

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

SIMON BERNSTEIN IRREVOCABLE )  
INSURANCE TRUST DTD 6/21/95, )  
by Ted S. Bernstein, its Trustee, Ted S. )  
Bernstein, an individual, )  
Pamela B. Simon, an individual, )  
Jill Iantoni, an individual and Lisa S. )  
Friedstein, an individual. )

Plaintiff, )

v. )

HERITAGE UNION LIFE INSURANCE )  
COMPANY, )

Defendant, )

----- )  
HERITAGE UNION LIFE INSURANCE )  
COMPANY )

Counter-Plaintiff )

v. )

SIMON BERNSTEIN IRREVOCABLE )  
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 )

**Case No. 13 cv 3643  
Honorable Amy J. St. Eve  
Magistrate Mary M. Rowland**

**ADAM SIMON AND PLAINTIFFS'  
MEMORANDUM IN OPPOSITION  
TO ELIOT BERNSTEIN'S MOTION  
TO DISQUALIFY AND STRIKE  
PLEADINGS**

Irrevocable Insurance Trust Dtd 6/21/95, )  
and ELIOT BERNSTEIN )

Third-Party Defendants. )

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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. )

## INTRODUCTION

Eliot Bernstein's ("ELIOT") Motion to Disqualify and Strike Pleadings highlights the importance of adherence to the Federal Rules of Civil Procedure and the Local Rules of the Northern District of Illinois. When a *pro se* or represented party files a motion that directly violates these rules, it prejudices the opposing party and makes a cogent response nearly impossible.

What makes ELIOT's motion even more difficult is that the motion contains reference what may be kernels of truth regarding certain alleged misconduct that appears to have occurred in the Probate proceedings in Palm Beach County, FL. The alleged misconduct appears to involve staff and/or attorneys at law the firm Tescher & Spallina. Donald Tescher and Robert Spallina were attorneys for Simon and Shirley Bernstein while they were living, and after their deaths, they were counsel for the Estates of Simon and Shirley Bernstein (the "Estate" or "Estates").

In virtually all of his pleadings in the instant action, ELIOT refers repeatedly to the probate proceedings for the Estates, and fails to comprehend that those proceedings are separate and apart from the instant litigation which involve only the Policy proceeds.

Plaintiffs brought this litigation in good faith and in furtherance of their efforts to collect what is rightfully theirs and *twenty-percent ELIOT'S*. I represent the original Plaintiff, the Bernstein Trust, and four out of five of the adult children of Simon Bernstein. All of my clients are in agreement that their claims are consistent with the stated intent of Simon Bernstein with regard to the Policy proceeds.

Plaintiffs and I, as their counsel, verily believe that the claims they are asserting for the Policy proceeds are being brought in good faith, and are well grounded in fact and law. One of the most important facts being that the Simon Bernstein Irrevocable Insurance Trust Dtd 6/21/1995 was actually named a beneficiary of the Policy proceeds pursuant to the Policy. (See Beneficiary Designation attached to Adam Simon's affidavit as Exhibit "A", bates #BT000029-030). ELIOT's purported claims made either on his own behalf or that of his children fail to include reference to any document recorded with the Insurer naming ELIOT, ELIOT's children, or any of Simon Bernstein's grandchildren as beneficiaries of the Policy.

Most importantly, however, I shall demonstrate in this memorandum that ELIOT has failed to assert any facts showing that a conflict exists with regard to my representation of my clients in this case. Neither has ELIOT provided any factual record showing the existence of a conflict or any misconduct on my part.

What makes the situation a bit more confusing is the fact that all of the pleadings for relief filed by my clients seek to claim the Policy proceeds on behalf of the Bernstein Trust or its beneficiaries, all FIVE children of Simon Bernstein. Our pleadings allege that ELIOT is a twenty percent beneficiary of the Bernstein Trust, so twenty percent of the Policy proceeds would inure to ELIOT. Conversely, ELIOT's pleadings fail to make any other coherent claim to the Policy proceeds on his own behalf or anyone else's for that matter.

