IN THE UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

CA NO. 09-1117

IN RE: CUMBERLAND INVESTMENT CORPORATION

ON APPEAL FROM A JUDGMENT OF

THE FEDERAL DISTRICT COURT

FOR THE DISTRICT OF RHODE ISLAND

CA NO. 08-0189 ML

HAROLD F. CHORNEY, PRO SE
16 SPRING DRIVE
JOHNSTON, R.I. 02919
401 934-0536

DATED: MARCH 27, 2009

REQUEST FOR ORAL ARGUMENT

The Appellant, Harold F. Chorney, respectfully requests oral argument. This instant appeal brief deals with the threshold jurisdictional issue of standing. Appellant's discussion of the facts and the lack of applicable precedent for this set of circumstances would benefit the Court.

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UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

IN RE: CUMBERLAND INVESTMENT CORPORATION **CA. No. 09-1117**

ISSUE OF STANDING IN AN APPEAL OF THE DENIAL OF MOTION TO CLARIFY FIRST AND FINAL FEE APPLICATION OF EDWARDS ANGELL PALMER & DODGE LLP

A. JURISDICTION

The Courts of Appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the District Courts of the United States…..28 U.S.C.A. §1291.

B. STATEMENT OF THE ISSUES

In light of the fact that Appellant's standing is a threshold jurisdictional issue, In Re: Shkolnikov, 337 B.R. 1, 4 (B.A.P. 1st Cir. 2006.) and that "The party invoking federal jurisdiction bears the burden of proof to demonstrate standing." Lujan v. Defenders of Wildlife, 504 U.S. 555 at 561, the Statement of Issues argued in this brief are related to the issue of standing. A History of Issues presented to Appeals Courts concerning the Motion to Clarify is contained in the following section. Appellant incorporates those issues into this instant brief.

1. Whether the bankruptcy court's determination, adopted in full by the District Court, from the finding of fact that Appellant is not an aggrieved individual and therefore lacks standing, is "clear error?"

2. Whether the bankruptcy court abused its discretion by granting the fee application of Edwards Angell Palmer & Dodge and Edward Bertozzi

subsequent to Appellant showing discrepancies with the application while denying Appellant relevant discovery pertinent to this appeal?

3. Whether the rulings of law are correct concerning standing or should be reviewed de novo?

HISTORY OF ISSUES PRESENTED TO THE APPEALS COURTS CONCERNING TH E DENIAL OF THE MOTION TO CLARIFY

I. On November 1, 2007, a Petition to the First Circuit was made by Harold F. Chorney, claiming that he is being denied evidence necessary to establish facts in dispute. The issues presented were:

A. Whether the sanctions of the November 3, 2004 order as applied fall within the purview of F.R.C.P. Rule 60(b)(6) in that the imposition of sanctions preclude Petitioner of access to the courts.

B. Whether the history of failure by officers of the court to disclose or produce materials in civil and related criminal discovery so that Petitioner can present his case, can constitute misconduct within the purview of Rule 60(b)(3). See Anderson v. Cryovac, Inc., 862 F2d 910, 923. (1st Cir. 1988.)

C. Whether Judge Votolato has engaged in conduct prejudicial to the effective and expeditious administration of the case thus committing wrongs against the institutions set up to protect and safeguard the public.

D. Whether Petitioner can obtain a fair hearing and be granted due process and equal protection under the law with Judge Votolato presiding over this case.

II. On May 23, 2008, as a result of continuous denial of due process in the bankruptcy proceedings, Appellant presented twelve (12) issues to the Bankruptcy Court to be presented to the District Court in Ca. No.

08-0189ML, in STATEMENT OF THE ISSUES IN AN APPEAL OF THE DENIAL OF MOTION TO CLARIFY FIRST AND FINAL FEE APPLICATION OF EDWARDS ANGELL PALMER & DODGE LLP, AND DENIAL OF STANDING OF PETITIONER TO BE HEARD. Appellant stated that the twelve issues raised in the District Court for the District of Rhode Island are manifestations of the four issues raised in the Petition to the First Circuit Court of Appeals in Ca. No. 07-8038.

The twelve issues presented was paragraphs (a.) to (l.) below:

a. The Bankruptcy Court has denied due process to the Petitioner by allowing the unfair taking of his personal property in violation of the Fifth Amendment to the Constitution of the United States of America and has implemented unfair procedures and decisions preventing Petitioner from discovering what happened to his personal property.

b. The Bankruptcy Court erred in not granting Petitioner, an aggrieved party with a pecuniary interest, his rightful standing to participate and question "professionals" on this case concerning an accounting of the assets of this case and the billings submitted by said "professionals". The due process clause of the Fifth Amendment to the Constitution of the United States of America, guarantees Petitioner the right to be heard in these circumstances.

c. The Court erred in not granting Petitioner, ordered by the Bankruptcy Court to pay $200,000.00 in financial compensation, with interest totaling in excess of $500,000.00, to have standing as an aggrieved party with a pecuniary interest, so that Petitioner could question the billings of those who claimed their services have been made necessary by the actions of Petitioner, especially in light of the fact that these billings contain numerous and serious discrepancies.

d. Petitioner was denied due process when a full and fair hearing was denied to Petitioner after he was presented with the "position" papers of the other parties shortly before the hearing and the docket was manipulated to favor the presentation of those positions, depriving Petitioner the opportunity to respond adequately to the arguments presented.

e. Petitioner was denied due process when a full and fair hearing was denied to him after the docket was manipulated in a manner designed to deprive Petitioner the opportunity to present his case and to examine Attorney Bertozzi and Attorney Cullen concerning some 20 discrepancies in their billings.

f. Petitioner was denied due process when full and fair hearings were denied and discovery concerning Petitioner's Motion to Clarify, prior to the March 27, 2008 and May 7, 2008 hearings, was not allowed by the court.

g. Petitioner was denied a full and fair hearing when he could not ask through discovery or at the hearings on March 27, 2008 and May 7, 2008, whether payments were made to Attorney Bertozzi or Attorney Cullen as stated in the Court Order, dated December 12, 1990 [206-1].

h. Petitioner was denied a full and fair hearing by the unexplained absence of Attorney Cullen at the hearing on May 7, 2008. Attorney Cullen's absence deprived both Petitioner and the Bankruptcy Court of the ability to compare his billings to the billings of Attorney Bertozzi to possibly uncover evidence as to the location of Petitioner's personal assets.

i. Petitioner was denied due process when a request to the Court for a "comfort letter" concerning Attorney Bertozzi and Edwards Angell Palmer & Dodge LLP being responsible for their actions despite not being paid for the time billed in the so called "Missing Bertozzi Billing", was denied to Petitioner.

j. Petitioner was denied due process by failure of the court to administer this case by enforcing its fiduciary responsibility to have the Trustee provide an accounting of the assets of the case as required by statute.

k. Petitioner is being denied fair treatment and is being denied equal protection under the law in accord with the guarantees of the Fourteenth Amendment to the Constitution of the United States of America.

l. Petitioner avers that the repeated references to prior orders and sanctions of Petitioner by Judge Votolato and Judge Votolato's conduct and continued participation in Petitioner's hearing on the Motion to Clarify the billings deprived Petitioner of due process and the right to a full and fair hearing on his motion.

III. Subsequently, a July 21, 2008, Order of the District Court in Ca. No. 08-189ML stated that "in the interest of uniformity and orderly presentation of facts and legal issues……..appeal to this Court shall be taken with the same concern as though it were to the First Circuit Court of Appeals. On August 19, 2008, Appellant adopted the same four issues A-D as listed in section I. above, to the First Circuit Court of Appeals on November 1, 2007 for the Appeal in Ca. No 08-189ML.

