

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

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

Plaintiff,)

v.)

HERITAGE UNION LIFE INSURANCE)
COMPANY,)

Defendant,)

HERITAGE UNION LIFE INSURANCE)
COMPANY)

Counter-Plaintiff,)

v.)

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

Counter-Defendant,)

and,)

FIRST ARLINGTON NATIONAL BANK)
as Trustee of S.B. Lexington, Inc. Employee)
Death Benefit Trust, UNITED BANK OF)
ILLINOIS, BANK OF AMERICA,)
Successor in interest to LaSalle National)
Trust, N.A., SIMON BERNSTEIN TRUST,)
N.A., TED BERNSTEIN, individually and)
as purported Trustee of the Simon Bernstein)
Irrevocable Insurance Trust Dtd 6/21/95,)
and ELIOT BERNSTEIN,)

Third-Party Defendants.)

**Case No. 13 cv 3643
Honorable John Robert Blakey
Magistrate Mary M. Rowland**

**INTERVENOR’S LOCAL RULE
56.1(a)(3) STATEMENT OF
UNDISPUTED MATERIAL FACTS**

Filer:
Brian O’Connell, as Personal Representative
of the Estate of
Simon L. Bernstein, Intervenor.

ELIOT IVAN BERNSTEIN,)

Cross-Plaintiff,)

v.)

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

Cross-Defendant,)

and,)

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

Third-Party Defendants.)

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

Intervenor.)

_____)

INTERVENOR’S LOCAL RULE 56.1(a)(3) STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Intervenor Brian M. O’Connell, Personal Representative of the Estate of Simon L. Bernstein (“Estate”), for his Statement of Undisputed Material Facts pursuant to Local Rule 56.1(a)(3), states as follows:

I. THE PARTIES

1. The Simon Bernstein Irrevocable Insurance Trust Dated 6/21/95 (“1995 Trust”) is a Plaintiff and purports to be an irrevocable life insurance trust formed in Illinois. The Estate disputes the existence and terms of the 1995 Trust. (*Intervenor’s Response to Plaintiffs’ Statement of Undisputed Material Facts* ¶ 1 (ECF No. 192); *Order* at 2-4 (ECF No. 220).)

2. Benjamin Brown, as Curator of The Estate of Simon L. Bernstein (the “Estate”), filed a motion to intervene in this litigation. On July 28, 2014, the Court granted the motion to intervene and the Estate became an Intervenor-Plaintiff. (ECF No. 121.) On November 3, 2014, Brian O’Connell substituted his appearance as the Personal Representative of the Estate. (ECF No. 126.)

3. Ted Bernstein, both individually and purporting to be Trustee of the alleged 1995 Trust, is a Plaintiff. Ted Bernstein has also been named as a Third-Party Defendant to Eliot Bernstein’s third-party claims. Ted Bernstein is one of the five adult children of Simon Bernstein. (*Intervenor’s Response to Plaintiffs’ Statement of Undisputed Material Facts* ¶ 6 (ECF No. 192); *Affidavit of Ted Bernstein* ¶ 25 (ECF No. 150-31).)

4. Ted Bernstein will receive over \$300,000, representing 20 percent of the Policy proceeds, if Plaintiffs prevail in this litigation. (*Movants’ Reply to the Estate of Simon Bernstein’s Statement of Additional Facts* ¶ 3 (ECF No. 201); *Deposition of Ted Bernstein*, 9:18-10:4, 118:16-119:14 (ECF No. 192-1).)

5. Pamela Simon is a Plaintiff, and has been named as a Third-Party Defendant to Eliot Bernstein's third-party claims. Pamela Simon is one of the five adult children of Simon Bernstein. (*Intervenor's Response to Plaintiffs' Statement of Undisputed Material Facts* ¶ 10 (ECF No. 192); *Affidavit of Pam Simon* ¶¶ 2-3 (ECF No. 150-32).)

