

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

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

Plaintiff, )

v. )

HERITAGE UNION LIFE INSURANCE )  
COMPANY, )

Defendant, )

HERITAGE UNION LIFE INSURANCE )  
COMPANY )

Counter-Plaintiff )

v. )

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

Counter-Defendant )

and, )

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

Third-Party Defendants. )

ELIOT IVAN BERNSTEIN, )

Cross-Plaintiff )

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

**INTERVENOR'S RESPONSE TO  
PLAINTIFFS' STATEMENT OF  
UNDISPUTED MATERIAL FACTS**

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

v.

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

Cross-Defendant  
and,

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

Third-Party Defendants.

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

Intervenor.

**INTERVENOR'S LOCAL RULE 56.1(b)(3) RESPONSE TO PLAINTIFFS'  
STATEMENT OF UNDISPUTED MATERIAL FACTS AND LOCAL RULE 56.1(b)(3)(C)  
STATEMENT OF ADDITIONAL FACTS REQUIRING THE DENIAL OF  
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

NOW COMES, Intervenor, Brian M. O'Connell, Personal Representative of the Estate of  
Simon L. Bernstein ("Intervenor"), by his attorneys, James J. Stamos and Kevin P. Horan of

Stamos & Trucco, LLP, and for his Response to Plaintiffs' Statement of Undisputed Material Facts and Statement of Additional Facts pursuant to Local Rule 56.1(b)(3), states as follows:

**THE PARTIES**

1. Simon Bernstein Irrevocable Insurance Trust Dated 6/21/95 (the "Bernstein Trust"), is an irrevocable life insurance trust formed in Illinois as further described below. The Bernstein Trust is the original Plaintiff that first filed this action in the Circuit Court of Cook County. The Insurer then filed a notice of removal to the Northern District of Illinois. The Bernstein Trust has also been named as a Counterdefendant to Eliot's Claims. The Bernstein Trust is represented by counsel, Adam M. Simon. (**Ex. 30, Aff. of Ted Bernstein, ¶21**)

**ANSWER:** The first sentence of Paragraph 1 is disputed in that Plaintiffs have failed to present any admissible evidence to demonstrate as a matter of law that the "Bernstein Trust" was executed and bore the terms they allege. Plaintiffs rely entirely on ¶ 21 of the Affidavit of Ted Bernstein to support the assertions in paragraph 1 that the Trust exists. Under Rule 56(c)(1)(b), Ted Bernstein's Affidavit cannot serve to demonstrate the absence of a disputed issue of material fact with respect to the existence of the Trust because Ted Bernstein has never seen an executed copy of the document. (*See* May 6, 2015 Deposition of Ted Bernstein, attached hereto as Intervenor's Exhibit A, p. 24:6-12) Ted Bernstein has no personal knowledge with regard to the creation of the Trust, its execution or its terms, as he testified at his deposition. (*See* Intervenor's Exhibit A, pp. 10:25 – 11:2; 12:19 – 13:6) He knows of the facts regarding the Trust only by having been told by David Simon. (*Id.* pp. 17:5 – 18:20; 27:23 – 28:4; 30:4-7)

In addition, the existence of the Trust is disputed by multiple items of evidence as more fully described in Intervenor's Response to Plaintiffs' SOF, ¶ 40.

2. Bank of America, N.A. ("Bank of America"), was named a party to Heritage's counterclaim for Interpleader. Bank of America was terminated as a co-Plaintiff on January 13, 2014, and the Insurer voluntarily dismissed Bank of America as a Third-Party Defendant on February 14, 2014. (**Dkt. #97; Ex. 30, Aff. of Ted Bernstein, ¶22**)

**ANSWER:** Undisputed.

3. Eliot Bernstein ("Eliot") was named a Party by virtue of Heritage's counterclaim for Interpleader, and Eliot filed third-party claims against several Parties described herein making Eliot a Third-Party Plaintiff as well ("Eliot's Claims"). Eliot is the third adult child of Simon Bernstein. Eliot is representing himself, and/or his children, pro se in this matter. (Ex. 30, Aff. of Ted Bernstein, ¶23)

ANSWER: Undisputed.

4. United Bank of Illinois, now known as PNC Bank, was named as a Third-Party Defendant in Heritage's counterclaim for Interpleader. PNC Bank was served on August 5, 2013, and has never filed an appearance or answer. (Dkt. #25; Ex. 30, Aff. of Ted Bernstein, ¶24)

ANSWER: Undisputed.

5. "Simon Bernstein Trust, N.A." was named a Party to Heritage's counterclaim for interpleader. "Simon Bernstein Trust, N.A.", however, is merely a misnomer by the Insurer as a result of a data entry error in the database of the Insurer. There is no evidence that any entity exists or was formed under the name "Simon Bernstein Trust, N.A." No one submitted a claim to the Policy Proceeds with the Insurer on behalf of an entity named "Simon Bernstein Trust, N.A." (Ex. 29, Aff. of Don Sanders, ¶69 and ¶78)

ANSWER: Disputed pursuant to Rule 56(c)(1)(b) in that the Affidavit of Don Sanders (Ex. 29) at paragraphs 69 and 78 does not demonstrate that a "misnomer" occurred. It does not address that topic.

6. Ted Bernstein, as Trustee, of the Bernstein Trust retained Plaintiff's counsel and initiated the filing of this Action. Ted Bernstein, is also a co-Plaintiff, individually, and has been named as a Third-Party Defendant to Eliot's Claims. Ted Bernstein is the eldest of the five adult children of Simon Bernstein. Ted Bernstein is represented by counsel, Adam M. Simon. (Ex. 30, Aff. of Ted Bernstein, ¶25)

ANSWER: Intervenor disputes the first sentence of paragraph 6 under Rule 56(c)(1)(b) in that the sole basis cited for the assertion that Ted Bernstein is "Trustee" of the "Bernstein Trust" is paragraph 25 of Ted Bernstein's Affidavit. However, paragraph 25 states no factual basis for that assertion. It simply declares that he acted as Trustee when he initiated this action. At his deposition, Ted Bernstein confirmed that the only basis he had for believing himself to be the Trustee was that David Simon told him that he was to be the Trustee and that his name appears at page BT000020 of Plaintiffs' Exhibit 16. (See Intervenor's Exhibit A, pp. 12:19 – 13:6) That

document, however, is unsigned and the initial trustee was indicated to be “Shirley, David, [illegible]?” with the successor trustee indicated as “Pam, Ted.” Moreover at page BT000010 of Plaintiffs’ Exhibit 15, which is represented to be the more formalized version of Exhibit 16, the successor trustee to Shirley is specifically stated to be David Simon, not Ted Bernstein. At the very least, the document itself demonstrates a question of fact as to whether Ted was to be the successor trustee to Shirley. (*See* Plaintiffs’ Exhibits 15 and 16)

7. First Arlington National Bank was named as a Third-Party Defendant by virtue of Heritage’s counterclaim for Interpleader. First Arlington National Bank was never served by Heritage, and instead Heritage served JP Morgan Chase Bank as First Arlington Bank’s alleged successor and JPMorgan Chase Bank was substituted as a party in place of First Arlington National Bank on 10/16/2013. (**Dkt. #44; see also JP Morgan Chase Bank at Par. 12 below; Ex. 30, Aff. of Ted Bernstein, ¶26**)

**ANSWER:** Undisputed.

8. Lisa Sue Friedstein is a co-Plaintiff and has been named as a Third-Party Defendant to Eliot’s Claims. Lisa Sue Friedstein is the fifth adult child of Simon Bernstein. Lisa Sue Friedstein is represented by counsel, Adam M. Simon. (**Ex. 34, Aff. of Lisa Friedstein, ¶2, ¶3, ¶6 and ¶23**)

**ANSWER:** Undisputed.

9. Jill Marla Iantoni is a co-Plaintiff and has been named as a Third-Party Defendant to Eliot’s Claims. Jill Marla Iantoni is the fourth adult child of Simon Bernstein. Jill Marla Iantoni is represented by counsel, Adam M. Simon. (**Ex. 33, Aff. of Jill Iantoni, ¶2, ¶3, ¶6 and ¶23**)

**ANSWER:** Undisputed.

10. Pamela Beth Simon is a co-Plaintiff and has been named as a Third-Party Defendant to Eliot’s Claims. Pamela Beth Simon is the second adult child of Simon Bernstein. Pamela Beth Simon is represented by counsel, Adam M. Simon. (**Ex. 31, Aff. of Pam Simon, ¶2, ¶3, ¶6 and ¶38.**)

**ANSWER:** Undisputed.

11. Heritage is the successor Insurer to Capitol Banker [*sic*] Life Insurance Company that originally issued the Policy in 1982. Heritage was terminated as a party on February 18, 2014 when the court granted Heritage’s motion to dismiss itself from the Interpleader litigation after having deposited the Policy Proceeds with the Registry of the Court pursuant to an Agreed

Order. The amount of the Policy Proceeds (plus interest) on deposit with the Registry exceeds \$1.7 million. (Dkt. #101 and Ex. 30, Aff. of Ted Bernstein, ¶30 and Ex. 2.)

