

**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
Honorable John Robert Blakey
Magistrate Mary M. Rowland**

v.)
)
HERITAGE UNION LIFE INSURANCE)
COMPANY,)

Defendant,)

**Simon Bernstein Irrevocable
Insurance Trust Dated 6/21/95,
Ted Bernstein, as Trustee and
Individually,
Pamela B. Simon
("Plaintiffs")**

HERITAGE UNION LIFE INSURANCE)
COMPANY)

Counter-Plaintiff)

**PLAINTIFFS' SUPPLEMENTAL
STATEMENT OF
UNDISPUTED MATERIAL FACTS IN
SUPPORT OF THEIR MOTION FOR
SUMMARY JUDGMENT**

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)

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.)

Plaintiffs, pursuant to Local Rule 56.1, submit the following supplemental statement of uncontested material facts, including a supplemental appendix of exhibits hereto, in support of their motion for summary judgment.

I. INTRODUCTION

On March 27, 2015, Plaintiff's filed their initial statement of undisputed facts numbered 1-75, in support of their motion for summary judgment. [**Dkt. #150, Pltf's Statement of Undisputed Facts**]. Plaintiff's motion for summary judgment was denied. [**Dkt. #220**].

Now the Estate of Simon Bernstein (the "Estate") has filed its motion for summary judgment claiming that Plaintiff's cannot prove their claim to the Policy Proceeds and in the absence of a named beneficiary of the Policy, the Estate takes the Policy Proceeds by default.

In order to respond to and overcome the Estate's motion for summary judgment, Plaintiffs must again set forth the undisputed facts that support their claims. Within the last two months, Plaintiffs were able to obtain the Affidavit of Robert Spallina, Simon Bernstein's final estate planning attorney. Plaintiff served the affidavit upon all parties in this litigation on July 15, 2016. In the interest of clarity and economy, instead of submitting an entirely new statement of undisputed facts, Plaintiff is incorporating by reference its initial statement of undisputed facts and then filing this supplemental statement in order to set forth the additional undisputed facts contained in the Affidavit of Robert Spallina.

Plaintiffs recognize that its Initial Statement of Undisputed Facts contains references to certain testimony involving conversations between Plaintiffs (and interested persons) and the decedent that this court ruled were inadmissible under the Illinois Dead Man's Act. Plaintiffs' memorandum in opposition to the Estate's motion for summary judgment does not rely upon such excluded testimony.

II. PLAINTIFF'S SUPPLEMENTAL STATEMENT OF UNDISPUTED FACTS

76. In October of 2013, and then again in 2014 after the Estate intervened, Plaintiffs served all parties with Rule 26 disclosures which disclosed Donald Tescher and Robert Spallina (erroneously referred to at times as Ronald Spallina) and the law firm of Tescher & Spallina as potential witnesses in this matter. On July 15, 2016, Plaintiff served all parties in this litigation with the Affidavit of Robert Spallina who was Simon Bernstein's final estate planning attorney in the years before his death. Also, attached to the Affidavit of Robert Spallina are his contemporaneous notes from his 2012 estate planning meetings with Simon Bernstein to which he makes reference in his Affidavit. **(Ex. 37, Affidavit of Robert Spallina).**

77. Currently and for the past several years, there have been several actions pending in the Palm Beach County Court, Probate Division. Certain testamentary trusts (not the insurance trusts at issue here) and the Will of Simon Bernstein have been filed with and submitted to the Probate Court.

78. On December 15, 2015, after a bench trial was held, and where Eliot Bernstein appeared and represented himself *pro se*, Judge John L. Phillips entered an Order including the following:

- a. This was a "Final Judgment" on Count II of the Amended Complaint;
- b. A trial was held on December 15, 2015 pursuant to the Court's Order setting trial on Amended Complaint Count II;
- c. The Court received evidence in the form of documents and testimony of witnesses;
- d. The Court heard argument from counsel and *pro se* parties who wished to argue;
- e. The Court found that five testamentary documents, including the Will of Simon Bernstein and a Simon Bernstein Amended and Restated Trust Agreement dated July 25, 2012 are "genuine and authentic, and are valid and enforceable according to their terms."

- f. That based on evidence presented, “Ted S. Bernstein, Trustee, was not involved in the preparation or creation of the Testamentary Documents...Ted S. Bernstein played no role in any questioned activities of the law firm of Tescher & Spallina, P.A., who represented Simon and Shirley when they were alive. There is no evidence to support the assertion of Eliot Bernstein that Ted Bernstein forged or fabricated any of the Testamentary Documents, or aided or abetted others in forging or fabricating documents. The evidence shows Ted Bernstein played no role in the preparation of any improper documents, the presentation of any improper documents to the Court, or any other improper act, contrary to the allegations of Eliot Bernstein.

- g. This ruling is intended to be a Final Judgment under Rule 9.170 of the Florida Rules of Appellate Procedure...” **(Ex. 38, Probate Order of 12/15/15, *Ted Bernstein, as Trustee of Shirley Bernstein Trust Agreement v. Alexandra Bernstein...Eliot Bernstein, et. al. No. 502014CP003698.*)**

Dated: August 24, 2016

Respectfully submitted,

/s/ Adam Simon

Adam Simon, Esq.

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Attorney for Plaintiffs

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(OF ILLINOIS) AND JOHN AND JANE)
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Third-Party Defendants.)
<hr/>)

NOW COMES Plaintiffs, Simon Bernstein Irrevocable Insurance Trust dated June 21, 1995, by Ted Bernstein, as Trustee, Ted Bernstein, individually, and Pamela Simon (“Plaintiffs”), by and through their undersigned counsel, and respectfully submit this memorandum of law in opposition to the motion for summary judgment filed on behalf of the Estate of Simon Bernstein (the “Estate”).

I. FACTUAL BACKGROUND

A. THE PARTIES

Please see **SoF ¶¶1-¶25** for a review of the identity and status of the parties.¹

B. THE POLICY

The Policy was originally purchased from Capitol Bankers by the VEBA in December of 1982 to insure the life Simon Bernstein. The “Policy” was issued as Policy No. 1009208 with an original sum insured of \$2,000,000.00. (**SoF ¶26; Ex. 5**)

C. THE INSURED

Simon Bernstein was the Insured under the Policy. Shirley, his spouse, predeceased Simon Bernstein. The identity of the Insured is not in dispute, nor does anyone dispute that the Insured passed away on September 13, 2012. (**SoF, ¶26, ¶52, ¶68; Ex. 12**)

D. THE INSURER

The Insurer of the Policy changed over the life of the Policy from time to time through corporate succession. The Insurer has been previously dismissed from this case after having deposited the Policy Proceeds with the Registry of the Court. Prior to its dismissal, the Insurer did not dispute either the existence of the Policy or its liability for the Policy Proceeds following the death of the insured. (**SoF ¶11**)

E. THE POLICY PROCEEDS (THE “STAKE”)

In the Insurer’s Complaint for Interpleader, the Insurer represented that the net death benefit payable under the Policy on the date of Simon Bernstein’s death was \$1,689,070 (less an

