

To be argued by  
PAUL WINDELS III

New York County Index No. 24517/88

---

**NEW YORK SUPREME COURT**  
**APPELLATE DIVISION -- FIRST DEPARTMENT**

---

SUSAN CHARNEY,

Plaintiff-Respondent

- against -

JUDITH HERSKOWITZ,

Defendant-Appellant

NORTH JERSEY TRADING CORPORATION,  
ALEXANDER FRIED, \_\_\_\_\_ HERSKOWITZ,  
and \_\_\_\_\_ HERSKOWITZ,

Defendants.

---

BRIEF OF RESPONDENT-RECEIVER PAUL WINDELS III

---

PAUL WINDELS III, ESQ.  
187 Garth Road  
Scarsdale, New York 10583  
(212) 374-9260  
Attorney for Paul Windels III,  
Receiver of the Assets of  
North Jersey Trading Corp.

Printed on Recycled Paper

## TABLE OF CONTENTS

	<b>Page</b>
Table of Authorities	iii
BRIEF OF RESPONDENT-RECEIVER PAUL WINDELS III	1
PRELIMINARY STATEMENT	1
QUESTIONS PRESENTED	2
STATEMENT OF FACTS AND PROCEDURAL HISTORY	4
<b>A.   <u>Background – The Underlying Derivative Action</u></b>	4
<b>B.   <u>The Liquidation of North Jersey to a Surplus and its Remission to the Receiver</u></b>	6
<b>C.   <u>Proceedings Relating to the Distribution of Funds by the Receiver</u></b>	8
<b>D.   <u>The Receiver’s Accounting and Related Proceedings</u></b>	13
<b>E.   <u>Proceedings in This Court</u></b>	16
ARGUMENT	18
POINT I – THIS APPEAL SHOULD BE DISMISSED BECAUSE OF THE FAILURE TO PROSECUTE A PRIOR APPEAL OR TO APPEAL PRIOR FINAL ORDERS RESOLVING THE ISSUES APPELLANT SEEKS TO RAISE HERE	19

	<b>Page</b>
<b>A. <u>Herskowitz’s Failure to Prosecute her Appeal of the October 26 Order Bars This Appeal</u></b>	20
<b>B. <u>The July 27 Decision and Order is Unappealable as a Denial of Reargument</u></b>	22
<b>C. <u>The October 14 Decision and Order Cannot be Reviewed on This Appeal</u></b>	28
<b>D. <u>This Court has Already Upheld Jurisdiction in This Case</u></b>	31
 POINT II – HERSKOWITZ LACKS STANDING TO OBJECT TO THE DISTRIBUTION OR THE ACCOUNTING	 32
 POINT III – THE SUPREME COURT PROPERLY APPROVED THE RECEIVER’S ACCOUNTING	 35
 CONCLUSION	 38
 PRINTING SPECIFICATIONS STATEMENT	 39

## TABLE OF AUTHORITIES

<b>Cases</b>	<b>Page</b>
<i>Application of Burge</i> , 282 A.D. 219, 122 N.Y.S.2d 232 (1 <sup>st</sup> Dep’t 1953)	37
<i>Back v. Stern</i> , 23 A.D.2d 837, 259 N.Y.S.2d 538 (1 <sup>st</sup> Dep’t 1965)	27
<i>Charney v. North Jersey Trading Corp.</i> , 184 A.D.2d 409, 587 N.Y.S.2d 144 (1 <sup>st</sup> Dep’t 1992)	1, 5, 25, 31
<i>Ciafone v. New York University Medical Center</i> , , 35 A.D.3d 780, 828 N.Y.S.2d 149 (2d Dep’t 2006)	29
<i>Collins v. Bertram Yacht Corp.</i> , 53 A.D.2d 527, 384 N.Y.S.2d 186 (1 <sup>st</sup> Dep’t 1976), <i>aff’d</i> , 42 N.Y.2d 1033, 399 N.Y.S.2d 202, 369 N.E.2d 758 (1977)	27, 30
<i>Comber v. Anderson</i> , 34 A.D.2d 333, 824 N.Y.S.2d 276 (1 <sup>st</sup> Dep’t 2001)	21-22, 31
<i>Conserve Elec. Inc. v. Tulger Contracting Corp.</i> , 36 A.D.3d 747, 831 N.Y.S.2d 185 (2d Dep’t 2007)	27-28, 30
<i>Cuccia v. City of New York</i> , 306 A.D.2d 2, 761 N.Y.S.2d 31 (1 <sup>st</sup> Dept. 2003)	23
<i>Foster v. Gherardi</i> , 201 A.D.2d 701, 608 N.Y.S.2d 289 (2d Dep’t 1994)	30
<i>Garner v. Latimer</i> , 306 A.D.2d 209, 761 N.Y.S.2d 657 (1st Dept. 2003)	23
<i>Henderson v. Stilwell</i> , 116 A.D.2d 861, 498 N.Y.S.2d 183 (3d Dep’t 1986)	28, 30

	<b>Page</b>
<i>In re North Jersey Trading Corp.</i> , No. 93-31620 (SAS) (Bankr. D. N.J.) Order dated April 19, 1999	7
<i>In re North Jersey Trading Corp.</i> , No. 93-31620 (SAS) (Bankr. D. N.J.) Opinion dated July 12, 2000	7, 8n.
<i>Insurance Company of Pennsylvania v. HSBC Bank</i> , 10 N.Y.3d 32, 852 N.Y.S.2d 812, 882 N.E.2d 381 (2008)	36
<i>Kanat v. Oscher</i> , 301 A.D.2d 456, 456-57, 755 N.Y.S.2d 371 (1st Dep't 2003)	27, 30
<i>Johnson v. Ford</i> , 33 A.D.3d 529, 823 N.Y.S.2d 67 (1 <sup>st</sup> Dep't 2006)	22
<i>Matter of Application of Susan Charney/Claire Friedlander et al.</i> , No. 113775/95 (Sup. Ct., N.Y. Cty.), <i>aff'd</i> , 233 A.D.2d 147, 649 N.Y.S.2d 145 (1 <sup>st</sup> Dep't 1996)	6
<i>Matter of Herskowitz v. Tompkins</i> , 184 A.D.2d 402, 585 N.Y.S.2d 386, 388 (1 <sup>st</sup> Dept. 1992)	5, 8n., 12, 16n., 31n., 32, 33n.
<i>Meyer v. Petrograd Metal Works</i> , 256 A.D. 1077, 11 N.Y.S.2d 125 (2d Dep't 1939)	37
<i>Morris Heights Health Center v. Della Pietra</i> , 38 A.D.3d 261, 262, 834 N.Y.S.2d 9 (1st Dep't 2007)	22
<i>Robinson v. Saw Mill Works, Inc.</i> , 265 A.D.2d 604, 696 N.Y.S.2d 277 (3d Dep't 1991)	28, 30
<i>Rubeo v. National Grange Mutual Insurance Co.</i> , 93 N.Y.2d 750, 697 N.Y.S.2d 866, 720 N.E.2d 286 (1999)	20-22
<i>Whiteman v. Teminich</i> , 255 A.D.2d 378, 679 N.Y.S.2d 708 (2d Dep't 1998)	21-22

<b>Statutes</b>	<b>Page</b>
CPLR § 5513(a)	19
CPLR § 5701(a)(2)(iv) & (v)	19
<b>Other Authorities</b>	
Restatement (Second) of Judgments § 50	34, 35

