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.)
)

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

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[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 lllinois, 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. Juir. (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.
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> 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.
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> 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)**
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> 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)**
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> 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, <u>Option A</u>)**. 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, <u>Option B</u>)**. **(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, than 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

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[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 Bersntein'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,

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