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' REPLY TO THE ESTATE OF SIMON BERNSTEIN'S STATEMENT OF ADDITIONAL FACTS**

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 reply to the Estate's Statement of Additional Facts.

MOVANTS' REPLY TO ESTATE'S STATEMENT OF ADDITIONAL FACTS

1. Plaintiffs' and Intervenor's interests in the outcome of this action are diametrically opposed: the Policy proceeds will either be payable to the Plaintiffs or to the Estate, the beneficiaries of which are Simon Bernstein's grandchildren (Plaintiffs' children). *(See* Deposition of Ted Bernstein, attached hereto as Intervenor's Exhibit A, pp. 92:23 – 93:25).

Answer: Disputed. Ted Bernstein, who is a non-lawyer's understanding of where Policy Proceeds would go is not controlling. Also, this statement of additional fact does not contain all of Ted Bernstein's testimony on the issue, which included his acknowledgment that in the event the court did not rule that the Bernstein Trust was the beneficiary of the Policy Proceeds, that "there's infinite possibilities of where it could go." *(See* Deposition of Ted Bernstein, attached hereto as Exh. 37, pp, 120:7-121:4).

2. David and Pamela Simon are interested parties to this litigation. If Plaintiffs are successful, Pamela Simon will receive over $300,000, representing 20 percent of the Policy proceeds. *(See* Deposition of David Simon, attached hereto as Intervenor's Exhibit B, pp. 58:9 – 59:4) David is Pamela's husband. *(Id. at* p. 7:9-10)

Answer: Object insofar as the characterization that they are "interested parties" calls for a legal conclusion. Undisputed that if Plaintiffs are successful Pamela Simon will receive 20 percent of the Policy Proceeds and David Simon is Pamela's husband.

3. Ted Bernstein is an interested party to this litigation. If Plaintiffs prevail, he will receive over $300,000, representing 20 percent of the Policy proceeds. *(See* Intervenor's Exhibit A, pp. 9:18 – 10:4; 118:17 – 118:14)

Answer: Object insofar as the characterization that Ted is an "interested party" calls for a legal conclusion. Undisputed that if Movants' prevail Ted will receive a 20 percent share of the Policy Proceeds.

4. The remaining Plaintiffs (Jill lantoni and Lisa Friedstein) are interested parties to this litigation. If Plaintiffs prevail, they will each receive over $300,000, representing 20 percent of the Policy proceeds. *(See* Intervenor's Exhibit A, pp. 118:16 – 119:14; Plaintiffs' Exhibits 15 and 16).

Answer: Object insofar as the characterization that Jill and Lisa are "interested parties" calls for a legal conclusion. Undisputed that if Plaintiffs prevail Jill and Lisa will each receive a 20 percent share of the Policy Proceeds.

5. Ted Bernstein, purported Trustee of the 1995 Trust, has never seen an executed copy of the document. *(See* Intervenor's Exhibit A, p. 24:6-12) 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. *(See* Intervenor's Exhibit A, pp. 24:13 — 25:3).

Answer: Undisputed with one clarification. Ted testified about the conversation described by the Estate between Ted and his father, Simon Bernstein. Except, Ted testified he was told by his father he was a "successor trustee".

6. Plaintiffs have produced no executed original or executed copy of a written trust agreement reflecting the terms of the purported 1995 Trust. (See Dkt. No. 144 at ¶9; Intervenor's Exhibit A, p. 13:13-15; Plaintiffs' Exhibit 29 at ¶ 35, 37) No original or executed copy of the Policy has been produced by Plaintiffs to date. (See Plaintiffs' Exhibit 29 at 35).

Answer: Undisputed with regard to the executed written formal trust agreement. Objection as to relevance with regard to the Policy as the Insurer has not disputed either the Policy or its liability for the Policy Proceeds. Further, the Insurer has produced a specimen policy, as well as copies of the specification and schedule pages unique to the Policy.