## **BRIEF OF RESPONDENT-RECEIVER PAUL WINDELS III**

### **PRELIMINARY STATEMENT**

Respondent Paul Windels III, Receiver of the assets of defendant North Jersey Trading Corporation (“North Jersey”) pursuant to an order of the Supreme Court, New York County, dated May 21, 1991 (annexed as Exhibit A to the Affirmation of Paul Windels III dated September 12, 2005 (“Windels Aff.”) (RA-38-48))<sup>1</sup>, which was affirmed by this Court, *Charney v. North Jersey Trading Corp.*, 184 A.D.2d 409, 587 N.Y.S.2d 144 (1<sup>st</sup> Dep’t 1992), which appointment was continued by an Order of the Supreme Court for New York County dated November 21, 1995, which Order was entered on or about November 24, 1995 (Windels Aff. Ex. B (RA-49-55)), respectfully submits this Brief on appeal.<sup>2</sup>

This appeal was taken from the July 27, 2007, decision and order of the Supreme Court for New York County (Hon. Sherry Klein Heitler, J.) (A-7-12) denying appellant Judith Herskowitz’s motion to reargue the Supreme Court’s October 26, 2006, Order (A-21-25) approving the Receiver’s accounting and

---

<sup>1</sup> Because appellant Herskowitz failed to consult the Receiver in connection with the preparation of an appendix on appeal, the Receiver has been compelled to file a Respondent’s Appendix, citations to which are denoted “RA-” followed by the page citation. Citations to appellant’s Appendix are similarly denoted “A-\_\_”.

<sup>2</sup> Appellant Herskowitz purports not to recognize the Receiver as a party on this appeal and may object to the Receiver’s brief on that ground. In that the Receiver stands in the position of North Jersey and in that this appeal concerns relief granted on motions made by the Receiver, such a position would be frivolous on its face.

discharging him. As demonstrated in the Receiver's accounting, the Receiver has made no payments other than pursuant to the unappealed and final orders of the Supreme Court dated April 13 and October 12, 2004 which directed the distribution of those funds. Windels Aff. ¶¶ 2, 5, 13-17, Ex. C, D (RA-21-24, 26-28, 56-64)). Moreover, since Herskowitz's appeal from the October 26, 2006, Order was dismissed for failure to prosecute and since the denial of a motion for reargument is not appealable as a matter of black letter law, this Court has no jurisdiction to hear Herskowitz's appeal, and the appeal should therefore be dismissed.

#### QUESTIONS PRESENTED

1. Whether issues that were raised on an appeal that was dismissed for failure to prosecute may be raised again in connection with a subsequent appeal by the same party in the same case. This question was not before the Court below.
2. Whether the denial of a motion for reargument is appealable. This question was not before the Court below.
3. Whether a motion may be made to renew a prior motion when it is not based on any facts that the moving party did not know and could not have known at the time of the original motion. The Supreme Court for the County of New York below held that it could not.

4. Whether a party who has submitted papers in response to a motion and appeared for oral argument and whose response was expressly addressed in a preliminary ruling relating to the motion may be considered to have defaulted on that motion when the Court rejected supplemental papers from that party served after the after the return date of the motion. The Court below did not find a default.

5. Whether it was within the Supreme Court's discretion to default a party who failed to appear at a Court hearing after committing on the record to do so, when the Court had already granted that party three adjournments and had advised that party that no further adjournments would be granted. The Court below held that in its discretion that that party should be held in default.

6. Whether a party who has defaulted in connection with a motion must show a reasonable excuse for the default as well as a valid defense of its position on the merits. The Court below held that it did.

7. Whether a party claiming financial hardship as an excuse for a deliberate default must make a showing of financial hardship beyond a conclusory statement in order for such hardship to be considered as an excuse for default.

8. Whether a shareholder of a corporation who is under an unstayed and unappealed order to turn over her shares in that corporation to the sheriff and who

is further a judgment debtor to the corporation has standing to dispute a proposed distribution of funds belonging to that corporation and an accounting for that distribution. The Court below held that that shareholder lacked standing.

9. Whether a receiver who has distributed funds entrusted to him pursuant to unstayed and unappealed Court Orders on notice has carried out his duties when no creditor of the corporation has responded to notice other than creditors who were being paid under the distribution. The Court below held that the receiver had properly carried out his duties.

#### STATEMENT OF FACTS AND PROCEDURAL HISTORY

##### **A. Background – The Underlying Derivative Action**

This action is a derivative action brought by Susan Charney, a shareholder in North Jersey. The other known shareholders are defendants Judith, Robert, and Mark Herskowitz.<sup>3</sup> North Jersey is a privately held, family-owned corporation whose business was the operation of an apartment building on Riverside Drive in New York City. Windels Aff. ¶ 3 (RA-22-23). During the course of repeated motions to dismiss by the defendants on jurisdictional grounds, the Supreme Court (Hon. Harold Tompkins, J.), appointed the Receiver by Order dated May 21, 1991. Windels Aff. Ex. A (RA-30-48). This Court affirmed the denial of those motions

---

<sup>3</sup> For purposes of clarity, \_\_\_\_\_ and \_\_\_\_\_ Herskowitz shall be referred to as “\_\_\_\_\_ Herskowitz” and “\_\_\_\_\_ Herskowitz”, respectively. References to “Herskowitz” are to Judith Herskowitz.

to dismiss and held that the appointment of the Receiver was valid. *Charney v. North Jersey Trading Corp.*, 184 A.D.2d 409, 587 N.Y.S.2d 144 (1<sup>st</sup> Dep't 1992). In a separate proceeding commenced by Ms. Herskowitz seeking to remove Justice Tompkins from the case, this Court dismissed Ms. Herskowitz's appeals and further sanctioned her and her sons \$5,000. *Matter of Herskowitz v. Tompkins*, 184 A.D.2d 402, 585 N.Y.S.2d 386, 388 (1<sup>st</sup> Dept. 1992).

On remand of *Matter of Herskowitz v. Tompkins*, the defendants refused to pay the sanctions ordered by this Court, and failed to produce the books and records of North Jersey or appear for depositions as directed by the Supreme Court. The Supreme Court found defendants (including Judith Herskowitz) in contempt and ordered them to turn over their shares in North Jersey by Order dated September 18, 1992, and entered under both the *Matter of Herskowitz v. Tompkins* and *Charney v. North Jersey Trading Corp.* captions. Windels Aff. Ex. L (RA-96-99). In December 1993 and January 1994, the Supreme Court further entered judgments against defendants Judith, , and . Herskowitz in the approximate amount of \$4 million. Affirmation of Steven Delibert dated May 28, 2003 ("Delibert Aff.") ¶¶ 11-15 (A-34-37), Windels Aff. ¶ 3 (RA-22-23).

The Receiver, however, was prevented from acting as Receiver on account of the prior appointment of another receiver acting on behalf of the mortgage

lender in a foreclosure proceeding and the subsequent commencement of bankruptcy proceedings on behalf of North Jersey in the United States Bankruptcy Court for the District of New Jersey in order to block the foreclosure proceeding. On Charney's motion, the Bankruptcy Court appointed a bankruptcy trustee for North Jersey. Windels Aff. ¶ 6 (RA-24).