¹ Pursuant to Local Rule 56.1, Plaintiffs filed their original statement of uncontested facts for their initial motion for summary judgment on March 27, 2015 [**Dkt. #150**]. Plaintiffs have now filed a filed their Supplemental Statement of Uncontested Material Facts simultaneously herewith. Collectively, Plaintiff’s Statements of Uncontested Facts and the Supplemental Statement of Facts are referred to herein as (“**SoF**”).

outstanding policy loan). (**Ex. 28 at ¶17**). In its Rule 26 disclosures and in the Affidavit of Don Sanders, the Insurer provided documentation and testimony verifying the amount of the Policy Proceeds. No objections were made by any Party to this litigation regarding the amount of the Policy Proceeds that the Insurer deposited with the Registry of the Court. (**SoF ¶11**)

F. THE POLICY PROVISIONS ON BENEFICIARIES

The Policy provisions which set forth both the definitions of a beneficiary under the Policy, and the requirements for naming or changing a beneficiary of the Policy are the controlling factors in making the determination as to whom is the beneficiary of the Policy Proceeds. *Bank of Lyons v. Schultz*, 22 Ill.App.3d 410, 415, 318 N.E.2d 52, 57 (1st Dist., 1974) *citing* 2 Appelman, Insurance Law and Practice §921 (1966). In this instance, the Policy defines “Beneficiary” as follows:

A Beneficiary is any person *named on our* [the Insurer’s] *records* to receive proceeds of this policy after the insured dies. There may be different classes of Beneficiaries, such as primary and contingent. These classes set the order of payment. There may be more than one beneficiary in a class. Unless you provide otherwise, any death benefit that becomes payable under this policy will be paid in equal shares to the Beneficiaries living at the death of the Insured. Payments will be made successively in the following order: (emphasis added)

- a. Primary Beneficiaries.
- b. Contingent Beneficiaries, if any, provided no primary Beneficiary is living at the death of the Insured.
- c. The Owner or the Owner’s executor or administrator, provided no Primary or Contingent Beneficiary is living at the death of the Insured.

Any Beneficiary may be named an Irrevocable Beneficiary. An irrevocable beneficiary is one whose consent is needed to change that Beneficiary. Also, this Beneficiary must consent to the exercise of certain other rights by the Owner. We discuss ownership in part 2. (**SoF, ¶26; Ex. 5 at bates no. JCK00101**).

Here, the application for the Policy indicates that initial Policy Owner designated “First Arlington Bank, Trustee of S.B. Lexington Employee Death Benefit Trust” [the “VEBA”] as the

Beneficiary of the Policy. This was accomplished by the Policy Owner completing the beneficiary section of the application. **(SoF, ¶28).**

The Policy also includes the Insurer's requirements for the Policy Owner to effectuate a change of beneficiary. With regard to changing the beneficiary, the Policy provides as follows:

The Owner or any Beneficiary may be changed during the Insured's lifetime. We do not limit the number of changes that may be made. *To make a change, a written request, satisfactory to us, must be received at our Business Office.* The change will take effect as of the date the request was signed, even if the Insured dies before we receive it. Each change will be subject to any payment we made or other action we took before receiving the request. **(Ex. 5 at bates #JCK00103).** (emphasis added).

G. THE DESIGNATED BENEFICIARIES OF THE POLICY

According to the records of the Insurer, the last change of Beneficiaries was submitted to the Insurer by the Policy Owner on or about November 27, 1995. **(SoF, ¶33).** As a result of that last change of Beneficiaries, the Beneficiaries of the Policy proceeds designated by the Owner as of the Insured's date of death (Sept. 13, 2012), were as follows: LaSalle National Trust, as Successor Trustee (primary beneficiary), and Simon Bernstein Irrevocable Insurance Trust dtd June 21, 1995 (contingent beneficiary). **(SoF, ¶33 and ¶34)**

The VEBA was an employee benefit plan that provided death benefits to the beneficiaries of the S.B. Lexington VEBA plan participants. The Policy was initially purchased by the VEBA and at Policy issuance the VEBA was both Policy Owner and Primary Beneficiary. **(SoF, ¶27 and ¶28).** As part of the VEBA, the plan participant (an S.B. Lexington Employee), was authorized to designate his/her intended beneficiary of their death benefit under the VEBA. Simon Bernstein, as a plan participant, executed a beneficiary designation form for the death benefits provided through the VEBA. In August of 1995, Simon Bernstein designated the

“Simon Bernstein Irrevocable Insurance Trust” as his beneficiary for the death benefit provided through the VEBA. (SoF, ¶32; Ex. 4)

Simon Bernstein’s beneficiary designation form which contains his designation of the Bernstein Trust as his beneficiary for the VEBA death benefit provides extremely strong corroborating evidence of both (i) the existence of the Bernstein Trust; and (ii) Simon Bernstein’s intent that the beneficiary of the Policy is the Bernstein Trust. (SoF, ¶32; Ex. 4).

Plaintiffs also submit a simple diagram (Ex. 17) which is referred to and explained in Ex. 30, Aff. of Ted Bernstein at ¶105-¶106. This diagram illustrates that whether the Policy Proceeds were paid to the Primary Beneficiary -- the VEBA-- or the Contingent Beneficiary -- the Bernstein Trust, the result is the same. Ultimately, the Policy Proceeds are to be paid to the Bernstein Trust. (SoF, ¶44)

In 1998, S.B. Lexington was voluntarily dissolved and the VEBA terminated at the same time. In conjunction with this dissolution, the ownership of the Policy was also changed in 1998 from the VEBA to Simon Bernstein. So, as of 1998, it is undisputed that the Primary Beneficiary under the Policy, the VEBA, had ceased to exist, and thus the sole surviving beneficiary was the contingent beneficiary, the 1995 Bernstein Trust. (SoF ¶21 and ¶36)

ARGUMENT

A. STANDARDS

Plaintiffs incorporate by reference the summary judgment standards set forth by the court in its Order of March 16, 2016. [Dkt. #220 at p.1-2].

B. GOVERNING LAW

Where an insurance policy is the result of an application to an agent of the insurance company within a state, the policy after having been issued, delivered by the company's agent within the state, and the premiums paid by the insured within the state to the company, the policy becomes a contract of that state, subject to the applicable laws of said state. Where the most significant contacts of the contract are made, the applicable law of that place is controlling.

Minnesota Mut. Life Ins. Co. v. Sullivant, 334 F.Supp 346, 349 (1971), citing *New York Life Ins. Co. v Head*, 234 U.S. 149, 34 S.Ct. 879, 58 L.Ed. 1259 (1914).

Here, the law of the state of Illinois controls because it is undisputed that the first Policy Owner, the VEBA, was domiciled at the offices of its Bank Trustee located in Illinois. Simon Bernstein was the agent who sold the Policy and it is undisputed that when he sold the Policy he was a citizen of the state of Illinois, and the Policy would have been delivered to the Owner in the state of Illinois. Simon Bernstein was also the insured under the Policy and the application was signed in Illinois. (SoF ¶28). In short, all of the significant contacts with regard to the application, sale and delivery of the Policy occurred in Illinois. Also, the affidavit of David Simon and the drafts of the 1995 Bernstein Trust indicate it was drafted in Illinois, by Illinois counsel pursuant to Illinois law.