C. BACKGROUND:

There are lengthy motions and appeals with voluminous exhibits filed by Appellant related to both the criminal case Cr. No. 92-099P and civil cases related to 89-11051ANV. In case number 94-1343, Appellant compiled a list of constitutional violations committed against him. Although his attorney Scott A. Lutes, chose not to argue constitutional violation issues at trial, Mr. Lutes, at Appellant's insistence presented these arguments to the Court of Appeals for the First Circuit on appeal from a judgment of the United States District Court for the District of Rhode Island

on December 12, 1994. Some constitutional issues (See E503-E561.) previously raised by Appellant, are relevant to the standing issues argued in this instant brief.

Subsequently there was a long series of events leading up to the Motion to Clarify in a bankruptcy case that is over 19 years old. Critical events are listed in eight (8) Appendices, containing 693 pages of exhibits, including three transcripts, related to this motion and have been presented to this court in the Designation of the Record, with exception of Appendices VII and VIII.

Appellant in the interest of uniformity and orderly presentation has identified Exhibits heretofore sent to the Circuit Court in Ca. No.07-8038 and District Court in Ca. No. 08-0189ML. Each page from the (8) Appendices is listed with an "E" page number and will be referred to in this brief utilizing the "E" page numbers.

A more complete Chronology of events is contained in BRIEF OF APPELLANT, Ca. No. 08-189ML, dated August 19, 2008 and SUPPLEMENTAL BRIEF OF APPELLANT, dated December 27, 2008. However many other important aspects of this case are contained in Appellant Briefs and Exhibits presented prior to 2007.

A brief summary of the case: 1. Appellant was the principal in Cumberland Investment Corporation (C.I.C.), which was petitioned into bankruptcy by Eastland Bank. 2. Appellant was accused of improprieties, the basis of a criminal referral, by a court appointed Examiner, who had "inventoried" the assets of C.I.C. 3.

Appellant was replaced by a Chapter 11 Trustee, who hired the Examiner, contrary to statute 11 U.S.C. §327 (f). Both the Examiner and Trustee Cullen were advanced money by Eastland Bank and both were represented by Mr. Bertozzi. 4. The Trustee, Mr. Cullen, removed documents, corporate and non-corporate assets from the premises of C.I.C. at 141 Main Street Woonsocket, R.I. on or about August 17, 1990. 5. Subsequently, assets dissipated and the inventory documents, "yellow inventory notebooks" disappeared. 6. Every attempt of Appellant to obtain a copy of the "yellow inventory notebooks" was unsuccessful. 7. Every attempt to obtain an accounting of the assets removed by Appellee Cullen through a *warrantless* search on August 17, 1990 from the premises, has been met with opposition by officers of the court. 8. Recently produced billings by Mr. Bertozzi and Mr. Cullen show discrepancies with each other and bring to light events which may shed light on missing and unaccounted for assets, both personal and corporate. 9. Appellant has attempted to obtain clarification of these billings and requested discovery. 10. Appellees claim that Appellant has no standing to bring motions, is abusing the process and obstructing the administration of this 19 year old case. 11. Appellant claims that he has standing. 12. Appellant claims he is championing his own rights and is an "aggrieved" party who has sustained injuries. 13. Appellant also claims he has property interests and that his personal assets were removed with corporate assets by the Trustee on August 17, 1990. 14. Appellant claims

that he has been denied due process; that he cannot obtain an accounting; and in the process has been denied evidence necessary to establish facts in dispute.

D. FIRST ISSUE

> Whether the bankruptcy court's determination, adopted in full by the District Court, from the finding of fact that Appellant is not an aggrieved individual and therefore lacks standing is "clear error?"

I. DISCUSSION OF FIRST ISSUE:

Hearings were held concerning the billings of Mr. Bertozzi. For all intents and purposes, the hearing held on March 27, 2008 (See E387-399.) and the hearing held on May 7, 2008 (See E473-502.) were hearings in name only. They were not full hearings where Appellant could gather evidence necessary to establish facts in dispute concerning the assets removed on August 17, 1990. Appellant was not allowed to present his case by calling and questioning witnesses (See Par. B on E543); Appellant was denied the opportunity to obtain discovery from Appellees.

Appellees argue that Appellant lacked standing to bring this Motion for Clarification, contending that Appellant has only recently begun to argue that he has some personal interest in the estate, though the bankruptcy estate has been pending since 1989.

The May 7, 2008 and May 8, 2008 decisions of the bankruptcy court (despite the arguments presented in the APRIL 18, 2008, OFFER OF PROOF CONCERNING

STANDING--See E448-458) fully adopted the positions of the Appellees. In effect, the ruling of Judge Votolato was like a "Summary Judgment" basically denying that there are any issues of disputed facts concerning standing such as personal assets of Appellant being seized with corporate assets on August 17, 1990 or that the testimony or records of Mr. Bertozzi would contain evidence of these personal assets of Appellant or that the "missing" transcripts and videotapes taken by Trustee Cullen would contain evidence concerning personal assets of Appellant.

(**NOTE**: Neither Mr. Cullen not Mr. Bertozzi responded to the May 17, 1995, (See E148-E150.) request for documents related to a chain of custody of the assets removed on August 17, 1990, despite the fact that the record shows that inventories, transcripts and videos were in their custody and control.)

The District Court, as they have done in past appeals regarding Appellant to that court, accepted the "Summary Judgment" of the Bankruptcy Court and adopted the arguments of the Appellees and found that the Bankruptcy Court's determination that Appellant Chorney lacks standing does not constitute clear error .

II. ARGUMENT CONCERNING FACTUAL DETERMINATIONS

Whether an individual is aggrieved for purposes of appeal is "a factual determination generally made in the first instance by the bankruptcy court." In re: Spenlinhauer, 261 F. 3d. 113, 118 (1st Cir. 2001).

Appellant questions and disputes the facts relied upon by the bankruptcy court for the May 7, 2008 and May 8, 2008 decisions and subsequently by the District Court.

Appellant argues that he was denied "due process" and that there is a history of failure of officers of the court to disclose or produce materials so that Appellant can present his case. In effect, the decision of Judge Votolato was akin to a Summary Judgment. Since the issue in question is viewed as a Summary Judgment, Appellant set forth by Affidavit (See E460-468.) evidence and specific facts which for purposes of the summary judgment be taken as true. (See Fed R. Civ. P. 56(e).)

IN RE: AFFIDAVIT OF APPELLANT, EVIDENCE BEFORE ALL COURTS

1. Paragraph 11, E461. Transcript of the removal of the assets on August 17, 1990 on E336 shows that Mr. Weingarten was aware that there were non-corporate assets.

2. Paragraph 14, E462. Transcript of the removal of the assets on August 17, 1990 show that items like the golden frogs were removed on August 17, 1990.

3. Paragraph 15, E462. All assets of Cumberland Investment Corporation were listed in "yellow inventory notebooks."

4. Paragraph 16, E462. The "yellow inventory notebooks" were removed from the premises by Trustee Cullen on August 15, 1990.

5. Paragraph 23, E463. Appellant supplied Mr. Monzack with a written list of assets seized that were missing.

6. Paragraph 25, E463. Appellant supplied Mr. Monzack with transcript of August 17, 1990, and a second request for what happened to the golden frogs and other assets.

7. Paragraph 26, E463-4. As of December 28, 1994, the yellow inventory notebooks were missing; Mr. Monzack was attempting to obtain the records, inventories, documents, videos and still photographs of the seized assets as they were being removed from the building; and some $300,000 to $400,000 in assets seized by John F. Cullen, Esq., was missing.

8. Paragraph 27, E464. Requests from Appellant's criminal attorney, Scott Lutes, Esq. concerning inventories and detailed disposition of assets were not responded to by Jason D. Monzack, Chapter 7, Trustee.

9. Paragraph 29, E464. Mr. Cullen, Mr. Bertozzi, Mr. Weingarten and others did not comply with the request from Mr. Monzack on May 17, 1995 (See E148-E150.) seeking inventories and documents to establish a chain of custody of the assets removed from the premises on August 17, 1990.

