

IN THE SUPREME COURT OF
THE STATE OF ILLINOIS

BRUCE C. FREIMUTH,)
TERRY G. BOMMER, individually and as)
Custodian for Joshua C. Bommer and Emily E.)
Bommer, minors, and)
BARBARA P. DAVIDSON,)

Plaintiffs,)

v.)

Cause Number _____

PRICEWATERHOUSECOOPERS, LLP, as)
Receiver of The Independent Trust Corporation,)
And THE HONORABLE SIDNEY A. JONES, III,)
Circuit Judge,)

Defendants.)

COMPLAINT FOR A WRIT OF MANDAMUS

Pursuant to Supreme Court Rule 381, Plaintiffs seek a Writ of *Mandamus* to compel compliance with the Illinois Corporate Fiduciaries Act, 205 ILCS 610/6-10(5). As grounds for the requested relief, Plaintiffs state:

Jurisdiction

1. This is an original action for a writ of *mandamus* over which this Court has exclusive jurisdiction pursuant to Supreme Court Rule 381 and to Article VI, section 4(a) of the Illinois Constitution.

The Parties and Involved Entities

2. Each Plaintiff is an individual and the beneficial owner of mutual fund shares owned of record and held in trust for Plaintiffs' separate accounts by The Independent Trust Corporation, an Illinois trust company now in receivership ("Intrust").

3. Intrust was organized as a trust company in 1984 to provide trust services, including securities custodial services, to clients who wished to direct their own investments or who wished to utilize the services of an investment advisor to direct the investment of their assets.

4. Defendant, the Honorable Sidney A. Jones, III, is a Circuit Judge sitting in the Chancery Division of the Circuit Court for Cook County, Illinois. Judge Jones is supervising the Receivership of Intrust in a case entitled *In the Matter of the Possession and Control of the Commissioner of Banks and Real Estate of Independent Trust Corporation a/k/a Intrust*, an Illinois corporate fiduciary, now pending as Cause No. 00CH05905 in the Chancery Division of the Circuit Court for Cook County, Illinois (“the Receivership Proceedings”).

5. Defendant PricewaterhouseCoopers, LLP is an accounting and consulting firm that is presently serving as Intrust’s Receiver.

Background

6. Intrust purchased the mutual fund shares held for each Plaintiff’s separate account pursuant to instructions received from Financial Timing Services, Inc. (“Financial Timing”), a registered investment advisor authorized by each Plaintiff to direct Intrust’s investment of the Plaintiff’s funds deposited with Intrust.

7. During the 1990s, Intrust actively solicited business relationships with investment advisors, such as Financial Timing, who specialize in managing customers’ funds using market timing systems. Market timers like Financial Timing generally arrange for their customer’s funds to be invested in mutual fund shares offered by investment companies that operate both a money market mutual fund and one or more other mutual funds, the assets of which are invested in equity securities. When the investment advisor believes that the equity

markets are going to decline in value, they cause their client's assets to be invested in money market mutual fund shares. When the investment advisors believe that the equity markets will increase in value, they cause their clients' money market mutual fund shares to be exchanged for shares of an equity mutual fund operated by the same investment company.

8. In 1995, Intrust entered into a written agreement with Financial Timing. A true and correct copy of the agreement between Intrust and Financial Timing is included in the Appendix as Exhibit 1.

9. After entering into the agreement with Financial Timing, Intrust, working with Financial Timing, established omnibus accounts with various investment companies to hold the mutual fund shares to be purchased by Intrust from those investment companies for the accounts of Plaintiffs and other Financial Timing customers.

10. Each of the Plaintiffs is a customer of Financial Timing.

11. On January 26, 1995 Plaintiff Bruce Freimuth opened an account with Intrust pursuant to a written Custody Agreement, given account number 840001. A copy of the Custody Agreement is included in the Appendix as Exhibit 2.

