

2008 WL 5596347 (S.D.N.Y.) (Trial Pleading)
For docket see [1:08cv09421](#)

United States District Court, S.D. New York.

THE STUART MOLDAW INSURANCE TRUST, Norman Ferber Trustee; Susan Moldaw,
Executor of the Estate of Stuart Moldaw; Phyllis Moldaw, an individual, Plaintiffs,

v.

XE-R, LLC, a limited liability company; XE L.I.F.E., LLC, a limited liability company; XE
Capital Management, LLC, a limited liability company; Mark Ross & Co., a corporation,
Defendants.

No. 08 CV 9421.

December 5, 2008.

Demand for Jury Trial

First Amended Complaint for Violation of New York Insurance Law and California Family Law

Cotchett, Pitre & McCarthy, [Joseph W. Cotchett](#), [Stuart G. Gross](#), [Nancy L. Fineman](#), San
Francisco Airport Office Center, 840 Malcolm Road, Suite 200, Burlingame, CA 94010,
Telephone: (650) 697-6000, Facsimile: (650) 697-0577.

Pomerantz Haudek Block Grossman & Gross LLP, [Stanley M. Grossman](#), [Robert J. Axelrod](#),
100 Park Avenue, Suite 2600, New York, NY 10017, Telephone (212) 661-1100, Facsimile
(212) 661-8665, Attorneys for Plaintiffs.

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Plaintiffs, by and through their undersigned attorneys, bring this action and allege the following on information and belief, except as to those allegations applicable specifically to the Plaintiffs, which are based on personal knowledge:

NATURE OF THE ACTION

1. This case seeks to remedy the illegal wagers on the life of Stuart G. Moldaw by Defendants XE L.I.F.E., LLC, XE Capital Management LLC, XE-R LLC, Mark Ross & Co., Archie Master Fund, L.P. (collectively, "Defendants"). Stuart Moldaw died on May 24, 2008.
2. Wagers on the life of another have always been contrary to public policy. Accordingly, New York state law explicitly prohibits life insurance transactions that constitute such wagers. Specifically, [New York Insurance Law §3205](#)(b) prohibits persons from procuring, or causing another to procure, a life insurance policy upon a person in whom they have no insurable interest. An insurable interest is an interest which arises out of a desire to see the person insured continue to live. It is thus one which arises out of close relationships of blood or law, substantial affection and love, or "a lawful and substantial economic *interest in the continued life*, health or bodily safety of the person insured." [N.Y. Ins. Law §3205](#)(a)(1) (emphasis added). It is explicitly *not* "an interest which would arise only by, or would be enhanced in value by, the death, disablement or injury of the insured." *Id.* The latter is an illegal wager on the life of another.
3. New York law provides that when a life insurance policy is procured and transferred in violation of these provisions, the person receiving the proceeds through such procurement or transfer shall disgorge of those proceeds to the rightful beneficiary. [N.Y. Ins. Law §3205](#)(b)(4).
4. Defendants caused approximately \$78 million in life insurance policies to be taken out on the life of Stuart Moldaw (collectively, "Policies"). Stuart Moldaw never paid a single premium related to the Policies and never held a beneficiary interest in the Policies. No other individual or entity that had an insurable interest in Stuart Moldaw ever paid such a premium or held such a beneficial interest. Rather, Stuart Moldaw was paid \$2 million, and, through a series of transactions and sham loan agreements, upon information and belief, Defendant XE L.I.F.E., LLC and/or another Defendant became, and remains still, the named beneficiary on all of the Policies except a small portion thereof that were sold to a third party.
5. None of the Defendants has ever had an insurable interest in the life of Stuart Moldaw. Rather, they caused the Policies to be procured upon the life Stuart Moldaw purely as a financial wager: that they would pay less in premiums and compensation to Stuart Moldaw than they would realize reselling the Policies or collecting the benefits thereof upon Stuart Moldaw's death.
6. The Policies, thus, were procured in violation of New York law. Accordingly, Plaintiffs Norman Ferber, Trustee of The Stuart Moldaw Insurance Trust and Susan Moldaw, as the Executor of the Estate of The Stuart Moldaw, hereby respectfully request that the Court order Defendants to disgorge any death benefits they received upon Stuart Moldaw's death on May 24, 2008 or may receive in the future, which on information and belief totals approximately \$70 million, and transfer those benefits to The Stuart Moldaw Insurance Trust, which is the rightful beneficiary of the Policies. From this amount, the Plaintiffs agree to repay the compensation that Stuart Moldaw received from Defendants for agreeing to participate in the scheme.
7. Plaintiffs further request the Court enter an order declaring that amongst the parties currently claiming, or who may in the future claim, rights to the proceeds of the Policies, The Stuart Moldaw Insurance Trust is the rightful beneficiary of the benefits of the Policies.
8. In the alternative, Plaintiff Phyllis Moldaw requests an Order by the Court setting aside one-half of the benefits of the Policies and giving Phyllis the authority to name the beneficiary of such benefits, pursuant to California State community property law.

9. In the interim, Plaintiffs request an order by the Court imposing a constructive trust over the proceeds of the Policies until such time as the rights and obligations of the parties as to such proceeds are conclusively determined by the Court.

10. Plaintiffs request that the Court, upon determining that The Stuart Moldaw Insurance Trust is the rightful beneficiary of the Policies, impose a constructive trust over the proceeds for the benefit of The Stuart Moldaw Insurance trust.

