**IN THE UNITED STATES COURT OF APPEALS**

**FOR THE FIRST CIRCUIT**

**C.A. No. 02-1976**

**IN RE: HAROLD F. CHORNEY VS.**

**REPUBLIC CREDIT CORPORATION I**

**ON APPEAL FROM UNITED STATES DISTRICT COURT**

**FOR THE DISTRICT OF RHODE ISLAND**

# REPLY BRIEF OF THE APPELLANT

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**DATED 23 JANUARY 2003**

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## I. INTRODUCTION:

Appellee argues that Appellant did not file a timely appeal of the District Court's Decision. Appellant had briefed that he was seeking relief under Rule 60(b)(2), 60(b)(3), 60(b)(4) and 60(b)(5). Irrespective of the requirements of the Rule 60(b) motion, at issue for a timely appeal is whether the U.S. Trustee's office is a party to this case. If they are a party, an appeal of the decision of the district court, is under the purview of F.R.AP. 4(a)(1)(B) and not F.R.A.P. 4(a)(1)(A) as Appellee claims.

## II. BACKGROUND:

1. An attorney for the U.S. Trustee's Office, Kate Dowling, was present on August 17, 1990, at the premises of Cumberland Investment Corporation, when the assets of Appellant's former company were removed by the Chapter 11 Trustee, John F. Cullen.

2. The United States Trustee's Office has been notified by the Appellant on September 13, 1994, that assets of the estate were missing. (See Appendix BA-49 and BA-50.) Note: BA designates Brief of Appellant.

3. On March 17, 1995, the Office of Professional Responsibility sent a letter to Mr. Nacu indicating that a copy of his correspondence was sent to the Executive Office of U.S. Trustees. (See Appendix, BA-51 to BA-70 and BA-71.)

4. The United States Trustee's Office has been notified of virtually all pleadings involving missing assets. (See Designation of the Record, starting with M-10, dated October 6, 1995, until present date.) by both Appellant and Mr. Taft.

5. There is a series of correspondence between Appellant and the U.S. Trustee's office and an F.O.I.A. Request to the Executive Office of United States Trustees on July 1999. (See RA pages 1-20.) The F.O.I.A. requested a copy of the written report required by U.S.T. Manual 5-7.2 (See RA pages 21-23.) concerning missing assets of the estate of

Cumberland Investment Corporation as well as the Semi Annual Reports of the Trustee to the United States Trustee. (See paragraphs #14 on RA page 7and paragraph #32 on RA page 9.) Note: RA designates Reply Appendix.

6. The United States Trustee's Office have been active participants in the bankruptcy proceedings in Ca. No. 89-11051, particularly on the matter of controversy concerning standing of parties and accounting of assets of the estate of Cumberland Investment Corporation. (See Docket #717, dated January 12, 2001, Response by U.S. Trustee to Motion to Strike Motion to Compel Production of Requested Documents from Chapter 7 Trustee, Jason D. Monzack and Docket #719,Order, dated 2/9/01.) (See RA pages 24-27 and RA page 28.)

7. On January 25, 2001, Gary Donahue, Esq. for the U.S. Trustee, made an appearance at the hearing concerning the Motion to Strike. (See January 25, 2001, Transcript in Reply Appendix of Appellant, pages RA 29-38.) Representatives of the U.S. Trustee's office have appeared at other bankruptcy court hearings in Ca. No. 89-11051.

8. "On February 9, 2001, the Bankruptcy Court ruled that Warren Taft had no standing to bring **these** Motions." (emphasis added.) (See page 11 of Appellee's Brief, dated January 13, 2002 that lists three separate motions by Mr. Taft: (1.)

   a. Petitioners Request for Clarification and Accounting of Estate Property Sold on December 7, 1999 by Spink America. (See Appendix, BA 121-123)

   c. Petitioner's Motion to Compel Production of Requested Documents from Chapter 7 Trustee. (See Appendix BA 118-120.)

