APPENDIX ~~GG~~ FF

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

C.A. No. 02-1976

IN RE: HAROLD F. CHORNEY VS.

REPUBLIC CREDIT CORPORATION I

ON APPEAL FROM UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF RHODE ISLAND

BRIEF FOR THE APPELLANT

HAROLD F. CHORNEY, PRO SE
5 CATHEDRAL SQUARE, APT 106
PROVIDENCE, R.I. 02903
401 351-7311

DATED 16 DECEMBER 2002

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INTRODUCTION:

Appellant, formerly the majority owner of the assets of Cumberland Investment Corporation, (C.I.C.) has presented this honorable court with a lengthy Designation of the Record that spans a thirteen year period in which Cumberland Investment Corporation has been in a bankruptcy proceeding, 89-11051 ANV, in the District of Rhode Island.

Appellant has claimed for several years that the assets seized by the Chapter 11 Trustee in Bankruptcy, John F. Cullen, on August 17, 1990, were not intact and that assets of C.I.C. were conspicuously missing since they were seized. (1.) Appellant and others have attempted on several occasions to obtain an accounting of the assets from the Chapter 11 Trustee without success. (See M-8.) The case was eventually converted to a Chapter 7 liquidating case. Jason D. Monzack was appointed to be the Chapter 7 Trustee. (See M-3 and M-6.) Efforts were made by the Appellant and Mr. Taft, a former client of C.I.C., to obtain an accounting of the assets at various stages during the liquidation of the assets, without success. (See M-

(1.) In a related criminal case, CR 92-099P in the District of R.I., from a criminal referral of the bankruptcy court in C.A. 89-11051, Appellant claimed and still claims that assets under the custody and control of Eastland Bank, the bankruptcy trustee and others have been tampered with and switched and that inventory records seized by the Trustee on August 17, 1990, under the custody and control of the Trustee and others are missing.

12, M-13, M-24, M-25, M-27, M-28, M-31, and M-32.) One accounting sought by Appellant and Mr. Taft was a joint inventory taken by Mr. Monzack and Mr. Cadigan, of the F.D.I.C. (See A-6, Paragraph 14.) (See C-18, T-2, page 68.) Since no accounting of the assets seized, those sold and those remaining were ever received, and the Trustee has refused to give Appellant inventories taken by him and FDIC, (See C-16, C-17), and the fact that the Trustee and/or others have misplaced the inventory records seized by the Chapter 11 Trustee on August 17, 1990, (See C-9, C-10) Appellant did not know whether all the assets of the estate had been sold up until the Hearing held in the bankruptcy court in the District of Rhode Island, before Judge Votolato on 2/7/02. At this hearing Mr. Monzack, the Chapter 7 Trustee, identified the only assets remaining as being some 380 silver dollars and three ten thousand dollar bills that were in the possession of Christies Auction house. (See T-6, pages 18, 19.)

On December 7, 1999, Spink America, a subsidiary of Christies, conducted the last reported sale of the assets of Cumberland Investment Corporation at public auction. The auction contained some 500 coins more than stated in the court order authorizing the sale. (See M-23, M-26 and M-27.)

It was subsequently disclosed by Mr. Monzack that some of those coins, some 180 silver dollars were part of the coins, "segregated at the insistence of Eastland Bank" from the bankruptcy estate of C.I.C., that was the subject of Appellant's criminal case. (See T-3, pg. 12, and M-31.) (1.)

Mr. Monzack, Chapter 7 Trustee, filed on July 3, 2000, a Motion to Strike Appellant's request for CHAPTER 7 TRUSTEE PROVIDE AN ACCOUNTABILITY OF ASSETS OF THE ESTATE AND TO PRODUCE REQUESTED DOCUMENTS AND VIDEOTAPES. (See M-32.) Still no accounting has been produced.

It has been three years since this last sale, yet no full accounting of the assets of the estate have been provided to Appellant and other creditors of the estate. Mr. Taft, an aggrieved party, attempted to compel production and was denied on the premise that he had no standing. (See M-39.) Back in

(1.) Newly discovered at the April 6, 2000, Hearing (T-3, pg .12) was the admission by Mr. Monzack that assets were set aside by Eastland Bank in a separate vault taken control of by the U.S. Attorney's Office. Appellant has always claimed that the assets from the possessory collateral and from the in-house assets of the company were not intact. This is the first admission that assets, were 'set aside'. Since Appellant's sentence and restitution were based upon amount of loss to the alleged victim, in CR. 92-099P, there seems to be some question concerning the amount of this 'loss' and the veracity of the Government's claims that the assets were intact, when some 180 silver dollars were under the custody and control of the U.S. Attorney's office. See M-2 GOVERNMENT'S MEMORANDUM IN SUPPORT OF ITS OBJECTION TO DEFENDANT'S MOTION FOR PRODUCTION OF APPRAISAL RESULTS FROM THE FDIC. dated 12/13/93, subsequent to Appellant's criminal trial. See A-4, paragraph 23, and GJ-1, page 35 concerning assets from the possessory collateral sold or missing prior to trial.

November 9, 2001, Republic Credit Corporation I, attempted to obtain an accounting of these same assets. Since that time, Republic Credit Corporation I has entered into some agreement with the trustee and no longer seeks said accounting. In fact Republic Credit Corporation I, is the successor to F.D.I.C., who is the successor to Eastland Bank, the original 'secured' creditor that forced C.I.C. into a highly contested bankruptcy, back in December 1989.

Appellant has claimed for the last thirteen years that assets of C.I.C., under the custody and control of parties other than the Appellant were indeed missing. This issue has been raised in both the District Court in the District of Rhode Island and then in the First Circuit Court of Appeals and the Supreme Court of the United States. Both trustees have presented the argument to the bankruptcy court that any assets missing were probably missing while in the possession of the Appellant. The Government adopted this same argument in the criminal case. Now it appears as if the alleged victim, Eastland Bank and their successor F.D.I.C., the Trustee in Bankruptcy and the U.S. Attorney's office knew that the assets were indeed not intact prior to Appellant's criminal trial on May 1993.

Subsequent to obtaining a transcript of the assets removed by Mr. Cullen on 1990, (See R-1.) Appellant notified Mr. Monzack, the court and the U.S. Trustee, Sheryl Serreze and the A.U.S.T. John Fitzgerald at the Boston Regional Office in 1994, of specific assets that appeared to be missing or unaccounted for from the non possessory collateral, the "general inventory". (See C-2, C-3, C-4, C-5, C-6.) (See T-3, page 12.) On October 19, 1999, Appellant obtained from the Executive Office of United States Attorneys, as a result of an F.O.I.A. nineteen videotapes that show assets removed by Trustee Cullen on August 17, 1990, that are missing and unaccounted for and confirm the claims of the Appellant. (Mr. Monzack alludes to a 20th videotape, see T-6 page 14.)