10. Paragraph 32, E465. To date Appellant has not been able to obtain a copy of the "yellow inventory notebooks."

11. Paragraph 35, E465. On March 27, 2008, at a bankruptcy court hearing, Mr. Monzack denies knowledge of the August 17, 1990 transcript and the existence of the golden frogs (TR 3/27/08, page 15, E-365.) The documents in paragraph 23. (E120-E125) and paragraph 25. (E307-E349; E342) above belie Mr. Monzacks March 27, 2008 statements of denial of any knowledge concerning the golden frogs and the August 17, 1990 Allied Court Transcript.

12. Paragraph 36, E465. When Mr. Cullen is asked by the court "to respond to this allegation about the specific items that Mr. Chorney just referenced to establish his alleged interest in property and, therefore, his standing in the

case," Mr. Cullen denies any knowledge of the golden frogs. (TR 3/27/08, page 16-18, E366-E368.)

13. Paragraph 37, E465. Appellant, upon information and belief, believes that he has been denied due process by not having the opportunity through the bankruptcy court to question witnesses such as Mr. Cullen, Mr. Monzack, Mr. Weingarten or Mr. Bertozzi concerning the seizure and possible sale of Appellant's personal property and/or why there is no record of these assets and other assets listed on page E-121 being sold.

EVIDENCE BEFORE THE DISTRICT COURT <u>NOT</u> BEFORE THE BANKRUPTCY COURT

1. In response to the Brief of Appellee in Ca. No. 08-0189ML, (Docket # 16), entered August 20, 2008, Appellant on August 25, 2008 (Docket #17.) submitted APPELLANT'S REPLY TO AND CITATION OF CERTAIN ERRONEOUS AND EGREGIOUS ALLEGATIONS CONTAINED IN THE BRIEF OF JASON MONZACK.

   Mr. Monzack states that, "Eighteen and a half (18 ½) years after his case was filed Chorney now apparently asserts that he has a personal interest in "some of the property seized." (Docket #16.)

   "In response Appellant demonstrates to the court that he has always claimed that "personal assets" were removed by the Chapter 11 Trustee, when corporate assets were removed. See pages E401-2 in Appendix IV, letters from David N. Cicilline, Esq. to Mr. Cullen concerning the fact that certain personal property of Mr. Chorney was removed by the Trustee."

No one is contesting the fact that Mr. Cicilline sent letters to Trustee Cullen (See paragraph 17, page E462.) on August 24, 1990 and September 13, 1990, concerning personal assets seized. (See E401-402.)

The Cicilline letters alone should have negated the Appellees argument that Appellant has just recently begun to make the claim that he had personal assets that were missing.

Appellant avers that based upon the untruthful testimony of Mr. Monzack and Mr. Cullen described in paragraphs 35 and 36 of Appellant's Affidavit, (See E465; E385; E366-E368.) and the Cicilline letters described in paragraph 17 of Appellant's Affidavit (See E462, E401-402.) unequivocally show that Appellant has raised the issue of personal assets seized by the trustee, and therefore the existence of clear error exists concerning the facts.

EVIDENCE BEFORE THE CIRCUIT COURT FROM AFFIDAVIT OF APPELLANT RELATED TO PERSONAL ASSETS NOT PRESENTED TO THE DISTRICT COURT PRIOR TO THE MOTION TO MODIFY THE RECORD, DATED FEBRURARY 9, 2009 (DISTRICT COURT DOCKET #28.)

1. Paragraph 4 on E460, stating that on August 16, 1990, "an order that the Debtor and his personal property be physically removed from the Premises located at 141 Main Street, Woonsocket, R.I." (See E468-470, bankruptcy court docket #137.)

   Docket entry 8/22/90 shows that a Hearing Held Re: [137-1] Motion for hrg to physically remove debtor by John F. Cullen. Hearing held on 8/17/90.

   Appellant's notes indicate that when Attorney Oster called Mr. Cullen to the stand to testify concerning the events of August 15, 1990 when Mr. Dougherty and Mr. Blais, accompanying Mr. Cullen took the yellow inventory notebooks and other items and then Mr. Cullen threatened

Appellant that he had to move otherwise he and his personal items would be removed, the judge continued the hearing. (Note: The antics of Mr. Cullen on August 15, 1990, were done prior to him being officially made Trustee.)

2. Although E468-470 was not part of the April 18, 2008 Offer of Proof to the bankruptcy court, the bankruptcy judge and officers of the bankruptcy court were aware of the Emergency Motion to remove Debtor and his property and having toured the premises (See paragraph 3 on E460) were aware that Appellant had personal assets on the premises the date that the Trustee removed the assets.

3. Paragraph 6 on E460. When Appellant left Woonsocket on August 17th 1990 subsequent to a bankruptcy court hearing, the vaults at the premises, containing personal and corporate assets were sealed. When Appellant returned to Woonsocket on or about August 18th 1990, the vaults containing personal and corporate assets were open and all the contents were removed.

4. Paragraph 9 on E461. Corporate and non-corporate assets had been segregated in some instances in the vaults at the premises by an employee of the Examiner, Michael Weingarten. Michael Weingarten was represented by Edward Bertozzi and should have had knowledge of this segregation of assets. (Paragraph 10 on E461.)

5. Paragraph 12 on E461. Judge Votolato, Mr. Cullen and other officers of the court, like Mr. Bertozzi, upon information and belief, were aware that both corporate and non corporate assets were at the premises in Woonsocket. Documents, such as the document on page E472 sent to Appellant's attorney John Boyajian, from Mr. Bertozzi, lead Appellant to believe that Mr. Bertozzi was well aware of the fact that assets belonging to Appellant and others were in the vaults at 141 Main Street, Woonsocket, R.I. on and before August 17, 1990.

6. Paragraph 17 on E462. The letters from attorney Cicilline to Mr. Cullen referred to personal assets seized. Not said in paragraph 17, but believed to be true is that Mr. Bertozzi was in contact with Mr. Cullen prior to the removal of the assets on August 17, 1990; that Mr. Bertozzi actually represented Mr. Cullen prior to August 23, 1990; that the billing of Mr. Cullen on 8/16/90 (See E218.) "Telephone conference with counsel" refers

to Mr. Bertozzi and fourthly that Mr. Bertozzi was well aware of the letters from Mr. Cicilline.

7. Paragraph 20 on E462. There were requests for documents concerning corporate and personal assets from attorney Oster. Not said in paragraph 20, but believed to be true is that Mr. Bertozzi was well aware of the requests from Mr. Oster concerning the golden frogs and other assets, removed by Mr. Weingarten under the direction of Mr. Cullen.

8. Paragraph 23 on E463. Appellant made no distinction between corporate and personal assets seized in his lists to Mr. Monzack on June 10, 1994 and September 13, 1994 (See E120-E125.), since Appellant could not recall from memory which assets, stored in vaults at 141 Main Street Woonsocket, R.I., were listed in the "yellow inventory notebooks."

9. Paragraph 41 on E466. Appellant has argued that personal and corporate assets are missing. Not specifically stated was that Appellant has personal knowledge that he has had conversations with Mr. Baverstam concerning the contents of the vaults at 141 Main Street Woonsocket, R.I. containing assets which were not corporate assets. Said assets included "redemption client coins", segregated coin and stamp lots being appraised belonging to the "McCrystals" and others as well as antiquities and different items belonging to Appellant.

BACK IN 1994 APPELLANT MAKES CLAIMS OF REMOVAL OF PERSONAL PROPERTY BY THE TRUSTEE ON AUGUST 17, 1990

A list of constitutional violations was part of an Appeal to the First Circuit Court of Appeals, Ca. No. 94-1343, on December 12, 1994. Attorney Lutes, at Appellant's insistence presented Appellant's arguments to the court, although Attorney Lutes chose to argue other strategies in Appellant's Brief. (Trustee Monzack stated that assets and records of the estate were missing on December 28, 1994. This was only a few weeks later than Appellant's Brief.) (See E127.) Appellant stated as

part of his Fourth Amendment Arguments over fourteen years ago on December 12, 1994, referring to the August 17, 1990 Search and Seizure, on page E-548 that his personal property had been removed:

> "Defendant Chorney alleges that the government agents in this case knowingly removed personal property and Wescap property. That they knowingly broke into the office of FPC and removed documents from the Wescap office and that these same records were then turned over to the U.S. Attorney"

NOTE: The clearly marked offices of Financial Privacy Consultants and Wescap Enterprises Limited, the parent corporation of Cumberland Investment Corporation were both located at the premises at 141 Main Street, Woonsocket, Rhode Island.

