Firm I.D. No. 90443

IN THE CIRCUIT COURT OF COOK COUNTY
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 JONES**
a/k/a INTRUST, an Illinois corporate	§	
fiduciary	§	

OPPOSITION TO MOTION OF JOSEPH UMBACH AND OTHER MOTIONS TO EXCLUDE ACCOUNTS FROM ALLOCATION OF SHORTAGE BECAUSE ACCOUNTS ALLEGEDLY WERE NOT INVESTED IN CASH WHEN INTRUST TRANSFERRED FUNDS TO INTERCOUNTY

At the time of this filing, over 3,000 account holders have requested that their accounts be excluded from the allocation of the cash trust fund shortage pursuant to the Court's August 2, 2000 Order. Many of these account holders contend that, because their accounts were not invested in cash on the date of a transfer from Intrust to Intercounty Title Company of Illinois ("Intercounty"), cash in their accounts was not subject to risk.

The motions of Joseph Umbach[1] and the Connaughtons[2] exemplify such motions. These account holders argue that cash deposited in their accounts was used to purchase securities or other non-cash assets ***before*** any subsequent transfer to Intercounty. Umbach, for example, transferred $500,000 into his account on March 18, 1999 -- about a month before the final transfer of cash from Intrust to Intercounty on April 23, 1999. (Umbach Mot., ¶ 3) These funds purportedly were invested in mutual funds by March 22, 1999. In October, 1999, Umbach transferred an additional $6.3 million into his Intrust account.

[1] Motion By Joseph Umbach To Exclude His Account From Allocation Of The Shortage. ("Umbach Mot.")
[2] Motion of Peter J. Connaughton and Jeanine Connaughton To Exclude Intrust Account Nos. 840093 (IRA#34780), 840094 (IRA#43781), 985013 From Any Allocation Of The Cash Shortage Referred To In The Receiver's Recommendation Dated June 23, 2000. ("Connaughton Mot.")

Umbach argues that "the entire amount [of his initial deposit] was indisputably invested in identifiable mutual funds by March 22, 1999 and was not subject to transfer from Intrust to Intercounty when the final diversion occurred on April 23, 1999, the *only* possible date Mr. Umbach's deposits were at risk." (Umbach Mot. ¶ 11). Similarly, the Connaughtons claim that their funds were not at risk because "[c]omparison of the period during which Intrust actually held funds for [their accounts] in cash and the points in time in which Intrust was transferring cash to Intercounty Title demonstrates that at no time did Intrust simultaneously hold cash for [their accounts] and transfer cash into Intercounty Title." (Connaughtons Mot. ¶ 10)

The Receiver urges the Court to reject the argument that accounts should be excluded unless they held cash (in a significant amount or otherwise) on the date of a transfer to Intercounty. *First,* it is simply not true that funds were "at risk" only on the dates that they were actually misappropriated. Rather, they were "at risk" whenever cash was at Intrust, regardless of when funds were transferred to Intercounty and/or misappropriated. *Second*, because of the turnover of accounts at Intrust, it is likely that a large number of accounts that held cash on the dates of transfer to Intercounty no longer exist. As a result, the accounts that remained at Intrust in April 2000 *and* were in cash on the dates of transfer to Intercounty would bear the entire burden of the allocation should Umbach's theory prevail. *Third*, as a practical matter, evaluating motions based on this premise will be extremely time consuming and expensive.

Umbach makes two other arguments, both without merit, that will be considered only briefly in this pleading. He first contends that his approximately $500,000 account balance on April 23, 1999 was *de minimus.* The Receiver intends to identify other exemplar motions claiming that the amounts in their accounts are *de minimus*. The Receiver does not believe, however, that a $500,000 balance even arguably falls within a *de minimus* exclusion.

Umbach also argues that it would be unfair to use his April 30, 2000 account balance when allocating the shortage, because only 7.35% of his deposits were made before April 23, 2000. (Umbach Mot. ¶ 17.) This is an argument that the Court has already rejected when it held that April 30, 2000 balances, rather than balances at some other date, should be used to allocate the shortfall. (8/17/00 Order, ¶ 21) The Court should not now revisit that decision.

I. THE TIMING OF TRANSFERS IN AND OUT OF CASH SHOULD NOT BE USED TO DETERMINE WHETHER AN ACCOUNT IS EXCLUDED FROM THE ALLOCATION.

