

Exhibit 35

THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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

)
Plaintiff,)

)
vs.) No. 13 CV 3643

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

The deposition of DAVID SIMON, called for examination pursuant to the Rules of Civil Procedure for the United States District Courts pertaining to the taking of depositions, taken before Vicki L. D'Antonio, a certified shorthand reporter of the State of Illinois, at One East Wacker Drive, Chicago, Illinois, on the 5th day of January, 2015, at the hour of 2:18 p.m.

Reported by: Vicki L. D'Antonio, CSR, RPR
License No. 084-004344

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ALSO PRESENT VIA TELEPHONE:

16

Ms. Joielle Foglietta

Mr. Bill Stansbury

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Mr. Eliot Bernstein

Honorable Amy J. St. Eve

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I N D E X

WITNESS	PAGE
DAVID SIMON	
Examination by Mr. Stamos.....	4
Examination by Mr. Simon.....	85
Further Examination by Mr. Stamos.....	94

E X H I B I T S

NUMBER	PAGE
D. Simon Deposition Exhibit	
No. 1	86
No. 2.....	88
No. 3.....	90
No. 4.....	91

NOTE: Exhibits retained by Mr. Adam Simon.

1 (Whereupon, the witness was duly
2 sworn.)

3 DAVID SIMON,
4 having been first duly sworn, was examined and
5 testified as follows:

6 EXAMINATION

7 BY MR. STAMOS:

8 Q. Will you state your name, please.

9 A. David Bruce Simon.

10 Q. Have you been deposed before?

11 A. I have.

12 Q. And how many times?

13 A. I believe one or two.

14 Q. The first one that comes to mind -- the
15 first one that -- bringing to mind the first
16 deposition you can remember, what was it -- what
17 did it involve?

18 A. I think I was deposed in a case
19 revolving around a suit for disparagement in
20 Kentucky.

21 Q. What was the name of the case?

22 A. Ernie -- David Simon and S.T.P.
23 Enterprises versus Ernie Sampson and Kentucky
24 Financial, I think, is the -- something like

1 that.

2 Q. What year was that?

3 A. I want to say the late '80s, early

4 '90s.

5 Q. Someone had said something unpleasant

6 about you and you sued them?

7 A. Not about me, no.

8 Q. About the company?

9 A. About the program.

10 Q. Was that litigation resolved?

11 A. It was.

12 Q. And how was it resolved?

13 A. Well, we lost at summary judgment, we

14 appealed, we lost, and then we entered into an

15 agreement with the individual to correct his

16 misassumptions about the program.

17 Q. Okay. When you said the program, what

18 are you referring to?

19 A. The Arbitrage Life Payment System.

20 Q. Is that something that still continues?

21 A. It does.

22 Q. And how -- who is it administered or

23 offered by?

24 A. S.T.P. Enterprises, Inc.

1 Q. There was a second deposition, was
2 there?

3 A. ING -- Security Life of Denver.

4 Q. There was a lawsuit involving Security
5 Life of Denver?

6 A. Correct.

7 Q. Who was the plaintiff and who was the
8 defendant?

9 A. Life Plans, Inc. is the plaintiff.
10 Security Life of Denver is the defendant.

11 Q. Is it a pending litigation?

12 A. It is.

13 Q. Where is it pending?

14 A. Northern District of Illinois.

15 Q. What is the nature of that case?

16 A. Breach of contract and tortious
17 interference.

18 Q. Who is the plaintiff?

19 A. Life Plans.

20 Q. How are you related to Life Plans?

21 A. I'm on their board.

22 Q. And you're a party or you're just a
23 member -- as a person with knowledge, you were
24 deposed?

1 A. I'm also the general counsel. I don't
2 own any of the company, though.

3 Q. Where are you currently employed?

4 A. S.T.P. Enterprises, Inc.

5 Q. Who owns that?

6 A. Fifty percent of it is owned by a trust
7 that I control. Fifty percent of it is owned by
8 a trust that Pam Simon controls.

9 Q. Pam Simon is who?

10 A. My wife.

11 Q. How long have you had that interest,
12 the 50 percent interest that you control in
13 S.T.P.?

14 A. I believe 2000.

15 Q. All right. And how did you come to
16 possess that interest?

17 A. Bought it.

18 Q. From whom?

19 A. Which part?

20 Q. You tell me.

21 A. The first part was bought in from Dov
22 Kahana, and the second part was bought from
23 Simon Bernstein.

24 Q. 25 percent each part? I want to

1 know -- I'll back up.

2 The 50 percent that you control, was
3 that -- was that obtained at the same time that
4 Pam control -- obtained her 50 percent?

5 A. Yes.

6 Q. And each of you obtained what portion
7 of your 50 percent from which of those people?

8 A. Half of it from Dov Kahana, half of it
9 from Simon Bernstein.

10 Q. And what was the compensation paid for
11 it?

12 A. For Dov Kahana?

13 Q. Okay.

14 MR. SIMON: I'm going to object as relevance.

15 THE WITNESS: I don't know the exact numbers,
16 but it was six figures and release from any
17 debts and obligations.

18 BY MR. STAMOS:

19 Q. How about to Mr. Bernstein?

20 MR. SIMON: Same objection.

21 THE WITNESS: Several million dollars.

22 BY MR. STAMOS:

23 Q. All right. When did you first start
24 working with Mr. Bernstein?

1 A. In what capacity? Do you mean with --

2 Q. Any. Any capacity.

3 Okay. So did you -- at one point, were
4 you in business with Simon Bernstein in any
5 capacity?

6 A. Yes.

7 Q. When was the first time you were in any
8 way associated with him?

9 A. Well, associated with him the first
10 time was -- I don't know what you mean by
11 associated, but the first time I was associated
12 with him was that his daughter sold my father
13 life insurance in, I believe, 1978. I was --

14 Q. His daughter Pam?

15 A. Yes.

16 Q. Okay.

17 A. When she updated the life insurance
18 plan, that's the first time I met Simon
19 Bernstein.

20 Q. Were you employed elsewhere at that
21 time?

22 A. I was.

23 Q. Where were you employed?

24 A. I was employed at that -- I was

1 self-employed.

2 Q. Doing what?

3 A. Law.

4 Q. When did you graduate law school?

5 A. 1984.

6 Q. And what did you do following

7 graduation from law school?

8 A. Law.

9 Q. Where did you law [sic]?

10 A. First in California, and then within

11 about six months, Illinois.

12 Q. All right. When you came to work as a

13 lawyer in Illinois, where did you work?

14 A. For myself.

15 Q. What kind of law did you practice?

16 A. General corporate, mostly litigation.

17 Q. And have you ever been associated as a

18 lawyer with other lawyers?

19 A. When I first started in California,

20 yes.

21 Q. Other than that, have you always been

22 on your own?

23 A. I've had other lawyers work with me and

24 for me, but yes.

1 Q. Do you continue to practice law today?

2 A. I do.

3 Q. What kind of law do you practice?

4 A. Mostly, I would say I -- my practice is
5 structured finance. However, I also service a
6 handful of clients in whatever their needs are.
7 I will maybe find another attorney to partner
8 with if their expertise is needed or will handle
9 it in-house.

10 Q. Are you on any boards of directors?

11 A. Yes.

12 Q. What boards of directors are you on?

13 A. For-profit companies?

14 Q. Any boards.

15 A. S.T.P. Enterprises, Life Plans, Inc.,
16 Intervivos Foundation, Institutional Longevity
17 Assets.

18 Q. What's that?

19 A. It's a limited liability company.
20 And Institutional Pooled Benefits.

21 Q. The last one, what does that company
22 do?

23 A. That owns a patent that pools death
24 benefit.

1 Q. The entity you named before, that --
2 the LLC, what does that company do?

3 A. That's the asset that promotes that
4 pooling.

5 Q. And the company that was in litigation
6 that you were on the board of, which one was it?

7 A. Life Plans?

8 Q. That's the last one you mentioned? Had
9 you mentioned that in the list of boards? I
10 didn't -- I didn't catch it. Okay.

11 A. Yes.

12 Q. What is its business, Life Plans?

13 A. Insurance agency.

14 Q. How much of your time do you currently
15 spend practicing law as opposed to the other
16 ventures in which you're involved?

17 A. The Simon Law Firm, I probably spend
18 now probably 25 percent of my time.

19 Q. Did there come a time when you became
20 professionally associated with Simon Bernstein?

21 A. As his attorney? Yes.

22 Q. I don't -- I don't -- I'm not sure what
23 you're intending to leave out, but in any
24 capacity, when is the first time you became

1 associated professionally with Simon Bernstein
2 in any way?

3 A. 1986.

4 Q. And what was -- in what capacity was
5 that?

6 A. Attorney.

7 Q. And how long did you serve as his
8 attorney?

9 A. About ten years.

10 Q. So that would be about to '96?

11 A. Yes.

12 Q. At some point, did you become involved
13 with him in the insurance business?

14 A. Yes.

15 Q. When was that?

16 A. 1987.

17 Q. In what capacity did you become
18 involved with him in the insurance business in
19 1987?

20 A. I wrote a documentation for a life
21 insurance sales concept that had been originated
22 by his brother.

23 Q. Who was his brother?

24 A. Norman Bernstein.

1 Q. Were they in business together at the
2 time?

3 A. I believe they did share one common
4 business.

5 Q. At some point, I take it you married
6 his daughter?

7 A. I did.

8 Q. When was that?

9 A. July 3, 1988.

10 MR. STAMOS: Let's go off the record for a
11 second.

12 (Whereupon, a discussion was had
13 off the record.)

14 BY MR. STAMOS:

15 Q. All right. We were talking about his
16 brother Norman, I guess, when he was -- you --
17 you assisted him in preparing a document that
18 defined a product he was going to offer? Is
19 that what that was?

20 A. I prepared some transactional documents
21 for a unique program to sell life insurance and
22 a manner to pay for it.

23 Q. And did there come a time when you
24 became involved in the actual life insurance or

1 insurance business as opposed to simply serving
2 as a lawyer for his business?

3 A. Yes.

4 Q. When was that?

5 A. 1988.

6 Q. In what -- in what capacity did you --
7 did you participate?

8 A. Owner of S.T.P. Enterprises.

9 Q. Right. What does that do? What do you
10 do as the owner of S.T.P.?

11 A. Promote the Arbitrage Life Payment
12 System as well as general life insurance
13 brokerage.

14 Q. Can you describe for me this Arbitrage
15 program you're talking about?

16 MR. SIMON: Object, relevance and --

17 BY MR. STAMOS:

18 Q. I don't need a long explanation. I
19 just want to -- when you say it, I want to know
20 what you're talking about.

21 A. It's a way to pay for life insurance
22 using leverage.

23 Q. Okay. For example?

24 A. Borrow from a bank to pay the premiums.

1 Q. I see.

2 A. Although the individual doesn't borrow
3 and there's some nuances to the program that are
4 unique compared to standard premium finance.

5 Q. Now, in the course of your association
6 with Mr. Bernstein, I know we're here talking
7 about this life insurance policy. I want to
8 designate it correctly so we don't get ourselves
9 confused.

10 The Capitol -- was originally the
11 Capitol Bankers Life policy, you know what
12 I'm -- you know what policy I'm talking about,
13 correct?

14 A. I do.

15 Q. Are you aware of any other insurance
16 policies that ever existed that insured the life
17 of Simon Bernstein or his wife?

18 A. I am.

19 Q. Okay. Tell me what other policies
20 you're aware of.

21 A. Lincoln Benefit Life, Inter-Ocean Life.

22 Q. And were benefits paid on those two
23 policies after his death?

24 A. Not to my knowledge.

1 Q. Were they in force at the time of his
2 death?

3 A. Not to my knowledge.

4 Q. And how are you aware that they
5 existed?

6 A. The Lincoln Benefit Life was paid for
7 through the Arbitrage Life Payment System, so I
8 participated in the closing of that policy.

9 Q. What was the benefit on that?

10 A. I believe \$200,000.

11 Q. And the Ocean, Inter-Ocean Life policy,
12 how were you aware of its existence?

13 A. From Simon.

14 Q. He told you it existed?

15 A. Yes.

16 Q. What was the -- what was the benefit on
17 that policy?

18 A. I'm not a hundred percent sure, but it
19 is my belief that it was a million dollars.

20 Q. And what years -- what year was it
21 initiated?

22 A. I don't know. Sometime in the '70s or
23 early '80s, I believe.

24 Q. Was it a term policy?

1 A. I don't know.

2 Q. How did you come to learn about it?

3 A. Discussing with him his life insurance.

4 Q. When did you first become aware of the
5 Capitol life policy?

6 MR. SIMON: Objection just to form. I think
7 we need to --

8 BY MR. STAMOS:

9 Q. Capitol Bankers Life policy. I'm
10 sorry.

11 I'll restate the question.

12 When did you first become aware of the
13 Capitol Bankers Life policy?

14 A. I believe sometime in the mid '80s.

15 Q. Do you know what year it was initiated?

16 A. The policy?

17 Q. Yeah.

18 A. I know only from looking at records.

19 Q. And so what do you know from looking at
20 records?

21 A. 1982.

22 Q. Okay. What -- when was the first time
23 you ever discussed that policy with Simon?

24 A. I don't know if a first time I remember

1 discussing it with Simon is so much as learning
2 about the VEBA, because one of the things that
3 was done was file the 5500s for the death
4 benefit VEBA at S.B. Lexington, and so sometime
5 in the mid '80s, I became aware of the 5500, and
6 that it had to do with the policy, I believe I
7 learned through Richard Klink, who was Simon
8 Bernstein's partner in S.B. Lexington.

9 Q. Tell me what the 5500 is.

10 A. It's a form, tax filing form.

11 Q. And that's filed in order to obtain the
12 tax benefits that relate to the VEBA?

13 A. It's a -- yes, in part.

14 Q. What is it --

15 A. It's some -- it's a -- you know, just
16 like any benefit plan. You file a 5500.

17 Q. I'm not asking very good questions.

18 What was your role in dealing with that
19 is, I guess, what I'm trying to get at. Why did
20 you -- why did you become aware of it?

21 A. Mr. Klink showed it to me, told me
22 about the process he went through to file the
23 form. My father's company also had to do the
24 same thing for his policy.

1 Q. Was your father's company in any way
2 related to Mr. Bernstein's companies?

3 A. Not at all.

4 Q. What did you learn about the policy at
5 that time when you first learned its existence
6 when Mr. Klink showed you the 5500?

7 A. It was a policy on Simon's life, owned
8 by the VEBA, and the beneficiary was the VEBA.

9 Q. What's the next thing you -- strike
10 that.

11 After being told about its existence by
12 Mr. Klink, what's the next time you ever
13 conversed with anyone about it?

14 A. Well, probably conversed annually about
15 the policy because we would get annual
16 statements.

17 Q. What was the face policy -- I'm sorry.

18 What was the face amount of the policy?

19 A. When originally applied for?

20 Q. Yeah.

21 A. I believe \$2 million.

22 Q. Did it ever change?

23 A. There was borrowings against the
24 policy, so the death benefit was reduced.

1 Q. Did the face amount ever -- ever
2 change?

3 A. Face amount changes.

4 (Whereupon, a discussion was had
5 off the record.)

6 THE COURT: Let's go on the record, then, so
7 this is clear.

8 So Mr. Simon, what is the basis of your
9 objection to having Mr. Stansbury present? Is
10 he physically present or listening in?

11 MR. SIMON: This is Adam Simon. Our
12 objection is he's a nonparty to this case and
13 he's a potential witness, and I believe under
14 the witness exclusion rules, I think it's 615,
15 he should not be permitted to listen in on this
16 deposition, much less participate.

17 THE COURT: And is he physically there or
18 listening in on the phone?

19 MR. STAMOS: Listening in, Judge.

20 THE COURT: Okay.

21 MR. STAMOS: Yeah. Actually, what we -- what
22 we did was we asked him if we could exclude him,
23 pending your call, which we've done, so he
24 hasn't -- he hasn't heard any of the deposition.

1 THE COURT: Okay.

2 MR. STAMOS: And he -- if I may say, Judge,
3 he became involved because he asked the -- my
4 client, the estate, if he could attend, and they
5 were willing to have him attend, and I don't
6 think that witness exclusion rules would apply
7 to a -- to a deposition, which, of course, he
8 could read when it's done anyway, so I don't --
9 I don't think that there are any rules that
10 would prevent him from listening, and he
11 certainly may not participate. We don't -- we
12 don't -- he won't be allowed to participate.

13 THE COURT: And Mr. Simon, what's the
14 prejudice of having him present?

15 THE WITNESS: I just don't believe he's
16 entitled to be present, and from my quick
17 reading online, the witness exclusion rules do
18 apply to depositions, and I don't want his
19 testimony to be tainted by listening in or
20 possibly, you know, participating with counsel's
21 questioning of our witness.

22 THE COURT: If that's the basis of your
23 objection, that is overruled because the witness
24 exclusion under Rule 615 does not apply to

1 depositions. Rule 30C specifically says that.
2 It provides that deposition testimony should
3 proceed as if at trial, and the Federal Rules of
4 Evidence apply except for Rules 103 and 615, so
5 Rule 615 does not apply.

6 Your objection is overruled and he may
7 be present. He, of course, may not participate.
8 I will accept your representation with that, but
9 he may be present, listening in on the
10 deposition.

11 MR. SIMON: Okay.

12 THE COURT: So you should proceed forward and
13 he can listen in.

14 MR. SIMON: Thank you, your Honor.

15 MR. STAMOS: Thanks, your Honor.

16 THE COURT: Thank you.

17 MR. STAMOS: Appreciate it.

18 THE COURT: Bye.

19 (Whereupon, a discussion was had
20 off the record.)

21 BY MR. STAMOS:

22 Q. What I'm asking is the -- I understand
23 that the -- maybe I'm not using the terminology
24 correctly.

1 Was there ever a time that the stated
2 benefit of the policy was other than \$2 million?
3 I understand that the amount to be paid would
4 have varied based upon loans, but was there ever
5 a time that it was other than \$2 million or
6 greater than \$2 million?

7 A. I don't think I can answer the
8 question.

9 Q. Why not?

10 A. Because I don't understand what you're
11 saying.

12 Q. Okay. I buy an insurance policy. It
13 says a million dollars on it, a million dollars
14 of life insurance. I understand that there are
15 instances in which the payment of a million upon
16 someone's death might be reduced due to
17 intervening events, but the million -- piece of
18 paper still says a million on it, right?

19 Okay. Now, my question is: With
20 regard to the policy of '82, which is policy
21 No. 1009208, I think we can all agree that's
22 what it is, was there ever a time that the face
23 amount of that policy was ever greater than
24 2 million?

1 A. Not to my knowledge.

2 Q. All right. Are you aware at any point
3 at which an application was made to increase the
4 benefit amount from 2 million to 3 million?

5 A. Not to my knowledge.

6 Q. All right. So back to the -- you said
7 that there would be a discussion, likely
8 annually, about the -- about the policy. I take
9 it that would be because you'd have to file an
10 annual 5500?