C. THE SIMON BERNSTEIN IRREVOCABLE INSURANCE TRUST DATED JUNE 21, 1995 (THE "1995 BERNSTEIN TRUST")

As set forth above, the last named Contingent Beneficiary of the Policy was the Bernstein Trust. One of the reasons the Insurer refused to pay the Policy Proceeds to the Bernstein Trust upon presentation of the death claim was because no one has been able to locate an original or copy of an executed trust agreement for the Bernstein Trust. (SoF ¶45). But, Plaintiffs in their

Statement of Undisputed Facts set forth a comprehensive and cohesive bundle of evidence, including signed documentation from both the settlor and the initial trustee of the Bernstein Trust evidencing the existence of the Bernstein Trust. In addition, Plaintiffs have supplemented their submissions and statement of undisputed facts with the affidavit of Robert Spallina, Simon Bernstein's final estate planning attorney.

Earlier in this litigation, Plaintiff's ability to secure the testimony of Mr. Spallina was impeded. Mr. Spallina was the subject of an SEC investigation resulting in an SEC Complaint being filed and then promptly resolved in September of 2015. Subsequently, Mr. Spallina voluntarily placed his Florida Law License on inactive status. Mr. Spallina's legal issues have been sufficiently resolved such that Plaintiffs have now been able to secure Mr. Spallina's affidavit. Mr. Spallina's sworn testimony is crucial because it comes from an uninterested party whose testimony is not barred by the Illinois Dead Man's Act. Mr. Spallina's affidavit also includes corroborating evidence in his contemporaneous notes which are attached to his affidavit.

In his affidavit, Mr. Spallina attests as follows:

- a. That beginning in 2007 until his death, Mr. Spallina and his law firm provided estate planning advice and represented Simon Bernstein.
- b. That in the spring and early summer of 2012, Simon Bernstein consulted Mr. Spallina to review his estate plan.
- c. That Simon Bernstein informed him that he had formed the 1995 Bernstein Trust and that the 1995 Bernstein Trust was the beneficiary of a life insurance policy with a death benefit of \$1.6 million. Simon Bernstein informed him that the beneficiaries of the 1995 Bernstein were Simon Bernstein's five children.
- d. That Simon Bernstein discussed making changes to the beneficiary of the insurance policy, but Mr. Spallina advised him against it, and Simon Bernstein left the beneficiary unchanged.

- e. That Simon Bernstein purposefully never transferred ownership or changed the beneficiary of the Policy to the 2000 Trust that had been drafted by an attorney for Proskauer Rose. Simon Bernstein decided to retain ownership and control of the Policy himself.
- f. That Simon Bernstein made changes to his Estate plan in 2012 to provide that the assets in his estate would skip a generation and would go to his ten grandchildren and not his five children.
- g. That Simon Bernstein informed Robert Spallina that he intended for his life insurance Policy proceeds to pass ultimately to his five children, in equal shares, through the irrevocable trust that was the named beneficiary of the Policy.
- h. That having discussed these matters with Simon Bernstein , it was evident to Mr. Spallina that Simon Bernstein understood the benefits of retaining ownership and control of the policy in his own name, and also understood the asset protection and administrative benefits of forming and naming an irrevocable trust -- the 1995 Bernstein Trust -- as the beneficiary of the Policy. **(SoF, ¶76-¶78, Ex. 37, Affidavit of Robert Spallina).**

The Illinois Dead-Man's Act does not bar the testimony of a decedent's attorney regarding conversations with decedent about his testamentary intent, his will or estate plan. *In re Estate of Sewart*, 274 Ill.App.3d 298, 652 N.E.2d 1151, 210 Ill.Dec. 175 (5th Dist., 1995).

In *Sewart*, the court reasoned as follows:

Synek's testimony was not barred by the Dead-Man's Act for several reasons. First, as the trial court found, Synek was not an interested person. Synek would not gain or lose as an immediate and direct result of the suit. (See *In re Estate of Henke* (1990), 203 Ill.App.3d 975, 149 Ill.Dec. 36, 561 N.E.2d 314; *Michalski v. Chicago Title & Trust Co.* (1977), 50 Ill.App.3d 335, 8 Ill.Dec. 416, 365 N.E.2d 654.) Synek's right to recover fees against the estate was not contingent upon his successful defense of the estate. Moreover, Synek was not testifying on his own behalf. (See 735 ILCS 5/8-201 (West 1992))

In *Michalski*, the court enforced the transfer of interests in real estate to Plaintiffs even though the deeds were missing and unrecorded. The court allowed the testimony of the decedent's attorney regarding decedent's intent to transfer the real estate to plaintiffs over the defendant's objection made pursuant to the Dead-Man's Act. The trial court, sitting without a jury, allowed the testimony finding decedent's attorney was not an interested person for purposes

of the Dead Man's Act. The court rejected defendant's argument that the possibility of a legal malpractice claim somehow made the attorney directly interested in the outcome. The Trial Court's holdings on both the evidentiary ruling on the application of the Dead Man's Act and the judgment for Plaintiff were unanimously affirmed. The reviewing court agreed that despite the missing and unrecorded deeds, Plaintiff's evidence was "overwhelming" and sufficient to satisfy the applicable burden of proof of clear and convincing evidence. *Michalski v. Chicago Title and Trust Co.*, 50 Ill.App.3d 335, 365 N.E.2d 654, 8 Ill.Dec. 416 (2nd Dist., 2011).

All of the same factors that made the attorneys' testimony admissible in the Illinois case law cited above apply to Mr. Spallina's sworn testimony in this matter. Mr. Spallina is not an interested person, and has nothing to gain or lose as a direct result of the outcome of this litigation which relates only to the determination of the beneficiary of certain life insurance proceeds in which Spallina claims no interest.

Plaintiffs have also provided sworn witness testimony and unexecuted drafts of the Bernstein Trust Agreement establishing the terms and beneficiary of the Bernstein Trust. Further, Plaintiffs have attached affidavits of four of Simon Bernstein's adult children accounting for 4/5ths of the beneficiaries of the Bernstein Trust, and these 4/5ths are all in agreement with regard to the terms of the Bernstein Trust and intent of the Settlor. It is also important to note that this is not a case where the four consenting beneficiaries are trying to exclude the fifth beneficiary. Instead, the four consenting beneficiaries seek distribution of the Policy Proceeds to all five children of Simon Bernstein as beneficiaries, *including Eliot Bernstein*.

