

1 IN THE FIFTEENTH JUDICIAL CIRCUIT COURT  
2 IN AND FOR PALM BEACH COUNTY, FLORIDA  
3 CASE NO: 502012CP004391XXXXNBIH

4  
5 IN RE:  
6 ESTATE OF SIMON L. BERNSTEIN,  
7 \_\_\_\_\_/

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9  
10 Proceedings before the Honorable  
11 ROSEMARIE SCHER

12  
13 [EXCERPT - OPENING STATEMENTS]

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15  
16 Thursday, February 16, 2017  
17 3188 PGA Boulevard  
18 North County Courthouse  
19 Palm Beach Gardens, Florida 33410  
20 2:38 p.m. - 4:46 p.m.

21 ORIGINAL

22  
23 Reported by:  
24 Lisa Mudrick, RPR, FPR  
25 Notary Public, State of Florida

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P R O C E E D I N G S

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OPENING STATEMENTS

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MR. FEAMAN: Thank you, Your Honor. May it please the Court. Peter Feaman on behalf of William Stansbury. My remarks are by way of an opening statement at this time, Your Honor, in connection with Your Honor's order, case management conference and order specially setting hearings.

As Your Honor noted, we are dealing with Stansbury's motion, docket entry 496, and Stansbury's related motion to disqualify Alan Rose and his law firm, docket entry 508.

The story and premise, Your Honor, for this is that the personal representative of the Simon Bernstein estate, Brian O'Connell, has a fiduciary duty to all interested persons of the estate. And that's found in Florida Statute 733.602(1) where it states a personal representative is a fiduciary, and in the last sentence, a personal representative shall use the authority conferred by this code, the

1 authority in the will, if any, and the  
2 authority of any order of the Court, quote, for  
3 the best interests of interested persons,  
4 including creditors, close quote.

5 Mr. Stansbury is an interesting --  
6 interested person to the Estate of Simon  
7 Bernstein as well as a claimant in this case.

8 Interesting -- interested persons -- yes,  
9 he is an interesting person. But interested  
10 persons is defined, Your Honor, in Florida  
11 Statute 731.201(23) which states that an  
12 interested person means, quote, any person who  
13 may reasonably be expected to be affected by  
14 the outcome of the particular proceeding  
15 involved.

16 The evidence will show that Mr. Stansbury  
17 clearly falls into that category.

18 The second part of our presentation, Your  
19 Honor, will then involve the presentation of  
20 evidence to show that in fact there is a  
21 conflict of interest. And then part three --  
22 of conflict of interest of Mr. Rose and his law  
23 firm representing the estate in this case.

24 And thirdly, that the conflict of  
25 interest, the evidence will show, is not

1           waivable.

2           The parties' chart, which we did and  
3           submitted to Your Honor with our package last  
4           week, is the color chart, I have an extra copy  
5           if Your Honor does not have it.

6           THE COURT: I believe it is --

7           MR. FEAMAN: For the Court's convenience.

8           THE COURT: I believe it is in -- I know I  
9           have it. And I know I had it. Oh, got it. I  
10          knew it was in one of my notebooks. Thank you.

11          MR. FEAMAN: Thank you.

12          Now, the summation of the position of the  
13          parties in connection with what the evidence  
14          will show, Your Honor, shows that we are here  
15          obviously on the Estate of Simon Bernstein, and  
16          the proposed attorney is Alan Rose. That's the  
17          box at the top. The two proceedings that are  
18          engaged with regard to the estate right now is  
19          the Stansbury litigation against the estate  
20          which is wherein it is proposed that Mr. Rose  
21          and his law firm defend the estate in that  
22          case.

23          And more significantly, Your Honor,  
24          because it really wouldn't matter what the  
25          other litigation is that Mr. Rose is being

1 asked to defend, because more significantly is  
2 the orange box on the right, which I will call  
3 for the purposes of this litigation the Chicago  
4 litigation. And in that action there are a  
5 number of plaintiffs, one of whom is Ted  
6 Bernstein individually. And the evidence will  
7 show in this case that Alan Rose represents Ted  
8 Bernstein individually, not only in other  
9 matters, but he actually appeared in a  
10 deposition on behalf of Mr. Bernstein  
11 individually in that Chicago litigation, made  
12 objections to questions. And the evidence will  
13 show that he actually on a number of occasions  
14 instructed Mr. Bernstein not to answer certain  
15 questions that were directed to Mr. Bernstein  
16 by counsel for the Estate of Simon Bernstein.

17 In that Chicago litigation we will present  
18 to Your Honor certified copies of pleadings  
19 from the Chicago litigation that shows the  
20 following: That Ted Bernstein, among others,  
21 sued an insurance company to recover  
22 approximately \$1.7 million dollars of life  
23 insurance proceeds. Mr. Stansbury became aware  
24 that that litigation was going on, and moved to  
25 intervene in that lawsuit. Mr. Stansbury was

1 denied.

2 So the evidence will show that he was able  
3 to prevail upon Ben Brown, and Ben Brown moved  
4 on behalf of the estate when he was curator to  
5 intervene. And in fact the Estate of Simon  
6 Bernstein --

7 MR. ROSE: May I object for a second?

8 THE COURT: Legal objection?

9 MR. ROSE: That he is completely  
10 misstating the record of this Court and the  
11 proceedings before Judge Colin.

12 THE COURT: You will have an opportunity  
13 to respond and explain it to me.

14 MR. FEAMAN: Thank you, Your Honor.

15 And the evidence will show that the Estate  
16 of Simon Bernstein is now an intervenor  
17 defendant, and they filed their own intervenor  
18 complaint seeking to recover that same \$1.7  
19 million dollars that Ted Bernstein is seeking  
20 to recover as a plaintiff in that same action.

21 So the evidence will show that Mr. Rose  
22 represents Ted Bernstein. Ted Bernstein is  
23 adverse to the estate. And now Mr. Rose seeks  
24 to represent the estate to which his present  
25 client, Ted Bernstein, is adverse in the

1 Stansbury litigation, which is why we are  
2 there. Now --

3 THE COURT: Wait. Slow down one second.

4 MR. FEAMAN: Sure.

5 THE COURT: That is something you repeated  
6 several times in your motion, but I want you to  
7 state it one more time for me slowly.

8 MR. FEAMAN: Yes. The Chicago litigation  
9 one of the plaintiffs is Ted Bernstein  
10 individually. The Estate of Simon Bernstein  
11 has now intervened in that action. And Ted  
12 Bernstein as plaintiff is seeking to recover  
13 \$1.7 million dollars.

14 Adversely, the Estate of Simon Bernstein  
15 seeks to recover that same \$1.7 million dollars  
16 and is arguing up there that it should not go  
17 to the plaintiffs but should go to the estate.

18 So they are one hundred percent adverse,  
19 that would be Ted Bernstein and the Estate of  
20 Simon Bernstein.

21 And Mr. Rose represents Ted Bernstein, and  
22 now seeks to represent the estate in a  
23 similar -- in an action against the estate, and  
24 they are both going on at the same time. Thus,  
25 the conflict is an attorney cannot represent a



1 plaintiff in an action, whether he is counsel  
2 of record in that action or not, that's adverse  
3 to the Estate of Simon Bernstein, and at the  
4 same time defend the Estate of Simon Bernstein  
5 when he has a client that is seeking to deprive  
6 the estate of \$1.7 million dollars.

7 Now, if Ted Bernstein and the other  
8 plaintiffs in that case were monetary  
9 beneficiaries of the estate, I suppose it could  
10 be a waivable conflict. However, that's not  
11 the case.

12 That drops us to the third box on the --  
13 the fourth box on the chart, which is the green  
14 one, which deals with the Simon Bernstein  
15 Trust. The Simon Bernstein Trust is the  
16 residual beneficiary of the Simon Bernstein  
17 estate. And once the estate captures that  
18 money as a result of the Chicago litigation, if  
19 it does, then the trust will eventually accede  
20 to that money after payment of creditors, one  
21 of which would be or could be my client.

22 And who are the beneficiaries of the  
23 trust? So we have the one beneficiary of the  
24 Simon Bernstein estate, the Simon Bernstein  
25 Trust, and who are the beneficiaries of the

1 trust? Not the children of Simon Bernstein.  
2 Not Ted Bernstein. But the grandchildren of  
3 Simon Bernstein, some of whom are adults and  
4 some of whom are minors in this case. Such  
5 that if the estate prevails in the Chicago  
6 litigation, even assuming Mr. Stansbury wasn't  
7 around making his claim against the estate, if  
8 all of the distributions were finally made when  
9 the estate wins that Chicago litigation, none  
10 of it will ever end up in the hands of Ted  
11 Bernstein as plaintiff. The only way  
12 Mr. Bernstein can get that money is to prevail  
13 as a plaintiff in the Chicago litigation.  
14 Mr. Rose represents Mr. Bernstein, and  
15 therefore there's a conflict, and it's a  
16 non-waivable conflict.

17 And in my final argument when I discuss  
18 the law, I will suggest to the Court that the  
19 conflict that's presented before the Court is  
20 in fact completely non-waivable.

21 THE COURT: Before you sit down, I want  
22 you to address one thing that's been raised in  
23 their responses. And that is why did it take  
24 you so long to file it?

25 MR. FEAMAN: I filed it as soon as I

1 became aware that there was a conflict. For  
2 example, when the order that we are seeking to  
3 set aside was entered, I was not aware that the  
4 Rose law firm represented Ted Bernstein in that  
5 Chicago action. My client then brought it to  
6 my attention. And as soon as we did that, I  
7 moved to set aside the order because it became  
8 apparent that there was a clear conflict.

9 Because initially, as I told Brian  
10 O'Connell, Mr. Stansbury can't dictate who the  
11 estate wishes to hire as its attorneys unless,  
12 as it turns out, that attorney represents  
13 interests that are adverse to the estate. And  
14 that's when we filed our motion to set aside.

15 I got possession of the deposition that  
16 will be offered today. The deposition revealed  
17 to me what I have summarized here today, this  
18 afternoon, and then we moved to set aside the  
19 order. And then we thought that wasn't enough,  
20 we should do a formal motion to disqualify,  
21 which we did.

22 The chronology of the filings, the motion  
23 to vacate, I am not sure exactly when that was  
24 filed, but it wasn't too long after the entry  
25 of the September 7th order, and then the motion

1 to disqualify came after that. And --

2 THE COURT: It was filed October 7th.

3 MR. FEAMAN: Pardon me?

4 THE COURT: It was filed October 7th.

5 MR. FEAMAN: Okay. The motion to vacate?

6 THE COURT: Yes.

7 MR. FEAMAN: Correct. We had to do our  
8 due diligence. We got the copy of the  
9 deposition, and moved. Because we don't get  
10 copies of things that go on up there on a  
11 routine basis.

12 THE COURT: Okay. I just wanted to ask  
13 what your position was. Okay. All right.  
14 Thank you.

15 Opening?

16 MR. ROSE: As a threshold matter, I think  
17 even though this is an evidentiary hearing, you  
18 are going to receive some documentary evidence,  
19 I don't think there's a real need for live  
20 testimony, in other words, from witnesses. No,  
21 no.

22 THE COURT: Okay.

23 MR. ROSE: I am advising you. I am not  
24 asking your opinion of it.

25 THE COURT: Thank you.

1 MR. ROSE: I am advising you. I have  
2 spoken to Mr. Feaman.

3 THE COURT: Okay.

4 MR. ROSE: So I don't know there's going  
5 to be live witnesses.

6 THE COURT: Okay.

7 MR. ROSE: He has seven documents or eight  
8 documents he would like to put in evidence, and  
9 I would be happy if they just went into  
10 evidence right now.

11 THE COURT: He can decide how he wants to  
12 do his case.

13 MR. ROSE: Okay.

14 THE COURT: You can do your opening.

15 MR. ROSE: I think we are going to be  
16 making one long legal argument with documents,  
17 so.

18 THE COURT: Okay. Well, let's do an  
19 opening and then.

20 MR. ROSE: Let me start from the beginning  
21 then.

22 THE COURT: Okay.

23 MR. ROSE: So we are here today, and there  
24 are three motions that you said you would try  
25 to do today. And I don't have any doubt you

1 will get to do all three today given how much  
2 time we have and progress we are making and the  
3 amount of time Mr. Feaman and I think this will  
4 take.

5 THE COURT: Okay.

6 MR. ROSE: The three are completely  
7 related. They are all the same. They are  
8 three sides of the same coin.

9 Am I blocking you?

10 MR. O'CONNELL: Your Honor, could I step  
11 to the side?

12 THE COURT: Yes, absolutely.

13 MR. ROSE: You can have the chart.

14 MR. O'CONNELL: Okay.

15 THE COURT: Mr. Rose, I have to ask you.  
16 I received a, I think it was a flash drive, and  
17 it had proposed orders on matters that were not  
18 necessarily going to be heard today. I don't  
19 think I got a flash drive with a proposed order.  
20 I did receive Mr. Feaman's on these particular  
21 orders.

22 MR. ROSE: I don't think I sent you a  
23 flash drive that I recall.

24 THE COURT: Okay. But I did on the other  
25 ones. That's what seemed odd to me.

1 MR. ROSE: I am not aware, I am sorry.

2 THE COURT: Okay. That's okay. You may  
3 proceed.

4 MR. ROSE: There's three matters today and  
5 they are sort of related, and they involve how  
6 are we going to deal with the claim by  
7 Mr. Stansbury against the Estate of Simon  
8 Bernstein.

9 And there are currently three separate  
10 proceedings. There's a proceeding in Illinois.  
11 It's all taking place in Illinois. There's the  
12 probate proceeding which we are here on which  
13 is the Estate of Simon Bernstein. And there's  
14 the Stansbury litigation that is pending in  
15 circuit court. It's just been reassigned to  
16 Judge Marx, so we now have a judge, and that  
17 case is going to proceed forward. It's set for  
18 trial, I believe, in July to September  
19 timeframe.

20 So the first thing you are asked to do  
21 today is to reconsider a valid court order  
22 entered by Judge Phillips on September the 7th.  
23 We filed our motion in August, and they had 30  
24 days, more than 30 days before the hearing to  
25 object or contest the motion to appoint us.

1           The genesis of the motion to appoint us  
2           was what happened at mediation. We had a  
3           mediation in the summer. The parties signed a  
4           written mediation settlement agreement. We  
5           have asked Your Honor at next week's hearing to  
6           approve the mediation settlement agreement. It  
7           is signed by every single one of the ten  
8           grandchildren or their court-appointed guardian  
9           ad litem, Diana Lewis, who has now been  
10          approved by this Court, upheld by the 4th  
11          District, and upheld by the Supreme Court this  
12          week. So I think it's safe to say that she's  
13          going to be here.

14                 So the settlement agreement is signed by  
15                 all of those people. It's signed by my client  
16                 as the trustee. It's also signed by four of  
17                 the five children, excluding Eliot Bernstein.

18                 And as part of this, once we had a  
19                 settlement, there was a discussion of how do we  
20                 get this relatively modest estate to the finish  
21                 line. And the biggest impediment getting to  
22                 the finish line is this lawsuit. Until this  
23                 lawsuit is resolved, his client is something.  
24                 We can debate what he is. He claims to be an  
25                 interested person. I think technically under



1 law he is a claimant. Judge, I think even  
2 Judge Colin ruled he was not a creditor and  
3 denied his motion to remove and disqualify Ted  
4 Bernstein as trustee. That was pending and  
5 there's an order that does that a long time  
6 ago. If I could approach?

7 THE COURT: Sure.

8 MR. ROSE: I don't have the docket entry  
9 number. This is in the court file. This was  
10 Judge Colin on August 22nd of 2014.

11 THE COURT: I saw it.

12 MR. ROSE: He has been trying to remove me  
13 and Mr. Bernstein for like almost three or four  
14 years now. But that's only significant because  
15 he is not a creditor. He is a claimant. So  
16 what we want to do is we want to get his claim  
17 to the finish line.

18 So I am not talking about anything that  
19 happened at mediation. Mediation is now over.  
20 We have a signed settlement agreement.

21 Mr. Stansbury participated in the mediation,  
22 but we did not make a settlement with him.

23 Okay.

24 So as a result of the mediation, all the  
25 other people, everybody that's a beneficiary of

1           this estate coming together and signing a  
2           written agreement, those same people as part of  
3           the written agreement said we want this case to  
4           finish, and how are we going to do that.

5           Well, let's see. Mr. Stansbury is the  
6           plaintiff represented by Mr. Feaman. The  
7           estate was represented by -- do you?

8           THE COURT: No.

9           MR. ROSE: I can give you one to have if  
10          you want to make notes on.

11          THE COURT: I would like that. I would  
12          like that very much.

13          MR. ROSE: That's fine. I have two if you  
14          want to have one clean and one with notes.

15          THE COURT: Thank you.

16          MR. ROSE: You will recall -- I don't want  
17          to talk out of school because we decided we  
18          weren't going to talk out of school. But I got  
19          Mr. Feaman's -- like I didn't have a chance to  
20          even get this to you because I hadn't seen his  
21          until after your deadline, but.

22          THE COURT: This is demonstrative.

23          MR. ROSE: Okay.

24          THE COURT: He can pull up something new  
25          demonstrative as well.

1           MR. ROSE: Mr. -- originally the defendant  
2 here originally was assigned when he was alive.  
3 When he died his estate was substituted in. He  
4 hired counsel. His counsel didn't do much in  
5 the case because I did all the work because I  
6 was representing the companies, Ted Bernstein  
7 and another trust. And in January of 2014 the  
8 PRs of the estate resigned totally unrelated to  
9 this.

10           So in the interim between the original PRs  
11 and the appointment of Mr. O'Connell, we had a  
12 curator. The curator filed papers, which I  
13 filed, it's in the file, but I have sent it to  
14 Your Honor, where he admits, he states that he  
15 wanted to stay the litigation but he states  
16 that I have been doing a great job representing  
17 him and he hasn't even had to hire a lawyer yet  
18 because he is just piggybacking on the work I  
19 am doing.

20           I represented in this lawsuit the very one  
21 that Mr. O'Connell wants to retain my firm to  
22 handle. And he wants it with the consent --  
23 and one thing he said was that there's some  
24 people that aren't here. Every single person  
25 who is a beneficiary of this estate wants my

1 firm to handle this for the reasons I am about  
2 to tell you. And I don't think there's any  
3 dispute about it.

4 I was the lawyer that represented the main  
5 company LIC and AIM. Those are the shorthands  
6 for the two companies. Mr. Stansbury was at  
7 one point a ten percent stockholder in these  
8 companies. He gave his stock back. Ted  
9 Bernstein who is my client, and the Shirley  
10 Bernstein trust, I represented all these people  
11 in the case for about 15 or 18 months before we  
12 settled. I could be off on the timing. But I  
13 did all the documents, the production,  
14 interviewed witnesses, interviewed everybody  
15 you could interview. Was pretty much ready to  
16 go to trial other than we had to take the  
17 deposition of Mr. Stansbury, and then he had  
18 some discovery to do.

19 We went and we settled our case. Because  
20 we had a gap, because we didn't have a PR at  
21 the time, we were in the curator period,  
22 Mr. Brown was unwilling to do anything, so we  
23 didn't settle the case.

24 So Mr. O'Connell was appointed, so he is  
25 now the personal representative. He doesn't

1 know the first thing about the case. No  
2 offense. I mean, he couldn't. You know, it's  
3 not expected for him to know the first thing  
4 about it. I don't mean the first thing. But  
5 he doesn't know much about the case or the  
6 facts.

7 We had discussions about hiring someone  
8 from his law firm to do it. I met someone from  
9 his law firm and provided some basic  
10 information, but nothing really happened. We  
11 were hopeful we'd settle in July. We didn't  
12 settle.

13 So they said the beneficiaries with  
14 Mr. O'Connell's consent we want Mr. Rose to  
15 become the lawyer and we want Mr. Ted Bernstein  
16 to become the administrator ad litem.

17 Now, why is that important? That's the  
18 second motion you are going to hear, but it's  
19 kind of important.

20 THE COURT: That's the one Phillips  
21 deferred?

22 MR. ROSE: Well, what happened was  
23 Mr. Feaman filed an objection to it timely.  
24 And in an abundance of caution because it might  
25 require an evidentiary or more time than we

1 had, Judge Phillips deferred. That was my  
2 order. And my main goal was I wanted to get  
3 into the case and so we could start going to  
4 the status conferences and get this case  
5 moving. And what happened was as soon as we  
6 had the first status conference and we started  
7 the case moving, until we got the motion to  
8 disqualify, and stopped and put the brakes on.

9 And this is a bench trial, so there's  
10 not -- this is like maybe argument, but it's a  
11 little bit related. I believe that Mr. -- this  
12 is the case they want to happen first and  
13 they're putting the brakes on this case because  
14 they want this case to move very slowly.  
15 Because the only way there's any money to  
16 pay --

17 MR. FEAMAN: Objection.

18 THE COURT: Legal objection?

19 MR. FEAMAN: What counsel believes is not  
20 appropriate for --

21 THE COURT: Sustained.

22 MR. ROSE: Okay. So this case -- so  
23 anyway. Mr. Bernstein, Ted Bernstein, Ted,  
24 Simon and Bill, that's Ted, the dead guy Simon  
25 and his client Bill, were the three main

1           shareholders of a company.

2           THE COURT: I got it.

3           MR. ROSE: Ted and Simon started it. They  
4 brought Bill in and gave him some stock for a  
5 while. Bill is suing for two and a half  
6 million dollars. The only person alive on this  
7 planet who knows anything about this case is  
8 Ted. He has got to be the representative of  
9 the estate to defend the case. He has got to  
10 be sitting at counsel table. If he is not at  
11 counsel table, he is going to be excluded under  
12 the exclusionary rule and he will be out in the  
13 hallway the whole trial. And whoever is  
14 defending the estate won't be able to do it.  
15 This guy wants Ted out and me out because we  
16 are the only people that know anything about  
17 this case.

18           So why is that important? Well, it makes  
19 it more expensive. It makes him have a better  
20 chance of winning. That's what this is about.  
21 And at the same time the Illinois case is  
22 really critical here because unless the estate  
23 wins the money in Illinois, there's nothing in  
24 this estate to pay him.

25           THE COURT: I understand.

1           MR. ROSE: Mr. O'Connell, I proffer, he  
2           advised me today there's about \$285,000 of  
3           liquid assets in the estate. And we are going  
4           to get some money from a settlement if you  
5           approve it.

6           Now, Eliot and Mr. Stansbury will probably  
7           object to that. It's not for today. So we  
8           have a settlement with the lawyers, the ones  
9           that withdrew. So we got a little bit of money  
10          from that. But there's really not going to be  
11          enough money in the estate to defend his case,  
12          pay all, do all the other things you got to do.  
13          So this is critical for Mr. Stansbury.

14          So the original PR, the guys that  
15          withdrew, they refused to participate in this  
16          lawsuit because they knew the facts. They knew  
17          the truth. They met with Simon. They drafted  
18          his documents. So they were not participating  
19          in this lawsuit.

20          Mr. Feaman stated in his opening that his  
21          client tried to intervene. So Bill tried to  
22          intervene directly into Illinois, and the  
23          Illinois judge said, no thank you, leave.

24          So when these guys withdrew we got a  
25          curator. The curator I objected --



1 THE COURT: Mr. Brown?

2 MR. ROSE: Ben Brown. He was a lawyer in  
3 Palm Beach, a very nice man. He passed away in  
4 the middle of the lawsuit at a very young age.  
5 But he -- the important thing -- I interrupted,  
6 and I apologize for objecting. I didn't know  
7 what to do. But Mr. Brown didn't say, hey, I  
8 want to get in this lawsuit in Illinois; let me  
9 jump in here. Mr. Feaman and Mr. Stansbury  
10 filed a motion to require Mr. Brown to  
11 intervene in the case.

12 THE COURT: In the federal case?

13 MR. ROSE: In the federal case in  
14 Illinois. Because it's critical for  
15 Mr. Stansbury, it's critical for Mr. Stansbury  
16 to get this money into the estate.

17 THE COURT: Into the estate, I understand.

18 MR. ROSE: Okay. So we had a hearing  
19 before Judge Colin, a rather contested hearing  
20 in front of Judge Colin. Our position was very  
21 simple -- one of the things you will see, my  
22 client's goals on every one of these cases are  
23 exactly the same. Minimize time, minimize  
24 expense, maximize distribution. So we have the  
25 same goal in every case.

1           All the conflict cases you are going to  
2           see all deal with situations where the lawyers  
3           have antagonistic approaches and they want --  
4           like in one case he has, it's one lawsuit the  
5           lawyer wants two opposite results inside the  
6           same lawsuit for two different clients. That's  
7           completely different. And even that case,  
8           which is the Staples case, it was two to one.  
9           There was a judge that dissented and said,  
10          look, I understand what you are saying, but  
11          there's still not really a conflict there.

12                    But our goals are those goals.

13                    So what we said to Judge Colin is we think  
14                    the Illinois case is a loser for the estate.  
15                    We believe the estate is going to lose. The  
16                    lawyer who drafted the testamentary documents  
17                    has given an affidavit in the Illinois case  
18                    saying all his discussions were with Simon.  
19                    The judge in Illinois who didn't have that when  
20                    he first ruled had that recently, and he denied  
21                    their summary judgment in Illinois. So it's  
22                    going to trial. But that lawyer was the  
23                    original PR, so he wasn't bringing the suit.

24                    Mr. Brown says, I am not touching this.  
25                    So we had a hearing, and they forced Mr. Brown

1 to intervene with certain conditions. And one  
2 of the conditions was very logical. If our  
3 goal is to save money and Mr. Stansbury,  
4 Mr. Feaman's client, is going to pay the cost  
5 of this, he will get it back if he wins, then  
6 we got no objection anymore, as long as he is  
7 funding the litigation. He is the only guy who  
8 benefits from this litigation. None of the --  
9 the children and the grandchildren they don't  
10 really care.

11 Judge Lewis represents Eliot's three kids  
12 versus Eliot. The money either goes to Eliot  
13 or his three kids. She's on board with, you  
14 know, we don't want to waste estate funds on  
15 this. Our goal is to keep the money in the  
16 family. He wants the money.

17 This is America. He can file the lawsuit.  
18 That's great. But these people should be able  
19 to defend themselves however they choose to see  
20 fit. But the critical thing about this is  
21 Mr. Brown didn't do anything in here. Judge  
22 Colin said, you can intervene as long as he is  
23 paying the bills. And that's an order. Well,  
24 that order was entered a long time ago. It was  
25 not appealed.

1           So one of the things, the third thing you  
2           are being asked to do today is vacate that  
3           order, you know. And I did put in my motion,  
4           and I don't know if it was ad hominem toward  
5           Mr. Feaman, it really was his client, his  
6           client is driving this pace. He is driving us  
7           to zero. I mean, we started this estate with  
8           over a million dollars. He has fought  
9           everything we do every day. It's not just  
10          Eliot. Eliot is a lot of this. Mr. Stansbury  
11          is driving us to zero as quickly as possible.

12           So in the Illinois case the estate is  
13          represented by Stamos and Trucco. They are  
14          hired by, I think, Ben Brown but was in  
15          consultation with Mr. Feaman. They  
16          communicated -- the documents will come into  
17          evidence. I am assuming he is going to put the  
18          documents on his list in evidence.

19           You will see e-mails from Mr. Stamos from  
20          the Stamos Trucco firm, they e-mailed to  
21          Mr. O'Connell, and they copied Bill Stansbury  
22          and Peter Feaman because they are driving the  
23          Illinois litigation. I don't care. They can  
24          drive it. I think it's a loser. They think  
25          it's a winner. We'll find out in a trial.

1           They are supposed to be paying the bills.  
2           I think the evidence would show his client's in  
3           violation of Judge Colin's orders because his  
4           client hasn't paid the lawyer all the money  
5           that's due. And Mr. O'Connell, I think, can  
6           testify to that. I don't think it's a disputed  
7           issue. But the lawyer's been paid 70 and he is  
8           owed 40, which means Mr. Feaman's client is  
9           right now technically in violation of a court  
10          order.

11           I have asked numerous times for them to  
12          give me the information. I just got it this  
13          morning. But I guess I can file a motion to  
14          hold him in contempt for violating a court  
15          order.

16           But in the Chicago case the plaintiff is  
17          really not Ted Bernstein, although he probably  
18          nominally at some point was listed as a  
19          plaintiff in the case. The plaintiff is the  
20          Simon Bernstein 1995 irrevocable life insurance  
21          trust. According to the records of the  
22          insurance company, the only person named as a  
23          beneficiary is a defunct pension plan that went  
24          away.

25           THE COURT: Net something net something,

1 right?

2 MR. ROSE: Right. And then the residual  
3 beneficiary is this trust. And these are  
4 things Simon -- he filled out one designation  
5 form in '95 and he named the 95 trust.

6 THE COURT: But there's no paperwork,  
7 right?

8 MR. ROSE: We can't find the paperwork.  
9 Not me. It was not me. I have nothing to do  
10 with it. I said we. I wanted to correct the  
11 record because it will be flown up to Illinois.

12 Whoever it is can't find the paperwork.  
13 So there's a proceeding, and it happens in  
14 every court, and there's Illinois proceedings  
15 to determine how do you prove a lost trust.

16 This lawsuit is going to get resolved one  
17 way or the other. But in this lawsuit the 95  
18 trust Ted Bernstein is the trustee, so he  
19 allowed, though under the terms of the trust in  
20 this case, and we cited it to you twice or  
21 three times, under Section 4J of the trust on  
22 page 18 of the Simon Bernstein Trust, it says  
23 that you can be the trustee of my trust, Simon  
24 said you can be the trustee of my trust even if  
25 you have a different interest as a trustee of a

1 different trust. So that's not really an  
2 issue. And up in Chicago Ted Bernstein is the  
3 trustee of the 95 trust. He is represented by  
4 the Simon law firm in Chicago.

5 I have never appeared in court. He is  
6 going to put in all kinds of records. My name  
7 never appears -- I have the docket which he  
8 said can come into evidence. I don't appear on  
9 the docket.

10 Now, I have to know about this case though  
11 because I represent the trustee of the  
12 beneficiary of this estate. I've got to be  
13 able to advise him. So I know all about his  
14 case. And he was going to be deposed.

15 Guess who was at his deposition? Bill  
16 Stansbury. Bill Stansbury was at his  
17 deposition, sat right across from me. Eliot,  
18 who is not here today, was at that deposition,  
19 and Eliot got to ask questions of him at that  
20 deposition. He wanted me at the deposition.  
21 He is putting the deposition in evidence. If  
22 you study the deposition, all you will see is  
23 on four occasions I objected on what grounds?  
24 Privilege. Be careful what you talk about; you  
25 are revealing attorney/client privilege.

1           That's all I did. I didn't say, gee, don't  
2           give them this information or that information.  
3           And if I objected incorrectly, they should have  
4           gone to the judge in Illinois. And I guarantee  
5           you there's a federal judge in Illinois that if  
6           I had objected improperly would have overruled  
7           my objections. I instructed him to protect his  
8           attorney/client privilege. That's what I was  
9           there for, to advise him and to defend him at  
10          deposition and to protect him. That's all I  
11          did in the Illinois case. And that is over.

12                 Now, I am rooting like crazy that the  
13          estate loses this case in one sense because  
14          that's what everybody that is a beneficiary of  
15          my trust wants. But I could care less how that  
16          turns out, you know, from a legal standpoint.  
17          I don't have an appearance in this case. And  
18          everyone up there is represented by lawyers.

19                 So what we have now is we have this motion  
20          which seeks to disqualify my law firm. We  
21          still have the objection to Ted serving as the  
22          administrator ad litem. And I think those two  
23          kind of go hand in hand.

24                 There's another component you should know  
25          about that motion. But as I told you, our



1 goals are to reduce expense.

2 The reason that everybody wanted Ted to  
3 serve as the administrator ad litem, so he  
4 would sort of be the representative of the  
5 estate, because he said he would do that for  
6 free.

7 THE COURT: I remember.

8 MR. ROSE: Mr. O'Connell is a  
9 professional. He is not going to sit there for  
10 free for a one-week, two-week jury trial and  
11 prepare and sit for deposition. That's enough  
12 money -- just his fees alone sitting at trial  
13 are enough to justify everything -- you know,  
14 it's a significant amount of money.

15 So that's what's at issue today.

16 But their motion for opening statement,  
17 and I realize this is going to overlap, my  
18 other will be --

19 THE COURT: Which motion?

20 MR. ROSE: The disqualification.

21 THE COURT: I wasn't sure.

22 MR. ROSE: I got you. That was sort of  
23 first up. All right. So I am back. That's  
24 the background. You got the background for the  
25 disqualification motion. This is an adversary

1 in litigation trying to disqualify me.

2 I think it is a mean-spirited motion by  
3 Mr. Stansbury designed to create chaos and  
4 disorder and raise the expense, maybe force the  
5 estate into a position where they have to  
6 settle, because now they don't have a  
7 representative or an attorney that knows  
8 anything about the case.

9 MR. FEAMAN: Objection.

10 THE COURT: Legal objection?

11 MR. FEAMAN: Comments on the motivation or  
12 intention of opposing counsel in opening  
13 statement is not proper.

14 THE COURT: I will allow it only -- mean  
15 spirited I will strike. The other comments I  
16 will allow because under Rule 4-1.7, and I may  
17 be misquoting, but it is one of the two rules  
18 we have been looking at under the Florida Bar,  
19 the commentary specifically talks about an  
20 adverse party moving to disqualify and the  
21 strategy may be employed. So I will allow that  
22 portion of his argument, striking mean  
23 spirited.

24 MR. ROSE: Okay. If you turn to tab 2 of  
25 the -- we, I think, sent you a very thin

1 binder.

2 THE COURT: Yes, you did.

3 MR. ROSE: We had already sent you the  
4 massive book a long time ago.

5 THE COURT: Yes.

6 MR. ROSE: And I think all I sent you was  
7 the very thin binder. If you turn to Tab 2.

8 THE COURT: In any other world this would  
9 have been a nice sized binder. In this  
10 particular case you are indeed correct, this is  
11 a very thin binder.

12 MR. ROSE: Okay. If you flip to page  
13 2240 --

14 THE COURT: I am just teasing you, sorry.

15 MR. ROSE: -- which is about five or six  
16 pages in.

17 THE COURT: Yes.

18 MR. ROSE: This is where a conflict is  
19 charged by opposing party.

20 THE COURT: Yes.

21 MR. ROSE: It's part of Rule 4-1.7. These  
22 two rules have a lot of overlap.

23 And I would point for the record I did not  
24 say that Mr. Feaman was mean spirited. I  
25 specifically said mean spirited by his client.

1 THE COURT: Thank you.

2 MR. ROSE: So conflicts charged by the  
3 opponent, and this is just warning you that  
4 this can be used as a technique of harassment,  
5 and that's why I am tying that in.

6 But the important things are I have never  
7 represented Mr. Stansbury in any matter.  
8 Generally in a conflict of interest situation  
9 you will see I represented him. I don't have  
10 any confidential information from  
11 Mr. Stansbury. I have only talked to him  
12 during his deposition. It wasn't very  
13 pleasant. And if you disqualify me to some  
14 degree my life will be fine, because this is  
15 not the most fun case to be involved in. I am  
16 doing it because I represent Ted and we are  
17 trying to do what's right for the  
18 beneficiaries.

19 THE COURT: Appearance for the record.  
20 Someone just came in.

21 MR. ELIOT BERNSTEIN: Hi. Eliot Ivan  
22 Bernstein.

23 THE COURT: Thank you.

24 MR. ELIOT BERNSTEIN: I am pro se, ma'am.

25 THE COURT: Thank you. You may proceed.

1 I just wanted the court reporter to know.

2 MR. ELIOT BERNSTEIN: Thank you, Your  
3 Honor.

4 MR. ROSE: I don't have any confidential  
5 information of Mr. O'Connell. He is the PR of  
6 the estate. I don't know anything about  
7 Mr. O'Connell that would compromise my ability  
8 to handle this case. I am not sure he and I  
9 have ever spoken about this case. But in  
10 either case, I don't have any information.

11 So I can't even understand why they are  
12 saying this is a conflict of interest. But the  
13 evidence will show, if you look at the way  
14 these are set up, these are three separate  
15 cases, not one case. And nothing I am doing in  
16 this case criticizes what I am doing in this  
17 case. Nothing I am doing -- the outcome of  
18 this case is wholly independent of the outcome  
19 of this case. He could lose this case and win  
20 this case. He could lose this case and lose  
21 this case. I mean, the cases have nothing to  
22 do with the issues.

23 Who gets the insurance proceeds? Bill  
24 Stansbury is not even a witness in that case.  
25 It has nothing to do with the issue over here,

1           how much money does Bill Stansbury get? So  
2           you've got wholly unrelated, and that's the  
3           other part of the Rule 4-1.9 and 4-1.7, it  
4           talks about whether the matters are unrelated.  
5           And I guess when I argue the statute I will  
6           argue the statute for you.

7                     At best what the evidence is going to show  
8           you -- and I am not trying to win this on a  
9           technicality. I want to win this like up or  
10          down and move on. Because this estate can't --  
11          this delay was torture to wait this long for  
12          this hearing.

13                    But if I showed up at Ted's deposition,  
14          and I promise you I will never show up again, I  
15          am out of that case, this is a conflict of  
16          interest with a former client. I have ceased  
17          representing him at his deposition. He is  
18          never going to be deposed again. If it's a  
19          conflict of interest with a former client, all  
20          these things are the prerogative of the former  
21          client. They are not the prerogative of the  
22          new client. The new client it's not the issue.  
23          So if I represented Ted in his deposition, I  
24          cannot represent another person in the same or  
25          a substantially related matter.

1           So I can't represent the estate in this  
2 case because I sat at Ted's deposition, unless  
3 the former client gives informed consent. He  
4 could still say, hey, I don't care, you do the  
5 Illinois case for the estate. I wouldn't do  
6 that, but that's what the rule says. Use  
7 information. There's no information. I am not  
8 even going to waste your time. Reveal  
9 information. So there's no information. If  
10 this is the rule we are traveling under, you  
11 deny the motion and we go home and move on and  
12 get back to litigation. If we are traveling  
13 under this rule, I cannot under 4-1.7 --

14           MR. FEAMAN: Excuse me, Your Honor, this  
15 sounds more like final argument than it does  
16 opening statement what the evidence is going to  
17 show.

18           THE COURT: Overruled.

19           MR. ROSE: So under 4-1.7, except as in b,  
20 and I am talking about b because that's maybe  
21 the only piece of evidence we may need is the  
22 waiver. I have a written waiver. I think it  
23 has independent legal significance. Because if  
24 I obtained his writing in writing, I think it's  
25 admissible just because Mr. O'Connell signed

1           it. But they object, they may object to the  
2           admission of the waiver, so I may have to put  
3           Mr. O'Connell on the stand for two seconds and  
4           have him confirm that he signed the waiver  
5           document.

6           But except if it's waived, now let's put  
7           that aside. We never even get to the waiver.  
8           The representation of one client has to be  
9           directly adverse to another client. So  
10          representing Ted in his deposition is not --  
11          has nothing to do -- first of all, Ted had  
12          counsel representing him directly adverse. I  
13          was there protecting him as trustee, protecting  
14          his privileges, getting ready for a trial that  
15          we had before Judge Phillips where he upheld  
16          the validity of the documents, determined that  
17          Ted didn't commit any egregious wrongdoing.  
18          That's the December 15th trial. It's on appeal  
19          to the 4th District. That's what led to having  
20          Eliot determined to have no standing, to Judge  
21          Lewis being appointed as guardian for his  
22          children. That was the key. That was the only  
23          thing we have accomplished to move the thing  
24          forward was that, but we had that.

25                 But that's why I was at the deposition,



1 but it was not directly adverse to the estate.

2 Number two, there's a substantial risk  
3 that the representation of one or more clients  
4 will be materially limited by my  
5 responsibilities to another. I have asked them  
6 to explain to me how might -- how what I want  
7 to do here, which is to defend these people  
8 that I have been doing -- I have asked  
9 Mr. Feaman to explain to me how what I am doing  
10 to defend the estate, like I defended all these  
11 people against his client, could possibly be  
12 limited by my responsibilities to Ted. My  
13 responsibilities to Ted is to win this lawsuit,  
14 save the money for his family, determine his  
15 father did not defraud Bill Stansbury. So I am  
16 not limited in any way.

17 So if you don't find one or two, you don't  
18 even get to waiver. But if you get to waiver,  
19 and this is evidence, it's one of the -- I only  
20 gave you three new things in the binder. One  
21 was the waiver. One was the 57.105 amended  
22 motion.

23 I think the significance of that is after  
24 I got the waiver, after I got a written waiver,  
25 I thought that changed the game a little bit.

1           You know, if you are a lawyer and you file a  
2           motion to disqualify -- so when I got the  
3           written waiver --

4           MR. FEAMAN: Your Honor --

5           THE COURT: Legal objection.

6           MR. FEAMAN: Not part of opening statement  
7           when you are commenting on a 57.105 motion --

8           THE COURT: Sustained.

9           MR. FEAMAN: -- that you haven't even seen  
10          yet.

11          THE COURT: Sustained.

12          MR. FEAMAN: Thank you.

13          THE COURT: Sustained.

14          MR. ROSE: I got a waiver signed by  
15          Mr. O'Connell. I had his permission, but I got  
16          a formal written waiver. And it was after our  
17          first hearing, and it was after -- so I sent it  
18          to Mr. Feaman.

19                 But if you look under the rule, it's a  
20          clearly waivable conflict. Because I am not  
21          taking an antagonistic position saying like the  
22          work I did in the other case was wrong or this  
23          or that.

24                 And if you look at the rules of  
25          professional conduct again, and we'll do it in

1 closing, but I am the one who is supposed to  
2 decide if I have a material limitation in the  
3 first instance. That's what the rules direct.  
4 Your Honor reviews that. But in the first  
5 instance I do not have any material limitation  
6 on my ability to represent the estate  
7 vigorously, with all my heart, with everything  
8 my law firm's resources, and with Ted's  
9 knowledge of the case and the facts to defend  
10 his case, there is no limitation and there's no  
11 substantial risk that I am not going to do the  
12 best job possible to try to protect the estate  
13 from this claim.

14 And I think we would ask that you deny the  
15 motion to disqualify on the grounds that  
16 there's no conflict, and the waiver for  
17 Mr. O'Connell would resolve it.

18 And we also would like you to appoint Ted  
19 Bernstein. There's no conflict of interest in  
20 him defending the estate as its representative  
21 through trial to try to protect the estate's  
22 money from Mr. Stansbury. It's not like Ted or  
23 I are going to roll over and help Mr. Stansbury  
24 or sell out the estate for his benefit. That's  
25 what a conflict would be worried about. We are

1 not taking a position in -- we are not in the  
2 case yet, obviously. If you allow us to  
3 continue in this case, we are not going to take  
4 a position in this case which is different from  
5 any position we have ever taken in any case  
6 because all --

7 THE COURT: Just for the record, for the  
8 record, I see you pointing. So you are not  
9 taking a position in the Palm Beach circuit  
10 court --

11 MR. ROSE: Case.

12 THE COURT: -- civil case --

13 MR. ROSE: Different than we've --

14 THE COURT: -- that's different than  
15 probate or even the insurance proceeds?

16 MR. ROSE: Correct. Different from what  
17 we did in the federal case in Illinois,  
18 different from we are taking in the probate  
19 case. Or more importantly, in fact most  
20 importantly, we are not taking a position  
21 differently than we took when I represented  
22 other people in the same lawsuit.

23 You have been involved in lawsuits where  
24 there are eight defendants and seven settled  
25 and the last guy says, well, gee, let me hire

1           this guy's lawyer, either he is better or my  
2           lawyer just quit or I don't have a lawyer. So  
3           but I am not taking a position like here we  
4           were saying, yeah, he was a terrible guy, he  
5           defrauded you, and now we are saying, oh, no,  
6           it's not, he didn't defraud you. That would be  
7           a conflict. We have defended the case by  
8           saying that Mr. Stansbury's claim has no merit  
9           and we are going to defend it the same way.

10           And then that's what we'd like to do with  
11           the Florida litigation, and then time  
12           permitting we'd like to discuss the Illinois  
13           litigation, because we desperately need a  
14           ruling from Your Honor on the third issue you  
15           set for today which is are you going to vacate  
16           Judge Colin's order and free Mr. Stansbury of  
17           the duty to fund the Illinois litigation.

18           Judge Colin entered the order. The issue  
19           was raised multiple times before Judge  
20           Phillips. He wanted to give us his ruling one  
21           day, and we -- you know, he didn't. We were  
22           supposed to set it for hearing. We had  
23           numerous hearings set on that motion, the  
24           record will reflect, and those were all  
25           withdrawn. And now that they have a new judge,

1 I think they are coming back with the same  
2 motion to be excused from that, and that's the  
3 third thing you need to decide today.

4 THE COURT: All right.

5 MR. ROSE: Unless you have any questions.

6

7 (Opening statements excerpt concluded.)

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C E R T I F I C A T E

- - -

The State of Florida  
County of Palm Beach

I, Lisa Mudrick, RPR, FPR, certify that I  
was authorized to and did stenographically report  
the foregoing proceedings, and that the excerpted  
transcript is a true record.

Dated February 21, 2017.



LISA MUDRICK, RPR, FPR  
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561-615-8181

1 IN THE FIFTEENTH JUDICIAL CIRCUIT COURT  
2 IN AND FOR PALM BEACH COUNTY, FLORIDA  
3 CASE NO: 502012CP004391XXXXNBIH

4  
5 IN RE:  
6 ESTATE OF SIMON L. BERNSTEIN,  
7 \_\_\_\_\_/

8  
9  
10 Proceedings before the Honorable  
11 ROSEMARIE SCHER

12  
13 [EXCERPT - BRIAN O'CONNELL TESTIMONY]

14  
15  
16 Thursday, February 16, 2017  
17 3188 PGA Boulevard  
18 North County Courthouse  
19 Palm Beach Gardens, Florida 33410  
20 2:38 p.m. - 4:46 p.m.

21 ORIGINAL

22  
23 Reported by:  
24 Lisa Mudrick, RPR, FPR  
25 Notary Public, State of Florida



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1                   P R O C E E D I N G S

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3                                   \* \* \* \* \*

4                   BRIAN O'CONNELL TESTIMONY

5                                   - - -

6                   MR. FEAMAN: Next I would call Brian  
7                   O'Connell to the stand.

8                   THE COURT: Okay.

9                                   - - -

10            Thereupon,

11                   BRIAN O'CONNELL,

12            a witness, being by the Court duly sworn, was  
13            examined and testified as follows:

14                   THE WITNESS: I do.

15                   THE COURT: Have a seat. Thank you very  
16            much.

17                   Before we start I need six minutes to use  
18            the restroom. I will be back in six minutes.

19                   (A recess was taken.)

20                   THE COURT: All right. Call

21            Mr. O'Connell. I apologize. Let's proceed.

22                   MR. FEAMAN: Thank you, Your Honor.

23                   DIRECT (BRIAN O'CONNELL)

24            BY MR. FEAMAN:

25                   Q. Please state your name.

1 A. Brian O'Connell.

2 Q. And your business address?

3 A. 515 North Flagler Drive, West Palm Beach,  
4 Florida.

5 Q. And you are the personal representative,  
6 the successor personal representative of the Estate  
7 of Simon Bernstein; is that correct?

8 A. Yes.

9 Q. And I handed you during the break Florida  
10 Statute 733.602. Do you have that in front of you?

11 A. I do.

12 Q. Would you agree with me, Mr. O'Connell,  
13 that as personal representative of the estate that  
14 you have a fiduciary duty to all interested persons  
15 of the estate?

16 A. To interested persons, yes.

17 Q. Okay. Are you aware that Mr. Stansbury,  
18 obviously, has a lawsuit against the estate,  
19 correct?

20 A. Correct.

21 Q. And he is seeking damages as far as you  
22 know in excess of \$2 million dollars; is that  
23 correct?

24 A. Yes.

25 Q. Okay. And the present asset value of the

1 estate excluding a potential expectancy in Chicago  
2 I heard on opening statement was around somewhere a  
3 little bit over \$200,000; is that correct?

4 A. Correct.

5 Q. And --

6 A. Little over that.

7 Q. Okay. And you are aware that in Chicago  
8 the amount at stake is in excess of \$1.7 million  
9 dollars, correct?

10 A. Yes.

11 Q. And if the estate is successful in that  
12 lawsuit then that money would come to the Estate of  
13 Simon Bernstein, correct?

14 A. Correct.

15 Q. And then obviously that would quintuple,  
16 if my math is correct, the assets that are in the  
17 estate right now; is that correct?

18 A. They would greatly enhance the value of  
19 the estate, whatever the math is.

20 Q. Okay. So would you agree that  
21 Mr. Stansbury is reasonably affected by the outcome  
22 of the Chicago litigation if he has an action  
23 against the estate in excess of two million?

24 A. Depends how one defines a claimant versus  
25 a creditor. He certainly sits in a claimant

1 position. He has an independent action.

2 Q. Right.

3 A. So on that level he would be affected with  
4 regard to what happens in that litigation if his  
5 claim matures into an allowed claim, reduced to a  
6 judgment in your civil litigation.

7 Q. So if he is successful in his litigation,  
8 it would -- the result of the Chicago action, if  
9 it's favorable to the estate, would significantly  
10 increase the assets that he would be able to look  
11 to if he was successful either in the amount of  
12 300,000 or in an amount of two million?

13 A. Right. If he is a creditor or there's a  
14 recovery then certainly he would benefit from that  
15 under the probate code because then he would be  
16 paid under a certain priority of payment before  
17 beneficiaries.

18 Q. All right. And so then Mr. Stansbury  
19 potentially could stand to benefit from the result  
20 of the outcome of the Chicago litigation depending  
21 upon the outcome of his litigation against the  
22 estate?

23 A. True.

24 Q. Correct?

25 A. Yes.

1 Q. So in that respect would you agree that  
2 Mr. Stansbury is an interested person in the  
3 outcome of the estate in Chicago?

4 A. I think in a very broad sense, yes. But  
5 if we are going to be debating claimants and  
6 creditors then that calls upon certain case law.

7 Q. Okay.

8 A. But I am answering it in sort of a general  
9 financial sense, yes.

10 Q. Okay. We entered into evidence Exhibits 7  
11 and 8 which were e-mails that were sent to you  
12 first by an associate in Mr. Stamos's office and --

13 MR. FEAMAN: Could I approach, Your Honor?

14 THE COURT: Yes. Do you have an extra  
15 copy for him so I can follow along?

16 MR. FEAMAN: I think I do.

17 THE COURT: Okay. If you don't, no  
18 worries. Let me know.

19 Does anyone object to me maintaining the  
20 originals so that I can follow along? If you  
21 don't --

22 MR. FEAMAN: I know we do.

23 MR. ROSE: If you need my copy to speed  
24 things up, here.

25 ///

1 BY MR. FEAMAN:

2 Q. There's our copies of 7 and 8.

3 A. Which one did you want me to look at  
4 first?

5 Q. Take a look at the one that came first on  
6 January 31st, 2007. Do you see that that was an  
7 e-mail directed to you from is it Mr. Kuyper, is  
8 that how you pronounce his name?

9 A. Yes.

10 Q. Okay. On January 31st. Do you recall  
11 receiving this?

12 A. Let me take a look at it.

13 Q. Sure.

14 A. I do remember this.

15 Q. All right. And did you have any  
16 discussions with Mr. Kuyper or Mr. Stamos  
17 concerning your comments regarding the Court's  
18 ruling which was denying the estate's motion for  
19 summary judgment?

20 A. There might have been another e-mail  
21 communication, but no oral communication since  
22 January.

23 Q. Did you send an e-mail back in response to  
24 this?

25 A. That I don't recall, and I don't have my

1 records here.

2 Q. Okay.

3 A. I am not sure.

4 Q. Why don't we take a look at Exhibit 8, if  
5 we could. That's the e-mail from Mr. Stamos dated  
6 February 14th to you and me and Mr. Stansbury. Do  
7 you see that?

8 A. Yes.

9 Q. And he says, "What's our position on  
10 settlement?," correct?

11 A. Correct.

12 Q. Okay. And that's because Mr. Stamos had  
13 received an e-mail from plaintiff's counsel in  
14 Chicago soliciting some input on a possible  
15 settlement, correct?

16 A. Yes.

17 Q. And when you received this did you respond  
18 to Mr. Stamos either orally or in writing?

19 A. Not yet. I was in a mediation that lasted  
20 until 2:30 in the morning yesterday, so I haven't  
21 had a chance to speak to him.

22 Q. So then you haven't had any discussions  
23 with Mr. Stamos concerning settlement --

24 A. No.

25 Q. -- since this?



1           A.    Not -- let's correct that.  Not in terms  
2 of these communications.

3           Q.    Right.

4           A.    I have spoken to him previously about  
5 settlement, but obviously those are privileged that  
6 he is my counsel.

7           Q.    Okay.  And you are aware that -- would you  
8 agree with me that Mr. Ted Bernstein, who is in the  
9 courtroom today, is a plaintiff in that action in  
10 Chicago?

11          A.    Which action?

12          Q.    The Chicago filed, the action filed by  
13 Mr. Bernstein?

14          A.    Can you give me the complaint?

15          Q.    Sure.

16                MR. FEAMAN:  If I can take a look?

17                THE COURT:  Go ahead.

18 BY MR. FEAMAN:

19          Q.    This is the --

20                MR. ROSE:  We'll stipulate.  The documents  
21 are already in evidence.

22                THE COURT:  Same objection?

23                MR. ROSE:  I mean, we are trying to save  
24 time.

25                ///

1 BY MR. FEAMAN:

2 Q. Take a look at the third page.

3 (Overspeaking.)

4 THE COURT: Hold on. Hold on. Hold on.

5 I have got everybody talking at once. It's  
6 Feaman's case. We are going until 4:30. I  
7 have already got one emergency in the, we call  
8 it the Cad, that means nothing to you, but I am  
9 telling you all right now I said we are going  
10 to 4:30.

11 THE WITNESS: Yes, sir, Ted Bernstein is a  
12 plaintiff.

13 BY MR. FEAMAN:

14 Q. Individually, correct?

15 A. Individually and as trustee.

16 Q. And Mr. Stamos is your attorney who  
17 represents the estate, correct?

18 A. Correct.

19 Q. And the estate is adverse to the  
20 plaintiffs, including Mr. Bernstein, correct?

21 A. In this action, call it the Illinois  
22 action, yes.

23 Q. Correct.

24 A. Okay.

25 THE COURT: Hold on. One more time. Go

1 back and say that again. You are represented  
2 by Mr. Stamos?

3 THE WITNESS: Right, in the Illinois  
4 action, Your Honor.

5 THE COURT: Right.

6 THE WITNESS: And Ted Bernstein  
7 individually and as trustee is a plaintiff.

8 THE COURT: Right, individually and as  
9 trustee, got it.

10 THE WITNESS: And the estate is adverse to  
11 Ted Bernstein in those capacities in that  
12 litigation.

13 BY MR. FEAMAN:

14 Q. All right. And are you aware --

15 THE COURT: Thank you.

16 BY MR. FEAMAN:

17 Q. And are you aware that Mr. Rose represents  
18 Mr. Ted Bernstein in various capacities?

19 A. Yes.

20 Q. Generally?

21 A. In various capacities generally, right.

22 Q. Including individually, correct?

23 A. That I am not -- I know as a fiduciary,  
24 for example, as trustee from our various and sundry  
25 actions, Shirley Bernstein, estate and trust and so

1     forth. I am not sure individually.

2           Q.     How long have you been involved with this  
3     Estate of Simon Bernstein?

4           A.     A few years.

5           Q.     Okay. And as far as you know  
6     Mr. Bernstein has been represented in whatever  
7     capacity in all of this since that time; is that  
8     correct?

9           A.     He is definitely -- Mr. Rose has  
10    definitely represented Ted Bernstein since I have  
11    been involved. I just want to be totally correct  
12    about exactly what capacity. Definitely as a  
13    fiduciary no doubt.

14          Q.     Okay. And did you ever see the deposition  
15    that was taken by your lawyer in the Chicago action  
16    that was introduced as Exhibit 6 in this action?

17          A.     Could I take a look at it?

18          Q.     Sure. Have you seen that deposition  
19    before, Mr. O'Connell?

20          A.     I am not sure. I don't want to guess.  
21    Because I know it's May of 2015. It's possible.  
22    There were a number of documents in all this  
23    litigation, and I would be giving you a guess.

24          Q.     On that first page is there an appearance  
25    by Mr. Rose on behalf of Ted Bernstein in that

1 deposition?

2 A. Yes.

3 Q. So would you agree with me that Ted  
4 Bernstein is adverse to the estate in the Chicago  
5 litigation? You said that earlier, correct?

6 A. Yes.

7 Q. Okay. And would you agree with me upon  
8 reviewing that deposition that Mr. Rose is  
9 representing Ted Bernstein there?

10 MR. ROSE: Objection, calls for a legal  
11 conclusion.

12 THE WITNESS: There's an appearance by  
13 him.

14 THE COURT: Sustained.

15 BY MR. FEAMAN:

16 Q. There's an appearance by him? Where does  
17 it show that?

18 MR. ROSE: The objection is sustained.

19 THE COURT: I sustained the objection.

20 MR. FEAMAN: Oh, okay. Sorry.

21 BY MR. FEAMAN:

22 Q. Now, you have not gotten -- you said that  
23 you wanted to retain Mr. Rose to represent the  
24 estate here in Florida, correct?