**ANSWER:** Undisputed.

12. J.P. Morgan Chase Bank, N.A., ("J.P. Morgan") was named as a Third-Party Defendant by virtue of Heritage's counterclaim for Interpleader. In its claim for Interpleader, Heritage named J.P. Morgan, as a successor to First Arlington National Bank (described above). J.P. Morgan filed an appearance and answer to Heritage's counterclaim for Interpleader in which it disclaimed any interest in the Policy Proceeds. J.P. Morgan then filed a motion for judgment on the pleadings to have itself dismissed from the litigation, and the court granted the motion. As a result, J.P. Morgan was terminated as a party on March 12, 2014. (Dkt. #105; Ex. 30, Aff. of Ted Bernstein, ¶31)

**ANSWER:** Undisputed.

13. William Stansbury filed a motion to intervene in this action, but his motion to intervene was denied, and he was terminated as a non-party intervenor on January 14, 2014. (Dkt. #74; Ex. 30, Aff. of Ted Bernstein, ¶32)

**ANSWER:** Undisputed.

14. Adam M. Simon is counsel for the Bernstein Trust and four of the five adult children of Simon Bernstein. Adam M. Simon is not counsel for the fifth adult child, Eliot Bernstein whom has chosen to represent himself *Pro Se* in this matter. Adam M. Simon was named a Third-Party Defendant to Eliot's Claims. Adam M. Simon is the brother-in-law of Pam Simon, and the brother of David B. Simon. (Ex. 30, Aff. of Ted Bernstein, ¶33);

**ANSWER:** Undisputed.

15. National Service Association, Inc. (of Illinois) was a corporation owned by the decedent, Simon Bernstein. According to the public records of the Secretary of State of Illinois, National Service Association, Inc. (of Illinois) was dissolved in October of 2006. There is no record of Eliot having obtained service of process upon National Service Association, Inc. because it is dissolved and has been for over 7 years. (Ex. 30, Aff. of Ted Bernstein, ¶34; Ex. 21)

**ANSWER:** Undisputed.

16. Donald R. Tescher, Esq. was named a Third-Party Defendant to Eliot's Claims. Donald R. Tescher is a partner of in the firm of Tescher & Spallina. Donald R. Tescher was terminated as a party to this matter when the court granted his motion to dismiss as to Eliot's claims on March 17, 2014. (Dkt. #106; Ex. 30, Aff. of Ted Bernstein, ¶35)

**ANSWER:** Undisputed.

17. Tescher and Spallina, P.A. is a law firm whose principal offices are in Palm Beach County, FL. Tescher and Spallina, P.A. was named a Third-Party Defendant to Eliot's Claims. Tescher & Spallina, P.A. Donald R. Tescher was terminated as a party to this matter when the court granted his motion to dismiss as to the Eliot's Claims. (Dkt. #106; Ex. 30, Aff. of Ted Bernstein, ¶36)

**ANSWER:** Undisputed.

18. The Simon Law Firm was named a Third-Party Defendant to Eliot's Claims. The Simon Law Firm is being represented by counsel, Adam M. Simon.

**ANSWER:** Undisputed.

19. David B. Simon is the husband of Pam Simon, and the brother of counsel, Adam M. Simon and was named a Third-Party Defendant to Eliot's Claims. David B. Simon is being represented by counsel, Adam M. Simon. (Ex. 32, Aff. of David Simon, ¶20 and ¶29)

**ANSWER:** Undisputed.

20. S.B. Lexington, Inc. was a corporation formed by Simon Bernstein. According to the records of the Secretary of State of Illinois, S.B. Lexington, Inc. was dissolved on April 3, 1998. (Ex. 30, Aff. of Ted Bernstein ¶39; Ex. 35; Dep. of David Simon, p. 51:13-18 and Ex. 9)

**ANSWER:** Undisputed.

21. S.B. Lexington, Inc. Employee Death Benefit Trust (the "VEBA Trust") was named a Third-Party Defendant by virtue of Eliot's Claims, and was a Trust formed by Simon Bernstein in his role as principal of S.B. Lexington, Inc. The VEBA Trust was formed pursuant to I.R.S. Code Sec. 501(c)(9) as a qualified Employee Benefit Plan designed to provide a death benefit to certain key employees of S.B. Lexington, Inc. The VEBA was dissolved in 1998 concurrently with the dissolution of S.B. Lexington, Inc. (Ex. 35, Dep. of David Simon, p. 51:13-18 and Ex. 9; Ex. 30, Aff. of Ted Bernstein, ¶40)

**ANSWER:** Undisputed.

22. Robert Spallina, Esq. was named a Third-Party Defendant to Eliot's Claims. Robert Spallina is a partner of in the firm of Tescher & Spallina, P.A. Robert Spallina was terminated as a party to this matter when the court granted his motion to dismiss as to Eliot's Claims on March 17, 2014. (Dkt. #106; Ex. 30, Aff. of Ted Bernstein, ¶41)

**ANSWER:** Undisputed.

23. S.T.P. Enterprises, Inc. was named a Third-Party Defendant to Eliot's Claims. S.T.P. Enterprises, Inc. has filed an appearance and responsive pleading and is represented by counsel, Adam M. Simon. (Dkt. #47; Ex. 31, Aff. of Pam Simon, ¶25)

**ANSWER:** Undisputed.

24. According to the records of the Secretary of State of Florida, National Service Association, Inc. (Florida) was a Florida corporation formed by Simon L. Bernstein. National Service Association, Inc. (Florida) was named a Third-Party Defendant in Eliot's Claims. According to the records of the Secretary of State of Florida, National Service Association, Inc. (Florida) dissolved in 2012. (Ex. 30, Aff. of Ted Bernstein, ¶42; Ex. 22)

**ANSWER:** Undisputed.

25. Benjamin Brown as Curator of The Estate of Simon Bernstein filed a motion to intervene in this litigation. The court granted the motion to intervene on July 28, 2014, and as a result the Estate became a third-party claimant in the litigation. (Dkt. #121). Subsequently, Brian O'Connell as successor Curator and *Administrator Ad Litem* of the Estate of Simon Bernstein filed a motion to substitute for Benjamin Brown, and the court granted the motion November 3, 2014. For purposes of this motion, Movants refer to this party as the "Estate of Simon Bernstein" or the "Estate". (Dkt. #126; Ex. 30, Aff. of Ted Bernstein ¶43-¶44)

**ANSWER:** Undisputed, except that Brian M. O'Connell substituted his appearance as Personal Representative of the Estate of Simon Bernstein as of November 3, 2014, not as Curator and Administrator *ad Litem*. (See Dkt. No. 126)

## **II. THE POLICY AND POLICY PROCEEDS**

26. In 1982, Simon Bernstein, as Insured, applied for the purchase of a life insurance policy from Capitol Bankers Life Insurance Company, issued as Policy No. 1009208 (the "Policy"). A specimen policy and a copy of the Schedule Page of the Policy are included in Movant's Appendix to the Statement of Facts. (Ex. 29, Aff. of Don Sanders at ¶38, ¶39, ¶48, ¶52; Ex. 5). The amount of the Policy Proceeds (plus interest) on deposit with the Registry of the Court exceeds \$1.7 million. (Dkt. #101 and Ex. 30, Aff. of Ted Bernstein, ¶30 and Ex. 2.)