D. THE 1995 BERNSTEIN TRUST WAS FORMALLY ESTABLISHED BY SIMON BERNSTEIN AS AN EXPRESS TRUST.

In *Butler*, the Iowa Supreme Court cited to an extensive array of case law on the subject of the establishment of express trusts including several applicable citations to Illinois law and reviewed the following pronouncements:

“Neither a statement by the settlor, nor a formal written declaration is essential to establish a trust”. The court continued, “Whether a trust has been perfectly created is largely a question of fact in each case, and the court in determining the fact will give efficacy to the situation and relation of the parties, the nature and situation of the property, and the purpose and objects which the settlor had in view.” *Butler v. Butler*, 253 Iowa 1084, 1113, 114 N.W.2d, 595, 612 (1962) citing Perry on Trusts and Trustees, 7th Ed, vol. 1, p.124.

Next, the *Butler* court cited the Illinois Supreme Court case *McDiarmid* as follows:

“In support of their contention that they have proved an express trust appellees rely on our holdings in *Kingsbury v. Burnside*, 58 Ill. 310, 11 Am.Rep. 67, and many other decisions, including *Whetsler v. Sprague*, 224 Ill. 461, 79 N.E. 667, supra. These decisions hold that the statute of frauds has been complied with if the trustee makes a memorandum or writing showing that the property is held in trust. *The details of the trust may be established aliunde and even by parol evidence.*” *Butler*, 235 Iowa 1084, 1114, 114 N.W.2d 595, (1962) citing *McDiarmid v. McDiarmid*, 368 Ill. 638, 15 N.E.2d 493 (1938)

The *Butler* court also held that an express trust may be proven by a writing signed by the grantor or trustee of the trust, but not from its cestui que. *Holmes v. Holmes*, 65 Wash. 572, 118 P. 733, 734 (1911), Pomeroy’s Eq. Jur. (3 Ed.) §1007. The court also set forth certain legal principles regarding the Settlor’s manifestation of his intent to create a trust. The court stated:

“Except as otherwise provided by statute, the manifestation of intention to create a trust may be made by written or spoken words or conduct. No particular form of words or conduct is necessary for the manifestation of intention to create a trust.(cites omitted) Acts prior to and subsequent to, as well as acts contemporaneous with the manifestation which it is claimed creates a trust, may be relevant in determining the settlor’s intention to create a trust.” *Butler*, 235 Iowa 1084, 1113, 114 N.W.2d 595, 613 (1962)

Since an interest in real property is not at issue here, the Statute of Frauds is not applicable. But, even if it were, Plaintiffs' have provided ample evidence in the form of signed writings by both the Settlor and Trustee which establish the existence of the Bernstein Trust as an express trust. As far as written evidence which establishes the formation and existence of the Bernstein Trust, Plaintiffs submit the following:

1. The VEBA Beneficiary Designation form is critically important because it (i) contains the signature of the Simon Bernstein, (ii) refers to the "Simon Bernstein Irrevocable Insurance Trust", and (iii) memorializes Simon Bernstein's intent that the Policy Proceeds were to be paid to the Bernstein Trust. **(SoF, ¶32)**. Under the case law discussed above, this document alone is sufficient evidence of the establishment and existence of the Bernstein Trust.
2. The SS-4 Form used to obtain the Federal Tax Identification Number for the Bernstein Trust is also conclusive evidence of the formation of the Bernstein Trust. The SS-4 Form contains reference to the "Simon Bernstein Irrevocable Insurance Trust", and is signed and dated on June 21, 1995 by the initial trustee of the Bernstein Trust, Shirley Bernstein. **(SoF, ¶41)**. As discussed above, the signature of a Trustee is also sufficient on its own to evidence the establishment of a trust.
3. The Beneficiary Designation Forms for the Policy submitted by the Policy Owner designates the Bernstein Trust as a Contingent Beneficiary. **(SoF, ¶33 and ¶34)**
4. The unexecuted versions of the Bernstein Trust Agreement provide evidence of the Settlor's intent to form the trust. This document also establishes the terms of the "irrevocable trust". According to both drafts of the Bernstein Trust Agreement, the beneficiaries of the Bernstein Trust are the five children in equal shares. **(SoF, ¶50)**
5. The change of owner form signed by Simon Bernstein on August 8, 1995 which transferred his ownership interest in the Lincoln Policy to the Bernstein Trust. This document contains the full name of the Bernstein Trust, the tax identification number of the Bernstein Trust as reflected on the IRS SS-4 form, and it identifies the initial trustee, Shirley Bernstein.

In addition to the documentation produced in this case, Plaintiffs have proffered corroborating parole evidence of Simon Bernstein's intent to i) form the Bernstein Trust: (ii) designate the Bernstein Trust as the beneficiary of the Policy proceeds; (iii) designate his wife Shirley Bernstein, as initial trustee, and his son Ted, as successor trustee; and (iv) designate his

five children as beneficiaries of the Bernstein Trust. Such additional evidence includes the following:

- a) Affidavit of Don Sanders, Asst. Vice-President of Operations of the Insurer
- b) Affidavit of Ted Bernstein (revise to include his current appointments and approvals)
- c) Affidavit of Pam Simon
- d) Affidavit of Jill Iantoni
- e) Affidavit of Lisa Friedstein
- f) Affidavit of David B. Simon
- g) Deposition of David B. Simon
- h) Affidavit of Robert Spallina

E. PLAINTIFFS HAVE SET FORTH UNDISPUTED EVIDENCE THAT THE BENEFICIARY OF THE POLICY PROCEEDS IS THE BERNSTEIN TRUST.

Plaintiffs have submitted a simple diagram marked as **Ex. 17** in their Appendix of Exhibits. In his Affidavit (**Ex. 30 at ¶106**), Ted Bernstein explains the diagram and how it illustrates Simon Bernstein's intent with regard to the Policy Proceeds. This diagram shows that when Simon Bernstein executed the VEBA Member Beneficiary Form in 1995, just months after he formed the Bernstein Trust, he expressed his intent in a signed writing that the Policy Proceeds should be paid to the VEBA and then flow through to the Bernstein Trust (**Ex. 17, Option A**). In a belt in suspenders approach, the Bernstein Trust was also named contingent beneficiary of the Policy as illustrated in the diagram. So, if the Insured survived the primary beneficiary--which he did in this case--the Policy Proceeds would still be paid to the Bernstein Trust as contingent beneficiary (**Ex. 17, Option B**). (**SoF, ¶44**).

Simon Bernstein spent most of his career as a life insurance agent and owner and operator of life insurance agencies and brokerages. (**SoF, ¶46**). Simon Bernstein knew what was required to change an owner or beneficiary of a life insurance policy, and that the terms of the life insurance contract, and records of the insurer determine the beneficiary of the Policy

Proceeds. Approximately a year before his death, Simon Bernstein completed the necessary paperwork and submitted the required premium to reinstate the Policy after it had lapsed. In doing so, Simon Bernstein made no changes to the owner or beneficiary of the Policy when he transmitted the forms to the Insurer. **(SoF, ¶44).**

F. THE ESTATE OF SIMON BERNSTEIN'S INTERVENOR COMPLAINT

Benjamin Brown, as personal representative of the Estate of Simon Bernstein (the "Estate") was granted leave to intervene in this litigation on July 28, 2014 **(SoF, ¶25)**. But, intervenor's complaint does not set forth a conflicting claim to the Policy Proceeds with any affirmative evidence that the Estate was either a primary or contingent beneficiary of the Policy. Instead the complaint merely sets forth the Estate's assertion that if all other claimants fail to establish a claim to the Policy Proceeds, then the Policy Proceeds should be paid to the Estate by default. So, when reviewing this motion the court should look at the facts and submissions and resolve all doubt in favor of the non-moving party, the Plaintiffs. If the court determines that Plaintiffs submissions provide sufficient support for their claims to the Policy Proceeds such that a triable issue of fact remains, then the court must deny the Estate's motion.