11 A. Yes.

12 Q. All right. Other than that, when is
13 the next time you recall a -- strike that.

14 When was the first time you talked to
15 Simon Bernstein about the existence of that
16 policy, other than Mr. Klink?

17 A. 1987.

18 Q. All right. Who was present for that
19 conversation?

20 A. Dov Kahana, myself, and Mr. Bernstein.

21 Q. And Dov Kahana was Mr. Bernstein's
22 business partner?

23 A. In one of his businesses, yes.

24 Q. Okay. In which business?

1 A. Cambridge Associates.

2 Q. What was the business of Cambridge
3 Associates?

4 A. General insurance brokerage, I believe.

5 Q. Okay. What was the occasion for
6 discussing the 1982 policy?

7 A. Simon Bernstein was significantly in
8 debt and did not have the money to pay the
9 premium.

10 Q. Okay. What was the premium? Do you
11 recall?

12 A. No.

13 Q. And who said what to who in that
14 conversation about that topic?

15 A. Simon said to Dov we have to pay the
16 premium.

17 Q. Anyone else say anything in that
18 conversation?

19 A. I'm sure, but that was the gist of the
20 conversation.

21 Q. All right. What -- what came from
22 that?

23 A. I believe either the premium was paid
24 or they started to borrow against the cash value

1 to pay the premium.

2 MR. STAMOS: Bill, is that you?

3 MR. STANSBURY: I'm here.

4 MR. STAMOS: Got it.

5 MR. STANSBURY: Thank you.

6 BY MR. STAMOS:

7 Q. And at that time when you first spoke
8 to him -- Mr. Bernstein about it, were you aware
9 of who the beneficiary was? Was it still the
10 VEBA as far as you knew?

11 A. Yes.

12 Q. Did you become aware at any point of a
13 change in beneficiary?

14 A. Yes.

15 Q. When was that?

16 A. Sometime around 1995.

17 Q. And from whom and to whom was the
18 beneficiary changed?

19 A. Beneficiary was still the VEBA and a
20 contingent beneficiary was named as the
21 irrevocable life insurance trust.

22 Q. How did you become aware of that in
23 1995?

24 A. Saw the change of beneficiary forms,

1 helped Mr. Bernstein design the trust, and
2 signed off on the change of forms.

3 Q. Do you do trust work? Do you prepare
4 trusts?

5 A. I have. I don't regularly, no.

6 Q. All right. You're aware that there was
7 a -- that the claim here is that a 1995 trust
8 existed, correct?

9 A. I know a 1995 trust existed.

10 Q. Did Mr. -- prior to the -- to 1995 or
11 prior to the date designated as the date of the
12 reported trust of '95, did Mr. Bernstein ever
13 have another trust, prior trust?

14 A. Yes.

15 Q. Okay. What year was that trust?

16 A. The VEBA trust was, I believe, in the
17 early '80s.

18 Q. Did he ever have any other trusts that
19 you're aware of?

20 A. Subsequent to that or prior?

21 Q. Prior to 1995.

22 A. Not that I'm aware of.

23 Q. Tell me the first time you ever had a
24 conversation with Mr. Bernstein about a trust in

1 1995.

2 A. We discussed his making application for
3 additional death benefit. My wife and I had
4 just completed our own irrevocable life
5 insurance trusts and made applications to
6 Lincoln Benefit. He wished to get more
7 insurance. That was the first time.

8 Q. Okay. And when you say more insurance,
9 what insurance are you talking about? Are you
10 talking about adding the Lincoln Benefit policy?

11 A. More death benefit.

12 Q. On the Capitol Bank -- Bankers policy?

13 A. No. No, a new policy. More death
14 benefit for himself --

15 Q. Okay.

16 A. -- for -- on his life.

17 Q. All right. Did he do that?

18 A. Yes.

19 Q. And what company did he obtain that
20 insurance from?

21 A. Lincoln Benefit Life.

22 Q. Okay. That's the one you told me about
23 earlier?

24 A. Yes.

1 Q. Okay. And that's -- when you say he
2 owned another policy, you're saying that's a
3 policy that he -- that he initiated in 1995?

4 A. I believe that's the date.

5 Q. All right. And that's the policy that
6 you believed was not in force at the time of his
7 death?

8 A. I believe that's correct.

9 Q. And you think he added \$200,000 to the
10 death benefit?

11 A. I think the policy had a face amount of
12 \$200,000.

13 Q. Okay. Why did he want -- if he had a
14 policy that paid 2 million, why did he -- why
15 did he want 10 percent more?

16 MR. SIMON: Objection for speculation.

17 BY MR. STAMOS:

18 Q. Why?

19 A. I know he was trying to get as much
20 death benefit as he could. He was uninsurable
21 up until that point, and I believe this was a
22 highly rated policy also.

23 Q. All right. So tell me the first time
24 you and Mr. Bernstein had a conversation about

1 the trust. What did you say to him and what did
2 he say to you?

3 MR. SIMON: Can I just make a general point?

4 MR. STAMOS: Yeah.

5 MR. SIMON: There's -- there's so many
6 Mr. Bernsteins here that I think it's best if
7 you --

8 MR. STAMOS: That's fine.

9 MR. SIMON: Yeah.

10 MR. STAMOS: I have no problem.

11 BY MR. STAMOS:

12 Q. With regard to the 1995 trust that is
13 referred to in the complaint, in your complaint,
14 when was the first time you ever had a
15 conversation with Simon Bernstein about that?

16 A. 1995.

17 Q. And what did you say to him and what
18 did he say to you in the course of that
19 conversation?

20 A. It's privileged. I was acting as his
21 attorney at that time.

22 Q. So you were acting as his attorney with
23 regard to the trust?

24 A. In the first conversation, yes.

1 Q. Now, wait a minute.

2 A. Subsequently, I do not, but --

3 Q. Now, wait a minute. Let's get
4 organized here.

5 There's a complaint that's filed
6 describing your interactions with Mr. Bernstein
7 about that trust, which I assume you plan to
8 testify about?

9 A. Absolutely.

10 Q. But you're going to not testify about
11 the start of those conversation -- the first of
12 those conversations?

13 A. You know, in general, you asked me very
14 specific questions about what did he say and
15 what did I say.

16 Q. Right.

17 A. So in the first conversation, yes, he
18 came to me as an attorney, so I -- it's
19 privileged conversation.

20 Q. When did it stop being privileged?

21 A. Right after the first conversation.

22 Q. What made it stop being privileged?

23 A. I said I wouldn't act as his attorney
24 regarding the trust.

1 Q. Isn't what you told me just now
2 privileged?

3 A. No.

4 Q. Why not?

5 A. Because I said it after we discussed
6 it.

7 Q. Who else was present for this
8 conversation?

9 A. Just himself and I.

10 Q. Well, I take it you're going to refuse
11 to answer questions with regard to that
12 conversation, based upon privilege?

13 A. The first conversation.

14 Q. I'm sorry, I don't mean to be clever,
15 but explain to me again how that remains
16 privileged and -- and --

17 A. It's where I'm not acting as an
18 attorney for him, it's not privilege. It's his
19 privilege to assert.

20 Q. Does it -- does it survive his death?

21 A. As far as I understand, it does.

22 Q. And it can be waived by the estate?

23 A. Don't know.

24 MR. STAMOS: Does the estate have an

1 objection to Mr. Simon testifying about that
2 conversation?

3 MS. FOGLIETTA: Can you repeat that? It's a
4 little hard to hear.

5 MR. STAMOS: Yes. I've asked Mr. Simon about
6 the first conversation he had with Simon
7 Bernstein about the trust alleged to exist in
8 the complaint, and Mr. Simon has asserted a
9 privilege based upon -- an attorney-client
10 privilege with Mr. Bernstein regarding that
11 first conversation.

12 I don't frankly remember the law on
13 whether that privilege survives his death, but
14 assuming that it does, I believe the estate can
15 waive it, the estate controls it, so I asked
16 whether the estate has an objection to his
17 testimony about that first conversation.

18 MS. FOGLIETTA: No, no objection.

19 MR. SIMON: I will sus- -- or reassert the
20 objection, based on privilege. It's my
21 understanding that privilege does survive when
22 it is involved with an individual but not a
23 corporation. I don't think the estate has the
24 right to waive that privilege. I think

1 Mr. Simon has a duty to assert the privilege up
2 to the point where he was no longer acting as
3 the attorney with regard to the trust, and from
4 a practical standpoint -- well, I'll just leave
5 it at that.

6 MR. STAMOS: But who does control the
7 privilege if not the estate?

8 MR. SIMON: It just survives.

9 MR. STAMOS: Well, but I mean, it can't be
10 waived by anybody?

11 MR. SIMON: I don't believe it can.

12 MR. STAMOS: Well, I certainly think it can,
13 and the estate -- if the estate doesn't control
14 it, nobody controls it. It's not a -- it
15 doesn't -- I know --

16 MS. FOGLIETTA: I agree, and the estate
17 controls it.

18 MR. STAMOS: Yeah. So based upon the estate
19 having waived the privilege with regard to that
20 answer, I ask you to answer the question.

21 MR. SIMON: Could we go off the record for a
22 moment?

23 MR. STAMOS: Sure.

24

1 (Whereupon, a discussion was had
2 off the record.)

3 MR. STAMOS: Back on the record.

4 So we'll certify the question, deal
5 with it at a later time.

6 BY MR. STAMOS:

7 Q. Let's move on to the -- so following
8 this conversation with Mr. Bernstein that you
9 don't contend was privileged, what's the next
10 conversation or the continuation of that
11 interaction about the trust?

12 A. So I showed him the trust that I
13 received from Hopkins & Sutter. We discussed
14 how he would want that trust changed for him. I
15 mocked one up. I gave it to him and told him he
16 had to go to Hopkins & Sutter to have it
17 executed.

18 Q. All right. So when you say you showed
19 him the ones from -- the one from Hopkins &
20 Sutter, is that the one Hopkins & Sutter had
21 prepared for you?

22 A. Yes.

23 Q. And when you say you mocked it up, how
24 was that not practicing law for him?

1 A. I was not doing it as his attorney. I
2 was filling it in almost as a secretary for him
3 to change some of the names.

4 Q. Who was the lawyer at Hopkins & Sutter?

5 A. Jim Hammond, I believe.

6 Q. Say what?

7 A. James Hammond.

8 Q. James Hammond?

9 A. Yeah.

10 Q. Is he still -- I know Hop- -- I know
11 Hopkins is no longer in existence, but is he
12 still practicing?

13 A. No, he does not.

14 Q. How do you know?

15 A. He died.

16 Q. All right. Who is the lawyer at
17 Hopkins & Sutter -- strike that.

18 Did you -- did -- to your knowledge,
19 did Simon then -- Mr. Bernstein then interact
20 with Hopkins & Sutter?

21 A. I believe so.

22 Q. With whom?

23 A. I don't know.

24 Q. Was it Mr. Hammond?

1 A. I don't know.

2 Q. To your knowledge, was Hopkins & Sutter
3 involved in the execution of his trust?

4 A. I believe so.

5 Q. What makes you believe that?

6 A. Si said that Hopkins & Sutter or an
7 attorney at Hopkins & Sutter helped him execute
8 the will -- I mean the trust.

9 Q. Well, we'll get to that conversation in
10 a second, okay, and -- but you never learned who
11 it was there?

12 A. No.

13 Q. Did you ever tell Mr. Hammond I'm
14 sending over my father-in-law to do for him what
15 you did for me?

16 A. I did not. Simon had his own
17 relationships at Hopkins & Sutter.

18 Q. And with whom did he have
19 relationships?

20 A. Several folks.

21 Q. Who?

22 A. Henry Lawrie.

23 Q. Is Henry still alive?

24 A. I believe so.

1 Q. Okay. Who else?

2 A. Brad Ferguson.

3 Q. Okay. Who else?

4 A. I don't know.

5 Q. And of that -- of those two, do you

6 believe either of them participated with him in

7 creating this trust you talked about?

8 A. Be pure speculation.

9 MR. STAMOS: Off the record for a second.

10 (Whereupon, a discussion was had

11 off the record and a short

12 break was taken.)

13 MR. STAMOS: All right. We're back on.

14 BY MR. STAMOS:

15 Q. Well, in the declaratory judgment

16 portion of your complaint, it states that --

17 Paragraph 29: On or about June 21, 1995, David

18 Simon -- that's you, right? -- an attorney, and

19 Simon Bernstein's son-in-law met with Simon

20 Bernstein before Simon Bernstein went to the law

21 offices of Hopkins & Sutter in Chicago, Illinois

22 to finalize and execute the Bernstein trust

23 agreement.

24 You're familiar with that allegation?

1 A. I am.

2 Q. All right. Tell me what the facts are
3 surrounding the allegations in that
4 Paragraph 29.

5 A. Gave him a draft of the document to go
6 to Hopkins & Sutter to have it finalized and
7 executed.

8 Q. All right. And this is a document that
9 you had taken, the one that had been prepared
10 for you, and changed it to give effect to what
11 Simon -- for Simon. That's your testimony?

12 A. Yes.

13 Q. And was it in final form?

14 A. No.

15 Q. In what form was it?

16 A. Near final form.

17 Q. All right. And tell me what you and
18 Simon said to each other on the 21st before he
19 went to this meeting.

20 A. I believe I spoke to him the day before
21 and said I would make changes. I took notes on
22 another draft of the document and then utilized
23 those notes to have the document modified to
24 reflect those additional desires, and I handed

1 it to him.

2 Q. What was it that Mr. Simon told you
3 what he wanted the trust to do?

4 MR. SIMON: Strike -- objection on form.

5 MR. STAMOS: I'm sorry. You're right.

6 BY MR. STAMOS:

7 Q. What was it that Mr. Bernstein told you
8 he wanted the trust to do in that conversation
9 the day before the 21st?

10 A. Take care of his wife and children.

11 Q. And did you draft terms that would do
12 that, to the best of your ability?

13 A. Yes.

14 Q. Any other conversation you had with
15 Mr. Bernstein?

16 A. Yes.

17 Q. What did you say to him and what did he
18 say to you?

19 A. He asked me to be the trustee after
20 Shirley, and at first, I said yes, but at that
21 night, I thought about it and asked him to
22 remove me as trustee, and instead, replace it
23 sequentially with his children.

24 Q. And did you make changes to the form of

1 it at that point to give effect to that change?

2 A. No.

3 Q. What happened about that?

4 A. He took the draft that I had given him
5 and left.

6 Q. And then in Paragraph 30, it says after
7 the meeting, you reviewed the final version.

8 You recall those -- that allegation?

9 I'm paraphrasing, but that's what it says,

10 correct?

11 A. Yes.

12 Q. Was it that day?

13 A. I believe the day I reviewed it was the
14 day of the 21st, but it could have been the
15 22nd.

16 Q. All right. What did you say to him and
17 what did he say to you after that -- after that
18 meeting? Did you have -- strike that.

19 Did you have a conversation with him
20 after the meeting took place, whenever you first
21 had occasion to converse with, him about the
22 trust?

23 A. Thank you, and thank you for removing
24 me and replacing me with Ted, sign these forms

1 here and this form here and this form here.

2 Q. So when he brought it back to you, it
3 was not yet signed?

4 A. His was signed. I'm talking about the
5 change of owner -- I mean the change of
6 beneficiary forms that we would submit, as well
7 as the change of beneficiary forms for Lincoln
8 Benefit as -- and any other form that would need
9 to be submitted to the insurance carriers.

10 Q. So if we got the records of Lincoln
11 Benefit, we would see a beneficiary form
12 indicating that funds from that policy were to
13 be paid to a 1995 trust?

14 MR. SIMON: Objection, assumes facts not in
15 evidence, form.

16 THE WITNESS: I believe so.

17 BY MR. STAMOS:

18 Q. Have you ever tried to do that? Has
19 anyone on behalf of your family ever undertaken
20 to do that, to investigate the records of
21 Lincoln?

22 A. I know we called and asked to see if
23 they had a copy of the trust, but that's all
24 that I'm -- believe we've done.

1 Q. Did they have a copy of the trust?

2 A. Not to my knowledge.

3 Q. Now, what other documents -- strike

4 that.

5 He had already -- so when he came back
6 from Hopkins & Sutter, he had a signed document,
7 correct?

8 A. Correct.

9 Q. And he'd obviously left a copy with
10 Hopkins & Sutter, correct?

11 A. No idea.

12 Q. Now, we're both lawyers. We've both
13 been in the business a long time. I've never,
14 ever, ever heard of a -- of a firm that drafts a
15 trust and doesn't keep a copy, in the word
16 processor, if no place else, but executed copy.

17 Did you call Hopkins & Sutter to see
18 whether there's a -- there's a document -- a
19 copy of this document in their files?

20 A. Well, Hopkins & Sutter no longer
21 exists, but we did follow up with their
22 successor firm, as well as some of the attorneys
23 who broke away from Hopkins & Sutter and started
24 their own firm.

1 Q. Okay. And what did you find?

2 A. Neither had a copy of the executed
3 trust.

4 Q. Who did you talk to? And who did the
5 talking for you if not you?

6 A. Yeah, I don't know.

7 Q. You don't know who you talked to -- I'm
8 sorry.

9 You don't know who was spoken to at --
10 for those lawyers?

11 A. Right.

12 Q. Who made the contact with them?

13 A. I'm not sure. I'd have to look.

14 Q. What are the -- what are the choices?

15 A. Anybody in our offices.

16 Q. Well, probably not anybody in your
17 office.

18 I mean, who do you think are the likely
19 candidates to have done the investigation to
20 determine whether the trust existed?

21 MR. SIMON: Objection, asked and answered.

22 THE WITNESS: Could be anyone that's in our
23 office that was just assigned to make the phone
24 call. I mean, I don't know.

1 BY MR. STAMOS:

2 Q. Who asked them to do it?

3 A. Might have been Pam, might have been
4 me, might have been Adam.

5 Q. So when the complaint says -- refers
6 to the -- let me see if I can pull up the
7 correct page here.

8 MR. SIMON: Can we get a copy of the
9 complaint?

10 MR. STAMOS: I don't know if we have a copy
11 here. I don't -- I don't intend to make it an
12 exhibit, but I could make you a copy if you need
13 to.

14 BY MR. STAMOS:

15 Q. So where the complaint says in
16 Paragraph 35, as diligent searches were made of
17 Ted Bernstein and the other Bernstein family
18 members; of Simon Bernstein's home and business;
19 the law offices of Tescher & Spallina; the
20 offices of Foley & Lardner, successor to
21 Hopkins & Sutter; and the office of the Simon
22 Law Firm, who -- who is it who investigated,
23 first of all, with respect to the offices of
24 Foley & Lardner?

1 A. I don't know the person's name off the
2 top of my head. I'd have to look.

3 Q. I don't mean to be clever, but that
4 sounds like an awful important issue for this
5 whole litigation. I find it kind of astonishing
6 that it could have been a secretary that called
7 and gave -- came up with the answer. I mean, is
8 that really what might have happened?

