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 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., SIMON BERNSTEIN TRUST, N.A., TED BERNSTEIN, individually and as purported Trustee of the Simon Bernstein Irrevocable Insurance Trust Dtd 6/21/95, and ELIOT BERNSTEIN Third-Party Defendants.	**Case No. 13 cv 3643** **Honorable John Robert Blakey** **Magistrate Mary M. Rowland** **Simon Bernstein Irrevocable Insurance Trust Dated 6/21/95, Ted Bernstein, as Trustee and Individually, Pamela B. Simon, Jill Iantoni, and Lisa Friedstein ("Movants or Plaintiffs")** **MOVANTS' MEMORANDUM OF LAW IN REPLY TO THE ESTATE OF SIMON BERNSTEIN'S AND ELIOT BERNSTEIN'S RESPONSES TO MOTION FOR SUMMARY JUDGMENT**

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., NATIONAL SERVICE ASSOCIATION (OF FLORIDA), NATIONAL SERVICE ASSOCIATION (OF ILLINOIS) AND JOHN AND JANE DOES

Third-Party Defendants.

NOW COMES Plaintiffs, Simon Bernstein Irrevocable Insurance Trust dated June 21, 1995, by Ted Bernstein, as Trustee, Ted Bernstein, individually, Pamela Simon, Jill Iantoni, and Lisa Friedstein ("Movants" or "Plaintiffs"), by and through their undersigned counsel, and respectfully submit this memorandum of law in further support of their motion for summary judgment and in reply to the responses of the Estate of Simon Bernstein and Eliot Bernstein.

INTRODUCTION[1]

In respondents' combined efforts to knock down a few trees, they have missed the forest completely. In fact, Eliot denies and disclaims any claim to the forest, both on behalf of himself and his children. Eliot then takes a giant leap further by denying the forest's very existence.

More importantly, both the Estate and Eliot failed to plant any tree of their own. And all of this is because respondents seem to have forgotten or misapprehended the fact that this is now an interpleader action based on the Interpleader Complaint filed by the Insurer and the conflicting pleadings of the potential claimants.

Respondents' collective failure to assert competing claims to the Policy Proceeds is the dispositive issue (the forest) in this litigation. By failing to assert and establish viable claims of their own that could prevail at trial, both respondents fail to raise a dispute as to the primary issue which is who is the beneficiary of the Policy Proceeds. Movants' motion for summary judgment, on the other hand, sets forth two legal theories (Counts I and II) both leading to the same conclusion, and that is the Bernstein Trust is the beneficiary of the Policy Proceeds.

SUMMARY JUDGMENT UNOPPOSED AS TO COUNT I

Respondents argue that movants can no longer proceed on Count I because it's moot since the Insurer was dismissed as a party from the litigation after depositing the Policy Proceeds with the Registry of the Court. But, Respondents chose to ignore the fact that Count I of

[1] The definitions of capitalized terms used herein shall be consistent with the definition section contained in Movant's Statement of Undisputed Facts.

movant's first amended complaint states one of its claims to the Policy Proceeds on behalf of an express common law trust – the Bernstein Trust – and thus is certainly not moot. (**Exh. 25, Movants' First Amended Complaint, Count I).**

Neither respondent cites any legal authority that requires a party to re-plead its claim to the stake simply because the interpleading party deposited the stake -- the Policy Proceeds -- with the court and was eventually dismissed from the litigation. Nor, did the court order the conflicting claimants to re-plead when it granted the Insurer's motion to dismiss itself from the litigation**. (Dkt. #101)**. And again, the relief requested in Count I specifically targets the Policy Proceeds placed on deposit with the Registry of the Court. (**Exh. 25, Movants' First Amended Complaint, Count I).**

An interpleader involves two stages. In the first, the court determines if the prerequisites of an interpleader action have been met, and if so, a court may discharge the stakeholder. *Aaron v. Merrill Lynch Pierce Fenner & Smith,* 502 F.Supp.2d 804, 808 (2007). In the case at bar, on February 18, 2014, the court entered an order discharging the Insurer, and did not order the conflicting claimants to the Policy Proceeds whom had been named parties to the case to re-plead their claims to the stake (the Policy Proceeds). **(Dkt. #101).**

Also, the Insurer originally brought its Interpleader Complaint as a counterclaim to Movants' initial breach of contract action. In its Interpleader Complaint the Insurer alleged that the Bernstein Trust had filed a breach of contract action seeking the Policy Proceeds, and that it was the named contingent beneficiary of the Policy Proceeds. (**Exh. 28**, **Insurer's Interpleader Complaint**, **¶3 and ¶9**). This shows that the Insurer clearly understood that Movant's Count I

represented a claim to the Policy Proceeds and treated it as such when filing its Interpleader Complaint.