It is also important for the court to take a step back and look at what the Estate is trying to accomplish here. The 2012 Will of Simon Bernstein, determined by the Florida court to be valid and enforceable according to its terms, is the controlling document governing the Estate and its actions. **(SoF, ¶79)**. The Estate should be enforcing the "WILL" of Simon Bernstein, but instead the personal representative is doing his level best to subvert it. A Will, by its very nature, is a legal instrument designed to express one's intent. Simon Bernstein's Will contains a provision expressly reaffirming his beneficiary designations and his *intent* that any proceeds of an

insurance contract be paid to the designated beneficiary of that contract. (SoF ¶68). Despite this proclamation of the testator's intent, the Estate in this litigation is acting in direct contravention and with total disregard for the intent of the testator as expressed in his last Will, and in his beneficiary designations.

G. THE ULTIMATE BENEFICIARIES OF THE POLICY PROCEEDS.

On March 15, 2016, this court entered an Order denying Plaintiff's motion for summary judgment. But in the Order, this court noted that "if the Trust was established as Plaintiffs claimed they would entitled to summary judgment." Thus, the court has effectively narrowed the remaining issues in this litigation to the existence and terms of the Trust. The identity of the only *surviving* beneficiary named on the records of the insurer is not in dispute, and that beneficiary is the 1995 Bernstein Trust. The fact that the 1995 Bernstein Trust was named as the contingent beneficiary of the Policy during the life of the owner and insured and remained that way until his death is further evidence in and of itself of the intent of Simon Bernstein to create the Trust. Simon Bernstein's Will executed in 2012, just months before his death, contains further documented evidence of his intent that the Policy proceeds should be distributed *not through his Will or Estate* but through the named beneficiary of his insurance policies.

To further corroborate Simon Bernstein's intent which resulted in his estate plan, Plaintiffs attach the affidavit of Robert Spallina. Plaintiff was previously impaired in their ability to obtain Mr. Spallina's affidavit due to legal issues Mr. Spallina was facing ultimately resulting in SEC civil penalties. The allegations related to trades of shares of a public company Mr. Spallina and others made after meeting with clients of their law firm for estate planning purposes. Subsequently, Mr. Spallina voluntarily placed his Florida law license on inactive

status. The SEC matters do not involve to any of the parties or issues either the instant litigation or the Florida Probate Litigation.² In his sworn affidavit, Mr. Spallina confirms that he could competently testify to the following facts:

- a. That Mr. Spallina, and the law firm of Tescher & Spallina, P.A. represented Simon Bernstein in connection with his estate planning and the preparation and execution of various testamentary documents from late 2007 until Simon Bernstein's death on September 13, 2012.
- b. That Mr. Spallina met with Simon Bernstein in the early spring and summer of 2012 to discuss Simon Bernstein's estate plan and to execute certain new testamentary documents to effectuate parts of that plan while retaining the existing beneficiary designation for the Policy at issue.
- c. That Mr. Spallina's contemporaneous handwritten notes from his 2012 meetings including notes and testimony relating to the \$1.6 million life insurance Policy and Simon Bernstein's intent to have those Policy proceeds flow through the Bernstein Trust to his five children, equally.
- d. Mr. Spallina testified about Simon Bernstein having considered changing the beneficiary designation of the Policy to include Simon Bernstein's then girlfriend. Mr. Spallina testified to the fact that he advised Simon Bernstein against making such change and that Mr. Bernstein heeded that advice. As a result, no change to the beneficiary designation was submitted to the Insurer.
- e. That Mr. Spallina was never shown the 1995 Trust by Simon Bernstein, but, he discussed on several occasions with Simon Bernstein that the ultimate intended beneficiaries of the Policy proceeds was his five children equally.
- f. That Mr. Spallina had discussions with Simon Bernstein regarding the flexibility he retained by retaining ownership of the Policy himself as opposed to placing it in an ILIT-such as the 2000 Trust.
- g. That Mr. Spallina and Simon Bernstein had discussion regarding the benefit of maintaining the 1995 Trust as beneficiary of the Policy to simplify administration, avoid probate and assure asset protection from creditors.
- h. That based on Mr. Spallina's discussions with Simon Bernstein, Mr. Spallina is certain that it was Simon Bernstein's intent to avail himself and his family of the

² U.S. Securities and Exchange Commission, Litigation Release No. 23368/September 28, 2015
Securities and Exchange Commission v. Robert Spallina, et. al., Civil Action No. 15-cv-7118 (D.N.J.)

estate planning benefits derived from maintaining the 1995 Trust as beneficiary of the Policy.

- i. That Spallina drafted Simon Bernstein's 2012 Last Will. The 2012 Last Will that Simon Bernstein executed includes a reaffirmation of his intent that all proceeds from insurance policy flow not through his Estate but according to the beneficiary designations for any such policy.

All of Plaintiff's evidence jibes with the two drafts of the 1995 Bernstein Trust. Both drafts include beneficiary designations naming Simon Bernstein's children as the beneficiary of the Bernstein Trust to share equally. Plaintiffs have also submitted the Equifax investigation report that was part of the Policy records, and that report indicates that Simon Bernstein told the investigator that the Policies purchased by the VEBA are owned by a Trust and that the death benefits are generally left to family members. **(SoF, ¶30)**. The Affidavit of Ted Bernstein also shows that on June 21, 1995 when the Bernstein Trust was formed, only two of Simon Bernstein's five children had children of their own. At the time, Simon Bernstein had four minor grandchildren, the eldest of whom was six years old. **(SoF, ¶48)** Common sense in this case also comports to the written evidence that in 1995, Simon Bernstein formed the 1995 Bernstein Trust to provide life insurance protection to his own immediate family--the five children. Plaintiff's evidence of the formation of the 1995 Bernstein Trust as an express trust is further corroborated by Robert Spallina in his affidavit.

CONCLUSION

When considering this motion, the court must resolve all doubt in favor of the non-movant. The Estate's motion should be denied because Plaintiff's submissions are sufficient to create a triable issue as to whether the 1995 Bernstein Trust or a resulting trust is entitled to the Policy Proceeds as Plaintiffs claim.

Respectfully Submitted,

/s Adam M. Simon

Adam M. Simon (#6205304)

303 E. Wacker Drive, Suite 2725

Chicago, IL 60601

Phone: 312-819-0730

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Attorney for Plaintiffs

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)

v.)

