

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

IN THE MATTER OF THE POSSESSION            )  
AND CONTROL OF THE COMMISSIONER        ) No. 00 CH 5905  
OF BANKS AND REAL ESTATE OF            )  
INDEPENDENT TRUST CORPORATION         ) Judge Jones  
a/k/a INTRUST, an Illinois Corporate fiduciary    )

**Motion of WILLIAM & MAMIE KOENIG,  
TRUSTEES OF KOENIG REV. LIV. TRUST  
To Exclude Intrust Account 840050 From Any Allocation Of The Cash  
Shortage Referred To In The Receiver's Recommendation Dated June 23, 2000**

William & Mamie Koenig, Trustees Of the Koenig Rev. Liv. Trust ("Movant"), pursuant to the Court's comments at the July 28, 2000 hearing and the Order entered on August 2, 2000, in this matter, moves the Court to enter an Order precluding the Receiver from allocating any portion of the Intrust cash shortage to Movant's account. As grounds for this motion, and in support thereof, Movant states:

1. Movant established an account with Intrust on or about November 20, 1995, which account was assigned account number 840050.
2. Throughout the period during which Movant had an account at Intrust, Financial Timing Services, Inc., acted as Movant's investment adviser and managed Movant's account.
3. On or about July 14, 2000, Movant served on the Receiver's attorney, and filed with this Court, an Objection to the Receiver's Recommendation concerning the allocation of Intrust cash shortages. A true and correct copy of that objection is attached as Exhibit 1.
4. The Receiver and its counsel have advised that the cash shortage identified in the Receiver's report and recommendation can be traced to one or more transfers of cash from

Intrust to Intercounty Title. The Receiver and its counsel have further advised that such transfers occurred only on the dates listed in the document entitled "Intrust Preliminary Detailed Listing of Transactions With Intercounty Title Company of Illinois," which the Receiver has posted on the Intrust.com website and which is attached as Exhibit 2 hereto.<sup>1</sup>

5. A review of the records relating to Movant's Intrust account shows that none of the cash transfers reflected on Exhibit 2 occurred at a time when Intrust held any cash or cash equivalents on behalf of Movant's account.

6. Attached hereto as Exhibit 3 is a complete copy of the monthly account statements for Movant's Intrust account from the inception of that account to and including June 30, 1999. As the Receiver noted during the July 28, 2000 hearing, Tr. 214, the statements of an account holder such as Movant, who had an investment adviser, detail every transaction in the Movant's account. The account statements confirm that Movant opened the account in late November of 1995.

7. It was Intrust's practice, upon receipt of funds for deposit in accounts managed by Financial Timing Services, Inc., to report the receipt of such funds to Financial Timing Services immediately after the funds became available to Intrust for investment pursuant to the instructions of Financial Timing Services, Movant's agent. (See Affidavit of Bruce Freimuth, filed in support of Mr. Freimuth's and Mr. Terry Bommer's motions to exclude their accounts from any allocation of the Intrust cash shortage.) Thus, deposits into such accounts by check were reported

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<sup>1</sup> Regardless of when the money sitting at Intercounty was misappropriated, it obviously was only the money that had been transferred to Intercounty, on these dates, that could have been the subject of the misappropriation.

to Financial Timing Services by Intrust when the check cleared; deposits made to such accounts via wire transfer were reported to Financial Timing Services upon receipt of the wire transfer.

8. As attested to in Mr. Freimuth's affidavit, upon receipt of notice from Intrust that funds deposited by a Financial Timing Services customer were available for investment, Financial Timing Services would issue instructions to Intrust to transmit the funds to one or more mutual fund families, for investment in particular mutual funds.

9. Upon receipt of such instruction from Financial Timing Services, Intrust would wire funds to the designated mutual fund for Movant's account. In short, funds deposited with Intrust by Movant were transferred out of Movant's account either on the same day as, or within very few days after, the funds were received.

