

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NEW YORK

SUSAN CHARNEY,

Plaintiff,

-against-

NORTH JERSEY TRADING CORPORATION,
ALEXANDER FRIED, JUDITH HERSKOWITZ,
XXX HERSKOWITZ and XXX
HERSKOWITZ,

Index No. 24517/88

Defendants.

**MEMORANDUM OF LAW IN SUPPORT OF CROSS-MOTION
FOR STAY AND/OR TO ABATE IN DEFERENCE TO
PRE-EMPTIVE AND PRIMARY JURISDICTION OF OTHER PROCEEDINGS**

This Memorandum is submitted in support of this Cross-Motion for Stay and/or to Abate in deference to the pre-emptive jurisdiction of the United States Bankruptcy Court and Federal Bankruptcy Statutes; and the primary jurisdiction of the pending Florida action commenced by Charney to domesticate her New York judgments, upon which final judgment has yet to be entered. The facts supporting this motion are described in the accompanying Affidavit of Judith Herskowitz. As those facts, and the matters presented in this motion and memorandum will demonstrate, beyond question, this Court cannot proceed in the face of the pre-dominant jurisdictional forums, lacks to proceed under law, and the exercise of any such power is unlawful.

STATEMENT OF FACTS

The litigation that Charney commenced in this case in December 1988, had terminated close ten years ago with a default judgment in November 1993 against XXX and XXX Herskowitz and with the same judgment entered against Judith Herskowitz in January 1994. Regardless Charney

would now attempt to seek attorney fees that it is barred on the additional ground of an intervening Chapter 11 Bankruptcy of North Jersey Trading Corporation, which disposed of all claims for counsel fees either as a pre-petition claim or as a claim for administrative expenses. Plaintiff Charney upon Affirmation of her attorney Steven Delibert procured the Order to Show Cause for distribution of funds, supposedly on the basis of New York Business Corporation Law §626(e). Charney's Motion for Disbursement of Assets is invalid as a matter of law because §626(e) provides only that the Court may award the plaintiff reasonable attorney fees if anything is recovered in a derivative suit and makes no provision for the distribution of the entire remaining corporate funds of close to three quarter million dollars for Charney and her entourage of attorneys.

It is noteworthy that while Delibert recites in his Affirmation a laundry list of suits and procedures upon which Charney seeks those counsel fees, not one of them was pursued by "Charney as a shareholder of North Jersey Suing in the Right of North Jersey Trading Corporation" so as to entitle her to the attorney fees she now claims under §626(e) for a purported derivative action.

Charney's initial objective in commencing suit was not for any benefit of North Jersey, but for her personal pecuniary benefit, to force her elderly father Alex Fried to give her a substantial payout from his business North Jersey Trading Corporation ("North Jersey"). The corporation at the time was a going concern for thirty years, with less than a \$200,000.00 mortgage with a number of vacant apartments with a bright future for co-op conversion or to bring the rents up to XXXet. When Charney's demands were not met, she began this litigation, to liquidate the real property and to destroy the corporation. In her Verified Complaint Charney individually sought to be declared to be a shareholder of North Jersey, the dissolution of North Jersey, payout for her alleged shares, damages for three million dollars and the appointment of a receiver. As an afterthought Charney

then filed a new complaint to change her claim from the three million dollar damages individually to state it derivatively on behalf of North Jersey, which as proven at this stage was a litigation by Charney, her attorney Delibert and her other attorneys to totally deplete North Jersey for their personal enrichment.

To accomplish their end they resorted to unlawful means to gain in personam jurisdiction over the defendants Alex Fried, Judith Herskowitz, and XXX Herskowitz citizens and residents of the State of Florida who were not subject to the jurisdiction of the New York court.

The main falsity of Charney's motion centers on Charney's assertion that her litigation benefitted North Jersey. In fact she caused its ruination. The objective then, as is obvious from her Motion for Disbursement is to confiscate the proceeds from the sale of the corporation's real estate for the personal benefit of Plaintiff Charney and for her entourage of attorneys.