Now that the stake (the Policy Proceeds) has been deposited, in this second stage of the litigation, the court determines which claim to the Policy Proceeds prevails. *Id.* Count I sets forth all the facts and elements required under the pleading requirements of the FRCP to state one of its claims to the Policy Proceeds. Since both respondents argued that Count I was moot, they willingly ignored it. Thus, movants' uncontroverted Count I provides a first basis for the court to grant the relief requested by way of summary judgment. But in light of the shortcomings of respondents' opposition briefs, movants will provide the court with several additional compelling reasons for granting its motion for summary judgment.

ARGUMENT

NO COMPETING CLAIMS; NO STANDING; NO TRIABLE ISSUE OF FACT

In its motion pleadings, movants demonstrated that the Simon Bernstein Irrevocable Insurance Trust dated June 21, 1995 is the beneficiary of the Policy Proceeds at issue in this case. This essential fact is dispositive of the central issue in this case – who is the beneficiary of the Policy Proceeds. Both Respondents fail to dispel or disprove the underlying facts that were used by Ted Bernstein to submit and explain **Exh. 17**, which is a demonstrative exhibit containing a diagram illustrating that no matter if the Primary Beneficiary or Contingent Beneficiary are determined to have the prevailing claim, the ultimate outcome is the same, and the Bernstein Trust will end up with the Policy Proceeds. **(Movants' SoF, ¶44).** In fact, the Estate makes a significant admission supporting movants' explanation when the Estate did not dispute that "on August 26, 1995, Simon L. Bernstein, as Member of the VEBA, named the

Bernstein Trust as the "persons to receive my death benefits…". **(Estate's response to movants SoF, #32).** Here, the Estate is admitting that Simon Bernstein designated the Bernstein Trust as the ultimate beneficiary of the Policy Proceeds in the event the Primary Beneficiary survived the insured. As, movants explanation of **Exh. 17** demonstrated, the Primary Beneficiary – the VEBA -- did not survive the insured and thus the Policy Proceeds must pass to the Bernstein Trust as contingent beneficiary of the Policy.

The Estate also concedes that the Bernstein Trust was designated the owner of the Lincoln Benefit Life Policy, and does not dispute the written evidence submitted to Lincoln Benefit to designate the Bernstein trust as owner of the Lincoln policy. **(Estate's Response to SoF, ¶64)**. The Estate's admission that the Bernstein Trust was named the owner and beneficiary of the Lincoln Policy, and separate named beneficiary of the VEBA is at minimum a tacit admission of the very existence of the Bernstein Trust. Similarly, the fact that the Bernstein Trust was named the owner and beneficiary of the Lincoln Policy according to the Lincoln Policy records submitted by movants' is undisputed evidence in and of itself of the existence of the Bernstein Trust for the Lincoln Policy was at one time a part of the corpus of the Trust before the Lincoln Policy lapsed.

The documents and Policy records movants submitted as proof of the identity of the named beneficiaries of the VEBA, and the Capital Bankers Policy and the owner and beneficiary of the Lincoln Policy serve as undisputed, clear and convincing proof of the formation and existence of the Bernstein Trust itself. Respondents also fail to refute the written and signed evidence and case law Movants relied upon which establish that Movants' evidence satisfies the statute of frauds for written proof of the existence and formation of a trust. Such evidence includes the SS-4 form containing the signature of the trustee, the name of the trust, and its tax

i.d. Movants also submitted beneficiary and owner designations for the VEBA, this Policy and the Lincoln Policy collectively containing the Settlor's signature, the Trustee's signature, the tax i.d. and name of the trust. **(Movants' SoF, ¶32, ¶ 44, ¶59-¶64)**.

