No.

In the Supreme Court of the United States

CAROLYN LAZAR,
Petitioner

v.

MARK G. KRONCKE, IN HIS CAPACITY AS ADMINISTRATOR OF THE ESTATE OF GEORGE THOMAS KRONCKE,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

JOSH LAZAR
THE GERACI LAW FIRM
90 Discovery
Irvine, CA 92618

STEPHEN B. KINNAIRD
SERLI POLATOGLU
PAULHASTINGS LLP
875 15th Street N.W.
Washington, DC 20005

STEPHANOS BIBAS
JAMES A. FELDMAN
Counsel of Record
NANCY BREGSTEIN GORDON
UNIVERSITY OF PENNSYLVANIA
LAW SCHOOL
SUPREME COURT CLINIC
3501 Sansom Street
Philadelphia, PA 19104
(202) 730–1267
jfeldman@law.upenn.edu

Counsel for Petitioner Carolyn Lazar

QUESTION PRESENTED

A holder of a non-probate asset, such as a retirement account, life insurance policy, or annuity, frequently designates a spouse as a beneficiary in the event of the account holder's death. Numerous states' statutes nonetheless nullify such a beneficiary designation—ordinarily the only written expression of an account holder's intent—if the now-deceased account holder and the designated beneficiary have divorced. Most do so retroactively—applying even to contracts made before the statutes were enacted.

The question presented is:

Does retroactive application of state revocation-on-divorce statutes violate the Contracts Clause, U.S. Const. art. I, § 10, cl. 1?

PARTIES TO THE PROCEEDING

Petitioner Carolyn Lazar was plaintiff, counter-defendant, and cross-defendant in the district court and appellant in the court of appeals.

Respondent Mark G. Kroncke, in his capacity as Administrator of the Estate of George Thomas Kroncke, was defendant and counter-defendant in the district court and appellee in the court of appeals.

Charles Schwab & Co. was defendant, counter-claimant, and cross-claimant in the district court. Charles Schwab & Co. was listed in the caption of the court of appeals' opinion but did not participate as a party in the court below, so it is not a party before this Court.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Constitutional Provisions:

Statutes:

Other Authorities:

INTRODUCTION

Millions of Americans invest in non-probate assets such as retirement accounts, life insurance policies, and annuities, designating their spouses and other loved ones as beneficiaries in the event of their death. That designation is ordinarily the only written expression—and the only clear expression—of the account holder's intent. Twenty-nine states' statutes nonetheless nullify a now-deceased account-holder's designation of a spousal beneficiary if the account holder and beneficiary have divorced.

Federal courts of appeals and state supreme courts are split 4–2 on whether retroactive application of these state statutes violates the Contracts Clause. The split has deepened over more than a decade, as courts have openly taken sides and acknowledged the division. South Dakota's Supreme Court is at odds with its own federal circuit, creating a risk of forum-shopping and arbitrary outcomes based on a race to the courthouse.

Retroactive revocation-on-divorce statutes are quintessential "Law[s] impairing the Obligation of Contracts." U.S. Const. art. I, § 10, cl. 1. They inject uncertainty and frustrate decedents' estate planning. They force investment firms and other account custodians to file interpleader actions, raising thorny choice-of-law issues, incurring litigation expenses, freezing funds for extended periods of time, triggering disputes among relatives, and draining account assets. Millions of accounts worth trillions of dollars are at stake. And this case is an ideal vehicle: the issues were fully briefed and addressed below, and the case was decided on purely legal grounds on a motion to dismiss. Further review is warranted.

OPINIONS BELOW

The Ninth Circuit's opinion is reported at 862 F.3d 1186 and reprinted at App., *infra*, 1a–26a. The December 17, 2014 opinion of the U.S. District Court for the District of Arizona, granting respondent Kroncke's motion to dismiss, is unreported but reprinted at App., *infra*, 27a–53a. The July 3, 2014 opinion of the U.S. District Court for the Central District of California, granting respondent Kroncke's motion to dismiss and transferring the case, is unreported but reprinted at App., *infra*, 54a–76a. The March 17, 2014 opinion of the U.S. District Court for the Central District of California, granting respondent Kroncke's motion to dismiss, is unreported but reprinted at App., *infra*, 77a–96a.

JURISDICTIONAL STATEMENT

The Ninth Circuit panel filed its opinion on July 14, 2017. This Court has jurisdiction under 28 U.S.C. § 1254(1).

28 U.S.C. § 2403(b) CERTIFICATION

Because this action challenges the constitutionality of Ariz. Rev. Stat. Ann. § 14-2804, 28 U.S.C. § 2403(b) may apply. In compliance with S. Ct. R. 29.4(c), petitioner is serving this petition on the State of Arizona. On January 30, 2015, the Ninth Circuit certified to the State Attorney General that the constitutionality of that statute was drawn into question.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Contracts Clause, U.S. Const. art. I, § 10, cl. 1, provides, in relevant part:

> No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . .

Arizona's revocation-on-divorce statute, Ariz. Rev. Stat. Ann. § 14-2804, provides, in relevant part:

Termination of marriage; effect; revocation of probate and nonprobate transfers; federal law; definitions

A. Except as provided by the express terms of a governing instrument, a court order or a contract relating to the division of the marital estate made between a divorced couple before or after the marriage, divorce or annulment, the divorce or annulment of a marriage:

(1) Revokes any revocable

a. Disposition or appointment of property made by a divorced person to that person's former spouse in a governing instrument and any disposition or appointment created by law or in a governing instrument to a relative of the divorced person's former spouse.

. . . .

STATEMENT

1. Petitioner Carolyn Lazar and decedent George "Tom" Kroncke were married in 1990. He was a 48-year-old engineer; she was a 47-year-old high school teacher. *See* CA9 E.R. 472; Carolyn Lazar Decl. in Opp'n to Att'y's Fees 3–4 (Lazar Decl.). Each had been married before.

In 1992, Tom designated Carolyn as the sole primary beneficiary of an IRA that he had transferred to Charles Schwab & Co. *See* Schwab IRA Application, CA9 E.R. 470–71. The IRA application specified that, upon Tom's death, the account would "become the property of the primary beneficiary." *Id.* at 473. Under Schwab's plan, "[i]f a Participant dies before distribution of his or her entire Account, the undistributed balance in the Participant's Account shall be distributed to the Beneficiary *designated by the Participant in writing* on a form acceptable to and filed with the Custodian." *Id.* at 739 (emphasis added). Tom never changed that primary beneficiary designation.

2. Three years later, in 1995, Arizona passed its automatic revocation-on-divorce statute, Ariz. Rev. Stat. Ann. § 14-2804. Like sixteen other states, Arizona modeled its law on the Uniform Probate Code's provision, Unif. Probate Code § 2-804. *See* p. 21 n.2, *infra*. The Arizona statute provides that, unless the "express terms" of a "governing instrument" (or court order or marriage-related contract) provide otherwise, "the divorce or annulment of a marriage[ ] [r]evokes any revocable [d]isposition or appointment of property made by a divorced person to that person's former spouse." Ariz. Rev. Stat. Ann. § 14-2804. The statute nullifies the decedent's written designation of the ex-spouse as beneficiary,

contrary to the decedent's expressed intent. The only way to defeat its operation is to redesignate the ex-spouse after the divorce, and the need to do so would not occur to those who are unaware that the statute had nullified their original designation. No one has alleged, and we are aware of no evidence, that Tom ever learned of this statute or its effect on his IRA.

3. After eighteen years of marriage, Tom and Carolyn divorced in Arizona in 2008. Even after the divorce, they maintained a "close and confidential relationship." Am. Compl. 2; Lazar Decl. 2. For a time, they "talked about getting back together." Lazar Decl. 2. He visited her often at her home. *Id.* And when Carolyn had to undergo open-heart surgery, Tom visited her in the hospital. *See id.*

Tom designated additional beneficiaries after the divorce. In 2009, he converted a portion of the IRA to a Roth IRA, and named his sons from his first marriage, Mark and Erik Kroncke, as its primary beneficiaries. CA9 E.R. 604–09. He reversed the transaction in 2010, returning the funds to the traditional IRA. *Id.* at 611–12. But he never removed Carolyn as the primary beneficiary.

4. In 2012, Tom passed away. As the primary beneficiary of the IRA, Carolyn requested payment from Schwab. Respondent Mark Kroncke, as the administrator of Tom's estate, also requested payment from the IRA. Facing conflicting claims, Schwab refused to disburse the money to either party until a court resolved the conflict. Am. Compl. 2–3.

5. Carolyn sued in the U.S. District Court for the Central District of California, claiming breach of

contract by Schwab and seeking a declaratory judgment against the estate. Carolyn alleged, *inter alia*, that the U.S. Constitution's Contracts Clause forbade applying Arizona's revocation-on-divorce statute to pre-existing contracts. Am. Compl. 5–6. Schwab filed an interpleader action as a counterclaim. Schwab Counterclaim & Cross-Claim for Interpleader 4–5 (dkt. No. 15, Feb. 15, 2013).

The California district court dismissed Carolyn's Contracts Clause claim, ruling that "[a]s a designated beneficiary, [Carolyn] maintained only an expectation interest in the Account, and had no vested interest" sufficient to support a Contracts Clause claim. App., *infra*, 84a. The district court followed the Tenth Circuit's holding to the same effect in *Stillman* v. *Teachers Ins. & Annuity Ass'n College Retirement Equities Fund*, 343 F.3d 1311, 1322 (10th Cir. 2003). App., *infra*, 83a–84a.

Carolyn filed an amended pleading adding an additional claim. After dismissing Schwab from the case, the California district court held that it lacked personal jurisdiction over the estate and transferred the case to the U.S. District Court for the District of Arizona. App., *infra*, 59a–75a.

6. The Arizona district court then granted the estate's renewed motion to dismiss. It rejected Carolyn's Contracts Clause retroactivity claim both as law of the case and "for the same reasons" given by the California district court. App., *infra*, 43a.

7. The Ninth Circuit affirmed. App., *infra*, 26a. The court noted the "[d]ivergent [a]uthority" on whether the Contracts Clause permits retroactive application of a revocation-on-divorce statute, contrasting at length the Eighth and Tenth Circuit's

opposite holdings on the issue. *Id.* at 17a–18a (comparing *Whirlpool Corp.* v. *Ritter*, 929 F.2d 1318, 1323 (8th Cir. 1991), with *Stillman*, 343 F.3d at 1322). Rejecting the Eighth Circuit's approach, the Ninth Circuit instead "agree[d] with the *Stillman* court and conclude[d] that no substantial contractual impairment occurred through application of Arizona's [revocation-on-divorce] statute to the IRA." *Id.* at 19a.

The Ninth Circuit adopted the view that Tom's unexercised right to change the beneficiary designation "at any time and for any reason" meant that "no third-party rights to the IRA could vest until his death." App., *infra*, 19a. In the court's view, the fact that Tom had that right permitted Arizona's "law mandating the automatic revocation of any designation of a former spouse" to take effect at the time of the divorce and "extinguish[]" what it characterized as Carolyn's "expectancy interest." *Id.* The court stated, without citing evidence, that "[t]he Decedent [Tom] was free to reaffirm [Carolyn] Lazar as his designated beneficiary but *chose* not to do so." *Id.* (emphasis added). Putting dispositive weight on its "vesting" analysis, the court concluded that "[b]ecause [Carolyn] Lazar never possessed a vested contractual right, she suffered no contractual impairment." *Id.* at 18a.

REASONS FOR GRANTING THE WRIT

1. Federal courts of appeals and state supreme courts are divided 4–2 on whether retroactive application of revocation-on-divorce statutes violates the Contracts Clause. If Carolyn's claim had arisen in the Eighth Circuit or Pennsylvania, she would have prevailed. The conflict over retroactivity has grown

over more than a decade, as courts have expressly acknowledged the split and aligned themselves with one line of decisions or the other.

2. The Ninth Circuit erred in holding that the Contracts Clause permits retroactive revocation-on-divorce statutes to nullify beneficiary designations. Like the Ex Post Facto and Bill of Attainder Clauses, the Contracts Clause reflects a "deeply rooted . . . antiretroactivity principle." *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 265–66 (1994). By nullifying Tom's written beneficiary designation, an integral component of his contract with Schwab, the statute disrupted Tom's (and Carolyn's) "settled and completed financial arrangements made in reliance on existing law." *Whirlpool*, 929 F.2d at 1323 (internal quotation marks omitted). While revocation-on-divorce statutes purport to effectuate what some inattentive account holders might have wanted, that cannot justify retroactively nullifying the written beneficiary designations of ex-spouses kept in place by others.

3. The question presented is important. Millions of Americans are divorced, and non-probate assets collectively hold trillions of dollars. Twenty-nine states have revocation-on-divorce statutes, casting a shadow of uncertainty over Americans' estate planning. And conflicts between the federal and state courts in South Dakota risk breeding arbitrary outcomes or forum-shopping.

4. This case is an ideal vehicle. The Arizona statute is quite typical; like sixteen other state statutes, it is closely modeled on the Uniform Probate Code. The case was decided as a matter of law on a motion to dismiss, and the Contracts Clause issue was fully briefed and addressed below.

I. COURTS HAVE LONG BEEN DIVIDED OVER WHETHER APPLYING REVOCATION-ON-DIVORCE STATUTES RETROACTIVELY VIOLATES THE CONTRACTS CLAUSE

The Ninth Circuit acknowledged that its holding put it on one side of "[d]ivergent [a]uthority." App., *infra*, 17a. The Eighth Circuit and Pennsylvania Supreme Court have squarely held that the Contracts Clause forbids applying revocation-on-divorce statutes retroactively. If Carolyn Lazar's claim had arisen in either of these jurisdictions, she would have prevailed. Instead, the Ninth Circuit aligned itself with the Tenth Circuit and the supreme courts of Colorado and South Dakota, which have held to the contrary. The split is recognized by courts and commentators and has percolated for more than a decade.

A. Two Jurisdictions Have Held That Retroactive Application of Revocation-on-Divorce Statutes Violates the Contracts Clause

1. Both the Eighth Circuit and the Pennsylvania Supreme Court have held that the Contracts Clause forbids applying revocation-on-divorce statutes retroactively to invalidate the designation of ex-spouses as beneficiaries. In *Whirlpool,* the decedent had designated his first wife as the beneficiary of his life insurance policy before the revocation-on-divorce statute was passed. 929 F.2d at 1319–20. The Eighth Circuit held that applying the new statute retroactively to nullify the decedent's beneficiary designation violated the Contracts Clause. *Id.* at 1322–23. Contrary to the Ninth Circuit's decision in this case, which expressly rejected *Whirlpool*, the Eighth Circuit held that the pre-existing "rule of insurance contract construction became a part of the

insurance contract's obligations. [The decedent] was entitled to expect that his wishes regarding the insurance proceeds, as ascertained pursuant to this then-existing law, would be effectuated." *Id.* at 1322. *Contra* App., *infra*, 17a–19a.

The Eighth Circuit rejected the statute's blanket stereotype that all decedents would want to disinherit their ex-spouses but "fail to consider the need to change" their beneficiaries. 929 F.2d at 1323. And rather than assuming, as the Ninth Circuit did, that the decedent "chose not to" reaffirm his beneficiary designation, the Eighth Circuit recognized that a decedent "could rely on the pre-existing law and neither know nor expect that the rules governing his policy have changed." *Compare* App., *infra*, 19a, *with* 929 F.2d at 1323.

Earlier this year, in *Metropolitan Life Insurance Co.* v. *Melin*, 853 F.3d 410, 414 (8th Cir. 2017), *petition for cert. filed* (U.S. June 1, 2017) (No. 16-1432), the Eighth Circuit reaffirmed its decision in *Whirlpool*. The Minnesota statute at issue in *Melin*, like the Arizona statute here, was modeled on the Uniform Probate Code. *Id.* at 411; *infra* p. 21 n.2. The Eighth Circuit rejected the argument, accepted by the Ninth Circuit, that the account holder's ability to change the beneficiary designation at will during his or her lifetime is dispositive. The court explained that whether or not the beneficiary had a "vested" interest in that sense "is beside the point. What matters are the policyholder's rights and expectations, not any interest of the beneficiary." *Id.* at 413. *Contra* App., *infra*, 19a.

2. The Pennsylvania Supreme Court followed *Whirlpool*'s progeny. *Parsonese* v. *Midland Nat'l Ins. Co.*, 706 A.2d 814, 819 (Pa. 1998). It made no

difference that the ex-spouse in that case "received [only] a contract expectancy which would result in vested rights against Midland when [the decedent] died." *Id.* at 816. Revoking a beneficiary designation retroactively effects a "severe, virtually total" impairment of the *decedent*'s contract. *Id.* at 818. Thus, the court affirmed the trial court's holding that the law violated the Contracts Clauses of both the state and federal constitutions. *Id.* at 819.

3. Several other courts have likewise rejected retroactive application of revocation-on-divorce statutes. *See, e.g.*, *Mass. Mut. Life Ins. Co.* v. *Curley*, 459 F. App'x 101, 106 (3d Cir. 2012) (unpub) (following *Parsonese* in refusing to apply Pennsylvania's revocation-on-divorce statute retroactively, because doing so would violate both the federal and state constitutions); *MONY Life Ins. Co.* v. *Ericson*, 533 F. Supp. 2d 921, 928 (D. Minn. 2008); *First Nat'l Bank & Tr. Co.* v. *Coppin*, 827 P.2d 180, 181–82 (Okla. Civ. App. 1992) (following *Whirlpool* in interpreting both the federal and state Contracts Clauses), *superseded by statute*, Okla. Stat. Ann. tit. 15, § 178(D) (amending Oklahoma statute to apply only prospectively); *see also Aetna Life Ins. Co.* v. *Schilling*, 616 N.E.2d 893, 896 (Ohio 1993) (holding that Ohio's Contracts Clause bars retroactive application of Ohio's revocation-on-divorce statute).

B. Four Jurisdictions Have Upheld Retroactive Revocation-on-Divorce Statutes

1. In addition to the Ninth Circuit, three other courts have held that retroactive application of revocation-on-divorce statutes does not violate the Contracts Clause. In the decision below, the Ninth Circuit expressly aligned itself with those courts. App., *infra*, 17a–19a (adopting the Tenth Circuit's

position in *Stillman* and rejecting the Eighth Circuit's position in *Whirlpool*).

2. In *Stillman*, the Tenth Circuit held that Utah's revocation-on-divorce statute does not impair contracts, even when applied retroactively to nullify a decedent's beneficiary designation. While it noted that *Whirlpool*, *Parsonese*, and *Schilling* offered "distinguished support" for barring retroactive application of such statutes, the Tenth Circuit nevertheless disagreed with those courts. *Stillman*, 343 F.3d at 1321–22. Because it did not view the beneficiary designation as a "contractual obligation" of the decedent's annuity contract, the Tenth Circuit ruled that the statute "does not impair any contract right." *Id.* at 1322. Instead, that court characterized the decedent's "choice of beneficiaries [as] a donative transaction, not a contractual arrangement." *Id.* *Contra Parsonese*, 706 A.2d at 818 ("Selection of a beneficiary is the entire point of a life insurance policy.").

3. The Colorado Supreme Court has held that a statute that retroactively nullified the decedent's beneficiary designation does not violate the federal or state Contracts Clause. *In re Estate of DeWitt*, 54 P.3d 849, 859–60 (Colo. 2002). It distinguished contractual provisions, such as the decedent's and insurer's respective obligations to pay premiums and proceeds, from what it characterized as "the donative[] aspect of the insurance contract." *Id.* at 860. Because the statute "merely changed the identity of the presumptive beneficiary . . . . the essential elements of the bargained-for exchange remain intact." *Id.* (internal quotation marks omitted). The court expressly rejected the holdings of *Whirlpool*, *Parsonese*, *Coppin*, and *Schilling*. *Id.*

4. The South Dakota Supreme Court has reached the same conclusion. It expressly rejected the Eighth Circuit's holding in *Whirlpool*, instead aligning itself with *Stillman* and *DeWitt*. *Buchholz* v. *Storsve*, 740 N.W.2d 107, 113–14 (S.D. 2007). Like the *DeWitt* court, it rejected the view that a decedent's beneficiary designation is an "essential element[] of the bargained-for exchange." *Id.* at 114 (internal quotation marks omitted). And it asserted "that ex-spouses often intend to change their beneficiaries." *Id.* (internal quotation marks omitted). Thus, it upheld retroactively revoking the decedent's beneficiary designation under her retirement plan.[1]

5. Several other lower federal and state courts concur. *See Lincoln Benefit Life Co.* v. *Heitz*, 468 F. Supp. 2d 1062, 1068–69 (D. Minn. 2007) (rejecting *Whirlpool*); *Allstate Life Ins. Co.* v. *Hanson*, 200 F. Supp. 2d 1012, 1019–21 (E.D. Wis. 2002) (rejecting *Whirlpool*, *Coppin*, and *Parsonese*); *Mearns* v. *Scharbach*, 12 P.3d 1048, 1054–56 (Wash. Ct. App. 2000) (rejecting *Whirlpool*); *In re Estate of Dobert*, 963 P.2d 327, 332 (Ariz. Ct. App. 1998).

---

[1] The South Dakota Supreme Court relied on both the federal and state Contracts Clauses, 740 N.W.2d at 113 n.3; "looked to the United States Supreme Court's analysis of the Federal Constitution's Contracts Clause for guidance" because "the Federal and State Constitutions contain in substance and effect the same provisions," *id.* at 113 n.4; and agreed with or rejected federal constitutional Contracts Clause precedents from a variety of jurisdictions in reaching its conclusion, *id.* at 113–14. By upholding retroactive application of the statute, the court necessarily foreclosed any claim based on the U.S. Constitution's Contracts Clause.

C. The Conflict Is Mature, Acknowledged, and Ripe for This Court's Review

The decade-long conflict on this issue has reached a point where resolution by this Court is urgently needed. Within just a few months of each other this year, the Eighth Circuit in *Melin* and the Ninth Circuit in this case reached opposite decisions, with the former reaffirming and the latter rejecting the Eighth Circuit's leading *Whirlpool* decision. Even before those decisions expanded the conflict, courts and commentators had noted the "split of authority on this issue." *DeWitt*, 54 P.3d at 860; *accord* App., *infra*, 17a (noting "[d]ivergent [a]uthority"); Susan N. Gary, *Applying Revocation-on-Divorce Statutes to Will Substitutes*, 18 Quinnipiac Probate L.J. 83, 103 (2004) (noting "conflicting results"); Kristen P. Raymond, Note, *Double Trouble*, 19 Conn. Ins. L.J. 399, 418–21 (2013) (while "[m]any states have found the retroactive application of an automatic revocation statute unconstitutional under the Contract Clause[,] . . . . [o]ther courts . . . have found that no Contract Clause issue existed."). Only this Court can resolve the mature, acknowledged division among the federal courts of appeals and state supreme courts. Further review is warranted.

II. THE CONTRACTS CLAUSE FORBIDS APPLYING REVOCATION-ON-DIVORCE STATUTES RETROACTIVELY

Retroactive statutes that nullify a decedent's beneficiary designation are classic "Law[s] impairing the Obligation of Contracts," in violation of the Contracts Clause. U.S. Const. art. I, § 10, cl. 1. Like the Ex Post Facto Clause, the Bill of Attainder Clause, the Takings Clause, and the Due Process

Clause, the Contracts Clause "embodies a legal doctrine centuries older than our Republic": the "deeply rooted . . . . antiretroactivity principle." *Landgraf*, 511 U.S. at 265–66. "[R]etroactive statutes raise particular concerns" because they "sweep away settled expectations suddenly and without individualized consideration." *Id.* at 266.

The first inquiry under the Contracts Clause is [1] whether a change in law causes a "substantial impairment of a contractual relationship." *General Motors Corp.* v. *Romein*, 503 U.S. 181, 186 (1992) (internal quotation marks omitted). That "inquiry has three components: [a] whether there is a contractual relationship, [b] whether a change in law impairs that contractual relationship, and [c] whether the impairment is substantial." *Id.* A law that does substantially impair a contract is unconstitutional unless it both [2] serves a "significant and legitimate public purpose" *and* [3] is "appropriate to [that] purpose." *Energy Reserves Grp.* v. *Kan. Power & Light Co.*, 459 U.S. 400, 411–12 (1983) (quoting *United States Tr. Co.* v. *New Jersey*, 431 U.S. 1, 22 (1977)). Where there is a "[s]evere impairment," courts must "careful[ly] examin[e]" the state law's purpose and justification for impairing the contract. *Allied Structural Steel Co.* v. *Spannaus*, 438 U.S. 234, 245 (1978).

1.a. Tom unquestionably had a contractual relationship with Schwab, as both the Estate and the Ninth Circuit have acknowledged. App., *infra*, 18a–19a; Appellee C.A. Answering Br. 47. While the Ninth Circuit characterized Carolyn's own rights as not yet "vested" because Tom could have changed the beneficiary during his lifetime, that characterization is immaterial. App., *infra*, 19a. As the Eighth

Circuit held, it does not matter that a beneficiary lacks a "vested interest in the policy . . . . What matters are the policyholder's rights and expectations, not any interest of the beneficiary." *Melin*, 853 F.3d at 413. As the intended beneficiary, Carolyn had third-party standing to enforce Tom's contract. App., *infra*, 15a–16a; Restatement (Second) of Contracts §§ 302(1) & illus. 4, 304 (1981).

b. Arizona's revocation-on-divorce statute impaired Tom's contract with Schwab. A contract "depends on the laws in existence when it is made; these are necessarily referred to in all contracts, and form[] a part of them as the measure of the obligation to perform them." *Romein*, 503 U.S. at 189 (quoting *McCracken* v. *Hayward*, 43 U.S. (2 How.) 608, 612 (1844)). People planning their estates "are entitled to rely on the law governing [third-party beneficiary] contracts as it existed when the contracts were made." *Whirlpool*, 929 F.2d at 1323. When Tom established his IRA and designated Carolyn as the primary beneficiary, Arizona's revocation-on-divorce statute was not on the books. At that point, Tom entered into a contractual relationship that provided for payment of funds to Carolyn as beneficiary in the event of Tom's death.

The Ninth Circuit erroneously held that "[t]he beneficiary designation itself was not a contractual term." App., *infra*, 18a–19a. It followed *Stillman* in sharply distinguishing "contractual and donative transfer elements." *Id.* But one cannot artificially sever contracts from their beneficiary designations, which account holders rely on to ensure the financial security of their loved ones. *See Parsonese*, 706 A.2d at 818. Indeed, the beneficiary designation was a key term of Tom's contract; he chose to leave the

account to Carolyn, not to his estate. If Schwab had disbursed the account's funds to a stranger (or, in the absence of a revocation-on-divorce statute, to his estate) after Tom's death, there would undoubtedly have been an actionable breach of contract enforceable by Carolyn. *See, e.g.*, *Alexander* v. *Prudential Ins. Co.*, 292 N.W. 475, 476–77 (Mich. 1940); *J.C. Penney Life Ins. Co.* v. *Heinrich*, 32 S.W.3d 280, 283–84 (Tex. Ct. App. 2000). The fact that the statute purportedly *requires* Schwab to breach its obligation and distribute the funds to Tom's estate in no way vitiates its character as a serious impairment of the contract's obligations.

The Ninth Circuit further erred in treating Tom as having made a decision to allow revocation of the beneficiary designation. The panel simply asserted, without citing evidence, that "[t]he Decedent was free to reaffirm [Carolyn] Lazar as his designated beneficiary but *chose* not to do so." App., *infra*, 19a (emphasis added). No one has alleged or offered a shred of proof that Tom ever learned that Arizona later passed the revocation-on-divorce statute or that it might apply retroactively. Particularly on a motion to dismiss, a court may not assume facts against the non-moving party. The only evidence of what Tom "chose" to do is his written choice of Carolyn as his beneficiary. The revocation-on-divorce statute nullifies that choice.

The Eighth Circuit correctly recognized the "real possibility that" the decedent could "consciously decide[] not to change the named beneficiary" after a divorce. *Whirlpool*, 929 F.2d at 1323. It appears here that Tom thought he could rely on the words on the form he signed. *See* p. 5, *supra*. Not making a

change is certainly not the same thing as choosing to change the beneficiary.

c. The impairment of Tom's contract was substantial. As the Eighth Circuit recognized, a "[revocation-on-divorce] statute goes too far" when it "disrupts settled and completed financial arrangements made in reliance on existing law." *Whirlpool*, 929 F.2d at 1323 (internal quotation marks omitted). People use IRAs, insurance policies, annuities, and the like to plan their estates outside of probate, and beneficiary designations are critical parts of their estate plans. Because it "radically alter[s] the meaning of these contracts, the statute is unconstitutional." *Id.* at 1323.

Characterizing the revocation-on-divorce statute as "merely a default rule" cannot save it. Appellee's CA9 Answering Br. 49. That characterization is a variant of the Ninth Circuit's assertion that Tom "chose" to disinherit Carolyn by not acting. App., *infra*, 19a. An account holder like Tom is unlikely to know that a new law has been enacted that invalidates his beneficiary designation, that such a law could apply retroactively, or that he is obligated to reaffirm his beneficiary designation after a divorce. He is far more likely to "rely on the pre-existing law and neither know nor expect that the rules governing his [account] have changed." *Whirlpool*, 929 F.2d at 1323. And a legislature that enacts a law based on the "inattentive[ness]" of some people to their beneficiary designations "can hardly expect these same individuals to be cognizant of changes in the law respecting those policies" and treat their silence as a choice. *Id.*

In essence, the Ninth Circuit revoked Tom's contractual right to have his beneficiary designation

carried out by imposing a new, post-1995 obligation on him to redesignate Carolyn as his beneficiary after their divorce. But Tom's 1992 contract with Schwab contained no such obligation. Imposing this new, retroactive obligation on him violates the strong presumption against retroactively "creat[ing] a new obligation, impos[ing] a new duty, or attach[ing] a new disability, in respect to transactions or considerations already past." *Vartelas* v. *Holder*, 566 U.S. 257, 266 (2012) (quoting Justice Story's canonical definition of retroactive laws in *Soc'y for Propagation of the Gospel* v. *Wheeler*, 22 F. Cas. 756, 767 (C.C.N.H. 1814) (No. 13,156)).

2. For many of the same reasons, revocation-on-divorce statutes do not appropriately serve "significant and legitimate public purpose[s]." *Energy Reserves Grp.*, 459 U.S. at 411. Arizona cannot sustain its burden of demonstrating that the supposed problem addressed by these statutes is the kind of "broad and general social or economic problem," *id.* at 412, that could justify the impairment of contracts.

3. Finally, even assuming *arguendo* that the state can prove its purposes are both "significant and legitimate," and even granting the legislature appropriate deference for its means-ends judgment, *id.* at 412–13, revocation-on-divorce statutes poorly serve their supposed purposes. While these statutes purport to effectuate the hypothesized intent of inattentive account holders, that rationale cannot justify nullifying the explicit beneficiary designations that others have every reason to rely on. "[Revocation-on-divorce] statute[s] [are] just as likely to 'either effectuate or frustrate [the decedent's] intent.'" *Melin*, 853 F.3d at 413 (quoting *Whirlpool*,

929 F.2d at 1323). In many cases, as here, the best way to honor the intent of decedents is to respect and follow their written directives as to the disposition of their accounts or policies.

Nor does the statute make the law simpler, clearer, or more uniform. "A policy is perfectly clear on its face when an ex-spouse is designated as the beneficiary; it becomes no simpler or clearer merely because the [state] legislature has opted to replace the individual designated as the beneficiary with someone else, by operation of law." *MONY*, 533 F. Supp. 2d at 928. Indeed, it becomes *less* clear; instead of disbursing funds to a specific, named individual, the financial institution must find the new beneficiary and navigate potential choice-of-law problems. There is no significant or legitimate reason for Arizona to abrogate Tom's formal designation, in writing, of his chosen beneficiary.

III. THE QUESTION PRESENTED IS OF GREAT NATIONAL IMPORTANCE

The question presented is highly significant and can be resolved only by this Court. Tens of millions of Americans are divorced. More than 800,000 couples were divorced or received annulments in 2015 alone. Nat'l Ctr. for Health Statistics, Centers for Disease Control, *National Marriage and Divorce Rate Trends for 2000–2015*, https://perma.cc/3YRQ-X9HC. And IRAs alone (not to mention other non-probate assets) cover tens of millions of American households and hold *trillions* of dollars in assets. Inv't Co. Inst., *The Role of IRAs in U.S. Households' Saving for Retirement, 2016*, at 2, 3 fig. 2 (2017), https://perma.cc/36BY-BSQ3. The Ninth Circuit's decision in this case followed the Eighth Circuit's

contrary decision in *Melin* by only a few months, underscoring that the issue arises frequently and divides courts. That should be no surprise, given that new state revocation-on-divorce laws may be retroactively overturning beneficiary designations for periods of many years or decades to come, as pre-existing non-probate assets such as IRAs and life insurance policies distribute funds to beneficiaries.

Twenty-nine states have adopted revocation-on-divorce statutes, and a thirtieth is considering one. Seventeen of these statutes, including Arizona's, are modeled closely on Uniform Probate Code § 2-804.[2] Twelve others are similar.[3] And the problem continues to grow as more states adopt such statutes. Indeed, Maine is currently considering

---

[2] Ala. Code § 30-4-17; Alaska Stat. Ann. § 13.12.804; Ariz. Rev. Stat. Ann. § 14-2804; Colo. Rev. Stat. Ann. § 15-11-804; Haw. Rev. Stat. Ann. § 560:2-804; Idaho Code Ann. § 15-2-804; Mass. Gen. Laws Ann. ch. 190B § 2-804; Mich. Comp. Laws Ann. § 700.2807; Minn. Stat. Ann. § 524.2-804; Mont. Code Ann. § 72-2-814; Nev. Rev. Stat. Ann. § 111.781; N.J. Stat. Ann. § 3B:3-14; N.M. Stat. Ann. § 45-2-804; N.D. Cent. Code Ann. § 30.1-10-04; S.C. Code Ann. § 62-2-507; S.D. Codified Laws § 29A-2-804; Utah Code Ann. § 75-2-804.

[3] Cal. Prob. Code § 5040; Fla. Stat. Ann. § 732.703; Iowa Code Ann. §§ 598.20A, 598.20B; Mo. Ann. Stat. § 461.051; N.Y. Est., Powers & Trusts Law § 5-1.4; Ohio Rev. Code Ann. § 5815.33; Okla. Stat. Ann. tit. 15, § 178; 20 Pa. Stat. and Cons. Stat. Ann. § 6111.2; Tex. Fam. Code Ann. §§ 9.301, 9.302; Va. Code Ann. § 20-111.1; Wash. Rev. Code Ann. § 11.07.010; Wis. Stat. Ann. § 854.15. Apparently in order "to cure § 178's constitutional infirmity" as originally enacted, Oklahoma's legislature amended its revocation-on-divorce statute to apply only prospectively. *Coppin*, 827 P.2d at 182 (holding retroactive application unconstitutional under both federal and state Contracts Clauses); *see* Okla. Stat. Ann. tit. 15, § 178(D).

similar legislation.[4] The conflicting decisions leave the status of these laws in doubt.

Harmonizing the retroactivity of these laws is particularly important because Americans are so mobile. On average, Americans move more than eleven times in their lifetimes. Mona Chalabi, *How Many Times Does the Average Person Move?*, FiveThirtyEight, https://perma.cc/QGD4-JBBJ. Older Americans frequently retire from colder to warmer climes. When retirees move from Minnesota (in the Eighth Circuit) to Arizona, California, or Nevada (in the Ninth) or New Mexico (in the Tenth), they may unwittingly alter the validity of their beneficiary designations. These disparate legal rules breed protracted litigation over choice of law, and they make it more complicated and burdensome for financial institutions to pay benefits to the proper recipient.

The split in authority is especially problematic because it subjects citizens of one State to diametrically opposed rules depending on whether the suit is filed in state or federal court. The Eighth Circuit has twice held that the Contracts Clause bars retroactively revoking beneficiary designations, but the South Dakota Supreme Court has held to the contrary. Parties can use that inconsistency to manipulate outcomes. For instance, a financial-services company can arbitrarily decide whether to file its interpleader action in state or federal court, thus unwittingly—or not—foreclosing a potential beneficiary's claim to the assets. *See, e.g.*, *Melin*, 853

[4] *See* An Act Regarding Nonprobate Transfers on Death, H.P. 682, 128th Leg., 1st Sess. § 2 (Me. Mar. 9, 2017) (proposed § 6-519).

F.3d at 411 (interpleader action initiated by insurance company).

That is particularly problematic because South Dakota's banking-friendly laws have made it a financial-services hub, the headquarters to banks holding more than $3 trillion in assets. Fed. Deposit Ins. Corp., *State Profile: South Dakota* (2d quarter 2017), https://perma.cc/9HEN-XMYS; Stu Whitney, *What Really Happened to Land Citibank*, Argus Leader: USA Today, Apr. 7, 2015, https://perma.cc/4PDT-9H37. And the intra-state conflict encourages a race to the courthouse, as a South Dakota resident can file a diversity action for breach of contract in federal court but cannot remove such a case there. 28 U.S.C. § 1441(b)(2).

Thus, even a 1–1 split between a state supreme court and its regional federal circuit warrants this Court's review. *E.g.*, *Wos* v. *E.M.A. ex rel. Johnson*, 568 U.S. 627, 632 (2013); *Seling* v. *Young*, 531 U.S. 250, 260 (2001); *South Dakota* v. *Yankton Sioux Tribe*, 522 U.S. 329, 342 (1998); *Hagen* v. *Utah*, 510 U.S. 399, 409 (1994); *Connecticut* v. *Doehr*, 510 U.S. 1, 7–9 (1991). The 4–2 split at issue here, which pits South Dakota's Supreme Court against its federal circuit, calls out for this Court's prompt intervention.

IV. THIS CASE IS A CLEAN VEHICLE

This case is a clean vehicle for resolving the question presented. The Arizona revocation-on-divorce statute is quite typical, modeled directly on the Uniform Probate Code provision adopted by sixteen other states as well. The Contracts Clause retroactivity issue was both pressed and passed upon below. It was dispositive in both the district court and Ninth Circuit, and the outcome in both courts

turned on this pure question of federal constitutional law. This case was decided on a motion to dismiss, requiring courts to accept all of Carolyn's factual allegations as true. There is no question that this Court will be able to reach and resolve the question squarely presented by the facts.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JOSH LAZAR
THE GERACI LAW FIRM
90 Discovery
Irvine, CA 92618

STEPHEN B. KINNAIRD
SERLI POLATOGLU
PAULHASTINGS LLP
875 15th Street N.W.
Washington, DC 20005

STEPHANOS BIBAS
JAMES A. FELDMAN
Counsel of Record
NANCY BREGSTEIN GORDON
UNIVERSITY OF PENNSYLVANIA
LAW SCHOOL
SUPREME COURT CLINIC
3501 Sansom Street
Philadelphia, PA 19104
(202) 730–1267
jfeldman@law.upenn.edu

Counsel for Petitioner
Carolyn Lazar

October 3, 2017

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15-15078

CAROLYN LAZAR, PLAINTIFF-COUNTER-DEFENDANT-CROSS-DEFENDANT-APPELLANT,
v.
MARK G. KRONCKE, IN HIS CAPACITY AS ADMINISTRATOR OF THE ESTATE OF GEORGE THOMAS KRONCKE,
DEFENDANT-COUNTER-DEFENDANT-APPELLEE,

AND

CHARLES SCHWAB & CO., INC., DEFENDANT-COUNTER-CLAIMANT-CROSS-CLAIMANT.

Decided: July 14, 2017

Before SILER, JR.,* TASHIMA, AND HURWITZ,
Circuit Judges

SILER, Senior Circuit Judge:

Plaintiff Carolyn Lazar appeals the district court's grant of Defendant Mark G. Kroncke's motion to dismiss her second amended answer and cross-

* The Honorable Eugene E. Siler, Jr., United States Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

claim ("SAACC"). For the reasons set forth below, we reverse the district court's ruling that Lazar lacks standing to bring her constitutional challenge under the Contracts Clause, but nonetheless affirm the judgment finding that Lazar's constitutional challenge fails and affirming the district court's other rulings.

FACTUAL AND PROCEDURAL BACKGROUND

Lazar was married to George Thomas Kroncke ("Decedent") when he established an individual retirement account ("IRA") in 1992 with Charles Schwab & Co., Inc. ("Schwab"). The Decedent named Lazar as the IRA beneficiary. Lazar and the Decedent divorced in 2008 while domiciled in Arizona. Before Decedent's death in 2012, he neither removed nor reaffirmed Lazar as the IRA beneficiary. After the Decedent's death, Kroncke, as administrator of his father's estate (the "Estate"), made a demand on Schwab for the IRA proceeds on the basis of Arizona's revocation-on-divorce ("ROD") statute, A.R.S. § 14-2804. Schwab froze the IRA pending judicial resolution.

Lazar filed this action in the Central District of California against Schwab for breach of contract and against the Estate for declaratory relief. In her first amended complaint ("FAC"), Lazar challenged the constitutionality under the Contracts Clause of applying Arizona's ROD statute retroactively because the IRA was established in 1992 and the ROD statute was enacted in 1995.

