

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

SIMON BERNSTEIN IRREVOCABLE)
INSURANCE TRUST DTD 6/21/95)
)
 Plaintiff,)
v.)
)
HERITAGE UNION LIFE INSURANCE)
COMPANY,)
 Defendant,)
)
)
HERITAGE UNION LIFE INSURANCE)
COMPANY,)
)
)
 Counter-Plaintiff,)
v.)
)
SIMON BERNSTEIN IRREVOCABLE)
INSURANCE TRUST DTD 6/21/95)
)
 Counter-Defendant)
)
and,)
)
FIRST ARLINGTON NATIONAL BANK,)
as Trustee of S.B. Lexington, Inc. Employee)
Death Benefit Trust, UNITED BANK OF)
ILLINOIS, BANK OF AMERICA,)
successor in interest to "LaSalle National)
Trust, N.A., TED BERSTEIN, individually)
and as alleged Trustee of the Simon)
Bernstein Irrevocable Insurance Trust Dtd.)
6/21/95 and ELIOT BERNSTEIN,)
)
Third Party Defendants)
)
ELIOT IVAN BERNSTEIN,)
)
 Cross-Plaintiff)
v.)

)
TED BERNSTEIN, individually and as)
alleged Trustee of the Simon Bernstein)
Irrevocable Insurance Trust Dtd. 6/21/95)
)
Cross-Defendant)
and)
)
PAMELA B. SIMON, DAVID B. SIMON)
both Professionally and Personally, ADAM)
SIMON both Professionally and Personally,)
THE SIMON LAW FIRM, TESCHER &)
SPALLINA, P.A., DONALD TESCHER)
both Professionally and Personally,)
ROBERT SPALLINA both Professionally)
and Personally, LISA FRIEDSTEIN, JILL)
IANTONI, S.B. LEXINGTON, INC.,)
EMPLOYEE DEATH BENEFIT TRUST,)
S.T.P ENTERPRISES, INC., S.B.)
LEXINGTON, INC., EMPLOYEE DEATH)
BENEFIT TRUST, S.T.P. ENTERPRISES,)
INC., S.B. LEXINGTON, INC.,)
NATIONAL SERVICE ASSOCIATION,)
INC. (OF FLORIDA) NATIONAL)
SERVICE ASSOCIATION, INC,)
(OF ILLINOIS) AND JOHN AND)
JANE DOE'S)
)
Third Party Defendants)

BENJAMIN P. BROWN, as Curator and)
Administrator Ad Litem of the Estate of)
Simon L. Bernstein,)
)
Intervenor.)

REPLY IN SUPPORT OF ESTATE OF SIMON L. BERNSTEIN'S
MOTION TO INTERVENE

NOW COMES Benjamin P. Brown, as Curator and *Administrator Ad Litem* of the Estate of Simon L. Bernstein (the "Estate"), by and through his undersigned counsel, and submits this Reply in Support of his Motion to Intervene pursuant to Fed. R. Civ. P. 24:

I. Plaintiff's Response Does Not Refute the Estate's Entitlement to Intervene

Plaintiff's response to the Estate's Motion to Intervene offers nothing to refute the principal basis justifying intervention: the Estate is entitled to Intervention of Right under Fed. R. Civ. P. 24(a)(2) because the Estate is entitled to the Policy proceeds as a matter of law unless Plaintiff is successful in this litigation. But for Plaintiff's claim, the Estate would have no competing claim to the proceeds of the Policy, as the Estate is admittedly the default beneficiary under both Florida and Illinois law. *New York Life Ins. Co. v. RAK*, 180 N.E.2d 470 (Ill. 1962); *Harris v. Byard*, 501 So.2d 730 (Fla. Dist. Ct. App. 1987) As a consequence, the Estate's interest in this matter is "direct, significant, and legally protectable," as this court required in its Order denying Mr. Stansbury's Petition to Intervene. (Dkt. No. 74 at 2, *citations omitted*)

The instant litigation will produce only one outcome: the Policy proceeds will either be paid to the Plaintiff or to the Estate. Intervention is the Estate's sole avenue to secure its rival claim. If the Estate is not allowed to intervene, there will be no party present competent to challenge Plaintiff's claim to this very large sum of money. The Estate's direct, significant and legally protectable interest in the Policy proceeds cannot be protected absent intervention. The Estate's entitlement to intervene is patent and this motion must be allowed.

