

EXHIBIT 23

**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)
Bernstein, an individual, Pamela B.)
Simon, an individual, Jill Iantoni, an)
individual, and Lisa. S. Friedstein, an)
individual,)

Plaintiffs,)

v.)

HERITAGE UNION LIFE INSURANCE)
COMPANY,)

Defendant,)

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

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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)
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., NATIONAL SERVICE)
 ASSOCIATION (OF FLORIDA),)
 NATIONAL SERVICE ASSOCIATION)
 (OF ILLINOIS) AND JOHN AND JANE)
 DOES)
)
 Third-Party Defendants.)

HERITAGE'S RULE 12(b)(6) MOTION TO DISMISS

Defendant/Interpleader Counter-Plaintiff, Heritage Union Life Insurance Company ("Heritage"), by and through Jackson National Life Insurance Company ("Jackson"), as successor in interest to ReAssure America Life Insurance Company, reinsurer of Heritage's subject policy (the "Policy"), and as administrating and servicing agent for Heritage,¹ hereby

¹ The Policy, as further set forth below, was issued for insured Simon L. Bernstein, and a determination of the proper Policy beneficiaries is the subject of this dispute. Further, the relationship of the parties is set forth more fully in Heritage's Motion for Leave to Amend. [D.E. #87].

moves pursuant to Rule 12(b)(6) to be dismissed from this litigation having fulfilled all of its obligations as an interpleader, namely (a) joining all necessary parties with potential claims to the Policy's death benefit proceeds, and (b) depositing those proceeds with the registry of the Court. In support of this Motion, Heritage states as follows:

PROCEDURAL BACKGROUND

The original plaintiff to this matter is the Simon Bernstein Irrevocable Insurance Trust Dtd, 6/21/95 (the "Bernstein Trust"). Ted S. Bernstein, who is one of several children of Simon Bernstein (the decedent and owner/insured of the Policy), has asserted that he is the Trustee of the Bernstein Trust. Upon Simon Bernstein's death (then a Florida resident), the Bernstein Trust asserted a claim as the purported beneficiary of the Policy. However, no executed copy of the Bernstein Trust could be located, raising proof issues as to the appropriate payee legally entitled to the proceeds, and issues as to who is the proper Trustee. In addition, Eliot Bernstein, another of Simon Bernstein's children, asserted a conflicting claim to the Policy proceeds on behalf of himself and his children.

On April 5, 2013, the Bernstein Trust preempted Jackson's discussed filing of an interpleader action in Florida and instead filed its complaint in the Law Division of the Circuit Court of Cook County, Illinois, case number 2013-L-003498, alleging breach of contract against Heritage for failing to pay it the policy death benefit as the alleged Policy beneficiary.² Heritage, through Jackson, timely removed the case to Federal Court.

On June 25, 2013, Heritage, through Jackson, tendered to the registry of the Court the Policy's death benefit proceeds, \$1,703,567.09, which included contractual interest at a rate of 4% from Simon Bernstein's date of death through June 25, 2013. [D.E. 16]. On June 26, 2013, Heritage, through Jackson, answered the complaint and filed a counterclaim and third-party

² This resulted in Heritage serving as the interpleader counter-claimant, rather than, in most interpleader cases, as the plaintiff.

complaint for interpleader. [D.E. 17]. On October 16, 2013, Jackson produced over 1,300 pages of records (its entire file) relating to the Policy as part of its Rule 26(a) disclosures. Finally, on January 13, 2014, Plaintiff's complaint was amended [D.E. #73] to add counts for declaratory judgment (Count II), seeking a declaration as to proper policy beneficiaries, and for a resulting trust (Count III), including naming Simon Bernstein's remaining children as additional Plaintiffs as the purported beneficiaries of the purported resulting trust and as an alternative basis for the purported Bernstein Trust's entitlement to the Policy proceeds. Heritage now seeks dismissal from the suit.