**B. The Liquidation of North Jersey to a Surplus and its Remission to the Receiver**

Subsequent to the commencement of the bankruptcy proceeding, counsel for Charney learned that F. and M. Herskowitz had conversion rights in a rent controlled apartment in New York City. Charney therefore commenced an action entitled *Matter of Application of Susan Charney/Claire Friedlander et al.*, No. 113775/95 (Sup. Ct., N.Y. Cty.), *aff'd*, 233 A.D.2d 147, 649 N.Y.S.2d 145 (1<sup>st</sup> Dep't 1996) (the "Turnover Proceeding"), for the purpose of levying upon those rights. The Supreme Court accordingly continued the Receiver's receivership in both the Turnover Proceeding and in this action by Order dated November 21, 1995. Windels Aff. ¶ 7, Ex. B (RA-24, 49-55). Now being unimpeded by the foreclosure proceedings, the Receiver filed his oath and bond on January 5, 1996. Windels Aff. ¶ 10, Ex. G (RA-25-26, 86-91). Charney, the bankruptcy trustee, and the Receiver ultimately agreed with F. and M. Herskowitz to settle that proceeding in exchange for payment of \$150,000 into the bankruptcy estate of

North Jersey, and that agreement was approved by the Bankruptcy Court. *See In re North Jersey Trading Corp.*, No. 93-31620 (SAS) (Bankr. D. N.J.) Order dated April 19, 1999, Windels Aff. ¶ 7, Ex. F (RA-24, 83-85); *see also* Delibert Aff. ¶¶ 25-29 (A-44-46).

In the course of administering the bankruptcy estate, the bankruptcy trustee was able to sell the principal asset of North Jersey – the apartment building on Riverside Drive – at a price that exceeded the liabilities of North Jersey. Consequently, the Bankruptcy Court held a surplus for North Jersey, which surplus was increased as a result of the settlement of the Turnover Proceeding with . . . and . . . Herskowitz. The Bankruptcy Court accordingly dismissed the bankruptcy proceeding on the ground that North Jersey was not entitled to bankruptcy protection because its assets exceeded its liabilities and, after paying off all outstanding liabilities of North Jersey, remitted the surplus of \$663,759.68 to the Receiver. The Bankruptcy Court noted that the Courts of New York were competent to adjudicate how that surplus should be paid out.. *See In re North Jersey Trading Corp.*, No. 93-31620 (SAS) (Bankr. D. N.J.) Opinion dated July 12, 2000 (Windels Aff. Ex. E) at 9 (RA-78); *see also* Delibert Aff. ¶¶ 13, 30-34 (A-35, 46-48).

**C. Proceedings Relating to the Distribution of Funds by the Receiver**

In the course of conducting this derivative litigation, obtaining judgment for over \$4 million against Herskowitz, attempting to enforce that judgment in Florida, settling with [redacted] and [redacted] Herskowitz in the Turnover Proceeding, and representing the interests of North Jersey in the bankruptcy proceeding (culminating in North Jersey's liquidation at a surplus), Charney incurred substantial legal fees.<sup>4</sup> These fees exceeded the \$683,759.68 surplus paid by the Bankruptcy Trustee to the Receiver. Charney, her various counsel, and the Receiver negotiated an agreed plan of distribution of the surplus. Thus, with the agreement of all parties in interest to the funds in the Receiver's possession with the exception of appellant Judith Herskowitz, the Receiver and Charney applied to the Supreme Court for an Order directing distribution of those funds by Order to Show Cause dated May 29, 2003. A-28-30; Delibert Aff. ¶¶ 7-10 (A-32-34). That

---

<sup>4</sup> See generally Delibert Aff. (A-31-59). The extent of these fees is the result of the scorched earth litigation tactics employed by Herskowitz as set forth at paragraphs 14-25 of the Delibert Affirmation (A-36-45). As one example, Herskowitz has moved to disqualify eleven different judges (Delibert Aff. ¶ 23 (A-43-44)) in addition to filing a series of motions to disqualify Justice Heitler below (see Windels Aff. Ex. M at 6-10 (RA-109-12)). This conduct has earned sanctions in each forum in which this matter has been litigated, including by this Court in *Herskowitz v. Tompkins*, 184 A.D.2d 402, 587 N.Y.S.2d 144. See Delibert Aff. ¶ 9 (A-40); see also the opinion of the United States Bankruptcy Court for the District of New Jersey in *In re North Jersey Trading Corp.* dated July 10, 2000 (Windels Aff. Ex. E) at 6-7 (RA-75-76) and the June 8, 2005, Decision and Order of the Supreme Court below (Windels Aff. Ex M (RA-104-15) for further descriptions of Herskowitz's conduct.

The Court: We're way beyond that, Ms. Herskowitz. I am going to see you on the 18<sup>th</sup>.

Ms. Herskowitz: I'm telling the truth. I will see you on the 18th.  
(RA-60).

Notwithstanding her express, on-the-record commitment to appear on November 18, Herskowitz yet again failed to appear in Court, and the Court held Herskowitz in default. By its April 13, 2004, Decision and Order, the Supreme Court granted Charney's application and directed that the Receiver distribute the funds in his possession in accordance with Charney's proposed plan. Windels Aff. ¶¶ 14-15, Ex. C at 3-6 (RA-26-27, 58-61).

Herskowitz sought to vacate that default, arguing that the \$4 million judgment against her was void as having been satisfied by the execution of the satisfactions in favor of [redacted] and [redacted] Herskowitz.<sup>6</sup> By its October 12, 2004, Decision and Order (Windels Aff. Ex. D (RA-54-69)), the Supreme Court denied Herskowitz's application. Noting that it had, at Herskowitz's request, adjourned the return date of the Order to Show Cause three times and that Herskowitz had expressly agreed to be present on the final adjourned date, the Court rejected

---

<sup>6</sup> Herskowitz also argued that the proposed distribution somehow constituted a fraud on the Bankruptcy Court. In response to that argument, the Receiver noted that he had represented to the Bankruptcy Court that he would make no distribution of funds except pursuant to orders of the Courts of New York, which was exactly what he was doing. See Reply Affirmation of Paul Windels III dated October 14, 2003 ¶¶ 4-5, Ex. A (RA-12-13, 18-20).

Herskowitz's contention that her default was somehow excusable.<sup>7</sup> The Court found that default "was both 'wilful and contumacious' and does not warrant this court's exercise of discretion to vacate that default." Windels Aff. Ex. D at 3-4 (RA-67-68). The Court further expressly held that "Herskowitz has offered no legal argument to suggest that there is any merit to her opposition to plaintiff's motion for the disbursement of funds . . . ." (Windels Aff. Ex. D at 4 (RA-68)). After Notice of Entry of the October 12 Decision and Order, which was marked as a Final Disposition, was served on December 13, 2004, and Herskowitz did not file any notice of appeal. Windels Aff. ¶ 16, Ex. D (RA-27, 64).

The Receiver distributed the funds in his possession as directed by the April 13 Order. Windels Aff. ¶¶ 5, 13 (RA-23-24, 26). Other than the parties who received funds pursuant to that Order and who had consented to that distribution, the Receiver received no claims by any creditor of North Jersey after publication of notice of his receivership, nor did any such creditor appear at the creditors' meeting called by the Receiver pursuant to published notice. Windels Aff. ¶¶ 10-11, Ex. H, I, J, K (RA-25-26, 92-95).