Subsequent to the February 7, 2002, hearing, Appellant appealed the ruling of the bankruptcy court, which once again had denied the Appellant an accounting of the assets by the Chapter 7 Trustee, Mr. Monzack. Not only was Appellant's motion denied, the court ordered that his motion be stricken. Appellant appealed the court's ruling to the District Court for the District of Rhode Island. The District Court summarily dismissed Appellant's Appeal, and adopted the reasoning as set forth in Republic Credit Corporation I's Motion to Dismiss.

Appellant then appealed to the Court of Appeals for the First Circuit. Once again Republic Credit Corporation I presented a Motion to Dismiss Appeal of Harold F. Chorney, Pro Se to the Circuit Court. Republic Credit Corporation I, who I believe should not be the Appellee in this case, argued: that the appeal of the Appellant from the June 7, 2002, District Court Order was untimely, that Appellant has no standing to maintain this appeal, and that since Appellant's requests for accounting had been previously denied by the bankruptcy court that those prior determinations were final.

In response to Republic Credit Corporation I's Motion to Dismiss, Appellant filed a Motion and Memorandum in Objection, which heretofore has not been ruled upon by this honorable court. Also not ruled upon by the court is whether the Appellee in this case should be Jason D. Monzack, Trustee.

In conclusion, Appellant plans on showing that the trustee(s) exhibited a breach of duty, in that the Bankruptcy Code provides that a Chapter 7 trustee shall, inter alia, "collect and reduce to money the property of the estate for which such trustee serves, and close such estate as expeditiously as is compatible with the best interest of parties in interest." in accordance with 11 U.S.C. § 704(1) and "the Trustee shall be accountable for all property received" in accordance with 11 U.S.C. § 704(4).

Furthermore, the Trustee is required by statute, Title 11 U.S.C. §704(2) to supply an accounting upon request by an interested party. (1.) Yet it has been some 13 years, amid allegations of assets of the estate missing and unaccounted for, yet no detailed and complete accounting has ever been presented and the bankruptcy estate has not yet been finalized. The court will read of Mr. Monzack representing the interests of John F. Cullen and his dealings with Eastland Bank and FDIC, and the other conflicts of interest referred to in section D. of the Discussion section of this brief, yet the position of the Trustee has been upheld by the court.

> "Although the bankruptcy court enjoys considerable discretion in evaluating whether professionals suffer from conflicts, that discretion is not limitless. A bankruptcy court does not enjoy the discretion to bypass the requirements of the Bankruptcy Code." Delores K. Soviter, U.S. Circuit Judge in the District of Delaware.

All the above brings into question the "disinterestedness" of Mr. Monzack's administration in dealing with Appellant, the creditors and with Republic Credit Corporation I, the successor of FDIC. All this points to fraud, voiding the entire proceeding. All this points to a "fraud on the court" that vitiates the entire case.

(1.) The Notes of Committee on the Judiciary, Senate Report No. 95-989 states, "the Trustee is responsible to furnish such information concerning the estate and its administration as is requested by a party in interest."

TABLE OF AUTHORITIES

CASES:

STATUTES:

UNITED STATES CONSTITUTION:

"Congress shall make no law respecting an establishment of
religion, or prohibiting the free exercise thereof; or abridging
the freedom of speech, or of the press; or the right of the people
peaceably to assemble, and to petition the Government for a
redress of grievances."

I. BACKGROUND AND TRAVEL:

1. On June 10, 1994, Appellant sent a letter to the Trustee in Bankruptcy, Jason D. Monzack, indicating that certain assets appeared to be missing from the estate of Cumberland Investment Corporation.

2. At a meeting on December 28, 1994, Mr. Monzack met with Appellant, Mr. Nacu and Mr. Dunleavy. At this meeting Mr. Monzack admitted that some $300,000 in assets were indeed missing.

3. Since that meeting, Appellant has discovered a transcript of the removal of the assets by the Chapter 11 Trustee in Bankruptcy, John F. Cullen.

4. Also newly discovered by Appellant are 19 videotapes of the removal of the assets on August 17, 1990, by the Chapter 11 Trustee, John F. Cullen, indicating that some of the assets described in the June 10, 1994, letter to Mr. Monzack were indeed seized on August 17, 1990.

5. Several requests to obtain an accounting of the assets of the estate of Cumberland Investment Corporation (CIC) by Warren D. Taft, a client of CIC, whose assets, on August 17, 1990, were seized yet could not be identified and located by the Trustee after the seizure. Appellant and Mr. Taft have been denied an accounting of the assets taken since the seizure.

6. On December 7, 1999, allegedly all the remaining assets of the estate were offered for sale, at public auction, by Spinx America, a subsidiary of Christies.

7. On March 10, 2000, Republic Credit Corporation I served notice that it is the assignee of the interest of the Federal Deposit Insurance Corporation as shown by attached documents, dated December 8, 1999.

8. On March 10, 2000, Justin T. Shay, Esq. entered an appearance for Republic Credit Corporation I in the Chapter 7 case of 89-11051ANV, in the District of Rhode Island.

9. On November 9, 2001, Republic Credit Corporation I placed a motion seeking an accounting and distribution of the proceeds of the December 7, 1999, auction sale.

10.On November 16, 2001, Appellant filed MOTION IN OBJECTION TO SALE OF ASSETS PRIOR TO TRUSTEE PROVIDING AN ACCOUNTING OF THE ASSETS.

11.On December 18, 2001, JOINT MOTION FOR APPROVAL OF DISTRIBUTION OF THE PROCEEDS OF THE SALE OF SECURED CREDITOR'S COLLATERAL AND TO ABANDON CERTAIN ASSETS TO SECURED CREDITOR was filed by the Trustee, Jason D. Monzack, and Republic Credit Corporation I.

12.On January 2, 2002, MOTION IN OBJECTION TO ABANDONING ASSETS WITHOUT AN ACCOUNTABILITY OF ASSETS BY THE CHAPTER 7 TRUSTEE, JASON D. MONZACK was filed by Appellant.

13.On January 11, 2002, MOTION TO STRIKE, Appellant's MOTION IN OBJECTION TO ABANDONING ASSETS WITHOUT AN ACCOUNTABILITY OF ASSETS BY THE CHAPTER 7, TRUSTEE, JASON D. MONZACK.

14.On January 18, 2002, MOTION IN OBJECTION TO TRUSTEE'S MOTION TO STRIKE filed by Appellant.

15.On February 5, 2002, REQUEST FOR ADMISSIONS SENT BY HAROLD F. CHORNEY TO JASON D. MONZACK, TRUSTEE.

16.On February 7, Hearing held in Bankruptcy Court in the District of R.I. on Ca. No. 89-11051, where the court summarily dismissed Appellant's motion seeking an accountability of the assets, while granting the Trustee's Motion to Strike.

17.On February 15, 2002, Appellant filed a Notice of Appeal to the District Court for the District of Rhode Island concerning the Bankruptcy Court's ruling.