As a coverup for their wrongful objectives, Delibert criticizes the defendants Judith Herskowitz and her two sons XXX and XXX Herskowitz ("the Herskowitzes") for daring to oppose his ceaseless lawless litigation for the takeover of North Jersey. Delibert would make it appear that it is the Herskowitzes who were the aggressors, when the fact is that the litigation was commenced in the name of Charney against the Herskowitzes and against Alex Fried her own father. By Delibert's own admission, he pursued the case full time charging only nominal fees to Charney while anticipating that the fees which he now claims in the sum of 1.1 million dollars would come out of the corporate entity.

The Affirmation is silent on the corrupt and illegal methods that Charney relied on to prevail against the nonresident Herskowitzes and Fried citizens of the State of Florida, by resorting to abusive tactics including sanctions to deprive the Herskowitzs' of their opportunity to be heard on

defensive motions going to jurisdiction and as to the validity of the derivative action. There is no reference to any evidence to support Charney's claims for the 40% stock interest in North Jersey or upon what basis the nonresident Judith Herskowitz mismanaged the North Jersey property, when she did not even live in New York City.

Charney commenced litigation not only in the State of New York, but the Herskowitzes were sued by her in the State of Florida as well with an action to domesticate the New York judgments. Delibert acknowledges that it was Charney's actions that "spawned collateral defensive actions". Delibert in the name of Charney would clean out North Jersey totally, which in reality is nothing less than a dissolution of the corporation, without as much as the required legal procedures, and by methods beyond the jurisdiction of this Court, since North Jersey is a foreign corporation that can be dissolved only in the State of its incorporation, which is New Jersey. Further disregarded by Delibert is that the corporate entity is still an active corporation, so that decision affecting its very existence would require a decision by its board of directors.

Obviously in pursuit of these substantial fees, there can be no trifling obstacles for Delibert such as the rule of law. Delibert by his own admission managed to eliminate all the interested parties, including his own client Charney, with only Judith Herskowitz remaining to object to his unlawful scheme. While Charney acknowledges a settlement agreement with XXX and XXX Herskowitz she conveniently disregards that the full satisfaction of judgment given to XXX and XXX Herskowitz, on that derivative judgment was joint and several as to all defendants, and arose from the common conduct alleged against them, and so under well settled law discharges the judgment against Judith Herskowitz as well. Charney can rely on that 4.2 million dollar judgment against Judith Herskowitz all she wants, but by her own actions it was satisfied as a matter of law.

As for the transfer of the funds to Paul Windels III named as the receiver of the assets of

North Jersey this was yet another fraudulent scheme upon which Charney relies. The record shows that Windels has never filed an oath to serve North Jersey, and falsely claimed to be named the receiver of the real property of North Jersey when that property was no longer owned by North Jersey. Windels has not acted for the benefit of North Jersey but solely to serve the personal interest of plaintiff Charney and her attorney, Steven Delibert under his collusive oath to Charney. As such, Windels is without any authority to distribute corporate proceeds when that is in violation of the rules and laws of this State and the jurisdiction and procedures of the Bankruptcy Court.

ARGUMENT
POINT I

THE UNITED STATES BANKRUPTCY COURT AND FEDERAL BANKRUPTCY STATUTES PRE-EMPT ANY POWER IN THIS COURT TO AUTHORIZE THE DISTRIBUTION OF PROCEEDS TRANSFERRED FROM THE BANKRUPTCY COURT IN THE CUSTODY OF THE DESIGNATED RECEIVER AND ANY PAYMENT OF SUCH FUNDS IN THE CIRCUMVENTION OF THE ORDERS AND PROCEDURES OF THE BANKRUPTCY COURT IS A FEDERAL OFFENSE

A. THE BANKRUPTCY COURT HAS ALREADY DISPOSED OF ALL CLAIMS FOR FEES AND HAD SPECIFICALLY REJECTED THE CLAIMS PRESENTED ON THE PENDING MOTION TO DISBURSE PROCEEDS

The Statement of Facts by Charney's attorney Steven Delibert in support of Charney's motion to distribute assets, on page 5 thereof, informs that the

"Bankruptcy Court appointed a trustee sold the corporations real estate and paid the creditors leaving a surplus of approximately \$512,000.00 in the Bankruptcy Court **after payment of all debts and administrative costs.**" (Emphasis supplied)

Also on page 5, Delibert informs how, with the consent of the Bankruptcy court, a settlement was negotiated with XXX and XXX Herskowitz, whereby, they "paid \$150,000.00 to the bankruptcy trustee" in exchange for a "co-operative conversion interest of XXX Herskowitz in New York".