25 A. Yes. But I want to state my position

1 precisely, which is as now has been pled that Ted  
2 Bernstein should be the administrator ad litem to  
3 defend that litigation. And then if he chooses,  
4 which I expect he would, employ Mr. Rose, and  
5 Mr. Rose would operate as his counsel.

6 Q. Okay. So let me get this, if I understand  
7 your position correctly. You think that Ted  
8 Bernstein, who you have already told me is suing  
9 the estate as a plaintiff in Chicago, it would be  
10 okay for him to come in to the estate that he is  
11 suing in Chicago to represent the estate as  
12 administrator ad litem along with his attorney  
13 Mr. Rose? Is that your position?

14 A. Here's why, yes, because of events. You  
15 have an apple and an orange with respect to  
16 Illinois. Mr. Rose and Ted Bernstein is not going  
17 to have any -- doesn't have any involvement in the  
18 prosecution by the estate of its position to those  
19 insurance proceeds. That's not on the table.

20 THE COURT: Say it again, Ted has no  
21 involvement?

22 THE WITNESS: Ted Bernstein and Mr. Rose  
23 have no involvement in connection with the  
24 estate's position in the Illinois litigation,  
25 Your Honor. I am not seeking that. If someone

1           asked me that, I would say absolutely no.

2       BY MR. FEAMAN:

3           Q.     I am confused, though, Mr. O'Connell.  
4       Isn't Ted Bernstein a plaintiff in the insurance  
5       litigation?

6           A.     Yes.

7           Q.     Okay. And as plaintiff in that insurance  
8       litigation isn't he seeking to keep those insurance  
9       proceeds from going to the estate?

10          A.     Right.

11          Q.     Okay.

12          A.     Which is why the estate has a contrary  
13       position --

14          Q.     So if the estate --  
15                 (Overspeaking.)

16                THE COURT: Let him finish his answer.

17                THE WITNESS: It's my position as personal  
18       representative that those proceeds should come  
19       into the estate.

20       BY MR. FEAMAN:

21          Q.     Correct.

22          A.     Correct.

23          Q.     And it's Mr. Bernstein's position both  
24       individually and as trustee in that same action  
25       that those proceeds should not come into the

1 estate?

2 A. Right.

3 Q. Correct? And Mr. Bernstein is not a  
4 monetary beneficiary of the estate, is he?

5 A. As a trustee he is a beneficiary,  
6 residuary beneficiary of the estate. And then he  
7 would be a beneficiary as to tangible personal  
8 property.

9 Q. So on one hand you say it's okay for  
10 Mr. Bernstein to be suing the estate to keep the  
11 estate from getting \$1.7 million dollars, and on  
12 the other hand it's okay for him and his attorney  
13 to defend the estate. So let me ask you this --

14 A. That's not what I am saying.

15 Q. Okay. Well, go back to Exhibit 8, if we  
16 could.

17 A. Which one is Exhibit 8?

18 Q. That's the e-mail from Mr. Stamos that you  
19 got last week asking about settlement.

20 A. The 31st?

21 Q. Right.

22 A. Well, actually the Stamos e-mail is  
23 February 14th.

24 Q. Sorry, February 14th. And Mr. Rose right  
25 now has entered an appearance on behalf of the



1 estate, correct?

2 A. You have to state what case.

3 Q. Down here in Florida.

4 A. Which case?

5 Q. The Stansbury action.

6 A. The civil action?

7 Q. Yes.

8 A. Yes. You need to be precise because  
9 there's a number of actions and various  
10 jurisdictions and various courts.

11 Q. And Mr. Rose's client in Chicago doesn't  
12 want any money to go to the estate. So when you  
13 are discussing settlement with Mr. Stamos, are you  
14 going to talk to your other counsel, Mr. Rose,  
15 about that settlement when he is representing a  
16 client adverse to you?

17 A. No.

18 Q. How do we know that?

19 A. Because I don't do that and have not done  
20 that.

21 Q. So you --

22 A. Again, can I finish, Your Honor?

23 THE COURT: Yes, please.

24 THE WITNESS: Thanks. Because there's a  
25 differentiation you are not making between

1           these pieces of litigation. You have an  
2           Illinois litigation pending in federal court  
3           that has discrete issues as to who gets the  
4           proceeds of a life insurance policy. Then you  
5           have what you will call the Stansbury  
6           litigation, you represent him, your civil  
7           action, pending in circuit civil, your client  
8           seeking to recover damages against the estate.

9       BY MR. FEAMAN:

10           Q.     So Mr. Rose could advise you as to terms  
11           of settlement, assuming he is allowed to be counsel  
12           for the estate in the Stansbury action down here,  
13           correct?

14           A.     About the Stansbury action?

15           Q.     Right, about how much we should settle  
16           for, blah, blah, blah?

17           A.     That's possible.

18           Q.     Okay. And part of those settlement  
19           discussions would have to entail how much money is  
20           actually in the estate, correct?

21           A.     Depends on what the facts and  
22           circumstances are. Right now, as everyone knows I  
23           think at this point, there isn't enough money to  
24           settle, unless Mr. Stansbury would take less than  
25           what is available. There have been attempts made

1 to settle at mediations and through communications  
2 which haven't been successful. So certainly I am  
3 not as personal representative able or going to  
4 settle with someone in excess of what's available.

5 Q. Correct. But the outcome of the Chicago  
6 litigation could make more money available for  
7 settlement, correct?

8 A. It it's successful it could.

9 Q. Okay. May be a number that would be  
10 acceptable to Mr. Stansbury, I don't know, that's  
11 conjecture, right?

12 A. Total conjecture.

13 Q. Okay.

14 A. Unless we are going to get into what  
15 settlement discussions have been.

16 Q. And at the same time Mr. Rose, who has  
17 entered an appearance at that deposition for  
18 Mr. Bernstein in the Chicago action, his client has  
19 an interest there not to let that money come into  
20 the estate, correct?

21 MR. ROSE: Objection again to the extent  
22 it calls for a legal conclusion as to what I  
23 did in Chicago. I mean, the records speak for  
24 themselves.

25 THE COURT: Could you read back the

1 question for me?

2 (The following portion of the record was  
3 read back.)

4 "Q. And at the same time Mr. Rose, who  
5 has entered an appearance at that deposition  
6 for Mr. Bernstein in the Chicago action, his  
7 client has an interest there not to let that  
8 money come into the estate, correct?"

9 THE COURT: I am going to allow it as the  
10 personal representative his impressions of  
11 what's going on, not as a legal conclusion  
12 because he is also a lawyer.

13 THE WITNESS: My impression based on  
14 stated positions is that Mr. Ted Bernstein does  
15 not want the life insurance proceeds to come  
16 into the probate estate of Simon Bernstein.  
17 That's what he has pled.

18 BY MR. FEAMAN:

19 Q. Right. And you disagree with Mr. Ted  
20 Bernstein on that, correct?

21 A. Yes.

22 MR. FEAMAN: Thank you.

23 CROSS (BRIAN O'CONNELL)

24 BY MR. ROSE:

25 Q. And notwithstanding that disagreement, you

1 still believe that --

2 MR. ROSE: I thought he was done, I am  
3 sorry.

4 MR. ELIOT BERNSTEIN: Are you done, Peter?

5 MR. FEAMAN: No, I am not, Your Honor.

6 MR. ROSE: I am sorry, Your Honor.

7 THE COURT: That's okay. I didn't think  
8 that you were trying to.

9 MR. FEAMAN: Okay. We'll rest.

10 THE COURT: All right.

11 MR. FEAMAN: Not rest. No more questions.

12 MR. ELIOT BERNSTEIN: Excuse me, Your  
13 Honor.

14 BY MR. ROSE:

15 Q. And notwithstanding the fact that in  
16 Illinois Ted as the trustee of this insurance trust  
17 wants the money to go into this 1995 insurance  
18 trust, right?

19 A. Right.

20 Q. And he has got an affidavit from Spallina  
21 that says that's what Simon wanted, or he's got  
22 some affidavit he filed, whatever it is? And you  
23 have your own lawyer up there Stamos and Trucco,  
24 right?

25 A. Correct.

1 Q. And not withstanding that, you still  
2 believe that it's in the best interests of the  
3 estate as a whole to have Ted to be the  
4 administrator ad litem and me to represent the  
5 estate given our prior knowledge and involvement in  
6 the case, right?

7 A. It's based on maybe three things. It's  
8 the prior knowledge and involvement that you had,  
9 the amount of money, limited amount of funds that  
10 are available in the estate to defend the action,  
11 and then a number of the beneficiaries, or call  
12 them contingent beneficiaries because they are  
13 trust beneficiaries, have requested that we consent  
14 to what we have just outlined, ad litem and your  
15 representation, those items.

16 Q. And clearly you are adverse to  
17 Mr. Stansbury, right?

18 A. Yes.

19 Q. But in this settlement letter your lawyer  
20 in Chicago is copying Mr. Stansbury and Mr. Feaman  
21 about settlement position, right?

22 A. Correct.

23 Q. Because that's the deal we have,  
24 Mr. Stansbury is funding litigation in Illinois and  
25 he gets to sort of be involved in it and have a say

1 in it, how it turns out? Because he stands to  
2 improve his chances of winning some money if the  
3 Illinois case goes the way he wants, right?

4 A. Well, he is paying, he is financing it.

5 Q. So he hasn't paid in full, right? You  
6 know he is \$40,000 in arrears with the lawyer?

7 A. Approximately, yes.

8 Q. And there's an order that's already in  
9 evidence, and the judge can hear that later, but --  
10 okay. So --

11 THE COURT: I don't have an order in  
12 evidence.

13 MR. ROSE: You do. If you look at Exhibit  
14 Number 2, page --

15 THE COURT: Oh, in the Illinois?

16 MR. ROSE: Yes, they filed it in Illinois.

17 THE COURT: Oh, in the Illinois.

18 MR. ROSE: But it's in evidence now, Your  
19 Honor.

20 THE COURT: Yes, I am sorry, I didn't  
21 realize it was in --

22 MR. ROSE: I am sorry.

23 THE COURT: No, no, that's okay.

24 MR. ROSE: I was going to save it for  
25 closing.

1 THE COURT: In the Illinois is the Florida  
2 order?

3 MR. ROSE: Yes.

4 THE COURT: Okay. That's the only thing I  
5 missed.

6 MR. ROSE: Right.

7 BY MR. ROSE:

8 Q. The evidence it says for the reasons and  
9 subject to the conditions stated on the record  
10 during the hearing, all fees and costs incurred,  
11 including for the curator in connection with his  
12 work, and any counsel retained by the administrator  
13 ad litem will initially be borne by William  
14 Stansbury. You have seen that order before, right?

15 A. I have seen the order, yes.

16 Q. And the Court will consider a petition to  
17 pay back Mr. Stansbury. If the estate wins in  
18 Illinois, we certainly have to pay back  
19 Mr. Stansbury first because he has fronted all the  
20 costs, right?

21 A. Absolutely.

22 Q. Okay. So despite that order, you have  
23 personal knowledge that he is \$40,000 in arrears  
24 with the Chicago counsel?

25 A. I have knowledge from my counsel.



1 Q. Okay. That you shared with me, though?

2 A. Yes. It's information everyone has.

3 Q. Okay.

4 A. Should have.

5 Q. Would you agree with me that you have  
6 spent almost no money defending the estate so far  
7 in the Stansbury litigation?

8 A. Well, there's been some money spent. I  
9 wouldn't say no money. I have to look at the  
10 billings to tell you.

11 Q. Very minimal. Minimal?

12 A. Not a significant amount.

13 Q. Okay. Minimal in comparison to what it's  
14 going to cost to try the case?

15 A. Yes.

16 Q. Have you had the time to study all the  
17 documents, the depositions, the exhibits, the tax  
18 returns, and all the stuff that is going to need to  
19 be dealt with in this litigation?

20 A. I have reviewed some of them. I can't say  
21 reviewed all of them because I would have to  
22 obviously have the records here to give you a  
23 correct answer on that.

24 Q. And you bill for your time when you do  
25 that?

1 A. Sure.

2 Q. And if Ted is not the administrator ad  
3 litem, you are going to have to spend money to sit  
4 through a two-week trial maybe?

5 A. Yes.

6 Q. You are not willing to do that for free,  
7 are you?

8 A. No.

9 Q. Okay. Would you agree with me that you  
10 know nothing about the relationship, personal  
11 knowledge, between Ted, Simon and Bill Stansbury,  
12 personal knowledge? Were you in any of the  
13 meetings between them?

14 A. No, not personal knowledge.

15 Q. Were you involved in the business?

16 A. No.

17 Q. Do you have any idea who the accountant --  
18 well, you know who the accountant was because they  
19 have a claim. Have you ever spoken to the  
20 accountant about the lawsuit?

21 A. No.

22 Q. Have you ever interviewed any witnesses  
23 about the lawsuit independent of maybe talking to  
24 Mr. Stansbury and saying hello and saying hello to  
25 Ted?

1           A.    Or talking to different parties, different  
2 family members.

3           Q.    Now, did you sign a waiver, written waiver  
4 form?

5           A.    Yes.

6           Q.    And did you read it before you signed it?

7           A.    Yes.

8           Q.    Did you edit it substantially and put it  
9 in your own words?

10          A.    Yes.

11          Q.    Much different than the draft I prepared?

12          A.    Seven pages shorter.

13               MR. ROSE:  Okay.  I move Exhibit 1 into  
14 evidence.  This is the three-page PR statement  
15 of his position.

16               MR. FEAMAN:  Objection, it's cumulative  
17 and it's hearsay.

18               THE COURT:  This is his affidavit, his  
19 sworn consent?

20               MR. ROSE:  Right.  It's not cumulative.  
21 It's the only evidence of written consent.

22               THE COURT:  How is it cumulative?  That's  
23 what I was going to say.

24               MR. FEAMAN:  He just testified as to why  
25 he thinks there's no conflict.

1 THE COURT: But a written consent is  
2 necessary under the rules, and that's been  
3 raised as an issue.

4 MR. FEAMAN: The rule says that --

5 THE COURT: I mean, whether you can waive  
6 is an issue, and I think that specifically  
7 under four point -- I am going to allow it.  
8 Overruled.

9 MR. ELIOT BERNSTEIN: Can I object?

10 THE COURT: Sure.

11 MR. ELIOT BERNSTEIN: That just came on  
12 February 9th to me.

13 THE COURT: Okay.

14 MR. ELIOT BERNSTEIN: They didn't copy me  
15 on this thing. I just saw it.

16 THE COURT: Okay.

17 MR. ELIOT BERNSTEIN: Which kind of  
18 actually exposes a huge fraud going on here.  
19 But I will get to that when I get a moment. It  
20 shouldn't be in. I hardly had time to review  
21 it. And I will explain some of that in a  
22 moment, but.

23 THE COURT: I am overruling that  
24 objection. All documents were supposed to be  
25 provided by the Court pursuant to my order by

1 February 9th. This is a waiver of any  
2 potential conflict that's three pages. And if  
3 you got it February 9th you had sufficient  
4 time. So overruled.

5 I am not sure what to call this,  
6 petitioner's or respondent's, in this case. I  
7 am going to mark these as respondent's.

8 MR. ROSE: You can call it Trustee's 1.

9 THE COURT: I could do that. Let me mark  
10 it.

11 (Trustee's Exb. No. 1, Personal  
12 Representative Position Statement.)

13 BY MR. ROSE:

14 Q. I think you alluded to it. But after the  
15 mediation that was held in July, there were some  
16 discussions with the beneficiaries, including Judge  
17 Lewis who's a guardian ad litem for three of the  
18 children, correct?

19 A. Yes.

20 Q. And you were asked if you would consent to  
21 this procedure of having me come in as counsel  
22 because --

23 THE COURT: I know you are going fast, but  
24 you didn't pre-mark it, so you got to give me a  
25 second to mark it.

1 MR. ROSE: Oh, I am sorry.

2 THE COURT: That's okay.

3 I have to add it to my exhibit list.

4 You may proceed, thank you.

5 BY MR. ROSE:

6 Q. You agreed to this procedure that I would  
7 become counsel and Ted would become the  
8 administrator ad litem because you thought it was  
9 in the best interests of the estate as a whole,  
10 right?

11 A. For the reasons stated previously, yes.

12 Q. And other than having to go through this  
13 expensive procedure to not be disqualified, you  
14 still agree that it's in the best interests of the  
15 estate that our firm be counsel and that Ted  
16 Bernstein be administrator ad litem?

17 A. For the defense of the Stansbury civil  
18 action, yes.

19 Q. And that's the only thing we are asking to  
20 get involved in, correct?

21 A. Correct.

22 Q. Now, you were asked if you had a fiduciary  
23 duty to the interested persons including  
24 Mr. Stansbury, right?

25 A. I was asked that, yes.

1 Q. So if you have a fiduciary duty to him,  
2 why don't you just stipulate that he can have a two  
3 and a half million dollar judgment and give all the  
4 money in the estate to him? Because just because  
5 you have a duty, you have multiple duties to a lot  
6 of people, correct?

7 A. Correct.

8 Q. And you have to balance those duties and  
9 do what you believe in your professional judgment  
10 is in the best interests of the estate as a whole?

11 A. Correct.

12 Q. And you have been a lawyer for many years?

13 A. Yes.

14 Q. Correct? And you have served as trustee  
15 as a fiduciary, serving as a fiduciary,  
16 representing a fiduciary, opposing fiduciary,  
17 that's been the bulk of your practice, correct?

18 A. Yes, yes and yes.

19 MR. ROSE: Nothing further.

20 THE COURT: Redirect?

21 MR. FEAMAN: Yes.

22 THE COURT: Wait a minute. Let me let  
23 Mr. Eliot Bernstein ask any questions.

24 MR. ELIOT BERNSTEIN: Can I ask him  
25 questions at one point?

1 THE COURT: You can.

2 MR. ELIOT BERNSTEIN: Your Honor, first, I  
3 just wanted to give you this and apologize for  
4 being late.

5 THE COURT: Don't worry about it. Okay.

6 MR. ELIOT BERNSTEIN: Well, no, it's  
7 important so you understand some things.

8 I have got ten steel nails in my mouth so  
9 I speak a little funny right now. It's been  
10 for a few weeks. I wasn't prepared because I  
11 am on a lot of medication, and that should  
12 explain that. But I still got some questions  
13 and I would like to have my....

14 MR. ROSE: I would just state for the  
15 record that he has been determined to have no  
16 standing in the estate proceeding as a  
17 beneficiary.

18 THE COURT: I thought that was in the  
19 Estate of Shirley Bernstein.

20 MR. ROSE: It's the same ruling --  
21 (Overspeaking.)

22 THE COURT: Please, I will not entertain  
23 more than one person.

24 MR. ROSE: By virtue of Judge Phillips'  
25 final judgment upholding the documents, he is



1 not a beneficiary of the residuary estate. He  
2 has a small interest as a one-fifth beneficiary  
3 of tangible personal property, which is --

4 THE COURT: I understand.

5 MR. ROSE: Yes, he has a very limited  
6 interest in this. And I don't know that he --

7 THE COURT: Wouldn't that give him  
8 standing, though?

9 MR. ROSE: Well, I don't think for the  
10 purposes of the disqualification by Mr. Feaman  
11 it wouldn't.

12 THE COURT: Well, that would be your  
13 argument, just like you are arguing that  
14 Mr. Stansbury doesn't have standing to  
15 disqualify you, correct?

16 MR. ROSE: Right.

17 THE COURT: So that's an argument you can  
18 raise.

19 You may proceed.

20 CROSS (BRIAN O'CONNELL)

21 BY MR. ELIOT BERNSTEIN:

22 Q. Mr. O'Connell, am I a devisee of the will  
23 of Simon?

24 MR. ROSE: Objection, outside the scope of  
25 direct.

1 THE COURT: That is true. Sustained.

2 That was not discussed.

3 BY MR. ELIOT BERNSTEIN:

4 Q. Do I have standing in the Simon estate  
5 case --

6 MR. ROSE: Objection, calls for a legal  
7 conclusion.

8 BY MR. ELIOT BERNSTEIN:

9 Q. -- in your opinion?

10 MR. ELIOT BERNSTEIN: Well, he is a  
11 fiduciary.

12 THE COURT: He was asked regarding his  
13 thoughts regarding a claimant, so I will allow  
14 it. Overruled.

15 THE WITNESS: You have standing in certain  
16 actions by virtue of your being a beneficiary  
17 of the tangible personal property.

18 BY MR. ELIOT BERNSTEIN:

19 Q. Okay, so beneficiary?

20 A. Right.

21 Q. Okay. Thank you. Which will go to the  
22 bigger point of the fraud going on here, by the  
23 way.

24 Are you aware that Ted Bernstein is a  
25 defendant in the Stansbury action?

1 A. Which Stansbury action?

2 Q. The lawsuit that Mr. Rose wants Ted to  
3 represent the estate in?

4 A. I'd have to see the action, see the  
5 complaint.

6 Q. You have never seen the complaint?

7 A. I have seen the complaint, but I want to  
8 make sure it's the same documents.

9 Q. So Ted --

10 THE COURT: You must allow him to answer  
11 the questions.

12 MR. ELIOT BERNSTEIN: I am sorry, okay.

13 THE WITNESS: I would like to see if you  
14 are referring to Ted Bernstein being a  
15 defendant, if someone has a copy of it.

16 MR. ROSE: Well, I object. Mr. Feaman  
17 knows that he has dismissed the claims against  
18 all these people, and this is a complete waste.  
19 We have a limited amount of time and these are  
20 very important issues.

21 MR. ELIOT BERNSTEIN: Excuse me.

22 THE COURT: Wait.

23 MR. ROSE: These defendants they are  
24 dismissed, they are settled. Mr. Feaman knows  
25 because he filed the paper in this court.

1 THE COURT: Mr. Rose.

2 MR. ROSE: It's public record.

3 THE COURT: Mr. Rose, you are going to  
4 have to let go of the -- it's going to finish  
5 by 4:30.

6 MR. ROSE: Okay.

7 THE COURT: Because I know that's why you  
8 are objecting, and you know I have to allow --

9 MR. ROSE: Okay.

10 THE COURT: All right? The legal  
11 objection is noted. Mr. O'Connell can respond.  
12 He asked to see a document.

13 BY MR. ELIOT BERNSTEIN:

14 Q. I would like to show you --

15 THE DEPUTY: Ask to approach, please.

16 MR. ELIOT BERNSTEIN: Oh, ask to.

17 BY MR. ELIOT BERNSTEIN:

18 Q. Can I approach you?

19 THE COURT: What do you want to approach  
20 with?

21 MR. ELIOT BERNSTEIN: I just want to show  
22 him the complaint.

23 THE COURT: Complaint? As long as you  
24 show the other side what you are approaching  
25 with.

1 MR. ELIOT BERNSTEIN: It's your second  
2 amended complaint.

3 MR. ROSE: No objection.

4 BY MR. ELIOT BERNSTEIN:

5 Q. Is Ted Bernstein a defendant in that  
6 action?

7 A. I believe he was a defendant, past tense.

8 Q. Okay. Let me ask you a question. Has the  
9 estate that you are in charge of settled with Ted  
10 Bernstein?

11 A. In connection with this action?

12 MR. ROSE: Objection, relevance.

13 BY MR. ELIOT BERNSTEIN:

14 Q. Yes, in connection with this action?

15 THE COURT: Which action?

16 MR. ELIOT BERNSTEIN: The Stansbury  
17 lawsuit that Ted wants to represent.

18 THE COURT: If he can answer.

19 MR. ELIOT BERNSTEIN: This is the conflict  
20 that's the elephant in the room.

21 THE COURT: No, no, no.

22 MR. ELIOT BERNSTEIN: Okay.

23 THE COURT: I didn't allow anyone else to  
24 have any kind of narrative.

25 MR. ELIOT BERNSTEIN: Sorry.

1 THE COURT: Ask a question and move on.

2 MR. ELIOT BERNSTEIN: Got it.

3 THE COURT: Mr. O'Connell, if you can  
4 answer the question, answer the question.

5 THE WITNESS: Sure. Thanks, Your Honor.  
6 I am going to give a correct answer. We have  
7 not had a settlement in connection with Ted  
8 Bernstein in connection with what I will call  
9 the Stansbury independent or civil action.

10 BY MR. ELIOT BERNSTEIN:

11 Q. Okay. So that lawsuit --

12 A. The estate has not entered into such a  
13 settlement.

14 Q. So Stansbury or Ted Bernstein is still a  
15 defendant because he sued the estate and the estate  
16 hasn't settled with him and let him out?

17 A. The estate prior to -- I thought you were  
18 talking about me, my involvement. Prior to my  
19 involvement there was a settlement.

20 Q. With Shirley's trust, correct?

21 A. No, I don't recall there being --

22 Q. Well, you just --

23 THE COURT: Wait. You have to let him  
24 answer.

25 MR. ELIOT BERNSTEIN: Sorry, okay.

1 THE WITNESS: I recall there being a  
2 settlement again prior to my involvement with  
3 Mr. Stansbury and Ted Bernstein.

4 BY MR. ELIOT BERNSTEIN:

5 Q. But not the estate? The estate as of  
6 today hasn't settled the case with Ted?

7 A. The estate, the estate, my estate, when I  
8 have been personal representative, we are not in  
9 litigation with Ted. We are in litigation with  
10 Mr. Stansbury. That's where the disconnect is.

11 Q. In the litigation Ted is a defendant,  
12 correct?

13 A. I have to look at the pleadings. But as I  
14 recall the claims against Ted Bernstein were  
15 settled, resolved.

16 Q. Only with Mr. Stansbury in the Shirley  
17 trust and individually.

18 So let me ask you --

19 THE COURT: You can't testify.

20 MR. ELIOT BERNSTEIN: Okay.

21 BY MR. ELIOT BERNSTEIN:

22 Q. Ted Bernstein, if you are representing the  
23 estate, there's a thing called shared liability,  
24 meaning if Ted is a defendant in the Stansbury  
25 action, which he is, and he hasn't been let out by

1 the estate, then Ted Bernstein coming into the  
2 estate can settle his liability with the estate.  
3 You following? He can settle his liability by  
4 making a settlement that says Ted Bernstein is out  
5 of the lawsuit, the estate is letting him out, we  
6 are not going to sue him. Because the estate  
7 should be saying that Ted Bernstein and Simon  
8 Bernstein were sued.

9 THE COURT: I am sorry, Mr. Bernstein, I  
10 am trying to give you all due respect.

11 MR. ELIOT BERNSTEIN: Okay.

12 THE COURT: But is that a question?

13 MR. ELIOT BERNSTEIN: Yeah, okay.

14 THE COURT: I can't --

15 MR. ELIOT BERNSTEIN: I will break it  
16 down, because it is a little bit complex, and I  
17 want to go step by step.

18 THE COURT: Thank you. And we will be  
19 concluding in six minutes.

20 MR. ELIOT BERNSTEIN: Then I would ask for  
21 a continuance.

22 THE COURT: We will be concluding in six  
23 minutes.

24 MR. ELIOT BERNSTEIN: Okay.

25 THE COURT: Ask what you can.



1 MR. ELIOT BERNSTEIN: Okay.

2 BY MR. ELIOT BERNSTEIN:

3 Q. Ted Bernstein was sued by Mr. Stansbury  
4 with Simon Bernstein; are you aware of that?

5 A. I am aware of the parties to the second  
6 amended complaint that you have handed me.

7 Q. Okay.

8 A. At that point in time.

9 Q. So both those parties share liability if  
10 Stansbury wins, correct?

11 MR. ROSE: Objection.

12 THE WITNESS: No.

13 THE COURT: Hold on.

14 MR. ROSE: Objection, calls for a legal  
15 conclusion, misstates the law and the facts.

16 MR. ELIOT BERNSTEIN: Well, if  
17 Mr. Stansbury won his suit and was suing Ted  
18 Bernstein --

19 THE COURT: Hold on one second. Hold on,  
20 please. You have got to let me rule. I don't  
21 mean to raise my voice at all.

22 But his question in theory is appropriate.  
23 He says they are both defendants, they share  
24 liability. Mr. O'Connell can answer that. The  
25 record speaks for itself.

1 THE WITNESS: And the problem, Your Honor,  
2 would be this, and I will answer the question,  
3 but I am answering it in the blind without all  
4 the pleadings. Because as I -- I will give you  
5 the best answer I can without looking at the  
6 pleadings.

7 THE COURT: You can only answer how you  
8 can.

9 THE WITNESS: As I recall the state of  
10 this matter, sir, this is the independent  
11 action, the Stansbury action, whatever you want  
12 to call it, Ted Bernstein is no longer a  
13 defendant due to a settlement.

14 BY MR. ELIOT BERNSTEIN:

15 Q. He only settled with Mr. Stansbury,  
16 correct? The estate, as you said a moment ago, has  
17 not settled with Ted Bernstein as a defendant. So  
18 the estate could be --

19 THE COURT: Mr. Bernstein, Mr. Bernstein.

20 MR. ELIOT BERNSTEIN: Uh-huh.

21 THE COURT: From the pleadings the Court  
22 understands there is not a claim from the  
23 estate against Ted Bernstein in the Stansbury  
24 litigation. Is the Court correct?

25 MR. ELIOT BERNSTEIN: The Court is

1 correct.

2 THE COURT: Okay.

3 MR. ELIOT BERNSTEIN: But the estate, if  
4 Mr. O'Connell was representing the  
5 beneficiaries properly, should be suing Ted  
6 Bernstein because the complaint alleges that he  
7 did most of the fraud against Mr. Stansbury,  
8 and my dad was just a partner.

9 THE COURT: Okay. So that's your  
10 argument, I understand.

11 MR. ELIOT BERNSTEIN: Okay.

12 THE COURT: But please ask the questions  
13 pursuant to the pleadings as they stand.

14 MR. ELIOT BERNSTEIN: Okay.

15 BY MR. ELIOT BERNSTEIN:

16 Q. Could the estate sue Ted Bernstein since  
17 he is a defendant in the action who has shared  
18 liability with Simon Bernstein?

19 MR. ROSE: Objection, misstates -- there's  
20 no such thing as shared liability.

21 THE COURT: He can answer the question if  
22 he can.

23 MR. ROSE: Okay.

24 THE WITNESS: One of the disconnects here  
25 is that he is not a current beneficiary in the

1 litigation as you just stated.

2 MR. ELIOT BERNSTEIN: There's no  
3 beneficiary in that litigation.

4 THE COURT: Okay. You can't answer again.

5 MR. ELIOT BERNSTEIN: Oh.

6 THE COURT: Remember, you have got to ask  
7 questions.

8 THE WITNESS: Defendant, Your Honor, wrong  
9 term. He is not a named defendant at this  
10 point due to a settlement.

11 BY MR. ELIOT BERNSTEIN:

12 Q. Could the estate sue back a  
13 counter-complaint to Ted Bernstein individually who  
14 is alleged to have committed most of the egregious  
15 acts against Mr. Stansbury? He is a defendant in  
16 the action. Nobody settled with him yet from the  
17 estate. Could you sue him and say that half of the  
18 liability, at least half, if not all, is on Ted  
19 Bernstein?

20 A. Anyone, of course, theoretically could sue  
21 anyone for anything. What that would involve would  
22 be someone presenting in this case me the facts,  
23 the circumstances, the evidence that would support  
24 a claim by the estate against Ted Bernstein. That  
25 I haven't seen or been told.

1 Q. Okay. Mr. Stansbury's complaint, you see  
2 Ted and Simon Bernstein were sued. So the estate  
3 could meet the argument, correct, that Ted  
4 Bernstein is a hundred percent liable for the  
5 damages to Mr. Stansbury, correct?

6 A. I can't say that without having all the  
7 facts, figures, documents --

8 Q. You haven't read this case?

9 A. -- in front of me. Not on that level.  
10 Not to the point that you are -- not to the point  
11 that you are --

12 Q. Let me ask you a question.

13 A. -- trying to.

14 MR. ROSE: Your Honor?

15 BY MR. ELIOT BERNSTEIN:

16 Q. Let me ask you a question.

17 THE COURT: Hold on one second, sir.

18 MR. ROSE: He is not going to finish in  
19 two minutes and there are other things we need  
20 to address, if we have two minutes left. So  
21 can he continue his cross-examination at the  
22 continuance?

23 THE COURT: March we have another hearing.

24 MR. ELIOT BERNSTEIN: Can we continue this  
25 hearing?

1 THE COURT: Yes. But I am going to give  
2 you a limitation. You get as much time as  
3 everybody else has.

4 MR. ELIOT BERNSTEIN: That's fine.

5 THE COURT: You have about ten more  
6 minutes when we come back.

7 MR. ELIOT BERNSTEIN: Okay. Can I submit  
8 to you the binder that I filed late?

9 THE COURT: Sure.

10 MR. ELIOT BERNSTEIN: (Overspeaking).

11 THE COURT: As long as it has been -- has  
12 it been filed with the Court and has everybody  
13 gotten a copy?

14 MR. ELIOT BERNSTEIN: I sent them copies  
15 and I brought them copies today.

16 THE COURT: As long as everybody else gets  
17 a copy --

18 MR. ELIOT BERNSTEIN: Okay.

19 THE COURT: -- you can submit the binder.  
20 Just give it to my deputy.

21

22 (Brian O'Connell excerpt concluded.)

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C E R T I F I C A T E

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The State of Florida  
County of Palm Beach

I, Lisa Mudrick, RPR, FPR, certify that I  
was authorized to and did stenographically report  
the foregoing proceedings, and that the excerpted  
transcript is a true record.

Dated February 21, 2017.



LISA MUDRICK, RPR, FPR  
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West Palm Beach, Florida 33401  
561-615-8181

IN THE FIFTEENTH JUDICIAL CIRCUIT COURT  
IN AND FOR PALM BEACH COUNTY, FLORIDA  
CASE NO: 502012CP004391XXXXNBIH

IN RE:  
ESTATE OF SIMON L. BERNSTEIN,

/

Proceedings before the Honorable  
ROSEMARIE SCHER  
Volume II

Thursday, March 2, 2017  
3188 PGA Boulevard  
North branch Palm Beach County Courthouse  
Palm Beach Gardens, Florida 33410  
1:35 - 3:39 p.m.

Reported by:  
Lisa Mudrick, RPR, FPR  
Notary Public, State of Florida



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I N D E X  
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EXAMINATIONS Page

Witness:

BRIAN O'CONNELL

BY MR. ELIOT BERNSTEIN 145

BY MR. FEAMAN 170

ALAN B. ROSE

BY MR. FEAMAN 207

BY MR. ELIOT BERNSTEIN 214

EXHIBITS MARKED

No. Claimant Stansbury's

9 Pleading 214

## 1 P R O C E E D I N G S

2 - - -

3 BE IT REMEMBERED that the following  
4 proceedings were had in the above-styled and  
5 numbered cause in the north Branch Palm Beach  
6 County Courthouse, City of Palm Beach Gardens,  
7 County of Palm Beach, in the State of Florida, by  
8 Lisa Mudrick, RPR, FPR, before the Honorable  
9 ROSEMARIE SCHER, Judge in the above-named Court, on  
10 March 2, 2017, to wit:

11 - - -

12 THE COURT: I have evidence in my office.  
13 That's what I was looking for. One second.  
14 All right.

13:37:58 15 First thing, please everyone place their  
16 name on the record.

17 MR. FEAMAN: Good afternoon, Your Honor.  
18 Peter Feaman on behalf of William Stansbury.  
19 With me in the courtroom today is my paralegal  
13:38:12 20 from my office Trish Roth and Jeff Royer who  
21 was here last time.

22 THE COURT: All right.

23 MR. FEAMAN: Thank you.

24 MR. ELIOT BERNSTEIN: Your Honor, Eliot  
13:38:22 25 Bernstein, pro se.

1 THE COURT: Thank you.

2 MR. ROSE: Good afternoon, Your Honor,  
3 Alan Rose. With me is Michael Kranz from my  
4 law firm. And we represent the Simon Bernstein  
13:38:32 5 estate, Ted S. Bernstein as trustee. And in  
6 other matters we represent Mr. Bernstein as  
7 trustee and as personal representative of the  
8 Shirley Bernstein Trust and estate.

9 MR. O'CONNELL: Brian O'Connell, Your  
13:38:46 10 Honor. I am the personal representative of the  
11 Estate of Simon Bernstein.

12 JUDGE DIANA LEWIS: Your Honor, I am Diana  
13 Lewis. I represent the Eliot Bernstein  
14 children in the capacity as guardian ad litem.

13:38:59 15 THE COURT: Thank you. Yes, ma'am?

16 MS. CANDACE BERNSTEIN: Candace Bernstein.

17 THE COURT: All right. My recollection is  
18 Mr. Eliot, only to distinguish from all the  
19 Bernsteins, it was his opportunity, I told him  
13:39:15 20 he had ten more minutes, I had timed everybody,  
21 and it was my recollection I think  
22 Mr. O'Connell was still on the stand and it was  
23 Mr. Eliot's time, only you know I am not being  
24 disrespectful just for the record to establish  
13:39:28 25 which Bernstein I am talking about, to continue

1 your cross-examination.

2 MR. ELIOT BERNSTEIN: Your Honor, before  
3 we start that, I filed yesterday and Mr. Feaman  
4 filed yesterday --

13:39:38 5 THE COURT: I didn't receive anything from  
6 Mr. Feaman. I did receive -- I am just saying.  
7 But go ahead, yes, sir.

8 MR. ELIOT BERNSTEIN: It appeared that he  
9 mailed you a response.

13:39:52 10 THE COURT: I did not receive -- did you  
11 e-mail my JA a response, Mr. Feaman?

12 MR. FEAMAN: Yes, Your Honor. We had no  
13 opposition to his motion for continuance.

14 THE COURT: That I did receive.

13:40:01 15 MR. FEAMAN: And joined in it and said if  
16 we could have some additional time to take some  
17 discovery then we would be glad to avail  
18 ourselves of that.

19 THE COURT: Thank you.

13:40:11 20 MR. ELIOT BERNSTEIN: And, Your Honor,  
21 that discovery is essential because some of the  
22 things we learned at the last hearing  
23 contradicts this entire case, that I am not a  
24 beneficiary, have no standing. It was a  
13:40:24 25 compounding statement that Mr. Rose has told

1 over and over that ended up in orders here,  
2 that ended up in Illinois. And now we have  
3 absolute proof from Mr. O'Connell and Mr. Rose  
4 that, well, he is calling me a tiny beneficiary  
13:40:38 5 yesterday in the e-mail to you, but a  
6 beneficiary. And that contradicts --

7 THE COURT: Don't assume that I received  
8 like what my JA tells me. I received -- let me  
9 tell you for the record.

13:40:48 10 MR. ELIOT BERNSTEIN: Okay.

11 THE COURT: Your motion was a formal  
12 pleading, so I read that, of course, as a  
13 formal pleading I read everything.

14 MR. ELIOT BERNSTEIN: Okay.

13:40:55 15 THE COURT: I said to my JA, please find  
16 out everybody, ask them just for their  
17 response. I do know Mr. Feaman did not object.  
18 That's the extent of what I know.

19 Because those kinds of communications  
13:41:06 20 aren't formal, and I had heard that Mr. Rose's  
21 office did object. But I want you to know what  
22 I know and what I don't know beyond that.

23 MR. ELIOT BERNSTEIN: Okay. I will help  
24 you through it. I need time, as I have pled in  
13:41:18 25 my motion to vacate that I filed on

1 February 16th, time to question these  
2 witnesses. Because Mr. O'Connell's statement  
3 to this Court in fact contradicts Mr. Rose's  
4 filings and prior statements Mr. Rose has made  
13:41:31 5 to sheriff's. So I am going to have to call  
6 and subpoena the sheriff who he made statements  
7 that I was a beneficiary of my mother's trust  
8 on the record in an investigation. And then he  
9 came to the Court and told this whole story I  
13:41:45 10 am not a beneficiary of anything.

11 If you will look at the case management  
12 omnibus motion he filed to Judge Phillips that  
13 started this whole nonsense that I am not a  
14 beneficiary of anything, it says in there the  
13:41:56 15 overarching issue is Eliot is not a beneficiary  
16 of anything. That false statement led to  
17 orders that were never done on a construction  
18 hearing. There was only a validity hearing.  
19 Mr. Rose I will pull up and he can testify to  
13:42:10 20 that.

21 Although he has told you that there's been  
22 some kind of determinations, all of those  
23 determinations were based on him misleading the  
24 Court as an officer of the Court. And I put  
13:42:22 25 most of that in my motion to vacate, and I will

1 be preparing proper responses for that.

2 But we need, Mr. Feaman and I, time to do  
3 new discovery on certain people that will --  
4 you know, you don't want to be rushing into a  
13:42:37 5 decision here on this issue when new  
6 information just came out February 9th was when  
7 I first received it that contradicted the whole  
8 statements in all these pleadings that are  
9 forthcoming. And I think we'll be able to show  
13:42:51 10 that there's been fraud on this Court. The  
11 other date in that hearing if you look at the  
12 transcript Mr. Rose claimed that I had no  
13 standing, and you overruled that, or whatever  
14 you call it, you did.

13:43:03 15 THE COURT: I did.

16 MR. ELIOT BERNSTEIN: Okay. Meaning you  
17 allowed me to question Mr. O'Connell. Well,  
18 every other time he said that before Judge  
19 Phillips, it was whatever he said. They were  
13:43:13 20 never litigated the matters that I was a  
21 beneficiary or not, but it just got somehow  
22 accepted the more he said it to that judge.

23 So now that completely contradicts the  
24 orders that were issued that I am not a  
13:43:27 25 beneficiary of anything whatsoever. Now it's I



1 am a little, I am a TPP beneficiary. But the  
2 truth is I am a beneficiary of the will of  
3 Simon Bernstein. And Mr. O'Connell on the  
4 stand flipped his story as well that he was  
13:43:43 5 putting into this Court that he had consent of  
6 all the beneficiaries. Well, in fact they are  
7 saying that Mrs. Lewis is a beneficiary, is  
8 representing my children as parties here.

9 THE COURT: She's appointed as the  
10 guardian on behalf of the children.

11 MR. ELIOT BERNSTEIN: Who are supposed to  
12 be the beneficiaries.

13 THE COURT: Yes.

14 MR. ELIOT BERNSTEIN: Okay. Except my  
13:44:04 15 children have never been notified by anybody,  
16 PR, trustees, anything, that they are  
17 beneficiaries of anything.

18 THE COURT: All right. I have to keep it  
19 narrow to you want additional time to do  
13:44:13 20 additional discovery?

21 MR. ELIOT BERNSTEIN: Totally.

22 MR. FEAMAN: And, Your Honor, if I just  
23 may add?

24 THE COURT: Yes.

13:44:18 25 MR. FEAMAN: Thank you. What I said in my

1 joinder and consent was that we still had  
2 outstanding objections to the subpoena that we  
3 had served on Mr. Rose. Your Honor may  
4 recall --

13:44:30 5 THE COURT: I recall that, I do, that you  
6 wanted e-mails.

7 MR. FEAMAN: I said if the Court is  
8 inclined to give more time then that is  
9 something that we could handle. Thank you.

13:44:39 10 THE COURT: Thank you.

11 MR. ELIOT BERNSTEIN: Oh, Your Honor, one  
12 more point.

13 THE COURT: Last point.

14 MR. ELIOT BERNSTEIN: There's an open  
13:44:44 15 issue of production that I requested production  
16 of Mr. O'Connell.

17 THE COURT: Not set for today.

18 MR. ELIOT BERNSTEIN: No, I know.

19 THE COURT: I understand.

13:44:50 20 MR. ELIOT BERNSTEIN: Very important  
21 documents relating to this idea of my brother  
22 representing the estate which he was denied  
23 twice for by the Court. But I asked  
24 Mr. O'Connell for production, and he actually  
13:45:04 25 advised me to ask him, and then he objected to

1 it, and it's still not here, meaning it's never  
2 been heard, correct, Mr. O'Connell?

3 MR. O'CONNELL: I would have to see the  
4 item, Your Honor, that Mr. Eliot is referring  
13:45:16 5 to.

6 MR. ELIOT BERNSTEIN: Well, the Court has  
7 never heard it, and I need all those documents.  
8 They are original documents. They are business  
9 records that are all pertinent to this  
13:45:23 10 settlement.

11 So can we have that also heard so that he  
12 is either compelled to give me the documents or  
13 he -- you know, whatever you do, you order one  
14 way or the other?

15 THE COURT: Today's hearing, the first  
16 hearing at issue is whether or not Mr. Rose is  
17 on or off. That's the first matter. I put  
18 that very simply. But the first matter we are  
19 concluding is whether Mr. Rose on behalf of the  
13:45:49 20 Mrachek law firm is allowed to proceed as the  
21 attorney. That's the removal order that we are  
22 here about today.

23 MR. ELIOT BERNSTEIN: And that's all  
24 relevant, and we need to depose him now that  
13:45:59 25 he's got contradictory statements.

1 THE COURT: Okay. The problem I am  
2 having -- well, let me hear the response,  
3 please.

4 MR. ROSE: Okay. And I just need a minute  
13:46:06 5 to lay out a few of the facts and clear them.

6 The issue today is whether I can defend  
7 the estate in the state court action.

8 THE COURT: Right.

9 MR. ROSE: It has nothing to do with my  
13:46:19 10 serving as counsel for Ted Bernstein in these  
11 proceedings.

12 THE COURT: Yes, I understand.

13 MR. ROSE: All the efforts to remove me  
14 have been denied and dismissed long ago.

15 THE COURT: Let me ask you. The effort  
13:46:26 16 it's only for the state court action, the civil  
17 action in front of Judge Marx?

18 MR. ROSE: Correct.

19 THE COURT: Why is he not hearing this  
13:46:38 20 then?

21 MR. ROSE: Because I was retained -- a  
22 couple reasons, but --

23 THE COURT: Why is he not hearing the  
24 motion to remove him?

13:46:44 25 MR. FEAMAN: Because it was Judge Phillips

1 who entered the order allowing Mr. Rose to  
2 represent in that court.

3 THE COURT: But do you understand the  
4 Court's -- I think this is something Judge Marx  
13:46:55 5 should decide. Wait. Let me ask because then  
6 I will let you finish. Tell me why it should  
7 be me. I was clear last time, but it just hit  
8 me at this moment, if here you represent Ted  
9 Bernstein, correct?

10 MR. ROSE: Here I represent Ted Bernstein  
11 as a trustee.

12 THE COURT: As a trustee. Your motion to  
13 disqualify him has to do with the action in  
14 front of Judge Marx?

15 MR. FEAMAN: That is correct, Your Honor.

16 THE COURT: Explain to me why that judge  
17 shouldn't make the decision on whether to  
18 remove Mr. Rose?

19 MR. FEAMAN: Our thinking was, Your Honor,  
13:47:31 20 it was because Judge Phillips entered the order  
21 allowing it. And therefore, we came back to  
22 the Court that entered --

23 THE COURT: I see what you are saying.

24 MR. FEAMAN: -- the order allowing it to  
13:47:41 25 begin with.

1 MR. ROSE: There's two aspects of the  
2 motion. One is to appoint Ted Bernstein as  
3 administrator ad litem to represent the  
4 interests of the estate.

13:47:45 5 THE COURT: I understand that.

6 MR. ROSE: That's an issue for Your Honor.

7 THE COURT: That's me.

8 MR. ROSE: The other issue is whether,  
9 Your Honor, whether the order that Judge  
10 Phillips entered retaining me to represent the  
11 estate should be vacated, and that's all before  
12 Your Honor. We have spent I can't tell you how  
13 much money to get to this point.

14 THE COURT: Oh, I understand.

13:48:02 15 MR. ROSE: And so I think you are the  
16 correct judge because the issue isn't simply  
17 disqualification. The interest deals -- the  
18 issue deals with what's in the best interests  
19 of the estate and its beneficiaries.

13:48:15 20 If I could just have one minute to give  
21 you a little history briefly, just I think it  
22 will be helpful and I would --

23 THE COURT: I very much remember this  
24 chart. I very much remember the --

13:48:27 25 MR. ROSE: It's a new chart.

1 THE COURT: It's a new chart?

2 MR. ROSE: It's completely different.

3 THE COURT: Okay. But do you know what  
4 I'm saying? Oh, that chart.

5 MR. ELIOT BERNSTEIN: (Inaudible).

6 MR. ROSE: Completely different.

7 THE COURT: Stop.

8 MR. ELIOT BERNSTEIN: Okay.

9 THE COURT: I will let you know --

10 13:48:32 MR. ELIOT BERNSTEIN: I have not seen  
11 that.

12 THE COURT: Nobody has seen this. So  
13 before you show me -- put it back down. You  
14 are going to stay quiet and you are going to  
15 13:48:41 sit down. You know, I am very fair. I hear  
16 from each one of you. I am sure I am going to  
17 make someone very unhappy across the board with  
18 a ruling. But I will not be accused of not  
19 listening to everybody. All right.

20 13:48:54 MR. ROSE: Okay.

21 THE COURT: I am not seeing it. Do me one  
22 favor and listen to me for one second. The  
23 first response I have, before we get into the  
24 background, is your response to their motion  
25 13:49:05 that they need more time.

1 MR. ROSE: Okay.

2 THE COURT: Okay?

3 MR. ROSE: Okay. This started with a  
4 motion filed in August of last year. We had a  
13:49:15 5 hearing in September of last year. And then  
6 there were objections filed. Mr. Bernstein  
7 objected. He was unavailable for an extended  
8 period of time. We got a hearing set before  
9 Your Honor. We have waited for four or five  
13:49:29 10 months to get this done.

11 I'd like to explain the issues that Eliot  
12 Bernstein is suggesting that he needs discovery  
13 for some farfetched thing, and I'd like to  
14 explain to you his standing in a limited area  
13:49:42 15 so that you understand what he is saying.

16 Mr. Feaman has served discovery that we  
17 have objected to. But I think when you do this  
18 hearing, you will understand that the discovery  
19 he seeks is not relevant to the issue of  
13:49:53 20 whether there's a conflict of interest under  
21 Rule 4-1.9 or a conflict of interest under Rule  
22 4-1.7.

23 And these estates again are very small.  
24 We have spent a lot of money preparing. We are  
13:50:06 25 all here. Everyone is ready to roll. We've



1 got two hours reserved. And we need to get  
2 some progress made as to who's going to defend  
3 the estate in the Stansbury case. And at the  
4 same time there's other motions, who is going  
13:50:18 5 to -- how are we handling the -- how is the  
6 estate handling its Illinois litigation which  
7 is -- and both of these matters are now set for  
8 trial. So there's some urgency.

9 THE COURT: I remember the exact standing  
13:50:26 10 of Mr. Eliot with regard to being a  
11 beneficiary. There is a pour over trust from  
12 the Simon estate where the children, the ten  
13 grandchildren, are the beneficiaries, correct?

14 MR. ELIOT BERNSTEIN: No.

13:50:39 15 MR. ROSE: If you said there's a --

16 THE COURT: Pour over trust from the Simon  
17 estate?

18 MR. ROSE: Pour over from the Simon trust.

19 THE COURT: Correct.

13:50:45 20 MR. ROSE: And the ten grandchildren are  
21 the beneficiaries, correct.

22 MR. ELIOT BERNSTEIN: Incorrect.

23 THE COURT: No, it is correct. Wait for  
24 me. Wait for me one second. Let me finish.

13:50:50 25 MR. ELIOT BERNSTEIN: Okay.

1 THE COURT: That does not change any  
2 tangible property you would be a potential  
3 beneficiary of, correct?

4 MR. ROSE: Correct.

13:50:59 5 THE COURT: See, I wasn't excluding you.  
6 There's tangible property and there's a pour  
7 over trust.

8 MR. ELIOT BERNSTEIN: That's the problem,  
9 though. The ten grandchildren are not the  
13:51:07 10 beneficiaries. That's never been determined.  
11 There's been no construction hearings in any of  
12 these cases yet. Right, Mr. Rose?

13 MR. ROSE: Totally incorrect.

14 MR. ELIOT BERNSTEIN: There have been  
13:51:17 15 construction hearings? Can you give her the  
16 date of those hearings?

17 THE COURT: I am not going there. I am  
18 not letting you two litigate it. That's my  
19 understanding from the pleadings right now.  
13:51:25 20 It's not relevant for right this second.

21 MR. ELIOT BERNSTEIN: It doesn't say the  
22 ten -- okay.

23 THE COURT: Okay?

24 MR. ELIOT BERNSTEIN: It's very relevant,  
13:51:30 25 but okay.

1 THE COURT: Just trying to get to why we  
2 are here today.

3 MR. ELIOT BERNSTEIN: Your Honor,  
4 Mr. Stansbury's lawsuit they've said they don't  
13:51:39 5 have enough money in the trust to pay it if he  
6 wins so they would be coming to my tangible  
7 personal property interests. So it does affect  
8 me in this case in the retention of Ted, and I  
9 will be able to show why.

13:51:55 10 THE COURT: You don't have to. You have  
11 standing. You are sitting there. I have  
12 allowed it. I have allowed it. You are a  
13 tangible beneficiary whatever assets remain  
14 outside of the Simon trust. I think everyone  
13:52:08 15 is on the same page. If it's a dollar or if  
16 it's ten dollars, that's where you have -- now,  
17 I have no idea the dollar figures in any of  
18 this.

19 MR. ELIOT BERNSTEIN: None of us do.

13:52:20 20 THE COURT: Go ahead, Mr. Rose.

21 MR. ROSE: I am sorry, and I keep --

22 THE COURT: Go ahead.

23 MR. ROSE: I am not engaging with  
24 Mr. Eliot. He is engaging with me.

13:52:26 25 THE COURT: I am going to ask, Mr. Eliot,

1 to let him finish so we can at least move  
2 forward to the next point. Go ahead.

3 MR. ROSE: Just for the record, I conceded  
4 at the last hearing that he had limited  
13:52:35 5 standing. I did not say that he did not have  
6 standing.

7 THE COURT: I agree.

8 MR. ROSE: What I tried to get the  
9 impression -- does the Court know -- it's your  
13:52:41 10 next question which is the tangible personal  
11 property consists of furniture and jewelry.

12 THE COURT: Yes.

13 MR. ROSE: The furniture is dwindling in  
14 value. It's being stored. The jewelry -- this  
13:52:51 15 is about a hundred thousand. And my point was  
16 only that when you take a hundred thousand and  
17 you divide it five ways, best case is 20,000.  
18 And my point is --

19 THE COURT: It's not for right now. Let's  
13:53:00 20 move on.

21 MR. ROSE: No, okay.

22 THE COURT: Okay? Do you see what I am  
23 saying?

24 MR. ROSE: I got you. And I do, though,  
13:53:06 25 think, since you are new to the case, I would

1 like to just clear up a couple things just if I  
2 could briefly, very briefly?

3 THE COURT: Only if you think it's going  
4 to help. I don't want to poke the bear. I  
13:53:17 5 want to keep moving. I don't want everybody  
6 yelling at each other. Do you see what I am  
7 saying?

8 MR. ROSE: I do, absolutely.

9 THE COURT: Go ahead.

13:53:25 10 MR. ROSE: I just want -- we had a trust  
11 construction trial in the Shirley Bernstein  
12 Trust.

13 THE COURT: Yes. And I know that Judge  
14 Phillips decided in the Shirley Bernstein.

13:53:36 15 MR. ELIOT BERNSTEIN: It was only a  
16 validity hearing. The construction was  
17 severed.

18 THE COURT: Mr. Bernstein?

19 MR. ELIOT BERNSTEIN: Okay, I am sorry.

13:53:42 20 THE COURT: You keep interrupting. You  
21 can't do that.

22 MR. ELIOT BERNSTEIN: I am sorry.

23 THE COURT: Go ahead.

24 MR. ROSE: I would like to do, just so you  
13:53:47 25 know.

1 THE COURT: Sure.

2 MR. ROSE: Eliot Bernstein was a  
3 contingent beneficiary. This is Shirley's  
4 side.

13:53:53 5 THE COURT: Yes.

6 MR. ROSE: Judge Phillips tried the case.

7 THE COURT: Yes.

8 MR. ROSE: Eliot is named in the will as a  
9 contingent beneficiary if Simon died.

13:54:00 10 THE COURT: Okay.

11 MR. ROSE: Now, as soon as Simon --  
12 Shirley dies when Simon is alive and survives  
13 for 30 days, then that contingency disappears  
14 and he is no longer a tangible beneficiary in  
15 Shirley's estate. He was a contingent  
16 beneficiary of the Shirley trust if Simon  
17 didn't exercise a power of appointment.

18 So the trial we had on January -- the  
19 trial we had on December 15th, 2015, was to  
13:54:25 20 determine whether Simon's 2012 documents were  
21 valid and whether his exercise of his power of  
22 appointment was valid. Judge Phillips  
23 determined -- the exercise of the power of  
24 appointment was valid.

13:54:37 25 So now in the Shirley side the power of

1 appointment was exercised so Eliot is no longer  
2 a beneficiary. So he had some standing in that  
3 case as a potential beneficiary while we were  
4 dealing with the trial.

13:54:50 5 THE COURT: I am relying on Judge  
6 Phillips' order.

7 MR. ROSE: Then we have the trial.

8 THE COURT: I have to. That is the law.

9 MR. ROSE: The same thing -- the same  
13:54:58 10 thing over here --

11 THE COURT: I am not going to do this. I  
12 am going to make this very, very clear. Hold  
13 on. Stop, please, Mr. Rose, please.

