

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NEW YORK

SUSAN CHARNEY,

Plaintiff,

-against-

NORTH JERSEY TRADING CORPORATION,
ALEXANDER FRIED, JUDITH HERSKOWITZ,
XXXXXHERSKOWITZ and XXXHERSKOWITZ,

Defendants.

**AFFIDAVIT IN SUPPORT OF:
CROSS-MOTION FOR STAY
AND/OR TO ABATE IN
DEFERENCE TO PRE-EMPTIVE
AND PRIMARY JURISDICTION
OF OTHER PROCEEDINGS;
MOTION FOR RELIEF UNDER
CPLR 5015; MOTION TO COMPEL
PRODUCTION OF DOCUMENTS;
AND IN OPPOSITION
TO CHARNEY'S MOTION**

Index No. 24517/88

STATE OF FLORIDA)
) S.:
MIAMI-DADE COUNTY)

JUDITH HERSKOWITZ, being duly sworn, deposes and says:

1. That I am named as a defendant in the above entitled case and make this affidavit on personal knowledge, setting forth the history of the case and of this alleged in rem proceedings.

2. North Jersey Trading Corporation ("North Jersey") a closed New Jersey corporation owned a valuable 54 unit apartment building in an upscale neighborhood, at the address known as 200 Riverside Drive New York City. It was purchased in 1958 by Alex Fried ("Fried") and his wife Hedy Fried. The Frieds were the initial shareholders, they managed the building during their lifetime, and it was their source of income. Hedy Fried died in 1981.

3. On or around 1985 Fried was considering to co-op the building or to rehabilitate a number of apartments to bring the low rent controlled and rent stabilized rents up to market and so he decided not re-rent all the apartments as they became vacant.

4. On or around 1986 Fried retired to Miami Beach, Florida, but continued to be involved in the management of North Jersey. Negotiations were underway for a conventional

mortgage to finance the upgrading of the North Jersey property and to refinance a balloon mortgage that became due. Also contemplated was to turn North Jersey into a Subchapter S Corporation pursuant to the 1986 Tax Reform Act, a tax saving device, which had to be completed by December 31, 1988.

Charney's Primary Interest Was To Get Money from North Jersey

5. Charney used this occasion to demand a forty (40) percent interest in North Jersey and initiated proceedings designed to pressure her father Fried into acceding to a substantial corporate payout, by threatening to dissolve the corporation. Charney sent a demand letter dated December 19, 1988 to North Jersey demanding that "I receive payment for the full and fair value of my shares in the corporation", which she claimed was 40 shares of the of the 100 shares of the issued and outstanding stocks of North Jersey, without showing as to how or from whom she purported to have acquired those shares.

6. Charney's letter was merely a pretext for litigation brought in New York by her attorney Delibert to accomplish a multi million dollar shakedown. On or around December 20, 1988 Charney attempted to have served an Order to Show Cause for a Temporary Restraining Order and Preliminary Injunction issued on December 13, 1988 on Charney's ex parte application (prior to that demand letter). Charney was seeking to enjoin Judith Herskowitz her sons XXX and XXXXXXHerskowitz ("the Herskowitzes") and Alex Fried, from taking certain specified acts with regard to a tax reorganization and also filed a lis pendens against the real property of North Jersey.

7. Among the "exhibits" attached to Charney's motion was a Verified Complaint in

which Charney individually was seeking to be declared a shareholder of North Jersey; damages for herself for three million dollars; the inspection of the corporate books and records pursuant to N.Y. BCL § 624 and; “to receive payment for her shares under provisions of Section 623 of the Business Corporation Law.” To support her claim Charney alleged wrongs committed against her *personally* by the individual defendants.

8. In attempts to gain *in personam* jurisdiction over the North Jersey shareholders, Fried and the Herskowitzes, Charney falsely claimed under oath in her Verified Complaint that they were citizens of New York, when in fact both Charney and Delibert were fully aware that Fried and the Herskowitzes were domiciled in and were permanent residents of the State of Florida, the Herskowitzes since 1975 and Fried since 1986.

9. Each of the Herskowitzes and Fried moved to dismiss Charney’s purported action, primarily for lack of personal jurisdiction and contested her attempted service because: it was made only with a Motion for Preliminary Injunction and Temporary Restraining Order and not with the required summons; the attempted personal service and substituted service were deficient; and the Herskowitzes and Fried were not amenable to long arm jurisdiction of the New York court or to extra-territorial service of process because, they had not committed any act or engaged in any activity in New York and had no legal relations with Charney which could be construed as subjecting them to the jurisdiction of the New York courts.

In Her Amended Complaint Charney Simply Reasserted her Individual Damage Claim Derivatively on Behalf of North Jersey

10. In January 1989, Charney moved the court to allow her to serve an Amended Complaint described as “Verified Petition”, which was the required form for her primary claim,

the dissolution of North Jersey relying on N.Y. BCL § 1104(c) and N.J. Stat. §14A:12-7(b), asserted by Charney individually. Charney sought to force the dissolution and liquidation of North Jersey for a payout of her alleged shares. Charney individually: also sought a declaratory judgment for shares of North Jersey pursuant to CPLR §3001; the inspection of corporate books and records pursuant to, N.Y. BCL §624; and the appointment of a receiver for the property of North Jersey pursuant to, N.Y. BCL §1202(a)(1) and (a)(3); in only one count VII did she make a claim derivatively on behalf of North Jersey pursuant to N.Y. BCL §626, which she previously claimed individually.

11. Charney falsely claimed that the Herskowitzes enriched themselves at the expense of the corporation and diverted the income and assets of the corporation. Charney asserted that they were paying themselves exorbitant salaries for “management” from the surplus of the corporation, when there was no surplus from that rent controlled building and the moneys were barely enough for the income of Fried that he was entitled to. Charney further falsely claimed that corporate funds were converted for the purchase of a condominium and/or cooperative apartment, when that condominium in Miami Beach was purchased by the Frieds from their personal assets in the 1970's.

The Court Set Down The Issue of Service for An Evidentiary Hearing, But Charney Failed and Refused to Continue With that Hearing

12. By order dated March 8, 1989 Justice Jacqueline Silbermann denied the Motion for Preliminary Injunction and Temporary Restraining Order; set down the Herskowitzes' and Fried's Motion to Dismiss for a traverse hearing on the service of the Order to Show Cause; and granted Charney's Amended Complaint, the Verified Petition, “subject to the disposition of the

traverse hearing”. The March 8, 1989 order accelerated the return date of the Herskowitzes’ and Fried’s Motions to Dismiss on the service to March 21, 1989, which was previously set for June 1989.

