

**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, et al. )

Third-Party Defendants, )

and )

ELIOT IVAN BERNSTEIN, )

Cross-Plaintiff )

v. )

TED BERNSTEIN, individually et al. )

Third-Party Defendants )

BRIAN M. O'CONNELL, as Personal )  
Representative of the Estate of )  
Simon L. Bernstein, )

Intervenor. )

**Case No. 13 cv 3643  
Honorable John Robert Blakey  
Magistrate Mary M. Rowland**

**THIRD-PARTY DEFENDANT ELIOT I.  
BERNSTEIN'S MEMORANDUM OF LAW IN  
OPPOSITION TO PLAINTIFFS' MOTION FOR  
SUMMARY JUDGEMENT**

**Filers:**

Eliot Ivan Bernstein, Third-Party Defendant  
and Counter-Plaintiff.

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- A. PLAINTIFFS HAVE FAILED TO MEET THE CLEAR AND CONVINCING STANDARD OF PROOF.
  
- B. SIGNIFICANT PROBATIVE EVIDENCE HAS BEEN ADDUCED FROM WHICH A JURY COULD REASONABLY FIND FOR THE NON-MOVING PARTY, ELIOT I. BERNSTEIN, AGAINST THE PLAINTIFFS THEREBY DENYING SUMMARY JUDGMENT AT THIS STAGE OF LITIGATION.
  
- C. ILLINOIS DEAD-MAN STATUTE PREVENTS THE MAJORITY OF PROOF OFFERED BY PLAINTIFFS WHICH EVEN IF TRUE HAS NOT BEEN DEMONSTRATED BY CLEAR AND CONVINCING EVIDENCE

**TABLE OF AUTHORITIES**

- 1. 735 ILCS 5/8-201
- 2. FRCP 56
- 3. *Anderson*, 477 U.S. at 249
- 4. *Lindsey vs. Sears Roebuck and Company* , 16 F.3d 616, 618 (5<sup>th</sup> Cir. 1994).
- 5. *Little v . Liquid AirCorp.*, 37 F.3d 1069, 1975 (5th Cir. 1994) (en banc)
- 6. *Eastman Kodak v. Image Technical Servs., Inc*, 504 U.S. 45 1, 45 658 (1992);
- 7. *Jones v. Royal Builders of Bloomington Normal, Inc.*, 39 Ill. App. 3d 489 (4<sup>1</sup>Dist. 1976),
- 8. *Williams v. Anderson*, 288 Ill. App. 149, 5 N.E. 2d 593);
- 9. *Reynolds v. First National Bank*, 279 Ill. App. 581)
- 10. *(lyfaley v. Burns*, 6 Ill. 2d 11, 126N.E.2d 695
- 11. *Lytle v. Household lllfg., Inc.*, 494 U.S. 545, 554-555, 110 S.Ct. 1331, 108 L.Ed.2d 504 (1990).

12. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).
13. *Ball v. Kotter*, 2012 WL 987223 (U.S. Dist. Ct. N. D. Ill.), citing *Brown, Udell and Pomerantz, Ltd v Ryan*, 369 Ill. App. 3d 821, 861 N.E.2d 258 (1st D 2006);
14. *Lovejoy Electronics, Inc. v. O'Berto*, 873 F.2d 1001, 1007 (7th Cir. 1989).
15. *Kern's Estate v. Handelsman*, 115 Ill. App.3d 789, 793-94 (1983).

### **PRELIMINARY STATEMENT**

For the reasons herein and because of the genuine multiple issues of material fact and need for further discovery raised by Plaintiffs' own filings, the responses herein on Summary Judgment, the counterclaims made herein and all of the documentary evidence and exhibits to date, Plaintiffs' Amended Motion for Summary Judgment must be denied at this stage of litigation. Presented before this Court is an Amended Motion for Summary Judgment brought by Plaintiffs Ted Bernstein, Pamela Bernstein-Simon, Jill Bernstein-Iantoni, and Lisa Bernstein-Friedstein who added themselves as Plaintiffs after the action was first filed alleged on behalf of the 1995 Simon Bernstein Trust. This action was commenced on April 05, 2013 in the Illinois Circuit court several months after the passing of Simon Bernstein on September 13, 2012. At the time of Simon Bernstein's passing in September of 2012, the Estate of his wife, Shirley Bernstein who predeceased Simon Bernstein was still open and pending before Judge Martin Colin in the Florida Probate Court of Palm Beach County. Ted Bernstein, Pam Bernstein Simon, Jill Bernstein-Iantoni and Lisa Bernstein-Friedstein are natural children of Shirley and Simon Bernstein along with Third-party Defendant Eliot I. Bernstein, herein.

At the time of Simon Bernstein's passing, Ted Bernstein made comments at the Hospital where he passed suspecting the possible murder of Simon Bernstein. Ted Bernstein took action with the Coroner's Office and was seeking an autopsy of Simon Bernstein on or about the time of his passing and ultimately obtained the involvement of Palm Beach County Sheriff authorities

regarding the circumstances of Simon Bernstein's death, which resulted in police authorities arriving at the home of Simon Bernstein in the early morning of his passing. See Third-party Defendant Eliot I. Bernstein Answer and Cross Claim Par 18 (i)(a) citing and linking to Eliot Bernstein Emergency Motion to Judge Colin on May 2013 Florida Probate Court, Section III- Post Mortem Autopsy Demand and Sheriff Department Investigation of Allegations of Murder. The alleged policy at issue before this Court which has never been produced or presented and thus not proven involves the deceased Simon Bernstein.

Yet, in the short weeks after his passing and with unsettled questions as to the actual cause of death of Simon Bernstein existing, documentary evidence obtained months later shows that attorney Robert Spallina was seeking payment of a claimed policy's proceeds from Heritage Union Life while acting and being addressed by Heritage as the Trustee of the La Salle National Trust, N.A., which is shown by documentary evidence obtained months later to be the alleged Primary Beneficiary of an alleged policy involving Simon Bernstein at the time of his death, this fact has not been challenged by any party.

Somehow, Heritage apparently never confirms that attorney Spallina has or had any authority to act as Trustee of the La Salle National Trust, N.A., and no document or record has ever been brought forward in this action or elsewhere to show attorney Spallina was ever a Trustee of the La Salle National Trust, N.A. Mysteriously, on or about October 04 2012 again with open questions about the actual cause of death of Simon Bernstein outstanding, attorney Spallina then diverts to attempt to claim proceeds from Heritage now acting as the Trustee of the 1995 Simon Bernstein Trust, which also has never been produced or presented in writing in this action by submitting a claim for death benefits. On or about Oct. 19, 2012, documentary evidence of email communications between attorney Spallina, Ted and Pam Bernstein showing

the parties acting in concert to find a “solution” to missing trusts and policies. Days later on or about Oct. 24, 2012, attorney Tescher and Spallina’s offices begin filing documents in the Florida Probate Court of Judge Colin later determined to be fraudulent on many grounds including the fact that the attorneys were attempting to use an alleged sworn statement of now deceased Simon Bernstein allegedly sworn to months before his death to now close the Estate case of Shirley Bernstein acting as the Personal Representative while deceased. (See Response to Statement of Facts, See Footnote 3, Disqualification Motion.)

While the fraud is permitted to continue in the Florida Probate Court of Martin Colin who has also never held a hearing to determine a valid Trustee in those cases, attorneys Tescher & Spallina continued to communicate with the Plaintiffs on ways to obtain the proceeds from the alleged policy again while open questions and investigations remain as to the exact cause of death of Simon Bernstein all the while attorneys Spallina and the Plaintiffs never communicate to Heritage or any carrier that Simon Bernstein may have passed because of possible murder. These parties acting in concert specifically communicate on keeping a 2000 Trust of Simon Bernstein done by the law firm Proskauer Rose out of the insurance actions and this lawsuit as this Trust allegedly determines Pam Bernstein to be “predeceased” under the Trust and thus not able to claim proceeds, which is also the result of what would happen if the alleged policy proceeds were to flow into the Estate of Simon Bernstein due to a Will-Trust by Simon Bernstein that says that both Ted Bernstein and Pam Bernstein Simon are predeceased and will not gain benefits directly under the Estate-Trust.

From the time of Simon Bernstein’s passing and continuing for many months later attorneys Spallina and Tescher and Ted Bernstein and others are all withholding documents and records and property from Third-party Defendant Eliot I. Bernstein herein while also holding up

inheritances to Eliot Bernstein and his family and children. When the action is first filed in the Illinois courts by Ted Bernstein on behalf of the 1995 Simon Bernstein Trust that attorney Spallina attempted to act as Trustee of while making the death benefit claim to Heritage weeks before (that was then subsequently Denied by the carrier) attorney Spallina claims Ted Bernstein has no authority to file a breach of contract lawsuit against Heritage and heated exchanges take place by email between attorney Spallina, Plaintiffs and their attorneys the Simon Law Firm. Heritage-Jackson itself files an Answer in this Action which itself raises genuine material issues of fact preventing summary judgment as to what the actual policy is, where the policy is, what the policy says, what the terms and conditions of the policy are, what the death benefit actually is, what riders were attached, who the beneficiaries are and whether Ted Bernstein is a proper Trustee, if the trust exists and who is the Trustee of any such Trust that claims to be the beneficiary.

Meanwhile in this action, neither Heritage nor Plaintiffs seek to contact the party their own documents and filings show as the Primary Beneficiary being La Salle National Trust, N.A., which itself is a basis to deny summary judgment to Plaintiffs. Ultimately in this action neither Ted Bernstein nor any Plaintiff is able to find or produce any actual policy nor any actual Trust document and thus are relying solely upon parol evidence and statements barred by the Illinois Dead Man Statute. Yet, even such evidence even if admissible still lacks any clear and convincing evidence as to the actual policy, actual policy terms, conditions, riders, history nor any Trust and terms thereunder under which Plaintiffs can claim proceeds. On or about a year after the action is filed one David Simon, husband to Plaintiff Pam Bernstein Simon who is also brother to Adam Simon and partner in the The Simon Law Firm, the attorneys filing the complaints and documents in this action, magically has a revelation that he can prove an alleged

Trust allegedly by Data files on his computer that make no sense and do not match the dates alleged and all of which beg the question a reasonable juror could ask which is why he forgot he could prove the Trust for that entire year and why he and his brother never alleged those facts in any of the original and amended complaints in any event.

Thus, for all the genuine issues of material fact raised by Plaintiffs' own filings, raised by the Answer of Heritage-Jackson, raised by Third-party Defendant and Counterclaimant Eliot I. Bernstein's Answer and Counterclaim, raised by Third-Party Defendant and Counterclaimant Eliot Bernstein's Response and Opposition herein and for the specific areas of Discovery not produced and the absence of necessary and material parties such as La Salle National Trust NA or its successors, Plaintiffs' Amended Motion for Summary Judgement must be denied in its entirety at this stage of litigation.

## **PROCEDURAL HISTORY**

The present motion before the Court is an Amended Motion for summary judgment by Plaintiffs as to Counts I and II of the Amended Complaint. This comes after the claims by Plaintiffs were originally brought in the State Court in Cook County, Illinois and the action was then removed to this federal district court where it was previously heard before Hon. District Judge Amy St. Eves. This motion by Plaintiffs is now before this Court at a time when related actions in the Florida Probate Court are in limbo after Eliot I. Bernstein, Third-party Defendant and Counterclaimant herein, filed a detailed, specified motion for mandatory Disqualification of Florida Probate Judge Martin Colin as a necessary material and fact witness after multiple fraudulent filings in the Florida Courts by the offices of attorneys Tescher & Spallina emerged in the Florida Courts. Attorneys Tescher and Spallina, by clear documentary evidence, were clearly working and communicating with the Plaintiffs during the relevant times of this federal action.

Florida Probate Court Judge Martin Colin Denied the motion for mandatory disqualification as being “legally insufficient” and then, within 24 hours, issued a Sua Sponte Recusal Orders from all six Florida cases but then acted upon those Florida cases with other Florida Judges ultimately resulting in the Florida cases being transferred to one Hon. Judge Coates who was a Partner at the Boca Raton office of the Proskauer Rose law firm that was directly involved with one of the Trusts implicated in this Illinois federal action. Now, even Judge Coates has recused himself from the Florida proceedings leaving the present Florida state matters in limbo. Further, this motion for Summary Judgment by Plaintiffs comes as there are continued and open investigations into the fraudulent document filings in Florida, the fraudulent insurance claim filed by Spallina, stolen estate and trust Properties, illegal Real Estate Sales and continue while Third-party Defendant and Counterclaimant Eliot I. Bernstein has sought leave to file a motion in this action to continue depositions of Ted Bernstein amongst others including Florida Judge Martin Colin, a motion which has yet to be filed. Because of the multiple genuine issues of material fact that exist and the need for further discovery, Plaintiffs’ Amended Motion for Summary Judgement must be denied at this time.

