**11-10158-HH**

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

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**REASSURE AMERICAN LIFE INSURANCE CO.,
Plaintiff-Appellee,**

**v.**

**MIRIAM ANDREONI, et al.
Defendant-Appellants,**

**v.**

**FEDERAL TRADE COMMISSION,
Intervenor-Appellee.**

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**APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA (Case 1:08-cv-22664-JEM)**

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# BRIEF FOR APPELLEE FEDERAL TRADE COMMISSION

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**Reassure American Life Ins. Co. v. Andreoni, No. 11-10158-HH**

## APPELLEE FEDERAL TRADE COMMISSION'S CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to 11th Cir. R. 26.1 and 28-1(b), the Federal Trade Commission ("FTC" or "Commission") certifies that, in addition to those persons and entities listed in the Certificate of Interested Persons filed by Appellants, the following persons or entities are known to have an interest in the outcome of this case or appeal:

Daly, John F.— FTC Deputy General Counsel for Litigation

Tom, Willard K.— FTC General Counsel

## STATEMENT REGARDING ORAL ARGUMENT

Although the facts and procedural history are somewhat complex, the legal issues presented by this case are well-settled. The Federal Trade Commission does not think oral argument is necessary.

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## STATEMENT OF JURISDICTION

This is an interpleader action, brought by an insurer seeking a determination of the rightful beneficiary of a life insurance policy. Sitting in diversity, the district court exercised jurisdiction under 28 U.S.C. § 1332.

The court below allowed the Federal Trade Commission ("FTC" or "Commission") to intervene in this action, D.70,[1] and subsequently ordered the Commission substituted for one of the private policy claimants, pursuant to a judgment the Commission received against that claimant in a law enforcement action, D.151. On summary judgment, the court awarded the policy proceeds to the Commission, standing in the shoes of that claimant. D.152. Final judgment for the FTC, disposing of all claims in this action, was entered on December 30, 2010. D.156.

Other claimants to the insurance proceeds noticed appeals on January 12, 2011, and January 28, 2011. D.157; D.159. This Court has jurisdiction under 28 U.S.C. § 1291.

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[1] Docket entries are referred to as "D.xx".

## STATEMENT OF THE ISSUES

1. Whether the court below properly granted summary judgment to the Commission, standing in the shoes of one of the policy claimants, when the other claimant was unable to support an essential element of its claim – that the original owner of the Policy made a written request to transfer ownership of the Policy.

2. Whether the district court properly granted the FTC's motion to intervene, when all prerequisites of Rule 24(a) were established.

## STATEMENT OF THE CASE

### A. Background

Reassure America Life Insurance Company, f/k/a,Valley Forge Life Insurance Company ("Reassure") initiated this interpleader action, asking the court below to identify the rightful beneficiary of a $2,000,000 insurance policy on the life of Anthony Rocco Andreoni ("Anthony"). Anthony died in March 2008. D.1, ¶ 12. Miriam Andreoni ("Miriam"), Anthony's wife, was one of three potential beneficiaries.

Both Anthony and Miriam were also defendants in *FTC v. American Entertainment Distributors, et al.*, No.04-22431-CIV (S.D. Fla.) ("*AED*"), an enforcement action in which the FTC alleged that Miriam, the now-deceased Anthony, and others, had violated the Federal Trade Commission Act, 15 U.S.C.

§ 45(a), and the FTC's Franchise Rule, 16 C.F.R. Part 310, by deceptively marketing business opportunities and DVD rental machines. The enforcement action in *AED* was pending at the time this interpleader case began. The FTC's interest in this case was to preserve its ability to collect on a then potential, and now final, judgment of $19 million against Miriam. The FTC moved to intervene because Miriam herself made no attempt to protect her right to the life insurance proceeds. Instead, she joined with her parents, Peter and Nadia Smolyanski, the co-trustees to the Anthony Andreoni Irrevocable Trust ("the Trust") in contending that the Trust, established for the benefit of her and Anthony's daughter, was the rightful beneficiary. Ultimately, under the terms of the consent order entered against Miriam in *AED*, the Commission was directly assigned Miriam's right to the insurance proceeds at issue in this case,[2] and was substituted for Miriam as the real party in interest. D.151.

In this interpleader action, all parties agreed that the insurance policy issued by Reassure to insure Anthony's life, Policy No.TRTU000941 ("the Policy"), was valid. *See* D.1, ¶7 & Exh. A; D.10, ¶7; D.11, ¶7. Likewise uncontested below was

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[2] Appeal of this judgment is pending before this Court in *FTC v. Miriam Sophia Andreoni*, No. 11-10150-EE. Briefing was completed on April 26, 2011.

that Damian Shomers a/k/a David Shomers ("Shomers"),[3] Anthony's business partner and co-owner of the nightclub they ran together, was the owner and primary beneficiary of the Policy when it was issued. *Id.* It was also undisputed that, as owner of the Policy, Shomers had the authority to change the beneficiary or ownership of the Policy by making a "written request" to the insurance company. D.1, Exh. A at 19-20, ¶¶ 3.31-3.36. There was, however, a three-way dispute as to whether and when he had done so.