11. In the alternative, Plaintiffs request that the Court, upon determining that Plaintiff Phyllis Moldaw is the rightful beneficiary of that portion of the proceeds of the Policies that represent her community share thereof, impose a constructive trust over such proceeds for her benefit.

PARTIES

A. The Plaintiffs

12. Plaintiff The Stuart Moldaw Insurance Trust, Norman Ferber Trustee, is an irrevocable trust organized under the laws of California. Norman Ferber is an individual residing in Palo Alto, California. Accordingly, Plaintiff The Stuart Moldaw Insurance Trust is deemed to be a resident of California.

13. Plaintiff Susan Moldaw (“Susan”) is an individual residing in San Francisco. Pursuant to Court Order, Susan Moldaw is the Executor of the Estate of Stuart Moldaw. Stuart Moldaw (“Stuart”), born XX/XX/1927, was an individual residing in Atherton, California. Stuart died in California on May 24, 2008, at the age of 81 years. Accordingly, pursuant to [28 U.S.C. § 1332\(c\)\(2\)](#), Plaintiff Susan is deemed to be a resident of the State of California for this action.

14. Plaintiff Phyllis Moldaw (“Phyllis”), born XX/XX/1928, is an individual residing in Atherton, California.

B. The Defendants

15. Defendant XE Capital Management, LLC (“XE Capital”) is a limited liability company organized under the laws of the State of Delaware with its principal place of business at 24 West 40th Street, 3rd Floor, New York, NY, 10019. The sole member of Defendant XE Capital is Randall K. Kau (“Kau”), an individual residing at 131 Riverside Drive, Apartment 6D, New York, NY, 10024. Defendant XE Capital is an asset and hedge management fund, specializing in insurance premium finance and structured finance.

16. Defendant XE-R, LLC (“XE-R”) is a limited liability company formed on August 12, 2004 and organized under the laws of the State of Delaware with its principal place of business at c/o R 2004, LLC, 400 Park Avenue, 18th Floor, New York, NY, 10022. Defendant XE-R is a joint venture owned 44.44% by Defendant XE Capital, LLC, a limited liability company organized under the laws of the State of Delaware with its principal place of business at 24 West 40th Street, 3rd Floor, New York, NY, 10019, and 55.56% by R 2004, LLC (“R2004”), a limited liability company organized under the laws of New York with its principle place of business at 425 Park Ave., New York, NY 10022. R 2004 is a limited liability company formed by its sole member Defendant Mark Ross & Co., a corporation organized under the laws of the State of Florida with its principal place of business at 400 Park Avenue, 18th Floor, New York, NY, 10022, to act as the Managing Member of Defendant XE-R. Defendants Mark Ross & Co. and XE Capital, LLC, created XE-R, in the Spring of 2004, as a vehicle by which Defendants Mark

Ross & Co., and XE Capital, LLC could engage in life insurance transactions that are the subject of this action.

17. Defendant XE L.I.F.E., LLC (“XE Life”) is a limited liability company organized under the laws of the State of Delaware with its principal place of business at 24 West 40th Street, 3rd Floor, New York, NY, 10019. The sole member of Defendant XE Life is Defendant XE Capital, a limited liability company organized under the laws of the State of Delaware with its principal place of business at 24 West 40th Street, 3rd Floor, New York, NY, 10019, which formed Defendant XE Life, in August of 2004, as a wholly-owned subsidiary, for the purpose of entering into the XE-R joint venture.

18. Defendant Mark Ross & Co. (“MR & Co.”) is a corporation organized under the laws of the State of Florida with its principal place of business at 400 Park Avenue, 18th Floor, New York, NY, 10022. MR & Co. is an insurance broker engaged in the business of marketing, procuring, and selling insurance policies. MR & Co. holds itself out as an expert in the life insurance field, particularly in the premium financing and life settlements areas. The principal owner of Defendant MR & Co. is Mark Ross (“Ross”), an individual residing in New York, NY. Ross is also the principal owner of R2004, and is the president of Defendant XE-R.

19. Defendant Archie Master Fund, L.P. (“Arche”) is an investment fund organized under the laws of Bermuda with its principle place of business at c/o BISYS Hedge Fund Services Limited, Hemisphere House, Church Street, Hamilton HM 11, Bermuda. The sole member of Defendant Arche is Defendant XE Capital, a limited liability company organized under the laws of the State of Delaware with its principal place of business at 24 West 40th Street, 3rd Floor, New York, NY, 10019.

C. Agency, Employment And Joint Venture

20. At all relevant times, Defendants, and each of them, in performing the acts alleged in this complaint, were acting as the agents, employees, joint venturers and/or representatives of each other, and were acting within the full course and scope of their agency, employment, and/or representation with the full knowledge, consent, permission, authorization, and ratification, either express or implied, of each of the other Defendants.

15. Each of the Defendants has participated as members of the conspiracy, and has acted with or in furtherance of said conspiracy, or aided or assisted in carrying out the purposes of the conspiracy, and has performed acts and made statements in furtherance of the conspiracy and other violations of New York law. Each of the Defendants acted both individually and in alignment with other Defendants, with full knowledge of their respective wrongful conduct. As such, the Defendants conspired together, building on each other's wrongdoing, to accomplish the acts outlined in this complaint. Defendants are sued individually as principals, participants, and aiders and abettors in the wrongful conduct complained of; the liability of each arises from the fact that each has engaged in all or part of the improper acts, plans, schemes, conspiracies, or transactions complained of herein.