Thereafter, “the bankruptcy surplus of approximately of \$512,000.00 plus the settlement of \$150,000.00 totaling over \$662,000.00 was transferred to the named receiver. As Delibert informs on page 6, the additional interest of \$22,000.00 has produced a fund of approximately \$682,226.00 in the custody of the named receiver, Paul Windels, III. As Delibert states at last, the Plaintiff Susan Charney now seeks to have “the remaining corporate assets of approximately \$682,225.89” distributed to herself and her various attorneys. As discussed below any such distribution will be in circumvention of the order of the Bankruptcy Court and will in fact be illegal.

On July 10, 2000 Judge Stripp issued a Letter Opinion granting Trustee’s Motion to Dismiss the Chapter 11 Bankruptcy case. On page 5 of that opinion 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”. So, that there was no Bankruptcy Order allowing those funds to be used for any division of fees for the attorneys of Charney.

It was expressly acknowledged in the November 24, 1995, order of Justice Tompkins with regard to the powers of the named receiver Paul Windels III that it is

“Ordered that all of the said powers of the said Receiver shall be subject and subordinate to such orders as may issue from the United States Bankruptcy Court for the District of New Jersey in the matter entitled In re North Jersey Trading Corp., No. 93-31620-SA”

Therefore, even by prior order of this Court, Windels is without power to arrange for and permit the distribution of the remaining proceeds of the corporation that were transferred into his custody in

violation of the orders and jurisdiction of the Bankruptcy Court.

Furthermore, at issue is a so-called derivative judgment. Well settled bankruptcy law, provides that “Once bankruptcy petition has been filed, property rights belonging to debtor under state law becomes assets of estate.” *Koch Refining v. Farmers union Cent. Exchange, Inc.* 831 F.2d 1139 (7th Cir. 1987) It was made clear in *Mitchell Excavators by Mitchell v. Mitchell* 734 F.2d 129 (2nd Cir. 1984) that in the event of bankruptcy a derivative action and judgment becomes the property of debtor’s estate. Since the fees in a derivative suit are to be paid from the corporate funds and that is under administration of the bankruptcy court, it follows that any application for counsel fees and expenses is required to be made in the bankruptcy court.

Therefore, Charney’s §626(e) motion was pre-empted under Federal law, and the dispositive orders of the Bankruptcy Court. This particularly as shown in ¶50 of the Affidavit of Judith Herskowitz hereinbefore referred to as the “Affidavit”. So, because the derivative judgment was entered after the filing of the Bankruptcy Petition it became a property of debtor and in fact it was treated as such. In fact as noted in ¶58 of the Affidavit the applications in the Bankruptcy Court made on behalf of attorney Delibert recognized that fees could be awarded on only if Charney -

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

Thus, contrary to Delibert’s misleading contention, the fee award is not based on the number of hours spent by the attorney, but the actual recovery on the derivative judgment. The fees that Charney is seeking to distribute from corporate assets are based upon pre-petition hours, and a settlement on a derivative judgment during the bankruptcy so that application had to be made in the Bankruptcy Court. Although §626(e) proceeding, allows for fees related to the derivative judgment,

too, because here the only recovery thereon occurred under the supervision of the bankruptcy case and because Delibert ended all efforts for Charney in 2000 when the Bankruptcy case was closed, he is foreclosed from claiming additional fees.

Every single claim for distribution had to be presented to the Bankruptcy Court, and it was either allowed or rejected. The pre-empted jurisdiction in the Bankruptcy Court to determine such claims arises under Title II, United States Code, §§ 501, 502, 503 and 504, as well as § 726, governing the distribution of property of the estate. To claim against a debtor or its bankruptcy estate, the creditor may file a proof of claim pursuant to 11 U.S.C. § 501. Such claim may be allowed or disallowed under 11 U.S.C. § 502. Under 11 U.S.C. §503(b)(4), reasonable compensation for professional services rendered by an attorney may be allowed as an administrative expense and under 11 U.S.C. § 504 provisions related to when the sharing of compensation are set forth.