Shomers was one possible beneficiary. In June 2008, Shomers claimed that he was the rightful beneficiary pursuant to the original terms of the Policy and that any subsequent changes purporting to name new beneficiaries were invalid. D.1, ¶ 14.

Miriam was another possible beneficiary. In October 2007, Reassure received a "Request for Change of Beneficiary Form" naming Miriam as the new, sole beneficiary. None of the parties below disputed that Shomers signed this form in August 2007, when he was owner of the policy and therefore authorized to change the beneficiary. *See* D.1,¶ 8, Exh. B. at 2; D.11, ¶ 44 (Shomers Answer

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[3] After Shomers' death, in December 2009, Bruce E. Warner, the court-appointed representative of the Shomers Estate, was substituted for Shomers. D.68; D.71. In this brief, we use "Shomers" to refer to positions taken by both David Shomers and Bruce E. Warner, on behalf of the Shomers Estate.

and Cross claim); D.56-1, ¶ 18 (FTC Intervenor Complaint); D.93, ¶ 18 (Answer of the Trust to FTC Intervenor Complaint). Shortly after receipt of the form, Reassure notified Shomers that the primary beneficiary had been changed to Miriam. D.1, ¶ 9 & Exh. C.

The third claimant to the proceeds was the Trust, established by Anthony in December 2007 for the benefit of his and Miriam's daughter. *See* D.1, Exh. D. at 6-16 ("Irrevocable Trust Agreement). In setting up the Trust, Anthony designated Miriam's parents Peter and Nadia Smolyanski as co-trustees and named Miriam as substitute trustee.[4] When Anthony died in March 2008, the Trust claimed that it was both the owner of the Policy and the sole beneficiary. D.1, ¶ 13. This claim hinged upon two documents that Anthony (not Shomers) had forwarded to Reassure in December 2007: (i) a "Request for Change of Ownership Form"– purportedly signed by Shomers and purportedly notarized by Ronda O'Brien – requesting that the owner of the Policy be changed to the Trust, and (ii) a "Request for Change of Beneficiary Form," purportedly signed by Peter and Nadia, as co-trustees of the Trust, requesting that the Trust be designated as the primary

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[4] *See* D.1, Exh. D. at 2, ¶ 6. The terms of the Trust provide that Miriam would become trustee if her parents cease to serve or are unable to act as trustees for any reason, *id.* at 5, ¶ 11(a).

beneficiary of the policy. *Id.* at ¶ 10 & Exh. D. Reassure's confirmation of these changes was sent to the Trust, not to Shomers. *Id.* at ¶ 11 & Exh. E.

The purported signatures on the Change of Ownership form were critical to the Trust's claim. Under the terms of the Policy, only the owner of the Policy may change the beneficiary. D.1, Exh. A at 19-20, ¶¶ 3.31-3.36. Thus, the Trust could not designate itself as beneficiary if the transfer of ownership was invalid.

**B. Proceedings below**

*1. Shomers' Position.*

Shomers contended that he was the rightful beneficiary of the Policy because neither the August 2007 change of beneficiary form nor the December 2007 transfer of ownership form was valid. D.11, ¶¶ 43-46. Although Shomers admitted that he had signed the August 2007 form naming Miriam as beneficiary, Shomers alleged, with no evidentiary support, that Anthony had "duped" and "intimidated" him into signing the form. D.11, ¶ 44. With respect to the December 2007 form requesting change of ownership to the Trust, Shomers claimed that he had "never signed" the change of ownership form. *Id.*, ¶¶ 10, 45.[5]

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[5] Shomers presented two additional arguments. First, Shomers asserted that, although not a defendant in *AED*, he was nonetheless subject to the asset freeze entered in that case, and was therefore not authorized to effect a change in beneficiary or to transfer ownership of the Policy. D.11, ¶ 46. Second, Shomers claimed that any transfer of ownership was invalid because it violated the terms of a 2003

Shomers died while the interpleader was pending, and was never questioned about his allegations, but his estate pursued this claim.[6]

2. *The Position of Miriam and the Trust.*

Miriam and the Trust claimed that the change in beneficiary naming Miriam was valid, but superseded by the December 2007 documents naming the Trust. D.10, ¶ 38. They did not offer, however, any direct evidence that Shomers took any action to transfer ownership to the Trust. *See* D.115. They conceded that Shomers did not sign the December 2007 change of ownership form, and provided no evidence that Shomers had authorized anyone else to sign the form on his behalf. D.115 at 16. Instead, Miriam and the Trust argued, Shomers' conduct in December 2007 and shortly after Anthony's death in March 2008 was consistent with Shomers having implicitly authorized the change, *id.* at 19, and Shomers'

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Shareholders' Agreement entered into between DSG and its shareholders, Shomers and Anthony. *Id.*; *see also* D.13, ¶¶ 9-10.