13. On May 10, 1989, a traverse hearing on the threshold jurisdictional issue was commenced before Justice Phyllis Gangel Jacob. The hearing was conducted for four days, without any finding of personal jurisdiction. On June 19, 1989 the court issued an order dismissing the case on motion of North Jersey, on the ground that Charney’s claim for declaratory judgment was barred by statute of limitations. The traverse hearing was then terminated. On July 17, 1989 a judgment was issued by Judge Ostrau dismissing Charney’s action and the lis pendens was cancelled.

14. On Charney’s Motion to Reargue, claiming that her papers were overlooked, by order dated March 29, 1990 Justice Silbermann vacated her June 19, 1989 dismissal order. Justice Silbermann recommended that Judge Ostrau modify his judgment to the extent of vacating the dismissal, but retaining the cancellation of the lis pendens because,

“Plaintiff’s [Charney’s] papers, at the best, state a claim for stock interest in a corporation which owns realty; such a claim does not constitute a proper basis for a lis pendens.”¹

15. In a May 8, 1990 order Justice Silbermann allowed the Herskowitzes to withdraw their intervening motion to reargue her March 8, 1989 order, that had accelerated the return date of the Herskowitzes’ Motions to Dismiss to March 21, 1989, previously set for June 1989, and

¹ This lis pendens and Charney’s lawsuit had prevented North Jersey from obtaining a conventional mortgage to refinance its mortgage that became due and for the additional money needed to upgrade the vacant apartments, thereby damaging the corporation’s solvency and rental operations so severely as to cause the foreclosure of the apartment building a near certainty.

set a traverse hearing on the service for that same day of March 21. The Herskowitzes had objected to the March date because of intervening religious holidays. The Herskowitzes withdrew their motion to reargue when the traverse hearing was reset for May, 10, 1989, and was commenced on that day so, the issue became moot.

16. Justice Silbermann also directed in that same May 8, 1990 order that the traverse hearing on those parts of the motions which relate to service of the order to Show Cause on all defendants be resumed before Justice Gangel Jacob. However, before that evidentiary hearing, was resumed Justice Gangel Jacob was removed from the case and it was reassigned to Justice Harold Tompkins.

17. In September 1990, Charney personally came to Dade County, Florida for the sole purpose to institute incompetency proceedings in the Dade County Probate Court against her father the defendant Fried. Charney acknowledged in her petition that Fried was a “resident” of Dade County, Florida. Fried was 87 years old at the time and his health had deteriorated under Charney’s litigation. By so doing Charney sought the cancel the jurisdictional defects that Fried posed as an indispensable party for her New York case, and neutralize any opposition on behalf of Fried for her claim for 40 shares of North Jersey stock

18. In a motion dated February 7, 1991, Charney attempted to dispense with the traverse hearing and with the required determination on the jurisdictional issues. Charney claimed that the Herskowitzes and Fried failed to answer her complaint and moved for a judgment by default against them. Charney also sought to foreclose the Herskowitzes “from presenting any evidence in opposition to her claim to declare her to be a stockholder of North Jersey”.

19. The Herskowitzes denied any default on the ground that no response was due under

prior court orders to any of her complaints; and that it was Charney who failed and refused to proceed with the traverse hearing on the issue of service. In a Reply Affirmation verified by Delibert on March 18, 1991 Charney conceded that the burden of proof on jurisdiction was on her and that she had decided not to proceed with the traverse hearing in order to initiate service anew, stating:

“Plaintiff [Charney] did not seek to resume the traverse hearing with regard to the earlier service, because plaintiff believed it would be far simpler (and far more considerate of judicial economy) to repeat service on the individual defendants, than to repeat the four days of hearings on the initial service, which had taken place before Justice Gangel-Jacob, without reaching a conclusion, before the action was dismissed.”

The May 21, 1991 Order Appointed Paul Windels III As Receiver for North Jersey Property, But He Has Never Taken the Oath and Never Posted a Bond Under That Order and Never Assumed the Role of Receiver for North Jersey

20. By motion dated February 7, 1991 Charney also moved for the appointment of a receiver to take control over the North Jersey building, alleging the absence of any corporate officer in the State of New York to manage the corporate property and to remedy the loss of income on the vacant apartments in the building.²

21. In a decision dated April 9, 1991, Justice Tompkins “declined to grant a default judgment” against the Herskowitzes and Fried, and expressly noted that the Herskowitzes had a legitimate and an “evident dispute with plaintiff [Charney] on the underlying facts”. Without holding an evidentiary hearing on the disputed issues of service and without making a determination on long arm jurisdiction, Justice Tompkins merely directed the Herskowitz

² These assertions were consistent with the factual grounds for the jurisdictional objections filed by the Herskowitzes, that were still pending the required determination pursuant to CPLR 3211(c) “immediate trial” on the issue of service.

“defendants, with the exception of defendant Alexander Fried, to answer within 30 days after service of a copy of this order with notice of entry.”

22. Likewise without a hearing on the disputed issues of that loss of rental income, in that same April 9, 1991 decision Justice Tompkins summarily appointed attorney Paul Windels III as both temporary receiver for the real property of North Jersey and as guardian ad litem for Fried. An order settling the April 9th decision was entered on May 21, 1991. However, Paul Windels III never acted as receiver of the real property of North Jersey nor as the guardian ad litem for Fried under that May 21, 1991 order because before he had occasion to execute the oath, the property was forced into foreclosure by Charney’s litigation.

23. In a Stipulation entered into on June 26, 1991 between Delibert and Stephen King, New York attorney for the Herskowitzes, it was expressly stipulated and agreed upon that the May 21, 1991 order directing the Herskowitzes to “answer” did not limit them to “answer” Charney’s Second Complaint, (“Verified Petition”)³ but, they could “move” that is with a Motion to Dismiss.

24. On July 2, 1991 the Herskowitzes had filed a Motion to Dismiss, addressed to the Amended Complaint, raising their previously undecided defense of lack of personal jurisdiction. The Herskowitzes objected to the insufficiency of the service and demonstrated the absence of long arm jurisdiction, because of the lack of minimum contact with the State of New York by the Florida citizens, Fried and the Herskowitzes.

³ Charney changed to petition because that was the required form for her claim, the dissolution of North Jersey.

Charney Conceded: That the Herskowitzes Initial Motion to Dismiss Was Never Ruled On; She Agreed To the Herskowitzes Filing a Second Motion to Dismiss; and Acknowledged There Was No Prior Determination on Jurisdiction on the Merits

25. Charney's response to the Motion to Dismiss was supported with Delibert's affirmation dated August 1, 1991 in which on page 6, Delibert acknowledged that the Herskowitzes' and Fried's initial Motions to Dismiss "were never determined on the merits" and expressly noted that this was in accordance with the June 26, 1991 stipulation with counsel for the Herskowitzes.

26. On that second Motion to Dismiss Charney repeatedly acknowledged in Delibert's affirmations and memoranda of law that, personal jurisdiction over the Herskowitzes was not yet determined. Charney conceded that the extraterritorial service on XXXXXXHerskowitz was invalid and there was no long arm jurisdiction over him. In fact Charney claimed that a ruling on the Motion to Dismiss was premature since she needed to conduct discovery on jurisdiction and moved for leave to file an amended complaint to state facts for long arm jurisdiction.