9 A. I don't find it astonishing. We work
10 in the business, so it's not a big deal to make
11 a phone call, so it's very possible.

12 Q. Okay. But you don't know who was
13 spoken to at the -- at Foley & Lardner?

14 MR. SIMON: Objection, asked and answered.

15 THE WITNESS: Not as I sit here today.

16 BY MR. STAMOS:

17 Q. Okay. Who made the -- who investigated
18 the -- in the offices of the Simon Law Firm to
19 see whether a copy existed?

20 A. Myself, Adam Simon, and Cheryl
21 Sychowski.

22 Q. And the law offices of Tescher &
23 Spallina, who investigated there?

24 A. I don't know.

1 Q. And how about Ted Bernstein -- about
2 Ted Bernstein and Simon Bernstein's home and
3 business office?

4 A. I don't know.

5 Q. Who would I -- whose deposition would I
6 take to find out about that, to find out the
7 answers to those questions?

8 A. I don't know.

9 Q. So nobody might know?

10 A. Well, I would -- I would assume that in
11 Tescher & Spallina, you would ask Tescher &
12 Spallina --

13 Q. That's the easy way.

14 A. -- and Ted Bernstein, you would ask Ted
15 Bernstein, and for Simon Bernstein, you would
16 probably ask Tescher & Spallina.

17 Q. All right. And after you have this
18 conversation with Mr. -- with Simon Bernstein
19 when he came back from the office, what's the
20 next time you had a conversation with him about
21 his -- about that trust?

22 A. After we changed the beneficiaries, I
23 don't believe I had a subsequent conversation
24 until he mentioned it in 2012.

1 Q. Okay.

2 A. Actually, he didn't mention the trust.

3 He mentioned the insurance policy.

4 Q. All right. We'll get to that in just a

5 second.

6 At the time that -- in 1995, were you
7 and he working in the same office, physically?

8 A. He had an office there. He seldom came
9 to Chicago. He was living in Florida.

10 Q. Okay. Was there a time when he stopped
11 coming to Chicago?

12 A. He no longer had an office in Chicago
13 in 1996, but he has family here.

14 Q. You've seen this 2000 trust, correct?

15 MR. SIMON: Objection. You're referring to
16 some other trust. We'd like to see it.

17 MR. STAMOS: Do you have a copy?

18 MS. FOGLIETTA: It's a little hard to hear.

19 Would you mind speaking up a little?

20 MR. STAMOS: Yeah, I will.

21 BY MR. STAMOS:

22 Q. Well, before I show that to him, let --

23 let me ask you this: Did you have any

24 conver- -- when's the next -- after 1995,

1 this -- the June 1995 event we've been
2 discussing, what's the next time you had a
3 conversation with Simon Bernstein about any
4 trust?

5 A. Well, I don't know how long it took to
6 complete the change of beneficiary forms and
7 have them come back, but after that process?

8 Q. Yes.

9 A. I don't believe I spoke to him about
10 the trust again.

11 Q. Okay.

12 A. Until the 2012, and again, the
13 reference was more to the policy and not the
14 trust.

15 Q. Okay. So let's talk about that, then.
16 So if we're thinking about two -- two concepts,
17 the existence of the insurance policy that we're
18 all litigating about and the existence of the
19 trust, what you're telling me is, after whatever
20 took place in this -- 1995 took place with
21 regard to a new beneficiary and so forth, you
22 never had a conversation with him about either
23 thing until 2012, and at that time, you had a
24 conversation about the insurance policy?

1 A. Did have a conversation with him about
2 the policy, yes.

3 Q. Okay. And when in 2012?

4 A. No, no. In 1998.

5 Q. Oh.

6 A. But I didn't have another conversation
7 about...

8 Q. All right. '98's a new year for us, so
9 let's talk about that.

10 What -- who was present for the
11 conversation in 1998?

12 A. Myself and Mr. Bernstein.

13 Q. And what did you say to him and what
14 did he say to you?

15 A. Let's voluntarily dissolve the S.B.
16 Lexington VEBA and S.B. Lexington Corporation.

17 Q. Okay.

18 A. And I voluntarily dissolved them.

19 Q. All right. Was there a discussion
20 about the wisdom of that or why do it? Why do
21 it?

22 A. There was a discussion about the wisdom
23 of that.

24 Q. Okay. I'd like you to tell me what you

1 said to him and what he said to you in that
2 conversation.

3 A. I said let's dissolve S.B. Lexington
4 and you've got a lot of tax issues that you need
5 to bury, and the quicker we do it, the better.

6 Q. Okay. Did he agree to that?

7 A. Yes.

8 Q. All right. What did he say to you in
9 that conversation?

10 A. Dissolve the corporation.

11 Q. Did you perform the work necessary to
12 achieve that?

13 A. I did.

14 Q. And other than discussing the
15 dissolution of the VEBA, what other conversation
16 was there, if any, about the insurance policy?

17 A. That the death benefit would now go to
18 the contingent beneficiary, which is the 1995
19 irrevocable life insurance trust.

20 Q. And was there any other discussion at
21 that time?

22 A. No.

23 Q. Was there ever another discussion about
24 the insurance policy before he died?

1 A. 2012.

2 Q. All right. And where did that
3 conversation take place?

4 A. I was on the telephone.

5 Q. And did you call him or did he call
6 you?

7 A. I believe he arranged a conference
8 call. I don't remember if everyone was called
9 or we called in to a number, but there was a
10 conference call amongst the children, some of
11 the spouses, Mr. Spallina, and Simon Bernstein.

12 Q. Okay. And what -- who said what to
13 whom in that conference call?

14 I'm sorry. Let me interrupt myself for
15 a second.

16 What was the date of that call, the
17 best you can recall?

18 A. A few months before he died. I don't
19 know.

20 Q. All right. And he was in Florida at
21 that time?

22 A. I wasn't there, but I believe he was in
23 Florida.

24 Q. Okay.

1 A. He was on the phone, so I can't tell
2 you really where he was.

3 Q. Okay. And tell me what everybody said
4 in that conversation to the best you can recall.

5 A. The gist of it was that Simon was going
6 to change his will and estate to leave his
7 estate and trust to the ten grandchildren, that
8 the life insurance policy proceeds would go to
9 the five children, and that he hoped this would
10 end some of the acrimony within the family.

11 Mr. Spallina introduced Simon and
12 introduced the reason for the call, then each of
13 the children were asked to agree, and each of
14 the children agreed, even though, in my mind,
15 they didn't have to agree anyway.

16 Q. When you say that he was referring to
17 disputes in the family, what was that about?

18 A. He felt that there was a lot of
19 acrimony within the family.

20 Q. About what?

21 A. A whole number of things, as far as I
22 know. His girlfriend, his treatment of some of
23 the children and grandchildren.

24 Q. In what way treatment? Financially?

1 MR. SIMON: Object, relevance.

2 THE WITNESS: You're asking my opinion? I
3 would say emotionally, but financially, if, you
4 know, if you mean two of the children had a
5 clause inside of a trust that if in certain
6 instances, they would be disinherited, and that
7 translated down to the lineal descendants of the
8 two.

9 BY MR. STAMOS:

10 Q. And who were the children who would
11 have been disinherited?

12 A. In this narrow exception, it would have
13 been Pam and Ted and their children.

14 Q. And what would have -- what was the
15 narrow exception?

16 A. All for distributions made under a
17 trust.

18 Q. Was there any further discussion in
19 that conversation about the insurance policy
20 beyond what you've described?

21 A. Just that it was left to the five
22 children.

23 Q. At the time that you were involved in
24 that conversation, were you aware of whatever

1 trusts existed at that time?

2 A. I was aware of the 1995 trust. I was
3 not aware of any other trusts.

4 Q. When did you become --

5 A. Other than -- you're talking about
6 Simon's life in- -- are you talking about life
7 insurance trusts?

8 Q. No, no. Just trusts.

9 A. I was aware -- I was aware of Shirley's
10 trust.

11 Q. You've since learned of a series of
12 trusts that Simon Bernstein executed, correct?

13 A. Some. I don't know if I'd call it a
14 series, but --

15 Q. Well, you're aware that he -- that
16 after 19 -- that after the year 1995, his
17 signature appears on trusts in a number of
18 successive -- succeeding years, not in -- not
19 years in a row, but a number of years -- start
20 again.

21 After the year 1995, you're aware
22 that -- you are now aware that there are trusts
23 dated in various years between 2000 and 2012,
24 right?

1 MR. SIMON: Object, speculation.

2 THE WITNESS: I'm aware of one other trust,
3 yes.

4 BY MR. STAMOS:

5 Q. Which other trust are you aware of?

6 A. I saw it in the litigation. I think it
7 was drafted by somebody at Proskauer Rose.

8 Q. And what year was that trust?

9 A. I'd have to see it. If you showed it
10 to me, I would --

11 Q. Okay. I guess what I'm asking is: Are
12 you currently aware, beyond the trust that was
13 drafted by the Proskauer firm, are you aware
14 today of any other trusts that Mr. -- that Simon
15 Bernstein executed prior to his death?

16 A. Yes. There is the Simon Bernstein
17 Trust that has to do with his, you know, last
18 will and trust.

19 Q. All right. Are you aware of any
20 intervening trusts before then -- between 1995
21 and before the trust that you believe you're
22 aware of?

23 A. And the 2000 one I spoke about?

24 Q. Right. Any others?

1 A. No.

2 Q. All right. What's your understanding
3 of the significance of the -- of the trust the
4 Proskauer firm prepared?

5 MR. SIMON: Objection, calls for speculation.

6 THE WITNESS: I'm not aware of any
7 significance.

8 BY MR. STAMOS:

9 Q. Have you ever made any analysis of its
10 relevance to this litigation or to your position
11 or your family's position in this litigation?

12 A. No.

13 Q. Am I correct, if you're successful in
14 this litigation, your wife will receive
15 roughly a -- a fifth of whatever the proceeds
16 are that are -- have been paid into court,
17 correct?

18 A. Yes.

19 Q. What does that calculate out to about,
20 350,000, 300,000, something like that?

21 MR. SIMON: Object, speculation.

22 MR. STAMOS: Well, it's math. It's
23 arithmetic.

24

1 BY MR. STAMOS:

2 Q. Have you ever done the math? I've got
3 334,000. Does that sound about right?

4 A. It could be correct, yes.

5 Q. All right. That's all I'm asking.

6 But that's how much she would receive,
7 correct?

8 MR. SIMON: Object to speculation.

9 THE WITNESS: Pre-fees, yes, I believe so.

10 BY MR. STAMOS:

11 Q. Okay. All right. Now, have you ever
12 had conversations with -- well, strike that.

13 When did you first become -- when was
14 the first attempt made to locate the 1995 trust
15 document?

16 A. I believe some times in the winter of
17 2012, 2013.

18 Q. And what was the first steps taken to
19 locate it?

20 A. I don't believe I took the first steps.
21 I believe --

22 Q. Who did?

23 A. Whoever had Si's documents and
24 materials. Somebody in Florida.

1 Q. Who?

2 A. I don't know, but I -- you know, I
3 would guess Donald Tescher and Robert Spallina.

4 Q. Okay. And do you recall being advised
5 that they were unable to locate such a document?

6 A. Yes.

7 Q. When did Spallina first become aware
8 that there was a -- that there was purportedly a
9 1995 document?

10 A. I don't know.

11 Q. He must have -- according to your
12 testimony, he must have been aware of that prior
13 to the conversation or certainly during the
14 conversation, the conference call you described,
15 correct?

16 A. I assume, but I don't know when that
17 happened. He may have become aware of it in
18 2005 or 2000 --

19 Q. Truly.

20 A. I have no idea.

21 Q. Truly. But certainly no later -- when
22 that conversation started, it wasn't your
23 impression that as Simon Bernstein was
24 describing the policy that that was the first

1 time Spallina ever heard about it, correct?

2 A. I was unaware if it was under that
3 trust or any other trust during that
4 conversation.

5 Q. I see. So at that point, that
6 conversation, you would have been unaware
7 whether the trust that Simon Bernstein was
8 referring to as being the beneficiary for the
9 policy would have been a 1995 trust or some
10 other trust?

11 MR. SIMON: Objection. It's facts not in
12 evidence.

13 MR. STAMOS: That's a speaking objection.
14 There aren't facts in evidence because we're
15 talking -- we're getting the evidence now here,
16 so --

17 THE WITNESS: But I don't believe I said what
18 you said. I --

19 BY MR. STAMOS:

20 Q. I misunderstood you, then.

21 A. Yeah. I don't think he referred to a
22 trust in the phone conversation. I think he
23 referred to the proceeds of the policy.

24 Q. Okay. And when is -- to your

1 knowledge, when is the first time that
2 Mr. Spallina would have become aware that there
3 was a purported 1995 trust?

4 MR. SIMON: Objection, speculation.

5 THE WITNESS: No idea.

6 BY MR. STAMOS:

7 Q. Who was the principal contact with
8 Mr. Spallina after Simon Bernstein died, on
9 behalf of the family?

10 A. I assume Ted Bernstein, but I don't
11 know for sure.

12 Q. Did you have any conversations with
13 Mr. Spallina?

14 A. Right after his death, no. Have I had
15 conversations with Mr. Spallina, yes.

16 Q. And did Mr. Spallina ever -- did you
17 ever have conversations with him about the trust
18 itself?

19 A. Yes.

20 Q. And about its creation?

21 A. I believe so.

22 Q. When was the first time you had such a
23 conversation?

24 A. Be the winter of '12-'13.

1 Q. Was there ever a discussion with him
2 about this trust that was executed in 2000 --

3 MR. STAMOS: What's the date of that trust?

4 MR. HORAN: August 15th.

5 MR. STAMOS: Of what year?

6 MR. HORAN: 2000.

7 BY MR. STAMOS:

8 Q. Did you ever have a conversation with
9 Mr. Spallina about a trust that was executed by
10 Mr. Simon Bernstein in August of 2000 --
11 August 15th of 2000?

12 A. I'm not sure.

13 Q. When did you first become aware that
14 such a document might exist?

15 A. During the course of the litigation.

16 Q. And did you have any conversations with
17 Mr. Spallina once you learned of its existence?

18 A. I'm not sure it was Mr. Spallina.

19 Q. Who did you talk to?

20 A. I believe it was Alan Rose.

21 Q. Who's Alan Rose?

22 A. He's an attorney.

23 Q. With who?

24 A. I don't remember the firm.

1 Q. Why Mr. Rose?

2 A. Oh, he was representing Ted Bernstein,
3 and during the course of the conversation, Eliot
4 Bernstein had brought up the 2000 trust in one
5 of his pleadings, and Mr. Rose said it was
6 unfunded, and it's very possible Mr. Spallina
7 echoed that sentiment.

8 Q. Unfunded in what sense?

9 A. That there's no res in the trust.

10 Q. Were there any -- was there ever any
11 discussion of the fact that that trust had
12 indicated that one of its assets was a -- the
13 1982 insurance policy?

14 A. I think that was the conversation I
15 just referred to.

16 Q. Right. And did anyone -- I mean, it
17 wasn't funded, but did anyone discuss the
18 significance or the relevance of the
19 relationship of that trust to the proceeds of
20 the '82 policy?

21 A. Just that it was to be ignored.

22 Q. Because -- because it had never been
23 made a beneficiary of the -- of the policy?

24 A. Because it was unfunded.

1 Q. I don't know what that means.

2 A. No race.

3 Q. I know that. That wasn't my question,
4 though.

5 There would be a race if the proceeds
6 of the policy were paid into it, correct?

7 MR. SIMON: Objection, facts not in evidence.

8 THE WITNESS: Not necessarily. Probably it
9 would have been held in constructive trust for
10 the beneficiary, but because it was never named
11 a beneficiary of the policy, it was --

12 BY MR. STAMOS:

13 Q. That's what I'm getting at. All I'm
14 trying to -- I'm not trying to be tricky. All
15 I'm -- my only point is your understanding was
16 the 2000 trust was not relevant here because it
17 had never been made a beneficiary of the policy
18 from '82?

19 A. And that Simon didn't wish it to be.

20 Q. How did you conclude that?

21 A. That's what I was told.

22 Q. By whom?

23 A. I believe either Mr. Rose or
24 Mr. Spallina.

1 Q. They told you that Mr. Simon had told
2 them something about the -- about the -- his
3 desires about the 2000 trust?

4 A. Correct.

5 Q. Had he told them that he had intended
6 it to be paid to the '95 trust?

7 A. To the five children.

8 Q. So just so we're clear, at no point --
9 I think this is what you're telling me: At no
10 point did Mr. Spallina say Simon Bernstein told
11 me that the proceeds of the '82 policy would be
12 paid to a '95 trust. He never said that,
13 correct?

14 A. I don't know.

15 Q. Well, you don't -- you don't remember
16 him saying that, do you?

17 A. I remember him saying something like
18 that he talked about Mr. Bernstein contemplating
19 changing the beneficiary to his girlfriend at
20 the time, and that instead, he decided to leave
21 it as the five children through the trust, but I
22 don't know that he used the word 1995 at that
23 point.

24 Q. All right. Because if Mr. Bernstein --

1 if Mr. Spallina had been aware of the existence
2 of a 1995 trust, you would agree with me a
3 prudent attorney would have asked to obtain a
4 copy of that trust, correct?

5 A. I believe he did.

6 Q. He asked Mr. Bernstein for that?

7 A. It's my understanding.

8 Q. And what -- and what became of that?

9 A. I don't know.

10 Q. He never received it, though, did he?

11 A. I assume not, but I don't know because
12 he didn't produce it.

13 Q. Who are you aware heard Mr. Spallina
14 say anything that referred to the existence of a
15 1995 trust?

16 A. All of the children.

17 Q. In what conversation?

18 A. Discussing how to have the proceeds of
19 the trust paid to the --

20 Q. This was after death?

21 A. Pardon me?

22 Q. Was this after Simon's death?

23 A. Yes.

24 Q. Okay. Go on. I'm sorry. I wasn't --

1 A. That's the winter of '12-'13.

2 Q. Right. But --

3 A. He died in September, so all the

4 conversations I'm talking about --

5 Q. Are all after death.

6 A. -- are all during that period.

7 Q. But just to revisit it, prior to Simon

8 Bernstein's death -- I don't usually get --

9 sound so formal, Simon Bernstein, but just to

10 keep it clear, I'm going to do that.

11 Prior to Simon Bernstein's death, you

12 are unaware of any conversation in which

13 Mr. Spallina reported or said anything that

14 implied that he was aware that a 1995 trust

15 existed; am I correct?

16 A. Just the conversation that I referred

17 to in the preceding months.

18 Q. Okay. But I don't think -- but I

19 think -- I thought I understood you to say in

20 that conversation you don't remember him saying

21 the word "trust"?