[6] DSG Holding, Inc., ("DSG"), the company Shomers had owned with Anthony, joined Shomers' crossclaim against Miriam and the Trust. D.11. DSG, however, never moved to intervene. And although DSG likewise joined in the Notice of Appeal filed by Warner, *see* D.159, its counsel has withdrawn and no new counsel has filed an entry of appearance on its behalf. As a corporate defendant, it may not pursue its appeal unless represented by a licensed attorney. *See Palazzo v. Gulf Oil*, 764 F. 2d 1381, 1385 (11th Cir. 1985). DSG thus appears to have abandoned its appeal.

"overall pattern of conduct" before and after Anthony's death "confirmed his authorization to the change," *id.* at 16.

Unable to provide direct evidence that Shomers signed, authorized, ratified, or was even aware of the December 2007 forms, Miriam and the Trust argued that those contesting its claim instead should bear the burden of proving that the signatures on the form (of Shomers, and of the notary, Ronda O'Brien), were inserted with intent to defraud. *Id.* at 19.

In July 2009, Miriam, the Trust, and David Shomers reached a contingent settlement to resolve their competing claims to the Policy proceeds. Under the settlement, more than $1.3 million of the proceeds would have been paid to the Trust, and another $650,000 would be paid to DSG, the corporation owned by Anthony and Shomers. Miriam agreed to surrender her claim without receiving any of the Policy proceeds. D.54. The settlement was contingent upon multiple court approvals, which Miriam, the Trust, and Shomers never obtained.[7]

*3. The FTC Intervenes and is Substituted for Miriam.*

Prior to, and after, the purported settlement, the Commission moved to intervene to preserve its ability to collect on claim against Miriam resulting from

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[7] The agreement was contingent upon approval by the district court, approval by the Florida probate court in charge of Anthony's estate, and vacatur of the preliminary injunction in *AED*. *See* D.56 at 7 (discussing D.54).

the *AED* enforcement action, including attachment of any proceeds rightfully payable to Miriam under the Policy. *See* D.37, D.56.

In moving to intervene, the Commission explained that the contested $2 million in Policy proceeds was "the largest asset potentially available" to Miriam to pay a $19 million judgment in *AED*, but that she had impaired the Commission's ability to reach this asset by urging "that the Court disregard her claim in favor of that of the Trust operated by her parents." D.37 at 3-4. But after the private parties announced they had reached a proposed settlement, the district court,"inadvertently" denied the Commission's first motion as moot, in a one page order that directed the Clerk to treat all pending motions as moot. D.53; D.70 at 3-4.

The Commission renewed its motion to intervene, noting that the parties' contingent settlement did not render its motion moot. D.56. Indeed, the proposed settlement, the Commission argued, offered further proof that Miriam's willingness to concede her interest in the proceeds in favor of the Trust would frustrate the Commission's ability to collect on any claim against her. *Id.*[8]

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[8] Contrary to Appellants' assertion, the Commission did not "refuse[] to participate" in the mediation that produced the contingent settlement. Initial Brief of Miriam and the Trust ("Br.") at 17. When the first mediation talks occurred, the Commission's motion to intervene was pending and all private parties opposed intervention. After the district court granted the Commission's renewed motion to

The district court granted the Commission leave to intervene, recognizing that, "[a]s it is clear that Miriam Andreoni will not argue that she is entitled to the insurance proceeds, it is clear that absent intervention by the FTC, those proceeds will not be available to pay any judgment in the *AED* litigation." D.70 at 5. [U]pon consideration," the court concluded, "the parties' purported settlement does not render the FTC's motion to intervene moot." D.70 at 3-4. The court readily concluded that intervention was appropriate under Fed. R. Civ. P. 24,[9] and the four factors set forth in *Purcell v. BankAtlantic Financial Corp.,* 85 F.3d 1508, 1512 (11th Cir. 1996). D.70 at 4.

The court first found the FTC's motion to be timely, as it was filed within three months of Miriam's pleading that "conced[ed] her interest in the insurance proceeds to the Trust managed by her parents for the benefit of her child," and "there was no evidence of prejudice suffered by the existing parties as a result of that three month delay." D.70 at 4-5 (citing D.10). The court likewise found the

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intervene and ordered a second round of mediation, the Commission did participate in mediation discussions. *See* D.70; D.99.

[9] Rule 24 provides that the court must grant a timely motion to intervene if the party "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately protect that interest." Fed. R. Civ. P. 24(a)(2).

second factor – an interest in the property that was the subject of the suit – established, because the Commission had adequately pled an interest in the proceeds of the Policy (to the extent it was determined they belonged to Miriam), under the Federal Debt Collection Procedure Act ("FDCPA"), 28 U.S.C. §§ 3301-08. D.70 at 5. The court agreed with the Commission that Miriam's relinquishment of her claim to the Trust controlled by her parents constituted a fraudulent transfer under the FDCPA and would prejudice the ability of the United States to recover any judgment against Miriam in the *AED* enforcement action. *Id.*; D.56 at 2-3.