---

<sup>7</sup> Herskowitz claimed as an excuse that she was not aware that the arrest warrants had actually been suspended until it was too late for her to purchase an airline ticket to New York at a price she could afford. The Court noted that Herskowitz was free to call the Court at any time to verify that the warrants had been suspended and that her "'bare and self-serving contention that [s]he was unable to afford' a plane ticket is 'made without any offer of financial proof' and 'is not a reasonable excuse for the default.'" Windels Aff. Ex. D at 3-4 (RA-67-68).

Following the denial of her motion to vacate, Herskowitz filed a barrage of motions, including motions to vacate the \$4 million default judgment that had been entered against her over ten years earlier in this case and the even earlier order directing her to turnover her shares in *Herskowitz v. Tompkins*. By Orders entered in this case and *Matter of Herskowitz v. Tompkins* dated June 8, 2005 (Windels Aff. Ex. M (RA-100-16)), the Supreme Court denied all of Herskowitz's motions and further directed that Herskowitz refrain from filing any further motions without written permission from the Court. The Court repeatedly noted that Herskowitz's motions simply sought to relitigate prior decisions of the Court without offering any basis for doing so and expressly denied reargument of those prior determinations.<sup>8</sup> The Court accordingly denied each of Herskowitz's motions "in its entirety" (Windels Aff. Ex. M at 2, 11-12 (RA-102, 113-14). Again, Herskowitz did not appeal the denial of her motions to vacate the judgment against her or of the order to turn over her shares in North Jersey to the Sheriff.<sup>9</sup>

---

<sup>8</sup> In the words of the Court: Herskowitz (a) did not "assert the existence of new facts or new law which would have changed the prior determination of those issues" (Windels Aff. Ex. M at 5 (RA-108)) (b) "offers no new facts or new law . . . no reasonable excuse for her default or 'meritorious defense' on the motion to distribute funds" (*Id.* at 6 (RA-109)) and (c) "again fails to provide the Court with reasonable justification for her default and has presented the court with no new facts that would have changed the court's prior determination on the motion for distribution of funds." (*Id.* at 10 (RA-112).

<sup>9</sup> Notice of Entry of those Decisions and Orders was served on September 12, 2005. The Decision and Order in *Herskowitz v. Charney* was marked as a final disposition. The Decision and Order in this case was marked as non-final in that it was denying motions to reargue. *See* Windels Aff. Ex. M (RA-100, 103).

#### **D. The Receiver's Accounting and Related Proceedings**

The Receiver then moved in September 2005 for approval of his accounting, for an award of fees and disbursements, and to be discharged. In support of his motion, the Receiver pointed out that he had made no distributions except pursuant to unappealed and unstayed final orders of the Court and that no objection had been made except by Judith Herskowitz, who was a judgment debtor of North Jersey and who was under order to turn over her shares in North Jersey to the Sheriff of New York County. *See* Windels Aff. ¶¶ 2-3, 5, 13-17, 21, Ex. L (RA-21-24, 26-28, 96-99). Herskowitz alone objected to the proposed accounting by affirmation and memorandum of law dated September 26, 2005. *See* October 26, 2006, Order at 2-3 (A-23-24).

By Decision and Order dated March 23, 2006 (RA-134-39), Justice Heitler found that Herskowitz lacked standing to oppose the accounting on account of the pending Order in *Herskowitz v. Tompkins* that she turn over her shares in North Jersey to the Sheriff and the \$4 million judgment against her. (RA-96-99). In response to one of Herskowitz's objections, that Decision and Order directed the Receiver to publish further notice of his accounting and to provide further notice to the Attorney General of New York of these proceedings with a return date of September 11, 2006, which the Receiver did. *Id.*, *see also* Affirmation of Paul

Windels III dated September 6, 2006 (“Windels 9/6 Aff.”) (RA-118-31). In response to that publication, the Receiver received no further objections to his accounting, including an express disclaimer of objection from the Attorney General. Windels 9/6 Aff. Ex. D (RA-131). Herskowitz, however, purported to serve further objections on or about August 30, 2006, nearly a year after the return date of the Receiver’s motion. However, she did not appear on September 11, 2006, when the Receiver presented his accounting to the Court. (A-23-24).

Justice Heitler approved the Receiver’s motion by Order filed on October 26, 2006. (A-21-25). The October 26 Order expressly stated that it was based “UPON the affirmation and Memorandum of Law of Judith Herskowitz, both dated September 26, 2005, in opposition to the Receiver’s motion for approval of his accounting and discharge,” among other things (A-22). The Court separately noted that Herskowitz had “served purported additional objections . . . on or about August 30, 2006, which date is after the September 30, 2005 return date of the Receiver’s motion” but had “failed to appear before the Court on September 11, 2006, in support of her objections as required under the rules of this Court” and therefore ordered that “the objections served by Judith Herskowitz are rejected for the foregoing reasons.” (A-23-24).

Herskowitz appealed the October 26, 2006, Order – which was marked as a Final Determination and which she acknowledged was a final determination in her notice of appeal – by notice of appeal dated December 11, 2006. (A-20-21).

Herskowitz also moved on December 11, 2006, “to Renew and to Vacate and to Set Aside” the October 26, 2006, Order. In support of her motion, Herskowitz offered no new facts that were not previously before the Court and no facts that she could not have brought before the Court in connection with prior decisions rendered by the Court. As summed up by the Court below, Herskowitz contended that “a hearing was required before a decision could be rendered [on the Receiver’s accounting]; that she was excluded as not an ‘interested party’ and was threatened with contempt should she appear in court; and finally that the Receiver was never qualified to serve as Receiver.” (A-10).

By Decision and Order dated July 27, 2007, and filed August 1, 2007, the Supreme Court noted that “Herskowitz has made each of her arguments in prior applications which have all been denied” (A-10) and that “this application is once again an attempt to relitigate what has already been decided by this judge and other judges who have presided over this matter.” (A-11). Specifically, the Court noted that, as it had ruled in the October 26 Order, there was no objection to the

Receiver's application by any interested party<sup>10</sup>, that as it had noted in the April 13 and October 12 Decisions and Orders, the Court had stayed the outstanding arrest warrants so that Herskowitz could make court appearances, and, as it had ruled in the June 8 and March 23 Decisions and Orders, that Herskowitz had failed to object to the Receiver's qualifications until such objections were moot. (A-10-11).

The Court held that, as Herskowitz had "fail[ed] to provide the court with any new material facts" (A-10, 12), her motion could not be for renewal.

Considering the motion as a motion for reargument, the Court observed that "a motion to reargue is not just a repetitious application by a litigant who feels he should have reconsideration" and denied the motion "in its entirety." (A-12).

Notice of entry of the July 27, 2007, Decision and Order was served on September 5, 2007, and Herskowitz noticed this appeal on October 3, 2007. (A-6, 13-14).

#### **E. Proceedings in This Court**

After noticing appeals of the October 26, 2006, and July 27, 2007, Orders, Herskowitz took no action to perfect either appeal until September 2007, when she moved for an enlargement of time to perfect her appeal of the October 26 Order.

By Order dated October 18, 2007 (No. M 4754 slip op.), this Court granted her

---

<sup>10</sup> The Court had previously found on March 23, 2006, that Herskowitz was not an interested party because she was subject to the Order in *Herskowitz v. Tompkins* that she turn over her shares in North Jersey and because of the \$4 million judgment against her. (RA-134-39).

motion and directed her to perfect her appeal for the February Term. Herskowitz did not, however, perfect her appeal for the February Term. On January 25, 2008, more than seven weeks after the December 3, 2007, deadline for the February Term had passed, she moved for a further enlargement of time to perfect her appeal, and for an order “to direct the lower court to hold evidentiary hearing , to take proof and for judicial notice of the record.” The Receiver and Charney in response requested that the Court grant no further enlargements of time beyond the June Term and opposed the balance of the motion on the ground that it effectively sought to argue Herskowitz’s appeal on motion papers.