My client's seek a court order which would allow for the distribution of the Policy proceeds according to the intent of Simon Bernstein. All of the potential ultimate beneficiaries of the Policy proceeds are represented in the instant litigation. Four of these ultimate beneficiaries are my clients, and the fifth, ELIOT, has chosen to represent himself and pursue his own agenda, *pro se*.

To avoid any appearance of a conflict and in furtherance of the goals of transparency, accuracy and finality, my clients and I would welcome having the ultimate distribution of the Policy proceeds occur under this court's supervision, i.e. with an accounting and vouchers being submitted to the court.

### **FACTUAL BACKGROUND**

ELIOT'S Motion to Disqualify contains no factual support which would lead this court to disqualify me as counsel. ELIOT has not attached his own Affidavit to his motion. ELIOT has not attached an Affidavit of the Plaintiffs, other parties to this litigation, or any other witness in support of his motion. With that being said, I submit the following factual background regarding my representation supported with my attached Affidavit:

- 1) I have been an attorney licensed in the State of Illinois and in good standing since November of 1990.
- 2) Since 1990, I have worked in a law firm with my brother, David B. Simon known as The Simon Law Firm. The Simon Law Firm has been named as a third-party defendant in the instant litigation by ELIOT.
- 3) I have also worked as assistant general counsel for a life insurance brokerage owned by David B. Simon and Pamela B. Simon named STP Enterprises, Inc. ("STP"). STP has been named as a third party defendant in the instant litigation by ELIOT.
- 4) I am currently representing the Simon Bernstein Irrevocable Insurance Trust dtd 6/21/95 (the "Bernstein Trust"), Ted Bernstein, as Trustee and individually, Pamela B. Simon (my sister-in-law), Jill Iantoni, and Lisa Friedstein as Plaintiffs. I am also representing those parties as counter, cross, or third party defendants where they have

- been named as parties by either ELIOT or Heritage Union. I am also representing The Simon Law Firm and STP as they have been named as third-party defendants by ELIOT.
- 5) The goal of all Plaintiffs I represent is to prosecute their claims to the Policy proceeds as set forth in their First Amended Complaint (Dkt. #73).
  - 6) The goal of all cross, counter or third-party defendants I represent is to defeat the counter-claims, cross-claims and/or third-party claims made against them by ELIOT.
  - 7) I am unaware of the existence of any conflict among the parties I represent at this time. Should a conflict arise, I would advise my clients accordingly.
  - 8) I have had no involvement with ELIOT's inventions, patents, business or personal life, outside of a limited time he was selling life insurance as an agent of STP at the same time I was working for STP in the 1990's.
  - 9) I verily believe that ELIOT's third-party claims filed against me, David Simon and The Simon Law Firm were filed for the improper purpose of attempting to manufacture a basis for ELIOT's motion to disqualify.
  - 10) Despite these manufactured claims and because my interests as a third-party defendant are aligned with the parties I represent, I remain steadfast in my belief that there is no conflict in this case.
  - 11) I have had approximately three contacts with attorney, Robert Spallina and possibly one contact with attorney, Donald Tescher. Those contacts focused on obtaining a copy of Tescher and Spallina's file relating to the matters involved in the above-captioned litigation.

- 12) I had no involvement with Tescher and Spallina's representation of the Estates of Simon or Shirley Bernstein, or Tescher and Spallina's legal representation of Simon or Shirley Bernstein prior to their deaths.
- 13) I had no direct or indirect involvement whatsoever with regard to the alleged misconduct in the probate of the Estates of Simon or Shirley Bernstein.
- 14) It is my understanding that the alleged misconduct in the probate of the Estates involved document irregularities and/or notarial misconduct.
- 15) I have never met or spoken with the notary who was allegedly involved in such misconduct.
- 16) I did not draft any of the Wills or Trusts of Simon or Shirley Bernstein including the Bernstein Trust Agreement at issue in this litigation.
- 17) I never had custody or control of the Wills, Trusts or insurance policies of Simon or Shirley Bernstein including the Bernstein Trust Agreement.
- 18) I am unaware of the existence of any facts or circumstances which would prevent me from continuing my representation of all of my clients and myself, free from any conflict of interest or other disqualifying factor.