7. While Ted asserts in his Affidavit that he was the Trustee of the Trust as of October 19, 2012, Robert Spallina, Simon Bernstein's lawyer, made an application for the Policy proceeds on behalf of Plaintiffs, purportedly as trustee of the 1995 Trust. *(See* Intervenor's Exhibit A, pp. 35:12 — 36:3 and Dep. Ex. 1) On October 19, 2012, Ted Bernstein sent an email to Robert Spallina suggesting that he had a "solution to the life insurance policy which provides the desired result" and that a conversation take place between he, Spallina, Pamela Simon and David Simon prior to any further overtures to the insurance company. *(See* Intervenor's Exhibit A, pp. 35:12 — 37:3; Dep. Ex. 1).

Answer: Object as to relevance as the Insurer never paid any claim that Spallina submitted and instead filed an Interpleader Action. Otherwise undisputed.

8. On November 19, 2012, after Robert Spallina unsuccessfully attempted to claim the Policy proceeds without providing any documentation, David Simon suggested attempting to secure the Policy proceeds on behalf of the Plaintiffs by submitting a waiver and settlement agreement. *(See* Intervenor's Exhibit A, pp. 51:22 — 52:2; 53:22 — 54:4; Dep. Ex.2)

Answer: Object as to relevance as the Insurer never paid any claim proposed or submitted and instead filed an Interpleader Action. Otherwise undisputed.

9. At least one "exhaustive search" for the 1995 Trust document had been conducted between September 13, 2012 and December 6, 2012, but it was not found. *(See* Intervenor's Exhibit A, p. 55:1-11).

Answer: Undisputed.

10. According to David Simon, the first attempt to locate the 1995 Trust took place in the winter of 2012-2013 *(See* Dep. of David Simon, p. 59:13-22). Foley & Lardner, the successor firm to Hopkins & Sutter, was contacted to see if they retained a copy of the 1995 Trust; but David Simon could not recall who contacted the law firm, which attorneys were contacted, or even if he or someone on his behalf made the effort to contact the law firm. *(See* Intervenor's Exhibit B, pp. 44:12 — 45:15; 46:22 — 47:15)

Answer: Undisputed regarding the first attempts to locate the 1995 Trust. Disputed with regard to David's testimony as to who contacted Foley and Lardner as David Simon testified it "might have been Pam, might have been me, might have been Adam" and further when David Simon was asked who contacted Foley and Larder he also responded "I'm not sure. I'd have to look." (Movants' Statement of Undisputed Facts, **Exh. 35**, David Simon

Dep., p. 45:12-13.)

11. On February, 8, 2013, Pamela Simon informed Ted Bernstein that she could not find a copy of the insurance Policy or the 1995 Trust. *(See* Intervenor's Exhibit A, pp. 60:25 — 61:10; Dep. Ex. 10)

Answer: Undisputed.

12. As of February 14, 2013, the Plaintiffs planned to pursue the Policy proceeds via a Release and Settlement Agreement and have the proceeds paid to Robert Spallina. *(See* Intervenor's Exhibit A, pp. 62:16-63:3; Dep. Ex.2)

Answer: Disputed. The Estate has misstated the testimony and evidence it cited. The testimony and evidence does not indicate that the settlement will result in a payment to Robert Spallina. Instead, it states that the proceeds would be deposited into the Tescher and Spallina firm trust account.

13. Mr. Spallina apparently engaged in discussions with Heritage making a plan for the company to interplead the funds into court in Florida. *(See* Intervenor's Exhibit A, Dep. Exs. 1, 2, 4, 7, 11) However, at that point David Simon and his brother, Adam Simon, the attorney currently representing Plaintiffs in this case, abruptly filed a lawsuit in Circuit Court of Cook County on April 15, 2014 seeking to obtain the funds from Heritage. *(See* Intervenor's Exhibit A, Dep. Ex. 16) This act resulted in a breach with Mr. Spallina, including a very angry exchange of emails *(See* Intervenor's Exhibit A, Dep. Exs. 16, 17).

Answer: Objection relevance. Without waiving said objection, dispute. Adam Simon, as attorney, filed the lawsuit in Illinois on behalf of Ted Bernstein, as Trustee for the Bernstein Trust. Undisputed that Adam Simon sent a, terse, email attempting to end communications with Mr. Spallina.