TED BERNSTEIN, individually and)
as alleged Trustee of the Simon Bernstein)
Irrevocable Insurance Trust Dtd, 6/21/95)

Cross-Defendant)

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

Filers: Simon Bernstein Irrevocable
Insurance Trust Dated 6/21/95,
Ted Bernstein, as Trustee and
Individually,
Pamela B. Simon (“Plaintiffs”).

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.)
 _____)

NOTICE OF FILING

To: SEE CERTIFICATE OF SERVICE ATTACHED

PLEASE TAKE NOTICE that the following documents, copies of which are attached, were filed with the clerk of the court and are hereby served upon you:

- PLAINTIFF’S SUPPLEMENTAL STATEMENT OF UNDISPUTED FACTS
- PLAINTIFF’S SUPPLEMENTAL APPENDIX OF EXHIBITS
- EX. 37 – AFFIDAVIT OF ROBERT SPALLINA AND ATTACHED NOTES
- EX. 38 - PROBATE COURT ORDER ENTERED 12/15/15
- PLAINTIFFS’ MEMORANDUM OF LAW IN OPPOSITON TO THE ESTAT’S MOTION FOR SUMMARY JUDGMENT

DATED: August 24, 2016

RESPECTFULLY,

/s/Adam Simon
 Adam M. Simon
 #6205304
 303 E. Wacker Drive
 Ste. 2725
 Chicago, IL 60601
 (312) 819-0730

CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that he caused a copy of the documents set forth below to be served upon the undersigned via the Northern District's ECF filing system, and by U.S. mail if indicated, proper postage prepaid to the following on August 24, 2016:

ELIOT IVAN BERNSTEIN
2753 NW 34 St.
Boca Raton, FL 33434
Appearing Pro Se
(By U.S. Mail)

Lisa Friedstein
2142 Churchill Lane
Highland Park, IL 60035
Appearing Pro Se
(By U.S. Mail)

Jill Iantoni
2101 Magnolia Lane
Highland Park, IL 60035
Appearing Pro Se
(By U.S. Mail)

James J. Stamos
STAMOS & TRUCCO LLP
One East Wacker Drive, Third Floor
Chicago, IL 60601
*Attorney for Intervenor,
Estate of Simon Bernstein*

/s/ Adam M. Simon
Adam Simon, Esq.
303 East Wacker Drive, Suite 2725
Chicago, Illinois 60601
Attorney for Plaintiffs
(312) 819-0730

**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
Honorable John Robert Blakey
Magistrate Mary M. Rowland**

v.)
)
HERITAGE UNION LIFE INSURANCE)
COMPANY,)
)
Defendant,)

**Simon Bernstein Irrevocable
Insurance Trust Dated 6/21/95,
Ted Bernstein, as Trustee and
Individually,
Pamela B. Simon, Jill Iantoni, Lisa
Friedstein, David Simon, Adam Simon,
The Simon Law Firm, and STP
Enterprises, Inc.**

HERITAGE UNION LIFE INSURANCE)
COMPANY)
)
Counter-Plaintiff)

**SUPPLEMENTAL
APPENDIX TO PLAINTIFFS'
STATEMENT OF UNDISPUTED
MATERIAL FACTS IN SUPPORT OF
THEIR MOTION FOR
SUMMARY JUDGMENT**

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)

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.)
_____)

Plaintiff's, pursuant to Local Rule 56.1, submit the following supplemental appendix to their statement of uncontested material facts in support of their motion for summary judgment:

EXHIBIT #	DESCRIPTION
1	Financial Activity from Issue Bates No. JCK001252-1259
2	Receipt from Registry of the Court for Policy Proceeds Bates No. BT000106
3	Part I of Application Bates No. JCK00419
4	VEBA Beneficiary Designation Bates No. BT000001
5	Specimen Policy Bates No. JCK001098-1117
6	Statement of Policy Cost and Benefit Info. Bates No. JCK001023-24
7	NSA Letter regarding change of VEBA Trustee Bates No. JCK000365
8	Capitol Bankers Request Letter, Confirmation and Cert. of Coverage Bates No. JCK000370, 372, 514 and 554
9	Secretary of State Database Screenshot-S.B. Lexington, Inc. Bates No. BT00027
10	Owner Change Confirmation Bates No. JCK000560
11	Capitol Bankers Request Letter and Owner Confirmation Bates No. JCK000566 and 563
12	Certificate of Death of Simon Bernstein Bates No. JCK001311
13	Application for Reinstatement Bates No. JCK00213-217
14	Confirmation of Reinstatement Bates No. JCK000294

EXHIBIT #	DESCRIPTION
15	Draft of Bernstein Trust with Meta Data Bates No. BT000002-000012
16	Draft of Bernstein Trust with handwritten notes Bates No. BT000014-000022
17	Diagram of Beneficiaries
18	Lincoln Benefit Policy Transfer of Ownership Bates No. BT000112
19	SS-4 Form for Bernstein Trust Tax I.D. Bates No. BT000104
20	Equifax Report Bates No. JCK001084
21	National Service Association, Illinois Secretary of State Screenshot
22	National Service Association, Florida Secretary of State Screenshot
23	Heritage Union Life Insurance Company Rule 12(b)(6) Motion to Dismiss
24	Will of Simon L. Bernstein Dated July 25, 2012
25	Plaintiff's First Amended Complaint
26	Eliot Bernstein's Answer, Counterclaims, Cross-Claims, and Third-Party Claims
27	Estate of Simon Bernstein's Intervenor Complaint
28	Insurer's Interpleader Complaint
29	Affidavit of Don Sanders

30	Affidavit of Ted Bernstein
31	Affidavit of Pam Simon
32	Affidavit of David Simon
33	Affidavit of Jill Iantoni
34	Affidavit of Lisa Friedstein
35	Transcript of Deposition of David Simon
36	Heritage Letter to Simon Bernstein
37	Affidavit of Robert Spallina w/notes
38	Probate Court Order Dated 12/15/15

EXHIBIT 37

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

SIMON BERNSTEIN IRREVOCABLE)
INSURANCE TRUST DTD 6/21/95,)
by Ted S. Bernstein, its Trustee, Ted S.)
Bernstein, an individual,)
Pamela B. Simon, an individual,)
Jill Iantoni, an individual and Lisa S.)
Friedstein, an individual.)

Plaintiff,)

v.)

HERITAGE UNION LIFE INSURANCE)
COMPANY,)
Defendant,)

-----)
HERITAGE UNION LIFE INSURANCE)
COMPANY,)

Counter-Plaintiff)

v.)

SIMON BERNSTEIN IRREVOCABLE)
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.)
_____)

Case No. 13 cv 3643
Honorable Amy J. St. Eve
Magistrate Mary M. Rowland

AFFIDAVIT OF ROBERT L. SPALLINA

1. My name is Robert L. Spallina. I am over the age of eighteen, and if duly sworn I could competently and voluntarily testify to the facts set forth herein.

2. While he was alive, Simon L. Bernstein ("Simon Bernstein") was a client of my then law firm, Tescher & Spallina, P.A. ("Firm"). The Firm and I provided estate planning advice and represented Simon Bernstein in connection with the preparation and execution of various testamentary documents from late 2007 until his death on September 13, 2012.

