

**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT - CHANCERY DIVISION**

IN THE MATTER OF THE POSSESSION)	
AND CONTROL OF THE COMMISSIONER)	
OF BANKS AND REAL ESTATE OF)	Case No.: 00 CH 05905
INDEPENDENT TRUST CORPORATION)	
A/K/A INTRUST, AN ILLINOIS)	
CORPORATE FIDUCIARY,)	

**MOTION FOR RECONSIDERATION OF THIS COURT'S
NOVEMBER 8, 2000 RULING INCLUDING THEIR ACCOUNTS
IN THE ALLOCATION OF THE INTRUST CASH TRUST FUND SHORTAGE**

Movants, Four Seasons Asset Management and certain individual holders of investment accounts through Intrust as listed on the attached Exhibits 'A,' 'B,' and 'C' ("Movants"), by their attorneys, Arnstein & Lehr, respectfully request this Court reconsider its November 8, 2000 Order which included Movants' individual accounts in the allocation of the Intrust cash trust fund Shortage. Movants neither suggest nor concede that the November 8, 2000 Order is a final order; however, in support of this Motion, Movants state as follows:

INTRODUCTION

1. At its most basic level, this matter seeks to allocate among the various individual account holders, all of whom, it is undisputed, are without fault in this financial debacle, the serious Intrust cash trust fund Shortage (the "Shortage"). Indeed, since July 28, 2000, this Court has held numerous hearings and entered many rulings (the "Rulings") with respect to the Receiver's Recommendations for allocating the Shortage. The Court's rulings directly affect — and indeed determine — the amount of money in the respective individual accounts which will ultimately be returned to the individual account holders,

including the Movants.

2. On November 8, 2000, this Court entered the Order attached as Exhibit 'D.' Attached as an exhibit to that Order was a 168 page list of accounts ordered to be included in the allocation of the Shortage (in the interests of brevity, Movants do not attach that exhibit to this Motion). The basis for this November 8, 2000 ruling, according to the Order, was that the Rulings on the Exemplar Motions were dispositive of all motions to exclude pertaining to any and all accounts listed on the exhibit attached to the November 8, 2000 Order. All of the Movants to the instant Motion had accounts listed on that exhibit.

3. Illinois law is clear that reconsideration is proper to consider "newly discovered evidence which was not available at the time of the [initial] hearing, changes in the law or errors in the court's previous application of existing law." Korogluyan v. Chicago Title and Trust Company, as Trustee, 213 Ill. App. 3d 622, 627 (1st Dist. 1991).

4. The Movants seeking reconsideration pursuant to this motion fall into three groups:

- a. Exhibit 'A' is a list of Movants who argue that: (1) the Court erred in its application of the law, specifically, that it failed to apply existing, controlling principles pertaining to the treatment of aliquot withdrawals from commingled accounts; and (2) the very framework within which the Court's prior Rulings, including the November 8, 2000 Order, were made, was based on certain factual representations made by the Receiver to the Court pertaining to the Receiver's perceived ability to reconstruct the account balances for all accounts as of April 23, 1999, which representations the Receiver has recently admitted are not accurate. This new fact (the inaccuracy of the Receiver's prior representations) decimates the very foundation of that framework, and requires that the Court reconsider the November 8, 2000 Order and rule in its place consistent with the recommendations set forth herein. Furthermore to the extent that the Court does not does not reconsider the November 8, 2000 Order and exclude the Movants' individual accounts as requested herein, the Movants listed in Exhibit 'A' seek, in the alternative, to join in the arguments of Sharon

Matthies in her Second Motion to Reconsider that the conceptual framework of the distribution of the loss itself must therefore be reevaluated (the Matthies motion is scheduled for hearing on December 13, 2000);

- b. Exhibit 'B' is a list of Movants for whom counsel is in possession of newly acquired evidence which should be considered in the determination of whether these accounts are subject to the allocation of the Shortage (and which Movants believe compels the conclusion that their respective accounts should be excluded from the allocation);
- c. Exhibit 'C' consists of one individual account holder, Herman Diebler, whose account should have been considered subsequent to the decision on the Schectman motion, and for whom new evidence will support the exclusion of his account from the allocation of the Shortage.

Exhibit 'A' Movants

5. The accounts of the Movants listed in Exhibit 'A' were funded after July 29, 1996. Subsequent to July 29, 1996, no funds were transferred from Intrust to Intercounty until the two final transfers which occurred on April 21, 1999, and April 23, 1999. The key fact here is that, on April 21, 1999 and April 23, 1999, the funds of these account holders had been withdrawn from the commingled mass in the cash trust fund and were fully invested. In ruling on the Exemplar Motions, the Court held that if there was "substantial" cash in an Intrust account which then became commingled in the cash trust fund, that account would be included in the allocation of the Shortage, even if that cash was fully deposited and invested between transfers of funds from Intrust to Intercounty. However, Movants submit that the mere fact that cash was funneled through the commingled account does not prove that the account was "at risk" at all

times.