On March 25, 2008 (M-639 slip op.), this Court (Tom, Andrias, Nardelli, Sweeny, JJ.) denied Herskowitz’s motion and *sua sponte* dismissed her appeal of the October 26 Order. This Court denied a further motion by Herskowitz – based on her outrageous and false allegation that the Receiver had forged Charney’s name to their joint memorandum responding to her January 25 motion – on July 1, 2008 (M-2317 slip op.).

On or about July 1, Herskowitz also filed a brief and appendix purporting to relate to both the October 26 and July 27 Orders, and her papers were accepted for the October Term of the Court. In response, the Receiver moved to dismiss the appeal of the July 27 Order on the ground that it was a denial of reargument. That

motion, which Herskowitz opposed, was returnable on August 11, 2008, and is presently pending before the Court.

### ARGUMENT

This appeal relates to an accounting of a distribution made by the receiver of a liquidated corporation pursuant to Court Order entered in response to a motion made on notice to all parties to this litigation. No objection has been made, and no claim to the funds at issue, by any person having an interest in the corporation after the publication of notice of the receivership, of the calling of a creditors' meeting, and of the accounting itself. As found by the Supreme Court below, the only objecting party – who was and is under Court Order to surrender her shares in the corporation and who is a \$4 million judgment debtor to the corporation – lacked standing to object, wilfully defaulted on her objections after being granted three adjournments of the hearing regarding the distribution, offered no valid excuse for her default, and failed to appeal or stay the Orders directing distribution. Moreover, this Court has dismissed her appeal from the Order approving the accounting, with the result that what she is appealing is the denial of reargument of that Order. Under these circumstances, this Court should either dismiss this appeal or hold that the Supreme Court below properly approved the Receiver's accounting.

## POINT I

### THIS APPEAL SHOULD BE DISMISSED BECAUSE OF THE FAILURE TO PROSECUTE A PRIOR APPEAL OR TO APPEAL PRIOR FINAL ORDERS RESOLVING THE ISSUES APPELLANT SEEKS TO RAISE HERE

Herskowitz's failure to appeal the October 14, 2004, final order or to prosecute her appeal of the October 26 Order precludes her from raising issues that were resolved in those orders on this appeal. The New York Civil Practice Law and Rules lay out the structure under which appeals may and must be taken in the Courts of New York. Specifically, under CPLR § 5701(a)(2)(iv) & (v), an appeal may be taken to the appellate division as of right "from an order . . . where the motion it decided was made upon notice and it: . . . (iv) involves some part of the merits; or (v) affects a substantial right . . . ." CPLR § 5513(a) further requires that an appeal of an order as of right "must be taken within thirty days after service . . . upon the appellant of a copy of the judgment or order appealed from and written notice of its entry . . . ." These rules, of course, speak to the jurisdiction of the appellate courts.

Here, notice of entry of the October 14, 2004, Decision and Order was served on Herskowitz on December 13, 2004 (Windels Aff. ¶ 16 (RA-27)). That Decision and Order was entered as a final determination (RA-64) and determined the merits of the claims of Charney and her various counsel to the funds held in the

possession of the Receiver. It was entered over ten years after final judgment in the case was entered against Herskowitz in January 1994 (A-34).<sup>11</sup> Herskowitz failed to appeal that Order. The October 26 Order likewise was entered as a final determination (A-21) allowing the Receiver's accounting, granting his request for fees and disbursements, and discharging him. Herskowitz's appeal of that Order has been dismissed by this Court. What she appeals here is the Supreme Court's denial of reargument of the October 26 Order, which is unappealable as a matter of law.

**A. Herskowitz's Failure to Prosecute her Appeal of the October 26 Order Bars This Appeal**

This Court's dismissal of Herskowitz's appeal of the October 26 Order for failure to prosecute by itself mandates dismissal of this appeal. Directly on point is the decision of the Court of Appeals in *Rubeo v. National Grange Mutual Insurance Co.*, 93 N.Y.2d 750, 697 N.Y.S.2d 866, 720 N.E.2d 286 (1999). In *Rubeo*, the plaintiff appealed an order granting summary judgment against him and simultaneously moved for reargument of that order. The Supreme Court granted reargument and, on reargument, adhered to its prior decision and the plaintiff appealed the Supreme Court's decision on reargument as well. The plaintiff failed,

---

<sup>11</sup> CPLR 5501, which provides that "an appeal from a final judgment brings up for review (1) any non-final judgment or order which necessarily affects the final judgment . . .", has no applicability here, where the October 14, 2004, Decision and Order is a post-judgment order.

however, to perfect his appeal from the initial decision granting summary judgment and the Appellate Division dismissed that appeal for failure to prosecute. The Appellate Division then dismissed the plaintiff's appeal from the decision on reargument – notwithstanding that an appeal would ordinarily lie from that decision – on the ground that the plaintiff could have raised the same issue on his prior appeal which he had abandoned.

The Court of Appeals affirmed the dismissal of the second appeal. The Court held: “If an appeal has been dismissed for failure to prosecute, any subsequent appeal raising an issue presented by the first appeal is subject to dismissal.” 93 N.Y.2d at 754. As the Court further explained, “If no penalty were imposed for failing to prosecute an earlier appeal, litigants could use the appellate process as a means of delaying enforcement of judgments and the inevitable payment of just debts and obligations.” *Id; accord, Combier v. Anderson*, 34 A.D.2d 333, 333-34, 824 N.Y.S.2d 276 (1<sup>st</sup> Dep’t 2001) (“we decline to review issues involving the order that granted defendants partial summary judgment in view of the dismissal of plaintiff’s appeal from that order for failure to prosecute”); *Whiteman v. Teminich*, 255 A.D.2d 378, 679 N.Y.S.2d 708 (2d Dep’t 1998) (dismissal of prior appeal for failure to prosecute bars review of same issue on subsequent appeal).

Since the July 27 Decision and Order denied a motion “to vacate and renew” the October 26 Order, Herskowitz cannot possibly raise any issue on this appeal that she could not have raised on her appeal of the October 26 Order. That (as shown below at pages 22-28) this appeal is from an unappealable denial of reargument makes this a more compelling case for dismissal than under *Rubeo* where the plaintiff concededly had a right to appeal a the Supreme Court’s decision granting reargument and adhering to its prior decision. Under *Rubeo*, *Combier*, and *Whiteman*, her appeal of the July 27 Decision and Order must be dismissed.