22 A. Correct.

23 Q. All right. Now, you're aware, I take

24 it, that the 2000 trust, the terms of that

1 trust, if it were given effect, would have

2 excluded your wife, correct?

3 A. I have not read the trust.

4 Q. Why not?

5 A. No reason to read it.

6 Q. Why not?

7 A. There's just no reason to read it.

8 Q. Okay. Let's go to a different topic.

9 Do you know Don Sanders?

10 A. Don Sanders?

11 Q. Yes.

12 A. No, I do not.

13 Q. Okay. And how -- do you know how it

14 came to be his affidavit was prepared?

15 A. I do know, yes.

16 Q. How?

17 A. Attorney representing the trust sought

18 to seek the deposition of someone from the

19 servicer for the insurance company and served a

20 notice of deposition and that in the course of

21 negotiating that deposition, they agreed to

22 provide an affidavit.

23 Q. Who drafted the affidavit?

24 A. I don't know.

1 Q. Who do you think drafted the affidavit?

2 MR. SIMON: Objection, speculation.

3 BY MR. STAMOS:

4 Q. I'm not asking you to speculate, but do
5 you have a -- you have a -- did you ever talk to
6 find out any --

7 MR. SIMON: He said he didn't know -- and he
8 said he didn't know, and then you said who do
9 you think. You're definitely asking him to
10 speculate. He doesn't know.

11 MR. STAMOS: No. There are all sorts of
12 things I think things about that aren't
13 speculation, but I also don't know. I mean,
14 there are gradations to knowledge.

15 THE WITNESS: I would be guessing, but
16 there's --

17 MR. SIMON: Don't guess.

18 BY MR. STAMOS:

19 Q. Okay. Let's see. Aside from
20 discussions regarding a trust in 1995, did you
21 do any other -- did you assist Simon Bernstein
22 in any other way in his personal affairs from
23 1995 forward?

24 A. Yes.

1 Q. Like what?

2 A. Bill paying, litigation, day-to-day
3 operation of his companies, and occasionally
4 purchasing gifts for some of his family members,
5 and tickets for himself.

6 Q. Did you practice law for him after
7 1995? Obviously litigation. I assume that
8 would be practicing law for him.

9 A. Yes.

10 Q. What kind of litigation would you help
11 him with?

12 A. Depends what came up. Litigation
13 mostly with 1995 would be ex-business partner.

14 Q. Who was that?

15 A. Joseph Flanagan.

16 Q. Was that just litigation over payouts
17 from the business or was there some other issue
18 involved? Money out of the business?

19 A. Yes.

20 Q. Were you aware of the handwritten will
21 that Simon Bernstein prepared?

22 A. No.

23 Q. You're not aware of that now?

24 A. Nope.

1 Q. Have you had occasion to review the
2 records of that -- that were produced by the
3 insurance company in this case? Have you seen
4 any of them?

5 A. I might have.

6 Q. Do you think you did?

7 A. I think so.

8 Q. Did you ever assist -- other than 1995
9 as you've described, was there ever another
10 occasion in which you were aware of another
11 beneficiary designation form being sent to or
12 from the insurance company regarding the 1982
13 policy?

14 MR. SIMON: Objection as to form.

15 THE WITNESS: I'm not sure I understand what
16 you asked just now.

17 BY MR. STAMOS:

18 Q. Well, if a policy is going to have a
19 beneficiary change, there's usually a form that
20 has to be filled out, correct?

21 A. Correct.

22 Q. And where someone requests to change a
23 beneficiary, the insurance company might send
24 out the form to them to fill out, correct? To

1 prepare?

2 A. Sure. I guess.

3 Q. And likewise, if someone wants to
4 effect a change of beneficiary and they have the
5 form, they fill it out and send it to the
6 insurance company. That's one of the things
7 they could do, correct?

8 A. Sure.

9 Q. All right. Are you aware of any such
10 communications between the insurance company and
11 Mr. Bernstein about the 1982 policy following
12 1995?

13 A. Other than the 1998 dissolution of the
14 VEBA trust, I'm not aware of any other forms.

15 Q. And I take it that you -- were you
16 aware that there were a number of instances in
17 which the policy lapsed and had to be revived,
18 so to speak, reinstated?

19 A. I'm aware of one.

20 Q. Did you participate in any of the
21 documentation with regard to any instance of
22 reinstatement?

23 A. I did not.

24 Q. Who did?

1 A. I don't know. I assume Mr. Bernstein,
2 Simon Bernstein.

3 Q. When -- which reinstatement were you
4 aware of?

5 A. I don't know. I didn't know there was
6 multiple. I'm only aware of one, so I can't
7 tell you --

8 Q. Well, but I mean, which -- what year
9 was that?

10 A. Oh, I don't know when it was. I just
11 knew that it had lapsed once, then needed to be
12 reinstated.

13 Q. Do you know where the insurance company
14 would send forms or communications regarding the
15 policy -- well, strike that.

16 To your knowledge, would the -- would
17 the insurance company send communications about
18 the insurance policy to your office at any time?

19 A. Up until 1996, I believe so.

20 Q. Okay. How about after that?

21 A. Probably not.

22 Q. If a communication were sent by the
23 insurance company to your office, that would
24 come to your attention, wouldn't it?

1 A. Not necessarily, no.

2 Q. Whose attention would it go to?

3 A. Depends if it -- who it was addressed

4 to. If it was addressed to him, it may have

5 just been -- come to our office and forwarded

6 from our offices. If it was addressed to

7 something more general, then it probably would

8 have been opened by Pam Simon.

9 Q. Okay. It's fair to say, though, that

10 if you had come into possession of

11 communications that could bear on the continuing

12 existence of the policy, you would want to make

13 sure that was dealt with, correct? You wouldn't

14 want the policy to lapse because, as far as you

15 were concerned, your wife was a one-fifth --

16 one-fifth indirect beneficiary of that policy,

17 correct?

18 A. Not correct.

19 Q. Why not? What's not correct about

20 that?

21 A. I would be indifferent as to whether

22 the policy lapsed, just as I was when the policy

23 lapsed.

24 Q. When did you first learn it lapsed?

1 A. I want to say after he passed away.

2 Q. So you weren't -- so during his
3 lifetime, you were unaware of it having lapsed?

4 A. Correct.

5 Q. Oh, okay. So when you say it was --
6 you were indifferent to it, you never had the
7 occasion to be indifferent to it when there was
8 still something to be done about it, right?

9 A. Well, I know I was indifferent about it
10 because it was a discussion about how to pay for
11 it during the time and he had no other assets,
12 and so this was the way he wanted to take care
13 of his wife, and at that time, I was not
14 indifferent to it.

15 Q. I see. I'm not following. So --

16 A. Well, I thought with no other assets,
17 that his wife needed to be taken care of, and
18 that should be a priority, along with repaying
19 his debt.

20 Q. Okay. Two things. When you say
21 repaying his debt, to whom was the debt?

22 A. Several people.

23 Q. Who?

24 A. Exchange Bank, Harris Bank Glencoe,

1 Boulevard Bank, Capitol Bankers Life, Fidelity
2 Union, and there were a couple of others that
3 I -- I'm not -- off the top of my head but I
4 believe had to do with condominiums owed that
5 were under water, and I can't tell you the exact
6 names.

7 Q. I think I might have missed -- I might
8 have -- might be misunderstanding what you said.

9 Were you aware during his lifetime that
10 the policy had lapsed?

11 A. No.

12 Q. Okay.

13 A. While he was alive was I --

14 Q. Yes.

15 A. No.

16 Q. All right. But you're saying that
17 after he died, you learned that it had lapsed
18 and it had to be paid?

19 A. No.

20 Q. So what could all of that have to do
21 with taking care of his wife? She was dead by
22 then, right?

23 A. Yeah. You asked me if I was ever
24 indifferent, and during the early '90s, I was

1 not indifferent.

2 Q. Oh, I'm sorry. I thought -- I meant
3 you were indifferent to it at having lapsed.
4 That's what I was referring to. I'm sorry. I
5 confused myself.

6 A. Okay. I was speaking of decades
7 before.

8 Q. Got it, got it.

9 MR. STAMOS: Let me step outside just for a
10 second with Kevin.

11 (Whereupon, a discussion was had
12 off the record and a short
13 break was taken.)

14 MR. STAMOS: All right. We're going to go
15 back on. We just have a few more questions.

16 BY MR. STAMOS:

17 Q. When -- to your knowledge, what -- who
18 made the first approach to the insurance company
19 with regard to the policy?

20 A. Simon Bernstein.

21 Q. No, no. I'm sorry.

22 After Simon's death, who's the -- who
23 was the person who made the first communication
24 to the insurance company with regard to

1 obtaining payment of the proceeds?

2 A. I don't know.

3 Q. Do you recall being part of any

4 conversations or becoming aware of any

5 conversations that took place prior to that

6 approach being made?

7 MR. SIMON: Objection, facts not in --

8 THE WITNESS: I don't know if it was prior to

9 or subsequent to the first approach.

10 BY MR. STAMOS:

11 Q. And when was the first approach -- I'm

12 sorry. Mr. Bernstein died in September of 2012?

13 A. Simon Bernstein?

14 Q. Yes.

15 A. September of 2012.

16 Q. And when was the first approach made to

17 the insurance company?

18 A. I don't know.

19 Q. When was the first conversation you had

20 with anyone after Simon Bernstein's death about

21 making an approach to the insurance company?

22 A. I believe in the winter of '12-'13.

23 December, January, right in there.

24 Q. And why then, not more proximate to the

1 time of his death?

2 A. That's the first conversation I had. I
3 don't know. That's why I said it's very
4 possible that a prior approach had been made.

5 Q. And with whom did you have the first
6 conversation about it?

7 A. I don't know who. It was all on the
8 phone, but Robert Spallina for sure was on the
9 phone. Ted Bernstein. I believe Lisa
10 Friedstein.

11 Q. Okay.

12 A. Jill Iantoni. Eliot might have been on
13 the phone. I don't know.

14 Q. Okay. And who said what to whom in
15 that conversation?

16 A. Does anybody have a copy of the
17 insurance policy.

18 Q. All right. And --

19 A. And does anybody have a copy of the
20 life insurance trust.

21 Q. And who initiated that call?

22 A. I don't know.

23 Q. Do you know, when the first submission
24 was made to the insurance company, do you know

1 who made it as trustee? Who was identified as
2 the trustee of the trust of that communication?

3 A. I don't know if anyone was identified
4 as trustee on the first submission.

5 Q. Have you ever seen the first submission
6 of the document?

7 A. I don't know if it was the first
8 submission. I don't know what -- I -- I can't
9 tell what would be the first submission.

10 Q. Right, right. Have you seen a document
11 that -- that you believe to have been the first
12 submission?

13 A. I would have no belief of whether it
14 was the first or second or third submission.

15 Q. Have you seen any documents that you
16 understand to have been a submission?

17 A. Yes.

18 Q. And who was identified -- did you see
19 one or more than one?

20 A. I've seen more than one.

21 Q. And in those, who was identified as
22 trustee?

23 A. In one, I don't know that anyone was
24 identified as trustee, and in the other one, I

1 believe Robert Spallina identified himself as
2 trustee.

3 Q. Okay. And was he the trustee?

4 A. No.

5 Q. Then why did he identify himself as
6 trustee?

7 MR. SIMON: Objection, speculation.

8 THE WITNESS: Ask Robert Spallina.

9 BY MR. STAMOS:

10 Q. Were you surprised to see him
11 identified as trustee when you -- when you read
12 it?

13 A. Yes.

14 Q. And did you discuss that with anyone?
15 Did you discuss the fact that he was identified
16 as the trustee when you knew that, to your
17 knowledge, he would not have been the trustee?

18 A. I discussed it before filing this
19 litigation, yes.

20 Q. With whom?

21 A. Adam Simon.

22 Q. Okay. And what did you --

23 A. Ted Bernstein.

24 Q. And what did you say to Adam and what

1 did he say to you?

2 MR. SIMON: Objection, attorney-client.

3 BY MR. STAMOS:

4 Q. You're not a party to this litigation,
5 are you?

6 A. No.

7 MR. SIMON: Yes, he is.

8 THE WITNESS: It's true. I am. Eliot sued
9 me.

10 BY MR. STAMOS:

11 Q. Well, at the time that the suit was
12 filed -- prior to the time the suit was filed,
13 you were not to be a party, correct? How could
14 you be a party? You never understood yourself
15 to be a beneficiary of either the trust or
16 the -- or the policy, correct?

17 A. That's correct.

18 Q. So when the suit was brought in order
19 to obtain proceeds of the policy and presumably
20 proceeds of the trust, you couldn't have been
21 suing on your own behalf, right?

22 A. I was not.

23 Q. So he wasn't representing you?

24 A. No.

1 Q. So what did he say to you and what did
2 you say to him?

3 A. I said that Spallina is not the
4 trustee. Ted is.

5 Q. Okay.

6 A. I saw the trust. I know Ted's the
7 trustee because that was one of the things that
8 needed to be changed in the draft, and I wasn't
9 positive that that was changed.

10 Q. Okay. Now, tell me this: You -- what
11 are the terms of the trust that you saw with
12 your own eyes?

13 A. I'd have to see a draft of the trust to
14 give you all the terms.

15 Q. All right. Did you ever have a
16 conversation with Mr. Spallina in which he -- in
17 which you asked him or he explained why it was
18 he identified himself as the trustee?

19 A. I may have. I don't recall.

20 Q. What did you say to him and what did he
21 say to you?

22 A. I just have a general remembrance of a
23 discussion about us filing the litigation.

24 Q. And what's your general remembrance of

1 how he explained that he identified himself as
2 the trustee?

3 A. I'm not sure that that specifically was
4 talked about.

5 MR. STAMOS: All right. I think that's all I
6 have. Anybody else have anything?

7 MR. SIMON: I do.

8 MR. STAMOS: Guys on the phone?

9 MS. FOGLIETTA: Not me.

10 MR. STAMOS: Okay. Eliot? Eliot, are you
11 there?

12 MR. SIMON: I take that as a no.

13 MR. BERSTEIN: I said I'm okay.

14 MR. STAMOS: Okay. I'm sorry. We didn't
15 hear you. Thank you. All right.

16 MR. SIMON: I do have questions.

17 MR. STAMOS: Yeah, of course.

18 MR. SIMON: I have some questions.

19 Just for the record, this is Adam Simon
20 questioning David Simon.

21 EXAMINATION

22 BY MR. SIMON:

23 Q. David, during the entire deposition,
24 you have not been presented with any marked

1 exhibits by Mr. Stamos; is that correct?

2 A. Yes.

3 Q. You've been asked to testify solely by

4 recollection; is that true?

5 A. Yes.

6 Q. Okay. I just would like to show you

7 some documents that may be relevant to some of

8 your testimony.

9 MR. SIMON: Can we mark this as David Simon

10 Deposition Exhibit No. 1.

11 (Whereupon, D. Simon Deposition

12 Exhibit No. 1 was marked for

13 identification.)

14 BY MR. STAMOS:

15 Q. David, I am showing you what's been

16 marked as David Simon Deposition Exhibit No. 1

17 that's got a Bates stamp BT 000031, and at the

18 top of the page, it says S.B. Lexington, Inc.,

19 Employer.

20 Have you ever seen that document

21 before?

22 A. Yes, I have.

23 Q. And can you describe what that document

24 is?

1 A. Under the VEBA, the individual insured
2 or member fills out a beneficiary designation
3 form. This is Si Bernstein's membership -- Si
4 Bernstein as member, filling out his beneficiary
5 designation.

6 Q. And at the top of the page, can you
7 read that, the very heading?

8 A. S.B. Lexington, Inc., Employer/Employee
9 Death Benefit Plan and Trust, Plan and Trust
10 Beneficiary Designation, Simon L. Bernstein.

11 Q. And then can you read -- actually, can
12 you read the entire form into the record?

13 A. Sure.

14 I hereby designate in accordance with
15 the terms of said plan and trust as it may be
16 amended that the name of the beneficiary should
17 be Simon Bernstein irrevocable insurance trust
18 and is signed then by Simon Bernstein as the
19 person to receive at my death the death benefit
20 stipulated in the S.B. Lexington, Inc. employee
21 death benefit and trust in the adoption form
22 adopted by my employer.

23 It is then signed again by Simon and
24 dated.

1 Q. What is the date?

2 A. 8/26/95.

3 Q. And do you recognize those signatures?

4 A. I do.

5 Q. And what are -- whose signatures are
6 those?

7 A. Simon Bernstein.

8 Q. Okay. I have no further questions on
9 that.

10 I'd like to show you --

11 MR. STAMOS: Can you mark this as David Simon
12 Deposition Exhibit No. 2.

13 (Whereupon, D. Simon Deposition
14 Exhibit No. 2 was marked for
15 identification.)

16 BY MR. SIMON:

17 Q. David, I'm showing you what's been
18 marked David Simon Deposition Exhibit No. 2.
19 It's got a Bates stamp of BT 000104. It's
20 entitled SS-4, Application for Employer
21 Identification Number.

22 Have you ever seen that form before?

23 A. Yes, I have.

24 Q. And can you describe what that is?

1 A. This is an application for a tax ID
2 number on behalf of the irrevocable insurance
3 trust, and I filled it out.

4 Q. And can you tell me what appears on
5 Line 1 under Name of Applicant?

6 A. Simon Bernstein Irrevocable Insurance
7 Trust.

8 Q. And on Line No. 3 as trustee or
9 executor?

10 A. Shirley Bernstein.

11 Q. And in the upper-right corner, can you
12 identify what number that is?

13 A. The tax ID number given to the
14 insurance trust.

15 Q. And that -- can you read that number
16 into the record?

17 A. 65-6178916, signed by Shirley Bernstein
18 as trustee, June 21, 1995.

19 Q. And do you recognize that signature?

20 A. I do.

21 Q. And whose signature is that?

22 A. Shirley Bernstein.

23 MR. SIMON: Can we mark this as David Simon

24 Exhibit 3.

1 (Whereupon, D. Simon Deposition
2 Exhibit No. 3 was marked for
3 identification.)

4 BY MR. SIMON:

5 Q. David, I'm showing you what's been
6 marked as David Simon Deposition Exhibit No. 3.
7 It's Bates stamped BT 000002 through BT 000012,
8 and I'm going to ask you if you recognize this
9 exhibit?

10 A. I do.

11 Q. And can you tell me -- can you describe
12 what's contained on the page stamped BT 000002?

13 A. It is a screenshot of a page from our
14 database.

15 Q. And can you tell us what it says at the
16 top of the page of that screenshot?

17 A. It is Si Trust and the properties of Si
18 Trust, and then it says when it was modified,
19 which was the day it was put in, June 21, 1995,
20 and the date that we accessed it, September 30,
21 2013, and then it has a created date, which was
22 when we modified our database to the new
23 database, which is September 3, 2004, so it was
24 reentered.

