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

SIMON BERNSTEIN IRREVOCABLE INSURANCE TRUST DTD 6/21/95, Plaintiff, v. HERITAGE UNION LIFE INSURANCE COMPANY, Defendant, HERITAGE UNION LIFE INSURANCE COMPANY Counter-Plaintiff, v. SIMON BERNSTEIN IRREVOCABLE INSURANCE TRUST DTD 6/21/95 Counter-Defendant, and, FIRST ARLINGTON NATIONAL BANK as Trustee of S.B. Lexington, Inc. Employee Death Benefit Trust, UNITED BANK OF ILLINOIS, BANK OF AMERICA, Successor in interest to LaSalle National Trust, N.A., SIMON BERNSTEIN TRUST, N.A., TED BERNSTEIN, individually and as purported Trustee of the Simon Bernstein Irrevocable Insurance Trust Dtd 6/21/95, and ELIOT BERNSTEIN, Third-Party Defendants.	**Case No. 1:13-cv-3643** **Honorable John Robert Blakey** **Magistrate Mary M. Rowland** **INTERVENOR'S REPLY TO PLAINTIFFS' RESPONSE IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT** **Filer:** Brian O'Connell, as Personal Representative of the Estate of Simon L. Bernstein, Intervenor.

ELIOT IVAN BERNSTEIN,

Cross-Plaintiff,

v.

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

Cross-Defendant,

and,

PAMELA B. SIMON, DAVID B.SIMON, both Professionally and Personally ADAM SIMON, both Professionally and Personally, THE SIMON LAW FIRM, TESCHER & SPALLINA, P.A., DONALD TESCHER, both Professionally and Personally, ROBERT SPALLINA, both Professionally and Personally, LISA FRIEDSTEIN, JILL IANTONI S.B. LEXINGTON, INC. EMPLOYEE DEATH BENEFIT TRUST, S.T.P. ENTERPRISES, INC. S.B. LEXINGTON, INC., NATIONAL SERVICE ASSOCIATION (OF FLORIDA), NATIONAL SERVICE ASSOCIATION (OF ILLINOIS) AND JOHN AND JANE DOES

Third-Party Defendants.

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

Intervenor.

INTERVENOR'S REPLY TO PLAINTIFFS' RESPONSE IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

Intervenor Brian M. O'Connell, Personal Representative of the Estate of Simon L. Bernstein (the "Estate"), for his Reply to Plaintiffs' response in opposition to the Estate's motion for summary judgment, states as follows:

INTRODUCTION

Plaintiffs do not respond to the Estate's summary judgment motion ("Motion") with admissible evidence disputing any of the material facts submitted by the Estate. In fact, all of those facts are admitted under Local Rule 56.1(b)(3)(c) because Plaintiffs did not file a response pursuant to Local Rule 56.1(b)(3)(a)-(b). *See L.R. 56.1(b)*; ECF Nos. 255-256; *Malec v. Sanford*, 191 F.R.D. 581, 584 (N.D. Ill. 2000). Plaintiffs have also abandoned their claim for a resulting trust in Count III by ignoring the Estate's request for summary judgment on that count and arguing only that the 1995 Trust was established as an express trust, effectively conceding summary judgment on Count III. *Plfs.' L.R. 56.1(b)(2) Memorandum of Law* ("*Resp.*") at 9 (ECF No. 256).[1]

As a result, the only remaining issue is whether the evidence Plaintiffs offer is "of insufficient caliber or quantity," *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 253-55 (1986), so "as to lead to only one conclusion" regarding (1) Simon Bernstein's intent to create the 1995 Trust, (2) the property of that trust, (3) the identities of the trustee and (4) beneficiaries, (5) the specifications how it is to be performed, and (6) delivery of the trust property to the trustee, *Eychaner v. Gross*, 779 N.E.2d 1115, 1131 (Ill. 2002).