**B. The July 27 Decision and Order is Unappealable as a Denial of Reargument**

That Herskowitz seeks to appeal the Supreme Court’s denial of reargument of its October 26, 2006, Order separately mandates dismissal of her appeal. As a matter of black letter law, denials of motions to reargue are unappealable. *Morris Heights Health Center v. Della Pietra*, 38 A.D.3d 261, 262, 834 N.Y.S.2d 9 (1st Dep’t 2007) (“To the extent that the . . . defendants raised claims in a subsequent motion . . . which could have been raised in response to plaintiff’s initial motion, the . . . Defendants were seeking to reargue the first order, denial of which was unappealable”); *Johnson v. Ford*, 33 A.D.3d 529, 823 N.Y.S.2d 67 (1<sup>st</sup> Dep’t 2006) (“Since plaintiffs did not submit any new or additional facts, the motion

court correctly determined that the second motion was really a motion to reargue . . . and denied it as such. The denial of a motion to reargue is not appealable”).<sup>12</sup>

Here, it is beyond question that Justice Heitler’s July 27, 2007, denial of Herskowitz’s motion “in its entirety” (A-12) denied reargument – as distinct from granting reargument and, on reargument, denying the motion on its merits – and as such is unappealable. Nor can Herskowitz characterize her motion as a motion for renewal, which must be based on facts that were unknown to the party asserting them at the time of the original motion and could not have been known at the time. *See Garner v. Latimer*, 306 A.D.2d 209, 761 N.Y.S.2d 657 (1st Dept. 2003) (“a motion for leave to renew is intended to direct the court’s attention to new or additional facts which . . . were unknown to the movant” at the time of the original motion); *Cuccia v. City of New York*, 306 A.D.2d 2, 761 N.Y.S.2d 31 (1<sup>st</sup> Dept. 2003) (“an application to renew must be based upon additional material facts which existed at the time that the prior motion was made but were not then known to the party seeking leave to renew and a valid excuse must be offered for not supplying such facts”). As the Supreme Court found below in the July 27, 2007, Decision and Order, “The Receiver argues that Herskowitz’s motion must be denied as she failed to raise any new facts. . . . The Receiver is correct” (A-10) and

---

<sup>12</sup> Were that not the case, a party could evade the time periods for taking appeals simply by filing endless motions for reargument and appealing the denial of those motions. The rule thus speaks to the appellate jurisdiction of the Court.

Herskowitz “fail[ed] to provide the court with any new material facts” (A-12) on which to base a renewal motion.

Comparison of the points of argument raised in Herskowitz’s brief with the October 26 Order and with earlier and unappealed final Orders of the Supreme Court below eliminates any doubt that this appeal would simply relitigate issues that have been disposed of or were subsumed in those Orders below. Her first argument, that the Bankruptcy Court proceedings barred the distribution and that the proposed distribution somehow constituted a fraud on the Bankruptcy Court, was raised before Justice Heitler in connection with the Orders directing distribution of the funds held by the Receiver, which were entered in April and October 2004 (Reply Affirmation of Paul Windels III dated October 14, 2003 (“Windels Reply Aff.”) ¶¶ 3-6, Windels Aff. Ex. C & D (RA-12-14, 56-69) and were never appealed.<sup>13</sup> Likewise, her second argument that she should have been afforded standing to object because the satisfactions of judgments given to Robert and Mark Herskowitz satisfied the \$4 million judgment against her met with rejection in connection with the October 12, 2004, June 8, 2005 (Windels Aff. Ex.

---

<sup>13</sup> Significantly, Herskowitz has not obtained any stay of these proceedings from the Bankruptcy Court, which she was free to do if her position had any merit. In fact, and as the Receiver pointed out in opposition to that argument, he had represented to the Bankruptcy Court that he would make no distribution of funds except by order of the Courts of New York, which is exactly what he did. *See* Windels Reply Aff. Ex. A ¶ 4 (RA-19). As a result, the Bankruptcy Court expressly left the issue of the distribution of the surplus to the Courts of New York. Windels Aff. Ex. E at 9 (RA-78).

D, M, RA-64-69, 100-15), and March 23, 2006, Decisions (RA-134-39), the latter two being subsumed in the October 26 Order (A-21-25)).<sup>14</sup> Indeed, Herskowitz was aware of the underlying fact for her contention in 2000, when she argued before the Bankruptcy Court that the separate judgment against her should be satisfied as part of the settlement with \_\_\_\_\_ and \_\_\_\_\_ Herskowitz. Windels Aff. Ex. E at 4, 11-12 (RA-73, 80-81).

Justice Heitler further rejected Herskowitz's third and fourth points – that the Receiver was not properly qualified and that there was no statutory basis for his appointment – in her June 8, 2005, decision which again went unappealed and was further subsumed in the October 26 decision. A-11, Windels Aff. Ex. M at 5, 9-10 (RA-108, 111-12). Finally, in continuing to object to the jurisdiction of this Court, Herskowitz seeks to reargue issues that were finally determined in this Court's decision of sixteen years ago in *Charney v. North Jersey Trading Corp.*, 184 A.D.2d 409, 587 N.Y.S.2d 144, as well as being rejected more recently in the unappealed June 8 Decision and Order. At no point has Herskowitz suggested any facts that were unknown to her – and that she could not reasonably have been expected to know – at the time of those prior Orders, which would entitle her to move to renew.

---

<sup>14</sup> Nor did Herskowitz appeal the denial of her motion to vacate the Order that she turn over her shares in North Jersey to the Sheriff in *Herskowitz v. Tompkins*, which by itself would deprive her of standing to object herein. Windels Aff. Ex. L, M (RA-96-102).

Nor can Herskowitz argue that the July 27 Decision and Order is appealable because it denied vacatur of a default on her part in connection with the October 26 Order. In the first place, the October 26 Order nowhere mentions the word default, nor does the July 27 Decision and Order.<sup>15</sup> Indeed, as the plain text of that Order as well as the March 23 Decision and Order establish, the Supreme Court heard Herskowitz's objections (which Herskowitz argued at the January 23, 2006, hearing) on the ground that she lacked standing to make them. What the Court rejected was Herskowitz's *second* set of objections which were served eleven months after the return date of the Receiver's motion and in support of which Herskowitz did not appear. Nothing in the CPLR entitles a party to file multiple sets of objections to a motion *seriatim* and after the return date for that motion and the Supreme Court was well within its discretion in rejecting of those objections, especially since it had already ruled that she lacked standing to make them (RA-134-39).

Even assuming *arguendo* that the October 26 Order was entered on default, however, Herskowitz has failed to raise any justification for such a default. Under

---

<sup>15</sup> Significantly, Herskowitz's Notice of Appeal of the October 26 Order expressly refers to the "final order dated October 23, 2006, entered on October 26, 2006" (A-20). That she sought to vacate her default in connection with the April 13, 2004, Decision and Order without appealing it but oth appealed and moved to "vacate and renew" with respect to the October 26 Order further indicates that she was well aware of the difference between a non-final order on default and a final determination on the merits and that any suggestion to the contrary is a sham.