14 MR. ROSE: I am sorry.

13:55:06 15 THE COURT: I am going to use Mr. Feaman  
16 as an example. I know he disagrees with a lot  
17 of what you are saying. And I am using this  
18 for Mr. Eliot and just because he is on the  
19 other side. He is sitting there professional  
13:55:18 20 as an attorney, not reacting. So I have no  
21 idea if he is thinking I enjoyed my lunch or if  
22 he is thinking I disagree with everything he  
23 said. I am not saying favoritism. I used him  
24 because I happened to look straight up. I need  
13:55:32 25 everybody to have that kind of expression.

1 When it's your turn you are allowed to talk,  
2 but I cannot have the constant -- what happens  
3 is one of you reacts, the other one reacts, the  
4 other one reacts. I am going to let everybody  
13:55:45 5 do their presentation. I am going to make a  
6 ruling, and we are going to move on.

7 Continue, please.

8 MR. ROSE: That's the end of the story.  
9 He is clearly a beneficiary. We have never  
13:55:52 10 denied he is a beneficiary for a very narrow  
11 purpose. But based on the rulings it is  
12 exactly that which is a very narrow purpose.

13 So we are here. Everyone is ready. I  
14 think you can rule on the motion. If at the  
13:56:05 15 end of hearing the evidence you think there's  
16 some reason you need additional discovery,  
17 which I don't think that the record and the  
18 evidence and the law would require, you know,  
19 we can address it at that point. But we are  
13:56:16 20 here. We need to get -- move forward.

21 And just Judge Phillips had entered on  
22 order, I am sorry, Judge Colin had entered an  
23 order about a month after this lawsuit was  
24 filed prohibiting Eliot from filing papers  
13:56:32 25 without permission. Yesterday he filed about



1 4,000 pieces of paper. It's very hard for  
2 everybody to follow, including his -- the  
3 guardian for his children have to read the  
4 pages and it's billing time. But we have spent  
13:56:43 5 so many times in front of Judge Colin deciding  
6 what hearings we are going to have and not  
7 have, we waste so much time, that we are here,  
8 everyone is ready, we are prepared, he has ten  
9 minutes of cross-examination, we can make our  
13:56:54 10 argument and then you can rule and we can go to  
11 the next motion, and we have about six or eight  
12 things. We have settlements we want to get  
13 approved that are set for today, and they  
14 should be -- it should be very routine. And I  
13:57:07 15 think we should move forward today, and we'd  
16 ask that you do so.

17 THE COURT: Thank you.

18 If you will give me a second, what  
19 happened is I have so many notebooks I am  
13:57:37 20 trying to find the one that I was looking for  
21 something. That's what I was looking for.

22 At this time we are going to continue with  
23 this hearing. Mr. O'Connell, please take the  
24 stand.

13:58:50 25 MR. ELIOT BERNSTEIN: Your Honor?

1 THE COURT: No. I am denying the motion  
2 to continue. Mr. O'Connell, take the stand.  
3 You can complete your cross-examination.

4 - - -

5 Thereupon,

6 BRIAN O'CONNELL,  
7 a witness, being by the Court duly sworn, was  
8 examined and testified as follows:

9 THE WITNESS: I do.

10 13:59:01 THE COURT: Thank you. Please have a  
11 seat. You may proceed.

12 CROSS (BRIAN O'CONNELL)

13 BY MR. ELIOT BERNSTEIN:

14 Q. Mr. O'Connell, can you please state your  
15 13:59:15 full name and address for the record?

16 A. Brian O'Connell, 515 North Flagler Drive,  
17 West Palm Beach, Florida.

18 Q. In what capacity are you testifying today?

19 A. As an individual.

20 13:59:27 Q. Not in a fiduciary capacity?

21 A. I am a fiduciary, but I have been called  
22 as a witness. I am an individual witness.

23 Q. Okay. Are you also a practicing lawyer in  
24 Florida?

25 13:59:38 A. Yes.

1 Q. And your bar number, please?

2 A. 308471.

3 Q. Okay. Mr. O'Connell, did you obtain all  
4 of the LIC, LIC Life Insurance Concept financial  
13:59:51 5 records from the beginning of the Stansbury's  
6 lawsuit to the present to review as part of making  
7 your recommendations to hire Alan Rose and appoint  
8 Ted Bernstein?

9 A. I can't answer that sitting here today  
14:00:04 10 because there was a volume of files of information  
11 that we have collected. I couldn't give you an  
12 accurate answer as to exactly what material I have,  
13 over what timeframe. It's just impossible to do  
14 that accurately.

14:00:16 15 Q. Okay. A yes or no to these questions if  
16 you can. You want me to ask it again? Just  
17 looking for a simple yes or no.

18 THE COURT: Do your best answer yes or no.  
19 If he can't answer yes or no he doesn't have to  
14:00:28 20 answer yes or no.

21 THE WITNESS: Could I explain, Your Honor,  
22 after?

23 THE COURT: First answer yes or no, then  
24 you will be allowed to explain.

14:00:34 25 THE WITNESS: I don't know on that

1 question. I don't know the answer.

2 BY MR. ELIOT BERNSTEIN:

3 Q. Okay. Are these records they would be  
4 relevant to the lawsuit in the claims of Stansbury  
14:00:45 5 and the Estate of Simon Bernstein, yes or no?

6 A. I don't know.

7 Q. Okay. If you had the records when did you  
8 obtain those records?

9 A. Since I am not sure what records I have, I  
14:01:01 10 don't know if I have them. I don't know what they  
11 say. And I certainly haven't reviewed them as of  
12 the last few days.

13 Q. Okay. When I came to your offices in  
14 August 2015 to pick up copies of Simon's business  
14:01:21 15 records, did you produce those documents at that  
16 time to me?

17 A. I produced documents to you. But again,  
18 I'd have to go through my records to determine what  
19 copies were made for you at that time. I have no  
14:01:34 20 way of giving a precise answer today as to what was  
21 given.

22 MR. ELIOT BERNSTEIN: Which, Your Honor,  
23 might be reason for more discovery time and  
24 whatnot.

25 ///

1 BY MR. ELIOT BERNSTEIN:

2 Q. Mr. O'Connell, did you obtain copies of  
3 all the Arbitrage International records from the  
4 beginning of the Stansbury lawsuit to the present  
14:01:50 5 to review as part of making your recommendations to  
6 hire Alan Rose and Ted Bernstein, appoint Ted  
7 Bernstein, yes or no?

8 A. I don't know.

9 Q. Okay. If -- would you think those would  
14:02:03 10 be relevant to this lawsuit and the claims in the  
11 case?

12 A. I don't know because I'd have to see them.

13 Q. Okay.

14 A. If there are such records.

14:02:13 15 Q. Okay. And you don't know if you turned  
16 those records over to me when I came to pick up  
17 Simon's business records at your office in August  
18 2015?

19 A. I don't recall.

14:02:23 20 Q. Okay. Did you obtain copies of the IRS  
21 certified records from Simon and Shirley's  
22 businesses and their personal tax returns?

23 A. We have certain tax records for Simon  
24 Bernstein. But again, I couldn't tell you  
14:02:45 25 precisely what they are, for what years.

1 Q. Are they Simon's? Are they certified?

2 A. I don't recall that, but I could tell you  
3 generally tax returns typically aren't certified.

4 Q. Are they signed, the ones you've produced?

14:03:00 5 A. I am not sure.

6 Q. Were you produced -- did you order tax  
7 returns?

8 A. We ordered tax returns.

9 Q. Did you receive them from the IRS?

14:03:06 10 A. We received certain information from the  
11 IRS, because I do recall one item we got was a  
12 letter that they didn't have records that old; I  
13 know that.

14 Q. Yes or no would be simple. So did you get  
14:03:17 15 the tax returns that you were ordering?

16 A. The problem is when you say the tax  
17 returns, there are a number of years for which we  
18 made a request. And I can't be precise in terms of  
19 what exactly were produced and for what year it  
14:03:31 20 relates.

21 MR. ELIOT BERNSTEIN: Again, this might  
22 need more discovery time here to figure these  
23 things out because they are all germane, but.  
24 BY MR. ELIOT BERNSTEIN:

14:03:45 25 Q. Did you turn those records you got over to

1 any of the beneficiaries?

2 A. Again, I don't know what was furnished to  
3 whom, if requests were made or not, I don't know.

4 Q. Okay. Right immediately before Ben Brown  
14:03:57 5 died mysteriously, the prior curator to you, he had  
6 alleged he received the tax returns from the IRS  
7 and was transferring them to you.

8 MR. ROSE: Objection, hearsay and  
9 relevance.

14:04:10 10 THE COURT: It is hearsay, so sustained.

11 MR. ELIOT BERNSTEIN: Okay.

12 BY MR. ELIOT BERNSTEIN:

13 Q. Do you recall receiving tax returns from  
14 Mr. Ben Brown that were from the IRS?

14:04:20 15 A. Not with any specificity. And I don't  
16 want to guess.

17 Q. Can you describe what the Stansbury  
18 lawsuit is all about?

19 A. Well, there's a number of counts. Some  
14:04:39 20 have been resolved. There have been dismissals,  
21 for example, of Ted Bernstein. And there's --  
22 without seeing it, I can probably give a better  
23 answer, but there's several, there's some breach of  
24 an oral contract. There's a claim for a fraudulent  
14:04:54 25 misrepresentation. There's a conspiracy count.

1 These are just things I can recall sitting here.  
2 But in terms of what the actual accounts are, it  
3 would be best to look at the lawsuit itself.

4 Q. Have you looked at the lawsuit?

14:05:10 5 A. Yes.

6 Q. Okay. Because the last time and in your  
7 pleadings you state that you have no knowledge of  
8 the lawsuit; is that correct?

9 A. Well, I'd have to see what it is that you  
14:05:20 10 are referring to. But I have a general knowledge  
11 of the lawsuit because I have seen the complaint.  
12 That would be the source of, one source of  
13 information that I have.

14 Q. Okay. Because Mr. Rose has pled that you  
14:05:32 15 have no knowledge, and I believe your statement  
16 says you have no knowledge. But I will get to that  
17 in a moment.

18 A. I'd have to see my statement.

19 Q. Okay. We are going to get that out.  
14:05:42 20 We'll get that, circle back to that.

21 Is that all you have to say on the  
22 Stansbury lawsuit that know of?

23 A. That the lawsuit speaks for itself.

24 Q. Have you spoken to me ever about the  
14:05:53 25 lawsuit?



1 A. I don't recall.

2 Q. Do you recall a three-hour conversation  
3 with my wife and me regarding the Stansbury  
4 litigation?

14:06:02 5 A. I remember a lengthy conversation with you  
6 and your wife about estate issues. Not too long  
7 after I took over, yes, you came to the office.  
8 Again, I'd have to refresh my recollection as to  
9 what exactly we covered. But I recall that much.  
14:06:17 10 It was pending issues involving estate matters that  
11 were of concern to you. And then I think we even  
12 talked about was there a way to resolve the issues  
13 that you had. So those were sort of the  
14 generalities that I recall.

14:06:29 15 Q. Okay. Because your bill mainly says that  
16 it was regarding the Stansbury lawsuit --

17 A. I'd have to see the bill.

18 Q. -- for three hours. But -- and let me ask  
19 you another question. Did you bill for that three  
14:06:41 20 hours?

21 A. Again, without seeing the bill to be sure.

22 Q. Okay.

23 A. But I am going to take an assumption that  
24 I did.

14:06:47 25 Q. Okay. Okay. And after I just heard you,

1 you said there was some breach of contract issues,  
2 some conspiracy issues, some fraud issues, and the  
3 defendants we know were Ted Bernstein that was sued  
4 and Simon Bernstein and their companies, correct?

14:07:19 5 A. Originally.

6 Q. Okay.

7 A. And there's been some dismissals  
8 principally of Ted Bernstein and some of the  
9 entities.

14:07:24 10 Q. Okay. And I was looking for yes or no,  
11 but okay.

12 Okay. So is it possible that some of the  
13 issues involved in the Stansbury claims could  
14 involve negligence, yes or no?

14:07:39 15 A. I don't recall a negligence claim or count  
16 in the complaint. And there's a second amended  
17 complaint. That would be what one would need to  
18 look to answer that for sure. But sitting here  
19 without looking at it, I don't recall a negligence  
14:07:54 20 claim.

21 Q. Are you aware of Florida Statute 768.1,  
22 yes or no?

23 A. 768.01 perhaps?

24 Q. 768.81.

14:08:23 25 A. 81?

1 Q. Yes.

2 MR. ELIOT BERNSTEIN: Your Honor, can I  
3 approach?

4 THE DEPUTY: I will bring it to the  
14:08:29 5 witness.

6 THE COURT: Thank you.

7 MR. ELIOT BERNSTEIN: Do you want one,  
8 Your Honor?

9 THE COURT: I have my statute book. I am  
14:08:32 10 looking it up right now.

11 MR. ELIOT BERNSTEIN: Okay. Okay. Let me  
12 get back to where I was.

13 THE COURT: The comparative fault statute?

14 MR. ELIOT BERNSTEIN: Yes.

14:09:04 15 BY MR. ELIOT BERNSTEIN:

16 Q. Can you read subdivision C for the record,  
17 Mr. O'Connell?

18 MR. ROSE: I am going to object. I mean,  
19 the statute is the statute. They can make  
14:09:15 20 whatever argument they want to make in the  
21 argument, but he doesn't have to read the  
22 statute.

23 MR. ELIOT BERNSTEIN: Well --

24 THE COURT: Just let him read it.  
14:09:23 25 Overruled.

1 THE WITNESS: "Negligence action means,  
2 without limitation, a civil action for damages  
3 based upon a theory of negligence, strict  
4 liability, products liability, professional  
14:09:33 5 malpractice whether couched in terms of  
6 contract or tort, or breach of warranty and  
7 like theories. The substance of an action, not  
8 conclusory terms used by a party, determines  
9 whether an action is a negligence action."

14:09:48 10 BY MR. ELIOT BERNSTEIN:

11 Q. And then can you just read real quick  
12 number three short?

13 A. Sure. "Apportionment of damages. In a  
14 negligence action, the court shall enter judgment  
14:09:57 15 against each party liable on the basis of such  
16 party's percentage of fault and not on the basis of  
17 the doctrine of joint and several liability."

18 Q. Okay. And both Ted and my father were  
19 sued in the Stansbury action, correct?

14:10:17 20 A. Yes, originally.

21 Q. Okay. And so it could be that Ted  
22 committed, and according to Mr. Stansbury's  
23 complaint, most of the egregious acts of fraud on  
24 Mr. Stansbury, checking account fraud, et cetera,  
14:10:40 25 and that my father was more of a passive partner in

1 this thing who might not have even known what was  
2 going on with Ted?

3 So would there be the ability to say that  
4 there was an apportionment of damages that could  
14:11:04 5 result that where Ted is found maybe a hundred  
6 percent liable for the damages to Mr. Stansbury?

7 A. Well, at this point, I will give you a no  
8 at this point. Because what you would have to do  
9 is -- and look the complaint, because everyone has  
14:11:23 10 to travel under the complaint and what's been  
11 alleged in that and what legal theories are being  
12 claimed.

13 Again, like I mentioned, negligence I  
14 don't recall being a count within that particular  
14:11:33 15 complaint. Then you have to couple that with the  
16 fact that you had a dismissal of Ted in certain  
17 entities as a defendant. Then on top of that you'd  
18 have to have, which I certainly don't have and not  
19 been given, facts to support that type of a I will  
14:11:49 20 call it apportionment claim as you have alluded to  
21 it. So someone would have to have that information  
22 to make that assessment after considering  
23 everything else that I just said.

24 Q. And so since you didn't know if there was  
14:12:03 25 a negligence and we'd have to circle back to that

1 with more discovery because you need to check your  
2 records, we could find that there's a negligence  
3 theory here that establishes that there's shared  
4 fault in the action, correct?

14:12:19 5 MR. ROSE: Objection. And may I be heard?

6 THE COURT: Give me just one second.

7 MR. ROSE: Okay.

8 THE COURT: All right. I just reviewed  
9 the complaint at issue in the Stansbury case.  
10 There does not appear to be a negligence  
11 action. Am I missing it?

12 MR. FEAMAN: There is not a negligence  
13 action per se, Your Honor.

14 THE COURT: Okay. Thank you.

14:12:50 15 So let's move on. Don't forget, I said  
16 you had ten minutes.

17 MR. ELIOT BERNSTEIN: Okay.

18 THE COURT: I have already given you ten.  
19 I am going to give you five more.

14:12:58 20 MR. ELIOT BERNSTEIN: Well, I am going to  
21 need more just based on the fact that there's  
22 some certain things that are germane --

23 THE COURT: Okay. I understand your  
24 objection.

14:13:05 25 (Overspeaking.)

1 MR. ELIOT BERNSTEIN: -- consideration.

2 Thank you.

3 THE COURT: I understand your objection.

4 MR. ELIOT BERNSTEIN: Okay.

14:13:07 5 THE COURT: And wait. And you put it on

6 the record so it's preserved.

7 MR. ELIOT BERNSTEIN: Okay.

8 THE COURT: But you get six more minutes.

9 BY MR. ELIOT BERNSTEIN:

14:13:13 10 Q. Mr. O'Connell, when did you -- did you

11 perform a due diligence investigation into Ted

12 Bernstein's potential liability in the Stansbury

13 lawsuit?

14 A. I have not. I have never been presented

14:13:24 15 with any facts by anyone or even an allegation to

16 suggest that such a liability might exist.

17 Q. Well, the complaint actually alleges that

18 Ted committed the frauds?

19 A. And then, as I have mentioned, Ted was

14:13:35 20 dismissed as a defendant by Mr. Stansbury.

21 Q. Yeah, that's okay. Whether Mr. Stansbury

22 in the estate would have to determine if Ted had

23 liability in this, correct?

24 A. No.

14:13:47 25 MR. ROSE: Objection, again.

1 THE COURT: Go ahead, place your legal  
2 objection on the record.

3 MR. ROSE: Well, my legal objection is a  
4 lack of relevancy under the two statutes that  
14:13:59 5 are relevant to these issues. But he can  
6 finish.

7 THE COURT: Thank you.

8 You may proceed.

9 BY MR. ELIOT BERNSTEIN:

10 Q. Did you do a due diligence investigation  
11 to check out if Ted had any liability in this  
12 lawsuit?

13 A. Not the way you've phrased it. I mean, we  
14 examined the lawsuit and determined the defendant  
14:14:25 15 initially. And, of course, we are here today for a  
16 different form of defense. But I have no  
17 information specifically relates to the topics that  
18 you are raising that Ted has some type of a  
19 contribution, I think would be your theory for  
14:14:40 20 that, or a portion you have also used that term.

21 Q. But if you did find that out through due  
22 diligence that Ted had liability, you would be able  
23 to take action on behalf of the beneficiaries to  
24 have Ted sued or charged with that, correct?

14:14:57 25 A. If, yes, if that information exists, if



1 someone provides us with that information, then, of  
2 course, we could.

3 Q. Okay.

4 A. That begs the issue of --

14:15:09 5 Q. That's good.

6 A. -- us needing the information after the  
7 years that have gone by that this litigation has  
8 been pending that I have never been provided.

9 Q. Okay. Okay. So but you just said that as  
14:15:19 10 the estate could do that after reviewing to see if  
11 Ted had liability. And my question is this, do you  
12 think that Ted, if he is in your chair right there  
13 right now representing the estate on behalf of  
14 Stansbury, will file a lawsuit against Ted saying  
14:15:38 15 that he committed most of the egregious acts and he  
16 should be apportioned the damages?

17 A. I wouldn't --

18 MR. ROSE: Again, I will object. Legal  
19 ground is that the estate has no claim against  
14:15:49 20 Ted Bernstein under any circumstances. And for  
21 the record, under Section 768.31(c) and  
22 768.31(b)(5), which states that when a party  
23 has been dismissed and given a release, there's  
24 no claim for contribution, it discharges the  
14:16:09 25 tort-feasor to whom it is given from all

1 liability for contribution to any other  
2 tort-feasor.

3 Mr. Feaman is in the courtroom, and he can  
4 confirm that there's a settlement agreement  
14:16:18 5 that includes a release of Mr. Ted Bernstein.

6 And under 768.81, just for the record,  
7 there's no liability if there's apportionment  
8 of fault. The jury could award him a billion  
9 dollars, put a hundred percent on Ted  
14:16:29 10 Bernstein, and the estate pays nothing under  
11 781 --

12 MR. ELIOT BERNSTEIN: Your Honor --

13 (Overspeaking.)

14 THE COURT: I understand the legal  
14:16:33 15 implications of 768.81. Next question.  
16 Mr. Eliot has approximately three more minutes,  
17 and I want him to have his time.

18 MR. ELIOT BERNSTEIN: Well, that's not  
19 enough time, I mean literally. I have  
14:16:46 20 requested and shown the reasons why. But okay.  
21 And I will say this is more infringement on my  
22 due process right, but.

23 THE COURT: I have absolutely --

24 MR. ELIOT BERNSTEIN: Okay.

14:16:56 25 THE COURT: Wait. Wait. I want to say

1           this. I have always -- I will never be upset  
2           by you establishing your record, so that's  
3           fine, go on.

4   BY MR. ELIOT BERNSTEIN:

14:17:05 5           Q.    When did you first read the will of Simon  
6           Bernstein, the 2012 will?

7           A.    Shortly after I was appointed as the  
8           personal representative.

9           Q.    Did you read a copy or the original?

14:17:16 10          A.    I believe it was a copy.

11          Q.    Why didn't you read the original?

12          A.    Well, the original would be in the court  
13          file, and we rely on copies.

14          Q.    Okay. When did you first see the  
14:17:36 15          paragraph in the alleged valid will of my father  
16          that makes me a beneficiary as devisee?

17          A.    When I would have read the will I would  
18          have seen the children as beneficiaries as to  
19          tangible personal property.

14:17:49 20          Q.    So how long have you let Ted Bernstein and  
21          Alan Rose falsely claim in the court that I have no  
22          standing?

23                   MR. ROSE:  Objection, argumentative.

24                   THE COURT:  Overruled.  You can answer.

14:17:59 25                   THE WITNESS:  And I haven't let them do

1 anything.

2 BY MR. ELIOT BERNSTEIN:

3 Q. Well, did you object at the validity  
4 hearing when it was said I wasn't a beneficiary of  
14:18:08 5 the estate?

6 A. I am not sure which hearing you are  
7 referring to and whether or not I was present.

8 Q. You weren't present. But the estate, you  
9 left and abandoned the estate at that validity  
14:18:17 10 hearing, in fact, and left it unrepresented. But  
11 you would have, obviously, opposed any statements  
12 like the ones that are full in these pleadings  
13 before the Court right now where Mr. Rose is  
14 claiming Eliot is not a beneficiary of anything  
14:18:29 15 whatsoever? That's incorrect, correct?

16 A. Sort of a compound question, but I will  
17 try to answer it the best I can. Based on what  
18 Mr. Rose just said in open court, I am not aware  
19 that he is contesting that you are beneficiary of  
14:18:44 20 the Simon Bernstein estate as to tangible personal  
21 property.

22 Q. He said he conceded, which means he  
23 changed his entire pleadings, the pleadings before  
24 Judge Phillips --

14:18:53 25 THE COURT: Okay, question. You ask a

1 question. You don't stand there and --

2 MR. ELIOT BERNSTEIN: I got you.

3 (Overspeaking.)

4 THE COURT: Last question.

14:19:00 5 MR. ELIOT BERNSTEIN: Well, I have got a  
6 few more.

7 THE COURT: Last question.

8 BY MR. ELIOT BERNSTEIN:

9 Q. Have you negotiated a signed settlement  
14:19:09 10 between Stansbury and the estate?

11 A. No. You mean is there a signed settlement  
12 agreement between Mr. Stansbury and the estate?

13 Q. That Mr. Stansbury signed that you sent to  
14 him that you negotiated a settlement between the  
14:19:26 15 estate and Mr. Stansbury?

16 A. At this point to get some clarity here,  
17 because we have had exchanges of correspondence  
18 about trying to settle the case. But if you are  
19 saying do I have a signed settlement agreement  
14:19:39 20 that's been approved by the Court that's been --

21 Q. No, I didn't say -- I just asked do you  
22 have a signed one by Mr. Stansbury?

23 A. Again, I'd have to look through my file  
24 because I remember exchanging proposals. Whether  
14:19:51 25 or not Mr. Stansbury signed off on one of those,

1 because we did have a hearing before Judge Colin  
2 about approving a settlement. But that was  
3 objected to by counsel for the grandchildren,  
4 therefore it wasn't approved. So it's possible  
14:20:04 5 there could be something that was signed in that  
6 era. But I'd want to look at the file to be sure,  
7 if that's what you are referring to.

8 Q. Okay. So --

9 THE COURT: All right. That was the last  
14:20:16 10 question.

11 MR. ELIOT BERNSTEIN: Can I finish that  
12 question?

13 THE COURT: You can finish one more.

14 MR. ELIOT BERNSTEIN: Okay.

14:20:20 15 BY MR. ELIOT BERNSTEIN:

16 Q. In Shirley's trust construction case in  
17 relation to Simon's trust you were served a  
18 complaint in Shirley's trust, you entered and  
19 intervened on behalf of the estate. Did you not at  
14:20:35 20 that time answer your first affirmative defense  
21 that Ted Bernstein was not a validly serving  
22 trustee of the Simon Bernstein Trust?

23 A. I'd need to see that. It's possible. I'd  
24 need to see the pleading itself.

14:20:47 25 Q. Okay.

1 MR. ELIOT BERNSTEIN: I can get that if  
2 you'd like, Your Honor.

3 THE COURT: If you want to hand it to him.

4 MR. ELIOT BERNSTEIN: Okay. Hold on.

14:20:57 5 THE COURT: Does anyone have that pleading  
6 handy?

7 MR. ROSE: If I could enlighten you?

8 THE COURT: Yes. Which pleading are you  
9 referencing?

14:21:13 10 MR. ROSE: No, in the trust --

11 MR. ELIOT BERNSTEIN: (Inaudible).

12 (Overspeaking.)

13 THE COURT: No, I asked which pleading you  
14 are referencing, and he was just trying to tell  
14:21:20 15 me.

16 MR. ELIOT BERNSTEIN: Okay.

17 THE COURT: Do you have the pleading,  
18 Mr. Eliot?

19 MR. ELIOT BERNSTEIN: I am looking for it.

14:21:25 20 THE COURT: I was just going to ask him if  
21 he had the pleading he can show you the  
22 pleading if he can get it. Do you know which  
23 pleading?

24 MR. ROSE: I can tell you what it is.

14:21:31 25 THE COURT: What is it?

1 MR. ROSE: In the trust construction case  
2 Judge Colin ordered that we try the validity of  
3 five documents.

4 THE COURT: Yes, I remember.

14:21:42 5 MR. ROSE: One of them affected  
6 Mr. O'Connell --

7 THE COURT: I might be able to pull it up  
8 from the court file.

9 MR. ROSE: -- which was the will. So  
14:21:46 10 Mr. O'Connell filed an answer in the case. But  
11 then we entered into a stipulation and an order  
12 that Mr. O'Connell would abide by whatever  
13 Judge Phillips ruled at the trial so that he  
14 wouldn't have to sit through a trial and incur  
14:21:57 15 the expense.

16 THE COURT: Got it.

17 MR. ROSE: So I think he withdrew his --  
18 he entered into an agreement and he did not  
19 pursue any defenses, and the documents were  
14:22:04 20 upheld as valid. It would be his answer filed  
21 in, not in the Estate of Simon Bernstein, but I  
22 think it's the 2014 3698 case.

23 MR. ELIOT BERNSTEIN: It's Mr. O'Connell's  
24 answer. It's his only affirmative defense,  
14:22:22 25 Your Honor, if you want to look it up. It's



1 his answer to the Shirley Bernstein Trust,  
2 construction complaint on behalf of the estate.

3 BY MR. ELIOT BERNSTEIN:

4 Q. Mr. O'Connell, what made you say that?

14:22:34 5 A. Originally?

6 Q. Yes.

7 A. Before it was settled? My review of the  
8 Shirley Bernstein Trust.

9 Q. You said the Simon Bernstein Trust he  
14:22:46 10 wasn't validly serving under?

11 A. Sorry, Simon Bernstein Trust, correct.

12 Q. Okay. So now what was it?

13 A. My review -- originally when that  
14 affirmative defense was entered based on my review  
14:22:55 15 of the Simon Bernstein Trust.

16 Q. You claimed that Ted wasn't validly  
17 serving. On what grounds? On what basis?

18 MR. ROSE: Objection, Your Honor. Under  
19 the statute -- it's not relevant. But under  
14:23:06 20 the statute Mr. O'Connell has no, would have  
21 had no standing, just like Mr. Bernstein had no  
22 standing, and Mr. Feaman has no standing --

23 THE COURT: Sustained.

24 MR. ROSE: -- because only the settlor or  
14:23:17 25 the co-trustee or the beneficiary trust can

1 seek removal.

2 THE COURT: All right. Let's wrap it up.

3 MR. ELIOT BERNSTEIN: Well, you are not  
4 going to let me ask any more questions?

14:23:23 5 THE COURT: I am not.

6 MR. ELIOT BERNSTEIN: Okay. Again, my --

7 THE COURT: Your objection is so noted for  
8 the record.

9 Okay. Redirect.

14:23:34 10 MR. FEAMAN: Thank you, Your Honor.

11 THE COURT: You are welcome, thank you.

12 MR. ELIOT BERNSTEIN: Oh, excuse me, Your  
13 Honor?

14 THE COURT: Yes, sir.

14:23:42 15 MR. ELIOT BERNSTEIN: Just one last thing.  
16 Do I get to make an opening statement and stuff  
17 at this proceeding?

18 THE COURT: We are way past that.

19 MR. ELIOT BERNSTEIN: Well, I was late  
14:23:52 20 last time.

21 THE COURT: And that's why you waived it.

22 MR. ELIOT BERNSTEIN: So I waived it?

23 THE COURT: You waived it by being late.

24 MR. ELIOT BERNSTEIN: Oh, okay.

14:23:58 25 THE COURT: Okay? Thank you.

1 MR. FEAMAN: May it please the Court?

2 THE COURT: Absolutely, thank you.

3 REDIRECT (BRIAN O'CONNELL)

4 BY MR. FEAMAN:

14:24:05 5 Q. Good afternoon, Mr. O'Connell.

6 A. Good afternoon.

7 Q. Mr. Eliot actually brought this up when we  
8 were here the first time concerning the counts of  
9 the Stansbury lawsuit, and I actually thought about  
10 what he had to say. So I would like to follow up  
11 and ask you some more questions on the Stansbury  
12 lawsuit. If I could hand you a copy of the second  
13 amended complaint?

14 A. Sure.

14:24:38 15 Q. Okay.

16 A. I have got it.

17 Q. And this is the second amended complaint  
18 in the lawsuit that is pending where Mr. Rose seeks  
19 to become counsel for the estate, correct?

14:24:55 20 MR. ROSE: If I could, just a brief  
21 objection for the record?

22 THE COURT: For the record.

23 MR. ROSE: To the extent we are going to  
24 argue that we should be disqualified because of  
14:25:02 25 some potential contribution, I would just note

1 it's not in the papers --

2 MR. FEAMAN: Move to strike.

3 THE COURT: I get to hear his entire  
4 argument before you get to move to strike  
14:25:11 5 anything.

6 MR. FEAMAN: Yes, ma'am.

7 THE COURT: I don't know what you are  
8 striking.

9 MR. ROSE: The grounds -- those grounds  
14:25:17 10 aren't in the motion to disqualify our firm as  
11 valid or the objection to our retention that's  
12 the basis of vacating your order.

13 THE COURT: Continue.

14 MR. ELIOT BERNSTEIN: Excuse me, I just  
14:25:31 15 missed that piece. Can somebody read that  
16 back? I am sorry.

17 THE COURT: Sure, I can have the court  
18 reporter read back his objection. Thank you.

19 MR. ELIOT BERNSTEIN: I am sorry.

14:25:38 20 THE COURT: No, that's all right.

21 MR. ELIOT BERNSTEIN: I was out there for  
22 just a second.

23 MR. FEAMAN: Response, Your Honor.

24 THE COURT: I was just waiting to hear the  
14:25:48 25 question. He asked that Mr. Rose's objection

1 be read back, and I said sure, and I was giving  
2 the court reporter the opportunity to read it  
3 back.

4 MR. ELIOT BERNSTEIN: I am sorry, Your  
14:25:58 5 Honor.

6 THE COURT: That's quite all right. Thank  
7 you.

8 (The following portion of the record was  
9 read back.)

10 "MR. ROSE: Those grounds aren't in the  
11 motion to disqualify our firm as valid or the  
12 objection to our retention that's the basis of  
13 vacating your order."

14 THE COURT: Mr. Feaman, you wanted a  
14:26:50 15 response?

16 MR. FEAMAN: My response is we allege that  
17 Mr. Rose has a conflict of interest.

18 THE COURT: I think that's broad enough.  
19 We are talking about the lawsuit he is saying  
14:27:01 20 he has a conflict. Let's move on. Overruled.

21 MR. FEAMAN: Thank you.

22 BY MR. FEAMAN:

23 Q. So the lawsuit is case number 13933 in the  
24 general jurisdiction division, correct?

14:27:11 25 A. Correct.

1 Q. And this is not the first time you are  
2 looking at this, correct?

3 A. Correct.

4 Q. In fact, you have looked at it in somewhat  
14:27:20 5 detail because you and I carried on some serious  
6 settlement negotiations, did we not?

7 A. Yeah, we have over a span of time, yes.

8 Q. Okay. Let me then first draw your  
9 attention to paragraph 26 on page six. Let me know  
14:27:41 10 when you are there.

11 A. I am there.

12 THE COURT: Hold on. The Court is not  
13 there yet. I assume you want the Court to  
14 follow along? Does anyone have an objection to  
14:27:48 15 me pulling up the complaint?

16 MR. ELIOT BERNSTEIN: No, ma'am.

17 MR. FEAMAN: It's public record.

18 THE COURT: Just for the record.

19 MR. ROSE: That's fine, or you can have my  
14:27:56 20 copy.

21 THE COURT: Just give me one second. I  
22 have got the docket up. And just tell me when  
23 it was filed, the amended complaint.

24 MR. FEAMAN: The amended complaint was  
14:28:04 25 served and filed on or about September 3rd,

1 2013.

2 THE COURT: Thank you. Got it.

3 You may proceed, thank you.

4 BY MR. FEAMAN:

14:28:21 5 Q. Now, it's alleged there that LIC Holdings  
6 and Arbitrage became the alter ego of Simon  
7 Bernstein and Ted Bernstein; is that correct?

8 A. I see that, yes, that language.

9 Q. Now, LIC Holdings and Arbitrage were two  
14:28:36 10 corporate defendants before -- in this action  
11 before they were settled out; is that correct?

12 A. Correct.

13 Q. And that was the corporations under which  
14 Mr. Stansbury and Mr. Simon Bernstein and Mr. Ted  
14:28:48 15 Bernstein did business, correct?

16 A. Well, that's what's alleged in here.

17 Q. Okay. And it says that the allegations  
18 are against both Simon Bernstein and Ted Bernstein,  
19 correct?

14:29:01 20 A. Yes, in 26.

21 Q. And then the last sentence of page six  
22 says, "The wrongful action of Simon Bernstein and  
23 Ted Bernstein in diverting and converting corporate  
24 assets rendered LIC and possibly Arbitrage  
14:29:18 25 insolvent," correct?

1           A.    That's what it says.  That's the  
2 allegation.

3           Q.    Right.  And now you are aware that Mr. Ted  
4 Bernstein's deposition has not been taken in this  
14:29:27 5 case, correct?

6           A.    I am not sure.

7           THE COURT:  Can I ask you to clarify which  
8 case?

9           MR. FEAMAN:  Sorry.

14:29:36 10          THE COURT:  The civil case?

11          MR. FEAMAN:  The Stansbury action.

12          THE COURT:  Thank you.

13          MR. FEAMAN:  Refer to it that way for the  
14 record.

14:29:40 15          THE COURT:  Thank you.

16          THE WITNESS:  I don't know either way.

17 BY MR. FEAMAN:

18          Q.    In fact, are you aware that other than the  
19 beginning of the deposition of Mr. Stansbury, that  
14:29:48 20 in the Stansbury action no depositions have yet  
21 been taken in that case; are you aware of that?

22          A.    I recall Mr. Stansbury's deposition, but I  
23 am not sure what other depositions may or may not  
24 have been taken.

14:30:01 25          Q.    If I told you that no other depositions



1 have been taken, that wouldn't surprise you, would  
2 it? You wouldn't have any reason to disagree with  
3 that?

4 A. I don't sitting here without again looking  
14:30:11 5 at some more material.

6 Q. All right. And then could I draw your  
7 attention to paragraph 27?

8 A. Sure.

9 Q. It says, "Throughout 2009 Simon Bernstein  
14:30:21 10 and Ted Bernstein continued to make false  
11 statements to Stansbury to hide the fact that LIC  
12 and/or Arbitrage was their alter ego in that they  
13 converted corporate property and corporate assets  
14 of LIC," correct?

14:30:34 15 A. That's what it says.

16 Q. Now, assume for me for a moment that  
17 discovery shows that in fact most of that conduct  
18 was performed by Ted Bernstein. Would you agree  
19 that then possibly the Estate of Simon Bernstein  
14:30:48 20 could have a third party complaint against Ted  
21 Bernstein?

22 MR. ROSE: Objection, under the same  
23 grounds as before. I mean, first of all, the  
24 statute prohibits the claim for contribution  
14:31:02 25 which would be a third party claim for

1 contribution.

2 THE COURT: That's not a legal objection.

3 MR. ROSE: Also, he is the opposing party  
4 in the lawsuit that's pending. I really object  
14:31:11 5 to him asking him his opinion about strategy in  
6 the case, which is -- I mean, it's a delicate  
7 balance, I understand, but, you know.

8 THE COURT: Which is why I asked you first  
9 if you think Judge Marx should hear this. So  
14:31:24 10 if you want me to hear it, I've got to know  
11 what's going on.

12 MR. ROSE: And I want you to hear it. It  
13 would be the same issue in front of Judge Marx.  
14 I am saying he is asking him trial strategy. I  
14:31:32 15 understand what they are getting at with this  
16 contribution thing. And the reason why I  
17 suggest it's completely irrelevant is there  
18 is --

19 THE COURT: Wait a minute. Are you  
14:31:39 20 objecting trial strategy is work product as  
21 between attorney and client? Do you see what I  
22 am saying? I need a basis.

23 MR. ROSE: My basis for the record is this  
24 is completely irrelevant because it's  
14:31:49 25 undisputed in this record that there's no claim

1 for contribution which exists. So to ask about  
2 a third party claim that doesn't exist I think  
3 is an improper question and the objection  
4 should be sustained.

14:31:59 5 THE COURT: I am overruling it. It goes  
6 to the weight of the evidence and me deciding  
7 overall whether or not there's a conflict. I  
8 am going to let him explore his theory, but it  
9 all goes to whether or not there's a conflict  
14:32:12 10 that exists.

11 You may continue.

12 MR. FEAMAN: And with Your Honor's  
13 permission I would just like to state for the  
14 record that there's nothing in this record to  
14:32:20 15 support what Mr. Rose has said. Thank you.

16 BY MR. FEAMAN:

17 Q. Now, so my question was --

18 THE COURT: Do you want it read back?

19 MR. FEAMAN: Yes.

20 (The following portion of the record was  
21 read back.)

22 "Q. Now, assume for me for a moment that  
23 discovery shows that in fact most of that  
24 conduct was performed by Ted Bernstein. Would  
25 you agree that then possibly the Estate of

1 Simon Bernstein could have a third party  
2 complaint against Ted Bernstein?"

3 THE WITNESS: I don't know enough to make  
4 that analysis sitting here right now because it  
14:33:06 5 would have to go through -- actually it would  
6 be two contribution statutes, related statutes  
7 in Chapter 768 I can think of that one would  
8 have to review besides the one that I have been  
9 provided.

14:33:18 10 BY MR. FEAMAN:

11 Q. Okay.

12 A. And obviously then take that against what  
13 the facts are that you are referencing that might  
14 be disclosed in discovery, apply that against the  
14:33:26 15 dismissal, release, look at the settlement  
16 agreement that was signed, and take an analysis of  
17 all of those items, to give you a correct answer to  
18 your question.

19 Q. And you haven't seen the release even,  
14:33:38 20 have you?

21 A. I have talked to Mr. Rose about it. I  
22 haven't -- I don't have it in my hands. It's not  
23 part of my files.

24 Q. You haven't made an independent  
14:33:48 25 determination outside of what Mr. Rose may have

1 told you that there might be something in that  
2 release which would somehow keep the Estate of  
3 Simon Bernstein from suing Ted Bernstein out of the  
4 Stansbury lawsuit, correct?

14:34:01 5 A. I don't know that. I understood it was a  
6 confidential settlement.

7 Q. Okay. So then you don't know; is that  
8 correct?

9 A. It is because, as I just said, I was told  
14:34:10 10 it was a confidential settlement. I inquired of  
11 Mr. Rose generally what the terms and conditions  
12 was. I looked at the docket. I see the dismissal  
13 with prejudice of the parties you referred to  
14 before.

14:34:21 15 Q. And so going back to what the facts might  
16 develop, you really don't know yet whether the  
17 Estate of Simon Bernstein could sue Ted Bernstein  
18 arising out of the conduct alleged in the Stansbury  
19 lawsuit, correct?

14:34:35 20 A. Right. I think I have answered that, but  
21 I will say it again. I don't have enough  
22 information to apply case law. There's a Supreme  
23 Court decision I can think of that deals with  
24 contribution that would be relevant here, yeah, a  
14:34:50 25 number of items. But I would have to start with

1 some sort of a factual basis, looking at documents,  
2 what's the nature of the tort, what's the  
3 contribution, if it's a contract claim, if there's  
4 no contribution, all of those items would have to  
14:35:05 5 be looked at because this complaint has contractual  
6 claims and it has tort claims.

7 Q. Right. And assume for me, if you would,  
8 that the release would not bar an action by the  
9 estate. And assume for me that the facts would  
14:35:18 10 support a jury's conclusion as to the truthfulness  
11 of what's alleged in paragraphs 26, 27, 28 and 29.  
12 Isn't it true that in that event, and I am  
13 admitting now that you don't know this yet, but  
14 that the estate could have an action against Ted  
14:35:36 15 Bernstein?

16 A. Then I would --

17 MR. ROSE: I am going to object for the  
18 record on multiple grounds, first of which is I  
19 can't believe a lawyer in this courtroom who's  
14:35:46 20 negotiated a general release --

21 MR. FEAMAN: Move to strike.

22 THE COURT: Hold on. One second, please.

23 MR. FEAMAN: He can object, Your Honor,  
24 but he can't make statements like that.

14:35:55 25 THE COURT: I indicated at the very

1 beginning, remember point one, that no one was  
2 to take a strike at the lawyer. If you want to  
3 put on the law, put on the law.

4 MR. ROSE: Okay.

14:36:06 5 THE COURT: I am looking at 768.81.

6 You may proceed with your objection.

7 MR. ROSE: Can I clarify the point since  
8 this is not pled and we are traveling --

9 THE COURT: Sure.

14:37:01 10 MR. ROSE: Is there a position taken in

11 this case by the movant that there is not a  
12 mediation settlement agreement signed that  
13 includes a general release negotiated by  
14 counsel at a mediation, including Mr. Feaman

14:37:14 15 who was the lead counsel for the plaintiff,  
16 that includes a general release of all

17 defendants? And if that's an issue, I need to  
18 know that just to be on notice of what the  
19 issues are in the case so I can be prepared to

14:37:26 20 meet the evidence that's going to be presented

21 today. I don't think it's too much to ask if  
22 that's actually a disputed issue of fact today.

23 And if it is, I would submit to the Court that  
24 when we prove the opposite it should reflect on

14:37:39 25 the credibility of the movant.

1 MR. FEAMAN: Move to strike --

2 MR. ROSE: And I have a legal objection  
3 after I --

4 THE COURT: Mr. Feaman, it's the Court's  
14:37:47 5 understanding there was a dismissal and a  
6 settlement with regards to Ted individually  
7 from the Stansbury lawsuit; is that correct?

8 MR. FEAMAN: That is correct.

9 THE COURT: All right. Move on, Mr. Rose.  
14:37:58 10 That was the basis of your issue, correct?

11 MR. ROSE: But that included a release.  
12 The settlement agreement that was signed  
13 included a general release. I didn't know that  
14 was a disputed issue of fact.

14:38:08 15 THE COURT: I don't think it's been raised  
16 as a disputed issue of fact.

17 MR. ROSE: Okay. Then my legal objection  
18 is --

19 THE COURT: I did not believe there was an  
14:38:18 20 issue raised that it was a disputed issue. Was  
21 in fact I believe there was a release executed  
22 in the Stansbury litigation?

23 MR. FEAMAN: Right.

24 THE COURT: With regards to Ted Bernstein?

14:38:28 25 MR. FEAMAN: Correct. Now, there may be a



1 legal issue as to whether the terms of that --

2 THE COURT: I was going to say I am not  
3 going there.

4 MR. FEAMAN: Correct.

14:38:35 5 THE COURT: The question is is there a  
6 release?

7 MR. ROSE: So that's a stipulated fact for  
8 the purposes of the hearing?

9 THE COURT: There are. A release has been  
14:38:42 10 executed. The effect of that release to the  
11 Court on this day is not making any  
12 determination.

13 MR. ELIOT BERNSTEIN: Your Honor?

14 MR. ROSE: And then my legal objection is  
14:38:48 15 the same as it was before under 768.81, 31,  
16 sorry.

17 THE REPORTER: I'm sorry, what?

18 THE COURT: 768.31.

19 THE REPORTER: 768.31?

14:38:58 20 MR. ELIOT BERNSTEIN: Your Honor?

21 THE COURT: Is that correct? That was off  
22 the top of my head. Is that correct?

23 MR. ROSE: Yes, Your Honor. I apologize,  
24 I am not trying to disrupt the proceedings.

14:39:03 25 THE COURT: That's okay.

1 MR. ROSE: But I appreciate the  
2 clarification.

3 THE COURT: Very spirited proceedings.  
4 That's all right.

14:39:09 5 Yes, Mr. Eliot?

6 MR. ELIOT BERNSTEIN: Well, Your Honor, on  
7 that settlement in Shirley's estate all parties  
8 didn't enter into that settlement.

9 THE COURT: We are not -- that wasn't --  
14:39:16 10 it was just --

11 MR. ELIOT BERNSTEIN: Oh, okay.

12 THE COURT: The only thing was whether or  
13 not Stansbury had released Ted.

14 MR. ELIOT BERNSTEIN: Okay.

14:39:24 15 THE COURT: That was the only question.

16 MR. ELIOT BERNSTEIN: None of the  
17 beneficiaries know about it.

18 THE COURT: I kept it very clear --

19 MR. ELIOT BERNSTEIN: Okay.

14:39:28 20 THE COURT: -- because I know there's a  
21 lot of disputes within that one statement if I  
22 go too far.

23 MR. ELIOT BERNSTEIN: Okay.

24 THE COURT: You may proceed.

14:39:35 25 MR. FEAMAN: Thank you, Your Honor.

1 THE COURT: Mr. Feaman, you may proceed.

2 MR. FEAMAN: Can you read back my last  
3 question?

4 (The following portion of the record was  
5 read back.)

6 "Q. And assume for me, if you would, that  
7 the release would not bar an action by the  
8 estate. And assume for me that the facts would  
9 support a jury's conclusion as to the  
10 truthfulness of what's alleged in paragraphs  
11 26, 27, 28 and 29. Isn't it true that in that  
12 event, and I am admitting now that you don't  
13 know this yet, but that the estate could have  
14 an action against Ted Bernstein?"

14:40:15 15 MR. ROSE: I object also on the grounds I  
16 don't think you ask a fact witness to make  
17 assumptions that aren't supported by the  
18 record.

19 THE COURT: I am going to say he is  
14:40:32 20 proposing a hypothetical which is often the  
21 case even in medical malpractice and things of  
22 that nature. So I will allow it.

23 Mr. Feaman, go ahead.

24 BY MR. FEAMAN:

14:40:40 25 Q. You may answer, sir.

1 A. Sure. Let's see if we can get to the  
2 bottom of this by looking at 768.31(b)(5).

3 Q. Sure. What's the title of that statute?

4 A. Contribution Among Tort-Feasors.

14:40:50 5 Q. Okay. Does it relate to negligence?

6 A. Actually I think the Florida Supreme Court  
7 has ruled in a 1970s case that it applies to all  
8 tort actions.

9 Q. Okay.

14:41:10 10 A. But I'd have to have that case in front of  
11 me.

12 Q. Well, take a look at Count II, if you  
13 would, at page ten. That's a breach of an oral  
14 contract against LIC Holdings, Arbitrage, Simon  
15 Bernstein and Ted Bernstein, correct?

14:41:38

16 A. Right, a contract claim.

17 Q. Okay. And take a look, if you would, as  
18 to Count III.

19 A. Count III, fraud in the inducement again  
14:41:57 20 as to a contract.

21 Q. Right. That's an employment agreement  
22 against Simon Bernstein and Ted Bernstein, correct?

23 A. Correct.

24 Q. Okay. Take a look at Count V. It's page  
14:42:10 25 15.

1           A.    I am sorry, did you say page five or  
2 Count V?

3           Q.    Count V.  I am sorry, I may have  
4 misspoken.  Page 15, Count V, that's a civil  
14:42:20 5 conspiracy against Simon Bernstein and Ted  
6 Bernstein, right?

7           A.    It incorporates Counts III and IV.

8           Q.    Okay.  And then take a look at Count VIII,  
9 that's unjust enrichment, on page 18, again,  
14:42:40 10 against all four defendants, including Simon  
11 Bernstein and Ted Bernstein, correct?

12          A.    That's what it says.

13          Q.    Okay.  And you cannot say with certainty  
14 as you sit here today that under no circumstances  
14:42:55 15 would the estate ever have a claim against Ted  
16 Bernstein arising out of this Stansbury action, can  
17 you?

18          A.    I can't say with a hundred percent  
19 certainty.  But based on if there's a release,  
14:43:11 20 there's a settlement, under the statute that I have  
21 given you, there's no contribution, which I believe  
22 is the topic we are debating here.

23          Q.    Well, let's move on from contribution to  
24 allowing a jury to apportion percentages of fault.  
14:43:28 25 That certainly would be allowed, would it not, on a

1 jury verdict form --

2 MR. ROSE: Objection.

3 BY MR. FEAMAN:

4 Q. -- without a claim for contribution?

14:43:34 5 THE COURT: Legal objection?

6 MR. ROSE: Legal objection is that that  
7 statute does not impose liability on the  
8 person based on the percentages of fault.  
9 Specifically that statute, as Your Honor is  
10 well aware, liability is only apportioned on  
11 the defendant. In the non-party defendants  
12 they can be a hundred percent liable that  
13 there's no --

14 THE COURT: I know, but your objection is  
14:43:56 15 interpreting the statute. Do you have a  
16 different legal objection?

17 MR. ROSE: It's a completely irrelevant  
18 question as to this line of questioning is  
19 irrelevant on that basis. It's a fiction. We  
14:44:07 20 are doing this whole hearing based on a fiction  
21 that there's some claim that doesn't exist,  
22 based on negligence that doesn't exist under  
23 the statute.

24 MR. FEAMAN: Goes to weight, not  
14:44:19 25 admissibility, Your Honor.

1 THE COURT: I got to agree it goes to the  
2 weight whether or not it could actually be  
3 added as a nonparty defendant under the various  
4 claims, whether -- I am not going to say  
14:44:33 5 anything else. Based on the objection as you  
6 have raised it I will overrule it.

7 MR. FEAMAN: Could you read it back,  
8 please?

9 (The following portion of the record was  
10 read back.)

11 "Q. Well, let's move on from contribution  
12 to allowing a jury to apportion percentages of  
13 fault. That certainly would be allowed, would  
14 it not, on a jury verdict form without a claim  
14:45:11 15 for contribution?"

16 THE WITNESS: And are you talking about  
17 what's -- I assume you are talking about what's  
18 pled in the second amended complaint?

19 BY MR. FEAMAN:

14:45:17 20 Q. Yes.

21 A. I think the problem there is you don't  
22 have a negligence count.

23 Q. You've got an unjust enrichment count,  
24 correct?

14:45:25 25 A. I don't count that as a negligence count.

1 THE COURT: Mr. --

2 MR. FEAMAN: Okay. I will move on, Your  
3 Honor.

4 THE COURT: Thank you.

14:45:34 5 BY MR. FEAMAN:

6 Q. Now, the reference to LIC Holdings and  
7 Arbitrage, those are two entities that during  
8 Mr. Simon Bernstein's lifetime and that of Ted  
9 Bernstein they each owned at least 45 percent each  
10 and possibly 50 percent each at the time of  
11 Mr. Simon Bernstein's death, correct?

12 A. That I am not sure what the exact  
13 ownership percentage was at that point.

14 Q. Okay.

14:46:02 15 A. That would be a guess, and I am not going  
16 to guess.

17 Q. And have you investigated whether Mr. Ted  
18 Bernstein, who kept running the corporations after  
19 Simon Bernstein's death, made any payments to the  
14:46:16 20 estate as a result of renewal commissions that  
21 might have been paid --

22 MR. ROSE: Objection.

23 BY MR. FEAMAN:

24 Q. -- to Simon Bernstein?

14:46:25 25 THE COURT: Before you object I need to



1 hear the whole question.

2 MR. ROSE: I am sorry, I thought he was  
3 done. I apologize.

4 MR. FEAMAN: Okay.

14:46:31 5 THE COURT: I need you to say it again. I  
6 lost it.

7 MR. FEAMAN: Sure. Read it back again.

8 (The following portion of the record was  
9 read back.)

10 "Q. And have you investigated whether  
11 Mr. Ted Bernstein, who kept running the  
12 corporations after Simon Bernstein's death,  
13 made any payments to the estate as a result of  
14 renewal commissions that might have been paid  
14:47:05 15 to Simon Bernstein?"

16 MR. ROSE: Objection as to relevancy and  
17 materiality. It's beyond the scope of  
18 examination.

19 THE COURT: Sustained. Next question.

14:47:11 20 BY MR. FEAMAN:

21 Q. Now, Mr. Rose represents Mr. Ted  
22 Bernstein, correct?

23 A. In different capacities in different  
24 proceedings.

14:47:21 25 Q. Okay.

1 A. In the call it the Bernstein matters, yes.

2 Q. Okay. And you are aware that both Simon  
3 and Ted were running Arbitrage and LIC at the time  
4 that Mr. Simon passed away, correct?

14:47:38 5 A. I know these entities involved the father  
6 and son at various and sundry times.

7 Q. Okay.

8 A. I don't have any, of course, personal  
9 knowledge of that. A lot of what I have been told  
14:47:53 10 is that.

11 Q. Did you make an investigation as to  
12 whether as a result of money that came in to LIC or  
13 Arbitrage after Mr. Simon Bernstein's death should  
14 have been payable to Mr. Simon Bernstein, but now  
14:48:08 15 that he would be dead the estate, such that the  
16 estate if those monies weren't paid would then have  
17 a claim against Ted Bernstein?

18 MR. ROSE: Objection, same relevancy and  
19 materiality, beyond the scope.

14:48:21 20 THE COURT: Sustained.

21 MR. FEAMAN: May I respond, Your Honor?

22 THE COURT: Sure.

23 MR. FEAMAN: If there's a potential that  
24 the estate could have a claim against Ted  
14:48:30 25 Bernstein for corporate misconduct after

1 Mr. Bernstein dies, because the corporations  
2 may owe Mr. Simon Bernstein some money, that's  
3 also potential conflict of interest between  
4 Mr. Rose and now representing the estate.

14:48:43 5 THE COURT: Okay. That's argument. What  
6 you just said that's your argument, but it is  
7 beyond.

8 MR. FEAMAN: That's my respectful response  
9 to your ruling.

14:48:55 10 THE COURT: No, I understand.

11 MR. FEAMAN: Okay.

12 BY MR. FEAMAN:

13 Q. Do you know what happened to the  
14 commissions that Simon Bernstein was to receive  
14:49:06 15 after his death?

16 MR. ROSE: Objection, same objection.

17 THE COURT: I don't want to try that  
18 lawsuit now, okay? Thank you.

19 MR. FEAMAN: May I approach, Your Honor,  
14:49:18 20 to grab an exhibit?

21 THE COURT: Absolutely. They are all up  
22 here for you.

23 MR. ROSE: While he is doing that, for  
24 scheduling purposes how much time do we have  
14:49:31 25 for today?

1 THE COURT: Until 4:30.

2 MR. ROSE: Thank you.

3 MR. ELIOT BERNSTEIN: Your Honor, did you  
4 get my exhibit list that I gave you last time?

14:49:35 5 THE COURT: I have your binder. But these  
6 are exhibits entered into evidence he is  
7 looking through. These were entered at the  
8 last --

9 MR. ELIOT BERNSTEIN: Already.

14:49:44 10 THE COURT: Yes. They've already been  
11 entered. The Court was holding them.

12 MR. ELIOT BERNSTEIN: My confusion, thank  
13 you.

14 THE COURT: No.

14:49:50 15 MR. ELIOT BERNSTEIN: Just didn't see it  
16 there.

17 THE COURT: Here's your book.

18 MR. ELIOT BERNSTEIN: Oh, no, don't lift  
19 it.

14:50:00 20 THE COURT: It's got the colored tabs.