Plaintiffs offer three categories of "evidence" to oppose the Estate's motion for summary judgment on Plaintiffs' Count II: (i) testimony of Plaintiffs and one Plaintiff's spouse, David

[1] Plaintiffs' Local Rule 56.1(b)(2) memorandum is inaccurately titled "*Plaintiffs' Supplemental Statement of Undisputed Material Facts in Support of Their Motion for Summary Judgment*." *See* ECF No. 256.

Simon, *Resp.* at 8, 10-11, 15; (ii) two documents they contend are unexecuted "drafts" of the 1995 Trust and a number of hearsay forms they argue constitute "a comprehensive and cohesive bundle of evidence," *id.* at 6, 8, 10-11; and (iii) the recently-procured Affidavit of Robert Spallina, *id.* at 6-7, 13-15. Plaintiffs' evidence is of insufficient caliber and quantity to lead to only one conclusion as to each of the elements set forth in *Eychaner* and the Estate's Motion should therefore be granted.

Because the Affidavit of Robert Spallina is the only one of the three categories of evidence not previously offered by Plaintiffs and addressed by the Court, the Estate first addresses the Affidavit in Section I, demonstrating the many reasons it is inadmissible. Argument regarding the other categories of evidence follows in Section II, and a discussion of the evidence together is contained in Section III.

ARGUMENT

I. The Spallina Affidavit Is Inadmissible Under Fed. R. Civ. P. 56 and Fed. R. Evid. 802.

"An affidavit or declaration used to … oppose a motion for summary judgment must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated." Fed. R. Civ. P. 56(c)(4). "On a motion for summary judgment, a court must not consider parts of an affidavit that fail to comply." *Bitler Inv. Venture II, LLC v. Marathon Ashland Petro., LLC*, 653 F. Supp. 2d 895, 915 (N.D. Ind. 2009). The material averments in the Spallina Affidavit cannot serve to defeat the Estate's motion for summary judgment because they do not satisfy those requirements of Fed R. Civ P. 56.

A. The Spallina Affidavit Is Hearsay and No Exception Applies.

The issue before the Court is whether the purported trust was formed in 1995 and what its terms were, while Mr. Spallina had no contact with Simon Bernstein until 2007, according to his

own affidavit. *See Affidavit of Robert L. Spallina* ("*Spallina Aff.*") ¶ 2 (ECF No. 255-2). His affidavit also avers that Simon Bernstein never showed him the 1995 Trust. *Id.* ¶ 10. As a consequence, he cannot have had personal knowledge of its creation nor personal knowledge of its existence. Everything he says in the affidavit is hearsay, as discussed in detail below.

Under Rule 56(c)(4), "an affidavit's hearsay assertion that would not be admissible at trial if testified to by the affiant is insufficient to create a genuine issue for trial." *Patterson v. County of Oneida, N.Y.*, 375 F.3d 206, 219 (2d Cir. 2004). The following key averments by Mr. Spallina are hearsay because they simply recite statements allegedly made by Simon Bernstein, and are clearly being offered for their truth:

> 6. Simon Bernstein *told me* the *intended* beneficiaries of the Policy *were* his five children equally, through an irrevocable life insurance trust that *was* named beneficiary of the Policy.
>
> ***
>
> 8. … Simon Bernstein *told me* … that all of the proceeds *would go* equally to his five children through the 1995 Trust.
>
> ***
>
> 10. … *we discussed* several times the *fact* that (i) the 1995 Trust *had been* created and, (ii) how that his wife had died, the beneficiaries of the 1995 Trust *were* his five adult children[.]