6. David Simon is Pamela Simon's husband, Adam Simon's brother, and has been named a Third-Party Defendant to Eliot Bernstein's third-party claims. Adam Simon was previously counsel for all Plaintiffs and is currently counsel for Plaintiffs the 1995 Trust, Ted Bernstein and Pamela Simon, and Third-Party Defendants David Simon and The Simon Law Firm. (*Movants' Reply to the Estate of Simon Bernstein's Statement of Additional Facts* ¶ 2 (ECF No. 201); *Deposition of David Simon*, 7:9-10 (ECF No. 192-2); *Affidavit of David Simon* ¶ 20 (ECF No. 150-33); ECF Nos. 12, 26, 46, 224 and 226.)

7. Pamela Simon will receive over \$300,000, representing 20 percent of the Policy proceeds, if Plaintiffs prevail in this litigation. (*Movants' Reply to the Estate of Simon Bernstein's Statement of Additional Facts* ¶ 2 (ECF No. 201); *Deposition of David Simon*, 58:13-59:4 (ECF No. 192-2).)

8. Jill Marla Iantoni is a Plaintiff, and has been named as a Third-Party Defendant to Eliot Bernstein's third-party claims. Jill Marla Iantoni is one of the five adult children of Simon Bernstein. (*Intervenor's Response to Plaintiffs' Statement of Undisputed Material Facts* ¶ 9 (ECF No. 192); *Affidavit of Jill Iantoni* ¶¶ 2-3 (ECF No. 150-34).)

9. Lisa Sue Friedstein is a Plaintiff, and has been named as a Third-Party Defendant to Eliot Bernstein's third-party claims. Lisa Sue Friedstein is one of the five adult children of Simon Bernstein. (*Intervenor's Response to Plaintiffs' Statement of Undisputed Material Facts* ¶ 8 (ECF No. 192); *Affidavit of Lisa Friedstein* ¶¶ 2-3 (ECF No. 150-35).)

10. Jill Marla Iantoni and Lisa Sue Friedstein will each receive over \$300,000, representing 20 percent of the Policy proceeds, if Plaintiffs prevail in this litigation. (*Movants' Reply to the Estate of Simon Bernstein's Statement of Additional Facts* ¶ 4 (ECF No. 201); *Deposition of Ted Bernstein*, 118:16-119:14 (ECF No. 192-1); *Deposition of David Simon*, 58:13-59:4 (ECF No. 192-2); Plaintiffs' Exhibit 15 (ECF No. 150-16); Plaintiffs' Exhibit 16 (ECF No. 150-17).)

11. Eliot Bernstein ("Eliot") was made a Party by virtue of Heritage Union Life Insurance Company's counterclaim for Interpleader, and Eliot filed third-party claims against several Parties as described herein, making Eliot a Third-Party Plaintiff as well. Eliot is one of the five adult children of Simon Bernstein. (*Intervenor's Response to Plaintiffs' Statement of Undisputed Material Facts* ¶ 3 (ECF No. 192); *Affidavit of Ted Bernstein* ¶ 23 (ECF No. 150-31).)

12. Heritage Union Life Insurance Company ("Heritage") is the successor to the Capitol Bankers Life Insurance Company ("Capitol Bankers"), which originally issued the Policy to Simon Bernstein in 1982. Heritage was terminated as a party on February 18, 2014 when the Court granted Heritage's motion to dismiss itself from the Interpleader litigation after having deposited the Policy proceeds with the Registry of the Court pursuant to an Agreed Order. (ECF No. 101.)

II. THE LIFE INSURANCE POLICY

13. In 1982, Simon Bernstein applied for a life insurance policy from Capitol Bankers, which was issued as Policy No. 1009208 (the "Policy"). (*Intervenor's Response to Plaintiffs' Statement of Undisputed Material Facts* ¶ 26 (ECF No. 192); *Affidavit of Don Sanders* ¶¶ 6, 23 (ECF No. 150-30).) The amount of the Policy proceeds (plus interest) on deposit with

the Registry of the Court exceeds \$1.7 million. (ECF No. 101; Plaintiffs' Exhibit 2 (ECF No. 150-3).)

14. The Capitol Bankers Life Insurance Application, dated October 12, 1982 (the "Application"), designates Simon L. Bernstein as the Insured, lists S.B. Lexington, Inc. as his employer, and designates the Owner of the Policy as "First Arlington National Bank Trustee of S.B. Lexington, Inc. Employee Death Benefit Trust." (*Intervenor's Response to Plaintiffs' Statement of Undisputed Material Facts* ¶ 27 (ECF No. 192); Plaintiffs' Exhibit 3 (ECF No. 150-4); *Affidavit of Don Sanders* ¶ 48 (ECF No. 150-30).)

