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., 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

FILERS:
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 SUPPORT OF THEIR 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.

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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 support of their motion for summary judgment as to Counts I and II of Plaintiffs' claims to the Policy Proceeds.

I. INTRODUCTION[1]

Movants will demonstrate to the court that the Simon Bernstein Irrevocable Insurance Trust dated June 21, 1995 is the beneficiary of the Policy Proceeds at issue in this case.

Simon Bernstein, the insured and decedent in this matter, had a long career as a life insurance agent including owning and operating several insurance brokerages. Simon Bernstein was married to his spouse, Shirley, for fifty-two years prior to Shirley's death in 2010. Simon and Shirley Bernstein had five children, whose names in order of age are as follows: Ted Bernstein, Pamela Simon, Eliot Bernstein, Jill Iantoni, and Lisa Friedstein. All five of Simon Bernstein's children are now adults with children of their own. Simon Bernstein had ten grandchildren from his five children.

Simon Bernstein's life insurance career started in Chicago where he raised his family. After his children were grown, Simon and Shirley moved from Chicago to Palm Beach County, Florida.

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

Simon Bernstein was the Insured under the Policy. On the day Simon Bernstein passed away in 2012, Heritage was the successor insurer to the insurance company that issued the Policy.[2]

After Simon Bernstein died on September 13, 2012, Simon Bernstein's attorney, Robert Spallina, submitted a death claim on the Policy to Heritage on behalf of the Bernstein Trust. The death claim was not paid by Heritage. Subsequently, the Bernstein Trust filed an action for breach of contract against Heritage in the Circuit Court of Cook County. Heritage removed the action from Cook County Court to the Northern District of Illinois. Heritage then filed a counterclaim for interpleader, and named the Bernstein Trust, Eliot Bernstein, and certain banks named in the caption above as potential competing claimants to the Policy Proceeds. With leave of court, Heritage deposited the Policy Proceeds with the Registry of the Court and was subsequently dismissed from the case.

After being served, Eliot Bernstein appeared pro se and filed cross-claims, counter-claims, and third-party claims ("Eliot's Claims") naming the existing parties and several new third-parties.

The Estate of Simon Bernstein was granted leave to intervene in August of 2014. The Estate's intervenor complaint alleges that if no other claimant can prove up their claim, then the Estate should take the Policy Proceeds by default.

[2] For purposes of this brief movants will refer to the last successor insurer as "Heritage". Movants will refer more generally to the "Insurer" as one or more of the companies that was on the risk for the death benefit from time to time during the Policy's existence.

II. FACTUAL BACKGROUND

A. THE PARTIES

Please see **SoF ¶1-¶28** for a review of the identity and status of the parties. [3]

B. THE POLICY

The Policy was originally purchased from Capitol Bankers by the VEBA in December of 1982 to insure the life of Simon Bernstein. The Policy was issued as Policy No. 1009208 with an original sum insured of $2,000,000.00. **(SoF ¶26; Ex. 5)**

C. THE INSURED

Simon Bernstein was the Insured under the Policy. Shirley, his spouse, predeceased Simon Bernstein. The identity of the Insured is not in dispute, nor does anyone dispute that the Insured passed away on September 13, 2012. **(SoF, ¶26, ¶52, ¶68; Ex. 12)**

D. THE INSURER

The Insurer of the Policy changed over the life of the Policy from time to time through succession. The Insurer has been previously dismissed from this case after having deposited the Policy Proceeds with the Registry of the Court. Prior to its dismissal, the Insurer did not dispute either the existence of the Policy or its liability for the Policy Proceeds following the death of the Insured. **(SoF ¶11)**

E. THE POLICY PROCEEDS (THE "STAKE")

In the Insurer's Complaint for Interpleader, the Insurer represented that the net death benefit payable under the Policy on the date of Simon Bernstein's death was $1,689,070 (less an

[3] Pursuant to Local Rule 56.1, Movants are concurrently filing their Statement of Uncontested Material Facts ("SoF").

