

**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. )

ELIOT IVAN BERNSTEIN, )

Cross-Plaintiff )

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

**MOTION FOR LEAVE TO  
FILE SUR-REPLY**

**Filer:**  
Brian O'Connell, as Personal Representative  
of the Estate of Simon L. Bernstein,  
Intervenor.

v. )  
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 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 )  
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Third-Party Defendants. )  
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 BRIAN M. O'CONNELL, as Personal )  
 Representative of the Estate of )  
 Simon L. Bernstein, )  
 )  
 )  
Intervenor. )

**MOTION FOR LEAVE TO FILE SUR-REPLY**

NOW COMES Intervenor, Brian M. O'Connell, Personal Representative of the Estate of Simon L. Bernstein ("Intervenor"), by his attorneys, James J. Stamos and Kevin P. Horan of Stamos & Trucco LLP, and moves this Court for leave to file a brief sur-reply comprised of two

(2) pages of argument to address matters and law newly raised in Plaintiffs' Memorandum of Law in Reply to Intervenor's Response to Plaintiffs' Motion for Summary Judgment.

Specifically, in their Reply Brief, Plaintiffs for the first time address the appropriateness of their Motion as to Count I and newly cite *Aaron v. Merrill Lynch Pierce Fenner & Smith*, 502 F. Supp. 2d 804, 808 (2007) to support their position, as well as to argue that Intervenor bears a burden of proof of its own claim in responding to the Motion. Intervenor seeks leave to address this newly cited case in a sur-reply which will more fully and fairly elucidate the issues raised by the Motion. Intervenor's proposed sur-reply is attached hereto as Exhibit A.

WHEREFORE, Intervenor, prays this Court grant it leave to file a brief sur-reply to address matters newly raised in Plaintiffs' Reply Brief.

Respectfully submitted,

/s/ James J. Stamos  
Attorney for Intervenor, Brian M. O'Connell

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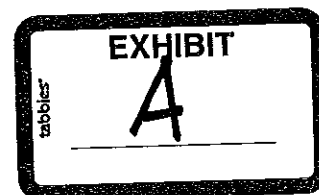
Cross-Plaintiff )

Case No. 13 cv 3643

Honorable John Robert Blakey  
Magistrate Mary M. Rowland

INTERVENOR'S SUR-REPLY IN  
OPPOSITION TO PLAINTIFFS'  
SUMMARY JUDGMENT MOTION

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**INTERVENOR'S SUR-REPLY IN OPPOSITION  
 TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

NOW COMES Intervenor, Brian M. O'Connell, Personal Representative of the Estate of Simon L. Bernstein ("Intervenor"), by his attorneys James J. Stamos and Kevin P. Horan of Stamos & Trucco LLP, and for its Sur-Reply in Opposition to Plaintiffs' Motion for Summary Judgment, states as follows:

**A. Intervenor Did Not Concede Count I of Plaintiffs' Complaint**

Plaintiffs in their Reply newly cite *Aaron v. Merrill Lynch Pierce Fenner & Smith*, 502 F. Supp. 2d 804, 808 (N.D. Ind. 2007) to support their argument that Intervenor “willingly ignored” Count I and that summary judgment is therefore unopposed on that count. In fact, *Aaron* does not address the issue raised here, *i.e.*, Plaintiffs seeking summary judgment against a dismissed party. In *Aaron*, the stakeholder (Merrill Lynch) had deposited the contested funds with the court but remained a party to the case at the summary judgment phase. The parties filed cross-motions for summary judgment, necessitating a judicial determination of the merits of each party’s respective claims to the contested funds. That case has no application when the stakeholder has been dismissed and there is no cross-motion for summary judgment.

The only determination to be made on Plaintiffs’ Motion for Summary Judgment is whether they have met their burden of showing the existence and terms of the purported Trust, as a matter of law, by clear and convincing evidence. Plaintiffs have failed to meet this burden and have failed even to acknowledge the application of the clear and convincing standard.

**B. *Aaron* Does Not Impose a Burden on Intervenor**

Plaintiffs also cite *Aaron* for the proposition that Intervenor has a burden to meet in its Response. As noted above, unlike *Aaron*, Intervenor did not file a cross-motion for summary judgment. Intervenor therefore bears no burden to demonstrate a superior claim to the Policy proceeds. In fact, the Estate is the default beneficiary of the Policy proceeds under both Florida and Illinois law. *New York Life Ins. Co. v. RAK*, 180 N.E. 2d 470 (Ill. 1962); *Harris v. Byard*, 501 So. 2d 730 (Fla. Dist. Ct. App. 1987). The Estate does not need to demonstrate a superior claim in order to defeat Plaintiffs’ Motion, or even to win the case. Under these cases, the Estate wins if Plaintiffs cannot prove their claim.

**C. Dead Man's Act**

Plaintiffs argue that Intervenor triggered an exception to the Illinois Dead Man's Act, 735 ILCS 5/8-201 *et seq.* (the "Act"), and has "opened the door" by offering testimony of interested witnesses that will be barred by the Act. No door was opened. The evidence cited was initially cited *by Plaintiffs* in support of their Motion. *See* Plaintiffs' Motion for Summary Judgment Exhibit 30 at ¶ 88 and Exhibit 35 at p. 52, ln. 23 – p. 55, lm. 22. Intervenor referred to that testimony again only to demonstrate that credibility questions would have to be resolved regarding those statements if they were ever heard by the jury. Intervenor would obviously never seek to offer that evidence at trial.

And, even if Intervenor had "opened the door" to otherwise-barred testimony, Plaintiffs still must be denied summary judgment. In his Response, Intervenor cited to Plaintiffs' evidence to highlight clear questions of fact which can only be resolved by a determination of the credibility of Plaintiffs' witnesses who all have an interest in the outcome of the case. Credibility determinations are the sole province of the trier of fact. Plaintiffs have not addressed how this Court can decide this Motion as a matter of law in their favor without making critical credibility determinations. It cannot and summary judgment must therefore be denied.

Respectfully submitted,

/s/ James J. Stamos

Attorney for Intervenor, Brian M. O'Connell

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