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 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** **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")** **PLAINTIFFS-MOVANT'S MOTION FOR LEAVE TO FILE ITS SUR SUR REPLY TO THE ESTATE'S SUR REPLY TO PLAINTIFFS' 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.

NOW COMES PLAINTIFFS, by and through their undersigned counsel and move this Honorable Court, for an Order granting Plaintiffs leave to file the attached Sur Sur Reply to Intervenor's Sur Reply, and in support thereof states as follows:

Introduction

1. Intervenor's (the "Estate") motion for leave to file a sur reply, and their sur reply itself was based on multiple misrepresentations of the record which must be corrected and clarified in order for the court to render a just decision on Plaintiffs' motion for summary judgment.

2. By the end of June, 2015, Plaintiffs filed their consolidated reply to the Estate's and Eliot's responses, and Plaintiffs motion for summary judgment appeared fully briefed.

3. Obviously concerned with the state of the record at the end of briefing, the Estate then filed a motion for leave to file a sur reply. The motion was quickly granted by the court, and on July 8, 2015, the Estate filed its sur reply.

4. Plaintiffs have filed this motion and are requesting leave to file the attached proposed Sur Sur Reply not because the substance of the Reply causes Plaintiffs concern, but because the Estate has attempted to muddy the waters through misstatements of the record which are addressed, clarified and corrected in Plaintiffs' proposed Sur Sur Reply.

WHEREFORE, Plaintiffs respectfully request, that this Honorable Court (i) grant Plaintiffs' leave to file the attached Sur Sur Reply, instanter, and (ii) terminate briefing on Plaintiffs' motion for summary judgment and take it under advisement.

Dated: July 17, 2015

Respectfully Submitted,

/s *Adam M. Simon*

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Pamela B. Simon, Jill Iantoni, Lisa Friedstein

EXHIBIT A

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

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

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")

SUR SUR REPLY TO INTERVENOR'S SUR REPLY TO PLAINTIFFS' 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.

NOW COMES PLAINTIFFS-MOVANTS, by and through their undersigned counsel, and respectfully submit this Sur Sur Reply to Intervenor's Sur Reply, in further support of Plaintiffs' motion for summary judgment.

1. To begin, let's examine Intervenor's (the "Estate") assertion that for the first time *in their reply brief,* Plaintiffs argue that the Estate bears a burden of proof of its own claims in responding to the Motion. This assertion is patently false, and so easily controverted it's a wonder that the Estate made it at all. This assertion is false because under the "Standards" section of Plaintiffs' *initial* memorandum of law in support of their motion for summary judgments Plaintiffs state as follows:

> "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)." (see Dkt. #151, Plaintiffs' Memorandum of Law in support of their motion for summary judgment at p.8.)

2. As shown above, Plaintiff did argue that Respondents had the burden to establish their own claims and not just negate or attack Plaintiff's claims. The Estate had every opportunity to respond by asserting and explaining its own claim in its responsive pleadings, but decided instead to argue mootness, and the Dead Mans' Act. The Estate's arguments are limited to attacking Plaintiff's claims while failing to establish any basis for the Estate's claims to the Policy Proceeds. What the Estate continues to ignore or fails to apprehend is that this is an *Interpleader Action.*

3. To try to correct this uncorrectable deficiency, the Estate trumped up the notion that they were never on notice that they had to put forth a claim. But, as shown above, Respondents were made aware of that obligation by Plaintiffs' in their *initial* brief.

4. The Estate's argument in its Sur Reply regarding the Dead Mans' Act also plays fast and loose with the record. The Estate does not deny that it invoked the Dead Mans' Act and did so in an attempt to exclude all conversations between interested parties, including David Simon and Ted Bernstein on the one hand, and decedent on the other.

5. The Estate also cannot and does not deny that it then when on to introduce this exact same type of testimony, but in its sur reply the Estate represents to the court that it only mentioned the testimony it sought to exclude in order to discredit or impeach it. If that were true, all the Estate need do is cite to Plaintiffs' statement of facts to try to discredit or dispute testimony offered by Plaintiff. But, that is not what transpired here.