18. On April 22, 2002, Appellant filed the Designation of the Record and Statement of the Issues with the Clerk of Courts for the Bankruptcy Court in the District of Rhode Island.

19. On May 16, 2002, the case was assigned to Judge Ernest J. Torres.

20. On May 16, 2002, the BANKRUPTCY RECORD on appeal of Order dated 2/7/02 granting motion to strike received.

21. On May 17, 2002, based upon information and belief, the Designation Of the Record and Statement of the Issues were sent to the District Court, and CA No. 02-240T was assigned to this case.

22. On May 21, 2002, Republic Credit Corporation I, sent Motion and Memorandum to Dismiss Appeal.

23. On May 30, 2002, Appellant, Harold F. Chorney, filed Motion and Memorandum in Objection to Republic Credit Corporation I's Motion to Dismiss Appeal.

24. On June 7, 2002, Order granting Motion to Dismiss Appeal signed by Judge Ernest C. Torres.

25. On June 12, 2002, Appellant receives ORDER, signed by Judge Torres.

26. On June 14, 2002, Appellant obtains copy of Docket which states,

"5/16/02 CASE assigned to Judge Ernest C. Torres. Assigned to Magistrate Judge Martin (fpm) [Entry date 5/17/02]

27. On June 19, 2002, Appellant filed MOTION AND MEMORANDUM IN OBJECTION TO ORDER GRANTING MOTION TO DISMISS APPEAL AND MOTION TO RECONSIDER.

28. On June 24, 2002, Republic Credit Corporation I objected to Appellant's MOTION AND MEMORANDUM IN OBJECTION TO ORDER GRANTING MOTION TO DISMISS APPEAL AND MOTION TO RECONSIDER.

29. On July 23, 2002, the court denied Appellant's Motion in Objection and Motion to Reconsider.

30. On July 29, 2002, Appellant received copy of the denial dated July 23, 2002.

31.On August 6, 2002, Appellant filed a timely Notice of Appeal

32.On September 10, 2002, Republic Credit Corporation I, filed a Motion to Dismiss Appeal and Memorandum in Support of Motion of Republic Bank to Dismiss Appeal of Appellant Harold F. Chorney, Pro Se.

33. On September 11, 2002, by Order of the court, the United States Trustee was removed from the caption in the above referenced appeal.

34. On September 20, 2002, Appellant filed a motion and memorandum in support of his objection to Republic Credit Corporation I's motion to dismiss.

35.On October 3, 2002, the COURT ordered the Brief of the Appellant due on or before November 4, 2002.

36. October 28, 2002, Appellant filed for and Extension of time to file Brief of the Appellant.

37. On November 4, 2002, by order of the court the Brief of the Appellant is due on or before December 16, 2002.

II. JURISDICTION

According to 11 U.S.C. §1109(b), "a party in interest, including …a creditor ….may raise and may appear and be heard on any issue in a case under this chapter." Appellant appeared at a hearing on February 7, 2002, concerning bankruptcy case 89-11051 ANV.

Appellant appealed the decision of February 7, 2002 to the district court because Federal District Courts have original jurisdiction over all civil proceedings related to bankruptcy cases. See 28 U.S.C. § 1334(b). The District Court summarily dismissed the appeal of Appellant and incorporated the reasoning as set forth by Republic Credit Corporation I. 28 U.S.C. § 158 (d) permits parties to appeal from "all final decisions, judgments, orders and decrees" entered by the district court in bankruptcy matters. Appellant is appealing the final decision, a summary decision by the District Court in the District of Rhode Island. (1.)

Appellant is seeking relief under Rule 60(b)(2) based upon 'newly discovered evidence; Rule 60(b)(3) based upon a fraud upon the court; and Rule 60(b)(4) based upon a void judgment because the court acted in a manner inconsistent with due process of law.

(1.) Appellant questioned the district court assigning the case to a magistrate judge as reflected in docket entry of 5/16/02. Appellant cited Minerex Erodoel, Inc. v Sing, Inc. 109 S. Ct. 57, 488 U.S. 817, 102 L.Ed. 2d 35 and Matter of Elcona Homes Corp., 810 F.2d 136, but failed to cite 28 U.S.C. §1332(c) in his objection to summary judgment.

III. STATEMENT OF THE ISSUES

1. Appellant was denied his first amendment right to redress of grievance, fifth amendment right to due process and equal protection under the law guaranteed by his fourteenth amendment rights by the court appointing a Trustee with a conflict of interest, and who is not a disinterested party to represent Appellant's property and other interests in a COURT ORDER, dated July 3, 1991, denying Appellant the right to participate at the 2/7/02 hearing and then the Court erred in incorporating by reference the reasons argued by the Trustee in his Motion to Strike in the denial of the accountability of the assets of the estate without an evidentiary hearing.

2. The Court, in accordance with Title 28 §157 concerning a core proceeding involved with the administration of the estate, erred in not requiring an accounting by the Chapter 7 Trustee in accordance with statute, Title 11 U.S.C. §704 (2).

3. Appellant was denied due process and equal protection under the law when the Court denied Appellant an accounting of the Agreement, where the Appellant is a signatory, whereby the Trustee borrowed money for 'administrative expenses' subject to Title 11 U.S.C. §364.

4. Appellant was denied due process and equal protection under the law when he was denied an evidentiary hearing concerning an accountability

of assets of the estate.

5. Appellant was denied due process when the Trial Judge did not allow discovery concerning genuine issues of material fact before granting judgment in violation of 28 U.S.C. Rule 56 (c).
6. Appellant was denied due process and equal protection under the law when a continuance of the hearing on February 2, 2002, was denied, and discovery concerning the accountability of the assets could not be obtained.
7. Appellant, in accordance with the ninth amendment, was denied a right retained by the people, the right to defend himself.
8. Appellant was denied due process and equal protection under the law when the Court denied Appellant the production or requested documents and videotapes in the possession of the Trustee.
9. The Court erred in denying Appellant due process of an evidentiary hearing concerning an accountability of assets of the estate.
10. The Court, in accordance with Title 28 §157 concerning a core proceeding involved with the expeditious closing of an estate, erred in not requiring the Trustee to perform his fiduciary responsibility as required by Statute, in accordance with 11 U.S.C. §704 (1).

IV. STANDARD OF REVIEW

"We review the record evidence in light most favorable to the non-moving party, and thus draw all reasonable inferences and resolve factual disputes in favor of the party against who summary judgment has been entered, in this case……appellants."

See Den Norske Bank vs. First National Bank of Boston, 75 F.3d 49 at 53, 1st Cir., 1996.

"If after such review, we find that "the evidence reveals genuine dispute over a material fact, the summary judgment will not lie."

Serapion v. Martinez, 119 F.3d 982, 987, 1st Cir. 1997.

V. DISCUSSION

There is a genuine dispute over material facts concerning the disposition of the estate assets. (1.) One dispute arose from Republic's statement that,

"The Trustee has, with the permission of this [bankruptcy] Court, liquidated all remaining assets of the Debtor."

