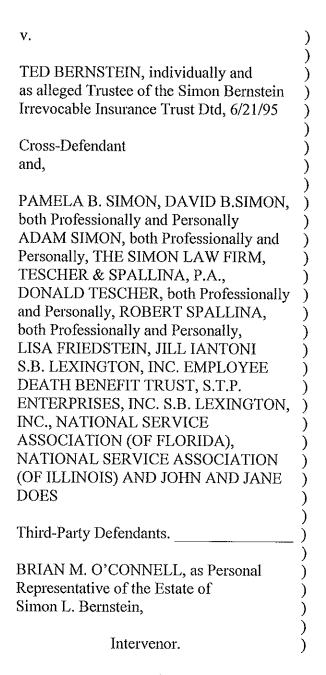
IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

SIMON BERNSTEIN IRREVOCABLE INSURANCE TRUST DTD 6/21/95,)	
Plaintiff,)	Case No. 13 cv 3643
v. HERITAGE UNION LIFE INSURANCE)))	Honorable John Robert Blakey Magistrate Mary M. Rowland
COMPANY,))	
Defendant,)	
HERITAGE UNION LIFE INSURANCE COMPANY))	
Counter-Plaintiff))	INTERVENOR'S SUR-REPLY IN OPPOSITION TO PLAINTIFFS'
V)	SUMMARY JUDGMENT MOTION
SIMON BERNSTEIN IRREVOCABLE INSURANCE TRUST DTD 6/21/95)))	Filer: Brian O'Connell, as Personal Representative of the Estate of Simon L. Bernstein, Intervenor.
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,))))	3
Third-Party Defendants.	,))	
ELIOT IVAN BERNSTEIN,)))	
Cross-Plaintiff)))	•



INTERVENOR'S SUR-REPY 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 crossmotions 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.

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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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CERTIFICATE OF SERVICE

I hereby certify that on July 13, 2015, this Intervenor's Sur-Reply in Opposition to

Plaintiffs' Summary Judgment Motion pursuant to Rule 56.1(b)(3)(C) was filed electronically

using the CM/ECF system and notice will be sent electronically to the registered participants

identified on the Notice of Electronic Filing.

/s/ James J. Stamos

James J. Stamos

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