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

INTERVENOR'S LOCAL RULE 56.1(a)(2) MEMORANDUM OF LAW IN SUPPORT OF SUMMARY JUDGMENT

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

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.

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

Intervenor.

INTERVENOR'S LOCAL RULE 56.1(a)(2) MEMORANDUM
OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Intervenor Brian M. O'Connell, Personal Representative of the Estate of Simon L. Bernstein ("Estate"), for his Memorandum of Law in support of Motion for Summary Judgment pursuant to Local Rule 56.1(a)(2), states as follows:

INTRODUCTION

Under well-established law, the Estate is the default beneficiary of the insurance Policy and entitled to the proceeds absent a valid designated beneficiary. The sole question presented to this Court is whether Plaintiffs can meet their burden of proving by clear and convincing evidence the existence and terms of a purported 1995 Trust which they claim is the valid designated beneficiary of the Policy. Discovery is complete. The only evidence Plaintiffs have to establish the existence and terms of the 1995 Trust is the self-interested testimony of David Simon and Ted Bernstein, which is barred by the Illinois Dead Man's Act, and a variety other of circumstantial evidence which, as a matter of law, cannot satisfy the "clear and convincing evidence" standard—either on its own or in conjunction with the testimony of David Simon and Ted Bernstein. As a consequence, Plaintiffs cannot meet their burden, and the Estate is entitled to summary judgment.

JURISDICTION AND VENUE

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 removing this action from the Circuit Court of Cook County. Venue is proper in this district because a substantial part of the events giving rise to the claims occurred in Cook County, Illinois. The Policy was applied for and delivered in Cook County, and the initial Policy owner was a bank in Cook County, acting as trustee for a trust domiciled in Cook County. *Intervenor's Local Rule 56.1(a)(3) Statement of Undisputed Material Facts* ("SoF") ¶¶ 13-16.

LEGAL STANDARD FOR SUMMARY JUDGMENT

Summary judgment is appropriate if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. *Spurling v. C & M Fine Pack, Inc.*, 739 F.3d 1055, 1060 (7th Cir. 2014). A defendant moving for summary judgment satisfies its burden "(1) by affirmatively disproving the plaintiff's case by introducing evidence that, if uncontroverted, would entitle the movant to judgment as a matter of law (traditional test), or (2) by establishing that the nonmovant lacks sufficient evidence to prove an essential element of the cause of action (*Celotex* test)." *Williams v. Covenant Med. Ctr.*, 737 N.E.2d 662, 668 (Ill. App. Ct. 2000) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)) (internal citations omitted). "If the nonmoving party cannot muster sufficient evidence to make out its claim, a trial would be useless, and the moving party is entitled to summary judgment as a matter of law." *Celotex*, 477 U.S. at 331 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986)).

Further, "in ruling on a motion for summary judgment, the judge must view the evidence through the prism of the substantive evidentiary burden." *Anderson*, 477 U.S. at 254. Here, Plaintiffs have the burden of proving the 1995 Trust by clear and convincing evidence, which evidence cannot be "capable of reasonable explanation upon any other theory" and "must be so unequivocal and unmistakable as to lead to only one conclusion." *Order* at 3 (ECF No. 220). "[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson*, 477 U.S. at 249-50. Under these standards, the Estate is entitled to judgment as a matter of law.

ARGUMENT

The Estate is entitled to summary judgment for the following reasons:

(a) The Estate, as default beneficiary, is entitled to the Policy proceeds under both Illinois and Florida law unless Plaintiffs can prove the 1995 Trust by clear and convincing evidence.

(b) Plaintiffs are attempting to prove the existence and terms of the 1995 Trust through the testimony of David Simon and Ted Bernstein, who are "interested parties" under Illinois' Dead Man's Act. Their testimony is inadmissible in this proceeding, and Plaintiffs cannot otherwise establish the 1995 Trust by clear and convincing evidence.

(c) Even if the testimony of David Simon and Ted Bernstein were not barred by the Dead Man's Act, the circumstantial evidence is inconsistent and contradictory to such a degree that Plaintiffs still cannot prove the 1995 Trust by clear and convincing evidence.