Schwab filed a counterclaim against both parties under Federal Rule of Civil Procedure 22 seeking to liquidate the securities held by the IRA and

interplead those funds into the district court. The California district court granted Schwab's motion to be dismissed as an interpleader but ordered it to continue to hold and not liquidate the securities in the IRA.

The district court dismissed Lazar's FAC on the basis that it did not state a claim under the Contracts Clause because Lazar had no vested interest in the IRA. The district court permitted Lazar to file her SAACC. The SAACC added a claim that the IRA statute and the regulations promulgated thereunder preempted Arizona's ROD statute to the extent it retroactively revokes IRA beneficiary designations. The district court dismissed Lazar's SAACC on the grounds that it lacked personal jurisdiction over the Estate and ordered the case transferred to the District of Arizona pursuant to 28 U.S.C. § 1406(a).

After the case was transferred to the District of Arizona, the district court granted the Estate's renewed motion to dismiss, holding that the pertinent IRA statutes and regulations did not preempt the operation of Arizona's ROD statute, that the prior decision on the Contracts Clause was the law of the case and the court would have reached the same outcome for the same reasons, and that the Commerce Clause argument need not be considered since it was not included in the SAACC. The district court stayed the distribution of IRA proceeds pending appeal.

STANDARD OF REVIEW

We review the dismissal of the SAACC de novo. *See Syed v. M-I, LLC*, 853 F.3d 492, 499 (9th Cir. 2017).

A dismissal for lack of personal jurisdiction is reviewed de novo. *Harris Rutsky & Co. Ins. Servs. v. Bell & Clements Ltd.*, 328 F.3d 1122, 1128 (9th Cir. 2003). Transfer orders pursuant to 28 U.S.C. § 1406(a) are reviewed for an abuse of discretion. *King v. Russell*, 963 F.2d 1301, 1304 (9th Cir. 1992). Stays of discovery pending resolution of the motion to dismiss are also reviewed for an abuse of discretion. *Alaska Cargo Transp., Inc. v. Alaska R.R. Corp.*, 5 F.3d 378, 383 (9th Cir. 1993).

DISCUSSION

I. Enforceability of the IRA's Choice of Law Provision under Arizona Law

Two documents govern the IRA: the Schwab Individual Retirement Plan ("the Plan") and the Schwab IRA Application ("the Adoption Agreement"). The Plan sets forth the rights and responsibilities of the account holder and Schwab, and the Adoption Agreement designates beneficiaries. The Plan contains a choice-of-law provision specifying that:

> The Plan is intended to qualify as an individual retirement account plan under [Internal Revenue] Code Section 408. Accordingly, the Plan shall be governed by and interpreted under the laws of the United States, and, to the extent such laws do not apply, shall be governed by and interpreted under the laws of the State of California.

The Adoption Agreement does not itself contain a choice-of-law provision but does state "I hereby adopt the Charles Schwab & Co., Inc., INDIVIDUAL

RETIREMENT PLAN ('the Plan') which is made part of this Agreement...." The district court did not resolve whether the choice-of-law provision governed both the Plan and the Adoption Agreement, instead concluding that the choice-of-law provision was unenforceable under Arizona law.

The district court began from the proposition that "[a] federal court sitting in diversity must look to the forum state's choice of law rules to determine the controlling substantive law." *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1187 (9th Cir. 2001). Arizona generally follows the Restatement (Second) of Conflict of Laws ("Restatement") to assess the validity of choice-of-law provisions. *See Swanson v. Image Bank, Inc.*, 206 Ariz. 264, 77 P.3d 439, 441 (2003). The relevant Restatement section provides that the choice-of-law provision in a contract governs "if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue." Restatement (Second) of Conflict of Laws § 187 (1971). But, the same section also provides a caveat—the law of the state chosen by the contracting parties will not be applied if "application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which ... would be the state of the applicable law in the absence of an effective choice of law by the parties." *Ibid.*

For instruments governing donative transfers, Arizona has deviated from the Restatement's choice-of-law analysis as set forth at Arizona Revised

Statute § 14-2703: "The meaning and legal effect of a governing instrument is determined by the local law of the state selected in the governing instrument unless the application of that law ... is contrary to any other public policy of this state otherwise applicable to the disposition." An IRA is a "governing instrument" under the statute. A.R.S. § 14-1201(22).

Lazar contends that the district court erred by not conducting a *Swanson* Restatement analysis and instead basing its decision on the Arizona statute. She argues that because the parties could have resolved this issue by contract, subsection 187(1) of the Restatement is satisfied and that concludes the analysis. But the Restatement expressly recognizes that "[t]he chosen law should not be applied without regard for the interests of the state which would be the state of the applicable law with respect to the particular issue involved in the absence of an effective choice by the parties." § 187 cmt. g. We cannot conclude that an Arizona court would ignore an Arizona statute directly on point in favor of a Restatement analysis, so Lazar's argument to that effect is unavailing.

The purpose of Arizona's ROD statute is to "achiev[e] the social goal of implementing [a person's] probable intention in the wake of a divorce." *In re Estate of Dobert*, 192 Ariz. 248, 963 P.2d 327, 333 (Ariz. Ct. App. 1998). To effectuate this purpose, Arizona automatically revokes all dispositions to a former spouse upon divorce and requires a person intending to retain such dispositions to re-designate the former spouse in writing and in compliance with the instrument's formalities. A.R.S. § 14-2804; *In re Estate of*

Lamparella, 210 Ariz. 246, 109 P.3d 959, 965–66 (Ariz. Ct. App. 2005). This contrasts with California's approach, under which divorce establishes a presumption of intent to revoke which can be rebutted by clear and convincing evidence. Cal. Prob. Code § 5600. Thus, California allows inquiry into the very extrinsic manifestations of contrary intent which Arizona seeks to foreclose. Arizona's interest in its ROD statute is not merely to effectuate a donor's probable intent, but also to provide clarity and avoid litigation. Even the statutory exception demonstrates this desire for clarity, because doing so requires either an express provision ex-ante that the designation will apply in the event of divorce or an ex-post reaffirmation. A.R.S. § 14-2804(A).

Lazar challenges the strength of Arizona's interest because a donor can override the operation of Arizona's ROD statute. She draws an analogy to *Cardon v. Cotton Lane Holdings, Inc.*, where the Arizona Supreme Court allowed California law to govern a deed of trust and preclude a deficiency judgment which would have been available under Arizona law because in both states it was legal to contract away the availability of a deficiency judgment. 173 Ariz. 203, 841 P.2d 198, 202–04 (1992). However, *Cardon* did not involve an Arizona statute specifying Arizona's intent to deviate from the Restatement and apply its own law to cases involving donative transfers. Lazar also stresses that Arizona's ROD statute allows for parties to avoid its effects, but this can occur only with affirmative and written evidence of intent without recourse to extrinsic evidence.

The Plan's choice-of-law provision is not an "express term" for the purposes of Arizona's ROD statute. A.R.S. § 14-2804(A). The reference to "express terms" in the ROD statute pertains only to the effect on an instrument wrought by divorce, so any "express terms" removing an instrument from the scope of the ROD statute must address the effect of divorce. *Ibid.* ("Except as provided by the express terms of a ... contract relating to the division of the marital estate made between a divorced couple ..."). The Plan's choice-of-law provision was silent in this regard. The district court thus correctly determined that an Arizona state court would disregard the choice-of-law provision in the Plan and instead apply Arizona's ROD statute.

II. Conflict Preemption

Lazar claims that application of Arizona's ROD statute is preempted by federal statutes and regulations governing IRAs. None of these statutes or regulations contains an express preemption clause, but state law must nevertheless yield to federal law to the extent the laws conflict. *See Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000). Federal regulations have the same preemptive effect as federal statutes. *See Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982). Because domestic relations and probate are areas of traditional state control, *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979) (domestic relations); *Zschernig v. Miller*, 389 U.S. 429, 440 (1968) (probate), there is a presumption against preemption in such areas. *Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141, 151 (2001).

The Plan states that it "is intended to qualify as an individual retirement account under Code Section 408," referring to 26 U.S.C. § 408—the section of the Internal Revenue Code creating IRAs. It is undisputed that IRAs are governed by federal law. The dispute is between Lazar's position that IRA regulations compel distribution to her even in the face of the ROD statute and the Estate's position that the regulations do not govern *who* must be paid the IRA proceeds but instead only dictate *how* those funds must be paid out for taxation purposes.

a. Lazar's Definitional Argument Fails

In arguing that she is entitled to the IRA, Lazar first relies upon the Employee Retirement Income Security Act's ("ERISA's") definition of beneficiary: "[A] person designated by a participant, or by the terms of the employee benefit plan, who is or may become entitled to a benefit thereunder." 29 U.S.C. § 1002(8). The second provision on which she relies is the IRA distribution rule:

> [A]n IRA is subject to the required minimum distribution rules provided in section 401(a)(9) [applicable to ERISA plans]. In order to satisfy section 401(a)(9) for purposes of determining required minimum distributions ... the rules of [26 C.F.R.] §§ 1.401(a)(9)-1 through 1.401(a)(9)-9 and 1.401(a)(9)-6 for defined contribution plans must be applied, except as otherwise provided in this section.

26 C.F.R. § 1.408-8, Q&A-1(a). Lazar argues that this IRA distribution rule necessarily incorporates ERISA's definition of "beneficiary" any time it is used in the term "designated beneficiary."

Building upon this asserted equivalence, Lazar argues that IRA distribution rules demarcate the only two methods whereby someone can become a beneficiary: "[a]n individual may be designated as a beneficiary under the plan either by the terms of the [IRA] plan or, if the plan so provides, by an affirmative election by the [IRA's owner]... specifying the beneficiary." 26 C.F.R. § 1.401(a)(9)-4, Q&A-1(a). As provided in 26 C.F.R. § 1.408-8, Q&A-1(b), the ERISA language reading "employee" can be altered to read "IRA owner." Since the regulation describing the procedures for making someone a designated beneficiary does not contemplate the operation of ROD statutes and she was designated as the beneficiary on the Plan documents, Lazar argues that this combination of statutes and regulations compels distribution to her.

The terms "beneficiary" and "designated beneficiary" cannot be conflated in this manner. Otherwise it would have been redundant to have a separate definition of designated beneficiary:

> A designated beneficiary is an individual who is designated as a beneficiary under the plan. An individual may be designated as a beneficiary under the plan either by the terms of the plan or, if the plan so provides, by an affirmative election by the [IRA owner] ... specifying the beneficiary.... A designated beneficiary need not be specified by name in the plan or by the [IRA owner] to the plan in order to be a designated beneficiary so long as the individual who is to be the beneficiary is identifiable under the plan.... *The fact that an [IRA owner's] interest under the plan passes to a certain individual under a will or otherwise under*

> *applicable state law does not make that individual a designated beneficiary unless the individual is designated as a beneficiary under the plan.*

26 C.F.R. § 1.401(a)(9)-4, Q&A-1 (emphasis added). This definition contemplates that "designated beneficiary" demarcates a smaller class than does "beneficiary" for two reasons. First, only an individual can be a designated beneficiary, excluding any trust or estate from the status. Second, an interest is allowed to pass under a will or through the operation of otherwise applicable state law to someone who is not a designated beneficiary, but such passage does not confer designated beneficiary status upon the recipient.

We thus find it clear that "beneficiary" and "designated beneficiary" are not interchangeable, a conclusion consistent with the preferential tax treatment provided to designated beneficiaries, such as avoiding application of the IRS's five-year distribution rule. *See* 26 C.F.R. § 1.401(a)(9)-8, Q&A-11; IRS Publication 590-B, Distributions from Individual Retirement Arrangements (IRAs) (*available at* http://www.irs.gov/pub/irs-pdf/p590b.pdf) at 10 ("The 5-year rule applies in all cases ... where any beneficiary is not an individual (for example, the owner named his or her estate the beneficiary)."). Thus, the regulation Lazar cites as setting out the only ways an individual can become a "beneficiary" actually sets forth the ways someone can become a "designated beneficiary" eligible for preferential tax treatment. *See* 26 C.F.R. § 1.401(a)(9)-4 Q&A 1 (beginning by saying "an individual may be *designated* as the *beneficiary*")

(emphasis added). This means the district court correctly concluded that "designated beneficiary" is a term-of-art and that the IRA distribution rules govern only *how* distributions will be treated for tax purposes and does not determine *who* is entitled to them.

Further support for our conclusion is found in the regulation listing as possible IRA beneficiaries "(except where the context indicates otherwise) the estate of the individual, dependents of the individual, and any person designated by the individual to share in the benefits of the account after the death of the individual." 26 C.F.R. 1.408-2(b)(8). Because an estate is a potential IRA beneficiary, an IRA beneficiary need not be someone who qualifies as a "designated beneficiary" under ERISA.

Lazar argues that the district court erred by failing to consider the parenthetical "except where the context indicates otherwise" in § 1.408.2(b)(8) as a clear reference to the IRA Plan. She asserts that the terms of the Plan exclude the Estate as a beneficiary by defining beneficiary as "the person or persons designated from time to time by a Participant ... to receive benefits by reason of the death of the Participant...." It is difficult to see how the parenthetical "except where the context indicates otherwise" is a clear reference to the Plan when the word "plan" appears numerous times elsewhere in the same regulation. In any event, the terms of the Plan list the Estate as the default beneficiary in the absence of a valid beneficiary designation and so do not exclude it.

b. Lazar's Reliance on ERISA and FEGLIA Cases Is Misplaced

In support of her preemption claim, Lazar cites *Egelhoff*, where the Supreme Court ruled that Washington's ROD statute could not be applied to ERISA-qualified plans. *Egelhoff*, 532 U.S. at 150. The Court held that the ROD statute was preempted since it had a "connection with" ERISA plans by interfering with the statutory requirements that ERISA "plans be administered, and benefits be paid, in accordance with plan documents." *Ibid.* The Court has also held that a divorce decree is ineffective to revoke an ex-wife's interest as the named beneficiary of an ERISA plan. *See Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan*, 555 U.S. 285, 288 (2009). It also conducted a similar analysis when it considered a Federal Employee Group Life Insurance ("FEGLIA") policy, ruling that a Virginia statute permitting a current wife to recover funds distributed to an ex-wife was preempted as an obstacle to Congress's intent to establish a clear procedure for designating a beneficiary. *See Hillman v. Maretta*, 133 S.Ct. 1943, 1953 (2013). *Free v. Bland*, another case upon which Lazar relies, is inapposite since the federal savings bonds at issue there involved regulations establishing a right of survivorship, which is not the case for IRAs. *See* 369 U.S. 663, 667–68 (1962).

It does not follow from these cases that IRA plans should be treated in the same manner. Both ERISA and FEGLIA include express preemption clauses, *see* 29 U.S.C. § 1144(a) (ERISA) and 5 U.S.C. § 8709(d) (FEGLIA), while IRA statutes do not. Although the absence of an express preemption clause is not

dispositive, *see de la Cuesta*, 458 U.S. at 153, the contrast between ERISA's expansive preemption language and the absence of such language in the IRA statutes is persuasive as "pre-emption claims turn on Congress's intent." *Gobeille v. Liberty Mut. Ins. Co.*, 136 S.Ct. 936, 946 (2016) (alteration and citation omitted).

Despite conceding that the ERISA preemption provision does not govern IRAs, Lazar nonetheless claims that policies underlying IRAs—avoiding probate proceedings, avoiding uncertainty and potential resulting losses, and avoiding the siphoning off of funds to pay administrative, legal, and tax fees—dictate that preemption should be coextensive. Even assuming the validity of these policies, they offer no justification to preempt the ROD statute because there is no underlying conflict between the ROD statute addressing *who* receives benefits and the IRA regulations mandating *how* those benefits are distributed.

c. *Debickero* Does Not Mandate Distribution to Lazar

Lazar additionally relies on *Charles Schwab & Co. v. Debickero*, 593 F.3d 916 (9th Cir. 2010), to assert that federal regulations mandate distribution of the IRA to her. This over-reads *Debickero*. In *Debickero*, the IRA custodian filed an interpleader action to determine whether the surviving spouse or the adult children designated as beneficiaries were entitled to the IRA. *Id.* at 917–18. The surviving spouse claimed that ERISA regulations mandating distribution to a surviving spouse should apply to IRAs, but we rejected that argument, holding the

regulations insufficient to overcome the beneficiary designation made on an IRA by the decedent. *Id.* at 917–22. Contrary to Lazar's assertion that federal law mandates any particular distribution outcome, we made clear that IRA regulations "leave the designation of beneficiaries to the individual account holder." *Id.* at 922.

III. Contracts Clause Challenge

a. The District Courts Erred When They Denied Lazar Had Standing

The Contracts Clause prevents any state from passing a law impairing the obligation of contracts. *See* U.S. Const. art. I, § 10. The crux of Lazar's claim is that Arizona's ROD statute violates this constitutional provision by interfering with her contractual rights.

The Arizona district court cited the California district court's prior order denying standing to raise the Contracts Clause challenge as the law of the case and stated that it would have reached the same conclusion for the same reasons. The California district court held that Lazar lacks standing to challenge the application of the ROD statutes because she possessed only an expectation interest in IRA. This conflated standing with the merits. To have standing, a party must have suffered an injury "concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 149 (2010). Arizona's ROD statute operated to extinguish Lazar's valid expectancy interest in the IRA—an injury which is actual, concrete, and particularized.

She challenges the constitutionality of the ROD statute, and a ruling in her favor would redress her injury because invalidation of Arizona's ROD statute would entitle her to the IRA funds. This is sufficient to confer standing.

b. Lazar's Contracts Clause Challenge Fails on the Merits

Because the lower courts addressed the merits and the issue was fully briefed, we too proceed to the merits of Lazar's Contracts Clause challenge. The question of whether the operation of an ROD statute violates the Contracts Clause is an issue of first impression in this circuit. In conducting a Contracts Clause analysis, we first ask if the change in state law has "operated as a substantial impairment of a contractual relationship." *Gen. Motors Corp. v. Romein,* 503 U.S. 181, 186 (1992) (internal quotation marks omitted). "This inquiry has three components: whether there is a contractual relationship, whether a change in law impairs that contractual relationship, and whether the impairment is substantial." *Ibid.* If a substantial impairment is found, we then assess the significance of the State's justification and the legitimacy of the public purpose behind the law, such as "the remedying of a broad and general social or economic problem." *Energy Reserves Grp. v. Kan. Power & Light Co.*, 459 U.S. 400, 411–12 (1983). We then look to whether the change in applicable law is based on reasonable conditions and is appropriate to achieve the stated public purpose. *Id.* at 412. Courts generally defer to the judgment of state legislatures as to both necessity and reasonableness so long as the state itself is not a contracting party. *Id.* at 412–13.

(1) Divergent Authority: *Whirlpool* and *Stillman*

The Eighth Circuit has held Oklahoma's ROD statute unconstitutional as applied to a life insurance policy. *Whirlpool Corp. v. Ritter*, 929 F.2d 1318, 1323 (8th Cir. 1991). The Eighth Circuit construed the life insurance contract to contain a term that the insurance company would pay the decedent's chosen beneficiary. *Id.* at 1322. The court therefore determined that when operation of the ROD statute amended the beneficiary, Oklahoma substantially impaired the decedent's contract with the insurance company. *Ibid.* In its reasonableness analysis, the Eighth Circuit found Oklahoma's justification legitimate but insufficient for retroactive application, citing the possibility that the decedent did not desire to revoke his ex-wife's beneficiary status as evidence of constitutional infirmity. *Id.* at 1323. The Eighth Circuit reasoned that the possibility of the decedent's reaffirming his ex-wife as beneficiary after divorce bolstered its conclusion—just as an individual could not be presumed to know he must change beneficiary status after a change in family arrangements (the rationale behind ROD statutes), it is also unreasonable for people to be required to investigate positive changes in the law enacted after they make beneficiary designations. *Ibid.* On that basis, the court found it inappropriate and unreasonable to apply the ROD statute retroactively in light of the statutory purpose of effectuating donor intent. *Ibid.*

In contrast, the Tenth Circuit has upheld the constitutionality of Utah's ROD to an annuity, finding no contractual impairment had occurred.

Stillman v. Teachers Ins. & Annuity Ass'n Coll. Ret. Equities Fund, 343 F.3d 1311, 1322 (10th Cir. 2003). The Tenth Circuit conceptualized the annuity as having both contractual and donative transfer elements. *Ibid*. The contractual elements were those between the annuity company and the annuitant—to fund the annuity and pay as directed by the annuitant—and the Contracts Clause would only be violated if the state statute interfered with those elements. The donative transfer element was naming the beneficiary. *Ibid*. The Tenth Circuit characterized the annuity company as an escrow-agent, and because its obligation to pay the proceeds of the annuity was not impacted by the operation of Utah's ROD statute, there was no violation of the Contracts Clause. *Ibid*. Because it found no significant contractual impairment, the Tenth Circuit did not address the state's justification for enacting the legislation.