outstanding policy loan). **(Ex. 28 at ¶17).** In its Rule 26 disclosures and in the Affidavit of Don Sanders, the Insurer provided documentation and testimony verifying the amount of the Policy Proceeds. No objections were made by any Party to this litigation regarding the amount of the Policy Proceeds that the Insurer deposited with the Registry of the Court. In short, the amount of the Policy Proceeds is undisputed. **(SoF ¶11)**

F. THE POLICY PROVISIONS ON BENEFICIARIES

The Policy provisions which set forth both the definitions of a beneficiary under the Policy, and the requirements for naming or changing a beneficiary of the Policy are the controlling factors in making the determination as to whom is the beneficiary of the Policy Proceeds. *Bank of Lyons v. Schultz,* 22 Ill.App.3d 410, 415, 318 N.E.2d 52, 57 (1st Dist., 1974) *citing* 2 Appelman, Insurance Law and Practice §921 (1966). In this instance, the Policy defines "Beneficiary" as follows:

> A Beneficiary is any person *named on our* [the Insurer's] *records* to receive proceeds of this policy after the insured dies. There may be different classes of Beneficiaries, such as primary and contingent. These classes set the order of payment. There may be more than one beneficiary in a class. Unless you provide otherwise, any death benefit that becomes payable under this policy will be paid in equal shares to the Beneficiaries living at the death of the Insured. Payments will be made successively in the following order: (emphasis added)
>
> a. Primary Beneficiaries.
> b. Contingent Beneficiaries, if any, provided no primary Beneficiary is living at the death of the Insured.
> c. The Owner or the Owner's executor or administrator, provided no Primary or Contingent Beneficiary is living at the death of the Insured.
>
> Any Beneficiary may be named an Irrevocable Beneficiary. An irrevocable beneficiary is one whose consent is needed to change that Beneficiary. Also, this Beneficiary must consent to the exercise of certain other rights by the Owner. We discuss ownership in part 2. **(SoF, ¶26; Ex. 5 at bates no. JCK00101)**

Here, the application for the Policy, indicates that initial Policy Owner designated "First Arlington Bank, Trustee of S.B. Lexington Employee Death Benefit Trust" [the "VEBA"] as the Beneficiary of the Policy. This was accomplished by the Policy Owner completing the beneficiary section of the application. **(SoF, ¶28).**

The Policy also includes the Insurer's requirements for the Policy Owner to effectuate a change of beneficiary. With regard to changing the beneficiary, the Policy provides as follows:

> The Owner or any Beneficiary may be changed during the Insured's lifetime. We do not limit the number of changes that may be made. *To make a change, a written request, satisfactory to us, must be received at our Business Office.* The change will take effect as of the date the request was signed, even if the Insured dies before we receive it. Each change will be subject to any payment we made or other action we took before receiving the request. **(Ex. 5 at bates #JCK00103).** (emphasis added).

G. THE DESIGNATED BENEFICIARIES OF THE POLICY

According to the Insurer, the last change of beneficiaries was submitted to the Insurer by the Policy Owner on or about November 27, 1995. **(SoF, ¶33).** As a result of that last change of beneficiaries, the Beneficiaries of the Policy Proceeds designated as of the Insured's date of death (Sept. 13, 2012), were as follows: LaSalle National Trust, as Successor Trustee [the "VEBA"] (primary beneficiary), and Simon Bernstein Irrevocable Insurance Trust dtd June 21, 1995 (contingent beneficiary). **(SoF, ¶33 and ¶34)**

The VEBA was an employee benefit plan that provided death benefits to the beneficiaries of the S.B. Lexington VEBA plan participants. The Policy was initially purchased by the VEBA and at Policy issuance the VEBA was both Policy Owner and Primary Beneficiary**. (SoF, ¶27 and ¶28)**

As part of the VEBA, the plan participant (an S.B. Lexington Employee), was authorized to designate his/her intended beneficiary of their death benefit under the VEBA. Simon Bernstein, as a plan participant, executed a beneficiary designation form for the death benefits provided through the VEBA. In August of 1995, Simon Bernstein designated the "Simon Bernstein Irrevocable Insurance Trust" as his Beneficiary for the death benefit provided through the VEBA. **(SoF, ¶32; Ex. 4)**