21 MR. ELIOT BERNSTEIN: Yes.

22 MR. FEAMAN: Your Honor, let the record  
23 reflect that I am handing Your Honor a copy of  
24 Exhibit 1, Rose Exhibit 1, so that you can read  
14:50:08 25 along.

1 THE COURT: Thank you.

2 MR. ROSE: That's Trustee Exhibit 1 for  
3 the record.

4 THE COURT: I can look at my exhibit list.

14:50:17 5 MR. ROSE: I don't want the record to  
6 suggest there was a Rose exhibit that wasn't in  
7 evidence.

8 THE COURT: I have this as Stansbury.  
9 Stansbury entered all of these 1 through 8 are  
14:50:33 10 without objection. The trustee --

11 MR. FEAMAN: This would be -- it's marked  
12 as Trustee's Exhibit 1.

13 THE COURT: The PR waiver?

14 MR. FEAMAN: Yes.

14:50:43 15 THE COURT: That was Trustee's Number 1.

16 MR. FEAMAN: Yes. I am handing that to  
17 the witness, Your Honor.

18 THE COURT: Thank you. I was just  
19 checking my exhibit list.

14:50:50 20 MR. FEAMAN: Okay.

21 BY MR. FEAMAN:

22 Q. Now, the Trustee's Exhibit 1 was that  
23 prepared by you?

24 A. My office, yes.

14:51:03 25 Q. Was there a draft prepared for you by

1 Mr. Rose?

2 A. Yes.

3 Q. And --

4 A. I made extensive revisions to it.

14:51:15 5 Q. I would like to draw your attention to  
6 page two of Trustee's Exhibit 1. In the middle of  
7 the page, the third paragraph that begins with "I  
8 have been advised," do you see that?

9 A. Yes.

14:51:30 10 Q. Okay. And it says, "I have been advised  
11 that Mrachek --" and you are referring for the  
12 record that's Alan Rose's firm, correct?

13 A. Correct.

14 Q. Okay. "I have been advised that Mrachek  
14:51:43 15 represented those defendants."

16 What defendants are you referring to  
17 there?

18 A. That would be the defendants with whom the  
19 I will call it the settlement was reached with  
14:51:55 20 regard to this matter.

21 Q. With regard to the Stansbury litigation?

22 A. Stansbury litigation.

23 Q. Is that what you were referring to there?

24 A. Stansbury litigation, yes.

14:52:05 25 Q. Okay. "And the position taken is not in

1 conflict or adverse to the estate's position;" do  
2 you see that?

3 A. I see that.

4 Q. Okay. So that's what they told you?

14:52:16 5 A. Well, that was part of the discussion that  
6 I had with Mr. Rose. And, of course, from looking  
7 at the lawsuit itself the interest of the estate is  
8 to pay as little as possible to your client, which  
9 is also the position that's being advocated by  
14:52:32 10 Mr. Rose. And was his position when he was  
11 representing the defendants who were dismissed as a  
12 result of your settlement.

13 Q. Would you agree with me in this waiver  
14 that there's nowhere that you take that position,  
14:52:47 15 but the only place you make reference to there not  
16 being in conflict with at least the ongoing lawsuit  
17 that Stansbury has with the Mrachek firm  
18 representing the estate is that one sentence?

19 A. Just give me one moment just to look at  
14:53:07 20 page three.

21 Q. Sure.

22 A. That's the primary section that would deal  
23 with conflict or uses the terminology of  
24 conflict --

14:53:20 25 Q. All right.

1 A. -- besides the last sentence.

2 Q. All right. And would you agree with me  
3 that your statement here makes absolutely no  
4 reference to Mrachek's, the Mrachek firm's activity  
14:53:36 5 on behalf of Ted Bernstein in what we call the  
6 Chicago litigation, whereas you saw there was a  
7 deposition admitted into evidence in this  
8 proceeding that shows Mr. Rose representing Mr. Ted  
9 Bernstein in that deposition in the Chicago action?  
14:53:54 10 Would you agree with me that your statement here  
11 makes no reference to any potential conflict that  
12 might create between the Mrachek law firm and the  
13 estate?

14 A. Well, the language here doesn't make any  
14:54:08 15 reference to the Chicago litigation and the estate,  
16 that's correct. But there's no involvement either  
17 past, present or future contemplated by Mr. Rose  
18 representing the estate in connection with the  
19 Chicago litigation.

14:54:26 20 Q. No involvement --

21 MR. ROSE: I would object before -- I  
22 waited until he finished the question. This  
23 has now vastly exceeded the length of his  
24 direct examination and it's very --

14:54:34 25 THE COURT: You do need to wrap it up.



1 MR. ROSE: -- argumentative.

2 THE COURT: I am not handling the  
3 argument.

4 MR. ROSE: I know.

14:54:39 5 THE COURT: We need to --

6 MR. FEAMAN: Thank you. Just one  
7 follow-up on that.

8 THE COURT: Absolutely.

9 BY MR. FEAMAN:

14:54:46 10 Q. You said no involvement past. Okay. But  
11 are you not aware of the deposition that Mr. Rose  
12 attended and appeared on behalf of Ted Bernstein in  
13 that Chicago litigation where he made objections  
14 and even instructed Mr. Bernstein not to answer a  
14:55:02 15 question in that litigation?

16 A. I think you might not have heard my whole  
17 answer.

18 Q. Okay.

19 A. Regarding representing the estate. I am  
14:55:10 20 talking about Mr. Rose not having any involvement  
21 in the Chicago litigation representing the estate.

22 Q. But he certainly had involvement in the  
23 Chicago litigation representing Ted Bernstein who  
24 is suing the estate, correct?

14:55:23 25 MR. ROSE: Objection, cumulative.

1 THE COURT: I will allow it. Just answer  
2 the question.

3 THE WITNESS: I just recall that based on  
4 this deposition that, yes, went into evidence  
14:55:33 5 earlier he represented Ted Bernstein as a  
6 witness in a deposition.

7 THE COURT: This is the Court being just  
8 particular about the exhibits. Is this an  
9 extra copy for me that you gave me or was it  
14:55:42 10 the actual exhibit?

11 MR. FEAMAN: The actual exhibit is in  
12 front of the witness.

13 THE COURT: Okay. Thank you. I just  
14 wanted to make sure before I put it with my  
14:55:51 15 notes. Thank you.

16 MR. FEAMAN: I am almost done, Your Honor.

17 THE COURT: Thank you.

18 BY MR. FEAMAN:

19 Q. Now, going back to your statement that's  
14:56:00 20 Trustee's Exhibit 1.

21 A. Okay.

22 Q. Right here.

23 A. Got it.

24 Q. I want to draw your attention to the third  
14:56:14 25 paragraph of page two.

1 A. Yes, I am there.

2 Q. You state that "Some of the direct and  
3 indirect beneficiaries of the estate I am  
4 administering advise me," and then continuing on,  
14:56:37 5 "the beneficiaries wanted Mrachek to represent the  
6 estate in the Stansbury lawsuit."

7 So that gets me to ask the question, if  
8 only some of them, who is not consenting?  
9 Obviously we know Mr. Eliot Bernstein who we have  
14:56:55 10 already established is a beneficiary of the Simon  
11 Bernstein estate. Who else in addition to  
12 Mr. Bernstein if only some want Mr. Rose and his  
13 firm to come in?

14 A. I am not aware of any objections from  
14:57:09 15 anyone other than Mr. Eliot.

16 Q. Do you have any in writing, any consents  
17 in writing from anybody?

18 A. I am not sure. There could be e-mail  
19 correspondence on this. That I am not positive.

14:57:24 20 Q. You didn't actually take the time to have  
21 people sign consents, did you?

22 A. Not formal consents.

23 Q. Okay.

24 A. That's why my best recollection this was  
14:57:34 25 discussions, perhaps e-mails, but probably more

1 likely telephonic discussions with the various  
2 counsel.

3 Q. And when you say indirect beneficiary,  
4 would you be referring to one of the grandchildren?

14:57:47 5 A. Correct, contingent type beneficiaries.

6 Q. Eliot's?

7 A. Yes, that's the reference.

8 Q. All right. Now, have you ever made an  
9 investigation as to whether any of Eliot's children  
14:57:56 10 have actually reached the age of capacity and are  
11 no longer minors?

12 A. Again, I'd need to look at the file. He  
13 might have one child who is an adult.

14 Q. Okay. So if he has one child that's an  
14:58:13 15 adult, then a consent from the guardian ad litem  
16 as to his position would no longer be valid, would  
17 it?

18 MR. ROSE: Objection, I think it calls for  
19 a legal conclusion.

14:58:21 20 THE COURT: Sustained.

21 MR. ROSE: I'd like to be heard.

22 THE COURT: Sustained.

23 MR. ROSE: Thank you.

24 MR. FEAMAN: No further questions.

14:58:25 25 THE COURT: Thank you. All right.

1 MR. ROSE: I only have one redirect.

2 THE COURT: Well, you would be allowed to  
3 call him in your case in chief.

4 MR. ROSE: That's fine.

14:58:35 5 THE COURT: Mr. O'Connell, let me ask that  
6 you get off the stand at this time.

7 THE WITNESS: Yes, Your Honor.

8 MR. ELIOT BERNSTEIN: Can I redirect a  
9 question or two?

14:58:50 10 THE COURT: I didn't let him do it, so,  
11 no, I am not letting you do it. I did not let  
12 Mr. Rose do the same thing you are asking me to  
13 do. That's what he asked me to do.

14 MR. ELIOT BERNSTEIN: He is allowed to  
14:58:58 15 call him back up as part of the proceeding, you  
16 said?

17 THE COURT: No, we are done with this  
18 witness now. So we are going to proceed to the  
19 next witness in Mr. Feaman's case. But we are  
14:59:07 20 going to take six minutes because I have to use  
21 the restroom. Thank you.

22 (Witness excused.)

23 (A recess was taken.)

24 THE COURT: Mr. Feaman, are you ready to  
15:04:39 25 proceed with the next witness?

1 MR. FEAMAN: I have a few questions of  
2 Mr. Rose.

3 THE COURT: Okay.

4 MR. ROSE: I guess I can't object to being  
15:04:48 5 called as a witness.

6 THE COURT: I think in this proceeding for  
7 the very limited purpose of his representation,  
8 I think that if we keep it limited to that,  
9 which is what the motion is about, clearly I  
10 don't expect or anticipate that Mr. Feaman will  
11 be asking about strategy or anything like that.  
12 It would be for the limited purposes of  
13 representation. If we go beyond then you are  
14 going to have to object on your own behalf.

15:05:17 15 MR. ROSE: I'd like permission to object  
16 on my own behalf.

17 THE COURT: That's what I said, you have  
18 to. I don't know how else to proceed.

19 MR. FEAMAN: I have no objection.

15:05:24 20 THE COURT: Okay.

21 MR. ROSE: And then I also -- just to be  
22 very -- you know, I'd object to Eliot being  
23 able to cross-examine me or at least request  
24 that the Court give him very narrow latitude.

15:05:36 25 THE COURT: He will have the same latitude

1 as Mr. Feaman. It will be strictly related to  
2 whether or not he represents various parties,  
3 the extent of his representation of parties.  
4 That is the limits of Mr. Rose being allowed to  
15:05:50 5 be questioned, because he is still counsel, and  
6 the only issue is representation. You don't  
7 have to believe him. You don't have to like  
8 it. But it's limited to that. Fair enough?

9 MR. ROSE: Fair enough.

15:06:02 10 THE COURT: Fair enough, Mr. Feaman?

11 MR. FEAMAN: Yes.

12 THE COURT: Fair enough, Mr. Eliot?

13 MR. ELIOT BERNSTEIN: I am not sure.

14 THE COURT: Okay. That's honest.

15 - - -

16 Thereupon,

17 ALAN B. ROSE,

18 a witness, being by the Court duly sworn, was  
19 examined and testified as follows:

15:06:10 20 THE WITNESS: I do.

21 THE COURT: Have a seat. Again, see, the  
22 Court's a little nervous about this one, so go  
23 ahead.

24 ///

25 ///

1 DIRECT (ALAN B. ROSE)

2 BY MR. FEAMAN:

3 Q. Please state your name.

4 A. Alan Rose.

15:06:20 5 Q. By whom are you employed?

6 A. I am employed by the law firm Mrachek,  
7 Fitzgerald, Rose, Konopka, Thomas and Weiss.

8 Q. And for how long?

9 A. Sixteen years plus.

15:06:33 10 Q. Okay. Now, you are aware that in the  
11 Chicago litigation that the Estate of Simon  
12 Bernstein was not originally a party to that  
13 litigation, correct?

14 A. Correct.

15:06:50 15 Q. And you are aware that at some point the  
16 estate, as shown by the exhibits here today,  
17 intervened in that litigation, correct?

18 A. Yes, but if I can explain?

19 MR. FEAMAN: It's just yes or no so we can  
15:07:07 20 move on, Your Honor.

21 THE COURT: I know the facts.

22 THE WITNESS: Okay.

23 MR. FEAMAN: Okay. Just want to set a  
24 predicate.

15:07:12 25 THE COURT: Yes.



1 BY MR. FEAMAN:

2 Q. And would you agree with me, Mr. Rose,  
3 that when a motion was filed to allow the estate,  
4 Ben Brown was the curator then, do you recall that,  
15:07:23 5 to allow the estate to intervene and Ben Brown was  
6 the curator, and there was a motion filed in front  
7 of Judge Colin, correct?

8 A. Technically I think what happened was you  
9 filed a motion to appoint an administrator ad litem  
15:07:41 10 for the Chicago action, and the judge appointed Ben  
11 Brown as the administrator ad litem.

12 Q. Okay.

13 A. And I objected on behalf of the trustee.

14 Q. And you objected on behalf of the trustee  
15:07:53 15 when there was a motion filed to obtain the Court's  
16 permission to in fact intervene in the Chicago  
17 lawsuit, correct?

18 A. I don't understand exactly. What I did  
19 was on behalf of the trustee we did not want the  
15:08:12 20 estate's money being spent in Illinois in a  
21 lawsuit. We had a hearing, and Judge Colin allowed  
22 the intervention conditioned on Mr. Stansbury  
23 paying it. And once Mr. Stansbury was paying the  
24 expenses, so therefore there's no risk to the  
15:08:26 25 estate, it is a great deal and I am in favor of it,

1 and I have not been involved beyond that.

2 Q. So on behalf of the trustee, you are  
3 talking about Ted Bernstein as the trustee which is  
4 the pour over trust to the Simon Bernstein estate,  
15:08:41 5 correct?

6 A. Correct, Ted Bernstein as the trustee of  
7 the trust which is the sole residuary beneficiary  
8 of this estate.

9 Q. Right. So on behalf of Ted Bernstein  
15:08:49 10 trustee you did not want the estate to intervene to  
11 make a claim toward the \$1.7 million dollars in  
12 Chicago in that case where Ted Bernstein is an  
13 individual plaintiff on his own in that case,  
14 correct?

15:09:03 15 A. I disagree.

16 Q. He is not an individual plaintiff in the  
17 Chicago lawsuit?

18 A. No, that's not the part I disagreed with.  
19 The part I disagreed with was I disagree with the  
15:09:12 20 what you called the intent. My concern is the  
21 person who's a witness of material information in  
22 the Illinois case, who I had spoken with and whose  
23 testimony I believe convinced me that the estate  
24 has a non-winning case, which is free to pursue so  
15:09:29 25 long as it doesn't deprive the beneficiaries of

1 their remaining limited assets, which is not  
2 happening now that Mr. Stansbury is funding the  
3 litigation.

4 So I don't agree that the motive of why we  
15:09:42 5 objected is what you did. We did not object to  
6 them intervening per se. Only we objected to the  
7 further drain of the very limited resources of this  
8 estate.

9 Q. Sure. And now in fact, though, you are  
15:09:54 10 aware that the attorney up in Chicago representing  
11 the estate is now even willing to take it on a  
12 contingency, isn't he?

13 A. I don't understand -- I don't know the  
14 answer to that.

15:10:08 15 Q. Okay.

16 A. And I didn't understand the question  
17 because it had a double negative.

18 Q. Well, you said it was a non-winner of a  
19 case. Are you aware that the attorney in Chicago  
15:10:16 20 now wants to take the case on a contingency whereby  
21 nobody would risk any money?

22 A. I am aware that Mr. O'Connell has filed a  
23 motion asking for that relief, which we oppose.

24 Q. Okay. And you oppose on behalf of the  
15:10:29 25 trustee?

1 A. Correct, and the beneficiaries.

2 Q. Okay. And that's the same person that you  
3 represent is the same person who is the plaintiff  
4 in Chicago, correct?

15:10:37 5 A. Well, that's the next motion we are going  
6 to decide after this hearing, but -- and the judge  
7 will decide the issue.

8 Q. I just want to establish and then I am  
9 done. I just want to establish that you  
10 represented Ted Bernstein as the successor trustee  
11 to the pour over trust, not wanting the estate to  
12 intervene in a case where that same client that you  
13 represent was a plaintiff opposing the estate in  
14 Chicago; is that correct?

15:11:03 15 A. I don't think that's an accurate  
16 statement. And I think Mr. O'Connell was aware of  
17 all that when he consented to our representation.

18 Q. And one more thing. You were here in the  
19 court when Mr. O'Connell said that Mr. Bernstein,  
15:11:19 20 Eliot, Mr. Eliot was a beneficiary of the Estate of  
21 Simon Bernstein, correct? Correct? It's a  
22 perfunctory. You heard him say that?

23 A. I didn't -- I blanked out on the question.

24 THE COURT: That's okay.

15:11:35 25 THE WITNESS: I apologize.

1 THE COURT: That's okay. We'll just have  
2 it read back.

3 THE WITNESS: I was thinking about  
4 something else.

15:11:38 5 THE COURT: That's okay. Let's have the  
6 question read back.

7 BY MR. FEAMAN:

8 Q. You were here when Mr. O'Connell said that  
9 Mr. Eliot is a beneficiary of the Simon Bernstein  
10 estate, correct?  
15:11:47

11 A. I was here when he said it. I have said  
12 it. I don't dispute it. I have told the judge  
13 that. I don't understand. For tangible personal  
14 property.

15:11:55 15 Q. Okay.

16 THE COURT: What am I being handed?

17 BY MR. FEAMAN:

18 Q. I am handing you a pleading that you filed  
19 in September 2015 entitled Trustee's Omnibus Status  
20 Report and Request for Case Management Conference.  
15:12:08

21 And the very first page you said, relating to  
22 Mr. Eliot, he is not a named -- he is not named as  
23 a beneficiary of anything. And it's in the Estate  
24 of Simon Bernstein. So my question is when did you  
15:12:25 25 suddenly become aware that he is a beneficiary of

1 the estate?

2 A. That sentence is -- I now see that  
3 sentence is technically wrong. It's not -- I am  
4 talking about where the money is and the money is  
15:12:37 5 in the trust. He is not a beneficiary of the  
6 trust. I may have made a misstatement.

7 THE COURT: Are you asking me to take this  
8 into evidence?

9 MR. FEAMAN: Yes.

15:12:45 10 THE COURT: Objection?

11 MR. ROSE: No. It's in the court file.

12 THE COURT: I know. Let me just mark it.

13 MR. FEAMAN: No further questions.

14 THE COURT: All right.

15:12:55 15 MR. ELIOT BERNSTEIN: Can I?

16 THE COURT: Not yet. I can only mark and  
17 think in small little doses.

18 And am I missing any exhibits up here,  
19 Mr. Feaman?

15:13:09 20 MR. FEAMAN: I don't believe so, Your  
21 Honor.

22 THE COURT: You had given Mr. O'Connell an  
23 original. I just want to make sure it's  
24 returned. I am very particular. I make myself  
15:13:18 25 nuts. But nonetheless, we are stuck with me.

1 It was Number 1, the waiver. Did the original  
2 waiver come back?

3 MR. FEAMAN: Yes, Your Honor.

4 THE COURT: Okay. Thank you. All right.

15:13:38 5 So Number 9 is entered into evidence.

6 (Claimant Stansbury's Exb. No. 9,  
7 Pleading.)

8 THE COURT: Limited to what he discussed,  
9 Mr. Eliot.

15:13:49 10 MR. ELIOT BERNSTEIN: Your Honor, I kind  
11 of object that I didn't have time to prepare.  
12 I didn't know this would be a witness today.  
13 It wasn't on the witness list.

14 THE COURT: So noted.

15:13:56 15 MR. ELIOT BERNSTEIN: No time to prepare  
16 proper questioning.

17 THE COURT: Okay.

18 MR. ELIOT BERNSTEIN: So I am just going  
19 to wing it for a moment.

15:14:00 20 CROSS (ALAN B. ROSE)

21 BY MR. ELIOT BERNSTEIN:

22 Q. Mr. Rose, can you state your name and  
23 address for the record.

24 THE COURT: We already had that.

15:14:06 25 MR. ELIOT BERNSTEIN: Oh, okay.

1 BY MR. ELIOT BERNSTEIN:

2 Q. Your Florida Bar number?

3 A. It's in evidence in every paper I file.

4 Q. You don't know it?

15:14:19 5 A. I do know it, 961825.

6 Q. Thank you.

7 You said to the Court today that Judge  
8 Phillips entered an order from the validity hearing  
9 stating that I was not a beneficiary and had no  
10 standing; is that correct?  
15:14:37

11 A. The validity trial resulted in a final  
12 judgment. Thereafter there were a series of  
13 hearings before Judge Phillips where he made what I  
14 would call follow-on rulings that would implement  
15 the result of the final judgment dated December 15,  
16 2015.  
15:14:53

17 Q. Well, you actually claimed to the Court  
18 repeatedly that Judge Phillips on December 15th  
19 ruled that, and you actually led the judge to  
20 believe that and she said, oh, I am relying on that  
15:15:10 21 order.

22 MR. ELIOT BERNSTEIN: I urge you, Your  
23 Honor, to look up on that order on that  
24 validity hearing --

15:15:17 25 THE COURT: We are going past --



1 (Overspeaking.)

2 MR. ELIOT BERNSTEIN: Oh, it's very  
3 central to this, meaning that he made a  
4 statement to the Court today --

15:15:23 5 THE COURT: Please, next question. Next  
6 question.

7 BY MR. ELIOT BERNSTEIN:

8 Q. Has there been a construction hearing of  
9 who the beneficiaries are in any of these cases?

15:15:32 10 A. There was a final judgment that  
11 resolved --

12 Q. Yes or no to the question. Was there a  
13 construction hearing in any of these cases?

14 A. The construction matter that's in Count I  
15:15:45 15 has been settled by agreement of all the  
16 beneficiaries.

17 Q. And I am a beneficiary?

18 A. You are not a beneficiary of the trust,  
19 the Shirley Bernstein Trust, which was the sole  
15:15:57 20 subject of the construction proceeding. The only  
21 thing relevant to the estate that was tried in this  
22 case number 3698 was the narrow issue of whether  
23 Simon Bernstein's will dated July 25, 2012, was  
24 valid and enforceable according to its terms.

15:16:13 25 Q. So there has been no formal construction

1 hearing? You are basing it off of a validity  
2 hearing?

3 A. There's nothing to construe with the will.  
4 The will has never been challenged. Well, you have  
15:16:25 5 challenged that the will is valid, but no one has  
6 said that the will needed any construction. And  
7 the only issue that needed some construction was  
8 inside the Shirley Bernstein Trust. Before Judge  
9 Colin would allow that issue to be heard, he wanted  
15:16:38 10 a narrow issue tried, which is which documents were  
11 valid so that we didn't construe a trust that he  
12 later determined was invalid. And once he ruled  
13 that and we had a guardian ad litem appointed to  
14 protect the trust interests of all the  
15:16:52 15 beneficiaries who were being represented by you,  
16 then everyone entered into a mediated settlement  
17 agreement that is one of the motions we are going  
18 to seek approval for later today, including the  
19 court-appointed guardian ad litem.

15:17:06 20 Q. Is your answer no, there was no  
21 construction hearing in any of these cases?

22 A. I think I have answered your question.

23 Q. You haven't.

24 THE COURT: Okay. Let's move on because  
15:17:15 25 this is about whether or not --

1 MR. ELIOT BERNSTEIN: Well, can I get an  
2 answer to the question or show that he is  
3 nonresponsive?

4 THE COURT: He did answer.

15:17:19 5 MR. ELIOT BERNSTEIN: Well, he didn't. He  
6 answered something else.

7 THE COURT: Don't argue with me, please.  
8 I understood. Certain things have been  
9 determined and certain things haven't been  
10 determined.

11 MR. ELIOT BERNSTEIN: Well, he is  
12 misrepresenting what was determined, and that's  
13 a serious problem.

14 THE COURT: Mr. Eliot?

15:17:31 15 MR. ELIOT BERNSTEIN: And it's exactly  
16 moved to --

17 THE COURT: Mr. Eliot? Mr. Eliot?

18 MR. ELIOT BERNSTEIN: Yes, ma'am.

19 THE COURT: Remember I said you don't have  
15:17:36 20 to like his answers?

21 MR. ELIOT BERNSTEIN: Oh, okay.

22 THE COURT: You don't have to like them.

23 MR. ELIOT BERNSTEIN: I just want the  
24 truth. Okay.

25 ///

1 BY MR. ELIOT BERNSTEIN:

2 Q. At that validity hearing was the estate  
3 represented by counsel?

4 A. As I explained earlier, Mr. O'Connell  
15:17:59 5 entered into a stipulation that was, I think,  
6 approved by Judge Colin or Judge Phillips that he  
7 did not need to attend the hearing; he would abide  
8 by the ruling to conserve resources.

9 So Mr. O'Connell was not technically  
15:18:12 10 there. But what I was doing and what Ted Bernstein  
11 as trustee was doing, we were advocating the  
12 validity of the documents. So we were asserting  
13 the position that Mr. O'Connell would have wanted  
14 to assert, which is that the will was valid. So he  
15:18:25 15 wasn't -- technically the estate wasn't represented  
16 but their interests were being pushed by the  
17 movant, the complainant, the plaintiff.

18 Q. Did you have a construction hearing in  
19 Simon Bernstein's estate to determine the  
15:18:36 20 beneficiaries?

21 A. It was not necessary.

22 Q. Okay. To your knowledge has Ted Bernstein  
23 ever notified who you claim the beneficiaries are,  
24 the grandchildren, that they are beneficiaries?

15:18:51 25 A. Under the terms of Simon Bernstein's trust

1 and also under his power of appointment, he  
2 appointed the assets of the Shirley Bernstein Trust  
3 into his trust to be distributed on the same terms.  
4 The beneficiaries, technically ten trusts, none of  
15:19:06 5 the grandchildren are individually beneficiaries.  
6 There are ten trusts created. Each trust needs a  
7 beneficiary. And because we don't have a  
8 beneficiary for three of the trusts that Eliot  
9 refused to serve, there's a guardian ad litem  
15:19:18 10 appointed. But none of the grandchildren are  
11 individually beneficiaries. They are indirect  
12 beneficiaries through trusts created under Simon's  
13 testamentary documents.

14 THE COURT: Understand.

15:19:27 15 BY MR. ELIOT BERNSTEIN:

16 Q. Okay. Under those testamentary documents  
17 do you have those trusts for each of the  
18 grandchildren?

19 THE COURT: Mr. Bernstein?

15:19:34 20 MR. ELIOT BERNSTEIN: Yes.

21 THE COURT: Mr. Eliot, I am sorry, this is  
22 about whether we remove him or not. It's not  
23 -- it's like, in other words, you are getting  
24 into bigger issues and fights that are for a  
15:19:44 25 later day.

1 MR. ELIOT BERNSTEIN: Okay. Okay. I got  
2 it.

3 THE COURT: We've got to stay on  
4 Mr. Feaman's, Mr. William Stansbury, he  
15:19:50 5 shouldn't represent.

6 MR. ELIOT BERNSTEIN: Okay.

7 BY MR. ELIOT BERNSTEIN:

8 Q. Were you party to the negotiated  
9 settlement with Mr. Stansbury?

15:20:02 10 A. I am aware that there --

11 Q. Yes or no?

12 A. I am not a party to it.

13 Q. Were you a party to the settlement? Were  
14 you there at the settlement with Mr. Stansbury?

15:20:11 15 A. Well, I am saying -- I was answering I am  
16 not a party to it. But I am aware there were  
17 settlement discussions. I have encouraged  
18 settlement discussions that Mr. Stansbury has. He  
19 entered into, I think, one agreement that was --

15:20:26 20 MR. FEAMAN: Objection. If the question  
21 talks of -- the settlement was at a mediation.  
22 So if the settlement with regard to  
23 Mr. Bernstein and some of the other defendants  
24 by Mr. Stansbury in the Stansbury action, if  
15:20:39 25 it's questions about what happened at the

1 mediation, I would object because that's  
2 confidential.

3 THE COURT: Let me --

4 MR. ELIOT BERNSTEIN: I am just asking if  
15:20:46 5 he was there.

6 THE COURT: Whether or not he was there is  
7 not confidential. Let me clarify something  
8 that may be kicking up a little. He is not a  
9 party. He might be an attorney for a party.

10 MR. ELIOT BERNSTEIN: A person, sorry.

11 THE COURT: No, I am only saying because  
12 some of what you may interpret as being  
13 defensive is just he is not a party, just like  
14 no other lawyer is a party to a lawsuit.

15 MR. ELIOT BERNSTEIN: Right.

16 BY MR. ELIOT BERNSTEIN:

17 Q. Were you a person at the settlement?

18 THE COURT: And also let me also tell you  
19 Mr. Feaman is correct and on point that you can  
15:21:17 20 ask if he was present. Those negotiations are  
21 confidential under law.

22 MR. ELIOT BERNSTEIN: I am not going to  
23 ask that.

24 THE WITNESS: I think my answer does not  
15:21:26 25 involve anything that happened at mediation.

1 If Mr. Bernstein would just step slightly to  
2 the side, Mr. Feaman can correct me if I am  
3 wrong. But I believe there was a written  
4 settlement agreement between Mr. Stansbury and  
15:21:38 5 Mr. O'Connell as the personal representative  
6 that was presented to the Court that has  
7 nothing to do with the mediation.

8 BY MR. ELIOT BERNSTEIN:

9 Q. No, I am talking about the Shirley trust  
15:21:47 10 settlement, not the Simon settlement that you also  
11 negotiated?

12 A. Was I present? I attended a mediation.

13 THE COURT: Okay.

14 BY MR. ELIOT BERNSTEIN:

15:21:54 15 Q. Did you represent any parties at that  
16 mediation?

17 THE COURT: Settlement discussions and who  
18 he represented -- I am --

19 MR. ELIOT BERNSTEIN: I just need to know  
15:22:08 20 which parties he represented --

21 THE COURT: I know, but --

22 MR. ELIOT BERNSTEIN: -- to show a  
23 conflict, Your Honor.

24 THE COURT: Not at the mediation. You can  
15:22:13 25 pick another thing. If he is in court, if he



1 is at a discovery.

2 BY MR. ELIOT BERNSTEIN:

3 Q. Did you represent any parties in the  
4 settlement?

15:22:21 5 THE COURT: Place your objection on the  
6 record.

7 MR. ROSE: I am concerned that --

8 THE COURT: He could also violate  
9 attorney/client privilege.

15:22:30 10 MR. ELIOT BERNSTEIN: I am not going to  
11 ask him any questions about the settlement.

12 THE COURT: I know. But the -- I  
13 understand you are not trying to go outside the  
14 bounds. I am going to ask you to ask another  
15:22:39 15 question because I don't want to put him in a  
16 position of violating.

17 MR. ELIOT BERNSTEIN: Okay.

18 THE COURT: But at the same time I am  
19 trying to have your --

15:22:47 20 MR. ELIOT BERNSTEIN: Got you.

21 THE COURT: And if you could stick to  
22 things that happened in court, because things  
23 that happened in court are public record.

24 BY MR. ELIOT BERNSTEIN:

15:22:57 25 Q. Do you represent Ted Bernstein as a

1 defendant in the Stansbury action?

2 A. I do not. I did at one point in time.

3 Q. Did you also simultaneously represent Ted  
4 Bernstein as the trustee for the Shirley Bernstein  
15:23:18 5 Trust?

6 A. I did represent Ted Bernstein as the  
7 trustee of the Shirley Bernstein Trust in the  
8 Stansbury litigation defending the interests of the  
9 trust, just as we proposed to defend the interests  
15:23:33 10 of the estate. And I represented Ted Bernstein as  
11 trustee of the Shirley Bernstein Trust in  
12 proceedings in the probate court, various  
13 proceedings.

14 Q. Okay. You stated today that you had  
15:23:45 15 consent of all the beneficiaries. And Mr. Feaman  
16 adequately asked you, am I a beneficiary of the  
17 Simon estate? Yes or no? I don't need an  
18 explanation.

19 A. The question has a --

15:24:09 20 MR. FEAMAN: Objection, asked and  
21 answered.

22 MR. ELIOT BERNSTEIN: (Inaudible).

23 (Overspeaking.)

24 THE REPORTER: Excuse me.

25 MR. ELIOT BERNSTEIN: Sorry.

1 MR. FEAMAN: Object, asked and answered.

2 THE WITNESS: I did not --

3 THE COURT: Sustained. It's been  
4 established that you are a tangible beneficiary  
15:24:16 5 of the Simon Bernstein estate.

6 MR. ELIOT BERNSTEIN: Actually I don't  
7 think there's a term tangible beneficiary. I  
8 am a beneficiary of tangible property; is that  
9 correct, for the record?

10 THE COURT: That is correct, you actually  
11 did correct me.

12 MR. ELIOT BERNSTEIN: Got to be careful,  
13 because that's -- there's a misinterpretation  
14 going on.

15:24:34 15 BY MR. ELIOT BERNSTEIN:

16 Q. Okay. You said you had consent of all  
17 beneficiaries to move forward on this settlement or  
18 to have Ted come into this case. Do you have my  
19 consent as a beneficiary?

15:24:48 20 A. I think what we said was they had the  
21 consent of the direct and indirect beneficiaries of  
22 the trust. I think what it actually says is that  
23 Mr. O'Connell has the consent of the beneficiary,  
24 which is Ted Bernstein as trustee, who is the  
15:25:05 25 residuary beneficiary. And then all the indirect

1 beneficiaries who are the trustees of the ten  
2 trusts, which is there are seven trusts for  
3 grandchildren whose trustee is their parent who  
4 have consented, and there are three trusts for  
15:25:22 5 Eliot's children whose guardian has consented.

6 So the statement was intended to state  
7 that consent was obtained from the direct  
8 beneficiary -- residuary beneficiary, all of the  
9 indirect beneficiaries. And in addition -- well,  
15:25:44 10 that's....

11 Q. Were you aware at the time of the  
12 guardianship hearings that gave Diana Lewis  
13 guardianship power of my children that one of the  
14 children was an adult child over the age of 18?

15:26:00 15 A. As I have explained, Your Honor, our view  
16 of the interests and who are technically the  
17 beneficiaries being trusts, it's also that issue  
18 was appealed and the appeals have been dismissed at  
19 the Fourth and at the Supreme Court. So I don't  
15:26:14 20 think we are relitigating the issue of guardian ad  
21 litem.

22 THE COURT: Okay. I want you to wrap up  
23 this line of questioning because it was very  
24 limited. One more question.

15:26:21 25 MR. ELIOT BERNSTEIN: Okay.

1 BY MR. ELIOT BERNSTEIN:

2 Q. So are you saying unequivocally that you  
3 have consent of all the beneficiaries to Ted  
4 Bernstein representing the estate of Simon, not the  
15:26:34 5 trusts, the estate of Simon?

6 A. Well, I don't have your -- of everyone,  
7 you would be the one person if we needed your --

8 Q. Yes or no, do you have consent of all?

9 THE COURT: Do not raise your voice. Do  
15:26:51 10 not raise your voice.

11 MR. ELIOT BERNSTEIN: I am sorry, it's  
12 getting difficult with these side tracks.

13 BY MR. ELIOT BERNSTEIN:

14 Q. Please, simple, do you have consent of all  
15:26:58 15 the beneficiaries of the Simon estate, yes or no?

16 MR. ELIOT BERNSTEIN: Sorry.

17 THE COURT: That's okay.

18 MR. ELIOT BERNSTEIN: I am just  
19 passionate.

15:27:07 20 THE WITNESS: To the extent that you are a  
21 beneficiary, no.

22 BY MR. ELIOT BERNSTEIN:

23 Q. Okay.

24 THE COURT: Okay?

25 ///

1 BY MR. ELIOT BERNSTEIN:

2 Q. So that would be a no, correct?

3 THE COURT: He said no.

4 MR. ELIOT BERNSTEIN: Okay. Quantified it  
15:27:17 5 or something.

6 THE COURT: That's it. Okay.

7 MR. ELIOT BERNSTEIN: Oh, can I ask one  
8 last question?

9 THE COURT: One last question.

10 15:27:23 BY MR. ELIOT BERNSTEIN:

11 Q. Are you aware that two of my children are  
12 adults and that there's never been a competency  
13 hearing on either of them?

14 A. Well, I have testified to the structure of  
15 15:27:34 the documents, and so I don't think I can answer  
16 the question.

17 Q. So have you contacted my children --

18 THE COURT: All right.

19 BY MR. ELIOT BERNSTEIN:

20 15:27:44 Q. -- regarding settlement?

21 THE COURT: That's enough. Stop.

22 MR. ELIOT BERNSTEIN: Okay.

23 THE COURT: Do you have your own --

24 MR. ROSE: No questions.

25 15:27:50 THE COURT: You are good? Okay.

1 Mr. Feaman, any other witnesses?

2 MR. FEAMAN: I rest, Your Honor.

3 THE COURT: All right.

4 (Witness excused.)

15:27:56 5 MR. ELIOT BERNSTEIN: And I reserve my  
6 rights to, you know, challenge this whole  
7 hearing as part of a sham. I didn't have time.

8 THE COURT: Okay.

9 MR. ELIOT BERNSTEIN: You knew I was  
15:28:03 10 medically unfit for three weeks. You have  
11 medical evidence of that. And I am really  
12 sorry you moved this way instead of you  
13 allowing all this fraud to come out first. We  
14 have wasted a lot of time and money, as they've  
15:28:14 15 done all along with this nonsense.

16 THE COURT: Okay.

17 MR. ELIOT BERNSTEIN: By the way, Your  
18 Honor, we are here all these years later  
19 because Ted Bernstein's counsel committed fraud  
15:28:25 20 and forgery to this Court, fraud on this Court.

21 THE COURT: All right.

22 MR. ELIOT BERNSTEIN: And Mr. Rose was one  
23 of the people brought in by those people.

24 THE COURT: That's enough of a statement.  
15:28:33 25 That was totally --

1 MR. ELIOT BERNSTEIN: Well, I didn't get  
2 an opening so I am sorry to try to --

3 THE COURT: But you were late. But you  
4 were late.

15:28:40 5 MR. ELIOT BERNSTEIN: I was sick.

6 THE COURT: Either way.

7 MR. ELIOT BERNSTEIN: And I petitioned.  
8 It seems to have no compassion of this Court.

9 THE COURT: If -- I will not, if you  
15:28:49 10 noticed, I don't tolerate disrespect from  
11 anyone else. You have been very kind until  
12 now. Let's not change it.

13 MR. ELIOT BERNSTEIN: Yes. Oh, and, Your  
14 Honor, we have to go at the appointed time. I  
15:29:08 15 thought that it was 3:30. But we have  
16 commitments that we have to walk out this door  
17 at 3:30, if that's okay?

18 THE COURT: Whatever you feel is  
19 appropriate. I am going to continue until  
15:29:16 20 4:30.

21 MR. ELIOT BERNSTEIN: Didn't you schedule  
22 only for two hours? I am confused. Because  
23 that would totally kill me.

24 THE COURT: Let me look at the order.

15:29:23 25 MR. ELIOT BERNSTEIN: Okay. Thank you.



1 THE COURT: I have it right here.

2 MR. ELIOT BERNSTEIN: Okay.

3 THE COURT: It says the continuation  
4 hearing being held -- oh, this was just that  
15:29:37 5 one. Does anybody have -- I do. Hold on. It  
6 does indicate two hours were reserved.

7 MR. ELIOT BERNSTEIN: I am really sorry,  
8 and I am going to have to go at the exact  
9 minute. I have a child that is in need. And I  
15:29:59 10 have been really sorry about that. But if you  
11 want to continue without me, that's your  
12 prerogative.

13 THE COURT: I did schedule this for two  
14 hours.

15:30:10 15 MR. ELIOT BERNSTEIN: Yes, that was my  
16 understanding.

17 THE COURT: This Court is very aware of  
18 what needs to be done with regards to appellate  
19 purposes. I scheduled this for two hours. I  
15:32:06 20 will stick to that commitment. In two weeks we  
21 will come back. Unless you have a trial or you  
22 are having surgery, you will be here on the  
23 date I am going to announce. Do we all  
24 understand each other?

15:32:17 25 MR. FEAMAN: Yes, Your Honor.

1 THE COURT: We understand each other? I  
2 am going to move something to make sure that we  
3 come back in two weeks. And I am going to give  
4 you a two-hour block. We are going to  
15:32:28 5 conclude, if nothing else, this particular  
6 matter on whether or not the part -- because it  
7 will be too prejudicial to the parties to  
8 continue beyond two hours.

9 Mr. Eliot is correct, I scheduled this for  
15:32:41 10 two hours. He was within his rights. If a  
11 lawyer asked me and said, I had this exact  
12 circumstance occur yesterday, and I ended at  
13 4:30 because someone had told me I had only  
14 discussed 'til 4:30. So I am giving you the  
15:32:56 15 same courtesy --

16 MR. ELIOT BERNSTEIN: I appreciate that.

17 THE COURT: -- I would extend to a lawyer.

18 MR. ROSE: Just briefly, Judge.

19 THE COURT: Yes.

15:33:01 20 MR. ROSE: I would suggest since the  
21 evidence is closed we could submit written  
22 final argument and --

23 THE COURT: You don't intend on calling  
24 any other parties?

15:33:11 25 MR. ROSE: I mean, I don't think they've

1 made their case, and I have -- I mean, I would  
2 move for involuntary denial of their motion  
3 without having to put on evidence which in a  
4 bench trial is a procedure. I don't know if  
15:33:22 5 you want to hear evidence from me. I think you  
6 have heard the evidence. But, you know, my  
7 goal is to get beyond this because we have --

8 THE COURT: I would do that. I would  
9 receive written closings from everyone, and I  
10 will issue an order.

11 MR. ROSE: That's fine. And then we can  
12 still set the other matters if you have two  
13 hours --

14 THE COURT: I will give it to you.

15:33:40 15 MR. ELIOT BERNSTEIN: If that's the case,  
16 then I would rather not schedule some  
17 indiscriminate date. I don't know all of my  
18 kids' schedules.

19 THE COURT: No, that's not how it works.  
15:33:50 20 Sorry, I wouldn't give --

21 MR. ELIOT BERNSTEIN: I can't look at my  
22 schedule?

23 THE COURT: You can look at your schedule  
24 right now.

15:33:53 25 MR. ELIOT BERNSTEIN: I can't.

1 THE COURT: Well, then that's an  
2 obligation. This Court --

3 MR. ELIOT BERNSTEIN: I have three kids  
4 with obligations. I've got games --

15:34:00 5 THE COURT: If you can imagine if I let  
6 everybody do that to me I would never get  
7 anything set.

8 MR. ELIOT BERNSTEIN: Can't we agree on a  
9 time when we get back like we always do for a  
15:34:09 10 hearing?

11 THE COURT: No, we don't always do that.  
12 I tell you a date.

13 MR. ELIOT BERNSTEIN: I thought that's how  
14 we have been doing it.

15:34:15 15 THE COURT: I am going to -- I am not  
16 promising you I will have an order done,  
17 though, that's the problem, on this case by the  
18 time you come back. How can I --

19 MR. ROSE: This is a very narrow issue. I  
15:34:33 20 mean, there's no issue with I am going to be  
21 involved in the estate proceedings either way.

22 THE COURT: Okay.

23 MR. ROSE: It's just a question of whether  
24 I am going to be handling --

15:34:39 25 THE COURT: Okay. We can do that.

1 MR. ROSE: We can do everything else.

2 THE COURT: All right. March 16th, 2:00  
3 o'clock, from 2:00 to 4:00.

4 MR. ELIOT BERNSTEIN: And, Your Honor, can  
15:34:47 5 I ask? I put in a motion to vacate that we  
6 haven't heard that would solve having any of  
7 these hearings, based on the fraud that you  
8 have seen in this court already, with him  
9 changing statements that I am not a  
10 beneficiary, beneficiary, not.  
15:34:58

11 THE COURT: These have been -- we'll  
12 decide when that will be heard next. These  
13 have been rescheduled and rescheduled and  
14 rescheduled on the docket.

15:35:06 15 MR. ELIOT BERNSTEIN: But that fraud issue  
16 that you are not aware of in that motion to  
17 vacate would preclude them from even  
18 representing, because they've been misleading  
19 this Court in fraud.

15:35:17 20 THE COURT: I have made my ruling.

21 MR. ELIOT BERNSTEIN: Thank you. Have a  
22 good day.

23 THE COURT: I will have written rulings --  
24 but I have to give you a date --

15:35:22 25 MR. ELIOT BERNSTEIN: Oh.

1 THE COURT: -- because you need to know  
2 when I need the closing. March 16th, 2:00  
3 o'clock, my JA will send out an order on things  
4 that were not heard today. And I have that  
15:35:32 5 order here. So --

6 MR. ROSE: I think we need to clarify too  
7 because your case management order --

8 MR. FEAMAN: I didn't think Her Honor was  
9 done.

15:35:40 10 THE COURT: I am not. I am not. Sit down  
11 for a second. Thank you.

12 All right. I am looking at the order I am  
13 relying on which ending this now that gave two  
14 hours. The attorneys will submit written  
15:35:53 15 closings on -- ready? And I am giving you,  
16 they can be no more than ten pages in total,  
17 written closings limited to ten pages double  
18 spaced. Do not give me a single spaced ten  
19 page, 25 page. Ten pages, single spaced --

15:36:18 20 MR. FEAMAN: Double spaced.

21 THE COURT: I am sorry, thank you, double  
22 spaced. And that is on Stansbury's motion to  
23 vacant, don't forget I have been briefed and  
24 re-briefed, and Stansbury's motion to  
15:36:30 25 disqualify. Okay? I would like those within

1 two weeks. So by March 16th the closings.

2 MR. ELIOT BERNSTEIN: Your Honor, could I  
3 put in a pleading then? I mean, I was out.  
4 You have a medical doctor saying that I was out  
15:36:47 5 for three weeks heavily medicated. I still am  
6 recovering.

7 THE COURT: Mr. Eliot?

8 MR. ELIOT BERNSTEIN: Yes, ma'am.

9 THE COURT: You are going to let me  
15:36:54 10 finish.

11 MR. ELIOT BERNSTEIN: Okay.

12 THE COURT: And you keep interrupting me  
13 and telling me --

14 MR. ELIOT BERNSTEIN: Pardon.

15:36:58 15 THE COURT: No. You keep telling me why I  
16 can't do what I am going to do.

17 MR. ELIOT BERNSTEIN: Okay.

18 THE COURT: And I am going to do it.

19 MR. ELIOT BERNSTEIN: Okay.

15:37:02 20 THE COURT: And then you can put  
21 everything you want on the record, all right?

22 MR. ELIOT BERNSTEIN: All right.

23 THE COURT: Give me a second.

24 MR. ELIOT BERNSTEIN: Sure.

15:37:07 25 THE COURT: Written closings actually I am

1           only making it a week. I want them before  
2           then. I want them by March 9th. Written  
3           closings by March 9th, ten pages, double  
4           spaced.

15:37:19 5           Our next hearing will be March 16th which  
6           will be the trustee's motion to approve  
7           retention of counsel and the trustee's ominous  
8           response and reply, will be March 16th for two  
9           hours.

15:37:34 10          MR. ROSE: I am going to interrupt. I  
11          think technically I have one clarification. I  
12          don't want to speak to Mr. Feaman directly. If  
13          there's not going to be any additional evidence  
14          on the motion to appoint Ted as guardian ad  
15:37:48 15          litem, I mean as administrator ad litem, it's  
16          the same issue with the conflict and all that,  
17          we could submit written closings --

18          MR. FEAMAN: I concur.

19          MR. ROSE: -- on both of those.

15:37:55 20          THE COURT: No.

21          MR. ROSE: If not, then that's the next  
22          motion.

23          THE COURT: That's the next motion.

24          That's what I am saying, the trustee's motion  
15:38:03 25          to -- it's the administrator ad litem.



1 MR. ROSE: Yes.

2 MR. FEAMAN: Right.

3 THE COURT: Right. That's 3/16 I said,  
4 March 16th.

15:38:10 5 MR. FEAMAN: Okay.

6 THE COURT: And we have the omnibus reply,  
7 and Stansbury's motion for credit or discharge  
8 will be 3/16. That's all I am setting for 3/16  
9 because I have got two hours, and I have  
10 watched how things have proceeded. Everything  
11 else will be handled in due course. All right?  
12 Thank you.

13 MR. O'CONNELL: Your Honor, could I just  
14 make a statement on the record about the 16th,  
15 not to change the date? But I personally  
16 wouldn't be able to appear. So I just want  
17 everyone to know that. If you want to call me  
18 as a witness I am happy to be deposed.

19 THE COURT: Fair enough. They all know he  
15:38:56 20 is not available and they can depose him if he  
21 is not going to be here.

22 MR. O'CONNELL: And I will have someone  
23 from my office here on behalf of the estate.

24 THE COURT: All right. Thank you.

15:39:03 25 MR. O'CONNELL: Just so the Court is

1           aware.

2                   MR. ELIOT BERNSTEIN: I don't think we  
3 need him as witness, do we?

4                   THE COURT: I can't make that decision.

15:39:08 5 All right. Court is in recess.

6                   MR. ROSE: Thank you, Your Honor.

7                   THE COURT: Thank you.

8

9                   (The proceedings adjourned at 3:39 p.m.)

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C E R T I F I C A T E

- - -

The State of Florida  
County of Palm Beach

I, Lisa Mudrick, RPR, FPR, certify that I was authorized to and did stenographically report the foregoing proceedings, pages 119 through 241, and that the transcript is a true record.

Dated March 8, 2017.



LISA MUDRICK, RPR, FPR  
Mudrick Court Reporting, Inc.  
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561-615-8181

①

CERTIFIED COPY (Rev. 7/2013)

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*United States District Court*  
*Northern District of Illinois*  
*Eastern Division*

I, Thomas G. Bruton, Clerk of the United States District Court for the Northern District of Illinois, do hereby attest and certify that the annexed document(s) is (are) a full, true, and correct copy of the original(s) on file in my office and in my legal custody.

IN TESTIMONY WHEREOF:

I have hereunto subscribed my name and affixed the seal of the  
foresaid court at Chicago, Illinois, on FEB 08 2017

THOMAS G. BRUTON, CLERK

By: *Laksh C Williams*  
Deputy Clerk

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

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

Plaintiff, )

v. )

HERITAGE UNION LIFE INSURANCE )  
COMPANY, )

Defendant, )

----- )  
HERITAGE UNION LIFE INSURANCE )  
COMPANY )

Counter-Plaintiff )

v. )

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

Counter-Defendant )

and, )

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

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

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

Third-Party Defendants. )

\_\_\_\_\_)  
ELIOT IVAN BERNSTEIN, )

Cross-Plaintiff )

v. )

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

Cross-Defendant )

and, )

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

Third-Party Defendants. )

\_\_\_\_\_)

**PLAINTIFFS' FIRST AMENDED COMPLAINT**

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

**BACKGROUND**

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

### COUNT I

#### **BREACH OF CONTRACT**

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

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

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

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

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

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

## COUNT II

### DECLARATORY JUDGMENT

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

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

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

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

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

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

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

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

i) Ted Bernstein and other Bernstein family members of Simon Bernstein's home and business office;

ii) the law offices of Tescher and Spallina, Simon Bernstein's counsel in Palm Beach County, Florida,

iii) the offices of Foley and Lardner (successor to Hopkins and Sutter) in Chicago, IL; and

iv) the offices of The Simon Law Firm.

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

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

a) declaring that the original BERNSTEIN TRUST was lost and after a diligent search cannot be located;

b) declaring that the BERNSTEIN TRUST Agreement was executed and established by Simon Bernstein on or about June 21, 1995;

c) declaring that the beneficiaries of the BERNSTEIN TRUST are the five children of Simon Bernstein;

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

### COUNT III

#### RESULTING TRUST

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

WHEREFORE, PLAINTIFFS pray for an Order as follows:

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

By: s/Adam M. Simon

Adam M. Simon (#6205304)  
303 E. Wacker Drive, Suite 210  
Chicago, IL 60601  
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Fax: 312-819-0773

E-Mail: [asimon@chicagolaw.com](mailto:asimon@chicagolaw.com)  
Attorneys for Plaintiffs and Third-Party  
Defendants

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





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

CASE NO. 502012CP004391XXXXNB-IH

Plaintiff: In Re: Estate of: Simon L. Bernstein

Defendant: N/A

Item: CERTIFIED COPY OF PLAINTIFFS' FIRST  
AMENDED COMPLAINT-CHICAGO LITIGATION

Filed by the:  PLAINTIFF  
 DEFENDANT  
 COURT

FOR IDENTIFICATION as exhibit # 1

DO NOT WRITE BELOW THIS LINE - FOR COURT USE ONLY

ADMITTED INTO EVIDENCE AS exhibit # 1  
this date \_\_\_\_\_

SHARON R. BOCK, Clerk & Comptroller

By: \_\_\_\_\_ D.C.

*United States District Court*  
*Northern District of Illinois*  
*Eastern Division*

I, Thomas G. Bruton, Clerk of the United States District Court for the Northern District of Illinois, do hereby attest and certify that the annexed document(s) is (are) a full, true, and correct copy of the original(s) on file in my office and in my legal custody.

IN TESTIMONY WHEREOF:

I have hereunto subscribed my name and affixed the seal of the  
foresaid court at Chicago, Illinois, on FEB 03 2017

THOMAS G. BRUTON, CLERK  
By: Yulonda Thomas  
Deputy Clerk

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

Third Party Defendants )

ELIOT IVAN BERNSTEIN, )

Case No. 13 cv 3643

Honorable Amy J. St. Eve  
Magistrate Mary M. Rowland

MOTION TO INTERVENE PURSUANT  
TO FED. R. CIV. P. 24 BY  
INTERESTED PARTY BENJAMIN P.  
BROWN, CURATOR AND  
ADMINISTRATOR AD LITEM OF  
THE ESTATE OF SIMON L.  
BERNSTEIN

Cross-Plaintiff )  
 )  
 v. )  
 )  
 TED BERNSTEIN, individually and as )  
 alleged Trustee of the Simon Bernstein )  
 Irrevocable Insurance Trust Dtd. 6/21/95 )  
 )  
 style="text-align: center;">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., EMPLOYEE DEATH )  
 BENEFIT TRUST, S.T.P. ENTERPRISES, )  
 INC., S.B. LEXINGTON, INC., )  
 NATIONAL SERVICE ASSOCIATION, )  
 INC. (OF FLORIDA) NATIONAL )  
 SERVICE ASSOCIATION, INC, )  
 (OF ILLINOIS) AND JOHN AND )  
 JANE DOE'S )  
 )  
 style="text-align: center;">Third Party Defendants )  
 \_\_\_\_\_ )  
 BENJAMIN P. BROWN, as Curator and )  
 Administrator Ad Litem of the Estate of )  
 Simon L. Bernstein, )  
 )  
 Intervenor. )

**MOTION TO INTERVENE PURSUANT TO FED. R. CIV. P. 24 BY INTERESTED PARTY BENJAMIN P. BROWN, CURATOR AND ADMINISTRATOR AD LITEM OF THE ESTATE OF SIMON L. BERNSTEIN**

NOW COMES Benjamin P. Brown, as Curator and *Administrator Ad Litem* of the Estate of Simon L. Bernstein (“Brown”), by and through his undersigned counsel, and files this Motion to Intervene pursuant to Fed. R. Civ. P. 24, and in support thereof, states as follows:

1. Simon L. Bernstein, a resident of Florida, died in September of 2012. His estate was admitted to probate in Palm Beach County, Florida on October 2, 2012. Letters of Curatorship in favor of Benjamin Brown were issued on March 11, 2014. (A copy of the Letters of Curatorship filed in the Probate Court is attached hereto as Exhibit A).

2. At the time of Simon Bernstein’s death, there was in effect a life insurance policy issued by Capitol Bankers Life Insurance Company as policy number 1009208 (the “Policy”). The Policy’s current proceeds are \$1,689,070.00, less an outstanding loan. (*See* Dkt. No. 17 at ¶17).

3. Upon Mr. Bernstein’s death, several of his children filed a Complaint in the Circuit Court of Cook County against the insurer claiming a right to the proceeds of the Policy as alleged beneficiaries under a purported trust they describe as the “Simon Bernstein Irrevocable Insurance Trust” (the “Trust”). The Bernstein children acknowledge that they are unable to produce an executed Trust document under which they assert their rights. (*See* letter of Third Party Defendant Robert Spallina, Esq. to Defendant Heritage Union Life Insurance Company, attached as Exhibit B).