No Determination on Jurisdiction Was Made on that Second Motion to Dismiss on the Alleged Ground That the Herskowitzes Were Permitted to Withdraw Their Jurisdictional Claim and Were Prohibited From Re-raising the Jurisdictional Issues

27. In an order dated October 2, 1991 Justice Tompkins then, without reconvening the traverse hearing on the service of that Order to Show Cause; without making any determination on the merits on the issue of service and long arm jurisdiction and without any finding of minimum contact was misled by Charney's misguided interpretation of Justice Silbermann's May 8, 1990 order that it was a waiver of the "jurisdictional claim" by the Herskowitzes and prohibited them from raising their jurisdictional defenses saying that,

“The extensive prior history of the numerous prior motions have given the Court familiarity with the action. North Jersey and the defendant Fried and the Herskowitz defendants have repeatedly raised and reraised the issue of jurisdiction in spite of Justice Silbermann’s order of May 8, 1990 which permitted the withdrawal of the jurisdictional claim. North Jersey, defendant Fried and the Herskowitz defendants may not re-raise the jurisdictional issue.”

In that same October 2, 1991 order Justice Tompkins deemed the Herskowitzes second Motion to Dismiss to be a reargument of the May 8, 1990 order, and so he declined to rule on their Motion to Dismiss.⁴

28. Following that October 2, 1991 order Charney informed the Herskowitzes of a one million dollar price for settling her claims, which was confirmed in an October 31, 1991 letter of Stephen King counsel for the Herskowitzes. The Herskowitzes were not independently wealthy and Charney made her demand while the building was already operated by a court appointed receiver. When that one million dollar demand was not met, and the Herskowitzes attempted to show to the Court that they did not withdraw their objection to jurisdiction, Charney retaliated by further inciting the Court against them, as the subsequent proceedings would prove.

29. On November 21, 1991 the Herskowitzes filed a Motion to Reargue the October 2, 1991 order, demonstrating that the order was unsupported by the record because Judge Silbermann’s order of May 8, 1990 nowhere found a waiver or withdrawal of jurisdictional objections, but (as stated hereinbefore) the Herskowitzes were withdrawing only a motion to reargue the scheduling of a hearing, which was then reset and so the motion became moot. Yet without any hearing and without making any ruling on the Motions to Reargue Justice Tompkins instructed a deputy clerk to mail back to the Herskowitzes their already filed motion papers.

⁴ At no time were the Herskowitzes afforded a right to be heard pursuant to CPLR 3211(c) as a consequence of this order of October 2, 1991. So, Justice Tompkins acted without legal authority, since no waiver had occurred pursuant to CPLR 3211(e).

The Herskowitzes Were Sanctioned in the Sum of \$5,000 for Attempting to Show That They Have Not Withdrawn Their Jurisdictional Defenses

30. Then without notice of hearing to the Herskowitzes, Charney moved to sanction them for their “bad faith” attempts to reconsider the jurisdictional issues procuring an *ex parte* order dated December 10, 1991 whereby sanctions were granted against the Herskowitzes in the sum of \$5,000.00 as fees for Delibert, on the stated basis that they were impeding Charney from reaching the merits of her case by re-raising the jurisdictional issues. Thereupon, on February 6th 1991 a judgment was entered by the clerk on the \$5,000.00 sanction award with direction to “have execution thereto”.

31. Over the Herskowitzes’ ongoing objections to personal jurisdiction, and without a determination on the jurisdictional issues on the merits, Charney proceeded individually, with a Motion for Partial Summary Judgment dated December 12, 1991 to be declared owner of (20) twenty shares of the common stock of North Jersey. Although the Herskowitzes’ opposition papers supported with copies from the North Jersey stock books and with copies of stock certificates showing Charney did not own the said shares, were received by the Court, as was directed by Justice Tompkins, by March 3, 1992, by order dated March 5, 1992 Charney’s motion was granted on the ground that it was “unrebutted”, because the Herskowitzes’ papers were not received by the Court. Even though at a later date the Court acknowledged having received the Herskowitzes papers, it was rejected in a June 3, 1992 order deeming it to be a “reargument” of the March 5, 1992 order.⁵

32. Alex Fried died on March 25, 1992, in Miami-Dade County, Florida. Charney did

⁵ The fact remains that Charney’s stockholder status resulted from this judicial fiat, and not by declaratory judgment based upon proof and due process in a contested proceeding.

not attend his funeral. Charney did not contest Fried's Will and his Codicil disinheriting her because of the multifarious, vexatious litigation she conducted against him in his lifetime. Charney failed to substitute his estate and no one qualified to act in place and stead of Fried in the New York Supreme Court case, Charney made no claim against his estate or stock interest in North Jersey.

The Herskowitzes Were Denied Appellate Review and Were Sanctioned by the Appellate Court in the sum of \$5,000 for Their Attempts to Be Heard on the Jurisdictional Issues

33. The Herskowitzes sought appellate review of the October 2, 1991 order. At the same time they petitioned the New York Appellate Division, First Department for a writ of prohibition and mandamus to require Justice Tompkins to accept for filing their November 21, 1991 Motion to Reargue and to restrain the lower court from exercising in personam jurisdiction over the Florida domiciliaries.

34. By decision dated June 23, 1992 the Appellate Division, First Department dismissed the appeal without reviewing the merits of the jurisdictional issues. The October 2, 1991 order on appeal, was deemed to be nonappealable for the stated ground that no appeal lies from an order denying a motion that the lower court characterized to be a "reargument". However, since no order determining the Herskowitzes' and Fried's initial motions to dismiss on the jurisdictional defenses had been made in any "immediate trial" pursuant to CPLR 3211(c) the appeal was over an alleged waiver of personal jurisdiction before Justice Silbermann. Inasmuch as no such order waiving personal jurisdiction was entered by Justice Silbermann, there was no initial order from which to appeal.