12. On April 26, 1995, Plaintiff Terry Bommer opened a retirement account with Intrust pursuant to an IRA Adoption Agreement, given account number 840013. Copies of this agreement, the pertinent Investment Directions, the Intrust IRA/Trust Agreement and blank, more legible copies of the IRA Adoption Agreement and Investment Directions are included in the Appendix collectively as Exhibit 3.

13. On March 16, 1997, Plaintiff Terry Bommer, as custodian for Joshua C. Bommer, opened an account with Intrust pursuant to a written Custody Agreement given

account number 840153. A copy of the Custody Agreement is included in the Appendix as Exhibit 4.

14. On March 16, 1997, Plaintiff Terry Bommer, as custodian for Emily E. Bommer, opened an account with Intrust pursuant to a written Custody Agreement given account number 840154. A copy of the Custody Agreement is included in the Appendix as Exhibit 5.

15. On June 8, 1995, Plaintiff Barbara Davidson opened an account with Intrust pursuant to a written Custody Agreement given account number 840020. A copy of the Custody Agreement is included in the Appendix as Exhibit 6.

16. Under the terms of each Plaintiff's Custody Agreement, Intrust agreed to invest and reinvest such funds as each Plaintiff entrusted to Intrust's custody solely in accordance with the instructions received by Intrust from Financial Timing.

17. Intrust routinely accepted each Plaintiff's deposits and, upon collection thereof, transmitted those funds to an investment company in exchange for the issuance of mutual fund shares. The mutual fund shares purchased for each Plaintiff's account were then held in an omnibus account Intrust maintained at the investment company for the specific purpose of holding mutual fund shares purchased for the accounts of Financial Timing customers, such as Plaintiffs.

18. From the inception of each Plaintiff's account at Intrust, and continuing through February, 2000, Intrust regularly rendered monthly accountings of the activity in each Plaintiff's account both to each Plaintiff and to Financial Timing. Financial Timing was also able to verify the share balances in the omnibus accounts Intrust maintained for Financial

Timing's customers with the investment companies in whose mutual fund shares Financial Timing directed Intrust to invest Plaintiffs' (and other Financial Timing customers') funds.

19. As Plaintiffs' money was originally entrusted to Intrust to purchase specific investments, there was a short time during which Plaintiffs' money was in the possession and control of Intrust, subject to the specific investment instructions.

20. For each deposit Plaintiffs made to their Intrust accounts, the entire amount of money entrusted to Intrust with investment instructions was used to purchase mutual funds as instructed. For each withdrawal or liquidation of mutual funds made by Plaintiffs, all of the proceeds were delivered to the Plaintiffs, after deduction of wire transfer and/or custodial fees.

21. From time to time, Financial Timing directed that each Plaintiffs' money market mutual fund shares be exchanged for shares of an equity mutual fund, or that each Plaintiffs' shares of an equity mutual fund be exchanged for shares of a money market mutual fund. All such transactions were executed by the investment company that operated the mutual funds, without the transfer of money to or from Intrust.

22. In addition to providing services similar to those described above to customers whose funds were invested pursuant to the instructions of investment advisors such as Financial Timing, Intrust operated what it described as its "Cash Management Program." In that program, Intrust offered to invest collected funds that remained on deposit with Intrust for any period of time in "savings accounts, certificates of deposit, treasury investments, overnight repurchase agreements and such other similar investments for the benefit of the [customer]" and to credit the customer's Intrust account with interest. For example, see Appendix Exhibit 6.

23. At no time did Financial Timing or any of the Plaintiffs herein instruct Intrust to invest any of Plaintiffs' funds pursuant to the Intrust Cash Management Program.

24. To the contrary, Plaintiffs and Financial Timing consistently gave Intrust specific instructions to invest in mutual fund shares or distribute to the order of the Plaintiff withdrawing the funds each Plaintiff's funds immediately upon collection by Intrust.

25. In April 2000, an examination of Intrust by the Illinois Office of Banks and Real Estate (OBRE) revealed a significant shortage of *cash assets* in the Intrust Cash Management Program.

