

IN THE CIRCUIT COURT OF THE  
15<sup>TH</sup> JUDICIAL CIRCUIT, IN AND FOR  
PALM BEACH COUNTY

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

CASE NO.: 502014CP003698XXXXNB  
DIVISION: IH  
JUDGE: ROSEMARIE SCHER

v.

ALEXANDRA BERNSTEIN; ERIC  
BERNSTEIN; MICHAEL BERNSTEIN;  
MOLLY BERNSTEIN; 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.

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**OBJECTION TO SCHEDULING OF HEARINGS ON MOTION CALENDAR AND  
MOTION FOR SPECIAL SET HEARINGS**

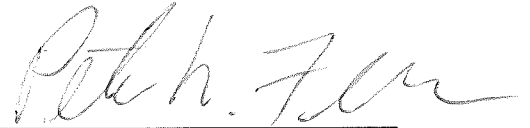
COMES NOW, Petitioner, William E. Stansbury (“Stansbury”), a creditor and  
“Interested Person,” in the Estate of Simon Bernstein, by and through his undersigned counsel  
and hereby objects to the setting of the hearing of (i) Trustee’s Motion to Approve Compromise  
and Settlement (ii) Appoint a Trustee for the Trusts Created for D.B., JA.B. and JO.B., and (iii)  
Determine compensation for Guardian Ad Litem (“Motion”), and as grounds therefore would  
show unto the Court as follows:

1. On November 9, 2016, Ted S. Bernstein, Successor Trustee in the Simon Bernstein Amended and Restated Trust Agreement dated July 25, 2012, filed the Motion described above.

2. The Motion is set to be heard on this Court's motion calendar of November 22, 2016.

3. The Motion contains issues that overlap the issue involving William Stansbury and the Estate of Simon Bernstein, Case No. 2012 CP 004391 NB IH. A copy of the Objection to the Motion filed in the Estate of Simon Bernstein is attached hereto as **Exhibit "A."**

WHEREFORE, WILLIAM STANSBURY, Creditor and Interested Person in the Estate of Simon Bernstein, requests that the Court set for a special set hearing the matters before it and not rule on any substantive issues at an 8:45 a.m. motion calendar which would deprive Mr. Stansbury of his right to be heard.




Peter M. Feaman

### CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been forwarded via e-mail service through the Florida E-portal system to: Alan Rose, Esq., Mrachek, Fitzgerald Rose, 505 So. Flagler Drive, Suite 600, West Palm Beach, FL 33401, [arose@pm-law.com](mailto:arose@pm-law.com) and [mchandler@pm-law.com](mailto:mchandler@pm-law.com); Eliot Bernstein, 2753 NW 34<sup>th</sup> Street, Boca Raton, FL 33434, [iviewit@iviewit.tv](mailto:iviewit@iviewit.tv); Diana Lewis, GAL, [dzlewis@aol.com](mailto:dzlewis@aol.com); Brian O'Connell, Esq., Ciklin Lubitz Martens & O'Connell, 515 North Flagler Drive, 20<sup>th</sup> Floor, West Palm Beach, FL 33401, [boconnell@ciklinlubitz.com](mailto:boconnell@ciklinlubitz.com); John P. Morrissey, Esq., 330 Clematis Street, Suite 213, West Palm Beach, FL 33401, [john@jmorrisseylaw.com](mailto:john@jmorrisseylaw.com); Lisa Friedstein, [lisa@friedsteins.com](mailto:lisa@friedsteins.com), 2142 Churchill Lane, Highland Park, IL 60035; Jill Iantoni, [jilliantoni@gmail.com](mailto:jilliantoni@gmail.com), 2101 Magnolia Lane, Highland Park, IL 60035; on this 13<sup>th</sup> day of November, 2016.

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By:   
Peter M. Feaman  
Florida Bar No.: 0260347

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

IN RE:

CASE NO.: 502012CP004391XXXXNB  
DIVISION: IH  
JUDGE: ROSEMARIE SCHER

ESTATE OF SIMON  
BERNSTEIN,  
Deceased.

**OBJECTION TO SCHEDULING OF HEARINGS ON MOTION CALENDAR AND  
MOTION FOR SPECIAL SET HEARINGS**

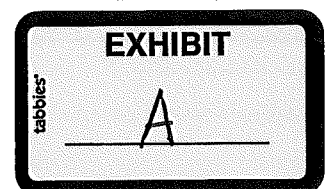
COMES NOW, Petitioner, William E. Stansbury (“Stansbury”), a creditor and “Interested Person,” in the Estate of Simon Bernstein, by and through his undersigned counsel and hereby objects to the setting of the hearing of (i) Trustee’s Motion to Approve Compromise and Settlement (ii) Appoint a Trustee for the Trusts Created for D.B., J.A.B. and J.O.B., and (iii) Determine compensation for Guardian Ad Litem (“Motion”), and as grounds therefore would show unto the Court as follows:

1. On November 9, 2016, Ted S. Bernstein, Successor Trustee in the Simon Bernstein Amended and Restated Trust Agreement dated July 25, 2012, filed the Motion described above.

2. The motion is set to be heard on this Court’s motion calendar of November 22, 2016.

3. The Motion seeks to “resolve all questions concerning the validity and terms of the Simon Bernstein Trust and...confirm that the Mrachek Law Firm shall represent the Estate in the case of Stansbury v. the Estate” and “seek to enforce and continue the existing Order requiring Stansbury to fund/advance the legal fees and expenses of (the Illinois Litigation).”

4. All of those issues and more are the subject of previously filed lengthy motions. Obviously, they cannot be resolved at an 8:45 a.m. hearing. For example, there is presently





pending before this Court, awaiting a hearing, Stansbury's "*Motion of Creditor, William E. Stansbury for Discharge from Further Responsibility for Funding the Estate's Participation in the Chicago Life Insurance Litigation and for Assumption of Responsibility by the Estate and for Reimbursement of Advancement of Funds.*" This requires a special set hearing. A copy of that motion is attached hereto as **Exhibit "A."**

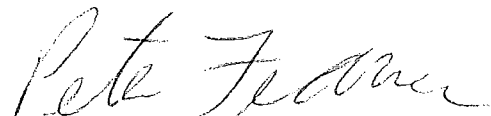
5. There is also Mr. Stansbury's "*Response in Opposition to Motion to Ratify and Confirm Appointment of Ted S. Bernstein as Successor Trustee of the Simon Bernstein Amended and Restated Trust.*" That response is attached hereto as "**Exhibit B.**" This also requires a special set hearing. The motion giving rise to Mr. Stansbury's *Response* is attached hereto as **Exhibit "C."**

6. There is also Mr. Stansbury's "*Motion to Vacate in Part the Court's Ruling of September 7, 2016, and/or Any Subsequent Order, Permitting the Estate of Simon Bernstein to Retain Alan Rose and Page, Mrachek, Fitzgerald, Rose, Konopka, Thomas & Weiss, P.A. as Legal Counsel and Motion for an Evidentiary Hearing whether Rose and Page Mrachek are Disqualified from Representing the Estate due to an Inherent Conflict of Interest.*" A copy of this motion is attached hereto as **Exhibit "D."** This Motion needs to be set for hearing.

7. To the extent that any of these issues and others are to be disposed of at an 8:45 10-minute motion calendar, without Mr. Stansbury having the opportunity to fully present his arguments in the forum of a special set or evidentiary hearing constitutes denial of due process.

8. Mr. Stansbury has also filed a "*Demand for Accounting as to Missing Personal Property of the Estate,*" which is attached hereto as **Exhibit "E"** and his "*Amended Petition to Determine the Whereabouts of the Missing Tangible Personal Property and for Payment of Restitution to the Estate of Simon Bernstein,*" which is attached hereto as **Exhibit "F."**

WHEREFORE, based upon all of the foregoing, WILLIAM STANSBURY, Creditor and Interested Person to this Estate, requests that the Court set for a special set hearing the aforementioned pending motions and not rule on any substantive issues at an 8:45 a.m. motion calendar which would deprive Mr. Stansbury of his right to be heard on the foregoing matters.




Peter M. Feaman

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been forwarded via e-mail service through the Florida E-portal system to: Alan Rose, Esq., Mrachek, Fitzgerald Rose, 505 So. Flagler Drive, Suite 600, West Palm Beach, FL 33401, [arose@pm-law.com](mailto:arose@pm-law.com) and [mchandler@pm-law.com](mailto:mchandler@pm-law.com); Eliot Bernstein, 2753 NW 34<sup>th</sup> Street, Boca Raton, FL 33434, [iviewit@iviewit.tv](mailto:iviewit@iviewit.tv); Diana Lewis, GAL, [dzlewis@aol.com](mailto:dzlewis@aol.com); Brian O'Connell, Esq., Ciklin Lubitz Martens & O'Connell, 515 North Flagler Drive, 20<sup>th</sup> Floor, West Palm Beach, FL 33401, [boconnell@ciklinlubitz.com](mailto:boconnell@ciklinlubitz.com); John P. Morrissey, Esq., 330 Clematis Street, Suite 213, West Palm Beach, FL 33401, [john@jmorrisseylaw.com](mailto:john@jmorrisseylaw.com); Lisa Friedstein, [lisa@friedsteins.com](mailto:lisa@friedsteins.com), 2142 Churchill Lane, Highland Park, IL 60035; Jill Iantoni, [jilliantoni@gmail.com](mailto:jilliantoni@gmail.com), 2101 Magnolia Lane, Highland Park, IL 60035; and Gary Shendell, Shendell & Pollock, P.a., 2700 N. Military Tr., Ste. 150, Boca Raton, FL 33431; [gary@shendellpollack.com](mailto:gary@shendellpollack.com), [ken@shendellpollack.com](mailto:ken@shendellpollack.com); [britt@shendellpollack.com](mailto:britt@shendellpollack.com) [grs@shendellpollack.com](mailto:grs@shendellpollack.com) on this 15<sup>th</sup> day of November, 2016.

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By: 

Peter M. Feaman  
Florida Bar No.: 0260347

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

IN RE:

Case No.: 502012CP004391XXXXNB (IY)  
JUDGE JOHN L. PHILLIPS

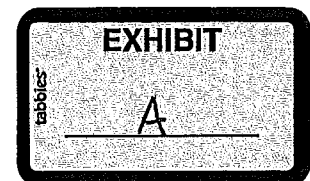
ESTATE OF SIMON  
BERNSTEIN,  
Deceased.

**MOTION OF CREDITOR, WILLIAM E. STANSBURY, FOR DISCHARGE  
FROM FURTHER RESPONSIBILITY FOR THE FUNDING OF THE ESTATE'S  
PARTICIPATION IN THE CHICAGO LIFE INSURANCE LITIGATION AND FOR  
ASSUMPTION OF RESPONSIBILITY BY THE ESTATE AND FOR  
REIMBURSEMENT OF ADVANCED FUNDS**

COMES NOW, William E. Stansbury ("Stansbury"), Creditor of the Estate of Simon Bernstein (the "Estate"), by and through his undersigned counsel, and moves this Court for an Order discharging Stansbury from further responsibility for the funding of the Estate's participation in the "Chicago life insurance litigation", and for the Estate to assume responsibility for funding the Chicago life insurance litigation, and states:

1. At the time of Simon Bernstein's death it was determined that there existed a life insurance policy on the life of Simon Bernstein issued by Heritage Union Insurance Company ("Heritage"). The policy proceeds are approximately \$1.75 million, which, if included in the Estate, would more than double its assets. The policy was allegedly payable to a Simon Bernstein Irrevocable Insurance Trust as its beneficiary (the "Insurance Trust").

2. The alleged Insurance Trust submitted a death claim to Heritage and demanded that Heritage pay the policy proceeds to the so-called "trustee" of the Insurance Trust the former Co-Personal Representative of the Estate. If paid to the Insurance Trust, the death benefit would



not be included as an asset of the Estate. However, neither the original nor a copy of the "Insurance Trust" exists.

3. Heritage refused to pay the death benefit of \$1.7 million to anyone without a court order. The alleged Insurance Trust then sued Heritage in the Circuit Court of Cook County, Illinois. The case was subsequently removed to the U.S. District Court for the Northern District of Illinois. (The "Life Insurance Litigation") See Simon Bernstein Irrevocable Trust DTD 6/21/95 v. Heritage Union Life Insurance Company, Case No. 13 cv 3643 (N.D. Ill., E. Div.) A copy of the Amended Complaint filed in U.S. District Court is attached as Exhibit "1." Heritage ultimately deposited the entire \$1.75 million death benefit of the policy into the registry of the court in Chicago.

4. The Estate of Simon Bernstein was not made a party to the Life Insurance Litigation, even though the Estate will clearly be affected by the outcome of the case. The original co-personal representatives of the Estate, Donald Tescher and Robert Spallina, either failed or refused to intervene on behalf of the Estate. In fact, they actively participated in trying to prevent the death benefit from being paid to the Estate at a time when they were Co-Personal Representatives of the Estate!

5. In December of 2013, Stansbury filed a Motion to Intervene in the Life Insurance Litigation as an Interested Party. The Court denied the Motion and thus Stansbury was unable to Intervene in his own right.

6. Thereafter, Stansbury brought the Life Insurance Litigation to the attention of Benjamin Brown ("Brown"), who had been appointed Curator of the Estate following the resignation of Tescher & Spallina as co-personal representatives. By Order dated May 23, 2014, pursuant to a Petition filed by Stansbury, this Court appointed Brown as Administrator Ad Litem

to pursue intervention in the Life Insurance Litigation in order to protect the interests of the Estate.

7. More importantly, as a creditor of the Estate, Stansbury volunteered to initially fund the Life Insurance Litigation despite being under no legal obligation to do so. While Stansbury does stand to benefit from a successful outcome in the Life Insurance Litigation, his funding of the case on behalf of the Estate will clearly benefit the Estate and the Simon Bernstein Trust, who is the residuary legatee of the Estate. As a consequence of Stansbury's offer of initial funding, this Court accordingly ordered that all fees and costs incurred in the Life Insurance Litigation, "including for the Curator in connection with this work as Administrator Ad Litem and any counsel retained by Administrator Ad Litem, will initially be borne by William Stansbury." A copy of the May 23, 2014 Order is attached as **Exhibit "2."**

8. On June 5, 2014, the Estate, by and through counsel in Chicago, James J. Stamos, Esq., filed a Motion to Intervene on behalf of the Estate.

9. On July 28, 2014, the United States District Court for the Northern District of Illinois **granted** the Estate's Motion to Intervene. In granting the Motion, the court stated at page 3 of the Order:

It is undisputed, however, that no one can locate the Bernstein Trust. Accordingly, Brown, the Administrator Ad Litem of the Estate, moves to intervene arguing that in the absence of a valid trust and designated beneficiary, the policy proceeds must be paid to the Estate as a matter of law. (*citing Harris v. Byard*, 501 So.2d 730, 734 (Fla. App. 1<sup>st</sup> DCA, 1987) ("Since the policy had no named beneficiary, there is no basis in law for directing payment of the policy proceeds to anyone other than the decedent's estate for administration and distribution."))

The Court concluded that the Estate demonstrated a sufficient interest justifying intervention. A copy of the Order of the District Court Order is attached as **Exhibit "3."**

10. Thereafter, James J. Stamos ("Stamos"), the attorney in Chicago hired by the Estate to represent it in the Life Insurance Litigation, opines that the Estate has a meritorious case, and has a reasonable likelihood of success on the merits. Stamos believes in the merits of the Estate's position so strongly that his firm has offered to continue representing the Estate on a contingency fee basis. In that event, there will be no further out of pocket expenses to the Estate for legal fees unless and until there is a recovery, either through settlement or judgment. To date the Estate has not yet brought the contingency fee offer by Stamos before the Court for approval.

11. As a result of the foregoing, Stansbury respectfully submits that due to his actions on behalf of the Estate, he has enabled the Estate to intervene and advance a meritorious position in the pending Life Insurance Litigation. There is now created a realistic expectation that the assets in the Estate could be more than doubled should the Estate's position prevail.

12. As such, Stansbury, who volunteered to initially fund the Life Insurance Litigation, despite being under no legal obligation to do so, should be discharged from further responsibility to pay attorney fees and costs in connection with the Estate's participation in the Life Insurance Litigation. The Estate, through a contingent fee arrangement, can now proceed without paying legal fees out of pocket. Any fees would only be paid if there is a recovery.

WHEREFORE, Petitioner, William E. Stansbury, requests that this Court issue an Order stating that: a) Stansbury is hereby discharged from further responsibility to pay attorney fees and costs in connection with the Estate's participation in the Life Insurance Litigation; b) the responsibility to pay future attorney fees and costs in the case are hereby to be assumed by the Estate and the Estate is hereby authorized to proceed; and c) that the Court order that the Estate reimburse Stansbury for fees advanced in the amount to be determined at a subsequent hearing, together with any other relief this court deems just and proper.

Respectfully submitted,



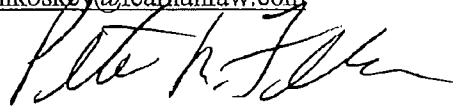
Peter M. Feaman

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been forwarded via e-mail service through the Florida E-portal system to those listed on the attached service list, on this 4<sup>th</sup> day of May, 2016.

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By: \_\_\_\_\_

  
Peter M. Feaman  
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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 )  
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, 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 )

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



Irrevocable Insurance Trust Dtd 6/21/95,  
and ELIOT BERNSTEIN

Third-Party Defendants.

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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.

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**PLAINTIFFS' FIRST AMENDED COMPLAINT**

**NOW COMES** Plaintiffs, SIMON BERNSTEIN IRREVOCABLE INSURANCE TRUST dtd 6/21/95, and TED BERNSTEIN, as Trustee, (collectively referred to as "BERNSTEIN TRUST"), TED BERNSTEIN, individually, PAMELA B. SIMON, individually, JILL IANTONI, individually, and LISA FRIEDSTEIN, individually, by their attorney, Adam M. Simon, and complaining of Defendant, HERITAGE UNION LIFE INSURANCE COMPANY, ("HERITAGE") states as follows:

**BACKGROUND**

1. At all relevant times, the BERNSTEIN TRUST was a common law irrevocable life insurance trust established in Chicago, Illinois, by the settlor, Simon L. Bernstein, ("Simon Bernstein" or "insured") and was formed pursuant to the laws of the state of Illinois.
2. At all relevant times, the BERNSTEIN TRUST was a beneficiary of a life insurance policy insuring the life of Simon Bernstein, and issued by Capitol Bankers Life Insurance Company as policy number 1009208 (the "Policy").
3. Simon Bernstein's spouse, Shirley Bernstein, was named as the initial Trustee of the BERNSTEIN TRUST. Shirley Bernstein passed away on December 8, 2010, predeceasing Simon Bernstein.
4. The successor trustee, as set forth in the BERNSTEIN TRUST agreement is Ted Bernstein.
5. The beneficiaries of the BERNSTEIN TRUST as named in the BERNSTEIN TRUST Agreement are the children of Simon Bernstein.

6. Simon Bernstein passed away on September 13, 2012, and is survived by five adult children whose names are Ted Bernstein, Pamela Simon, Eliot Bernstein, Jill Iantoni, and Lisa Friedstein. By this amendment, Ted Bernstein, Pamela Simon, Jill Iantoni and Lisa Friedstein are being added as co-Plaintiffs in their individual capacities.

7. Four out five of the adult children of Simon Bernstein, whom hold eighty percent of the beneficial interest of the BERNSTEIN TRUST have consented to having Ted Bernstein, as Trustee of the BERNSTEIN TRUST, prosecute the claims of the BERNSTEIN TRUST as to the Policy proceeds at-issue.

8. Eliot Bernstein, the sole non-consenting adult child of Simon Bernstein, holds the remaining twenty percent of the beneficial interest in the BERNSTEIN TRUST, and is representing his own interests and has chosen to pursue his own purported claims, pro se, in this matter.

9. The Policy was originally purchased by the S.B. Lexington, Inc. 501(c)(9) VEBA Trust (the "VEBA") from Capitol Bankers Life Insurance Company ("CBLIC") and was delivered to the original owner in Chicago, Illinois on or about December 27, 1982.

10. At the time of the purchase of the Policy, S.B. Lexington, Inc., was an Illinois corporation owned, in whole or part, and controlled by Simon Bernstein.

11. At the time of purchase of the Policy, S.B. Lexington, Inc. was an insurance brokerage licensed in the state of Illinois, and Simon Bernstein was both a principal and an employee of S.B. Lexington, Inc.

12. At the time of issuance and delivery of the Policy, CBLIC was an insurance company licensed and doing business in the State of Illinois.

13. HERITAGE subsequently assumed the Policy from CBLIC and thus became the successor to CBLIC as "Insurer" under the Policy and remained the insurer including at the time of Simon Bernstein's death.

14. In 1995, the VEBA, by and through LaSalle National Trust, N.A., as Trustee of the VEBA, executed a beneficiary change form naming LaSalle National Trust, N.A., as Trustee, as primary beneficiary of the Policy, and the BERNSTEIN TRUST as the contingent beneficiary.

15. On or about August 26, 1995, Simon Bernstein, in his capacity as member or auxiliary member of the VEBA, signed a VEBA Plan and Trust Beneficiary Designation form designating the BERNSTEIN TRUST as the "person(s) to receive at my death the Death Benefit stipulated in the S.B. Lexington, Inc. Employee Death Benefit and Trust and the Adoption Form adopted by the Employer".

16. The August 26, 1995 VEBA Plan and Trust Beneficiary Designation form signed by Simon Bernstein evidenced Simon Bernstein's intent that the beneficiary of the Policy proceeds was to be the BERNSTEIN TRUST.

17. S.B. Lexington, Inc. and the VEBA were voluntarily dissolved on or about April 3, 1998.

18. On or about the time of the dissolution of the VEBA in 1998, the Policy ownership was assigned and transferred from the VEBA to Simon Bernstein, individually.

19. From the time of Simon Bernstein's designation of the BERNSTEIN TRUST as the intended beneficiary of the Policy proceeds on August 26, 1995, no document was submitted by Simon Bernstein (or any other Policy owner) to the Insurer which evidenced any change in his intent that the BERNSTEIN TRUST was to receive the Policy proceeds upon his death.

20. At the time of his death, Simon Bernstein was the owner of the Policy, and the BERNSTEIN TRUST was the sole surviving beneficiary of the Policy.

21. The insured under the Policy, Simon Bernstein, passed away on September 13, 2012, and on that date the Policy remained in force.

22. Following Simon Bernstein's death, the BERNSTEIN TRUST, by and through its counsel in Palm Beach County, FL, submitted a death claim to HERITAGE under the Policy including the insured's death certificate and other documentation.

### COUNT I

#### **BREACH OF CONTRACT**

23. Plaintiff, the BERNSTEIN TRUST, restates and realleges the allegations contained in ¶1-¶22 as if fully set forth as ¶23 of Count I.

24. The Policy, by its terms, obligates HERITAGE to pay the death benefits to the beneficiary of the Policy upon HERITAGE'S receipt of due proof of the insured's death.

25. HERITAGE breached its obligations under the Policy by refusing and failing to pay the Policy proceeds to the BERNSTEIN TRUST as beneficiary of the Policy despite HERITAGE'S receipt of due proof of the insured's death.

26. Despite the BERNSTEIN TRUST'S repeated demands and its initiation of a breach of contract claim, HERITAGE did not pay out the death benefits on the Policy to the BERNSTEIN TRUST instead it filed an action in interpleader and deposited the Policy proceeds with the Registry of the Court.

27. As a direct result of HERITAGE'S refusal and failure to pay the Policy proceeds to the BERNSTEIN TRUST pursuant to the Policy, Plaintiff has been damaged in an amount equal to the death benefits of the Policy plus interest, an amount which exceeds \$1,000,000.00.

WHEREFORE, PLAINTIFF, the BERNSTEIN TRUST prays for a judgment to be entered in its favor and against Defendant, HERITAGE, for the amount of the Policy proceeds on deposit with the Registry of the Court (an amount in excess of \$1,000,000.00) plus costs and reasonable attorneys' fees together with such further relief as this court may deem just and proper.

## COUNT II

### DECLARATORY JUDGMENT

28. Plaintiff, the BERNSTEIN TRUST, restates and realleges the allegations contained in ¶1-¶27 above as ¶28 of Count II and pleads in the alternative for a Declaratory Judgment.

29. On or about June 21, 1995, David Simon, an attorney and Simon Bernstein's son-in-law, met with Simon Bernstein before Simon Bernstein went to the law offices of Hopkins and Sutter in Chicago, Illinois to finalize and execute the BERNSTEIN TRUST Agreement.

30. After the meeting at Hopkins and Sutter, David B. Simon reviewed the final version of the BERNSTEIN TRUST Agreement and personally saw the final version of the BERNSTEIN TRUST Agreement containing Simon Bernstein's signature.

31. The final version of the BERNSTEIN TRUST Agreement named the children of Simon Bernstein as beneficiaries of the BERNSTEIN TRUST, and unsigned drafts of the BERNSTEIN TRUST Agreement confirm the same.

32. The final version of the BERNSTEIN TRUST Agreement named Shirley Bernstein, as Trustee, and named Ted Bernstein as, successor Trustee.

33. As set forth above, at the time of death of Simon Bernstein, the BERNSTEIN TRUST was the sole surviving beneficiary of the Policy.

34. Following the death of Simon Bernstein, neither an executed original of the BERNSTEIN TRUST Agreement nor an executed copy could be located by Simon Bernstein's family members.

35. Neither an executed original nor an executed copy of the BERNSTEIN TRUST Agreement has been located after diligent searches conducted as follows:

- i) Ted Bernstein and other Bernstein family members of Simon Bernstein's home and business office;
- ii) the law offices of Tescher and Spallina, Simon Bernstein's counsel in Palm Beach County, Florida,
- iii) the offices of Foley and Lardner (successor to Hopkins and Sutter) in Chicago, IL; and
- iv) the offices of The Simon Law Firm.

36. As set forth above, Plaintiffs have provided HERITAGE with due proof of the death of Simon Bernstein which occurred on September 13, 2012.