**ARGUMENT: POINT 1 - BECAUSE MULTIPLE GENUINE ISSUES OF MATERIAL FACT EXIST, PLAINTIFFS HAVE FAILED TO MEET THEIR BURDEN AND PLAINTIFFS MOTION FOR SUMMARY JUDGEMENT MUST BE DENIED.**

Plaintiffs seek summary judgment on Counts I and II of their Amended Complaint. (Dkt. No. 73) However, Count I is a breach of contract claim against Heritage Union Life Insurance Company that interpleaded the proceeds of an insurance policy and was dismissed from the case. (Dkt. No. 101) Plaintiffs provide no authority for the proposition that they may obtain a judgment against a party who is no longer a defendant. Summary judgment must be denied on Count I, which is moot. Heritage’s (and-or successor Jackson) absence from this action at this



stage of litigation is improper and the Answer filed by Jackson itself raises genuine issues of material facts as to Count II. Ironically, Plaintiffs' have not moved for summary judgment on Count III of the Amended Complaint and thus, this Memorandum does not address this claim at this stage of litigation.

**A. PLAINTIFFS HAVE FAILED TO MEET THE CLEAR AND CONVINCING STANDARD OF PROOF**

When seeking summary judgment, the movant bears the initial responsibility of demonstrating the absence of an issue of material fact with respect to those issues on which the movant bears the burden of proof at trial. *Lindsey vs. Sears Roebuck and Company*, 16 F.3d 616, 618 (5<sup>th</sup> Cir. 1994). If the movant fails to meet its initial burden, the motion must be denied, regardless of the non-movant's response. *Little v. Liquid AirCorp.*, 37 F.3d 1069, 1975 (5<sup>th</sup> Cir. 1994) (*en banc*). With respect to the Plaintiffs' current Amended Motion for Summary Judgment presently before the Court, it is absolutely clear that multiple issues of genuine fact exist preventing summary judgment at this stage of the litigation and that a reasonable juror could come to multiple conclusions against the moving party and thus, Plaintiffs' motion must be denied.

In determining whether a genuine issue exists for trial, the Court must view the evidence introduced and all factual inferences from the evidence in the light most favorable to the nonmovant. *Eastman Kodak v. Image Technical Servs., Inc.*, 504 U.S. 451, 456 (1992); *Gremillion v Gulf Coast Catering Co.*, 904 F.2d 2902, 92 (5<sup>th</sup> Cir. 1990); see also *Bodenheimer v. PPG Indus., Inc.*, 5 F.3d 955, 956 (5<sup>th</sup> Cir. 1993). The action before the Court involves Plaintiffs' claims to proceeds allegedly under an Illinois insurance policy and thus, the Illinois state law of insurance contracts is at issue. In construing an insurance policy, the court must

ascertain the intent of the parties to the contract. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 108, 607 N.E.2d 1204, 1212 (1992).

In *Royal Jones v Builders of Bloomington Normal, Inc.*, 39 Ill. App. 3d 489 (4<sup>1</sup>Dist. 1976), the plaintiff sought to prove the existence of a trust agreement and, failing that, sought to prove the existence of a resulting trust. The court there described the applicable burden of proof as follows:

The proof necessary to establish the existence of a trust by parol evidence has been phrased in various ways: The proof must be 'clear and convincing' (*Williams v. Anderson*, 288 Ill. App. 149, 5 N.E. 2d 593); 'unequivocal and unmistakable' (*Reynolds v. First National Bank*, 279 Ill. App. 581); even so strong, unequivocal and unmistakable as to lead to but one conclusion. (*Ivafaley v. Burns*, 6 Ill. 2d 11, 126 N.E.2d 695). A similar high degree of proof is necessary to establish the terms of the trust, such as the identity of the beneficiaries, and the nature and extent of their interests. *Ivafaley v. Burns*.

In the present action, there is no contract which has been produced, there is no policy which has been produced, and the Plaintiffs' own pleadings, documentary evidence and statements and exhibits before this Court show that one major necessary party, La Salle National Trust, N.A., has never even been contacted by Plaintiffs at least according to the submissions before this Court and clearly have not been brought in to this action as a party. Thus, one of the major necessary parties in this action, La Salle National Trust NA, who by the way is deemed a Primary Beneficiary according to Plaintiffs' own documents and Heritage/Jackson and has never been heard before this Court and this alone should defeat Plaintiffs' present motion for summary judgment.