Simon Bernstein's beneficiary designation form which contains his designation of the Bernstein Trust as his Beneficiary for the VEBA death benefit provides extremely strong corroborating evidence of both (i) the existence of the Bernstein Trust; and (ii) Simon Bernstein's intent that the Beneficiary of the Policy Proceeds is the Bernstein Trust. **(SoF, ¶32; Ex. 4).**

In support of their motion, Movants submitted a simple diagram **(Ex. 17)** which is referred to and explained in **Ex. 30, Aff. of Ted Bernstein at ¶105-¶106**. This diagram illustrates that whether the Policy Proceeds were paid to the Primary Beneficiary -- the VEBA-- or the Contingent Beneficiary -- the Bernstein Trust, the result is the same. Ultimately, the Policy Proceeds are to be paid to the Bernstein Trust. **(SoF, ¶44)**

In 1998, S.B. Lexington was voluntarily dissolved and the VEBA terminated at the same time. In conjunction with this dissolution, the ownership of the Policy was also changed in 1998, from the VEBA to Simon Bernstein. So, as of 1998, it is undisputed that the Primary Beneficiary under the Policy, the VEBA, had ceased to exist, and thus the sole remaining beneficiary was the Contingent Beneficiary, the Bernstein Trust. **(SoF ¶21 and ¶36)**

H. THE SIMON BERNSTEIN IRREVOCABLE INSURANCE TRUST DATED JUNE 21, 1995 (THE "BERNSTEIN TRUST")

As set forth above, the last named Contingent Beneficiary of the Policy was the Bernstein Trust. But, one of the reasons the Insurer refused to pay the Policy Proceeds to the Bernstein Trust upon presentation of the death claim, was because no one has been able to locate an original or copy of an executed trust agreement for the Bernstein Trust (a "Bernstein Trust Agreement"). **(SoF ¶45)**

But, Movants in their Statement of Undisputed Facts set forth a comprehensive and cohesive bundle of evidence, including signed documentation from both the settlor and the initial trustee of the Bernstein Trust evidencing the existence of the Bernstein Trust. Movants have also provided sworn witness testimony and unexecuted drafts of the Bernstein Trust Agreement establishing the terms of the Bernstein Trust. Further, Movants account for 4/5ths of the Beneficiaries of the Bernstein Trust, and these 4/5ths are all in agreement with regard to the terms of the Bernstein Trust and intent of the Settlor.

It is also important to remember that this is not a case where the four consenting Beneficiaries are trying to exclude the fifth beneficiary. Instead, the four consenting Beneficiaries seek distribution of the Policy Proceeds to all five children of Simon Bernstein as Beneficiaries of the Bernstein Trust, *including the contesting Beneficiary, Eliot*.

III. VENUE AND JURISDICTION

The Court has subject matter jurisdiction over this matter pursuant to 28 U.S.C. §1335 (interpleader). The insurer invoked such jurisdiction when it filed its Interpleader Action after having removed this matter from Cook County Court.

Venue is proper in this district because a substantial part of the events giving rise to the claims occurred in Cook County, Illinois. The insurance policy at issue was applied for and delivered in Illinois. At the time of issue, the insured was a citizen of Illinois. The initial policy owner was a bank trustee for the VEBA domiciled in Illinois. The Bernstein Trust was established and created in Illinois, at an Illinois law firm, by attorneys whom drafted a trust agreement that selected Illinois law to govern. **(SoF, ¶28, ¶47-¶49)**

IV. ARGUMENT

A. STANDARDS

Summary judgment is appropriate when "there is no genuine issue as to any material fact" and the movant "is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Only disputes "that might affect the outcome of the suit…will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). "When the material facts are not in dispute….the sole question is whether the moving party is entitled to judgment as a matter of law." *ANR Advance Transp. V. Int'l Bhd. Of Teamsters Local 710,* 153 F.3d 774, 777 (7th Cir. 1998). If full summary judgment is not warranted, the court may grant partial summary judgment. Fed R. Civ. P. 56(a).