(See Affidavit of Adam M. Simon attached hereto and made a part hereof as Exhibit 1.)

#### **STANDARD OF REVIEW**

ELIOT has failed to set forth a standard of review in his motion. In case law cited herein, court's are required to base their findings of fact regarding a motion to disqualify on evidentiary hearings, or at a very minimum sworn affidavits. ELIOT has attached no sworn affidavit to his motion and has shown no reasonable cause for an evidentiary hearing. Thus, there are no facts of record regarding my representation nor any disqualifying factors. Absent a factual record, this

court cannot make the requisite finding of facts for ELIOT to prevail on his motion. For this reason alone, ELIOT's motion must be denied.

But, the following guidance is instructive regarding how a court should view a motion to disqualify:

"...we also note that disqualification, as a prophylactic device for protecting the attorney-client relationship, is a drastic measure which courts should hesitate to impose except when absolutely necessary. A disqualification of counsel, while protecting the attorney-client relationship also serves to destroy a relationship by depriving a party of representation of their own choosing. (citations omitted) We do not mean to infer that motions to disqualify counsel may not be legitimate and necessary; nonetheless, such motions should be viewed with extreme caution for they can be misused as techniques of harassment. *Freeman v. Chicago Musical Instrument Co.*, 689 F.2d 715, 721 (7<sup>th</sup> Cir. 1982)."

In a separate opinion, the court put it this way:

Disqualification is a drastic measure that courts should impose only when absolutely necessary. Mr. Weeks, as the movant, has the burden of showing facts requiring disqualification. *Weeks v. Samsung Heavy Industries Co., Ltd.* 909 F.Supp. 582 (N.D. Ill., 1996)

In *Freeman*, supra, the court rejected movant's motion to disqualify because the movant failed to provide a factual record to determine whether the attorney at issue in that case knew confidential information regarding the opposing party that would justify disqualification. In *Weeks*, supra, the court ultimately rejected movant's motion to disqualify because the movant's grounds for disqualification were based on "bald assertions unsupported by either an affidavit or evidence." *Weeks*, 909 F.Supp. at 583.

## **ARGUMENT**

### **A. ELIOT'S Third-Party claims and motion to disqualify violate Fed. R. Civ. Pro. 11 in that they were filed for improper purposes and are not well grounded in fact or law.**

Fed. R. Civ. P. 11(b) provides in pertinent part as follows:



**Representations to the Court.** By presenting to the court a pleading, written motion, or other paper – whether by signing, filing, submitting, or later advocating it – an attorney or unrepresented party certifies that to the best of his knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

- (1) It is not being presented for an improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;
- (2) the claims, defenses and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or establishing new law;
- (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigations or discovery; and
- (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

On December 22, 2013, I sent a letter to ELIOT reminding him that the court had previously admonished him regarding a motion to disqualify and the requirement for such a motion to comply with Rule 11. I further stated my belief that his motion to disqualify and strike pleadings violated Rule 11, and I provided an opportunity for him to withdraw the motion. Despite the warnings he received, ELIOT has chosen to pursue his motion.

**B. ELIOT’S motion is devoid of a factual record and thus his motion is not well grounded in fact.**

Although it is difficult to discern from his motion, ELIOT seems to be arguing that the complaint I filed on behalf of my clients is groundless and baseless. If that were so, ELIOT has opportunities to attack the pleading, but instead he has chosen to attack me.

ELIOT asserts that my involvement in alleged misconduct relating to the probate of his parents’ estates (the “Estates”) prohibit me from representing my clients. ELIOT’S motion is full

of libelous innuendo but devoid of any facts that illustrate misconduct or any participation in the probate proceedings on my part.

In contrast, my attached affidavit contains my sworn denials of any involvement in the probate matters in Palm Beach County, including any involvement in alleged misconduct.

Absent a factual record from which this court can render a decision, ELIOT'S motion must fail.

