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.
_____________________________________/

MOTION TO DISQUALIFY ALAN ROSE AND PAGE, MRACHEK, FITZGERALD, ROSE, KONOPKA, THOMAS & WEISS, P.A. AS LEGAL COUNSEL FOR THE ESTATE OF SIMON BERNSTEIN 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 disqualifying Alan Rose ("Rose") and the law firm of Page, Mrachek, Fitzgerald, Rose, Konopka, Thomas & Weiss, P.A ("Page Mrachek") from representing 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 due to an inherent conflict of interest. As grounds, Stansbury 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 Simon's 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 Insurance 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 Simon Bernstein Insurance Trust dated 6/21/1995 (the "Insurance 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 Estate of Simon Bernstein.

6. Because no trust document could be found, Heritage refused to pay the death benefit of the life insurance policy 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 Amended 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 Estate of Simon Bernstein. The Estate intervened in the Insurance Litigation to assert that the Estate, 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 AND where Ted Bernstein is also an individual Plaintiff! In the Insurance Litigation, the Estate is now a Defendant and Ted Bernstein is the 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, the sole residuary beneficiary of the Estate of Simon Bernstein. Additionally, 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. 4th 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.

11. 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.

12. 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.

13. 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 precludes them from representing the Estate in Stansbury's litigation against the Estate. 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, defend the Estate in Stansbury's lawsuit against it.

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

14. 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. 5th 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.

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

15. The fact that Alan Rose has a conflict of interest in beyond question. It has recently been discovered 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. 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."**

16. 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 Stansbury's lawsuit for damages against the Estate.

17. 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. Alan Rose and the law firm of Page, Mrachek, Fitzgerald, Rose, Konopka, Thomas & Weiss, P.A ("Page Mrachek") be disqualified from representing 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 due to an inherent conflict of interest;

B. Award Stansbury his costs herein expended; and,

C. 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 and mchandler@pm-law.com; Eliot Bernstein, 2753 NW 34th Street, Boca Raton, FL 33434, *iviewit@iviewit.tv*; Brian O'Connell, Esq., Ciklin Lubitz Martens & O'Connell, 515 North Flagler Drive, 20th Floor, West Palm Beach, FL 33401, boconnell@ciklinlubitz.com; John P. Morrissey, Esq., 330 Clematis Street, Suite 213, West Palm Beach, FL 33401, john@jmorrisseylaw.com; Lisa Friedstein, lisa@friedsteins.com, 2142 Churchill Lane, Highland Park, IL 60035; Jill Iantoni, jilliantoni@gmail.com, 2101 Magnolia Lane, Highland Park, IL 60035, on this 28th day of November, 2016.

PETER M. FEAMAN, P.A.
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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

EXHIBIT

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1

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.

<u>COUNT III</u>

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

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.

______________________________________/

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ELIOT IVAN BERNSTEIN,

Cross-Plaintiff

v.

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EXHIBIT
Composite
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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.

_______________________________________/

DEPOSITION OF
TED BERNSTEIN

Taken on behalf of the Estate of Simon Bernstein

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

Stenographically Reported by:
Lisa Gropper, R.P.R., F.P.R.

APPEARANCES

ON BEHALF OF TED BERNSTEIN:

ADAM M. SIMON, ESQ.
THE SIMON LAW FIRM
303 East Wacker Drive

Suite 2725
Chicago, Illinois 60601

ALAN B. ROSE, ESQ.
MRACHEK, FITZGERALD, ROSE, KONOPKA,
THOMAS & WEISS, P.A.
505 South Flagler Drive
Suite 600
West Palm Beach, Florida 33401

ON BEHALF OF THE ESTATE OF SIMON BERNSTEIN:

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

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

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

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

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

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

0064

Spallina, who he considered to be his counsel. That's the position for the record and that's why the privilege is being asserted.

Continue.

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

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

MR. STAMOS: Can we proceed?

0065

MR. ROSE: Absolutely. Thanks.

MR. STAMOS: Got it.

Q (By Mr. Stamos) In any event, looking at Exhibit 11, this was a -- whatever it says, this was an owner of this policy and that I think he was learning about the -- the chain of -- of ownership of the policy from the very beginning and its iterations over time when -- after speaking with the insurance company.

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

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

0069

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

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

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

A Right.

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

A Between me and Robert?

Q Yeah. Could that have been possible?

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

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

A At the time, I probably did not.

Q Now, looking at Exhibit 16, please.

(Exhibit 16 was marked for identification.)

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

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

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

0070

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

Q Yeah.

A Okay.