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).

B. GOVERNING LAW

Where an insurance policy is the result of an application to an agent of the insurance company within a state, the policy after having been issued, delivered by the company's agent within the state, and the premiums paid by the insured within the state to the company, the policy becomes a contract of that state, subject to the applicable laws of said state. Where the most significant contacts of the contract are made, the applicable law of that place is controlling. *Minnesota Mut. Life Ins. Co. v. Sullivant*, 334 F.Supp 346, 349 (1971), citing *New York Life Ins. Co. v Head*, 234 U.S. 149, 34 S.Ct. 879, 58 L.Ed. 1259 (1914).

Here, the law of the state of Illinois controls because it is undisputed that the first Policy Owner, the VEBA, was domiciled at the offices of its Bank Trustee located in Illinois. Simon Bernstein was the agent who sold the Policy and it is undisputed that when he sold the Policy he was a citizen of the state of Illinois, and the Policy would have been delivered to the Owner in the state of Illinois. Simon Bernstein was also the insured under the Policy and the application was signed in Illinois. **(SoF ¶28).** In short, all of the significant contacts with regard to the application, sale and delivery of the Policy occurred in Illinois.

With regard to issues relating to the Bernstein Trust, Illinois law also applies. Both drafts of the Bernstein Trust have two independent choice of law provisions on the first page of each draft and directly above the signature line for the grantor which state that "the Trust created hereby shall be construed and governed by the laws of Illinois." **(SoF ¶57, Ex. 15 and Ex. 16 at Art. II and Art. XIII.)** This makes perfect sense, since according to the undisputed testimony of David Simon, the attorneys who drafted the Bernstein Trust were from the law firm of

Hopkins and Sutter located in Chicago, IL. Simon Bernstein executed the Bernstein Trust in Chicago, Illinois. **(SoF ¶47).**

C. THE BERNSTEIN TRUST WAS FORMALLY ESTABLISHED BY SIMON BERNSTEIN AS AN EXPRESS TRUST.

In *Butler*, the Iowa Supreme Court cited to an extensive array of case law on the subject of the establishment of express trusts including several applicable citations to Illinois law. Prior to examining the facts of the case in Butler, the court noted the following pronouncements:

"Neither a statement by the settlor, nor a formal written declaration is essential to establish a trust". The court continued, "Whether a trust has been perfectly created is largely a question of fact in each case, and the court in determining the fact will give efficacy to the situation and relation of the parties, the nature and situation of the property, and the purpose and objects which the settlor had in view." *Butler v. Butler,* 253 Iowa 1084, 1113, 114 N.W.2d, 595, 612 (1962) citing Perry on Trusts and Trustees, 7th Ed, vol. 1, p.124.

Next, the *Butler* court cited the Illinois Supreme Court case in *McDiarmid* as follows:

> "In support of their contention that they have proved an express trust appellees rely on our holdings in *Kingsbury v. Burnside*, 58 Ill. 310, 11 Am.Rep. 67, and many other decisions, including *Whetsler v. Sprague*, 224 Ill. 461, 79 N.E. 667, supra. These decisions hold that the statute of frauds has been complied with if the trustee makes a memorandum or writing showing that the property is held in trust. *The details of the trust may be established aliunde and even by parol evidence*." *Butler*, 235 Iowa 1084, 1114, 114 N.W.2d 595, (1962) citing *McDiarmid v. McDiarmid,* 368 Ill. 638, 15 N.E.2d 493 (1938)

The *McDairmid* court continued:

> "….that in order to establish an express trust and to meet the requirements of the statute of frauds it is not necessary that it be established by formal declaration of the trust but it is sufficient if proved by letters or other memoranda. The writing need not be an instrument expressly framed for the purpose of acknowledging the trust. *It is sufficient if*

> *the recognition or admission of the trust be incidentally made in the course of correspondence and almost any memorandum will suffice.* The letter or memorandum need not be addressed to the *cestui que* of the trust and may be written after title has been acquired by the trustee." *McDiarmid v. McDiarmid,* 368 Ill. 638, 642 (1938).