14. Despite David Simon's averment that he recalls having created the trust on his computer and having seen it after execution, the Complaint filed by Adam Simon on behalf of David Simon's wife and her siblings makes no reference whatsoever to the execution of a written trust. It refers only to the existence of a "common law trust." (Dkt. No. 73 at ¶ It was only after this event that David and Adam purportedly found Plaintiffs' Exhibits 15 and 16.

Answer: Object relevance. Without waiving the objection, Movants' do not dispute that the words "executed" or "written" do not appear in their complaint to describe the Bernstein Trust.

15. As of August 30, 2013, the 1995 Trust (in any form) had not been located. (See intervenor's Exhibit A, pp. 76:11 — 77:3).

Answer: Disputed. Misstates the testimony cited, as Ted Bernstein merely testified that as of August 30, 2013, he was unaware that drafts of the Bernstein Trust had been located.

16. David Simon claims to have located an unexecuted copy of the purported 1995 Trust on the computer system of the Simon Law Firm on September 13, 2013. *(See* Plaintiffs' Exhibit 15; Plaintiffs' Exhibit 32 at ¶¶28-29)

Answer: Undisputed.

17. David Simon claims to have located an unexecuted copy of the purported 1995 Trust containing the handwriting of David Simon, in the stored files of the Simon Law Firm on or around September 13, 2013. *(See* Intervenor's Exhibit B, pp. 94:13 — 96:22)

Answer: Undisputed.

18. According to David Simon, the persons who searched the offices of the Simon Law Firm to see whether a copy of the 1995 Trust could be found were David Simon (husband of Plaintiff Pamela Simon), Adam Simon (brother of David Simon), and Cheryl Sychowski (employee of STP Enterprises and The Simon Law Firm). *(See* Intervenor's Exhibit B, p. 47:17--21).

Answer: Undisputed.

19. Simon Bernstein executed a Will and Irrevocable Insurance Trust on August 15, 2000 (the "2000 Trust"). The Policy at issue in this litigation was listed as an asset of the 2000 Trust. That Trust document made no reference to a 1995 [Trust] even though by definition it would have superseded it. *(See* Intervenor's Exhibit A at Dep. Ex. 23).

Answer: Object insofar as the Estate lacks standing to make any claims on behalf of the 2000 Trust. Object to the legal conclusion that "by definition it would have superseded" the 1995 Trust although it did not mention it. Without waiving said objections, dispute insofar as Dep. Ex. 23 does not indicate it is a "Will and Trust". Undisputed insofar as Dep. Ex. 23 does indicate that it is a "Simon Bernstein 2000 Insurance Trust". Dispute that the Policy at issue ever became an asset of the 2000 Trust as no one has produced any evidence that the 2000 Trust was ever named an owner or beneficiary of the Policy on the Policy records of the Insurer.

20. Pursuant to the terms of the 2000 Trust, Pamela Simon and her lineal descendants are considered "predeceased" and no inheritance was allocated for them "not out of lack of love or affection but because they have been adequately provided for." (See Intervenor's Exhibit A at Dep. Ex. 23, p. 19).

Answer: Objection, relevance as the 2000 Trust was never named a beneficiary of the Policy Proceeds and the Estate has no standing to raise any claim on its behalf. Disputed insofar as the 2000 Trust does not contain a general statement that "no inheritance" was allocated for Pamela Simon and her lineal descendants. The 2000 Trust merely says that "The Settlor has not made any provisions herein (in the 2000 Trust) for Pamela Beth Simon or her lineal descendants".

21. Simon Bernstein executed a Will and Trust Agreement on May 20, 2008 (the "2008 Trust"). Pursuant to the terms of the 2008 Trust, Pamela Simon and her lineal descendants, in addition to Ted Bernstein and his lineal descendants are considered "predeceased" and no inheritance shall pass to them pursuant to the terms of the 2008 Trust (See Intervenor's Exhibit A at Dep. Ex. 25, p. 7 E1.; Dep. of David Simon, p. 55:2-17).