15. The Application: (i) directs premium notices to be sent to S.B. Lexington, Inc. Employee Death Benefit Plan c/o National Service Assoc. at 9933 Lawler Ste. 210, Skokie, Illinois 60077; (ii) lists Simon Bernstein's occupation as an Executive with S.B. Lexington, Inc. located in Skokie, Illinois; (iii) lists Simon Bernstein as the selling agent of the Policy; and (iv) was signed in Illinois. (*Intervenor's Response to Plaintiffs' Statement of Undisputed Material Facts* ¶ 28 (ECF No. 192); Plaintiffs' Exhibit 3 (ECF No. 150-4); *Affidavit of Don Sanders* ¶ 48 (ECF No. 150-30).)

16. In late 1982 when the Policy was issued: (a) the Policy would have been delivered to the selling agent (*i.e.* Simon Bernstein), who would have then delivered the Policy to the initial Owner; (b) Simon Bernstein resided and was domiciled in Glencoe, Illinois; (c) Simon Bernstein's offices were located in Chicago, Illinois; and (d) First Arlington National Bank was located in Arlington Heights, Illinois. (*Intervenor's Response to Plaintiffs' Statement of Undisputed Material Facts* ¶ 28 (ECF No. 192); Plaintiffs' Exhibit 3 (ECF No. 150-4); *Affidavit of Don Sanders* ¶ 48 (ECF No. 150-30); *Affidavit of Pam Simon* ¶¶ 22-24 (ECF No. 150-32).)

III. THE DESIGNATED BENEFICIARIES

17. At the time the Policy was issued, the only designated beneficiary was First Arlington National Bank as Trustee of S.B. Lexington, Inc. Employee Death Benefit Trust. (*Intervenor's Response to Plaintiffs' Statement of Undisputed Material Facts* ¶¶ 29-30 (ECF No. 192); Plaintiffs' Exhibit 3 (ECF No. 150-4); *Affidavit of Don Sanders* ¶ 48 (ECF No. 150-30).)

18. In June of 1992, LaSalle National Trust, N.A., as Successor Trustee of the S.B. Lexington, Inc. Employee Death Benefit Trust, became Owner of the Policy. (*Intervenor's Response to Plaintiffs' Statement of Undisputed Material Facts* ¶ 31 (ECF No. 192); Plaintiffs' Exhibit 7 (ECF No. 150-8); *Affidavit of Don Sanders* ¶ 55 (ECF No. 150-30).)

19. In November of 1995, Capitol Bankers received a "Request Letter" signed by the Owner of the Policy, LaSalle National Trust, N.A., pursuant to which the following changes were made to the Policy: (a) LaSalle National Trust, N.A., as Trustee of the S.B. Lexington, Inc. Employee Death Benefit Trust, was designated primary beneficiary; and (b) the "Simon Bernstein Irrevocable Insurance Trust Dated June 21, 1995" (*i.e.* the 1995 Trust) was designated contingent beneficiary. (*Intervenor's Response to Plaintiffs' Statement of Undisputed Material Facts* ¶ 33 (ECF No. 192); Plaintiffs' Exhibit 8 at JCK000370 (ECF No. 150-9); *Affidavit of Don Sanders* ¶¶ 56, 60 (ECF No. 150-30).)

20. As of September 13, 2012, the date of Simon Bernstein's death: (a) LaSalle National Trust, N.A., as Trustee of the S.B. Lexington, Inc. Employee Death Benefit Trust, was designated primary beneficiary of the Policy; and (b) the "Simon Bernstein Irrevocable Insurance Trust Dated June 21, 1995" (*i.e.* the 1995 Trust) was designated contingent beneficiary of the Policy. (*Affidavit of Don Sanders* ¶¶ 62, 72 (ECF No. 150-30); Plaintiffs' Exhibit 8 at JCK000370 (ECF No. 150-9); *Deposition of Ted Bernstein*, 10:8-10 (ECF No. 192-1).)