(2) Lazar's Interest Never Vested so Her Contracts Clause Challenge Fails

We agree with the *Stillman* court and conclude that no substantial contractual impairment occurred through application of Arizona's ROD statute to the IRA, and we find there was no violation of the Contracts Clause. Because Lazar never possessed a vested contractual right, she suffered no contractual impairment. *See Dodge v. Bd. of Educ. of City of Chicago*, 302 U.S. 74, 80 (1937) (holding that Contracts Clause challenge failed in the absence of vested contractual rights). The Decedent's contract with Schwab specified that Schwab would pay his chosen beneficiary in the event of his death. The beneficiary designation itself was not a contractual

term. The IRA specifically provided that the Decedent could alter his beneficiary designation at any time and for any reason, so no third-party rights to the IRA could vest until his death. And, as a citizen of Arizona, the Decedent was governed by its law mandating the automatic revocation of any designation of a former spouse through operation of the ROD statute. The Decedent was free to reaffirm Lazar as his designated beneficiary but chose not to do so. Thus, Lazar's expectancy interest, which could not vest until the death of the Decedent, was extinguished upon divorce and never vested. Finding no substantial impairment to have occurred, we need not assess the legitimacy of Arizona's justification for its ROD statute.

IV. Venue Transfer Based on a Lack of Personal Jurisdiction

The California district court transferred this action to the District of Arizona under 28 U.S.C. § 1406(a) on the grounds that it lacked personal jurisdiction over the Estate. Lazar argues that the Estate waived any objection to personal jurisdiction in California by moving to dismiss Lazar's cross-claim and not Schwab's counterclaim, and that in any event, the Estate's contacts with California were sufficient to establish personal jurisdiction in California. We conclude that the California district court did not abuse its discretion in transferring the case to Arizona.

a. Potential Waiver of the Personal Jurisdiction Defense

Lazar posits that the Estate waived any personal jurisdiction defense because it did not move to

dismiss Lazar's cross-claim until after Schwab's counterclaim had already been dismissed, arguing that the Estate should have challenged Schwab's counterclaim under Federal Rule of Civil Procedure 12(b)(2) and not in response to Lazar's cross-claim. Because Schwab was dismissed from the case before the Estate filed its renewed motion to dismiss, Lazar argues, the Estate waived any personal jurisdiction defense.

Generally, waiver of the defense of personal jurisdiction requires a showing of conduct inconsistent with raising or maintaining the defense. *See, e.g.*, *Peterson v. Highland Music, Inc.*, 140 F.3d 1313, 1318–19 (9th Cir. 1998). The California district court found that there were five occasions when the Estate could have waived its personal jurisdiction defense and upon each of those occasions the defense was expressly preserved. It therefore found the Estate had complied with its obligation under Federal Rule of Civil Procedure 12(h)(1) to raise a personal jurisdiction defense at the earliest stage possible.

The cases upon which Lazar relies do not demonstrate that the California district court abused its discretion.[1] One case even expressly recognized that a personal jurisdiction defense remains viable

---

[1] *Lesnik v. Public Industrial Corp.* involved a challenge to improper venue and not to personal jurisdiction. 144 F.2d 968, 977 (2d Cir. 1944). *Peterson v. Highland Music Inc.* focused on the possibility of "sandbagging" by not raising the issue of personal jurisdiction until later stages of proceedings and was concerned with preventing a litigant from engaging in strategic behavior to test the waters of litigation, something which did not occur here. 140 F.3d 1313, 1318 (9th Cir, 1998).

when the cross-claim defendant (here the Estate) has not waived personal jurisdiction. *See United States v. All Right, Title & Interest in Contents of Following Accounts at Morgan Guar. Trust Co. of N.Y.*, No. 95 CIV. 10929 HB THK, 1996 WL 695671, at *13 (S.D.N.Y. Dec. 5, 1996). In sum, these cases provide more support to the Estate than to Lazar.

b. California Cannot Properly Exercise Jurisdiction over the Estate

Lazar contends that the Estate's contacts with California were sufficient to confer specific personal jurisdiction. Lazar cites four different contacts with California: (1) the Decedent opened the IRA with Schwab, a California corporation; (2) the Decedent made an average of 124 trades per year in the account from 1992 to 2012; (3) the Decedent made Schwab his "agent and attorney-in-fact" for purposes of buying and selling on the account; and (4) the Estate sent a letter to Schwab from California. The California district court found that the first three contacts were not sufficiently "substantial" or "continuous and systematic" to confer general personal jurisdiction, *see Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414–16 (1984), and found that the fourth contact insufficient to confer specific personal jurisdiction.

Lazar does not assert on appeal that there was general personal jurisdiction. She argues only that the California contacts established specific personal jurisdiction. We utilize a three-part test when making specific personal jurisdiction determinations:

> (1) The non-resident defendant must purposefully direct his activities or consummate some

> transaction with the forum or resident thereof; or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws; (2) the claim must be one which arises out of or relates to the defendant's forum-related activities; and (3) the exercise of jurisdiction must comport with fair play and substantial justice, i.e. it must be reasonable.

Schwarzenegger v. Fred Martin Motor Co. 374 F.3d 797, 802 (9th Cir. 2004). Purposeful availment and purposeful direction are distinct inquiries. The personal availment inquiry asks if the defendant "purposefully avail[ed] [himself] of the privilege of conducting activities in the forum State, thus invoking the benefits and protections of its laws." *Ibid*. The purposeful direction inquiry asks if the defendant directed an action at the forum state such that personal jurisdiction could be exercised even without physical contacts with the forum. *Id.* at 803.

In its transfer order, the California district court focused on the purposeful direction test. Purposeful direction requires a defendant to have "(1) committed an intentional act, (2) expressly aimed at the forum state, [and] (3) causing harm that the defendant knows is likely to be suffered in the forum state." *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 433 F.3d 1199, 1206 (9th Cir. 2006) (quoting *Schwarzenegger*, 374 F.3d at 803). The first three contacts are insufficient to constitute purposeful direction, as none of them was expressly aimed at California and any harm to the IRA would be felt in Arizona where the decedent and Lazar were domiciled.

The Estate's sending of a demand letter to Schwab was an intentional act. *See, e.g.*, *Bancroft & Masters, Inc. v. Augusta Nat'l Inc.*, 223 F.3d 1082, 1088 (9th Cir. 2000) (finding that sending a letter constituted an intentional act). But, as the California district court found, the act of sending the letter was aimed at Arizona and not California. We look to who would suffer the harm and where the harm would be felt when determining whether a defendant expressly aimed his activities at the forum state. *See Metro. Life Ins. Co. v. Neaves*, 912 F.2d 1062, 1065 (9th Cir. 1990) (holding that the place of incorporation of the letter's recipient is not dispositive but instead the focus is on where the letter's effects would be felt). The letter was sent to a Schwab address in Arizona, and any harm which Lazar would suffer would occur in Arizona, where she resides, and not in California.

The California district court also did not abuse its discretion when it conducted a purposeful availment analysis in assessing two additional contacts with California which Lazar claimed conferred specific personal jurisdiction over the Estate. The first contact is the choice-of-law provision in the IRA stipulating that California law governs in the absence of applicable federal law. Because it is not essential that the state whose law will be applied to a lawsuit exercise jurisdiction over the litigation, this contact did not confer specific personal jurisdiction. *See Shaffer v. Heitner*, 433 U.S. 186, 215 (1977). The second contact is Kroncke's domicile in California, but this is immaterial as the Estate in located in Arizona. It is the Estate which is the party to this lawsuit, so Kroncke's domicile does not

impact the jurisdictional analysis. *See Religious Tech. Ctr. v. Liebreich*, 339 F.3d 369, 374 (5th Cir. 2003).

V. Lazar's Dormant Commerce Clause Claim Was Waived

Lazar concedes that she failed to specifically allege a violation of the dormant Commerce Clause in her SAACC. In seeking to bring this challenge on appeal, she relies on her general allegation below that ROD statutes are unconstitutional for reasons "including but not limited to" a violation of the Contracts Clause and conflict preemption. But, Federal Rule of Civil Procedure 5.1 requires a party challenging the constitutionality of a state statute to "file a notice of constitutional question stating the question and identifying the paper that raises it" so that a state attorney general can intervene if desired to defend the statute. Lazar filed such a notice, but specified only the Contracts Clause and conflict preemption as grounds for her constitutional challenge.

Lazar now asserts before this court that her Commerce Clause argument should be considered anyway because it was briefed and alternatively addressed on the merits by the district court, meeting the standard that an "argument must be raised sufficiently for the trial court to rule on it." *In re E.R. Fegert, Inc.,* 887 F.2d 955, 957 (9th Cir.1989). But in *In re E.R. Fegert, Inc.* we determined that the bankruptcy court "could have" ruled on the applicability of a relevant Supreme Court decision because a party had actually argued its applicability. *See ibid*. Lazar also cites *Cmty. House, Inc. v. City of*

Boise, where we considered an Establishment Clause challenge when it was disputed whether the claim had been properly raised before the district court but the district court considered and resolved the issue. 490 F.3d 1041, 1054 (9th Cir. 2007). In that case, the district court did not find waiver; instead it considered and resolved the issue. *Ibid*. Here, by contrast, the district court expressly found Lazar's Commerce Clause claim to have been waived. Neither of those precedents rescues Lazar.

VI. Stay of Discovery

The district court stayed discovery pending resolution of the Estate's motion to dismiss the SAACC. District courts orders controlling discovery are reviewed for an abuse of discretion. *Alaska Cargo*, 5 F.3d at 383. Lazar argues that she should have been allowed discovery into whether the Decedent redesignated her as the IRA beneficiary after their divorce. No discovery was necessary, however, as Arizona law is clear that there cannot be substantial compliance with the redesignation requirement, *Lamparella*, 109 P.3d at 967, and there is no dispute that the Decedent failed to change the designation.

Lazar also argues that discovery should have proceeded because of a purported 2001 designation which made the Marital Trust the contingent beneficiary of the IRA. Lazar did not argue below either that the Estate is not the default beneficiary of the IRA or that she has title to the IRA through some other post-divorce instrument, and Schwab identified only Lazar's and the Estate's claims in its interpleader. The district court therefore did not

abuse its discretion in denying discovery on this issue pending resolution of the Estate's motion to dismiss.

CONCLUSION

For the foregoing reasons, although we disagree with the district court's holding that Lazar lacks standing to raise her Contracts Clause challenge, we affirm the judgment below.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

CIV ACTION NO. CV-14-01511-PHX-DLR

CAROLYN LAZAR, PLAINTIFF,
V.
CHARLES SCHWAB & COMPANY INCORPORATED, ET AL.,
DEFENDANTS.

December 17, 2014

ORDER

RAYES, District Judge.

Before the Court are the Estate of George Thomas Kroncke's Motion to Dismiss Lazar's Second Amended Answer and Cross-Claim, (Doc. 182), and Carolyn Lazar's motion to strike allegedly improper new arguments and unsworn statements or, alternatively, for permission to file a sur-reply, (Doc. 202). The Court has considered the motions, the responses and replies thereto, and the parties' presentations at oral argument. For the following reasons, the Estate's motion to dismiss is granted and Ms. Lazar's motion to strike or for permission to file a sur-reply is denied.

BACKGROUND

This case involves a dispute between the Estate of George Thomas Kroncke ("the Estate") and Cross-Claimant Carolyn Lazar ("Lazar") over the distribution of Decedent George Thomas Kroncke's ("Decedent") individual retirement account ("IRA"). Decedent established the IRA with Charles Schwab & Co., Inc. ("Schwab") in 1992. (Doc. 130 at ¶ 21.) At that time, Decedent was married to Lazar and designated her as the IRA beneficiary. (*Id.*) In 2008, Decedent and Lazar divorced in Arizona, but Decedent did not remove or change the IRA beneficiary designation. (*Id.* at ¶¶ 24-25.) Decedent passed away in September 2012. (*Id.* at ¶ 25.) Subsequently, Lazar asserted rights to the IRA. (*Id.* at ¶¶ 2, 39.) Separately, the Estate asserted rights to the IRA pursuant to A.R.S. § 14-2804, Arizona's revocation-on-divorce statute.[1] (*Id.* at ¶ 27.)

Lazar thereafter sued Schwab and the Estate in the United States District Court for the Central

---

[1] A.R.S. § 14-2804 provides, in relevant part:

> A. Except as provided by the express terms of a governing instrument, ... the divorce or annulment of a marriage:
>
> 1. Revokes any revocable:
>
> (a) Disposition or appointment of property made by a divorced person to that person's former spouse in a governing instrument ...
>
> ...
>
> C. Provisions of a governing instrument are given effect as if the former spouse ... disclaimed all provisions revoked by this section....

District of California, alleging breach of contract against Schwab, seeking declaratory relief against the Estate, and alleging that Arizona's and California's revocation-on-divorce statutes are unconstitutional. (Doc. 19.) Citing the opposing claims, Schwab filed an interpleader and counterclaim against Lazar and cross-claim against the Estate pursuant to Federal Rule of Civil Procedure 22. (Doc. 15.)

On March 17, 2014, the California District Court dismissed Lazar's complaint after determining that she lacked standing to raise her constitutional challenges to the revocation-on-divorce statutes. (Doc. 129.) Significantly, the California District Court found:

> As a designated beneficiary, Lazar maintained only an expectation interest in the [IRA], and had no vested interest.... Moreover, regardless of if or when her interest in the [IRA] vested, because Lazar is challenging the sequence of events relating to the donative transfer portion of the contract governing the [IRA], she lacks the requisite contractual relationship to bring a constitutional Contract Clause challenge.... Without standing to bring a constitutional challenge, the Court lacks jurisdiction.

(Doc. 129 at 6.)

The California District Court granted Lazar leave to amend, and Lazar filed her Second Amended Answer and Cross-claim ("SAAAC") on April 2, 2014. (Doc. 130.) However, on July 3, 2014, the California District Court concluded that it lacked personal

jurisdiction over the Estate and, therefore, transferred this case to the United States District Court for the District of Arizona. (Doc. 164.)

Once here, the Estate moved to dismiss Lazar's SAAAC pursuant to Federal Rule of Civil Procedure 12(b)(6). (Doc. 182.) The Estate also moved to stay discovery pending resolution of its motion to dismiss. (Doc. 183.) On September 19, 2014, this Court granted the Estate's motion to stay discovery after concluding that the motion to dismiss raises only legal issues, is potentially dispositive of the entire case, and is not dependent on additional fact discovery. (Doc. 200.)

LEGAL STANDARD

In evaluating the Estate's motion to dismiss pursuant to Rule 12(b)(6), the SAAAC's well-pled factual allegations are taken as true and construed in the light most favorable to Lazar. *See Cousins v. Lockyer*, 568 F.3d 1063, 1067 (9th Cir. 2009). To avoid dismissal, the SAAAC must plead sufficient facts to state a claim to relief that is plausible on its face. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). However, legal conclusions couched as factual allegations are not entitled to the assumption of truth, *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009), and are insufficient to defeat a motion to dismiss, *In re CuteraSec. Litig.*, 610 F.3d 1103, 1108 (9th Cir. 2010).

ANALYSIS[2]

This case presents a choice of law problem. The Estate argues that Arizona law governs the determination of the IRA beneficiary and, by operation of A.R.S. § 14-2804, Lazar's designation was automatically rescinded upon divorce. (Doc. 182 at 13–14.) Lazar, utilizing various contractual, choice of law, and constitutional theories, argues: (1) Federal law applies and directs Schwab to distribute the IRA to her because she is designated in the IRA plan documents; (2) If federal law does not apply, the IRA's choice-of-law provision directs the Court to apply California law. California's revocation-on-divorce statute, Cal. Prob. Code 5600(b)(2), creates only a presumption that a former spouse's interest was revoked upon divorce, which may be rebutted by clear and convincing evidence of contrary intent. Thus, fact issues surrounding Decedent's intent preclude the dismissal of her claim; and (3) if Arizona law applies, A.R.S. § 14-2804 is unconstitutional or, alternatively, creates only a

---

[2] In support of her opposition to the Estate's motion to dismiss, Lazar requests that the Court judicially notice twenty documents. (Docs. 186, 187, 189-195.) "The court may judicially notice a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). The documents Lazar supplies consist of legal filings and court dockets. Accordingly, the Court grants Lazar's request and takes judicial notice of the supplied documents because their existence can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.

rebuttable presumption of revocation. (Doc. 185 *passim*.)

I. The Choice-of-Law Provision

The relevant IRA documents consist of two items: the Charles Schwab & Co., Inc. Individual Retirement Plan ("the Plan") and the Schwab IRA Application ("the Adoption Agreement"). (Doc. 111-1; Doc. 111-12.) The Plan establishes the respective rights and responsibilities of the custodian and account holder, including: contribution and distribution rules; Schwab's powers, duties, and obligations; and rules for amending or terminating the Plan. (Doc. 111-12.) The Adoption Agreement is "the Agreement signed by each individual adopting the Plan and establishing an Account on behalf of that individual," and is the document in which the account holder designates beneficiaries (Doc. 111-12 at 1.1; Doc. 111-1).

The Plan contains a choice of law provision stating, in relevant part:

> The Plan is intended to qualify as an individual retirement account plan under Code Section 408. Accordingly, the Plan shall be governed by and interpreted under the laws of the United States, and, to the extent such laws do not apply, shall be governed by and interpreted under the laws of the State of California.

(Doc. 111-12 at 10.3.) The Adoption Agreement does not contain its own choice-of-law provision. However, it includes a clause that states, in relevant part, "I hereby adopt the Charles Schwab & Co., Inc., INDIVIDUAL RETIREMENT PLAN ("the Plan")

which is made part of this Agreement...." (Doc. 111-1 at 3.)

The parties devote a substantial portion of their arguments to whether the Plan's choice-of-law provision is incorporated into the Adoption Agreement and whether, as a result, either federal law (if applicable) or California law governs the beneficiary designation. Lazar argues that the "made part of" clause in the Adoption Agreement incorporates the Plan's choice-of-law provision and, thus, Arizona's revocation-on-divorce statute cannot operate to automatically revoke her designation as the IRA beneficiary. (Doc. 185 at 2–6.) The Estate argues that the choice-of-law provision only governs the Plan, which by its own terms is separate from the Adoption Agreement, and therefore is inapplicable to the beneficiary designation. (Doc. 182 at 7–8.) Additionally, the Estate argues that Lazar lacks standing to enforce the choice-of-law provision, and that the choice-of-law provision is unenforceable because it violates Arizona policy. (*Id.* at 8–11.) Alternatively, the Estate contends that, even if the choice-of-law provision applies, California law directs the Court to apply Arizona law. (*Id.* at 11–12.)

However, the Court need not decide most of these questions to resolve the choice-of-law issue because, even assuming that the Plan's choice-of-law provision is part of the Adoption Agreement and, therefore, was intended to govern the beneficiary determination, the provision is unenforceable under Arizona law.

"A federal court sitting in diversity must look to the forum state's choice of law rules to determine the controlling substantive law." *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1187 (9th Cir. 2001). Generally, Arizona courts look to the Restatement (Second) of Conflict of Laws ("the Restatement") to determine whether a contract's choice-of-law provision is valid and effective. *Swanson v. Image Bank, Inc.*, 206 Ariz. 264, 266, 77 P.3d 439, 441 (Ariz. 2003). The Restatement provides that the law chosen by the contracting parties will apply "if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue." Restatement § 187(1). If the parties could not have resolved the issue through an explicit contractual provision, a choice-of-law provision still will apply unless: (1) the chosen state has no substantial relationship to the parties or the transaction and there is no reasonable basis for the selection; or (2) the chosen state's law is contrary to a fundamental policy of the forum state. Restatement § 187(2); *Cardon v. Cotton Lane Holdings, Inc.*, 173 Ariz. 203, 207, 841 P.2d 198, 202 (Ariz. 1992).

However, Arizona, through statute, has carved out different rules for enforcing choice-of-law provisions in instruments governing the affairs and estates of decedents. Title 14 of the Arizona Revised Statutes applies to the "affairs and estates of decedents ... domiciled in this state." A.R.S. § 14-1301(A). An IRA beneficiary designation is a nonprobate donative transfer, effective upon death. A.R.S. § 14-6101(A). Pursuant to A.R.S. § 14-2703:

> The meaning and legal effect of a governing instrument[3] is determined by the local law of the state selected in the governing instrument *unless the application of that law is contrary ... to any other public policy of this state otherwise applicable to the disposition.*

(Emphasis added.) Deviating from the Restatement's choice-of-law framework, Arizona will not enforce a choice-of-law provision in an instrument governing a donative transfer if the law selected conflicts with any otherwise applicable Arizona policy, regardless of whether the parties could have resolved the issue through an explicit contractual provision or whether the relevant state policy is fundamental.