With respect to the third factor – the prejudice that would be suffered by the Commission if the motion to intervene were denied – the district court recognized that disposition of the insurance proceeds in the interpleader action, might, as a practical matter, impair the FTC's ability to later obtain the monies. D.70 at 6. Finally, the court readily concluded that "none of the other parties adequately represent the FTC's interests [in] finding that Miriam is the rightful beneficiary." *Id.* "Ironically," the court observed, it was in Miriam's interest that the "proceeds go to the Trust controlled by her parents, so that they cannot be turned over as assets in the *FTC v. AED* litigation." *Id.* And, it was "certainly not in Mr. Shomers' interest for Miriam Andreoni to be found to be the beneficiary." *Id.*

As noted earlier, this intervention ruling was effectively superseded when Miriam subsequently agreed to assign her claim to the Policy proceeds under the consent judgment resolving the Commission's claim against her in the *AED* enforcement action. Upon entry of the consent judgment in *AED*, the district court substituted the FTC for Miriam in this interpleader action, under Fed. R. Civ. P. 25(c). D.151.

*4. Summary Judgment.*

At the conclusion of discovery, Shomers and the FTC both moved for summary judgment. The district court ruled in the Commission's favor, concluding that Miriam was the rightful beneficiary of the Policy proceeds, denying Shomers' motion for summary judgment, and granting summary judgment to the Commission, which by then had been substituted for Miriam as a party under Fed. R. Civ. P. 25(c). D.152 at 5; 18; D.151.[10]

The court first resolved a threshold evidentiary issue, regarding Shomers' contention that his Verified Answer could serve as proof that the August 2007 change in beneficiary form was invalid. The court recognized that, in ruling on a

[10] The court recognized that Miriam had assigned her rights as beneficiary under the Stipulated Final Order and Permanent Injunction entered in the *AED* enforcement action, and that the FTC's motion to substitute for Miriam in this case had been granted. D.152 at 5. Thus, the "FTC had the same standing to challenge the position of the Shomers Estate as Miriam Andreoni." *Id.*

motion for summary judgment, it could consider only evidence that would be available in an admissible form at trial. D.152 at 2 (citing *Macuba v. Deboer*, 193 F.3d 1316, 1322-25 (11th Cir. 1999); *McMillian v. Johnson*, 88 F.3d 1573, 1584 (11th Cir. 1996)). The court determined that Shomers' Verified Answer, D.11 (the sole basis for Shomers' allegation that the designation of Miriam as beneficiary was invalid due to fraud or duress), was inadmissible hearsay, and that the residual exception to the hearsay rule did not apply, D.152 at 3-5.

Following a summary of the factual and procedural background, and recitation of the legal standards, *id.* at 6-13, the district court next addressed Shomers' claim that the January 2005 asset freeze entered in the *AED* litigation precluded recovery by any of the other claimants in the interpleader dispute. *Id.* at 13-15. The Commission, Miriam, and the Trust all argued that this claim was unfounded because the Policy was owned by Shomers and the asset freeze did not apply to his assets. D.108.[11] The court agreed, rejecting Shomers' argument that the *AED* asset freeze deprived him of his authority to change the beneficiary or the owner of the Policy. Shomers' assets were not frozen by the *AED* freeze order, the court noted, because Shomers was neither a defendant in that action, nor owned or

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[11] Miriam and the Trust "fully adopt[ed] as their own" the Commission's argument against Shomers' claim based on the preliminary injunction in *AED*. *See* D.114 at 1 (referencing D.108); *see also* Br. at 22.

controlled by a defendant, and therefore was not subject to the freeze order. D.152 at 14.[12]

Finally, the court ruled that the FTC, standing in Miriam's shoes, was entitled to summary judgment on its claim that Miriam was the rightful beneficiary of the Policy.[13] *Id.* at 15-18. The court first concluded that the August 2007 form designating Miriam as beneficiary was valid. All parties conceded that Shomers' signature on the form was "genuine," and this signature "is sufficient to show an intent to change the beneficiary and a designation of the new beneficiary pursuant to a valid written request." *Id.* at 16. Moreover, the court observed, "no admissible evidence exists to show fraud or coercion." *Id.*

With respect to the December 2007 change of ownership form, in contrast, the court noted that "David Shomers' signature has not been verified." *Id.* And

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[12] The district court found the arguments based upon the 2003 shareholders agreement to be unpersuasive, and irrelevant. D.152 at 14-15 & n.9.