21. On April 3, 1998, S.B. Lexington, Inc. was voluntarily dissolved and the S.B. Lexington, Inc. Employee Death Benefit Trust was terminated. (*Intervenor's Response to Plaintiffs' Statement of Undisputed Material Facts* ¶ 36 (ECF No. 192); Plaintiffs' Exhibit 9 (ECF No. 150-10); *Affidavit of Pam Simon* ¶ 36 (ECF No. 150-32).)

22. Neither LaSalle National Trust, N.A. as Trustee of the S.B. Lexington, Inc. Employee Death Benefit Trust, nor the S.B. Lexington, Inc. Employee Death Benefit Trust itself, has made any claim to the Policy proceeds. (*Intervenor's Response to Plaintiffs' Statement of Undisputed Material Facts* ¶ 37 (ECF No. 192); *Affidavit of Don Sanders* ¶¶ 77(a)-(b), 78 (ECF No. 150-30).)

23. First Arlington National Bank has not made any claim to the Policy proceeds. Its successor-in-interest, J.P. Morgan Bank, filed a responsive pleading in this action, and then a motion for judgment on the pleadings in which it disclaimed any interest in the Policy proceeds and requested to be dismissed. That motion was granted and J.P. Morgan Bank was dismissed as a Party on March 12, 2014. (*Intervenor's Response to Plaintiffs' Statement of Undisputed Material Facts* ¶ 37 (ECF No. 192); ECF No. 60; ECF No. 105.)

IV. THE FIRST "EXHAUSTIVE SEARCH" FOR THE 1995 TRUST

24. At least one "exhaustive search" for the 1995 Trust document was conducted between Simon Bernstein's death on September 13, 2012 and December 6, 2012, but no trust document could be found. (*Movants' Reply to the Estate of Simon Bernstein's Statement of Additional Facts* ¶ 9 (ECF No. 201); *Deposition of Ted Bernstein*, 55:1-11 and Dep. Ex. 3 at TS004519 (ECF No. 192-1).)

25. According to David Simon, the first attempt to locate the 1995 Trust document occurred in the winter of 2012-2013. He was aware of the search and advised that no such

document was found. (*Movants' Reply to the Estate of Simon Bernstein's Statement of Additional Facts* ¶ 10 (ECF No. 201); *Deposition of David Simon*, 59:13-17, 60:4-6 (ECF No. 192-2).)

26. David Simon also testified that Foley & Lardner, the successor firm to Hopkins & Sutter, and some of the attorneys who broke away from Hopkins & Sutter and started their own firm, were contacted to see if they had a copy of a 1995 Trust document, but they did not. David Simon does not even know whether it was he or someone else who contacted Foley & Lardner and the attorneys, or with whom they specifically spoke, and he testified that whoever it was may have been asked to do so by him, his wife Pamela Simon, or his brother Adam Simon. (*Deposition of David Simon*, 44:17-45:15, 46:2-4 (ECF No. 192-2).)

V. **IDEAS ABOUT HOW TO OBTAIN THE POLICY PROCEEDS & UNSUCCESSFUL ATTEMPTS TO DO SO**

27. On August 15, 2000, Simon Bernstein executed the Simon Bernstein 2000 Insurance Trust (the "2000 Trust"), which identifies the Policy at issue in this litigation as an asset of the 2000 Trust. (*Deposition of Ted Bernstein*, Dep. Ex. 23 at ¶ 1 and Schedule A (ECF No. 192-1); *Order* at 5 (ECF No. 220).)

28. Plaintiffs considered "using" the 2000 Trust to obtain the Policy proceeds, but this option was rejected on or before November 19, 2012 because Pamela Simon was not included as a beneficiary of the 2000 Trust. (*Deposition of Ted Bernstein*, 48:21-49:9, Dep. Ex. 1 and Dep. Ex. 2 at TS004490 (ECF No. 192-1); *Order* at 5 (ECF No. 220).)

29. Plaintiffs' former counsel, Robert Spallina, representing that he was trustee of the 1995 Trust, made an application to Heritage for the Policy proceeds on behalf of Plaintiffs. (*Movants' Reply to the Estate of Simon Bernstein's Statement of Additional Facts* ¶ 7 (ECF No.

201); *Deposition of Ted Bernstein*, 35:6-16 and Dep. Ex. 1 (ECF No. 192-1); *Deposition of David Simon*, 81:15-82:2 (ECF No. 192-2).)