**C. ELIOT'S motion fails to set forth a legal standard or authority necessary for the court to grant the relief he has requested. Thus, his motion is not well grounded in law.**

ELIOT's third-party claims, counterclaims, and motion to disqualify and strike pleadings, merely recite ELIOT's theories and positions but fail to establish that there are a set of facts which exist that would entitle him to the relief he demands as a matter of law. Instead of setting out the facts and law for the court, he proffers theory and innuendo, stating that this is "my position" and then asking the court to investigate and figure out whether his "position" has any merit.

**D. ELIOT's counterclaim was manufactured for the improper purpose of disqualifying me and denying my client's their choice of counsel. In so doing, he is attempting to needlessly increase the expense of litigation.**

As noted in *Freeman*, supra, granting a motion to disqualify "destroys a relationship by depriving a party of representation of their own choosing". The clients I represent in this matter have chosen to act jointly, in large part, to efficiently prosecute their common claims while reducing the associated legal fees and costs. ELIOT's efforts appear to be targeted to increase the expense and time needed for all parties to resolve this matter.

**E. ELIOT'S counterclaim and motion were manufactured for the improper purposes of harassment and attempting to cause harm to my reputation and those of my clients.**

ELIOT is currently utilizing this same abusive litigation tactic in the Probate proceedings in Palm Beach County, FL. On or about January 2, 2014, ELIOT filed a motion in the probate estate of Simon Bernstein styled as follows:

**MOTION TO:**  
**(I) STRIKE ALL PLEADINGS OF MANCERI AND REMOVE HIM AS COUNSEL; (II) FOR EMERGENCY INTERIM DISTRIBUTIONS AND FAMILY ALLOWANCE; (III) FOR FULL ACCOUNTING DUE TO ALLEGED THEFT OF ASSETS AND FALSIFIED INVENTORIES; (IV) NOT CONSOLIDATE THE ESTATE CASES OF SIMON AND SHIRLEY BUT POSSIBLY INSTEAD DISQUALIFY YOUR HONOR AS A MATTER OF LAW DUE TO DIRECT INVOLVEMENT IN FORGED AND FRAUDULENTLY NOTARIZED DOCUMENTS FILED BY OFFICERS OF THIS COURT AND APPROVED BY YOUR HONOR DIRECTLY; (V) THE COURT TO SET AN EMERGENCY HEARING ON ITS OWN MOTION DUE TO PROVEN FRAUD AND FORGERY IN THE ESTATE OF SHIRLEY CAUSED IN PART BY OFFICERS OF THE COURT AND THE DAMAGING AND DANGEROUS FINANCIAL EFFECT IT IS HAVING ON PETITIONER, INCLUDING THREE MINOR CHILDREN AND IMMEDIATELY HEAR ALL PETITIONER'S PRIOR MOTIONS IN THE ORDER THEY WERE FILED**

(See excerpts from ELIOT'S 68 page motion in the Probate proceedings in Palm Beach County, attached to Adam Simon's Affidavit as Exhibit B, at p.2).

In the motion, ELIOT demands from the probate court a myriad of relief including not only disqualifications of a number of attorneys, but also the judge, himself. ELIOT's motions are designed to harass the court, and its officers. Where there has been alleged misconduct in the probate proceedings it is my understanding that such misconduct has been reported to both the authorities and the court.

One of the main reasons ELIOT files such motions is in an attempt to freely slander and libel anyone whom he confronts that does not do what he says when he says its. In his motion, ELIOT states about my client, Ted Bernstein, and Tescher and Spallina, the former attorneys for Simon and Shirley Bernstein and their Estates as follows:

12. That due to the Proven and Admitted Felony acts already exposed and being

prosecuted, the ongoing alleged criminal acts taking place with the Estates assets, the fact that Spallina and Tescher are responsible not only for their alleged criminal acts involving Fraud on this Court and the Beneficiaries but are wholly liable for the FELONY acts of Moran of FORGERY and FRAUDULENT NOTARIZATIONS, is just cause for all of the fiduciaries of the Estates and Trusts and counsel thus far be immediately removed, reported to the authorities and sanctioned by this Court. This disqualification and removal is further mandated now as Theodore, Spallina, Manceri and Tescher all have absolute and irrefutable Adverse Interests now with Beneficiaries and Interested Parties, *especially Petitioner who is attempting to have them prosecuted further for their crimes and jailed and all their personal and professional assets seized through civil and criminal remedies and their reputations ruined for their criminal acts against his Mother and Father's Estates and Trusts.*" (emphasis added.) (See Exhibit B attached to Adam Simon's Affidavit at par. 12).