35. By order dated June 23, 1992 the simultaneously filed petition for writ of prohibition

and mandamus was denied by the Appellate Division, First Department, on the stated ground that the proper remedy was by appeal (an appeal that, as previously noted, in the companion appeal had been dismissed for reasons other than on the merits). On Charney's motion sanctions were imposed on the Herskowitzes in the sum of \$5,000.00 deeming their continued efforts to be heard on the personal jurisdictional issues to have been "undertaken primarily for delay." On August 19, 1992 a judgment was entered for the \$5,000.00 as fees payable directly to Delibert with the provision "to have execution thereof".⁶

The Herskowitzes Were Ordered to Turn over All Their North Jersey Shares Worth Over a Million Dollars in Satisfaction of the \$5,000 Sanction Imposed on Them by the Appellate Court for Objecting to the New York Court's Jurisdiction and When Those Stock Were Not Turned Over, Orders Were Issued to Incarcerate Them

36. Charney then moved before Justice Tompkins by motion dated August 24, 1992 claiming reliance upon CPLR §5225 and sought to compel Judith, XXX and XXXXXXHerskowitz "to turn over to the Sheriff of the County of New York, their shares of stock in North Jersey Trading Corporation, in aid of satisfaction of that August 19th judgment", which in effect was for benefit of Delibrt. There was no personal service or otherwise of this motion on the nonresident Herskowitzes and CPLR §5225, by its own terms, can have no extraterritorial effect.⁷

37. Charney's motion was granted by order dated September 18, 1992, directing the

⁶ This foreclosure of any form of appellate remedy stemming from Justice Tompkins erroneous belief that the Herskowitzes had waived jurisdictional defenses precluded them due process pursuant to CPLR 3211(c).

⁷ Pursuant to CPLR §5225 only so much of personal property "as is sufficient value to satisfy the judgment" may be directed to be delivered to the Sheriff. The Herskowitzes' stocks based on the value of the North Jersey real property were well over a million dollars.

Herskowitzes to turn over all their North Jersey stocks certificates to the Sheriff in the County of New York although the court was without extraterritorial authority over the stocks held by the nonresident Herskowitzes in the State of Florida.

38. That same September 18, 1992 order also granted the striking of the Herskowitzes' pleadings, unless they "appear and submit to depositions commencing on October 29, 1992, 9:30 A.M. at the Supreme Court, 60 Centre Street, Room 252, New York, New York" the courtroom of Justice Tompkins. That October 29, 1992 day of deposition was set a few days following the October 16th, 1992 date for the Herskowitzes to turn over their North Jersey shares to the Sheriff in the State and County of New York. So, the deposition was just a pretense to force the Herskowitzes into the New York court's jurisdiction, to hand over all their North Jersey shares.⁸

39. When the nonresident Herskowitzes did not appear for that deposition, Charney then procured from the Court a whole succession of orders and sanctions to further punish the Herskowitzes, arising from their ongoing objection to jurisdiction. Charney first procured from Justice Tompkins a further order dated January 19, 1993 holding the Herskowitzes in contempt of court for alleged failure to appear for their deposition. Delibert was awarded the sum of \$23,500.00 for fees and expenses, against the Herskowitzes to be paid on or before February 4, 1993. The order further provided that if the \$23,500.00 were not paid as directed, then on Charney's *ex parte* application an order would be entered to arrest and to incarcerate the

⁸ Once again, Charney sought to side step the issue of personal jurisdiction. Indeed without going to Florida to domesticate her judgment and order, this attempted exercise of extra territorial jurisdiction was surely void.

Herskowitzes until compliance with the order.⁹

The Judgment on Behalf of North Jersey Was Procured by Charney by Default, Based On a Fraudulent Claim of a Loss of Rental Income, Relying on an Inflated Rent Roll, Minimizing Expenses and Disregarding the Income Received by Fried

40. Charney next procured from Justice Tompkins yet another order dated January 19, 1993 striking the Herskowitzes' pleadings for failure to appear for their deposition, the pleading in which the Herskowitzes also continued to object to personal jurisdiction. Then, without any opportunity to be heard at any hearing evidentiary or otherwise and without any further proof, Charney was declared to be the owner of yet another 20 shares of stock, for a total of 40 shares of the 100 issued and outstanding shares of common stock of North Jersey. Also, without any proof of corporate or fiduciary misconduct before the court, the case was then set down for a hearing before a referee, but only as to the amount of the damages.¹⁰

41. Charney also moved to have the Herskowitzes held in contempt pursuant to § 753 of the New York Judiciary Act in further enforcement of the August 19, 1992 judgment even though §753(A)(3) makes §753 inapplicable to judgments such as this, since its is limited solely "to a case where by law execution *can not* be awarded for the collection of such sum".

42. Then by order dated January 19, 1993, the Herskowitzes were held in contempt of court, again pursuant to §753, for failure to deliver their North Jersey stock certificates to the Sheriff in satisfaction of that August 19th judgment and an additional fee of \$7,000.00 was awarded to Delibert. The order provided that the Herskowitzes may purge themselves of the fine

⁹ This use of the Court's power to sanction and coerce, without due process of law, to inflict a forfeiture merely under color of law, was extortionate within the definition of USC 1951.

¹⁰ So, once again, Charney's stock interest was created by judicial fiat rather than by declaratory judgment supported by proof.

by turning over their North Jersey stock certificates to the Sheriff on or before February 4, 1993.

In the event of failure of compliance, the order provided for an *ex parte* application,

“for an order of commitment directing the Sheriff of the City of New York or the sheriff of any county within the state wherein the Petitioners, may be apprehended, commanding him forthwith to arrest the said Petitioners, JUDITH HERSKOWITZ, XXX HERSKOWITZ and XXXXXXHERSKOWITZ, to be brought before IAS Part 13 of this Court during the time when such part is in session, to be committed until they shall purge their contempt by complying with the Order of this Court entered the 21st day of September, 1992, by turning over to the Sheriff of the City of New York the shares of stock....” (Emphasis supplied)

43. On February 19, 1993, Justice Tompkins issued an *ex parte* Order of Commitment, (arrest) directing the Sheriff to arrest the Herskowitzes and to bring them before him for their alleged failure to purge themselves by paying the fine of \$7,000.00 and by delivering all their North Jersey stock certificates to the Sheriff. Still, another *ex parte* Order of Commitment (arrest) of the same date was entered by Justice Tompkins for the arrest of the Herskowitzes for their alleged failure to pay the \$23,500.00 fine imposed on them by the January 19, 1993 order.¹¹

44. With these schemes, to seize their North Jersey stocks certificates and warrants of arrest to incarcerate them, in retaliation for objecting to the New York court’s jurisdiction over their person and seeking to adjudicate the jurisdictional issues on the merits, the Herskowitzes were effectively barred from participating in the hearing on Charney’s derivative claim. So that hearing before the Referee, which was the only proceeding on Charney’s purported derivative suit, was by default, with no opposition to Charney’s fabricated damages, masterminded by

¹¹ The arrest of Judith Herskowitz, as the holder of the majority shares of North Jersey continued to be of great interest to Charney. When in January 1994 it was believed that she was visiting in the New York City apartment of XXX Herskowitz, New York City police officers were dispatched to his New York City address to arrest Judith Herskowitz.

Delibert. In fact the Referee noted in his March 22, 1993 Report that his recommendation was based solely on Charney's claims.