**ANSWER:** Undisputed.

27. The Capitol Bankers Life Insurance Application, dated March 2, 1982 designates Simon Bernstein, as the Insured and lists S.B. Lexington as his employer. On page one of the Application, the Owner of the Policy is designated as follows:

"First Arlington National Bank, Trustee of S.B. Lexington Employee Death Benefit Trust". (Ex. 29, Aff. Don Sanders, ¶48; Ex. 3)

**ANSWER:** Undisputed.

28. Also, on page one of the Application the beneficiary was designated as follows: "First Arlington National Bank, Trustee of S.B. Lexington Employee Death Benefit Trust". (See Ex. 3--Part 1 of application); and (ii) Premium notices were to be sent to S.B. Lexington Inc. Employee Death Benefit Plan and Trust c/o National Service Association, Inc., 9933 Lawler Ste. 210, Skokie, IL 60077; and (iii) Simon Bernstein's occupation was listed as an Executive with S.B. Lexington, Inc.; (iv) Simon Bernstein was the insured and on the application his residence address was in Glencoe, Illinois and he was a citizen of the state of Illinois; and (v) Simon Bernstein was the listed as the selling agent on the application; (vi) the application was signed in Illinois; and (vii) the Policy would have been delivered by the Insurer via its agent to the initial Policy Owner. (Ex. 29, Aff. Don Sanders, ¶48, Ex. 31; Aff. Pam Simon, ¶¶21-¶23; Ex. 3)

ANSWER: Undisputed.

### III. THE S.B. LEXINGTON EMPLOYEE DEATH BENEFIT TRUST (THE "VEBA")

29. The S.B. Lexington Employee Death Benefit Trust was a Voluntary Employee Benefit Trust ("VEBA") established by S.B. Lexington, Inc. to provide death benefits to the beneficiaries of its employees. The Policy was purchased by the VEBA, with the VEBA listed as both owner and beneficiary of the Policy on the application. The Policy would have been delivered by the agent (Simon Bernstein) to the Owner at the offices of its Bank trustee in Illinois. (Ex. 3; Ex. 31, Aff. Pam Simon, ¶21-¶23; Ex. 30, Aff. Ted Bernstein, ¶56 and ¶57; Ex. 29, Aff. Don Sanders ¶48)

ANSWER: Disputed under Rule 56(c)(1)(b) in that the Affidavit paragraphs cited do not establish the facts asserted in paragraph 29.

30. Part 1 of the application for the Policy indicates that First Arlington National Bank, was acting as Trustee of the VEBA. As part of the application and underwriting process, a company named Equifax conducted an interview with Simon Bernstein about his application for the Policy. The Equifax report states that Simon Bernstein told the investigator the Policy would be owned by the VEBA, that (i) the insurance [benefits] would be paid to the VEBA, (ii) the VEBA would determine to whom the benefits are paid, and (iii) the benefits are normally paid to family members. (Ex. 29, Aff. Don Sanders ¶48, ¶74-¶75; Ex. 3 and Ex. 20)

ANSWER: Undisputed.

31. On June 5, 1992, Sandy Kapsa (an employee of S.B. Lexington and an affiliated company, National Service Association, Inc.) submitted a letter to Capitol Bankers Life Insurance Company informing them that LaSalle National Trust was being appointed successor trustee of the VEBA. On June 17, 1992, the Insurer acknowledged the change of trustee listing the owner of the Policy as LaSalle National Trust, N.A., as Successor Trustee. (Ex. 31, Aff. of Pam Simon, ¶31, and Ex. 7)

ANSWER: Undisputed.

32. On August 26, 1995, Simon L. Bernstein, as a Member of the VEBA, named 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 Adoption Form adopted by my Employer." (Ex. 31, Aff. of Pam Simon, ¶35; Ex. 30, Aff. of Ted Bernstein, ¶65-¶67; Ex. 4)

**ANSWER:** Undisputed but Pam Simon asserts no basis to conclude that she has personal knowledge of the matters contained in paragraph 32.

33. On or about November 27, 1995, Capitol Bankers received a "Request Letter" signed by LaSalle National Trust, N.A. in their capacity as Trustee of the VEBA which owned the Policy, and the following policy changes were made a part of the Policy by way of endorsement issued by the Company: LaSalle National Trust, N.A. as Trustee (the "VEBA") was designated as the Primary Beneficiary of the Policy; and The Simon Bernstein Irrevocable Insurance Trust dated June 21, 1995 (the "Bernstein Trust") was designated the contingent beneficiary. According to the Insurer's records, the VEBA and the Bernstein Trust were the primary and contingent beneficiaries of record on the date of death of the Insured. (Ex. 29, Aff. of Don Sanders, ¶56, ¶64 and Ex. 8)

**ANSWER:** Undisputed.

34. On November 27, 1995, Capitol Bankers sent correspondence acknowledging the change in beneficiary referenced above in Par. 33, and that correspondence was sent to "LaSalle National Trust, N.A., as Successor Trustee". (Ex. 29, Aff. of Don Sanders, ¶60 and Ex. 8)

**ANSWER:** Disputed. The face of the documents in Plaintiffs' Exhibit 8 does not indicate that Capitol Bankers Life sent correspondence on November 27, 1995 (*See* Plaintiffs' Exhibit 8)

35. The records above establish that First Arlington National Bank, N.A., and LaSalle National Trust, N.A. were original and successor trustees of the VEBA, respectively. This is confirmed by Pamela B. Simon who worked on the VEBA insurance program for both S.B. Lexington and NSA. (Ex. 31, Aff. of Pam Simon, ¶22 and ¶31)

**ANSWER:** Disputed under Rule 56(c)(1)(b) in that the Affidavit paragraphs cited do not address the matters asserted in paragraph 35.

36. On April 3, 1998, S.B. Lexington, Inc. was voluntarily dissolved by its shareholder(s), and the VEBA was likewise terminated at this time. (Ex. 9). As a part of the dissolution, ownership of the Policy was changed from the VEBA to Simon Bernstein, individually. (Ex. 31, Aff. of Pam Simon, ¶36; Ex. 9 and Ex. 10)

**ANSWER:** Undisputed.

37. Neither First Arlington National Bank nor LaSalle National Trust, N.A. have made any claim to the Policy proceeds. First Arlington National Bank's successor-in-interest, J.P. Morgan Bank, filed a responsive pleading and then a motion for judgment on the pleadings disclaiming any interest in the Policy Proceeds and requesting to be dismissed from the litigation. J.P. Morgan's motion was granted and it was dismissed as a party on March 12, 2014. (Dkts. #60 and 105)

**ANSWER:** Undisputed.

38. None of the Bank Parties whose names appear on the docket have tendered a claim to the Insurer for the Policy proceeds. (Ex. 29, Aff. of Don Sander, ¶77(b))

**ANSWER:** Undisputed.

39. The docket also reflects that none of the Bank Parties whose names appear on the docket in this matter have filed a claim in this litigation for the Policy Proceeds.