Further, the Estate's assertion that David Simon only saw the executed trust in the presence of Simon Bernstein is just plain wrong and is a blatant mischaracterization of his testimony. At his deposition, David Simon testified that he saw the executed Bernstein Trust Agreement on the date Simon Bernstein executed it after he returned from the law offices of Hopkins & Sutter. **(Exh. 32, Dep. D. Simon, p. 44:5-8)**. David Simon further testified that he reviewed or according to his customary business practice would have reviewed the executed Bernstein Trust Agreement during a document review meeting for an A.L.P.S. funding of the Lincoln Policy. **(Exh. 32, Dep. of David Simon, p. 100:15-102:2)**. David Simon also testified that he saw the executed Bernstein Trust Agreement just before he assisted Simon and Shirley Bernstein with completing the SS-4 form to obtain a tax i.d. number for the Bernstein Trust. **(Movants SoF**, **¶59).** The SS-4 form itself evidences formation and existence of the trust, and the fact that the tax i.d. number that appears on the SS-4 form is used by the Bernstein Trust in association with both the Capitol Bankers Policy and the Lincoln Policy is extremely strong corroborative evidence of the formation and existence of the Bernstein Trust.

More glaringly, Eliot affirmatively denies and disclaims any interest in the "non-existent Policy" and "non-existent Policy Proceeds". Eliot's response to movants' statement of facts includes several admissions which nullify his standing to participate in this interpleader action as a potential claimant at all. For example, Eliot states as follows:

> "The claim that the Contingent Beneficiary is a mistake and/or data entry error is made by affiant Don Sanders who is working for an insurance carrier that has lost the legally

> nonexistent "Policy" that this the subject of this Breach of Contract Lawsuit**…." (Eliot Resp. Statement of Facts, p.3).**
>
> "There can be no "Policy Proceeds" without a legally binding policy produced…" **(Eliot Resp. Statement of Facts, p.4)**
>
> "There is no policy presently produced or even proven by Plaintiffs so no "Policy Proceeds" can be determined from a specimen…." **(Eliot Resp. Statement of Facts, p.12).**
>
> "Eliot never submitted a claim to the carrier claiming he or his children were named beneficiaries." **(Eliot Resp. Statement of Facts, p.12).**

Eliot's final strategy is to attempt to manufacture a dispute between the primary beneficiary and the contingent beneficiary where none exists, and Eliot certainly has no standing to raise one. And, both respondents' oppositions rest largely on their own self-serving misstatements of law requiring a written and signed, formal trust agreement. Respondents' proclamations are totally devoid of any citations to authority for the proposition that a trust can only exist if a formal, executed, written trust document is produced.

DEAD MAN'S ACT – EXCEPTION TRIGGERED – DOOR OPEN

Both Respondents attempt to exclude certain testimony of Ted Bernstein and David Simon regarding conversations they had with decedent, Simon Bernstein. But, the only party permitted to invoke the Illinois Dead Mans' Act is a "representative". *Balma v. Henry*, 404 Ill.App. 3d 233 (2nd Dist. 2010), *Moran v. Erickson*, 297 Ill.App. 342 (1st Dist. 1998). Thus, all of Eliot's invocations of the DMA must be disregarded by the court.

Turning to the Estate's invocation of the DMA, the Estate apparently failed to adequately consider and address certain statutory exceptions to the DMA. And the Estate *triggered a big one* in its own statements of additional facts.

In its memorandum of law, the Estate seeks to bar "the testimony of every Plaintiff (including Ted Bernstein) and of David Simon; regarding what Simon Bernstein said or did in

their presence." **(Estate brief, p.8)**. The Estate invoked the DMA stating that as interested parties all testimony of Ted Bernstein and David Simon relating to conversations they had with decedent, Simon Bernstein, should be excluded. **(Estate opp. brief, p.8).**

But in its own statement of additional facts, the Estate "opens the door" to the very type of testimony it seeks to exclude -- and opens it wide -- by making the following allegations of additional facts:

> 5. Ted Bernstein, purported Trustee of the 1995 Trust, has never seen an executed copy of the document. Ted Bernstein testified that he was *informed by his father* that he would be a trustee of the 1995 Trust in 1995 but did not recall his status as trustee until he was informed by David Simon after Simon Bernstein's death. (*cite to Ted Bernstein testimony omitted) (*emphasis added*).*
>
> 23. Simon Bernstein participated in a telephone conference with Plaintiffs and their spouses a few months prior to his death (Summer 2012). *During this telephone conference, Simon Bernstein instructed* that the assets of his estate and trust would be left to his ten grandchildren and the insurance policy proceeds were to pass to his five children in an effort to quell some then-existing family acrimony. (*cite to David Simon and Ted Bernstein's testimony omitted*) (emphasis added) **(Estate Statement of Additional Facts, ¶23).**

First, its simply odd that such allegations of facts are included by the Estate in its own opposition papers since Simon Bernstein's declarations that the "policy proceeds were to pass to his five children" and that his son, Ted "would be a trustee of the 1995 Trust in 1995" both jibe so nicely with Movants' claim that (i) the Bernstein Trust is the beneficiary of the Policy Proceeds, (ii) that the five children are the beneficiaries of the Bernstein Trust; and (iii) Ted Bernstein is the successor trustee.

But, back to the point. By alleging these additional facts, the Estate offers up the exact type of testimony it otherwise seeks to exclude under the DMA. The DMA provides in pertinent part as follows:

> 735 ILC § 8-201. Dead-Man's Act. In the trial of any action in which any party sues or defends as the representative of a deceased person or person under a legal disability, no

> adverse party or person directly interested in the action shall be allowed to testify on his or her own behalf to any conversation with the deceased or person under legal disability or to any event which took place in the presence of the deceased or person under legal disability, except in the following instances:
>
> (a) If any person testifies on behalf of the representative to any conversation with the deceased or person under legal disability or to any event which took place in the presence of the deceased or person under legal disability, any adverse party or interested person, if otherwise competent, may testify concerning the same conversation or event.

By offering testimony of conversations between the decedent on one hand, and David Simon, Ted Bernstein and the remaining Plaintiffs on the other, the Estate has certainly opened the door to testimony regarding all conversations described in the Estate's own allegations of additional facts. But also, where courts determine that in the face of the "door opening" testimony further exclusions of evidence under the DMA would provide a misleading picture of events, courts have not hesitated to open the door wide in order to let the truth in.

In other words, the Estate's offer of the same testimony they seek to exclude when offered by movant triggers the exception to the DMA for all testimony between these witnesses and the decedent for the rest of these proceedings including trial, if any. *Zorn v. Zorn,* 126 Ill.App.3d 258 (4th Dist., 1984). In *Zorn,* the court was confronted with a case where the party who had invoked the DMA, was simultaneously trying to offer the same type of testimony they were seeking to exclude.

The court in *Zorn* reasoned as follows:

"Although it was decided under a prior statute, the case of *Perkins v. Brown* (1948), 400 Ill. 490, 81 N.E.2d 207, bears many striking similarities to the case at bar. There the defendant wished to explain his testimony as an adverse witness by testifying to conversations which he had had with the decedent in the months prior to her death. The Illinois Supreme Court held:

> "The justice of this rule is too apparent to require discussion. It would be palpably unjust if a litigant were permitted to call an adverse party and examine him as to one fact or phase of a transaction in his favor and then invoke the bar of the statute when the party examined sought to testify further with regard to the same transaction for the purpose of

> explaining his former testimony or correcting an erroneous impression left thereby. (cite omitted). Giving the litigant the right to call the adverse party and examine him as if under cross-examination, in no way abrogates the rule that where a party calls a witness and examines him as to a particular part of a transaction, the other party may call out the whole of the transaction bearing upon or tending to explain or qualify the particular part to which the examination of the other party was directed. Appellants having called Brown to testify and elicited from him the statement that he had received a deed for the property from the deceased and that he did not pay her for it or buy it from her, it was entirely proper to permit him to explain the entire transaction with the deceased, including the conversations had by her with him concerning the conveyance of the property, as such conversations were a part of the transaction inquired about by appellants." *Zorn v. Zorn*, 126 Ill.App.3d 258 (4th Dist., 1984) citing *Perkins v. Brown*, 400 Ill. 490, 497, 81 N.E.2d 207, 211 (1948).