I. The Estate, As The Default Beneficiary, Is Entitled To The Policy Proceeds Because Plaintiffs Cannot Prove The Existence of The Purported 1995 Trust.

In the absence of a valid designated beneficiary, the Policy proceeds are payable to the Estate as a matter of both Illinois and Florida law. *See New York Life Ins. Co. v. RAK*, 180 N.E.2d 470, 470-71 (Ill. 1962) (where beneficiary no longer existed, proceeds of life insurance policy passed to the decedent's estate); *Harris v. Byard*, 501 So.2d 730, 734 (Fla. Dist. Ct. App. 1987) (in the absence of a named beneficiary, no basis in law for directing payment of insurance policy proceeds to anyone other than decedent's estate for administration and distribution).

Here, as of the Insured's date of death, the designated primary beneficiary of the Policy was LaSalle National Trust, N.A. as Trustee of the S.B. Lexington, Inc. Employee Death Benefit Trust. SoF ¶ 20. The S.B. Lexington, Inc. Employee Death Benefit Trust ceased to exist prior to the Insured's death, and neither it nor LaSalle National Trust, N.A. as Trustee thereof has made any claim to the Policy proceeds. SoF ¶¶ 20-21. Thus, there is no valid designated primary beneficiary of the Policy.

The contingent beneficiary was the "Simon Bernstein Irrevocable Insurance Trust Dated June 21, 1995" (the "1995 Trust"). SoF ¶ 20. Plaintiffs admit that they have been unable to locate

False the contingent is Simon Bernstein Trust, NA

an executed original or executed copy of the 1995 Trust document. *See* SoF ¶ 44. Nonetheless, in Count II, Plaintiffs seek a declaration that the 1995 Trust was established on or about June 21, 1995 and is entitled to the Policy proceeds, the trustee is Ted Bernstein and the beneficiaries are Simon Bernstein's five children. *First Amended Complaint*, Count II (ECF No. 73). Alternatively, Count III seeks a declaration that the Policy proceeds are being held in a resulting trust for the benefit of Plaintiffs and Eliot Bernstein. *Id.*, Count III. The only available evidence, however, demonstrates that Plaintiffs cannot prove Simon Bernstein created or intended to create the 1995 Trust, nor can they prove its terms. Because Plaintiffs cannot establish the existence of the 1995 Trust, there exists no valid designated beneficiary under the Policy, and the proceeds are payable to the Estate. As a result, the Estate is entitled to judgment as a matter of law.

"In Illinois, creation of an express trust requires: (1) intent of the parties to create a trust, which may be shown by a declaration of trust by the settlor or by circumstances which show that the settlor intended to create a trust; (2) a definite subject matter or trust property; (3) ascertainable beneficiaries; (4) a trustee; (5) specifications of a trust purpose and how the trust is to be performed; and (6) delivery of the trust property to the trustee." *Eychaner v. Gross*, 779 N.E.2d 1115, 1131 (Ill. 2002). "If any one of the necessary elements is not described with certainty, no trust is created." *Id.*

"[A] resulting trust is created by operation of law and arises out of a presumed intention of the parties as evidenced by their acts and conduct." *Kaibab Indus., Inc. v. Family Ready Homes, Inc.*, 444 N.E.2d 1119, 1126 (Ill. App. Ct. 1983). Where a party does not establish the intent necessary to create an express trust, the Court cannot impose a resulting trust. *See Estate of Wilkening*, 441 N.E.2d 158, 164 (Ill. App. Ct. 1982) ("By definition, a resulting trust is imposed by operation of law to effectuate the intent of the parties. … [T]he Estate did not establish the

requisite intent necessary to create an express trust. Obviously, without the established intent, the court cannot impose a trust that operates to effectuate that intent.") (internal citations omitted).

Because they are unable to produce an executed copy of the 1995 Trust, Plaintiffs rely on parol evidence to prove the existence and terms of the 1995 Trust. *Order* at 3 (ECF No. 220).

> However, one seeking to establish an express trust by parol evidence bears the burden of proving the trust by clear and convincing evidence. The acts or words relied upon must be so unequivocal and unmistakable as to lead to only one conclusion. If the parol evidence is doubtful or capable of reasonable explanation upon any other theory, it is not sufficient to establish an express trust.