1 Q. Can you describe that further about the
2 new database?

3 A. We switched over and had to enter
4 into -- some old records into a new database.

5 Q. And do you recall how this document was
6 found?

7 A. Myself or Cheryl conducted a search and
8 found this print of the screen and then the
9 attached draft of the irrevocable trust
10 agreement.

11 Q. And can you describe what the remainder
12 of the exhibit is?

13 A. It's a draft of the irrevocable life
14 insurance trust that I gave to Si.

15 Q. And this was in June of 1995?

16 A. Yes.

17 Q. Showing you --

18 MR. SIMON: Can you mark this as Exhibit 4,
19 please.

20 (Whereupon, D. Simon Deposition
21 Exhibit No. 4 was marked for
22 identification.)

23 BY MR. SIMON:

24 Q. Showing you what has been marked as

1 David Simon Deposition Exhibit No. 4. It's
2 Bates stamped BT 000013 through 000021.

3 Have you ever seen that document
4 before?

5 A. Yes, I have, and it has my writing on
6 it.

7 Q. So you see some handwriting in the
8 blanks on the first page?

9 A. I do.

10 Q. And what does that say?

11 A. The handwriting says Si, then Shirley,
12 then Si.

13 Q. And it's got Shirley -- Shirley's name
14 and then the words -- what words follow
15 Shirley's name?

16 A. As trustee. This is an earlier draft
17 of the same document.

18 Q. Okay. Now, I'd like to direct your
19 attention to Article 7 of Exhibit 4, and can you
20 read that Article 7 into the record?

21 A. Upon my death, the trustee shall divide
22 the property of this trust into as many separate
23 trusts as there are children of mine who survive
24 me and children of mine who predecease me

1 leaving descendants who survive me. These
2 trusts shall be designated respectively by the
3 name of my children. Each trust shall be
4 administered and distributed in the following
5 manner.

6 And there's an A, B, and C.

7 Q. And then Article 8, let's look at the
8 last paragraph. Right before Article 9, can you
9 read that sentence?

10 A. As of the date of this agreement, I
11 currently have blank children living; namely,
12 colon.

13 Q. And now I'd like you to look back at
14 Exhibit No. 3 and read to me Article 7.

15 A. Upon my death, the trustee shall divide
16 the property of the trust into as many separate
17 trusts as there are children of mine that
18 survive me and children of mine who predecease
19 me, living descendants who survive me. These
20 trusts shall be designated respectively by the
21 names of my children. Each trust shall be
22 administered and distributed in the following
23 manner.

24 And there's an A, B, and C.

1 Q. And directing you to the end of
2 Article 8 of that draft, which is, again,
3 Exhibit 3, can you read the last same sentence?

4 A. Sure.

5 As of the date of this agreement, I
6 currently have five children living; namely, Ted
7 S. Bernstein, Pamela B. Simon, Jill Bernstein,
8 Lisa Bernstein Friedstein, and Eliot Bernstein.

9 MR. SIMON: I have nothing further.

10 MR. STAMOS: Couple follow-ups.

11 FURTHER EXAMINATION

12 BY MR. STAMOS:

13 Q. When you look at Exhibit No. 4,
14 where -- where was this document located?

15 A. My file.

16 Q. And when you say your files, what does
17 that mean? I mean, did you have a file that --

18 A. File, yes, my --

19 Q. Was it lying on a -- laying on a desk?

20 A. Oh, no. In storage --

21 Q. I mean, how was it maintained? I mean,
22 how did you -- how did you locate it?

23 A. Went to storage, got the manila folder
24 out that said File on it, opened the file.

1 Q. And what did that file -- what did that
2 file -- how was that file designated?

3 A. I -- I don't know off the top of my
4 head. I'd have to check.

5 Q. How did you -- were there other
6 materials in it aside from this document, this
7 blank?

8 A. No.

9 Q. So I take it the document that we have
10 marked as Exhibit No. 3 was not in that file,
11 because this -- this, you had to go in the
12 computer to find, correct?

13 A. Correct.

14 Q. And so how did -- where did this --
15 when you look at Exhibit No. 4, where did this
16 originally come from? Was this originally --
17 was this at some point in your word processor
18 and you -- with these lines in it that were to
19 be filled out?

20 A. Yes.

21 Q. Did you locate that? This, meaning
22 Exhibit 4, right, just so we know what we're
23 talking about.

24 A. Did I locate that on the word

1 processor?

2 Q. Yeah, no, I wasn't clear.

3 Looking at Exhibit No. 4, I take it

4 this is at -- this was at one point on your word

5 processor and it was printed out and then filled

6 out and then --

7 A. Not -- not the exhibit, no. It has my

8 handwriting on it, so what I think I did is, is

9 I wrote this in and gave it to my assistant who

10 then made the modifications which you see is

11 Exhibit 3.

12 Q. But my question to you is: Before you

13 wrote in, this was obviously printed out from a

14 printer, correct?

15 A. Correct.

16 Q. This must have been on your word

17 processor to be printed out on a printer,

18 correct? Exhibit 4.

19 A. I believe so.

20 Q. Did you find Exhibit 4 in your -- in

21 your computer?

22 A. Changed to look like Exhibit 3, yes.

23 Q. And then I take it -- hang on for a

24 second.

1 Were any subsequent drafts made on your
2 computer after -- after Exhibit No. 3?

3 A. No.

4 Q. Did you give a copy of Exhibit No. 3 to
5 Simon Bernstein?

6 A. Yes.

7 Q. And what did he do with it?

8 A. I don't know for sure because I wasn't
9 there, but I believe he went to Hopkins & Sutter
10 to have it changed one last time and executed.

11 Q. And did you share your draft with
12 Hopkins & Sutter? What's in your computer, was
13 it ever transmitted to Hopkins & Sutter so they
14 could mark it up?

15 A. It originated at Hopkins & Sutter
16 because it was Hopkins & Sutter that did my
17 irrevocable life insurance trust.

18 Q. No, no, I know that, but -- but you
19 created the document called Si Trust that you've
20 talked about, Exhibit No. 3, correct?

21 A. Actually, it was created at -- most of
22 it by Hopkins & Sutter when they did the work
23 for me.

24 Q. Okay.

1 A. I modified what you're seeing.

2 Q. I understand that. So you modified a
3 document that had been your document from
4 Hopkins & Sutter, right? That's what you're
5 telling us?

6 A. Yes.

7 Q. And then -- and you made modifications,
8 including you being identified as the trustee,
9 correct?

10 A. Yes.

11 Q. On No. 3, Exhibit No. 3?

12 A. Yes.

13 Q. And you gave that to Simon Bernstein,
14 correct?

15 A. Yes.

16 Q. Okay. What I'm asking is: Did you
17 also transmit to Hopkins & Sutter electronically
18 what we have before us as Exhibit No. 3 so that
19 they could make modifications to it pursuant to
20 what Mr. Bernstein wanted?

21 A. I personally did not.

22 Q. Did somebody else do that?

23 A. It's very possible.

24 Q. And who would have done that?

1 A. My assistant.

2 Q. Who?

3 A. Debbie.

4 Q. Is she still with you?

5 A. She's not.

6 Q. Is she still available?

7 A. Don't know.

8 Q. Would she have done that without your

9 instruction?

10 A. She would -- if Si would have told her,

11 she would have, yes.

12 Q. Do you think that happened?

13 A. I don't know.

14 Q. When Mr. Bernstein -- did you -- did

15 you keep a copy of what you gave Mr. Bernstein

16 to take to Hopkins & Sutter?

17 A. No, I did not.

18 Q. Why not?

19 A. No reason.

20 Q. Why'd you keep a draft?

21 A. I didn't realize I did, but obviously

22 at the time, Debbie must have filed it.

23 Q. When he returned to you after his

24 meetings at Hopkins & Sutter, did you keep a

1 copy of that document?

2 A. The executed trust?

3 Q. Yeah.

4 A. I believe we did have it for a period
5 of time till we moved offices.

6 Q. Okay. And I take it you would have
7 stored it in the same file as the draft, right?

8 You wouldn't put it in another place --

9 A. I didn't store it.

10 Q. Who --

11 A. Mr. Bernstein would have stored it,
12 Simon Bernstein.

13 Q. He did? Did you see him put it in the
14 file?

15 A. Did I see him? No. I don't watch --

16 Q. Did you ever see it again after that
17 day?

18 A. We do a thing called the document
19 review board, so depending on the exact date
20 that it was funded, I'd have to go back. I
21 probably would have seen it at that point, too,
22 so on every time there's an A.L.P.S. funding,
23 there's a series of documents.

24 Q. Every time there's a what funding?

1 A. A.L.P.S.

2 Q. Yeah?

3 A. Arbitrage Life Payment System.

4 So at the time of the funding of the
5 policy, there would have been a document review
6 board, and that would have been reviewed again
7 at that time.

8 Q. Why do you care who the beneficiary is?

9 A. He was also the owner.

10 Q. What does that matter at that the
11 point?

12 A. Because in the Arbitrage Life Payment
13 System, there's reps and warranties made by the
14 owner that are essential to the payment plan.

15 Q. Is it your testimony that you saw
16 the -- the trust at a later date in your office?

17 A. I would have to see what date it was
18 funded, but I would say yes, I saw it on the
19 date that it was funded also.

20 Q. Do you remember doing that? Do you
21 remember seeing it?

22 A. I remember seeing it when he came back.
23 I do not have an independent recollection of
24 that, but it was our habit and custom to do that

1 on each and every trust and each and every
2 owner.

3 Q. Okay. And that's something that would
4 have been maintained by your company because you
5 were participating in this A.L.P.S. program,
6 correct?

7 I'm probably not talking about it
8 properly, but -- but the exercise you said you
9 went through --

10 A. Yes.

11 Q. -- was something that -- this review
12 you would have done would have been done as the
13 company. The company would have been required
14 to do that as part of this A.L.P.S. payment?

15 A. S.T.P. would have done it. It's not
16 required to, but it's one of the ways that --

17 Q. All right. And it would have been in
18 your records, the document would have been in
19 your records to facilitate your doing that,
20 correct?

21 A. No.

22 Q. Whose records would it have been in?

23 A. Simon Bernstein's.

24 Q. And all the -- do you have other people

1 who have purchased insurance pursuant to the
2 A.L.P.S. program?

3 A. Yes.

4 Q. Do you do the same review for all of
5 them?

6 A. Yes.

7 Q. Do you have them bring their records in
8 to look at or do you look at the records you
9 maintain for them?

10 A. No, I would look at the records. And
11 if it wasn't other than Simon Bernstein or
12 myself or the employees are there, then we
13 probably would have kept a copy of that
14 individual's trust, but maybe not the whole
15 trust. Usually what happens is we get a trust
16 certification from the attorney, so there's a
17 front two pages, and then a back signature page.
18 That's the standard practice for us.

19 Q. I see. I see.

20 And your testimony is that at some
21 point, he just took that with him and it was no
22 longer available to you?

23 A. 1996 or when we moved offices, he took
24 all of his furniture, books, records.

1 Q. And when did -- when did -- at some
2 point, did he -- did it cease being funded
3 through the A.L.P.S. program?

4 A. The Lincoln Benefit policy?

5 Q. No. The -- the --

6 A. Capitol Bankers policy was never funded
7 through the A.L.P.S. program.

8 Q. Did the Lincoln benefits policy have
9 the '95 trust you've talked about as the
10 beneficiary?

11 A. And owner.

12 Q. Well, you said that earlier.

13 MR. STAMOS: Okay. That's all I got.

14 Thanks.

15 Reserve?

16 MR. SIMON: Yes.

17 (Whereupon, the deposition
18 concluded at 4:25 p.m.)

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

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

vs.) No. 13 CV 3643

HERITAGE UNION LIFE)
INSURANCE COMPANY,)
Defendant.)

This is to certify that I have read the transcript of my deposition taken in the above-entitled cause by Vicki L. D'Antonio, Certified Shorthand Reporter, on January 5, 2015, and that the foregoing transcript accurately states the questions asked and the answers given by me as they now appear.

DAVID SIMON

SUBSCRIBED AND SWORN TO
before me this _____ day
of _____, 2015.

Notary Public

1 STATE OF ILLINOIS)

2) SS:

3 COUNTY OF C O O K)

4

5 I, VICKI L. D'ANTONIO, a Notary Public

6 within and for the County of Cook and State of

7 Illinois, do hereby certify that heretofore,

8 to-wit, on the 5th day of January, 2015,

9 personally appeared before me, DAVID SIMON, a

10 witness in a certain cause now pending and

11 undetermined in the United States District

12 Court, Northern District of Illinois, Eastern

13 Division, wherein SIMON BERNSTEIN IRREVOCABLE

14 INSURANCE TRUST DTD 6/21/95 is the Plaintiff and

15 HERITAGE UNION LIFE INSURANCE COMPANY

16 is the Defendant.

17 I further certify that the said DAVID

18 SIMON was by me first duly sworn to testify the

19 truth, the whole truth, and nothing but the

20 truth in the cause aforesaid; that the testimony

21 then given by said witness was reported

22 stenographically by me in the presence of said

23 witness and afterwards reduced to typewriting by

24 Computer-Aided Transcription, and the foregoing

1 is a true and correct transcript of the
2 testimony so given by said witness as aforesaid.

3 I further certify that the signature to
4 the foregoing deposition was reserved by counsel
5 for the respective parties.

6 I further certify that the taking of this
7 deposition was pursuant to notice and that there
8 were present at the deposition the attorneys
9 hereinbefore mentioned.

10 I further certify that I am not counsel
11 for nor in any way related to the parties to
12 this suit, nor am I in any way interested in the
13 outcome thereof.

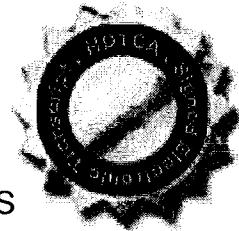
14 IN TESTIMONY WHEREOF: I have hereunto
15 set my hand and affixed my notarial seal this
16 9th day of January, 2015.

17

18

19

Richard S. D'Antonio



20 NOTARY PUBLIC, COOK COUNTY, ILLINOIS
21 CSR LIC. NO. 84-004344

22

23

24

25

1 McCorkle Litigation Services, Inc.
2 200 N. LaSalle Street, Suite 2900
3 Chicago, Illinois 60601-1014

4 January 9, 2015

5 The Simon Law Firm
6 Mr. Adam M. Simon
7 203 East Wacker Drive, Suite 2725
8 Chicago, Illinois 60601

9 IN RE: Bernstein v. Heritage
10 COURT NUMBER: 13 CV 3643
11 DATE TAKEN: January 5, 2015
12 DEPONENT: Mr. David Simon

13 Dear Mr. Simon:

14 Enclosed is the deposition transcript for the
15 aforementioned deponent in the above-entitled
16 cause. Also enclosed are additional signature
17 pages, if applicable, and errata sheets.

18 Per your agreement to secure signature, please
19 submit the transcript to the deponent for review
20 and signature. All changes or corrections must
21 be made on the errata sheets, not on the transcript
22 itself. All errata sheets should be signed and
23 all signature pages need to be signed and notarized.
24 After the deponent has completed the above,
 please return all signature pages and errata
 sheets to me at the above address, and I will
 handle distribution to the respective parties.

 If you have any questions, please call me at the
 phone number below.

 Sincerely,

 Margaret Setina Court Reporter Present:
 Signature Department Vicki L. D'Antonio
 cc: Mr. James Stamos