10. A review of Movant's account statements (Exh. 3) reveals that almost all of the activity in Movant's account consisted of exchanges between mutual funds at a particular mutual fund family. The only arguably significant cash transactions for Movant's account were as follows:

<b>Cash In</b>		<b>Cash Out</b>	
11/20/95	Deposited \$41,090	11/20/95	Bought \$41,090 mut. funds
4/12/96	Sold \$7,505 mut. funds	4/12/96	Withdrew \$5 fee
		4/12/96	Withdrew \$7,500 to Movant
10/29/96	Sold \$3,005 mut. funds	10/29/96	Withdrew \$5 fee
		10/31/96	Withdrew \$3,000 to Movant
12/6/96	Sold \$24,001 mut. funds	12/6/96	Withdrew \$1 fee
		12/10/96	Bought \$24,000 mut. funds
4/10/97	Sold \$3,005 mut. funds	4/14/97	Withdrew \$5 fee
		4/15/97	Withdrew \$3,000 to Movant
12/10/97	Sold \$1,000 mut. funds	12/15/97	Withdrew \$1,000 to Movant

<b>Cash In</b>		<b>Cash Out</b>	
3/30/98	Sold \$3,000 mut. funds	4/3/98	Withdrew \$3,000 to Movant
10/15/98	Sold \$1,510 mut. funds	10/19/98	Withdrew \$10 fee
		10/19/98	Withdrew \$1,500 to Movant
1/25/99	Sold \$54,038 mut. funds	1/26/99	Bought \$54,038 mut. funds
4/15/99	Sold \$33,010 mut. funds	4/19/99	Bought \$20,000 mut. funds
		4/21/99	Withdrew \$13,000 to Movant
		4/21/99	Withdrew \$ 10 fee
6/9/99	Sold \$17,883 mut. funds	6/10/00	Bought 17,873 mut. funds
		6/16/99	Withdrew \$ 10 fee

In each of these transactions, Movant held cash at Intrust for no more than a few days before all of the cash was invested in mutual funds or otherwise removed from Movant's Intrust account.

**11.** A comparison of the brief periods during which Intrust actually held funds for Movant's account in cash, as set forth in the preceding paragraph, and the times when Intrust transferred cash to Intercounty Title (Exh. 2) demonstrates that Intrust never simultaneously held cash for Movant's account and transferred cash into Intercounty Title. (There were *no* transfers to Intercounty between November 2, 1995, and January 12, 1996, or between January 12, 1996, and July 11, 1996, or between July 29, 1996, and April 21, 1999, see Exh. 2, lines 192-246.)

**12.** As a result of this lack of overlap between the transfers from Intrust to Intercounty Title and Intrust's handling of cash for Movant's account, it is clear that none of the funds ultimately misappropriated from Intrust were funds deposited at Intrust for the account of Movant in account number 840050.

**13.** On April 21, 1999, the date of a transfer from Intrust to Intercounty, Intrust disbursed \$13,000 to the Movant by check, as shown in the chart above, following a sale of mutual funds six days earlier. This is not an disqualifying overlap, as those monies undeniably were sent

to Movant on that day, and received in due course, and are no longer in the account. Those funds therefore could not have been included within Intrust's transfer that day to Intercounty. This "close call," in any event, could not expose any funds in Movant's account *other than* the \$13,000 to the allocation of loss. If the Court were to hold that any part of Movant's account were subject to the allocation of loss, only that percentage of the account represented by the \$13,000 – that is, only 20% of the fund's balance – should be assessed any part of the loss.

**14.** The Receiver's purported need for administrative convenience cannot justify charging Movant for losses which clearly did not involve the use of Movant's funds. Movant has demonstrated that "[s]ubstantially all cash in the account was not subject to risk," as set forth in the Court's Order of August 2, 2000. This Court should not permit the Receiver, for reasons of administrative convenience, to charge Movant with losses that are properly attributable to other accounts.

**15.** Movant continues to object to any allocation of the Intrust cash shortage to Movant's Intrust account on the further grounds set forth in the Objection, and those stated and further explained in the suggestions of Terry Bommer and Bruce Freimuth in support of their objections to the Receiver's Recommendation, all of which are incorporated herein by reference.

WHEREFORE, Movant requests that this Court enter an order directing the Receiver to exclude account number 840050 from any allocation of the Intrust cash shortages.

Respectfully submitted,

ROTHSCHILD, BARRY & MYERS

By: \_\_\_\_\_  
One of the Attorneys for Objector/Movant  
William & Mamie Koenig, Trustees Of the Koenig  
Rev. Liv. Trust

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