The *Butler* court also relied upon *Holmes*, where the Washington Supreme Court addressed the question of whether an express trust may be proven by a writing signed by the trustee. To answer the question, the court relied upon Pomeroy's Eq. Juir. (3 Ed.) §1007 and concluded that an express trust may be proven by a writing signed by the grantor or trustee of the trust, but not from its *cestui que*. *Holmes v. Holmes*, 65 Wash. 572, 118 P. 733, 734 (1911)

In *Butler*, the court also set forth certain legal principles regarding the settlor's manifestation of his intent to create a trust. The court stated:

> "Except as otherwise provided by statute, the manifestation of intention to create a trust may be made by written or spoken words or conduct. No particular form of words or conduct is necessary for the manifestation of intention to create a trust.(cites omitted) Acts prior to and subsequent to, as well as acts contemporaneous with the manifestation which it is claimed creates a trust, may be relevant in determining the settlor's intention to create a trust." *Butler*, 235 Iowa 1084, 1113, 114 N.W.2d 595, 613 (1962)

Since an interest in real property is not at issue here, the Statute of Frauds is not applicable. But, even if it were, Movants' have provided ample evidence in the form of signed writings by both the Settlor and Trustee which establish the existence of the Bernstein Trust as an express trust.

As far as written evidence which establishes the formation and existence of the Bernstein Trust, Movants submit the following:

1. The VEBA Beneficiary Designation form is critically important because it (i) contains the signature of the Simon Bernstein, (ii) refers to the "Simon Bernstein Irrevocable Insurance

Trust", and (iii) memorializes Simon Bernstein's intent that the Policy Proceeds were to be paid to the Bernstein Trust. **(SoF, ¶32).** Under the case law discussed above, this document alone is sufficient evidence of the establishment and existence of the Bernstein Trust.

2. The SS-4 Form used to obtain the Federal Tax Identification Number for the Bernstein Trust is also conclusive evidence of the formation of the Bernstein Trust. The SS-4 Form contains reference to the "Simon Bernstein Irrevocable Insurance Trust", and is signed and dated on June 21, 1995 by the initial trustee of the Bernstein Trust, Shirley Bernstein. **(SoF, ¶41)**. As discussed above, the signature of a Trustee is also sufficient on its own to evidence the establishment of a trust.

3. The Beneficiary Designation Forms for the Policy submitted by the Policy Owner designates the Bernstein Trust as a Contingent Beneficiary. **(SoF, ¶33 and ¶34)**

4. The unexecuted versions of the Bernstein Trust Agreement provide evidence of the Settlor's intent to form the trust. This document also establishes the terms of the "irrevocable trust". According to both drafts of the Bernstein Trust Agreement, the beneficiaries of the Bernstein Trust are the five children in equal shares. **(SoF, ¶50)**

5. The change of owner form signed by Simon Bernstein on August 8, 1995 which transferred his ownership interest in the Lincoln Policy to the Bernstein Trust. This document contains the full name of the Bernstein Trust, the tax identification number of the Bernstein Trust as reflected on the IRS SS-4 form, and it identifies the initial trustee, Shirley Bernstein.

In addition to the documentation produced in this case, Plaintiffs have proffered corroborating parole evidence of Simon Bernstein's intent to i) form the Bernstein Trust: (ii) designate the Bernstein Trust as the beneficiary of the Policy proceeds; (iii) designate his wife

Shirley Bernstein, as initial trustee, and his son Ted, as successor trustee; and (iv) designate his five children as beneficiaries of the Bernstein Trust.

Such additional evidence includes the following:

a) Affidavit of Don Sanders, Asst. Vice-President of Operations of the Insurer
b) Affidavit of Ted Bernstein
c) Affidavit of Pam Simon
d) Affidavit of Jill Iantoni
e) Affidavit of Lisa Friedstein
f) Affidavit of David B. Simon
g) Deposition of David B. Simon

D. MOVANTS HAVE SET FORTH UNDISPUTED EVIDENCE THAT THE BENEFICIARY OF THE POLICY PROCEEDS IS THE BERNSTEIN TRUST.

Movants have submitted a simple diagram marked as **Ex. 17** in their Appendix of Exhibits. In his Affidavit **(Ex. 30 at ¶106),** Ted Bernstein explains the diagram and how it illustrates Simon Bernstein's intent with regard to the Policy Proceeds.