Here, just as in *Perkins* and *Zorn*, it would be "palpably unjust" to allow the Estate to pick and choose testimony and evidence in this fashion. The door has been opened, and according to the DMA and related case law, it remains open for the remainder of the proceedings. In short, the court should disregard both respondents invocations of the DMA entirely.

STANDARD FOR SURVIVING SUMMARY JUDGMENT

Both respondents set forth the same standard they each must satisfy to survive a motion for summary judgment:

> At summary judgment, "if fair-minded persons could draw more than one conclusion or inference from the facts, including one unfavorable to the moving party, a triable issue exists and the motion for summary judgment should be denied. *It is only when undisputed facts are susceptible to a single inference that the issue becomes one of law*." (emphasis added) **(Estate opp. Brief, p.13; Eliot opp. Brief, p.16)**

In only trying to chop down a few trees -- attacking oral testimony made in front of the decedent -- the Estate forgot to lay claim to the forest -- the Policy Proceeds. The Estate has attached no documentation that the Estate was ever named the beneficiary of the Policy

Proceeds. Nor did the Estate rebut the affidavit of Insurer's 30(b)(6) representative Don Sanders whom confirmed the Estate was never named a beneficiary of the Policy Proceeds. **(Movants' SoF, ¶70)**

Similarly, Eliot failed to submit any evidence or testimony which supports a claim to the Policy Proceeds either on his own behalf or that of his children. This makes perfect sense since Eliot denies the very existence of the Policy and Policy Proceeds. In addition, Eliot also failed to rebut the Affidavit of Don Sanders and the Policy records that indicate that neither Eliot, nor any of his children, were ever individually named as beneficiaries of the Policy Proceeds. **(Movants' SoF, ¶67)**.

Conversely, movants established that the Bernstein Trust was the beneficiary of the Policy Proceeds. What is truly dispositive here is that (i) the Estate failed to explain how any disputed fact raises an inference that the Policy Proceeds could be awarded to the Estate; and (ii) Eliot failed to explain how any disputed fact raises an inference that the Policy Proceeds could be awarded to Eliot. Eliot does not claim that either Eliot or his children are the beneficiaries of the Policy Proceeds. Similarly, the Estate never asserts that it was named a beneficiary of the Policy Proceeds.

The Estate tries – but fails – to rebut the trust's existence. Tellingly, while relying on certain portions of Simon Bernstein's last will regarding his bequests, the Estate fails to addresses the language highlighted by movants and contained in Simon Bernstein's own last Will which reaffirmed his beneficiary designation of insurance contracts. **(Movants' SoF, ¶71).**

But, respondents' collective failure to take that next essential step of drawing an inference from disputed facts that creates a triable issue is the fatal blow to their opposition. Because the Estate and Eliot each failed to show how any set of facts could lead to the conclusion that they could be determined to be the prevailing claimant and awarded the Policy Proceeds, both respondents failed to survive summary judgment according to the standards set forth in their own opposition papers.

Since they lacked viable claims of their own, both Eliot and the Estate sought simply to poke a few holes in Movants' case which is insufficient to prevail in an Interpleader Action. In an interpleader action each claimant has the burden of establishing its entitlement to the stake, and it is insufficient to negate or rely on the weakness of the claims of others. *Eskridge v. Farmers New World Life Ins. Co.*, 250 Ill.App.3d 603 at 608-609, 190 Ill.Dec. 295, 621 N.E.2d 164 (1st Dist., 1983). Neither rebutted this proposition of law contained in the movants' memorandum of law regarding interpleader procedure. In doing so, both respondents failed to lay claim to the stake, confining their responses to trying to point out weakness of movants' claims or asserting claims of others -- chopping trees but ignoring the forest. And in the same vein, since respondents provided no evidence that they are even potential claimants to the Policy Proceeds, neither respondent possess the standing to make any of the evidentiary objections they make in their responses or oppose movants' claims at all.