**ANSWER:** Undisputed.

#### **IV. MOVANTS' CLAIMS TO THE POLICY PROCEEDS**

40. On or about June 21, 1995, Simon Bernstein as Grantor formed the Simon Irrevocable Insurance Trust dtd 6/21/95. Simon Bernstein, appointed his wife, Shirley Bernstein, as Trustee of the Trust. (Ex. 32, Aff. of David B. Simon, ¶30; Ex. 19)

**ANSWER:** Disputed under Rule 56(c)(1)(a) and 56(c)(1)(b) as follows:

a. Plaintiffs cite only Paragraph 30 of Plaintiffs' Exhibit 32 (the Affidavit of David Simon) in support of this paragraph but that paragraph makes no reference whatsoever to the creation or formation of the Simon Bernstein Trust nor to the appointment of his wife, Shirley as Trustee. That paragraph addresses only the creation of an IRS SS-4 form, Plaintiffs' Exhibit 19.

b. The evidence Plaintiffs present for the assertion that Simon Bernstein executed a Trust with the terms reflected in Plaintiffs' Exhibits 15 and 16 is the Affidavit of David Simon at Paragraphs 23 through 27. (See Plaintiffs' Exhibit 32) However, these paragraphs are based entirely upon Mr. Simon's description of conversations he had with Simon Bernstein and things he observed Mr. Bernstein doing with respect to the creation of the alleged Trust. In Paragraph 23 he avers that he and his wife had used Hopkins & Sutter to create trusts for themselves. In

Paragraph 24 he then describes how Simon Bernstein came to him and said essentially that he wanted to do the same thing. Paragraph 25 describes David Simon creating a sample insurance trust for Simon Bernstein and reviewing it with him. It further describes conversations he had in which they agreed he would use Hopkins & Sutter to finalize and execute the insurance trust and where they discussed the purpose of the insurance trust, who would be a trustee and Mr. Simon's suggestion to Mr. Bernstein that Ted Bernstein act as the "next trustee." Paragraph 26 describes Simon Bernstein taking a copy of the draft trust and going to Hopkins & Sutter to execute it.<sup>1</sup> (See Plaintiffs' Exhibit 32 ¶¶ 23-27).

In Paragraph 27, David Simon then avers that he met again with Simon Bernstein and reviewed the executed Bernstein Trust Agreement and that he assisted him with preparing certain other forms. The testimony contained in these paragraphs is all the evidence Plaintiffs have to rely upon for the notion that Mr. Bernstein executed a trust document. All of this testimony is offered by an interested party which is barred by the Illinois Dead Man's Act, 735 ILCS 5/8-201 *et seq.*, because it relates conversations and events that took place solely in the presence of the Decedent.

c. Even if David Simon's testimony were admissible, his testimony could only be accepted if deemed credible by the trier of fact. Multiple facts exist that controvert his testimony and/or undermine the credibility of David Simon in this regard:

1. David Simon never witnessed Simon Bernstein draft or execute the purported Trust document as described in ¶ 30 of Plaintiffs' Exhibit 32 (See Plaintiffs' Exhibit 35, pp. 36:12 – 39:8; 39:17 – 40:16; 41:14 – 43:9). According to David Simon's

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<sup>1</sup> It is undisputed that Hopkins & Sutter has no record of the 1995 Trust (See Plaintiffs' Exhibit 35, pp. 44:12 – 45:15; 46:15 – 47:21) and there has been no evidence explaining why it was that he needed to go to Hopkins & Sutter to "execute the document" when David Simon appears to be saying that he prepared the document.

testimony, Simon Bernstein left the Simon Law Firm with an unsigned draft of a document and returned with a signed document, which was not copied, scanned or otherwise saved in the files of the Simon Law Firm or Hopkins & Sutter. (*See* Plaintiffs' Exhibit 35, pp. 44:3 - 45:13);

2. David Simon states in his Affidavit (and in his deposition) that he recalls the exchanges with Simon Bernstein, including the assertion at Paragraph 25 of his Affidavit that he created the sample insurance trust (presumably Exhibit 15 which was retrieved from the computer hard drive). However, throughout the period of time from Simon's death in September of 2012 until the purported discovery of Plaintiffs' Exhibits 15 and 16 one year later, not a single email exchanged among the Plaintiffs, when they were discussing their attempts to locate the trust document, reflects anything about David's recollection of having created it on his computer. (*See* Intervenor's Exhibit A, the Deposition of Ted Bernstein, at Exs. 1-5, 8-11, 14);

3. The emails among Simon Bernstein's children for the most part included Robert Spallina, Simon Bernstein's attorney, through whom they were attempting to obtain the proceeds of the insurance policy from Heritage. Again, none of those emails refers to David's recollection of having created the Trust on his word processor and providing it to Simon. There is also no evidence in that year-long string of emails that David thought to check his word processor for drafts of the document. (*See* Intervenor's Exhibit A, the Deposition of Ted Bernstein, at Exs. 1-5; 8-11; 14-18);

4. Mr. Spallina apparently engaged in discussions with Heritage for the company to interplead the funds into the Court in Florida. (*See* Intervenor's Exhibit A, the Deposition of Ted Bernstein, at Exs. 1, 2, 4) However, at that point David Simon and

his brother, Adam Simon, the attorney currently representing Plaintiffs in this case, filed a lawsuit in Circuit Court of Cook County seeking to obtain the funds from Heritage. (*See* Intervenor's Exhibit A at Ex. 16) This resulted in a breach with Mr. Spallina, including a very angry exchange of emails and ultimate withdrawal of Mr. Spallina's lawfirm. (*See* Intervenor's Exhibit A at Exs. 16-17);

5. Simon Bernstein died on September 2012. His children, and David Simon, conducted a series of conversations, and exchanges of emails, in which they discussed strategies for obtaining the payout from the Heritage policy notwithstanding the inability to locate the 1995 Trust. (*See* Intervenor's Exhibit A, pp. 51:22-52:2; 53:22 – 54:11 and Exs. 2-4, 7, 11) This included considering the possibility of employing a different trust, called the "2000 Trust" which choice was rejected because it did not include Pam Simon as a beneficiary. (*See* Intervenor's Exhibit A, pp. 48:21 – 49:16; 52:15 – 53:6 and Exs. 1-2);

6. Notwithstanding the fact that David Simon now testifies to recalling the creation of the Trust in the office he shared with Simon Bernstein, the "discovery" he describes at paragraphs 28 and 29 of his Affidavit (Plaintiffs' Exhibit 32) occurred in September 2013, one year after Simon died. (*See* Plaintiffs' Exhibit 15; Plaintiffs' Exhibit 32 at ¶ 28-29);

7. Despite David Simon's averment that he recalls having created the Trust on his computer and having sent Mr. Bernstein off to the law firm of Hopkins and Sutter, the Complaint filed by Adam Simon on behalf of David Simon's wife and her other siblings makes no reference whatsoever to the execution of a written trust. It refers only to the existence of a "common law trust." (Dkt. No. 73 at ¶ 1);

8. Thereafter, despite there having allegedly been an “exhaustive search” prior to December of 2012 (*See* Intervenor’s Exhibit A, p. 55:1-11 and Dep. Ex. 3), David Simon for the first time purports to have located Plaintiffs’ Exhibits 15 and 16 on the computer and in the records at his law office on September 13, 2013, one year after Simon’s death, which he had previously shared with Simon Bernstein. (*See* Plaintiffs Exhibit 32 at ¶ 19);

9. Notwithstanding David’s testimony in his Affidavit at paragraphs 23 through 27 regarding his knowledge of the creation of the Trust, at no point over the course of that year did David ever report such knowledge to his wife or her siblings or to their attorney. (*See* Intervenor’s Exhibit A, p. 81:13-21);

10. Ted Bernstein testified that, despite David’s current assertions as described above, the recollections referenced in paragraphs 25-27 of his Affidavit were never related to the other family members during the interim between Simon’s death and the “discovery” of the documents. (*Id.*)

11. David Simon’s recollections of his conversations with Simon are inconsistent with Plaintiffs’ Exhibits 15 and 16 because, despite the parties’ current assertion that Ted Bernstein was to be the successor trustee to Shirley Bernstein under the 1995 Trust, Plaintiffs’ Exhibit 15, the most complete purported version of that Trust, indicates that David Simon was to be the Successor Trustee. (*See* Plaintiffs’ Exhibit 15, p. BT000010). No testimony or evidence is offered to explain how that can be consistent with David’s current assertion as to whom the successor trustee was to be.