It is well settled that holders of disputed and unliquidated claims are required to file proof of claim to receive distribution from the Chapter 11 estate. Disputed and unliquidated claims for which no timely proofs had been filed, are discharged in a Chapter 11 case and are no longer obligation of debtor. *In Re: Nutri Bevco, Inc.* 117 B.R. (Bkrcty S.D. N.Y. 1990) The within action of Charney was listed as a disputed claim for legal fees in the Bankruptcy Petition of North Jersey. Thus, reaffirming that the Bankruptcy Court was the place for Charney's and her attorneys to make their claims for fees.

As noted in the accompanying Affidavit of Defendant Judith Herskowitz in ¶59, Delibert made application for fees pursuant to 11 U.S.C. §503(b)(4) and was allowed fees and expenses of \$22,789.15 on March 20,1995 and \$27, 172.72 on September 11, 1995. As such, Delibert already received nearly \$50,000.00 in fees and costs for his role in that so-called derivative suit, Delibert was

fully aware and acknowledged that all his fee application had to be made in the Bankruptcy Court.

In fact, as noted in ¶60 of Judith Herskowitz's affidavit, when Delibert made a third application, the Bankruptcy Court by letter opinion of May 2, 1997, rejected any additional allowance of compensation, finding that whatever "substantial contribution" to the corporate debtor was used to justify prior fee allowances could not be used to justify any further awards. Also, with respect to the Florida litigation, the Bankruptcy Court found that Charney'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".

Consequently, the Bankruptcy Court has already allowed and disallowed, and fully determined all the claims against the assets of the corporation that Charney seeks to have this Court distribute in circumvention of the Bankruptcy Courts orders and procedures.

Delibert refers to the fact that when the Bankruptcy case was dismissed the remaining proceeds were transferred to the receiver named in this case. Yet this transfer of custody from he Bankruptcy Trustee to the named receiver conferred no power on the receiver of this Court to direct the distribution of these Chapter 11 assets in a manner contrary to Federal law. Attention is called to 11 U.S.C. §349 on the effect of dismissal in which subsection (b)(3)

"(3) reverts the property of the estate in the entity in which such property was vested immediately before the commencement of the case under this title."

The title at all times to the property of the estate prior to filing of the petition for bankruptcy vested in North Jersey and the funds in issue were the result of the sale of that real property.

Furthermore under 11 U.S.C. §726 (a)(6), the sequence of distribution of the property of the estate requires that after an estate has been fully administered as occurred in the case of North Jersey Trading Corporation, the property is to be distributed "to the debtor".

B. THE RECEIVER HAS NO POWER UNDER NEW YORK LAW TO SERVE AND HOLD ASSETS UNDER A FALSE OATH AND HAS NO POWER TO DISTRIBUTE THE FUNDS WHICH WERE FRAUDULENTLY TRANSFERRED INTO HIS CUSTODY FROM THE BANKRUPTCY COURT

The funds in the hand of Windels initially in the sum of \$663,759.68 (now with interest in the sum of \$682,225.89) was transferred to him around August 2000, on termination of the bankruptcy case of North Jersey in the United States Bankruptcy Court for Trenton, New Jersey, Case No. 93-31620. Charney induced the Bankruptcy Court to transfer those funds to the alleged New York court receiver on her representations that it would be distributed to the shareholders, insisting that the New York court is better suited for these purposes, and to resolve issues of New York law. However, this was just an illegally created conduit to syphon the funds out of the Bankruptcy Court because Windels never intended and never moved to distribute those funds, to the shareholders. When after three years Judith Herskowitz began to question what happened to those funds then Charney through Delibert moved in the New York court with a “Motion Directing Disbursement of Assets” pursuant to N.Y. Business Corporation Law § 626(e). The motion is supported with Delibert’s Affirmation of May 28, 2003 seeking court approval of that illegal and collusive agreement to divide the said funds as fees among the attorneys as noted above.

The collusional nature of this fee splitting arrangement is evidenced by Windels’ Affirmation in support of the motion. Yet, Windels never pursued collection efforts on the derivative judgment, and did not join in Charney’s action to domesticate her judgments in Florida, proving that Charney’s reliance on NY CPLR §5228 was a sham, and that her domestication efforts in Florida were exclusively individual much as the Bankruptcy Court found.