Another necessary party, Heritage and or Jackson as successor, by their own Answer and Counterclaim before this Court, has alleged Ted Bernstein is not a proper Trustee and raises material questions of fact itself as to the actual policy, policy terms, and also admitting that no actual policy has been produced. Yet, this necessary party has presently been dismissed from this action and Third-party Defendant and Counterclaimant Eliot Bernstein asserts Heritage-Jackson

should be brought back into this action by this Court and thus Summary Judgment to the Plaintiffs is inappropriate at this stage of litigation and must be denied.

Duties of an insured are controlled by the terms and conditions of its insurance contract. *American Country Insurance Co. v. Bruhn*, 289 Ill. App. 3d 241, 247, (1997). In construing an insurance policy, the primary function of the court is to ascertain and enforce the intentions of the parties as expressed in the agreement. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 108 (2001). Yet, as stated, the actual terms and conditions of the contract and policy are unknown as it has never been properly produced and thus summary judgment to Plaintiffs at this stage is impossible and must be denied. Even by attempting to prove a claim to proceeds by parol evidence, Plaintiffs wholly fail to meet their burden of demonstrating the absence of genuine material issues of fact by clear and convincing evidence and summary judgment must be denied.

According to his Deposition, Ted Bernstein, purported Trustee of the 1995 Trust, has never seen an executed copy of the document. (See Response Exhibit 10, 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 Response Exhibit 10, pp. 24:13 -25:3) 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 but also a party shown to be working in common with Ted Bernstein at certain stages and even represented Ted Bernstein, made an application for the Policy proceeds on behalf of Plaintiffs, purportedly as trustee of the 1995 Trust after communications from Heritage to Spallina as the Trustee of the La Salle Trust with no authority shown by Spallina to act or be such Trustee and with La Salle never being contacted or brought in as a party. (See Response

Exhibit 10, pp. 35:12 - 36:3 and Dep. Exhibit 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 Response Exhibit 10, pp. 35:12 - 37:3; Dep. Ex. 1).

According to Paragraphs 17-21 of the Jackson Counterclaim and Third Party Complaint submitted with its Answer herein, with Jackson as the alleged successor in interest to Heritage as follows:

“17. At the time of the Insured's death, it appears "LaSalle National Trust, N.A." was the named primary beneficiary of the Policy, and the "Simon Bernstein Trust, N.A." was the contingent beneficiary of the Policy. The Policy's Death Benefit Proceeds are \$1,689,070.00, less an outstanding loan.

18. Subsequent to the Insured's death, Ted Bernstein, through his Florida counsel (who later claimed Bernstein did not have authority to file the instant suit in Illinois on behalf of the Bernstein Trust and withdrew representation), submitted a claim to Heritage seeking payment of the Death Benefit Proceeds, purportedly as the trustee of the Bernstein Trust. Ted Bernstein claimed that the Lexington Trust was voluntarily dissolved in 1998, leaving the Bernstein Trust as the purported sole surviving Policy beneficiary at the time of the Decedent's death.

19. However, Ted Bernstein could not locate (nor could anyone else) a copy of the Bernstein Trust. Accordingly, on January 8, 2013, Reassure, successor to Heritage, responded to Ted Bernstein's counsel stating: “In as much as the above policy provides a large death benefit in excess of \$1.6 million dollars and the fact that the trust document cannot be located, we respectfully request a court order to enable us to process this claim.”

20. Presently, the Bernstein Trust still has not been located. Accordingly, Jackson is not aware whether the Bernstein Trust even exists, and if it does whether its title is the "Simon Bernstein Insurance Trust dated 6/21/1995, Trust," as captioned herein, or the "Simon Bernstein Trust, N.A.", as listed as the Policy's contingent beneficiary (or otherwise), and/or if Ted Bernstein is in fact its trustee. In conjunction, Jackson has received conflicting claims as to whether Ted Bernstein had authority to file the instant suit on behalf of the Bernstein Trust.

21. In addition, it is not known whether "LaSalle National Trust, N.A." was intended to be named as the primary beneficiary in the role of a trustee (of the Lexington and/or

Bernstein Trust), or otherwise. Jackson also has no evidence of the exact status of the Lexington Trust, which was allegedly dissolved.”

