EXHIBIT B

No. 00 – 4130

APPEAL TO THE APPELLATE COURT FOR THE STATE OF ILLINOIS
FOR THE FIRST DISTRICT

FROM THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT

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	)	**No. 00 CH 05905**
	)	**Judge Sidney A. Jones, III**
THE COMMISSIONER OF BANKS AND REAL ESTATE and PRICEWATERHOUSECOOPERS, LLP, AS RECEIVER OF INDEPENDENT TRUST CORP., a/k/a INTRUST, and MILLENNIUM TRUST COMPANY, LLC,	)	
Appellees,	)	
J. PHILLIP O'BRIEN, INTRUST ACCOUNT HOLDER AND ALL ACCOUNT HOLDERS LISTED HEREIN, parties in interest,	)	
Appellants.	)	

APPELLANTS' REPLY TO RECEIVER'S RESPONSE TO MOTION TO STAY LIQUIDATION AND DISTRIBUTION OF ASSETS FROM THEIR INDIVIDUAL FIDUCIARY ACCOUNTS

J. Phillip O'Brien, an individual account holder of Intrust, by his counsel, and those other Intrust account holders named on Exhibit A attached to this Motion and incorporated herein (collectively, "Account Holders" or "Appellants"), by their respective counsel, have moved this Court pursuant to Illinois Supreme Court Rule 305(d) to stay the liquidation of non-cash assets from their individual fiduciary accounts and the distribution of such proceeds ("Motion to Stay").

In Reply to Receiver's Response, Appellants rely on their Motion to Stay, Supporting Record, Motion to Supplement Supporting Record, affidavits of counsel, and state as follows:

ARGUMENT

Appellants agree with Receiver that it is in the best interest of all parties for this Honorable Court to rule on the substantive merits of their Motion to Stay, as well as other appellants' motions, as soon as possible.[1] Resp. at ¶¶ 2, 40. Appellants further agree that absent a stay of Receiver's Cash Shortage Reallocation plan as set forth in the allocation orders – with the liquidation of Appellants' assets and distribution of those funds to others – Appellants will suffer substantial harm that may not be remedied upon a successful appeal. Resp. at ¶¶ 38-39; Mtn. at 7-8. Appellants and Receiver also agree that seeking a stay in the Trial Court would not be fruitful, as the Trial Court has already revealed how it will rule on such a motion. Resp. at ¶¶ 20, 41; Mtn. at 6; Mtn. to Suppl. at 2 (Exhibits A and B). Appellants' view of the critical issues before this Court, however, differs drastically from Receiver's.

Receiver's unwillingness to appropriately address the "likelihood of success" factor relevant to this Court's determination of whether a stay is appropriate (*Stacke v. Bates*, 138 Ill.2d 295, 302, 562 N.E.2d 192, 195 (1990)), belies its stated intent to quickly address the salient issues in this matter. Resp. at ¶ 28. Below, Appellants will also address the factual inaccuracies contained in the Response in order to provide this Court with the framework upon which to craft appropriate relief allowing Appellants to pursue their appeal, while minimizing any delay and potential hardship to others.

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[1] Presently, Appellants are aware of only two fully-briefed motions to stay before this Court – those filed in these proceedings (No. 00-4130) and filed in Appeal No. 00-4129 (Abbott). Several other appellant groups have joined or adopted the arguments in these two filings: Carroll (No. 00—4262); Bertoldi (No. 01-0026); and Four Seasons (No. 01-0443) in order to expedite the relief requested herein.

A. Receiver does not refute Appellants' "likelihood of success" on the merits of their appeals.

Receiver agrees with Appellants that this Court's analysis of the factors enunciated in *Stacke* should guide its discretion on whether to issue a stay. Mtn. at 7; Resp. at ¶27. Again, Receiver agrees that the first *Stacke* factor is met – that without a stay preventing the allocation against Appellants' accounts and the distribution of those funds to others – the "fruits of their appeal" will be thwarted if Appellants are successful. Resp. at 38; Mtn. at 7-8. It is Receiver's reluctance to address the second *Stacke* factor, the Appellants' likelihood of success on the merits of the appeal, however, which is most telling. Receiver apparently does not want this Court or any other court to analyze Appellants' rights under the Illinois Corporate Fiduciary Act ("CFA") or the nearly 100 years of precedent in this State, which, if examined, would reveal that Receiver's proposed reallocation of cash trust fund losses to Appellants' identifiable non-cash accounts is hopelessly flawed. Resp. at ¶ 28 ("Receiver does not believe it appropriate to address every legal argument made by the Appellants….").[2]

In its Motion, Appellants cite several provisions of the CFA and Illinois precedents that form the bedrock of trust law from 1902 to the present date showing Receiver's current Cash Shortage Reallocation proposal, as approved by the Trial Court, violates such law. Mtn. at 8-11. Although clearly challenged in the Motion to Stay ("Receiver has cited absolutely no statute or precedent allowing it to invade the Appellants' Individual Fiduciary Accounts, liquidate their identifiable assets held by third parties, and distribute the proceeds to other account holders due to the shortage in Intrust's preclosing cash trust funds"), Receiver utterly fails to provide this Court with any authority or attempt to distinguish those authorities relied upon by Appellants.