Spallina Aff. ¶¶ 6, 8, 10 (emphasis added); *accord id.* ¶ 5, 9. *See* Fed. R. Evid. 801(c); *Howard-Ahmad v. Chicago Sch. Reform Bd. of Trustees*, 161 F. Supp. 2d 857, 865 (N.D. Ill. 2001) (statement "I was told by Lydia DeJesus Casaliano … that …." held hearsay and stricken); 2 McCormick on Evid. § 276 (7th ed.) ("backward-looking statements of memory or belief are excluded") (citing *Shepard v. United States*, 290 U.S. 96, 105-06 (1933)); *Knit With v. Knitting Fever, Inc.*, 742 F. Supp. 2d 568, 582 (E.D. Pa. 2010) (holding "statements related not her desire or intent to form a partnership, but rather the fact that she actually formed a partnership," are inadmissible hearsay because they "are offered to prove the truth of a fact remembered").[2]

---

[2] "Hearsay is not admissible" unless an exception applies. Fed. R. Evid. 802. "[T]he proponent of hearsay

Butler v. Butler, 114 N.W.2d 595 (Iowa 1962), relied on by Plaintiffs, is distinguishable. There, the court allowed an alleged trust beneficiary's widow to testify as to an out-of-court statement the settlor made to the widow and her husband *before* the trust was created based on the hearsay exception for "*a design or plan* ***to do*** a specific act," as it was a forward-looking statement of then-existing intention. *Id.* at 613 (¶¶ 1-2), 15 (italics in original). The lawyer's testimony in *In re Estate of Stewart*, 652 N.E.2d 1151 (1st Dist. 1995), also cited by Plaintiffs, is likewise distinguishable. There, Mrs. Popham claimed the decedent entered into an oral contract to make a will leaving most of the estate to her. *Id.* at 1153-54. The lawyer testified that prior to the execution of the estate documents, the decedent "told him, 'Mrs. Popham was a real [expletive] to me as well as to [Mr. Popham], and she hurt him and she hurt me.'" *Id.* at 1158. This testimony was offered to prove indirectly the decedent's state of mind toward Mrs. Popham during the period in which she needed to show that the decedent had the intent to contract with her. *Id.* at 1161. The decedent's actual feelings regarding Mrs. Popham were not at issue in the case. *See id.*[3] Simon Bernstein's alleged retrospective statements, in contrast to those in *Butler* and *Estate of Stewart*, purport to directly declare the intent to create the 1995 Trust and to make his children beneficiaries that the statements are offered to prove. Those statements are offered to prove retrospectively, the fact of his intent, not to prove his state of mind in 1995 with contemporaneous statements. That make the statements hearsay. *See* Wright & Miller, *Fed. Prac. & Proc.* § 7006 ("while a direct declaration of the existence of a state of mind or feeling which it is offered to prove is hearsay, declarations which only impliedly, indirectly, or inferentially indicate the state of mind or feeling

---

bears the burden of establishing the statement is admissible." *See*, *e.g.*, *Hartford Fire Ins. Co. v. Taylor*, 903 F. Supp. 2d 623, 640 (N.D. Ill. 2012). Plaintiffs do not assert that any exception applies.

[3] No party in *Estate of Stewart* appears to have objected to the testimony as hearsay. *See id.* at 1153-61.

of the declarant are not hearsay").[4]

As a result, Simon Bernstein's hearsay statements reported in paragraphs 5-6 and 8-10 of the Spallina Affidavit are barred by Fed. R. Evid. 802.

B. The Spallina Affidavit Does Not Set Out Admissible Facts Based On Personal Knowledge.

Beyond the hearsay declarations about what Simon Bernstein told him, the remainder of the Affidavit offers only Mr. Spallina's conclusions and opinions about Simon Bernstein's knowledge and intent:

> 11. *In light of … our specific discussions* about the beneficiaries of the proceeds of the Policy, … *I have no doubt* he intended [the Policy proceeds] to go to his children.
>
> ***
>
> 13. *Based upon … discussing* matters with Simon Bernstein, 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 … were his five adult children ….
>
> ***
>
> 15. *I also know from discussions* with Simon Bernstein that he … *would not have desired or intended* to subject the proceeds of the Policy to the claims of his creditors.
>
> 16. Further, *I know from discussions with Simon Bernstein* that … the beneficiary of the Policy was the 1995 Trust ….
>
> ***
>
> 18. … *I do not believe* Simon Bernstein *would have* … misrepresent[ed] 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.