JURISDICTION AND VENUE

21. This Court has jurisdiction over this action pursuant to [28 U.S.C. § 1332](#). The amount in controversy exceeds \$75,000 and the dispute is between citizens of different states.

22. Venue is proper in this Court because the principal places of business of all the Defendants are in the District.

23. This Court has jurisdiction over the Defendants because the principals place of business of each is in the District, and each does substantial business in the District and has close connections thereto.

FACTUAL ALLEGATIONS

A. Mark Ross Approaches Stuart About A Financial Proposal

24. The origin of this action is a financial proposal made unilaterally to Stuart by Defendants through Ross, in the Fall of 2004.

25. Prior to 2004, Stuart and his wife Phyllis (collectively, the “Moldaws”) had an established relationship with Ross, whereby Ross through his insurance brokerage company, Defendant MR & Co., placed life insurance on their lives. From time to time over a 10-year period, Defendant MR & Co. through Ross provided professional expertise and guidance to Stuart in connection with life insurance as an estate-planning vehicle.

26. In the second half of 2004, Defendants, through Ross, approached Stuart regarding what Ross referred to as a “new deal.” Ross explained to Stuart that he and Phyllis could each earn a “guaranteed” *\$4 million in exchange for allowing a series of insurance policies on their lives.* Ross explained that the *Moldaws would pay no premiums for the policies or any other fees* related to the transaction and that the *life insurance policies would be sold to investors.*

27. At the time Defendants approached Stuart regarding the proposal, the Moldaws did not have any existing desire or need for additional policies upon their lives. Accordingly, the Moldaws did nothing to initiate this discussion with Defendants. Rather, Defendants *unilaterally* approached Stuart and *presented the proposal* as a way for the Moldaws to earn a financial return with little or no risk.

28. Interested in the potential for the proposal to generate funds that the Moldaws could, in part, donate to charity, Stuart agreed to meet further with Defendants regarding the proposal. Meetings were held in the Fall of 2004 at the offices of Seiler & Co., LLC (“Seiler”) in Redwood City, California. Participants included Ross, Stuart, Stuart's accountant, Donald Seiler of Seiler & Co., and Stuart's occasional lawyer, Julian Stern of Heller Ehrman, LLP (“Heller”).

29. At the meetings, Ross stated that new life insurance policies could likely be taken out on the lives of Stuart and Phyllis, worth \$100 million in coverage upon each of their lives. The total amount of life insurance that can be taken out on an individual's life is determined by a number of factors, including the person's financial worth and the amount of insurance upon his or her life that is already outstanding. Upon information and belief, it was ultimately determined that life insurance policies totaling approximately \$78 million were available upon the life of Stuart and the same amount upon the life of Phyllis.

30. Ross stated, again, that Moldaws would *not be required to make any premium payments on the policies or pay any other costs* that might be involved in the contemplated transaction. *This includes fees that might be charged by Moldaw's advisors, including Seiler & Co. and Heller Ehrman, for their advice or by Bryan Cave, LLC (“Bryan Cave”) or any other law firm retained by Defendants to prepare the legal advice and documentation for the contemplated transaction.* All premiums, fees and other costs would be borne by Defendants.

31. As he had stated when he first approached Stuart about the deal, the Moldaws would earn \$4 million in exchange for participating in the deal. Specifically, Ross explained that upon the

issuance of the insurance policies on the lives of Stuart and Phyllis, Defendant XE Life and/or the other Defendants would pay Stuart and Phyllis a total of \$4 million as consideration for their agreeing to become the insured lives and, in effect, giving up their right to secure insurance coverage that they could otherwise own on their lives.

32. Convinced that the proposal would allow he and his wife to generate funds that could be used, in part, for charitable purposes and believing that they did not need any additional life insurance coverage, Stuart agreed to proceed with the proposal. Plaintiffs are informed and believe that Stuart did not get Phyllis' written consent before so agreeing or at any other point in the process.

B. Structure Of The Transactions

33. Following Stuart's agreement to proceed, Defendants initiated discussions with Stuart and his advisors regarding the structure of the transactions by which proposal would be consummated. Apparently aware of the legal prohibition of transactions by which a person is paid to take out insurance upon his or her life for the benefit of a stranger, Defendants devised a complicated scheme involving unfunded life insurance trusts, unfunded limited liability companies, and non-recourse insurance premium financing agreements, which had as its goal obscuring the true nature of the proposed transaction: a purchase of insurance upon the lives of Stuart and Phyllis by persons with no insurable interests in their lives.

1. Original Transactions

34. Upon information and belief, the first iteration of the scheme proposed by Defendants involved the creation of insurance trusts, limited liability companies, and the execution of non-recourse financing agreements. According to the proposal, life insurance trusts would be formed for the benefit of the Moldaw's issue, which, in turn would form limited liability companies. The trusts in combination with the limited liability companies would then secure individual insurance policies on the lives of Stuart and Phyllis. However, neither the trusts nor the limited liability companies would be funded or have any assets other than the life insurance policies, and so would not have any independent ability to pay the premiums necessary to acquire the insurance policies. Rather, the Defendants would make "loans" to the trusts and/or the limited liability companies in the form of an agreement to pay the premiums due on the policies. These "loans" would be secured by the trusts' only assets, the life insurance policies themselves, and the funds "loaned" would be paid directly to the insurance companies. As the trusts were unfunded and had no assets other than the policies, there was no chance that trusts would ever repay the "loans." Rather, it was intended that the loans would expire and Defendants would take ownership of the insurance policies on the lives of Stuart and Phyllis by which the "loans" were secured.