None of the filings by Plaintiffs satisfactorily answer these questions such that there is an absence of genuine issues of material fact by clear and convincing evidence entitling Plaintiffs to summary judgement. Likewise, the Trust and Trust documents have not been produced and are not proven by any standard of evidence and certainly not by a clear and convincing standard of evidence and therefore the very authority for Plaintiffs to claim rights to the proceeds of any insurance contract has not been proven and material issues of fact exist preventing summary judgment to Plaintiffs at this time.

**B. SIGNIFICANT PROBATIVE EVIDENCE HAS BEEN ADDUCED FROM WHICH A JURY COULD REASONABLY FIND FOR THE NON-MOVING PARTY, ELIOT I. BERNSTEIN, AGAINST THE PLAINTIFFS THEREBY DENYING SUMMARY JUDGMENT AT THIS STAGE OF LITIGATION.**

Plaintiffs’ assertions before this Court is that the VEBA dissolved in 1998 and LaSalle was no longer the owner of the policy but however records exist with Heritage (Movant Exhibit 36) showing as recent as 2010 with La Salle National Trust, N.A., still as the Primary Beneficiary. Yet, Plaintiffs have never contacted La Salle since the time of passing of Simon Bernstein or at least never brought any proof forward showing La Salle as Primary Beneficiary has ever been contacted and La Salle was not made a party to this action. Meanwhile, there is proof in the Record that attorney Spallina was being contacted by Heritage as the Trustee of La Salle National Trust, N.A. (See correspondence by Heritage to Spallina, Response Exhibit 1, P.7) in the weeks after the passing of Simon Bernstein who passed under such suspicious circumstances that Plaintiff Ted Bernstein was seeking an autopsy through the Coroner, an independent autopsy and involved the local Sheriff authorities regarding the possible murder of Simon Bernstein while never advising or informing any Insurance Company or this Court of these facts.

Nowhere in the Record is there any proof brought forward to show attorney Spallina as a valid Trustee of La Salle and nowhere in the Record is there any explanation about how or why this occurred. There is proof in the Record, however, showing attorney Spallina communicating with Ted Bernstein in Oct. 2012 to find a “solution” to some of the alleged missing policy and trust problems days before filings made in Probate Court of Judge Martin Colin in Florida on Oct. 24, 2012 ( See Response Exhibit 2). These filings are later determined to involve fraudulent notaries performed by a Paralegal/Notary Public employed by attorneys Spallina and his partner Donald R. Tescher, Esq. at Spallina & Tescher PA named Kimberly Moran who was arrested and convicted. Attorney Spallina later admitted to Palm Beach County authorities of being involved in fraud-forgery of at least one Trust document involving Shirley Bernstein’s Irrevocable Trust to fraudulently include Ted Bernstein’s family back into the trust and a subsequent motion for mandatory disqualification of Florida Probate Judge Martin Colin recently filed and already exhibited herein showed Judge Colin as a necessary material witness to other specified fraud document filings by attorney Spallina ( and maybe Tescher ) around that time. This mandatory disqualification motion of Florida Judge Colin ultimately results in a sua sponte recent Recusal from all cases by Judge Colin within 24 hours of denying the disqualification motion as legally insufficient.

Further, there is other proof in the Record that attorney Spallina and the Plaintiffs secreted and withheld from this Court evidence of a 2000 Trust by Proskauer Rose that also cut Ted Bernstein and Pam Bernstein Simon out of a claim to proceeds. Later on, a “different story” emerges about the policies and Trusts, where David Simon jumps in to the game a year after the original complaint was filed and then 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 law 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 Movant Exhibit 35, pp. 44: 12 -45:15; 46:22 -47:15)