ELIOT'S bold-faced, glaring description of his own malicious intent proves beyond doubt his contempt for the judicial system, officers of the court, and members of his own family. ELIOT even has the audacity to demand from the probate judge, that he rule on all of ELIOT'S previously filed and pending motions in the "order they were filed." (See Exhibit B at pg. 2 of 68, attached to Adam Simon's Affidavit).

In ELIOT's motion to disqualify and strike pleadings pending before this court, ELIOT states in pertinent part as follows:

Defendant, A. SIMON, can no longer be unbiased either as counsel for himself or others, especially where there is adverse interest in the matter that could put him behind bars for felony crimes alleged herein, that he is a central party to." (Dkt. #58 at Par. 70).

ELIOT spews such false allegations with malicious intent and to cause harm. I, for one, can no longer permit ELIOT to wreak havoc in this litigation free from fear of any meaningful sanction. Which is why, if the court denies ELIOT's motion to disqualify me, I shall file a separate motion seeking sanctions from the Court that will include, but are not limited to, withdrawal of ELIOT's filing privileges absent leave of the court for each pleading and/or motion he desires to file in this matter in the future.

**G. ELIOT'S motion is styled as a motion to disqualify and strike pleadings actually seeks relief well beyond that.**

ELIOT, in his motion to disqualify and strike pleadings seeks a myriad of relief from this court far too extensive to regurgitate in full. Suffice to say however, that his demand for \$8 million from me, in a motion to disqualify, provides additional irrefutable evidence that he has filed this motion for an improper purpose. The number \$8 million is tossed about by ELIOT with total disregard for me or this court because he does so without a shred of evidence to support it.

ELIOT's prayers for relief also demand that this court order all children and grandchildren of Simon Bernstein to seek their own separate counsel. Such a demand is designed solely to increase the cost and expense of this litigation beyond the point of any rational economic sense. Again, ELIOT makes these demands purportedly on behalf of relatives whom are not represented in this litigation, because they were not named by the Insurer in its interpleader action nor by any other party to the litigation. Also, neither ELIOT nor any of the relatives purportedly represents can offer any evidence or documentation that would support a claim to the Policy proceeds. That would explain their absence in this case.

**H. ELIOT'S motion violates the Northern District's Local Rules, LR 7.1 in that it exceeds page limitations without leave of the court.**

**LR 7.1. Briefs: Page Limit**

Neither a brief in support of or in opposition to any motion nor objections to a report and recommendation or order of a magistrate judge or special master shall exceed 15 pages without prior approval of the court. Briefs that exceed the 15 page limit must have a table of contents with the pages noted and a table of cases. Any brief or objection that does not comply with this rule shall be filed subject to being stricken by the court.

ELIOT'S motion is over twice the length permitted by LR 7.1 and it was filed without leave of the court. In addition, the motion also contains over 125 pages of exhibits. Most of

ELIOT'S motion is devoted to the probate proceedings in Palm Beach County, Florida as opposed to the issues in the case at bar. In fact all of ELIOT's pleadings in this matter violate this rule. ELIOT's 34 page motion to disqualify with over 120 pages of exhibits is likely the shortest pleading he has filed in this matter to date. For violating LR 7.1, ELIOT's motion should be stricken by the court.

### **CONCLUSION**

ELIOT, as movant, had the burden of establishing the facts showing that the drastic remedy of disqualifying me as attorney for my clients is required in this instance. ELIOT failed to proffer any factual record in support of his motion. ELIOT also failed to articulate any legal authority supporting his motion and the myriad of relief he requests from this court. For all the foregoing reasons, this court should deny ELIOT'S motion to disqualify and strike pleadings, in its entirety.

**Dated:** January 17, 2014

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Iantoni, Adam M. Simon, David B.  
Simon, STP Enterprises, Inc., and The  
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