WHEREFORE, PLAINTIFF, the BERNSTEIN TRUST prays for an Order entering a declaratory judgment as follows:

- a) declaring that the original BERNSTEIN TRUST was lost and after a diligent search cannot be located;
- b) declaring that the BERNSTEIN TRUST Agreement was executed and established by Simon Bernstein on or about June 21, 1995;
- c) declaring that the beneficiaries of the BERNSTEIN TRUST are the five children of Simon Bernstein;



- d) declaring that Ted Bernstein, is authorized to act as Trustee of the BERNSTEIN TRUST because the initial trustee, Shirley Bernstein, predeceased Simon Bernstein;
- e) declaring that the BERNSTEIN TRUST is the sole surviving beneficiary of the Policy;
- f) declaring that the BERNSTEIN TRUST is entitled to the proceeds placed on deposit by HERITAGE with the Registry of the Court;
- g) ordering the Registry of the Court to release all of the proceeds on deposit to the BERNSTEIN TRUST; and
- h) for such other relief as this court may deem just and proper.

### COUNT III

#### RESULTING TRUST

37. Plaintiffs restate and reallege the allegations contained in ¶1-¶36 of Count II as ¶37 of Count III and plead, in the alternative, for imposition of a Resulting Trust.

38. Pleading in the alternative, the executed original of the BERNSTEIN TRUST Agreement has been lost and after a diligent search as detailed above by the executors, trustee and attorneys of Simon Bernstein's estate and by Ted Bernstein, and others, its whereabouts remain unknown.

39. Plaintiffs have presented HERITAGE with due proof of Simon Bernstein's death, and Plaintiff has provided unexecuted drafts of the BERNSTEIN TRUST Agreement to HERITAGE.

40. Plaintiffs have also provided HERITAGE with other evidence of the BERNSTEIN TRUST'S existence including a document signed by Simon Bernstein that designated the BERNSTEIN TRUST as the ultimate beneficiary of the Policy proceeds upon his death.

41. At all relevant times and beginning on or about June 21, 1995, Simon Bernstein expressed his intent that (i) the BERNSTEIN TRUST was to be the ultimate beneficiary of the life insurance proceeds; and (ii) the beneficiaries of the BERNSTEIN TRUST were to be the children of Simon Bernstein.

42. Upon the death of Simon Bernstein, the right to the Policy proceeds immediately vested in the beneficiary of the Policy.

43. At the time of Simon Bernstein's death, the beneficiary of the Policy was the BERNSTEIN TRUST.

44. If an express trust cannot be established, then this court must enforce Simon Bernstein's intent that the BERNSTEIN TRUST be the beneficiary of the Policy; and therefore upon the death of Simon Bernstein the rights to the Policy proceeds immediately vested in a resulting trust in favor of the five children of Simon Bernstein.

45. Upon information and belief, Bank of America, N.A., as successor Trustee of the VEBA to LaSalle National Trust, N.A., has disclaimed any interest in the Policy.

46. In any case, the VEBA terminated in 1998 simultaneously with the dissolution of S.B. Lexington, Inc.

47. The primary beneficiary of the Policy named at the time of Simon Bernstein's death was LaSalle National Trust, N.A. as "Trustee" of the VEBA.

48. LaSalle National Trust, N.A., was the last acting Trustee of the VEBA and was named beneficiary of the Policy in its capacity as Trustee of the VEBA.

49. As set forth above, the VEBA no longer exists, and the ex-Trustee of the dissolved trust, and upon information and belief, Bank Of America, N.A., as successor to LaSalle National Trust, N.A. has disclaimed any interest in the Policy.

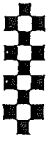
50. As set forth herein, Plaintiff has established that it is immediately entitled to the life insurance proceeds HERITAGE deposited with the Registry of the Court.

51. Alternatively, by virtue of the facts alleged herein, HERITAGE held the Policy proceeds in a resulting trust for the benefit of the children of Simon Bernstein and since HERITAGE deposited the Policy proceeds the Registry, the Registry now holds the Policy proceeds in a resulting trust for the benefit of the children of Simon Bernstein.

WHEREFORE, PLAINTIFFS pray for an Order as follows:

- a) finding that the Registry of the Court holds the Policy Proceeds in a Resulting Trust for the benefit of the five children of Simon Bernstein, Ted Bernstein, Pamela Simon, Eliot Ivan Bernstein, Jill Iantoni and Lisa Friedstein; and
- b) ordering the Registry of the Court to release all the proceeds on deposit to the Bernstein Trust or alternatively as follows: 1) twenty percent to Ted Bernstein; 2) twenty percent to Pam Simon; 3) twenty percent to Eliot Ivan Bernstein; 4) twenty percent to Jill Iantoni; 5) twenty percent to Lisa Friedstein
- c) and for such other relief as this court may deem just and proper.

By: s/Adam M. Simon  
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Attorneys for Plaintiffs and Third-Party  
Defendants  
*Simon L. Bernstein Irrevocable Insurance Trust  
Dtd 6/21/95; Ted Bernstein as Trustee, and  
individually, Pamela Simon, Lisa Friedstein  
and Jill Iantoni*



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

IN RE:

CASE NO.: 50 2012 CP 004391 XXXX SB  
PROBATE DIV.

ESTATE OF SIMON L. BERNSTEIN,  
Deceased.

**ORDER APPOINTING ADMINISTRATOR AD LITEM TO  
ACT ON BEHALF OF THE ESTATE OF SIMON L. BERNSTEIN  
TO ASSERT THE INTERESTS OF THE ESTATE IN THE ILLINOIS  
LITIGATION (CASE NO. 13CV3643, N.D. ILL. E. DIV.) INVOLVING  
LIFE INSURANCE PROCEEDS ON THE DECEDENT'S LIFE**

THIS CAUSE came before this Honorable Court on May 23, 2014 upon the Curator's Amended Motion for Instructions/Determination regarding Estate Entitlement to Life Insurance Proceeds and upon the Petition for Appointment of Administrator Ad Litem filed by William Stansbury, in the U.S. District Court case styled *Simon Bernstein Irrevocable Insurance Trust DTD 6/21/95 v. Heritage Union Life Insurance*, Case No. 13-cv-03643, currently pending in the United States District Court for the Northern District Court of Illinois, and the Court having heard argument of counsel and being otherwise duly advised in the premises, it is

ORDERED and ADJUDGED that


I. The Court appoints Benjamin P. Brown, Esq., who is currently serving as Curator, as the Administrator Ad Litem on behalf of the Estate of Simon L. Bernstein to assert the interests of the Estate in the Illinois Litigation involving life insurance proceeds on the Decedent's life in the U.S. District Court case styled *Simon Bernstein Irrevocable Insurance Trust DTD 6/21/95 v. Heritage Union Life Insurance*, Case No. 13-cv-03643, pending in the United States District Court for the Northern District Court of Illinois.



2. For the reasons and subject to the conditions stated on the record during the hearing, all fees and costs incurred, including for the Curator in connection with his work as Administrator Ad Litem and any counsel retained by the Administrator Ad Litem, will initially be borne by William Stansbury.

3. The Court will consider any subsequent Petition for Fees and Costs by William Stansbury as appropriate under Florida law.

DONE AND ORDERED in Palm Beach County, Florida this 23 day of May, 2014.

  
MARTIN COLIN  
Circuit Court Judge

*Copies to:*

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- Benjamin R. Brown, Esq., Mutwiozyk & Brown, LLP, 625 No. Flagler Drive, Suite 401, West Palm Beach, FL 33401, [mutwiozykandbrown.com](mailto:bbr@mutwiozykandbrown.com)

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. )

Case No. 13 C 3643

Judge Amy St. Eve

ORDER

The Court grants Benjamin P. Brown's motion to intervene pursuant to Federal Rule of Civil Procedure 24(a)(2) [110].

STATEMENT

On May 20, 2013, Defendant Jackson National Life Insurance Company ("Defendant" or "Jackson"), as successor in interest to Heritage Union Life Insurance Company ("Heritage"), filed an amended notice of removal pursuant to 28 U.S.C. § 1441 removing the present lawsuit from the Circuit Court of Cook County, Illinois, based on the Court's diversity jurisdiction. *See* 28 U.S.C. § 1332(a). In the Complaint filed on April 5, 2013, Plaintiff Simon Bernstein Irrevocable Insurance Trust ("Bernstein Trust") alleged a breach of contract claim against Heritage based on Heritage's failure to pay Plaintiff proceeds from the life insurance policy of decedent Simon Bernstein. On June 26, 2013, Defendant filed a Third-Party Complaint and Counter-Claim for Interpleader pursuant to 28 U.S.C. § 1335(a) and Federal Rule of Civil Procedure 14 seeking a declaration of rights under the life insurance policy for which it is responsible to administer. Plaintiffs filed a First Amended Complaint on January 13, 2014.

Before the Court is Benjamin P. Brown's ("Brown") motion to intervene both as of right and permissibly under Federal Rule of Civil Procedure 24(a)(2) and Rule 24(b)(1)(B). Brown is the Administrator Ad Litem of the Estate of Simon Bernstein. For the following reasons, the Court grants Brown's motion brought pursuant to Rule 24(a)(2).

BACKGROUND

In their First Amended Complaint, Plaintiffs, who are the Bernstein Trust and four of the five adult children of decedent Simon Bernstein, allege that at all times relevant to this lawsuit,



the Bernstein Trust was a common law trust established in Chicago, Illinois by Simon Bernstein. (R. 73, Am. Compl. ¶¶ 1, 7.) Plaintiffs assert that Ted Bernstein is the trustee of the Bernstein Trust and that the Bernstein Trust was a beneficiary of Simon Bernstein's life insurance policy. (*Id.* ¶¶ 2, 4.) In addition, Plaintiffs allege that the beneficiaries to the Bernstein Trust are Simon Bernstein's five children. (*Id.* ¶ 5.) According to Plaintiffs, at the time of his death, Simon Bernstein was the owner of the life insurance policy and the Bernstein Trust was the sole surviving beneficiary under the policy. (*Id.* ¶ 20.) Following Simon Bernstein's death on September 13, 2012, the Bernstein Trust, by and through its counsel in Palm Beach County, Florida, submitted a death claim to Heritage under the life insurance policy at issue. (*Id.* ¶ 22.)

In its Counter-Claim and Third-Party Complaint for Interpleader, Jackson alleges that it did not originate or administer the life insurance policy at issue, but inherited the policy from its predecessors. (R. 17, Counter ¶ 2.) Jackson further alleges that on December 27, 1982, Capitol Bankers Life Insurance Company issued the policy to Simon Bernstein and that over the years, the owners, beneficiaries, contingent beneficiaries, and issuers of the policy have changed. (*Id.* ¶¶ 15, 16.) At the time of the insured's death, the policy's death benefits were \$1,689,070.00. (*Id.* ¶ 17.) It is undisputed that no one has located an executed copy of the Bernstein Trust. (*Id.* ¶ 19.)

In the present motion to intervene, Brown maintains that after Simon Bernstein, a resident of Florida, died in September 2012, his estate was admitted to probate in Palm Beach County, Florida on October 2, 2012. Brown further alleges that on May 23, 2014, a judge in the Probate Court of Palm Beach County appointed him as Administrator Ad Litem of the Estate of Simon Bernstein ("Estate"). According to Brown, the probate judge directed him to "assert the interests of the Estate in the Illinois Litigation involving the life insurance proceeds on the Decedent's life." Brown contends that because no one can locate an executed copy of the Bernstein Trust, and, in absence of a valid trust and designated beneficiary, the insurance policy proceeds at issue in the present lawsuit are payable to the Estate, and not Plaintiffs.

#### LEGAL STANDARD

"Rule 24 provides two avenues for intervention, either of which must be pursued by a timely motion." *Grochocinski v. Mayer Brown Rowe & Maw, LLP*, 719 F.3d 785, 797 (7th Cir. 2013). Intervention as of right under Rule 24(a)(2) states that "the court must permit anyone to intervene who claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." Fed.R.Civ.P. 24(a)(2); *see also Flying J, Inc. v. Van Hollen*, 578 F.3d 569, 571 (7th Cir. 2009) (citation omitted). "Intervention as of right requires a 'direct, significant[,] and legally protectable' interest in the question at issue in the lawsuit." *Wisconsin Educ. Ass'n Council v. Walker*, 705 F.3d 640, 658 (7th Cir. 2013) (citation omitted). "That interest must be unique to the proposed intervenor." *Id.*

### ANALYSIS

At issue in this lawsuit is who are the beneficiaries of Simon Bernstein's life insurance policy. In their First Amended Complaint, Plaintiffs allege that there is a common law trust, namely, the Bernstein Trust, and that the Bernstein Trust is the beneficiary of Simon Bernstein's life insurance policy. In addition, Plaintiffs allege that the beneficiaries to the Bernstein Trust are Simon Bernstein's five children. In short, according to Plaintiffs' First Amended Complaint, at the time of his death, Simon Bernstein was the owner of the life insurance policy and the Bernstein Trust was the sole surviving beneficiary under the policy.

It is undisputed, however, that no one can locate the Bernstein Trust. Accordingly, Brown, the Administrator Ad Litem of the Estate, moves to intervene arguing that in the absence of a valid trust and designated beneficiary, the insurance policy proceeds must be paid to the Estate as a matter of law. *See, e.g., New York Life Ins. Co. v. Rak* 24 Ill.2d 128, 134, 180 N.E.2d 470 (Ill. 1962); *see Harris v. Byard*, 501 So.2d 730, 734 (Fla. Ct. App. 1987) ("Since the policy had no named beneficiary, there is no basis in law for directing payment of the policy proceeds to anyone other than decedent's estate for administration and distribution.").

In response to the present motion to intervene, Plaintiffs maintain that there is a designated beneficiary of the insurance proceeds. In support of their argument, Plaintiffs set forth an affidavit averring that "on the date of death of Simon Bernstein, the Owner of the Policy was Simon Bernstein, the primary beneficiary was designated as LaSalle National Trust, N.A. as Successor Trustee, and the Contingent Beneficiary was designated as the Simon Bernstein Irrevocable Insurance Trust dated June 21, 1995. (R. 116-2, Sanders Aff. ¶ 62.) By submitting Sanders' affidavit, Plaintiffs have contradicted their own allegations in their First Amended Complaint by contending that the primary beneficiary of the insurance policy is LaSalle National Trust, N.A., and not the Bernstein Trust. Nevertheless, the Court cannot view this averment in a vacuum without more information about the insurance policy's provisions and any additional extrinsic evidence. To clarify, under Illinois law, "[t]he designation of a beneficiary is solely a decision of the insured and when a controversy arises as to the identity of a beneficiary the intention of the insured is the controlling element. If such intention is dependent on extrinsic facts which are disputed the question, of course, must be resolved as one of fact." *Reich v. W. F. Hall Printing Co.*, 46 Ill.App.3d 837, 844, 361 N.E.2d 296, 5 Ill.Dec. 157 (2d Dist. 1977); *see also Estate of Wilkening*, 109 Ill.App.3d 934, 941, 441 N.E.2d 158, 163, 65 Ill.Dec. 366, 371 (1st Dist. 1982) ("Evidence to establish a trust must be unequivocal both as to its existence and to its terms and conditions.") Moreover, Plaintiffs' contradiction illustrates why Brown has a competing interest in the insurance proceeds justifying intervention.

Further, Plaintiffs take issue with the fact that William E. Stansbury, who brought an unsuccessful motion to intervene in January 2014, filed a petition in the Florida probate court for an administrator ad litem and is paying costs and legal fees for the present motion to intervene. Based on Stansbury's conduct, Plaintiffs argue that the law of the case doctrine and collateral estoppel apply. In denying Stansbury's motion, the Court concluded that his interest as an

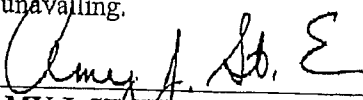


unsecured creditor of the Estate was too remote for purposes of Rule 24(a)(2). See *Flying J, Inc.*, 578 F.3d at 571 (“the fact that you might anticipate a benefit from a judgment in favor of one of the parties to a lawsuit — maybe you’re a creditor of one of them — does not entitle you to intervene in their suit.”).

Plaintiffs’ law of the case doctrine argument fails because “[w]hether an applicant has an interest sufficient to warrant intervention as a matter of right is a highly fact-specific determination, making comparison to other cases of limited value.” *Security Ins. Co. of Hartford v. Schipporeit, Inc.*, 69 F.3d 1377, 1381 (7th Cir. 1995). Here, Brown, as the Administrator Ad Litem, is protecting the Estate’s interest in the insurance proceeds, which is different from Stansbury’s remote interest as an unsecured creditor of the Estate. See *Walker*, 705 F.3d at 658; see also *Tallahassee Mem. Reg’l Med. Ctr., Inc. v. Petersen*, 920 So.2d 75, 78 (Fla. Ct. App. 2006) (“Florida Probate Rule 5.120(a) provides for discretionary appointment of a guardian ad litem in estate and trust proceedings where ... the personal representative or guardian may have adverse interests.”).

Furthermore, the doctrines of collateral estoppel or issue preclusion do not apply under the facts of this case because there was no separate, earlier judgment addressing the issues presented here. See *Adams v. City of Indianapolis*, 742 F.3d 720, 736 (7th Cir. 2014). (“‘collateral estoppel’ or ‘issue preclusion’—applies to prevent relitigation of issues resolved in an earlier suit.”). Therefore, this argument is unavailing.

Dated: July 28, 2014

  
\_\_\_\_\_  
AMY J. ST. EVE  
United States District Court Judge

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

IN RE:

Case No. 502012CP004391XXXXNB

ESTATE OF SIMON  
BERNSTEIN,  
Deceased.

\_\_\_\_\_ /

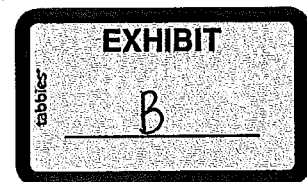
**RESPONSE IN OPPOSITION TO MOTION TO RATIFY AND CONFIRM  
APPOINTMENT OF TED S. BERNSTEIN AS SUCCESSOR TRUSTEE OF THE  
SIMON BERNSTEIN AMENDED AND RESTATED TRUST**

COMES NOW, Claimant and Interested Person, WILLIAM STANSBURY, by and through his undersigned counsel and objects to the Motion of Ted S. Bernstein to Ratify and Confirm his Appointment as Successor Trustee, and states as follows:

**I. Stansbury has standing to assert this Objection.**

Stansbury filed a lawsuit styled *William E. Stansbury v. Ted Bernstein, et al*, Case No. 50 2012 CA 013933 MB AA, Palm Beach County, Florida against Simon Bernstein ("Simon"), Ted Bernstein ("Ted") and several corporate defendants in August of 2012 to collect compensation, and other damages due Stansbury arising out of a life insurance business in which Stansbury, SIMON and TED were principals. Stansbury asserts claims against Simon and Ted both as agents of the corporate defendants and in their individual capacities (the claims against TED have settled). The damages Stansbury claims are in excess of \$2.5 million. Shortly after the lawsuit was filed, SIMON BERNSTEIN passed away in September of 2012. The Estate of Simon Bernstein (the "Estate") was substituted as a party defendant.

The provisions of §736.0706(1), §736.0103, and §733.707(3), Fla. Stats. (2014) govern the issue of who has standing to seek removal (or in this case, object to a Motion to Ratify a Successor Trustee) of a trustee. Section 736.0706(1) Fla. Stat. (2014) states:



*(1) The settlor, a cotrustee, or a beneficiary may request the court to remove a trustee, or a trustee may be removed by the court on the court's own initiative.*

§736.0103, Fla. Stat. (2014), defines a “beneficiary”:

*(4) “Beneficiary” means a person who has a present or future beneficial interest in a trust, vested or contingent, or who holds a power of appointment over trust property in a capacity other than that of trustee. (emphasis added)*

A “beneficial interest” is defined as: “A right or expectancy in something (such as a trust or an estate), as opposed to legal title to that thing.” Black’s Law Dictionary 149 (7<sup>th</sup> ed. 1999). Stansbury’s claim against the Estate is an expectancy, and though it may be contingent at this point, his claim falls within the definition of “beneficiary” set forth above. Stansbury has at least a contingent future beneficial interest in the Trust.

The next query is how does Mr. Stansbury have a beneficial interest in the Trust in his capacity as a claimant against the Simon Bernstein Estate? §733.707(3), Fla. Stat. (2014), states:

*(3) Any portion of a trust with respect to which a decedent who is the grantor has at the decedent’s death a right of revocation...is liable for the expenses of the administration and obligations of the decedent’s estate to the extent the decedent’s estate is insufficient to pay them...” (emphasis added)*

Stansbury’s claim against the Estate is for damages in excess of \$2.5 million. The assets of the Simon Bernstein Estate are worth considerably less than \$2 million. Florida Statute §733.707(3) (Fla. Stat. 2016) becomes operative when the assets of a probate estate are insufficient to satisfy the obligations of the decedent’s estate. In that situation, trust assets then become available to satisfy the expenses of the decedent’s estate when the assets of the decedent’s estate are insufficient to pay its obligations. Stansbury therefore has a contingent future beneficial interest in the assets of the Revocable Trust to the extent the assets of the Estate are insufficient to satisfy his claim when and if proven. This makes Stansbury, although not a named beneficiary of the Revocable Trust, a “beneficiary” nonetheless by virtue of his beneficial

interest under the statutory definition. Therefore, Stansbury has standing to object to the ratification of Ted Bernstein as Successor Trustee.

Florida law recognizes that a person not specifically named in a will or trust document as a beneficiary may nonetheless be deemed to have a sufficient beneficial interest in a will or trust to be considered a beneficiary thereunder. See, *In Re Estate of Nelson*, 232 So.2d 222 (Fla. 1<sup>st</sup> DCA 1970). There, a decedent bequeathed the major portion of his estate to a trust granting to his attorneys unlimited discretion to distribute the income or corpus for such religious, educational, scientific, charitable, or literary purposes as they saw fit. The attorneys were not named beneficiaries of the will or trust, other than in their capacity as executors and trustees. Family members contested the documents. The trial court found that the attorneys had, by virtue of their anticipated future compensation for services as executors and trustees, a sufficient beneficial interest in the will so as to make them de facto beneficiaries.

The Florida First District Court agreed. Relying on *Ziegler v. Coffin*, 219 Ala. 586, 123 So.2d 22 (1929), a Supreme Court of Alabama case, the Florida court held that, as a matter of law, the compensation which the attorney would receive for their services rendered as executors and trustees, together with the almost unlimited discretion and control they had in the management of the trust estate, constituted them as beneficiaries under the will even though they were not named as legatees or devisees therein.

While not entirely analogous to this case, the holding makes clear that courts may look beyond the written documents to ascertain a claimant's status as a beneficiary, based on the interests involved and the circumstances of the matter before the court. Additionally, an articulable claim of economic interest, even though contingent, is a sufficient beneficial interest to determine that a claimant such as Stansbury has the status of trust beneficiary under the statute, thereby giving him standing to object to trustee.

**--- Previous Order on Standing ---**

On August 22, 2014, the Honorable Martin Colin, a predecessor Judge in this matter, entered an Order holding that Mr. Stansbury did not have standing to object to the appointment of Ted Bernstein as Successor Trustee under the Simon Bernstein Revocable Trust. However, there has been a change of circumstances since the entry of that Order. Specifically, the Court ordered Mr. Stansbury to fund the Estate's attempted intervention into litigation in Chicago that could potentially bring over \$1.7 million into the Estate. Since that time Mr. Stansbury has expended in excess of \$80,000 in funding the litigation in Chicago on behalf of the Estate. His efforts have met with success, as the Estate has in fact intervened and now the attorneys representing the Estate in Chicago have offered to take the rest of the case on a contingency fee basis. This shows how confident the attorneys are that their efforts will ultimately recover money for the Estate of Simon Bernstein. In light of the fact that Mr. Stansbury now has almost \$100,000 invested in connection with bringing money into the Estate, he is clearly much more than a contingent beneficiary and should be granted standing to oppose the ratification of Ted Bernstein as Successor Trustee of the Simon Bernstein Trust, the sole monetary beneficiary of this Estate.

**II. Ted Bernstein is Not Eligible to Serve as a Successor Trustee under the very terms of the Trust.**

**A. Ted Bernstein was specifically disqualified to be a Successor Trustee by the terms of the Trust, representing the expressed intent of the Settlor, Simon Bernstein.**

Article III E(1) of the Simon Bernstein Trust states:

Notwithstanding the foregoing, for all purposes of this Trust and the dispositions made hereunder, my children, TED S. BERNSTEIN, PAMELA B. SIMON, ELIOT BERNSTEIN, JILL AIANTONI and LISA S. FRIEDSTEIN, shall be deemed to have predeceased me ..." (emphasis added)

Therefore, by the very language of the Trust, Ted Bernstein is disqualified by this provision to serve as Successor Trustee. A copy of the Trust is attached hereto as "**Exhibit 1.**"

**B. Ted Bernstein is a "related party" under the Trust and is therefore not eligible to serve as Successor Trustee by the express language of the Trust.**

The previous co-trustees of the Trust were Donald Tescher and Robert Spallina, by virtue of the Successor Trustee provision set forth in Article IV, Section C of the Trust. By letter dated January 14, 2014 addressed to the five children of Simon Bernstein, Donald Tescher, for himself and on behalf of Robert Spallina, resigned as co-trustees of the Simon Bernstein Trust and stated, "If the majority of the Bernstein family is in agreement, I would propose to exercise the power to designate a successor trustee by appointing Ted Bernstein in that capacity." A copy of the letter is attached hereto as **Exhibit "2."**

However, Tescher wrongfully exercised this supposed power of appointment. Ted Bernstein is ineligible under the very terms of the Trust to serve as successor trustee, not only because of the language of Article III E (1), *supra*, but also under Article IV, Section C (3) (Page 16) of the Trust therein. The Trust states:

C. Appointment of Successor Trustee

3. ... A successor Trustee appointed under this subparagraph shall not be a Related or Subordinate Party of the trust. (emphasis added)

Under Article III, E (7), A "Related or Subordinate Party" is defined in the Trust as follows:

E. Definitions. In this Agreement,

7. Related or Subordinate Party. A "*Related or Subordinate Party*" to a trust describes a beneficiary of the subject trust or a related or subordinate party to a beneficiary of the trust as the terms "related or subordinate party" are defined under Code Section 672(c).