III. CONCLUSION:

Based upon the untruthful testimony of Mr. Monzack and Mr. Cullen described in paragraphs 35 and 36 of Appellant's Affidavit, (See E465; E385; E366-E368.) and the Cicilline letters described in paragraph 17 of Appellant's Affidavit (See E462, E401-402.) unequivocally show that Appellant has raised the issue of personal assets seized by the trustee, and therefore the existence of clear error exists concerning the facts. Appellant avers that this same information, excluding the Docket #137 entry, was proffered to the District Court. The other information in Appellant's Affidavit show that when the "*warrantless"* search and seizure was conducted that officers of the court knew that Appellant's personal assets were contained in the vaults at 141 Main Street, Woonsocket Rhode Island.

Appellant further shows that a claim of personal assets being seized was made to the First Circuit back in 1994 in the criminal case. For all those reasons above, Appellant believes he has shown clear error in the opinions of both the Bankruptcy Court and the District Court for the District of Rhode Island.

E. SECOND STATEMENT OF THE ISSUES

> Whether the bankruptcy court abused its discretion by granting the fee application of Edwards Angell Palmer & Dodge and Edward Bertozzi subsequent to Appellant showing discrepancies with the application while denying Appellant relevant discovery pertinent to this appeal?
>
> Appellant's second statement of the issues asserts that the court order at issue violates the procedural protections of the Due Process Clause found in the Fourteenth Amendment of the United States Constitution. The Due Process Clause prohibits a deprivation of "life, liberty or property" without due process of the law.

I. BACKGROUND OF THE SECOND ISSUE

There is a long history of Appellant claiming due process and other constitutional violations committed by officers of the court. On December 12, 1994, in Ca. No. 94-1343 in the U. S. Court of Appeals for the First Circuit, Harold F. Chorney, Appellant, by his attorney, Scott A. Lutes, on appeal from a judgment of the U. S. District Court for the District of R. I., presented Brief of the Appellant. Appendix Exhibits included First, Fourth, Fifth, Sixth, and Ninth Amendment violation arguments (See e-503-E-561.) previously present to the District Court in 92-099P on March 11, 1993.

II. DISCUSSION

"It is only where an act or omission operates so as to deprive a defendant of notice or so as to deprive him of an opportunity to present such evidence as he has, that it can be said that due process of law has been denied."…. Mooney v Holohan, 294 U.S. 103 at 112. (Part of Ninth Amendment argument pg E-560.)

Federal courts must in all cases continue to have the power to hear constitutional claims and grant the necessary relief. Smith v. Robinson, 468 U.S. 992 (1984), 1012, n.15. In the only Supreme Court case to find preclusion of a §1983 constitutional claim, the Court indicated that constitutional claims under § 1983 may be precluded by another statute if the claims are "virtually identical." *Smith v. Robinson,* 468 U.S. 992, 1009 (1984). In *Smith*, the statutory claim was found to be "virtually identical" to the § 1983 claim because the statute at issue, like § 1983 itself, was created expressly to enable litigants to enforce their constitutional rights. The denial of the motion to clarify violates the procedural due process protections of the Fourteenth Amendment to the United States Constitution. The denial penalizes Appellant without providing him the procedural protections required by federal law, including notice and an opportunity to be heard. The United States Constitution provides due process protections to *all* persons. The twelve issues listed on pages 3, 4 and 5 above is but a partial listing of procedural due process violations related to the Motion to Clarify.

When discretionary decision making goes awry and judgment is exercised arbitrarily, there is an abuse of discretion that may amount to a constitutional

violation in the form of substantive due process, which is actionable under federal law. Substantive due process refers to the fact that the Fourteenth Amendment to the U.S. Constitution imposes both substantive and procedural requirements when it prohibits any government action that deprives "any person of . . .liberty, or property, without due process of law." U.S. Const. Amend XIV. This substantive component of the Due Process Clause "bars certain arbitrary, wrongful government actions 'regardless of the fairness of the procedures used to implement them.'" Zinermon v Burch, 494 U.S. 113, 125 (1990) (quoting Daniels v. Williams, 474 U.S. 327, 331 (1986.) The fact that the personal assets of Appellant were seized and Appellant was deprived of property without due process of law bars government from denying standing to Appellant. It is a substantive due process right to defend oneself. The Fourteenth Amendment prohibits the deprivation of liberty or property without due process of law. A due process claim is cognizable only if there is a recognized liberty or property interest at stake. Board of Regents v. Roth, 408 U.S. 564, 69 (1972).

III. ARGUMENTS PRESENTED IN 1993 AND 1994

Due process is best defined in one word--fairness. Throughout the U.S.'s history, its constitutions, statutes and case law have provided standards for fair treatment of citizens by federal, state and local governments. These standards are known as due

process. When a person is treated unfairly by the government, including the courts, he is said to have been deprived of or denied due process.

When Appellant felt he was being treated unfairly he presented some of the following arguments concerning Fourth Amendment Violations of his birth rights in Ca. No. 92-099P pretrial on March 11, 1993 using the rational of Anders v. California, 386 U.S. 738. The trial judge did not consider them (**Tr. 4/21/93 pg. 6.**) or require the government to file a response. (**Tr. 3/11/93, pg. 17**.) Some of the same arguments made in Ca. No. 92-099P and appealed in Ca. No. 94-1343 before the First Circuit, are presented below once again:

> "In order to qualify as a 'person aggrieved by an unlawful search and seizure' one must have been a victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else."
> Jones v U.S. 362 U.S. 257 at 261. (See pg. E-547.)

> "In the ordinary case, the Court has viewed a seizure of personal property as per se unreasonable within the meaning of the Fourth Amendment unless it is accomplished pursuant to a judicial warrant issued upon probable cause and particularly describing the items to be seized."
> U.S. v Place, 462 U.S. 696 at 701 (1983.) (See pg. E-546.)

> "A warrantless search is per se unreasonable unless the government can demonstrate that it falls within one of a carefully defined set of exception to the Fourth Amendment's warrant requirements."
> U.S. v Munez-Guerra, 788 F2d 295 (1986.) (See pg. E546.)

Appellant also stated that, "The fourth amendment prohibition against unreasonable searches protects against warrantless intrusions during civil as well

as criminal investigations. The reason is found in the 'basic purpose of this Amendment which is to safeguard the privacy and security of individuals against arbitrary invasions by government officials'.

> " If the government intrudes on a person's property, the privacy interest suffers whether the government's motivation is to investigate violations of criminal laws or breaches of other statutory or regulatory standards." Franks v Smith, 717 F2d 183 at 186 (1983.) (See pg. E-546.)

IV. CONCLUSION

The actions directed by Trustee Cullen on August 15 and17, 1990 were in one word, "outrageous". The denial of due process is as plain as the nose on my face. (See pages E-550-E556.) Appellant knows of no statutory claim related to Title 11, in which Congress would authorize the actions committed on August 15 and 17, 1990 that would allow the circumvention of Appellant's constitutional rights including the taking of property without due process of law.

F. THIRD STATEMENT OF THE ISSUES

> Whether the rulings of law are correct concerning standing or should be reviewed de novo?

I. BACKGROUND

We live in a nation governed by law and tempered with freedoms. The Founding Fathers realized that a nation must have both. They realized that a nation ruled by law with no freedoms would lead to tyranny and to be ruled by freedom without law would lead to anarchy. A system was created with a Bill of Rights, which

provided freedoms to protect you and me from government itself. The first eight of these Amendments, or freedoms, were enumerated and the last two were unenumerated.