CPLR 5015(a)(1), a party seeking to vacate a default must show both a reasonable excuse for the default and a valid defense on the merits. *See e.g., Kanat v. Oscher*, 301 A.D.2d 456, 456-57, 755 N.Y.S.2d 371 (1st Dep't 2003) (party seeking to vacate default bears the burden of establishing "both a reasonable excuse for the default and a meritorious defense to the action"). Yet nowhere does her brief to this Court make any such argument and her appendix contains not one scintilla of evidence establishing a reasonable excuse for such a default. To the contrary, given her pattern of defaults throughout twenty years of this litigation, the Supreme Court would have been well within its discretion in finding that she had offered no valid excuse for her default. *See Windels Aff. Ex. C at 3-6, Ex. D at 2-3 (RA-58-60, 66-67)*. As this Court held in *Back v. Stern*, 23 A.D.2d 837, 259 N.Y.S.2d 538 (1st Dep't 1965), where "there is no showing of any adequate excuse for the default – to the contrary it appears to have been a deliberate one . . . such defects mandate a denial of the motion" to vacate. Under numerous decisions of this and other Courts, the establishment of a pattern of defaults presents compelling evidence that the defaults were deliberate. *E.g., Collins v. Bertram Yacht Corp.*, 53 A.D.2d 527, 384 N.Y.S.2d 186 (1st Dep't 1976), *aff'd*, 42 N.Y.2d 1033, 399 N.Y.S.2d 202, 369 N.E.2d 758 (1977) ("plaintiff's default was not inadvertent; it was part of a pattern of default"); *Conserve Elec. Inc. v. Tulger Contracting Corp.*, 36 A.D.3d 747, 831

N.Y.S.2d 185 (2d Dep't 2007) ("repeated failure of defendants' attorney to appear on scheduled trial dates demonstrates a pattern of wilful neglect"); *Robinson v. Saw Mill Works, Inc.*, 265 A.D.2d 604, 696 N.Y.S.2d 277 (3d Dep't 1991) ("defendants' overall pattern of noncompliance and delay gave rise to an inference of wilful and contumacious conduct on their part"); *Henderson v. Stilwell*, 116 A.D.2d 861, 498 N.Y.S.2d 183 (3d Dep't 1986) ("history of delay and evasion on the part of plaintiffs . . . clearly supported an inference that plaintiffs' conduct was . . . wilful and contumacious").

In sum, the July 27 Decision and Order involved neither a motion for renewal based on facts that were unavailable to Herskowitz when she objected to the Receiver's motion for approval of his accounting nor a motion to vacate any default. That Herskowitz has not made and cannot make any showing of a reasonable excuse for any such default confirms that that Decision and Order was in fact – as the Supreme Court held that it was – a denial of reargument and is therefore unappealable.

**C. The October 14 Decision and Order Cannot be Reviewed on This Appeal**

---

Even were the July 27 Decision and Order somehow appealable, Herskowitz's failure to appeal the final October 14, 2004, Decision and Order bars her from raising any issues that were before the Supreme Court in connection with

that Order. That post-judgment Order was entered as a final determination and determined on the merits the claims of Charney and her attorneys to the distribution of the funds held by the Receiver. Directly on point is *Ciafone v. New York University Medical Center*, , 35 A.D.3d 780, 828 N.Y.S.2d 149 (2d Dep't 2006). In *Ciafone*, certain of the defendants had successfully moved to dismiss the claims against them. The plaintiff did not file a notice of appeal from the order granting those dismissals but sought to appeal them on a subsequent appeal involving other defendants. The Second Department held that the plaintiff could not raise the validity of its claims as against the first group of defendants on its subsequent appeal against other defendants because it had failed to appeal the original dismissal of those claims. Here, as in *Ciafone*, a final Order was entered with respect to the merits of the claims of Charney and her attorneys to the funds held by the Receiver and Herskowitz failed to appeal from that Order. *Ciafone* thus precludes Herskowitz from raising any issues regarding the distribution of funds held by the Receiver on this appeal.<sup>16</sup>

Even were the October 14, 2004, Decision and Order reviewable on this appeal, however, Herskowitz has again shown no valid excuse for her default, as

---

<sup>16</sup> To rule otherwise would put the Receiver in the impossible quandary of (a) being subject to an unstayed and unappealed Court Order to distribute the funds while (b) being subject to the risk that that Order might be altered in some way on appeal. Under those circumstances, it was incumbent upon the objecting party – Herskowitz – to appeal and/or seek a stay of the Orders directing distribution, which she never did.

found by the Supreme Court below. In *Kanat v. Oscher*, *supra*, 301 A.D.2d 456, 457-58, 755 N.Y.S.2d 371, this Court held that a “self-serving affidavit that [a party is] unable to afford counsel without any offer of financial proof is not a reasonable excuse” for a default. Here, as Justice Heitler found below, Herskowitz failed to offer any financial proof that she could not afford to travel to New York to attend the November 18 hearing which she had committed to attend less than a month before. Justice Heitler thus acted well within her discretion in holding that Herskowitz had not offered a reasonable excuse for her default and in finding that Herskowitz’s pattern of default demonstrated wilful and contumacious conduct – especially given her two prior failures to appear at Court on dates she had consented to. See *Collins v. Bertram Yacht Corp.*, *supra*, 53 A.D.2d 527, 384 N.Y.S.2d 186; *Conserve Elec. Inc. v. Tulger Contracting Corp.*, *supra*, 36 A.D.3d 747, 831 N.Y.S.2d 185; *Robinson v. Saw Mill Works, Inc.*, *supra*, 265 A.D.2d 604, 696 N.Y.S.2d 277; *Henderson v. Stilwell*, *supra*, 116 A.D.2d 861, 498 N.Y.S.2d 183 (all holding that a pattern of failures to appear demonstrates wilful default); *accord*, *Foster v. Gherardi*, 201 A.D.2d 701, 608 N.Y.S.2d 289 (2d Dep’t 1994) (not abuse of discretion by Supreme Court to refuse to adjourn hearing after previously advising parties that there would be no further adjournments). Justice Heitler was thus well within her discretion in denying Herskowitz’s application to

vacate her wilful default and there is no basis for overruling her October 14 Decision and Order.

**D. This Court has Already Upheld Jurisdiction in This Case**

This Court's 1992 decision in this case, *Charney v. North Jersey Trading Corp.*, 184 A.D.2d 409, 587 N.Y.S.2d 144, bars Herskowitz from relitigating yet again the issue of jurisdiction. In that decision, this Court affirmed the Supreme Court's denial of Herskowitz's motion to dismiss based on jurisdictional grounds. Under the doctrine of law of the case, issues decided on a prior appeal are not subject to reconsideration on a subsequent appeal in the same case. *Combiar v. Anderson, supra*, 34 A.D.2d 333, 824 N.Y.S.2d 276. Here, this Court's 1992 decision regarding personal jurisdiction remains binding in this case, especially after the entry of final judgment against the defendants over fourteen years ago.<sup>17</sup>

---

<sup>17</sup> Of course Herskowitz can raise no jurisdictional argument against the entry of sanctions – including the outstanding order that she turn her shares in North Jersey over to the Sheriff of New York County – entered in *Herskowitz v. Tompkins*, a case that Herskowitz herself commenced in this State.

## POINT II

### HERSKOWITZ LACKS STANDING TO OBJECT TO THE DISTRIBUTION OR THE ACCOUNTING

That Herskowitz remains subject to the Order that she turn over her shares in North Jersey and is a judgment debtor to North Jersey for over \$4 million separately precludes her objections on this appeal. As the Supreme Court held below in the March 23, 2006, Decision and Order, in order to have standing to object to either the Receiver's distribution of funds belonging to North Jersey or the Receiver's accounting relating to that distribution, Herskowitz must be either a shareholder or a creditor of North Jersey. In fact, she is neither as a matter of law. To the contrary, the outstanding Order entered in *Herskowitz v. Tompkins* that she turn over her shares in North Jersey to the Sheriff of New York County precludes her from shareholder status. Herskowitz has never appealed that Order and that this Court accordingly lacks jurisdiction to review it on this appeal in this case.<sup>18</sup> The \$4 million judgment against her and in favor of North Jersey in this case – again never appealed and still pending – likewise bars her from claiming to be a creditor of North Jersey. Even were that judgment to be vacated, however, at no

---

<sup>18</sup> Herskowitz also failed to appeal the June 8, 2005, Decision and Order in *Herskowitz v. Tompkins* denying her motion to vacate that Order, which was marked as a final determination in that case (RA-100).

time in connection with the Receiver's distribution of funds has Herskowitz made any claim to be a creditor of North Jersey.