[2] With only two fully-briefed Motions to Stay pending in these proceedings, Receiver's reluctance to address their cogent legal arguments is mystifying. Presumably, if Receiver had the legal authority to distinguish those cited by Appellants, it would have done so.

Resp. at ¶28; Mtn. at 8. Receiver's silence in the face of the authorities cited by Appellants should be deemed an admission that Appellants have met their burden of showing a substantial "likelihood of success on the merits of their appeal." *Stacke*, 138 Ill.2d at 306, 562 N.E.2d at 196.

Receiver's continued misapprehension of Appellants' primary argument on appeal is borne out of Receiver's failure to address Appellants' authorities. Appellants are not arguing that the court trace *specific dollars* deposited in one of the allegedly commingled account(s) managed by Intrust or its affiliates and then into Appellants' identifiable securities and accounts held by third parties. Resp. at ¶¶ 10, 28. These Appellants seek to trace their property rights in *securities or funds that are clearly identifiable and held by third parties*, as evidenced by Intrust's Account Summary statements regularly mailed to Appellants. Mtn. at 10. Consequently, Receiver's repeated warnings to this Court that it simply cannot trace the *specific dollars* from each depositor to each individual fiduciary account is simply irrelevant for purposes of this appeal. *Id*.

B. The balance of equities lies in favor of upholding Appellants' rights to seek redress in this Court pending their appeals.

After reviewing each of the *Stacke* factors, the balance of equities clearly favors preserving Appellants' ability to seek relief in this Court and to prevent Receiver and Millennium (the successor trustee) from invading their individual fiduciary accounts, liquidating a large portion of their retirement accounts and distributing those funds to other account holders who were heavily invested in Intrust's cash management/money market funds on the date of Receiver's appointment. Receiver asserts that if the allocation process moves forward absent a stay, Appellants' loss of 8.69% of their accounts "is probably less than what they lost in the stock market in the year 2000". Resp. at ¶ 14 n.4. Receiver's suggestion that Appellants 'suck-

it-up' because they likely suffered greater losses in last year's turbulent market misses the mark. The proposed Cash Shortage Reallocation is an unlawful, unprecedented *additional* loss to Appellants that they should not have to bear. Mtn. at 8-11. Appellants fully recognize that $68.1 million is missing from Intrust account holders' Preclosing Cash Trust Fund accounts ("Preclosing CTF") and, as such, the loss should remain where it was found and be applied to such accounts. Accordingly, allocating a loss found in the Preclosing CTF accounts to those Preclosing Trust Fund accounts of others that hold identifiable IRA's and securities violates Illinois law, is neither fair nor equitable and further supports the issuance of a stay.

Appellants have met their burden under each of the *Stacke* factors and therefore respectfully request that this Honorable Court issue a stay pending their appeals.

C. Receiver mischaracterizes several facts in its Response.

1. Accounts are not "frozen" to preclude continued trading or the ability to receive hardship withdrawals.

The Administrative Order entered in this case allows account holders to continue trading in their accounts, but places restrictions on the removal of assets from the accounts unless the account holder meets certain hardship criteria. Mtn. at 3; R. v1 C000043-44. For example, those account holder retirees dependent upon continued monthly income from their IRAs have been allowed to receive those payments. Taxes incurred from trading in the accounts also may be paid from the assets held in the "frozen" accounts. Accordingly, Receiver's repeated reference to "frozen" accounts must be placed in the proper context. Appellants clearly desire to have the "freeze" lifted from their accounts as well, but not at the risk of losing a substantial portion of their life savings and retirement accounts due to the implementation of Receiver's proposed Cash Shortage Reallocation scheme.

2. Receiver was able to trace the loss in cash trust funds to specific Preclosing Cash Trust Fund accounts as of April 14, 2000.