Windels and Delibert as attorneys, must be fully aware that the New York court is without jurisdiction under BCL § 626(e) to order the distribution of funds in the hands of a receiver. This is

yet another scheme to defraud North Jersey. Under § 626(e) the court may award reasonable attorney fees from the corporation in a stockholder's derivative suit based on the recovery for the corporation and strictly for pursuing that suit for the corporation. However, this statute is clearly inapplicable to Delibert/Windels' fee arrangement for several unassailable reasons:

1) The initial 1988 complaint was for Charney individually and it was litigated as such until the May 21, 1991 order of this Court requiring the Herskowitzes to respond to the Amended Complaint designated as the "Verified Petition". Even that Amended Complaint except for one count of the seven count complaint was pursued by Charney individually which were: three counts for the dissolution of North Jersey relying on N.Y. BCL § 1104(c) and N.J. Stat. §14A:12-7(b) 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; the appointment of a receiver for the property of North Jersey pursuant to, N.Y. BCL §1202(a)(1) and (a)(3) all individually for Charney only one claim Count VII derivatively on behalf of North Jersey pursuant to N.Y. BCL §626. Still the judgments procured on the derivative claim was by default, without discovery and without opposition, requiring just a minimal effort for which Delibert can show no allocated time.

2) No statutory authority has been cited to authorize fees to be paid to attorneys retained by Charney in Florida (Christu, Hark, and Carlton Fields) who never appeared in the New York court. Also for Livingston who was not an attorney in that derivative suit.

3) The making of any claims in the New York State court would be precluded by the prior federal bankruptcy court case, in which the claims against North Jersey were required to be made either as a prepetition claim or as administrative expenses pursuant to 11 USC §§ 501- 504, as noted in Point I(A) hereinabove.

Moreover, Windels has never taken an oath and lacks authority to serve as receiver of North Jersey or to assume the duties of receiver of the assets of North Jersey, for the following reasons:

1) Charney initially sought the appointment of a temporary receiver of the property of North Jersey pursuant to N.Y. BCL §1202 and N.Y. CPLR §6401 by motion dated February 7, 1991. An order dated May 21, 1991 was entered by the Court appointing Paul Windels III as the temporary receiver of the property of North Jersey. (Attached to Charney's motion as Exhibit B) However, Windels did not execute an oath, posted no bond and did not serve as receiver under that May 21st order. That is because the litigation by Charney through her attorney Delibert forced the real property into foreclosure, in which the court appointed its own receiver. Without regard to the foregoing, Windels misrepresents himself in his Affirmation in Support of Proposed Distribution, affirmed on May 28, 2003, under penalty of perjury, that he is the "receiver of the assets of North Jersey Trading Corporation ("North Jersey") pursuant to this Court's order of May 21, 1991."

2) In October 1993, on Charney's motion in the Bankruptcy Court case, a trustee was appointed for North Jersey, who assumed control over the North Jersey real property. The final judgments Charney procured in the New York Supreme Court, on behalf of North Jersey dated November 22, 1993 and January 21, 1994 terminated the action and the temporary receivership, and made no provision whatsoever [under N.Y. BCL §1203(b)] to continue Windels as the temporary receiver or as a permanent receiver for North Jersey.

3) Delibert through Charney acting in further collusion with Windels to get the remaining funds of North Jersey into the hands of Windels, moved in the Supreme Court of New York, without the required notice and service with an ex parte motion dated September 28, 1995 to appoint Windels as post judgment receiver pursuant to N.Y. CPLR §§5106, 5228 and 6401. Charney made

no application in that motion for the appointment of a permanent receiver under Article 12.

4) An order dated November 20, 1995 was entered appointing Windels specifically only under N.Y. CPLR §5228, and to have the powers pursuant to §6401(b). (Attached to Charney's instant motion as Exhibit C) Based upon that order, Windels filed an "Oath of Receiver" sworn to on January 4, 1996 (Exhibit A) specifically reciting that he is the

"duly appointed Receiver for the benefit of Plaintiff's "of all rents, issues and profits of mortgaged premises described in the Complaint in the above entitled action [Index No. 24517/88]"

The Plaintiff named in the caption of the case to this oath was Susan Charney, and she alone, so no oath for the benefit of North Jersey was taken by Windels. Also ¶2 of the complaint, as indexed above refers to -

"North Jersey Trading Corporation (hereafter "North Jersey" or Corporate Defendant"), is a New Jersey corporation.....owning as its principal asset a parcel of real property located at and known as No. 200 Riverside Drive, within the City and County of New York". (Emphasis supplied) (Copy of the oath attached as Exhibit "A")

Thus Windels knew that his oath was false and perjured, because he was fully aware that the real property known as 200 Riverside Drive in N.Y.C. was no longer owned and controlled by North Jersey at the time he took that oath on January 4, 1995, since it was sold in August 1994, by the New Jersey Bankruptcy Court trustee.