(1.) There were also adversary proceedings in which Mr. Taft and others sought to obtain an accounting of the estate assets of Cumberland Investment Corporation. Attorney Z. Hershel Smith, since disbarred, represented Mr. Taft. Upon information and belief, Mr. Smith although unauthorized to do so (See Docket #540) consented to withdraw the request for Mr. Cullen, Chapter 11 Trustee, to supply an accounting. (See Docket #529.) In subsequent adversary proceedings, FDIC, as receiver for Eastland Bank, and Jason D. Monzack, Trustee for Cumberland Investment Corporation, with a conflict of interest because he was also the Trustee for Eastland Bank Financial Corporation (See Appendix, BA-81) successfully utilized joint motions to dismiss Mr. Taft's proceedings seeking discovery. (See Reply Appendix pages 39-41.)

d. Petitioner's Motion in Objection to Chapter 7 Trustee's Motion to Strike Motion to Compel Production of Requested Documents from Chapter 7 Trustee. (See Designation of the Record, M-37, dated December 16, 2000.)

**DISCUSSION:**

THE UNITED STATES TRUSTEE IS A PARTY BUT NOT THE APPELLEE IN THIS INSTANT APPEAL

1. The United States Trustee was a named Appellee in the caption of Ca. No. 02-1976 when the docketing statement was sent on September 4, 2002.
2. The United States Trustee placed a motion before this court, UNITED STATES TRUSTEE'S MOTION TO BE REMOVED AS APPELLE, on September 6, 2002, stating that,

   "....Sheryl Serreze, as named appellee in this appeal...did not participate in the proceeding giving rise to the order *sub judice,* and ..has no stake in the appeal's ultimate resolution." (See Reply Appendix pages 42-43.) (1.)
3. The court ordered on September 11, 2002, that "In consideration of motion, The United States Trustee is removed from the caption in the above appeal."

THE UNITED STATES TRUSTEE IS A PARTY THAT DOES HAVE A STAKE IN THE APPEAL'S ULTIMATE RESOLUTION

Appellant avers that the U.S. Trustee is not only a party, but contrary to their claims, they also have a stake in the appeal's ultimate resolution. The U.S. Trustees, in both Providence and Boston, had been noticed on a myriad of

(1.)Note: Sheryl Serreze, was once an attorney with Hinkley, Allen, Comen and Snyder, who represented the secured creditor, Eastland Bank in Ca. No. 89-11051 (ANV).

occasions, through documents filed in this case by Appellant and others that assets of the estate were missing. The guidelines of the U.S. Trustee's own manual, in Chapter 5-7: ALLEGATION INVOLVING LOSS OF ESTATE ASSETS BY A PRIVATE TRUSTEE OR AN EMPLOYEE OR AGENT OF A PRIVATE TRUSTEE require an investigation when assets are reported missing. However information received from the EOUST in response to FOIA's of Appellant indicate that no investigation has been commenced as of May 4, 2001. (See RA page 20.)

In light of the above, individuals with the United States Trustee's Office do have a stake in the appeal's ultimate resolution, despite the pleading from the office of United States Trustees, dated September 6, 2002.

**IV. ARGUMENT:**

APPELLEE PRESENTS MISLEADING ARGUMENT

The Appellee has lead this court to believe that the court has no jurisdiction in the appeal of the District Court's summary dismissal. The Appellee cites In Re: Perry Hollow Management Company, 297 F. 3d. 34 (1st Cir 2002.) which quotes the Federal Rule of Appellate Procedure 4(a)(1)(A), providing a default deadline of (30) thirty days for filing an appeal in a civil case.

THE U.S. TRUSTEE IS A PARTY TO THIS CASE

"The United States, its officer, or agency is a "party" to a case not only where it is named party to the appeal, see In re Lloyd, Carr, & Co., 617 F. 2d 882, 884 n.1 see id.; cf. In re Serrato, 117 F. 3d 427, 429 (9th Cir. 1997) (holding that U.S. Trustee did not become party merely by his involuntary appearance to quosh summons)." In Re: Perry Hollow, page 38.

The office of the U.S. Trustee has actively participated by presenting

pleadings to the bankruptcy court in objection to Mr. Taft, whose assets were removed on August 17, 1990, by the Chapter 11 Trustee and since have possibly been taken or co-mingled with other assets, having standing to ask for discovery and an accountability stating that Mr. "Taft has no pecuniary interest in the outcome of this bankruptcy case....." (See RA-25.) Mr. Donahue appeared at a hearing dated January 25, 2001 concerning this same issue. (See Reply Appendix, pages 29-38.) The record indicates that the United States Trustee is clearly a party to this case.