In discussing these freedoms in Lozano et al. v. City of Hazelton, 459 F. Supp. 2d 332 (M.D. PA) 2007 only the first eight amendments appear to be mentioned. "Fundamental to the American Legal Tradition is the notion that those accused of and convicted of crimes possess fundamental rights which are not abrogated simply because of such person's alleged behavior." A person accused of a crime is entitled, among other rights, to be free of unreasonable search and seizure; to the presumption of innocence; to the proof of his guilt beyond a reasonable doubt; to minimally competent legal representation; to access to any potentially exculpatory evidence……" See U.S. Constitution, Amendments IV, V, Brady v. Maryland, 373 U.S. 83, 87 (1963) (holding that the suppression by the prosecution of evidence favorable to the accused upon request violates due process where the evidence is material either to guilt or to punishment.

Similar to Lozano, involving illegal aliens, Appellant has been accused and convicted of crimes. And similar to Lozano, Appellant's fundamental rights should not be abrogated simply because of Appellant's alleged behavior. Appellant should be entitled, among other rights to be free from unreasonable search and seizure. Appellant should not be threatened or traumatized that he

would have to leave his home and that he and his personal property be physically removed. (See E470.) Yet the Trustee on August 15 & 17, 1990, without a search warrant or any adequate notice to Appellant, removed personal and corporate assets from the premises of Appellant and in doing so broke into offices and removed documents. The Trustee and others, had surreptitiously in the context of both civil and criminal investigations, gained discovery without a warrant while denying due process to the Appellant. Subsequently to conceal their deeds, the Trustee withheld evidence favorable to the accused such as the videotapes, yellow inventory notebooks, sign in/out cards, records of inventories taken and then refused to give an accounting of the assets seized, sold and remaining at various stages of the bankruptcy and criminal proceedings. All of this resulted in the denial of due process to Appellant and a violation of Brady since the evidence requested by Appellant was material to either guilt or punishment. In addition, since the sentence of Appellant was based upon the alleged shortfall of the value of the assets of the estate of Cumberland Investment Corporation, any and all missing or unaccounted for assets or assets sold without being credited to Appellant would have a direct bearing upon the restitution which was part of Appellant's sentencing.

One difference between the Lozano case and this instant case is that Appellant is a citizen of the United States and may qualify for both Constitutional and Prudential standing. In this case, Appellant is being denied his rights under color of law in the bankruptcy proceedings. In Lozano, only Constitutional standing was granted.

II. DISCUSSION INVOLVING STANDING AND RULINGS OF LAW

Which set of rules apply if there is a conflict between laws governing civil cases and the laws governing a criminal case? The Bertozzi billings should have involved both criminal and civil case related billings. The Bertozzi billings involved meetings with the U.S. Attorney and others involved with the criminal investigation and prosecution of Appellant. These billings involved the appraisals and inventories of assets by the Examiner or by the Trustee, or both since Mr. Bertozzi represented both of them.

Mr. Bertozzi claims the billings for August 30, 1991 to December 22, 1993 are missing as a result of computer glitches. Yet Appellant has produced a copy of those billings to this court. (See E256-E281.) Subsequently, Appellant, seeking a clarification of the billings which were a basis for a $200,000 fine against Appellant, supplied a copy of the discrepancies between the billings of Mr. Cullen and the Bertozzi Billings in PETITIONER'S MOTION TO ASSIST AND HELP THE COURT CONCERNING THE FIRST AND FINAL APPLICATION FOR FEES AND EXPENSES OF EDWARDS ANGELL PALMER & DODGE LLP. (See E387-E399.)

Appellees argue that Appellant lacks standing to bring this Motion to Clarify while Appellant argues that he has standing in different ways. First of all Appellant has standing because he has personal property, seized by the Trustee which is missing.

Secondly, Appellant has standing because he was convicted of a crime and information related to "punishment" and possibly guilt is being withheld by the Appellees.

III. ARGUMENT

In the District Court's Analysis of Standing, referencing Great Road Serv . Ctr., Inc. v Golden, 304 B.R. 547, 550 (B.A.P. 1st Cir. 2004.) the court states that the addressed bankruptcy standing standards are,

> "narrower than Article III standing. Only a person aggrieved has standing to challenge a bankruptcy court order; the challenged order must directly and adversely affect the appellant's pecuniary interests. A person aggrieved is one whose property is diminished, burdens are increased, or rights are impaired by order on appeal."

Article III states that the judicial power of the federal courts extends only to cases and controversies which arise under the Constitution, federal laws of the United States and its treaties. A determination that a person lacks standing means that person is not the proper party to bring the issue before the court for adjudication. The Standing Doctrine is viewed as a tool that promotes both Separation of Power and judicial efficiency. The limiting of cases before the courts promotes judicial efficiency, and this limiting also improves decision-making ability of the judiciary through ensuring a specific controversy and that an advocate with a stake in the outcome is present to pursue the matter.

Four requirements must be met before a party will be granted standing in the federal judiciary. The first three requirements are based upon Article III as Constitutional barriers to standing, and the last is an exercise of judicial restraint which may be overridden by Congressional statute.

CONSTITUTIONAL BARRIERS TO STANDING

The Supreme Court has held that "the standing question in its Art. III aspect is whether the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf.'" Simon, 426 U.S. at 38 (quoting Warth, 422 U.S. at 498-99). The Court has described three elements that comprise the "irreducible constitutional minimum of standing." Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).

The first requirement is that the parties are adversaries and that the plaintiff has suffered or imminently likely to suffer a distinct and palpable injury. Additionally, a plaintiff seeking declaratory or injunctive relief must show a likelihood of injury in the future. City of Los Angeles v. Lyons, 461 U.S. 95 (1983). Injuries which are sufficient to satisfy this requirement have generally been found to be an injury based on the common law and injuries based on a violation of the Constitution.

Appellant has argued, quoting Troutman, 286 F.3d 364, 6th Cir. 2002, that he is an aggrieved party with a financial stake in the order. Using the logic of Los Angeles

v. Lyons, 461 U. S. 95, 102 (1983) where "Past wrongs were evidence bearing on whether there is a real and immediate threat of repeated injury," what could be a more compelling argument of injury than the past loss of both liberty and property? Besides diminishing the property of Appellant, Appellant has demonstrated that the order increases his burdens and most importantly impairs his rights. Appellant has supplied a myriad of examples of being denied full and fair hearings, showing an infringement of individual rights. See District Court Docket # 13, 14, Brief of Appellant, dated August 19, 2008, pages 14-16.

The second and third requirements are that the named defendant(s) be the causation of the injuries and that the injury is redressable through the court. The plaintiff must show that the injury is fairly traceable to the defendant through a causal nexus linking the action of the defendant with the injury. An injury caused by the defendant(s) can be directly compensated for by the court.

Appellant had met the second and third requirements. He has demonstrated that the Appellees in this case have denied discovery to Appellant in both the criminal and the civil proceedings. This history of failure by officers of the court to disclose or produce materials in discovery so that Appellant can present his case was the second issue presented in Brief of Appellant on August 19, 2008. Appellant presented events which happened in both the civil and criminal arenas. On December 27, 2008, Appellant supplemented the Appellant Brief to emphasize

the affect of the lack of production in the criminal trial by officers of the bankruptcy court. Basically, the lack of production denied Appellant the utilization of the defense best suited to vindicate his rights. Appellant's counsel, rather than pursuing the constitutional arguments Appellant proffered, chose another trial strategy. There should be no denial of standing to Appellant using Constitutional barriers in the criminal action.

However should there be a denial of standing in the civil bankruptcy case to gather information concerning issues raised in the criminal case, despite the fact that Appellant has demonstrated that he is an aggrieved party, it would be an affront to the Constitution and to fundamental fairness.