Eychaner, 779 N.E.2d at 1135; *Order* at 3 (ECF No. 220); *All. to End Repression v. City of Chicago*, 74 C 3268, 2000 WL 562480, *5 (N.D. Ill. May 8, 2000) (evidence is clear and convincing "only if the material offered instantly tilted the evidentiary scales in the affirmative when weighed against the evidence offered in opposition") (internal quotes omitted). Likewise, the intent necessary to support a resulting trust must be established by clear and convincing evidence. *Kohlhaas v. Smith*, 97 N.E.2d 774, 776 (Ill. 1951). In light of the facts taken most favorably to the non-moving parties, Plaintiffs cannot possibly satisfy this standard.

A. Plaintiffs Cannot Prove the Existence and Terms of the 1995 Trust by "Clear and Convincing Evidence" Because the Testimony of David Simon and Ted Bernstein is Barred by the Dead Man's Act.

Plaintiffs have no evidence that anyone actually witnessed Simon Bernstein execute the purported 1995 Trust or that anyone possesses an executed copy. To establish the intent to create the 1995 Trust, Plaintiffs instead rely primarily on the testimony of David Simon and Ted Bernstein that Simon Bernstein executed some form of the documents attached to Plaintiffs' prior summary judgment motion as Exhibits 15 and 16, which are purportedly unexecuted drafts of the 1995 Trust. As this Court already held, "[h]owever, the testimony of David Simon and Ted Bernstein, along with the testimony of other Plaintiffs, is barred by the Illinois Dead Man's Act to

the extent it relates to conversations with the deceased or to any events which took place in the presence of the deceased." *Order* at 3 (ECF No. 220) (citing 735 ILCS 5/8-201). The Court's holding was absolutely correct and remains so.

David Simon is the sole witness who claims to have seen the executed version of the purported 1995 Trust, and he testified that this took place during a meeting with Simon Bernstein. SoF ¶ 52. He also testified that he had a conversation with Simon Bernstein about the 1995 Trust and took notes from that conversation on Plaintiffs' Exhibit 15. SoF ¶ 45. The only other witness who offered testimony about the terms of the 1995 Trust is Ted Bernstein, who attests that Simon Bernstein told him he would be named trustee once the 1995 Trust was formed. SoF ¶¶ 54-55.[1]

The testimony of both witnesses is barred by the Dead Man's Act, which provides, in pertinent part, that "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 to any event which took place in the presence of the deceased." 735 ILCS 5/8-201. Plaintiff Ted Bernstein is an "adverse party" to the Estate and "directly interested" because he will receive 20% of the interpleaded Policy proceeds if Plaintiffs prevail. *See* SoF ¶¶ 3-4. Thus, the Dead Man's Act bars Ted Bernstein from testifying about any conversation with Simon Bernstein or events which took place in his presence.

In addition, Plaintiffs' most critical witness, David Simon, is Pamela Simon's spouse. SoF ¶ 6. Plaintiff Pamela Simon is not only an "adverse party," but is also "directly interested" because she will receive 20% of the Policy proceeds if Plaintiffs prevail. SoF ¶¶ 5, 7. As a result, the Dead Man's Act renders David Simon incompetent to testify about any conversation with or events which took place in the presence of Simon Bernstein, such as David Simon purportedly reviewing

[1] In addition to being barred by the Dead Man's Act, the testimony of David Simon and Ted Bernstein is also inadmissible hearsay. *See infra* § I(B)(1).

the executed 1995 Trust document with Simon Bernstein. *See In re Estate of Babcock*, 473 N.E.2d 1316, 1319 (Ill. 1985). The Dead Man's Act also bars David Simon from testifying about his notes. *See* 735 ILCS 5/8-201; *Theofanis v. Sarrafi*, 791 N.E.2d 38, 50-53 (Ill. App. Ct. 2003).[2]

"This dramatically limits the testimony upon which Plaintiffs may rely in support of their [claims regarding the existence and terms 1995 Trust], and leaves the Court without any direct testimony describing the Trust's creation." *Order* at 3 (ECF No. 220). Without such testimony, the two purported drafts of the 1995 Trust document cannot establish the existence and terms of the 1995 Trust by clear and convincing evidence. *See id.* ("those documents offer Plaintiffs little support in the absence of the testimony from David Simon and Ted Bernstein describing how some form of those exhibits was executed by Simon Bernstein").