A	22:12 amended 87:16 amount 20:18 21:1,3 24:3,23 25:4 30:11 Amy 2:17 analysis 58:9 annual 20:15 25:10 annually 20:14 25:8 answer 24:7 33:11 35:20,20 47:7 answered 45:21 47:14 answers 48:7 105:16 anybody 35:10 45:15,16 80:16 80:19 85:6 anyway 22:8 54:15 appealed 5:14 appear 105:17 APPEARANCES appeared 106:9 appears 56:17 89:4 applicable 108:12 Applicant 89:5 application 25:3 29:2 88:20 89:1 applications 29:5 applied 20:19 apply 22:6,18,24 23:4,5 Appreciate 23:17 approach 78:18 79:6,9,11,16 79:21 80:4 Arbitrage 5:19 15:11,14 17:7 101:3,12 arithmetic 58:23 arranged 53:7 Article 92:19,20 93:7,8,14 94:2 aside 70:19 95:6 asimon21@att.net 2:12 asked 21:22 22:3 32:13 34:5,15 41:19,21 43:22 45:21 46:2 47:14 54:13 67:3,6 72:16 77:23 84:17 86:3 105:16 asking 19:17 23:22 55:2 57:11 59:5 70:4,9 98:16 assert 33:19 35:1 asserted	34:8 asset 12:3 assets 11:17 64:12 76:11,16 assigned 45:23 assist 70:21 72:8 assistant 96:9 99:1 assisted 14:17 associated 9:8,9,11,11 10:17 12:20 13:1 Associates 26:1,3 association 16:5 assume 32:7 48:10 60:16 62:10 67:11 71:7 74:1 assumes 43:14 assuming 34:14 astonishing 47:5,9 attached 2:1 attempt 59:14 attend 22:4,5 attention 74:24 75:2 92:19 attorney 11:7 12:21 13:6,8 31:21,22 32:18,23 33:18 35:3 37:1 38:7 39:18 63:22 67:3 69:17 103:16 attorney-client 34:9 83:2 attorneys 44:22 107:8 August 63:4,10,11 available 99:6 103:22 aware 16:15,20 17:4,12 18:4,12 19:5,20 25:2 27:8,12,22 28:6,19,22 55:24 56:2,3,9,9,15,21 56:22 57:2,5,12,13 57:19,22 58:6 60:7 60:12,17 62:2 63:13 67:1,13 68:14,23 71:20,23 72:10 73:9,14,16 73:19 74:4,6 77:9 79:4 awful 47:4	B B 1:6 3:7 93:6,24 94:7 105:6 back 8:1 25:6 36:3 39:13 43:2 44:5 48:19 50:7 78:15 93:13 100:20 101:22 103:17 bank	15:24 29:12 76:24,24 77:1 Bankers 16:11 18:9,13 29:12 77:1 104:6 based 24:4 33:12 34:9,20 35:18 basis 21:8 22:22 Bates 86:17 88:19 90:7 92:2 bear 75:11 becoming 79:4 behalf 43:19 62:9 83:21 89:2 belief 17:19 81:13 believe 4:13 7:14 9:13 14:3 17:10,23 18:14 19:6 20:21 21:13 22:15 26:4,23 28:16 30:4,8,21 34:14 35:11 37:5 37:21 38:4,5,24 39:6 40:20 42:13 43:16,24 48:23 50:9 53:7,22 57:21 59:9,16,20,21 61:17 62:21 63:20 65:23 67:5 74:19 77:4 79:22 80:9 81:11 82:1 96:19 97:9 100:4 believed 30:6 beneficiaries 48:22 beneficiary 20:8 27:9,13,18,19 27:20,24 43:6,7,11 50:6,21 52:18 61:8 64:23 65:10,11,17 66:19 72:11,19,23 73:4 75:16 83:15 87:2,4,10,16 101:8 104:10 benefit 11:24 16:21 17:6,9 17:16 19:4,16 20:24 24:2 25:4 29:3,6,10,11,14,21 30:10,20 43:8,11 52:17 87:9,19,21 104:4 benefits 11:20 16:22 19:12 104:8 Bernstein 1:3,4,5 2:17 7:23 8:9 8:19,24 9:4,19 12:20 13:1,24 16:6 16:17 25:15,20 26:7 27:8 28:1,12 28:24 30:24 31:15 32:6 34:7,10 36:8 37:19 39:20,20,22 41:7,15 46:17,17 48:1,2,14,15,15,18 50:3 51:12 53:11 56:12 57:15,16 60:23 61:7 62:8,10 63:10 64:2,4 66:10 66:18,24 67:6 68:9 70:21 71:21 73:11 74:1,2 78:20 79:12	79:13 80:9 82:23 87:4,10,17,18 88:7 89:6,10,17,22 94:7 94:7,8,8 97:5 98:13,20 99:14,15 100:11,12 103:11 105:3,4,5 106:13 108:7 Bernstein's 19:8 20:2 25:21 39:19 46:18 48:2 68:8,11 79:20 87:3 102:23 Bernsteins 31:6 BERSTEIN 79:4 best 31:6 41:12 53:17 54:4 better 52:5 beyond 55:20 57:12 big 47:10 Bill 2:16 27:2 71:2 blank 93:11 95:7 blanks 92:8 board 6:21 12:6 100:19 101:6 boards 11:10,12,14 12:9 books 103:24 borrow 15:24 16:2 26:24 borrowings 20:23 bought 7:17,21,22 Boulevard 77:1 Brad 39:2 Breach 6:16 break 39:12 78:13 bring 103:7 bringing 4:15 broke 44:23 brokerage 15:13 26:4 brother 13:22,23 14:16 brought 43:2 64:4 83:18 Bruce 4:9 BT 86:17 88:19 90:7,7 90:12 92:2 bury 52:5 business 9:4 12:12 13:13,18 14:1,4 15:1,2 25:22,24 26:2 44:13 46:18 47:10 48:3 71:17,18 businesses 25:23 buy	24:12 Bye 23:18 C C 93:6,24 106:3 calculate 58:19 California 10:10,19 call 21:23 44:17 45:24 47:11 53:5,5,8,10 53:13,16 54:12 56:13 60:14 80:21 108:19 called 1:14 43:22 47:6 53:8 53:9 97:19 100:18 calls 58:5 Cambridge 26:1,2 candidates 45:19 capacity 9:1,2,5 12:24 13:4,17 15:6 Capitol 16:10,11 18:5,9,13 29:12 77:1 104:6 care 41:10 76:12,17 77:21 101:8 carriers 43:9 case 4:18,21 6:15 21:12 72:3 cash 26:24 catch 12:10 cause 105:15 106:10,20 108:12 cc 108:24 cease 104:2 certain 55:5 106:10 certainly 22:11 35:12 60:13,21 certification 103:16 certified 1:18 105:15 certify 36:4 105:14 106:7,17 107:3,6,10 change 20:22 21:2 27:13,24 28:2 37:3 42:1 43:5,5,7 50:6 54:6 72:19,22 73:4 changed 27:18 36:14 40:10 48:22 84:8,9 96:22 97:10 changes 21:3 40:21 41:24 108:14 changing 66:19 check 95:4 Cheryl 47:20 91:7
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Chicago 1:20 2:5,11 39:21 49:9,11,12 108:2,6	77:4 conducted 91:7 conference 53:7,10,13 60:14 confused 16:9 78:5 constructive 65:9 contact 45:12 62:7 contained 90:12 contemplating 66:18 contend 36:9 contingent 27:20 52:18 continuation 36:10 continue 11:1 continues 5:20 continuing 75:11 contract 6:16 control 7:7,12 8:2,4 35:6,13 controls 7:8 34:15 35:14,17 conver- 49:24 conversation 25:19 26:14,18,20 28:24 30:24 31:15 31:19,24 32:11,17 32:19,21 33:8,12 33:13 34:2,6,11,17 36:8,10 38:9 41:8 41:14 42:19 48:18 48:20,23 50:3,22 50:24 51:1,6,11 52:2,9,15 53:3 54:4 55:19,24 60:13,14,22 61:4,6 61:22 62:23 63:8 64:3,14 67:17 68:12,16,20 79:19 80:2,6,15 84:16 conversations 32:12 59:12 62:12,15 62:17 63:16 68:4 79:4,5 converse 42:21 conversed 20:13,14 Cook 106:6 107:20 copy 43:23 44:1,9,15,16 44:19 45:2 46:8,10 46:12 47:19 49:17 67:4 80:16,19 97:4 99:15 100:1 103:13 corner 89:11 corporate 10:16 corporation 34:23 51:16 52:10 correct 5:15 6:6 16:13 28:8 30:8 42:10 44:7,8 44:10 46:7 49:14 56:12 58:13,17 59:4,7 60:15 61:1	65:6 66:4,13 67:4 68:15,22 69:2 72:20,21,24 73:7 75:13,17,18,19 76:4 83:13,16,17 86:1 95:12,13 96:14,15,18 97:20 98:9,14 102:6,20 107:1 corrections 108:14 correctly 16:8 23:24 counsel 7:1 107:4,10 counsel's 22:20 County 106:3,6 107:20 couple 77:2 94:10 course 16:5 22:7 23:7 31:18 63:15 64:3 69:20 85:17 court 1:1 21:6,17,20 22:1 22:13,22 23:12,16 23:18 58:16 105:1 106:12 108:8,22 Courts 1:16 created 90:21 97:19,21 creating 39:7 creation 62:20 CSR 1:23 107:20 currently 7:3 12:14 57:12 93:11 94:6 custom 101:24 CV 1:10 105:10 108:8	71:2 dead 77:21 deal 36:4 47:10 dealing 19:18 dealt 75:13 Dear 108:10 death 11:23 16:23 17:2 19:3 20:24 24:16 29:3,11,13 30:7,10 30:20 33:20 34:13 52:17 57:15 62:14 67:20,22 68:5,8,11 78:22 79:20 80:1 87:9,19,19,21 92:21 93:15 Debbie 99:3,22 debt 26:8 76:19,21,21 debts 8:17 decades 78:6 December 79:23 decided 66:20 declaratory 39:15 defendant 1:13 2:13 6:8,10 105:13 106:16 defined 14:18 definitely 70:9 Denver 6:3,5,10 Department 108:23 depending 100:19 Depends 71:12 75:3 deponent 108:9,11,14,17 deposed 4:10,18 6:24 deposition 1:14 3:10 4:16 6:1 21:16,24 22:7 23:2 23:10 48:5 69:18 69:20,21 85:23 86:10,11,16 88:12 88:13,18 90:1,6 91:20 92:1 104:17 105:14 107:4,7,8 108:11 depositions 1:17 22:18 23:1 descendants 55:7 93:1,19 describe 15:14 86:23 88:24 90:11 91:1,11 described 55:20 60:14 72:9 describing 32:6 60:24 design 28:1 designate 16:8 87:14 designated 28:11 93:2,20 95:2	designation 72:11 87:2,5,10 desires 40:24 66:3 desk 94:19 determine 45:20 died 37:15 52:24 53:18 62:8 68:3 77:17 79:12 different 69:8 diligent 46:16 direct 92:18 directing 94:1 directors 11:10,12 discuss 64:17 82:14,15 discussed 18:23 29:2 33:5 36:13 82:18 discussing 18:3 19:1 26:6 50:2 52:14 67:18 discussion 14:12 21:4 23:19 25:7 36:1 39:10 51:19,22 52:20,23 55:18 63:1 64:11 76:10 78:11 84:23 discussions 70:20 disinherited 55:6,11 disparagement 4:19 disputes 54:17 dissolution 52:15 73:13 dissolve 51:15 52:3,10 dissolved 51:18 distributed 93:4,22 distribution 108:18 distributions 55:16 District 1:1,1,16 6:14 105:1,1 106:11,12 divide 92:21 93:15 Division 1:2 105:2 106:13 document 14:17 40:5,8,22,23 44:6,18,19 59:15 60:5,9 63:14 81:6 81:10 86:20,23 91:5 92:3,17 94:14 95:6,9 97:19 98:3 98:3 100:1,18 101:5 102:18 documentation 13:20 73:21 documents 14:20 44:3 59:23 81:15 86:7 100:23 doing 10:2 37:1 101:20 102:19 dollars	8:21 17:19 24:13,13 Don 69:9,10 Donald 60:3 Dov 7:21 8:8,12 25:20,21 26:15 draft 40:5,22 41:11 42:4 84:8,13 91:9,13 92:16 94:2 97:11 99:20 100:7 drafted 57:7,13 69:23 70:1 drafts 44:14 97:1 Drive 1:20 2:4,10 108:6 DTD 1:4 105:4 106:14 due 24:16 duly 4:1,4 106:18 duty 35:1
				E	
					East 1:19 2:4,10 108:6 Eastern 1:2 105:2 106:12 easy 48:13 echoed 64:7 effect 40:10 42:1 69:1 73:4 either 26:23 39:6 50:22 65:23 83:15 electronically 98:17 Eliot 2:17 64:3 80:12 83:8 85:10,10 94:8 emotionally 55:3 employed 7:3 9:20,23,24 employee 87:20 employees 103:12 employer 86:19 87:22 88:20 Employer/Employee 87:8 enclosed 108:11,12 enter 91:3 entered 5:14 Enterprises 4:23 5:24 7:4 11:15 15:8 entire 85:23 87:12 entitled 22:16 88:20 entity
		D			
		D 3:1,10 86:11 88:13 90:1 91:20 D'Antonio 1:18,23 105:15 106:5 108:23 database 90:14,22,23 91:2,4 date 28:11,11 30:4 53:16 63:3 88:1 90:20,21 93:10 94:5 100:19 101:16,17,19 108:8 dated 56:23 87:24 daughter 9:12,14 14:6 David 1:14 3:3 4:3,9,22 39:17 85:20,23 86:9,15,16 88:11 88:17,18 89:23 90:5,6 92:1 105:19 106:9,17 108:9 day 1:20 40:20 41:9 42:12,13,14 90:19 100:17 105:21 106:8 107:16 day-to-day			

12:1 Ernie 4:22,23 errata 108:12,15,15,17 essential 101:14 estate 22:4 33:22,24 34:14 34:15,16,23 35:7 35:13,13,16,18 54:6,7 Eve 2:17 event 50:1 events 24:17 everybody 54:3 evidence 23:4 43:15 61:12,14 61:15 65:7 ex-business 71:13 exact 8:15 77:5 100:19 examination 1:15 3:4,4,5 4:6 85:21 94:11 examined 4:4 example 15:23 exception 55:12,15 Exchange 76:24 exclude 21:22 excluded 69:2 exclusion 21:14 22:6,17,24 execute 38:7 39:22 executed 36:17 40:7 44:16 45:2 56:12 57:15 63:2,9 97:10 100:2 execution 38:3 executor 89:9 exercise 102:8 exhibit 3:10 46:12 86:10,12 86:16 88:12,14,18 89:24 90:2,6,9 91:12,18,21 92:1 92:19 93:14 94:3 94:13 95:10,15,22 96:3,7,11,18,20,22 97:2,4,20 98:11,18 exhibits 3:15 86:1 exist 34:7 63:14 existed 16:16 17:5,14 28:8,9 45:20 47:19 56:1 68:15 existence 17:12 20:5,11 25:15 37:11 50:17,18 63:17 67:1,14 75:12 exists 44:21 expertise	11:8 explain 33:15 Financial 84:17 85:1 explanation 15:18 eyes 84:12 F face 20:17,18 21:1,3 24:22 30:11 facilitate 102:19 fact 64:11 82:15 facts 40:2 43:14 61:11,14 65:7 79:7 fair 75:9 familiar 39:24 family 43:19 46:17 49:13 54:10,17,19 62:9 71:4 family's 58:11 far 27:10 33:21 54:21 75:14 father 9:12 father's 19:23 20:1 father-in-law 38:14 Federal 23:3 felt 54:18 Ferguson 39:2 Fidelity 77:1 fifth 58:15 Fifty 7:6,7 figures 8:16 file 19:3,16,22 25:9 94:15,17,18,24,24 95:1,2,2,10 100:7 100:14 filed 19:11 32:5 83:12,12 99:22 files 44:19 94:16 filing 19:10 82:18 84:23 fill 72:24 73:5 filled 72:20 89:3 95:19 96:5 filling 37:2 87:4 fills 87:2 final 40:13,16 42:7 finalize 39:22 finalized	40:6 finance 11:5 16:4 Financial 4:24 financially 54:24 55:3 find 11:7 45:1 47:5,9 48:6 48:6 70:6 95:12 96:20 fine 31:8 firm 2:9 12:17 44:14,22 44:24 46:22 47:18 57:13 58:4 63:24 108:5 first 4:4,14,15,15 7:21 8:23 9:7,9,11,18 10:10,19 12:24 18:4,12,22,24 20:5 25:14 27:7 28:23 29:7 30:23 31:14 31:24 32:11,17,21 33:13 34:6,11,17 41:20 42:20 46:23 59:13,14,18,20 60:7,24 62:1,22 63:13 75:24 78:18 78:23 79:9,11,16 79:19 80:2,5,23 81:4,5,7,9,11,14 92:8 106:18 five 54:9 55:21 66:7,21 94:6 Flanagan 71:15 Floor 2:4 Florida 49:9 53:20,23 59:24 Foglietta 2:16 34:3,18 35:16 49:18 85:9 folder 94:23 Foley 46:20,24 47:13 folks 38:20 follow 44:21 92:14 follow-ups 94:10 following 10:6 36:7 73:11 76:15 93:4,22 follows 4:5 For-profit 11:13 force 17:1 30:6 foregoing 105:16 106:24 107:4 form 18:6 19:10,10,23 40:13,15,16 41:4 41:24 43:1,1,8,11 43:15 72:11,14,19 72:24 73:5 87:3,12 87:21 88:22 formal 68:9 forms 27:24 28:2 42:24 43:6,7 50:6 73:14 74:14	forth 50:21 forward 23:12 70:23 forwarded 75:5 found 91:6,8 Foundation 11:16 frankly 34:12 Friedstein 1:8 80:10 94:8 105:8 front 103:17 funded 64:17 100:20 101:18 101:19 104:2,6 funding 100:22,24 101:4 funds 43:12 furniture 103:24 further 3:5 55:18 88:8 91:1 94:9,11 106:17 107:3,6,10 G general 7:1 10:16 15:12 26:4 31:3 32:13 75:7 84:22,24 getting 61:15 65:13 gifts 71:4 girlfriend 54:22 66:19 gist 26:19 54:5 give 40:10 42:1 84:14 97:4 given 42:4 69:1 89:13 105:16 106:21 107:2 Glencoe 76:24 go 14:10 21:6 35:21 36:16 40:5 52:17 54:8 67:24 69:8 75:2 78:14 95:11 100:20 going 8:14 14:18 32:10 33:10 54:5 68:10 72:18 78:14 90:8 good 19:17 gradations 70:14 graduate 10:4 graduation 10:7 grandchildren 54:7,23 greater 24:6,23 guess 14:16 19:19 57:11 60:3 70:17 73:2 guessing 70:15 Guys	85:8 H habit 101:24 half 8:8,8 Hammond 37:5,7,8,24 38:13 hand 107:15 handed 40:24 handful 11:6 handle 11:8 108:18 handwriting 92:7,11 96:8 handwritten 71:20 hang 96:23 happened 42:3 47:8 60:17 99:12 happens 103:15 hard 34:4 49:18 Harris 76:24 head 47:2 77:3 95:4 heading 87:7 hear 34:4 49:18 85:15 heard 21:24 44:14 61:1 67:13 held 65:9 help 71:10 helped 28:1 38:7 Henry 38:22,23 hereinbefore 107:9 heretofore 106:7 hereunto 107:14 Heritage 1:11 105:11 106:15 108:7 highly 30:22 home 46:18 48:2 Honor 23:14,15 Honorable 2:17 Hop- 37:10 hoped 54:9 Hopkins 36:13,16,19,20 37:4 37:11,17,20 38:2,6 38:7,17 39:21 40:6 44:6,10,17,20,23 46:21 97:9,12,13 97:15,16,22 98:4 98:17 99:16,24	HORAN 2:3 63:4,6 hour 1:21 hundred 17:18 I Iantoni 1:7 80:12 105:7 ID 89:1,13 idea 44:11 60:20 62:5 identification 86:13 88:15,21 90:3 91:22 identified 81:1,3,18,21,24 82:1 82:11,15 84:18 85:1 98:8 identify 82:5 89:12 ignored 64:21 Illinois 1:1,19,20 2:5,11 6:14 10:11,13 39:21 105:1 106:1,7,12 107:20 108:2,6 implied 68:14 important 47:4 impression 60:23 in- 56:6 in-house 11:9 including 98:8 increase 25:3 independent 101:23 indicated 64:12 indicating 43:12 indifferent 75:21 76:6,7,9,14 77:24 78:1,3 indirect 75:16 individual 1:6,6,7,8 5:15 16:2 34:22 87:1 105:6,6 105:7,8 individual's 103:14 ING 6:3 initiated 17:21 18:15 30:3 80:21 inside 55:5 instance 73:21 instances 24:15 55:6 73:16 Institutional 11:16,20 instruction 99:9 insurance 1:3,12 9:13,17 12:13 13:13,18,21 14:21 14:24 15:1,12,21
--	--	---	---	--	--