Arizona's revocation-on-divorce statute reflects the state's public policy of providing "a rational means of achieving the social goal of implementing [a person's] probable intention in the wake of a divorce." *In re Estate of Dobert*, 192 Ariz. 248, 254, 963 P.2d 327, 333 (Ct. App. 1998). Discussing the policy behind the statute, the Arizona Court of Appeals explained:

> The statutes anticipate that, upon undergoing a fundamental change in family composition such as ... divorce ... [a person] would most likely intend to provide for ... new family members, and/or revoke prior provisions made for ... ex-spouses. The statutes also anticipate that [a person] will often fail to so provide and revoke, not out of conscious intent, but simply from a lack

---

[3] A "governing instrument" includes a retirement benefit plan. *See* A.R.S. § 14-1201(22).

> of attentiveness. By automatically revoking prior beneficiary-designations upon a change in family composition, and by substituting statutory beneficiaries in their place, [the statutes] are designed to protect [people] from such inattentiveness.

Id. (quoting *Coughlin v. Bd. of Admin.*, 152 Cal. App. 3d 70, 73 (1984)).

Arizona law automatically revokes any disposition to a former spouse upon divorce. *See In re Estate of Lamparella*, 210 Ariz. 246, 252, 109 P.3d 959, 965 (Ct. App. 2005). If a person intends to retain a former spouse as a beneficiary, Arizona law requires the person to affirmatively re-designate the former spouse in writing and in the manner required by the governing instrument for such designations. *Id.* at 966. Thus, Arizona law forecloses any inquiry into extrinsic manifestations of intent and, consequently, offers predictability and certainty in ascertaining those who are legally entitled to a decedent's property.

California's revocation-on-divorce statute materially differs from Arizona's. Pursuant to Cal. Prob. Code § 5600, divorce creates a presumption that the decedent intended to revoke any dispositions to the former spouse, which may be rebutted by clear and convincing evidence of contrary intent. § 5600(a) & (b)(2). California law permits inquiry into extrinsic manifestations of contrary intent and, consequently, preserves a degree of uncertainty in the determination of legal beneficiaries.

Assuming, as Lazar argues, that the Plan's choice-of-law provision is part of the instrument governing the donative transfer, Arizona law directs the Court to disregard the provision because it is contrary to an Arizona public policy otherwise applicable to the disposition.[4] Accordingly, the choice-of-law provision is unenforceable as applied to the facts of this case.

II. Federal Law

Lazar argues that Arizona's revocation-on-divorce statute conflicts with federal statutes and regulations governing IRAs and, therefore, is

---

[4] At first, it might appear that A.R.S. § 14-2703, which instructs the Court not to enforce a choice-of-law provision that conflicts with an otherwise applicable Arizona policy, is in tension with A.R.S. § 14-2804(a), which permits parties to avoid automatic revocation-on-divorce through "the express terms of a governing instrument." The practical result is that a person can avoid the effect of A.R.S. § 14-2804 by agreeing to an express term providing that a former spouse's beneficial designation survives divorce, but cannot indirectly accomplish the same by agreeing to a choice-of-law term that subjects the governing instrument to the laws of a state without automatic revocation. However, the tension evaporates when one considers the public policy underlying revocation-on-divorce statutes—namely, effectuating probable intent in the face of likely inattentiveness. When considered in the context of this policy, it is rational to permit someone to opt-out of automatic revocation by explicit agreement, but to prohibit the same by reference to a foreign forum's law. The former requires an affirmative and knowing election, whereas the latter resurrects the underlying problem of inattentiveness and adds to it the possibility that the person might be ignorant of the foreign forum's laws governing divorce and pre-dissolution revocable dispositions of property.

implicitly preempted.[5] The IRA statutes and regulations cited by Lazar do not contain an express preemption provision. However, even in the absence of an express preemption provision, state law must yield to federal law to the extent the laws conflict. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000). A preemptive conflict exists when it is impossible for a party to comply with both federal and state law. *Id.*

The Plan expressly states that it "is intended to qualify as an individual retirement account under Code Section 408." (Doc. 111-12 at 10.3.) "Code Section 408" refers to 26 U.S.C. § 408, which is a section of the Internal Revenue Code that regulates IRAs. Pursuant to § 408, an IRA is "a trust created or organized in the United States for the exclusive benefit of an individual or his beneficiaries," provided the plan or "governing instrument" meets certain minimum requirements. 26 U.S.C. § 408(a). Among these minimum requirements is that:

> Under regulations prescribed by the Secretary [of the Treasury], rules similar to the rules of section

---

[5] Lazar also argues that A.R.S. § 14-2703 applies only to choice-of-law provisions that select the local law of another state, not to provisions that select federal law. The Plan's choice-of-law provisionprovides [*sic*] that federal law governs only where applicable. For reasons explained in this Order, the Court finds that the cited federal statutes and regulations are inapposite. Therefore, assuming Lazar is correct that A.R.S. § 14-2703 does not prohibit the Court from enforcing a choice-of-law provision that selects federal law, even in the face of a contrary and otherwise applicable Arizona policy, federal law simply does not address the issue at hand.

> 401(a)(9) and the incidental death benefit requirements of section 401(a) shall apply to the distribution of the entire interest of an individual for whose benefit the trust is maintained.

26 U.S.C. § 408(a)(6).

The Secretary prescribed such rules in 26 C.F.R. §§ 1.408-1 through 1.408-11 ("the § 408 Regulations"). Pursuant to § 1.408-8, Q&A-1(a):

> [A]n IRA is subject to the required minimum distribution rules provided in section 401(a)(9). In order to satisfy section 401(a)(9) for purposes of determining required minimum distributions ... the rules of [26 C.F.R.] §§ 1.401(a)(9)-1 through 1.401(a)(9)-9 and 1.401(a)(9)-6 for defined contribution plans must be applied, except as otherwise provided in this section.

When applying §§ 1.401(a)(9)-1 through 1.401(a)(9)-9 and 1.401(a)(9)-6 ("the § 401 Regulations") to IRAs, the IRA custodian (here, Schwab) is treated as the plan administrator, and the IRA owner (here, Decedent) is treated as the employee. 26 C.F.R. § 1.408-8, Q&A-1(b).

Section 1.401(a)(9)-4, Q&A-1 states:

> A designated beneficiary is an individual who is designated as a beneficiary under the plan. An individual may be designated as a beneficiary under the plan either by the terms of the plan or, if the plan so provides, by an affirmative election by the [IRA owner] ... specifying the beneficiary.... A designated beneficiary need not be specified by name in the plan or by the [IRA owner] so long as the individual who is to be the beneficiary is

> identifiable under the plan.... *The fact that an [IRA owner's] interest under the plan passes to a certain individual under a will or otherwise under applicable state law does not make that individual a designated beneficiary unless the individual is designated as a beneficiary under the plan.*

(Emphasis added.) Lazar argues that these regulations require Schwab to distribute the IRA to the beneficiary designated by Decedent in the Adoption Agreement, despite any state revocation-on-divorce statute that might dictate otherwise. The Court disagrees.

The cited IRS regulations do not require an IRA custodian to make distributions to a specific person or entity. Instead, these regulations govern the manner in which beneficiaries will be treated for taxation purposes.

To determine whether an IRA beneficiary will enjoy deferred taxation benefits, the regulations instruct the IRA custodian to look to the beneficiary designation—meaning the "individual designated as a beneficiary by the [IRA owner]." *See* 26 U.S.C. § 401(a)(9)(E). Only persons are entitled to deferred taxation benefits. If the beneficiary identified in the plan documents is not a person (for example, if the account holder designates his estate as the IRA beneficiary), then that beneficiary is not a "designated beneficiary" as defined in the regulations. Consequently, the 5-year rule[6] for required

[6] If an IRA owner dies before the required beginning date for receiving distributions, IRS regulations provide several

distributions would apply, and the beneficiary will not receive deferred taxation benefits. *See* 26 C.F.R. § 1.401(a)(9)-8, Q&A-11 ("A payment by a plan after the death of an [IRA owner] will not fail to be treated as a distribution ... solely because it is made to an estate or trust.... [A]n estate may not be a designated beneficiary. Thus, ... distribution to the estate must satisfy the 5-year rule...."); *see also* IRS Publication 590, Individual Retirement Arrangements (IRAs) (*available at* http://www.irs.gov/pub/irs-pdf/p590.pdf) at 38 ("The 5-year rule applies in all cases ... where any beneficiary is not an individual (for example, the owner named his or her estate as the beneficiary).").

Thus, in the context of IRS regulations, the phrase "designated beneficiary" amounts to a term-of-art that refers to a beneficiary who may enjoy deferred taxation benefits. This conclusion finds further support in the § 408 Regulations. Section 1.408-2(b)(8) defines "beneficiaries," as "the estate of the individual, dependents of the individual, and any person designated by the individual to share in the benefits of the account after the death of the individual." The section contemplates that an IRA beneficiary can be a person or entity not affirmatively designated by the account holder. Furthermore, by defining beneficiary to include the

---

methods for distributing the IRA owner's interest. Pursuant to §§ 401(a)(9)(B)(iii) and (iv), the beneficiary receives distributions over the course of his or her life expectancy. 26 C.F.R. § 1.401(a)(9)-3, Q&A-1(a). Pursuant to § 401(a)(9)(B)(ii), assets must be distributed within five years of the IRA owner's death. *Id.* Where the estate is the IRA beneficiary, the 5-year rule applies.

IRA owner's estate, the section contemplates scenarios wherein the IRA beneficiary will not meet the definition of "designated beneficiary" in the § 401 Regulations. Lazar's argument that IRS regulations require Schwab to distribute the IRA only to the individual designated in the Adoption Agreement in untenable. The cited IRS regulations govern *how* to distribute IRA assets, not to whom they must be distributed. They, therefore, are inapposite to the issue at hand.

There being no conflict between state law directing Schwab *who* to pay and IRS regulations directing Schwab *how* to pay based on the type of beneficiary, neither the Plan's choice-of-law provision nor principles of preemption preclude application of Arizona law to this case. Accordingly, the Court finds that Arizona law governs the effect of divorce on Decedent's pre-dissolution, revocable designation of Lazar as the IRA beneficiary.

III. The Contracts Clause

Throughout this litigation, Lazar has argued that revocation-on-divorce statutes violate the Contracts Clause. U.S. Const. art. 1, § 10. In a previous order, the California District Court concluded that, because Decedent retained the right to freely revoke any beneficiary designation, Lazar had only an expectation interest in the IRA and, therefore, lacked the requisite contractual relationship to bring a constitutional Contracts Clause challenge. (Doc. 129 at 5-6.) Lazar reasserts her Contracts Clause argument here "to preserve her rights, and in the event the Court wishes to revisit the issue." (Doc. 185 at 11.) The previous order is law of the case and

the Court declines Lazar's invitation to revisit the issue. Further, to the extent the previous order is not law of the case, or to extent Lazar's argument can be interpreted as a request for reconsideration, this Court would reach the same result for the same reasons.

IV. The Dormant Commerce Clause

In her opposition to the Estate's motion to dismiss, Lazar for the first time argues that Arizona's revocation-on-divorce statute violates the dormant Commerce Clause. (Doc. 185 at 14–16.) Lazar did not allege any such violation in her SAAAC. The only constitutional defects Lazar alleged therein were violation of the Contracts Clause and preemption by IRS regulations. (Doc. 130 at ¶¶ 41–50.) Lazar admits that "the Commerce Clause claim was not specifically pled," but argues that the issue is nonetheless preserved because her SAAAC prefaces the constitutional claims with the phrase "including but not limited to." (Doc. 202 at 2.) The Court disagrees.

One of the basic functions of a complaint is to provide opposing parties with notice of the legal claims asserted and the factual bases for those claims. *See McHenry v. Renne*, 84 F.3d 1172, 1178 (9th Cir. 1996). Although the Federal Rules of Civil Procedure do not require any formulaic pleading, at minimum they require claims to be pled with sufficient particularity, specificity, and clarity so as to put all parties on notice of the subject and scope of the litigation. Lazar's vague "including but not limited to" language fails to meet this minimum specificity threshold. This is especially true in the

context of constitutional challenges, where Federal Rule of Civil Procedure 5.1 requires the party questioning the constitutionality of a state statute to "file a notice of constitutional question stating the question and identifying the paper that raises it," so that the appropriate state attorney general can intervene, if so desired. Lazar filed such notice and therein specified only the Contracts Clause and conflict preemption as the bases of her constitutional challenge. (*See* Doc. 121.) In her notice, Lazar reserved "her right to amend to add additional bases for her federal constitutional challenge...." (Doc. 121 at 2.) However, to date she has not sought leave to amend her SAAAC to add an additional basis for her constitutional challenge, nor can she amend her SAAAC by raising a new argument in her response to a motion to dismiss. Accordingly, Lazar has not pled or properly lodged notice of a Commerce Clause challenge.[7]

---

[7] Moreover, Lazar's argued basis for a Commerce Clause challenge lacks merit. Lazar argues that revocation-on-divorce statutes:

> have a practical effect of forcing Schwab, or other IRA companies, to comply with the laws of the state where the IRA holder gets divorced—not the law of the State the parties contractually agreed to—thereby [ ] fundamentally altering the parties' rights to freely contract. They violate the Commerce Clause by legislating conduct outside of Arizona's borders.

(Doc. 185 at 16.) This is incorrect. Whether a state's revocation-on-divorce statute trumps a contractual choice-of-law provision is dictated by the state's choice-of-law rules and principles of contract interpretation. Thus, it is A.R.S. § 14-2703—not A.R.S. § 142804—that directs the Court to ignore the choice-of-law provision in the context of this case.

V. Arizona's Revocation-on-Divorce Statute

As previously noted, Arizona law automatically revokes any disposition to a former spouse upon divorce. *See Lamparella*, 109 P.3d at 965. Contrary to Lazar's argument, Arizona law does not create a rebuttal presumption of revocation. Instead, if a person intends to retain a former spouse as a beneficiary, Arizona law requires the person to affirmatively re-designate the former spouse in writing and in the manner required by the governing instrument for such designations. *Id.* at 966. The Court does not consider extrinsic manifestations of intent.

In the penultimate page of her response to the Estate's motion to dismiss, Lazar asserts for the first time that there is a factual dispute about whether the Estate is the default beneficiary. (Doc. 185 at 17.) Additionally, Lazar states that she "does not agree at this prediscovery stage that [Decedent] never redesignated her or attempted to redesignate her on the IRA...." (*Id.*) First, the Court reiterates that Arizona law requires post-divorce, affirmative, written re-designation and, thus, whether Decedent *attempted or intended* to re-designate Lazar is irrelevant. Second, nowhere in Lazar's SAAAC does she allege that Decedent affirmatively re-designated her as the IRA beneficiary, nor has she moved to amend her SAAAC to add such information.[8] Instead, Lazar alleges that, after she and Decedent divorced

[8] Lazar has reminded and implored the Court not to look beyond the pleadings in ruling on the motion to dismiss. (*See* Doc. 202.)

in 2008, "her status as beneficiary was neither changed or revoked," (Doc. 130 at ¶ 2), and "[Decedent] died without changing the beneficiary designation on the Schwab IRA, which continued to name ... Lazar as beneficiary," (*Id.* at ¶ 25).[9]

Nor has she alleged that the Estate is not the default beneficiary, or that she is entitled to the IRA through execution of some other post-divorce dispositive instrument. The Adoption Agreement designated Lazar as the primary beneficiary and, in the event the primary designation fails, directed Schwab to distribute the IRA "[a]ccording to the instructions in [Decedent's] will and its attachments." (Doc. 111-1 at 3.) Moreover, the Adoption Agreement provides that in the event no designated beneficiary survives, Schwab "shall distribute the amounts payable to [Decedent's] estate." (*Id.*) Nowhere in her SAAAC does Lazar allege the existence of a will. But more to the point, nowhere in her SAAAC does Lazar allege that, *after their divorce*, Decedent designated her to receive the IRA in a will or other dispositive instrument. Pursuant to A.R.S. § 14-2804, any pre-divorce beneficial designation of Lazar in a will or other dispositive instrument automatically would have been revoked after dissolution of the marriage.

---

[9] If Lazar has a good-faith basis for alleging that she was affirmatively re-designated as the IRA beneficiary, it is unclear to the Court why she would choose the far more difficult and convoluted path of raising constitutional challenges to Arizona's revocation-on-divorce statute, rather than simply alleging that she remains the legal beneficiary pursuant to that statute.

Thus, in the absence of any factual allegations plausibly showing that Decedent affirmatively re-designated Lazar as the IRA beneficiary—either in the IRA plan documents or through some other post-divorce dispositive instrument—Lazar's SAAAC fails to state a legal claim to Decedent's IRA under Arizona law. The only competing claims to the IRA that Schwab identified in its Counterclaim and Cross-claim for Interpleader were those of Lazar and the Estate. (Doc. 15.) Accordingly, as between Lazar and the Estate, the Court finds, based on the allegations in Schwab's claim for interpleader and the parties' answers thereto, that the Estate is entitled to the IRA by operation of A.R.S. § 14-2804.

VI. Motion to Strike

Lazar filed objections to and a request to strike allegedly improper new arguments and unsworn statements from the Estate's reply. (Doc. 202.) She argues that the Estate should not be permitted to address her IRA tax regulations and Commerce Clause arguments in its reply because it failed to discuss those arguments in its original motion to dismiss. (*Id.* at 2.) Alternatively, Lazar requests leave to file a sur-reply.

Federal Rule of Civil Procedure 12(f) permits the Court, on its own or by motion, to "strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." The purpose of a motion to strike "is to avoid the expenditure of time and money that must arise from litigating spurious issues by dispensing with those issues prior to trial...." *Sidney-Vinstein v. A.H. Robins Co.*, 697 F.2d 880, 885 (9th Cir. 1983).

Motions to strike are generally disfavored. *Ordahl v. U.S.*, 646 F. Supp. 4, 6 (D. Mont. 1985).

Federal Rule of Civil Procedure Rule 7(a) defines "pleading" as only:

> (1) a complaint; (2) an answer to a complaint; (3) an answer to a counterclaim designated as a counterclaim; (4) an answer to a crossclaim; (5) a third-party complaint; (6) an answer to a third-party complaint; and (7) if the court orders on, a reply to an answer.

Rule 7 distinguishes between "Pleadings" and "Motions and Other Papers." *See* Fed. R. Civ. P. 7(a)-(b). Rule 12 also distinguishes between pleadings and motions. *See* Fed. R. Civ. P. 12(b) ("Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion...."). Accordingly, a motion to dismiss is not a "pleading" for purposes of Rule 12(f). *See Sidney-Vinstein*, 697 F.2d at 885 ("Under the express language of the rule, only pleadings are subject to motions to strike."); *Ordahl*, 646 F. Supp. at 6 (concluding that it would be inappropriate to grant a motion to strike a motion for reconsideration because motions are not pleadings).

Moreover, the Estate did not improperly raise new arguments in its reply. As the Court has already noted, Lazar did not properly plead or lodge notice of a Commerce Clause challenge to Arizona's revocation-on-divorce statute. Thus, the Estate had no reason to discuss the Commerce Clause in its motion to dismiss. Instead, Lazar raised the

argument for the first time in her response in opposition. The Estate had every right to rebut Lazar's new argument.

Nor did the Estate raise new arguments in its reply with respect to the cited IRS regulations. In her SAAAC, Lazar alleged that the preemptive doctrines applicable to ERISA and FEGLIA should extend to statutes and regulations governing IRAs. (Doc. 130 at 45-47.) Accordingly, in its motion to dismiss the Estate argued that these preemptive doctrines were inapplicable to the IRA regulations cited by Lazar. In her response, Lazar argued that IRS regulations governing IRAs preempt state revocation-on-divorce statutes, despite IRAs not falling within the scope of ERISA or FEGLIA. The Estate replied by discussing why the cited IRS regulations are not applicable. The arguments presented were within the scope of what had been argued in the Estate's motion and Lazar's response thereto.[10]

Lazar also objects to and moves to strike statements made by the Estate in its reply to rebut Lazar's assertion that discovery might produce evidence that Decedent had re-designated her as the IRA beneficiary post-divorce. (Doc. 202 at 6.) However, the Court has not relied on these statements in reaching its decision, nor does it need to. As already explained, Lazar's SAAAC fails to

---

[10] Furthermore, Lazar has had ample opportunity to respond to the Estate's arguments. After full briefing on the motion to dismiss and motion to strike, the Court heard oral argument, thereby permitting Lazar to rebut the Estate's arguments.

allege facts plausibly showing that Decedent affirmatively re-designated her as the IRA beneficiary—either in the IRA plan documents or through some other post-divorce dispositive instrument—and, consequently, fails to state a legal claim to the IRA under Arizona law. Accordingly, Lazar's motion to strike or, alternatively, to file a sur-reply is denied.