41. On June 21, 1995, the date of the Trust Agreement, David Simon assisted Shirley Bernstein to obtain a tax identification number for the Bernstein Trust. The tax identification number for the Bernstein Trust is X5-XXXX916. In order to obtain the tax identification number David Simon completed an IRS SS-4 form. Shirley Bernstein is identified as trustee of the

Bernstein Trust and Shirley's signature, and the name of the Bernstein Trust also appear on this SS-4 form. (Ex. 32, Aff. of David Simon at ¶30; Ex. 19)

**ANSWER:** Intervenor disputes that Simon Bernstein formed the purported Simon Bernstein Irrevocable Insurance Trust on the bases described in its response to SOF ¶40, above. Intervenor disputes that Plaintiffs' Exhibit 32 complies with Fed. R. Civ. P. 56(c)(2), 56(c)(4), or 56(e) so as to be admissible for the purposes of Plaintiffs' Motion for Summary Judgment.

42. On August 26, 1995, Simon L. Bernstein, as a Member of the VEBA, named 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 Adoption Form adopted by my Employer." Simon Bernstein's signature and the name of the Bernstein Trust appear on this document. (Ex. 31, Aff. of Pam Simon, ¶35; Ex. 30, Aff. of Ted Bernstein, ¶65-¶67; Ex. 4)

**ANSWER:** Undisputed.

43. As of August 26, 1995, the VEBA was the owner and primary beneficiary of the Policy, and on August 26, 1995, Simon Bernstein's execution of the VEBA Beneficiary Designation form evidenced his intent that the Policy proceeds flow through the VEBA to the Bernstein Trust. (Ex. 31, Aff. of Pam Simon, ¶32 and ¶35; Ex. 30, Aff. of Ted Bernstein; ¶65-¶67; Ex. 4)

**ANSWER:** This paragraph asserts a legal conclusion as to the intent of Simon Bernstein. Intervenor disputes that conclusion and the credibility and personal knowledge of the Affiants as well as their testimonial competence under the DMA.

44. The next Policy change in November of 1995, as described in Par. 32 above, again confirmed Simon Bernstein's intent with regard to the death benefit proceeds. The primary beneficiary he named was the VEBA and Simon Bernstein's beneficiary of the VEBA was the Bernstein Trust. In addition, the Bernstein Trust was designated as contingent beneficiary of the Policy. (Ex. 29, Aff. of Don Sanders, ¶56, ¶57 and ¶62; Ex. 8). Movants have included a diagram, explained in the Aff. of Ted Bernstein illustrating Simon Bernstein's intent with regard to the ultimate beneficiaries of the Policy Proceeds. (Ex. 30, Aff. of Ted Bernstein ¶106; Ex. 17).

**ANSWER:** This paragraph asserts a legal conclusion as to the intent of Simon Bernstein. Intervenor disputes the credibility and personal knowledge of the Affiants, as well as their testimonial competence under the DMA. Further, no original or executed copy of the Policy has

been produced. (*See* Plaintiffs' Exhibit 29, Aff. of Don Sanders at ¶ 35) Moreover, Plaintiffs' diagram (Plaintiffs' Exhibit 17), is irrelevant, should be barred pursuant to 735 ILCS 5/8-201 *et seq.* and Fed. R. Civ. P. 56 as it is an inadmissible hearsay document created by an interested person purporting to show the intent of the Decedent.

45. The Policy Records indicate that on April 23, 2010, Heritage sent Simon Bernstein a letter in response to Simon Bernstein having contacted Heritage. (**Ex. P. 36**). The letter provides confirmation to Simon Bernstein that the primary beneficiary is the VEBA, listed as LaSalle National Trust as Trustee, and the letter states that the contingent beneficiary is "Simon Bernstein Trust, N.A."

**ANSWER:** Undisputed.

46. According to the Policy records as confirmed by the testimony of Don Sanders, the misnomer "Simon Bernstein Trust, N.A." was an error or abbreviation of the name of the actual Contingent Beneficiary, "Simon Bernstein Insurance Trust dated 6/21/95". Don Sanders also confirmed that there is no change of beneficiary in the Policy records that was submitted by an Owner designating Simon Bernstein Trust, N.A. as a primary or contingent beneficiary of the Policy. (*Aff. of Don Sanders*, ¶¶71-¶72, and **Ex. P. 36**)

**ANSWER:** Disputed in that the cited testimony of Don Sanders in his opinion, not an averment of fact based upon his personal knowledge.

47. In 2011, the Policy had lapsed for non-payment of premium, and Simon Bernstein executed the paperwork necessary and paid the required premium to the Insurer to reinstate the Policy without making any change to the beneficiary of the Policy. (**Ex. 29, Aff. of Don Sanders**, ¶¶56, ¶57 and ¶62; **Ex. 30, Aff. of Ted Bernstein**, ¶¶91-¶93; **Ex. 13 and Ex. 14**)

**ANSWER:** Undisputed.

48. That no party to this litigation, including movants and the Insurer, have been able to locate an executed original or copy of the Bernstein Trust Agreement. However, two unexecuted drafts of the Bernstein Trust have been located and produced by Movants in this litigation. (**Ex. 30, Aff. of Ted Bernstein**, ¶¶97-¶98; **Ex. 32, Aff. of David Simon**, ¶¶28 and ¶29; **Ex. 31, Aff. of Pam Simon**, ¶37; **Ex. 15 and Ex. 16**)

**ANSWER:** The first sentence is undisputed. The second sentence is disputed on the same basis as asserted in Intervenor's Response to SOF ¶40. Moreover, Plaintiffs' status as interested

parties renders them incompetent to testify on the matters stated in their Affidavits pursuant to the Illinois Dead Man's Act.

49. In 1995, David B. Simon, Ted S. Bernstein, Pam Simon, and Simon L. Bernstein all shared common office space at 600 West Jackson Blvd., Ste. 800, Chicago, IL 60606, and all were engaged in the life insurance business. Simon Bernstein was a licensed life insurance agent for at least 30 years and owned and operated several insurance brokerages. (Ex. 30, Aff. of Ted Bernstein, ¶88; Ex. 32, Aff. of David Simon, ¶19, ¶20, and ¶24; Ex. 31, Aff. of Pam Simon, ¶33)

ANSWER: Undisputed.

50. In 1995, David and Pamela Simon created irrevocable insurance trusts with the assistance of attorneys from the Chicago firm of Hopkins and Sutter. (Ex. 31, Aff. of Pam Simon, ¶34, Ex. 32, Aff. of David Simon, ¶23; Ex. 35, Dep. Of David Simon, p.41:7-41:10)

ANSWER: Disputed to the extent that Plaintiffs' Exhibit 32 ¶23 lists 1994, not 1995 as the year of creation of the insurance trusts with which Hopkins & Sutter purportedly assisted David and Pamela Simon and that the citation to Plaintiffs' Exhibit 35 does not support any fact asserted in paragraph 50.

51. David B. Simon and Simon Bernstein discussed Simon Bernstein's desire to form a similar irrevocable insurance trust to protect his family. (Ex. 32, Aff. of David Simon, ¶24)

ANSWER: Disputed. David Simon's status as an interested party renders him incompetent to testify on the matters stated in ¶ 24 of his Affidavit pursuant to the Illinois Dead Man's Act. (See Plaintiffs' Exhibit 35, pp. 58:9 – 59:4) The assertion contained in ¶ 24 of David Simon's Affidavit cannot be presented in a form that would be admissible in evidence pursuant to Fed. R. Civ. P. 56(c)(2).

52. One unexecuted draft of what would become The Simon Bernstein Irrevocable Trust dated 6/21/95 include [*sic*] David Simon's handwritten notations which he made to show Simon Bernstein where his name and others would go in the trust. According to David Simon, Simon Bernstein went to the firm of Hopkins and Sutter and executed the Bernstein Trust Agreement. (Ex. 32, Aff. of David Simon, ¶28; Ex. 35, Dep. Of David Simon, p.40:17-41:1, and Ex. 16)

**ANSWER:** Disputed. David Simon's status as an interested party renders him incompetent to testify to the matters stated in ¶ 28 of his Affidavit and at pages 40:17-41:1 of his deposition pursuant to the Illinois Dead Man's Act. (*See* Plaintiffs' Exhibit 35) The assertion contained in ¶ 28 of David Simon's Affidavit, together with his deposition testimony, cannot be presented in a form that would be admissible in evidence pursuant to Fed. R. Civ. P. 56(c)(2). Plaintiffs' Exhibit 16 is a hearsay document which cannot be presented in a form that would be admissible in evidence as required by Fed. R. Civ. P. 56(c)(2). This paragraph is further disputed by the evidence cited in Intervenor's response to SOF ¶ 40.