ARGUMENT

A. Heritage Has Satisfied Its Duties As Interpleader.

"Interpleader is an equitable procedure used when the stakeholder is in danger of exposure to double liability or the vexation of litigating conflicting claims. Courts have recognized two distinct stages for resolution of interpleader cases. During the first stage, the court determines whether the interpleader complaint was properly brought and whether to discharge the stakeholder from further liability to the claimants. During the second stage, the court determines the respective rights of the claimants to the interpleaded funds." *Metropolitan Life Ins. Co. v. Johnson*, -- F.Supp.2d --, 2012 WL 2192283, *2 (N.D. Ill. June 13, 2012) (internal citations omitted). "Under Federal Rule of Civil Procedure 22(a) ..., '[p]ersons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability.' ... A stakeholder may file an interpleader action to protect itself against potential, as well as actual claims." *Id.* (internal citations omitted).

Importantly, "an interpleader action permits a 'stakeholder who has no claim to the money in the accounts and is willing to release it to the rightful claimant, to put the money ... in

dispute into court, *withdraw from the proceeding*, and leave the claimants to litigate between themselves the ownership of the fund in court." *Id.* (citing *Commercial Nat'l Bank of Chicago v. Demos*, 18 F.3d 485, 487-88 (7th Cir. 1994) (emphasis in original). "The result is that the competing claimants are left to litigate between themselves, while *the stakeholder is discharged* from any further liability with respect to the subject of the dispute." *Id.* (internal citations omitted) (emphasis added).

In *Metropolitan*, MetLife received conflicting claims to the death benefits from a life insurance policy. After depositing the subject funds with the Clerk of the Court, the Court dismissed Met Life from the interpleader action and awarded it its reasonable costs. *Id.* Similarly, here, Heritage, through Jackson, has joined all necessary parties with potential claims (including Eliot Bernstein and various banks in their potential roles as trustee of the purported Bernstein Trust) and deposited the subject funds with the Clerk of the Court. Thus, it has satisfied all of its obligations as an interpleader and should be dismissed from the interpleader action.

B. Plaintiffs' Counterclaims Do Not Preclude Heritage's Dismissal.

Plaintiffs' amended complaint contains three counts: (1) breach of contract; (2) declaratory judgment; and (3) resulting trust. Count II seeks a declaration that the Bernstein Trust is entitled to the Policy death benefit proceeds (the same issue the Court will decide pursuant to Heritage's interpleader), and Count III seeks in the alternative, and based on there being no evidence of an executed Bernstein Trust, a declaration that a resulting trust was established that is entitled to the same Policy proceeds. Accordingly, only Count I, breach of contract, is directed at Heritage. That count alleges Heritage breached the Policy contract by failing to pay the Bernstein Trust the Policy proceeds. [Am. Compl., ¶¶26-27].

"When an interpleader is properly asserted, counterclaims seeking payment of the interpleaded funds are disallowed." *Metropolitan Life Ins. Co. v. Yitao Sun*, 2013 WL 4759586, *6 (N.D. Ill. Sept. 4, 2013); *see also Daniels v. Equitable Life Assurance Soc. of the U.S.*, 35 F.3d 210, 214-15 (5th Cir. 1994) ("if the state court found that Equitable's interpleader was appropriate, Equitable cannot now be found to have breached a duty to Daniel by interpleading the funds"); and *Abstract & Title Guar. Co. v. Chi. Ins. Co.*, 2006 WL 1343860, *4 (S.D. Ind. May 12, 2006) ("CIC cannot be liable to ATG for breach of contract because of its lawful commencement of the interpleader action").

In *Lutheran Brotherhood v. Comyne*, 216 F.Supp.2d 859 (E.D. Wis. 2002), an annuity holder filed an interpleader action to resolve its liability as to two competing potential beneficiaries. After depositing the annuity funds in dispute with the Clerk, the Court dismissed the holder, despite pending counterclaims against it:

The court recognizes that dismissing the plaintiff from this action will have the effect of also dismissing the counterclaims that the defendants have asserted. Such a result is justified. ... [T]he counterclaims of each defendant essentially object to the plaintiff's not having automatically paid the annuity proceeds to him or to her. Put differently, those counterclaims are essentially based on plaintiff's having opted to proceed via an interpleader complaint rather than having chosen from among competing adverse claimants. Courts have *consistently rejected such counterclaims* where, as here, the plaintiff was entitled to pursue interpleader relief.