Indeed, the mere existence of those two documents is not "so unequivocal and unmistakable as to lead to only one conclusion," *i.e.* that Simon Bernstein intended to create the 1995 Trust and its terms were as set forth in the purported drafts, which are not even identical. Rather, the existence of those two documents is readily "capable of reasonable explanation upon any other theory" than an intent to create a trust with those terms—indeed, multiple theories—for example, that Simon Bernstein never actually saw the drafts or approved those terms, or he wound up creating the 1995 Trust with completely different terms than the drafts, or the purported drafts are not even drafts of the 1995 Trust.

In other words, Plaintiffs have no competent evidence upon which a trier of fact could find that Simon Bernstein executed anything, much less a document creating the 1995 Trust. Plaintiffs likewise have no evidence that would enable the factfinder to find that any such document

[2] The Dead Man's Act likewise bars testimony by Plaintiffs Lisa Friedstein and Jill Iantoni, both of whom are "adverse" to the Estate and, like Ted and Pamela, "directly interested" because they will each receive 20% of the interpleaded Policy proceeds if Plaintiffs prevail. *See* SoF ¶¶ 8-10; 735 ILCS 5/8-201.

contained terms identical to the purported drafts or otherwise determine the actual or intended terms of the purported 1995 Trust. Therefore, Plaintiffs cannot carry their burden of proving the purported 1995 Trust by clear and convincing evidence. As a result, there is no valid designated beneficiary and the Policy proceeds are payable to the Estate, which is entitled to judgment as a matter of law. *See RAK*, 180 N.E.2d at 470-71 (where beneficiary no longer existed, proceeds of life insurance policy passed to the decedent's estate); *Harris*, 501 So.2d at 734 (in the absence of a named beneficiary, no basis in law for directing payment of insurance policy proceeds to anyone other than decedent's estate for administration and distribution).

B. Even If The Testimony of David Simon and Ted Bernstein Were Not Barred by the Dead Man's Act, There is Still Not "Clear and Convincing Evidence" Establishing the Existence and Terms of the 1995 Trust.

The Estate is entitled to summary judgment even if the testimony of David Simon and Ted Bernstein were not barred by the Dead Man's Act because the caliber and quality of that evidence and the other circumstantial evidence, even taken most favorably to the non-moving parties, is insufficient to allow a rational trier of fact to find an intent to create the 1995 Trust and determine its specific terms by clear and convincing evidence. In deciding the Estate's motion for summary judgment, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *See Anderson*, 477 U.S. at 255. But the Court must then determine whether that evidence "is of insufficient caliber or quantity" to allow a rational finder of fact to find that Plaintiffs have proven the 1995 Trust by clear and convincing evidence. *Id.* at 254. Again, clear and convincing evidence "must be so unequivocal and unmistakable as to lead to only one conclusion," and "[i]f the … evidence is doubtful or capable of reasonable explanation upon any other theory, it is not sufficient." *Eychaner*, 779 N.E.2d at 1135; *Kohlhaas*, 97 N.E.2d at 776; *All. to End Repression*, 2000 WL 562480 at *5.

Here, the available evidence demonstrates that Plaintiffs cannot satisfy the foregoing standard. Even assuming, *arguendo*, that the Dead Man's Act did not bar the testimony of David Simon and Ted Bernstein, that testimony and the other evidence does not unequivocally or unmistakably prove the intent of Simon Bernstein to create the 1995 Trust or the terms of that Trust. As detailed below, most of the testimony of David Simon and Ted Bernstein is hearsay, even if not barred by the Dead Man's Act. And the undisputed evidence about the events leading up to the "discovery" of the drafts are utterly inconsistent with the existence of a 1995 Trust. These include the inconsistent provisions of the drafts themselves, the inconsistencies between the testimony of the family as to what the drafts were to show, and what they do show, the failure of the family to discover those drafts for over a year despite supposedly exhaustive searches, and the conduct engaged in by the family, including David Simon and Ted Bernstein in considering and seeking to employ alternatives to a 1995 Trust to collect the proceeds.