6. Instead, the Estate, *in its own statement of additional facts*, made allegations of *additional facts* and in support of those allegations the Estate cites to testimony relating to conversations between the interested parties and decedent. The Estate's not very subtle attempt to use its sur reply to try to re-shut the door it so clearly had opened in its response brief fails because the exact type of testimony it seeks to exclude is included in their own statement of additional facts. (*See* Dkt. 191, Intervenor's Local Rule 56.1(b)(3)(C) Statement of Additional Facts, at ¶5 and ¶23).

7. Local Rule 56.1 states in pertinent part as follows:

   If additional material facts are submitted by the opposing party pursuant to section (b), the moving party may submit a concise reply in the form prescribed in that section for a response. All material facts set forth in the statement filed pursuant to section (b)(3)(C) will be deemed admitted unless controverted by the statement of the moving party.

8. In response to the Estate's allegations of additional fact regarding Ted Bernstein's conversation with Simon Bernstein where Ted was told he was named a trustee of the Bernstein Trust, Plaintiffs' response was as follows:

   "Answer: Undisputed with one clarification. Ted testified about the conversation described by the Estate between Ted and his father, Simon Bernstein. Except, Ted testified he was told by his father he was a 'successor trustee'". (See Dkt. 201, Movants' Reply to the Estate's Statement of Additional Facts at ¶5.)

9. In response to the Estate's allegation of additional facts regarding the content of a telephone conversation decedent participated in a few months before his death with Plaintiffs, and David Simon, the Estate answered: "Undisputed." (See Dkt. 201, Movants' Reply to the Estate's Statement of Additional Facts at ¶23.)

10. Since the Estate made these allegations of additional fact, and Plaintiffs answered "undisputed", pursuant to Local Rule 56 these facts are deemed admitted and are part of the record for summary judgment.

11. The Estate's explanation that it submitted these undisputed facts solely for the purposes of discrediting them is not only incredulous, it is inapposite with Local Rule 56 pursuant to which the Estate promulgated their statements of additional fact. Something is amiss when the Estate says out of one side of its mouth that these allegations in our statement of additional facts are undisputed, yet out of the other side the Estate claims it really sought only to discredit these same "undisputed" facts.

12. The Estate's plea to the court to re-shut the door because the Estate would never have introduced such evidence at trial is rebutted by the Estate's own memorandum of law in response to Plaintiffs' motion for summary judgment where the Estate *itself* argued as follows:

> "The DMA applies to summary judgment proceedings and in federal cases where state law supplies the rule of decision. (cites omitted). The parties agree that Illinois supplies the rules of decision here. (cite omitted). The DMA will prohibit the testimony of an adverse or indirectly interested party from testifying on his or her own behalf. (*See* Dkt. 193, Intervenor's Memorandum of Law in Response to Plaintiffs' motion for summary judgment, p. 7).

13. What's transpired here is that in its response the Estate invoked the DMA and argued its applicability on summary judgment – that is until Plaintiffs pointed out that the Estate had opened the door pursuant to an exception under the DMA.

Then, in their Sur Reply, the Estate argues that the door should be re-shut or was never opened because the Estate would never have offered such testimony at trial.

14. The Estate wants it both ways. Apply the DMA to exclude Plaintiffs' assertion of such testimony on summary judgment, but ignore the DMA until trial when the Estate offers the exact same type of testimony on summary judgment. This is a perfect illustration of the reason for the "door" in the first place, and that is to prevent one party from opening it in support of their own case, then sealing it shut to frustrate the opposition.

15. The Estate opened the door, and it remains open for the remainder of the proceedings.

16. Despite the Estate's unsuccessful attempt to muddy the waters, what remains dispositive here, is that the Estate has not and cannot present the court with a set of facts and then explain under applicable law – how it is that the Estate should be named the beneficiary of the Policy Proceeds.

17. Absent that set of facts, the Estate's only arrow in its quiver was used to try to shoot down Plaintiffs' claim to the Policy Proceeds. And as Plaintiffs have demonstrated, that arrow is insufficient as a matter of law to strike down its target -- and in any case -- it flew by harmlessly, missing its target by a wide margin.

For all of the foregoing reasons, Plaintiffs respectfully request that the Court (i) terminate briefing on Plaintiffs' motion for summary judgment, and then (ii) grant Plaintiffs' motion for summary judgment in its entirety.

Dated: July 16, 2015

Respectfully Submitted,

/s Adam M. Simon

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