35. The proposed arrangement was agreed to, and a first attempt was made at its consummation in October of 2004. First, counsel to Defendant MR & Co., Bryan Cave, drafted documents creating the life insurance trusts for Phyllis and Stuart ("October 2004 Trusts") and associated limited liability companies. Defendant MR & Co. paid Bryan Cave's fees for this work and a Bryan Cave partner was named trustee of the October 2004 Trusts, with full powers. Next, on October 5, 2004, Defendant XE Life loaned Defendant XE-R funds, which Defendant XE-R subsequently loaned to Defendant MR & Co., to pay the premiums on the insurance policies to be taken out on the lives of Stuart and Phyllis. Upon information and belief, on October 6, 2004, the first of the insurance policies on the lives of Stuart and Phyllis were purchased, with the October 2004 Trusts and/or associated limited liability companies named as beneficiaries; the

premiums due on these policies were paid directly to the associated insurance companies by Defendants. In purported exchange, the October 2004 Trusts and/or associated limited liability companies simultaneously executed in favor of Defendants non-recourse promissory notes secured by the policies.

36. No person with an insurable interest in Stuart nor Phyllis ever held a beneficial interest in these insurance policies taken out on their lives; any beneficial interest of the October 2004 Trusts or associated limited liability companies in the policies was a sham. The October 2004 Trusts and the associated limited liability companies were unfunded; thus there was no chance that the October 2004 Trusts or associated limited liability companies would ever be able to pay off the loans and take ownership of the policies. Rather, it was fully intended that the loans would expire, and that Defendants would take ownership of the policies pursuant to the terms of the non-recourse promissory notes that the policies secured.

2. Defendants Modify Arrangements To Further Obscure Their True Character

37. On *October 11, 2004*, Defendant XE-R retained Debevoise & Plimpton LLC (“Debevoise”) to act as counsel in its transactions with the Moldaws. At the time, Debevoise was already counsel to Defendant XE Capital and Defendant XE Life. Soon thereafter, Defendants approached Stuart with the demand that the Moldaws agree to modification of the arrangements that been made between Defendants and the Moldaws as to the insurance policies taken out on their lives. The apparent intention of the proposed modification was further obscuring the arrangements' true nature.

38. Defendants, through Ross, informed Stuart that Defendants could not, as had been originally promised, immediately give Stuart and Phyllis the \$4 million upon issuance of the life insurance policies. Instead, the Moldaws would have to wait for such payment till the expiration of a two-year “incontestability period,” after which the policies on their lives would become available for sale. Stuart responded that he would only agree to the delayed payment if Defendants agreed to place the \$4 million in escrow, which together with all earnings would be payable to Stuart and Phyllis, at their election, following termination of the proposed incontestability period.

39. Defendants agreed to this arrangement. Defendants, through Ross, further informed Stuart that, in his opinion as an expert in the sale of life insurance policies to investors, the policies taken out on the lives of Stuart and Phyllis could be sold to for more than the \$4 million agreed to be paid to Stuart and Phyllis. Upon information and belief, on this basis, and in consideration for Stuart's agreement to modify the arrangements, it was agreed between Defendants MR & Co. and XE-R and Stuart that proceeds from the sales of the policies on lives of Stuart and Phyllis in excess of \$4 million, plus certain expenses, would be shared 80% to Stuart and Phyllis and 20% to Defendant XE-R. Ross further promised Stuart that the sales transactions would be undertaken so as to protect the names of Stuart and Phyllis as the insureds from the possible beneficial buyers of the insurance policies on their lives. Ross further promised that he and the entities he controlled, particularly Defendant XE-R, would be involved in diligently negotiating the sale of the policies shortly before the incontestability periods expired. Upon information and belief, Phyllis was not asked for written consent to the modified arrangement.

40. Following this agreement between Defendants and Stuart to modify the arrangements, counsel for Defendants, Bryan Cave and Deveboise, completely reformed the legal documents originally executed in early October 2004. The fees for this work were paid entirely by Defendants.

41. Pursuant to the reformed documents, in *October and November of 2004*, new limited liability companies solely owned by the October 2004 Trusts were created (“LLCs”). Ownership of the insurance policies already taken out on the lives of Stuart and Phyllis were then transferred to the newly created LLCs. The October 2004 Trusts remained unfunded and the newly created LLCs were unfunded as well.

42. On *December 13, 2004*, new irrevocable trusts (“December 2004 Trusts”) were created under the direction of Bryan Cave, including The Stuart Moldaw Insurance Trust, on whose behalf Plaintiff Norman Ferber, Trustee brings this action. Plaintiff Norman Ferber, Trustee was named trustee with full powers of both December 2004 Trusts. Ownership of the LLCs was then transferred to the December 2004 Trusts. As with their predecessor trusts and LLCs, the December 2004 Trusts were left unfunded.

43. On *January 14, 2005*, an escrow agreement (“Escrow Agreement”) was entered into among Stuart, Phyllis, Defendant XE Life and JP Morgan Trust Company, National Association, as escrow agent.