Despite David Simon's late in the game "magical revelation and recollection" that he recalls having created the trust on his computer and having seen it after execution which is magically recalled over a year after the original complaint was filed by Plaintiffs, the Complaint filed by Adam Simon who is the brother to David Simon filed 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) It was only after this event that David and Adam purportedly found Plaintiffs' Exhibits 15 and 16. Yet, despite these late in the game magical revelations and recollections, still no original documents are produced, nothing but Sample policies produced, no documents prepared by law firms produced nor properly signed or executed while at the same time Plaintiffs are failing to inform the insurance carriers of the possible murder of Simon Bernstein, failing to contact La Salle or bring in La Salle National Trust, N.A., the Plaintiffs were attempting to secret and hide documents from this Court and other parties like the 2000 Proskauer Trust that cut out Ted Bernstein and Pam Simon, and massive fraud is unfolding in the Florida Probate Court where Judge Martin Colin who has allowed the fraud to continue for 2.5 years without conducting a hearing into who is the proper Trustee, if the Trusts and Wills of Simon are valid and now suddenly "Recused" from all cases within 24 hours of Third-party Defendant Eliot Bernstein filing a detailed, specified motion for mandatory disqualification claiming COLIN as a material witness and possible participant to the

fraud on the Court who acted outside his jurisdiction by failing to disqualify when he knew of his standing as witness as required by Judicial Canons and law for over two years.

A reasonable juror under these facts and records could fairly arrive at multiple conclusions including but not limited to the Plaintiffs are hiding evidence from this Court, the Plaintiffs may be involved in fraud by these filings, La Salle National Trust, N.A. who hasn't been contacted despite attorney Spallina acting as Trustee with no authority as the Primary Beneficiary, and further that the Plaintiffs have failed to meet their burden of proof.

"If fair-minded persons could draw more than one conclusion or inference from the facts, including one unfavorable to the moving party, a triable issue exists and the motion for summary judgment should be denied. It is only when undisputed facts are susceptible of but a single inference that the issue becomes one of law." *Kern's Estate v. Handelsman*, 115 Ill. App.3d 789, 793-94 (1983). Significant probative evidence must be adduced from which a jury could reasonably find for the non-movant. *Anderson*, 477 U.S. at 249.

Third-party Defendant Eliot Bernstein has adduced significant probative evidence from which a jury could reasonably find in his favor and all such conclusions mandate that summary judgment is denied at this time.

**C. ILLINOIS DEAD-MAN STATUTE PREVENTS THE MAJORITY OF PROOF OFFERED BY PLAINTIFFS WHICH EVEN IF TRUE HAS NOT BEEN DEMONSTRATED BY CLEAR AND CONVINCING EVIDENCE**

The relevant portion of the DMA states as follows:

In the trial of any action in which any party sues or defends as the representative of a deceased person or person under a legal disability, no adverse party or person directly interested in the action shall be allowed to testify on his or her own behalf to any conversation with the deceased or person under legal disability or to any event which took place in the presence of the deceased or person under legal disability..

The DMA is an evidentiary rule banning testimony by someone with an interest in litigation about any conversation with or event occurring in the presence of a decedent. *Gunn v Sobucki*, 216 Ill. 2d 602, 837 N.E. 2d 865 (2005) (upheld DMA); *Brown, Udell and Pomerantz, Ltd. v Ryan*, 369. The DMA applies to summary judgment proceedings and in federal diversity



cases where state law supplies the rule of decision. *Ball v. Kotter*, 2012 WL 987223 (U.S. Dist. Ct. N. D. Ill.), citing *Brown, Udell and Pomerantz, Ltd v Ryan*, 369 Ill. App. 3d 821, 861 N.E.2d 258 (1st D 2006); *Lovejoy Electronics, Inc. v. O'Berto*, 873 F.2d 1001, 1007 (7th Cir. 1989).

While Plaintiffs have wholly failed to satisfy their burden of proof by clear and convincing evidence, any of the proof in the form of affidavits and deposition testimony by Ted Bernstein and David Simon that comes close to answering some of the multiple genuine issues of material fact would be barred by the Dead Man statute. For these additional reasons Summary Judgment must be denied.

### **CONCLUSION**

**WHEREFORE**, for all of the foregoing reasons, Plaintiffs' motion for Summary Judgment must be denied at this stage of litigation and further Discovery ordered and leave granted to add parties such as La Salle National Trust, N.A., bring Jackson-Heritage back into the case and for such other and further relief as may be just and proper.

DATED: June 05, 2015

/s/ *Eliot Ivan Bernstein*

Third Party Defendant/Cross Plaintiff PRO SE

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### **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on June 05, 2015 I electronically filed the foregoing with the Clerk of the Court using CM/ECF. I also certify that the foregoing is being served this day on all counsel of record identified below via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner.

*/s/ Eliot Ivan Bernstein*

Third Party Defendant/Cross Plaintiff PRO SE

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