30. On October 19, 2012, Ted Bernstein sent Robert Spallina an email suggesting he had a “solution to the life insurance policy which provides the desired result,” that he wanted to discuss and that the initial conversation about it involve only him, Robert Spallina, Pamela Simon and David Simon. The email also asked that Robert Spallina avoid any further overtures to the insurance company until after the initial conversation in order “to avoid any unnecessary confusion” for the insurance company. (*Movants’ Reply to the Estate of Simon Bernstein’s Statement of Additional Facts* ¶ 7 (ECF No. 201); *Deposition of Ted Bernstein*, Dep. Ex. 1 at TS004965 (ECF No. 192-1).)

31. On November 19, 2012, after Robert Spallina unsuccessfully attempted to claim the Policy proceeds without providing any documentation, David Simon suggested attempting to secure the Policy proceeds on behalf of the Plaintiffs by submitting a waiver and settlement agreement to the insurer. (*Movants’ Reply to the Estate of Simon Bernstein’s Statement of Additional Facts* ¶ 8 (ECF No. 201); *Deposition of Ted Bernstein*, 51:22-52:2, 53:22-54:4 and Dep. Ex. 2 at TS004490 (ECF No. 192-1).) **The Plaintiffs tried David Simon’s suggestion of a waiver and settlement agreement, but it was not successful because Eliot would not agree.** (*Deposition of Ted Bernstein*, 54:13-25 and Dep. Ex. 3 (ECF No. 192-1).)

32. Between October 19, 2012 and February 8, 2013, the Plaintiffs exchanged many emails discussing how best to obtain the Policy proceeds and referring to an inability to locate the 1995 Trust document. (*Order* at 5 (ECF No. 220); *Deposition of Ted Bernstein*, Dep. Exs. 1-4, 8-9 (ECF No. 192-1).) David Simon was a participant in the email exchanges, yet in none of those emails did he relate a recollection that he created the 1995 Trust document for Simon

Bernstein, that he saw the final version of the 1995 Trust executed by Simon Bernstein, or that it named Ted Bernstein as successor trustee of the 1995 Trust. (*Id.*)

33. One of those email exchanges on January 22, 2013 states that “none of us can be sure exactly what the 1995 trust said.” (*Deposition of Ted Bernstein*, Dep. Ex. 4 (ECF No. 192-1).)

34. On February, 8, 2013, Pamela Simon informed Ted Bernstein that she could not find a copy of the insurance Policy or the 1995 Trust. (*Movants’ Reply to the Estate of Simon Bernstein’s Statement of Additional Facts* ¶ 11 (ECF No. 201); *Deposition of Ted Bernstein*, 60:25-61:10, Dep. Ex. 8 at BT000049, and Dep. Ex. 10 at BT000047 (ECF No. 192-1).)

35. As of February 14, 2013, the Plaintiffs planned to pursue the Policy proceeds via a Release and Settlement Agreement and have the proceeds paid either to Robert Spallina as trustee or to the Tescher & Spallina trust account. (*Deposition of Ted Bernstein*, 62:17-63:3 and Dep. Ex. 11 at TS004464 (ECF No. 192-1).)

36. From March 15, 2013 through April 12, 2013, Robert Spallina on behalf of Plaintiffs was engaged in discussions with Heritage and they planned for Heritage to interplead the funds into court in Florida. (*Deposition of Ted Bernstein*, Dep. Exs. 15 and 16 (ECF No. 192-1).) Unbeknownst to Mr. Spallina, however, on April 5, 2013, the Plaintiffs, through counsel Adam Simon, filed a lawsuit in the Circuit Court of Cook County seeking to obtain the Policy proceeds from Heritage. (*Deposition of Ted Bernstein*, Dep. Ex. 16 at TS005253-54 (ECF No. 192-1); *Notice of Removal* ¶ 1 (ECF No. 1).) As a result, Robert Spallina and the law firm Tescher & Spallina ceased representing Plaintiffs in connection with their efforts to obtain the Policy proceeds from Heritage. (*Deposition of Ted Bernstein*, Dep. Ex. 16 at TS005252, and Dep. Ex. 17 at TS006547 (ECF No. 192-1).)