The "Code" is defined as "the Internal Revenue Code of 1986..."

A "related or subordinate party" under the Code means any non-adverse party who is "...(2) any one of the following: The Grantor's father, mother, issue, brother or sister..." See, IRS Code §672(c).

Ted is the son, or an "issue" of the Grantor, SIMON BERNSTEIN. Therefore, Ted is ineligible as a Related or Subordinate Party, as defined by the Trust, to be successor trustee and is therefore unfit to serve as a successor trustee under §736.0706(2)(c), Fla.Stat. (2016).

**III. Ted Bernstein has a Conflict of Interest with the Estate of Simon Bernstein, Which Precludes Him from Serving as Successor Trustee.**

Ted Bernstein has a clear and present conflict of interest with the Estate of Simon Bernstein. The Trust over which he seeks ratification to be the Successor Trustee is the sole beneficiary of the Estate of Simon Bernstein (other than personal property). Pursuant to §736.0802, Fla.Stat. (2016), the primary duty of a trustee is as follows:

§736.0802: Duty of Loyalty.

(1) As between the trustee and the beneficiaries, a trustee shall administer the trust solely in the interest of the beneficiaries.

However, in this case Ted Bernstein is currently the Plaintiff in a lawsuit in the Northern District of Illinois which is suing to keep life insurance proceeds in the amount of \$1,700,000 from being paid to the Estate of Simon Bernstein, and then ultimately to the Trust, and ultimately to the beneficiaries of the Trust.

The background of the litigation in the Northern District of Illinois is as follows:

At the time of Simon Bernstein's death, it was determined that there was a life insurance policy issued by Heritage Mutual Insurance Company ("Heritage") insuring his life. Simon was listed on the company records as the owner of the policy. Heritage represented that the death benefit was approximately \$1.7 million. Heritage records also indicated that on November 27,

1995 there was a beneficiary change for the policy to read: "LaSalle National Trust N.A., primary beneficiary and Simon Bernstein Ins. Trust dated 6/21/1995, contingent beneficiary." It was determined by Heritage that the primary beneficiary (LaSalle) no longer had an interest in the death benefit and the contingent beneficiary would be paid the proceeds. At the time of Simon Bernstein's death the trust document establishing this alleged trust was not and, to date, has not been found.

Supposedly the beneficiaries of the Insurance Trust were Ted Bernstein and his siblings, Lisa Sue Friedstein, Pamela Beth Simon, Jill Iantoni and Eliot Bernstein (the "Bernstein Children"). Whether or not they were, in fact, beneficiaries was just an "educated guess" by attorney Robert Spallina, who was counsel to the Bernstein Children. See e-mail correspondence from Spallina to the Bernstein Children dated October 23, 2012, attached as **Exhibit "3."** If the Insurance Trust is no longer in existence, is lost, or if the insurance proceeds are not properly payable to this alleged trust, the proceeds would be payable to the Simon Bernstein Estate under Florida law.

Because no trust document could be found, Heritage refused to pay the claim for the life insurance proceeds to anyone without a court order. The alleged Insurance Trust then sued Heritage in the Circuit Court of Cook County, Illinois (the case was removed to Federal Court), styled *Simon Bernstein Irrevocable Insurance Trust Dtd. 6/21/95 v. Heritage Union Life Insurance Company*, Case No. 13 CV 3643, United States District Court for the Northern District of Illinois (the "Insurance Litigation"). A copy of the Amended Complaint (the "Complaint") is attached as **Exhibit "4."** In paragraph 2 of the Complaint, the Plaintiff, the Insurance Trust, although apparently still lost, and requiring an "educated guess" to ascertain its beneficiaries, nonetheless also alleges that Ted Bernstein is the "trustee" of the Insurance Trust. No trust



document exists establishing the continued existence of the Insurance Trust, let alone that Ted is the Trustee. Ted Bernstein is also suing as Plaintiff in his own name, individually.

Ted Bernstein, as the putative “trustee” of the purported insurance trust and as Plaintiff in the Insurance Litigation, is actively pursuing litigation that is contrary to the best interests of the Simon Bernstein Estate. The Estate intervened in the Insurance Litigation to assert that it, not the Bernstein Children, is the proper beneficiary of the life insurance proceeds. (Interestingly, Ted Bernstein opposed the intervention of the Estate.) As such, the Estate is an adverse party to the Insurance Trust for which Ted Bernstein is identified as trustee. The Estate is now a Defendant where Ted Bernstein is a Plaintiff.

Ted Bernstein now seeks ratification that he is properly the Successor Trustee of the Simon Bernstein Amended and Restated Trust Agreement Dated 7/25/2012 (the “Trust”). The Trust is the residuary legatee of the Estate, and its beneficiaries are the grandchildren of Simon Bernstein. As a result of Ted Bernstein’s prosecution of the Insurance Litigation, Ted is, on the one hand, seeking to deprive the Estate of \$1.7 million in life insurance proceeds, while at the same time he serves as Successor Trustee of the Trust which will be deprived of the life insurance proceeds if he, Ted, succeeds in the Insurance Litigation. The conflict of interest is obvious and should disqualify Ted Bernstein from serving in any fiduciary capacity in the Trust.

While the ultimate outcome of the adjudication of the issues surrounding the Heritage life insurance proceeds is as yet unknown, what is clear is that Ted Bernstein has advocated, and continues to advocate a position that is contrary to the best interests of the Estate and its beneficiaries. These two conflicting and contrary positions between the interests of Ted Bernstein as a Plaintiff in the Insurance Litigation versus his duty as Successor Trustee, renders Ted Bernstein unfit to serve as a fiduciary.

Ted Bernstein's testimony in the Insurance Litigation in Illinois could contribute to an adverse result against the Estate, depending upon how the testimony is received by the trier of fact. This in turn would deprive the Trust of receiving that money from the Estate. This inherent conflict of interest should serve to disqualify Ted Bernstein.

**IV. It was Simon Bernstein's intent, both expressed and implied, that Ted Bernstein not serve in a fiduciary capacity in his Estate or Trust.**

The continuation of Ted Bernstein as Successor Trustee conflicts with both the expressed intent and implied intent of the deceased, Simon Bernstein. In addition to the language of the Trust referenced earlier herein, a review of Simon Bernstein's other testamentary documents is revealing as to his intent concerning any involvement by Ted Bernstein as a fiduciary.

**--- The 2008 Testamentary Documents ---**

In 2008, Simon Bernstein prepared and executed his Last Will and Testament and his Revocable Trust. The designated Personal Representative under his 2008 Last Will and Testament was his wife, Shirley Bernstein and William Stansbury as Co-Personal Representatives, or either of them alone if the other was unable to serve. In his 2008 Trust, he designated himself as Trustee, and in the event a successor trustee was necessary, Shirley Bernstein and William Stansbury were appointed as Successor Co-Trustees, or either of them if the other was unable to serve. In the 2008 trust document, he specifically excluded Ted Bernstein by indicating that he was to be considered as having pre-deceased him:

Notwithstanding the foregoing [the definitions of "Children" and "Lineal Descendants"], as I have adequately provided for them during my lifetime, for purposes of the dispositions made under this Trust, my children TED S. BERNSTEIN ("**TED**") and PAMELA B. SIMON ("**PAM**") and their respective lineal descendants shall be deemed to have predeceased the survivor of my spouse and me, . . . .

*See*, Simon L. Bernstein Trust Agreement dated May 20, 2008, Article III, Section E(1), page 7.

--- The 2012 Last Will and Testament ---

In 2012, Simon Bernstein revised and re-executed his Last Will and Testament (the "2012 Will") and amended his 2008 Trust (the "2012 Trust").

Even though Simon Bernstein could have appointed Ted Bernstein as his Personal Representative or as his Alternate Personal Representative under the 2012 Will, again he specifically chose not to. Rather, Simon Bernstein appointed Donald Tescher and Robert Spallina as Co-Personal Representatives of his Estate. When they were forced to resign, this Court appointed a Curator, Benjamin Brown, Esq., even though Ted Bernstein filed a Motion to have himself appointed Curator or Administrator Ad Litem. The Court, through Judge Colin, denied his motion. *See* Order of Judge Colin dated February 19, 2014, **Exhibit "5"** attached hereto. Thereafter, when Curator Benjamin Brown passed away and a Successor Personal Representative was appointed, the Court again chose not to appoint Ted Bernstein, but instead appointed Brian O'Connell, Esq. who presently serves as Successor Personal Representative.

--- The 2012 Trust ---

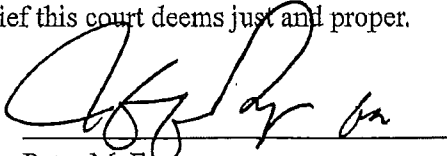
In 2012, Simon Bernstein also amended his 2008 Trust. Simon again specifically excluded Ted Bernstein, and he stated in even stronger language that Ted Bernstein should be considered as having predeceased him for all purposes of the Trust:

Notwithstanding the foregoing [the definitions of "Children" and "Lineal Descendants"], for all purposes of this Trust and dispositions made hereunder, my children, TED S. BERNSTEIN, PAMELA B. SIMON, ELIOT BERNSTEIN, JILL IANTONI and LISA FRIEDSTEIN, shall be deemed to have predeceased me as I have adequately provided for them during my lifetime.

Simon L. Bernstein Amended and Restated Trust Agreement dated July 25, 2012, Article III, Section E(1), page 6. (emphasis added)

A copy of the Trust is attached hereto as Exhibit "1." Obviously, Simon Bernstein did not want Ted Bernstein to ever serve in a fiduciary capacity in connection with his Estate and Trust matters.

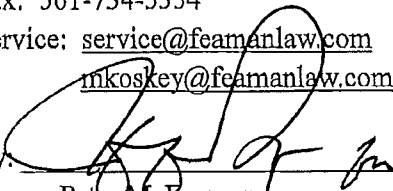
WHEREFORE, WILLIAM STANSBURY, requests this Honorable Court to deny the Motion to Ratify and Confirm the Appointment of Ted Bernstein as Successor Trustee of the Simon Bernstein Trust, together with any other relief this court deems just and proper.

  
Peter M. Feaman

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been forwarded via e-mail service through the Florida E-portal system to: Alan Rose, Esq., MRACHEK, FITZGERALD ROSE, 505 So. Flagler Drive, Suite 600, West Palm Beach, FL 33401, [arose@pm-law.com](mailto:arose@pm-law.com) and [mchandler@pm-law.com](mailto:mchandler@pm-law.com); Diana Lewis, Esq., 2765 Tecumseh Dr., West Palm Beach, FL 33409, [dzlewis@aol.com](mailto:dzlewis@aol.com); Eliot Bernstein, 2753 NW 34<sup>th</sup> Street, Boca Raton, FL 33434, [iviewit@iviewit.tv](mailto:iviewit@iviewit.tv); Gary R. Shendell, Esq., Shendell & Pollock, P.L., 2700 N. Military Trail, suite 150, Boca Raton, FL 33431, [gary@shendellpollock.com](mailto:gary@shendellpollock.com); Brian O'Connell, Esq., Ciklin Lubitz Martens & O'Connell, 515 North Flagler Drive, 20<sup>th</sup> Floor, West Palm Beach, FL 33401, [boconnell@ciklinlubitz.com](mailto:boconnell@ciklinlubitz.com); John P. Morrissey, Esq., 330 Clematis Street, Suite 213, West Palm Beach, FL 33401, [john@jmorrisseylaw.com](mailto:john@jmorrisseylaw.com); Lisa Friedstein, 2142 Churchill Lane, Highland Park, IL 60035, [Lisa@friedsteins.com](mailto:Lisa@friedsteins.com); Jill Iantoni, 2101 Magnolia Lane, Highland Park, IL 60035, [jilliantoni@gmail.com](mailto:jilliantoni@gmail.com), on this 23 day of September, 2016.

PETER M. FEAMAN, P.A.  
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By:   
Peter M. Feaman  
Florida Bar No. 0260347

**SIMON L. BERNSTEIN**  
**AMENDED AND RESTATED TRUST AGREEMENT**

*Prepared by:*

Tescher & Spallina, P.A.  
4855 Technology Way, Suite 720, Boca Raton, Florida 33431  
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LAW OFFICES  
**TESCHER & SPALLINA, P.A.**



SIMON L. BERNSTEIN

AMENDED AND RESTATED TRUST AGREEMENT

This Amended and Restated Trust Agreement is dated this 26 day of July, 2012, and is between SIMON L. BERNSTEIN, of Palm Beach County, Florida referred to in the first person, as settlor, and SIMON L. BERNSTEIN, of Palm Beach County, Florida and SIMON L. BERNSTEIN's successors, as trustee (referred to as the "Trustee," which term more particularly refers to all individuals and entities serving as trustee of a trust created hereunder during the time of such service, whether alone or as co-trustees, and whether originally serving or as a successor trustee).

WHEREAS, on May 20, 2008, I created and funded the SIMON L. BERNSTEIN TRUST AGREEMENT (the "Trust Agreement," which reference includes any subsequent amendments of said trust agreement);

WHEREAS, Paragraph A. of Article I. of said Trust Agreement provides, inter alia, that during my lifetime I shall have the right at any time and from time to time by an instrument, in writing, delivered to the Trustee to amend or revoke said Trust Agreement, in whole or in part.

NOW, THEREFORE, I hereby amend and restate the Trust Agreement in its entirety and the Trustee accepts and agrees to perform its duties and obligations in accordance with the following amended provisions. Notwithstanding any deficiencies in execution or other issues in regard to whether any prior version of this Trust Agreement was a valid and binding agreement or otherwise created an effective trust, this amended and restated agreement shall constitute a valid, binding and effective trust agreement and shall amend and succeed all prior versions described above or otherwise predating this amended and restated Trust Agreement.


ARTICLE I. DURING MY LIFE AND UPON MY DEATH

A. Rights Reserved. I reserve the right (a) to add property to this trust during my life or on my death, by my Will or otherwise; (b) to withdraw property held hereunder; and (c) by separate written instrument delivered to the Trustee, to revoke this Agreement in whole or in part and otherwise modify or amend this Agreement.

B. Payments During My Life. If income producing property is held in the trust during my life, the Trustee shall pay the net income of the trust to me or as I may direct. However, during any periods while I am Disabled, the Trustee shall pay to me or on my behalf such amounts of the net income and principal of the trust as is proper for my Welfare. Any income not so paid shall be added to principal.

SIMON L. BERNSTEIN  
AMENDED AND RESTATED TRUST AGREEMENT

LAW OFFICES  
TESCHER & SPALLINA, P.A.



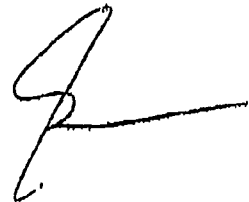
C. Upon My Death. Upon my death the Trustee shall collect and add to the trust all amounts due to the trust under any insurance policy on my life or under any death benefit plan and all property added to the trust by my Will or otherwise. After paying or providing for the payment from the augmented trust of all current charges and any amounts payable under the later paragraph captioned "Death Costs," the Trustee shall hold the trust according to the following provisions.

## ARTICLE II. AFTER MY DEATH

A. Disposition of Tangible Personal Property. If any non-business tangible personal property other than cash (including, but not limited to, my personal effects, jewelry, collections, household furnishings, and equipment, and automobiles) is held in the trust at the time of my death, such items shall be promptly distributed by the Trustee of the trust to such person or persons, including my estate, as to the item or items or proportion specified, as I may appoint, and to the extent that any such items are not disposed of by such appointment, such items shall be disposed of by the Trustee of the trust in exactly the same manner as such items would have been disposed of under the terms and provisions of my Will (including any Codicil thereto, or what the Trustee in good faith believes to be such Will and Codicil) had such items been included in my probate estate. Any such items which are not effectively disposed of pursuant to the preceding sentence shall pass with the other trust assets.

B. Disposition of Trust Upon My Death. Upon my death, the remaining assets in this trust shall be divided among and held in separate Trusts for my then living grandchildren. Each of my grandchildren for whom a separate trust is held hereunder shall hereinafter be referred to as a "beneficiary" with the separate Trusts to be administered as provided in Subparagraph II.C.

C. Trusts for Beneficiaries. The Trustee shall pay to the beneficiary and the beneficiary's children, such amounts of the net income and principal of such beneficiary's trust as is proper for the Welfare of such individuals. Any income not so paid shall be added to principal each year. After a beneficiary has reached any one or more of the following birthdays, the beneficiary may withdraw the principal of his or her separate trust at any time or times, not to exceed in the aggregate 1/3 in value after the beneficiary's 25th birthday, 1/2 in value (after deducting any amount previously subject to withdrawal but not actually withdrawn) after the beneficiary's 30th birthday, and the balance after the beneficiary's 35th birthday, provided that the withdrawal powers described in this sentence shall not apply to any grandchild of mine as beneficiary of a separate trust. The value of each trust shall be its value as of the first exercise of each withdrawal right, plus the value of any subsequent addition as of the date of addition. The right of withdrawal shall be a privilege which may be exercised only voluntarily and shall not include an involuntary exercise. If a beneficiary dies with assets remaining in his or her separate trust, upon the beneficiary's death the beneficiary may appoint his or her trust to or for the benefit of one or more of any of my lineal descendants (excluding from said class, however, such beneficiary and such beneficiary's creditors, estate, and creditors of such beneficiary's estate). Any part of his or her trust such beneficiary does not effectively appoint shall upon his or her death be divided among and held in separate Trusts for the following persons:



1. for his or her lineal descendants then living, *per stirpes*; or
2. if he or she leaves no lineal descendant then living, *per stirpes* for the lineal descendants then living of his or her nearest ancestor (among me and my lineal descendants) with a lineal descendant then living.

A trust for a lineal descendant of mine shall be held under this paragraph, or if a trust is then so held, shall be added to such trust.

**D. Termination of Small Trust.** If at any time after my death in the opinion of the Trustee a separate trust holds assets of a value of less than \$50,000.00 and is too small to justify the expense of its retention, and termination of such trust is in the best interests of its current income beneficiary, the Trustee in its discretion may terminate such trust and pay it to said beneficiary.

**E. Contingent Gift.** If at any time property of these Trusts is not disposed of under the other provisions of this Agreement, it shall be paid, as a gift made hereunder, to such persons and in such shares as such property would be distributed if I had then owned such property and had then died solvent, unmarried and intestate domiciled in the State of Florida, according to the laws of inheritance of the State of Florida then in effect.

**F. Protective Provision.** No beneficiary of any trust herein created shall have any right or power to anticipate, transfer, pledge, sell, alienate, assign or encumber in any way his or her interest in the income or principal of such trust. Furthermore, no creditor shall have the right to attach, lien, seize or levy upon the interest of a beneficiary in this trust (other than myself) and such interest shall not be liable for or subject to the debts, liabilities or obligations of any such beneficiary or any claims against such beneficiary (whether voluntarily or involuntarily created), and the Trustee shall pay directly to or for the use or benefit of such beneficiary all income and principal to which such beneficiary is entitled, notwithstanding that such beneficiary has executed a pledge, assignment, encumbrance or in any other manner alienated or transferred his or her beneficial interest in the trust to another. This paragraph shall not preclude the effective exercise of any power of appointment granted herein or the exercise of any disclaimer.

**G. Maximum Duration.** Regardless of anything in this Agreement to the contrary, no trust interest herein created shall continue beyond three hundred sixty (360) years after the date of creation of this Agreement, nor shall any power of appointment be exercised in such manner so as to delay vesting of any trust beyond such period. Immediately prior to the expiration of such period, all such trusts then in existence shall terminate, and the assets thereof shall be distributed outright and in fee to then beneficiaries of the current income and in the proportions in which such persons are the beneficiaries, and if such proportions cannot be ascertained, then equally among such beneficiaries.

### ARTICLE III. GENERAL

SIMON L. BERNSTEIN  
AMENDED AND RESTATED TRUST AGREEMENT

-3-

LAW OFFICES  
**TESCHER & SPALLINA, P.A.**





A. Disability. Subject to the following Subparagraph captioned "Subchapter S Stock," while any beneficiary is Disabled, the Trustee shall pay to him or her only such portion of the income to which he or she is otherwise entitled as is proper for his or her Welfare, and any income not so paid shall be added to the principal from which derived. While any beneficiary is Disabled, income or principal payable to him or her may, in the discretion of the Trustee, be paid directly to him or her, without the intervention of a guardian, directly to his or her creditors or others for his or her sole benefit or to an adult person or an eligible institution (including the Trustee) selected by the Trustee as custodian for a minor beneficiary under the Uniform Transfers to Minors Act or similar law. The receipt of such payee is a complete release to the Trustee.

B. Timing of Income Distributions. The Trustee shall make required payments of income at least quarterly.

C. Substance Abuse.

1. In General. If the Trustee reasonably believes that a beneficiary (other than myself) of any trust:

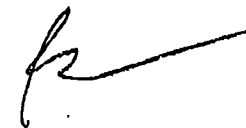
a. routinely or frequently uses or consumes any illegal substance so as to be physically or psychologically dependent upon that substance, or

b. is clinically dependent upon the use or consumption of alcohol or any other legal drug or chemical substance that is not prescribed by a board certified medical doctor or psychiatrist in a current program of treatment supervised by such doctor or psychiatrist,

and if the Trustee reasonably believes that as a result the beneficiary is unable to care for himself or herself, or is unable to manage his or her financial affairs, all mandatory distributions (including distributions upon termination of the trust) to the beneficiary, all of the beneficiary's withdrawal rights, and all of the beneficiary's rights to participate in decisions concerning the removal and appointment of Trustees will be suspended. In that event, the following provisions of this Subparagraph III.C will apply.

2. Testing. The Trustee may request the beneficiary to submit to one or more examinations (including laboratory tests of bodily fluids) determined to be appropriate by a board certified medical doctor and to consent to full disclosure to the Trustee of the results of all such examinations. The Trustee shall maintain strict confidentiality of those results and shall not disclose those results to any person other than the beneficiary without the prior written permission of the beneficiary. The Trustee may totally or partially suspend all distributions otherwise required or permitted to be made to that beneficiary until the beneficiary consents to the examination and disclosure to the Trustee.

3. Treatment. If, in the opinion of the examining doctor, the examination indicates current or recent use of a drug or substance as described above, the examining doctor will determine an appropriate method of treatment for the beneficiary (for example, counseling or treatment on an



in-patient basis in a rehabilitation facility) that is acceptable to the Trustee. If the beneficiary consents to the treatment, the Trustee shall pay the costs of treatment directly to the provider of those services from the distributions suspended under this Subparagraph III.C.

4. Resumption of Distributions. The Trustee may resume other distributions to the beneficiary (and the beneficiary's other suspended rights will be restored) when, in the case of use or consumption of an illegal substance, examinations indicate no such use for 12 months and, in all cases, when the Trustee in its discretion determines that the beneficiary is able to care for himself or herself and is able to manage his or her financial affairs.

5. Disposition of Suspended Amounts. When other distributions to the beneficiary are resumed, the remaining balance, if any, of distributions that were suspended may be distributed to the beneficiary at that time. If the beneficiary dies before distribution of those suspended amounts, the Trustee shall distribute the balance of the suspended amounts to the persons who would be the alternate takers of that beneficiary's share (or takers through the exercise of a power of appointment) as otherwise provided in this Trust Agreement.

6. Exoneration. No Trustee (or any doctor retained by the Trustee) will be responsible or liable to anyone for a beneficiary's actions or welfare. The Trustee has no duty to inquire whether a beneficiary uses drugs or other substances as described in this Subparagraph III.C. The Trustee (and any doctor retained by the Trustee) is to be indemnified from the trust estate and held harmless from any liability of any nature in exercising its judgment and authority under this Subparagraph III.C, including any failure to request a beneficiary to submit to medical examination, and including a decision to distribute suspended amounts to a beneficiary.

7. Tax Savings Provision. Despite the provisions of this Subparagraph III.C, the Trustee cannot suspend any mandatory distributions or withdrawal rights that are required for that trust to become or remain a Qualified Subchapter S Trust (unless the Trustee elects for the trust to be an Electing Small Business Trust), or to qualify for any federal transfer tax exemption, deduction, or exclusion allowable with respect to that trust.

D. Income on Death of Beneficiary. Subject to the later paragraph captioned "Subchapter S Stock," and except as otherwise explicitly provided herein, upon the death of any beneficiary, all accrued or undistributed income of such deceased beneficiary's trust shall pass with the principal of his or her trust but shall remain income for trust accounting purposes.

E. Definitions. In this Agreement,

1. Children, Lineal Descendants. The terms "child," "children," "grandchild," "grandchildren" and "lineal descendant" mean only persons whose relationship to the ancestor designated is created entirely by or through (a) legitimate births occurring during the marriage of the joint biological parents to each other, (b) children born of female lineal descendants, and (c) children and their lineal descendants arising from surrogate births and/or third party donors when (1) the child is



raised from or near the time of birth by a married couple (other than a same sex married couple) through the pendency of such marriage, (ii) one of such couple is the designated ancestor, and (iii) to the best knowledge of the Trustee both members of such couple participated in the decision to have such child. No such child or lineal descendant loses his or her status as such through adoption by another person. Notwithstanding the foregoing, for all purposes of this Trust and the dispositions made hereunder, my children, TED S. BERNSTEIN, PAMELA B. SIMON, ELIOT BERNSTEIN, JILL IANTONI and LISA S. FRIEDSTEIN, shall be deemed to have predeceased me as I have adequately provided for them during my lifetime.

2. Code. "Code" means the Internal Revenue Code of 1986, as amended, and in referring to any particular provision of the Code, includes a reference to any equivalent or successor provision of a successor federal tax law.

3. Disabled. "Disabled" or being under "Disability" means, as to any applicable individual: (1) being under the age of 21 years, (2) having been adjudicated by a court of competent jurisdiction as mentally or physically incompetent or unable to manage his or her own property or personal affairs (or a substantially similar finding under applicable state or national law), or (3) being unable to properly manage his or her personal or financial affairs, or a trust estate hereunder as to a Trustee hereunder, because of a mental or physical impairment (whether temporary or permanent in nature). A written certificate executed by an individual's attending physician or attending psychiatrist confirming that person's impairment will be sufficient evidence of Disability under item (3) above, and all persons may rely conclusively on such a certificate.