Herskowitz's contention that the satisfaction of the judgments against [redacted] and [redacted] Herskowitz extinguishes the judgment against her does not alter the result. As noted above, Herskowitz unsuccessfully raised that issue before the Bankruptcy Court (which refused to require that she be given as satisfaction in connection with that settlement) and in opposition to the proposed distribution, with the result that that issue should have been raised in an appeal of the final October 14 Decision and Order and cannot be raised here. Even were she not precluded from relitigating that issue, however, none of the cases Herskowitz cites actually held that the issuance of a satisfaction of judgment against one defendant based on payment of less than the full judgment amount satisfied that judgment as against all defendants. Moreover, even if the money judgment against her were satisfied as a matter of law, that has nothing to do with the September 18, 1992, Order that she turn over her shares in North Jersey to the Sheriff of New York County, which was entered against her in another case and based on her contempt of Court and was not a money judgment in favor of Charney.<sup>19</sup> So long as that

---

<sup>19</sup> Herskowitz's motion to vacate that Order in *Matter of Herskowitz v. Tompkins* was denied on June 8, 2005, and she did not take an appeal from the denial of that motion.

unappealed Order remains in place, she has no standing as a shareholder of North Jersey and cannot object to the Receiver's accounting of his distribution of funds.

Were that not enough, the Restatement of Judgments (Second) – which was published after those cases were decided – notes that the present rule in effect in most recent decisions would only reduce the amount of the judgment against the non-settling defendant by the amount of the settlement. Section 50 of the Restatement provides:

When a judgment has been rendered against one of several persons each of whom is liable for the loss claimed in the action on which the judgment is based:

(1) A satisfaction or release of the judgment, or covenant not to execute upon it, or other agreement terminating in whole or in part the judgment debtor's obligation does not discharge the liability of any of the other persons liable for the loss, except:

(a) To the extent that the agreement may so provide; and

(b) To the extent required by the law of suretyship.

(2) Any consideration received by the judgment creditor in payment of the judgment debtor's obligation discharges, to the extent of the amount of value received, the liability to the judgment creditor of all other persons liable for the loss.

Restatement (Second) of Judgments § 50.

The stated rationale for the modern rule is that the rules regarding settlements with joint tortfeasors and obligors have likewise changed so that an

aggrieved plaintiff may settle with one obligor or joint tortfeasor and maintain his claim against all others, subject to a set-off in the amount of the actual settlement. *Id.* at volume 2, page 41. The modern rule as reflected in the Restatement encourages settlement of cases, and such a policy would be particularly fitting here, where Charney and the Receiver were faced with having to settle on an inchoate asset which could have vanished if not converted into cash. The Receiver and Charney therefore respectfully suggest that, should the Court this issue be properly before it on this appeal, it should hold that the effect of the Satisfactions given to \_\_\_\_\_ and \_\_\_\_\_ Herskowitz on the money judgment against Judith Herskowitz should be to reduce that judgment by \$150,000.

### POINT III

#### THE SUPREME COURT PROPERLY APPROVED THE RECEIVER'S ACCOUNTING

Even if Herskowitz could be permitted to raise arguments on this appeal that she should have raised in prior appeals or appeals that she abandoned, even if she could excuse her wilful defaults below, even if she had standing to object, she has no basis whatsoever for objecting to the Receiver's accounting. For, as demonstrated in that accounting, the Receiver distributed no funds except as Ordered by the Supreme Court below on motions served on the parties to this

litigation.<sup>20</sup> Other than the parties to the distribution, no claimants for the funds appeared in response to the Receiver's published notices of his receivership and call of a creditors' meeting.<sup>21</sup> Nobody at all other than Herskowitz objected to the accounting. Under these circumstances, where the Receiver was subject to unstayed and unappealed Court Orders to distribute the funds in his possession, the Receiver had no choice but to make that distribution, and there can be no basis for objecting to his accounting that he did exactly that. In short, as the Supreme Court found below, the Receiver was duly qualified, gave proper notice including additional notice of his accounting, and "fully and faithfully carried out his duties under the law of this State . . . ." (A-24).

None of the cases cited by Herskowitz in her brief are to the contrary. *Insurance Company of Pennsylvania v. HSBC Bank*, 10 N.Y.3d 32, 852 N.Y.S.2d 812, 882 N.E.2d 381 (2008), barred a claim to a fund that had already been awarded to a bank by a bankruptcy court under the doctrine of *res judicata*. Here, by contrast, the Bankruptcy Court expressly held that it was for the New York Courts to determine how to distribute the surplus it was remitting to the Receiver.

---

<sup>20</sup> The accounting did not relate to the fees awarded by the Court to the Receiver in the October 26 Order, which the Receiver sought in conjunction with the accounting along with his discharge.

<sup>21</sup> This is hardly surprising since the creditors of North Jersey were paid off as part of the bankruptcy proceeding in order for North Jersey to have been liquidated at a surplus.

Far from making an award out of that surplus that would be entitled to *res judicata* effect, the Bankruptcy Court deferred that entire issue to the Courts of New York.<sup>22</sup>

That North Jersey owned and operated a building in New York City and is a closed corporation all of whose shareholders are known to the Court (Windels Aff. ¶ 28, Sch. 4 (RA-28, 37) and that Charney is a New York resident distinguishes cases like *Meyer v. Petrograd Metal Works*, 256 A.D. 1077, 11 N.Y.S.2d 125 (2d Dep't 1939) (case involving nationalization by the Soviet Union of a Soviet company), and *Application of Burge*, 282 A.D. 219, 122 N.Y.S.2d 232 (1<sup>st</sup> Dep't 1953) (case involving nationalization by Czechoslovakia of a Czech bank).

Moreover, the Receiver did qualify and file his oath and bond when he and Charney were able to seize an asset of North Jersey that was located in New York – specifically the cooperative conversion rights of [redacted] and [redacted] Herskowitz in a residential building located in New York City, which was liquidated through the payment of \$150,000 into North Jersey's bankruptcy estate and ultimately returned to the Receiver as part of the surplus.

---

<sup>22</sup> If the proposed distribution actually ran afoul of any ruling made in the Bankruptcy proceeding, Herskowitz was of course free to seek to reopen the bankruptcy proceedings and obtain a stay of these proceedings. No such stay has been issued, however. Moreover, even if the Bankruptcy Court in denying fees to Charney's counsel in the context of the bankruptcy proceeding barred an award in the context of this derivative case, the result would be the same. Because [redacted] and [redacted] Herskowitz had disclaimed any interest in the proceeds of the bankruptcy case and because Judith Herskowitz remained subject to the Order to turn over her shares and remained a judgment debtor to North Jersey, the Court could only have awarded the fees to Charney, out of which Charney could have paid her counsel in the same manner as agreed among themselves.

CONCLUSION

For the reasons set forth above, this appeal should be dismissed – or in the alternative the Decision and Order of the Supreme Court, New York County, should be affirmed, together with such other and further relief as the Court may deem just and proper.

Dated: Scarsdale, New York  
September 2, 2008

Respectfully Submitted,

PAUL WINDELS III



Paul Windels III  
187 Garth Road  
Scarsdale, New York 10583  
(212) 374-9260  
Attorney for Paul Windels III,  
Receiver