37. Despite David Simon's current claims that he drafted the 1995 Trust document on his computer and saw it after execution, the Complaint filed by his brother on April 5, 2013 makes no reference whatsoever to David Simon having drafted the 1995 Trust or having seen the final version after it was executed, or to the identity of the trustee and successor trustee named in the executed 1995 Trust, or to the alleged fact that Simon Bernstein ever even executed a 1995 Trust document. (*Complaint at Law* (ECF No. 1-1).)

38. As of August 30, 2013, the 1995 Trust (in any form) could not be located. (*Movants' Reply to the Estate of Simon Bernstein's Statement of Additional Facts* ¶ 16 (ECF No. 201); Plaintiffs' Exhibit 15 at BT000002 (ECF No. 150-16); *Deposition of David Simon*, 95:9-13 (ECF No. 192-2).)

VI. THE SEARCH WHICH UNCOVERED THE PURPORTED DRAFTS OF THE 1995 TRUST

39. David Simon claims to have located an unexecuted draft electronic copy of the purported 1995 Trust (*i.e.* Plaintiffs' Exhibit 15 (ECF No. 150-16)) on the computer system of The Simon Law Firm on September 13, 2013. (*Movants' Reply to the Estate of Simon Bernstein's Statement of Additional Facts* ¶ 16 (ECF No. 201); Plaintiffs' Exhibit 15 at BT000002 (ECF No. 150-16); *Deposition of David Simon*, 95:9-13 (ECF No. 192-2).)

40. According to David Simon, he located Plaintiffs' Exhibit 15 with the help of his brother, Adam Simon. (*Affidavit of David Simon* ¶ 29 (ECF No. 150-33).)

41. David Simon also claims to have located an unexecuted draft paper copy of the purported 1995 Trust (*i.e.* Plaintiffs' Exhibit 16 (ECF No. 150-17)) which contains his handwritten notes in the stored files of The Simon Law Firm on or about September 13, 2013. (*Movants' Reply to the Estate of Simon Bernstein's Statement of Additional Facts* ¶ 17 (ECF No.

201); Plaintiffs' Exhibit 16 (ECF No. 150-17); *Deposition of David Simon*, 94:13-95:8 (ECF No. 192-2); *Affidavit of David Simon* ¶ 28 (ECF No. 150-33).)

42. According to David Simon, he located Plaintiffs' Exhibit 16 without anyone else's assistance. (*Affidavit of David Simon* ¶ 28 (ECF No. 150-33).)

43. According to Pamela Simon, however, she and David Simon located Plaintiffs' Exhibit 15 and Plaintiffs' Exhibit 16, with assistance from their employees. (*Affidavit of Pam Simon* ¶ 37 (ECF No. 150-32).)

VII. THE EXISTENCE AND TERMS OF THE PURPORTED 1995 TRUST

44. Plaintiffs have produced no executed original or executed copy of a written trust agreement reflecting the terms of the purported 1995 Trust. (*Movants' Reply to the Estate of Simon Bernstein's Statement of Additional Facts* ¶ 6 (ECF No. 201); *Answer to Intervenor Complaint* ¶ 9 (ECF No. 144); *Deposition of Ted Bernstein*, 13:13-15 (ECF No. 192-1).)

45. According to David Simon, he had a conversation with Simon Bernstein on June 20, 1995 about creating an insurance trust, during which Simon Bernstein said he wanted to create one and name his wife Shirley as trustee and David Simon as successor trustee, and David Simon agreed to be successor trustee. David Simon testified that he took handwritten notes of this conversation on Plaintiffs' Exhibit 16. (*Plaintiffs' First Amended Complaint* ¶ 29 (ECF No. 73); *Deposition of David Simon*, 39:15-40:1, 40:17-41:1, 41:7-20, 96:3-11 (ECF No. 192-2); *Affidavit of David Simon* ¶ 28 (ECF No. 150-33).)

46. The handwritten notes on Plaintiffs' Exhibit 16, however, list the trustee as "Shirley, David, [illegible]?" and list the successor trustee as "Pam, Ted." (*Plaintiffs' Exhibit 16* at BT000020 (ECF No. 150-17).)