6. The concept of the “commingled” bank account exists for one purpose: to vitiate whatever requirement otherwise might exist for the need to trace funds which flow through such an account. When the need to trace does not exist, the fact that an account might contain commingled funds is of no consequence. The holders of funds in a commingled account are considered to be entitled to an aliquot portion of the funds in the account.

7. Tracing would be of absolute significance if seeking to identify whose cash was stolen. However, that is not the case here. The fact that an account contains commingled funds should be of no consequence to the rights of those entitled to the funds. This Court decided, regardless of whose funds were actually stolen, all account holders with funds “at risk” of theft will be subject to bearing the allocation of the Shortage.

8. This is exactly the same phenomenon as exists when fungible goods are placed in the same storage facility, such as grain in a grain elevator. The entitlement of each of 1,000 persons who have placed 1,000 bushels of grain in an elevator having a capacity of one million bushels is an aliquot portion of that one million bushels to the extent of 1,000 bushels. The entitlement of an Intrust account holder to an amount of money placed in cash is an aliquot amount to the extent of the amount placed.

9. During the period when an individual’s aliquot portion of the whole remains in the commingled mass, it is vulnerable to whatever loss the whole may incur. But, it is only during this time that this vulnerability exists. Once the aliquot portion has been withdrawn from the commingled mass, the analysis changes dramatically. The withdrawn aliquot

portion no longer is vulnerable to the loss which the commingled mass may incur because the aliquot portion no longer is a portion of that commingled mass. Withdrawal of the aliquot portion is exactly as though the person entitled to that portion has concluded its business with the holder of the commingled mass. 30A Illinois Law & Practice 169, Property § 3; see also Low v. Martin, 18 Ill. 286 (1857).

10. In the example of the elevator, once the aliquot portion is withdrawn, it no longer is susceptible of bearing any allocation of loss which the remainder of the commingled mass may suffer, whether that be due to conversion, spoilage or otherwise. Likewise, once an Intrust account holder has had its aliquot portion of the cash funds of the commingled mass removed from the commingled mass, that aliquot portion no longer is susceptible of allocation of any loss which the commingled mass may incur at another time.

11. Pursuant to this analysis (which Movants believe is the only proper analysis under the controlling law), funds which an account holder placed into the commingled account and which were transferred from that account into securities or any other investment outside the control of Intrust, at a time when Intrust made no transfer to Intercounty Title (where the conversion took place) simply could not have been susceptible to such a conversion. It is only the commingled mass of funds which existed on the dates of the transfers to Intercounty and which were transferred to Intercounty which were susceptible of conversion. The funds of those who had removed their aliquot portion of the commingled mass from that mass before any such transfer occurred were not — and indeed, could not have been — subject to any risk of loss with respect to the actions of Intercounty. It is exactly as though the holder of those funds had closed its account with Intrust.

12. The Movants recognize that it is in the interests of equity that the Court seeks to spread the allocation of the Shortage widely, so as to avoid unduly and unfairly burdening a minority of account holders, all of whom are innocent parties in this affair. However, the Court has taken the position that, rather than distribute the loss across the widest possible group of account holders, it will exclude those accounts from the allocation of the Shortage where the holders demonstrate conclusively that their funds were not at risk.

13. Based on the foregoing analysis, if an account holder is able to demonstrate that the aliquot portion of funds to which it was entitled was in the commingled mass at a time when that mass was not vulnerable to conversion and then was removed before any other such time of vulnerability, the fact that the funds were in a commingled mass is irrelevant. Their removal under the circumstances described here places them outside the potential for allocation of the loss.

14. The Movants listed in Exhibit 'A' met each and every one of these criteria. Thus, the Court erred pursuant to existing Illinois law when it ruled on November 8, 2000, that these Movants were subject to the allocation of the Shortage. The Court should reconsider and reverse its November 8, 2000 Order.

15. Alternatively, to the extent that the Court does not reconsider its November 8, 2000 Order and reverse its position as to these Movants' accounts for the reasons set forth above, the Movants listed in Exhibit 'A' hereby join in and adopt the arguments of Sharon Matthies in her Second Motion to Reconsider that the conceptual framework of the distribution of the loss itself must be reevaluated. The Matthies motion is scheduled for hearing on December 13, 2000.