VII. Stay of IRA Distributions Pending Appeal

At oral argument, Lazar indicated that she would appeal an adverse ruling to the Ninth Circuit Court of Appeals and requested that the Court enjoin the Estate from receiving distributions pending appeal should it determine that the Estate is entitled to the IRA. The Court is mindful that Lazar's constitutional claims present issues of first impression in this Circuit. The Ninth Circuit has not addressed whether state revocation-on-divorce statutes violate the Contracts Clause—either facially or as retroactively applied—or whether beneficiaries whose designations are freely revocable have standing to raise such challenges.[11] Moreover, this issue is the subject of disagreement among other circuits. *Compare Stillman v. Teachers Ins. &*

[11] The Arizona Court of Appeals addressed this question in *Dobert*, ruling that a life insurance beneficiary was not a party to the life insurance contract because her interest was contingent and freely revocable and, therefore, she lacked the requisite contractual relationship to bring a Contract Clause challenge. 963 P.2d at 332. The Court also ruled that, even if a contractual relationship existed, the revocation-on-divorce statute did not run afoul of the Constitution because it did not substantially impair a contractual relationship. *Id.*

Annuity Ass'n Coll. Ret. Equities Fund, 343 F.3d 1311, 1322 (10th Cir. 2003) (finding no Contracts Clause violation), *with Whirlpool Corp. v. Ritter*, 929 F.2d 1318, 1323 (8th Cir. 1991) (concluding Oklahoma's revocation-on-divorce statute violated Contracts Clause as retroactively applied). Nor has the Ninth Circuit or the United States Supreme Court squarely addressed whether IRS regulations governing IRA distributions preempt state revocation-on-divorce statutes.[12]

Further, the Court finds that the balance of hardships weighs in Lazar's favor. If the IRA assets are distributed to the Estate, there is a possibility that Lazar later will be unable to recover the funds if the Court's ruling on the motion to dismiss is reversed on appeal and Lazar is ultimately found to be the legal beneficiary. Although the Estate will suffer some hardship from delaying distributions, the possibility that Lazar might altogether lose assets to which she is legally entitled outweighs the possible, temporary hardship facing the Estate.

Accordingly, the California District Court's March 17, 2014, order directing Schwab to continue serving as the IRA custodian and enjoining the Estate and Lazar from trading, transfer, and distribution activity, (Doc. 129), will remain in effect pending appeal. No distribution shall be made by

---

[12] The United States Supreme Court has found similar preemption in the context of ERISA, *see Egelhoff v. Egelhoff*, 532 U.S. 141 (2001), and FEGLIA, *Hillman v. Maretta*, 133 S.Ct. 1943 (2013). Those cases are distinguishable, however, and the Supreme Court has not extended their reach to IRAs.

Schwab until the time for perfecting an appeal has expired and, if an appeal is taken, until the Court of Appeals has completed its review of this Court's rulings and a mandate has issued.

CONCLUSION

Lazar alleges that Decedent established an IRA with Schwab in 1992 and designated her as the beneficiary. She further alleges that, in 2008, she and Decedent divorced in Arizona, but Decedent did remove [*sic*] or change the IRA beneficiary designation, nor did he do so prior to his death in September 2012. For the foregoing reasons, Arizona law governs and, by operation of A.R.S. § 14-2804, Lazar's beneficial interest in the IRA was automatically revoked upon her and Decedent's divorce. Lazar has not alleged that Decedent affirmatively re-designated her as the IRA beneficiary, either in the IRA plan documents or in some other dispositive instrument, as required by Arizona law. Thus, Lazar has failed to state a plausible legal claim to the IRA. Accordingly,

IT IS ORDERED that the Estate's motion to dismiss (Doc. 182) is **GRANTED**.

IT IS FURTHER ORDERED that Lazar's motion to strike (Doc. 202) is **DENIED**.

IT IS FURTHER ORDERED that Lazar's Second Amended Answer and Cross-Claim (Doc. 130) is dismissed.

IT IS FURTHER ORDERED directing the Clerk to enter judgment for the Estate on its answer to Schwab's cross-complaint and claim for interpleader (Doc. 49).

IT IS FURTHER ORDERED that this Order shall be effective upon entry, except that no distribution shall be made by Schwab until the time for perfecting an appeal has expired and, if an appeal is taken, until the Court of Appeals has completed its review of this Court's rulings and a mandate has issued.

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIV ACTION NO. CV-12-02141-BRO (ANX)

CAROLYN LAZAR, PLAINTIFF,
V.
CHARLES SCHWAB AND CO., INC., ET AL., DEFENDANTS.

July 3, 2014

ORDER GRANTING ESTATE OF GEORGE THOMAS KRONCKE'S MOTION TO DISMISS LAZAR'S SECOND AMENDED ANSWER AND CROSS–CLAIM

O'CONNELL, District Judge.

Pending before the Court is Estate of George Thomas Kroncke's Motion to Dismiss Lazar's Second Amended Answer and Cross–Claim. (Dkt. No. 138.) After considering the papers filed in support of the instant motion, the Court deems this matter appropriate for decision without oral argument of counsel. *See* Fed. R. Civ. P. 78; C.D. Cal. L.R. 7–15. For the following reasons, the Estate's Motion to Dismiss is **GRANTED** for lack of personal jurisdiction. In the interest of justice, the Court **TRANSFERS** this case to the United States District Court for the District of Arizona.

I. BACKGROUND

A. Factual History

This case involves an action for declaratory relief seeking resolution of the parties' rights as to the distribution of funds from decedent G. Thomas Kroncke's ("Decedent") Charles Schwab ("Schwab") IRA account (the "Account"). Upon opening the Account on or about December 5, 1992, Decedent designated Plaintiff Lazar ("Plaintiff"), who was his wife at the time, as the primary beneficiary with full rights as to its proceeds at the time of his death. (Dkt. No. 59–1 at 2.) On February 12, 2008, Decedent and Plaintiff divorced. (Dkt. No. 59–1 at 2.) Plaintiff and Decedent were residents of Arizona both when they were married and at the time of their divorce. (Dkt. No. 62 at 19.) Decedent died on September 30, 2012, and shortly thereafter, Plaintiff requested the funds in the Account from Schwab. (Dkt. No. 59–1 at 2.) On November 11, 2012, the Estate contacted Schwab and demanded that the Account be secured as an asset of the Estate. (Dkt. No. 59, Ex. 2.) As of March 31, 2013, the Account was valued at $1,098,566.46. (Dkt. No. 65 at 3.)

B. Procedural History

Plaintiff initiated this action on December 10, 2012 claiming breach of contract against Schwab and seeking declaratory relief against the Estate. (Dkt. No. 1.) On February 15, 2013, Schwab filed an interpleader counterclaim against Plaintiff and cross-claim against the Estate pursuant to Federal Rule of Civil Procedure 22. (Dkt. No. 15.) The Court granted extensions of the time to respond while the

parties attempted to mediate the dispute out of court. (Dkt. Nos. 24, 26.) Plaintiff answered Defendant Schwab's counterclaim for interpleader on April 15, 2013. (Dkt. No. 38.) The Estate answered Schwab's cross-claim for interpleader on June 3, 2013. (Dkt. No. 48.)

On June 12, 2013, Schwab moved the Court to liquidate the Account and order it be deposited with the Court. (Dkt. No. 59.) Plaintiff and the Estate opposed this motion on June 24, 2013. (Dkt Nos. 65–66.) On August 21, 2013, the Court ordered the parties to provide Schwab with an agreed-upon brokerage firm to take receipt of the Account's assets within twenty days. (Dkt. No. 85.) The parties, however, were unable to agree on a replacement broker to replace Schwab.

On August 30, 2013, Plaintiff moved to amend its April 15, 2013 answer to Schwab's counterclaim in order to add a cross-claim against the Estate. (Dkt. No. 88.) The Estate opposed on October 7, 2013, and Plaintiff timely replied. (Dkt. Nos. 104, 109.) On September 10, 2013, the Estate filed a motion asking the Court to postpone liquidation of the Account in order to preserve the IRA tax benefits. (Dkt. No. 91.) Schwab responded and Plaintiff opposed on October 7, 2013 (Dkt. Nos. 103, 106), and the Estate timely replied (Dkt. No. 116). On September 20, 2013, the Estate moved to dismiss Plaintiff's First Amended Complaint ("FAC"). (Dkt. No. 98.) Plaintiff opposed on October 21, 2013, and the Estate timely replied. (Dkt. Nos. 111, 117.) Finally, on September 30, 2013, the Estate moved to stay discovery pursuant to Rule 26(c). (Dkt. No. 99.) Plaintiff opposed on October 7,

2013, and the Estate timely replied. (Dkt. Nos. 107, 115.)

II. REQUEST FOR JUDICIAL NOTICE

In support of its motion, Plaintiff/Counterclaim Defendant Lazar requests the Court to judicially notice twenty-five documents. (Lazar RJN (Dkt. No. 147).) Pursuant to the Federal Rules of Evidence, a court "may judicially notice a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). A court is required to take judicial notice where "a party requests it and the court is supplied with the necessary information." Fed. R. Evid. 201(c)(2).

The Court has reviewed Plaintiff's request and finds that the documents are properly subject to judicial notice. The documents comprise legal filings and court dockets. (*See* Lazar RJN.) Because these documents are legal filings and court dockets, their existence "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." *See* Fed. R. Evid. 201(b). Accordingly, the Court GRANTS Plaintiff's request and takes judicial notice of the existence of the documents attached to its request.

III. DISCUSSION

A. The Estate's Motion to Dismiss Plaintiff's Second Amended Answer and Cross–Claim

1. Personal Jurisdiction

In its motion to dismiss Plaintiff's Second Amended Answer and Cross–Claim, the Estate asserts that this Court lacks the personal jurisdiction required to compel the Estate's participation in this suit. Plaintiff offers several personal jurisdiction theories in her Second Amended Answer and Cross–Claim against the Estate ("SAACC"). (Dkt. No. 130.) For the following reasons, the Court finds that it does not have personal jurisdiction over the Estate.

Plaintiff bears the burden of establishing that the Court has either general or specific personal jurisdiction over the Estate. *See Boschetto v. Hansing*, 539 F.3d 1011, 1015 (9th Cir. 2008). Where, as here, the motion to dismiss is based on pleadings and affidavits rather than an evidentiary hearing, plaintiff only needs to make a prima facie showing of jurisdictional facts. *See Caruth v. Int'l Psychoanalytical Ass'n*, 59 F.3d 126, 127–28 (9th Cir. 1995).

The law of the state where a federal court sits and federal constitutional principles of due process limit the federal court's power to exercise personal jurisdiction over a nonresident defendant. *See Data Disc, Inc. v. Sys. Tech. Assocs., Inc.*, 557 F.2d 1280, 1286 (9th Cir. 1977). California's jurisdictional statute, however, reaches the constitutional limit.

Cal. Civ. Pro. Code § 410.10 (West 2013).[1] Thus, a court in California need only analyze whether exercising jurisdiction over a non-resident defendant would comport with federal due process. *See Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 800–01 (9th Cir. 2004).

a. General Personal Jurisdiction

Plaintiff argues that the Court has general personal jurisdiction over the Estate because Decedent opened the Account with Schwab, a California Corporation, and made an average of 124 trades per year from 1992 to 2012. This argument fails. A federal court may exercise general personal jurisdiction over a party as to any cause of action if the party is domiciled in the forum state or if the party's activities in the forum state are "substantial" or "continuous and systematic." *See Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414–16 (1984); *Omeluk v. Langsten Slip & Batbyggeri A/S*, 52 F.3d 267, 268 (9th Cir. 1995). "The standard for establishing general jurisdiction is 'fairly high' and requires ... the defendant's contacts be of the sort that approximate physical presence." *Bancroft & Masters, Inc. v. Augusta Nat'l Inc.*, 223 F.3d 1082, 1086 (9th Cir. 2000) (citations omitted). When analyzing general jurisdiction, the Ninth Circuit considers the "[l]ongevity, continuity, volume, economic impact, physical presence, and integration into the state's regulatory or economic

[1] California Code of Civil Procedure Section 410.10 provides: "a court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or the United States."

markets" of the defendant's forum contacts. *Mavrix Photo, Inc. v. Brand Techs., Inc.*, 647 F.3d 1218, 1224 (9th Cir. 2011).

Plaintiff premises her general jurisdiction argument upon the fact that Schwab is incorporated in California. (Dkt. No. 111 at 8.) Plaintiff suggests that Decedent's Account management activity—124 trades per year on average—is, as a result of Schwab's California presence, systematic and continuous contact with California. (Dkt. No. 111 at 8.) These allegations do not amount to general jurisdiction over the Estate. Decedent opened up the Account in Colorado and delegated its management to a broker operating exclusively in Colorado. (Dkt. No. 117 at 4.) The Court has no evidence that Decedent has ever even been in California, much less had substantial contacts with the state as to approximate a sustained physical presence. If the Court were to count Decedent's trades through his broker as California contacts, a litigant could potentially hale every Schwab account holder into California court due to the fact that Schwab's headquarters are located in San Francisco. The Court cannot sanction such a result and finds that it does not have general personal jurisdiction over the Estate.

b. Specific Personal Jurisdiction

Even though there is no general jurisdiction, this Court may still exercise jurisdiction over the Estate if Plaintiff's claims arise out of the Estate's California-related activities. *See Bancroft*, 223 F.3d at 1086. In the Ninth Circuit, courts utilize a three-

part test to determine whether specific personal jurisdiction exists:

> (1) the non-resident defendant must purposefully direct his activities or consummate some transaction with the forum or resident thereof; or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws; (2) the claim must be one which arises out of or relates to the defendant's forum-related activities; and (3) the exercise of jurisdiction must comport with fair play and substantial justice, i.e. it must be reasonable.

Schwarzenegger, 374 F.3d at 802. "The [p]laintiff bears the burden of satisfying the first two prongs of the test." *Id.* If successful, the burden then shifts to the defendant to persuade the Court why jurisdiction would be unreasonable. *Id.* (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476–78 (1985)).

The Ninth Circuit distinguishes between "purposeful availment" and "purposeful direction" when analyzing the first prong of the specific personal jurisdiction test. *Id.* (citing *Harris Rutsky & Co. Ins. Servs., Inc. v. Bell & Clements Ltd.*, 328 F.3d 1122, 1130 (9th Cir. 2003)). Purposeful availment asks whether a defendant "purposefully availed itself of the privilege of conducting activities in the forum State, thus invoking the benefits and protections of its laws." *Id.* (citing *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)). By contrast, purposeful direction asks whether a defendant directed an action at the forum state and permits the exercise of personal jurisdiction "even in 'absence of

physical contacts' with the forum." *Id.* at 803 (citing *Burger King*, 471 U.S. at 476). In the Ninth Circuit, "[a] purposeful availment analysis is most often used in suits sounding in contract. A purposeful direction analysis, on the other hand, is most often used in suits sounding in tort." *Id.* (citations omitted).

The instant case falls more properly into the tort category, warranting the purposeful direction test rather than the purposeful availment test. The Parties agree that they are both residents of Arizona and that the event giving rise to Plaintiff's suit was the Estate's November 11, 2012 letter to an Arizona Schwab branch office asserting the Estate's rights to the Account. (SAACC ¶¶ 2, 20.) Plaintiff claims the Estate's letter forced Schwab to breach its contractual obligation to distribute the Account to Plaintiff. (SAACC ¶ 35.) Thus, the Estate's conduct is comparable to the tort of intentional interference with a contractual relationship. Moreover, Plaintiff consistently asserts that the Estate's letter caused her directed harm in California. (Lazar Opp'n to Mot. to Dismiss SAACC ("Lazar Opp'n") at 5–6 (Dkt. No. 145)); (SAACC ¶ 35.) Therefore, the Court will apply the purposeful direction test to determine if it has specific personal jurisdiction over the Estate.

i. Purposeful Direction

The Ninth Circuit applies a three-part "effects" test derived from the Supreme Court's holding in *Calder v. Jones*, 465 U.S. 783 (1984), to determine whether a party has purposefully directed its activities at the forum state. *See Schwarzenegger*, 374 F.3d at 803. The effects test requires a defendant to have "'(1) committed an intentional act,

(2) expressly aimed at the forum state, (3) causing harm that the defendant knows is likely to be suffered in the forum state.'" *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 433 F.3d 1199, 1206 (9th Cir. 2006) (quoting *Schwarzenegger*, 374 F.3d at 803). "There is no requirement that the defendant have any physical contacts with the forum." *Brayton Purcell LLP v. Recordon & Recordon*, 606 F.3d 1124, 1128 (9th Cir. 2010) (citing *Schwarzenegger*, 374 F.3d at 803). Nevertheless, "it is the defendant, not the plaintiff or third parties, who must create contacts with the forum State." *Walden v. Fiore*, 134 S. Ct. 1115, 1126 (2014).

a) Intentional Act

Mailing the November 11, 2012 letter was doubtlessly an intentional act by the Estate. The Ninth Circuit defines intent, in this context, " 'as referring to an intent to perform an actual, physical act in the real world, rather than an intent to accomplish a result or consequence of that act.' " *Brayton*, 606 F.3d at 1128 (quoting *Schwarzenegger*, 374 F.3d at 806). By simply placing the letter in the mail, the Estate fulfilled the requisite intent to meet the effects test's first requirement. *See e.g., Bancroft & Masters*, 223 F.3d at 1088 (finding that sending a letter constituted an intentional act).

b) Express Aiming

The Ninth Circuit has emphasized that "something more than mere foreseeability is required in order to justify the assertion of personal jurisdiction." *Id.* (alteration in original) (quoting *Schwarzenegger*, 374 F.3d at 805) (internal

modifications and quotation marks omitted). In *Bancroft*, the Court concluded that this "'something more' is what the Supreme Court described as 'express aiming' at the forum state." 223 F.3d at 1087. "The presence of individualized targeting is what separates [cases where express aiming was found] from others in which we have found the effects test unsatisfied." *Id.* at 1088. Moreover, the Supreme Court has recently made it clear that the defendant's targeting conduct must be aimed at the forum itself, and not merely related to the forum: "Due process requires that a defendant be haled into court in a forum State based on his own affiliation with the State, not based on the 'random, fortuitous, or attenuated' contacts he makes by interacting with other persons affiliated with the State." *Walden*, 134 S. Ct. at 1123 (quoting *Burger King*, 471 U.S. at 475).

Plaintiff's argument requires this Court to conclude that a letter mailed to an Arizona address should be construed as being expressly aimed at California because the recipient—Schwab—is a California corporation with its principal place of business in California. Plaintiff contends that her being an Arizona resident is of no consequence because the Estate targeted the Account in California and intended the consequent harm to be felt by Plaintiff in California. But the "'minimum contacts' analysis looks to the defendant's contacts with the forum State itself, not the defendant's contacts with persons who reside there." *Walden*, 134 S. Ct. at 1122. That the Estate has a relationship with a California-based company does not mean that the effect of its interactions with that

company will necessarily be "targeted" toward California.

To illustrate this principle, in *Metropolitan Life Insurance Co. v. Neaves*, 912 F.2d 1062, 1063 (9th Cir. 1990), Metropolitan, a company headquartered in New York, was allegedly defrauded into paying the proceeds from a life insurance policy to Geneva Gambrell, a resident of Alabama. When James Neaves, a California resident and the policy's alleged true beneficiary, asked for the proceeds as well, Metropolitan filed a declaratory action against Neaves and Gambrell in California asking the Court to determine the rights and duties of the parties. *Id.* at 1064. The District Court dismissed the action against Gambrell for lack of personal jurisdiction because Gambrell was a resident of Alabama, and it was unreasonable to subject her to California jurisdiction when her only relevant conduct was mailing allegedly fraudulent papers to California. *Id.* The Ninth Circuit overturned, explaining that the letter's effect of defrauding Neaves in California was the relevant consideration. *Id.*

Significantly for the instant case, Gambrell argued "that it was 'only fortuitous' that the mailing was directed to California as opposed to, for example, Metropolitan's headquarters in New York." *Id.* at 1065. In other words, Gambrell posited that because Metropolitan was the recipient and was incorporated in New York, her letter should be construed as being aimed at New York not California. The Ninth Circuit dismissed this argument as irrelevant. In the context of the purposeful direction test, the dispositive

consideration was whom the letter targeted and where its intended effect would be felt. *Id.* As Neaves contended that the letter purposefully defrauded him of the policy and Gambrell knew Neaves was a resident of California, the Ninth Circuit found personal jurisdiction to be satisfied. *Id.*

In *Metropolitan*, the Ninth Circuit was unwilling to make the leap that Plaintiff would have this Court perform here. Just as Gambrell's letter was not construed as targeting Metropolitan's headquarters in New York, the fact that Schwab is incorporated in California does not mean the Estate's letter targeted California. Rather, the Court must look at whom the harm was aimed and where the harm would be felt. In *Metropolitan*, the fraudulent harm was knowingly aimed at Neaves and was deemed to have been felt in California because that was Neaves's state of residence. Accordingly, in this case, if indeed the Estate's letter caused Plaintiff any harm, it was aimed at Plaintiff in Arizona where she resides—not California. Schwab's incorporation in California is irrelevant. As a result, the Court finds Plaintiff has failed to satisfy this prong.

c) Foreseeable Harm

While failure of the express aiming prong is enough to conclude there is no personal jurisdiction over the Estate, the Court finds that Plaintiff fails to satisfy the final prong as well. The final prong of the *Calder* effects test requires a defendant's conduct to have caused foreseeable harm in the forum. *Brayton Purcell*, 606 F.3d at 1131. The Ninth Circuit no longer requires the "brunt of the harm [to] be suffered in the forum." *See id.* Rather, the final

prong "is satisfied when defendant's intentional act has foreseeable effects in the forum." *Id.* "If a jurisdictionally sufficient amount of harm is suffered in the forum state, it does not matter that even more harm might have been suffered in another state." *Yahoo!*, 433 F.3d at 1207.