47. David Simon testified that his assistant created Plaintiffs' Exhibit 15 by making the modifications reflected in David Simon's handwritten notes on Plaintiffs' Exhibit 16. (*Deposition of David Simon*, 40:17-41:1, 96:3-11 (ECF No. 192-2).)

48. Plaintiffs' Exhibit 15, however, identifies the trustee as "Shirley Bernstein" and identifies the successor trustee as "David B. Simon." (*Plaintiffs' Exhibit 15* at BT000010 (ECF No. 150-16).)

49. David Simon testified that, after thinking about it overnight, on June 21, 1995 he asked Simon Bernstein to remove him as successor trustee and make the successor trustees Simon Bernstein's children sequentially. (*Deposition of David Simon*, 41:17-23 (ECF No. 192-2).)

50. David Simon averred, however, that he asked Simon Bernstein to appoint only Ted Bernstein as successor trustee. (*Affidavit of David Simon* ¶ 25 (ECF No. 150-33).)

51. David Simon testified that he did not change the name of the successor trustee from his own name, and Simon Bernstein then took Plaintiffs' Exhibit 15 to the law firm of Hopkins & Sutter to be finalized and executed. (*Deposition of David Simon*, 40:2-7, 41:17-42:5 (ECF No. 192-2).)

52. According to David Simon, he met with Simon Bernstein after the 1995 Trust document was executed and reviewed the final executed version of it, which he claims named Ted Bernstein as the successor trustee. (*Deposition of David Simon*, 42:6-43:1 (ECF No. 192-2); *Affidavit of David Simon* ¶ 27 (ECF No. 150-33).)

53. David Simon testified that, when he met with Simon Bernstein after the 1995 Trust document was executed, he had Simon Bernstein sign a change of beneficiary form to submit to Lincoln Benefit in order to make the 1995 Trust the beneficiary of Simon Bernstein's

life insurance policy issued by Lincoln Benefit, and that he would have expected Lincoln Benefit to retain a copy of that form. David Simon also testified that Lincoln Benefit was contacted and they did not have a copy of the 1995 Trust. (*Deposition of David Simon*, 43:10-44:2 (ECF No. 192-2); *Order* at 5-6 (ECF No. 220).)

54. Ted Bernstein, purported trustee of the 1995 Trust, has never seen an executed copy of a 1995 Trust document. (*Movants' Reply to the Estate of Simon Bernstein's Statement of Additional Facts* ¶ 5 (ECF No. 201); *Deposition of Ted Bernstein*, 24:6-12 (ECF No. 192-1).)

55. According to Ted Bernstein, in the summer of 1995, he had a conversation with his father in which his father told Ted that he was forming a life insurance trust for the Policy and that Ted would be one of the trustees. No one except Simon Bernstein and Ted Bernstein was present for the conversation. (*Movants' Reply to the Estate of Simon Bernstein's Statement of Additional Facts* ¶ 5 (ECF No. 201); *Deposition of Ted Bernstein*, 23:1-8 (ECF No. 192-1); *Affidavit of Ted Bernstein* ¶ 88 (ECF No. 150-31).)

56. Ted Bernstein averred, based on having reviewed the purported drafts of the 1995 Trust document and facts as told to him by David Simon, that Ted was appointed successor trustee of the 1995 Trust. (*Affidavit of Ted Bernstein* ¶ 99 (ECF No. 150-31).)

57. Ted Bernstein testified that the bases for his knowledge that he is successor trustee of the 1995 Trust are that he saw his name handwritten on Plaintiffs' Exhibit 16 at page BT000020 (ECF No. 150-17), and after his father's death, David Simon told him that he was successor trustee of the 1995 Trust. When David Simon informed Ted that he was successor trustee, Ted does not recall whether he even remembered the conversation he testified that he had with his father during the summer of 1995. (*Deposition of Ted Bernstein*, 12:19-16:16, 17:5-17, 24:13-25:3 and Dep. Ex. 22 (ECF No. 192-1).)

VIII. SIMON BERNSTEIN'S SUBSEQUENTLY-EXECUTED ESTATE DOCUMENTS

58. On August 15, 2000, Simon Bernstein executed the Simon Bernstein 2000 Insurance Trust (the "2000 Trust"), which identifies the Policy at issue in this litigation as an asset of the 2000 Trust. (*Deposition of Ted Bernstein*, Dep. Ex. 23 at ¶ 1 and Schedule A (ECF No. 192-1); *Order* at 5 (ECF No. 220).)