This diagram shows that when Simon Bernstein executed the VEBA Member Beneficiary Form in 1995, just months after he formed the Bernstein Trust, he expressed his intent in a signed writing that the Policy Proceeds should be paid to the VEBA and then flow through to the Bernstein Trust **(Ex. 17, Option A)**. In a belt in suspenders approach, the Bernstein Trust was also named contingent beneficiary of the Policy as illustrated in the diagram. So, if the Insured survived the primary beneficiary--which he did in this case--the Policy Proceeds would still be paid to the Bernstein Trust as contingent beneficiary **(Ex. 17, Option B)**. **(SoF, ¶44)**

In April of 2010, the Policy records reflect that Simon Bernstein contacted the Insurer, and the Insurer responded with a letter confirming the primary and contingent beneficiaries as

follows: The primary was listed as "LaSalle National Trust" [the VEBA], and the contingent beneficiary is listed as "Simon Bernstein Trust, N.A.". But, according to the Policy records as confirmed by Don Sanders in his Affidavit, "Simon Bernstein Trust, N.A." is merely a misnomer or abbreviation input by the Insurer into their records for the named contingent beneficiary which is "Simon Bernstein Insurance Trust dated 6/21/95." There is no record of any submission of a change of beneficiary to the Insurer under the name Simon Bernstein Trust, N.A., and no one as filed a claim on behalf of a separate entity named "Simon Bernstein Trust, N.A." **(SoF ¶45-46)**.

Simon Bernstein spent most of his career as a life insurance agent and owner and operator of life insurance agencies and brokerages. **(SoF, ¶46).** Simon Bernstein knew what was required to change an owner or beneficiary of a life insurance policy.

Approximately a year before his death, Simon Bernstein completed the necessary paperwork and submitted the required premium to reinstate the Policy after it had lapsed. In doing so, Simon Bernstein made no changes to the owner or beneficiary of the Policy when he transmitted the forms to the Insurer. **(SoF, ¶44).**

A final crucial piece of evidence is Simon Bernstein's Will executed just months before his passing. A Will, by its very nature, is a legal instrument designed to express one's intent. Simon Bernstein's Will contains a provision expressly reaffirming his beneficiary designations and thus his desire that any proceeds of an insurance contract be paid to the designated beneficiary of that contract. **(SoF ¶68).**

E. THE BENEFICIARIES OF THE BERNSTEIN TRUST

The beneficiaries of the Bernstein Trust were set forth in the two unexecuted drafts of the Bernstein Trust Agreement. **(Ex. 15 and Ex. 16).** And those beneficiaries are the five children of Simon Bernstein.

David Simon stated when Simon Bernstein approached him to form an insurance trust he initially said he wanted to do so to protect his wife and children. The Affidavit of Ted Bernstein also shows that in 1995 when the Bernstein Trust was formed, only two of Simon Bernstein's children had children of their own, and they were young minors at the time. **(SoF, ¶48)**

Movants have submitted the Equifax investigation report that was part of the Policy records, and that report indicates that Simon Bernstein told the investigator that the Policies purchased by the VEBA are owned by a trust and that the death benefits are generally left to family members. **(SoF, ¶30)**

The affidavits, documentation and evidence submitted by Movants all lead to the same conclusion. First, the Bernstein Trust was an express irrevocable insurance trust formed by Simon Bernstein, as settlor, on or about June 21, 1995. Second, the Bernstein Trust is the Beneficiary of the Policy proceeds. Third, the Beneficiaries of the Bernstein Trust are the Five Children, to share equally.