5) Pursuant to Siegal Practice Commentary C5105:1 the receivership under §5106 is a post-judgment enforcement counterpart of the temporary receivership of §6401. Both are available only where a party is seeking to establish a right to or interest in a specific property which is the subject matter of the action, but neither §5106 nor §6401 is available where the action is for money. Since

the North Jersey real property was sold in August 1994, these provisions were inapplicable.

6) Only N.Y. CPLR §5228 applies to the enforcement of a money judgment. However, it is provided under §5228 that §6402 applies, likewise requiring an oath to be taken before a receiver can enter upon his duties. §6403 also requires the posting of a bond. The final judgments Charney procured in the New York Supreme Court, on behalf of North Jersey dated November 22, 1993 and January 21, 1994 against the Herskowitzes, are strictly money judgments for about 4.2 million dollars, entered by default.

Since Windels has taken no oath and posted no bond for North Jersey he is equally unauthorized to act as the receiver of North Jersey pursuant to §5228. (Copies of the judgments attached to Charney's instant motion as Exhibit A) McKinneys Forms §12:01 Chapter 12, Receivership in General, makes a clear distinction between a temporary receiver and a permanent receiver under Article 12 -

"This text deals only with corporate receivership as by BCL Article 12. The BCL authorizes both temporary and permanent receiverships in cases of both domestic and foreign corporations. A temporary receiver is one appointed before final judgment or order; a permanent receiver is one appointed by a final judgment or order; or is a temporary receiver who has been continued by the final judgment or order. BCL §1203. The powers of a permanent receiver are set forth in BCL §1206 save for the power to employ counsel which is to be found in CPLR 5228(a). Temporary receivership as a provisional remedy is covered by CPLR 6401 to 6405. See *Copake Lake Development Corp. v. Zasuly*, 1967, 72 A.D.2d 810, 277 N.Y.S.2d 750. Receivers appointed in aid of satisfaction of a judgment are governed by CPLR 5228".

Thus, clearly under these provisions Windels cannot and does not serve as the receiver of the assets of North Jersey.

Were Windels a receiver he most certainly could not enter into the fee agreement he is supporting in that Motion for Disbursement inasmuch as under both N.Y. BCL §626(e) and federal

Bankruptcy Code 11 USC §501-504 the awarding of fees has to be commensurate to the value of the benefit derived by the corporation from the legal services provided. Claims for legal fees that exceed the value of the benefit are not authorized. Obviously a fee claim of over 1.1 million dollars and an agreement to pay the entire remaining corporate funds of \$700,000.00 for that claim based upon a benefit of \$150,000.00 is both excessive and illegal. Moreover, were his appointment under §5228 valid, then only he could have retained the Florida attorneys with respect to Charney's effort to domesticate the New York derivative judgment.

The named Receiver is further seeking commission on the funds transferred from the bank account of the bankruptcy trustee. First of all he has not been appointed as an Article 12 receiver to be entitled to the Article 12 fees that he claims. Additionally, since he has not taken an oath to serve North Jersey he could not assume his duties to North Jersey and therefore, he is not entitled any fees on this additional ground. Even if had he taken the oath (which is not the case) he would still not be entitled to commissions on the amount which was on deposit when he assumed his duties nor on the interest generated thereon see *In Re Kraemer*, 40 A.D. 1053; 338 N.Y.S.2d 913 (3rd Dep't 1972)

C. THE DISTRIBUTION CONTEMPLATED BY PLAINTIFF TO HERSELF, THE RECEIVER, AND HER ATTORNEYS WILL BE ILLEGAL

Title 18 U.S.C. 152, 153, 154 and 155 and 157 describe various federal offenses related to Bankruptcy proceedings. Several different violations are described under §152 such as

Knowingly and fraudulently receiving any material amount of property from a debtor after the filing of a case under title 11, with intent to defeat the provisions of title 11;

knowingly and fraudulently giving, offering, receiving or attempting to obtain any money or property remuneration, compensation reward, advantage or promise thereof for acting or forbearing to act in any case under title 11; and

After the filing of a case under title 11 to knowingly and fraudulently withhold from a custodian, trustee, marshall or other officer of the court entitled to its possession any recorded information including books documents records and papers, relating to the property or financial affairs of a debtor.