4. Education. The term "education" herein means vocational, primary, secondary, preparatory, theological, college and professional education, including post-graduate courses of study, at educational institutions or elsewhere, and expenses relating directly thereto, including tuition, books and supplies, room and board, and travel from and to home during school vacations. It is intended that the Trustee liberally construe and interpret references to "education," so that the beneficiaries entitled to distributions hereunder for education obtain the best possible education commensurate with their abilities and desires.

5. Needs and Welfare Distributions. Payments to be made for a person's "Needs" means payments necessary for such person's health (including lifetime residential or nursing home care), education, maintenance and support. Payments to be made for a person's "Welfare" means discretionary payments by the Trustee, from time to time, for such person's Needs and also for such person's advancement in life (including assistance in the purchase of a home or establishment or development of any business or professional enterprise which the Trustee believes to be reasonably sound), happiness and general well-being. However, the Trustee, based upon information reasonably available to it, shall make such payments for a person's Needs or Welfare only to the extent such person's income, and funds available from others obligated to supply funds for such purposes (including, without limitation, pursuant to child support orders and agreements), are insufficient in its opinion for such purposes, and shall take into account such person's accustomed manner of living, age, health, marital status and any other factor it considers important. Income or principal to be paid for a person's Needs or Welfare may be paid to



such individual or applied by the Trustee directly for the benefit of such person. The Trustee may make a distribution or application authorized for a person's Needs or Welfare even if such distribution or application substantially depletes or exhausts such person's trust, without any duty upon the Trustee to retain it for future use or for other persons who might otherwise benefit from such trust.

6. Per Stirpes. In a division "*per stirpes*" each generation shall be represented and counted whether or not it has a living member.

7. Related or Subordinate Party. A "*Related or Subordinate Party*" to a trust describes a beneficiary of the subject trust or a related or subordinate party to a beneficiary of the trust as the terms "related or subordinate party" are defined under Code Section 672(c).

8. Spouse. A person's "*spouse*" includes only a spouse then married to and living as husband and wife with him or her, or a spouse who was married to and living as husband and wife with him or her at his or her death. The following rules apply to each person who is a beneficiary or a permissible appointee under this Trust Agreement and who is married to a descendant of mine. Such a person will cease to be a beneficiary and will be excluded from the class of permissible appointees upon:

a. the legal termination of the marriage to my descendant (whether before or after my death), or

b. the death of my descendant if a dissolution of marriage proceeding was pending when he or she died.

The trust will be administered as if that person had died upon the happening of the terminating event described above.

9. Gender Number. Where appropriate, words of any gender include all genders and the singular and plural are interchangeable.

F. Powers of Appointment. Property subject to a power of appointment shall be paid to, or retained by the Trustee or paid to any trustee under any will or trust agreement for the benefit of, such one or more permissible appointees, in such amounts and proportions, granting such interests, powers and powers of appointment, and upon such conditions including spendthrift provisions as the holder of such power (i) in the case of a power exercisable upon the death of such holder, appoints in his or her will or in a trust agreement revocable by him or her until his or her death, or (ii) in the case of a power exercisable during the life of such holder, appoints in a written instrument signed by such holder, two witnesses and a notary public, but in either case only if such will, trust agreement, or instrument specifically refers to such power.

G. Limitations on Powers of Trustee. Regardless of anything herein to the contrary, no Trustee shall make or participate in making any distribution of income or principal of a trust to or for the benefit of a beneficiary which would directly or indirectly discharge any legal obligation of such



Trustee or a donor of such trust (as an individual, and other than myself as donor) to support such beneficiary; and no Trustee (other than myself) shall make or participate in making any discretionary distribution of income or principal to or for the benefit of himself or herself other than for his or her Needs, including by reason of a determination to terminate a trust described herein. For example, if a Trustee (other than myself) has the power to distribute income or principal to himself or herself for his or her own Welfare, such Trustee (the "restricted Trustee") shall only have the power to make or participate in making a distribution of income or principal to the restricted Trustee for the restricted Trustee's Needs, although any co-Trustee who is not also a restricted Trustee may make or participate in making a distribution of income or principal to the restricted Trustee for such restricted Trustee's Welfare without the participation or consent of said restricted Trustee.

H. Presumption of Survivorship. If any person shall be required to survive another person in order to take any interest under this Agreement, the former person shall be deemed to have predeceased the latter person, if such persons die under circumstances which make it difficult or impracticable to determine which one died first.

I. Governing Law. This Agreement is governed by the law of the State of Florida.

J. Other Beneficiary Designations. Except as otherwise explicitly and with particularity provided herein, (a) no provision of this trust shall revoke or modify any beneficiary designation of mine made by me and not revoked by me prior to my death under any individual retirement account, other retirement plan or account, or annuity or insurance contract, (b) I hereby reaffirm any such beneficiary designation such that any assets held in such account, plan, or contract shall pass in accordance with such designation, and (c) regardless of anything herein to the contrary, any of such assets which would otherwise pass pursuant to this trust due to the beneficiary designation not having met the requirements for a valid testamentary disposition under applicable law or otherwise shall be paid as a gift made hereunder to the persons and in the manner provided in such designation which is incorporated herein by this reference.

K. Release of Medical Information.

1. Disability of Beneficiary. Upon the written request of a Trustee (with or without the concurrence of co-Trustees) issued to any current income or principal beneficiary (including discretionary beneficiaries and myself if a beneficiary) for whom a determination of Disability is relevant to the administration of a trust hereunder and for whom a Trustee (with or without the concurrence of co-Trustees) desires to make such a determination, such beneficiary shall issue to all Trustees (who shall be identified thereon both by name to the extent known and by class description) a valid authorization under the Health Insurance Portability and Accountability Act of 1996 and any other applicable or successor law authorizing all health care providers and all medical sources of such requested beneficiary to release protected health information of the requested beneficiary to all Trustees that is relevant to the determination of the Disability of the requested beneficiary as Disability is defined hereunder. The period of each such valid authorization shall be for six months (or the earlier death of the requested



beneficiary). If such beneficiary (or his or her legal representative if such beneficiary is a minor or legally disabled) refuses within thirty days of receipt of the request to provide a valid authorization, or at any time revokes an authorization within its term, the Trustee shall treat such beneficiary as Disabled hereunder until such valid authorization is delivered.

2. Disability of Trustee. Upon the request to a Trustee that is an individual by (a) a co-Trustee, or if none, (b) the person or entity next designated to serve as a successor Trustee not under legal incapacity, or if none, (c) any adult current income or principal beneficiary not under legal incapacity, or in any event and at any time (d) a court of competent jurisdiction, such Trustee shall issue to such person and all persons, courts of competent jurisdiction, and entities (who shall be identified thereon both by name to the extent known and by class description), with authority hereunder to determine such requested Trustee's Disability, a valid authorization under the Health Insurance Portability and Accountability Act of 1996 and any other applicable or successor law authorizing all health care providers and all medical sources of such requested Trustee to release protected health information of the requested Trustee to such persons, courts and entities, that is relevant to the determination of the Disability of the requested Trustee as Disability is defined hereunder. The period of each such valid authorization shall be for six months (or the earlier death or resignation of the requested Trustee). If such requested Trustee refuses within thirty days of receipt of the request to deliver a valid authorization, or at any time revokes an authorization within its term, such requested Trustee shall thereupon be treated as having resigned as Trustee hereunder.

3. Ability to Amend or Revoke. The foregoing provisions of this paragraph shall not constitute a restriction on myself to amend or revoke the terms of this trust instrument under paragraph LA hereof, provided I otherwise have legal capacity to do so.

4. Authorization to Issue Certificate. All required authorizations under this paragraph shall include the power of a physician or psychiatrist to issue a written certificate to the appropriate persons or entities as provided in Subparagraph III.E.3 hereof.

#### ARTICLE IV. FIDUCIARIES

A. Powers of the Trustee. During my life except while I am Disabled, the Trustee shall exercise all powers provided by law and the following powers, other than the power to retain assets, only with my written approval. While I am Disabled and after my death, the Trustee shall exercise said powers without approval, provided that the Trustee shall exercise all powers in a fiduciary capacity.

1. Investments. To sell or exchange at public or private sale and on credit or otherwise, with or without security, and to lease for any term or perpetually, any property, real and personal, at any time forming a part of the trust estate (the "estate"); to grant and exercise options to buy or sell; to invest or reinvest in real or personal property of every kind, description and location; and to receive and retain any such property whether originally a part of any trust herein created or subsequently acquired, even if the Trustee is personally interested in such property, and without liability for any

decline in the value thereof; all without limitation by any statutes or judicial decisions whenever enacted or announced, regulating investments or requiring diversification of investments, it being my intention to give the broadest investment powers and discretion to the Trustee. Any bank, trust company, or other corporate trustee serving hereunder as Trustee is authorized to invest in its own common trust funds.

2. Special Investments. The Trustee is expressly authorized (but not directed) to retain, make, hold, and dispose of investments not regarded as traditional for trusts, including interests or investments in privately held business and investment entities and enterprises, including without limitation stock in closely held corporations, limited partnership interests, joint venture interests, mutual funds, business trust interests, and limited liability company membership interests, notwithstanding (a) any applicable prudent investor rule or variation thereof, (b) common law or statutory diversification requirements (it being my intent that no such duty to diversify shall exist) (c) a lack of current cash flow therefrom, (d) the presence of any risk or speculative elements as compared to other available investments (it being my intent that the Trustee have sole and absolute discretion in determining what constitutes acceptable risk and what constitutes proper investment strategy), (e) lack of a reasonable rate of return, (f) risks to the preservation of principal, (g) violation of a Trustee's duty of impartiality as to different beneficiaries (it being my intent that no such duty exists for this purpose), and (h) similar limitations on investment under this Agreement or under law pertaining to investments that may or should be made by a Trustee (including without limitation the provisions of Fla. Stats. §518.11 and successor provisions thereto that would characterize such investments as forbidden, imprudent, improper or unlawful). The Trustee shall not be responsible to any trust created hereunder or the beneficiaries thereof for any loss resulting from any such authorized investment, including without limitation loss engendered by the higher risk element of that particular entity, investment, or enterprise, the failure to invest in more conservative investments, the failure to diversify trust assets, the prudent investor rule or variant thereof. Notwithstanding any provisions for distributions to beneficiaries hereunder, if the Trustee determines that the future potential investment return from any illiquid or closely held investment asset warrants the retention of that investment asset or that sufficient value could not be obtained from the sale or other disposition of an illiquid or closely held investment asset, the Trustee is authorized to retain that asset and if necessary reduce the distributions to beneficiaries due to lack of sufficient liquid or marketable assets. However, the preceding provisions of this Subparagraph shall not be exercised in a manner as to jeopardize the availability of the estate tax marital deduction for assets passing to or held in the a trust for my surviving spouse or that would otherwise qualify for the estate tax marital deduction but for such provisions, shall not override any express powers hereunder of my surviving spouse to demand conversion of unproductive property to productive property, or reduce any income distributions otherwise required hereunder for a trust held for the benefit of my surviving spouse or a "qualified subchapter S trust" as that term is defined in Code Section 1361(d)(3).

3. Distributions. To make any division or distribution pro rata or non-pro rata, in cash or in kind, and to allocate undivided interests in property and dissimilar property (without regard to its tax basis) to different shares.

4. Management. To manage, develop, improve, partition or change the character of an asset or interest in property at any time; and to make ordinary and extraordinary repairs, replacements, alterations and improvements, structural or otherwise.

5. Borrowing. To borrow money from anyone on commercially reasonable terms, including entities owned in whole or in part by the trust, a Trustee, beneficiaries and other persons who may have a direct or indirect interest in a Trust; and to mortgage, margin, encumber and pledge real and personal property of a trust as security for the payment thereof, without incurring any personal liability thereon and to do so for a term within or extending beyond the terms of the trust and to renew, modify or extend existing borrowing on similar or different terms and with the same or different security without incurring any personal liability; and such borrowing from a Trustee may be with or without interest, and may be secured with a lien on trust assets.

6. Lending. To extend, modify or waive the terms of any obligation, bond or mortgage at any time forming a part of a trust and to foreclose any such mortgage; accept a conveyance of encumbered property, and take title to the property securing it by deed in lieu of foreclosure or otherwise and to satisfy or not satisfy the indebtedness securing said property; to protect or redeem any such property from forfeiture for nonpayment of taxes or other lien; generally, to exercise as to such bond, obligation or mortgage all powers that an absolute owner might exercise; and to loan funds to beneficiaries at commercially reasonable rates, terms and conditions.

7. Abandonment of Property. To abandon any property or asset when it is valueless or so encumbered or in such condition that it is of no benefit to a trust. To abstain from the payment of taxes, liens, rents, assessments, or repairs on such property and/or permit such property to be lost by tax sale, foreclosure or other proceeding or by conveyance for nominal or no consideration to anyone including a charity or by escheat to a state; all without personal liability incurred therefor.

8. Real Property Matters. To subdivide, develop or partition real estate; to purchase or sell real property and to enter into contracts to do the same; to dedicate the same to public use; to make or obtain the location of any plats; to adjust boundaries; to adjust differences in valuations on exchange or partition by giving or receiving consideration; and, to grant easements with or without consideration as the fiduciaries may determine; and to demolish any building, structures, walls and improvements, or to erect new buildings, structures, walls and improvements and to insure against fire and other risks; and to protect and conserve, or to lease, or to encumber, or otherwise to manage and dispose of real property to the extent such power is not otherwise granted herein or otherwise restricted herein.

9. Claims. To enforce, compromise, adjust, arbitrate, release or otherwise settle or pay any claims or demands by or against a trust.

10. Business Entities. To deal with any business entity or enterprise even if a Trustee is or may be a fiduciary of or own interests in said business entity or enterprise, whether operated in the form of a corporation, partnership, business trust, limited liability company, joint venture, sole



proprietorship, or other form (all of which business entities and enterprises are referred to herein as "Business Entities"), I vest the Trustee with the following powers and authority in regard to Business Entities:

- a. To retain and continue to operate a Business Entity for such period as the Trustee deems advisable;
- b. To control, direct and manage the Business Entities. In this connection, the Trustee, in its sole discretion, shall determine the manner and extent of its active participation in the operation and may delegate all or any part of its power to supervise and operate to such person or persons as the Trustee may select, including any associate, partner, officer or employee of the Business Entity;
- c. To hire and discharge officers and employees, fix their compensation and define their duties; and similarly to employ, compensate and discharge agents, attorneys, consultants, accountants, and such other representatives as the Trustee may deem appropriate; including the right to employ any beneficiary or fiduciary in any of the foregoing capacities;
- d. To invest funds in the Business Entities, to pledge other assets of a trust as security for loans made to the Business Entities, and to lend funds from a trust to the Business Entities;
- e. To organize one or more Business Entities under the laws of this or any other state or country and to transfer thereto all or any part of the Business Entities or other property of a trust, and to receive in exchange such stocks, bonds, partnership and member interests, and such other securities or interests as the Trustee may deem advisable;
- f. To treat Business Entities as separate from a trust. In a Trustee's accounting to any beneficiary, the Trustee shall only be required to report the earnings and condition of the Business Entities in accordance with standard business accounting practice;
- g. To retain in Business Entities such net earnings for working capital and other purposes of the Business Entities as the Trustee may deem advisable in conformity with sound business practice;
- h. To sell or liquidate all or any part of the Business Entities at such time and price and upon such terms and conditions (including credit) as the Trustee may determine. My Trustee is specifically authorized and empowered to make such sale to any person, including any partner, officer, or employee of the Business Entities, a fiduciary, or to any beneficiary; and
- i. To guaranty the obligations of the Business Entities, or pledge assets of a trust to secure such a guaranty.



11. Principal and Income. To allocate items of income or expense between income and principal as permitted or provided by the laws of the State of Florida but without limiting the availability of the estate tax marital deduction, provided, unless otherwise provided in this instrument, the Trustee shall establish out of income and credit to principal reasonable reserves for depreciation, obsolescence and depletion, determined to be equitable and fair in accordance with some recognized reasonable and preferably uncomplicated trust accounting principle and; provided, further that the Trustee shall not be required to provide a rate of return on unproductive property unless otherwise provided in this instrument.

12. Life Insurance. With respect to any life insurance policies constituting an asset of a trust, to pay premiums; to apply dividends in reduction of such premiums; to borrow against the cash values thereof; to convert such policies into other forms of insurance, including paid-up insurance; to exercise any settlement options provided in any such policies; to receive the proceeds of any policy upon its maturity and to administer such proceeds as a part of the principal of the Trust; and in general, to exercise all other options, benefits, rights and privileges under such policies.

13. Continuing Power. To continue to have or exercise, after the termination of a trust, in whole or in part, and until final distribution thereof, all title, power, discretions, rights and duties conferred or imposed upon the Trustee by law or by this Agreement or during the existence of the trust.

14. Exoneration. To provide for the exoneration of the Trustee from any personal liability on account of any arrangement or contract entered into in a fiduciary capacity.

15. Agreements. To comply with, amend, modify or rescind any agreement made during my lifetime, including those regarding the disposition, management or continuation of any closely held unincorporated business, corporation, partnership or joint venture, and including the power to complete contracts to purchase and sell real estate.

16. Voting. To vote and give proxies, with power of substitution to vote, stocks, bonds and other securities, or not to vote a security.

17. Combination of Shares. To hold the several shares of a trust or several Trusts as a common fund, dividing the income proportionately among them, to assign undivided interests to the several shares or Trusts, and to make joint investments of the funds belonging to them. For such purposes and insofar as may be practicable, the Trustee, to the extent that division of the trust estate is directed hereby, may administer the trust estate physically undivided until actual division thereof becomes necessary to make distributions. The Trustee may hold, manage, invest and account for whole or fractional trust shares as a single estate, making the division thereof by appropriate entries in the books of account only, and may allocate to each whole or fractional trust share its proportionate part of all receipts and expenses; provided, however, this carrying of several Trusts as a single estate shall not defer the vesting in possession of any whole or fractional share of a trust for the beneficiaries thereof at the times specified herein.



18. Reimbursement. To reimburse itself from a trust for reasonable expenses incurred in the administration thereof.

19. Reliance Upon Communication. To rely, in acting under a trust, upon any letter, notice, certificate, report, statement, document or other paper, or upon any telephone, telegraph, cable, wireless or radio message, if believed by the Trustee to be genuine, and to be signed, sealed, acknowledged, presented, sent, delivered or given by or on behalf of the proper person, firm or corporation, without incurring liability for any action or inaction based thereon.

20. Assumptions. To assume, in the absence of written notice to the contrary from the person or persons concerned, that a fact or an event, by reason of which an interest or estate under a trust shall commence or terminate, does not exist or has not occurred, without incurring liability for any action or inaction based upon such assumption.

21. Service as Custodian. To serve as successor custodian for any beneficiary of any gifts that I may have made under any Transfer to Minors Act, if at the time of my death no custodian is named in the instrument creating the gift.

22. Removal of Assets. The Trustee may remove from the domiciliary state during the entire duration of a trust or for such lesser period as it may deem advisable, any cash, securities or other property at any time in its hands whether principal or not, and to take and keep the same outside the domiciliary state and at such place or places within or outside the borders of the United States as it may determine, without in any event being chargeable for any loss or depreciation to the trust which may result therefrom.

23. Change of Situs. The situs and/or applicable law of any trust created hereunder may be transferred to such other place as the Trustee may deem to be for the best interests of the trust estate. In so doing, the Trustee may resign and appoint a successor Trustee, but may remove such successor Trustee so appointed and appoint others. Each successor Trustee may delegate any and all fiduciary powers, discretionary and ministerial, to the appointing Trustee as its agent.

24. Fiduciary Outside Domiciliary State. In the event the Trustee shall not be able and willing to act as Trustee with respect to any property located outside the domiciliary state, the Trustee, without order of court, may appoint another individual or corporation (including any employee or agent of any appointing Trustee) to act as Trustee with respect to such property. Such appointed Trustee shall have all of the powers and discretions with respect to such property as are herein given to the appointing Trustee with respect to the remaining trust assets. The appointing Trustee may remove such appointed Trustee and appoint another upon ten (10) days notice in writing. All income from such property, and if such property is sold, exchanged or otherwise disposed of, the proceeds thereof, shall be remitted to the appointing Trustee, to be held and administered by it as Trustee hereunder. Such appointed Trustee may employ the appointing Trustee as agent in the administration of such property. No surety shall be required on the bond of the Trustee or agent acting under the provisions of this

paragraph. No periodic court accounting shall be required of such appointed Trustee, it being my intention to excuse any statutory accounting which may ordinarily be required.

25. Additions. To receive and accept additions to the Trusts in cash or in kind from donors, executors, administrators, Trustee or attorneys in fact, including additions of my property by the Trustee or others as my attorneys in fact.

26. Title and Possession. To have title to and possession of all real or personal property held in the Trusts, and to register or hold title to such property in its own name or in the name of its nominee, without disclosing its fiduciary capacity, or in bearer form.

27. Dealing with Estates. To use principal of the Trusts to make loans to my estate, with or without interest, and to make purchases from my estate.

28. Agents. To employ persons, including attorneys, auditors, investment advisers, and agents, even if they are the Trustee or associated with the Trustee, to advise or assist the Trustee in the performance of its administrative duties and to pay compensation and costs incurred in connection with such employment from the assets of the Trust; to act without independent investigation upon their recommendations; and, instead of acting personally, to employ one or more agents to perform any act of administration, whether or not discretionary.

29. Tax Elections. To file tax returns, and to exercise all tax-related elections and options at its discretion, without compensating adjustments or reimbursements between any of the Trusts or any of the trust accounts or any beneficiaries.

B. Resignation. A Trustee may resign with or without cause, by giving no less than 30 days advance written notice, specifying the effective date of such resignation, to its successor Trustee and to the persons required and in the manner provided under Fla.Stats. §§736.0705(1)(a) and 736.0109. As to any required recipient, deficiencies in fulfilling the foregoing resignation requirements may be waived in a writing signed by such recipient. Upon the resignation of a Trustee, such Trustee shall be entitled to reimbursement from the trust for all reasonable expenses incurred in the settlement of accounts and in the transfer of assets to his or her successor.

C. Appointment of Successor Trustee.

1. Appointment. Upon a Trustee's resignation, or if a Trustee becomes Disabled or for any reason ceases to serve as Trustee, I may appoint any person or persons as successor Trustee, and in default of such appointment by me, ROBERT L. SPALLINA and DONALD R. TESCHER shall serve together as successor co-Trustees, or either of them alone as Trustee if either of them is unable to serve. Notwithstanding the foregoing, if a named Trustee is not a U.S. citizen or resident at the time of commencement of his term as Trustee, such Trustee should give due consideration to declining to serve to avoid potential adverse U.S. income tax consequences by reason of the characterization of a trust

hereunder as a foreign trust under the Code, but shall not be construed to have any duty to so decline if such Trustee desires to serve.

2. Specific Trusts. Notwithstanding the preceding provisions of this Subparagraph IV.C, subsequent to my death I specifically appoint the following person or persons as Trustee of the following Trusts under the following described circumstances provided that the foregoing appointments shall apply when and to the extent that no effective appointment is made below:

a. Trustee of Separate Trusts for My Grandchildren. Each grandchild of mine shall serve as co-Trustee with the immediate parent of such grandchild which parent is also a child of mine as to all separate trusts under which such grandchild is the sole current mandatory or discretionary income beneficiary upon attaining the age of twenty-five (25) years, and shall serve as sole Trustee of such trusts upon attaining the age of thirty-five (35) years. While serving alone as Trustee, a grandchild of mine may designate a co-Trustee that is not a Related or Subordinate Party to serve with such grandchild and such grandchild may remove and/or replace such co-Trustee with another that is not a Related or Subordinate Party from time to time.

b. Trustee of Separate Trusts for My Lineal Descendants Other Than My Grandchildren. In regard to a separate trust held for a lineal descendant of mine other than a grandchild of mine which lineal descendant is the sole current mandatory or discretionary income beneficiary, each such lineal descendant shall serve as co-Trustee, or sole Trustee if the preceding described Trustees cease or are unable to serve or to continue to serve, of his or her separate trust upon attaining age twenty-five (25) years. While serving alone as Trustee, a lineal descendant of mine other than a grandchild of mine may designate a co-Trustee to serve with such lineal descendant and such lineal descendant may remove and/or replace such co-Trustee with another from time to time.

3. Successor Trustees Not Provided For. Whenever a successor Trustee or co-Trustee is required and no successor or other functioning mechanism for succession is provided for under the terms of this Trust Agreement, the last serving Trustee or the last person or entity designated to serve as Trustee of the applicable trust may appoint his or her successor, and if none is so appointed, the following persons shall appoint a successor Trustee (who may be one of the persons making the appointment):

- a. The remaining Trustees, if any; otherwise,
- b. A majority of the permissible current mandatory or discretionary income beneficiaries, including the natural or legal guardians of any beneficiaries who are Disabled.

A successor Trustee appointed under this subparagraph shall not be a Related or Subordinate Party of the trust. The appointment will be by a written document executed by such person in the presence of two witnesses and acknowledged before a notary public delivered to the appointed Trustee and to me if I am living and not Disabled or in a valid last Will. Notwithstanding the foregoing, a designation under this Subparagraph of a successor trustee to a corporate or entity trustee shall be limited to a corporate or

entity trustee authorized to serve as such under Florida law with assets under trust management of no less than one billion dollars.

4. Power to Remove Trustee. Subsequent to my death, the age 35 or older permissible current mandatory or discretionary income beneficiaries from time to time of any trust established hereunder shall have the power to unanimously remove a Trustee of such trust at any time with or without cause, other than a named Trustee or successor Trustee designated hereunder, or a Trustee appointed by me during my lifetime or under my Will or otherwise at the time of my death, with the successor Trustee to be determined in accordance with the foregoing provisions.

D. Method of Appointment of Trustee. Any such appointment of a successor Trustee by a person shall be made in a written instrument executed by such person in the presence of two witnesses and acknowledged before a notary public which is delivered to such appointed Trustee during the lifetime of the person making such appointment, or any such appointment of a successor Trustee by a person may be made under the last Will of such person.

E. Limitations on Removal and Replacement Power. Any power to remove and/or replace a trustee hereunder that is granted to an individual (including such power when reserved to me) is personal to that individual and may not be exercised by a guardian, power of attorney holder, or other legal representative or agent.