4. Defendant, Heritage Union Life Insurance Company, as successor to Capitol Bankers Life Insurance Company removed the case to this Court on June 26, 2013 and filed an Interpleader action pursuant to 28 U.S.C. § 1335(a), in conjunction with its Answer to Plaintiff’s Complaint. (*See* Dkt. No. 17). In its Complaint for Interpleader, Heritage asserts that it cannot ascertain whether the Plaintiff is a proper beneficiary of the Policy:

“Presently the Bernstein Trust has not been located. Accordingly [Defendant] is not aware whether the Bernstein Trust even exists, and if it does whether its title is the “Simon Bernstein Trust, N.A.,” as listed as the Policy’s contingent beneficiary (or otherwise), and/or if Ted Bernstein is in fact its trustee. In conjunction, [Defendant] has received conflicting claims as to whether Ted Bernstein had authority to file the instant suit on behalf of the Bernstein Trust.”

(Dkt. No. 17 at ¶20).

5. In the absence of a valid trust and designated beneficiary, the Policy proceeds are payable to Petitioner, the Estate of Simon Bernstein, as a matter of law. *See New York Life Ins. Co. v. RAK*, 180 N.E. 2d 470 (Ill. 1962) (where beneficiary no longer existed, proceeds of life insurance policy passed to the decedent’s estate); *Harris v. Byard*, 501 So.2d 730 (Fla. Dist. Ct. App. 1987) (in the absence of a named beneficiary, no basis in law for directing payment of insurance policy proceeds to anyone other than decedent’s estate for administration and distribution).

6. On May 23, 2014, Mr. Brown was appointed *Administrator Ad Litem* to act on behalf of the Estate of Simon L. Bernstein (the “Estate”) and was specifically directed by the Probate Court in Palm Beach County “to assert the interests of the Estate in the Illinois Litigation involving life insurance proceeds on the Decedent’s life.” (A copy of the Order Appointing *Administrator Ad Litem* is attached hereto as Exhibit C). Mr. Brown now seeks to Intervene in the instant litigation to assert the rights of the Estate as beneficiary of the Policy.

7. Brown is entitled to Intervention of Right under Fed. R. Civ. P. 24(a)(2) because the Estate is entitled to the Policy proceeds as a matter of law. But for Plaintiff’s claim, the Estate would have no competing claim to the proceeds of the Policy, as it is the default beneficiary under both Florida and Illinois law.

8. The Plaintiff’s and Brown’s interests in the outcome of this action are diametrically opposed: the Policy proceeds will either be payable to the Plaintiff or to the Estate,

which must be allowed to intervene as a matter of right to assert its rival claim. Disposing of this action without this Intervention will impair Mr. Brown's ability to protect the Estate's direct claim on the interpleaded funds and to carry out the mandate of the Florida Probate Court "to assert the interests of the Estate" in the present litigation. The parties to this action will not adequately represent Brown's interest in that the purported Trust will seek to defeat the Estate's claim and the insurer has no stake in the identity of the payee.

9. Brown is also entitled to Permissive Intervention under Fed. R. Civ. P. 24(b)(1)(B) in that the Estate shares with the main action a common question of law and fact, to wit, the proper disposition of life insurance proceeds in excess of \$1,000,000.00.

10. Brown's intervention will not destroy diversity of citizenship.

11. A pleading that sets out the claim for which intervention is sought is attached hereto as Exhibit D.

WHEREFORE, proposed Intervenor, Benjamin P. Brown, as Curator and *Administrator Ad Litem* on behalf of the Estate of Simon L. Bernstein, moves this Honorable Court for an Order permitting him to intervene in this action pursuant to Fed. R. Civ. P. 24 (a)(2) or 24 (b)(1)(B).

Dated: June 5, 2014

Respectfully submitted,

/s/ James J. Stamos

One of the attorneys for Proposed Intervenor,  
Benjamin P. Brown, Curator and *Administrator Ad Litem* on behalf of the Estate of Simon L. Bernstein

James J. Stamos (ARDC 03128244)  
Kevin P. Horan (ARDC 06310581)  
STAMOS & TRUCCO LLP  
One East Wacker Drive, Third Floor  
Chicago, IL 60601  
Telephone: (312) 630-7979  
Facsimile: (312) 630-1183

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on June 5, 2014, I electronically filed the foregoing with the Clerk of the Court using CM/ECF. I also certify that the foregoing is being served this day on all counsel of record identified below via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner.



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

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

IN RE: ESTATE OF SIMON L. BERNSTEIN,  
Deceased.

---

LETTERS OF CURATORSHIP IN FAVOR OF BENJAMIN BROWN

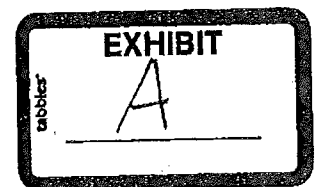
WHEREAS, Co-Personal Representatives of the Estate of Simon L. Bernstein were permitted to resign by Order of this Court on February 18, 2014. A copy of the Order is attached hereto as Exhibit "A"; and

WHEREAS, this Court found it necessary for the appointment of a Curator and appointed Benjamin Brown, Esq. as Curator of this Estate on February 25, 2014. A copy of the Order is attached hereto as Exhibit "B"; and

WHEREAS Benjamin Brown as Curator appointed by Order of this Court has performed all acts prerequisite to the issuance of Letters of Curatorship as a legally qualified Curator of the Estate of Simon L. Bernstein;

NOW, THEREFORE, I the undersigned Circuit Judge do grant Benjamin Brown (hereinafter Curator), the Curatorship of the Estate of Simon L. Bernstein with the following powers:

- (a) To collect and preserve assets of the Estate;
- (b) To administer the assets of the Estate;
- (c) To evaluate all discovery requests related to the Decedent for the purposes of asserting objections and privileges on behalf of the Estate, if necessary;
- (d) To appear on behalf of the Estate in the following two cases: Case No. 502012CA013933 (Circuit Court, Palm Beach County, FL) and Case No. 13CV3643 (U.S. Dist. Ct. Northern Dist.,



Illinois),

Further, pursuant to Fla. Stat. §733.603, Curator shall proceed expeditiously with the duties described herein and except as otherwise specified by the Florida Probate Code, or ordered by the Court, shall do so without adjudication, Order or direction of the Court. The Curator may invoke the jurisdiction of this Court to resolve questions concerning the Estate or its administration.

DONE AND ORDERED in Chambers at Delray Beach, Palm Beach County, Florida,  
this \_\_\_\_\_ day of March, 2014.

SIGNED & DATED

Martin Colin, Circuit Judge

JUDGE MARTIN H. COLIN

Copies furnished to:

Alan Rose, Esq., PAGE, MRACHEK, 505 So. Flagler Drive, Suite 600, West Palm Beach, FL 33401, [arose@pm-law.com](mailto:arose@pm-law.com) and [mchandler@pm-law.com](mailto:mchandler@pm-law.com);

John Pankauski, Esq., PANKAUSKI LAW FIRM, 120 So. Olive Avenue, Suite 701, West Palm Beach, FL 33401, [courtfilings@pankauskilawfirm.com](mailto:courtfilings@pankauskilawfirm.com);

Peter M. Feaman, Esq., PETER M. FEAMAN, P.A., 3615 W. Boynton Beach Blvd., Boynton Beach, FL 33436, [service@feamanlaw.com](mailto:service@feamanlaw.com);

Eliot Bernstein, 2753 NW 34<sup>th</sup> Street, Boca Raton, FL 33434, [iviewit@iviewit.tv](mailto:iviewit@iviewit.tv);

William H. Glasko, Esq., Golden Cowan, P.A., Palmetto Bay Law Center, 17345 S. Dixie Highway, Palmetto Bay, FL 33157, [bill@palmettobaylaw.com](mailto:bill@palmettobaylaw.com).

IN THE CIRCUIT COURT FOR PALM BEACH COUNTY, FL

IN RE: ESTATE OF SIMON L. BERNSTEIN,  
Deceased.

PROBATE DIVISION

CASE NO. 502012CP004391XXXXSB

ELIOT IVAN BERNSTEIN, PRO SE

DIVISION: IY (COLIN)

Petitioner

vs.

TESCHER & SPALLINA, P.A., (and all parties,  
associates and of counsel); ROBERT L. SPALLINA  
(both personally and professionally); DONALD R.  
TESCHER (both personally and professionally);  
THEODORE STUART BERNSTEIN (as alleged  
personal representative, trustee, successor trustee)  
(both personally and professionally); et. al.

Respondents.

ORDER ON PETITION FOR RESIGNATION AND DISCHARGE

This cause was heard by the Court on the co-Personal Representatives' Petition for Resignation and Discharge on February 18, 2014, and the Court, having heard arguments of counsel, and otherwise being fully advised in the premises, ORDERS AND ADJUDGES AS FOLLOWS:

1. The Petitioners' request to accept their resignation is ACCEPTED. The co-Personal Representatives' Letters of Administration are hereby revoked.

2. ~~With effect from the date of this order or the appointment of a successor fiduciary,~~ <sup>BY MARCH 4, 2014</sup> ~~the resigning co-Personal Representatives shall deliver to the successor fiduciary all property of the Estate, real, personal, tangible or intangible, all of the documents and records of the Estate and all records associated with any property of the Estate, regardless of whether such property has been previously distributed, transferred, abandoned or otherwise disposed of.~~ <sup>(initials)</sup>

3. The Petitioners' request to reserve ruling on their discharge is ACCEPTED.

4. The resigning co-Personal Representatives shall file an accounting and a Renewed Petition for Discharge within sixty (60) days after the date hereof, which Renewed Petition for Discharge shall be verified and recite that the letters of administration have been revoked, the resigning co-Personal Representatives have surrendered all undistributed Estate assets, records, documents, papers and other property of or concerning the Estate to the successor fiduciary as set forth above, and the amount of compensation paid or to be paid by the resigning co-Personal Representatives pursuant to Probate Rule 5.430(g). Such accounting shall include cash and transactions from the commencement of administration of the Estate and ending as of the date the accounting is submitted.

5. The resigning co-Personal Representatives shall serve notice of filing and a copy of the accounting and Renewed Petition for Discharge on all interested parties and the notice shall state that the objection to the Renewed Petition for Discharge must be filed within thirty days after the later of service of the petition or service of the accounting on that interested person pursuant to Probate Rule 5.430(l).

6. The successor Personal Representative or Curator is authorized to pay a \$ \_\_\_\_\_ retained to the accountant whom the Successor Personal Representative or Curator selects to provided the accounting which this Order requires. The accountant's hourly rate and compensation shall be subject to court approval.

DONE AND ORDERED in Delray Beach, Florida, this 18 day of Feb, 2014.

  
Circuit Judge

cc: Parties on attached service list

*Write*  
"THE COURT REGRANT JUDICIAL TO ENFORCE THIS ORDER."

SERVICE LIST

Theodore Stuart Bernstein (e-mail)  
Life Insurance Concepts  
950 Peninsula Corporate Circle, Suite 3010  
Boca Raton, Florida 33487

Alan B. Rose, Esq. (E-mail)  
Page Mrachek Fitzgerald Rose Konopka &  
Dow PA  
505 S Flagler Dr Ste 600  
West Palm Beach, Florida 33401

Eliot Bernstein (U.S. Mail)  
2753 NW 34<sup>th</sup> Street  
Boca Raton, Florida 33434

Lisa Sue Friedstein (U.S. Mail)  
2142 Churchill Lane  
Highland Park, Illinois 60035

Pamela Beth Simon (U.S. Mail)  
950 North Michigan Avenue, Suite 2603  
Chicago, Illinois 60611

Jill Iantoni (U.S. Mail)  
2101 Magnolia Lane  
Highland Park, Illinois 60035

Donald R. Tescher (E-mail)  
4855 Technology Way, Suite 720  
Boca Raton, Florida 33431

Mark R. Manceri, Esq. (E-mail)  
Mark. R. Manceri, P.A.  
2929 East Commercial Boulevard, Ste. 702  
Fort Lauderdale, Florida 33308

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

PROBATE DIV.

CASE NO.: 50 2012 CP 004391 XXXX SB

IN RE: ESTATE OF SIMON L. BERNSTEIN,  
Deceased.

---

**ORDER ON "INTERESTED PERSON" WILLIAM STANSBURY'S  
MOTION FOR THE APPOINTMENT OF A CURATOR  
OR SUCCESSOR PERSONAL REPRESENTATIVE**

THIS CAUSE came on to be heard by this Honorable Court on Wednesday, February 19, 2014, on the Motion of William Stansbury, as an "Interested Person" in the Estate, For the Appointment of a Curator or Successor Personal Representative, and the Court having received evidence, reviewed the file, heard argument of counsel, and being otherwise duly advised in the premises, it is

ORDERED and ADJUDGED:

1. The Motion of William Stansbury is hereby granted.
2. The Court hereby appoints Benjamin Brown, Esq., Matwiczuk & Brown, LLP, 625 No. Flagler Drive, Suite 401, West Palm Beach, FL 33401 as Curator of this Estate pursuant to §733.501 Fla. Stat. (2013) and Florida Probate Rule 5.122(a).
3. Reasonable fees for the Curator are capped at \$350.00 per hour.

EXHIBIT "B"

2/25/14

4. Fee payments will be made in \$5,000.00 increments. Any fee requests in excess of that amount for any given period will require a court hearing.

5. In accordance with §733.501(2) Fla. Stat. (2013), bond is hereby set in the amount of \$ none.

DONE and ORDERED in West Palm Beach, Palm Beach County, Florida on this \_\_\_ day of February, 2014.

**SIGNED & DATED**  
MARTIN COLIN  
Circuit Court Judge FEB 25 2014  
JUDGE MARTIN H. COLIN

*Copies to:*

Alan Rose, Esq., PAGE, MRACHEK, 505 So. Flagler Drive, Suite 600, West Palm Beach, FL 33401, [arose@pm-law.com](mailto:arose@pm-law.com) and [mchandler@pm-law.com](mailto:mchandler@pm-law.com);

John Pankauski, Esq., PANKAUSKI LAW FIRM, 120 So. Olive Avenue, Suite 701, West Palm Beach, FL 33401, [courtfilings@pankauskilawfirm.com](mailto:courtfilings@pankauskilawfirm.com);

Peter M. Feaman, Esq., PETER M. FEAMAN, P.A., 3615 W. Boynton Beach Blvd., Boynton Beach, FL 33436, [service@feamanlaw.com](mailto:service@feamanlaw.com);

Eliot Bernstein, 2753 NW 34<sup>th</sup> Street, Boca Raton, FL 33434, [iviewit@iviewit.tv](mailto:iviewit@iviewit.tv);

William H. Glasko, Esq., Golden Cowan, P.A., Palmetto Bay Law Center, 17345 S. Dixie Highway, Palmetto Bay, FL 33157, [bill@palmettobaylaw.com](mailto:bill@palmettobaylaw.com).

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

BOCA VILLAGE CORPORATE CENTER I  
4855 TECHNOLOGY WAY, SUITE 720  
BOCA RATON, FLORIDA 33431

ATTORNEYS  
DONALD R. TESCHER  
ROBERT L. SPALLINA  
LAUREN A. GALVANI

TEL: 561-997-7008  
FAX: 561-997-7308  
TOLL FREE: 888-997-7008  
WWW.TESCHERSPALLINA.COM

SUPPORT STAFF  
DIANE DUSTIN  
KIMBERLY MORAN  
SUANN TESCHER

December 6, 2012

VIA FACSIMILE: 803-333-4936

Attn: Bree  
Claims Department  
Heritage Union Life Insurance Company  
1275 Sandusky Road  
Jacksonville, FL 62651

Re: Insured: Simon L. Bernstein  
Contract No.: 1009208

Dear Bree:

As per our earlier telephone conversation:

- We are unable to locate the Simon Bernstein Irrevocable Insurance Trust dated June 1, 1995, which we have spent much time searching for.
- Mrs. Shirley Bernstein was the initial beneficiary of the 1995 trust, but predeceased Mr. Bernstein.
- The Bernstein children are the secondary beneficiaries of the 1995 trust.
- We are submitting the Letters of Administration for the Estate of Simon Bernstein showing that we are the named Personal Representatives of the Estate.
- We would like to have the proceeds from the Heritage policy released to our firm's trust account so that we can make distributions amongst the five Bernstein children.
- If necessary, we will prepare for Heritage an Agreement and Mutual Release amongst all the children.
- We are enclosing the SS4 signed by Mr. Bernstein in 1995 to obtain the EIN number for the 1995 trust.

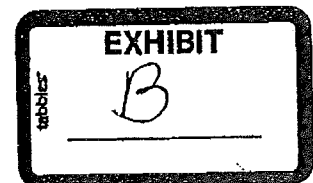
If you have any questions with regard to the foregoing, please do not hesitate to contact me.

Sincerely,

  
ROBERT L. SPALLINA

RLS/km

Enclosures





FROM: Peter M. Feaman P.A. 7345664 TO: 2741419 05/23/2014 10:43:41 #17897 P.003/006



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

IN RE:

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

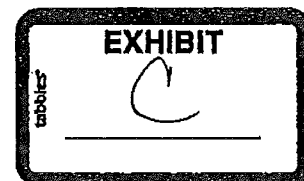
ESTATE OF SIMON L. BERNSTEIN,  
Deceased.

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

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

ORDERED and ADJUDGED that

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




Case: 1:13-cv-03643 Document #: 110 Filed: 06/05/14 Page 16 of 23 PageID #:1310

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

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

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

  
MARTIN COLIN  
Circuit Court Judge

- Copies to:
- Alan Rose, Esq., PAGE, MRACHIEK, 505 So. Flagler Drive, Suite 400, West Palm Beach, FL 33401, [arose@pm-law.com](mailto:arose@pm-law.com) and [mehandler@pm-law.com](mailto:mehandler@pm-law.com)
  - John Pankowski, Esq., PANKAUSKI LAW FIRM, 120 So. Olive Avenue, Suite 701, West Palm Beach, FL 33401, [john@pankowskilawfirm.com](mailto:john@pankowskilawfirm.com)
  - Peter M. Fenau, Esq., PETER M. FEAMAN, P.A., 3615 W. Boynton Beach Blvd., Boynton Beach, FL 33436, [service@fenaulaw.com](mailto:service@fenaulaw.com)
  - Elliot Bernstein, 2753 NW 34<sup>th</sup> Street, Boca Raton, FL 33434, [eviz@elliotbernst.com](mailto:eviz@elliotbernst.com)
  - William H. Glasko, Esq., Clenden Cowan, P.A., Palmetto Bay Law Center, 17345 S. Dixie Highway, Palmetto Bay, FL 33157, [bill@palmettobaylaw.com](mailto:bill@palmettobaylaw.com)
  - John P. Morrissey, Esq., 330 Clematis St., Suite 213, West Palm Beach, FL 33401, [john@jpmorrisseylaw.com](mailto:john@jpmorrisseylaw.com)
  - Benjamin P. Brown, Esq., Mutwicz & Brown, LLP, 625 No. Flagler Drive, Suite 401, West Palm Beach, FL 33401, [bpbrown@mutwiczlaw.com](mailto:bpbrown@mutwiczlaw.com)

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

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

Plaintiff, )

v. )

HERITAGE UNION LIFE INSURANCE )  
COMPANY, )

Defendant, )

HERITAGE UNION LIFE INSURANCE )  
COMPANY, )

Counter-Plaintiff, )

v. )

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

Counter-Defendant )

and, )

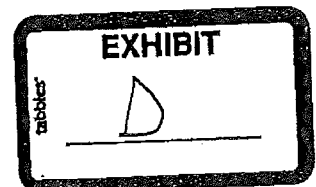
FIRST ARLINGTON NATIONAL BANK, )  
as Trustee of S.B. Lexington, Inc. Employee )  
Death Benefit Trust, UNITED BANK OF )  
ILLINOIS, BANK OF AMERICA, )  
successor in interest to "LaSalle National )  
Trust, N.A., TED BERSTEIN, individually )  
and as alleged Trustee of the Simon )  
Bernstein Irrevocable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

Third Party Defendants )

Case No. 13 cv 3643

Honorable Amy J. St. Eve  
Magistrate Mary M. Rowland

INTERVENOR COMPLAINT FOR  
DECLARATORY JUDGMENT BY  
INTERESTED PARTY BENJAMIN P.  
BROWN, CURATOR AND  
ADMINISTRATOR AD LITEM OF  
THE ESTATE OF SIMON L.  
BERNSTEIN



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., EMPLOYEE DEATH )  
BENEFIT TRUST, S.T.P. ENTERPRISES, )  
INC., S.B. LEXINGTON, INC., )  
NATIONAL SERVICE ASSOCIATION, )  
INC. (OF FLORIDA) NATIONAL )  
SERVICE ASSOCIATION, INC, )  
(OF ILLINOIS) AND JOHN AND )  
JANE DOE'S )

Third Party Defendants )

\_\_\_\_\_)  
BENJAMIN P. BROWN, as Curator and )  
Administrator Ad Litem of the Estate of )  
Simon L. Bernstein, )

Intervenor. )

**INTERVENOR COMPLAINT FOR DECLARATORY JUDGMENT BY INTERESTED  
PARTY BENJAMIN P. BROWN, CURATOR AND ADMINISTRATOR AD LITEM OF  
THE ESTATE OF SIMON L. BERNSTEIN**

NOW COMES Benjamin P. Brown, as Curator and *Administrator Ad Litem* of the Estate of Simon L. Bernstein (“Brown”), by and through his undersigned counsel, and states as follows for his Complaint for Declaratory Judgment pursuant to Fed. R. Civ. P. 57 against the purported Simon Bernstein Irrevocable Trust DTD 6/21/95 (the “Trust”) and Heritage Union Life Insurance Company:

### **INTRODUCTION**

1. This declaratory judgment action is filed pursuant to Fed. R. Civ. P. 57 and seeks a declaration that there exists no designated beneficiary of the life insurance policy proceeds at issue in the instant action and that the proceeds of the policy must be paid to the Estate of Simon Bernstein, currently pending in the Circuit Court of Palm Beach County, Florida.

### **PARTIES AND JURISDICTION**

2. Benjamin P. Brown is an Intervening Party pursuant to Fed. R. Civ. P. 24 and is a resident of Palm Beach County, Florida.

3. The purported Simon Bernstein Irrevocable Insurance Trust is alleged in Plaintiff's original Complaint to have been established in Chicago, Illinois.

4. Heritage Union Life Insurance Company, a Minnesota corporation, is the successor corporation to the insurer that issued the life insurance policy (the “Policy”) at issue in the instant litigation.

5. The death benefit payable under the Policy exceeds \$1 million dollars.

6. This Court has jurisdiction over this matter in that it is a civil action wherein the parties are all citizens of different states and the amount in controversy exceeds \$75,000.00. 28 U.S.C. §1332(a).

**BACKGROUND**

7. Simon L. Bernstein, a resident of Florida, died in September of 2012. His estate was admitted to probate in Palm Beach County, Florida on October 2, 2012. Letters of Curatorship in favor of Benjamin Brown were issued on March 11, 2014. (A copy of the Letters of Curatorship filed in the Probate Court is attached hereto as Exhibit A).

8. At the time of Simon Bernstein's death, there was in effect a life insurance policy issued by Capitol Bankers Life Insurance Company as policy number 1009208 (the "Policy"). The Policy's current proceeds are \$1,689,070.00, less an outstanding loan. (See Dkt. No. 17 at ¶17).

9. After Mr. Bernstein's death, several of his children filed a Complaint in the Circuit Court of Cook County claiming a right to the proceeds of the Policy as alleged beneficiaries under a purported trust they describe as the "Simon Bernstein Irrevocable Insurance Trust" (the "Trust"). The Bernstein children acknowledge that they have been unable to produce an executed Trust document under which they assert their rights. (See letter of Third Party Defendant Robert Spallina, Esq. to Defendant Heritage Union Life Insurance Company, attached as Exhibit B).

10. Defendant, Heritage Union Life Insurance Company, as successor to Capitol Bankers Life Insurance Company, removed the case to this Court on June 26, 2013 and filed an Interpleader action pursuant to 28 U.S.C. § 1335(a), in conjunction with its Answer to Plaintiff's Complaint. (See Dkt. No. 17). In its Complaint for Interpleader, Heritage asserts the following:

"Presently the Bernstein Trust has not been located. Accordingly [Defendant] is not aware whether the Bernstein Trust even exists, and if it does whether its title is the "Simon Bernstein Trust, N.A.," as listed as the Policy's contingent beneficiary (or otherwise), and/or if Ted Bernstein is in fact its trustee. In conjunction, [Defendant] has received conflicting claims as to whether Ted Bernstein had authority to file the instant suit on behalf of the Bernstein Trust."

(Dkt. No. 17 at ¶20).

11. On May 23, 2014, Mr. Brown was appointed *Administrator Ad Litem* to act on behalf of the Estate of Simon L. Bernstein (the "Estate") and, more specifically, directed by the Probate Court in Palm Beach County "to assert the interests of the Estate in the Illinois Litigation involving life insurance proceeds on the Decedent's life." (A copy of the Order Appointing Administrator Ad Litem is attached hereto as Exhibit C).

12. Plaintiff cannot prove the existence of a Trust document; cannot prove that a trust was ever created; thus, cannot prove the existence of the Trust nor its status as purported beneficiary of the Policy. In the absence of a valid Trust and designated beneficiary, the Policy proceeds are payable to Petitioner, the Estate of Simon Bernstein, as a matter of both Illinois and Florida law. *See New York Life Ins. Co. v. RAK*, 180 N.E. 2d 470 (Ill. 1962) (where beneficiary no longer existed, proceeds of life insurance policy passed to the decedent's estate); *Harris v. Byard*, 501 So.2d 730 (Fla. Dist. Ct. App. 1987) (in the absence of a named beneficiary, no basis in law for directing payment of insurance policy proceeds to anyone other than decedent's estate for administration and distribution).

13. Intervenor Benjamin P. Brown seeks a judgment from this Court declaring that no valid beneficiary is named under the Policy and that the proceeds of the Policy must therefore be paid to the Estate.

WHEREFORE, Intervenor, Benjamin P. Brown, as Curator and *Administrator Ad Litem* on behalf of the Estate of Simon L. Bernstein, requests this Court to enter judgment as follows:

- A. Declare that there is no valid beneficiary designated under the Policy;
- B. Declare that the proceeds of the Policy are payable to the Estate of Simon Bernstein;

C. For Intervenor's costs and expenses incurred herein, including reasonable attorneys' fees, and such other and further relief as this Court deems just and proper.

Dated: June 5, 2014

Respectfully submitted,

/s/ James J. Stamos

One of the attorneys for Proposed Intervenor,  
Benjamin P. Brown, Curator and Administrator Ad  
Litem on behalf of the Estate of Simon L. Bernstein

James J. Stamos (ARDC 03128244)  
Kevin P. Horan (ARDC 06310581)  
STAMOS & TRUCCO LLP  
One East Wacker Drive, Third Floor  
Chicago, IL 60601  
Telephone: (312) 630-7979  
Facsimile: (312) 630-1183



**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on June 5, 2014, I electronically filed the foregoing with the Clerk of the Court using CM/ECF. I also certify that the foregoing is being served this day on all counsel of record identified below via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner.

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

CASE NO. 502012CP004391XXXXNB-IH

Plaintiff: In Re: Estate of: Simon L. Bernstein

Defendant: N/A

Item: CERTIFIED COPY OF MOTION TO  
INTERVENE BY BENJAMIN P. BROWN-  
CHICAGO LITIGATION

Filed by the:  PLAINTIFF  
 DEFENDANT  
 COURT

FOR IDENTIFICATION as exhibit # 2

DO NOT WRITE BELOW THIS LINE - FOR COURT USE ONLY

ADMITTED INTO EVIDENCE AS exhibit # 2  
this date \_\_\_\_\_

SHARON R. BOCK, Clerk & Comptroller

By: \_\_\_\_\_ D.C.

CERTIFIED COPY (Rev. 7/2013)

*United States District Court*  
*Northern District of Illinois*  
*Eastern Division*

I, Thomas G. Bruton, Clerk of the United States District Court for the Northern District of Illinois, do hereby attest and certify that the annexed document(s) is (are) a full, true, and correct copy of the original(s) on file in my office and in my legal custody.

IN TESTIMONY WHEREOF:

I have hereunto subscribed my name and affixed the seal of the  
foresaid court at Chicago, Illinois, on FEB 03 2017

THOMAS G. BRUTON, CLERK

By: Yulanda Thomas  
Deputy Clerk

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

Third Party Defendants )

Case No. 13 cv 3643

Honorable Amy J. St. Eve  
Magistrate Mary M. Rowland

INTERVENOR COMPLAINT FOR  
DECLARATORY JUDGMENT BY  
INTERESTED PARTY BENJAMIN P.  
BROWN, CURATOR AND  
ADMINISTRATOR AD LITEM OF  
THE ESTATE OF SIMON L.  
BERNSTEIN

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 )  
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INC., S.B. LEXINGTON, INC., )  
NATIONAL SERVICE ASSOCIATION, )  
INC. (OF FLORIDA) NATIONAL )  
SERVICE ASSOCIATION, INC, )  
(OF ILLINOIS) AND JOHN AND )  
JANE DOE'S )

Third Party Defendants )

\_\_\_\_\_  
BENJAMIN P. BROWN, as Curator and )  
Administrator Ad Litem of the Estate of )  
Simon L. Bernstein, )

Intervenor. )

**INTERVENOR COMPLAINT FOR DECLARATORY JUDGMENT BY INTERESTED  
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THE ESTATE OF SIMON L. BERNSTEIN**

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### INTRODUCTION

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"Presently the Bernstein Trust has not been located. Accordingly [Defendant] is not aware whether the Bernstein Trust even exists, and if it does whether its title is the "Simon Bernstein Trust, N.A.," as listed as the Policy's contingent beneficiary (or otherwise), and/or if Ted Bernstein is in fact its trustee. In conjunction, [Defendant] has received conflicting claims as to whether Ted Bernstein had authority to file the instant suit on behalf of the Bernstein Trust."

(Dkt. No. 17 at ¶20).

11. On May 23, 2014, Mr. Brown was appointed *Administrator Ad Litem* to act on behalf of the Estate of Simon L. Bernstein (the "Estate") and, more specifically, directed by the Probate Court in Palm Beach County "to assert the interests of the Estate in the Illinois Litigation involving life insurance proceeds on the Decedent's life." (A copy of the Order Appointing Administrator Ad Litem is attached hereto as Exhibit C).

12. Plaintiff cannot prove the existence of a Trust document; cannot prove that a trust was ever created; thus, cannot prove the existence of the Trust nor its status as purported beneficiary of the Policy. In the absence of a valid Trust and designated beneficiary, the Policy proceeds are payable to Petitioner, the Estate of Simon Bernstein, as a matter of both Illinois and Florida law. *See New York Life Ins. Co. v. RAK*, 180 N.E. 2d 470 (Ill. 1962) (where beneficiary no longer existed, proceeds of life insurance policy passed to the decedent's estate); *Harris v. Byard*, 501 So.2d 730 (Fla. Dist. Ct. App. 1987) (in the absence of a named beneficiary, no basis in law for directing payment of insurance policy proceeds to anyone other than decedent's estate for administration and distribution).

13. Intervenor Benjamin P. Brown seeks a judgment from this Court declaring that no valid beneficiary is named under the Policy and that the proceeds of the Policy must therefore be paid to the Estate.

WHEREFORE, Intervenor, Benjamin P. Brown, as Curator and *Administrator Ad Litem* on behalf of the Estate of Simon L. Bernstein, requests this Court to enter judgment as follows:

- A. Declare that there is no valid beneficiary designated under the Policy;
- B. Declare that the proceeds of the Policy are payable to the Estate of Simon Bernstein;



C. For Intervenor's costs and expenses incurred herein, including reasonable attorneys' fees, and such other and further relief as this Court deems just and proper.

Dated: June 5, 2014

Respectfully submitted,

/s/ James J. Stamos

One of the attorneys for Proposed Intervenor,  
Benjamin P. Brown, Curator and Administrator Ad  
Litem on behalf of the Estate of Simon L. Bernstein

James J. Stamos (ARDC 03128244)  
Kevin P. Horan (ARDC 06310581)  
STAMOS & TRUCCO LLP  
One East Wacker Drive, Third Floor  
Chicago, IL 60601  
Telephone: (312) 630-7979  
Facsimile: (312) 630-1183

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on June 5, 2014, I electronically filed the foregoing with the Clerk of the Court using CM/ECF. I also certify that the foregoing is being served this day on all counsel of record identified below via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner.

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

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

IN RE: ESTATE OF SIMON L. BERNSTEIN,  
Deceased.

LETTERS OF CURATORSHIP IN FAVOR OF BENJAMIN BROWN

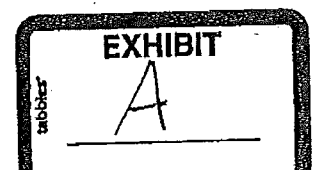
WHEREAS, Co-Personal Representatives of the Estate of Simon L. Bernstein were permitted to resign by Order of this Court on February 18, 2014. A copy of the Order is attached hereto as Exhibit "A"; and

WHEREAS, this Court found it necessary for the appointment of a Curator and appointed Benjamin Brown, Esq. as Curator of this Estate on February 25, 2014. A copy of the Order is attached hereto as Exhibit "B"; and

WHEREAS Benjamin Brown as Curator appointed by Order of this Court has performed all acts prerequisite to the issuance of Letters of Curatorship as a legally qualified Curator of the Estate of Simon L. Bernstein;

NOW, THEREFORE, I the undersigned Circuit Judge do grant Benjamin Brown (hereinafter Curator), the Curatorship of the Estate of Simon L. Bernstein with the following powers:

- (a) To collect and preserve assets of the Estate;
- (b) To administer the assets of the Estate;
- (c) To evaluate all discovery requests related to the Decedent for the purposes of asserting objections and privileges on behalf of the Estate, if necessary;
- (d) To appear on behalf of the Estate in the following two cases: Case No. 502012CA013933 (Circuit Court, Palm Beach County, FL) and Case No. 13CV3643 (U.S. Dist. Ct. Northern Dist.,



Illinois),

Further, pursuant to Fla. Stat. §733.603, Curator shall proceed expeditiously with the duties described herein and except as otherwise specified by the Florida Probate Code, or ordered by the Court, shall do so without adjudication, Order or direction of the Court. The Curator may invoke the jurisdiction of this Court to resolve questions concerning the Estate or its administration.

DONE AND ORDERED in Chambers at Delray Beach, Palm Beach County, Florida,  
this \_\_\_\_\_ day of March, 2014.

SIGNED & DATED

Martin Colin, Circuit Judge

JUDGE MARTIN H. COLIN

Copies furnished to:

Alan Rose, Esq., PAGE, MRACHEK, 505 So. Flagler Drive, Suite 600, West Palm Beach, FL 33401, [arose@pm-law.com](mailto:arose@pm-law.com) and [michandler@pm-law.com](mailto:michandler@pm-law.com);

John Pankauski, Esq., PANKAUSKI LAW FIRM, 120 So. Olive Avenue, Suite 701, West Palm Beach, FL 33401, [courtfilings@pankauskilawfirm.com](mailto:courtfilings@pankauskilawfirm.com);

Peter M. Feaman, Esq., PETER M. FEAMAN, P.A., 3615 W. Boynton Beach Blvd., Boynton Beach, FL 33436, [service@feamanlaw.com](mailto:service@feamanlaw.com);

Eliot Bernstein, 2753 NW 34<sup>th</sup> Street, Boca Raton, FL 33434, [iviewit@iviewit.tv](mailto:iviewit@iviewit.tv);

William H. Glasko, Esq., Golden Cowan, P.A., Palmetto Bay Law Center, 17345 S. Dixie Highway, Palmetto Bay, FL 33157, [bill@palmettobaylaw.com](mailto:bill@palmettobaylaw.com).

IN THE CIRCUIT COURT FOR PALM BEACH COUNTY, FL

IN RE: ESTATE OF SIMON L. BERNSTEIN,

PROBATE DIVISION

Deceased.

CASE NO. 502012CP004391XXXXSB

ELIOT IVAN BERNSTEIN, PRO SE

DIVISION: IY (COLIN)

Petitioner

vs.

TESCHER & SPALLINA, P.A., (and all parties, associates and of counsel); ROBERT L. SPALLINA (both personally and professionally); DONALD R. TESCHER (both personally and professionally); THEODORE STUART BERNSTEIN (as alleged personal representative, trustee, successor trustee) (both personally and professionally); et. al.

Respondents.

ORDER ON PETITION FOR RESIGNATION AND DISCHARGE

This cause was heard by the Court on the co-Personal Representatives' Petition for Resignation and Discharge on February 18, 2014, and the Court, having heard arguments of counsel, and otherwise being fully advised in the premises, ORDERS AND ADJUDGES AS FOLLOWS:

1. The Petitioners' request to accept their resignation is ACCEPTED. The co-Personal Representatives' Letters of Administration are hereby revoked.

2. ~~With~~ <sup>BY MARCH 4, 2014</sup> ~~from the later of the date of this order or the appointment of a successor fiduciary,~~ the resigning co-Personal Representatives shall deliver to the successor fiduciary all property of the Estate, real, personal, tangible or intangible, all of the documents and records of the Estate and all records associated with any property of the Estate, regardless of whether such property has been previously distributed, transferred, abandoned or otherwise disposed of.

3. The Petitioners' request to reserve ruling on their discharge is ACCEPTED.

4. The resigning co-Personal Representatives shall file an accounting and a Renewed Petition for Discharge within sixty (60) days after the date hereof, which Renewed Petition for Discharge shall be verified and recite that the letters of administration have been revoked, the resigning co-Personal Representatives have surrendered all undistributed Estate assets, records, documents, papers and other property of or concerning the Estate to the successor fiduciary as set forth above, and the amount of compensation paid or to be paid by the resigning co-Personal Representatives pursuant to Probate Rule 5.430(g). Such accounting shall include cash and transactions from the commencement of administration of the Estate and ending as of the date the accounting is submitted.

5. The resigning co-Personal Representatives shall serve notice of filing and a copy of the accounting and Renewed Petition for Discharge on all interested parties and the notice shall state that the objection to the Renewed Petition for Discharge must be filed within thirty days after the later of service of the petition or service of the accounting on that interested person pursuant to Probate Rule 5.430(i).

6. The successor Personal Representative or Curator is authorized to pay a \$ \_\_\_\_\_ retained to the accountant whom the Successor Personal Representative or Curator selects to provided the accounting which this Order requires. The accountant's hourly rate and compensation shall be subject to court approval.

*Wtk*  
*THE COURT NEEDS TO ENFORCE THIS ORDER.*

DONE AND ORDERED in Delray Beach, Florida; this 18 day of Feb, 2014.

*[Signature]*  
Circuit Judge

cc: Parties on attached service list

SERVICE LIST

Theodore Stuart Bernstein (e-mail)  
Life Insurance Concepts  
950 Peninsula Corporate Circle, Suite 3010  
Boca Raton, Florida 33487

Alan B. Rose, Esq. (E-mail)  
Page Mrachek Fitzgerald Rose Konopka &  
Dow PA  
505 S Flagler Dr Ste 600  
West Palm Beach, Florida 33401

Eliot Bernstein (U.S. Mail)  
2753 NW 34<sup>th</sup> Street  
Boca Raton, Florida 33434

Lisa Sue Friedstein (U.S. Mail)  
2142 Churchill Lane  
Highland Park, Illinois 60035

Pamela Beth Simon (U.S. Mail)  
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Chicago, Illinois 60611

Jill Iantoni (U.S. Mail)  
2101 Magnolia Lane  
Highland Park, Illinois 60035

Donald R. Tescher (E-mail)  
4855 Technology Way, Suite 720  
Boca Raton, Florida 33431

Mark R. Manceri, Esq. (E-mail)  
Mark. R. Manceri, P.A.  
2929 East Commercial Boulevard, Ste. 702  
Fort Lauderdale, Florida 33308

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

PROBATE DIV.

CASE NO.: 50 2012 CP 004391 XXXX SB

IN RE: ESTATE OF SIMON L. BERNSTEIN,  
Deceased.

---

**ORDER ON "INTERESTED PERSON" WILLIAM STANSBURY'S  
MOTION FOR THE APPOINTMENT OF A CURATOR  
OR SUCCESSOR PERSONAL REPRESENTATIVE**

THIS CAUSE came on to be heard by this Honorable Court on Wednesday, February 19, 2014, on the Motion of William Stansbury, as an "Interested Person" in the Estate, For the Appointment of a Curator or Successor Personal Representative, and the Court having received evidence, reviewed the file, heard argument of counsel, and being otherwise duly advised in the premises, it is

ORDERED and ADJUDGED:

1. The Motion of William Stansbury is hereby granted.
2. The Court hereby appoints Benjamin Brown, Esq., Matwiczuk & Brown, LLP, 625 No. Flagler Drive, Suite 401, West Palm Beach, FL 33401 as Curator of this Estate pursuant to §733.501 Fla. Stat. (2013) and Florida Probate Rule 5.122(a).
3. Reasonable fees for the Curator are capped at \$350.00 per hour.

EXHIBIT "B"

2/25/14



4. Fee payments will be made in \$5,000.00 increments. Any fee requests in excess of that amount for any given period will require a court hearing.

5. In accordance with §733.501(2) Fla. Stat. (2013), bond is hereby set in the amount of \$ none.

DONE and ORDERED in West Palm Beach, Palm Beach County, Florida on this \_\_\_ day of February, 2014.

**SIGNED & DATED**  
MARTIN COLIN  
Circuit Court Judge FEB 25 2014  
JUDGE MARTIN H. COLIN

*Copies to:*

Alan Rose, Esq., PAGE, MRACHEK, 505 So. Flagler Drive, Suite 600, West Palm Beach, FL 33401, [arose@pm-law.com](mailto:arose@pm-law.com) and [mchandler@pm-law.com](mailto:mchandler@pm-law.com);

John Pankauski, Esq., PANKAUSKI LAW FIRM, 120 So. Olive Avenue, Suite 701, West Palm Beach, FL 33401, [courtfilings@pankauskilawfirm.com](mailto:courtfilings@pankauskilawfirm.com);

Peter M. Feaman, Esq., PETER M. FEAMAN, P.A., 3615 W. Boynton Beach Blvd., Boynton Beach, FL 33436, [service@feamanlaw.com](mailto:service@feamanlaw.com);

Eliot Bernstein, 2753 NW 34<sup>th</sup> Street, Boca Raton, FL 33434, [iviewit@iviewit.tv](mailto:iviewit@iviewit.tv);

William H. Glasko, Esq., Golden Cowan, P.A., Palmetto Bay Law Center, 17345 S. Dixie Highway, Palmetto Bay, FL 33157, [bill@palmettobaylaw.com](mailto:bill@palmettobaylaw.com).

LAW OFFICES

TESCHER & SPALLINA, P.A.

BOCA VILLAGE CORPORATE CENTER I  
4855 TECHNOLOGY WAY, SUITE 720  
BOCA RATON, FLORIDA 33431

ATTORNEYS  
DONALD R. TESCHER  
ROBERT L. SPALLINA  
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TEL 561-997-7008  
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TOLL FREE: 888-997-7008  
WWW.TESCHERSPALLINA.COM

SUPPORT STAFF  
DIANE DUSTIN  
KIMBERLY MORAN  
SUANN TESCHER

December 6, 2012

VIA FACSIMILE: 803-333-4936

Attn: Bree  
Claims Department  
Heritage Union Life Insurance Company  
1275 Sandusky Road  
Jacksonville, FL 62651

Re: Insured: Simon L. Bernstein  
Contract No.: 1009208

Dear Bree:

As per our earlier telephone conversation:

- We are unable to locate the Simon Bernstein Irrevocable Insurance Trust dated June 1, 1995, which we have spent much time searching for.
- Mrs. Shirley Bernstein was the initial beneficiary of the 1995 trust, but predeceased Mr. Bernstein.
- The Bernstein children are the secondary beneficiaries of the 1995 trust.
- We are submitting the Letters of Administration for the Estate of Simon Bernstein showing that we are the named Personal Representatives of the Estate.
- We would like to have the proceeds from the Heritage policy released to our firm's trust account so that we can make distributions amongst the five Bernstein children.
- If necessary, we will prepare for Heritage an Agreement and Mutual Release amongst all the children.
- We are enclosing the SS4 signed by Mr. Bernstein in 1995 to obtain the EIN number for the 1995 trust.

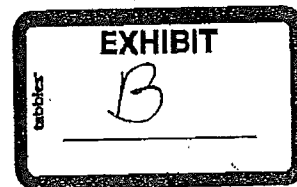
If you have any questions with regard to the foregoing, please do not hesitate to contact me.

Sincerely,

*Robert L. Spallina/km*  
ROBERT L. SPALLINA

RLS/km

Enclosures





FROM: Peter M. Feaman P.A. 7345654 TO: 2741418 05/23/2014 10:43:47 #/7697 P.003/006

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

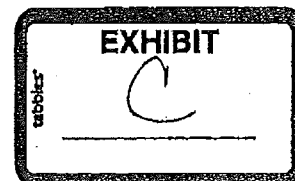
IN RE: CASE NO.: 50 2012 CP 004391 XXXX SB  
PROBATE DIV.  
ESTATE OF SIMON L. BERNSTEIN,  
Deceased.

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

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

ORDERED and ADJUDGED that

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





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

CASE NO. 502012CP004391XXXXNB-IH

Plaintiff: In Re: Estate of: Simon L. Bernstein

Defendant: N/A

Item: CERTIFIED COPY OF INTERVENOR  
COMPLAINT BY BENJAMIN P. BROWN FOR  
ESTATE OF SIMON L. BERNSTEIN-CHICAGO  
LITIGATION

Filed by the:  PLAINTIFF  
 DEFENDANT  
 COURT

FOR IDENTIFICATION as exhibit # 3

DO NOT WRITE BELOW THIS LINE - FOR COURT USE ONLY

ADMITTED INTO EVIDENCE AS exhibit # 3  
this date \_\_\_\_\_

SHARON R. BOCK, Clerk & Comptroller

By: \_\_\_\_\_ D.C.

*United States District Court*  
*Northern District of Illinois*  
*Eastern Division*

I, Thomas G. Bruton, Clerk of the United States District Court for the Northern District of Illinois, do hereby attest and certify that the annexed document(s) is (are) a full, true, and correct copy of the original(s) on file in my office and in my legal custody.

IN TESTIMONY WHEREOF:

I have hereunto subscribed my name and affixed the seal of the  
foresaid court at Chicago, Illinois, on FEB 03 2017.

THOMAS G. BRUTON, CLERK

By: Yulonda Thomas  
Deputy Clerk

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

|                               |   |                    |
|-------------------------------|---|--------------------|
| SIMON BERNSTEIN IRREVOCABLE   | ) |                    |
| INSURANCE TRUST DTD 6/21/95,  | ) |                    |
|                               | ) |                    |
| Plaintiff,                    | ) |                    |
|                               | ) | Case No. 13 C 3643 |
| v.                            | ) |                    |
|                               | ) | Judge Amy St. Eve  |
|                               | ) |                    |
| HERITAGE UNION LIFE INSURANCE | ) |                    |
| COMPANY,                      | ) |                    |
|                               | ) |                    |
| Defendant.                    | ) |                    |

**ORDER**

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

**STATEMENT**

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

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

**BACKGROUND**

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

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

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

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

### LEGAL STANDARD

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



## ANALYSIS

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

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

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

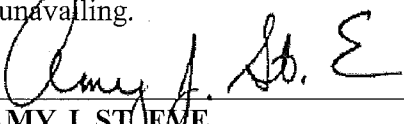
Further, Plaintiffs take issue with the fact that William E. Stansbury, who brought an unsuccessful motion to intervene in January 2014, filed a petition in the Florida probate court for an administrator ad litem and is paying costs and legal fees for the present motion to intervene. Based on Stansbury's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

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

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

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

**Dated:** July 28, 2014

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

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

CASE NO. 502012CP004391XXXXNB-IH  
Plaintiff: In Re: Estate of: Simon L. Bernstein  
Defendant: N/A  
Item: CERTIFIED COPY OF ORDER ON  
BENJAMIN P. BROWN'S MOTION TO  
INTERVENE-CHICAGO LITIGATION

Filed by the:  PLAINTIFF  
 DEFENDANT  
 COURT

FOR IDENTIFICATION as exhibit # 4

DO NOT WRITE BELOW THIS LINE - FOR COURT USE ONLY

ADMITTED INTO EVIDENCE AS exhibit # 4  
this date \_\_\_\_\_

SHARON R. BOCK, Clerk & Comptroller  
By: \_\_\_\_\_

D.C.

***United States District Court***  
*Northern District of Illinois*  
*Eastern Division*

I, Thomas G. Bruton, Clerk of the United States District Court for the Northern District of Illinois, do hereby attest and certify that the annexed document(s) is (are) a full, true, and correct copy of the original(s) on file in my office and in my legal custody.

**IN TESTIMONY WHEREOF:**

I have hereunto subscribed my name and affixed the seal of the  
foresaid court at Chicago, Illinois, on FEB 03 2017.

THOMAS G. BRUTON, CLERK

By: Yulanda Thomas  
Deputy Clerk

NOW COMES Benjamin P. Brown, as Curator and *Administrator Ad Litem* of the Estate of Simon L. Bernstein (“Brown”), by and through his undersigned counsel, and states as follows for his Complaint for Declaratory Judgment pursuant to Fed. R. Civ. P. 57 against the purported Simon Bernstein Irrevocable Trust DTD 6/21/95 (the “Trust”) and Heritage Union Life Insurance Company:

### INTRODUCTION

1. This declaratory judgment action is filed pursuant to Fed. R. Civ. P. 57 and seeks a declaration that there exists no designated beneficiary of the life insurance policy proceeds at issue in the instant action and that the proceeds of the policy must be paid to the Estate of Simon Bernstein, currently pending in the Circuit Court of Palm Beach County, Florida.

### PARTIES AND JURISDICTION

2. Benjamin P. Brown is an Intervening Party pursuant to Fed. R. Civ. P. 24 and is a resident of Palm Beach County, Florida.

3. The purported Simon Bernstein Irrevocable Insurance Trust is alleged in Plaintiff’s original Complaint to have been established in Chicago, Illinois.

4. Heritage Union Life Insurance Company, a Minnesota corporation, is the successor corporation to the insurer that issued the life insurance policy (the “Policy”) at issue in the instant litigation.

5. The death benefit payable under the Policy exceeds \$1 million dollars.

6. This Court has jurisdiction over this matter in that it is a civil action wherein the parties are all citizens of different states and the amount in controversy exceeds \$75,000.00. 28 U.S.C. §1332(a).

### BACKGROUND

7. Simon L. Bernstein, a resident of Florida, died in September of 2012. His estate was admitted to probate in Palm Beach County, Florida on October 2, 2012. Letters of Curatorship in favor of Benjamin Brown were issued on March 11, 2014. (A copy of the Letters of Curatorship filed in the Probate Court is attached hereto as Exhibit A).

8. At the time of Simon Bernstein's death, there was in effect a life insurance policy issued by Capitol Bankers Life Insurance Company as policy number 1009208 (the "Policy"). The Policy's current proceeds are \$1,689,070.00, less an outstanding loan. (See Dkt. No. 17 at ¶17).

9. After Mr. Bernstein's death, several of his children filed a Complaint in the Circuit Court of Cook County claiming a right to the proceeds of the Policy as alleged beneficiaries under a purported trust they describe as the "Simon Bernstein Irrevocable Insurance Trust" (the "Trust"). The Bernstein children acknowledge that they have been unable to produce an executed Trust document under which they assert their rights. (See letter of Third Party Defendant Robert Spallina, Esq. to Defendant Heritage Union Life Insurance Company, attached as Exhibit B).

10. Defendant, Heritage Union Life Insurance Company, as successor to Capitol Bankers Life Insurance Company, removed the case to this Court on June 26, 2013 and filed an Interpleader action pursuant to 28 U.S.C. § 1335(a), in conjunction with its Answer to Plaintiff's Complaint. (See Dkt. No. 17). In its Complaint for Interpleader, Heritage asserts the following:

"Presently the Bernstein Trust has not been located. Accordingly [Defendant] is not aware whether the Bernstein Trust even exists, and if it does whether its title is the "Simon Bernstein Trust, N.A.," as listed as the Policy's contingent beneficiary (or otherwise), and/or if Ted Bernstein is in fact its trustee. In conjunction, [Defendant] has received conflicting claims as to whether Ted Bernstein had authority to file the instant suit on behalf of the Bernstein Trust."

(Dkt. No. 17 at ¶20).

11. On May 23, 2014, Mr. Brown was appointed *Administrator Ad Litem* to act on behalf of the Estate of Simon L. Bernstein (the "Estate") and, more specifically, directed by the Probate Court in Palm Beach County "to assert the interests of the Estate in the Illinois Litigation involving life insurance proceeds on the Decedent's life." (A copy of the Order Appointing Administrator Ad Litem is attached hereto as Exhibit C).

12. Plaintiff cannot prove the existence of a Trust document; cannot prove that a trust was ever created; thus, cannot prove the existence of the Trust nor its status as purported beneficiary of the Policy. In the absence of a valid Trust and designated beneficiary, the Policy proceeds are payable to Petitioner, the Estate of Simon Bernstein, as a matter of both Illinois and Florida law. *See New York Life Ins. Co. v. RAK*, 180 N.E. 2d 470 (Ill. 1962) (where beneficiary no longer existed, proceeds of life insurance policy passed to the decedent's estate); *Harris v. Byard*, 501 So.2d 730 (Fla. Dist. Ct. App. 1987) (in the absence of a named beneficiary, no basis in law for directing payment of insurance policy proceeds to anyone other than decedent's estate for administration and distribution).

13. Intervenor Benjamin P. Brown seeks a judgment from this Court declaring that no valid beneficiary is named under the Policy and that the proceeds of the Policy must therefore be paid to the Estate.

WHEREFORE, Intervenor, Benjamin P. Brown, as Curator and *Administrator Ad Litem* on behalf of the Estate of Simon L. Bernstein, requests this Court to enter judgment as follows:

- A. Declare that there is no valid beneficiary designated under the Policy;
- B. Declare that the proceeds of the Policy are payable to the Estate of Simon Bernstein;

C. For Intervenor's costs and expenses incurred herein, including reasonable attorneys' fees, and such other and further relief as this Court deems just and proper.

Dated: June 5, 2014

Respectfully submitted,

/s/ James J. Stamos

One of the attorneys for Proposed Intervenor,  
Benjamin P. Brown, Curator and Administrator Ad  
Litem on behalf of the Estate of Simon L. Bernstein

James J. Stamos (ARDC 03128244)  
Kevin P. Horan (ARDC 06310581)  
STAMOS & TRUCCO LLP  
One East Wacker Drive, Third Floor  
Chicago, IL 60601  
Telephone: (312) 630-7979  
Facsimile: (312) 630-1183



**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on June 5, 2014, I electronically filed the foregoing with the Clerk of the Court using CM/ECF. I also certify that the foregoing is being served this day on all counsel of record identified below via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner.

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

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

IN RE: ESTATE OF SIMON L. BERNSTEIN,  
Deceased.

LETTERS OF CURATORSHIP IN FAVOR OF BENJAMIN BROWN

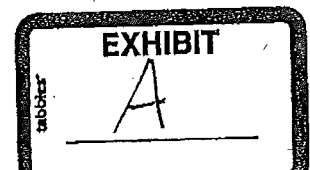
WHEREAS, Co-Personal Representatives of the Estate of Simon L. Bernstein were permitted to resign by Order of this Court on February 18, 2014. A copy of the Order is attached hereto as Exhibit "A"; and

WHEREAS, this Court found it necessary for the appointment of a Curator and appointed Benjamin Brown, Esq. as Curator of this Estate on February 25, 2014. A copy of the Order is attached hereto as Exhibit "B"; and

WHEREAS Benjamin Brown as Curator appointed by Order of this Court has performed all acts prerequisite to the issuance of Letters of Curatorship as a legally qualified Curator of the Estate of Simon L. Bernstein;

NOW, THEREFORE, I the undersigned Circuit Judge do grant Benjamin Brown (hereinafter Curator), the Curatorship of the Estate of Simon L. Bernstein with the following powers:

- (a) To collect and preserve assets of the Estate;
- (b) To administer the assets of the Estate;
- (c) To evaluate all discovery requests related to the Decedent for the purposes of asserting objections and privileges on behalf of the Estate, if necessary;
- (d) To appear on behalf of the Estate in the following two cases: Case No. 502012CA013933 (Circuit Court, Palm Beach County, FL) and Case No. 13CV3643 (U.S. Dist. Ct. Northern Dist.,



Illinois),

Further, pursuant to Fla. Stat. §733.603, Curator shall proceed expeditiously with the duties described herein and except as otherwise specified by the Florida Probate Code, or ordered by the Court, shall do so without adjudication, Order or direction of the Court. The Curator may invoke the jurisdiction of this Court to resolve questions concerning the Estate or its administration.

DONE AND ORDERED in Chambers at Delray Beach, Palm Beach County, Florida, this \_\_\_\_\_ day of March, 2014.