16:7,15 18:3 24:12 24:14 26:4 27:21 29:5,7,8,9,20 43:9 49:3 50:17,24 52:16,19,24 54:8 55:19 56:7 64:13 69:19 72:3,12,23 73:6,10 74:13,17 74:18,23 78:18,24 79:17,21 80:17,20 80:24 87:17 89:2,6 89:14 91:14 97:17 103:1 105:3,12 106:14,15 insured 16:16 87:1 intend 46:11 intended 66:5 intending 12:23 Inter-Ocean 16:21 17:11 interact 37:19 interaction 36:11 interactions 32:6 interest 7:11,12,16 interested 107:12 interference 6:17 interrupt 53:14 intervening 24:17 57:20 Intervivos 11:16 introduced 54:11,12 investigate 43:20 investigated 46:22 47:17,23 investigation 45:19 involve 4:17 involved 12:16 13:12,18 14:24 22:3 34:22 38:3 55:23 71:18 involving 6:4 irrevocable 1:3 27:21 29:4 52:19 87:17 89:2,6 91:9 91:13 97:17 105:3 106:13 issue 47:4 71:17 issues 52:4	37:5 Joielle 2:16 Joseph 71:15 jstamos@stamostr... 2:6 Judge 21:19 22:2 judgment 5:13 39:15 July 14:9 June 39:17 50:1 89:18 90:19 91:15	K K 106:3 Kahana 7:22 8:8,12 25:20,21 keep 44:15 68:10 99:15,20 99:24 Kentucky 4:20,23 kept 103:13 Kevin 2:3 78:10 khoran@stamostr... 2:6 kind 10:15 11:3 47:5 71:10 Klink 19:7,21 20:6,12 25:16 knew 27:10 74:11 82:16 know 8:1,15 9:10 15:19 16:6,11,12 17:22 18:1,15,18,19,24 19:15 22:20 28:9 30:19 32:13 33:23 35:15 37:10,10,14 37:23 38:1 39:4 43:22 45:6,7,9,24 46:10 47:1,12,24 48:4,8,9 50:5 53:19 54:22 55:4 56:13 57:17 60:2,2 60:10,16 62:11 65:1,3 66:14,22 67:9,11 69:9,13,15 69:24 70:7,8,10,13 74:1,5,5,10,13 76:9 79:2,8,18 80:3,7,13,22,23,24 81:3,7,8,23 84:6 95:3,22 97:8,18 99:7,13 knowledge 6:23 16:24 17:3 25:1 25:5 37:18 38:2 44:2 62:1 70:14 74:16 78:17 82:17	L L 1:18,23 87:10 105:15 106:5 108:23 lapse 75:14 lapsed 73:17 74:11 75:22,23 75:24 76:3 77:10 77:17 78:3	Lardner 46:20,24 47:13 LaSalle 108:1 late 5:3 law 2:9 10:3,4,7,8,9,15 11:1,3 12:15,17 34:12 36:24 39:20 46:19,22 47:18,22 71:6,8 108:5 Lawrie 38:22 lawsuit 6:4 lawyer 10:13,18 15:2 37:4 37:16 lawyers 10:18,23 44:12 45:10 laying 94:19 learn 18:2 20:4 75:24 learned 19:7 20:5 38:10 56:11 63:17 77:17 learning 19:1 leave 12:23 35:4 54:6 66:20 leaving 93:1 left 42:5 44:9 55:21 let's 14:10 21:6 32:3 36:7 50:15 51:9,15 52:3 69:8 70:19 93:7 leverage 15:22 Lexington 19:4,8 51:16,16 52:3 86:18 87:8,20 liability 11:19 LIC 107:20 License 1:24 life 1:11 5:19 6:3,5,9,10 6:19,20 9:13,17 11:15 12:7,12 13:20 14:21,24 15:11,12,21 16:7 16:11,16,21,21 17:6,7,11 18:3,5,9 18:13 20:7 24:14 27:21 29:4,16,21 52:19 54:8 56:6,6 77:1 80:20 91:13 97:17 101:3,12 105:11 106:15 lifetime 76:3 77:9 likewise 73:3 limited 11:19 Lincoln 16:21 17:6 29:6,10 29:21 43:7,10,21 104:4,8 Line 89:5,8 lineal 55:7 lines	95:18 Lisa 1:7 80:9 94:8 105:7 list 12:9 listen 21:15 23:13 listening 21:10,18,19 22:10,19 23:9 litigating 50:18 litigation 5:10 6:11 10:16 12:5 47:5 57:6 58:10,11 58:14 63:15 71:2,7 71:10,12,16 82:19 83:4 84:23 108:1 little 34:4 49:18,19 living 49:9 93:11,19 94:6 LLC 12:2 LLP 2:2 loans 24:4 locate 59:14,19 60:5 94:22 95:21,24 located 94:14 long 7:11 13:7 15:18 44:13 50:5 longer 35:2 37:11 44:20 49:12 103:22 Longevity 11:16 look 45:13 47:2 93:7,13 94:13 95:15 96:22 103:8,8,10 looking 18:18,19 96:3 lost 5:13,14 lot 52:4 54:18 lying 94:19	M M 2:9 108:5 maintain 103:9 maintained 94:21 102:4 making 29:2 79:21 manila 94:23 manner 14:22 93:5,23 Margaret 108:22 mark 86:9 88:11 89:23 91:18 97:14 marked 85:24 86:12,16 88:14 88:18 90:2,6 91:21 91:24 95:10 married 14:5 materials 59:24 95:6	math 58:22 59:2 matter 101:10 McCorkle 108:1 mean 9:1,10 33:14 35:9 38:8 43:5 45:18,24 47:3,7 55:4 64:16 70:13 74:8 94:17 94:17,21,21 meaning 95:21 means 65:1 meant 78:2 meeting 40:19 42:7,18,20 meetings 99:24 member 6:23 87:2,4 members 46:18 71:4 membership 87:3 mention 49:2 mentioned 12:8,9 48:24 49:3 107:9 met 9:18 39:19 mid 18:14 19:5 million 8:21 17:19 20:21 24:2,5,6,13,13,15 24:17,18,24 25:4,4 30:14 mind 4:14,15 49:19 54:14 mine 92:23,24 93:17,18 minute 32:1,3 misassumptions 5:16 missed 77:7 misunderstanding 77:8 misunderstood 61:20 mocked 36:15,23 modifications 96:10 98:7,19 modified 40:23 90:18,22 98:1 98:2 moment 35:22 money 26:8 71:18 months 10:11 53:18 68:17 move 36:7 moved 100:5 103:23 multiple 74:6	N N 3:1 108:1 name 4:8,21 47:1 87:16 89:5 92:13,15 93:3 named 12:1 27:20 65:10 names 37:3 77:6 93:21 narrow 55:12,15 nature 6:15 Near 40:16 necessarily 65:8 75:1 necessary 52:11 need 15:18 18:7 43:8 46:12 52:4 108:16 needed 11:8 74:11 76:17 84:8 needs 11:6 negotiating 69:21 Neither 45:2 never 38:10 44:13 50:22 64:22 65:10,17 66:12 67:10 76:6 83:14 104:6 new 29:13 50:21 51:8 90:22 91:2,4 night 41:21 nonparty 21:12 Nope 71:24 Norman 13:24 14:16 Northern 1:1 6:14 105:1 106:12 notarial 107:15 notarized 108:16 Notary 105:23 106:5 107:20 NOTE 3:15 notes 40:21,23 notice 69:20 107:7 nuances 16:3 number 3:9 53:9 54:21 56:17 56:19 73:16 88:21 89:2,12,13,15 108:8,20 numbers 8:15	O O 106:3,3 object 8:14 15:16 55:1 57:1 58:21 59:8 objection 8:20 18:6 21:9,12 22:23 23:6 30:16 34:1,16,18,20 41:4 43:14 45:21 47:14
--	---	--	--	---	---	---	---	--	--

49:15 58:5 61:11 61:13 62:4 65:7 70:2 72:14 79:7 82:7 83:2 obligations 8:17 obtain 19:11 29:19 67:3 83:19 obtained 8:3,4,6 obtaining 79:1 obviously 44:9 71:7 96:13 99:21 occasion 26:5 42:21 72:1,10 76:7 occasionally 71:3 Ocean 17:11 offer 14:18 offered 5:23 office 45:17,23 46:21 48:3 48:19 49:7,8,12 74:18,23 75:5 101:16 offices 39:21 45:15 46:19,20 46:23 47:18,22 75:6 100:5 103:23 Oh 51:5 64:2 74:10 76:5 78:2 94:20 okay 5:17 8:13 9:3,16 12:10 15:23 16:19 18:22 21:20 22:1 23:11 24:12,19 25:24 26:5,10 28:15 29:8,15,22 30:1,13 38:10 39:1 39:3 45:1 47:12,17 49:1,10 50:11,15 51:3,17,24 52:6 53:12,24 54:3 57:11 59:11 60:4 61:24 67:24 68:18 69:8,13 70:19 74:20 75:9 76:5,20 77:12 78:6 80:11 80:14 82:3,22 84:5 84:10 85:10,13,14 86:6 88:8 92:18 97:24 98:16 100:6 102:3 104:13 old 91:4 once 63:17 74:11 one-fifth 75:15,16 ones 36:19 online 22:17 opened 75:8 94:24 operation 71:3 opinion 55:2 opposed 12:15 15:1 order 19:11 83:18	organized 32:4 originally 16:10 20:19 95:16,16 originated 13:21 97:15 outcome 107:13 outside 78:9 overruled 22:23 23:6 owed 77:4 owned 7:6,7 20:7 30:2 owner 15:8,10 43:5 101:9 101:14 102:2 104:11 owns 7:5 11:23 <hr/> P P 2:3 p.m 1:21 104:18 page 3:2,9 46:7 86:18 87:6 90:12,13,16 92:8 103:17 pages 103:17 108:12,16,17 paid 8:10 16:22 17:6 24:3 26:23 30:14 43:13 58:16 65:6 66:6,12 67:19 77:18 Pam 7:8,9 8:4 9:14 46:3 55:13 75:8 Pamela 1:6 94:7 105:6 paper 24:18 paragraph 39:17 40:4 42:6 46:16 93:8 paraphrasing 42:9 Pardon 67:21 part 7:19,21,22,24 19:13 79:3 102:14 participate 15:7 21:16 22:11,12 23:7 73:20 participated 17:8 39:6 participating 22:20 102:5 parties 107:5,11 108:18 partner 11:7 19:8 25:22 71:13 party 6:22 83:4,13,14 passed 76:1 patent 11:23 pay 14:22 15:21,24 26:8 26:15 27:1 76:10 paying 71:2 payment	5:19 15:11 17:7 24:15 79:1 101:3 101:12,14 102:14 payouts 71:16 pending 6:11,13 21:23 106:10 people 8:7 76:22 102:24 percent 7:6,7,12,24 8:2,4,7 12:18 17:18 30:15 perform 52:11 period 68:6 100:4 permitted 21:15 person 6:23 78:23 87:19 person's 47:1 personal 70:22 personally 98:21 106:9 pertaining 1:17 phone 21:18 45:23 47:11 54:1 61:22 80:8,9 80:13 85:8 108:20 physically 21:10,17 49:7 piece 24:17 place 42:20 44:16 50:20,20 53:3 79:5 100:8 plaintiff 1:9 2:7 6:7,9,18 105:9 106:14 plan 9:18 19:16 32:7 87:9 87:9,15 101:14 Plans 6:9,19,20 11:15 12:7 12:12 pleadings 64:5 please 4:8 91:19 108:13,17 108:19 point 9:3 13:12 14:5 25:2 27:12 30:21 31:3 35:2 42:1 61:5 65:15 66:8,10,23 95:17 96:4 100:21 101:11 103:21 104:2 policies 16:16,19,23 policy 16:7,11,12 17:8,11 17:17,24 18:5,9,13 18:16,23 19:6,24 20:4,7,15,17,18,24 24:2,12,20,20,23 25:8,16 26:6 29:10 29:12,13 30:2,3,5 30:11,14,22 43:12 49:3 50:13,17,24 51:2 52:16,24 54:8 55:19 60:24 61:9 61:23 64:13,20,23 65:6,11,17 66:11 72:13,18 73:11,17 74:15,18 75:12,14 75:16,22,22 77:10 78:19 80:17 83:16	83:19 101:5 104:4 104:6,8 Pooled 11:20 pooling 12:4 pools 11:23 portion 8:6 39:16 position 58:10,11 positive 84:9 possess 7:16 possession 75:10 possible 47:11 64:6 80:4 98:23 possibly 22:20 potential 21:13 practical 35:4 practice 10:15 11:1,3,4 71:6 103:18 practicing 12:15 36:24 37:12 71:8 Pre-fees 59:9 preceding 68:17 predecease 92:24 93:18 prejudice 22:14 premium 16:4 26:9,10,16,23 27:1 premiums 15:24 prepare 28:3 73:1 prepared 14:20 36:21 40:9 58:4 69:14 71:21 preparing 14:17 presence 106:22 present 2:15 21:9,10 22:14 22:16 23:7,9 25:18 33:7 51:10 107:8 108:22 presented 85:24 presumably 83:19 prevent 22:10 principal 62:7 print 91:8 printed 96:5,13,17 printer 96:14,17 prior 28:10,11,13,20,21 57:15 60:12 68:7 68:11 79:5,8 80:4 83:12 priority 76:18	privilege 33:12,18,19 34:9,10 34:13,20,21,24 35:1,7,19 privileged 31:20 32:19,20,22 33:2,16 36:9 probably 12:17,18 20:14 45:16 48:16 65:8 74:21 75:7 100:21 102:7 103:13 problem 31:10 Procedure 1:16 proceed 23:3,12 proceeds 54:8 58:15 61:23 64:19 65:5 66:11 67:18 79:1 83:19 83:20 process 19:22 50:7 processor 44:16 95:17 96:1,5 96:17 produce 67:12 produced 72:2 product 14:18 professionally 12:20 13:1 program 5:9,16,17 14:21 15:15 16:3 102:5 103:2 104:3,7 Promote 15:11 promotes 12:3 properly 102:8 properties 90:17 property 92:22 93:16 Proskauer 57:7,13 58:4 provide 69:22 provides 23:2 proximate 79:24 prudent 67:3 Public 105:23 106:5 107:20 pull 46:6 purchased 103:1 purchasing 71:4 pure 39:8 purported 62:3 purportedly 60:8 pursuant 1:15 98:19 103:1 107:7 put 90:19 100:8,13	<hr/> Q question 18:11 24:8,19 35:20 36:4 65:3 96:12 questioning 22:21 85:20 questions 19:17 32:14 33:11 48:7 78:15 85:16 85:18 88:8 105:16 108:19 quick 22:16 quicker 52:5 <hr/> R race 65:2,5 rated 30:22 read 22:8 69:3,5,7 82:11 87:7,11,12 89:15 92:20 93:9,14 94:3 105:14 reading 22:17 realize 99:21 really 47:8 54:2 reason 54:12 69:5,7 99:19 reassert 34:19 recall 25:13 26:11 42:8 53:17 54:4 60:4 79:3 84:19 91:5 receive 58:14 59:6 87:19 received 36:13 67:10 recognize 88:3 89:19 90:8 recollection 86:4 101:23 record 14:10,13 21:5,6 23:20 35:21 36:2,3 39:9,11 78:12 85:19 87:12 89:16 92:20 records 18:18,20 43:10,20 72:2 91:4 102:18 102:19,22 103:7,8 103:10,24 reduced 20:24 24:16 106:23 recentered 90:24 reference 50:13 referred 31:13 61:21,23 64:15 67:14 68:16 referring 5:18 49:15 54:16 61:8 78:4 refers 46:5 reflect 40:24 refuse 33:10 regard 24:20 31:12,23 33:11 35:3,19 50:21
---	--	--	--	--	--

73:21 78:19,24 regarding 32:24 34:10 70:20 72:12 74:14 regularly 28:5 reinstated 73:18 74:12 reinstatement 73:22 74:3 relate 19:12 related 6:20 20:2 107:11 relationship 64:19 relationships 38:17,19 release 8:16 relevance 8:14 15:16 55:1 58:10 64:18 relevant 65:16 86:7 remainder 91:11 remains 33:15 remember 4:16 18:24 34:12 53:8 63:24 66:15 66:17 68:20 101:20,21,22 remembrance 84:22,24 remove 41:22 removing 42:23 repaying 76:18,21 repeat 34:3 replace 41:22 replacing 42:24 reported 1:23 28:12 68:13 106:21 reporter 1:19 105:15 108:22 representation 23:8 representing 2:7,13 64:2 69:17 83:23 reps 101:13 requests 72:22 required 102:13,16 res 64:9 Reserve 104:15 reserved 107:4 resolved 5:10,12 respect 46:23 respective 107:5 108:18 respectively 93:2,20 restate 18:11 retained	3:15 return 108:17 returned 99:23 review 72:1 100:19 101:5 102:11 103:4 108:14 reviewed 42:7,13 101:6 revisit 68:7 revived 73:17 revolving 4:19 Richard 19:7 right 7:15 8:23 10:12 14:15 15:9 24:18 25:2,6,12,18 26:21 28:6 29:17 30:5,23 32:16,21 34:24 36:18 37:16 39:13 39:18 40:2,8,17 41:5 42:16 45:11 48:17 49:4 51:8,19 52:8 53:2,20 56:24 57:19,24 58:2 59:3 59:5,11 62:14 64:16 66:24 68:2 68:23 73:9 76:8 77:16,22 78:14 79:23 80:18 81:10 81:10 83:21 84:15 85:5,15 93:8 95:22 98:4 100:7 102:17 Robert 60:3 80:8 82:1,8 role 19:18 Rose 57:7 63:20,21 64:1,5 65:23 roughly 58:15 row 56:19 RPR 1:23 Rule 22:24 23:1,5 rules 1:15 21:14 22:6,9,17 23:3,4 S S 1:4,5,7 3:7 94:7 105:4,5,7 S.B 19:4,8 51:15,16 52:3 86:18 87:8,20 S.T.P 4:22 5:24 7:4,13 11:15 15:8,10 102:15 sales 13:21 Sampson 4:23 Sanders 69:9,10 saw 27:24 57:6 84:6,11 101:15,18 saying 24:11 30:2 66:16,17	68:20 77:16 says 23:1 24:13,18 42:6,9 46:5,15 86:18 90:15,18 92:11 school 10:4,7 screen 91:8 screenshot 90:13,16 seal 107:15 search 91:7 searches 46:16 second 6:1 7:22 14:11 38:10 39:9 49:5 53:15 78:10 81:14 96:24 secretary 37:2 47:6 secure 108:13 Security 6:3,4,10 see 16:1 43:11,22 44:17 46:6 47:19 49:16 57:9 61:5 70:19 76:15 81:18 82:10 84:13 92:7 96:10 100:13,15,16 101:17 103:19,19 seeing 98:1 101:21,22 seek 69:18 seen 49:14 72:3 81:5,10 81:15,20 86:20 88:22 92:3 100:21 seldom 49:8 self-employed 10:1 sell 14:21 send 72:23 73:5 74:14,17 sending 38:14 sense 64:8 sent 72:11 74:22 sentence 93:9 94:3 sentiment 64:7 separate 92:22 93:16 September 68:3 79:12,15 90:20 90:23 sequentially 41:23 series 56:11,14 100:23 serve 13:7 served 69:19 service 11:5 servicer 69:19 Services 108:1 serving	15:1 set 107:15 Setina 108:22 share 14:3 97:11 sheets 108:12,15,15,18 Shirley 41:20 89:10,17,22 92:11,13 Shirley's 56:9 92:13,15 short 39:11 78:12 shorthand 1:18 105:15 show 49:22 86:6 88:10 showed 19:21 20:6 36:12,18 57:9 showing 86:15 88:17 90:5 91:17,24 Si 38:6 87:3,3 90:17,17 91:14 92:11,12 97:19 99:10 Si's 59:23 sic 10:9 sign 42:24 signature 56:17 89:19,21 103:17 107:3 108:12,13,14,16 108:17,23 signatures 88:3,5 signed 28:2 43:3,4 44:6 87:18,23 89:17 108:15,16 significance 58:3,7 64:18 significantly 26:7 Simon 1:3,6,14 2:9,9 3:3,4 3:10,15 4:3,9,22 7:8,9,23 8:9,14,20 9:4,18 12:17,20 13:1 15:16 16:17 17:13 18:6,23 19:1 19:7 21:8,11,11 22:13 23:11,14 25:15 26:7,15 30:16 31:3,5,9,15 34:1,5,6,8,19 35:1 35:8,11,21 37:19 38:16 39:18,19,19 39:20 40:11,11,18 41:2,4 43:14 45:21 46:8,18,21 47:14 47:18,20 48:2,15 48:18 49:15 50:3 53:11 54:5,11 55:1 56:12 57:1,14,16 58:5,21 59:8 60:23 61:7,11 62:4,8 63:10 65:7,19 66:1 66:10 68:7,9,11 70:2,7,17,21 71:21 72:14 74:2 75:8 78:20 79:7,13,20 82:7,21 83:2,7 85:7,12,16,18,19	85:20,22 86:9,9,11 86:16 87:10,17,18 87:23 88:7,11,13 88:16,18 89:6,23 89:23 90:1,4,6 91:18,20,23 92:1 94:7,9 97:5 98:13 100:12 102:23 103:11 104:16 105:3,6,19 106:9 106:13,18 108:5,5 108:9,10 Simon's 20:7 56:6 67:22 78:22 simply 15:1 Sincerely 108:21 sit 47:15 six 8:16 10:11 sold 9:12 solely 86:3 somebody 57:7 59:24 98:22 someone's 24:16 son-in-law 39:19 sorry 18:10 20:17 33:14 41:5 45:8 53:14 67:24 78:2,4,21 79:12 85:14 sorts 70:11 sought 69:17 sound 59:3 68:9 sounds 47:4 Spallina 46:19 47:23 48:11,12 48:16 53:11 54:11 60:3,7 61:1 62:2,8 62:13,15,16 63:9 63:17,18 64:6 65:24 66:10 67:1 67:13 68:13 80:8 82:1,8 84:3,16 speak 73:18 speaking 49:19 61:13 78:6 specific 32:14 specifically 23:1 85:3 speculate 70:4,10 speculation 30:16 39:8 57:1 58:5 58:21 59:8 62:4 70:2,13 82:7 spend 12:15,17 spoke 27:7 40:20 50:9 57:23 spoken 45:9 47:13 spouses 53:11 SS 106:2 SS-4	88:20 St 2:17 Stamos 2:2,3 3:4,5 4:7 8:18 8:22 14:10,14 15:17 18:8 21:19 21:21 22:2 23:15 23:17,21 27:2,4,6 30:17 31:4,8,10,11 33:24 34:5 35:6,9 35:12,18,23 36:3,6 39:9,13,14 41:5,6 43:17 46:1,10,14 47:16 49:17,20,21 55:9 57:4 58:8,22 59:1,10 61:13,19 62:6 63:3,5,7 65:12 70:3,11,18 72:17 78:9,14,16 79:10 82:9 83:3,10 85:5,8,10,14,17 86:1,14 88:11 94:10,12 104:13 108:24 stamp 86:17 88:19 stamped 90:7,12 92:2 standard 16:4 103:18 standpoint 35:4 Stansbury 2:16 21:9 27:3,5 start 8:23 32:11 56:19 started 10:19 26:24 44:23 60:22 state 1:19 4:8 106:1,6 stated 24:1 statements 20:16 states 1:1,16 39:16 105:1 105:16 106:11 stenographically 106:22 step 78:9 steps 59:18,20 stipulated 87:20 stop 32:20,22 stopped 49:10 storage 94:20,23 store 100:9 stored 100:7,11 Street 108:1 strike 20:9 25:13 37:17 41:4 42:18 44:3 59:12 74:15 structured 11:5 submission 80:23 81:4,5,8,9,12 81:14,16 submit 43:6 108:14 submitted
---	--	--	---	--	--