F. ADMINISTRATIVE MATTER OF APPOINTING OR DECLARING TED BERNSTEIN TRUSTEE OF THE BERNSTEIN TRUST

Shirley Bernstein, the initial trustee of the Bernstein Trust, predeceased Simon Bernstein. According to all of the evidence submitted by Movants, Ted Bernstein was appointed successor trustee to the Bernstein Trust, and he has brought this action on behalf of the Bernstein Trust and its beneficiaries. Based on the evidence provided, this Court should declare that Ted Bernstein is

the successor trustee of the Bernstein Trust with authority to carry out the actions needed to collect the Policy Proceeds and distribute them to the Five Children.

Further authority for Ted's appointment or declaration as acting trustee can be found in 760 ILCS 5/13 which provides as follows:

> § 13. Vacancy--Successor trustee. In the event of the death, resignation, refusal or inability to act of any trustee:
>
> (1) the remaining trustee, if any, shall continue to act, with all the rights, powers and duties, of all of the trustees; or
>
> (2) if there is no remaining trustee, a successor trustee may be appointed by a majority in interest if the beneficiaries then entitled to receive the income from the trust estate or, if the interest of the income beneficiaries are indefinite, by a majority in number of the beneficiaries then eligible to have the benefit of the income of the trust estate, by an instrument in writing delivered to the successor, who shall become a successor trustee upon written acceptance of the appointment, but no beneficiary who is appointed as a successor trustee shall have any discretion to determine the propriety or amount of any distribution of income or principal to himself or to any person to whom he is legally obligated.

Here, Movants' whom represent 80% of the beneficial interests of the Bernstein Trust, have submitted to the court and to Ted, as Trustee, there sworn affidavits containing their consent to having Ted continue to act as Trustee of the Bernstein Trust. Ted, in his Affidavit, has also signified his willingness to act as Trustee. This court, in its order granting movants motion for summary judgment should declare that Ted Bernstein is duly appointed and authorized to act as Trustee for the Bernstein Trust.

G. ELIOT'S CLAIM – THE SOLE CONFLICTING CLAIM

Another reason cited by the Insurer for its refusal to pay the death claim made by Bernstein Trust was because the Insurer received a letter from Eliot that purported to make a conflicting claim to the Policy Proceeds. **(SoF, ¶72)**. A copy of Eliot's letter was attached as an

Exhibit to the Insurer's complaint for Interpleader. In his letter to the Insurer dated May 3, 2013, Eliot describes his purported claims as follows:

"I, Eliot I. Bernstein, son of Simon L. Bernstein, and my children have been notified that we are possible beneficiaries of the life insurance policy on my deceased father."

In this same letter, Eliot states that he has obtained counsel to represent his children with regard to their claims, and he would be retaining separate counsel for himself. **(SoF, ¶26 and Ex. 28 at ¶22)** Yet, in this litigation, only Eliot has appeared, pro se', presumably on behalf of himself.

No matter who Eliot purports to represent, Eliot's Claims fail to articulate any coherent set of facts or legal theories, either on his own behalf or on behalf of his children that could establish that Eliot or his children are beneficiaries of the Policy Proceeds.

Instead, Eliot's Claims sound in attempted fraud, and legal malpractice. Eliot's Claims recite allegation after allegation, all wholly irrelevant, of certain disputes and discrepancies involved in the probate and administration of the estate of Simon Bernstein which is occurring simultaneously herewith in Palm Beach County, Florida. Eliot describes the actions he is taking in Probate court in Palm Beach County and asks this court for basically the same relief he seeks in Palm Beach County.

Eliot's prayers for relief make absolutely no mention of the Policy Proceeds. Instead, in section "(i)" Eliot asks the court to seize all records regarding the Policies. But, Eliot has all Parties' Rule 26 production of documents including the Insurer's records. And, Eliot has had well over a year to conduct discovery. In short, this first prayer for relief is now moot because Eliot has had access to the records and ample time to conduct discovery.