1. The Inconsistent, Unexecuted Drafts of the 1995 Trust, and David Simon's and Ted Bernstein's Inconsistent Testimony About Them and the Trustee's Identity, Do Not Meet the "Clear and Convincing Evidence" Standard.

In place of an executed 1995 Trust document, Plaintiffs rely on two purported drafts of the 1995 Trust that are inconsistent with each other and with David Simon's testimony attempting to explaining how those drafts came to be, which testimony is itself internally inconsistent. Plaintiffs' Exhibit 16, the earlier draft, lists the potential trustees as "Shirley, David, [illegible name]?" and the successor trustees as "Pam, Ted." SoF ¶ 46. The more-recent "draft" embodied by Plaintiffs' Exhibit 15, however, lists Shirley as trustee and David Simon as successor trustee. SoF ¶ 48. In contrast to Plaintiffs' Exhibits 15 and 16, when the purported 1995 Trust first made a claim to the insurance company, it represented that Plaintiffs' former attorney, Robert Spallina, was the trustee. SoF ¶ 29. Despite all of this, in the current proceeding Plaintiffs claim now that Ted Bernstein is

the trustee. *Order* at 6 (ECF No. 220).

Plaintiffs' evidentiary basis for claiming Ted Bernstein is the trustee is two-fold. First, David Simon's testimony implies that he saw the executed 1995 Trust which provided that Ted Bernstein was the trustee. SoF ¶ 52. This is classic hearsay, however, in that the out of court statement written in the document (*i.e.* that Bernstein is trustee) is being offered to prove the truth of that assertion. As such, David Simon's testimony on this point is inadmissible irrespective of the Dead Man's Act.

Second, Ted Bernstein claims that Simon Bernstein told Ted that he was forming a life insurance trust and Ted would be one of the trustees once the trust was formed. SoF ¶ 55. Ted Bernstein further testified that his assertion that he is trustee is also based on David Simon telling Ted that he was the trustee and Ted seeing his name handwritten as one of multiple potential trustees on a document David Simon told him was a draft of the 1995 Trust. SoF ¶¶ 54-57. As such, Ted Bernstein has no personal knowledge about whether he is trustee. Ted's claim that he is trustee is entirely based on inadmissible hearsay, *i.e.* the out of court statements, spoken by Simon Bernstein and David Simon and written in the purported draft of the 1995 Trust, that Ted is the trustee, which are being offered by Ted for their truth. Admissibility aside, this still cannot constitute clear and convincing evidence that Ted is the trustee because it is capable of reasonable explanation by many other theories, *e.g.* Simon Bernstein never formed the 1995 Trust or did but decided not to make Ted trustee, the information given to Ted by David Simon was not accurate.

Similarly, David Simon's explanation of how those purported drafts came to be, which is inconsistent with the drafts, and his internally inconsistent attempts to explain the discrepancies, are not the caliber and quantity of evidence that would enable a reasonable trier of fact to conclude that Plaintiffs have shown the existence and terms of the 1995 Trust by clear and convincing

evidence. For example, David Simon testified that the trustees and successor trustees listed in Plaintiffs' Exhibit 16 are his handwritten notes from a June 20, 1995 conversation with Simon Bernstein in which Simon Bernstein said he wanted his wife, Shirley, to be trustee and asked David Simon to be the successor trustee, to which David Simon agreed. SoF ¶ 45. In contrast to his testimony about the conversation, David Simon's handwritten notes of that conversation list multiple potential trustees followed by a "?" and list multiple successor trustees—none of whom is David Simon. *See* SoF ¶ 46.

David Simon also testified that he used those handwritten notes on Plaintiffs' Exhibit 16 to create Plaintiffs' Exhibit 15. SoF ¶ 47. Yet the trustees' names handwritten on Plaintiffs' Exhibit 16 are not the same as the trustee in Plaintiffs' Exhibit 15, and the successor trustee listed in Plaintiffs' Exhibit 15 is not even one of the two successor trustees whose names are handwritten on Plaintiffs' Exhibit 16. *See* SoF ¶¶ 46, 48.