Answer: Objection, relevance. The Estate has no alleged no standing on behalf of the 2008 Trust, nor has the Estate submitted any evidence that the 2008 Trust was ever named a beneficiary of the Policy. Without waiving the objections, dispute and deny that Dep. Ex. 25 is entitled a "Will and Trust Agreement", and disputes and denies that Dep. Ex. 25, includes the word "predeceased" or refers to Ted Bernstein or Pamela Simon by name anywhere in the document.

22. In May 2012, Plaintiff Pamela Simon wrote to her father, expressing her distress over his decision to disinherit her and her children, along with Plaintiff Ted Bernstein and his children. *(See* Intervenor's Exhibit A at Dep. Ex. 25). Plaintiff Pamela Simon was passionate that Simon Bernstein's estate plan did not, at that time, include several of his children, including Pamela Simon and Ted Bernstein. *(See* Intervenor's Exhibit A, p. 91:13-25).

Answer: Dispute that the communication referred to is attached as Dep. Ex. 25 to Intervenor's Exhibit A. Undisputed that Pamela Simon was concerned about the fact that Simon Bernstein had "cut" Pam, Ted and their families "out of his will".

23. Simon Bernstein participated in a telephone conference with Plaintiffs and their spouses a few months prior to his death (Summer 2012) *(See* Intervenor's Exhibit B, p. 53:1-19; Intervenor's Exhibit A, p. 90:11-14) 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. *(See* Intervenor's Exhibit B, pp. 53:12 — 55:8; Intervenor's Exhibit A, pp. 89:21 — 90:2; 90:15-18).

Answer: Undisputed.

24. Simon Bernstein executed an Amended at Restated Trust Agreement on July 25, 2012 (the "2012 Trust"). This document amends and restates the May 20, 2008 Trust Agreement in its entirety. *(See* Intervenor's Exhibit A at Dep. Ex. 24, p. 1) Pursuant to the terms of the 2012 Trust, Plaintiffs are deemed to have predeceased Simon Bernstein *(Id.* at p. 6) and all assets are directed to be passed in equal shares among Simon Bernstein's grandchildren. *(Id.* at p. 2, p. 16; Intervenor's Exhibit A, p: 89:2-15; pp. 118:17 -- 119:14)

Answer: Objection, relevance. There is no evidence that the 2012 Trust was ever named a beneficiary of the Policy on the Policy records of the Insurer. Without waiving the objection, undisputed that the assets of the 2012 Trust, if any, are to be passed in equal shares among Simon Bernstein’s grandchildren.

25. On September 7, 2012, six days prior to his death, Simon Bernstein executed a holographic will directing a $100,000 bequest to Maritza Puccio from his current insurance policy and indicating that he would change the beneficiary on said policy to reflect his wishes. *(See* Intervenor's Exhibit C). Simon Bernstein directed that the bequest to Ms. Puccio should proceed in the event of his death, without interruption "from family or probate." (Id.) This document was not witnessed or notarized.

Answer: Objection, relevance. Objection to the legal conclusion that the document is a holographic will. The Estate has failed to allege any standing on behalf Maritza Puccio. Maritza Puccio was not named or served and is not a party to the Insurer's Interpleader Action, nor has she ever sought to intervene. There has been no evidence produced indicating that Maritza Puccio was ever named a beneficiary of the Policy Proceeds on the Policy records of the Insurer. Dispute that Exh. C is executed or signed by Simon Bernstein. Dispute that the gift or bequest contemplated was effectuated as it was expressly conditional. Any gift contemplated in the document is expressly subject to the condition stating "should either party fail to live up to these conditions all claims are void".

26. Simon Bernstein executed no other Wills or Trust Agreements which were witnessed and/or notarized between July 25, 2012 and September 13, 2012 (the date of his death).

Answer: Object, as there is no citation to an affidavit or other testimony indicating the source of this allegation of fact. Without waving said objection, Movants are unaware of the existence of any Will or Trust Agreement executed by Simon Bernstein between the dates of July 25, 2012 and September 13, 2012.

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