44. On *January 18, 2005*, upon information and belief, the original promissory notes concluded by the October 2004 Trusts were replaced by non-recourse promissory notes executed by the LLCs, payable to Defendant XE Life for \$14 million bearing interest at the rate of 27.12% per annum, each collateralized by the insurance policies on the respective lives of Stuart and Phyllis. These funds were never paid to the December 2004 Trusts or the LLCs; rather, they were paid directly to insurance companies for the premiums due on the policies taken out upon the lives of Stuart and Phyllis.

45. The Escrow Agreement contained a provision that purported to provide the LLCs with the right to elect to regain beneficial ownership of the insurance policies on the lives of Stuart and Phyllis, prior to their sale, by paying the principal, plus interest, on the promissory notes. However, as neither the December 2004 Trusts nor the LLCs were funded, this purported right was illusory. Furthermore, the associated interest rate on the promissory notes was intentionally set at a level so prohibitively high - 27.12% - that regaining beneficial ownership in the Policies would have been economically impractical if the December 2004 Trusts or LLCs had the funds to do so.

C. Defendants Part Ways; XE Life Becomes Formal Beneficiary of The Policies

46. Before the end of the incontestability periods, Defendants parted ways in less than amicable circumstances. In the struggle that ensued, Defendants XE Capital and XE Life took control of the various agreements that controlled the transaction between the Moldaws and Defendants. Defendants XE Capital and XE Life then replaced Defendants MR & Co. and XE-R with Sierra Life Solutions, as the party with the authority to negotiate sale of the insurance policies on the lives of the Moldaws. This is despite the fact that more than a year earlier, the parties had agreed that Sierra Life Solutions was not a proper sales agent for the insurance policies on the lives of the Moldaws.

47. Neither Defendants XE Life and XE Capital nor Sierra Life Solutions made any effort to sell the insurance policies on the Moldaws' lives prior to the end of the incontestability periods. Thus, at the expiration of these two year periods. Stuart and Phyllis each received \$2 million, plus earnings thereon, from the escrow account and, upon information and relief, Defendant XE Life took formal beneficial ownership of the policies on Stuart and Phyllis' lives pursuant to the terms of the promissory notes.

48. On May 24, 2008, Stuart died.

49. Upon information and belief, Defendants are presently engaged in a dispute with one another regarding who amongst them is or was entitled to control the sale of the policies on the lives of Stuart and Phyllis and who is entitled to control the death benefits payable under the Policies. Plaintiffs are not aware, and have not been informed, to whom, if anyone, proceeds of the Policies have been paid or the amount of any such payment.

CLAIMS

FIRST CLAIM

(Violation of [New York Insurance Law §3205\(b\)\(2\)](#))

50. Plaintiffs hereby repeat and reallege the foregoing allegations.

51. [New York Insurance Law §3205\(b\)\(2\)](#) provides:

No person shall procure our cause to be procured, directly or by assignment or otherwise any contract of insurance upon the person of another unless the benefits under such contract are payable to the person insured or his personal representatives, or to a person having, at the time when such contract is made, and insurable interest in the person insured.

52. [New York Insurance Law §3205\(a\)\(1\)](#) defines an “insurable interest” as:

(A) in the case of persons closely related by blood or by law, a substantial interest engendered by love and affection;

(B) in the case of other persons, a lawful and substantial economic interest in the continued life, health or bodily safety of the person insured, as distinguished from an interest which would arise only by, or would be enhanced in value by, the death, disablement or injury of the insured.

53. [New York Insurance Law §3205\(b\)\(4\)](#) provides:

If the beneficiary, assignee or other payee under any contract made in violation of this subsection [b] receives from the insurer any benefits thereunder accruing upon the death, disablement or injury of the person insured, the person insured or his executor or administrator may maintain an action to recover such benefits from the person receiving them.

54. None of the Defendants is, or ever was, closely related to Stuart.

55. None of the Defendant has ever had any lawful and substantial economic interest in the continued life, health or bodily safety of Stuart, but rather has only ever had an interest which would arise only by, or would be enhanced in value by, the death, disablement or injury of Stuart.

56. Defendants procured or caused to be procured, directly or by assignment or otherwise, contracts of life insurance upon the person of Stuart-the Policies.

57. Defendants lacked an insurable interest in Stuart at the time the Policies were made.

58. The Policies were made in violation of [New York Insurance Law §3205\(b\)\(2\)](#).

59. Pursuant to [New York Insurance Law §3205\(b\)\(4\)](#), Plaintiffs are entitled to recover the death benefits paid or payable under the Policies.

60. Wherefor, Plaintiffs request an order by the Court ordering Defendants to pay The Stuart Moldaw Insurance Trust any proceeds of the Policies paid or payable to Defendants, less those funds received by Stuart Moldaw in exchange for agreeing to allow the Policies to be taken out on his life.

61. In the alternative, Plaintiffs request an order by the Court ordering Defendants to pay Plaintiff Susan, as Executor and on behalf of the Estate of Stuart Moldaw, for transfer to The Stuart Moldaw Insurance Trust, any proceeds of the Policies paid or payable to Defendants, less those funds received by Stuart Moldaw in exchange for agreeing to allow the Policies to be taken out on his life.

62. Plaintiffs further request an order by the Court declaring The Stuart Moldaw Insurance Trust the rightful beneficiary of the Policies and declaring the rights of The Stuart Moldaw Insurance Trust to the proceeds of any of the Policies paid or payable, less those funds received by Stuart Moldaw in exchange for agreeing to allow the Policies to be taken out on his life.