See MEMORANDUM IN SUPPORT OF MOTION OF REPUBLIC BANK TO DISMISS APPEAL OF APPELLANT HAROLD F. CHORNEY, PRO SE, presented to the District Court, Ca. No. 02-240T on May 21, 2002.

According to Appellant, all the assets have not been sold with the permission of the court. Appellant presented documents, in the Designation of the Record, claiming assets of the Cumberland estate were missing and

(1.) 28 U.S.C. Rule 56 (c). "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

unaccounted for and showing letters were sent to the court and to court officers, including Mr. Monzack concerning these missing assets. In addition, discovery concerning the hearing was not completed since the Trustee had not answered the Request for Admissions (See M-50) and the Court did not grant a continuance in order for Appellant to receive a response to same.

A. EVIDENCE PRESENTED TO THE DISTRICT COURT

Approximately 1000 pages of documents was presented to the District Court in the Designation of the Record. This Record contains evidence that was presented to the Bankruptcy Court concerning missing and unaccounted for assets as well as assets that have been tampered with or switched.

The document R-1, the August 17, 1990, transcript of the Removal of the Assets by Tustee John F. Cullen indicates some $500 bills with their serial numbers and some Pre-Columbian Art Work. See R-1, pages 36-37.

Correspondence C-2, C-3, C-4, C-5 and C-6 shows that the Trustee Jason Monzack, and the U.S. Trustee in Providence and in Boston, as well as the court were informed of missing assets.

Correspondence C-7 shows that Trustee Jason Monzack knew that assets were indeed missing and C-8 indicates that the Executive Office Of United States Trustees was informed of Mr. Nacu's Correspondence, C-7 concerning Mr. Monzack admitting to assets being missing. Also included was a copy of the Request for Admissions sent by Appellant to the Trustee.

B. 'NEWLY DISCOVERED' EVIDENCE

According to 'newly discovered' evidence, obtained by the Appellant at the February 7, 2002, hearing, the Chapter 7 Trustee, Jason Monzack represented that the only assets remaining in the estate were some 380 silver dollars and three ten thousand dollar bills that were not sold at the December 7, 1999, Spink America Auction sales. (1.) Based upon the assets seized, as contained in the transcript of August 17, 1990, and the videotapes of the same date, certain assets were seized but never sold. Another issue of material fact consequently exists. Since the $500 bills, listed by serial number, and the Pre-Columbian Art Work were never listed for sale (2.)

(1.) The "newly discovered evidence" presented to the District Court in the 5/30/02, and 6/19/02 pleadings could not have been discovered prior to the February 7, 2002, Hearing unless the Trustee had answered the Request for Admissions (See M-50) or the Trustee had given an accounting of the assets of the estate as requested on several occasions by Appellant and others. Consequently the information was not available to Appellant as a result of a lack of diligence on his part. The newly discovered evidence may not justify United States v. Huddleston (194 F.3d 214, 1st Cir. 1999.) standards for a new trial, but there can be little doubt that the newly discovered evidence may affect the "restitution" allegedly owed by Appellant in the criminal case and the fine in the bankruptcy case.

(2.) More assets of the estate are missing than described above. The value of these assets are in the tens or hundreds of thousand of dollars. Mr. Monzack admitted to some $300,000 in assets missing at a meeting at his office on December 28, 1994. (See C-7.) A partial list, compiled by Appellant from memory was contained in C-2, page 2, in the June 10, 1994 letter sent to Jason Monzack. Despite Appellant seeking discovery from the Chapter 11, Trustee prior to and after his criminal trial, R-1 was not obtained from him. R-1 was obtained from Allied Court Reporters subsequent to trial and supplied to the Chapter 7, Trustee, Mr. Monzack, the U.S. Trustees in RI and MA (See C-4, 5, 6.)

in documents presented by the Trustee in Notices for Intended Sale, these assets are missing and unaccounted for. Also 'newly discovered' is the fact that the 'secured creditor', Republic Credit Corporation I, is now making the representation that,

> "The Trustee has, with the permission of this Court, liquidated all remaining assets of the Debtor."

In light of the fact that there has not been any permission of the bankruptcy court to sell the $500 bills or the Pre-Columbian Art Work, the statement of Republic Credit Corporation I is false and misleading.

C. FRAUD UPON THE COURT

Appellant was prevented by fraud, accident or mistake from obtaining the benefit of his defense. See Rule 60(b)(3). The term 'misconduct' is defined in Black's Law Dictionary as "a dereliction of duty", or "unlawful behavior". "The term 'misconduct' when applied to an act of an attorney, implies dishonest act or attempt to persuade court or jury by use of deceptive or reprehensible methods." Black's Law Dictionary, 5th Edition, 1979. Appellant avers that the representatives of Republic Credit Corporation I, as officers of the court, are willing participants in a fraud upon the court. By fraud upon the court, as in Aoude v. Mobil Oil Corp. 892 F.2d 1115, 1118 (1st Cir. 1989) involves of an "unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate a matter' perpetrated by an officer of the court." See Simon v. Navon, 17 F.3d 9, (1st Cir. 1994.) The set of circumstances that surround the Cumberland Investment Corporation Bankruptcy case, involving conflicts of interest, lack of due process, and violations of the bankruptcy code itself, are significantly offensive to justify relief under Rule 60(b)(3).

Rule 60(b) of the Fed. R. Civ. P., provides in pertinent part:

> "On motion and upon such terms as are just, the court may relieve a party....from a final judgment, order, or proceeding for the following reasons; .....(3) fraud (whether intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party...."

At first blush the statement of Republic Credit Corporation I, that

> "The Trustee has, with the permission of this Court, liquidated all remaining assets of the Debtor."

could be just a mistake on their part. However when viewed in light of the totality of the circumstances, this statement is not that innocent at all. The consequences of this statement, if true, would be to negate Appellant's claims that "the assets of the estate are not intact and that permission to sell all the assets was not granted." Bear in mind that Republic Credit Corporation I, made an appearance in this bankruptcy case, 89-11051 on March 10, 2000, just one day after Mr. Taft filed a MOTION TO COMPEL TRUSTEE TO PROVIDE AN ACCOUNTING OF ESTATE PROPERTY SOLD ON 12/7/99 AND REQUEST FOR CLARIFICATION AS TO

WHY THE SALE CONTAINED SOME 8,000 SILVER DOLLARS INSTEAD OF 7,491 SILVER DOLLARS, as originally represented by Mr. Monzack. (See M-27.) Upon information and belief, and for the reasons expounded on below, the information used by Republic concerning receiving permission from the court to liquidate all remaining assets of the Debtor was supplied by the Chapter 7 Trustee. Bear in mind that Mr. Monzack, an officer of the court, Trustee in bankruptcy, at best is involved with a conspiracy of silence. Mr. Monzack is well aware that assets of the estate of Cumberland Investment Corporation are missing and that the statement of Mr. Shay, representing Republic Credit Corporation I, is not true.