Receiver contends that it was not able to trace "the loss to specific Intrust accounts" and therefore had to apply the loss to all accounts. Resp. at ¶ 10. Receiver's statement of "fact" is based on the erroneous assumption that it was ordered by the Trial Court to identify the *specific dollars* that were embezzled. That was never its charge. Receiver was to investigate where the loss was found and present a plan to allocate that loss to the Trial Court. Resp. at ¶¶ 10-11; Mtn. at 3. After its appointment, Receiver identified approximately $105 million in Preclosing Cash Trust Funds on the books of Intrust; yet, after reviewing records supplied by Intercounty Title (its affiliate), Cole Taylor, Quick & Reilly and Schwab, where Intrust had accounts, Receiver was able to locate only $37 million of the Preclosing CTF. Mtn. at 3. Thus, by June 2000, Receiver had identified the extent of the loss – $68.1 million – and those account holders who had Preclosing Cash Trust Fund accounts. (Receiver has never contended that any embezzlement occurred from individual account holders' *non-cash* securities held by third parties). Receiver's determination of the extent of the Cash Shortage has not changed from June 2000 through its proposed final report filed with the Trial Court on January 26, 2001. Mtn. at 3. Again, the central issue raised in this appeal is whether Receiver should have proposed to the Trial Court and received an appropriate order pursuant to established Illinois law to apply the loss where Receiver found it on April 14, 2000 – in the Preclosing Cash Trust Fund accounts at Intrust.

3. Account Holders' appeals are not preventing Receiver and Millennium from allocating the Cash Shortage quickly and unfreezing accounts.

Receiver repeatedly refers to the hardship to others that granting Appellants' request to stay will cause or that this *appeal* is having on the Cash Shortage Reallocation process. Resp. at

¶¶ 16-20. On the contrary, it has been Receiver's own misdirected allocation proposals to the Trial Court and the Trial Court's unfortunate adoption of those proposals that have delayed these proceedings. Receiver's proposal has precipitated nearly 5,000 motions to exclude filed by account holders. Resp. at ¶ 11; Mtn. at 4. The Trial Court's orders adopting of Receiver's proposal have caused over 1,200 Intrust account holders to file appeals.[3]

Furthermore, Receiver's proposed final order filed on January 26, 2000 does not provide any timetable or procedure for allowing an account holder to remove its accounts from Millennium. Indeed, due to the Trial Court's granting of Millennium's request to limit the number of transfer or liquidation requests per month to 1,500 (entered on November 29, 2000), any one of the 17,000 account holders who is not subject to any allocation or who is allocated a loss during the approximately 90-day process is not assured of being able to extricate his or her accounts from the successor trustee for what could be a year. *See* Resp. at ¶ 15 n.5; SR. C00147. Consequently, the process currently proposed *by Receiver* casts considerable doubt on its assertion that "many account holders just desire to pay their allocation percentage and get their accounts *released without further delay*." Resp. at ¶20 n.8; SR. C00137-149.

D. Appellants have offered to expedite these proceedings to promptly resolve the legal issues and request Receiver to do the same to avoid further delays in releasing accounts.

Appellants have repeatedly informed Receiver of their desire to expedite their appeal by proposing an accelerated docket and presenting a limited record on appeal. Over the last two weeks, Appellants have attempted to obtain an agreed-upon stay from Receiver to avoid

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[3] Receiver refers to itself as an "independent neutral" in these proceedings and seeks a "fair" and prompt determination of these appeals. Resp. at ¶¶ 20-22. There is no question Appellants seek a fair and prompt resolution, as well. Receiver also complains of the "vehemence" of certain account holders in pressing their claims. Appellants have been forced to expend considerable resources to protect their rights under established Illinois law. Appellants' so-called "vehemence" has been brought about by Receiver's failure to address the law and its suggestions to the Trial Court (and in these proceedings) to moot Account Holder's appeals by requiring a prohibitive bond.

unnecessary briefing. Unfortunately, those efforts were not successful and Appellants expeditiously moved in this Court for a stay. Appellants' pledge to work with Receiver to accelerate these proceedings for prompt resolution has never waned. Such efforts, however, will be for naught if this Court does not stay the Cash Shortage Reallocation against Appellants' accounts while the appeal is accelerated.

E. Appellants' do not seek class-wide relief and request to keep frozen only that portion of *their* accounts to act as a bond pending appeal.

Again, contrary to Receiver's mischaracterizations of Appellants' argument in its Motion to Stay, this Court need only review Appellants' requests for relief to see that Appellants are not seeking "class-wide relief." Resp. at ¶ 31 n.15; Mtn. at 13. Appellants seek to preserve the status quo ante for its accounts, preventing an invasion to liquidate their non-cash assets, and freezing *only that portion of their accounts* that would be subject to an allocation as proposed by Receiver (8.69%) during the appeal to act as a bond. Mtn. at 12-13. Appellants are willing to keep "frozen" 65% of their Preclosing Cash Trust Funds, as well. Because the vast majority of Appellants have a *de minimus* amount cash in their Cash Trust Fund accounts, freezing a percentage of their non-cash trust accounts will clearly preserve all parties' rights on appeal while allowing those other account holders whom Receiver characterizes as "willing to take the loss" to do so. Resp. at ¶ 20 n.8.