63. Plaintiffs further request the Court: (1) order the imposition of an interim constructive trust over any proceeds of the Policies paid or payable to remain in force until such time as the rights and obligations of the parties as to such proceeds are conclusively determined by the Court; and (2) order Defendants to make a full accounting to Plaintiffs of any proceeds of the Policies that have been paid or are payable.

64. Plaintiffs further request the Court, upon determination that The Stuart Moldaw Insurance Trust and/or any Plaintiff is the rightful beneficiary of the proceeds paid or payable under the Policies, (1) order that the constructive trust imposed over proceeds of the Policies remain in force until such time as the full amount of such proceeds are transferred to The Stuart Moldaw Insurance Trust and/or any Plaintiff; and (2) order Defendants to make a full accounting of any proceeds of the Policies that have been paid or are payable.

SECOND CLAIM

(Violation of [New York Insurance Law §§3205\(b\)\(1\)](#))

65. Plaintiffs hereby repeat and reallege the foregoing allegations.

66. [New York Insurance Law §3205\(b\)\(1\)](#) provides:

Any person of lawful age may on his own initiative procure or effect a contract of insurance upon his own person for the benefit of any person, firm, association or corporation. Nothing herein shall be deemed to prohibit the immediate transfer or assignment of a contract so procured or effectuated.

67. [New York Insurance Law §3205\(b\)\(4\)](#) provides:

If the beneficiary, assignee or other payee under any contract made in violation of this subsection [b] receives from the insurer any benefits thereunder accruing upon the death, disablement or injury of the person insured, the person insured or his executor or administrator may maintain an action to recover such benefits from the person receiving them.

68. But for the understanding and agreement that Stuart would receive a substantial cash payment in exchange for agreeing to the procurement of the Policies through the trusts and associated limited liability companies through a financing arrangement that guaranteed beneficial ownership of the Policies would accrue to Defendants and/or a third party purchaser, Stuart would not have obtained the Policies, whether directly or indirectly.

69. The applications for the Policies, the associated financing arrangements, the creation of the Trust and associated limited liability companies, and all the other component actions of the deal were all part of an overarching transaction, which had as its purpose the procurement of policies of life insurance on Stuart's life by persons having no insurable interest in his life.

70. Stuart did not on his own initiative procure or effect a contract of insurance upon his own person for the benefit of any person, firm, association or corporation.

71. The Policies were procured or effectuated in violation of [New York Insurance Law §3205\(b\)\(1\)](#).

72. The beneficial interests in the Policies were transferred in violation of [New York Insurance Law §3205\(b\)\(1\)](#).

73. Pursuant to [New York Insurance Law §3205\(b\)\(4\)](#), Plaintiffs are entitled to recover the death benefits paid or payable under the Policies.

74. Wherefor, Plaintiffs request an order by the Court ordering Defendants to pay The Stuart Moldaw Insurance Trust any proceeds of the Policies paid or payable to Defendants, less those funds received by Stuart Moldaw in exchange for agreeing to allow the Policies to be taken out on his life.

75. In the alternative, Plaintiffs request an order by the Court ordering Defendants to pay Plaintiff Susan, as Executor and on behalf of the Estate of Stuart Moldaw, for transfer to The Stuart Moldaw Insurance Trust, any proceeds of the Policies paid or payable to Defendants, less those funds received by Stuart Moldaw in exchange for agreeing to allow the Policies to be taken out on his life.

76. Plaintiffs further request an order by the Court declaring The Stuart Moldaw Insurance Trust the rightful beneficiary of the Policies and declaring the rights of The Stuart Moldaw Insurance Trust to the proceeds of any of the Policies paid or payable, less those funds received by Stuart Moldaw in exchange for agreeing to allow the Policies to be taken out on his life.

77. Plaintiffs further request the Court: (1) order the imposition of an interim constructive trust over any proceeds of the Policies paid or payable to remain in force until such time as the rights and obligations of the parties as to such proceeds are conclusively determined by the Court; and (2) order Defendants to make a full accounting to Plaintiffs of any proceeds of the Policies that have been paid or are payable.

78. Plaintiffs further request the Court, upon determination that The Stuart Moldaw Insurance Trust and/or any Plaintiff is the rightful beneficiary of the proceeds paid or payable under the Policies, (1) order that the constructive trust imposed over proceeds of the Policies remain in force until such time as the full amount of such proceeds are transferred to The Stuart Moldaw Insurance Trust and/or any Plaintiff; and (2) order Defendants to make a full accounting to Plaintiffs of any proceeds of the Policies that have been paid or are payable.

THIRD CLAIM

(Violation of California Family Law § 1100(b))

79. Plaintiff Phyllis hereby repeats and realleges the foregoing allegations.

80. Plaintiff Phyllis is entitled to an order that the purchase and sale of the Policies without her written consent are in violation of California Family Law § 1100(b), are void to the extent that they purport to transfer her community property to a third person, and that Phyllis is entitled to a set aside of her community share of the proceeds of those Policies, equaling one-half thereof.

81. California Family Law § 1100(b) provides:

A spouse may not make a gift of community personal property, or dispose of community personal property for less than fair and reasonable value, without the written consent of the other spouse. This subdivision does not apply to gifts mutually given by both spouses to third parties and to gifts given by one spouse to the other spouse.