3. At all times material to my representation of Simon Bernstein, I was an attorney admitted to practice in the state of Florida. I hold a Bachelor of Science in accounting from the University of Florida Fisher School of Accounting; a Juris Doctor from Loyola Law School in Los Angeles, California; and a Master of Laws Degree in Estate Planning from the University of Miami School of Law. I am a former Certified Public Accountant and Certified Financial Planner, and began my career with KPMG Peat Marwick in Los Angeles. I was admitted to the Florida Bar in 2001, and focused my practice on wealth transfer planning, post-mortem planning, probate and related matters for high net worth individuals and families.

4. Of relevance to this lawsuit concerning the proceeds of a life insurance policy, during the spring and early summer 2012, Simon Bernstein asked our Firm to assist him in modifying his testamentary documents. During this time, while discussing and reviewing his overall estate plan, Simon Bernstein and I specifically discussed the insurance policy at issue.

5. Simon Bernstein told me he owned a life insurance policy with a current death benefit of \$1.6 million (the "Policy"). This is reflected in my attached notes of a meeting with Simon Bernstein on February 1, 2012. During this meeting and over the course of the next few months, Simon Bernstein and I discussed the Policy as part of his estate planning.

6. Simon Bernstein told me that the intended beneficiaries of the Policy were his five children equally, through an irrevocable life insurance trust that was the named beneficiary of the

Policy. On February 1, 2012, Simon Bernstein was considering giving part of the Policy proceeds to his girlfriend, Maritza Puccio. My notes reflect discussion of an increasing scale for Maritza:

0-2 yrs	250k
2-4 yrs	500k
>4 yrs	600k

7. I advised Simon Bernstein against changing the beneficiaries of his Policy to include Maritza, and ultimately (even though Simon Bernstein requested a form to change the beneficiaries) Simon Bernstein decided to leave the beneficiary unchanged.

8. Simon Bernstein also wanted to change other parts of his estate plan in 2012. Primarily, he wanted to change his current estate plan which benefitted only three of his five children; and had caused some family disharmony. As part of these discussions, Simon Bernstein and I again discussed the Policy. In the end, Simon Bernstein told me he had decided to leave the Policy unchanged, so that all of the proceeds would go equally to his five children through the 1995 Trust. Having thus provided for all of his children; Simon Bernstein decided to alter his testamentary documents and to exercise a power of appointment he held to leave all of his family's wealth to his ten grandchildren equally.

9. As soon as Simon Bernstein made that decision, he instructed me to set up a conference call with his children. Simon Bernstein told them during the call that he had decided to leave all of the money to the ten grandchildren. He did not discuss the Policy during that call, but Simon Bernstein and I had specifically discussed the Policy as part of our estate planning discussions.

10. Simon Bernstein never showed me the 1995 Trust, although we discussed several times the fact that (i) the 1995 Trust had been created and, (ii) now that his wife had died, the beneficiaries of the 1995 Trust were his five adult children: Ted, Pam, Eliot, Jill and Lisa, each of whom would receive one-fifth, or 20%, of the proceeds of the Policy. In 2012, Simon Bernstein made no changes to the Policy's ownership or beneficiary.

11. In light of Simon Bernstein's overall estate plan, including our specific discussions about the beneficiaries of the proceeds of the Policy, Simon Bernstein in fact executed new testamentary documents. Under Simon Bernstein's new Will and his Amended and Restated Trust Agreement, both of which were formally executed on July 25, 2012, his ten grandchildren are the ultimate beneficiaries of all of his wealth other than the Policy, which I have no doubt he intended to go to his children.

12. The final testamentary documents Simon Bernstein signed on July 25, 2012, were the last ones Simon Bernstein signed before he died on September 13, 2012.

13. Based upon my direct and personal involvement in meeting and discussing matters with Simon Bernstein, and my personal knowledge of Simon Bernstein's testamentary documents and his stated intent, I believe that Simon Bernstein was aware of and believed that the 1995 Trust existed and was named as the sole beneficiary of the Policy, or that Simon Bernstein was aware of and believed that the beneficiaries of the 1995 Trust (given that his wife had passed away) were his five adult children, who would each receive 20% of the life insurance proceeds.

14. Having discussed these matters with Simon Bernstein, and based upon my years of experience as an estate planning lawyer, Simon Bernstein understood that he retained ownership of the Policy. Simon Bernstein always wanted maximum flexibility to change his estate plan, and

putting ownership of the Policy into an irrevocable trust (such as the 2000 trust drafted by lawyers at Proskauer Rose) would have taken away Simon Bernstein's ability to change the Policy or the beneficiaries. Because Simon Bernstein remained the owner of the policy, he had the ability to change the beneficiary from the ILIT to a different beneficiary or beneficiaries up until the moment he died.

15. I also know from discussions with Simon Bernstein that he was aware of asset protection issues and was aware that the Policy proceeds would be exempt from his creditors, even if Simon Bernstein owned the Policy on the date of his death. Simon Bernstein would not have desired or intended to subject the proceeds of the Policy to claims of his creditors.

16. Further, I know from discussions with Simon Bernstein that he was aware of avoiding probate of assets. Under the structure he and I discussed, in which the beneficiary of the Policy was the 1995 Trust, the proceeds of the Policy would pass outside of probate. Simon Bernstein would not have desired or intended to subject these assets to probate, so if the 1995 Trust did not exist, I would have advised (and I believe Simon Bernstein would have followed my advice) that a new Trust document be drafted and executed at the same time as Simon Bernstein's new testamentary documents on July 25, 2012.

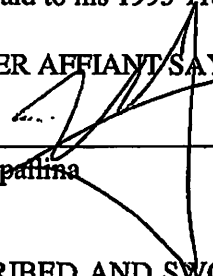
17. Above all else, I know from discussions with Simon Bernstein that he wanted to shield all of his assets from creditors, and in fact he was sued by William Stansbury shortly before his death. Stansbury was a former shareholder with Simon Bernstein in a business, and Simon Bernstein felt betrayed by Stansbury having sued Simon Bernstein.

18. Simon Bernstein removed Stansbury as a fiduciary when he executed new testamentary documents on July 25, 2012, and I do not believe Simon Bernstein would have allowed

the Policy to be subjected to creditors' claims, especially Stansbury, by misrepresenting to me that a 1995 Trust existed if one did not.

19. Based upon the foregoing, I believe that Simon Bernstein intended the Policy proceeds to be paid to his 1995 Trust, for the benefit of his five children.

FURTHER AFFIANT'S SAYETH NAUGHT.