APPELLANT FILED A TIMELY APPEAL

The applicable Federal Rule of Appellate Procedure for the appeal of the district court's judgment is 4(a)(1)(B) and not 4(a)(1)(A).

"When the United States or its officer or agency is a party" in the case, then the appellant has sixty days after the judgment to file a notice of appeal in accordance with 4(a)(1)(B)." In Re: Perry Hollow, page 38.

Judge Torres signed the Motion to Dismiss Appeal on June 7, 2002. Appellant received the judgment on June 12, 2002. On August 6, 2002, exactly 60 days after Judge Torres signed the Dismissal Order on June 7, 2002, Appellant filed a Notice of Appeal of both the June 7, 2002, Order and the Reconsideration Motion, dated June 19, 2002, and denied July 23, 2002.

## V. CONCLUSION CONCERNING JURISDICTION:

Whether the District Court perceived Appellant to have filed a Rule 60(b) Motion on May 30, 2002, or in the Motion for Reconsideration on June 19, 2002, Appellant filed a timely appeal to the summary judgment of the District Court. An appeal of these decisions was timely filed by

Appellant within the 60 day limit, but the appeals were not consolidated. Consequently, this court has jurisdiction to hear Appellant's Appeal(s).

## VI. OTHER BASIS FOR JURISDICTION

Appellant presented his brief as if he had filed a Rule 60(b) motion. Appellant was seeking relief because the 'newly discovered evidence', revealed at the February 7, 2002 hearing, indicated a 'fraud upon the court'. Appellant showed how the bankruptcy court abused its discretion, allowing Trustees with conflicts of interest, to strike Appellant's motions and in not allowing Appellant an accounting of the assets. In presenting the above arguments, Appellant's brief used the Standard of Review of the record evidence in light most favorable to the non moving party and the resolution of factual disputes in favor of the party against who summary judgment has been entered, in accord with Den Norske Bank vs. First National Bank of Boston, 75 F. 3d 49 at 53, (1st Cir. 1996.)

## VII. STANDARD OF REVIEW

Appellee argues that the Standard of Review in this case should be in accord with In Re: Perry Hollow Management Co., Inc., 297 F.3d 34 (1st Cir. 2002), on page 35,

"In an appeal from a district court reviewing proceeding before the bankruptcy court, the Court of Appeals independently reviews the bankruptcy court's decision, applying the clearly erroneous standard to findings of fact and de novo review to conclusions of law; no special deference is owed to the district court's determination."

Appellant will now argue using the above standard.

The facts of this case are disputed. The Designation of the Record, on

appeal to the District Court certainly contained evidence that the assets were not intact and that certain identifiable assets, like $500 bills and Pre Colombian Art Work had not been sold with permission of the court.

In addition, the Appellant, Mr. Taft and others have supplied the bankruptcy court with ample evidence: in motions in objection to the sale of assets; in motions requesting a clarification of assets sold and requests for accounting of assets. It would be 'clearly erroneous' to state that the assets were intact and that assets of the estate were not missing. Appellant produced a transcript of the removal of the assets on August 17, 1990, taken at the behest of the Chapter 11 Trustee. A 'reasonable man' should know that the record clearly shows that some of the assets removed by the Trustee are no longer in the estate and permission to sell these assets did not occur.

In addition, an issue exists as to whether the bankruptcy court erred as a matter of law in ordering the distribution of funds without an accounting of the assets sold, assets remaining and funds received. A detailed breakdown of the use of the funds, obtained from the sale of these assets, has been requested on several occasions but never produced by the parties. Appellant is one of the signatories of the 11 U.S.C. §364(c)(1) agreement, the '364 Agreement', dated October 26, 1990, (See Appendix BA 161-175.) and approved by a court order dated December 12, 1990, and should be given an accounting of the assets and the funds received from their sale, prior to any distribution of the assets.

THE LANGUAGE OF THE '364 AGREEMENT' IS UNAMBIGUOUS

Where the language of the 364 Agreement is unambiguous, the bankruptcy court's interpretation of it is subject to de novo review. In Re: SPM Mnf. Corp., 984 F. 2d 1305, 1311, (1st Cir. 1993.) "whatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code." Norwest Bank Worthington v. Ahlers, 485 U.S. 197, 206, see also In Re: Plaza de Diego Shopping Ctr., Inc., 911 F. 2d 820, 830-31 (1st Cir 1990.) "The bankruptcy court's equitable discretion is limited and cannot be used in a manner inconsistent with the commands of the Bankruptcy Code."