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

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

privilege.
MR. STAMOS: In as much as it includes Scott Welling on it, I'd have a hard time understanding how that supports the existence of a privilege, but --
MR. ROSE: Okay.
Q (By Mr. Stamos) Have you had a chance to read that yet, Mr. Bernstein?
A Yes. I'm -- yes, I have.
Q I bet you recall this email string, correct?
A Yes.
Q It ends with a message from Mr. Spallina to you which would have included all the rest of it, correct?
A Yes.
Q What's this about? What's the genesis of this

0071

dispute that results in Mr. Spallina saying, "Ted, I'm done with this matter"? What did you understand was going to happen?
A The change in who was going to be handling the life insurance policy at -- at around this time.
Q It was changed from whom to whom?
A From the Tescher & Spallina firm to Adam Simon.
Q Were there any discussions with the insurance company about that prior to the lawsuit being filed in Chicago?
MR. SIMON: Objection; speculation.
A I've -- I simply don't know.
Q You don't?
A I do not.
Q Now, when you then look at --
I'm sorry, we'll go to the next exhibit, which is -- it looks like Exhibit 17.
(Exhibit 17 was marked for identification.)
Q Now, looking at Exhibit Number 17, where Mr. Tescher writes, "I feel that we have serious conflicts in continuing to represent you as trustee to the life insurance trust and need to withdraw from further representation," do you see that?
A I do.

0072

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

Mr. Welling, Mr. Spallina and also to yourself, as well as the Simons, correct?
A Yes.
Q You recall receiving this, do you?
A Now that I see it, I recall.
Q Now, where Mr. Tescher says that, "There's a serious conflict continuing to represent you as trustee of the life insurance trust," is he referring to the 1995 trust?
MR. SIMON: Objection; speculation.
A I believe that that's what he's referring to here.
Q I take it that he withdraw from representing you in that capacity as of this email?
A I -- I believe that to be the case.
Q Did they continue to represent you in any other capacity after that date?
A Yes.
Q In what capacities did they continue to represent you?
A As the -- counsel for the Shirley Bernstein Trust.
Q Do they continue to be your attorney in that

0073

capacity?
A Currently?
Q Yes.
A They are not.
Q When did they cease being your attorney in that capacity?
A Early 2014 is my recollection.
Q What led to that?
A What led to that was --
MR. ROSE: Well, let me -- to the extent he's discussing communications he had with his former counsel, they would be privileged, and I would instruct him not to answer based upon any communications with his counsel.
MR. STAMOS: Okay.
Q I don't agree with that, but I assume you're going to follow your attorney's instruction not to answer that?
A Yes.
Q All right. We don't need to say anymore, but we'll certify that.

Leaving aside conversations then with Mr. Spallina or Mr. Tescher, what led to their ceasing to be your attorneys?
A My recollection is that they withdrew.
0074
Q Okay.
A Again, we're going back quite a while, but I believe what led to them not being my attorneys is that they withdrew.
MR. ROSE: And just for the record, there are aspects of that that are not privileged, but you asked him about his -- I just advised him not to disclose his private, confidential communication with them while they were still his lawyers. That does not foreclose your questioning.
MR. STAMOS: No, what I asked him was what other circumstances led to that other than -- without reference to such conversations, and he said they withdrew.
Q Do you know why they withdrew?
A I -- I do know why they withdrew. There were some questions within their firm about documents and irregular -- irregularity around documents, and they withdrew because I felt it was best for them to withdraw.
Q What documents were there -- with regard to what documents were there irregularities, as far as you knew?
A There was an amendment to a trust document.
Q Which trust?
0075
A Shirley Bernstein Trust.
Q And finally Exhibit Number 18.
(Exhibit 18 was marked for identification.)
Q Are you ready?
A Yes.
Q Let me just back up a second. The document that you were talking about that there was a problem with was a document which it appeared that the Tescher & Spallina firm had participated in backdating a signature by your father, correct? Is that your understanding of it?
A Something along those lines. I'm not quite sure that it's backdating or creation of a document. I'm not sure that backdating would be the right way to

A I can't answer that question without reading
0086
the whole document.

MR. SIMON: Go ahead.

Q Well, it speaks for itself.

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

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

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

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

MR. SIMON: Objection; relevance.

Go ahead.

Q Do you know?

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

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

MR. SIMON: Objection; speculation.

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

A Can you ask me that question again?

0087

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

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

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

Q Okay. That's what 2012 talks about, correct?
A Correct.
Q Not only are you not a beneficiary, none of your siblings are beneficiaries, correct?
A You are correct.
Q Was there a dispute in the family when you all learned that your father was going to, in effect, disinherit his singling? I'm sorry, the siblings?
MR. ROSE: What time was that? Did you --
MR. STAMOS: Let me start again.
Q Prior to his death, you became aware that it was his plan that he was not going to leave money to his children, correct?
A I did -- I'm aware of that.
Q And that lead to some discord in the family,
0090
correct?
A It did.
Q Was there a call in which he participated, as did the siblings, in which you attempted to get him to change his mind or explain why his plan was not appropriate?
A No.
Q There was no such call?
A There was no such call based on what you just said that call was about.
Q Was there a call prior to his death that involved inheritance, that involved the siblings and your father?
A Yes.
Q Who said what to whom in that conference?
A Robert Spallina explained that my father was going to leave the -- his assets to ten grandchildren equally.
Q When -- I ask you to -- if you could pick up Exhibit Number 26, please.
(Exhibit 26 was marked for identification.)
Q Exhibit Number 26 was one of the documents produced by the Tescher & Spallina firm. Have you seen it before?
A Yes.
0091
Q The third page is a transcription so that we could read what it actually said. Do you see that?
A Do I see what the third page is?