[13] The Commission had also argued that Miriam's surrender of her claim to the Trust would fraudulently prevent this asset from being used to satisfy Miriam's liability for the debt being litigated in the *AED* enforcement action. D.104 at 2, 13-16. But by the time the court ruled on summary judgment, it had already substituted the Commission for Miriam under Fed. R. Civ. P. 25(c) as the real party in interest for Miriam's claim. *See* D.152 at 5, & 18 n.12; D.151. The court's summary judgment decision, therefore, treats the Commission as the direct assignee of Miriam's claim, and the FTC was ultimately awarded the proceeds as the substituted real party in interest, *not* on the basis of the FDCPA interest that underpinned its motion to intervene.

evidence, albeit circumstantial, indicated that the notary's signature on the form was forged. *Id.* The notary's testimony "gave a number of concrete reasons why the signature does not look like hers, stated that she did not remember ever meeting or notarizing anything for David Shomers, and asserted that she would have remembered notarizing anything other than a roofing document." *Id.* at 16, n.11; *see also id.* at 9 (summarizing and citing O'Brien Dep.). In light of this evidence, the district court declined to "simply presume that the signature belonged to David Shomers." *Id.* at 16.

The court rejected the Trust's assertion that the FTC and the Shomers Estate needed to affirmatively prove that the signature was a forgery, because, "in order for the transfer of ownership to be valid, there must be some admissible evidence that Shomers intentionally executed the document." *Id.* at 17. Simply put, the court could find none: Anthony, not Shomers, provided the executed document to the insurance company; the signature on the form, on its face, did not look identical to Shomers' other record signatures; and there was no testimony from anyone claiming to have seen Shomers sign the form. *Id.* The Trust's narration of events regarding Shomers' behavior after Anthony's death, during the insurance agent's condolence calls and at a Christmas party, moreover, was "not sufficient to create a genuine issue of material fact as to whether Shomers transferred his

ownership of the policy, especially in light of the fact that the evidence shows that Shomers had named Miriam Andreoni as a beneficiary." *Id.*

In short, the "only admissible evidence," showed that the "transfer of policy ownership was not valid," and there was "no material evidence to dispute that evidence." *Id.* Under the terms of the Policy, "absent a transfer of ownership to the Trust, the Trust could not change the beneficiary." *Id.* The FTC, standing in Miriam's shoes, was therefore entitled to summary judgment, as "the undisputed admissible evidence before this Court shows that Miriam Andreoni is the rightful beneficiary." *Id.* at 17-18.

## STANDARD OF REVIEW

This Court considers de novo a grant or denial of summary judgment, applying the same legal standards as the district court. *Eli Lilly and Co. v. Air Exp. Intern. USA, Inc.*, 615 F.3d 1305, 1313 (11th Cir. 2010). Summary judgment is proper if "there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (quoting Fed. R. Civ. P. 56(c)). When there is "a complete failure of proof concerning an essential element of the nonmoving party's case," summary judgment should be granted. *Id.* at 322-23; *see also Fanin v. U.S. Dep't of Veterans Affairs*, 572 F.3d 868, 872 (11th Cir. 2009).

Dispositions of motions to intervene are reviewed de novo, *Purcell*, 85 F.3d at 1512, but a district court's decision regarding the timeliness of the motion is reviewed for abuse of discretion, *Meek v. Metropolitan Dade County, Fla.*, 985 F.2d 1471, 1477 (11th Cir. 1993), *abrogated on other grounds by Lance v. Coffman*, 549 U.S. 437 (2007). "Once a party establishes all the prerequisites to intervention, the district court has no discretion to deny the motion." *United States v. State of Ga.*, 19 F.3d 1388, 1393 (11th Cir. 1994).

## SUMMARY OF ARGUMENT

The district court's determination that Miriam was validly designated as the rightful beneficiary of the Policy in August 2007 stands unchallenged. On appeal, the core issue is thus whether the district court properly concluded that the Trust had no evidence to support its claim that, in December 2007, Shomers made a written request to transfer ownership of the Policy to the Trust.

The FTC, standing in Miriam's shoes, was entitled to summary judgment due to the Trust's complete failure to support its case with evidence. The Trust failed to produce any evidence that Shomers ever signed the December 2007 transfer of ownership form upon which the Trust's claim hinges, that he authorized anyone to sign on his behalf, or that he was even aware of the

document prior to Anthony's death. Without a valid transfer of ownership, the Trust had no right under the Policy to name itself as beneficiary.