Attempting to explain why the more recent draft (*i.e.* Plaintiffs' Exhibit 15) lists a different individual than the individual who Plaintiffs now claim is the successor trustee, David Simon testified at this deposition that, after agreeing himself to be successor trustee, he thought about it overnight and then asked Simon Bernstein to replace him sequentially with Simon Bernstein's children. SoF ¶¶ 49. In contrast, David Simon later attempted to support Plaintiffs' summary judgment motion by inconsistently attesting in his affidavit that he actually suggested that Simon Bernstein appoint Ted Bernstein as the only successor trustee. SoF ¶ 50. Not coincidentally, in this proceeding, Ted Bernstein is who Plaintiffs now claim was the trustee. This supposed trustee has never seen an executed copy of the 1995 Trust, and his only bases for claiming he is trustee are Simon Bernstein telling him before any Trust was ever even purportedly created, David Simon telling him it is so, and him having seen it written on a document that David Simon told him was

a draft of the purported 1995 Trust. SoF ¶¶ 54-57.

In sum, the purported drafts of the 1995 Trust have inconsistent terms, Plaintiffs have taken inconsistent positions about the identity of the trustee, and David Simon's internally inconsistent testimony, which is inconsistent with the terms of the purported drafts, is also inadmissible hearsay, like Ted Bernstein's testimony. This aspect of the evidence is of insufficient caliber and quantity to enable a rational trier of fact to conclude that Plaintiffs have proven by clear and convincing evidence both an intent to create the 1995 Trust and its terms.

2. David Simon's Testimony About the Discovery of the Purported Drafts of the 1995 Trust Does Not Contribute to Satisfying the "Clear and Convincing Evidence" Standard.

Plaintiffs' testimony about the circumstances under which the purported drafts of the 1995 Trust were supposedly discovered does not support the validity of those documents or their value in showing that Simon Bernstein intended to create a trust with those terms. Shortly after the death of Simon Bernstein in 2012, his family (including the Plaintiffs) conducted what was described as an "exhaustive search" for the 1995 Trust, and none was found. SoF ¶ 24-25. One year later, David Simon (with the help of his brother and counsel herein, Adam), searched his office and records in Chicago and purportedly located both a hard copy draft of the 1995 Trust and a version prepared on a word processor at the Simon Law Firm. *See* SoF ¶¶ 39-42.

Between the "exhaustive" search conducted in the aftermath of Simon Bernstein's death and the search conducted by the Simon brothers, however, Plaintiffs and their then-attorney, Robert Spallina, exchanged many emails referring to the inability to locate a trust document and addressing how best to extract the insurance proceeds from Heritage. SoF ¶¶ 32. David Simon was a participant in those email exchanges, yet in none of those emails did he relate a recollection of the critical fact that he drafted the 1995 Trust and saw the final executed version, which named

Ted Bernstein trustee. *See id.*; *Order* at 4-5 (ECF No. 220). Nor did it come to his mind to check his office files and his computer for this critical document. Those critical facts are also found nowhere in the original Complaint David Simon's brother filed in this action during that period. SoF ¶ 37. Apparently, David Simon inexplicably did not search his office and computer files for Plaintiffs' Exhibits 15 and 16 until one year later.

3. David Simon's Uncorroborated Testimony about the Creation of the 1995 Trust Does Not Help Plaintiffs Satisfy the "Clear and Convincing Evidence" Standard.

According to David Simon, Simon Bernstein took the draft 1995 Trust document to Hopkins & Sutter to be executed and the identity of the successor trustee on the executed version was changed when he saw the final version. SoF ¶¶ 48-52. This clearly implies that the document was revised at Hopkins & Sutter, and thus, the firm would have an electronic and possibly a hard copy of the final version of the document which was purportedly executed. David Simon testified that Foley & Lardner, the successor firm to Hopkins & Sutter, and other attorneys who broke away and started their own firm, were contacted to see if they had retained a copy of the 1995 Trust, but they did not. Oddly, David Simon has no idea who specifically was contacted or even whether it was him or someone else who contacted them. SoF ¶ 26; *Order* at 5 (ECF No. 220).