D. CONFLICT OF INTEREST

An extraordinary set of circumstances exists in the Cumberland Investment Corporation Bankruptcy case, resulting in a myriad of conflicts of interest and is the basis for the misrepresentation of Republic Credit Corporation I, to rise to a higher lever, that being a deliberate "fraud upon the court." The sole 'secured creditor' left in this 13-year-old case, Republic Credit Corporation I, has filed joint motions with the trustee in bankruptcy. (1.)

(1.) There is an apparent pattern of Joint Motions filed by the Chapter 11 Trustee and his successor, the Chapter 7 Trustee, and Eastland Bank and their assignees FDIC and now Republic Credit Corporation I.

There is no harm in filing joint motions unless a conflict of interest exists in dealings between the Trustee, Jason D. Monzack, and Republic Bank. (1.) But a conflict of interests does exist for the following reasons:

JASON MONZACK REPRESENTS BOTH THE BANK AND THE ESTATE IN A CONFLICT OF INTEREST

Jason D. Monzack, the Chapter 7 Trustee, successor to John F. Cullen, the Chapter 11 Trustee, was appointed to the Cumberland Investment Corporation case on December 23, 1993. (See M-3.) This was less than one year after Mr. Monzack was appointed as Trustee for Eastland Financial Corporation by the same judge. (See M-1.) "Professionals employed in bankruptcy cases are subject to "particularly rigorous conflict-of-interest restraints, (See Rome v Braunstein, 19 F.3d 54, 1st Cir 1994 at 57) whereby they must not evidence "even [an] appearance of impropriety." Id at 58. However in this instant case there was no disclosure.

MR. MONZACK HAD A FIDUCIARY DUTY OF DISCLOSURE BUT FAILED TO DO SO

By Mr. Monzack representing both the estate of Cumberland Investment Corporation and also the largest creditor, he is no longer a disinterested party. He can no longer avoid potential claims of preferential or fraudulent

(1.) Appellant will not detail other conflicts of interest existed in dealings between the Chapter 11 Trustee, the attorney for the Trustee, Edward Bertozzi, and Eastland Bank, with exception of the statement that Edward Bertozzi has represented Eastland Bank in the past and that John Cullen was 'fronted' monies by Eastland Bank to operate the estate.

transactions. When an alleged conflict of interest is at issue, actual prejudice need not be established. Cuyler, 446 U.S. 335, at 349-50 (1980).

Eastland Bank, originally with two other creditors, petitioned Appellant's company into a bankruptcy. When Eastland Bank failed in 1991, FDIC became their successor in interest as a secured creditor. Subsequently FDIC assigned their secured interests in 1999 to Republic Credit Corporation I.

JASON MONZACK REPRESENTING THE APPELLANT IS AN APPARENT CONFLICT OF INTEREST

On December 12, 1990, Appellant entered into an agreement with Eastland Bank, the chapter 11 Trustee and others concerning a loan to the trustee for estate administration. (See M-46a.) On July 3, 1991, the bankruptcy court found Appellant in contempt, mostly based upon representations of the Chapter 11Trustee and his attorney, and issued an order stating that the Appellant was not to participate in the liquidation of the assets. (See M-46b.) Previously Appellant entered into the December 12, 1990 agreement [M-46a, see Paragraphs 21 c, d and e] on the basis of participating in the liquidation of the estate assets. The order further stated that the interests of the Appellant would be henceforth represented by the Trustee.

TRUSTEE REPRESENTING THE INTERESTS OF APPELLANT DENIES APPELLANT OF DUE PROCESSS

A judgment is void as a matter of law under the non-discretionary prong of

60(b)(4) because the court acted in a manner inconsistent with due process of law. Carter et al vs. Fenner et al. 136 F.3d 1000, 5th Cir., 1998.

> "Under Rule 60(b)(4), this court will generally look toward two factors to determine voidness.....stated that a judgment is void only if the court rendering it lacked jurisdiction of the subject matter, or of the parties, or acted in a manner inconsistent with due process of law." Id at 1006.

See New York Life Ins. Co. vs. Brown, 84 F.3d 137, 142-3.

In Cuyler, 446 U.S. at 348, the Sixth Amendment Right to effective assistance of counsel is violated when an actual conflict of interest adversely affects counsel's representation. Cuyler involves the rights of an accused in a criminal case. However the adverse affects of representation of counsel with a conflict of interest applies in civil cases also. The requirements of the Trustee in Bankruptcy to disclose can be found in Federal Rules of Bankruptcy Procedure, Rule 2014(a).

> ".....The application shall be accompanied by a verified statement of the person to be employed setting forth the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States Trustee, or any person employed in the office of the United States trustee."

There can be little doubt that there is an actual conflict of interest in either the Chapter 11Trustee, or his successor, the Chapter 7 Trustee, representing multiple interests without a full, complete and frank disclosure of actual or potential conflict of interest, especially in light of the Moser decision.

"Successor trustees, unlike successors of public officers, are regarded as transferees or assignees of all the interests of the predecessors, and removal of a trustee does not cause abatement." Mosser v Darron, 341 U.S. 267, 271.

Consequently it appears that Mr. Monzack as successor to Mr. Cullen, becomes the transferee or assignee of the Chapter 11 Trustee. In addition to representing the interest of the estate, and allegedly the interests of the creditors and allegedly the interests of Appellant by court order, Mr. Monzack also represents other interests by employing himself and the firm he works for as Counsel to the Trustee, (See M-6.) which is perfectly legal if done in the best interests of the estate. See Title 11§327(d).

The Trustee, in this set of circumstances where Appellant is claiming the Trustee of wrongdoing, cannot lawfully represent two masters. He cannot represent the interests of Appellant and the interests of the estate at the same time, especially in light of known conflicts of interest.

Consequently, the court order dated July 3, 1991, is void.

The Trustee cannot hide behind the fact that he was following an order of the court. By following the court order, the integrity of the system is violated because the Trustee can no longer perform his fiduciary duties.

TRUSTEE VIOLATES HIS FIDUCIARY DUTIES IN NOT GIVING AN ACCOUNTING OF THE ESTATE TO APPELLANT

By not supplying an accounting to Appellant, the Trustee violates his fiduciary responsibilities. According to Title 11, §704(2), "the Trustee shall be accountable for all property received". The notes of Committee on the Judiciary, Senate Report No. 95-989, states the following,

> "the Trustee is responsible to furnish such information concerning the estate and its administration as is requested by a party in interest."

Yet the Trustee argues that the information should not be supplied and cites the contents of the July 3, 1991 court order in which the Trustee allegedly represents the interests of the Appellant and the Appellant is enjoined from participating in the sale of the assets. Yet seeking an accounting has nothing to do with the language of the July 3, 1991, court order:

> "...Chorney and Aubin will no longer be permitted to intervene or otherwise participate in proceedings relating to sales or other disposition of estate assets, and are not entitled to any notice other than that received by general creditors." (See M-32.)

Appellant and others were not 'interfering with the disposition of the assets' but rather were seeking an accounting of what was being done.

The court at the February 7, 2002, Hearing continues to state that Appellant's interests are represented by others and that orders have been entered, that are final orders.

> MR. CHORNEY...that's why I'm seeking discovery from Mr. Monzack, to verify—
>
> THE COURT: No., no. We---I don't think you have an interest here that's not represented in other ways, and any items where you're aggrieved, I'm sure there are orders that have been entered. Either way they've been appealed and disposed of somehow, or haven't been

> appealed, which makes them final orders, and, you know, you want to talk about things that happened in 1990 and 1994; if you know, crimes were committed in those days without statute of limitations problems in 2002, that'a a matter that you need to bring to the U.S. Attorney's Office. See T-6 pages 8-9.

Appellant believes the Court is constantly referring to the 7/3/91 order which denied Appellant fundamental rights, including the rights to redress of grievance and the right to due process in the February 7, 2002, proceedings.

<u>MR. MONZACK AS SUCCESSOR TRUSTEE RELIES UPON A VOID COURT ORDER.</u>

Another way of viewing Mr. Monzack's conflict of interest status is in the context of Mr. Monzack as the successor Trustee to Mr. Cullen. As the successor Trustee, Monzack has moved to strike the motion of the Appellant, seeking an accounting of the assets of the estate and simultaneously striking Appellant's claim of the Trustees' own wrongdoing. This seems to be a pattern utilized by the Trustees in the Cumberland case. On April 26, 1994, the Chapter 11, Trustee, John F. Cullen objected to presenting a complete accounting of the assets of the estate much in the same manner as the Chapter 7 Trustee's Motion to Strike. Both motions refer to and rely upon the Court Order of July 3, 1991. (See M-8. and M-32, M-33.) In both instances no production was made based upon an order that is void and contrary to law because it denies Appellant due process of law.

Since the court order of July 3, 1991, the underlying judgment of the February 7, 2002 order is contrary to law, as argued below, judgments based upon it are also void. Consequently, the February 7, 2002, order and the entire proceeding is void. See Austin v. Smith 312 F2d 337, 343.

In summary, the entire proceeding indicates a veiled "appearance of impropriety". See In Re: Martin, 817 F.2d 175, (1st Cir. 1987) at 180-182.

VI. ARGUMENT

Listed below is the first argument presented to the District Court in the Statement of the Issues. Some aspects of this and other statements have already been discussed.

1. Appellant was denied his first amendment right to redress of grievance, fifth amendment right to due process and equal protection under the law guaranteed by his fourteenth amendment rights by the court appointing a Trustee with a conflict of interest, and who is not a disinterested party to represent Appellant's property and other interests in a COURT ORDER, dated July 3, 1991, denying Appellant the right to participate at the 2/7/02 hearing and then the Court erred in incorporating by reference the reasons argued by the Trustee in his Motion to Strike in the denial of the accountability of the assets of the estate without an evidentiary hearing.

Denying Appellant's appeal and not voiding the July 3, 1991, COURT ORDER, would be the same as allowing a party, not represented by counsel (in this instant case, the Appellant) to be appointed a counsel who is not disinterested and has conflicts of interest. In this case the Appellant was appointed counsel, the Trustee in bankruptcy, by a court that is suppose to be impartial. The Appellant did not request that the Trustee represent his property and other interests. In fact, it appears as if the Trustee, is or has been in possession of certain inventories and videotapes, and by non production of these documents, as requested on several occasions, has deliberately prevented the Appellant from obtaining information beneficial to his property and liberty interests due to apparent conflict of interest.

FIRST AMENDMENT RIGHTS OF APPELLANT HAVE BEEN VIOLATED BY THE JULY 3, 1991, COURT ORDER

The dominant purpose of the First Amendment was to prohibit the widespread practice of governmental suppression of embarrassing information. Some of the embarrassing information concerning the bankruptcy system in R.I. is the apparent acceptance of conflict of interests. The court, contrary to the law fails to raise the issue concerning apparent conflicts of interest.

See In re Anver Corp., 44 B.R. 615, 617 (Bankr. D.Mass. 1984)

> "once alerted to potential conflict of interest on part of appointed counsel, the bankruptcy court must raise the issue *sua sponte,* in order to safeguard its institutional integrity."

It appears as if it is more expedient to silence the vocal critic than to follow the law and accept criticism.

> "Criticism of those responsible for government operations must be free, lest criticism of government itself be penalized."

Rosenblatt v Baer 383 U.S. 75 at 85

> "any system of prior restraints of expression comes to the Court bearing a heavy presumption against its constitutional validity."

Bantam Books v. Sullivan 372 U.S. 58 at 70

In this instant case, Appellant is being deterred from exercising his First Amendment right to criticize the bankruptcy proceeding and to seek a redress of grievance in violation of his rights to due process.

APPELLANT'S FIFTH AMENDMENT RIGHTS HAVE BEEN VIOLATED BY THE JULY 3, 1991, COURT ORDER

The Fifth Amendment guarantees Appellant the right to due process.

"Aside from all else, 'due process' means fundamental fairness."

Pinkerton v Farr, 220 S.E. 2d 682 at 687.

What can be fundamentally fair about having an attorney appointed to represent your interests, when in affect he has interests that are in conflict with yours? Basically, in doing so, Appellant has been denied due process of law as well as equal protection under the law.

> "Fifth Amendment prohibits the Federal Government from taking any action which would deny to any person within its jurisdiction the equal protection of the law.

U.S. v. Falk, 479 F.2d 616, at 617

Appellant was not afforded the basic right to defend himself and his legal positions in violation of his due process rights and consequently was denied equal protection under the law in the bankruptcy court at the February 7, 2002 hearing and appealed the ruling to the District Court, which summarily dismissed his appeal after adopting the arguments of Republic Credit Corporation I and denied the accountability of the assets without an evidentiary hearing inspite of the fact that there were genuine issues of material fact. The following argument concerning due process and being heard was presented to the District Court and is repeated here:

"Appellant objects to the dismissal order based upon the following:

The Trustee in Bankruptcy's Motion to Strike was granted on 2/7/02 by the Bankruptcy Court in the District of Rhode Island. According to Clark v. Dew. 1829, Volume 1, Russell & Mylne 103,

> "....contempt of court for disobeying certain orders in another cause pending between the same parties, he ought to be heard in these, otherwise the consequence would be that a party who was utterly unable to comply with an order of the court might be prevented from prosecuting any claims, however just, against the person who had succeeded in obtaining the order."

In this instant case, Appellant was found in contempt of a court order as a result of the Trustee's in Bankruptcy claims as reflected in the ORDER of July 3, 1991. (See Exhibit 46b in Designation of the Record.) For the reasons stated in Clark v. Dew, Appellant should be heard and the Appellee should be the Trustee in Bankruptcy, Jason D. Monzack and not Republic Credit Corporation I.

In summary to the first statement of the issues, Appellant was denied his first and fifth amendment rights by the bankruptcy court appointing a Trustee with conflicts of interest and the COURT ORDER, dated July 3, 1991 is void because it is contrary to due process of law. The District court was mislead by a "fraud on the court" that all the assets of the estate had been sold with the permission of the court, and that no disagreements as to material fact existed, inspite of evidence presented to the court that genuine issues of material fact did indeed exist.

2. The Court, in accordance with Title 28§157 concerning a core proceeding involved with the administration of the estate, erred in not requiring an accounting by the Chapter 7 Trustee in accordance with statute, Title 11 U.S.C. §704(2).

Title 28 §157(b)(1) states: "Bankruptcy judges may hear and determine all cases under title 11 and all core proceeding arising under title 11, or arising

in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title. (2) Core proceeding include, but are not limited to—
(A) matters concerning the administration of the estate:

According to Title 11 U.S.C.§704(2), Duties of Trustee, (2) be accountable for all property received.

By statute, the trustee is accountable for all property received. On December 23, 1993, Jason D. Monzack became the Chapter 7 Trustee for Cumberland Investment Corporation. (See M-3.) Both prior to an since Mr. Monzack's appointment, Appellant and others have not been able to obtain a list of assets currently in the possession of the Trustee, those items sold and those items remaining. In addition there are records of assets that were seized by Mr. Monzack's predecessor, John F. Cullen, the Chapter 11 Trustee that are missing, notably some yellow covered inventory notebooks of the estate of Cumberland Investment Corporation and some videotapes taken by FDIC, when Eastland Bank failed in 1991.

By not providing a detailed accounting to parties of interest upon request, the Trustee has breached his fiduciary duties. By not requiring the Trustee to produce an accounting of the assets and the documents above, the Bankruptcy Judge, responsible for all core proceeding arising under title 11, is derelict in his duties.

3. Appellant was denied due process and equal protection under the law when the Court denied Appellant an accounting of the Agreement, where the Appellant is a signatory, whereby the Trustee borrowed money for 'administrative expenses' subject to Title 11 U.S.C. §364.

BACKGROUND:

Appellant has sought to obtain an accounting of moneys loan to the Trustee in Bankruptcy, John F. Cullen, Chapter 11 Trustee, allegedly for the purpose of administrating the estate of Cumberland Investment Corporation. Mr. Cullen was authorized to borrow up to $400,000 from Eastland Bank for said purposes. Appellant is a signatory of this note, dated December 12, 1990. (See M-46 a.) Appellant has not been able to obtain an accounting of said note from Fleet Bank, successor in the note to Eastland Bank, nor from the trustee in Bankruptcy. (See C-12, T-6, pages 10-12, 16-18)

THE HEARING ON FEBRUARY 7, 2002

During the February 7, 2002, Hearing Appellant states to the court:

> ".....there's an awful lot of undisclosed matters involving the monies that were used in the 364 agreement. (See T-6 page 7.)

When Appellant asked for a continuance in order to obtain discovery from Mr. Monzack, the court states, "......I don't think you have an interest here that's not represented in other ways, and any items where you're aggrieved, I'm sure there are orders that have been entered........" page 8

The court goes on to state that ".......you don't have standing to start looking for discovery at this point on anything." Page 9

Appellant states that "Fleet and FDIC had certain undisclosed agreements concerning the assets of Cumberland Investment Corporation." Page 11.

Appellant states, "there's not a full disclosure, and that's what I'm seeking, Your Honor." Page 12.

Monzack on pages 16-18 tries to explain what occurred. "I wasn't that interested in terms of what agreement the FDIC had with Fleet because it didn't cost the estate any money. It was essentially the FDIC telling me that, "Look, we owe Fleet a portion of these funds." Page 18

In the end, Appellant was denied continuance of the hearing, and discovery concerning the 364 agreement.

ARGUMENT

The trustee, is an attorney and officer of the court. While he should represent his client, the estate with singular loyalty that loyalty obviously does not demand that he act dishonestly or fraudulently. In not supplying an accounting of the 364 agreement, the trustee is apparently acting with the explicit approval of the bankruptcy court. Yet by statute is he not responsible to provide information concerning the administration of the estate? Has the trustee breached his fiduciary duty? Does he have a conflict of interest between obeying the court and obeying his 'job description', namely the code. Is the trustee breaking the law? Is the trustee committing a "fraud upon the court"? Is the trustee entitled to immunity in not providing Appellant the requested information? Some of these issues are addressed in In Re Mailman Steam Carpet Cleaning Corp., 99-1170, 1st Cir. 1999. In Mailman, the complaint existed that the Trustee, Salem, had breached his fiduciary duty as a Chapter 7, Trustee. Quoting In re: San Juan Hotel Corp., Lopez-Stubbe v. Rodriguez-Estrada 847 F2d 931, 1st Cir. 1988, "Trustee acting with explicit approval of the bankruptcy court is entitled to absolute immunity, so long as there is a full and frank disclosure to creditors and the court." Id 942.

In this case, Appellant argues that a full disclosure, was never provided by the trustee(s) to either the creditors, including the Appellant, and perhaps the court in accordance with 11 U.S.C. §327, 11 U.S.C. §329 and BRP 2014 and that the officers of the court acted contrary to statute.

Contrary to statute ,

"The trustee may not employ a person that has served as an examiner in the case." 11 U.S.C §327(f).

and with court approval, the Chapter 11 Trustee, hired Michael Weingarten, former examiner. (Appellant had brought to the court's attention that the examiner had conflicts of interest and had double billed the estate.)

Contrary to statute, Mr. Monzack did not disclose his relationship with

Eastland Bank and others with his application for trustee in the C.I.C. case. (See M-3.) Subsequently, Mr. Monzack did not disclose his relationship with FDIC or in different conflicts of interest in making certain agreement with Fleet concerning various loans, or with Republic Credit Corporation I.

> "…..application shall be accompanied by a verified statement of the person to be employed setting forth the persons connection with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee." 11 U.S.C. Rule 2014(a).

As a result of this failure to disclose, the Trustee is not entitled to absolute immunity, especially in light of the non disclosure of conflicts of interest. When faced with the dilemma of following the court's orders, and following statute, there can be little question as to which action the trustee should follow. An accounting of the 364 Agreement should have been supplied to Appellant, but was not. Once again the Trustee has breached his fiduciary Duties and Appellant was denied due process and equal protection under the law.

Since many of the other issues have already been previously argued, Appellant will not reargue that he was denied due process and equal protection under the law by the actions of the Trustee and the court: when discovery in the form of Request for Admissions was not allowed, when a continuance was not granted, when production of requested documents and videotapes was not allowed, when an accountability of assets was not allowed, when an accounting of the 364 agreement was not allowed..... however, Appellant feels that it is very relevant to argue that the court usurped a constitutional power that belonged to defendant, basically, the right to defend himself.

7. APPELLANT, IN ACCORDANCE WITH THE NINTH AMENDMENT, WAS DENIED A RIGHT RETAINED BY THE PEOPLE, THE RIGHT TO DEFEND HIMSELF.

According to the ninth amendment, "the enumeration in the constitution of certain rights, shall not be construed to deny or disparage others retained by the people.

> "Specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."

Griswald v Connecticut, 381 U.S. 479 at 484 (1965.)

The Penumbra doctrine as state in Kohl v. U.S. 91 U.S. 367 speaks of

> "The implied powers of the federal government predicated on the Necessary and Proper Clause of the U.S. Const., Article I. Sec. 8(18), permits one implied power to be engrafted on another implied power."

and that

> "These penumbral rights are protected by one Amendment or a complex of Amendments despite the absence of a specific reference."

Griswald v. Connecticut, at 484.

BACKGROUND OF THIS CASE

Historically, in this instant case, when Appellant, seeking an accounting of the estate of Cumberland Investment Corporation, criticized the officers of the court for conflicts of interest and lack of disinterestedness, Appellant was enjoined from contacting witnesses in his own defense. See court order dated August 23, 1990. At the insistence of the U.S. Attorney, this order was modified so that Appellant could contact witnesses in his own defense for the criminal trial. Now the Court officers seek to deny Appellant the right to obtain evidence 'in his own defense' concerning issues in his criminal trial, namely that the assets of the estate were not in tact and that the assets were missing as Appellant had claimed in his criminal trial but lacked the evidence to prove. Secondly, since assets were missing and unaccounted for, the amount of 'restitution' to the alleged victim, the secured credit was calculated on the value of an incomplete inventory.

ARGUMENT

The Appellant, a 'convicted' criminal defendant, claims that he has a constitutional right, protected by his First and Fifth Amendment right to due process, to defend himself by gathering evidence to overturn his conviction. Pre-trial, Appellant was impeded and deprived of evidence that he was seeking. Appellant was convicted. Appellant claims that he is currently being deprived of the right to defend himself and overturn his conviction. The officers of the bankruptcy court are utilizing a court order dated July 3, 1991, appointing a trustee, accused of wrongdoing by the Appellant, with conflicts of interest, and interests adversarial to the Appellant to defend Appellant's interests.

In bankruptcy cases, the 'conflict of interest' issue is so important that by statute [See this brief pages 16 and 29, 11 U.S.C. Rule 2014(a)] specific parameters are set up that involve full disclosure. This disclosure requires the applicant declare his connections with other parties in the bankruptcy, which was not done in this instant case.

Although the Sixth Amendment right concerning counsel applies only to criminal cases, the basic and fundamental right to defend oneself, is deep rooted in our society. In Cuyler, 446 U.S. 335, at 348, the court stated that effective assistance of counsel is violated when an actual conflict of interest adversely affects counsel's representation.

Subsequent to his trial, Appellant, no longer is guaranteed counsel at all critical stages of his case in accord with the Sixth Amendment. Yet he is protected by his penumbral First and Fifth Amendment rights, and should not be handicapped by the appointment of counsel with interests, adversarial to his own to represent his interests. When Judge Votolato appointed the

Trustee to represent his interests in this case, and continuously represents that , "I don't think you have an interest here that's not represented in other ways……" (See T-6, page 8.) he usurped a power belonging to Appellant, the protected power to defend oneself (especially when your interests are not being adequately represented and protected.)

Because Judge Votolato clearly usurped a power belonging to Appellant, the Court Order, dated July 3, 1991 is void in accordance with F.R.C.P. 60(b)(4). See U.S. v. Boch Oldsmobile, Inc. 909 F.2d 657, where the court states, "A judgment is void, and therefore subject to relief under Rule 60 (b)(4), *only* if the court that rendered judgment lacked jurisdiction *or* in circumstances in which the court's action amounts to a plain usurpation of power constituting a violation of due process." Id. at 657.

The judgment was void from its inception. As a result, in accordance with Rule 60(b)(5), "….if the underlying judgment is void, the judgment based upon it is also void. Austin v. Smith, 312 F. 2d 337, at 343. Consequently the court order of February 7, 2002, is also void.

VII. CONCLUSION:

Acceptance of the court's rulings in this instant case would place society in jeopardy. The Appellant is like a defendant attempting to prove his case.

However, the Appellant's hands are being tied and his mouth is being gagged by court orders that deny Appellant, defendant, due process of law by the court appointing Trustees, with conflicts of interest adverse to defendant to represent the interests of defendant.

> "It is only where an act or omission operates so as to deprive a defendant of notice or so as to deprive him of an opportunity to present such evidence as he has, that it can be said that due process of law has been denied."

Mooney v Holohan, 294 U.S. 103 at 112.

> "That requirement, in safeguarding the liberty of the citizen against deprivation through action of the State, embodies the fundamental conceptions of justice which lie at the base of our civil and political institutions."

Id. Holohan 112.

In this instant case, both the liberty interests and property interests of Appellant have been at jeopardy as the result of the "representation" of Appellant's interests in a bankruptcy where the "representation" has been froth with misrepresentation and conflicts of interest.

In order for the Appellant to fully defend himself, he needs to present evidence in the possession of those that allegedly "represent" him. But those that "represent" the Appellant will not disclose this evidence, namely a full and detailed accounting of the assets of the estate of Cumberland Investment Corporation, even though required by statute, due to conflicts of interest.

The rights of Appellant, an accused and convicted defendant in a criminal case, stemming from a referral by parties with conflicts of interest, namely the secured creditor and the bankruptcy officials, are once again at jeopardy. Appellant is being denied the right to defend himself and to prove his case by the court denying the production of an accounting.

The caveat, of the Supreme Court in the Calandra decision, for the protection of our fundamental rights, rings true in this instance.

> "When judges appear to become 'accomplices in the willful disobedience of a Constitution they are sworn to uphold' Elkins v U.S. supra 223, we imperil the very foundation of our people's trust in Government on which democracy rests."
>
> U.S. v Calandra 414 U.S. 338 at 360

To uphold the rulings, based upon the July 3, 1991, court order would be an affront to our way of life by denying a defendant, Appellant, his fundamental right to defend himself.

WHEREFORE, Appellant prays this honorable court refer this case to the appropriate authorities for a proper investigation and any other measure seems just and fair.

Respectfully submitted,

Harold F. Chorney

Harold F. Chorney
5 Cathedral Square, Apt. 106
Providence, R.I. 02903
401 351-7311

CERTIFICATION

I hereby certify that on this 16th day of December 2002, I sent a copy of the above by first class mail to the following:

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

Justin T. Shay
Cameron & Middleman
56 Exchange Terrace
Providence, R.I. 02903

Harold F. Chorney
HAROLD F. CHORNEY