PRUDENTIAL BARRIERS TO STANDING

The fourth requirement involves judicial restraint. Judicial restraint has two aspects to its nature. The first is the use of discretion in granting certiorari, and the second is a set of prudential rules used to deny a party standing in a particular case. The prudential restraint rules focus on whether the plaintiff's own rights are being asserted, or whether someone else's rights are being asserted. These prudential restrain rules seem similar to the "aggrieved party rules" stated in Great Road Serv. Ctr., Inc. v Golden, 304 B.R. 547, 550 (B.A.P. 1st Cir. 2004.)

There can be little doubt that the Appellant is the "aggrieved party" asserting his own rights. The Appellant has championed his own rights throughout the criminal and the civil proceedings and in doing so has constantly questioned the lack of production, the denial of due process and the lack of fundamental fairness resulting from same.

NINTH AMENDMENT DISCUSSION:

Appellant continues to argue that "the right to defend oneself" is a basic fundamental right and even though it is not enumerated in the Constitution, it is like the right to privacy, a right that is retained by the people.

There is case law that says that the prosecution has a constitutional duty to disclose evidence favorable to the accused when such evidence is material to guilt or punishment. Appellant has proffered these Brady Arguments in the Supplemental Brief of the Appellant, dated December 27, 2008, Docket #22, page 16. "The lack of corroborating information and evidence, such as the yellow inventory notebooks, sign in/out cards, videotapes of assets of Cumberland Investment Corporation, inventories of the assets and transcripts of the different inventories and movements of the assets, prevented counsel for Appellant from utilizing the information in paragraph 3. of Addendum to Travel and Facts in preparing a defense based upon Appellant's claims of missing, switched and mishandled assets in the criminal case. (See TR 3/9/94 pages. 44-48, E429-433.)

NINTH AMENDMENT ARGUMENT

What are the ramifications if Appellant has the rightful standing to request information concerning his criminal conviction or punishment, yet the civil bankruptcy proceeding continues to deny Appellant the rightful standing to request clarifications related to guilt or punishment?

Appellant avers, that it is because of unknown situations like this that the Founding Fathers intended for individuals like the Appellant to enjoy the fundamental right of defending himself. Appellant believes that the intent was, in cases similar to this one, for the basic and fundamental rights of individuals to be protected through the Ninth Amendment. (1.)

The Ninth Amendment serves as a "savings clause to keep from lowering, degrading or rejecting any rights which are not specifically mentioned in the document itself." Gibson v. Matthews, 715 F. Supp 181 at 187 (1989).

The savings clause of the Ninth Amendment would kick in to protect the fundamental freedom of defending oneself and trump the civil statutory "rules" of law even if Appellant could not prove that he has standing because his personal

(1.) Appellant made Ninth Amendment Arguments before the District Court on March 11, 1993 and also before the First Circuit in Ca. No. 94-1343 when Mr. Lutes presented Anders styled pleadings at Appellants insistence. In both those instances, Appellant argued that his rights were being violated when Appelant was enjoined from contacting witnesses in his defense in the bankruptcy case. Appellant argued that the fundamental right of defending himself was guaranteed by the Ninth Amendment to the Constitution. (See E559 to E561.)

assets were missing or even did not have any personal property at all. Appellant relies upon the same logic in his current Ninth Amendment Arguments as he did back in 1993 and 1994 (See E559-E561.), because both sets of arguments involve the Appellant seeking fairness in a process to defend himself:

"…we rightfully place a prime value on providing a system of impartial justice to settle civil disputes, we require even a greater insularity with fairness in criminal cases. Perhaps this is symbolically reflected in the Sixth Amendment's requirements of an "impartial jury" in criminal cases whereas the Seventh amendment guarantees only "trial by jury" in civil cases." Hirschkop v. Snead, 594 F2d 356, 4th Cir. 1979. (See E-560.)

Appellant avers that the Ninth Amendment in this situation protects his standing. Appellant avers that all he should have to show in order to have standing in this instant case is that he was being denied fair treatment and that there were assets missing and or unaccounted for that would affect his guilt or punishment in accordance with Brady.

IV. CONCLUSION:

Hearings concerning the billing records of the professionals in the bankruptcy proceedings, including the Bertozzi billing, the subject of the Motion to Clarify, have brought to light methods and procedures used to deny Appellant due process.

In this bankruptcy case, virtually any party of interest could object or respond to a motion or not. However the court set up a set of circumstances where only

Appellant was being denied the ability to respond or object. This set of circumstances is unfair and thus impaired and denied due process to the Appellant.

Through these 'professional' billings Appellant has developed a case showing that there is a history of failure by officers of the court to disclose or produce materials in discovery so that Appellant could present his case. Appellant argued that this could constitute misconduct within the purview of Rule 60(b)(3) and cited Anderson v. Cryovac, Inc. , 862 F2d 910, 923 (1st Cir. 1988.)

Appellant claims that the lack of production of relevant discovery is an issue that is pertinent to this appeal. Appellant has demonstrated that Appellees have not even responded to basic correspondence from Appellant or his attorneys. Appellant demonstrated that failure to disclose or produce discovery so that Appellant could present his case was the strategy used in both the criminal and the bankruptcy cases.

Appellant in exercising his rights claims that :

> "In our adversary system of justice, each litigant remains under an abiding duty to take the legal steps that are necessary to protect his or her own interests." Cotto v United States, 993 F.2d. 274, 1st Cir. 1993 at 278.

And while championing his own rights in the spirit of Cotto, Appellant has presented to the court those reasons in fact and law that the bankruptcy court's decision of May 7, 2008 and May 8, 2008, should be rejected.

Appellant has presented information to this court, directly related to issues in this case which prove that there are numerous problems with the administration of this bankruptcy case. Appellees have hidden the truth for years by a lack of production of pertinent inventories and appraisals while arguing that issues involving accountability of the assets of this case have been long settled. But these issues are not settled when Appellees cannot answer a simple question like, "What happened to the golden frogs?"

Information and sworn testimony contained in this brief shed light upon the events of August 15 and 17, 1990, including the basis for the sentencing of Appellant in the criminal case as well as the lack of "accountability" of personal and corporate assets seized. Appellant prays that this court, in light of the lack of veracity of the billings and testimony of the Appellees, examine the credibility of those Appellees and the courts' former reliance upon their dubious testimony in decision making and perform a 'de novo' review of the entire record related to cases 92-099P and 89-11051 and any other remedy which metes as just and fair.

Respectfully submitted,

Harold F. Chorney
16 Spring Drive
Johnston, R.I. 02919
401 934-0536

ADDENDUM

I.

UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

IN RE: CUMBERLAND INVESTMENT CORPORATION,
Debtor

HAROLD F. CHORNEY,
Appellant

v.

CA 08-189 ML

JASON D. MONZACK and
JOHN F. CULLEN,
Appellees

ORDER

The Appellant's Motion for Reconsideration is hereby DENIED.

SO ORDERED:

Mary M. Lisi
Chief United States District Judge
January 9, 2009

II.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

HAROLD F. CHORNEY

C.A. NO. 08-189ML

Vs.

JASON D. MONZACK and
JOHN F. CULLEN

JUDGMENT

[ ] Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[x] Decision by the Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED:

Judgment shall enter for appellees, Jason D. Monzack and John F. Cullen pursuant to the Memorandum and Order dated December 18, 2008 DENYING Appellant's appeal and AFFIRMING the order of the Bankruptcy Court.

Enter:

Barbara Barletta
Deputy Clerk

DATED: December 18, 2008

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III.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

IN RE: CUMBERLAND INVESTMENT CORPORATION,
Debtor

HAROLD F. CHORNEY,
Appellant,

v.

C.A. No. 08-189ML

JASON D. MONZACK and
JOHN F. CULLEN,
Appellees

MEMORANDUM AND ORDER

This matter is before the Court pursuant to Harold F. Chorney's ("Chorney") appeal from orders of the United States Bankruptcy Court for the District of Rhode Island. For the reasons set forth below, Chorney's appeal is DENIED and the orders of the bankruptcy court are AFFIRMED.

I. Background

The bankruptcy proceedings of the Cumberland Investment Corporation ("CIC") began in 1989 when CIC involuntarily petitioned for bankruptcy. An outline of the relevant history follows.