59. The 2000 Trust document makes no reference to the 1995 Trust (*i.e.* the "Simon Bernstein Irrevocable Insurance Trust Dated June 21, 1995"), which the 2000 Trust would have superseded. (*Deposition of Ted Bernstein*, Dep. Ex. 23 (ECF No. 192-1); *Order* at 5 (ECF No. 220).)

60. Pursuant to the terms of the 2000 Trust, the Trustees were only authorized to pay the trust principal and income to only Shirley Bernstein and Simon Bernstein's "descendants," with "descendants" being defined to "specifically exclude ... PAMELA BETH SIMON and her descendants." (*Deposition of Ted Bernstein*, Dep. Ex. 23 at ¶¶ 2(a)-(b), 9 (ECF No. 192-1).)

61. On May 20, 2008, Simon Bernstein executed the Simon L. Bernstein Irrevocable Trust Agreement (the "2008 Trust"). The terms of the 2008 Trust, in effect, provide that no inheritance shall pass to Ted Bernstein, Pamela Simon, or the lineal descendants of either Ted Bernstein or Pamela Simon. (*Deposition of David Simon*, 55:2-17 (ECF No. 192-2); *Deposition of Ted Bernstein*, Dep. Ex. 25 (ECF No. 192-1).)

62. In January 2012, Plaintiff Pamela Simon wrote to her father, Simon Bernstein, expressing her distress over his act of "disinheriting" her, David Simon and their children, as well as Ted Bernstein and his children. (*Deposition of Ted Bernstein*, Dep. Ex. 26 (ECF No. 192-1).) Pamela Simon wrote the note to her father because she was passionate about the fact

that his “estate plan” did not include her and her family or Ted Bernstein and his family. (*Deposition of Ted Bernstein*, 90:22-25, 91:13-25, and Dep. Ex. 26 (ECF No. 192-1).)

63. A few months before he died on September 13, 2012, Simon Bernstein arranged a conference call with Robert Spallina, Plaintiffs and some of their spouses. During the call, Simon Bernstein instructed that the assets of his estate and trust would be left to his ten grandchildren **and the insurance policy proceeds were to pass to his five children,** in an effort to quell some then-existing family acrimony about his girlfriend and about the trust document that disinherited Pamela Simon, Ted Bernstein and their respective children. (*Deposition of Ted Bernstein*, 90:11-18 (ECF No. 192-1); *Deposition of David Simon*, 53:1-19, 54:3-55:17 (ECF No. 192-2).)

64. On July 25, 2012, Simon Bernstein executed the Simon L. Bernstein Amended and Restated Trust Agreement (the “2012 Trust”), which amends and restates in its entirety the 2008 Trust. (*Deposition of Ted Bernstein*, Dep. Ex. 24 at TS007362 (ECF No. 192-1).) Pursuant to the terms of the 2012 Trust, all of the Plaintiffs shall be deemed to have predeceased Simon Bernstein and all assets are to be passed on equal shares among Simon Bernstein’s grandchildren. (*Id.* at Art. I (B)-(C), Art. III (E)(1).)

65. On September 7, 2012, six days prior to his death, Simon Bernstein prepared a holographic will directing a bequest to Maritza Puccio of, among other things, \$100,000 from his current insurance policy and expressing an intention to change the beneficiary on said policy to reflect his wishes. (ECF No. 192-3 at TS003889). Simon Bernstein directed that the bequest to Ms. Puccio should proceed in the event of his death “with no interruption from family or probate.” (*Id.*) This document was not witnessed or notarized. (*Id.*)

66. There is no evidence that Simon Bernstein executed any other Wills or trust agreements between July 25, 2012 and his death on September 13, 2012.

Dated: May 25, 2016

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

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

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he caused a copy of the foregoing **Intervenor's Local Rule 56.1(a)(3) Statement of Undisputed Material Facts** to be served upon all registered E-Filers via electronic filing using the CM/ECF system, and to be served upon the following persons via U.S. mail, proper postage prepaid:

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 /s/ James J. Stamos