53. According to the terms of this draft of the Bernstein Trust Agreement, the proceeds in the trust were to be split into as many separate Trusts as there were "children of mine who survive me and children of mine who predecease me leaving descendants who survive me." (**Ex. 32, Aff. of David Simon, ¶28; Ex. 16 at §7**)

**ANSWER:** Disputed. Plaintiffs' Exhibit 16 is a hearsay document which cannot be presented in a form that would be admissible in evidence as required by Fed. R. Civ. P. 56(c)(2). Moreover, David Simon's status as an interested party renders him incompetent to testify on the matters stated in ¶ 28 of his Affidavit pursuant to the Illinois Dead Man's Act and as required by Rule 56(c)(4). This paragraph is further disputed by the evidence cited in response to SOF ¶ 40.

54. On David Simon's law firm database, David and Adam Simon located a computer file named "SITRUST" and the file date on the metadata for the file is June 21, 1995, the date of the Bernstein Trust. This draft contains virtually identical language to Ex. 16, and also directs that all proceeds be split by the surviving children of Simon Bernstein. (**Ex. 32, Aff. of David Simon, ¶29; Ex. 15 at §7**)

**ANSWER:** Intervenor disputes the first sentence of paragraph 54 under Rule 56(c)(1)(b) for the reason stated in its Response to SOF ¶ 40, referenced above with respect to the "discovery" of the document on the Simon Law Firm computer. In addition, the "metadata" is hearsay. Intervenor further disputes the credibility of David Simon regarding the cited testimony. Intervenor does not dispute the second sentence of paragraph 54.

55. On September 13, 2012, the date of Simon Bernstein's death, he had five adult children whom survived him, Ted S. Bernstein, Pamela B. Simon, Eliot I. Bernstein, Jill Iantoni, and Lisa Friedstein. (Ex. 30, Aff. of Ted Bernstein, ¶102)

**ANSWER:** Undisputed.

56. Simon Bernstein's five children had a total of ten children of their own, so Simon Bernstein had ten grandchildren that survived him, whose names and year of birth are set forth in Ted Bernstein's Affidavit. (Ex. 30, Aff. of Ted Bernstein, ¶103)

**ANSWER:** Undisputed.

57. In Ex. 16, Simon Bernstein names his wife Shirley Bernstein, as Trustee, and he was going to name either David Simon, or Ted Bernstein or Pam Simon as successor trustee. (Ex. 32, Aff. of David Simon, ¶25; Ex. 16)

**ANSWER:** Intervenor disputes paragraph 57 pursuant to Rule 56(c)(1)(a) and (b). Plaintiffs' Exhibit 16 is a hearsay document which cannot be presented in a form that would be admissible in evidence as required by Fed. R. Civ. P. 56(c)(2). David Simon's status as an interested party renders him incompetent to testify on the matters stated in ¶ 25 of his Affidavit pursuant to the Illinois Dead Man's Act. The assertion contained in ¶ 25 of David Simon's Affidavit, together with his deposition testimony, cannot be presented in a form that would be admissible in evidence pursuant to Fed. R. Civ. P. 56(c)(2).

In addition, Plaintiffs' Exhibit 16, referenced as the basis for the assertions of paragraph 57, is ambiguous regarding the identity of the trustee. At page BT 000013 of Plaintiffs' Exhibit 16, the name "Shirley" is handwritten as the Trustee but at page BT 000020, in the section which deals with the naming of successor trustees, the first blank line, which is intended to identify the original trustee, does not state "Shirley" but rather states "Shirley, David, [illegible]?". Moreover, in the second blank line where the successor trustee is to be named, the words "Pam, Ted" appear. This language is inconsistent with the Affidavit of David Simon, Plaintiffs' Exhibit 29 at ¶ 25, where he stated that Shirley was to be the trustee and that either he, Ted or Pam were

to be successor trustees. Notwithstanding the assertion in this Court that Ted Bernstein is the Successor Trustee, and Ted's testimony that his father told him he was to be the Trustee (*See* Intervenor's Exhibit A, pp. 23:2 – 25:3), Plaintiffs' Exhibit 15, at page BT 000010 purports to identify David Simon as the Successor Trustee in Article 11.

58. At a meeting in 1995 prior to Simon Bernstein executing the trust, David Simon recalls discussing the fact that for various reasons involving family dynamics, Ted Bernstein should be the first successor trustee to Shirley Bernstein rather than David Simon. (**Ex. 32, Aff. of David Simon, ¶25**)

**ANSWER:** Disputed. Paragraph 25 of David Simon's Affidavit does not support the averments in SOF ¶ 58. Moreover, David Simon's status as an interested party renders him incompetent to testify on the matters stated in ¶ 25 of his Affidavit pursuant to the Illinois Dead Man's Act. The assertion contained in ¶ 25 of David Simon's Affidavit cannot be presented in a form that would be admissible in evidence pursuant to Fed. R. Civ. P. 56(c)(2). Intervenor also disputes SOF ¶58 based upon the evidence presented in its Response to SOF ¶ 40 and SOF ¶ 57. Intervenor further disputes David Simon's credibility regarding the testimony in ¶ 25 of his Affidavit.

59. On or about June 21, 1995, David Simon assisted his mother-in-law, Shirley Bernstein, as Trustee of the Bernstein Trust, with obtaining a tax identification number from the Internal Revenue Service. Prior to obtaining the Tax Identification number, David Simon saw the executed Bernstein Trust Agreement with Simon Bernstein's signature on it. By this time, David Simon also confirmed that Shirley was the initial Trustee and Ted Bernstein was the successor trustee. I then completed an SS-4 form indicating the name of the trust, and the tax identification number issued by the Internal Revenue Service. The SS-4 document contains the signature of Shirley Bernstein, as trustee of the Bernstein Trust. (**Ex. 32, Aff. of David Simon, ¶30, Ex. 35, Dep. of David Simon, p.42:6-p.43:9, p. 88:17-89:22; Ex. 19**)

**ANSWER:** Intervenor disputes the averments of SOF ¶ 59 in that Intervenor disputes the credibility of David Simon with regard to cited testimony. Moreover, David Simon's testimony regarding his viewing the executed Trust in the presence of Simon Bernstein, in the midst of a conversation with Simon Bernstein, is barred by the Illinois Dead Man's Act. His description in

his deposition of having seen an executed trust in which Ted Bernstein was identified as a successor trustee is inconsistent with the terms of Exhibit 15, which designates David Simon as the successor trustee. This implies that whatever might have been contained in a purported executed trust had at least one change in it which his own testimony establishes. His testimony fails to establish what other changes would or would not have been made.

In addition, despite the fact that changes were made in the text of the trust according to David Simon's testimony, his investigation with the firm of Hopkins & Sutter, where the execution purportedly occurred, demonstrated that they had no evidence of a trust. (*See* Plaintiffs' Exhibit 35, pp44:17 – 45:13; 46:15 – 47:11) Moreover, while David Simon testifies at p. 43 of his deposition that he had Simon Bernstein execute several forms for submission to Lincoln Benefit, including the trust, he further testifies at p. 43 of his deposition that when he contacted Lincoln Benefit, they had no copy of the trust even though he believed that they would have. (*Id.* at pp. 43:10 – 44:2)

60. The executed Bernstein Trust Agreement like the drafts referenced above designated the five surviving children of Simon Bernstein as the beneficiaries to the Trust in equal shares. (Ex. 32, Aff. of David Simon, ¶25, ¶26, ¶28, ¶29 and ¶30; Ex. 15 at §7; Ex. 16 at §7).

**ANSWER:** Intervenor disputes the existence of an executed trust and the averments of SOF ¶ 57 for the reasons set forth in its Response to SOF ¶ 40, above.