The only other strategy both respondents utilized was to try to assert the claims of others (LaSalle and the 2000 Trust) which as movant pointed out is also improper and should be disregarded in an Interpleader Action. Neither Respondent has alleged any standing or representative capacity to represent the 2000 Trust or LaSalle. Simply put, a claimant may only assert his own injury or claim and cannot rest his claim to relief on the legal rights or interests of

third parties. *Hodack v. City of St. Peters,* 535 F.3d 899 (8th Cir. 2008) citing *Warth v. Seldin,* 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975); *see also Deutsche Bank Nat. Trust Co. v. Gilbert,* 2012 IL App (2d) 120164 (2nd Dist., 2012).

Also, the notion that either the Insurer or movants' failed to notify or serve the 2000 Trust, or that the 2000 Trust has a claim at all is nonsensical. The Insurer looked at its Policy records and did not determine that the 2000 Trust was a potential claimant. Neither respondent has submitted any Policy record submitted to the insurer by a Policy owner naming the 2000 Trust an owner or beneficiary of the Policy.

The Insurer was represented by competent counsel. Presumably, the Insurer together with its counsel determined which persons and entities they felt represented potential claimants to the Policy Proceeds before deciding which parties to serve with their Interpleader Action. The Insurer never heard from a representative of the 2000 Trust asserting a claim. The Insurer evidently found no need to name or serve the 2000 Trust. And, nothing and no one prevented either respondent from notifying the 2000 Trust or serving it with this litigation. Also, it is safe to assume that the trustee of a trust that purportedly has a pecuniary interest in an insurance policy with a death benefit exceeding $1,000,000.00 would be duty bound to periodically monitor whether the insured was alive or dead, and if dead, make a death claim on the Policy. The 2000 Trust never did.

Though lacking any standing to do so, Eliot raises an issue regarding LaSalle as primary beneficiary. Eliot fails to dispute all the evidence movants submitted proving that LaSalle was acting as a trustee for the VEBA that had long since been dissolved. **(Movants' SoF, ¶29-39)**.

The Estate, on the other hand, admitted that LaSalle was acting as a trustee for the VEBA that had long since been dissolved. **(Estate's response to movants SoF, #33 and #36).** Also, the fact is that the Insurer did serve their Interpleader Complaint upon Bank of America, N.A. as the successor to LaSalle as alleged in their Interpleader Complaint. Subsequently, Bank of America, N.A. was dismissed from the litigation. **(Movants' SoF ¶22 and Insurer's Interpleader Action, Exh. 28, ¶8)**.

Even if the Insurer failed to serve a claimant whom has not appeared in this litigation – it did not – that still does not impede the court's ability to render summary judgment in this action. If another claimant were to appear later to file an independent and viable claim against the Insurer, it is the Insurer who may face liability that exceeds the amount of the stake despite all of its efforts to the contrary. This risk of excess liability of the Insurer is not a risk that falls on any other party to this action, and thus provides no reason to delay judgment with regard to this litigation. Given the time that has lapsed since the death of the insured, and the extent to which the Insurer went to examine its records and serve all potential conflicting claimants, the Insurer's risk, if any, is miniscule. And, in any case, as a matter of law and procedure an interpleader action cannot guaranty to limit the stakeholder's liability to that of the stake. *William Penn Life Ins. Co. of New York v. Viscuso,* 569 F.Supp.2d 355 (S.D. NY, 2008); *Lee v. West Coast Life Ins. Co,* 688 F.3d 1004 (9th Cir., 2012).

UNDISPUTED BENEFICIARIES OF THE BERNSTEIN TRUST

With regard to the identity of the beneficiaries of the Bernstein Trust, Respondents fail to raise a disputed issue of fact. Here again, Respondents failed to refute the consistent evidence provided in **Exh. 15** and **Exh. 16** that both identify Simon Bernstein's children as beneficiaries

of the Bernstein Trust. Respondent's failed to make any counterargument as to the identities of the beneficiaries, and also failed to address or distinguish the case law cited by Movants' in their motion that obligates the court to look at the totality of the circumstances and apply common sense in making the determination of the intended beneficiaries.

The Estate failed to dispute the arguments made by Movants with regard to the surrounding factors and considerations that the court should consider with regard to the timing of the formation of the trust and its purposes. All of the parole evidence regarding the Bernstein Trust and the five children as its beneficiaries is also admissible and unrefuted since the DMA does not apply to exclude it.