Plaintiff fails to satisfy this prong for reasons closely related to those that led her to failing the express aiming prong. Plaintiff argues that the harm occurred in California because that is where Schwab and the Account are located. But it is Plaintiff, not the Account or Schwab, that is alleged to have suffered harm. The harm would thus be felt in Arizona—Plaintiff's place of residence—not California. It is therefore not foreseeable that this conduct directed at an Arizona resident would have foreseeable effects in California. Accordingly, the Court finds that Plaintiff also fails the foreseeable harm prong of the *Calder* effects test.

ii. Purposeful Availment

Although the Court finds that purposeful direction is the proper analysis to be applied in this context, Plaintiff also fails to establish that personal jurisdiction would be proper under the purposeful availment analysis. Plaintiff alleges two further Estate contacts with California that, although not germane to a purposeful direction analysis, are relevant in the context of purposeful availment. First, Plaintiff adamantly asserts that the Estate must submit to this Court's jurisdiction because the Account included a choice-of-law clause stipulating that California law would govern any disputes over

its terms.[4] [*sic*] (Lazar Opp'n at 6–7.) Second, Plaintiff points to the fact that Mark Kroncke, the administrator of the Estate, lives in California and mailed the letter to Schwab from California. (Lazar Opp'n at 6.) Plaintiff maintains that these contacts provide further evidence of this Court's power over the Estate. The Court again disagrees.

a) The Account's Choice-of–Law Clause

The Supreme Court explained that courts should not ignore choice-of-law provisions in deciding "whether a defendant has 'purposefully invoked the benefits and protections of a State's laws' for jurisdictional purposes." *Burger King Corp.*, 471 U.S. at 482 (quoting *Hanson*, 357 U.S. at 254). But such provisions alone are insufficient to confer jurisdiction. When combined with other evidence of a party's "deliberate affiliation with [a] forum state," exercising personal jurisdiction will not offend traditional notions of fair play and substantial justice. *Id.* When analyzing personal jurisdiction, a contract is "but an intermediate step serving to tie up prior business negotiations with future consequences which themselves are the real object of the business transaction." *Id.* at 479. "'[R]andom,' 'fortuitous,' or 'attenuated'" contacts will not suffice to confer personal jurisdiction. *Walden*, 134 S. Ct. at 1123 (quoting *Burger King*, 471 U.S. at 475).

---

[4] The provision states in relevant part, "Accordingly, the Plan shall be governed by and interpreted under the laws of the United States, and, to the extent such laws do not apply, shall be governed by and interpreted under the laws of the State of California." (Dkt. No. 111–12 Ex. L § 10.3, at 9.)

The choice-of-law clause relied on by Plaintiff cannot, without more, establish personal jurisdiction over the Estate. The Court is not engaging in a choice-of-law analysis, "which focuses on all the elements of a transaction"; rather, the Court is engaging in a minimum-contacts jurisdictional analysis, "which focuses at the threshold solely on the defendant's purposeful connection to the forum." *See Burger King*, 471 U.S. at 481–82. In other words, the question of whether a dispute over the Account, by its terms, must be decided under California law is separate from the question of whether this Court has personal jurisdiction over the Estate. The Estate's purposeful conduct connecting it with this forum controls, not whether a court adjudicating a dispute over the Account is required to apply California law.[5]

It is also significant that the choice-of-law provision is buried on the ninth page of what appears to be a list of generic terms applicable to any Schwab "Individual Retirement Plan." (*See* Dkt. No. 112–12 Ex. L, at 9.) Moreover, Decedent did not even sign or acknowledge the form in any fashion. (*See* Dkt. No. 112–12 Ex. L.) The record does not show any negotiations between Decedent and Schwab prior to setting up the Account. Nor is there any evidence that by setting up the Account, Decedent commenced a relationship by which he injected himself into California in such a way as to invoke the benefits of its laws. *See supra* Subsection

[5] The Court also notes that even if the provision was held to apply, it is a choice-of-*law*—not a choice-of-*forum*—clause and would not compel the Estate to adjudicate any Account dispute in California.

IV.A.1.b (finding Account trades were not contacts with California). The Account's choice-of-law provision is therefore precisely the type of boilerplate, "attenuated" contact the Supreme Court has found insufficient to confer personal jurisdiction. *See Walden*, 134 S. Ct. at 1123.

b) The Estate Administrator's Residence in California

Plaintiff's final argument asks this Court to impute the California contacts of the Estate's administrator, Mark Kroncke, to the Estate itself. Plaintiff asserts that Mark Kroncke lives in California, mailed the letter from California, and, therefore, has sufficient contacts with California to confer jurisdiction over the Estate. (Lazar Opp'n at 6.) The Court remains unconvinced.

Whether an estate administrator's residence may confer personal jurisdiction over the estate appears to be an issue of first impression in this Circuit. In *Religious Technology Center v. Liebreich*, 339 F.3d 369, 374 (5th Cir. 2003), however, the Fifth Circuit held that the Texas residence of a Florida estate's personal representative did not provide personal jurisdiction over the estate in Texas. To begin, the court rejected the lower court's finding of general jurisdiction over the Florida estate due to estate representative's Texas residence, finding that the district court had "impermissibly imputed that general jurisdiction to the Estate." *Id.* As for specific jurisdiction, the court considered only those activities performed by the representative on behalf of the Estate that related to the event giving rise to the dispute, including negotiating and signing a

contract with residents of Florida and California. *Id.* at 375. The Court held that those activities did not provide specific personal jurisdiction because:

> While it is well established that "with respect to interstate contractual obligations ... parties who reach out beyond one state and create ... obligations with citizens of another state are subject to regulation and sanctions in the other State for the consequences of their activities," here, while contracting in the stead of a Florida resident, Liebreich reached out *from* Texas to residents of Florida (Flag) and California (RTC).

Id. (quoting *Burger King*, 471 U.S. at 473). Moreover, the Fifth Circuit found that the physical location of the personal representative in Texas at the time she acted on behalf of the estate was "not especially relevant in the analysis[,]" because she was "at the time representing an entity whose 'physical presence' was in Florida." *Id.* at 375 & n.5.

The Court finds the Fifth Circuit's holding in *Liebreich* persuasive. Mark Kroncke's residence in California is his personal residence and may not be imputed to the Estate for personal jurisdiction purposes. When Kroncke sent the letter requesting the Account funds, he acted in his capacity as personal representative of the Estate, whose "physical presence" was in Arizona. *Id.* Just as the personal representative in *Liebreich* acted *from* his home in Texas to Florida and California, by sending the letter, Kroncke acted *from* his home in California to Arizona and on behalf of an entity whose physical presence was in Arizona. And as in *Liebreich*, Kroncke's physical location in California is not

relevant. Neither Kroncke's personal residence in California nor his act of sending out the letter provides personal jurisdiction over the Estate.

Plaintiff therefore fails the first prong of the Ninth Circuit's specific personal jurisdiction test under both the purposeful direction and the purposeful availment approach. As a result, the Court need not address whether Plaintiff's claim arises out of the Estate's forum-related activities or whether it was reasonable. *See Pebble Beach Co. v. Caddy*, 453 F.3d 1151, 1155 (9th Cir. 2006) ("Here, Pebble Beach's arguments fail under the first prong. Accordingly, we need not address whether the claim arose out of or resulted from Caddy's forum-related activities or whether an exercise of jurisdiction is reasonable ...."). The Court has no power to compel the Estate to appear in this forum.

B. The Estate Has Not Waived Personal Jurisdiction

Alternatively, Plaintiff argues that the Estate waived its right to challenge personal jurisdiction. The Estate, however, repeatedly challenged the Court's exercise of personal jurisdiction. (*See* Dkt. Nos. 49, 62, 66, 91.) Federal Rule of Civil Procedure 12(h) states that a party's right to challenge personal jurisdiction may be waived if (1) it is not raised in the first motion in which it was available, or (2) it is not raised "in a responsive pleading or in an amendment allowed by Rule 15(a)(1) as a matter of course." Fed. R. Civ. P. 12(h)(1). Defendants are required to raise Rule 12(b)(2)–(5) defenses at their first possible opportunity to promote efficient adjudication of disputes and prevent dilatory tactics

by defense. *See* Fed. R. Civ. P. 12 advisory committee's note on subdivisions (g) and (h) (1966 amendment) (stating that Rule 12(h) reinforces Rule 12(g)'s policy forbidding successive motions and guarding against "piecemeal consideration of a case").

There have been five instances where the Estate could have waived personal jurisdiction: (1) in the Estate's Answer to Schwab's Rule 22 Interpleader Cross-claim (Dkt. No. 49); (2) in the Estate's Opposition to Plaintiff's Motion for Default Judgment Against the Estate (Dkt. No. 62); *see Am. Ass'n of Naturopathic Physicians v. Hayhurst*, 227 F.3d 1104, 1106–07 (9th Cir. 2000) (finding that defendant waived personal jurisdiction when he failed to preserve it in a Rule 55 motion to set aside default); (3) in the Estate's Opposition to Schwab's Motion to Liquidate the IRA (Dkt. No. 66); (4) in the Estate's Motion for Order Preserving IRA Tax Benefits (Dkt. No. 91); and (5) in the Estate's Rule 26 Initial Disclosures (Lazar RJN, at LAZAR 0251).

On all five of these occasions, the Estate explicitly preserved the defense. "[W]here a party has filed a timely and unambiguous objection to the court's jurisdiction, we have concluded that the party has not consented to jurisdiction. This is true even if the party has preserved its own options by simultaneously asserting whatever claims or defenses it has against the plaintiff." *S.E.C. v. Ross*, 504 F.3d 1130, 1149 (9th Cir. 2007); *accord Wright v. Yackley*, 459 F.2d 287, 291 (9th Cir. 1972) ("What is required under Rule 12(g), (h) is that the defense of lack of jurisdiction over the person be raised by pre-

answer motion or in the answer itself no later than the raising of other defenses under Rule 12."). First, in its Answer to Schwab's Rule 22 Interpleader, the Estate's first affirmative defense "allege[d] that this Court lacks personal jurisdiction over this Answering Interpleader Defendant." (Dkt. No. 49, at 2.) Second, in its Opposition to Plaintiff's Motion for Default Judgment Against the Estate, the Estate again maintained that "the Court lacks ... personal jurisdiction over the defaulted defendant." (Dkt. No. 62, at 18.) Third, in its Opposition to Schwab's Motion to Liquidate the IRA, the Estate alleged that "The Court ... Lacks Personal Jurisdiction Over Cross-Defendant Kroncke[.]" (Dkt. No. 66, at 6.) Fourth, in its Motion for Order Preserving IRA Tax Benefits, the Estate asserted that it was "appear[ing] ... without waiving the Court's jurisdiction and the improper venue in this case." (Dkt. No. 91, at 2 n.1.) Finally, in its Rule 26 Initial Disclosures, the Estate expressly stated that it was providing the disclosures "without waiving the Estate's defenses that personal ... jurisdiction [is] lacking here, and that venue is improper in the Central District of California [.]" (Lazar RJN, at LAZAR 0251.)

Accordingly, the Court finds that the Estate has not waived its right to challenge personal jurisdiction in this case. Therefore, the Court may either grant the Estate's Motion to Dismiss for lack of personal jurisdiction or transfer the case to cure its personal jurisdiction defect in the interest of justice. *See Goldlawr, Inc. v. Heiman*, 369 U.S. 463, 466–67 (1962).

C. Transfer

"The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought." 28 U.S.C. § 1406(a). "The language of [§] 1406(a) is amply broad enough to authorize the transfer of cases," where the Court does not have personal jurisdiction. *Goldlawr*, 369 U.S. at 466. The Parties here have been litigating proper ownership of the Account since December 2012. Schwab has agreed to serve as custodian until the ownership of the Account can be resolved. (*See* Dkt. No. 129.) Dismissal of this action will not resolve the dispute between the Parties because ownership of the Account will still be in question. In the interest of judicial economy and out of respect for the tremendous resources that have been expended litigating this case, the Court finds that a transfer is appropriate. The Superior Court of Maricopa County in Arizona appointed the administrator to the Estate. (PCC ¶ 20.) Therefore, the Court ORDERS that this case be TRANSFERRED to the United States District Court for the District of Arizona in Phoenix.

IV. CONCLUSION

Accordingly, the Court **ORDERS** that:

1. The Estate's Motion to Dismiss Lazar's Second Amended Answer and Cross-claim (Dkt. No. 138) is **GRANTED** for lack of personal jurisdiction.

2. This case is **TRANSFERRED** to the United States District Court for the District of Arizona at 401 W. Washington St., Suite 130, SPC 1 Phoenix, AZ 85003–2118.

IT IS SO ORDERED.

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIV ACTION NO. SA CV 12-02141 BRO (ANX)

CAROLYN LAZAR, PLAINTIFF,
V.
CHARLES SCHWAB AND CO., INC., ET AL., DEFENDANTS.

03/17/2014

---

1. ORDER RE: DEFENDANT KRONCKE'S MOTION TO DISMISS

2. ORDER RE: DEFENDANT KRONCKE'S MOTION FOR ORDER PRESERVING IRA ACCOUNT TAX BENEFITS

3. ORDER RE: LAZAR'S MOTION TO AMEND ANSWER TO ADD CROSS CLAIM AGAINST DEFENDANT KRONCKE

O'CONNELL, District Judge.

Pending before the Court is (1) the Estate's Motion to Dismiss, (Dkt. No. 98); (2) the Estate's Motion for Order Preserving IRA Account Tax Benefits Pending Resolution of the Dispute, (Dkt. No. 91); and (3) Carolyn Lazar's ("Lazar") Motion to File a Second Amended Answer to Defendant Charles Schwab, Inc.'s ("Schwab") Interpleader Counterclaim to Add a Cross-Claim against

Defendant Mark G. Kroncke in his capacity as Administrator of the Estate of G. Thomas Kroncke (the "Estate") (Dkt. No. 88).

For the reasons detailed below: the Estate's Motion to Dismiss is **GRANTED**; the Estate's Motion for an Order Preserving IRA Account Tax Benefits is **GRANTED** in part and **DENIED** in part; and Lazar's Motion to File a Second Amended Answer is **GRANTED**.

I. BACKGROUND

A. Factual History

This case involves an action for declaratory relief seeking resolution of the parties' rights as to the distribution of funds from decedent G. Thomas Kroncke's ("Decedent") Charles Schwab IRA account ("Account" or "IRA Account"). Upon opening the Account on or about December 5, 1992, (Dkt. No. 59-1 at 2), Decedent designated Lazar, his wife at the time, as the primary beneficiary with full rights as to its proceeds at the time of his death, (Dkt. No. 59-1 at 2). On February 12, 2008, Decedent and Lazar divorced. (Dkt. No. 59-1 at 2.) Lazar and Decedent were residents of Arizona both when they were married and at the time of their divorce. (Dkt. No. 62 at 19.) Decedent died on September 30, 2012, (Dkt. No. 59-1 at 2), and shortly thereafter, Lazar requested the funds in the Account from Schwab. (Dkt. No. 59-1 at 2.) On November 11, 2012, the Estate contacted Schwab and demanded the Account be secured as an asset of the Estate. (Dkt. No. 59, Ex. 2.) As of March 31, 2013, the Account was valued at $1,098,566.46. (Dkt. No. 65 at 3.)

B. Procedural History

Lazar initiated this action on December 10, 2012 claiming breach of contract against Schwab and seeking declaratory relief against the Estate. (Compl. at1, Dkt. No. 1.) On February 15, 2013, Schwab filed an interpleader counterclaim against Lazar and cross-claim against the Estate pursuant to Federal Rule of Civil Procedure 22. (Dkt. No. 15.) The parties were granted extensions of the time to respond deadline while they attempted to mediate the dispute out of court. (Dkt. Nos. 24, 26.) Lazar answered Schwab's counterclaim for interpleader on April 15, 2013. (Dkt. No. 38.) The Estate answered Defendant Schwab's cross-claim for interpleader on June 3, 2013. (Dkt. No. 48.)

On June 12, 2013, Defendant Schwab moved the Court to liquidate the Account and order it be deposited with the Court. (Dkt. No. 59.) Lazar and the Estate opposed this motion on June 24, 2013. (Dkt Nos. 65–66.) On August 21, 2013, the Court ordered the parties to provide Schwab with an agreed-upon brokerage firm to take receipt of the Account's assets within twenty days. (Dkt. No. 85.) The parties, however, were unable to agree on a replacement broker to replace Schwab.

On August 30, 2013, Lazar moved to amend its April 15, 2013 answer to Defendant Schwab's counterclaim in order to add a cross-claim against Defendant Schwab. (Dkt. No. 88.) The Estate opposed on October 7, 2013, and Lazar timely replied. (Dkt. Nos. 104, 109.) On September 10, 2013, the Estate filed a motion asking the Court to postpone liquidation of the Account in order to

preserve the IRA tax benefits. (Dkt. No. 91.) Defendant Schwab responded and Lazar opposed on October 7, 2013, (Dkt. Nos. 103, 106), and the Estate timely replied, (Dkt. No. 116). On September 20, 2013, the Estate moved to dismiss Lazar's first amended complaint ("FAC"). (Dkt. No. 98.) Lazar opposed on October 21, 2013, and the Estate timely replied. (Dkt. Nos. 111, 117.) On September 30, 2013, the Estate moved to stay of discovery pursuant to Rule 26(c). (Dkt. No. 99.) Lazar opposed on October 7, 2013, and the Estate timely replied. (Dkt. Nos. 107, 115.)

III. [*sic*] LEGAL STANDARD

A federal court must determine its own jurisdiction even where there is no objection to it. *Rains v. Criterion Systems, Inc.*, 80 F.3d 339 (9th Cir. 1996). Jurisdiction must be determined from the face of the complaint. *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987). Under 28 U.S.C. § 1331, federal courts have jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. A case "arises under" federal law if a plaintiff's "well-pleaded complaint establishes either that federal law creates the cause of action" or that the plaintiff's "right to relief under state law requires resolution of a substantial question of federal law in dispute between the parties." *Franchise Tax Bd. v. Constr. Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 13 (1983).

Original jurisdiction may also be established pursuant to 28 U.S.C. § 1332. Under 28 U.S.C § 1332, a federal district court has "original

jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and" the dispute is between "citizens of different states."[1] 28 U.S.C. § 1332. The Supreme Court has interpreted the statute to require "complete diversity of citizenship," meaning it requires "the citizenship of each plaintiff [to be] diverse from the citizenship of each defendant." *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 68 (1996).

IV. DISCUSSION

A. The Estate's Motion to Dismiss the FAC for lack of Subject Matter Jurisdiction

Lazar's FAC alleges only that jurisdiction is proper under 28 U.S.C. § 1331 because:

> [Lazar] is suing to vindicate a federal constitutional right, to wit: a) whether Arizona Revised Statutes ("A.R.S.") section 14-2804 (1995), Arizona's "revocation on divorce" [sic] statute [allegedly automatically revoking any pre-divorce disposition by a divorced person to that person's former spouse] is unconstitutional under the United States Constitution, including but not limited to The Contract[ ] Clause, U.S. Const. art. I, section 10, clause 1, on its face and/or as applied to the facts of this case; and [b]) whether [Lazar's] rights under The Contract[ ] Clause have been violated by: a) defendant Schwab's refusal to pay [Lazar] her benefits under the Schwab IRA account in reliance, on

[1] Diversity of citizenship may also be established on other grounds that are not relevant here. *See* 28 U.S.C. § 1332.