SIGNED & DATED

Martin Colin, Circuit Judge

JUDGE MARTIN H. COLIN

Copies furnished to:

Alan Rose, Esq., PAGE, MRACHEK, 505 So. Flagler Drive, Suite 600, West Palm Beach, FL 33401, [arose@pm-law.com](mailto:arose@pm-law.com) and [mchandler@pm-law.com](mailto:mchandler@pm-law.com);

John Pankauski, Esq., PANKAUSKI LAW FIRM, 120 So. Olive Avenue, Suite 701, West Palm Beach, FL 33401, [courtfilings@pankauskilawfirm.com](mailto:courtfilings@pankauskilawfirm.com);

Peter M. Feaman, Esq., PETER M. FEAMAN, P.A., 3615 W. Boynton Beach Blvd., Boynton Beach, FL 33436, [service@feamanlaw.com](mailto:service@feamanlaw.com);

Eliot Bernstein, 2753 NW 34<sup>th</sup> Street, Boca Raton, FL 33434, [iviewit@iviewit.tv](mailto:iviewit@iviewit.tv);

William H. Glasko, Esq., Golden Cowan, P.A., Palmetto Bay Law Center, 17345 S. Dixie Highway, Palmetto Bay, FL 33157, [bill@palmettobaylaw.com](mailto:bill@palmettobaylaw.com).

IN THE CIRCUIT COURT FOR PALM BEACH COUNTY, FL

IN RE: ESTATE OF SIMON L. BERNSTEIN,

PROBATE DIVISION

Deceased.

CASE NO. 502012CP004391XXXXSB

ELIOT IVAN BERNSTEIN, PRO SE

DIVISION: IY (COLIN)

Petitioner

vs.

TESCHER & SPALLINA, P.A., (and all parties, associates and of counsel); ROBERT L. SPALLINA (both personally and professionally); DONALD R. TESCHER (both personally and professionally); THEODORE STUART BERNSTEIN (as alleged personal representative, trustee, successor trustee) (both personally and professionally); et. al.

Respondents.

ORDER ON PETITION FOR RESIGNATION AND DISCHARGE

This cause was heard by the Court on the co-Personal Representatives' Petition for Resignation and Discharge on February 18, 2014, and the Court, having heard arguments of counsel, and otherwise being fully advised in the premises, ORDERS AND ADJUDGES AS FOLLOWS:

1. The Petitioners' request to accept their resignation is ACCEPTED. The co-Personal Representatives' Letters of Administration are hereby revoked.

2. ~~Within 30 days of the date of this order or the appointment of a successor fiduciary,~~ <sup>BY MARCH 4, 2014</sup> ~~from the later of the date of this order or the appointment of a successor fiduciary,~~ the resigning co-Personal Representatives shall deliver to the successor fiduciary all property of the Estate, real, personal, tangible or intangible, all of the documents and records of the Estate and all records associated with any property of the Estate, regardless of whether such property has been previously distributed, transferred, abandoned or otherwise disposed of. (HKE)

3. The Petitioners' request to reserve ruling on their discharge is ACCEPTED.

4. The resigning co-Personal Representatives shall file an accounting and a Renewed Petition for Discharge within sixty (60) days after the date hereof, which Renewed Petition for Discharge shall be verified and recite that the letters of administration have been revoked, the resigning co-Personal Representatives have surrendered all undistributed Estate assets, records, documents, papers and other property of or concerning the Estate to the successor fiduciary as set forth above, and the amount of compensation paid or to be paid by the resigning co-Personal Representatives pursuant to Probate Rule 5.430(g). Such accounting shall include cash and transactions from the commencement of administration of the Estate and ending as of the date the accounting is submitted.

5. The resigning co-Personal Representatives shall serve notice of filing and a copy of the accounting and Renewed Petition for Discharge on all interested parties and the notice shall state that the objection to the Renewed Petition for Discharge must be filed within thirty days after the later of service of the petition or service of the accounting on that interested person pursuant to Probate Rule 5.430(i).

6. The successor Personal Representative or Curator is authorized to pay a \$ \_\_\_\_\_ retained to the accountant whom the Successor Personal Representative or Curator selects to provided the accounting which this Order requires. The accountant's hourly rate and compensation shall be subject to court approval.

*WTR*  
*THE COURT NEEDS TO ENFORCE THIS ORDER.*

DONE AND ORDERED in Delray Beach, Florida; this 18 day of Feb, 2014.

*[Signature]*  
Circuit Judge

cc: Parties on attached service list

SERVICE LIST

Theodore Stuart Bernstein (e-mail)  
Life Insurance Concepts  
950 Peninsula Corporate Circle, Suite 3010  
Boca Raton, Florida 33487

Alan B. Rose, Esq. (E-mail)  
Page Mrachek Fitzgerald Rose Konopka &  
Dow PA  
505 S Flagler Dr Ste 600  
West Palm Beach, Florida 33401

Eliot Bernstein (U.S. Mail)  
2753 NW 34<sup>th</sup> Street  
Boca Raton, Florida 33434

Lisa Sue Friedstein (U.S. Mail)  
2142 Churchill Lane  
Highland Park, Illinois 60035

Pamela Beth Simon (U.S. Mail)  
950 North Michigan Avenue, Suite 2603  
Chicago, Illinois 60611

Jill Iantoni (U.S. Mail)  
2101 Magnolia Lane  
Highland Park, Illinois 60035

Donald R. Tescher (E-mail)  
4855 Technology Way, Suite 720  
Boca Raton, Florida 33431

Mark R. Manceri, Esq. (E-mail)  
Mark R. Manceri, P.A.  
2929 East Commercial Boulevard, Ste. 702  
Fort Lauderdale, Florida 33308

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

PROBATE DIV.

CASE NO.: 50 2012 CP 004391 XXXX SB

IN RE: ESTATE OF SIMON L. BERNSTEIN,  
Deceased.

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**ORDER ON "INTERESTED PERSON" WILLIAM STANSBURY'S  
MOTION FOR THE APPOINTMENT OF A CURATOR  
OR SUCCESSOR PERSONAL REPRESENTATIVE**

THIS CAUSE came on to be heard by this Honorable Court on Wednesday, February 19, 2014, on the Motion of William Stansbury, as an "Interested Person" in the Estate, For the Appointment of a Curator or Successor Personal Representative, and the Court having received evidence, reviewed the file, heard argument of counsel, and being otherwise duly advised in the premises, it is

ORDERED and ADJUDGED:

1. The Motion of William Stansbury is hereby granted.
2. The Court hereby appoints Benjamin Brown, Esq., Matwiczuk & Brown, LLP, 625 No. Flagler Drive, Suite 401, West Palm Beach, FL 33401 as Curator of this Estate pursuant to §733.501 Fla. Stat. (2013) and Florida Probate Rule 5.122(a).
3. Reasonable fees for the Curator are capped at \$350.00 per hour.

EXHIBIT "B"

2/25/14

4. Fee payments will be made in \$5,000.00 increments. Any fee requests in excess of that amount for any given period will require a court hearing.

5. In accordance with §733.501(2) Fla. Stat. (2013), bond is hereby set in the amount of \$ None.

DONE and ORDERED in West Palm Beach, Palm Beach County, Florida on this \_\_\_ day of February, 2014.

**SIGNED & DATED**  
MARTIN COLIN  
Circuit Court Judge FEB 25 2014  
JUDGE MARTIN H. COLIN

*Copies to:*

Alan Rose, Esq., PAGE, MRACHEK, 505 So. Flagler Drive, Suite 600, West Palm Beach, FL 33401, [arose@pm-law.com](mailto:arose@pm-law.com) and [mchandler@pm-law.com](mailto:mchandler@pm-law.com);

John Pankauski, Esq., PANKAUSKI LAW FIRM, 120 So. Olive Avenue, Suite 701, West Palm Beach, FL 33401, [courtfilings@pankauskilawfirm.com](mailto:courtfilings@pankauskilawfirm.com);

Peter M. Feaman, Esq., PETER M. FEAMAN, P.A., 3615 W. Boynton Beach Blvd., Boynton Beach, FL 33436, [service@feamanlaw.com](mailto:service@feamanlaw.com);

Eliot Bernstein, 2753 NW 34<sup>th</sup> Street, Boca Raton, FL 33434, [iviewit@iviewit.tv](mailto:iviewit@iviewit.tv);

William H. Glasko, Esq., Golden Cowan, P.A., Palmetto Bay Law Center, 17345 S. Dixie Highway, Palmetto Bay, FL 33157, [bill@palmettobaylaw.com](mailto:bill@palmettobaylaw.com).



LAW OFFICES

TESCHER & SPALLINA, P.A.

BOCA VILLAGE CORPORATE CENTER I  
4855 TECHNOLOGY WAY, SUITE 720  
BOCA RATON, FLORIDA 33431

ATTORNEYS

DONALD R. TESCHER  
ROBERT L. SPALLINA  
LAUREN A. GALVANI

TEL 561-997-7008  
FAX: 561-997-7308  
TOLL FREE: 888-997-7008  
WWW.TESCHERSPALLINA.COM

SUPPORT STAFF  
DIANE DUSTIN  
KIMBERLY MORAN  
SUANN TESCHER

December 6, 2012

VIA FACSIMILE: 803-333-4936

Attn: Bree  
Claims Department  
Heritage Union Life Insurance Company  
1275 Sandusky Road  
Jacksonville, FL 62651

Re: Insured: Simon L. Bernstein  
Contract No.: 1009208

Dear Bree:

As per our earlier telephone conversation:

- We are unable to locate the Simon Bernstein Irrevocable Insurance Trust dated June 1, 1995, which we have spent much time searching for.
- Mrs. Shirley Bernstein was the initial beneficiary of the 1995 trust, but predeceased Mr. Bernstein.
- The Bernstein children are the secondary beneficiaries of the 1995 trust.
- We are submitting the Letters of Administration for the Estate of Simon Bernstein showing that we are the named Personal Representatives of the Estate.
- We would like to have the proceeds from the Heritage policy released to our firm's trust account so that we can make distributions amongst the five Bernstein children.
- If necessary, we will prepare for Heritage an Agreement and Mutual Release amongst all the children.
- We are enclosing the SS4 signed by Mr. Bernstein in 1995 to obtain the EIN number for the 1995 trust.

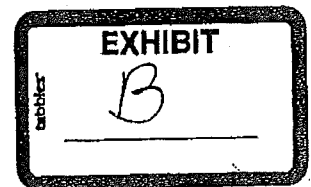
If you have any questions with regard to the foregoing, please do not hesitate to contact me.

Sincerely,

*Robert L. Spallina/km*  
ROBERT L. SPALLINA

RLS/km

Enclosures



FROM: Peter M. Feaman P.A. 7345654 TO: 2741410 05/23/2014 10:43:41 #17697 P.003/006

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

IN RE:

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

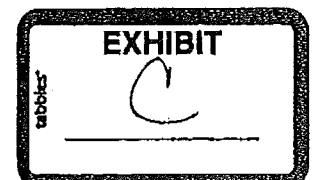
ESTATE OF SIMON L. BERNSTEIN,  
Deceased.

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

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

ORDERED and ADJUDGED that

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




10/06/14 10:44:01 #17897 P.004/006

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

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

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

  
MARTIN COLIN  
Circuit Court Judge

*Copies to:*

Alan Ross, Esq., PAGE, MRACHIEK, 505 So. Flagler Drive, Suite 600, West Palm Beach, FL 33401, [alan@pm-law.com](mailto:alan@pm-law.com) and [mehandler@pm-law.com](mailto:mehandler@pm-law.com);  
John Pankowski, Esq., PANKAUSKI LAW FIRM, 120 So. Olive Avenue, Suite 701, West Palm Beach, FL 33401, [john@pankowskilawfirm.com](mailto:john@pankowskilawfirm.com);  
Peter M. Framan, Esq., PETER M. FRAMAN, P.A., 3615 W. Boynton Beach Blvd., Boynton Beach, FL 33436, [service@framanllp.com](mailto:service@framanllp.com);  
Elliot Bernstein, 2753 NW 34<sup>th</sup> Street, Boca Raton, FL 33434, [eb@elliottbernst.com](mailto:eb@elliottbernst.com);  
William H. Glasko, Esq., Golden Cowan, P.A., Palmetto Bay Law Center, 17345 S. Dixie Highway, Palmetto Bay, FL 33157, [bill@palmettobaylaw.com](mailto:bill@palmettobaylaw.com);  
John P. Morrissey, Esq., 330 Clematis St., Suite 213, West Palm Beach, FL 33401, [john@jpmorrisseyllp.com](mailto:john@jpmorrisseyllp.com);  
Benjamin P. Brown, Esq., Matwiorzyk & Brown, LLP, 625 No. Flagler Drive, Suite 401, West Palm Beach, FL 33401, [bbrown@matwiorzyk.com](mailto:bbrown@matwiorzyk.com)

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

CASE NO. 502012CP004391XXXXNB-IH

Plaintiff: In Re: Estate of: Simon L. Bernstein

Defendant: N/A

Item: CERTIFIED COPY OF INTERVENOR  
COMPLAINT BY BENJAMIN P. BROWN FOR  
ESTATE OF SIMON L. BERNSTEIN-CHICAGO  
LITIGATION

Filed by the:  PLAINTIFF  
 DEFENDANT  
 COURT

FOR IDENTIFICATION as exhibit # 3

DO NOT WRITE BELOW THIS LINE - FOR COURT USE ONLY

ADMITTED INTO EVIDENCE AS exhibit # 3  
this date \_\_\_\_\_

SHARON R. BOCK, Clerk & Comptroller

By: \_\_\_\_\_ D.C.

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

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

Plaintiff,

v. Case No. 13 cv 3643  
HERITAGE UNION LIFE INSURANCE  
COMPANY,

Defendant,

HERITAGE UNION LIFE INSURANCE  
COMPANY,

Counter-Plaintiff

v.

SIMON BERNSTEIN IRREVOCABLE  
INSURANCE TRUST DTD 6/21/95  
Counter-Defendant

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

1 APPEARANCES

2 ON BEHALF OF TED BERNSTEIN:

3 ADAM M. SIMON, ESQ.  
4 THE SIMON LAW FIRM  
5 303 East Wacker Drive  
6 Suite 2725  
7 Chicago, Illinois 60601

8 ALAN B. ROSE, ESQ.  
9 MRACHEK, FITZGERALD, ROSE, KONOPKA,  
10 THOMAS & WEISS, P.A.  
11 505 South Flagler Drive  
12 Suite 600  
13 West Palm Beach, Florida 33401

14 ON BEHALF OF THE ESTATE OF SIMON BERNSTEIN:

15 JAMES J. STAMOS, ESQ.  
16 KEVIN P. HORAN, ESQ.  
17 STAMOS & TRUCCO, LLP  
18 One East Wacker Drive  
19 Suite 300  
20 Chicago, Illinois 60601

21 ELIOT BERNSTEIN, PRO SE  
22 2753 NW 34th Street  
23 Boca Raton, Florida 33434

24 ALSO PRESENT: William Stansbury  
25 Candice Bernstein (as noted)

1 ELIOT IVAN BERNSTEIN,  
2 Cross-Plaintiff

v.

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

8 and,

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

22 Third-Party Defendants.

23 DEPOSITION OF  
24 TED BERNSTEIN  
25 Taken on behalf of the Estate of Simon Bernstein

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

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

1 INDEX

| 2 Witness                  | Direct | Cross | Redirect | Recross |
|----------------------------|--------|-------|----------|---------|
| 3 Ted Bernstein            |        |       |          |         |
| 4 (By Mr. Stamos)          | 6      |       | 118, 120 |         |
| 5 (By Mr. Eliot Bernstein) | 94     |       | 115, 121 |         |
| 6 (By Mr. Simon)           | 113    |       | 119      |         |

8 EXHIBITS

| 10 Exhibit | Description                                     | Page |
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| 12 2       | Email chain Bates stamped TS4489 through TS4492 | 50   |
| 13 3       | Email from Pam Simon dated December 6, 2012     | 54   |
| 14 4       | Email chain Bates stamped BT67 through BT70     | 55   |
| 15 5       | Email chain Bates stamped BT65 through BT66     | 57   |
| 16 8       | Email chain Bates stamped BT48 through BT50     | 58   |
| 17 9       | Email chain Bates stamped BT51 through BT52     | 59   |
| 18 10      | Email chain Bates stamped BT47                  | 60   |
| 19 11      | Email chain Bates stamped TS4464 through TS4466 | 62   |



| Exhibit | Description   | Page |
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| 14      | Email chain Bates stamped TS6578 through TS6579   | 66   |
| 15      | Email chain Bates stamped TS6508 through TS6512   | 67   |
| 16      | Email chain Bates stamped TS5252 through TS5255   | 69   |
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| 19      | Affidavit of Ted Bernstein  | 11   |
| 21      | Trust draft Bates stamped BT2 through BT12  | 13   |
| 22      | Trust draft Bates stamped BT13 through BT21   | 13   |
| 23      | Simon Bernstein 2000 Insurance Trust dated August 15, 2000                                | 77   |
| 24      | Simon L. Bernstein Amended and Restated Trust Agreement                                   | 78   |
| 25      | Simon L. Bernstein Irrevocable Trust Agreement  | 78   |
| 26      | Document titled "Text of Pam's Notes 1 & 2" with two pages and handwritten notes attached | 90   |
| A       | Palm Beach County Sheriff's Office Offense Report   | 108  |
|         | ---   |      |

5

1 a lot of detail, but what was the nature of it? Was it  
2 mostly life insurance?  
3 A Yes, it was.  
4 Q Do you hold a license of any kind in Florida?  
5 A I do.  
6 Q What kind of license do you hold?  
7 A A life insurance license: Life, accident and  
8 health insurance.  
9 Q Do you hold a license in any other state?  
10 A I believe I do.  
11 Q What other state or states?  
12 A I can't remember off the top of my head.  
13 Q What are the candidates for states in which  
14 you might hold a license?  
15 MR. SIMON: Objection; speculation.  
16 You can answer.  
17 A I can't -- I really can't remember. There's a  
18 lot of states, and at different times we will do  
19 business in those states and get a nonresident license.  
20 I really can't remember.  
21 Q Let me ask you this: Did you ever have a  
22 resident license in any other state?  
23 A I did.  
24 Q What state is that?  
25 A Illinois.

7

1 THE COURT REPORTER: Do you swear or affirm  
2 that the testimony you're about to give will be the  
3 truth, the whole truth, and nothing but the truth?  
4 THE WITNESS: I do.  
5 DIRECT EXAMINATION  
6 BY MR. STAMOS:  
7 Q State your name for the record, please.  
8 A Ted Bernstein.  
9 Q Where do you reside, Mr. Bernstein?  
10 A 880 Berkeley Street, Boca Raton, Florida.  
11 Q Where are you employed?  
12 A In Boca Raton, Florida.  
13 Q What's the entity that employs you?  
14 A Life Insurance Concepts.  
15 Q How long have you been in that business?  
16 A Approximately 15, 16, 17 years.  
17 Q Were you engaged in the insurance business  
18 before working with Life Concepts?  
19 A I was in the insurance business before.  
20 Q With who?  
21 A Primarily for myself.  
22 Q Were you employed by yourself or were you an  
23 employee of some other person or entity?  
24 A I was employed by companies that I set up.  
25 Q Can you just tell me generally -- I don't need

6

1 Q Is that license still active?  
2 A My resident license is not.  
3 Q Okay. Has any license, resident or otherwise,  
4 in any state ever been disciplined or restricted in any  
5 way?  
6 A I don't recall. I don't think so.  
7 Q Can you tell me what status you now have with  
8 respect to the Estate of Simon Bernstein.  
9 MR. SIMON: Objection; vague.  
10 Q Do you understand my question?  
11 A I don't understand the word "status".  
12 Q Well, do you have any official role in any  
13 official capacity with regard to the estate itself or  
14 any entities or structures that relate to the estate?  
15 MR. SIMON: Objection; vague.  
16 A I believe I do; as trustee.  
17 Q Of what are you trustee?  
18 A Simon Bernstein Trust.  
19 Q What is the year of that trust?  
20 A I don't recall.  
21 Q You are also a plaintiff in the case that's  
22 pending in Chicago; is that correct?  
23 A Yes.  
24 Q So have you perceived any divergence of  
25 interest or any conflict of interest in having a role

8



1 with respect to the trust and the estate while  
2 simultaneously being a plaintiff in the case in Chicago?

3 A I do not.

4 Q As the trustee of the trust, the Simon  
5 Bernstein Trust, will the proceeds of the estate, once  
6 they are disbursed, be disbursed to that trust of which  
7 you are a trustee?

8 MR. SIMON: Objection; speculation.

9 Q To your knowledge, is that your understanding  
10 of the mechanics of it?

11 A I do believe that that's correct.

12 Q And you agree that, if you are successful as a  
13 plaintiff in the Chicago case, the amount of assets  
14 available in the estate to be disbursed to the trust of  
15 which you are a trustee will be reduced, correct?

16 A Could you -- could you ask me that in a  
17 different way?

18 Q Yes. If you are successful as a plaintiff in  
19 the Chicago case and the proceeds of the insurance  
20 policy regarding which we are all litigating is  
21 disbursed to the plaintiffs in the Chicago case, those  
22 funds will not be disbursed to the estate. You  
23 understand that?

24 A I do.

25 Q And, therefore, the estate will have less

9

1 A I'm not sure that I can recall when I first  
2 remembered when there was a trust.

3 Q Did you learn of it before or after your  
4 father passed away?

5 A Before.

6 MR. STAMOS: I just want to get oriented  
7 mechanically here. What we did was we have a bunch  
8 of exhibits that we sent down, and the court  
9 reporter was kind enough to break them into  
10 exhibits so that we could use them with some ease,  
11 I think there should be more than one set there I'm  
12 hoping. And so we'll address those in a moment.  
13 Among them would be the affidavit that was  
14 submitted in support of the Motion for Summary  
15 Judgment. I'm wondering if the court reporter  
16 could give that to the witness now, and it is  
17 Exhibit 19.

18 (Exhibit 19 was marked for identification.).

19 Q (By Mr. Stamos) Now, first of all,  
20 Mr. Bernstein, can you tell me, who drafted this  
21 affidavit?

22 A Can you explain -- help me with the term  
23 "draft"?

24 Q Who wrote it? Who created it? I'm not sure  
25 how to put it otherwise, but let's start with that.

11

1 funds to disburse to the trust of which you are a  
2 trustee. Do you understand mechanically that's what  
3 would happen in that circumstance?

4 A I -- I do.

5 Q So you don't perceive a conflict in those  
6 roles?

7 A I do not.

8 Q Okay. Now, the date of your father's death  
9 was September 13, 2012, correct?

10 A Yes.

11 Q Prior to the time that your father died, were  
12 you aware of the existence of any trust with regard to  
13 any life insurance policy?

14 MR. SIMON: Objection; vague.

15 A Can you define "existence"?

16 Q Well, when did you first learn that -- well,  
17 strike that.

18 In the lawsuit in Chicago, you're aware that  
19 the plaintiffs are promoting the notion that there is a  
20 1995 insurance trust which should receive the funds of  
21 the insurance proceeds, correct?

22 A Correct.

23 Q When did you first become aware of the  
24 existence of the trust that is being promoted as the  
25 beneficiary in the Chicago case?

10

1 A Counsel and -- and me, I guess.

2 Q Mr. Simon --

3 A Correct.

4 Q -- and you?

5 A Correct.

6 Q What did you understand the purpose of the  
7 affidavit to be?

8 A To create a record of what my understanding  
9 was of the questions being addressed here.

10 Q Now, if I could ask you, please, to look at --  
11 I think it's the -- I don't know what page it is, but  
12 it's -- I guess at the top it's Page 6 of 20, if you  
13 look up there, and paragraph 25. Do you see that?

14 A I do.

15 Q Now, that paragraph says that, "I, Ted  
16 Bernstein, as trustee of the Bernstein Trust, retained  
17 plaintiff's counsel and initiated the filing of this  
18 action."

19 Now, the first question I have for you is  
20 what's the basis for your assertion that you are the  
21 trustee of the Bernstein Trust?

22 A What is the basis of my understanding?

23 Q Yeah.

24 A I guess a couple of different things would be  
25 the basis of my understanding.

12



1 Q What are they?  
 2 A David Simon told me I was the successor  
 3 trustee.  
 4 Q Okay.  
 5 A I've seen documents that would lead me to  
 6 believe that I was a successor trustee in some of the  
 7 notes that were in the documents that I've seen.  
 8 Q What documents are those?  
 9 A Trust documents.  
 10 Q Which trust documents are you referring to?  
 11 A I'm referring to the trust document that owned  
 12 this trust. I mean owned this policy.  
 13 Q So do we share the understanding that no one  
 14 has located an executed copy of the 1995 trust?  
 15 A We do.  
 16 Q I have Exhibits 21 and 22. I would ask the  
 17 court reporter to give those to you.  
 18 (Exhibits 21 and 22 were marked for  
 19 identification.)  
 20 Q Looking at number 21, I understand this to  
 21 have been a draft of -- represented to be a draft of a  
 22 trust that was found on a computer in the Simon law  
 23 office. Have you seen this document before and is my  
 24 understanding correct as far as you know?  
 25 A 21?

13

1 Q Yeah.  
 2 (Pause.)  
 3 Q Does my question make sense or should I  
 4 restate it? It was kind of convoluted.  
 5 A Sure, please.  
 6 Q So looking at number 21, what do you  
 7 understand that to be?  
 8 A An unexecuted copy of the Irrevocable trust  
 9 agreement.  
 10 Q I'll tell you what. When we're talking about  
 11 the '95 trust, how about if we both call it the '95  
 12 trust? That way we won't confuse ourselves. Because I  
 13 think I started by not doing that, and I don't want us  
 14 confused. Okay?  
 15 A The '95 trust, certainly.  
 16 Q Have you seen this before?  
 17 A Yes, I have.  
 18 Q Is this one of the documents you're referring  
 19 to as being one of the bases for your belief that you  
 20 are the trustee of the '95 trust?  
 21 A I believe so.  
 22 Q When I look at Page 10, BT10, paragraph A  
 23 refers to the appointment of a successor trustee and it  
 24 refers to David Simon, and I'm wondering what about this  
 25 document implies to you that you would be the successor

14

1 trustee.  
 2 A Well, there's a couple of versions of this  
 3 document if my recollection is correct, and -- or maybe  
 4 not this document, but maybe forms of this document, and  
 5 in another one of the forms of this document I have seen  
 6 in this, what I believe would be the same or similar  
 7 section, some handwritten notes that listed me as a  
 8 successor trustee.  
 9 Q So, at least for our purposes, what I've shown  
 10 you as number 21 does not refer to you, correct?  
 11 A That's correct.  
 12 Q All right. We'll get back to 21.  
 13 Looking at 22 now, if you go to Page 20, I  
 14 understand, and tell me if you share this understanding,  
 15 that number 22 was a hard copy draft represented to be a  
 16 draft of the '95 trust that was found in a file  
 17 someplace in the Simon law office. Do you share that  
 18 understanding?  
 19 A I'm -- I'm not sure. Could you repeat that  
 20 for me, please?  
 21 Q Well, have you seen this before?  
 22 A I have.  
 23 Q What do you understand it to be?  
 24 A A version, another version of the -- of the  
 25 trust document, of the '95 trust.

15

1 Q It is also unexecuted, correct?  
 2 A Yes, it is.  
 3 Q When you look at Page BT20, do you see that?  
 4 A I do.  
 5 Q When you look at paragraph A under article 11,  
 6 is that the handwriting you're talking about having  
 7 seen?  
 8 A Yes, it is.  
 9 Q It says, "If for any reason --," it looks like  
 10 it says, "Shirley dead," et cetera, question mark,  
 11 right?  
 12 A Yes.  
 13 Q Then it says, "Does not continue to act as  
 14 trustee," and then it looks like it says, "Pam, Ted,"  
 15 right?  
 16 A Yes.  
 17 Q Whose handwriting is that, do you know?  
 18 A I believe it to be David's.  
 19 Q Did David ever have a conversation with you  
 20 about either of these documents, 21 or 22?  
 21 A No.  
 22 Q Other than those two documents that I've just  
 23 shown you, Exhibits 21 and 22, are you aware of any  
 24 other documents that exist that constitute drafts of the  
 25 1995 trust?

16





1 A No.  
 2 Q So, as far as you know, these are the only  
 3 drafts that are in our communal possession, correct?  
 4 A I believe so.  
 5 Q Earlier, in beginning to answer one of my  
 6 questions, you said that David Simon was a source of  
 7 your knowledge that you were the trustee. Did you ever  
 8 have a conversation with David in that regard, or  
 9 conversations?  
 10 A About him telling me that I was the successor  
 11 trustee?  
 12 Q Yes.  
 13 A Yes.  
 14 Q When was the first time you and he talked  
 15 about that?  
 16 A It was sometime after Simon's death. I would  
 17 say after Simon's death.  
 18 Q Do you have a sense for how long after Simon's  
 19 death?  
 20 A No, I really don't.  
 21 Q Who was present for that conversation?  
 22 A Other than he and me, I don't know if anybody  
 23 was.  
 24 Q What did you say to him? What did he say to  
 25 you in that conversation?

17

1 A I don't have any idea.  
 2 Q Well, did you talk about the '95 trust?  
 3 A Yes.  
 4 Q What did you say to him and what did he say to  
 5 you?  
 6 A I can't recall the specifics, but it was about  
 7 the fact that there was a trust that was unable to be  
 8 located and who the -- the trustees were, who the  
 9 successor trustees were.  
 10 I can't be more specific with you than --  
 11 than -- than that. I just don't recall, you know, the  
 12 specifics of the conversation at that point in time.  
 13 Q All right. At the point in time that you had  
 14 that conversation, did David have in his possession  
 15 either Exhibit Number 21 or Number 22, or had you seen  
 16 either of them by then?  
 17 A I don't believe so.  
 18 Q Is it fair to say that you didn't see 21 and  
 19 22 until sometime after your father died?  
 20 A That's correct.  
 21 Q Now, if you would go to -- looking back at  
 22 your exhibit now, which is number 19, if you would look  
 23 at paragraph 47. Do you see that?  
 24 A Yes.  
 25 Q Now, you describe there that you participated

18

1 in and conducted diligent searches of your father's  
 2 home, office and condominium, and some further activity  
 3 following that. Can you tell me when those searches  
 4 took place relative to his death?  
 5 A No, I can't.  
 6 Q Can you give me a time range? If you think  
 7 about the date of his death being in September, did you  
 8 do that search October, November, December?  
 9 A I really -- I don't know the dates.  
 10 Q Who else searched, or who searched with you,  
 11 if that's different?  
 12 A I don't believe that anybody else searched  
 13 with me.  
 14 Q Did anyone search separately for documents?  
 15 MR. SIMON: Object --  
 16 A No.  
 17 Q In paragraph 48 of Exhibit 19, it says, "I am  
 18 aware that the documents produced by Plaintiffs in this  
 19 matter also contain documents located by David Simon and  
 20 Pamela Simon in their offices in Chicago." Do you see  
 21 that there?  
 22 A I do.  
 23 Q When do you understand they performed a search  
 24 of their offices in Chicago for documents relative to  
 25 the dispute we're in now?

19

1 MR. SIMON: Objection; speculation.  
 2 A I have no idea.  
 3 Q Well, you said that you're aware. How were  
 4 you made aware of that fact?  
 5 A By learning of it probably from conversations.  
 6 Q Conversations with whom?  
 7 A With David Simon, I would imagine.  
 8 Q But you don't know the source -- you can't  
 9 tell me specifically the source of that information,  
 10 correct?  
 11 A Well, you're asking for dates or source?  
 12 Q Well, source is where I'm going now.  
 13 A Source, I think it was with -- with David  
 14 Simon.  
 15 Q What documents do you understand were located  
 16 and produced that were found in their offices?  
 17 MR. SIMON: Objection; speculation.  
 18 Q Well, now, let's make sure we're clear. I'm  
 19 never asking you to speculate -- there might be times  
 20 that I do ask you to speculate. Sometimes that's a  
 21 useful question to ask. So when Mr. Simon says,  
 22 "Objection; speculation," I'm asking you to tell me what  
 23 you know or you don't know or what you think. So I just  
 24 want you to be aware that I'm not asking you to take  
 25 wild guesses about things.

20



1 A Okay.  
2 Q All right?  
3 A Could you ask me that last question again,  
4 please.  
5 Q Now I forget my question.  
6 MR. SIMON: Can you read the question?  
7 MR. STAMOS: Why don't you read that question  
8 back.  
9 (Candice Bernstein enters the room.)  
10 (Read back by the reporter.)  
11 MR. SIMON: Same objection.  
12 Let's just take a one-minute break.  
13 (Recess taken.)  
14 MR. STAMOS: Was there a question pending?  
15 (Read back by the reporter.)  
16 THE WITNESS: And -- other than these  
17 documents, I would imagine, that you're asking me  
18 about?  
19 Q (By Mr. Stamos) Other than 21 and 22 you mean?  
20 A Yes.  
21 Q Yes.  
22 A Other than 21 and 22. I believe there was a  
23 document that was something to do with a filing to the  
24 IRS concerning the trust. There might have been a -- a  
25 W-9 or something. And I think that might be the extent

21

1 forth.  
2 Q It says, "In the summer of 1995, Simon  
3 Bernstein discussed with me that he was forming a life  
4 insurance trust with a policy and that I would be named  
5 one of the trustees for the life insurance trust."  
6 Now, who was present for that conversation?  
7 A Of course Simon Bernstein, my father, would  
8 have been present, but other than that I can't remember.  
9 Q After you and he talked about that in 1995,  
10 what was the next time you had any information or  
11 knowledge regarding the existence, creation, changes to,  
12 et cetera, regarding a trust in 1995, dated 1995?  
13 A I believe that would have been maybe a year, a  
14 year and a half prior to my father's death when there  
15 was a -- this -- the policy that was in this trust  
16 lapsed and there was a reinstatement matter, and about  
17 that time it would have -- it would have come up again.  
18 Q When you say, "It would have come up again,"  
19 did you have a conversation with anyone at that time  
20 about the 1995 trust? In other words --  
21 A No.  
22 Q -- at the time that you were addressing the  
23 reinstatement of the policy the year or two before he  
24 died, did you have any conversation with him, not about  
25 the reinstatement of the policy, but about the 1995

23

1 of it.  
2 Q All right. So let's then go to number 88,  
3 paragraph 88. That's page 13 of 20.  
4 A 88?  
5 Q Yes.  
6 A Okay. It's on my Page 12, but okay.  
7 Q Oh. If you look at the top, does the top say,  
8 "13 of 20"?  
9 A 13 of 20 on the top, it does.  
10 Q Yeah, I'm sorry. I think actually we had  
11 those numbered and sent to you, but the copy I had it  
12 made from was never numbered. So we'll refer to it as  
13 Page 12.  
14 A Okay.  
15 Q All right. So 88, it says here, "In 1995, I  
16 was sharing office space with Simon Bernstein in  
17 Chicago, as was your sister Pam and David."  
18 Now, first of all, during what years did you  
19 share office space with your father in Chicago?  
20 A About these times, I'm going to say shared  
21 office space in 1980 through 1995-ish.  
22 Q In 1995, did you leave for Florida?  
23 A Yes. I began --  
24 Q Okay.  
25 A Yes, I began going to Florida in 1995 back and

22

1 trust?  
2 A No.  
3 Q So any other time prior to his death that you  
4 had conversations with anyone about the 1995 trust?  
5 A No.  
6 Q Now, it says here that he told you you were  
7 going to be one of the trustees. I take it you never  
8 saw an executed trust with you -- period, correct?  
9 A Correct.  
10 Q So, therefore, you never saw an executed trust  
11 with your name on it as trustee, correct?  
12 A Not -- not that I recall.  
13 Q Well, when you had the conversation with David  
14 Simon that you described earlier in which you learned  
15 that you were the replacement -- the successor trustee,  
16 did you remember this conversation with your father, or  
17 was that a different topic because in '95 he said you  
18 would be the trustee, not a successor trustee?  
19 MR. SIMON: Objection; vague.  
20 A So the conversation with David Simon would  
21 have made perfect sense -- based on '88, would have made  
22 perfect sense when he told me that I was, you know,  
23 successor trustee.  
24 Q Right. I mean, I know it would have made  
25 perfect sense. What I'm asking you is: Did you hearken

24



1 back and say, "Oh, yeah, dad told me that," or something  
2 like that?

3 A Oh. I don't recall. I can't remember.

4 Q Then if you would go, please, to paragraph 97,  
5 it says, "Following the death of my father, my sister  
6 Pamela and brother-in-law David conducted searches of  
7 their office files and records and that's where they  
8 located the unexecuted drafts." I take that to be 21  
9 and 22, correct?

10 A Yes.

11 Q Now, referring to the metadata that is in the  
12 last sentence of that paragraph, if you would please  
13 look at Exhibit 21, let me tell you what I understand  
14 the facts to be, and tell me if you share the  
15 understanding. I always get a little confused about  
16 metadata, but where it indicates, "Wednesday June 21,  
17 1995," then says, "Modified," David's told us that's  
18 actually the date the document was created. Does that  
19 sound like your understanding?

20 MR. SIMON: Objection; speculation. This is  
21 not his database. He knows nothing about it.

22 MR. STAMOS: Adam, if you've got an objection  
23 as to form, you may do that, but I don't expect you  
24 to give answers about what he knows or he doesn't  
25 know, because the affidavit says it includes a

25

1 Q What I understand David has testified to, and  
2 I believe it's on Page 90 of his deposition, is that  
3 where it says, "Modified," that was the day it was put  
4 in the computer; where it says, "September 3rd," that  
5 was the day it was re-entered into a new database,  
6 September 3, 2004; and where it says, "September 30,  
7 2013 accessed," that's the day it was taken off of the  
8 computer and ultimately printed so that we could see it.  
9 Do you share that understanding?

10 MR. SIMON: Objection; speculation.

11 A I don't. I don't have any idea what this --  
12 all this means.

13 Q Do you know what date it was that this  
14 document, 21, was taken off of the computer?

15 A I don't.

16 Q Where paragraph 98 says, "The second draft of  
17 the Bernstein trust was located as a hard copy inside a  
18 file folder within the stored files of David Simon," do  
19 you know when that was found?

20 A Back to this document (indicating)?

21 Q Back to Exhibit Number 22, yes.

22 A Okay. Could you ask me that again, please?

23 Q Yeah. If you look at -- do you know when  
24 Exhibit Number 22 was found?

25 A I don't.

27

1 printout of metadata from the computer file for  
2 this draft indicating it was last modified on  
3 June 21st. So he's got some knowledge; otherwise,  
4 he wouldn't have signed the affidavit. So please  
5 don't tell him what he knows and doesn't know.

6 So I'm going to ask my question again.

7 Q (By Mr. Stamos) When you look at the metadata,  
8 do you understand -- this is my understanding. Do you  
9 understand that, where it says, "Modified Wednesday  
10 June 21, 1995" -- David Simon has told us that's the day  
11 that the document was created. Is that your  
12 understanding of it?

13 MR. SIMON: Objection; speculation.

14 A I just want to make sure that -- could you  
15 help me out and -- where do you want me to look at on  
16 this document in reference to what you're asking me?

17 Q On the page you're looking at, is there --  
18 Can you see this (indicating)?

19 Is there a little square box --

20 A Yes, there is.

21 Q -- rectangular box? Okay.

22 So you see those words there about -- on the  
23 second half of it, so to speak, "Created, modified,  
24 accessed"?

25 A Yes, I do now, yeah. Yes.

26

1 Q How did you learn it was found?

2 A I learned of it from conversations with David.  
3 I learned of it reading these things. I -- that's, I  
4 guess, the two ways I would have learned about it.

5 Q We're going to go through some emails in a  
6 moment, but I imagine that the discovery of those two  
7 drafts was considered to be an important step in this  
8 case for you, correct?

9 MR. SIMON: Objection; speculation.

10 Q Was it important or not?

11 A I don't know.

12 Q Did you think it was a positive development  
13 from the point of view of the lawsuit, you as a  
14 plaintiff in the Chicago lawsuit, that these documents  
15 were found?

16 MR. SIMON: Objection; relevance.

17 A I thought it was a positive development as a  
18 layperson.

19 Q How did you come to possess them so that you  
20 could look at them? Were they emailed to you from  
21 Chicago?

22 A I don't recall.

23 Q Do you recall seeing them before today,  
24 obviously?

25 A Yes.

28

Pages 25 to 28



1 Q Do you recall seeing him before the lawsuit  
2 was filed in Chicago?  
3 A I don't recall.  
4 Q Now, a couple of more things about your  
5 affidavit.  
6 Some of these things that are in here -- I'd  
7 like you, if you would, to look at paragraph 21, would  
8 you, of Exhibit Number 19. Do you see paragraph 21?  
9 A I do.  
10 Q Now, the first sentence where it says, "The  
11 Simon Bernstein Irrevocable Insurance Trust dated  
12 6/21/95 is an irrevocable life insurance trust formed in  
13 Illinois as further described below," does that assume  
14 that the trust -- your statement that it is a trust, is  
15 that based upon your understanding that it was executed?  
16 A If I'm understanding your question correctly,  
17 yes.  
18 Q What's the basis for your understanding that  
19 it was executed?  
20 A That -- number one, that David told me that it  
21 was; number two, that there were filings that had tax ID  
22 number. I believe I -- there was a form that may have  
23 been filled out for the insurance company that named the  
24 beneficiary -- I mean -- yeah, that named the life  
25 insurance trust as the beneficiary, and maybe there was

29

1 an Equifax reporting where I think Simon said --  
2 mentioned that the contingent beneficiary of the life  
3 insurance policy was an irrevocable trust, just --  
4 Q But in terms of your father having signed the  
5 document, the knowledge of that is based on what David  
6 Simon told you, correct?  
7 A Yes.  
8 Q Look if you will, at paragraph 40, which is on  
9 page -- I'm guessing 7 at the bottom.  
10 A 40?  
11 Q Yes, paragraph 40, the last line of that.  
12 Do you see that?  
13 A I do.  
14 Q It says, "The vivo was dissolved in 1998 upon  
15 dissolution of S.B. Lexington, Inc." How do you know  
16 that?  
17 A I know that from -- from David.  
18 Q Where it says, paragraph 41, "Robert Spallina,  
19 Esquire was named a third-party defendant to Eliot's  
20 claims," how do you know that?  
21 A I'm not sure how I know it. I just -- I'm not  
22 exactly sure that I even understand that question.  
23 Q You don't understand the question or the  
24 assertion in 41?  
25 A Your question of how I know something.

30

1 Q Well, how did you become aware? How did you  
2 become aware of the statement of the fact asserted in  
3 paragraph 41, that Robert Spallina, Esquire was named a  
4 third-party defendant to Eliot's claims? How do you  
5 know that to be true?  
6 A Probably from seeing documents where he was a  
7 named defendant.  
8 Q Would that also be true with regard to the  
9 succeeding paragraphs, 42, 43, 44?  
10 A Okay. So I've read those subsequent  
11 paragraphs. What is the question about them?  
12 Q How do you know the facts asserted in those  
13 paragraphs?  
14 A Well, they're all different paragraphs about  
15 different things, so some --  
16 Q Well, we'll go through them one by one.  
17 That's fine.  
18 A Okay.  
19 Q How do you know that National Services  
20 Association was named as a third-party defendant to  
21 Eliot's claim?  
22 A From seeing documents or from -- and/or from  
23 having conversations with David and counsel.  
24 Q How about Benjamin Brown filed a motion to  
25 intervene? How did you know that?

31

1 A From conversations with -- with counsel or  
2 seeing documents.  
3 Q Look at page 59 -- I'm sorry, paragraph 59 on  
4 Page 9, please, and in that first sentence, it says,  
5 "During the application process, the insurer conducted a  
6 routine underwriting investigation of Simon Bernstein  
7 prior to approving his policy." How do you know that?  
8 A From conversations with counsel, and also  
9 there were a lot of documents that the insurance company  
10 sent over to me at the time that this policy was going  
11 through the reinstatement process. So these are all  
12 pretty common things for -- for me to see in -- in an  
13 insurance company's document like that.  
14 I'm -- I'm -- I think it would be also in  
15 something about an application process that may have  
16 been through the discovery of the documents that the  
17 insurance company provided in that reinstatement  
18 process.  
19 Q Look at paragraph 70, please. It's on Page  
20 10.  
21 A Okay.  
22 Q It says, "On or about June 5, 1992, a letter  
23 was submitted on behalf of the policyholder informing  
24 the insurer that LaSalle National Trust was being  
25 appointed as successor trustee." Did you become aware

32

Pages 29 to 32



1 of that by reviewing documents in this case?  
2 A Yes, I believe so.  
3 Q Likewise, the June 17, 1992, acknowledgment by  
4 the insurer is also something you learned long after  
5 1992, correct?  
6 A Yes.  
7 Q That's all I want to talk to you about your  
8 affidavit for now. I want to walk through the emails  
9 with you, if we can. I think they've been numbered.  
10 I'd like to begin with Exhibit Number 1.  
11 (Exhibit 1 was marked for identification.)  
12 Q Do you have that in front of you? I believe  
13 it's marked Exhibit Number 1 with Bates numbers TS4965  
14 to 4966. Do you see that?  
15 A Yes, I do.  
16 Q Now, this is dated -- it's a string that  
17 begins, it looks like, on October 15th and ends on  
18 October 19th, if I'm looking at that correctly. So we  
19 have to read the second page first. Okay?  
20 A Yes.  
21 Q Now, as best I'm able to tell, this is the  
22 earliest email that I have on the subject matter of  
23 obtaining the life insurance proceeds that we're  
24 addressing here. Do you know when the process began, if  
25 this was the beginning of the process or was there

33

1 have time for status --"  
2 Q Okay.  
3 A -- I -- I can't be sure what led up to the --  
4 to that question being asked without any more guiding  
5 information in that sentence.  
6 Q Did you have an understanding that  
7 Mr. Spallina submitted a claim to the insurance company  
8 representing himself to be the trustee of the '95 trust?  
9 A Can you ask me that again? There was wind or  
10 something.  
11 Q I'm sorry. That's actually a train.  
12 Do you understand that Mr. Spallina made  
13 application to the insurance company for the proceeds of  
14 the insurance stating that he was the trustee of the  
15 trust?  
16 A I do understand that, yes.  
17 Q When is the first time you became aware that  
18 Mr. Spallina was going to make an application  
19 identifying himself as the trustee?  
20 A I'm -- I will say after Simon's death  
21 obviously, but other than that, I don't -- I can't tell  
22 you what the time period was.  
23 Q Did you ever have a -- were you aware he was  
24 going to do that before he did it?  
25 A I was not.

35

1 effort and discussion about that prior to October 15,  
2 2012?  
3 A I do not know.  
4 Q What's the first conversation you recall with  
5 anyone after your father's passing about the insurance  
6 policy and the trust and so forth?  
7 A My recollection would be with Robert Spallina  
8 and/or Don Tescher.  
9 Q If we're looking here at Exhibit Number 1,  
10 Page 2 of that exhibit, on the 15th it looks like Pam  
11 wrote, "Hi all. Do you have time for a status," to  
12 which Spallina writes, "There are no updates at this  
13 time." Does that imply to you that there must have been  
14 communications before October 15th about the insurance  
15 policy?  
16 MR. SIMON: Objection; speculation.  
17 A No, it doesn't.  
18 Q It doesn't?  
19 A No.  
20 Q So, when he says there are no updates, would  
21 that not imply to you that he knew there was something  
22 to be updated and, therefore, would have been familiar  
23 with the topic?  
24 A I -- I'm not sure. There were a lot of things  
25 going on about a lot of topics. So the question "Do you

34

1 Q You were only aware of that after he was --  
2 after he did it?  
3 A After he did it.  
4 Q How did you become aware of that?  
5 A Through conversations with Robert Spallina.  
6 Q Look, if you will, at the top of -- I'm sorry,  
7 look at the middle, from Robert Spallina, October 19th,  
8 to Pam Simon, copied to you. Do you see that?  
9 A We're on Page 1 now?  
10 Q Yes, we are.  
11 A Page 1, and you want me to pick up where?  
12 Q Where it says, right in the middle, "Pam, my  
13 office is processing."  
14 A Yeah.  
15 Q Do you see that?  
16 A Yes, I do.  
17 Q And you were copied on this, correct?  
18 A I was.  
19 Q It says, "My office is processing --" this is  
20 from Spallina. "My office is processing the claim as  
21 your father was the owner of the policy and the proceeds  
22 will likely be paid to the estate in the absence of  
23 finding the trust."  
24 Is it fair to say -- did you understand at  
25 that point it was understood that the trust could not be

36

Pages 33 to 36



1 located, the '95 trust?  
2 MR. SIMON: Objection; speculation, form.  
3 A Yes.  
4 Q Then he says, "As I mentioned previously,  
5 there was a discussion with the carrier about possibly  
6 using the 2000 trust (the one you are carved out of but  
7 would be split five ways according to Ted), but I am not  
8 sure that we will achieve that result." Do you see  
9 that?  
10 A I do.  
11 Q What was the first conversation you had with  
12 Mr. Spallina about the possibility of submitting the  
13 claim to the insurance company using the 2000 trust?  
14 A Around the same time that these discussions  
15 were going on.  
16 Q When did you become aware that the 2000 trust  
17 existed?  
18 A Around this same time period.  
19 Q When you first had that conversation with  
20 Mr. Spallina, what did you say to him and what did he  
21 say to you about using the 2000 trust to submit a claim  
22 to the insurance company?  
23 MR. SIMON: Objection; privilege.  
24 Don't answer.  
25 MR. STAMOS: Privilege? Privilege of who for

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1 lawyer. He's now told me Mr. Spallina was his  
2 lawyer as trustee of Shirley's trust, and he's now  
3 established with me that Shirley's trust had no  
4 interest in the subject matter of the insurance  
5 policy, while we know that Mr. Bernstein has a  
6 personal interest in the result of the insurance  
7 policy. So I don't see how Mr. Spallina was his  
8 lawyer with regard to this topic.  
9 Do you have a basis for asserting that?  
10 MR. SIMON: He consulted with him as an  
11 attorney on this matter. That's my basis.  
12 Q (By Mr. Stamos) Is that true, Mr. Bernstein.  
13 THE WITNESS: Answer?  
14 MR. SIMON: (Nonverbal response.)  
15 A Is it true that I consulted with him about  
16 this matter?  
17 Q That you consulted with him about this matter  
18 in a capacity other than as the trustee of Shirley's  
19 trust.  
20 And I don't mean to be disrespectful by saying  
21 "Shirley's trust". I'm just shortening --  
22 A Sure.  
23 Q Is "sure" the answer to my question or  
24 response to my comment there?  
25 A Oh.

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1 whom?  
2 MR. SIMON: Attorney-client. He was his  
3 attorney. Spallina was his attorney. You're  
4 asking about a conversation between him and his  
5 attorney.  
6 Q Well, he was your attorney personally or as  
7 trustee or what?  
8 A He was my attorney as trustee.  
9 Q Trustee of what?  
10 A Shirley Bernstein Trust.  
11 Q Did the Shirley Bernstein Trust have an  
12 interest in the insurance policy that we're litigating  
13 about?  
14 A It did not.  
15 Q So what did the conversation you had with him  
16 about the 2000 trust have to do with your role as  
17 trustee of Shirley's trust?  
18 MR. SIMON: Same objection; privilege.  
19 Don't answer.  
20 MR. STAMOS: Well, I'm not asking for a  
21 conversation. I'm trying to establish -- I think  
22 that you're obligated to establish the basis of a  
23 privilege objection, and I'm entitled to test the  
24 existence of the privilege.  
25 You've declared that Mr. Spallina was his

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1 Q I'm sorry, I'm confused.  
2 MR. ROSE: Do you want to confer about the  
3 privilege issue if you're confused?  
4 MR. STAMOS: I do. I do.  
5 Would you please recite the question again to  
6 the witness leaving out my comment about Shirley.  
7 MR. SIMON: We're going to take a minute and  
8 confer on a privilege issue.  
9 MR. STAMOS: That's a good idea.  
10 (Recess taken.)  
11 MR. STAMOS: All right. So can we read the  
12 last question back to the witness without my  
13 editorial comment at the end.  
14 (Read back by the reporter.)  
15 Q (By Mr. Stamos) Can you answer that, please.  
16 THE WITNESS: Could you read it back to me  
17 again, please.  
18 Q Actually, you know what, let me stop there.  
19 Let me ask a couple of more questions and I'll get back  
20 to that.  
21 Would you agree with me that Exhibit Number 1  
22 reflects an email by Mr. Spallina to yourself and to Pam  
23 with regard to the subject matter of the potential use  
24 of the 2000 trust?  
25 A Yes.

40



1 Q And, likewise, the email from yourself at the  
2 top to Mr. Spallina and to Pam is talking generally here  
3 about making the application to the insurance company,  
4 correct?  
5 A Correct.  
6 Q So you made Pam privy to your conversations  
7 and your communications with Mr. Spallina with regard to  
8 this topic, correct?  
9 A Well, I don't know if I made her privy, but  
10 this was a chain of people in -- in this email going,  
11 you know, between two and three people.  
12 Q Right. But you were the only one who was the  
13 trustee of Shirley's trust, correct?  
14 A Yes.  
15 MR. STAMOS: All right. Well, let me just add  
16 that, not only do I still not understand what the  
17 basis for a privilege would be, but if there was a  
18 privilege, it was waived by including Pam in these  
19 communications. So do I need to establish that any  
20 more, Adam, or can I ask more questions?  
21 MR. SIMON: If depends what the question is.  
22 If it's about these emails, that's fine. If it's  
23 about conversations between Robert and him  
24 personally, it's not fine. It's privileged.  
25 MR. STAMOS: All right.

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1 my -- if that's what he did, he was doing it as my  
2 attorney.  
3 Q But you're telling me that he did it without  
4 your knowledge?  
5 A I'm telling you that, if he did it, he did it  
6 as my attorney. Whether he did it with my knowledge or  
7 not, that's something I think I've said I -- I don't  
8 remember.  
9 Q When you say he did it as your attorney, are  
10 you saying he did it as your attorney in your capacity  
11 as the trustee of Shirley's trust?  
12 A All my --  
13 MR. SIMON: Objection; speculation.  
14 MR. STAMOS: Well, I mean, I'm not sure what's  
15 speculative about that.  
16 Q Can you answer that question?  
17 MR. SIMON: Yeah, I can answer what's  
18 speculative about it. He --  
19 MR. STAMOS: No, no, no. I haven't asked you  
20 any questions. I'm asking the witness. I'm not  
21 asking you to explain to the witness now how to  
22 calculate this as being speculative. I'm asking  
23 the question.  
24 I'm going to ask the court reporter to read  
25 that question back.