In section "(ii)", Eliot asks for court costs to be paid by the Parties not the Policy Owners. This prayer for relief also does not seek the Policy Proceeds. In section "(iii)", Eliot states that he has asked the Probate Court in Florida to remove Ted Bernstein, Pam Simon, Donald Tescher and Robert Spallina from acting in any fiduciary capacity regarding the Estates of Simon or Shirley and Eliot asks this court for the same relief. First, Donald Tescher and Robert Spallina are no longer parties to this action as their motion to dismiss Eliot's claims was granted. **(SoF, ¶16, ¶17, and ¶22)** Second, this Court has no jurisdiction over the Estates of Simon and Shirley Bernstein as that matter is being administered in Palm Beach County, Florida. Again, this third prayer for relief does not seek the Policy Proceeds.

In section "(iv)" Eliot complains of parties abusing their fiduciary duty and demands that such parties be required to retain non-conflicted counsel. Although this prayer is vague, it appears to be an attempt to have counsel for Movants disqualified. This prayer for relief was previously denied by the court when it denied Eliot's motion to disqualify counsel **(Dkt. #91).** This prayer for relief also makes no mention of the Policy Proceeds.

In section "(v)" Eliot asks the court to take judicial notice of the crimes alleged in his complaint and use its court powers to "prevent any further crimes." This prayer for relief is so vague that it would be impossible for the court to grant and enforce it. No specific redress is requested, and no demand is made for the Policy Proceeds.

In section "(vi)" Eliot asks for permission to obtain ECF access. Movant's believe Eliot has ECF access. In section (vii) Eliot asks for leave to amend his claims. Neither of these prayers for relief seek the Policy Proceeds.

In section (viii), Eliot seeks $8 million, punitive damages, attorneys' fees and costs. Eliot's Claims contains no allegations of fact regarding the damages alleged that have any reasonable relation to the $8 million plus punitive damages award he seeks. And the amount sought certainly bears no relation to the amount of Policy Proceeds on deposit. This last prayer for money damages does not seek either a determination that Eliot or his children are beneficiaries of the Policy Proceeds, nor does it make a demand for an award of the Policy Proceeds.

Eliot's pleadings are based on his erroneous assumption that the determination of the beneficiary of the Policy proceeds must be made in Florida by the probate court, instead of the Northern District of Illinois. Here again, Eliot misapprehends the fact that the Policy Proceeds are not part of the probate action in Florida because they are non-probate assets whose beneficiary is determined according to the life insurance contract, the Policy. The Policy Proceeds vested in the Beneficiary of the Policy immediately upon the death of the insured. *Bank of Lyons v. Schultz*, 22 Ill.App.3d 410, 318 N.E.2d 52 (1st Dist., 1974).

Further, this Court has exercised its jurisdiction from the outset of this matter and it was left unchallenged by the Insurer or any other party. In fact, it was the Insurer whom removed the action to the Northern District from the Circuit Court of Cook County, and in so doing, the Insurer alleged and invoked this court's jurisdiction over this matter pursuant to 28 U.S.C. §1335 (interpleader).

What is also conspicuously absent from Eliot's Claims is any reference to documentation in the Insurer's records that supports a claim to the Policy Proceeds on Eliot's own behalf or that

of his children. In short, Eliot has not pled a conflicting claim to the Policy Proceeds such that this court could find in his favor.

H. THE ESTATE OF SIMON BERNSTEIN'S INTERVENOR COMPLAINT

Benjamin Brown, as personal representative of the Estate of Simon Bernstein (the "Estate") was granted leave to intervene in this litigation on July 28, 2014 **(SoF, ¶25).** But, intervenor's complaint does not set forth a conflicting claim to the Policy Proceeds with any affirmative evidence that the Estate was either a primary or contingent beneficiary of the Policy. Instead, the complaint merely sets forth the Estate's assertion that if all other claimants fail to establish a claim to the Policy Proceeds, than the Policy Proceeds should be paid to the Estate by default.

The Estate's claims are wholly moot since the contingent beneficiary of the Policy – the Bernstein Trust – has established its claim as matter of law such that it should be awarded the Policy Proceeds. Thus, the issue of whom should take by default does not even arise.

V. CONCLUSION

For all of the foregoing reasons, Movant's motion for summary judgment as to Counts I and II of their First Amended Complaint should be granted in its entirety.

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Respectfully Submitted,

/s *Adam M. Simon*

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