

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

IN THE MATTER OF THE POSSESSION)
AND CONTROL OF THE COMMISSIONER)Cause No. 00 CH 05905
OF BANKS AND REAL ESTATE OF)Judge Jones
INDEPENDENT TRUST CORPORATION)
a/k/a INTRUST, an Illinois corporate fiduciary)

AFFIDAVIT OF EDWARD TOPTANI, ESQ. IN SUPPORT OF MOTION BY
JOSEPH UMBACH TO EXCLUDE HIS ACCOUNT FROM ALLOCATION OF THE
SHORTAGE

Edward G. Toptani, Esq., swears under the penalties of perjury
that the following is true and correct:

1. I am attorney for Joseph Umbach, an account holder with funds
deposited at Independent Trust Corporation ("Intrust")
Pursuant to the Court's Order dated August 2, 2000 (the "Order"), Mr.
Umbach respectfully moves the Court for an Order excluding his account
number 985823 at Intrust from the allocation of the deficiency in the
trust assets of Intrust (the "Shortage").

2. Under the Court's Order, any individual account holder that
filed a timely objection to the Receiver's Recommendation may file a
motion with the Court to exclude his account from the Shortage if (1)
his account never contained cash, (2) the account balance on April 23,
1999 was zero or de minimis, or (3) substantially all cash in the
account was not subject to risk. On July 13, 2000, Mr. Umbach filed a
timely objection to the Receiver's Recommendation.

POINT I

MR. UMBACH'S ACCOUNT SHOULD BE EXCLUDED FROM THE SHORTAGE ON THE GROUND THAT HIS ACCOUNT BALANCE ON APRIL 23, 1999 WAS DE MINIMIS

3. From March 18, 1999 to October 28, 1999, Mr. Umbach made the following five wire transfers aggregating \$6,800,000.00 into his account at Intrust:

<u>Date</u>	<u>Amount Wired</u>	<u>Depository Institution</u>
1. March 18, 1999	\$ 500,000.00	Cole Taylor Bank
2. October 7, 1999	\$ 800,000.00	Cole Taylor Bank
3. October 8, 1999	\$ 3,000,000.00	Cole Taylor Bank
4. October 12, 1999	\$ 500,000.00	Cole Taylor Bank
5. October 28, 1999	\$ 2,000,000.00	Cole Taylor Bank
<u>Total Amount Deposited:</u>	<u>\$ 6,800,000.00</u>	

4. The bank confirmations received by Mr. Umbach evidencing such wire transfers are attached hereto as Exhibit A. The Intrust Account Summary statements confirming Mr. Umbach's deposits are attached hereto as Exhibit B.

5. Mr. Umbach's funds were used by Mr. Umbach's financial advisor, International Equity Advisors, LLC, to purchase various mutual funds held in Mr. Umbach's account at Intrust. (See Exhibit B).

6. Mr. Umbach did not make any withdrawals from his Intrust account since its inception. (See Exhibit B)

7. \$6,300,000 of the \$6,800,000, or 92.65% of Mr. Umbach's total deposits were made after April 23, 1999. Accordingly, only 7.35% of Mr. Utnbach's total deposits were made before April 23,

1999.

8. Mr. Umbach herein contends that his account balance on April 23, 1999 was de minimis¹ justifying exclusion of his account from the across-the-board allocation of the Shortage. (Order, ¶ 2(b) (2)).

POINT II

MR. UMBACH'S ACCOUNT SHOULD BE EXCLUDED FROM THE SHORTAGE ON THE GROUND THAT SUBSTANTIALLY ALL CASH IN MR. UMBACH'S ACCOUNT WAS NOT SUBJECT TO RISK

9. In addition, Mr. Umbach's account should also be excluded from the Shortage on the ground that "substantially all cash in the account was not subject to risk". (Order, ¶ 2(b) (3)).

10. Given that 92.65% of the Mr. Umbach's money was deposited into his account after the last date of any diversion, substantially all of his money was not subject to risk. (See Exhibit B).

11. Moreover, of the \$500,000 that was deposited into Mr. Umbach's account on March 18, 1999, the entire amount 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. (Exhibit B)

¹ At the hearing on July 28, 2000, the Court stated that the definition of "de minimis" would vary with each account on a case-by-case basis. Transcript of 7/28/00 Hearing, pages 173-174.

POINT III

IT IS WHOLLY UNFAIR TO SUBJECT MR. UMBACH'S ACCOUNT TO
AN ACROSS THE BOARD ALLOCATION OF THE SHORTAGE

12. At the hearing on July 28, 1999, the Receiver's counsel stated that the issue of whose \$68.1 million was stolen is the issue that answers all the questions that have been raised. (Transcript of 7/28/00 Hearing, page 75; lines 4-8)

13. The documentation provided by Mr. Umbach unequivocally shows that none of his deposits could have possibly been misappropriated. Such documentation sufficiently details all activity that occurred within the account on a transaction-by-transaction basis, including all deposits and withdrawals. (Transcript of 7/28/00 Hearing, page 214, lines 16-24; page 215, lines 1-2; Receiver's Recommendation, paragraph 7)

14. At the hearing on July 28, 2000, the Receiver's counsel . . . recognizing certain inequities in its Recommendation by subjecting post-April 23, 1999 deposits to the Shortage . . . stated that the Receiver was limited by "realistically what could be done." (Transcript of 7/28/00 Hearing, page 212, lines 6-10)

15. The Receiver should be taken at its word. In Mr. Umbach's case, it has been adequately demonstrated that none of his deposits were stolen. Moreover, it is realistic and practical to allow Mr. Umbach to prove this fact, as demonstrated by the documentation annexed hereto. With respect to any claims by the Receiver relating to alleged administrative burdens, Mr. Umbach has offered to pay the Receiver's expenses for any expenses incurred by the Receiver to verify his claims.

16. Nevertheless, in its desire to minimize the percent of the loss allocation, the Receiver seeks to include deposits in accounts that were never subject to the fraud. There is no legitimate basis for such a decision and the cases cited by the Receiver's counsel do not provide for the allocation of losses to funds clearly not misappropriated. To do so would be a denial of due process.

17. In Mr. Umbach's case, the sole deposit made prior to April 23, 1999, which comprised only 7.35% of all deposits he made, occurred on March 18, 1999. (Exhibit B) He made four other deposits after April 23, 1999. (*Id.*). Under the Receiver's Recommendation, 100% of his entire investment would be subject to the allocation despite the fact that 92.65% of such deposits could not have been misappropriated and were indisputably all invested in mutual funds.

18. Indeed, with respect to the funds deposited into Mr. Umbach's account after April 23, 1999, the Court has recognized that such deposits were fortuitous and that the losses suffered by the victims of the fraud would have been the same even if investors deposited no monies after April 23, 1999. (Transcript of 7/28/00 Hearing, page 193, lines 12-22)

19. Assuming, arguendo, that the \$500,000 deposited into Mr. Umbach's account on March 18, 2000 was exposed to the fraud, which it was not, under the Receiver's Recommendation an amount greater than \$500,000 would be taken from Mr. Umbach's account to subsidize other victims. Such an outcome would be entirely inequitable and unfair.

CONCLUSION

20. Based on all the foregoing, JOSEPH UMBACH respectfully requests that the Court issue an Order excluding his account number 985823 at Intrust from the allocation of the deficiency in the trust assets of Intrust.

Respectfully submitted,
Dated: August 7, 2000

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Sworn to before me this
7th day of August, 2000

Notary Public