As the Trust's claim to the Policy proceeds was unsupported, the district court correctly concluded that Miriam, as the last validly designated beneficiary, was entitled to the proceeds. The Trust's arguments that the Commission should bear the burden of proving that the December 2007 form was created with intent to defraud were properly rejected below, and provide no grounds for reversal on appeal. And, this Court need not reach any of the alternative arguments raised by Miriam and the Trust regarding the FDCPA. All relief the Commission initially sought through use of the FDCPA has been effectively granted; no live issues remain. *(Part I)*

Appellants also raise a subsidiary challenge to the district court's procedural ruling granting the FTC leave to intervene. But this challenge is irrelevant, because the Commission was substituted as the real party in interest after Miriam assigned her interest in the Policy proceeds to the Commission, and the district court's final judgment here rests on the Commission's role as the assignee of Miriam, not as intervenor. In any event, the challenge to the grant of intervention is meritless. Appellants do not dispute that the Commission had an interest in preserving its ability to collect on its judgment against Miriam in the *AED*

enforcement action. Nor do they deny that the prerequisites of Rule 24 were established. Indeed, they do not even mention Rule 24.[14] Instead, Appellants cry waiver. They argue that the Commission's position below – that the asset freeze order in *AED* did not prohibit changes in the ownership or beneficiary of the Policy – is inherently inconsistent with the fraudulent transfer theory underpinning the FTC's motion to intervene. Br. at 27, 53-59. But in so doing, Appellants mischaracterize the Commission's position below, and ignore the limits of the *AED* freeze order. The Commission was not inconsistent. Because the Commission established all the prerequisites under Fed. R. Civ. P. 24(a), the district court was obligated to grant its motion to intervene. *(Part II)*

[14] *See* Br. at 53-59 (Part III, which was adopted in its entirety by appellant Bruce E. Warner).

## ARGUMENT

### I. The district court did not err in granting summary judgment to the FTC.

The district court's ruling as to the validity of the August 2007 form naming Miriam as beneficiary stands unchallenged on appeal. Because no evidence supports the validity of the subsequent December 2007 changes in ownership and beneficiary, the FTC, as assignee of Miriam's claim, is entitled to the Policy proceeds. The grant of summary judgment to the FTC should be affirmed.

#### A. The Trust completely failed to prove that it was the rightful beneficiary.

Under Rule 56(c), summary judgment was appropriate against Miriam and the Trust because there was a "complete failure of proof" concerning an essential element of their case – *i.e.*, that Shomers ever executed a transfer of ownership to the Trust. *Celotex*, 477 U.S. at 323. This absence of evidence "necessarily renders all other facts immaterial." *Id.* The district court properly determined that "the only admissible evidence in this case shows, albeit circumstantially, that the transfer of policy ownership was not valid, and there is no material evidence to dispute this evidence." D.152 at 17.

As the district court recognized, "'[c]ontract principles apply to the interpretation of an insurance policy, which is a type of contract.'" D.152 at 15-16

(quoting *O'Brien v. McMahon*, 44 So. 3d 1273, 1277 (Fla. 1st DCA 2010)). There was no dispute among the parties that "Shomers needed the intent to change the beneficiary or transfer ownership in order for those documents to be valid." D.152 at 16. But, under Florida law, the contractual provisions of an insurance policy must be strictly complied with in order to effectuate a change in beneficiary; unrealized intent is insufficient. *Brown v. Di Petta*, 448 So. 2d 561, 562 (Fla. 3d DCA 1984).

No evidence was presented to show that Shomers executed the December 2007 transfer of ownership form. No attempt was made to verify Shomers' signature on the form. The Trust never even contended that Shomers had signed the form. *See* D.115 at 3, 13, 16. Shomers denied that he signed the form, and the notary, Ronda O'Brian testified, with certainty, in the view of the district court, that she neither signed nor notarized the form. D.152 at 9; 16 & n.11.[15] The purported transfer of ownership form therefore provides no evidence that Shomers authorized the transfer of ownership to the Trust.

As Miriam and the Trust acknowledge, "[u]nder Florida law, the right of an insured owner to change the beneficiaries of a life insurance policy depends on the

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[15] Although the change of ownership form includes a space for notarization (as does the change of beneficiary form), the Policy does not require that a notary validate a written request to change beneficiary or ownership.

terms of contract between the insurer and insured as expressed in the insurance policy." Br. at 29-30 (citing *O'Brien*, 44 So. 3d at 1277). Because the Trust produced no evidence that Shomers complied with the contractual requirements of the Policy to effectuate a change of ownership, the district court did not err in dismissing as immaterial the circumstantial evidence concerning Shomers' state of mind.

Nor is *O'Brien*, 44 So. 3d 1273, heavily relied upon by Miriam and the Trust, *see* Br. at 26, 29-33, to the contrary. In *O'Brien*, there was no dispute that the insured had actually executed a written request to add his newly adopted daughter as beneficiary and to remove his niece. In stark contrast to this case, the authenticity of the request – *e.g.*, that it had been signed by the party with the contractual authority to make the request – was undisputed. *See O'Brien*, 44 So. 3d at 1276 ("Mr. Todd signed the form."); *id.* at 1278 ("Mr. Todd used Prudential's forms"); *id.* ("Mr. Todd sent the forms to Prudential"). At issue in *O'Brien*, therefore, was not whether the person with authority to change the beneficiary had exercised that authority, but rather, whether such authority was exercised in a manner that complied with the contractual requirements of the insurance policy. The court ultimately determined that the change of beneficiary was binding, even though the insurer did not approve of how the insured had

designated presumptive guardians, because the contractual requirements under the Policy had been satisfied. *Id.* at 1279-81. In this case, however, there is no evidence that Shomers ever exercised his contractual authority to transfer ownership of the Policy to the Trust.