Perhaps more importantly, David Simon testified that after Simon Bernstein returned from executing the 1995 Trust, he assisted Simon Bernstein in preparing documents to be submitted to the insurer in order to give effect to the 1995 Trust and that he would have expected the insurer to retain copies of the documents. *See* SoF ¶ 53. Again, however, he cannot recall who called the insurer or with whom that person spoke, and the insurer retained no copies of documents relevant to the 1995 Trust. *Id.*; *Order* at 5-6 (ECF No. 220).

4. The Creation of the 2000 Trust is Inconsistent with the Existence of the 1995 Trust and the Notion That Ted Bernstein is the Trustee.

While Plaintiffs addressed the lack of an executed 1995 Trust document in their email exchanges, they also considered several other options for attempting to obtain the Policy proceeds from the insurer. One of the options was "using" the 2000 Trust, a trust that Simon Bernstein admittedly executed. SoF ¶¶ 27-28. Plaintiffs deliberated extensively over this option, exchanging numerous emails with their then-counsel, Robert Spallina, but this option was rejected because the 2000 Trust did not include Pamela Simon as a beneficiary. SoF ¶ 27. As an initial matter, the notion of Plaintiffs "using" the 2002 Trust to obtain the Policy proceeds is entirely inconsistent with Ted Bernstein's supposed understanding that he was the trustee of a 1995 Trust. His participating in "using" the 2000 Trust to obtain Policy proceeds of which the 1995 Trust was supposedly the beneficiary would have breached his fiduciary duties as trustee of the 1995 Trust.

More importantly, however, the existence of the 2000 Trust is also critical because it identifies the proceeds of the insurance policy at issue here as an asset of *that* Trust, but does not refer to the existence of the alleged 1995 Trust, which the 2000 Trust would have superseded. SoF ¶¶ 58-59; *Order* at 5 (ECF No. 220).[3] No rational trier of fact could conclude that Simon Bernstein 1) executed the 2000 Trust, 2) omitting any reference to a 1995 Trust, but 3) actually *intended* for the Policy proceeds identified as an asset of the 2000 Trust not to pass in accordance with the terms of that Trust and 4) instead to pass in accordance with the terms of a trust he supposedly created five years earlier. And, on this evidence, no rational trier of fact could determine the specific terms of the 1995 Trust by clear and convincing evidence.

[3] It is also significant that no subsequent estate planning document executed by Simon Bernstein revokes, or even refers to the existence of, a purported 1995 Trust. *See* SoF ¶¶ 60-65.

All of the evidence that exists in this case taken as true, and considered most favorably to the Plaintiffs, nonetheless presents a confused, contradictory and inconsistent series of events with regard to whether the 1995 Trust ever existed and what its terms were. Even if a trier of fact believed that both David Simon and Ted Bernstein were telling the truth, *i.e.* believed what they were saying, the Court must consider that testimony with all of the other circumstantial evidence, not one item of which supports the notion that Simon Bernstein intended to create the 1995 Trust or that anyone knows its terms. As a consequence, no reasonable trier of fact could conclude that this amalgam of evidence proves the existence and terms of a 1995 Trust by clear and convincing evidence.

CONCLUSION

For the foregoing reasons, the Estate respectfully requests that the Court grant summary judgment in favor of the Estate on its Complaint for Declaratory Judgment (ECF No. 112) and on Plaintiffs' First Amended Complaint (ECF No. 73).

Dated: May 25, 2016

BRIAN M. O'CONNELL, PERSONAL REPRESENTATIVE OF THE ESTATE OF SIMON L. BERNSTEIN, Intervenor

By: /s/ James J. Stamos
One of Intervenor's Attorneys

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he caused a copy of the foregoing **Intervenor's Local Rule 56.1(a)(2) Memorandum of Law in Support of Summary Judgment** to be served upon all registered E-Filers via electronic filing using the CM/ECF system, and to be served upon the following persons via U.S. mail, proper postage prepaid:

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on this 25th day of May, 2016.

/s/ James J. Stamos