26. On April 14, 2000, pursuant to the Illinois Corporate Fiduciary Act, 205 ILCS 620/6-1, *et seq.*, OBRE took possession and control of Intrust and appointed PricewaterhouseCoopers LLP as Receiver of Intrust.

27. On April 14, 2000, the Receiver initiated the "Receivership Proceedings" and the Trial Court entered his Order of Administration authorizing the Receiver to take charge of the assets of in the custody of Intrust. See Exhibit 7 in the Appendix.

28. The Receiver has determined that at the time of its appointment, the Intrust Cash Management Program should have held approximately \$105 million in cash assets for the benefit of Intrust customers whose collected funds were left on deposit with Intrust.

29. In fact, the Receiver was only able to locate and assume control of approximately \$37 million in cash assets held by Intrust in its Cash Management Program.

30. The difference between these sums, which the Receiver has represented to be \$68.1 million, is represented by a credit balance on Intrust's books for an "escrow" account Intrust purportedly maintained at Intercounty Title Company of Illinois ("Intercounty"). See Exhibit 8, paragraph 18 in the Appendix.

31. Intercounty was a corporation owned by certain Intrust shareholders.

32. Following the initial investigation mandated by 205 ILCS 620/6-4(b), the Receiver concluded that on specific dates between 1990 and 1999, Intrust transferred funds it had collected and was supposedly holding for the benefit of Intrust customers as part of the Intrust Cash Management Program to Intercounty. A copy of the Receiver's summary of these transactions, including the dates and amounts of each transfer, is included in the Appendix as Exhibit 10.

33. After these funds were transferred to Intercounty, they disappeared, and the Receiver has been unable, to date, to collect those funds for the benefit of Intrust customers whose Intrust accounts had credit balances in the Intrust Cash Management Program at the inception of the Receivership Proceedings.

34. The Receiver has determined, "It is the Intrust cash trust account in which the Shortage has occurred." See paragraph 5 of the July 12, 2000 Recommendation Regarding Allocation of Cash Trust Fund Shortage, a copy of which is included in the Appendix as Exhibit 9B (emphasis added).

35. The Receiver has determined that there is no shortage in non-cash accounts. See paragraph 20 of the July 12, 2000 Report, a copy of which is included in the Appendix as Exhibit 9A.

36. Plaintiffs claim no right to immediate surrender of any of the money remaining in the Cash Management Program.

37. The Receiver has records that show the dates of each transfer from Intrust to Intercounty and has no better evidence of the dates of the misappropriations of Intrust cash.

Pages 270 and 276, Transcript of Proceedings on July 28, 2000 before the Trial Court, a copy of which is included in the Appendix as Exhibit 16.

38. The Receiver takes the position that during the brief time that Plaintiffs' money was not invested, thieves working at Intrust might have stolen some of Plaintiffs' money, then replaced it with money stolen from other account holders with whose money Plaintiffs' money was briefly commingled. Exhibit 16 at pages 104-11.

39. None of Plaintiffs' Assets were stolen. Plaintiffs deposited money with Intrust and, a short time later, the same amount of money was transmitted to an investment company which accepted the funds and exchanged them for shares in the appropriate mutual fund.

40. None of the Intercounty transfers occurred during the short times that Intrust had possession of any of Plaintiffs' money, so that their assets were never at risk. See chart included in the Appendix as Exhibit 17, prepared from the Receiver's list of Intercounty transfers and Plaintiffs' account statements, which the Receiver had at all times material.

Plaintiffs' Demand for Possession

41. The Illinois Legislature has declared that "The Receiver shall have the authority, and it shall be the Receiver's duty, to surrender to the customers of such corporate fiduciary, when requested in writing directed to the Receiver by such customers, the assets, private papers and valuables left with the corporate fiduciary for safekeeping, under a custodial or agency agreement, upon satisfactory proof of ownership." 205 ILCS 620/6-10(5).