Umbach, the Connaughtons, and thousands[3] of others like them ("Movants") argue that they should be excluded from the allocation because their cash deposits were purportedly invested in securities or other non-cash assets at the time Intrust transferred funds to Intercounty. They maintain that their funds could not have been misappropriated because their funds were not available to be transferred to Intercounty and the misappropriations were from Intrust's accounts at Intercounty. The Receiver believes that this argument should be rejected for both equitable and practical reasons.

A. Depositors Cash Was "At Risk" Regardless Of The Actual Timing Of Transfers To Intercounty.

There is no equitable reason why the fortuity of the timing of particular investments and transfers to Intercounty should determine whether an account holder should bear part of the loss at Intercounty. None of the Movants claims that he had any knowledge of the timing of transfers of cash to Intercounty, or that there was any relationship between such transfers and the timing of their own investments. On the contrary, it is clear that Movants, like the majority of account holders, held cash for only short periods of time until their funds could purportedly be invested in some other asset with a greater expected return.

It is undisputed that Movants' cash holdings were part of a commingled cash fund that was misappropriated over a period of many years. While Movants were presumably unaware of the misappropriation, they knew, or should have known, that their funds were deposited in uninsured accounts. These accounts, it is now known, were at even greater risk because one or more fiduciaries were misappropriating funds. Although the thefts took place at specific points in time, the risk was the same whenever funds were in cash at Intrust.

The only difference between Movants and other account holders is that Movants purportedly happened not to be in cash on one of the dates of transfers to Intercounty. There is no equitable reason that the Court should establish a lottery where some account holders, by pure chance, would be excluded from the allocation while others would have to bear a greater burden.

B. Movants Should Not Be Exempted From Bearing Loss To Accounts That Are No Longer At Intrust.

Movants argument is predicated on the theory that there are identifiable accounts from which funds were stolen, and that those accounts should bear the loss. There was, however, a regular turnover of accounts at Intrust. As a result, a significant percentage of accounts that existed on the date of any particular transfer to Intercounty were subsequently closed and are effectively excluded from the allocation. Thus, even if Movants' theory is correct, there is a portion of the loss that cannot be attributed to *any* existing account holder.

Under the Receiver's proposed method of allocation, all accounts opened before April 23, 1999 would share in the allocation of the loss that, under Movants' theory, should be borne by account holders who are no longer at Intrust. If the Movants are excluded from the allocation, however, only the remaining account holders would be subject to this loss.

---

[3] As of this writing, the Receiver has received over 3,000 motions to exclude. While these have not all been reviewed and categorized, it appears that a fair number make the arguments addressed in this brief.

If it were practical to identify all closed accounts and the cash balances of all accounts on the date of each transfer to Intercounty, one could theoretically estimate the percentage of the shortfall that should, under Movant's theory, be allocated to closed accounts.[4] Movants advance no theory that supports exempting them from this portion of the shortage.

The Receiver's proposed solution to this problem is to allocate the loss across all accounts opened before April 23, 1999. While this may seem unfair, it is less unfair than imposing the entire burden of closed accounts on those who do not move to be excluded from the allocation under the Movants' theory or on those who cannot prove that they did not have cash balances in their accounts on dates of transfer of funds to Intercounty. On the other hand, the Movant's theory foists on those people whose cash was misappropriated from Intrust not only the misappropriation of their own funds *and* the burden of the shortage that should be borne (but cannot) by the closed accounts.

C. Evaluating Hundreds Or Thousands Of Motions Based On Movants' Theory Will Further Deplete Account Holder Funds And Delay The Completion Of The Allocation Process.

Evaluating motions like Umbach's and the Connaughtons will consume enormous time and resources by the Receiver and this Court. There is no cost-effective way of determining cash account balances on the dates of transfers to Intercounty. It will therefore be necessary to review the entire account history for each account seeking exclusion on these grounds to determine whether the account was, in fact, invested in cash on the date of a transfer to Intercounty.