43:9 SUBSCRIBED 105:21 subsequent 28:20 48:23 79:9 97:1 Subsequently 32:2 succeeding 56:18 successful 58:13 successive 56:18 successor 44:22 46:20 sued 5:6 83:8 suing 83:21 suit 4:19 83:11,12,18 107:12 Suite 2:10 108:1,6 summary 5:13 sure 12:22 17:18 26:19 35:23 45:13 62:11 63:12,18 72:15 73:2,8 75:13 80:8 85:3 87:13 94:4 97:8 surprised 82:10 surrounding 40:3 survive 33:20 34:21 92:23 93:1,18,19 survives 34:13 35:8 sus- 34:19 Sutter 36:13,16,20,20 37:4 37:17,20 38:2,6,7 38:17 39:21 40:6 44:6,10,17,20,23 46:21 97:9,12,13 97:15,16,22 98:4 98:17 99:16,24 switched 91:3 sworn 4:2,4 105:21 106:18 Sychowski 47:21 System 5:19 15:12 17:7 101:3,13	63:19 70:5 talked 25:14 39:7 45:7 66:18 85:4 97:20 104:9 talking 14:15 15:15,20 16:6 16:12 29:9,10 43:4 45:5 56:5,6 61:15 68:4 95:23 102:7 tax 19:10,12 52:4 89:1 89:13 Ted 1:4,5 42:24 46:17 48:1,2,14,14 55:13 62:10 64:2 80:9 82:23 84:4 94:6 105:4,5 Ted's 84:6 telephone 2:15 53:4 tell 7:20 16:19 19:9 28:23 30:23 38:13 40:2,17 51:24 54:1 54:3 74:7 77:5 81:9 84:10 89:4 90:11,15 telling 50:19 66:9 98:5 ten 13:9 54:7 term 17:24 terminology 23:23 terms 41:11 68:24 84:11,14 87:15 Tescher 46:19 47:22 48:11,11 48:16 60:3 testified 4:5 testify 32:8,10 86:3 106:18 testifying 34:1 testimony 22:19 23:2 34:17 40:11 60:12 86:8 101:15 103:20 106:20 107:2,14 thank 23:14,16 27:5 42:23 42:23 85:15 Thanks 23:15 104:14 thereof 107:13 thing 19:24 20:9 50:23 100:18 things 19:2 54:21 70:12,12 73:6 76:20 84:7 think 4:18,24 18:6 21:14 22:6,9 24:7,21 30:9,11 31:6 34:23 34:24 35:12 45:18 57:6 61:21,22 64:14 66:9 68:18 68:19 70:1,9,12 72:6,7 77:7 85:5 96:8 99:12 thinking 50:16 third	2:4 81:14 thought 41:21 68:19 76:16 78:2 tickets 71:5 till 100:5 time 8:3 9:7,10,11,18,21 12:14,18,19,24 14:2,23 17:1 18:22 18:24 20:5,12 24:1 24:5,22 25:13,14 27:7 28:23 29:7 30:6,23 31:14,21 36:5 44:13 48:20 49:6,10 50:2,23 52:21 53:21 55:23 56:1 61:1 62:1,22 66:20 74:18 76:11 76:13 80:1 83:11 83:12 97:10 99:22 100:5,22,24 101:4 101:7 times 4:12 59:16 to-wit 106:8 today 11:1 47:15 57:14 told 17:14 19:21 20:11 29:22 33:1 36:15 41:2,7 65:21 66:1 66:1,5,10 99:10 top 47:2 77:3 86:18 87:6 90:16 95:3 topic 26:14 69:8 tortious 6:16 transactional 14:20 transcript 105:14,16 107:1 108:11,14,15 Transcription 106:24 translated 55:7 transmit 98:17 transmitted 97:13 treatment 54:22,24 trial 23:3 tricky 65:14 tried 43:18 TRUCCO 2:2 true 83:8 86:4 107:1 Truly 60:19,21 trust 1:4 7:6,8 27:21 28:1 28:3,7,9,12,13,13 28:15,16,24 31:1 31:12,23 32:7,24 34:7 35:3 36:11,12 36:14 38:3,8 39:7 39:22 41:3,8 42:22 43:13,23 44:1,15 45:3,20 48:21 49:2 49:14,16 50:4,10	50:14,19 52:19 54:7 55:5,17 56:2 56:10 57:2,5,8,12 57:17,18,21 58:3 59:14 61:3,3,7,9 61:10,22 62:3,17 63:2,3,9 64:4,9,11 64:19 65:9,16 66:3 66:6,12,21 67:2,4 67:15,19 68:14,21 68:24 69:1,3,17 70:20 73:14 80:20 81:2 83:15,20 84:6 84:11,13 87:9,9,15 87:17,21 89:3,7,14 90:17,18 91:9,14 92:22 93:3,16,21 97:17,19 100:2 101:16 102:1 103:14,15,15 104:9 105:4 106:14 trustee 1:5 41:19,22 81:1,2,4 81:22,24 82:2,3,6 82:11,16,17 84:4,7 84:18 85:2 89:8,18 92:16,21 93:15 98:8 105:5 trusts 28:4,18 29:5 56:1,3,7 56:8,12,17,22 57:14,20 92:23 93:2,17,20 truth 106:19,19,20 trying 19:19 30:19 65:14,14 two 4:13 16:22 39:5 50:16,16 55:4,8 76:20 103:17 typewriting 106:23	usually 68:8 72:19 103:15 utilized 40:22	V v 108:7 value 26:24 varied 24:4 various 56:23 VEBA 19:2,4,12 20:8,8 27:10,19 28:16 51:16 52:15 73:14 87:1 ventures 12:16 version 42:7 versus 4:23 Vicki 1:18,23 105:15 106:5 108:23 voluntarily 51:15,18 vs 1:10 105:10	W Wacker 1:20 2:4,10 108:6 wait 32:1,3 waive 34:15,24 waived 33:22 35:10,19 want 5:3 7:24 15:19,19 16:7 22:18 30:13 30:15 36:14 75:12 75:14 76:1 wanted 41:3,8 76:12 98:20 wants 73:3 warrantees 101:13 wasn't 53:22 60:22 64:17 65:3 67:24 83:23 84:8 96:2 97:8 103:11 watch 100:15 water 77:5 way 9:8 13:2 15:21 20:1 48:13 54:24 70:22 76:12 107:11,12 ways 102:16 we'll 36:4 38:9 49:4 we're 16:6 39:13 44:12 50:16,17 61:14,15 66:8 78:14 95:22 we've 21:23 43:24 44:12 50:1 went 19:22 39:20 40:19 94:23 97:9 102:9	weren't 76:2 when's 49:24 WHEREOF 107:14 Why'd 99:20 wife 7:10 16:17 29:3 41:10 58:14 69:2 75:15 76:13,17 77:21 willing 22:5 winter 59:16 62:24 68:1 79:22 wisdom 51:20,22 wish 65:19 wished 29:6 witness 3:2 4:1 8:15,21 21:13 21:14 22:6,15,17 22:21,23 43:16 45:22 47:15 55:2 57:2 58:6 59:9 61:17 62:5 65:8 70:15 72:15 79:8 82:8 83:8 106:10 106:21,23 107:2 word 44:15 66:22 68:21 95:17,24 96:4,16 words 92:14,14 work 10:12,13,23 28:3 47:9 52:11 97:22 working 8:24 49:7 wouldn't 32:23 74:24 75:13 100:8 writing 92:5 wrote 13:20 96:9,13
T 3:7 tainted 22:19 take 14:5 25:8 33:10 41:10 48:6 53:3 68:23 73:15 76:12 85:12 95:9 96:3,23 99:16 100:6 taken 1:17 39:12 40:9 59:18 76:17 78:13 105:14 108:8 talk 45:4 50:15 51:9	T 19:24 20:9 50:23 100:18 things 19:2 54:21 70:12,12 73:6 76:20 84:7 think 4:18,24 18:6 21:14 22:6,9 24:7,21 30:9,11 31:6 34:23 34:24 35:12 45:18 57:6 61:21,22 64:14 66:9 68:18 68:19 70:1,9,12 72:6,7 77:7 85:5 96:8 99:12 thinking 50:16 third	times 4:12 59:16 to-wit 106:8 today 11:1 47:15 57:14 told 17:14 19:21 20:11 29:22 33:1 36:15 41:2,7 65:21 66:1 66:1,5,10 99:10 top 47:2 77:3 86:18 87:6 90:16 95:3 topic 26:14 69:8 tortious 6:16 transactional 14:20 transcript 105:14,16 107:1 108:11,14,15 Transcription 106:24 translated 55:7 transmit 98:17 transmitted 97:13 treatment 54:22,24 trial 23:3 tricky 65:14 tried 43:18 TRUCCO 2:2 true 83:8 86:4 107:1 Truly 60:19,21 trust 1:4 7:6,8 27:21 28:1 28:3,7,9,12,13,13 28:15,16,24 31:1 31:12,23 32:7,24 34:7 35:3 36:11,12 36:14 38:3,8 39:7 39:22 41:3,8 42:22 43:13,23 44:1,15 45:3,20 48:21 49:2 49:14,16 50:4,10	U unable 60:5 unaware 61:2,6 68:12 76:3 understand 23:22 24:3,10,14 33:21 72:15 81:16 98:2 understanding 34:21 58:2 65:15 67:7 understood 68:19 83:14 undertaken 43:19 undetermined 106:11 unfunded 64:6,8,24 uninsurable 30:20 Union 1:11 77:2 105:11 106:15 unique 14:21 16:4 United 1:1,16 105:1 106:11 unpleasant 5:5 updated 9:17 upper-right 89:11	usually 68:8 72:19 103:15 utilized 40:22	V v 108:7 value 26:24 varied 24:4 various 56:23 VEBA 19:2,4,12 20:8,8 27:10,19 28:16 51:16 52:15 73:14 87:1 ventures 12:16 version 42:7 versus 4:23 Vicki 1:18,23 105:15 106:5 108:23 voluntarily 51:15,18 vs 1:10 105:10	W Wacker 1:20 2:4,10 108:6 wait 32:1,3 waive 34:15,24 waived 33:22 35:10,19 want 5:3 7:24 15:19,19 16:7 22:18 30:13 30:15 36:14 75:12 75:14 76:1 wanted 41:3,8 76:12 98:20 wants 73:3 warrantees 101:13 wasn't 53:22 60:22 64:17 65:3 67:24 83:23 84:8 96:2 97:8 103:11 watch 100:15 water 77:5 way 9:8 13:2 15:21 20:1 48:13 54:24 70:22 76:12 107:11,12 ways 102:16 we'll 36:4 38:9 49:4 we're 16:6 39:13 44:12 50:16,17 61:14,15 66:8 78:14 95:22 we've 21:23 43:24 44:12 50:1 went 19:22 39:20 40:19 94:23 97:9 102:9	weren't 76:2 when's 49:24 WHEREOF 107:14 Why'd 99:20 wife 7:10 16:17 29:3 41:10 58:14 69:2 75:15 76:13,17 77:21 willing 22:5 winter 59:16 62:24 68:1 79:22 wisdom 51:20,22 wish 65:19 wished 29:6 witness 3:2 4:1 8:15,21 21:13 21:14 22:6,15,17 22:21,23 43:16 45:22 47:15 55:2 57:2 58:6 59:9 61:17 62:5 65:8 70:15 72:15 79:8 82:8 83:8 106:10 106:21,23 107:2 word 44:15 66:22 68:21 95:17,24 96:4,16 words 92:14,14 work 10:12,13,23 28:3 47:9 52:11 97:22 working 8:24 49:7 wouldn't 32:23 74:24 75:13 100:8 writing 92:5 wrote 13:20 96:9,13
					X X 3:1,7		
					Y Yeah 18:17 20:20 21:21 31:4,9 35:18 37:9 45:6 49:20 61:21 77:23 85:17 96:2 100:3 101:2 year 5:2 17:20 18:15 28:15 51:8 56:16 56:21 57:8 63:5 74:8 years 13:9 17:20 56:18,19 56:19,23		
					Z		
					0		
					000002 90:7,12 000012 90:7		

000013	48:24 50:12,23 51:3	2:5
92:2	53:1 56:23 59:17	65-6178916
000021	79:12,15	89:17
92:2	2013	
000031	59:17 90:21	<u>7</u>
86:17	2015	
000104	1:21 105:15,22 106:8	7
88:19	107:16 108:3,8	92:19,20 93:14
084-004344	203	70s
1:24	2:10 108:6	17:22
<u>1</u>	21	<u>8</u>
1	39:17 89:18 90:19	8
3:11 86:10,12,16	21st	93:7 94:2
89:5	40:18 41:9 42:14	8/26/95
10	22nd	88:2
30:15	42:15	80s
1009208	25	5:3 17:23 18:14 19:5
24:21	7:24 12:18	28:17
103	2725	819-0730
23:4	2:10 108:6	2:11
12-'13	29	82
62:24 68:1 79:22	39:17 40:4	24:20 64:20 65:18
13	2900	66:11
1:10 105:10 108:8	108:1	84-004344
15th	<u>3</u>	107:20
63:4,11	3	85
19	3:12 14:9 25:4 89:8	3:4
56:16	89:24 90:2,6,23	86
1978	93:14 94:3 95:10	3:11
9:13	96:11,22 97:2,4,20	88
1982	98:11,11,18	3:11
18:21 26:6 64:13	30	<u>9</u>
72:12 73:11	42:6 90:20	9
1984	300,000	93:8 108:3
10:5	58:20	90
1986	30C	3:12
13:3	23:1	90s
1987	312	5:4 77:24
13:16,19 25:17	2:5,11	91
1988	334,000	3:12
14:9 15:5	59:3	94
1995	35	3:5
27:16,23 28:7,9,10	46:16	95
28:21 29:1 30:3	350,000	28:12 66:6,12 104:9
31:12,16 39:17	58:20	96
43:13 49:6,24 50:1	3643	13:10
50:20 52:18 56:2	1:10 105:10 108:8	98's
56:16,21 57:20	<u>4</u>	51:8
59:14 60:9 61:9	4	9th
62:3 66:22 67:2,15	3:4,12 91:18,21 92:1	107:16
68:14 70:20,23	92:19 94:13 95:15	
71:7,13 72:8 73:12	95:22 96:3,18,20	
89:18 90:19 91:15	4:25	
1996	104:18	
49:13 74:19 103:23	<u>5</u>	
1998	5	
51:4,11 73:13	105:15 108:8	
<u>2</u>	50	
2	7:12 8:2,4,7	
3:11 20:21 24:2,5,6	5500	
24:24 25:4 30:14	19:5,9,16 20:6 25:10	
88:12,14,18	5500s	
2:18	19:3	
1:21	5th	
200	1:20 106:8	
108:1	<u>6</u>	
200,000	6/21/95	
17:10 30:9,12	1:4 105:4 106:14	
2000	60601	
7:14 49:14 56:23	2:5,11 108:6	
57:23 60:18 63:2,6	60601-1014	
63:10,11 64:4	108:2	
65:16 66:3 68:24	615	
2004	21:14 22:24 23:4,5	
90:23	630-7979	
2005		
60:18		
2012		