[4] Plaintiffs misrepresent that *Michalski v. Chicago Title & Trust Co.* "allowed the testimony of the decedent's attorney regarding decedent's intent to transfer the real estate." *Resp.* at 7-8. In fact, the attorney only testified that he witnessed the decedents execute the missing deeds—a non-hearsay fact of which he had personal knowledge, and which was not barred by the Dead Man's Act—and the testimony was not used to prove intent, it was only used to prove the unrecorded deeds had once existed. 165 N.E.2d 654, 656-57 (1st Dist. 1977). Here, there is no analogous testimony because no one witnessed Simon Bernstein execute the alleged 1995 Trust, and David Simon's testimony about seeing the executed document is barred by the Dead Man's Act.

Spallina Aff. ¶¶ 11, 13, 15-16, 18, 19 (emphasis added); *see also id.* ¶¶ 14, 17.

"Statements in affidavits premised on hearsay and not personal knowledge cannot be used to defeat a motion for summary judgment." *Sys. Dev. Integration, LLC v. Computer Scis. Corp.*, 739 F. Supp. 2d 1063, 1069, 1078 (N.D. Ill. 2010) ("assertions regarding the specific terms of the partnership agreement" based on hearsay must be disregarded in case where "parties dispute whether there is a partnership agreement" but "agree that there is no written, executed partnership agreement"); *Richardson v. Rush Presbyterian St. Luke's Med. Ctr.*, 63 Fed. Appx. 886, 890 (7th Cir. 2003) ("Lampkin's averment [of what "she was informed by other patients"] is inadmissible hearsay and is not based upon her personal knowledge, so it cannot be used to defeat a motion for summary judgment."); *Brozenec v. First Indus. Realty Trust, Inc.*, 09 C 6916, 2010 WL 5099995, *2 (N.D. Ill. Dec. 8, 2010) ("The court … does not consider factual assertions based upon inadmissible hearsay testimony."). Moreover, the averments in paragraphs 11, 13, 18 and 19 represent Mr. Spallina's subjective beliefs, which cannot form the basis for an affidavit. *See In re Hermanson*, 273 B.R. 538, 549 (Bankr. N.D. Ill. 2002) ("Proper affidavits must be based upon the personal knowledge of definite facts, not upon … subjective beliefs.").

Paragraphs 11, 13, 15 and 16 must be disregarded for the separate reason that they represent conclusory speculation about what Simon Bernstein did or did not intend or believe, and would or would not have done or intended. *See Koursa, Inc. v. manroland, Inc.*, 971 F. Supp. 2d 765, 781 (N.D. Ill. 2013) ("Hawrysz … attests to actions that manroland 'would have taken' …. Hawrysz's statements … are speculative and conclusory, and the Court therefore disregards them."); *United States v. Wittje*, 333 F. Supp. 2d 737, 744-45 (N.D. Ill. 2004) ("Dunham's testimony regarding the actions McMahon … would have taken … constitute[s] inadmissible speculation."); *Ashwell & Co. v. Transamerica Ins. Co.*, 407 F.2d 762, 765-66 (7th Cir. 1969) (averment about what

"Transamerica … *intended*" is "conclusory and should not be considered," as it "does not set forth a specific fact shown to be within [affiant]'s personal knowledge …. which would be admissible in evidence"); *Patterson* , 375 F.3d at 219 ("Nor is a genuine issue created merely by the presentation of assertions that are conclusory.").

II. The Testimony and Affidavit of Plaintiffs, David Simon and Don Sanders to Prove the Trust Are Inadmissible.

A. David Simon's and Plaintiffs' Testimony Is Still Inadmissible.

Plaintiffs offer the previously-filed Affidavits of themselves, Don Sanders and David Simon, and the deposition testimony of David Simon, arguing that this is "corroborating parole evidence of Simon Bernstein's intent to 1) 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." *Resp.* at 10-11. As Plaintiffs acknowledge, the Court already held that the testimony of David Simon, Ted Bernstein and the other Plaintiffs "is barred by the Illinois Dead Man's Act to the extent it relates to conversations with the deceased or to any events which took place in the presence of the deceased." *Order* at 3 (citing 735 ILCS 5/8-201); *Plfs.' Supplemental Statement of Undisputed Material Facts in Support of Their Motion for Summary Judgment* ("SoAF") at 1 (ECF No. 255).