Because Mr. Umbach opened his account in early 1999, his account history is relatively short. (Umbach Mot. Exhibit A) The same cannot be said of the Connaughton's accounts, which

[4] As previously explained to the Court, there is no practical way, at reasonable expense, to calculate cash balances for individual accounts for the dates on which funds were transferred to Intercounty. Nor does the Receiver have reliable information about closed accounts. Nor is there any reliable way of estimating the hypothetical April 30, 2000 balances of closed accounts if they

were opened in 1996. (Connaughtons Mot., Ex. 2) In fact, careful review of these account statements reveals that that the Connaughtons are incorrect when they assert that they were not in cash on any date of a transfer from Intrust to Intercounty. All of the three Connaughton accounts were initially funded with a cash deposit to the Intrust cash account. The Connaughtons clearly carried a cash balance in Account 840093 (IRA #34780) from November 1, 1998 through December 31, 1999 and in account 985013, from August 1, 1998 to December 31, 1999. (Connaughton Mot., Ex. 2) During this period, the transfers of April 21, 1999 and April 23, 1999 from Intrust to Intercounty occurred. Account 840094 (IRA #34781) was not in cash on any specific date of any transfer to Intercounty, but it was in and out of Intrust's money market account throughout the period earning interest from the account.

This review of the Connaughton's account history is illustrative of the problems the Receiver and this Court will face if the Court grants these motions. Each Movant's account history will have to be reviewed to determine if the assertions in his or her motion are correct. If, as will often be the case, there were cash balances on the dates of a transfer to Intrust, the Receiver will have to make a determination about whether these amounts, individually or together, are *de minimus*.

Assuming, *arguendo*, that this process takes only two hours, on average, per motion (for review by the Receiver, its counsel, and Intrust personnel), the process of allocating the cash shortage will be set back several months. This could complicate the Receiver's plans to sell Intrust's business as a going concern and will certainly result in additional professional fees, all of which will ultimately be borne by account holders.

II. UMBACH'S TWO OTHER ARGUMENTS FOR EXCLUSION ARE ALSO WITHOUT MERIT.

---

had been maintained at Intrust. All of this information would be required to estimate the share of the shortage that "should" be apportioned to closed accounts.

A. $500,000 Is Not *De Minimus*.

As noted above, the Receiver expects to identify additional exemplar motions to explore the *de minimus* exclusion established by the Court. (8/17/00 Order, ¶ 14). The Receiver urges the Court to reject Mr. Umbach's contention that his $500,000 deposit on March 18, 2000 is *de minimus* in light of his subsequent deposits of $6.3 million. Mr. Umbach seems to be arguing for a sliding scale where the *de minimus* amount will depend on the amount ultimately deposited in the account.

This argument should be rejected for two reasons. *First*, it would have the perverse result of exposing individuals with smaller account balances to a greater share of the loss. An individual who made a $10,000 deposit, but no subsequent deposits would have his entire balance subject to allocation, while Mr. Umbach would escape with no share of the allocation at all. *Second*, this approach requires an individual, and somewhat arbitrary, judgment about each deposit in light of the entire account history. It is unlikely that the Receiver and account holders would agree about these judgments and each of them would have to be brought to the Court for an individual determination.

B. The Court Should Not Revisit Its Ruling That April 30, 2000 Balances Should Be Used For The Allocation.

The Court heard two full days of argument concerning objections to the Receiver's proposed allocation methodology. It specifically considered the objections of account holders who believed that April 1999, rather than April 2000, balances be used for the allocation and overruled those objections. (8/17/00 Order, ¶ 21) Moreover, the Receiver and an expert proposed by one of the objecting parties both testified that this methodology is unworkable. Mr. Umbach advances no new arguments and no legal authority that should prompt the Court to reconsider its decision.

CONCLUSION

For the reasons stated herein, the Receiver requests that the Court deny the Umbach and Connaughton motions, and also deny other motions to the extent they argue that only accounts invested in cash on the date of a transfer to Intercounty be included in the allocation of the cash shortage.

DATED: September 7, 2000

Respectfully submitted,

____

Joseph U. Schorer (ARDC No. 3128758)
S Jonathan Silverman (ARDC No. 6210059)
Amy Andrews (ARDC No. 6226692)
KIRKLAND & ELLIS (Firm No. 90443)
200 East Randolph Drive
Chicago, Illinois 60601

Attorneys for PricewaterhouseCoopers LLP as
Receiver for Independent Trust Corporation