45. No matter how many corporate records the Herskowitzes produced at Charney's request, it was never enough, because this was just a contrivance for Charney to use to build a fraudulent case against them. Upon not being able to find any evidence of theft or diversion of income, as alleged in her verified complaint Charney made up a loss of rental income on the vacant apartments which comprised the greatest portion of the derivative damages described in her attorney's Post Inquest Memorandum dated March 18, 1993.¹²

46. That alleged diversion and conversion of income was noted in the Referee's Report dated March 22, 1993 in the sum of \$2,104,963.33; to this was added on \$960,000.00 as loss of value because of the vacant apartments, without any appraisal of the property; and a further sum of \$200,000 added on for mortgages. Then a prejudgment interest of 1.6 million dollars to produce that 4.2 million judgment "derivatively" jointly and severally against the Herskowitzes.

47. Because of the detrimental effect that Charney's then five years of litigation had on North Jersey with her unproven claims for corporate shares, and fabricated claims for damages, in March 1993, North Jersey filed a voluntary petition for relief under Chapter 11 in the United

¹² Pursuant to Charney's Post Inquest Memorandum, Delibert claimed a hypothetical rental income from 1985 to 1993, paid 365 days a year on all 54 apartment. He minimized expenses including only the utility bills, mortgage payments, and the super's salary. The difference of \$2,104,963.33 was falsely claimed to be a "loss" of income. Hidden by these make believe items of damages is the apartments initially kept vacant by Fried to co-op or refurbish to increase the controlled rents, the loss on vacancies, nonpayment, etc., the super's helper, taxes, legal and accounting fees, telephone, repairs, painting, capitol improvements i.e. windows, a new boiler, etc., and most significantly that North Jersey was Fried's source of income. See, par. 67, infra Charney admitting that the income belonged to Fried. So, the Herskowitzes were made liable for the support of Fried and for the expenses of North Jersey.

States Bankruptcy Court in Trenton New Jersey, Case No. 93-31620.

48. In May 1993, also represented by Delibert, Charney filed in the United States Bankruptcy Court for Trenton, New Jersey a Motion for Relief from Automatic Stay and for Appointment of Trustee. Charney sought permission to continue her New York derivative suit on behalf of North Jersey to enter judgments against the Herskowitzes. Charney also sought the appointment of a trustee based on her fabricated claims of waste and mismanagement of the real property of North Jersey in her New York derivative suit.

49. At the end of 1992 the Herskowitzes filed a federal suit in the Southern District of Florida against Charney individually. At her request the venue was transferred to the Southern District of New York, Case No. 92-2531. Charney used that case to force the Herskowitzes to appear for their deposition in New York, threatening them with the warrants of arrest from Supreme Court of New York should they appear. When the Herskowitzes failed to appear Charney promptly procured a dismissal of the case with sanctions imposed on them. Charney once again raised the alleged withdrawal of "jurisdictional claim" by the Herskowitzes, on page 9 par. 41 of her *Answer* dated September 22, 1993 wherein she falsely represented that:

"it has been expressly held and determined by Justice Tompkins of Supreme Court, New York County, adhered to by him on application for reargument, and affirmed by the New York Supreme Court Appellate Division, First Department, from which no further appeal has been taken, that the said reference in Justice Silbermann's order was to service of the Orders to Show Cause; that in permitting withdrawal of the Herskowitz defendants motion to reargue, Justice Silbermann was determining that jurisdiction existed; and that no issues of personal jurisdiction remained in the action." (page 11) (Emphasis added)

50. Charney moved for the appointment of a trustee based on her New York derivative suit and for relief from Automatic Stay in the New Jersey Bankruptcy Court case to allow her to

apply in the Supreme Court of the State of New York to enter final judgment in her derivative suit in. Charney's motion for appointment of trustee was granted by order dated October 12, 1993 appointing attorney Karen Bezner as trustee. Charney was granted a partial relief from automatic stay by order dated October 27, 1993. Thereupon, on November 22, 1993 Justice Tompkins entered a default judgment not in favor of North Jersey, but "in favor of Charney on behalf of North Jersey" against defendants XXX and XXXXXXHerskowitz in the principal sum of \$3,264,963.33 and prejudgment interest of \$986,984.52 for the total sum \$4,251,947.87 and on January 21, 1994 entered the same default judgment against Judith Herskowitz in the same principal sum of \$3,264,963.33 with prejudgment interest of \$1,035,061,12 in the total sum of \$4,300,024.42. As shown above, the judgments arise out of the same alleged injury, but were entered at different times because of a bankruptcy stay for Judith Herskowitz.

Delibert Conceded in Sworn Testimony That it Is Unsupported by the Record That the Herskowitzes Have Withdrawn Their Objections to Jurisdiction

51. On December 29, 1993 Delibert personally appeared in a Bankruptcy Court case in Dade County, Florida filed by Judith Herskowitz (dismissed at a later date). Delibert testified and conceded under oath that he always knew and was fully aware that the reference by Justice Tompkins in his October 2, 1991 order that the Herskowitzes withdrew their objections to personal jurisdiction, was unsupported by the New York record. In this regard Delibert stated:

"Q.....is there any document that you have knowledge of where the defendants Judith Herskowitz, XXXXXXHerskowitz, XXX Herskowitz and Alex Fried withdrew their jurisdictional objections in the New York court?

A. In so many words, I don't believe so.

Q. You do not have any such document?

A. I don't believe there is such a document in so many words.

Q. I am asking you if there is any such document wherein these parties withdrew their jurisdictional objections. The same parties as above.

A. I know of no document stating an expressed withdrawal of the objections.”¹³
Charney Recorded Her New York Judgements for Domestication in the Florida Court

52. At the end of 1993 and the beginning of 1994, Charney recorded for domestication her individual New York judgments as well as the ones on behalf of North Jersey in the Eleventh Judicial Circuit Court for Miami-Dade County, Florida, under Case No(s). 93-22064, 94-669 and 94-3614. As provided under the Florida Statute for the Enforcement of Foreign judgments, the Herskowitzes filed actions challenging the constitutional validity of Charneys’ judgments in Case No(s) 94-472, 94-2887 and 94-5714.

The Herskowitzes Were Ordered to Turn over All Their North Jersey Shares Worth Over a Million Dollars in Satisfaction of the \$5,000 Sanction Imposed on Them by the Appellate Court for Objecting to the New York Court’s Jurisdiction and When Those Stock Were Not Turned Over, Orders Were Issued to Incarcerate Them

36. Charney then moved before Justice Tompkins by motion dated August 24, 1992 claiming reliance upon CPLR §5225 and sought to compel Judith, XXX and XXXXXXHerskowitz “to turn over to the Sheriff of the County of New York, their shares of stock in North Jersey Trading Corporation, in aid of satisfaction of that August 19th judgment”, which in effect was for benefit of Delibrt. There was no personal service or otherwise of this motion on the nonresident Herskowitzes and CPLR §5225, by its own terms, can have no

¹³ Consequently, we have the undisputed admission by Charney’s attorney that the default judgments Charney had procured against the Herskowitzes were by fraud since personal jurisdiction was predicated on that fictional waiver of personal jurisdiction.

extraterritorial effect.¹⁴

37. Charney's motion was granted by order dated September 18, 1992, directing the Herskowitzes to turn over all their North Jersey stocks certificates to the Sheriff in the County of New York although the court was without extraterritorial authority over the stocks held by the nonresident Herskowitzes in the State of Florida.