F. Successor Fiduciaries. No Trustee is responsible for, nor has any duty to inquire into, the administration, acts or omissions of any executor, administrator, Personal Representative, or trustee or attorney-in-fact adding property to these Trusts, or of any predecessor Trustee. Each successor Trustee has all the powers, privileges, immunities, rights and title (without the execution of any instrument of transfer or any other act by any retiring Trustee) and all the duties of all predecessors.

G. Liability and Indemnification of Trustee.

1. Liability in General. No individual Trustee (that is, a Trustee that is not a corporation or other entity) shall be liable for any of his or her actions or failures to act as Trustee, even if the individual Trustee is found by a court to have been negligent or in breach of fiduciary duty, except for liability caused by his or her actions or failures to act done in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries. Each Trustee that is a corporation or other entity will be liable for its actions or failures to act that are negligent or that breach its fiduciary duty, without contribution by any individual Trustee.

2. Indemnification of Trustee. Except in regard to liabilities imposed on a Trustee under Subparagraph IV.G.1, each Trustee shall be held harmless and indemnified from the assets of the trust for any liability, damages, attorney's fees, expenses, and costs incurred as a result of its service as Trustee. A Trustee who ceases to serve for any reason will be entitled to receive reasonable security from the assets of the trust to protect it from liability, and may enforce these provisions for indemnification against the current Trustee or against any assets held in the trust, or if the former Trustee is an individual

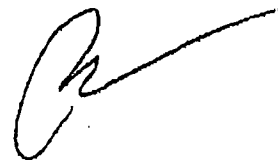
and not a corporation or other entity, against any beneficiary to the extent of distributions received by that beneficiary. This indemnification right extends to the estate, personal representatives, legal successors and assigns of a Trustee.

3. Indemnification of Trustee - Additional Provisions. I recognize that if a beneficiary accuses a Trustee of wrongdoing or breach of fiduciary duty, the Trustee may have a conflict of interest that ordinarily would prevent it from paying legal fees and costs from the trust estate to defend itself. I do not want to put a financial burden on any individual named to serve as a Trustee. Just as important, I do not want an individual who has been selected to serve as a Trustee to be reluctant to accept the position, or while serving to be intimidated in the performance of the Trustee's duties because of the threats of lawsuits that might force the Trustee to pay fees and costs from the Trustee's personal resources. For this reason, I deliberately and intentionally waive any such conflict of interest with respect to any individual serving as Trustee so that he or she can hire counsel to defend himself or herself against allegations of wrongdoing or if sued for any reason (whether by a beneficiary or by someone else) and pay all fees and costs for his or her defense from the trust estate until the dispute is resolved. I understand and agree that a court may award, disallow or allocate fees and costs in whole or in part after the dispute is resolved, as provided by law. The Trustee will account for all such fees and costs paid by it as provided by law. This provision shall not apply to any Trustee that is a corporation or other entity.

H. Compensation, Bond. Each Trustee is entitled to be paid reasonable compensation for services rendered in the administration of the trust. Reasonable compensation for a non-individual Trustee will be its published fee schedule in effect when its services are rendered unless otherwise agreed in writing, and except as follows. Any fees paid to a non-individual Trustee for making principal distributions, for termination of the trust, and upon termination of its services must be based solely on the value of its services rendered, not on the value of the trust principal. During my lifetime the Trustee's fees are to be charged wholly against income (to the extent sufficient), unless directed otherwise by me in writing. Each Trustee shall serve without bond.

I. Maintenance of Records. The Trustee shall maintain accurate accounts and records. It shall render annual statements of the receipts and disbursements of income and principal of a trust upon the written request of any adult vested beneficiary of such trust or the guardian of the person of any vested beneficiary and the approval of such beneficiary shall be binding upon all persons then or thereafter interested in such trust as to the matters and transactions shown on such statement. The Trustee may at any time apply for a judicial settlement of any account. No Trustee shall be required to file any statutory or other periodic accountings of the administration of a trust.

J. Interested Trustee. The Trustee may act under this Agreement even if interested in these Trusts in an individual capacity, as a fiduciary of another trust or estate (including my estate) or in any other capacity. The Trustee may in good faith enter into a sale, encumbrance, or other transaction involving the investment or management of trust property for the Trustee's own personal account or which is otherwise affected by a conflict between the Trustee's fiduciary and personal interests, without liability and without being voidable by a beneficiary. The Trustee is specifically authorized to make loans to, to receive loans from, or to sell, purchase or exchange assets in a transaction with (i) the



Trustee's spouse, (ii) the Trustee's children or grandchildren, siblings, parents, or spouses of such persons, (iii) an officer, director, employee, agent, or attorney of the Trustee, or (iv) a corporation, partnership, limited liability company, or other business entity in which the Trustee has a financial interest, provided that in any transaction the trusts hereunder receive fair and adequate consideration in money or money's worth. The Trustee may renounce any interest or expectancy of a trust in, or an opportunity to participate in, specified business opportunities or specified classes or categories of business opportunities that are presented to the Trustee. Such renunciation shall not prohibit the Trustee from participating in the Trustee's individual capacity in such opportunity or expectancy.

K. Third Parties. No one dealing with the Trustee need inquire into its authority or its application of property.

L. Merger of Trusts. If the Trustee is also trustee of a trust established by myself or another person by will or trust agreement, the beneficiaries to whom income and principal may then be paid and then operative terms of which are substantially the same as those of a trust held under this Agreement, the Trustee in its discretion may merge either such trust into the other trust. The Trustee, in exercising its discretion, shall consider economy of administration, convenience to the beneficiaries, tax consequences and any other factor it considers important. If it is later necessary to reestablish the merged trust as separate trusts, it shall be divided proportionately to the value of each trust at the time of merger.

M. Multiple Trustees. If two Trustees are serving at any time, any power or discretion of the Trustees may be exercised only by their joint agreement. Either Trustee may delegate to the other Trustee the authority to act on behalf of both Trustees and to exercise any power held by the Trustees. If more than two Trustees are serving at any time, and unless unanimous agreement is specifically required by the terms of this Trust Agreement, any power or discretion of the Trustees may be exercised only by a majority. The Trustees may delegate to any one or more of themselves the authority to act on behalf of all the Trustees and to exercise any power held by the Trustees. Trustees who consent to the delegation of authority to other Trustees will be liable for the consequences of the actions of those other Trustees as if the consenting Trustees had joined the other Trustees in performing those actions. A dissenting Trustee who did not consent to the delegation of authority to another Trustee and who has not joined in the exercise of a power or discretion cannot be held liable for the consequences of the exercise. A dissenting Trustee who joins only at the direction of the majority will not be liable for the consequences of the exercise if the dissent is expressed in writing delivered to any of the other Trustees before the exercise of that power or discretion.

#### ARTICLE V. ADDITIONAL TAX AND RELATED MATTERS

A. GST Trusts. I direct (a) that the Trustee shall divide any trust to which there is allocated any GST exemption into two separate Trusts (each subject to the provisions hereof) so that the generation-skipping tax inclusion ratio of one such trust is zero, (b) any property exempt from generation-skipping taxation shall be divided as otherwise provided herein and held for the same persons





designated in Trusts separate from any property then also so divided which is not exempt from generation-skipping taxation, and (c) if upon the death of a beneficiary a taxable termination would otherwise occur with respect to any property held in trust for him or her with an inclusion ratio greater than zero, such beneficiary shall have with respect only to such property a power to appoint such fractional share thereof which if included in such beneficiary's gross estate for federal estate tax purposes (without allowing any deduction with respect to such share) would not be taxed at the highest federal estate tax rate and such fractional share of such property shall be distributed to such persons including only such beneficiary's estate, spouse, and issue, as such beneficiary may appoint, and any part of a trust such beneficiary does not effectively appoint shall be treated as otherwise provided for disposition upon his or her death, provided, if upon his or her death two or more Trusts for his or her benefit are directed to be divided among and held or distributed for the same persons and the generation-skipping tax inclusion ratio of any such trust is zero, the amount of any other such Trust to which there is allocated any of such beneficiary's GST exemption shall be added to the Trusts with generation-skipping tax inclusion ratios of zero in equal shares. For purposes of funding any pecuniary payment to which there is allocated any GST exemption, such payment shall be satisfied with cash or property which fairly represents appreciation and depreciation (occurring between the valuation date and the date of distribution) in all of the assets from which such distribution could be made, and any pecuniary payment made before a residual transfer of property to which any GST exemption is allocated shall be satisfied with cash or property which fairly represents appreciation and depreciation (occurring between the valuation date and the date of distribution) in all of the assets from which such pecuniary payment could be satisfied and shall be allocated a pro rata share of income earned by all such assets between the valuation date and the date of payment. Except as otherwise expressly provided herein, the valuation date with respect to any property shall be the date as of which its value is determined for federal estate tax purposes with respect to the transferor thereof, and subject to the foregoing, property distributed in kind in satisfaction of any pecuniary payment shall be selected on the basis of the value of such property on the valuation date. All terms used in this paragraph which are defined or explained in Chapter 13 of the Code or the regulations thereunder shall have the same meaning when used herein. I request (but do not require) that if two or more Trusts are held hereunder for any person, no principal be paid to such person from the Trusts with the lower inclusion ratios for generation-skipping tax purposes unless the trust with the highest inclusion ratio has been exhausted by use, consumption, distribution or otherwise or is not reasonably available. The Trustee is authorized and directed to comply with the provisions of the Treasury Regulations interpreting the generation skipping tax provisions of the Code in severing or combining any trust, creating or combining separate trust shares, allocating GST exemption, or otherwise, as necessary to best accomplish the foregoing allocations, inclusion ratios, combinations, and divisions, including, without limitation, the payment of "appropriate interest" as determined by the Trustee as that term is applied and used in said Regulations.

B. Individual Retirement Accounts. In the event that this trust or any trust created under this Agreement is the beneficiary of an Individual retirement account established and maintained under Code Section 408 or a qualified pension, profit sharing or stock bonus plan established and maintained under Code Section 401 (referred to in this paragraph as "IRA"), the following provisions shall apply to such trust:



1. I intend that the beneficiaries of such trust shall be beneficiaries within the meaning of Code Section 401(a)(9) and the Treasury Regulations thereunder. All provisions of such trust shall be construed consistent with such intent. Accordingly, the following provisions shall apply to such trust:

a. No benefits from any IRA may be used or applied for the payment of any debts, taxes or other claims against my estate as set forth in the later paragraph captioned "Taxes", unless other assets of this trust are not available for such payment.

b. In the event that a beneficiary of any trust created under this Agreement has a testamentary general power of appointment or a limited power of appointment over all or any portion of any trust established under this Agreement, and if such trust is the beneficiary of any benefits from any IRA, the beneficiary shall not appoint any part of such trust to a charitable organization or to a lineal descendant of mine (or a spouse of a lineal descendant of mine) who is older than the beneficiary whose life expectancy is being used to calculate distributions from such IRA.

2. The Trustee shall deliver a copy of this Agreement to the custodian of any IRA of which this trust or any trust created under this Agreement is the named beneficiary within the time period prescribed Code Section 401(a)(9) and the Treasury Regulations thereunder, along with such additional items required thereunder. If the custodian of the IRA changes after a copy of this Agreement has been provided pursuant to the preceding sentence, the Trustee shall immediately provide a copy of this Agreement to the new custodian. The Trustee shall request each custodian to complete a receipt of the Agreement and shall attach such receipt to this Agreement. The Trustee shall provide a copy of each amendment of this Agreement to the custodian and shall obtain a receipt of such amendment.

C. Gift Transfers Made From Trust During My Lifetime. I direct that all gift transfers made from the trust during my lifetime be treated for all purposes as if the gift property had been first withdrawn by (or distributed to) me and then transferred by me to the donees involved. Thus, in each instance, even where title to the gift property is transferred directly from the name of the trust (or its nominee) into the name of the donee, such transfer shall be treated for all purposes as first a withdrawal by (or distribution of the property to) me followed by a gift transfer of the property to the donee by me as donor, the Trustee making the actual transfer in my behalf acting as my attorney in fact, this paragraph being, to that extent, a power of attorney from me to the Trustee to make such transfer, which power of attorney shall not be affected by my Disability, incompetence, or incapacity.

D. Gifts. If I am Disabled, I authorize the Trustee to make gifts from trust property during my lifetime for estate planning purposes, or to distribute amounts to my legally appointed guardian or to my attorney-in-fact for those purposes, subject to the following limitations:

1. Recipients. The gifts may be made only to my lineal descendants or to trusts primarily for their benefit, and in aggregate annual amounts to any one such recipient that do not exceed the exclusion amount provided for under Code Section 2503(b).



2. Trustee Limited. When a person eligible to receive gifts is serving as Trustee, the aggregate of all gifts to that person during the calendar year allowable under the preceding subparagraph 1. shall thereafter not exceed the greater of Five Thousand Dollars (\$5,000), or five percent (5%) of the aggregate value of the trust estate. However, gifts completed prior to a recipient's commencing to serve as Trustee shall not be affected by this limitation.

3. Charitable Pledges. The Trustee may pay any charitable pledges I made while I was not Disabled (even if not yet due).

E. Death Costs. If upon my death the Trustee hold any United States bonds which may be redeemed at par in payment of federal estate tax, the Trustee shall pay the federal estate tax due because of my death up to the amount of the par value of such bonds and interest accrued thereon at the time of payment. The Trustee shall also pay from the trust all of my following death costs, but if there is an acting executor, administrator or Personal Representative of my estate my Trustee shall pay only such amounts of such costs as such executor, administrator or Personal Representative directs:

1. my debts which are allowed as claims against my estate,
2. my funeral expenses without regard to legal limitations,
3. the expenses of administering my estate,
4. the balance of the estate, inheritance and other death taxes (excluding generation-skipping transfer taxes unless arising from direct skips), and interest and penalties thereon, due because of my death with respect to all property whether or not passing under my Will or this Agreement (other than property over which I have a power of appointment granted to me by another person, and qualified terminable interest property which is not held in a trust that was subject to an election under Code Section 2652(a)(3) at or about the time of its funding) and life insurance proceeds on policies insuring my life which proceeds are not held under this trust or my probate estate at or by reason of my death), and
5. any gifts made in my Will or any Codicil thereto.

The Trustee may make any such payment either to my executor, administrator or Personal Representative or directly to the proper party. The Trustee shall not be reimbursed for any such payment, and is not responsible for the correctness or application of the amounts so paid at the direction of my executor, administrator, or Personal Representative. The Trustee shall not pay any of such death costs with any asset which would not otherwise be included in my gross estate for federal or state estate or inheritance tax purposes, or with any asset which otherwise cannot be so used, such as property received under a limited power of appointment which prohibits such use. Further, no payment of any such death costs shall be charged against or paid from the tangible personal property disposed of pursuant to the prior paragraph captioned "Disposition of Tangible Personal Property."

F. **Subchapter S Stock.** Regardless of anything herein to the contrary, in the event that after my death the principal of a trust includes stock in a corporation for which there is a valid election to be treated under the provisions of Subchapter S of the Code, the income beneficiary of such a trust is a U.S. citizen or U.S. resident for federal income tax purposes, and such trust is not an "electing small business trust" under Code Section 1361(e)(1) in regard to that corporation, the Trustee shall (a) hold such stock as a substantially separate and independent share of such trust within the meaning of Code Section 663(e), which share shall otherwise be subject to all of the terms of this Agreement, (b) distribute all of the income of such share to the one income beneficiary thereof in annual or more frequent installments, (c) upon such beneficiary's death, pay all accrued or undistributed income of such share to the beneficiary's estate, (d) distribute principal from such share during the lifetime of the income beneficiary only to such beneficiary, notwithstanding any powers of appointment granted to any person including the income beneficiary, and (e) otherwise administer such share in a manner that qualifies it as a "qualified Subchapter S trust" as that term is defined in Code Section 1361(d)(3), and shall otherwise manage and administer such share as provided under this Agreement to the extent not inconsistent with the foregoing provisions of this paragraph.

G. **Residence as Homestead.** I reserve the right to reside upon any real property placed in this trust as my permanent residence during my life, it being the intent of this provision to retain for myself the requisite beneficial interest and possessory right in and to such real property to comply with Section 196.041 of the Florida Statutes such that said beneficial interest and possessory right constitute in all respects "equitable title to real estate" as that term is used in Section 6, Article VII of the Constitution of the State of Florida. Notwithstanding anything contained in this trust to the contrary, for purposes of the homestead exemption under the laws of the State of Florida, my interest in any real property in which I reside pursuant to the provisions of this trust shall be deemed to be an interest in real property and not personalty and shall be deemed my homestead.

*[remainder of page intentionally left blank]*





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SUPPORT STAFF  
DIANA DUSTON  
KIMBERLY MORAN  
SUANN TESCHER

January 14, 2014

VIA U.S. MAIL AND EMAIL

Ted S. Bernstein  
880 Berkeley Street  
Boca Raton, FL 33487

Ellot Bernstein  
2753 NW 34<sup>th</sup> Street  
Boca Raton, FL 33434

Lisa S. Friedstein  
2142 Churchill Lane  
Highland Park, IL 60035

Pamela B. Simon  
950 North Michigan Ave.  
Suite 2603  
Chicago, IL 60606

Jill Iantoni  
2101 Magnolia Lane  
Highland Park, IL 60035

Re: Estates and Trusts of Shirley Bernstein and Simon Bernstein

Dear Ladies and Gentlemen:

It has been brought to my attention that a document was prepared in our office that altered the disposition of the Shirley Bernstein Trust subsequent to Simon Bernstein's death. Information provided to me appears to indicate that there were two versions of the First Amendment to the Shirley Bernstein Trust Agreement, both executed on November 18, 2008. Under one version the children of Pam Simon and Ted Bernstein would not be permissible appointees of Simon Bernstein's exercise of the power of appointment while under the second version that restriction was removed. As you all know, Simon Bernstein's dispositive plan, expressed to all of you during his lifetime on a conference call, was to distribute the Estate to all ten of his grandchildren. That was the basis upon which the administration was moving forward.

Under the Shirley Bernstein Trust, there is a definition of children and lineal descendants. That definition excluded Pam Simon, Ted Bernstein and their respective children from inheriting. The document also contained a special Power of Appointment for Simon wherein he could appoint the assets of the Trust for Shirley's lineal descendants. Based upon the definition of children and lineal descendants, the Power of Appointment could not be exercised in favor of Pam Simon, Ted Bernstein or their respective children, although we believe it was Simon Bernstein's wish to provide equally for all of his grandchildren.

On November 18, 2008, it does appear from the information that I have reviewed that Shirley Bernstein executed a First Amendment to her trust agreement. The document as executed appears to make only one relatively minor modification to her trust disposition by eliminating a specific gift to Ted



Bernstein Family  
January 14, 2014  
Page 2

Bernstein's stepson. In January of 2013 a First Amendment to the Shirley Bernstein Trust Agreement was provided to Christine Yates, Esq. who, at that time, was representing Eliot Bernstein. The document provided contained a paragraph number 2 which modified the definitional language in Shirley's document so as to permit, by deleting the words "and their respective lineal descendants" from the definition, an exercise of the power of appointment by Simon Bernstein over the Shirley Bernstein Trust to pass equally to all ten grandchildren rather than only six of the grandchildren.

By virtue of The Florida Bar Rules of Professional Conduct, I am duty bound to provide this information to you. Obviously, as a result of the issues and ramifications raised by the allegations, my firm must resign from further representation in all matters relating to the Estates and Trusts of Simon Bernstein and Shirley Bernstein. Furthermore, it is my intent, and I assume also the intent of Robert Spallina, to tender our resignations as personal representatives of the Simon Bernstein Estate and as trustees of the Simon Bernstein Trust. If the majority of the Bernstein family is in agreement, I would propose to exercise the power to designate a successor trustee by appointing Ted Bernstein in that capacity. With regard to the Simon Bernstein Estate, the appointment of the successor would require a court proceeding.

I am obviously upset and distraught over this chain of events and will do all that I reasonably can to correct and minimize any damages to the Bernstein family. As I believe you know, to date there has only been a modest funding of some, but not all, of the continuing trusts for the grandchildren emanating from Shirley's Trust assets.

Very truly yours,

DONALD R. TESCHER

DRT/km  
cc: Alan Rose, Esq.

LAW OFFICES  
TESCHER & SPALLINA, P.A.

**From:** Robert Spallina [mailto:rspallina@tescherspallina.com] **Sent:** ~~Tuesday, October 23, 2012 2:34 PM~~ **To:** Jill Iantoni; Eliot Bernstein; Ted Bernstein; Ted Bernstein; Pamela Simon; Lisa Friedstein **Subject:** RE: Call with Robert Spallina tomorrow/Wednesday at 2pm EST

As discussed, I need the EIN application and will process the claim. Your father was the owner of the policy and we will need to prepare releases given the fact that ~~we do not have the trust instrument and are making an educated guess that the beneficiaries are the five of you as a result of your mother predeceasing Si. Luckily we have a friendly carrier and they are willing to process the claim without a copy of the trust instrument.~~ A call regarding this is not necessary. We have things under control and will get the claim processed expeditiously after we receive the form.

Thank you for your help.

Robert L. Spallina, Esq.

TESCHER & SPALLINA, P.A.

4855 Technology Way, Suite 720

Boca Raton, Florida 33431

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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 )  
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, 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 )

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



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' FIRST AMENDED COMPLAINT**

**NOW COMES** Plaintiffs, SIMON BERNSTEIN IRREVOCABLE INSURANCE TRUST dtd 6/21/95, and TED BERNSTEIN, as Trustee, (collectively referred to as "BERNSTEIN TRUST"), TED BERNSTEIN, individually, PAMELA B. SIMON, individually, JILL IANTONI, individually, and LISA FRIEDSTEIN, individually, by their attorney, Adam M. Simon, and complaining of Defendant, HERITAGE UNION LIFE INSURANCE COMPANY, ("HERITAGE") states as follows:

**BACKGROUND**

1. At all relevant times, the BERNSTEIN TRUST was a common law irrevocable life insurance trust established in Chicago, Illinois, by the settlor, Simon L. Bernstein, ("Simon Bernstein" or "Insured") and was formed pursuant to the laws of the state of Illinois.
2. At all relevant times, the BERNSTEIN TRUST was a beneficiary of a life insurance policy insuring the life of Simon Bernstein, and issued by Capitol Bankers Life Insurance Company as policy number 1009208 (the "Policy").
3. Simon Bernstein's spouse, Shirley Bernstein, was named as the initial Trustee of the BERNSTEIN TRUST. Shirley Bernstein passed away on December 8, 2010, predeceasing Simon Bernstein.
4. The successor trustee, as set forth in the BERNSTEIN TRUST agreement is Ted Bernstein.
5. The beneficiaries of the BERNSTEIN TRUST as named in the BERNSTEIN TRUST Agreement are the children of Simon Bernstein.

6. Simon Bernstein passed away on September 13, 2012, and is survived by five adult children whose names are Ted Bernstein, Pamela Simon, Elliot Bernstein, Jill Iantoni, and Lisa Friedstein. By this amendment, Ted Bernstein, Pamela Simon, Jill Iantoni and Lisa Friedstein are being added as co-Plaintiffs in their individual capacities.

7. Four out five of the adult children of Simon Bernstein, whom hold eighty percent of the beneficial interest of the BERNSTEIN TRUST have consented to having Ted Bernstein, as Trustee of the BERNSTEIN TRUST, prosecute the claims of the BERNSTEIN TRUST as to the Policy proceeds at issue.

8. Eliot Bernstein, the sole non-consenting adult child of Simon Bernstein, holds the remaining twenty percent of the beneficial interest in the BERNSTEIN TRUST, and is representing his own interests and has chosen to pursue his own purported claims, pro se, in this matter.

9. The Policy was originally purchased by the S.B. Lexington, Inc. 501(c)(9) VEBA Trust (the "VEBA") from Capitol Bankers Life Insurance Company ("CBLIC") and was delivered to the original owner in Chicago, Illinois on or about December 27, 1982.

10. At the time of the purchase of the Policy, S.B. Lexington, Inc., was an Illinois corporation owned, in whole or part, and controlled by Simon Bernstein.

11. At the time of purchase of the Policy, S.B. Lexington, Inc. was an insurance brokerage licensed in the state of Illinois, and Simon Bernstein was both a principal and an employee of S.B. Lexington, Inc.

12. At the time of issuance and delivery of the Policy, CBLIC was an insurance company licensed and doing business in the State of Illinois.

13. HERITAGE subsequently assumed the Policy from CBLIC and thus became the successor to CBLIC as "Insurer" under the Policy and remained the insurer including at the time of Simon Bernstein's death.

14. In 1995, the VEBA, by and through LaSalle National Trust, N.A., as Trustee of the VEBA, executed a beneficiary change form naming LaSalle National Trust, N.A., as Trustee, as primary beneficiary of the Policy, and the BERNSTEIN TRUST as the contingent beneficiary.

15. On or about August 26, 1995, Simon Bernstein, in his capacity as member or auxiliary member of the VEBA, signed a VEBA Plan and Trust Beneficiary Designation form designating the BERNSTEIN TRUST as the "person(s) to receive at my death the Death Benefit stipulated in the S.B. Lexington, Inc. Employee Death Benefit and Trust and the Adoption Form adopted by the Employer".

16. The August 26, 1995 VEBA Plan and Trust Beneficiary Designation form signed by Simon Bernstein evidenced Simon Bernstein's intent that the beneficiary of the Policy proceeds was to be the BERNSTEIN TRUST.

17. S.B. Lexington, Inc. and the VEBA were voluntarily dissolved on or about April 3, 1998.

18. On or about the time of the dissolution of the VEBA in 1998, the Policy ownership was assigned and transferred from the VEBA to Simon Bernstein, individually.

19. From the time of Simon Bernstein's designation of the BERNSTEIN TRUST as the intended beneficiary of the Policy proceeds on August 26, 1995, no document was submitted by Simon Bernstein (or any other Policy owner) to the Insurer which evidenced any change in his intent that the BERNSTEIN TRUST was to receive the Policy proceeds upon his death.

20. At the time of his death, Simon Bernstein was the owner of the Policy, and the BERNSTEIN TRUST was the sole surviving beneficiary of the Policy.