82. Premiums on the Policies were fully paid with the community funds of Stuart and Plaintiff Phyllis.

83. Stuart disposed of the beneficial interest in the Policies for less than the fair and reasonable value of the Policies.

84. Stuart did not get the written consent of Phyllis before making these dispositions.

85. These dispositions were neither gifts mutually given by both Moldaws nor gifts given to one another.

86. As a direct and proximate cause of these dispositions, Phyllis was improperly dispossessed of the community property to which she was properly entitled.

87. Phyllis is, therefore, entitled to set aside her community share of the proceeds of the Policies.

88. Wherefore, Plaintiffs request an order by the Court ordering Defendants to pay Plaintiff Phyllis her community share of any proceeds of the Policies paid or payable to Defendants.

89. Plaintiff Phyllis further request an order by the Court declaring Plaintiff Phyllis the rightful beneficiary of that portion of the Policies that represent her community share thereof and declaring her rights to the that portion of proceeds of any of the Policies paid or payable that represent her community share thereof.

90. Plaintiff Phyllis further request the Court: (1) order the imposition of an interim constructive trust over any proceeds of the Policies paid or payable to remain in force until such time as the rights and obligations of the parties as to such proceeds are conclusively determined by the Court; and (2) order Defendants to make a full accounting to Plaintiffs of any proceeds of the Policies that have been paid or are payable.

91. Plaintiff Phyllis further request the Court, upon determination that Plaintiff Phyllis is the rightful beneficiary of that portion of the proceeds paid or payable under the Policies that represent her community share thereof: (1) order that the constructive trust imposed over proceeds of the Policies remain in force until such time as that portion of the proceeds paid or payable under the Policies that represent Plaintiff Phyllis' community share thereof are transferred to Plaintiff Phyllis; and (2) order Defendants to make a full accounting to Plaintiffs of any proceeds of the Policies that have been paid or are payable.

FOURTH CLAIM

(Declaratory Relief)

92. Plaintiffs hereby repeat and reallege the foregoing allegations.

93. An actual and justiciable controversy within the jurisdiction of the Court exists between the parties to this action regarding their rights and liabilities with respect to the proceeds of the Policies, which controversy may be determined by a judgement of this Court.

94. Plaintiffs are entitled to a declaration that Defendants' purchase and transfer of the Policies were in violation of [New York Insurance Law §§3205\(b\)\(1\), 3205\(b\)\(2\)](#), and that The Stuart Moldaw Insurance Trust the rightful beneficiary of the Policies and declaring the rights of The Stuart Moldaw Insurance Trust to the proceeds of any of the Policies paid or payable.

95. Wherefore, Plaintiffs request the Court enter an order declaring that (1) Defendants' purchase and transfer of the Policies were in violation of [§ 3205\(b\)\(1\), 3205\(b\)\(2\) of New York Insurance Law](#), (2) The Stuart Moldaw Insurance Trust is the rightful beneficiary of the Policies, and (3) The Stuart Moldaw Insurance Trust is entitled to demand the proceeds of any of the Policies paid or payable, less those funds received by Stuart Moldaw in exchange for agreeing to allow the Policies to be taken out on his life.

96. In the alternative, Plaintiff Phyllis is entitled to a declaration that Defendants' purchase and transfer of the Policies were (1) in violation of California Family Law § 1100(b) to the extent they purported to dispossess Phyllis of her community property and (2) Plaintiff Phyllis is the rightful beneficiary of that portion of the Policies that represent her community share thereof and that portion of proceeds of any of the Policies paid or payable that represent her community share thereof.

97. Wherefore, Plaintiffs request and order by the Court declaring that (1) Defendants' purchase and transfer of the Policies were in violation of California Family Law § 1100(b) to the extent they purported to dispossess Phyllis of her community property, (2) Plaintiff Phyllis is the rightful beneficiary of that portion of the Policies that represent her community share thereof, and (3) Plaintiff Phyllis is entitled to that portion of proceeds of any of the Policies paid or payable that represent her community share thereof.

FIFTH CLAIM

(Imposition of a Constructive Trust and Accounting)

98. Plaintiffs hereby repeat and reallege the foregoing allegations.

99. Defendants caused the Policies to be made or procured and the beneficial interests therein to be transferred in violation of [New York Insurance Law §§3205\(a\)\(1\), 3205\(b\)\(1\), 3205\(b\)\(2\)](#).

100. Therefore, under [New York Insurance Law §3205\(b\)\(4\)](#), Plaintiffs are entitled to demand that any person receiving the proceeds of the Policies transfer such proceeds to The Stuart Moldaw Insurance Trust, as the Policies' rightful beneficiary, and no person other than Plaintiffs has a right to the proceeds of the Policies.

101. Plaintiffs are not aware, and have not been informed, what portion, if any, of the proceeds of the Policies have been paid or are payable or to whom such proceeds have been paid or are payable.

102. Wherefore, Plaintiffs request the Court: (1) order the imposition of an interim constructive trust over any proceeds of the Policies paid or payable to remain in force until such time as the rights and obligations of the parties as to such proceeds are conclusively determined by the Court; and (2) order Defendants to make a full accounting to Plaintiffs of any proceeds of the Policies that have been paid or are payable.

