

**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)	Cause No. 00 CH 05905
INDEPENDENT TRUST CORPORATION)	Judge Sidney A. Jones, III
a/k/a INTRUST, an Illinois corporate fiduciary)	
_____)	

OPPOSITION TO REVISED FINAL ORDER ON ALLOCATION

J. Phillip O’Brien, Michael Elkin, Steven J. Fagan, William R. Schowalter, Cheri B. Shinsky n/k/a Cheri B. Rakowsky, Harold K. Shinsky, Jody E. Shinsky, Michael S. Shinsky and Miriam C. Shinsky, account holders (“Account Holders”), by their attorneys, submit this Opposition to the Revised Proposed Final Order on Allocation, and state as follows:

1. Account Holders, along with thousands of others, have objected to the Cash Shortage Reallocation plan proposed by Receiver in several pleadings filed with this Court. Account Holders already have filed Notices of Appeal to the First District Court of Appeals from the Court’s entry of allocation orders entered on November 8, 2000 – cause No.s 1-01-4130 and 1-01-0342. Account Holder Appellants also have sought a stay of the execution of any order of this Court to liquidate their accounts pursuant to the November 8th allocation orders determining their status as ‘included’ accounts in Receiver’s Cash Shortage Reallocation.

2. Account Holders reiterate their previous objections to Receiver’s Cash Shortage Reallocation proposal and its incorporation into the entry of the Revised Proposed Final Order Allocating Cash Trust Fund Shortage, filed on February 9, 2001¹. Receiver has provided this

¹ Receiver’s filing of its “Revised” Proposed Final Order on February 9 after this Court ordered all Account Holders to file their responses by February 13 has left very little time to coordinate objections. Receiver’s moving target, both in terms of the Final Order and the failure to timely supply the necessary information to Account Holders in this cause to properly evaluate

Honorable Court an amalgam of unworkable, unprecedented and unlawful reallocation schemes that this Court must reassess. No matter how many motions have been filed by account holders, how many hearings this Court has held and the number of ever-changing proposals Receiver has presented to this Court, the fundamental question of whether the current proposal is both *legal* and fair must be addressed by carefully weighing the authorities on the salient issues.

3. Account Holders' request that this Court require Receiver to file a **memorandum of law** in support of its Proposed Final Order so that this Court can address the proposed allocation process in the context of the Illinois Corporate Fiduciary Act and established law. A proposal based on "expedience" (as Receiver indicates it is focused on) would also have dictated applying the loss where it was found. Receiver has known since at least June 2000 the amount (or close to it) of Preclosing Cash Trust Funds that are missing as of the date of its appointment. Receiver informed this Court that the loss is approximately \$68.1 million (although that number may include interest) and was found in each account holders' cash/Intrust money market accounts, if they had them. Contrary to Receiver's suggested language that it "is not feasible or possible to trace the misappropriation of the cash trust funds to specific Intrust accounts" (§ 3), its tracing argument is based on a tracing of actual *dollars*, versus identifying specific funds or *property* that Receiver and Account Holders can verify with their account statements, as requested by Account Holders. Receiver knows which account holders held Intrust cash/money market accounts as of April 14, 2000. Consequently, Receiver could have followed precedent and applied the loss in Cash Trust Funds Accounts to such accounts within weeks of being appointed in this matter. As a result, the *legal* allocation of the Cash Trust Fund loss is also the most "expedient" and fair and avoids the myriad of problems currently facing this Court and the Appellate Court.

Receiver's multiple proposals continues to hamper Account Holder's efforts to adequately respond and further prejudices them.

4. Account Holders further object to Receiver's suggested language in the Final Order that this Court is faced with so-called "extreme circumstances" (§ 1), with the implication that this Court should ignore the obvious flaws in Receiver's Final Order and established law. In order to avoid duplication of arguments to this Court, Account Holders hereby adopt the objections made in Bruce Friemuth's Objections and Use of the March 1999 Account Statements as they relate to the practical and logistical problems caused by Receiver's proposal. Furthermore, the subjective nature of Receiver's analysis of what it can and cannot do has been partially documented in the depositions of Receiver's accountants held on February 5, 2001. The transcript from the depositions has not been made available to Account Holders by the time their Objections were due to be filed in this Court, but portions thereof will be provided as an exhibit hereto in the near future.

5. Nowhere in the Final Order or accompanying report does Receiver indicate *who* is purportedly to receive the distribution of proceeds from liquidated non-cash assets from those account holders' individual fiduciary accounts held by third parties. This Court has never been provided that information and it should.

6. Receiver "over-allocates" against Account Holders for the Cash Shortage. Again, without precedent and with only its admittedly subjective determination, Receiver has included a nearly 2% over-allocation for illiquid accounts and to create a "buffer" in the event the initial allocation hits a snag. Receiver's over-allocation of a loss that Account Holders did *not* suffer in their non-cash identifiable securities held by third parties (as Receiver admits it cannot find any instances of embezzlement from non-cash accounts), merely compounds the unfairness and illegality of the current proposal.

WHEREFORE, for all of the foregoing reasons and those contained in their multiple filings with this Court, Account Holders respectfully request this Court to enter an order requiring Receiver to provide a memorandum of law in support of the Revised Proposed Final Order, allow Account

Holders an opportunity to respond, and to reject Receiver's Revised Proposed Final Order in its current form and grant all such other relief as this Court deems just and appropriate.

Respectfully submitted,
**J. PHILLIP O'BRIEN, MICHAEL ELKIN,
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