38. That same September 18, 1992 order also granted the striking of the Herskowitzes' pleadings, unless they "appear and submit to depositions commencing on October 29, 1992, 9:30 A.M. at the Supreme Court, 60 Centre Street, Room 252, New York, New York" the courtroom of Justice Tompkins. That October 29, 1992 day of deposition was set a few days following the October 16th, 1992 date for the Herskowitzes to turn over their North Jersey shares to the Sheriff in the State and County of New York. So, the deposition was just a pretense to force the Herskowitzes into the New York court's jurisdiction, to hand over all their North Jersey shares.¹⁵

39. When the nonresident Herskowitzes did not appear for that deposition, Charney then procured from the Court a whole succession of orders and sanctions to further punish the Herskowitzes, arising from their ongoing objection to jurisdiction. Charney first procured from Justice Tompkins a further order dated January 19, 1993 holding the Herskowitzes in contempt of court for alleged failure to appear for their deposition. Delibert was awarded the sum of \$23,500.00 for fees and expenses, against the Herskowitzes to be paid on or before February 4,

¹⁴ Pursuant to CPLR §5225 only so much of personal property "as is sufficient value to satisfy the judgment" may be directed to be delivered to the Sheriff. The Herskowitzes' stocks based on the value of the North Jersey real property were well over a million dollars.

¹⁵ Once again, Charney sought to side step the issue of personal jurisdiction. Indeed without going to Florida to domesticate her judgment and order, this attempted exercise of extra territorial jurisdiction was surely void.

1993. The order further provided that if the \$23,500.00 were not paid as directed, then on Charney's *ex parte* application an order would be entered to arrest and to incarcerate the Herskowitzes until compliance with the order.¹⁶

Charney Supported the Liquidation of the North Jersey Real Property to Create a Cash Fund and Opposed to Save it as a Going Concern

56. In August 1994 the North Jersey building on Riverside Drive in New York City, was put up for sale on Trustee's motion supported by Charney. The Trustee did not allow the Herskowitzes to rent any of the vacant apartments, saying that it would decrease the value of the building. Charney joined Trustee to liquidate the property and opposed North Jersey's attempts at reorganization. Neither Charney nor the Trustee wanted the North Jersey property to continue as a going concern. Their goal was just to turn it into cash. The Herskowitzes had secured a considerable financial commitment to save the real property and to continue the corporate business and made a substantial settlement offer to Charney, which she rejected through her Florida attorney, Clifford B. Hark who in a letter dated August 18, 1994 advised:

“Pursuant to our discussion on Monday, August 15, 1994, this letter will confirm that your settlement letter dated August 9, 1994, has been reviewed by Susan Charney.

Unfortunately, although my client would be amenable to settling this matter for the sum of \$350,000.00, your proposal does not immediately tender said funds to her for the purchase of her shares of North Jersey Trading Corporation stock so that she is no longer a part of any of the bankruptcy discussions.”

57. Without any appraisal, the real property was sold for Three million dollars in a

¹⁶ This use of the Court's power to sanction and coerce, without due process of law, to inflict a forfeiture merely under color of law, was extortionate within the definition of USC 1951.

closed ale.¹⁷ Following that all the creditors and all the administrative expenses were paid.

Delibert Was Awarded about Fifty Thousand Dollars in Fees, Further Fees Were Denied by the Bankruptcy Judge for Not Showing Benefit to North Jersey and Fees for Charney's Florida Lawyers Were Denied the Court Finding it Was for Personal Benefit of Charney

58. Several applications were made by Charney's attorney Delibert for his fees and expenses in the Bankruptcy Court pursuant to 11 U.S. §503(b)(4) as an administrative expense for professional services rendered. These applications acknowledged that attorney's fees could be awarded only if Charney -

“realized any actual recovery on behalf of debtor with respect to the derivative action judgments”.

59. A first application for fees was granted by order dated March 20, 1995 awarding attorney Delibert the sum of \$19,692.20 for counsel fees and \$3,096.95 for expenses. A second application was granted by order dated September 11, 1995 awarding attorney Delibert the sum of \$24,310.00 for fees and \$2,862.72 for expenses.

60. Although it was the bankruptcy Trustee who administered the affairs of North Jersey, Charney claimed that she assisted the Trustee through Delibert, by pursuing collection proceedings on the alleged New York derivative judgments. Yet, when she made a Third Application for Fees, it was rejected in a letter opinion of May 2, 1997 Judge Stripp saying as follows:

¹⁷In 1988 when Charney brought her suit the North Jersey building was encumbered with only about a \$200,000.00 a mortgage. In the bankruptcy case the entire debt could have been restructured for about \$600,000.00. But, because it was forced into liquidation by Charney, everyone owed money was paid dollar for dollar. One million dollars alone was used to pay the N.Y. State Cuomo tax and capitol gain taxes, about \$120,000.00 for real estate commissions; and over \$500,000.00 for administrative expenses.

“This is the Court’s response to your motion for allowance of fees and expenses under Code section 503(b)(3)(D), authorizes the court to allow compensation and reimbursement of expenses to an attorney for a creditor or equity security holder in a chapter 11 case where such professional makes a “substantial contribution” to the case. You haven’t submitted a memo on the standards for determining “substantial contribution” in this Court, which you should have. The mere fact that such allowances have been made by this Court before does not mean that they will continue to be made indefinitely.

Moreover, you note that one of the motions for which you seek such compensation was denied by this Court. It is difficult to understand how that could constitute a substantial contribution within the meaning of the subject standard. In addition, your client’s challenges to the actions taken by the Herskowitzes in Florida to invalidate the New York judgments **appear to be primarily for your client’s benefit rather than for the benefit of the estate.**” (Emphasis supplied)

The Florida Court Entered a Final Summary Judgment in Favor of the Herskowitzes Denying Full, Faith and Credit on the New York Judgments, Which Was Lost on Appeal Only Because Charney Relied on a False Affidavit by Delibert And So That Domestication Proceeding Is Still Pending

61. On May 25, 1995 the Herskowitzes filed a Motion for Summary Judgment in the Dade County Circuit Court for Florida seeking to deny full faith and credit on Charney’s New York judgments solely for lack of personal jurisdiction. Charney responded with a Cross-Motion For Summary Judgment supported with an “Affidavit in Opposition to Motion for Summary Judgment and in Support of Charney’s Cross Motion for Summary Judgment” sworn to on June 6, 1995, by Delibert and filed by Charney on June 15, 1995. The facts stated in the Herskowitzes’ affidavit that they had not received a full and fair hearing in the Supreme Court of New York upon their jurisdictional objections were undisputed.