The portions of David Simon's affidavit and deposition testimony germane to the trust elements Plaintiffs must prove are reports of purported conversations with Simon Bernstein and/or events that took place in his presence, such as David Simon's testimony that Simon Bernstein showed him an executed version of the 1995 Trust. *Intervenor's L.R. 56.1(a)(3) Statement of Undisputed Material Facts* ("SoF") ¶¶ 45-53 (ECF No. 247). This is precisely the testimony this Court correctly held is barred by the Dead Man's Act. *See Order* at 3. The out-of-court statements

of Simon Bernstein and the alleged executed 1995 Trust are inadmissible hearsay as well. *See Intervenor's L.R. 56.1(a)(2) Mem. of Law in Support of Summary Judgment* ("*MSJ*") at 6-7, 10 (ECF No. 246).

The only averments in Ted Bernstein's Affidavit related to the trust elements Plaintiffs must prove by clear and convincing evidence, other than that Ted has never seen an executed copy of the 1995 Trust, are based on a statement Simon Bernstein supposedly made to Ted when no one else was present and Ted having seen two documents that *David Simon told him* were drafts of the 1995 Trust. SoF ¶¶ 54-57. The Court correctly held that the Dead Man's Act bars the testimony about what Simon Bernstein allegedly said to Ted. *Order* at 3; *MSJ* at 6. And that averment, along with Ted's testimony about what the drafts and David Simon allegedly said, is also inadmissible hearsay. Further, because that inadmissible evidence is Ted's only basis for his averment that he is trustee, that averment does not satisfy the personal knowledge requirement of Rule 56(c)(4). *MSJ* at 10.[5]

Similarly, the Affidavits of Pam Simon, Jill Iantoni, Lisa Friedstein and Don Sanders contain no averments purporting to establish their personal knowledge of facts relevant to any of the trust elements Plaintiffs must prove by clear and convincing evidence. *See* Plfs.' Exhibit 29 (ECF No. 150-30), Exhibit 31 (ECF No. 150-32), Exhibit 33 (ECF No. 150-34), Exhibit 34 (ECF No. 150-35). So those affidavits cannot defeat the Estate's Motion.

B. The Documents Plaintiffs Rely on Are Inadmissible.

Plaintiffs also offer six documents that they characterize as "a comprehensive and cohesive bundle of evidence" supporting their attempt to prove each element required to establish the 1995 Trust by clear and convincing evidence. *Resp.* at 6, 10. Each of those documents is inadmissible.

---

[5] The same is true of his deposition testimony, though Plaintiffs do not rely on it. *See* SoF ¶ 57; *MSJ* at 10.

The two key documents are the purported unexecuted drafts of the 1995 Trust. *See Resp.* at 10 (¶ 4). But "those documents offer Plaintiffs little support in the absence of the testimony from David Simon and Ted Bernstein describing how some form of those exhibits was executed by Simon Bernstein," which the Court correctly held is barred by the Dead Man's Act. The purported drafts are inadmissible because, without David Simon's testimony that is barred by the Dead Man's Act, they cannot be authenticated. *See* Fed. R. Evid. 901.[6]

The next document Plaintiffs offer is a Request Letter that they argue "designates the Bernstein Trust" as contingent beneficiary of the Policy. *Resp.* at 10 (¶ 3). This document refers to the "Bernstein Irrevocable Insurance Trust Dated June 21, 1995" at issue here, *see* Plfs.' Exhibit 8 (ECF No. 150-9), SoF ¶ 1, but the only thing this form unequivocally and unmistakably shows is that someone—***other than Simon Bernstein***—typed "SIMON BERNSTEIN IRREVOCABLE INSURANCE TRUST DATED JUNE 21, 1995" on the line for "successor" beneficiary. *See* Plfs.' Exhibit 8 (ECF No. 150-9). This form does not support the assertion that Simon Bernstein intended to create *any* fiduciary relationship, much less foreclose any other conclusion, as required. As a result, it is irrelevant and inadmissible. *See* Fed. R. Evid. 401-402.