61. Four of five of the adult children (the "Consenting Children") have executed Affidavits indicating their stipulation to the following:

- a. That Simon Bernstein formed the Bernstein Trust on June 21, 1995;
- b. That the five surviving children of Simon Bernstein were named as beneficiaries;
- c. That Ted S. Bernstein is authorized to act as Trustee of the Bernstein Trust, and with the assistance of counsel, Adam Simon, Ted Bernstein is authorized to cause the release and distribution of the Policy proceeds from the Registry of the Court for deposit to The Simon Law Firm, and to distribute the Policy proceeds (less legal fees and costs associated with this litigation) to the five adult children of Simon Bernstein in equal shares, and to obtain vouchers of receipt therefore;

**ANSWER:** Undisputed that four of the five adult children have executed affidavits indicating their respective stipulations, but disputed as to the foundation and admissibility of their assertions contained therein.

62. Prior to his death, Simon Bernstein was also the insured under a separate Policy of insurance issued by Lincoln Benefit Life Insurance Company, as Policy No. U0204204 (the "Lincoln Policy"). (Ex. 30, Aff. of Ted Bernstein, ¶108; Ex. 31, Aff. of Pam Simon, ¶26-¶27)

**ANSWER:** Undisputed.

63. The Lincoln Policy lapsed in 2006 six years prior to Simon Bernstein's death. (Ex. 30, Aff. of Ted Bernstein, ¶108; Ex. 31, Aff. of Pam Simon, ¶27)

**ANSWER:** Undisputed.

64. While the Lincoln Policy was in force and less than two months after the formation of the Bernstein Trust, Simon Bernstein, as Lincoln Policy owner transferred his ownership interest in the Lincoln Policy to the Simon Bernstein Irrevocable Insurance Trust on August 8, 1995. This form contains the name of the Bernstein Trust, the same tax identification number that appears of the IRS Form SS-4 form signed by the trustee, the name and address of the trustee, Shirley Bernstein, and the signature of Simon Bernstein. (Ex. 31, Aff. of Pam Simon, ¶27; Ex. 18)

**ANSWER:** Undisputed.

#### **V. ELIOT'S CLAIMS**

65. Eliot Bernstein filed counterclaims, third-party claims and cross-claims in this litigation the ("Eliot's Claims"). (Ex. 26)

**ANSWER:** Undisputed.

66. The pleading setting forth Eliot's Claims—not including exhibits—is seventy-two pages long and consists of one hundred and sixty-three separate paragraphs. (Ex. 26)

**ANSWER:** Undisputed.

67. No Owner of the Policy ever submitted any change of beneficiary forms which were received by the Insurer that designated Eliot, or any of Eliot's children as a beneficiary of the Policy. (Ex. 29, Aff. of Don Sanders, ¶65-¶68)

**ANSWER:** Undisputed.

## **VI. INTEVENOR CLAIMS BY ESTATE OF SIMON BERNSTEIN**

68. In its intervenor complaint, the Estate of Simon Bernstein, asserts that it has an interest in the policy because "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 the Petitioner [Estate].....". (Ex. 26 at ¶12)

**ANSWER:** Undisputed, except that Intervenor's Complaint is attached as Exhibit 27 to Plaintiffs' Statement of Facts.

69. The Estate of Simon Bernstein produced no documents pursuant to Fed. R. Civ. P. 26 indicating that the Estate of Simon Bernstein was ever designated as a beneficiary of the Policy.

**ANSWER:** Undisputed.

70. The Policy Records contain no documents indicating that the Estate of Simon Bernstein was ever designated a beneficiary or contingent beneficiary of the Policy. (Ex. 29, Aff. of Don Sanders, ¶70)

**ANSWER:** Undisputed.

71. The Will of Simon L. Bernstein which was duly executed on July 25, 2012 and has been admitted to Probate in Palm Beach County, Florida. The Will of Simon L. Bernstein was filed in this action as an Exhibit to William Stansbury's motion to intervene (*See Dkt. #56-2*). A true and correct copy of the Will of Simon L. Bernstein is included in Movant's Appendix to their Statement of Undisputed facts as (Ex. 24.) A true and correct copy of the Palm Beach County Death Certificate for Simon Bernstein is included in Movant's Appendix of Exhibits. (Ex. 30, Aff. of Ted Bernstein, ¶96; Ex. 12)

**ANSWER:** Undisputed.

72. A copy of Plaintiff's Amended Complaint is included in Movant's Appendix to its Statement of Undisputed Facts as (Ex. 25.)

**ANSWER:** Undisputed.

73. A copy of the Estate of Simon Bernstein's Intervenor Complaint is included in Movant's Appendix to its Statement of Undisputed Facts attached hereto as (Ex. 27.)

**ANSWER:** Undisputed.

74. A copy of Eliot's Counterclaims, Cross-claims and Third-Party Claims is included in Movant's Appendix to its Statement of Undisputed Facts as (Ex. 26.)

**ANSWER:** Undisputed.

**VII. THE INSURER'S INTERPLEADER ACTION**

75. A copy of the Insurer's Interpleader Action is included in Movant's Appendix to its Statement of Undisputed Facts as (Ex. 28). In its Interpleader Action, the Insurer alleges that it failed to pay the Bernstein Trust's death claim because the claimants could not produce an original or copy of an executed trust agreement, and because the Insurer received a letter from Eliot setting forth a conflicting claim. (Ex. 28 at ¶22)

**ANSWER:** Undisputed.

**LOCAL RULE 56.1(b)(3)(C) STATEMENT OF ADDITIONAL FACTS**

1. Plaintiffs' and Intervenor's interests in the outcome of this action are diametrically opposed: the Policy proceeds will either be payable to the Plaintiffs or to the Estate, the beneficiaries of which are Simon Bernstein's grandchildren (Plaintiffs' children). (See Deposition of Ted Bernstein, attached hereto as Intervenor's Exhibit A, pp. 92:23 – 93:25)

**Interested Parties**

2. David and Pamela Simon are interested parties to this litigation. If Plaintiffs are successful, Pamela Simon will receive over \$300,000, representing 20 percent of the Policy proceeds. (See Deposition of David Simon, attached hereto as Intervenor's Exhibit B, pp. 58:9 – 59:4) David is Pamela's husband. (*Id.* at p. 7:9-10)

3. Ted Bernstein is an interested party to this litigation. If Plaintiffs prevail, he will receive over \$300,000, representing 20 percent of the Policy proceeds. (See Intervenor's Exhibit A, pp. 9:18 – 10:4; 118:17 – 118:14)

4. The remaining Plaintiffs (Jill Iantoni and Lisa Friedstein) are interested parties to this litigation. If Plaintiffs prevail, they will each receive over \$300,000, representing 20 percent of the Policy proceeds. (See Intervenor's Exhibit A, pp. 118:16 – 119:14; Plaintiffs' Exhibits 15 and 16)

**Lack of Personal Knowledge**

5. Ted Bernstein, purported Trustee of the 1995 Trust, has never seen an executed copy of the document. (*See* Intervenor's Exhibit A, p. 24:6-12) Ted Bernstein testified that he was informed by his father that he would be a trustee of the 1995 Trust in 1995 but did not recall his status as trustee until he was informed by David Simon after Simon Bernstein's death. (*See* Intervenor's Exhibit A, pp. 24:13 – 25:3)

**The Purported 1995 Trust**

6. Plaintiffs have produced no executed original or executed copy of a written trust agreement reflecting the terms of the purported 1995 Trust. (*See* Dkt. No. 144 at ¶9; Intervenor's Exhibit A, p. 13:13-15; Plaintiffs' Exhibit 29 at ¶ 35, ¶ 37) No original or executed copy of the Policy has been produced by Plaintiffs to date. (*See* Plaintiffs' Exhibit 29 at ¶ 35)

7. While Ted asserts in his Affidavit that he was the Trustee of the Trust as of October 19, 2012, Robert Spallina, Simon Bernstein's lawyer, made an application for the Policy proceeds on behalf of Plaintiffs, purportedly as trustee of the 1995 Trust. (*See* Intervenor's Exhibit A, pp. 35:12 – 36:3 and Dep. Ex. 1) On October 19, 2012, Ted Bernstein sent an email to Robert Spallina suggesting that he had a "solution to the life insurance policy which provides the desired result" and that a conversation take place between he, Spallina, Pamela Simon and David Simon prior to any further overtures to the insurance company. (*See* Intervenor's Exhibit A, pp. 35:12 – 37:3; Dep. Ex. 1).

