contend that Judge Vitunac should have construed the application language in favor of the defendants and erred by not recommending that the Court grant the motion to dismiss as to Count III on this basis.

While West Coast agrees with Judge Vitunac's recommendation that the motion to dismiss Count III be denied, West Coast objects to certain aspects to Judge Vitunac's analysis of this count. Specifically, West Coast objects to Judge Vitunac's analysis of the count to the extent that Judge Vitunac's report suggests that only the insureds provided incorrect responses or that the question was targeted only at the insureds. West Coast also objects to the report to the extent that Judge Vitunac suggests that the rescission claim would fail if Question 10 were narrower than it appears to be.

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After conducting a *de novo* review of this portion of the report and considering the parties' objections, the Court agrees with Judge Vitunac's recommendation that the motion to dismiss be denied. The Court, without further briefing, cannot conclude as a matter of law that the insureds did not answer Question 10 untruthfully because it is unclear at this point what the parties intended the term "interest" to mean in the context of Question 10. The Court sees no harm in deferring ruling on this count. Fully briefed summary judgment motions remain pending. Perhaps, after reviewing those papers, the Court will be in a position to make a definitive ruling as to the legal and factual sufficiency of this count. Alternatively, it could be that supplemental briefing on the issue might be necessary before the Court can make such a determination. The Texas Trust defendants' objections are **OVERRULED**. Accordingly, dismissal at this time is inappropriate.

To the extent that Judge Vitunac's analysis regarding this count could be interpreted to constitute a finding that the trust beneficiaries have an "interest" in the policies, the Court declines to adopt that finding. The Court will make a determination regarding the interpretation of Question 10 when adjudicating the parties' motions for summary judgment. Further, the Court reserves judgment as to who actually provided the responses to Question 10.

IV. Conclusion

The Court has carefully considered the report and recommendation, objections, responses, applicable law and pertinent portions of the record. The Court has conducted a *de novo* review of those portions to which objections have been made. Accordingly, it is hereby

ORDERED AND ADJUDGED that

(1) The report of United States Magistrate Judge Ann E. Vitunac **[DE 8]** be, and the same hereby is **RATIFIED**, **AFFIRMED** and **APPROVED** to the extent indicated in the foregoing analysis; and

(2) The Texas Trust defendants' motion to dismiss **[DE 183]** is **GRANTED IN PART AND DENIED IN PART**.

DONE AND ORDERED in Chambers at West Palm Beach, Florida this 21 day of May, 2010.

/s/ Kenneth L. Ryskamp
KENNETH L. RYSKAMP
UNITED STATES DISTRICT JUDGE