A fourth document Plaintiffs rely on is a Request for Service form they argue transferred ownership of the separate Lincoln Policy insuring Simon Bernstein's life "to the Bernstein Trust." *Resp.* at 10 (¶ 5). While the Request for Service refers to the 1995 Trust, *see* Plfs.' Exhibit 18

---

[6] The exception in subsection (c) of the Dead Man's Act for "testimony competent under Section 8-401" does not apply to David Simon's testimony authenticating the alleged drafts because Plaintiffs' claim is not "founded on" those drafts as would be the case with, for example, a breach of contract claim. It is founded on the existence of the 1995 Trust; the so-called drafts are *at most* (and only in conjunction with evidence that does not exist) indirect evidence of the 1995 Trust's existence. *See* 735 ILCS 5/8-401; *Theofanis v. Sarrafi*, 791 N.E.2d 38, 52 (1st Dist. 2003) ("Sarrafi's medical notes similarly do not form the foundation for his defense of contributory negligence. Sarrafi founded his claim on Sofia's allegedly unreasonable refusal to follow medical advice; the notes provided evidence of the refusal.").

(ECF No. 150-19), SoF ¶ 1, as the Court already observed, "[t]his document refers to 'ownership' … and does not affect the policy's beneficiaries," *Order* at 4. Thus, this document is irrelevant and inadmissible. *See* Fed. R. Evid. 401-402.

Plaintiffs also rely heavily on the VEBA Beneficiary Designation form which they argue "contains [Simon Bernstein's] designation of *the Bernstein Trust* as his beneficiary" and "memorializes [his] intent that the Policy proceeds were to be paid to *the Bernstein Trust*," thereby implying that this document refers to the same trust as the Request Letter and the Request for Service discussed above (*i.e.* the 1995 Trust at issue). *See Resp.* at 4, 10 (¶ 1) (emphasis added). As the Court already observed, however, "this document does not refer to the Trust at issue here, the 'Simon Bernstein Irrevocable Insurance Trust dated 6/21/95.'" *Order* at 4. It refers instead to a different trust—the Simon Bernstein Irrevocable Insurance Trust. *See id.* at 10 (¶ 1); Plfs.' Exhibit 4 (ECF No. 150-5).[7] "It is unclear from the record of that was an oversight, or was intentionally done to refer to a distinct trust." *Order* at 4. Plaintiffs offer nothing here to clarify the record in that regard. As a result, it is irrelevant, inadmissible and not of any assistance in helping Plaintiffs prove by clear and convincing evidence any of the elements that are necessary to establish the 1995 Trust as an express trust. *See* Fed. R. Evid. 401-402.

Finally, Plaintiffs rely on an IRS Form SS-4 that they characterize as referring to "the Bernstein Trust," *Resp.* at 10 (¶ 2), and which in fact refers to the "Simon Bernstein Irrevocable

[7] Because the VEBA Beneficiary Designation does not refer to the 1995 Trust at issue, there is no merit to Plaintiffs' argument that "[u]nder the case law discussed above, this document alone is sufficient evidence of the establishment and existence of the Bernstein Trust." *See Resp.* at 10 (¶ 1). The referenced "case law" is *Butler*, which Plaintiffs argue "held that an express trust may be proved by a writing signed by the grantor or trustee of the trust." *Id.* at 9. That is another meritless argument, as *Butler* did not so hold. The portion of *Butler* Plaintiffs rely on was merely discussing cases about complying with "**the statute of frauds**" and quoted *Holmes v. Holmes* for the proposition that "[t]he written evidence of the trust which will satisfy **the statute** *may* come from the grantor … or the trustee." 114 N.W.2d at 612-13 (italics in original).