COURT'S DECISIONS ARE INCONSISTENT WITH THE COMMANDS OF THE BANKRUPTCY CODE

Appellant has briefed that the decision to grant distribution of the funds without an accounting is inconsistent with the commands of the Bankruptcy Code. The Trustee is required by statute, to be accountable for all property received, in accordance with Title 11, §704(2) and that the Trustee is responsible to furnish such information concerning the estate and its administration as is requested by a party in interest in accordance with Title 11, §704(7). The glitch in this reasoning is that 'unless the court orders otherwise' is also part of §704(7). The Trustee refused to provide Appellant a detailed accounting based upon the court's decision of July 3, 1991. The bankruptcy court has continued to uphold this 'conclusion of law', while stating that Appellant's interests are being represented by the same trustee,

with apparent conflicts of interest.

Some of the decisions of the parties inconsistent with the Bankruptcy Code that have been approached and/or argued in the Brief of the Appellant:

1. The Trustee has violated 11 U.S.C., Rule 2014(a) by not disclosing his connection with other parties. See Brief of Appellant, December 16, 2002, pages 16, 29 and 32.

2. The Trustee, with permission of the court, has violated 11 U.S.C. §327(f) by employing Mr. Weingarten, who served as examiner in the case. (See Brief of the Appellant, page 28.) Starting on 8/22/90 (See Docket #136.) the Examiner was hired to 'assist the trustee in the disposition of the estate assets.'

3. The court order of July 3, 1991, is based upon the bankruptcy court's interpretation of the facts concerning the '364 Agreement', which is open to de novo review by this court. The order itself is void and contrary to law. It is inconsistent with the code, since one of the parties, Mr. Weingarten could not be legally employed by the Trustee. How then could Appellant be held in contempt for attempting to enforce the terms and conditions of the '364 Agreement' and allegedly interfering with the illegal set-up of the Trustee, the Examiner and others.

4. The bankruptcy court's decision that Mr. Taft was not a party in interest, because he had 'no pecuniary interests in the outcome of the case' is inconsistent with the record and contrary to previous rulings of the court.

Some of the questions raised are:

Can the court void only Appellant's interests in the '364 Agreement' without voiding the entire contract? Why should the Appellant be denied an accounting of the assets used to fund the '364 Agreement' in light of the fact that he had a 90 percent ownership of his former companies property interests in these same assets, sold to allegedly fund administrative expenses? Thirdly, should not the entire contract, with its priority of

payment, now be void?

Contrary to law, the court has applied a rational that allowed a trustee with conflicts of interest to continue to perform his 'duties'. Contrary to law, the court has relied upon a 'void judgment' which usurped a power belonging to Appellant, the power to defend himself and consequently denied Appellant due process of law.

But what could be the court's rational in refusing to provide Mr. Taft, an 'interested party', with an accounting of the estate assets? What could be the court's rational in denying Mr. Taft inventories of assets performed by Mr. Monzack and Mr. Cadigan of FDIC? What could be the court's rational to justify and allow this case to linger for over 13 years? What could be the U.S. Trustee's rational in not requesting an investigation according to their own statutes? What has happened to all the accountability safety nets?

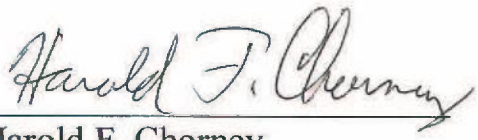
By not closing the case in an expeditious manner, the trustee and the 'accountability network' that oversees him, are in violation of their fiduciary duties and the intent of the code as listed in §704 (1)

> "collect and reduce to money the property of the estate for which such trustee serves, and close such estate as expeditiously as is compatible with the best interests of parties in interest."

**WHEREFORE;** Appellant, for the reasons stated above, should be granted a full and detailed accounting. The accounting should include the assets sold, the monies received and the use of proceeds in this case, including but not limited to a detailed accounting of the funds advanced under the '364

Agreement' and this honorable court should refer this case to the appropriate authorities for a proper investigation and any other remedy the court meets just and fair.

Respectfully submitted



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## CERTIFICATION

I hereby certify that on this 23rd day of January 2003, I sent a copy of the above by first class mail to the following:

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