The bankruptcy court issued an injunction against Chorney in July of 1991, citing his obstructive conduct and prohibiting him from intervening or "otherwise participat[ing] in proceedings relating to sales or other disposition of estate assets." In re Cumberland Investment Corp., BK No. 89-11051, slip op. at 1-2 (Bankr. D.R.I. July 3, 1991). The bankruptcy court

2.

37.

specifically found that "Chorney ha[d] deliberately and continuously acted in bad faith to obstruct and to hinder the efficient administration of the estate, which action has been very damaging, expense-wise, to the estate and its creditors." Id. The bankruptcy court subsequently imposed a civil contempt sanction against Chorney in the amount of $200,000 due to his bad faith and his abuse of the bankruptcy process. In re Cumberland Investment Corp., BK No. 89-11051, slip op. at 1-2 (Bankr. D.R.I. July 2, 1992), *aff'd sub nom.* Chorney v. Weingarten, 7 F.3d 218 (1st Cir. 1993), *cert. denied*, 510 U.S. 1200 (1994). In its order, the bankruptcy court found that Chorney "filed frivolous pleadings, willfully interfered with and obstructed the administration of the case, and generally and in bad faith abused the bankruptcy process, causing the estate and its creditors significant economic harm." Id. According to the Appellees, this sanction has not yet been paid by Chorney.

On November 3, 2004, the bankruptcy court issued one of the orders that Chorney now appeals. That order imposes sanctions on Chorney and strikes Chorney's "Motion To Clarify the Class Action Award [] and Require Chapter 7 Trustee Provide [*sic*] a Complete and Detailed Accounting of the Estate Assets," as well as his "Second Request for Admissions." In re Cumberland Investment Corp., No. 89-11051, 2004 WL 2616318 (Bankr. D.R.I. Nov. 3, 2004). The bankruptcy court found that Chorney lacked standing and that his "hyperactivity and ludicrous conduct throughout this case is marked by his incessant acts of bad faith and abuse of the system from the inception of this bankruptcy in 1989." Id., at *1. The bankruptcy court held that Chorney had directly violated the 1991 injunction by filing the motions. Id. The First Circuit has since dismissed Chorney's appeal of that order for lack of jurisdiction, because he did not pursue a timely intermediate appeal to this Court or the Bankruptcy Appellate Panel. In re

Cumberland Investment Corp., No. 07-8038 (1st Cir. Aug. 5, 2008). Chorney concedes that he failed to timely appeal the order but contends that the bankruptcy court violated Fed. R. Civ. P. 60(b)(6) by precluding his access to the courts. Brief of Appellant, In re Cumberland Investment Corp., at 11-12 (No. 08-189).

Between July and October of 2007, both Edwards, Angell, Palmer and Dodge, LLP ("Edwards Angell") and Trustee Cullen filed applications for final compensation, which prompted Chorney to file a "Motion to Clarify First and Final Application for Fees and Expenses of Edwards Angell Palmer & Dodge LLP" on February 14, 2008, and an "Offer of Proof Concerning Standing" on April 25, 2008.

In May of 2008, the bankruptcy court issued an order approving the first and final fee application of Edwards Angell, denying Chorney's "Motion to Clarify First and Final Application for Fees and Expenses" of Edwards Angell, and holding that Chorney lacks standing to participate regarding claims of professional expenses against the bankruptcy estate. Chorney, filing *pro se*, subsequently filed this "Motion and Memorandum to Appeal and/or Amend Bankruptcy Orders Dated November 3, 2004 and May 8, 2008," which this Court treats as an appeal.

II. Standard of Review

An aggrieved party may appeal to this Court "from the final judgments, orders, and decrees" of a bankruptcy court. 28 U.S.C. § 158(a)(1). In a bankruptcy appeal, this Court accepts the findings of fact by a bankruptcy court unless they are clearly erroneous. LaRoche v. Amoskeag Bank (In re LaRoche), 969 F.2d 1299, 1301 (1st Cir. 1992). A bankruptcy court's

decision "may only be rejected if this Court has a 'definite and firm conviction that a mistake has been committed.'" Forbes v. Four Queen Enterprises, Inc., 210 B.R. 905, 909 (D.R.I. 1997) (quoting United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948)). Rulings of law, however, are reviewed *de novo*. LaRoche, 969 F.2d at 1301 (citing Bartmann v. Maverick Tube Corp., 853 F.2d 1540, 1543 (10th Cir. 1988)).

III. Analysis

A. Standing

A primary issue in the case at hand is whether Chorney has standing to address the application for professional fees and expenses of Edwards Angell against the bankruptcy estate. The Bankruptcy Appellate Panel of the First Circuit has addressed bankruptcy standing standards, holding that it is:

> narrower than Article III standing. Only a person aggrieved has standing to challenge a bankruptcy court order; the challenged order must directly and adversely affect the appellant's pecuniary interests. A person aggrieved is one whose property is diminished, burdens are increased, or rights are impaired by order on appeal.

Great Road Serv. Ctr., Inc. v. Golden (In re Great Road Serv. Ctr., Inc.), 304 B.R. 547, 550 (B.A.P. 1st Cir. 2004) (internal citations and quotations omitted). An appellant's standing is a threshold jurisdictional issue. In re Shkolnikov, 337 B.R. 1, 4 (B.A.P. 1st Cir. 2006), *appeal dismissed*, 470 F.3d 22 (1st Cir. 2006). Whether an individual is aggrieved for purposes of appeal is "a factual determination generally made in the first instance by the bankruptcy court." Id. (citing Spenlinhauer v. O'Donnell (In re Spenlinhauer), 261 F.3d 113, 118 (1st Cir. 2001)). This Court, then, reviews that factual determination for clear error. See LaRoche, 969 F.2d at

1301.

Chorney argues that he is an aggrieved party with some personal, non-corporate interest in some of the property seized. In his "Statement of the Issues", Chorney also contends that the $200,000 sanction imposed by the bankruptcy court provides him with standing. He further argues that time records of the billing of Cullen and the billing of Mr. Edward Bertozzi of Edwards Angell from August 31, 1991 to December 22, 1993 are inconsistent with each other and with other billings. Chorney argues that this inconsistency provides the basis of his pecuniary interest, giving him standing to challenge the bankruptcy court's orders. The bankruptcy court did not rule on Trustee Cullen's application for expenses and fees in May of 2008 and thus Cullen's application is not a part of this appeal.

The Appellees argue that the determination on the fee application of Edwards Angell does not have any affect on Chorney, because he does not stand to receive any funds from the bankruptcy estate. Chorney did not file a proof of claim in this bankruptcy proceeding and thus lacks standing as a creditor. The Appellees contend that Chorney has only recently begun to argue that he has some personal interest in the estate, though the bankruptcy estate has been pending since 1989. Appellees further contend that Chorney's argument that his court-ordered sanctions constitute a pecuniary interest in the proceedings should be "dismissed out of hand." Brief of Appellee Monzack, In re Cumberland Investment Corp., at 6 (No. 08-189).

In its May 7, 2008 bench decision, the bankruptcy court adopted the Appellees' arguments against Chorney's standing in their entirety. Transcript of Record at 26:20 - 27:2, In re Cumberland Investment Corp., BK No. 89-11051 (May 7, 2008). This decision was incorporated by reference in the bankruptcy court's May 8, 2008 order, denying Chorney's

Motion to Clarify. In re Cumberland Investment Corp., BK No. 89-11051 (May 8, 2008).

This Court agrees with the bankruptcy court's finding that Chorney is not a person aggrieved for purposes of this appeal. Therefore this Court finds that the bankruptcy court's determination that Appellant Chorney lacks standing does not constitute clear error. Accordingly, the Appellant's appeal of the order of May 8, 2008, and the bench order of May 7, 2008, is denied.