Robert Spallina

Dated: ^{July} June 1, 2016

SUBSCRIBED AND SWORN TO BEFORE ME THIS 1 DAY OF ^{July} JUNE, 2016, by ROBERT SPALLINA, who is personally known to me or provided the following identification: _____



Alexa Collevechio
COMMISSION # FF185462
EXPIRES: December 28, 2018
WWW.AARONNOTARY.COM


NOTARY PUBLIC
County of Palm Beach, FL

Si Penniston

JE/KLF

2/1/12

SIPC - Accounts	- 500K
LIC Accounts	- 100K
G.I.R.	<u>600K</u>

Loans	Si's Estate	Value	Estate Tax
1.2M JON	- LLP -	1.15	.8M
.5M WF	- IRA -	.75	.25M
			<u>1.05M</u>

Si's Estate

Si's Estate	Value	FMV
- Cash	- 1.0M	2.0M
- House	- 1.0M	3.0M
- 1/2 LLP	- 1.15M	.8M
		<u>5.8M</u>

~~LIC~~

Debiting
 To FIVE
 To FIVE
 To FIVE
 To FIVE
 To FIVE
 To FIVE
 To FIVE
 To FIVE
 To FIVE

- FIVE	45		
- 5	33		
- 6C	12		
- Blue	10		
	<u>100</u>		VALUE (Total)

Term	Insurance		
Bonus	1.25M	→	250k } Term: Ann Cash
1/1/12	Monica	→	0-2 yrs } 250k
			2-4 yrs } 50k
			4 yrs } 100k

EXHIBIT 38

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT IN AND
FOR PALM BEACH COUNTY, FLORIDA

TED BERNSTEIN, as Trustee
of the Shirley Bernstein Trust Agreement
dated May 20, 2008, as amended,

Probate Division
Case No.: 502014CP003698XXXXNBIJ

Plaintiff,

v.

ALEXANDRA BERNSTEIN; ERIC BERNSTEIN;
MICHAEL BERNSTEIN; MOLLY SIMON;
PAMELA B. SIMON, Individually and as Trustee
f/b/o Molly Simon under the Simon L. Bernstein
Trust Dtd 9/13/12; ELIOT BERNSTEIN, individually,
as Trustee f/b/o D.B., Ja. B. and Jo. B. under the
Simon L. Bernstein Trust Dtd 9/13/12, and on
behalf of his minor children D.B., Ja. B. and Jo. B.;
JILL IANTONI, Individually, as Trustee f/b/o J.I.
under the Simon L. Bernstein Trust Dtd 9/13/12, and
on behalf of her Minor child J.I.; MAX FRIEDSTEIN;
LISA FRIEDSTEIN, Individually, as Trustee f/b/o
Max Friedstein and C.F., under the Simon L.
Bernstein Trust Dtd 9/13/12, and on behalf of her
minor child, C.F.,

Defendants.

COPY

FINAL JUDGMENT ON COUNT II OF THE AMENDED COMPLAINT

This cause came before the Court for trial on December 15, 2015, pursuant to the Court's
ORDER SETTING TRIAL on AMENDED COMPLAINT (DE 26) COUNT II dated September 24,
2015. The Court, having received evidence in the form of documents and testimony of witnesses,

having heard argument of counsel and *pro se* parties who wished to argue, and being otherwise fully advised of the premises, hereby enters a Final Judgment as to Count II of the Amended Complaint:

1. This is an action for declaratory judgment to determine the validity, authenticity and enforceability of certain wills and trusts executed by Simon Bernstein and Shirley Bernstein, as follows:

- A. Shirley Bernstein Trust Agreement dated May 20, 2008 ("Shirley Trust", attached to the Amended Complaint as Exhibit A~~3~~, *EX. P2 AT TRIAL*) JB
- B. First Amendment to Shirley Bernstein Trust Agreement dated November 18, 2008 ("Shirley First Amendment", attached to the Amended Complaint as Exhibit B~~3~~, *EX. P3 AT TRIAL*) JB
- C. Will of Simon L. Bernstein dated July 25, 2012 ("Simon Will", attached to the Amended Complaint as Exhibit C~~3~~, *EX. P4 AT TRIAL*) JB
- D. Simon L. Bernstein Amended and Restated Trust Agreement dated July 25, 2012 ("Simon Trust", attached to the Amended Complaint as Exhibit D~~3~~, *EX. P5 AT TRIAL*), *and* JB
- E. Will of Shirley Bernstein dated May 20, 2008 ("Shirley Will", attached to the Amended Complaint as Exhibit E~~3~~, *EX. P1 AT TRIAL*) JB

(collectively, the "Testamentary Documents").

2. Based upon the evidence presented during the trial, the Court finds that the Testamentary Documents, as offered in evidence by Plaintiff, are genuine and authentic, and are valid and enforceable according to their terms.

3. The Court finds that Simon's Testamentary Documents were signed by Simon and Shirley's Testamentary Documents were signed by Shirley, in the presence of two attesting witnesses who signed in the presence of the testator and in the presence of each other. § 732.502, Fla. Stat.; § 736.0403(2)(b), Fla. Stat.

4. The Court finds the Testamentary Documents meet the requirements for self-proof, as specified in §732.503, Fla. Stat. Alternatively, the Testamentary Documents were properly admitted based upon the testimony of at least one of the attesting witnesses, which occurred. §733.201, Fla. Stat.

5. Based on the evidence presented, the Court finds that Plaintiff, Ted S. Bernstein, Trustee, was not involved in the preparation or creation of the Testamentary Documents. ~~Indeed,~~ Ted S. Bernstein had never seen the documents before his father's death. ~~Moreover,~~ Ted S. Bernstein played no role in any questioned activities of the law firm Tescher & Spallina, PA, who represented Simon and Shirley while they were alive. There is no evidence to support the assertions that Ted Bernstein forged or fabricated any of the Testamentary Documents, or aided and abetted others in forging or fabricating documents. ~~Thus,~~ Ted Bernstein played no role in the preparation of any improper documents; the presentation of any improper documents to the Court; or any other improper act, contrary to the allegations of Eliot Bernstein, ~~made in the pleadings in this case or in various blogs and websites in which Eliot Bernstein has attacked the actions of Ted Bernstein.~~

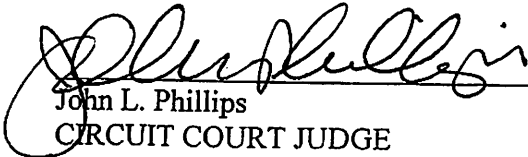
Handwritten initials and notes: "ju", "ju", "of ELIOT BERNSTEIN", "ju", "ju".

6. Based on the evidence presented, the Court finds that an unauthorized version of the First Amendment to Shirley Bernstein Trust Agreement was prepared sometime after Simon died. This document (Pl. Ex. 6) was not signed by Shirley Bernstein and, therefore, is not an operative document.

7. This ruling is intended to be a Final Judgment under Rule 9.170 of the Florida Rules of Appellate Procedure, determining the validity of Testamentary Documents, denying any objection to the probate of Shirley's and Simon's Wills or the validity of the Trust Agreements, and determining which persons are entitled to receive distributions from these trusts and estates.

8. Based upon the rulings made by the Court in this trial of Count II, the Court reserves jurisdiction to determine the remaining issues in this action.

DONE AND ORDERED in Chambers, in Palm Beach County, Florida, this 16 day of December, 2015.


John L. Phillips
CIRCUIT COURT JUDGE

cc: All parties on the attached service list

SERVICE LIST Case No.: 502014CP003698XXXXNBIJ

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