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1 Q (By Mr. Stamos) Were there any other  
2 conversations in which you and Pam and he participated  
3 with regard to the subject matter of the 2000 trust?  
4 A No, not that I recall.  
5 Q What was the notion behind the potential for  
6 using the 2000 trust?  
7 MR. SIMON: Objection; speculation.  
8 A I don't know.  
9 Q When Mr. Spallina made the application to the  
10 company identifying himself as the trustee of the '95  
11 trust, was he acting as your lawyer at that time?  
12 MR. SIMON: Objection; form. I think you said  
13 made an application to an insurance company?  
14 Q I thought we established earlier that you were  
15 aware that Mr. Spallina had applied to the insurance  
16 company for distribution of the proceeds to the '95  
17 trust and had done that representing himself to be the  
18 trustee of the '95 trust. Did I hear that correctly?  
19 A Yes.  
20 Q Okay. When he did that, was he your lawyer  
21 then?  
22 A Yes.  
23 Q So are you telling us that he submitted that  
24 as your lawyer without your knowledge?  
25 A I'm telling you that, if that's what he did as

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1 (Read back by the reporter.)  
2 A I'm saying that my conversations with Robert  
3 Spallina, I viewed him as my counsel. In any  
4 conversations I had with Robert Spallina, I expected  
5 that the attorney-client privilege was there.  
6 Q But what I'm trying to get at is, do you have  
7 an understanding as to in what -- because you have --  
8 you wear many hats apparently. Are you saying he was  
9 your attorney in every hat you wore?  
10 MR. SIMON: Object to form.  
11 Q Do you understand my question?  
12 A I believe I do.  
13 Q Okay. Are you telling us that he was your  
14 attorney in each of the capacities you have that relate  
15 to the subject matter of this lawsuit?  
16 A In these -- in these matters --  
17 Q For your father's --  
18 A Yes.  
19 Q So that would include he was your attorney as  
20 the trustee of Shirley's trust; he was your attorney as  
21 the successor trustee of the '95 trust; and he was your  
22 personal attorney?  
23 A As everything that relates to these matters,  
24 yes, I -- I viewed Robert as my attorney.  
25 Q Did he ever disclose to you potential issues

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Pages 41 to 44



1 of conflict that arose by virtue of the divergent roles  
2 you have as I've just described, and perhaps there are  
3 other roles?  
4 MR. SIMON: Objection; privilege.  
5 MR. STAMOS: Privilege for which attorney --  
6 MR. SIMON: If that's not privileged, nothing  
7 is.  
8 MR. STAMOS: Well, we're going to have to  
9 litigate about this, so I'm trying to figure out --  
10 MR. SIMON: That's fine.  
11 MR. STAMOS: -- a privilege in which  
12 attorney-client relationship? The attorney-client  
13 relationship of him to --  
14 MR. SIMON: You just asked -- Jim, let me  
15 answer your question. You just asked about a  
16 conflict in many different capacities, correct?  
17 MR. STAMOS: Yes.  
18 MR. SIMON: So any of those capacities or all  
19 of them, it's privileged, and that's --  
20 MR. STAMOS: I understand conceptually. What  
21 I'm asking you is, in which capacity are you saying  
22 there was a conversation that resulted in a  
23 privileged conversation?  
24 MR. SIMON: In the capacity that he was the  
25 client and Robert was the attorney, and we won't be

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1 we're addressing, such as the potential use of the  
2 2000 trust, that the privilege was waived, that you  
3 can't -- that's number one.  
4 And, number 2, that these documents reflect  
5 that the communications on these topics were not  
6 conducted solely between Mr. Spallina, as  
7 Mr. Bernstein's lawyer, and Mr. Bernstein, but were  
8 conducted among Mr. Spallina and Mr. Bernstein and  
9 others who did not have his capacities regarding  
10 these matters and was waived in that way as well.  
11 So that's my position, and I ask you to  
12 reconsider yours. Otherwise, we'll have to have  
13 the judge address it.  
14 MR. SIMON: We'll likely have to have the  
15 judge address it, but we'll consider it at a break.  
16 MR. STAMOS: Okay.  
17 Q (By Mr. Stamos) Did you personally make a  
18 judgment or reach a conclusion as to whether the 2000  
19 trust should be used as a beneficiary in making a  
20 submission to the insurance company for proceeds of the  
21 insurance policy?  
22 A I did not.  
23 Q Did you ever have a conversation with anyone  
24 other than Mr. Spallina about the potential for using  
25 the 2000 trust in making an application to the insurance

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1 talking about conversations between them that are  
2 privileged.  
3 Q (By Mr. Stamos) Are you going to follow your  
4 lawyer's instruction not to answer any questions about  
5 conversations you had with Robert Spallina?  
6 A I am.  
7 Q Will that extend to conversations that are  
8 memorialized in the emails that we're going to be  
9 reviewing here?  
10 MR. SIMON: I will --  
11 Is that for me or him?  
12 MR. STAMOS: Well, that's for him, but I guess  
13 I'm curious --  
14 (Cross-talking. Interruption by the  
15 reporter.)  
16 MR. SIMON: We won't assert privilege where  
17 there's a third party on the email or it's been  
18 disclosed because we didn't assert the privilege.  
19 MR. STAMOS: Okay. I just want to state that  
20 my position, so to give you an opportunity to  
21 modify yours, is that, by virtue of our having been  
22 produced these emails, and we're going to go  
23 through more, which themselves give us partial  
24 information about conversations that took place and  
25 communications that took place about the topics

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1 company?  
2 A Possibly -- possibly Donald Tescher.  
3 Q Did you ever have a conversation with your  
4 sister who would not have received proceeds of the  
5 policy if, in fact, the 2000 trust were employed?  
6 A Not that I recall, no.  
7 Q So this entire process was conducted, and at  
8 no point did you discuss with your sister the fact that  
9 if the 2000 trust were employed, in fact, she would be  
10 cut out of the proceeds of the insurance policy?  
11 MR. SIMON: Objection; asked and answered.  
12 You can answer.  
13 Q Is that correct? That's your testimony?  
14 A That's correct.  
15 Q Did you have a conversation with anyone else  
16 other than maybe Spallina and maybe Tescher?  
17 A About the 2000 trust document; is that the  
18 question?  
19 Q Yes.  
20 A No, I don't believe so.  
21 Q Where Mr. Spallina writes to Pam here in the  
22 middle of Exhibit Number 1, Page 1, "As I mentioned  
23 previously, there was a discussion with the carrier  
24 about possibly using the 2000 trust, the one you are  
25 carved out of but would be split five ways according to

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1 Ted, but I'm not sure that we will achieve that result."  
2 Are you familiar with what he's talking about there?  
3 A Yes.  
4 Q What's he talking about there?  
5 A It looks like he's talking about the fact that  
6 the 2000 document didn't include Pam, and he was  
7 probably -- he -- it looks like he may have been  
8 referencing, according to him, according to me, the --  
9 the -- there would be a split five ways.  
10 Q What was the basis for your belief that there  
11 would be a split five ways?  
12 A There were conversations going on at that  
13 point in time about how to -- what to do with, you know,  
14 this insurance policy, and splitting it five ways was  
15 what -- my understanding was how the -- what the  
16 proceeds of the policy -- of the trust were going to be.  
17 Q The 2000 trust?  
18 A No, not the -- I knew nothing about a 2000  
19 trust.  
20 Q Do you recall receiving this email where --  
21 the last item in the string is from you, where  
22 Mr. Spallina says, "As I mentioned previously, there was  
23 a discussion with the carrier about possibly using the  
24 2000 trust, the one you are carved out of but would be  
25 split five ways according to Ted," doesn't that imply

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1 I guess Pam Simon twice, right?  
2 A Yes.  
3 Q Okay. Going back to front, the first message  
4 appears to be from Pam to Spallina and to you saying,  
5 "Hi, Robert. Any word on the proceeds," asking whether  
6 he needed help, correct?  
7 A Yes.  
8 Q Then the next item of the string is from  
9 Spallina to Pam saying, "Heritage responded back that  
10 they need a copy of the trust instrument. We do not  
11 have a copy, and the only executed trust document that  
12 we have in which the policy is listed as an asset is the  
13 2000 trust prepared by Al Gortz." Do you see that?  
14 A I do see that.  
15 Q This is dated, it looks like, November 19,  
16 2012. It is your email back. "Highly unlikely they  
17 will use another trust. What is the SOP when a doc  
18 can't be found?" That's from you, right?  
19 A Yes, it is.  
20 Q And it's dated November 19, 2012, right?  
21 A Yes.  
22 Q Am I correct, as I'm reading this, at least by  
23 November 19, 2012, no one has located Exhibits 21 and 22  
24 that we talked about earlier, the unsigned drafts of the  
25 trust, correct?

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1 that you were involved in a conversation about the 2000  
2 trust?  
3 A I didn't have conversations with the carrier.  
4 Spallina had conversations with the carrier. I did not.  
5 Q No, no. Doesn't this imply that you had a  
6 conversation with Mr. Spallina in which he says, "But it  
7 would be split five ways according to Ted"? I mean, how  
8 would he know what Ted thought unless Ted told him, and  
9 you're Ted?  
10 A I -- I -- I can't help you there. I don't  
11 know what Spallina was thinking.  
12 Q In any event, so we've established that this  
13 is a string of emails that you and Ted and Pam shared,  
14 correct? You and Spallina and Pam shared, correct?  
15 A Yes.  
16 Q And you would have seen them at or about the  
17 time they're dated, correct?  
18 A Yes.  
19 Q Let me then go to Exhibit Number 2, which is  
20 TS4489 through 92.  
21 (Exhibit 2 was marked for identification.)  
22 Q Again, we have to go back to front, and this  
23 is a string of emails -- am I correct, this is a string  
24 of emails in which you participated, the last one being  
25 from you to Mr. Spallina, Pam Simon, David Simon and --

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1 MR. SIMON: Objection; speculation.  
2 A You are right, correct.  
3 Q When you then go to the next page, 4490, it  
4 says, from Pam to you, copied to Spallina, "Please send  
5 the executed trust document before you respond to  
6 Heritage." Do you remember what Pam -- what trust  
7 document she was talking about?  
8 A I do not.  
9 Q Is it fair to say the only executed document  
10 you had that would be relevant at that point would have  
11 been the 2000 trust document, correct?  
12 MR. SIMON: Objection; speculation.  
13 Q As far as you knew.  
14 A Can you ask me that question again, please?  
15 Q Yeah. Actually, it might help if I go above  
16 that. When you look at Spallina's note to you then, a  
17 little bit below the halfway point of page 4409, it  
18 says, from Spallina, "We are not responding to them with  
19 the document from 2000. We discussed that and you are  
20 carved out under that document. We need to find the  
21 1995 trust ASAP."  
22 Do you understand that was him responding to  
23 Pam where she said, "Please send the executed trust  
24 document before you respond to Heritage"?  
25 A I -- I do.

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Pages 49 to 52



1 Q He must have been talking about the 2000  
2 trust, and he's telling her we're not going to use that  
3 trust because you're cut out, right?  
4 A I can't say for sure, you know, why he's  
5 saying that, but that's, you know, what -- what it looks  
6 like from this document.  
7 Q When you received this and saw it, is that  
8 what you assumed, that he's telling her we're not going  
9 to use the 2000 trust because you're cut out of it?  
10 MR. SIMON: Objection; speculation.  
11 MR. STAMOS: No. I'm not asking him to  
12 speculate.  
13 Q I'm asking your perception when you read this.  
14 MR. SIMON: No. You asked him what he  
15 assumed, is what you asked.  
16 MR. STAMOS: Well, I'm not asking him to  
17 speculate about what he assumed. I'm asking him to  
18 tell me what he assumed, if he can remember.  
19 A I can't remember, but according to this,  
20 that's what it looks like Spallina is saying.  
21 Q Okay. That's fine.  
22 Then there's another letter -- there's another  
23 note November 19th, the same date, from David Simon,  
24 "May be able to achieve Sy's intended result through  
25 waiver and settlement agreement." That was the attempt

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1 that was made to get all five children to sign off, and  
2 then you wouldn't need to worry about what the trust  
3 said or didn't say, correct?  
4 A I believe so, yes.  
5 Q Okay, excellent. If you then look at Exhibit  
6 Number 3, it looks to me -- if you just take a quick  
7 look at this, it looks to me that this is an email from  
8 Pam, and you are among those copied --  
9 A I don't have it.  
10 Q We don't have 3 yet.  
11 MR. STAMOS: Oh, I'm sorry. I'm sorry. Could  
12 the court reporter please give it to him.  
13 (Exhibit 3 was marked for identification.)  
14 Q I just have a simple question for you.  
15 Looking at this, am I correct that this is a letter --  
16 an email that Pam sent and that you were copied on which  
17 attempted to circulate a settlement agreement among you  
18 to try to get the proceeds without the need for  
19 litigation or worrying about the trusts?  
20 A That is what it looks like to me, yes.  
21 Q And you recall that effort was made, correct?  
22 A Yes.  
23 Q And it was not successful because Eliot would  
24 not agree, correct?  
25 A I believe that's the reason why, yes.

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1 Q If you could then --  
2 I'm sorry, continue to look at that exhibit,  
3 at 4519. It said there was -- at the bottom, that's  
4 your email, correct, that says, "There was an exhaustive  
5 search for the original trust document from 1995 which  
6 is the beneficiary of the policy owned by dad. Since  
7 we've have not been able to locate it," and then some  
8 further text. Is it fair to say that as of December 6,  
9 2012, the drafts of the trust, Numbers 21 and 22, had  
10 still not been located?  
11 A That is correct.  
12 Q Thank you.  
13 All right. If you could then look at Exhibit  
14 4.  
15 (Exhibit 4 was marked for identification.)  
16 Q Now, reading bottom to top here, which I think  
17 we need to do, on Page 69, this is from you -- I'm  
18 sorry, this is from Spallina to you, correct?  
19 A No.  
20 On 67 or -- a different page?  
21 Q I'm sorry.  
22 Oh, you got 67. Okay, yeah, I'm sorry. I  
23 have two sets of them.  
24 When you're looking at Page 67, that's  
25 Mr. Spallina writing to you, correct?

55

1 A Well, I'm copied.  
2 Q You are one of those to whom this was  
3 addressed, correct?  
4 A Yes.  
5 Q In it, Mr. Spallina was talking about options  
6 and trying to deal -- dealing with the situation where  
7 the agreement could not be achieved, right?  
8 A Yes.  
9 Q Among the things he said was, and this is in  
10 the fourth line from the bottom, "As none of us can be  
11 sure exactly what the 1995 trust said (although an  
12 educated guess would point to the children in light of  
13 the document prepared by Al Gortz in 2000), it is  
14 important that we discuss further prior to spending more  
15 money to pursue this option." As of that day, and this  
16 was dated January 22, 2013, none of you could know for  
17 sure what it said, correct?  
18 A That's correct.  
19 Q Am I correct, as of this date, Exhibits 21 and  
20 22 had not been located, correct?  
21 MR. SIMON: Objection; speculation, asked and  
22 answered.  
23 A That's correct.  
24 MR. STAMOS: No, it hasn't been asked.  
25 Q I'm sorry, what was the answer?

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1 A Correct.  
2 Q Thank you.  
3 MR. STAMOS: Do you want to take a break now,  
4 Adam?  
5 MR. SIMON: Please.  
6 MR. STAMOS: Okay.  
7 (Recess taken.)  
8 MR. STAMOS: So now we're on Exhibit 5.  
9 (Exhibit 5 was marked for identification.)  
10 Q (By Mr. Stamos) Now, I'm looking at Exhibit  
11 Number 5. Do you have page 65? Is that the page number  
12 at the bottom?  
13 A Yes.  
14 Q Looking at the message from Spallina, the  
15 second one here - it looks like the top is from Lisa to  
16 Spallina and Jill - where Spallina said, "I need to see  
17 Pam's life insurance trust to answer the question," do  
18 you know what question he was talking about?  
19 MR. SIMON: Objection; speculation.  
20 A I don't.  
21 Q All right. Then I'm going to skip Number 6.  
22 I'm just trying to cut this down so we can  
23 move along. I'm saving time by wasting a little bit of  
24 time.  
25 I'm not going to talk to you about 7.

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1 MR. SIMON: You said did he understand that he  
2 understood. It's like two understandings removed.  
3 MR. STAMOS: If that's what I did, let me fix  
4 it.  
5 Q When Mr. Spallina wrote that and you received  
6 this and read it, was it your understanding that  
7 Mr. Spallina had the understanding that the 1995 trust  
8 was basically a copy, so to speak, of Pam's trust and,  
9 therefore, he could use Pam's trust to fill in the  
10 missing boilerplate language that might be necessary to  
11 be filled in?  
12 MR. SIMON: Same objections.  
13 A You're using words like "mirror image" and  
14 I -- I don't believe that he was looking at Pam's  
15 document, according to this email, as a -- as a tool and  
16 a mirror image. I think he was using Pam's document  
17 maybe as -- more as a guide, because I think they were  
18 prepared around the same time by the same firm. So --  
19 but I can't honestly speculate what was in Spallina's  
20 mind at the time he wrote this.  
21 Q Have you ever seen Pam's trust?  
22 A I have not.  
23 Q Then let's go to -- looking now at Exhibit  
24 Number 9.  
25 (Exhibit 9 was marked for identification.)

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1 If you would then look at Exhibit Number 8,  
2 please.  
3 (Exhibit 8 was marked for identification.)  
4 Q This is from Mr. Spallina to Eliot and  
5 yourself and -- to Pam, carbon copied to Eliot and  
6 yourself, Lisa, Jill and Christine, right?  
7 A Correct.  
8 Q See at the top there?  
9 A Yes, you are correct.  
10 Q Thank you. And I want to direct you to the  
11 fourth paragraph up, the one that begins, "Let's stop  
12 making." Do you see that?  
13 A I do.  
14 Q The second sentence says, "Pam saw him execute  
15 the trust with the same attorney that prepared her own  
16 trust, a copy of which I have and will offer up to fill  
17 in the boilerplate provisions." Do you see that?  
18 A Yes.  
19 Q When you received this, did you understand  
20 that to mean that Mr. Spallina understood that your  
21 father's '95 trust was basically a mirror image of Pam's  
22 and, therefore, he would use Pam's in order to fill in  
23 the blanks with regard to boilerplate language?  
24 MR. SIMON: Objection; speculation, form.  
25 Q I'm asking if that's your understanding.

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1 Q We have number 9 in front of you. Page 51 and  
2 52, do you see that?  
3 A I do.  
4 Q This looks to be, going back on Page 52, an  
5 email that you drafted giving your analysis of the  
6 Heritage payout situation, and looking at that document,  
7 about seven lines down, as of that point the trust could  
8 not be located still, correct?  
9 A Correct.  
10 Q I take it at that time Exhibits 21 and 22 were  
11 still not located, because if they were, you would have  
12 talked about them, correct?  
13 MR. SIMON: Objection; speculation.  
14 A Correct.  
15 Q Then on Page 51, that's your email to your  
16 siblings and Mr. Spallina in which -- in further  
17 analysis -- this is actually to Eliot - I see - with  
18 copies to your siblings responding to a prior email he  
19 had written about what he thought the situation was,  
20 correct?  
21 A Yes, sir.  
22 MR. STAMOS: Now, if we could go, please, to  
23 Exhibit 10.  
24 (Exhibit 10 was marked for identification.)  
25 Q If you're looking at the bottom of Page 47,

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Pages 57 to 60



1 this is part of a string that ends with Eliot writing on  
2 February 9th to yourself and to Pam, copies to many  
3 other people. Do you see that?  
4 A Yes, I do.  
5 Q Then when you look at the bottom, the first  
6 email on that page where Pam says, on February 8, 2013,  
7 "Yeah, bad news. We don't have copies of the policy.  
8 Dad probably took it when he emptied his office.  
9 Probably the trust, too." Do you see that?  
10 A Yes, I do.  
11 Q Do you have any understanding as to how it  
12 came to be that a copy of the draft trust was located at  
13 a later date even though a search had already been done  
14 trying to find the trust document itself?  
15 MR. SIMON: Objection; speculation.  
16 A None.  
17 Q When the trust documents -- strike that.  
18 When the draft trust documents, Exhibits 21  
19 and 22, were located, do you recall having any  
20 conversation with anybody, Mr. Simon, your sister,  
21 anything to the effect of, "How come you didn't find  
22 these the first time you looked," or anything like that?  
23 A No, nothing like that with me, no.  
24 Q Did it strike you? Did you wonder? Whether  
25 you had a conversation or not, did you wonder how it was

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1 that they didn't find them the first time?  
2 A No.  
3 Q It didn't strike you as odd?  
4 MR. SIMON: Objection; asked and answered.  
5 A No, it didn't. Having searched for things  
6 before in my life, you search once, you search again,  
7 sometimes you come across things, especially old. No,  
8 it didn't strike me as odd.  
9 Q If you could look at Exhibit Number 11,  
10 please.  
11 (Exhibit 11 was marked for identification.)  
12 Q This is another string here. Beginning at the  
13 bottom, this is your brother Eliot telling you that he's  
14 seeking independent counsel, correct, on February 13,  
15 2013?  
16 A Yes.  
17 Q Then the next email up, on February 14th, is  
18 you to Robert Spallina saying, "Please move forward as  
19 we discussed in the last group phone call in which we  
20 decided to have Heritage pay your trust account or a  
21 trust that you would act as trustee. Heritage has  
22 stated that they will pay based on a court order showing  
23 that there's consensus among the 1995 trust  
24 beneficiaries. Let's get this done."  
25 My question about that is, as of that point,

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1 was it your understanding that Eliot would agree to have  
2 such a court order entered?  
3 A I don't know.  
4 Q This communication with Mr. Spallina includes  
5 copies to all of your siblings as well as to Christine  
6 Yates, who was Eliot's attorney, correct?  
7 A I -- I believe so.  
8 Q Is it your position that this was  
9 attorney-client communication, as well, between you and  
10 Mr. Spallina?  
11 MR. SIMON: We didn't assert a privilege, if  
12 that's what you're asking. I didn't object.  
13 MR. STAMOS: Well, our position, for the  
14 record, is that you may not selectively employ the  
15 privilege.  
16 Q So my question is, was this an attorney-client  
17 communication, as far as you were concerned?  
18 A In every communication I had with Robert  
19 Spallina, I would expect that that privilege was there.  
20 MR. ROSE: This is Alan Rose, just for the  
21 record, since I'm Mr. Bernstein's personal counsel.  
22 He's not asserting the privilege as to  
23 communications of this nature as responded in your  
24 email. He's asserting privilege to private  
25 communications he had one-on-one with Robert

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1 Spallina, who he considered to be his counsel.  
2 That's the position for the record and that's why  
3 the privilege is being asserted.  
4 Continue.  
5 MR. STAMOS: No, I understand that. It's just  
6 that our position is that, if one has an  
7 attorney-client relationship, in particular with  
8 regard to discussions concerning a particular  
9 topic, the privilege is waived when you do not  
10 maintain the privilege with respect to certain  
11 communications and you do with others, and that's  
12 our position. So --  
13 MR. ROSE: Okay. But for the record, since  
14 you're going to argue this in Illinois potentially,  
15 in every piece of litigation, certain things that  
16 you communicate with your lawyer eventually find  
17 their way into pleadings or communication with the  
18 other side. That does not mean that private  
19 communication you have one-on-one with your lawyer  
20 about various things when you're seeking legal  
21 advice on a confidential basis are not privileged.  
22 That's the sole basis upon which the privilege is  
23 being asserted and it's going to continue to be  
24 asserted.  
25 MR. STAMOS: Can we proceed?

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Pages 61 to 64



1 MR. ROSE: Absolutely. Thanks.  
2 MR. STAMOS: Got it.  
3 Q (By Mr. Stamos) In any event, looking at  
4 Exhibit 11, this was a -- whatever it says, this was an  
5 email series of -- exchange between yourself and Eliot  
6 and all the addressees, correct?  
7 A It appears to be, yes.  
8 Q Have you ever investigated to advise yourself  
9 as to what took place within the insurance company, that  
10 is to say the insurance company records, as to your  
11 father's interactions or lack of interactions with them  
12 about beneficiary changes or ownership changes?  
13 A I -- I have not; did not do that.  
14 Q I take it you, therefore, have no knowledge  
15 about that, no personal knowledge about that?  
16 A Can you tell me what "that" is again.  
17 Q About beneficiary changes that your father  
18 either did send or did not send to the insurance  
19 company.  
20 A Again, I'm going to go back to that time of  
21 reinstatement where it was my understanding that the  
22 beneficiary of this insurance policy was the trust,  
23 so -- I think you stated something that wasn't entirely  
24 accurate about that I didn't have any knowledge.  
25 Q Okay. So your knowledge of it would have been

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1 with regard -- I think we talked about that earlier.  
2 You told us what your role was in that -- what you knew  
3 about the reinstatement provision a couple of years  
4 before he died, correct?  
5 A Yes, that's right.  
6 Q All right. We don't need to go over that  
7 again. That, I understand.  
8 Let's look, if we can, at Exhibit Number 14.  
9 (Exhibit 14 was marked for identification.)  
10 Q Looking at that document, it looks like a  
11 string that ends with an email from Mr. Spallina to Pam  
12 and copied to yourself and David, correct?  
13 A Yes, that is correct.  
14 Q Now that email -- the initial email in that  
15 string is one from David Simon -- I'm guessing to  
16 Mr. Spallina, although it's not clear, where it says,  
17 "Last of the docs we could dig up." Do you see that?  
18 A I do.  
19 Q My assumption, although it's not clear from  
20 the email, is that there was -- oh, yeah, I'm sorry. At  
21 the bottom you can see there's a PDF attachment, a  
22 Document 9 PDF. Do you see that on Page 6579?  
23 A Yes.  
24 Q Do you know what document he's referring to in  
25 that email?

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1 A I don't.  
2 Q If you would look at Exhibit Number 15,  
3 please.  
4 (Exhibit 15 was marked for identification.)  
5 Q This document, 6508 through 6512, is a string  
6 of emails that ends with one from you to Robert Spallina  
7 copied to several people, correct?  
8 A It appears that way so far, yes.  
9 Q Take your time. Is that what that is?  
10 A Yes.  
11 Q The last email in that string is one that you  
12 sent, correct?  
13 A Yes.  
14 Q When you say, "I think one of my --" This is  
15 to Robert: "Pam, Scooter, Jill, Lisa and I will be  
16 discussing several related issues over the weekend," and  
17 this is Saturday, March 16, 2013. "I think one of my  
18 previous emails asked you to hold off doing anything  
19 concerning the life insurance policy after a specific  
20 date. Please continue to work with the insurance  
21 company on our behalf."  
22 What were you talking about there?  
23 A I cannot remember.  
24 Q If you would please look at 6510. It's the  
25 third page of that exhibit.

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1 A Okay.  
2 Q Do you see the reference to March 15, 2013  
3 there from Spallina?  
4 A I see March 15, 2013.  
5 Q Right. 7:07 a.m., in the middle of that page?  
6 A Yes, I do.  
7 Q And Mr. Spallina wrote in this email string  
8 that ends with your last email, "There is a break in  
9 title and beneficiary designation prior to getting where  
10 the confirmation letters state where we are today, Sy as  
11 owner and the trust as beneficiary." Do you know what  
12 they're talking about?  
13 A I believe that I do.  
14 Q What did you understand Mr. Spallina was  
15 conveying by that message?  
16 A That there was a previous owner or an initial  
17 owner of this policy and that I think he was learning  
18 about the -- the chain of -- of ownership of the policy  
19 from the very beginning and its iterations over time  
20 when -- after speaking with the insurance company.  
21 Q Did you understand this to be that  
22 Mr. Spallina was told by the insurance company that  
23 there was a break in title and beneficiary designation?  
24 A Well, I -- I'm -- only because I'm reading  
25 what he said. I don't know what he assumed that meant,

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Pages 65 to 68



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

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

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

7 A Right.

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

10 A Between me and Robert?

11 Q Yeah. Could that have been possible?

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

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

15 A At the time, I probably did not.

16 Q Now, looking at Exhibit 16, please.  
17 (Exhibit 16 was marked for identification.)

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

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

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

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

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

6 Q It was changed from whom to whom?

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

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

12 MR. SIMON: Objection; speculation.

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

14 Q You don't?

15 A I do not.

16 Q Now, when you then look at --  
17 I'm sorry, we'll go to the next exhibit, which  
18 is -- it looks like Exhibit 17.

19 (Exhibit 17 was marked for identification.)

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

25 A I do.

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

3 Q Yeah.

4 A Okay.

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

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

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

15 MR. ROSE: Okay.

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

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

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

20 A Yes.

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

24 A Yes.

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

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1 Q Now, first, this document is an email string  
2 that ends with Mr. Tescher sending an email to  
3 Mr. Welling, Mr. Spallina and also to yourself, as well  
4 as the Simons, correct?

5 A Yes.

6 Q You recall receiving this, do you?

7 A Now that I see it, I recall.

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

12 MR. SIMON: Objection; speculation.

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

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

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

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

20 A Yes.

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

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

25 Q Do they continue to be your attorney in that

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1 capacity?  
2 A Currently?  
3 Q Yes.  
4 A They are not.  
5 Q When did they cease being your attorney in  
6 that capacity?  
7 A Early 2014 is my recollection.  
8 Q What led to that?  
9 A What led to that was --  
10 MR. ROSE: Well, let me -- to the extent he's  
11 discussing communications he had with his former  
12 counsel, they would be privileged, and I would  
13 instruct him not to answer based upon any  
14 communications with his counsel.  
15 MR. STAMOS: Okay.  
16 Q I don't agree with that, but I assume you're  
17 going to follow your attorney's instruction not to  
18 answer that?  
19 A Yes.  
20 Q All right. We don't need to say anymore, but  
21 we'll certify that.  
22 Leaving aside conversations then with  
23 Mr. Spallina or Mr. Tescher, what led to their ceasing  
24 to be your attorneys?  
25 A My recollection is that they withdrew.

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1 Q Okay.  
2 A Again, we're going back quite a while, but I  
3 believe what led to them not being my attorneys is that  
4 they withdrew.  
5 MR. ROSE: And just for the record, there are  
6 aspects of that that are not privileged, but you  
7 asked him about his -- I just advised him not to  
8 disclose his private, confidential communication  
9 with them while they were still his lawyers. That  
10 does not foreclose your questioning.  
11 MR. STAMOS: No, what I asked him was what  
12 other circumstances led to that other than --  
13 without reference to such conversations, and he  
14 said they withdrew.  
15 Q Do you know why they withdrew?  
16 A I -- I do know why they withdrew. There were  
17 some questions within their firm about documents and  
18 irregular -- irregularity around documents, and they  
19 withdrew because I felt it was best for them to  
20 withdraw.  
21 Q What documents were there -- with regard to  
22 what documents were there irregularities, as far as you  
23 knew?  
24 A There was an amendment to a trust document.  
25 Q Which trust?

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1 A Shirley Bernstein Trust.  
2 Q And finally Exhibit Number 18.  
3 (Exhibit 18 was marked for identification.)  
4 Q Are you ready?  
5 A Yes.  
6 Q Let me just back up a second. The document  
7 that you were talking about that there was a problem  
8 with was a document which it appeared that the Tescher &  
9 Spallina firm had participated in backdating a signature  
10 by your father, correct? Is that your understanding of  
11 it?  
12 A Something along those lines. I'm not quite  
13 sure that it's backdating or creation of a document.  
14 I'm not sure that backdating would be the right way to  
15 describe that.  
16 Q It included a notarization that was not  
17 authentic, correct?  
18 A There were -- there were two issues that arose  
19 out of that law firm that were highly irregular as far  
20 as I'm concerned.  
21 Q What were those?  
22 A One was a -- was the signing of a notarized  
23 document by a notary that was not proper, and the second  
24 was the creation or fabrication of a document by  
25 Mr. Spallina that -- that related to Shirley's trust

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1 document. It was, I believe, in the amended trust  
2 document, but I'm going now by complete recollection  
3 of --  
4 Q Do you recall what the purpose of that  
5 document was, the second document you're talking about?  
6 A The purpose was to make changes to the  
7 original trust document.  
8 Q Any particular change that you can recall?  
9 A No, not -- not, you know, sitting here without  
10 the document, no.  
11 Q The last document that I've shown you, this  
12 Exhibit Number 18, this is Mr. Tescher -- it looks like  
13 he's writing to you and your siblings in particular  
14 about billing, correct?  
15 A Yes.  
16 Q This is August 30, 2013, correct?  
17 A Yes, it is.  
18 Q As of this date, he's still referring to the  
19 fact that your father's - looking at the second full  
20 paragraph from the bottom - that your father's affairs  
21 were not left in the best order and so forth, and also  
22 some concern that Eliot's activity might be costing the  
23 estate money, correct?  
24 A That's what he says here, yes.  
25 Q As of this time that this was written, you

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1 still were not aware of the existence of Exhibits 21 and  
2 22, the draft unsigned '95 trust, correct?  
3 A I'm not sure.  
4 Q Here's what I want to ask you: You're aware  
5 that the 2000 trust is an insurance trust, correct?  
6 It's for the purpose of receiving insurance proceeds,  
7 correct?  
8 MR. SIMON: Objection. Are you going to show  
9 him the document?  
10 MR. STAMOS: Yeah, I can. I was going to work  
11 from memory, but we can.  
12 That's Exhibit Number 23.  
13 (Exhibit 23 was marked for identification.)  
14 Q So, first, let me ask you this: I imagine  
15 that your business, over the years that you've been  
16 involved in selling life insurance, you've dealt with  
17 many customers or clients who have had insurance trusts,  
18 correct?  
19 A That is correct.  
20 Q This is not the first time you've ever looked  
21 at an insurance trust, the one you've just looked at,  
22 correct?  
23 A Also correct, yeah.  
24 Q In your experience, the lawyers who draft  
25 trusts, for example this one, very often do what was

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1 done here, which is they provide a first page indicating  
2 who prepared it with the law firm's name on it, right?  
3 MR. SIMON: Objection; speculation.  
4 Q Is that your experience to see that?  
5 A Yes.  
6 Q If you look at Exhibit Number 24 and 25 --  
7 Let's start with Number 24.  
8 (Exhibits 24 and 25 were marked for  
9 identification.)  
10 Q Looking at 24, that's the trust dated July 25,  
11 2012, correct?  
12 A Yes, it is.  
13 Q And number 25 is a trust dated May 20, 2008,  
14 correct?  
15 A Yes.  
16 Q And those are both prepared by the Tescher &  
17 Spallina firm, right?  
18 A Yes.  
19 Q The three trusts that we have, at least that  
20 we know are executed, each one of them identifies the  
21 law firms who prepared them, correct?  
22 A Yes.  
23 Q In your experience as a life insurance  
24 professional, I'm sure you've had occasion over time to  
25 be the first one advised that one of the insureds has

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1 died and then you participated in helping to make a  
2 claim, correct?  
3 A Yes.  
4 Q In doing that, I'm sure you've interacted with  
5 attorneys, including those who have drafted trusts as  
6 part of that process, right?  
7 A Yes.  
8 Q Is it your experience, what I believe to be  
9 universal among estates and trusts lawyers, that they  
10 maintain trusts that they have drafted or estate plans  
11 they have created because they're aware that down the  
12 line when someone dies, number one, they might need to  
13 find those documents, and number 2, the lawyers hope to  
14 get the business as part of the estate? Is that true in  
15 your experience?  
16 MR. SIMON: Objection; speculation, form.  
17 MR. STAMOS: I'm asking for his experience.  
18 MR. SIMON: He's not an attorney.  
19 A That, I don't know. I mean, what their intent  
20 is for drafting the documents and -- I can't say in  
21 general terms --  
22 Q Okay. But in your experience, have you ever  
23 gone to a firm that drafted a trust and they didn't have  
24 a copy of it?  
25 A I don't know.

79

1 Q Here, do you know if efforts were made to  
2 contact the attorneys who are purported to have drafted  
3 the 1995 trust to see if they had a copy of it?  
4 A I believe that efforts were made to do that,  
5 yes.  
6 Q Did you learn what the results of that  
7 investigation were?  
8 A My recollection was the firm was absorbed by  
9 another firm, or maybe there were two, you know,  
10 iterations of this, but the firm is no longer in  
11 existence and that they didn't keep the records or they  
12 may have sent out something about records.  
13 I'm just going by memory, so I can't be -- you  
14 know, give you anything more than that.  
15 Q Do you remember who told you that?  
16 A I do believe that was Robert Spallina. I  
17 think he was making those inquiries to the other firm.  
18 It may have been David in Chicago.  
19 Q Now, David has testified that -- I'm speaking  
20 roughly, but I believe accurately in describing his  
21 testimony, which is that he -- that when Simon created  
22 the '95 trust, that David assisted him in preparing it  
23 on the computer actually and Simon then took that  
24 version and took it over to Hopkins & Sutter, the law  
25 firm that they say prepared it, and that was the basis

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Pages 77 to 80





1 for the trust ultimately that Simon executed. Does that  
2 sound familiar to you?  
3 A It doesn't. It does not sound familiar that  
4 Scooter was -- that David was creating a document on  
5 a -- on a -- on a computer.  
6 Q We now know that David testifies that there  
7 was a document on the computer, correct, because that's  
8 what Exhibit Number 21 is, right?  
9 A Okay.  
10 Q Okay? I mean, do you agree with me, that's  
11 what we understand that to be?  
12 A I do.  
13 Q So the question I have for you is, did you  
14 ever have a conversation with David in which he said --  
15 when these communications were taking place with  
16 Mr. Spallina about how do we approach, we can't find the  
17 '95 trust and so forth, did David ever say anything to  
18 you like, "You know, I put it on my computer to begin  
19 with. Maybe I should check there"? Do you ever  
20 remember any such conversation?  
21 A I do not.  
22 Q When you look at Exhibit Number 23, if you  
23 would look at that, please, the first page indicates  
24 that the 2000 trust is to receive the proceeds --  
25 looking at the very first paragraph, the first sentence

81

1 Don't tell me the number.  
2 MR. STAMOS: I'm looking --  
3 MR. ROSE: What does it say on the front?  
4 MR. STAMOS: Let's start again.  
5 MR. ELIOT BERNSTEIN: Proskauer Rose trust.  
6 MR. STAMOS: I'm looking at Exhibit 23. The  
7 very first page indicates it was prepared by the  
8 Proskauer firm. Do we all have that document in  
9 front of us?  
10 MR. SIMON: Yes.  
11 THE WITNESS: Yes.  
12 Q (By Mr. Stamos) All right. If you flip that  
13 first page and go to TS3893, paragraph number 1, do we  
14 agree that it says, "As and for a gift, the settlor  
15 hereby assigns and transfers to the trustees and their  
16 successors (together "the trustees"), the life insurance  
17 policies set forth in Schedule A."  
18 MR. SIMON: Continue.  
19 Q Do you see that?  
20 MR. SIMON: Continue.  
21 Q Well, it says other things as well, but -- you  
22 can read as much as you -- read as much of it as you  
23 want and then tell me whether you've read it.  
24 MR. SIMON: Into the record. Read the whole  
25 thing into the record.

83

1 actually, was to receive the proceeds of some insurance  
2 policies listed on Exhibit A, correct?  
3 A Okay. I'm with you now. You want me looking  
4 at 23?  
5 Q Yup. And look at the first page of it, which  
6 is 3893, the first text page.  
7 A Okay. I'm with you.  
8 Q This trust provides that the insurance  
9 policies set forth in Schedule A, the proceeds of those  
10 policies are going to be paid to the trust, right?  
11 MR. SIMON: Objection; the document speaks for  
12 itself.  
13 MR. STAMOS: I'm asking if that's his  
14 understanding of it.  
15 MR. SIMON: Same objection.  
16 A I mean, the document says what it says.  
17 Right?  
18 Q It says that it transfers to the trustees of  
19 this 2008 trust the life insurance policies set forth in  
20 Schedule A, right?  
21 MR. ROSE: Wait. Which one are you looking  
22 at?  
23 MR. SIMON: Objection as to form of question.  
24 That's not what it says.  
25 MR. ROSE: Which document are you looking at?

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1 Q Okay? You see that, correct?  
2 A I see it.  
3 Q All right. And then Schedule A includes in it  
4 the life insurance policy with regard to which we are  
5 currently litigating, right?  
6 MR. SIMON: I'm going to object as to form,  
7 because again you've misstated what paragraph 1  
8 said.  
9 A Yeah. I'm going to read it. "The life  
10 insurance policies set forth in Schedule A annexed  
11 hereto, and the settlor agrees to execute all such  
12 assignments and changes of beneficiary and to do such  
13 other acts and things as may be necessary in order to  
14 make the trustees irrevocable absolute assignees of said  
15 life insurance policies. The trustee shall hold said  
16 policies together with any other property which may be  
17 received by them in trust upon the terms and conditions  
18 set forth herein. This trust shall be known as the  
19 Simon Bernstein 2000 Insurance Trust."  
20 And I don't believe this policy ever  
21 received -- this trust ever received the policy, but  
22 okay.  
23 Q I just want to establish first what it says,  
24 see if we could agree what it says. I agree that's what  
25 it -- you accurately read it. I agree with you.

84

Pages 81 to 84



1 A Okay.  
2 Q Listed on Schedule A then, as being subject to  
3 the words that you just read, is included the insurance  
4 policy that we're litigating about, correct?  
5 A Let me go to sub 2A.  
6 Q Okay.  
7 THE WITNESS: Do you have Schedule A?  
8 MR. SIMON: It's the last page, I think.  
9 Q It's the last page of that exhibit.  
10 A Got it.  
11 Q All right?  
12 A I missed it at the top.  
13 Q That's okay. And that includes the life  
14 insurance policy that we are litigating about in this  
15 case, correct?  
16 A That is correct.  
17 Q Do you agree with me that this trust document  
18 does not reference the existence of a prior trust that  
19 had any interest in that insurance policy or any prior  
20 trust at all, right?  
21 MR. SIMON: I'm going to have to ask him to  
22 read the entire document.  
23 THE WITNESS: Yeah, I can't answer --  
24 MR. SIMON: Go ahead.  
25 A I can't answer that question without reading

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1 Q Yeah. If this document said, for example,  
2 "I'm replacing the '95 trust with this 2000 trust,"  
3 would you have expected that Mr. Spallina would have  
4 given you advice with regard to that fact, if it were a  
5 fact?  
6 MR. ROSE: I'm going to object, instruct him  
7 not to answer based on communications he had with  
8 Mr. Spallina, but you can ask the question with  
9 regard to information that Spallina disseminated to  
10 third parties or --  
11 Q Well, other than conversations that just  
12 involved you and Mr. Spallina, but not excluding  
13 communications that involved your siblings, like so many  
14 of these emails did, would you have expected in such  
15 communications when you and he were talking about  
16 whether we're going to use the 2000 trust and so forth,  
17 if the 2000 trust had referenced the existence of a  
18 prior trust, do you not think he would have brought that  
19 to your attention so that you could decide what impact  
20 that had on your view that the '95 trust still applied?  
21 MR. SIMON: Objection; form.  
22 A Honestly, I'm not sure. I can't, you know,  
23 tell you or speculate as to what Spallina -- what the  
24 expectations were of what was in this document.  
25 Honestly, I -- I can't.

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1 the whole document.  
2 MR. SIMON: Go ahead.  
3 Q Well, it speaks for itself.  
4 Let me ask you this: Are you aware of whether  
5 it does without reading it? Are you aware of whether it  
6 references any 1995 trust or any other trust?  
7 MR. SIMON: Objection; speculation. Not  
8 allowing him to read it.  
9 MR. STAMOS: No, no. I'm just asking if he's  
10 aware of it without reading it. It says what it  
11 says. His reading is not going to change what it  
12 says. I'm asking his state of mind.  
13 Q Are you aware of whether or not that document  
14 references the 1995 trust without having read it?  
15 MR. SIMON: Objection; relevance.  
16 Go ahead.  
17 Q Do you know?  
18 A I'm not -- I'm not aware.  
19 Q Do you think that if this document did  
20 reference the 1995 trust, that Mr. Spallina would have  
21 commented on that?  
22 MR. SIMON: Objection; speculation.  
23 Q Would you have expected him to tell you that  
24 it did?  
25 A Can you ask me that question again?

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1 MR. STAMOS: If you can give me just one  
2 second, I want to confer with Mr. Horan for a  
3 second.  
4 (Recess taken.)  
5 Q (By Mr. Stamos) If you would look at Exhibit  
6 24, please.  
7 A Okay.  
8 Q Is it your understanding that this document,  
9 the Simon L. Bernstein Trust -- I'm sorry, let me start  
10 again.  
11 This document is dated July 25, 2012, correct?  
12 A Yes. It's hard to read, but yes.  
13 Q You understand this document treats all of  
14 Simon's children as predeceasing for the purpose of its  
15 distribution, correct?  
16 A I have not read this document, but -- so I  
17 can't -- you know, I can't tell you that I agree with  
18 you.  
19 Q Are you aware, being one of those children, as  
20 to whether you are a beneficiary or are entitled to any  
21 distribution from the 2012 trust?  
22 MR. SIMON: Objection; the document speaks for  
23 itself.  
24 A Do you want me to read the whole document? If  
25 that's what it says, then that's what it says. If not,

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Pages 85 to 88



1 then --  
2 Q No, I don't -- that's not what I'm asking you.  
3 There's a reasonable amount of money involved here, and  
4 what I'm asking you is, as one of Simon's children, are  
5 you aware, personally aware -- not did you read this  
6 just now and what is it saying, but are you aware of  
7 whether you are a beneficiary of a trust that he left  
8 when he died?  
9 A I am -- I am aware of the trust when he died  
10 and I'm aware that I'm not a beneficiary.  
11 Q Okay. That's what 2012 talks about, correct?  
12 A Correct.  
13 Q Not only are you not a beneficiary, none of  
14 your siblings are beneficiaries, correct?  
15 A You are correct.  
16 Q Was there a dispute in the family when you all  
17 learned that your father was going to, in effect,  
18 disinherit his singling? I'm sorry, the siblings?  
19 MR. ROSE: What time was that? Did you --  
20 MR. STAMOS: Let me start again.  
21 Q Prior to his death, you became aware that it  
22 was his plan that he was not going to leave money to his  
23 children, correct?  
24 A I did -- I'm aware of that.  
25 Q And that lead to some discord in the family,

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1 correct?  
2 A It did.  
3 Q Was there a call in which he participated, as  
4 did the siblings, in which you attempted to get him to  
5 change his mind or explain why his plan was not  
6 appropriate?  
7 A No.  
8 Q There was no such call?  
9 A There was no such call based on what you just  
10 said that call was about.  
11 Q Was there a call prior to his death that  
12 involved inheritance, that involved the siblings and  
13 your father?  
14 A Yes.  
15 Q Who said what to whom in that conference?  
16 A Robert Spallina explained that my father was  
17 going to leave the -- his assets to ten grandchildren  
18 equally.  
19 Q When -- I ask you to -- If you could pick up  
20 Exhibit Number 26, please.  
21 (Exhibit 26 was marked for identification.)  
22 Q Exhibit Number 26 was one of the documents  
23 produced by the Tescher & Spallina firm. Have you seen  
24 it before?  
25 A Yes.

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1 Q The third page is a transcription so that we  
2 could read what it actually said. Do you see that?  
3 A Do I see what the third page is?  
4 Q Yeah.  
5 A Yes, I do.  
6 Q What was the genesis of the facts surrounding  
7 Pam writing this note?  
8 MR. SIMON: Objection; speculation.  
9 Q I'm asking what you know, not what you're  
10 speculating about.  
11 A Can you ask me the -- what -- the question  
12 again, or what you're specifically asking me?  
13 Q What do you understand to have been the  
14 circumstances of the facts that led to Pam writing this  
15 note to your father? Why did she write it, as far as  
16 you know?  
17 MR. SIMON: Objection.  
18 A As far as I know, she read it -- she wrote it  
19 because she was -- she was passionate about the fact  
20 that the document -- that the estate plan did not  
21 include some of Sy's beneficiaries.  
22 Q Meaning several of the siblings, right?  
23 A Some of his children. Some of my siblings.  
24 Q Did it exclude you as well?  
25 A It did.

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1 Q Did you encourage her to write that, or did  
2 you know she was going to write that note when she wrote  
3 it?  
4 A I did not.  
5 Q Did you take any view on the subject matter?  
6 MR. SIMON: Objection.  
7 Q The subject of the disinheritance.  
8 MR. SIMON: Objection; relevance.  
9 Q You may answer.  
10 A Did I take any view to who?  
11 Q Did you have a view internally as to the  
12 appropriateness of your father's plan to disinherit some  
13 of his children?  
14 A Appropriateness, no. I encouraged --  
15 Q You didn't have any --  
16 A -- my father --  
17 Q Oh, go ahead, I'm sorry.  
18 A I encouraged my father to go speak with his  
19 counsel about the fact that he received this and what he  
20 should contemplate doing in receipt of it and how he was  
21 feeling about it, and I encouraged him to talk to  
22 counsel about it.  
23 Q Ultimately, he left the estate plan in place  
24 so that upon his death none of his estate passed to the  
25 siblings, correct?

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1 MR. ROSE: Object to the form.  
2 Oh, that's your objection.  
3 A He left the -- he left it in place.  
4 Q Meaning that each of you and your siblings was  
5 deemed to have been predeceased for the purpose of his  
6 estate planning?  
7 MR. SIMON: Objection; form.  
8 Q Is that your understanding? If it's not, tell  
9 me. I mean, I don't -- I'm not going to --  
10 MR. SIMON: Well, the first time you said  
11 "estate" and the second time you said "estate  
12 planning", which is much more general.  
13 MR. STAMOS: I didn't mean a distinction.  
14 Q I just want to establish, upon his death, no  
15 money as a consequence of his death passed or will have  
16 passed to you and your siblings if the '95 trust is  
17 never enforced and receives money through the insurance  
18 policy, right?  
19 A Correct.  
20 Q But the money will otherwise pass to all of  
21 your children, correct?  
22 A To all of his grandchildren.  
23 Q All of Simon's grandchildren, including your  
24 children as well, correct?  
25 A Correct.

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1 A I don't know what a holographic will is.  
2 Q It's a document that was written to leave  
3 Maritza a portion of the death benefit that Rachel  
4 Walker --  
5 Did she give you documents at the hospital the  
6 night he died?  
7 MR. SIMON: Objection; form. What's the  
8 question? Did she give you documents?  
9 Q Did Rachel -- do you know Rachel Walker?  
10 A I do.  
11 Q On the night your father died, did she bring  
12 documents to you at the hospital?  
13 A I believe she did.  
14 Q Was one of those documents a document with a  
15 check and a letter regarding Maritza Puccio?  
16 A No.  
17 Q What documents did she bring you?  
18 A My recollection is she brought me something --  
19 things pertaining to living wills. I'm not using  
20 correct legal terms I'm sure, but DNRs and things like  
21 that.  
22 Q On the day your dad died, did you contact the  
23 sheriff?  
24 A No.  
25 Q On the day after he died, did you contact the

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1 MR. STAMOS: Give me just one second.  
2 THE WITNESS: Sure.  
3 Q This is my final question, or just about:  
4 When you learned that Mr. Spallina had filed a claim  
5 identifying himself as trustee of the '95 trust, did you  
6 ever report to anyone in the insurance company or any  
7 authority that he, in fact, was never the trustee of the  
8 '95 trust?  
9 A I did not.  
10 Q Did you ever instruct him to take steps to  
11 correct any misimpression he might have caused others to  
12 form as a result of him having made that claim?  
13 A I'm not sure he caused misimpressions in  
14 anybody, so I don't know, and I didn't have any  
15 conversations with insurance companies.  
16 MR. STAMOS: All right. That's all I have.  
17 Thank you.  
18 THE WITNESS: You're welcome.  
19 MR. ELIOT BERNSTEIN: Okay. I have a few  
20 questions.  
21 CROSS-EXAMINATION  
22 BY MR. ELIOT BERNSTEIN:  
23 Q Ted, are you aware of a holographic will  
24 leaving some of the insurance proceeds to Maritza  
25 Puccio?

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1 sheriff?  
2 A I don't recall.  
3 Q Did you file a sheriff's report at all after  
4 your father died?  
5 A I don't recall.  
6 Q Did you make any claims that Maritza Puccio,  
7 his girlfriend, might have poisoned him?  
8 A No.  
9 Q You gave no statement to the sheriff?  
10 MR. SIMON: Objection; asked and answered.  
11 Don't answer.  
12 Q Did you file a coroner's -- did you order a  
13 coroner inquiry on the day your father died?  
14 A I did not.  
15 Q At any time?  
16 A I did not.  
17 Q Do you know anybody who did?  
18 A I believe the Palm Beach County did.  
19 Q Palm Beach County who?  
20 A The County.  
21 Q The County ordered a coroner's --  
22 MR. SIMON: Asked and answered.  
23 Q -- investigation?  
24 MR. SIMON: Asked and answered.  
25 Q Okay. Why did they order it?

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Pages 93 to 96



1 MR. SIMON: Objection; speculation.  
2 Q Have you seen the report?  
3 A I believe so.  
4 Q On the day after your -- on the morning after  
5 your father died -- or actually that morning, did you go  
6 to your father's house?  
7 A What date are you asking me about?  
8 Q September 13th.  
9 A You know, it's a blurry time. I -- shortly  
10 after dad died, I -- I went to his house.  
11 Q Were there sheriffs there?  
12 A I believe some -- somebody from a law  
13 enforcement agency showed up one of those days shortly  
14 after dad died.  
15 Q Did you speak with those sheriffs?  
16 A I did.  
17 Q What did you talk to them about?  
18 A Not a lot of recollection, but they were  
19 asking me questions about things.  
20 Q Like?  
21 A Medication, what -- what amounts of  
22 medication, if I knew what kind of medication he took or  
23 was taking or things like that.  
24 Q Why were they there?  
25 MR. SIMON: Objection; speculation.

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1 Q Well, you met with the sheriff. Didn't you  
2 wonder why he was at your father's house on the day he  
3 died and you were giving statements to him?  
4 MR. SIMON: Same objection.  
5 A You -- did you ask me why were they there?  
6 Q Yeah.  
7 A I don't know. I can't remember why they were  
8 there.  
9 Q And you had no involvement in the call. Did  
10 your attorney have any involvement in the call to the  
11 sheriff that you're aware of?  
12 A I don't -- I can't -- I don't think so. I  
13 don't think so.  
14 Q So you, to the best of your recollection, you  
15 don't know who called the sheriff or contacted them?  
16 MR. SIMON: Objection; form.  
17 Q Are you aware the night your father died that  
18 a call had been made to the hospital claiming that he  
19 had been poisoned?  
20 A I'm not -- I'm not aware of a call that was  
21 made where -- where it was claimed that he was poisoned.  
22 Q You weren't aware of that?  
23 A (Nonverbal response.)  
24 Q Okay.  
25 MR. ROSE: Can you hear this okay in Chicago?

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1 I can't tell if you're acting like you're not able  
2 to hear.  
3 MR. STAMOS: No, we can hear. We got it.  
4 MR. ROSE: Okay.  
5 MR. STAMOS: Thank you.  
6 MR. ROSE: You're welcome. I just saw your  
7 face, so...  
8 MR. STAMOS: Thanks.  
9 Q (By Mr. Eliot Bernstein) So you became aware  
10 at some point that there was a coroner's inquiry and you  
11 were aware that there was claims about his medication,  
12 correct?  
13 MR. SIMON: Objection; form.  
14 Q That if he had been --  
15 MR. ELIOT BERNSTEIN: Oh, okay. I'll skip  
16 that for a second.  
17 Q If this 1995 trust is lost and is not valid by  
18 the court, you get no benefits whatsoever, correct?  
19 MR. SIMON: Objection; speculation, and calls  
20 for a legal conclusion.  
21 Q Can you look at the trust document, either one  
22 of those trust documents that were exhibited, and tell  
23 me who the law firm is on that trust document.  
24 A Tescher & Spallina's law firm?  
25 Q No, the two 1995 trusts that you're claiming

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1 you're the trustee of. Who's the law firm that prepared  
2 that document?  
3 MR. STAMOS: Those are Exhibit 21 and 22.  
4 THE WITNESS: Oh, thank you, Jim.  
5 21 and 22? Of course I kept everything in  
6 order except 21 and 22.  
7 Do you have it? He's looking for the law  
8 firm's name? Is this 21 and 22?  
9 MR. SIMON: Yeah, these are 21 and 22. You  
10 can just look at it.  
11 A Are you asking me for the law firm on 21 and  
12 22?  
13 Q Yes.  
14 A I don't see a law firm.  
15 Q You don't see a law firm on the trust  
16 document?  
17 A I don't.  
18 Q Anywhere on the document, does it say who  
19 prepared it?  
20 MR. SIMON: Objection; asked and answered.  
21 MR. ELIOT BERNSTEIN: Well, I'm asking him  
22 is -- anywhere on the document, is there a  
23 reference to a law firm.  
24 MR. SIMON: Asked and answered.  
25 A Not -- not that I see.

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1 Q Are you aware of any claim that your father  
2 had been poisoned by anybody? Have you ever heard that  
3 claim in the course of these proceedings?  
4 A I -- I have heard things about dad being  
5 poisoned.  
6 Q Did you report those things to the insurance  
7 company?  
8 MR. SIMON: Objection; relevance.  
9 MR. ELIOT BERNSTEIN: Well, there's a death  
10 benefit claim, and I think it would be pretty  
11 relevant, if somebody was murdered, who the  
12 beneficiaries would be and how it would be paid and  
13 if the insurance company should seek an  
14 investigation.  
15 MR. SIMON: You can ask the question.  
16 MR. ELIOT BERNSTEIN: So --  
17 Q Go right ahead.  
18 A Can you ask me the question again?  
19 Q Did you report to the insurance company that  
20 you had information that your father might have been  
21 poisoned?  
22 A I did not.  
23 Q Did you report it to the federal court that  
24 your father might have been poisoned?  
25 A I have -- I have not.

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1 Q When you filed the lawsuit, did you notify  
2 anybody that your father might have been poisoned?  
3 A Which lawsuit?  
4 Q The 1995 trust.  
5 A I did not.  
6 Q When you became trustee -- Robert Spallina  
7 filed that original claim. When you became trustee, who  
8 did you notify? Did you send out anything to the  
9 beneficiaries?  
10 A When I became the trustee of --  
11 Q The successor trustee of this lost trust that  
12 doesn't exist legally.  
13 A Did I send anything to anybody?  
14 Q Yeah.  
15 MR. SIMON: Objection as to form.  
16 Q Did you contact the beneficiaries by sending  
17 them proper notice that you were trustee?  
18 MR. SIMON: Objection as to form.  
19 A I think all the beneficiaries were in  
20 discussions, but I didn't.  
21 Q Are you familiar with the laws regarding  
22 successor trustees?  
23 MR. SIMON: Objection; vague; asking for legal  
24 conclusions.  
25 MR. ELIOT BERNSTEIN: Okay.

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1 Q Is Adam Simon related to you?  
2 MR. SIMON: It's an easy question. No.  
3 A I don't think so, no.  
4 Q Is he related to your sister's husband?  
5 A He is.  
6 Q He is. And does your sister stand to lose all  
7 of her benefit if this trust can't be proven and the  
8 money gets paid to the estate?  
9 MR. SIMON: Objection; speculation, calls for  
10 a legal conclusion.  
11 A No -- no idea.  
12 Q So you know that if the trust doesn't succeed  
13 and the money's paid to the estate, you, because you're  
14 considered predeceased, don't get benefit, but you're  
15 not sure about your sister who's also considered  
16 predeceased?  
17 MR. SIMON: Objection as to form; makes a  
18 legal conclusion that's not necessarily correct.  
19 I wouldn't even answer that one.  
20 Continue.  
21 MR. ELIOT BERNSTEIN: Okay. So we'll certify  
22 that to take up with the judge.  
23 MR. SIMON: Please.  
24 MR. ELIOT BERNSTEIN: Okay.  
25 Q Do you think that notifying an insurance

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1 company of a potential claim that the insured was  
2 murdered is appropriate in your experience as an  
3 insurance agent?  
4 MR. SIMON: Objection; speculation, form.  
5 You can try to answer.  
6 A I think you're asking me, if I knew that  
7 somebody was murdered -- would I notify an insurance  
8 company if I knew that somebody was murdered.  
9 Q If you thought somebody was murdered.  
10 A Would I notify an insurance company if I had  
11 reason to be involved in that situation, I think what  
12 you're asking me is, if I had that knowledge, I would  
13 notify an insurance company.  
14 Q When you filed this lawsuit, you filed a  
15 breach of contract lawsuit, correct?  
16 A I'm not sure.  
17 Q Well, you're the plaintiff. You filed the  
18 lawsuit --  
19 MR. SIMON: Show him the Complaint. That's  
20 what it's for.  
21 Q So you're not sure --  
22 MR. SIMON: Show him the Complaint, Mr.  
23 Bernstein.  
24 MR. ELIOT BERNSTEIN: That's a good enough  
25 answer.