21. The insured under the Policy, Simon Bernstein, passed away on September 13, 2012, and on that date the Policy remained in force.

22. Following Simon Bernstein's death, the BERNSTEIN TRUST, by and through its counsel in Palm Beach County, FL, submitted a death claim to HERITAGE under the Policy including the insured's death certificate and other documentation.

#### COUNT I

#### **BREACH OF CONTRACT**

23. Plaintiff, the BERNSTEIN TRUST, restates and realleges the allegations contained in ¶1-¶22 as if fully set forth as ¶23 of Count I.

24. The Policy, by its terms, obligates HERITAGE to pay the death benefits to the beneficiary of the Policy upon HERITAGE'S receipt of due proof of the insured's death.

25. HERITAGE breached its obligations under the Policy by refusing and failing to pay the Policy proceeds to the BERNSTEIN TRUST as beneficiary of the Policy despite HERITAGE'S receipt of due proof of the insured's death.

26. Despite the BERNSTEIN TRUST'S repeated demands and its initiation of a breach of contract claim, HERITAGE did not pay out the death benefits on the Policy to the BERNSTEIN TRUST instead it filed an action in interpleader and deposited the Policy proceeds with the Registry of the Court.

27. As a direct result of HERITAGE'S refusal and failure to pay the Policy proceeds to the BERNSTEIN TRUST pursuant to the Policy, Plaintiff has been damaged in an amount equal to the death benefits of the Policy plus interest, an amount which exceeds \$1,000,000.00.

WHEREFORE, PLAINTIFF, the BERNSTEIN TRUST prays for a judgment to be entered in its favor and against Defendant, HERITAGE, for the amount of the Policy proceeds on deposit with the Registry of the Court (an amount in excess of \$1,000,000.00) plus costs and reasonable attorneys' fees together with such further relief as this court may deem just and proper.

## COUNT II

### DECLARATORY JUDGMENT

28. Plaintiff, the BERNSTEIN TRUST, restates and realleges the allegations contained in ¶1-¶27 above as ¶28 of Count II and pleads in the alternative for a Declaratory Judgment.

29. On or about June 21, 1995, David Simon, an attorney and Simon Bernstein's son-in-law, met with Simon Bernstein before Simon Bernstein went to the law offices of Hopkins and Sutter in Chicago, Illinois to finalize and execute the BERNSTEIN TRUST Agreement.

30. After the meeting at Hopkins and Sutter, David B. Simon reviewed the final version of the BERNSTEIN TRUST Agreement and personally saw the final version of the BERNSTEIN TRUST Agreement containing Simon Bernstein's signature.

31. The final version of the BERNSTEIN TRUST Agreement named the children of Simon Bernstein as beneficiaries of the BERNSTEIN TRUST, and unsigned drafts of the BERNSTEIN TRUST Agreement confirm the same.

32. The final version of the BERNSTEIN TRUST Agreement named Shirley Bernstein, as Trustee, and named Ted Bernstein as, successor Trustee.

33. As set forth above, at the time of death of Simon Bernstein, the BERNSTEIN TRUST was the sole surviving beneficiary of the Policy.

34. Following the death of Simon Bernstein, neither an executed original of the BERNSTEIN TRUST Agreement nor an executed copy could be located by Simon Bernstein's family members.

35. Neither an executed original nor an executed copy of the BERNSTEIN TRUST Agreement has been located after diligent searches conducted as follows:

- i) Ted Bernstein and other Bernstein family members of Simon Bernstein's home and business office;
- ii) the law offices of Tescher and Spallina, Simon Bernstein's counsel in Palm Beach County, Florida,
- iii) the offices of Foley and Lardner (successor to Hopkins and Sutter) in Chicago, IL; and
- iv) the offices of The Simon Law Firm.

36. As set forth above, Plaintiffs have provided HERITAGE with due proof of the death of Simon Bernstein which occurred on September 13, 2012.

WHEREFORE, PLAINTIFF, the BERNSTEIN TRUST prays for an Order entering a declaratory judgment as follows:

- a) declaring that the original BERNSTEIN TRUST was lost and after a diligent search cannot be located;
- b) declaring that the BERNSTEIN TRUST Agreement was executed and established by Simon Bernstein on or about June 21, 1995;
- c) declaring that the beneficiaries of the BERNSTEIN TRUST are the five children of Simon Bernstein;



- d) declaring that Ted Bernstein, is authorized to act as Trustee of the BERNSTEIN TRUST because the initial trustee, Shirley Bernstein, predeceased Simon Bernstein;
- e) declaring that the BERNSTEIN TRUST is the sole surviving beneficiary of the Policy;
- f) declaring that the BERNSTEIN TRUST is entitled to the proceeds placed on deposit by HERITAGE with the Registry of the Court;
- g) ordering the Registry of the Court to release all of the proceeds on deposit to the BERNSTEIN TRUST; and
- h) for such other relief as this court may deem just and proper.

### COUNT III

#### RESULTING TRUST

37. Plaintiffs restate and reallege the allegations contained in ¶1-¶36 of Count II as ¶37 of Count III and plead, in the alternative, for imposition of a Resulting Trust.

38. Pleading in the alternative, the executed original of the BERNSTEIN TRUST Agreement has been lost and after a diligent search as detailed above by the executors, trustee and attorneys of Simon Bernstein's estate and by Ted Bernstein, and others, its whereabouts remain unknown.

39. Plaintiffs have presented HERITAGE with due proof of Simon Bernstein's death, and Plaintiff has provided unexecuted drafts of the BERNSTEIN TRUST Agreement to HERITAGE.

40. Plaintiffs have also provided HERITAGE with other evidence of the BERNSTEIN TRUST'S existence including a document signed by Simon Bernstein that designated the BERNSTEIN TRUST as the ultimate beneficiary of the Policy proceeds upon his death.

41. At all relevant times and beginning on or about June 21, 1995, Simon Bernstein expressed his intent that (i) the BERNSTEIN TRUST was to be the ultimate beneficiary of the life insurance proceeds; and (ii) the beneficiaries of the BERNSTEIN TRUST were to be the children of Simon Bernstein.

42. Upon the death of Simon Bernstein, the right to the Policy proceeds immediately vested in the beneficiary of the Policy.

43. At the time of Simon Bernstein's death, the beneficiary of the Policy was the BERNSTEIN TRUST.

44. If an express trust cannot be established, then this court must enforce Simon Bernstein's intent that the BERNSTEIN TRUST be the beneficiary of the Policy; and therefore upon the death of Simon Bernstein the rights to the Policy proceeds immediately vested in a resulting trust in favor of the five children of Simon Bernstein.

45. Upon information and belief, Bank of America, N.A., as successor Trustee of the VEBA to LaSalle National Trust, N.A., has disclaimed any interest in the Policy.

46. In any case, the VEBA terminated in 1998 simultaneously with the dissolution of S.B. Lexington, Inc.

47. The primary beneficiary of the Policy named at the time of Simon Bernstein's death was LaSalle National Trust, N.A. as "Trustee" of the VEBA.

48. LaSalle National Trust, N.A., was the last acting Trustee of the VEBA and was named beneficiary of the Policy in its capacity as Trustee of the VEBA.

49. As set forth above, the VEBA no longer exists, and the ex-Trustee of the dissolved trust, and upon information and belief, Bank Of America, N.A., as successor to LaSalle National Trust, N.A. has disclaimed any interest in the Policy.

50. As set forth herein, Plaintiff has established that it is immediately entitled to the life insurance proceeds HERITAGE deposited with the Registry of the Court.

51. Alternatively, by virtue of the facts alleged herein, HERITAGE held the Policy proceeds in a resulting trust for the benefit of the children of Simon Bernstein and since HERITAGE deposited the Policy proceeds the Registry, the Registry now holds the Policy proceeds in a resulting trust for the benefit of the children of Simon Bernstein.

WHEREFORE, PLAINTIFFS pray for an Order as follows:

- a) finding that the Registry of the Court holds the Policy Proceeds in a Resulting Trust for the benefit of the five children of Simon Bernstein, Ted Bernstein, Pamela Simon, Eliot Ivan Bernstein, Jill Iantoni and Lisa Friedstein; and
- b) ordering the Registry of the Court to release all the proceeds on deposit to the Bernstein Trust or alternatively as follows: 1) twenty percent to Ted Bernstein; 2) twenty percent to Pam Simon; 3) twenty percent to Eliot Ivan Bernstein; 4) twenty percent to Jill Iantoni; 5) twenty percent to Lisa Friedstein
- c) and for such other relief as this court may deem just and proper.

By: s/Adam M. Simon

Adam M. Simon (#6205304)

303 E. Wacker Drive, Suite 210

Chicago, IL 60601

Phone: 313-819-0730

Fax: 312-819-0773

E-Mail: asimon@chicagolaw.com

Attorneys for Plaintiffs and Third-Party  
Defendants

*Simon L. Bernstein Irrevocable Insurance Trust  
Dtd 6/21/95; Ted Bernstein as Trustee, and  
individually, Pamela Simon, Lisa Friedstein  
and Jill Iantoni*

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

IN RE:

Case No.: 50 2012 CP 004391 SB  
JUDGE MARTIN COLIN

ESTATE OF SIMON  
BERNSTEIN,

Deceased.

Division: IY

**ORDER ON MOTION FOR APPOINTMENT  
OF CURATOR OR ADMINISTRATOR AD LITEM**

THIS MATTER came before this Court on Tuesday, February 18, 2014, upon the Motion for Appointment of Curator or Administrator Ad Litem, filed by Ted S. Bernstein, and the Court, having heard argument of counsel, and considered the evidence, it is

ORDERED AND ADJUDGED that:

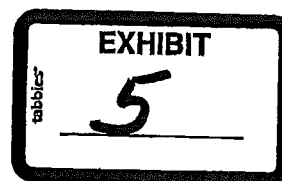
DENIED, for the reasons  
stated on the record

DONE and ORDERED in Delray Beach, Palm Beach County, Florida, this 19 day of  
February, 2014.

  
CIRCUIT COURT JUDGE

*Copies to:*

Alan Rose, Esq., PAGE, MRACHEK 505 So. Flagler Drive, Suite 600, West Palm Beach, FL 33401;  
John J. Pankauski, Esq., PANKAUSKI LAW FIRM, 120 South Olive Avenue, Suite 701, West Palm Beach, FL 33401;  
Peter M. Feaman, Esq., PETER M. FEAMAN, P.A., 3615 Boynton Beach Blvd., Boynton Beach, Florida 33436.



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

CASE NO. 502012CP004391XXXXNB-IH  
Probate – Judge John L. Phillips

IN RE:

ESTATE OF SIMON L. BERNSTEIN,  
\_\_\_\_\_ /

**MOTION TO RATIFY AND CONFIRM APPOINTMENT  
OF TED S. BERNSTEIN AS SUCCESSOR TRUSTEE OF TRUST  
WHICH IS SOLE BENEFICIARY OF THIS ESTATE**

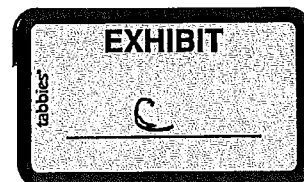
Ted S. Bernstein, Successor Trustee of the Simon Bernstein Amended and Restated Trust Agreement dated July 25, 2012 ("Simon's Trust"), which is the sole residuary beneficiary of the Estate, files this Motion to Ratify and Confirm Appointment of Ted S. Bernstein as Successor Trustee, and states:

1. A vacancy was created in the trusteeship of Simon's Trust after the named successor trustees resigned. Robert Spallina resigned initially, leaving Donald Tescher as the sole remaining trustee. There was no vacancy because one cotrustee remained in office. § 736.0704(2) ("If one or more cotrustees remain in office, a vacancy in a trusteeship need not be filled. A vacancy in a trusteeship must be filled if the trust has no remaining trustee.").

2. Mr. Tescher then resigned, which created a vacancy which had to be filled. Section 736.0704(3) provides:

(3) A vacancy in a trusteeship of a noncharitable trust that is required to be filled must be filled in the following order of priority:

(a) By a person named or designated pursuant to the terms of the trust to act as successor trustee.



(b) By a person appointed by unanimous agreement of the qualified beneficiaries.

(c) By a person appointed by the court.

3. Looking at these three methods in order, *first*, under section (3)(a), Simon's Trust designated a method and manner of designating a successor trustee. There was no one named, but under the terms of the Trust, Simon designated that Simon's "last serving trustee" may appoint his or her successor trustee or a majority in interest of the beneficiaries may designate as successor. In this case, Mr. Tescher, as last serving trustee, appointed Ted S. Bernstein as his successor.

4. That was a logical and sound choice, given the fact that: (i) there was pending litigation against Simon L. Bernstein's Estate and Trust, as well as the Shirley Bernstein Trust, involving a business formerly operated by Simon and his son Ted; (b) the fact that Shirley Bernstein had named Ted as the sole successor PR and sole successor Trustee in case of Simon's death; and (c) in light of his knowledge, professional friendship and fiduciary relationship with both Simon and Shirley during their lives. Mr. Tescher determined and believed it was in the best interest of the family and the beneficiaries to have Ted S. Bernstein serve as Successor Trustee of the Simon L. Bernstein Trust.

5. Mr. Tescher based his decision on his 40-plus year's experience as a lawyer with an impeccable reputation and as one of the most well-respected trusts and estate lawyers in Palm Beach County. He earned that reputation over many years, and notwithstanding the misguided beliefs of Eliot Bernstein and William Stansbury (the only two people trying to win money from Simon's estate through litigation of disputed claims), there is no reason to doubt Mr. Tescher's choice. Mr. Tescher confirmed and explained his view in an Affidavit (**Ex. A**) dated March 4, 2014.

6. Mr. Tescher designated Ted as his successor trustee and resigned effective upon Ted's acceptance of that role on February 3 2014. (Ex. B) Since February 3, 2014, Ted S. Bernstein has been serving as successor Trustee, with the acknowledgment of the Court, and in the best interests of the beneficiaries of the Trust. There have been numerous attempts by Eliot Bernstein and William Stansbury to remove Ted as Trustee, and to object to him serving. The last of these was a Petition for Removal filed by Eliot, Case No. 502015CP001162XXXXNB IJ, dismissed with prejudice by a final unappealed order dated April 8, 2016.

7. Part of the basis for these challenges was a claim that Ted Bernstein was ineligible for appointment under section IV.C.3 of the Trust, a clause designed to protect against adverse tax consequences which do not exist here. Ted Bernstein is eligible to serve and, indeed, was appointed and is serving as the sole successor trustee of his mother's trust, which benefits the same ten people. Ted Bernstein and an expert witness retained by him believe there was no question as to his service as trustee.

8. Regardless, to avoid any issue, reduce expenses and put to rest for all time any concerns raised as to Ted S. Bernstein's service as Successor Trustee, the beneficiaries of the Trust unanimously have agreed to ratify and confirm the appointment of Ted S. Bernstein.

9. Alternatively, section 736.0704(3) allows a successor trustee to be appointed by unanimous agreement of the qualified beneficiaries. The Court having determined who are the qualified beneficiaries and having appointed a Guardian ad Litem to represent the interests of Eliot's children, the qualified beneficiaries of the Trust unanimously have agreed to appoint Ted S. Bernstein as successor trustee, *nunc pro tunc* February 3, 2014.

10. Finally, to remove any possible doubt, the Successor Trustee and all qualified beneficiaries ask the Court to confirm the appointment and/or formally appoint Ted S. Bernstein under section 736.0704(3) on the basis that his observed actions and the actions of his counsel have clearly and undeniably demonstrated that he has acted in the best interests of the Trust and its qualified beneficiaries.

WHEREFORE, Ted requests that this Court: (a) accept and approve the qualified beneficiaries' ratification and confirm the appointment of Ted S. Bernstein; (b) accept and approve the qualified unanimous agreement that Ted S. Bernstein be appointed as successor trustee, *nunc pro tunc* February 3, 2014; and/or (c) enter an order appointing Ted S. Bernstein as Successor Trustee.

**CERTIFICATE OF SERVICE**

I CERTIFY that a copy of the foregoing has been furnished to parties listed on attached Service List by:  Facsimile **and**  U.S. Mail;  U.S. Mail;  E-mail Electronic Transmission;  FedEx;  Hand Delivery this 10<sup>th</sup> day of August, 2016.

MRACHEK, FITZGERALD, ROSE, KONOPKA,  
THOMAS & WEISS, P.A.  
505 South Flagler Drive, Suite 600  
West Palm Beach, FL 33401  
(561) 655-2250 Telephone / (561) 655-5537 Facsimile  
email: [arose@mrachek-law.com](mailto:arose@mrachek-law.com)  
Attorneys for Ted S. Bernstein

By: /s/ Alan B. Rose  
Alan B. Rose (Fla. Bar No. 961825)



### SERVICE LIST

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Boca Raton, FL 33434

Jill Iantoni  
2101 Magnolia Lane  
Highland Park, IL 60035

Lisa Friedstein  
2142 Churchill Lane  
Highland Park, IL 60035

Alexandra Bernstein  
3000 Washington Blvd, Apt 424  
Arlington, VA, 22201

Eric Bernstein  
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Delray Beach, FL 33445

Michael Bernstein  
2231 Bloods Grove Circle  
Delray Beach, FL 33445

Matt Logan  
2231 Bloods Grove Circle  
Delray Beach, FL 33445

Molly Simon  
1731 N. Old Pueblo Drive  
Tucson, AZ 85745

Daniel Bernstein, a Minor  
c/o Eliot and Candice Bernstein,  
His Parents and Natural Guardians  
2753 NW 34th Street  
Boca Raton, FL 33434

Jacob Bernstein, a Minor  
c/o Eliot and Candice Bernstein,  
His Parents and Natural Guardians  
2753 NW 34th Street  
Boca Raton, FL 33434

Joshua Bernstein, a Minor  
c/o Eliot and Candice Bernstein,  
His Parents and Natural Guardians  
2753 NW 34th Street  
Boca Raton, FL 33434

Julia Iantoni, a Minor  
c/o Guy and Jill Iantoni,  
Her Parents and Natural Guardians  
2101 Magnolia Lane  
Highland Park, IL 60035

Max Friedstein, a Minor  
c/o Jeffrey and Lisa Friedstein,  
His Parents and Natural Guardians  
2142 Churchill Lane  
Highland Park, IL 60035

Carley Friedstein, a Minor  
c/o Jeffrey and Lisa Friedstein,  
Her Parents and Natural Guardians  
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Highland Park, IL 60035

Eliot I. Bernstein  
2753 N.W. 34th Street  
Boca Raton, FL 33434  
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(561) 886-7628 - Cell  
(561) 245-8644 - Facsimile  
Email: Eliot I. Bernstein ([iviewit@iviewit.tv](mailto:iviewit@iviewit.tv))

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Email: [pfeaman@feamanlaw.com](mailto:pfeaman@feamanlaw.com);  
[service@feamanlaw.com](mailto:service@feamanlaw.com);  
[mkoskey@feamanlaw.com](mailto:mkoskey@feamanlaw.com)  
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[bill@palmettobaylaw.com](mailto:bill@palmettobaylaw.com);  
[tmealy@gcprobatelaw.com](mailto:tmealy@gcprobatelaw.com)

Counsel for Lisa Sue Friedstein, individually and  
as trustee for her children, and as natural guardian  
for M.F. and C.F., Minors; Jill Marla Iantoni,  
individually and as trustee for her children, and as  
natural guardian for J.I. a minor

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(561) 910-3080 - Facsimile  
Email: [ijb@ijblegal.com](mailto:ijb@ijblegal.com)  
Counsel for Tescher & Spallina

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Benjamin P. Brown, Esq.  
Matwiczuk & Brown, LLP  
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Curator for the Estate of Simon Bernstein

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Email: John P. Morrissey  
[john@jmorrisseylaw.com](mailto:john@jmorrisseylaw.com)  
Counsel for Molly Simon, Alexandra Bernstein,  
Eric Bernstein, Michael Bernstein

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

CASE NO. 502012CP004391XXXXSB  
CP - Probate

IN RE:

ESTATE OF SIMON L. BERNSTEIN,  
\_\_\_\_\_ /

AFFIDAVIT OF DONALD R. TESCHER

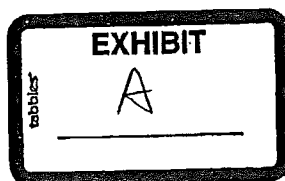
STATE OF FLORIDA            )  
  )  
COUNTY OF PALM BEACH    )

BEFORE ME, the undersigned authority, personally appeared Donald R. Tescher, upon being duly sworn, deposes and says:

1. I am over the age of eighteen years, sui juris, and have personal knowledge of the facts set forth herein.

2. Tescher & Spallina, P.A. ("Firm") were counsel to Shirley Bernstein and Simon L. Bernstein while they were alive. They had five children borne of their long-time marriage, Ted Bernstein, Pamela Simon, Eliot Bernstein, Lisa Friedstein and Jill Iantoni. Simon was the natural father and Shirley was the natural mother of each of these children. Simon and Shirley also had ten living grandchildren, each of whom was a direct and natural descendant of one of the children. Thus, Simon and Shirley had fifteen lineal descendants.

3. After consultations with Robert L. Spallina and myself or solely with Robert L. Spallina, a Will and Trust was created for each of Simon and Shirley, as amended. I am aware of the final estate plan of each, as expressed in their final testamentary documents, specifically:



- a. Will of Shirley Bernstein dated May 20, 2008 (Exhibit A);
- b. Shirley Bernstein Trust Agreement dated May 20, 2008 (Exhibit B), as Amended on November 18, 2008 (Exhibit C);
- c. Will of Simon L. Bernstein dated July 25, 2012 (Exhibit D); and
- d. Simon L. Bernstein Amended and Restated Trust Agreement dated July 25, 2013 (Exhibit E).

4. The attached five documents are the final documents signed by each of Shirley and Simon, respectively, during their lives. The originals of the Wills were retained in our Firm's safe deposit box (or "vault") until the times of their deaths.

5. It is my understanding and belief that, during their lifetimes, neither Shirley nor Simon shared copies of their testamentary documents with their children. None of the five children were involved in the estate planning process, nor did any of them attend any meetings with myself as counsel.

6. When Shirley died on December 8, 2010, her testamentary documents provided that Simon be given any tangible personal property in her name, other than anything disposed of in a separate written memorandum. The residue of her estate was devised to the Shirley Trust. After her death, the beneficiary of the Shirley Trust was Simon during his life, with the assets disposed of after his death through a limited power of appointment, empowering Simon to transfer the assets to or for the benefit of one or more of their lineal descendants and their spouses.<sup>1</sup>

7. Our Firm prepared the July 2012 Amended and Restated Trust Agreement and the Will for Simon Bernstein. Those are the final documents that our Firm prepared and the final documents I am aware of Simon having signed prior to his death in September, 2013. Our Firm

---

<sup>1</sup> There is an alternate disposition of the assets upon the death of Simon if he did not exercise his power of appointment, but in my view that is irrelevant.

retained the originals of those documents in our safe deposit box until Simon's death. There are no later executed testamentary documents for Simon L. Bernstein.

8. Simon exercised his limited power of appointment in Article II of the July 2012 Will, which specifically references Shirley's Trust and the power given to him under subparagraph E.1 of Article II of Shirley's Trust. Pursuant to that power of appointment, Simon directed Shirley's Trustee to divide the remaining trust assets into equal shares for his then living grandchildren to be added to trusts established for the ten grandchildren under Simon's Trust. Because Simon exercised his power of appointment, the assets in the Shirley Trust were distributed according to Simon's direction, and did not pass under the Shirley Trust to Shirley's default beneficiaries.

9. Under these testamentary documents, neither Ted, Pam, Eliot, Lisa or Jill is a beneficiary of any of their Trusts and Estates. With the sole exception of possibly some specific items of tangible personal property not relevant to the estate and trust administration, Shirley and Simon effectively disinherited all five of their children, and none of them take anything from either of their Trusts or Wills.

10. While he was alive, Simon was the Personal Representative of the Estate of Shirley Bernstein and was the Trustee of the Shirley Bernstein Trust. After Simon's death, under the terms of the Will and Trust, Ted S. Bernstein became the Successor Personal Representative and Successor Trustee. Prior to that time, Ted had not been involved in the administration of Shirley's Estate or Trust. As far as I am aware, Ted was not aware that he would be the successor to Simon until after Simon's death.

11. Upon Ted assuming his fiduciary role as Successor Personal Representative and Successor Trustee, Ted retained our Firm to represent him as a fiduciary. From that point in time until our withdrawal from representing Ted, which was approved by the Court in February 2014, Ted was a responsive client who listened to and followed my advice. At no time did Ted take any action which I advised him would be improper or a breach of his fiduciary duty. In my view, at all times Ted acted as a fiduciary based upon the facts and circumstances and information available to him at that time.

12. At some point after Simon died, a significant asset of Shirley's Trust (a condominium) was sold, and the decision was made to make a partial interim distribution to all of the beneficiaries of the Shirley Trust. In connection with the decision to make an interim distribution, I participated in consulting with Ted and his siblings (other than Eliot) as his counsel. I engaged in a call with various members of the family (other than Eliot). Among those children who participated in the phone call, there was a general consensus that it was appropriate to make an interim partial distribution. I assisted in the mechanics of making these distributions, including providing tax identification numbers and instructions to open a bank account for each of the grandchildren's trusts.

13. At no time did I advise Ted that it would be a violation of his fiduciary duty to make the interim distribution to the trusts for the ten living grandchildren of Simon. I did not advise Ted at any time that there was any question concerning the proper beneficiaries of the Trust, nor was Ted aware of any issue concerning the effectiveness of the exercise of the power of appointment until I advised him and others of that fact in mid-January, 2014.


14. In my view, during the time I was counsel for Ted as fiduciary, it is my opinion that he fulfilled his fiduciary duties and acted in a reasonable and appropriate manner. I am aware of

no facts that would give a court cause to be concerned about whether Ted could continue to fulfill his fiduciary duty in those capacities, or serve as Personal Representative of Simon's Estate.