62. However, Delibert fabricated a new set of false facts in his affidavit, never before raised in the Supreme Court of New York or in any other court, when he knowingly

misrepresented that the New York court had affirmatively determined personal jurisdiction on the merits in the April 9, 1991 decision embodied in the May 21, 1991 order, on Charney's Motion for Default Judgment, when no such decision is stated in that order. Because Charney refused to submit to discovery, her Cross Motion for Summary Judgment was not heard by the lower court so that Delibert's affidavit was not addressed..

63. The lower court then considered only the Herskowitzes' affidavit and Delibert's sworn admission that the Herskowitzes had not withdrawn their objections to jurisdiction. The General Master made the finding in his September 6, 1995 Report based on these undisputed facts, that on Charney's December 1988 service, the Herskowitzes were served only with a motion, that was insufficient to commence an action under New York law, and moreover that

"The Herskowitzes' alleged "withdrawal" of their objections to personal jurisdiction is unsupported by the record. It seems clear that the order of Justice Tompkins reciting that the objection to jurisdiction had been "withdrawn" is unsupported by the record."

The General Master further noted that,

"Notwithstanding that the defendants Herskowitzes repeatedly raised the issue of jurisdiction over their person in each of the various lawsuits, all courts denied relief to the Herskowitzes yet none are shown by the record to have ever addressed the personal jurisdictional issue on the merits."

The General Master recommended that judgment be entered in favor of the Herskowitzes.

64. Charney again acknowledged in her Exceptions to the General Master's Report filed on September 5, 1995 that the New York court's determination on personal jurisdiction

"was not reached in the October 2, 1991 decision" on that "earlier permitted withdrawal of their jurisdictional objections. Rather, jurisdiction was clearly determined in the April 9, 1991 decision and resulting May 21, order."

Charney also conceded that pursuant to the May 8, 1990 order the Herskowitzes have not withdrawn their jurisdictional defenses but, only “a motion to reargue Justice Silbermann’s [prior] order setting the jurisdictional issue down for a factual hearing.”¹⁸

65. Charney’s Exceptions were overruled by Judge Rosemary Usher Jones and on November 2, 1995 Judge Jones entered a Final Judgment among others holding that,

“the documents CHARNEY sought to have served upon the HERSKOWITZES were legally insufficient to commence an action in the Supreme Court of New of the State of New York. Accordingly, all proceedings in the New York State courts (trial and appellate) were null and void ab initio;

The judgments and order that CHARNEY seeks to domesticate are thus not entitled to full faith and credit for lack of in personam jurisdiction.”

66. The Herskowitzes secured from the Florida court an injunction enjoining Charney from collection activities on the void New York judgments. To avoid the effect of that injunction, Charney rushed into the Supreme Court of New York and by order dated November 20, 1995 secured the appointment of attorney Paul Windels III as post-judgment receiver under N.Y. CPLR §5228 but, only to collect and receive funds from the judgment debtors on the New York derivative judgments. However, the oath executed by Windels was for Charney personally and not for North Jersey.

67. On May 1996 Charney’s deposition was taken in the Florida case. Charney conceded that Fried did get the income and profits of North Jersey, and that she received no dividends or distributions by testifying on pages 99, 157, 212 and 213 of the May 13, 1996 transcript as follows:

“Q. Did you father draw any money from the corporation?

¹⁸ See footnote 18, supra. Because Charney’s New York judgments depend upon that order of October 2, 1991 for any colorable legitimacy, its admitted invalidity invalidates her judgments.

A. I think he did. Yeah.

Q. Did he do this by way of salary or just taking profits?

A. He got the profits somehow. I'm not sure how."

"Q. Do you know who paid the monthly condo expenses, and the nurses and so forth for your dad here in Florida

A. No I do not.

Q. While he was alive

A. I do not."

"Q. Did your dad ever engage in any other type of employment than operating North Jersey Trading Corporation during the time that the corporation has been in existence?

A. No.

Q. So that it was his sole source of income?

A. Right"

"Q. Did you ever receive any dividends from North Jersey?

A. No."

68. In a decision dated February 5, 1997 the Summary Final Judgment was reversed by the Third District Court of Appeal of Florida, on Charney's arguments raising a disputed issue of fact, over whether the New York court determined personal jurisdiction on the merits. This decision was based upon the false June 6, 1995 affidavit of Steven Delibert. However, the record of the proceedings in the New York court hereinabove alleged, was not part of the record in the lower court or in the appellate court in Florida. Because of that reversal there is no Final Judgment and no final determination in the Florida case, and so the case is still pending. So, that Delibert on page 12 of his Affirmation in support of Charney's instant Motion for Disbursement of Assets falsely asserts that "Florida Courts recognized that the Court's judgments are entitled to full faith and credit and are enforceable in all jurisdictions".

Charney Forced a Settlement Agreement with XXX and XXXXXXHerskowitz for the Sum of \$150,000.00 in Full Satisfaction of All Her New York Judgments

69. All that Charney found to collect on that purported 4.2 million dollar New York default judgment was a subscription agreement to purchase as a co-op a New York rent controlled apartment, the prior residence of Fried. Upon his demise the right to purchase that apartment went to the Herskowitzes. The apartment was then occupied by XXX Herskowitz and his young family. Charney brought a turnover proceeding for that subscription agreement and threatened to sell it at a Sheriff's sale and to evict its occupants. Charney used that subscription agreement to force a settlement. Delibert himself acknowledges on page 15 par. 27 of his May 28, 2003 affirmation in support of the instant Motion Directing Disbursement of Assets, filed in the Supreme Court of New York, that the settlement was

“concluded only by a threat to re-open the turnover proceeding regarding XXX Herskowitz's co-op conversion rights on the ground of his bad-faith settlement negotiations.

Charney, the Receiver herein, and the Bankruptcy Trustee all finally agreed to the settlement, rather than face the extended uncertainties of continued litigation with Herskowitzes, which would have raised such novel and difficult issues as the effect on an ostensibly rent-controlled tenancy (of XXX Herskowitz), of attachment of his co-op conversion rights by a judgment creditor.”

70. The Bankruptcy Trustee received the sum of \$150,000.00 from XXX and XXXXXXHerskowitz, pursuant to a Settlement Agreement dated December 1988 attached to Charney's motion. The settlement was in “full payment” for all of Charney's New York judgments individually and on behalf of North Jersey against XXX and XXXXXXHerskowitz, for which “they were provided” “full and absolute satisfaction or vacatur” of the judgments. It is undisputed that a full satisfaction of the judgments was provided for XXX and XXXXXXHerskowitz. Under applicable common law that discharged all of Charney's judgments individually as well as on behalf of North Jersey as to Judith Herskowitz as well.