42. Pursuant to 205 ILCS 620/6-10(5), Plaintiffs each made demand upon the Receiver that it return to them the assets they left with Intrust as a corporate fiduciary for safekeeping under a custodial agreement ("the Assets"). Copies of Plaintiffs' demands are included in the Appendix as Exhibits 11 through 15. The Assets consist solely of shares of

mutual funds and only *de minimis* amounts of the Assets are cash (Mr. Freimuth, \$164.04 out of an account worth \$16,865; Mr. Bommer, \$0; Mr. Bommer for Joshua, \$98.34 out of an account worth \$40,386.82; Mr. Bommer for Emily \$0; and Ms. Davidson, \$.50).

43. Each Plaintiff has also filed in the Receivership Proceedings an Objection raising the issue of Plaintiffs' demand. Copies of these Objections are included in the Appendix as Exhibit 18 through 22.

44. Plaintiffs also filed Suggestions in Support of their Objections. See Exhibit 23 in the Appendix.

45. Plaintiffs herein have made a clear demand upon the Receiver under 205 ILCS 620/6-10(5), to which no specific response has been made, although the Receiver documented its opposition to this type of demand in papers filed in the Receivership Proceedings. See Receiver's Response to Objections to Its Recommendations Regarding Allocation of Cash Trust Fund Shortage, page 4, a copy of which is included in the Appendix as Exhibit 24.

46. The Receiver's position is clearly to reject any and all such demands, without any examination of the particular facts and circumstances of any demand. The Receiver has not objected to the procedure Plaintiffs used and the Trial Court's ruling is not based on procedural grounds.

47. Plaintiffs' Objections were overruled by Order of the Court dated August 17, 2000, a copy of which is included in the Appendix as Exhibit 27. At paragraph 16, the Trial Court's Order clearly overruled Plaintiffs' requests that the Receiver be directed to surrender the Assets held for Plaintiffs' account pursuant to 205 ILCS 620/6-10(5).

48. Illinois law provides that those who claim an interest in the interest bearing cash accounts of Intrust are general creditors as to those amounts, while Plaintiffs are trust beneficiaries for whom Intrust is holding specific, identifiable Assets.

49. The Trial Court and the Receiver in the Receivership Proceedings have no discretion under 205 ILCS 620/6-10(5) when a demand is made, but have only to perform the ministerial act of returning assets to the rightful owner thereof.

50. The Receiver has failed and refused to return the Assets to Plaintiffs and has made no response to Plaintiffs' demand, either to object to the form or the substance of Plaintiffs' demand.

51. Plaintiffs are damaged in that they are deprived of the use, possession and control of their valuable property.

52. Plaintiffs herein respectfully request that this Honorable Court direct the Trial Court to order the Receiver to return to Plaintiffs herein their property, as more particularly described in the Appendix, Exhibits 11 through 15.

Imminent Threat of Irreparable Harm

53. In the Receiver's Recommendation filed June 23, 2000 (Appendix, Exhibit 8), the Receiver recommended to the Trial Court that the \$68.1 million cash shortage be "allocated" to all Intrust accounts in proportion to the value of cash and non-cash assets held for those accounts as of April, 2000.

54. In subsequent hearings conducted by the Trial Court concerning the Receiver's Recommendation, the Receiver has explained its plan to liquidate Plaintiffs' and other Intrust account holders' liquid, non-cash assets (such as Plaintiffs' mutual fund shares) to the extent

necessary to generate \$68.1 million in cash, and to use the proceeds of Plaintiffs' Assets to cover the \$68.1 million cash shortage.

55. By Orders dated August 17, 2000 (Appendix, Exhibit 27) and September 12, 2000 (Appendix, Exhibit 29), the Trial Court has approved the Receiver's scheme to take non-cash assets held by the Receiver in trust for the accounts of Plaintiffs and other similarly situated Intrust customers, convert those assets to cash, and apply the cash for the benefit of Intrust customers who elected to have Intrust hold and invest their funds, at interest, through the Intrust cash management program.