Section 153 deals with embezzlement by knowingly and fraudulently appropriating to one's own use, or by spending or transferring any property, or by secreting or destroying any document belonging to the estate of the debtor that came into one's charge as trustee, custodian, marshall or other officer of the court.

Section 154 deals with adverse interests by custodian or other officer of the court, by refusing to permit a reasonable opportunity for inspection of documents and accounts related to the affairs of an estate in his charge to a party of interest.

Lastly, Section 155 deals with fee agreements in cases under Title 11 and receiverships and appears to raise the most self-evident and hence most serious concern over the legality of the distribution being proposed by Charney. For under this section it is prohibited for a "party in interest", whether as a debtor, creditor, receiver trustee or representative of any of them or attorney for any such party in interest in any receivership or case under title 11 in any United States court or under its supervision" to knowingly and fraudulently enter into agreement, express or implied, with another party in interest or attorney for another such party in interest "for the purpose of fixing the fees or other compensation to be paid to any party in interest or to any attorney for any party in interest for services rendered in connection therewith, from the assets of the estate". It appears from the fact of attorney Delibert's Statement of the Facts. that both he and his client, Susan Charney and

the named receiver Windels, have already transgressed Section 155.

It would also appear that their refusal to file the satisfaction of judgments arising from their settlements with XXX and XXX Herskowitz is in violation of Sections 153 and 154. Finally the distribution that the Plaintiff and her attorney Delibert, and the named receiver, Windels all arranged by and between themselves and Charney's Florida attorneys, will violate those and other sections described above, especially § 157, prohibiting schemes or artifices to defraud.

Clearly, such federal crimes cannot be perpetuated through the manipulation of this Court upon what will be shown to be unwarranted use of New York BCL §626(e) especially when Charney, Delibert and Windels combined and colluded to siphon corporate assets from the Bankruptcy Court, in order to convert and appropriate same for their own use, through the circumvention of the orders and procedures of the Bankruptcy Court, through their scheme to defraud hereinabove described.

POINT II

CHARNEY INITIATED LITIGATION IN FLORIDA TO ENFORCE HER NEW YORK JUDGMENTS WHOSE CONSTITUTIONAL VALIDITY UNDER THE FULL FAITH AND CREDIT CLAUSE ARE BEING CONTESTED BY JUDITH HERSKOWITZ, THE OUTCOME OF WHICH TAKES PRECEDENCE OVER THE IN REM PROCEEDING IN THIS COURT, ESPECIALLY BECAUSE THE THRESHOLD JURISDICTIONAL ISSUES WERE NEVER DECIDED ON THE MERITS IN THIS COURT

To begin with, Delibert falsely affirms on page 12 ¶21 of his Affirmation that the Florida courts have accorded Full Faith and Credit to the judgments of this Court. The so-called litigative phase in this Court ended with the default judgments in favor of Charney in November 1993 and

January 1994, in this New York Supreme Court case. Yet, contrary to Delibert's Affirmation, there is now a prior pending action in Florida that by operation of law, abates the current in rem phase. Moreover, the Bankruptcy Court relinquished jurisdiction back to the New York Court only because it was misled to believe upon Delibert's false representations that the Florida litigation was nearly concluded in Charney's favor, except appeals by Judith Herskowitz. Therefore, the Bankruptcy Court, by virtue of its express powers and pre-emptive jurisdiction, required this case to abate pending the final determination of the Florida case.

The end of 1993 and the beginning of 1994 Susan Charney individually and purportedly on behalf of North Jersey Trading Corporation ("Charney") recorded for domestication several New York judgments in the Dade County Circuit Court. Pursuant to Florida Foreign Judgment Act §§ 55.501 to 55.09 Judith Herskowitz, her sons XXX Herskowitz and XXX Herskowitz ("the Herskowitzes") initiated actions challenging those judgments inter alia., for lack of personal jurisdiction and lack of subject matter jurisdiction. The Act implements the Full Faith and Credit Clause of the United States Constitution for domesticating foreign judgments.