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Pages 101 to 104



1 Q What type of lawsuit did you file with the  
2 federal court?  
3 MR. SIMON: Objection. Show him the  
4 Complaint, please.  
5 Q I'm just asking based on your knowledge.  
6 A And I'm -- and I'm not a lawyer, and I don't  
7 have the document, and the type of lawsuit that was  
8 filed, without looking at something, I can't tell you.  
9 Q So you're the trustee of this trust and you  
10 filed as a plaintiff a lawsuit and you don't know what  
11 kind of lawsuit?  
12 MR. SIMON: Objection; speculation,  
13 argumentative. We've asked you several times to  
14 give him the Complaint which would give you the  
15 answer you're looking for, Mr. Bernstein, so please  
16 continue.  
17 MR. ELIOT BERNSTEIN: I'm just asking for his  
18 knowledge.  
19 MR. SIMON: I'm just asking you to continue.  
20 We'll just stop. We can just stop.  
21 MR. ELIOT BERNSTEIN: I'm just asking for his  
22 knowledge.  
23 MR. SIMON: Then go ahead.  
24 Q So, based on your knowledge, you are claiming  
25 that you have no idea how you filed this lawsuit?

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1 Q Well, were you in charge of Simon's personal  
2 property to remove documents off the estate when he  
3 died?  
4 MR. SIMON: Objection; relevance.  
5 A I don't understand the question.  
6 Q Well, we have missing documents, Ted --  
7 A Yes.  
8 Q -- as you're aware, estate documents, trusts.  
9 Rachel came with --  
10 How many documents did she give you that  
11 night?  
12 MR. SIMON: Objection; form. That's not  
13 even --  
14 Q Approximately how many documents did she bring  
15 to you that were estate planning documents?  
16 A A couple.  
17 Q And then you have no idea where you have those  
18 documents?  
19 A No. At this time, I don't.  
20 Q In those documents, you weren't aware of any  
21 documents that were supposed to be tendered back to the  
22 estate?  
23 MR. SIMON: Objection.  
24 Q You removed property from the estate or had  
25 someone remove it on your behalf. Did you have it

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1 MR. SIMON: Objection. That's not what  
2 he's -- you're testifying for him. Ask him a  
3 question.  
4 Q Did you deliver the documents that you got  
5 from Rachel Walker at the hospital to any party?  
6 A Other than the hospital?  
7 Q Yeah.  
8 A Deliver them? I don't recall, Eliot.  
9 Q Where are those documents?  
10 A I don't recall that either.  
11 Q Well, Rachel Walker, you sent her to get  
12 documents from the home of Simon after he died, correct?  
13 A I believe I did.  
14 Q And they were estate documents, correct?  
15 A I think I understand what you're asking me,  
16 and, yes, they were -- they were documents that were  
17 part of his estate planning.  
18 Q And I'm asking you if you know where they are.  
19 A I think I answered. I don't recall right now  
20 where they are.  
21 Q Were you in custody of Simon's personal  
22 property and possessions after he died?  
23 MR. SIMON: Objection; relevance.  
24 A Was I in custody? Can you clarify "custody"  
25 for me?

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1 returned to the estate?  
2 MR. SIMON: Objection; form. Didn't let him  
3 answer. Compound questions.  
4 Q Were you requested by any parties to turn  
5 those documents over to them?  
6 A I don't believe so.  
7 MR. ELIOT BERNSTEIN: I'd like to submit this  
8 as an exhibit. Can we get a copy of that real  
9 quick.  
10 (Recess taken.)  
11 (Exhibit A was marked for identification.)  
12 MR. STAMOS: Can you describe that for us? We  
13 don't have a copy.  
14 Q (By Mr. Eliot Bernstein) Ted, could you  
15 describe that document.  
16 MR. ROSE: (Indicating.)  
17 MR. STAMOS: Is that the police report  
18 document?  
19 MR. ELIOT BERNSTEIN: Yes.  
20 MR. STAMOS: Yeah, we have that. I think we  
21 have that.  
22 MR. ROSE: I'm just trying to be helpful.  
23 MR. STAMOS: Thank you.  
24 Is that topped by the February 11, 2014 fax  
25 number -- fax legend?

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1 MR. ROSE: This one says January 31, '13.  
2 MR. STAMOS: Oh.  
3 MR. ROSE: The report entry though is --  
4 starts with the words "On 9/13/12 at 12:11 hours."  
5 MR. STAMOS: Oh, okay. We don't have that  
6 one. All right.  
7 THE WITNESS: Okay.  
8 Q (By Mr. Eliot Bernstein) You were talking to  
9 the sheriff's department on this day, correct?  
10 A Yes, I was.  
11 Q And that's the day your father died, right?  
12 A Yes.  
13 Q Did you advise the sheriff's department that  
14 your father might have been overdosed or the likes by  
15 his girlfriend?  
16 A No.  
17 Q No?  
18 A No.  
19 Q Okay. Were you advised by anybody that your  
20 father could have been overdosed?  
21 A Yes.  
22 Q That's good. So now you're remembering that  
23 you did talk to the sheriff's department that day?  
24 MR. SIMON: Objection; move to strike,  
25 argumentative.

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1 Q Did you contact a private company regarding  
2 doing an autopsy?  
3 A I believe that I did.  
4 Q Oh, now you did, okay.  
5 MR. SIMON: Objection; move to strike,  
6 argumentative.  
7 Q Did you contact the Palm Beach County Medical  
8 Examiner's Office about having an autopsy?  
9 A I can't recall.  
10 Q Well, read the next line. Did you tell a  
11 sheriff's deputy that?  
12 A Which line are you asking me to read?  
13 Q The one that is -- I think it's like 14. Hold  
14 on.  
15 MR. SIMON: Elliot, I'm going to give you two  
16 more questions, and then we're going to do my  
17 questions, and then I'm going to stop.  
18 MR. ELIOT BERNSTEIN: I've got a few more  
19 questions.  
20 MR. SIMON: You've got two.  
21 MR. ELIOT BERNSTEIN: And these are very  
22 serious questions, so please. This could have --  
23 you know, potential murder of my father. I know  
24 you're concerned because my father spoonfed you his  
25 whole life.

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1 Q Did you voice concerns to Delray Hospital that  
2 your father might have been overdosed or taken too much  
3 medication?  
4 MR. SIMON: Objection; asked and answered.  
5 Q Okay. Can you read in the 11th line.  
6 A What is the first word?  
7 Q It will be at the end of that sentence. "He,"  
8 being you, Ted, "said," can you read that?  
9 A "He said he voiced his concerns to the doctors  
10 at Delray Community Hospital but they advised there did  
11 not appear to be any suspicious circumstances  
12 surrounding Simon's death and they would not be  
13 conducting an autopsy."  
14 Q Can you keep reading the next sentence,  
15 please.  
16 A "Ted contacted both a private company and the  
17 Palm Beach County Medical Examiner's Office regarding  
18 having an autopsy conducted."  
19 Q Would you like to change your prior statement?  
20 MR. SIMON: Objection; argumentative, form.  
21 Q Does that say you contacted the private  
22 autopsy firm?  
23 MR. SIMON: Objection.  
24 A It says, "Regarding."  
25 MR. SIMON: Document says what it says.

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1 MR. SIMON: Nobody from the insurance  
2 department --  
3 Q Ted, on Line 15 --  
4 MR. SIMON: We're done now.  
5 Q -- Ted contacted -- it starts with "Ted  
6 contacted." Could you read that into the record,  
7 please.  
8 MR. SIMON: You can read that.  
9 Q Three lines up from the bottom of the first  
10 paragraph.  
11 A "Ted contacted both the private company and  
12 the Palm Beach County Medical Examiner's Office  
13 regarding having an autopsy conducted. Both advised he  
14 should contact the Palm Beach County Sheriff's Office."  
15 Q Did you contact the Palm Beach County  
16 Sheriff's Office?  
17 A I don't remember.  
18 MR. SIMON: We're done.  
19 Q You don't recall that you're --  
20 MR. ELIOT BERNSTEIN: I'm not done. I have  
21 questions.  
22 MR. SIMON: You're done. We agreed to five to  
23 eight. I'm going to ask him two questions and then  
24 we're out of here.  
25 MR. ELIOT BERNSTEIN: Then you're out of time.

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Pages 109 to 112





1 MR. SIMON: Come on.  
2 Okay.  
3 MR. ELIOT BERNSTEIN: Yeah.  
4 (Mr. Simon and Mr. Ted Bernstein exit the  
5 room.)  
6 MR. ROSE: We're temporarily off the record.  
7 (Recess taken.)  
8 MR. SIMON: This is Adam Simon. I just have  
9 two or three questions.  
10 MR. ELIOT BERNSTEIN: Well -- so you're  
11 interrupting my line of questioning? I was  
12 questioning. So we should take this up with the  
13 judge to give me more time?  
14 MR. SIMON: Please do.  
15 MR. ELIOT BERNSTEIN: Okay, we will.  
16 MR. SIMON: Please do. Please. Please do.  
17 Yeah, the judge has been so --  
18 (Cross-talking. Interruption by the  
19 reporter.)  
20 MR. ELIOT BERNSTEIN: Your father would be  
21 ashamed.  
22 MR. SIMON: All right. You guys ready?  
23 MR. STAMOS: We're ready.  
24 CROSS-EXAMINATION  
25 BY MR. SIMON:

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1 Q Ted, we talked about the 2000 insurance trust,  
2 correct?  
3 A Yes.  
4 Q Have you seen any documents produced by anyone  
5 that assigned the ownership of the Capital Bankers  
6 policy to the 2000 trust?  
7 A No, I haven't. It's my understanding that  
8 that -- that trust never received any assets, didn't  
9 receive the insurance policy, was never named as a  
10 beneficiary.  
11 Q Never named as a beneficiary or an owner,  
12 correct?  
13 A Or an owner.  
14 Q Around the time of the reinstatement of the  
15 policy that you discussed, did you have any  
16 conversations with your father regarding the beneficiary  
17 of the policy and the purpose of the policy?  
18 A I did.  
19 Q And can you describe that conversation.  
20 A So we were having conversations at that time  
21 about a buy/sell agreement, you know, buying each other  
22 out of the business as he was winding things down in his  
23 career, and I wanted a life insurance policy because we  
24 were partners in that business and I, you know, was  
25 hoping that we would get a life insurance policy, but he

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1 made it, you know, emphatically clear, and I knew it  
2 from the reinstatement process, and I also just knew it  
3 from his medical history, that there was really little  
4 chance or no chance of getting another life insurance  
5 policy on his life. So I thought it might be easy to  
6 use existing life insurance and just change the  
7 beneficiary portion of the policy to take care of the  
8 needs that we would have needed in the buy/sell  
9 agreement discussions, but he was unwilling to do that.  
10 I guess he was unwilling to do that because he felt it  
11 was part of his overall plan to have those life  
12 insurance policies, you know, do other things to be left  
13 obviously for his children through the trust.  
14 MR. SIMON: I have nothing further.  
15 MR. ELIOT BERNSTEIN: I'd like to ask you a  
16 question on that.  
17 RECROSS EXAMINATION  
18 BY MR. ELIOT BERNSTEIN:  
19 Q You mentioned the policy. You're the trustee  
20 of this lost trust. Do you have possession of the  
21 policy?  
22 A I think I have a copy of the policy.  
23 Q A fully executed life insurance policy?  
24 MR. SIMON: Objection; relevance.  
25 Q Have you produced that policy to the court?

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1 MR. SIMON: Objection; relevance. The  
2 policy's been paid out by the carrier.  
3 Q The policy, do you have a copy of the actual  
4 policy from the carrier?  
5 A A copy of the policy? I think so.  
6 Q Fully executed?  
7 MR. SIMON: Objection.  
8 A I don't know what that means.  
9 Q A policy that has all the pages to it that's a  
10 complete policy, that's got the beneficiaries, the death  
11 benefits, all that listed out. A copy of the policy.  
12 MR. SIMON: Objection; form --  
13 Q Do you have possession of that?  
14 MR. SIMON: Objection; form. Objection;  
15 foundation.  
16 Q Do you have the policy?  
17 MR. SIMON: Objection, relevance.  
18 A I believe I have a copy of what the insurance  
19 company sent during this time of reinstatement. I  
20 believe I have a copy of the insurance policy. Whether  
21 executed, I -- I don't know what they deem executed.  
22 Q You have a copy of the insurance policy, okay.  
23 Have you given that in your production?  
24 MR. SIMON: Objection; misstated his answer.  
25 Q I asked you did you put it in production. You

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Pages 113 to 116



1 haven't answered.  
2 MR. SIMON: He said he saw it in production.  
3 He said what was produced.  
4 Q No. I asked you, did you put your copy of the  
5 policy in production. You were supposed to --  
6 MR. SIMON: No, you didn't.  
7 Q -- put all your documents.  
8 MR. SIMON: That's not what you said. That's  
9 not what he said. He said he found the documents  
10 through production.  
11 Q Did you put the policy in with your production  
12 documents?  
13 A I'm not sure.  
14 Q You were asked by the court to produce  
15 documents. Did you produce all your documents?  
16 A I don't know if I was asked by a court to  
17 produce documents, but...  
18 Q Okay. We had to do a Rule 26 document  
19 request. You're the plaintiff. You produced documents.  
20 MR. SIMON: I'm going to object to this line  
21 of questioning. He has answered about the policy.  
22 He believes he had a copy. He's not sure if --  
23 Q You believe you had a copy --  
24 (Cross-talking. Interruption by the  
25 reporter.)

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1 which is probably inaccurate.  
2 Q I'm asking your understanding.  
3 MR. SIMON: Relevance. His understanding is  
4 not going to determine that.  
5 A It's my understanding that if the trust is  
6 determined not to be the beneficiary of the insurance  
7 policy, that I will not receive whatever it was I was  
8 supposed to receive. That's my -- what I understand.  
9 Anything else, I don't -- I don't know.  
10 Q Just one last -- but the corollary of that is  
11 your notion that if the court does recognize the trust  
12 as being the beneficiary, you'll receive something;  
13 you're just not sure what it is?  
14 A That's correct.  
15 MR. STAMOS: Okay. Thanks. That's all I  
16 have.  
17 MR. SIMON: I just have one more.  
18 RECCROSS EXAMINATION  
19 BY MR. SIMON:  
20 Q Do you understand that there is a third  
21 possibility, that even if the trust is not acknowledged,  
22 it may not go to the estate? It could possibly be  
23 decided to go somewhere else by the judge? Do you  
24 understand that?  
25 A I do understand that.

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1 Q Did you put the copy of the policy you claim  
2 to have with your production to the court when you  
3 produced?  
4 A I'm not sure.  
5 MR. SIMON: Jim, we're ten minutes over the  
6 agreed time. Do you have anything further?  
7 MR. STAMOS: I just have one additional  
8 question, if you don't mind.  
9 REDIRECT EXAMINATION  
10 BY MR. STAMOS:  
11 Q You described this conversation you had with  
12 your father a moment ago about the trust, how it related  
13 to the buy/sell and so forth. Do you recall that  
14 question and answer you just gave?  
15 A Yes, I do.  
16 Q And apropos of that conversation and any  
17 other -- apropos of that conversation, you understand  
18 that if the court recognizes the '95 trust as being the  
19 appropriate beneficiary for the policy, that you will  
20 receive 20 percent of the proceeds, and that if the  
21 court doesn't recognize the '98 [sic] trust as the  
22 beneficiary of the insurance policy in question, you  
23 will receive none of the proceeds of that policy,  
24 correct?  
25 MR. SIMON: Objection; it's a legal conclusion

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1 MR. ELIOT BERNSTEIN: Okay. I have one last  
2 question.  
3 MR. STAMOS: Let me ask -- let me follow that  
4 up.  
5 REDIRECT EXAMINATION  
6 BY MR. STAMOS:  
7 Q Where do you understand to be the third  
8 possibility as the destination for the proceeds of the  
9 policy?  
10 A So there's, you know, all kinds of  
11 possibilities of where insurance proceeds can go when  
12 they're up for grabs like that and --  
13 MR. SIMON: And I'm going to object, because  
14 this is all legal conclusion for the judge to  
15 decide.  
16 MR. STAMOS: I'm just following up your  
17 question. You asked him was there a third  
18 possibility; he said yes. I'm just trying to find  
19 out what third possibility he understands that  
20 there is.  
21 MR. SIMON: I said third possibility that the  
22 judge would determine. That was my question.  
23 MR. STAMOS: Yeah. Well, Adam, I'm just  
24 asking what he understands. If he has no  
25 understanding, he can tell me that and we can go

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Pages 117 to 120



1 home.  
 2 A I understand that there's infinite  
 3 possibilities of where it could go in the event that a  
 4 judge makes a ruling on where they go.  
 5 MR. ELIOT BERNSTEIN: Okay. I have one last  
 6 question.  
 7 RE-CROSS EXAMINATION  
 8 BY MR. ELIOT BERNSTEIN:  
 9 Q Ted, what's the primary beneficiary on the  
 10 policy that you possess?  
 11 A The primary beneficiary, if I recall, was a --  
 12 was a -- I think it was a voluntary employee benefit  
 13 plan.  
 14 Q Would that happen to be LaSalle National  
 15 Trust?  
 16 A Oh, boy, I -- I don't know.  
 17 Q You don't know who the primary beneficiary on  
 18 the policy that you're the trustee for is?  
 19 MR. SIMON: Objection; asked and answered,  
 20 argumentative.  
 21 We're done. Let's go.  
 22 Q One more question.  
 23 MR. SIMON: No. We're done.  
 24 Q Who's the contingent beneficiary named on it?  
 25 Are you aware your father -- of his heavy

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1 ERRATA-SIGNATURE PAGE  
 2 SIMON BERNSTEIN IRREVOCABLE TRUST VS. HERITAGE UNION  
 3 LIFE INSURANCE  
 4 Case No. 13 CV 3643  
 5 DEPOSITION TAKEN May 6, 2015  
 6 Page \_\_\_\_ Line \_\_\_\_:  
 7 Now Reads: \_\_\_\_\_  
 8 Should Read: \_\_\_\_\_  
 9 Reason for Change: \_\_\_\_\_  
 10 Page \_\_\_\_ Line \_\_\_\_:  
 11 Now Reads: \_\_\_\_\_  
 12 Should Read: \_\_\_\_\_  
 13 Reason for Change: \_\_\_\_\_  
 14 Page \_\_\_\_ Line \_\_\_\_:  
 15 Now Reads: \_\_\_\_\_  
 16 Should Read: \_\_\_\_\_  
 17 Reason for Change: \_\_\_\_\_  
 18 Page \_\_\_\_ Line \_\_\_\_:  
 19 Now Reads: \_\_\_\_\_  
 20 Should Read: \_\_\_\_\_  
 21 Reason for Change: \_\_\_\_\_  
 22 Page \_\_\_\_ Line \_\_\_\_:  
 23 Now Reads: \_\_\_\_\_  
 24 Should Read: \_\_\_\_\_  
 25 Reason for Change: \_\_\_\_\_  
 Under penalties of perjury, I declare that I have  
 read the foregoing transcript and that the facts stated  
 in it are true.  
 \_\_\_\_\_  
 Date TED BERNSTEIN


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1 metal poison test, Ted? Ted?  
 2 MR. ROSE: I think Adam's terminated the  
 3 deposition, so --  
 4 MR. SIMON: Yeah. We're way past --  
 5 MR. ROSE: You have no further questions in  
 6 Chicago, right?  
 7 MR. SIMON: Way past.  
 8 MR. STAMOS: No, we're all set.  
 9 MR. ROSE: Have a good night, guys.  
 10 (Mr. Simon and Mr. Ted Bernstein exit the  
 11 room.)  
 12 (Deposition concluded at 8:15 p.m.)  
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122

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 2 CERTIFICATE OF OATH  
 3  
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 5 STATE OF FLORIDA )  
 6 )  
 7 COUNTY OF PALM BEACH )  
 8  
 9 I, Lisa Gropper, Registered Professional Reporter,  
 10 Florida Professional Reporter, Notary Public, State of  
 11 Florida, certify that TED BERNSTEIN personally appeared  
 12 before me on the 6th day of May, 2015 and was duly  
 13 sworn.  
 14 WITNESS MY HAND AND OFFICIAL SEAL this 19th day of  
 15 May, 2015.  
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*Lisa Gropper*  
 LISA GROPPER, RPR, FPR  
 Notary Public, State of Florida  
 My Commission No.: EE136111  
 My Commission Expires: 11/18/2015




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CERTIFICATE OF REPORTER

STATE OF FLORIDA )  
)  
COUNTY OF PALM BEACH )

I, LISA GROPPER, Registered Professional Reporter,  
Florida Professional Reporter, do hereby certify that I  
was authorized to and did stenographically report the  
deposition of TED BERNSTEIN; that a review of the  
transcript was requested; and that the foregoing  
transcript is a true record of my stenographic notes.

I FURTHER CERTIFY that I am not a relative,  
employee, or counsel of any of the parties, nor am I a  
relative or employee of any of the parties' attorney or  
counsel connected with the action, nor am I financially  
interested in the action.

Dated this 19th day of May, 2015.

*Lisa Gropper*

\_\_\_\_\_  
Lisa Gropper, R.P.R., F.P.R.

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McCorkle Litigation Services, Inc.  
200 N. LaSalle Street - Suite 2900  
Chicago, Illinois 60601  
(312) 263-0052

May 19, 2015

The Simon Law Firm  
303 East Wacker Drive  
Suite 2725  
Chicago, Illinois 60601  
ATTN: Adam M. Simon, Esq.

RE: SIMON BERNSTEIN IRREVOCABLE TRUST VS. HERITAGE  
UNION LIFE INSURANCE

Dear Mr. Simon,

Enclosed please find the deposition transcript of  
TED BERNSTEIN in the above-captioned case taken on  
May 6, 2015.

Please have Mr. Bernstein read your transcript copy  
and sign the attached errata sheet. Make a copy of the  
errata sheet to attach to your copy of the transcript,  
and then please forward the original errata sheet back  
to our office.

Please make arrangements to have this accomplished  
as soon as possible. The failure to read and sign the  
deposition could be constituted as a waiver if not  
accomplished within a reasonable period of time.

Your attention to this matter is appreciated.

Sincerely,

*Lisa Gropper*  
\_\_\_\_\_  
Lisa Gropper, RPR, FPR



| A                     |                        |                       |                         |                      | B                      |
|-----------------------|------------------------|-----------------------|-------------------------|----------------------|------------------------|
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| 3:8                    | 6:10                 |  |  |  |  |
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| 52                     | 9                    |  |  |  |  |
| 60:2,4                 | 4:20 32:4 59:24,25   |  |  |  |  |
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| 55                     | 109:4                |  |  |  |  |
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| 4:17                   | 92                   |  |  |  |  |
| 58                     | 50:20                |  |  |  |  |
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| 2:20 4:4,15 12:12 55:8 | 35:8 37:1 42:10,16   |  |  |  |  |
| 57:21 123:3 126:13     | 42:18 44:21 58:21    |  |  |  |  |
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| 60                     | 118:18               |  |  |  |  |
| 4:22                   | 97                   |  |  |  |  |
| 600                    | 25:4                 |  |  |  |  |
| 3:8                    | 98                   |  |  |  |  |
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| 62                     | 61:2                 |  |  |  |  |
| 4:23                   |                      |  |  |  |  |
| 65                     |                      |  |  |  |  |
| 57:11                  |                      |  |  |  |  |
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| 68:5                   |                      |  |  |  |  |
| 70                     |                      |  |  |  |  |
| 32:19                  |                      |  |  |  |  |
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| 5:8                    |                      |  |  |  |  |
| 75                     |                      |  |  |  |  |



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

CASE NO. 502012CP004391XXXXNB-IH

Plaintiff: In Re: Estate of: Simon L. Bernstein

Defendant: N/A

Item: NOTICE OF FILING CHICAGO LITIGATION  
DEPOSITION TRANSCRIPT OF TED  
BERNSTEIN ON MAY 6, 2015

Filed by the:  PLAINTIFF  
 DEFENDANT  
 COURT

FOR IDENTIFICATION as exhibit # 6

DO NOT WRITE BELOW THIS LINE - FOR COURT USE ONLY

ADMITTED INTO EVIDENCE AS exhibit # 6  
this date \_\_\_\_\_

SHARON R. BOCK, Clerk & Comptroller

By: \_\_\_\_\_ D.C.



**Peter M. Feaman**

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**From:** Theodore Kuyper <tkuyper@stamostrucco.com>  
**Sent:** Tuesday, January 31, 2017 2:54 PM  
**To:** boconnell@ciklinlubitz.com  
**Cc:** Peter M. Feaman; William Stansbury (wesgator@msn.com)  
**Subject:** Bernstein - Status Update  
**Attachments:** [ECF 273] Memorandum Opinion and Order.pdf

Gentlemen:

I am writing to bring you up to date on the status of the case, on behalf of Jim Stamos, whose father unexpectedly passed away this weekend. Unfortunately, Judge Blakey denied our motion for summary judgment yesterday (see attached Memorandum Opinion and Order). While we disagree with the Court's analysis, we do not see anything in the opinion that undermines our position for trial. Your thoughts and comments are welcome.

The next status hearing is scheduled for February 21, 2017, at which time a trial date will be set. Judge Blakey hopes to do the trial during the summer. We do not anticipate that any of you will need to attend the trial, but will let you know the trial date as soon as it is set. In the interim, we appreciate your comments regarding the Court's ruling.

Sincerely,  
Ted Kuyper

**Theodore H. Kuyper**  
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UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

SIMON BERNSTEIN IRREVOCABLE  
INSURANCE TRUST DTD 6/21/95, *et al.*,

Plaintiffs,

v.

HERITAGE UNION LIFE INSURANCE  
CO.,

Defendant.

Case No. 1:13-cv-3643

Judge John Robert Blakey

---

HERITAGE UNION LIFE INSURANCE  
COMPANY,

Counter-Plaintiff,

v.

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

Counter-Defendant,

and

FIRST ARLINGTON NATIONAL BANK,  
*et al.*,

Third-Party Defendants.

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ELIOT IVAN BERNSTEIN,

Cross-Plaintiff,

v.

TED BERNSTEIN, *et al.*,

Cross-Defendants,

and

PAMELA B. SIMON, *et al.*,

Third-Party Defendants.

**MEMORANDUM OPINION AND ORDER**

This action concerns the distribution of proceeds from a life insurance policy (the “Policy Proceeds”) previously held by decedent Simon Bernstein. The principal parties remaining in the case are: (1) Plaintiff Simon Bernstein Irrevocable Insurance Trust Dated 6/21/95 (the “1995 Trust”); (2) the four Bernstein siblings who believe the Policy Proceeds should be distributed to the 1995 Trust (Ted Bernstein, Lisa Friedstein, Jill Iantoni and Pam Simon; collectively, the “Agreed Siblings”); (3) the fifth Bernstein sibling, Eliot Bernstein, a *pro se* third-party Plaintiff who disputes that approach (“Eliot”); and (4) the intervenor estate of Simon Bernstein (the “Estate”), which contends that the 1995 Trust was never actually created, such that the Policy Proceeds should default to the Estate.

Before the Court are two motions for summary judgment. In the first, [239] at 1-4, the 1995 Trust and the Agreed Siblings seek judgment on Eliot’s third-party claims. In the second, [245] at 1-6, the Estate seeks judgment against the 1995 Trust and the Agreed Siblings on their claims in the Second Amended Complaint, [73], and entry of judgment in the Estate’s favor on its Complaint for Declaratory Judgment. [112] at 1-17. For the reasons explained below, the former is granted while the latter is denied.

## I. Background<sup>1</sup>

### A. Procedural Posture

Following Simon Bernstein's death on September 13, 2012, the 1995 Trust submitted a death claim to Heritage pursuant to Simon Bernstein's life insurance policy. [150] at 15; [240] at 13. After Heritage failed to pay, the 1995 Trust initiated this lawsuit in the Circuit Court of Cook County, alleging that Heritage had breached its contractual obligations. [1-1] at 1-3. On May 20, 2013, Jackson National Life Insurance Company ("Jackson"), as successor in interest to Heritage, removed the case to this Court. [1] at 1-2.

On June 26, 2013, Heritage, through Jackson, filed a Third-Party Complaint and Counter-Claim for Interpleader pursuant to 28 U.S.C. § 1335(a) and Federal Rule of Civil Procedure 14, seeking a declaration of rights under the life insurance policy. [17] at 1-10. Heritage was eventually dismissed in February of 2014 after interpleading the Policy Proceeds. [101] at 2.

On September 22, 2013, Eliot, a third-party Defendant to Jackson's interpleader claim, filed a 177-page Answer, Cross-Claim and Counter-Claim. [35] at 1-117. Eliot brought claims against the 1995 Trust, the Agreed Siblings, and

---

<sup>1</sup> The facts are taken from the parties' Local Rule 56.1 statements and the Court's previous rulings [106, 220]. [240] refers to Plaintiffs' statement of material facts. [247] refers to the Estate's statement of material facts. [255], which incorporates [150] by reference, refers to Plaintiffs' statement of additional facts. [257] refers to both Eliot's responses to Plaintiffs' statement of material facts and Eliot's statement of additional material facts. [260] refers to Eliot's responses to the Estate's statement of material facts. [266] refers to the Estate's responses to Plaintiffs' statement of additional facts.

The Estate correctly notes that [255] deviates in certain respects from the procedure enumerated in Local Rule 56.1. Given this lawsuit's convoluted history, and in the interests of justice and judicial economy, the Court nevertheless elects to consider [255] and [150] in support of Plaintiffs' opposition to the Estate's motion for summary judgment.

multiple third-party Defendants (including the law firm of Tescher & Spallina, P.A., The Simon Law Firm, Donald Tescher, Robert Spallina, David Simon, Adam Simon, S.B. Lexington, Inc., S.B. Lexington, Inc. Employee Death Benefit Trust, and S.T.P. Enterprises, Inc.). *Id.*

On January 13, 2014, the Agreed Siblings and the 1995 Trust filed their First Amended Complaint. [73] at 1-11. Plaintiffs alleged that: (1) the 1995 Trust was a common law trust established in Chicago by Simon Bernstein; (2) Ted Bernstein is the trustee of the 1995 Trust; and (3) the 1995 Trust was the beneficiary of Simon Bernstein's life insurance policy. *Id.* In addition, Plaintiffs alleged that all of Simon Bernstein's children, *including Eliot*, are equal beneficiaries to the Trust. *Id.*

On March 3, 2014, the Court dismissed Eliot's claims against Tescher & Spallina, P.A., Donald Tescher, and Robert Spallina. [106] at 1-4. The Court explained that Eliot, as a third-party Defendant to an interpleader claim, was "not facing any liability" in this action, and he was accordingly not authorized to seek relief against other third parties. *Id.*

On June 5, 2014, the Estate filed its Complaint for Declaratory Judgment, [112] at 1-16, and on July 28, 2014, the Court granted the Estate's motion to intervene. [121] at 3-4.

Fact discovery closed on January 9, 2015, [123], and on March 15, 2016 the Court denied Plaintiffs' motion for summary judgment. [220] at 1-6. The Court found, *inter alia*, that while Plaintiffs were able to adduce "some evidence that the [1995] Trust was created," this evidence was "far from dispositive." *Id.* at 4.

## B. Probate Actions

The Probate Division of the Palm Beach County Circuit Court recently resolved two other cases related to the disposition of Simon Bernstein's assets: *In re Estate of Simon L. Bernstein*, No. 502012CP004391XXXNBIH (Fla. Cir. Ct.) and *Ted Bernstein, as Trustee of the Shirley Bernstein Trust Agreement dtd 5/20/2008 v. Alexandra Bernstein; et al.*, No. 502014CP003698XXXXNBIJ (Fla. Cir. Ct.) (collectively, the "Probate Actions").

Judge John L. Phillips presided over a joint trial of the Probate Actions in December of 2015. A full recitation of Judge Phillips' findings is unnecessary here, but relevant portions of his final orders include:

- The testamentary document identified as the "Will of Simon Bernstein" was "genuine and authentic," and "valid and enforceable according to [its] terms."
- Ted Bernstein "was not involved in the preparation or creation of" the Will of Simon Bernstein, "played no role in any questioned activities of the law firm of Tescher & Spallina, P.A.," there was "no evidence to support the assertions of Eliot Bernstein that Ted Bernstein forged or fabricated" the Will of Simon Bernstein, and, in fact, "Ted Bernstein played no role in the preparation of any improper documents, the presentation of any improper documents to the Court, or any other improper act, contrary to the allegations of Eliot Bernstein."
- The beneficiaries of the testamentary trust identified in the Will of Simon Bernstein are "Simon Bernstein's then living grandchildren," while "Simon's children – including Eliot Bernstein – are not beneficiaries."
- Eliot "should not be permitted to continue representing the interests of his minor children, because his actions have been adverse and destructive to his children's interest," such that it became necessary to appoint a *guardian ad litem*.

[240-11] at 2-5; [240-12] at 2-3.

## II. Legal Standard

Summary judgment is appropriate if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. *Spurling v. C & M Fine Pack, Inc.*, 739 F.3d 1055, 1060 (7th Cir. 2014). A genuine dispute as to any material fact exists if “the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The party seeking summary judgment has the burden of establishing that there is no genuine dispute as to any material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). In determining whether a genuine issue of material fact exists, this Court must construe all facts and reasonable inferences in the light most favorable to the nonmoving party. *See CTL ex rel. Trebatoski v. Ashland Sch. Dist.*, 743 F.3d 524, 528 (7th Cir. 2014).

## III. Analysis

### A. Motion for Summary Judgment on Eliot’s Claims

Eliot currently has seven claims pending against the 1995 Trust, the Agreed Siblings, David Simon, Adam Simon, The Simon Law Firm, S.B. Lexington, Inc., S.B. Lexington, Inc. Employee Death Benefit Trust, and S.T.P. Enterprises, Inc.<sup>2</sup>

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<sup>2</sup> As Judge St. Eve (the District Judge originally assigned to this case) previously explained before dismissing third-party Defendants Tescher & Spallina, P.A., Donald Tescher, and Robert Spallina: “Eliot is not an original Defendant to Plaintiffs’ First Amended Complaint . . . . Instead, Eliot is a Third-Party Defendant in Jackson’s interpleader action [such that] he is not facing any liability in this lawsuit . . . . Rule 14(a) does not authorize Eliot to seek any such relief in the present lawsuit because Eliot is not facing any liability in the first instance.” [106] at 3-4. This reasoning applies with equal force to the remaining third-party Defendants. The Federal Rules of Civil Procedure permit a defendant to “serve a summons and complaint on a nonparty who is or may be liable to it for all or part of the claim against it.” Fed. R. Civ. P. 14(a)(1). Here, Eliot is not facing any liability, and his claims against the remaining third-party Defendants are procedurally

[35] at 61-117. Eliot's causes of action sound in fraud, negligence, breach of fiduciary duty, conversion, abuse of legal process, legal malpractice, and civil conspiracy.<sup>3</sup>

1. **Fraud, Negligence, Breach of Fiduciary Duty & Legal Malpractice**

Plaintiffs argue that Eliot's claims for fraud, negligence, breach of fiduciary duty, and legal malpractice fail because Eliot "cannot show that he sustained damages or that he has standing to assert damages on behalf of his children or the Estate." [241] at 14; *see also Damato v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 878 F. Supp. 1156, 1162 (N.D. Ill. 1995) (damages are a requisite element of a claim for fraud); *Elliot v. Chicago Hous. Auth.*, No. 98-cv-6307, 1999 WL 519200, at \*9 (N.D. Ill. July 14, 1999) (damages are a requisite element of a claim for negligence); *Pearson v. Garrett-Evangelical Theological Seminary, Inc.*, 790 F. Supp. 2d 759, 768 (N.D. Ill. 2011) (damages are a requisite element of a claim for breach of fiduciary duty); *Snyder v. Heidelberger*, 953 N.E.2d 415, 424 (Ill. 2011) (damages are a requisite element of a claim for legal malpractice).

First, Eliot cannot sustain cognizable damages related to the disposition of the Estate or the testamentary trust in light of the Probate Court's rulings. The

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defective. Because all of Eliot's claims also fail as a substantive matter, however, they are dismissed on that basis, as discussed *infra*.

<sup>3</sup> The Court construes Eliot's arguments on each claim liberally, in light of his *pro se* status. *See Johnson v. Cook Cty. Jail*, No. 14-cv-0007, 2015 WL 2149468, at \*2 (N.D. Ill. May 6, 2015) ("Motions for summary judgment involving *pro se* litigants are construed liberally for the benefit of the unrepresented party, so as to ensure that otherwise understandable filings are not disregarded if the *pro se* litigant stumbles on a technicality. That said, *pro se* litigants are not entitled to a general dispensation from the rules of procedure.") (internal quotations omitted).



Probate Court found, *inter alia*, that Simon Bernstein's "children – including Eliot – are not beneficiaries" of the Will of Simon Bernstein or the related testamentary trust. [240] at 11. Instead, Simon Bernstein's grandchildren (including Eliot's children) are the testamentary trust's beneficiaries. *Id.* Eliot also has no interest in the disposition of the testamentary trust vis-à-vis his own children, as the Probate Court was forced to appoint a *guardian ad litem* in light of Eliot's "adverse and destructive" actions relative "to his children's interest." *Id.* These findings have preclusive effect in this case,<sup>4</sup> such that Eliot cannot demonstrate cognizable damages relative to the disposition of the Estate or the testamentary trust.

Second, Eliot cannot identify cognizable damages relating to the disposition of the Policy Proceeds, as Plaintiffs have consistently argued that Eliot is entitled to

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<sup>4</sup> All four elements of collateral estoppel are present in this case. *See Westport Ins. Corp. v. City of Waukegan*, 157 F. Supp. 3d 769, 778 (N.D. Ill. 2016) ("Collateral estoppel applies if the following four elements are met: (1) the issue sought to be precluded must be the same as that involved in the prior action; (2) the issue must have been actually litigated; (3) the determination of the issue must have been essential to the final judgment; and (4) the party against whom estoppel is invoked must be fully represented in the prior action.") (internal quotation omitted). Here, the "issue sought to be precluded" is Eliot's lack of a cognizable interest in the Estate and the testamentary trust, precisely "the same as that involved" in the Probate Court. This issue was "actually litigated," as the Probate Court held a full trial on this issue, and resolution of this question formed the crux of the Probate Court's final judgments. Finally, Eliot, the party against whom estoppel is invoked, was "fully represented," as he had a full and fair opportunity to litigate this question at trial. *See Murray v. Nationwide Better Health*, No. 10-cv-3262, 2014 WL 53255, at \*4 (C.D. Ill. Jan. 7, 2014) (The "overarching concern when applying issue preclusion is that the party against whom the prior action is invoked must have had a full and fair opportunity to litigate the issue.").

Eliot argues that the application of collateral estoppel is inappropriate, given that he was proceeding *pro se* in the Probate Court and the Probate Court's orders were appealed. Neither of these concerns have merit. *See DeGuelle v. Camilli*, 724 F.3d 933, 938 (7th Cir. 2013) (The "idea that litigating *pro se* should insulate a litigant from application of the collateral estoppel doctrine, or, more broadly, the doctrine of *res judicata*, of which collateral estoppel is an aspect, is absurd."); *Robinson v. Stanley*, No. 06-cv-5158, 2011 WL 3876903, at \*5 (N.D. Ill. Aug. 31, 2011), *aff'd*, 474 F. App'x 456 (7th Cir. 2012) (The Seven Circuit "has adhered to the general rule in American jurisprudence that a final judgment of a court of first instance can be given collateral estoppel effect even while an appeal is pending.") (internal quotation omitted):

an equal share of the same. [265] at 3 (asserting a claim to the Policy Proceeds “on behalf of all five siblings, *including* Eliot”) (emphasis in original).

In his response opposing summary judgment, Eliot fails to articulate a coherent response to Plaintiffs’ argument. *See generally* [261]. Indeed, Eliot does not identify any material in the record to support his vague and conclusory damages allegations. Eliot has simply recycled his previous arguments, and cited only his pleadings in support of the same. *See, e.g.*, [261] at 3 (“Moreover, the Counterclaims have express language seeking claims to the proceeds and damages from the wrongful conduct . . . See ECF No. 35.”).

Eliot’s exclusive reliance on his pleadings rather than evidence, at this point in the proceedings, is both: (1) inconsistent with Federal Rule of Civil Procedure 56, this district’s local rules, and this Court’s standing orders; and (2) insufficient to defeat a motion for summary judgment. *See Essex Crane Rental Corp. v. C.J. Mahan Const. Co.*, No. 07-cv-439, 2008 WL 3978345, at \*10 (N.D. Ill. Aug. 25, 2008) (“Unlike a motion to dismiss, summary judgment is the put up or shut up moment in a lawsuit, and the nonmovant must do more than merely rest on its pleadings.”) (internal quotation omitted).

Plaintiffs have cited ample evidence in the record to support their argument that Eliot’s claims for fraud, negligence, breach of fiduciary duty, and legal malpractice must fail, as Eliot cannot adduce any evidence of the requisite damages. Eliot’s opposition fails to formulate a cogent response, much less cite any

countervailing evidence in the record. Plaintiffs' motion for summary judgment is accordingly granted with respect to these four claims.

## 2. Conversion

The elements of conversion under Illinois law are: "(1) the unauthorized and wrongful assumption of control or ownership by one person over the personalty of another; (2) the other person's right in the property; (3) the right to immediate possession of the property; and (4) a demand for possession." *Jordan v. Dominick's Finer Foods*, 115 F. Supp. 3d 950, 956 (N.D. Ill. 2015).

Plaintiffs argue that Eliot's claim for conversion fails, because Eliot cannot identify "a specific asset or piece of property that was converted" or "show an unfettered right of ownership to such property." [241] at 15. This argument similarly turns on Eliot's lack of legal interest in the Estate or testamentary trust, and the Plaintiffs' acknowledgement that Eliot, under their theory, is entitled to an equal share of the Policy Proceeds. *Id.*

Here again, Eliot has failed to formulate an intelligible response. His brief does not even mention his conversion claim. *See generally* [261]. Eliot makes no effort to either identify any purportedly converted property or cite material in the record in support of his conversion claim. *See id.* In light of the foregoing, Plaintiffs' motion for summary judgment is also granted with respect to Eliot's conversion claim.

### 3. Abuse of Process

Under Illinois law, abuse of process “is the misuse of legal process to accomplish some purpose outside the scope of the process itself.” *Neurosurgery & Spine Surgery, S.C. v. Goldman*, 790 N.E.2d 925, 929 (Ill. App. Ct. 2003). The “two distinct elements of an abuse of process claim are: (1) the existence of an ulterior purpose or motive; and (2) some act in the use of process that is not proper in the regular course of proceedings.” *Id.* at 930. The “tort of abuse of process is not favored under Illinois law,” and its “elements must be strictly construed.” *Id.*

Plaintiffs argue that Eliot cannot satisfy either element of his abuse of process claim. More specifically, they claim that the Probate Actions were simply “filed by the named beneficiary of a life insurance policy to pursue a death claim against a life insurer for the Policy Proceeds,” and that no “act in the use of” that process was improper. [241] at 13.

Eliot’s response does not specifically address his claim for abuse of process; indeed, the phrase “abuse of process” does not appear in his briefing. *See generally* [261]. Instead, Eliot asserts, without citation to the record, that Plaintiffs have “repeatedly taken action to barrage and occupy” him in one case in order “to improperly gain advantage” in the other. *Id.* at 6. These allegations, in addition to having no evidentiary basis in the record, are insufficient under Illinois law. *Goldman*, 790 N.E.2d at 930 (“abuse of process is a very narrow tort” typically “found only in cases in which a plaintiff has suffered an actual arrest or seizure of

property”). Plaintiffs are entitled to summary judgment on Eliot’s abuse of process claim.

#### 4. Civil Conspiracy

Under Illinois law, the elements for a civil conspiracy are: (1) a combination of two or more persons; (2) for the purpose of accomplishing by some concerted action either an unlawful purpose or a lawful purpose by unlawful means; and (3) in the furtherance of the same, one of the conspirators committed an overt tortious or unlawful act. *See Fritz v. Johnston*, 807 N.E.2d 461, 470 (Ill. 2004). As “the third element of this test indicates, however, civil conspiracy is not an independent tort: if a plaintiff fails to state an independent cause of action underlying his conspiracy allegations, the claim for conspiracy also fails.” *Jones v. City of Chicago*, No. 08-cv-3501, 2011 WL 1898243, at \*6 (N.D. Ill. May 18, 2011) (internal quotation omitted).

Plaintiffs argue that Eliot’s civil conspiracy claim fails, because it remains predicated upon his other deficient claims. Eliot fails to respond to this argument. *See Jones*, 2011 WL 1898243, at \*6 (“Because defendants are entitled to summary judgment on Jones’s state law claim for malicious prosecution, and Jones’s conspiracy claim is predicated on her malicious prosecution claim, defendants are also entitled to summary judgment on count four.”); *Siegel v. Shell Oil Co.*, 656 F. Supp. 2d 825, 836 (N.D.Ill. 2009), *aff’d*, 612 F.3d 932 (7th Cir. 2010) (granting summary judgment in favor of defendants on plaintiff’s civil conspiracy claim because “Siegel has failed to establish his ICFA deceptive and unfair practices claim or his unjust enrichment claims”).

In short, Eliot “fails to present any evidence or legal arguments as to the underlying elements of his conspiracy claim,” such that the Plaintiffs are entitled to summary judgment. *Siegel*, 656 F. Supp. 2d at 836.

#### 5. Additional Discovery

Eliot, in the alternative, also “respectfully seeks application of Federal Rules of Civil Procedure 56(f) to obtain either a continuance or Deposition and Discovery.” [261] at 11. The Court presumes that Eliot actually intended to invoke Federal Rule of Civil Procedure 56(d), which provides that a “nonmovant” may receive “time to obtain affidavits or declarations or to take discovery” when that same party demonstrates that it currently “cannot present facts essential to justify its opposition.” In either event, this effort is rejected. Eliot’s untimely request is not supported by the requisite “affidavit or declaration,” the discovery he seeks would not alter the Court’s analysis, and fact discovery has been closed since January of 2015. Fed. R. Civ. P. 56(d).

#### B. The Estate’s Motion for Summary Judgment

In the other summary judgment motion pending before the Court, the Estate argues that Plaintiffs cannot establish the existence of the 1995 Trust, such that the Estate is entitled to the Policy Proceeds as Simon Bernstein’s default beneficiary. The Trust and the Agreed Siblings essentially concede that: (1) absent valid countervailing provisions in the 1995 Trust, the Estate would be entitled to the Policy Proceeds; and (2) they are unable to produce the executed version of the 1995

Trust, and they must rely on extrinsic evidence to support their claim that the 1995 Trust actually exists.

A party “seeking to establish an express trust” by such evidence “bears the burden of proving the trust by clear and convincing evidence” and the “acts or words relied upon must be so unequivocal and unmistakable as to lead to only one conclusion.” *Eychaner v. Gross*, 779 N.E.2d 1115, 1135 (Ill. 2002). If such evidence is “doubtful or capable of reasonable explanation upon any other theory, it is not sufficient to establish an express trust.” *Id.*

**1. Evidence Suggesting That The 1995 Trust Was Created**

Plaintiffs’ extrinsic evidence falls into three discrete categories: (1) testimony from the Agreed Siblings (and Linda Simon’s spouse, David Simon) regarding the creation of the 1995 Trust by Simon Bernstein; (2) the affidavit of attorney Robert Spallina regarding the creation of the 1995 Trust and his understanding of Simon Bernstein’s intentions; and (3) six documents that Plaintiffs characterize as “a comprehensive and cohesive bundle of evidence” supporting their allegation that the 1995 Trust exists. *Id.* Before deciding whether a reasonable factfinder could infer that the 1995 Trust exists based on this evidence, however, the Court must first determine whether this material is cognizable on summary judgment.

**a) The Agreed Siblings’ Testimony**

As the Court previously explained, “the testimony of David Simon and Ted Bernstein, along with the testimony of the other Plaintiffs, is barred by the Illinois Dead Man’s Act to the extent it relates to conversations with the deceased or to any

events which took place in the presence of the deceased.” [220] at 3. The Agreed Siblings and their spouses remain “directly interested” in this action, and the Court accordingly disregards their testimony regarding “any conversation with the deceased person,” Simon Bernstein. 735 Ill. Comp. Stat. 5/8-201.<sup>5</sup>

b) Mr. Spallina’s Affidavit and Notes

In the affidavit relied upon by Plaintiffs, Mr. Spallina avers, *inter alia*, that:

- He “provided estate planning advice and represented Simon Bernstein in connection with the preparation and execution of various testamentary documents from late 2007 until his death on September 13, 2012.”
- “Simon Bernstein told me he owned a life insurance policy with a current death benefit of \$1.6 million (the ‘Policy’). This is reflected in my attached notes of a meeting with Simon Bernstein on February 1, 2012. During this meeting and over the course of the next few months, Simon Bernstein and I discussed the Policy as part of his estate planning.”
- “Simon Bernstein told me the intended beneficiaries of the Policy were his five children equally, through an irrevocable life insurance trust that was named beneficiary of the Policy.”
- “Simon Bernstein also wanted to change other parts of his estate plan in 2012. Primarily, he wanted to change his current estate plan, which benefitted only three of his five children, and had caused some family disharmony. As part of these discussions, Simon Bernstein and I again discussed the Policy. In the end, Simon Bernstein told me he had decided to leave the Policy unchanged, so that all of the proceeds would go equally to his five children through the 1995 Trust. Having thus provided for all of his children, Simon Bernstein decided to alter his testamentary documents and to exercise a power of appointment he

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<sup>5</sup> While it is true that “as a general rule federal rather than state law governs the admissibility of evidence in federal diversity cases, there are a number of express exemptions to this rule, including state dead man laws.” *Campbell v. RAP Trucking Inc.*, No. 09-CV-2256, 2011 WL 4001348, at \*3 (C.D. Ill. Sept. 8, 2011).



held to leave all of his family's wealth to his ten grandchildren equally."

- "Simon Bernstein never showed me the 1995 Trust, although we discussed several times the fact that (i) the 1995 Trust had been created, and (ii) now that his wife had died, the beneficiaries of the 1995 Trust were his five adult children: Ted, Pam, Eliot, Jill and Lisa, each of whom would receive one-fifth, or 20%, of the proceeds of the Policy."
- "Having discussed these matters with Simon Bernstein, and based upon my years of experience as an estate planning lawyer, Simon Bernstein understood that he retained ownership of the Policy. Simon Bernstein always wanted maximum flexibility to change his estate plan, and putting ownership of the Policy into an irrevocable trust (such as the 2000 trust drafted by lawyers at Proskauer Rose) would have taken away Simon Bernstein's ability to change the Policy or the beneficiaries. Because Simon Bernstein remained the owner of the policy, he had the ability to change the beneficiary from the ILIT to a different beneficiary or beneficiaries up until the moment he died."
- "In light of Simon Bernstein's overall estate plan, including our specific discussions about the beneficiaries of the proceeds of the Policy, Simon Bernstein in fact executed new testamentary documents. Under Simon Bernstein's new Will and his Amended and Restated Trust Agreement, both of which were formally executed on July 25, 2012, his ten grandchildren are the ultimate beneficiaries of all of his wealth other than the Policy, which I have no doubt he intended to go to his children."
- "I believe that Simon Bernstein intended the Policy proceeds to be paid to his 1995 Trust, for the benefit of his five children."

[255-2] at 2-7.

The Estate argues that these statements by Mr. Spallina constitute inadmissible hearsay or expressions of subjective belief, which "cannot be used to defeat a motion for summary judgment." *Sys. Dev. Integration, LLC v. Computer Scis. Corp.*, 739 F. Supp. 2d 1063, 1069, 1078 (N.D. Ill. 2010); *see also Richardson v. Rush Presbyterian St. Luke's Med. Ctr.*, 63 Fed. App'x 886, 890 (7th Cir. 2003)

("Lampkin's averment [of what "she was informed by other patients"] is inadmissible hearsay and is not based upon her personal knowledge, so it cannot be used to defeat a motion for summary judgment."); *Hammer v. Residential Credit Sols., Inc.*, No. 13-cv-6397, 2015 WL 7776807, at \*12 (N.D. Ill. Dec. 3, 2015) ("A testimonial statement about contract formation would be a statement to the effect that a contract does or does not exist. Such an out-of-court statement would be impermissible hearsay."); *Hindin/Owen/Engelke, Inc. v. GRM Indus., Inc.*, 869 F. Supp. 539, 544 (N.D. Ill. 1994) ("A statement by an employee that his employer agrees to make a proposal would be a statement offered for the truth of the matter asserted, *i.e.*, that his employer agreed to make a proposal, and constitutes hearsay."); Fed. R. Civ. P. 56(c)(4) ("An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.").

The Estate, however, paints with too broad a brush. Mr. Spallina's statements regarding his work for Simon Bernstein (including his statements regarding Simon Bernstein's modifications to his testamentary documents) are based upon Mr. Spallina's personal knowledge, and ostensibly are not hearsay. For example, Mr. Spallina might competently testify that: (1) Simon Bernstein modified his testamentary documents in 2012 to name his grandchildren (instead of his children) as the sole beneficiaries of his Estate; (2) when Simon Bernstein made those modifications in 2012, he was aware of the life insurance policy at issue here;

and (3) Simon Bernstein, in 2000, considered but ultimately decided against placing that same life insurance policy into an irrevocable trust. Considered in conjunction, this testimony suggests that Simon Bernstein provided for his children in a manner outside of his testamentary documents.

**c) Plaintiffs' Documentary Evidence**

In their attempt to resist the Estate's motion for summary judgment, Plaintiffs also identify six separate documents that they contend represent evidence of the 1995 Trust's existence.

The Court previously considered this same documentary evidence when it rejected *Plaintiffs'* motion for summary judgment in March of 2016. At that time, the Court noted that this documentary evidence does "provide some evidence that the Trust was created," though it was "far from dispositive." [220] at 4. Ultimately, while the party moving for summary judgment may have changed, the weight of this documentary evidence has not, as discussed below.

**(1) Drafts Of The 1995 Trust**

Two of the principal documents relied upon by Plaintiffs are unexecuted drafts of the 1995 Trust itself. As the Court previously explained, however, these "documents offer Plaintiffs little support in the absence of the testimony from David Simon and Ted Bernstein describing how some form of those exhibits was executed by Simon Bernstein," and that same testimony is excluded by the Illinois Dead Man's Act. *Id.* at 3.

**(2) The Request Letter**

Plaintiffs identify a “Request Letter” dated November 7, 1995 in support of their claim that the 1995 Trust actually exists. The Request Letter is a standardized form, which instructs Capitol Bankers Life to “Change Beneficiary As Follows”—the “Simon Bernstein Irrevocable Insurance Trust Dated June 21, 1995” is the new “successor” to the Policy Proceeds. [150-9] at 2.

**(3) The Request for Service**

Plaintiffs also rely upon a “Request for Service” form dated August 8, 1995, which seeks to transfer ownership of the life insurance policy to the “Simon Bernstein Irrevocable Insurance Trust dtd 6/21/1995.” [150-19]. As the Court previously noted, however, this “document refers to ‘ownership’ of the policy, and does not affect the policy’s beneficiaries.” [220] at 4.

**(4) The Beneficiary Designation**

In a “Beneficiary Designation” dated August 26, 1995, Simon Bernstein designated the “Simon Bernstein Irrevocable Insurance Trust” as the beneficiary to receive his death benefits. Plaintiffs suggest that this designation is probative of the fact that the Trust actually exists; however, “this document does not refer to the Trust at issue here, the ‘Simon Bernstein Irrevocable Insurance Trust dated 6/21/95.’” [220] at 4. It remains “unclear from the record if that was an oversight, or was intentionally done to refer to a distinct trust.” *Id.*

(5) The IRS Form 22-4

Finally, Plaintiffs point to an IRS “Form 22-4” (or application for an Employer Identification Number) in support of their contention that the 1995 Trust exists as alleged. [150-20]. The Form 22-4 reflects that it was executed on behalf of the “Simon Bernstein Irrevocable Insurance Trust” and signed by Shirley Bernstein, Simon’s wife. *Id.* It is unclear from the record whether the Form 22-4 was actually submitted to, or approved by, the IRS. *Id.*

2. The Weight of the Evidence

As the Court previously explained, Plaintiffs’ documents, while not “dispositive,” provide “some evidence that the Trust was created.” [220] at 4. In fact, Plaintiffs’ case has improved since the Court first considered their evidence in March of 2016, in light of the new affidavit from Mr. Spallina, and the Court remains incapable of resolving these disputed factual questions on summary judgment.


A reasonable factfinder could infer, based upon both the potential testimony of Mr. Spallina and the documentary evidence previously discussed, that Simon Bernstein created the 1995 Trust in the manner alleged by Plaintiffs. The Estate’s motion for summary judgment is accordingly denied.

IV. Conclusion

For the foregoing reasons, Plaintiffs' motion for summary judgment on Eliot Bernstein's claims [239] is granted, and the Estate's motion for summary judgment [245] is denied.

Dated: January 30, 2016

Entered:

  
John Robert Blakey  
United States District Judge