56. In Orders entered August 2, 2000 (Appendix, Exhibit 25) and August 17, 2000 (Appendix, Exhibit 27), the Court prescribed a procedure by which Intrust account holders could seek exclusion, by motion, from the allocation process.

57. Over 4900 Intrust account holders moved for exclusion. Plaintiff Barbara Davidson's Motion for Exclusion, which requested exclusion from the allocation process on the same grounds as the motions filed by Plaintiff Bommer and many other account holders, is reproduced at Exhibit 26 of the Appendix.

58. The Court ordered that the Receiver select "exemplar" motions for the Court's initial consideration. Plaintiff Davidson's Motion for Exclusion (Appendix, Exhibit 26) was selected as one of the "exemplar" motions. Appendix, Exhibit 30.

59. Following a hearing on September 27, 2000, the transcript of which is included in the Appendix as Exhibit 31, the Trial Court entered an interlocutory order denying Plaintiff Davidson's motion for exclusion. Appendix, Exhibit 32.

60. At a hearing conducted October 4, 2000, the Trial Court stated that it intended to rule the remaining motions for exclusion consistently with the exemplar motions—i.e., to

deny all such motions filed on behalf of Intrust account holders who, on or prior to April 23, 1999, made cash deposits to their Intrust accounts. Appendix, Exhibit 33, p. 36.

61. The Trial Court further stated that its orders on the motions for exclusion and its orders implementing the Receiver's plan are intended to be interlocutory, not certified for immediate appeal, and would not be stayed by the Trial Court. Appendix, Exhibit 33, pp. 37-38.

62. At a further hearing held November 3, 2000, the Trial Court set December 8, 2000 as the target date for implementing the allocation process. Appendix, Exhibit 35, p. 65.

63. Plaintiffs' Assets are threatened by the Receiver's plan to "allocate" to each Intrust account holder, including each of the Plaintiffs, a portion of the \$68.1 million cash shortfall in proportion to the book value of each account, or an average of not less than 6.5% of each account. See Receiver's Recommendation, Exhibit 8.

64. Plaintiffs also have been damaged by a charges assessed against their accounts to help to pay the receiver's fees. See a copy of the Court's Order dated August 30, 2000 included in the Appendix as Exhibit 27.

65. Plaintiffs have no adequate remedy on appeal, because a successful appeal of the Trial Court's approval of the Receiver's actions would not, as a practical matter, restore them to the *status quo* nor would it allow for recovery of the amounts lost, in that after the accounts are charged a share of the loss and the balance is distributed, these funds and assets will be distributed among as many as 17,000 Intrust account holders. To retrieve the part of that distribution that belongs to Plaintiffs would require a new and separate class action lawsuit against all 17,000 account holders for recovery of amounts that could be *de minimis* after

distribution. Moreover, each account holder who wished to rectify the court's error would have to bring his or her own class action, resulting in a multiplicity of complex actions.

66. As further grounds, Plaintiffs offer their suggestions in support of their motion for leave to file this Complaint, as though fully set forth herein.

WHEREFORE, Plaintiffs respectfully request that this Court issue its Writ of Mandamus to the Honorable Sidney A. Jones and Pricewaterhouse Coopers, LLP, as Receiver of the Independent Trust Corporation, instructing the Trial Court to authorize the Receiver to surrender to Plaintiffs within 10 days all of the Assets Plaintiffs demanded, plus any additional assets which have accrued since the date of the demand, as dividends or otherwise, and directing the Receiver to comply with the mandate of 205 ILCS 620/6-10(5) by effecting such surrender.

Respectfully submitted,

Of Counsel
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Verification

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that he has read the Complaint for a Writ of Mandamus and the statements set forth therein are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.

Bruce C. Freimuth

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that he has read the Complaint for a Writ of Mandamus and the statements set forth therein are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.

**Terry G. Bommer, individually and as
Custodian for Joshua C. Bommer and
Emily E. Bommer, minors**

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that she has read the Complaint for a Writ of Mandamus and the statements set forth therein are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that she verily believes the same to be true.

Barbara Davidson