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

0093

MR. ROSE: Object to the form.
Oh, that's your objection.

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

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

MR. SIMON: Objection; form.

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

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

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

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

A Correct.

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

A To all of his grandchildren.

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

A Correct.

0094

MR. STAMOS: Give me just one second.

THE WITNESS: Sure.

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

A I did not.

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

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

asking me questions about things.
Q Like?
A Medication, what -- what amounts of medication, if I knew what kind of medication he took or was taking or things like that.
Q Why were they there?
MR. SIMON: Objection; speculation.
0098
Q Well, you met with the sheriff. Didn't you wonder why he was at your father's house on the day he died and you were giving statements to him?
MR. SIMON: Same objection.
A You -- did you ask me why were they there?
Q Yeah.
A I don't know. I can't remember why they were there.
Q And you had no involvement in the call. Did your attorney have any involvement in the call to the sheriff that you're aware of?
A I don't -- I can't -- I don't think so. I don't think so.
Q So you, to the best of your recollection, you don't know who called the sheriff or contacted them?
MR. SIMON: Objection; form.
Q Are you aware the night your father died that a call had been made to the hospital claiming that he had been poisoned?
A I'm not -- I'm not aware of a call that was made where -- where it was claimed that he was poisoned.
Q You weren't aware of that?
A (Nonverbal response.)
Q Okay.
MR. ROSE: Can you hear this okay in Chicago?
0099
I can't tell if you're acting like you're not able to hear.
MR. STAMOS: No, we can hear. We got it.
MR. ROSE: Okay.
MR. STAMOS: Thank you.
MR. ROSE: You're welcome. I just saw your face, so...
MR. STAMOS: Thanks.
Q (By Mr. Eliot Bernstein) So you became aware at some point that there was a coroner's inquiry and you were aware that there was claims about his medication,

answer. Compound questions.
Q Were you requested by any parties to turn those documents over to them?
A I don't believe so.
MR. ELIOT BERNSTEIN: I'd like to submit this as an exhibit. Can we get a copy of that real quick.
(Recess taken.)
(Exhibit A was marked for identification.)
MR. STAMOS: Can you describe that for us? We don't have a copy.
Q (By Mr. Eliot Bernstein) Ted, could you describe that document.
MR. ROSE: (Indicating.)
MR. STAMOS: Is that the police report document?
MR. ELIOT BERNSTEIN: Yes.
MR. STAMOS: Yeah, we have that. I think we have that.
MR. ROSE: I'm just trying to be helpful.
MR. STAMOS: Thank you.
Is that topped by the February 11, 2014 fax number -- fax legend?
0109
MR. ROSE: This one says January 31, '13.
MR. STAMOS: Oh.
MR. ROSE: The report entry though is -- starts with the words "On 9/13/12 at 12:11 hours."
MR. STAMOS: Oh, okay. We don't have that one. All right.
THE WITNESS: Okay.
Q (By Mr. Eliot Bernstein) You were talking to the sheriff's department on this day, correct?
A Yes, I was.
Q And that's the day your father died, right?
A Yes.
Q Did you advise the sheriff's department that your father might have been overdosed or the likes by his girlfriend?
A No.
Q No?
A No.
Q Okay. Were you advised by anybody that your father could have been overdosed?
A Yes.

Susan Johnson

From: Susan Johnson
Sent: Friday, October 07, 2016 3:50 PM
To: 'ARose@mrachek-law.com'; 'mchandler@mrachek-law.com'; 'iviewit@iviewit.tv'; 'boconnell@ciklinlubitz.com'; 'jfoglietta@ciklinlubitz.com'; 'john@jmorrisseylaw.com'; 'dzlewis@aol.com'; 'lisa@friedsteins.com'; 'jilliantoni@gmail.com'
Cc: Peter M. Feaman; Jeff Royer; Nancy Guffey; Trish Roth; Maryanne Koskey
Subject: SERVICE OF COURT DOCUMENT - CASE NO. 502012CP004391XXXXNB (IH)
Attachments: Motion to vacate in part Court's Ruling on September 7 2016.pdf

COURT CASE PENDING IN:	In the Circuit Court of the 15th Judicial Circuit in and for Palm Beach County, Florida
CASE NUMBER:	502012CP004391XXXXNB (IH)
STYLE OF CASE:	Estate of Simon L. Bernstein
TITLE OF DOCUMENT(S) ATTACHED:	**Letter to Honorable John L. Phillips, dated July 15, 2016 (with enclosures)**
SENDER'S NAME & TELEPHONE NUMBER:	Peter M. Feaman, Esq. (561) 734-5552

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