As the district court noted, moreover, neither Shomers' failure to make a claim to the proceeds during the insurance agent's condolence call after Anthony's funeral, nor the evidence that the Trust had taken over the premium payments, serve to establish that Shomers executed the document transferring ownership to the Trust. D.152 at 17. Shomers had stopped making the premium payments after he changed the beneficiary to Miriam, and there was "no evidence that Shomers knew who was making the premium payments after he stopped doing so." *Id.*

Further, the insurance agent's speculative opinions as to Shomers' state of mind after Anthony's death do not rise to the level of material evidence sufficient to preclude summary judgment. "It is a well-settled rule of law that a beneficiary under a life insurance policy may be changed only by strict compliance with the conditions set forth in the policy." *Brown*, 448 So. 2d. at 562.[16] Shomers'

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[16] Miriam and the Trust provide no support for the proposition that the mere ministerial act of processing a document by an insurance company provides an automatic imprimatur of validity to the contents of that document. The terms of the Policy mandated that only the owner had authority to transfer ownership, and there is no evidence that Shomers ever exercised his authority to do so. Filing of an

purported failure to react to a passing statement that the Trust might make a claim on the Policy, a statement that we cannot be sure he even heard, is no proof that he transferred ownership of the Policy to the Trust. As the court below recognized, Shomers had no particular reason to react at all; having already given up his beneficial interest in the Policy, he was presumably indifferent to its disposition. In any event, the Policy, by its terms, did not permit transfer of ownership through silent acquiescence. Only a written request, signed by the owner of the Policy, sufficed. See D.1, Exh. A., ¶ 3.36 (changes in assignment, beneficiary, and ownership of the policy are not binding "unless made by Written Request").

Finally, it bears repeating that no party, *not even the Trust*, vouched for Shomers' signature on the December 2007 transfer of ownership form.[17] Unable to verify Shomers' signature, the Trust failed to prove its case. The FTC bore no burden, therefore, to prove forgery of a signature that no one was willing to verify, or to otherwise disprove a claim that the Trust was unable to support with admissible evidence. On summary judgment, a non-moving party cannot

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interpleader action does not waive an insurance company's "binding contract provisions." *Brown*, 448 So. 2d at 562.

[17] Although Miriam and the Trust baldly assert on appeal that "[t]he request was signed by Shomers," Br. at 30, they expressly declined to make such a claim below, and provide no record support for this assertion. They similarly state, also without support, that the insurer found the request to be "satisfactory." *Id.*

compensate for failure to prove its own case by foisting the burden on the moving party to disprove a case that was never made. *See Avirgan v. Hull*, 932 F.2d 1572, 1577-80 (11th Cir. 1991).

Simply put, the Trust's claim that Shomers executed a transfer of ownership that would permit the Trust to name itself as beneficiary was bereft of factual support. "One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses." *Celotex*, 477 U.S. at 323-24. The district court therefore correctly disposed of the Trust's claim on summary judgment. Because Miriam was the last validly designated beneficiary, and the FTC was assigned Miriam's rights to the Policy proceeds, the district court did not err in granting summary judgment to the Commission.

**B. No FDCPA issues remain to be resolved on appeal.**

Miriam and the Trust dispute at length the Commission's argument below that Miriam's actions constituted a fraudulent transfer, in violation of the FDCPA. Br. at 46-53. As Miriam and the Trust acknowledge, however, because the FTC was substituted as assignee of Miriam's interest in the Policy proceeds, the district court never addressed this issue. *See* Br. at 25 (citing D.152 at 18, n.12). Nor is there any reason for this Court to do so.

The FDCPA did not provide the Commission with an "alternative theory" on the merits. *Cf.* Br. at 46. Rather, the FDCPA served as a procedural vehicle to support the Commission's intervention *before* substitution of the Commission for Miriam. D.56 at 2-3, 9-11. It likewise provided a ground on which the court below could retain the funds pending final judgment in *AED*. D.104 at 14-15. Because the *AED* judgment, (and attendant assignment of Miriam's interest) was entered, and the Commission was substituted for Miriam under Rule 25(c) prior to summary judgment, no FDCPA issues remain to be resolved.

## II. The district court properly granted the FTC leave to intervene because the Commission had established all the prerequisites to intervention in Rule 24(a).

The Court need not rule on the propriety of the district court's order granting the Commission leave to intervene, because summary judgment was granted to the FTC not as intervenor, but as the direct assignee of Miriam's claim. If this Court nonetheless chooses to review the propriety of the district court's intervention order – even though it was effectively superseded when the Commission was substituted for Miriam under Rule 25(c) – it should affirm.