SUCCESSOR TRUSTEE

The issue of the identity of the Successor Trustee of the trust is really a non-issue and yet the Estate devotes a significant portion of its response to it. With regard to the issue of the identity of the successor trustee, respondents ignore both written evidence provided in **Exh. 16**, and the fact that Movant's have petitioned the court for a declaration or appointment of Ted Bernstein as successor trustee based on the written consent of 4/5ths of the beneficiaries of the Bernstein Trust. Also, since the DMA does not apply, all of David Simon's, Ted Bernstein's and all the other Plaintiffs' testimony regarding the existence of the trust, the identity of the trustee and successor trustee, and the beneficiaries of the trust is admissible and unrefuted. Finally, the Estate's own statement of additional fact #5 provides evidence and cites testimony that Ted was informed by his father that he was one of the trustees.

CONCLUSION

To wrap up let's briefly revisit how we got here and how this case should be resolved. The reason we are here in the first place is that movants filed a breach of contract action (and related claims) against the Insurer in the Circuit Court of Cook County, Illinois. In response, the Insurer removed to the Northern District and filed an Interpleader Complaint citing, *inter alia*, conflicting claims it received from Eliot Bernstein and the Bernstein Trust. Eliot's response expressly disclaimed any interest in the Policy proceeds on behalf of Eliot or his children. In fact, Eliot's response denied the very existence of the Policy and the Policy Proceeds. So, neither Eliot nor his children, by Eliot's own adamant admissions, possess a claim to the Policy Proceeds. As a result, Eliot and his children have no standing as potential claimants to the stake in this Interpleader Action.

Respondents provided no facts, testimony, or documents that establish a claim on behalf of the Estate, Eliot or Eliot's children. On the other hand, movants' have provided, clear, convincing, and undisputed evidence of their claim that the Bernstein Trust is the Beneficiary of the Policy Proceeds. Not only is this claim undisputed by respondents, it is corroborated by the Insurer's Policy records and the Affidavit of its Rule 30(b)(6) witness, Donald Sanders, VP of Operation.

All of the documents, and unrefuted testimony that establish the identity of the Bernstein Trust as Beneficiary, are also sufficient to satisfy both the statute of frauds, and/or a "clear and convincing" standard to prove up the existence and terms of the Bernstein Trust. The material terms of the trust, the identity of its beneficiaries are also undisputed. No other claimant has

asserted that they are beneficiaries of the Bernstein Trust other than movants on behalf of all five children of Simon Bernstein -- including Eliot. The Estate's own statement of additional facts #23 is completely consistent with this result.

Movants' written and parole evidence also establishes the identity of the successor trustee, Ted Bernstein. But in addition, movants' have set forth statutory authority for the court to declare and appoint Ted Bernstein as successor trustee by virtue of the consent of 4/5ths of the beneficiaries of the Bernstein Trust.

Ultimately, the court must first consider that movants have set forth detailed and documented claims to the Policy Proceeds explaining to the Court (i) how the beneficiary is to be determined according to the Policy – from the beneficiary designations contained in the Policy records; (ii) who was the sole surviving beneficiary under the Policy -- the Bernstein Trust; (iii) who are the beneficiaries of the Bernstein Trust – Simon Bernstein's five children, including Eliot; and (iv) who should be declared or appointed to be the successor trustee – Ted Bernstein.

Next, the court should consider respondents' opposition papers, and ask itself:

Has the Estate drawn an inference that explains how the Estate could be awarded the Policy Proceeds at trial? Has Eliot drawn an inference that explains how Eliot, or his children, could be awarded the Policy Proceeds at trial? And, the answer to both questions is an emphatic "NO". So the only thing left for the court to do is enter the order requested by movants' in their motion for summary judgment.

Dated: June 26, 2015

Respectfully Submitted,

/s *Adam M. Simon*

Adam M. Simon (#6205304)
303 E. Wacker Drive, Suite 2725
Chicago, IL 60601
Phone: 312-819-0730
Fax: 312-819-0773
E-Mail: asimon@chicagolaw.com
Attorney for Movants
Simon Bernstein Irrevocable Insurance Trust;
Ted Bernstein as Trustee, and individually,
Pamela B. Simon, Jill Iantoni, Lisa Friedstein