Insurance Trust," Plfs.' Exhibit 19 (ECF No. 150-20). But this document also does not establish that it is referring to the 1995 Trust at issue in this case. *See* SoF ¶ 1. Therefore, this document, like the VEBA Beneficiary Designation, is irrelevant, inadmissible and does not help Plaintiffs prove by clear and convincing evidence any of the elements that are necessary to establish the 1995 Trust as an express trust. *See* Fed. R. Evid. 401-402.

III. The Addition of The Spallina Affidavit Does Not Assist Plaintiffs In Demonstrating The Existence of a Triable Issue of Fact by The "Clear and Convincing" Standard.

As the court held in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) in considering a motion for summary judgment where the burden of proof on the plaintiff was the "clear and convincing" standard, the court must assess the evidence offered in light of that standard in judging whether a genuine issue of fact exists. *Id.* at 255-257. The Estate demonstrated in its initial paper how the aggregation of evidence Plaintiffs have offered, even if admissible, could not meet that standard. The only new evidence offered here is the affidavit of Mr. Spallina which, charitably, does not increase the volume of evidence available to meet the clear and convincing standard. Not only is Mr. Spallina's Affidavit self-evidently not based upon personal knowledge, and self-evidently based entirely upon hearsay, but Plaintiffs have admitted that the author of that affidavit previously made an express, intentional misrepresentation to the insurer in a document seeking the proceeds of the Policy, attesting falsely that *he* was the trustee of the 1995 Trust. *See* SoF ¶ 27-29. And in their Response Memorandum describing the Spallina Affidavit, they oddly excuse its tardy introduction to the case by reporting that Mr. Spallina had to give up his law license as a consequence of an SEC investigation and complaint that resulted in civil penalties. *Resp.* at 6, 13-14. Plaintiffs do not explain why they could not have taken his deposition in the interim in order to obtain from him what they appear to believe is quite critical information.

Again, as described in detail above, the material averments of Mr. Spallina's Affidavit are inadmissible, as is virtually every piece of evidence Plaintiffs are asking the Court to consider. But even if admissible, the compromised Spallina Affidavit must be considered together with all of Plaintiffs' evidence combined. That combination of evidence includes the inconsistent drafts, David Simon's nonsensical explanation of how his notes on one draft were used to create the other draft, the inconsistencies between David Simon's testimony about his conversations with Simon Bernstein and his purported notes of those conversations, the inconsistent positions Plaintiffs, David Simon and Robert Spallina have taken regarding the identity of the trustees, David Simon's evolving explanations of how the person Plaintiffs currently claim is trustee came to be the trustee, and David Simon's absence of any explanation for why, despite the fact that an "exhaustive" search for the 1995 Trust was ongoing, he did not think to look for the "drafts" of the trust in his office computer for over a year. *See MSJ* § I(B). This evidence combined is of insufficient caliber and quantity to allow a rational factfinder to find that it is "clear and convincing" and leads to only one conclusion regarding each of the elements in the *Eychaner* case, and the Estate is therefore entitled to summary judgment.

CONCLUSION

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

Dated: October 27, 2016

Respectfully submitted,

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

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

James J. Stamos (ARDC # 3128244)
Theodore H. Kuyper (ARDC # 6294410)
STAMOS & TRUCCO LLP
One East Wacker Drive, Third Floor
Chicago, Illinois 60601
(312) 630-7979
jstamos@stamostrucco.com
tkuyper@stamostrucco.com

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he caused a copy of the foregoing **Intervenor's Reply to Plaintiffs' Response in Opposition to Motion for Summary Judgment** to be served upon all registered E-Filers via electronic filing using the CM/ECF system, and to be served upon the following persons via U.S. mail, proper postage prepaid:

Lisa Sue Friedstein
2142 Churchill Lane
Highland Park, IL 60035
Lisa@friedsteins.com
Pro Se Litigant

Jill Marla Iantoni
2101 Magnolia Lane
Highland Park, IL 60035
jilliantoni@gmail.com
Pro Se Litigant

on this 27th day of October, 2016.

/s/ James J. Stamos