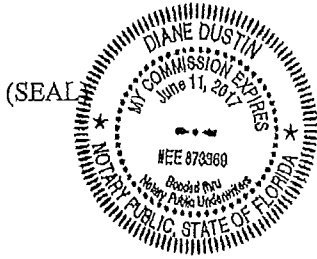
15. Upon my resignation as Trustee of the Simon Trust, I concluded that the appointment of Ted as Successor Trustee would be consistent with Simon's wishes and would be in the best interest of the family. Under the terms of Simon's Trust, he gave the power to appoint a successor trustee to the last resigning trustee. In this case, for a variety of reasons I concluded that Ted was the logical choice for Successor Trustee, including the following: Ted's knowledge of the facts and of these estate matters; his current service in similar capacities in Shirley's Trust and Estate; his knowledge of the pending litigation with a creditor, William Stansbury; the fact that he is not a beneficiary of or seeking monies from any of the Trusts or Estates; and the fact that I believe him to be a reasonable and competent business person capable of fulfilling his fiduciary duties. Accordingly, after Robert Spallina resigned, I exercised the power given to me by Simon to appoint Ted S. Bernstein as Successor Trustee of the Simon Bernstein Trust.

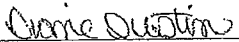
16. The last person Simon would want to serve in any fiduciary capacity is Eliot. Simon did not want Eliot to have any role in any of these matters.

FURTHER AFFIANT SAYETH NAUGHT.

  
\_\_\_\_\_  
DONALD R. TESCHER

Sworn to and subscribed before me this 4 day of March, 2014, by Donald R. Tescher,  
who is personally known to me and who did take an oath.



  
\_\_\_\_\_  
Notary Public  
My commission expires:



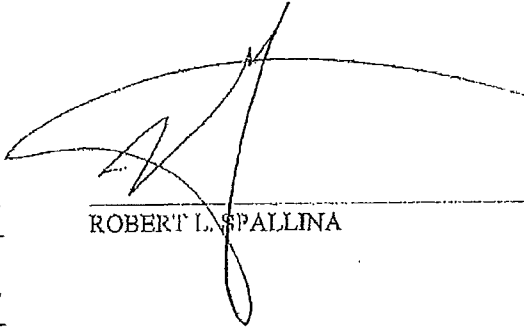
RESIGNATION OF CO-TRUSTEE

I, ROBERT L. SPALLINA, pursuant to Subparagraph B. of Article IV of the SIMON L. BERNSTEIN TRUST dated September 13, 2012 ("Trust Agreement"), do hereby resign as co-Trustee of the Trust Agreement, effective immediately.

IN WITNESS WHEREOF, I have hereunto executed this Resignation of Co-Trustee on this 21 day of January, 2014.

Signed, Sealed & Delivered  
in the presence of:

  
Print Name: LAUREN CASAVANI

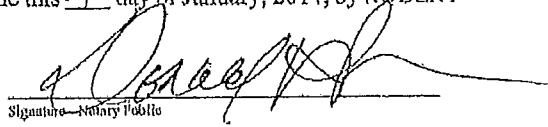
  
ROBERT L. SPALLINA

Kimberly Moran  
Print Name: Kimberly Moran

STATE OF FLORIDA  
SS  
COUNTY OF PALM BEACH

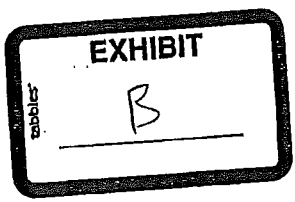
THE FOREGOING was acknowledged before me this 21 day of January, 2014, by ROBERT L. SPALLINA.



  
Signature - Notary Public

Print, type or stamp name of Notary Public

- Personally Known
- Produced Identification/Type of Identification Produced \_\_\_\_\_





RESIGNATION OF TRUSTEE

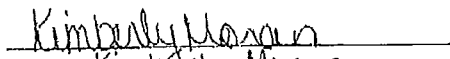
I, DONALD R. TESCHER, pursuant to Subparagraph B. of Article IV of the SIMON L. BERNSTEIN TRUST dated September 13, 2012 ("Trust Agreement"), do hereby resign as Trustee of the Trust Agreement, effective immediately upon TED S. BERNSTEIN accepting his appointment as successor Trustee.

IN WITNESS WHEREOF, I have hereunto executed this Resignation of Trustee on this 22 day of January, 2014.

Signed, Sealed & Delivered  
in the presence of:

  
\_\_\_\_\_  
Print Name: LARES GALVANI

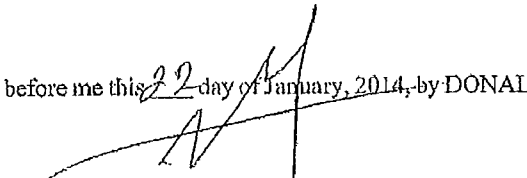
  
\_\_\_\_\_  
DONALD R. TESCHER

  
\_\_\_\_\_  
Print Name: Kimberly Moran

STATE OF FLORIDA  
SS  
COUNTY OF PALM BEACH

THE FOREGOING was acknowledged before me this 22 day of January, 2014, by DONALD R. TESCHER.



  
\_\_\_\_\_  
Signature - Notary Public  
\_\_\_\_\_  
Print, type or stamp name of Notary Public

Personally Known  
 Produced Identification/Type of Identification Produced \_\_\_\_\_



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

IN RE:

Case No. 50 2012 CP 004391 NB

ESTATE OF SIMON  
BERNSTEIN,  
Deceased.

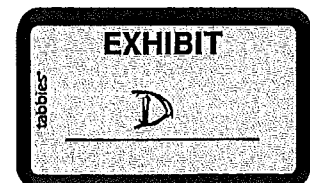
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**MOTION TO VACATE IN PART THE COURT'S RULING ON SEPTEMBER 7, 2016,  
AND/OR ANY SUBSEQUENT ORDER, PERMITTING THE ESTATE OF SIMON  
BERNSTEIN TO RETAIN ALAN ROSE AND PAGE, MRACHEK, FITZGERALD,  
ROSE, KONOPKA, THOMAS & WEISS, P.A AS LEGAL COUNSEL AND MOTION  
FOR EVIDENTIARY HEARING TO DETERMINE WHETHER ROSE AND PAGE,  
MRACHEK ARE DISQUALIFIED FROM REPRESENTING THE  
ESTATE DUE TO AN INHERENT CONFLICT OF INTEREST**

COMES NOW, Plaintiff WILLIAM STANSBURY, claimant and Interested Person in the Estate of Simon Bernstein, ("Stansbury"), and moves this Court for an Order: 1) vacating its ruling on September 7, 2016, or any court Order resulting therefrom, permitting the Estate of Simon Bernstein to retain attorney Alan Rose ("Rose") and the law firm of Page, Mrachek, Fitzgerald, Rose, Konopka, Thomas & Weiss, P.A ("Page Mrachek") to represent the Estate of Simon Bernstein in *William E. Stansbury v. Ted Bernstein, et al*, Case. No. 50 2012 CA 013933 MB AA, Palm Beach County, Florida; and, 2) setting an evidentiary hearing to determine whether Alan Rose and Page Mrachek should be disqualified from representing the Estate due to an irreconcilable conflict of interest. As grounds, Plaintiff states as follows:

**I. Background Facts**

1. Stansbury filed a lawsuit styled *William E. Stansbury v. Ted Bernstein, et al*, Case No. 50 2012 CA 013933 MB AA, Palm Beach County, Florida against Simon Bernstein ("Simon"), Ted Bernstein ("Ted") and several corporate defendants in August of 2012 to collect



compensation, and other damages due Stansbury arising out of an insurance business in which Stansbury, SIMON and TED were principals. Stansbury asserted claims against Simon and Ted both as agents of the corporate defendants and in their individual capacities (the claims against TED and the companies have settled). The Shirley Bernstein Trust was dropped as a Party.

3. The damages Stansbury claims are in excess of \$2.5 million. After the lawsuit was filed, SIMON BERNSTEIN passed away in September of 2012. The Estate of Simon Bernstein (the "Estate") was substituted as a party defendant. Ted Bernstein now serves as Trustee of the Simon Bernstein Amended and Restated Revocable Trust Agreement dated July 25, 2012 (the "Simon Trust"). The Simon Trust is the sole residuary beneficiary of the Estate.

4. At the time of Simon Bernstein's death, it was determined that there was a life insurance policy issued by Heritage Mutual Insurance Company ("Heritage") insuring his life. Simon was listed on the company records as the owner of the policy. Heritage represented that the death benefit was approximately \$1.7 million. Heritage records also indicated that on November 27, 1995 there was a beneficiary change for the policy to read: "LaSalle National Trust N.A., primary beneficiary and Simon Bernstein Ins. Trust dated 6/21/1995, contingent beneficiary." It was determined by Heritage that the primary beneficiary (LaSalle) no longer had an interest in the death benefit. At the time of Simon Bernstein's death, the trust document establishing this alleged contingent beneficiary trust was not and, to date, has not been found.

5. Supposedly the beneficiaries of the Insurance Trust were Ted Bernstein and his siblings, Lisa Sue Friedstein, Pamela Beth Simon, Jill Iantoni and Eliot Bernstein (the "Bernstein Children"). Whether they were, in fact, beneficiaries was just an "educated guess" by attorney Robert Spallina, who was counsel to the Bernstein Children. Under Florida law, if the Insurance Trust is no longer in existence, is lost, or if the insurance proceeds are not properly payable to

this alleged trust, the proceeds would be payable to the Defendant in this action, the Simon Bernstein Estate.

6. Because no trust document could be found, Heritage refused to pay the claim for the life insurance proceeds to anyone without a court order. The alleged Insurance Trust then sued Heritage in the Circuit Court of Cook County, Illinois (the case was removed to Federal Court), styled *Simon Bernstein Irrevocable Insurance Trust Dtd. 6/21/95 v. Heritage Union Life Insurance Company*, Case No. 13 CV 3643, United States District Court for the Northern District of Illinois (the "Insurance Litigation"). A copy of the Amended Complaint (the "Complaint") is attached as **Exhibit "1."** In paragraph 2 of the Complaint, the Plaintiff, the Insurance Trust, although apparently still lost, and requiring an "educated guess" to ascertain its beneficiaries, nonetheless alleges that Ted Bernstein is the "trustee" of the Insurance Trust. No trust document exists establishing the continued existence of the Insurance Trust, let alone that Ted is the Trustee. Ted Bernstein is also suing as Plaintiff in his own name, individually.

7. Ted Bernstein, as the putative "trustee" of the purported insurance trust and as Plaintiff in the Insurance Litigation, is actively pursuing litigation that is contrary to the best interests of the Simon Bernstein Estate. The Estate intervened in the Insurance Litigation to assert that it, not the Bernstein Children, is the proper beneficiary of the life insurance proceeds. (Interestingly, Ted Bernstein opposed the intervention of the Estate.) As such, the Estate is an adverse party to the Insurance Trust for which Ted Bernstein is identified as trustee. The Estate is now a Defendant where Ted Bernstein is a Plaintiff.

8. This is germane to this Motion because Alan Rose and the Page Mrachek law firm represent Ted Bernstein as Trustee of the Simon Trust. Additionally, as counsel for Stansbury recently discovered, Alan Rose also represents Ted Bernstein as his personal counsel in the

Insurance Litigation in Illinois and even made an appearance on behalf of Ted Bernstein, and made objections of record, in Ted Bernstein's deposition taken by counsel for the Estate! Therefore, Alan Rose is representing a Party adverse to the Estate of Simon Bernstein and cannot now represent the Estate of Simon Bernstein in a related action.

**I. Stansbury has standing to file this Motion**

9. The provisions of §731.201(23), Fla. Stat. (2013) define an "interested person" as:

(23) "Interested person" means any person who may reasonably be expected to be affected by the outcome of the particular proceeding involved . . . The meaning, as it relates to particular persons, may vary from time to time and must be determined according to the particular purpose of, and matter involved in, any proceeding.

10. Stansbury, as a claimant with a lawsuit pending against the Estate, has an interest in ensuring, to the extent possible, that the personal representative will effectively marshal the assets of the Estate in order to maximize the resources available to pay his and other claims. This includes an interest in ensuring that the Personal Representative retains outside counsel that will act in the best interests of the estate and its beneficiaries, claimants and creditors and will be free of conflicts of interest. The Fourth District Court of Appeal has recognized that a claimant to an estate is an "interested person" and has standing in a proceeding to approve the personal representative's final accounting and petition for discharge. *See, Arzuman v. Estate of Prince Bander BIN Saud Bin, etc.*, 879 So.2d 675 (Fla. 4<sup>th</sup> DCA 2004). *See also, Montgomery v. Cribb*, 484 So.2d 73 (Fla. 2d DCA 1986) (Wrongful death claimant was entitled to notice of hearing as an "interested person" under the probate code even though case was dismissed by trial court and disputed settlement was on appeal.) Stansbury is therefore an "interested person" with standing to bring to the court's attention Alan Rose's conflict of interest that should disqualify him from representing the estate in Stansbury's lawsuit.

Moreover, an attorney hired by a personal representative is an agent of the personal representative and any conflicts of interest or adverse interest of the attorney are imputed to personal representative. Estate of Brugh, 306 So. 2d 599 (Fla. 2d DCA 1975); see also, § 733.6171(5), Fla. Stat. (an interested party has standing to challenge compensation paid to personal representative's agents, including his attorneys). Under § 733.602, Fla. Stat., a personal representative must use his authority "for the best interests of interested parties, including creditors." Id. Indeed, the fundamental responsibilities of a personal representative are to pursue all assets of the estate. Bookman v. Davidson, 136 So. 3d 1276 (Fla. 1st DCA 2014). An "interested party" may seek to remove a personal representative (or its agent) when the personal representative (or its agent) holds or acquires "conflicting or adverse interests against the estate that will or may interfere with the administration of the estate as a whole." See §§ 733.506, 733.504(9), Fla. Stat.

In the present case, Stansbury clearly has standing to challenge the personal representative's hiring of Alan Rose and his law firm because they have an inherent conflict of interest with the Estate which will interfere with the administration of the Estate. These attorneys currently represent Mr. Ted Bernstein, individually, in the Insurance Litigation that is directly opposed to the interests of the Estate and its beneficiaries, creditors and claimants. Specifically, these attorneys are currently seeking to keep assets from the Estate and to instead have the life insurance proceeds paid to their individual client, Ted Bernstein. The existence of this inherent adverse interest of these attorneys to the Estate preclude them from representing the Estate in this litigation. Indeed, Mr. Stansbury has been incurring significant expenses on behalf of the Estate in the Chicago litigation. It would be unconscionable to permit these attorneys,



who are litigating against the Estate in Chicago, to, at the same time, represent the Estate in this matter.

## II. Alan Rose has a Conflict of Interest and Should Be Disqualified.

11. When considering whether disqualification of an attorney is appropriate based on a conflict of interest, courts recognize that the Rules Regulating the Florida Bar govern. *See, Morse v. Clark*, 890 So.2d 496 (Fla. 5<sup>th</sup> DCA 2004).

Rule 4-1.7(a) provides:

**(a) Representing Adverse interests.** Except as provided in subdivision (b), a lawyer must not represent a client if:

- (1) the representation of 1 client will be directly adverse to another client; or
- (2) there is a substantial risk that the representation of 1 or more clients will be materially limited by lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

12. As the court in *Morse* stated:

The existing client rule is based on the ethical-concept requirement that a lawyer should act with undivided loyalty for his client and not place himself or herself in a position where a conflicting interest may affect the obligation of an ongoing professional relationship. It is difficult to imagine how a lawyer could appear in court one day arguing vigorously for a client, and then face the same client the next day and vigorously oppose him in another matter, without seriously damaging their professional relationship. Such unseemly conduct, if permitted, would further erode the public's regard for the legal profession. *Id.* at 498

13. The fact that Alan Rose has a conflict of interest is beyond question. It has recently been discovered, however, that Alan Rose represents Ted Bernstein as personal counsel in the Insurance Litigation filed in Chicago. Rose appeared as counsel for Ted Bernstein in the Chicago Insurance Litigation when Ted Bernstein is an adverse Party to the Simon Bernstein Estate. Rose participated and interposed objections in Ted Bernstein's deposition taken by James Stamos, the attorney hired by the Estate to pursue the life insurance benefits on its behalf. Excerpts from the deposition establishing Rose's representation of Ted Bernstein and showing

Rose's participation in the deposition adverse to the Estate are attached hereto as **Composite Exhibit "2."**

14. Under Rule 4-1.7(a) of Rules Regulating the Florida Bar, the representation of one client, Ted Bernstein, in his action seeking to deprive the Estate of \$1.7 million (the Insurance Litigation), is directly adverse to Rose's representation of the Estate in this lawsuit.

15. Due to the existence of the conflict of interest by Alan Rose, the entire Page, Mrachek firm is similarly disqualified. *See* Rule 4-1.10(a) of Rules Regulating the Florida Bar.

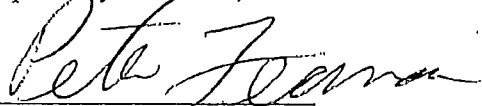
WHEREFORE, William Stansbury requests that this court:

A. Vacate its ruling on September 7, 2016 (or any Order resulting therefrom) that permits the Estate of Simon Bernstein to retain Alan Rose and Page, Mrachek, Fitzgerald, Rose, Konopka, Thomas & Weiss, P.A as legal counsel to represent the Estate of Simon Bernstein in Stansbury's lawsuit;

B. Set an evidentiary hearing to determine the existence of the conflict of interest;

C. Award Stansbury his costs herein expended, and such other relief as this court deems just and proper.

Respectfully submitted,

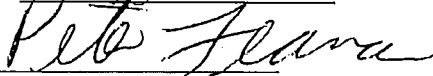
  
Peter M. Feaman

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been forwarded via e-mail service through the Florida E-portal system to: Alan Rose, Esq., Mrachek, Fitzgerald Rose, 505 So. Flagler Drive, Suite 600, West Palm Beach, FL 33401, [arose@pm-law.com](mailto:arose@pm-law.com) and [mchandler@pm-law.com](mailto:mchandler@pm-law.com); Eliot Bernstein, 2753 NW 34<sup>th</sup> Street, Boca Raton, FL 33434, [tviewit@tviewit.tv](mailto:tviewit@tviewit.tv); Brian O'Connell, Esq., Ciklin Lubitz Martens & O'Connell, 515 North Flagler Drive, 20<sup>th</sup> Floor, West Palm Beach, FL 33401, [boconnell@ciklinlubitz.com](mailto:boconnell@ciklinlubitz.com); John P. Morrissey, Esq., 330 Clematis Street, Suite 213, West Palm Beach, FL 33401, [john@jmorrisseylaw.com](mailto:john@jmorrisseylaw.com); Lisa Friedstein, [lisa@friedsteins.com](mailto:lisa@friedsteins.com), 2142 Churchill Lane, Highland Park, IL 60035; Jill Iantoni, [jilliantoni@gmail.com](mailto:jilliantoni@gmail.com), 2101 Magnolia Lane, Highland Park, IL 60035, on this 7<sup>th</sup> day of October, 2016.

PETER M. FEAMAN, P.A.  
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Boynton Beach, FL 33436  
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By: \_\_\_\_\_

  
Peter M. Feaman  
Florida Bar No. 0260347

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 )  
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. )

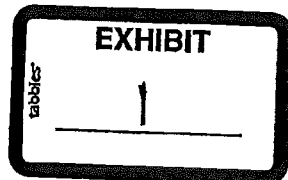
SIMON BERNSTEIN IRREVOCABLE )  
TRUST DTD 6/21/95 )

Counter-Defendant )

and, )

FIRST ARLINGTON NATIONAL BANK )  
as Trustee of S.B. Lexington, Inc. Employee )  
Death Benefit Trust, 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 )

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



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' FIRST AMENDED COMPLAINT**

**NOW COMES** Plaintiffs, SIMON BERNSTEIN IRREVOCABLE INSURANCE TRUST dtd 6/21/95, and TED BERNSTEIN, as Trustee, (collectively referred to as "BERNSTEIN TRUST"), TED BERNSTEIN, individually, PAMELA B. SIMON, individually, JILL IANTONI, individually, and LISA FRIEDSTEIN, individually, by their attorney, Adam M. Simon, and complaining of Defendant, HERITAGE UNION LIFE INSURANCE COMPANY, ("HERITAGE") states as follows:

**BACKGROUND**

1. At all relevant times, the BERNSTEIN TRUST was a common law irrevocable life insurance trust established in Chicago, Illinois, by the settlor, Simon L. Bernstein, ("Simon Bernstein" or "insured") and was formed pursuant to the laws of the state of Illinois.
2. At all relevant times, the BERNSTEIN TRUST was a beneficiary of a life insurance policy insuring the life of Simon Bernstein, and issued by Capitol Bankers Life Insurance Company as policy number 1009208 (the "Policy").
3. Simon Bernstein's spouse, Shirley Bernstein, was named as the initial Trustee of the BERNSTEIN TRUST. Shirley Bernstein passed away on December 8, 2010, predeceasing Simon Bernstein.
4. The successor trustee, as set forth in the BERNSTEIN TRUST agreement is Ted Bernstein.
5. The beneficiaries of the BERNSTEIN TRUST as named in the BERNSTEIN TRUST Agreement are the children of Simon Bernstein.

6. Simon Bernstein passed away on September 13, 2012, and is survived by five adult children whose names are Ted Bernstein, Pamela Simon, Eliot Bernstein, Jill Iantoni, and Lisa Friedstein. By this amendment, Ted Bernstein, Pamela Simon, Jill Iantoni and Lisa Friedstein are being added as co-Plaintiffs in their individual capacities.

7. Four out five of the adult children of Simon Bernstein, whom hold eighty percent of the beneficial interest of the BERNSTEIN TRUST have consented to having Ted Bernstein, as Trustee of the BERNSTEIN TRUST, prosecute the claims of the BERNSTEIN TRUST as to the Policy proceeds at issue.

8. Eliot Bernstein, the sole non-consenting adult child of Simon Bernstein, holds the remaining twenty percent of the beneficial interest in the BERNSTEIN TRUST, and is representing his own interests and has chosen to pursue his own purported claims, pro se, in this matter.

9. The Policy was originally purchased by the S.B. Lexington, Inc. 501(c)(9) VEBA Trust (the "VEBA") from Capitol Bankers Life Insurance Company ("CBLIC") and was delivered to the original owner in Chicago, Illinois on or about December 27, 1982.

10. At the time of the purchase of the Policy, S.B. Lexington, Inc., was an Illinois corporation owned, in whole or part, and controlled by Simon Bernstein.

11. At the time of purchase of the Policy, S.B. Lexington, Inc. was an insurance brokerage licensed in the state of Illinois, and Simon Bernstein was both a principal and an employee of S.B. Lexington, Inc.

12. At the time of issuance and delivery of the Policy, CBLIC was an insurance company licensed and doing business in the State of Illinois.

13. HERITAGE subsequently assumed the Policy from CBLIC and thus became the successor to CBLIC as "Insurer" under the Policy and remained the insurer including at the time of Simon Bernstein's death.

14. In 1995, the VEBA, by and through LaSalle National Trust, N.A., as Trustee of the VEBA, executed a beneficiary change form naming LaSalle National Trust, N.A., as Trustee, as primary beneficiary of the Policy, and the BERNSTEIN TRUST as the contingent beneficiary.

15. On or about August 26, 1995, Simon Bernstein, in his capacity as member or auxiliary member of the VEBA, signed a VEBA Plan and Trust Beneficiary Designation form designating the BERNSTEIN TRUST as the "person(s) to receive at my death the Death Benefit stipulated in the S.B. Lexington, Inc. Employee Death Benefit and Trust and the Adoption Form adopted by the Employer".

16. The August 26, 1995 VEBA Plan and Trust Beneficiary Designation form signed by Simon Bernstein evidenced Simon Bernstein's intent that the beneficiary of the Policy proceeds was to be the BERNSTEIN TRUST.

17. S.B. Lexington, Inc. and the VEBA were voluntarily dissolved on or about April 3, 1998.

18. On or about the time of the dissolution of the VEBA in 1998, the Policy ownership was assigned and transferred from the VEBA to Simon Bernstein, individually.

19. From the time of Simon Bernstein's designation of the BERNSTEIN TRUST as the intended beneficiary of the Policy proceeds on August 26, 1995, no document was submitted by Simon Bernstein (or any other Policy owner) to the Insurer which evidenced any change in his intent that the BERNSTEIN TRUST was to receive the Policy proceeds upon his death.



20. At the time of his death, Simon Bernstein was the owner of the Policy, and the BERNSTEIN TRUST was the sole surviving beneficiary of the Policy.

21. The insured under the Policy, Simon Bernstein, passed away on September 13, 2012, and on that date the Policy remained in force.

22. Following Simon Bernstein's death, the BERNSTEIN TRUST, by and through its counsel in Palm Beach County, FL, submitted a death claim to HERITAGE under the Policy including the insured's death certificate and other documentation.

### COUNT I

#### **BREACH OF CONTRACT**

23. Plaintiff, the BERNSTEIN TRUST, restates and realleges the allegations contained in ¶1-¶22 as if fully set forth as ¶23 of Count I.

24. The Policy, by its terms, obligates HERITAGE to pay the death benefits to the beneficiary of the Policy upon HERITAGE'S receipt of due proof of the insured's death.

25. HERITAGE breached its obligations under the Policy by refusing and failing to pay the Policy proceeds to the BERNSTEIN TRUST as beneficiary of the Policy despite HERITAGE'S receipt of due proof of the insured's death.

26. Despite the BERNSTEIN TRUST'S repeated demands and its initiation of a breach of contract claim, HERITAGE did not pay out the death benefits on the Policy to the BERNSTEIN TRUST instead it filed an action in interpleader and deposited the Policy proceeds with the Registry of the Court.

27. As a direct result of HERITAGE's refusal and failure to pay the Policy proceeds to the BERNSTEIN TRUST pursuant to the Policy, Plaintiff has been damaged in an amount equal to the death benefits of the Policy plus interest, an amount which exceeds \$1,000,000.00.

WHEREFORE, PLAINTIFF, the BERNSTEIN TRUST prays for a judgment to be entered in its favor and against Defendant, HERITAGE, for the amount of the Policy proceeds on deposit with the Registry of the Court (an amount in excess of \$1,000,000.00) plus costs and reasonable attorneys' fees together with such further relief as this court may deem just and proper.