103. Plaintiffs further request the Court, upon determination that The Stuart Moldaw Insurance Trust and/or any Plaintiff is the rightful beneficiary of the proceeds paid or payable under the Policies, (1) order that the constructive trust imposed over proceeds of the Policies remain in force until such time as the full amount of such proceeds are transferred to The Stuart Moldaw Insurance Trust and/or any Plaintiff; and (2) order Defendants to make a full accounting to Plaintiffs of any proceeds of the Policies that have been paid or are payable.

104. Alternatively, Stuart transferred beneficial interest in the Policies for less than their fair and reasonable value and without obtaining Plaintiff Phyllis written consent in violation of California Family Law § 1100(b). Plaintiff Phyllis therefore is entitled to that portion of the Policies' proceeds that represent her community share thereof.

105. Wherefore, plaintiffs request the Court: (1) order the imposition of an interim constructive trust over any proceeds of the Policies paid or payable to remain in force until such time as the rights and obligations of the parties as to such proceeds are conclusively determined by the Court; and (2) order Defendants to make a full accounting to Plaintiffs of any proceeds of the Policies that have been paid or are payable.

106. Plaintiffs further request the Court, upon determination that Plaintiff Phyllis is the rightful beneficiary of that portion of the proceeds paid or payable under the Policies that represent her community share thereof: (1) order that the constructive trust imposed over proceeds of the Policies remain in force until such time as that portion of the proceeds paid or payable under the Policies that represent Plaintiff Phyllis' community share thereof are transferred to Plaintiff Phyllis; and (2) order Defendants to make a full accounting to Plaintiffs of any proceeds of the Policies that have been paid or are payable.

REQUEST FOR RELIEF

Wherefore, Plaintiffs pray for judgment as follows:

1. As to all claims, preliminarily enjoining Defendants from disposing any proceeds of Policies paid or payable to Defendants or transferring beneficial interest in any proceeds of Policies paid or payable until such time as the Court has conclusively determined the rights and obligations as to the proceeds of the Policies.
2. As to the First and Second Claims, in favor of Plaintiffs and against Defendants in the amount totaling the proceeds of the Policies, with interest, costs, and disbursements to be paid to The Stuart Moldaw Insurance Trust, less those funds received by Stuart Moldaw in exchange for agreeing to allow the Policies to be taken out on his life.
3. As to the First and Second Claims, in favor of Plaintiffs and against Defendants, declaring that (1) Defendants' purchase and transfer of the Policies were in violation [§§3205\(b\)\(1\), 3205\(b\)\(2\) of New York Insurance Law](#), (2) The Stuart Moldaw Insurance Trust is the rightful beneficiary

of the Policies, and (3) The Stuart Moldaw Insurance Trust is entitled to demand the proceeds of any of the Policies paid or payable, less those funds received by Stuart Moldaw in exchange for agreeing to allow the Policies to be taken out on his life.

4. As to the First and Second Claims, permanently enjoining Defendants from disposing any proceeds of Policies paid or payable to Defendants or transferring beneficial interest in any proceeds of Policies paid or payable to persons other than Plaintiffs.

4. In the alternative, as to the Third Claim, in favor of Plaintiff Phyllis and against Defendants, in the amount of her community share of the proceeds of the Policies.

5. In the alternative, as to the Third Claim, in favor of Plaintiff Phyllis and against Defendants, declaring that (1) Defendants' purchase and transfer of the Policies were in violation of California Family Law § 1100(b) to the extent they purported to dispossess Phyllis of her community property, (2) Plaintiff Phyllis is the rightful beneficiary of that portion of the Policies that represent her community share thereof, and (3) Plaintiff Phyllis is entitled to that portion of proceeds of any of the Policies paid or payable that represent her community share thereof.

6. In the alternative, as to the Third Claim, permanently enjoining Defendants from disposing of proceeds of Policies equaling Plaintiff Phyllis' community share thereof that have been paid or are payable to Defendants or transferring beneficial interest in such proceeds to persons other than Plaintiff Phyllis.

7. Awarding such other and further relief as the Court deems just and proper.

Dated: December 05, 2008

COTCHETT, PITRE & McCARTHY

By: <<signature>>

JOSEPH W. COTCHETT

STUART G. GROSS

NANCY L. FINEMAN

San Francisco Airport Office Center

840 Malcolm Road, Suite 200

Burlingame, CA 94010

Telephone: (650) 697-6000

Facsimile: (650) 697-0577

POMERANTZ HAUDEK BLOCK GROSSMAN & GROSS LLP

By <<signature>>

STANLEY M. GROSSMAN

ROBERT J. AXELROD

100 Park Avenue, Suite 2600

New York, NY 10017

Telephone (212)661-1100

Facsimile (212) 661-8665

Attorneys for Plaintiffs

JURY DEMAND

Plaintiffs demand trial by jury on all issues so triable.

Dated: December 5, 2008

COTCHETT, PITRE & McCARTHY

By: <<signature>>

JOSEPH W. COTCHETT

START G. GROSS

NANCY L. FINEMAN

COTCHETT, PITRE & McCARTHY

San Francisco Airport Office Center

840 Malcolm Road, Suite 200

Burlingame, CA 94010

Telephone: (650) 697-6000

Facsimile: (650) 697-0577

POMERANTZ HAUDEK BLOCK

GROSSMAN & GROSS LLP

By <<signature>>

STANLEY M. GROSSMAN

ROBERT J. AXELROD

100 Park Avenue, Suite 2600

New York, NY 10017

Telephone (212) 661-1100

Facsimile (212) 661-8665

Attorneys for Plaintiffs

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