Additionally, that settlement agreement provided on pages 8 and 9 that Delibert was to make his fee application to the Bankruptcy court, upon approval of that settlement agreement by the Bankruptcy Court.

The Remaining Funds of North Jersey of Close to \$700,000.00 Was Transferred to the New York Receiver for the Sole Purpose of Distribution to the Shareholders

71. Charney's Motion for Approval of Settlement came up for hearing before the Bankruptcy Court on April 19, 1999. Judge Stripp and the parties acknowledged that New York law applied to the judgments and to the Settlement Agreement and the specific laws cited by Judith Herskowitz were unchallenged. However, the position taken by the Bankruptcy Court was that New York law should be applied in the New York court as to the effect of the settlement.

72. Although it is undisputed that full satisfaction of judgment were given to XXX and XXXXXXHerskowitz no such documents were filed by Charney, Windels or Bezner with the Clerk of this Court as mandated under N.Y. CPLR 5020.

73. On November 24, 1999 the Chapter 11 trustee filed a Motion to Complete Administration and to Dismiss Case and moved to transfer the surplus funds to the New York receiver. In her December 10, 1999 response, Charney through Delibert joined in support of the motion under the representation that the transfer to the New York court was essential because

“there remain bitterly contested issues between Susan Charney and Judith Herskowitz, as to who is entitled to the surplus remaining on behalf of the debtor.”

74. Charney reinforced this position by asserting that because issues on the Settlement Agreement were outside the Bankruptcy Court then to -

“what extent the settlement violated any provision of New York law was an appropriate resolution for the New York court .”

Charney did not participate in the appeals pursued by Judith Herskowitz defended only by Trustee, who maintained that Judith Herskowitz had no standing and who likewise maintained that the issues on the New York law be resolved in the New York court.

75. Judge Stripp was misled by Charney’s false representations that litigation over her domestication case in Florida was over and the 4.2 million dollar derivative judgment against Judith Herskowitz was given full faith and credit. Additionally, Charney used that judgment to instigate Judge Stripp against Judith Herskowitz. In a Letter Opinion dated July 10, 2000 Judge Stripp granted Trustee’s Motion to Dismiss the Chapter 11 Bankruptcy case. Judge Stripp recognized that there remained about \$700,000.00 in the estate of North Jersey, the bulk of it from the sale of its real property, free and clear of all claims and administrative expenses. Judge Stripp stated that “this fund belongs to the debtor’s shareholders”, and ruled that it was to be transferred by the Trustee to the New York receiver “for adjudication there of the shareholders’ rights therein between Judith Herskowitz and Susan Charney”.

76. Thereafter on August 9, 2000, Judge Stripp entered an order dismissing the bankruptcy case and directed the Trustee to deliver to the New York receiver Paul Windels, III Esq., all of the funds of North Jersey in her possession.

Delibert and the Other Attorneys Retained by Charney Are Not Entitled to Seek Fees in the Supreme Court of New York, Even If Delibert Pursued the Cases Full Time, Which Was Only to Build Fees for Himself, to the Destruction of North Jersey and to the Injury of the Shareholders

77. No information was given by the named receiver on the North Jersey funds for three

years until forced by Judith Herskowitz through court proceedings in federal court. After that case was dismissed upon administrative grounds Charney filed in the Supreme Court of New York a “Motion Directing Disbursement of Assets” dated May 28, 2003 purportedly based on N.Y. Business Corporation Law §626(e).

78. This motion does not seek any distribution to the shareholders and/or to make any determination on these issues as directed by the Bankruptcy Court, but seeks court approval of a collusive agreement to distribute all the remaining funds of North Jersey of close to \$700,000.00 to all the attorneys Charney retained for herself and for reimbursement for herself in the following manner:

Attorneys	Charges Out-	Amount Agreed
	standing	
Susan Charney (partial reimbursement of sums already paid)	\$120,000.00	\$110,000.00
Steven Delibert, Esq.	\$767,904.74	\$401,950.94
Eric C. Christu, Esq.	\$102,879.45	\$105,000.00
William T. Livingston, III, Esq.	\$28,185.83	\$18,000.00
Clifford Hark, Esq.	\$44,541.12	\$25,000.00
Carlton, Fields, Ward, Emmanuel, Smith & Cutler	\$28,553.56	\$2,500.00
Paul Windels, III, E.q., Receiver	\$19,774.95	\$19,774.95
Totals	\$1,111,839.65	\$682,225.89

79. Charney resorts to N.Y. BCL §626(e) although it does not provide for distribution of corporate assets. In view of the fact that the funds were transferred to the named receiver under pretext that it would be distributed to the shareholders the proposed distribution is a fraud

on North Jersey and on Judith Herskowitz a major shareholder. This particularly where Delibert was already awarded fees in the Bankruptcy Court and where further fees were denied for Delibert as noted hereinbefore.

80. Furthermore, the case is still pending in the Dade County Circuit Court of Florida. Motions are before that court and a final judgment is yet to be entered. Charney's judgments had not been domesticated to entitle her Florida lawyers Carlton, Fields, Clifford Hark and Eric Christu., to any fees. In fact the Florida attorneys were expressly denied fees in the New Jersey Bankruptcy Court for having failed to benefit the estate of North Jersey. William T. Livingston, never represented North Jersey.

81. The so-called derivative suit and judgments procured by Charney in New York did not benefit the corporation or any stockholder, or even the judgment claimant. Delibert and Windels obviously, used Charney as a vehicle to liquidate North Jersey and to confiscate the corporation's remaining funds, and to deprive Judith Herskowitz of her entitlement to those funds.

82. Delibert and Windels even attempted to deprive Judith Herskowitz, a majority shareholder of North Jersey of her North Jersey stocks with that void turnover judgment dated January 19, 1993, under threats of contempt and arrest warrants and other such illegal and unlawful orders of contempt, to eliminate her opposition to their confiscation of those funds for their personal use and would even label her as a "fugitive" from the New York courts.

83. Equally disregarded is the fact that when the judgments of Charney had been fully satisfied by XXX and XXXXXXHerskowitz then the judgments are discharged as to Judith Herskowitz as well. Consequently, Charney on behalf of North Jersey at most recovered

\$150,000.00 upon which if there were any fees due and owing it has been compensated by the Bankruptcy Court which is the only and court the application for fees could be made and not to the Supreme Court of New York.

84. To further eliminate any defense to Charney's and Delibert's unlawful and illegal agreement on the distribution of the assets of North Jersey, Charney joined by all her attorneys assert that Judith Herskowitz has no standing to object to their collusive scheme of distribution by reason of those contempt orders and threatens Judith Herskowitz with arrest should she appear in the New York court.

WHEREFORE, by reason of the foregoing, it is hereby requested that the within Motion for Stay and to Abate be granted and that the moving party has such other relief as may to the Court appear just and proper.

JUDY HERSKOWITZ

SWORN to before me
this 1st day of October, 2003

Notary Public - State of Florida