II. The Fact that William Stansbury is Provisionally Paying the Fees to Pursue Intervention is Irrelevant to Whether the Estate is Entitled to Intervene

Plaintiff contends that the Estate's Motion to Intervene should be denied because Mr. William Stansbury, one of the claimants against the Estate, is paying the fees to pursue intervention. First, the party bringing this motion is Benjamin Brown, as curator and administrator *ad litem* of the Estate of Simon L. Bernstein. Mr. Brown was appointed by the probate court in Florida to curate the Estate and separately to bring this motion. The order of the probate court instructed Mr. Brown to "assert the interest of the Estate in the Illinois Litigation

involving life insurance proceeds.” (Dkt. No. 110 at 4) This motion is brought by the Estate expressly at the order of the probate court in Florida.

Second, the fact that Mr. Stansbury is financing the motion has no bearing whatsoever on its validity. In fact, Mr. Stansbury is financing this motion at the behest of the Florida Probate Court. (See Dkt. No. 116-1 at 33:8-9) It is not uncommon for estates to allow potential claimants to finance their activity, to be reimbursed if the activity benefits the estate. Nothing about that arrangement changes the fact that if this motion results in an order in favor of the Estate, the money will be paid to the Estate, not to Mr. Stansbury.

Third, while Mr. Stansbury has made a claim upon the Estate, and very much hopes to recover a substantial judgment against the Estate, no such judgment currently exists. If the money is ultimately paid to the Estate as a consequence of this motion, Mr. Stansbury will still have to prove his claim and its amount. And any amount not paid to Mr. Stansbury will be paid to the other beneficiaries of the Estate who include the grandchildren of Simon Bernstein. The Probate Court acknowledged this reality when it instructed the Estate to seek intervention in this action, financed by Mr. Stansbury. (See Dkt. No. 116-1 at 35:4-16)

III. The Court Should not Rely on the Affidavit of Mr. Sanders for Any Purpose Until the Estate has had the Opportunity to Challenge and Controve It

Plaintiff must prove the existence and validity of the purported Trust by clear and convincing evidence. *Estate of Wilkening v. Nicholson*, 441 N.E.2d 158, 163 (Ill. App. Ct. 1982) Such evidence must be “unequivocal as to both its existence and to its terms and conditions.” *Id.* Upon intervention, the Estate expects to demonstrate that Plaintiff cannot meet its burden. And Plaintiff’s reliance on the Affidavit of Don Sanders in resisting this Motion illustrates precisely why the Estate must be allowed to offer such evidence: Plaintiff asks the court to accept

everything in the Affidavit as "essential truth" while simultaneously asking the Court to prevent the rival claimant to the proceeds from testing and challenging the Affidavit.

Plaintiff correctly states in its Response that the "testimony" of Don Sanders has gone "unrefuted" to date. (Dkt. No. 116 at 6) But that has only been because the Estate has not had the opportunity to test the Affidavit and to offer controverting evidence. The Court cannot determine the validity and credibility of Plaintiff's evidence until the Estate has the opportunity to employ the normal processes of discovery and litigation to test it. And the "bald assertions" to which Plaintiff derisively refers are either actual facts (i.e., Plaintiff cannot locate the trust document (*See* Dkt. No. 116 at 6)) or are propositions the Estate expects to prevent Plaintiff from proving (i.e., that the Trust ever existed).

This Court, in its Order denying Mr. Stansbury's Motion to Intervene, described Rule 24 Intervention as of Right as requiring "a direct, significant, and legally protectable interest in the question at issue in the lawsuit." (Dkt. No. 76 at 2, *citations omitted*) Mr. Stansbury's interest as a potential claimant did not qualify for intervention by that standard. However, no interest could be more "direct, significant, and legally protectable" than the Estate's rival claim to the same interpled funds claimed by Plaintiff. *Id.* As such, the Estate must be allowed to intervene under Fed. R. Civ. P. 24.

Respectfully submitted,

/s/ James J. Stamos

One of the attorneys for Proposed Intervenor,
Benjamin P. Brown, Curator and Administrator Ad
Litem on behalf of the Estate of Simon L. Bernstein

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 15, 2014, I electronically filed the foregoing with the Clerk of the Court using CM/ECF. I also certify that the foregoing is being served this day on all counsel of record identified below via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner.