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UNITED STATES BANKRUPTCY COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

In re: **WAYNE STURMAN**, *Debtor.*	Case No.89-11932(SCC)
In re: **BRUCE D. STURMAN**, *Debtor.*	Case No.89-11933(SCC)
In re: **HOWARD STURMAN**, *Debtor.*	Case No.89-11934(SCC)

REPLY MEMORANDUM IN FURTHER SUPPORT OF MOTION TO REOPEN DONNA STURMAN'S ADVERSARY PROCEEDINGS

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Introduction

This Reply Memorandum is respectfully submitted in further support of Donna Sturman's motion to reopen three Adversary Proceedings which the Court dismissed for "failure to prosecute": one by Donna Sturman et al. (individually, and derivately asserting the interests of the various Partnerships and Corporations she owned and were stolen by the brothers (the "Entities") and her rights arising in the Muriel and Henry Estates) against the Trustee (Adv. Pro. 99-8076)[1]; one against Chase Manhattan Bank, N. A., the successor in interest to Manufacturers Hanover Trust ("MHT")—which proceeding was **fully briefed** on cross-motions for summary judgment and awaiting a Decision by the Court—which it never rendered (Adv. Pro. 98-9435)[2]; and the third against Howard Sturman, as the Executor of the Estate of Muriel Sturman, et al. (Adv. Pro. 91-9500).[3] (These Adversaries are defined as the "Actions" in the Notice of Motion, and are annexed to the affirmation of David H. Relkin.)

Preliminary Statement

This Court can no longer remain blind, deaf and dumb to the illegal, abusive and unconstitutional violation of Donna Sturman's rights in these Cases. Stripped of hyperbole and rhetoric, these Cases were permeated with unconstitutional taking of property, bankruptcy fraud, collusion, embezzlement, defalcation, larceny, intentional violation of injunctions, breach of fiduciary duties and fraud on the Court.

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[1] Exhibit "D" to Relkin Affirmation, in support of motion to reopen, dated December 29, 1999.

[2] Exhibit "C" to Relkin Affirmation.

[3] Exhibit "G" to Relkin Affirmation.

The issue of Fraud on the Court is so commanding the US Supreme Court has stated that the statute of limitations is made moot by such as it did remark in the precedential case of *In re Hazel Atlas-Glass Co., v Hartford Empire Co*., 322 U.S. 238, 239, 245, 64 S.Ct. 997 (1944), that due to fraud on the court a party can seek relief even nine years after the decision and open a previously closed case. Establishing the precedent that Fraud upon the Court by Officers of the Court is an offense so heinous that the Statute of Limitations cannot be utilized as an evasive tool by Officers of the Court who would abuse established positions to pervert justice.

As a preliminary and decisive matter, the Court had no jurisdiction to make any orders with respect to the Actions since they were "non-core matters" under 28 U.S.C. §157 (c)(1). "The administrative act of filing a claim must be distinguished from the state-law right underlying the claim, which 'could be enforced in a state court proceeding absent the bankruptcy' and is non-core." *In re Toledo*, 170 F.3d 1340, 1350 (11th Cir. 1999) (citing *Wood v. Wood*, 825 F.2d 90, 98 (5th Cir. 1987). "To the extent that the literal wording of some of the types of proceedings might seem to apply, it should be remembered that engrafted upon all of them is an overarching requirement that property of the estate under §541 be involved." *Id.* at 1348 (citing *Gallucci v. Grant,* 931 F.2d 738, 742 (11th Cir. 1991) (noting that the category for turnover actions applies only to orders to turn over property of the estate); *see also 131 Liquidating Corp v. Glastiris,* 222 B.R. 209, 211 (S.D.N.Y. 1998) (fraud claims are non-core, as such claims are not within the definition of core proceedings of 157 (b)(2), do not invoke substantive rights provided by Title 11, and arise under state common law and involve pre-petition conduct).

Here, of course, the properties in question were owned by the partnerships and corporations, not by the debtors themselves; thus, the Adversary Proceedings brought by Donna Sturman could not have been dismissed by this Court. Rather, the Bankruptcy Court would have to making findings of facts and conclusions of law and certify them to the District Court for decision. 28 U.S.C. §157(c)(1). "If the Court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action." FRCP 12(h)(3). "The federal courts are obliged to police the constitutional and statutory limitations on their jurisdiction on their jurisdiction." *Kanzelberger v. Kanzelberger,* 782 F.2d 774, 777 (7th Cir. 1986), see also *Meritcare v. St. Paul Mercury Ins.,* 166 F.3d 214, 217 (3d Cir. 1999) ("A federal court has the obligation to address a question of subject-matter jurisdiction *sua sponte*.")

Incredibly, the Trustee's sole opposition to this motion is that all of Donna Sturman's claims were "released" in a collusive Settlement Agreement between him and the Trustee in bankruptcy for Ms. Sturman, in which both fiduciaries exculpated each other and their respective Estates and executed general releases. These collusive releases allegedly bar any of Ms. Sturman's claims **including the adversary proceeding by Donna Sturman against the Trustee, personally**. (More specifically, despite his papers, the Trustee does not rely on the settlement agreement to bar this motion; rather he relies on the exculpatory releases executed in the settlement agreement by him and Donna Sturman's Trustee in Bankruptcy, Alan Nisselson.)

In truth and substance, the releases were executed in a jurisdictionally defective and bad faith filing of an involuntary proceeding—in which Ms. Sturman was never served—

involved embezzlement of funds and defalcation by the Trustee since he used "purported" estate funds to settle the adversary action Donna Sturman brought against him individually. Since **there was not a single fact—no less any legal support—submitted in the application for the approval of the "settlement," in the Donna Bankruptcy, this Court cannot determine whether the settlement amount paid to Donna's Trustee, which had an approximate surplus of $600 Thousand surplus over the asserted claims, was entirely for the Trustee's release or for any other basis**. Moreover, the amount of analysis done by Nisselson in support of the Settlement Agreement and the execution of the exculpatory releases was so minor as to be virtually non-existent.

It is well-settled that "Equity tolerates in bankruptcy trustees no interest adverse to the trust." As soon as the Trustee began to negotiate the "settlement," with Donna's Trustee, Alan Nisselson, both trustees were no longer "disinterested" in these Cases under FRBP 2014(a), rather they had a direct conflict since they had "an interest materially adverse to the estate or any class of creditors[4] ... in connection with, or interest in, the debtor." 11 U.S.C. §101 (14).

Simply put, both Nisselson and Goldberg were unequivocally disqualified to continue to negotiate this settlement. Nor should they be heard to say that they "disclosed" this clear and very real actual conflict—which they did not—except that Goldberg inserted a statement into the last sentence of a 40 line footnote in the Settlement Agreement running two pages, which doesn't reference the Case No. of the proceeding or even state the name of the

[4] Notwithstanding the fraudulent bankruptcy, Donna Sturman clearly remained a creditor in these Estates, to whom the Trustee had a fiduciary relationship.

defendant other than stating that "Donna also sued the Sturman Brothers' Trustee in connection with his administration of [these cases]..."[5] In any event, disclosure is insufficient where there is an actual conflict as there was here. Moreover, since there are significant and serious allegations against the Trustee regarding his misconduct in these Cases, involving "missing" property and stock which were never accounted for, this Court must reexamine the settlement. (See Complaint against Trustee at ¶¶32-36, 61-81.)

Some relevant portions of Adv. Pro. 99-8076A against Goldberg follow.

"**33**. Although duty-bound to close the Estates "as expeditiously as compatible with the best interests of parties in interest," the Trustee actively sought to milk the Sturman bankruptcy cases for as long as possible to enrich himself, to the detriment of the interests of other creditors, particularly Donna Sturman.

34. At the time of his appointment, the Trustee was a solo practitioner with an office located at 60 East 42nd Street, New York, New York. As a reference, the Trustee listed Manufacturers Hanovers Trust Company ("MHTCo."), one of the largest Institutional Creditors and the bank which commenced the involuntary proceeding.

35. Soon after his appointment, the Trustee retained the law firm of Otterbourg, Steindler, Houston & Rosen, P.C. ("Otterbourg") to assist him as counsel in the discharge of his duties.

36. Upon information and belief, prior to such retention, Otterbourg had represented one or more of the institutional Creditors in unrelated proceedings, a fact that was not adequately disclosed to the Court or Donna Sturman.

37. Upon information and belief, one of the factors that led the Trustee to select Otterbourg as his counsel was its relationship with the Institutional Creditors.

61. For example, of the $11,321,263 made available to the Estates between 1992 and June 1998, $6,371,152, or fifty-six (56%) percent, was entirely attributable to income generated by the Yorkville property, and $1,199,161, or eleven (11%) percent, was attributable to income generated by Pelham Associates. Very little, if any, of the funds made available during the period 1992 through June 1998 were the result of legal work performed by the Trustee.

[5] The Trustee in that Adversary Proceeding (99-8076) was sued individually and as the Trustee of the Estates. (See Exhibit "D" to the Relkin Affirmation.) However, the Trustee never answered the Complaint in that action and defaulted.

62. The payment of compensation to the Trustee and his innumerable law firms has substantially reduced the assets that are available for distribution to creditors of the Estates, including Donna Sturman.

63. By dragging out the resolution of the action and depleting the assets of the Estates, the Trustee breached his fiduciary obligation to place the interests of the Estates and each creditor of the Estates, including Donna Sturman, ahead of his own interests.

64. The Trustee also breached his obligation to expeditiously examine the proofs of claims of each of the creditors of the Estates. In particular, the Trustee never seriously investigated Donna Sturman's claims, which were supported by thousands of pages of documents and explicitly described in voluminous pleadings in the New York Supreme Court Action and the Surrogate's Court Proceeding. The Trustee never examined Donna Sturman, or questioned her counsel regarding the merits of her claim.

65. Throughout the eight years he has been involved in these proceedings and despite having done no investigation, the Trustee consistently belittled Donna Sturman's claims, treating them as if they were completely without merit. In fact the Trustee once made the specious argument that Donna Sturman's claims had little or no value because the Brothers, admitted liars, had denied her allegations. The Trustee has continued to make the very same frivolous arguments that Donna's brothers initially asserted. The Trustee's frivolous arguments most recently were asserted in his objections to Donna's claims where, true to form, the Trustee continues to take the side of the Institutional Creditors against Donna.

66. The Trustee breached his fiduciary obligation to treat each creditor of the Estates equally and fairly. In particular, the Trustee continuously took a position adverse to Donna Sturman when beneficial to the interests of Institutional Creditors. The Trustee had virtually no objection to any of the claims submitted by the Institutional Creditors.

67. Upon information and belief, from 1991 forward, the Trustee has had a continuous dialogue with the institutional Creditors concerning the maximizing of their claims to Donna Sturman's detriment.

68. The Trustee, directly and through his counsel, has consistently sought to bully and defeat Donna Sturman because of the exigent circumstances in which she was placed by the criminal and fraudulent conduct of her brothers and the unreasonable conduct of the Trustee and his counsel. The Trustee consistently targeted Donna Sturman as an adversary and treated her unfairly. Without any basis, he withheld partnership distributions from her to keep her impoverished and without sufficient means to defend herself or care for her children.

69. The Trustee intentionally withheld distributions from Donna Sturman. For example, after taking the legal position that Donna Sturman was a tenant-in-common of the 86th Street property, the Trustee continued to deny her access to revenues generated from this property. On other occasions, when forced to disgorge funds to Donna Sturman, the Trustee chose to pay these funds to alleged creditors of Donna Sturman, rather than to Donna

herself. Upon information and belief, the Trustee took these steps to exert pressure on Donna to accede to his demands (and those of the Institutional Creditors).

70. In connection with Donna Sturman's litigation regarding the South East partnership agreement, the Trustee improperly took an active role in the dispute and wasted Estate assets by supporting South East's position over Donna's in the litigation. Unbeknownst to Donna Sturman, the Trustee secretly communicated with her adversaries, plotting against her.

71. The Trustee breached his obligation to protect and care for the assets of the Estate. For example, he negligently failed to maintain insurance on the building which housed all of the books and records of the Sturman organization -- which were the target of discovery in certain litigations commenced by Donna Sturman and necessary to prove her claims. As a result of the Trustee's inexcusable carelessness, the documents that perhaps best reflected the magnitude and breadth of the Brothers' scheme to defraud Donna Sturman and the Muriel Sturman Estate were destroyed in a fire caused by arson.

72. The Trustee breached his fiduciary duties by failing to maximize the liquidation value of the assets in which the Brothers had an interest. For example, the Trustee failed to aggressively pursue an *action* against Bruce Sturman with respect to shares of stock worth millions of dollars that had been transferred to an inter vivos trust. Despite clear and incontrovertible evidence that Bruce Sturman had transferred these shares solely to avoid claims of creditors, the Trustee weakly pursued a litigation to avoid this transfer, which settled after Bruce Sturman agreed to make a minimal payment to the Estate.

73. In evaluating how to handle the properties in which the Brothers had an interest, the Trustee consistently gave favorable treatment to the claims of the Institutional Creditors over Donna Sturman's claims. For example, the Trustee abandoned the Brothers' interest in the asset- owned by Wayne-Adam, a building located on 18th Street in Manhattan, because the Brothers had pledged their stock in Wayne-Adam to MHTCo. However, as the Trustee knew, the Brothers' pledge of stock not only violated banking regulation "U," the pledge transaction was a nullity since Donna Sturman had not consented to it. TheTrustee, however, elected to pursue the course of action most deferential to MHTCo., his sole reference as of 1991.

74. Similarly, without conducting any investigation of the facts underlying Donna Sturman's proof of claim, the Trustee consented, or did not object, to foreclosure actions being brought by Boston Safe Deposit and Trust Company and MHTCo. with regard to loan transactions that Donna Sturman claimed were void. In each instance, the Trustee considered the interests of the Institutional Creditors ahead of Donna Sturman's interest.

75. The Trustee abandoned the asset held by the Grand Realty Company, an office building in White Plains, back to the Brothers.

76. The Trustee breached his obligation to properly account for assets of the Estates. Upon information and belief, based on the review of records provided by the Trustee, hundreds of thousands of dollars and thousands of shares of Cooper Company stock, potentially worth millions of dollars, cannot be accounted for.

77. Simply stated, throughout these bankruptcy proceedings, the Trustee has been blind to the ethical or moral consequences of his conduct, focusing instead on improving his own position, financially and otherwise, to the detriment of the Estates and its creditors, particularly Donna Sturman.

78. By reason of the foregoing, the Trustee should be surcharged in an amount to be proven at trial but not less than Ten Million ($10,000,000.00) Dollars.

80.The Trustee wasted assets of the Estates by mismanaging the administration of the Estates; permitting valuable assets to be squandered; failing to maintain insurance on partnership assets; abandoning valuable assets without properly challenging the liens of secured creditors; and placing the interests of himself, his law firm and others above the interests of creditors of the Estates.

81. By reason of the foregoing, the Trustee should be surcharged in an amount to be proven at trial but not less than Ten Million ($10,000,000.00) Dollars."[6]

In continuation of the Trustee's attempts to demonize the victim (discussed hereinafter), in response to the objection of Donna Sturman to his final Report dated October 27, 2009, he stated: "[i]t should come as no surprise to anyone familiar with these Bankruptcy Cases that Donna Sturman would wish again to be heard with respect to the injustices *she continues to believe she has suffered* in the context of her relationship with her brothers and in the administration of their Estates." (ECF # 906 in Case No. 89-11932.) (Emphasis supplied.)

This dismissive comment—that she labors under some kind of illusion—is startling since it is from the same person who stated under oath, only months prior to this "settlement" of Donna's claims, that: "the Debtors either borrowed, liquidated, transmuted or otherwise

[6] This complaint was drafted and filed in 1999 by Helen Davis Chaitman, Esq. and Charles A. Stewart, III, Esq. As the Court no doubt is aware, Ms. Chaitman is an expert on breaches of lenders duties and coined the phrase "lender liability." Thus, these allegations are not new as claimed by the Trustee.

took control of certain assets in which the brothers and Donna had an interest." (Rather, the settlement agreement was the curtain behind which all of Goldberg's taking control of the non-debtor properties owned by partnerships and corporations was accomplished in furtherance of the fraudulent conveyances that her brothers began.)

Similarly, in papers prepared by his counsel, Leonard I. Spielberg, Esq., who also testified under oath in these Cases that Donna's claim was huge and would likely involve disgorgement if not settled: "**I would say that no serious person could maintain that Donna Sturman was not badly wronged and damaged and hurt in a variety of ways** by her brothers prior to these cases being brought."[7]

Mr. Spielberg also stated under oath that: "**Donna Sturman has a significant claim and that claim is serious enough and large enough and frightening enough to make a very substantial payment to her justified**...there are substantial and meaningful and undeniable justifications for Donna's claim."[8] (Emphasis supplied.)

The Court itself made similar statements, recognizing the antagonism by the Trustee and his numerous law firms against Donna: "I do not want to deal with these things on the basis of personal antagonism, okay, and I believe it has come from many, many sources. All right? Yes, the banks laid out a lot of money to the brothers. There is no question about that. Yes, the banks would like to get paid. **But it is equally true that Donna Sturman was, in essence, a one-fourth partner with her brothers in the inheritance** that came to her

[7] See Transcript of July 3, 2001 at 105, previously submitted by hand to this Court.
[8] Id.

through her father, and then through her mother and that her brothers borrowed big time, and somehow there we are."[9]

And, further on, in the same hearing, regarding Ms. Sturman: "...and so I'm suggesting that by going every single possible way you can kick somebody until they're bloody, beaten and bruised and battered to death..."[10]

Prior to the involuntary Petition filed by Manufacturers Hanover Trust ("MHT"), (now merged into JP Morgan Chase Co.), Donna Sturman commenced actions against her Brothers, individually and derivatively on behalf of seven corporate entities, based on fraudulent conveyances made by the Debtors from the entities to MHT to purchase Cooper Company Stock and meet margin calls. In addition, she sued the executors of her mother's Estate in the Surrogate's Court, including Debtor Howard Sturman, who was a co-executor, *In re Muriel Sturman*, 2400/80, New York County, for an accounting of the defalcations from her mother's estate by her brothers of essentially all the assets thereof.

In 1994, when Donna applied to the Surrogate's Court to have Howard and Joseph Warren removed as executors, and to have her named as executrix, the Trustee sought and obtained an injunction from this Court barring her from making any application to the Surrogate's Court. (Adv. Pro. 94-8278A.)[11]

In both actions, Donna Sturman sought and obtained injunctions preventing further

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[9] See Transcript of March 16, 1999, at 19, submitted herewith as Exhibit "A."

[10] See Transcript of March 16, 1999, at 21, submitted herewith as Exhibit "A."

[11] See Order to Show Cause, Temporary Restraining Order and affirmation in support of Marc Stuart Goldberg, submitted herewith as Exhibit "B."

transfers, which as this Court well knows, are only granted if she was able to show: "(1) a likelihood of success on the merits, (2) irreparable injury absent granting of the preliminary injunction, and (3) a balancing of the equities in her favor."

Upon receipt of a subpoena from her counsel, Millbank Tweed Hadley & McCloy, MHT lent an additional $2 Million to the Debtors, against what it admitted was a pledge of only 75% of the Stock of Wayne-Adam Corp., a defendant in the Action, in which Donna owned the other 25%.

The exculpatory Releases included in the Settlement Agreement executed by Donna's Trustee in Bankruptcy, Alan Nisselson, and the Trustee are void as against public policy. Moreover, the Court lacked personal jurisdiction since Donna was never served and, although this was recognized by Nisselson, when he applied for, and received an order to hire a private investigator to locate Ms. Sturman, he shows no disbursement in his final report for such an expense.

Thus, notwithstanding the Trustee's own sworn testimony in these Cases that Donna's $20 Million claims "were indisputable" and "could wipe out the entire estate," and the Court's characterization of the Trustee's objection to Donna's Proof of Claim as "**ridiculous**," it is submitted that the exculpatory Releases by the two Trustees of each other and their Estates was a breach of fiduciary duty, involved embezzlement and a fraud on the Court. Thus, the Actions must be reopened and the Releases voided as nugatory.

Donna's claims in these Estates were illegally and fraudulently settled in violation of

the Trustees' fiduciary duties (in part since one of the Adversaries was directly against Goldberg)[12] and the fiduciary duty Nisselson owed to Donna. Moreover, the Trustees KNEW the settlement was fraudulent, in breach of their fiduciary duties[13] and in violation of the Code, so they attempted to shield their unlawful conduct behind the exculpatory releases of themselves and the Estates from any claims by Donna Sturman.

It is submitted that, under well-settled principles of law and equity, this Court may not enforce these unlawful Releases to insulate their unconstitutionally invalid conduct. The Trustee had no authority to discharge his personal liability asserted against him by Donna Sturman in her adversary proceeding against him (99-8076A). It was a direct violation of the fiduciary duties both Trustees owed Ms. Sturman, which by law cannot be avoided, no less without jurisdiction or an opportunity to be heard.

"Courts of bankruptcy are essentially courts of equity, and their proceedings inherently proceedings in equity. Accordingly, the bankruptcy court is to apply the principles and rules of equity jurisprudence. [A]mong the powers available to the bankruptcy court to effect this mandate is the power of subordination in light of equitable considerations." *In re Stirling Homex Corp*., 579 F.2d 206, 212 (2d Cir. 1978). "In the exercise

[12] Adv. Pro. No. 99-8076A, at Exhibit "D" to Relkin affirmation.

[13] As more fully discussed in Point III, it is interesting to note that the alleged Settlement Agreement was presented to the Court without any Memorandum of Law or any factual basis since there was no law or facts that could have supported such an exculpatory collusive settlement. There was clearly virtually no investigation of Donna's claims by Nisselson. **The only basis advanced by Nisselson for settling Donna's claims—there is no other basis stated anywhere else in the Settlement Agreement—is the conclusory remark that there was a wholly conclusory statement that there was a "paucity" of evidence to support her claim**. See Nisselson motion dated June 10, 2004, authorizing distributions to Creditors and dismissing the case at ¶5, p. 3, annexed hereto as Exhibit "C."

of its equitable jurisdiction the bankruptcy court has the power to sift the circumstances surrounding any claim to see that injustice or unfairness is not done in administration of the bankrupt estate." *Id*. "We also note that, "as a general rule equity prefers the claims of innocent general creditors over the claims of shareholders or subordinated creditors deceived by officers of the corporation." *Id*. at 213.

"Courts of bankruptcy are essentially courts of equity, and their proceedings inherently proceedings in equity. [A] bankruptcy court is a court of equity at least in the sense that in the exercise of the jurisdiction conferred upon it by the Act, it applies the principles and rules of equity jurisprudence....Among the granted powers are the allowance and disallowance of claims; the collection and distribution of the estates of bankrupts and the determination of controversies in relation thereto; the rejection in whole or in part "according to the equities of the case" of claims previously allowed; and the entering of such judgments as may be necessary for the enforcement of the provisions" of the Act. In such respects the jurisdiction of the bankruptcy court is exclusive of all other courts." *Pepper v. Litton*, 308 U.S. 295, 304, 60 S.Ct. 238, 245 (1938).

"The essence of the test is whether or not under all the circumstances the transaction carries the earmarks of an arm's length bargain. If it does not, equity will set it aside." Id. at 306-307, 60 S.Ct. at 244.

"It is a well settled and salutary rule that "a person who undertakes to act for another in any matter shall not, in the same matter, act for himself. It is only by a rigid adherence to this simple rule that all temptation can be removed from one acting in a fiduciary capacity to

abuse his trust, or seek his own advantage in the position which it affords him. One consequence of a violation of the rule is that the agent must, at the option of his principal, account to him for any profit he may have made by the transaction. It matters not how fair the conduct of the agent may have been in the particular case, nor that the principal would have been no better off if the agent had strictly executed his power, nor that the principal was not in fact injured by the intervention of the agent for his own benefit." *Dutton v. Willner*, 52 N.Y. 312, 318-19 (1873); ("If persons having a confidential character were permitted to avail themselves of any knowledge acquired in that capacity, they might be induced to conceal their information, and not to exercise it for the benefit of the persons relying on their integrity. The characters are inconsistent.") *Gardner v. Ogden*, 22 N.Y. 327, 343 (1860).

"An agent has duties to discharge of a fiduciary character toward his principal; and **it is a rule of universal application that no one having such duties to discharge shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound to protect. So strictly is this principle adhered to, that no question is allowed to be raised as to the fairness or unfairness of a contract so entered into**. It obviously is, or may be, impossible to demonstrate how far, in any particular case, the terms of such a contract have been the best for the *cestui que trust* which it was possible to obtain. It may sometimes happen that the terms on which a trustee has dealt, or attempted to deal, with the estate or interests of those for whom he is a trustee, have been as good as could have been obtained from any other person: they may even, at the time, have been better. But still, *so inflexible is the rule, that no inquiry on that subject is permitted*." *Gardner*, at 347-8.

Only months prior to the involuntary against Donna the Trustee and his Counsel had testified under oath that her claims were not worth $1.5 Million for which they were settled in Donna's Bankruptcy, but that she was entitled her to take at least "**all the assets of these Cases [$20 Million]**," and likely an additional $6 Million of proceeds of Cooper Company Stock which the Trustee collected after the Orders for Relief.

To understand the fundamental nature of these Cases one must recognize that these Cases were used by the Trustee and the Court to systematically strip Donna Sturman of her property interests in the Entities, by authorizing the Trustee to take over and manage the non-debtor Properties, owned by partnerships and corporations, withholding her income, her ability to pay rent, have medical insurance, and to leave her homeless, and unable to hire counsel to represent her interests.

Interestingly, while the Trustee repeatedly maintained that the Properties were property of the estates, at various times he took the opposite position. In the Trustee's declaration "pursuant to the Court's Order of January 14, 1997, which, among other things, directed that I [Goldberg] account for **the non-debtor business entities** (other than any entity which may have an interest in the 86th Street Properties) **that I have managed** pursuant to Court Order in connection with these bankruptcy cases and in which Donna Sturman has claimed an interest."[14]

In such declaration, dated March 17, 1997, he accounted for his management and sale of non-debtor properties owned by non-debtor Partnerships and Corporations: Pelham

[14] See Declaration of Goldberg dated March 17, 1997, submitted herewith as Exhibit "D."

Associates,[15] Wayne-Adam Corp., as to which the Trustee admitted Donna owned 25%, H. Development Corp.[16], H.P. Howard & Co., Inc.[17], The Pelham Health and Racquetball Club, a Partnership,[18] and the Yorkville Partnership Agreement, the certificate of which was filed.[19]

Donna's ownership interests in these Entities are listed on her proof of Claim exhibits "A" through "C."[20]

Once Donna was rendered homeless due to the Trustee's illegal management of the non-debtor entities and his collection of all the income of the non-debtor Entities, Pollack & Greene, her own attorneys, filed a fraudulent, bad faith involuntary bankruptcy against her **where they split their claims into three by using two members of their own firm as separate creditors**, failed to serve her with the Petition and failed to disclose direct conflicts of interest to her in violation of §303 of the Code and 18 U.S.C. §152.

The settlement of Donna Sturman's claims in the context of a jurisdictionally defective bankruptcy proceeding instituted against Donna, in violation of Judicial Estoppel by Goldberg and the absence of personal jurisdiction over Ms. Sturman, was no more than garden variety Bankruptcy Fraud.

As evidence of such fraud, there was a complete absence of any factual or legal

[15] See Pelham partnership Agreement submitted herewith as Exhibit "E."

[16] See H.D. Development and its shareholders listed by the brothers submitted herewith as Exhibit "F."

[17] See election by H.P Howard & Co., Inc. to be treated as an "S" corporation, submitted herewith as Exhibit "G."

[18] See Pelham Racquetball partnership Agreement, submitted herewith as Exhibit "H."

[19] See Yorkville Partnership Certificate and Partnership Agreement, collectively submitted herewith as Exhibit "I."

[20] See Excerpt of Donna Sturman's Proof of Claim submitted herewith at Exhibit "J."

basis for such settlement submitted to the Court by Nisselson and Goldberg, and it directly contradicted what the Trustee, the Court and the Trustee's counsel had stated under oath in these Cases: namely that Donna's interest in these Cases was "enormous" and "an unlawful taking of her property without compensation."

Put simply, Donna Sturman has the following valid claims against the Trustee:

(a) He managed and sold properties owned by non-debtor corporations and partnerships, which Entities owned the real property which was not "property of the estate" under no stretch of the imagination;[21]

(b) Such sales were in direct contravention of Supreme and Surrogate Court injunctions;

(c) The Trustee illegally converted Donna Sturman's property interests and deprived her of her receiving her rightful income from the Entities;

(d) Confiscated the Properties and unlawfully collecting the income from the partnerships, including Yorkville Associates, which had income of $1 Million per year, without paying her anything though she was at least a 20% partner/owner of Yorkville (with the three debtors and her mother Muriel Sturman's Estate)[22];

(e) Purchased a mortgage on the Yorkville Associates property with partnership funds not belonging to the Estates—though he testified belonged to her—and then paid

[21] See listing of the Entities in which Donna Sturman had an interest as a shareholder, partner or beneficiary at Exhibit "J."

[22] See Yorkville Partnership submitted herewith as Exhibit "I."

the estates the amounts due under the mortgage even though Donna had a 20-25% interest in Yorkville Associates;

(f) "Settled" her ownership claims in the Entities through his wrongful conduct in the collusive and unenforceable Settlement Agreement with Nisselson;

(g) Entered into an illegal exculpatory Release of any liability of both Trustees and the Estates to Donna in consideration for paying her money that the Trustee had testified under oath belonged to her anyway;

(h) Embezzled and/or converted over $8 Million dollars of professional fees from these "no-asset" cases which were funded by the illegal and jurisdictionally defective sale of the Properties owned by the non-debtor Entities[23]; and

(i) Distributed over $10 Million Dollars of "Non-Estate funds paid to third parties."[24]

This is the true story of these Cases, involves violations of Bankruptcy Fraud statutes and sets a dangerous precedent for this Court due to the blatant violation of the provisions of the Code and public policy. The unlawful administration of these Cases does not merely concern the particular parties to these Cases, which unlawful conduct must be remedied by this Court in the interests of Justice, or this Court will have given its imprimatur to such fraudulent conduct.

[23] See Adversary Proceeding against the Trustee (99-8076A), at Exhibit "D" to Relkin affirmation.

[24] See Cover Sheet of the Trustee's Final Report, ECF# 896, Exhibit "A" in 89-11932, submitted herewith as Exhibit "K."

FACTUAL ANALYSIS

The Hearing Transcripts Demonstrate The Hostility of the Court and the Trustee To Donna Sturman And Concede The Validity of Her Interests

Since Ms. Sturman was a 25% percent ***owner*** of various NON-DEBTOR partnerships and corporations inherited by her and the three Debtors (the "Entities")[25], and the Entities owned the underlying REAL ESTATE (the "Properties"), such Properties never became Property of the Estates under 11 U.S.C. §541.[26]

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[25] See listing of her ownership interests submitted with her Proof of Claim at Exhibit "J".

[26] **The proposition that the Corporate and Partnership Properties could never became part of their Estates is black-letter law without exception**. The distinction between property belonging to a partnership of which the debtor was partner, and property belonging to the debtor-partner, is well-established in bankruptcy law. See McGahren v. First Citizens Bank & Trust Co., 111 F.3d 1159, 1166 (4th Cir.), cert. denied, 522 U.S. 950, 118 S. Ct. 369, 139 L. Ed. 2d 287 (1997); *In re Palumbo,* 154 B.R. 357, 358 (Bankr.S.D.Fla.1992) (noting, with regard to a partner who had a 97% interest in a partnership and claimed that foreclosure on the partnership property violated the automatic stay, that "it is firmly established that the assets of a partnership are not to be administered in a partner's bankruptcy proceeding since a partnership is a separate entity from its partners under bankruptcy law"); In re Funneman, 155 B.R. 197, 199 (Bankr.S.D.Ill.1993) ("It is well settled that assets owned by a partnership are not included in the bankruptcy estate of the individual partner. The only partnership property before the court during an individual's bankruptcy is the partner's personal property interest in the partnership, which consists of the individual's interest, if any, in the partnership assets after an accounting and payment of partnership debts out of the property belonging to the partnership."). **The Partnership Property could never have entered these Estates**. See also 2 Collier on Bankruptcy, §101.30 [3], p. 101-96 (15ed. Rev.) ("while the individual's interest in the partnership or corporation (which could even be 100%) would be property of the estate, the assets of the partnership or corporation would not be."); Ginsberg and Martin On Bankruptcy §5.01[b] (stating that "the interest in question [an interest of an estate] must be the debtor's property. For example, if the debtor owns shares in a corporation, the shares become part of the estate; the assets of the corporation do not."); See also In re Manning, 37 B.R. 755, 758 (Bankr. Col. 1984): "[T]he primary rule in bankruptcy cases, in considering a problem involving partners or partnerships, is that *a partnership is a distinct legal entity separate and apart from the partners who formed it.")*; See Fowler v. Shadel, 400 F.3d 1016 (7th Cir. 2005) (even if sole shareholder); See also In re Murray, 147 B.R. 688, 690 (Bankr. E.D.Va. 1992); In re Russell, 121 B.R. 16, 17 (Bankr. W.D. Ar. 1990) (stating that "[a} corporation has a separate legal existence from its shareholders, and the corporation, not its shareholders, owns the corporate assets and owes the corporate debts."); In re Normandin, 106 B.R. 14, 16 (Bankr. D. Ma. 1989) ("[I]t is well settled that assets owned by a partnership are not included in

Thus, this Court had no jurisdiction or authority to authorize the use, management or sale of the Properties by the Trustee no less to use such assets to pay other, bigger and more powerful creditors such as MHT, Chemical Bank (into which MHT was merged and Chase Manhattan Bank, N.A. (the successor to Chemical), which conversion of the Properties belonging to Donna Sturman eventually drove her into a fraudulent involuntary Bankruptcy.

The Trustee and the Banks could not **legally** get to the Properties—the only available assets to make them whole—without steamrolling over Donna Sturman's rights, and they did what they had to do to get them.[27]

The fact of the matter is that Donna's ownership interests in the Entities were the sole impediment to the sale and use of the Properties to pay the Banks and the professional fees. Accordingly, these Cases were characterized by a direct and hostile adversary relationship between Donna Sturman and the Trustee, the creditors and the Court.

The Court opined that, due to such animosity, the Trustee had repeatedly taken

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the bankruptcy estate of an individual partner...Clearly, then, the Court has no jurisdiction over specific partnership property when a partner-rather than the partnership itself-is in bankruptcy.") See also In re Funneman, 155 B.R. 197, 200 (Bankr. S.D. Oh. 1993); In re Katz, 341 B.R. 123, 128 (Bankr. D. Mass. 2006) ("It is axiomatic that the mere bankruptcy of a partner does not bring the partnership's assets within the jurisdiction of the bankruptcy estate. A debtor's interest in a partnership is an asset of the debtor's estate under 11 U.S.C. §541; the assets of the partnership are not.") (Emphasis added.) See also In re Holywell Corp., 118 B.R. 876 (Bankr. S.D. Fla. 1990) (No jurisdiction over property of fifty nondebtor subsidiaries of corporate debtors.).

[27] As the Trustee's counsel, Leonard I. Spielberg, stated at the July 3, 2001 Hearing, at 109: "the argument that **because your Honor issued an order that gave the Trustee the right to run the property, he exculpated the estates from the claim of property rights is just absurd. It is unconstitutional. It is an unlawful, unconstitutional taking of [Donna's] property without compensation. You can't do that. Nobody can do that.** She has a claim. We used her property for ten years." See Exhibit "L" submitted herewith.

contradictory positions in the Cases:

> **The Court**: I really believe that there have been multiple positions taken with respect to these things and that there are positions that were previously taken that somehow got changed for some reason or another.[28]

It was not only the Trustee who shifted positions in the Cases, in 1999 the Court made clear that the Trustee could not sell the Yorkville Property since Donna Sturman was an owner of the partnership.[29]

As the Court stated:

> Now, I'm suggesting to you, I do believe, and I will put it flat out on the table, **there has been far too much personal antagonism in this case directed at Donna Sturman, all right?** - I am trying to tell you people that, I do not want to deal with these things on the basis of personal antagonism, okay, and I believe it has come from many, many sources. Allright? Yes, the banks laid out a lot of money to the brothers. There is no question about that. **Yes, the banks would like to get paid. But it is equally true that Donna Sturman was, in essence, a one-fourth partner** with her brothers in the inheritance that came to her through her father, and then through her mother and that her brothers borrowed big time, and somehow there we are. [30]

Again, on July 15, 1996, the Court pointed out not only the Trustee's personal animus against Donna, but illustrated her own, stating that:

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[28] See Transcript of July 15, 1996 Hearing, at 10, submitted herewith as Exhibit "M."

[29] Despite the fact that the Trustee maintained that the Yorkville Property was not owned by a non-debtor partnership, he held the income from the "86th Street Property" in a bank account entitled "Yorkville" using the Tax ID number of Yorkville Associates, a partnership in which Donna Sturman owned 20%, yet never distributed any income to her.

[30] See Transcript of March 19, 1999 Hearing at 18-19, submitted herewith as Exhibit "A."

> **The Court**: I find one of the things that I don't really understand is, I do not understand the extreme adversarial posture that Mr. Goldberg appears to have taken to Miss Sturman.
>
> What I am saying to you is, **there is an adversarial attitude that seems to be taken [sic] by the trustee** that's without regard to the monetary aspects of the situation and **which leads me to wonder whether Donna Sturman's attacks on the trustee's activities are in fact considerably more accurate than I would like to give them for [sic]**.
>
> **We are talking about an estate which produced almost no benefit** or a benefit which if I were to put in the amount of legal fees and other things that went on, **I wouldn't be surprised to discover that there was no net benefit to the estate whatsoever**.[31]

The Court suggested that the Trustee's animus against Donna was based on the fact that he was wrongfully retaining her property, stating at one point:

> **The Court:** Mr. Kaiser, I believe that there has been—it is not you—**a lot of extremely unnecessary hostility in this case coming from the Trustee directed towards your client [Donna Sturman] and I think that it has at many times caused the trustee to take positions which were not intellectually refined and which denied the obvious**, caused him to be in the position of saying one thing when it was perfectly clear he had done another thing, like this Yorkville Associates." (Emphasis added.)[32]

Despite the Court's lack of jurisdiction over the Properties, the Court nevertheless allowed Goldberg to "manage" and sell the Properties in clear violation of the Code, including managing Yorkville Associates' non-debtor Property for 8 years, from 1991 to 1998, all the

[31] See Transcript of July 15, 1996 Hearing, at 3-4, submitted herewith as Exhibit "M."
[32] See Transcript of January 7, 1998 Hearing, at 12, Exhibit "N" submitted herewith.

while collecting the income from the Property—according to his testimony under oath of $1Million a year—**and then the Trustee sought fees for the management of the Properties which were not part of the estates**!

At the December 8, 1994 Hearing, Mr. Goldberg sought almost $300,000 in fees for his new law firm, Dreyer & Traub, for "marketing" the non-debtor Yorkville Property for sale.[33]

Upon reviewing his application, the Court clearly noted that the Trustee was attempting to obtain fees for his firm, Dreyer & Traub, for managing NON-DEBTOR PROPERTY.[34] Under no section of the Code or under any interpretive law could such Property be considered property of the Estates. Thus, it appears that the application by Goldberg for these fees violated 18 U.S.C. §152 (2), (3), (5) and (6).

As the Court stated:

> **The Court**: I think that, frankly, I have very serious concern [sic] about the level of fees in this Case.
>
> **Mr. Goldberg**: I do as well.
>
> **The Court**: I don't know of any way to control it and it seems as if—**some of what is happening in this case is that you are administering assets that are not really in this case**....[35]

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[33] It is unquestionable that the Trustee's compensation could not be paid from income derived from non -debtor Properties. See Affidavit of Goldberg dated December 1, 1994, submitted herewith as Exhibit "O" in which he states that his application is made for services rendered to manage the non-debtor Properties. See specifically ¶8.

[34] Since these fees were paid for operating the non-debtor Properties belonging to the Entities—and not to the Estates, these fees amounted to conversion of non-debtor assets not property of the estate and must be disgorged.

[35] **It remains inexplicable why the Court repeatedly acknowledged that the Properties were not property of the Estate and yet allowed the Trustee to manage them and unbelievably approved 50% of the Dreyer application at that Hearing, and then paid the balance later—in**

Perhaps the simplest way to deal with the fees...is such that I should award no further interim fees...

Mr. Goldberg: But that would be terribly injurious.

*

Mr. Goldberg: The $2 million of legal fees that Otterbourg, Steindler enjoyed should not be as an impediment to Dreyer & Traub's receiving appropriate compensation for performance of services necessarily performed.

The Court: I guess the problem that I have is I understand what you are saying and I shouldn't penalize Dreyer & Traub. The problem is that you are the only person who makes a recommendation about fee requests.

Mr. Goldberg: That is not entirely correct.

The Court: It is the trustee's burden, and if in fact the Otterbourg fees were too high, then we shouldn't have awarded them.

Mr. Goldberg: I don't believe the other fees were too high-- this is a particularly difficult case as your Honor is aware. There are issues---[36]

The Court also made egregiously inappropriate statements about and to Ms. Sturman. For example:

Ms. Sturman: [As to the fact that Donna was not receiving her rightful compensation for her ownership interest in the Properties] If I did and I was, I would be able to hire counsel, wouldn't I your Honor?

The Court: I have no idea because I know nothing about your personal finances.

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violation of Donna Sturman's interests. It is nevertheless crystal clear that there was only one impediment to the sale of all of the Properties owned by the non-debtor Entities: it was Donna Sturman. Every time the Court would bring up the issues of continued payment of professional fees, the Court pointed to Donna and told the Trustee: you have got to get rid of her and settle her claim.

[36] See Transcript of December 12, 1994 Hearing, at 8-12, submitted herewith as Exhibit "P."

> **Ms. Sturman**: I would be glad to share that with you.
>
> **The Court:** I don't have any need to be shared with [sic] your personal finances.
>
> **Ms. Sturman**: I think that someone should have need to understand it because it is very amazing to me that I am not in bankruptcy and yet I am about to be evicted.
>
> **The Court**: $600, $700 you can file a petition.[37]

In response to Ms. Sturman's counsel advising the Court on December 7, 2001 that Donna was about to be evicted and homeless again, and in one of the most inappropriate and insulting comments by a Court one is ever likely to hear, Judge Beatty, demonstrated her animus towards Donna Sturman, by sarcastically stating that:

> "It's very simple if you know how much money she needs to stay in the apartment for six months, and to stay there let's say you know that number, **you'll go to Pollack & Green[sic], and you say, it's Christmas, play the little violin, you know, and say, you don't want to put a lady and three kids back on a street**."[38]

These excerpts from the Transcripts cover decades of advances and reverses in position, yet make abundantly clear that everyone involved in these Cases was aware of the "elephant" in the room: Donna Sturman's claim clearly demonstrated the Trustee's conversion of the non-estate property in these Cases to pay creditors and professionals.

As later discussed herein, after the December 7, 2001 Hearing, Kane Kessler ("KK"), who filed the involuntary petition against Donna Sturman on behalf of her former counsel,

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[37] See Transcript of August 18, 1995 Hearing, at 57, submitted herewith as Exhibit "Q."
[38] See Transcript of December 7, 2001 Hearing, at 39, submitted herewith as Exhibit "R."

Pollack & Greene, had already begun research on January 2, 2002, regarding the filing and whether counsel for the petitioning creditor could act as counsel for the Trustee.

Mr. Kolodney of KK also began speaking to Mr. Leonard Spielberg on January 7, 2002 and made a telephone call to the Trustee and Spielberg on March 8, 2002 to find the address for Donna Sturman—presumably to serve her with the Petition, which was filed on April 9, 2002.[39]

[39] See Bill of KK, dated April 15, 2002, to Pollack & Greene is submitted herewith as Exhibit "S."

POINT I

DONNA STURMAN'S CLAIMS IN THESE CASES BASED ON HER OWNERSHIP OF THE ENTITIES WHICH WERE NEVER IN BANKRUPTCY AND WHICH WERE SUBJECT TO INJUNCTIVE ORDERS IGNORED BY THE COURT AND THE TRUSTEE AND WERE CONVERTED BY THE TRUSTEE

It has been demonstrated that the Properties owned by The Sturman Family Enterprises were inherited by Donna Sturman and the three debtors equally and were unequivocally ***never part of the debtor's Estates*** since the Properties were all beneficially owned by the Entities: the ***non-debtor partnerships and corporations,*** all of which were listed on her Proofs of Claim. This proposition has been unequivocally established above.[40]

Prior to the filing the involuntary petitions against the Debtors by MHT, it became clear to Donna Sturman that the assets of the Entities were being dissipated and/or encumbered by her Brothers with liens filed by Manufacturers Hanover Trust ("MHT") in order to obtain loans to invest in publicly traded stock of The Cooper Companies, Inc. ("Cooper"). As she learned later on in the Supreme Court case, MHT made approximately $18 Million in loans against the 22 Acres of Property owned by H. Development Corp., which the MHT checks show that they were "for margin calls."[41]

Accordingly, on June 26, 1987, as amended July 10, 1987, Donna filed a Verified Complaint in New York State Supreme Court, individually and derivatively on behalf of the Entities against her Brothers and other Entities, which assets, derived from the Trustee's sale

[40] See footnote 26, supra.
[41] See copies of MHT checks marked "for margin calls," annexed hereto as Exhibit "T."

of Cooper stock, amounting to approximately $18 Million which the Trustee acquired during the case[42], clearly creating a constructive trust in favor of Donna Sturman, who was an owner of the Entities from which the proceeds, in the form of Cooper stock, came into the possession of the Trustee.

Donna also filed a motion in the New York Surrogate Court in her mother Muriel's Estate, once it became clear to Donna that Howard, one of the executors, was secreting and using the assets of the Properties in the same way as he and the Brothers had pledged and transferred Entities and Properties to MHT to wage their proxy fight against Cooper Companies.

Howard Sturman, later convicted with his two Brothers of felonious submissions of false financial statements to a federally insured Bank, remains a co-executor of the Estate of Muriel Sturman with Joseph Warren, whom Ms. Sturman also named as a defendant in the Surrogate Court proceeding.

Both the Supreme Court and the Surrogate's Court found Donna's claims meritorious enough, and likely enough to succeed on the merits to issue Injunctions against any distribution of the assets of the Sturman Family Enterprises and the assets of the Muriel Estate.

The MHT involuntary filings against the Brothers immediately followed Donna's service of a subpoena on MHT in her State Court litigation in which Donna Sturman was

[42] See Answer and Counterclaim of Chemical Bank, February 18, 1994, in which it alleges that the Trustee took in over $18 Million and failed to account for same, submitted herewith as Exhibit "U."

suing individually and derivately on behalf of the Entities, some of which Property MHT had already taken as collateral for loans to the Brothers to make margin calls, **knowing** that the Properties were inherited and that Ms. Sturman had an interest in them,[43] and that such use of the funds for margin calls on their Cooper stock was clearly not for a corporate purpose.

As shown by Exhibit "B" to the Final Reports of the Trustee, ECF#896, dated April 29, 2009, the property of the Estates came from only three sources: (i) the unlawful sale of the Properties in violation of the Code, over which this Court had no jurisdiction or authority, (ii) the income from the Entities which were not in Bankruptcy (all of which income was withheld from Donna[44]—causing her to be unable to pay her attorneys, ultimately allowing the fraudulent involuntary bankruptcy petition to be filed against her by Pollack & Greene), and (iii) the proceeds of the Cooper Stock, which derived directly from fraudulent transfers from the Properties made by the Debtors to and for the benefit of, and aided and abetted by MHT, who **knew** Donna Sturman was an owner.[45]

This Court, the Trustee and, among all of his counsel, even his long-time present

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[43] See deposition of Paige Davis on August 2, 1988, at 13-14, and Criminal Testimony on March 27, 1998, at 364-370, collectively submitted herewith as Exhibit "V."

[44] This was admitted by the Trustee. See Transcript of June 22, 2001 Hearing, at 9-13, submitted herewith as Exhibit "W."

[45] See Transcript of November 10, 1998, at 7, submitted herewith at Ex. "X." See also Whitney v. Citibank, 782 F.2d 1106 (2d Cir. 1986), in which the Second Circuit found aiding and abetting breaches of fiduciary duties in circumstances remarkably like the case at bar. The MHT Proof of Claim unequivocally states that it relied on financial statements provided by the Debtors to MHT which show that, *inter alia*, Donna Sturman owned 25% of H. Development Corporation, against which MHT took $17.5Million in mortgages to fund margin calls on the Cooper stock. This is part of the essence of the Adversary proceeding against MHT (Adv. Pro. 98-9435A). These fraudulent transfers were simply ignored by the Trustee—he never sought to avoid them—despite the fact that the Trustee even used Donna Sturman's complaint in the State Court action as an exhibit to his objection to the Discharge of Bruce Sturman to demonstrate his fraudulent activities. (See Complaint in Adv. Pro. 92-8470A.)

counsel, Leonard I. Spielberg, admitted on the record that (a) the Properties were not "property of these estates" since they were all beneficially owned by non-debtor partnerships and corporations (the Entities) in which Donna Sturman owned at least a 25% interest and (b) that Donna Sturman's constructive trust claim on monies the Brothers fraudulently transferred from the Entities to purchase Cooper stock was also indisputably not property of the Estates.

A. The Trustee Admitted That The Properties Were Not Property Of The Estate

Perhaps the most fundamental problem with these cases is that the bankruptcy court was required **at the inception of the Cases** to "have made a threshold determination whether certain disputed [assets] were 'property of the estate'" *In re Koreag*, 961 F.2d 341, 344 (2d Cir. 1992), but it never did.

Since it never made such a decision—even to this day, the Properties owned by the non-debtor Entities, which was clearly outside the jurisdiction of the bankruptcy Court, was simply swept into the control and arms of the Trustee who converted them for the creditors and professional fees, including his numerous law firms.

What shocks the conscience is that, contrary to the conduct of the Trustee, he and his counsel testified under oath that Ms. Sturman's Proof of Claim was "indisputable" and would take all of the assets of the Estates.

In an interesting colloquy between the Court and Mr. Goldberg regarding the Trustee's management of Yorkville Associates (the 86th Street Property) and its $1 Million a year of income, none of which was ever paid to Donna, Goldberg admits that the Yorkville Property was not property of the brothers' estates:

> **The Court**: I think that what has come out from this situation is a serious question about why there was a 6-month delay in securing the physical premises.[46]
>
> **Mr. Goldberg**: **Recognize as well *this was not property of the estate*. It was property in which the brothers had an interest**. Yes, I was charged - -
>
> **The Court**: Mr. Goldberg, you are sort of caught on the horns of a dilemma, as I see the matter. ***If you want to take that view, then I will vacate the order which authorizes you to manage the 86th Street property* and I will leave it out in the cold**.[47]
>
> **Mr. Goldberg**: I do not want to take that view. I was about to set forth that I was authorized to manage and operate the property.[48]

Thus, the management of the Properties owned by the non-debtor Entities free of Donna Sturman's interests—as the Court and the Trustee well knew—was a complete perversion of the Code, lacks any basis in any known cases or statutes and was an

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[46] The Court raised the issue of whether the Trustee should have been surcharged for his failure to secure the debtors' books and records over six months after he was appointed, after the building containing them had been broken into, and then approximately two weeks later it was destroyed by arson. See Transcript of July 15, 1996, at 17, submitted herewith as Exhibit "M."

[47] It is apparent from this interchange that Judge Beatty understood that the non-debtor partnership property could not be part of the brothers' estates, yet nevertheless inexplicably allowed the Trustee to manage and sell the Properties. One should also note that, at this point in the Cases, the Debtors, Joseph Warren, one of the executors of the Muriel Estate and the Entities were all represented by Stroock Stroock & Lavan, Judge Beatty's former law firm.

[48] Transcript of August 5, 1996 Hearing, at 9, submitted herewith as Exhibit "Y."

embezzlement of non-debtor property. See 18 U.S.C. §153 (embezzlement) and §645 (conversion by a Trustee).

Pursuant to 11 U.S.C. § 502 "Allowance of claims or interests:"

> (a) A claim or interest, proof of which is filed under section 501 of this title [11 USCS § 501], is deemed allowed, unless a party in interest, including a creditor of a general partner in a partnership that is a debtor in a case under chapter 7 of this title [11 USCS §§ 701 et seq.], objects.[49]
>
> (b) Except as provided in subsections (e)(2), (f), (g), (h) and (i) of this section, if such objection to a claim is made, the court, after notice and a hearing, shall determine the amount of such claim in lawful currency of the United States as of the date of the filing of the petition, and shall allow such claim in such amount.

In commenting on the indisputable validity of Ms. Sturman's Proofs of Claims in these Estates, this Court stated:

> **"[T]he objection to Donna's claims is ridiculous**. Donna filed a claim which was supported by so many documents that the Clerk's Office refuse [sic] to take them and required the mail bank [sic—should be Millbank, Tweed] to retain them in order to review them.[50]
>
> **The Trustee has offered nothing prima facie that overcomes the prima facie validity of the claim** under the Bankruptcy Rules that the claim is valid until such time [sic] you offered [sic] such evidence to overcome the prima facie validity.

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[49] A properly executed and timely filed Proof of Claim will constitute *prima facie* evidence of the validity and amount of the claim, and, accordingly, the burden is on the objecting party to establish that the claim should be disallowed or reduced. H.R. No. 95-595, 95th Cong., 1st Sess. 352 (1977), reprinted in App. C, Collier on Bankruptcy, Pt. 4(d)(i) (Mathew Bender 15th Ed. Rev.) 11 U.S.C.§510(c) (1).

[50] These documents were retained by Donna's counsel, Millbank, Tweed which "served Otterbourg, Steindler, Houston & Rosen, P.C., attorneys for Marc Stuart Goldberg, Esq., the Trustee in this case with the Proof of Claim, including all exhibits."

> Because [sic] 5502(a) [sic—should be §502(a)] of the claim is deemed allowed unless objected to. Once the objection is filed then B.R. 3001 (f) says [sic] proof of claim is prima facie evidence, the case law is clear.
>
> **[S]imply saying we don't like it is not overcoming the claim and I did review the claim. And as I say, the file is quite evident that there were significant, substantial supporting documentation for that claim**...
>
> Without that claim being resolved there is no possibility that one can move forward with a distribution today with the creditors.[51],[52]

Since the Court found that the Trustee failed to rebut Donna's Proof of Claims, they are considered allowed pursuant to 11 U.S.C. §502 (b).

Moreover, the Trustee's counsel *conceded* that Donna's claims were indisputably valid:

> **"It's clear to us that Donna seems to have a claim and a significant one**.
>
> We felt that Donna should be, should receive a distribution because frankly she waited long enough with respect to her $20 million claim, Judge. ***We have reserved for that*.**[53]

But the full admission of Donna's Claims in these Cases was testified to by Mr. Spielberg, counsel for the Trustee, who stated under oath in open Court:

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[51] See Transcript of November 10, 1998 Hearing, at 7, submitted herewith as Exhibit "X."

[52] See also this Court's comment that the job of the Trustee is "to return the property to its true owners"—something he never did. See Transcript of July 15, 1996, at 15, submitted herewith as Exhibit "M."

[53] See Transcript of November 10, 1998 Hearing, at 21 and 34, submitted herewith as Exhibit "X." Mr. Spielberg may have committed perjury in making this statement since the proceeds of the sale of the Properties by Goldberg were **never segregated**, **as required by Rule 9027(i), or paid**.

[T]he Trustee has determined finally to reject the myopic view of Donna Sturman's claims that have prevailed for a decade. He has confronted the reality of the fact that **Donna Sturman has a significant claim and that claim is serious enough and large enough and frightening enough to make a very substantial payment to her justified**...there are substantial and meaningful and **undeniable** justifications for Donna's claim.

She has presented and there is evidence and there are indications that in the period before the filing of these cases her property interests were evaporated by her brothers. **It appears likely that the claim she makes that the $6 million or 5 or $6 million of cash that the Trustee came into possession of at the beginning of the cases were proceeds of the liquidation of Donna's assets**.

If that is so, **we believe that you would permit Donna to make a claim and prove a claim and prevail in a claim of constructive trust.**

If that happened [sic] Donna would wipe out the estates. There would be disgorgement and there would be mayhem in the final stages of these cases.

It has been shown that the Muriel Estate was evaporated, defrauded, emaciated and defalcated by her brothers. **It is clear that Donna has a prima facie case to take the entire Muriel Estate**.

With respect to the administration of the estate and the potential for claims that Donna could make as a result of it, I remind Your Honor that the Donna and **Muriel Estates in which Donna probably has a 100 percent interest ... owned between 25 and 50 percent of a $16 million asset which over ten years they [sic] received zero return upon**.[54]

The Trustee is doing his job, in following Your Honor's order to run that property in derogation of the property rights of the Donna and Muriel estate. There can be no dispute to that.

[54] Mr. Spielberg is referring to Yorkville Associates, the partnership which owned five lots of real estate on East 86th Street in Manhattan.

> **[T]he argument that because Your Honor issued an order that gave the Trustee the right to run the property, he exculpated the estates from the claim of property rights is just absurd. It is unconstitutional. It is an unlawful taking of her property without compensation. You can't do that. Nobody can do that. She has a claim. We used her property without paying her for ten years.**
>
> That claim, if this settlement is not approved, that claim will be made here. That claim will be heard by Your Honor, **and it worries me because it is real and it is clear.**
>
> What I ask you to focus on, Judge, is this: In addition to the factors that are incumbent upon you to address, remember this: In terms of Donna's constructive trust claim and the other unliquidated claims she makes, **there is no real question that she has an entitlement and she deserves to be paid for them.**
>
> The constructive trust claims could wipe out the estate.[55],[56],[57]

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[55] As the Second Circuit stated in In re Howard's Appliance Corp.:

> "The Supreme Court has declared that, while the outer boundaries of the bankruptcy estate may be uncertain, "**Congress plainly excluded property of others held by the debtor in trust at the time of the filing of the petition**," [United States v.] Whitting Pools, [Inc., 462 U.S. 198, 205 n.10, 103 S. Ct. 2309, 2314, 76 L. Ed. 2d 515 n.10 (1983)]; see S.Rep. No. 989, 95th Cong., 2d Sess. 82 and H.R.Rep. No. 595, 95th Cong., 2d Sess. 368, reprinted in 1978 U.S. Code Cong. & Ad. News 5787, 5868, 6323-24; see also In re Kennedy & Cohen, Inc., 612 F.2d 963, 965 (5th Cir.) (under previous bankruptcy statute, property held by debtor in constructive trust "belongs to the beneficiary and never becomes a part of the bankruptcy estate"), cert. denied, 449 U.S. 833, 101 S. Ct. 103, 66 L. Ed. 2d 38 (1980). A constructive trust, therefore, "confers on the true owner of the property an equitable interest in the property superior to the trustee's," [In re] Quality Holstein Leasing, 752 F.2d [1009, 1012 (5th Cir. 1985)]; cf. In re General Coffee Corp., 828 F.2d 699, 706 (11th Cir. 1987) (constructive trust beneficiary has priority to trust assets over a judicial lienholder or execution creditor), cert. denied, [485] U.S. [1007], 108 S. Ct. 1470, 99 L. Ed. 2d 699 (1988)." 874 F.2d 88, 93 (2d Cir. 1989)(footnote omitted).

[56] See Transcript of July 3, 2001 Hearing, at 106-110, submitted herewith as Exhibit "L."

[57] These comments in open court fall under the doctrine of judicial estoppel which "prevents a party from asserting a factual position in a legal proceeding that is contrary to a position previously taken by him in a prior legal proceeding ... judicial estoppel protects the sanctity of the oath and the integrity of the judicial process." Bates v. Long Island R.R. Co., 997 F.2d 1028, 1037 (2d Cir.), cert.

Based on such testimony, this Court recognized the validity of Ms. Sturman's claims:

> I think that the Trustee has taken a thorough look at Donna Sturman's likelihood of being able to construct the Constructive Trust claims, which were somewhat extensive.
>
> **I think that the Trustee has shown she would, in fact, end up with a $20 Million claim**...[58]

Thus, the $41Million which passed through these "no asset" Cases filed by MHT to stop Donna Sturman's litigation to recover the fraudulent transfers by the debtors to MHT and other lenders, were the proceeds of the non-debtor Properties over which the Court had no jurisdiction, which proceeds were used to pay unsecured creditors and over $8,000,000 in fees and commissions to the Trustee and other professionals.

B. The Conversion By The Trustee Of Non-Debtor Property

In support of his proposed settlement with Donna Sturman in June and July of 2001, Mr. Goldberg testified under oath as to his wrongful acquisition of the non-debtor Property when he characterized what he initially attempted to do in the Cases:

> **Mr. Goldberg**: Well, initially we attempted to secure all of the available assets in the estate which could be realized without the necessity of litigation.
>
> **We attempted to put our arms around and take control of their just [sic] real estate assets in which the**

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denied, 510 U.S. 992, 126 L. Ed. 2d 452, 114 S. Ct. 550 (1993). By settling Donna's Claims with Nisselson, in that subsequent legal proceeding, the Trustee violated this legal principle.

[58] See Transcript of December 7, 2001 Hearing, at 17, submitted herewith as Exhibit "R."

brothers had an interest in order to manage and operate those properties so as to realize the greatest possible return for all the creditors of the estates.[59]

Mr. Spielberg: Discussing the three estates as a whole, rather than separately, will you remind the court of the nature of the assets you collected?

Mr. Goldberg: At the time that the relief orders were entered there were cash assets which were held by counsel to [sic] two or more of the debtors.

Their cash assets, which I believe were held in bank accounts of the Debtors, and there was a substantial holding of Cooper Company Stock.

Mr. Spielberg: How much money was realized by the estates, both from the cash obtained and liquidation of the Cooper Company stock?

Mr. Goldberg: It is approximately $6 Million.[60]

Mr. Spielberg: [D]id you come to have an understanding of the source of these $6 Million that you have just testified to or the manner in which the Debtors accumulated that sum of money?

Mr. Goldberg: It is my understanding that **the Debtors either borrowed, liquidated, transmuted or otherwise took control of certain assets in which the brothers and Donna had an interest and/or otherwise borrowed money from**

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[59] As fully demonstrated herein, **there were simply no real estate assets which were property of the Estates**. **Thus, this comment by the Trustee is an acknowledgement of conversion and embezzlement pursuant to 18 U.S.C. § 153 and 645.** See also Meagher v. U.S., 36 F.2d 156, 158 (1929). Moreover, it is well-settled that the "use of the Bankruptcy Court proceedings....to divest plaintiffs of their rightful interest in partnership property constitute[s] a blatant breach of trust." See Stein v. Rappaport, 11 Phil. 594, 1995 Phil. Cnty. Rptr. LEXIS 140, *11 (Ct. Common Pleas, 1985).

[60] But see Answer and Counterclaim of Chemical Bank, claiming that the Trustee took in over $18 Million from the sale of the Cooper Stock, at Exhibit "U." Submitted as part of Exhibit "U" is a letter from Donna's counsel Helen Davis Chaitman requesting Mr. Goldberg to account for the missing $18 Million in Cooper stock, and Ms. Sturman's earlier counsel, Laurence J. Kaiser, Esq., asking about the same missing stock.

certain financial institutions for purposes of acquiring stock...[61]

The admitted conduct of the Trustee in "putting his arms around" the Properties, managing and selling non-debtor assets for the benefit of the attorneys and unsecured creditors **is a clear admission of conversion under 18 U.S.C. §645.** These converted funds of non-estate property were the appropriation of Donna Sturman's legal ownership of the non-debtor Properties and the confiscated proceeds of the fraudulent transfers by the debtors—used to meet margin calls on the Cooper Stock—which were admittedly subject to a constructive trust in favor of Donna Sturman. This amounts to both embezzlement and larceny

This is admitted by Goldberg. As stated in Goldberg's Summary of the Cases in his Final Report: "In the several years prior to the Petition Date, the Debtors, either individually or as partners or officers of their aforementioned entities, borrowed tens of millions of dollars from numerous sources thereby encumbering their personal assets as well as the assets of their partnerships and corporations. The loan proceeds were used for several purposes including the purchase of large blocks of stock of The Cooper Companies, Inc. ("Cooper")." (ECF#896, at ¶9.)

Seen in this way, the plundering of the Entities, initially by the debtors, and then by the Trustee to pay himself, his firms and the other unsecured creditors with stolen money

[61] See Transcript of June 22, 2001 Hearing, at 9-13, submitted herewith as Exhibit "W." Also see the Trustee's April 17, 2009 Application for Final Allowance of Compensation ECF#899, at ¶9, in which Mr. Goldberg incredibly admits that: "**The Trustee is not able to produce actual, contemporaneous time records for the period July 1995 through the present.**" See ¶83. This application is submitted herewith as Exhibit "Z."

was simply a continuation of what the Debtors started: conversion of Donna' property interests, breaches of fiduciary duties and a violation of 18 U.S.C. §§152, 153 and 645.

The Trustee acknowledged that his analysis of the proceeds of the Cooper Stock that came into the Cases at its inception, over which Donna Sturman had asserted a constructive trust claim, supported her claim to such proceeds:

> **Mr. Goldberg**: Donna has further asserted prior to the filing of the bankruptcy cases, the brothers had defalcated, stolen, transmuted or otherwise taken some 7 or $8 million worth of value that Donna contends belongs to her and has asserted a constructive trust as to that $8 Million or so.[62]
>
> That constructive trust theory, as I understand the argument presented by Donna, is in addition to the $20 million claim that Donna has filed in each of these estates.
>
> Now, if Donna were successful in proving up those claims and **recognizing that the proofs I need to rely upon are financial statements, tax returns that were prepared by the brothers who are convicted felons as a result of bank fraud and the filing of false financial statements**...
>
> **Based on that lowest intermediate balance theory is, once again, approved by Collier's and followed in this Court some or all of the $6 million might very well be found to be the property of Donna Sturman. If so that could certainly give rise, not only to an administratively insolvent estate or estates but could also give rise to further additional litigations against parties who have received distributions in these cases for disgorgement**.[63]

[62] As stated on the record by Glen Rice, Esq., a partner at Otterbourg, the amount of assets holding by the Trustee at the inception of the case was approximately $7,800,000.00. (See Exhibit "**X**" to ECF#908-2, Case No. 89-11932.)

[63] See Transcript of June 22, 2001 Hearing at pp. 19-21, submitted herewith as Exhibit "P."

In his testimony regarding his proposed settlement in of Donna Sturman's claims, the Trustee explained that he had proposed to settle Donna's claims because of the enormous risk to the Estate if they were not settled:

> **Mr. Guarino**: If Donna Sturman's constructive trust theory were proved to be valid, what would that mean in terms of the impact upon the Estate?
>
> **Mr. Goldberg**: It would be enormous.
>
> **Mr. Guarino**: In what way?
>
> **Mr. Goldberg**: As I understand it, Ms. Sturman asserts through her constructive trust theory that she would be entitled to somewhere in the neighborhood of 8 to 12 to $13 million, predicated upon the theory as equity, as it were of the brothers' properties and that **if, in fact, Ms. Sturman were correct or her theory was proven, it would be approximately $5 million in cash that existed at the time of the filing of the bankruptcy cases would be a fund upon which Mr. Sturman would be able to attach in connection with her allowed constructive trust claim, fees which had been paid to professionals and disbursements which had been made to creditors may be subject to disgorgement requests or litigation**.
>
> It would be absolutely enormous. Not to mention the obvious cost that would assumed by the estates, Ms. Sturman and others in connection with that litigation, the time that would be involved.
>
> **Mr. Guarino**: In fact, there might be disgorgement that would be required; would there not?
>
> **Mr. Goldberg**: I just testified to that.[64]

It is obvious from such testimony at these Hearings, that the eventuality of such a

[64] See Transcript of July 3, 2001 Hearing at p. 35-43, submitted herewith as Exhibit "F."

massive disgorgement and mayhem was inimical to this Court's reputation and would have undermined numerous jurisdictionally defective orders causing the Court great embarrassment.

In each of the Trustee's Final Reports to this Court, dated September 29, 2009, the Records of Cash Receipts and Disbursements Exhibit "B" in each Case, ECF #896, in 89-11932 (Wayne), ECF #520, in 89-11933 (Bruce) and ECF #557, in 89-11934 (Howard), demonstrate that the income of the Estates was essentially derived from the Trustee's sale and conversion of the Properties owned by the Entities, and the fraudulently transferred assets used by the brothers to purchase Cooper stock (over which Donna Sturman had a valid claim of constructive trust).

C. By Illegally Controlling The Income From The Non-Debtor Properties The Trustee Rendered Donna Sturman Penniless

Regarding the management of the Yorkville Associates (86th Street) Property by the Trustee, one of the Properties that the Trustee "put his arms around," **the Trustee admitted that during such "management" he had cut off all of Donna's income**, rendering her homeless in a complete perversion of the code:

> **Mr. Spielberg**: Did there come a time that Donna communicated with you either directly or through attorneys or other representatives regarding the management of property in which she had an ownership interest?
>
> **Mr. Goldberg**: Well, at the very inception of my involvement in this case by Donna, through counsel, I believe it

> was then Mr. Blanker [sic] at Milbank, objected and opposed the Trustee's applications to manage and operate these real estate properties.
>
> **Mr. Spielberg**: With respect to those applications, how did the Court rule?
>
> **Mr. Goldberg**: Well, the Court granted the Trustee the authority to manage and operate properties while reserving as to Donna's interest in those properties.
>
> **Mr. Spielberg**: Approximately how much did [you] collect on the 86th Street Property?
>
> **Mr. Goldberg**: **There is about a million dollars of income for about seven or eight years**.
>
> **Mr. Spielberg**: **How much did Donna receive?**
>
> **Mr. Goldberg**: **Nothing.**[65]

Thus, from the very inception of the Cases, the Trustee treated Donna Sturman as a *debtor*, not like an owner of the Entities—which were not in bankruptcy and which Entities owned the Properties the Trustee plundered—and, due to the enmity of the Trustee towards Donna, she was forced into Kane Kessler's ("KK") fraudulent involuntary bankruptcy filing on behalf of Pollack & Greene, Donna's own attorneys.[66]

By refusing to allow Donna Sturman access to the income from the Properties, the Trustee and the Court sanctioned the unconstitutional taking of property from Ms. Sturman

[65] See Transcript of Hearing on June 22, 2001, at 15-16, submitted herewith as Exhibit "W."

[66] See involuntary Petition, dated April 9, 2002, filed by KK against Donna Sturman, at Exhibit "AA" submitted herewith, which shows three petitioning creditors, Pollack & Greene, Lori Samet Schwartz and Mitchell Mandel. Ms. Schwartz and Mr. Mandell, however, were members of Pollack & Greene, and strangely enough never filed any proof of claim in the Case. **This is a clear violation of 18 U.S.C. §152 (3) and (4).** See In re Orlinsky, 2007 Bankr. LEXIS 1520 (S.D. Fl. 2007).

and causing her eventual insolvency. Once she was rendered penniless by the Court and the Trustee, the Court then approved an illegal and collusive Bankruptcy and the fraudulent and collusive Release contained in the Settlement Agreement on which the Trustee relies to preclude Ms. Sturman from presenting her claims.

D. The Alleged Transfers or Sales of the Properties Were Void Since They Violated Injunctions Issued by the Supreme and Surrogates' Court

It has been unequivocally demonstrated in this brief that the sales of the Properties were made without any jurisdiction of the Court or basis in law since the Properties were not property of the estates.

Additionally, the Trustee's sales of the Properties directly violated State Court and Probate Court Injunctions obtained by Donna Sturman prior to the Bankruptcy filing which enjoined the dissipation or sale of any of the Properties. This Court should schedule a Hearing to determine the damages caused by the Trustee for his willful and knowing violation of these injunctions.

Both the Court and the Trustee acknowledged the continued existence of these injunction orders, rendering intentionally fraudulent the sales of the non-debtor Properties.[67]

[67] See Tr. July 15, 1996, at 37, submitted herewith as Exhibit "M," and Tr. July 3, 2001, at 39, submitted herewith as Exhibit "L." See also FRBP 9027 (i). The Trustee could not sell or release the Properties to creditors, nor could the proceeds have been distributed but were required to be held for later determination.

In *Celotex v. Edwards*, 514 U.S. 300, 306, 115 S.Ct. 1493 (1995), the Supreme Court stated:

> "In *GTE Sylvania, Inc.* v. *Consumers Union of United States, Inc.*, 445 U.S. 375, 386, 63 L. Ed. 2d 467, 100 S. Ct. 1194 (1980), we reaffirmed **the well-established rule that 'persons subject to an injunctive order issued by a court with jurisdiction are expected to obey that decree until it is modified or reversed, even if they have proper grounds to object to the order.'**
>
> "In *GTE Sylvania*, we went on to say: 'There is no doubt that the Federal District Court in Delaware had jurisdiction to issue the temporary restraining orders and preliminary and permanent injunctions. Nor were those equitable decrees challenged as only a frivolous pretense to validity, although of course there is disagreement over whether the District Court erred in issuing the permanent injunction. **Under these circumstances, the CPSC was required to obey the injunctions out of respect for judicial process.**' *Id.*, at 386-387 (internal quotation marks, citations, and footnote omitted)."

The Full Faith and Credit Act mandates that the "judicial proceedings" of any State "shall have the same full faith and credit in every court within the United States ...as they have by law or usage in the courts of such State . . . from which they are taken." 28 U.S.C. §1738.

The Act thus directs all courts to treat a state-court judgment with the same respect that it would receive in the courts of the rendering State. Federal courts may not "employ their own rules . . . in determining the effect of state judgments," but must "accept the rules chosen by the State from which the judgment is taken." *Kremer* v. *Chemical Constr. Corp.*, 456 U. S. 461, 481-482, 102 S.Ct. 1883 (1982).

It is well-settled that civil contempt proceedings may be classified into two categories. Coercive sanctions, which are really the essence of civil contempt, seek to induce future behavior by attempting to coerce a recalcitrant party or witness to comply with an express directive from the court. *See Latrobe Steel Co. v. United Steelworkers of Am., AFL-CIO*, 545 F.2d 1336, 1344 (3rd Cir. 1976). **Remedial sanctions**, by contrast, are backward-looking and **seek to compensate an aggrieved party for losses sustained as a result of the contemnor's disobedience of a court's order or decree made for the aggrieved party's benefit**. See *Id.* However, irrespective of the nature of the civil contempt, whether it be coercive or remedial, any sanction imposed by the court must be predicated on a violation of an explicit court order. *See Ferrell v. Pierce,* 785 F.2d 1372, 1378 (7th Cir. 1986); *see also Boylan v. Detrio*, 187 F.2d 375, 378-79 (5th Cir. 1951).

Accordingly, due to the existence of the Supreme and Surrogate injunctions, which were removed to this Court under Case No. 91-9501 and had to be respected by this Court, the sales by the Trustee were invalid as a matter of law, and entitle Ms. Sturman to her losses due to the Trustee's malfeasance.

POINT II

THE ADVERSARY PROCEEDINGS INSTITUTED BY MS. STURMAN SHOULD BE OPENED AND THE RELEASES VOIDED SINCE THE COURT SHOULD NOT ALLOW COLLUSIVE RELEASES TO SHIELD THE FRAUDULENT CONDUCT OF THE TRUSTEES

The Trustee attempts to convince this Court that the releases between Ms. Sturman's "Trustee in Bankruptcy," Alan Nisselson, and himself exculpate the Estates and themselves from any liability and prevent Donna Sturman from proceeding on the Adversary Proceedings.[68]

The Trustee was directly responsible for Donna's insolvency. As the Trustee's counsel testified regarding the Trustee's acquisition of the non-debtor Property: "**It is an unlawful taking of her property without compensation. You can't do that. Nobody can do that. She has a claim. We used her property without paying her for ten years.**"[69]

The Trustee's acknowledged refusal to distribute the income from the Properties to Donna was not only unconstitutional, but impoverished her and her three children, forcing eviction after eviction, and rendering her unable to obtain representation by counsel.

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[68] See Settlement Agreement annexed to the opposition papers of the Trustee. See also ECF #11, in Bankruptcy Case 02-11671. **Without question, the Trustee knew, and benefitted tremendously by recharacterizing the Properties as part of the Estate**. He was interested from the inception of the Cases. They were filed as "no-asset" cases, and then, poof, the properties just poured in and Goldberg "put his arms around them" and held on tight.

[69] See Tr. of July 3, 2001 Hearing, at 109, submitted herewith as Exhibit "L," and Transcript of Hearing on June 22, 2001, at 15-16, submitted as Ex. "V."

As the Trustee testified:

> **Mr. Spielberg**: Approximately how much did [you] collect on the 86th Street Property?
>
> **Mr. Goldberg**: **There is about a million dollars of income for about seven or eight years**.
>
> **Mr. Spielberg**: **How much did Donna receive?**
>
> **Mr. Goldberg**: **Nothing.**[70]

Regarding this Property, counsel for the Trustee, Leonard I. Spielberg stated:

> "With respect to the administration of this Estate and the potential for claims that Donna could make as a result of it, I remind Your Honor that the Donna and the Muriel Estates in which **Donna** probably has a 100 percent interest, **owned between 25 and 50 percent of a $16 Million asset [Yorkville Associates] which over ten years they received zero return on**."[71]

It was a direct result of such wrongful and unconstitutionally void conduct by the Trustee that Donna was forced into an involuntary and fraudulent bankruptcy—which he used to settle all of her claims for pennies on the dollar.

It should be clarified that the Trustee does not rely on the settlement agreement between Nisselson and Goldberg that is asserted as a defense to this motion, rather **it is the illegal mutual RELEASES of the Trustees of each other and Donna Sturman's claims in her three brothers' Estates in her Bankruptcy proceeding** in which, among other things, the Trustee

[70] Transcript of Hearing on June 22, 2001, at 15-16, submitted herewith as Ex. "V."
[71] Transcript of Hearing on July 3, 2001, at 108, submitted herewith as Ex. "L."

exculpated himself from an Adversary Proceeding brought by Donna against him.[72]

A. The Releases Are Void Since They Purport To Exculpate The Trustees' Fiduciary Duty

The Releases are void since they are a clear violation of the fiduciary duties of the Donna Trustee, Alan Nisselson, and the Trustee herein. Their motivation was very lucrative. Once Donna Sturman was gone, the two pages of objections contained in the Settlement Agreement which she had raised, and the Court had failed to decide, all magically disappeared and the money flowed and flowed.

The remedy for such breach of fiduciary duties, which in these Cases involves fraud, omissions to disclose and self-dealing are equitable in nature. The damages resulting from such conduct is the restoration of the diverted monies and reimbursement of the amount of the defalcations. This action sounds in the equitable remedies of constructive trust and an accounting. See e.g., *Pressman-Neubardt v. Pressman*, 603810/99 (Sup. Ct. N.Y. Cnty.), *aff'd*, 278 A.D.2d 153, 718 N.Y.S.2d 255 (2000).

To enforce these releases, including the release of the Trustee herein, is to allow a fraud to be committed on the Court, which must not be condoned. This Court should not be used by a Trustee to commit a fraud upon the Court to and then insulate himself by inserting a general release from Donna's Claims against him and the Estates which he testified

[72] These Releases are contained in the Trustee's Memorandum of Law dated December 29, 2009, in opposition to the instant motion at page 10.

were valid under oath. This case involves the Trustee in embezzlement, arson, filing false tax returns, conversion, violation of Court Orders, perjury, obstruction of justice, fraudulent use of a bankruptcy court---this cannot simply be hidden behind a fraudulent exculpatory release.

The permeation of fraud in these cases began with the involuntary petitions commenced by MHT against the Debtors after receiving subpoenae from Donna Sturman's counsel (naming, among others, two Entities which had been mortgaged to MHT as collateral for loans to meet the debtors margin calls on Cooper Stock) to disclose the loans and security interests and mortgages they had fraudulently put on the non-debtor Properties which they knew she owned.[73] It was continued by the Trustee in these Cases.

It is well-settled that a Judgment is void if a court with jurisdiction "acted in a manner inconsistent with due process of law." *Fustok v. Conticommodity Services,* 873 F.2d 38, 39 (2d Cir. 1989); *O'Brien v. National Property Analysts Partners*, 739 F. Supp. 896, 900 (SDNY 1990); 12 Moore's Federal Practice §60.44 (3d Ed. 1997).

The fraud which is the gravamen of Donna Sturman's claim against the Trustee's actions lies in his deliberately secret, deceitful, undisclosed and fraudulent manipulation and

[73] This is the basis of the Adversary Proceeding against Chase (98-9435A) and is admitted in the Proof of Claim of Chase, namely, that they relied on financial statements provided by the Debtors which showed that all the properties were owned in inheritance and that Donna Sturman owned 25% of the Properties and Entities. Indeed, immediately after receiving a subpoena showing that Wayne-Adam Corp. (which owned property in lower Manhattan) was a defendant in an action for money damages, MHT took a pledge of 75% of the Stock for a $2Million Dollar loan to the Debtors since they knew that Donna Sturman owned the other 25% of the Stock. See deposition testimony of Paige Davis, August 2, 1988, at 13-14, and at Debtors' criminal Trial, March 27, 1998, at 364-70, submitted herewith as Exhibit "W."

transfer of the proceeds from the sale of the Properties owned by non-debtor Entities to make it thereby impossible for her to recover her ownership interests.

This is fully demonstrated in Form 1 to the Final Reports of the Trustee, filed November 13, 2009 (ECF#901 in 89-11932) (ECF#523 in 89-11933) and (ECF# 560 in 89-11934), where it is clearly broken down to show that the receipts of the Trustee related to the Entities (the partnerships and corporations), which were never part of the Estates.

Concealment of facts which one is duty bound to disclose is of the same legal effect and significance as affirmative misrepresentations. See *Quadrozzi Concrete Corp. v Mastroianni*, 56 A.D.2d 353 , 392 N.Y.S.2d 687 (2d Dept. 1977); *Di Maio v State of New York*, 128 Misc.2d 101 488 N.Y.S.2d 550 (Ct. Cl. Ny. Cnty. 1985). (Since there was no service of the Petition on Ms. Sturman, the Releases are void in any event. Nevertheless, there are only two possibilities: Goldberg concealed information from Nisselson, which is the most likely explanation, since the entire amount of time Donna's trustee and counsel was insignificant, or Goldberg and Nisselson colluded in the settlement agreement.)

"Constructive fraud, although a breach of a duty, may be consistent with innocence. The purpose to defraud need not enter into it because the law regards the act which gives it rise as fraudulent *per se*. Of such class of acts is the dealing by trustees for their own benefit in matters to which their trust relates." *Costello v. Costello*, 209 N. Y. 252, 258-259 (1913).

In *Munson v. Syracuse Geneva & Corning R. R. Co.*, 103 N. Y. 58, 74-5 (1886), the New York Court of Appeals stated the rule as regards the conduct of a fiduciary:

> "[W]e are of opinion that the contract...is repugnant to **the great rule of law which invalidates all contracts made by a trustee or fiduciary, in which he is personally interested, at the election of the party he represents**. There is no controversy as to the facts bringing the case...within the operation of the rule....The law permits no one to act in such inconsistent relations. **It does not stop to inquire whether the contract or transaction was fair or unfair. It stops the inquiry when the relation is disclosed, and sets aside the transaction or refuses to enforce it**, at the instance of the party whom the fiduciary undertook to represent, without undertaking to deal with the question of abstract justice in the particular case. It prevents frauds by making them as far as may be impossible, **knowing that real motives often elude the most searching inquiry**, and it leaves neither to judge nor jury the right to determine upon a consideration of its advantages or disadvantages, whether a contract made under such circumstances shall stand or fall."

(Cited by *Erbe v. Lincoln Rochester Trust Co*., 2 A.D.2d 242, 245 (4th Dept. 1956).

"**No actual fraud on the part of the [Trustees] need be found, nor is it necessary that there should be. The object of the rule which precludes trustees from dealing for their own benefits, in matters to which their trust relates, is to prevent secret frauds by removing all inducement to attempt them**." *Fulton v. Whitney*, 66 N.Y. 548, 555 (N.Y. 1876).Without any exaggeration or gloss, this Bankruptcy Court was used by the Trustee in these Cases to further criminal and fraudulent purposes for over 19 years.[74]

A Trustee owes a duty of undivided, absolute loyalty to the true owners of the property in a bankruptcy proceeding whose interests they are required to protect. Under no

[74] While the "Releases" provided for the immediate dismissal of the Adversary Proceedings in the Settlement Agreement dated December 2, 2002, they were not dismissed. Rather, the Court, in a type of clean up of her docket, dismissed all of Donna Sturman's adversary proceedings for "failure to prosecute." (See Motion to Reopen.) It is well-settled that *dismissal for failure to prosecute or to comply with a court order under Rule 41(b) is "one of the harshest sanctions . . . reserved for use only in the most extreme circumstances,"* United States ex rel. Drake v. Norden Sys., 375 F.3d 248, 251 (2d Cir. 2004).

theory could the Entities and their Properties have been sold if the Trustee had properly followed the Code—there is simply no characterization for his actions other than larceny.

"This "inflexible" duty of fidelity is akin to the highest standards of honor, not just honesty alone." *In re Wallens*, 9 N.Y.3d 117, 122-23, 847 N.Y.S.2d 156 (2007). It obligates fiduciaries to administer the estate or trust for the benefit of the beneficiaries, without regard to self-interests. *Id.* **These legal and ethical duties cannot be exculpated by agreement or otherwise**.

Moreover, **since the Trustee was settling Donna's Adversary Proceedings, one of which was against *him with assets of the Estate*[75], the Releases** were executed through fraud, embezzlement or violations of 18 U.S.C. §§152, 153 and 645. The conflict involved in settling an action against himself for $20 Million is violative of every aspect of the Trustee's responsibility.

18 U.S.C.§152 "attempts to cover *all the possible methods* by which a bankrupt *or any other person* may attempt to defeat the Bankruptcy Act through an effort to keep assets from being equitably distributed among creditors." *Stegeman v. United States,* 425 F.2d 984, 986 (9th Cir.), *cert. den.,* 400 U.S. 837 (1970) (italics in original).

[75] Since the settlement agreement between Nisselson and Goldberg involved Embezzlement in violation of 18 U.S.C. §153 (knowingly and fraudulently appropriates to his own use, embezzles, spends or transfers any property...which came into his charge as trustee ...shall be fined ..or imprisoned...or both), and the statute does not require that the property is ultimately determined to be property of the Estate. Meagher v. U.S., 36 F.2d 156 (9th Cir. 1929). Clearly, as demonstrated in footnote 26, none of the property sold by Goldberg was property of the estate.

Moreover, "18 U.S.C. § 152 was enacted to serve the important interests of government, not merely to protect individuals who might be harmed by the prohibited conduct." *Id.*

"The statutory requirement that the underlying acts be performed knowingly requires only that the acts be voluntary and intentional; the government does not have to show that the defendant knew that he or she was breaking the law." *United States v. Zehrbach,* 47 F.3d 1252 (en banc) (3rd Cir. 1995), *cert. den.,* 115 S.Ct. 1699 (1995).

As to embezzlement under 18 U.S.C. §153, which has been demonstrably proven herein, "The statute reaches all property that a court officer receives by reason of his or her position, regardless of whether it is ultimately determined to be property of the estate." *Meagher v. United States,* 36 F.2d 156 (9th Cir. 1929).

Moreover, 18 U.S.C. §645 provides that: "Whoever, being a ... trustee...retains or converts to his own use or to the use of another or after demand by the party entitled thereto, unlawfully retains any money coming into his hands by virtue of his official relation, position or employment, is guilty of embezzlement." No fraudulent intent is required by this statute. *United States v. Sharpe,* 996 F.2d 125 (6th Cir.), *cert. den.,* 114 S.Ct. 400 (1993). Mr. Goldberg admitted as much when he said that, at the beginning of the Cases, "we attempted to put our arms around and take control of their just [sic] real estate assets in which the brothers had an

interest in order to manage and operate those properties so as to realize the greatest possible return for all the creditors of the estate."[76]

An exoneration clause is void as a matter of public policy in a fiduciary relationship. In *In re Francis*, 2008 N.Y. Misc. LEXIS 1580; 239 N.Y.L.J. 50 (Sur. Westchester Co. March 14, 2008), Surrogate Anthony A. Scarpino, Jr. held that under **the traditional fiduciary standards of "utmost good faith and undivided loyalty toward the principal," an exoneration clause exculpating a fiduciary from liability "runs afoul of the spirit of New York's public policy" against such clauses**, as well as the duty of a fiduciary who "must act in accordance with the highest principles of morality, fidelity, loyalty and fair dealing," (citing In re Ferrara, 7 N.Y.3d 244, 254, 819 N.Y.S.2d 215 (2006)), stating that "**the provision exonerating [the trustee] from any liability is void**."[77]

It is well-settled law that: "One of the established principles of equity is 'that an individual should not be allowed to profit through his or her own wrongdoing.' *Noble v. McNerney*, 165 Mich.App. 586, 419 N.W.2d 424, 434 (1988)." *In re O'Keefe*, 583 N.W.2d 138, 141, 1998 S.D. 92 (1998).

"The general principle adopted by the courts of this State is that a person may not 'profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime' ([citing] *Riggs v. Palmer*, 115 N.Y.

[76] Transcript of Hearing dated June 22, 2001, 9-13, submitted herewith as Exhibit "V."

[77] Citing: EPTL 11-1.7 that, while limited to wills, noting that its prohibition has been applied to an exculpatory clause in an inter vivos trust which seeks to relieve a trustee from any and all liability. Such provision may be strictly construed against the trustee, or determined to be void as against public policy (Matter of Schauer, NYLJ, June 3, 1992, at 23, col. 3; Matter of Akin, NYLJ, Oct. 23, 1989, at 29, col. 4; see also Matter of Amaducci, NYLJ, Jan. 12, 1998, at 32, col. 3).

506, 511 (1889))." *In re Dorsey*, 161 Misc.2d 258, 261, 613 N.Y.S.2d 335 (Sur. Ct. 1994). See also, *People v. Perkins*, N.Y.L.J. p. 44 (6/30/10) (Court of Appeals) stating "the maxim that the law will not allow a person to take advantage of his own wrong."

The Court itself recognized that the Trustee's settlement of the claim against himself was not only a violation of his fiduciary duties, but involved conversion of Estate assets since he used those assets to fund the settlement agreement with Nisselson.

The Court recognized the conflict suffered by the Trustee in attempting to settle the Adversary Proceeding against him:

> A compromising settlement here in this case, it's objected to, it's going to go up on appeal as far as can tell, no matter what - - only if I turn it down will it not go up on appeal, and it will go up on appeal on the ground that **the Trustee abused his discretion in making the settlement because he's really concerned about the possibility of personal liability because of Donna's action against him personally** or something of that sort. **There will be allegations that, in essence, that he used estate funds to settle a personal liability**. I mean, I could think of that just right off the top of my head for a basis for asserting that....[78]

These fraudulent "Releases" are the sole basis on which the Trustee now relies to preclude Donna Sturman's application to proceed on her Adversary Complaints—or to have any standing in these Cases whatsoever. However **—"It is basic that "a settlement agreement or contract [with no notice to Donna], like any other, may be attacked on the**

[78] See Tr. of March 19, 1999 Hearing, at 37, Ex. A. This cannot be characterized other than as embezzlement by the Trustee.

grounds that it was procured by fraud." *First Nat. Bank of Cincinnati v. Pepper*, 454 F.2d 626, 632 (2d Cir. 1972).

In the bankruptcy context a threshold fiduciary requirement is counsel's duty to establish its qualification as a party with no conflicts of interest and the maintenance of that qualification throughout the case. *In re Angelika Films 57th, Inc.,* 227 B.R. 29, 37 (Bankr. S.D.N.Y. 1998). This standard is well-beyond the Trustee's reach.

This responsibility included in §327 (a), requires that an attorney must meet a two-prong test to be considered qualified: (i) the attorney must not hold or represent an interest adverse to the bankruptcy estate, and (ii) the attorney must be a disinterested person. *In re Angelika Films 57th, Inc.,* 227 B.R. at 37 (citing *In re Leslie Fay Cos., Inc.,* 175 B.R. 525, 531 (Bankr. S.D.N.Y. 1994)).

An interested party has been defined as one who has "either a meaningful incentive to act contrary to the best interests of the estate and its sundry creditors -- an incentive sufficient to place those parties at more than acceptable risk -- or the reasonable perception of one." *In re Martin,* 817 F.2d 175, 180 (1st Cir. 1987); *In re Leslie Fay Cos.,* 175 B.R. at 533.

Counsel is said to represent an interest adverse to the estate when representing an interest that either is in possession of an economic interest that would tend to lessen the value of the estate or create an actual or potential dispute with the estate as a rival counsel or a predisposition of bias against the estate. *In re Angelika Films 57th, Inc.,* 227 B.R. at 38 (citing *In re Granite Partners, L.P.,* 219 B.R. 22, 33 (Bankr. S.D.N.Y. 1998)).

"Limitation of liability clauses cannot shield a party from liability for fraud or other intentional wrongdoing." See *Tomoka Re Holdings, Inc. v. Loughlin,* 2004 U.S. Dist. LEXIS 8931 (S.D.N.Y. 2004). ("Under New York Law, a party may not insulate itself contractually from liability from fraud or gross negligence.") (citations omitted); *Kalisch-Jarcho, Inc. v. New York,* 58 N.Y.2d 377, 461 N.Y.S.2d 746 (1983) ("An exculpatory clause is unenforceable when, in contravention of acceptable notions of acceptable notions of morality, the misconduct for which it would grant immunity smacks of intentional wrongdoing. This can be explicit, as when it is fraudulent, malicious or prompted by the sinister intention of one acting in bad faith. Or, when, as in gross negligence, it betokens a reckless indifference to the rights of others, it may be implicit.")(citing *Karp v. Hults,* 12 A.D.2d 718 (3rd Dept. 1960), *aff'd,* 9 N.Y.2d 857(1961).)

The Second Circuit held that **the "strong inference" [of fraud] could be established either (a) by alleging facts to show that defendants had both motive and opportunity to commit fraud**, or (b) by alleging facts that constitute strong circumstantial evidence of conscious misbehavior or recklessness. *Shields v. Citytrust Bancorp, Inc.*, 25 F.3d 1124, 1128 (2d Cir. 1994); *Time Warner, Inc.*, 9 F.3d 259, 268-269 (2nd Cir. 1993); *Beck v. Manufacturers Hanover Trust Co.*, 820 F.2d 46, 50 (2nd Cir. 1987).

"A judgment is ... void if a court with jurisdiction has 'acted in a manner inconsistent with due process of law." *Fustok v. ContiCommodity Services, Inc.,* 873 F.2d 38, 39 (2d Cir. 1989); *O'Brien v. National Property Analysts Partners,* 739 F.Supp. 896, 900 (S.D.N.Y. 1990).

"[W]here there is cause sufficient to invalidate a contract, such as fraud, collusion, mistake or accident, a party will be relieved from the consequences of a stipulation made during litigation." *Hallock v. New York,* 64 N.Y.2d 224, 230, 485 N.Y.S.2d 510 (Ct. Appeals 1984). ("Equally rooted in the law is the principle that, without a grant of authority from the client, an attorney cannot compromise or settle a claim (see *Kellogg v. Gilbert*, 10 Johns 220; *Jackson v Bartlett*, 8 Johns 361), and settlements negotiated by attorneys without authority from their clients have not been binding (see *Countryman v. Breen*, 241 A.D. 392, 271 N.Y.S. 744 (4th Dept. 1934), *aff'd,* 268 NY 643 (1935); *Spisto v. Thompson*, 39 A.D.2d 598, 331 N.Y.S.2d 818 (2nd Dept. 1972); *Leslie v. Van Vranken*, 24 A.D.2d 658, 261 N.Y.S.2d 103 (3rd Dept. 1965); *Mazzella v. American Home Constr. Co*., 12 A.D.2d 910, 211 N.Y.S.2d 131 (1st Dept. 1961)." *Id.*

On December 16, 2002, in what is reminiscent of the ***"Saturday Night Massacre,"*** a purported hearing took place (**which is not shown on any docket and for which no transcript exists**)[79] in which the Trustee illegally released himself, the Estates and all the creditors and professionals therein from any claims by Ms. Sturman, **including the adversary proceeding against the Trustee himself** in a collusive settlement with Alan Nisselson in an utterly fraudulent and void bankruptcy proceeding in which the Trustee settled all of Donna Sturman's claims for $1.5 Million, when he had previously testified that her claim was "enormous" and would likely "wipe out the estates [worth $20 Million]".

On the same date, the Trustee executed a Settlement Agreement, **this time releasing**

[79] This fact is based upon repeated searches by this office of the Bankruptcy Records Room. Pursuant to FRBP 9019, a settlement may only be made by a Court "upon notice and a Hearing."

the Muriel Estate and having the Muriel Estate release *him and the Debtors' Estates*, notwithstanding that the Trustee admitted in the Settlement Agreement that he was holding over $1,089,000 from the sale of Yorkville, plus $394,000 in the Yorkville operating account, which the ***Trustee admitted were assets belonging to Donna***.[80],[81]

In continuation of the breach of the Trustee's fiduciary duties and in contravention of the Surrogate Court order barring any transfers or distributions from the Muriel Estate, the Trustee then paid $100,000 to Joseph Warren, one of the executors of the Muriel Estate, for "trustee commissions" out of the assets of the Cases.

Once Goldberg had released and exculpated himself and had been released by the Muriel Estate and the Donna Estate, which he claims disposed of anyone who could make any claims against him or his actions or the estates, the Trustee then made huge distributions of the proceeds of the non-debtor Properties to the unsecured creditors, himself and the other professionals—not to Donna Sturman, the true owner of such Entities.[82]

B. The Motivation For The Trustee To Make The Settlement Was To Distribute Millions To Creditors and Counsel

[80] See Transcript of July 3, 2001 Hearing, at 106-10, submitted herewith as Exhibit "L."

[81] This Court should be aware that the Trustee recently moved to hold Ms. Sturman and her counsel in Contempt for filing a motion in the Surrogate's Court for an Accounting of the looted Muriel Sturman Estate. That motion by the Trustee is clearly frivolous since, according to Goldberg's own release with Warren, there is no property of the Estates in the Surrogate's Court, and Mr. Warren, an executor purportedly released any and all claims that the Muriel Estate could have in these Cases. The Trustee will apparently go to any length to destroy Donna Sturman. See ECF #929, 930 and 931.

[82] See below.

Where motive is not apparent, it is valid to prove scienter by identifying circumstances indicating conscious behavior by the defendant. *U.S. v. Simon*, 425 F.2d 796, 808-809 (2d Cir. 1969); *see also Goldman v. Belden*, 754 F.2d 1059, 1070 (2d Cir. 1985).

Immediately after the so-called settlement agreement and releases, came the flood of applications and orders granting professional fees and distributions to creditors. On December 5, 2002, Goldberg applied for a Second Interim Distribution to Unsecured Creditors. (ECF#851, 89-11932) This application was granted by the Court on December 16, 2002, the day the settlement agreement and releases were sanctioned by the court. (ECF# 852, 89-11932.)

On December 23, 2002, Goldberg distributed **$528,000.00 to Boston Safe & Deposit**, **$440,000.00 to SFS Management & Moses Marx**, **$1,140,283.73 to JP Morgan Chase** and **$22,244.74 to Bank of New York**. In all, Goldberg distributed $2,130,528.40 on that date.

On January 24, 2003, Goldberg applied for a Second Interim Application for Professional compensation to **his firm, Harrington, Ocko & Monk**. (ECF#860, 89-11932.) This application was granted by the court on February 21, 2003. (ECF#865, 89-11932.)

On February 23, 2003, Goldberg distributed $149,457.67 to Harrington, Ocko & Monk.

On January 24, 2003, Goldberg applied for the 10th Interim compensation Order for BDO Seidman, accountants (ECF#858, 89-11932), which application was granted on February 21, 2003. (ECF# 864, 89-11932.) They received $67,207.28.

On February 10, 2003, JP Morgan Chase applied for reimbursement of costs and expenses (ECF#863), which application was granted on February 21, 2003 (ECF# 866.) **Goldberg distributed $441,984.18 to Walter Conston**, **$85,132.18 to Otterbourg Steindler Houston & Rosen**,[83] **$337,711.45 to Dryer & Traub**, and **$14,238.55 to Tenzer Greenblatt**.

According to the Trustee's Application for a final allowance of compensation, he states that in early to mid March 2003, just after the Settlement Agreement with Ms. Sturman, he **distributed $1,854,659.40 to professionals**.

He goes on to say that by that same time, mid-March 2003, he had disbursed to unsecured creditors the sum of $19,262,389.00.[84]

C. The Releases in the Settlement Agreement Were Void Due To The Trustee's Fraud Against the Court

Fraud upon the court is "fraud which . . . subvert[s] the integrity of the Court itself, *or is a fraud perpetrated by officers of the court* so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that are presented for adjudication."

[83] This was in addition to the $2 Million they received in 1992.

[84] See Goldberg Final Application for Commissions, April 17, 2009, submitted herewith as Exhibit "Z" at ¶¶75-76.

Evans v. Gunter, 294 S.C. 525, 529, 366 S.E.2d 44, 46 (Ct. App. 1988) (emphasis added). It has also been defined as "fraud that does, or at least attempts to, defile the court itself . . . ." 12 Moore's Federal Practice § 60.21[4] [a] (3d. ed. 2000).

The Releases contained in the Settlement Agreement are void as against public policy since, in a gross breach of fiduciary duties of the two trustees, ***they exculpated themselves*** from any liability to Ms. Sturman in the Releases of the Settlement Agreement and made a grossly inadequate settlement—contradicting the Trustee's testimony under oath—without notice to Donna Sturman to settle her claims against these Cases and against the Trustees. (Settlement Agreement at ECF# 11.)[85]

In a clear line of decisional authority in New York, a fiduciary may not engage in this type of self-dealing by exculpating themselves from any liability, and the beneficiary may seek redress directly against the trustees. *In re Schulman*, 165 A.D.2d 499, 503-04 (3d Dep't), *app. den.*, 79 N.Y.2d 751 (1991); *In re Sakow*, 219 A.D.2d 479, 482-3 (1st Dep't 1995).

The Adversary Proceedings purportedly settled by the Trustee was Donna Sturman's action against the Trustee, Adv. Pro. No. 99-8076A, styled *Donna Sturman, individually and as a beneficiary on behalf of [the Entities] v. Marc Stuart Goldberg, individually and as the Trustee* of these three Bankruptcy Cases. (Previously annexed to Affirmation of David H. Relkin at Exhibit "D.") (ECF#582 in 89-11934.)

[85] Given the knowledge of Goldberg and Nisselson that Ms. Sturman was owed approximately $20 Million, her bankruptcy was a clear obstruction of justice, a continuation of the bankruptcy fraud committed by the Trustee Goldberg and was nothing more than an attempt to conceal similar breaches of fiduciary duty sanctioned by this Court and was a clear violation of 18 U.S.C. §152 and 157.

"The trustee serves the role of 'protecting the public interest and ensuring that bankruptcy cases are conducted according to law.'" *In re Revco*, 898 F.2d 498, 500 (6th Cir. 1990), quoting H. Rep. 595 at 109, reprinted in 1978 U.S. Code Cong. & Admin. News at 5787, 6070. This was simply ignored in these cases.

In a far less egregious case, the Second Circuit found that the Trustee should be disqualified since the Trustee was a member of the Trustee's law firm, stating: "A trustee who hires his own professional firm to assist him cannot be a "disinterested person" who has no interest adverse to the Estate. Once the trustee's firm is hired by the Estate, the Trustee's personal interests are implicated. **At that point, the Trustee's independence and disinterestedness are compromised by a potential conflict of interest. The Trustee may be placed in a position where it would be to his benefit to harm the reorganization or dissolution of the estate**." *In re Palm Coast*, 101 F.3d 253, 258 (2nd Cir.1996).

The conflict involved in releasing himself and all of Donna Sturman's claims in the Cases was so egregious because the Trustee waived any rights Donna had to the Estate or against him; thus, he himself signed a Settlement Agreement in which he released himself and the Estate of Donna Sturman from any liability to each other. Accordingly, the Release provisions must be considered void by this Court and should not be allowed to shield fraudulent conduct of the Trustee.

Trustees are fiduciaries with wide-ranging responsibilities to effectuate the goals of the particular chapter under which a bankruptcy is filed. Because they are fiduciaries, trustees are held to very high standards of honesty and loyalty. See generally *Woods v. City National Bank*

& Trust Co., 312 U.S. 262, 278 (1941); *Mosser v. Darrow*, 341 U.S. 267 (1951). See also *Meinhard v. Salmon*, 249 N.Y. 458, 464, 464, 164 N.E. 545, 546 (1928) (Cardozo, C.J.). A trustee is the representative of the court and, as in the Donna Sturman Bankruptcy, **the Trustee in these cases engaged in settling the claims against himself and these Estates for his own personal advantage**.

"**Equity tolerates in bankruptcy trustees no interest adverse to the trust**. This is not because such interests are always corrupt but because they are always corrupting. By its exclusion of the trustee from any personal interest, it seeks to avoid such delicate inquiries as we have here into the conduct of its own appointees by **exacting from them forbearance of all opportunities to advance self-interest that might bring the disinterestedness of their administration into question**." *Mosser v. Darrow*, 341 U.S. 267, 271, 71 S. Ct. 680, 681 (1951) (Emphasis added). This exculpatory Release could not implicate the Trustee in any more direct and interested way—thus he had no power to enter it.

This Court's approval of the Releases contained in the Settlement Agreement which dismissed Ms. Sturman's Adversary proceeding against the Trustee was not only without **jurisdiction, it was without any legal or factual justification, without the slightest examination of Donna Sturman's rights and remedies in the Cases, without any Memorandum of Law and without any Hearings**.

It was a blatant violation of the Trustees' fiduciary duties in both Cases and a violation of 18 U.S.C. §152 (6). "Congress has recognized **the importance of requiring that the bankruptcy trustee have no interest adverse to the estate**. The requirement that a

trustee be a "disinterested person" has been expressly incorporated into various sections of the Bankruptcy Code." *In re Palm Coast*, 101 F.3d 253, 258 (2nd Cir. 1996).

A "Disinterested person" is defined in subsection 101(14) of the Bankruptcy Code as, *inter alia*, a person that "does not have an interest materially adverse to the interest of the estate." 11 U.S.C. § 101(14)(E). There is no question but that the Trustee had an interest **directly adverse to Ms. Sturman** in that she had brought an Adversary Proceeding against him from which he released himself. (Adv. Pro. No. 99-8076A.)

The Second Circuit made abundantly clear that "a trustee, *in his role as trustee*, be disinterested and prohibits him from obtaining interests adverse to the estate. As with any trustee, a bankruptcy trustee owes a duty of loyalty to the beneficiaries of the trust. Austin W. Scott, *Scott on Trusts*, § 170 (3rd ed. 1967)." A trustee 'is not permitted to place himself in a position where it would be for his own benefit to violate his duty to the beneficiaries.'" *In re Palm Coast*, 101 F.3d 253, 258 (2d Cir. 1996).

Goldberg and his counsel now speciously claim that Donna Sturman wants to "relitigate" her claims—she has never had even one opportunity. However, in his Application for a Final Allowance of Compensation, dated April 17, 2009, the Trustee stated: In the several years prior to the Petition Date, the Debtors, either individually or as partners or officers of their aforementioned entities, borrowed tens of millions of dollars from numerous sources thereby encumbering their personal assets as well as the assets of their partnerships and corporations. The loan proceeds were used for several purposes including the purchase of

large blocks of stock of The Cooper Companies, Inc. ("Cooper"). Goldberg App. for Final Compensation, April 17, 2009, Ex. "Z" at ¶9.

In *Estate of Wallens*, 9 N.Y.3d 117, 847 N.Y.S.2d 156 (2007), the Court of Appeals of New York expressed its long-held position regarding fiduciary obligations, stating:

> **This is a sensitive and "inflexible" rule of fidelity, barring not only blatant self-dealing, but also requiring avoidance of situations in which a fiduciary's personal interest possibly conflicts with the interest of those owed a fiduciary duty**. (Citing *Birnbaum v. Birnbaum*, 73 N.Y.2d 461, 466, 541 N.Y.S.2d 746 (1989).)

Accordingly, the two Trustees had no jurisdiction, authority or power to exculpate each other and their respective Estates.

A similar result was announced in *In re Kornrich,* 19 Misc. 3d 663, 854 N.Y.S.2d 293 (Sur. 2008) (Per Roth, Sur.), where the trustee claimed that the trust language excused him from accounting during the period of the trust: "There is a basic reason that such a provision cannot be enforced, namely that accountability is an essential element of all fiduciary relationships which cannot be waived." 19 Misc.3d at 665, 854 N.Y.S. at 295.

Thus, the purported "release" of all of Donna Sturman's claims, including the adversary proceedings, was a clear breach of the Trustee's fiduciary duties and void. He should not now be able to use such a fraudulent document to oppose the opening of the three adversary proceedings brought by Ms. Sturman. This Court should not sanction the use of such an agreement to insulate the Trustee from Donna Sturman's attempt to prosecute the

Adversary Proceedings. (As to the money paid to the Donna Estate, there can be no disgorgement since the money paid to her was hers to begin with according to the Trustee.)

Under ***any*** construction of the law, the Releases by the Donna Estate of her claims herein and against the Trustee are void, and ***a fraud on this Court***. Since these releases are the ***sole*** basis upon which the Trustee supports his frivolous claim that Donna Sturman lacks standing to reopen the Adversary Proceedings, the motion should be granted.

It is well-settled in this Circuit that "a trustee in bankruptcy is an officer of the court that appoints him." *In re Beck Industries, Inc.*, 725 F.2d 880, 888 (2nd Cir. 1984). Moreover, **there is 'no question that a trustee in bankruptcy may be held personally liable for breach of his fiduciary duties**.' *In re Gorski*, 766 F.2d at 727 (*citing Mosser v. Darrow*, 341 U.S. 267, 95 L. Ed. 927, 71 S. Ct. 680 (1951)).

In *Gorski*, the Second Circuit noted that that in 'the usual case, a surcharge is imposed [by the bankruptcy court] on the fiduciary in the amount of the actual or estimated financial harm suffered by either the creditors or the estate and is payable accordingly.'" 766 F.2d at 727." *Lebovits v. Scheffel, (In Re: Lehal Realty Associates)*, 101 F.3d 272, 276 (2d Cir. 1996).

Without any notice to Ms. Sturman, the two Trustees not only settled exculpated themselves and their respective estates from any claims by Ms. Sturman and against *themselves in violation of their fiduciary duties*, but all of Ms. Sturman's claims against Chase and all other parties in these three consolidated Bankruptcy proceedings, 89-11932, -3 -4, and voided all of her objections, claims and rights to any proceeds in these Cases.

This type of conduct mandates not only that this Court void the Releases but to refer this matter to the US Attorney in this District. 18 U.S.C. §3057 (a).

The principals and the debtor in possession have such an adverse interest for conflict purposes when counsel begins to advocate for or represent the principals' interests in ways that are at the expense of the estate. *In re Angelika Films 57th, Inc.,* 227 B.R. at 40 (finding attorney actions which benefited the principal, who was the sole shareholder of a closely held corporation, put at risk the benefits to the estate previously achieved and was therefore an actual conflict); *see also In re Greene,* 138 B.R. 403, 409 (Bankr. S.D.N.Y. 1992) (finding attorney's resistance to conversion from chapter 11 was a delaying action intended not to benefit the estate but to benefit the debtors); *Bergrin v. Eerie World Entm't L.L.C.,* No. 03 Civ. 4501, 2003 U.S. Dist. LEXIS 18259, 2003 WL 22861948, at *2 (Bankr. S.D.N.Y. 2003) (finding counsel for a chapter 11 debtor owes a fiduciary duty of loyalty and care to his client, the debtor in possession, and the estate, but not to the debtor's principals).

D. The Releases Were Part Of A Scheme To Defraud This Court

When Nisselson "settled" with Goldberg, it was not an "arms-length" settlement—it was an opportunity for Goldberg to get rid of Donna Sturman, the only party in the Brothers' Cases who asserted that the Properties were not property of the Estate.

While Nisselson obtained the transfer from these Estates of $1.5 Million to the Donna Estate, he should be sanctioned for his gross negligence (spending a mere 8.8 hours to

determine that Donna's $20 Million claim, which this Court, the Trustee and his counsel **admitted and testified in open Court under oath was worth $20 Million** over four separate hearings, hundreds of pages of Donna's Proof of Claim, the State Court Litigations containing Injunctive relief, to which this Court was bound, as well as the three adversary complaints sought to be opened herein.)

Based upon the Trustee's own Final Accounting, there is a clear ability to trace the funds embezzled deriving from the income and sale of the Properties owned by the Entities. Virtually all the income derives from the sale of the non-debtor Property.

However, in a startling revelation in the Wayne Case, 89-11932, the Cover Sheet shows that **the Trustee admits distributing $10,315,930.89 of "non-estate assets."** The nature and source of these funds and to whom they were distributed is not described, but the fact remains that **the Trustee admits taking in a huge amount of non-estate assets and distributing them to persons other than Ms. Sturman**. Under 11 U.S.C. §704 (a) (2) "The Trustee shall be accountable for all property received." Where is the accountability in these Reports for the $10 Million of non-estate property? It would seem that this is either yet another example by the Trustee of concealment of assets, defalcation, larceny, or a breach of 18 U.S.C. §152, 157 and 645.

The balance of the funds properly belonging to Ms. Sturman are those which were fraudulent transfers of assets and property she owned by the Debtors to Chemical, MHT and by the Debtors to other entities controlled by them. Since these funds were obtained by them through fraud, in breach of the fiduciary duty owed by the Debtors to Ms. Sturman, and the

Banks gave substantial assistance to aid and abet such fraudulent transfers (with the knowledge that they were encumbering assets belonging to Donna but giving no value to the properties which were denuded so the Brothers could make their margin calls on Cooper Companies' stock) the Trustee asserted that assets and proceeds of such fraud would be impressed with a constructive trust in her favor in the full amount of $20Million.

E. The Fraud Behind The Bankruptcy Against Donna Sturman

The involuntary Petition against Donna Sturman was filed by KK on behalf of Pollack & Greene, Donna Sturman's former attorneys on April 9, 2002.[86] They had over 100 boxes of documents supporting Donna's claims in the Cases. KK signed the Petition notwithstanding that the second and third petitioners were Lori Samet, Esq. and Mitchell Mandell, Esq., two members of Pollack & Greene. (02-11671, ECF #1.) This was a clear splitting of claims and a violation of §303 (b).

As the Trustee of Ms. Sturman's Estate, it was Nisselson's responsibility to determine whether the Petition was filed in bad faith, which he never did in violation of his fiduciary duties. See 11 U.S.C. §704 (b). Thus, it also appears that KK filed the Petition in violation of 18 U.S.C. §152 and 157. Notably, neither Samet nor Mandell ever filed proofs of claim.

Since §303 (b) confers subject matter jurisdiction on the Court, and hence can be raised at any time as a basis for dismissal of the bankruptcy, *In re BDC 56 LLC*, 330 F.3d

[86] See April 9, 2002 Involuntary Bankruptcy Petition, submitted herewith as Exhibit "AA."

111 (2d Cir. 2003), it would seem that examination of the Petition was a fairly important responsibility that Nisselson neglected.

F. The Sturman Bankruptcy Failed To Acquire Personal Jurisdiction Over Donna

The Settlement Agreement was entered in a Bankruptcy filed against Ms. Sturman without any personal jurisdiction is was therefore void. Fundamental to our system of justice is the right to be heard.

"A Judgment will be found to be void if the Court that rendered it lacked personal or subject matter jurisdiction or acted in a manner inconsistent with the due process of law." *Beller & Keller v. Tyler*, 120 F.3d 21 (2d Cir. 1997); *see also Triad Energy Corp. v. McNell*, 110 F.R.D. 382, 385 (S.D.N.Y. 1986) (default judgment was void as service was not properly made); *Mullane v. Central Hanover Bank & Trust Co*., 339 U.S. 306, 314, 70 S.Ct. 652 (1950) ("This right to be heard," however, "has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." Failure to give such notice violates "the most rudimentary demands of due process of law.") *See Armstrong v. Manzo*, 380 U.S. 545, 550, 85 S.Ct. 1187, 1190, 14 L.Ed.2d 62 (1965).[87]

[87] "She must have her day in court. This right is guaranteed to her by the Constitution of the State (Art. 1, § 2), and the court has no power to deprive her of it. It can no more be done in an action in equity than it could in an action at law. In either case, before she can be subjected to a personal liability, jurisdiction must have been obtained of her person." Dittmar v. Gould, 60 App.Div. 94, 100, 69 N.Y.S. 708 (1st Dept. 1901).

Furthermore, "It is basic that a settlement agreement or contract [with no notice to Donna], like any other, may be attacked on the grounds that it was procured by fraud." *First Nat. Bank of Cincinnati v. Pepper*, 454 F.2d 626, 632 (2d Cir. 1972).

Firstly, Alan Nisselson, the Trustee in the Donna Sturman bankruptcy, failed to notify her of the bankruptcy proceedings filed against her. (Case No. 02-11671.) Not only did he fail to take any reasonable steps to notify her of the proceedings, but ***purposely concealed the Bankruptcy filing*** by sending the Petition to an address to which there was *no possibility* that she could receive notice since, just weeks before the filing, her attorney advised the Court and the Trustee that Ms. Sturman was being evicted from. (See Tr. December 7, 2001, at 22.)[88]

Simply stated, Donna Sturman did not receive service of either the summons or of the involuntary petition prior to entry of the Order for Relief—nor was such service even remotely calculated to advise her of the Bankruptcy. According to the Certificate of Service of Christine Culberson of the Petition, Ms. Culberson served copies of the summons and petition upon Donna on April 10, 2002 at 105 West 55th Street Apt. 3C, New York, New York 10019-5335.[89]

As was well-known, since it was stated by Sturman's counsel in open court, Donna Sturman had been evicted from that address in January 4, 2002, approximately three months

[88] See Exhibit "R" submitted herewith.

[89] See ECF #3. Ms. Sturman never used this address for service and, indeed, even the Court knew this. (See copy of correspondence from the court to Ms. Sturman at Exhibit "BB" submitted herewith.)

prior to the service of the involuntary petition and summons as alleged in the Certificate of Service and, notably, after the Court refused an application on Sturman's behalf for an interim distribution from assets owned by the Sturman family entities specifically to avoid this eviction. As her counsel stated: "Right now she has zero money. She's being evicted in approximately three weeks, with three children, nowhere to go and no money." (See Transcript of December 7, 2001, at 22, submitted herewith as Exhibit "K".)

In that regard, since Ms. Sturman was always shown on every other affidavit of service to reside at 45 E. 62nd Street, New York—an address Nisselson never used—the Bankruptcy Court had no personal jurisdiction over her, and thus, the Court had no jurisdiction to enter Orders for Relief or to allow the Trustee to make any settlement of her claims with the Trustee in these Cases.[90] The affirmation of service of the Trustee's present counsel, Leonard I. Spielberg, under penalties of perjury, states that he served Ms. Sturman at 105 West 55th Street, New York, NY 10019, the same incorrect address as the Petition, with a notice of Hearing on the Settlement (no docket entry for which exists in the Bankruptcy Court).

There is no evidence in the Donna Sturman bankruptcy that she was served or that she was even insolvent—a requirement for the Bankruptcy Court to exercise jurisdiction under §303 (h). The Trustee admits that the remittance from these cases to her had a ***surplus*** of over $614,000, and that which he is shown to be holding at the time the Case was dismissed in July of 2004. (ECF #35.)

[90] Again, the Trustee's counsel makes much of the fact that Ms. Sturman (having been alerted by a former attorney who called her to tell her that she was in Bankruptcy and that the attorney was now her creditor) submitted a Notice of Appeal, which was not perfected. However, it is axiomatic that a Court without jurisdiction to enter orders cannot later acquire jurisdiction by the later filing of an appeal by Ms. Sturman.

In fact, as of the date that Nisselson filed his Final Report and Request for Distributions on June 9, 2004, a review of his "Schedule of Proposed Distributions" demonstrates that he had still not found Ms. Sturman because the amount to be paid to her is still shown in his escrow account—almost two years after the supposed settlement. (See Final Report of Nisselson at ECF #28 and 32.)

Although on September 29, 2003, ***almost a year after the Settlement Agreement was approved by the Court,*** Mr. Nisselson requested the Court permission to retain the services of a private investigator to locate Ms. Sturman, which application was granted, there are no disbursements in his Final Report for such an expense—thus he committed fraud on the Court. (ECF #18.) After obtaining such an Order it is hard to believe that Nisselson simply "forgot" to retain the investigator and merely did it for appearances.

Thus, since the Bankruptcy Court had no jurisdiction over Ms. Sturman, the Releases contained in the Settlement Agreement cannot bar her from proceeding on the "settled" adversary proceedings which this Court inexplicably dismissed for "lack of prosecution"—not pursuant to the Settlement Agreement.[91]

G. Nisselson's Fraud and Knowing Violation of 2014

More egregious, however, is the fact that **Nisselson retained KK as his counsel**—in a

[91] Due to the fact that the Court itself was unaware of the Settlement Agreement regarding the dismissal of the Adversary Proceedings, and the two trustees did not dismiss the Adversary Proceedings, it may be that this Court should review the dismissals as dismissals for failure to prosecute and not from the perspective of the void Release in the Settlement Agreement. Under this Standard, as discussed at Point III, this Court should grant Donna Sturman's motion.

blatant conflict of interest with the Estate of Donna Sturman. By Order dated October 24, 2002 (ECF# 10), KK, who had filed the jurisdictionally invalid Petition was retained by Nisselson. Since they had filed the Petition, it would not behoove them to consider whether "splitting claims" by a creditor was valid. They were also directly conflicted on the issue of personal jurisdiction over Donna. **KK was in a direct conflict with its client Pollack & Greene, since the validity of the Petition it had filed was not going to be investigated by KK**.

Under FRBP 2014(a), KK had **a mandatory and continuing obligation** to advise the court of any conflicts. "Promptly after learning any additional material information relating to such employment (such as potential or actual conflicts), the professional employed or to be employed shall file and serve a supplemental affidavit setting forth the additional information." §328(c) provides a tool for enforcement of the continuing duty of disclosure. See *In re Leslie Fay Companies*, 175 B.R. 525 (S.D.N.Y 1994). "This obligation is critical." *In re Enron Corp.*, 2003 WL 223455 (S.D.N.Y 2003). The application and the professional must disclose, without exception, all connections, and not merely those that rise to the level of conflicts. *In re Granite Partners, L.P.*, 219 B.R. (S.D.N.Y. 1998). "[C]ounsel who fail to disclose timely and completely their connections proceed at their own risk because failure to disclose is sufficient grounds to revoke an employment order and deny compensation." *In re Crivello*, 134 F.3d 831, 836 (7th Cir. 1998).

"**This requirement goes to the heart of the integrity of the administration of the bankruptcy estate**. The Code reflects Congress' concern that any person who might possess

or assert an interest or have a predisposition that would reduce the value of the estate or delay its administration ought not have a professional relationship with the estate." *U.S. v. Gellene*, 182 F.3d 578, 588 (7th Cir. 1999).

Section 327(a) professional persons must meet two standards that do well beyond conventional conflict-of-interest rules. They may "not hold or represent an interest adverse to the estate" and they must be "disinterested persons." The Bankruptcy Code defines "disinterested person" in part as a person that--

"(A) is not a creditor, an equity security holder, or an insider;

. . . .

and

(E) **does not have an interest materially adverse to the interest of the estate or of any class of creditors** or equity security holders, by reason of any direct or indirect relationship to, connection with, or interest in, the debtor or an investment banker specified in subparagraph (B) or (C) of this paragraph, or for any other reason;

11 U.S.C. §101 (14). Emphasis added.

There can be no question that there was an actual conflict: the Petition was filed in violation of §303, and the service of process was jurisdictionally defective. KK was in a direct conflict with its client Pollack & Greene, upon its retention by the Trustee. It goes without saying that no amended disclosure statement was filed by KK, nor would it have helped KK.

Prior to being retained by Nisselson, the time sheets of KK, who filed the Petition against Donna on behalf of Pollack & Greene was researching "into ability of attorney

for petitioning creditors to serve as Trustee." The date of this entry is January 3, 2002.[92] **The Petition was not filed until April 9, 2002**. (ECF#1.) It is clear that there was a potential conflict as far back as January 3, 2002, when KK was already researching whether it could represent the trustee of Donna's bankruptcy. **Perhaps more startling, however, is that this same time sheet indicates that, on January 7, 2002, Robert Kolodney of KK, made a "telephone call to Lenny Spielberg" for 3/10's of an hour. One can only wonder**.

In Mr. Nisselson's time sheets regarding his incisive analysis of Ms. Sturman's Estate, he indicates that **on September 17, 2002, *Goldberg* called *Nisselson***[93] and, apparently, Nisselson ***then*** "reviewed objection to claims by Donna Sturman [**1.4** hrs.]"; he then had "**several** telephone conferences with M.S. Goldberg re: same [**0.3** hrs]"; He then had a "telephone conference with counsel to Goldberg re: same and possible settlement [**0.2**]"; and **then Mr. Nisselson makes a very unusual entry in his time sheets: "telephone conference with R. Kolodney [of KK] re: retention [0.2]**."

This last entry is startling since KK represented Pollack & Greene, Lori Samet Schwartz and Mitchell Mandell, the Petitioning Creditors. At this point in time, Brauner Baron Rosenzweig & Klein, LLP was counsel for the Trustee. However, it is interesting to note that **Nisselson did not call his own counsel, but instead called Robert Kolodney at KK, Pollack & Greene's attorney**, and then made a motion to retain KK by motion granted

[92] See KK time sheet dated April 15, 2002 at Exhibit "S" submitted herewith.

[93] The initiation of the settlement discussions by Goldberg must be considered in light of the distributions made by the Trustee on December 23, 2002, February 21, 2003 and March 5, 2003, discussed herein.

on **October 24, 2002** (ECF# 10).[94]

H. There Was Absolutely No Factual Or Legal Basis For The Settlement Nor Was Any Adduced

According to Leonard I. Spielberg, counsel for the Trustee, he and Nisselson "**negotiated at arm's length** for a resolution of the Donna Sturman's Claims."[95] The time sheets and the circumstances surrounding this purported settlement demonstrate the opposite.

According to his time sheets, on November 14, 2002, Nisselson "review[ed] documents in support of debtor's claim against her brothers Chapter 7 estates [**1.0 hrs**.]." His next entry regarding this "settlement" is on November 25, 2002, when he "review[s] settlement agreement, motion, order to show cause and related papers [**2.0**]." On the next day is the penultimate entry for Mr. Nisselson's due diligence regarding the settlement: "Extensive office conference with R. Kolodney, A. Nisselson, M.S. Goldberg, L. Spielberg to discuss terms of settlement of debtor's claims in brothers chapter 7 Cases [**2.5** hrs.]." Finally, on December 2, 2002, Nisselson's time records indicate that he "review[ed] the settlement agreement [**.70** hrs.]; telephone conference with R. Kolodney re: same [**.20** hrs.]; and review revised settlement agreement and execute [**.30** hrs.]." (See ECF#28.)

Thus, Mr. Nisselson spent a total of **8.8 hours** discussing and analyzing the settlement

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[94] Incredibly, the basis given by the Trustee for retaining KK was "since KK had represented the Petitioning Creditors, it had acquired extensive knowledge about the Debtor's pre-petition Date conduct and **the nature of her debts. This is hardly one of the Trustee's responsibilities.** In fact, the primary duty of the Trustee is §704(1) "collect and reduce to money the property of the estate for which the trustee serves." Nisselson clearly did not do this or "investigate the financial affairs of the debtor."

[95] ECF #906 at ¶10 in 89-11932 (Emphasis supplied).

of Donna's Claims, which obviously intense and searching "inquiry" was initiated by Mr. Goldberg.

KK's time sheets show the following: on September 18, 2002, Telephone call from M. Goldberg about potential settlement [**0.2**]; October 28, 2002, Telephone call from Goldberg [**0.2**]; November 11, 2002, Review documents about claim against brothers estate [**2.4**]; November 13, 2002, Review of transcript of hearing before court on prior settlement motion [**1.7**]; November 14, 2002, Telephone call from Goldberg about settlement [**0.2**]; November 14, 2002, Further review of papers on brothers case [**1.3**]; November 18, 2002, Reviewed transcript of hearing and various objections to claim [**1.0**][96]; November 18, 2002, Reviewed proposed motion to settle claims against Sturman Estate [**0.3**]; November 19, 2002, Telephone call from Goldberg about settlement [**0.3**]; November 21, 2002, Telephone call with Nisselson about settlement on Sturman estate [**0.2**]; November 21, 2002, Telephone call to Goldberg about meeting and to discuss settlement [**0.2**]; December 2, 2002, Telephone call from Nisselson about release language [**0.2**]; December 2, 2002, Telephone call to Goldberg about changes in release language in the Settlement Agreement [**0.2**]; December 2, 2002, prepare revised language in settlement agreement and sent to Nisselson for review [**0.3**].[97]

Thus, the conflicted counsel for the Trustee, KK, put in a total of **8.7 hours** to resolve

[96] The Court should be aware that there were four transcripts of Hearing, June 22, 2001, June 29, 2001, July 3, 2001 and December 7, 2001—and only one was reviewed by the Trustee and his counsel.

[97] See application for Final Allowance of compensation, as attorneys for Alan Nisselson, dated June 9, 2004, and the time sheets annexed thereto. ECF#25.

all of Donna Sturman's claims.[98]

Nisselson utterly failed to investigate the adequacy of this "settlement." See 11 U.S.C. §704 (4) failure to investigate the financial affairs of the debtor; (5) failure to examine proofs of claims and object to the allowance of any claim that is improper. Moreover, **there is no factual or legal basis supplied for the settlement, only a conclusory statement by Nisselson that Donna's claims "were based upon a paucity of factual and legal support."**[99] This is not factual, legal or any other type of valid basis: **it a mere conclusory statement** based on less than 8.8 hours that Nisselson spent to enter the Settlement Agreement.

It was a patently violation of FRBP 9011 for Nisselson to have signed those Settlement papers.

FRBP 9011 provides: "(b) Representations to the court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a petition, pleading, written motion, or other paper, an attorney or unrepresented party is **certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances**,--

"(3) the allegations and other factual contentions **have evidentiary support** or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity

[98] KK previously represented Pollack & Greene, and never filed a withdrawal of counsel for Pollack & Greene. Pollack & Greene had overwhelming documentation to substantiate Donna's claims, yet they were never deposed by Nisselson. See Application for Final Compensation by KK, June 9, 2004, at Exhibit "CC."

[99] See Exhibit "B" submitted herewith at ¶5.

for further investigation or discovery..."

Nisselson entered the Settlement Agreement with Goldberg and inserted releases of any and all claims of Donna Sturman in his motion in support of the Settlement (ECF#11). As is obvious to anyone, the Settlement has:

(a) no factual analysis whatsoever of her claims;

(b) no analysis of the value of the Adversary Proceedings;

(c) no analysis of Donna Sturman 9 inch tall Proof of Claim that this Court stated was valid; and

(d) no analysis of the three transcripts of testimony: July 3, 2001, July 22, 2009, July 29, 2001 and December 7, 2001—over three hundred pages—without supporting his determination with even a wisp of evidence.

How could he spend a mere 8.8 hours on a problem that perplexed this Court and the Trustee for 11years? **Based on the testimony under oath by the Trustee and his counsel, it is utterly frivolous that in his motion to approve the settlement Nisselson states that the basis for the settlement is the "paucity" of evidence for Donna Sturman's claim. How did "cogent arguments" "which could well prove successful," and "the distinct possibility that Donna will prevail on her claims" turn into "paucity?"**

Where motive is not apparent, it is valid to prove scienter by identifying circumstances indicating conscious behavior by the defendant. *U.S. v. Simon*, 425 F.2d 796,

808-809 (2d Cir. 1969); *see also Goldman v. Belden*, 754 F.2d 1059, 1070 (2d Cir. 1985).

In his Application for final Professional Compensation and Report of Case filed June 10, 2004, Nisselson states that "All assets of the debtor's estate have been collected..." (ECF #28, ¶16.) This is clearly false and a violation of FRBP 9011—there is no question he failed to make any genuine, reasonable or sufficient inquiry into the basis for the settlement. He then goes on to say at ¶21: "The Trustee and the Sturman Brothers Trustee conducted "a series of negotiations" to settle the Debtor's Claims and came to an agreement that the Debtor's estate would receive a distribution of $1.5 million dollars from the Sturman Brothers' estates (the "Settlement Agreement")."

Nisselson's **sole basis** for the settlement payment and releases is that: "**based upon the paucity of factual and legal support for the Debtor's claims** as well as the amount of the settlement payment, the trustees urged the Court to approve the Settlement Agreement as **fair, reasonable and in the best interest of the creditors** of the several bankruptcy estates." (¶23.)

The two Trustees were not only a fiduciary to the creditors in these cases—**they were fiduciaries to Ms. Sturman**. Similarly, **Nisselson had an obligation to collect all of the Debtor's assets—which he claims, under oath, that he did**. Did he not know partnership assets are not part of the estate? On July 17, 2002, Nisselson moved the Court to retain his firm, Brauner Baron Rosenzweig & Klein as his counsel. (ECF#6.) This motion was granted on July 26, 2002. (ECF#7.)

Furthermore, nowhere in the Settlement Agreement or in any other papers submitted in the Donna Bankruptcy is there a wisp of legal or factual basis for the amount of the settlement, no memorandum of law, no hearings and no examination of Donna Sturman's proofs of claims, objections or her adversary proceedings. Nisselson spent exactly no time on examining Donna's assets in these Cases.

Despite the comments of the Court, the Trustee and his counsel, who had testified under oath only months before, that Donna Sturman's claims were "substantial and meaningful **and *undeniable* justifications for Donna's claim [in the sum of $20Million]**," Nisselson apparently took no notice.

In contrast, the proposed settlement of Donna Sturman's claims in these Cases for $3.75Million plus a distribution of the assets of the Estate of her mother Muriel Sturman, was amply supported by a factual and legal analysis submitted in a Memorandum by the Trustee's counsel, Leonard I. Spielberg, Esq. and took three separate hearings, over 200 pages of transcripts on June 22, June 29 and July 30, 2001.[100]

As stated in the Trustee's Response to the Objections of Donna Sturman, "The Trustee's objections to Donna Sturman's claims and the J.P. Morgan Chase objection to the Donna Sturman claims have never been ruled upon by this Court." How then, did the Trustee and Nisselson come up with a number of $1.5 Million—it is never stated, nor is any justification given by the Trustee or Nisselson.

[100] While it is not the position of Ms. Sturman that she was entitled to this amount, she is clearly entitled to much more, in fact, the Trustee proposed this amount because he asserted that she had a right to take **all** of the assets of the Estates.

I. The Court, The Trustee And The Trustee's Counsel All Agreed That Donna Sturman's Claims Were Valid And Indisputable

Moreover, with her claims in the instant cases admittedly amounting to approximately $20Million one must ask how the Trustee, who had testified under oath that Donna Sturman had the "UNDENIABLE" right to such claim, which Mr. Spielberg, still the Trustee's present counsel, also confirmed that Ms. Sturman should be entitled to all the assets in the Estates, **four months** later "determined" **without any articulated calculation or explanation** as to why Ms. Sturman was somehow entitled to a mere $1.5Million in her Bankruptcy.

Was the Settlement with Nisselson and Warren no more than an opportunity to at last get rid of all of Donna Sturman's claims against himself and the estate, the creditors and professionals without any notice, substantiation, **any hearing** or even articulate a reason for the amount he paid her on her claims?

The validity of Donna Sturman's claims was repeatedly acknowledged by the Court, the Trustee and his counsel to be valid and "**indisputable**," and the Court called the objection to her claims "ridiculous."

Notwithstanding the foregoing, the Court nevertheless sanctioned the stripping of all of the assets and property of Ms. Sturman in her approval of the fraudulent settlement agreement in her Bankruptcy.

POINT III

THE CONDUCT OF THE TRUSTEE IN THESE CASES DEMONSTRATES FRAUD AND CONVERSION OF ASSETS

In contrast to the three days of Hearings (June 22, 2001, June 29, 2001 and July 3, 2001), the testimony and cross-examination of the Trustee and his attorney Leonard I. Spielberg, under oath, and a full Memorandum of Law describing the basis for the proposed settlement with Donna Sturman in 2001, giving the factual basis and weighing the competing legal principles, the Settlement Agreement between Nisselson and Goldberg, on the other hand, which contained mutual exculpatory releases was accomplished with no hearings, no factual basis, no notice to Donna Sturman, and a total of 8.8 hours of time invested by Nisselson in "extensive negotiations regarding the settlement." In fact, no factual or legal basis for the amount of the settlement payment to Nisselson is provided in any documents in this Case.

The trustee's duties involved an examination of the claims of MHT under §303 to determine whether the Petitions were interposed for improper purposes or whether they were subject to a bona fide dispute—this was never done. Pollack & Greene, KK's client had hundreds of redwelds demonstrating the bona fides of Donna's claims, yet they were never deposed, or even reviewed by the Trustee or his counsel.

Nevertheless, despite the fact that Ms. Sturman filed papers with the Trustee unequivocally demonstrating that the MHT claims were subject to a *bona fide* dispute, he

never took one 2004 examination of MHT. Obviously, the Trustee did not think it necessary for Nisselson to review Donna Sturman's numerous objections, which are laid out in a forty-line footnote over two pages.

Moreover, despite certain knowledge of the existence of injunctions issued by the Supreme Court and the Surrogate's Court preventing any transfer of the Properties or the Entities, the Trustees apparently thought them unnecessary to review.

It has long been the law that: "A *quasi* or constructive contract rests upon the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another. In truth it is not a contract or promise at all. It is an obligation which the law creates, in the absence of any agreement, **when and because the acts of the parties or others have placed in the possession of one person money, or its equivalent, under such circumstances that in equity and good conscience he ought not to retain it**, and which *ex oequo et bono* belongs to another. **Duty, and not a promise or agreement or intention of the person sought to be charged, defines it**." *Miller v. Schloss*, 218 N.Y. 400, 113 N.E. 337 (1916).[101]

The fraudulent conveyances by the Debtors came into the estate in the form of Cooper Stock and cash defalcations from the Muriel Estate, and the Trustee immediately "put

[101] In the words of Judge Cardozo: "[a] constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee." Beatty v Guggenheim Exploration Co., 225 N.Y. 380, 386 (1919). '"He who seeks equity must do equity" and "He who comes into equity must come with clean hands" are maxims which are clearly pertinent in these proceedings in answer to the respondents' claims to be relieved on equitable grounds from compliance with the order of the commission." In re Public Service Commission,105 Misc. 254, 265, 172 N.Y.S. 790, 796 (Kings Cnty. 1918).

his arms around" the Properties. They were manifestly never part of the Estate—and he knew it—he testified to it under oath! Apparently, Nisselson didn't think it was necessary to consider this body of law either.

Then, after keeping the Properties and their income from Donna Sturman for over 11 years so she could no longer pay her attorneys and one of them, Pollack & Greene, forced her into a fraudulent bankruptcy, of which she had no notice, Mr. Nisselson spent all of 8.8 hours to sign an agreement with Goldberg, and, for good measure, made sure they exculpated themselves from any liability for what they had done and not done.

The Trustee then paid Nisselson a pittance of what the Trustee knew she was owed, and together, Nisselson and the Trustee **EXCULPATED EACH OTHER AND THEIR ESTATES FROM ANY CLAIMS BY DONNA STURMAN.** If this does not cause outrage to this Court nothing will.

It is said that "If one man has obtained money from another, through the medium of oppression, imposition, extortion, or deceit, or by the commission of a trespass, such money may be recovered back, for the *law* implies a promise from the wrong-doer to restore it to the rightful owner, although it is obvious that this is the very opposite of his intention. Implied or constructive contracts of this nature are similar to the constructive trusts of courts of equity, and in fact are not contracts at all. (Addison on Contracts, 22.) And a somewhat similar distinction is recognized in the civil law, where it is said: 'In contracts it is the consent of the contracting parties which produces the obligation; in *quasi* contracts there is not any consent. The law alone or natural equity produces the obligation by rendering obligatory the

fact from which it results. Therefore these facts are called *quasi* contracts, because without being contracts, they produce obligations in the same manner as actual contracts.' (1 Pothier on Obligations, 113.)"

"Equity regards as done that which should have been done (2 Pomeroy, Equity Jurisprudence [5th ed.], § 364; see, e.g., *Wallace v. First Trust Co. of Albany*, 251 App.Div. 253, 256, 295 N.Y.S. 769 (3d Dept. 1937).

In *Wright v. Board of Public Instruction*, 142 F.2d 577, 579 (5th Cir. 1944), the opinion was expressed that a bankruptcy court has jurisdiction 'in its discretion, if justice and equity so require' to reconsider the disallowance of a proof of claim. If it can do that, it is equally reasonable to allow a claimant whose claim has already been allowed to turn in his bonds to share pro rata with other bondholders, even though such turning in may be done later than the others.

In *Wayne United Gas Co. v. Owens-Illinois Glass Co*., 300 U.S. 131, 57 S.Ct. 382, 81 L.Ed. 557 (1947), the Supreme Court said that a District Court in bankruptcy matters applies the doctrines of equity, and is not limited to any terms of court in granting a rehearing, vacating, altering, or amending its decree, even after an appeal has been perfected and after the time for appeal has expired.

It would be unconscionable to deny Donna Sturman's motion to open the Adversaries. Equity does not favor anything which amounts to a forfeiture. *In re Detroit Macaroni Co., D.C.*, 46 F.Supp. 284, 286 (D.C. Ed. MI 1942). "A court of bankruptcy is a court of equity,

and possessing jurisdiction of the cause, the court below must dispose harmoniously and justly of the assets of the bankrupt." *In re Pennsylvania Central Brewing Co.*, 135 F.2d 60, 64 (3d Cir. 1943).

"It is well established that a court of bankruptcy, in a strict sense, is a court of equity, the estate being a trust in the possession of persons completely under the control of the court in so far as they deal with the property subject to its jurisdiction." *Donald v. San Antonio Joint Stock Land Bank*, 100 F.2d 312, 314 (5th Cir. 1938).

"In the exercise of its equitable jurisdiction the bankruptcy court has the power to sift the circumstances surrounding any claim to see that injustice or unfairness is not done in administration of the bankrupt estate." *Pepper v. Litton*, 308 U.S. 295, 307, 60 S.Ct. 238, 246, 84 L.Ed. 281 (1939), cited by *In re Coastal Cable T.V., Inc.*, 709 F.2d 762, 764 (1st Cir. R.I. 1983).

As the Court of Appeals of the State of New York long-ago stated the applicable rule in this case:

"There can be no doubt that a corporate officer who applies the funds of a corporation to purposes beyond the scope of his authority is guilty of conversion of the corporate funds, and **the corporation may maintain an action against him and against any person who participates in the conversion and accepts its fruit. Against such person an action will lie for money had and received**. There can also be no doubt that a corporate officer has no power, implied or apparent, to apply corporate funds to the discharge of his personal

indebtedness. These rules have been enunciated so frequently and are so fundamental in the law governing corporate rights and powers, that citation is unnecessary." *Qunital v. Kellner*, 264 N.Y. 33, 35 (1934).

The Final Reports of the Trustee demonstrate unequivocally that the property owned by Donna Sturman came into the hands of the Trustee—he "accepted its fruit." "Against such person an action will lie for money had and received." The Trustee and his "disinterested" law firms benefitted handsomely: over $8 Million in fees were paid in non-asset cases.

The law was perverted and only this Court can make it straight again. The embezzlement of Donna's entire inheritance by the brothers was fully accomplished by the Trustee in this illegal release. Justice does not allow a criminal to stand behind an exculpatory instrument for to do so would countenance theft.

The Releases must be voided and this Court returned to principles that advance justice, not trounce them.

Dated: New York, New York
July 9, 2010

Respectfully Submitted,

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