Id. at 862-63 (emphasis added).³

Similarly, here, Plaintiffs' breach of contract claim (which preemptively was filed after Heritage, through Jackson, indicated it intended to file an interpleader), essentially objects to Heritage not having automatically paid the Policy proceeds to the alleged Bernstein Trust, instead opting to file an interpleader and joining all necessary parties with potential claim

³ *See also Williams v. Teachers Ins. and Annuity Assoc.*, 15 Ill.App.3d 542, 544 (1st Dist. 1973) (insurance company, after depositing funds with court, was dismissed from interpleader suit involving claim of a resulting trust).

interests, including Eliot Bernstein and various banking institutions (in their roles as potential trustees of the purported Bernstein Trust). Thus, like in *Lutheran Brotherhood*, such claim should be dismissed and does not prevent Heritage's dismissal as a party.

C. Heritage Owes No Further Interest Under the Policy

It is anticipated that Plaintiffs will object to such dismissal by arguing that Heritage may owe additional statutory interest under the Policy. Specifically, in the agreed order in which the Policy proceeds were tendered to the Court, Plaintiff retained "its rights to raise any further interest issues, including under the Illinois Insurance Code, 215 ILCS 5/224." [D.E. #16]. However, Heritage can owe no further interest under that statute because no determination has yet been made as to who the proper payee is, the existence of any purported Bernstein Trust, and the authority of any purported Trustee of that Trust, all of which serve as a predicate to statutory interest being owed.

Under Section 5/224(1), "[i]nterest shall accrue on the proceeds payable because of the death of the insured; from the date of death, at the rate of 10% annually on the totally amount payable ... *unless* payment is made within 31 days from the *latest of the following to occur*:

- (2) the date that the company receives sufficient information to determine its liability, the extent of the liability, *and the appropriate payee legally entitled to the proceeds*; or
- (3) the date that legal impediments to payment of proceeds that depend on the action of parties other than the company are resolved and sufficient evidence of the same is provided to the company ... [including] ... the *appointment and qualification of trustees*...

215 ILCS 5/224(1)(2-3) (emphasis added). Here, this Court will determine who the appropriate payee is that is legally entitled to the proceeds, including resolving Plaintiffs' resulting trust count and associated issues regarding the existence of the Bernstein Trust and any corresponding

trustee. Thus, the condition(s) precedent to trigger Heritage's obligations under the statute the have not been met, and as the Policy proceeds have already been tendered to the Court, such eventual distribution from the Clerk to the proper payee pursuant to Court order will occur within 31 days of the Court making the aforementioned determinations.

CONCLUSION

WHEREFORE, Defendant / Interpleader Counter-Plaintiff Heritage Union Life Insurance Company, by and through Jackson National Life Insurance Company, as successor in interest to Reassure America Life Insurance Company, reinsurer of Heritage's subject Policy, and as administrating and servicing agent for Heritage, respectfully moves this Court to enter an order: (1) dismissing it as a party from this action, including dismissal all claims against it, with prejudice; (2) discharging it of all liability under the Policy; (3) awarding it its reasonable costs; and (4) providing such other and further relief as the Court deems just and proper.

**Heritage Union Life Insurance Company, by and through Jackson National Life Insurance Company, as successor in interest to Reassure America Life Insurance Company, reinsurer of Heritage's subject Policy, and as administrating and servicing agent for Heritage,
Defendant/Interpleader Counter-Plaintiff,**

By: /s/ Alexander D. Marks
One of Its Attorneys

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CERTIFICATE OF SERVICE

The undersigned, an attorney, states that on February 11, 2014 he caused to be filed electronically with the Clerk of the United States District Court for the Northern District of Illinois a copy of the foregoing Motion to Dismiss which is served electronically upon the following:

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