## COUNT II

### DECLARATORY JUDGMENT

28. Plaintiff, the BERNSTEIN TRUST, restates and realleges the allegations contained in ¶1-¶27 above as ¶28 of Count II and pleads in the alternative for a Declaratory Judgment.

29. On or about June 21, 1995, David Simon, an attorney and Simon Bernstein's son-in-law, met with Simon Bernstein before Simon Bernstein went to the law offices of Hopkins and Sutter in Chicago, Illinois to finalize and execute the BERNSTEIN TRUST Agreement.

30. After the meeting at Hopkins and Sutter, David B. Simon reviewed the final version of the BERNSTEIN TRUST Agreement and personally saw the final version of the BERNSTEIN TRUST Agreement containing Simon Bernstein's signature.

31. The final version of the BERNSTEIN TRUST Agreement named the children of Simon Bernstein as beneficiaries of the BERNSTEIN TRUST, and unsigned drafts of the BERNSTEIN TRUST Agreement confirm the same.

32. The final version of the BERNSTEIN TRUST Agreement named Shirley Bernstein, as Trustee, and named Ted Bernstein as, successor Trustee.

33. As set forth above, at the time of death of Simon Bernstein, the BERNSTEIN TRUST was the sole surviving beneficiary of the Policy.

34. Following the death of Simon Bernstein, neither an executed original of the BERNSTEIN TRUST Agreement nor an executed copy could be located by Simon Bernstein's family members.

35. Neither an executed original nor an executed copy of the BERNSTEIN TRUST Agreement has been located after diligent searches conducted as follows:

- i) Ted Bernstein and other Bernstein family members of Simon Bernstein's home and business office;
- ii) the law offices of Tescher and Spallina, Simon Bernstein's counsel in Palm Beach County, Florida,
- iii) the offices of Foley and Lardner (successor to Hopkins and Sutter) in Chicago, IL; and
- iv) the offices of The Simon Law Firm.

36. As set forth above, Plaintiffs have provided HERITAGE with due proof of the death of Simon Bernstein which occurred on September 13, 2012.

WHEREFORE, PLAINTIFF, the BERNSTEIN TRUST prays for an Order entering a declaratory judgment as follows:

- a) declaring that the original BERNSTEIN TRUST was lost and after a diligent search cannot be located;
- b) declaring that the BERNSTEIN TRUST Agreement was executed and established by Simon Bernstein on or about June 21, 1995;
- c) declaring that the beneficiaries of the BERNSTEIN TRUST are the five children of Simon Bernstein;

- d) declaring that Ted Bernstein, is authorized to act as Trustee of the BERNSTEIN TRUST because the initial trustee, Shirley Bernstein, predeceased Simon Bernstein;
- e) declaring that the BERNSTEIN TRUST is the sole surviving beneficiary of the Policy;
- f) declaring that the BERNSTEIN TRUST is entitled to the proceeds placed on deposit by HERITAGE with the Registry of the Court;
- g) ordering the Registry of the Court to release all of the proceeds on deposit to the BERNSTEIN TRUST; and
- h) for such other relief as this court may deem just and proper.

### COUNT III

#### RESULTING TRUST

37. Plaintiffs restate and reallege the allegations contained in ¶1-¶36 of Count II as ¶37 of Count III and plead, in the alternative, for imposition of a Resulting Trust.

38. Pleading in the alternative, the executed original of the BERNSTEIN TRUST Agreement has been lost and after a diligent search as detailed above by the executors, trustee and attorneys of Simon Bernstein's estate and by Ted Bernstein, and others, its whereabouts remain unknown.

39. Plaintiffs have presented HERITAGE with due proof of Simon Bernstein's death, and Plaintiff has provided unexecuted drafts of the BERNSTEIN TRUST Agreement to HERITAGE.

40. Plaintiffs have also provided HERITAGE with other evidence of the BERNSTEIN TRUST'S existence including a document signed by Simon Bernstein that designated the BERNSTEIN TRUST as the ultimate beneficiary of the Policy proceeds upon his death.

41. At all relevant times and beginning on or about June 21, 1995, Simon Bernstein expressed his intent that (i) the BERNSTEIN TRUST was to be the ultimate beneficiary of the life insurance proceeds; and (ii) the beneficiaries of the BERNSTEIN TRUST were to be the children of Simon Bernstein.

42. Upon the death of Simon Bernstein, the right to the Policy proceeds immediately vested in the beneficiary of the Policy.

43. At the time of Simon Bernstein's death, the beneficiary of the Policy was the BERNSTEIN TRUST.

44. If an express trust cannot be established, then this court must enforce Simon Bernstein's intent that the BERNSTEIN TRUST be the beneficiary of the Policy; and therefore upon the death of Simon Bernstein the rights to the Policy proceeds immediately vested in a resulting trust in favor of the five children of Simon Bernstein.

45. Upon information and belief, Bank of America, N.A., as successor Trustee of the VEBA to LaSalle National Trust, N.A., has disclaimed any interest in the Policy.

46. In any case, the VEBA terminated in 1998 simultaneously with the dissolution of S.B. Lexington, Inc.

47. The primary beneficiary of the Policy named at the time of Simon Bernstein's death was LaSalle National Trust, N.A. as "Trustee" of the VEBA.

48. LaSalle National Trust, N.A., was the last acting Trustee of the VEBA and was named beneficiary of the Policy in its capacity as Trustee of the VEBA.

49. As set forth above, the VEBA no longer exists, and the ex-Trustee of the dissolved trust, and upon information and belief, Bank Of America, N.A., as successor to LaSalle National Trust, N.A. has disclaimed any interest in the Policy.

50. As set forth herein, Plaintiff has established that it is immediately entitled to the life insurance proceeds HERITAGE deposited with the Registry of the Court.

51. Alternatively, by virtue of the facts alleged herein, HERITAGE held the Policy proceeds in a resulting trust for the benefit of the children of Simon Bernstein and since HERITAGE deposited the Policy proceeds the Registry, the Registry now holds the Policy proceeds in a resulting trust for the benefit of the children of Simon Bernstein.

WHEREFORE, PLAINTIFFS pray for an Order as follows:

- a) finding that the Registry of the Court holds the Policy Proceeds in a Resulting Trust for the benefit of the five children of Simon Bernstein, Ted Bernstein, Pamela Simon, Eliot Ivan Bernstein, Jill Iantoni and Lisa Friedstein; and
- b) ordering the Registry of the Court to release all the proceeds on deposit to the Bernstein Trust or alternatively as follows: 1) twenty percent to Ted Bernstein; 2) twenty percent to Pam Simon; 3) twenty percent to Eliot Ivan Bernstein; 4) twenty percent to Jill Iantoni; 5) twenty percent to Lisa Friedstein
- c) and for such other relief as this court may deem just and proper.

By: s/Adam M. Simon

Adam M. Simon (#6205304)  
303 E. Wacker Drive, Suite 210  
Chicago, IL 60601

Phone: 313-819-0730

Fax: 312-819-0773

E-Mail: [asimon@chicagolaw.com](mailto:asimon@chicagolaw.com)

Attorneys for Plaintiffs and Third-Party  
Defendants

*Simon L. Bernstein Irrevocable Insurance Trust  
Dtd 6/21/95; Ted Bernstein as Trustee, and  
individually, Pamela Simon, Lisa Friedstein  
and Jill Iantoni*

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

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SIMON BERNSTEIN IRREVOCABLE  
INSURANCE TRUST DTD 6/21/95,

Plaintiff,

v. Case No. 13 cv 3643

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.



4 TED BERNSTEIN, individually and as  
alleged Trustee of the Simon Bernstein  
Irrevocable Insurance Trust Dtd  
5 6/21/95,  
Cross-Defendant

6  
and,

7  
8 PAMELA B. SIMON, DAVID B. SIMON, both  
Professionally and Personally, ADAM  
SIMON, both Professionally and Personally,  
9 THE SIMON LAW FIRM, TESCHER & SPALLINA,  
P.A., DONALD TESCHER, both Professionally  
10 and Personally, ROBERT SPALLINA, both  
Professionally and Personally, LISA  
11 FRIEDSTEIN, JILL IANTONI, S.B. LEXINGTON,  
INC. EMPLOYEE DEATH BENEFIT TRUST, S.T.P.  
12 ENTERPRISES, INC., S.B. LEXINGTON, INC,  
NATIONAL SERVICE ASSOCIATION (OF FLORIDA),  
13 NATIONAL SERVICE ASSOCIATION (OF ILLINOIS),  
AND JOHN AND JANE DOES

14  
Third-Party Defendants.

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17 DEPOSITION OF  
TED BERNSTEIN  
18 Taken on behalf of the Estate of Simon Bernstein

19  
20 DATE TAKEN: May 6, 2015  
TIME: 5:06 p.m. - 8:15 p.m.  
21 PLACE: 2385 N.W. Executive Center Drive  
Boca Raton, Florida

22  
23  
24 Stenographically Reported by:  
25 Lisa Gropper, R.P.R., F.P.R.

0003

1 APPEARANCES

2  
ON BEHALF OF TED BERNSTEIN:

3  
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ON BEHALF OF THE ESTATE OF SIMON BERNSTEIN:

11

JAMES J. STAMOS, ESQ.  
12 KEVIN P. HORAN, ESQ.  
STAMOS & TRUCCO, LLP  
13 One East Wacker Drive  
Suite 300  
14 Chicago

12 that's what you're asking. I didn't object.

13 MR. STAMOS: Well, our position, for the  
14 record, is that you may not selectively employ the  
15 privilege.

16 Q So my question is, was this an attorney-client  
17 communication, as far as you were concerned?

18 A In every communication I had with Robert  
19 Spallina, I would expect that that privilege was there.

20 MR. ROSE: This is Alan Rose, just for the  
21 record, since I'm Mr. Bernstein's personal counsel.  
22 He's not asserting the privilege as to  
23 communications of this nature as responded in your  
24 email. He's asserting privilege to private  
25 communications he had one-on-one with Robert  
0064

1 Spallina, who he considered to be his counsel.

2 That's the position for the record and that's why  
3 the privilege is being asserted.

4 Continue.

5 MR. STAMOS: No, I understand that. It's just  
6 that our position is that, if one has an  
7 attorney-client relationship, in particular with  
8 regard to discussions concerning a particular  
9 topic, the privilege is waived when you do not  
10 maintain the privilege with respect to certain  
11 communications and you do with others, and that's  
12 our position. So --

13 MR. ROSE: Okay. But for the record, since  
14 you're going to argue this in Illinois potentially,  
15 in every piece of litigation, certain things that  
16 you communicate with your lawyer eventually find  
17 their way into pleadings or communication with the  
18 other side. That does not mean that private  
19 communication you have one-on-one with your lawyer  
20 about various things when you're seeking legal  
21 advice on a confidential basis are not privileged.  
22 That's the sole basis upon which the privilege is  
23 being asserted and it's going to continue to be  
24 asserted.

25 MR. STAMOS: Can we proceed?

0065

1 MR. ROSE: Absolutely. Thanks.

2 MR. STAMOS: Got it.

3 Q (By Mr. Stamos) In any event, looking at  
4 Exhibit 11, this was a -- whatever it says, this was an

17 owner of this policy and that I think he was learning  
18 about the -- the chain of -- of ownership of the policy  
19 from the very beginning and its iterations over time  
20 when -- after speaking with the insurance company.

21 Q Did you understand this to be that  
22 Mr. Spallina was told by the insurance company that  
23 there was a break in title and beneficiary designation?

24 A Well, I -- I'm -- only because I'm reading  
25 what he said. I don't know what he assumed that meant,  
0069

1 but I'm assuming from what I'm reading that he is saying  
2 that there was some break there.

3 Q And this was in response to your email from --  
4 it looks like --

5 Well, it looks like the times are a little bit  
6 odd there. I'm not sure why that is.

7 A Right.

8 Q I wonder if one is eastern time and one is  
9 central time?

10 A Between me and Robert?

11 Q Yeah. Could that have been possible?

12 A Anything's possible, but unlikely, I think.

13 Q Well, in any event, when you received that,  
14 did you understand what he was talking about?

15 A At the time, I probably did not.

16 Q Now, looking at Exhibit 16, please.

17 (Exhibit 16 was marked for identification.)

18 Q Do you know who Mr. Welling is, before I ask  
19 you any questions about the document?

20 A I believe that he was someone connected to the  
21 insurance company.

22 Q I'd like you, if you will, to take a moment  
23 and read Exhibit Number 12 -- I'm sorry, Exhibit  
24 Number 16, back to front, and then I want to ask you  
25 some questions about it. It's not all that long.

0070

1 A So you'd like me to read all the pages in the  
2 email?

3 Q Yeah.

4 A Okay.

5 Q Just take a moment to read it. The messages  
6 are actually pretty brief.

7 MR. ROSE: While he's looking at that, I'd  
8 just state for the record that TS5253, at the  
9 bottom, clearly supports the assertion of the

10 privilege.

11 MR. STAMOS: In as much as it includes Scott  
12 Welling on it, I'd have a hard time understanding  
13 how that supports the existence of a privilege,  
14 but --

15 MR. ROSE: Okay.

16 Q (By Mr. Stamos) Have you had a chance to read  
17 that yet, Mr. Bernstein?

18 A Yes. I'm -- yes, I have.

19 Q I bet you recall this email string, correct?

20 A Yes.

21 Q It ends with a message from Mr. Spallina to  
22 you which would have included all the rest of it,  
23 correct?

24 A Yes.

25 Q What's this about? What's the genesis of this  
0071

1 dispute that results in Mr. Spallina saying, "Ted, I'm  
2 done with this matter"? What did you understand was  
3 going to happen?

4 A The change in who was going to be handling the  
5 life insurance policy at -- at around this time.

6 Q It was changed from whom to whom?

7 A From the Tescher & Spallina firm to Adam  
8 Simon.

9 Q Were there any discussions with the insurance  
10 company about that prior to the lawsuit being filed in  
11 Chicago?

12 MR. SIMON: Objection; speculation.

13 A I've -- I simply don't know.

14 Q You don't?

15 A I do not.

16 Q Now, when you then look at --

17 I'm sorry, we'll go to the next exhibit, which  
18 is -- it looks like Exhibit 17.

19 (Exhibit 17 was marked for identification.)

20 Q Now, looking at Exhibit Number 17, where  
21 Mr. Tescher writes, "I feel that we have serious  
22 conflicts in continuing to represent you as trustee to  
23 the life insurance trust and need to withdraw from  
24 further representation," do you see that?

25 A I do.

0072

1 Q Now, first, this document is an email string  
2 that ends with Mr. Tescher sending an email to

3 Mr. Welling, Mr. Spallina and also to yourself, as well  
4 as the Simons, correct?

5 A Yes.

6 Q You recall receiving this, do you?

7 A Now that I see it, I recall.

8 Q Now, where Mr. Tescher says that, "There's a  
9 serious conflict continuing to represent you as trustee  
10 of the life insurance trust," is he referring to the  
11 1995 trust?

12 MR. SIMON: Objection; speculation.

13 A I believe that that's what he's referring to  
14 here.

15 Q I take it that he withdraw from representing  
16 you in that capacity as of this email?

17 A I -- I believe that to be the case.

18 Q Did they continue to represent you in any  
19 other capacity after that date?

20 A Yes.

21 Q In what capacities did they continue to  
22 represent you?

23 A As the -- counsel for the Shirley Bernstein  
24 Trust.

25 Q Do they continue to be your attorney in that  
0073

1 capacity?

2 A Currently?

3 Q Yes.

4 A They are not.

5 Q When did they cease being your attorney in  
6 that capacity?

7 A Early 2014 is my recollection.

8 Q What led to that?

9 A What led to that was --

10 MR. ROSE: Well, let me -- to the extent he's  
11 discussing communications he had with his former  
12 counsel, they would be privileged, and I would  
13 instruct him not to answer based upon any  
14 communications with his counsel.

15 MR. STAMOS: Okay.

16 Q I don't agree with that, but I assume you're  
17 going to follow your attorney's instruction not to  
18 answer that?

19 A Yes.

20 Q All right. We don't need to say anymore, but  
21 we'll certify that.

22 Leaving aside conversations then with  
23 Mr. Spallina or Mr. Tescher, what led to their ceasing  
24 to be your attorneys?

25 A My recollection is that they withdrew.

0074

1 Q Okay.

2 A Again, we're going back quite a while, but I  
3 believe what led to them not being my attorneys is that  
4 they withdrew.

5 MR. ROSE: And just for the record, there are  
6 aspects of that that are not privileged, but you  
7 asked him about his -- I just advised him not to  
8 disclose his private, confidential communication  
9 with them while they were still his lawyers. That  
10 does not foreclose your questioning.

11 MR. STAMOS: No, what I asked him was what  
12 other circumstances led to that other than --  
13 without reference to such conversations, and he  
14 said they withdrew.

15 Q Do you know why they withdrew?

16 A I -- I do know why they withdrew. There were  
17 some questions within their firm about documents and  
18 irregular -- irregularity around documents, and they  
19 withdrew because I felt it was best for them to  
20 withdraw.

21 Q What documents were there -- with regard to  
22 what documents were there irregularities, as far as you  
23 knew?

24 A There was an amendment to a trust document.

25 Q Which trust?

0075

1 A Shirley Bernstein Trust.

2 Q And finally Exhibit Number 18.  
3 (Exhibit 18 was marked for identification.)

4 Q Are you ready?

5 A Yes.

6 Q Let me just back up a second. The document  
7 that you were talking about that there was a problem  
8 with was a document which it appeared that the Tescher &  
9 Spallina firm had participated in backdating a signature  
10 by your father, correct? Is that your understanding of  
11 it?

12 A Something along those lines. I'm not quite  
13 sure that it's backdating or creation of a document.  
14 I'm not sure that backdating would be the right way to

25 A I can't answer that question without reading  
0086

1 the whole document.

2 MR. SIMON: Go ahead.

3 Q Well, it speaks for itself.

4 Let me ask you this: Are you aware of whether  
5 it does without reading it? Are you aware of whether it  
6 references any 1995 trust or any other trust?

7 MR. SIMON: Objection; speculation. Not  
8 allowing him to read it.

9 MR. STAMOS: No, no. I'm just asking if he's  
10 aware of it without reading it. It says what it  
11 says. His reading is not going to change what it  
12 says. I'm asking his state of mind.

13 Q Are you aware of whether or not that document  
14 references the 1995 trust without having read it?

15 MR. SIMON: Objection; relevance.

16 Go ahead.

17 Q Do you know?

18 A I'm not -- I'm not aware.

19 Q Do you think that if this document did  
20 reference the 1995 trust, that Mr. Spallina would have  
21 commented on that?

22 MR. SIMON: Objection; speculation.

23 Q Would you have expected him to tell you that  
24 it did?

25 A Can you ask me that question again?

0087

1 Q Yeah. If this document said, for example,  
2 "I'm replacing the '95 trust with this 2000 trust,"  
3 would you have expected that Mr. Spallina would have  
4 given you advice with regard to that fact, if it were a  
5 fact?

6 MR. ROSE: I'm going to object, instruct him  
7 not to answer based on communications he had with  
8 Mr. Spallina, but you can ask the question with  
9 regard to information that Spallina disseminated to  
10 third parties or --

11 Q Well, other than conversations that just  
12 involved you and Mr. Spallina, but not excluding  
13 communications that involved your siblings, like so many  
14 of these emails did, would you have expected in such  
15 communications when you and he were talking about  
16 whether we're going to use the 2000 trust and so forth,  
17 if the 2000 trust had referenced the existence of a

11 Q Okay. That's what 2012 talks about, correct?

12 A Correct.

13 Q Not only are you not a beneficiary, none of  
14 your siblings are beneficiaries, correct?

15 A You are correct.

16 Q Was there a dispute in the family when you all  
17 learned that your father was going to, in effect,  
18 disinherit his singling? I'm sorry, the siblings?

19 MR. ROSE: What time was that? Did you --

20 MR. STAMOS: Let me start again.

21 Q Prior to his death, you became aware that it  
22 was his plan that he was not going to leave money to his  
23 children, correct?

24 A I did -- I'm aware of that.

25 Q And that lead to some discord in the family,

0090

1 correct?

2 A It did.

3 Q Was there a call in which he participated, as  
4 did the siblings, in which you attempted to get him to  
5 change his mind or explain why his plan was not  
6 appropriate?

7 A No.

8 Q There was no such call?

9 A There was no such call based on what you just  
10 said that call was about.

11 Q Was there a call prior to his death that  
12 involved inheritance, that involved the siblings and  
13 your father?

14 A Yes.

15 Q Who said what to whom in that conference?

16 A Robert Spallina explained that my father was  
17 going to leave the -- his assets to ten grandchildren  
18 equally.

19 Q When -- I ask you to -- if you could pick up  
20 Exhibit Number 26, please.

21 (Exhibit 26 was marked for identification.)

22 Q Exhibit Number 26 was one of the documents  
23 produced by the Tescher & Spallina firm. Have you seen  
24 it before?

25 A Yes.

0091

1 Q The third page is a transcription so that we  
2 could read what it actually said. Do you see that?

3 A Do I see what the third page is?



23 Q Ultimately, he left the estate plan in place  
24 so that upon his death none of his estate passed to the  
25 siblings, correct?

0093

1 MR. ROSE: Object to the form.

2 Oh, that's your objection.

3 A He left the -- he left it in place.

4 Q Meaning that each of you and your siblings was  
5 deemed to have been predeceased for the purpose of his  
6 estate planning?

7 MR. SIMON: Objection; form.

8 Q Is that your understanding? If it's not, tell  
9 me. I mean, I don't -- I'm not going to --

10 MR. SIMON: Well, the first time you said  
11 "estate" and the second time you said "estate  
12 planning", which is much more general.

13 MR. STAMOS: I didn't mean a distinction.

14 Q I just want to establish, upon his death, no  
15 money as a consequence of his death passed or will have  
16 passed to you and your siblings if the '95 trust is  
17 never enforced and receives money through the insurance  
18 policy, right?

19 A Correct.

20 Q But the money will otherwise pass to all of  
21 your children, correct?

22 A To all of his grandchildren.

23 Q All of Simon's grandchildren, including your  
24 children as well, correct?

25 A Correct.

0094

1 MR. STAMOS: Give me just one second.

2 THE WITNESS: Sure.

3 Q This is my final question, or just about:  
4 When you learned that Mr. Spallina had filed a claim  
5 identifying himself as trustee of the '95 trust, did you  
6 ever report to anyone in the insurance company or any  
7 authority that he, in fact, was never the trustee of the  
8 '95 trust?

9 A I did not.

10 Q Did you ever instruct him to take steps to  
11 correct any misimpression he might have caused others to  
12 form as a result of him having made that claim?

13 A I'm not sure he caused misimpressions in  
14 anybody, so I don't know, and I didn't have any  
15 conversations with insurance companies.

19 asking me questions about things.

20 Q Like?

21 A Medication, what -- what amounts of  
22 medication, if I knew what kind of medication he took or  
23 was taking or things like that.

24 Q Why were they there?

25 MR. SIMON: Objection; speculation.

0098

1 Q Well, you met with the sheriff. Didn't you  
2 wonder why he was at your father's house on the day he  
3 died and you were giving statements to him?

4 MR. SIMON: Same objection.

5 A You -- did you ask me why were they there?

6 Q Yeah.

7 A I don't know. I can't remember why they were  
8 there.

9 Q And you had no involvement in the call. Did  
10 your attorney have any involvement in the call to the  
11 sheriff that you're aware of?

12 A I don't -- I can't -- I don't think so. I  
13 don't think so.

14 Q So you, to the best of your recollection, you  
15 don't know who called the sheriff or contacted them?

16 MR. SIMON: Objection; form.

17 Q Are you aware the night your father died that  
18 a call had been made to the hospital claiming that he  
19 had been poisoned?

20 A I'm not -- I'm not aware of a call that was  
21 made where -- where it was claimed that he was poisoned.

22 Q You weren't aware of that?

23 A (Nonverbal response.)

24 Q Okay.

25 MR. ROSE: Can you hear this okay in Chicago?

0099

1 I can't tell if you're acting like you're not able  
2 to hear.

3 MR. STAMOS: No, we can hear. We got it.

4 MR. ROSE: Okay.

5 MR. STAMOS: Thank you.

6 MR. ROSE: You're welcome. I just saw your  
7 face, so...

8 MR. STAMOS: Thanks.

9 Q (By Mr. Eliot Bernstein) So you became aware  
10 at some point that there was a coroner's inquiry and you  
11 were aware that there was claims about his medication,

3 answer. Compound questions.

4 Q Were you requested by any parties to turn  
5 those documents over to them?

6 A I don't believe so.

7 MR. ELIOT BERNSTEIN: I'd like to submit this  
8 as an exhibit. Can we get a copy of that real  
9 quick.

10 (Recess taken.)

11 (Exhibit A was marked for identification.)

12 MR. STAMOS: Can you describe that for us? We  
13 don't have a copy.

14 Q (By Mr. Eliot Bernstein) Ted, could you  
15 describe that document.

16 MR. ROSE: (Indicating.)

17 MR. STAMOS: Is that the police report  
18 document?

19 MR. ELIOT BERNSTEIN: Yes.

20 MR. STAMOS: Yeah, we have that. I think we  
21 have that.

22 MR. ROSE: I'm just trying to be helpful.

23 MR. STAMOS: Thank you.

24 Is that topped by the February 11, 2014 fax  
25 number -- fax legend?

0109

1 MR. ROSE: This one says January 31, '13.

2 MR. STAMOS: Oh.

3 MR. ROSE: The report entry though is --  
4 starts with the words "On 9/13/12 at 12:11 hours."

5 MR. STAMOS: Oh, okay. We don't have that  
6 one. All right.

7 THE WITNESS: Okay.

8 Q (By Mr. Eliot Bernstein) You were talking to  
9 the sheriff's department on this day, correct?

10 A Yes, I was.

11 Q And that's the day your father died, right?

12 A Yes.

13 Q Did you advise the sheriff's department that  
14 your father might have been overdosed or the likes by  
15 his girlfriend?

16 A No.

17 Q No?

18 A No.

19 Q Okay. Were you advised by anybody that your  
20 father could have been overdosed?

21 A Yes.