On the one occasion that an appropriate constitutional inquiry was made upon the limited record presented in support of the Herskowitzes' Motion for Summary Judgment, the finding was that no full and fair hearing sufficient for full faith and credit had ever been made by the New York State Court Judge who rendered Charney's judgments. However, that Summary Final Judgment was reversed by the 1997 decision of the Third District Court of Appeal in *Charney v. Herskowitz*, 689 So.2d 1101 (Fla. 3rd DCA 1997) based upon the panel's belief that the affidavit by Charney's New York attorney Steven Delibert, sworn to on June 6, 1995 was true and raised a genuine issue of material fact over whether the New York State Court's finding of personal jurisdiction could be

treated as res judicata. That affidavit of Delibert has been proven to be false in the Florida court

What remains is that Charney is now attempting to rely on an October 2, 1991 order of Justice Tompkins of this Court. Judith Herskowitz is entitled to litigate this matter in Florida because she was denied the right to be heard on her jurisdictional defenses and no “immediate trial” on the threshold jurisdictional defenses was conducted as required under CPLR 3211(c). Instead the October 2, 1991 order relied on an alleged waiver of jurisdictional defense by the Herskowitzes which depended upon a non-existent withdrawal of their objections to personal jurisdiction.

When the Herskowitzes attempted to be heard in the New York court that they have not withdrawn those defenses, the Herskowitzes were not only denied an opportunity to be heard, including the right to appeal, and were sanctioned and fined for their efforts. To enforce payment for the sanctions, an order compelling the Herskowitzes to turnover all their North Jersey stocks was entered and when they declined to hand it over, warrants were issued for their arrest and if apprehended in the State of New York to be brought before the New York Court to incarcerate them. This is supported with about twenty - five additional documents from this Court.

These tactics by Charney have so far succeeded in procuring decisions and orders in the New York and Florida courts, whose effect has been to obstruct evidentiary hearings and presentation of documents, which, when considered in their totality, prove that Charney’s contentions before the court are fabrications of the record of the New York court, and is a fraud upon the Court

The constitutionally mandated inquiry that must be undertaken by the sister state whether to grant full faith and credit to the foreign judgment are set forth in the leading cases of *Durfee v. Duke*, 375 U.S. 10, 107; 11 L.Ed 2d 186; 84 S.Ct. 242 (1963) and *Underwriters National Assurance Co. V. North Carolina Life & Accident Health Insurance Guaranty Ass'n*. 455 U.S. 691; 71 L.Ed2d

558; 102 S.Ct. 1357 (1982). As stated in *Underwriters*, (455 U.S. 706)

“a judgment is entitled to full faith and credit - even as to questions of jurisdiction - ‘when the second court’s inquiry discloses that those questions have been **fully and fairly litigated and finally decided** in the court which rendered the original judgment.’” (Emphasis supplied)

In *Durfee*, (375 U.S. at p. 110) the Court held that a judgment of a court is conclusive upon the merits in a court of another state

“only if the court in the first state had power to pass on the merits - had jurisdiction, that is to render the judgment”

Yet this conclusiveness over jurisdictional issues further requires that there be “the absence of an allegation at fraud in obtaining the judgment”; and that the party had his day court “with opportunity to present his evidence and his view of the law” *Durfee*, 375 U.S. at 113-114.

Thus, by attempting to domesticate her New York judgments in the Circuit Court for Dade County, Florida, Charney placed the validity of this proceeding before the Florida courts for determination, under the constitutionally mandated standards for inquiry as to whether her judgments in that case are entitled to full faith and credit. The outcome of this Florida litigation will directly impact upon the power of this Court to decide competing claims to the corporate assets.

CONCLUSION

Accordingly, sufficient reasons have been set forth herein for a stay and/or to abate the within proceedings, while the case is reopened in the Bankruptcy Court and to complete the case in the Florida State Court, without interference by the abusive exploitation and potential misuse of the North Jersey funds by Charney, Delibert and Windels. In fact this Court cannot do otherwise for it

lacks legal authority to exercise jurisdiction over these funds.

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Respectfully submitted,

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