To intervene as a matter of right under Fed. R. 24(a)(2), a proposed intervenor must show that: (1) the intervention application is timely; (2) an interest exists relating to the property or transaction which is the subject of the action; (3)

disposition of the action, as a practical matter, may impede or impair the ability of the intervenor to protect that interest; and, (4) the intervenor's interests are inadequately represented by existing parties to the lawsuit. *Chiles v. Thornburgh*, 865 F.2d 1197, 1213 (11th Cir. 1989). Once a party establishes these four criteria, the "district court must allow the party to intervene." *Fed. Sav. and Loan Ins. Corp. v. Falls Chase Special Taxing Dist.*, 983 F.2d 211, 215 (11th Cir. 1993).

Here, the district court determined that the Commission had established each of the prerequisites for intervention as a matter of right. D.70. In particular, the district court concluded that intervention was necessary to protect the Commission's ability to collect on a future judgment against Miriam in the *AED* enforcement action. D.70 at 5. Appellants do not dispute these findings.[18] Nowhere in their brief do they even cite to Rule 24. There is no warrant to reverse the grant of intervention.

Appellants' sole challenge to the grant of leave to intervene is a baseless and illogical claim of waiver. Appellants' claim that the FTC should have been

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[18] To the extent that Miriam and the Trust might be deemed to dispute the fraudulent transfer property interest underpinning the Commission's motion to intervene by contesting its factual predicates, *see* Br. at 51-53, such arguments fail. For purposes of deciding a motion to intervene, the district court must accept the allegations of the FTC's proposed pleading as true. *Mendenhall v. M/V Toyota Maru, No. 11*, 551 F.2d 55, 56, n.2 (5th Cir. 1977).

estopped from intervening is based on a series of mistaken premises and mischaracterizations of the proceedings below. Appellants erroneously characterize the FTC's motion to intervene as alleging that Miriam was responsible for the change of beneficiary to the Trust. Br. at 53. This supposed position, they assert, was inconsistent with the Commission's representation to the district court that the *AED* asset freeze did not enjoin changes to the beneficiary or ownership of the Policy. *Id.* at 54-55. But, the FTC never argued that Miriam was responsible for any of the change of beneficiary forms; and the scope of the asset freeze order is irrelevant to the arguments the FTC actually did make in support of intervention.

Contrary to Appellants' assertions, the Commission's motion for intervention was based solely on Miriam's litigation stance during this interpleader action – i.e., her failure to pursue her claim as beneficiary after Anthony died, and her request that the Policy proceeds be awarded to the Trust controlled by her parents. The scope of the January 2005 asset freeze order, moreover, was irrelevant to the Commission's motion to intervene. The Commission never argued that it should be allowed to intervene in order to protect

assets subject to the freeze; rather intervention was sought to secure the procedural protections of the FDCPA.[19]

In short, the district court's order granting the Commission leave to intervene became irrelevant to the final judgment when it was superseded by substitution of the Commission for Miriam. If the Court nonetheless chooses to reach this issue, there is no warrant to disturb the district court's ruling. Indeed, on this record, *denial* of leave to intervene would have been reversible error. *See Fed. Sav. and Loan Ins. Corp.*, 983 F.2d 216 (reversing the denial of a motion to intervene when all the prerequisites under Fed. R. Civ. P. 24(a) were established).

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[19] Appellants mischaracterize the freeze order. Br. at 53-54. The January 2005 freeze order expressly covers assets of Miriam and Anthony "at the time this Order was entered," and "assets obtained after the time this Order was entered *if* the assets are derived from the conduct alleged in the Commission's Complaint." D.103-13, (Exh. C.), ¶ 4 (emphasis added). The Policy proceeds are neither. No party argued that Miriam owned or controlled the Policy when the freeze order was entered in January 2005, as Shomers, not Miriam, was the owner of the Policy. Miriam's interest in the Policy proceeds, moreover, came into existence only *after* the January 2005 freeze order was entered.

**CONCLUSION**

For the reasons set forth above, the district court's judgment should be affirmed.

Respectfully submitted,

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Dated: June 23, 2011

## CERTIFICATE OF COMPLIANCE

I certify that Appellee's Brief complies with the type-volume limitation set forth in Fed. R. App. P. 32(a)(7)(B) because it contains 6,825 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). I further certify that Appellee's Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using the Corel WordPerfect word processing program in 14-point Times New Roman font.

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 23rd day of June, 2011, I sent for filing by express overnight delivery an original and six copies of the foregoing Brief of Appellee Federal Trade Commission to the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit. On the same day, I also uploaded one copy of the foregoing Brief in electronic format onto the Web site for the United States Court of Appeals for the Eleventh Circuit. On the same day, I sent two copies by express overnight delivery to counsel for Appellants at the following addresses:

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