B. The November 3, 2004 Bankruptcy Court Order

Chorney contends that the order of November 3, 2004 precludes his participation in the bankruptcy proceedings, in violation of his constitutional rights. A notice of appeal is timely if filed within ten days after the entry of the judgment. Fed. R. Bankr. P. 8002(a). Chorney failed to timely appeal this order. Instead, on November 3, 2007, Chorney filed a "Motion to Appeal and/or Amend Bankruptcy Order, Dated November 3, 2004" with the First Circuit. The First Circuit determined that it lacked jurisdiction over the appeal, as Chorney did not timely appeal the order to this Court or to the Bankruptcy Appellate Panel and failed to obtain certification under 28 U.S.C. § 158(d)(2). In re Cumberland Investment Corp., No. 07-8038 (Aug. 5, 2008).

Chorney has attempted to appeal the November 3, 2004 bankruptcy order with this appeal, filed initially with this Court on May 13, 2008. The filing of this appeal is three and a half years after the original order was entered. As a result, the appeal is untimely. The Appellant contends that "untimely request for relief is justified and in the public interest." This Court finds no legitimate support for such an untimely request.

Chorney further contends that the bankruptcy court's orders and judgments have

effectively precluded him from accessing the courts, violating Fed. R. Civ. P. 60(b)(6), which provides relief from a final judgment or order for "any other reason that justifies relief." Rule 60 offers "the only avenue of relief from final civil judgments other than by appeal or independent action." Lubben v. Selective Serv. Sys. Local Bd. No. 27, 453 F.2d 645, 648 (1st Cir. 1972). In particular, a party invoking Rule 60(b)(6) must assert a reason "*other* than those enumerated in 60(b)(1)-(5), and must be sufficient to justify the relief sought." Id., at 651. Furthermore, "the residual clause, like Rule 60(b) generally, is not a substitute for an appeal, and in all but exceptional circumstances, the failure to prosecute an appeal will bar relief under that clause." Id. (footnote omitted). Having determined that Chorney's appeal is untimely, this Court further finds that Chorney has failed to advance any legitimate reasons for relief under Rule 60.

The Appellant's appeal of the November 3, 2004 bankruptcy order is accordingly denied.

C. Arguments not part of this appeal

Chorney raises a number of other issues on appeal, including an alleged failure to disclose or produce materials in discovery which he argues constitutes a violation of Fed. R. Civ. P. 60(b)(3). These issues have been long settled. For example, Chorney's request for an accounting of assets was denied in March of 2002 on the basis of lack of standing and the barring effect of prior final orders, and this determination was sustained on appeal and the United States Supreme Court denied certiorari. See In re Cumberland Investment Corp., No. 02-1976, 2003 WL 21435745 (1st Cir. June 20, 2003), *cert. denied*, 540 U.S. 1022 (2003). In any case, the relevant discovery was not at issue in May of 2008 and is not pertinent to this appeal.

IV. Conclusion

For the foregoing reasons, this Court concludes that the Appellant lacks standing and prior final orders and judgments bar his claims. Accordingly, Chorney's appeal is DENIED and the orders of the bankruptcy court are AFFIRMED.

SO ORDERED.

Mary M. Lisi
Chief United States District Judge
December 16, 2008

IV.

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF RHODE ISLAND

In Re: **Cumberland Investment Corporation** Debtor(s)	BK No. **1:89–bk–11051** Chapter **7**

Order Denying Document (doc# 966) After Hearing

Re: Motion to Clarify filed by Interested Party Harold Chorney

Upon consideration of theabove entitled document and any objection or response thereto, and after hearing, IT IS ORDERED that for the reasons stated by the Court in its bench decision which are incorporated herein by reference, the Document (doc# 966) is **DENIED** .

Judgment #: 1:89–bk–11051 – 1007 – 966

ORDER:

By: **CAL**
Deputy Clerk

ENTER:

Arthur N. Votolato
U.S. Bankruptcy Judge
Date: **5/8/08**

Entered on Docket: **5/8/08**
Document Number: **1007 – 966**

odmaah.jsp #120

45.

V.

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF RHODE ISLAND

In re:

CUMBERLAND INVESTMENT CORP.,

Debtor

BK No. 89-11051

Providence, Rhode Island
May 7, 2008

TRANSCRIPT OF TRIAL
BEFORE THE HONORABLE ARTHUR N. VOTOLATO
UNITED STATES BANKRUPTCY JUDGE

A P P E A R A N C E S :

For the Debtor:	**HAROLD F. CHORNEY** 16 Spring Drive Johnston, Rhode Island 02919
For the Chapter 7 Trustee:	**JASON D. MONZACK, ESQ.** 888 Reservoir Avenue Cranston, Rhode Island 02910
For the U.S. Trustee:	**GARY L. DONAHUE, ESQ.** Office of the U.S. Trustee 10 Dorrance Street Providence, Rhode Island 02903
For Edwards, Angell, Palmer & Dodge:	**EDWARD J. BERTOZZI, JR., ESQ.** Edwards, Angell, Palmer & Dodge 2800 Financial Plaza Providence, Rhode Island 02903
Transcription Service:	Elite Transcription (479) 872-2639 Email: Elite-Transcription@cox.net

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WITNESSES	DIRECT	CROSS	REDIRECT	RECROSS
No Witnesses				

EXHIBITS	DESCRIPTION	MARKED	RECEIVED
No documents			

$626.43 is approved. Mr. Cullen's application is not dealt with this morning. As we just talked over, that will be heard on the final hearing, on the trustee's final report.

Edwards, Angell, Palmer & Dodge, attorney for the Chapter 11 Trustee, fees in the amount of $45,953.75, expenses of $3,764.47. That excludes the $35,000 waiver that we've talked about. That is approved. What about objections by claimant's Michael Miller and Frederick Coor (phonetic)? What's that about?

MR. MONZACK: I believe, Your Honor, those in the nature of letters, that the Court has considered those to be objections written by some creditors --

THE COURT: Okay.

MR. MONZACK: -- that essentially say, "How can other people be paid when I'm not being paid?" I think --

THE COURT: Okay.

MR. MONZACK: I think that boils those down.

THE COURT: All right. To the extent that that's an accurate description of these objections, neither Mr. Miller or Mr. Coor are here, and in light of the response by the U.S. Trustee, to the fee applications, those objections are overruled, and objections are preserved, for Mr. Miller and Mr. Coor.

Harold Chorney's motion to clarify the fee application of Edwards & Angell is denied. And then we had supplemental

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motions by Mr. Chorney. To the motion to clarify and the supplemental filing by Mr. Chorney, regarding the issue of standing, both those motions are denied. Your objections, Mr. Chorney, are noted.

I think that finishes the business for this morning. I obviously was trying to get away with it much too easily the first time around, but I think we have touched all the bases. So we'll see you again whenever the application for Mr. Cullen's fee, together with the hearing on the trustee's final report. I think we've got it narrowed down to two issues. I don't know how long that prediction will last but that's it for this morning. Thank you all for your attention.

MR. MONZACK: Thank you, Your Honor.

MR. DONAHUE: Thank you, Your Honor.

(Proceedings concluded)

* * * * *

CERTIFICATION

On this 27th day March, 2008, Appellant Harold F. Chorney mailed by first class mail a copy of the enclosed to the following:

Jason D. Monzack
Kirshenbaum & Kirshenbaum
888 Reservoir Avenue
Cranston, R.I. 02910

United States Trustee
Thomas P. O'Neill, Jr.
Federal Office Bldg.
10 Causeway Street Room 472
Boston, MA 02222-1043

Leonard DePasquale, AUST
Office of the U.S. Trustee
10 Dorrance Street
Providence, R.I. 02903

Edward J. Bertozzi, Jr.
Edwards Angell Palmer & Dodge LLP
2800 Financial Plaza
Providence, R.I. 02903

John F. Cullen
Law Office of John F. Cullen, PC
17 Accord Park Drive, Ste 103
Norwell, MA 02061

Harold F. Chorney

Harold F. Chorney
16 Spring Drive
Johnston, R.I. 02919
401 934-0536

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