> information and belief on A.R.S. 14-2804; b) by Defendant M. Kronke's [sic] demand to Schwab, on behalf of the Estate, and present demand for the proceeds from the Schwab IRA account.

FAC ¶ 10. The Court finds that these allegations are inadequate to establish a claim arising under federal law.

Article 1, § 10 of the Constitution states: "No state shall ... pass any ... Law impairing the Obligation of Contracts." U.S.Const., art. 1, § 10. In order to establish standing to bring a constitutional challenge to the Contract Clause, "the first inquiry must be whether the state law has, in fact, operated as a substantial impairment of a contractual relationship." *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244 (1978). "This inquiry has three components: [(1)] whether there is a contractual relationship, [(2)] whether a change in law impairs that contractual relationship, and [(3)] whether the impairment is substantial." *Gen. Motors Corp. v. Romein*, 503 U.S. 181, 186 (1992). Often, "the first two are unproblematic." *Id.* But, in the arena of the application of revocation-upon-divorce statutes in estate distribution proceedings, the substantial impairment of a contractual relationship is not clear. *See MONY Life Ins. Co v. Ericson*, 533 F. Supp. 2d 921, 926-27 (D. Minn. 2008) (discussing the split amongst courts as to whether revocation-upon-divorce statutes are subject to a Contract Clause challenge).

"To establish a contractual relationship subject to the Contract Clause, a party first must demonstrate that the contract gave her a vested interest, not

merely an expectation interest." *Lincoln Ben. Life Co. v. Heitz*, 468 F. Supp. 2d 1062, 1067 (D. Minn. 2007); *see also Allstate Life Ins. Co. v. Hanson*, 200 F. Supp. 2d 1012, 1019 (E.D. Wis. 2002) ("[T]o show that she had a contractual relationship subject to the Contract Clause, [the beneficiary] must demonstrate that as a result of the relationship she had a vested interest. Her claim fails because she cannot make such a showing.") (internal citations omitted). The Tenth Circuit has held that "[a]pplication of [a revocation-upon-divorce] statute does not impair any contract right." *Stillman v. Teachers Ins. & Annuity Ass'n Coll. Ret. Equities Fund*, 343 F.3d 1311, 1322 (10th Cir. 2003). It noted the mixed characteristics of third-party beneficiary contracts:

> A life insurance policy is a third-party beneficiary contract. As such, it is a mixture of contract and donative transfer. The Contract[ ] Clause ... applies to protect against legislative interference with the contractual component of the policy.... The divorce statute affects only the donative transfer, the component of the policy that raises no Contract[ ] Clause issue.

Id. (quoting *Statement of the Joint Editorial Board for Uniform Probate Code Regarding the Constitutionality of Changes in Default Rules as Applied to Pre-existing Documents* at 3 (1991)). *But see Whirlpool Corp. v. Ritter*, 929 F.2d 1318, 1322-23 (8th Cir. 1991) (finding that a revocation-upon-divorce statute did violate the Contract Clause by substantially impairing the contracting right of the purchaser of a life insurance policy when it

disqualified his designated beneficiary). The Court finds the reasoning of the Tenth Circuit persuasive.

Here, Lazar concedes that it was her ex-husband that opened the Account of which he designated her as the beneficiary. (FAC ¶ 4.) Being a designated beneficiary, however, as noted by the Tenth Circuit, does not establish a contractual right under which Lazar may bring a constitutional Contract Clause challenge.[2] As a designated beneficiary, Lazar maintained only an expectation interest in the Account, and had no vested interest. *See Morgan v. Penn Mut. Life Ins. Co.*, 94 F.2d 129, 130 (8th Cir. 1938) ("[W]here the policy by its terms gives the insured the right to change the beneficiary or assign the policy, the beneficiary takes only a contingent interest therein in the nature of an expectancy."); *see also Webster v. State Mut. Life Assur. Co. of Worcester, Mass.*, 50 F. Supp. 11, 18 (S.D. Cal. 1943) *modified sub nom. State Mut. Life Assur. Co. of Worcester, Mass., v. Webster*, 148 F.2d 315 (9th Cir. 1945) ("The general rule is that where an insured reserves the right to change the beneficiary in the policy, then the beneficiary has only a contingent interest ... but if the insured does not reserve the right to change beneficiaries ... the beneficiary has a vested interest ...").

Moreover, regardless of if or when her interest in the Account vested, because Lazar is challenging the

---

[2] Though the Tenth Circuit addressed the issue as it relates to a life insurance policy, the Court finds the reasoning relevant to the discussion of an IRA account because of the similarity in beneficiary designation.

sequence of events relating to the donative transfer portion of the contract governing the Account, she lacks the requisite contractual relationship to bring a constitutional Contract Clause challenge. *See Heitz*, 468 F. Supp. 2d at 1068 ("The Contract Clause addresses contracts, not donative transfers. Because [a revocation-upon-divorce statute] does not impair any contractual relationship of [the beneficiary], her constitutional challenge fails."). Without standing to bring a constitutional challenge, the Court lacks jurisdiction. *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1174 (9th Cir. 2004) ("A suit brought by a plaintiff without Article III standing is not a 'case or controversy,' and an Article III federal court therefore lacks subject matter jurisdiction over the suit.").

Lazar's alleged injuries from the Estate and Schwab are all premised on her belief that she has a right as a designated beneficiary to challenge the constitutionality of the Arizona statute. Accordingly, the Court finds that Lazar has failed to carry her burden to assert federal court jurisdiction. "The proponent of federal court jurisdiction has the burden of proving the existence of subject-matter jurisdiction." *Scott v. Breeland*, 792 F.2d 925, 927 (9th Cir. 1986) ("The party seeking to invoke the court's jurisdiction bears the burden of establishing that jurisdiction exists."). When a defendant challenges the court's subject-matter jurisdiction over a plaintiff's claim, a plaintiff must "present affidavits or any other evidence necessary to satisfy its burden of establishing that the court, in fact, possesses subject matter jurisdiction." *Ass'n of Am. Med. Colls. v. United States*, 217 F.3d 770, 778 (9th

Cir. 2000); *see generally Native Am. Arts, Inc. v. Specialty Merch. Corp.*, 451 F. Supp. 2d 1080, 1083 (C.D. Cal. 2006). Therefore, the Estate's Motion to Dismiss the FAC for Lack of Subject Matter Jurisdiction is **GRANTED**.

B. The Estate's Motion to Dismiss the FAC for lack of Personal Jurisdiction

The Estate's Motion to Dismiss for lack of personal jurisdiction is **DENIED** as moot.

C. The Estate's Motion for an Order Preserving IRA Account Tax Benefits Pending Resolution of Dispute

The Estate also moves for an order preserving the Account's tax benefits pending a resolution of the dispute. Should Schwab deposit the Account, the assets will first have to be liquidated. This would incur a large and potentially unnecessary tax liability. (Dkt. No. 65 at 4.)

In the Court's prior Order, Schwab and the Estate were instructed to find another custodian for the Account or they would face liquidation. (Dkt. No. 85.) The disputed ownership of the account made this task nearly impossible for the Parties. (Dkt. No. 91 at 4.) As a result, the Estate requests that the Court adopt one of two alternatives. The Estate requests the Court enter an Order dismissing Schwab as a party to this case and, either: (1) order Schwab to retain the Contributory IRA Account of George Thomas Kroncke pending a settlement between the parties, or a final determination of the identity of the beneficiary; or (2) authorize the Estate to establish an inherited IRA account at

Fidelity Brokerage Services, subject to a Court-ordered restriction restraining distributions from such account pending a settlement between the parties, or a final determination of the identity of the beneficiary. (Dkt. No. 91 at 2.) The second option would require the Parties to name the inherited beneficiary and establish an inherited IRA account to receive the funds. (Dkt. No. 91 at 4.) The Parties could not agree which should be named as the inherited beneficiary, as that is the center of the instant dispute. (Dkt. No. 91 at 4.) Therefore the Court will explore the first option as a way to avoid unnecessary tax liability by way of the Schwab's deposit to the Court.

Though deposit of the disputed funds is required in statutory interpleader actions, it is discretionary in Rule 22 interpleader actions. Fed. R. Civ. P. 67; *see also Gelfgren v. Republic Nat'l Life Ins. Co.*, 680 F.2d 79, 81-82 (9th Cir. 1982) ("Deposit of disputed funds in the court's registry is a jurisdictional requirement to statutory interpleader under 28 U.S.C. § 1335. However, a deposit is not a jurisdictional requirement to rule 22(1) interpleader."); *see also Murphy v. Travelers Ins. Co.*, 534 F.2d 1155, 1159 (5th Cir. 1976) ("Rule 22 interpleader does not require a 'deposit ...'"). Schwab previously agreed to be the custodian of the Account if three conditions were met: (1) Schwab's attorneys' fees and costs be paid to date; (2) both sides agree to complete indemnification of Schwab during the joint administration of the Account; and (3) Schwab be dismissed from the action and released from all claims with prejudice. (Dkt. No. 103 at 3.)

1. Attorneys' Fees and Costs

The Court has discretion to award attorneys' fees to the disinterested stakeholder in an interpleader action when appropriate. *See Abex Corp. v. Ski's Enterprises, Inc.*, 748 F.2d 513, 516 (9th Cir. 1984). Schwab has agreed to be custodian of the account in the Interpleader action if reasonable attorney's fees and costs are paid. The Estate and Lazar have agreed to pay Schwab reasonable attorney's fees and costs out of the Account. (Dkt. No. 65 at 12; Dkt. No. 66 at 2.) "The amount of fees to be awarded in an interpleader action is committed to the sound discretion of the district court." *Trs. of Dirs. Guild of America-Producer Pension Benefits Plans v. Tise*, 234 F.3d 415, 426 (9th Cir. 2000). Accordingly, Schwab is **ORDERED** to file any invoices for work done after August 31, 2013 by April 7, 2014. The Court will review the invoices in their totality to determine reasonable attorneys' fees and costs.

2. Indemnification

The Court recognizes that an interpleader action would be futile if claimants were allowed to file separate suits against the claim holder. *United States v. Major Oil Corp.*, 583 F.2d 1152, 1157-58 (10th Cir. 1978). Schwab is expressly concerned about incurring liability if it remains a part of the action. The Court considered enjoining the [*sic*] Lazar and the Estate from bringing claims against Schwab in connection with the Interpleader action. Unfortunately, "injunctive power can be brought into play only if the fund or bond has been deposited by the stakeholder." *Id.* (district court's jurisdiction extends only to the fund deposited with the court). In

this case, the Account has not been deposited with the Court. *See generally Herman Miller, Inc. Ret. Income Plan v. Magallon*, No. 207CV00162MCEGGH, 2008 WL 2620748, at *2 (E.D. Cal. July 2, 2008).

Lazar refuses to indemnify Schwab before reading specific indemnification language. (Dkt. No. 106 at 2.) As an alternative, the Estate asks the Court to enjoin both the Estate and Lazar from engaging in trading activity while Schwab acts as custodian. (Dkt. No. 116 at 3.) By eliminating trading activity, Schwab will become a passive custodian. The Court finds that this has the same operative effect as the indemnification clause and therefore acts as a safeguard for Schwab. Accordingly, the Court **ENJOINS** the Estate and Lazar from trading, transfer, and distribution activity while Schwab acts as custodian.

3. Discharge

Once the Court determines that an interpleader is proper, it may discharge the stakeholder from further liability. *OM Financial Life Ins. Co. v. Helton*, No. CIV. 2:09–1989 WBS EFB, 2010 WL 3825655, at *3 (E.D. Cal. Sept. 28, 2010). Schwab has agreed to serve as custodian of the Account upon dismissal from the action with prejudice.

a. Lazar's Action

In this Order, the Court ruled that it did not have subject matter jurisdiction over the Complaint naming Schwab as a defendant. *See supra* Section IV.A. The Court notes that both Lazar and the Estate agree Schwab should not remain as a party to

Lazar's action; however, the Court does not have jurisdiction over Lazar's FAC and such an order would be inappropriate. (Dkt. No. 116 at 3; Dkt. No. 103 at 3; Dkt. No. 106 at 5.) The Court will now turn to the Interpleader action over which it has subject matter jurisdiction.

b. Interpleader Action

Interpleader protects stakeholders from facing multiple liability or defending multiple claims to a fund of money by allowing the stakeholder to bring an action joining all parties asserting claims against the fund, and forcing those parties to litigate who is properly entitled to the fund. *Cripps v. Life Ins. Co. of N. Am.*, 980 F.2d 1261, 1265 (9th Cir. 1992). Interpleader actions typically proceed in two stages: (1) "the district court decides whether the requirements for rule or statutory interpleader action have been met by determining if there is a single fund at issue and whether there are adverse claimants to that fund" and (2) if the standards are met, "the district court will then make a determination of the respective rights of the claimants." *Mack v. Kuckenmeister*, 619 F.3d 1010, 1023-24 (9th Cir. 2010) (quoting *Rhoades v. Casey*, 196 F.3d 592, 600 (5th Cir. 1999)) (internal quotation marks omitted). After determining that the action meets the requirements of the first stage, the court may discharge the plaintiff from further liability. *Magallon*, 2008 WL 2620748, at *2.

In the instant action it is undisputed that Schwab is an uninterested stakeholder. Additionally, both Lazar and the Estate agree that Schwab should be dismissed from the case. (Dkt. No. 91 at 7; Dkt.

No. 106 at 5.) The Court now turns to see if the jurisdictional requirements are met and if Schwab should deposit the disputed funds.

i. Jurisdictional Requirements

Schwab meets the jurisdictional requirements for Rule 22 interpleader. Rule 22 interpleader "does not convey jurisdiction on the courts," thereby requiring any interpleaded action brought under Rule 22 to also have independently established statutory jurisdiction. *Aetna Life Ins. Co. v. Bayona*, 223 F.3d 1030, 1033 (9th Cir. 2000). The Court has subject matter jurisdiction over the Interpleader through diversity jurisdiction. "For interpleader under rule 22(1) predicated on diversity jurisdiction, there must be diversity between the stakeholder on one hand and the claimants on the other." *Gelfgren*, 680 F.2d at 81 n.1; *see also Leimbach v. Allen*, 976 F.2d 912, 916 (4th Cir. 1992) ("The diversity requirement is satisfied in a Rule interpleader case when each stakeholder is diverse from each claimant.") Both the Estate and Lazar are residents of Arizona, while Schwab is a California corporation. (Dkt. No. 15 ¶ 4.) The amount in controversy requirement is easily met because the Account exceeds $75,000. (Dkt. No. 15 ¶ 4.) As such, the jurisdictional requirements are met.

ii. Deposit of the Disputed Funds

Finally, Schwab is not required to deposit the disputed funds for discharge from the case. Generally, "Rule 22 does not require deposit of funds with the court before discharging the stakeholder in a Rule interpleader action; although, such a deposit may be ordered at the discretion of the court

pursuant to Rule 67." *Magallon*, 2008 WL 2620748, at *2 (citing *Gelfgren*, 680 F.2d at 81-82); *see also Transamerica Life Ins. Co. v. Shubin*, No. 1:11-CV-01958-LJO, 2012 WL 2839704, at *6 (E.D. Cal. July 10, 2012) *report and recommendation adopted*, 1:11-CV-01958-LJO, 2012 WL 3236578 (E.D. Cal. Aug. 6, 2012) (quoting *Magallon*, 2008 WL 2620748, at *2 but holding that there was no issue with regard to deposit); *Metro. Life Ins. Co. v. Probst*, No. CV-09-8180-PCT-DGC, 2009 WL 3740775, at *1 (D. Ariz. Nov. 6, 2009) ("The deposit of funds is not, however, a jurisdictional requirement to a Rule 22 interpleader action ... and is therefore not required in this case.").

Schwab has agreed to abide by the Court's ruling and distribute benefits payable under the terms of the fund upon the Court's determination of the proper beneficiary. (Dkt. No. 103 at 3-4.) Therefore, the Court will not require a deposit of the disputed amount as a prerequisite to discharge of stakeholder in the Interpleader action. *See Magallon*, 2008 WL 2620748, at *3 (dismissing a Retirement Income Plan with prejudice from an interpleader action because it agreed to maintain the account and pay the beneficiary upon order of the court).

In light of Schwab's concession to retain the Account as custodian pending a settlement between the Parties or a final decision on the merits, the Court hereby **DISCHARGES** Schwab from the Interpleader action **with prejudice**.

D. Lazar's Motion to File a Second Amended Answer to the Counter Claim

According to Rule 15 of the Federal Rules of Civil Procedure, when a party requests leave to amend its pleading the court "should freely give leave when justice so requires." Fed. R. Civ. P. 15(a)(2). In *Foman v. Davis*, the Supreme Court explained that the objective of Rule 15 is to give a plaintiff "the opportunity to test his claim on the merits." 371 U.S. 178, 182 (1962) (citation omitted). The burden to demonstrate the *Foman* factors falls upon the party opposing the amendment. *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183 (9th Cir. 1987). Unless the opposing party demonstrates that the amendment would cause undue delay, is being made in bad faith, is futile to cure the deficiencies of the pleading, or would result in prejudice, leave should be granted. *Id.*

Without "prejudice, or a strong showing of any of the remaining factors, there exists a presumption under Rule 15(a) in favor of granting leave to amend." *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003). Inferences are generally to be performed in favor of granting the motion when assessing the *Foman* factors. *Griggs v. Pace Am. Grp., Inc.*, 170 F.3d 877, 880 (9th Cir. 1999). Courts retain the discretion to deny leave for amendments, but must provide a justification. *DCD Programs, Ltd.*, 833 F.2d 183.

1. Futility

The Estate argues that Lazar should be denied leave because her proposed amendments would be

futile. (Dkt. No. 104 at 3.) Lazar seeks to add that the IRA is subject to federal preemptive doctrines, and that California law applies. According to the Estate, both arguments fail. The Court finds that the amendments are not clearly futile. While the Estate's arguments may have merit, they strike at the very heart of the dispute. Therefore, determining the merit of these arguments at this stage would be inappropriate. The "determination of the respective rights of the claimants" should be handled in the second phase of interpleader. *Mack v. Kuckenmeister*, 619 F.3d 1010, 1023-24 (9th Cir. 2010) (quoting *Rhoades v. Casey*, 196 F.3d 592, 600 (5th Cir. 1999)) (internal quotation marks omitted).

The Estate articulates no prejudice from the amended answer, which is the factor carrying the greatest weight. *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003) (holding that if prejudice or a strong case for one of the other *Foman* factors cannot be shown then leave to amend should be granted). Because there is a strong presumption in favor of granting leave under Rule 15(a), the Court **GRANTS** Lazar's Motion.

2. Request for Attorneys' Fees

The Estate requests that sanctions be imposed under Fed. R. Civ. P. 11. (Dkt. No. 104 at 6.) The Court declines to do so. First, a motion for sanctions "must be made separately from any other motion and must describe the specific conduct that allegedly violates Rule 11(b)." Fed. R. Civ. P. 11(c)(2). Second, the Estate does not articulate in clear terms the unreasonable conduct, except that she filed a Motion

that is "wholly without merit." (Dkt. No. 104 at 6.) The Estate's request for attorneys' fees is **DENIED**.

V. CONCLUSION

Accordingly, the Court **ORDERS** that:

1. The Estate's Motion to Dismiss for lack of subject matter jurisdiction is **GRANTED**. (Dkt. No. 98)
2. The Estate's Motion to Dismiss for lack of personal jurisdiction is **DENIED** as moot. (Dkt. No. 98)
3. The Estate's Motion for an order preserving the IRA Account tax benefits is **GRANTED** in part and **DENIED** in part. (Dkt. No. 91)
    a. The Estate's request to be named the temporary beneficiary is **DENIED**.
    b. Schwab is **DISCHARGED** from the Interpleader action **with prejudice**, upon condition that it will serve as custodian of the IRA Account.
    c. The Estate and Lazar are **ENJOINED** from trading, transfer, and distribution activity until Schwab is given joint instructions from the Parties or there is a further Order from the Court.
    d. The Estate and Lazar must pay Schwab's reasonable attorneys' fees and costs to be immediately deducted from the IRA Account. As of August 31, 2013, Schwab submitted invoices totaling $28,539.65 in attorneys' fees and costs. Schwab is ordered to file a declaration with any subsequent fees and costs by April 7, 2014. The Court

will review the invoices in totality and then determine the amount of reasonable attorney's fees and costs.

4. Lazar's Motion for leave to file a second amended answer is **GRANTED**. (Dkt. No. 88).
5. The Estate's Request for Attorneys' Fees is **DENIED**.

IT IS SO ORDERED.