8. On November 19, 2012, after Robert Spallina unsuccessfully attempted to claim the Policy proceeds without providing any documentation, David Simon suggested attempting to secure the Policy proceeds on behalf of the Plaintiffs by submitting a waiver and settlement agreement. (*See* Intervenor's Exhibit A, pp. 51:22 – 52:2; 53:22 – 54:4; Dep. Ex.2)

9. At least one “exhaustive search” for the 1995 Trust document had been conducted between September 13, 2012 and December 6, 2012, but it was not found. (*See* Intervenor’s Exhibit A, p. 55:1-11).

10. According to David Simon, the first attempt to locate the 1995 Trust took place in the winter of 2012-2013 (*See* Dep. of David Simon, p. 59:13-22). Foley & Lardner, the successor firm to Hopkins & Sutter, was contacted to see if they retained a copy of the 1995 Trust; but David Simon could not recall who contacted the law firm, which attorneys were contacted, or even if he or someone on his behalf made the effort to contact the law firm. (*See* Intervenor’s Exhibit B, pp. 44:12 – 45:15; 46:22 – 47:15)

11. On February, 8, 2013, Pamela Simon informed Ted Bernstein that she could not find a copy of the insurance Policy or the 1995 Trust. (*See* Intervenor’s Exhibit A, pp. 60:25 – 61:10; Dep. Ex. 10)

12. As of February 14, 2013, the Plaintiffs planned to pursue the Policy proceeds via a Release and Settlement Agreement and have the proceeds paid to Robert Spallina. (*See* Intervenor’s Exhibit A, pp. 62:16-63:3; Dep. Ex.2)

13. Mr. Spallina apparently engaged in discussions with Heritage making a plan for the company to interplead the funds into court in Florida. (*See* Intervenor’s Exhibit A, Dep. Exs. 1, 2, 4, 7, 11) However, at that point David Simon and his brother, Adam Simon, the attorney currently representing Plaintiffs in this case, abruptly filed a lawsuit in Circuit Court of Cook County on April 15, 2014 seeking to obtain the funds from Heritage. (*See* Intervenor’s Exhibit A, Dep. Ex. 16) This act resulted in a breach with Mr. Spallina, including a very angry exchange of emails. (*See* Intervenor’s Exhibit A, Dep. Exs. 16, 17)

14. Despite David Simon's averment that he recalls having created the trust on his computer and having seen it after execution, the Complaint filed by Adam Simon on behalf of David Simon's wife and her siblings makes no reference whatsoever to the execution of a written trust. It refers only to the existence of a "common law trust." (Dkt. No. 73 at ¶ 1) It was only after this event that David and Adam purportedly found Plaintiffs' Exhibits 15 and 16.

15. As of August 30, 2013, the 1995 Trust (in any form) had not been located. (*See* Intervenor's Exhibit A, pp. 76:11 – 77:3)

16. David Simon claims to have located an unexecuted copy of the purported 1995 Trust on the computer system of the Simon Law Firm on September 13, 2013. (*See* Plaintiffs' Exhibit 15; Plaintiffs' Exhibit 32 at ¶¶ 28-29)

17. David Simon claims to have located an unexecuted copy of the purported 1995 Trust containing the handwriting of David Simon, in the stored files of the Simon Law Firm on or around September 13, 2013. (*See* Intervenor's Exhibit B, pp. 94:13 – 96:22)

18. According to David Simon, the persons who searched the offices of the Simon Law Firm to see whether a copy of the 1995 Trust could be found were David Simon (husband of Plaintiff Pamela Simon), Adam Simon (brother of David Simon), and Cheryl Sychowski (employee of STP Enterprises and The Simon Law Firm). (*See* Intervenor's Exhibit B, p. 47:17-21).

#### **Subsequently Executed Estate Documents**

19. Simon Bernstein executed a Will and Irrevocable Insurance Trust on August 15, 2000 (the "2000 Trust"). The Policy at issue in this litigation was listed as an asset of the 2000 Trust. That Trust document made no reference to a 1995 even though by definition it would have superseded it. (*See* Intervenor's Exhibit A at Dep. Ex. 23)

20. Pursuant to the terms of the 2000 Trust, Pamela Simon and her lineal descendants are considered “predeceased” and no inheritance was allocated for them “not out of lack of love or affection but because they have been adequately provided for.” (*See* Intervenor’s Exhibit A at Dep. Ex. 23, p. 19)

21. Simon Bernstein executed a Will and Trust Agreement on May 20, 2008 (the “2008 Trust”). Pursuant to the terms of the 2008 Trust, Pamela Simon and her lineal descendants, in addition to Ted Bernstein and his lineal descendants are considered “predeceased.” and no inheritance shall pass to them pursuant to the terms of the 2008 Trust (*See* Intervenor’s Exhibit A at Dep. Ex. 25, p. 7, ¶E. 1.; Dep. of David Simon, p. 55:2-17)

22. In May 2012, Plaintiff Pamela Simon wrote to her father, expressing her distress over his decision to disinherit her and her children, along with Plaintiff Ted Bernstein and his children. (*See* Intervenor’s Exhibit A at Dep. Ex. 25) Plaintiff Pamela Simon was passionate that Simon Bernstein’s estate plan did not, at that time, include several of his children, including Pamela Simon and Ted Bernstein. (*See* Intervenor’s Exhibit A, p. 91:13-25)

23. Simon Bernstein participated in a telephone conference with Plaintiffs and their spouses a few months prior to his death (Summer 2012) (*See* Intervenor’s Exhibit B, p. 53:1-19; Intervenor’s Exhibit A, p. 90:11-14) During this telephone conference, Simon Bernstein instructed that the assets of his estate and trust would be left to his ten grandchildren and the insurance policy proceeds were to pass to his five children in an effort to quell some then-existing family acrimony. (*See* Intervenor’s Exhibit B, pp. 53:12 – 55:8; Intervenor’s Exhibit A, pp. 89:21 – 90:2; 90:15-18)

24. Simon Bernstein executed an Amended at Restated Trust Agreement on July 25, 2012 (the “2012 Trust”). This document amends and restates the May 20, 2008 Trust Agreement

in its entirety. (*See* Intervenor's Exhibit A at Dep. Ex. 24, p. 1) Pursuant to the terms of the 2012 Trust, Plaintiffs are deemed to have predeceased Simon Bernstein (*Id.* at p. 6) and all assets are directed to be passed in equal shares among Simon Bernstein's grandchildren. (*Id.* at p. 2, p. 16; Intervenor's Exhibit A, p. 89:2-15; pp. 118:17 – 119:14)

25. On September 7, 2012, six days prior to his death, Simon Bernstein executed a holographic will directing a \$100,000 bequest to Maritza Puccio from his current insurance policy and indicating that he would change the beneficiary on said policy to reflect his wishes. (*See* Intervenor's Exhibit C). Simon Bernstein directed that the bequest to Ms. Puccio should proceed in the event of his death, without interruption "from family or probate." (*Id.*) This document was not witnessed or notarized.

26. Simon Bernstein executed no other Wills or Trust Agreements which were witnessed and/or notarized between July 25, 2012 and September 13, 2012 (the date of his death).

Respectfully submitted,

By: /s/ James J. Stamos  
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**CERTIFICATE OF SERVICE**

I hereby certify that on June 5, 2015, this Response to Plaintiffs' Rule 56.1 Statement of Undisputed Material Facts and Statement of Additional Facts pursuant to Rule 56.1(b)(3)(C) was filed electronically using the CM/ECF system and notice will be sent electronically to the registered participants identified on the Notice of Electronic Filing.

/s/ James J. Stamos  
James J. Stamos