Receiver agrees with Appellants that this Court has wide discretion in determining whether to require a bond for the issuance of a stay. Resp. at ¶ 35; Mtn. at 12. Appellants' proposal to continue a freeze on that portion of their accounts subject to the maximum amount of the Cash Shortage Reallocation preserves the status quo and does not penalize Appellants for seeking redress here. Likewise, such a bond, if ordered by this Court, would protect Receiver's ability to collect the allocation in the event it prevails on appeal. Receiver's hypothesis that

Appellants suggested bond would not protect those "non-appellants" from "possible damage from the continued delay in freezing and access to their accounts" is an unsupported scare tactic. As cited above, account holders continue to trade in their accounts and withdraw funds in the event of a hardship. The purpose of a bond is not to protect against the hypothetical lawsuits – rather, an appeal bond is meant to address what happens if appellant loses. Here, if Appellants lose, their accounts will be subject to allocation. The proposed bond – based on the amount of that allocation – is more than sufficient.

Moreover, Receiver's own proposal for implementing the Cash Shortage Reallocation does not even assure non-appellant account holders their "freedom" within the next 12 months – the estimated time Receiver informs this Court it will take to prosecute the appeals. Resp. at ¶¶ 15, 35 n.18. Furthermore, the "possible damages" Receiver alludes to must have been accruing for the last 8 months, as well. Presumably, Receiver is maintaining an adequate bond to cover such damages in the event a court finds its actions have violated Illinois law. It is Receiver's rush to allocate while these Account Holders are on appeal that poses a problem for Receiver because this Court may reverse the Trial Court's orders and Receiver/Millennium may have allocated a loss against individual fiduciary accounts in violation of Illinois law.

Appellants also have suggested to Receiver that it consider a global stay (thus protecting everyone's rights) while this Court addresses the salient legal issues raised in accelerated appeals, fashioned to preserve an account holder's ability to remove a substantial amount from his or her non-cash assets by freezing an adequate portion (65%) of all Preclosing Cash Trust Fund accounts (subject to current hardship exceptions) and 8.69% of the Preclosing Non-cash Trust Fund accounts. Appellants remain confident that there is considerable room for this Court to fashion a stay without causing any undue harm to others and without ordering a crippling

bond, as suggested by Receiver, which will prevent Appellants from pursuing their rights on appeal.

WHEREFORE, for all of the foregoing reasons and those cited in its Motion to Stay and supporting documents, Appellants respectfully request that this Court grant its Motion to Stay and the relief requested therein. Appellants further offer to attend a hearing on their Motion to answer any questions that this Court may have.

Dated: February 9, 2001

SEE ATTACHED LIST OF APPELLANTS AND THEIR RESPECTIVE COUNSEL

Respectfully submitted,

Appellant, J. PHILLIP O'BRIEN, an Intrust account holder

By:________________________________
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AFFIDAVIT

I, Daniel T. Graham, being first duly sworn, depose and on oath state as follows:

1. I am a member of the firm of Levin & Funkhouser, Ltd., counsel to Michael Elkin, Steven J. Fagan, J. Phillip O'Brien, 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. in this appeal. Due to the common interest of the account holders in the issues raised in this appeal, and to minimize undue cost and inconvenience in prosecuting separate appeals, the account holders named on the list attached to this Motion have joined together in this appeal.

2. I submit this Affidavit pursuant to Illinois Supreme Court Rule 328. I have personal knowledge of the facts contained in the attached Motion that do not appear of record and, if called and sworn as a witness, could and would competently testify as set forth therein to the best of my knowledge and belief.

FURTHER AFFIANT SAYETH NOT.

____
Daniel T. Graham

SUBSCRIBED and SWORN to
Before me this February 9, 2001.

____
Notary Public

No. 00 – 4130

APPEAL TO THE APPELLATE COURT FOR THE STATE OF ILLINOIS
FOR THE FIRST DISTRICT

FROM THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT

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	)	**No. 00 CH 05905** **Judge Sidney A. Jones, III**
THE COMMISSIONER OF BANKS AND REAL ESTATE and PRICEWATERHOUSECOOPERS, LLP, AS RECEIVER OF INDEPENDENT TRUST CORP., a/k/a INTRUST, and MILLENIUM TRUST COMPANY, LLC, **Appellees,**	)	
J. PHILLIP O'BRIEN, INTRUST ACCOUNT HOLDER AND ALL ACCOUNT HOLDERS LISTED HEREIN, parties in interest, **Appellants.**	)	

ORDER

This cause coming on to be heard on Appellants' Motion To Stay Liquidation And Distribution Of Assets From Their Individual Fiduciary Accounts, it is hereby ordered that the Appellants' Motion is (granted)(denied).

____
Justice

____
Justice

____
Justice

ORDERED PREPARED BY:
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