Exhibit 'B' Movants

16. The accounts of Movants listed in Exhibit 'B' were included in the list of eighteen (18) accounts referenced in the October 27, 2000 Reply Brief filed by Four Seasons Asset Management. These accounts were all opened on the basis of a transfer of securities and, thereafter, were never funded with cash that passed through Intrust's cash or money market accounts. Subsequent to October 27, 2000, the Receiver entered into agreed orders excluding eight (8) of those accounts from the allocation. The remaining ten (10) accounts listed in Exhibit 'B' were considered "suspect" by the Receiver based on information from the admittedly unreliable TMAS computer system.

17. Counsel requested records from Four Seasons Asset Management on the remainder of the accounts, which had to be ordered from Intrust and took some time to acquire. Only on Tuesday, December 5, 2000, did counsel receive these records for the first time. These records constitute new evidence, and the interests of equity and justice require that the Court permit counsel time to review the proof that these accounts should be excluded from the allocation of the Shortage, and reconsider its November 8, 2000 Order accordingly. The Movants named in Exhibit 'B' respectfully request 21 days in which to file supporting legal memoranda and documentary evidence regarding the propriety of the exclusion of their accounts from the allocation of the Shortage.

Exhibit 'C' Movant

18. The Movant named in Exhibit 'C,' Herman Diebler, is the holder of account number 975812. In his reply brief to this Court, as well as in discussions between counsel

for Mr. Diebler and Amy Andrews on behalf of the Receiver, Mr. Diebler made it clear that the resolution of his motion for exclusion was dependent upon the outcome of the Schectman motion, because although his account was funded by wire transfer on April 23, 1999, the actual transfer itself was not made until some time after the final transfer of funds from Intrust to Intercounty. Furthermore, and in any event, the funds which were the subject of the wire transfer were not even credited to Mr. Diebler's account until April 26, 1999, as demonstrated by the documentation attached to his original motion. Thus, Mr. Diebler's account was included in the November 8, 2000 Order of Court in error.

19. Further, the Court's ruling on the Schectman motion was instructive as to the documentation needed to support the exclusion of Mr. Diebler's account from the allocation of the Shortage. Thus, documentation of the exact time of the wire transfer from the third party financial management company used by Mr. Diebler has been requested, and should be shortly forthcoming (expected today). Mr. Diebler respectfully requests that he be permitted twenty-one (21) days to file supporting documentation and legal memoranda in support of this Motion to Reconsider the Court's November 8, 2000 Order including his account as subject to the allocation of the Shortage.

CONCLUSION

WHEREFORE, Movants respectfully request that this Court reconsider its November 8, 2000 Order including their accounts in the allocation of the Shortage as set forth above, and grant them twenty-one (21) days in which to file supplementary legal memoranda and documentation.

FOR THE MOVANTS:

By:

One of Their Attorneys

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Dated this 8th day of December, 2000

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EXHIBIT 'A'

Account Number
Account Holder

832002	Charles Meyer and Leonide Plagens
975117	Leeland and Kristen Gray
975028	Eileen Seger
975093	Roy Molgard
975121	Lissa Minkin
975226	Roland Seger
975272	Eileen Seger
975041	Roland Seger
975087	Matthew Minkin
975175	Penelope B. Fishman
975176	Julia Fishman
975180	Clark A. Denslow

975196	William Heineman
975201	Toba Rainess
975209	Frederic M. Fishman
975210	Penelope B. Fishman
975214	Roland and Eileen Seger
975218	Joseph Champagne
975233	Marshall Minkin
975315	John R. Book
975353	James LaRue
975381	Kathleen Denslow
975382	Kathleen Denslow
975398	Penelope B. Fishman
975399	Deutsch American Partners
975442	Darrell Hatcher
975496	Joseph Champagne
975498	John R. Book
975523	G. Preston and Bonnie Strong
975588	Ray A. Cooke, Custodian for Daniel R. Cooke.
975589	Cooke Pension Fund
975612	John Bretton Book
975677	Kenneth C. Lewis
975678	Donald Hofbauer
975679	

975680

Charles Ward

985056

Charles and Melva Ward

985511

Rodney J.H. Smith

Charles Meyer and Leonide Plagens

EXHIBIT 'B'

<u>Account Number</u>	<u>Account Holder</u>
975253	Colhoun
975255	Hermann
975261	Muscott
975264	Iverson
975282	Krumweide
975290	Jealous
975298	Connelly
975319	Dunne

EXHIBIT 'C'

Account Number

Account Holder

975812

Herman Diebler

CERTIFICATE OF SERVICE

Amy Maldonado, an attorney, states that she served the foregoing Notice of Motion and Motion of Certain Individual Holders of Investment Account Through Intrust For Reconsideration of This Court's November 8, 2000 Ruling Including Their Accounts In the Allocation of the Intrust Cash Trust Fund Shortage by placing a true and correct copy in the U.S. Mail, proper postage prepaid, addressed to the persons listed on the attached Service List as well as to

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